

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH : COURT NO - 3

Customs Application No. C/EH/10256/2019

(On behalf of the appellant)

Customs Appeal No. 10662 of 2019

(Arising out of OIA No. AHD-CUSTOM-000-APP-294-18-19 dated 28/03/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

Devoir Trading Limited

Appellant

202, Arihant Kala Shree, Roayl
Royal City Colony, Behind Agarwal Public School, Goyal Nagar
INDORE
MP
452016

-VERSUS-

C.C.-Ahmedabad

Respondent

CUSTOM HOUSE,
NEAR ALL INDIA RADIO NAVRANGPURA,
AHMEDABAD,
GUJARAT

Present For the Appellant : Shri Hardik Modh, Adv

Present For the Respondent : Shri S.K. Shukla, Supdt. (AR)

CORAM:

HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO. A/10962/2019.

Date of Hearing: 24/04/2019

Date of Decision: 03.06.2019

RAMESH NAIR

The applicant filed this application for early hearing on the ground that the issue is squarely covered by this Tribunal's order dated 25/03/2019 in the case of Uni Bourne Food Ingredients LLP, no. A/30410/2019. Considering the reason for seeking Early Hearing, we allow the Early Hearing Application. With the consent of both the sides, we are taking up the appeal itself for disposal.

2. Brief facts of the case are that the appellants imported 116 kgs. of Inshell Walnut under transferable DFIA no. 0310709650 dated 18/09/2012 issued against export of biscuits as per standard input output norms E-5. The aforesaid DFIA was issued in terms of chapter 4 of the Foreign Trade Policy (2009-14) and in particular para 4.2.1 and 4.2.2 thereof. The said DFIA was transferred by the Regional Licensing Authority after discharge of export obligation by the exporter in terms of

provision of para 4.36A of HBP- (2009-14). Upon transferability, the inputs mentioned in the DFIA are made freely transferable by the Regional Licensing Authority within the quantity and overall CIF value mentioned in the DFIA in accordance with the policy and procedure in force on the date of issue of authorization in terms of para 4.2.2 (b) of FTP (2009-14). Under the DFIA scheme, the goods are exempted in Custom Notification No. 98/2009-Cus dated 11/09/2019 from the whole of Customs duty foregone leviable thereon which is specified in the first schedule of Custom Tariff Act, 1975.

The appellant claimed exemption on the strength of provisions of Foreign Trade Policy (2009-14) read with notification 98/09-Cus dated 11/09/2009 by filing Bills of Entry no. 9112328 dated 04.03.2008 for the imported goods of walnuts covered under the definition of Relevant Food Flavour/Flavouring agent/Flavour improvers- (Serial No. 6) Fruit/Cocoa Powder-under Serial no. 10 and Dietary Fibre under Serial no. 11 of the list of goods mentioned in DFIA. After examining the relevant import documents, the assessing officer sought a clarification from the appellant vide query memo dated 05/12/2018 seeking clarification on the claim of appellant's that Walnut comes under S. No. 6,10,11 of license. The appellant vide letter dated 05/12/2018 made a detailed submission to Deputy Commissioner of Customs, ACC, Ahmedabad by producing technical reference books which evidently states that Walnuts, is covered under the description of Fruit/Flavour and Dietary Fibre. In response to the said reply, the assessing officer with approval of Dy. Commissioner informed the appellant that query dated 11.12.2018 to justify value of the imported goods, DFIA License not tallied with item description of the imported goods, submit the FSSAI and P.Q. report. The appellant in response reiterated the earlier submission and made further submission vide letter dated 007/12/2018 and requested Dy. Commissioner of Customs to extend the DFIA benefit as per Custom Notification no. 98/09-Cus dated 11/09/2009. The department did not accept the contention of the appellant and once again informed vide letter dated 11/12/2018 that the appellant have imported Walnut which was not tallying with the DFIA license. The appellant, thereafter, submitted a letter dated 17/12/2018 informed the Dy. Commissioner of Customs that applicable duty is being paid under protest reserving the appellant's right for any appeals. Since the said Bills of entry no. 9112328 dated 04/12/2018 was not finally assessed, the appellant produced another alternate transferable DFIA no. 0310825085 dated 16/11/2018 vide letter dated 19/01/2019. The DFIA exemption is granted in terms of Custom Notification no. 19/15-Cus. Dated 01/04/2015. The appellant thereafter find that the Dy. Commissioner is not inclined to accept the fresh transferable DFIA no. 0310825085 dated 16/11/2018 forwarded the said same to the Dy. Commissioner of Customs through Registered post. Thereafter, the appellant paid the applicable custom duty

under protest after final assessment of Bills of Entry no 9112328 dated 04/12/2018.

Subsequently, the Dy. Commissioner of Customs, ACC Cargo Complex, Ahmedabad passed an Order in original no. 109/DC/ACC/BOA-911328/20118 dated 28/01/2019 whereby the Bills of Entry were reassessed classifying the imported goods, i.e., 'Inshell Walnut' under CTSN 0803231000 leviable duty that is 100% instead of Nil rate of duty claimed by the appellant alongwith other duties and ordered to appropriate the duty paid under protest against the said Bills of Entry and by subsequent order in original dated 28/01/2019, Appellant being aggrieved, filed appeal before the Commissioner (A) which was rejected. Therefore, the present appeal.

3. Shri Hardik Modh, Ld. Counsel appearing on behalf of the appellant submits that the very same issue in respect of the same product in respect of the same product came up before the Hyderabad Bench of this Tribunal vide order no. A/30410/2019 dated 25/03/2019. The appeal was allowed with consequential relief. He also placed reliance on the following decisions:

1. A.V. Industries Vs Union of India 2005 (187) E.L.T. 9 (Bom.)
2. Commr. of Customs (Export) Vs, USMS Saffron Co. INC. 2016 (344) E.L.T. 161 (Bom.)

4. Shri S.K. Shukla, Ld. Supdt. (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

5. We have heard both the sides and perused the records. We have also perused the order of the Hon'ble MP High Court a

We find that the Hyderabad bench of this Hon'ble Tribunal in the case of Uni bourne Food Ingredients LLP Vs. Commissioner of Customs, ACC, Hyderabad considered the question whether the appellant before it is eligible for duty free benefits under Transferable Duty Free Import Authorisation issued against the Export of Biscuits as per the SION E-5 for import of Inshell Walnut under the description of Food Flavour/Flavouring Agent/Flavour improvers or Dietary Fibre.

This appellate Tribunal- Hyderabad in Para 12 held as follows:-

"In view of the above discussion, the imported goods walnut in shell is covered under the description of relevant food flavour/flavouring agent/flavour improvers and dietary fibre as claimed by the appellant. The

denial of exemption is not justified. The impugned OIA is set aside and appeal allowed with consequential reliefs. As regards , the prayer for revalidation of the DFIA , the revenue may consider if such an application is made by the appellant since it is upto the licensing authority to decide whether the same can be allowed or not."

We find that the appellate Tribunal in the above case relied upon the judgement dated 11.09.2018 rendered by the Hon’ble MP High Court, Indore bench in the case of Global Exim Vs. UOI.

We find that it is not in dispute that the DFIA No. 0310709650 dated 18.09.2012 was issued to Rama Exports against export of Biscuit . The input to be imported against the said DFIA are mentioned in SION E-5. The SION E-5 reads thus

“

E-5 Biscuits 1kg	1 Wheat Flour	480 gms
	2 Cane Sugar	190 gms
	3 Vegetable Shortening/Cream/ Fats/Spray Fats	180 gms
	4 Biscuit additives and Ingredients	
	(i) Leavening Agent/Dough Conditioner	04 gms
	(ii) Emulsifier/Stabilizing agent	01gms
	(iii) Relevant (Food Flavour/ Flavouring agent/Flavour Improvers	16 gms
	(iv) Starch	05gms
	(v) Relevant Food Colour	0.1gms
	(vi) Anti oxidant	0.1gms
	(vii) Fruit/Coco Powder	09 gms
	(viii) Dietary Fibre	30 gms
	5 Milk & Milk Product	70 gms
	6 Packing Material	As per packing Policy

We find that the appellate Tribunal has already held that the Walnut Inshell is covered by the description of ‘Food flavour/flavouring agent/flavour improvers’ and dietary fiber’ respectively under serial no. 6 and 11 of the SION E-5. The appellate Tribunal relied upon the certificate of the IIT and technical reference books and several wrappers produced by the appellant to show that the Walnut is used as relevant food flavour/flavouring agent/flavour improvers’ and dietary fibre’ for the manufacture of Biscuits.

Moreover, we also find from the technical opinions of IIT and other technical references that walnuts as fruit/nut of bakeshop, it can be used as food flavour in the manufacturing of biscuits and assorted confectionary products and also as

substitute of protein and dietary fibre (in appropriate proportion) in the manufacturing of biscuits and confectionary products.

We are of the considered opinion that the Inshell Walnut are actually used in the manufacturing of Biscuits in view of the technical material produced by the appellant in the appeal before us.

We however find that the authorities below have sought to deny the benefit of duty free import of inshell walnut against the DFIA issued for export of biscuit on the ground that CTH mentioned in the Annexure –A to DFIA are different from the CTH mentioned in the BE.

In our view, the issue raised in the above appeal is also covered by the order by the Hon'ble Bombay High Court in the case of USMS Saffron Co. Inc reported in 2016(331) ELT 155. The appellate tribunal held that ITC (HS) mentioned in the DFIA is not a criterion to get the benefit under FTP and Custom provisions as long as the items imported falls under the description of the goods mentioned in the DFIA. In that case, the appellate tribunal held that the imported saffron is covered by the description food flavour mentioned in the DFIA irrespective of ITC (HS) mentioned in the DFIA. We also find that Hon'ble Bombay High Court in the case of USMS Saffron (supra) upheld the order of the appellate tribunal holding saffron can be imported as food flavour without payment of duty against DFIA issued for export of biscuits.

We find considerable force in the submission of the appellant that the term 'generic input' and 'alternative input' are not defined under FTP (2009-14) and 2015-2020 and the relevant Public Notice No. 93 dated 01.02.2012 for export of biscuits under DFIA covered by SION E-5 and SION E-5 mentions that the description of import item in very specific details and rationalised quantities.

We further find that the Hon'ble Bombay High Court, Nagpur bench in the case of Shah Nanji Nagsi Exports Pvt. Ltd., Vs. UOI In WP No. 8268/2017 Order dated 29.03.2019 under Para 26 held that "*It reveals that DFIA scheme is distinct than Advance Authorisation scheme where raw material to be imported on authorisation and to be used for manufacturing purpose. Basically, DFIA is post export scheme in which exporter has to first export goods and after realization proceeds, exporter has to make an application to the authority, who after verification, grant DFIA certificate which is transferable. Therefore, there is no actual user condition inbuilt under the scheme*".

In view of the judgment of the Hon'ble Bombay High Court, it is beyond doubt that the actual use of the imported items in the manufacture of export goods is not a pre-condition to grant exemption under the DFIA. The Hon'ble High Court has extensively dealt with the scheme of DFIA for reaching the above conclusion.

In our view once the imported goods satisfy the description given in the SION and reproduced in the DFIA, they are clearly entitled to claim benefit without payment of duty on the strength of the valid DFIA irrespective of ITC (HS) No. mentioned in the DFIA. Interestingly, SION does not refer to ITC (HS) Codes and only the description and quantity of the goods allowed to be imported are mentioned .

We also find that no actual user condition is specifically mentioned in the SION E-5. In a post export entitlement scheme like DFIA, in our view once the endorsement of transferability is made in the DFIA, the imported goods only requires to be covered by the description, quantity mentioned in the DFIA within the overall CIF Value as specified therein.

As per our above discussion, we are of the view that appellant is entitled to clear the imported 'Inshell Walnut' against the DFIA License obtained against export of 'Biscuits and produced before the Customs authority. Accordingly, the appeal is allowed with consequential reliefs.

With regard to the appellant's prayer for revalidation of DFIA, we find that the appellate tribunal Hyderabad has passed a direction to the lower authorities to consider if such an application is made by the appellants. In view of the above, it is directed the revenue may consider, if such an application is made by the appellant.

(pronounced in the open court on 03.06.2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)