OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS,
CUSTOM HOUSE: MUNDRA, KUTCH
MUNDRA PORT & SPL ECONOMIC ZONE, MUNDRA-370421
Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62

PO(EDI) 23/5/19

OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS 22 MAY 2019 Custom House, Mundra 3245

A	File No.	VIII/48-10/Adj/ADC/MCH/2018-19
B	Order-in-Original No.	MCH/ADC/PSK/19/2019-20
C	Passed by	Shri Prashant Kaduskar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra
D	Date of Order	10.05.2019
E	Date of Issue	21.05.2019
F	SCN NO. & Date	F. No. S/15-02/Enq.-Urea/Malani/SIIB/CHM/2018-19 dated 09.07.2018
G	Noticee / Party / Importer / Exporter	M/s. Malani Enterprise,B-8, Jalkamal Co Op Hsg Soc Ltd., Plot No. 10, GIDC Ankleshwar, Gujarat-393002

1. यह अपील आदेश संबन्धित को नि:शुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A के अंतर्गत प्रपत्र सीए- 1- में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-
Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

" सीमा शुल्क आयुक्त (अपील), कांडला
7 वीं मंजिल, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009"
"THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
Having his office at 7th Floor, Mridul Tower, Behind Times of India,
Ashram Road, Ahmedabad-380 009."

3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए ।
Appeal shall be filed within sixty days from the date of communication of this order.

4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must accompanied by –

(i) उक्त अपील की एक प्रति और
A copy of the appeal, and
(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं°-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए ।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. अपील ज्ञापन के साथ ड्यूटि/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये ।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.

6. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम,1982 और सीमा शुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए ।
While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (A) के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।
An appeal against this order shall lie before the Commissioner (A)on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

Subject :- SCN F. No. S/15-02/Enq.-Urea/Malani/SIIB/CHM/2018-19 dated 09.07.2018 issued to M/s. Malani Enterprise,B-8, Jalkamal Co Op Hsg Soc Ltd., Plot No. 10, GIDC Ankleshwar, Gujarat-393002

BRIEF FACTS OF THE CASE:

M/s. Malani Enterprise,B-8, Jalkamal Co Op Hsg Soc Ltd., Plot No. 10, GIDC Ankleshwar, Gujarat-393002 (herein after referred as "the importer"), having IEC No.03411004622, engaged in import of Technical Grade Urea falling under CTH 31021000 of the first schedule to the Customs Tariff Act, 1975 on high sea purchase basis from State Trading Enterprises viz. MMTC etc. during the period from April, 2012 to 27.04.2015 without having a license for import of Urea from Director General of Foreign Trade (DGFT).

2.1 A reference F. No. DRI/DZU/JRU/19/ENQ.30/2016 dated 26.10.2017 was received from the Assistant Director, Directorate of Revenue Intelligence, Regional Unit, Jaipur, passed the inputs that some importers of urea had violated the provisions of Foreign Trade Policy in import of Technical Grade Urea during the period from April, 2012 to 27.04.2015. In terms of Notification No. 04/2015-2020 dated 28.04.2015 issued by the Ministry of Commerce & Industry, Department of Commerce, Udyog Bhawan, New Delhi, Import policy of Urea under ITC (HS) code 31021000 was amended. Import of "Urea whether or not in aqueous solution" allowed to be imported by State Trading Enterprises only prior to 28.04.2015. As per revised policy besides State Trading Enterprises, import of Industrial Urea/Technical Grade Urea shall be free subject to Actual User Condition.

2.2 Foreign Trade Policy defines State Trading Enterprises as "State Trading Enterprises (STEs) are governmental and non-governmental enterprises, including marketing boards, which deal with goods for export and/ or import. Any goods, import or export of which is governed through exclusive or special privileges granted to State Trading Enterprises (STEs) may be imported or exported by STE(s) as per condition specified in ITC (HS). The list of STEs notified by DGFT is in Appendix 2J. However, it is provided that DGFT may grant an authorization to any other person to import and export any of these goods.

2.3 As per para 2.11 of Foreign Trade Policy 2009-2014, such STE(s) shall make any such purchases or sales involving imports or exports solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale in a non-discriminatory manner and shall afford enterprises of other countries adequate opportunity, in accordance with customary business practices, to compete for participation in such purchases or sales.

3. Further, the Joint Director, Directorate of Revenue Intelligence, Regional Unit, Jaipur, communicated vide letter F. No. DRI/DZU/JRU/19/

ENQ.30/2016 dated 07.03.2018 that as per Foreign Trade Policy 2009-2014, there were only three State Trading Enterprises viz. STC, MMTC and Indian Potash Limited (para 2.11 of FTP); that on enquiry, the Deputy Director General of Foreign Trade, DGFT, New Delhi, vide his letter F.No. 01/89/180/102/AM-02/PC-2[A]/Part-II/800 dated 14.09.2017 informed that DGFT permitted import of Urea (46% granular) from Oman to M/s IFFCO and M/s KRIBHCO, New Delhi; that apart from the above, following parties were permitted during 2011-15 for import of urea:-

(i) M/s Coromandel International, Secunderabad;

(ii) M/s Zuari Agro Chemicals Ltd., Gurgaon;

(iii) M/s Blusky Automotive Pvt. Ltd., Mumbai; and

4. Ministry of Chemicals and fertilizers had invited tender for handling and distribution of Urea. Some third parties other than State Trading Enterprises filed Bills of Entry and imported Urea, which they had purchased on High Sea Sale basis. In fact, State Trading Enterprises purchased Urea from outside India and instead of directly importing into India they had sold Urea to third parties who had been awarded orders by Ministry of Chemical and Fertilizers for handling and distribution of Urea on High Sea Sale basis. In the process, ownership of Urea had been transferred and such third parties filed the Bills of Entry.

5. The importer had filed Bill of Entry No. 2695993 dated 12.07.2013 at Mundra port during the period from April, 2012 to 27.04.2015, for clearance of 'Technical Grade Urea' purchased on High Sea Sales basis from MMTC Limited (original importer). The following Bill of Entry had been filed by the importer at Mundra port and the Out-of Charge had been granted by the proper officer after payment of appropriate Customs duties by the importer.

TABLE-A

Sr. No.	**Bill of Entry Number & date**	**Quantity (in MTs)**	**Assessable Value (Rs.)**	**Total Customs duties paid (Rs.)**	**Date of OOC of B/E**
1	2695993/12.07.2013	200	5025962	1299336	16.07.2013

6.1 Summon was issued to the importer on 23.05.2018 for producing documents and giving statement. No one appeared for giving statement however, the importer vide E-mail dated 03.07.2018 submitted copy of permission/license No. 6-4/2013-FM (Vol-II) dated 23.07.2013 along with copies of Bill of entry, High Sea Sale agreement with M/s. MMTC and other import documents.

6.2 On scrutiny of documents, it is found that the importer had entered into agreement for High Sea Purchase of 200 MT with M/s. Trans Agro India Pvt. Ltd., Sanpada, Mumbai who had purchased the said quantity from MMTC, a State Trading Enterprise on High Sea Sale basis and had filed Bill of Entry 2695993 dated 12.07.2013 and cleared the same on payment of appropriate Customs duties during the period 2013-14.

7. The Joint Director, Department of Fertilizer, Ministry of Chemicals & Fertilizers vide permission No. 6-4/2013-FM dated 23.07.2013 extended the permission to import balance 2300 MTs of Technical Grade Urea for Industrial Use through any State Trading Enterprises (i.e., MMTC, IPL, STC) during the year 2013-14 on fulfilment of certain conditions by the importer. As per condition No. (xiv) of the permission No. 6-4/2013-FM (Vol-II) dated 23.07.2013, which is reproduced below:

> *"TG urea user shall inform this department through STEs/ any other company under license from DGFT, from whom he/ she is buying TG urea."*

It implies that the permission was granted to the importer for domestic purchase of Technical Grade Urea from STEs/ any other company under licence from DGFT but in the instant case the importer has purchased the Technical Grade Urea on high sea sales basis from M/s. MMTC Ltd., a State Trading Enterprise which is to be considered as "Import" of goods which is contrary to the conditions of the permission granted by Ministry of Fertilizers. Therefore, it clearly indicates that the importer had violated the permission No. 6-4/2013-FM (Vol-II) dated 23.07.2013.

8. As per Para 2.11 of General Provisions regarding Import and Export under Foreign Trade Policy 2009-2014:

> *"2.11 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 Authorisation to any other person to import or export any of these goods.*
>
> *Such STE(s) shall make any such purchases or sales involving imports or exports solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale in a non-discriminatory manner and shall afford enterprises of other countries adequate opportunity, in accordance with customary business practices, to compete for participation in such purchases or sales."*

8.1 The Customs Act, 1962 defines the meaning of Import, Importer, & India which is as under:

"Section 2(23) -"Import" with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

Section 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;'*

Section 2(27) -"India" includes the territorial waters of India;"

8.2 As per the Foreign Trade (Development and Regulation) Act, 1992, definition of "Import" is "in relation to goods bringing into India any goods by land, Sea or Air". The definition of "Importer" as per Foreign Trade (Regulation) Rules, 1993 "means a person who import goods and holds a valid IEC No.". As per Foreign Trade Policy importer means 'person who imports or intends to import and holds and IEC No., unless otherwise specifically exempted".

8.3 No other importer, other than STEs and importers mentioned at para 3 above was permitted to import Urea during the material period. Thus, importer had imported total 200 MTs of Technical grade Urea having assessable value of Rs.50,25,962/-, in violation of provisions of Foreign Trade Policy enforced at the material time. The importer had paid total Customs duties of Rs.12,99,336/- against the import and clearance of 200 MTs of Urea. The importer was fully aware about the fact that the goods in question was a canalised item and he had suppressed the facts by producing the licence No. 6-4/2013-FM (Vol-II) dated 23.07.2013 issued by the Jt. Director, Department of Fertilizer, Ministry of Chemicals & Fertilizers in guise of licence issued by the DGFT. Thus, the act on the part importer for wilful mis-statement and the suppression of facts at the material time draw the attention that the goods were improperly imported into India and liable for confiscation under Section 111 of Customs Act, 1962.

9. It appeared that the importer had imported 'Technical Grade Urea" without having a valid licence issued from Director General of Foreign Trade which regulate the Exim Policy. Since, the import of 'Technical Grade Urea' is a canalised item and permitted to import by State Trading Enterprises or by the import licence holder issued by DGFT. Thus, it appears that the goods imported by the importer during the period from April, 2012 to 27.04.2015, details as per table-A above, liable for confiscation under the provisions of Section 111 (d) of Customs Act, 1962.

10. It was alleged in the Show cause Notice that the importer was fully aware about the provisions of restriction imposed on the import of "Technical Grade Urea" and allowed to import through STEs and a valid licence holder persons. The importer was having a culpable mind of state and that the act of omission and commission made on his part that the act of import of goods were liable for confiscation and thus they have rendered themselves liable for penalty under Section 112 of the Customs Act, 1962.

11. In view of the above, M/s. Malani Enterprise, B-8, Jalkamal Co Op Hsg Soc Ltd., Plot No. 10, GIDC Ankleshwar, Gujarat- 393002 was called upon to show cause to the Additional Commissioner of Customs, Mundra, vide Show cause Notice No. F. No. S/15-02/Enq-UREA/Malani/SIIB/CHM/18-19 dated 09.07.2018 asking them as to why:

(i) The Technical Grade Urea of 200 MT valued to Rs.50,25,962/- imported by the importer in contravention of provisions of Foreign Trade Policy enforced at the material time should not be held liable for confiscation under Section 111 (d) of the Customs Act, 1962;

(ii) Penalty should not be imposed on them under Section 112(a)(i) of the Customs Act, 1962 for the acts and omission on their parts.

WRITTEN SUBMISSION:

12. The noticee, vide their letter dated 25.04.2019 has submitted the following submission:

i. The said urea has long being cleared and consumed and is no more available for the purpose of confiscation. They further submitted that, any goods which are neither cleared on bond nor were ever seized by customs authorities at any stage and were allowed to be cleared on filing of bill of entry, the same cannot be confiscated since they are no more available. That in support of this contention they crave leave to refer to and rely upon the following decisions:

(a) *Shiv Kripa Ispat Pvt. Ltd. 2009(235) ELT 623 (Tri-LB)*

(b) *Commissioner v. Shiv Kripa Ispat Pvt. Ltd. - 2015 (318) E.L.T. A259 (Bom.)*

(c) *Kothari Foods & Fragrance P. Ltd. 2018 (364) E.L.T. 368 (Tri. – Del)*

(d) *Indokem Ltd. 2017 (352) E.L.T. 386 (Tri. – Mumbai)*

(e) *Tej Overseas 2018 (364) E.L.T. 407 (Tri. – Mumbai)*

(f) *Bharthi Rubber Lining & Allied Services P. Ltd. 2018 (362) E.L.T. 376 (Tri. – Mumbai)*

ii. The subject SCN proposes to import penalty under Section 112(a)(i) of the Customs Act, 1962. The said section by its very text suggests that any person who in relation to any goods does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111 or abates in doing such act or omission, will be liable in case of goods in respect of which any prohibition is in force under the act or any other law for the time being in force, a penalty which can range between Rs. 5000/- to the value of the goods.

iii. The penalty under Section 112 is not mandatory, and provides for a range for fixation of penalty. In other words, the same is a discretionary penalty. Further, noticee had filed the bill of entry wherein the goods were declared to be urea. It was also brought to the attention that, such urea was purchased by notiicee on high sea sale basis and it was originally imported by MMTC which is a state trading enterprise.

iv. The custom authorities did not raise any objection at such time at all whereas it is a fact within common knowledge that urea is otherwise a canalized item. In other words, everyone including noticee as well as customs authorities were of a view that such goods were otherwise importable when originally imported by MMTC (state trading enterprise) and eventually purchased by noticee on high sea sales basis through another high seas buyer who had originally procured it from MMTC. That being the case, it cannot be said that it is noticee who did or omitted to do any act which rendered the goods liable to confiscation but instead at the most penalty could have been imposed either against MMTC or against the other high seas buyer who had procured the goods on high seas basis and had sold them further on High Seas to noticee.

v. In fact such goods are not liable to confiscation at all since no provisions of FTP and/or any other law for the time being in force were ever violated much less Para 2.11 of FTP 2009-2014 at all and hence there is no question of good being liable to confiscation and/or noticee having done or omitted to do anything which rendered such goods liable to confiscation and hence the very requirement of section 112 (a) not being fulfilled, the goods cannot be confiscated and noticee

cannot be penalized under any of the provisions of Customs Act much less the said section 112(a)(i) of the Customs Act 1962.

vi. The definition of the term import under FTP is different and refers to the actual import of bringing the goods from outside India into India and the same cannot be applied for the purpose of customs where mere filing bill of entry renders a person importer of the goods, even though the goods are purchased on high seas basis. Further, even under Customs Act, the definition of the term import as reproduced in the subject SCN as well at Para 8.2, means bringing into India from a place outside India. That although noticee is an importer who file a bill of entry, they have nonetheless never imported the goods into India at all except for having a filed a bill of entry on account of having purchased the goods on high seas basis. As such when either under FTP or under Customs Act 1962, when noticee never imported urea into India, the requirement of section 112(a)(i) of the Customs Act 1962 was never fulfilled as under the facts and circumstances, they can never be held liable to penalty under the said proposed section at all.

vii. The noticee has submitted that urea was never a prohibited commodity at all for imports contrary to what is suggested in the Show Cause Notice. It is more in the nature of being a restricted item; however, when imported for industrial purposes and other than agricultural purposes, the same should be treated as being freely importable. Nonetheless, in the present case, necessary license/permission was in place. Anyway the same is required for "goods" in question i.e. Urea being imported and not who files BE, once the import was admittedly made by MMTC only. As such, no case for violation of any of the legal provisions can be made out.

viii. It is mentioned that as regards the requirement of fulfillment of conditions regarding import of urea, it has to be appreciated that the actual import was made by canalizing agency (MMTC) only under appropriate authorization from DGFT/Government of India. As such, insofar as requirement of FTP is concerned, to bring the goods from outside into India, in respect of urea, the requisite conditions were already fulfilled inasmuch as the actual import was being done by state trading enterprise only (MMTC). As to who purchases such goods on high seas basis and who files the bill of entry is therefore

quite immaterial and there was no prohibition in force at the time of import of goods into India at all.

ix. The noticee has relied upon the decision of the Hon'ble Tribunal in the case of GNFC Ltd. reported at 2015 (37) S.T.R. 796 (Tri. – Ahmd) wherein similar arrangement was examined in great detail in the context of demand of service tax on GNFC Ltd. who had procured the goods from canalizing agency on high seas basis and cleared the same on handling charges and it was held that since GNFC Ltd. has become the owner of the goods, the levy of service tax is not extended in such circumstances. Be that as it may, at least the transaction was similar to the one in the present case wherein the bill of entry was not filed by any canalizing agency/state trading enterprise but instead filed by GNFC Ltd. who had procure the same on high seas basis. As such it is a practice in vogue and even recognized and allowed by the government of India to have urea imported through canalizing agencies and sold to other actual users on High Seas basis.

x. It is added that the Ministry of Commerce Industry Department of Commerce Udyog Bhavan had also clarified vide letter dated 14.09.2017 that in any case after 28.04.2015, import of urea whether or not in aqueous solution was allowed to be imported by any person as long as he was the actual user. This also shows the intention of the government of India to permit import of urea for industrial use with actual user condition which is not disputed in the present case at all inasmuch the noticee had actually imported the urea for its own consumption and manufacturing operations. This being the case, even when such arrangement has been liberalized and recognized for actual users to import urea freely after 20.04.2015 anyway, the said arrangement when allowed by the government of India by way of makeshift arrangement in permitting actual users to purchase the same on high seas basis from others, in case of urea physically brought into India from outside India by any state trading enterprise, therefore cannot be questioned. The entire basis of assuming violation of any law for the time being in force, as contained in the subject SCN, is without any substance. This is further buttressed by the fact that similar objection has never been raised by ministry of commerce and no penal action stands taken against anyone in this regard which will also mean that it was otherwise permissible to carry out the transaction in the peculiar manner in which it was

undertaken in the present case, insofar as imports of urea is concerned.

xi. The noticee has stated that it is also a known fact that the canalizing agencies do not actually file bill of entry to clear the urea and generally options urea by inviting bids from various other entities who under fertilizer control order or otherwise permitted to manufacture sales store and deal with urea and other fertilizers.

xii. The noticee has stated that another way to look at the controversy is that when urea is meant for agricultural purposes, the same attracts the lesser duty and at lesser value and has to follow certain stringent conditions. When urea is meant for industrial use as in the present case, all that is required is appropriate authorization from canalizing agency whereby a domestic industrial user of urea is authorized to procure the urea on high seas and clear the same by filing bill of entry. Admittedly such permission was granted to the noticee to clear industrial grade urea after having purchased the same on high seas basis which permission was also issued by appropriate arm of government of India. That the government cannot approbate and reprobate. For the sake of consistency, the conscious decision taken to sell the urea on high seas basis for industrial use cannot be questioned by any other arm of the government i.e., customs authorities, much less the DRI. The apex court as already held in the case of Vadilal Chemicals Ltd 2005 (192) E.L.T. 33(SC), holding that "state, which is represented by the departments, has to speak with one voice". This would show that the government of India wants our client to clear urea imported by any canalizing agency, after having procured the same on high seas basis, the same cannot be questioned by custom authorities otherwise the same will result in travesty of justice and complete lawlessness.

xiii. The Hon'ble Larger Bench of CESTAT in the case of Hico Enterprises 2005 (189) E.L.T. 135 (Tri. – LB) as upheld by Hon'ble Apex Court as reported at 2008(228) ELT 161(SC), following the legal maxim LEX NON COGIT AD IMPOSSIBILIA held that the law does not expect one to do the impossible. Since this was an impossible condition to fulfill, based on DGFT and Ministry of Commerce approvals, noticee cannot be expected to become MMTC to clear Urea, especially when the Govt. of India (Ministry of Commerce) allowed them to file BE as high seas buyer of Urea for industrial use.

xiv. The assessments were already finalized by customs authorities by permitting noticee to file bill of entry being the high seas purchaser on basis of permission granted by the Ministry of Commerce and such urea was also duly consumed by noticee. Therefore it is too late in the day to question this that too after almost five year after having imported the same inasmuch as there cannot be any fraud, suppression or willful-misstatement at all. In fact the commodity was also know i.e., urea and the high seas agreement was also on record before the custom authorities at the time of assessing and permitting the noticee to clear the urea being a high seas purchaser. That the revenue authorities cannot penalize unsuspecting importers such as noticee by raising such kind of hyper technical objection, which is clearly contrary to the clear practice followed by Ministry of Commerce in a contradicting manner, and proposing to penalize noticee including proposal to confiscate the goods which are no more available.

xv. The noticee has also mentioned that they had procured the urea on High Seas Sale following decades of practise in vogue which has ratified and approved by Customs authorities since time immemorial. It is also stated that there is no suppression in the present case. It is added that the Customs authorities also considered it appropriate to allowed the noticee to file the Bill of Entry and clear the goods. Hence, imposition of penalty is out of question.

xvi. In the case of Inditalia Refcon Ltd. 2013 (293) E.L.T. 387 (Tri. – Mumbai) it was held that penalty under Section 112 of CA, 1962 is not imposable in absence of fraud, suppression etc. which is admittedly the case on hand. Further, even if penalty is to be imposed, it should be restricted to Rs.5000/- being token penalty in the given set of facts and circumstances of the case.

xvii. In fact, Hon'ble Larger Bench of CESTAT in the case of Rama Wood Craft (P) Ltd. 2008 (225) E.L.T. 348 (Tri. – LB) held as follows:

Penalty - Quantum of - Amount mentioned in Rule 173Q(1) of erstwhile Central Excise Rules, 1944 or Rule 25(1) of Central Excise Rules, 2002 is the maximum and not the minimum - Amount not to exceed the duty determined; if it is more than Rs. 5,000, or Rs. 5,000 if the duty determined is less than Rs. 5,000 - While exercising discretion in fixing

the amount, authorities are supposed to give due regard to relevant factors. [paras 7, 11]

Penalty - Quantum of, discretion - Even where a minimum penalty is prescribed, the authority has discretion to impose a lesser penalty depending on facts and circumstances of the case - Imposition of penalty is a penal action hence there cannot be cut and dried formulae for quantifying the amount - Attending fact and circumstances, nature and gravity of offences, defence of person and extent of evasion among other things to be taken into account in doing so - Rule 173Q of erstwhile Central Excise Rules, 1944 - Rule 25 of Central Excise Rules, 2002. [para 10]

xviii. It has been submitted that while no penalty is at all imposable a nominal penalty not exceeding Rs. 5000/- can be imposed against them.

RECORD OF PERSONAL HEARING:

13. Shri Saurabh Dixit, Advocate of M/s. Malani Enterprises appeared for Personal Hearing on 30.04.2019 and gave detailed argument as to why the SCN abinitio is incorrect. He referred to and relied upon the written submission dated 25.04.2019 and also the separately submitted the following case laws.

(i) Shiv Kripa Ispat Pvt. Ltd. Vs CCE Nasik

(ii) CCE, Bhopal Vs Rama Wood Craft (P) Ltd.

He requested to drop the Show cause Notice.

DISCUSSION AND FINDING:

14. The learned Advocate has stated that since the goods has long being cleared & consumed and is no more available for confiscation and also added that goods are neither cleared on Bond nor were ever seized by Custom authorities at any stage and hence cannot be confiscated. He has cited 6 case laws. He has cited decision of Larger Bench in Shiv Kripa Ispat Pvt. Ltd. 2009(235) ELT 623(Tri-LB) which has been upheld by hon'ble High Court in case cited at [2015 (318) E.L.T. A259 (Bom.)] and similar other case laws. In this context, it is agreed that redemption fine in lieu of confiscation was not imposable when goods were allowed to be cleared without execution of bond/Undertaking though the goods can be held liable of confiscation though these are not available for confiscation.

15. The other point has been raised that penalty under section 112 is not mandatory and is a discretionary penalty. It has been argued that the goods were originally imported by MMTC (State Trading Enterprises) and eventually purchased by them on High Seas Sales basis. It is stated that the noticee who did or omitted to do any act which rendered the goods liable to confiscation but instead at the least penalty could have been imposed either against MMTC or against the other High Seas buyer who had purchased the goods on High Seas basis and had sold them further on High Seas to the noticee. It is also argued that noticee has not done anything which rendered such goods liable for confiscation, hence noticee cannot be penalized under Section 112(a)(i) of the Customs Act, 1962. In this context, I shall examine the facts, circumstances and merits of the case and then came to the conclusion as regards penalty.

16. The noticee has referred to the decision of hon'ble Tribunal in case of GNFC Ltd reported at [2015 (37) S.T.R. 796 (Tri. – Ahmd)] where M/s. GNFC Ltd has bought the Urea on High Seas Sale basis from Ministry of Chemical & Fertilizers. The case appear to have been cited to prove that transaction was similar to the one in the present case where in Bill of Entry was not filed by any canalizing agency but instead filed by GNFC Ltd who had procured the same on High Seas basis. However, the facts of the case cited are entirely different. It was import of Urea for agricultural end use for distribution to farmer and was imported by Ministry of Chemical & Fertilizers themselves for being distributed at subsidized price to the farmers in order to further the policy of Govt. of India and to meet the Food Control Act and Essential Commodities Act, read with Fertilizer Policy of Govt. of India. In that case of M/s. GNFC Ltd., the Govt. of India Viz. Ministry of Chemical & Fertilizers had floated tender for unloading, bagging, standardization and distribution of this imported Urea for which bid was made by various Fertilizer marketing companies. Whereas, the present case is of Technical Grade Urea which is allowed to be imported by STC, MMTC, Indian Potash Ltd. (State Trading Enterprises) as per policy para 2.11 of FTP 2009-2014 and there is no unloading, bagging, standardization by Fertilizer Marketing Companies. The allegation in the Show Cause Notice in the present case is that noticee is the importer whereas policy permission mandates that STE should import the Technical Grade Urea. Thus, there is no similarity of facts and circumstances of the GNFC Ltd. case (supra) as there was no allegation of violation of policy provisions due to High Sea Sale in the cited case.

17. The noticee has taken a further plea that in any case after 28.04.2015 the import of urea was allowed by actual user and said arrangement when allowed by the Govt. of India by way of make shift

arrangement in permitting actual users to purchase the Urea on High Seas Sale basis from others in case of urea physically brought into India from outside India by any State Trading Enterprises therefore cannot be questioned.

17.1 In this context I find that under Section 2(26) of the Customs Act, 1962 the "importer" is defined as

> -"*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;'*

Further, I find that the para 2.11 of Foreign Trade Policy 2009-2014 states:

> "2.11 :- *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 Authorisation to any other person to import or export any of these goods.....*"

I find that special & exclusive privilege was granted to State Trading Enterprises to be importer of Technical Grade Urea as per para 2.11 of the relevant Foreign Trade Policy in force at the time of imports. Thus, I find that as per harmonious reading of the definition of importer and the provision of para 2.11 of the relevant Foreign Trade Policy, the importer should be invariably be the STEs only. Whereas the noticee M/s. Malani Enterprises have themselves filed the Bill of Entry as an importer and also as an importer M/s. Malani Enterprises has also paid duty of Customs.

18. In para 15 of the written submission dated 25.04.2019 the Learned Advocate has stated

> ....."*Admittedly such permission was granted to our client to clear industrial grade urea after having purchased the same on high seas basis which permission was also issued by appropriate arm of government of India.*"

The Learned Advocate has not specifically mentioned the details of such permission, but I find that he has submitted the letter No. 6-4/2013-FM dated 17.04.2013 addressed to M/s. MMTC Ltd., Core-1, Scope Complex, New Delhi on subject of import of Technical Grade Urea for Industrial use. The letter of permission No. 6-4/2013-FM dated 17.04.2013 is with reference to letter No. MMTC/FERT/TG UREA/2012-13/02 dated 13.02.2013 on subject of permission for import of Technical Grade Urea for Industrial use. The copy of the letter of permission No. 6-4/2013-FM dated 17.04.2013 is marked to M/s. Malani Enterprises among other 6 Companies. The Condition No. (v) mentioned in the said letter reads "Technical Grade Urea thus imported shall be **Sold** to

end users distributers/permission holder only." The word used in condition (v) is "**thus imported shall be sold**...." indicates domestic sale (Post importation sale) only as no word High Sea Sale is mentioned.

Further the condition (xiv) of the said letter of permission no. 6-4/2013-FM dated 17.04.2013 addressed to M/s. MMTC Ltd. mention that TG Urea users shall inform the Ministry of Chemical & Fertilizers through State Trading Enterprises (STEs) from whom they are "**buying**" TG Urea, giving information w.r.t. production being produced by using TG Urea, quantity of TG urea needed to manufacture one MT of the product. The word used is also "**buying**" through STEs means domestic buying. The information has to be given to Ministry of Chemical & Fertilizers through STEs from whom they are buying. This also makes it evident that the act of importation of TG Urea by the noticee is in violation of the para 2.11 of the Foreign Trade Policy 2009-2014 read with the conditions in the letter of permission No. 6-4/2013-FM dated 17.04.2013 of Ministry of Chemical & Fertilizers addressed to M/s. MMTC Ltd. and copy of which is marked to M/s. Malani Enterprises the noticee. I find that the noticee has filed the Bill of Entry for clearance of the imported the goods in violation of policy provisions and also paid the duty as an importer, hence the Show Cause Notice obviously and logically has been addressed to M/s. Malani Enterprises as it is they who have violated the policy provisions by importing the goods which were meant to be imported by Canalizing Agency. The reference to the case of Vadilal Chemicals Ltd. [2005 (192) ELT 33(SC)] made in the written submission appear to be therefore unwarranted and uncalled for.

18.1 I also find in record the letter No. 6-4/2013-FM (Vol-II) dated 23.07.2013 issued by Ministry of Chemical & Fertilizers addressed to M/s. Malani Enterprise, B-8, Jalkamal Co Op Hsg Soc Ltd., Plot No. 10, GIDC Ankleshwar, Gujarat-393002. In the opening para thereof it is mentioned,

"This has reference to your letter No. ME/U/1/13-14 dated 17th June, 2013 on the subject mentioned above and to say that this Department hereby permits to import 2,300 MTs of Technical Grade Urea for Industrial use from Indian potash Ltd. (IPL) & State Trading Enterprises(STC) during the year 2013-14 subject to the following conditions....."

The referred letter of permission No. 6/4/2013-FM dated 17/04/2013 has been addressed to M/s. MMTC Ltd. as is mentioned in para 18 Supra. Thus the letter of permission is to M/s. MMTC and in letter No. 6-4/2013-FM (Vol-II) dated 23.07.2013 mentioned above also it is clearly clarified that "*import of 2300MTs of Technical Grade Urea for Industrial use from Indian Potash Ltd.(IPL) & State Trading Enterprises (STC).....*" subject to certain conditions. The copy of letter dated 23.07.2013 has been marked to Indian Potash Ltd, MMTC, STC.

The importer in the subject case therefore will be STE viz. MMTC only, herein again the condition (v) states:-

*"Technical Grade Urea thus imported shall be **Sold** to end users distributers/permission holder only."*

The word sale indicates domestic selling and the word High Seas sale has not been used.

Further, the condition (xiv) of the said letter no. 6-4/2013-FM (Vol-II) dated 23.07.2013 addressed to M/s. Malani Enterprises, state that TG Urea users shall inform the Ministry of Chemical & Fertilizers through State Trading Enterprises (STEs) from whom they are "**buying**" TG Urea, giving information w.r.t. production being produced by using TG Urea, quantity of TG urea needed to manufacture one MT of the product. The word used is "**buying**" through STEs means domestic buying. This also makes it amply clear and evident that noticee is mandated to domestically 'buy' the TG Urea from M/s. MMTC who is mandated to import as per policy provisions (para 2.11 of FTP 2009-2014) also as per letter of permission Ministry of Chemical & Fertilizers dated 17.04.2013 addressed to M/s. MMTC Ltd. and also a letter to noticee M/s. Malani Enterprises dated 23.07.2013

19. The noticee has in their written submission (para-16) filed on their behalf by the Learned Advocate has stated that approach taken by Custom authorities in this case is to oppose the movement 'Make In India'. It is argued that such restriction can at most apply only for agricultural grade urea and not for industrial grade urea. I think such superfluous statements and arguments are not expected in response to the Show Cause Notice which is purely under ambit of Customs Act, 1962. No evidence have been given in support as to why the restriction of import by canalizing agency will at the most apply for agricultural grade urea and not for industrial grade urea. Such arguments are not germane to the issue concerned. It has been further argued that noticee has purchased goods from canalizing agency on High Seas and Bill of Entry was filed as required by Custom Law. It is argued that when originally goods were imported by canalizing agency, the conditions are deemed to be sufficiently fulfilled and noticee cannot be penalized for their genuine procurement on High Seas as allowed by Government of India. I find that contention of noticee in this context are absolutely misplaced & untrue. The Government of India nowhere has allowed the High Seas Sales as alleged. Neither the policy para 2.11 of Foreign Trade Policy 2009-2014 nor the letter of permission no. 6-4/2013-FM dated 17.04.2013 or letter No. 6-4/2013-FM(Vol-II) dated 23.07.2013 anywhere even remotely suggest that the noticee can buy the Technical Grade Urea on High Seas Sale basis.

20. The noticee has referred to the decision of hon'ble Larger Bench of CESTAT in case of M/s. Hico Enterprises [2005(189) ELT 135 (Tri.- LB)] and has quoted the legal maxim LEX NON COGIT Ad IMPOSSIBILA which state that law does not expect one to do impossible. It has been argued that noticee cannot be expected to become MMTC to clear urea, especially when Govt. of India (Ministry of Commerce) allowed them to file Bill of Entry as High Seas buyer of urea for industrial use. The cited case of M/s. Hico Enterprises (Supra) relates to value based advance licence issued in terms of Notification 203/92-Cus and the condition (vii) of the said notification states that if the benefit of the said notification is sought by a person other than a licensee, such benefit shall be allowed only if the licence bears the endorsement of transferability by the licensing authority. In the case of M/s. Hico Enterprises in-spite of the endorsement of transferability by DGFT, the Customs department had alleged that the endorsement of transferability had been obtained by fraud or misrepresentation, though the importer who had purchased licence is not party to fraud/misrepresentation. In this context hon'ble Larger Bench of CESTAT held that work of issuing of value based Advance Licence, DEEC, execution of Bond, Legal Undertaking, monitoring of import and export item, fulfilment of export obligations, discharge of Bond etc. have all been vested with licencing authority. Certain special powers have been given to the DGFT or Licencing Authority to exercise the same in public interest. The condition (vii) of the Notification No. 203/92-Cus makes it abundantly clear that benefit of notification is to be extended to a person other than a person to whom the licence has been issued if there is an endorsement of transfer by licencing authority on value based advance licence and DEEC, the benefit of Notification cannot be denied to transferee on ground of breach of certain condition and Custom authorities cannot question the power of licencing authorities. I find that the case cited is not similar to one in hand. In the present case we do not deal with any licence which is issued by the DGFT and there is not execution of Bond or Legal undertaking and monitoring of export obligation nor DGFT/Licencing authority have been any special power. In present case the Technical Grade urea is canalized item and MMTC/STC/Indian Potash Ltd. were permitted to import. In subject case the Ministry of Chemical & Fertilizers has issued letter of permission to MMTC Ltd. to import Technical Grade Urea on certain conditions. One of the condition no. (v) states Technical Grade Urea imported shall be **"Sold"** to end users distributers and the Technical Grade urea users shall inform the Ministry of Chemical & Fertilizers through the State Trading Enterprises from who he/she is **"buying"** urea, giving information w.r.t. production being produced by using TG Urea etc. The words "**sold**" & "**buying**" clearly indicate domestic selling and buying. Nowhere in the word High Seas Sale appears in letter of permission

dated 17.04.2013 of Ministry of Chemical & Fertilizers addressed to M/s. MMTC Ltd. or letter No. 6-4/2013-FM (Vol-II) dated 23.07.2013 addressed to M/s. Malani Enterpriese. Thus, I find that the citation of case law of M/s. Hico Enterprises (Supra) is superfluous and not applicable to the facts and circumstances of the case and need to be distinguished.

20.1 I find that in case law cited at [2007 (209) ELT 403 (Tri-Mumbai)] in case of M/s. Marico Industries Vs. Commissioner of Customs (EP), Mumbai Coconut Oil was canalized item under the provisions of Foreign Trade Policy and could be imported only through State Trading Corporation. The importer claimed that they had purchased the goods on High Sea Sales basis and the Bill of Lading and invoice issued by overseas supplier were in the name of State Trading Corporation and there after the coconut oil purchased by M/s. Marico Industries Ltd. on High Sea Sale basis and they had filed Bill of Entry in their name. The Department has then issued a Show Cause Notice and on adjudication the Commissioner had held that goods were liable for confiscation for violation of policy restriction under Section 111(d) of the Customs Act, 1962 and redemption fine of Rs.1.20 Crore was imposed on goods valued at Rs.1.39 Crores approximately. A penalty of Rs.20 Lakhs was also imposed under Section 112(a) of the Customs act, 1962. I find that on the appeal, the hon'ble Tribunal held that goods imported was direct and importer entered into High Sea Sale from STC which was not permissible and there was violation of policy restrictions and confiscation of goods under Section111(d) of the Customs Act, 1962 was upheld, though redemption fine was reduced. The hon'ble Tribunal held that:

".....We however hold that the goods were liable for confiscation under section 111(d) as the procedure prescribed in the policy was not followed....."

I find that case of Marico Industries Ltd. cited above is similar to the subject case and the decision of hon'ble Tribunal is applicable to the subject case. This also negates the citation of case law in case of M/s. Hico Enterprises (Supra) which otherwise also is not applicable to the subject case.

21. It has been argued that the assessments of Technical Grade Urea were already finalized by Customs Authorities by permitting the noticee to file the Bill of Entry being High Seas purchaser on basis of permission granted by Ministry of Chemical & Fertilizers and also such urea was duly consumed. I find that the Bill of Entry may have been filed and assessed finally but there is no permission from Ministry of Commerce as alleged again and again by the noticee in their written defence submissions. It has been stated that SCN must to be dropped as goods are not available for confiscation and also it is out of question to impose the penalty. They have quoted case of Inditalia Refcon Ltd. [2013 (293) ELT 387 (Tri-Mumbai)] wherein it is held that penalty was not

imposable in absence of fraud, suppression. They have also cited the case law in case of Rama Wood Craft (P) Ltd. [2008 (225) ELT 348 (Tri-LB)] wherein in a Central Excise case the hon'ble Larger Bench has held that even where a minimum penalty is prescribed the authority has discretion to impose a lesser penalty depending on facts and circumstances of the case. Imposition of penalty is a penal action hence there cannot be cut and dried formulae for quantifying the amount. This decision has been given in context of Rule 173Q of the erstwhile Central Excise Rules, 1944 and Rule 25 of Central Excise Rules, 2002. The Learned Advocate has contended that a nominal penalty not exceeding Rs. 5000/- be imposed on the noticee.

21.1 I find that the ingredients of fraud, suppression etc. are not invoked when the penalty is proposed under Section 112 of the Customs Act, 1962. Only when there is specific mention in the statute the ingredients of fraud, suppression etc. are required for imposition of penalty, these ingredients are mentioned in a Show Cause Notice. In subject case of Inditalia Refcon Ltd. Vs Commissioner of Central Excise & Customs, Raigad cited above, the hon'ble Tribunal in para 6.4 of the order state and I quote

"..... Further, penalty under Section 114A is imposable in case duty has not been levied or has been short levied, etc. by reason of fraud, collusion or wilful mis-statement or suppression of facts or contravention of Central Excise Act or Rules, 1944 with intent to evade payment duty. No such ingredients have been brought out by the department....."

I find that in the subject case Section 112 of the Customs Act, 1962 has been invoked and Section 114A of the Customs Act, 1962 has not been invoked and hence there is no need to invoke fraud or suppression.

21.2 I further find that hon'ble Supreme Court in their judgement [1989 (42) ELT 350 (SC)] of Gujarat Travancore Agency Vs Commissioner of Income Tax, in context of imposition of penalty has held

"..... unless there is something in the language of statute indicating the need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with statute has occurred"

. . . .
. . . .
. . . .

It is further stated

".....We are supported by the statement in Corpus Juris Secundum Volume 85, page 580, paragraph 1023:

"A penalty imposed for tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws....." (para 4)

Hence, appeal filed by M/s. Gujarat Travancore Agency against penalty imposed for lack of mens rea was dismissed with costs.

Coming back to subject case, the language of Section 112(a) merely mention that if the importer in relation to any goods does or omits to do any act or omission which would render the goods liable for confiscation then penalty under Section 112 (a) is imposable. Thus, the case laws of M/s. Inditalia Refcon Ltd. has been misquoted and the argument in this context is incorrect.

22. In view of the aforesaid detailed discussions, I find that goods were infact imported in violation of para 2.11 of the Foreign Trade Policy (2009-2014) in as much as the goods were purchased on High Seas by noticee from MMTC who were only granted special & exclusive privilege to import the goods as per para 2.11 of the Foreign trade Policy. The noticee filed the Bill of Entry and also paid the duty and cleared the goods from Customs as a legitimate importer inconformity with definition of importer under Section 2(26) of the Customs Act, 1962. In view of the above, I hold that 200 MT of Technical Grade Urea valued at Rs. 50,25,962/- imported by M/s. Malani Enterprises, Ankleshwar, Gujarat is liable for confiscation under Section 111(d) of the Customs Act, 1962 for importing in violation of para 2.11 of Foreign Trade Policy (2009-2014). I also hold that M/s. Malani Enterprises, Ankleshwar, Gujarat liable for penalty under Section 112(a) (i) of the Customs Act, 1962 for acts and omissions on their part to make the goods liable for confiscation under section 111(d) of the Customs Act, 1962. However, I find that in view of the decision of Larger Bench of Tribunal in case of Shiv Kripa Ispat Pvt. Ltd. (Supra) which has been upheld by the hon'ble High Court of Mumbai as cited at [2015 (318) ELT A 259 (Bom)] and also decision of hon'ble Punjab & Haryana High Court in the case of Raja Impex (P) Ltd. [2008 (229) ELT 183 (P&H)] the goods when cleared by authorities without execution of any Bond/Undertaking by the assesse, redemption fine is not imposable.

23. In view of the above legal decisions of higher legal fora, I pass the following order.

:: ORDER ::

(i) I hold that 200 MT of Technical Grade Urea imported and cleared by M/s. Malani Enterprise, B-8, Jalkamal Co Op Hsg Soc Ltd., Plot No. 10, GIDC Ankleshwar, Gujarat-393002 under Bill of Entry No.

2695993 dated 12.07.2013 filed by them and which is valued at Rs.50,25,962/- and on which the importer M/s. Malani Enterprises paid duty of Rs. 12,99,336/- is liable for confiscation in terms of Section 111(d) of the Customs Act, 1962. However, since the goods have been released/ out of charged on final assessment without any Bond/Undertaking, I do not impose the redemption fine as goods are not available for confiscation.

(ii) However, I impose a penalty of Rs.3,50,000/- (Rupees Three Lakhs Fifty Thousand Only) on M/s. Malani Enterprise,B-8, Jalkamal Co Op Hsg Soc Ltd., Plot No. 10, GIDC Ankleshwar, Gujarat-393002 in term of Section 112(a) (i) of the Customs Act, 1962.

21/5/2019

(PRASHANT KADUSKAR)
Additional Commissioner
Custom House, Mundra.

F.No. VIII/48-10/Adj/ADC/MCH/2018-19 Date: 21.05.2019

By Registered post

To

M/s. Malani Enterprise,
B-8, Jalkamal Co Op Hsg Soc Ltd.,
Plot No. 10, GIDC Ankleshwar,
Gujarat-393002

Copy to:

(i) The Principal Commissioner, Custom House, Mundra
(ii) The Deputy Commissioner (RRA), Custom House, Mundra.
(iii) The Deputy Commissioner (SIIB), Custom House, Mundra.
(iv) The Deputy Commissioner (Gr-II), Custom House, Mundra.
(v) The Deputy Commissioner (TRC), Custom House, Mundra.
(vi) The Deputy Commissioner (EDI), Custom House, Mundra.
(vii) Guard File.