

SPEED POST



F.No. 380/ 03/SL/ 2018-R.A  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue..

17.11.2019

Order No. 25/19-Cus dated 16-10-2019 of the Government of India passed by Smt Mallika Arya, Principal Commissioner & Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject : Revision Application filed, under section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. Kol/ Cus (port)/ AA/ 2021/ 2017 dated 27.11.2017 passed by the Commissioner of Customs (Appeals), Kolkata

Applicant : The Commissioner of Customs (port), Kolkata.

Respondent : M/s Pharos Shipping and Overseas Service Limited

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ORDER

A revision application No. F.No. 380/ 03/SL/ 2018-R.A dated 27.02.2018 has been filed by the Commissioner of Customs (port), Kolkata (herein after referred to as the "applicant") against the Order-in-Appeal No. Kol/ Cus (port)/ AA/ 2021/ 2017 dated 27.11.2017 passed by the Commissioner of Customs (Appeals), Kolkata who has set aside Order-in-Original No. Kol/ Cus/ AC/ 3735/ MCD/ 2013 dated 29.01.2013.

2. Brief facts of the case are that a show cause notice was issued to the steamer agent M/s Pharos Shipping and Overseas Service Limited (herein after referred to as the "respondent") for short landing of 11 pieces of Malaysian Round logs out of 1433 pieces against line no. 4,5 &6 based on Kolkata Port Trust's Out Turn Report. The show cause notice was decided vide Order-in-Original No. Kol/ Cus/ AC/ 3735/ MCD/ 2013 dated 29.01.2013 passed by the Assistant Commissioner of Customs, Manifest Clearance Department, Customs House, Kolkata, who imposed a penalty of Rs. 89,000/- on the Respondent under Section 116 of the Customs Act, 1962. Being aggrieved the Respondent challenged this order before the Commissioner (Appeals) who set aside the Order-in-Original on the basis of the fact that the OTR (Out Turn Report) alone cannot be the basis of imposition of penalty where the Surveyor's report has confirmed that there was no short landing. He has referred to his predecessor's Order-in-Appeal no. Kol/ Cus/ Port/ SS/ 171/ 2016 dated 23.06.2013 on a similar matter.

3. Personal hearing in the case was fixed on 26.08.2019. No one appeared personal hearing on behalf of the applicant or the respondent. While the respondent asked for another date of hearing, the Applicant sent a copy of the Revision Application again without offering any further submission. Accordingly another hearing was granted to the respondent on 25.09.2019. Sh. Bharat B. Shah, Consultant appeared for the hearing on behalf of the Respondent. He produced two orders of Commissioner (Appeals) in support of his case wherein the applicant has not filed any Revision Application. The respondent further submitted written submissions in continuation to their earlier written submissions dated 20.04.2018 and prayed that the short-landing should not be determined on the basis of quantity but should be determined on the basis of Metric Tons or Cubic Metre (CBM) as was done by the surveyor. The respondent vide their letter dated 27.09.2019 (received on 01.10.2019) submitted copies of Bill of Lading mentioning 1433 no. of impugned logs. Since no one appeared on behalf of the applicant, the case is being taken up on the basis of evidence on record.

4. On examination of the revision application, submissions by the respondent at the time of personal hearing, written submissions by the respondent, Commissioner (Appeals)'s order and the order in original, Government finds that the present case is regarding imposition of penalty under Section 116 of the Customs Act, 1962 on the ground of short-landing determined on the basis of quantity. CBIC's Circular No. 46/95-Cus. dated 04.05.95, relied on by the Respondent reads as under:-

*"In the case of bearings, imports are effected on weight basis in some cases and on piece basis in other. It is, therefore, clarified that in a case where transaction has taken place on weight basis, the weight of the bearing so transacted should be the basis for levy of duty. In other cases the normal weight of the bearing shown in the invoice, packing specification should form the basis, however, where the importer is able to produce adequate proof of the actual weight of the bearing, in such cases the actual weight of the bearing shall form the basis for the levy of duty."*

The circular relied upon by the respondent is regarding levy of duty and penalty. Therefore the respondent does not get any benefit of the above circular.

**While Section 116 of the Customs Act, 1962 reads as under:-**

*Penalty for not accounting for goods.—If any goods loaded in a conveyance for importation into India, or any goods transhipped under the provisions of this Act or coastal goods carried in a conveyance, are not unloaded at their place of destination in India, or if the quantity unloaded is short of the quantity to be unloaded at that destination, and if the failure to unload or the deficiency is not accounted for to the satisfaction of the [Assistant Commissioner of Customs or Deputy Commissioner of Customs], the person-in-charge of the conveyance shall be liable,—*

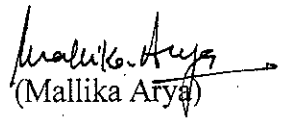
*(a) in the case of goods loaded in a conveyance for importation into India or goods transhipped under the provisions of this Act, to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been imported;*

*(b) in the case of coastal goods, to a penalty not exceeding twice the amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been exported.*

No explanation has been offered by the respondent as to how the weight of 2473.628 MT in the survey report can match the weight of the imported shipment wherein

11 pieces of logs have short landed. Survey Report is silent both in respect of volume and quantity of the impugned cargo. Since there is no evidence to contrary, the fact regarding short-landing of eleven pieces of logs gets established. Since the person in charge of conveyance is liable for penalty in case of quantity unloaded is short of the quantity to be unloaded at the destination, the adjudicating authority has correctly imposed the penalty on the respondent under Section 116 of the Customs Act, 1962.

5. In view of above discussion, government sets aside the order of the Commissioner (Appeals) and Revision Application is allowed.

  
(Mallika Arya)

(Additional Secretary of the Government of India)

1. The Commissioner of Customs (port), NSCBI Airport, 15/1, Strand Road, Kolkata-700001

2. M/s Pharos Shipping and Overseas Service Limited, Flat No. 3B, Arihant Building, 53A, Mirza Ghalib Street, Kolkata-700016.

Order No. 25 /19-Cus dated 16-10-2019

Copy to:

1. The Commissioner of Customs (Appeals), 3<sup>rd</sup> Floor, Customs House, Strand Road, Kolkata- 700001.
2. PA to AS(RA)
- ✓ 3. Guard File.
4. Spare Copy

ATTESTED

  
16/10/19  
(Nirmala Devi)

S.O (R.A.)