(2021) 11 CESTAT CK 0008

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 61354 Of 2019

M/s. Chander Chemical Co. APPELLANT

Vs

Commissioner Of Customs, Ludhiana RESPONDENT

Date of Decision : 01-11-2021

Acts Referred:

Customs Act, 1962 — Section 27, 111, 111(d), 111(m), 112, 125, 125(1)
Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008 — Rule 13(1), 13(2), 17, 17(2)
Environment Protection Act 1986 — Section 12(1)(b), 13, 15(1)
Constitution of India, 1950 — Article 226

Citation : (2021) 11 CESTAT CK 0008

Hon'ble Judges : Ashok Jindal, J;Sanjiv Srivastava, Technical Member

Bench : Division Bench

Final Decision : Disposed Of

Judgement

1. This appeal is directed against Order-In-Appeal No.LDH EXCUS-001-APP-2965-2019-20 dated 15.11.2019 of the Commissioner Customs, Goods and Service Tax (Appeals) Ludhiana. By the impugned order Commissioner (Appeal) has upheld the Order-in-Original No.LDH-CUS-JC-RRG-024-18-19 dt. 04.09.2019 of the Additional Commissioner of Customs, ICD-GRFL, GT Road, Sahnewal. Ludhiana. Additional Commissioner has vide the order in original held as follows:

"(i) The imported goods i.e. 44306.90 kg of lubricant oil open gear of declared value of Rs 9,37,213/- vide bill of entry No 8060152 dtd 21.01.2015 by the Noticee and found as hazardous waste are held liable to confiscation under section 111 (d) & 111 (m) of Customs Act, 1962.

(ii) The imported goods found as hazardous waste shall be re-exported by the importer at his own expense in view of the provisions of Rule 17 of Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008, immediately. However as the goods have been held liable for confiscation, the goods shall be redeemed by the importers for exporting them after paying a fine of Rs 50,000/- (Rupees Fifty Thousand) under section 125(1) of the Customs Act, 1962.

(iii) I impose a penalty of Rs 10,000/- (Rupees Ten Thousand) is imposed on M/s Chander Chemicals Co., Mandi Road, Near Neem Chakki, Jalandhar under Section 112 of the Customs Act, 1962."

2.1 Appellant imported 44306.90 kg of Lubricant Oil - Open Gear vide invoice number 182956298 257511 dated 12.10.2014 issued by M/s Salvex, 723 Main Sr. STE 600 Houston TX 77002 United States at a unit price of USD 0.101564 per kgs. For the clearance he filed bill of entry No. 8060152 dt. 21.01.2015 declaring assessable value of Rs. 9,37,213/-involving duty of Rs. 1,90,170/- under tariff item 2710 1980 of Customs Tariff Act, 1985.

2.2 Three samples drawn from impugned consignment were sent to CRCL, New Delhi vide 3 test memos all dated 31.01.2015 requiring tests as under:-

? Description of test required

To know the basic constituent of the preparation containing by weight what percentage of petroleum oil or of oils obtained from bituminous minerals and whether it is lubricating oil or otherwise

The test reports all dt. 19.02.2015 received from CRCL, New Delhi stated as follows:-

Sample 1.

The sample is in the form of black colored viscous liquid having mineral hydrocarbon content more than 70% having following content.

1.

Ash (% by mass)

0.05 (zero deci zero five)

2.

Density (gm/ml)

0.9842 (zero deci nine eight four two)

3.

Kinematic Viscosity at 100 °c cst

150.7 (one hundred fifty deci seven)

4.

Flash point (coc)

100 °c (one hundred)

5.

Aromatic content

72.0 (seventy two deci zero)

6.

Non Aromatic content

28.0 (twenty eight deci zero)

7.

PAH content (mg/kg)

116.1 (one hundred sixteen deci one)

8.

Acidity

Nil

9.

Sediments

Nil

10.

Water content

Nil

The sample under reference falls under the category of hazardous waste as PAH content in the sample is more than prescribed limit.

Sealed remnant returned

Sample 2

The sample is in the form of black colored viscous liquid having mineral hydrocarbon content more than 70% having following content.

1.

Ash (% by mass)

0.05 (zero deci zero five)

2.

Density (gm/ml)

0.9707 (zero deci nine seven zero seven

3.

Kinematic Viscosity at 100 °c cst

112.5 (one hundred twelve deci five)

4.

Flash point (coc)

100 °c (one hundred)

5.

Aromatic content

72.0 (seventy two deci zero)

6.

Non Aromatic content

28.0 (twenty eight deci zero)

7.

PAH content (mg/kg)

194.8 (one hundred ninety four deci eight)

8.

Acidity

Nil

9.

Sediments

Nil

10.

Water content

Nil

The sample falls under the category of hazardous waste as PAH content in the sample is more than prescribed limit.

Sealed remnant returned

Sample 3

The sample is in the form of black colored viscous liquid having mineral hydrocarbon content more than 70% having following content.

1.

Ash (% by mass)

0.09 (zero deci zero nine)

2.

Density (gm/ml)

0.9537 (zero deci nine five three seven

3.

Kinematic Viscosity at 100 °c cst

44.78 (forty four deci Seven eight)

4.

Flash point (coc)

115 °c (one hundred fifteen)

5.

Aromatic content

72.0 (seventy two deci zero)

6.

Non Aromatic content

28.0 (twenty eight deci zero)

7.

PAH content (mg/kg)

58.43 (fifty eight deci four three)

8.

Acidity

Nil

9.

Sediments

Nil

10.

Water content

Nil

The sample falls under the category of hazardous waste as PAH content in the sample is more than prescribed limit.

Sealed remnant returned

2.3 The appellant vide his letter dated. 15.05.2015 contested the test reports and on the basis of the arguments raised by the appellant, Deputy Commissioner vide his letter dated 10.06.2015 sought clarifications from Chief Chemical Examiner, CRCL New Delhi.

2.4 The Chemical Examiner, CRCL, New Delhi vide his letter dated 22.06.2015 replied stating that concentration of PAH have been found more than specified limit i.e. 50 mg/kg of Schedule II of Class A, therefore, the product under reference are hazardous waste as they are listed under Schedule I (SNo. 1) and Basal No. 3020 and have also characteristics of E of Schedule II and H of Part C Schedule III of HW Rules, 2008.

2.5 A show cause notice C. No. 82/CSCN/Ldh/2015 was issued to the appellant dated 31.05.2015 on the grounds that that as per CRCL reports, concentration of the Polycyclic Aromatic Hydrocarbons (PAHs) in the impugned goods is found more than the specified limit i.e. 50 mg/kg. therefore, product under reference is "Hazardous Waste" and fall under Basel No. A3020 under Schedule III, Part-A of Hazardous Waste (Management, Handling & Transboundary Movement) Rules, 2008. Further, alleged that for the purpose of import clearance of these goods prior permission from Ministry of Environment and Forest and license from DGFT was required, but the importer did not have the same; rather the importer vide their letter dated 15.05.2015 stated that goods are not hazardous. It has been alleged as to why goods declared as lubricant oil - open gear imported vide bill of entry number 8060152 dated 21.01.2015 should not be held as hazardous waste and be not confiscated under section 111 (d) of Customs Act. It was further proposed to re-export impugned goods in terms of Rule 17 of Hazardous Waste Management Handling & Transboundary Movement) Rules 2008. The penal provisions under section 112 (a) of Customs Act read with Section 15(1) of the Environment Protection Act 1986 invoked for violation of Rule 13 (1) & 13(2) Of Hazardous Waste (Management, Handling & Transboundary Movement) Rules 2008.

2.6 The Ld. Addl. Commissioner of Customs, ICD, Ludhiana vide order-in original No. LDH-CUS-ADC-SSK-022-16-17 dt. 19.05.2016 ordered confiscation of 44306.90 Kg. of lubricant oil-open gear under section 111 (d) & 111 (m) of the Customs Act, 1962 and ordered the same to be re-exported after payment a fine of Rs. 1,00,000/-; the penalty of Rs. 10,000/- imposed u/s 112 of Act.

2.7 In appeal, Commissioner (Appeals), vide order in-appeal No.CHD-EXCUS-001-APP-65-17-18 rejected the appeal of appellant.

2.8 CESTAT, vide final order no. A/62509/2018-CU[DB] dt. 04.07.2018 remanded the matter to Ld. Adjudicating Authority with a direction to decide the case within two months from the date of receipt of order after affording cross examination of the Chemical Examiner.

2.9 As per directions of Hon'ble CESTAT, Joint Commissioner of Customs, ICD, GRFL, Sahnewal, Ludhiana after affording the cross examination of Shri A K Maurya Chemical Examiner, CRCL, New Delhi vide Order-in-Original No. LDH-CUS-JC-RRG-024-18-19 dt. 04.09.2018 holding that the impugned goods were hazardous waste thus ordered confiscation and re-export of goods on payment of redemption fine of Rs. 50,000/- and penalty of Rs. 10,000/- imposed.

2.10 Commissioner (Appeals) has by the impugned order referred to in para 1, supra, rejected the appeal of appellant. Hence, the present appeal.

3.1 We have heard Shri Sudhir Malhotra, Advocate for the appellant and Shri Dhindsa, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submitted as follows:-

Ø This is a second round of litigation before Hon'ble CESTAT. Earlier the Hon'ble Bench by referring letter dt. 14.03.2016 of respondent to Chemical Examiner, remanded the case to ld. Adjudicating authority with the direction to decide the case after affording cross examination of Chemical Examiner.

Ø The issue required determination in the case is whether impugned imported goods are hazardous waste or not as per Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 (in short HW Rules, 2008).

Ø The impugned goods have been held hazardous waste based upon Central Revenue Control Laboratory three test reports all dated 19.02.2015.

Ø As directed by the CESTAT, the adjudicating authority allowed cross examination of Shri A K Maurya Chemical Examiner, CRCL, New Delhi.

Ø Sh. A. K. Maurya during cross examination on 17.08.2018 as summarized in order-in-original stated:-

o Without ascertaining the nature of product in question conclusion of hazardous waste cannot be made.

o In response to question 6 admitted that there is no mentioning in the report whether impugned goods is lubricating oil or not. There is nothing brought on records to suggest that imported goods were not lubricant oil.

o Test were done by chemical assistant CRCL in supervision of Assistant Chemical Examiner and reports dt. 19.02.2015 were opined by him; and report dt. 22.06.2015 were opined in consultation with Supervisory Authority, CRCL.

o In response to question 7, Sh. Maurya stated that CRCL, New Delhi were not having working facility to ascertain hazardous character of products upto December 2015.

Ø The CBEC vide ibid circular No 33/2001 dated 04.06.2001 have clarified that first step to determine hazardous waste is to find out whether the impugned products is off specification products. The products of off specification shall be further tested. The perusal of the reports dtd 19.02.2015 (RUD-1 to 3) reveal that impugned goods satisfied the criteria laid down in said circular dt. 04.06.2001 and accordingly the impugned goods are not of off specification.

Ø The case made out against them as stated in the Show Cause Notice was based on the test reports dated 09.02.2015 received from the CRCL. The allegation in show cause notice (Para-4) reads as under:-

"4. As per the provisions of Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008, the import of any item falling in the Part A of Schedule III requires prior informed consent and permission from Ministry of Environment and Forest and DGFT license. As per the list given in this part A of Schedule III, "Waste mineral oils unfit for their originally intended use" are given in Basel no. A3020. Further, Hazardous waste is that which has waste constituents specified in Schedule II of these Rule if their concentration is equal to or more than the limit indicated in the said schedule. Concentration limit has been specified as 50 mg/kg for the constituents falling in Class A of Schedule II." The Ld. Adjudicating & Appellate Authority relied upon the information available on the website www.chevronlubricants.com and invoice raised by supplier, for adjudging the case against them when there is no such allegation in show cause notice. Thus the impugned order have gone beyond the scope of show cause notice

Ø Certain clarifications were sought by the adjudicating authority from the Chemical Examiner after completion of the cross examination vide email dated 22.08.2018, in respect of the response to the question No 4. The query/ clarification sought and received was never disclosed to the appellant and has been relied upon by the authority while adjudicating the matter. Since this was never disclosed to the appellants the order in original has been passed in violation of the principles of natural justice. Impugned order has failed to consider this aspect.

Ø Impugned order needs to be set aside.

3.3 Arguing for the revenue learned Authorized Representative while re-iterating the findings in the impugned order submits that,-

Ø CRCL's test reports clarifications there upon, cross examination of the Chemical Examiner and clarificatory emails of the Chemical Examiner pursuant to the cross examination confirm goods to be hazardous waste.

Ø This is corroborated from the invoice of M/s Salvex (supplier of the goods) that the goods have been purchased on "as is where basis", salvage, they do not fall under normal trade practices of various industries and that the buyer should understand the Condition and usability of the products.

Ø No request for re-testing was made by the appellant nor any expert evidence produced to the contrary during the entire proceedings.

Ø Imported Goods found to be hazardous waste are illegal traffic under Rule 17 of the Hazardous Waste (Management, Handling and Transboundary Movement) Rules. 2008 have to be re-exported: - As per provisions of the Hazardous Waste (Management, Handling and Transboundary Movement) Rules. 2008 the import of any item falling in the Part A of Schedule H requires prior informed consent and permission from Ministry of Environment and Forest and DGFT License which the appellant did not have hence the goods are prohibited and have been rightly ordered to be re-exported. The order for re-export is in accordance with the following decisions

o Kushal N, Desai [2016 (339) ELT 305 (T-Mum)]

o Srikant Bagla [2016(332) ELT 525 (Kol)] (para 9).

o Ruby Impex [2020 (373) ELT 674] (para 4 and 5|.

o Eastron Overseas Inc. [2013(296) ELT 74 (T-Del)] (paras 7,8 and 9).

o Marut Nandan Overseas Ltd. [2002(141) ELT 14 (Del)] (para 13).

Ø It is settled law that the goods which are imported contrary to the conditions imposed for their importation, fall in category of prohibited goods, as per the following decisions,-

o Sheikh Mohd. Omer [1983 (13)ELT 1439 (SC)]

o Om Prakash Bhatia [2003 (155) ELT 423(SC)]

o Sheikh Mohammed Omar [2000 (126) ELT 507 (Kol.)].

o Samynathan Murugesan [2009 (247) ELT 21 (Mad)] affirmed by the Hon'ble Supreme Court [2010 (254) ELTA15 (SC)].

o First Track Traders vs Commissioner of Customs Seaport (Imports), Tuticorin [2012(286) ELT 681 (Mad)]

o M/s LNX Impex vs Principal Commissioner of Customs[2020-TIOL-281= HC-AP-Cus].

Ø There is a Constitutional mandate to protect and improve the environment and legislation has been enacted to solve the problem of environmental degradation. It is well settled few by the Hon'ble Supreme Court in a catena of judgments that hazardous waste has to be re-exported or incinerated on the principle of polluter pays. [Science Technology and Natural Resources Policy [(MANU/SC/0013/2005)].

4.1 We have considered the impugned order along with the submissions made in appeal, during the course of arguments and the written submissions filed by both the sides.

4.2 Interestingly the issue is in respect of certain off specification goods imported by the appellant for which the Bill of Entry No 8060152 dtd 21.01.2015 was filed. There is no dispute in the matter in respect of classification or valuation of the goods i.e. relating to the assessment of the duty on the goods. The only dispute which is there is in respect of the nature of goods i.e., whether the imported goods are hazardous waste or otherwise." The issue has been lingering on for the last nearly seven years, and the goods alleged to be the hazardous waste continue to lie in the ICD, without any serious effort on the part of anyone to resolve and dispose of the goods, even when direction was given by the Hon'ble High Court of Punjab and Haryana in the CWP No 7856 of 2016, vide order dated 28.04.2016, directed for the decision in two months. Extracts from the order of Hon'ble High Court are reproduced below:

2. The petitioner imported Lubricant Oil-Open Gear on12.10.2014 and filed bill of entry No. 8060152 dated 21.01.2015for clearance of said goods at assessable value of Rs 9,37,213/-involving duty of Rs 1,90,170/- under tariff item No. 2710 1980 of Customs Tariff Act, 1985. Three different samples were drawn from the consignments and sent to Central Revenue Control Laboratory, New Delhi (in short 'CRCL') for testing on 31.01.2015whereupon three separate reports dated 19.02.2015 were given by the CRCL on the basis of which show cause notice dated31.05.2015 which according to the petitioner was dispatched on23.09.2015.

3. Learned counsel for the petitioner submitted that the petitioner had submitted its reply to the aforesaid show cause notice within three days on 26.09.2015 itself which has not been adjudicated so far. Prayer was made that the reply be adjudicated expeditiously as more than six months have passed but no decision has been taken thereof. It was urged that the petitioner is suffering on account of not deciding the show cause notice as it is in respect of live consignment.

4. After hearing learned counsel for the petitioner and perusing the petition, keeping in view the facts and circumstances of the present case and without expressing any opinion on the merits of the case, as the petitioner claims that it is a live consignment, we deem it appropriate to direct the concerned Authority to adjudicate the show cause notice within two months from the date of receipt of certified copy of this order by passing a speaking order and after affording an opportunity of hearing to the petitioner in accordance with law."

4.3 After the direction from the Hon'ble High Court, the matter was adjudicated, and thereafter taken up by the appellant in appeal before the Commissioner (Appeal) and CESTAT. CESTAT remanded the matter back to original authority for allowing the cross examination of the Chemical Examiner, CRCL. Adjudicating authority has in the remand proceedings concluded after allowing the cross examination of Chemical Examiner, as follows:

"2.22 Accordingly, I hold that the lubricant oil open gear oil Chevron NC 100, NC 250 & NC 800 imported by the Noticee is hazardous waste and thus the imported goods are liable to confiscation under Section 111 (d) and 111(m) of the

Customs Act, 1962 for the contravention of provisions of the Hazardous Waste Rules, 2008 and the goods are required to be re-exported by the importer in terms of the Rule 17 of the said rules, at the importer's expense as has been held by my predecessor vide OIO dated 19.05.2016. Further since the imported goods are liable for confiscation, the importer is liable to penalty under section 112 of the Customs Act, 1962.

2.23 I also observe that while imposing fine under section 125 of the Customs Act, 1962, I note that the goods have been imported long time back in January 2015, and they would be liable to detention and demurrage. Besides, the goods are required to re-exported and as such the importer instead of making any profit on the goods, would be incurring losses. Therefore, a lenient view requires to be taken while imposing fine and penalty."

4.4 Rule 17 (2) of the Hazardous Waste Rules, 2008 read as under:

"Rule 17 Illegal Traffic

(2) In case of illegal import of the hazardous waste, the importer shall re-export the waste in question at his cost within a period of ninety days from the date of its arrival into India and its implementation will be ensured by the concerned State Pollution Control Board."

4.5 The provisions of Rule 17 (2) of the Hazardous Waste Rules, 2008 are very succinct and clear. They provide who so ever has imported the Hazardous Waste into India, will be required to re-export the same within a period of ninety days from the date of arrival of such waste into India, and the implementation of the same is to be ensured by the State Pollution Control Board. In terms of this rule, the Stat Pollution Control Board is the implementing authority for this provision. Further we should not forget that the present issue is in respect of the Hazardous Waste, which should be disposed of at the earliest in order to protect our environment, flora and fauna from the ill effects of such waste. Now after COVID-19 pandemic, the issue has acquired much greater proportions whereby we have seen numerous ill effects including the loss of human life also. No administration or country will/ shall tolerate the import of any hazardous waste into its territory.

4.6 Here in this case while the revenue alleges that the imported goods are Hazardous Waste, still they are sitting over the same for nearly last seven years, endangering all if the allegations made are true and correct. In case the allegations do not substantiate then the serious economic and financial damage is being caused to the importer. Adjudicating authority seem to be concerned about the demurrage and detention charges, and the cost of re-export that needs to be incurred by the importer and would impose redemption fine of Rs 50,000/- after holding the goods to be prohibited and confiscable in terms of section 111 (d) and 111 (m) of Customs Act, 1962 under Section 125 of the said Act.

4.7 Commissioner (Appeal) has by the impugned order dismissed the appeal filed by the appellants stating as follows:

"7.2 The basis of whole case lies on the CESTAT F O No A/62509/2018 dated 04.07.2018 wherein the case was remanded back to the adjudicating authority with the directions to the adjudicating authority to grant the opportunity of cross examination of the chemical examiner of CRCL. The adjudicating authority decided the case afresh vide OIO No LDH-CUS-JC-RRG-024-18-19 dated 4.9.19, after complying with the directions of Hon'ble CESTAT order referred to above. From the OIO it is gathered that the opportunity of cross examination has been given the appellant by calling Shri A K Maurya, Chemical Examiner, CRCL, Delhi.

7.3 I find that appellant has mainly alleged that CRCL, New Delhi was not having the facility to test the impugned goods to ascertain the hazardous character of the products till December 2015, and the samples were got tested from private laboratory i.e., M/s Avon Food Labs Pvt Ltd. I find that the plea of the appellant that the CRCL, got the samples tested from the private laboratory i.e., M/s Avon Food Labs Pvt Ltd. Does not sustain in view of the fact that CRCL has sub contracted the services of M/s Avon Food Labs Pvt Ltd. In pursuance of the Board Circular No 9/2009-Customs dated 23.02.2009 which is notified by the Ministry of Environment and Forest GOI under section 12(1) (b) and section 13 of the Environment (Protection) Act, 1986. The said agency is accredited for "Testing of PAH content in Petroleum Products" from National Accreditation Board for Testing and Calibration Laboratories as per standard of ISO/ IEC 17025/ 2005.

7.4 I further take up the issue wherein it has been alleged that the chemical examiner admitted that the contents i.e. Accnapthalene, Acenapthene, Flourine mentioned in RUD 5 do not fall under clause A12 to A15 of the Schedule II of the Hazardous Waste Rules, 2008, and hence cannot be considered as in Class A of Schedule II of the Hazardous Waste Rules, 2008. I observe that adjudicating authority has already taken up the point at para no 2.13 -2.15 of the Order in Original No LDH-CUS-JC-RRG-024-18-19 DATED 4.9.19, wherein this plea of the appellant w.r.t sample report CL-3953 in respect of open gear lubricant oil has been considered. However, I find that after going through the comparative chart of the parameters as tested and as specified by Cheveron who are a standard manufacturer of such products, the adjudicating authority has held that the test results on the parameters of flash point and kinematic viscosity of imported goods were vastly different from the standard products of the manufacture of such products. Further the details of the invoice indicated that the imported goods were not of standard quality as they were salvaged with no warranties being extended by the seller. Hence the imported goods were unfit for the original intended use and were under Basel A 3020 of the Schedule III, the import of which required prior permission from the Ministry of Environment and Forest and a license from DGFT.

7.5 I find that appellant has stressed that during the cross examination the Chemical Examiner, CRCL, has disposed incorrectly that the tests were done by

Chemical Assistant CRCL in supervision of Assistant Chemical Examiner, CRCL, while the tests were actually outsourced. As already observed above I find that as CRCL lacked the facility for testing the samples of hazardous waste the test was outsourced to M/s Avon Food Laboratory Pvt Ltd., which is recognized by the Ministry of Environment and Forest and allowed for testing of the customs imports vide circular No 9/2009-Customs dated 23.02.2009. The appellant has tried to make an issue of this unnecessarily. The Chemical Examiner, CRCL, in his cross examination has admitted that the samples were got tested from M/s Avon Food Laboratory Pvt Ltd. Hence there is nothing which has been hidden from the appellant. The appellant has also submitted that no test was conducted to ascertain whether the impugned goods were lubricating oil or otherwise. In this regard, I observe that the description of the test required mentioned on the test memo clearly indicates that the test was required to know the basic constituent of the preparation containing by weight what percentage of petroleum oils or of goods obtained from bituminous minerals and whether it was lubricating oil or otherwise.

8. In view of the discussions made in the foregoing paras, I find that the impugned goods fall in the category of hazardous goods and thus reject the appeal filed by the appellant. The order in original no LDH-CUS-JC-RRG-024-18-19 dated 4.9.19 is upheld."

4.8 Entire dispute revolves around the test reports dated 09.02.2015 in respect of the three samples drawn by the department and sent to CRCL for testing. Undisputedly as has been admitted by the Chemical Examiner CRCL during cross examination, CRCL was not having the capability to test the hazardous waste, and hence the test was conducted by one private laboratory, M/s Avon Food Labs Pvt Ltd. For justifying the same Commissioner (Appeal) has referred to the CBEC Circular No 09/2009-Customs, which states as follows:-

"Reference is invited to the Notification No. 35/2004-(N.T)-Customs dated 19.3.2004 and Board's Circular No. 31/2004-Cus dated 26/4/2004 regarding the import and export of hazardous wastes. As the field formations were facing certain difficulties in getting such consignments tested before permitting their clearance, the matter was taken up with Ministry of Environment and Forests.

2. Now, it has been informed by Ministry of Environment and Forests (MoEF) that if Customs authorities need assistance for undertaking sampling and analysis of the hazardous waste consignments, they could utilise the facilities of the recognised laboratories. These laboratories are recognised from time-to-time by the Ministry of Environment and Forests under Section 12(1) (b) and Section 13 of the Environment (Protection) Act, 1986 (EPA) read with Rule 10 of the Environment (Protection) Rules, 1986. The labs notified by MoEF are authorised to test all kinds of samples of hazardous wastes. The details of these laboratories are available at the website of the Ministry at: http://envfor.nic.in/

3. It has also been informed by Ministry of Environment and Forests that the

State Pollution Control Boards (SPCBs) and Pollution Control Committees (PCCs) have been asked to coordinate with the Customs on regular basis for implementation of the provisions of Hazardous Waste (Management, Handling and Transboundary Movement) Rules 2008, especially relating to the import/ export of hazardous wastes. Further, the MoEF has informed that information regarding the registered recyclers has also been made available by the SPCBs on their websites, which can be accessed online by Customs, if required.

4. Accordingly, it is requested that the field formations may consider utilizing the services of these laboratories for getting the consignments of hazardous wastes and substances tested and seek assistance from SPCBs/PCCs in dealing with the import/export consignments of hazardous wastes as and when required."

4.9 From perusal of the test reports, it is quite evident that, the report do not disclose the name of laboratory where the samples were tested and also the report of the said laboratory has not been disclosed in the opinion furnished by the Chemical Examiner, CRCL. At this point it is relevant to look into the questions that were put to Shri A K Maurya Chemical Examiner during the cross examination. The clarification contained in the circular prescribes that field formations "may consider utilizing the services of these laboratories for getting the consignments of hazardous wastes and substances tested and seek assistance from SPCBs/PCCs in dealing with the import/export consignments of hazardous wastes as and when required." This circular inter alia do not provide or permit CRCL, to opine on the basis of the test not conducted by them on the samples sent to them by the field formations. Further the circular also advices the field formations to seek assistance of SPCBs/ PCCs in dealing with the import/ export consignments of hazardous wastes as and when required. This advice is also in accordance with the Rule 17 (2) of Hazardous Waste Rule, 2008. From the facts it is not clear as to whether at any point of time, revenue has sought the assistance of the SPCBs/ PCCs, who as per the Rule 17 (2) of Hazardous Waste Rules, 2008 are the implementing authority for that provision.

4.10 During cross examination of Shri A K Maurya Chemical Examiner, CRCL New Delhi, following questions and their responses as recorded in order in original where by the doubt is raised in respect of the test reports are reproduced below:

"Qn.2 I am showing you the test reports bearing CL No. 3952, 3953 and 3954 (I)/ 04.02.2015 dated 19.02.2015 i.e. RUD - 1 to 3 and letter C. No. 35/CUS/ Corress/2013-14 dated 22.06.2015 i.e. RUD-5, signatures appended are yours and were opined by you?

Ans. I confirm that tests were done by Chemical Assistant, CRCL In supervision of Assistant Chemical Examiner, CRCL and report bearing CL No. 3952, 3953 and 3954 (I)/04.02.2015 dated 19.02.2015 i.e RUD-I to 3 were opined by me. Further letter C.No. 35/CUS/Corress/2013-14 dated 22.06.2015 i.e RUD-5 were opined in consultation with Supervisory Authority, CRCL.

Qn.3 It is correct by simply referring PAH value without ascertaining the nature of product it can be arrived at conclusion of Hazardous Waste?

Ans Yes, it is correct without ascertaining the/nature of product in question conclusion of hazardous waste cannot be made. And first we have to ascertain the chemical test/nature of the product in question and if it is found off specification than Hazardous Waste (Management Handling and Transboundary Movement) Rules, 2008 is followed.

Qn.6 I am showing you the sample test memo bearing S. No. 34/0WPL/2015, 35/ OWPL/2015, 36/OWPL/2015 all dated 31.01.2015 (RUD-1 to 3 resp. to show cause notice) vide which samples were sent to CRCL, New Delhi to ascertain whether product imported is lubricating oil or not?

Ans. Yes, it is correct there is no mentioning about the same in the report. However, the query raised in test memo regarding the constituents of preparation were answered in terms of aromatic content of the sample under reference.

Qn.7 Is it correct that CRCL, New Delhi were not having facility to ascertain Hazardous character of product upto December 2015?

Ans. Yes, it is correct CRCL, NEW Delhi were not having working facility to ascertain hazardous character of product when reports in questions were opined."

4.11 From the cross examination it is quite evident that CRCL New Delhi, during the time when these samples were tested were not having the facility to conduct the test to ascertain the Hazardous Character of the goods. These facilities were acquired by them only in December 2015. Thus the opinion rendered in the test reports dated 19.02.2015 was not based on the tests conducted by CRCL by some other laboratory namely M/s Avon Food Labs Pvt Ltd. Reasons for not providing the copy of the actual test report of the said laboratory is not forth coming. However, when the appellant was contesting the test reports and prior to the adjudication order dated 19.05.2016 in first round, CRCL, had acquired the capabilities to conduct such tests, then what stopped the adjudicating authority to get the samples retested when the entire dispute was in respect of the test reports? Even in the remand proceedings when the adjudicating authority was again seized with the issue and the appellant had during the cross examination raised this issue, why he did not got the samples re-tested?

4.12 The order of the adjudicating authority confiscating the goods and permitting them to be re-exported on payment of redemption fine is contrary to the decisions rendered by CESTAT in case of Pace India [2020 (372) ELT 442 (T)], wherein following has been held-

"5.1. After considering the submissions of both the parties and perusal of the material on record, we find that the order of re-export of the goods on payment of redemption fine within 30 days and if not complied with, the goods will be disposed of as per the statutory provisions, is in excess of jurisdiction conferred by the Statute, because the provisions of the Customs Act do not provide for re-export of the imported goods on payment of redemption fine and therefore the adjudication order was beyond the statutory provisions of the Customs rules. This proposition was considered by the Division Bench of the Tribunal in the case of HBL Power Systems Ltd. v. CC, Visakhapatnam [2018 (362) E.L.T. 856 (Tri. - Hyd.)] wherein the Tribunal in identical circumstances has analysed the scope of Section 125 of the Customs Act. It is relevant to reproduce Section 125, which is hereinbelow :-

125. Option to pay fine in lieu of confiscation. -

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods for, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) where any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods."

The Tribunal has considered the scope of application of Section 125 which provides imposition of penalty in lieu of confiscation and has held in para 10 to 14 reproduced hereinbelow :-

10. A plain reading of the above section shows that it does not confer upon the Authority passing the Order any power to impose any conditions while allowing redemption of goods.

11. The scope of Section 125 of the Act is limited by the words in which it is framed and it is not open to the adjudicating authority or the Tribunal (who are creatures of the statute) to stretch, modify or restrict the scope of this Section; they are bound by it. Hon'ble Supreme Court and High Courts can and do examine the validity of the laws and subordinate legislations and pass judgments annulling or modifying them by neither the officers nor the Tribunal, as creations of the statute cannot do so. This position has been explained clearly by the Hon'ble Supreme Court in UOI v. Kirloskar Pneumatics Company - 1996 (84) E.L.T. 401 (S.C.) in which it was held as under :

"According to these sub-sections, a claim for refund or an order of refund can be made only in accordance with the provisions of Section 27 which inter alia includes the period of limitation mentioned therein. Mr. Hidayatullah submitted that the period of limitation prescribed by Section 27 does not apply either to a suit filed by the importer or to a writ petition filed by him and that in such cases the period of limitation would be three years. Learned Counsel refers to certain decisions of this Court to that effect. We shall assume for the purposes of this appeal that it is so, notwithstanding the fact that the said question is now pending before a larger Constitution Bench of nine Judges along with the issue relating to unjust enrichment. Yet the question is whether it is permissible for the High Court to direct the authorities under the Act to act contrary to the aforesaid statutory provision. We do not think it is, even while acting under Article 226 of the Constitution. The power conferred by Article 226/227 is designed to effectuate the law, to enforce the Rule of law and to ensure that the several authorities and organs of the State Act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law. In particular, the Customs authorities, who are the creatures of the Customs Act, cannot be directed to ignore or act contrary to Section 27, whether before or after amendment. May be the High Court or a Civil Court is not bound by the said provisions but the authorities under the Act are. Nor can there be any question of the High Court clothing the authorities with its power under Article 226 or the power of a Civil Court. No such delegation or conferment can ever be conceived. We are, therefore, of the opinion that the direction contained in Clause (3) of the impugned order is unsustainable in law."

12. We also find that not only Section 125 but no Section of the Customs Act, 1962 gives any officer the power to compel anyone to import or export or re-export. This Section also does not give the Adjudicating Authority the right to give a conditional redemption saying "you can redeem only if you agree to re-export ". In case of prohibited goods the adjudicating authority has only two options :

(a) to allow redemption on payment of fine; or

(b) to not allow redemption.

13. In view of the above, we find that the condition in the Order-in-Original that the goods should be re-exported after redemption is liable to be set aside and we do so.

14. Appeal is allowed to the extent that the condition in the Order-in-Original that the goods should be re-exported after redemption is set aside.

Further we find that the ratio of the decision of the Tribunal in the case of HBL Power Systems Ltd. is squarely applicable in the present case. Therefore we hold that the impugned order ordering for re-export of the goods on payment of redemption fine is not sustainable in law and therefore we set aside this finding of the Commissioner (Appeals)."

4.12 In case of Nathi Mal Rugan Mal {2018-TIOL-3335-CESTAT-MUM], after taking into account the decisions of tribunal on the subject, bench has observed as follows:

"4.3 Section 125 of the Customs Act 1962 has been considered by the larger bench of Tribunal in case of A K Jewellers [2003 (155) ELT 585 (T-LB)] and it has been held as follows:

10. After going through the provisions of Section 125 of the Customs Act, we find that provisions of this section do not specifically provide that an option may be given to redeem the goods for re-export. It empowers an adjudicating authority in case of goods the import or export of which is prohibited under Customs Act or under any law in force, to grant an option to pay in lieu of confiscation such fine as the said authority thinks fit. The provisions of this section equally apply to the goods to be exported as well as imported goods. Where the goods which have been tendered for export are ordered to be confiscated and an option to redeem the goods on payment of fine, it would follow that option is for the export of the goods. This is no doubt different from reexport. Re-export is a facility permitting export of goods which have already been permitted to be imported. Except in cases where import is prohibited by any law, those goods which have been imported may be permitted to be exported. The formal procedure of filing a shipping bill and observing other formalities relating to export of goods would have to be followed. There is no prohibition on the adjudicating authority from permitting re-export of the goods. When an adjudicating authority after ordering confiscation of imported goods permits their re-export, he is in effect first ordering the redemption of the goods on payment of fine and thereafter permitting them to be reexported. Each of these two actions is independent and is permitted by law. An order whereby both are combined, therefore, is not contrary to law.

11. If we take up the issue from another angle that where the adjudicating authority allows re-export of the prohibited goods and in such a case, by holding that the order of confiscation and redemption fine is not justifiable, this will make the provisions of Section 125 of the Customs Act redundant which specifically empowers the adjudicating authority to exercise his powers in respect of prohibited goods. As confiscation and redemption fine in lieu of confiscation and re-export are two independent actions, hence the view taken that in case the assessee is allowed to re-export, the confiscation and redemption fine is not justified, is not a correct view. Further, we find that this view is also taken by the Hon'ble Supreme Court in the case of C.C. v. Elephanta Oil & Industries Ltd. reported in 2003 (152) E.L.T. 257 (S.C.) rejected the contention of the importer that once the imported article is re-exported as directed by the department, there is no question of levying any penalty or redemption fine. The Hon'ble Supreme Court held that power to levy the penalty under Section 112 of the Customs Act for improper importation of goods is different from the power of confiscation of goods under Section 125 of the Customs Act. The question of law referred to the Larger Bench is answered accordingly."

4.4 Further in case of Hemant Bhai R Patel [2003 (153) E.L.T. 226 (Tri. - LB)] Larger Bench of Tribunal held as follows:

"8.In the light of the above discussion we have no hesitation to agree with the view expressed in the K & K Gems, Escorts Herion Ltd., Smt. Kusumbhai Dhyabhai Patel and Kothari Filaments. Section 111 of the Customs Act, empowers the Customs authorities to confiscate goods imported if any of the provisions contained under the sub-clauses is satisfied. Section 112 authorizes imposition of penalty. Section 125 contains the provisions enabling the Customs Officer to grant an option to the owner or the person from whose possession the goods have been seized to pay a fine in lieu of confiscation. In an adjudication proceeding as in the present case these are the provisions which would come into play. If the owner gets the goods released after payment of redemption fine, he may either clear it for home consumption or re-export the same subject to the relevant rules. A permission granted for re-export on the basis of a request made by the owner of the goods is outside the purview of the adjudication proceedings, as mentioned above. We, therefore, answer the questions referred in the affirmative and hold that it is open to the adjudicating authority to impose redemption fine as well as penalty even when permission is granted for re-exporting the goods. The reference is answered as above."

4.5 Similarly in case of Kothari Filaments [2002 (144) E.L.T. 80 (Tri. - Kolkata)], on difference of opinion, majority view was expressed as follows:

21. It is relevant to note that while the Learned Member (judicial) holds that no redemption fine is imposable when re-export of goods is allowed, learned Member (Technical) does not hold otherwise. On the other hand, by interpreting the order of the Commissioner the Member (Technical) comes to the conclusion that no permission has been granted by the Commissioner to re-export and therefore the question that Commissioner cannot pass an order granting permission to re-export while imposing redemption fine does not arise in this case. In paragraph 48 of the order impugned the Commissioner refers to the argument as to whether simultaneous imposition of two conditions, namely, (i) imposition of fine in lieu of confiscation and (ii) direction to re-export can co-exist. Ultimately in paragraph 49 he rejects the request for release of 11.5 MTs of Lithopone and re-export of 10 MTs of Tetracycline. Thereafter in paragraph 50 he orders confiscation of the whole consignment containing 10 MTs of Tetracycline and 11.5 MTs of Lithopone under Section 111(d) and (m) of the Customs Act, 1962 read with Section 119 and Section 3 of the Foreign Trade Development & Regulation Act. An option to redeem the confiscated goods was then granted on payment of a fine of Rs.30 lakhs in lieu of confiscation. Thereafter he observed that the importer may re-export the goods after redemption or take out the goods for home consumption. The above observation cannot be treated as an option given to the importer to re-export. No provision of law has been brought to my notice which gives jurisdiction to the Commissioner in an adjudication proceedings as in the present case to grant permission for re-export. In M/s. Goodyear India Ltd. v. Collector of Customs (Final Order No. A/32/90-NRB, dated 27-12-90) which was followed in Padia Sales Corporation v. Collector of Customs - 1992 (61) E.L.T. 90, it has been held as follows :

"7. The Collector by his order. confiscated the goods. However, as per Section 125 of the Customs Act, 1962 he is empowered to allow the importer to redeem the goods on payment of fine. The imposition of fine only validates the import, in other words, on payment of fine the importer becomes absolute owner of the goods, and he is free to export them subject to the provisions of Customs Act, 1962 and Rules made thereunder. The provision enables the owner to avoid confiscation by paying the fine imposed. However, there is no provision under the Act empowering the Collector to re-export the goods on payment of redemption fine. The order passed by the Collector is, therefore, without jurisdiction. The reliance placed by Ms. Mann on para 128 of the Handbook of Import and Export Procedures 1985-88 is irrelevant to the facts of the case.

8. We, therefore, modify the order of the Collector in the following manner :

"The goods are confiscated, but the appellants are entitled to redeem the same on payment of Rs. 5000/-. Accordingly, we dispose of the appeal."

In the above mentioned two cases challenge was against the imposition of redemption fine while permitting reexport and in both the cases the Tribunal modified the orders retaining that portion of the order directing confiscation and imposing redemption fine. Direction for re-export was vacated. The position of law as explained in the above decision is that once the redemption fine is paid and the confiscated goods are redeemed the importer becomes the full owner of the goods and it is open to him to deal with the goods as he desires either to use it in domestic consumption or to export the same subject to relevant rules. In the light of the above, there is justification in the view taken by the Learned Member (Technical) that the last sentence in paragraph 50(i) of the order may be treated as an observation with regard to the legal position. This is more so in view of the rejection of the prayer of the importer to release the goods for reexport in paragraph 49 of the order."

4.6 Similar view has been expressed by the tribunal in the decisions cited by the learned counsel. On going through the provisions of section 125 and the above referred decision the position of law emerges as follows:

i. In terms of Section 125, officer adjudging the cases in relation to confiscation of goods shall confiscate the goods absolutely when the goods under adjudication are prohibited goods and in case where the goods are not prohibited he shall still confiscate the goods but allow the goods to redeemed on payment of redemption fine adjudged by him.

ii. On redemption of the said goods the person redeeming the goods becomes the owner of the goods and he is entitled to deal with the goods in manner he likes. No condition can be imposed by the adjudicating authority for dealing the goods in particular manner after redemption.

iii. In case when the goods are redeemed, and taken for home consumption, the person redeeming the goods is required to pay the duty due on the goods in addition to redemption fine imposed.

iv. The person redeeming the goods can ask for reexport of the goods if he deems fit.

v. Permission to re-export the goods cannot be factor for determining the quantum of redemption fine.

vi. Proceedings for confiscation and imposition of penalty are separate proceedings and just because goods are allowed to redeemed or allowed to be re-exported the penalty cannot be waived or imposed on lower side.

4.7 In view of the legal position as stated above we are not in position to uphold the order of the lower authorities whereby a condition of re-export has been imposed in the proceedings of confiscation under Section 125 of the Customs Act, 1962."

4.13 Hence we do not find ourselves in agreement with the order of the adjudicating authority, whereby he confiscates the goods and imposes the redemption fine and directs the goods to be re-exported. Redemption of the goods against the redemption fine is the option given to the importer/ exporter and it is his choice whether to avail of that option. If the goods are to be re-exported as per Rule 17 (2) of Hazardous Waste Rules, 2008, then such an action could not have been justified, as importer can very well chose not to pay the redemption fine. The approach of the adjudicating authority cannot be upheld in any manner. Impugned order of Commissioner (Appeal) is totally silent on this vital aspect of permitting the goods to be re-exported against payment of redemption fine.

4.14 We find that serious doubt has been raised, on the face of invoice of supplier, M/s Salvex whereby they state that the goods have been sold on as is as where is basis, and are sold without the manufacturer's warranty etc, to the effect that the goods would be of hazardous nature. This invoice is the part of the proceedings from the day one. We find that though we are not in position to uphold the impugned order, we cannot shun the responsibility cast on us, to prevent the import of hazardous waste which may damage the flora, fauna and environment of our country. Hon'ble Supreme Court has time and again stated so in the following decisions that for causing the damage to environment the polluter pays:

Ø Indian Council for Enviro-Legal Action vs. Union of India 1996(3) SCC 212

Ø Vellore Citizens' Welfare Forum vs. Union of India 1996(5) SCC 647

Ø The Oleum Gas Leak case (M.C. Mehta vs. Union of India) AIR 1987 SC 1086

Ø M. C. Mehta vs Kamal Nath & Ors (1997)1SCC388

4.15 Since the issue involves the hazardous good we would not be in position to permit the clearance of the goods without the active consideration of the same by the SPCBs/ PCCs who are the designated authority in terms of the rule 17 (2) of the Hazardous Waste Rules, 2008 and also as per the Board Circular of 2009, referred by us earlier. In our view now with the capability to ascertain the Hazardous Nature of the impugned goods CRCL should conduct proper re-test on the goods and give the report, to the concerned authorities in the matter. In our view revenue authorities should make a proper and justifiable opinion in the matter as to the nature of the goods after retesting of the same and in consultation with the concerned SPCB. On the basis of the said opinion, the appellant should be either permitted to clear the goods in DTA or re-export the same as per Rule 17 (2) of the Hazardous Waste Rules, 2008. In case importer do not intend to opt for the said options the said goods, needs to be dealt in the manner as prescribed by the Hazardous Waste Rules, 2008 for disposal.

4.16 As observed by us earlier and also the adjudicating authority, long time has elapsed since the importation of the goods, revenue authorities should accord high priority to the disposal of these goods. In our view three months from the date of the receipt of this order is sufficient for the final disposal of the said goods.

5.1 In view of discussions as above, we set aside the impugned order. The matter is remanded back to the original authority to get the samples of the impugned goods re-tested by CRCL or any appropriately notified laboratory to determine the hazardous nature of the goods.

5.2 Original Authority should in remand proceedings follow the principle of natural justice and allow the proper and judicious hearing to the appellants.

5.3 Appellants should co-operate with the authorities in all possible manner to determine the true nature of the impugned goods.

5.4 The matter should be disposed off within three months of the receipt of this order.

5.5 The appeal is disposed off in above terms.

(Order pronounced in the open court on 01.11.2021)