

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

WEST ZONAL BENCH, MUMBAI

Customs Appeal No. 85638 of 2019

(Arising out of Order-in-Appeal No. 1897(Gr.I)2018(JNCH)/Appeal-II dated 13.12.2018 passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai-II.)

M/s AAA Trading Company
102 Sai Smruti Buildig,
L T Collony No. 2,
Dadar East, Mumbai – 400 014

.....Appellant

VERSUS

Commissioner of Customs, Nhava Sheva-I
JNPT, Customs House, Nhava Sheva,
Raigad, Maharashtra – 400 707

.....Respondent

APPERANCE:

Shri Chirag Shetty, Advocate for the Appellant
Shri Sai Krishna Hatangadi, Assistant Commissioner, Authorised
Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. 86147/2023

Date of Hearing: 02.06.2023

Date of Decision: 20.07.2023

Denial of benefit of exemption Notification No. 46/2011-Cus.
dated 01.06.2011 as amended *vide* Notification No. 63/2016-Cus.
dated 31.12.2016 ignoring certificate of origin issued by the
exporting Country in respect of imported goods namely cashew on
the ground that those were not roasted cashew so as to be covered
under the exemption notification and confirmation of duty demand

alongwith interest and penalties by the Adjudicating Authority that received of the approval of the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai-II *vide* his above referred order is assailed in this appeal.

2. Facts of the case, in brief, is that as per the provision of the Foreign Trade Agreement (FTA) of the Association of South East Asian Nations (ASEAN), benefit of exemption had been claimed by the Appellant against its import of roasted cashew kernel from Vietnam *vide* Bills of entry No. 5003672 dated 30.01.2018 in conformity to the above referred two Notifications No. 46/2011-Cus. and 63/2016-Cus., which were issued in accordance with the provision of the Customs Tariff (Determination of origin of goods) Act under the preferential trade agreement between the Government of Members state i.e. India in the instant case and the ASEAN. Intelligence was gathered by DRI that Appellant mis-declared the imported goods as "Roasted Cashew Kernel" falling under Tariff Item No. 20081910 and sought for denial of the benefit by proposing differential duty, interest with proposal for confiscation and redemption fine etc. as the same goods were held to be 'Plain Cashew Kernel'. Further investigation, Laboratory testing by the Cashew Export Promotion Council laboratory at Kerala, statement of the proprietor Mr. Okhayasho etc. reveal that imported goods were not roasted cashew and on the earlier occasion also. *vide* Bills of entry No. 5003672 dated 30.01.2018 another consignment of cashew from the same country of origin Vietnam was imported by the Appellant and exemption was also availed by it. Accordingly

differential duty of Rs.22,47,676/- was demanded for the live consignment and Rs.19,68,480/- was demanded from past consignment through show-cause notice with proposal for interest, penalty, confiscation of live consignment and penalty against passed consignment that was not available for confiscation. Appellant being unsuccessful at the adjudication level preferred an appeal before the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai-II who *vide* his order dated 13.12.2018 partly allowed the Appellant's appeal in respect of passed consignment on the ground that the same was not available for test and confiscation, for which he had accepted the country of origin certificate and granted necessary relief. However, he confirmed the demand, interest, penalty as well as confiscation order passed by the Adjudicating Authority in respect of live consignment that was kept on hold by the Customs. Legality of the order passed in respect of live consignment is assailed by the Appellant and the order passed in respect of passed consignment remains unchallenged.

2.1 At the commencement of hearing, jurisdictional issue was raised by the Respondent-Department on the ground that issue been one of interpretation of exemption notification for which the matter needs to be decided by the Division Bench but ultimately Revenue had withdrawn its transfer petition and a judicial order was passed by the Hon'ble Sr. Member for hearing of this appeal by this Bench. In view of the judgment of the Hon'ble Supreme Court passed in the case of *Commissioner of Customs, Bangalore-I Vs. M/s. Motorola India Ltd.* reported in 2019 (9) TMI 229 (SC) wherein it was clearly

held that violations of conditions of notification would not determine any question with regard to determination of "rate of duty" nor a question relating to "valuation of goods" for the purpose of assessment since goods are covered under the said notification and question that is required to be determine is alleged breaching of conditions by the assessee herein by the importer. In due obedience to the said decisions the hearing of this appeal is concluded and the same is taken up for orders.

3. During course of hearing of the appeal learned Counsel for the Appellant Mr. Chirag Shetty, with reference to Annexure - 3 of the Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Members states of the ASEAN) and the Republic of India Rules, 2009 published in the Notification No. 189/2009-Cus. dated 31.12.2009, argued that prima facie allegation against the importer is that he mis-declared the goods to avail the benefit of duty exemption but it is not dealt in accordance with the clearly stipulated procedure that was required to be followed by the Customs Authority of the importing country in case they have doubts about the certificate of origin issued by the competent authority of the exporting country as that has mandated resolving of such doubt in consultation with the competent authority issuing the certificate but the same procedure has been completely ignored by the Indian Customs to be followed that might have adversely impacted even the bilateral treaty and reputation of India in the international forum. Further, he submitted that certificate received from Food Safety of Standard Authority of India (FSSAI),

required to be filed at the time of clearance of imported goods, clearly noted that the sample confirmed to the specifications prescribed under the Food Safety and Standard Act, 2006 and Regulations made thereunder for which they have no objection for release of the said consignment and, therefore, withholding the goods and demanding additional duties of Customs by the Authority is disrespectful to the international treaties. He placed his reliance on the judgements of *Bombay Chemicals Pvt. Ltd. Vs. Union of India* [1982 (10) ELT 171 (Bom.)], *Bombay Chemicals Pvt. Ltd. Vs. Appellate Collector* [1990 (49) ELT 190 (Bom.)], *Santonza Trade Concern Pvt. Ltd. Vs. Union of India* – [2000 (122) ELT 662 (Cal.)], *Commissioner Vs. Tullow India Operations Ltd.* – [2005 (189) ELT 401 (SC)], *Zuari Industries Ltd. Vs. Commissioner* – [2007 (210) ELT 648 (SC)], *BDB Exports Pvt. Ltd. Vs. Commissioner of Customs (Prev.)* – [2017 (347) ELT 662 (Tri.-Kolkata)], *Yellama Dasappa Vs. Commissioner of Customs* – [2000 (120) ELT 67 (Kar.)], *Commissioner of Customs, Hyderabad Vs. Riddhi Siddhi Bullions Ltd.* [2017 (355) ELT 585] to support his stand taken during the argument.

3.1 In placing due reliance on the judgment of *BDB Exports Pvt. Ltd. cited supra* that dealt with import of cloves from SAARC Country, he further argued that provisions being identical, it can be said that Certificate of Origin issued by the designated authority cannot be dishonoured unless cancelled by the same authority. Decision of *Yellama Dasappa* and *Commissioner of Customs, Hyderabad Vs. Riddhi Siddhi Bullions Ltd.* are also cited that dealt with the

acceptance of Certificate of Origin unless the same is cancelled and in the case of Appellant certificate of origin is still valid. In respect of test report issued by the CEPCI he has drawn attention of this Bench to point out that the same certificate contradicts its own findings/opinion and the same is not a complete one as it indicates that analysis on roasting of sample products would be done and subsequent report would be sent and placing reliance solely on this certificate, the Commissioner (Appeals) has passed this order which is unsustainable both in law and facts.

4. In response to such submissions learned Authorised Representative for the Respondent-Department Mr. Sai Krishna Hatangadi submitted that sample tested in the laboratory of CEPCI were ascertained as Plain/Raw Cashew Kernel instead of "Roasted Cashew Kernel" and the objection of the Counsel for the Appellant is no more valid since, during pendency of this appeal, they sought for wanting report of the CEPCI, that was prepared after making a separate study and the same report also confirmed that the samples were not "Roasted Cashew Kernel" but raw Cashew Kernel. In supporting the reasoning and rationality of the order passed by the Commissioner (Appeals), he further submitted that the CEPCI had tested and opined that the samples were plain/raw Cashew Kernel broken pieces and not "Roasted Cashew Kernel" for which *prima facie* there was mis-declaration of goods so as to avail benefit of duty exemption and the goods failed to qualify for the benefits provided under AIFTA *vide* Notification No. 48/2011-Cus. dated 01.06.2011. She concluded his argument in pointing out that FSSAI had only

confirmed the specification but not conducted any test to determine it as roasted cashew or plain cashew and the certificate of origin from the exporting country did not reveal that any test was conducted at the shippers end, for which the order passed by the Commissioner (Appeals) needs no interference by this Tribunal.

5. I have perused the case record, test report, relevant notifications and the relied upon case laws. At the outset it can be said that para 3 of the Notification No. 189/2009-Cus. dated 31.12.2009 stipulates country of origin criteria and para 13 clearly provided provisions for acceptance of certificate of origin, it reads:

"Certificate of Origin – Any claim that a product shall be accepted as eligible for preferential tariff treatment shall be supported by a Certificate of Origin as per the specimen in the Attachment to the Operational Certification Procedures issued by a Government authority designated by the exporting party and notified to the other parties in accordance with the Operational Certification Procedures as set out in Annexure III annexed to these rules."

This being the clear provision and direction for acceptance of certificate of origin issued by the Government Authority designated by the exporting party, I have no objection to accept the certificate of origin copy available at page 156 of the Appeal Memo that has been issued by the Ministry of Agriculture and Rural Development the Government of Vietnam. At column 8 of it they have certified it as cashew nut Kernel roasted BB Grade. Therefore, in view of the requirement of Annexure-3 of the Customs Tariff (Determination of

Origin of Goods) Rules, 2009 in case of doubt regarding certificate of origin containing erroneous description of goods, resolution should have been made in consultation with Competent Authority issuing the certificate but apparently the same has not been followed by the Respondent-Department and, therefore, on this score alone the demand would not survive.

6. Now coming to the test report submitted by the CEPCI, Kerala there would not be any hesitation to say that the report creates more confusion than giving a finding/opinion on the product. At point No. 2 of the report it has been mentioned as follows:

"In the qualitative test Cardanol is present in both the samples. If the sample is roasted, the traces of cardanol will be less."

To elaborate this, it can be said that presence of Cardanol was noticed and if the sample is roasted traces of Cardanol will be less but the report lacks the basic clarity as to if Cardanol presence is much more than the same is supposed to be present in roasted cashew! Likewise at point No. 4, it is clearly mentioned that Fatty Acid is found to be higher above 3% and as per FSSAI standard the maximum limit prescribed is 1.25% for plain cashew. If this is the observation, then the sample should have been considered as roasted cashew since Fatty Acid presence is above 3% as for plain cashew Fatty Acid content should be less than 1.25% but surprisingly it (the report) said that on the basis of the above fact it was concluded that the sample was 'Plain/Raw Cashew Kernel' (baby bits).

7. Therefore, the only conclusion that can be drawn is that the report is devoid of all logic and it is apparently prepared to favour the department but it contains the basis of such preparation that is favouring the stand taken by the importer appellant. The report remained inconclusive as there was an indication to send analysis of 'roasting' of the sample product subsequently that was not done since April, 2018 till they produced some roasting reports through the concerned Commissionerate after its repeated insistence that had been forwarded to the AR office by the Deputy Commissioner of Customs, JNCH vide his letter dated 25.09.2022. Paragraph 4 of his letter reads as follows:

"4. Attached is the detailed thread of the said e-mail communication(s) from CEPCI Lab, Kerala wherein Scientist of CEPCI Lab has clarified that the subject samples drawn vide panchanama dated 21.03.2018 were not used to conduct the said study. However, based on the study so conducted, Scientist reiterated that the subject samples drawn vide panchanama dated 21.03.2018 are/were not roasted."

8. On perusal of the report, it is noticed that on which date those test were conducted is not available in the said report and on which date they have forwarded the same to the Commissioner, JNCH is also not indicated except putting a head-note on these 10 pages report that it is a clarification of CEPCI with reference to test certificate No. 1039 dated 04.04.2018. It is quite imposable to preserve the samples for 5 years without exposure to moisture etc. having its self-live period also. Therefore, the veracity of these reports are questionable apart from the fact that page 4 of the said

report that contents quality parameter of Cashew Kernel during AR roasting indicates that the more time it is exposed to heat the more it loses its moisture content, but from it, no reference could be made as to if after being exposed to moisture again subsequent to roasting also cashew nuts would absorb moisture further. Moreover the observation of Additional Commissioner in para 4 of his letter referred above that based on the study so conducted Scientist reiterated that the sample drawn *vide* its punchnama dated 21.03.2018 are/were not roasted is manifestly missing in this supplementary test documents forwarded to support the test report. Hence the order.

The Order

9. The appeal is allowed and the order passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai-II *vide* Order-in-Appeal No. 1897(Gr.I)2018(JNCH)/Appeal-II dated 13.12.2018 is hereby set aside with consequential relief, if any.

(Order pronounced in the open court on 20.07.2023)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad