

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

REGIONAL BENCH- COURT NO. 3

CUSTOMS Appeal No. 11044 of 2017

(Arising out of OIO-MUN-CUSTOM-000-COM-25-26-16-17 Dated-31/01/2017 passed by
Commissioner of Central Excise, Customs and Service Tax-MUNDRA)

Balkrishna Industries Ltd

C/15 Trade World, Kamla Mills Compound,
Senapati Bapat Marg, Lower Parel,
Mumbai, Maharashtra

.....Appellant

VERSUS

C.C.-Mundra

Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat-370421

.....Respondent

WITH

CUSTOMS Appeal No. 11045 of 2017

(Arising out of OIO-MUN-CUSTOM-000-COM-25-26-16-17 Dated-31/01/2017 passed by
Commissioner of Central Excise, Customs and Service Tax-MUNDRA)

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Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat-370421

.....Respondent

APPEARANCE:

Paritosh Gupta, Advocate for the Appellant
Shri. J A Patel, learned Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

Final Order No. A/ 11231-11232 /2022

DATE OF HEARING:28.06.2022
DATE OF DECISION:18.10.2022

RAMESH NAIR

M/s. Balkrishna Industries Ltd., have filed these appeals being
aggrieved with the Order-In-Original No. MUM-CUSTOM-000-COM-25 & 26 -
16-17 dated 31.01.2017.

2. The brief facts of the case are that the appellant are engaged in manufacture of "off road tires". The appellant imported Shell Flavex Oil 595/B Shell Flavex Oil 595H and classified the goods under Customs Tariff Heading 38122090. The officers of DRI, Gandhidham detained seven consignment of shell Flavex Oil having value of Rs. 85,37,562/- alleging that the same were misdeclared as theses are allegedly classifiable as "Rubber Processing Oil" having more aromatic components under CTH 2707 which is subjected to a higher rate of duty. After carrying out investigation and recording the statements of the relevant personnel of the Appellant first Show Cause Notice dated 20.01.20016 was issued proposing to reject the classification claimed by the Appellant under CTH 38122090 and to classify the same under 27079900 of Customs Tariff Act, 1975 and reassess bill of entry accordingly. It was also proposed to demand differential customs duty of Rs. 43,35,516 + Rs. 10,91,994/- alongwith interest. Total qty. of "Shell Flavex Oil 595B" imported by the Appellant are declared as plasticizer was proposed to be confiscated as per the provisions of Section 111(m) of Customs Act, 1962. It was also proposed to impose penalty on Appellant under Section 112(a)/114A of the Customs Act, 1962.

3. Another second show cause notice dated 08.09.2016 was also issued to the Appellant by Additional Commissioner of Customs, Mundra in respect of the bills of entry provisionally assessed at Mundra Port proposing to classify the goods under CTH 2707 and demanding differential duty of Rs. 20,86,750/- under Section 28(4) with interest and proposing confiscation of 7,50,507 Kg. of goods under Section 111(m) of the Act. It was also proposed to impose penalty under Section 112(a) and 114A of the Act.

4. The Adjudicating authority vide impugned order decided both the show cause notice and passed the following order:

(a) I reject the claim for classification of impugned goods viz 'Shell Flavex Oil 595B/Shell Flavex Oil 595H under Customs Tariff heading 38122090 of the First Schedule to Customs Tariff Act, 1975, imported under various Bills of Entry as marked under the Annexure to the show cause notice F.No. DRI/AZU/GRU/SFO/INT-22/2015 dated 20.01.2016 and F.No. VIII/48-579/Balkrishna/Cr.VII/MCH/16-17 dated 08.09.2016 and order to re-classify the same under Customs Tariff heading 27079900 of the First Schedule to the Customs Tariff Act, 1975;

(b) The proceedings initiated in the present show cause Notices, except the goods under seizure, is hereby order to be concluded in terms of the provisions of Sub-Section (5) & (6) of Section 28 of Customs Act, 1962, for the reason that the noticee has paid the Customs duty alongwith interest and penalty to the tune of 15% of the total duty.

(c) I order for confiscation of 1,80,120 kgs of "Shell Flavex Oil 595" which was seized, having assessable value of Rs. 85,37,562/-. As the goods in question are not available for confiscation since they have been provisionally released, I thereby order for redemption fine of Rs. 5,00,000/- in lieu of confiscation under Section 125 of the Customs Act, 1962.

(d) I confirmed the differential customs duty of Rs. 4,08,115/- on the seized goods valued at Rs. 85,37,562/- under Section 28(4) of the Customs Act, 1962, as detailed under Annexure B to the show cause notice F.No. VIII/48-579/Balkrishna/Cr.VII/MCH/16-17 dated 08.09.2016 and order to adjust the same, if paid already.

(e) I impose a penalty of Rs. 3,00,000/- on M/s Balkrishna Industries Ltd., Mumbai under Section 112(a) of the Customs Act, 1962.

(f) I also impose a penalty of Rs. 4,08,115/- on M/s Balkrishna Industries Ltd., Mumbai under Section 114A of the Customs Act, 1962.

(g) I order to enforce the Bond and Bank Guarantee, executed by M/s Balkrishna Industries Ltd., Mumbai during the provisional release of the seized goods and to appropriate the same to recover the demand of duties, interest and penalties, as ordered above.

5. Being aggrieved by the Order-In-Original Appellant filed the present Appeals.

6. Shri. Paritosh Gupta, Learned Counsel appearing on behalf of Appellant submits that the Appellant is eligible for deemed conclusion of the case under Section 28(2) of the Act in as much as there is no willful suppression or misdeclaration by the Appellant. The entire proceedings including confiscation of seized goods, imposing of redemption fine, penalty under Section 112(a) and Penalty under Section 114A gets covered under "deemed conclusion" under Section 28(2) of the Customs Act, 1962 as the full amount of duty alongwith interest have been paid much before the issuance of show cause notices. The Adjudicating authority has ignored vital evidences on

record including bonafide of the Appellant thereby violating principle of natural justice as well. The impugned order needs to be modified to the extent of ordering deemed conclusion under Section 28(2) of the Act.

6.1 He also submits that Hon'ble CESTAT vide final order No. A/12477/2021 dated 29.10.2021 in the Appellant's own case involving same import goods under advance authorization dismissed the Appeal of revenue. Once the bonafide is established, the same is applicable to the facts of the impugned case where similar import of same goods was made under duty payment route from the very same ports for the very same periods. Accordingly, deemed conclusion under Section 28(2) should have been ordered.

6.2 He also argued that it is also a legal facts that no penalty under Section 112(a) can be imposed if penalty under Section 114A has been imposed.

7. Shri. J A Patel learned Superintendent (Authorized Representative) appearing on behalf of the revenue drew our attention to the impugned order wherein the Commissioner has considered the submissions and has reached the conclusion which according to the learned AR/DR is the correct conclusion.

8. We have considered the submissions of both the sides and perused the records. We find that the only issue to be decided in the given facts and circumstances is as to when the appellant has paid the entire duty amount alongwith the interest and the penalty, whether the proceedings would have been concluded and as to whether the Adjudicating Authority have been right while not concluding the proceedings in that scenario. In this context the relevant provision of sub-section (2) of Section 28 of the Customs Act, 1962 reads as follows :

28. Notice for payment of duties, interest, etc. –

(1)-----

(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person

(not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined: Provided that if such person has paid the duty in full together with interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notice is served under sub-section (1) shall, without prejudice to the provisions of sections 135, 135A and 140, be deemed to be conclusive as to the matters stated therein: Provided further that, if such person has paid duty in part, interest and penalty under sub-section (1A), the proper officer shall determine the amount of duty or interest not being in excess of the amount partly due from such person.

The bare perusal of the above provisions makes it clear that the same is a beneficial provision of legislation with an intention to reduce the litigation proceedings where the assessee satisfies the condition of the said Section. The language makes it clear that the provisions provide for deemed conclusion of the proceedings against the assessee if the payment as regard the duty, interest and penalty thereof stands made by the assessee. It is further seen that the provision is applicable even in the cases of demand having been arisen on account of collusion, wilful mis-statement or suppression, if the same stands accepted by him and the respective duty along with interest and the required penalty stands paid.

8.1 Now coming to the fact of the present case, it is admitted facts in present matter that the appellant herein has made the duty payment alongwith interest and penalty. The said acknowledgment is very much recorded in the impugned order itself. In the given circumstances, we are of the opinion that the Adjudicating Authority has committed error for not concluding the proceedings in present matter.

8.2 No doubt above Section provisions are applicable without prejudice to the provisions of Sections 135, 135A and 140 of the Customs Act but perusal of Show Cause Notices makes it clear that none of these provisions have been invoked at the time of issuing Show Cause Notices. Hence, we opine that case of appellant is very much covered under the deemed conclusion scheme of legislature under Section 28 of the Customs Act. It is well settled law that the legislative intent, extending certain beneficial provision to the

assessee, should not be made frivolous by interpreting the provision in a particular manner other than the one which reflects upon such intent.

8.3 Further, the Circular as relied upon by the Ld. Adjudicating authority though expressly excludes the cases covered under Sections 111, 113, 115, 118, 119, 120 & 128 but this emphasis of Department is also of no any benefit to the Department for the reasons that the Circular is merely a clarification regarding the co-noticees. Hence, the Circular is not applicable at least on the main importer/Noticee. It is the settled provision that Circulars being mere clarificatory in nature cannot supersede the legislature. It is also settled principle of law as was held by Hon'ble Apex Court in *Babu v. Bar Council, Kerala* - AIR 1999 SC 1281 that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. In another case of *Aphali Pharmaceuticals Ltd. v. State of Maharashtra* - 1989 (44) E.L.T. 613, the Hon'ble Apex Court has observed that a taxing statute must be interpreted in the light of what is clearly expressed therein and nothing can be implied nor can the provisions be imported into it so as to supply an assumed deficiency.

9. We agree with the contentions raised by the appellant that there is grave infirmity, as observed above, in the impugned Order under challenge. Resultantly, we hereby set aside impugned order under challenge extending the benefit of deemed conclusion of the proceedings in view of Section 28 of the Customs Act to the appellants herein for the reason that they have complied with the conditions mentioned in the provision. Both the Appeals are therefore hereby allowed with consequential benefits, if any, in accordance with law.

(Pronounced in the open court on 18.10.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)