

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10610 of 2023

(Arising out of MUN-CUSTM-000-COM-02-23-24 dated 25/05/2023 passed by Commissioner of Customs, Customs House, Mundra)

KARNAWAT INTERNATIONAL PVT LTD

NH 8 village piparda
rajsamand, rajasthan-313326

.....Appellant

VERSUS

COMMISSIONER OF CUSTOMS- MUNDRA CUSTOMS

Office Of The Pr. Commissioner Of Customs,
Customs House, Mundra, Kutch, Mundra Port
And Special Economic Zone, Mundra Kachchh
Gujarat-370421

.....Respondent

WITH

- 1. Customs Appeal No.10611 of 2023 (SHRI GUN SAGAR KARNAWAT)**
- 2. Customs Appeal No.10612 of 2023 (SHRI BHAGWATILAL KHATRI)**
- 3. Customs Appeal No.10613 of 2023 (SHRI PRABUDDHA KARNAWAT)**
- 4. Customs Appeal No.10614 of 2023 (SMT POONAM JAITLEY)**
- 5. Customs Appeal No.10744 of 2023 (MUNDRA CUSTOMS VS. m/S. KARNAWAT INTERNATIONAL PVT. LTD.)**

(Arising out of MUN-CUSTM-000-COM-02-23-24 dated 25/05/2023 passed by Commissioner of Customs, Customs House, Mundra)

APPEARANCE:

Shri. Jitin Singhal, Advocate for the Appellant
Shri Prashant Tripathi, Superintendent (AR) for the Respondent

CORAM:

**HON'BLE MEMBER (TECHNICAL), MR. RAJU
HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA**

Final Order No. 12515-12520 /2024

DATE OF HEARING: 26.09.2024
DATE OF DECISION: 25.10.2024

SOMESH ARORA

M/s Karnawat International Pvt. Ltd. [here-in-after referred to as appellant had filed two Bills of Entry dated 03.05.2018 for import of marble slabs which was purchased on High Sea from M/s Paras Marble (which had imported goods from M/s Marmor, SG S.A. Marble and Granite, Greece). It was alleged in the show cause notice that the importer had imported polished marble slabs by mis-declaring the same as unpolished slabs. It was further alleged that during physical verification, quantity of 51.85 Sqm (slabs) were found in excess. Thereafter, the goods were seized on 24.05.2018. The importer vide letter dated 04.06.2018 requested for provisional release of goods which was accepted by the learned Commissioner on 19.06.2018 subject to submission of bond for the assessable value of goods along with Bank Guarantee of total duty involved plus 25% of assessable value i.e. Rs. 88,61,690/-. Thereafter, the importer submitted the bond as asked for with Bank Guarantee dated 23.07.2018 for Rs. 32,16,245/- and deposited customs duty of Rs. 26,47,624/- along with interest of Rs. 89,211 [qua B/E No. 6226233 dated 03.05.2018) and Rs. 30,78,821/- along with interest of Rs. 1,01,359/- [qua B/E No. 6226269 dated 03.05.2018] on 15.10.2018. Further, 15% of penalty of Rs. 8,48,318/- (15% of Rs. 56,55,445/-) deposited on 25.10.2018 by the importer. Based on the afore-said allegations, a show cause notice dated 25.01.2021 was issued to the importer and co-noticee asking as to why customs duty of Rs. 56,60,702/- should not be demanded along with interest and why penalty should not be imposed on the importer and other co-noticees'.

2. The appellants contested the show cause notice by denying all allegations levelled against them. The importer admittedly paid total customs duty of Rs. 56,60,702 (prior to issue of show cause notice and after issue of show cause notice) along with interest and 15% penalty and requested to close the proceedings in view of Section 28(5) and 28(6) of the Customs Act, 1962. However, the learned Commissioner instead of closing the proceedings under Section 28(5) and 28(6) of the Customs Act, held that show cause notice is pre-mature for demand of duty only, therefore proceedings cannot be closed, however, it also denied the benefit of notification and imposed redemption fine and penalties on importer and co-noticee. Hence, the present appeals before this is against the impugned order.

3. The party has, inter alia, taken the following grounds before us:

3.1 PROCEEDINGS ARE LIABLE TO BE CLOSED IN VIEW OF SECTION 28(5) AND 28(6) OF THE CUSTOMS ACT, 1962.

It is submitted that, the importer has already deposited the entire tax as proposed in the show cause notice along with applicable and 15% interest within 30 days of issuance of show cause notice. It is pertinent to note that importer has deposited the requisite in order to avoid any litigation. Thus, it is submitted that proceedings are liable to be concluded in view of Section 28(5) and 28(6) of the Act.

It is further submitted that learned Commissioner erred in holding that explanation 1(b) of Section 28 of the Act is applicable in the present case. It is submitted that in the impugned SCN, there is not a whisper about whether the bills of entries are provisional assess or finally assess. It is further submitted that in the impugned order as well, there is no finding by the learned Commissioner that impugned Bills of entry were directed to be finally assess. In other words, there is no direction by the learned Commissioner for final assessment of Bills of Entry in the impugned order.

It is submitted that as per importer explanation 1(a) of Section 28 of the Act is applicable which says in a case where duty is not levied or not paid or short-levied or short-paid, or interest is not charges, the date on which the proper officer makes an order for the clearance of goods as order of clearance was already made for questioned bill of entries as explained above.

3.2 WITHOUT PREJUDICE TO ABOVE SUBMISSION, IF SHOW CAUSE NOTICE IS PRE-MATURE, THEN THE ENTIRE SHOW CAUSE NOTICE IS LIABLE TO BE QUASHED INASMUCH NEITHER BENEFIT OF NOTIFICATION CAN BE DENIED NOR REDEMPTION FINE CAN BE IMPOSED NOR PENALTY CAN BE IMPOSED:

It is respectfully submitted that, if show cause notice is pre- mature as held by the learned Commissioner, then the entire show cause notice is liable to be quashed. It is further submitted that the learned Commissioner erred in holding against the appellant by denying the benefit of Notification No. 52/2003-Customs dated 31.03.2023 and rejecting the classification, quantity and description of the goods when according to him final assessment has not been done.

It is further submitted that when according to the learned Commissioner final assessment has not been done and show cause notice is pre-mature, then imposition of redemption fine and penalty are liable to be set aside. Reliance is placed on the following judgements:

- Saharsh Distributors Pvt. Ltd. Vs Commissioner of Cus, New Delhi, 2017 (354) ELT 671 (Tri-Del.)
- Kevin Infotech (P) Ltd. Vs Commissioner of Customs (Port), Kolkata, 2007 (216) ELT 435 (Tri-Kolkata)
- A.S. Syndicate (Warehousing) P. Ltd. Vs Commissioner of Customs (Port), 2011 (267) ELT 469 (Cal.)
- Deep Jyoti Wax Traders Pvt. Ltd. Vs Commissioner of Customs (Port), 2016 (333) ELT 265 (Cal.)
- Jaju Petro Chemical Pvt. Ltd. Vs Commissioner of Customs (Port), 2017 (354) ELT 614 (Cal.)

It is submitted that as far as other appellants are concerned, no penalty can be imposed. Firstly, when the proceedings are liable to be closed against the main importer, then no penalty can be imposed on co-noticee. Secondly, ingredients of respective provisions are not satisfied. In view of the aforesaid submissions, the impugned order is liable to be set aside and appeals of the appellants may be allowed.

4. The department in rebuttal on the other hand submits as follows:-

Whether the assessment was provisional or final:

4.1 The basic contention of the appellant is that since the Show Cause Notice has been issued under Section 28(4) of the Customs Act, they should be given the option of deemed closure of proceedings under Section 28(5) & (6) which allow closure of proceedings on payment of 15% of the penalty. During the hearing. the learned advocate also disputed the fact that the assessment remained provisional though the goods were released provisionally. However, adjudicating authority has recorded findings in this regard and relevant portion of the OIO (Para 4.4 on Page 48 of the appeal file) is reproduced as under:

".....I find that in this case subject Bills of Entry were filed for clearance of the impugned goods but the goods could not be cleared as the goods were seized by the DRI. The goods were released only after granting of provisional release. Therefore, consequent upon the order of provisional release, the assessment was done provisionally under Section 18 of Customs Act, 1962. In view of the clause (b) of the said explanation, I find that the relevant date in this case will start from the date on which final assessment is done. In the instant case, the

assessment of goods is pending for finalization. Therefore, I find it premature to demand the duty under Section 28(4) ibid, as this Section would kick in only after final clearance (not provisional assessment) of goods by customs after importation."

4.2 The adjudicating authority has clearly mentioned that not just release but assessment was also provisional under Section 18(2) of the Customs Act, 1962. The appellant requested to finalize the assessment quite a few times. All these requests to make the assessment final were made after provisional release. Relevant paras of the Show Cause Notice in which this request has been recorded are as under:

(a) Para 1.9 Last point of the para clearly mentions that the appellant vide letter dated 25.10.2018 requested to finalize the Bill of Entry.

(b) Para 2.23/Para 3.74 M/s KIPL vide their letter dated 01.06.2020 requested for final assessment and to release the Bank Guarantee.

4.3 The letter dated 25.10.2018 is also available in case file at page number 198. The last line clearly mentions the request to finalize the Bill of Entry. Further, a letter dated 15.11.2018, submitted by the appellant to the Di, Gandhidham regional Unit is also available in case file at page number 201. This letter also requests to finalize the Bill of Entry. Therefore, as admitted by the appellant many times, the assessment of the Bills of Entry remained provisional. It was not just a provisional release but a provisional assessment also. The same fact has been recorded by the adjudicating authority in para 4.4 of the O-1-0. Though "Provisional Release" and "Provisional Assessment" are two independent concepts, in the instant case both are present.

Whether Section 28(4) is applicable at all:

4.4 The adjudicating authority has held that it would be premature to demand duty under Section 28(4) of the Act. This is in consonance with various judicial pronouncements and it is a settled law that Section 28(4) kicks in only after final assessment. As explained in para 2, assessment was provisional, and therefore, the proceedings have been rightly concluded under Section 125.

Provisions quoted in the Show Cause Notice:

4.5 Before coming to the legality of proceedings in the OIO, the relevant provisions quoted in para 9.1 of the Show Cause Notice are required to be summarized. This is necessary to determine whether all the elements required

for the proceedings to be concluded under Section 125 were available or not. Relevant provisions quoted in the Show Cause Notice are as under:

Section	Reason
17(1)	Why the self assessment under the section should bnot be cancelled.
17(4)	Why the Bill of Entry should not be re-assessed in terms of section 17(4)
111(f)	Why the goods should not be confiscated for violation of the quoted provisons.
111(i)	
111(j)	
111(l)	
111(m)	
111(o)	
119	
120	

What is the recourse for adjudicating authority when assessment is provisional in case of provisional release:

4.6 Since the assessment was provisional, the proceedings were required to be concluded under Section 125 of the Customs Act after issuing a Show Cause Notice under Section 124. Various judicial pronouncements have held that when the assessment is not final, a Show Cause notice should be given under Section 124 of the Customs Act which as a corollary can be concluded under Section 125. Some of the judicial pronouncements and relevant paras are as under:

(A) Para 4 in DEEP JYOTI WAX TRADERS PVT. LTD, case-2016 (333) E.LT. 265 (Cal.), issued by Hon'ble High Court of Calcutta, the Court observed as under:-

.....Here, Mr. Roy points out that there is an allegation of misdeclaration regarding the value of the goods. In such a case the department is empowered to issue a show cause notice under Section 124 of the Customs Act, 1962 read with Section 111 thereof.

4.7 The instant case is squarely covered since there is a mis-declaration of goods.

(B) Hon'ble CESTAT, Mumbai in DINESH BHABOOTMAL SALECHA- 2022

(381) E.L.T. 762 (Tri. Mumbai) held that provisional release does not impede adjudication proceedings under Section 124. Relevant portion of para 9 is reproduced below:

9. Both confiscation and provisional release arise in the aftermath of seizure under Section 110 of Customs Act, 1962. The scope for, and limits on, confiscation under Section 111 of Customs Act, 1962, and, thereby, of redemption fine, stand settled by the decision of the Hon'ble

Supreme Court in Weston Components Ltd. v. Commissioner of Customs, New Delhi (2000 (115) ELT. 278 (S.C.)) and of the Hon'ble High Court of Bombay in Commissioner of Customs v. Finesse Creation Inc. [2009 (248) E.L.T. 122 (Bom)]. Provisional release under Section 110A of Customs Act, 1962 does not, in any way, impede completion of adjudication proceedings commenced under Section 124 of Customs Act, 1962 and is to be invoked upon seizure with due acknowledgement of legislative intent to which we may now bring our attention to bear.

Further para 20 of the judgment refers to the order in Pushpak Lakhani v. Commissioner of Customs (Preventive), New Delhi (Final Order No. 50001/2022] issued by Hon'ble Principal Bench, CESTAT, Delhi which established framework within which the adjudicating authority may exercise discretion after seizure. All the judicial pronouncements along with legal provisions of seizure, confiscation, adjudication and redemption have been put together to decide this framework. Para 20 the judgement is as reproduced below:

20. Before doing so, it would be apposite for us to take note of the decision of the Tribunal in Pushpak Lakhani v. Commissioner of Customs (Preventive), New Delhi [Final Order No. 50001/2022 disposing of Appeal No. 50253 of 2021 against Order-in-Original No. VIII (CusPrev)/Adj/Commr/JWC/27/2013/9900, dated 11th September, 2020 of Principal Commissioner of Customs (Preventive), New Delhi] which has elaborately dealt with the legal provisions of seizure, confiscation, adjudication and redemption as well as the several judicial decisions that, put together, establish the framework within which adjudicating authorities may exercise discretion after seizure. All these aspects were summarized thus:

"42. The following position emerges from the aforesaid decision of the Delhi High Court in Its My Name:

.....

.....

(viii) While passing an order for provisional release, there is no adjudication of competing rights and liabilities;

(ix) High Courts would interfere with an order passed by the Tribunal for provisional release of the goods only on grounds of perversity;

(x) Allowing provisional release of the seized goods does not interfere with the adjudication of the show cause notice or with the jurisdiction of the adjudicating authority to hold that the goods were liable to confiscation and the mere fact that the goods may possibly be held liable to confiscation at a later stage cannot be a ground to refuse provisional release because in that case section 110A of the Customs Act would be rendered otiose,

.....

.....

Thus it has been categorically decided in above judgement that allowing provisional release does not interfere in adjudication process or with the jurisdiction of adjudicating authority. Jurisdiction of the adjudicating authority in the instant case under Section 125 cannot be questioned by any stretch of imagination and hence, the adjudicating authority has correctly adjudicated the issue under Section 125.

Mere mentioning of wrong provisions or not mentioning of it does not vitiate the proceedings till the time statutory authority has requisite authority therefore:

4.8 Proceedings under Section 125 originate after issuance of Show Cause Notice under Section 124 which provides that confiscation of goods requires a SCN under this section. In the instant case, goods were found mis-declared and hence seized under Section 110. Bills of Entry were amended and provisional release was granted under Section 110(A), as has been discussed above, assessment remained provisional. Show Cause Notice proposed rejection of self assessment and then re-assessment. The Show Cause Notice also mentions as to why the goods should not be confiscated under Section 111 of the Customs Act, 1962. Till here all elements for Section 124 to become operative are present. A natural consequence of a Show Cause Notice issued under Section 124 would be adjudication under Section 125. Section 28(4), if at all, can be considered to be present in the Show Cause Notice as an extra section which was not required to be invoked since the assessment was provisional. Mere mentioning Section 28(4) in the Show Cause Notice does not take away the right of adjudicating authority to conclude the proceedings under Section 125 when all the essential elements required to enforce it are present. Had Section 124 been mentioned in the Show Cause Notice, proceedings would have been perfect. It has been held in various judicial pronouncements that mere mentioning of wrong provisions or not mentioning of it does not vitiate the proceedings till the time statutory authority has requisite authority therefor. Relevant portions of some of the case laws are reproduced below:

(a) In P.K.Palanisamy vs N.Arumugham & Anr while disposing SLP (Civil) No. 2308 of 2009 Hon'ble Supreme Court in para 13 held that:

"It is a well settled principle of law that mentioning of a wrong provision or non-mentioning of a provision does not invalidate an order if the court and/or statutory authority had the requisite jurisdiction therefor."

(b) In Ram Sunder Ram vs Union Of India & Ors while disposing Appeal (civil) 2951 of 2007, Hon'ble Supreme Court held in para 20 that:

"It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law (see N. Mani v. Sangeetha Theatre & Ors. (2004) 12 SCC 278). Thus, quoting of wrong provision of Section 20 in the order of discharge of the appellant by the competent authority does not take away the jurisdiction of the authority under Section 22 of the Army Act."

Ratio of above judgement is squarely applicable in the instant case since order of dismissal of an army personnel was upheld despite the fact that wrong provision was quoted in the order of discharge but the authority had power, though in a different section, to dismiss him. In the instant case also, though wrong section i.e. Section 28(4) has been quoted, authority of adjudicating authority cannot be questioned under Section 125 after the goods were seized and found liable for confiscation on account of mis-declaration.

(e) Hon'ble Supreme Court expressed similar view in MERINO PANEL PRODUCT LTD.- 2023 (383) E.L.T. 129 (S.C.) / (2022) 1 Centax 59 (S.C.) judgement. Para 16 is reproduced below:

"16. It is clear that the latter question goes to the heart of the matter, rather than the issue of whether the show cause notice becomes legally untenable for failure to expressly mention that the valuation of the goods is to be done under Rule 11 read with Rule 9 of the CEVR. On the legal proposition advanced by Learned ASG, we readily affirm that citation of an incorrect source of power does not vitiate the exercise of the power itself provided the power vests in the authority to begin with."

Thus, in view of the above judicial pronouncements, mentioning of a wrong provision i.e. Section 28(4) and not mentioning of correct section i.e. Section 124 does not vitiate the proceedings till the adjudicating authority has the power to pass an order under Section 125 which is unquestionably present with the adjudicating authority.

4.9 Apart from Section 28(4), the other main contention of the appellant is that since goods were released provisionally and were not available, redemption fine cannot be imposed. For this, the judgment relied upon by revenue is the judgement issued in KAY BEE TAX SPIN LTD. 2017 (349) E.L.T. 451 (Guj.) by Hon'ble High Court of Gujarat. It has been held that when the

goods are released under bond, RF can be imposed under section 125 since RF is in lieu of confiscation of goods and not in lieu of goods. When the goods are liable for confiscation, RF should be imposed. Relevant paras, para 5.4 & 6, of the judgement are reproduced below:

Para 5.4: once the confiscation of such goods was authorized, Section 125 of the Customs Act shall be applicable. However, as the goods were not available for confiscation at the time of adjudication, as the same were already released on bond and/or permitted to be warehoused without payment of duty on furnishing the bond and undertaking, redemption fine in lieu of confiscation was imposable."

Para 6: "For the reasons stated above, as the goods were not available for confiscation, as the goods were already diverted/permitted to be warehoused without payment of duty, on furnishing the bond and the undertaking and thereafter, the respondent-Unit clandestinely and illicitly diverted the goods to the open market, the goods which otherwise were liable to be confiscated, in lieu of confiscation, redemption fine was imposable."

Appeal No C/10744/2023

5. The adjudicating authority has imposed a penalty on M/s KIPL under Section 112(a) of the Customs Act, 1962 whereas the Show Cause Notice proposes penalties under Sections 112(a), 114(AA) and 117 of the Act. In Para 7.1 of the subject 0-1-0, the adjudicating authority has recorded findings that M/s KIPL is liable to penalty under Section 112(a) & Section 114(AA) of the Act. However, on the contrary, penalty has been imposed under Section 112(a) only and not under Section 114(AA). The adjudicating authority has erred by not imposing any penalty under Section 114(AA). Such a defect in the order can be considered as "omission" on the part of the adjudicating authority.

5.1 Secondly, there is a proposal in the Show Cause Notice that M/s KIPL is liable for penalty under Section 117 of the Act also. The adjudicating authority has observed in para 2.14 of the 0-1-0 that M/s KIPL has contravened the provisions of Section 46(4) and 46(4A) of the Customs Act, 1962. However, no penalty has been imposed for contravention of these provisions. The adjudicating authority has neither imposed any penalty nor given any findings on imposition of penalty under Section 117 of the Act.

5.2 In view of the above, the subject 0-1-0 is not proper and legal to the extent that it does not impose penalties on M/s KIPL under Section 114(AA) & 117 of the Customs Act, 1962.

5.3 The prayer is either to impose the penalties on M/s KIPL under Section 114(AA) and 117; or alternatively, the case may be remanded back to the adjudicating authority to determine and impose penalties under Section 114(AA) & 117 of the Customs Act, 1962.

6. We find that the department is not in appeal at this stage and has tried to make a fresh case for imposition of penalty against the appellants. We find that in the instant case the appellants party had deposited the remaining duty+interest+15% penalty so as to be eligible for claim for amnesty. We find in the show cause notice duty has been demanded under Section 28 (4) of the Customs Act, 1962 in para 9.1 (e) along with interest under Section 28AA of the Customs Act, 1962. Simultaneously, we find that confiscation has also been proposed and has been upheld. Learned Advocate has disputed that the assessment was provisional and has only pointed out that the goods were released provisionally after seizure. The findings at para 4.4 on page 48 as reproduced above in the submissions of the department at para 4.1 are relevant. We find that it is not coming out clearly as to whether the goods were provisionally released or assessment were done provisionally as the former relates to seized goods and later in part of interim assessments required to be subjected to finalisation. In case demand under Section 28 (4) was applicable and duty was demandable then the party is very much entitled to claim the amnesty under Section 28 (5) and the same on following of the requisite conditions. In which case confiscation of goods and interest thereof does not get triggered nor any provisional assessment is required to be finalized to the prejudice of the party. We are therefore, remanding the matter back to the adjudicating authority to decide firstly nature of proceedings by determining the appropriate facts and if assessment was not provisional to allow benefit of provisions of Section 28(5) & 28 (6) to the party on fulfilment of the conditions or otherwise to finalise assessment first and then demand

duty under Section 28 (4) and allow amnesty under Section 28 (5) and 28 (6) on fulfilment of conditions. The penalties on the other parties will be subject to the amnesty being available or not to M/s. Karnawat International Private Limited.

7. Appeals are allowed by way of remand in above terms.

(Pronounced in the open court on 25.10.2024)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi