::आयुक्त (अपील) का कार्यालय,वस्तु एवं सेवा करऔर 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 – 2477952/2441142Email: commrappl3-cexamd@nic.in

सत्यमेव जयते

रजिस्टर्डडाकए.डी.द्वारा :- DIN-20210464SX0000424312

क	अपील / फाइलसंख्या/Appeal /File No.	मूलआदेशसं /OIO No.	दिनांक/Date
	V2/36/RAJ/2020	DC/JAM-1/CEX/29/2019-20	27.03.2020

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

RAJ-EXCUS-000-APP-012-2021

आदेश का दिनांक / Date of Order: **26.03.2021** जारी करने की तारीख / Date of issue: **16.04.2021**

श्री अखिलेश कुमार, आयुक्त (अपील), राजकोट द्वारा पारित/
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपयुक्तलिखित जारी मूल आदेश से सृजित: /
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. Deep Recycling Industries Plot No. 773, GIDC Phase-II, Dared, Jamnagar.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से 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 निम्नलिखि+त 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- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in 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 dutydemand/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,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में 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/-.

(i) वित अधिनियम,1994की 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 Commissionerauthorizing 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 वितीय 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 वितीय (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 कोपुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में,केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई,वित 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 outsideIndia export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी 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 रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 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 variousnumbers 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 ::

M/s Deep Recycling Industries, Jamnagar (*hereinafter referred to as* "Appellant") has filed Appeal No. V2/36/RAJ/2020 against Order-in-Original No. DC/JAM-1/CEX/29/2019-20 dated 27.3.2020 (*hereinafter referred to as* 'impugned order') passed by the Deputy Commissioner, Central GST Division-I, Jamnagar (*hereinafter referred to as* "adjudicating authority").

2. The facts of the case, in brief, are that the Appellant, a 100% EOU, was engaged in the manufacture of Brass ingots, Brass electrical parts, Brass rods etc. falling under Chapter 74 of the Central Excise Tariff Act, 1985 out of raw materials viz. Mixed Metal Brass scrap imported duty free in terms of Notification No. 52/2003-Cus dated 31.3.2003, as amended. During the test check of records of Central GST Range-III, Jamnagar pertaining to the Appellant by CERA officers for the period F.Y. 2016-17, it was observed that the Appellant had applied for exit from EOU Scheme. At the time of de-bonding, the Appellant was required to pay applicable duties of Customs and Central Excise on the duty free imported goods/ procured goods / semi-finished goods/ finished goods lying in stock. It was observed by the CERA officers that,

(i) the Appellant had not paid Special Additional Duty (SAD) amounting to Rs. 5,81,474/- on duty free imported raw materials contained in work-in-progress goods and finished goods lying in stock at the time of de-bonding.

(ii) the Appellant had cleared Brass turning scrap in DTA during the period from 13.6.2016 to 27.3.2017 on payment of BCD @2.5% by classifying the said goods under 74040022 instead of classifying under CETH 74040029 and paying applicable BCD @5%. This resulted in short payment of duty amounting to Rs. 3,12,199/-.

(iii) The Appellant had self-calculated liability of SAD on imported raw material Mixed Metal Brass Scrap falling under CTH 74040029 and had paid SAD @ 2% as per Sr. No. 79A of the Notification No. 21/2012-Cus dated 17.3.2012, as amended. It appeared to the CERA officers that concessional rate of SAD @2% was applicable to Brass scrap falling under Chapter Sub Heading No. 74040022 and the Appellant was not eligible for concessional rate of SAD @2% and was required to pay SAD @4%. The appellant short paid SAD amounting to Rs. 3,37,527/-.

3. The above observations of the CERA officers culminated into issuance of Show Cause Notice No. V.74/GSTR-III/JAM-I/13/2019-20 dated 24.4.2019 to the Appellant calling them to show cause as to why an amount of Rs. 12,31,200/- should not be demanded and recovered from them under Section 11A of the Act, along with interest under Section 11AB and proposed imposition of penalty under Section 11AC of the Act.

3.1 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who confirmed the demand of Rs. 8,93,673/- and ordered for its recovery under Section 11A of the Act, along with interest under Section 11AA of the Act and imposed penalty of Rs. 8,93,673/- under Section 11AC ibid. The impugned order dropped the demand of Rs. 3,37,527/- in respect of differential SAD on imported raw material Mixed Metal Brass Scrap.

4. Being aggrieved, the Appellant has preferred the present appeal, inter alia, on the grounds that,

(i) The impugned order confirmed demand of SAD of Rs. 5,81,474/- on work-in-process goods and finished goods lying in stock at the time of its exit from EOU scheme under proviso to Section 3 of the Act, however, the said proviso to section 3 of the said Act is not at all applicable and relevant in their case in as much as the same is attracted only in a case when goods manufactured by an EOU are brought to any other place in India; that in the present case, since there is no clearance whatsoever of any goods, the impugned order confirming demand of SAD under proviso to Section 3 of the Act is untenable in law. In case of de-bonding of an EOU, Custom duties are payable on duty free imported raw materials lying in stock, either as such or as contained in work-in-process / finished goods and if there is any short payment of such duties, demand has to be confirmed under Section 28 of the Customs Act, 1962 and not under Section 11A of the Central Excise Act, 1944, as confirmed in the present proceedings and hence the impugned order is not sustainable and relied upon case law of Sterlite Optical Technologies Ltd. - 2011 (270) E.L.T. 266 (Tri. - Mumbai)

(ii) That recovery of SAD on the stocks of work-in-process and finished goods has been confirmed under proviso to Section 3 of the Act treating the same as clearance of goods into DTA. If the stock lying at the time of

de-bonding is treated as clearances of such stock, then they are eligible for exemption under serial no. 1 of Notification No. 23/2003-CE dated 31.03.2003, which granted exemption from payment of SAD in case of DTA clearances of goods by an EOU, if such goods are leviable to VAT / sales tax. In the present case, goods namely brass turning scrap, brass rods, brass billets, brass ingots, iron scrap, brass electrical parts, brass welding parts, brass building hardware, slag / ash etc. were all leviable to VAT if cleared in DTA and hence the impugned order confirming recovery of SAD on such goods, is untenable in law.

(iii) That the impugned order confirmed recovery of differential BCD on the findings that they had paid BCD @ 2.5% on clearances of 'brass turning scrap' in DTA during the financial year 2016-17 by classifying the same under CETH 74040022, whereas, it should have been classified under CETH 74040029 attracting BCD @ 5%. That they are engaged in manufacturing of brass components falling under Chapter No. 74, 83, 84 and 85 and these components are manufactured through various machining processes, wherein, brass turning scrap is generated and sometimes the same is cleared in DTA on payment of appropriate duties; that as per guidelines issued by the ISRI (Institute of Scrap Recycling Industries), such brass turning scrap are classified under the code 'Nomad' which is covered under CETH 74040022 and hence the impugned order confirming recovery of differential BCD amounting to Rs. 3,12,199/- on DTA clearances of 'brass turning scrap' by classifying the same under CETH 74040029, is untenable in law.

(iv) They had been regularly classifying 'brass turning scrap' under CETH 74040022 in their periodical returns, however, the Department never objected to such classification and now the Department cannot turn around and object to such classification so as to deny benefit of concessional rate of duty.

(v) The appellant submits that the present recovery of differential BCD amounting to Rs. 3,12,199/- on DTA clearances of 'brass turning scrap' pertains to the period June, 2016 to March, 2017 and the relevant notice was issued on 24.04.2019 i.e. the same was issued by invoking extended period of limitation, however, the necessary ingredients to invoke

extended period of limitation i.e. suppression of facts or willful misstatement are completely absent in the present matter. It was within knowledge of the Department that they were clearing 'brass turning scrap', by classifying the same under CETH 74040022 on payment of duties by availing benefit of concessional rate of BCD and such clearances were duly reflected by them in their periodical returns and therefore the invocation of extended period of limitation in the present case is not sustainable.

5. Personal Hearing in the matter was held on 25.8.2020. Subsequently, due to change of Appellate Authority, personal hearing was again fixed in virtual mode on 12.2.2021, 23.2.2021 and 9.3.2021. The Appellant vide letter dated 6.3.2021 requested to decide the appeal on the basis of submission made in appeal memorandum.

6. I have carefully gone through the facts of the case, the impugned order, and submission made in appeal memorandum. The issues to be decided in the present appeal are whether

(i) the impugned order confirming demand of Special Additional Duty on duty free imported raw materials contained in work-in-progress goods and finished goods lying in stock at the time of de-bonding of 100% EOU, is correct, legal and proper or not ?

(ii) the impugned order holding that Brass turning scrap when cleared into DTA is classifiable under CETH 74040029 and liable to Basic Customs Duty @5% is correct, legal and proper or not ?

7. On going through the records, I find that the Appellant, a 100% EOU, had imported Mixed Metal Brass Scrap without payment of duty in terms of Notification No. 52/2003-Cus dated 31.3.2003. Subsequently, they applied for exit from EOU scheme and at the time of de-bonding, the Appellant was required to pay applicable duties of Customs and Central Excise on the duty free imported goods / procured goods / semi-finished goods/ finished goods lying in stock. During the test check of records of CGST Range-III, Jamnagar, it was observed by CERA officers that the Appellant had, *inter alia*, not paid Special Additional Duty (SAD) amounting to Rs. 5,81,474/- on duty free imported raw materials contained in work-in-progress goods and finished goods lying in stock at the time of de-bonding. It was further observed that the Appellant had

cleared Brass turning scrap in DTA on payment of BCD @2.5% by classifying the said goods under 74040022 instead of classifying under CETH 74040029 and paying applicable BCD @5%. This resulted in short payment of duty amounting to Rs. 3,12,199/-. The impugned order confirmed duty totally amounting to Rs. 8,93,673/- under Section 11A of the Act, along with interest under Section 11A and imposed equal penalty under Section 11AC ibid.

7.1 On examining the first issue, I find that the Appellant has not disputed about their liability to pay SAD on duty free imported raw materials contained in work-in-progress goods and finished goods lying in stock at the time of de-bonding of 100% EOU but it has been contended that the impugned order has wrongly confirmed demand of SAD under proviso to Section 3 of the Act. The Appellant contended that the said provisions are attracted only in a case when goods manufactured by an EOU are brought to any other place in India and since there is no clearance of any goods, the impugned order confirming demand of SAD under proviso to Section 3 of the Act is not sustainable. The Appellant further contended that in case of de-bonding of an EOU, Custom duties are payable on duty free imported raw materials lying in stock, either as such or as contained in work-in-process / finished goods and if there is any short payment of such duties, demand has to be confirmed under Section 28 of the Customs Act, 1962 and not under Section 11A of the Central Excise Act, 1944 and relied upon case law of Sterlite Optical Technologies Ltd. - 2011 (270) E.L.T. 266 (Tri. - Mumbai).

7.2 I find that the Appellant had imported duty free raw material without payment of Customs duties including SAD in terms of Notification No. 52/2003-Cus dated 31.3.2003. While applying for de-bonding of their unit, the Appellant failed to pay applicable SAD on imported raw materials contained in work-in-progress goods and finished goods lying in stock. Under the circumstances, the Appellant was liable to pay applicable SAD on said raw materials. However, demand for such non-payment of SAD should have been issued under Section 28 of the Customs Act, 1962 and not under Section 11A of the Central Excise Act, 1944, since SAD is a duty of Customs. Hence, demand of SAD raised and confirmed under Section 11A of the Act is not correct. However, invocation of wrong provisions of law will not vitiate the entire proceedings when liability to pay SAD by the Appellant is otherwise not in dispute. Further, it is also not under dispute that the adjudicating authority had powers to invoke the provisions of

Customs Act, 1962 too, since the Appellant was functioning under the administrative control of the adjudicating authority at the material time. Hence, invocation of wrong provisions of law for demanding SAD in Show Cause Notice can, at best, be considered as technical lapse only. My views are supported by the Judgement rendered by the Hon'ble Supreme Court in the case of J. K. Steel Ltd. reported as 1978(2) E.L.T. J 355 (S.C.), wherein it has been held that,

> "45. ... ... If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question. This is a well-settled proposition of law. In this connection reference may usefully be made to the decisions of this Court in *P. Balakotaiah* v. *The Union of India,* 1958 SCR 1052 = (AIR 1958 SC 232) and *Afzal Ulah* v. *State of U.P.,* 1964 - 4 SCR 991 = (AIR 1964 SC 264). ..."
>
> (Emphasis supplied)

7.3 I also rely on the Order passed by the Hon'ble CESTAT, Mumbai in the case of Endress + Hauser Flowtec (I) Pvt. Ltd. 2009 (237) E.L.T. 598 (Tri. - Mumbai), wherein it has been held that,

> "39. Even otherwise, since the PC are a 100% EOU, demands can be raised as per the provisions of the B-17 bond executed by them. As per this bond, there is no time limit for demanding duty in the case of short payment by an EOU. Though this bond has not been invoked by the Commissioner, while confirming the demand, there are a plethora of judgments to the effect that so long as the proper officer has the power under a particular provision of law, invoking the wrong provision of law for confirming the duty, will not vitiate the demand. [*J.K. Steel* reported in 1978 (2) E.L.T. J355 (S.C.), *Industrial Coating Corporation* v. *CCE, Mumbai-III* reported in 2002 (150) E.L.T. 772 (Tri-Mum), *Sharda Synthetics Bombay Pvt. Ltd.* v *Union of India* reported in 2006 (205) E.L.T. 49 (Bom) etc."
>
> (Emphasis supplied)

7.4 I have also examined the relied upon case law of Sterlite Optical Technologies Ltd. - 2011 (270) E.L.T. 266 (Tri. - Mumbai). In the said case, the issue involved was that while exiting from EOU scheme, the party had paid Basic Customs Duty at concessional rate of 5% under Notification No. 21/2002-Cus dated 1.3.2002. The Department issued Show Cause Notice demanding duty @25% by denying benefit of said Notification by invoking condition No. 10 of the

B-17 Bond read with Para 6.2(a) of EXIM policy. The party, inter alia, contended that demand raised without invoking Section 28 of the Customs Act, 1962 was not sustainable. The Hon'ble Tribunal examined condition No. 10 of the B-17 Bond and came to conclusion that said condition is applicable to those cases where goods are neither present in stock nor duly accounted for by the EOU and in such cases, unit is liable to pay Customs duty on demand. The Tribunal further observed that it would not be applicable in case of raw material imported duty free are received in factory and duly accounted for in the records and physically present in stock on the date of de-bonding of the unit. The Tribunal held that the Department should have issued Show Cause Notice under Section 28 of the Customs Act, 1962 as per condition No. 2 of the B-17 Bond. The relevant portion of the Tribunal's order is reproduced as under:

> "9.4 ... ... The reason is that condition No. 10 of the B-17 Bond read with condition No. 6 of Notification 53/97-Cus and condition No. 3 of Notification 52/03-Cus. only purport to make the EOU liable to pay, on demand, an amount equal to the duty of customs leviable on the goods as are not proved to the satisfaction of the Assistant Commissioner of Customs to have been used in the manufacture of articles for export. In respect of the goods (raw materials) present in physical stock (verified by the Bond Officer) at the time of debonding of the Unit, the question of proving to the satisfaction of the Assistant Commissioner of Customs that such goods have not been used in the manufacture of articles for export does not arise. The very physical presence of the goods with the EOU as verified by the Bond Officer is per se evidence of the goods having not been used in the manufacture of finished goods for export. Obviously, the phrase *"goods as are not proved to the satisfaction of the Assistant Commissioner of Customs/Central Excise to have been used in the manufacture of articles for export'* found in the text of condition No. 10 of the B-17 Bond can only mean goods which are neither present in stock nor duly accounted for by the EOU. Any raw material imported duty-free but diverted instead of being brought into the factory for use in the manufacture of articles for export can fall in this category. Similarly, any raw material imported duty-free and brought into the factory but clandestinely disposed of instead of being used in the manufacture of articles for export may also fall in the same category. Any duty-free imported raw material cleared from the Unit for job work but not returned after job work might also get covered in the same category. Thus raw materials which were imported by an EOU and cleared duty-free under any of the aforesaid

Notifications but not physically available, nor duly accounted for by the Unit, would be covered by the above italicized phrase and, therefore, if the Unit fails to prove to the satisfaction of the Assistant Commissioner that such goods were used in the manufacture of articles for export, it would be liable to pay, on demand, an amount equal to the customs duty leviable on such goods. No such eventuality can arise in the case of raw materials imported by the EOU duty-free, duly received in the factory, duly accounted for in the records and physically present in stock (verified by the Bond Officer) on the date of debonding of the Unit. Therefore, we hold that the raw material found in physical stock with the Unit at the time of its debonding would not attract condition No. 6 of Notification 53/97-Cus. or condition No. 3 of Notification 52/03-Cus. and, for that matter, would not attract condition No. 10 of the B-17 Bond.

9.5 ... ...

9.6 The B-17 Bond executed by the appellant contains provisions which appear to indicate that Section 28 of the Act could be invoked for the above purpose. Condition No. 2 of the bond refers to a notice of demand of "duties, rent and charges claimable under the Customs Act, Central Excise Act and rules/regulations made thereunder". This condition reads thus :

"We, the obligors, shall pay on or before a date specified in a notice of demand all duties, rent and charges claimable on account of the said goods under the Customs Act, 1962, Central Excise Act, 1944 and rules/regulations made thereunder together with interest on the same from the date so specified at the rate applicable."

...

...

A conjoint reading of condition No. 2 and condition No. 14(3) of the B-17 Bond would indicate that an amount of customs duty (with interest) leviable from the appellant could be demanded through a show-cause notice under Section 28 of the Customs Act and, in the event of default, could be recovered in the manner laid down in sub-section (1) of Section 142 of the Act. In our view, therefore, the department should have issued a show-cause notice to the appellant under Section 28(1) of the Customs Act demanding customs duty on the raw materials in question as per condition No. 2 of the B-17 Bond. In that event, the Commissioner of Customs would have

determined the correct amount of duty under sub-section (2) of Section 28 and demanded the same from the appellant. If the appellant does not honour the demand, the remedy for the Revenue is under Section 142(1) of the Act. In this case, there is no demand of duty under Section 28 of the Customs Act. What is fatal to the Revenue is not the non-mention of Section 28 in the show-cause notice but the absence of the essential ingredients of the said Section in the notice. The demand of duty without invoking Section 28 of the Act, i.e., without alleging the necessary ingredients thereof, is not sustainable."

Whereas facts involved in the present case are entirely on different footing. In the present case, demand was not raised by invoking any condition of B-17 Bond and hence, the said case law is not applicable to the facts of the present case. I, therefore, discard the reliance placed on the above said case law being devoid of merit.

7.5 In view of above discussion, I uphold the impugned order to the extent of confirmation of demand of SAD amounting to Rs. 5,81,474/-. Since confirmation of duty is upheld, it is natural that confirmed duty is required to be paid along with interest. I, therefore, uphold recovery of interest under Section 11AA of the Act.

8. As regards the second issue, I find that the adjudicating authority has confirmed duty of Rs. 3,12,199/- on Brass turning scrap cleared by the Appellant in DTA on the ground that the Brass turning scrap is classifiable under CETH 74040029 and liable to Basic Customs Duty @5% but the Appellant wrongly classified the said goods under CETH 74040022 and paid Basic Customs Duty @2.5%. The Appellant has contended that they are engaged in manufacturing of brass components falling under Chapter No. 74, 83, 84 and 85, which are manufactured through various machining processes, wherein, brass turning scrap is generated and sometimes the same is cleared in DTA on payment of appropriate duties. The Appellant has further contended that as per guidelines issued by the ISRI (Institute of Scrap Recycling Industries), such brass turning scrap are classified under the code 'Nomad' which is covered under CETH 74040022 and hence, the impugned order confirming recovery of differential BCD amounting to Rs. 3,12,199/- on DTA clearances of 'Brass turning scrap' by classifying the same under CETH 74040029, is untenable in law.

8.1 I have examined relevant guidelines issued by the Institute of Scrap Recycling Industries (ISRI) submitted by the Appellant in Appeal Memorandum. As per the Appellant, Brass turning scrap generated during machining process of various brass components is covered under the code 'Nomad' of the said guidelines, which is reproduced as under:

> "Nomad Yellow Brass Turnings
>
> Shall consist of yellow brass turnings, free of aluminum, manganese and composition turning not to contain over 3% of free iron, oil or other moisture; to be free of grindings and babbitts."

8.2 On the basis of facts emerging from records, I am of the opinion that Brass turning scrap generated during machining process while manufacturing brass components would get covered under ISRI code 'Nomad' and such Brass turning scrap would be classifiable under Tariff Sub Heading No. 74040022 under description "Yellow brass turnings covered by ISRI code word 'Nomad' ". It is pertinent to mention here that the impugned order has not given any justification / findings as to how 'Brass turning scrap' is classifiable under Tariff Sub Heading No. 74040029. Further, the Appellant had put forth the above defence before the adjudicating authority in support of their claim that Brass turning scrap was classifiable under Tariff Sub Heading No. 74040022, but the impugned order is silent about it.

8.3 In view of above discussion and findings, I hold that the Appellant had correctly classified 'Brass turning scrap' under Tariff sub-Heading No. 74040022 and correctly paid applicable duty under the said sub-Heading. The confirmation of demand of Rs. 3,12,199/- is, therefore, not sustainable and required to be set aside and I ordered to do so. Since, confirmation of demand of Rs. 3,12,199/- is set aside, recovery of interest and consequent penalty of Rs. 3,12,199/- imposed under Section 11AC are also set aside.

9. Regarding imposition of penalty under Section 78 of the Act, I find that non-payment of SAD of Rs. 5,81,474/- on Mixed Metal Brass Scrap contained in work-in-process goods and finished goods lying in stock at the time of de-bonding of the unit by the Appellant was came to light during Audit conducted

by the CERA officers. Had there been no CERA Audit, the non-payment of SAD by the Appellant would have gone unnoticed. So, there was suppression of facts involved in the present case and extended period of limitation was rightly invoked in the impugned order. Since the Appellant suppressed the facts of non-payment of SAD, 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 of Rs. 5,81,474/- imposed under Section 11AC of the Act.

10. In view of above, I partially allow the appeal and set aside the impugned order to the extent of confirmation of demand of Rs. 3,12,199/- along with interest and imposition of penalty of Rs. 3,12,199/-. I uphold the remaining part of the impugned order.

11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

11. The appeal filed by the Appellant stand disposed off in above terms.

26th March, 2021

(Akhilesh Kumar)
Commissioner (Appeals)

Attested
सत्यापित

Superintendent (Appeals)
अधीक्षक (अपील्स)

By RPAD

To, M/s. Deep Recycling Industries Plot No. 773, GIDC Phase-II, Dared, Jamnagar.	सेवा में, मैसर्स दीप रीसाइक्लिंग इंडस्ट्रीज, प्लॉट न° 773, जीआईडीसी फेस 2, दरेड, जामनगर।

प्रतिलिपि :-

1) 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, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।

3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, जामनगर-1 मण्डल, को आवश्यक कार्यवाही हेतु।

4) गार्ड फ़ाइल।