

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

**Customs Misc. Application No.20078 of 2023
Customs Misc. Application No.20079 of 2023
in
Customs Appeal No. 20327 of 2023**

AND

Customs Appeal No. 20327 of 2023

(Arising out of Order-in-Appeal No. COC-CUSTOM-000-APP-17/2022-23 dt. 13/10/2022 passed by Commissioner Of Customs (Appeals), Cochin)

Hardex,
41/2040, MES Centre,
Mathew Pilly Road,
Near Town Hall,
Kochin – 682 018.
KERALA

Appellant(s)

VERSUS

Commissioner of Customs,
Customs House,
Willington Island,
COCHIN, - 682009
KERALA

Respondent(s)

APPEARANCE:

Shri Baby, M.A., Advocate for the appellant.

Shri K.A. Jathin, Deputy Commissioner(AR) for the respondent.

CORAM:

HON'BLE Dr. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE Mrs. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20548 / 2023

Date of Hearing: 19/05/2023

Date of Decision: 09/06/2023

Per : DR. D.M.MISRA

These two miscellaneous applications have been filed, one seeking direction for supply of test reports & drawl of samples for retesting, and the second one for release of the goods pending disposal of the Appeals. On the previous day of hearing i.e. on 19.4.2023, on the suggestion of the Bench to take up the appeal itself for disposal, after handing over the copy of test reports to the appellant by the Revenue, both sides fairly agree to argue the appeal itself and accordingly the matter was adjourned and today the Appeal itself was taken for hearing and disposal along with the aforesaid Applications.

2.1. Briefly stated the facts of the case are that the appellant had filed a Bill of Entry No. 78752280 on 15th March 2022 for clearance of the imported good viz. industrial composite solvent by declaring its classification under CTH 38140010 which corresponds to the Heading 'organic solvents and thinners, not elsewhere specified or included'. The said goods were imported from the overseas supplier M/s. Encore Arabia Group for General Trading and Contracting Co. W.L.L, Kuwait declaring its transaction value as ₹15,26,931/- under invoice number 044-112021. The packing list, certification of origin and certificate of analysis dated 31.01.2022 were filed with the said Bill of Entry.

2.2. Samples were drawn and tested in the in the Customs laboratory by the Department and it was orally informed to the

Appellant through their CHA that the goods fall under the category of kerosene. The appellant through their letter dated 29th of March 2022 requested to allow for re-testing of the samples and accordingly sent to the laboratory of BPCL, Cochin Refineries. Later, the clearing agent informed that the report furnished by BPCL was matching with the parameters of composite solvent as declared by appellant. Immediately thereafter the appellant through letter dated 13th May 2022 requested to assess the bill of entry and allow clearance of the goods as per the declaration filed by the appellant. Later it was informed to them that the Department sought clarification from BPCL on the said report and by report dated 26.05.2022, it was clarified that the sample is more inclined towards petroleum hydrocarbon solvents (125/240) IS 1745:2018.

2.3. Due to mounting demurrage and immediate requirement of the imported goods to be used in their own factory, for the manufacture of paints, the appellant waived issuance of show cause notice and attended personal hearing extended to them on 16.06.2022. The adjudicating authority arrived at the conclusion that the classification of the said goods fall under CTH 27101920 which corresponds to "solvent 125/240(petroleum hydrocarbon solvent) as specified under standard IS 1745, and since the import was not canalized through authorized Agencies, hence import is in violation of the Import Policy, accordingly prohibited goods; he ordered absolute confiscation of goods under

Sections 111 (d) and 111 (m) of the Customs Act, 1962, but allowed to redeem the same for the purpose of export on payment of redemption fine of ₹ 75,000/- under the provisions of section 125 of Customs Act, 1962; imposed penalty of ₹30,000/- under Section 112 (a) of Customs Act, 1962. Since the office of the Commissioner (Appeals) was vacant, the appellant filed a writ petition before the Hon'ble High Court of Kerala at Ernakulam challenging the action of the Department. The Hon'ble High Court passed the following direction:-

- i. The 2nd respondent shall provide to the petitioner copies of all test reports/report relied upon in Ext.P2 order to establish that the goods imported by the petitioner are prohibited goods. This shall be done within one week from the date of receipt of a certified copy of the judgment;
- ii. A sample of the product shall also be permitted to be drawn by the petitioner for establishing that the goods in question are not prohibited goods. This shall also be permitted within a period of one week from the date of receipt of a certified copy of the judgment;
- iii. The petitioner shall file an appeal against Ext.P2 order before the first appellate authority within a period of ten days from today;
- iv. If such an appeal is filed within ten days from today, the appellate authority shall consider the appeal and dispose

of the same in accordance with law, within a period of one month from the date of receipt of a certified copy of this judgment, after affording to the petitioner an opportunity of being heard.

2.4. Pursuant to the High Court's order, the appellant filed an appeal before the learned Commissioner(Appeals), who in turn, upheld the order of the adjudicating authority and rejected their appeal.

2.5. The Department, however, has not implemented the observation of the Hon'ble High Court by issuing copies of all test reports and drawal of sample by the appellant to establish that the goods in question are not prohibited goods.

2.6. Against the order of the learned Commissioner(Appeals), the appellant approached this Tribunal on 17/01/2023 by filing an appeal under Section 129A of the Customs Act,1944 and also filed two miscellaneous applications referred as above.

3. Assailing the impugned order, the learned advocate for the appellant submits that they had imported 24.320M.T. of "industrial composite solvent" from overseas supplier M/s Encore Arabia Group, Kuwait against invoice No.044-112021 dt. 31/01/2022. On the basis of Chemical analysis report, invoice,

packing list etc. issued by the overseas supplier, they have filed Bill of Entry No.78752228 dt 15.3.2022 declaring the product as "industrial composite solvent" attracting classification under CTH 38140010 for clearance.

3.1. It is his contention that even though they did not accept the test reports, copies of which were not handed over to them, tests in private laboratory at Chennai confirmed to the parameters of the overseas certificate of analysis, and on enquiry with the Overseas supplier it was confirmed to Industrial composite solvent only, however, due to urgency in clearance of the goods to be used in their factory for manufacture of paints, they waived the show-cause notice and requested for assessment of the Bill of Entry anticipating a nominal redemption fine and penalty as import of the same is permitted through canalising agencies. Contrary to their expectation, the Additional Commissioner of Customs (Imports) by order dt. 01/07/2022 directed absolute confiscation of the goods, allowed redemption on payment of fine of Rs.75,000/- only for the purpose of re-export; also imposed penalty of Rs.30,000/-.

3.2. The Ld. Advocate submitted that even after the direction of the Hon'ble High Court the Appellants were not handed over the Test Reports nor sample was allowed to be drawn and sent to a Specialized Laboratory like Indian Institute of Petroleum, Dehradun to establish that the same are not prohibited goods.

The test reports were handed over to them now only after the direction of the Tribunal.

3.3. It is further submitted that since almost one and half year has been passed and drawl of sample and testing in a reputed Lab will cause further delay, the Appellants are keen to release the goods on payment of fine for its use in the factory.

3.4. The learned Advocate argued that the direction of absolute confiscation by the adjudicating authority, and redemption only for the purpose of re-export on payment of fine, is unsustainable in law as the import and use of the said goods is not completely banned, nor the import was in excess of the quantity permitted under the policy; the only breach of condition, if any, is that it should have been imported through a canalised agency. The appellant has never imported kerosene in the past for their use or sale, nor the present consignment was also imported with any such intention. The industrial solvent was imported for the purpose of its use in their factory for manufacture of paints. Therefore, re-export of the goods, being not a viable option, they would prefer to release the same on payment of fine and penalty.

3.5. The learned advocate has submitted that their *bona fide* approach is evident from the fact that at the time of exporting the goods by the overseas supplier, it was tested at the country of export and the test report enclosed with the invoice indicated

that it was industrial composite solvent. After import of the said goods when re-tested, by the Department found it to be Kerosene, but not industrial solvent; the import of which is allowed through canalised agencies. He has submitted that assuming without admitting that the imported goods is kerosene when tested in India, even then the said goods cannot be considered as prohibited goods being not imported in breach of the restriction of its import through canalising agencies. It is his contention that at best it could be treated as restricted one. He has also submitted that there is no evidence to the effect that the appellant are aware of the fact that the goods in question is kerosene and not industrial solvent. Therefore, the direction to confiscate the goods absolutely is unwarranted and exercise of discretion vested on the adjudicating authority under section 125 of the Customs Act, 1962 is contrary to the circumstances of the case; also the condition to re-export on payment of redemption fine of the confiscated goods is contrary to the provisions of Section 125 of the Customs Act, as nowhere under the said provision it is laid down that after allowing redemption of the confiscated goods on payment of fine, the goods can only re-exported. In support, he has referred to the judgment of Hon'ble Madras High Court in the case of CC(Chennai-II), Chennai Vs. Magal Engg. Tech Pvt. Ltd. [2021(378) ELT 409 (Mad.)] and in the case of Nathi Mal Rugan Mal Vs. CC, Nhava Sheva, Raigad [2018-TIOL-3335-CESTAT-MUM], SD Ramcides Crop Science Pvt. Ltd. Vs. CC, Chennai-II 2018 (369)ELT239(Tri-Chennai), Commissioner of customs, Cochin Vs. Office Devices

2009 (240) ELT 336(Ker.), Commissioner of customs(Export), Chennai Vs. Sri Venkateswara Enterprises 2014 (310) ELT 433(Mad.).

4. *Per contra*, the learned AR for the Revenue reiterating the orders submitted that the imported goods, after analysis in two laboratories found to be kerosene, the import of which is allowed only through canalised agencies; hence the said goods are prohibited goods. It is his submission that the adjudicating authority has rightly directed absolute confiscation of the goods being prohibited one; however, allowed to re-export the same on payment of appropriate redemption fine. It is his contention that there is no error in such direction in view of the judgment of the Hon'ble Supreme Court in the case of UOI Vs. Raj Grow Impex LLP [2021(377) ELT 145 (SC)] & Collector of Customs, Bombay Vs. Elephanta Oil & Industries Ltd. 2003 (152) ELT 257(SC) and the judgment of Hon'ble Madras High Court in the case of Chennai Marine Trading (P) Ltd. Vs. CC (Seaport –Import), Chennai [2014(304) ELT 354 (Mad.)].

5. In his re-joinder, the Ld. Advocate has submitted that the case laws cited by the Ld. AR for the Revenue is not applicable to the facts of the present case. In Raj Grow Impex LLP's case, the import made in excess of the quantity of Yellow peas was permitted under the policy knowing fully well that such excess was not permitted, and the excess quantity so imported, if allowed to

be used in India, it would have adversely affected the interest of Indian farmers, thus there is a conflict of private interest to public interest, hence, the Supreme Court upheld the condition of re-export on payment of fine. No such circumstances exist in the present case, as the goods were imported by the appellant was industrial composite solvent to be used by them in their factory in the manufacture of paints. Also, the judgement of Madras High Court in Chennai Marine Trading's case is not applicable as from the very beginning the importers were fully aware that what imported was R-22 Gas, a prohibited item, and mis-declared it as HCFC R-401A refrigerant gas only for the purpose of import admitted by the Director of the Appellant.

6. Heard both sides and perused records.

7. In the light of the above pleadings, the limited issue for determination is: whether in the facts and circumstances of the case, direction for absolute confiscation of the goods and allowing redemption of the same solely for the purpose of re-export on payment of fine and penalty is justified and sustainable?.

8. The goods imported by the appellant from the overseas supplier M/s. Encore Arabia Group for General Trading and Contracting Co. W.L.L, Kuwait has been declared as industrial composite solvent falling under chapter sub-heading 38140010 of Customs Tariff Act, 1975 on the basis of relevant documents viz.

invoice, certificate of analysis and packing slip etc. Also, the said goods have been imported by the Appellant for the purpose of its use in their own factory in the manufacture of paints by the appellant. It is also not in dispute, that industrial composite solvent, imported from the said country earlier by the appellant in March 2021, allowed to be cleared by the Customs against the declared chapter sub-heading 38140010 of Customs Tariff Act, 1975.

9. The allegation of the Department is that the goods imported when tested by the Revenue in their laboratory and on re-test in the BPCL laboratory, found to be Kerosene, whose import as per policy permitted through canalised agencies.

10. It is also an admitted fact that copies of both test reports were not handed over to the appellant nor further testing of sample was allowed by the Department to be drawn for test in a well-equipped reputed Laboratory. Being not satisfied with the said test reports, and the subject assessment order of the adjudicating authority directing absolute confiscation and imposing condition of re-export after payment of fine and penalty, they have approached the Hon'ble High Court of Kerala by filing a writ petition for appropriate relief. While disposing the writ petition, Hon'ble High Court has directed the Revenue to handover the test reports and allow the petitioner to draw samples for re-testing so as to establish that the goods imported in question are

not prohibited goods. Both the directions of the Hon'ble High Court were not complied with by the Revenue.

11. With the said grievance, the Appellant approached this Tribunal. During the course of hearing, on the direction of the Bench, the copies of test reports were handed over to the appellant and the appellant after going through the test reports initially insisted for further re-testing by a reputed laboratory but later submitted that in the event the goods allowed to be redeemed on payment of fine imposed for their use in the factory, they would not insist for re-testing of the samples as the delay in deciding the matter would result in greater loss than acceptance of release for its use in their factory on payment of fine and penalty. In this backdrop, the arguments advanced by both sides were analysed.

12. We find that the appellants are engaged in the manufacture of paints for which they import industrial composite solvent, a raw material, use it captively in the manufacture of paints. They have been importing the same goods earlier also, declaring it under the same chapter sub-heading 38140010 of Customs Tariff Act, 1975 on the basis of invoice, chemical analysis report supplied along with goods by overseas supplier; the Customs Department also assessed it accordingly accepting the same and no objection was raised. In relation to the present consignment, except re-testing the samples, the reports though disputed by the Appellant, no further investigation was carried

out, nor any statement of the appellant was recorded, whereby it could be inferred that the appellant had knowingly imported Kerosene but mis-declared it as industrial solvent.

13. If the re-test reports are accepted to be correct, the only breach of condition on the part of the appellant would be that they did not import the goods through canalised agencies. Such goods if imported through canalised agencies, there will be no restriction of its use in the country. In our opinion, such violation, in the circumstances of the present case, where the goods were imported under a valid certificate of analysis, invoice etc., but later found to be kerosene on retest, which are also in dispute, at best be considered as a technical breach and the goods imported to be considered as restricted one and not absolutely prohibited, meant to be used in the factory of the appellant.

14. Besides, we find that once the goods are allowed to be redeemed on payment of appropriate fine, the condition of re-export tagged with it in the facts and circumstances of the present case is unwarranted. In our opinion, the judgment of the Hon'ble Supreme Court in the case of Raj Grow Impex LLP (*supra*) is not applicable to the facts of the present case as in that case, the goods, namely Yellow peas were knowingly imported in excess than the permissible quantity under the Policy and if allowed to be released on payment of fine to be sold in India, then it would have adversely affected the interest of indigenous farmers. In that

scenario, giving due weight to the public interest in contrast to the interest of few importers, the Hon'ble Supreme Court upheld the imposition of fine and penalty with the direction of re-export of the goods. It is observed as :

"81. *It needs hardly any elaboration to find that the prohibition involved in the present matters, of not allowing the imports of the commodities in question beyond a particular quantity, was not a prohibition simpliciter. It was provided with reference to the requirements of balancing the interests of the farmers on the one hand and the importers on the other. Any inflow of these prohibited goods in the domestic market is going to have a serious impact on the market economy of the country. The cascading effect of such improper imports in the previous year under the cover of interim orders was amply noticed by this Court in Agricas (supra). This Court also held that the imports were not bona fide and were made by the importers only for their personal gains.*

82. *The sum and substance of the matter is that as regards the imports in question, the personal interests of the importers who made improper imports are pitted against the interests of national economy and more particularly, the interests of farmers. This factor alone is sufficient to find the direction in which discretion ought to be exercised in these matters. When personal business interests of importers clash with public interest, the former has to, obviously, give way to the latter. Further, not a lengthy discussion is required to say that, if excessive improperly imported peas/pulses are allowed to enter the country's market, the entire purpose of the notifications would be defeated. The discretion in the cases of present nature, involving far-reaching impact on national economy, cannot be exercised only with reference to the hardship suggested by the importers, who had made such improper imports only for personal gains. The imports in question suffer from the vices of breach of law as also lack of bona fide and the only proper exercise of discretion would be of absolute confiscation and ensuring that these tainted*

goods do not enter Indian markets. Imposition of penalty on such importers; and rather heavier penalty on those who have been able to get some part of goods released is, obviously, warranted."

15. Similarly, the judgment of Hon'ble Madras High Court in the case of Chennai Marine Trading (P) Ltd. (supra) is also not applicable to the facts of the present case as the evidence in that case revealed that the Director of the company was aware that the imported items was Refrigerant Gas (R-22), a prohibited item for import into India and have mis-declared the product as HCFC R-401A refrigerant gas only to sell in the local market.

16. While exercising the discretion vested with the authorities under Section 125 of the Customs Act, 1962 utmost care need to be taken, and it should not be exercised in a mechanical way. Their Lordships in the said aforesaid case observed as:

"79. *As noticed, the exercise of discretion is a critical and solemn exercise, to be undertaken rationally and cautiously and has to be guided by law; has to be according to the rules of reason and justice; and has to be based on relevant considerations. The quest has to be to find what is proper. Moreover, an authority acting under the Customs Act, when exercising discretion conferred by Section 125 thereof, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The purpose behind leaving such discretion with the Adjudicating Authority in relation to prohibited goods is, obviously, to ensure that all the pros and cons shall be weighed before taking a final decision for release or absolute confiscation of goods."*

17. In the present case, the appellants have imported goods viz. Industrial solvents for consumption in their factory for manufacture of paints. Hence, the interest of public would not in any manner be affected if the said goods are allowed to be used by the Appellant for their own use even if found to be a different item than imported, the import of which is allowed only through canalized agencies. There is no allegation that the import was not *bona fide* and the Appellant knowingly imported kerosene in the guise of Industrial solvent not for use in their factory but for sale. But, simultaneously, it cannot be ignored that that on the basis of the re-test reports the goods are liable for confiscation and ground for imposition of penalty, till further test of the samples resulting into confirmation of the overseas chemical analysis report. Thus, the goods are liable for confiscation but not absolute confiscation as held by the adjudicating and upheld in the impugned order.

18. In view of the above findings, we do not see merit in the Order of the lower authorities directing absolute confiscation and allowing redemption solely to re-export on payment of redemption fine and penalty. Hence, the impugned order is modified to the extent of setting aside the direction of absolute confiscation and condition of re-export for redemption on payment of fine and penalty and hold that the goods are liable for confiscation; in the event the appellant choose to redeem the goods on payment of fine and penalty, he shall be allowed to exercise the said option and after payment fine of Rs.75,000/- and

penalty of Rs.30,000/- as determined by the adjudicating authority, the goods be released to the Appellant forthwith. The appeal is disposed of in above terms. Miscellaneous applications are also disposed of.

(Pronounced in open court on 09/06/2023)

(Dr. D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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