CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.404

CustomAppeal No. 1302 of 2009

(Arising out of Order-in-Appeal No.588(GR.VII-I)/2009(JNCH)/EXP-26 dated 14.10.2009passed by the Commissioner of Customs(Appeals), JNCH, Nhava Sheva.)

Commissioner of Customs(Export), Nhava Sheva ....Appellant
Jawaharlal Nehru Custom House,
Post Uran, Dist. Raigad
Pin Code-400707

VERSUS

M/s Sparkling Traders Pvt Ltd. ....Respondent
Gala No. 37 & 38, Gr. Flr
Bldg No. 2, Purna Village,
Tal Bhiwandi, Thane
421302

APPERANCE:

Shri Ramesh Kumar, Asst. Commissioner Authorised Representative for the Appellant
Shri Prakash Shah, Advocate for the Respondent

CORAM:

HON'BLE SHRI AJAY SHARMA, MEMBER (JUDICIAL)
HON'BLE P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86140 / 2019

Date of Hearing: 22/02/2019
Date of Decision: 20/06/2019

PER BENCH:

The instant Appeal has been filed against the impugned order dated 14.10.2009 passed by the Commissioner of Customs (Appeals), Nhava Sheva in Order-in-Appeal No. 588 (GR. VII-I) / 2009 (JNCH) EXP-26. The issue to be decided in this Appeal is whether the learned Commissioner is justified in granting the benefit, under Notification No.40/2006-Cus, to the respondents, in respect of import of Ascorbic Acid as '*Corrosion Inhibitor*' under Duty Free Import Authorisation (DFIA) or in other words whether benefit of exemption available to 'Corrosion *Inhibitor' is applicable to* Ascorbic Acid imported by the respondents.

2. The facts, in brief, in the instant Appeal, are as follows. The respondents i.e. M/s. Sparkling Traders Pt.Ltd. purchased a transferable DFIA dated 27.12.2006, which permits duty free import of Corrosion Inhibitor, against export of Soda Ash, from M/s. Tata Chemicals Ltd. The respondents imported Ascorbic Acid as Corrosion Inhibitor under the said DFIA against export of Soda Ash, *vide* Invoice dated 1.6.2009 and filed B/E dated 21.7.2009 by claiming exemption under custom notification No.40/2006. Revenue raised certain queries, on the bill of entry, vide query memo dated 25.7.2009, stating that the imported goods i.e. ascorbic acid is not covered under the description of Corrosion Inhibitor and that an NOC is required to import ascorbic acid, which was replied by the respondents. Deputy Commissioner of Customs, vide order-in-original dated 22.9.2009, denied the benefit of notification No.40/2006 to the respondents. On an appeal filed by the respondents, Commissioner (appeals), *vide* impugned order dated 14.10.2009, set aside the order in original dated 22.9.2009 and directed the deputy Commissioner to release the goods only under customs/central excise escort to the factory of use of the respondent. Learned Commissioner directed that non-pharmaceutical use should be monitored by the jurisdictional Central Excise authorities and that any violation be brought to the notice of the Customs Authorities for taking appropriate action under Customs Act, 1962 or any other law for the time being in force.

3. We have heard Learned Authorised Representative for the Revenue and Learned Counsel for the Respondents and have gone through the respective written submissions by both sides. The learned Authorised Representative assailed the impugned order passed by the Commissioner and submits that ammonia is used as a corrosion inhibitor in the manufacture of soda ash and not Ascorbic Acid; ‘corrosion inhibitor’ is classifiable under CTH 3800 000, whereas Ascorbic Acid, imported by the respondents, is classifiable under CTH 2936 2700.

3.1. The learned Authorised Representative submits that if the Ascorbic Acid is allowed to be imported as corrosion inhibitor, conditions imposed in the Standard Input Output Norms (SION) and Para 4.4.2 of Foreign Trade Policy and Para 4.59 of the Handbook of procedure (HBP) stand violated; as per *SION,* the value of items at Serial No.5 i.e. ‘Corrosion Inhibitor’ and at Serial No.6. i.e. ‘Chemical for treatment of Boiler water, process water and cooling water’ shall not exceed 10% of FOB value; as the FOB value of the Export Product i.e. Soda Ash is $1,04, 58,355.35, the C/F value of items at serial No. 5 & 6 together should not be more than $10,45,835; in the instant case, the value of Ascorbic Acid itself work out to $20,05,657.50 which is contrary to the provisions of SION. He also submitted that as per DGFT policy circular dated 24.3.2009, only those imports are allowed which are actually used or are capable of being used in manufacturing of export product and since ascorbic acid is a pharmaceutical product, it is not used in the industry of manufacturing of soda ash and hence the same cannot be allowed as input as corrosion inhibitor. He relied upon the ratio of decisions in SVA Udyog Viniyog Ltd. vs. UOI; 1993 (65) ELT 20 (Bom.) and Mewati & Co. vs. CC Bombay; 2010 (253) ELT 378 (Bom.).The learned Authorised Representative further contended that in terms of the Order of Ministry of Health & Family Welfare dated 13.12.2004, drugs used for dual purpose will have to obtain a waiver, from the Ministry of Health & Family welfare, before Imports; respondents have not obtained any such NOC/waiver before the import and therefore, permitting the import of the same in the impugned order is not legal and proper.

3.2. Per contra the learned counsel for the respondents reiterated the findings recorded in the impugned order and prayed for dismissal of the appeal filed by revenue. He submits that Ascorbic Acid can be used as corrosion inhibitor and can be imported on the strength of DFIA issued for export of soda ash. In support of his submission he relied upon the opinion of joint director, New Custom House Laboratory, Mumbai dated 15.1.2010. He also relied upon the decision of the Hon’ble Supreme Court in the matter of Polyglass Acrylic Mfg. Co. Ltd. vs. Commr. of Customs, Vishakhapatnam; 2003 (153) ELT 276 (SC), wherein it was held that the report obtained at the instance of the Department itself has great force and it should not be ignored. He further submitted that the provisions of para 4.56

of Handbook of Procedures is applicable only for sensitive item and Ascorbic Acid does not fall into that category. Learned Counsel also informed us that despite the order of Commissioner, the department did not release the imported goods and the respondents approached the Hon'ble High Court Mumbai with a Writ Petition No. 9367 of 2009. As per High Court's order dated 18.11.2009, the imported goods were provisionally released to the respondents on execution of bond.

4. The moot point requiring consideration, in the instant case, is as to whether the import of Ascorbic Acid, as Corrosion Inhibitor, for export of Soda Ash, is permissible under the Duty Free Import Authorization (DFIA) Scheme under the Foreign Trade Policy (FTP) read with the Standard Input Output Norms (SION) and as to whether the same is entitled for exemption under Customs Notification No.40/2006, dated 1.5.2006. In view of the material placed on record it is clear that Ascorbic Acid has multiple applications in pharmaceutical formulations, food products etc while it can be used as a corrosion inhibitor in industrial operations. It was argued by the Learned Counsel for respondents that the Joint Director CRCL, Mumbai, vide letter dated 15.1.2010, opined that Ascorbic Acid is also a Corrosion Inhibitor. The said letter was also relied upon by the Learned Commissioner while passing the impugned order. The letter is extracted as under for ease of reference.

F.No.S/23-24(21)/2009 Lab Date: 15.01.2010

To,
The Dy. Commissioner of Customs (EP),
New Customs House, Ballard Estate,
Mumbai-400 001.
Sir,

Sub: Your technical opinion on Ascorbic Acid used as Corrosion Inhibitor-reg.

Please refer to your letter F. No. S/16-Misc-1061/09 VIIB dt. 30.12.2009 on the above cited subject.

The technical opinions from Dr.C. Rajagopal Ex. Scientist, CECRI-CSIR and Sh. R.V. Alagesan, Scientist, CECRI-CSIR Karaikudi, available in the file along with other documents on above subject are studied and given credence as there is no much references available in this office library.

The matter relates to importation of ascorbic acid as corrosion inhibitor against export of soda ash. In soda ash industry the demand for water is high-bringing in damage through scales and corrosion to the equipment. During onset of corrosion the dissolved oxygen present in water enhances corrosion leading to pitting. The dissolved oxygen is removed by using oxygen scavengers in boiler water treatment in boilers it is stated that "In plants where the steam may be in contact with food, sodium sulphite, ascorbic acid or erythorbic acid is commonly used as an oxygen scavenger"

Regarding other applications of ascorbic acid as oxygen scavenger the importer may be asked to submit copies of relevant papers from the Encyclopaedia of Chemical Technology by Kirk Othmer, 5th Edition, Vol-25, Sr. No. 3 of the references cited under heading Ascorbic acid as corrosion inhibitor.

Corrosion inhibitors are used in boiler water treatment as well as in cooling water system. Dr C. Rajagopal, after quoting different references has opined that ascorbic acid is an effective corrosion inhibitor for steel in all the media namely acidic, neutral and sulphite.

Sh. R.V. Alagesan, Scientist of CECRI-CSIR, Karaikudi has also confirmed one of the industrial uses of ascorbic acid as oxygen scavenger used for prevention of corrosion in heat exchangers circulating cooling water system of soda ash plant.

Therefore it may be considered that ascorbic acid also finds use as corrosion inhibitor.

Yours faithfully,
Sd/-
(D. MohanKumar)
(Joint Director)

It can be seen above, that the Joint Director, New Custom House Laboratory has clearly opined that Ascorbic Acid can also be used as Corrosion Inhibitor. This Tribunal, at the time of hearing of application for stay filed by Revenue, considered the above opinion. We find that as the opinion was obtained at the instance of the revenue, from their own Laboratory, it cannot be ignored in view of the decision of the Hon'ble Supreme Court in the matter of *Polyglass Acrylic Mfg. Co. Ltd. (supra)*. As per the aforesaid opinion of joint director, capability of Ascorbic Acid being used as Corrosion Inhibitor as claimed by the Respondent is beyond doubt. When ascorbic Acid is used as Corrosion Inhibitor, DGFT policy circular dated 24.3.2009, which clarified that duty-free import of the inputs which are actually used or capable of being used in the export product is permissible, are complied with. Moreover, 'Corrosion Inhibitor' having been specifically mentioned in the Duty Free Import Authorisation (DFIA), applicability notification No. 40/2006 cannot be denied. We find that DFIA nowhere mentions that only ammonia can be used as Corrosion Inhibitor or that Ascorbic Acid cannot be used as Corrosion Inhibitor in manufacturing Soda Ash. The learned counsel for the respondent also relied upon the technical opinion received from CSIR, Karaikudi which establishes that Ascorbic Acid can be used as Corrosion inhibitor and therefore we are of the view that the learned commissioner has rightly held that the Ascorbic Acid can be used as corrosion inhibitor. It is not the case of the department that the appellants have not used imported Ascorbic Acid as Corrosion Inhibitor and have diverted the same to outside their premises.

Moreover, in view of the policy provisions also the catch word is that the imported item must be capable of being used and not necessarily be used. In view of this, Revenue's contention that since Ascorbic Acid cannot be used as Corrosion Inhibitor, respondent is not entitled to import the same under DFIA availing the benefit of Exemption Notification No.40/06-Cus dated 1.5.2006, is untenable and liable to be rejected. Revenue also contends that since Ascorbic Acidis a pharmaceutical product and is not used in the industry of manufacturing of soda ash, the same cannot be allowed as input as Corrosion Inhibitor is also liable to be rejected.

5. Learned AR for Revenue submitted that, as per *SION,* the value of items at Serial No.5 i.e. 'Corrosion Inhibitor' and at Serial No. 6. i.e. 'Chemical for treatment of Boiler water, process water and cooling water' shall not exceed 10% of FOB value; as the FOB value of the Export Product i.e. Soda Ash is $1,04,58,355.35, the C/F value of items at serial No.5 & 6 together should not be more than $10,45,835; in the instant case, the value of Ascorbic Acid itself work out to $20,05,657.50 which is contrary to the provisions of SION. Ongoing through public notices dated 3.3.2004, 29.6.2004 & 13.7.2006, we find that while the notice dated 3.3.2004 restricted the value of items at Sr.No. 4,5 & 6 of SION A1170 @ 5% and public notice dated 29.6.2004 enhanced restriction to 10% for items at Sr. No. 5 & 6, public notice dated 13.7.2006 completely removed the restriction and therefore there was no restriction in SION w.e.f. 13.7.2006. The relevant date in this matter is 27.12.2006, hence, the contention of the revenue that the respondents have breached the conditions imposed in the SION is not sustainable. We completely agree with the contention of learned counsel for the respondent that in view of paragraph 4.59 of the Handbook of Procedure Volume-I, the limiting factor of quantity and value of the individual inputs can apply only if SION so provides. In the present case, SION, as in force on the date of issuance of the DFIA, did not provide any limiting factor of quantity, therefore the contention of the learned Authorised Representative that the respondent could not have imported Ascorbic Acid in excess of the CIF value is untenable.

6. The contention of the revenue that only goods covered by ITC (HS) 3800 0000 can be imported as corrosion inhibitor and not goods of ITC (HS) 2936 2700 is also not sustainable in view of the decision of a co-ordinate Bench of the Tribunal, in the matter of *USMS Saffron Co. Inc. vs. Commr. of Cus. (ACC & Export), Mumbai;2016(331) ELT 155, wherein it was held* as under:-

> *"6.1 the appellants' contention is that duty exemption criterion is only the description (and quantity) mentioned in the SION norms which is described in the DFIA as ITC heading 0900000. But even ITC (HS) Code is not a criterion to get the benefit under the FTP and Customs provisions as long as the item imported falls under the description of goods mentioned in the DFIA. We accept this contention as the goods mentioned in the DFIA are "food flavour". It is therefore undisputed that the appellant is entitled to import saffron as a "food flavour" irrespective of ITC (HS) heading mentioned in the DFIA."*

We are in complete agreement with the aforesaid observation and there is no reason for us to take a contrary view. So far as the contention of the Revenue regarding taking NOC/waiver letter before importing Ascorbic Acid is concerned, we find that Drugs & Cosmetics Act, 1945 exempts substances if not used for medicinal purpose from the purview of Chapter III which deals with import of Drugs and Cosmetics with certain conditions and for import of bulk drugs, each container has to be marked “Not for Medicinal use”. So far as NOC/waiver letter is concerned, Rule 43 of the Drugs and Cosmetics Rules, 1945 exempts substances not for medicinal use which is appearing under Schedule ‘D’, from the purview of Chapter III, which extensively deals with import of drugs and cosmetics in India. Although there is requirement of NOC for Ascorbic Acid, but it is clearly exempted under Schedule ‘D’, if the drug is of dual use. When the requirement of NOC has been specifically exempted by statute then no executive order/ circular can override the same and put the requirement of taking NOC/ waiver letter. If there is any such condition then it is in complete violation of statute. We are in complete agreement with the decision of the Hon’ble Supreme Court in the matter of *Union of India vs. Inter-Continental (India); 2003(156) ELT A160 (SC)* which has been relied upon by the learned Commissioner in which the Hon’ble Supreme Court upholds the decision of the Hon’ble Gujarat High Court that if a notification itself does not provide any condition, such a condition cannot be imposed by subsequent circular as such an addition tantamount to rewriting the notification or legislating by Circular.

7. Now we will take up the contention of Revenue that since Ascorbic Acid is a pharmaceutical product, it is not used in the industry of manufacturing of soda ash and hence the same cannot be allowed as input. According to Revenue as per DGFT policy circular dated 24.3.2009, only those imports are allowed which are actually used or are capable of being used in manufacturing of export product and since ascorbic acid is a pharmaceutical product it is not used in the industry of manufacturing of soda ash and hence the same cannot be allowed as input against corrosion inhibitor. We have also gone through the decisions viz. *SVA Udyog Viniyog Ltd. (supra)* and *Mewati &Co (supra)* as cited by learned Authorised Representative in support of his submission. We find that the said cases deal with different kind of Licences and DFIA. Moreover, in a nut shell the principles enunciated in the above cases is that the transferee is also required to be bound by the conditions of the license; one cannot go beyond the terms of the license for import of goods and only the goods which are covered by the subject license can be imported. We are of the opinion that all these principles have been followed in the instant case. In the instant matter it is the specific case of the importer that they are importing the goods in accordance with the license which has been transferred in their favour by M/s. Tata Chemicals Ltd. Policy under which Licence has been issued gives allowance to import items which are capable of being used. Therefore, we are of the view that no conditions have been violated by the respondents in the instant case. We have also gone through the Notification No.40/2006-Cus dated 1.5.2006 as well as the DGFT policy circular dated 24.3.2009 as produced by the learned Authorised Representative. According to us, a product which is 'Corrosion Inhibitor' and is imported under a DFIA licence, is eligible for benefit of Notification No. 40/2006. Our attention has been drawn to the transferred DFIA and it was pointed out that the actual use of the imported goods has not been contemplated in DFIA. The DFIA allows any input actually used or capable of being used in the export product. Our attention has also been drawn towards Circular No. 46/2007, dated 20.12.2007 issued by the CBEC, wherein it has been clarified that except for the items specified in paragraph 4.55.3 of the Handbook of Procedures, Vol.I 2004-09, in all other cases a correlation between the inputs under import with those used in the exported product is not required to be established and that clearance under DFIA scheme may be allowed if other conditions of the scheme and Customs notification are fulfilled. In this case, the item under import does not figure in the paragraph 4.55.3 and is of non-sensitive nature, therefore 'Ascorbic Acid' can be imported under the said DFIA licence. In a somewhat similar matter, this Tribunal in the case of *Global Exim vs. Commissioner of Customs (Export), Mumbai; 2010 (253) E.L.T.417 (Tri.- Mum.)* allowed the benefit of Notification No. 40/2006 and held that compliance to technical specifications of the imported material are not required in the case of material not covered by para 4.55.3. Board Circular No.16/2006 dated 9.5.2006 also clarified that only for the items specified in paragraph 4.55.3 of the Handbook of Procedures, correlation is required. Therefore Revenue ought to have taken a liberal view and benefit of Notification No. 40/2006 should not have been denied if other conditions are satisfied. Such licenses are issued to the exporter under the export incentive schemes to boost the export and to earn the foreign exchange. The whole scheme of DFIA is to allow duty free imports against exports. Denial of the benefit under the scheme on unsubstantiated and technical reasons, would defeat the very purpose of the scheme and would amount to denial of substantial benefit. This is more so when the respondents have invested huge sums of money in purchasing such licenses. The submission of learned Authorised Representative that the Ascorbic Acid does not satisfy the definition of “material” as appeared in the Notification No.40/2006 since ‘Ascorbic Acid’ is not actually used in the manufacture of Soda Ash is also untenable. Our attention has been drawn by the learned counsel to the DGFT Policy Circular No.72 dated 24.03.2009 which says that the import of duty free inputs, which are actually used or capable of being used in the export product is permissible. Thus the actual use of the duty free imported goods is not mandatory. According to us the definition of ‘material’ has to be read in the context of the scheme of the Duty Free Import Authorisation (DFIA) in the Foreign Trade Policy. In view of the discussions in earlier paragraphs Ascorbic Acid is clearly capable of being used in the manufacture of soda ash. The definition of word ‘materials’ in terms of notification No.40/2006 exempts raw material, components, intermediates, consumables, catalysts and parts which are required for manufacture of resultant product. The word used is ‘required’ and not ‘actually used’. The contention of the Revenue that if a material is not used in the export product, neither the same can be considered to be required for manufacture of export product nor can it be granted the duty exemption under the said notification, is also misplaced. We are in complete agreement with the finding of the learned commissioner that once the license is transferred by endorsing transferability by the licensing authorities, customs have no reason to go beyond the license and sit in judgment. The importer (respondent herein) need not have to prove the nexus between the imported goods and inputs used in the export product, so long as the imported product is covered under the description of the license. One has to see only if the imported goods are capable of being used in the export product. In view of this, we are of the opinion that in the instant case, Ascorbic Acid is capable of being used as corrosion inhibitor in the manufacture of Soda Ash and it is irrelevant whether it is actually used or not in the export product. In the result, we find that the respondents are entitled to avail the benefit of Notification No.40/2006-Cus. We have gone through the decision of the Hon'ble High Court of Judicature at Bombay in the matter of *USMS Safforn Company Inc-2016 (344) E.L.T. 161 (Bom.)* which has been cited by the learned counsel for the respondent, in which the Hon'ble High Court has held that import of duty free Saffron is permissible against the DFIA issued for export of assorted confectionary and biscuits against the inputs food flavour and rejected the contention of the Revenue that saffron cannot be imported as saffron was not actually used in the manufacture of biscuits.

8. The apprehension of the Revenue about misuse of DFIA scheme or material is also misplaced in view of the specific directions issued by the learned Commissioner to the Deputy Commissioner to release the goods only under customs/central excise escort to the factory of use of the respondent and that non-pharmaceutical use should be monitored by the jurisdictional central excise authorities and that any violation to this condition should be brought to the notice of the customs authorities for initiating appropriate action under the Customs Act or any other law for the time being in force. In view of our discussion we find that the respondents have not violated any provisions of Customs Act, 1962 or the Foreign Trade Policy, in as much as import of Ascorbic Acid under transferred DFIA. In the result, we find that no case is made out by revenue to interfere with the impugned order passed by Commissioner.

9. In view of the discussions made hereinabove, we hold that that the Appeal filed by the Revenue is devoid of any merit and consequentially the appeal stands dismissed.

(Order pronounced in the court on 20/06/2019

(Ajay Sharma)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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