

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/222 /2006 - CU[DB]

Date 23/09/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S ROSHANALAL LALIT MOHAN
7 GADODIA MARKET, KHARI BAOLI, DELHI
M/S ROSHANALAL LALIT MOHAN

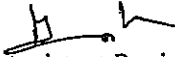
Appellant

Vs
Respondent

THE COMMISSIONER OF CENTRAL EXCISE &
CUSTOMS

I am directed to transmit herewith a certified copy of Final order No. C/341/2008-CUS. DATED 06.08.08
passed by the Tribunal under Section 129, (B) of the Customs Act, 1962 & Financial Act 1994 relating to Service Tax




Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent THE COMMISSIONER OF CUSTOMS,
DELHI III, UDYOG VIHAR, VANIJYA NIKUNJ,
UDYOG MINAR PHASE V, GURGAON

2. Adv. / Consult
MR.H.S.MEW, ADV., 52 B, UPKAR APPTS,
MAYUR VIHAR PHASE EXTN, DELHI-91

3 S.D.R

4 J.C.D.R.

5 Bar association, CESTAT, New Delhi

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12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar, Chennai

13 Taxindiaonline.com Pvt.Ltd. B-XI/8183, Vasant Kuni, New Delhi - 110070

14 Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

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Assistant Registrar
(Customs Appeal Branch)

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**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
R.K. PURAM, W.B. NO.2, PRINCIPAL BENCH
NEW DELHI, COURT NO.I**

Custom Appeal No. 222 of 2006

[Arising out of Order-in-Appeal No. 62/GRM/GGN/2006 dated 21.02.2006 passed by the Commissioner of Central Excise & Customs, Gurgaon]

Date of Hearing/ decision: 06.08.2008

For approval and signature:

Hon'ble Mr. Justice S.N. Jha, President

Hon'ble Mr. M. Veeraiyan, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	<i>No</i>
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	<i>Yes</i>
3	Whether Their Lordships wish to see the fair copy of the Order?	<i>Seen</i>
4	Whether Order is to be circulated to the Departmental authorities?	<i>Yes</i>

M/s Roshanlal Lalit Mohan

Appellant

Vs.

CCE &C, Delhi-III

Respondent

Appearance:

Mr. H.S. Mew, Advocate for the Appellant

Mr. Fateh Singh, Authorized Representative (DR) for the Respondent

CORAM: Mr. Justice S.N. Jha, President
Mr. M. Veeraiyan, Member (Technical)

Final ORDER No. C/341/08

Per M. Veeraiyan:

This is an appeal against the order of the appellate Commissioner No. 62/GRM/GGN/2006 dated 21.02.2006 by which the order of the original authority rejecting the refund claim has been upheld by him.

2. Heard both sides.

3. The relevant facts, in brief, are as follows-

(a) The appellant imported cloves and filed bills of entries dated 17.7.2004 declaring the quantity as 200 MT of cloves (Net Weight).

(b) As the import of cloves were subject to the provisions of the Prevention of Food Adulteration Act, (PFA Act) 1954 and PFA Rules, 1955. Samples were drawn and sent for test by Central Food Laboratory (CFL). (Meanwhile the goods were kept in warehouse.) The samples were found to contain organic extraneous matters in quantity more than the maximum prescribed limit and hence held to be adulterated. On request by the party, Commissioner on 29.9.2004 permitted segregation of extraneous matter from the cloves and the cleaning operation was undertaken under the supervision of Customs staff and in the presence of representative of custodian. After segregating the extraneous materials net weight of the cleaned cloves were found to be 190.405 MTs. Fresh samples were drawn on 26.10.2004 and sent for re-testing. As there was dispute whether re-testing could be done under Prevention of Food Adulteration Act, 1954, the party filed petition before the High Court and in pursuance of order dated 22.2.2005 of Hon'ble High Court of Delhi, the samples were re-tested and as per report dated 11.03.2005, the fresh samples were found to be of required standards. The goods were cleared on 18.3.2005 and at the time of clearance the consignment was subject to weighment and the net weight at the time of clearance of goods was found to ^{be} 188.236 MTs. The consignments were cleared on payment of duty on the quantity of 200 MT as per the manifest and for which the bill of entry was filed.

4. The appellant thereafter contended that the customs authorities have delivered only 188.236 MTs and therefore there was loss which was for reasons other than pilferage and therefore they were eligible for remission under section 23 of the Customs Act and accordingly claimed refund of Rs. 11,04,843/- on total quantity of 11.746 MT stated to be short delivered to the importer. The claim was

rejected by the original authority and the order of rejection was upheld by the first appellate authority.

5. | Learned Advocate appearing for the appellant submits that they imported 200 MTs of cloves; filed bill of entry for the same quantity and ultimately paid duty on 200 MT. The examination report of the examining officers indicate that "the goods on open and examination found to contain cloves description weight of the goods as per invoice and bill of lading". Inasmuch as the customs have failed to deliver the entire quantity of 200 MT as found from the bill of entry, the demand of duty for the entire quantity was not justified, the remission should have been granted and refund should have been allowed.

○ 5. He relies on the decision of the Tribunal in the case of Ferro Alloys Corporation Ltd., vs. CC&CE reported in 1991 (52) ELT 268 (Tribunal) and the decision of the single Member Bench of the Tribunal in Sonal Vyapar Ltd., vs. Collector of Customs reported in 1993 (65) ELT 653 (Tribunal).

6. Learned DR submits that this is not a case of any loss of goods; at the most it is a case of loss of weight due to long storage; and the reasons for long storage; and delay in customs clearance was not attributable to the Customs authorities as the goods were not in conformity with the provision of the Prevention of Food Act and the dispute having been resolved only by the order of the High Court dated 22.2.2005.

7. We have carefully considered the submissions from both sides. We have not been shown that the goods have been physically weighed at the time of landing in the port or subsequently when it was received in the warehouse. The goods have been imported in bags of 50 kg. net weight as seen from the record. The examination report of the examining officers, in our opinion, merely indicate that the goods were cloves as per invoice, the weight declared in the invoice/bill of lading tallied with the weight as per the recording on the bags. Further, the clearance of consignment was delayed as the report of Central Food Laboratory held that the goods were adulterated and therefore not permissible to be cleared

from the customs area to the market and causing health hazardous to the people. However, efforts have been made and extraneous mater appears to have been segregated and after segregation a quantity of only 190.405 MT was found to be of good quality in October 2004. Even after this, there was delay in clearance. The dispute whether the re-testing of such cleaned cloves could be done under PFA Act was resolved by the Delhi High Court order dated 22.2.2005. In view of above there was a further loss of weight of about 2.169 MT. We are not able to appreciate that there was any loss of imported goods. It is a peculiar case where contaminated material to the tune of about 10 MT was found and segregated and the balance material was permitted to be cleared. Further loss of weight of about 2.45 MT is attributable to moisture loss. We have not been shown that the appellant has paid a lesser value to the foreign supplier based on alleged shortage. If it was wet season, there was a possibility of increase in weight. In our considered opinion, the variation in weight due to weather condition cannot result in loss or gain in the quantum of goods. The appellants claim include claim for abatement of extraneous material of about 10 MT. This also cannot be appreciated.

8. Reliance sought to be placed on the decision of the Tribunal in the case of Ferro Alloys Corporation Ltd., (supra) which dealt with "break bulk item" namely coke to the present case is not appropriate. The coke was being loaded not in pre-packed packages and the actual quantity was determined based on "draft survey method", an internationally accepted method of ascertaining quantity in respect of such break bulk. It would be appropriate to mention that similar method of determining /estimating the quantity of liquid bulk by 'dip reading' is in vogue in international trade. The present case does not involve determining the quantity by any such method.

9. The decision of the single Member Bench in the case of Sonal Vyapar Ltd., (supra) is also not applicable to the present facts of the case. In the said case it appears that subject goods were cleared from the port area and they were being

subject to weighment and it was treated as a case of short receipt or delivery of goods. Whether the short receipt was due to short landing of the goods or otherwise is not clear from the facts described therein. Therefore, we hold that the said case cannot be treated as akin to the facts of the present case.

10. Section 23 of the Customs Act envisages remission of duty on account of loss, destruction or abandonment of the goods. The goods imported in the instant case was clove. What is said to have been lost is the organic extraneous mater i.e. waste which the imported goods carried and for which the appellant have to blame themselves. It is clear that if the goods had not carried the extraneous matter beyond the prescribed limit and therefore adulterated and hazardous to the health of the people at large in view of the provisions of PFA, they would have been delivered the quantity of goods which they had imported. As the loss does not relate to loss of 'goods', the provisions of Section 23 are not attracted and the appellant was not entitled to remission of duty.

11. In the light of the above, we hold that this was not a fit case for granting remission in terms of Section 23 of the Customs Act. Therefore, the order of the original authority as upheld by the Commissioner (Appeals), in rejecting the refund claim is proper and legal and no interference is warranted from us.

○ 12. Appeal is rejected.

[Dictated and pronounced in the open Court on 05.09.2008]

(Justice S.N. Jha)
President

[M. Veeraiyan]
Member [Technical]

[Pant]