

REGISTERED
SPEED POST



F. Nos. 375/40/SL/2019-RA
375/40-A/SL/2019-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue... 08/02/22

Orders No. 39-40/22-Cus dated 08-02-2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India under section 129DD of the Custom Act, 1962.

Subject : Revision Applications under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. LUD-CUS-001-APP-1410-1411-18 dated 16.07.2018 passed by the Commissioner (Appeals), CGST & Customs, Ludhiana.

Applicant : M/s Mediterranean Shipping Company Sea Pvt. Ltd., Ludhiana.

Respondent : The Commissioner of Customs, Ludhiana.

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ORDER

Revision Applications, bearing nos. 375/40/SL/2019-RA & 375/40-A/SL/2019-RA both dated 20.05.2019, have been filed by M/s Mediterranean Shipping Company Sea Pvt. Ltd., Ludhiana (hereinafter referred to as the Applicant) against the Order-in-Appeal No. LUD-CUS-001-APP-1410-1411-18 dated 16.07.2018, passed by the Commissioner (Appeals), CGST & Customs, Ludhiana. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Orders-in-Original, passed by the Deputy Commissioner of Customs, CFS (PSWC), Ludhiana, bearing nos. 163/DC/CFS/PSWC/LDH/2014 dated 31.07.2014 & 193/DC/CFS/PSWC/LDH/2014 dated 30.08.2014, vide which penalties were imposed upon the Applicant herein under Section 116 of the Customs Act, 1962.

2. Briefly stated, M/s R.P. Multimetals Pvt. Ltd., Mandigobindgarh filed Bills of Entry for the import of Heavy Melting Scrap/Re-rollable Scrap under Section 17 read with Section 46 of the Customs Act, 1962. On written request of the importer, joint survey of the goods was conducted in the presence of representatives of various parties, including the Applicant herein. The containers were de-stuffed and found to contain the goods as per the declaration. However, the weight of the goods was found to be less as compared to the declared weight, as per details below:

S. No.	Bill of Entry No. & Date	Description of goods	Declared weight (In MTs)	Ascertained Weight (In MTs)	Difference in Weight (In MTs)
1	2	3	4	5	6
1	5249848 dated 21.11.2011	Heavy Melting Scrap	389.640	292.180	97.460
2	2080281 dated 09.05.2013	I-Beam and H-Beam used section defined as Re-rollable	25.211	12.180	13.031

Since the Applicant failed to deliver the quantity stuffed in the containers from the premises of the supplier to the consignee/importer in India, show cause notices were issued for imposing penalty under Section 116 read with Section 148 of the Act. The original authority imposed penalty of Rs. 4,50,000/- and Rs. 1,00,000/- in respect of the Serial No. 1 & Serial No. 2, respectively, as per details in the table

above. The appeals filed by the Applicants herein before the Commissioner (Appeals) have been rejected, vide the impugned Order-in-Appeal.

3. The revisions applications have been filed, mainly, on the grounds that the goods were examined on 28.11.2011 whereas show cause notice was issued on 01.04.2013 and, thus, the proceedings are time barred having been issued beyond the period of one year; that, in the present case, the cargo was never loaded at the port of shipment and there was a misdeclaration by the Shipper/Consignor in the bill of lading; that the consignment was shipped on "PARTICULARS FURNISHED BY THE SHIPPER – NOT CHECKED BY CARRIER – CARRIER NOT RESPONSIBLE (on front side and in Clause 14)" basis; that the goods were loaded by them as agents on FCL basis with the condition that the contents of the goods were not checked by the Applicant or the principals of the Applicant; that it is not a case of 'Short Landing' but actually a case of 'Short Shipment' for which the Applicant should not be penalized. Reliance has been placed on the judgment of the Hon'ble Bombay High Court in the case of *Shaw Wallace & Co. Ltd. vs. Assistant Collector of Customs {1986 (25) ELT 948 (Bom.)}*. Condonation of delay has been prayed for on the grounds that Applicants herein had earlier filed appeal against the Order-in-Appeal impugned herein before the CESTAT, which was rejected as non-maintainable by the CESTAT, vide the Order dated 07.03.2019. Replies have been filed by the Respondent department, vide letter C.No. VIII-CUS/Review/DC/CFS/PSWC/LDH/367/2014/2671 dated 26.08.2019.

4. Personal hearing in the matter was held on 28.01.2022, in virtual mode. Sh. Saurabh Kapoor, Advocate appeared for the Applicant and submitted that RA fee has been paid. He requested 5 days time to file Additional Submissions and thereafter a hearing may be granted. Accordingly, the matter was again heard on 07.02.2022, in virtual mode. Sh. Saurabh Kapoor, Advocate appeared for the Applicant and submitted that:

- (i) The RA fee has been paid in both the cases and Court Fee Stamps have also been submitted.

(ii) Additional Submissions have been filed by email on 07.02.2022.

Sh. Kapoor reiterated the contents of the RA and Additional Submissions filed on 07.02.2022.

5. In the Additional Submissions filed on 07.02.2022, it has been, inter-alia, brought out that seals of the container were found to be intact and, therefore, penalty should not be imposed on them. In this regard, the judgments of the Hon'ble Madras High Court in the case of *Container Corporation of India vs. Priya Dyeing & Chemicals {2012-4-LW-163}* and *Thakur Shipping Co. Ltd. vs. Food Corporation of India {AIR 1983 Mad. 105}* have been relied upon.

6. The Government has carefully examined the matter. The delay in filing of subject revision applications, due to filing of appeals in wrong forum, is condoned.

7. It is not disputed that, on joint survey, the quantity of goods imported was found to be less than what was declared/manifested. It is the contention of the Applicants that they had not checked the particulars furnished by the Shipper and, therefore, this is a case of 'Short Shipment' rather than that of 'Short Landing'. It is also stated that the joint survey was conducted on 28.11.2011 whereas the show cause notice was issued on 01.04.2013 and, as such, proceedings are time barred having been issued beyond the period of one year.

8. Adverting first to the issue of time bar, it is observed that Section 116 does not provide for any limitation period within which the penal proceedings have to be initiated. The period of one year is provided under Section 28 of the Customs Act for the purpose of demand of duty and not for penal proceedings. Therefore, the limitation period of one year has no applicability in the case of penalty, under Section 116. In any case, the proceedings in the instant case were initiated within one and a half years of discovery of short landing. A period of one and a half years cannot be considered to be unreasonable. Therefore, following the ratio of judgment of Hon'ble Supreme Court in the case of *GOI vs. Citadel Fine*

Pharmaceuticals {1989 (42) ELT 515 (SC)}, the penal action cannot be assailed on the grounds of delay.

9. In respect of penalty under Section 116, the Applicants have assailed the same, mainly, on the grounds that as per commercial arrangement between them and the Shipper, the cargo was accepted on the basis of particulars furnished by the Shipper and were not checked by the carrier. Therefore, they cannot be responsible for any 'Short Shipment'/'Short Landing'. Secondly, with reference to the judgment of Hon'ble Bombay High Court in the case of Shaw Wallace & Co. Ltd. (supra), it is contended that the seals of the container were intact and, hence, penalty under Section 116 is not tenable. The Commissioner (Appeals) has correctly brought out that the arrangement between Shipper and the principals of the Applicants herein, where the cargo was accepted on the basis of particulars furnished by the Shipper, was a commercial arrangement between the Shipper and the Applicant. Further, this being a commercial arrangement absolved the Applicant/principal from any financial claims, damages, etc. which may be levied upon them by the Shipper at a later stage but such a commercial arrangement between the two private parties cannot absolve the Applicants of the statutory obligation placed upon them under Section 116 read with Section 148 of the Customs Act, 1962. The judgment of the Hon'ble Bombay High Court in the case of Shaw Wallace & Co. Ltd. (supra) does not support the case of the Applicants herein, in as much as, in the case of Shaw Wallace & Co. Ltd., certain guidelines were issued in the background of practices followed at the Bombay Port Trust and the Customs in early 1980s. The applicability of these guidelines after a lapse of about 40 years does not appear to have been tested, by any constitutional court. The Government also observes that the Hon'ble Supreme Court has, in the case of *British Airways PLC. Vs. Union of India {2002 (139) ELT 6 (SC)}*, elaborated the scope of penalty under Section 116 in following terms:

"9. The scheme of the Act provides that the cargo must be unloaded at the place of intended destination and it should not be short of the quantity. Where it is found that the cargo has not been unloaded at the requisite destination or the deficiencies are not accounted for to the satisfaction of the authorities under the Act,

the person incharge of the conveyance, the liability could be fastened upon his agent appointed under the Act or a person representing the officer incharge who was accepted as such by the officer concerned for the purposes of dealing with the cargo on his (officer-in-charge) behalf."

Further, in the case of *Commissioner of Customs (Imports), Mumbai vs. Patvolk {2006 (202) ELT 411 (Bom.)}*, a Division Bench of Hon'ble Bombay High Court itself has followed the judgment in *British Airways PLC (supra)* and repelled the challenge to penalty imposed upon agent of the person incharge of the conveyance under Section 116. Therefore, the present contentions of the Applicants are not acceptable. Other case laws relied upon by the Applicants are not applicable in view of declaration of law by the Apex court in *British Airways* case.

10. In view of the above, it is held that the penalty has been correctly imposed on the Applicant herein under Section 116 of the Act *ibid*. However, keeping in view, the facts and circumstances of the case, the penalty imposed is reduced from Rs. 1,00,000/- to Rs. 50,000/- and from Rs. 4,50,000/- to Rs. 2,00,000/-, respectively.

11. The revisions applications are disposed of in above terms.



(Sandeep Prakash)

Additional Secretary to the Government of India

M/s Mediterranean Shipping Company Sea Pvt. Ltd.,
1st Floor, Sector – 32 A, Chandigarh Road,
Ludhiana – 141 010.

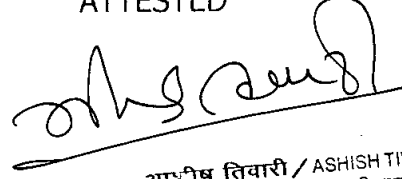
Order No. 39-40/22-Cus dated 08-02-2022

Copy to:

1. The Commissioner of Customs, Customs House, G.T. Road, Sahnewal, Ludhiana – 141 120.
2. The Commissioner (Appeals), CGST & Customs, Ludhiana, F-Block, Rishi Nagar, Ludhiana – 141 001.
3. Sh. Saurabh Kapoor, Advocate, #553, MDC Sector-6, Panchkula – 134 109.

4. PA to AS(RA).
- ✓ 5. Guard File.
6. Spare Copy.

ATTESTED



आशीष तिवारी / ASHISH TIWARI
सहायक आयुक्त / Assistant Commissioner
केन्द्रीय वस्तु एवं सेवा कर, केन्द्रीय उत्पाद एवं सीमा शुल्क
CGST, Central Excise & Customs
राजस्व विभाग / Department of Revenue
वित्त मंत्रालय / Ministry of Finance
भारत सरकार / Government of India
नई दिल्ली / New Delhi