आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE

[illegible] GST Bhavan
[illegible] Race Course Ring Road
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: [illegible]

[illegible] :-

अपील / फाइल संख्या Appeal /File No. V2/5/BVR/2019 [illegible]	मूल आदेश सं. / O.I.O. No. BHV-EXCUS-000-ADC-[illegible]-2018-19	दिनांक Date: [illegible]/2019

अपील आदेश संख्या (Order-In-Appeal No.):

BHV-EXCUS-000-APP-241-2019

आदेश का दिनांक / Date of Order:	31.10.2019	जारी करने की तारीख / Date of issue:	05.11.2019

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Gopi Nath, Commissioner (Appeals), Rajkot

ग [illegible]
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot/Jamnagar/Gandhidham

घ अपीलकर्ता&प्रतिवादी का नाम एवं पता (Name&Address of the Appellant&Respondent) :-

M/s Reliance Naval and Engineering Ltd (earlier known as Reliance Defence and Engineering Limited (RDEL), Pipav port, Post- Ucchaiya, Via- Rajula, Distt- Amreli Gujarat

[illegible]
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) [illegible]

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) [illegible]

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) [illegible]

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para-1(a) above

(iii) [illegible]

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of [illegible] [illegible] Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) [illegible]

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of [illegible] [illegible] Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

:: ORDER-IN-APPEAL ::

M/s. Reliance Naval and Engineering Ltd. *(hereinafter referred to as* "Appellant") has filed appeal No. V2/21/BVR/2019 against Order-in-Original No. BHV-EXCUS-000-ADC-10-2018-19 dated 18.1.2019 (hereinafter referred to as 'impugned order') passed by the Additional Commissioner, Central GST & Central Excise, Bhavnagar (hereinafter referred to as 'adjudicating authority').

2. The facts of the case are that the Appellant, a 100% Export Oriented Unit, was engaged in the manufacture of Ship falling under CETH No. 89.01 and was registered with Central Excise. During CRA audit, it was observed that the Appellant had cleared MS Scrap, SS Scrap, Copper Scrap and Aluminium Scrap during the period 2011-12 to 2015-16 on payment of either Central Excise Duty or concessional rate of aggregate duty of Customs by availing benefit of notification No. 23/2003-CE dated 31.3.2003; that as per para 6.08(a) of Foreign Trade Policy, any EOU who desired to clear goods in DTA was required to submit application to the Development Commissioner concerned in prescribed form duly certified by Cost/Chartered/cost and works Accountant and endorsed by the Bond officer of jurisdictional Customs / Central Excise office. It was observed that the Appellant was not having DTA sale permission for clearance of scrap and thus, the Appellant had wrongly availed benefit of notification No. 23/2003-CE dated 31.3.2003 by clearing scrap at concessional rate of duty and thereby short paid Central Excise duty.

2.1 Show Cause Notice No. V/15-4/Dem/HQ/17-18 dated 1.6.2017 was issued to the Appellant calling them to show cause as to why Central Excise Duty of Rs. 56,42,802/- for the period from May, 2012 to March, 2016 should not be recovered from them under Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as "Act") along with interest under Section 11AA of the Act and proposing imposition of penalty under Section 11AC of the Act.

2.2 The above SCN was adjudicated by the adjudicating authority vide the impugned order who confirmed demand of Central Excise duty of Rs. 56,42,802/- under Section 11A(4) of the Act along with interest under Section 11AA of the Act and imposed penalty of Rs. 56,42,802/- under Section 11 AC of the Act

3. Aggrieved, the Appellant preferred appeal, inter alia, on following grounds:

(i) The crux of the findings recorded in the impugned order for confirming duty demand revolves around non-production of permission for sale scrap in DTA from the Development Commissioner; that not obtaining permission for DTA sale of waste and

scrap was a technical lapse more so because Net Foreign Exchange (NFE) is not taken into account against sale of waste and scrap by 100% EOU as per the Policy provisions; that there was no revenue loss to the government in absence of such permission from the Development Commissioner. Thus, at the most it can be said to be a technical or venial breach. However, the same has no adverse effect in the instant case as duty was paid by appellant at appropriate rate at relevant time.

(ii) The adjudicating authority has not given any findings on the points of defense relating to (i) payment of duty at appropriate rate, (ii) serious mistakes in application of rate of duty applied for working out differential duty, (iii) highly inflated duty demand (iv) discussion about conditions of the disputed notifications, provisions of EXIM Policy and the provisions of the Central Excise Act, 1944 which clearly lead to infer that they had correctly assessed and paid duty of various scraps. The impugned order is passed not only in violation of principles of natural justice but it is also non-speaking and passed without giving reasons for disagreement with the submission made by appellant and hence, the impugned order deserves to be set aside in the interest of justice and relied upon case law of Asstt. Commr., Commercial Tax Department Vs Shukla & Brothers- 2010 (254) E.L.T. 6 (S.C.).

(iii) That since majority of raw materials were imported without payment of duty, they had opted to pay duty of excise i.e. amount equal to the aggregate of duties of Customs leviable on like goods as if duty of customs specified in the First Schedule to the Customs Tariff Act, 1975 read with any other notification in force was reduced by 50% and no additional duty of customs was leviable under sub-section (5) of Section 3 of the said Customs Tariff Act as per Sr. No. 2 of the Notification NO. 23/2003-CE dated 31.03.2003, as amended; that during the period under dispute i.e. May, 2017 to January, 2016, they had paid the amount equal to the aggregate of duties of Customs leviable on like goods i.e. effective rate of duty of Customs, plus additional duty of customs viz. amount equal to duty of excise as per Sr. No.2 of the notification No. 23/2003-CE dated 31.03.2003, as amended and not under Sr. No. 3 of the notification as alleged in the show cause notice. Thus, the allegation that it has wrongly availed benefit of Sr. No.3 of the said Notification No. 23/2003-CE dated 31.03.2003, as amended is totally baseless and without appreciating facts available on records viz. invoices and monthly ER-2 returns for the disputed period.

(iv) That the Department has wrongly applied rate of duty in Annexure-A to SCN instead of taking correct rate of duty effective at material time; that in remarks column of Annexure-A, rate of duty for the period from April, 2014 to January, 2016 for both MS Scrap and SS Scrap has been shown as "BCD 2.5% + CVD 12% + Cess 3%"

which comes to 15.25%, but rate of duty of 18.3% has been applied; that based upon the invoices of disputed waste and scrap, they had prepared revised Annexure-A by considering actual rate of duty payable vis-à-vis duty paid as per monthly ER-2 Returns so as to arrive at amount of differential duty, if any and submitted before the adjudicating authority vide letter dated 24.2.2018 from which it is evident that there was differential duty of Rs. 3,11,541/- payable by them and not Rs. 56,42,802/-, as alleged in the notice.

(v) That entire amount of demand covered under the notice dated 01.06.2017 was barred by limitation; that the notice was issued by invoking extended period and it covered period of May, 2012 to January, 2016 in terms of provision of Section 11A(4). However, the adjudicating authority failed to appreciate that the same can be applied only in a case involving duty short-levied or short-paid or erroneously refunded, by the reason of (a) fraud (b) collusion (c) any wilful misstatement (d) suppression of facts (e) contravention of any of the provision of this Act or of the rules made thereunder with intent to evade payment of duty; that no such allegation of suppression etc was made in the notice; that clearance of goods were shown in Monthly ER-2 returns as under paragraph 6.8 of the FTP and payment of duty of excise equal to duty of customs viz. effective rate of customs duty, CVD etc and therefore, extended period cannot be invoked in this case. In any case, goods were removed from the factory under proper Central Excise Invoice on payment of appropriate duty of excise equal to duty of customs as provided under Section 3 of the Central Excise Act, 1944 read with the notification and the Foreign Trade Policy and said facts were declared in monthly statutory returns ER-2. Therefore, it cannot be alleged that it was unearthed during the CER audit. On the contrary these undisputed facts confirm that it was within the knowledge of the department from the periodical returns filed by appellant which are not only being regularly scrutinized but even various show cause notices were also issued by the department based on such scrutiny to it in past.

(vi) That it is settled law that when a notice is issued based on the audit objection on the basis of the records maintained by assessee, then in such case the department cannot claim that alleged short recovery of duty was on account of willful suppression of facts with intent to evade duty. In the instant case it has been admitted in the notice itself that the objections were raised by CERA audit party on the strength of the records of the Appellant. Thus, entire demand is barred by limitation.

(vii) That since notice was time barred, penalty imposed under the impugned order is outside the purview of law. It is settled law that if allegation is only of nonpayment of Excise Duty without intention to evade such duty then in that

case penalty cannot be imposed under section 11AC of the Act that to sustain penalty under section 11 AC of the Act, it is incumbent is required to spell out the facts which may establish that there was deliberate delay on the ground of (a) fraud or (b) collusion or (c) any willful mis-statement or (d) suppression of facts or (e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty which is not clearly absent in the impugned case. It, therefore, submits that penalty imposed under section 11AC on them in the impugned order deserves to be set aside and relied upon case law of Jyoti Structure Ltd. 2014-TIOL 1579-HC-MUM-CX.

4. In hearing, Shri P.G. Rajichar, Advocate appeared on behalf of the Appellant and reiterated the grounds of appeal memorandum and requested that their case may be decided on merit as well as on limitation.

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and submission made during personal hearing. The issue to be decided in the present case is whether the impugned order, confirming Central Excise duty, interest and imposing penalty, is correct, legal and proper or otherwise.

6. On going through the records, I find that that the adjudicating authority disallowed benefit of notification No. 23/2003-CE dated 31.3.2003, as amended availed by the Appellant in respect of clearance of scrap into DTA at concessional rate of duty on the ground that the Appellant had not obtained required permission from Development Commissioner for clearance of scrap into DTA. I find it is pertinent to examine notification No. 23/2003 CE dated 31.3.2003, as amended, availed by the Appellant, as under:

> "In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as the Central Excise Act), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below, and falling within the Chapter, heading No. or sub-heading No. of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act) specified in the corresponding entry in column (2) of the said Table, produced or manufactured in an export oriented undertaking or an Electronic Hardware Technology Park (EHTP) Unit or a Software Technology Park (STP) Unit and brought to any other place in India in accordance with the provisions of Export and Import Policy and subject to the relevant conditions specified in the Annexure to this notification, and referred to in the corresponding entry in column (5) of the said Table, from so much of the duty of excise leviable

thereon under section 3 of the Central Excise Act as specified in the corresponding entry in column (4) of the said Table."

(Emphasis supplied)

7. I find that benefit of Notification No. 23/2003-CE dated 31.3.2003 was to be availed in accordance with the provisions of Export and Import Policy prevailing at the material time. I find that procedure for clearance of goods in DTA by EOU units was provided in Chapter 6 of the Foreign Trade Policy (2009-2014) and governed by the guidelines prescribed in Appendix 14-I-H which read as under:

"I. DTA SALE ENTITLEMENT FOR EOU UNITS:

Paragraph 6.8 of the Chapter 6 of the Foreign Trade Policy provide for sale in DTA by EOU/EHTP/STP units. Such sales in the DTA will be governed by the following guidelines: -

a) The sale of goods in DTA will be subject to the payment of applicable duties as notified from time to time by the Department of Revenue, Ministry of Finance, Government of India. DTA sale includes clearance to any other unit within India under para 6.8.

b) DTA sale entitlement will be applicable only to those goods and services, which are permissible as per EOU Scheme. No DTA sale will be permissible if such sale is specifically prohibited in the EOU Scheme or the Letter of Permission/Letter of Intent.

c) Units may opt for DTA sales on a quarterly, half-yearly or annual basis by intimation to the concerned Development Commissioner of SEZ. However, Premier Trading House (PTH) as defined in para 3.5.2 of Foreign Trade Policy (FTP) shall have the option to undertake DTA sales on monthly basis, as well.

d) The DTA sales entitlement shall be availed of within three years of the accrual of entitlement.

e) An application for sale of goods in DTA (as per EOU Scheme) by the EOUs shall be submitted to the Development Commissioner concerned in the form given at Annexure A. The application shall be certified by an independent Cost/Chartered (Cost and Works Accountant and endorsed by the Head Officer of Customs/Central Excise having jurisdiction over the unit. The Development Commissioner concerned will determine the extent of the DTA sale admissible and issue authorization in terms of value. However, EOUs having status holder certificate can sell finished goods into

DTA under para 6.8(a) of Foreign Trade Policy under intimation to concerned Development Commissioner and Jurisdictional Central Excise Authority in terms of Para 6.38.8 of Handbook. DTA sale in terms of para 6.8(a) of Policy shall be allowed only after adjustment of advance DTA. No permission is granted.

....."

(Emphasis supplied)

7.1 I find that any EOU desired to clear goods in DTA was required to submit application to the Development Commissioner in prescribed form, inter alia, giving details of goods manufactured, physical exports, net foreign exchange earned, proposed DTA sale etc. The Application was to be certified by the independent Cost/Chartered /Cost and Works Accountant and endorsed by the Bond Officer of Customs/Central Excise having jurisdiction over the unit. After that, the Development Commissioner determines the extent of the admissible DTA sale and issues authorization in terms of value. In the present case, the Appellant had not obtained permission from the Development Commissioner for clearance of goods into DTA as held by the adjudicating authority in the impugned order and which is not disputed by the Appellant. So, the clearance of scrap in DTA by the Appellant was not in accordance with the Export and Import Policy and therefore, the Appellant was ineligible to avail the benefit of Notification No. 23/2003-CE dated 31.3.2003, as amended. I find that compliance of procedure setforth in Foreign Trade Policy was substantial requirement to avail benefit of Notification No. 23/2003-CE dated 31.3.2003, as amended. I am in agreement with the reliance placed by the adjudicating authority on the decision rendered by the Hon'ble Rajasthan High Court in the case of Auto Lilted India Ltd reported as 2018 (360) E.L.T. 488 (Raj.), wherein it has been held that,

"5 We have heard the learned counsel for the parties.

5.1 Taking into consideration the very object of EHTP export oriented and exemption of excise duty is to save draining of foreign exchange, if without prior permission of the authority, local sale is allowed then it will lead to loss of excise duty and if the prior permission is not taken, without permission, the export will not be done and lovally goods will be disposed of.

5.2 In that view of the matter, clause 9.9 is to be read as intimation subject to proviso they have to take permission of the competent authority.

6. In that view of the matter, the issue is decided in favour of Department against the assessee."

8. Regarding contention of the Appellant that non obtaining said permission from Development Commissioner was only a technical or venial breach, I find that when

detailed procedure was prescribed in the relevant Foreign Trade Policy and benefit of Notification No. 23/2003-CE dated 31.3.2003 was to be availed in accordance with Foreign Trade Policy, failure to obtain permission from the Development Commissioner cannot be said to be a mere technical lapse. If such lapses are allowed to be condoned, then very purpose of prescribing detailed procedure would become otiose. Apparently, the purpose of prescribing such procedure was to monitor and regulate clearance of goods by EOU into DTA. However, when any EOU clears goods in DTA in blatant disregard to the set procedure, then no laxity can be shown. I find that EOU was required to submit comprehensive information to the Development Commissioner for obtaining permission for clearance of goods into DTA. The applicant EOU was required to submit details of goods manufactured, physical exports, net foreign exchange earned, proposed DTA sale etc. Further, the Application was to be certified by the independent Cost/Chartered /Cost and Works Accountant and endorsed by the Bond Officer of Customs/Central Excise having jurisdiction over the unit. When such elaborative procedure was set forth in Foreign Trade Policy and when benefit of Notification No. 23/2003-CE dated 31.3.2003 was subject to following said procedure, it is apparent that obtaining permission from Development Commissioner for clearance of goods in DTA was substantial requirement of the Notification supra. I rely on the judgment rendered by the Hon'ble Supreme Court in the case of Hari Chand Shri Gopal reported as 2010 (260) E.L.T. 3 (S.C.),wherein it has been held that,

> "22. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly. Though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption. In *Novopan India Ltd.* (supra), this Court held that a person, invoking an exception or exemption provisions, to relieve him of tax liability must establish clearly that he is covered by the said provisions and, in case of doubt or ambiguity, the benefit of it must go to the State. A Constitution Bench of this Court in *Hansraj Gowardhandas v. H.H. Dave* - (1969) 2 SCR 253, held that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption.
>
> 23. Of course, some of the provisions of an exemption notification may be directory in nature while some are of mandatory in nature. The distinction between provisions of simple procedural or subservient character and were built in with certain specific objectives of policy on the one hand, and those which are merely procedural and technicalities in their nature, on the other, must be kept clearly distinguished. In Siza Fibre

and Steel Co. Ltd. (supra), this Court i eld that the principles as regard construction of an exemption notification are no longer res integra; whereas the eligibility clause in relation to an exemption notification is given strict meaning whereby the notification has to be interpreted in terms of its language, once an assessee satisfies the eligibility clause, the exemption clause therein may be construed liberally. An eligibility criteria, therefore, deserves a strict construction, although construction of a condition thereof may be given a liberal meaning if the same is directory in nature.

Doctrine of substantial compliance – not 'invoked' suo

24. The doctrine of substantive compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concep. of "reasonableness", the acceptance or otherwise of a plea of "substantial compliance" depends upon the facts and circumstances of each case and the purpose and object to be achieved and the extent of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleaded if a clear statutory prerequisite which ultimately the object and the purpose of the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and as a minor image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed. Fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance of an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the non-compliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and so forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, thus, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance of those factors which are considered as essential."

9. In view of above, I hold that since the Appellant had not cleared goods in DTA in accordance with Export and Import Policy, the Appellant was not eligible to avail benefit of Notification No. 23/2003-CE date 31.3.2003, as amended. I, therefore, uphold confirmation of demand under Section 11A(4) of the Act.

10. The Appellant has contended that entire demand was barred by limitation; that the notice was issued by invoking extended period of limitation but no such allegation of suppression etc. was made in the notice; that all facts were declared in monthly statutory returns ER-2 and consequently it was within the knowledge of the Department; that it is a settled law that when a notice is issued based on the audit objection on the basis of the records maintained by assessee, then in such case the Department cannot claim that alleged short recovery of duty was on account of willful suppression of facts with intent to evade duty. I find that proceedings were initiated on the basis of CRA audit of the records of the Appellant. It is on record that during said Audit, it was revealed that the Appellant had availed benefit of Notification No. 23/2003-CE dated 31.3.2003, as amended, in respect of goods cleared into DTA but had not obtained permission from the Development Commissioner for such clearance and hence, the Appellant was not eligible for the benefit of notification *supra*. It is apparent that had there been no audit of Appellant's records, wrong availment of notification *supra* by the Appellant would have gone unnoticed and hence, ingredients for invoking extended period under Section 11A(4) of the Act existed in the present case. Hence, I hold that the demand is not barred by limitation. I rely on the order passed by the Hon'ble CESTAT, Chennai in the case of Six Sigma Soft Solutions (P) Ltd. reported as 2018 (18) G.S.T.L. 448 (Tri. - Chennai), wherein it has been held that,

> "6.5 Ld. Advocate has been at pains to point out that there was no *mala fide* intention on the part of the appellant. He has contended [that] they were under the impression that the said activities would come within the scope of IT services, hence not taxable. For this reason, Ld. Advocate has contended that extended period of time would not be invocable. However, we find that the adjudicating authority has addressed this aspect in para-10 of the impugned order, where it has been brought to the fold that appellant had not at all disclosed the receipt of income in respect of the activities done by them in respect of services provided by them in their ST-3 returns.
>
> 6.6 The facts came to light only when the department conducted scrutiny of the annual reports, possibly during audit. In such circumstances, the department is fully justified in invoking the extended period of limitation of five years."

(Emphasis supplied)

10.1 I have also gone through sample ER-2 Returns for the months of December, 2012 and January, 2013 submitted by the Appellant in Appeal Memorandum. Though it has been mentioned in the said Returns that the goods were cleared into DTA under Para 6.8 of FTP but it is not forthcoming whether they had availed benefit of Notification No. 23/2003-CE dated 31.3.2003 or whether they possessed required permission from the Development Commissioner for clearance of goods into DTA or not. I find that such information was in the personal domain of the Appellant and unless and until the Appellant firm brought these facts to the knowledge of the Department, there is no way the Department could possess knowledge about the

same. Thus, merely filing periodical ER-1 returns would not mean that it was within the knowledge of the Department that the appellant was clearing goods into DTA under Notification No. 23/2003-C.E. dated ...2.2003 without obtaining requisite permission from the Development Commissioner. The contention of the Appellant is, thus, devoid of merit. My views are supported by the Order passed by the Hon'ble Tribunal in the case of Nitin Park reported as 2011 (273) E.L.T. 104 (Tri. - Mumbai), wherein the Hon'ble Tribunal held that:

> "11. Coming to the issue of the limitation of time raised by the appellant, we find that the extended period of time has been rightly invoked in the present case. It is not the appellant's contention that they had informed the department of availing the higher SSP, on the imported as well as locally procured goods or the fact that they were relabelling the products and also affixed the bar code and also undertaken repack ng in some cases. They have also not followed any of the procedures prescribed under the Central Excise Act and the Rules. Ignorance of law or bona fide belief cannot be an excuse. With the introduction of self-assessment procedure and self assessment of excise duty, a higher responsibility has been cast on the assessee to comply with all the requirements prescribed under the statute. The department cannot and does expected to find out on their own in all cases what each assessee is doing and whether discharging the correct duty liability. The non registration and non-declaration of their activities and non-compliance with the procedures with respect to removal of goods from the place of manufacture certainly would amount to suppression of facts and therefore, the adjudicating authority has correctly invoked the extended period of time for demand of central excise duty and we hold accordingly."
>
> (Emphasis supplied)

11. Regarding penalty imposed under Section 11AC of the Act, I find that extended period of limitation under Section 11A(4) of the Act was correctly invoked by the adjudicating authority on the ground of suppression of facts, as held by me in para supra. Since there was suppression of facts with intent to evade payment of duty involved in the present case, penalty under Section 11AC of the Act is mandatory as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.), wherein it is held that when there are ingredients for invoking extended period of limitation for demand of duty, imposition of penalty under Section 11AC is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, uphold penalty imposed under Section 78 of the Act.

12. Regarding contention of the Appellant that they had cleared goods into DTA by paying applicable duty under Sr. No. 2 of the notification No. 23/2003-CE dated 31.03.2003, as amended and not under Sr. No. 3 of the notification as alleged in the show cause notice, I find that since I have held in para supra that the Appellant was not eligible to avail benefit of notification No. 23/2003-CE dated 31.3.2003, it will not serve any purpose to examine applicability of Sr. No. 2 of notification supra. Hence, I discard this contention of the Appellant.

13. The Appellant has contended that the Department has wrongly applied rate of duty in Annexure-A to SCN instead of taking correct rate of duty effective at material time while calculating differential duty; that in remarks column of Annexure-A, rate of duty for the period from April, 2014 to January, 2016 for both MS Scrap and SS Scrap has been shown as "BCD 2.5% + CVD 12% + Cess 3%" which comes to 15.25%, but rate of duty of 18.3% has been applied. On scrutiny of records, I find that there are glaring errors in calculating differential duty in Annexure-A to SCN as discussed herein under:

(I) The notification No. 12/2012-Cus dated 17.3.2012 was amended by Notification No. 25/2013-Cus dated 8.5.2013 and BCD on MS Scrap was reduced from 5% to 2.5%. However, Annexure-A to SCN has calculated BCD @5% for the period from June,2013 to April, 2014.

(II) The Appellant has paid 50% of BCD apart from 12% CVD and 3 % Education Cess in many invoices but calculation sheet of SCN only shows that the Appellant had paid 12% CVD and 3 % Education Cess under the heading 'Applied rate of duty', which is factually incorrect.

(III) The remarks column of Annexure-A, rate of duty for the period from April, 2014 to January, 2016 for both MS Scrap and SS Scrap has been correctly shown as "BCD 2.5% + CVD 12% + Cess 3%", but rate of duty of 18.3% has been taken under the heading 'Applicable rate of duty' instead of 15.25%. This also needs to be rectified.

13.1 I find that the Appellant had brought these errors to the knowledge of the adjudicating authority in reply to Show Cause Notice, but the adjudicating authority chose to ignore the same for the reasons best known to him. I find that since the differential duty is wrongly calculated in the Show Cause Notice and not rectified while passing the impugned order despite specifically brought to the notice of the adjudicating authority, it will be appropriate if the adjudicating authority himself takes pain and re-calculate differential duty payable by the Appellant by taking correct rate of duty effective at material time as well as correct duty paid by the Appellant. I, therefore, find it fit to remand to the adjudicating authority for limited

purpose of quantification of [illegible] Adjudicating Authority shall verify correct rate of duty applicable at [illegible] consider actual duty paid by the Appellant by verifying all the [illegible] of the Appellant has already furnished copies of invoices for the [illegible] vide letter dated 24.2.2015. On [illegible] of duty, the adjudicating authority shall inform to the Appellant about [illegible] which shall be paid by the Appellant along with interest. The Appellant shall also be liable to pay penalty under Section 11AC of the Act which shall be equal to duty so quantified. I make it clear that impugned order is otherwise upheld [illegible] duty has not been properly quantified, the matter is being remanded.

14. In view of above, I uphold the impugned order but remand the matter to the adjudicating authority for limited purpose of re-quantification of duty.

15. अपीलकर्ता द्वारा दर्ज की गई अपील का विभाग द्वारा [illegible] तरीके से किया जाता है।

15. The appeal filed by the Appellant stands disposed off in above terms.

(Gopi Nath)
Commissioner (Appeals)

By R.P.A.D.

To,

सेवा में,

प्रतिलिपि :-

1) प्रधान मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र,अहमदाबाद को जानकारी हेतु।

2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।

3) अधीक्षक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।

4) गार्ड फाइल।