ORDER-IN-ORIGINAL NO. 136 OF 2015-16
M/s. Tata Textile Mills Limited
(NTN: 0698400-2 / STRN 12-06-5205-014-64)
Adj-II/Coll/SCN-152/MCC-Export-PWL-15/Tata Textile/2015

GOVERNMENT OF PAKISTAN
COLLECTORATE OF CUSTOMS (ADJUDICATION-II)
CUSTOMS HOUSE, KARACHI

Adj-II/Coll/SCN-152/MCC-Export-PWL-15/Tata Textile/2015 Dated:- 08-01-2016

Before	:	**Ch. Muhammad Javaid** Collector Collectorate of Customs (Adjudication-II), Karachi
Respondents	:	**M/s. Tata Textile Mills Limited** **(NTN: 0698400-2 / STRN 12-06-5205-014-64)** 6th Floor, Textile Plaza, M.A. Jinnah Road, Karachi. a). 10th KM, Multan-Mianwali Road, Khanpur, Baggasher, Muzaffargarh
Date of Instauration	:	01-07-2015
Dates of hearings	:	13-07-2015,27-07-2015,04-08-2015,17-08-2015,274-08-2015, 08-09-2015 and 09-10-2015.
Date of judgment	:	05-01-2016
Present For Respondents	:	Mr. Ghulam Muhammad, Manager & Mr. Shamshad Younus (Advocate) appared on behalf of the respondent
For Department	:	Mr. S.M Ilays Appraising Officer & Mr. S.Riffat Ali Examiner

ORDER-IN-ORIGINAL NO. 136 OF 2015-16
M/s. Tata Textile Mills Limited
(NTN: 0698400-2 / STRN 12-06-5205-014-64)
Adj-II/Coll/SCN-152/MCC-Export-PWL-15/Tata Textile/2015

1) This copy is granted free of charge for the private use of the person to whom it is issued.

2) An appeal against this order lies with the Appellate Tribunal, Karachi, within 60 days from the date of communication of this order. The appeal shall be accompanied by a fee of Rs.1000/- (One thousand only) to be paid in the manner that may be prescribed by the Board.

3) The appellant should state in his Appeal if he desires to be heard in person or through a pleader.

* *

Brief facts of the case are that, the Model Customs Collectorate of (Export), Custom House, Karachi, has reported vide its contravention report No. PWL-15/2010-MFG-Bond/Exp dated 10-06-2015, details are as under:-

a) Name & address of the licensee :- M/s. Tata Textile Mills Limited

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of Export Oriented Unit:		(NTN 0698400-2/STRN 12-06-5205-014-64 dated 08.07.1996) Address (a) 6th Floor, Textile Plaza, M.A. Jinnah Road, Karachi. b) 10th KM, Multan-Mianwali Road, Khanpur, Baggasher, Muzaffargarh (hereinafter referred to as "respondent"
b) Export Oriented Unit Licence No.	:-	PWL-15/2010-EOU granted on 22.12.2010 under rule 3(2) of SRO 327(I)/2008 dated 29.03.2008 for import, without payment of duty and taxes, of plant, machinery, equipment, apparatus, capital goods as well as raw materials viz. raw Cotton (5201.0000), Polyester Fibre (5503.0000) & Viscose Fibre (5504.0000) required for the manufacture of yarn meant for export. The license was renewed upto 19.05.2012.
c) Face Value Licence	:-	Rs.50 million
d) License suspended on	:-	13.02.2015. De-blocking was subsequently allowed in the light of order dated 05.03.2015 of Appellate Tribunal in Appeal No.K-174/2015
e) Imports during (01.01.2014 to 03.02.2015)	:	**Import value (PKR** **Rs. 429,966,631/-**
f) Amount of duty and taxes payable		Customs duty (Statutory) Rs. 16,580,904/- Sales Tax (Statutory) Rs. 73,095,033/- Income Tax (Statutory) Rs. 25,286,810/- **Total Duty and Taxes** **Rs. 114,962,747/-**
g) Nature of offence	:-	Failure in achievement of 80% export target as prescribed under sub-clause (i) clause (d) in Sub-rule (1) of Rule 2 of SRO 327(I)/2008 dated 29-03-2008 during calendar year 2014.
h) Provisions of law/rules/order Sections Contravened	:-	Sub-clause (i) of clause (d) of sub- rule (1) of Rule 2 of SRO 327(I)/2008 dated 29.03.2008 read with SRO 326(I)/2008 dated 29.03.2008 read with Sections 18, 19, 32(1), 32(2), 32(3A) of the Customs Act, 1969 during the calendar year 2014 and non-submission of requisite record of production despite issuance of notice under Section 26 of the Customs Act, 1969
i) Provisions of law/rules/order Sections under which offence is punishable.	:-	Rule 14(5) of 327(I)/2008 dated 29.03.2008 read with under Section 32(1)(2)(4) of the Customs Act, 1969, Section 11 of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001 for violating sub-clause (i) of clause (d) sub-rule (1) of Rule 2 of SRO 327(I)/2008 dated 29.03.2008 during the calendar year 2014 besides imposition of penalty under clauses 1,10A & 14 of section 156(1) of the Customs Act, 1969 (read with sub-rule 5 of Rule 14 of SRO 327(I)/2008 and penal

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clause 12 of Section 156(1) of the Customs Act, 1969 due to non-furnishing of complete information despite letter dated 31.03.2015.

2. And whereas, M/s. Tata Textile Mills Limited were granted a license on 22.12.2010 for operating an export oriented unit under SRO 327(I)/2008 dated 29.03.2008. The license authorizes import of plant, machinery, equipment, apparatus, capital goods as well as raw materials viz. raw Cotton (5201.0000), Polyester Fibre (5503.0000) & Viscose Fibre (5504.0000) required for the manufacture of yarn meant for export. The license expired on 19.05.2011, therefore, the license was renewed upto 19.05.2012 without audit under Rule 14(5) of SRO 327(I)/2008 dated 29.03.2008 because one year's performance was required to determine 80% export of their total production. However, when they applied for renewal of license upto 19.05.2013, an audit was conducted to check whether they have achieved export target or not. The audit revealed that they had not only imported duty/taxes free goods in excess of permissible face value of the license of Rs.50 million but they also failed to fulfill the condition of at least 80% export of its production during calendar years 2011 and 2012, as per following data of their sales tax returns:-

Calendar Year	Export Sales	Local Sales	Total Sales	% age of export	Shortfall in 80% export target (%)
2011	3,682,672,246	1,255,236,412	4,937,908,658	74.58%	5.42%
2012	3,698,461,924	1,102,182,239	4,800,644,163	77.04%	2.96%

3. And whereas, therefore, renewal was not allowed and a contravention case was constituted against them on 10.01.2014 for recovery of customs duty and taxes on all imports made by them from the date of issuance of license i.e. 22.12.2010 to 31.12.2014 i.e. date of preparation of contravention report. Meanwhile, operations of the unit were kept on continuing through temporary de-blocking of license. The contravention report resulted in issuance of show cause notice on 25.01.2014 and Order-in-Original No. 90/2014-15 dated 23.12.2014 establishing recovery of Rs. 489,025,778/- worked out on statutory rate of duty and taxes. A penalty of Rs. 500,000/- was also imposed upon them. M/s. Tata Textile Mills Limited, Karachi have filed an appeal No. K-174/2015 under Section 194-A of the Customs Act, 1969. The appeal was allowed by the Honourable Customs Appellate Tribunal (Bench-III), Karachi vide order dated 05.03.2015. However, the Collectorate has filed a reference under Section 196 of the Customs Act, 1969 against the order of the Honourable Customs Appellate Tribunal (Bench-III), dated 05.03.2015 and de-blocking of license was allowed upto 25.06.2015.

4. And whereas, it is pertinent to mention that during pendency of the adjudication proceedings, procurements and production record was also sought from the unit vide letter dated 10.09.2014 to carryout

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audit for determination of percentage of export during the calendar years 2013 and 2014, but the requisite information was not furnished completely despite notices / letters dated 07.01.2015 and 20.01.2015 issued under Section 26 of the Customs Act, 1969. Due to non-submission of complete record of procurements, production, export etc., data of sales tax returns was sought from Regional Tax Office, Karachi which again showed failure in achievement of export target as under:-

Calendar Year	Domestic Purchases	Imports	Goods or Services Supplied locally	Direct Exports	%age of direct export	Shortfall in 80% export target
2013	1,743,903,840	293,920,625	1,401,350,601	3,485,946,974	71.33%	8.67%
2014	2,938,034,276	281,694,559	1,651,236,268	3,764,191,279	69.51%	10.49%

5. It was also observed that facility of indirect export was not available under EOU Scheme prior to February, 2012. The same was allowed upto 20% out of 80% export production vide SRO 163(I)/2012 dated 10.02.2012. However, indirect export was never claimed by the licensee as they never submitted financial securities prior to making local supplies for indirect export nor submitted any documentary proof to the effect that the local supplies made by them to other export houses have subsequently been exported nor such supplies were made by them against zero-rated invoices to substantiate that the same were meant for subsequent export by the purchaser.

6. And whereas, M/s. Tata Textile Mills Limited were registered on 08.07.1996 under Sales Tax Act, 1990 vide Sales Tax Registration No.12-06-5205-014-64 they were therefore required to export at least eighty percent (80%) of their production to other countries in terms of sub-clause (i) of clause (d) of sub- rule (1) of Rule 2 of SRO 327(I)/2008 dated 29.03.2008. They, however, consistently failed to achieve export target prescribed under SRO 327(I)/2008 dated 29.03.2008 during the calendar years 2011, 2012, 2013 and 2014 therefore, their license was suspended on 13.02.2015 and a show cause notice was also issued on 13.02.2015 for cancellation of license. Simultaneously, data of duty & taxes free import from 01.01.2014 to 03.02.2015 was sought from M/s. PRAL for preparation of contravention report for recovery of duty and taxes due to failure in achievement in export target during 2014. Since the percent exports made by M/s. Tata Textile Mills Limited remained considerably less than the target which is eighty percent (80%) as prescribed under sub-clause (i) of clause (d) of sub-rule (1) of Rule 2 of SRO 327(I)/2008 dated 29.03.2008. Hence failure in achievement of export target constitutes violation of sub-clause (i) of clause (d) of sub-rule (1) of Rule 2 of SRO 327(I)/2008 dated 29.03.2008 forfeiting thereby the right of availing the benefits of the Export Oriented Units License during the default period and is liable for its forfeiture and recovery at statutory rates amounting to **Rs.114,962,747/-** against import of consignments during 01.01.2014 to 03.02.2015 in the export oriented unit in terms of Rule 14(5) of SRO 327(I)/2008 dated 29.03.2008. Calculation of duty and taxes on statutory

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rates has been made due to the reason that the unit has misused the exemption by not meeting the export target as required under SRO 327(I)/2008 read with SRO 326(I)/2008 dated 29.03.2008 and using exemption of one scheme under SRO 327(I)/2008 dated 29.03.2008 so they were not legally entitled for availing exemptions / concessions available under any other scheme. This has also been clarified by the Board vide letter C.No. 4(29)DTRE/2010-64766-R dated 07.05.2012 therefore the amount of duty and taxes has been calculated at statutory rates. Violation of rules under SRO 327(I)/2008 dated 29.03.2008 does not permit the licensee to avail any partial exemption as rules have to be followed in letter and spirit.

7. And whereas, M/s. Tata Textile Mills Limited are required to pay customs duty and taxes amounting to **Rs. 114,962,747/-(Customs duty (Statutory) Rs. 16,580,904/-, Sales Tax (Statutory) Rs. 73,095,033/- and Income Tax (Statutory) Rs. 25,286,810/-)** at statutory rates in terms of sub rule 5 of Rule 14 of SRO 327(I)/2008 dated 29.03.2008 read with SRO 326(I)/2008 dated 29.03.2008 read with Sections 18, 19, 32(1), 32(2), 32(3A) & 32(4) of the Customs Act, 1969, Section 11 of Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001 for violating sub clause (i) of clause (d) of sub-rule (1) of Rule 2 of SRO 327(I)/2008 dated 29.03.2008 during the calendar year 2014 besides imposition of penalty under clauses 1,10A & 14 of section 156(1) of the Customs Act, 1969 read with sub-rule 5 of Rule 14 of SRO 327(I)/2008. M/s. Tata Textile Mills Limited also failed to submit record sought vide notice dated 31.03.2015 issued under section 26 of the Customs Act, 1969 which also attracts the penal clause 12 of Section 156(1) of the Customs Act, 1969.

8. Accordingly, M/s. Tata Textile Mills Limited, Karachi was called upon to show cause under Section 32(2) of the Customs Act, 1969 read with Sections 18, 19, 32(1), 32(2), 32(3A), 32(4) of the Customs Act, 1969 and Rule 14(5) of SRO 327(I)/2008 dated 29-03-2008 further read Section 11 of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001 for violating sub-clause (i) of clause (d) in sub-rule (1) of Rule 2 of SRO 327(I)/2008 dated 29.03.2008 read with SRO 326(I)/2008 dated 29.03.2008 as to why evaded amount of duty and taxes to the tune of **Rs. 114,962,747/- (Customs duty (Statutory) Rs. 16,580,904/-, Sales Tax (Statutory) Rs. 73,095,033/- and Income Tax (Statutory) Rs. 25,286,810/-)** may not be recovered from them and penal action may not be taken against them under the Rule 14(5) of SRO 327(I)/2008 dated 29-03-2008 read with clauses 1,10A & 14 of Section 156(1) of the Customs Act, 1969, Section 148 of the Income Tax Ordinance, 2001 and Section 33 of the Sales Tax Act, 1990.

9. In this case the show cause notice was issued by my predecessor on 01-07-2015. The period of 120 days as provided in sub-section (3) of section 179 of the Customs Act, 1969, for conclusion of adjudication proceeding was set to expire on 29-10-2015. However, the said time limits further stood extended to 20-11-

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2015 by thirty (30) days on account of adjournment sought by the M/s. Tata Textile and Mr. Zafar Iqbal (Advocate authorized legal advisor by the respondents) vide their letters No. Nil dated 10-07-2015, 27-07-2015 & 27-08-2015 in terms of proviso to sub-section (3) of Section 179 of the Customs Act 1969. Further extension of sixty days (60) was allowed by the undersigned in exercise of powers under section 179 (3) ibid.

10. As per record indicated that on 04-08-2015 Mr. Shamshad Younus Advocate appeared before my predecessor and submitted written reply to the show cause notice, which is reproduced as follows:-

REPLY TO THE SHOW CAUSE NOTICE NO. ADJ-II/COLL/SCN-152/MCC-EXPORT - PWL-15/TATA TEXTILE DATED 1.7.2015.

Humbly Sheweth:

Facts:

1. That the respondent is a licensee of bond within the framework of the provisions of Custom Act, 1969 read with SRO 327(1)/2008 dated 29.3.2008 since 22.12.2010 as an export oriented unit.

2. That under the terms of said license, it was expected from the licensee that goods produced however, during the year 2011 and 2012, the would be exported up to 80% of the production, licensee was able to export (direct) 76.12% and 77.04% of its production respectively showing a marginal shortfall which was made up with indirect exports made to local export oriented vendors.

3. That the licensee was served with a show cause in the past for the same violations, that is, non-fulfillment of export quota and duty was demanded on the total import of goods, however that show cause notice was contested and the Custom Appellate Tribunal vacated the order of the Customs authorities, and directed to re-audit the production figures and to charge duty on the quantity of goods which remained short, that is, on 3.88% and 2.96 % of the shortfall. The said order of the Tribunal is still in the field and is binding on all the authorities of the Customs in this regard. (Annex A)

4. That on the same grounds, the present show cause notice has been served thereby alleging that during the year 2013 and 2014, there is a shortfall of 8.6% and 10.5% of the direct export, which is factually incorrect as permissible indirect export has not been accounted for, thereby misreading of available evidence has taken place. In fact during these years with the support of indirect sales the licensee exceeded its targets.

5. It has further been alleged that the licensee has violated the provisions of sections 32(2), 18, 19, 32(1}, 32(2} 32(4} of the Customs Act, 1969 along with Section II of the Sales Tax, Act, 1969, section 148 of the Income Tax Ordinance and rule 14(5) of SRO 327(1) 2008 dated 29.3.2008, these allegations are, however, denied as the licensee never violated any of the directive provisions of law

6. That the licencee vehemently denies the charges framed against him on the following among other grounds:

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a) As per allegation No.3 of the show cause notice, it has been alleged that the licensee failed to provide records demanded for conducting the audit. The allegation is denied the licensee submitted the required record on 9.3.2015 (copy of letter attached). It is evident from para 3 of show cause notice that audit required in terms para 14(2)(3) was never conducted hence the show cause notice is illegal.

b) As per sub-clause (i) of clause (d) of the rule 2, there does not exist any violation, as the licensee is engaged in manufacture and export of goods in terms of license granted to him, as such the licensee has not violated the conditions of his license.

c) Rule 14(5) of the EOU Rules 2008 provides that the quantum or percentage of annual production should be as per the rules, the licensee produced and exported goods as per the aforesaid rule as amended vide SRO 163(1)/2012 dated 10.2.2012, the facility granted vide SRO dated 10.2.2012 now stands extended retrospectively as the said notifications is a remedial legislation, hence the amended clause (i) of rules (2) of SRO 327(1)/2008 now allows sale through local supply up to specified limit 20% in this case the licensee thus not only exported manufactured goods but also sold the goods in the local market in accordance with rule 2 (d) (ii) of SRO 327(I)/2008, and met the specified target, hence there is no violation of rule 2 (d) (i) of the rules in vague.

d) That the licensee made local supplies against standardized purchase orders in terms of CBR's Circular No. 24 of 1999 being a standard acceptable procedure for SBP and all other government agencies. Hence the domestic sales have been made on verifiable documents.

e) That in terms of SRO 326(1)/ 2008 dated 29.3.2008 the exports made by the licensee are exempt and no charge of taxes has been casted upon the exports, it is also submitted that with reference to demand of duties and sales tax etc, as per the procedure in vogue, there is no charge in the show cause notice that exports made by the licensee were in any way violative of the provisions of the EOU and SME Rules 2008.

f) That demand of duty from the licensee is also not sustainable in law as it amounts to cancellation of his license which can only be done within the framework of section 13 of the Custom Act, after serving the licensee a cause notice, no such cause notice was ever issued, hence the cancellation of license is against the requirements of section 13 of the Customs Act, 1969.

g) The demand of duty on imported goods and machinery is also not warranted by law as the imported machinery has been used for the production of exportable goods and imported raw materials stand consumed for the manufacture of exported goods, the same is evident from the record and these facts have not denied by the department, hence the licensee has not violated any of the provisions of SRO 327(1)/2008.

h) That provisions of section 156(1), 10A and 14 are not attracted as neither the contravention report nor the show cause notice allege intentional default of these provisions of law on the part of licensee, it may be submitted that exports are dependent on demand and supply of the market, if the demand does not exist, the manufacturer cannot be forced to sale the goods, as the fault of market behavior is beyond one's control; hence no element of intentional or willful default can be attributed on the part of licensee

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i) The notice has not been issued in accordance with law as the requirements of each sub-section of section 32 with reference to the acts of the licensee have not been specified; as such the show cause notice is not enforceable being defective.

j) No violations of section 18 or 19 of the Custom Act, 1969 have been committed by the licensee as section 18 only prescribes condition when import duty becomes payable and section 19 prescribes the power of the 'Board' regarding grant of exemption from payment of duty and does not provide any prohibitive clause, as such there is no violation of these provisions by the licensee.

k) The show cause notice is defective in as much as that it does not discloses that which specific sub-section of section 32 has been violated by the licensee as each sub-section relates to a different situation and provides different time frame and its requirements are distinct and separate as each type of notice specified in section 32 is to be based on different grounds and different period of service of notice in each sub-section has been prescribed. For instance, sub-section (2) of action 32 relates to non levy, short levy or erroneous refund, where specific allegation of existence of collusion between the licensee and custom staff stands established, there are no such circumstances present on the face of record. Similarly in other sub-sections each sub-section of section 32 prescribes different requirements, and since specific particulars in this regard are not stated in the notice, the notice is vague and is not in consonance with the dictates of law as contained in sub-section (1), (2), (3), and (4) of the Custom Act, 1969.

l) The licensee obtained the benefit extended by SRO NO.822 (I)/2007, 509(1)/2007, 1125(1)/2011, 809(1)/2009 and 727(1)/2011. All these notifications are independent notifications and are not tagged with any other concessionary scheme. The benefit extended through these notifications can neither be restricted nor withdrawn by administrative orders; hence the plea that multiple benefits obtained by the licensee are illegal is not warranted by law. Each notification is independent and has extended benefit subject to conditions prescribed in the notification.

m) That no post exportation audit as directed in rule 14(2)(3) has been conducted by the complainant as such the demand of leviable duty is not warranted by law. Further by not conducting the mandatory audit, the proceedings of initiation of show cause notice stand vitiated.

Under these circumstances, it is respectfully prayed that the show cause notice dated 01.7.2015 be vacated as the same:

i). Has not been issued in accordance with law.

II). Failure to follow the dictates of rule 14(2) {3} have vitiated the processing as having no force of law.

III) Is vague as it fails to provide specific charges in terms of section 32 of the Customs Act, 1969

(iv) Is against the law and facts of the case.

-sd/-
Respondent

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11. As per file record indicated that the reply submitted by the respondents was forwarded to the Model Customs Collectorate of Export, Customs House, Karachi for furnishing parawise comments. The Collectorate submitted parawise comments, the same are reproduced hereunder:-

"BEFORE THE COLLECTOR OF CUSTOMS (ADJUDICATION-II)
6TH FLOOR, CUSTOM HOUSE, KARACHI

M/s. Tata Textile Mills Limited,
6th Floor, Textile Plaza, M.A. Jinnah Road, Karachi ..... *Respondents*

PARA-WISE COMMENTS ON THE WRITTEN REPLY DATED 04.08.2015 TO THE SHOW CAUSE NOTICE NO.ADJ-II,COLL/SCN-152/MCC-EXPORTS/PWL-15/TATA TEXTILE/2015 DATED 01.07.2015

Para-wise comments on the written reply dated 04.08.2015 to the show cause notice submitted by M/s. Tata Textile Mills Limited are as under:-

Facts:

Para-1 *Admitted that M/s. Tata Textile Mills Limited were granted a license No.PWL-15/2010 on 22.12.2010 for operating an export oriented unit under SRO 326(I)/2008 read with SRO 327(I)/2008 dated 29.03.2008. The license authorizes import of plant, machinery, equipment, apparatus, capital goods as well as raw materials viz. raw cotton (5201.0000), polyester fibre (5503.0000) & viscose fibre (5504.0000) required for the manufacture of yarn meant for export.*

Para-2 *As per Sales Tax Registration No.12-06-5205-014-64, M/s. Tata Textile Mills Limited were registered under Sales Tax Act, 1990 on 08.07.1996, therefore, they were required to export atleast 80% of their total production under Rule 2(1)(d)(i) of SRO 327(I)/2008 dated 29.03.2008. The data declared by the unit in their sales tax returns revealed that they failed to fulfill the condition of atleast 80% export of its production during calendar years 2011 and 2012. The percentage of export during this period was 74.58% and 77.04% respectively as per following data of their sales tax returns:-*

Calendar Year	Export Sales	Local Sales	Total Sales	%age of export	Shortfall in 80% export target (%)

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2011	3,682,672,246	1,255,236,412	4,937,908,658	74.58%	5.42%
2012	3,698,461,924	1,102,182,239	4,800,644,163	77.04%	2.96%

The percentage of export stated by the respondent in this para at 16.12% and 77.04% is incorrect.

Para-3 *This para narrates history of the case which does not need comments. It is however pertinent to point out that the Collectorate has filed a reference under section 196 of the Customs Act, 1969 in the High Court of Sindh, Karachi on 30.05.2015 against the Order dated 05.03.2015 passed by the Customs Appellate Tribunal in Customs Appeal No.K-174 / 2015.*

Para-4 *Admitted that another show cause notice dated 01.07.2015 has been issued to them for recovery of Rs.114,962,747/- due to failure in achievement of 80% export target during 2013 & 2014. The percentage of export and shortfall are summarized below:-*

Calendar Year	Domestic Purchases	Imports	Goods or Services Supplied locally	Direct Exports	%age of direct export	Shortfall in 80% export target
2013	1,743,903,840	293,920,625	1,401,350,601	3,485,946,974	71.33%	8.67%
2014	2,938,034,276	281,694,559	1,651,236,268	3,764,191,279	69.51%	10.49%

It is admitted that according to amending SRO 163(I)/2012 dated 10.02.2012, the licensees of export oriented unit were allowed 20% indirect export out of 80% of production. But this facility of indirect export is subject to certain conditions of seeking permission and depositing securities with the regulatory Collectorate against supplies to be made as indirect export. The respondent never submitted any security or even intimated to the regulatory Collectorate about zero-rated supplies being made by them to avail benefit of indirect exports. Mere claiming indirect export without fulfillment of prescribed conditions is not binding on Customs for the purpose of determination of export target. Since no security has ever been submitted by them for making supplies as 20% indirect export, therefore, benefit of 20% indirect export cannot be extended to them for determination of export target.

Para-5 *M/s. Tata Textile Mills Limited consistently failed to export 80% of production to other countries which constituted violation of sub clause (i) of clause (d) of sub- rule (1) of Rule 2 of SRO 327(I)/2008 dated 29.03.2008. As a result of this violation customs duty and taxes are recoverable from them in terms for rule 14(5) of SRO 327(I)/2008 dated 29.03.2008 read with*

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SRO 326(I)/2008 dated 29.03.2008 further read with section 18, 19 and 32(3A) of the Customs Act, 1969, Section 11 of Sales Tax Act, 1990 and Section 162 of Income Tax Ordinance, 2001.

Grounds:

Para-6(a) *Denied. M/s. Tata Textile Mills Limited failed to submit monthly statements showing details of local purchases in the format of Appendix-V of SRO 327(I)/2008 dated 29.03.2008 and in the format set out in Annex-I, II, III, IV of Collectorate's letter dated 10.09.2014 and 07.01.2015. In the absence of the same percentage of export was determined by sales tax return based data.*

Para-6(b) *Denied. Failure in export of 80% of production to other countries constitutes violation of sub clause (i) of clause (d) of sub- rule (1) of Rule 2 of SRO 327(I)/2008 dated 29.03.2008, which is not only punishable under rule 14(5) ibid but also requires recovery on the goods imported without payment of duty and taxes.*

Para-6(c) *Denied. The percentage of export made by them was less than 80% of their production during 2011, 2012, 2013 & 2014, as shown above. The amendment in SRO 327(I)/2008 dated 29.03.2008 vide SRO 163(I)/2012 dated 10.02.2012 is not retrospective. Moreover, prerequisites / conditions of SRO 163(I)/2012 dated 10.02.2012 have not been fulfilled by them.*

Para-6(d) *Denied. The indirect exports being claimed by M/s. Tata Textile Mills Limited are local supplies made against Standardized Purchase Order (SPO) issued by customer as direct exporter under section 154(3) of Income Tax Ordinance, 2001 for purchase of inputs from indirect exporter. The seller issues sales tax paid invoice against SPO as indirect exporter and the bank acting as withholding agent deducts withholding tax on purchase against SPO bill at concessionary rate of 1% instead of statutory rate of income tax/WHT. Thus SPO based sale is treated as indirect export for the purpose of deduction of advance income tax at concessionary rate, applicable on export sale. The same is not treated as export under Sales Tax Act, 1990. That is why sales tax is charged on SPO based sales. Thus the same is not acceptable under EOU Rules. Moreover, SRO 327(I)/2008 dated 29.03.2008 has its own built-in mechanism for indirect export. The prerequisite and condition stipulated in the Rules in this regard have not been complied with by the respondent.*

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Para-6(e) *Denied. The payment of duty and taxes is being demanded as per rule 14(5) of SO 327(I)/2008 dated 29.03.2008.*

Para-6(f) *Denied for the reason stated in sub-para (e) above.*

Para-6(g) *Denied. The duty and taxes on the machinery / spares imported under SRO 327(I)/2008 dated 29.03.2008 is also recoverable because the production made therefrom has not been made to the extent as required under the relevant rules.*

Para-6(h) *Denied. The extent of export per annum has been clearly prescribed in the rules. The respondent should have considered the principal of demand and supply before seeking license for duty and taxes procurements.*

Para-6(i) *Denied. The show cause notice clearly quotes the requirement of law under rule 2(1)(d)(i) of SRO 327(I)/2008 dated 29.03.2008 and consequential action prescribed rule 14(5) ibid read with relevant provisions the Customs Act, 1969.*

Para-6(j) *The provisions of section 18 & 19 of the Customs Act, 1969 are applicable because customs duty is to be charged on the goods imported by the units under the rule made under section 19 ibid.*

Para-6(k) *The relevant sub-section stands applicable in case only the relevant section of the Customs Act, 1969 has been cited in the contravention report / show cause notice.*

Para-6(l) *The contention of the respondent is admitted to the extent that the notifications SRO 822(I)/2007, 509(I)/2007, 1125(I)/2011, 809(I)/2009 and 727(I)/2011 are independent to each other. For the same reason, the exemption available under multiple notifications cannot be claimed / extended simultaneously in the light of Board's letter C.No.4(29)DTRE/2010-64766-R dated 07.05.2012 and C.No.4(29)DTRE/ 2010-109663 dated 24.07.2014.*

Para-6(m) *The Collectorate has determined the percentage of export and short fall in the 80% export target from scrutiny / audit of sales tax returns submitted by M/s. Tata Textile Mills Limited. Post exportation audit for release of securities was not required when all imports are being charged for duty and taxes under rule 14(5) of SRO 327(I)/2008 dated 29.03.2008 due to non-achievement of 80% export target.*

Prayer:

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It is humbly submitted that the respondent had failed to achieve the export target in the years 2011 and 2012, therefore, recovery of Rs.489,025,778/- was established vide Order-in-Original No. No.90/2014-15 dated 23.12.2014 besides imposition of penalty. Again they have also failed to meet the condition of at least 80% export to other countries during the years 2013 and 2014, for which the instant show cause notice has been issued. The same may be decided in the light of Order-in-Original No. No.90/2014-15 dated 23.12.2014.

-sd/-
Muhammad Ahsan Khan
Deputy Collector
(Export Oriented Units)"

12. The authorized representative (advocate) of the respondent appeared on behalf of the respondent on 17-08-2015 and submitted additional arguments against the parawise comments submitted by the department, which additional arguments are reproduced hereunder for ready reference:

"REPLY TO PARA WISE COMMENTS TO THE WRITTEN REPLY DATED 04.08.2015 TO THE SHOW CAUSE NOTICE NO. ADJ-II.COLL/SCN-152/MCC-EXPORTS/PWL-15/TATA TEXTILE/2015 DATED 01.07.2015.

Humbly Sheweth:

Reply to Para wise comments are as under:

FACTS:

Para-1: *Needs no comments.*

Para-2: *During 2011-12 as well as during 2013-14 the Complainant has failed into account the permissible indirect Exports and by adding the indirect exports the answering Respondent met the desired target.*

Para-3: *Needs no comments except that complainant's Point of view to penalize the respondent was not accepted By the Customs Appellate Tribunal Karachi, and the demand Of duty and penalty was annulled by the Tribunal and that Order still holds in the field.*

Para-4 *Denied. The respondent filed request to Customs to Prescribe the procedure for Rule 2 (d) (1) of SRO 327(1)/2008 Regarding securities to the satisfaction of Collector.*

Para-5 *Denied. The respondent met the target with the help of indirect export. Further more how markets behave and in what direction the demand and supply curve tilts is not controlled by producers. The market factors are to be taken into consideration by the authorities and a*

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realistic picture is to be accepted by the department. The law does not prohibit the authorities to take a realistic view; hence the issuance of show cause notice is misconceived.

Para-6 ***Denied.*** *As is evident the respondent met the targets as a good number of %age sales were made in the local exporters. In these circumstances, the relevant SRO does not provide for taking any action against the licensee.*

Para-6(a) ***Denied.*** *The relevant SRO lays down duty to submit appendix-5, but there is no provision in the SRO to submit any other appendix, hence the statement of the complainant is misconceived. The statements as prescribed in appendix - 5 are being regularly submitted. The statement prescribed by the Collectorate in the format of Annex I through IV are required for the renewal of EOU license and the respondent had been submitting these statements at the relevant time as is evident from respondent's letter dated March 9, 2015.*

Para-6(b) ***Denied.*** *As explained in our reply to show cause notice, the licensee met the target of 80% as provided in the relevant notification.*

Para-6(c) ***Denied.*** *The %age of export along with local sales exceeds the target of 80% as is evident from the evidence produced before Hon'ble Tribunal. And even on this count decision was given by ~he Customs Tribunal in favor of the respondent by accepting the evidence of indirect export.*

Para-6(d). *As is admitted by the department, indirect export has taken place and in this manner the licensee has achieved the target fixed, therefore, the situation does not call for issuance of show cause notice within the framework of SRO 327(I)/2008.*

Para-6(e) ***denied.*** *The demand raised is not in accordance with Rule 14 (2) (3) (5), as no audit was conducted to determine leviability of duty and taxes.*

Para (f). *Denied for the reasons stated in Para (e) above.*

Para (g) ***Denied.*** *There is no such provision in the SRO to demand duty on the machinery and spares. The demand raised by the department is thus illegal and not based on the provisions of SRO that is Rule 14 (5). The said rule talks of demand of leviable duty which is to be calculated through audit but in this case no audit was overdone. There is no provision in the ~RO to demand duty on machinery imported.*

Para(h) ***Denied.*** *The target as specified in the SRO has been achieved by selling the goods to other exporters.*

Para(i) ***Denied.*** *The provisions of SRO are being misinterpreted Rule 2(1) (d) (I) only defines a licensed unit and action under rule 14 (5) can only be taken once the audit is done.*

Para (j) ***Denied.*** *These provisions of law do not have any co-relationship with the issues involved in the case. Section 18 talks of levy of duty which is done when GD's are presented to customs and section 19 talks of exemption and under said section SRO 327 has been issued. Hence there is no violation of section 18 & 19 of the Custom Act, 1969.*

Para(k) ***Denied.*** *All the sections quoted in the show cause notice are irrelevant and misconceived. It is now settled law that where the show cause notice fails to show what mis-declaration was made and that the licensee had reason to believe that such statement was untrue, for that department*

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has to produce evidence, but in the present case there was no such evidence presented by the complainant, hence charging the respondent under Section 32 is totally misconceived.

Para (I) ***Denied.*** *Board's letter cannot take away the rights granted under a notification of the government. Furthermore, the letter referred to do not relate to EOU's hence has no relevance in this case.*

Para(m) *No audit has been done and no audit report is on record, hence the whole case is misconceived.*

That as far as the question of submission of the securities against indirect export is concerned, the Appellant requested the Collector of Customs Exports Karachi, vide their letter dated 9.10.2013, to clarify, the procedures under Rule 2(d) (1) of SRO 327(1)/2008, Enabling the Appellant to deposit [he securities. However, no reply was received from the learned Collector.

That having failed to receive any reply to the appellant's letter, the appellant once again addressed a reminder to the learned Collector vide their letter of 21st 0ctober 2013, In para 3 of the aforesaid reminder, it was specifically pointed out, that the appellants were unable to comply with the procedures set out in SRO 327 ibid since the mechanism) modus operandi of securities provided in SRO 327 was completely absent. Para 3 ibid is reproduced below for the sake of ready reference:

" We by this application request your good office to clarify the same as we understand that the mechanism/ rnodus operandi of securities to be given upto the satisfaction of the Collector concerned is not provided in the SRO. Moreover, we have not found any SOP or Public Notice in order to comply the same in accordance with the provisions EOU Rules"..,

That having still failed to receive reply from the learned Collector of Customs] Exports, yet another reminder was sent on 30th Oclober 2013 to clarify the procedures for furnishing securities, which 'were conspicuous by their absence in rule 327 ibid. However, inspire of three reminders, the learned Collector did not respond to the appellant 's queries, which could have the effect of causing irreparable damage to an exporter making an annual export in billions of Rupees.

That it is a well settled law that any authority vested with enormous powers under a statutory instrument (and to exterminate a tax payer in a single transaction) in the' words of CorneiusCJ cannot cause excruciating losses to a bona fide exporter, on account of its own defaults. The public functionaries exercising public powers cannot approbate and reprobate all at the same time. In other words a public functionary cannot give a command to a subject to comply with certain procedural provisions of law and yet fail to prescribe that procedure and then catch the innocent exporter by the neck on the allegation that he has not complied with the so called mechanism or procedures in complying with the procedures in giving securities as set out in the statutory instrument.

IT IS SUBMITTED WITHOUT PREJUDIE, *that reference is made, without prejudice, to the allegation, that there is a shortfall of 8.67%) for the year 2013 and 10.49% for the year 2014. So,*

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the penalty, if at all, can only be levied on that portion, which is admitted as a shortfall. Cru-cification of an importer on an insignificant and nominal short fall shall itself be ultra-vires However, if SRO 327(1)/2008 dated 29.3.2008 is interpreted in the unlawful manner, In which it being presently interpreted in the show cause notice, would render SRO 327(1)/2008 subject to Constitutional Challenge. The Supreme Court of Pakistan has held, that any unreasonable legislation shall be void. In a case of Indian jurisdiction it was held, that the provisions of section 115(2) of the Indian Customs Act, 1962, in relation to the confiscation of vehicles do cast an unreasonable burden on the owner of a vehicle, Hence, the provisions of section 115(2) ibid was therefore, held to constitute unreasonable restrictions on the fundamental rights guaranteed by Article 19 of the Indian Constitution and parallel provisions in the Constitution of Pakistan.

That the invocation of section 32 of the Customs Act, 1969, and other irrelevant sections cited in the show cause notice is wholly malajide. The provisions of sections 32 can only be invoked, if it is shown, [hat some positive declaration on facts has been made. (see Quetta Textile Mills v. Government of Pakistan C : No. DJ 1721/ 11987 1990 A.L.D. 582). The claiming of the benefit of SRO 327 ibid is not a ***declaration,*** *but a mere claim. (see Northern Plastics Ltd. u. Collector 1998 (101) ELT 549 (SC).See also as many as 15 cases in this respect cited at page 635 of our book on Customs Act 1969, in support of this view.*

That the show cause notice is wholly against the decision of the appellate tribunal contained in para 17 of its order dated 05-03-2015, in which the Tribunal observed as follows in an identical case:-

"The upshot of above discussion is that this Tribunal is of the view that the order in original passed by the Collector is very harsh, who has demanded the amount of Rs. 48,90,257,78/- on the total production of appellant during the period 2011 and 2012".

"Therefore, this appeal is accepted, impugned order is set aside and it is held that the respondents are only entitled to demand duty and taxes on the shortfall of 5.42% and 2.96%determined by the respondent 1 and communicated to FBR vide the letter referred to in para 8 above) of exports in the year 2011 and 2012, provided the appellants fail to disprove the shortfall".

«To this extent the case is remanded back to the Collector Exports) Collectorate of Exports) Karachi) with a direction to make afresh assessment of the shortfall mentioned herein above after giving opportunity of hearing".

"The matter be decided expeditiously. Respondents are further directed that pending above as directed) no coercive measure shall "be taken against the appellants in terms of their imports, exports of the goods and operation of their EOU facility".

That the show cause notice has made a serious error in law by computing its alleged demand on the basis of statutory rates of duty. However sub rule 5 of rule 14 of SRO 327 stipulates, that the Collector can initiate proceedings for the recovery of " leviable duties and taxes".

However, in juxtaposition to statutory rates of duties, leviable rates of duties mean the effective rate of duties based on the basis of following computations:-

a) Statutory rates reduced by any concessionary rates prevailing in the field or

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b) Statutory rates plus any additional or regulatory duties which may for the time being be enforced.

That according to Maxwell it is a well settled law that all taxing statutes have to be interpreted strictly. There is no room for intendment, or, for making inferences. The rules of ***cassus omissus*** *clearly provides that the legislature is never short of words and it must use those words in the statute which are really intended for the purpose of legislation Therefore, if it was at all intended by the legislature to recover duties and taxes at the statutory rates, then the words 'statutory rates must have been used in sub rule 5 of rule 14 of SRO 327 as nothing prevented the law makers to use the words 'statutory' rates in sub rule 5 ibid. since legislature is never short of words. No authority has the power to replace the words leviable rates with the words 'statutory' rates and to declare that both are the same and have same terminologies. No such public power even exists with the FBR, it is submitted with respect.*

That in the present case, the effective rates or the leviable rates both in respect of Sales Tax, Income Tax as well as duties and taxes are entirely different than statutory rates. For instance textile machinery from customs duty is wholly exempt under SRO 809 and the benefit of Sales Tax under the 8th schedule and SRO 1125. Therefore by no process of reasoning the appellants can be inflicted with the statutory rates of duties. -

It is accordingly prayed that the contents of show cause notice does not constitute any violation of law, hence the SCN may be vacated
-sd/-
Counsel for the respondent

13. The additional reply submitted by the respondent forwarded to the Collectorate for submission of parawise comments, which additional parawaise comments is reproduced as under:-

BEFORE THE COLLECTOR OF CUSTOMS (ADJUDICATION-II)
6TH FLOOR, CUSTOM HOUSE, KARACHI

M/s. Tata Textile Mills Limited,
6th Floor, Textile Plaza, M.A. Jinnah Road, Karachi ..... Respondents

PARA-WISE COMMENTS ON THE REJOINDER DATED NIL SUBMITTED BY M/S. TATA TEXTILE MILLS LIMITED DURING HEARING ON THE DATE OF HEARING OF 17.08.2015

Hearing in the case of show cause notice dated 01.07.2015 issued to M/s. Tata Textile Mills Limited was held on 17.08.2015. The respondent submitted a rejoinder dated nil on the para-wise comments submitted by the Collectorate on the written reply dated 04.08.2015 to the show cause notice. Para-wise comments on the rejoinder are as under:-

Facts:

Para-1 No comments.

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Para-2 The facility of indirect export upto 20% was allowed vide amending SRO 163(I)/2012 dated 10.02.2012 prospectively. The same was not admissible during 2011 in which short fall in 80% export was 5.42%. Moreover, the facility of indirect export was subject to certain conditions of seeking permission and depositing securities with the regulatory Collectorate against supplies to be made as indirect export. The respondent never submitted any security or even intimated to the regulatory Collectorate about zero-rated supplies made by them to avail benefit of indirect exports. Mere claiming indirect export without fulfillment of prescribed conditions is not binding on Customs for the purpose of determination of export target. Since no security has ever been submitted by them for making supplies as 20% indirect export, therefore, benefit of 20% indirect export cannot be extended to them for determination of export target.

Para-3 The Collectorate has filed a reference under section 196 of the Customs Act, 1969 in the High Court of Sindh, Karachi on 30.05.2015 against the Order dated 05.03.2015 passed by the Customs Appellate Tribunal in Customs Appeal No.K-174/2015.

Para-4 No procedure was required to be prescribed for indirect export as the provisions of amending SRO 163(I)/2012 dated 10.02.2012 were quite clear prescribing securities / permission of the regulatory Collectorate on for supplies to be made as indirect export. The respondent's application vide letters dated 09.10.2013, 21.10.2013 and 30.10.2013 for laying down procedure for indirect export was without any security. Thus the same cannot be made basis for claiming indirect export being without fulfillment of prescribed conditions.

Para-5 Denied. M/s. Tata Textile Mills Limited consistently failed to export 80% of production to other countries. The benefit of 20% indirect export was not available under the rule prior to 10.02.2012.

Para-6 The indirect export was not admissible prior to 10.02.2012. Subsequently after 10.02.2012 M/s. Tata Textile Mills Limited failed to apply for indirect export on submission of securities. Therefore the same cannot be claimed at this belated stage.

Para-6(a) Local purchases were also required to be submitted in the format of Appendix-V of SRO 327(I)/2008 dated 29.03.2008 as the sales tax invoice No. & Date were also specified in the column (2) of Appendix-V for declaration of related data. M/s. Tata Textile Mills Limited

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failed to submit the same. That is why information in the format set out in Annex-I, II, III, IV of Collectorate's letter dated 10.09.2014 and 07.01.2015 was sought for determination of percentage of export quantitatively.

Para-6(b) The respondent were required to export of 80% of production to other countries in terms of sub clause (i) of clause (d) of sub- rule (1) of Rule 2 of SRO 327(I)/2008 dated 29.03.2008. The respondent failed to do so, which is punishable under rule 14(5) besides recovery of duty and taxes exempted under the above notification.

Para-6(c) Denied. The percentage of export made by them was less than 80% of their production during 2011, 2012, 2013 & 2014, as shown in the show cause notice. The amendment in SRO 327(I)/2008 dated 29.03.2008 vide SRO 163(I)/2012 dated 10.02.2012 is not retrospective. Moreover, prerequisites / conditions of SRO 163(I)/2012 dated 10.02.2012 have not been fulfilled by them.

Para-6(d) The indirect exports being claimed by M/s. Tata Textile Mills Limited on account of local supplies against Standardized Purchase Order (SPO) are not export under Sales Tax Act, 1990 as well as EOU Rules. SRO 327(I)/2008 dated 29.03.2008 lays down its own mechanism for indirect export. The prerequisite and conditions for the same have not been complied with by the respondent, therefore, benefit of the same is not admissible to them.

Para-6(e) Denied. The payment of duty and taxes is being demanded as per rule 14(5) of SO 327(I)/2008 dated 29.03.2008 due to failure of the respondent in 80% export during 2013 & 2014.

Para-6(f) Denied.

Para-6(g) Denied. Rule 14(5) of SO 327(I)/2008 dated 29.03.2008 stipulates that proceedings for recovery and penal action shall be initiated in case of non-achievement of export target or other violation of rules.

Para-6(h) Denied. The extent of export per annum has been clearly prescribed in the rules. The respondent should have considered the principal of demand and supply before seeking license for duty and taxes procurements.

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Para-6(i) Denied. The audit under rule 14(4) is prescribed for determination of export target as per rule 2(1)(d)(i) of SRO 327(I)/2008 dated 29.03.2008 and consequential action is prescribed rule 14(5) ibid read with relevant provisions the Customs Act, 1969.

Para-6(j) Denied. Section 18 was involved for levy of customs duty which was exempted under section 19 under the rules made under section 219 ibid.

Para-6(k) Denied. Recovery of customs duty and taxes cannot be made without invoking section 32 of the Customs Act, 1969.

Para-6(l) Board vide letter C.No.4(29)DTRE/2010-64766-R dated 07.05.2012 and C.No.4(29)DTRE/2010-109663 dated 24.07.2014 clarifies that the exemption available under multiple notifications cannot be availed simultaneously. It does not restrict exemption under one applicable regime.

Para-6(m) The percentage of export and short fall in the 80% export target has been determined from scrutiny / audit of sales tax returns submitted by M/s. Tata Textile Mills Limited in terms of rule 14(4) of SRO 327(I)/2008 dated 29.03.2008. Post exportation audit for release of securities was not required when all imports are being charged for duty and taxes under rule 14(5) ibid due to non-achievement of 80% export target.

The respondent's application vide letters dated 09.10.2013, 21.10.2013 and 30.10.2013 for laying down procedure for indirect export was without any security. Thus the same cannot be made basis for claiming indirect export being without fulfillment of prescribed conditions. Moreover, no procedure was required to be prescribed for indirect export as the provisions of amending SRO 163(I)/2012 dated 10.02.2012 were quite clear prescribing securities / permission of the regulatory Collectorate on for supplies to be made as indirect export. The respondent did not submit any security for claiming indirect export, therefore, benefit of 20% indirect export cannot be extended to them for the purpose of determination of export target.

As regards the order of the Honourable Appellate Tribunal vide No.K-174/2015 dated 05.03.2015, the Collectorate has filed a reference under section 196 of the Customs Act, 1969 which is sub-judice in the High Court of Sindh, Karachi.

Prayer:

The respondent had failed to achieve 80% export target in the years 2011 and 2012, therefore, recovery of Rs.489,025,778/- was established vide Order-in-Original No. No.90/2014-15 dated 23.12.2014

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besides imposition of penalty. Again they failed to meet the condition of atleast 80% export to other countries during the years 2013 and 2014, therefore show cause notice has been issued for recovery of duty and taxes involved on goods imported conditionally for export of total production to the extent of 80%. The case may therefore be decided in the light of Order-in-Original No. No.90/2014-15 dated 23.12.2014 for parity.

-sd/-
(Muhammad Ahsan Khan)
Deputy Collector of Customs
(Export Oriented Units)

14. Final hearing in the matter was fixed on 05-10-2015. The Advocate of the respondent appeared for hearing and reiterated what had earlier been stated that they were awaiting the response of the Federal Board of Revenue regarding allowing indirect exports to be taken into account for the purposes of calculating "Export to other Countries" in terms of sub-clause (i) of clause (d) of sub-rule 2 of SRO 327(I)/2008.

15. In this case the respondent has repeatedly sought adjournments and requested that the case be held in abeyance on the grounds that they are seeking a clarification from the Federal Board of Revenue. While several adjournments have been granted to the respondent to approach the relevant authorities and seek clarification or condonation as deemed appropriate. However, the case cannot be kept pending for an unlimited duration due to the time limit fixed in Section 179 of the Customs Act, 1969 for finalization of the case. The case is, therefore, being finalized on the basis of the replies of the respondent and available record.

16. I have gone through the case record and perused the replies submitted by the respondent and the department. The case against the respondent has been framed on the ground that the respondent failed to achieve the 80% export of its production for the year 2013 and 2014 as required under Sub clause (i) of Clause (d) of sub- rule (1) of Rule 2 of SRO 327(I)/2008 dated 29-03-2008. The respondent made direct exports upto 71.33% during the year 2013 and 69.51% during the year 2014 falling short by 8.67% & 10.49% during the year 2013 and 2014 respectively from the requisite 80% export target as required under law. Therefore, failure to achieve the requisite 80% export target constituted violation of Sub clause (i) of Clause (d) of sub- rule (1) of Rule 2 of SRO 327(I)/2008 dated 29-03-2008, which was punishable in terms of Rules 14(5) of SRO 327(I)/2008 dated 29-03-2008. Therefore, the respondent was required to pay an amount of **Rs.114,962,747/-** against duty and taxes free imports of inputs in the Export Oriented Unit during the period 01-01-2014 to 03-02-2015. The respondent on the other hand has argued that the similar case was made out against them for the year 2011 and 2012 for not meeting the 80% export target under SRO 327(I)/2008 dated 29.03.2008 and the Honourable Appellate Tribunal , on an appeal filed by them, has directed to charge duty

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on the quantity of goods which remained short of 80% export target and the same order of Appellate Tribunal will be applicable for the period 2013 and 2014. They have also argued that the short fall of 8.6% and 10.5% as alleged by the department, is factually incorrect as the respondent has made indirect exports which have not been accounted for and by adding up the indirect exports their export performance exceeds even 80% of their production. They also contend that the licensee made local supplies against Standardized Purchase Order in terms of FBR, Circular No. 24 of 1999 being a standard acceptable procedure for SBP and all other government agencies. They also argue that no duties and taxes can be demanded upon the machinery and goods as the same have been used for production of exportable goods and exports are exempt from the charge of taxes. The show cause notice is defective in law because it does not specify the exact sub section of section 32 of the Customs Act, 1969. Moreover, as no post exportation audit as required under Rules 14(2)(3) of SRO 327(I)/2008 dated 29-03-2008 has been conducted by the department, therefore demand of leviable duty is not warranted by law.

17. It may be emphasized that the scheme of Export Oriented Units as envisaged under SRO 327(I)/2008 dated 29.03.2008 is a specialized scheme encompassing special features to facilitate the units engaged in large scale exports to boost their exports through special incentives. These EOUs are allowed duty free imports of inputs to be used for the production of exportable goods to reduce the cost of doing business and allow the exporters to utilize the amount of saved duties and taxes in importing more input / raw material to export more. This facility is not available to the exporters working under normal export regime where they have to pay all the duties and taxes on all the inputs / raw materials to be used in the production of exportable goods which may subsequently be recovered through lodging refund and duty draw back claims with the concerned tax authorities after the export of goods. Therefore, facility of duty free imports can not be extended to any entity unconditionally and in order to qualify to avail such an extensive concession the beneficiary must fulfill the conditions set out for operating under any concessionary scheme. SRO 327(I)/2008 dated 29.03.2008 also specifies certain conditionalities for operating under this scheme . One of such conditions is export of 80% of the production of the Export Oriented Unit as mentioned under sub-clause (i) of clause (d) of sub-rule (1) of Rule 2 of SRO 327(I)/2008 dated 29-03-2008. The license under SRO 327(I)/2008 dated 29-03-2008 is granted under the pre-condition that condition of 80% export would be met and if this condition is not met then there is breach of the conditions of the license which is clearly punishable under Rules 14(5) of SRO 327(I)/2008 dated 29.03.2008. There is no question of missing the 80% export target by slight or large margin. SRO 327(I)/2008 dated 29.03.2008 does not conceive of any such situation and allowing such a margin would tantamount to allowing a concession not authorized by law. Many a time it has been held by higher courts that when a law requires a thing to be done in a particular manner then it has to

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be done in that particular manner or not at all. Admittedly, the respondent could not fulfill the condition of 80% export of its total production, therefore, there is no ambiguity that the respondent does not remain entitled to avail the benefit of SRO 327(I)/2008 dated 29-03-2008 and the penal provision of Rule 14(5) of the said SRO ibid need to be invoked. Therefore, respondent's, contention to miss the export target by a slight percentage is not acceptable.

18. The respondent has also argued that they also made indirect exports which have not been accounted for towards calculating the 80% export target. Bare reading of the SRO 327(I)/2008 dated 29-03-2008 make its clear that in terms of sub-clause (i) of clause (d) of sub-rule (1) of Rule 2 of SRO 327(I)/2008 dated 29-03-2008 such an indirect export has to be made after depositing the securities with the Collector concerned to his satisfaction. It is a matter of fact that the respondent never deposited any such securities with the Collector concerned before making indirect supplies as required under law and, therefore, any such indirect exports, if made ever, are not acceptable under the provisions of SRO 327 and hence can not be accounted for. Moreover, the respondent was also asked to provide proof regarding the export of 20% Supplies made to the indirect exporters to substantiate his claim but he failed to bring forth and evidence to suggest that supplies made to indirect exporters were exported. Therefore, respondent's contention on this account is without evidence and hence unacceptable.

19. Moreover, the respondent's plea that such indirect supplies were made in accordance with Standardized Purchase Order in terms of CBR's circular No. 24 of 1999 is also not acceptable because such are local supplies is terms of Section 154(3) of Income Tax Ordinance,2001 for which a specific procedure has been provided for the purposes of deduction of advance Income Tax at concessionary rate but as the Sales Tax is charged under the Sales Tax, 1990 on such supplies, therefore, same is not treated as exports and, therefore, this can not be accepted under the Export Oriented Units scheme as provided under SRO 327(I)/2008 dated 29-03-2008 which has its own specific mechanism for indirect exports and this provided mechanism should not be replaced with any other mechanism without amending the law.

20. The respondent's, argument that duty taxes are to be paid only on the short quantities is not acceptable because the law does not allow apportionment of the livable duties and taxes. In case of non-fulfillment of the conditions of SRO 327(I)/2008 dated 29-03-2008 it will be considered that benefit of the SRO ibid is not available to all the imports imported under the said SRO and the imports and exports will be considered as under the normal regime and subject to normal duties and taxes and concessions. As no bifurcation of leviable duties and taxes has been provided in the SRO 327(I)/2008 dated 29-03-2008, therefore, the same should not be deemed to have been provided unless intended by the legislature as such.

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Custom House, Karachi

The argument of the respondent that on a similar issue the Honorable Appellate Tribunal has ruled in their favour and the same judgment is acceptable in this case is not tenable because the instant case pertains to the years 2013 and 2014 and the judgment relates to different time period.

22. In view of the above discussion I am convinced that the charges leveled in the show Cause notice stand established. M/s. Tata Textile Mills Limited, (NTN- 0698400-2) & (Sales Tax Registration No. 12-06-5205-014-64), Karachi is ordered to pay duty and taxes amounting to Rs. 114,963,747/- (Customs duty (Statutory) Rs. 16,580,904/-, Sales Tax (Statutory) Rs. 73,095,033/- and Income Tax (Statutory) Rs. 25,286,810/-) into the goverament treasury in terms of sub- rule 5 of rule 14 of SRO 327(I)/2008 dated 29-03-2008 read with Section 32(1)(2)(4) of the Customs Act, 1969, Section 14 of the Federal Excise Act, 2005 and Section 162 of the Income Tax Ordinance, 2001. I also impose a penalty of **Rs. 10,00,000/-** (Rupees **One Million Rupee Only**) under clauses (1)(10A) & (14) of section 156(1) of the Customs Act 1969.

23. This order comprises of (24) twenty four pages each bearing my seal and initial.

(Ch. Muhammad Javaid)
Collector
Collectorate of Customs (Adjudication-II)
Custom House, Karachi

To

M/s. Tata Textile Mills Limited,
(NTN- 0698400-2) & (Sales Tax Registration No. 12-06-5205-014-64)
office 8th Floor Textile Plaza, M.A Jinnah Road, Karachi

a). 10th KM, Multan-Mianwali Road, Khanpur,
Baggasher, Muzaffargarh

P.S. To Collector (Exports)
Custom House, Karachi

Copy to:-

1. The Collector of Customs, Model Customs Collectorate of (Export), Custom House, Karachi.
2. The Collector of Customs, Model Customs Collectorate of (Export-PMBQ), Port Muhammad Bin Qasim, Main National Highway Road, Karachi.
3. Mr. Shamshad Younus, Advocate of M/s. Azimuddin Law Associates, Suit No. 403, 4th Floor, Ibrahim Trade Tower, Shahra-e-Faisal, Karachi
4. Guard File.

(Ch. Muhammad Javaid)
Collector
Collectorate of Customs (Adjudication-II)
Custom House, Karachi