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

PRINCIPAL BENCH –COURT NO. 4

Customs Appeal No. 6 of 2011

(Arising out of Order-in-Original No. 28/HKC/Commr./2010 dated 30.09.2010/7.10.2010 passed by the Commissioner of Customs (Preventive), New Delhi)

M/s Mahamaya Overseas Pvt. Ltd. **Appellant**
(Now known as M/s Narayan Mercantile Pvt. Ltd.)
170/10, Film Colony, R.N.T. Marg,
Indore (MP)-452001

Versus

Commissioner of Customs (Preventive) **Respondent**
New Delhi
New Customs House,
Near IGI Airport,
New Delhi-110037.

Appearance:

Present for the Appellant: Shri Rajesh Rawal, Advocate

Present for the Respondent: Shri Rakesh Kumar, Authorized Representative

CORAM:

**Hon'ble Dr. Rachna Gupta, Member (Judicial)
Hon'ble Mr. P.V. Subba Rao, Member (Technical)**

**Date of Hearing : 11/02/2025
Date of Decision :26/05/2025**

Final Order No. 50764/2025

P V Subba Rao:

This appeal has been filed by M/s. Mahamaya Overseas Pvt. Ltd.[1] to assail the Order-in-Original bearing No. 28/2010 dated

1 Appellant

07.10.2010[2] passed by the Commissioner of Customs (Preventive) deciding the proposals made in the Show Cause Notice dated 4.3.2009. It was held in the impugned order that the goods imported by the appellant from Sri Lanka and cleared by filing five Bills of Entry were not 'RBD Palmolein mixture' as declared in the Bills of Entry but was 'RBD palmolein' and for this reason, the benefit of the exemption notification 26/2000-Cus dated 1.3.2000 was denied. This exemption notification was applicable to the goods which were notified as per the India Sri Lanka Free Trade Agreement[3]; RBD Palmolein mixture was notified but not RBD Palmolein. The impugned order confirmed the demand of duty of Rs. 69,13,917/- under section 28 of the Customs Act, 1962[4] invoking extended period of limitation and also imposed penalties under Sections 114A and 112 (a) of the Act.

2. The facts which culminated in the issue of the impugned order are that the officers of Customs (Preventive) received information that some importers were importing "RBD Palmolein" from Sri Lanka under Sri Lanka Free Trade Agreement by mis-declaring the description of the imported goods as "RBD Palmolein Mixture", in order to avail the benefit of import at 'Nil' rate of Basic Customs Duty[5] under exemption Notification No. 26/2000 dated 01.3.2000, as amended. Based on this information, they intercepted the goods imported by the appellant imported through Bills of Entry No. 102513 dated 12.03.2004, 103724 dated 16.04.2004, 103725 dated 16.04.2004, 1563 dated 7.6.2004 and

2 Impugned order
3 ISFTA
4 Act
5 BCD

1593 dated 10.06.2004 filed at Inland Container Depot [6], Tuglakabad, New Delhi and ICD, Ballabgarh through its Customs House Agent[7] viz. M/s Jaykay Freighters Pvt. Ltd. The Bills of Entry and the goods were examined. The goods were declared as 'RBD Palmolein mixture' in the Bills of Entry and classified under Customs Tariff Heading[8] 1518.00 subject to Nil rate of BCD under Notification No. 26/2000-Cus. dated 01.03.2000. The Bills of Entry were supported by Certificates of origin issued by the Assistant Director of Commerce, Department of Commerce, Colombo, Sri Lanka. Samples of the goods were drawn, sealed and sent to Central Food Laboratory, Ghaziabad[9] which tested the samples and sent Test Reports stating that the samples conformed to the standards of 'RBD Palmolein' laid down under Item No. A17.20 read with Item No. A17.15 for refined vegetable oil of Appendix 'B" of Prevention of Food Adulteration Rules, 1954.

3. The matter was investigated further, statements of various persons were recorded and the SCN and the proposals therein were decided in the impugned order.

4. Aggrieved, the appellant filed this appeal.

5. We have heard Shri Rajesh Rawal, learned Advocate for the appellant and Shri Rakesh Kumar, learned Authorized Representative for Revenue and perused the records. The short question to be answered is whether the finding in the impugned order that the imported goods were 'RBD Palmolein' and not 'RBD

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[6] ICD
7 CHA
8 CTH
9 CFL

Palmolein mixture' can be sustained and consequently, if the demand of duty of customs with interest and penalties can be sustained.

6. The finding in the impugned order and the allegation in the SCN that the imported goods were not 'RBD Palmolein mixture' but were 'RBD Palmolein' is based on the following three types of documents:

a) The Bills of Entry which were filed by the appellant which declared the imported goods as 'RBD Palmolein mixture' **(RUD 1 to the SCN)**;
b) The statements of several persons recorded under section 108 of the Act **(RUDs 9,12,13,14,15,16,17,18,19,20 &21 to the SCN)**; and
c) The test reports of CFL, Ghaziabad **(RUD2,3,4,5 & 6 to the SCN)**.

7. The other RUDs to the SCN included the search Panchnama (RUD 11) and copies of some Rules (RUD 7&8). There is no dispute regarding the Bills of Entry which were filed by the appellant and the imported goods were declared as 'RBD Palmolein mixture'.

8. As far as the statements recorded by the officers under section 108 of the Act are concerned, these will be relevant to prove the facts mentioned therein as per section 138B of the Act under two types of circumstances:

(a) If the person is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or whose presence cannot be obtained without an amount of delay or expense, which under the circumstances of the case, the court considers unnecessary; or

(b) If the person is examined as witness and the court (or adjudicating authority in this case) is of the opinion that the statement should be admitted as evidence.

9. Section 138B is reproduced below:

Section 138B. Relevancy of statements under certain circumstances. -

(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) **when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.**

(2) **The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court**.

10. In the impugned order, there is no indication that any of the circumstances mentioned in Section 138B(1)(a) were present. The procedure specified in section 138B(1)(b) was not followed by the Commissioner during the adjudication. Thus, the Commissioner, by not admitting them as evidence by following the procedure prescribed under section 138B(2), rendered all the statements recorded under section 108 and relied upon in the SCN irrelevant to prove the case.

11. The third set of documents relied upon in the SCN are the test reports from the cfl, Ghaziabad. These indicate that the samples that were tested met the parameters set under the

Prevention of Food Adulteration Rules for RBD Palmolein. They also list each of the parameters, the standards to be met for each parameter and the test results.

12. However, what is interesting is none of the test reports say that the imported goods were NOT "RBD Palmolein mixture". In fact, none of the reports indicate that the samples were even tested to see if they meet the parameters for "RBD Palmolein mixture" which was the description of the imported goods by the appellant in the Bills of Entry. The reason for this is apparent from the first page of the reports. They say that the samples sent were 'purported to be RBD Palmolein'. The facts of the case show that while the Bills of Entry imported goods which were purported to be 'RBD Palmolein mixture' but the officers suspected them to be 'RBD Palmolein'. The question is which of the two is true. When sending the samples for testing, it does not appear that the CFL Ghaziabad was asked if the samples were 'RBD Palmolein mixture' or 'RBD Palmolein'. Naturally, IT did not test the samples to see if it meets the parameters for "RBD Palmolein mixture" as declared by the appellant. It is also not clear from the report what should have been the parameters for "RBD Palmolein mixture".

13. Another question which may arise is, since the samples meet the parameters for 'RBD Palmolein', does it automatically imply that they do not meet the parameters for 'RBD Palmolein mixture'? The test reports do not either say or imply so.

14. What is evident is that the CFL was not provided with the complete information- it was provided with what the officers

suspected samples to be but was not provided with what was declared in the Bills of Entry. Naturally, the reports do not say that the imported goods cannot be called 'RBD Palmolein mixture' or that they do not meet the standards for RBD Palmolein mixture or that any test for RBD Palmolein mixture was conducted.

15. Before the Commissioner, the appellant disputed the test reports and sought a re-test of the samples. This request was denied by the Commissioner in the impugned order on the ground that the request was made five years after the import. The goods were imported in 2004 and the appellant made the request for retest in 2009.

16. What the Commissioner said is interesting but what he did not is vital. Although the goods were imported in 2004 and samples were drawn in 2004, there was evidently no reason for the appellant to ask for a retest until it was made aware that the test reports were received and that they were against the appellant and that they would be used against the appellant to fasten duty liability and impose penalties. All these things were clear when the SCN was issued by the Commissioner in 2009 relying on the test reports and then the appellant sought re-test. Thus, the entire delay of five years from 2004 to 2009 was caused by the Commissioner in issuing the SCN. He relied on the test report received five years before but refused to send the samples for re-testing on the ground that the request for re-test was made after five years. There could have been better clarity on the nature of the goods imported and if they were NOT RBD Palmolein mixture as

declared had the samples been re-tested but the Commissioner, by denying re-test, removed that possibility.

17. Another possibility of finding the truth would have been to cross-examine the persons who tested the samples. This would have thrown more light on the nature of tests conducted and if they had also tested the samples for 'RBD Palmolein mixture' or if they had otherwise concluded that the samples were not 'RBD Palmolein mixture'. The appellant sought cross examination which was denied by the Commissioner on the ground that the test reports have been rendered between 12.3.2004 and 10.6.2004 under two different Directors of CFL, Ghaziabad and all show that the samples conform to the standards laid down under PFA Rules for RBD Palmolein. Another reason given by the Commissioner was that the test reports were shown to two of the persons whose statements were recorded under section 108 and at that time they had not contested the test reports.

18. However, we find what the Commissioner does not state is that none of the test reports say that the samples do not conform to RBD Palmolein mixture or that the goods were not RBD Palmolein mixture. At the time of recording the statement, the individuals may or may not have contested the test reports but when the test reports were proposed to be used against the appellant to fasten duty liability and impose penalties in the SCN issued in 2009, the appellant did have a right to contest the test reports.

19. Thus, the Commissioner removed any possibility of having an expert opinion or test report which can support the case of the department that the imported goods were NOT RBD Palmolein mixture as declared. This conclusion in the impugned order is not borne out of the test reports. Therefore, the allegation that the appellant had mis-declared the nature of goods is not substantiated.

18. To sum up:

a) The SCN and the impugned order are based on three types of documents- the Bills of Entry, Statements of various persons and test reports.
b) The Bills of Entry filed by the appellant are not in dispute.
c) All statements of various persons recorded under section 108 of the Act have become irrelevant to prove the case because the Commissioner did not admit them following the procedure prescribed under section 138B of the Act.
d) The test reports are one-sided; while they say that the samples meet the criteria for RBD Palmolein nowhere do they say that the samples were NOT RBD Palmolein mixture nor do they suggest that the samples were tested for RBD Palmolein mixture; this was possibly due to reason that the CFL was not asked if the goods were RBD Palmolein mixture as described or not.
e) Another possibility of getting clarity about what the imported goods were and what they were not was to re-test the samples which was denied by the Commissioner on the ground that the request was made five years after the import

when, in fact, the delay was solely on account of the Commissioner issuing the SCN five years after the goods were imported and samples were tested. Thus, the Commissioner denied the appellant its right on account of his own wrong viz., the delay of five years in issuing the SCN.

f) Another possibility of finding the true nature of the goods could have been to cross-examine the experts who tested the samples but that was also denied by the Commissioner.

19. In view of the above, the allegation of mis-declaration of the nature of the goods in the Bills of Entry and consequential demand of duty and interest and the penalties cannot be sustained.

20. The appeal is allowed and the impugned order is set aside with consequential relief to the appellant.

(Pronounced in open Court on 26.05.2025)

(Dr. Rachna Gupta)
Member (Judicial)

(P.V. Subba Rao)
Member (Technica)

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