

		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/15-11/Gr.1/Shree Ganesh/18-19
B	Order-in-Original No.:	KDL/ADC/UBR/23/2018-19
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.Shree Ganesh Enterprises

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.: M/s.Shree Ganesh Enterprises, Flat No.211, 2 nd Floor, Plot No.220, Sector-9, Vrindavan Co-Op Housing society, Banking Area, Gandhidham , Kutch, Gujarat. had filed B/E No.8117647 dated 19.09.2018-reg

BRIEF FACTS OF THE CASE

1. The importer M/s.Shree Ganesh Enterprises, Flat No.211, 2 nd Floor, Plot No.220, Sector-9, Vrindavan Co-Op Housing society, Banking Area, Gandhidham , Kutch, Gujarat. had filed B/E No.8117647 dated 19.09.2018 for clearance of 302.93 Mts (17 Containers) of " Industrial Composite Mixture " through their Customs Broker, M/s. Cargo Clearing Agency, Gandhidham. The importer classified the goods under CTH 27101990. The declared assessable value of the goods comes to Rs. 1,44,59,044.29. 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. 1034969 dated 20.09.2018 received from CRCL, Kandla states that the imported goods is composed of mixture of mineral Hydrocarbon Oil having;
 - Initial Boiling Point = 150°C
 - Final Boiling Point = 250° C
 - Distilled at 210°C = 80%
 - Flash Point = 50°C
 - Density at 15°C = 0.7858 gm/ml
 - Smoke Point = 21 mm
 - Above reported parameter meets the specification of Kerosene Oil As per IS 1459-2016
3. It is evident from the Test Report that the product is "Superior Kerosene Oil" falling under tariff heading 27101910 against the description of "Industrial Composite Mixture" classified under CTH No. 27101990 as declared by the Importer. The goods falling under tariff heading 27101910 are restricted and allowed to be imported through State Trading Enterprises (STE) only as per Policy condition -2 of the Chapter -27 of ITC (HS), Schedule-1.

The policy condition-2 of the Chapter 27 is reproduced below:-

"2.Import of SKO shall be allowed through State Trading Enterprises(STEs).i.e.IOC, BPCL, HPCL and IBP for all purpose with STC being nominated as a STE for supplies to Advance Licence holders. Advance Licence holders shall, however, have the option to import SKO from the above mentioned STEs including STC"
4. The importer in this case is neither an 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 STEs.
5. It is further noticed that the declared description of the goods in the bill of entry is of Industrial Composite Mixture , classified under CTH No. 27101990, whereas the goods on being tested, vide test report as mentioned in the preceding para-2, are found to be 'Superior Kerosene Oil ' which falls under Tariff heading 27101910 are restricted for importation and clearance thereof.
6. In view of the above discussion, it is found that the impugned goods valued at Rs.1,44,59,044.29 are more appropriately classifiable under Tariff heading 27101910, imported against the provisions of FTP are "illegal import" under the provisions of Section 11 of the Customs Act, 1962 and hence are held liable for confiscation under Section 111 (d) & (m) of the act ibid. The importer for such acts of commission/omission is also liable for penal action under Section 112(a) of the Customs Act, 1962.

7. In this connection, the importer vide their letter dated 27.09.2018 have submitted that they are regularly importing various Petroleum products, viz. Low Aromatic White Spirit, and Petroleum Hydro Carbon Solvents, Industrial composite mixture.. through Kandla and Mundra Port.. They are supplying these products to actual users who engaged in paint and ink industries. The captioned goods are purchased by them from modern chemicals on High sea sale basis which has been supplied to them M/s.Greek Traders, FZC Sharjah against Proforma invoice No.GREEK/MODERN CHEMICALS. They have ordered industrial composite mixture having distillation range 140-240 as guided in 1745-1978.

8. They have further submitted that as per IS 1459-1974 (Reaffirmed in 2001)., the Final Boiling Point Of Kerosene is 300° C Maximum but as per Test Report the Final Boiling Point Of their product is comparatively very low (206° C only)Party has stated that it is also to be noted that as per the above referred standard, the Flash Point of Kerosene is 35 Degree C Minimum Whereas the Flash Point Of their product is reported as 45 Degree C. It is pertinent to understand the fact that the goods are crude Products and separated on the basis of Distillation, so minor errors are possible. It is also highlighted that the Boiling Point and Flash Point of sample shown in the test result is nowhere close to the standard of SKO as being referred by the Department. It is a just a marginal variation from the general standard of industrial composite mixture plus. So it will be unjust to declare it as SKO. In view of the above, party submitted that the captioned goods imported by them are Nothing but Industrial Composite Mixture Only. The importer has also submitted that the containers are landed 19/09/2018 and it is incurring Heavy detention and demurrage also goods are required on urgent basis for supplying to the actual users.. Party has further submitted that they do not want any show case notice or personal hearing In this matter. In view of above submission party has requested for release of goods at the earliest.

DISCUSSION & FINDINGS

9. I have carefully gone through the case records & submissions of the importer and applicable provisions of law. The importer vide letter dated 27.09.2018 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

10. The importer, M/s.Shree Ganesh Enterprises, had filed B/E No.8117647 dated 19.09.2018 for clearance of 302.93 Mts (17 Containers) of " Industrial Composite Mixture Plus" However as per test report No.1034969 dated 20.09.2018 of Customs Laboratory, Kandla the imported goods were found "Superior Kerosene Oil" falling under CTH 27101910 Instead of Industrial Composite Mixture falling under CTH 27101990.

11. On verification of the above test report, I find that the product imported is having characteristics of Superior Kerosene Oil and accordingly falls under tariff heading 27101910. All the goods falling under tariff heading 27101910 are not freely importable but restricted for imports to be made by the State Trading Enterprises (STE) only as per the policy condition -2 of the Chapter 27 of the ITC (HS) Shedule-1.

The policy condition -2 of the Chapter 27 is reproduced herein below;-

"2.Import of SKO shall be allowed through State Trading Enterprises(STEs).i.e.IOC, BPCL, HPCL and IBP for all purpose with STC being nominated as a STE for suppliesw to Advance Licence holders. Advance Licence holders shall, however, have the option to import SKO from the above mentioned STEs including STC"

Further Para 2.20 of FTP 2015-20 may be read as under-

2.20 State Trading Enterprises (STEs)

(a) State Trading Enterprises (STEs) are governmental and non-governmental enterprises, including marketing boards, which deal with goods for export and / or import. Any good, import or export of which is governed through exclusive or special privilege granted to State Trading Enterprises (STE), may be imported or exported by the concerned STE as per conditions specified in ITC (HS). The list of STEs notified by DGFT is in Appendix 2J.

(b) Such STE (s) shall make any such purchases or sales involving imports or exports solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale in a non discriminatory manner and shall afford enterprises of other countries adequate opportunity, in accordance with customary business practices, to compete for participation in such purchases or sales.

(c) DGFT may, however, grant an authorization to any other person to import or export any of the goods notified for exclusive trading through STEs.

12. The policy provisions mentioned in the Indian Trade Classification (Harmonised System) of Import in the Schedule-1 is binding as per the FTP 2015-20, Chapter-2 and Paragraph 2.02 thereto.

13. The importer in this case is neither an 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 STEs. It is further noticed that the declared description of the goods in the bill of entry is of Industrial Composite Mixture , classified under CTH No. 27101990, whereas the goods on being tested, vide test report as mentioned in the preceding para-2, are found to be 'Superior Kerosene Oil ' which falls under Tariff heading 27101910 are restricted for importation and clearance thereof.

14. In view of the above discussion, I find that M/s.Shree Ganesh Enterprises have tried to import "Superior Kerosene Oil" by mis-declaring the same as "Industrial Composite Mixture classified under CTH No.27101990 . The importer has also mis-classified the item under CTH - 27101990 instead of CTH-27101910. 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 *ibid*.

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. In this connection, I find that, the importer vide their letter dated 27.09.2018 have submitted that they are regularly importing various Petroleum products, viz. Low Aromatic White Spirit, and Petroleum Hydro Carbon Solvents, Industrial composite mixture.. through Kandla and Mundra Port.. They are supplying these products to actual users who engaged in paint and ink industries. The captioned goods are purchased by them from modern chemicals on High sea sale basis which has been supplied to them M/s.Greek Traders, FZC Sharjah against Proforma invoice No.GREEK/MODERN CHEMICALS. They have ordered industrial composite mixture having distillation range 140-240 as guided in 1745-1978.

17. They have further submitted that as per IS 1459-1974 (Reaffirmed in 2001)., the Final Boiling Point Of Kerosene is 300° C Maximum but as per Test Report the Final Boiling Point Of their product is comparatively very low (250° C only)Party has stated that it is also to be noted that as per the above referred standard , the Flash Point of Kerosene is 35 Degree C Minimum Whereas the Flash Point Of their product is reported as 45 Degree C. it is pertinent to understand the fact that the goods are crude Products and separated on the basis of Distillation, so minor errors are possible. It is also highlighted that the Boiling Point and Flash Point of sample shown in the test result is nowhere close to the standard of SKO as being referred by the Department. It is a just a marginal variation from the general standard of industrial composite mixture plus. So it will be unjust to declare it as SKO. In view of the above, party submitted that the captioned goods imported by them are Nothing but Industrial Composite Mixture Only. The importer has also submitted that the containers are landed 19/09/2018 and it is incurring heavy detention and demurrage also goods are required on urgent basis for supplying to the actual users.. Party has further submitted that they do not want any show case notice or personal hearing In this matter. In view of above submission party has requested for release of goods at the earliest.

18. I further find that the importer has requested to release the goods on the genuine grounds and since the imported goods i.e. Superior Kerosene Oil 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 302.930 MTS of Industrial Composite Mixture 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 Superior Kerosene Oil based on the parameters as indicated in the said Test Report.

19. Now, the issue before me to decide is whether the restriction imposed under FTP for import of Superior Kerosene 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."

20. 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."

21. 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.

22. In the Chapter Note 2 of Ch.27 of CTH, it is mentioned that The import of Superior Kerosene Oil is allowed subject to condition that "2.Import of SKO shall be allowed through State Trading Enterprises(STEs).i.e.IOC, BPCL, HPCL and IBP for all purpose with STC being nominated as a STE for supplies to Advance Licence holders. Advance Licence holders shall, however, have the option to import SKO from the above mentioned STEs including STC". From which it appears that the importer violated the above said condition and therefore the goods in question are liable to be confiscated. It can also be seen as the advance licence holders are allowed to import the product through STC, hence it cannot be consider it as a cannalised item.

23. It is also to mentioned that the importer in his submission contended that they are actual user of the imported Low Aromatic While Spirit 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 original

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

24. In view of the above pronouncement and discussion , I find that Superior Kerosene Oil is not expressly prohibited goods for its importation. Therefore, I hold that the importation of goods i.e. Superior Kerosene Oil is liable for confiscation under section 111 (d) and 111(m) of Customs Act, 1962, however, I find that the same 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.

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

ORDER

20. I reject the declared classification of imported goods "Industrial Composite Mixture" which was classified under CTH r/w ITC (HS) Schedule - 1's heading 27101990 and order the same to be re-classified under CTH-27101910 in view of Test Report No. 1034969 dated 20.09.2018.

21. I order for confiscation of imported goods i.e Superior Kerosene Oil valued at Rs. 1,44,59,044.29 covered under B/E No.8117647 dated 19/09/2018 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.14,50,000/- (Rupees Fourteen Lac Fifty Thousand only) under Section 125 of the Customs Act, 1962.

22. I also impose a penalty of Rs.4,00,000/- (Rupees Four lac only on the importer under Section 112 (a) (i) of the Customs Act, 1962.

23. 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.Shree Ganesh Enterprises,
Flat No.211, 2 nd Floor, Plot No.220,
Sector-9, Vrindavan Co-Op Housing society,
Banking Area, GANDhidham , Kutch, Gujarat

Copy to:

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