

		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.02838-271165/66/67/68	
		SECTION OF THE PRINCIPAL COMMISSIONER OF CUSTOMS	
A	File No.	VIII/48-11/Adj/ADC/MCH/2018-19	
B	Order-in-Original No.	MCH/ADC/PSK/41/2019-20	
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	31.07.2019	
F	SCN NO. & Date	F. No. S/15-02/Enq.-Urea/TransAgro/SIIB/CHM/2018-19 dated 05.07.2018	
G	Noticee / Party / Importer / Exporter	M/s. Trans Agro India Pvt. Ltd., Office No. 1802, The Affaires Building, 18 Floor, Plot No.9 Sector-17, Palm Beach Road, Sanapada, Navi Mumbai, Maharashtra- 400 705.	

02 AUG 2019
8559
Custom House, Mundra

- 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 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.
- 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/TransAgro/SIIB/CHM/2018-19 dated 05.07.2018 issued to M/s. Trans Agro India Pvt. Ltd., Office No. 1802, The Affaires Building, 18 Floor, Plot No.9, Sector-17, Palm Beach Road, Sanapada, Navi Mumbai, Maharashtra-400705

BRIEF FACTS OF THE CASE

M/s. Trans Agro India Pvt. Ltd., Office No. 1802, The Affaires Building, 18 Floor, Plot No.9 Sector-17, Palm Beach Road, Sanapada, Navi Mumbai, Maharashtra (herein after referred as "the importer"), having IEC No.0306068923, 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).

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 Bill 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	2700094/15.07.2013	100	2336534	604052	15.07.2013
2	2700199/15.07.2013	100	2336534	604052	15.07.2014
	TOTAL	200	4673068	1208104	

1.8 A statement of Shri Tarun Anand, Vice President cum Authorized person of M/s. Transworld Furtichem Pvt. Ltd. (earlier known as M/s. Trans

Agro India Pvt. Ltd.) Office No. 1802, The Affaires Building, 18 Floor, Plot No.9 Sector-17, Palm Beach Road, Sanapada, Navi Mumbai was recorded on 13.06.2018, wherein he, *inter alia* stated that M/s. Trans Agro India Pvt. Ltd. merged with M/s. Transworld Furtichem Pvt. Ltd. on 27.04.2017; that M/s. Trans Agro India Pvt. Ltd. was engaged in trading activity of various types of fertilizers including "Technical Grade Urea"; that he was working as Director in M/s. Trans agro India Pvt. Ltd; that he was looking after the work relating to import and clearance of goods; that at present, he is the Vice President in Transworld Furtichem Pvt. Ltd; 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 dated 25.04.2013 and No. 6-4/2013-FM (Vol-III) dated 11.12.2013 and submitted copy of permission/license No. 6-4/2013-FM dated 25.04.2013 and No. 6-4/2013-FM (Vol-III) dated 11.12.2013 along with copies of Bill of entry, High Sea sale agreement with M/s MMTC and other import documents.

1.9 On being asked, he stated that his company had entered into agreement of High Sea Purchase of Technical Grade Urea with M/s. MMTC, a State Trading Enterprise, from time to time and filed Bill of Entry and cleared the same on payment of appropriate Customs duties; that they have imported and cleared the Technical Grade Urea at Mundra port under the cover of 2 Bills of Entry during the period 2013-14 and they have complied the conditions imposed under No. 6-4/2013-FM dated 25.04.2013 & No. 6-4/2013-FM (Vol-III) dated 11.12.2013 at the material time.

1.10 The Joint Director, Department of Fertilizer, Ministry of Chemicals & Fertilizers vide permission No. 6-4/2013-FM dated 25.04.2013 extended the permission to import balance 8930 MTs of Technical Grade Urea for Industrial Use & the Jt. Director, Department of Fertilizer, Ministry of Chemicals & Fertilizers vide permission No. 6-4/2013-FM (Vol-III) dated 11.12.2013 extended the permission to import balance 11000 MTs of Technical Grade Urea for Industrial 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 dated 25.04.2013 & permission No. 6-4/2013-FM dated 11.12.2013, 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."

1.11 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 dated 25.04.2013 & permission No. 6-4/2013-FM (Vol-III) dated 11.12.2013.

1.12 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."

1.13 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;"

1.14 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".

1.15 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.46,73,068/-, in violation of provisions of Foreign Trade Policy enforced at the material time. The importer had paid total Customs duties of Rs.12,08,104/- 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 dated 25.04.2013 & No. 6-4/2013-FM (Vol-III) dated 11.12.2013 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.

1.16 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.

1.17 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.

1.18 In view of the above, M/s. Trans Agro India Pvt. Ltd., Office No. 1802, The Affaires Building, 18 Floor, Plot No.9 Sector-17, Palm Beach Road, Sanapada, Navi Mumbai was called upon to show cause to the Additional Commissioner of Customs, Mundra, vide Show cause Notice F. No. S/15-02/Enq-UREA/Trans Agro/SIIB /CHM/18-19 dated 05.07.2018 asking them as to why:

- (i) The Technical Grade Urea of 200 MT valued to Rs.46,73,068/- 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 06.06.2019 have submitted the following,

2.1 M/s. Trans Agro Pvt. Ltd. has argued that the contention raised in the Notice that prior to 28.04.2015, "Urea whether or not in aqueous solution" was allowed to be imported only by State Trading Enterprises under Heading No.3102 1000 of the ITC (HS) Policy 2009-2015 is ex-facie incorrect. A bare reading of the said Heading No.3102 1000 of the said ITC (HS) Policy as it stood before 28.04.2015 would show that import of Urea was allowed **through** STC, MMTC and Indian Potash Limited. The word used in the said Heading 3102 1000 is "**through**" and not "**by**" STC, MMTC and Indian Potash. Thus the contention raised in the Notice is based on a total mis-reading of the words of the said Heading No.3102 1000 of the ITC (HS) Policy. When the import is allowed "**through**" STC, MMTC and Indian Potash, it means that any person may import "**through**" STC, MMTC and Indian Potash. All that it means is that the purchase order on the foreign buyer has to be placed by STC, MMTC and Indian Potash and that the importer in India has in turn to purchase the same from STC, MMTC and Indian Potash. There is no restriction anywhere in the Policy which prohibits a person in India from effecting such purchase from STC, MMTC and Indian Potash on High Seas basis and filing Bill of Entry. So long as the purchase of the Urea from the foreign supplier is effected by STC, MMTC or Indian Potash who in turn sell the same to a party in India whether on High Seas or otherwise, the import is clearly through STC, MMTC or Indian Potash.

2.2 It has been argued that Para 2.11 of the Policy provides that 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. This clearly shows that the purchase for the import has to be done by the STEs. So long as the purchase of the Urea from the foreign supplier is effected by STEs, the import is through STEs and this is sufficient compliance with the ITC HS Policy which requires import through STEs and there is no restriction or prohibition that the Indian buyer from STEs cannot purchase the Urea from STEs on High Seas.

2.3 They have further argued that even the Government of India, Ministry of Chemical and Fertilizers, has by its letters dated 25th April 2013 and 11th December 2013, permitted them to import Technical Grade Urea through any State Trading Enterprise (i.e. MMTC, IPL, STC). When noticee is permitted to import through STE, it clearly means that purchase from the foreign supplier has to be by STE and that they in turn can purchase from the STE and file the Bill of Entry. If as contended in the Notice, noticee were only permitted to purchase domestically from the STE, the letters would not have said that noticee is permitted to import through STE.

2.4 The noticee has further added that the contention in the Notice that the STEs must only file the Bill of Entry and STEs cannot sell the Urea on High Seas to the Indian buyer is baseless. There can be no rational or logic in contending that under the Import Policy although the STEs who have purchased the Urea from the foreign buyer can sell the same to the Indian buyer after clearance from customs, such sale cannot be permitted on High Seas before clearance of the Urea from customs. Such a contention is totally absurd and meaningless.

2.5 The noticee has proffered that contention raised in the Show Cause Notice, apart from being the result of a total mis-reading of the ITC (HS) Policy is totally contrary to and in complete disregard of the regular and accepted practice followed by customs for over several decades. It is a regular practice followed over several decades that in case of imports which are canalized through STEs, the STEs place the order on the foreign supplier and thereafter effect High Seas sale of the same to the Indian Buyers. This would be evident from the following judgments:

- (a) CC v Union Carbide India Ltd-1987 (27) ELT 241: This case pertains to the period June 1975 when import of Manganese Ore was canalized through MMTC and in this case the Manganese Ore was sold on High Seas by MMTC to Union Carbide India Ltd,
- (b) Hyderabad Industries Ltd v UOI-2000 (115) ELT 593 (SC): In this case before the Supreme Court, asbestos was canalized through MMTC who sold the same on High Seas to Hyderabad Industries and the Supreme Court held that duty was payable on the price charged by MMTC to Hyderabad Industries,
- (c) CC v Coromondal Fertilizers Ltd- 1988 (33) ELT 451: In this case rock phosphate and sulphur were canalized through MMTC who sold the same on High Seas to Coromondal Fertilizers Ltd.
- (d) Godavari Fertilizers & Chemicals Ltd v CC-1986 (81) ELT 535: In this case Phosphoric Acid was canalized through MMTC who sold the same on High Seas to Godavari Fertilizers & Chemicals Ltd.

(e) SAIL v CC - 1999 (112) ELT 946: In this case, Lubricating Oil and Greases were canalized through Indian Oil Corporation who sold the same on High Seas to SAIL and the Tribunal held the import to be valid in law.

It is stated from the above judgments that right from the 1970s, the practice has been that where the import of any item is canalized through a STE, the STE places the order on the foreign buyer and purchases the same for import and thereafter sells the same on High Seas to the Indian buyer. To suggest that such a practice which is being followed for decades is in contravention of the Import Policy, is to say the least, totally uncalled for.

2.6 It has been averred that even the Central Board of Customs and Excise is fully aware and conscious of this practice and has not considered the same to be in contravention of law. This will be evident from the Board's Circular No.49/89-CX.8 dated 02.11.1989 in which the procedure for taking Modvat Credit has been laid down in respect of the duty paid by Indian Oil Corporation in respect of import of Steel Sheets which was canalized through MMTC and which were purchased on High Seas by IOC from the canalizing agency, MMTC. The view taken in this circular is reiterated in Circular No. 23/90-CX.8 dated 09.04.1990.

2.7 It is contended by the noticee that in the Show Cause Notice by relying on condition no. (xiv) of Permissions dated 25th April 2013 and 11th December 2013 were granted to them by the Government of India, Ministry of Chemicals and Fertilizers, that permission was granted to them only for domestic purchase of Urea from STE. Noticee submits that there is absolutely no such restriction in the said condition no. (xiv). Neither does condition no.(xiv) contain any restriction that purchase shall be made only domestically from STE nor does it prohibit purchase on High Seas. All that condition (xiv) stipulates is that the Department of fertilizers has to be kept informed through the STE from whom the Urea is purchased, about the product being produced from such urea, the quantity required, etc. There is absolutely no stipulation in condition (xiv) that urea has to be purchased from STE only domestically and not on High Seas. On the contrary, the Show Cause Notice has ignored the very first para of the said letters which grants permission to noticee to import the Urea through STE. If as contended in the Notice, noticee was only permitted to purchase domestically from the STE, the letters would not have said that noticee is permitted to import through STE.

2.8 The noticee has pointed out that if the contention in the Show Cause Notice that STEs cannot sell the Urea on High Seas Basis were to be correct, it would mean that the STEs and the Ministry of Chemicals and

Fertilizers are themselves acting in contravention of law. Noticee submits that such a view that the Government of India and STEs are themselves acting in contravention of the law is totally uncalled for.

2.9 The noticee has further submitted that 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 of their being liable to penalty under Section 112(a) of the said Act does not arise. Even otherwise, as submitted herein above, right from the 1970s, the consistent practice which has been accepted by customs is that where the import of any item is canalized through a STE, the STE places the order on the foreign buyer and purchases the same for import and thereafter sells the same on High Seas to the Indian buyer who files the Bill of Entry and to whom clearance is allowed by customs. It is settled law as laid down by the following judgments that where the import is in accordance with a consistent past practice, the question of confiscation under Section 111(d) and imposition of penalty under Section 112 of the Customs Act 1962 does not arise:

RECORD OF PERSONAL HEARING:

3. Shri Rahul Gajera, the learned Advocate of M/s. Trans Agro Pvt. Ltd., appeared for personal hearing on 10/06/2019 & took me through the Policy Provisions of ITC(HS) which states that import of Urea is allowed "through" STC, MMTC and Indian Potash Ltd. and not by STC, MMTC etc. He also stated that there are Board's Circular (i) 49/89-CX.8 dated 02/11/1989 and (ii) 23/90-CX.8 dated 09/04/1990 where Board has acknowledged that the practise that the purchase order will be by the STE but later the goods will be sold to actual user on High Sea Sale basis. He stated that since 1970's the practise has been going on and even department is accepting such imports without objection.

3.1 He refers to and relies upon the Case Law cited at [1984 (17) ELT 50 (Bom.) in case of Gujarat State Export Corporation Ltd. and another Vs. Union of India and another, wherein it is accepted that the practice once accepted would continue and there is no case of wrongful import. He states that in their case it is not a wrong practise but correct practise in conformity with Foreign Trade Policy. He added that this judgement has been accepted and relied in case of M/s. Memon Associates [1988 (34) ELT 367 (Tribunal)] and also in Case of M/s. Trident Agencies [1990 (45) ELT 116 (Tribunal)] where also it is held that once department accepts the existing practise then goods cannot be treated as canalized and there is no question of importation of any fine or penalty. The learned Advocate stated that the SCN is misconceived and should

be dropped. He also referred to the detailed written submission dated 06.06.2019 and reiterated what has been stated therein.

DISCUSSION AND FINDING:

4. I have gone through the show cause notice dated 05/07/2018, the written submission dated 06/06/2019, the record of personal hearing dated 10/06/2019 and various case laws referred to and relied upon and proceed to decide the case. The noticee has stated in their written submission that bare reading of ITC (HS) policy, under heading 31021000 as it stood before 28/04/2015 shows that import of urea is allowed through STC, MMTC and Indian Potash Limited. It is stated that the word used is “**through**” and not “**by**” STC, MMTC and Indian Potash Limited. According to noticee it means the purchase order on foreign buyer has to be placed by STC, MMTC, Indian Potash Limited and importer in turn has to purchase from STC, MMTC and Indian Potash Limited. It has been argued that there is no restriction anywhere in the policy for effecting High Sea Sale purchase from STC, MMTC, Indian Potash Limited. It has been further argued that para 2.11 of the policy provide that STEs shall make such purchases or sales involving imports and exports solely in accordance with commercial consideration, including price, quality, availability etc. The noticee has interpreted this to argue and state that as long as purchase of urea from foreign supplier is affected by STEs, the import is through STEs and there is no restriction for purchase of urea from STEs on High Seas. The noticee has also referred to a letters dated 25.04.2013 & 11.12.2013 of Ministry of Chemical & Fertilizers wherein the noticee has been permitted Technical Grade Urea through any State Trading Enterprises (i.e. MMTC, IPL and STC). The interpretation of the noticee for this letter is that purchase from foreign supplier has to be by STEs and they can purchase from STE on High Seas Sale basis and file the Bill of Entry. It has also been argued that contention of the Department that STEs cannot sell the urea on High Seas to the Indian buyers is baseless and that show cause notice is contrary to the accepted practice and noticee has also referred to relied upon various case laws and Circular 49/89-CX-8 dated 02.11.1989 and 23/90-CX-8 dated 09.04.1990 in this context.

5. In this context it will be prudent to examine the definition of “import” and “importer” given in Customs Act, 1962. The Section 2(23) of the Customs Act, 1962 defines “import” as bringing into India from a place outside India. The section 2(26) of the Customs Act, 1962 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 any person holding himself out to be the importer.”

6. 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”.

“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 & exclusive privilege has been granted to State Trading Enterprises 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 definition of “importer” under Customs Act, 1962 and the para 2.11 of the Foreign Trade Policy 2009-14, the importer should be invariable STEs only. Whereas due to purchase of goods on High Sea Sale basis from STEs the noticee M/s. Trans Agro India Pvt. Ltd. have themselves become an importer which is in itself contrary to the condition of the permission granted by Ministry of Chemical & Fertilizers as per the letters dated 25.04.2013 & 11.12.2013 for the import of Technical Grade Urea through STEs viz. MMTC in this case. I find that the Condition No. (xiv) of the letters dated F. No. 6-4/2013-FM dated 25.04.2013 and F. No. 6-23/2013-FM (Vol.III) dated 11.12.2013 of Ministry of Chemical & Fertilizers addressed to noticee and on subject of Permission for import of Technical Grade (TG) Urea through STE states that TG Urea users shall inform the Ministry of Chemical & Fertilizers through 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 etc.. The condition (v) of these permission letters dated 25.04.2013 & 11.12.2013 reads “*Technical Grade Urea thus imported shall be **sold** to end users distributors/ permission holders only.....*”. The word “**sold**” clearly indicate domestic sale as no word High Sea Sale is mentioned. Even condition (xiv) which noticee has mentioned in para 19 of the written submission dated 06.06.2019, indicate that TG Urea users shall inform the Department of Fertilizers, Ministry of Chemicals & Fertilizers, through 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 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 and falsified 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 STEs namely STC, MMTC and Indian Potash Limited and they are required to clear the goods as importer for home consumption. The fact that M/s. Trans Agro India Pvt. Ltd. has filed the Bills of Entry as importer is contrary to the exclusive and special privilege granted to the STEs and the said imports of 200MTs of Technical Grade Urea by M/s. Trans Agro India Pvt. Ltd. as importer thus makes the imported Technical Grade Urea 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 Foreign Trade Policy provisions in force. This view is also supported by the Legal meaning of word “through” In the Legal dictionary ‘The free dictionary.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**” Sate 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 the importer M/s. Trans Agro India Pvt. Ltd have violated the Policy provision provided under para 2.11 of the Foreign Trade Policy 2009-14 and the imports of 200 MTs of Technical Grade Urea covered under 2 Bills of Entry as detailed in Table-A of the Show Cause Notice and collectively valued at Rs. 46,73,068/- is liable for confiscation under Section 111(d) of the Customs Act, 1962.

7. I find that noticee has submitted the following case laws:-

- (i) CC Vs Union Carbide India Ltd. – 1987(27) ELT 241
- (ii) Hyderabad Industries Ltd. Vs UOI – 2000 (115) ELT 593 (SC)
- (iii) CC Vs Coromandal Fertilizers Ltd. – 1988 (33)ELT 451
- (iv) Godavari Fertilizers & Chemicals Ltd. Vs CC – 1986 (81) ELT 535
- (v) SAIL Vs CC – 1999 (112) ELT 946

The common theme in all these cited case laws is that various canalized item like Manganese Ore was sold by canalizing agency to M/s. Union Carbide India Ltd., asbestos which was canalized through MMTC was sold on High Seas to Hyderabad Industries, rock phosphate and sulphur canalized through MMTC was sold on High Seas Sale basis to Coromandal Fertilizers Ltd., phosphoric acid which was also canalized item was sold by MMTC on High Seas Sale basis to Godavari Fertilizers & Chemicals Ltd. etc., etc.. The noticee has averred that right from 1970s it is a the practice followed that where the import of any item is canalized through STE, the STE sells the canalized item on High Seas to Indian Buyer. Hence, according to the noticee, there is no contravention of Foreign Trade Policy in the subject case. They have also referred to Circular No. 49/89-CX-8 dated 02/11/1989 and Circular No. 23/90-CX-8 dated 09/04/1990. In this context to proffer that steel sheets which were canalized through MMTC were purchased by IOC from MMTC on High sea Sale basis.

8. In this context, I find that the cited case laws are very old 1986, 1987, 1988, 1999, 2000 vintage. I find that in a more recent case law 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 was purchased by M/s. Marico Industries Ltd. on High Sea Sale basis and they had filed Bill of Entry in their name. The Department had 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 upheld the confiscation of the goods, though the redemption fine was reduced. The hon'ble Tribunal in para 11 of the cited decision has 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. Vs Commissioner of Customs (EP), Mumbai, cited supra, is similar to the subject case and the decision would be applicable to the subject case. In view of the above, I find that the case laws cited (i) to (v) in para 7 (supra) need to be distinguished. In view of the above, I also find that citation of circular No. 49/89-CX-8 dated 02/11/1989 and 23/90-CX-8 dated 09/04/1999 are not applicable to the facts and circumstances of the case.

9. In view of the above, I hold that the 200 MT of Technical Grade Urea valued at Rs.46,73,068/- imported by M/s. Trans Agro India Pvt. Ltd., under 2 Bills of Entry, as detailed in Table-A of the Show Cause Notice have been imported in violation to para 2.11 of the Foreign Trade Policy (2009-2014) is liable for confiscation under section 111(d) of the Customs Act, 1962 and I also hold that importer M/s. Trans Agro Pvt. Ltd., Office No. 1802, The Affaires Building, 18 Floor, Plot No.9 Sector-17, Palm Beach Road, Sanapada, Navi Mumbai is liable for penalty under section 112(a)(i) of the Customs Act, 1962 for acts and omission on their part to make goods liable for confiscation under section 111(d) of the Customs Act, 1962. The case laws of M/s. Trident Agencies, M/s. Memon Associates and M/s. Gujarat State Export Corporation Ltd. cited in para 17 of the written submission dated 06.06.2019 need to be distinguished and not applicable to the facts and circumstances of the subject case.

10. In this case, I find that 200 MT of Technical Grade Urea under two Bills of Entry as detailed in TABLE-A of the Show Cause Notice were assessed finally and Technical Grade Urea was not available for confiscation as already given out of charge on 15.07.2013 as detailed in Table-A of the Show Cause Notice (Para 5). I also note that the goods were assessed finally and not released against Bond/Undertaking on provisional assessment basis. I find that the hon'ble Larger Bench of Tribunal in case of Shiv Kripa Ispat Pvt. Ltd. Vs CCE Nasik [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/ undertaking. The hon'ble High Court of Mumbai vide the decision cited at [2015 (318) ELT A 259 (Bom)] has upheld the decision of hon'ble Tribunal in case of Shiv Kripa Ispat Pvt. Ltd. cited supra. Similar decision has been taken by hon'ble Punjab & Haryana High Court in the case of Raja Impex (P) Ltd. [2008 (229) ELT 183 (P&H)] wherein it is held that when goods in question were cleared by authorities without execution of any bond/ undertaking by the assessee, redemption fine is not imposable and is set aside.

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

ORDER

(i) I hold that 200MT of Technical Grade Urea imported under two Bills of Entry No. 2700094 dated 15.07.2013 & 2700199 dated 15.07.2013 mentioned in Table-A of the Show Cause Notice and valued at Rs.46,73,068/- are liable for confiscation in terms of Section 111(d) of the Customs Act, 1962. However, in view of the various case laws discussed above, since goods have been released/ out of charged on final assessment and without any Bond/ Undertaking and since the impugned goods are not available for confiscation, I do not impose any redemption fine thereon.

(ii) However, I impose a penalty of Rs. 4,00,000/- (Rupees Four Lakh only) on M/s. Trans Agro India Pvt. Ltd., Office No. 1802, The Affaires Building, 18 Floor, Plot No.9, Sector-17, Palm Beach Road, Sanapada, Navi Mumbai in term of Section 112(a) (i) of the Customs Act, 1962.


(PRASHANT KADUSKAR)
Additional Commissioner
Custom House, Mundra.

31/7/2019

F.No. VIII/48-11/Adj/ADC/MCH/2018-19

Date: 31.07.2019

By Speed post

To

M/s. Trans Agro India Pvt. Ltd.,
Office No. 1802, The Affaires Building,
18 Floor, Plot No.9, Sector-17,
Palm Beach Road, Sanapada, Navi Mumbai
Maharashtra-400 705

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.