IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No. 42583/2017

(Arising out of Order-in-Original No. 14/2017 dated 8.9.2017 passed by the Commissioner of Customs, Tuticorin)

M/s. S.A. Cashews **Appellant**
XIV/859, Venad Nagar
Kilikolloor P.O.
Kollam – 691 004.

Vs.

Commissioner of Customs **Respondent**
Custom House
New Harbour Estate
Tuticorin – 628 004.

APPEARANCE:

Shri S.P. Mathew, Advocate for the Appellant
Ms. K. Komathi, ADC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Raju, Member (Technical)

Final Order No. **40177 / 2022**

Date of Hearing : 22.4.2022
Date of Decision: 18.5.2022

Per Ms. Sulekha Beevi C.S.

Brief facts are that the appellant M/s. S.A. Cashews is a proprietary concern and is engaged in processing Raw Cashew Nuts (herein after referred to as RCN) in shells to cashew kernel for sale / export. Intelligence collected by the officers of Directorate of Revenue Intelligence, Trivandrum revealed that during the period 2016 – 17, the RCN imported duty-free by the appellants under Advance Authorization licenses were being diverted to other units which were not authorized by DGFT and that they also sold substantial quantity of processed cashew kernels violating the conditions of the notification. Searches were conducted by the DRI at the premises of the appellant. Statements were recorded.

2. It appeared to the department that the appellant had obtained 4 Advance Authorization license from Jt. DGFT, Trivandrum to import RCN in shells without payment of customs duty. As per the condition attached to the Advance Authorization issued to them, they are required to follow inter alia the following conditions:-

(a) The exempt goods imported against this Authorization shall only be utilized in accordance with the provisions of para 4.16 of FTP 2015 – 20 and other provisions and relevant Customs Notification No. 18/2015 dated 1.4.2018.

(b) The factory addresses where the goods imported shall be processed is M/s. SAC, KP VI/733 to 736, Puthenvila Jn. Elamkulam, Kalluvathukkal Post, Kollam.

(c) No co-licensee was mentioned in terms of Para 4.35 of Handbook of Procedures 2015 – 2020.

3. As per the terms of Notification No. 18/2015 dated 1.4.2015, the goods imported against the Advance Authorization shall only be utilized in accordance with the provisions of Para 4.16 of Foreign Trade Policy and other relevant conditions of Notification No. 18/2015. Thus, the materials imported under the Advance Authorization shall be subject to 'actual user condition' that is, the goods imported duty-free shall be processed only in the factory of M/s. S.A. Cashews as shown in the Advance Authorization.

4. It was noticed that the appellant, M/s. S.A. Cashews, had diverted 1149.59 MTs of RCN in shell to other units not authorized by DGFT. By this, they violated the actual user condition stipulated in Para 4.16 of the FTP 2015 – 2020 read with Customs Notification No. 18/2015 dated 1.4.2015. Out of 1449.613 MTs of imported RCN, only 236.54 MTs were received in the authorized unit. Hence it appeared that the appellant failed to comply with the relevant provisions of FTP 2015 – 20, conditions of Advance Authorization and conditions of the Customs Notification.

5. On the basis of the above, Show Cause Notice was issued to the appellant as well as the Customs Broker. The appellant submitted their written statement vide their letter dated 22.3.2017 and additional submissions were made by them at the time of personal hearing dated 9.8.2017. After due process of law, the original authority held that the appellants have not complied with the conditions prescribed in the Notification No. 18/2015 in respect of 1149.59 MTs of RCN in shell imported duty-free under 15 Bills of Entry and ordered for confiscation of the same. The adjudicating authority also ordered to release 578.40 MTs of RCN in shell valued at Rs.5,78,40,000/- imported duty-free which was seized and already released provisionally to the importer on payment of redemption fine of Rs. 12 lakhs. The customs duty of Rs.1,14,05,501/- in respect of 1149.59 MTs of RCN confiscated was confirmed under sec. 28(8) of the Customs Act, 1962. The adjudicating authority also imposed equal penalty under sec. 114A of the Customs Act, 1962 on the appellant. He ordered to enforce the bond executed by the importer for the import of 1149.59 MTs of RCN imported duty-

free under Advance Authorization. Aggrieved by such order, the appellant, M/s. S.A. Cashews is now before the Tribunal.

6. The learned counsel Shri S.P. Mathew appeared and argued for the appellant. He submitted that the appellant is a proprietary concern and is engaged in procurement of RCN either from local market or by import on payment of duty for processing them into cashew kernels for sale in the local market or for export. They have 7 processing units of which the main factory is at Puthenvila Jn. Elamkulam, Kalluvathukkal Post, Kollam. The said factory has been endorsed in the Advance Authorization granted by DGFT. The main allegation in the Show Cause Notice is that the appellant has diverted the RCN to other units for processing which is against the conditions of the Customs Notification as well as the Advance Authorization. He submitted that it is true that the appellant had mentioned only the factory at Elamkulam, Kalluvathukkal Post, Kollam in the Advance Authorization license. However, the appellant had their own six other processing units and the imported RCN were sent to these six units for being processed to cashew kernels for export. It is not disputed that all the other units belong to the appellant. This fact has been recorded in para 36 of the impugned order. This being so, even though, all the other units are not endorsed in the Advance Authorization, such dispatch of the imported RCN directly from the port to the appellant's own units for processing would not constitute diversion / sale or transfer of the imported goods as there is no change of title in the goods. He adverted to condition (x) in Notification No. 18/2015-Cus dated 1.4.2015 which reads as under:-

> *"(x) That the said authorization shall not be transferred and the said materials shall not be transferred or sold:*

> *Provided that the said material may be transferred to a job workers for processing subject to complying with the conditions specified in the relevant Central Excise Notifications pertaining to transfer of materials for job work:"*

7. The main condition is that the appellant shall not transfer or sell the imported goods. In the present case, the appellant has dispatched goods to their own units for the purpose of processing. The title in the goods always remain with the appellant and there is no transfer or sale.

8. Further, para 4.35 of Handbook of Procedures envisages facility of supporting manufacturer, job worker, licensing where it is stated that if the manufacturer / importer is not required to be registered with the Central Excise authorities, the job worker may be allowed as per Central Excise Rules and Regulations without insisting for endorsement of supporting manufacturers name. However, authorization holder shall be held responsible for imported item and fulfillment of export obligation.

9. He explained that in case the manufacturer / importer is not registered with the Central Excise authorities, the above para of Handbook of Procedures allows the importer to have the processing done by job workers and the importer shall be solely responsible for the imported items and fulfillment of export obligation. In the present case, the appellant has been issued the export obligation certificate. The same has been noted by the adjudicating authority in para 58.1 of the impugned order. Even though the EODC has been issued to the appellant, the adjudicating authority has noted that the appellant has not satisfied the conditions contemplated in the notification and therefore the action intended under the Customs Act, 1962 is just and proper. The learned counsel explained that when the export obligation

certificate has been issued by DGFT after examining the shipping bills and related documents, the Customs Department cannot allege that the appellant has violated the conditions of notification.

10. The learned counsel relied upon the decision of the Tribunal in the case of Regin Exports Vs. Commissioner of Customs, Tuticorin vide Final Order No. 42432 to 42435/2018 dated 17.9.2018. He prayed that the appeal may be allowed.

11. The learned AR Smt. K. Komathi appeared for the department.

12. Heard both sides.

13. At the outset, it has to be stated that the learned counsel for appellant did not put forward any arguments on the issue as to whether DRI is the proper officer to issue Show Cause Notice. Though the judgment of the Hon'ble Supreme Court in the case of Canon India Pvt. Ltd. Vs. Commissioner of Customs – 2021 (376) ELT 3 (SC) was brought to his notice, he submitted that he does not wish to contest on the said issue before the Tribunal or before any other forum.

14. In para 34 of the impugned order, the adjudicating authority has noted that the moot point to be decided is whether the diversion of RCN imported duty-free under Advance Authorization at the port of import to its unauthorized unit for processing is permissible under FTP 2015 – 20 and Handbook of Procedures 2015 – 2020. Consequently it is also to be decided whether the quantity of 1149.59 MTs of RCN alleged to be diverted to unauthorized units is liable for confiscation.

15. From the above, we have to first address the issue whether there is any violation of condition of the Notification No. 18/2015-Cus. dated 1.4.2015 and conditions of the Advance Authorization issued by the

DGFT in terms of para 4.16 of FTP 2015 – 20. Admittedly, the units to which the RCN are said to be diverted belong to the appellant. Though only the factory premises at Elamkulam, Kalluvathukkal Post, Kollam has been endorsed in Advance Authorization, all other units belong to the appellant. The department does not have a case that the other units to which the RCN was dispatched from the port belongs to any other person. As already reproduced above, clause (x) of Notification No. 18/2015 allows transfer of the imported materials to a job worker for processing subject to complying with the conditions of relevant Central Excise notifications. Again, in para 4.35 of Handbook of Procedures, it is stated that if the manufacturer / importer is not required to obtain central excise registration, it is not required to insist for endorsement of the name of supporting manufacturers in the Advance Authorization. The relevant part is reproduced as under:-

> *If authorisation holder is registered with Central Excise, he has an option of getting names of jobber endorsed by Central Excise as per Central Excise Rules in lieu of Regional Authority's endorsement. In case manufacturer exporter holding authorisation is not registered / not required to be registered with Central Excise authority, job work may be allowed as per Central Excise Rules and regulations without insisting for endorsement of supporting manufacturer's name. However, authorisation holder shall be solely responsible for imported items and fulfilment of Export Obligation."*

16. It is stated that in such transfer of materials to the premises of job worker, whose premises are not endorsed in the license, the sole responsibility shall be of the importer. In the present case, the appellant has been issued export obligation discharge certificate. Such discharge certificate has been issued after perusing the shipping bills, whether foreign exchange was realized and also examining whether

the appellant has fulfilled the conditions as per the Advance Authorization license and Customs Notification.

17. On similar set of facts, the Tribunal vide Final Order in the case of Regin Exports (supra) had occasion to consider whether the transfer of materials to the premises of job worker whose names have not been endorsed in the license would be permissible or not. The Tribunal in the said case after noting condition (x) of Notification No. 18/2015 had observed that the allegation of diversion cannot sustain.

18. On appreciating the facts, evidences placed before us and also applying the principle laid down in the case of Regin Exports, we are of the considered opinion that the allegation raised in the Show Cause Notice and the consequent confiscation of goods and duty demand cannot sustain. The impugned order in regard to the appellant M/s. S.A. Cashews is set aside. The appeal is allowed with consequential relief if any.

(Pronounced in open court on 18.5.2022)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**RAJU**)
Member (Technical)

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