CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
REGIONAL BENCH – COURT NO.405

Custom Appeal No. 88128 of 2019

(Arising out of Order-in-Appeal No. 1378(Gr. I&IA)/2019(JNCH)/Appeal-II dated 07.10.2019 passed by the Commissioner of Customs(Appeal),JNCH, Nhava Sheva.)

M/s Global Exim ....Appellant
301, Faiz E-Qutbi,
375 Narshi Natha Street
Masjid Bunder(West)
Mumbai-400 009

VERSUS

The Commissioner of Customs-Nhava Sheva-I ....Respondent
Jawaharlal Nehru Custom House,
Nhavasheva- Taluka-Uran

APPERANCE:

Mr. Prakash Shah, Advocate for the Appellant
Ms. Trupti Chavan, Assistant Commissioner Authorised Representative for the Respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85945 / 2020

Date of Hearing: 21/10/2020
Date of Decision: 09/12/2020

PER: AJAY SHARMA

This Appeal has been filed impugning the order dated 7.10.2019 passed by the Commissioner of Customs (Appeals) JNCH, Nhava Sheva, Mumbai-II by which the order-in-original dated 28.8.2019 for confiscation of goods and for imposing of penalty was upheld.

2. The issue to be decided in this Appeal is whether the '*Skimmed Milk Powder'* imported by the Appellants under the Duty Free Import

Authorisation (in short "*DFIA"*) Scheme can be held to be prohibited goods and liable for complete confiscation for non-production of BIS Certificate at the time of assessment?

3. The facts giving rise to the filing of the instant Appeal are stated in brief as follows. The Appellants filed Bill of Entry dated 25.4.2019 for clearance of goods declared as '*Edible Skimmed Milk Powder High Heat'* under Duty Free Import Authorisation (in short "*DFIA"*) weighing 11000 kgs (11MT) having total assessable value of Rs.16,17,568/-. The release of the said goods was said to be subject to compliance of *BIS standards*. According to the department, in terms of compulsory registration order, '*Edible Skimmed Milk Powder High Heat'* should conform to IS 14542, but the Appellants-importer failed to produce BIS certificate and admitted that they don't have any such BIS certificate for the said goods. Therefore as per the department, since the goods were imported in violation of the provisions of EXIM policy, the said goods amount to be *prohibited.* The appellants waived the show cause notice and personal hearing in the matter. After going through the documents and the case records, the Adjudicating Authority vide Order-in-Original dated 28.8.2019 while relying upon Section 2(33) ibid considered the goods in issue as *'prohibited goods'* and ordered its absolute confiscation of the goods in issue u/s. 111(d) of the Customs Act, 1962 and also imposed a penalty of Rs.1,00,000/- on the Appellants u/s. 112(a) of the said Act. Aggrieved the instant Appeal was filed. Since the *skimmed milk powder* in issue is having shelf life and is perishable in

nature, therefore early hearing was granted by this Tribunal vide order dated 6.1.2020.

4. I have heard learned counsel for the Appellants and learned Authorised Representative for the Revenue and perused the case records including the written submissions and case laws cited by the respective sides. According to learned counsel, *Skimmed Milk Powder* is a specific entry in the DFIA and the said DFIA do not stipulate any condition that the said powder is subject to BIS standard and since the goods are freely importable under ITC (HS) classification of goods therefore they are eligible for DFIA benefit under the said transferable DFIA. According to learned counsel, the exemption of duty benefits was claimed on the strength of a transferable DFIA issued against Export of Biscuits, which allows duty free import of Skimmed Milk Powder. He further submits that the goods in question are not prohibited goods and that the department had illegally termed it as *prohibited goods.* Had it been a prohibited item, the licensing authorities would not have issued DFIA license. He further submits that the goods in issue are freely importable goods and they are neither prohibited nor restricted goods under any law. He also submits that if the department is so keen for BIS specification, then they should have get the impugned goods tested at the cost of the Appellants, in order to verify whether the goods meet the standards or not but nothing of that sort was done by the department since last more than one year. According to learned counsel, the samples were sent to FSSAI for mandatory tests in terms of the provisions of The Food Safety and Standards Act, 2006 and the FSSAI clearance was

given by the authorities. As per learned counsel the impugned goods are not liable to confiscation and therefore no penalty can be imposed. In support of his submissions, learned counsel relied upon the decision of this Tribunal in appellant's own case titled as *Global Exim vs. Commr. of Cus.(Exports) JNCH, Nhava Sheva; 2015(328) ELT 141 (Tri.-Mumbai)* in which this Tribunal has held that once the goods are imported under DFIA, no separate permit is necessary for clearance. He submits that similarly since the Skimmed *Milk Powder* in issue has been imported under DFIA therefore no BIS certificate is required for its import. Per contra learned Authorised Representative very vehemently argued and reiterated the findings recorded in the impugned order and prayed for dismissal of Appeal. According to her the goods were imported without the BIS certificate in violation of EXIM policy condition which is mandatory requirement. According to her Chapter 1A-General Notes Regarding Import Policy of ITC(HS) Classification of Export & Import specifically stated that in terms of paragraph 2.2 of Foreign Trade Policy, all imported goods shall also be subject to domestic laws, acts, rules, orders, regulation, technical specifications, environmental and safety norms as applicable to domestically prohibited goods. Para 2 of Chapter 1A regarding Mandatory Indian Standards of BIS is reproduced hereinunder:-

> *"Para 2. Indian Quality Standards:*
> *"(A) Mandatory Indian Standards of Bureau of Indian Standards (BIS)*
>
> > *Quality of the products that are subject to mandatory Indian Standards, as applicable to domestic goods shall be required to comply with quality specified for the product as per same Indian Standards. For compliance of this requirement, <u>all manufacturers/exporters of these produces to India, shall be required to obtained BIS license for using Standards mark on their product</u>. The*

> *present list of 'items under mandatory BIS certification' is given in Appendix-III of this schedule. As and when BIS notifies the quality specifications for new product(s) as an Indian Standards, the said Indian Standard would be deemed to be part of Appendix-III from the date of implementation of the said Indian Standards for the said product(s) and the import of that product(s) shall conform to that specified Indian Standard from the date of implementation as specified for the said product(s) by BIS."*

As per learned Authorised Representative from the above extract it is clear that the quality of goods that are subject to mandatory Indian Standard, as applicable to domestic goods, shall be required to comply with quality specified for the product as per the same Indian Standards. She also submits that Skimmed Milk Powder is listed in Appendix III to the Schedule I of EXIM Policy requiring BIS Certificate conforming goods of IS 14542 and since the appellant had imported Skimmed Milk Powder without BIS certificate which rendered them to fall in the category of 'prohibited goods' as laid down u/s. 2(33) of the Customs Act, 1962.

5. Nothing has been produced to counter the submission of learned counsel that *skimmed milk powder* is freely importable under ITC (HS) classification of goods. Nor any document/statute has been produced before me, where *skimmed milk power* has been put under the category of *prohibited goods*. Had it been a prohibited good then the authorities would not have issued the DFIA. Revenue is terming the *skimmed milk powder* as prohibited one only because the BIS certificate has not been produced. Now I have to see whether the non production of BIS certificate would render the freely importable goods as prohibited goods. The term 'Prohibited goods' has been defined u/s. 2(33) of the Customs Act, which is extracted as under:-

> "2(33) "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."

A perusal of the same would make it clear that unless the goods is subject to any prohibition under the Customs Act or any other law, it can't be treated as *prohibited goods*. Now the question is whether the *Skimmed milk powder* has been prohibited anywhere under the customs act or any other law, the answer is 'No' and if that is so then by no stretch of imagination it can be treated as 'prohibited goods' merely because the appellants failed to produce the BIS certificate. It is not disputed that the product in issue has been imported under the DFIA scheme. The import of *skimmed milk powder* is denied being prohibited items under DFIA scheme as per para 4.18(i) of Foreign Trade Policy 2015-2020. Although *Skimmed Milk Powder* is freely importable but subject to furnishing of *BIS certificate,* which can be said to be a kind of condition/ restriction and the absence of it won't make it a prohibited good. If it is not a prohibited good/item, then certainly it is allowable under the DFIA scheme and at the most the authorities could have imposed redemption fine on the importer/appellants but no option to redeem the goods was given to the appellants rather the goods were ordered to be destroyed within 90 days by the Adjudicating Authority. Recently the Hon'ble Delhi High Court in the matter of *Additional Director General (Adjudication) vs. Its My Name Pvt. Ltd.; MANU/DE/1823/2020* has held that in case of goods which are not prohibited, section 125(1) mandates grant of permission, to the person, from whose custody or possession the goods were seized, the option to redeem the goods on payment of redemption fine. Although in the instant matter facts are different, but still the option ought to have been given to the Appellant. It is not disputed that the department did not ask for redemption fine and rather went for complete confiscation of the goods under the guise of *prohibited goods*, which is not correct as per discussions already made. In the said matter i.e. *Its my Name Pvt. Ltd. (supra)* the Hon'ble High Court also rejected the submission of revenue that by virtue of gold/ silver jewellery, having been imported in contravention of the Act, acquired the character of *'prohibited goods'*. The Hon'ble Supreme Court also in the matter of *Commissioner of Customs vs. Atul Automations Pvt. Ltd.; 2019 (365) ELT 465 (SC)* has specifically laid down that there exist a fundamental distinction between what is prohibited and what is restricted. In the present case also the absence of BIS certificate can't made the *skimmed milk power* as prohibited goods and since the goods in question are not prohibited therefore its complete confiscation is not warranted. It is not disputed that the appellants/importer did not possess the required BIS certificate, but that itself would not make it prohibited goods. The authorities could have given opportunity to the appellants for its redemption. As the same was not offered to the appellants now they can't ask for it, as no new case can be made at this stage. The goods in issue are not prohibited goods under the Customs Act, 1962 or under the provisions of Foreign Trade Policy and under any other law. Learned Counsel for the Appellant rightly submitted that if the department is so much concerned, then in the meantime it could have got the *skimmed milk powder* tested at the cost of the appellants in order to verify whether it meet the standards or not but nothing of the sort has been done.

6. I agree with the decision of this Tribunal in the matter of *Global Exim (supra)* in which it has been held that Boric Acid imported under the DFIA is not liable for confiscation for want of import permit under the Insecticide Act and am convinced with the view taken therein. No decision/ruling has been cited by the revenue in support of its submission that freely importable goods if imported under the DFIA scheme, the absence of BIS certificate would make it prohibited goods, liable for complete confiscation. Para 2 of Chapter 1A regarding Mandatory Indian Standards of BIS, which has been relied upon by the learned commissioner in the impugned order, has made it obligatory on the exporter to obtain BIS license and not the importer, whereas the appellant herein is the importer. The exemption of duty benefits was claimed on the strength of a DFIA issued against Export of Biscuits, which allows duty free import of Skimmed Milk Powder. The authorities below as well as learned Authorised Representative relied upon Para 2.2 of Foreign Trade Policy according to which all imported goods shall also be subject to domestic laws, acts and rules, orders, regulation, technical specification, environmental and safety norms as applicable to domestically prohibited goods. The learned counsel has specifically submitted that as per domestic laws the goods were sent to FSSAI for mandatory tests in terms of the provisions of The Food Safety

and Standards Act, 2006. The FSSAI clearance was given by the authorities and it can very well be said that that the appellants have complied with the mandatory food safety standard under the Food safety standards Act, 2006 under the domestic law. The technical specification of the impugned goods clearly falls under the FSSAI regulation as per the direction issued under Section 16(8) of the Food Safety Standards Act, 2006 regarding operationalisation of amended regulation regarding revised standards for milk and milk products etc., which includes essential parameters such as Milk fat (%), Milk Protein, Titrable acidity, Total ash content etc. Undisputedly FSSAI standards and BIS standards are complementary to each other and are not contrary.

7. Therefore as per the discussions made hereinabove including the case laws, I am of the considered view that the impugned goods in question are neither liable for confiscation nor for any penalty under the Customs Act. The instant Appeal is accordingly allowed with consequential relief, if any, as per law.

(Order pronounced in the open Court on 09/12/2020)

(Ajay Sharma)
Member (Judicial)

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