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

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10642 of 2019

(Arising out of OIA-AHD-CUSTM-000-APP-192-194-18-19 dated 07/01/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

Dhaval Agri Exports Llp **.........Appellant**
Shri Hari Kutir Till Factory
Rajkot, Rajkot, Gujarat

VERSUS

C.C.-AHMEDABAD **.........Respondent**
Custom House, Near All India Radio Navrangpura,
Ahmedabad, Gujarat

WITH
Customs Appeal No.10644 of 2019
(Arising out of OIA-AHD-CUSTM-000-APP-192-194-18-19 dated 07/01/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

SHRI JAY S CHANDARANA **.........Respondent**
Ceo Of Ms Dhaval Agri Exports
Shri Hari Kutir, Rajkot Morbi, Highway Road,
Touch Nr. Market Yard Bedi, Rajkot, Gujarat

VERSUS

C.C.-AHMEDABAD **.........Respondent**
Custom House, Near All India Radio Navrangpura,
Ahmedabad, Gujarat

APPEARANCE:
Shri. P D Rachchh, Advocate for the Appellant
Shri A.R Kanani, Superintendent (AR) for the Respondent

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

Final Order No. 12391-12392 /2024

DATE OF HEARING: 24.09.2024
DATE OF DECISION:16.10.2024

SOMESH ARORA

M/s. Dhaval Agri Exports LLP, Rajkot (Hereinafter referred to as Appellant) is engaged in processing and exports of natural and hulled sesame seeds and other agro products like cumin seed, fenugreek seed, chick peas etc. by carrying out various processes including cleaning, grading, sorting and packing. It is holding IEC No. 2499002191. It is also Status Holder and exporting products covered under ITC HS Chapter 1 to 24 as per paragraph 3.13.4 of Chapter 3 of Foreign Trade Policy, 2009-2014. It had exported Sesame Seeds falling under tariff item 1207 40 90 and Cumin Seeds falling under tariff item 0909 31 29 etc having total FOB value of Rs.111,86,20,922.17 as Status Holder during the period from October, 2012 to March, 2013.

2. Appellant had applied for Duty Credit Scrip – Agri Infrastructure Incentive Scrip (Hereinafter referred as AIIS) before the Additional Director General of Foreign Trade (CLA), New Delhi after exporting the agricultural products vide application dated 27.05.2013. A query was raised by the license issuing authority vide letter dated 06.08.2013 and 11.12.2013. In reply to the said query appellant vide its letter dated 20.12.2013 submitted revised application. Consequently it was issued Duty Credit Script / Import License No. 0267366 dated 18.02.2014 under the category of Agri Infrastructure with Duty Credit Rs.1,77,25,096/- for import of goods referred under Para 3.13.4 of FTP, 2009-14 read with Public Notice No.93 dated 27.12.2007 and Notification No. 66 Dated 27.12.2007.

2.1 Appellant had on the basis of license imported goods viz. Cleaning/ Grading(size), Grader (Density), Sortex Automatic Colour Sorting Machine/ Processing Machine (Grain Sorting Machine), Dosing Scale (weight feeding) etc. under four different bills of entry as per details mentioned in table inserted under paragraph 3.6 of the show cause notice dated 13.01.2017 by debiting duty of Rs.57,15,706/- from the said Scrip for the purpose of processing/ sorting/ packaging etc of different kinds of seeds.

3. The officer of the Directorate of Revenue Intelligence (Hereinafter referred to as DRI) recorded statements of Shri Jay Chandarana, Chief Executive Officer of appellant (Hereinafter referred as the CEO) and the officers visited the premises of appellant and seized imported goods under the said bills of entry. Based on the investigation the Additional Director, DRI, Ahmedabad issued a Show Cause Notice F. No.DRI/AZU/CI/ENQ-35(INT-14)/2015 dated 13.01.2017 asking appellant to show cause before the Additional/ Joint Commissioner of Customs, Ahmedabad as to why:

(i) The seized goods with assessable value of Rs.2,93,89,738/- imported by way of mis-utilization of AIIS No. 0267366 dated 18.02.2014 vide three Bills of Entry through Air Cargo, Customs, Ahmedabad (as detailed in Table-I in the notice) should not be confiscated under Section 110(o) of the Customs Act, 1962;

(ii) The duty foregone of Rs.35,76,783/- on seized goods of assessable value of Rs.2,93,89,738/- imported by way of mis-utilization of AIIS No. 0267366 dated 18.02.2014 vide three Bills of Entry through Air Cargo, Customs, Ahmedabad (as detailed in Table-I in the notice) should not be demanded and recovered from it under Notification No. 94/2009-Cus dated 11.09.2009 read with Section 28(4) of the Customs Act, 1962 along with interest under Section 28AA of the Customs Act, 1962;

(iii) Penalty should not be imposed on it under Section 114A/112(a) of the Customs Act, 1962 for its acts of commission and omission as discussed in the notice.

(iv) Penalty should not be imposed on it under Section 114AA of the Customs Act, 1962 for acts of commission and omission as discussed in the notice.

Similarly, appellant was also asked under the said notice to show cause before Additional/ Joint Commissioner of Customs, Mundra as to why:

(i) The seized goods with assessable value of Rs.1,44,74,311/- imported by way of mis-utilization of AIIS No. 0267366 dated 18.02.2014 vide three Bills of Entry through Customs, Mundra Port and SEZ (as detailed in Table-I in the notice) should not be confiscated under Section 110(o) of the Customs Act, 1962;

(ii) The duty foregone of Rs. 21,38,923/- on seized goods of assessable value of Rs. 1,44,74,311/- imported by way of mis-utilization of AIIS No. 0267366 dated 18.02.2014 vide three Bills of Entry through Mundra Pot and SEZ (as detailed in Table-I in the notice) should not be demanded and recovered from it under Notification No. 94/2009-Cus dated 11.09.2009 read with Section 28(4) of the Customs Act, 1962 along with interest under Section 28AA of the Customs Act, 1962.

(iii) Penalty should not be imposed on it under Section 114A/112(a) of the Customs Act, 1962 for its acts of commission and omission as discussed in the notice.

(iv) Penalty should not be imposed on it under Section 114AA of the Customs Act, 1962 for its acts of commission and omission as discussed in the notice.

4. The above propositions were made mainly on the following grounds that:

All the equipments imported by appellant by using AIIS scrip are used for the purpose of either processing, packing, weighing, sorting etc. of agricultural products. Plain reading of para 3.13.4(c) of the FTP (209-14) shows that the capital goods/ equipment as mentioned at point (i) to (iv) are permitted to be imported under AIIS scrip. That "pack house" and concession mentioned at (ii) in the said para is not for capital goods/equipment. Hence, the word pack house has to be read with what follows after the semi colon i.e. 'for items notified in Appendix 37F'. From the above, it appeared that pack houses (which have the facilities mentioned at (ii) of the said para are allowed to import capital goods/ equipment as detailed in Appendix 37F.

4.1 As per para 3.13.4(C)(ii) of FTP, 2009-14, Pack House facilities for handling, grading, sorting and packing etc. are permitted to import capital goods/equipments that are to be utilized for storage, packing etc. and notified in Appendix 37F which is a "List of Equipment for Pack Houses". It appeared to the department from the heading of Appendix 37F itself that the said equipments listed therein only can be imported by Pack House. In the instant case, appellant is stated to have some of the facilities mentioned in the said para, it did not process horticultural produce like fruits and vegetables. Hence, it appeared to the department that appellant can neither be termed as pack house nor the capital goods imported by it were notified to import in Appendix 37F read with Para 3.13.4(c)(ii) of FTP, 2009-14. Therefore, it appeared to the department that appellant could not avail the benefit of using the AIIS for importing items listed out in para 3.13.4(c) of the FTP, 2009-14.

5. Appellant made detailed submissions before the Additional Commissioner, Custom, Ahmedabad, inter alia, submitting that it had rightly imported goods and goods imported by it are covered by the FTP. There was no suppression of facts etc so demand is time barred and no duty, interest is payable and no penalty is imposable upon them etc. Even it had represented its case in person also. However, the Additional Commissioner confirmed the demand with interest and also imposed penalty under Section 112(a) and Section 114AA of the Customs Act, 1962, also held that goods are liable for confiscation. Appellants preferred appeals before the Commissioner (Appeals), Customs, Ahmedabad and even department also preferred an appeal against

the said order for imposing fine in lieu of seized goods. The learned Commissioner (Appeals) rejected appellants appeal and allowed department's appeal by way of remand. Aggrieved the appellant has filed the present appeal.

Grounds for the Appellant

6. Appellant submits that the impugned order of Commissioner (Appeals) is not sustainable in the test of law as the notice itself in the case was issued on the basis of incorrect interpretation of the relevant provisions of FTP 2009-14 read with Notification No. 94/2009-Cus dated 11.09.2009 by DRI. The investigation had failed to appreciate that the scrip under reference was issued by the appropriate licensing authority in terms of provisions relating to export incentives being extended to exporters under Para 3.8 of the FTP, 2007-08 titled as "VISHESH KRISHI AND GRAM UDYOG YOJANA (VKGUY) (SPECIAL AGRICULTURE AND VILLAGE INDUSTRY SCHEME)." The said scheme in general is applicable to exporters of all products including agro products falling under Chapter 1 to 24 of ITC. Appellant submits that that the goods exported by it were covered under Chapter 12 (sesame seeds) and Chapter 9 (cumin seeds) of ITC and Section II – Vegetable Products (Chapter 6 to Chapter 14) of the First Schedule to the Customs Tariff Act, 1975. It means that Customs Tariff considered the goods of Chapter 6 to Chapter 14 as Vegetable Products only. It further submits that one of the objectives of the said scheme is to promote export of "(i) Agriculture Produce and their value added products" as clarified at para 3.8.1 of FTP 2007-08 as amended from time to time. Even FTP for the period 2009-14 as amended from time to time also provides the same. Therefore, there cannot be intention of legislature to extend export incentive only to the exporters of vegetables and fruits, as is presumed by department on the basis of erroneous interpretation of the word 'pack house'. Besides, said Agri. Infrastructure Incentive Scrip (AIIS scrip for brevity) was issued on the basis of agro products exported by appellant in terms of para 3.13.4 after

due verification of export documents. Therefore, it is obvious that capital goods/equipments permitted to be imported must be in relation to processing of said agro products, especially when the Policy does not specify that import of such goods shall be permitted only in relation to 'pack house' engaged in processing of fruits/vegetables.

6.1 Similarly, Notification No. 94/2009-Cus dated 11.09.2009 exempts goods specified in paragraph 3.13.4 of the Foreign Trade Policy, when imported into India against AIIS scrip issued under "VISHESH KRISHI AND GRAM UDYOG YOJANA (VKGUY) (SPECIAL AGRICULTURE AND VILLAGE INDUSTRY SCHEME)" and therefore, it covers all the goods specified under the said paragraph and not only goods listed in Appendix 37F. Besides, perusal of the first condition of the said notification (reproduced below) issued by the Central Government specifically reveals that an exporter who has exported goods under para 3.13.4 of FTP 2009-14 is only eligible for AIIS licence; and that benefit of the notification can only be extended when the said scrip issued in terms of para 3.13.4 by the licensing authority is produced before proper officer of the customs at the time of clearance of imported capital goods/ equipments. The said condition is also reproduced by learned Additional Commissioner at para 18.5 in the impugned order.

> *'(i) that the said scrip has been issued to an exporter of products specified in paragraph 3.13.4 of the Foreign Trade Policy by the Licensing Authority or Regional Authority and it is produced before the proper officer of customs at the time of clearance for debit of the duties leviable on the goods;'*

It may be appreciated that the above clarifications read with the condition (i), clearly leads to confirm that the impugned notice was issued without considering object of the scheme and without going through relevant provisions of the FTP and Notification No. 94/2009-Cus.

6.2 In view of the above appellant submits that the proper officer of customs had rightly permitted clearance of the goods after examination of goods and endorsing/debit entries on the valid AIIS licence in terms of the above

Notification No.94/2009-Cus at the material time. Therefore, the show cause notice itself was totally baseless and deserved to be dropped at threshold.

6.3 Appellant also submits that the investigation and the lower authorities have erred in trying to restrict the meaning of paragraph 3.13.4(c) of the FTP in following two different and contradictory course by interpreting the same which suited them to raise and confirm the demand of duty for the reasons best known to them.

(i) First they have tried by inferring that "Pack House" mentioned at para 3.13.4 (c)(ii) is not a capital goods / equipment but "Pack House" means only items notified in Appendix 37F. They not only completely ignored the meaning of Pack House defined in inclusive portion of clause (ii) that Pack House (including facilities for handling, grading, sorting and packaging etc.) but also tried to omit the same from the said clause while interpreting the said paragraph. In the same way, they have not only ignored the wordings of the clause (c) of para 3.13.4 "The following capital goods / equipments shall be permitted to import:" above sub-clause (ii) in the said paragraph but also tried to omit the same while reading/interpreting the said paragraph.

(ii) Secondly, though the said paragraph of the policy gives the inclusive meaning of "Pack House" which included grading, sorting and packaging exclusively for products covered under ITC HS 1 to 24 – agriculture exports the investigation has also erroneously tried to restrict the same only for fruits and vegetables and both the lower authorities have endorsed the same in their orders without appreciating the above submissions. As submitted in para supra "Pack House" includes grading, sorting and packaging including for products covered under ITC HS 6 to 14 – Vegetable Products which the appellant had exported.

6.4 Appellant further invites attention towards Notification No. 66(RE-2007)/2004-2009 dated 27.12.2007 issued by the DGFT so as to amend the

FTP, 2004-2009 by way of replacing the paragraph 3.8.6 which reads as under:

> *"For exports during 2007-08, …………. exporting products covered under ITC HS Chapters 1 to 24, shall be incentivized with duty credit script equal to 10% of FOB value of agricultural exports ……. for grant of the benefit to all status holders.*
>
> *The following capital goods / equipments shall be permitted for import:*
>
> *"(i) …….*
> *(ii) Pack Houses (including facilities for handling, grading, sorting and packaging etc); and*
> *(iii) ………*
>
> *Imported capital goods/equipment shall be utilized for storage, packing etc. (as in (ii) above) and transportation of agricultural products (including agro-processed perishable products)."*

6.5 Similarly, as per FTP 2004-2009 and 2009-2014 in each year from 2007-08 to 2011-12 under Paragraph 3.8.6 / 3.13.4 following capital goods/equipments were permitted to import viz.

> (ii) Pack House (Including facilities for handling, grading, sorting and packing etc.);
>
> (iii) …….;
>
> (iv) Other capital Goods/equipments as may be notified in Appendix 37F, can be permitted for import.
>
> Imported capital goods /equipment shall be utilized for storage, packing etc. (as in (ii) above) and transportation of agricultural products (including agro-processed perishable products).

However, there were no capital goods/equipments notified under Appendix 37F during the above period.

- The CBEC vide Circular No. 26/2009-Cus., dated 30-9-2009 has also clarified that

> *"(2) Agri-Infrastructure Incentive Scrip (AIIS)*
>
> *Para 3.8.6 of FTP (04-09) permitted issue of scrips against exports of agricultural exports for import of specified capital goods. This was part of the Vishesh Krishi and Gram Udyog Yojana (VKGUY) scheme. A new name has been given to such scrips in the Policy. In terms of para 3.13.4*

of the Policy such scrips will now be known as Agri-Infrastructure Incentive Scrip (AIIS). The scrips issued under the scheme would be allowed for import of specified agri-equipments with actual user condition, as was the case earlier. One important change is that now, transferability of the scrips amongst status holders has been permitted for import of cold chain equipment only without breaking the actual user condition. Notification No. 94/2009-Cus., dated 11-9-2009 has been issued to operationalize the scheme and may be perused for details."

6.6 The said para 3.13.4 of FTP, was further amended in the FTP, 2012-13 which reads as under:

Paragraph 3.13.4 of FTP, 2012-13 (c)

The following capital goods/equipments shall be permitted for import viz. (ii) Pack House (Including facilities for handling, grading, sorting and packing etc.); <u>for items notified in Appendix 37F.</u> (iv) Other capital Goods/equipments as may be notified in Appendix 37F.

(d) Imported capital goods /equipment shall be utilized for storage, packing etc. (as in (ii) above) and transportation of agricultural products (including agro-processed perishable products).

List of Equipment for Pack Houses were first time notified under Appendix 37F.

6.7 Even CBEC also vide Circular No. 20/2012-Cus dated 26.07.2012 in paragraph 3(b) had clarified as under:

"3. There are certain areas of change in the FTP which do not require amendments in Customs notifications. Salient amongst these are –

(b) In respect of the Agri Infrastructure Incentive Scrip (AIIS), the para 3.13.4(c) of FTP specifies the capital goods/equipment for cold storages, <u>pack houses</u> etc, which are permitted for import. In terms of the existing notification No. <u>94/2009</u>-Customs dated 11.9.2009, this scrip will now also be eligible to be used for import of fourteen specified equipment (for setting up of Pack Houses) that are notified in Appendix 37F of the HBP, Vol. I."

6.8 From the above it can be inferred that initially as per the FTP 2004-2009 and 2009-2014 in each year from 2007-08 to 2011-12 under Paragraph 3.8.6 / 3.13.4 Pack House (Including facilities for handling, grading, sorting and packing etc.) and other capital goods/equipments notified in Appendix-37F were permitted to be imported under the scheme against export of agriculture products. However, no goods/equipments were notified under Appendix 37 F during the above period. The CBEC vide Circular No. 26/2009-Cus., dated 30-9-2009 had also clarified that such scrip was part of the VKGUY scheme; that a new name was given to such scrips in the Policy and that in terms of para

3.13.4 of the Policy such scrips will now be known as Agri-Infrastructure Incentive Scrip (AIIS). The scrips issued under the scheme would be allowed for import of specified agri-equipments with actual user condition, as was the case earlier. It means that there was no change in the Policy regarding the equipments/ capital goods that were permitted to be imported from the beginning.

6.9 Besides, the CBEC vide Circular No. 20/2012-Cus dated 26.07.2012 in paragraph 3(b) had clarified para 3.13.4(c) of FTP specifies the capital goods/equipment for cold storages, pack houses etc**.**; that in terms of the existing notification No. 94/2009-Customs dated 11.09.2009, this scrip will now also be eligible to be used for import of fourteen specified equipment (for setting up of Pack Houses) that are notified in Appendix 37F of the HBP, Vol. I. Thus, capital goods/ equipments for cold storages, pack houses etc. were first time specified in the Policy in July, 2012. The CBEC had also clarified in the said circular that there was no need to amend the notification No. 94/2009-Customs. It means that there was no change in respect of the goods which were allowed since beginning.

6.10 Appellant submits that harmonious reading of the above provisions, amendments and the Circulars clearly leads to confirm that the entire scheme nowhere defined that the goods meant for vegetable (though sesame seeds are under Section of Vegetables in the ITC as well as Customs Tariff Act) product industry or that items listed in Appendix 37 F can only be permitted to be imported against AIIS. This apart, when the meaning of "Pack House" is not defined in the EXIM Policy or the HBP, reasonable meaning coming out of the above provisions or known in trade parlance is required to be considered for interpretation. Besides, the dictionary meanings relied upon by department (discussed in para infra) do not specifically confirm that pack house is meant only for vegetable produces.

6.11 Appellant submits that it appears that actually after change in FTP in 2012-13 by adding the wordings "for items notified in Appendix 37F" that too by putting semi-colon in clause (ii) after "Pack Houses (including facilities for handling, grading, sorting and packing etc.), had created some confusion about the goods imported for "Pack Houses" are limited to goods notified under Appendix – 37. However, according to appellant as well as clarification issued by CBEC is addition of "equipments" for pack houses which can also be imported under the paragraph 3.13.4 (C)(ii) with any capital goods / equipment for handling, grading, sorting and packaging which were imported till the date of amendment.

6.12 Appellant, in view of the above, submits that "Pack Houses" means units engaged in packing after carrying out certain processes which do not amount to manufacture and any capital goods / equipments for handling, grading, sorting and packing etc. and the same can be imported under this script viz. Agri. Infrastructure Incentive Scrip and after amendment in the year 2012-13 in addition to those goods, equipments specified in Appendix 37F can also be imported under the said scrip. There is no necessity to import all the goods mentioned in para 3.13.4(c)(ii) and also goods listed in Appendix 37F as there is no such provision but any one or more capital goods for the said processes or goods listed in Appendix 37F can be imported under this scrip.

6.13 Appellant submits that it is engaged in process and packing of sesame seeds after carrying out processes of cleaning, grading, sorting and packing and the clause (c) of Paragraph 3.13.4 of FTP, 2009-14 covers capital goods/ equipments having facility of grading/sorting, it had imported the said goods under claim of benefit of Notification No. 94/2009-Cus dated 11.09.2009 as amended under said four bills of entry referred in the impugned notice. The proper officer of Customs at MP& SEZ, Mundra, after examination of goods, had allowed clearance of the said goods for home consumption without payment of customs duty by debiting the said License/Scrip as all the conditions of said notification were fulfilled by it.

6.14 Appellant submits that the Additional Commissioner as well as the Commissioner (Appeals) have also failed to consider that the goods imported by it and allowed to clear without payment of Customs Duty by debiting the AIIS scrip by the proper officer is not cancelled by the DGFT and still valid documents/scrip. The department, therefore, cannot sit over the decision of DGFT without making any reference to the DGFT in policy matters and also cancellation or revoking of such scrip. It is settled position of law by way number of decisions that no duty can be demanded nor any penalty can be imposed if goods were imported and allowed to be cleared without payment of duty based on valid scrip. It refers and relies upon amongst other following decision:

- ADITYA BIRLA NUVO LTD. Versus COMMISSIONER OF CUS., BANGALORE - 2010 (249) E.L.T. 273 (Tri. - Bang.)

  Advance Licence - Exemption notification - Notification No. 30/97-Cus., whether empowers Customs to go beyond licence - Customs authorities bound by licences issued by licensing authority - Precedent decisions prohibiting Customs authorities to contend contrary to stipulations in licence and licensing authority to take action in case of misrepresentation - Duty of Customs authorities to refer to DGFT and to abide by orders of DGFT - Reference to DGFT and adjudication by DGFT to precede show cause notice by Customs - Proceedings premature when SCN issued by Customs before adjudication by DGFT. - It would be in the fitness of the things if the Board would issue suitable clarificatory instructions regarding the thin line of jurisdiction of licensing authority and the customs authority in the matters concerning clearances under duty exemption/remission credit schemes. [paras 8.4, 8.7, 9.1]

Hon'ble Tribunal while passing the said order had relied upon following decisions:

> ***"8.4*** *We now take up question No. (e) which we have framed above.*
>
> *(e) Whether the exemption Notification empowers the customs to go beyond the licence?*
>
> *We find that it is well settled law that customs authorities are bound by the licenses issued by the licensing authority. The Hon'ble Supreme Court in the case of Titan Medical Systems Pvt. Ltd. v. CCE - 2003 (151) E.L.T. 254 at Paragraph 13 held as under:*
>
> *"13...........To be noted that licensing authority having taken no steps to cancel the license. The licensing authority have not claimed that there*

was any misrepresentation. Once an advance license was issued and not questioned by the licensing authority, the Customs Authorities cannot refuse exemption on an allegation that there was misrepresentation. If there was any misrepresentation, it was for the licensing authority to take steps on that behalf.

14. We are therefore' unable to uphold the impugned order or the order of the collector. Accordingly, the same are set aside and the show cause notice shall stand dismissed."

We further find that in Autolite (India) Ltd.v. UOI - 2003 (157) E.L.T. 13 (Bom.), the Hon'ble Bombay High Court had held as under :

"7............Once the licensing authority has accepted that the steel is a material required in the manufacture of export product, it is not open to the customs authorities to go behind the license and deny duty free clearance of the goods. The exemption Notification No. 116/1988 dated 30-3-1998 specifically states that the materials that are required to be imported for the purpose of manufacture of resultant products shall include such items as are imported into India against advance license for subsequent exportation. In the instant case, license specifically states that the petitioner is entitled to import the steel as a material required for the manufacture of resultant product. The Apex Court in the case of Titan Medical Systems Pvt. Ltd. v. Collector of Customs as reported in 2003 (151) E.L.T. 254 (S.C.) has held that once advance license is issued not questioned by the licensing authority, the customs authorities cannot refuse exemption on an allegations that there was any misrepresentation. In the present case also, the licensing authorities have not found fault with the statement of the petitioner that the steel is a material required in the manufacture of the resultant product and have granted advance license to the petitioner. Assuming that the licensing authorities have wrongly accepted the statements of the petitioner, so long as the license is valid and subsisting the import of the materials set out in the advance license are liable to be cleared duty free under Notification of 116/1988 and the customs authorities cannot deny duty free clearance of the materials set out in the license. It is not open to the customs authorities to sit in appeal and hold that the licensing authorities have erroneously endorsed advance license to permit import of the steel as a material required in the manufacture of resultant product. In this view of the matter, we are of the opinion that the impugned orders passed by the Customs Authorities below cannot be sustained".

Further in the matter of Titan Industries Ltd. v. Addl. Commissioner of Customs - 2003 (158) E.L.T. 437 (Mad.), the Hon'ble Madras High Court held as under :

"8 From the aforesaid decisions, it becomes clear that once export obligation has been met, it is not for the customs authority to insist for a nexus in respect of matters coming up under this Special Scheme. If any import is contravention of the license, it is for the licensing authorities to take action not the customs authorities. It is stated by the first respondent that the customs authorities have already made correspondence in a matter with the licensing authorities. Therefore, it is for the licensing authorities to take action, if it is so required under the law. But, the Customs Authorities cannot refuse to release the bank guarantee merely because the matter is under correspondence with the licensing authorities."

In the case of UOI v. Tamil Nadu Dadha Pharmaceuticals Ltd. - 2008 (226) E.L.T. 490 (Mad.), it was held by the Hon'ble High Court that :

"18............Admittedly, in this case, the license has been granted by the licensing authority who is very well aware of the licensing scheme. If the licensing authority was of the view that the license has been wrongly issued, he would have immediately taken remedial measures either to

> *cancel the license or incorporate CIF value for each of the items allowed to the imported or granted independent licenses for independent inputs with a necessary details as argued. Having granted a compendious license for several items of imports without specifying the CIF value for each one of the items, allowed to be imported and resultant product was also allowed to be exported, now it is not available to the appellant to contend otherwise, particularly, when all the conditions incorporated in the licenses and notifications have been complied with by the respondent".*
>
> *In the matter of Marmo Classic v. CC (E.P.), Mumbai - 2002 (143) E.L.T. 153 (Tri.-Mumbai), the coordinate Bench of this Tribunal its impugned order has held that customs authorities have no jurisdiction to go beyond the license and sit in judgment over the licensing authority. The appeal filed by the revenue against the same was dismissed by the Hon'ble Supreme Court as reported in 2003 (152) E.L.T. A85 (S.C.). The ratio laid down by these precedents prohibits the customs authorities to contend contrary to the stipulations in the licenses and if any misrepresentation in obtaining the license is alleged, it is for the licensing authority to take steps in that behalf."*

Neither the Additional Commissioner nor the Commissioner (Appeals) has given any findings on the above submissions.

- In the case of FNS Agro Foods Ltd. Vs. Commissioner of Customs (Preventive), Delhi – 2016 (337) ELT 31 (Del.) wherein it is held as under**:**

> *"33. As observed by the Supreme Court in Titan Medical System Pvt. Ltd. Vs. Collector of Customs, New Delhi (Supra) if the license issuing authority, which in this case DGFT, has not questioned the veracity of the transactions under taken under the license, the Customs authorities cannot refuse exemption on an allegation that there was any misrepresentation. It was held that if there was any mis-representation it was the licensing authority which had to take steps to cancel the license."*

In view of the above submissions, appellant submits that the impugned order confirming allegations made by the department is liable to be set aside on this count too.

6.15 Appellant further submits that even if the department's contention that scrip holder can only import capital goods/equipments required for pack house of vegetable products is considered to be true for sake of argument, even in that case meaning of 'vegetable products' is required to be considered in line with the products being classified under the Customs Tariff Act, 1975. It submits that the products specified under Paragraph 3.13.4 are the goods covered under Chapter 1 to 24 of the ITC. It is on record and undisputed that products exported by appellant are covered under Chapter 6 to 14 titled as 'Vegetable Products' of SECTION-II of the Customs Tariff Act, 1975. Therefore, even if department's contention is considered to be true, even in that case, the goods imported by appellant were for pack house of vegetables only.

7. In short, it was submitted that the learned Commissioner (Appeals) has confirmed the allegations made in the original order by ignoring the eligibility criteria of the goods that can be imported under AIIS licence. Department cannot judged the eligibility by merely relying upon dictionary meaning, particularly when the capital goods/ equipments imported by appellant are duly covered under definition of capital goods defined under FTP 2009-14 and Notification No. 66 (RE-2007)/2004-09 dated 27.12.2007. If allegations made in the notice and affirmed by the lower authorities were considered to be true, than in that case DGFT would not have issued disputed AIIS licence in favour of appellant. It is settled law that in disputes arising out of EXIM policy provisions, DGFT is only the proper authority to take final decision and in such cases, department cannot unduly rely on dictionary meaning of the words used in the Policy.

8. Appellant further submits that language of the Policy is clear and does not leave any doubt or room for making interpretation other than made by it. However, if the department had any doubt about interpretation of policy, DRI could have, instead of seizing the goods and issue of show cause notice, referred the matter to the DGFT (licensing authority) for clarification in the matter and could have directed appellant to file an undertaking to the effect that the imported goods shall not be disposed of till the reply/clarification receive from DGFT specially when in terms of paragraph 2.3 of the FTP, the decision of DGFT shall be final and binding on all matters relating to interpretation of Policy, or provision in v1 HBP v2 or classification of any item for import /export policy in the ITC (HS). However, since no such reference

was made by DRI, it had requested the learned Additional Commissioner that adjudication proceedings of the notice may please be kept in abeyance till suitable clarification in reply to representation made by appellant was received from the DGFT or fresh reference may be made by the department under intimation to it. It had also requested to arrange to furnish copy of such reference and reply if any receive by the department in the matter before adjudication of the impugned show cause notice, so as to enable it to submit further submission in the matter.

8.1 In spite of the above, the learned Additional Commissioner neither waited for clarification on the issue from DGFT, nor did he make such reference for clarification from the licensing authority. As per the FTP as and when any dispute arise out of EXIM Policy provisions, DGFT (licensing authority) is the appropriate authority of explain / interpret the relevant provisions. It is more so in the impugned case because none of the condition of customs notification No. 94/2009-Cus dated 11.09.2009 stands violated. Appellant submits that condition (I) of the said notification (reproduced supra) specifically directs that importer is required to produce before the proper officer of customs scrip issued by the DGFT authority in terms of paragraph 3.13.4 of the FTP at the time of clearance for debit of the duties leviable on the goods. It is undisputed fact that the scrip under reference and produced before the customs by appellant was issued by the DGFT under paragraph 3.13.4 of the FTP. Therefore, the department cannot go beyond the scope of customs notification No. 94/2009-Cus by erroneously interpreting meaning of the goods imported therein, unless it was proved that the scrip was not issued in terms of paragraph 3.13.4 of the FTP or that appellant had obtained the scrip fraudulently.

8.2 Appellant submits that investigation and both the lower authorities have erred in alleging/finding that goods imported by it does not form full pack house (facility); that it has constructed the same by importing only around

50% to 60% of equipments by using AIIS licence and rest of the equipments were procured either indigenously or under EPCG scheme.

8.3 Appellant submits that on one hand department alleges that the goods imported by it are not capital goods/ equipments that can be imported under AIIS in terms of Para 3.13.4 of FTP 2009-14 and on the other hand it is alleged that appellant had not imported all equipments but imported only around 50% to 60% of equipments for construction of pack house. In any case, it is submitted that Para 3.13.4 or the relevant customs notification nowhere insists that 100% capital goods/ equipments of a pack house must be imported by exporter holding AIIS to be eligible for the exemption. This apart, the above allegation also confirms that the department also admits that it had imported capital goods/ equipments of a pack house.

9. Appellant without admitting anything further submits that allegation and findings of wilful mis-statement and suppression of the facts are also unsustainable as wilful mis-statement and suppression cannot go together. One can either make wilful mis-statement or suppress the facts. The allegations which are based on totally mis-interpretation by the department cannot be considered as wilful mis-statement and/or suppression of facts. Appellant was very much clear about the provisions of foreign trade policy and about "Pack House" which is clearly forth coming from the statements of its CEO discussed in para supra. Therefore, declaration made in the bills of entry with claim of said Notification and clearance of goods without payment of customs duty by debiting the said scrip cannot be considered as willful mis-statement or suppression of facts by any means.

9.1 Appellant further submits that customs authorities at the port of import were very well aware of the fact the goods covered under various bills of entry were imported in terms of para 3.13.4 of FTP 2009-14 and that importer was required to fulfill the conditions mentioned in the Policy as well as Notification No. 94/2009-Cus. This fact also gets confirmation from the order for examination. For ease of reference such order appearing on bills of entry no. B/E No. 5419064/ 07.05.2014 filed by its CHA at Mundra port is reproduced here below for perusal:

> *"Compulsory Compliance Requirements Examination Instructions (for notification no. 094/2009 1 VERIFY THAT THE GOODS ARE CAPITAL GOODS AS SPECIFIED IN PARA 3.13.4 OF THE FTP AND HAVE BEEN IMPORED AGAINST AN AGRI. INFRASTRUCTURE INCENTIVE SCRIP ISSUED TO AN EXPORTER OF PRODUCTS SPECIFIED IN THE SAID PARA, INCLUDING EXPORTS SPECIFIED IN PARA 2 OF THE NOTIFICATION. VERIFY THE SCRIP IS NON-TRANSFERABLE EXCEPT FOR IMPORT OF COLD CHAIN EQUIPMENT BY UNITS IN AREA RECOMMENDED BY THE MINISTRY OF FOOD AND PROCESSING INDUSTRIES OR AMONGST HOLDERS OR TRANSFERABLE BY STATUS HOLDER TO ITS SUPPORTING MANUFACTURE OR IN A FARM RECOMMENDED BY THE MISTRY OF FOOD INDUSTRIES"*
>
> (Emphasis provided)

Similar orders are also available on bills of entry no. 5880815 dated 21.06.2014 and 7975924 dated 13.01.2015 filed at ACC, Ahmedabad by its CHA.

9.2 The above orders appearing on the bills of entry filed at the port of import do not leave any doubt about the fact that the examining / assessing officer was aware of the fact that the goods were imported in terms of conditions specified in Notification No. 94/2009-Cus. Therefore, if the goods were imported by it in contravention of provisions of FTP 2009-14 or the customs notification, then in that case department would certainly have seized the goods at the time of import and initiated further proceedings. It however appears that learned Commissioner (Appeals) has deliberately overlooked the above facts while confirming unfounded findings in the original order against appellant.

9.3 In continuation of the above, it is further submitted that four bills of entry under which seized goods were imported by appellant have been referred as relied upon document. In this context, appellant submits that it did not have copies of the examination reports on said 4 bills of entry. It had, therefore, requested to the Additional Commissioner to obtain copies of the examination reports from the Mundra/Ahmedabd customs, and to provide the same to it for making further submissions. Besides, it was also requested that if no examination was conducted at the time of import by examining officer of customs, than in that case, appellant may please be informed of the reasons for not carrying out examination in spite of specific instructions on body of the bills of entry. It was also requested that appellant may also be allowed to cross examine the examining officers as well as assessing officers before taking any adverse decisions in the matter. Despite such specific request, the learned Additional Commissioner neither furnished copies of bills of entry containing examination reports nor did he permit cross examination of the officers. In fact, the said request did not find place either in the brief of appellant's submissions filed in reply to the notice discussed at para 15.1 to 15.14 or in the finding portion of the order. All requests were again reiterated by it in the appeal before Commissioner (Appeals). However, some has been ignored while upholding the original order.

9.4 Appellant in view of the above submits it had rightly assessed customs duty under Section 17 of the Customs Act, 1962 on the imported goods and there was no suppression of facts etc. Therefore, learned Additional Commissioner has grossly erred in holding that extended period was rightly invoked; that imported goods referred in the notice were liable to confiscation under Section 110(o); that duty was rightly demanded on the same; and that penalty under Section 112(a) or 114A and Section 114AA of the Customs Act, 1962 is imposable upon it. In the same way the learned Commissioner (Appeals) has erroneously affirmed views of the adjudicating authority without considering the facts and circumstances of the case discussed in para supra.

10. Appellant in view of the above submits that it had rightly claimed benefit of exemption from payment of customs duty on the strength of a valid AIIS licence against the import of disputed goods in terms of Notification No. 94/2009-Cus dated 11.09.2009. Therefore, duty demand under Section 28(4) confirmed under the impugned order is not sustainable. Consequently, when

duty demand itself is devoid of merits, question of recovery of interest under Section 28AA of the Customs Act, 1962, imposition of penalty under Section 112(a) and Section 114AA of the Customs Act, 1926 and fine in lieu of confiscation does not arise.

In view of the above, it is prayed that appellants appeal may be allowed with consequential relief.

Case for the Department :-

11. The A.R forcefully reiterating the findings stated as follows:-

The instant appeals have their origin in a case booked by D.R.I. on the basis of intelligence that the appellant had improperly utilized the benefit of Agriculture Infrastructure Incentive Duty Credit Scrips (AIIS) issued by D.G.F.T. in ordnance with Paragraph 3.13.4(c) of Chapter 3 of the Foreign Trade Policy (FTP) 2009-2014, the capital goods imported by the appellant were goods other than goods covered in Appendix 37 Fins laid down in Paragraph 3.13.4(c) of Chapter 3 of the Foreign Trade Policy (FTP) 2009. 2014 and that the misuse of AllS was by way of suppression of the facts that the appellant was not a 'pack house' processing fruits and vegetable but were processing Agriculture produce like natural and hulled Sesame Seeds, Cumin seeds, Fenugreek seeds, Chick Peas etc. The impugned order covers imports by the appellant at Air Cargo Complex, Ahmedabad as well as at Customs, Mundra Port and SEZ. In the impugned order, the goods have been ordered to be confiscated under Section 111(0) of the Customs Act, 1962; the demand for Customs duty foregone has been confirmed under Notification No. 94/2009-Cus dated 11.09.2009 read with Section 28(4) of the Customs Act, 1962; penalties have been imposed on the appellant under Section 112(a) and under Section 114AA of the Customs Act, 1962 and penalty has been imposed on the co-appellant and CEO of the appellant firm under Section 112(b) of the Customs Act, 1962

12. The appellant has challenged the impugned order on the grounds that the provisions of F.T.P. 2009-14, as amended, have been misinterpreted by wrongly relying on the dictionary definition of the words "Pack House" instead of seeking clarification from D.G.F.T. who had issued the AllS. The appellant has also challenged the imposition of penalty under Section 112(a) and under Section 114AA of the Customs Act on the ground that the goods are not liable to confiscation for the reason that the issue involved in the case relates to

interpretation of provisions of F.T.P. 2009-14. The appellant has also contended that there was no wilful mis-statement or suppression of facts on part of the appellant and therefore, the demand notice was time barred. The co-appellant has challenged the penalty imposed on him citing similar grounds.

On examining the details of the instant case, the undisputed fact emerging was that the appellant, having used the All Scrip for importing the impugned goods, was bound by the relevant provisions of D.G.F.T. including the relevant Appendix as well as the relevant provisions of Customs Act, 1962 and the onus was cast on the appellant to ensure that there was no contravention of any of the provisions and stipulations. In the instant case, the imported capital goods consist of Grading Machines and Sorting Machines. These capital goods finds mention in Paragraph 3.13.4(c)(ii) as follows:

> "Pack Houses (including facilities for handling, grading, sorting and packaging etc); for items notified in Appendix 37 F"

From the above it is clear that such equipment of Pack Houses that are notified in Appendix 37F are eligible for the benefit under Paragraph 3.13.4 of F.T.P. 2009-14 for Agriculture Infrastructure Incentive Duty Credit Scrip. The list of equipments in Annexure 37 F are as follows:

APPENDIX 37 F

List of Equipment for Pack Houses

1. Packing grading equipments for fruits and vegetables 2. Equipments for ripening of fruits including ethylene generator

3. Adiabatic humidifiers for cold rooms

4. Gas sensor and controlled system covering Co2, ethylene and oxygen levels

5. Ethylene scrubbers 6. Co2 scrubbers

7. Blast freezers for IQF plants

8. Doors for gastight rooms, applications like CA, Banana/fruit ripening

9. Nitrogen generators

10. Gas controlling systems for CA stores 11. Bulk bins for CA stores

12. Reach stackers for cold stores and warehouses

13. Belt driven conveyors for bulk handling of cargo

14. Gantry cranes, unloading, mechanized loaders for bulk and break bulk cargo

As brought out in paragraph 8.8. of the Show Cause Notice dated 13.01.2017 and paragraph 6.5 of the impugned order, the C.E.O. of the appellant firm, who is also the co-appellant in the present case had accepted that the equipments imported by the appellant using all Scrips are not covered in the list of capital goods/equipment, notified under Appendix 37F. Thus the imported goods not being items notified under Section 37F were not eligible for benefit of Argi. Infrastructure Incentive Scrips ('AllS') issued by D.G.F.T. under Paragraph 3.13.4 of Chapter 3 of the Foreign Trade Policy (FTP) 2009-2014 under Vishesh Krishi and Gram Udyog Yojana (VKGUY) (Special Agriculture And Village Industry Scheme). Therefore, it is clear that the appellant had wrongly used the AIIS facility and imported the impugned goods with the intent to evade payment of duty in cash. In view of these admitted facts on record, the contentions put forth by the appellant with regards to the merits of the case as well as on limitation and natural justice are not sustainable in law. Accordingly, the confiscation of goods, the confirmation of duty demands and the imposition of penalties on the appellant are legally valid and sustainable. As regards the co-appellant, it has been brought out of the impugned order that he was aware that the imported goods were not covered under Appendix 37F of F.T.P 2009-14. Therefore, having concerned himself with and dealt with goods that he knew was liable for confiscation, the co-appellant had rendered himself liable to penalty under Section 112(b) of the Customs Act, 1962. In view of the above the confiscation of goods, the confirmation of demands and the imposition of penalties on the appellant as well as the imposition of penalty on the co-appellant was correctly upheld. Therefore, the appeals filed by the appellant and the co-appellant are liable to be rejected.

12. We have gone through various submissions made by both sides. We find that the issue to be settled is whether the machine obtained which were meant for Cleaning/ Grading (size), Grader (Density), Sortex Automatic Colour Sorting Machine/ Processing Machine (Grain Sorting Machine), Dosing Scale (weight feeding) under Agricultural Infrastructure Incentive Script (AIIS) were eligible to be imported being machinery meant for undefined term of 'Pack House' or covered under Appendix 37F or not? We also find after the initiation of investigation, a reference was also made in the Year-2017 seeking clarification by the appellant from DGFT Office, as indicated below:

> "We are manufacturer and Exporter of Sesamum seeds, we have imported the Capital Goods under AllS authorization No. 0267366 dated 18.02.2014 issued vide File No. 05/96/84/091/AM-14/Agri. Infra/EPS-II/CLA.
>
> Now there is question by DRI about import of items allowed only of Capital Goods mentioned there in and mentioned Export items therein Appendix 37F.

However, as per our belief, There are two separate sentences mentioned in (ii) of Para 3.13.4 (c)

"Pack Houses (including facilities for handling, grading, sorting and packaging etc): For Item notified in Appendix 37 F.

There are two separate line are as

"Pack Houses (including facilities for handling, grading, sorting and packaging etc);" and 2nd "For Item notified in Appendix 37 F" which was added later on dated: 05.06.2012 (updated in policy 2012-13 for FTP 2009-14)

as well as also items allowed to be import as mentioned in (iv) of 3.14.4(c) as words as below:

"Other Capital Goods/Equipments as may be notified in Appendix 37F.

Hence please to be clarify that it would be allowed to import All relevant Capital Goods (for Cleaning/Grading/Sorting/packing, etc.) for Sesamum Seeds, Grains, Oil seeds, etc."

This reference was made on 12 January, 2017 vide email at 17:56. However, the same till date for some reason is remaining un-replied. It was also pleaded by the appellant before the adjudicating authority to either keep the proceeding in abeyance or to make alternatively a fresh reference from their side. We find that DGFT authority which is the dispute resolving authority in such matters neither replied the same nor acknowledged the reference in the last seven years. The copy of the reference made has also been brought on record. We find that para 3.13.4 (c) of FTP as reproduced above in para 12 supra) by us, "Pack Houses is mentioned as including facilities for handling, grading, sorting and packaging etc". The same is followed by a Semicolon before "for items notified in Appendix 37F". Further the list of equipment for pack house has been notified in Appendix 37F as mentioned. Again, in point 3.13.4 (d) reproduced at point 6.6 "imported capital goods/ equipment shall be utilized for storage packing etc (as in (ii) above) and transportation of agricultural products (including agro-processed perishable products)" has been mentioned. We find that term pack house has not been defined but inclusive Clause is clearly there to extend scope of the entry as has been used. And that too with the expression "handling, grading, sorting and packaging, ending with the expression "etc." This is followed by semicolon which in legislative drafting normally means that an independent Clause has been followed. Further, we find that in para 3.13.4 reproduced at para 6.6 both expressions "shall be" and "may be" have been used and both have to be assigned different meanings. Either shall be can be mandatory or "may be" can be mandatory and vice-a-versa. We therefore, find that the way notification and Appendix 37F has been worded, offered sufficient scope to interpret and include various machines which are basically meant for agricultural produce. We also find that in the scope of para 3.8.6, it has been mentioned, inter alia, as follows:

"Imported capital goods/ equipment shall be utilized for storage packing etc (as in above) and transportation of agricultural products (<u>including agro-processed perishable products</u>)."

12.2 We thus, find that there was sufficient scope to include within the benefit of the scheme, the 'agro-processed perishable products'. Therefore, processing on agricultural product is allowed, till the time, the end product is perishable. We find in this instant that the end products are various kind of seeds which are perishable and whatever processing, these have been subjected on imported machines has been done to make the seeds edible and therefore de-husking is very much in terms and within the intended scope of the benefits as can be drawn from the expression "agro-processed perishable products". Considering all above, we are of the view that the benefit of machines imported will be permitted and the same is allowable till processing done on agricultural produce does not lead to long term preservation as generally happens in the food processing industry. We are of the view by looking at the contours of the scheme that machines which are used on agricultural produce of which the output is perishable agricultural products will be covered within the scope of this scheme and only food processing through use of preservation etc. or bringing in other manufactured food product will get excluded from the scope of the entries. We also find that there were sufficient scope for interpretation of the entries and therefore extended period in any case cannot apply. More so in the facts of the case, when the goods were duly examined by the Customs Authorities. We are constrained to observe that DGFT authorities should have at least clarified the matter, once a reference was made to them and should device system whereby such clarifications are issued in a time bound manner, as non-response could have implications, even further for revenue department.

12.3 In view of the foregoing discussion, we allow the appeals both on merits as well as limitation for both the appellants.

13. Appeals are allowed.

(Pronounced in the open court on 16.10.2024)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi