



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

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| A | File No. | VIII/48-09/Adj/ADC/MCH/2018-19 |
| B | Order-in-Original No. | MCH/ADC/PSK/ 39/2019-20 |
| C | Passed by | Shri Prashant Kaduskar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra |
| D | Date of Order | 29.07.2019 |
| E | Date of Issue | 29.07.2019 |
| F | SCN NO. & Date | F. No. S/15-02/Enq.-Urea/Deep/SIIB/CHM/2018-19 dated 05.07.2018 |
| G | Noticee / Party / Importer / Exporter | M/s. Deep Traders, 18, Vijay Society, Khambhat, Dist.- Anand, Gujarat |

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

- 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.
- 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 –
 - उक्त अपील की एक प्रति और
A copy of the appeal, and
 - इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं०-6 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.
- अपील ज्ञापन के साथ ड्यूटी/ 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.
- 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.
- 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/Deep/SIIB/CHM/2018-19 dated 05.07.2018 issued to M/s. Deep Traders, 18, Vijay Society, Khambhat, Dist.- Anand, Gujarat

BRIEF FACTS OF THE CASE

M/s. Deep Traders, 18 Vijay Society, Khambhat, Dist- Anand, Gujarat (Earlier Add. 4, Jeevan Vihar Society, Opp. Navyug College, Rander Road, Surat, Gujarat-395009) (herein after referred as "the importer"), having IEC No.5205031816, engaged in import of Technical Grade Urea falling under 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).

1.2 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.

1.3 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.

1.4 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.

1.5 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

1.6 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.

1.7 The importer had filed various Bills of Entry 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 Bills 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 | 2933419/07.08.2013 | 100 | 2713158 | 701419 | 07.08.2013 |
| | TOTAL | 100 | 2713158 | 701419 | |

1.8 A statement of Shri Dipen M Shah Proprietor of M/s. Deep Traders, 18, Vijay Society, Khambhat, Dist-Anand was recorded on 15.06.2018, wherein he, *inter alia* stated that his company is engaged in trading activity of various types of chemicals including 'Technical grade urea'; since last 25 years; that on being specifically asked regarding the import license of Technical grade Urea, imported during the period prior to 27.04.2015, he stated that his company have a valid permission for import of Technical grade urea for industrial use issued by the Jt. Director, Department of Fertilizer, Ministry of Chemicals & Fertilizers vide No. 6-4/2013-FM (Vol-II) dated 16.05.2013 for the F.Y. 2013-14 and submitted copy of

permission/license No. 6-4/2013-FM (Vol-II) dated 16.05.2013 along with copies of Bill of entry, High sea sale agreement with M/s. MMTC and other import documents.

On being asked, he stated that his company had entered into agreement of High Sea Purchase of 100 MT of Technical Grade Urea with M/s MMTC, a state trading Enterprise, and had filed Bill of Entry No. 2933419 dated 07.08.2013 for Home Consumption of Technical Grade Urea and cleared the same on payment of appropriate Customs duties; that they have complied the conditions imposed under No. 6-4/2013-FM (Vol-II) dated 16.05.2013 at the material time.

1.9 The Joint Director, Department of Fertilizer, Ministry of Chemicals & Fertilizers vide permission No. 6-4/2013-FM (Vol-II) dated 16.05.2013 extended the permission to import balance 1500 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 16.05.2013, which is reproduced as under:

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

1.10 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 (STE) 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 16.05.2013.

1.11 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.”

1.12 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;”

1.13 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”.

1.14 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 100 MTs of Technical grade Urea having assessable value of Rs. 27,13,158/-, in violation of provisions of Foreign Trade Policy enforced at the material time. The importer had paid total Customs duties of Rs.7,01,419/- against the import and clearance of 100 MTs of Urea. It appeared that 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 16.05.2013 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.

1.15 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.

1.16 It appeared 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.

1.17 In view of the above, M/s. Deep Traders, 18, Vijay Society, khambhat, Dist-Anand, Gujarat (Earlier Add. 4, Jeevan Vihar Society, Opp. Navyug College, Rander Road, Surat, Gujarat-395009) were called upon to show cause to the Additional Commissioner of Customs, Mundra, vide Show cause Notice No. F. No. S/15-02/Enq-UREA/Deep/SIIB/CHM/18-19 dated 05.07.2018 asking them as to why:

- (i) The Technical Grade Urea of 100 MT valued to Rs.27,13,158/- 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

2. The Noticee, vide their letter dated 22.10.2018 has submitted the following submission:

- (i) Ministry of Chemical and Fertilizer had granted the permission for import of Technical Grade Urea for Industrial use, vide letter no. 6-4/2013-FM (Vol-II) dated 16.05.2013. While giving the said permission to import the Technical Grade Urea for Industrial purpose, the Ministry of Chemical and Fertilizer had imposed various conditions but it has been never laid down the condition to the effect that the goods cannot be purchased on High Seas Sale basis from State Trading Enterprises.
- (ii) The Noticee had also entered into an agreement dated 05.06.2013 with MMTC Ltd., in terms of Article 15 of the said agreement, it is also required for the noticee to follow some conditions and to provide some documents, Even in terms of the conditions as mentioned in Article 15, it was not the restriction on the part of the noticee that the goods cannot be purchased from State Trading Enterprises on High seas sale basis. The noticee also entered into High seas Sale agreement dated 30.07.2013 with MMTC Limited; even there was no restriction under such agreement.

- (iii) They further submitted that based on High Seas Sale purchase agreement, the noticee had purchased 100MT of Technical Grade Urea from M/s. MMTC, a State Trading Enterprise and filed only one Bill of Entry No. 2933419 dated 07.08.2013 for home consumption and also cleared the said consignment on payment of Customs duties, The payment of Customs duties is not under dispute at all. Since the consignment has been cleared on payment of Customs duties, the question of confiscation of the goods does not arise at all. Even M/s MMTC Ltd., has not imposed any condition either in the agreement dated 05.06.2013 or in the agreement dated 30.07.2013 to the effect that the noticee i.e. Deep Traders, cannot purchase the goods from State Trading Enterprises. As the matter of fact, since in the permission dated 16.05.2013 granted by Ministry of Chemical & Fertilizers, no condition to the effect that the Technical Grade Urea cannot be purchased from State Trading Enterprises based on High seas sale-purchase transaction, has not been imposed, the notice was naturally unaware about such provisions even if the same are laid down in foreign Trade Policy. The noticee was under bonafide impression that the goods i.e. Technical Grade Urea can be purchased even by High Seas Sale basis as no such condition/restriction was mentioned in the said permission.
- (iv) Article-15 of the agreement with MMTC, does not state anything by which permission from the DGFT was required to be sought. It is also further submitted that there was also import of the same goods other than the present import consignment involved in the instant case, but in that case, no SCN has been issued. In the instant case, suppression of facts can never be alleged, in as much as, the noticee had entered into agreement with MMTC Ltd., to purchase the goods. Further, the goods are cleared after filing the Bill of Entry and also payment of Customs duties. Once the goods have been cleared by filing the relevant documents before the Customs Authority and on payment of Customs duty, how the department can alleged that the facts have been suppressed with intention to evade payment of Customs duty.
- (v) As regards the contention about non-fulfilment of condition (xiv) of the permission granted under letter dated 16.05.2018 is concerned, the noticee submit that they have not contravened the condition no. (xiv) of the said permission, in as much as, in terms of the said condition, it was required for the TG Urea user to inform the department through STEs/any other company under license from DGFT from whom he/she is buying TG Urea, giving information with respect to production being produced by using TG Urea, quantity of TG Urea needed to manufacture one MT (or any other unit) of the product,

total quantity produced last year and in last month, quantity of TG Urea used in that year/month respectively/ In view of the language of the said condition, it is submitted that it was required for the actual user of TG urea to intimate the department and not the person like the noticee as in the instant case, noticee has purchased the TG Urea from M/s. MMTC Limited, and therefore such TG Urea has been sold as such to different customers, and such different customers, in turn, have utilized TG Urea in the manufacture of the finished goods. It is also further submitted that the different customers, through whom the goods were sold were manufacture of chemical products and thereby TG Urea was an input for such customers. In view thereof, it is submitted that we were not utilizing TG Urea, but selling as such and thereby the noticee was not the actual user. In view of such facts, the noticee submit that the condition No. (xiv) was not applicable to the noticee. On perusal of the said condition, it would also be found that it was required for the actual users to give information regarding Input Output ratio in relation to consumption of TG Urea, the total quantity produced, and the quantity of the goods manufactured out of TG Urea. Since the noticee was trader and not the manufacture, the question of giving such details was not at all possible. The noticee therefore submit that the basic contention to the raise the proposal to confiscate the goods and to impose penalty itself is not correct and legal and also not based on the facts of the case and therefore such contention is not sustainable.

- (vi) They were registered as dealer under Central Excise Act and Rules made thereunder and noticee has sold the TGU as such to the customers and not utilized the same in manufacture any goods.
- (vii) There is no contravention of the Policy or any other law, the question of the goods being liable to confiscation under section 111 (d) of the Customs Act, 1962 and hence penalty cannot be imposed on noticee under Section 112(a) of the Customs Act, 1962.
- (viii) They relied upon following case laws and submitted that where the import is in accordance with the consistent past practise, the question of confiscation under section 111(d) and imposition of penalty under section 112(a) of the Customs Act, 1962 does not arise:
 - (a) CCE Vs Raja Impex – 2008(229) ELT 18 (T)
 - (b) Shivkripa Ispat Pvt. Ltd. Vs CCE, Nasik – 2009 (235) ELT 623 (T-LB)
 - (c) CCE Vs asoj Soft Caps Pvt. Ltd. – 2012 (280) ELT 88 (T-Ahmd)
 - (d) Dupont Synthetics Pvt. Ltd. Vs CCE, Surat – 2010 (259) ELT 408 9T-Ahmd)
 - (e) Weston Components Ltd. Vs CCE – 2000 (115) ELT 278 (SC)

- (f) Commissioner of Customs vs Finesse Creation Inc – 2009 (248)
ELT 122 (Bom.) [the ratio of the said judgement has been upheld by the Hon'ble
Supreme Court reported in 2010 (255) ELT AA120 (SC)]
- (g) Commr. of Customs Vs Sudarshan Cargo Pvt. Ltd. – 2009 (248)
ELT 122 (Bom.)

RECORD OF PERSONAL HEARING:

3. Personal hearing in the matter was fixed on 11/15/16.04.2019 but no one appeared. However, M/s. Deep Traders vide their letter dated 09.04.2019 have requested to adjudicate the case based on their reply dated 22.10.2018.

DISCUSSION AND FINDING:

4. I have gone through the show cause notice dated 05.07.2018, the detailed written submission dated 22.10.2018 given by the Noticee and the various case laws cited by them in their written submission. According to the noticee, they have valid permission no. 6-4/2013-FM (Vol.II) dated 16.5.2013 to import balance 1500 MTS through any State Trading Enterprises (STEs) (i.e. MMRTC, IPL, STC) during the year 2013-14 from Joint Director, Department of Fertilizer, Ministry of Chemical and Fertilizer. In this respect, the Importer has taken the plea that the permission from the Ministry has never laid down a condition that goods cannot be purchased on High Seas Sale basis from STE. The importer has stated that they were naturally unaware about such provision that TG Urea cannot be purchased from STE on High Seas Sale purchase transaction and even if such a condition was laid down in Foreign Trade Policy, the Noticee was under bonafide belief that TG urea can be purchased even on High Seas Sale basis as no such restriction was mentioned in the said permission. It is also mentioned that allegation that facts have been suppressed with intention to evade the payment of Custom duty is also wrong. They have submitted that they were not actual users and condition no. (xiv) was not applicable to them as they were Central Excise dealers. I find that they have submitted the Central Excise invoices and also the Central Excise returns along with commercial invoices and ledger account details. It has been argued that they have not contravened any provision of the Customs Act, 1962 and hence goods are not liable for confiscation under Sec 111 (d) of the Customs Act, 1962 & hence no penalty can be imposed on them.

5. In the context, it will be prudent to examine the definition of "Import" and "Importer" given in Custom Acts 1962. The section 2(23) of the Customs Act 1962, defines "import" as bringing into India from place outside India. The section 2(26) of the Customs Act defines "importer" 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 person holding himself out to be importer.

6. I find that Para 2.11 of the 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".

"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."

I find that special and exclusive privilege has been granted to the State Trading Enterprise to be importer of technical grade urea as Para 2.11 of the relevant foreign trade policy in force at the time of imports. Thus, in the subject case as per harmonious reading of the policy permission viz Para 2.11 of the foreign trade policy, the importer should invariably be STEs only. Whereas by purchasing the goods on High Seas Sale basis from STEs, the noticee, M/s Deep Traders, Anand, have themselves become an importer which is contrary to the condition of the permission granted by Joint Director in Dept of Fertilizer, Ministry of Chemicals & Fertilizers, as per their letter No. 6-4/2013-FM (Vol.II) dated 16.5.2013. I find that the condition (xiv) of letter dated 16.5.2013 of Ministry of Chemicals & Fertilizers dated 16.5.2013 addressed to the noticee on the subject of permission for import of Technical Grade Urea for Industrial use, states that TG Urea user shall inform the Ministry of Chemical and Fertilizer through STEs from whom they are buying TG Urea, giving information with respect to production being produced by using TG Urea, quantity of Technical Grade Urea needed to manufacture one MT of the product. The permission dated 16.5.2013 state that permission for import of balance 1500 MT of TG Urea for industrial uses **through** any State Trading Enterprise (i.e. MMTC, IPL, STC) and condition (v) reads;

"Technical Grade Urea thus imported shall be sold to end user/distributers/ permission holders only..."

The word used in condition (v) is "**sold**" which clearly indicates domestic sale as no word High sea Sale is mentioned. Even condition (xiv) which noticee has quoted mention that TG Urea users shall inform the Department through STEs from whom they "**buying**" TG Urea, are giving information w.r.t. production being produced by using TG Urea, quantity of TG urea needed to

manufacture one MT of the product etc. 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. I also find that the contention of the importer that the word used in ITC (HS) heading 31021000 is "through" and not "by" STC, MMTC and Indian Potash Limited, means only that the purchase order is to place by STEs, viz., STC, MMTC, Indian Potash Limited and there is no restriction in the policy for purchasing the goods from STC/MMTC/Indian Potash on High Sea Sale basis and filing the Bill of Entry by the noticee. I find that this distorted interpretation of the Policy provision in this context has been done by the importer for their own advantage and convenience as well material benefit to save Sales Tax/VAT. I find that as defined in Customs Act, 1962, importer in relation to any goods at any time between their importation and the time when they are cleared for home consumption include any owner, beneficial owner or any person holding himself out to the importer. Thus, it is clear that the privilege of being importer is granted to STC, MMTC and Indian Potash Limited and they are required to clear the goods as importer for home consumption. The fact that M/s. Deep Traders, Anand has filed the Bill of Entry as importer is contrary to the exclusive and special privilege granted to the STEs and the said imports with M/s. Deep Traders, Anand as importer thus becomes liable for confiscation under Section 111 (d) of the Customs Act, 1962 for imports being contrary to the prohibition imposed by any other law for time being in force viz., the Policy provisions in force. This view is also supported by the Legal meaning of word "through" In the Legal dictionary The 'freedictionary.com' the legal meaning of through is given as:

"through (by means of), adverb- by means of, by the hand of, by the way of, using, using the help of.

Through (from beginning to end), adverb- all along, all the way, by way of, via..."

Thus, meaning of word through State Trading Enterprises, would mean import of Technical Grade Urea at the hands of STEs or by the way of STEs using STEs, using the help of STEs, all along through STEs, via STEs. This makes it is evident that the imports all along, even clearance for home consumption should have been done by STEs.

I hold that M/s. Deep Traders, Khambat, Anand have violated the policy provisions provided under para 2.11 of the Foreign Trade Policy 2009-14 and the imports of 100 MTs of Technical Grade Urea valued at Rs. 27,13,158/- is liable for confiscation under Section 111(d) of the Customs Act, 1962.

7. I also find that in case of Marico Industries Ltd. Vs Commissioner of Customs (EP), Mumbai [2007 (209) ELT 403 (Tri-Mumbai)] wherein the coconut oil was canalized item under the provisions of Foreign Trade Policy and could only 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 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. I find that in the appeal, the hon'ble Tribunal held that there was violation of policy as sale was on high Sea Sale basis and not through STC. The hon'ble Tribunal up held the confiscation of the goods, though the redemption fine was reduced. The hon'ble Tribunal in para 11 of the cited decision has held;

“ 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. Vs Commissioner of Customs (EP), Mumbai, cited supra, is similar to the subject case and the decision would be applicable to the subject case.

8. I find that the noticee has taken a plea that noticee was under bonafide belief/impression that TG Urea can be purchased even on high sea sale basis as no such restriction was mentioned in the permission of Ministry of Chemical and Fertilizer letter No. 6-4/2013-FM (Vol.II) dated 16.5.2013. In context of bonafide belief the Tribunal in case of Winner System vs Commissioner of Central Excise & Customs Pune [2005 (191) ELT 1051 (Tri-Mumbai)] has held in that case where according to the assessee they had purchased 37 computers from outside and sold them again and had contended that extended period of limitation is not applicable as they entertained a bonafide belief that no duty is payable by them. The assessee's contention was held to be devoid of merit and tribunal had held that blind belief cannot substitute bonafide belief. The extended period of limitation was held applicable.

8.1 In case of Tanzeem Screenarts v. Commissioner of Central Excise, Mumbai -I : [2006] 196 ELT 209 (Tri -Mumbai)], the hon'ble Tribunal has held;

“ 7. the Appellant urged that the extended period of limitation is not invocable. We do not see why not. The appellant was receiving orders for Glow Signs and was supplying the same. He kept this fact to himself. He never disclosed to the department that he was either installing the Glow-Signs himself or was supplying fully

manufactured Glow-Signs. The Plea of bonafide belief neither here nor there.

A blind belief that what one is doing is right does not make it a bonafide belief."

In this case the hon'ble Tribunal confirmed the demand of duty and held that the extended period was invocable.

8.2 In case of Interscape vs Commissioner of Central Excise Mumbai-I [2006 (198) ELT 295 (Tri-Mumbai)], the hon'ble Tribunal has held;

" having examined the rival contention on this issue of penalty we observe that the bonafide belief is not blind belief. A belief can be said to be bonafide only when it is formed after all the reasonable consideration has been taken into account."

8.3 In case of Aircell Digilink India Ltd. vs CCE Jaipur [2004 (173) ELT 31 (Tri-Delhi)], hon'ble Tribunal has held;

" the contention of the counsel that the appellant had been working under the bonafide belief that such service i.e. sale of Sim cards to the subscribers was not taxable cannot be accepted there was nothing on record to suggest if the appellant ever approached the office of the service tax authorities to ascertain the details of their liability to pay service tax."

The plea of bonafide belief was rejected and extended period was held to be invocable.

8.4 In subject case also there is nothing on record that the importer M/s Deep Traders, 18, Vijay Society, Khambhat Dist Anand (Guj.) ever approached the department for any clarification. Hence, plea of bonafide belief need to be rejected in this case also.

9. The Importer has taken further a plea that in the subject case. The materials have neither seized nor released executing a bond and bank guarantee. Hence the order for confiscation cannot be given and as a corollary the penalty can also not be imposed on the noticee under section 112 (a) of the Customs Act, 1962. They have referred to and relied upon case laws as mentioned in Para 2 (viii) (a) to (g) (Supra). In this context the goods though not available for confiscation can be held to be liable for confiscation but only since goods are not available, the fine cannot be imposed. The penalty can very well be imposed for their acts & omissions making goods liable for confiscation under section 111 (d) of the Customs Act, 1962.

10. In view of the above, I hold that 100 MT of Technical Grade Urea valued at Rs. 27,13,158/- covered in Bill of Entry no. 2933419 dated 07.08.2013 and as mentioned in Table A above have been imported in violation of para 2.11 of the Foreign Trade Policy (2009-2014) and is liable for confiscation under section 111 (d) of the Customs Act 1962 and I also hold that M/s Deep Traders, 18, Vijay Society, Khambhat, Dist-Anand (Guj.) is also liable for penalty under section 112 (a) (i) of the Customs Act 1962.

The case laws of

- 1) I C Gandhi Texturising Industries Ltd. Vs CCE- [2014 (311) ELT 209 (Tri-Ahmedabad)]
- 2) A V Swamy vs CC -[2009 (240) ELT 419 (T)]
- 3) P. Kumar vs CC- [2009 (240) ELT 108 (T)]
- 4) Avlon Syntax Pvt. Ltd. vs CCE- [2007 (213) ELT 706 (T)]
- 5) S S Gupta vs CC -[2001 (132) ELT 441 (T)]
- 6) Maersk India Ltd. vs CC [2001 (129) ELT 444 (T)]

are not applicable and need to be distinguished as they are not applicable in view of the peculiar facts and circumstances of the subject case.

11. In view of the above, I hold that 100 MT of Technical Grade Urea under Bill of Entry no. 2933419 dated 07.08.2013 was given out of charge after assessment and goods were released on final assessment and not against any bond/Bank guarantee on provisional assessment basis. I find that Hon'ble Larger Bench of Tribunal in case of Shiv Kripa Ispat (P) Ltd. vs CCE Nashik [2009 (235) ELT 623 (Tri-LB)] has held that redemption fine in lieu of confiscation was not imposable when goods were allowed to be cleared without execution of bond and undertaking. In similar case of CC vs. M/s Raja Impex pvt ltd. [2008 (229) ELT 185 (P&H)], it is held that when goods in question were cleared by authorities without execution of bond/undertaking by the assessee, redemption fine is not imposable.

12. In view of the above, I pass the following order;

ORDER

- (i) I hold that 100 MT of Technical Grade Urea imported valued at Rs. 27,13,158/- (Rupees Twenty Seven Lakh Thirteen Thousand One Hundred and Fifty Eight only) covered under Bill of Entry no. 2933419 dated 07.08.2013 are liable for confiscation in terms of Section 111(d) of the Customs Act, 1962. However, since goods are not available for confiscation and have been already released, I do not impose any fine in terms of section 125 of the Customs Act, 1962.

- (ii) I impose a penalty of Rs.2,25,000/- (Rupees Two Lakh Twenty Five Thousand only) on M/s Deep Traders, 18, Vijay Society, Khambhat, Dist-Anand (Guj.) in term of Section 112 (a) (i) of the Customs Act, 1962.


(PRASHANT KADUSKAR)

29/7/2019
Additional Commissioner
Custom House, Mundra.

Date: 29.07.2019

F.No. VIII/48-09/Adj/ADC/MCH/2018-19

By Speed post

To

M/s Deep Traders, 18, Vijay Society,
Khambhat, Dist-Anand (Guj.)

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.