



OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS,
CUSTOM HOUSE: MUNDRA, KUTCH
MUNDRA PORT & SPL ECONOMIC ZONE, MUNDRA-370421
Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62

A	File No.	F. No. VIII/48-1363/Misc./Gr-I/MCH/19-20
B	Order-in-Original No.	MCH/ADC/AK/09/2020-21
C	Passed by	Shri Ajay Kumar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra
D	Date of Order	29.04.2020
E	Date of Issue	29.04.2020
F	SCN NO. & Date	F. No. VIII/48-1363/Misc./Gr-I/MCH/19-20 dated 28.02.2020
G	Noticee/Party/Importer / Exporter	M/s Vardhman Industries, 112/109, Pokharpur, Kanpur, Uttar Pradesh-208010.

- P.02ED1**
1. यह अपील आदेश संबन्धित को निःशुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.
 2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A के अंतर्गत प्रपत्र सीए-1- में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-
Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

“ सीमा शुल्क आयुक्त (अपील), कांडला

7 वीं मंजिल, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009”

**“THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
Having his office at 7th Floor, Mridul Tower, Behind Times of India,
Ashram Road, Ahmedabad-380 009.”**

3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए ।
Appeal shall be filed within sixty days from the date of communication of this order.
4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must accompanied by –
(i) उक्त अपील की एक प्रति और
A copy of the appeal, and
(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं.-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए ।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.
5. अपील ज्ञापन के साथ इयूटि/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये ।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.
6. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम, 1982 और सीमा शुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए ।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (A) के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।
An appeal against this order shall lie before the Commissioner (A) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

Sub: Import of “Pigeon Peas Toor Whole” vide Bill of Entry No. 5402802 dated 22.10.2019 by M/s Vardhman Industries, 112/109, Pokharpur, Kanpur, Uttar Pradesh-208010 (IEC: 0603005501) for violation the provisions of Food Safety & Standards Act, 2006 regarding importation of food/edible items read with the provisions of Section 111(d) & (o) of the Customs Act, 1962.

BRIEF FACTS OF THE CASE

M/s Vardhman Industries, 112/109, Pokharpur, Kanpur, Uttar Pradesh-208010 (IEC:0603005501) (hereinafter referred to as importer) filed Bill of Entry No. 5402802 dated 22.10.2019, through their Customs Broker (CB) M/s. Narendra Forwarders Private Limited seeking clearance of imported goods declared as "Pigeon Peas Toor Whole" under Custom Tariff item 07136000. The declared gross weight of goods in Bill of Entry is 94000 Kgs. The declared assessable value of goods is Rs. 38,05,872/-.

1.1 The imported goods are edible items; therefore samples were forwarded to FSSAI for examination in FSSAI approved Laboratory. The Authorised Officer, FSSAI (Mundra Port & Old Port) at Custom House Mundra vide Non Conformance Report dated 06.11.2019 conformed that the sample of imported "Pigeon Peas Toor Whole" is Substandard Food under the provision of Section 3(1)(zx)(ix) of food Safety and Standard Act, 2006. However, importers filed Frist Review Application dated 20.11.2019 before FSSAI authority. Accordingly, sample of imported goods are sent to Referral Laboratory Mysore for re-testing purpose. Referral Laboratory Mysore vide their Certificate No. 01P/FSSA/2020 dated 10.01.2020 also not confirm to the standards of FSSAI. Importer further filed second Review Application before Apex Committee. FSSAI, HQ vide their email dated 07.02.2020 granted permission to re-export the said consignment. Accordingly, Authorised Officer, FSSAI (Mundra Port & Old Port) vide letter dated 11.02.2020 issued Order for Re-Export only from the same place without any clearance for home consumption.

1.2 The FSSAI (Mundra Port & Old Port) did not find the imported "Pigeon Peas Toor Whole" fit for home consumption and issued Non Conformance CHM No. 10150/2019-20 dated 11.02.2020 for Re-Export only from the same place without any clearance for home consumption. Prime facie, it appears that said cargo is mainly for human consumption and such conditions is not fulfilled during FSSAI Test, hence the imported goods may not be cleared from Mundra port and same is required to be re-exported. Due to the failure of sample of imported cargo, it appear that the importers have violated the provisions of Food Safety & Standards Act, 2006 regarding importation of food/edible items as discussed in the foregoing paras read with the provisions of Section 111(d) & (o) of the Customs Act, 1962. Therefore, the imported goods appear to be liable for confiscation under section 111 (d) read with Section 111(o) of the Customs Act, 1962 and the importer is also liable for penal action under Section 112(a)(i) of the Customs Act, 1962.

2. In view of the above, a show Cause Notice bearing F. No. VIII/48-1363/Misc/Gr-I/MCH/19-20 dated 28.02.2020 was issued, whereby the importer M/s Vardhman Industries, 112/109, Pokharpur, Kanpur, Uttar Pradesh-208010 was called upon to show cause by the Additional Commissioner of Customs (Import), having his office at, 1ST Floor, Port User Building, Mundra Port, Mundra, Kutch, Gujarat as to why:-

- i) The imported "Pigeon Peas Toor Whole" weighing 94 MTs and valued at Rs. 38,05,872/- covered under Bill of Entry No. 5402802 dated 22.10.2019 should not be confiscated and re-exported under Section 111(d) and 111(o) of the Customs Act, 1962.

- ii) Penalty should not be imposed on them under Section 112 (a) (i) of the Customs Act, 1962, for the reasons discussed above.

PERSONAL HEARING

3. The personal hearing in the matter was held on 24.04.2020 wherein Shri Chetan Thakkar, Authorised representative of M/s Vardhman Industries, appeared and reiterated the facts mentioned in their written submission dated 10.03.2020.

WRITTEN SUBMISSION

4. The Noticee vide their letter dated 10.03.2020 have submitted point wise defence reply which as under:-

4.1 M/s Vardhman Industries have filed Bill of Entry No. 5402802 dated 22.10.2019 with Custom House, Mundra for clearance of imported goods, namely, 94000.00 kgs of "Pigeon Peas Toor Whole" valued at Rs. 38,05,872/-.

4.2. The goods were imported into India pursuant to Sales Contract No. 523C/2019 dated 20.09.2019 ("sales contract") entered between M/s Vardhman Industries and overseas seller M/s. KAMS Singapore Pte. Ltd., Singapore.

4.2.1. As per the sales contract, M/s Vardhman Industries had agreed to buy goods having specification of 97% purity, 2% weevil and 14% max moisture.

4.2.2. Further, it was agreed between M/s Vardhman Industries and overseas seller that weight and quality was required to be certified by the inspection agency at load port (Sl. No. 4 of "other conditions" on page 2 of the sales contract)

4.2.3 M/s Vardhman Industries received documents, including commercial invoice No. KAMS/4065E/2019 dated 05.10.2019, Packing list, Bill of lading, Certificate of Origin issued by Tanzania Chamber of Commerce, Industry and Agriculture, Phytosanitary Certificate issued by Plant Quarantine Officer, Ministry of Agriculture, The United Republic of Tanzania, Quality Report issued by Bureau Veritas Tanzania Limited, Tally & Weight Report issued by Bureau Veritas Tanzania Ltd. Certificate of Fumigation from the overseas supplier.

4.2.4 The Phytosanitary Certificate No. 00013521 dated 05.10.2019 issued by Plant Quarantine Officer, Ministry of Agriculture; The United Republic of Tanzania clearly certified that:

"This is to certify that the plants, parts of plants or plant products described above or representative samples of them were thoroughly examined on 15 September 2019 by JULIANA AMOS MWAKISITU authorized officer of the Ministry of Agriculture and were found to the best of his/her knowledge to be substantially free from injurious plant pests; and that consignment is believed to conform with the current phytosanitary

regulations of the importing country both as stated in the additional declaration and otherwise.”

4.2.5 The Additional Declaration attached to the aforesaid Phytosanitary Certificate state that:
“The cargo is free from quarantine weed seeds and soil contamination.”

4.2.6 The Quality Report No. TZN/ITD/SEPT/544A/2019 issued by Bureau Veritas Tanzania (load port) certified that Admixture (m/m)% was found to be 009 (as against max 2 agreed in contract), purity was found to be 99.91 (as against min 97 agreed in contract) and no weevils was found (as against 2% max agreed in the contract).

4.2.7 Thus, as per the documents received from the overseas supplier, the goods imported by M/s Vardhman Industries conformed to the specifications agreed in the contract. Consequently, based on these documents, M/s Vardhman Industries filed the Bill of Entry for clearance of goods. All the above documents were also presented with the Bill of Entry for consideration and clearance by the proper officer of Customs.

4.2.8 However, it was reported that samples tested by the FSSAI testing facility at Mundra were not found in accordance with the Food Safety and Standard Act, 2006. M/s Vardhman Industries had no reason to disbelieve the Phytosanitary Certificate issued by Plant Quarantine Officer, Ministry of Agriculture, The United Republic of Tanzania as well as Quality Report issued by Bureau Veritas Tanzania Limited, that were received from the overseas supplier. Hence, M/s Vardhman Industries preferred First Review Application as well as Second Review Application before the competent authority but of no avail. M/s Vardhman Industries have been refused clearance for home consumption and were directed to re-export the goods. They have also been issued one Show cause notice F. No. VIII/48-1363/Misc/Gr.-I/MCH/19-20 dated 28.02.2020 (“notice”) alleging that:

“3. ..Due to the failure of sample of imported cargo, it appears that the importers have violated the provisions of Food Safety & Standards Act,2005 regarding importation of food/edible items as discussed in the foregoing paras read with the provisions of Section 111 (d) & (o) of the Customs Act,1962. Therefore, the imported goods appear to be liable for confiscation under section 111 (d) read with Section 111 (o) of the Customs Act,1962 and the importer is also liable for penal action under Section 112 (a) (i) of the Customs Act,1962.”

4.2.9 Based on above, M/s Vardhman Industries were asked to show cause to your Honour as to why:

“i) The imported “Pigeon Peas Toor Whole” weighing 94 MTs and valued at Rs. 38,05,872/- covered under Bill of Entry No. 5402802 dated 22.10.2019 should not be confiscated and re-exported under Section 111 (d) and 111 (o) of the Customs Act,1962.

- ii) Penalty should not be imposed on them on them under Section 112 (a) (i) of the Customs Act,1962, for the reasons discussed above.”

4.3. They have denied the allegations and averments leveled in the notice. Save and except what is specifically admitted herein, no part of notice which is not expressly dealt with, shall be deemed to be admitted.

4.4. The submitted that they have not violated any provision of Food Safety & Standards Act,2005 inasmuch as they had entered into contract with overseas supplier for supply (import) of goods, namely, “Pigeon Peas Toor Whole” that were free from weevil (max 2%), min 97% pure and max moisture percentage of 14%. The Phytosanitary Certificate issued by the Ministry of Agriculture, The United Republic of Tanzania as well as Quality Report issued by Bureau Veritas, the Inspection Agency at the load port that were duly presented along with Bill of Entry before the proper officer of Customs bears testimony to this. Thus, it is a matter of record that M/s Vardhman Industries never intended to import any goods that were not in conformity with the specifications laid down in the Food Safety & Standards Act,2006 and therefore, they cannot be held responsible for import of any such goods. The notice also does not bring out any evidence to show that M/s Vardhman Industries had any prior knowledge about import of any such goods which did not conform to the provisions of the Food Safety & Standards Act,2006. Hence, it is submitted that M/s Vardhman Industries cannot be held responsible for any liability of confiscation under Section 111 (d) and (o) of Customs Act, 1962 arising from reasons beyond their control and therefore, no penalty is imposable on them under Section 112 (a)(i) ibid.

4.5. They submitted that it is proposed in the notice to confiscate the goods and re-export them. Thus, when the department itself wants M/s Vardhman Industries to re-export the goods, it is humbly submitted that no fine and penalty is imposable in such a case. Reliance is placed on the following amongst a large number of decisions taken by higher judicial bodies:

- (i) Siemens Limited, 1999 (113) E.L.T. 776 (S.C.)
- (ii) Siemens Public Communication Networks Ltd., 2001 (137) E.L.T 623 (T)
- (iii) Venus Gems & Jewellery, 2002 (142) E.L.T. 388 (T)
- (iv) ABP Pvt. Ltd., 2003 (151) E.L.T. 705 (T)

4.5.1 In the case of Akbar Badruddin Jiwani vs. Collector of Customs, 1990 (047) ELT 0161 (S.C.), Hon’ble Supreme Court has held that:

“57. Before we conclude it is relevant to mention in this connection that even if it is taken for arguments sake that the imported article is marble falling within Entry 62 of Appendix 2, the burden lies on the Customs Department to show that the appellant has acted dishonestly or contumaciously or with the deliberate or distinct object of breaching the law.

58. In the present case, the Tribunal has itself specifically stated that the appellant has acted on the basis of bona fide belief that the goods were importable under OGL and that, therefore, the Appellant deserves lenient treatment. It is, therefore, to be

considered whether in the light of this specific finding of the Customs, Excise & Gold (Control) Appellate Tribunal, the penalty and fine in lieu of confiscation required to be set aside and quashed. Moreover, the quantum of penalty and fine in lieu of confiscation are extremely harsh, excessive and unreasonable bearing in mind the bona fides of the Appellant, as specifically found by the Appellate Tribunal.

59. We refer in this connection the decision in Merck Spares v. Collector of Central Excise & Customs, New Delhi - 1983 E.L.T. 1261, Shama Engine Valves Ltd. Bombay v. Collector of Customs, Bombay - 1984 (18) E.L.T. 533 and Madhusudan Gordhandas & Co. v. Collector of Customs, Bombay - 1987 (29) E.L.T. 904 wherein it has been held that in imposing penalty the requisite mens rea has to be established. It has also been observed in Hindustan Steel Ltd. v. State of Orissa - 1978 (2) E.L.T. (J 159) (S.C.) = 1970 (1) SCR 753 - by this Court that :-

“The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.”

4.5.2 There is no allegation in the notice that M/s Vardhman Industries have acted dishonestly or contumaciously or with the deliberate or distinct object of breaching the law. By relying upon the above decision, it is submitted that M/s Vardhman Industries are not liable to penalty under Section 112 of Customs Act, 1962.

4.5.3 Without prejudice to above, it is submitted that in re-export cases, where the above decision was not placed for consideration of the judicial bodies, only token penalty was imposed. Reliance is placed on the following decisions in this regard:

- (i) AY Traders, 2019-TIOL-3163-CESTAT-MAD
- (ii) Arihant Groups, 2019-TIOL-2786-CESTAT-MAD
- (iii) OMS Sivajothi Mills, 2019-TIOL-2607-CESTAT-MAD

4.6 They submitted that goods under consideration are farm produce and susceptible to changes in specifications with the passage of time. The goods were duly tested at the load port and were found in accordance with the agreed upon specifications that were in accordance with the FSSAI, 2006 read with Regulations thereof. The goods were shipped in containers from Dar-es-Salam on 05.10.2019 and were tested in India after around one month. As against the Phytosanitary Certificate as well as Inspection Certificate received from the exporting country, the goods could not pass the tests carried out by the FSSAI authority in India. There is no allegation to show that M/s Vardhman Industries had deliberately imported such item or they were responsible for such mismatch in the load port. Moreover, it deserves due appreciation that goods are incurring ground

demurrage, detention, ground rent, etc. since last 04 months and would incur further expense for re-export also. In all, M/s Vardhman Industries have already incurred huge loss for no fault of theirs.

4.7 They submitted that in view of the above submission made by them none of the allegations and in turn, proposals directed against M/s Vardhman Industries can be sustained in law.

4.8. In view of above submissions and citations, they prayed to drop the notice by giving due consideration to the above submissions. They prayed also, in any case, a lenient view may be taken in the matter and obliged.

DISCUSSION AND FINDINGS

5. I have carefully gone through the Show Cause Notice dated 28.02.2020, the written submissions filed by the Noticee and the available records of the case and I find that the following main issues are involved in the subject Show Cause Notice, which are required to be decided-

Whether the imported "Pigeon Peas Toor Whole" weighing 94 MTs and valued at Rs. 38,05,872/- covered under Bill of Entry No. 5402802 dated 22.10.2019 are liable for confiscation under Section 111(d) and 111(o) of the Customs Act, 1962 and the importer is liable to penalty under Section 112(a) ibid.

5.1 I have gone through the report dated 06.11.2019 issued by the Authorised Officer, FSSAI (Mundra Port & Old Port) at Custom House Mundra which confirmed that the sample of imported "Pigeon Peas Toor Whole" is Substandard Food under the provision of Section 3(1)(zx)(ix) of food Safety and Standard Act, 2006. However, importer filed Frist Review Application dated 20.11.2019 before FSSAI authority. Accordingly, sample of imported goods were sent to Referral Laboratory Mysore for re-testing purpose. Referral Laboratory Mysore vide their Certificate No. 01P/FSSA/2020 dated 10.01.2020 also not confirmed to the standards of FSSAI. I have also find that Importer further filed second Review Application before Apex Committee. FSSAI, HQ vide their email dated 07.02.2020 granted permission to re-export the said consignment. Accordingly, Authorised Officer, FSSAI (Mundra Port & Old Port) vide letter dated 11.02.2020 issued Order for Re-Export only from the same place without any clearance for home consumption.


5.2. In view of the above I hold that by virtue of not having clearance of FSSAI authority, the "Pigeon Peas Toor Whole" weighing 94 MTs and valued at Rs. 38,05,872/- covered under Bill of Entry No. 5402802 dated 22.10.2019 are liable for confiscation under Section 111(d) and Section 111(o) of the Customs Act, 1962. The importer M/s Vardhman Industries is also liable for penalty under Section 112 (a) (i) of the Custom Act, 1962 for their act and omission to make goods liable for confiscation under Section 111 of the Custom Act, 1962. Further, I find that Authorised Officer, FSSAI (Mundra Port & Old Port) vide letter dated 11.02.2020 issued Order for Re-Export only from the same place without any clearance for home consumption.

6. In view of the above. I pass the following order.

ORDER

- i) I order confiscation of "Pigeon Peas Toor Whole" weighing 94 MTs and valued at Rs. 38,05,872/- covered under Bill of Entry No. 5402802 dated 22.10.2019; in terms of Section 111(d) and Section 111(o) of the Customs Act, 1962. However, I allow the redemption of the confiscated cargo on payment of redemption fine of Rs. 2,75,000.00(Rupees Two Lakh seventy Five thousand only) in terms of Section 125 of the Customs Act, 1962. I allow the redemption only for re-export and not for home consumption.
- ii) I also impose a penalty of Rs.1,00,000.00 (Rupees One Lakh only) on M/s Vardhman Industries, 112/109, Pokharpur, Kanpur, Uttar Pradesh-208010 in terms of Section 112 (a)(i) of the Custom Act, 1962.

7. This order is issued without prejudice to 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.


(AJAY KUMAR)
Additional Commissioner,
Custom House Mundra
Dated: - 29.04.2020

DIN-20200471MO00005C57C1
By REGD. POST A.D/Hand Delivery
To,

M/s Vardhman Industries,
112/109, Pokharpur, Kanpur,
Uttar Pradesh-208010 .

Copy to:

1. The Commissioner of Customs, Custom House, Mundra.
2. The Deputy Commissioner of Customs (RRA/TRC), Custom House, Mundra.
- ✓ 3. The Deputy Commissioner of Customs (EDI), Custom House, Mundra.
4. The Deputy Commissioner of Customs (Gr-I), Custom House, Mundra.
5. Guard File.

