REGISTERED SPEED POST AD

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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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No. 195/796/2013-RA /2463 Date of Issue: 10.06.2022

ORDER NO. 633/2022-CX(WZ)/ASRA/MUMBAI DATED 08.6.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Garden Silk Mills Ltd.(PFY Division)
Village Jolwa,
Tal. Palsana,
Dist. Surat 394 305

Respondent : Commissioner of Customs(Import-II), Mumbai Zone-I

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. MUM-CSTM-SMP-373-12-13 dated 02.07.2013 passed by the Commissioner of Customs(Appeals), Mumbai Customs Zone-I.

ORDER

The revision application has been filed by M/s Garden Silk Mills Ltd.(PFY Division), Village Jolwa, Tal. Palsana, Dist. Surat 394 305(hereinafter referred to as "the applicant") against Order-in-Appeal No. MUM-CSTM-SMP-373-12-13 dated 02.07.2013 passed by the Commissioner of Customs(Appeals), Mumbai Customs Zone-I.

2.1 The applicant had imported two consignments of Mono Ethylene Glycol(MEG) from M/s Mitsubishi Corporation and filed two separate warehouse Bills of Entry and cleared the goods into Bond under Customs supervision with the following details.

Sr. No.	Invoice No. and Date	Qty. in MT's	B/E No. and Date
1	9B917500 dated 30.03.2010	3023.510	941786 dated 03.04.2010
2	9B917600 dated 30.03.2010	3023.509	941787 dated 03.04.2010
Total		6047.019	

2.2 Subsequently, the applicant filed Ex-Bond Bills of Entry for clearance of the goods totalling to 5923.56 MT's against Advance Licence. They also paid customs duty amounting to Rs. 10,83,131/- on the balance quantity of 123.459 MT's under two separate Ex-Bond Bills of Entry No. 944621 and 944622 dated 21.04.2010 with declared quantities of 61.46 MT's and 62 MT's respectively. The applicant filed refund claims under Section 27 of the Customs Act, 1962 for refund of customs duty paid by them on the quantity of 123.459 MT's of MEG on the ground that the goods were not available for clearance since the same were reported as short-landed during the bonding of the goods under customs supervision and as there was no provision for amendment of IGM they had filed the aforesaid Ex-Bond Bills of Entry and paid duty. The Assistant Commissioner of Customs(CRARS), New Custom House, Mumbai rejected the refund claims vide his OIO No. 984/DD/AC/CRARS/12 dated 21.12.2012 on the ground that the customs

duty paid was inadmissible for refund in view of the instructions contained in Board Circular No. 06/2006-Cus dated 12.01.2006.

3. Being aggrieved by the OIO No. 984/DD/AC/CRARS/12 dated 21.12.2012 passed by the Assistant Commissioner of Customs(CRARS), New Custom House, Mumbai, the applicant filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) found that the essence of Circular No. 06/2006-Cus dated 12.01.2006 is that customs duty is leviable on imported liquid, bulk cargo on the invoice value or transaction value irrespective of quantity ascertained through shore tank measurement or any other manner. Averring that this was the prevalent law at the time of import, the appellate authority upheld the observation of the adjudicating authority that the amount of duty paid on the so called short-landed goods was an inevitable part of customs duty leviable on the imported consignments. She held that there was no scope for refund of such customs duty which is not mandated to be refunded by any prevailing rule, act, notification or circular. The Commissioner(Appeals) therefore upheld the OIO dated 21.12.2012 vide her OIA No. MUM-CSTM-SMP-373-12-13 dated 02.07.2013.

4. Aggrieved by the OIA No. MUM-CSTM-SMP-373-12-13 dated 02.07.2013, the applicant has filed revision application on the following grounds :

(i) The impugned order was bad in law as it had been passed without application of mind and without assigning cogent reasons for arriving at the conclusions therein. The order was contrary to the provisions of the Customs Act, 1962 and the rules made thereunder. It had been passed in gross violation of the principles of natural justice and also without authority and jurisdiction. The SCN was also void ab initio as it was without jurisdiction and vitiated on account of limitation prescribed under the statute.

(ii) Although the proposed method of determination of assessable value was in terms of CBEC Circular dated 12.01.2006, it was not

only contrary to the statutory provisions of the Customs Act, 1962 but also in direct conflict with the spirit and ratio of the various judgments of the Tribunal and Supreme Court referred to in Board's earlier Circular No. 96/2002-Cus dated 27.12.2002.

(iii) The lower authorities had erred by not considering the fact that quantity of 123.459 MT of MEG received short cannot be considered as imported goods. It was clear that they had not received the goods and that they were found short. It was also proved by the fact that the applicant had lodged insurance claim for the shortage of quantity with their insurer M/s Bajaj Allianz who had duly settled their claim vide certificate dated 26.09.2012. It was contended that when they had received the value for the shortage quantity from the concerned insurance company, the price paid by them gets reduced to that extent. Therefore, the stand of the adjudicating authority in adopting the full invoice price and charging duty even on the short quantity which was not even imported was not legal, proper and logical.

(iv) Both lower authorities had failed to appreciate that Section 14 of the Customs Act, 1962 provides that the valuation of goods for the purpose of assessment has to be done on the basis of the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation or exportation. The "price" has to necessarily be determined with reference to the quantity of imported goods. "Price" means the money consideration for sale of goods and the value which the seller places upon his goods for sale. In the present case, the foreign supplier/seller had asked for a particular price as per his invoice which was fixed per unit for the quantity of the imported goods. Therefore, the Department cannot ignore that unit price.

(v) The lower authorities had failed to note that the total invoice value mentioned was with direct reference to the total quantity mentioned in the invoice, that the total value shown in the invoice was not and cannot be independent of the quantity mentioned in

the invoice. It was averred that when there is change in the quantity mentioned in the invoice for the purpose of determining the actual quantity received, the value of that quantity considered to be so received has to necessarily be determined on pro rata basis, i.e. by applying the unit price or by modifying the invoice value vis-à-vis the invoice quantity. The applicant contended that this simple method of calculation of price cannot and should not be substituted by the Department by taking invoice value even though there is change in quantity.

(vi) The applicant further submitted that the lower authorities had failed to appreciate that the importer had paid the foreign supplier exactly the same unit price which was mentioned in the bill. It was averred that the payment of full invoice value to the foreign supplier was for the quantity which was mentioned in the invoice as shipped/dispatched by him. The particular price or value mentioned in the invoice cannot be changed suo moto by customs. As the supplier is concerned with the quantity shown to have been dispatched/shipped by him, he would apply the unit price to that quantity for arriving at the total invoice price.

(vii) The Customs Department was required to first determine the quantity which has arrived at the port as per legally accepted method for weighment and then apply the unit price as per the invoice to such re-determined quantity to arrive at the value of the imported goods. The Department cannot change the quantity as per the requirement of law but still keep the total invoice value unchanged in proportion to the change in the quantity.

(viii) The lower authorities had failed to note that if the quantity actually found to have been imported/landed is more than the quantity shown in the foreign suppliers invoice, the Customs Department will not allow the importer to contend that inspite of the excess quantity, the customs should apply ad valorem duty rate to only the invoice value, i.e. without enhancing the total value shown in the invoice. In such a case, the customs would obviously and very

rightly enhance the invoice value on pro rata basis by multiplying the excess quantity by unit price to arrive at the proportionate higher value of imported goods for the purpose of assessment thereof. The applicant submitted that the same principle and rationale would apply when the quantity of imported goods is found to be lesser than that mentioned in the invoice.

(ix) The lower authorities have failed to understand that Section 12 empowers the levy of customs duty on goods imported into India. The levy of customs duty is attached to the goods imported into India. Since the levy of customs duty is on the imported goods, it is only the quantity of goods(and their proportionate value) which can be subjected to customs duty. In this regard, reliance was placed upon the decision of the Tribunal in the case of NOCIL vs. CC(Import)[2000(126)ELT 1072(Trb.)] which was subsequently upheld by the Hon'ble Supreme Court as reported at [2002(142)ELT A280(SC)] and accepted by the Board as communicated vide its Circular No. 96/2002-Cus. Dated 27.12.2002. It was averred that by adopting the novel method proposed in the Board's Circular dated 12.01.2006, the Department had rendered all the aforesaid judgments and circulars nugatory.

(x) It was further submitted that the lower authorities had failed to discern that when the Department does not challenge or dispute the unit price of imported goods as mentioned in the foreign suppliers invoice, they cannot levy customs duty on either notionally higher quantity or by indirectly enhancing the unit price mentioned in the invoice. The applicant averred that the proposed method of finalisation of provisional assessment was contrary to and in conflict with the provisions of Section 12 of the Customs Act, 1962.

(xi) The applicants further submitted that the lower authorities did not appreciate that Section 23 of the Customs Act, 1962 clearly provides for remission of duty on goods lost or destroyed at any

time before clearance of the goods for home consumption. Under this section, it was incumbent upon the Assistant/Deputy Commissioner to remit the duty if it is shown to the satisfaction of the Assistant or Deputy Commissioner that any imported goods have been lost or destroyed. The expression "lost" or "destroyed" used in Section 23 of the Customs Act, 1962 is used in a generic and comprehensive sense and not in a narrow sense and therefore postulates loss or destruction caused by any reason. Therefore, when there is no doubt or dispute about the loss of the differential quantity, the Assistant or Deputy Commissioner at the port is duty bound to remit the duty on such lost quantity. This power of remission and corresponding right vested in the importer does not depend upon the determination of assessable value or on the fact as to whether the importer has paid full value or less value in respect of the lost goods.

(xii) The applicant averred that the Board Circular No. 06/2006-Cus dated 12.01.2006 was in direct conflict with the provisions of Section 14 and Section 23 of the Customs Act, 1962. Whereas according to Section 14, the value is to be determined only in respect of the imported goods, the definition of "imported goods" in Section 2(25) means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.

(xiii) The applicant pointed out that in the instant case, the subject quantity of 123.459 MT of MEG cannot be considered as imported goods because that quantity was never received by the applicant. The short found quantity was not amongst the quantity of goods brought into India. Secondly, the applicant pointed out that Section 14 refers to the transaction value of "such" goods which again supports the applicants case because both words "value" and "transaction value" refer specifically to the imported goods and therefore would not cover the lost goods which were neither imported nor received nor sought for clearance by the applicant.

Thirdly, the applicant alluded to Section 23 of the Customs Act, 1962 stating that it specifically provides for the facility and entitlement for remission of duty on lost or destroyed goods and that if the contention of the lower authorities is accepted, it would render Section 23 otiose. In such a case, no importer would be able to claim remission under Section 23 because the Department would invoke Circular No. 06/2006 to claim duty on the lost/destroyed goods by artificially changing the price and transaction value of the imported goods. The applicant averred that such a viewpoint cannot be permitted as a Board Circular cannot have ascendancy over the statutory provisions contained in the statute.

5. The applicant was granted a personal hearing on 25.01.2022. Ms. Reshma Shinde, Company Representative and Shri Willingdon Christian, Advocate appeared online on behalf of the applicant. They submitted that in view of the several High Court and Supreme Court judgments, duty paid on goods short landed is required to be refunded. They requested that their claim be allowed. The applicant also submitted a synopsis and compilation of relied upon judgments vide their letter dated 13.01.2022.

6.1 The applicant submitted that there was no dispute about the fact that the short receipted quantity of 123.459 MT was not available for clearance since it was found short landed during the bonding of goods under Customs supervision as per the Outturn Statements No. 3144 and 3145 dated 08.04.2010. It was pointed out that the Assistant Commissioner of Customs had while admitting in Para 9 of the OIO No. 984/DD/AC/CRARS/12 dated 31.12.2012 that the quantity of 123.460 MT was short received in tanks, rejected the refund claim solely on the basis of Board Circular No. 06/2006-Cus dated 12.01.2006.

6.2 The applicant stated that the Circular dated 12.01.2006 stands declared as contrary to law by the judgment of the Hon'ble Supreme Court in the case of Mangalore Refinery & Petrochemicals Ltd. vs.

CC[2015(323)ELT 433(SC)] at para 17 thereof and reproduced the contents of the said circular. After taking note of this judgment, the Board had rescinded the Circular dated 12.01.2006 and revised its instructions by way of issuing Circular No. 34/2016-Cus dated 26.07.2016. The applicant reproduced the following text of para 3 of the circular in their submission.

> "3. In case of all bulk liquid cargo imports, whether for home consumption or for warehousing, the shore tank receipt quantity i.e., dip measurement in tanks on shore into which such cargo is pumped from the tanker, should be taken as the basis for levy of Customs Duty irrespective of whether Customs Duty is leviable at a specific rate or ad valorem basis[including cases where tariff value is fixed under Section 142(2) of the Customs Act, 1962]."

6.3 The applicant also pointed out that the Hon'ble Tribunal had followed the Apex Court judgment in their decisions in Phillips Carbon Black Ltd. vs. CC[2016(341)ELT 414(Trb.)] and Tata Chemicals Ltd. vs. CC[2017(357)ELT 683(Trb.)]. It was therefore prayed that the revision application be allowed with direction to the adjudicating authority to refund Rs. 10,83,131/- alongwith applicable mandatory interest for the period starting with the date of expiry of 3 months from the date of filing refund application till the date of payment of refund claim.

7. Government has carefully gone through the impugned OIA, the OIO, the revision application, the written submissions filed by the applicant and their submissions during personal hearing. The issue involved in the present case is the admissibility of refund claim filed by the applicant for refund of customs duty paid by them on the short receipt quantity of imported goods under Section 27 of the Customs Act, 1962.

8. The facts of the case are that the applicant had imported MEG and filed warehouse Bills of Entry and cleared the goods into bond under customs supervision. Out of the quantity of 6047.019 MT's as per the import invoice, the applicant filed Ex-Bond Bills of Entry for clearance of 5923.56 MT's against Advance License. It was found that the applicant had short received the quantity of 123.460 MT's of MEG. Since there was no

provision for amendment in IGM, the importer filed Ex-Bond Bills of Entry and paid duty on this quantity of 123.460 MT's and paid duty totalling to Rs. 10,83,131/-. Since the goods had been short received and not delivered to the applicant, they had filed refund claim for the amount of Rs. 10,83,131/- under Section 27 of the Customs Act, 1962. The refund claim was rejected by Assistant Commissioner by following the instructions contained in CBEC Circular No. 06/2006-Cus. dated 12.01.2006.

9. On going through the provisions in the Customs Act, 1962, it is clear that the levy of customs duty under Section 12 is only on goods imported into India. Goods are said to be imported into India, when they are brought into India from a place outside India. When the goods have not been brought into India, the act of importation which triggers the levy does not take place. The levy of customs duty is applicable only to imported goods. Bulk liquid cargo would be considered to have crossed the customs barrier only when it is filled into the shore tanks. That being the taxable event, it is only that quantity of goods which was discharged from the vessel as measured by a shore terminal and recorded in the document referred to as the "outturn statement" which can be subjected to the levy of customs duty. Insofar as the quantity of 123.460 MT's of MEG is concerned, it has not been imported into India and therefore cannot be subjected to the levy of customs duty.

10.1 Government observes that in the present case the short landing of the goods is an admitted fact. The fact of short landing of goods has been acknowledged by the Customs authorities during examination of the imported goods and also by the adjudicating authority in para 9 of the findings in his OIO. The Circular No. 06/2006-Cus. dated 12.01.2006 was the edifice on which the case for leviability of customs duty was based by the original authority and upheld by the appellate authority. The contentious part of the circular was the direction contained therein that in all cases where the customs duty is leviable on *ad valorem* basis, the assessment of bulk cargo should be based on invoice price, which would be the price paid or payable for the imported goods; irrespective of the quantity ascertained through shore tank measurement or any other manner. On the

basis of this circular, the lower authorities have rejected the refund claim filed by the applicant as customs duty legitimately due and hence not refundable.

10.2 However, the CBEC Circular No. 06/2006-Cus. dated 12.01.2006 has since been rescinded vide Circular No. 34/2016-Cus. dated 26.07.2016. The relevant para in the Circular dated 26.07.2016 is reproduced below for ease of reference.

> "3. In case of all bulk liquid cargo imports, whether for home consumption or for warehousing, the shore tank receipt quantity i.e., dip measurement in tanks on shore into which such cargo is pumped from the tanker, should be taken as the basis for levy of Customs Duty irrespective of whether Customs Duty is leviable at a specific rate or ad valorem basis [including cases where tariff value is fixed under Section 14(2) of the Customs Act, 1962]."

10.3 It is apparent from the text of the para reproduced hereinbefore that in case of bulk liquid cargo imports, the receipt quantity in the shore tank is to be taken as the basis for levy of customs duty irrespective of whether customs duty is leviable at specific rate or on ad valorem basis. The inference that follows is that customs duty would be leviable only on the quantity of imported goods which has actually been received and the question of levying customs duty on the short received goods would not arise. It would be pertinent to note that the Circular No. 34/2016-Cus. dated 26.07.2016 was issued in the light of the judgment of the Hon'ble Supreme Court in the case of Mangalore Refinery and Petrochemicals Ltd. vs. Commissioner of Customs, Mangalore[2015(323)ELT 433(SC)]. The facts in the said judgment pertain to crude oil imported during the period between 13.01.1996 to 15.03.1998. The judgment of the Hon'ble Supreme Court in a Civil Appeal is to be construed as a declaration of law in terms of Article 141 of the Constitution of India. Since the imports in the present case pertain to the year March-April 2010, the ratio of this judgment of the Hon'ble Supreme Court would be applicable on all fours to the facts of the case at hand. Furthermore, the Circular No. 34/2016-Cus. dated

26.07.2016 rescinds the Circular No. 06/2006-Cus. dated 12.01.2006. Hence, the decisions taken on the basis of the circular dated 12.01.2006 cannot be sustained. The customs duty collected on the short received quantity of MEG was not leviable and hence cannot be retained by the Government. The amount collected in such manner must be refunded to the applicant.

11. The Government therefore directs the original authority to refund the amount of Rs. 10,83,131/- forthwith. The revision applicant filed by the applicant is allowed with consequential relief.

Shrawan 8/6/22

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 633/2022-CX(WZ) /ASRA/Mumbai DATED 08.6.2022

To,
M/s Garden Silk Mills Ltd.(PFY Division)
Village Jolwa,
Tal. Palsana,
Dist. Surat

Copy to:

1) The Commissioner of Customs(Import-II), Mumbai Zone-I
2) The Commissioner of Customs(Appeals), Mumbai Zone-I
3) Sr. P.S. to AS (RA), Mumbai
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