

REPORTABLE

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

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10985 of 2017

(Arising out of Notification Order-VIII-48-655-EXP-AMD-MP-SEZ-16-17 dated 23/01/2017 passed by Principle Commissioner Customs, Excise and Service Tax-MUNDRA)

Dhaval Agri Exports Llp

(earlier Known As Dhaval Agri Exports)
Shri Hari Kutir, Till Factory, Morbi Highway Road Touch,
Near New Market Yard, Dedi Village, RAJKOT, GUJARAT

.....Appellant

VERSUS

C.C.-Mundra

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

.....Respondent

WITH

Customs Appeal No.12919 of 2018

(Arising out of OIO-MUN-CUSTM-000-COM-14-18-19 dated 10/08/2018 passed by Commissioner of Central Excise, Customs and Service Tax-MUNDRA)

C.C.-Mundra

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

.....Appellant

VERSUS

Dhaval Agri Exports

Shri Hari Kutir, Rajkot-Morbi Road, Village-Bedi,
Rajkot, Gujarat

.....Respondent

AND

Customs Appeal No.10674 of 2022

(Arising out of OIO-MUN-CUSTM-000-COM-14-18-19 dated 10/08/2018 passed by Commissioner of CUSTOMS-MUNDRA)

C.C.-Mundra

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

.....Appellant

VERSUS

SHRI JAY SURESHBHAJ CHANDARANA

CEO of Ms Dhaval Agri Exports
Shri Hari Kutir, Rajkot Morbi Road Village Bedi
Rajkot, Rajkot, Gujarat

.....Respondent

APPEARANCE:

Shri. P D Rachchh, Advocate for the Appellant
Shri. Sanjay Kumar, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAJU
HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA**

Final Order No. 12308-12310/2024

DATE OF HEARING: 17.09.2024

DATE OF DECISION: 03.10.2024

SOMESH ARORA

Facts of case

M/s. Dhaval Agri Exports (DAE) were engaged in the import of duty-free Sesame seeds under Advance Authorization Scheme (A.A.S) under Notification No. 96/2009-Cus dated 11.09.2009 and subsequent export of processed Sesame seeds against Advance Authorization. An intelligence gathered by DRI revealed that DAE were indulging in diversion of raw sesame seeds, imported duty free, in the local market. The A.As. utilized by DAE were issued with actual user condition and the goods imported were required to be disposed of as provided in Notification No. 96/2009-Cus dated 11.09.2009 and Para 4.1.5 of the [FTP 2009-14](#).

2. Department-Appellant on its part through its special Counsel submitted as follows for their appeals: -

1.1 A search was conducted at the premises of DAE, Rajkot on 05.09.2014. The investigation revealed that DAE had imported 19944.560 MT raw sesame seeds duty free under 21 AAs, out of which export obligation was fulfilled in case of 11 AAs, by exporting 8331.752 MT hulled sesame seeds (8413.07 raw sesame seeds considering 1% process loss).

1.2 As regards remaining quantity of 11531.490 MTs of raw sesame seeds imported under 10 Advance Authorizations during the period 06.03.2013 to 05.02.2014, they have exported 1369.940 MT hulled sesame seeds (1383.290 raw sesame seeds). However, as per Standard Input Output Norms (SION) and conditions of Advance Authorization, the importer was required to export 11417.306 MTs of hulled sesame seeds. At the time of search, only 620.608 MT sesame seeds were found in stock. Thus, 9527.592 MT raw sesame seeds, imported duty free, under AA were found not utilized by them for the specific purpose i.e. processing the imported sesame seeds into hulled sesame seeds and subsequent export under advance license, but, the said quantity was alleged to be diverted into the local market in violation of condition of Notification No. 96/2009-Cus dated 11.09.2009 and Para 4.1.5 of the FTP 2009-14, rendering them ineligible for exemption under Notification No. 96/2009-Cus dated 11.09.2009.

1.3 The Importer claimed that 8140.649 MTs were exported under drawback scheme by mistake and their application for classification for conversion of drawback shipping bill to Advance Authorization scheme is pending with DGFT. The applications were made after initiation of investigations by DRI and no case with detailed explanation was made out for counting the drawback exports as Advance Authorization exports.

1.4 During investigation, statements of Shri Jay Sureshbhai Chandrana, CEO of DAE and Shri Dinesh Jayantilal Tanna of M/s Tirupati Agro, Broker was recorded. From the investigations done at the broker's end, it appeared that the imported sesame seeds were diverted to the domestic market.

1.5 A Show Cause Notice (SCN) dated 21.10.2015 was issued to DAE proposing confiscation of 9527.592 MT raw sesame seeds, valued at Rs. 1,27,57,35,460/-; demanding Customs duty amounting to Rs. 46,09,99,766/-, recovery of interest; appropriation of duty of Rs. 2,13,41,127/- already paid; imposition of penalty u/s 112 (a) and 114A. Penalty u/s 112 (b) was also proposed to be imposed on Shri Jay Chandarana.

Adjudication of SCN

2. The said SCN was adjudicated vide OIO No. MUN-CUSTOM-000-COM-14-18-19 dated 10.08.2018.

2.2 Before the adjudicating authority, the importer took its defense as under:

2.2.1 Though as per SION only 1% process loss is allowed, the actual process loss is around 13%. As per provisions of policy, after deducting 1% permissible process loss, goods were exported.

2.2.2 The imported goods were processed and hulled sesame seeds were exported under DBK instead of advance authorization. Pending outcome of the application for conversion of SB from DBK to advance authorization, they have exported 9396.034 MT under advance authorization by using domestic inputs.

2.2.3 Out of six contract notes, three contract notes were cancelled and against three contract notes, goods were exported to Korea. In case of two contract notes, goods were sold for export under Form – H.

2.2.4 There is no evidence of diversion of imported natural sesame seeds and no attempt was made to verify to whom the goods were sold.

2.2.5 They had filed Shipping Bills (S.B.) under advance authorization in EDI, but, due to technical reason CHA had filed fresh SBs under DBK.

2.2.6 Once Export Obligation Discharge Certificate (EODC) is issued by DGFT, Customs cannot demand duty against advance licenses.

2.2.7 They have relied on the ruling of Policy Interpretation Committee of DGFT dated 12.01.2018, wherein it is held that advance authorization holder has option to export resultant product using duty paid materials procured from domestic sources subject to actual user condition etc.

2.2.8 The interpretation of DGFT shall be final and binding for all; Relied upon case law of AKM Trading Corporation Ltd.

2.2.9 The process loss in SION is revised to 33% on 03.01.2018, vide Public Notice No. 49/2015-20.

3. The adjudicating authority dropped the proceedings against M/s Dhaval Agri Exports as well as Sh. Chandarana, mainly on the following grounds:

(i) The Adjudicating authority in his findings has observed that the investigating agency has ignored the part of the statement dated 21.01.2015 of Shri Dinesh Jayantilal Tanna of M/s. Tirupati Agro, Rajkot, a broker of sesame seeds. He had deposed that the product description mentioned in the contract notes denotes the quality of different sesame seeds which is commonly called in the business circle. As such it cannot be said that they are imported sesame seeds.

- (i) Out of six contract notes, in three notes, there is a mention of a country, in two notes, the product specification is shown as Korea quality and in one case there is no mention of any country.
- (ii) The adjudicating authority has found force in the contention of the importer that the name of the country mentioned in the contract notes to indicate its quality does not mean that the particular goods have originated from that country. He has observed that the allegation that DAE were diverting imported sesame seeds in domestic market is not supported by evidence on record.
- (iii) Regarding shortage of the physical quantity of raw sesame seeds, the adjudicating authority has relied upon revised SION norms, declared by DGFT vide public notice dated 03.01.2018, which allowed process loss upto 33% instead of 1%. The adjudicating authority also agreed to the process loss of 13% claimed by the importer. Accordingly, the adjudicating authority denied the shortage and diversion of the goods.
- (iv) The adjudicating authority observed that in absence of documentary evidence of diversion of imported goods, the actual user condition has not been violated.
- (v) Considering the fact that the importer has exported 8140.649 MT hulled sesame seeds under DBK, the adjudicating authority observed that it cannot be said that the goods were diverted into local market. Further, relying on the ruling of the Policy Interpretation Committee of DGFT dated 12.01.2018 and subsequent exports made by the importer against advance authorization, issue of EODC by DGFT and release of Bond by Customs, Mundra, the adjudicating authority held that DAE has not violated the conditions of duty-free import under advance license. Accordingly, it held that the goods are not liable for confiscation.

4. The OIO was reviewed by the committee of the Chief Commissioners. Commissioner was directed to file an appeal against the OIO on the grounds mentioned in the review order. As a result, the department has filed these two appeals in respect of DAE as well as Sh. Chandarana.

Department's Submissions

3. Department, *inter alia*, made following submissions through its Special Counsel

5. Legal provisions of exemption notification and advance authorization scheme:

5.1 The AAs utilized by DAE were issued with actual user condition and the goods imported were required to be disposed of as provided in Notification No. 96/2009-Cus dated 11.09.2009 and Para 4.1.5 of the [FTP 2009-14](#).

5.2 The relevant condition (x) of the said notification reads as under:

"That the said authorisation shall not be transferred and the said materials shall not be transferred or sold;

Provided that the said materials may be transferred to a job worker for processing subject to complying with the conditions specified in the relevant Central Excise notifications permitting transfer of materials for job work."

5.3 Para 4.1.5 of the FTP 2009-14 reads as under:

"Advance Authorization and / or materials imported there under will be with actual user condition. It will not be transferable even after completion of export obligation. However, Authorization holder will have option to dispose of product manufactured out of duty-free inputs once export obligation is completed. In case where CENVAT credit facility on inputs have been availed for the exported goods, even after completion of export obligation, the goods imported against Advance Authorization shall be utilized only in the manufacture of dutiable goods whether within the same factory or outside (by a supporting manufacturer), for which the authorization holder shall produce a certificate from either the jurisdictional Central Excise Supdt. or Chartered Accountant, at the option of the exporter, at the time of filing application for EODC to RA concerned. However, the actual user condition shall not be applicable in case of raw sugar to be imported from 17.2.2009, till 30.09.2009 under Advance Authorization Scheme.

Further the manufacturing wastes/scrap, as allowed, can be disposed of with the payment of applicable duty before fulfilment of export obligation."

5.4 Thus, as per condition (x) of Notification No. 96/2009-Cus dated 11.09.2009, the goods imported under advance authorization shall not be transferred or sold. Further, as per Para 4.1.5 of the [FTP 2009-14](#), Advance Authorization and / or materials imported thereunder will be with actual user condition. In the instant case, the importer has allegedly sold/diverted imported goods into local market and therefore, failed to adhere to the actual user condition.

Diversion of raw sesame seeds imported duty free:

6. M/s. DAE were indulging in diversion of sesame seeds imported duty free under advance licenses. The following facts are relevant to establish that the imported materials were diverted into local market:

6.1 On the date of search i.e. 05.09.2014, shortage of imported goods to the tune of 9527.592 MT was noticed. The importer claimed that 8140.649 MT goods were exported under drawback scheme by mistake and their application for conversion of

drawback shipping bill to Advance Authorization scheme is pending with DGFT. It is pertinent to mention here that the applications were made on 05.09.2014 (date of search conducted by DRI) and 27.08.2014. Further, condition No. 17 of the Advance Authorizations clearly stipulates that; -

"No drawback shall be available for any duty paid material whether imported or indigenous unless such item(s) is / are endorsed on the authorization by RA in terms of Para 4.1.14 of FTP."

Thus, the respondent has availed drawback, which is violative of the condition of the Advance Authorization. Further, the applications for conversion of shipping bills from drawback to advance authorizations have been rejected by the competent authority and nothing is forthcoming from the OIO that the respondent has paid the drawback amount claimed, along with interest. Hence, the findings of the adjudicating authority on this aspect are erroneous.

6.2 Shri Dinesh Tanna of Tirupati Agro, a broker firm, in his statement dated 09.09.2014, has categorically stated that the importers who import sesame seeds through him were also selling the same in the local market through him. In his further statement dated 21.01.2015, Shri Tanna stated that the goods viz. sesame seeds were delivered from Mundra and terms for supply to buyers is the responsibility of M/s. Dhaval Agri Exports. The place of delivery of the goods was Mundra i.e. port of import. The place of delivery (i.e. Mundra) mentioned in the contract notes itself is sufficient evidence to show that the goods were imported and diverted to local market.

6.3 The description, origin, quantity and delivery place mentioned in the sales contract notes coincides with the actual imports made by the importer under advance authorization. On perusal of the details of sale of goods as per contract notes and corresponding details of import, it can be seen that the description, origin, quantity and delivery place mentioned in the said contract notes exactly match with the actual imports made by the importer under advance authorization. Further, it is claimed that out of the 06 contract notes, 03 contract notes were cancelled. However, no documentary evidence is produced showing cancellation of contract notes. Under one contract, the goods were mentioned as "Korean quality". It is also claimed that under 02 contract notes, goods were cleared under 'H' form for export out of country and not for domestic sale. (defense reply before adjudicating authority at page 37 of the appeal) These claims were never made before the investigating authority. Further, such sale under H form (i.e. for export by other party) is not permitted when the goods have been imported under advance authorization and with actual user condition.

6.4 The total import of sesame seeds under 21 advance licenses was 19944.560 MT. Out of this in respect of 11 advance licenses they had fulfilled export obligation. They had exported 8331.752 MT processed sesame seeds as against import of 8413.070 MT sesame seeds. Thus, the process loss comes to 0.97%. In case of remaining 10 advance licenses, they had imported 11531.490 MT sesame seeds. Out of which they had exported 1369.594 MT processed sesame seeds (1383.594 raw sesame seeds considering process loss @1%) under advance authorization. At the time of search as per books of accounts 620.608 MT sesame seeds was in stock. Thus, there was shortage of 9527.591 MT. The export of 8140.649 MT goods under DBK have been claimed under advance authorization. Even if the quantity exported under DBK is

considered, there was shortage of 1304.714 MT sesame seeds, which constitutes process loss @11.31%. However, the respondent has contended that the shortage is due to process loss @13%. The importer has contended that vide Public Notice No. 49/2015-20 dated 03.01.2018 permissible loss up to 33% has been provided and accordingly claimed process loss of 13%. However, looking to the process loss on earlier imports, it is found that the actual process loss is 1% only, which is also in conformity with SION. The importer himself has consistently shown a process loss of 1% in respect of all their exports in the past. Suddenly they claim that the process loss has increased to 13% which exactly coincides with the shortage noticed even after taking into account the exports made under Drawback scheme. In any case, even if the permissible limit of process loss has been increased to 33 %, it does not mean that they can avail more process loss than what is actual, which was 1% until then, and divert the rest.

6.5 Furthermore, the said Public Notice dated 03.01.2018 is prospective and not retrospective. The SION norms applicable to an Advance Authorization in force at the time of issuance of advance authorization will be applicable. Any subsequent amendment in SION norms cannot be made applicable retrospectively, unless otherwise specified in the Public Notice of DGFT. Each advance authorization contains quantity of goods to be imported and quantity of the goods to be exported, after considering the SION as applicable.

6.6 Further, in his statement dated 11.09.2014, Shri Jay Chandarana has informed that they have received EODC from DGFT in 9 advance authorizations, according to which 5391.752 MT hulled sesame seeds were exported against import of 5445.670 MT sesame seeds. The process loss in above transactions comes to 1%, which is same as provided in SION. Furthermore, as mentioned above, in case of 11 advance licenses they had fulfilled export obligation by exporting 8331.752 MT processed sesame seeds as against import of 8413.070 MT raw sesame seeds. In these transactions also the process loss comes to @1%, which is in conformity with SION.

6.7 The adjudicating authority has, therefore clearly erred in accepting a process loss of 13% as claimed by the importer.

Violation of Actual User Condition of the FTP:

7. As discussed above, the contract notes and details viz. description, date and place of delivery, description / origin etc. mentioned in contract notes are sufficiently corroborated with the imports made by the respondent. Further, the process loss claimed is also not proper. The panchnama and stock statement prepared on 05.09.2014 is sufficient evidence, backed by the contract notes. These are crucial evidences which reveal that the imported goods were diverted into local market. The shortage found during search and contract notes duly corroborated with actual import are sufficient evidence to prove that the goods imported duty free were diverted into local market in violation of actual user condition.

Export under DBK instead of Advance Authorization:

8. The importer has claimed that out of 9527.592 MT of raw sesame seeds alleged to have been diverted to local market, they have exported 8140.649 MT hulled sesame seeds under drawback scheme. Shri Jay Chandarana, CEO of the respondent in his statement dated 08.09.2014 submitted copies of applications (dated 27.98.2014,

27.08.2014 and 02.09.2014) for conversion of shipping bills. Bare perusal of the above applications apparently shows that the applications have been hastily prepared without taking care of mentioning total numbers of shipping bills being requested for conversion. Therefore, these applications for conversion of shipping bills are questionable. It cannot be a mere coincidence that exactly on the date of search, the respondent may file such application. Even otherwise, it is stated that the respondent is regular importer / exporter. Filing of total 361 shipping bills under drawback cannot, by any stretch of imagination, be regarded as a mistake, as claimed by the importer as these must be spread over a period of time. In their defence reply, they had stated that this was due to technical mistake by their CHA which looks farfetched.

Maintenance of Records

9. As brought in the investigation, they were not maintaining separate accounts for usage of the indigenous and imported sesame seeds at different stages of processing. They were maintaining separate stock record of imported and indigenous sesame seeds and debiting the exports or other disposal against these. When they were asked as to how they ascertain whether the exported goods were from the imported or indigenous purchase, they could not give any satisfactory reply. They were also not maintaining any record to show the wastage arising during the processing of raw sesame seeds. It means they could be freely mixing the indigenous and imported sesame seeds at the stage of processing.

DGFT ruling dated 12.01.2018 of Policy Interpretation Committee:

10. The DGFT has issued ruling dated 12.01.2018 of Policy Interpretation Committee of DGFT. The decision of the committee is as under:

"Taking into consideration the above stipulation and submission of the applicant, it is clarified that Advance Authorization holder has option to export resultant product using duty paid materials procured from domestic sources also within the validity of period of Authorization and subject to Actual User condition in respect of inputs imported there under".

10.1 The said committee has issued the clarification based on the submission of the Importer. The gist of representation made by the importer to the Committee to ascertain the basis of clarification issued by the Committee has not been revealed. Hence, applying the said clarification in the present case is flawed. Nevertheless, this ruling is of no avail to the respondent as it also stipulates the actual user condition of the imported inputs, which has been violated by the importer in the instant case. As per the provisions of Chapter 4 of the FTP the inputs imported subsequent to exports are also subject to actual user condition and only the resultant final product is allowed to be sold in the domestic market and not the inputs as such. In the present case, the evidences on record indicate that the importer has sold the duty-free inputs imported under Advance Authorization, in the domestic market, as such without subjecting the same to manufacturing process.

Decision of DGFT – Final and Binding:

11. The adjudicating authority has relied upon the case law of AKM Trading [2007 (208) ELT 406 (Tri. Mum.)] and held that interpretation of the DGFT shall be final and binding. As discussed above, the interpretation ruling given by the policy

interpretation committee has been applied wrongly, without going into the question raised before the committee and circumstances under which the ruling has been issued. Therefore, the case law cited is not at all applicable in the present case.

Issuance of EODC by DGFT:

12. The conclusion of the adjudicating authority that DGFT has issued EODC in all cases on the basis of exports made by the importer against Advance Authorization will not be fatal to the current proceedings. This is because as per the ratio of Hon'ble Supreme Court's decision in the case of Sheshank Sea Foods Pvt. Ltd Vs UOI reported at 1996 (88) ELT 626, holding that Customs is not precluded by the licensing authority from conducting investigation in breach of condition of exemption notification, is applicable to the present case. It is pertinent to mention here that as on the date of search as per the books of accounts, stock of only 620.608 MT imported raw sesame seeds was available. As per Para 4.1.5 of the FTP 2009-14 the Advance Authorization and the materials imported there under will be with actual user condition and it will not be transferrable even after completion of export obligation. The adjudicating authority has failed to consider that for subsequent exports under advance licenses, it was not possible to fulfill the actual user condition as only small quantity of imported raw sesame seeds was available. The EODC issued by DGFT is without considering the facts and evidences unearthed in the course of the investigation and detailed in the show cause notice. The issuance of EODC by the DGFT does not bar the department from proceeding against the importer for violation of the conditions of the Notification granting exemption from payment of Customs duty. Grant of EODC is towards fulfillment of obligations mentioned in the FTP. The importer has been permitted to fulfill export obligation by even using domestic inputs but this cannot be considered as fulfillment of actual user condition under the customs notification.

Violation of condition (x) of Not. No. 96/2009-Cus dated 11.09.2009:

13. Notification No. 96/2009 - Cus dated 11.09.2009 exempts materials imported into India against an Advance Authorization issued in terms of paragraph 4.1.3 of the Foreign Trade Policy from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty, safeguard duty and anti - dumping duty leviable thereon, respectively, under sections 3, 8B and 9A of the said Customs Tariff Act, subject to the conditions enumerated therein. One of the conditions at (x) stipulates that "*the said authorization shall not be transferred and the said materials shall not be transferred or sold*" which has been violated by the importer.

13.1 The Hon'ble Supreme Court in the case of Commissioner of Customs (Import), Mumbai vs. Dilip Kumar & Company reported at 2018 (361) ELT 577 (S.C.) held at para 52 that:

(1) Exemption notification should be interpreted strictly; The burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exception clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject assessee and it must be interpreted in favor of the revenue.

13.2 In the instant case, the investigations have established that the importer has diverted the duty-free sesame seeds imported by availing the benefit of exemption under Notification No. 96/2009-Cus dated 11.09.2009 into the domestic market. The importer also failed to come up with any evidences during the adjudication to establish that the imported raw material was actually used in the manufacture of the goods which were exported. Consequently, applying the ratio of the above cited decision of the Hon'ble Supreme Court, the benefit of exemption under the said notification cannot be extended and the demand of Customs duty in respect of duty-free raw material diverted and sold in the domestic market needs to be confirmed.

14 From the facts narrated hereinabove it can be concluded that (i) the imported sesame seeds, which were imported duty free under advance authorization were sold/diverted into local market, (ii) subsequently, the export obligation was fulfilled by utilizing different goods (iii) the claim of 13% process loss is not sustainable as earlier they have consistently shown a process loss of 1%. Thus, the respondent herein has violated the conditions of the Notification as well as FTP 2009-10. Hence, Customs duty is recoverable and goods liable for confiscation. Dhaval Agri Exports and Shri Jay Sureshbhai Chadarana, CEO are also liable to penalty under section 114A and 112(a)/112(b).

15. In view of the above, it was prayed to allow both the departmental appeals.

4. **Submissions of M/s. Dhaval Agri Exports (Hereinafter referred to as Respondent)** It was submitted that they are engaged in processing of natural sesame seeds and trading of "Sesame Seeds" including natural as well as hulled sesame seeds and other agriculture produce. Respondent was importing Raw Sesame Seeds and also procuring locally. It mainly exports processed sesame seeds directly and sometimes through merchant exporter also. Sometimes they export natural sesame seeds as well as other agriculture produces like cotton, cumin seeds, coriander seeds etc.

5. Respondent had imported 19,944.56 MTs "Raw (Natural) Sesame Seeds" valued at Rs. 222,93,89,018/- without payment of customs duty amounting to Rs. 80,56,12,014/-under 21 Advance Authorisations (referred in paragraph 7(b) and 7(c) of the SCN) during the period 24.12.2012 to 23.07.2014 vide 139 Bills of Entry. It had declared and classified the goods as "Raw Sesame Seeds" under tariff item 12074090 which attracts basic customs duty 30% with 2% Education Cess and 1% Secondary & Higher Education Cess and 4% Additional duty of Customs and claimed benefit of Notification No.96/2009-Cus. dated 11.09.2009. In addition to the said quantity it had not imported any other consignment of Raw/Natural Sesame Seeds during the said period. Out of the said imported natural sesame seeds under Advance Authorisation respondent had exported 17750.100 MT (9738.944 MT under Advance Authorisation and 8011.156MT under claim of drawback). Though as per SION

only 1% process loss is allowed, actual process loss is/was around 13%. As per the provisions of policy after adjusting 1% permissible process loss, goods were exported.

6. Factory premises of Respondent was searched on 05.09.2014 by the officers of DRI, Jamnagar/Ahmedabad and documents related to the import and export of Sesame seeds were withdrawn under Panchnama dated 05.09.2014. During the course of Panchnama the physical verification of stock of Sesame Seeds lying in the factory premises of respondent was conducted and total quantity was found to be 942.525 MT which included the imported as well as indigenously purchased Sesame Seeds and all types of material i.e. raw Sesame Seeds, Sesame Seeds in process, rejected Sesame Seeds and Hulled Sesame Seeds. The books of account maintained by them showed the stock position of imported sesame seed as on 04.09.2014 to be 620.608 MT. The record of imports and exports of respondent was also examined and it was found that they had imported 19944.560 MT of Raw Sesame Seeds under 21 Advance Authorizations out of which they have shown export of 9701.346 MT of Hulled Sesame Seeds under Advance Authorization till date of Panchnama i.e. 05.09.2014. Furthermore, respondent claimed to have exported 8140.649 MT of Hulled Sesame Seeds under drawback scheme and not under Advance Authorization Scheme. Even if their exports under drawback scheme was accounted against export under Advance Authorization, there was as per the department as shortage of 1284.486 MT of imported Raw Sesame Seeds which is as detailed below.

Sr. No.	Description	Qty (in MT)
1	Total Import	19944.560
2	Total Export required as per SION	19747.089
3	Total Export under Advance Authorization	9701.346
4	Export under Drawback and claimed under Advance Authorization	8140.649
5	Stock of Sesame Seeds available at the time of Panchnama as per books of accounts	620.608
6	Shortage of imported goods found $[2-(3+4+5)]$	1284.486

6.1 Statement of various persons including Shri Jay Sureshbhai Chandarana being CEO of Respondent was recorded under Section 108 of the Customs Act, 1962 on 08.09.2014 and 11.09.2014, which were exculpatory.

7. Respondents filed detailed reply to the said SCN and also appeared before the Commissioner, Customs, Mundra who had while passing Order dated 10.08.2018 dropped the proceeding initiated vide said SCN dated 21.10.2015 against both the respondents. Hence the present appeals by the

department. Also a protective appeal has been filed by the party as appellant to seek adjustment of certain shipping bills filed as Drawback to be claimed and treated as having been filed under Advance Authorization Scheme, in case the department appeal is contemplated for acceptance.

7.1 Respondent submitted that though the learned Committee has directed to prefer an appeal for correct determination of mainly three points for determination viz.

- (i) Whether goods imported under various Advance Authorisations were not used for specified purpose but have been sold in local market?
- (ii) Whether respondent has violated the Condition No. (x) of the Notification No. 96/2009-Cus. dated 11.09.2009 read with Para 4.1.5 of the Foreign Trade Policy 2009-14?

and

- (iii) Whether Public Notice No.49/2015-20 dated 03.01.2018 issued by DGFT (Revising SION norms for export of Hulled Sesame Seeds from Import Item Raw Sesame Seeds from existing 1.01 Kg to 1.33Kg) is prospective and not retrospective?;

Sole ground to prefer an appeal and to be decided is whether allegation that goods imported under various advance authorization were not used for the specified purpose but have been sold in local market (diversion of imported raw sesame seeds and claim of process loss) or otherwise?

7.2 Respondent submitted that it had imported 19,944.56 MTs "Raw (Natural) Sesame Seeds" totally valued at Rs.2,22,93,89,018/- without payment of customs duty amounting to Rs. 80,56,12,014/-under 21 Advance Authorisations (referred at page 10 and 11 of the impugned order – page 101 to 102 of reply to appeal) during the period 24.12.2012 to 23.07.2014 vide 139 Bills of Entry. It had declared and classified the goods as "Raw Sesame Seeds" under tariff item 1207 40 90 which attracts basic customs duty 30% with 2% Education Cess and 1% Secondary & Higher Education Cess and 4% Additional duty of Customs and claimed benefit of Notification No. 96/2009-Cus dated 11.09.2009. Except for the said quantity it had not imported any other consignment of Raw/Natural Sesame Seeds during the said period.

7.3 Out of the said imported natural sesame seeds under Advance Authorisation, Respondent had exported 17750.100 MT (9738.944 MT under Advance Authorisation and 8011.156MT under claim of drawback). Though as

per SION only 1% process loss is allowed, actual process loss is/was around 13%. As per the provisions of policy after adjusting 1% permissible process loss, goods were exported. However, as per the revised norms of SION, process loss up to 33% is permissible in terms of Public Notice No. 49/2015-20 issued by the DGFT.

7.4 It is admitted fact in the SCN at para 4 as well as para 7(d) of the SCN (Page 124 and 131 of reply to appeal) that 8,140.649 were inadvertently exported under claim of draw back instead of Advance Authorisation. It was not considered only on the ground that conversion of shipping bills was not allowed by the Customs and application for amendment was made only after initiation of investigation by DRI. As discussed in para infra applications for amendments were made well before the investigation initiated by the DRI.

7.5 It is also admitted fact in the show cause notice at paragraph 7(b) (Page 124 of reply to appeal) that out of 8413.07 MT imported natural sesame seeds under 11 Advance Authorisation after allowing 1% process loss 8,331.752 MT processed Hulled Sesame Seeds were exported.

7.6 Respondent submitted that it is a fact evident on record that goods viz. imported raw sesame seeds were never diverted in local market but were used for intended purpose viz. hulling and exported the same. The goods viz. hulled sesame seeds instead of exporting under Advance Authorisation were through oversight exported under claim of Drawback. Even process loss claimed were less than 1% of permissible limit under SION. In any case there is no evidence of diversion of raw sesame seeds in local market. Since, it is established from the records available at the time of search and also revealed during further investigation by way of recording statements of CEO of the respondent as well as License-wise Statement/Sheet showing import and export of goods against 10 Advance Authorisation, imported goods were used for intended purposes of hulling and exported with claim of process losses less than 1% within the permissible limit of 1% as per SION. Therefore, grounds raised in the appeal about violation of the condition of notification and applicability of the public notice prospective are totally baseless at law.

7.7 The respondent submitted that original allegations made against it in the impugned show cause notice were at paragraph 7 which were self contradictory as well as contrary to documentary evidence gathered during the course of investigation and depositions made by various witnesses of the department are as under:

7.8 At paragraph 7(c), (d), (e) page 8 & 9 of the SCN it was alleged that it appears that Respondent had not utilized 9527.592 MT of imported Natural

Sesame Seeds for the specified purpose i.e. processing imported Sesame Seeds into Hulled Sesame Seeds and export thereof but diverted the same into the local market in contravention of the conditions of Notification No. 96/2009-Customs dated 11.09.2009 and para 4.1.5 of the Foreign Trade Policy 2009. However, at the same time at paragraph 7(d) page 9 of the SCN it was also mentioned that respondent had stated that it had also exported a quantity of 8140.649 MT under drawback scheme by mistake and it had applied to Customs for conversion of Shipping Bills relating to those exports to Advance Authorization scheme but so far no such amendment has been allowed.

7.9 Respondent further submitted that it is admitted fact on records by way of panchnama dated 05.09.2014 as discussed at para 4 page 2 of the SCN that its factory premises was searched on 05.09.2014 by the officers of DRI, Jamnagar/Ahmedabad and documents related to the import and export of Sesame seeds were withdrawn under Panchnama dated 05.09.2014; that during the course of Panchnama the physical verification of stock of Sesame Seeds lying in its factory premises was conducted and total quantity was found to be 942.525 MT which included the imported as well as indigenously purchased Sesame Seeds and all types of material i.e. raw Sesame Seeds, Sesame Seeds in process, rejected Sesame Seeds and Hulled Sesame Seeds; that the books of account maintained by it showed the stock position of imported sesame seed as on 04.09.2014 to be 620.608 MT; that the record of imports and exports of Respondent was also examined and it was found that it had imported 19944.560 MT of Raw Sesame Seeds under 21 Advance Authorizations out of which it had shown export of 9701.346 MT of Hulled Sesame Seeds under Advance Authorization till date of Panchnama i.e. 05.09.2014; that respondent claimed to have exported 8140.649 MT of Hulled Sesame Seeds under drawback scheme and not under Advance Authorization Scheme; that even if its exports under drawback scheme was accounted against export under Advance Authorization, there was shortage of 1284.486 MT of imported Raw Sesame Seeds which is as detailed below; and that Respondent failed to give any explanation for this shortage.

Sr. No.	Description	Qty (in MT)
1	Total Import	19944.560
2	Total Export required as per SION	19747.089
3	Total Export under Advance Authorization	9701.346
4	Export under Drawback and claimed under Advance Authorization	8140.649
5	Stock of Sesame Seeds available at the time of Panchnama as per books of accounts	620.608
6	Shortage of imported goods found [2-(3+4+5)]	1284.486

Thus, at the time of investigation it was deposed that out of imported raw sesame seeds 8140.649 MTs of Hulled Sesame Seeds were exported under claim of drawback instead of under Advance Authorisations. All these facts were disputed only on the ground that conversion of shipping bills were not allowed and application for conversion of shipping bills were made after initiation of investigation by DRI, which is factually incorrect as applications for conversion of shipping bills were made well before the investigation initiated as discussed in para infra. The investigation has not disputed this fact and not even tried to check further about the same.

7.10 Respondent further submitted that even CEO of the Respondent in his statement recorded under Section 108 of the Customs Act, 1962 on 08.09.2014 inter alia stated that they were maintaining separate stock registers for imported as well as indigenously purchased raw materials and debiting the same as and when exported/sold from the respective registers; that till date they have imported 18755.180 MT of Sesame Seeds and exported 34497.811 MT of Natural Sesame Seeds & Hulled Sesame Seeds during the period from 24.12.2014 to 04.09.2014; that out of 34497.811 MT exported Sesame Seeds, they had exported 9590.186 MT Sesame Seeds against advance license and 24907.625 MT sesame seeds under the Drawback Scheme; that on being told that on verification of the documents it was found that they had imported 18755.180 MT of Sesame Seeds under Advance Licenses, whereas, they have exported only 9590.186 MT of Sesame Seeds against such Advance License, and stock of imported Sesame Seeds as per their books of account as on 04.09.2014 was 620.608 MT thus showing a shortage of 8544.386 MT of Sesame Seeds, he stated that they have used the said 8544.386 MT of Sesame Seeds in their factory by processing and hulling it into Hulled Sesame Seeds and out of it exported 6966.25 MT under drawback scheme instead of showing the same under Advance Licenses. He further stated that they have filed an application to the Assistant Commissioner of Customs, Custom House, Pipavav, on 05.09.2014 and two applications to the Deputy Commissioner of Customs, Custom House, Mundra on 27.08.2014 requesting them to convert their shipping bills from drawback to Advance License Scheme; that on being asked whether he agreed that during the period from February-2014 to August-2014, they continued to export the Sesame Seeds Product imported duty free under Advance Licenses, under the claim of drawback in gross violation of the actual user condition of the Advance Licenses, to which he replied that as per his opinion, actual user condition means he could not sell the duty free inputs to other person for manufacturing, and then exporting the resultant product under Advance License.

7.11 Respondent further submitted that another statement of the CEO was recorded under Section 108 of the Customs Act, 1962 on 11.09.2014 wherein he inter alia stated that on being asked to explain the shortage of 1578.136 MT of sesame seeds as they have imported a quantity of 18755.180 MT of sesame seeds under Advance Licenses out of which they had exported 9590.186 MT against Advance Licenses and 6966.250 MT against Drawback Scheme as claimed by them and only 620.608 MT was in balance as per record, he stated that the shortage was on account of processing losses. On being asked that whether they have sold the imported Sesame Seeds or Hulled Sesame Seeds processed from imported Sesame Seeds through M/s. Tirupati Agro, Rajkot, to which he replied that they sold Natural as well as Hulled Sesame Seeds which were purchased locally and processed in their unit.

7.12 Respondent most respectfully further submits that a statement of Shri Dinesh Jayantilal Tanna of M/s. Tirupati Agro was recorded under Section 108 of the Customs Act, 1962 on 09.09.2014 wherein he inter alia stated that on being asked how much quantity of sesame seeds was imported by the respondent under indent ship and sold into the local market through them to which he replied that for respondent they have imported approximately 3425 MT; that they have sold the natural, yellow sesame, sortex as well as hulled sesame seeds in local market on party's request but it is not possible for them to state at this time whether the same was from the imported quantity only because respondent did not specify the same; that they have arranged for local sale of 4953 MT of natural, yellow sesame, sortex and hulled sesame seeds all under H-Form to different exporter.

7.13 Respondent further submitted that another statement of Shri Dinesh Jayantilal Tanna of M/s. Tirupati Agro was recorded under Section 108 of the Customs Act, 1962 on 21.01.2015 wherein inter alia on being shown the contract Notes No.10847 dated 20.03.2014; 10849 dated 21.03.2014; 11098 dated 20.05.2014; 11080 dated 14.05.2014; 10786 dated 12.02.2014; 10066 dated 26.04.2013 generated by them under which Seller is mentioned as "Dhaval Agri Exports, Rajkot" and in the column product description it is mentioned as "Sesame Seeds – Sudan Red Quality", "Sesame Seeds – Hulled Autodry Sortex Semi Premium (Somalia) Quality", "Sesame Seeds – Hulled Autodry Sortex Somalia Quality", "Sesame Seeds – Korea Quality", "Sesame Seed – Natural Sortex Korean Condition", etc. and informed that from contract notes it appears that they have facilitated respondent in selling the imported sesame seeds into the local market to which he replied that the product description mentioned in the contract denotes the quality of different sesame seeds which is commonly called in the business circle. He was also shown the statement of its CEO dated 11.09.2014 in which while answering question

No.16 it was stated that the product description in the contract notes were written by them without informing Respondent and asked to comment. He stated that they generate two copies of the contract one of which is for buyer and the other for seller, as such Respondent were already provided the copy of the contract and were very well aware of the description mentioned in the contract are the different names of Sesame seeds commonly known in the business.

7.14 Respondent further submitted that based on the above oral as well as documentary evidences clearly proved that there was no diversion of goods but raw sesame seeds after process of hulling were through oversight exported under claim of drawback instead of advance authorization. There is no other evidence in any form was/is adduced regarding diversion of goods in domestic market to local buyers nor recorded & relied upon any statement of such buyers if any.

7.15. Respondent submitted that while recording statement dated 08.09.2014 of CEO of respondent he had submitted License wise 10 Statements/Sheets for 10 Advance Authorisations referred in table at paragraph 7(c) of page 8 of the SCN showing details of Import and Export viz. Bills of Entry & date, import quantity(MT), CIF Value (Rs.) import of goods, Description viz. Raw Natural Whitish Sesame Seeds for import and Quantity to be exported, Shipping Bill Number and date, Invoice No., Export Quantity(MT), FOB Value (Rs.), FOB Value (USD as per BRC), Description-Hulled Sesame Seeds for export, which bears signature of CEO with date i.e. 08.09.2014. It is further submitted that Shipping Bills mentioned as per the remarks at bottom of the sheets for License/Advance Authorisation at Sr. No. 4, 5, 6, 7, 8, 9 and 10 were for exported Hulled Sesame Seeds processed from imported Raw Sesame Seeds under claim of Drawback instead of under Advance Authorisation. Attention of the Bench was further invited towards two letters dated 27.08.2014 addressed to the Deputy Commissioner, Customs House, GAPL, requesting for conversion of shipping bills for 5,378.982MT (actually applied for 5,529.582 MT but 150.600 MT Shipping Bill No. 3830557 dated 12.07.2014 claimed against two Advance Authorisation No.0810128099 and 0810131340) mentioned in the sheets attached with the letters from Drawback to Advance License for Advance Authorisation at Sr. No. 6, 7, 9 and 10 of the table at paragraph 7(c) of page 8 of the SCN. Similarly, attention of Bench was invited towards a letter dated 02.09.2014 addressed to the Assistant Commissioner, Customs, Customs House, GPPL, Pipavav requesting for conversion of shipping bills for 2,632.174MT mentioned in the sheets attached with the letter from Drawback to Advance License for Advance Authorisation at Sr. No. 4, 5 and 8 of the table at paragraph 7(c) of page 8 of the SCN. Based on those documents it is

submitted that in total 8,011.156 MT of Hulled Sesame Seeds were processed from imported raw sesame seeds under the said Advance Authorisations and exported under claim of drawback on the date of visit of the officer of DRI i.e. on 05.09.2014. Based on those documents again it was submitted that imported goods were used for intended purpose for hulling and not diverted raw sesame seeds as such, thereby there cannot be any violation of condition of the notification and foreign trade policy, therefore, department's appeal is liable to be quashed on this ground too.

7.16 Respondent most respectfully further submitted that even other documentary evidence in the form of two applications dated 27.08.2014 duly acknowledged by the MP & SEZ Mundra for conversion of shipping bills from drawback shipping bills to Advance Authorisation (for License No. at Sr. No. 7, 9, 10 of table and for License at Sr. No. 6 of table at page 8 of the SCN for the shipping bills listed in the sheets attached with the said letters) on the ground that through oversight shipments were done in Drawback Scheme and requested for conversion of shipping bills from drawback to advance license, were available on record. It may be appreciated that search was carried out on 05.09.2014 whereas two applications for conversion of shipping bills were made on 27.08.2014 for goods imported under four Advance Authorisations. In the same way another application dated 02.09.2014 for conversion of shipping bills (listed in the attached sheets) against 3 Advance Authorisation (Licenses at Sr.No.4,5 & 8 of the table at page 8 of the SCN) was submitted to Custom House, GPPL, Pipavav on 05.09.2014. Co-incidentally, date of search and submission of the said letter are same but by any means it was prepared and sent prior to search only. In addition to that the respondent had paid Rs. 2,28,41,127/- (Rs.2,13,41,127/- as shown in paragraph 6 page 7 of the SCN plus Rs.25,00,000/- paid vide GAR-7/TR-6 Challan No. MP&SEZ/2785/14-15 dated 21.11.2014) as against drawback of Rs. 1,37,36,994/- (inclusive of interest of Rs.6,04,519/-) were sanctioned and paid to it by way of refund.

Therefore, grounds of appeal at para 10 and 10.1 are totally baseless.

7.17 Respondent without admitting anything further submitted that in any case export obligations against said 10 Advance Authorizations were completed by it by procuring duty paid goods from the local markets, as per the provisions of the Foreign Trade Policy in addition to the hulled sesame seeds exported under claim of drawback. In this regard attention of Hon'ble Bench is invited towards sheets showing Advance Authorization/license wise shipping bills number, date, quantity in Kg or MT, FOB Value in Rupees and USD as well as actual realized amount as per Bank Realization Certificate in Rupees and USD for hulled sesame seeds exported against 11 Advance Authorisations

including 10 Advance Authorization referred in paragraph 7(c) at page 8 of the SCN. Based on the same it was further submitted that in any case it had exported 11,674.800 MT Hulled Sesame Seeds including procured Duty paid Raw Sesame Seeds from open market/domestic market under said 10 Advance Authorization (Total Exported Quantity of 12476.632 MT against 11 Advance Authorization [including 801.832MT against one clubbed License No.0810133348], so net quantity 11674.800MT against the said 10 Advance Authorization). It was further submitted that as per table at paragraph 7(c) of page 8 of the SCN against the 10 Advance Authorisation 11531.49 MT imported goods, 1,369.5940MT hulled sesame seeds were already exported, therefore, as against 9,527.59156MT (11,531.490 MT less 1383.290MT process loss [1%] as per SION) respondent had exported 11,674.800MT which is more than required quantity.

7.18 Respondent further submitted that it had also made applications requesting to issue EODC and the said authority had issued EODC/Bond Waiver Letter cum Redemption letters in respect of disputed 10 Advance Authorizations as detailed hereunder:-

Sr. No.	DGFT's F. No.	Advance Authorization No.	Date of order
1	08/91/165/00901/ AM15/dated 06.02.2013	0810118206 dated 06.02.2013	30.03.2015
2	08/91/165/00200/AM16 dated 13.08.2013	0810123765 dated 13.08.2013	30.06.2015
3	08/91/165/00201/AM16/ dated 13.08.2013	0810123766 dated 13.08.2013	30.06.2015
4	91/040/00555/AM.14 and 08/91/040/00453/AM.2014 dated 19.10.2015	0810128771 dated 10.02.2014 and 0810127077 dated 13.12.2013	19.10.2015
5	08/91/040/00480/AM.2016, 91/040/00519/AM.14 & 08/91/040/00014/ AM.2015 dated 04.02.2016	0810127477 dated 27.12.2013, 0810128099 dated 17.01.2014 & 0810130536 dated 11.04.2014	04.02.2016
6	08/91/165/00347/AM16 dated 28.02.2014	. 0810129251 dated 28.02.2014	24.07.2015
7	8/91/165/00857/AM16 dated 15.05.2014	0810131340 dated 15.05.2014	23.01.2016

7.19 Respondent thus submitted that the jurisdictional customs authorities at MP & SEZ port, Mundra had also discharged the relevant bonds executed by it at the time of importation of the goods against 10 disputed Advance Authorizations on fulfillment of export obligations. The same was informed by the Superintendent of Customs, Custom House, Mundra to Respondent vide his letters (1) F. No. VIII/48-36/MISC/MCH/15-16 dated

30.06.2015, (2) F. No. VIII/48-390/MISC/MCH/15-16 dated 14.08.2015, (3) F. No. VIII/48-309/ MISC/MCH/15-16 dated 28.12.2015, (4) F. No. VIII/48-4/MISC/MCH/15-16 dated 25.02.2016 and (5) F. No. VIII/48-52/MISC/MCH/15-16 dated 17.04.2015.

7.20 Respondent submitted that in view of the above, there was no diversion of goods at all. As regard to goods imported against Advance Authorisation but exported under claim of drawback and export obligations against said 10 Advance Authorization were fulfilled by procuring duty paid Sesame Seeds within validity period. Therefore, EODC were issued by the DGFT and Bonds were also cancelled by the Customs Department. As per settled position of law amongst other in following decisions it held that once export obligations are discharged it is not open for the revenue to initiate proceedings against the exporter:

- Jindal Drugs Pvt. Ltd. Vs. Commissioner of C. Ex. & ST, Ludhiana – 2018 (362) ELT 281 (Tri. – Chan.)
- Aditya Birla Nuvo Ltd. Vs. Commissioner of Cus., Bangalore – 2010 (249) ELT 273 (Tri. – Bang.)

7.21 Respondent further submitted that since there was no response from the department for conversion of shipping bills filed under claim of drawback to Advance Authorization, it had approached the Director General, Advance Authorization Wing, New Delhi vide letter dated 18.11.2017 informing him about the facts of the case wherein it was, *inter- alia*, submitted that it had obtained total 21 Advance Authorizations during 19.11.2012 to 15.09.2014; that out of the same, export obligations against 11 Advance Authorizations were already fulfilled before 05.09.2014; and that EODC/ Bond waiver letter in respect of the same were already issued by Joint DGFT, Ahmedabad. Brief of the case made out by DRI and its application to customs authorities for conversion of shipping bills into Advance Authorizations was also explained. Similarly, dispute about process loss in hulling industry, reference made on 13.06.2016 by Indian Oilseeds and Produce Export Promotion Council, Mumbai before the DGFT in respect of processing loss etc. were also explained. Besides, it was also clarified by the Respondent under the said letter dated 18.11.2017 that since there was no response from the concerned customs authorities regarding decision on conversion of DBK S/bills to Advance Authorization, it had fulfilled the export obligation after procuring sesame seeds from DTA against export orders in hand and within validity period of Licences; that the Licensing authority, Ahmedabad had already issued EODC/Bond waiver letters; and that the Customs authorities had also released

Bonds executed by the Respondent at the port from where the goods were imported. In view of the above it had requested the Director General, Advance Authorization Wing to facilitate the export/ imports in terms of Para 1.07 and to interpret the Policy provisions in terms of Para 2.57(a) of the Foreign Trade Policy 2015-20. It was further submitted that due to unavoidable situation, Respondent had procured sesame seeds from DTA against processing loss and against exports made under drawback shipping bills for fulfilling the export obligations; that necessary clarification to the effect that export obligation against Advance Authorizations can be discharged by procuring material from domestic sources so that the issue pending before the Customs authorities can be closed. In response to the above letter dated 18.11.2017, the Respondent, vide letter dated 12.01.2018 was informed by the Foreign Trade Development Officer DGFT, New Delhi that its case was discussed at length by the Policy Interpretation Committee (PIC) on 19.12.2017. Decision of the PIC was also conveyed under the said letter wherein after discussing the fact and provisions of the Policy, it was held that:

"Taking into consideration the above stipulation and submission of the applicant, it is clarified that Advance Authorization holder has option to export resultant product using duty paid materials procured from domestic sources also within the validity period of Authorization and subject to Actual User condition in respect of inputs imported thereunder. Only inputs which are declared in the shipping bills shall be allowed to be imported."

7.22 As per settled position of law amongst other following decisions decision /clarification issued by the DGFT is binding upon Customs:

- A.G. Enterprise Vs. Commissioner of Cus. (Preventive), Jamnagar – 2014 (308) ELT 418 (Tri. – Ahmd.)
- Unimers India Ltd. Vs. Commissioner of Customs, Mangalore – 2010 (250) ELT 225 (Tri. – Bang.)
- Commissioner of Custom (Gen.), Mumbai Vs. AKM Trading Corporation – 2007 (208) ELT 406 (Tri.-Mumbai)
- Cine Land Vs. Commissioner of Customs, Chennai – 1999(114) ELT 653 (Tribunal)
- Commissioner Vs. Cine Land – 2002(142) ELT A68 (SC)
- Richardson Hindustan Limited Vs. UOI – 1988 (37) ELT 496 (Bom)
- Autolite (India) Ltd. Vs. Union of India – 2003 (157) ELT 13 (Bom)
- Titan Medical Systems Pvt. Ltd. Vs. Collector of Customs, New Delhi – 2003 (151) ELT 254 (SC)

7.23 Respondent further submitted that it had claimed only 93.96 MT process losses which is less than 1% which is permissible as per SION 1%. Thereby in

view of the above submission there is no violation of any of the condition of notification No.96/2009-Cus. dated 11.09.2009 as amended not to speak of condition No.(x) viz. actual user condition as well as paragraph 4.16 read with para 4.03 of the Foreign Trade Policy, 2015-16. According to actual user condition means imported raw materials as such cannot be transferred or sold even after completion of export obligation but authorization holder have option to dispose of product manufactured out of duty free inputs once export obligation is completed. Attention of the bench was invited towards paragraph 4.47 of Handbook of Procedure, 2015-16 and submitted that in case authorization holder exports first (before effecting imports) by using imported inputs/indigenously procured raw materials, in that case the Authorization Holder can seek waiver of bond condition by submitting evidence of export made and payment realized to that extent. In other words, goods can be exported by using imported inputs/ indigenously procured raw materials and there is no need of exporting the same goods which were imported. Attention was further invited towards SION K36 – and submitted that for export of 1Kg Hulled Sesame Seeds 1.01Kg Raw Sesame Seeds can be imported. Further attention was invited towards modification of SION vide public notice No. 49/2015-2020 dated 03.01.2018 and submitted that as per modified SION for export of 1Kg Hulled Sesame Seeds, 1.33Kg Raw Sesame Seeds can be imported. However, respondent has claimed process loss less than 1% and exported Hulled Sesame Seeds by procuring indigenous raw sesame seeds as per the provisions of Foreign Trade Policy.

7.24 Based on the above it was submitted that actual process loss was higher around 13% and later on same was revised from 1% to 33% in SION. So at the time of visit of the DRI officers one of the reasons for shortages was process loss at higher rate than permissible 1% and goods were not diverted in local market as such. In any case process loss was claimed @ less than 1% only and indigenously procured duty paid raw sesames seed after hulling were exported for excess process loss. Therefore, allegations of diversion are far from the truth.

7.25 Respondent further submitted that apart from that differential quantities were exported by procuring duty paid raw sesame seeds under the said licenses. Even process loss claimed was less than 1%. Therefore, department's appeal is liable to be quashed on these grounds too.

7.26 Respondent submitted that in view of the above oral evidences as well as documentary evidences it is proved that there was no diversion of goods but raw sesame seeds after process of hulling through oversight were exported under claim of drawback instead of advance authorization. There was

no other evidence in any form was adduced regarding diversion of goods in domestic market to local buyers nor recorded & relied upon any statement of such buyers, if any.

8. Apart from the above the learned Committee in sheer disregard to above referred evidences in the form of documents as well as oral has preferred an appeal on one of the grounds, inter-alia, based on three general statements dated 09.09.2014, 10.09.2014 and 21.01.2015 of one of the brokers Shri Dinesh Tanna (hereinafter referred as the broker). As discussed in detailed in reply to appeal that in the said statements nothing specific was deposed by him against respondent at all. It was submitted that what was evident from the above deposition was that author of the statement (Shri Dinesh Tanna) did not say that sesame seeds imported by Respondent against Advance Authorization were directly sold in local market. It may be appreciated from the deposition that the broker never confirmed or even indicated that the Respondent had directly diverted sesame seeds imported against Advance Authorization. It may be appreciated from the depositions that of the broker recorded in the three statements that he had nowhere admitted or even indicated that sesame seeds imported by the Respondent under Advance Authorization were sold in local market as such or after process. He had also categorically clarified that varieties of sesame seeds referred in the Contract Notes were actually the qualities of different sesame seeds which are common names in the business circle and therefore it cannot be said the same are the imported sesame seeds.

8.1 Respondent submitted that the learned Committee had tried to create one more ground in para 7 and 7.1 on the basis of comparison of the dates of Contract Notes with dates of filing of bills of entry and the dates of order of out of charge presumed that goods were directly diverted by Respondent in DTA from Mundra port. As per evidence in the form of reply to information sought under RTI it is clearly admitted that the learned Committee had never called for original case record viz. Adjudication file to ascertain actual fact in the matter. Respondent submitted that the learned Committee failed to appreciate the facts that out of four contract notes, three contract notes were cancelled (Without prejudice to above and without admitting anything in any case goods mentioned in this contract note dated 20.05.2014 is Sesame Seed – Hulled Autodry Sortex and not natural or raw sesame seeds). In other words no invoice of sale of such goods were/are available in the books of accounts. Contract Note No.11080/14.05.2014 nowhere refers any other country quality goods and goods were sold against H form.

8.2 The above apart, learned Committee appeared to have lost sight of the fact that Respondent does not only deal in sesame seed imported against Advance Authorizations. It was matter of record that Respondent also traded in local sesame seeds in addition to imported sesame seeds under Advance Authorization scheme. Therefore, by comparing isolated data of imports referred to above, it cannot be claimed that said goods were diverted by it in local market.

8.3 Respondent without admitting any thing further submitted that Show Cause Notice did not refer such details nor alleged the same. Therefore, learned Committee at appeal stage cannot create new case and such points cannot be raised at the time of appeal before the Tribunal by traveling beyond the scope of SCN.

8.4 Respondent without admitting anything and without prejudice further submitted that even if it is assumed that above adverse inferences were true for sake of argument, even in that case based on one contract note it can be alleged that 18MT of sesame seeds were diverted by it in local market. It was for the reason that first three contracts were cancelled and therefore, 18 MT i.e. quantity involved in the fourth contract can be considered to be diverted and not huge quantity of 9527.592 MT as alleged in the appeal.

8.5 Respondent submitted that the learned Committee had further alleged in para 8 that the adjudicating authority had erred in accepting the importer's contention of 13% shortage as process loss as against 1% provided in SION, by citing Public Notice No. 49/2015-20 dated 03.01.2018 wherein 33% permissible loss has been provided; that revised SION is prospective and not retrospective unless otherwise specified in the Public Notice.

8.6 Respondent in this regard submitted that the above allegation also appeared to have been made without appreciating facts of the case vis a vis findings recorded in the impugned Order-in-Original dated 10.08.2018 for the following reasons:

8.7. Respondent submitted that in these circumstances discussed in reply to appeal it had argued that processing loss in the hulling industry was much more than 1% referred in the SION. It was further submitted that it had claimed process loss less than permissible 1% under SION and just to show the practically process loss was much higher than 1% and same was around 13%, reference of Public Notice was made so as to justify that in sesame seeds industry process loss is very high and therefore, same was increased from 1%

to 33%. It does not mean that respondent has claimed process loss of 33% and the adjudicating authority has allowed the same.

8.8 Respondent without admitting anything submitted that the impugned application filed by the Commissioner of Customs, Mundra is based on the direction by the learned Committee of the Chief Commissioners of Customs (Hereinafter referred to as the learned Committee) under Section 129D(1) of the Customs Act, 1962 but without being authorized to file an application before Hon'ble Tribunal under Section 129D(4)ibid read with Rule 8(3) of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982. The said Section and Rule provide that every application shall be signed and verified by the applicant duly authorized to sign the memorandum of application. Therefore, application/appeal (Hereinafter referred to as an appeal) filed by the department was without authorization was liable to be rejected on this ground alone.

8.9 The respondent further submitted that even otherwise an appeal filed based on the order passed by the learned Committee under Section 129D(1)ibid is devoid of merits. The learned Committee in exercise of powers conferred under Section 129D(1) ibid is supposed to call for and examine the record of any proceedings in any order for the purpose of satisfying itself as to the legality and propriety of order. However, on perusal of the review order dated 26/30.10.2018 as well as grounds of appeal dated 22.11.2018, however it is evident from the reply given under the RTI (enclosed in compilation submitted at the time of hearing) that the learned Committee has not called for and examined the record of proceedings of the Order-in-Original dated 10.08.2018. In other words while reviewing the order and preferring the appeal, the learned Committee has not gone into any entire case records viz. Show Cause Notice and its relied upon documents including statements recorded under Section 108 of the Customs Act, 1962, reply dated 07.03.2017 to the SCN supported with documentary evidences, further submission dated 23.04.2018 supported with documentary evidences and summary of submission dated 01.08.2018 made at the time of personal hearing before the Commissioner, Customs, Mundra, submitted by the respondent. Instead of reading allegations in the SCN as well as selective part of the statement of one of the brokers Shri Dinesh Tanna, if the learned Committee had really gone into all these documents and submissions as well as depositions made by the CEO of the respondent, also authorized persons of two CHAs of Mundra and Pipavav ports under Section 108 of the Customs Act, 1962, result would have been different. In support of the above submissions reliance was placed upon

decision of Collector of Customs Vs. Phoenix Overseas (P) Ltd. – 1992 (62) ELT 366 (Tribunal)

8.10 Respondent also invited attention of Hon'ble Bench towards Note Sheet page I to IV as well as letter dated 10.10.2018 of DRI communicating the grounds for review to the Chief Commissioner Office enclosed with RTI application (Submitted in compilation at the time of hearing) that Draft Review Order was prepared by the Superintendent based on communication received from DRI only and no independent findings were given by the learned Committee. Therefore, such review order cannot be considered as proper within the meaning of Section 129D(1) of the Customs Act, 1962. On this ground too appeal was liable to be rejected.

8.11 Respondent in view of the above submitted that no penalty was imposable upon Shri Jay Sureshbhai Chandarana. However, without prejudice to above and without admitting anything submitted that in any case since the committee has not reviewed the order not imposing any penalty upon the CEO of the respondent at all as not given any ground to impose penalty upon him. Therefore, in absence of ground for imposition of penalty upon CEO same cannot be entertained at all.

9. Respondent also submitted that the impugned appeal is not sustainable on facts as well as merits and therefore, the same deserves to be dismissed to meet with the ends of justice please.

10. Respondent submitted that for utmost precaution it also filed an appeal against the order dated 23.01.2017 of the Commissioner, Customs, Mundra rejecting its two applications both dated 27.08.2014 for conversion of Drawback Shipping Bills to Advance License/Authorization Shipping Bills. As per settled position of law amongst other following, its application for conversion of shipping bills from Drawback to Advance Authorisation was erroneously rejected by the learned Commissioner. It relied on the following case law:

- Nisan Exports Vs. CC, Mundra – Final Order No. A/12221/2023 dated 25.09.2023
- Pr. Commr. of Customs, Mundra Vs. Lykis Ltd. – 2021 (377) ELT 646 (Guj.)
- Oriental Carbon & Chemicals Ltd. Vs. UOI – 2021 (377) ELT 850 (Guj.)
- Gokul Overseas Vs. Union of India – 2020 (373) ELT 49 (Guj)

The Ld. Advocate prayed that though conversion of shipping bills is permissible but if the department's appeals are rejected, impugned appeal No. C/10985/2017-DB will become infructuous.

FINDINGS :-

11. We have considered the rival submissions along with the case law on record. We find that at the heart of the controversy (as it originally emanated) is the fact of respondent working under Advance Authorization Scheme and making exports under the same claiming initial wastage as per SION norms without conducting day to day inventory of non issued raw-material. It is found that there was deficiency in the inventory of non issued material which the respondent explained to the Appellant-Department as being due to higher rate of wastage than provided in SION norms. They sought to explain the deficiency in materials found during the search was due to higher process loss than permitted under SION norm which was only 1% during the impugned period. Whereas actual process loss was 13%, as stated by them. As against this Department relied upon their own assertion as contained in initial shipping bills and other documents stating the loss was as per SION norms i.e. 1%. The respondents have explained that it was their ad-interim assertion as they were not doing inventory check on day to day basis, and had also represented later to the authorities for higher percentage. They sought to justify that the actual loss was 13% which was still below revised norms of SION which indicated 33%, as permissible limit i.e. almost 33 times of the initial prescribed norms, which stood revised vide Public Notice No 149/2015-20 issued by the DGFT. They also pointed out that 1% SION norm, despite wastage of 13% was claimed by them as only the same was permissible. On the basis of their Industry representation same was later revised and raised to 33%. The period involved in the instant case though is from 24.12.2012 to 23.07.2014, it was submitted by the respondents that revised norm was as per the industrial representation and deserved to be considered retrospectively being beneficial to exporters and being embedded to the reality. Further, day to day experience also indicates that with advent of technologies wastage only goes down and does not go up. Therefore, such norms need to be applied retrospectively and the position deserves to be accepted by the department, which Commissioner in his order has correctly appreciated while Review Committee while seeking to appeal has not accepted this pragmatic and beneficial norm retrospectively. It was pointed out by the learned advocate that 13% wastage only indicated existence of efficiency in their operations, as 13% process loss was for below 33%, even though above unrealistic and rather incorrect norm of 1%. The later norms by the concerned Authority of Ministry of Commerce was issued looking into the whole situation and

consequently the Export Obligation Discharged Certificate(EODC) was also issued and therefore and realising that in paswt cases deficiency would have occurred, it also permitted usage of indigenous material. It should set at rest any controversy raised by the Customs department as it has the approval of concerned administrative Ministry i.e. Ministry of Commerce. He particularly drew our attention to the EODC issued in this regard and which forms part of the record of the findings of the adjudicating authority in discussion as contained in para 17 to 24 as reproduced below:

Para "17. I find that the entire show cause notice is based on the allegation that M/s. DAE has diverted the raw sesame seeds imported under Advance License in the domestic market and therefore, they have not fulfilled the actual user condition as envisaged in the Notification No. 96/2009-Customs dated 11.09.2009. In support of this allegation, the evidences relied upon by the investigating agency are the statement dated 10.09.2014 of Shri. Dinesh Jayatilal Tanna of M/s. Trupati Agro, Rajkot (a broker in selling or imported raw materials) and six contract notes bearing no. 1087 dated 20.03.2014, . 10849 dated 21.03.2014. 11098 dated 20.05.2014, 11080 dated 14.05.2014, 10786 dated 12.02.2014 dated 10066 dated 26.04.2013 of M/s. Tirupati Agri Brokers, Rajkot showing seller as 'Dhaval Ari Exports, Rajkot", Father, the shortage of imported goods to the tune of 1284.486 MTs ticed during the course of physical stock verification carried out under Panchnama dated 05.09.2014 is also relied as evidence of diversion by the investigating agency. No other evidence of diversion is available on record. Now, I proceed to examine these evidences one Thy one hereinunder

7.1. It has been alleged in the SCN that Shri Dinesh. Jayantilal Tanna of Mis. Tirupati Agro, Rajkot, a broker in selling of imported raw materials, in his statement dated 10.09.2014, admitted that it was a trend/practice to sell the sesame imported under Advance Authorization as the importers had sufficient time to fulfil their export obligation and it is also evident from the Contract Notes No. 10847 dated 20.03.2014; 10849 dated 21.03.2014: 11098 dated 20.05.2014, 11080 dated 14.05.2014, 10786 dated 12.02.2014; 10066 dated 26.04.2013 that raw sesame seeds of Sudan and Somalia origin were sold locally by M/s. DAE However, on going through the statement dated 10.09.2014 of Shri Dinesh Jayantilal Tanna of M/s. Tirupati Agro, Rajkot, I observe that the original reply to No.4 for the said six Contract Notes was that "In this regard I have to state that the product description in the contract mentioned are of the quality of different sesame seeds which is commonly called in business circle. As such it cannot be said that they are the imported sesame seeds." Thus, the investigating agency has

selectively relied upon the first sentence of his deposition while completely ignoring the second sentence.

17.2. Further, on going through the aforesaid contract notes, it is observed that out of six contract notes, on two contract notes viz., 10847 dated 20.03.2014 and 10849 dated 21.03.2014, the product specification is mentioned as "Sesame Seeds - Sudan Red Quality" while on Contract Note No. 11098 dated 20.05.2014, the product specification is "Semi Premium (Somalia) Quality". Further, two Contract Notes bearing Nos. 10786 dated 12.02.2014 and 10066 dated 26.04.2013 show the product specification as Korea Quality/Korea Condition while the sixth Contract Note No. 11080 dated 14.05.2014 nowhere refers any country name to indicate the quality of the goods. In this regard, I note that the investigating agency has interpreted the country name mentioned in the product specification to indicate the country of origin of goods. However, this conclusion is not tenable as two contract notes show product specification as "Korea Quality/Condition" even though no sesame seeds are imported from Korea, rather it is the country of destination for export of sesame seeds. Further, one of the contract notes does not reflect any country name to indicate the quality of the goods. Therefore, I find force in the defence submission of M/s. DAE wherein they have contended that the name of any country mentioned on the contract note to indicate its quality does not mean that the particular goods have originated from that country. Also in two contract notes, the sesame seeds mentioned are hulled, which is the processed product of M/s. DAE and not the raw material imported by them. Moreover, these contracts are under 'H' form for exports out of country and not for domestic sale. Hence, the allegation that M/s. DAE were diverting imported sesame seeds in the domestic market is not supported by the evidences on record.

17.3. In regard to the shortage of imported goods to the tune of 1284 486 MTs noticed during the course of physical stock verification carried out under Panchnama dated 05.09.2014 (as referred in para 4 of the SCN), I find that M/s. DAF in their statements before the investigating agency, as well as their defence reply, contended that this shortage 13% approx. was due to process loss, while the DRI has allowed for only 1% process loss as per the SION norms. In this regard, they have submitted that the actual process loss in hulling industry is upto 33% (13% in their case) depending upon the raw material used and that this fact is now acknowledged by the DGFT and the permissible loss in SION IS now revised to 33% on 03.01.2018 vide Public Notice No. 49/2015-20. In view of the revised SION norms allowing for process loss of 33% instead of just 1% allowed earlier, I find it reasonable to accept the

importer's contention regarding 13% process loss and hence, the said quantity of shortage of imported goods arrived at by the DRI cannot be accepted as evidence of diversion by M/s. DAE. As there is no other independent evidence of diversion on record, I find that the allegation of diversion of duty free goods imported under Advance License by M/s. DAE is based on assumption & presumption and is not legally sustainable.

18. Further, it is alleged in the Show Cause Notice that Mis. DAE has failed to observe the actual user condition stipulated under the Notification No. 96/2009. Customs dated 11.09.2009 for the sesame seeds imported duty free under Advance License. However in the absence of any documentary evidence whatsoever or admission in statements recorded by the investigating agency, of diversion of imported goods. I find that the actual user condition has not been violated by M/s. DAE.

19. Further, I find that it has been proposed in the SCN that the entire quantity of 9527.592 MT of Raw Sesame Seeds imported by M/s. DAE during the period from 06.03.2013 to 05.09.2014 under various Advance Authorization (as listed in Annexure-A to the Show Cause Notice), is liable for confiscation as the same has been diverted in the domestic market. However, it is an admitted fact in the SCN itself that Mis DAE had exported 8140.649 MT of Hulled sesame seeds manufactured out of the imported Sesame seeds under Drawback Scheme which cannot be termed as diversion in domestic market.

20. I also find that noticee had applied for conversion of shipping bills from Drawback to Advance Authorisation along with willingness to pay back the amount of drawback with interest even before the investigation was initiated by the DRI. However, their application for said conversion was denied by the competent authority and they proceeded to fulfill their export obligation by procuring raw material from the indigenous market. In this regard, I find that M/s. DAE had approached the DGFT for clarification on the issue vide their letter dated 18.11.2017. The issue was discussed in Policy Interpretation Committee of DGFT and the DGFT vide its ruling dated 12.01.2018 decided as under:

"Taking into consideration the above stipulation and submission of the applicant it is clarified that Advance Authorization holder has option to export resultant product using duty paid materials procured from domestic sources also within the validity period of Authorization and subject to Actual User condition in respect of inputs Imported there under only inputs which are declared in the shipping bills shall be allowed to be imported."

21. I find force in M's DAE's submission that in view of Para 2.3 of FTP, interpretation of the DGFT shall be final and binding. In this regard, reliance is placed on the decision of the Hon'ble Tribunal, Mumbai, in the case of Commissioner of Customs (Gen) Mumbai Vs AKM Trading Corporation reported as 2067(208) ELT 406(Tri-Mum), wherein, the Hon'ble Tribunal held that;

"The Decision Of The DGFT On Interpretation Of The Policy Is Final And Binding In The Light Of Apex Court Decision In The Case Tarachand Gupta & Brothers (1983(13) ELT 1456 (SC))"

22. Further. I find that on the basis of exports made by M/s. DAE against the Advance Licenses, the DGFT has issued EODC in all cases and accordingly, the Bonds submitted by them at Custom House, Mundra, for duty free import have also been discharged/released by the Assistant Commissioner of Customs, Custom House, Mundra.

23. In view of the above, I find that M/s. DAE has not violated the conditions of duty free import under Advance Licenses and therefore, the proposal for confiscation of 9527.592 MT of Raw Sesame Seeds imported by them during the period from 06.03.2013 to 05.09.2014 under various Advance Authorizations (as listed in Annexure-A to the Show Cause Notice), totally valued at Rs. 1,27,57,35,460/-, under Section 111(0) of the Customs Act, 1962, is not legally sustainable. Moreover, as the charge of diversion of duty free imported goods could not be established, therefore the demand for Customs duty leviable thereon does not survive.

24. Interest & penalty, In view of discussions and findings contained in the foregoing paras, I find that the duty demand proposed in the Show Cause Notice is not sustainable. Consequently, the demand of interest and penalty would not stand.

We thus hold that explanations given by the respondent have been correctly validated and conclusion of no diversion of material outside the factory has been correctly arrived at. We also in this regard draw support and supplement the above findings from various factual explanations given in above submissions made before us.

11.1 Coming specifically to the grounds taken by the department in its appeal, we find that that party claims to have made up exports by procuring indigenous duty paid goods and by claiming only 1% SION stipulated norm. Customs has also discharged the bond furnished in this regard after due

consideration of all facts. For alleged diversion of raw (natural, sesame seeds against 4 contract notes, as was pleaded before Original authority also, 3 notes were cancelled and against 4th contract notes, hulled sesame seeds were supplied, therefore diversion is not proved beyond allegation. The documents relied upon by the department fall flat on their face in attempting to evidence alleged diversion. Even, broker in his statement mentions that seeds were not imported but were of "Somalia quality" and not "Somalian origin" as also pointed out by the adjudicating authority. We find explanations offered in this regard by the respondents as credit worthy. Ground taken by the department that EODC was incorrectly taken belies the trite law in this regard that once export obligations are certified by DGFT, it is not open to revenue to initiate proceedings as reported in

- Jindal Drugs (P) Ltd. vs. CCE and ST, Ludhiana reported in 2018 (362) ELT 281 (Tri-Chan.)
- Aditya Biral Nuvo Ltd. Vs. C.C, Bangalore reported in 2010 (249) ELT 273 (Tri. -Bang.)
- A.G. Enterprise Vs. C.C. (P), Jamnagar-2014 (308) ELT 481 (Tri.-Ahmd.)
- Commissioner Vs. Cine Land-2002 (142) ELT A68 (S.C.)
- Titan Medical Systems (P) Ltd. Vs. Collector of Customs, New Delhi-2023 (151) ELT 254 (S.C.)

11.2 It is also found that clarification about indigenous raw material used for short fall as well as revision of norms was on specific reference by the appellants as well as the relevant export promotion council, same was therefore rather required to be given due weightage. It rather fortifies their claim that even under old dispensation of 1% wastage SION norm, there was need to use indigenous material to meet export obligation. Same was apparently done by them. In fact, instead of diversion, the evidence on record points to rather procurement of indigenous material and this appears to have been appreciated by DGFT, as how else an industry with low 1% norm as against actual 13% (revised 33%) could have practically operated, without indigenous procurement. Later stance of DGFT therefore was most practical and pragmatic and was indeed a corrective measure to rectify the lower rate norm of 1%. By not applying the later norm to the impugned period respondents will be subjected to hardship and inconvenience. "Ab inconvenient" has to be kept in mind, while considering retrospectivity or otherwise of a beneficial change in norm. A norm being a standard stands on a different footing than law (retrospectivity of which has to be judged on the touchstone of evolved legal principles). A norm or a standard of wastage based on technology, if revised to the benefit of industry has to be treated as retrospective.

11.3 Therefore, both revision of norm which now exists in synch with permissibility of usage of indigenous material for exports under Advance Authorization Scheme (A.A.S) was a course correction appropriately done by Ministry of Commerce. Since, respondent were also allowed procurement of indigenous materials, it leaves us in no two minds that same was done as SION norm of 1% was an aberration in fixing the same, rather than a die-cast norm embedded only to the past technologies, which became 33% later with advent of technologies. Applying the revised norm even for the past, therefore is both logical and reasonable.

11.4 It was also explained by the Ld. advocate that they had taken various stands as drawback to be counted etc. merely as alternate plea in case their assertion of higher weightage or no diversion was not accepted by the Revenue. They firmed up the same to usage of indigenous material and higher percentage of wastage on the basis of clarifications of DGFT office. And even now have taken up conversion of drawback exports as an alternate submission. It had been buying deficient materials, sourcing the same from domestic market, which is very much permissible course now, as has also been highlighted by the learned Commissioner of Customs in his capacity as adjudicating authority in above findings. He also explained that the appeal filed by them to count drawback exports, (which is also part of the bunch) was filed as abundant precaution to safeguard respondent's interest. As the acceptance of appeal of the department would have exposed them to undue loss during the course of their export business. And the same was on the premise that in case appeals of the department are accepted, they still have the right to get the drawback export made by them to be adjusted towards Advance Authorization Scheme. He in the same breath however, also pointed that there was no diversion, but procurement as indicated of the materials above was done by them. We find that in the peculiar facts of the matter, where norm was revised to 33 percent and the concerned Ministry also permitted usage of indigenous materials, whatever respondents did were alternate pleas and situational response till they became aware of the decisions of the concerned Ministry.

11.5 Further, we find that unless, the department is able to produce clear cut evidence of clandestine removal of material and by showing to whom it was transported, sold etc., its allegation of removal in domestic market cannot be taken as proved. All this is woefully lacking on the part of the department and therefore unproved assertion remains in the domain of bald presumption only. Statements recorded of brokers etc. are vague and do not advance

department's case. The discussion of Policy Interpretation Committee of DGFT as brought out in para 20 of the order of the Adjudicating authority, clearly indicates that sourcing material from domestic market is very much permissible to make up for deficiency. It is also noted that DGFT has issued EODC in all cases to the appellant. On the basis of such certificates, the Assistant Commissioner of Customs at Mundra port has also discharged the bond taken by it. We find that the adjudicating authority has correctly taken into account various arguments and has properly given relief which was due to the respondent. The respondent has also explained its position in the light of developments as happened. In case, the Revenue Department does not accept its proposition of higher wastage than SION norms, it was for it to prove with evidence the removal and convince DGFT for no need of revision of input output norms or of issuance of EODC. We find that the learned Commissioner of Customs has correctly appreciated the position and passed his order which, therefore, deserves to be upheld. Accordingly appeals by the department are dismissed as devoid of merits and the appeals by the respondent seeking approval to adjust drawback against Advance Authorization Scheme becomes infructuous and therefore deserves to be dismissed in view of aforesaid findings.

12. The discussion above brings us to the following postulates for our findings:-

- a. That export transactions as well as legislations including notification dealing with exports are required to be liberally interpreted, as they achieve national objective of higher exports in the Competitive world trade environment, as under aegis of rule bound trade of world trade organisation every country makes Export promotion Schemes that encourage not exporting taxation while exporting goods. Decision of C.C Vs. Dilip Kumar and Co. as reported in 2018 (361) ELT 577 (S.C) can help the department only after showing some legislative ambiguity. More so as export scheme notifications, unlike others are required to be liberally construed.
- b. The Ministry of Commerce and DGFT are the administrative authorities to monitor supervise the working "Advance Authorization Scheme" and only Drawback Scheme is required to administered under Customs Act by Ministry of Finance/Customs. Their word in respect of the schemes administered by them is final and cannot be challenged by the Department without getting EODC license cancelled by the Revenue department. Customs is not precluded from conducting its investigations,

as pointed by department by relying on ruling of Shashank Seafood Ltd. vs. U.O.I as reported in 1996 (88) ELT 626 (S.C.) but due respect to any administrative decision of Ministry of Commerce is required to be given and such later development like issuance of EODC can have bearing on investigations of the department and ought to be considered with positivity. Revenue cannot assign to itself the role of DGFT office.

- c. That the Ministry of Commerce being Administrative Ministry, its fiat runs and is respected as far as what is required to be done and how the administration of the Scheme is required to be undertaken. The certificates issued by them, as well as its clarification, therefore, have lot of weightage in understanding and in interpreting the nitty gritty of the Advance Authorization Scheme or any other scheme administered by them. And in this particular case, it has not only substantially revised norm which are roughly about 33 times which can be taken to be applied as a corrective measure, even for the past transactions. As in normal course advance technologies reduce wastage and not increase the same. The beneficial norms are therefore required to be applied retrospectively.
 - d. That there is no, illegality involved if 1% permissible SION norm is claimed, even if wastage is higher till the deficiency is made by procurement of indigenous material, as has been clarified by the DGFT and its allied offices. That clarification was made even if be at the behest of the respondent is of no consequence till it applies to all.
13. Department's appeals are rejected, Respondent's appeal is dismissed as infructuous.

(Pronounced in the open court on 03.10.2024)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)