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

REGIONAL BENCH – COURT NO. 03

CUSTOM Appeal No. 11219 of 2018

[Arising out of OIO-MUN-CUSTM-000-COM-13-17-18 dated 31/01/2018passed by Commissioner of CUSTOMS-MUNDRA]

Sanstar Bio Polymers Ltd **.....Appellant**
Sanstar House, Opp. Suvidha Shopping Centre,
Near Under Bridge, Mahalaxmi Char Rasta,
Paldi, Ahmedabad
GUJARAT

VERSUS

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

WITH

CUSTOM Appeal No. 11220 of 2018

[Arising out of OIO-MUN-CUSTM-000-COM-13-17-18 dated 31/01/2018 passed by Commissioner of CUSTOMS-MUNDRA]

Sambhav Chowdhary **.....Appellant**
Director Of M/S Sanstar Bio Polymers Ltd.,
Sanstar House, Opp. Suvidha Shopping Centre,
Near Under Bridge, Mahalaxmi Char Rasta,
Paldi, Ahmedabad
Gujarat

VERSUS

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

APPEARANCE:
Shri Rahul Gajera, Advocate for the Appellant
Shri Tara Prakash, Assistant Commissioner (Authorized Representative) for the Respondent

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

FINAL ORDER NO.A / 11878-11879 /2022

DATE OF HEARING:16.11.2022
DATE OF DECISION:07.12.2022

RAMESH NAIR

The present appeals are directed against Order-In-Original No. MUN-CUSTOM-000-COM-13-17-18 dated 31.01.2018 passed by the Commissioner of Customs, Mundra confirming the recovery of customs duty foregone on the inputs allowed to be imported under 7 DFIA licences issued in terms of Notification No. 98/2009-Cus dated 11-9-2009 and 19/2015-Cus dated 01-04-2015 under section 28AAA of the Customs Act, 1962 ("Act" in short).

2. Briefly, the facts are that the appellant, M/s. Sanstar Bio-Polymers Limited, Ahmedabad ("SBPL" in short) is engaged in manufacturing of Starch, Modified Starch, Liquid Glucose, Malto Dextrine Mono Hydrate and High Maltose Corn Syrup and for manufacturing the said product their main raw materials were "Maize, Maize Starch, Tapioca Starch, Potato Starch, Modified Starches, HCI, Caustic Soda Lye, Soda Ash, Filtrate, Bentonite, Enzymes, Hypo Chloride and Sulphur etc. During the period February 2015 to July 2015, SBPL exported one of its product declaring as "Liquid Glucose Concentrate (Food Grade)" - (ITC HS Code 17023010) under the Duty Free Import Authorization (DFIA) claim wherein import item declared was "Maize (Corn) Starch" – (ITC HS Code 11081200). The export benefit was claimed under SION Entry E22 for the imports of input "Starch" under the DFIA Scheme and after verification of the appellant's claim/application; 7 DFIA Licences were granted by the DGFT, Regional Authority, Ahmedabad to the appellant. The said Licences were transferrable and have been transferred by the appellant to various parties and the same are valid and subsisting as DGFT has not cancelled the said Licences. It is the case of the department in the show cause notice dated 30-12-2016 that appellant have wrongly declared its input as 'Maize (Corn) Starch' for 'Liquid Glucose Concentrate' exported by them as it

was found during investigation that actual raw material used was 'Maize'; that process of manufacturing does not at any stage use 'Maize Starch'; at best it uses 'Starch Slurry' which is manufactured from 'Maize'. Therefore, correct SION Entry is E76 under which appellant was entitled to import 'Maize' and not "Starch" as claimed by the appellant.

3. Shri Rahul Gajera, learned Counsel appearing for the appellant submitted that appellant has rightly claimed DFIA benefits under SION Entry E22. It is not in dispute that liquid glucose concentrate is manufactured out of starch slurry ("starch" in slurry form); that except moisture or water content there is no difference at all between starch slurry and starch powder and this difference is also only that of a physical parameter but not of any chemical characteristics or constitutional properties of the product; that maize may be the original material used at the beginning of the manufacturing process but the immediate input for manufacturing of liquid glucose concentrate was that one which was used directly for manufacturing export product; that for export and also for exemption for goods manufactured in India a concept of immediate parentage is well recognized and accordingly the immediate parent material was relevant to decide which input was used for manufacture of the exported goods and that since the immediate parent material was starch slurry i.e. "starch" and 'not maize'; E22 was the correctly applicable SION. For the proposition that immediate input is to be considered relevant, he relied upon Circular No. 5/89 dated 10.01.1989 and the following case laws:

- Commissioner of Customs, Bombay V. Jayana Packaging Pvt Ltd – 2000 (122) ELT 150
- Collector of Customs, Bombay V. Vijay Flexible Containers Pvt Ltd – 1996 (87) ELT 744
- Dhruvco Printers Pvt Ltd – 1996 (85) ELT 62

3.1 He further pointed out that "Raw Material" is defined under chapter 9 (para 9.44) of FTP 2015-20 to mean that input may either be in a raw/natural/unrefined/unmanufactured or manufactured state and hence even when starch slurry is not the original input but an intermediate input in a manufactured state the same qualified to be the input under the policy. That all the 7 DFIA licences issued by the DGFT authorities are still valid and subsisting because none of them are cancelled or suspended; no proceedings for cancellation or suspension of any of these authorizations have been initiated by the DGFT which is a competent authority to dispute the classification under the provisions of FTP and in absence of any dispute regarding classification by the DGFT and investigation as to utilization of the said licenses, customs would have no jurisdiction to demand duty from the appellant under section 28AAA of the Act. In this behalf he relied upon the following case laws:

- Collector of customs, Bombay V. Sneha Sales Corporation – 2000 (121) ELT 577 (SC),
- Titan Medical Systems Pvt Ltd V. Collector of Customs, New Delhi – 2003 (151) ELT 254 (SC),
- Taparia Overseas Pvt Ltd V. UOI – 2003 (161) ELT 47 (Bom.),
- Commissioner of Customs V. Raj Narayan Jwalaprasad – 2014 (306) ELT 592 (Guj.)
- Axiom Cordages Ltd V. CC, Nhava Sheva – II - 2020 (9) TMI 478 – CESTAT – Mum
- CC, Nhava Sheva – II V. Axiom Cordages Ltd – 2022 (4) TMI 791 (Bom.)

3.2 He further, relying upon the case of Axiom Cordages Ltd supra, submitted, that in absence of any appeal having been preferred by the customs against the assessment of shipping bills which has attained finality;

the proceedings by way of confirmation of show cause notice by the commissioner is not legal and proper.

4. Shri Tara Prakash, Learned Assistant Commissioner (Authorized Representative) appearing for the Revenue submitted that subject item is correctly classifiable under SION E76 as basic input for manufacture of the appellant's export item was "Maize"; that this is corroborated by the statement dated 19.09.2016 of Mr. Sambhav Choudhry. He further relied upon the technical literature downloaded from the internet to show that it is a standard process of manufacturing liquid glucose to use maize corn for manufacture of liquid glucose and not starch powder as claimed by the appellant. He further submitted that in order to avail benefit of duty-free import of starch powder instead of maize, appellant changed the description of export item from liquid glucose to liquid glucose concentrate (food grade) on the ground that percentage of solids in their export item was between 82% to 85%.

5. We have carefully considered the submission made by both the sides and perused the records.

5.1 The main issue involved related to correctness or otherwise of classification of 'Maize (corn) Starch' declared by the appellant to customs for claiming export benefit under DFIA scheme. It can be seen from show cause notice and the impugned order that there is no dispute to the fact that the export item namely "liquid glucose concentrate (food grade)" was manufactured from using "starch slurry" which is essentially a "starch" albeit in slurry form. 'Starch' is a necessary input for manufacture of liquid glucose is evident even from the technical material relied upon by learned AR appearing for the Revenue and from the extract of book titled "Glucose Syrups", Technology and Applications of Peter Hull published by Wiley-Blackwell relied upon by the appellant. However, the case of the revenue is

that since 'Starch' is manufactured out of "Maize" which is the base input, correct SION for the export item-liquid glucose is 'Maize' specified under SION Entry E76 and not 'Starch' specified under SION Entry E22 and that appellant has mis-classified its product in order to claim undue benefit of DFIA Scheme. It is therefore necessary to peruse both the conflicting SION entries as reproduced in para 16 & 21 of show cause notice. On plain perusal of the competing entries, it is quite clear that export item Glucose in liquid form is a common export item specified under both the entries. It can be seen that E22 specifies glucose in both form, liquid (concentrate) form and powder form whereas E76 covers only liquid glucose. There is no dispute to the classification of export item in the present case. The dispute relates to import item-input. One of the specified import items under E22 is "Starch" whereas "Maize" is the specified import item under SION E76. Since undisputedly 'Starch slurry' is used as immediate input by the appellant in manufacturing of its export item-liquid glucose concentrate, it cannot be said that starch was not appellant's input for export item. Further 'Starch' is in turn manufactured from 'Maize' is also an undisputed fact and equally qualify to be the input for the aforesaid export item under E76. It can be seen that subsequent to the exports by the appellant, SION Entry E22 was deleted by DGFT upon recommendation of internal committee on the premise that E22 was being mis-used by the exporters. This goes on to show that earlier exporters were eligible to claim any of the inputs under the respective entries as export item-liquid glucose essentially remained the same under both the entries. The case of the department is that since 'starch' is more commercially viable input for imports, appellant has purposely classified its product under E22. The said ground is of no consequence. It is settled law that when a claim of an applicant under a beneficial scheme or exemption notification, qualifies under two conflicting entries, for having opted for one which is more beneficial to him

would not amount to mis-declaration. Reliance in this behalf is placed on the following judgements:

- Share Medical Care V. UOI – 2007 (209) ELT 321 (SC)
- CCE, Bhopal V. Minwool Rock Fibres Ltd – 2012 (278) ELT 581 (SC)

5.2 Further it can be seen that definition of raw material under the Foreign Trade Policy, 2015-2020, para 9.44 which includes inputs in a manufactured state as also the definition of 'material' under exemption notification no. 98/2009-cus and 19/2015-cus includes intermediate required for manufacture of resultant products. It is significant that DGFT who issued licenses has also after due verification granted the licence have accepted the said position. The only conclusion is 'Starch' a specified import item declared by the appellant as 'Maize (Corn) Starch' is correctly classifiable under SION E22 even when 'Maize' is the base input used in manufacture of liquid glucose and is a specified input under SION E76. It can be seen that maize may be the original material used at the beginning of the manufacturing process but the input for manufacturing of liquid glucose concentrate was that one which was used directly for manufacturing export product. For export and also for exemption for goods manufactured in India a concept of immediate parentage is well recognized and accordingly the immediate parent material was relevant to decide which input was used for manufacture of the exported goods. In the present case, the immediate parent material was starch slurry i.e. 'starch' and 'not maize' and therefore case of the department that SION E76 was the correct norm cannot be sustained. Since the immediate parent material for manufacturing the exported goods was starch falling under SION E22 , it is clear that the 'Starch' was the correctly applicable SION. Reliance in this behalf is placed on the following decisions:

- Commissioner of Customs, Bombay V. Jayana Packaging Pvt Ltd – 2000 (122) ELT 150,
- Collector of Customs, Bombay V. Vijay Flexible Containers Pvt Ltd – 1996 (87) ELT 744,
- Dhruvco Printers Pvt Ltd – 1996 (85) ELT 62,

Considering the ratio of the above decisions of Tribunal, denying the benefit under DFIA on the ground that 'Starch' is not the original input and that 'Maize' is the original input which alone is eligible for the benefit of DFIA is bereft of any legal basis.

5.3 As regards, jurisdiction of customs to demand duty from the appellant invoking section 28AAA of the Act, it is undisputed fact that all the 7 DFIA licences were granted by the DGFT are valid and subsisting and further no proceedings for cancellation or suspension of any of these authorizations have been initiated by the DGFT. It thus follows that DGFT which is the proper authority to determine classification of goods under DFIA claim has not disputed and has accepted the classification of import item under E22 of SION. Further, considering the above analysis, appellant has correctly classified its product under SION E22. In the circumstances, finding of the commissioner that appellant resorted to mis-declaration and suppressed facts cannot be sustained. Further, in absence of any investigation by customs as regards utilization of the said 7 DFIA licences; section 28AAA of the Act cannot be pressed into service. In the circumstances, customs would have no jurisdiction to invoke section 28AAA of the Act or to deny exemption from customs duties or any other benefit flowing from such subsisting license. Reliance in this behalf is placed on the following judgments:

- Titan Medical Sytems Pvt Ltd V. Collector of Customs, New Delhi – 2003 (151) ELT 254 (SC);

- Commissioner of Customs, Banglore V. Aditya Birla Nuvo Ltd – 2021 (378) ELT 42 (Kar.)
- Axiom Cordages Ltd V. CC, Nhava Sheva -II – 2020 (9) TMI478 – CESTAT – MUM.

In the judgement of Titan Medical *supra* it has been held as under:

> ***"13.*** *As regards the contention that the appellants were not entitled to the benefit of the exemption notification as they had misrepresented to the licensing authority, it was fairly admitted that there was no requirement, for issuance of a licence, that an applicant set out the quantity or value of the indigenous components which would be used in the manufacture. Undoubtedly, while applying for a licence, the appellants set out the components they would use and their value. However, the value was only an estimate. It is not the respondents' case that the components were not used. The only case is that the value which had been indicated in the application was very large whereas what was actually spent was a paltry amount. To be noted that the licensing authority having taken no steps to cancel the licence. The licensing authority have not claimed that there was any misrepresentation. Once an advance licence 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 in that behalf"*

5.4 In the decision of Tribunal in the case of Axiom Cordages Ltd *supra* following the aforesaid judgement of the Hon'ble Supreme Court it has been held that provisions contained under section 28AAA of the Act for recovery of duties are applicable only in the eventuality where an instrument issued to a person has been obtained by him by means of 'collusion'; or 'wilful mis-statement' or 'suppression of facts' and that in absence of any material available on record to prove that competent licensing authority under the Foreign Trade Policy has initiated any proceedings against the appellant alleging acquisition of the license in a fraudulent manner, section 28AAA cannot be invoked. It has been further held that the allegation with regard to benefit under the scheme wrongly availed by the appellant does not have an independent nexus to the Customs Act, 1962 as such scheme for export

benefits are dealt with under the Foreign Trade Policy (2015-2020) and Foreign Trade (Development & Regulation) Act, 1992. Thus, the administration of such schemes squarely falls within the jurisdiction of the office of the DGFT and not the customs authorities. The division of exercise of authority between the DGFT and Customs authorities is well recognized judicially and should be respected to prevent abuse of due process of law.

5.5 It has been further held in the said decision of Axiom Cordages Ltd that when the assessment of shipping bills filed by the appellant has attained finality as department has not filed appeal against the same under section 128 of the Act; classification of goods cannot be questioned subsequently by the customs by way of issuance of show cause notice.

6. In view of foregoing discussions and findings, the impugned order cannot be sustained and is liable to be set aside. Accordingly, we set aside the impugned order. Appeals are allowed with consequential relief, if any arise, in accordance with law.

(Pronounced in the open Court on 07.12.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Palak