

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH,
COURT NO. 1

CUSTOMS APPEAL NO. 52590 OF 2019

[Arising out of the Order-in-Appeal No. CC (A)/CUS/ICD/TKD/EXP/D-II/538/
2019-20 dated 18/06/2019 passed by Commissioner of Customs (Appeals),
New Customs House, New Delhi -110 037.]

M/s Shalimar Precision Enterprises P. Ltd., **...Appellant**
A-61, Naraina Industrial Area, Phase - I,
New Delhi - 110 028.

Versus

Commissioner of Customs, **...Respondent**
Inland Container Depot, Tughlakabad,
New Delhi - 1110 020

APPEARANCE:

Shri J.C. Patel, Advocate for the appellant.
Shri Rakesh Kumar, Authorized Representative for the
Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50807/2022

DATE OF HEARING : 11.08.2022
DATE OF DECISION: 02.09.2022

P.V. SUBBA RAO

This appeal is filed by M/s Shalimar Precision Enterprises P. Ltd.¹ assailing order-in-appeal dated 18.06.2019² passed by the Commissioner (Appeals), whereby he upheld the order dated 31.03.2016 passed by the Additional Commissioner and rejected the appellant's appeal. By this order, customs duty amounting to

¹ **appellant**

² **impugned order**

Rs. 3,18,245/- and Anti Dumping Duty amounting to Rs. 3,56,045/- was demanded from the appellant in respect of the Melamine imported by it vide Bill of Entry 9556767 dated 13.03.2013 denying the benefit of the Duty Free Import Authorization³ licence and a penalty of Rs. 50,000/- was imposed under Section 117 of the Customs Act.

2. The appellant imported a consignment of "Melamine" by the aforesaid Bill of Entry dated 13.03.2013 and sought clearance under DFIA Scheme availing the benefit under Notification No. 98/2009-CUS dated 11.09.2009. The consignment was cleared for home consumption by the Customs Officers. The DFIA licence was purchased by the appellant for consideration as it was transferable. The DFIA licence, inter alia, permitted duty free import of "Syntan". The term "Syntan" refers to Synthetic Tanning Agent⁴ used in leather processing. According to the appellant Melamine is a Syntan as held by this Tribunal in **Commissioner of Customs, Nhava Sheva versus Dimple Overseas Ltd.**⁵. The proper officer of the Customs has cleared the consignment of Melamine accordingly holding it to be Syntan. Later, the Additional Director of DRI, Lucknow initiated an enquiry and issued a show cause notice dated 28.02.2014 alleging that Melamine is not a Syntan. According to the show cause notice, DRI received information that the appellant had mis-represented Melamine as Syntan and wrongly availed the

³ **DFIA**

⁴ **Syntan**

⁵ **2002 (147) E.L.T. 1164 (Tri. – Mumbai)**

benefit of exemption notification under the DFIA licence. DRI conducted enquiries with the importer who have pointed out in the case of **Dimple Overseas Ltd.**, the Tribunal has held that Melamine is a Synthetic Tanning Agent or Syntan.

3. **However, the Additional Director has effectively decided that the decision of the Tribunal was not correct and, therefore, proceeded to issue the show cause notice on the ground that Melamine was not a Syntan and hence the exemption was wrongly claimed.** The relevant paragraphs of the show cause notice with his observations regarding the Tribunal's order are below :-

"6. From the perusal of the above mentioned CEGAT order, it is seen that the said order was in the context of DFRC Scheme. The said order was based on two observations :

- i. General understanding of the melamine taken as tanning agent in the light of the GG Hawley's Condensed Chemical dictionary indicating one of the uses of melamine as a tanning agent
- ii. The licences issued by the DGFT permitting import of melamine as Syntan.

7. However, it is found that the said dictionary nowhere mentions that melamine as such can be used as 'Syntan' in tanning of leather. Further, the dictionary itself states that "No general entry is intended to be encyclopedic or definitive, but rather a condensation of essential information to be supplemented by reference to specialized sources".

4. The show cause notice also mentions that the matter was referred to the Director, Central Leather Research Institute, Chennai for clarification and in response, by letter dated 20.02.2014, expert opinion was provided by Dr. C. Muralidharan, Chief Scientist & Head, Tannery, CLRI, Chennai as follows :-

"To

Directorate of Revenue and Intelligence
Lucknow.

Sir,

Subject : Technical opinion on Melamine – reg.

Please find below the technical opinion on melamine.

1. Synthetic tanning agents (Syntans) are chemically synthesized leather auxiliaries. These are predominantly used in post tanning operations of leather manufacture to improve the functional properties of the leather. These are generally polymeric substances like phenol-formaldehyde resins, acrylic polymers, melamine formaldehyde resins etc.
2. Melamine is raw material used for syntan preparation. It is not used as such in leather processing as syntan.
3. Melamine is a monomer which is processed further to produce polymeric melamine syntans.

C. Muralidharan"

5. It is further stated in the show cause notice that the original holders of the DFIA licence were asked if they had used Melamine as Syntan in tanning or re-tanning of leather of the goods which they had exported against the licence and they had stated that they had not used Melamine as Syntan.

6. Additional Director of DRI further observed that the standard input/output norms issued by the DGFT by policy Circular No. 30 (RE-05)/04-09 dated 10.10.2005 states as follows :-

"Since the objective of SION is to allow duty free import of inputs which are actually used or are capable of being used in the export products, the exporter has the flexibility to import the alternative input/product mentioned in the

SION as long as the same can be used in the manufacture of all exported product under the DFRC (DFIA) Scheme”.

7. From the above, the Additional Director has, in the show cause notice observed that Melamine cannot be treated as a Syntan which is permitted for import under the DFIA licence and accordingly issued a demand of duty and proposed imposition of penalty under Section 117 of the Customs Act. The appellant opposed the show cause notice and had asserted that Melamine, is a Syntan as held by the Tribunal in **Dimple Overseas Ltd.** and, therefore, prayed the demand may be dropped. The appellant also contended that as per the judgment of the Supreme Court in **Commissioner of Customs, Calcutta** versus **G.C. Jain**⁶, in the DFIA licence, the materials given in the exemption notification covers both raw materials and intermediates and even entities which are not directly used in the export product, but are indirectly used would be eligible for exemption. Therefore, on this ground also even if Melamine is considered to be used indirectly after making it condensate with other materials as Tanning Agent, Melamine qualifies for duty free import under the DFIA licence.

8. The expert opinion of the CLRI was that Melamine cannot be used as Syntan as such, but can be used as Syntan after treating with formaldehyde and making a condensate called Melamine formaldehyde. It was the contention of the appellant

⁶ **2011 (269) E.L.T. 307 (S.C.)**

before the original authority/appellate authority and it is before us that even if it can be used after making it condensate with formaldehyde it will be still be eligible for exemption under licence in the light of the judgment in **G.C. Jain**.

9. Another contention of the appellant is that the expert opinion of CLRI is not correct as Melamine can now be used directly for tanning and it is not necessary to make a condensate with formaldehyde first. Therefore, the appellant sought cross-examination of the Chief Scientist, CLRI who gave the expert opinion. The adjudicating authority sent letters to him for cross-examination but the expert had not appeared. Therefore, the basis of the expert opinion that Melamine cannot be used as a Syntan could not be examined. Nevertheless, the original authority went by the expert opinion of CLRI and confirmed the demand. The appellant submitted technical literature to support its assertion that Melamine can be used as Syntan for tanning which are as follows:-

HAWLEY's condensed Chemical Dictionary which reads as follows:

"Melamine. (cyanurtriamide; 2,4,6 – triamino s-triazine)

CAS : 108-78-1.

Properties : while, monoclinic crystals. D 1.573 (14C), mp 354C. Sparingly soluble in water, glycol, glycerol, pyridine; very slightly soluble in ethanol; insoluble in ether, benzene, carbon tetrachloride. Nonflammable.

Derivation : (1) By heating urea and ammonia. The resulting mixture of isocyanic acid and ammonia reacts over a solid catalyst at approximately 400C to form melamine (2) From cyanamide, dicyanamide, or cyanuric chloride.

Method of purification : Recrystallization from water.

Grade : 99% min.

Hazard : Toxic by ingestion, skin, and eye irritant.

Use : Melamine resins, organic syntheses, leather tanning".

10. The Chemistry & Technology of Leather Volume II published by Renhold Publishing Corporation, which show that Melamine can be used directly for tanning, relevant extract of which is as follows :-

"While previously all tanning was done with methylomelamine monomer, windus showed that **tanning could be done with free formaldehyde and melamine without proforming the methylol compound**. He gives the following procedure for tanning :

Raw Stock : Pickled goatskins, rebrined, horsed, and drained overnight

Formula : Skins, drained pickle weight.....	50 lb
Water at 80° F	2 gal
Salt	2.5 lb
Run 15 min. pH 2.5	
Melamine	2.5 lb 5%
Run 30 min. pH 5.9	
Formaldehyde (36% by weight) ...	5 lb 10%
Run 3 hr. pH 4.7. Shrink test 166° F	
Temperature of liquor 82° F	
Run 6 hr more and shut down overnight	
Next Day : Run 15 min. pH 4.3. Shrink test 194° F	
Washed and fatliquored.	

Windus believes that this procedure is convenient for several reasons :

"The disagreeable and time-consuming operation of heating a solution of formaldehyde is avoided. No polymerization of the monomer can take place before tanning and there is no solution which must be used promptly. The limited solubility of the melamine provides an automatic regulator of the rate of tanning and yet the solubility is adequate to permit tanning in the normal time. When melamine is used on pickled skins the alkalinity is often sufficient to act as a depickling agent and the pH is controlled within the range of 4.0 to 5.0 for tanning and fatliquoring".

He says further :

"Such a method of tanning has two fundamental advantages. First, the basic and more economical raw materials are used, Second, the tanner controls the method of tanning so that different results can be produced by varying the ratio of formaldehyde to melamine".

11. United States Patent US 2470450A for tanning for free formaldehyde and Melamine simultaneously. It discusses in detail the method of using tanning using Melamine and formaldehyde directly and separately. The relevant portion of which reads as follows :-

“Accordingly, the present discovery involves a procedure in which the Melamine and formaldehyde are directly and separately added to the AQEOUS bath in which the skins are hides are being treated, care being taken to avoid the formation of a condensation product, but rather to allow both the Melamine and formaldehyde simultaneously to react with each other and the skin or hide substance”.

12. The Additional Commissioner has followed the show cause notice effectively stating that the Tribunal’s order in **Dimple Overseas Ltd.** was not correct and has chosen to follow the views of the Additional Director DRI in the show cause notice. He distinguished the judgment of the Supreme Court in **G.C. Jain** on the ground that the dispute was with reference to another chemical.

13. He relied on the expert opinion of the Chief Scientists CLRI despite recording that in order to comply with the principles of natural justice, cross-examination of the said official was agreed upon in principle and notices were issued to Dr. C. Muralidharan, but he failed to comply with the notices issued to him. We do not

find that he has discussed the copy of the United States Patent relied upon by the appellant, which specifically states that Melamine can be used directly on the leather for tanning without making a condensate with formaldehyde. Instead, he chose to accept the contrary expert opinion by Dr. C. Muralidharan, without even giving the appellant opportunity of cross-examining the expert.

14. On appeal, the Commissioner (Appeals) held that the expert opinion by CLRI was "unimpeachable evidence on record which differentiated Melamine and Melamine Syntan and the purposes thereof". Thus, holding, he upheld the order of lower authority. Hence, this appeal.

15. Learned Counsel for the appellant has taken us through the facts of the case and forcefully submitted as follows :-

- (i) The licence was issued for import of Syntan and it had imported Melamine declaring it as Melamine in the Bills of Entry and has not declared in any other name. The Bills of Entry were processed and the goods were cleared by the Proper Officer accordingly ;
- (ii) In **Dimple Overseas Ltd.**, Tribunal had already held that Melamine was a Synthetic Tanning Agent. This was brought to the notice of the Additional Director during investigations and enquiries as has been recorded in paragraph 5 of the show cause notice. There is nothing on record to show that the order of this Tribunal in **Dimple Overseas Ltd.** has been overturned by any superior judicial forum.
- (iii) Having recorded the Tribunal's decision, the Additional Director decided on his own that the Tribunal's order was not correct and proceeded to issue the show cause notice which is not correct because the Additional Director, DRI cannot over-rule the order of the Tribunal. If Revenue was

- aggrieved by this order, they could have appealed against to any higher authority ;
- (iv) The scope of the DIFA Scheme and the goods which can be imported under the scheme were clarified by the policy Circular of DGFT dated 10.10.2005 as reproduced in paragraph 14 of the show cause notice. It is clear that so long as a material is capable of being used in the manufacture of the products to be exported under licence they can be imported. It is not necessary the same goods to have been used in the manufacture of the exported products. Therefore, the assertion of the Revenue that the exporters from whom the appellant had purchased the DFIA licence had not used Melamine as Syntan a manufactured of export of leather makes no difference as per the DGFT's clarification. Despite that, the Additional Director of DRI has taken a view that Melamine cannot be imported under the DFIA licence as a Syntan.
 - (v) The entire case of the Revenue was built on the expert opinion by the CLRI that Melamine cannot be used as a Syntan directly, but it has to be reacted with formaldehyde before using it as a Syntan on the leather. This view is not correct in view of the United States Patent the Chemical Dictionary and other literature submitted by the appellant. It is clear that Melamine as well as formaldehyde can be used directly on the leather without forming making it condensate. Therefore, Melamine qualifies.
 - (vi) Even if it is presumed that Melamine has to be reacted with formaldehyde before using it as Syntan the judgment of the Supreme Court in **G.C. Jain** clarifies that the chemicals do not have been used directly to clarify as inputs they can be used indirectly also after some process and will still be eligible for exemption under DFIA Scheme.

16. The lower authorities have confirmed the demand by :

- (a) Holding that the Tribunal's order in **Dimple Overseas Ltd.** is not correct ;
- (b) Distinguishing the judgment of **G.C. Jain** on the ground that it was dealing with a different chemical ignoring the fact that the principle as to whether the

inputs under licence have to be used directly or can be used after some processes were laid down by the Supreme Court in **G.C. Jain**

- (c) Relying heavily on the expert opinion of CLRI which is contrary to the published literature holding it as “unimpeachable evidence” without even allowing an opportunity to cross-examine the expert who gave an opinion contrary to published literature.
- (d) Ignoring that DGFT, who is the licensing authority, has clarified that under the DFIA licence goods which are capable of being used in manufacture of the export products but which may not have actually been used in the manufacture of the export products can be imported.

17. He, therefore, prayed that the impugned order may be set aside and the appeal may be allowed with consequential relief.

18. Learned Departmental Representative submits that the case of **Dimple Overseas Ltd.** pertained to DEEC licence whereas the present case pertains to Duty Free Import Authorization licence. In **Balaji Action Buildwell** versus **Commissioner of Customs, New Delhi**⁷, this Tribunal had distinguished the decision of **Dimple Overseas Ltd.** and held that Melamine cannot be used, as such, and whether processing as Syntan and, therefore, is not covered under DFIA licence and for Syntan.

⁷ 2019 (366) E.L.T. 922 (Tri. – Del.)

19. He further submits that Melamine is covered under HSN 29336100 whereas Syntans are covered under HSN 32021000. He further submits that the expert opinion by Government lab cannot be simply brushed aside. He relied on the order of the Tribunal in **Commissioner of Customs, Vijayawada** versus **Kimmi Steels Pvt. Ltd.**⁸ upheld by Supreme Court in **Kimmi Steels Pvt. Ltd.** versus **Commissioner**⁹. He also relied on the judgment of **Alpha Impex** versus **Commissioner of Customs, Delhi – IV**¹⁰ and the judgment of Madras High Court in **Visal Lubetech Corporation** Versus **Additional Commissioner of Customs, Coimbatore**¹¹ and **Quinn India Ltd.** versus **Commissioner of Central Excise, Hyderabad**¹². He, therefore, prays that the impugned order is correct and proper and calls for no interference.

20. We have gone through the records of the case and considered the submissions of both sides.

21. The undisputed facts are that the appellant had imported Melamine declaring it Melamine and claiming the benefit of exemption under DFIA licence which permitted import of "Syntan". The short question which arises is whether the Melamine is a Syntan or otherwise. The Proper Officer had cleared the consignment for home consumption accepting

⁸ 2019 (368) E.L.T. 92 (Tri. – Hyd.)

⁹ 2019 (368) E.L.T. A40 (S.C.)

¹⁰ 2015 (315) E.L.T. 446 (Tri. – Del.)

¹¹ 2016 (342) E.L.T. 201 (Mad.)

¹² 2006 (198) E.L.T. 326 (S.C.)

Melamine to be Syntan. Thereafter, DRI initiated investigations and felt that Melamine was not Syntan. During enquiries by DRI importers had pointed out to it the order of the Tribunal in **Dimple Overseas Ltd.** holding that Melamine was a Syntan. However, the Additional Director, DRI, felt that the order of the Tribunal was not correct and therefore proceed to issue the show cause notice. The show cause notice was based on an expert opinion by CLRI stating that Melamine cannot be used directly on leather as Syntan, but a condensate can be made with formaldehyde and thereafter the condensate can be used in tanning leather.

22. According to the literature provided by the learned Counsel for the appellant including a patent and extracts of chemical dictionaries, melamine can be used for tanning leather without making a condensate first. It is clear that Melamine and formaldehyde can be simultaneously used on the leather for tanning instead of making a condensate first. Since the expert opinion is contrary to the published literature the appellant sought cross-examination of the expert. The Adjudicating Authority issued letters but the expert did not appear. The Adjudicating Authority could have issued summons to him to force his appearance, but he did not do so. Instead, he chose to rely on the expert opinion, which was contrary to the other published scientific literature produced by the appellant and confirmed the demand. In our considered view, such an approach cannot be sustained. Learned Authorized Representative has

argued that the expert opinion by Government Chemist cannot be brushed aside. We agree. However, if the expert opinion is contrary to some other technical literature and when the assessee seeks a cross-examination of the expert it must be provided before the expert's report can be relied upon. On cross-examination, perhaps, there would be better clarity as to how the expert held a view contrary to other technical literature. Therefore, we find the reliance on the expert opinion of CRCL not correct in this factual matrix.

23. We also find that prior to the issue of show cause notice there was an order of the Tribunal holding that Melamine qualifies as Syntan. The Additional Director of DRI and the adjudicating authority effectively said that the Tribunal was not correct. If it be their opinion, it was open for them to assail the order of the Tribunal before a higher judicial forum. Instead, the Additional Director DRI and the Assistant Commissioner have arrogated to themselves the role of a superior authority over the Tribunal and ignored the judicial precedent which is not only highly irregular, but is also in violation of judicial discipline.

24. Another ground in the show cause notice was that the original exporter from whom the appellant purchased the licence had not used Melamine in manufacture of exported products. As has already been recorded in the show cause notice itself DGFT had clarified that the imported material need not have been used and it is sufficient if it is capable of being used in the

manufacture of final products. In our considered view, neither the Additional Director DRI who issued the show cause notice, nor the adjudicating authority who confirmed the demand or the Commissioner (Appeals) have a jurisdiction to modify the scope of the licence when it is clarified by the licensing authority DGFT itself. So long as Melamine can be used as Syntan which appears to be true from the literature produce before us and also the decision of this Tribunal and **Dimple Overseas Ltd.** it qualifies as Syntan.

25. Even if it is presumed that for the sake of argument that all the technical literature is wrong and only the expert at CLRI is correct and Melamine cannot be used directly as Syntan, but it has first to be treated as formaldehyde to make a condensate with formaldehyde before being used, as held by the Supreme Court in **G.C. Jain** it would make no difference. It still qualifies as raw material and can be imported under the licence. Adjudicating Authority has sought to distinguish **G.C. Jain** on the ground that the chemical in that case was different. In our considered view drawing such a distinction is highly misplaced. The question is whether materials which are used in manufacture of final products after some processing and not directly qualify for imports under the licence or not and **G.C. Jain** answered in affirmative and this ratio applies in this case as well.

26. Another ground on which the demand was confirmed is that the HSN headings of Syntan and HSN heading of Melamine are

different. We find from the standard input/output norms published by the DGFT and also from the licence that the HSN codes are not specified when allowing imports in the licence and only the materials are indicated. So long as the goods match the description, they can be imported. The customs officers cannot add conditions to licence and insist that the inputs have to fall under a particular HSN.

27. Learned Authorized Representative has placed reliance on the order of the Tribunal in the case of **Balaji Action Buildwell**. We find that before the Tribunal in that case was only the expert opinion of CLRI, Chennai which stated as follows "Melamine cannot be used, as such, in leather processing as Syntan". It does not appear from the order that any of the technical literature contrary to this opinion of CLRI were produced in that case by appellants before the Tribunal. It is not recorded that Melamine can be used directly, as such, on leather as a Syntan as has been the assertion of the appellant in this case from the very beginning itself.

28. We further find that in that the judgment of the Supreme Court in the case of **G.C. Jain** holding that the materials need not be used directly, but can be used after some processing and will still qualify for exemption under licence was not brought to the attention of the Tribunal. Thus, both on the substantial question of law, which was laid down by the Supreme Court in **G.C. Jain**

and the technical literature were not placed before the Tribunal in that case. In this context that the Tribunal had passed the order.

29. The present case is distinguishable inasmuch technical literature has been provided by the appellant to assert that the expert opinion was not correct and cross-examination was sought, but it was not provided for the reason the expert did not show up despite notices by the Adjudicating Authority. In this case, the judgment of the Supreme Court in **G.C. Jain** has also been brought to our notice.

30. Further it has already been clarified that DGFT itself had clarified that the material need not have actually been used but so long as it is capable of being used in the manufacture of final products it clarifies under the licence.

31. To sum up, the lower authorities have confirmed the demand ignoring the order of this Tribunal in **Dimple Overseas Ltd.**, ignoring all the technical literature which state that Melamine can be used directly for tanning leather, relying on the opinion of CLRI contrary to the published literature and without even allowing cross-examination of that expert, on the ground that Melamine was not used in the export products contrary to the DGFT's clarification that actual use does not matter and on the ground that the HSN codes of Syntan and Melamine were different although there is no stipulation of HSN in the licence and even contrary to the law laid down by Supreme Court in **G.C.**

Jain that goods which are used even after same processing and not directly can be imported under the licence.

32. In view of all the above, the impugned order dated 18.06.2019 cannot be sustained and is set aside with consequential relief, if any, to the appellant. The appeal is, accordingly, allowed.

(Order pronounced in open court on 02/09/2022.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

PK