CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 89918 of 2018

[Arising out of Order-in-Original CAO No: 13/2018-19/RCB/CC(X) dated 23rd August 2018 passed by the Commissioner of Customs(Export),Mumbai – I.]

Uni Colloids Impex Pvt Ltd
Readymoney Premises Coop. Society Ltd,
Readymoney Terrace, 167 Dr Annie Besant Road
1st Floor, Block B, Worli Naka, Mumbai – 400 018 …***Appellant***

versus

Commissioner of Customs(Export)
2nd Floor, New Custom House, Shoorji Vallabhadas Road
Ballard Estate, Mumbai – 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 89943 of 2018

[Arising out of Order-in-Original CAO No: 13/2018-19/RCB/CC(X) dated 23rd August 2018 passed by the Commissioner of Customs (Export),Mumbai – I.]

Abbas Haveliwala
C/o Uni Colloids Impex Pvt Ltd
Readymoney Premises Coop. Society Ltd,
Readymoney Terrace, 167 Dr Annie Besant Road
1st Floor, Block B, Worli Naka, Mumbai – 400 018 …***Appellant***

versus

Commissioner of Customs(Export)
2nd Floor, New Custom House, Shoorji Vallabhadas Road
Ballard Estate, Mumbai – 400001 ***…Respondent***

APPEARANCE:

Shri Prakash Shah with Shri Prasad Paranjape and Shri Mohit Rawal, Advocates for the appellant

Shri RK Dwivedi, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLEDR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/85662-85663 / 2020

DATE OF HEARING:	18/09/2019
DATE OF DECISION:	11/06/2020

PER: C J MATHEW

These two appeals, of M/s Uni Colloids Impex Pvt Ltd and of Mr. Abbas Haveliwala, require us to determine the legality of import of 'sweet whey powder' valued at ₹ 3,67,36,871, against 10 bills of entry, filed between 31st December 2010 and 1st July 2011, claiming exemption under notification no. 40/2006-Cus dated 1st May 2006 or no. 98/2009-Cus dated 11th September 2009, under two 'duty-free import authorization (DFIA)' licenses permitting import of 'leavening agent' that was originally issued to M/s Ravi Foods Pvt Ltd for the manufacture of 'biscuits' intended for export. In order in-original no. 13/2018-19/RCB/CC/(X) dated 23rd August 2018, Commissioner of Customs (Exports), New Custom House, Mumbai, confirmed duty liability of ₹1,67,56,802 to be recovered under section 28(4) of Customs Act, 1962, along with interest as applicable, from the importer while imposing penalty under section 114A of Customs Act, 1962 on the importer and under both section 114A and section 114AA of Customs Act, 1962 on the director.

2. The case of the customs authorities was that 'sweet whey powder', assigned ITCHS code 0404, did not conform to either the description as 'leavening agent' or the code in the list attached to the licenses and that, being traders, had improperly resorted to a scheme intended for 'actual users' to effect imports. In the proceedings, substantial reliance is placed upon the statements of the officials of the original holders of the licenses and that of the importers admitting to both these alleged breaches.

3. While confirming the demand, the impugned order noted that SION E-5, applicable to the impugned licenses, covered 'leavening agent' of chapter 28 and 29 at serial no. 6 and that the exports, effected by the license holder, contained 'sodium bicarbonate' and 'ammonium bicarbonate' while 'sweet whey powder', imported by the noticees under the licenses, is processed for manufacture of 'whey protein concentrate' which does not find use in the baking industry. In doing so, the adjudicating authority also held that the precedent of the decision of the Tribunal in *Kushalchand & Co v. Commissioner of Customs, Mangalore [final order no. 1457/2010 dated 19th November 2010]*, being distinguishable, did not sustain the claim by the noticees.

4. Some of the facts that emerge from the rival submissions, and as recorded in the impugned order, are common ground. The importer is not only not an actual user but also is a transferee of a transferee as the original holder, M/s Ravi Foods Pvt Ltd, did not transact directly with importer herein. It is also not in dispute that the original license holder fulfilled the export commitment using inputs, including 'leavening agents' – an indispensable ingredient, sourced from elsewhere and, while filing shipping bills, had not declared the composition of the export product.

5. We also take note of the circumstances, unusual as they are, in which, according to the original authority, the critical mass was attained by the distinguishment of the ITC HS code, appropriate to the permissible item of import, from the goods actually imported but, nevertheless, proceeded to determine recovery on the basis of the ineligibility of the declared classification for entitlement under the notification that was cited in the bill of entry. The denial of eligibility, it must be noted, rests on the conditions in the exemption notification as applied to the declared classification which had not only been accepted at the time of import but also remains undisputed in the impugned order.

6. It may also be of relevance for us to place the impugned product in the proper perspective. From ancient times, food has been

accorded sanctity in every civilization and the pandering of the sense of taste has always been treasured as a measure of refinement. Leavening and condiments are culinary contributions of ancient Egypt and ancient Rome; by the one, humans could soften that which nature has on offer and, by the other, humans could flavour that which nature had not. It is generally accepted that the first leavening agent was 'dough' - a mixture of flour and water-which, when allowed to rest for a while, gelatinizes the starch. To enhance that vigourousness many other additives and substitutes have been discovered. Particularly so, in the production of food on an industrial scale.

7. 'Whey powder' - whether sweet or otherwise - is the remnant of milk -bovine, ovine or caprine- after being subject to coagulation. The difference between 'sweet' and 'sour' whey lies solely in the choice of coagulant - rennet or acid - and is not chemically chemical distinguishable. Being concentrate of protein in powder form after drying, it surely does find use in other industries. The obvious, and most commercially lucrative, of these would be for oral ingestion as food supplement. In the baking industry, it is considered to be a superior, and organic, source of leavening adding to the cost of production. The conclusion in the impugned order, probably prompted by the commercially widespread usage as supplement, of exclusion from any other use is, therefore, not on good authority.

8. In addition to asserting that the impugned goods are leavening agents, Learned Counsel was no less concerned about the discarding of the relevancy of proceedings before the licensing authority which, according to him, settles the permissibility of import once and for all. According to Learned Counsel, on a reference from Commissioner of Customs, Mumbai, the Director General of Foreign Trade clarified, *vide* letter dated 9^{th}August 2014, that, based on comments from Ministry of Food Processing Industry, technical literature and opinion of the Chemical Examiner, the Norms Committee advised ‘whey powder’ to be acceptable as leavening agent in manufacture of bakery and biscuit product. The minutes of the meeting held on 15^{th} November 2013 was also placed on record. Likewise, the opinion of the Chemical Examiner dated 16^{th} November 2010, as also those of the Institute of Chemical Technology, Mumbai and Indian Institutes of Technology, Kharagpur and Mumbai, is before us.

9. The submissions of Learned Authorized Representative were drawn from the conclusions arrived at in the impugned order from the several propositions therein which were sought to be supported by statements recorded under section 108 of Customs Act, 1962 and the ratio of decisions referred to therein. We, therefore, proceed to examine the adjudication order for ascertaining its sustainability on facts and the legal position.

10. It would appear that, despite availability of cheaper alternatives, it is not unknown for ‘whey powder’ to be deployed as ‘leavening agent’ in the baking industry. The adjudicating authority appears to have taken a contrary position on the basis of statements recorded from employees of the original holder of the license as well as those of the importer. This, as pointed out *supra*, is without good authority.

11. Furthermore, the disinclination on the part of customs authorities to accept the clarifications issued by the licensing authority is mystifying. It is not the case of the adjudicating authority that there has been misdeclaration of the classification, or value, of the goods implying that the essentials for assessment have, thus, been complied with. Consequently, there is no finding of differential duty attributable to re-assessment. The impugned order fastens recovery, and other detriment, for non-compliance, in terms of eligibility and fulfilment of conditions, with exemption notifications issued for the purposes of implementing the ‘duty-free import authorization (DFIA)’ scheme in the Foreign Trade Policy notified by the Directorate General of Foreign Trade under Foreign Trade (Development & Regulation) Act, 1992. The eligibility for import of ‘sweet whey powder’, as leavening agent for manufacture of biscuits, should not, therefore, have given cause for doubt after receipt of clarifications from the license issuing authority.

12. The adjudicating authority has, in rendering the findings, decided that the report of the Chemical Examiner has been wrongly relied upon by the importer as that opinion is restricted only to ‘whey powder’ which he distinguishes from ‘sweet whey powder’, though unsupported by any evidence other than certain statements recorded under section 108 of Customs Act, 1962. For the sanctity of such statements, he had placed reliance on the decisions of the Hon’ble Supreme Court in *Assistant Collector of Central Excise, Rajahmundry v. Duncan Agro India Ltd [2000 (120) ELT 280 (SC)], in Naresh J Sukawani v. Union of India [1996 (83) ELT 258 (SC)]* and *State (NCT) of Delhi v. Navjot Sandhu [2005 (122) DLT 194 (SC)]*. These decisions were rendered in specific contexts and the ratio therein, which may be applicable to disputes on similar facts, cannot be extended to encompass opinions entertained by the adjudicating authority, without claim of expertise. In the face of a plethora of technical literature available in the public domain and expert opinions furnished before us, just as these were before the adjudicating authority, statements of admission to the contrary, notwithstanding these not having been retracted, lack authenticity and relevance. While these may have served the proximate purpose of confirming an allegation during the adjudication proceedings, it would be naivete to expect us to accord unquestioned validity to such statements recorded by investigating officers. Furthermore, according to the adjudicating

authority, the several clarifications of, and correspondence with, the licensing authority did not advance the claims of the appellant herein as none of them pertained to 'sweet whey powder' which, in his view, was not the product intended while clarifying on substitutes for leavening agents. Yet another justification adduced for rejection of the various opinions rendered by experts was the lack of a sample and the revised classification offered by Indian Institute of Technology, Mumbai. As it was the prerogative of customs authorities to draw samples in the event of doubt, and having failed to do so at the time of import, the lack thereof with the experts at the time of obtaining their opinion is not sufficient ground to discard all these opinions and available technical literature merely to lend credence to the allegations in the show cause notice. The impugned order, is lacking in validity for the preference accorded to the expertise of the specialist from Indian Institute of Technology, Mumbai over all the others in relation to the use of 'whey powder' as 'leavening agent' and inadequately that 'whey powder' did not include the sweet version. We have no reason to discard the possibility of 'whey powder' – sweet or otherwise – being included as a permissible leavening agent.

13. With the threshold eligibility thus settled, the allegation pertaining to ineligibility arising from import by an entity other than 'actual user' and of ineligibility arising from utilization of a different 'leavening agent' in the exports effected by the original license holder

remain to be evaluated. The 'duty-free import authorizations' procured by the appellant-importer had been made transferable in accordance with the provisions of the Foreign Trade Policy and there is no whiff of allegation that the said endorsements had been procured unlawfully. The prescription of 'actual user' condition in the Foreign Trade Policy, and reflected in the corresponding notification issued under section 25 of Customs Act, 1962, cannot be said to be extended to transferees of such licences, except where specified otherwise, either in the policy prescriptions or in the notification, for that would be tantamount to imposing a condition that was not intended by the Central Government. Neither the adjudicating authority nor Learned Authorised Representative have been able to establish that 'post-export, endorsed for transfer' license continued to be entailed with such actual user condition. In any case, the ultimate usage of such goods by an actual user which is not in contention here renders the logic of Revenue to be unacceptable.

14. It has been contended by Learned Counsel that circular no. 46/2007-Cus dated 20th December 2007 of Central Board of Excise & Customs, the standing instructions issued thereto and policy circular no. 50/2008 dated 6th January 2009 of Director General of Foreign Trade have all clarified that correlation for technical specification, or quality characteristics of inputs, between that utilized in the manufacture of export product and the item of import, is not mandated

except for the few specified in paragraph 4.55.3 of the Handbook of Procedures appended to the Foreign Trade Policy. We are also constrained to note that the original holder of license had not indicated such details in the relevant shipping bills. The statement of the employee of the exporter is the sole evidence relied upon by the adjudicating authority to conclude that an entirely different input had been utilized. There is no evidence on record that the appellants were aware of the composition of the exported goods. Hence, the appellant cannot be expected to conform to such imports as they are not cognizant of. From the available records and submissions made, we are unable to conclude if any of the inputs permitted for import to enable manufacture of biscuits are enumerated among the goods specified for conformity in the Handbook of Procedures.

15. In the light of our findings on the inadequacy of credible evidence, nature of the impugned goods and apparent conformity with the conditions of the Foreign Trade Policy, the impugned order cannot be sustained. Accordingly, the appeals are allowed.

(Order pronounced in the open court on 11/06/2020)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

**/as*