

		OFFICE OF THE COMMISSIONER OF CUSTOMS NEW CUSTOMS BLDG, NR. BALAJI TEMPLE, KANDLA-370210 (GUJARAT) PHONE : 02836-271468-469 FAX : 02836- 271467
A	File No.:	S/15-07/Gr-I/Acrux/18-19
B	Order-in-Original No.:	KDL/ADC/UBR/19/2018-19
C	Passed by:	U.B. Rakhe Additional Commissioner of Customs, Custom House, Kandla.
D	Date of order:	27.09.2018
E	Date of issue:	05.10.2018
F	Importer:	M/s. Acrux Enterprise,

1. This copy is granted free of charge for the use of person to whom it is issued.
2. An appeal against this order lies with the Commissioner of Customs (Appeal), having office at 7th floor, Mridul Tower, Behind Times of India, Ashram Road, Ahmedabad - 380009 in terms of Section 128 of the Customs Act, 1962. it should be filed within sixty days from the date of communication of this order.
3. Appeal should be filed in format prescribed. It shall be signed by the person specified in sub-rule (2) of Rule 3 of the Customs Appeal Rules, 1982. It shall be filed in duplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate. The appeal shall be presented in person to the office of the Commissioner (Appeal), Ahmedabad, but the date of receipt in the office will be relevant date of appeal whether in time or not.
4. The copy of this order attached herein should bear a Court fee stamp of Re.1/- (Rupee one only) as prescribed under schedule-1, item 6 of the Court Fees Act, 1870.
5. Proof of payment of duty/penalty should also be attached to the original appeal.
6. Appeal should also bear a Court Fee Stamp of Rs. 5/-.
7. An appeal against this order shall lie before the Commissioner (Appeals) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute or penalty, are in dispute or penalty, where penalty alone is in dispute.
8. Proof payment of duty/interest/fine/penalty etc. should be attached with the appeal memo.
9. While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

Sub.: Import of "Industrial Composite Mixture" by M/s. Acrux Enterprise, Plot no 4, 3rd Floor, Safeway House, D Block, Central Market, Prashant Vihar, Delhi 110085 had filed B/E No. 7921326 dated 05.09.2018

BRIEF FACTS OF THE CASE

1. The importer M/s. Acrux Enterprise, Plot no 4, 3rd Floor, Safeway House, D Block, Central Market, Prashant Vihar, Delhi 110085 had filed B/E No. 7921326 dated 05.09.2018 for clearance of 220.14 Mts (13 Containers) of "Industrial Composite Mixture" through their Customs Broker, M/s. Gaurav M Jhaveri, Gandhidham. The importer classified the goods under CTH 27101990. The declared assessable value of the goods was Rs. 1,02,88,225.01. The goods were given first check with the order to draw sample and forward the same to CRCL, Kandla for testing.

2. The Test Report bearing No. 1034355 dated 06.09.2018 received from CRCL, Kandla states that the imported goods is composed of mixture of mineral Hydrocarbon Oil having;

- Initial Boiling Point = 144°C
- Final Boiling Point = 225°C
- **Distilled at 210°C = 94%**
- Flash Point = 44°C
- Density at 15°C = 0.7796 gm/ml
- **It is Light Oil.**

3. As evident from the above test report that imported cargo was other than their declaration, and test report confirmed that imported goods are other than Industrial Composite Mixture "**It is Light Oil**".

4. In this regard, Sub-Heading Note-4 of Chapter 27 provides that:-

"4. For the purposes of sub-heading 2710 12, "light oils and preparations" are those of which 90% or more by volume (including losses) distil at 210°C (ASTM D 86 method)."

In the instant case, the Test Report as discussed above, confirms that 94% by volume, of the goods distils below 210° C, hence the impugned goods fall within the purview of "light oils and preparations"

5. Further to decide appropriate tariff classification of the goods, Supplementary Notes, Sub-heading notes and rules of classification have been taken into consideration. As per the classification of chapter 27, it is seen that the chapter heading 2710 is further sub-classified as 'Light Oils and their Preparations' which is further sub-classified at --- level into 'Motor Spirit', Natural Gasoline Liquid' and 'other'. From the test report it is seen that the goods in question do not confirm the parameters of Motor Spirit. The 'Motor Spirit' is defined in Supplementary Note- (a) of chapter 27 reproduced herein below:-

(a) "Motor spirit" means any hydrocarbon oil (excluding crude mineral oil) which has its flash point below 25° C and which either by itself or in admixture with any other substance, is suitable for use as fuel in spark ignition engines. "Special boiling point spirits (tariff items 2710 12 11, 2710 12 12 and 2710 12 13)" means light oils, as defined in Sub-heading Note 4, not containing any anti-knock preparations, and with a difference of not more than 600 °C between the temperatures at which 6% and 90% by volume (including losses) distil;

6. In the instant case, test report shows the flash point of the goods is above 25°C; hence the same do not qualify the classification under tariff heading of 'Motor Spirit'. Further, in the said test report, the goods are not tested for having anti-knock preparations, hence the impugned are more appropriately classifiable under Tariff heading 27101290 i.e. 'Other' of sub-heading 'Light Oils and their Preparations'.

7. The goods falling under tariff heading 27101290 are allowed to be imported through State Trading Enterprises (STE) only as per Policy condition - 5 of the Chapter -27 of ITC (HS), Schedule-1.

The policy condition-5 of the Chapter 27 is reproduced below:-

"5.Import allowed through IOC subject to Para 2.20 of Foreign Trade Policy, except for the companies who have been granted rights for marketing of transportation fuels in terms of Ministry of P&NG's Resolution No. P-23015/1/2001-MKT. Dated 8.3.2002 including HPCL, BPCL & IBP who have been marketing transportation fuels before this date".

8. Further, in view of the above discussion, it appears that the impugned goods of Rs. 1,02,88,225.01 are more appropriately classifiable under Tariff heading 27101290 and are imported against the provisions of FTP are violated the provisions of Section 11 of the Customs Act, 1962 and hence are held liable for confiscation under Section 111 (d) of the act ibid. The importer for such acts of commission/omission is also liable for penal action under Section 112 of the Customs Act, 1962.

9. The Importer vide their letter dated 24.09.2018 have requested for waiver of the Show Cause Notice and personal Hearing and to adjudicate the case on merit and allow clearance on payment of minimum redemption Fine & Penalty.

DISCUSSION & FINDINGS

10. I have carefully gone through the case records & submissions of the importer and applicable provisions of law. The importer vide letter dated 24.09.2018 has requested for waiver of the show cause notice. Hence, I proceed to decide the case on the basis of documentary evidence available on case records.

11. I find that the importer, M/s. Acrux Enterprise, had filed B/E No. 7921326 dated 05.09.2018 for clearance of 220.14 Mts (13 Containers) of "Industrial Composite Mixture" valued at Rs. Rs. 1,02,88,225.01. However as per test report No. 1034355 dated 06.09.2018 .CRCL, Kandla', the imported goods were found "Light Oil" falling under CTH 27101290 instead of "Industrial Composite Mixture" as declared under CTH 27101990.

12. I, therefore, find that, importer has mis-declared goods as Industrial Composite Mixture wherein test report of the impugned goods indicate that goods are light oil and which rightly falls under tariff heading 27101290 and same are allowed to be imported through State Trading Enterprise (STE) only as per Policy Condition -5 of Chapter-27 of ITC (HS), Schedule -1

The policy condition-5 of the Chapter 27 is reproduced below:-

"5.Import allowed through IOC subject to Para 2.20 of Foreign Trade Policy, except for the companies who have been granted rights for marketing of transportation fuels in terms of Ministry of P&NG's Resolution No. P-23015/1/2001-MKT. Dated 8.3.2002 including HPCL, BPCL & IBP who have been marketing transportation fuels before this date".

13. I find that the importer in this case neither is STE nor has submitted any documents showing grant of such rights by the DGFT to import or export any of the goods notified for exclusive trading through STE's therefore the importer has violated the policy conditions of the Foreign Trade Policy.

14. In view of the above discussion, I find that M/s. Äcrux Enterprises has tried to import "Industrial Composite Mixture by mis-declaring the same as "Low Aromatic White Spirit per classified under CTH No.27101990 . The importer has also mis-classified the item under CTH - 27101990 instead of CTH-27101290. By doing so the importer has violated the provisions of FTP and Customs Act and made the goods liable for confiscation under Section 111 (d) and 111 (m) of the Customs Act, 1962 as the importer is neither an STE nor have submitted any authorization as provided in the Policy condition-5 of Chapter 27 of ITC (HS), Schedule-1. Further the declared description of the goods also have been found to be suppressed and mis-declared, hence the Importer is also liable for penal action under Section 112(a) of the act ib.

15. In this regard, section 111 (d) & (m) of the Customs Act, 1962, stipulates that the following goods brought from a place outside India shall be liable for confiscation:-

111(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force

111(m) any goods which do not correspond in respect of value are any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 (in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the provision to sub-section (1) of section 54;

16. I find that in instant case, the Importer vide their letter dated 24.09.2018 informed that their supplier is not ready to take back the goods in question and suggested for retesting . However by considering the escalating detention and demerage charges, they have requested for waiver of the Show Cause Notice and personal Hearing and to adjudicate the case on merit and allow clearance on payment of minimum redemption Fine & Penalty.

17. I further find that the importer has requested to release the goods on the genuine grounds and since the imported goods i.e. Light are allowed to be imported by STE's only. However taking into consideration the facts of the case and submission made by the importer for clearance of goods, it is clear that they had placed order to the foreign supplier for supplying 220.14 MTS of Low Aromatic White Spirit only. All the import documents also confirms that

description of the goods as Low Aromatic White Spirit but on testing by the CRCL the same is found to be Light Oil based on the parameters as indicated in the said Test Report.

18. Now, the issue before me to decide is whether the restriction imposed under FTP for import of Light Oil can be allowed to redeem under Section 125 of Customs Act, 1962. I rely on the judgement pronounced by the Hon'ble Punjab and Haryana High Court at Chandigarh in CWP No. 12517 of 2016, wherein it was held that

"5. It is submitted that although the R-22 Gas is a 'restricted' item for import, and the goods Cigarettes and the R-22 Gas were imported by concealment, however, none of these goods are expressly notified as 'prohibited' for importation. Imported Goods can only be seized under Section 110 of the Act, when there exists a reasonable belief that the same are liable to confiscation under Section 111. In respect of such goods even if the same are confiscated upon culmination of adjudication under Section 28 read with 124 of the Act, the owner/importer 'shall' be given an option to redeem the goods on payment of redemption fine in terms of Section 125 of the Act. Section 110A of the Act provides for provisional release of seized goods even pending adjudication. The petitioner company relies upon the Order dated 4.8.2015 of the Customs Excise and Service Tax Appellate Tribunal in the matter of Bhargav B. Patel in Appeal No. C/381/10-Mum reported in 2015-TIOL-1951-CESTAT-Mum, which is in the context of Section 125 of the Act. In para 11 thereof, it was held that under Section 125 of the Customs Act, unless the importation or exportation of goods is expressly "prohibited", the Adjudication Authority is obliged to offer to the owner of the goods an option to pay fine in lieu of confiscation. The Tribunal referred to Asian Food Industries, 2006 (204) ELT 8 (SC), wherein the Hon'ble Apex Court inter alia observed that the meaning of word "prohibited" will have to be construed in regard to the text and context in which it is used and the words prohibition, restriction and regulation are meant to be applied differently. The Tribunal also observed that in the context of Section 111(d) or 113(d), in several precedents, the definition of 'prohibited goods' as contained in Section 2(33) of the Customs Act, 1962 has been applied liberally, including in Om Parkash Bhatia vs Union of India, 2003 (155) E.L.T. 423 (S.C.) and Sheikh Mohd. Omer v. Collector, 1983 (13) E.L.T. 1439 (S.C.). However, the issue, whether in the context of Section 125, the definition of 'prohibited goods' under Section 2(33) is applicable or not, was neither raised nor determined in these precedents. The Tribunal also relied upon settled principles of statutory interpretation as held in Ramesh Mehta vs. Sanwal Chand Singhvi (2004) 5 SCC 409 for ascertaining the scope of words 'unless the context otherwise requires' appearing in Section 2(33) for application of the definition of 'prohibited goods', and rightly held that the liberal definition of Section 2(33) which is applied in the context of Section 111 or 113 cannot be applied in the context of Section 125. The Tribunal relied upon the judgment of Hon'ble Andhra Pradesh High Court in Shaik Jamal Basha vs. GOI, 1997 (91) ELT 277 (AP), wherein after considering both Section 111 as well as scheme of Section 125 in a case of concealment the High Court was pleased to hold that attempt to import gold un-authorisedly will come under the second part of Section 125 (1) of the Act where the adjudging officer is under mandatory duty to give option to the person found guilty to pay fine in lieu of confiscation. Section 125 of the Act leaves option to the officer to grant the benefit or not so far as goods whose import is 'prohibited' but no such option is available in respect of goods which can be imported, but because of the method of importation adopted, become liable for confiscation. Hon'ble Madras High Court in T Elavarasan, 2011 (266) ELT 167

(MAD HC), was pleased to rely on the said judgment of Hon'ble Andhra Pradesh High Court and held that an option has to be given to the petitioner to pay the applicable customs duty and the redemption fine and to get the gold jewellery released, as per Section 125 of the Customs Act, 1962. In the context of Section 125 if the word "prohibited" is construed as to apply in respect of every violation of any regulation or restriction or statutory procedural requirement, the word 'shall' in said Section would be rendered redundant and meaningless. If the definition of 'prohibited goods' is applied in the context of Section 125, it would result in absurdity rendering the word 'shall' redundant and otiose, because there cannot be any situation where the goods would be liable to confiscation under Section 111 and 113 as the case may be without there being any violation of the provisions under the Customs Act, 1962 or under any other law or rules, regulations made thereunder. Therefore, in the context of statutory provisions of Section 125, so as to give a meaningful application to both words 'may' and 'shall' used in the said Section, the definition of 'prohibited goods' is inapplicable by application of settled principles of statutory interpretation. The Tribunal was therefore correct in observing that under Section 125 of the Customs Act, unless the importation or exportation of goods is expressly "prohibited" the Adjudication Authority would be obliged to offer to the Owner the goods an option to pay fine in lieu of confiscation."

19. The expression " Prohibited Goods" is defined in Section 2(33) of the Customs Act, 1962 to mean "any goods, the import or export of which is subject to any prohibition under the Customs Act or any other law for the time being in force, but it does not include any such goods in respect of which, the conditions subject to which the goods are permitted to be imported or exported have been complied with."

20. A careful look at Section 2(33) would show that even prohibited goods could be permitted to be imported or exported subject to some terms and conditions. The moment those conditions are complied with, those goods would cease to be prohibited goods. This is why the exclusion clause contained in the second part of Section 2(33) uses the expression "any such goods". Therefore, it appears that the Customs Act recognizes only two types of goods namely: (1) those that are prohibited; and (2) those that are not prohibited. The Act also recognizes the fact that even prohibited goods could be imported or exported subject to certain conditions. If those conditions are fulfilled, prohibited goods would automatically become non-prohibited goods.

21. In the Chapter Note 5 of Ch.27 of CTH, it is mentioned that The import of Light Oil is allowed subject to condition that "5.Import allowed through IOC subject to Para 2.20 of Foreign Trade Policy, except for the companies who have been granted rights for marketing of transportation fuels in terms of Ministry of P&NG's Resolution No. P- 23015/1/2001-MKT. Dated 8.3.2002 including HPCL, BPCL & IBP who have been marketing transportation fuels before this date". From which it appears that the importer violated the above said condition and therefore the goods in question are liable to be confiscated.

22. It is also to mentioned that the importer in his submission contended that they are supplying the goods to actual users for making different types of solvents which in turns is the raw materials. Party did not agree with the test report of the CRCL, Kandla, however as they are the suppliers to original user of the product as well as in view of mounting demurrage charges they requested for clearance of the goods as Light Oil.

of the product as well as in view of mounting demurrage charges they requested for clearance of the goods as Light Oil.

23. In view of the above pronouncement and discussion, I find that Light Oil is not expressly prohibited goods for its importation. Therefore, I hold that the importation of goods i.e. Light Oil is liable for confiscation under section 111 (d) and 111(m) of Customs Act, 1962, however, I find that the kerosene may be redeemed on payment of redemption fine, as it is not expressly prohibited item, it is only a restriction imposed under FTP. Accordingly, I find it appropriate to consider the request of the importer and to redeem the impugned goods on payment of applicable duty, redemption fine, penalty etc. in the interest of revenue.

24. In view of the aforesaid discussion and findings, factual and legal matrix, I pass the following order.

ORDER

25. I reject the declared classification of imported goods "Industrial Composite Mixture which was declared classifying under CTH r/w ITC (HS) Schedule -1's heading 27101990 and order the same to be classified under CTH-27101290 in view of Test Report No. 1034355 dated 06.09.2018 .

26. I order for confiscation of imported goods i.e "light oil" valued at Rs. 1,02,88,225.01 covered under No. 7921326 dated 05.09.2018 under Section 111 (d) & (m) of the Custom Act, 1962. However, I give an option to the importer to redeem the confiscated goods on payment of redemption fine of Rs.10,00,000/- (Rupees Ten lacs only) under Section 125 of the Customs Act, 1962.

27. I also impose a penalty of Rs.2,50,000/- (Rupees Two Lacs Fifty Thousand only) on the importer under Section 112 (a) (i) of the Customs Act, 1962.

28. This order is passed without prejudice to the any other action which may be contemplated against the importer or any other person in terms of any provision of the Customs Act, 1962 and/or any other law for the time being in force. The goods should be released on payment of appropriate duty, redemption fine, penalty and other charges if any.


(U.B.RAKHE)

Additional Commissioner of Customs
Custom House, Kandla

To,

M/s. Acrux Enterprise,
Plot no 4, 3rd Floor, Safeway House, D Block,
Central Market, Prashant Vihar, Delhi 110085

Copy to: Copy to:

1. The Deputy Commissioner (RRA), Custom House Kandla.
2. The Deputy Commissioner (Recovery), Custom House Kandla.
3. Guard file.