

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

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 51646 of 2019 [SM]

[Arising out of Order-in-Appeal No.CC(A) CUS/D-II/ICD-TKD-IMP/12/2019 dated 08.04.2019 passed by the Commissioner of Customs (Appeal), New Delhi].

M /s.MTI Materials Pvt. Ltd.

...Appellant

Unit No.901A, 9th Floor, D Mall
Netaji Subhash Palace
Pitampura
Delhi – 110 034

VERSUS

The Commissioner of Customs, Delhi

...Respondent

ICD-TKD Import
Tughlakabad
New Delhi-110 020

APPEARANCE:

Mr. Ravinder Pal Jindal, Advocate for the Appellant

Mr.Ravi Kapoor, Authorized Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: **03.08.2021**

PRONOUNCED ON: **23.09.2021**

FINAL ORDER No. 51835/2021

RACHNA GUPTA

The appellant in the present case had filed two different claims of refund for Rs.11,94,413/- and Rs.5,10,365/- for the identical issues of custom duty paid on pilfered goods imported at ICD Tuglakabad, New Delhi Port. The refund claims were initially

rejected vide order dated 07.02.2012 on the ground that goods were pilfered after the order of clearance by the Custom Officer. The said order was challenged. The Appellate Authority of the Department, however, restored the refund application with a direction to pass a speaking order about applicability of Section 27 of the Act. The refund claim was again rejected vide order No.631/2016 dated 11.05.2016 again on the same ground that the pilferage was noticed after the out of charge order for clearance for home consumption was already given by the Custom Officer in terms of Section 47 of the Customs Act. The said order was challenged before Commissioner (Appeals) who vide the order bearing No.12/2019-20 dated 08.04.2019 has rejected the appeal. Still being aggrieved the appellant is before this Tribunal.

2. I have heard Shri Ravinder Pal Jindal, learned Advocate for the Appellant and Shri Ravi Kapoor, learned Authorized Representative for the Respondent.

3. It is submitted on behalf of the appellant that the shortage was detected at the time of joint survey conducted before the Customs and other related authorities such as, Shipping-line, CHA, Surveyor and Party Insurance Surveyor on 23.05.2011. It is impressed upon that the presence of all these authorities is sufficient to hold that the pilferage took place before the actual clearance of goods for home consumption. The refund claim filed in terms of Section 23 of the Customs Act cannot be rejected on the ground that the out of charge order has already been issued

and that the pilferage has been noticed after the said order. It is also mentioned that the pilferage was noticed by the importer on 18.05.2011 itself i.e. on the day when out of charge order was passed. This fact sufficiently indicates the greater possibility of pilferage to have taken place before the out of charge was given. Learned Counsel has relied upon the decision of **Hindustan Petroleum Corporation vs. Collector of Customs reported in 1984 (18) ELT 358 (Tri.-Mum.)** wherein it was held that claim for payment under Section 23 (1) arises even after an order of home consumption is made provided the actual physical delivery has not been taken. It is impressed upon that till the physical delivery is taken after the order for home consumptions the goods continued to be under the control of Customs Authorities i.e. in the custody of Port Trust Authorities upon which the importer has no control. Accordingly, in alternative, learned Counsel has prayed for applicability of section 45 (3) to the effect that liability if any, in the present case may be for the custodian of the goods i.e. CONCOR and the appellant has wrongly been held liable for the payment of the duty for which the impugned refund claim has been filed. Emphasis has been laid on the decision in the case of **ITI Ltd.vs.CC, Chennai reported in 2002 (149) ELT 991 (Tri.-Chennai)**. With these submissions, order under challenge is prayed to be set aside and appeal is prayed to be allowed.

4. While rebutting these submissions learned D.R. has mentioned that the remission of duty in terms of section 23 of Customs Act, 1962 is permissible only for the goods lost or

destroyed but for the pilfered goods the remission is prohibited by the Legislature. For such goods Section 13 only shall be applicable. But only in a situation where the goods are noticed to be pilfered prior the out charge order is issued by the proper Custom Officer. Since in the present case, the said OOC (out of charge order) was already issued prior the appellant noticed pilferation, the adjudicating authorities have rightly rejected the claim. While laying emphasis upon the decision in the case of **Bharat Electronics Ltd. vs. Collector of Customs reported in 1983 (E.C.R.) 401 (Tri.-Chennai)** and on the decision of **Zenith Bearing Enterprises vs. Collector of Customs reported in 1995 (75) ELT 801 (Tri.-Mumbai)**, learned D.R. has prayed for the dismissal of the impugned appeal.

5. After hearing the rival contentions and perusing the record of the appeal and also going through the decisions relied upon by the respective parties, I observe and hold as follows:-

Apparently and admittedly, the importer filed two Bills of Entries bearing No.3510981 and 3514989 both dated 16.05.2011 for clearance of Tin Ingots imported by him. The bills were assessed on the same day itself. Appellant deposited the requisite duty on 18.05.2011 (17.05.2011 being a holiday). On 18.05.2011 itself the goods were given out of charge from Customs without inspecting the container and without subjecting the goods to any examination. It was only at the time of loading i.e. 19.05.2011 that the appellant found that the container was not at the proper place as per the location assigned to it by CONCOR. It is on 20th

May, 2011 that appellant applied for joint survey of his container to the Shipping line as well to the CONCOR. Pursuant where to a joint survey was conducted on 23.05.2011 noticing the shortage in the goods on account of pilferation. With these admitted facts that the appellant had filed his refund seeking remission of the duty already paid by him in terms of section 23 of the Customs Act, 1962. Section 23 reads as follows:-

"Section 23 : Remission of duty on lost, destroyed or abandoned goods -

(1) Without prejudice to the provisions of Section 13, where is shown to the satisfaction of the Assistant Collector of Customs that any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption, the Assistant Collector of Customs shall remit the duty on such goods.

(2) The owner of any imported goods may at any time before an order for clearance of the goods for home consumption has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon."

5.1 The bare perusal makes it clear that the remission of duty is permissible for shortage on account of any loss or damage other than pilferation. I observe that for pilfered goods only section in the Customs Act, 1962 is Section 13 which reads as follows:-

"Section 13

If any imported goods are pilfered after the unloading thereof and before the proper officer has made an order for clearance for home consumption or deposit in warehouse, the importer shall not be liable to pay the duty leviable on goods except where such goods are restored to the importer after pilferage."

6. Two important admitted facts are relevant for present adjudication:-

- (1) There is no other reason for the loss or damage of the impugned goods other than pilferage.
- (2) That the shortage was noticed after the out of charge was given by the appropriate officer.

6.1 The appellants sole contention is that the noticed pilferage in the given facts and circumstances was the pilferage which had occurred prior the out of charge was given, accordingly, benefit of remission of duty be given to the appellant. For the purpose the above two said provisions need to be discussed and distinguished:-

Meaning	Section 13	Section 23
Pilfer	Pilfer means to steel specially in small quantities.	Words lost or destroyed refers to total loss of goods other than on account of pilferage.
Duty	Importer shall not be liable to pay duty	If already paid, it will be remitted.
Restoration	If goods are restored after pilferage, importer shall be liable to pay duty	Restoration is not possible
Warehousing	Does not apply to section 13	It applies to Section 23
Onus to prove	Does not lie on importer as it comes during examination of Officer.	Onus is upon the importer to prove.
Time of occurrence	After unloading but before order of clearance.	Before clearance for home consumption.

6.2 Above comparison makes it abundantly clear that Section 23 deals with a situation of complete loss or destruction of the imported consignment either in whole or in part and is not applicable to a loss which is not complete but is on the account of pilferation. It is Section 13 which specifically refers to loss by way of pilferation. It is also abundantly clear that for applicability of

both the Sections the loss or destruction/pilferage should have occurred prior the order of clearance for home consumption is passed. Since, the appellant has taken a plea that the shortage was noticed on the date of order for clearance itself remission be allowed, it is important to appreciate the meaning of clearance of goods for home consumption. Section 47 defines the same as follows:-

SECTION 47. Clearance of goods for home consumption. □

(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:

Provided that the Central Government may, by notification in the Official Gazette, permit certain class of importers to make deferred payment of said duty or any charges in such manner as may be provided by rules.

(3) The importer shall pay the import duty

□

(a) on the date of presentation of the bill of entry in the case of self assessment; or

(b) within one day (excluding holidays) from the date on which the bill of entry is returned to him by the proper officer for payment of duty in the case of assessment, reassessment or provisional assessment; or

(c) in the case of deferred payment under the proviso to subsection (1), from such due date as may be specified by rules made in this behalf, and if he fails to pay the duty within the time so specified, he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not less than ten per cent. but not exceeding thirty-six per cent per annum, as may be fixed by the Central Government, by notification in the Official Gazette.

Provided that the Central Government may, by notification in the Official Gazette, specify the class or classes of importers who shall pay such duty electronically:

Provided further that] where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill of

entry to him shall be deemed to be the date of such commencement for the purpose of this section :

Provided also that] if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section.

6.3 The bare perusal makes it clear that the clearance for home consumption implies that the Customs duty on import of the goods has been discharged and the goods are therefore, clear for utilization or consumption. The goods may instead of being cleared for home consumption be deposited in warehouse and cleared at a later time as is mentioned in Section 49 of the Customs Act, 1962. In that case, the collection of Customs Duty will be deflected till duty on such goods is paid for them to be cleared for home consumption. The Revenue for the Government is safeguarded by the importer executing a bond binding himself in a sum equal to twice the amount of duty assessed on the goods at the time of import. It becomes clear that the payment of duty is the stage for the order of out of charge and thus, amounts to be the stage for clearance of goods for home consumption. Hence, the idea of physical clearance of goods is irrelevant for the purpose.

7. Further, I observe that the common thing for section 13 & 23 is the time of applicability of these provisions i.e. after the unloading of the imported goods but before the proper Officer makes an order for clearance of imported goods for home consumption. Thus, the importer is not liable to pay the duty on the goods if pilfered during this period (as per Section 13).

Similarly, importer shall be liable for remission of duty for the goods if lost and destroyed during this period, but not for the pilfered goods. Since all the goods imported in India and cleared for home consumption or liable to Customs Duty, the intention of Legislature from both these provisions is clear that the goods lost or destroyed permanently will never see the market of home consumption but the pilfered goods shall come to the market thus resulting into evasion of such duty.

8. Also I would like to refer to the fact that Section 23(1) of the Act was amended by clause 48 of the Finance Bill, 1983, which reads as follows:-

“48. In Section 23 of the Customs Act, in sub-section(1). –

- (a) For the words “where it is shown”, the words and figures “without prejudice to the provisions of section 13, where it is shown” shall be substituted;
- (b) After the words “have been lost’, the brackets and words “(otherwise than as a result of pilferage)” shall be inserted.’

The amended provision read thus:

“Without prejudice to the provisions of section 13, where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost otherwise than as a result of pilferage or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods.”

The note on clause 48 of the Finance Bill, 1983 reads as follows:-

“Clause 48 seeks to amend section 23 of the Customs Act, 1962, to exclude from its purview goods pilfered before their clearance or home consumption.”

9. It is thus clear that only with the amendment effected by the Finance Bill, 1983, Section 23 (1) of the Act excluded from its purview goods pilfered before their clearance for home consumption being that in respect of pilferage of imported goods Section 13 alone and not Section 23 is applicable. It would be reasonable to infer that prior to the amendment, Section 23(1) did not exclude from its purview goods pilfered before their clearance for home consumption.

10. Reverting to the facts of the present case, the out of charge order i.e. order for clearance for home consumption was given on 18 May, 2011. Pilferage was noticed after the joint survey which was conducted on 23 May, 2011 i.e. after the said OOC was passed. It will not Section 23 which deals only with the permanent loss or damage to the goods that too before OOC but section 13 as shall be applicable which deals only with respect to goods pilfered but only if pilferage is noticed prior OOC. None is the fact of the present case. Neither duty exemption under Section 13 of Customs Act nor the remission of duty under Section 23 of Customs Act is available to the appellant. The question of refund of duty paid does not arise.

11. Hence, I do not find any infirmity in the order under challenge when the benefit of remission of duty as applicable under Section 23 has been denied to the appellant while rejecting the refund of duty as was already paid by the appellant for the pilfered goods.

12. Coming to the another submission that irrespective of applicability of Section 13 importer was still not liable as the goods were still in the possession of the custodian (CONCOR) even after the order of clearance (OOC) was passed. I am not in agreement with that submission as I am of the opinion that once an out of charge order has been given it will clearly indicate that the customs are no longer interested in keeping the goods and the importers are at liberty to clear the goods. If the importer continues to keep the goods in Custom area under the custody of the custodian, the Legislature has intended that it is at their own risk and responsibility, in so far as duty liability is concerned in respect of the pilferage. I draw my support from the decision in the case of **Zenith Bearing Enterprises** (supra) as relied upon by the learned D.R. Since the goods pilfered and stolen has to go into home consumption, duty has to be paid by the importer. From both these provisions, it is clearly apparent that Legislature has thought it fit to consider remission of duty held in the Customs area only for the period required for completion of Customs formalities and not beyond that. Appointment of custodian is mainly for the purpose of getting the customs

formalities completed. Hence, his responsibilities also continued only to the stage when out of charge order for clearance either for home consumption or for depositing in warehouse is passed by the proper officer. Custodian is not suppose to take the custody of goods treating the entire custom area as a warehouse. If the importers still choose to keep the goods in the custom area, it is possible only at the importers' own risk. Hence the provisions of Section 45 when read with section 47, 13 & 23 harmoniously, make it abundantly clear that the submissions made on behalf of appellant are not acceptable to the given facts and circumstances, I do not agree with the decision relied upon by them in **Hindustan Petrochemical** (supra).

13. I do not find any reason to interfere into the order under challenge. Same is hereby upheld. As a result, the appeal stands dismissed.

[Order pronounced in the open Court on **23.09.2021**]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita