CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.1

Customs Appeal No. 147 of 2011

[Arising out of Order-in-Appeal No.22 & 23/MCH/AC/Gr.I/2011, dt.08.02.2011, passed by the Commissioner of Customs (Appeals), Mumbai]

M/s Anand Mohata Agro Indus. P. Ltd, **......Appellant**
A-83, MIDC,
Khamgaon 444 303 (Maharashtra)

VERSUS

Commissioner of Customs (Import) Mumbai **......Respondent**
New Customs House, Ballard Estate,
Mumbai 400 001

WITH

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New Customs House, Ballard Estate,
Mumbai 400 001

Appearance:

For Appellant	:	Shri R. Ravindran, Advocate
For Respondent	:	Shri Ramesh Kumar, AC (AR)

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.A/86579-86580/2019

Date of Hearing: 07.03.2019
Date of Decision: 05.09.2019

PER: DR.D.M. MISRA

These appeals are filed against Order-in-Appeal No.22 & 23/MCH/AC/Gr.I/2011, dt.08.02.2011, passed by the Commissioner of Customs (Appeals), Mumbai.

2. Briefly stated the facts of the case are that the Appellants had purchased the Crude Palm Oil (edible grade) on high sea sale basis and filed Bills of Entry No.715 and 716 dated 22.09.2003, classifying the goods under Customs Tariff Heading 15111000 of Customs Tariff Act 1975, claiming the benefit of exemption Notification No.21/2002-Cus, dated 01.03.2002 as amended by Notification No.120/2003-Cus, dated 01.08.2003. The samples of the imported goods were drawn and sent for chemical analysis to Dy. Chief Chemist. In its report, the Dy. Chief Chemist informed that the carotenoids content of the imported palm oil is below 500 mg/kg which attracted high rate of duty @ 70% against the duty paid @ 65%. Consequently, the less charge demand notice was issued for recovery of differential duty of Rs.6,10,650/- in relation to the Bill of Entry No.715 dated 22.09.2003 and Rs.18,32,627/-in relation to Bill of Entry No.716 dated 22.09.2003. On adjudication, the less charge demand was confirmed after finalising the assessment of respective Bills of Entry. Aggrieved by the said order, the Appellant filed an appeal before the learned Commissioner (Appeals), who in turn, rejected their appeals. Hence, the present appeals.

3. The learned Advocate for the Appellant has submitted that the test report of Dy. Chief Chemist is not backed by any authority or research, hence, the said report cannot be given credence. He has submitted that the imported crude palm oil was purchased by them on high sea sale basis from M/s Anand Mohata Agro Industries Pvt. Ltd, Nagpur. He has further submitted that there was a delay of 16 days between the date of sampling and the date of testing by the laboratory. It is his contention that the Adjudicating authority has taken Lab date appearing on the test report as the date of testing. But, the Lab date is nothing more than the date of receipt of sample in the laboratory. The actual date is the date on which the Chemist signs the report after recording the findings. He has argued that Dy. Chief Chemist/ Examiner may sign the test report on the same day or any other date and sent it to Customs Group concerned. Hence, the lab date cannot be taken as the date of testing. He has submitted that the average loss of carotenoids content as stated by Ganesh Lab is 21.47 per day. It is his contention that the carotenoids value at the time of import was 21.47 which was increased by 341.92 points higher due to delay. Therefore, the carotenoid value would be 399.30 + 341.72 = 741.02. Hence, the value by Ganesh Lab has more credence as it an independent laboratory and conducted the test specifically on the issue. It is his contention that the case law relied upon by the learned Commissioner (Appeals) is not binding as it was in relation to the disposal of the stay application. On the other hand, the judgment in the case of Ruchi Soya Industries Ltd Vs Commissioner of

Customs, Mangalore – 2006 (193) ELT 499 (Tri-Mangalore) is more relevant having regard to fact that Beta Carotene contents in crude palm oil decrease over period of time and accordingly held that the crude palm oil imported satisfy the condition of relevant notification.

4. Per contra, the learned A.R. for the Revenue, on the other hand, submitted that on import of the goods, samples were drawn and tested for analysis to ascertain the carotenoid contents in the imported goods so as to determine the admissibility of the exemption notification claimed by the Appellant. On testing the samples in the case of Bill of Entry No.716, the carotenoid content was found to be 399.1 mg/kg and in the case of Bill of Entry No.716, the carotenoid contents found to be 448 mg/kg. It is his contention that since in both the cases, the CO contents was less than 500 mg/kg, therefore, the Appellants are not eligible to the benefit of exemption Notification No.21/2002-Cus, dated 01.03.2002. He has submitted that the Appellant had never challenged the test report by filing appeal before CRCL, Delhi nor any request for cross examination of Dy. Chief Chemist was made. Therefore, the test reports are binding and ought to have been accepted. The private report placed by the Appellant cannot be relied upon as the drawal of samples was not in presence of the Department, therefore, cannot be accepted. Further, he has submitted that the facts referred to in Ruchi Soya Industries Ltd case are different as there were conflicting reports of the samples drawn by the Department and tested at two different laboratories. No such conflicting reports have been placed in the present case

on test of the same samples drawn from the imported lot at the same point of time. The Appellant could not place on record any technical literature or any other authoritative publication to show that the carotenoid value decreases substantially with passage of time i.e. from the date of the drawl of sample and to the date of testing. Further, he has submitted that since the present issue relates to the admissibility of the benefit of exemption notification, the burden lies on the Assessee to establish that their case falls within the four corners of the said notification in view of the principle of law laid down by the constitution of Bench by Hon'ble Supreme Court in the case of *COMMISSIONER OF CUS. (IMPORT), MUMBAI Vs. DILIP KUMAR & COMPANY 2018 (361) E.L.T. 577 (S.C.).*

5. Heard both sides and perused the records.

6. The short issue involved in the present appeals for determination is whether the Appellants are entitled to the benefit of Notification No.21/2002-Cus, dt.01.03.2002 as amended on the crude palm oil imported during the relevant period against the respective Bills of Entry. The conditions in the said notification reads as follows:-

"A. Extract of Not. No.21/2002 Cus, dt.1.3.2002 as it originally stood:

.....

Table

S.No.	Chapter or Heading No. or sub-heading No.	Description of goods	Standard rate	Additional duty rate	Condition No.

1	2	3	4	5	6
34.	15.11	Crude pam oil and its fractions, of edible grade, in loose or bulk form	65%	-	-

AMENDMENT NOT. No.120/2003-Cus, dt. 1.8.2003:

.....

In the said notification, in the Table,

(A) against S.No.34, for the entry in column (3), the following entry shall be substituted, namely :-

> 'Crude palm oil and its fractions, of edible grade, having an acid value of 2, or more and total carotenoid (as beta carotene) in the range of 500-2500 mg/kg, in loose or bulk.

Explanation: For the purposes of this exemption, "Crude palm oil and its fractions" means fixed vegetable oils, fluid or solid, obtained by pressure, if they have undergone no processing other than decantation, centrifugation or filtration, provided that, in order to separate the oils from solid particles only mechanical force, such as gravity, pressure or centrifugal force, has been employed, excluding any absorption filtering process, fractionalization or any other physical or chemical process. If obtained by extraction an oil shall continue to be considered as "Crude", provided it has undergone no change in colour, odour or taste when compared with corresponding oil obtained by pressure';"

7. To ascertain the carotenoid contents of the imported crude palm oil, samples were drawn in presence of the Appellant by the Department. The samples were later sent to Dy. Chief Chemist, Mumbai. The Dy. Chief Chemist, after analysis, opined that the carotenoid contents in one case is 399.1 mg/kg and in another case, it is 448 mg/kg. The said test report was not challenged by way of appeal by the Appellant even though subsequently, the demand notice was issued for recovery of differential duty, denying the benefit of said exemption Notification to the Appellant

on the basis of the said report. The learned Advocate has referred to a report subsequently obtained by the Appellant from a private laboratory viz. Ganesh Research Foundation, New Delhi, which is dated 18.12.2003 to rebut the earlier report of DyCC. It is their contention that the average loss as per the said report of Ganesh Research Agency is 21.47 mg/kg per day and in the event, the delay in drawing samples and the test reports i.e. 16 days is considered, then the carotenoid contents value in the Dy. Chief Chemist's report would be higher and accordingly in both the cases, the carotenoid contents would be more than 500 mg/kg. We do not find any material to support the contention of the Appellant, inasmuch as the test report of the Dy. Chief Chemist has not been challenged by the Appellant by filing necessary appeal before the higher forum for retesting nor the remnant sample with the Dy. Chief Chemist, after conducting the test as mentioned in the respective test report, have been subjected to further test by any other agency to discard the Dy. Chief Chemist's test report on the carotenoid contents of the imported crude palm oil. Needless to mention that in view of the principle of law laid down by Hon'ble Supreme Court in *Dilip Kumar & Co. Case(supra),* it is the Assessee who has to establish while claiming the benefit of exemption notification that their case falls within the four corners of the notification. In the present case, the Appellant could not be able to justify that carotenoid contents is more than 500 mg/kg contrary to the Dy. Chief Chemists' Report, and consequently eligible to the benefit of said notification. Therefore, in our view, the observations recorded by the learned Commissioner (Appeals) in upholding the orders of the Adjudicating Authority does not warrant interference. In the result, the impugned order is uphold and the appeals are dismissed.

(Order pronounced in the open court on 05.09.2019)

(Dr. D.M. Misra)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

Bahalkar