

REGISTERED SPEED POST



**GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE**

**Office of the Principal Commissioner RA and  
Ex-Officio Additional Secretary to the Government of India**  
8<sup>th</sup> Floor, World Trade Centre, Cuffe Parade,  
Mumbai- 400 005

F. NO. 371/7&8/SL/16-RA | 6055

Date of Issue: 27.10.22

ORDER NO. <sup>293-29A</sup> /2022-CUS (WZ) /ASRA/MUMBAI DATED 19-10-2022  
OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,  
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO  
THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF CUSTOMS ACT,  
1962.

Applicant : M/s Kavi Commercial Company Limited.

Respondent : Commissioner of Customs (Appeals), Mumbai Zone-I.

Subject : Revision Applications filed under Section 129DD of Customs Act, 1962 against Order in Appeal No. MUM-CUSTM-SMP-232 & 233/2015-16 dated 23-12-2015 passed by Commissioner of Customs, (Appeals), Mumbai-I.

**ORDER**

This Revision Application has been filed by M/s Kavi Commercial Co. Ltd. having their office at Viraj Impex House, 47, P. D'Mello Road, Mumbai-400009 (hereinafter referred to as the "applicant") against Order-in-Appeal No. MUM-CUSTOM-SMP-232 & 233/2015-16 dated 23-12-15 passed by Commissioner of Customs (Appeals), Mumbai-II.

2. The brief facts of the case are that the applicant had imported 836 pieces of hot rolled steel plates of which 16 pieces were said to be short-landed. Having already paid duty on all 836 plates, the appellant claimed refund of duty paid on short-landed 16 plates after getting the short-landing certificate from the Mumbai Port Trust. The refund claim was rejected by the AC vide his OIO No.214/AM/08/MCD dated 30-12-2008 on grounds that there was no short landing as evidenced by the tally sheet, that no shortage was found at the time of physical examination by the Appraiser and that it appeared that the shortage was noticed while taking delivery but Customs were not associated at the time of survey.

3. Being aggrieved by the said order-in-original, applicant filed appeal before Commissioner (Appeals) who held that there was a short landing of goods as stated in short landing certificate issued by Mumbai Port Trust and set aside the order-in-original vide his OIA No. 198/2009/MCH/AC/MCD/09-10 dated 30-07-2009. The said OIA was not appealed by the department.

4. In respect of the steamer agent viz M/s Samsara Shipping Pvt Ltd, a SCN was issued to them to explain the short landing of goods and as to why penalty should not be imposed under Section 116 of the Customs Act, 1962. A.C vide OIO no.239/AM/09/MCD dated 5-02-2009, dropped the penal proceedings, as he found that there was no short landing and concluded that the manifested

quantity was discharged in full from the vessel. The said OIO was not appealed by the department.

5. The steamer agent filed revision application against OIA No. 198/2009/MCH/AC/MCD/09-10 dated 30-07-2009 under Section 129 DD of Customs Act, 1962, before Government of India on the grounds that in view of the impugned OIA, the Customs authorities asked them to pay the penalty. The Revisionary authority vide Order No. 246/2012 dated 12-06-12 set aside the said OIA and remanded the case back to the Appellate authority for fresh consideration after giving reasonable opportunity of hearing to all the concerned parties.

6. Commissioner Appeals vide OIA No Mum-Custm-SMP-232 &233/2015-16 dated 23-12-2015, rejected the refund claim of the applicant and held that no penal action is warranted against the steamer agent.

7. Aggrieved by the aforesaid OIA, the applicant filed the Revision Application on the following grounds:

(a) The Commissioner (Appeals) failed to understand that the examination order requires Shed Appraiser to check and Inspect only 10% of the packages at random as per Customs Appraising Manual. Accordingly out of charge was given for the full B/E of 836 Pieces after examining 10% of total Pieces.

(b) The Commissioner (Appeals) failed to understand the normal procedure followed in clearance of goods. The applicant had imported 836 Pieces 1694.400 M.T., under Bill of Entry no. 785313 dtd. 09-08-2007 IGM No.24970/2007 dtd. 14/08/2007. As such it is impossible to count the No. of Pieces in total or consignee wise. The Shipping Agent/The Surveyor/The Tally Clerk of BPT are taking tally round the clock but still they cannot surely say whether all the Pieces mentioned in the IGM have been discharged from the vessel. After seeing the lot nobody can count the No. of Pieces and ascertain in advance whether all the Pieces have been unloaded from the

vessel or otherwise some Pieces are short landed. The examination order requires Shed Appraiser to check and inspect 10% of the Pieces at random. As such the Shed Appraiser checks 10% of the Pieces and gives "Out of Charge Order" for those presented B/E's. After taking the Out of Charge Order, the applicant took the delivery of the Pieces belonging to them and then it was found that there were only 820 Pieces leading to shortage of 16 Pieces. But before the delivery itself the Shed Appraiser has already given "Out of Charge" order in full for all the 836 Pieces = 1694.400 MT mentioned in the aforesaid Bill of Entry. In view of the above full "Out of Charge" order for 836 Pieces given by the Shed Appraiser, cannot be valid reason to reject their claim.

(c) The Commissioner (Appeals) erred in relying on tally sheet provided by Mumbai Port Trust that all the manifested 4137 pieces were discharged in full from the Vessel but failed to appreciate that Short Landing Certificate for 16 Pieces were duly issued by Mumbai Port Trust itself, which establishes that 16 Pieces were short landed.

(d) The Commissioner (Appeals) had not relied on Short Landing Certificate dtd. 24-09-07 issued by Mumbai Port Trust.

(e) The Commissioner (Appeals) failed to understand that Refund claims are always filed if goods are short landed. There cannot be further more documents with Importer to substantiate his claim as short landing certificate is issued by BPT after verifying all aspect like discharge tally sheet, etc.

(f) The Commissioner (Appeals) failed to understand that insurance claim for the said refund was duly settled by the insurance co. after thorough verification and checks.

(g) The Commissioner (Appeals) failed to understand that department accepts claims only after receipt of short landing certificate from the Mumbai port trust. It takes months to the Port Trust Authorities for issuing the said certificate as they have to search entire port and only after satisfying that

these coils are not at all landed in the port they issue the Short Landing Certificate. The applicant filed their claims immediately on receipt of Short Landing Certificate from Mumbai Port Trust.

(h) The Commissioner (Appeals) erred by stating that the claim of the appellants is without the supporting document i.e. Discharge Tally Sheet which is never in possession of any importer and is solely a property of Customs Authorities.

(i) The Commissioner (Appeals) had not relied on the following judgments' submitted by the applicant on the identical issues which clearly states that *"it is departments duty to examine whether the shortage of the goods was on the part of steamer agent, i.e. the goods were not unloaded by the steamer agent and in that case the responsibility for the shortage is on the steamer agent u/s. 116 of the Customs Act, 1962. Similarly if the shortage occurred after unloading of the goods but before delivery to the consignee and if there is any pilferage, etc., the custodian is liable to pay duty"*:

a. Order No.127-132/2003 of The Government of India dtd. 21/04/2003 passed by Shri Dinesh Kacker, Joint Secretary to the Govt. of India.

b. Order No. 73/2011-Cus Dated 05/04/2011 of The Govt. of India, passed by Shri D.P. Singh, Joint Secretary to The Govt. of India.

(j) The Applicant therefore requested to direct the department to refund the amount of custom duty of all the 16 pieces short landed as per short landing certificate and to pay to the Applicant Interest at the prevailing rate of interest on the claim amount from the date of their claim lodged with the department to the date of final payment of claim amount.

8. Personal hearing was granted to the applicant on 29-07-2022 and 04-08-2022. Shri Kailash Didwania, Director appeared for the hearing. He submitted an additional written submissions. He submitted that they have

been given a short landing report of 16 Coils by Mumbai Port Trust. He further submitted that a Certificate from Jurisdictional Central Excise Office regarding non availing of Cenvat credit has also been submitted. He submitted a copy of JS (RA) where benefit in similar case has been given. He requested to allow his application.

09. Government has carefully gone through the relevant case records oral & written submissions and perused the impugned Order-in-Original, Orders-in-Appeal, and the impugned applications.

10. Government observes that the applicant has filed the impugned Revision Application against Commissioner Appeal's OIA which was remanded to Appellate authority by the Revisionary Authority Vide Order No.246/2012 dated 12-06-2012. Commissioner Appeal had to decide two issues i.e. whether the Steamer Agent viz M/s Samsara Shipping Pvt. Ltd is liable for penal action for short landing of goods and also to decide the admissibility of Refund claim of the applicant. Commissioner Appeal vide Order dated 22-12-2015 rejected the refund claim of the importer and also held that no penal action is warranted against the Steamer Agent. The applicant filed the application against the refund claim rejected. The department has not filed any appeal against the penalty dropped of the Steamer Agent. Government observes that the issue to be decided in this case is only regarding the admissibility of the refund claimed by the applicant on the duty paid on the short landed goods.

11. On perusal of the records of this case, Government observes the following:

a) Based on Short Landing Certificate dated 24-09-2007 issued by MPT, the applicant filed a claim for refund of duty of Rs.4,87,043/-, which was rejected by the AC(MCD) vide OIO dated 31.12.2008 holding that it was not a case of short landing.

b) A SCN dated 18-12-2008 was also issued to the steamer agent proposing penal action under section 116 of the Customs Act, 1962 for short landing the goods, which was adjudicated by the AC(MCD) vide OIO dated 05-

02-2009 holding that there was no such short landing and accordingly penal action was dropped. The department did not file any appeal against the OIO dated 05-02-2009 vide which penal action against the steamer agent was dropped. This OIO was not challenged by the department and hence it had attained finality.

c) The applicant filed an appeal against OIO dated 31-12-2008 vide which their refund claim was rejected. The Commissioner (Appeals) vide OIA dated 30-07-2009 held that Short Landing Certificate issued by MPT is enough proof of short landing of 16 steel plates and remanded the matter back to adjudicating authority to reconsider the refund claim on its merits. This OIA was also not challenged by the department and hence it had also attained finality.

d) Deputy Commissioner (MCD) vide letter 03-12-2010 forwarded the copy of aforesaid OIA dated 30-07-2009 and Short Landing Certificate dated 24-09-2007 to the steamer agent and directed them to pay customs penalty of Rs. 4,87,043/-. The steamer agent filed a Revision Application, which was decided vide No. 246/2012-Cus. dated 12-06-2012, wherein the Commissioner (Appeal)'s OIA dated 30-07-2009 was set aside as he had erred in passing the OIA without giving opportunity of hearing to the steamer agent. The Revision Authority remanded the case back to appellate authority for fresh consideration in the light of above observations after observing reasonable opportunity of hearing to the concerned parties

Government observes from the above, the letter F.No. S/8-10-4/2008-MCD dated 03-12-2010 issued by DC(MCD) directing the steamer agent to pay customs penalty of Rs. 4,87,043/- was not based on correct appreciation of law since the OIO dated 05-02-2009 dropping the penalty demanded, was not challenged by the department.

12. Government finds that the Discharge Tally Certificate issued by the Port Trust on 14-07-2008 and the Out of Charge Order issued by the Customs Authorities are not based on 100% checking. The applicant at the time of

delivery found the shortage which has been confirmed by the Mumbai Port Trust vide their short-landing certificate dated 24-09-2007 wherein the IGM No, Shed No. of the Dock, Bill of Entry, Quantity shortlanded, etc have been given. The Certificate given by the Custodian authority after proper verification is a valid document and cannot be set aside or ignored. Government finds that in case of M/s Hindalco Industries, GOI vide Order No127/91 dated 25-1-94 had held that Short landing must be established by a Certificate issued by the Port Trust Authority for claiming Refund.

*“Refund for short landing of one M.T. of Coal Tar Pitch - Short landing must primarily be established by a certificate issued by the Port Trust Authorities - Survey Report of M/s. General Inspection and Survey Company (India) Pvt. Ltd. cannot be sufficient basis for granting refund - Sections 27 and 129DD of the Customs Act, 1962.”*

13. The applicant has paid duty for the entire consignment and he is eligible for the refund of the duty of goods which he has not received and this has been certified by the Mumbai Port Trust. Government relies on CEGAT Calcutta's Order No. A-34-Cal., dated 21-1-1999 in the case of M/s Union Carbide India Ltd Vs Commissioner of Customs Calcutta wherein it was held that –

*“Refund - Short landing - Full quantity of goods on which duty paid by the importer not received - Short-supply of goods certified by Calcutta Port Trust through Short landing Certificate - Importer entitled to receive refund of duty paid by him in respect of goods which were short-landed and as such not received by him - Sections 27 and 23 of Customs Act, 1962. - The Short-landing Certificate issued by the Calcutta Port Trust clearly establish that the goods to the above extent never landed in India. On the contrary, the argument of the learned Departmental Representative that the non-appearance thereof in the Landing Tally always does not mean that the goods have not landed, is again assumptive in nature. The Survey Report of the independent surveyor also goes in favour of the appellants. In the circumstances, we hold that the appellants*



*are entitled to the refund of duty paid by them in respect of goods which were short-landed and as such were never received by the appellants"*

14. In view of the above, Government holds that the applicant is eligible for the refund claim and therefore modifies the impugned Order in Appeal to that extent. In respect to the Penal action dropped against the Steamer Agent, Government does not find it necessary to interfere as no appeal is filed by the department against the said point.

15. In view of the above, Government modifies the Order-in-Appeal No. SMP/232 & 233/2015-16 dated 22-12-2015 passed by the Commissioner of Customs (Appeals), Mumbai-I to the extent of allowing the refund claim. The Revision Application filed by the applicant is allowed.

16. The Revision Application is disposed off on above terms.

  
(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio  
Additional Secretary to Government of India.

ORDER No. ~~233~~-294/2022-CUS(WZ)/ASRA/Mumbai dated 19-10-2022

To,

M/s Kavi Commercial Company Ltd.  
Viraj Impex House,  
47, P. D'Mello Road,  
Mumbai-400009

Copy to:

1. Principal Commissioner of Customs (General), New Custom House, Ballard Estate, Mumbai-400001.
2. A.C. Customs, MCD, MBT OSC Building, IV Floor, P.D.Mello Road, Opp. GPO, Mumbai-400001
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Notice Board.