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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

SINGLE MEMBER APPEAL BRANCH

Appeal No. C/502 /2008 – SM[BR] Date 22/07/2010

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

To :
M/S OM UDYOG (JEEVAN JAIN, PROP)
E-403, PHASE-VI, FOCAL POINT LUDHIANA (PB)

M/S OM UDYOG (JEEVAN JAIN, PROP) Appellant

Vs

C.C. (PREVENTIVE) AMRITSAR Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 780 / 2010 –SM[BR] dated 13.7.2010 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   C.C. (PREVENTIVE) AMRITSAR
   CUSTOM HOUSE, CENTRAL REVENUE BUILDING, THE MALL, AMRITSAR 143001.
2. Adv. / Consult
   MR.BIPIN GARG
   B-1/1289,A-VASANT KUNJ, NEW DELHI

3 S.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14 Office Copy
15 Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. III

Customs Appeal No. 502 of 2008-SM(BR)

[Arising out of Order-in-Appeal No. 02/Cus/2008 dated 28.2.2008 passed by the Commissioner of Customs(Prev), Amritsar]

For approval and signature:

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?	:	Yes
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3. Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4. Whether Order is to be circulated to the Departmental authorities?	:	Yes

M/s. Om Udyog — Appellants

Vs.

Commissioner of Customs Amritsar — Respondent

Appearance: Shri Bipin Garg, Advocate for the Appellants
Shri I. Baig, SDR for the Respondent

Date of Hearing /decision: 2.7.2010/ 13.7.2010

Final **ORAL ORDER NO.** 780/2010 SM (Br)

Per M. Veeraiyan:

This is an appeal against the order of the Commissioner (Appeals) No. 02/Cus/2008 dated 28.2.2008.

2. Heard both sides extensively.

3. Relevant facts, in brief, are that the appellants imported four consignments of used lubricant oil in 5488 drums from M/s. Vancy Scrap Trading, UAE and filed Bill of Entries as detailed below:

S.No.	B/E No. & Date	Quantity	CIF Value
1	29 dated 7.4.97	1764 Drums	7,65,238
2	88 dated 28.4.97	980 Drums	4,25,131
3	121 dated 2.5.97	1372 Drums	5,93,867
4	122 dated 2.5.97	1372 Drums	5,93,867

4.1 The department was of the prima facie view that the used lubricating oil was hazardous waste oil as referred to in Serial No. 10 of the Schedule to the Hazardous Waste (Management & Handling) Rules, 1989 and the same have been imported without NOC certificate from the Pollution Control Board as used waste lubricating oil. The department drew samples and forwarded them to Chemical Examiner CRCL in Delhi and also to Punjab Test House, Ludhiana seeking to ascertain as to whether

"1) It is the "waste oil & oil emulsion" as specified against waste category No. 10 to schedule to the Hazardous waste (Management & Handling) Rules.

2) It is hazardous or toxic waste as envisaged under the said rules.

3) The sample contains:-

i) Poly chlorinated biphenyles (PCB)

ii) Poly chlorinated terphenyles (PCT)

iii) Poly Brominated biphenyles (PBB)"

4.2 The report from CRCL was categorical that the sample was not an oil emulsion and was free from PCB, PCT and PBB; that it could be used as lubricating oil. However, on the issue whether used lubricating oil in question would fall under the waste category at S.No.10, the Chemical Examiner recommended that the matter should be referred to Ministry of Environment and Forests or to the Central Pollution Control Board, Delhi.

4.3 The Punjab Test House in their report gave opinion which is as under:

"Result:
The sample contains more than 70% by weight of petroleum oil obtained from Bituminous minerals. Its flash point is above 98.5° C and does not contain waste soluble inorganic compound or organic compound i.e. PCB, PCT & PBB. Thus it is neither hazardous nor toxic.
So the sample is used lubricating oil is not a waste oil and oil emulsion as specified against waste category No.10 to schedule to hazardous waste (Management and Handling) Rule, 1989.
As it is not hazardous or toxic waste as envisage under the said Rule. This is safe for storage Handling and use."

4.4 It appears that the matter was referred to Ministry of Environment and Forests through Central Board of Excise and Customs who has opined vide their letter No.478/33/96-L.C. dated 17.9.1997 that the imports of hazardous waste should be considered illegal, if the importer did not have a valid NOC from the State Pollution Control Board or that if the importer did not have a valid licence for imports.

4.5 Mentioning the above letter the authorities have provisionally released the goods to the party on supardari on execution of bond with

20% Bank guarantee as per order dated 6.6.1997 with the condition that they should not remove, dispose of, part with or use the said oil till the final decision in the matter. It appears that the appellants have removed ~~the~~ and disposed the goods entrusted to them under supardari and an FIR has been filed on 7.4.97 for such unauthorised disposal by the party.

4.6 A show cause notice dated 11.2.1998 was issued proposing confiscation of waste oil and proposing penal action.

4.7 The original authority by the impugned order confiscated the goods valued at Rs.23,78,103/-. However, since the goods were not available for confiscation, he imposed a redemption fine of Rs.6,00,000/- and ordered the same to be appropriated from the Bank Guarantee furnished by the appellants. He also imposed a penalty of Rs.Five lakh on the proprietor of the appellants.

5.1 Learned Advocate for the appellants submits the following: They have imported used oil; the said oil cannot be treated as waste oil. In other words, every used oil cannot be treated as waste oil. S. No.10 of the schedule to the Hazardous Waste (Management and Handling) Rules, 1989 refers only to waste oil. He contends that what they have imported is only used oil, the same cannot be treated as waste oil and they are not required to produce NOC certificate from Pollution Control Board. The report of CRCL is also referring to imported items as used lubricating oil and it also says that the same is not oil emulsion. The report of Punjab Test House clearly gives a finding that the imported goods are neither waste oil nor oil emulsion. In these circumstances, the requirement of NOC is not warranted.

5.2 He also refers to Cenvat Credit Rules wherein in the context of removal of capital goods, two categories of Capital Goods have been envisaged namely, removal of "used capital goods", and removal of capital goods as "waste and scrap". He submits that on the same analogy, used lubricating oil cannot be treated as waste oil and requiring NOC from Pollution Control Board under the provisions relating to hazardous waste (Management and Handling) Rules. The clarification of the Ministry of Environment is with reference to waste oil. If what was imported was waste oil, the import without production of NOC from the Pollution Control Board is a violation and also the import by trader can be violation. In the present case, they have not imported waste oil.

5.3 He also submits that, as claimed by them in their appeal memorandum, they are not traders but are engaged in the manufacture of re-refined lubricating oil and industrial oil and therefore, restriction applicable to the traders does not arise.

6.1 Learned SDR made following submissions: What was imported by them is undisputedly 'used oil" as has been described by them . There are only two categories of oil either they are virgin oil or used oil. The used oil has to be treated as waste oil. He relies on the decision of the Tribunal in the case of Oil Processors Pvt. Ltd. vs. CC, Mumbai [1996 (87) ELT 731 (Tri) wherein it has been held that "there does not appear to be any distinction made between used oil and waste oil". It has also been held that "the phrase waste oil used in the Para 156(H) at Entry No. 8 has to be read as to also covering the used oil".

6.2 He also draws my attention to the communication from Pollution Control Board addressed to the Assistant Commissioner, Ludhiana by which it has been clarified that import authorisation for import of used lubricating oil for trading purposes has already been refused as there was no provision under the Rules to give permission / authorisation for import of waste oil for trading purposes. He also submits that as clarified by the Pollution Control Board, the Punjab Test House is not authorised laboratory of Ministry of Environment & Forests for carrying out such analysis. Therefore, he submits that no reliance should be placed on the report of Punjab Test House, Ludhiana.

6.3 Merely because samples were sent to two laboratories, the report from unrecognised laboratory cannot be binding on the authorities. He also submits that communication from the Pollution Control Board is to the effect that even used oil requires no objection certificate from Pollution Control Board for the purpose of import and that no such permissions is being given to any traders. He draws my attention to the show cause notice where specifically allegation was made that they did not have valid no objection certificate and that they did not have the evidence of being actual users and this fact has not been contradicted by any evidence by the appellants before the original authority. The original authority has also clearly held that the appellant, as a trader has imported these consignments in the absence of no objection certificate from State Pollution Control Board and that they had no authorisation of handling hazardous waste. A mere averment in the appeal memorandum, without supporting any evidence, that they are in the manufacture of re-refining lubricating oil and industrial oil do not make them as actual user and not a trader. He also submits that the appellants have unauthorisedly removed and disposed of the goods entrusted to them in supardari. No evidence whatsoever has been produced by them before the original authority regarding actual use of the hazardous material.

7.1 I have carefully considered the submissions from both sides and perused the records. The departments' contention is that import of waste oil is permissible only on the basis of valid licence for processing and reuse as per the EXIM Policy 1992-1997; that import of waste oil also requires no objection certificate from Pollution Control Board; and that as opined by Ministry of Environment and Forests, in case of import of waste oil, imports are considered illegal if :

a) the exporter has not been granted permission by the Ministry of Environment & Forests;

b) the importer does not have a valid 'NOC' from the State Pollution Control Board;

c) the importer does not have valid licence for imports; and

d) is not an actual user and does not have a valid authorisation for handling hazardous wastes.

It is also the contention of the Department that the appellant is only a trader as alleged in the show cause notice and the claim by the appellant that they are actual users is not supported by any evidence.

7.2 Thus, narrating the Policy provisions and the Regulations relating to hazardous waste, the department holds that the used lubricating oil imported by the appellants are nothing but waste oil and therefore the import is in violation of the prohibition and therefore, the goods are liable for confiscation and penalty is also imposable.

7.3 The EXIM Policy and the Hazardous Waste (Management & Handling) Rules refer to waste oil only. The submissions on behalf of the department that every "used oil" should be treated as "waste oil" cannot be accepted as it would amount the word "used" being equated as "waste". A product can become waste even without being put to use and every "used" product need not be a waste, as in many cases, the same may be further used. This being the common understanding, there is no warrant to treat the used oil as waste oil unless there is other evidence.

7.4 The report of the Chemical Examiner to whom the sample was sent indicates the use of the imported product as lubricating oil. In other words, the Chemical Examiner does not rule out the further use of the oil imported by the appellants. The understanding of the Chemical Examiner was not that every "used oil" should be treated as "waste oil". If that be the case, there was no need for recommending to the Department to seek the views of the Ministry of Environment and Forests. Opinion of the Ministry of Environment and Forests is not specific with reference to any samples drawn from the present consignments but based on the understanding of the law. In other words, if waste oil was imported, then all the conditions stipulated in the clarification of the Ministry of Environment and Forests requires to be adhered to.

7.5 The Department seeks to rely on the clarification dated 17.12.1997 by "In-charge of Pollution Control Board" that authorisation for the import of used lubricant oil for trading purpose has been refused as there was no provision in the rules to give such permission/ authorisation for import of waste oil for trading purposes. This clarification is in the nature of opinion based on presumption that there is no difference between used lubricating oil and waste oil. It does not quote the relevant provisions by which the used lubricant oil is sought to be treated as waste oil. Therefore, the reliance placed by the department on the opinion of the Punjab Pollution Control Board cannot support their case.

7.6 Regarding the submissions that the report of the Punjab Test House to be disregarded as they are not authorised by the Pollution Control Board is concerned, it is seen by the clarification given by the Department vide their communication dated 30.6.10 with reference to the queries made by the Bench vide Misc. Order NO. 98/2010 dated 27.4.2010, CBEC vide letter dated 1.8.95 has permitted for testing of the sample either by CRCL or by Government approved or Government laboratory in Punjab . That being the case, the test at Punjab Test House has been specifically permitted by the CBEC. Merely because the report of the Punjab Test House is not in favour of the department, the same cannot be disregarded especially in the absence of any report of any laboratory contrary to the one given by Punjab Test House. It is to be noted that the report of the CRCL is not contrary to report of Punjab Test House but only expressing their inability to offer any opinion as to whether 'used oil' can be treated as 'waste oil' or not.

7.7 Learned SDR was right in his submission that the show cause notice clearly alleges the appellant as a trader and it appears that the appellants have not made any submission contrary to the said allegation in their reply to the show cause notice or at the time of personal hearing before the

Commissioner. However, this issue will become relevant only when the goods imported are treated as 'waste oil'.

7.8 It is also to be noted that the department has chosen to release the goods after granting out of charge by Customs. If the goods were indeed hazardous in nature, it was not proper to release the goods to the appellants by granting out of charge by the Customs. The conditions stipulated such as 'appellants shall not dispose of' are not sufficient safeguard if the goods were indeed hazardous. The hazardous waste can not be released to unauthorised persons especially to traders. However, in the present case there is no evidence that the goods were of hazardous nature.

7.9 The irregularity in so far as the same relates to removal and disposal of the goods contrary to the terms and conditions of supardari does not have relevance to violations, if any, at the time of importation. Therefore, this issue need not be looked into by the Tribunal. The action for not adhering to the terms and conditions of supardari has to be considered as per law.

7.10 The reliance placed on the clarification of DGFT dated 23.3.98 relating to 'used / waste oil' may not be applicable to imports made in April, 1997 and May, 1997. Even otherwise, there is no warrant to treat every "used oil" as "waste oil". Definitely some used oil can come under the category of waste oil and in respect of such waste oil, provisions of EXIM Policy and the provisions of Hazardous waste (Management & Handling) Rules shall apply.

8. In the present case, there is no evidence that the used oil imported by them can be considered as waste oil. I find the report of Punjab Test House where the testing was done as approved by CBEC, is not in favour of the

Department. The report of CRCL is non committal on this issue. The clarification of Ministry of Environment and Forests is in the nature of general opinion without reference to specific samples.

9. In view of the above, I do not find any justification for upholding the order of the Commissioner. The order of the Commissioner is set aside and appeal is allowed with consequential relief as per law.

(M. Veeraiyan)
Member(Technical)

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