

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Customs Appeal No. 86108 of 2017

(Arising out of Order-in-Original No. 125/2016-17/PCC/NS-I/JNCH dated 31.01.2017 passed by the Principal Commissioner of Customs Nhava Sheva-I)

Shri Ashwin Shah

Appellant

Director, M/s. Shah Nanji Nagsi Exports Pvt. Ltd.,
Anaj Bazar, Itwari, Nagpur 440 002.

Vs.

Commissioner of Customs, Nhava Sheva-I Respondent

Jawaharlal Nehru Custom House,
Post Uran, Dist. Raigad, Sheva 400 707.

WITH

Customs Appeal No. 86113 of 2017

(Arising out of Order-in-Original No. 125/2016-17/PCC/NS-I/JNCH dated 31.01.2017 passed by the Principal Commissioner of Customs Nhava Sheva-I)

Pawan Kumar Jain

Appellant

Flat No. 502-503, C Block, Empress City,
Near Gandhi Sagar Lake, Nagpur 440 018.

Vs.

Commissioner of Customs, Nhava Sheva-I Respondent

Jawaharlal Nehru Custom House,
Post Uran, Dist. Raigad, Sheva 400 707.

AND

Customs Appeal No. 86114 of 2017

(Arising out of Order-in-Original No. 125/2016-17/PCC/NS-I/JNCH dated 31.01.2017 passed by the Principal Commissioner of Customs Nhava Sheva-I)

M/s. Shah Nanji Nagsi Exports Pvt. Ltd.

Appellant

Anaj Bazar, Itwari, Nagpur 440 002.

Vs.

Commissioner of Customs, Nhava Sheva-I Respondent

Jawaharlal Nehru Custom House,
Post Uran, Dist. Raigad, Sheva 400 707.

Appearance:

Shri Sumit Khanna, Advocate, for the Appellant

Shri D.S. Maan, Deputy Commissioner, Authorised Representative for
the Respondent

CORAM:

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)**

Date of Hearing: 25.01.2023
Date of Decision: 25.01.2023

FINAL ORDER NO. A/85352-85354/2023

PER: SANJIV SRIVASTAVA

These appeals are directed against Order-in-Original No. 125/2016-17/PCC/NS-I/JNCH dated 31.01.2017 passed by the Principal Commissioner of Customs Nhava Sheva-I. By the impugned order, the following has been held:-

"ORDER

(i) I disallow the duty exemption benefit of Sr. No.21 of the Notification No.21/2002- Customs dated 01.03.2002 claimed and extended at the time of assessment of aforesaid 11 consignments and confirm and demand the Customs duty 50% along with applicable Education Cess totally amounting to the Rs. 3,05,70,953/- (Rupees Three Crore Five lakhs Seventy thousand Nine hundred Fifty Three only) leviable on the imported popcorn maize (imported vide 11 bills of entry as detailed in para above) under the provisions of Section 28(4) of the Customs Act, 1962 along with interest under Section 28 AB (section 28 AA after 08.04.2011) of the Customs Act, 1962;

(ii) I hold popcorn maize imported vide aforesaid 11 Bills of Entry, liable to confiscation under Section 111(d) and 111(0) of the Customs Act, 1962. Since the goods have already been cleared and are not physically available for confiscation, I don't order to confiscate the same.

(iii) I order to appropriate the amount of Rs. 2,96,80,536/- (Rupees Two Crore Ninety Six Lakh Eighty Thousand Five Hundred Thirty Six Only) deposited during course of investigation towards the dues recoverable.

(iv) I impose penalty equal to the amount of duty evaded i.e. Rs. 3,05,70,953/- (Rupees Three Crore Five lakhs Seventy thousand Nine hundred Fifty Three only) on M/s Shah NanjiNagsi Exports Pvt. Ltd. (SNNEL) under the provisions of Section 114 A of the

Customs Act, 1962. No penalty is imposed on M/s M/s Shah NanjiNagsi Exports Pvt. Ltd. (SNNEL) under the provisions of Section 112(a) of the Customs Act, 1962 in view of the penalty imposed under Section 114A of the Customs Act, 1962. The amount of said penalty liable to be paid under section 114A shall be twenty five per cent of the duty or interest, provided that the importer paid such duty or interest as determined payable thereon under Section 28 within thirty days from the date of the communication of the order determining such duty along with penalty.

(v) I also impose penalty equal to the amount of interest payable at the applicable rate on the duty short paid by M/s Shah NanjiNagsi Exports Pvt. Ltd. (SNNEL), as determined above, under the provisions of Section 114A of the Customs Act, 1962;

(vi) I impose penalty equal to the amount of Rs. 30,00,000/- (Rupees Thirty lakh only) on Shri Ashwin Shah under the provisions of Section 112(b) of the Customs Act, 1962;

(vii) I impose penalty equal to the amount of Rs. 10,00,000/- (Rupees Ten Lakh only) on M/s Projects & Equipment Corporation of India (PEC) limited under the provisions of Section 112(b) of the Customs Act, 1962;

(viii) I impose penalty equal to the amount of Rs. 10,00,000/- (Rupees Ten Lakh only) on M/s P.V. Sons Com Milling Company Pvt. Ltd. under the provisions of Section 112(b) of the Customs Act, 1962;

(ix) I impose penalty equal to the amount of Rs. 5,00,000/- (Rupees Five Lakh only) on Shri Parag Chheda, Director of M/s P.V. Sons Corn Milling Company Pvt. Ltd. under the provisions of Section 112(b) of the Customs Act, 1962;

(x) I impose penalty equal to the amount of Rs. 10,00,000/- (Rupees Ten Lakh only) on Shri Pawan Kumar Jain, Chartered Accountant of M/s SNNEL under the provisions of Section 112(b) of the Customs Act, 1962;

(xi) I also order that in view of the facts of the present case revealing that Shri Pawan Kumar Jain, Chartered Accountant, has failed to conform to the statutory requirements and has proved himself to be of infamous conduct and further his conduct was found unbecoming as a member of the ICAI and involved moral turpitude. His acts were also observed to be loaded with actions against professional ethics violating the principles of integrity and truthfulness, intentionally connived and abetted in creation of forged and fabricated documents in this matter. As he had accepted his guilt and misconduct in his statement under Section 108 of the Customs Act, 1962. I direct that in the light of proven professional and/or other misconduct by Shri Pawan Kumar Jain, Chartered Accountant, Membership No. 065299, the matter may be reported to the council/ the Institute of Chartered Accountants of India Institute (ICAI) and the council may look into or forward his case to the disciplinary committee for further action against him under the Chartered Accountants Regulation, 1988, Chartered Accountants Act, 1949.

(xii) I impose penalty equal to the amount of Rs. 5,00,000/- (Rupees Five Lakh only) on Shri Harish D. Mamania, proprietor of M/s Mahalaxmi Cargo Movers under the provisions of Section 112(b) of the Customs Act, 1962."

2.1 Acting on intelligence, Directorate of Revenue Intelligence, Mumbai Zonal Unit undertook investigation against the appellants and concluded as follows:-

"9. SUMMARY OF INVESTIGATION

(i) Details of Import user condition was explicitly mentioned, are as detailed in SCN.

(ii) During the financial years, 2009-2010 and 2010-2011, the Actual User was allotted TRQ of 13000 MT, however, only 2506.50 MT of popcorn maize was imported against the allocated Quota (till November, 2011).

(iii) SNNEL had entered into a fraudulent agreement with M/s P.V. Sons Cora Milling Company Private Limited, Pune for

processing/converting the imported popcorn maize into corn grits only to mislead the canalizing agency. The popcorn maize imported by SNNEL was never sent to the factory/plant of M/s P.V. Sons, Pune for processing but was sold directly in the domestic market without any process and sometimes the consignments were sent to the local buyers directly from the port of import itself. SNNEL in connivance with M/s P.V. Sons, Pune and Mahalaxmi Cargo Movers had prepared Lorry Receipts (LRs) showing the movement of goods from different cold storages located in Mumbai and vice versa.

(iv) The details of 11 consignments of popcorn maize imported by SNNEL through PEC (STE) are as below:-

Sr. No.	Bill of Entry No./Date	Quantity imported (MT)	Assessable value (in Rs.)
1	945750 / 18.03.2010	400	1,04,82,243/-
2	945751 / 18.03.2010	260	66,15,157/-
3	951689 / 22.03.2010	500	1,31,02,804/-
4	960368 / 27.03.2010	260	71,57,504/-
5	993665 / 19.04.2010	250	65,28,115/-
6	615814 / 03.05.2010	203.200	48,64,301/-
7	901166 / 16.10.2010	125.00	21,83,162/-
8	915352 / 23.10.2010	127.50	20,35,319/-
9	901161 / 16.10.2010	127.50	22,56,517/-
10	952805 / 15.11.2010	127.50	19,49,649/-
11	933000 / 02.11.2010	125.00	21,49,649/-
	TOTAL	2505.70	5,93,61,070/-

(v) The duty exemption was availed for the imported goods under the Customs Notification No.21/2002-Cus dated 01.03.2002 (Sr. No.21) subject to the condition that the rate of duty specified therein shall apply to such quantity of imports for which an importer holds a Tariff Rate Quota Allocation Certificate issued by the EXIM Facilitation Committee in the Directorate

General of Foreign Trade in accordance with the procedure as may be specified by the EXIM Facilitation Committee in the DGFT from time-to-time through a Public Notice. As per the prescribed procedure as discussed earlier, the individual applicants were allowed to import through STE, subject to the Actual User Condition. The "Actual User" condition was specifically mentioned by the DGFT on such import authorizations as well as letters allotting the Tariff Rate Quota. Since the Actual User Condition stands violated (as discussed above), the exemption condition also stands violated. Further, the duty was evaded by wilfull suppression of facts and misrepresentation. Therefore, duty is recoverable along with interest apart from any other action under the extended period provisions of the Customs Act, 1962.

(vi) In view of the above, the exemption benefit claimed and extended vide Sr. No. 21 of Notification No.21/2002-Customs dated 31.03.2002 is liable for rejection and duty leviable at effective rate of Customs duty @ 50% ad valorem along with applicable Education Cess on the aforesaid 11 consignments. The Customs duty 50% along with applicable Cess works out to Rs.3.05,70,953/-. The bill of entry wise duty calculation is:-

Sr. No.	Bill of Entry No. & Date	Assessable value (in Rs.)	Total Customs duty payable @ 50% along with 3% Education cess (in Rs.)
1	945750 / 18.03.2010	1,04,82,243/-	53,98,356/-
2	945751 / 18.03.2010	66,15,157/-	34,06,806/-
3	951689 / 22.03.2010	1,31,02,804/-	67,47,944/-
4	960368 / 27.03.2010	71,57,504/-	36,86,115/-
5	993665 / 19.04.2010	65,28,115/-	33,61,980/-
6	615814 / 03.05.2010	48,64,301/-	25,05,115/-
7	901166 / 16.10.2010	21,83,162-	11,24,328/-
8	915352 / 23.10.2010	20,35,319/-	10,48,189/-
9	901161 / 16.10.2010	22,56,517/-	11,62,106/-
10	952805 / 15.11.2010	19,86,299/-	10,22,944/-

11	933000/02.11.2010	21,49,649/-	11,07,070/-
	TOTAL	5,93,61,070/-	3,05,70,953/-

(vii) During the course of investigation, SNNEL deposited a Rs.2,96,80,536/- towards their duty liability and the same was deposited in the Government treasury vide Challans dated 05.01.2011 and 02.02.2011.

10. From the above, it appears that:-

(i) SNNEL, Nagpur have imported popcorn maize and have cleared the same under the Tariff Rate Quota Scheme (TRQ) at concessional rate of Customs duty through a canalizing agency M/s.PEC Limited. The said TRQ license (by the DGFT) was subject to the Actual User condition i.e., the imported popcorn maize was to be used by the actual importer to manufacture the finished product. Ashwin Shah, Director of SNNEL had full knowledge that import of popcorn maize under the TRQ scheme was subject. to the actual user condition. He hatched a conspiracy by entering into a fraudulent agreement with M/s P.V. Sons, Pune. Imported consignments of popcorn maize were never sent to M/s P.V.Sons, Pune for carrying out job work. The agreement executed between M/s P.V.Sons and SNNEL was only to create documents for cover. Further, to mislead the canalizing agency viz., PEC and to avoid detection of fraud being committed, SNNEL had also procured blank Lorry Receipts (LRS) from Mahalaxmi Cargo Movers, Mumbai which were used to show fake movement. In contravention of the actual user condition, the entire imported popcorn maize was sold directly in the domestic market by raising the bills of corn grits, whereas in reality, imported popcorn maize was sold in the market as such in the original packing in which it was imported. All the imported popcorn maize was sold in the domestic market through local dealers: without any processing. Hence, it appears that SNNEL inspite of full knowledge of the AU conditions imposed by the DGFT for import of maize (corn) under the TRQ scheme, wilfully suppressed the fact that they were unable to process/incapable of processing the imported popcorn maize and were directly

selling the imported goods in the form in which it was being imported. It is evident that SNNEL does not qualify to be termed as 'Actual User', thereby making the imported popcorn maize (imported vide 11 bills of entry as detailed above) liable to confiscation under Section 111(d) and 111(0) of the Customs Act, 1962. Further SNNEL also have rendered themselves liable to penal action under Section 112/114A and 114AA of the Customs Act, 1962.

(ii) Duty of Rs.3,05,70,953/- on the above imported corn maize was evaded by resorting to fraud, wilful misstatement and suppression of facts. The said amount is recoverable under the provisions of Section 28 of the Customs Act, 1962 along with interest under Section 28AB (28AA from 08.04.2011) as prevalent during the material time.

(i) M/s PEC Limited, New Delhi appointed as one of the canalizing agencies by the DGFT for the import of Maize (corn) failed to verify the capacity/capability of the Actual User and did not carry out any inspection at any point of time. The applications received from the actual importers were merely forwarded to DGFT. It appears that the M/s.PEC Limited, failed to verify the declaration of place of manufacture and capacity to adhere to the actual user condition. Thus by their various acts of commission and omission have rendered the popcorn maize imported under the TRQ scheme, liable to confiscation under Section 111(d) and 111(0) of the Customs Act, 1962 and have rendered themselves liable for penal action Section 112 of the Customs Act, 1962.

(ii) Ashwin Shah, Director of SNNEL, Nagpur appears to have played a key role in this misuse of TRQ scheme in the import of popcorn maize. He had full knowledge of the actual user condition prescribed for the import of popcorn maize under the said scheme and hatched a conspiracy to sell the popcorn maize imported under the TRQ scheme in the local market without any processing in violation of the actual user condition. To circumvent the law and to cover tracks, he created bogus contracts for processing (with P.V.Sons), created bogus lorry

receipts from Mahalaxmi Cargo Movers, created fake invoices of corn grits etc., as part of the modus operandi. In reality, the imported corn maize was sold in the domestic market in the same form and packing in which it was imported, in violation of the AU condition. All this was done apparently to evade duty and circumvent law. By his above said acts, he has rendered the popcorn maize imported vide 11 bills of entry liable to confiscation under Section 111(d) and 111(0) of the Customs Act, 1962 and himself liable to penal action Section 112 and 114AA of the Customs Act, 1962.

(iii) Pawan Kumar Jain, Chartered Accountant was the internal auditor of SNNEL and was handling its work related to the PEC. Admittedly, he was well aware of the facts that the TRQ licences were issued by the DGFT subject to the actual user condition and they were unable to comply with the said condition. He had full knowledge about the agreement executed between M/s.P.V. Sons, Pune and SNNEL to misguide canalizing agency viz., PEC and to evade detection by the law enforcement agencies. Admittedly, he aided and abetted Ashwin Shah in the entire conspiracy in procuring the Lorry Receipts from Mahalaxmi Cargo Movers, Navi Mumbai, thereby making the said cargo liable to confiscation under Section 111(d) and 111(0) of the Customs Act, 1962 and himself liable to penal action under Section 112 of the Customs Act, 1962.

(iv) Shri Parag Chheda of M/s,P.V. Sons Corn Milling Company (P) Limited, Pune had aided and abetted SNNEL and Ashwin Shah by willfully entering into a bogus agreement with the said company. In his first statement recorded on 15.12.2010 under Section 108 of Customs Act 1962, he made an attempt to mislead the investigation by claiming he was processing the popcorn maize imported by SNNEL. However, in his subsequent statement recorded on 01.02.2011 under Section 108 of Customs Act 1962, he admitted the said agreement was for record purposes only and no actual movement of goods had ever taken place. To make the records look genuine, he had generated fake gates passes showing the movement of popcorn maize from his factory premises. By his above said acts and

omissions, he had sided, abetted and conspired with SNNEL in contravening the provisions of the TRQ licence, rendering the imported goods liable to confiscation under Section 111(d) and 111(0) of the Customs Act, 1962, thereby making himself and P.V. Sons Corn Milling Company (P) Limited, Pune independently liable to penal action under Section 112 of the Customs Act, 1962. (v) Harish D. Mamania, proprietor of Mahalaxmi Cargo Movers, Mumbai had provided the lorry receipts to Ashwin Shah which were utilized for showing the movement of cargo from Navi Mumbai to M/s P.V. Sons, Pune and back, without actual physical movement of goods. He is a commerce graduate running a transport company and was well aware that providing bogus bills is an offence and it could be used for irregular purposes. Yet he provided the bogus lorry receipts of his company to Ashwin Shah and aided in committing the fraud and subsequent loss of revenue to the exchequer. By his above acts of omission and commission, he has rendered the imported cargo liable to confiscation under Section 111(d) and 111(0) of Customs Act, 1962 and himself liable to penal action under Sections 112 of the Customs Act, 1962.

11. The DGFT, New Delhi was informed vide letter dated 05.01.2011 about the violation of the actual user condition by the various actual importers of Maize (corn) including SNNNL and request was made for ab initio suspension/cancellation of the respective TRQ allocation letters and associated Advance Authorizations. Further communication in this regard was established vide letter dated 19.10.2011 reiterating the same. The office of the DGFT vide their letter dated 14.08.2013 inter alia informed that violation of the conditions of actual user had happened after issue of import authorizations and ab initio cancellation of authorization may not be appropriate but the authorization holders are liable to pay duty, interest and other action for violation of actual user condition."

2.2 Show cause notice was issued to the appellant asking them to show cause as to why:-

“(i) the duty exemption benefit of Sr. No.21 of the Notification No.21/2002- Customs dated 31.03.2002 claimed and extended at the time of assessment of aforesaid 11 consignments should not be rejected and Customs duty @ 50% along with applicable Education Cess totally amounting to the Rs.3,05,70,953/- (Rupees three Crores five Lakhs seventy thousand nine hundred and fifty three only) leviable on the imported popcorn maize (imported vide 11 bills of entry at detailed above) should not be recovered under the provisions of Section 238(4) of the Customs Act, 1962 along with interest under Section 28AB (Section 2844 after 08.04.2011) of the Customs Act, 1962;

(ii) popcorn maize imported vide aforesaid 11 bills of entry should not be held liable to confiscation under Section 111(d) and 111(0) of the Customs Act, 1962;

(iii) interest should not be charged under Section 28AB (Section 2844 after 08.04.2011) of the Customs Act, 1962 on the duty recoverable;

(iv) Rs.2,96,80,536/- deposited during course of investigation should not be appropriated towards the duty and interest as above.”

Ashwin Shah and Pawan Kumar Jain were called to show cause as to why penalty should not be imposed on them.

2.3 The show cause notice has been adjudicated as per the impugned order referred in para 1 above. Aggrieved appellants have filed these appeals.

3.1 We have heard Shri Sumit Khanna, Advocate for the appellants and Shri D.S. Maan, Deputy Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellants, learned counsel puts on record the following documents:-

- i) Copy of judgment of Hon'ble High Court;
- ii) Copy of order dated 11.10.2021;

- iii) Copy of Minutes of Meeting;
- iv) Copy of the communication dated 18.07.2022.

3.3 On the basis of the above submissions, learned counsel submits that the actual user condition in Licences bearing No. 0550001698/1/14/00 dated 31.12.2009 and 0550001804/1/14/00 dated 09.04.2010 has been deleted by the licensing authority. As such the order of the Principal Commissioner holding differential duty to be payable cannot be sustained as this condition does not exist.

3.4 Accordingly he prays that the impugned order needs to be set aside.

3.5 Learned AR reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeals and during the course of arguments.

4.2 For confirming the demand against the appellants, the impugned order records as follows:-

"21.2 I find that first of all the facts of case need to be highlighted to ascertain the event of import, establishment of role and responsibility of canalizing agency, herein this case PEC, and actual user importer, M/s Shah Nanji for the purpose of the payment of duty and for the purpose who all are rendered to be held responsible under the penal provisions of the Customs Act, 1962. I find that the brief facts of the case are as follows:

(i) Investigation established that Maize (Corn) is in the restricted list of imported items and its import is allowed under TRQ scheme only under Custom Tariff Heading (CTH) 10059000 by designated State Trading Enterprises (STE) including PEC which acts as canalizing agency on behalf of certain importers. As per section 3 of the Foreign Trade Development and Regulation Act 1992, the Central Government had decided that the import should be canalized through "Special or special agencies or

channel". Such imports were cleared at "Nil" rate of Customs duty by claiming benefit of Sr. No. 21 of Notification No.21/2002-Custom dt. 01.03.2002 issued by the Department of Revenue, Ministry of Finance, Government of India.

(ii) That PEC or any other canalizing agency import maize for the applicant Actual Users. As only Actual User is allowed to import maize. Eligible entities like PEC are eligible to avail quotas as per request of applicant received. PEC and five other organisations were given the power to act as Canalizing Agency vide orders passed under guise of Sec 3 of the FTDR Act. This is pertinent to mention that EXIM Policy has been formulated under Sec 5 of the FTDR Act, whereby the power has been given to DGFT to lay down the criteria of import. The said power is solely vested on DGFT and the same has never been transferred to Canalysing Agencies. PEC's role has been that of a facilitator being a nominated entity in DGFT Public Notice to arrange the import authorization through DGFT and ensuring that "Actual User" should not exceed its allocated quota and the import has been completed within the validity of the licence.

(iii) In accordance with procedure warranted under the said clause, M/s Shah Nanji claimed to be Actual User having approached PEC along with the letter and other relevant documents including valid MPFA Licence issued by Government of Maharashtra for manufacture/sale/storage/distribution, etc. for import of maize.

(iv) As per prescribed condition eligible entity PEC duly made an application in the prescribed format addressed to the office of DGFT for the grant of license (Import license for negative list of import items) for and on behalf of M/s Shah Nanji.

(v) A license No. 0550001804 dated 09.04.2010 for import of 6000 MTs of Maize and License No. 0550001698 dated 31.12.2009 for import of 7000 MTs of Maize at zero rate of import duty was issued to PEC by the Office of Jt. Director of Foreign Trade, New Delhi, Government of India, Ministry of Commerce & Industry, New Delhi attached forwarding letter

from the office of the DGFT mentioning therewith negative list for the purpose with of import. The Item list attached to this licence stated as under:

"Maize (Corn) at the concessional duty as per Department of Revenue notification no. 33/2010 dated 12.03.2010 under Tariff Rate Quota (TRO) for the year 2010-11 subject to the condition that the import will be completed before 31.03.2011, i.e. consignment must be cleared before this date and also subject to the actual user conditions besides other usual conditions."

(vi) PEC accordingly supplied the quota to the named actual user (M/s Shah Nanji) with a condition that they have to comply with all the terms and conditions of the license specifically the actual user condition. The said actual user while accepting the quota for import of maize had entered into an agreement dated 07.10.2010 with PEC for import of corn under license issued to it. Clause 19 of this agreement states as under:

"The associate will indemnify PEC for any loss, damage shortage or cost which PEC may be required to pay or suffer with regard to the subject import"

(vii) Further under the above agreement as per different clauses, M/s Shah Nanji shall be liable for all consequences of such failure as contemplated by the Gol against the non- fulfilment of this import. Further M/s Shah Nanji indemnified PEC from all liabilities/claims during the performance/execution of the MOU or as consequences arising thereof. M/s Shah Nanji shall be further held responsible for any consequential loss caused to PEC arising due to nonfulfillment of import of the entire quantity of maize as mentioned in the license. M/s Shah Nanji also stated that they are in possession of a valid original license from Directorate of Industries, Government of Maharashtra, Pune and undertook to fulfil all the requirements as per ministry of Finance (Department of Revenue) Notification No. 21/2002-Customs dated 01.03.2003.

(viii) It is evident that DGFT issued the Import Authorization in favour of PEC with a stipulation that the same should be further

supplied to the actual user importer named in the very authorization. Further, On the basis of the agreement between PEC and M/s Shah Nanji and on specific request of actual user / requirement of policy on behalf of actual user, M/s Shah Nanji was procuring the popcorn maize from various exporters based in Argentina, payment to whom against the said imports was being made by the PEC, who were in return paid by M/s Shah kanji. It is found that PEC remitted funds to foreign exporters in foreign exchange through its banking channels as per the terms of agreement entered between PEC and M/s Shah Nanji. Further, PEC needed to supervise / monitor compliance of actual user condition post importation (which they failed to do in the instant case), it is also established by investigation that for the purpose of import clearance, M/s Prathamesh Shipping Private Limited was also appointed as the Customs House Agent (CHA) by the M/s Shah Nanji.

(ix) PEC in their submission stated that they acted bonafide in sending money on behalf of M/s. Shah Nanji, for import of Maize. The entire import under this license was completed by M/s. Shah Nanji, without any information to PEC about any irregularity on their part. PEC also stated that they took reasonable precaution and care within its means that the actual user do comply with the terms and conditions as laid down in the DGFT license.

(x) It is found that M/s. Shah Nanji vide their Associateship Agreement between PEC limited and M/s Shah NanjiNagsi Exports Pvt. Ltd signed at New Delhi on 07.10.2010 Undertook to absolve PEC from all liabilities, claims of duties / cess, all other consequence arising out of the above act and will indemnify and shall at all times keep PEC fully indemnified against any actions, sanctions, claims, losses, demand, expenses, liabilities, claims of duties/ cess and other consequences arising out of the maize imported by PEC for them as per actual user condition under the above referred import licence. Also the agreement stated that the associate will be responsible for the competitiveness of price, selection of supplier and quality & quantity of goods, the agreement also provide for earnest money deposit (EMD) to PEC as an advance of 10% of

the Foreign Contract Value and will also give post dated cheques for 92.5% of the foreign contract value (90% balance amount 15% FECS Trading Margin + 1% Expenses) as security which includes 1.5 % of PEC's Trading Main along with a legal undertaking as per the format given by PEC. the associate ie. M/s Shah Nanji also confirmed that they comply all the Govt instructions directions for import of Corn an actual user and shall also keep PEC absolved of all the consequences/liabilities in this read the agreement also stated that though the item corn is tax free goods under the provisions of Delhi VAT as well as Maharashtra VAT, even then, if any Excise Customs Duty, sales Tax, VAT, Market Fee, Turnover tax, Withholding Tax etc is payable on sale to the associate or any other party, same shall be paid / reimbursed by the associate, customs duty as applicable will be paid by the associate directly, no financing for the same will be allowed by PSC, the agreement further stated that deliveries will be allowed to associate after receipt of 100% value of the cargo including PEC Trading Margin and other Charges. On receipt of Payment, PEC shall issue delivery order to the associate against which proportionate quantity of the cargo shall be released.

(xi) PEC further stated that sufficient documents has been provided by Ms. Shah Nanji, to convince PEC that the Maize corn imported under said licences was not to be treated in the original in the open market. Thus it is M/s. Shah Nanji, who supplied false misleading information, to gain undue advantage. It is further submitted that PEC has always acted bonafidely and due diligence has been conducted by PEC in respect of the import authorization PEC believed the firm (Actual User) and filed application with DGFT on its behalf as per Public Notice in a bonafide manner.

22. In view of above, I find that the issue need to be examined in perspective taking holistic view. Here it is found that the prescribed TRQ Scheme related to import of any kind of maize at concessional rate of duty and import policy as per ITC (HS) suggests that the import for Maize under CTH 10059000 allowed import by STEs under policy condition (iv) which states that

import is allowed through FFCI subject to para 2:11 of foreign trade policy. Further Para 2,11 of FTP inter alia reads as under-

"Any goods, import or export of which is governed through exclusive or special privileges granted to STE(s), may be imported or exported by STE(s) as per conditions specified in ITC (HS). DGFT may, however, grant an authorization to any other person to import or export any of these goods".

22.1 Farther, Para 2.59 of Hand Book of Procedure (Volume 1) which prescribes the procedure for import of goods under TRQ scheme inter alia reads that Maize (Corn) (CTH 100590) up to prescribed quota is allowed to be imported at concessional rate of duty as mentioned in tabled below-

S. No.	Year	Quantity of Quota (in MT)	Concessional Duty
1	2009-10	5,00,000	15%
2	2010-11	5,00,000	15%

It is found that National Agricultural Cooperative Marketing Federation of India Limited (NAFED), State Trading Corporation (STC), Minerals and metals Trading Corporation (MMTC), Projects & Equipment Corporation of India (PEC), Spices Trading Corporation Limited (STCL) and State Cooperative Marketing Federations are eligible entities for allocation of quota and all eligible entities are eligible to avail quotas as per request of applicants received. It is further found that all eligible entities have to make application in the prescribed format to the DGFT before 1st March of each financial year preceding to the year g. applications for TRQ for 2011-12 must reach DGFT by 01.03.2011. Since import of maize corn) is through STES, the allottees of quota Le., designated agencies shall also be granted an import authorization for allotted quantities as indicated at Sr. No.21 of Customs Notification No. 21/2002-Cus dated 01.03.2002 in terms of para 2.11 of FTP. 2004-2009, if they do not wish to make imports through FCI.

22.2 It is also found that the Sr. No.21 of Customs Notification No. 21/2002-Cus dated 01.03.2002 provides for concessional rate (nil) of duty subject to a condition that the importer holds a Tariff Rate Quota Allocation Certificate issued by the EXIM Facilitation Committee in the Directorate General of Foreign Trade in accordance with the procedure as may be specified by the EXIM Facilitation Committee in the Directorate General of Foreign Trade from time to time through a public notice. Hence, it is evident that in terms of provisions of ITC (HS), para 2.11 of the Foreign Trade Policy (FTP) 2004-09/2009- 14 and para 2.59 of the Handbook of Procedures, Volume-I and Sr. No. 21 of Notification No. 21/2002-Cus dated 01.03.2002 import of all kinds of maize (CTH 10059000) at concessional rate (nil) of duty was canalized through 6 canalizing agencies/State Trading Enterprises (STE's) on behalf of the Actual users. The canalizing agencies on receipt of the applications in the prescribed format from the Actual users were making applications with the DGFT for the allotment of Tariff Rate Quota for importation. The DGFT on receipt of the said applications was allotting import authorization and Tariff Rate Quota to the respective canalizing agencies for import on behalf of the Actual users. The condition of 'Actual use' was specifically mentioned by the DGFT on the import authorizations as well as letters allotting the Tariff Rate Quota.

22.3 I find that from the available records and the statements as well as the facts presented in SCN, and the submissions made by M/s. Shah Nanji and PEC it is evident that PEC applied for import of maize under TRQ scheme after getting applications and authorization from various actual user applicants to import maize under TRQ scheme on their behalf. I also find that as per Import policy PEC or any canalizing agency cannot import Maize directly or independently as they are not Actual User, as only actual user is allowed to import maize and here in the capacity of canalizing agency PEC had responsibility of not only import of Maize under TRQ scheme but also on account of the actual user importer i.e. M/s. Shah Nanji, but also had the responsibility of regulating and monitoring of the conditions to be fulfilled at the end of actual user M/s. Shah Nanji, who not only undertook vide an

agreement to utilize the Maize (Corn) thus imported for manufacture of value added corn products but also had themselves indemnified PEC in the agreement from all claims or liabilities arising during the performance/execution of its MOU or with regard to the consequences arising thereof and that they would comply with all the liabilities.

23. I further find from the statements of Shri Ashwin Shah, Director of SNNEL recorded on 29.12.2010 and 13.04.2012 under Section 108 of the Customs Act, 1962 wherein it was categorically stated that he had approached PEC Limited, New Delhi regarding import of popcorn maize under TRQ scheme and on enquiry, PEC Limited had informed the import under TRQ scheme was subject to the actual user condition. He further accepted that he was not having any plant and machinery for manufacturing flours, grit or instant popcorn and he decided to make an application for importing popcorn maize under TRQ scheme, with the intention to evade Customs duty. He also admitted that although PEC Limited had asked them to produce the documents for satisfying the actual user condition, he was aware he could not fulfill the Actual User condition. he further stated that Pawan Jain, Chartered Accountant of his firm had approached PEC Limited, on his instructions and verbally informed them that they were not having facility or plant and machinery/industry to manufacture popcorn and that they would manufacture popcorn from their job worker viz., P. V. Sons Corn Milling Company Private Limited, Pune. He also stated that PEC Limited had agreed to the same.

23.1 I find that it is evident from the statement that Shri Ashwin Shah used to negotiate the price, quantity and quality etc. with the foreign supplier and that he had not processed or manufactured popcorn from the aforesaid imported maize (corn), as he was not having any popcorn manufacturing unit and that he had sold the entire quantity i.e., 2506.500 MT popcorn maze valued at Rs 5,93,61,071/ in the domestic market thorough brokers and traders viz. D. Vijay, Navi Mumbai and Viral Enterprises. Also that the imported goods were sold in the original packing as imported from the supplier and the domestic

sale bills were being raised as corn (grits), whereas the goods being supplied were popcorn maize it is further admitted by Shr Ashwin that he was aware that the TRQ licence was issued subject to the Actual User condition as he was not having the facility to process the imported popcorn maize and had sold the imported popcorn in the same form in which it was imported, it is further admitted that to avoid detection by the law enforcement agencies, he had issued the bills for corn (grits) he accepted to committing an offence under the provisions of the Customs Act, 1962 by violating the conditions of the TRQ licence and to avoid detection by the law enforcement agencies, he had arranged for the lorry receipts from Shri Harishbhai of Mahalaxmi Cargo Movers, Mumbai. that the said lorry receipts of Mahalaxmi Cargo Movers were issued showing the movement of cargo from Navi Mumbai to P.V. Sons, Pane and back, however no physical movement of goods had ever takes place, i find that Shri Ashwin categorically admitted that all the imported popcorn maize was sold in the local mark directly without processing the same and he had not fulfilled the actual user condition mentioned in the import licence.

24. I find that the subject SCN dealt with the import of Maize (ones) under Custom Tariff Heading (CTH) 10059000 from the restricted list of imported items under Tariff Rate Quota System (TRO) imported by designated State Trading Enterprises (STE) M/s PEC the applicant actual User M/s Shah Nanji availing "Nil" rate of Customs duty by claiming benefit of Revenue, Ministry of Finance, Government of India. It is also observed that the Directorate of Revenue issued the said SCN jointly calling upon to SNNEL, and PEC which is not a mal practice and need to be addressed/ reasoned for the purpose for doing so, I find that this is a peculiar case of import where the goods pertain to restricted list of imported items and its import is allowed only under Tariff Rate Quota Scheme (TRQ) and can be imported only by designated State Trading Enterprises (STE) which acts as canalizing agency on behalf of certain actual user applicant for imported maize which apply to the canalizing agencies and further to the DGFT for grant of import under the scheme which need to be under continuous physical monitoring and supervision

of designated State Trading Enterprises (STE). In this case per policy import is filed / materialized by canalizing agency but is done for and on behalf of another party which is pre-decided, clearly mentioned / stipulated / declared in the process and the said imported goods, being imported in the name of one party, L. PEC who is liable to customs duties and all such liabilities arising in that context on virtue of being importer in defined way but is being indemnified by the actual user applicant vetted by the legal documents like agreement and undertaking between the two parties, Le. canalizing agency and actual user importer.

25. Coming to the facts of the case, I find that though Maize is widely cultivated in few of Indian states popcorn maize is generally imported from United States of America and Argentina. In order to ensure that the domestic farmers and cultivation are not harmed, the Government of India, under the FTP, has always permitted the import of the Maize (popcorn) for 'actual users' and not for 'trading. It is as per the obligation of the Government, under the World Trade Organization compulsions, this agricultural product is negotiated and allowed to be imported under the Tariff Rate Quota (TRQ) at concessional rate of customs duty. Under the said procedure, the State Trading Enterprises are allowed to import it for and on behalf of the 'Actual Users' Licences for the import are thus issued with actual user condition. The proforma and the annexure required to be filed by each and every importer also contained a clear undertaking that the importer satisfied the requirement of actual user. The said condition of the actual user has been imposed in greater public interest so as to protect the domestic producers while the Government discharges its obligation under WTO by prescribing concessional duty on the said food product. The customs duty was relaxed at 15% in discharge of the obligation under WTO, which is evident from the notification no. 21/2002-Cus, dated 01.03.2002. The said duty was further reduced to 0% vide notification no. 9/2007-Cus dated 25.01.2007 as per the negotiations under the WTO.

25.1 I also find that the said imports mentioned in SCN were made under agreements with PEC an STC as canalizing agencies

and the applications for importation of maize under the TRQ scheme was made as 'Actual User' and stating the declared end product to be "VALUE ADDED CORN ANND CORN BASED PRODUCTS', It also came to the fore that TRQ was granted subject to 'Actual User' condition as clearly shown on the license itself while they were issued by the DGFT. These goods admittedly cleared under the provisions and conditions of the customs exemption notification no. 21/2002-Cus dated 01.03.2002 (as amended). 25.2 I am convinced and rely upon the judgement of Hon'ble Bombay High Court in case of Gujarat Export Corpn. V. State of Maharashtra (1990) 77 STC 110 (Bom.DB) wherein the court held that:

".....Customs Duties are payable by an importer which includes the owner of the goods. In the present case the buyers were the owners of the goods at the time when the goods were cleared for home consumption. The buyers were therefore the importers within the definition of importers' under the Customs Act and were liable to pay the customs duties before the clearance of the goods in question. [the court specifically observed that "there is nothing in the scheme of the Customs Act which requires us to exclude an owner of the goods from the definition of 'importer for the purposes of Section 46 or for the purposes of forms prescribed under the Bill of Entry regulations, 1976."].

25.3 In the said judgement the Hon'ble Court also cited the case of Mahabir Commercial Co. Ltd. v. Commissioner of Income-tax, West Bengal reported in [1972] 86 ITR 417, wherein the Supreme Court has observed that under the c.i.f. contract prima facie the property in the goods passes once the documents are tendered by the seller to the buyer or his agent as required under the contract. But, where the seller retains control over the goods by obtaining a bill of lading in his name or to his order, the property in the goods does not pass to the buyer until he endorses the bill of lading to the buyer and delivers the documents to him. If, however, the seller's dealing with the bill of lading is only to secure the contract price, not with the intention of withdrawing the goods from the contract, and he does nothing inconsistent with an intention to pass the property,

the property may pass either forthwith subject to the seller's lien or conditional on performance by the buyer of his part of the contract. In the present case from the statement of the case it is not clear whether in fact the bill of lading was endorsed by the applicants in favour of their buyers or not. But the bill of entry was in the name of the applicants since the goods were imported by the applicants. From the statement of the case it is clear that the documents were handed over by the applicants to their purchasers on receipt of the consideration as mentioned in the contract and the sellers have not thereafter done anything which would indicate any intention on their part not to transfer the property to their buyers. The sale was therefore complete at that stage.

25.4 I find that the merit of the said relied upon case squarely cover the matter at hand. I also find that the said actual user/ associate i.e. M/s Shah Nanji while accepting the quota for import of maize had entered into an agreement dated 15.06.2010 with PEC for import of corn under license issued to it. Clause 19 of this agreement states as under:

"Associate will indemnify PEC for any loss, damage shortage or cost which PBC may be required to pay or suffer with regard to the subject import."

In addition, clause 5 of the agreement reads as "Associate (M/s Shah Nanj Nagsi Exports Pvt Ltd) confirms that they comply all the Govt. instructions/directions for import of Corn (HS 10059000 Code) as actual user and shall also keep PBC absolved of all the consequences/liabilities in this regard.

25.5 Further under the above agreement as per various clauses of agreement M/s SNNEL shall be liable for all consequences of such failure as contemplated by the GOL against the non-fulfilment of this import. Further M/s SNNEL indemnified PEC from all liabilities/claims during the performance/execution of the MOU or as consequences arising thereof. M/s SNNEL shall be further held responsible for any consequential loss caused to PEC

arising due to nonfulfillment of import of the entire quantity of maize as men the license.

25.6 It is evident that the noticee M/s BNNEL was in legal contract and agreement with the canalizing agency PEC for sale of goods and indemnified the PEC from all s towards import of such goods. On the axiom that the actual user applicant on virtue of their agreement with the canalizing agency PEC, M/s SNNEL is the actual owner of the goods at the time when the goods were cleared for home consumption. I also find that it is admittedly established that actual user/associate Le M/s SNNEL had indemnified PTC from liabilities/claims arising during the performance/execution of its MOU or with respect to the consequences arising thereof and further they would comply with all the liabilities. Also the goods were cleared by the CHA appointed by M/s SNNEL, and the delivery of goods was taken at their place. It is also evident that the PEC has not imported for their own use but was in whole process was working as a facilitator as per requirement of Import Policy and was charging only administrative charges/commission / trading margin of agreed 1.5 % to M/s PEC. I also find that during the course of investigations, admitting the violation of notification condition M/s SNNEL voluntarily deposited Rs. 2,96.30.516/ towards the differential customs duty arising due to misuse of the TRQ scheme and violation of the Actual User Condition.

25.7 I also find that the Hon'ble Court observed that Under the Customs Act, 1962, an "importer" is defined extensively under Section 2(26). This section is as follows:-

"2/26) 'importer', in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer. In the present case the buyers were the owners of the goods at the time when the goods were cleared for home consumption. The buyers were therefore importers within the definition of "importer under the Customs Act. As "importers", buyers were liable to pay customs duties. The definition of "importer" under the Customs Act expressly includes

the owner of the goods at the time of clearance. There is nothing in the scheme of the Customs Act which requires us to exclude an owner of the goods from the definition of "importer" for the purposes of Section 46 or for the purposes of the forms prescribed under the Bill of Entry Regulations, 1976, which have been framed under Section 167 read with Section 46 of the Customs Act. The owner of the goods, therefore, at the time of clearance of the goods, is liable to pay customs duties in respect of the goods which he owns."

25.8 More over from the undertaking/affidavit / agreements made by M/s SNNEL between PEC and M/s SNNEL it is established that M/s SNNEL applied for obtaining Import Licence for import of total 13000 MT (7000 MT+ 6000MT) Maize (Com) at concessional duty as per Department of Revenue Notification No. 22/2010 dated 12.03.2010 under TRQ for the financial year 2010-11 subject to the conditions that the import applied for import will be completed before 31.03.2011 subject to ACTUAL USER CONDITIONS besides other conditions through PEC. Also that the import Licence No. 0550001698 and 0550001804 of PEC as per the conditions stipulated in the Agreement, a quantity of 13000 MT Maize was imported by PEC after M/s SNNEL agreed to utilize the imported cargo of Maize under TRQ to be processed for VALUE ADDED ITEMS as per actual user licence condition. M/s SNNEL in the said affidavit stated that the said import was made by PEC on behalf of M/s SNNEL as per their application based on actual user condition and verification of copy of licence in this regard. It is also stated that they had entered into an agreement with PEC wherein vide various clauses they as purchaser indemnified PEC from all liabilities / claims during the performance/execution of the agreement or as any consequences arising thereof. I find that it is evident from the agreement between PEC and M/s SNNEL and subsequently from the undertakings given by M/s SNNEL that the firm M/s SNNEL was legally owner of the goods on virtue of their agreement with PEC on date of agreement, before the import took place. I also find that M/S SNNEL in the statements given under section 108 of the Customs Act, 1962 admitted duty liability on the pop corn

maize imported duty free under the TRQ scheme by PEC for them and admitted the diversion and sale by them in market.

25.9 In judicial discipline I find that in the present case, therefore, the buyers/actual user associate i.e. M/s SNNEL who had become the owners of the goods at the time of clearance are "importer" for the purpose of Customs Act, 1962 and are liable to pay customs duties in respect of goods which he owns and are also liable to all the liabilities such as fine and penalty applicable/binding on importer. In the present case the provisions of the Customs Act cast the liability for payment of customs duty on the owner of the goods i.e. M/s SNNEL as well as on the person holding himself out to be the importer of the goods. It includes the buyers in the present case. Under the contract between the parties, the buyer was required to pay the customs duties.

26. I also find that the condition no. 1, applicable herein reads, "the rate of duty specified in column (4) shall apply to such quantity of imports for which an importer holds a Tariff Rate Quota Allocation Certificate issued by the EXIM Facilitation Committee in the Directorate General Of Foreign Trade in accordance with the procedure as may be specified by the EXIM Facilitation Committee in the Directorate General Of Foreign Trade from time to time through a Public Notice". Further, the DGFT Public notice no. 38/2002- 2007 dated 04.10.2002 reads as under:

"Subject: Procedure for import of various items under Tariff Rate Quota (IRQ).

.....in exercise of powers under Paragraph 2.4 of the Export and Import Policy 2002- 2007, as notified in the Gazette of India extraordinary, Part-II Section 3, sub section (ii) vide S.O. No. 349 dated 31.03.20002 as amended from time to time and as per provisions at condition no. 1 of the annexure to notification no. 21/2002-Cus dated 01.03.2002, the Director General of Foreign Trade hereby notifies the procedure for allocation of this Tariff Rate Quota (TRQ) for the year 2002-03, as under:

8. Eligible entities for allocation of quota:

(i)

(j) Maize (corn) tariff code no. 1005.90: national Agricultural Cooperative Marketing federation of India Ltd. (NAFED), State trading Corporation (STC), Minerals and Metals Trading Corporation (MMTC), projects & Equipment Corporation of India Ltd (PEC), Spices Trading Corporation Ltd (STCL) and State Cooperative Marketing Federations are eligible to avail the Quota. However, they have to make imports only on behalf of actual users."

26.1 It is also seen that the subsequent public notice no. 57/2002-2007 dated 08.01.2003 prescribed to the same conditions read as, "All other conditions/ modalities prescribed vide earlier Public Notice would remain unchanged." Annexure to the public notice 07(RE- 2003)/2002-2007 dated 09.05.2003 containing the prescribed application format for import of items covered under TRQ continued to show the requirement of the applicant having to declare that goods imported will be utilized for the purpose for which they are imported and shall be sold or permitted to be sold. Column 111 of the application form also clearly reads as "Name(s) of the applicants on whose behalf the imports are proposed to be made Admittedly the actual user condition was withdrawn by the public notice no. 47(RE- 2006 2009-2014 dated 18.05.2011 which reads as below:

"The effect of this Public Notice:

o

o With effect from the date of this Public Notice, the Actual User condition will not be mandatory under imports of all items under TRQ Scheme."

26.2 The noticees claim that an affidavit filed before the Hon'ble High Court of Andhra Pradesh shows that the 'Actual User' condition was not applicable cannot be accepted since the Public Notice No. 47 dated 18.05.2011, issued by the DGFT clearly shows that the said condition was not mandatory w.e.f.

18.05.2011, the date of the Public Notice. The public notice itself categorically declares that it is not retrospective and only prospective. From the above said public notice dated 18.05.2011, it is evident that the 'Actual User' condition was in vogue all through the years from 2002 to 2011. Operation of the said Public Notice was challenged in the Hon'ble High Court of Andhra Pradesh vide WP No. 16349/2011 wherein the Hon'ble Court upheld the changes made vide Public Notice No. 47. The licence issued by DGFT to the importer also carried such endorsement of 'Actual User' condition evidencing the fact. Further, the voluntary statement of Shri Ashwin Shah, Director of SNNEL clearly establish that the said imported popcorn Maize was sold by them in the local market in the very same condition of import and they did not qualify for the actual user condition for the said quantity of pop corn maize. Also the monitoring canalizing agency Le PEC failed in their responsibility of designated role of controlling the actual user importer to divert the goods without any processing on the imported goods in contravention of the actual user condition owing to the direct sale in the local market in the same very same condition of import. The notice thereby contravened the conditions under the customs exemption notification read with the public notice issued by the DGFT under the policy. 1 also find that as per paras 9.4. 9.5 and 9.6 of the FTP 2004-09/2009-14, an "Actual User industrial) means a person who utilizes imported goods for manufacturing in his own industrial or manufacturing for his own use in another unit including jobbing unit or an Actual User (non-industrial) means a person who utilizes imported goods for his use in (any commercial establishment carrying on any business, trade or profession; or (1) anx laboratory, scientific or research and development (R&D) institution, university or other educational institution or hospital or (ii) any service industry. As such, in the case, since admittedly, it was sold in the local market in the same condition as it was imported, the importer cannot be termed as 'Actual User' in terms of paras 9.4, 9.55 and 9.6 of the FTP 2004-09/ 2009-14 and the violation of the conditions under the exemption notification. provisions under section 11 of the Foreign Trade (Development and Regulation) art. 19922 read with rule 6(2), 13 and 14 of the Foreign Trade

(Regulation) Rules, 1993 stands clearly corroborated and substantiated.

26.3 I find that investigation had established that the import consignments were directly sent to the godowns/ cold storages/ dealers and have never seen the claimed setup for processing by M/s SNNEL. Also the evidences of creation of misleading and forge documents to prove transport of goods to and fro to premises of M/s P.V. Sons and statements given by various persons under section 108 of the Customs Act, 1962, as mentioned in SCN that they procured imported popcorn maize in bags of 22.68 kg each having the markings such as 'Argentine Made Corn', Three Star' etc. (which are brands / markings of supplier in Argentina proving that M/s SNNEL sold the pop corn maize to various dealers, retailers in the same condition as was imported and no processing or value addition was done to the goods in contravention of the notification condition to avail the concessional duty on the said goods.”

4.3 From the above it is evident that the only reason for denial of the exemption claimed by the appellant is for the reason that the goods imported were under the import licences which prescribed actual user condition and the appellant did not fulfil the actual user condition. For the purpose of the same, we refer to Notification No. 21/2002-Cus dated 01.03.2002, as per Entry No.21, appellant has claimed the benefit of exemption notification. Entry 21 in the said notification reads as follows:-

S.No.	Chapter or Heading or sub-heading	Description of goods	Standard rate	Additional duty rate	Condition No.
21.	1005.90	Goods upto an aggregate of - (a) four lakh metric tonnes of total imports of such goods in the financial year 2001-2002 (b) four lakh and fifty thousand metric tonnes of total imports of such goods in the financial year	15%	-	1

2002-2003	
Con- dition No.	Conditions
1.	The rate of duty specified in column (4) shall apply to such quantity of imports for which an importer holds a Tariff Rate Quota Allocation Certificate issued by the EXIM Facilitation Committee in the Directorate General of Foreign Trade in accordance with the procedure as may be specified by the EXIM Facilitation Committee in the Directorate General of Foreign Trade from time to time through a Public Notice.

4.4 In terms of above, it has been held by the Commissioner that the condition of licence has not been fulfilled. Accordingly the demand has been upheld.

4.5 However, we find that subsequently the matter in respect of actual user condition was taken up before the Hon’ble Bombay High Court in Writ Petition No. 4838 of 2016. Vide order dated 21.05.2021, Hon’ble High Court has held as follows:-

“29. Submissions made by Learned Counsel for the parties have been duly considered. Also perused the materials on record and considered the judgments cited at the Bar.

30. We have seen that petitioner through respondent No. 4 had applied before respondent No. 1 and was granted two licences for import of maize (corn) under the tariff rate quota scheme, the licences being 0550001698, dated 31-12-2009 and 0550001804, dated 9-4-2010. In the first licence it was mentioned as under :

“Maize (corn) at the concessional rate of customs duty as per Ministry of Finance (Department of Revenue) Notification No. 21/2002-Customs, dated 1-3-2003 for release of tariff rate quota for the year 2009-10 subject to actual user conditions and other usual conditions of the import LIC. Import of said item shall be completed before 31-3-2010.”

In the second licence it was remarked as follows :-

“Maize (corn) at concessional duty as per Department of Revenue Notification No. 33/2010, dated 12-3-2010 under tariff rate quota (TRQ) for the F.Y. 2010-11 subject to the condition that the import will be completed before 31-3-2011 i.e.,

consignment must be cleared before this date and also subject to actual user conditions besides other usual conditions.”

30.1 *Thus from a perusal of the two licences, we find that the licences were granted by respondent No. 1 subject to the ‘actual user’ condition and other usual conditions of import.*

31. *The ‘actual user’ condition as appearing in the two licences was challenged by the petitioner before this Court in Writ Petition (L) No. 2520 of 2013 besides demanding refund of customs duty paid by the petitioner under protest. During pendency of the writ petition, show cause notices dated 30-8-2013 were issued by respondent No. 1 under Section 13 of the Foreign Trade (Development and Regulation) Act, 1992 (briefly ‘the Act’ hereinafter) alleging breach of the ‘actual user’ condition in both the licences. Directorate of Revenue Intelligence also issued show cause notice dated 4-9-2013 contending that petitioner was not entitled to benefit of customs Notification No. 21/2002-Customs, dated 1-3-2002 in view of breach of ‘actual user’ condition in the licences and thus demanding customs duty of Rs. 3,05,70,953.00, besides calling upon the petitioner to show cause as to why the paid amount of Rs. 2,96,80,536.00 should not be adjusted towards the demand.*

32. *Petitioner brought the above show cause notices on record in the pending writ petition and those were also put to challenge.*

33. *By the order dated 20-11-2013, a Division Bench of this Court disposed of Writ Petition (L) No. 2520 of 2013. This Court noted that all the show cause notices emanated from the alleged violation of the ‘actual user’ condition contained in the two licences. Therefore, High Court was of the view that it would be in the fitness of things if the two notices dated 30-8-2013 with regard to the licences be first concluded on an expeditious basis and thereafter the notice dated 4-9-2013 issued by the Directorate of Revenue Intelligence be adjudicated, if necessary. The writ petition was disposed of with a direction to respondent No. 1 to first adjudicate the show cause notices dated 30-8-2013 on all issues expeditiously after giving the petitioner an opportunity of personal hearing. It was clarified that depending*

upon the outcome of the said proceeding, the show cause notice dated 4-9-2013 issued by the Directorate of Revenue Intelligence would be adjudicated.

34. *In Writ Petition No. 6349 of 2011 (M/s. Sriven Marketing v. Union of India) filed in the Andhra Pradesh High Court challenging Public Notice No. 47/2009-14, dated 18-5-2011, counter affidavit was filed by Shri K. Komalavally who was then serving as Assistant Director General of Foreign Trade in the office of Joint Director General of Foreign Trade, Hyderabad. The counter affidavit was filed on behalf of respondent Nos. 2 to 4 i.e., Union of India through the Commerce Secretary to the Government of India, Ministry of Commerce and Industry, Department of Commerce; Secretary to the Government of India, Ministry of Agriculture; and Director General of Foreign Trade, Ministry of Commerce and Industry, Department of Commerce, New Delhi. After dealing with import of maize (corn) under the tariff rate quota scheme of the Foreign Trade Policy, reference was made to Notification No. 21/2002-Customs, dated 1-3-2002 providing for concessional rate of duty on import of four items under the tariff rate quota in accordance with the procedure notified through a public notice. Following the same, Director General of Foreign Trade issued Public Notice No. 38/2002-07, dated 4-10-2002 laying down the procedure for import of various items under the tariff rate quota scheme. As per the procedure, import under the tariff rate quota was allowed only through eligible State Trading Enterprises. It was stipulated that State Trading Enterprises would have to import on behalf of actual users.*

34.1 *The said counter affidavit thereafter goes to State that in an interministerial meeting held on 29-4-2003, a decision was taken to remove the 'actual user' condition to make the tariff rate quota scheme prioritized in terms of need base of the applicants. Accordingly, it was stated that the 'actual user' condition was made non-mandatory under the procedure for import of all items under the tariff rate quota scheme and in this connection, Public Notice No. 7/2002-07, dated 9-5-2003 was*

issued specifying that eligible State Trading Enterprises could avail the quota as per request of the applications received.

34.2 *Proceeding further the counter affidavit stated that as per provisions of Public Notice No. 38/2002-07, dated 4-10-2002 imports under the tariff rate quota by eligible State Trading Enterprises on behalf of actual users were allowed. But as per decision taken in an inter-ministerial meeting held on 29-4-2003 'actual user' condition was made non-mandatory under the procedure for import of all items under the tariff rate quota scheme and Public Notice No. 7/2002-07, dated 9-5-2003 was issued specifying that eligible State Trading Enterprises could avail the quota as per request of the applications received.*

34.3 *To further clarify the matter, Public Notice No. 47/2009-14, dated 18-5-2011 was issued which clarified that 'actual user' condition stipulated under the prescribed application form for import authorization i.e., ANF-2B was not mandatory. Thus, filling up of the prescribed form ANF-2B pertaining to 'actual user' condition was made optional by the above public notice.*

34.4 *In paragraph 6 of the said counter affidavit, it was clearly stated that the stipulation of 'actual user' condition was already held non-mandatory under the tariff rate quota scheme since the year 2003. Public Notice No. 47/2009-14, dated 18-5-2011 only clarified the position that filling up of prescribed information in ANF-2B form pertaining to 'actual user' condition was non-mandatory for allocation of quota under the tariff rate quota scheme.*

34.5 *Thus as per the counter affidavit of Union of India and Director General of Foreign Trade before the Andhra Pradesh High Court in Writ Petition No. 6349 of 2011, the stipulation of 'actual user' condition was already non-mandatory under the tariff rate quota scheme since the year 2003. This position was only clarified by Public Notice No. 47/2009-14, dated 18-5-2011.*

35. *In the affidavit in reply filed by the respondents in the present proceeding through Shri Varun Singh, Deputy Director General of Foreign Trade working in the office of Additional Director General of Foreign Trade, Mumbai, stand has been*

taken that Public Notice No. 47, dated 18-5-2011 had made the 'actual user' condition non-mandatory with effect from 18-5-2011. Regarding the notes and correspondences in the offices of respondent Nos. 1, 2 and 3 particularly with regard to the averments made by the petitioner vis-a-vis noting made by the then Joint Director General of Foreign Trade, Ms. Shubhra on 18-3-2011 that the 'actual user' condition should not have been inserted in the licences from the year 2004 onwards, stand taken is that she does not represent respondent No. 1 but respondent No. 3. Decision of the competent authority was different from the views of Ms. Shubhra i.e., the 'actual user' condition was valid till 18-5-2011.

36. *First of all insofar the affidavit in reply of the respondents to the present writ petition is concerned, the stand taken that Ms. Shubhra the then Joint Director General of Foreign Trade did not represent respondent No. 1 but respondent No. 3 and that the decision of the competent authority was different from the views of Ms. Shubhra, we may point out that respondent No. 1 is an officer subordinate to respondent No. 3, who is appointed by the Central Government under Section 6 of the Act. Respondent No. 1 cannot take a view which is different from respondent No. 3. So far reference to competent authority is concerned, it is not understood as to who is referred to as the competent authority - respondent No. 1 or respondent No. 3.*

37. *Be that as it may, the moot point is while before the Andhra Pradesh High Court, Union of India and Director General of Foreign Trade had taken the stand that the 'actual user' condition was non-mandatory since the year 2003 and that this position was clarified by way of the Public Notice No. 47/2009-14, dated 18-5-2011, in the reply affidavit filed in the present case on behalf of the respondents by Shri Varun Singh, Deputy Director General of Foreign Trade, the stand taken is that the 'actual user' condition has been made non-mandatory with effect from 18-5-2011 only and that the 'actual user' condition was valid till 18-5-2011. Thus, the stands taken by the respondents in the two proceedings before the two High Courts are contradictory. Respondents more particularly, Union of India and*

Director General of Foreign Trade cannot speak in multiple voices in different High Courts to suit their positions in the respective litigations. Union of India and for that matter, Director General of Foreign Trade must speak in one voice.

37.1 *As a consequence, if what Shri Varun Singh has averred on oath in the affidavit in reply filed in the present case is correct, then the averments made in the counter affidavit of Union of India and Director General of Foreign Trade filed through Shri K. Komalavally would be incorrect. In that case Shri K. Komalavally may even be hauled up for perjury for making incorrect statements before the Court. Conversely, if the stand taken in the counter affidavit by Union of India and Director General of Foreign Trade before the Andhra Pradesh High Court is taken as correct then the stand taken by the respondents in the reply affidavit in the present proceeding would be incorrect and Shri Varun Singh would be held responsible for that.*

38. *When respondent No. 1 adjudicated the show cause notices, it noted the proceedings before the Andhra Pradesh High Court but only stated that Public Notice No. 47, dated 18-5-2011 indicated that the 'actual user' condition was made non-mandatory with effect from 18-5-2011. Either the stand taken by Union of India and Director General of Foreign Trade before the Andhra Pradesh High Court was not brought to the notice of respondent No. 1 or he had conveniently overlooked the stand so taken. Be that as it may, respondent No. 1 took the stand that it was beyond the purview of the adjudicating authority to adjudicate on the legality of the conditions imposed in the import licences and therefore, he refrained from deciding on the matter of legality of the 'actual user' condition. However, after referring to the said condition and the provision of Rule 13 of the Foreign Trade (Regulation) Rules, 1993, respondent No. 1 held that petitioner had violated the 'actual user' condition of the licences thereby making it liable for action under Section 11(2) of the Act. Consequently, the penalty was imposed.*

39. *Reverting back to the order of this Court dated 20-11-2013, we find that this Court had directed respondent No. 1 to adjudicate the show cause notices dated 30-8-2013 on all issues*

after giving the petitioner an opportunity of personal hearing. 'All issues' would include validity of the 'actual user' condition in the licences or whether such a condition was mandatory or non-mandatory. This is because this Court had noted that the show cause notices had emanated from the 'actual user' condition which was impugned in the said writ petition. Validity of the 'actual user' condition or whether it was mandatory or not is the central issue. Refusal of respondent No. 1 to adjudicate on this issue is not only violative of the directions of this Court as contained in the order dated 20-11-2013 but also amounts to non-exercise of jurisdiction vested in him. As rightly pointed out by this Court in the order dated 20-11-2013 the core issue is the insertion of 'actual user' condition in the two licences - whether such insertion is legally permissible or without entering into this aspect, whether such condition is directory or mandatory are issues which are required to be gone into by respondent No. 1. Failure to do so has occasioned non-exercise of jurisdiction.

40. *Thus upon thorough consideration of all relevant aspects, we are of the view that the impugned order dated 14-2-2014 passed by respondent No. 1 cannot be sustained in law and is required to be set aside and quashed. We are further of the view that the matter requires to be heard afresh on all issues as directed by this Court earlier and as indicated above.*

41. *Since the order-in-original dated 14-2-2014 is interfered with, the order-in-appeal dated 24-7-2015 and the order in review dated 4-11-2015 cannot survive. Insofar encashment of bank guarantee furnished by the petitioner is concerned as well as the claim for refund of excise duty paid, needless to say those would be subject to such decision that may be taken by respondent No. 1 on remand."*

4.6 As directed by the Hon'ble High Court, their matter was further adjudicated by the Joint Director General of Foreign Trade vide his order dated 11.10.2021 holding as follows:-

"10. Public Notice 62 dated 22.02.2002 with respect to procedure for import of various items under Tariff Rate Quota(TRQ) including Maize stated as under

1 (b): Maize(corn)(Tariff Code NO. 1005.90): National Agricultural Cooperative Marketing Federation of India Ltd (NAFED), State Trading Corporation (STC), Minerals and Metals Trading Corporation (MMTC), Projects & Equipment Corporation of India Limited(PEC) and State Cooperative Marketing Federations are eligible to avail the quota. However, they have to make imports only on behalf of actual users. In addition, the starch manufacturers, cattle feed manufacturers and poultry feed manufacturers are also eligible for allocation of quota. Imports by these entities will be subject to actual user condition.

11. Further, the Minutes of the Inter- Ministerial Meeting held on 29.04.2003 inter-alia states that

"The Scheme was earlier limited to Actual users only. However, it was pointed out that instead of making import subject to Actual User Condition imports can be prioritised in terms of the need base of the applicants. EFC may accordingly decide allocation of quota".

12. Thereafter Public Notice No. 7 dated 9th May, 2003 announced the Procedure for import of various items under Tariff Rate Quota (TRQ). The provision for Maize read as under:

1 (b) Maize (corn) (Tariff Code NO. 1005.90): National Agricultural Cooperative Marketing Federation of India Ltd (NAFED), State Trading Corporation (STC), Minerals and Metals Trading Corporation (MMTC), Projects & Equipment Corporation of India Limited(PEC). Spices Trading Corporation Limited (STCL) and State Cooperative Marketing Federations are eligible to avail the quota as per the request(s) of applicants received.

13. Para 2.59 of HBP for TRQ read as under:

Procedure for import under Tariff Rate Quota Scheme: Attention is invited to Government of India, Ministry of Finance (Department of Revenue), Notification No. 21/2002-Customs dated 01.03 2002 As per it, import of four items viz., (1) Skimmed and whole milk powder, milk food for babies etc. (0402.10 or 0402.21) (2) Maize (corn): other (1005.90) (3)

Crude sunflower seed or safflower oil or fractions thereof (1512.11) and (4) Refined rape, colza or mustard oil, other (1514.19 or 1514.99) is allowed in a financial year, up to quantities as well as such concessional rates of customs duty as indicated below:

<i>S.No</i>	<i>ITC Code No.</i>	<i>Quantity of Quota</i>	<i>Concessional Duty</i>
<i>1</i>	<i>Tariff No 0402.10 0402.21 Skimmed or Powder Milk and whole Milk Food for babies etc</i>	<i>10,000 MTs</i>	<i>15%</i>
<i>2</i>	<i>Tariff Code No. 1005.90 Maize (Corn) other</i>	<i>5,00,000 MTs</i>	<i>15%</i>
<i>3</i>	<i>Tariff Code No. 1512.11 Crude Sunflower seed or safflower oil or fractions thereof</i>	<i>150,000 MTs</i>	<i>50%</i>
<i>4</i>	<i>Tariff Code No.1514.19 & 1514.99 Rape, Colza, Canola or Mustard Oil, Other (Refined)</i>	<i>150,000 MTs</i>	<i>45%</i>

Eligible Entities for allocation of Quota

2.59.1 (a) Milk Powder (Tariff Code No. 0402.10 or 0402.21): National Dairy Development Board (NDDB). State Trading Corporation (STC), National Cooperative 33 Dairy Federation (NCDF), National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED), Minerals and Metals Trading Corporation

(MMTC), Projects & Equipment Corporation of India Limited (PEC) and Spices Trading Corporation Limited (STCL)

(b) Maize (corn)(Tariff Code No. 1005.90): National Agricultural Cooperative Marketing Federation of India Ltd(NAFED) State Trading Corporation (STC). Minerals and Metals Trading Corporation (MMTC), Projects & Equipment Corporation of India Limited(PEC), Spices Trading Corporation Limited (STCL) and State Cooperative Marketing Federations

(c) Crude sunflower seed or safflower oil or fractions thereof (Tariff Code No. 1512.11) and Refined rape, colza, canola or mustard oil, other (Tariff Code No. 1514.19 or 1514.99): National Dairy Development Board (NDDB), State Trading Corporation (STC), National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED) Spices Trading Corporation Limited (STCL) and Central Warehousing Corporation (CWC) State Cooperative Marketing Federation & State Cooperative Civil Supplies Corporation.

All eligible entities are eligible to avail quotas as per request of applicants received.

All eligible entities desiring availment of quota as mentioned above, may make application to EFC in ANF to DGFT, Udyog Bhavan, New Delhi - 110 011. Completed application forms along with prescribed documents must reach on or before 1st March of each financial year preceding to the year of quota eg Applications for TRO for 2010-2011 must reach DGFT by 01.03. 2010.

Imports have to be completed before 31st March of financial year ie consignments must be cleared by customs authorities before this date.

Since import of maize (corn) is through STES, the allottees of quota ie. designated agencies in para 1 (b) above for this item shall also be granted an import Authorisation for allotted quantities as indicated at Sl. No. 21(b) of Customs Notification

No. 21/2002 dated 1.3.2002 in terms of para 2.11 of FTP, 2009-2014, if they do not wish to make imports through FCI.

Application fee for these applications shall be paid according to procedure contained in Appendix 21 B to HBP-vl. EFC in DGFT will evaluate and allot quota among applicants by 31st March of each financial year preceding to year of quota eg. for 2010-11, EFC will allot quota by 31st March 2010.

13. In view of the foregoing provisions the impugned Authorisations / Licences were issued by the Regional Authority, CLA Delhi [where the Joint DGFT holds office on the basis of the approval given by the Exim Facilitation Committee (EFC).

14. In the light of above discussion, it seems that AU condition was imposed by EFC by debut in these Authorizations in 2009-2010. Since the AU condition was imposed by the EFC, the corrective course of action would be to request the Positioner to approach the Policy Relaxation Committee for removal of AU condition as per Para 2.58 of the Foreign Trade Policy. The details of Procedure for the same have been given in Para 2.111 of HBP.

Order

16. In pursuance of Hon'ble High Court's Order and in consideration of above said facts provisions, the petitioner is hereby directed to approach the Policy Relaxation Committee at DGFT for relaxation of policy for removal of AU condition imposed on the authorization no. 0550001698 dated 31/12/2009 and 0550001804 dated 09/04/2010 issued to them for import of Maize within two weeks."

4.7 Policy Relaxation Committee of DGFT has considered the issue in meeting No. 21/AM22 held on 10.03.2022. The Committee recorded as follows:-

"Case No. 13 M/s. Shah Nanji Nagsi Exports Pvt. Ltd., Nagpur

F. No. HQRPRCAPPLY00260028AM22

Meeting No 21/AM22 held on 10.03.2022

Subject: To remove AU condition from 2 Import License No.(i) 0550001698 dated 31.12.2009 and (ii) 0550001804 dated 09.04.2010.

The applicant stated that the department has given contradictory submissions on the issue of imposition of AU condition on the import license of identical nature before the Hon'ble High Court, Mumbai, in case no 4838 of 2016 and also before the Hon'ble High Court of Andhra Pradesh in case no.6349 of 2011. The said case of their bearing no 4838 of 2016 was remanded back to the original authority for reconsideration of the case of imposition of AU condition on the subject licenses. Accordingly, the CLA, New Delhi has passed the further order dated 11.10 2021 directing them to file an application for relaxation with regard to the removal of the said AU condition as imposed against the subject licenses. This is pertinent to note that the said direction of the Learned Adjudicating Authority was issued to them without the same being their prayer or part of their prayers Hence, they are requesting to remove AU condition from 2 import license No () 0550001698 dated 31 12 2009 and (6) 0550001804 dated 09.04.2010.

*Decision: The Committee went through the statements made by the firm and discussed the matter at length and took note of Order dated 21.5 2021 of Hon'ble HC of Mumbai and Order dated 11.10.2021 passed by Jt DGFT, CLA Office in compliance of directions of Hon'ble HC Mumbai. **It observed that there is merit in the request of the firm and accordingly it decided to accede to the request for removal of AU condition from 2 Import License No.(0) 0550001698 dated 31.12.2009 and 0550001804 dated 09.04.2010. The farm shall approach concerned RA within 30 days from the date of uploading of the minutes of meeting.***

4.8 From the above, it is seen that the actual user condition that contained in the licence has now been deleted and the

demand confirmed against the appellant for the said reason cannot be sustained.

4.9 Customs exemption notification under consideration did not impose any such condition and it only referred to the same and the only condition was that an importer holds a Tariff Rate Quota Allocation Certificate issued by the EXIM Facilitation Committee in the Directorate General of Foreign Trade in accordance with the procedure as may be specified by the EXIM Facilitation Committee. The applicant with the amended licences have fulfilled the said conditions.

5.1 Accordingly in view of the above, the impugned order which holds that imports were made in violation of the conditions of the import licence cannot be sustained and needs to be set aside.

5.2 Accordingly the impugned order to the extent it pertains to the three appellants before us is set aside allowing their appeals.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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