CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD
REGIONAL BENCH

Customs Miscellaneous Application No.70169 of 2021
IN
Customs Appeal No.725 of 2008

[Arising out of Order-in-Original No. (Cus-01/2008) 51 of 2008 dated 31.07.2008 passed by the Commissioner of Central Excise 38 M G Marg, Civil Lines]

Jhoola Refineries Limited **.....Appellant**
14-96-a, Jhoola Kunj, ashok Marg
Sharnath
Varanasi-UP

VERSUS

Commissioner of Central Excise, Allahabad **....Respondent**
38 M G Marg, Civil Lines,
Allahabad-211001

With
Customs Miscellaneous Application No.70204 of 2021
IN
Customs Appeal No.790 of 2008

[Arising out of Order-in-Original No. (Cus-01/2008) 51 of 2008 dated 31.07.2008 passed by the Commissioner of Central Excise 38 M G Marg, Civil Lines]

Shri M K Jhunjhunwala **.....Appellant**
Director, M/s Jhoola Refineries Ltd.
14-96-a, Jhoola Kunj, ashok Marg
Sharnath
Varanasi-UP

VERSUS

Commissioner of Central Excise, Allahabad **....Respondent**
38 M G Marg, Civil Lines,
Allahabad-211001

Appearance
Present for the Appellant: Shri Vineet Kumar Singh, Advocate

Present for the Respondent: Shri Gyanendra Kumar Tripathi, Authorized Representative

CORAM:
HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 24 January, 2022
DATE OF DECISION: 15 March, 2022

FINAL ORDER NOS. 70080-70081/2022

P V SUBBA RAO:

These two appeals assail the same order-in-original[1] dated 31 July 2008 passed by the Commissioner of Central Excise and Service Tax, Allahabad and hence are being disposed of together along with the miscellaneous applications filed in the two appeals. Miscellaneous application C/Misc/70169/2021filed in appeal C/725/2008 and miscellaneous application C/Misc/70204/2021 filed in C/790/2008 seek to amend the prayer in the appeals as the prayer in the appeals as originally filed were not clear. We allow the miscellaneous applications and the prayer in both the appeals stand modified accordingly.

2. Appeal no. C/725/2008 has been filed by M/s. Jhoola Refineries Ltd[2]., the importer, assailing the impugned order confiscating the imported crude palmolein oil under Section 111(o), imposing a redemption fine under section 125 of the Customs Act, demanding duty under section 28 along with interest under section 28AB and imposing penalties. Appeal No.

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1 Impugned order
2 Jhoola

C/790/2008 has been filed by Shri M K Jhunjhunwala[3], Director of the importer assailing the penalty imposed upon him by the impugned order.

3. We have heard learned counsel for the appellants and learned authorised representative of the department and perused the records. During the period 01/01/2005 to 31/07/2005, Jhoola imported 1,974.713 MT of Crude Palmolein Oil (industrial grade) under various bills of entry by claiming exemption of Notification No 21/2002-Cus dated 01/03/2002 (S.No. 30) as amended by Notification No. 20/2004- Cus dated 16.1.2004 and paid basic customs duty of 20%. This exemption was available to all oils which were of 'other than edible grade to be used in manufacture of soap' subject to the condition that they follow the procedure under Customs (Import of Goods at concessional rate of duty for manufacture of excisable goods) Rules 1996. According to Jhoola, it followed all the required procedure and it had imported only industrial grade crude palmolein oil and hence it was eligible to the exemption. The Bills of Entry were assessed by the Customs officers giving the benefit of the exemption notification as claimed. Later, officers of Directorate of Revenue Intelligence[4] initiated investigations and came to the conclusion that Jhoola was not entitled to the benefit of the exemption and the

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3 Jhunjhunwala
4 DRI

Assistant Director of DRI issued a Show Cause Notice[5] proposing to confiscate the goods, deny the benefit of the exemption notification and recover the differential duty under section 28 along with interest under Section 28AB and impose penalties. This SCN was adjudicated by the Commissioner by the impugned order confiscating the goods, imposing fine and confirming the demand of duty, interest and imposing penalty on Jhoola and also imposing a penalty on Jhunjhunwala. The notification provides exemption to a variety of goods listed in the table therein subject to various conditions. Of these, S.No. 30 of the table (as amended on 16.1.2004) and the condition no. 5 subject to which the exemption for the goods covered by this entry is available are relevant to these two appeals. The relevant part of the notification is reproduced below:

Notification No. 21/2002-Cus. Dated 1.3.2002

> **Effective rates of basic and additional duty for specified goods falling under chapters 1 to 99**
>
> In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 17/2001- Customs, dated the 1st March, 2001 [G.S.R. 116(E), dated the 1st March, 2001], the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading or sub-heading of the First Schedule

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5 SCN

to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India,-

(a) from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table;

(b) from so much of the additional duty leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act, as is in excess of the rate specified in the corresponding entry in column (5) of the said Table,

subject to any of the conditions, specified in the Annexure to this notification, the condition No. of which is mentioned in the corresponding entry in column (6) of the said Table :

Provided that nothing contained in this notification shall apply to –

(a) the goods specified against serial Nos. 239, 240, 241 and 242 of the said Table on or after the 1st day of April, 2003;

(b) the goods specified against serial Nos. 250, 251 , 252 and 415 of the said Table on or after the 1st day of March, 2005.

Explanation. - For the purposes of this notification, the rate specified in column (4) or column (5) is ad valorem rate, unless otherwise specified.

Table

S.No	Chapter or Heading No. or subheading No.	Description of goods	Standard rate	Additional rate	Condition
(1)	(2)	(3)	(4)	(5)	(6)
1…29					
30	15	All goods, having a Free Fatty Acid (FFA) content of 20 per cent. or more and falling under headings 15.07,	15	-	-

		15.08, 15.09, 15.10, 15.11, 15.12, 15.13, 15.14 or 15.15			

S. No. 30 of the table in the above notification was **substituted as follows by Notification No. 20/2004 dated 16.1.2004**

30	15	A) All oils, other than edible grade, having Free Fatty Acid (FFA) 20 percent or more and falling under heading 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514 or 1515, for the manufacture of soaps	20%	-	5
		B) Fatty Acid (FFA) 20 percent or more and falling under heading 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514 or 1515	65%	-	-

ANNEXURE

Condition No.	**Conditions**
5.	If the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996.

4. According to Jhoola, it had obtained Registration Certificate No 01 of 2004 from Central Excise Division Varanasi for import of non-edible Crude palm oil (CPO) industrial-grade for manufacture of Soap under Customs (Import of Goods at concessional rate of duty for manufacture of excisable goods) Rules 1996. It also submitted the ground plan of the factory premises indicating the place where the industrial soap will be manufactured from the imported Crude Palm oil and the plan was approved by the Range Superintendent. Thereafter, it imported

Crude Palm oil for manufacture of soap claiming concessional rate of duty. After import, DRI officers searched its registered premises and concluded that neither the manufacturing activities of Soap nor the documents concerning the manufacture of Soap were available in the factory premises. Jhoola submitted a certificate from Chartered Engineer Shri S.K Ahuja who certified that the applicant has set up the Soap manufacturing with a capacity of 60 tonnes per day. DRI officers recorded the statement of the Managing Director Shri Jhunjhunwala who denied the allegations of the DRI.

5. Not satisfied with the report of Shri Ahuja, the Chartered Engineer, DRI officers engaged Chartered Engineer Shri Vijay Prakash who also confirmed that Jhoola has manufacturing capacity of 60 MT per day, the manufacturing process was carried out in the factory premises and raw material essential to manufacture Industrial grade Soap were in the premises. DRI officers were not satisfied even with the report of the Chartered Engineer whom they hired. So, the Joint Director, DRI Gandhidham, Gujarat had sought opinion of Prof D.N Bhowmick, Head Division of Oils, Oleochemicals & Surfactants Mumbai University, Institute of Chemical Technology, Mumbai regarding production of Industrial Grade Soap without the aid of Power. Professor Bhowmick reported that "without power, handling of such a large quantity of material manually seems to be very difficult". Based on its investigations, it appeared to DRI that

Jhoola has no facility to manufacture soap and that it had wrongly availed the benefit of exemption notification on the imported palmolein oil and issued the SCN which culminated in the impugned order. The relevant paragraphs of the SCN are as follows:

> "29. From the above discussion it is proved that
>
> (i) M/s JRL have obtained central excise registration under the Customs (Import) of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996. They have imported 1974.713 MT of C P O (I.G) at Kandla. In stead of utilizing the same in the manufacture of soap as declared they have diverted/used the imported CPO (IG) for purposes other than for which it was imported. The bonds submitted by them require to be enforced.
>
> (ii) M/s JRL have rendered 250 MT of CPO (I.G) totally valued at Rs. 4654050.00, imported per MT ACE 7, seized on 30.08.2005 by DRI Gandhidham, liable for confiscation under section 111(o) of Customs Act, 1962.
>
> (iii) M/s JRL have rendered 25.474 MT of CPO (IG) totally valued at Rs. 475647.00 seized by DRI (9.510 MT of CPO(IG) valued at Rs. 178458.00 lying at tank no. 304 of M/s CRL Kandla seized on 6-10-05 by DRI Gandhidham and 15.964 MT of CPO (IG) valued at Rs. 297189.00 lying in the factory premises seized on 17.08.2005 by DRI Varanasi) liable for confiscation under section 111(o) of the Customs Act, 1962.
>
> (iv) M/s JRL have rendered 1974.708 MT. of crude plam oil (industrial grade) imported vide bills of entry No. 104819/17-05-2005, 106546/31-05-2005, 109482/23-06-2005, 109925/28-06-2005, 111098/6-7-2005, 102641/25-4-2005, 102642/25-4-2005, 794/10-1-2005 and 793/10-1-2005 imported under the Customs (import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 at concessional rate of duty liable for confiscation under Section 111(o) of the Customs Act, 1962. However, the goods are not available for confiscation.

(v)M/s JRL are liable to pay Customs duty of 1,71,73,426 (Rupees one crore seventy one lakh seventy three thousand, four hundred and twenty six only) in terms of proviso to Section 28 of the Customs Act, 1962 read with rule 8 of Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996.

(vi) M/s JRL have rendered themselves liable to pay penalty under Section 112/114 A of the Customs Act, 1962.

(vii) M/s JRL have rendered themselves liable to pay interest at appropriate rate under Section 28 AB of the Customs Act, 1962

30.(i) Shri Mahesh Kumar Jhunjhunwala, Director of M/s JRL had been actively involved in the import of CPO (IG) and also not using the same in the manufacture of soap. Shri Mahesh Kumar Jhunjhnwala is a full time working Director of M/s JRL. He is solely and fully responsible for day-today activities of his factory and office at Varanasi. He had opened a new factory at Hiramanpur, Near Sarnath in December 2004/ January 2005 for manufacture of vanaspati and soap. He had made false applications under Customs (import of goods a concessional rate of duty for manufacture of excisable goods) Rules, 1996 to the Assistant Commissioner of Central Excise, Division Varanasi in the month of December, 2004 and got registration certificate on the basis of false declarations. He was responsible for import and clearance of crude palm oil (industrial grade) by M/s JRL at concessional rate of 20% for availing the benefit of notification No. 21/2002-Cus dated 1.3.2002 as amended. He had arranged to install bhattis in their factory only to show that they have facilities for manufacture of soap, whereas actually they neither an intention nor total facilities required for the same. In additional to CPO (industrial grade), he claimed to have procured Caustic Soda from indigenous sources for manufacture of soap. He had claimed that they had added 12% of caustic soda to CPO (industrial grade) and that they were procuring Caustic soda indingenously. He had also falsely claimed that they had procured caustic soda from indigenous sources for manufacture of soap, for which they have failed to produce any evidences of purchase after having given enough time and opportunity to do so. JRL had purchased only 500 KGs of Caustic Soda from a local trader for which they had produced one bill. Whereas he had claimed to have consumed 290063 KGs of caustic soda in their records, but no purchase bills or any other evidence showing the same was not available with him. He was also instrumental in manipulation of records, preparation of wrongful declarations by M/s JRL. It is evident from the statement of Shri Subodh Kumar Singh on 6-9-2005 that he was forced to create a record for consumption of vitamins for a period November 2004 to December 2004 during which he was not an employee of M/s JRL. This is indicative of the fraudulent activity of the company at the behest of Shri M K Jhunjhunwala. Their manipulation of records is further evident from the fact that they have shown to have stored 127 MT of CPO (IG) in the Tank No. 2 which had a capacity of 50 MT only and which was claimed to have been used exclusively for storage of imported CPO (I.G.). He was responsible for getting registered with Sales Tax and Trade Tax Department (registration number UPTT-VN-0393521 dated 20.09.89 and CST No. VN 5215354 dated 25.09.89) and for submission of false records. On being asked how the manufactured goods (vanaspati ghee & soap) are disposed off, he stated that they disposed of vanaspati ghee through their depots and dealers, but they had claimed to have disposed soap directly to soap manufacturers and through traders to avoid production of bills/ sales invoices etc. As discussed above and evidences available, the sale of soap and its records/bills were found to be fake. They had claimed to have consumed 1757.480 MT of CPO (IG) and manufactured 2314.796 MT of soap and claimed to have sold 1332.746 MT of soap to various parties. Even if his claim is to be believed, then they should have had a balance stock of 982.050 MT of soap lying in their factory at the time of search on 17-08-2005, whereas there was no such balance of manufacture soap. It is evident that Shri M K Jhunjhunwala arranged for registers maintained by JRL which were in correct, false, mis-leading and fraudulent. Shri Mahesh Kumar Jhunjhunwala had a malafide intention that by way of omissions and commissions had dealt with the goods which he knew and had a reason to believe that his omission and commissions would render the goods liable for confiscation under Section 111(o) of the Customs Act, 1962. He had also knowingly concerned himself in a fraudulent evasion of Customs duty by way of preparing false documents, producing false declaration in his applications for availing concessional rate of duty under the Customs (import of goods at concessional rate of duty for manufacture of excisable goods) rules, 1996.

By doing so he has actively caused aided and abetted the duty evasion of Rs. 17173426.30 by M/s JRL. He has, therefore, rendered himself liable for penalty under Section 112 of Customs Act, 1962.

(ii) Shri Mahesh Kumar Jhunjhunwala Director of M/s JRL was arrested by DRI on 25-1-2006 under Section 104 of the Customs Act, 1962 and was produced before the Magistrate and was remanded to Judicial Custody till 3-2-06 and was deposited at Special Jail, Bhuj. His bail plea was rejected by the Hon'ble CJM Court Gandhidham on 03-01-06 and was released on condontinal bail by Hon'ble Additional Sessions Court, Gandhidham on 3-2-06."

31. Now, therefore, M/s Jhoola Refineries Ltd., Hiramanpur, Sarnath, Varanasi are hereby, called upon to show cause to the Assistant Commissioner of Central Excise, Varanasi having their office at Central Excise Division, 9, Maqbool Alam Road, Near Zila Kutchery, Varanasi-221 002 within thirty days of receipt of this notice as to why

(I)(i) 250 MT of CPO (IG) totally valued at Rs. 4654050.00, imported per MT ACE 7, seized on 30-8-05 by DRI Gandhidham at CRL Kandla, sought to be cleared vide bill of entry 117457 dated 29-08-05 should not be confiscated under section 111(o) of the Customs Act, 1962.

(ii) duty of Rs. 3085635.00 @ 65% Basic Customs Duty should not be demanded/confirmed without extending the benefit of concessional rate of duty as claimed by them under Notification NO. 21/2002-CUS dated 1.3.2002 and as to why the application in Annexure III (bond No. 16/2005 dated 2.8.2005) submitted in this regard should not be cancelled.

(II)(i) 1974.713 MT. of crude palm oil (industrial grade) (including 25.474 MT of CPO(IG) totally valued at Rs. 475647.00 seized by DRI (9.510 MT of CPO lying at tank no. 304 CRL Kandla seized on 06.10.05 by DRI Gandhidham and 15.964 MT of CPO (IG) lying in the factory premises seized on 17.08.2005 by DRI Varanasi) imported vide bills of entry no. 104819/17-5-2005, 106546/31-5-2005, 109482/23-6-2005, 109925/28-6-2005, 111098/6-7-2005, 102641/25-4-2005, 102642/25-4-2005, 794/10-1-2005 and 793/10-1-2005 imported under the Customs (Import of Goods at Concessional Rate of Duty for Manufacture excisable Goods)Rules, 1996 should not be confiscated under Section 111(o) of the Customs Act, 1962. However, the goods are not available for confiscation.

(ii) The benefit of concessional rate of duty under Notification No. 21/2002 dated 1-3-2002 as amended by notification no. 20/2004 dated 16-1-2004 should not be disallowed and the Customs duty evaded to the tune of Rs. 1,71,73,426 (Rupees one crore seventy one lakh four hundred twenty six only) (as detailed in Annexure-I to the show cause notice) should not be recovered from them in terms of proviso to Section 28 of the Customs Act, 1962 read with Rule 8 of Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996 enforcing the bonds submitted by them in this regard.

(iii) Why interest at appropriate rate should not be levied on them under section 28AB of Customs Act 1962 read with Rule 8 of Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996.

(iv) Why penalty should not be imposed on them under Section 112/114A of Customs Act, 1962.

32. Shri Mahesh Kumar Jhunjhunwala, Director of M/s JRL, 14/96A, Jhoola kunj, Saranath, Varanasi-221007 is hereby called upon to show cause to the Assistant Commissioner of Central Excise, Varanasi having their office at Central Excise Division,9, Maqbool Alam Road, Near Zila Kutchery, Varanasi -221 002 within thirty days of receipt of this notice as to why

(i) penalty should not be imposed on him under Section 112 of the Customs Act, 1962."

6. Learned counsel for the appellant contests the impugned order firstly, on the ground that DRI officers are not 'proper officers' to issue an SCN under Section 28 of the Customs Act, 1962 as per the judgment of the Supreme Court in the case of **Canon India[6].** He also contests it on merits that the proper officer of customs has given them the benefit of the exemption notification on being satisfied that they meet the conditions of the notification. This satisfaction was based on the fact that they were registered duly with the central excise officers. The Chartered Engineer hired by it Shri Ahuja confirmed that they have a capacity to produce 60 MT of soap per day and the Chartered Engineer hired by DRI also confirmed this position. The opinion of Prof. Bhowmick also nowhere says that Jhoola has no facility to manufacture soap. It only states that without the aid of power, handling a large quantity of material seems to be very difficult. Thus, the SCN cannot sustain even on merits. Therefore, he prays that the impugned order may be set aside.

7. Learned authorised representative of the Department reiterated the findings of the impugned order.

8. We have considered the submissions on both sides and perused the records. However, we need not examine the merits of the case, if the SCN itself was issued by an officer competent

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6 2021 (3) TMI 384- Supreme Court

to do so. The SCN gets vitiated and so will any order deciding the proposals in such an SCN.

9. Hon'ble Supreme Court held that DRI officers were held to be not proper officers for issue of SCN demanding duty under Section 28 in the **Canon India.** Since the SCN itself was issued without authority of law, the entire proceedings get vitiated. The ratio of **Canon India** was followed in several cases and demands were set aside by the Supreme Court, various High Courts and this Tribunal only on the ground that the SCN was issued under Section 28 by the officers of DRI. Some of these cases are:

Supreme Court

1. Commissioner of Customs vs **Agarwal Metals and Alloys**[7]

Madras High Court- Madurai bench

2. **Quantum Coal Energy Pvt. Ltd** vs Commissioner of Customs[8]

Karnataka High Court

3. **Givaudan India Pvt. Ltd.** vs Commissioner of Customs[9]

Punjab and Haryana High Court

4. **Godrej & Boyce Manufacturing Co. Ltd.** vs UOI[10]

Tribunal

5. Principal Commissioner, Customs, ACC Import vs **Dish TV India Limited, Rajeev Dalmia and Virender Kumar Tagra**[11]

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7 2021(9) TMI316- Supreme Court
8 2021 (3) TMI 1034- Madras High Court
9 2021(8) TMI 178- Karnataka High Court
10 Punjab & Haryana High Court Order dated 19.4.2021 in Civil Writ Petition No. 19871 of 2020
11 2021 (10) TMI 771- CESTAT, New Delhi

6. **Evershine Customs (C&F) Pvt. Ltd** vs Commissioner of Customs[12]

10. Undisputedly, the bills of entry in this case were not assessed by the officers of DRI but by the officers of the Custom house. Only that officer who has assessed the Bills of Entry in the first place or his successor in office was 'the proper officer' who, if he was subjectively satisfied that some duty had escaped assessment, could have issued the SCN. As the SCN has been issued by officer of DRI who is not competent to issue it, the impugned order deciding such an SCN cannot be sustained and needs to be set aside and we do so.

11. The impugned order is set aside and both appeals are allowed with consequential relief, if any, to the appellants. The miscellaneous applications also stand disposed of.

(Order pronounced in the court on 15.03.2022)

(P V SUBBA RAO)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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12 2021(8) TMI 906- CESTAT, New Delhi