CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 89984 of 2018

[Arising out of Order-in-Original No: 12-2018-19/RCB-CC-Xdated 24th August 2018 passed by the Commissioner of Customs (Export), Mumbai –.]

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

(i) Customs Appeal No: 89915 of 2018 (Pushpanjali Floriculture Ltd), (ii) Customs Appeal No: 89916 of 2018 (Global Exim), (iii) Customs Appeal No: 89956 of 2018 (MITC Rolling Mills Pvt Ltd) and (iv) Customs Appeal No: 89983of 2018 (Abbas Haveliwala)

[Arising out of Order-in-Original No: 12-2018-19/RCB-CC-X dated 24th August 2018 passed by the Commissioner of Customs (Export), Mumbai –.]

<u>APPEARANCE</u>:

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/85672-85676 / 2020

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

PER: C J MATHEW

These five appeals, of M/s Uni Colloids Impex Pvt Ltd, M/s Pushpanjali Floriculture Ltd, M/s Global Exim, M/s MITC Ruling Mills Pvt Ltd and of Mr Abbas Haveliwala, require us to determine the legality of import of 'wheat gluten amygluten 160',valued at ₹ 3,85,22,690/- against 22 bills of entry filed between November 2011 and September 2012, claiming exemption under notification no. 40/2006-Cus dated 1st May 2006 or of notification no. 98/2009-Cus dated 11th September 2009, by production of 'duty-free import authorization (DFIA)' licenses, permitting import of 'flour' for the manufacture of 'biscuits', that had been procured by the appellants from original holders of the licences and endorsed for transfer after fulfilling their export obligations. In order in-original no. 13-2018-19/RCB-CC-X dated 24th August 2018, Commissioner of Customs (Exports), New Custom House, Mumbai, confirmed duty liability of ₹ 1,39,20,557/- for recovery 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. The other appellants were imposed with penalties under section 112 of Customs Act, 1962.

2. Elaborating upon the appeal, Learned Counsel for the appellants contested the findings in the impugned order which held that imports, against the 'duty-free import authorisation (DFIA)' of the Foreign Trade Policy notified by Director General of Foreign Trade under the Foreign Trade (Development & Regulation) Act, 1992, was not within their entitlement as traders and that 'flour' (ITC (HS) 11010000) which was permissible under the norms, described as SION E5, could not be substituted by the impugned goods as declared in the bills of entry and which could, at best, be extended only to 'maida' or 'atta'. It was pointed out that, according to the adjudicating authority, the imported goods were 'flavouring agents' that would not be an acceptable substitute for the basic ingredient that is permitted for import and that, the exporter having failed to declare the quality, technical characteristics and specifications of the inputs used for manufacture of the export goods in the relevant shipping bills, the condition of conformity to those had been breached by the appellants at the time of import and that the licensing authority, having *vide* letter dated 2nd April 2013 clarified that public notice no. 93 dated 1st February 2012 had incorporated 'wheat gluten' as permissible import for manufacture of biscuits, imports against 'duty-free import

authorization' licenses prior to that merited disallowance.

3. It is the primary contention of Learned Counsel that the import of 'wheat gluten' as 'flour' stood settled by the decision of the Tribunal in *Uni Colloids Impex P Ltd v. Commissioner of Customs, Ahmedabad [2014 (310) ELT 583 (Tri-Ahmd)]* and that two orders, dated 12th September 2011 and 16th December 2011, of Commissioner of Customs (Appeals), having taken this view could not be reopened by the adjudicating authority as these had been accepted as legal and proper in review proceedings prescribed by the statute.

4. It was also contended that the clarification from the licensing authorities and that expert opinion affirmed the claim of the importer.

5. 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 through several intermediate entities and original holder did not transact directly with importer herein. It is also not in dispute that the original license holder completed the exports using inputs, including 'flour', sourced from elsewhere and, while filing shipping bills, had not declared the composition of the export product.

6. According to Learned Authorised Representative, 'wheat gluten amygluten 160' is classifiable under heading no. 1109 of the First

Schedule to Central Excise Tariff Act, 1985 whereas, against the description of the import item in the impugned licences, the ITC HS Code is 11010000. Further, pointing out that the definition of ‘maida’, ‘atta’ and ‘flour’ in the Food Safety & Standards (Food Products Standards & Food Additives) Regulations, 2011 places emphasis on milling or grinding as a necessary pre-requisite, Learned Authorized Representative suggests that the impugned goods, obtained by a different process, does not find acceptance as a substitute. Relying on the principle of *ejusdem generis* that, according to him, is so patent in the enumeration of the norms, he urges that the decision of the Hon’ble Supreme Court in *Bombay Pharma Products v. Additional Collector of Customs [2006 (198) ELT 501 (Bom)]*, on the intended use as a criteria for interpretation, damages the case of the appellants. Further reliance was placed on the decision of the Hon’ble Supreme Court in *Pardeep Aggarbatti v. State of Punjab [1997 (96) ELT 219 (SC)]* and of the Hon’ble High Court of Calcutta in *Atlantis (East) Ltd v Additional Member, Board of Revenue [(1975) 36 STC 210 Cal)]*.

7. In our opinion, Revenue has misdirected itself on this aspect. The principle adverted to by Learned Authorised Representative is an instrument for interpreting legislative intent in ambiguous circumstances as the enacting body cannot be approached for clarification and it is the judicial institutions that are called upon for ascertainment of correctness in implementation of the statute. In

interpreting policy formulations, framed by a competent executive authority under legislative sanction, the authorized instrumentality responsible for such formulation exists, and in contiguous harmony, with other instrumentalities such as customs – essentially a tax collection authority - but also assigned, by reason of convenience and economy, with responsibility to ensure compliance with such policy. This availability, and, indeed, the concomitant obligation to seek clarification of perceived ambiguities discards recourse to the principle of *ejusdem generis* in the present situation as a substitute.

8. 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.

9. 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 the benefit of the notification that was claimed in the bill of entry. The denial of eligibility, it must be noted, rests on the conditions of the notification as applied to the declared classification which was not only accepted at the time of import but also remains undisputed in the impugned order.

10. It may also be of relevance for us to place the impugned product in the proper perspective. With the removal of starch from dough made of ‘flour’, the resultant product is wheat gluten. Hard ‘wheat flour’ is hydrated to activate the gluten within it, processed for removal of the inherent starch by washing which, after dehydrating, is then powdered. Thus the composition of wheat, in a depleted form, in the flour does not appear, to us, to be an alteration of the essence of the product.

11. We are also not particularly convinced by the argument of Learned Authorised Representative that the decision of the Hon’ble Supreme Court in *Swaraj Mazda Ltd v. Commissioner of Central Excise, Chandigarh [1995 (77) ELT 505 (SC)]* permits us the latitude to ignore judicial discipline and discard the resolution of an identical

dispute of the same appellant by a coordinate bench of the Tribunal in the past. That the Tribunal did so while adjudging in *AB Mauri India Pvt Ltd v. Commissioner of Central Excise, Pune-II [2010 (260) ELT 424 (T)]* does not stand the urging of Revenue in good stead for, in that decision, the Tribunal was considering a plea that the decision of a lower authority could not be construed as a restriction on the appellate authority in deciding a different appeal. The present circumstances are vastly at variance in view of the decision of the Tribunal in *re Uni Colloids Impex P Ltd*. The acceptance of this adjudication order which also relied upon this decision does not advance the case of Revenue.

12. 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 ingredient 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 unless particularly specified, 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 renders the logic of Revenue to be unacceptable.

13. 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 the 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. 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.

14. Several other decisions have been cited by Learned Authorised Representative to suggest that benefits of the notification claimed by the importer herein should be denied to them notwithstanding anything pleaded by them in their favour. Other than being straws clutched upon by Revenue to persuade us to reopen a decision of the Tribunal which, according to us, binds us, no other purpose is palpable or apparent from the pleas on which they are erected. This may, in our opinion, be construed as an attempt, made on behalf of the respondent Commissioner, to supersede lawfully constituted reviewing authorities. We decline to participate in such a misadventure.

15. There is no argument, or contention, that the decision in *re Uni Colloids Impex P Ltd* of the Ahmedabad bench of this Tribunal lies on entirely, or partially, different set of facts or law. Nor has it been submitted that an appeal against that order is pending before the constitutional courts. Accordingly, we are bound by the findings therein.

16. In the light of our findings on the inadequacy of credible evidence of the ingredients used in the exported goods, the essential

nature of the impugned goods, the apparent conformity with the conditions of the Foreign Trade Policy and the precedent decision in the dispute of the appellant herein, 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*