

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

REGIONAL BENCH – COURT NO.2

CUSTOMS APPEAL NO: 87173 OF 2023

[Arising out of Order-in-Original CAO No: COMMR/AKG/23/2016-17/ADJN. ACC(X) dated 22nd March 2017 passed by the Commissioner of Customs – IV (Export), Air Cargo Complex, Mumbai.]

USMS Saffron Co Inc **... Appellant**
32 Himuda Indus Area, Bhatoli Kalan Baddi
Solan, Himachal Pradesh-173205

versus

Commissioner of Customs (Export), **...Respondent**
Mumbai – IV, Air Cargo Complex,
Sahar, Andheri East, Mumbai

WITH

CUSTOMS APPEAL NO: 87174 OF 2023

[Arising out of Order-in-Original CAO No: COMMR/AKG/23/2016-17/ADJN. ACC(X) dated 22nd March 2017 passed by the Commissioner of Customs – IV (Export), Air Cargo Complex, Mumbai.]

Nilesh Mota **... Appellant**
20, Kapadia Chamber Devji Ratanshi Marg, Masjid
East, Mumbai

versus

Commissioner of Customs (Export), **...Respondent**
Mumbai – IV, Air Cargo Complex,
Sahar, Andheri East, Mumbai

WITH

CUSTOMS APPEAL NO: 87175 OF 2023

[Arising out of Order-in-Original CAO No: COMMR/AKG/23/2016-17/ADJN. ACC(X) dated 22nd March 2017 passed by the Commissioner of Customs – IV (Export), Air Cargo Complex, Mumbai.]

Global Exim **... Appellant**
301-302 Faiz E Qutbi Narshi Natha Street, Masjid West,
Mumbai - 400009

versus

Commissioner of Customs (Export), **...Respondent**
Mumbai – IV, Air Cargo Complex,
Sahar, Andheri East, Mumbai

AND

CUSTOMS APPEAL NO: 87176 OF 2023

[Arising out of Order-in-Original CAO No: COMMR/AKG/23/2016-17/ADJN.ACC(X) dated 22nd March 2017 passed by the Commissioner of Customs – IV (Export), Air Cargo Complex, Mumbai.]

Jani and Co **... Appellant**
430 Vyapar Bhavan, P D’Mello Road, Masjid East
Mumbai - 400009

versus

Commissioner of Customs (Export), **...Respondent**
Mumbai – IV, Air Cargo Complex,
Sahar, Andheri East, Mumbai

APPEARANCE:

Shri Prakash Shah, Advocate and Mr. Rohit Rawal, Advocate for the appellants
Shri D S Mann, Deputy Commissioner (AR) for the respondent

CORAM:

HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON’BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85482-85485/2024

DATE OF HEARING: 29/11/2023
DATE OF DECISION: 25/04/2024

PER: C J MATHEW

‘Then it was like a genie out of the bottle and it began to walk all on its own and in directions..’

said to have been the words of Mikhail Kalashnikov echoes uncannily in the cavil before us. And though, it is said, the genie can never be put back, it should not be for want of trying for, if indeed it is out, the consequence could well be catastrophic for policy governance. The economic management of a nation rests upon four ‘policy’ pillars – monetary, fiscal, industrial and trade – and it is only from the harmonious blending of these that stability is assured. The issue in question is the statutory competence of a creature of Customs Act, 1962, owing its existence to section 3 therein, to interpret policy, and its offspring instrument thereof, enabled under the authority of the Foreign Trade (Development & Regulation) Act, 1992 beyond its jurisdictional ambit of the twin limbs of assessment - rate of duty and value - under section 17 of Customs Act, 1962, with contingent recourse to recovery under section 28 of Customs Act, 1962, and to interdict clearance of ‘saffron’ for home consumption from empowerment to deter entry of ‘prohibited’ goods.

2. This is not a case of ‘saffron’ having been misdeclared. Nor is this a case of ‘saffron’ having been undervalued. Computation of import duty on ‘saffron’ is also not in question. Nor is there any allegation that import of ‘saffron’ is subject to any prohibition. And yet, Commissioner of Customs-IV (Export), Air Cargo Complex (ACC), Mumbai found it conscionable to

hold that 'saffron', valued at ₹ 70,19,96,270 and imported between October 2010 and May 2013, was liable to confiscation under section 111(d) and section 111(o) of Customs Act, 1962 and to direct recovery of ₹ 25,22,83,817 under section 28(4) of Customs Act, 1962 as duty not paid from the appellant, along with interest thereon under section 28AA of Customs Act, 1962, while imposing penalty of like amount under section 114A of Customs Act, 1962, as well as under section 114AA of Customs Act, 1962, on the appellant and under section 112(a) of Customs Act, 1962 on others, some of whom, including customs broker and a custodian of transferred licences, found themselves at the wrong end of section 114AA of Customs Act, 1962 too in the impugned order¹.

3. In these circumstances, it does not behove us to keep the facts at bay. Ninety consignments of 'saffron'/ 'saffron pushali B' were imported by M/s USMS Saffron Co Inc which, after assessment and upon satisfaction of 'proper officer' designated for section 47 of Customs Act, 1962, were allowed to be cleared for home consumption against the claim of being entitled, as holder of 'authorizations', to privileges in notification no. 40/2006-Cus dated 1st May 2006 and notification no. 98/2009-Cus dated 11th September 2009. The impugned order denied entitlement to that claim for not having been in possession of valid 'authorizations' consonant with framework of 'duty free import authorization (DFIA)' scheme in the Foreign Trade Policy (FTP) and, thus, liable not only for return of duty

¹ [order-in-original CAO no. COMMR/AKG/23/2016- 17/ADJN.ACC(X) dated 22nd March 2017]

foregone at the time of clearance but also to consequences of liability of the goods to confiscation as well as for furnishing false documentation. According to the adjudicating authority, it all boiled down to ‘saffron’ not being ‘food flavour’ or ‘food colour’ that could, to the extent specified in ‘standard input output norms (SION)’, be legally imported without payment of duty in accordance with the particular scheme in the Foreign Trade Policy (FTP) and the authority to so determine vesting in the ‘proper officer’ from statutory control, between entry for the purpose of export and shipment out of India, over the goods that qualified for accrual of benefit as well as from responsibility to administer notifications issued under section 25 of Customs Act, 1962. As is usual among notifications of its ilk – according exemption as incentive in schemes of ‘export promotion’ in the Foreign Trade Policy (FTP) for import of goods used in the manufacture of goods intended for export - aspects of implementation of ‘duty free import authorization (DFIA)’ scheme, viz., certification of exports and clearance of imported goods, too were entrusted to customs administration through the notification, affording exemption to goods imported against ‘authorizations’ for manufacture and export, under Customs Act, 1962. And like other schemes of its ilk, it was also not necessary to import goods for manufacture and export with goods importable after exportation for being transferred or the right itself transferable subject to approval from the licencing authority. Here, the importer had, at the time of assessment, furnished eligibility, as transferee of ‘authorizations’ duly approved by the

competent authority, to benefit of exemption. That, according to the appellant-importer, should have been satisfactory closure as far as the goods were concerned; and that it was not is the cavil of the appellants.

4. The original holders of the ‘authorizations’, issued by the Directorate General of Foreign Trade (DGFT) with condition of ‘actual use’, were required to fulfill export obligation committed by them in their applications preferred under the Foreign Trade Policy (FTP); that they had, indeed, exported ‘biscuits’/‘assorted confectionery’ to the extent of their obligation is evident in the impugned order which dropped proposals for imposition of penalty against all of them and that, as not having been resorted to for import of ‘permissible goods’ to be used in manufacture for export, these ‘authorizations’ were rendered ‘transferable’ with approval of the licencing authority and that imports against these ‘transferred’ ‘authorizations’ were not required to be used in manufacture by the ‘transferee’ importer did not trouble the adjudicating authority at any time. It was just that ‘saffron’ was not ever intended to be ‘food flavour’ or ‘food colour’ – and eligible to be imported against the ‘authorizations’ issued with obligation to export ‘biscuits’/‘assorted confectionery’- that did. According to the importer, ‘saffron’, conceivably and actually, is ‘food flavour’ and ‘food colour’ and no restriction thereto had ever been placed on import of ‘saffron’ against the ‘authorizations’ to validate the proposal to recover duty foregone at time of import and to confiscate them for imposition of penalties. That the ‘authorizations’, as transferred in their favour, had been extinguished of

restrictions that attended upon issue to the applicants, and, therefore, valid for 'duty free' import unconditionally was the assertion of the importer. That 'saffron' is not excluded from coverage under 'food flavour' and 'food colour' could not have been in doubt as its incorporation in the note below the applicable group in the 'standard input output norms (SION)' from 2010 onwards was, time and again, harped upon in the impugned order. It was just that, according to customs authorities, 'actual use', entailed in the applicable group of the 'standard input output norms (SION)', did not attend manufacture of 'biscuits'/'assorted confectionery' which were exported and the entitlement of the importer to acquire the 'authorizations' for procurement of 'saffron' was contingent only on manufacture of 'biscuits'/'assorted confectionery' by deploying 'saffron' which, being well nigh improbable for being economically unviable, rendered the clearance untenable. On this foundational proposition was erected the further proposition that the licencing authority had not extinguished 'actual use' restriction in the 'authorizations' and absence thereto in the 'amendment sheets' appended to the 'authorizations' was not tenable support of claim that such extinguishment was, indeed, certified. Thus, the dispute over the consequences in the impugned order is about retention of 'actual use' condition in the 'transferred' 'authorizations' owing to the restrictive intent of 'standard input output norms (SION)' that had, allegedly, been suppressed at the time of import to obtain benefit of exemption notification without being eligible.

5. It has ever been the claim of importers that they were strangers to the exporters and entirely unconcerned with the goods exported by them and that the ‘authorizations’ had been obtained through brokers. They further held out that the impugned imports were entirely in the clear – both as to erasure of ‘actual use’ condition through amendments before they were put in possession of, or had not ever been entailed in, the ‘authorizations’ and by conceivable use of saffron as ‘food flavour’ and ‘food colour’ in edible goods. And yet, that the impugned order did wend its way, through the contours of ‘investigation trails’, to illegitimacy of claim for benefit of the ‘duty free import authorization (DFIA)’ scheme in the Foreign Trade Policy (FTP) is the grievance.

6. It was held in the impugned order that, with the exporters – to a person – having admitted to not having used ‘saffron’ in manufacture of goods exported by them, the ‘authorizations’ for ‘duty free’ import, that were enabled to be transferred only in consequence thereof, did not qualify for clearance of anything but those incorporated in the description of exported goods. Proceeding from that exclusion, and relying on purported clarifications obtained in 2015 from offices of the licencing authority, the adjudicating authority also negated recourse to ‘capable of being used’ as sufficing for ‘duty free’ clearance by demonstrating that such use was beyond rational contemplation inasmuch as the cost of saffron, even for the permissible quantities, far outstripped the export value of ‘biscuits’/ ‘assorted confectionery’ to render such proposition untenable. It was also

held that protestation of sanctity of the amended licences failed to convince as the eventual user, and brokers, of licences had obtained the amendments, and cleared imported goods, by false pretences and by contriving to deflect proper comprehension of the amendments that convinced the adjudicating authority of ‘toxicity’ of the ‘authorizations’ and, thus, denuded of validity. These recurring refrains are reproduced in each of the findings on the issues identified by the adjudicating authority as prelude to finalizing the adjudication order and are, thus, the proximate justification for confiscation and for recovery of duties. The jurisdiction to adjudicate notice, under section 28 and section 124 of Customs Act, 1962, has been sought to be anchored in the alleged misdeclaration in the bills of entry wherein, for the purposes of section 12 in relation to assessment to duty under section 17, as pre-requisite for compliance with section 47, of Customs Act, 1962, to enable clearance for home consumption, the impugned goods were claimed to be in conformity with description corresponding to tariff item 0910 2090 of First Schedule to Customs Tariff Act, 1975 but the authorization was intended originally for ‘duty free’ import of goods falling within chapter 32 or chapter 33 of ITC (HS) appended to Foreign Trade Policy (FTP).

7. There is, thus, no finding that flows from infirmity in assessment of duty to validate the two detriments, attended upon by corresponding penalties, on the imported goods and importer as well as on the brokers – of licences and for clearances – in the impugned order. It would not have been so had the adjudicating authority determined erroneous computation

of duty liability or/and of the goods being prohibited at the time of clearance for home consumption that, somehow, slipped past the ‘proper officer’ enjoined with responsibility by section 47 of Customs Act, 1962. However, the recovery of duty, here, is not predicated on incorrect assessment under section 17 of Customs Act, 1962 inasmuch as it was the assessed ‘duty foregone’ that, uncontestably, had been adopted for recovery and confiscation has not been predicated on goods being prohibited for import which could not have been as one of the two prompts invoked in the impugned order for confiscation of the impugned goods also happens to be one among the only four therein not related to ‘dutiable or prohibited goods’ but to ‘any goods’

(d) ...which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by, or under this Act or any other law for the time being in force;’

in section 111 of Customs Act, 1962. Read in conjunction with the

‘(23) “import”, with its grammatical variations and cognate expressions, means bringing from a place outside India’

in section 2 of Customs Act, 1962 and, in contradistinction with ‘imported goods’, a compound expression deployed elsewhere, in section 2(24) of Customs Act, 1962, as well as the absence of any guide to ‘prohibition’ therein, it is safe to say that ‘prohibited goods’

‘(33)means goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force...’

in section 2 of Customs Act, 1962 and from deployment of the compound expression in most of the remaining dozen enumerations which may be invoked for confiscation, was not intended as substitute for obtaining that particular empowerment. Consequently, ‘any goods’ in section 111(d) would be liable for confiscation upon being brought from outside India, and not by reason of prohibition on import/export alone but on being transacted within the country too. It is not the case of the adjudicating authority that ‘saffron’ has any prohibition attached to it under Customs Act, 1962 or any other law. Doubtlessly, section 111(d) of Customs Act, 1962 has been invoked without any basis in law.

8. The recovery under section 28 of Customs Act, 1962 is but a consequence of purported invalidation of ‘authorizations’, despite endorsement as ‘duly transferred’ by the licencing authorities, owing to confiscation of corresponding goods under section 111(d) and section 111(o) of Customs Act, 1962; at first blush, we fail to appreciate the manner by which an importer could be entailed with post-importation conditions, intended for ensuring adherence to commitment of ‘export obligation’, on imports against ‘authorizations’ endorsable as ‘duly transferred’ only upon extinguishment of obligations therein. Both these will be dealt with *in extensio* presently after dwelling upon the rival contentions before us on this very nub of the controversy as the essence of the dispute lies in alleged breach of conditions continuing to be attached, ‘limpet like’, to imports in the impugned notification.

9. Before turning to that crucial aspect, there is one critical feature that cannot be left unaddressed; more so, as the adjudicating authority – a creature of Customs Act, 1962 – has set out to go beyond its ordinary remit, of subjecting imported goods to assessment of duty to be discharged and to ascertainment of not being ‘prohibited goods’ *supra* before being cleared for home consumption with deficiency thereof to be rectified by recourse to section 28 and/or section 111 of Customs Act, 1962, to debar privilege assured in terms of a scheme espoused in the Foreign Trade Policy to incentivize foreign trade under the authority of Foreign Trade (Development & Regulation) Act, 1992. The empowerment has been appropriated in the belief that the remit flows from tax exemption afforded thereby without pausing to consider that the privilege did not flow from a concession or exemption incorporated in the ‘tax policy’ of the Central Government but ensconced within the rubric of a ‘trade policy’ initiative. The substantive distinction is that ‘tax policy’ sets out effective rates of duty in pursuance of some object enabled by the taxing statute while ‘trade policy’ incentivizes exports by offering benefits that are not otherwise due.

10. Exemption from import duties, and indeed all levies, is built into exports of every sort and the entirety of chapter X of Customs Act, 1962 is devoted to neutralization of taxes in the costing of export goods. Thus, exemption from taxes are not an incentive singular to design of schemes in the Foreign Trade Policy and any consequence predicated on a contrary assumption is anathema to the *raison d’etre* of such policy. At best, the

according of exemption upfront, instead of subsequent reimbursement, may be beneficial in working capital flow and nothing more; certainly not sufficing to jeopardize the objective of a scheme by subjecting its implementation to the unalloyed rigour of rigidity that bedevils levy and collection of taxes. The interpretation of the framework of a scheme, adorning ingenious modes of incentivizing, by the touchstone of tax enforcement, and merely owing to an enabling notification under the taxing statute, as a 'vanilla' variation of 'drawback' arising on exports is the 'genie' that has been uncorked. Here, the interpretation of the 'policy scheme' has been subsumed into an adjudicatory exercise of limited remit instead of being undertaken as an inter-departmental reconciliation in pursuance of economic stability. And it is here that the Tribunal is called upon to ascertain the robustness of the mandate, of tax collection and prohibition enforcement, to not only accommodate but also to be entrusted with jurisdiction to determine primacy among policies. That 'trade policy' may intend 'broad banding' in tax exclusion is not illegality and that such policy does traverse beyond the expropriation of taxes from export price is not a flaw for rectification by the tax collection agency. Such perspective, inevitable from such jurisdictional conferment, would subordinate all policy formulation of the government, in one way or other, to the revenue establishment of the State.

11. According to Learned Counsel for appellant, the imports effected by the appellant are entirely in order and in accord with the 'authorizations' as procured by them. He contended that the adjudicating authority has

erroneously proceeded on the premise that only such goods as have found use in the manufacture of exported goods may be imported without pausing to consider the substantial difference between treatment accorded to a licence for import of goods prior to export and import of goods after export. Assailing the interpretation of the adjudicating authority that 'capable of being used' is to be tested against the cost of 'saffron' as proportion of price of 'biscuits' or 'assorted confectionery', it was contended that the generality of description, affording procurement of alternative goods that, uncontestably, is not to be denied in 'post-exportation' import, has been sought to be discarded through a benchmark that has not even been hinted at in the inter-departmental correspondence adduced in the impugned order or even in the intra-departmental communication referred to. The collation of opinion of exporters on eligibility to import 'saffron' and the insinuation that any clarification/amendment pertaining to the impugned authorizations, instead of being accepted as proper exercise of empowerment by a statutorily competent licencing authority, were obtained by subterfuge and false pretences was strongly resisted by Learned Counsel as improper attempt at interpretation of instruments of governance that was well beyond the competence of adjudication proceedings statutorily confined to the framework of section 28 and section 111 of Customs Act, 1962.

12. Learned Counsel referred to the correspondence emanating from the licencing authority, as well as the amendment sheets attached to the impugned 'authorizations', to demonstrate that the adjudication had erred

in presuming to determine the manner in which the office of licencing authority should function. It was contended that the adjudicating authority had, without valid basis, padded up, or read down, the deliberate exclusions from the original, or the clarification implicit, in the amendments. According to him, it was not the intention of the scheme to fasten 'actual use' condition on a transferee in a scheme that acknowledged 'trade' in eligible 'authorizations' to be an incentive itself and that the adjudicating authority had tied itself into contradictory knots by placing a premium on 'actual use' when 'transferability' was a privilege attached to fulfillment of export obligation. It was also contended that 'alternative product', eligible by 'capable of being used', cannot be left to be determined by the discretionary whims of a tax collector when the objective of the scheme is commercial benefit to the participants in the scheme of the Foreign Trade Policy (FTP). According to him, if that had been the intent, the policy would have articulated so in no uncertain terms. He placed reliance on several judicial decisions that have a bearing on the limited remit available for customs officials to intervene in a licencing issue or where customs official could claim primacy. These shall be referred to should we be required to address the issue of jurisdictional limitation on exercise of adjudicatory prerogative.

13. On judicial determination in similar matters, Learned Counsel cited the decision of the Hon'ble High Court of Bombay in *Commissioner of Customs (Export) v. USMS Saffron Co Inc [2016 (2) TMI 1032 – BOMBAY HIGH COURT]* holding that

'12. The Tribunal recorded a finding of fact that whenever the Revenue had issued licenses styled as Duty Free Import Authorisation, the restrictions appearing in the notifications in question or the Standard Input Output Norms relating the individual items, they were invariably mentioned by the Licensing Authority in the license at the time of issuing or on transfer. If a particular authorisation does not contain an entry for restricting Saffron, then, by an inferential process and when the Licensing Authority did not think it proper to insert it, it will not be permissible to read it in the same. In terms of duty which is to be imposed and recovered, there is no question of any inference. The provisions enabling imposition and recovery of tax for duty have to be cleared. In the present case, the DFIA in question did not contain any entry restricting Saffron. That is how and in the absence of any further amendments to these authorisations that the Licensing Authority did not deem it proper to impose any liability. If that has not been imposed and the process by which it has to be read is as above, then, the Tribunal's finding of fact cannot be termed as perverse or vitiated by any error of law apparent on the face of the record.'

and on

'28. The appellant was right in their contention that so long it is not in dispute that saffron imported by the appellant is food flavour, it qualifies for duty free import under DFIA. There is no further requirement that only food flavour which was actually used by the exporter can be imported by the transferee of DFIA. Such a restriction that only the input of the same specification, quality and technical characteristics as used in the export product should be imported under DFIA applies only to the sensitive item mentioned in para 4.32.2 of Hand Book. This also flows from the plain terms of Notification No. 40/2006 and 98/2009. The appellant is right in his argument that the only requirement of notification is that the imported goods must answer the description of the item mentioned in the DFIA. Neither the Biscuits nor the Saffron or Food Flavour fall in Para 4.32.2 of Hand Book. Therefore it is not necessary to correlate the technical specification, quality and characteristics of the imported goods with those used in export

product.’

in the decision of the Tribunal in *Laxmi International and others v. Commissioner of Customs* [2017 (3) TMI 629 – CESTAT MUMBAI].

14. Learned Authorized Representative was apprehensive, and justifiably so, that the Tribunal was inclined to be influenced by its earlier decision in *re USMS Saffron Co Inc*, and followed in *re Laxmi International and ors*, and contended that, though appeal of Revenue was dismissed by the Hon’ble High Court, the pendency of appeal before the Hon’ble Supreme Court sufficed to place these in jeopardy as binding precedent and urged that the resolution of this dispute be on the merits of the factual matrix. He further urged that the admitted non-utilization of ‘saffron’ in both ‘biscuits’ and ‘assorted confectionery’, exported in fulfillment of obligation in the ‘authorizations’, sufficed to proceed against the impugned goods and the appellants herein, which was not before the Tribunal in the other disputes, also reinforced the claim of lack of judicial determination of the issue therein. It was also pointed out that licences issued to two of the exporters, M/s Rama Export and M/s Laxmi International, have had their transferability privilege revoked entailing recovery of duty foregone. It was contended that the claim of the appellant about the extent and scope of amendments effected in the licence should not be accepted as the pattern in exclusions was sufficiently consistent to conclude that, except when specifically altered, the original conditions were to be read along with the amendments. It was argued that ‘requirement for production’ in the scheme of the policy document makes it

abundantly clear that only such goods are permissible for import as have been utilized in the manufacture of the exported goods.

15. The impugned order has attempted to justify its jurisdiction on the premise of mis-application of licences, intended for goods covered by chapter 32 or 33 of ITC (HS) Code appended to the Foreign Trade Policy (FTP), for import of 'saffron' classified under heading 0910 2090 of First Schedule to Customs Tariff Act, 1975 and, therefore, of having availed the benefit of notification no. 40/2006-Cus dated 1st May 2006 and notification no. 98/2009-Cus dated 11th September 2009 without eligibility thereon. It would appear that the adjudicating authority has proceeded to find against the appellants on an entirely inappropriate premise and without ascertainment of the empowerment, and competence, of licencing authorities to conform with section 12 of Customs Act, 1962 in discharging its functions under Foreign Trade (Development & Regulation) Act, 1992. The provision under Customs Act, 1962 is authority for determining the rate of duty to be charged on goods upon occurrence of taxable event; the principles governing classification for identification of the tariff line describing imported goods most accurately is set out in Customs Tariff Act, 1975 only for that exercise. And all of this is for the specific purpose of assessment to duty. The assessment undertaken under section 17 of Customs Act, 1962 has not been disputed in the impugned order. The Indian Trade Classification (Harmonized System) Code, while largely aligned with the Schedules to Customs Tariff Act, 1975, has not been

enacted as a statute and alterations thereto are also not subject to legislative enactment as no statutory levy hinges thereby. It is a classification code that is handmaid for administrative convenience and consistency. The presence or absence of reference to ITC (HS) Code in the impugned authorization does not impact importability of goods except where import without licence is a transgression of law. Here, the 'authorization' is not relevant to import but for entitling exemption from duty and which, in turn, is dependent on conformity of the imported goods with the 'authorization' issued by the competent authority. That the 'authorization' may originally have incorporated such reference does not stand in the way of eligibility to exemption from duties which, as per 'authorization', is derived from the relevant entries in the relevant group in the 'standard input output norms (SION)' that, in the present dispute, revolves around 'food flavour' or 'food colour', as the case may be, without any more detailed description of eligibility. The classification, which stems from section 12 of Customs Act, 1962, is limited to charging of duty and its appropriateness for that purpose, which is not in contention here, does not find utility elsewhere unless statutory mandated. The impugned order has not adverted in that direction and the finding of misdeclaration thereon, being incomplete for that reason, is void of legal authority.

16. The impugned order is further founded upon the ascertainment that 'saffron' had not been used in the exported goods and, therefore, in breach of conditions incorporated in 'standard input output norms (SION)' as note

below product group E1 and E5, as the case may be, warranting denial of exemption for not being in possession of ‘authorization’ permitting ‘duty free’ import. It is evident that ‘food colour’, which, in the absence of finding to the contrary, saffron must be taken to be, in E1 is not subject to ‘actual use’ and, moreover, the amendments effected in the licence/authorizations have extinguished this condition; the reasons for such extinguishment may have been one or several, and not the least of which could be fulfillment of export obligation, which the adjudicating authority, in inferring that such extinguishment was not intended by the amendment, has not considered. That inference, thus, lies in the sphere of speculation and speculation is no ground for fastening detriment in an adjudication proceeding. No clarification has been sought on the specifics of the impugned amendments and intent thereof; the clarification of 20th July 2015 from the Mumbai office of the licencing authority is with reference to notes below the relevant product group in the ‘standard input output norms (SION)’ and does not offer insights into the impugned ‘authorizations’ for tenable conclusions therefrom. Furthermore, Learned Counsel has drawn our attention to letter dated 8th March 2017 attesting to validity of the revisions in the impugned ‘authorizations’ and which finds no reference in the impugned order. Both the presumed retention of ‘actual use’ condition, notwithstanding the amendments to that effect, as well the restriction on ‘alternative product’ premised on costing of exported goods, float in the ‘ether of statutory vacuum’ and, in the absence of express intent, elaborated in clarification

from the licencing authority, deployment to disadvantage of importer in proceedings under section 28 and section 124 of Customs Act, 1962 jeopardizes the validity of the findings and outcome therein.

17. Much has been made of order, dated 7th January 2016, reversing entitlement contained in the ‘authorization’ issued to M/s Laxmi International and M/s Rama Exports in adjudication proceedings of the licencing authority. The restoration of restrictive conditions therein is not the outcome of finding that, fulfillment of export obligation notwithstanding, the conditions of import remain unaltered but that there was an error in enumeration which the exporter chose to take advantage of and, therefore, deserving of being deprived of the pecuniary benefit from transfer. No clarification emerges from that order to impact any of the other ‘authorizations’ impugned in this appeal. It is pertinent to note that reliance on this development strikes at the very pillar on which the impugned proceedings have been erected as none of the other ‘authorizations’ were similarly proceeded against and must be deemed, for want of similar outcome, as validated. In the light of importer being a transferee of ‘authorizations’ invalidated subsequent to its use, the detriment, flowing thereby from processing subsequent to transfer by the two entities who were issued with it, is hit by the bar of limitation in the absence of any finding that the ‘person liable to pay duty’ had been involved in obtaining of ‘authorization’ or in the exports that enabled transfer. There is no such finding and the consequence of invalidation is not only restricted to imports

effected against those ‘authorizations’ but also barred from being deployed for recovery by lapse of normal period of limitation.

18. Turning now to the most significant issue, which covers both confiscation by relying on section 111(o) of Customs Act, 1962 as well as the implied jurisdictional oversight of customs authorities to interpret ‘authorization’ for ‘duty free’ import issued under empowerment in Foreign Trade (Development & Regulation) Act, 1992, we deal with the contention of the adjudicating authority that the test of ‘actual use’ is necessary for entitlement to exemption in the impugned notifications owing to the contents of paragraph 4.2.1 in Foreign Trade Policy (FTP) 2009-2014 thus

‘4.2.1 DFIA is issued to allow duty free import of inputs, fuel, oil, energy sources, catalysts which are required for production of export product....’

The approach of the adjudicating authority to discredit the ‘authorizations’, neither by recourse to the licencing agency for authoritative clarification on the scope of each authorization nor by invalidation in hands of the issuing authority, by obtaining of admission of ineligibility from the exporters and inference of scope of ‘authorizations’ therefrom is evident in

‘4.22 The above statements confirmed that the exporters whose DFIA Licences were used by the Noticee No. 1 M/s. USMS Saffron Co Inc, have never used Saffron in any form i.e. either in the form of ‘flavour’ or in the form of ‘colour’ in the manufacture of biscuits and assorted confectionery. All the exporters in their respective statements admitted that import of saffron under the subject DFIA licences is not permissible under SION norms and related Public Notices, since they have not used saffron in the manufacture of the export product.’

of the impugned order when it was the claim of

‘5.5.2all licences were got amended changing the status AU to Transferable and the entry Food Flavour has been reflected in the amendment sheet, hence the goods were imported the transferee. that once the licence has been issued by DGFT, it means all export conditions have been fulfilled by the exporter. Otherwise DGFT might not have issued import licence against the exports; that they do not know whether saffron was actually used as an input, they do not have the export supporting documents, they do not know who made the licence amendments.’

as recorded in the impugned order that should have been taken up for ascertainment. We have elaborated *supra* on the statutorily enabled ‘post export’ neutralization of duties available from the inception of customs law and, since first crafted in the then newly emerged nation - now known as the United States of America - even before its Constitution was, is a basic feature of customs law everywhere. That being a vested right of any exporter that contractually binds the State², ‘trade policy’ driven export promotion schemes should patently offer something more at ‘post-exportation’ stage and that something more appears to be the flexibility engendered from generic description of eligible imports, catering not just to the exporter as source of premium but also, and more especially, to transferee-importers. There is nothing in the impugned order from which we may deduce that the adjudicating authority had reason enough to discard the ‘incentive effect’ built into the design of such schemes other than revenue maximizing which sits well with ‘tax policy’ and not necessarily

² See *Haldiram Foods International Pvt Ltd* [2020 (12) TMI 1229 – CESTAT MUMBAI]

with other policies of government.

19. It does not require familiarity with rocket science to conjecture that ‘export promotion schemes’ are devised around some incremental benefit, beyond sale consideration from buyer and drawback from the Central Government, to be of purpose for the stated objective of ‘trade policy’ of the government. It also requires but the barest of understanding to appreciate the scheme, and the attendant exemption notification, in terms of general intent – a framework for a potential exporter to source, without payment of duty, goods necessary for production of stipulated goods as an option which, if exercised, must be ‘ring fenced’ with safeguards, till the ‘quid’ and ‘quo’ are, so to speak, balanced, for control over disposition of imported goods. That such ‘ring fence’ must attend import of goods after ‘quo’ and ‘quid’ are reconciled is a revenue perspective of the ‘trade policy’ which is hard put to fit the measure of common logic and that the exemption notification should make provision for unencumbered import after obligation to export has been certified by the licencing authority as duly discharged is but logical progression. To insinuate continuance of conditionality, intended for obvious ends at ‘pre-export’ stage, in the actual circumstances, and in an adjudication proceedings that is unable to draw upon even the authority by which customs officialdom is tethered to the scheme – the exemption notification – is telling enough of the intent of the Foreign Trade Policy (FTP) to keep such handicapping of ‘authorizations’ – by arrogating of authority to interpret licences and schemes in ‘trade policy’ - at bay. An

import for achieving contracted export obligation and an import unencumbered by such obligations cannot be on level even if in the same exemption notification and the essentiality of compliance with conditions that attaches to the former as its singular characteristic must, necessarily and for that very reason, be detached from the latter for equitability and sensibility. Bereft of that, transferability is but a 'silent bark' with no dog and 'trade policy' confined by 'tax policy' to the doghouse.

20. It is on the assumption that the conditions attaching to 'pre-export' importation also attend upon 'post-exportation' import that

'(o) any goods exempted, subject to any condition, from duty or prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;'

in section 111 of Customs Act, 1962 has also been invoked for confiscation of the saffron. The deployment of words and phrases therein enjoins the existence of condition for exemption from duty and also the discretion vested in 'proper officer' to sanction the non-observance thereof which, whether inclined to be used or not, as necessary for resort to confiscation on such ground. Had that not been so, the provision for condonation of non-observance would have been appropriately qualified as subject to conferment of such power. The manner in which the adjudicating authority has proceeded to determine the culpability of the importer leaves no space whatsoever for exercise of such sanction of non-observance. Moreover,

there is no finding of any condition, other than furnishing of ‘authorization’, contingent on which exemption from duties of customs may be claimed. *Per contra*, the adjudicatory exposition has been entirely about incongruity of the description of the imported goods with the description of permissible goods in the ‘authorizations’ which, with the bond, specified in the third condition in the notification and setting out consequence of non-observance, waived for post-exportation imports, is not surprising in the least but does not advance section 111(o) of Customs Act, 1962 as valid ground for confiscation. Implicit in the waiver is the exclusion of all conditions, except as are relevant to the import itself, which, in the present instance, is compliance with the first and second of those. Probably, and not unaware of such restricted conditions for exemption from duty, the adjudication order has focused on

‘(i) that the description, value and quantity of materials imported are covered by the said authorisation and the said authorisation is produced before the proper officer of customs at the time of clearance for debit:’

in notification no. 40/2006-Cus dated 1st May 2006 and notification no. 98/2009-Cus dated 11th September 2009 as those which were purportedly contravened to buttress an outcome otherwise jeopardized. The evidence marshalled for the purpose is about ‘saffron’ not being covered by the impugned ‘authorizations’ inasmuch as the facts militate against the ‘actual use’, or even potential for use, attending ‘food flavour’ and ‘food colour’ in product group E1 and E5 of ‘standard input output norms (SION)’ in the

Foreign Trade Policy. The question begging answer is the scope and extent to which ‘actual use’ is intended, at least, insofar as ‘post-exportation’ imports are concerned, to be enforced. In other words, it is the proposition of ‘selective application’, implicit in condition of manufacture for export and use in manufacture for entitlement to import – both devolving on original holder – that is limited only to the second, while discarding the first, for evaluating the ‘authorizations’ as entitlement of transferee, that must stand the test of legislative intent.

21. According to the adjudicating authority, ‘actual use’ attaches to the inputs, covered by the norms, at the time of export which is to mirrored even after the export obligation has been fulfilled and licence endorsed for transfer. Thus, it is the case of the adjudicating authority that the ‘pre-export’ entitlement remains unaltered ‘post-export’ and even after fulfillment of export obligation; impliedly, the incentive is nothing more or less than that would entitle as drawback. We have set out *supra* that the generality of description in ‘standard input output norms (SION)’ is intended to assist the policy objective of providing incremental incentive for export and, while that may not be entirely impossible in ‘pre-export’ importation, such possibility of alternative product being cleared in ‘post-export’ importation is not exactly not remote. The rigour of the expression ‘actual use’, to the extent inferred by the adjudicating authority, does not rule out such possibility. We proceed to look at it from two angles: literal and from its embedding in a policy document.

22. 'Actual use' is deployed without being encumbered by qualifying preposition and, therefore, not limited in its aspects to that which prevailed with the adjudicating authority. In schemes of the Foreign Trade Policy (FTP), unlike consequences attending upon 'quantitative restrictions QR)' in licencing regime of the erstwhile EXIM Policy which, often, specified 'actual user', the aspects, considering the substance of the conditions, of 'actual use' are three - by, for and in. Of these, the first is pivotal for, without an applicant intending to apply for 'authorization', there can be no 'authorization' that allows imports or sets out eligible exports. Notwithstanding this primacy thereof, the goods must also necessarily be deployed in production of export goods for the second to be no less significant. Furthermore, the scheme prescribes the output for which goods may be procured and, thus, the third is also no less critical in any perspective of 'actual use' referred in the scheme. It is the case of the adjudicating authority that only the first aspect may be varied though neither the Foreign Trade Policy (FTP) nor the corresponding exemption notification contain anything that may suggest such limited perspective of 'actual use' which, with fulfillment of export obligation, implicitly and literally, does not continue to insist that the importer must deploy it in production or that it should be deployed in the very product that is specified in the authorization for domestic sale instead of being exported. There is no percentage in such insistence on one aspect of 'actual use', and conveniently selected, when such is not sanctioned either by the Foreign Trade Policy (FTP) or in the

exemption notification without insisting on the other two aspects.

23. A policy document does create 'rights' and the Foreign Trade Policy (FTP) certainly proclaims 'rights' that are claimable. It is neither an obligation that is circumscribed by, nor a statutory privilege carefully doled out from, statutory provision. It is articulation of optimism that, if taken in conjunction with being worked in the true spirit by the agency of the State and the commercial stakeholder, can achieve the intended purpose. In this contextual framework, the words and expressions are articulation of intent unlike, as deployed in a taxing statute, with purpose of ensuring conformity of the charging and assessment provision with the tax objective. It affords verbosity comparatively more, and less of reliance on literal intent for interpretation, than a taxing provision. The rigour adopted by the adjudicating authority is better suited to resolution of tax dispute than of a policy interpretation. It is for that reason that tax adjudications are not expected to foray into

'19.The definition of 'importer' in Section 2(26) of the Customs Act is not really relevant to the question of title. It only defines the expression 'importer'. The first respondent, does not claim to be the importer. The provision upon which strong reliance is placed by the appellants in this behalf is the one contained in Clause 5(3)(ii) of the Imports (Control) Order..... Condition (ii) - which is the provision relevant herein says that the goods for the import of which a licence is granted "shall be the property of the licensee at the time of import and thereafter upto the time of clearance through customs." Now coming back to the Condition (ii), the question is what does it mean and what is the object underlying it when it says that the imported goods shall be the property of

the licensee from the time of import till they are cleared through customs. It is necessary to notice the language of the sub-clause. It says “it shall be deemed to be a condition of every such licence that — the goods for the import of which a licence is granted shall be the property of the licensee at the time of import and thereafter up to the time of clearance through Customs.” The Rule making authority (Central Government), which issued the order, must be presumed to be aware of the fact that in many cases, the importer is not the owner of the goods imported at the time of their import and that he becomes their owner only at a later stage, i.e., when he pays for and obtains the relevant documents. Why did the Central Govt. yet declare that such goods shall be the property of the licensee from the time of import? For appreciating this, one has to ascertain the object underlying the said provision. The interpretation to be placed upon the provision should be consistent with and should be designed to achieve such object. In this context, it should also be remembered that expressions like ‘Property of’ and ‘Vest’ do not have a single universal meaning. Their content varies with the context. The aphorism that a word is not a crystal and that it takes its colour from the context is no less true in the case of these words. In our opinion the object underlying Condition (ii) in Clause 5(3) is to ensure a proper implementation of the Imports (Control) Order and the Imports and Exports (Control) Act, 1947. The idea is to hold the licensee responsible for anything and everything that happens from the time of import till they are cleared through Customs. The exporter is outside the country, while the importer, i.e., the licensee is in India. It is at the instance of the licensee that the goods are imported into this country. Whether or not he is the owner of such goods in law, the Imports (Control) Order creates a fiction that he shall be deemed to be the owner of the such goods from the time of their import till they are cleared through Customs. This fiction is created for the proper and effective implementation of the said order and the Imports and Exports (Control) Act. The fiction however cannot be carried beyond that... .. But certainly he cannot be treated as the owner of the goods even in such a case. Holding otherwise would place the exporter in a very difficult position; he loses the goods without receiving the payment and his only remedy is to sue the importer for the price of goods and for such damage as he may have suffered. This would not be

conducive to international trade. We can well imagine situations where for one or other reason, an importer chooses or fails to pay for and take delivery of the imported goods. He just abandons them. (We may reiterate that we are speaking of a case where the import is not contrary to law). It is only with such a situation that we are concerned in this case and our decision is also confined only to such a situation.....’

as held by the Hon’ble Supreme Court in *Union of India v. Sampat Raj Dugar* [1992 (58) ELT 163 (SC)] even as the affirmation of jurisdiction to investigate rendered by the Hon’ble Supreme Court thus

‘10. We do not find in the provisions of the Import and Export Policy or the Hand Book of Procedure issued by the Ministry of Commerce, Government of India, anything that even remotely suggests that the aforesaid power of the Customs authorities had been taken away or abridged or that an investigation into such alleged breach could be conducted only by the licensing authority. That the licensing authority is empowered [to] conduct such an investigation does not by itself preclude the Customs authorities from doing so.’

in *Sheshank Sea Foods Pvt Ltd v. Union of India* [1996 (11) TMI 67 – SUPREME COURT] was limited to denial of such authority by the Hon’ble High Court of Karnataka in a matter involving alleged misuse of materials imported before fulfillment of export obligation. In the circumstances of the present dispute, the adjudicatory jurisdiction should not have been extended beyond the contents of the authorizations which were themselves to be evaluated only in terms of claim of the appellant that ‘saffron’ is capable of use as ‘food flavour’ and ‘food colour’ which were the descriptions in the impugned authorizations. These are not disputed in the proceedings and the test of commercial viability, adopted in the impugned order, is not

conceptually intrinsic to export promotion schemes in the Foreign Trade Policy (FTP) and, thus, undoing the foundation of both confiscation and recovery of duty in the impugned order. For these reasons, the impugned order is set aside to allow the appeals.

(Order pronounced in the open court on 25/04/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*