::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
क	V2/17/EA2/RAJ/2017	128/ADC/PV/2016-17	28-02-2017

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

RAJ-EXCUS-000-APP-25-2018-19

आदेश का दिनांक / Date of Order: **18.04.2018** जारी करने की तारीख / Date of issue: **19.04.2018**

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ अपीलकर्ता **& प्रतिवादी** का नाम एवं पता /Name&Address of the Appellant **& Respondent** :-
1.M/s. Vishal Impex, Plot No. 272-275 GIDC Phase -II, Dared , Jamnagar,,

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/

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) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/

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) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/
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) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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 Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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 Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

...2...

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" मे निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,
Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । /
In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

The Principal Commissioner, Central Excise and Service Tax, Rajkot (*hereinafter referred to as* "the department") filed present appeal against Order-in-Original No. 128/ADC/PV/2016-17 dated 28.02.2017 (*hereinafter referred to as* "the impugned order") passed by the Additional Commissioner, Central Excise and Service Tax, Rajkot (*hereinafter referred to as* "the lower adjudicating authority") in the matter of M/s. Vishal Impex, Plot No. 272-275, GIDC Phase-II, Dared, Jamnagar (*hereinafter referred to as* "the respondent").

2. The Brief facts of the case are that the respondent was 100% Export Oriented Unit, engaged in manufacturing of various Brass products falling under various Chapters of Central Excise Tariff Act, 1985. They were holding Private Bonded Warehouse License issued under Section 58 of the Customs Act, 1962 and had permission under Section 65 of the Customs Act, 1962 to manufacture finished goods under bond. Audit of the unit revealed that the respondent had cleared finished goods viz. "Brass re-melted ingots" valued at Rs.3,52,75,420/- during the period from January 2004 to September 2004 in DTA against Foreign Exchange Remittances received from Exchange Earners Foreign Currency (EEFC) account as per para 6.9(b) of the EXIM Policy 2002-2007, on payment of duty at concessional rate i.e. 50% of the aggregate duties leviable under Section 3 of the Central Excise Act, 1944 in terms of Notification No. 23/2003-CE, dated 31-03-2003. However, as per Condition No. 2 of the said Notification, benefit of concessional rate of duty can be made available to the goods cleared into DTA if the goods are cleared into DTA in accordance with sub-para (a), (b), (d) and (h) of para 6.8(b) of EXIM Policy and to the satisfaction of jurisdictional Deputy/Assistant Commissioner of Central Excise. The respondent admitted that they had cleared their finished goods under Para 6.9(b)

of the EXIM Policy and were not aware that they were required to clear finished goods subject to satisfaction of jurisdictional Central Excise Assistant Commissioner as per condition 2(ii) of Sr. No. 2 of Notification No. 23/2003-CE, dated 31-03-2003.

2.2 Show Cause Notice No. JMR/AR-SSBY/COMMR/24/2009 dated 22-01-2009 was issued to the respondent demanding short-paid Central Excise duty of Rs. 67,30,070/- under Section 11A of the Central Excise Act, 1944 along with interest under Section 11AB of the Act and proposing penalty under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC ibid. The lower adjudicating authority vide impugned order dropped the proceedings initiated against the respondent finding that the respondent correctly paid central excise duty by availing benefit of concessional rate of duty under Notification No. 23/2003-CE dated 31.03.2003 and in view of letter dated 04.12.2003 of the Development Commissioner, KASEZ clarifying that there should not be any objection for EOUs clearing the finished goods in DTA under Para 6.8 (b) of the policy against payment in foreign exchange under Para 6.9(b) of the policy since decision of the Development Commissioner is binding on this department.

3. Being aggrieved with the impugned order, the department preferred present appeal, *inter-alia,* on the following grounds:

(i) The lower adjudicating authority has observed that the respondent correctly paid duty by availing benefit of concessional rate of duty under Notification No. 23/2003-CE dated 31-03-2003 and that clarifications issued by the Development Commissioner, KASEZ, are binding on Central Excise department, but the lower adjudicating authority has not appreciated the fact that benefit of concessional rate of duty under Notification No. 23/2003-CE dated 31-03-2003 is subject to the conditions mentioned therein. The benefit of concessional rate of duty under Notification No. 23/2003-CE dated

31-03-2003 is available to a 100% EOU on clearance of finished goods into DTA, subject to fulfillment of Condition No. 2, prescribed under the said Notification. As per the Condition No. 2 (i), benefit of payment of concessional rate of duty is available if goods are cleared into Domestic Tariff Area in accordance with sub-paragraphs (a), (b), (d) and (h) of Paragraph 6.8 of the Export and Import Policy, whereas the respondent had cleared their finished goods under Para 6.9(b) of the Export and Import Policy and thus, they have not fulfilled the said condition of the Notification.

(ii) As per Condition No. 2(ii) of the notification, exemption shall not be availed until Deputy/Assistant Commissioner of Central Excise is satisfied with the said goods that the same are similar to the goods which are exported or expected to be exported from the unit. Whereas, the respondent had cleared goods without satisfaction of the jurisdictional Deputy/Assistant Commissioner of Central Excise at the relevant time. Thus, the respondent has failed to fulfill this condition also.

(iii) The lower adjudicating authority has placed reliance on the letter dated 04.12.2003 of the Development Commissioner, KASEZ and held that the clearances affected under Para 6.9(b) of the policy is admissible for the concessional rate of duty under the said Notification No. 23/2003–CE dated 31.03.2003. But, the Development Commissioner, KASEZ in his letter dated 04.12.2003 has nowhere clarified that the respondent is eligible for benefit of concessional rate of duty under the aforesaid notification in respect of clearances made by them under Para 6.9(b) of the EXIM Policy and also informed that the Ministry clarified that the two facilities [i.e. clearance of finished goods into DTA under Para 6.8(b) and Para 6.9(b)] are independent of each other. The lower adjudicating authority held that the letter dated 04.12.2003 of the Development Commissioner, KASEZ is binding on Central Excise department. The letter cannot take place of

the said notification issued under the Central Excise Act, 1944 and statutory provisions regarding payment of Central Excise duty at appropriate rates cannot be ignored on the basis of the said letter.

(iv) CBEC Circular No. 93/2000-Cus. dated 21.11.2000, as relied upon by the lower adjudicating authority, clarified that when other conditions are satisfied, the denial of such benefits envisaged under Foreign Trade Policy by Central Excise authorities is not proper and legal. In the present case, no question of denying of any benefit envisaged under Foreign Trade Policy and the respondent was not prevented from clearing their finished goods into DTA on the basis of permissions granted by the Development Commissioner, KASEZ. However, the respondent was required to pay appropriate Central Excise duty at prescribed rates instead of concessional rate of duty under Notification No. 23/2003-CE, dated 31-03-2003 under the guise of clarification issued by the Development Commissioner, KASEZ, as the benefit of any exemption notification can be availed only subject to the fulfillment of conditions mentioned therein.

3.1 In view of the above grounds and the statutory provisions, the impugned order was liable to be set aside and demand of Rs. 67,30,070/- along with interest payable thereon, under Section 11AB of the Central Excise Act, 1944 was requested to be confirmed and also to impose penalty under Section 11AC of the Central Excise Act, 1944 as proposed in the aforesaid Show Cause Notice.

4. Personal hearing in the matter was attended to by Shri R. T. Vajani, Consultant who reiterated their submissions given during adjudication and contradicted the grounds of appeal given by the department; that the impugned order is correct, legal and proper; that department in EA-2 has given someone else name; that they do not manufacture cement as said in brief facts of the appeal memo, which shows total non-application of mind on part of the department; that Development Commissioner has already granted permission for

DTA sale. No one appeared from the Department despite P H notices issued to the Commissionerate.

4.1 The respondent vide letter dated 26.03.2018 has, *inter-alia,* submitted Memorandum of Cross-Objections pointing out mistakes in the appeal memorandum such as:

(i) M/s. Rambo Cement Pvt. Ltd. Plot No. 272-275, G.I.D.C., Dared, Phase-2, Jamnagar shown as respondent in Column No. 2 of EA-2 proforma whereas respondent is M/s. Vishal Impex.

(ii) words "payable in respect of Cement cleared by them" mentioned at line 7 of the Para 7(i) of the appeal whereas the respondent is manufacturer of brass products.

(iii) words "and to confirm the demand of Service Tax" mentioned in Para 11(ii) of the appeal whereas no service tax is involved in the present case.

(iv) the department claimed relief for imposition of penalty under Rule 25 and Rule 26 of the Central Excise Rules, 2002 in Para 7(i) of the appeal but not claimed in Para 11(ii) of the appeal.

(v) Statement dated 05.01.2007 of Shri Vasant V. Kataria, Proprietor of the respondent is not relied upon document as per the Annexure – B of the impugned SCN and hence it cannot be used as evidence.

4.2 The Development Commissioner, KASEZ, Gandhidham vide letter dated 12.09.2003 has granted permission for eligible DTA Sales at concessional rate of duty under Para 6.8(b) of the EXIM Policy 2002-2007 to the respondent, on the basis of their physical export during the period from April, 2003 to June, 2003. The respondent requested the Development Commissioner, KASEZ, Gandhidham to permit them to effect DTA Sales at concessional rate against payment in Foreign exchange and accordingly, the Development Commissioner, KASEZ, Gandhidham vide letter dated 26.09.2003 amended the permission dated 12.09.2003 & granted permission to

sale the items in DTA against payment in Foreign Exchange. Further, three permissions for DTA Sale on their eligibility against physical export effected by them during the period from July, 2003 to September, 2003; October, 2003 to December, 2003 and January, 2004 to March, 2004 respectively have been granted in terms of Para 6.8(b) of the EXIM Policy by the Development Commissioner, KASEZ, Gandhidham vide letters dated 14.11.2003, dated 22.03.2004 and dated 02.07.2004 respectively and in Condition No. 5 of the said letters, it is mentioned that "the items permitted for sale in DTA shall also be cleared against payment from overseas in terms of Para 6.9(b) of the EXIM Policy.

4.3 The respondent vide letter dated 25.11.2003 had approached the Development Commissioner, KASEZ, Gandhidham that central excise authority was not agreed for clearance in DTA at concessional rate of duty under Notification No. 23/2003 against remittance received in foreign exchange, since, the same is covered under Para 6.9(b) of the EXIM Policy. The Development Commissioner, KASEZ, Gandhidham vide letter dated 04.12.2003, addressed to the Assistant Commissioner, Central Excise Division, Jamnagar explained the provisions of Foreign Trade Policy that *"in this context, it is to inform that the issue regarding sale of finished goods in DTA by the EOUs against payment from EEFC account of the buyer in DTA or against FE remittance received from overseas in terms of para 6.9(b) of the Policy against their DTA sale entitlement under para 6.8(b) of Exim Policy, was taken up with the Department of Commerce, New Delhi and the same was also discussed in the Board of Approval EOUs. The Ministry has clarified that the two facilities are independent of each other and, therefore, they can be clubbed as well, as none of them is dependent on other. Therefore, there should not be any objection for the EOUs clearing the finished goods in DTA under para 6.8(b) of the Policy against payment in foreign exchange under para 6.9(b) of the*

Policy. You are, therefore, requested to permit the unit to make DTA sale against various permissions granted by this office without any further delay." After satisfaction, the then Deputy Commissioner, Central Excise Division, Jamnagar had allowed such clearance of goods to the respondent, on the basis of the above letter dated 04.12.2003 of the Development Commissioner, KASEZ, Gandhidham. Thus, the respondent had cleared the goods subject to satisfaction of jurisdictional Central Excise Deputy/Assistant Commissioner as per condition 2(ii) of Sr. No. 2 of Notification No. 23/2003-CE, dated 31-03-2003.

4.4 The statement dated 05.01.2007 of Shri Vasant K. Kataria, Proprietor of the respondent was not relied upon in the SCN. Therefore, the same cannot be used in the present appeal and the said statement is not supported by any material evidence and hence, it cannot be used as evidence.

4.5 The respondent submitted that there are decisions of CESTAT on the similar issue in which applicability of concessional rate of duty under Notification No. 2/95-CE dated 04.01.1995 (now Notification No. 23/2003-CE dated 31.03.2003) for DTA Sales against payment in Rupees and against payment in Foreign exchange under Para 9.9 and Para 9.10 of the then EXIM Policy – 1997-2002 are discussed in detail and finally decided. Para 9.9 and Para 9.10 of the EXIM Policy are similar to Para 6.8 and Para 6.9 of the F.T.P. – 2002-2007 and the respondent relied upon following judgments:

(i) Virlon Textile Mill reported as 2007 (04) LCX 0002;

(ii) Virlon Textile Mill reported as 2002 (139) ELT 0371;

(iii) Kurt-O-John Shoe Components (I) P. Ltd. reported as 2003 (158) ELT 0300;

(iv) Juned Billal Memon reported as 2008 (221) ELT 45 (TRI-LB).

4.6 The above judgments pertain to Para 9.9(b) & Para 9.10(b) of EXIM Policy 1997-2002 which are similar to Para 6.8 and Para 6.9(b)

of the Foreign Trade Policy 2004-2009 and in same way, provisions of Notification No. 2/1995-CE dated 04.01.1995 were similar to Notification No. 23/2003-CE dated 01.03.2003 and therefore, these Judgements are squarely applicable in the present case.

Findings:

5. I have carefully gone through the facts of the case, impugned order, appeal memorandum filed by the department, memorandum of cross objections filed by the respondent and written as well as oral submissions made during and after the personal hearing. The issue to be decided on the present appeal is whether clearances effected by the respondent under Para 6.9(b) of the Foreign Trade Policy can be considered for eligibility of concessional duty benefit available under Notification No. 23/2003-CE dated 31.03.2003 or not.

6. The department submitted that the benefit of concessional rate of duty under Notification No. 23/2003-CE dated 31.03.2003 is available to goods cleared into DTA in accordance with sub-paragraphs (a), (b), (d) and (h) of Paragraph 6.8 of Export and Import Policy, 2002-2007 and subject to the satisfaction of jurisdictional Central Excise Deputy/Assistant Commissioner. I would like to reproduce relevant portion of the said Notification which reads as under:

"EOU/EHTP/STP — Exemption to specified goods produced therein —

"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.

TABLE

Sr. No.	Chapter or heading No. or sub-heading No.	Description of Goods	Amount of Duty	Conditions
(1)	(2)	(3)	(4)	(5)
2.	Any Chapter	All goods	In excess of the amount equal to fifty per cent of the duty leviable under section 3 of the Central Excise Act :	2

ANNEXURE

Sl. No.	Conditions
2.	If,-

Sl. No.	Conditions
	(i) the goods are cleared into Domestic Tariff Area in accordance with sub-paragraphs (a), (b), (d) and (h) of Paragraph 6.8 of the Export and Import Policy; (ii) exemption shall not be availed until Deputy Commissioner of Customs or Assistant Commissioner of Customs or Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, is satisfied with the said goods including Software, Rejects, Scrap, Waste or Remnants; (a) being cleared in Domestic Tariff Area, other than scrap, waste or remnants are similar to the goods which are exported or expected to be exported from the units during specified period of such clearances in terms of Export and Import Policy; (b) the total value of such goods being cleared under sub-paragraphs (a), (b), (d) and (h) of Paragraph of the Export and Import Policy, into Domestic Tariff Area from the unit does not exceed 50% of the Free on Board value of exports made during the year (starting from 1st April of the year and ending with 31st March of next year) by the said unit; (c) the balance of the production of the goods which are similar to such goods under clearance into Domestic Tariff Area, is exported out of India or disposed of in Domestic Tariff Area in terms of Paragraph 6.9 of the Export and Import Policy; (iii) clearance of goods into Domestic Tariff Area under sub-paragraphs (a), (b), (d) and (h) of Paragraph 6.8 of the Export and Import Policy shall be allowed only when the unit has achieved positive Net Foreign Exchange Earning ; and

Sl. No.	Conditions
	(iv) clearance of goods into Domestic Tariff Area under sub-paragraph (a) of Paragraph 6.8 of the Export and Import Policy in excess of 5% of free on board value of exports made by the said unit during the year (starting from 1st April of the year and ending with 31st March of the next year) shall be allowed only when the unit has achieved positive Net Foreign Exchange Earning.

6.1 In view of the above, the benefit of concessional rate of duty under the said Notification is available to a EOU unit in respect of clearance of finished goods into DTA in accordance with sub-paragraphs (a), (b), (d) and (h) of Paragraph 6.8 of the Export and Import Policy, 2002-2007 subject to satisfaction of jurisdictional Deputy/Assistant Commissioner of Central Excise.

6.2 The respondent relied upon various decisions of the Hon'ble CESTAT in their Memorandum of Cross Objections, under which applicability of concessional rate of duty under Notification No. 2/95-CE dated 04.01.1995 (now Notification No. 23/2003-CE dated 31.03.2003) for DTA Sales against payment in Rupees and against payment in Foreign exchange under Para 9.9 and Para 9.10 of the EXIM Policy – 1997-2002 are discussed in detail and finally decided in favour of appellants and submitted that Para 9.9 and Para 9.10 of the EXIM Policy 1997-2002 are similar to Para 6.8 and Para 6.9 of the F.T.P. – 2002-2007 and in same way, provisions of Notification No. 2/1995-CE dated 04.01.1995 were similar to Notification No. 23/2003-CE dated 01.03.2003 and submitted that these Judgements are squarely applicable in the present case.

6.3 I find that the respondent cleared their finished goods namely "brass re-melted ingots" into DTA in accordance with the permission granted by the Development Commissioner, KASEZ, Gandhidham vide letter dated

12.09.2003 in terms of Para 6.8(b) of Exim Policy 2002-07. The Development Commissioner, KASEZ, Gandhidham vide letter dated 26.09.2003 amended the above permission dated 12.09.2003 and granted permission to clear the such goods into DTA against payment in foreign exchange. The Development Commissioner, KASEZ, Gandhidham vide letters dated 14.11.2003, dated 22.03.2004 and dated 02.07.2004 also granted permissions for clearance of such goods into DTA against payment from overseas, in terms of Para 6.8(b) of Exim Policy 2002-07. I find that Condition No. 5 of the permission letter dated 02.07.2004 stipulates that *"the items permitted for sale in DTA shall also be cleared against payment from overseas in terms of Para 6.9(b) of Exim Policy"*. The Development Commissioner, KASEZ, Gandhidham vide letter dated 04.12.2003 further clarified that *".... there should not be any objection for the EOUs clearing the finished goods in DTA under Para 6.8(b) of the Policy against payment in foreign exchange under Para 6.9(b) of the Policy".*

6.4 With a view to understand provisions of EXIM Policy vis-à-vis conditions of Notification No. 23/2003-CE dated 31.03.2003, I would like to reproduce Para 6.8(b) and Para 6.9(b) of the Exim Policy 2002-07 which read as under:

Para 6.8 (b):

> *"Units, other than gems and jewellery units, may sell goods/ services upto 50 % of FOB value of exports, subject to fulfilment of minimum NFEP as prescribed in Appendix-I of the Policy on payment of applicable duties. Sales made to a private bonded warehouse set up under paragraph 2.39 of the policy shall also be taken into account for the purpose of arriving at FOB value of exports by EOU/EPZ units provided payment for such sales are made from EEFC account. No DTA sale shall be permissible in respect of motor cars, alcoholic liquors, tea (except instant tea) and books or by a packaging/labelling /segregation/ refrigeration unit and such other items as may be notified from time to time."*

Para 6.9(b):

> *"Supplies effected in DTA against payment from the Exchange Earners Foreign Currency (EEFC) Account of the buyer in the DTA or against foreign exchange remittance received from overseas."*

6.5 It can be seen from provisions of EXIM Policy 2002-07 that as per Para 6.8(b) of the Policy, EOU may sell goods into DTA, upto 50% of FOB value of exports on payment of applicable duty provided payment for such sales are made from EEFC account, which has not been disputed by the department. Para 6.9 (b) of the Policy allows DTA clearances against payment from EEFC Account of buyer or against foreign exchange remittance received from overseas. Hence, I find that there is no vital difference in the provisions of EXIM Policy 2002-07 allowing DTA clearance allowed under both the aforesaid Paragraphs of EXIM Policy except payment terms. I also find that DTA permissions have been granted by KASEZ in terms of Para 6.8(b) of the Exim Policy and also permitted for sale in DTA against payment from overseas/in foreign exchange in terms of Para 6.9(b) of the Exim Policy. Thus, I find that when all such permissions granted in terms of Para 6.8(b) of the Exim Policy, the respondent has fulfilled Condition No. 2(i) of the Notification No. 23/2003-CE dated 31.03.2003 and hence, respondent is eligible for benefit of concessional rate of duty as provided under the said Notification.

6.6 My above view is supported by the judgment of Hon'ble Supreme Court in the case of Virlon Textile Mills Ltd. reported as 2007 (211) ELT 353 (SC). Para 7 of the said judgment is reproduced as under:-

> *"7. For the following reasons, we find merit in this civil appeal. Firstly, on examination of the Exim Policy we find that the said Policy as a rule stated that every 100% EOU was obliged to manufacture or produce from duty free imported raw materials capital goods etc., finished products/articles and as a rule every 100% EOU was*

obliged to export its entire production and earn foreign exchange. This was what was called as Physical Exports. However, this rule had certain exceptions. In this civil appeal, we are concerned with DTA sales. As an exception, there existed two types of DTA sales under the said Policy, namely, DTA sales against rupee and DTA sales against foreign exchange which was similar to physical exports. This latter category was known as "Other Supplies in DTA". Therefore, to put it in brief, "Other Supplies in DTA" was equated with physical exports which, as stated above, was the general rule for 100% EOU. In other words, the general rule was physical exports and other supplies in DTA was equated to physical exports. This equation was necessary because other supplies in DTA gave certain benefits to the economy like preservation of foreign exchange, import substitution, savings of transportation costs and to provide competitiveness and level-playing field for Indian exporters. According to the Revenue, the expression occurring in the second proviso to Section 3(1), namely, "allowed to be sold in India" was applicable only to DTA sales against rupee and not DTA sale against foreign exchange. In this civil appeal, we are concerned with the law as it stood prior to 11-5-2001. In our view, DTA sale against foreign exchange was covered by the expression "allowed to be sold in India" and, therefore, such sale fell under the proviso to Section 3(1) of the 1944 Act. In the circumstances, the duty liability of the assessee (appellant herein) was required to be determined after allowing to it the benefit of Notification No. 2/95-CE. That notification granted partial exemption to the assessee from duties in respect of goods manufactured in 100% EOU and allowed to be sold in India under para 9.9 (a), (b), (c) and (d). Once DTA sales against foreign exchange are held to be covered by the proviso to Section 3(1) of the 1944 Act then the whole difference between DTA sales against rupee and DTA sales against foreign exchange, for the purposes of Notification No. 2/95-CE would stand eliminated. This would be, however, subject to the compliance of other conditions of Notification No. 2/95-CE. Therefore, in our view, the Tribunal had erred in relying on para 9.9(b) for limiting the benefits of exemption under Notification No. 2/95-CE by imposing a new condition to the effect that the benefits would be admissible only in respect of 50% of such DTA sales against foreign exchange. Secondly, once the permission was granted by the competent authority under the Exim

Policy to make DTA sales against foreign exchange, the assessee (appellant herein) was entitled to the benefit of concessional rate of duty under Notification No. 2/95-CE. If DTA sales against rupee were allowed the benefit of Notification No. 2/95-CE, then DTA supplies against foreign exchange, which were at par with physical exports, cannot be denied the same benefits and they cannot be subjected to a higher duty. Thirdly, once DTA sales against foreign exchange are covered by the above expression "allowed to be sold in India", all issues relating to calculation of the duty payable in terms of notification No. 2/95-CE will have to be decided afresh by the adjudicating authority and accordingly, we hereby remand the matter back to the Commissioner for calculating the duties payable by the assessee in terms of Notification No. 2/95. The Commissioner will calculate the duties accordingly as hereinabove mentioned. Lastly, we are of the view that there is no fundamental difference, as far as the exemption notification No. 2/95-CE is concerned, between DTA sales against foreign exchange and DTA sales against rupee. Once DTA sales against foreign exchange fall within the expression "allowed to be sold in India", the Department cannot deny to such sales the exemption under Notification no. 2/95-CE, since DTA sales against foreign exchange will come under para 9.9. According to the Tribunal, the entire supply to DTA against foreign exchange was not entitled to the benefit of Notification No. 2/95-CE but only 50% of the supply was eligible for the said relief. We do not see any basis for introduction of this condition in Notification No. 2/95-CE. It appears that this condition is brought in on the ground that para 9.9(b) refers to DTA sales up to 50% of the FOB value of exports. In our view, the Tribunal had erred in relying on the said para 9.9(b) for limiting the benefits of exemption under Notification No. 2/95-CE in respect of 50% of DTA sales (supplies) against foreign exchange. One cannot ignore the fact that DTA sales in foreign exchange provides for better money value as compared to DTA sales in rupee. Therefore, if DTA sales against rupee are allowed the benefits of Notification No. 2/95-CE, DTA supplies, which are at par with physical exports, cannot be denied the same benefits."

6.7 I find that the department also argued that the respondent cleared the goods without satisfaction of the then jurisdictional Deputy/Assistant Commissioner whereas it is on record that the

jurisdictional Deputy/Assistant Commissioner was satisfied with the clarification dated 04.12.2003 issued by the then Development Commissioner, KASEZ, Gandhidham and allowed the clearance into DTA and hence argument of the department regarding non-satisfaction of the Deputy/Assistant Commissioner is not tenable.

7. In view of above factual and legal position, I find that respondent has correctly paid central excise duty in terms of Notification No. 23/2003-CE dated 31.03.2003 and there is no infirmity in the impugned order. Therefore, I uphold the impugned order and reject the appeal filed by the department.

८. डिपार्टमेंट द्वारा दर्ज़ की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

8. The appeal filed by the department is disposed off in above terms.

19/4/2018

(कुमार संतोष) 18/4/2018
(अपील्स) आयुक्त

By R.P.A.D.

To,

1	The Commissioner, CGST & Central Excise, Rajkot Commissionerate, CGST Bhawan, Race Course Ring Road, Rajkot	आयुक्त, सीजीएसटी एवं के उ.शु., सीजीएसटी भवन, रेस कोर्स रिंग रोड, राजकोट
2	M/s. Vishal Impex, Plot No. 272-275, GIDC Phase-II, Dared, Jamnagar	मे. विशाल इंपेक्ष, प्लॉट नं. २७२-२७५, जीआईडीसी फेझ – II, दरेड, जामनगर.

Copy for information and necessary action to:

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for favour of kind information.
2. The Assistant Commissioner, CGST & Central Excise, Division-I, Jamnagar.
3. Guard File.