

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

CUSTOMS Appeal No. 10803 of 2021-SM

[Arising out of Order-in-Original/Appeal No MUN-CUSTOM-000-APP-123-21-22 dated 28.07.2021 passed by Commissioner of CUSTOMS-MUNDRA]

Brightglow Ventures

J-1104 Sorell Tower Applewood Township Near
Decathlon S P Ring Road Shela
Ahmedabad, Gujarat-380058

.... Appellant

VERSUS

Commissioner of Customs, Mundra

Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Kutch,
Gujarat-370421

.... Respondent

WITH

CUSTOMS Appeal No. 10686 of 2020-SM

[Arising out of Order-in-Original/Appeal No MUN-CUSTOM-000-APP-65-20-21 dated 31.07.2020 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD]

Laxmi Enterprise

230/1, Opp. Gidc Post Office, GIDC, Ankaleshwar,
Bharuch, Gujarat-393002

.... Appellant

VERSUS

Commissioner of Customs, Mundra

Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Kutch,
Gujarat-370421

.... Respondent

APPEARANCE :

Shri Vijay N. Thakkar, Consultant & Shri Saurabh Dixit, Advocate for the Appellant
Shri Sanjay Kumar & Shri G. Kirupanandan, Superintendents (AR) for the Revenue.

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)

DATE OF HEARING : 03.11.2022/10.02.2023

DATE OF DECISION: 28.03.2023

FINAL ORDER NO. A/10724-10725 / 2023

RAMESH NAIR :

The issue involved in both the appeals is whether the imports made by the appellant through the State Trading Enterprises (STEs) in respect of Urea is permissible to the appellant or otherwise.

2. Shri Vijay N. Thakkar, learned Consultant appearing on behalf of the appellant M/s. Brightglow Ventures submits that the appellant is only high sea buyer of the Urea. The physical import was made by State Trading Enterprises, M/s. MMTC and the appellant have purchased Urea on high sea sale basis, therefore the actual import was made by MMTC which is otherwise not permitted for other than State Trading Enterprises. Therefore, the purchase of Urea on high sea sale from MMTC cannot be restricted and for which no license is required. He placed reliance on the decision of this Tribunal in the case of *Marico Industries Limited vs. Commissioner of Customs (EP) Mumbai – 2007 (209) ELT 403 (Tri. Mumbai)*.

2.1 Shri Saurabh Dixit, learned Counsel appearing on behalf of the Appellant M/s. Laxmi Enterprise has adopted more or less the same arguments and submits that the identical issue involved in the case of *Pooja Chemicals in Appeal No. C/10736/2020* was heard by the Division Bench and the order was reserved. He prays that the case may be decided on the basis of the view to be taken in the case of *Pooja Chemicals (C/10736/2020)*.

3. Shri Sanjay Kumar and Shri G. Kirupanandan, learned Superintendents (AR) appeared on behalf of the Revenue and reiterated the findings of the impugned order. He further submits that purchases on high sea sale basis also falls under the definition of imports therefore, even the purchase is on high sea sale, cannot be made by any person other than State Trading Enterprises. Therefore, the appellant have violated the provisions of Foreign Trade Policy hence the penalty is rightly imposed.

4. I have carefully considered the submissions made by both the sides and perused the record. I find that there is no dispute that the appellants have not directly imported Urea from abroad but in fact M/s. MMTC / M/s. IFFCO and M/s. KEIBHCO have imported Urea and the same was sold on high sea sale basis to the appellants. In these facts, this Tribunal has considered identical issue and passed the following order in the case of *Marico Industries Limited (supra)*:-

“11. We find that in the present case, as per the policy at the prevailing time the goods could have been procured from M/s State Trading Corporation at Mumbai only and the initial import should have been that of State Trading Corporation. However, there have been some procedural lacunae and the appellants have brought to our notice a letter written by Jt. DGFT dated 28-12-2005 addressed to DGFT stating that since the procedure for import for canalized items was not very clear prior to 30-6-2005, the appellant’s case was a fit case for relaxation of policy. We further find that in any case, the Commissioner has allowed duty free clearance against AROs and has not demanded duty. We further note that in any case if M/s State Trading Corporation was required to pay duty, the same would have been reimbursable to them for supply against advance licences which are to be treated as deemed export. It is also admitted that DGFT has even prior to the date of import though after the date of shipment allowed the clearance on the basis of high sea sale. The Commissioner has confiscated the goods as she concluded that in this case the sale was on high sea sale basis. Therefore, in such a situation, the violation can be said to be technical in nature having no duty implication and once before date of import the goods could freely be procured on high sea sale basis, the margin of profit as compared to other importers is totally wiped out. We however hold that the goods were liable to confiscation under Section 111(d) as the procedure prescribed in the policy was not followed. Looking into the facts and circumstances of the case, having no duty implication, and no margin of profit, we reduce the redemption fine to Rs. 10,000/- (Rupees Ten thousand only) and penalty to Rs. 10,000/- (Rupees Ten thousand only).

12. The appeal is allowed in above terms.”

Further, this Tribunal in another case in the case *Pooja Chemicals & Others in Customs Appeal No. 10736 of 2020*, vide order No. A/10059-10062/2023 dated 16.01.2023 decided the issue in favour of the assessee, which is reproduced below:-

“4. Shri G. Kirupanandan, learned Superintendent (AR) appearing for the department reiterated the findings given in the impugned Orders. He pointed out that by virtue of purchase of Urea on High Seas from STEs and by filing Bill of Entry, the appellant became the importer and that under the Import Policy the STEs who have purchased the Urea from the foreign buyer can sell the same to the Indian buyer after clearance from Customs and that condition no. (xiv) of permission letter of Government of India, Ministry of Chemical and Fertilizers, permission was granted to the Appellant only for domestic purchase of Urea from STE.

5. On carefully considered the submissions made by both the sides and upon perusal of the case records, it emerges that the purchase from the foreign suppliers was made by STE viz. MMTC and Indian Potash Ltd and the goods were shipped by the foreign suppliers to MMTC/ Indian Potash Ltd and the Appellants have purchased the said goods on High Seas from the MMTC/Indian Potash Ltd. It can be seen that Heading No.3102 1000 of the ITC (HS) Policy 2009-2015, does not stipulate that Urea was allowed to be imported only by State Trading Enterprises; the said Heading allows import of Urea through STC, MMTC and Indian Potash Limited. Clearly, the word used in the said Heading 3102 1000 is “through” and not “by” STC, MMTC and Indian Potash. In view of above, when the import is allowed “through” STC, MMTC and Indian Potash, it means that so long as the purchase of the Urea from the foreign supplier is effected by STC, MMTC or Indian Potash and payment to foreign supplier is made by STC, MMTC or Indian Potash, who in turn sell the same to a party in India whether on High Seas or otherwise, the import is clearly through STC, MMTC or Indian Potash.

5.1 Learned Commissioner (Appeals) clearly erred in holding that under the Import Policy although the STEs who have purchased the Urea from the foreign supplier can sell the same to the Indian buyer after clearance from customs, such sale cannot be permitted on High Seas before clearance of the Urea from customs and that by virtue of purchase of the Urea on High Seas from STE and by filing the Bill of Entry, the Appellants became the importer is irrelevant because there is no bar against the Appellants being the importer so long as the import is through STE. There is no restriction in the Policy against State Trading Enterprise making High Seas Sale of Urea which during the relevant period was permitted to be imported through State Trading Enterprise.

5.2 Since the import was made through MMTC/Indian Potash Ltd and was in accordance with Heading No.3102 1000 of the ITC (HS) Policy and the letters of the Government of India, Ministry of Chemical and Fertilizers, the import was in accordance with law and therefore the goods cannot be held to be liable to confiscation under Section 111(d) of the Customs Act 1962. Consequently, no penalty is imposable on the Appellants under Section 112 of the said Act

5.3 The Commissioner (Appeals) has erred in not appreciating the permission granted by the Ministry of Chemical & Fertilizers to the Appellant. The very opening sentence of the said letters/ Permission of the Ministry of chemical and Fertilizers has permitted the Appellant to import the Urea through any STE. The permission to import is addressed and granted to the Appellant and such import has to be made by the Appellant through any STE, which only means that the STE would purchase the Urea from a foreign supplier and then sell the same to the Appellant on High Seas. This is the only way in which the permission to the Appellant to import through STE can be implemented and operated. Learned Commissioner (Appeals) finding that per condition no. (xiv) of Permissions of the Government of India, Ministry of Chemical and Fertilizers, permission was granted to the Appellant only for domestic purchase of Urea from STE is also erroneous. There is absolutely no such restriction in the said condition no. (xiv). Neither does condition no.(xiv) contain any restriction that purchase shall be made only domestically from STE nor does it prohibit purchase on High Seas. All that condition (xiv) stipulates is that the Department of fertilizers has to be kept informed through the STE from whom the Urea is purchased, about the product being produced from such urea, the quantity required, etc. There is absolutely no stipulation in condition (xiv) that urea has to be purchased from STE only domestically and not on High Seas. On the contrary, the very first para of the said letter grants permission to the Appellant to import the Urea through STE. If as upheld by the Commissioner (Appeals), Appellant was only permitted to purchase domestically from the STE, the letter would not have said that the Appellant is permitted to import through STE. The authorities below have mis-read

the Conditions Nos. (v) and (xiv) of the Permission letter dated 15th May 2013 of the Government of India, Ministry of Chemical and Fertilizers and in inferring therefrom that High Seas purchase by Appellant from STE was not permitted as per the said conditions. The said conditions are not related to the Appellant's purchase from STE but are related to the purchases by the end users/ distributors from the Appellant. The meaning of the word "through" used in Heading No.3102 1000 of the ITC (HS) Policy, itself show that when the ITC Policy talks of import through STE, it means import using the help of STE and not import by STE.

5.4 Further, as per the regular practice accepted by customs for over several decades in case of imports which are canalized through STEs, the STEs place the order on the foreign supplier and thereafter effect High Seas sale of the same to the Indian Buyers. This is evident from the judgments and Board Circular supra. As laid down in the following judgments, where the import is in accordance with a consistent past practice, the question of confiscation under Section 111(d) and imposition of penalty under Section 112 of the Customs Act 1962 does not arise:

Gujarat State Export Corporation Ltd v UOI – 1984 (17) ELT 50
 Memon Associates v CC – 1988 (34) ELT 367
 Trident Agencies v CC – 1989 (45) ELT 116
 Varson Chemicals P. Ltd v CC – 1987 (27) ELT 55

The judgment in the case of Marico Industries Ltd v CC – 2007 (209) ELT 403 relied upon by the Commissioner (Appeals) has no application to the facts of the present case. In that case the importer had directly established the Letter of Credit on the foreign supplier as result of which the import could not even be said to be through STE. Further, the import in that case was against Advance Release Order which is issued for sourcing inputs indigenously instead of importing against Advance License. The provisions relating to procurement of inputs against Advance Release Order which applied in that case did not provide for import through STE.

06. In view of above, impugned Orders vide which penalty under section 112(a)(i) of the Act on the appellants was upheld cannot be sustained Accordingly, the impugned orders are set aside. The appeals are allowed with consequential relief."

5. In view of the above judgments, the issue is no more res-integra. Accordingly the purchase of Urea through State Trading Enterprises cannot be liable for penalty under Section 112(a)(i) of Customs Act, 1962. Accordingly the penalties imposed by the lower authorities in both the appeals are set-aside and the appeals are allowed.

(Pronounced in the open court on 28.03.2023)

(Ramesh Nair)
Member (Judicial)