# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# MUMBAI

## WEST ZONAL BENCH

**Custom Appeal No. 88059 of 2013**

(Arising out of Order-in-Appeal No. 297 (G.VII-D)/2013/JNCH/EXP-90 dated 22.05.2013 passed by the Commissioner of Customs (Appeals), Mumbai-II, Nhava Sheva)

**M/s. Canpex Chemicals Pvt Ltd.** …..**Appellant**
**123, Nana Peth,**
**Pune**

**vs**

**Commissioner of Customs(Export), N.Sheva** …..**Respondent**
**JNCH, Post Uran,**
**District Raigad, Sheva**

**APPEARANCE:**

Shri Girish Nadkarni, Advocate for the appellant
Ms Trupti Chavan, AC (AR) for the respondent

**CORAM:** **Hon'ble Mr C J Mathew, Member (Technical)**
**Hon'ble Mr Ajay Sharma, Member (Judicial)**

**FINAL ORDER No: A/87214/2019**

DATE OF HEARING : 30.10.2019
DATE OF DECISION : 30.10.2019

**PER: C J MATHEW**

This appeal of M/s Canpex Chemicals Pvt Ltd arises from order-in-appeal no. 297 (G.VII-D)/2013/JNCH/EXP-90 dated 22nd May 2013 of Commissioner of Customs (Appeals), Mumbai-II, Nhava Sheva in which the communication of Deputy Commissioner of

Customs, Jawaharlal Nehru Customs House, acknowledging relinquishment of title to the goods lying uncleared had been accepted, was directed to be withdrawn while dismissing their pleas for further relief.

2. According to the appellant, who had imported five containers of 'dicyandiamide' from M/s Shenyang Aimixin Chemicals Ltd, China, against bill of entry no. 3883010 dated 23rd June 2011, 57.18 MT out of total quantity of 100MT had been taken delivery of after assessment was duly completed and duty liability discharged. It is claimed that the consignment, upon being subject to testing and found to contain 'sodium chloride', was not in conformity with the sale contract and they had sought relinquishment under section 26A of Customs Act, 1962 which was allowed partly, by the letter referred *supra*, to the extent of goods being uncleared. Aggrieved by lack of response for relinquishment of the remaining portion, appeal was filed before Commissioner of Customs (Appeals), Mumbai II, Jawaharlal Nehru Customs House, Nhava Sheva who, instead of restricting disposal to the finding – for or against – the limited grievance thereon, chose to invoke powers under *proviso* to section 128(3) of Customs Act, 1962 for proposing rejection of their application for relinquishment and for detriment arising from section 111 and 112 on the goods lying under customs control. According to Learned Counsel, the first appellate authority also directed Additional Commissioner of Customs, Nhava Sheva to draw samples of the

uncleared goods and to subject those confiscation under section 111 of Customs Act, 1962 as well as to impose penalty under section 112 of Customs Act, 1962 should the goods be different from that declared in the bills of entry. It was further held that the goods already cleared, which were beyond the scope of confiscation, were also not eligible for relinquishment.

3. According to Learned Counsel, appellant has been left in worse position than they were in before filing of the appeal on the limited grievance pertaining to the two containers already cleared. It was also pointed out that the first appellate authority was not empowered to invoke the provisions of Customs Act, 1962 to initiate fresh proceedings that had not been contemplated in any proceedings initiated for disposal by the original authority and that re-visiting of the decision of the competent authority under section 26A of Customs Act, 1962 in favour of appellant was in excess of jurisdiction.

4. We have heard Learned Authorised Representative who submits that the first appellate authority had merely directed the drawal of samples and fresh decision on the claim for refund arising in consequence of relinquishment under section 26A of Customs Act, 1962 and for penal action arising from misdeclaration ascertained therefrom.

5. We find that the issue before the first appellate authority in the

appeal of the importer was limited to the non-disposal of the claim of appellant, in relation to the goods already cleared, for relinquishment, and refund, under section 26A of Customs Act, 1962. In such a situation, it was not open to the first appellate authority to revisit a decision taken in favour of appellant save on appeal authorised by Commissioner of Customs. That apparently has not occurred yet. Moreover, *proviso* to section 128(3) of Customs Act, 1962 empowers the issue of show cause notice only for enhancing penalty or any other detriment or for rejection of refund sanctioned by the original authority. Proceedings that lie before the original authority can be initiated only under section 28 of Customs Act, 1962 or under section 124 of Customs Act, 1962 – neither of these envisages Commissioner of Customs (Appeals) as the 'proper officer'. Consequently, the notice contemplated by *proviso* to section 128(3) of Customs Act, 1962 is limited to enhancement or reduction, as the case may be, within the confines of the notice that commenced proceedings leading to the appeal. In other words, the extent of enhancement or reduction was limited to such as were proposed in the original notice; there is no empowerment in section 128 of Customs Act, 1962 for a new proceedings or cause of action. Such would also not constitute an enhancement and, therefore, the issue of show cause notice leading to the specific direction in the impugned order is beyond the pale of law.

6. Turning to the issue of entitlement of refund of duty discharged on goods already cleared, section 26A of Customs Act, 1962 requires

fulfilment of three conditions simultaneously along with one of the components of the fourth. The claim of the appellant is that the two containers cleared by them should also be entitled to benefit of refund of duty. However, there is no evidence on record to show that the goods that was taken into their possession was the same as that which was cleared. Further, these have neither been re-exported nor destroyed in compliance with section 26A of Customs Act, 1962. Relinquishment of title to the goods is not permissible to goods that have already been cleared. Consequently, the claim for refund of section 26A is limited only to such as those which were uncleared and acknowledged as relinquished.

7. Accordingly, we allow the appeal to the extent of setting aside the direction to the Additional Commissioner for further disposition of goods that remain uncleared. There is no flaw in non-consideration of the claim in relation to the goods cleared by appellant. Appeal is accordingly disposed off.

(Operative part pronounced in Court)

**(C J Mathew)**
**Member (Technical)**

**(Ajay Sharma)**
**Member (Judicial)**

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