Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Customs Appeal No. 10684 of 2020

(Arising out of Order-in-Appeal No Notification Order-VIII-48-01-CUS-T-MISC-2019-20 dated 06/10/2020 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-JAMNAGAR(PREV))

VKC NUTS PVT LTD .... **Appellant**
B-23, Ground Floor, Sector-63, Noida
Gautam Buddh Nagar, Gautam Buddh Nagar
Uttar Pradesh

VERSUS

C.C.-JAMNAGAR(PREV) .... **Respondent**
Sharda House...Bedi Bandar Road,
Opp. Panchavati,
Jamnagar, Gujarat

APPEARANCE:
Shri Hardik Modh, Advocate for the Appellant
Shri. D Kanjani, Superintendent (AR) for the Respondent

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

Final Order No. A/ 11365 /2020

DATE OF HEARING: 04.11.2020
DATE OF DECISION: 08.12.2020

RAMESH NAIR

The issue involved is that whether the appellant is entitled to claim DFIA benefit under Transferable DFIA No. 0310863589 dt. 09.06.2020 & 0310833517 dated 19.03.2020 both issued in terms of Custom Notification No. 19/2015-Cus. dated 01.04.2015 for the import of Inshell Walnut covered under the description of Fruit/Food Flavour/Dietary Fibre against Export of Biscuits as per SION E-5.

2. The brief facts of the case are that the appellant is a transferee of aforesaid two transferable Duty Free Import Authorizations (DFIA) originally issued to Krish Food Industry (India) by the Office of the Director General of Foreign Trade under Foreign Trade Policy for the period (2015-2020) against export of Biscuits from the open market.

2.1. The assessing officer raised a query and sought explanation from the appellant that in respect of inputs referred in para 4.12(i) and (ii) of FTP-

2015-20, the material permitted to be imported shall be of specific name/description or quantity which is actually used in the export product and should be mentioned in the relevant Shipping Bills. Further it was mentioned that the appellant cannot seek exemption of single input item, inshell walnut under three different product descriptions viz., Fruit/Flavour/Dietary Fibre.

3. The appellant replied to the said query in detail. However, the revenue rejected the claim on the ground that the appellant has not produced evidence to show that Inshell Walnut is actually used in export product. According to the revenue, only those inputs which are actually used in export product shall be allowed exemption from payment of customs duty in terms of Custom Notification No. 19/2015-cus. The import goods Inshell Walnut is not mentioned in the DFIA against input item description 'Fruit /Food Flavour/Dietary Fibre".

3.1. The above decision of the revenue was taken by the Principal Commissioner and the same was communicated through Deputy Commissioner of Customs (Prev) Jamnagar vide letter No. VIII/48-142/Cus-T/2016/2315 dated 30-09-2020 and Joint Commissioner (I/S), Custom House Pipavav vide letter No. VIII/48-01/Cus-T/Misc/2019-20/575 dated 06/10/2020. It is this decision of rejection of DFIA claim, the appellant is aggrieved with, hence filed the present appeal.

4. Shri Hardik Modh, learned counsel appearing on behalf of the appellant submits that in response to the preliminary objection raised by the Learned Authorised Representative that the appeal is not maintainable since it was filed against the letter issued by Joint Commissioner of Customs, he submits that the appeal is maintainable in terms of section 129 (1) of Customs Act, 1962 for the reason that the final decision was taken by the Principal Commissioner of Customs (Prev.) and it is that decision which was communicated by the Joint Commissioner of Customs (Prev.). Therefore, the order which was communicated to the appellant is given by Commissioner of Customs. Therefore, against such order, the appeal lies before this Tribunal. In this regard, he placed reliance on the following judgments:

(1) Sterlite Optical Technologies Vs. Commissioner of Customs (Export) ACC, Mumbai reported in 2008 (226) ELT 0069 (Mumbai)

(2) Unibourne Food Ingredients LLP vs Commissioner of Customs, Hyderabad 2018(364) ELT 254 (Tri- Hyd)

(3) Samrat Houseware Pvt. Ltd. vs Commissioner of Customs (Sea), Chennai-V 2019 (368) ELT 1089

(4) S.S. Offshore Pvt. Ltd. 2018 (361) ELT 51 (Bom)

4.1 He submits that in view of the above judgments it is settled position that against any decision taken by the Commissioner and communicated by the lower officer to the assessee, the appeal lies before the Tribunal. He further submits that as regard the case law in the case of Commissioner of Customs and Central Excise Vs M.P. Steel Corporation- 2003 (154) ELT 12 (SC), the same has no application in the present case. The said case relates to some internal correspondences between the Superintendent and Collector wherein the Collector took a policy decision on the question of how LDT was to be calculated. Whereas in the instant case, a clear decision was taken by the Principal Commissioner of Customs (Preventive) which was merely conveyed by the Joint Commissioner of Customs (Preventive). He further submits that the case law of M/s Piramal vs. Commissioner of Central Excise, Chennai vide Final Order no. A/40550/2017 dated 30.03.2017 has also no application as in the said case the assessee approached Hon'ble Tribunal against a rejection letter for extending warehouse period. He submits that the contention that the assessing officer is under no legal obligation to follow the decision of higher authorities while discharging the quasi judicial powers vested in the Act is wholly misplaced. The query has been raised at the time of assessment of Bills of Entry. The superior authority i.e. the Principal Commissioner of Customs (Preventive) has denied the duty benefit under DFIA Licenses and has conveyed the same through Joint Commissioner of Customs (Preventive). The Principal Commissioner of Customs (Preventive) has also directed the appellant to pay applicable customs duty for clearance of goods. He further submits that Revenue has relied upon several case laws on the question of whether it is binding on the assessing officer which was cited below:

- Madras Steel Re-Rollers Association vs UOI 2017 (217) ELT 167 (Mad)

5. The case law cited by the respondent has no application as in the said matter, the issue relates to circular issued by CBEC modifying its previous circular with respect of classification of goods. In the instant case, the Commissioner of Customs (Preventive), Jamnagar has taken a decision rejecting the DFIA benefits to the appellant recording reasons for rejection. Therefore, the contention that the assessing officer is required to exercise

independent mind and without impartiality and while doing so and take decision considering various documents present before him in totally misplaced. He submits that the Commissioner is a superior authority who has taken a decision in the above case after examining all the documents submitted by the appellant.

6. As regard the merit of the case, he submits that the Customs Authorities are not permitted by law to further elaborate or restrict the scope of the 'inputs' specified in SION. The Revenue has contended that in the case of description 'Fruit/Cocoa Powder' and Dietary Fibre ITC (HS) classification has been shown as 08023100 cannot be allowed to be imported against the 'Food Flavour- Vanillin' having classification '291200020. It was submitted that the Hon'ble Tribunal in the case of USMS Saffron Co. vs Commissioner of Customs, ACC, Mumbai in Final Order no. A/3267/15/CB dated 30.09.2015 has held that even ITC (HS) Number is not a criterion to get the benefit under the FTP and Customs provisions as long as the item imported falls under the description of goods in the DFIA.

6.1. Without prejudice, he submits that annexure issued by the Licensing Authority annexed along with the DFIAs clearly indicates the ITC (HS) numbers of Inshell walnuts against the description of goods claimed by the appellant. The Chapter Heading 08020000 is the main chapter heading which covers the items under the said heading. Therefore, the input item Inshell Walnut is correctly covered under the description of goods under Fruit/Flavour/Dietary Fibre as mentioned in the annexure annexed alongwith DFIA in question. He submits that the technical references evidently show that walnuts are covered under the description of Dietary Fibre as well as flavours. As per Food Chemistry authored by H.D. Belitz, W. Grosch. P. Schieberie, Walnut is mentioned as a fruit containing Dietary Fiber. Similarly, in the Hand Book of Perfumes and Flavours, walnut is mentioned as a food flavour. As per the Technical opinion given by the Associated professor, IIT Kharagpur, it amply demonstrates the use of Walnuts as fruit/ nut of bake shop can be used a food flavour as well as substitute for protein and dietary fibre (in appropriate proportion) in the manufacturing of biscuits and confectionary products. Similarly, the Joint Director, JNCH Lab, Nhavasheva vide F.no. S/16-11/2018-19/JNCH Lab dated 08.08.2018 has opined that walnuts may be used for source of dietary fibers in the manufacture of Biscuits/cookies and confectionary. By similar technical opinions vide letters dated 27.08.2018, it was confirmed that walnuts is used as flavour as well as fruit/nut in the manufacture of Biscuits/cookies and confectionary. He submits that above technical opinion cannot be brushed aside without providing any cogent evidences to show the contrary in the instant case. He takes support from the following judgments:

1. Interncontinental (India) vs Union of India 2003 (154) ELT 0037 (Guj.)
2. Tribunal Mumbai Final Order no. A/85730/2020 dated 11.09.2020

6.2 He further submits that words "Generic" and "Alternative inputs" as stipulated in para 4.12 (i) and 4.12(ii) of FTP- 2015-2020 is not defined under chapter 9 of the FTP. The Madhya Pradesh High Court (Indore) in the case of Commissioner of Customs and Central Excise Vs M.P. Steel Corporation (supra) in its judgment dated 18.06.2018 in WP No. 15132 of 2018 has held that the words generic and alternative inputs are not defined under chapter 9 of the FTP. He without prejudice to the above, submits that post transferability of the DFIA, there is no actual user condition exists in the DFIA license. He further submits that the Bombay High Court (Nagpur Bench) in the case of Shah Nanji Nagsi exports Pvt. Ltd. vs Union of India 2019 (367) ELT 335 (Bom.) in para 26 held that basically DFIA scheme is post export scheme in which exporter has to first export goods and after realization of proceeds, exporter has to make an application to the authority who after verification, grant DFIA certificate which is transferable. Therefore, there is no actual user condition inbuilt under the scheme. Without prejudice, he submits that as per provision of para 4.27 (iv) of FTP-2015-2020, it is interalia stipulated that no DFIA shall be issued for an input which is subject to pre import condition or where SION specifies actual user condition. Therefore licensing authority has correctly issued the DFIA without condition of actual user in the list of inputs, since the relevant SION E5 has not stipulated Actual User condition in any of the inputs. He also submitted that there is no provision either in the FTP or in the handbook of procedure or under Custom Notification 19/2015 to the extent that the entitlement of DFIA benefit of import goods is restricted for import only against particular description of goods. He submitted that as long as the imported goods are covered under the description, quantity and within the CIF value of the DFIA, there is no restriction to claim DFIA benefits under one or more product descriptions mentioned in the DFIA. The imported goods "Inshell walnuts" are not specified under Sensitive items under para 4.30 of FTP-2015-2020 of DFIA's. Therefore the exporter is not required to give a declaration of the technical specification, quality and characteristics of inputs used in the resultant product. The Central Board of Excise & Customs vide circular no.

46 of 2007 had earlier clarified the above provisions which existed under the previous policy period under para 4.55.3 of HBP. He submits that the board circulars are binding on Customs authorities as held by Hon'ble Gujarat High Court in the case of F.S. Enterprise vs State of Gujarat 2020 (32) GSTL 321. It is his submission that as per policy circular no. 72/2008 dated 24/03/2009 that flexibility has been given to import alternative inputs or goods which are capable of using in the export product. Therefore, inputs which are covered under the description are entitled for DFIA exemption for claiming DFIA benefits by either exporter or transferee or the importer under the Transferable DFIA scheme. He also submits that vide policy circular no. 22, a transferee of the license can apply for amendments in ITC (HS) numbers of the inputs to the regional licensing authorities. He submits that it is the case of the appellants that walnuts can be interalia used for the manufacture of export product under DFIA i.e. biscuits as a food/ fruit/flavour or dietary fiber. Therefore, there is no reason for rejecting the benefit under DFIA scheme in terms of Custom Notification No. 19/2015-Cus dated 01.04.2015. He submits that in any event, the respondent has not disputed that the imported material Walnut is covered under the description of fruit/flavour or dietary fibre, mentioned against Export of Biscuits as per SION E-5. In view of above submission, he prayed for setting aside the impugned order and to allow the appeal in full by extending DFIA benefit for duty free clearance of Inshell Walnuts covered under the description of Fruit/ Flavour/Dietary Fiber under the said Transferable DFIA license.

7. On the other hand, Shri Dharmendra Kanjani, Learned Superintendent (Authorised Representative) appearing on behalf of the Revenue raised a preliminary objection that against the letter of the Deputy Commissioner, the appeal is not maintainable before this Tribunal. He submits that the appeal can only be filed under section 129A against an order which is passed by the adjudicating authority. However, in the present case, the letter issued from the Headquarter (Technical), Customs, Jamnagar or by the Joint Commissioner, Customs House, Pipavav stating that the query raised by the department is just and proper and cannot be said to be an order or the decision passed by the Commissioner or Joint Commissioner (i/s) as Adjudicating Authority under the Customs Act, especially when the proper officer under Section 17 is Superintendent. The concerned Superintendent of Customs being an assessing officer has to take his own decision uninfluenced by all such correspondences, which has yet not been taken. Therefore, as per Notification no. 40/2012-Cus (N.T.) dated 02.05.2012, there is no order

against which appeal lies before this Tribunal. He further submits that as per the relevant para of letter dated 30.09.2020 with the approval of the Principal Commissioner, it was opined that the query raised by the department is just and proper and at the same time it was guided to ascertain practice being followed at other zones/Commissionerate. Therefore, the assessing authority is still free to decide on merit. Therefore, with the opinion given in letter dated 30.09.2020, is not conclusive. Hence, appeal against said order does not lie before this Tribunal.

7.1 He submits that appellant's reliance in this regard on case law of Sterlite Optical Technolgies vs Commissioner of Customs (Exports), ACC, Mumbai-2008 (226) ELT 0069, is misplaced as there issue involved in that case was conversion of shipping bills to drawback shipping bills which is not the case here. Similarly, the case of Swiber Offshore Construction Pvt. Ltd. vs Commissioner of Customs, Kandla is also not applicable as the issue involved in that case is denial of cross examination by the Adjudicating Authority. He submits that the present appeal challenging the letter of Joint Commissioner before the Tribunal is not maintainable. He placed reliance on the following judgments:

1. Commissioner of Customs and Central Excise Vs M.P. Steel Corporation- 2003 (154) ELT 12 (SC)
2. M/s Piramal vs. Commissioner of Central Excise, Chennai vide Final Order no. A/40550/2017 dated 30.03.2017

7.2 He further submits that the appeal is treated as if the above communication is treated as an order of the Commissioner, the question arises is that whether it is binding on the assessee. The Assessing Officer are independent to perform the function of quasi judicial authorities and orders passed by them are also quasi judicial orders. Therefore, such orders are required to be passed by exercising independent mind. Therefore, decision order of the Commissioner is not binding on the Assessing Officer. He placed reliance on the following judgments:

1. Madras Steel Re-Rollers Association vs UOI 2012 (278) ELT 284 (S.C)
2. Madras Steel Re-Rollers Association vs UOI 2017 (217) ELT 167 (Mad)

7.3 As regard the merit of the case, he submits that the exemption from the Customs Duty is available to the material imported in only against the valid Duty free Import Authorisation in terms of paragraph 4.25 and 4.27 of the Foreign Trade Policy under Notification No. 19/2015 dated 01.04.2015. The Central Government vide Notification 21/2015-2020 dated 05/12/2019, as notified the revised Foreign Trade Policy, 2015-2020 effective w.e.f. 05.12.2017. In the revised Foreign Trade Policy, para 4.29 (iv) and (v) have been inserted. As per the said amendment in FTP, it is clearly spelled out that only specific inputs along with quantity will be permitted to be imported under DFIA scheme. He submits that the original exporter has to file the prescribed Annexure, wherein the details of export items as well import items alongwith its Customs Tariff item no. (CTI) are required to be mentioned and based on these information, DGFT issues License with list of import items and export items along with Custom Tariff Item No. Therefore, the subsequent purchaser has no right to change the import items which is totally a different item. In this regard, he relies upon the judgment of Mumbai Tribunal in the case of Mumbai (Export Promotion) vs Global Exim dated 26.02.2020. He submits that as per the common parlance test, 'Inshell Walnuts" having classification 08023100 cannot be allowed to be imported against the 'Food Flavour- Vanillin' having classification '29120000' heading as "Aldehydes, whether or not with other Oxygen Function, Cyclic Polymers of Aldehydes; Paraformaldehyde" as both are different products. He submits that in case of description of 'Fruit/Cocoa Powder' and 'Dietary Fiber' ITC (HS) classification has been shown as 0802000. However, that description is generic, therefore, the exporter was required to mention the specific input which was used in the manufacturing of exported goods. He submits that since the specific inputs have not been mentioned in the scrips issued by the DGFT, the import of 'Inshell Walnuts' having classification 08023100 under exemption notification cannot be allowed. He submits that the India Tariff code has 8 digits. When there are two different item headings available in the CTI, they are two distinct and different commodities and not one and the same. Therefore, when goods are listed in two separate sub-headings as two different commodities, they are two distinct and different commodities and not one and same. He takes support from the Hon'ble Supreme Court decision in the case of Ravi Prakash Refineries (P) Ltd. vs State of Karnataka 2017 (349) ELT 5 (SC).

7.4 He further submits that Notification prescribed one condition that the description, value and quantity of material imported, are mentioned in the Authorisation. In the present case, the description and the classification of imported goods is not matching with the description and classification mentioned in the scrips issued by the DGFT. Therefore, the benefit of notification cannot be extended in the light of the Hon'ble Supreme Court judgment in the case of Commissioner of Customs (Import), Mumbai vs. Dilip Kumar ad Company 2018 (361) ELT 577 (S.C) as the notification should be interpreted strictly. He submitted that in SION norms, there is General Notes for all Export Products Groups which is applicable to all importers irrespective of DFIA license/ Advance Authorization/ DFRC etc. The DFIA in the present case was obtained by declaring the inputs as (1) Fruit/Cocoa powder ITC 080220000; (2) Food Flavour-Vanillin ITC 29120000 and (3) Dietary Fiber ITC 08020000, in the resultant export product. Therefore, the subsequent purchaser has no right to import 'Inshell Walnut' having Custom Tariff Classification '08023100'.

7.5 He further submits that the judgment relied upon by the appellant are not applicable to the present case as the facts of those cases were different. In view of above submission, he prayed the appeal may be dismissed as non-maintainable, pre-mature and devoid of any merits.

8. We have heard both the sides and perused the records. As regard preliminary issue of maintainability of appeal before this Tribunal, we find that the decision against which this appeal was filed, was admittedly taken by the Principal Commissioner of Customs which was merely communicated by the lower officer. As per the Ld. Commissioner's decision it was categorically decided that the appellant is not entitled to clear import goods against the DFIA Licences and also directed to pay applicable custom duty. In this undisputed position, in our clear view the only remedy left with the appellant is to file appeal before this Tribunal.

8.1 The appeal is maintainable in terms of Section 129 (1) of the Customs Act, 1962. The case is squarely covered by the Hon'ble Bombay High Court judgement in the case of Commissioner of Customs (Import-I) Vs. S.S. Offshore Pvt. Ltd., reported in 2018 (361) ELT 51 (Bom) & Unibourne Food Ingredients LLP Vs. Commissioner of Customs, Hyderabad reported in 2018 (364) ELT 254 (Tri-Hyd) ,

8.2 The contention of the revenue that there is no legal obligation to follow the decision of higher authorities while discharging the quasi judicial powers vested in the Act is incorrect. In the present case, the Commissioner has decided to reject the claim of DFIA benefits by giving reasons in writing. It is also a fact on record that the appellant has been directed to pay applicable customs duty for clearance of goods.

8.3 The case law relied upon by the revenue is clearly inapplicable in the present case Therefore the appeal is maintainable and not premature.

9. As regard merit of the case, we find that In the present case, the DFIA's produced by the appellant are post export entitlements . The DFIA's are issued against Export of Biscuits as per SION E-5. As per the provision of Para 4.27 (ii) of FTP- 2015-20, DFIA is issued for products for which Standard Input output Norms are notified.

9.1 It is settled law that a DFIA is governed by SION which is notified for the relevant export product. There is no provision either in the Policy or in the Hand book to say that DFIA benefits can be claimed on the basis of ITC (HS) numbers. Even SION does not prescribe any ITC (HS) Numbers.

10. The Hon'ble CESTAT (Mumbai) in the case of USMS Saffron Co. Inc. Vs. Commissioner of Customs, ACC, Mumbai vide Final Order No. A/3627/15/CB dated 30.09.2015 has held that even ITC (HS) Number is not a criterion to get the benefit under the FTP and Customs provisions as long as the items falls under the description of goods in the DFIA. Therefore the contention that Food Flavour (Vanillin) is covered under ITC (HS) 29120000 cannot be permitted is not correct. The DFIA being a post export entitlement scheme and different ITC (HS) numbers are mentioned against each input. The annexures attached with the DFIA's indicates ITC (HS) Nos. 08020000/080231000. against description of goods Fruit/Flavour/Dietary Fibre.

11. The Cestat, Mumbai in the case of VKC Nuts Pvt. Ltd., Vs. Commissioner of Customs, Nhavasheva in Final Order No. A/85730/2020 dated 11.09.2020 has taken a view that the imported Inshell walnuts are not liable for confiscation and the exemption claimed by the appellant appears to be correct in view of the Judgements of Hon'ble MP High Court (Indore) in the case of Global Exim and in the case of Uni Bourne Food Ingredients LLP Vs. CCE, Hyderabad, it has been held in the said decided case that Inshell Walnuts is allowed to be imported against the DFIA issued against Export of Biscuits & Confectionary goods against input items Nut and Nut Products, relevant food flavour, flavouring agent/flavour improvers, dietary fibre and fruit/cocoa powder.

12. We are convinced with the appellant’s submission that Chapter Heading 08020000 is the main chapter heading which covers the items of import under the said heading. Therefore the input item Inshell Walnut is correctly covered under the description of goods under Fruit/Flavour/Dietary Fibre as mentioned in the annexures annexed alongwith the DFIA’s in question.

13. The Jt. Director, JNCH Lab, Nhavasheva vide F.No. S/16-11/2018-19/JNCH Lab dated 08.08.2018, on the request of Asstt. Commissioner of Customs, NS, has opined that Walnuts may be used of source of dietary fibres in the manufacture of Biscuits/Cookies and Confectionary. By similar technical opinions vide letters dated 27.08.2018 it was confirmed that Walnuts is used as flavour as well as fruit/nut in the manufacture of Biscuits/Cookies and Confectionary.

14. Expert Technical Opinion given by technical qualified person from a reputed Institute like IIT cannot be brushed aside unless such technical opinion is displaced by specific and cogent evidence. The respondent has not provided any cogent evidence to show on the contrary in the instant case. The Hon’ble Gujarat High Court in the case of Inter-Continental (India) Vs. Union of India, reported in 2003 (154) ELT 0037 (Guj) is squarely covered in the present case.

14.1 In an identical case in the case of Devoir Trading Ltd., Vs. Commissioner of Customs, Ahmedabad in Final Order No. A/10962/2019 dated 03.06.2019, it was held as under:

> *“11. We find that the appellate Tribunal has already held that the Walnut Inshell is covered by the description of ‘Food Flavour/Flavouring Agent/Flavour Improvers’ and Dietary Fibre’ respectively under serial no.6 and 11 of the SION E-5. The appellate Tribunal upon the certificate of the IIT and technical reference books and several wrappers produced by the appellant to show that the walnut is used as relevant food flavour/flavouring agent/flavour improvers’ and dietary fibre’ for the manufacture of Biscuits.*
>
> *Moreover, we also find from the technical opinions of IIT and other technical references that walnuts as fruit/nut of bakeshop , it can be used as food flavour in the manufacturing of biscuits and assorted confectionary products and also as substitute of protein and dietary fibre (in appropriate proportion) in the manufacturing of biscuits and confectionary products.*

We are of the considered opinion that the Inshell Walnut are actually used in the manufacturing of Biscuits in view of the technical material produced by the appellant in the appeal before us.

We hoever find that the authorities below have sought to deny the benefit of duty free import of inshell walnut against the DFIA issued for export of biscuit on the ground that CTH mentioned in the Annexure-A to DFIA are different from the CTH mentioned in the BE.

In our view , the issue raised in the above is squarely covered by the order of Hon'ble Bombay High Court in the case of USMS Saffron Co. Inc reported in 2016(331) ELT 155. The appellate Tribunal held that ITC(HS) mentioned in the DFIA is not a criterion to get the benefit under FTP and customs provisions as long as the items imported falls under the description of goods mentioned in the DFIA. In that case, the appellate tribunal held that the imported saffron is covered by the description food flavour mentioned in the DFIA irrespective of ITC(HS) mentioned in the DFIA. We also find that Hon'ble Bombay High Court in the case of USMS saffron (supra) upheld the order of the appellate tribunal holding saffron can be imported as food flavour without payment of duty against DFIA issued for export of Biscuits.

We find considerable force in the submission of the appellant that the term 'generic input' and alternative input' are not defined under FTP (2009-14) and 2015-20 and the relevant Public Notice No. 93 dated 01.02.2012 for export of biscuits under DFIA covered by SION E-5 and SION E-5 mentions that the description of import item in very specific details and rationalised quantities.

We further find that the Hon'ble Bombay High Court , Nagpur bench in the case of Shah NanjiNagsi Exports Pvt. Ltd. Vs. UOI in WP No. 8268/2017 Order dated 29.03.2019 under para 26 held that "It reveals that DFIA Scheme is distinct than Advance Authorisation scheme where raw material to be imported on authorisation and be used for manufacturing purpose. Basically, DFIA is post export scheme in which exporter has to first export goods and after realisation proceeds, exporter has to make an application to the authority, who after verification, grant DFIA certificate which is transferable. Therefore , there is no actual user condition inbuilt under the scheme".

In view of the judgement of the Hon'ble Bombay High Court , it is beyond doubt that the actual use of the imported item in the manufacture of export goods is not a pre-condition to grant exemption under the DFIA. The Hon'ble High Court has extensively dealt with the scheme of DFIA for reaching the above conclusion.

In our view once the imported goods satisfy the description given in the SION and reproduced in the DFIA, they are clearly entitled to claim benefit without payment of duty on the strength of the valid DFIA irrespective of ITC(HS) No. mentioned in the DFIA. Interestingly SION does not refer to ITC (HS) Codes and only the description and quantity of the goods allowed to be imported are mentioned.

We also find that no actual user condition is specifically mentioned in the SION E-5. In a post export entitlement scheme like DFIA, in our view once the endorsement of transferability is made in the DFIA, the imported goods only requires to be covered by the description, quantity mentioned in the DFIA within the overall CIF value as specified therein.

As per our above discussion, we are of the view that appellant is entitled to clear the imported 'Inshell Walnut' against the DFIA License obtained against export of Biscuits and produced before the customs authorities. Accordingly, the appeal is allowed with consequential reliefs".

15. The revenue contended that vide notification no. 21 dated 05.12.2017, Central Government has notified FTP- (2015-20) and revised FTP by inserting the stipulations of Para 4.12 (i) and (ii) under Para 4.29 (iv) & (v) which deals with validity and transferability of DFIA. Therefore it was contended that DGFT vide above amendment in FTP, has clearly spelled out that only specific inputs alongwith quantity will be permitted to be imported under DFIA Scheme.

16. We find that the said Para 4.29 (iv) & (v) refers to Para 4.12 of FTP while incorporating the provisions therein. However, the Hon'ble Bombay High Court in the case of Shah Nanji Nagsi Exports Pvt. Ltd., Vs. UOI - 2019(367) ELT 335 (Bom) has already considered the provision of Para 4.12 for transferred DFIA under the said Judgement and order dated 29.03.2019. Wherein the Hon'ble court held as under:-

"15. *The controversy revolves around the question, whether petitioner can be allowed to import maize popcorn against DFIA licence for export of starch powder under SION entry No. E75 when admittedly imported popcorn is not used to manufacture export product namely maize starch powder. Petitioner's Learned Counsel conceded that the imported maize popcorn is not used for manufacturing the export goods namely maize starch powder. According to him, there is no such actual user condition as well as the DFIA is transferable.*

16. *The petitioner sought clearance of popcorn against DFIA licence issued for export of starch powder as per entry at serial No. E75 of SION. Apparently the norms (E-75) do not refer to any particular category of maize and it is petitioner's understanding that popcorn can be imported duty free against DFIA vide entry No. E75.*

17. *It is petitioner's contention that, normally entry which has been mentioned under the rules or norms should be construed as it stands. In this regard, petitioner relied on reported case of Standard Pencils (P) Ltd. v. Collector of Central Excise, Madras, (2002) 7 SCC 433 = 2002 (145) E.L.T. 278 (S.C.). In said case, the question was of interpretation of a term, in context to the exemption granted by the Central Government from paying excise duty. The Central Government by its Notification granted certain exemption for "Kumkum" (Bindi) under the Central Excise Act. It was the question whether the Kumkum pencil which is one of the form of "Kumkum" can avail benefit of Notification. In said context, it is held that the Central Government in its Notification has not confined the benefit of Notification to particular form of "Kumkum". There is no valid reason to exclude Kumkum in pencil form and therefore, the benefit has been accorded. According to petitioner, SION E75 refers the input commodity as "maize" without putting any restriction therefore, entry would cover maize of any quality, since the norms have not confined any quality of maize.*

18. *On similar line, the petitioner relied on reported case of M/s. Jain Exports (P) Ltd. and Another v. Union of India and Others, (1988) 3 SCC 579 = 1992 (61) E.L.T. 173 (S.C.). In said case, issue was whether import of industrial coconut oil was banned under Import Policy. It was observed that in relevant appendix there was no classification of coconut oil therefore all varieties of coconut oil should be taken as covered by said term. Precisely, it was observed that the term coconut oil as mentioned should take in its folds all varieties.*

The Hon'ble Supreme Court in reported case of Commissioner of Central Excise, New Delhi v. Connaught Plaza Restaurant Private Limited, New Delhi with connected matter, (2012) 13 SCC 639 = 2012 (286) E.L.T. 321 (S.C.), ruled that in the absence of statutory definition in precise terms, words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding or according to their popular meaning. Therefore in absence of any definition, the general meaning of the word is to be construed.

19. *The petitioner argued that it is not permissible for respondents to interprate policy condition. In this regard, reliance is placed on reported case of the Commissioner of Customs (Export) v. M/s. USMS Saffron Co. Inc. - 2016 (344) E.L.T. 161 (Bom.). In said case, it is observed that if a particular Authorization does not contain any entry for restricting the item (Saffron), then, by an inferential process and when the Licensing Authority did not think it proper to insert it, it will not be permissible to read it in the same. It conveys that in absence of statutory restriction, by inference scope of entry cannot be restricted.*

20. *The respondents contended that the petitioner has imported popcorn, in gross violation of para 4.12(i) of the FTP, 2015-20 which mandates that whenever SION permits use of generic inputs (maize in this case), the name of specific inputs (popcorn maize) should be* *endorsed in the relevant shipping bills and the relevant bills of entry. According to respondents maize is generic term used in SION E75 and therefore non-mentioning of specific input violates the above term, and consequently disentitles authorisation.*

21. *On the other hand, petitioner vehemently urged that the SION E75 entry i.e. "maize" itself is a specific term as against generic term. The petitioner would submit that Cereal is a generic term of which maize is species meaning thereby it is a specific term and therefore, Clause 4.12 would not apply. In short the quarrel is whether maize is generic or specific term, which would decide applicability of Clause 4.12.*

22. *Neither FTP 4.12 nor SION describes generic or specific terms, therefore, the general meaning of the word is to be construed. The term generic is an adjective relates to class of group or things or which is not a specific one. In other word use of generic term is for describing something that refers to whole class of similar things. Respondents' stand that maize is a generic term is based on the submission that there are different varieties of maize namely flint corn, dent corn, hybrid, popcorn etc. This argument does not stand to reason because maize itself is a quality of Cereal. When the term cereal is used, naturally unless it is specified, one cannot understand what it means. Naturally Cereal is generic term which covers all its types like corn, oat, wheat, rice etc. However, when the term maize is used, it is a specific class of cereal apart from its inter se varieties, therefore, the term maize can be well construed as a specific term and therefore, the provision of para 4.12(i) would not apply.*

23. *Respondents would submit that the general norms would indicate that, the items which are imported should be used for manufacturing resultant exportable items. The object of the scheme is to be looked upon to understand whether there exist actual user condition. For this purpose, respondents attracted our attention to the "general notes for all export products groups".*

Note-1 :-

"1. The norms have been published in this book with a view to facilitate determination of the proportion of various inputs which can be used or are required in the manufacture of different resultant products. In many cases, the resultant products and the inputs required have been described in generic terms. The applicants shall, therefore, ensure that the goods sought for import and actually imported are those, which are used/required in the export product. The items allowed for import in the licence shall be co-related with the description of the export product in the Shipping bill by the exporter to be authenticated by Customs.

For example, if the input allowed in the norms is 'relevant fabrics', only the specific types of fabric i.e. polyester or nylon etc. used in the export product shall be allowed. Similarly, if the norms provide for import of BOPP film against export of self adhesive tape, only BOPP film required for manufacture of Self Adhesive Tape will be allowed and not those, which are required as packing material."

Bare Perusal of Note 1 indicates that, there is no actual user condition but the input must be capable for use of export product. In absence of any specific word, the only requirement appears to be of capability of the input product to manufacture the export goods and no necessity to actually use the same. The plain reading of note-1 nowhere conveys that there is actual user condition.

24. *The statute should be read as a whole, in its context and scheme, to discover what each clause or word is meant and designed under the scheme. Interpretation of words and clauses must depend on the text and the context. There was no difficulty for the framers of the scheme to specifically lay down that the imported items must be used for manufacturing export items. However, in its absence the term 'can be used' must be interpreted as it stands. It simply conveys that the imported item should be potential to use but not necessary to be used. The scheme itself is of transferable authorisation and therefore in that context different interpretation cannot be made. Moreover, Clause 4.27(iv) conveys that wherever SION prescribes 'Actual User' condition, it will prevail. Herein, no such actual user condition is specifically prescribed by SION for relevant entry. Chapter 9 of the FTP, 2015-20 specifically defines the term 'actual user' as a person who utilizes imported goods for manufacturing in his own unit. It means that actual user condition relates to a person and not to a product. Therefore, the argument advanced by the petitioner regarding actual user condition would not sustain.*

25. *It is not denied that popcorn maize has also similar starch contents as other varieties of maize, indicating that popcorn maize can be used to manufacture maize starch powder. The scheme never conveys that there is actual user condition attached to the import against the export obligation. It amounts to adding some conditions in the FTP when they never exist. Moreover, when the authorisation is made transferable under the scheme there is no question of actual user condition.*

26. *It reveals that DFIA scheme is distinct than Advance Authorization Scheme where raw material is to be imported on authorization and to be used for manufacturing purpose. Basically, DFIA is post export scheme in which exporter has to first export goods and after realization of proceeds, exporter has to make an application to the authority, who after verification, grant DFIA certificate which is transferable. Therefore, there is no actual user condition inbuilt under the scheme.*

The respondents relied on the Circular dated 14-11-2017 to impress about the actual user condition. It is countered on the point that the circular is in relation to the Advance Authorization Scheme and not about DFIA Scheme. Secondly, it is argued that the circular cannot have retrospective effect. In this regard, petitioner relied on reported case of the Commissioner of Customs-IV v. Lactose (I) Ltd., 2017 (355) E.L.T. 541 (Bom.). In said case, it is ruled that the policy circular would apply only if it is issued prior to the date of issuance of licence meaning thereby it has no retrospective effect. In that light on the basis of circular entitlement cannot be denied.

27. *As per SION export item at Serial No. E-75 is maize starch powder against which exporter is permitted to import "maize" without putting* *any condition or restriction as regards to variety, quality or characteristic in the said entry. Moreover, there is no such corresponding condition in licence. In its absence, any addition of words cannot be imported to change the equation. Precisely, import of popcorn maize is not excluded from the scope of term "maize". We may reproduced one of the licence details as under :-*

Import Item :

Sr. No.	Item Description	Item Length	Import Quantity	CIF/Duty Saved (in Rs.)	CIF/Duty Saved (in FC)	Qty.	Val.
1.	Maize (Corn)	12,0	635.82 M.T.	7,155,876.00	108,079.00 USD	Y	N
				7,155,876.00	108,079.00		

Export Item :

Sr. No.	Item Description	Item Length	Export Quantity	FOB (in Rs.)	FOB (FC)
1.	Maize Starch Powder	19,0	405.5 M.T.	8,587,051.00	129,695.08 USD
				8,587,051.00	129,695.08

28. *The petitioner has imported maize which is capable of being used in the manufacturing of export goods namely maize starch powder. There is no "actual user condition" so as to restrict right of petitioner to import maize. So long as the export goods and the import item corresponds to the description given in the SION, it cannot be held to be invalid by adding something else which is not in the policy.*

29. *In conclusion, we hold that petitioner is entitled to import popcorn maize under DFIA scheme vide SION entry E75 and answer accordingly. We are not inclined to go into the rest of the technicalities which are left to the authority to decide as per policy.*

30. *In the light of the above discussion, we partly allow writ petition and hold that under DFIA scheme vide SION entry No. E75, the petitioner is entitled to import popcorn variety of maize. In the light of above adjudication, respondents to take appropriate decision about issuance of authorisation, subject to the fulfilment of rest of the policy condition. Writ petition stands disposed accordingly".*

17. From the above judgment it can be seen that all the issues raised in the present case have been considered. As regard the description of the goods in the said case the license was issued for input namely 'Maize' against export product of Maize Starch Powder, whereas, the importer had imported Popcorn Maize. The revenue's contention was that the popcorn maize is not used for manufacture of Maize starch powder. The Hon'ble court has decided that even though the popcorn maize is not used for manufacture of maize starch powder but since it is capable of being used, its import is permitted under DFIA. The present case is on a better footing that the 'Inshell Walnut' is not only capable of being used but invariably used for manufacture of biscuits as fruit/flavor/dietary fibre. This has been held in appellant's own case by the Hon'ble CESTAT-Mumbai in Final Order No. A/85730/2020 dated 11.09.2020. Moreover, as per the custom's lab report dated 08.08.2018 and various technical opinions as discussed above, the

Inshell Walnut is used as flavor or fruit/nut or dietary fibre in the manufacture of biscuits/cookies and confectionary. Therefore, there is no dispute that inshell walnut is correctly covered under the description of goods i.e, fruit/flavour/dietary fibre as mentioned in the annexures annexed along with DFIA Scheme as well as specified in SION.

18. In the case of Shah Nanji Nagsi Exports Pvt Ltd, The Hon'ble Court has rejected the contention of the revenue that the import goods should be actually used in the manufacture of export goods. In other words, actual user condition is not applicable unless it is specifically mentioned therefore, applying the same finding of the Hon'ble Court, in the present case also the contention raised by the revenue that the inshell walnut was not actually used in the export goods has no substance for denying the benefit of DFIA Scheme .The Hon'ble court in Shah Nanji Nagsi Exports Pvt Ltd(Supra) have categorically considered the amended provision of DFIA under Foreign Trade Policy 2015-20 and taken a view that if the input is covered under the description given and even if the input is not used actually in the export product the benefit of DFIA should be extended therefore, all the issues raised by the revenue in the present case have been elaborately dealt with by the Hon'ble Mumbai High Court of Nagpur Bench.

19. We as per judicial discipline cannot deviate from the ruling made by the Hon'ble High court. Accordingly, the appellant is entitle for DFIA Scheme in respect of import of inshell Walnut.

20. The imported goods "In shell Walnuts" are not specified under Sensitive items under Para 4.30 of FTP- (2015-2020) of DFIA's. Therefore the exporter is not required to give a declaration of the technical specification, quality and characteristics of inputs used in the resultant product. The Central Board of Excise & Customs vide Circular No. 46 of 2007 had earlier clarified the above provisions which existed under the previous policy period under Para 4.55.3 of HBP).

21. It is settled law that Board Circulars are bindings on customs authorities as held by Hon'ble Gujarat High Court in the case of F.S. Enterprise Vs. State of Gujarat reported in 2020(32) GSTL 321 (Guj).

22. As per Policy Circular No. 72/2008 dated 24.03.2009, flexibility has been given to import alternative inputs or goods which are capable of using in the export product. Therefore inputs which are covered under the

description are entitled for DFIA exemption for claiming DFIA benefits by either exporter or transferee or the importer under the Transferable DFIA Scheme. As per Policy Circular No. 22, even a transferee of the license can apply for amendments in ITC (HS) Numbers of the inputs from the regional licensing authorities. Therefore it cannot be said that if the specific name of input in the present case 'In shell Walnut' is not mentioned in the licence or in the export shipping bill, benefit of DFIA cannot be extended particularly when the broad description is specified in SION as well as in the annexure to the DFIA licence.

23. As per our above discussions and findings, we are of the view that in the facts of the present case the appellant is entitle for the benefit of DFIA for import clearance of in shell walnut.

24. Accordingly, the Appeal is allowed.

(Pronounced in the open court on 08.12.2020)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul