



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

A	File No.	VIII/48-12/Adj/ADC/MCH/2018-19
B	Order-in-Original No.	MCH/ADC/PSK/ 42 /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/Balaji/SIIB/CHM/2018-19 dated 09.07.2018
G	Noticee / Party / Importer / Exporter	M/s. Balaji Action Wooddecor Pvt. Ltd., G-11, Udyog Nagar, Main Rohtak Road, Delhi- 110041

OFFICE OF THE PRINCIPAL
COMMISSIONER OF CUSTOMS

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02 AUG 2019

Custom House, Mundra

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CHMundra website
02/08/19

1. यह अपील आदेश संबन्धित को निःशुल्क 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 प्रदत्त 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/- रुपये 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 सं०-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।

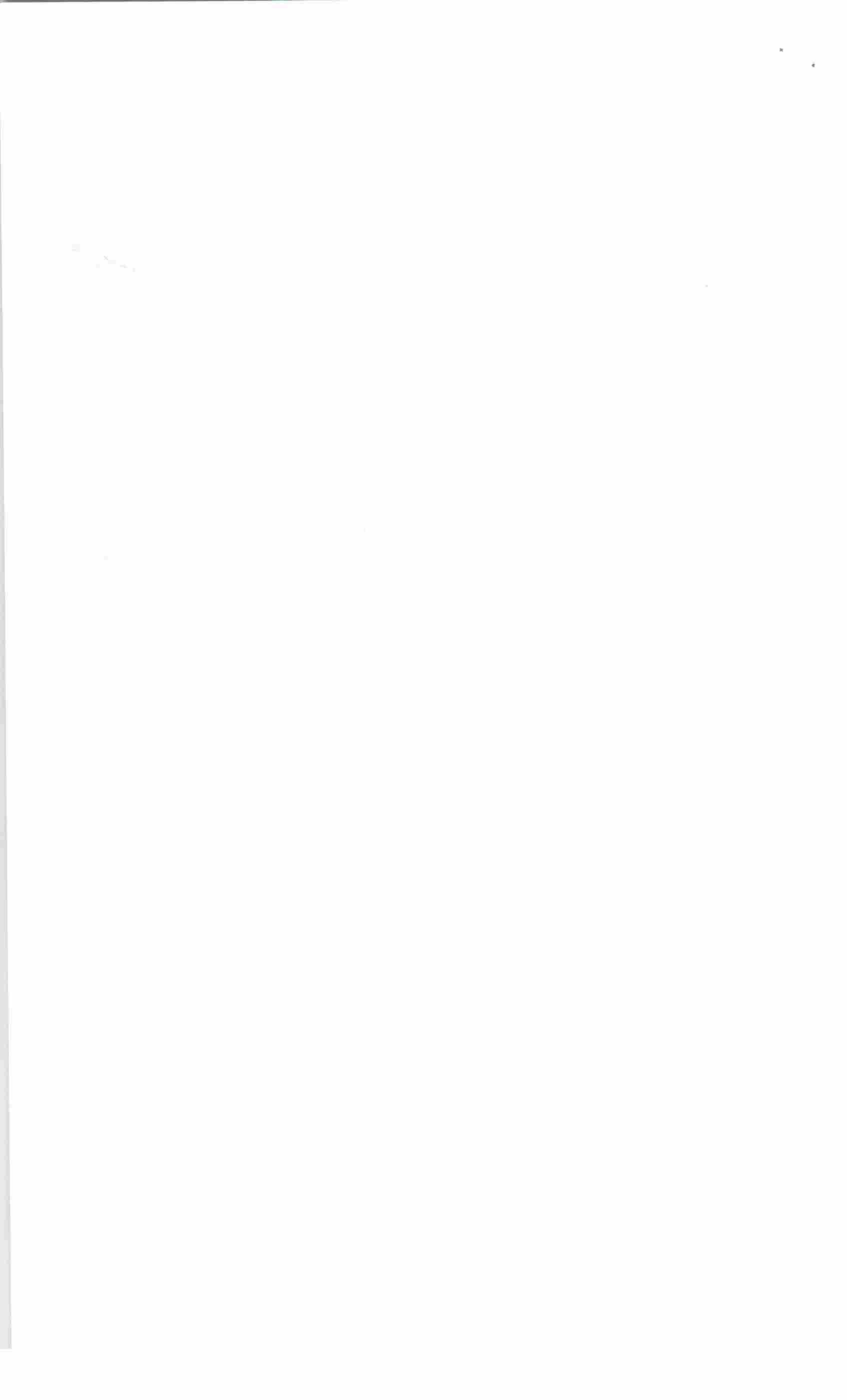
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. 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.

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/Balaji/SIIB/CHM/2018-19 dated 09.07.2018 issued to M/s. Balaji Action Wooddecor Pvt. Ltd., G-11, Udyog Nagar, Main Rohtak Road, Delhi- 110041



BRIEF FACTS OF THE CASE:

M/s. Balaji Action Wooddecor Pvt. Ltd., G-11, Udyog Nagar, Main Rohtak Road, Delhi- 110041 (herein after referred as “the importer”), having IEC No.510022529, 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. The 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. 8108906 dated 27.01.2015 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 Indian Potash Ltd. 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	8108906/27.01.2015	500	10560524	2413409	02.02.2015

6.1 Summon was issued to the importer on 04.04.2018 and 23.05.2018 for producing documents and giving statement. No one appeared for giving statement however, the importer submitted copy of permission/license No. 6-23/2013-FM dated 04.03.2014 along with copies of Bill of entry, High Sea Sale agreement with M/s. Indian Potash Ltd. 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 5000 MT with M/s. Indian Potash Ltd., a State Trading Enterprise on High Sea Sale basis and had filed Bill of Entry 8108906 dated 27.01.2015 and cleared the same on payment of appropriate Customs duties during the period 2014-15.

7. The Asstt. Commissioner(Movt.), Department of Fertilizer, Ministry of Chemicals & Fertilizers vide permission No. 6-23/2013-FM dated 04.03.2014 extended the permission to import balance 6000 MTs of Technical Grade Urea for Industrial Use through any State Trading Enterprises (i.e., MMTC, IPL, STC) during the year 2014-15 on fulfilment of certain conditions by the importer. As per condition No. (xiv) of the permission No. 6-23/2013-FM dated 04.03.2014, which is reproduced below:

“TG urea user shall inform this department through STEs 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 but in the instant case the importer M/s. Balaji Action Wooddecor Pvt. Ltd. has purchased the Technical Grade Urea on High Sea sales basis from M/s. Indian Potash 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. 6-23/2013-FM dated 04.03.2014.

8.1 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.”

8.2 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;”

8.3 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”.

8.4 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 500 MTs of Technical grade Urea having assessable value of Rs.1,05,60,524/-, in violation of provisions of Foreign Trade Policy enforced at the material time. The importer had paid total Customs duties of Rs.24,13,409/- against the import and clearance of 500 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. 6-23/2013-FM dated 04.03.2014 issued by the Asstt. Commissioner(Movt.), Department of Fertilizer, Ministry of Chemicals & Fertilizers in guise of licence issued by the DGFT. Thus, the act on the part importer for wilful misstatement 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, Balaji Action Wooddecor Pvt. Ltd., G-11, Udyog Nagar, Main Rohtak Road, Delhi- 110041 has been called upon to show cause to the Additional Commissioner of Customs, Mundra, vide Show cause Notice No. F. No. S/15-02/Enq-UREA/Balaji/SIIB/CHM/18-19 dated 09.07.2018 asking them as to why:

(i) The Technical Grade Urea of 500 MT valued to Rs.1,05,60,524/- 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 04.08.2018 and 20.05.2019 has submitted the following submission:

The noticee has submitted that the Show cause Notice totally misread and misconstrued the said letter No. 6-23/2013-FM dated 04.03.2014 issued by the Ministry of Chemicals and Fertilizers. It may be seen from the subject matter of the Permission letter No. 6-23/2013-FM dated 04.03.2014 as well as from the wordings employed in the opening paragraph of the said letter that the noticee M/s. Balaji Action Wooddecor Pvt. Ltd. were specially granted permission to import 6000MT of Technical Grade Urea for industrial use through any of the STEs Viz. MMTC, IPL, STC during 2014-15 subject to certain conditions and one such condition at (xiv) warranted that the necessary information w.r.t. production having used TG urea be supplied to the Department of Fertilizer through the STE from whom the Urea Technical Grade was bought by the TG urea user. The Noticee has imported 500MT of TG Urea through SRE viz. Indian Potash Limited in terms of the said permission granted by the Department of Fertilizers. It is not the case of the respondents that the Noticee has not

informed the Department of Fertilizers about the import of 500MT of TG urea after purchase of the same on High Sea Sale basis from Indian Potash Limited. At no stage, this condition could be read to mean that the said permission was granted to the noticee only for domestic purchase of Urea as contended in the Show Cause Notice. Such an interpretation will render the subject matter of the said letter otiose and nugatory, which is not permitted in Law. It is well settled that the words have to be read harmoniously to advance the purpose and not to read so as to defeat the purpose for which certain concession is granted. Therefore, the allegation of violation of conditions of permission letter No. 6-23/2013-FM dated 04.03.2014 is totally vexatious and not legally correct and hence not maintainable.

12.1 It has been argued that the contention raised in the show cause notice dated 09.07.2018 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 as per the Policy conditions then applicable, import of Urea was allowed through STC, MMTC and Indian Potash Ltd. 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 misreading 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 Ltd. All that it means is that the purchase order of the foreign buyer has to be placed by the STEs viz. STC, MMTC and Indian Potash and that the importer in India has in turn to purchase the same from STC, MMTC and Indian Potash Ltd. 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 Sea basis and filing Bill of Entry. So long as the purchase of the Urea from the foreign supplier is effected by STEs viz. 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 Ltd.

12.2 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 practice, 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 OTC 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.

12.3. It has been argued that the inference drawn in the show cause notice that the STEs can only import the said goods and file the Bill of Entry and STEs cannot sell the Urea on High Seas to the Indian buyer is baseless. There can be no rationale or logic in suggesting 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.

12.4 The noticee has proffered that the contention raised in the show cause notice apart 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 import which is 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 judgements:

- (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 Coromandal Fertilizers Ltd. – 1988 (33)ELT 451: In this case rock Phosphate and Sulphur were canalized through MMTC who sold the same on High Sea Sale to Coromandal 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 seen that from the above judgements 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 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.

12.5 It is 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 making 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 through agency, MMTC. The view taken in this circular is reiterated in Circular No. 23/90-CX.8 dated 09-04-1990.

12.6 It is further stated that even, the Ministry of Chemicals & Fertilizers had by their letter No. 6-23/2013-FM dated 04.03.2014 granted permission to import Urea through any STE. The contention in the Show Cause Notice would imply that STEs cannot sell the Urea on High Seas basis; it would mean that the STEs and Ministry of Chemical & Fertilizers were themselves acting in contravention of law. They submitted that such a view is uncalled for.

12.7. According to the noticee, in consideration of the above factual position and settled legal position as regards import of goods by third parties through canalizing agencies such as STC/MMTC/IPL etc. as explained in foregoing paras, the inference drawn in the show cause notice that the noticee suppressed and wilfully mis-declared and imported Urea by producing the Permission letter No. 6-23/2013-FM dated 04.03.2014 issued by the Ministry of Chemical and Fertilizers, New Delhi as if it were the import license is totally misleading and baseless. As the goods were correctly imported as per policy conditions then applicable read with the permission letter No. 6-23/2013-FM dated 04.03.2014 of Department of Fertilizers, the allegation that the goods were rendered liable for confiscation under Section 111(d) of the Customs Act, 1962 is not legally sustainable.

12.8. In addition to above, the noticee, vide letter dated 20.05.2019, submitted that they were granted extended permission vide letter dated 04.03.2014 to import balance 6000 MTs of Technical Grade Urea for industrial use through any STEs (namely MMTC, Indian Potash Ltd., STC) during the year 2014-15 on fulfilment of certain conditions. Condition No. (xiv) of the said conditions of the said letter stated thus:

"TG urea user shall inform this department through STEs from whom he/she is buying TG urea".

12.9. The noticee had entered into an agreement dated 16.01.2015 for High Sea Purchase of 500 MT with M/s Indian Potash Limited, a state trading enterprise on High Sea Sale basis and had filed a Bill of Entry and cleared the same on payment of appropriate custom duty in January 2015. This clearly states that permission was granted to the noticee for purchasing TG urea as the conditions were fulfilled by the noticee as requisite under the letter dated 04.03.2014.

No Mis-statement or Suppression of Facts

12.10. It has been contended that there was no mis-statement or suppression on behalf of the noticee. The noticee acted in consonance with EXIM policy law at the time and as per the prevailing general practice filed the Bill of Entry that clearly stated the terms of import as High Sea Sale through Indian Potash Ltd. The noticee had correctly filed and submitted with the authority all the relevant documents and permissions as requisite under law for import of impugned goods.

12.11 It is argued that the Bill of Entry was noted by proper officers of Customs and subsequently assessed by the Customs leaves no scope for any doubt that the consignment of technical grade urea was validly cleared by the noticee with proper and appropriate declaration.

That the Confiscation of goods is unwarranted

12.12 As regards confiscation of impugned goods, it is stated that Section 111 of the Act provides for who, in relation to any goods, does or omits or abets to do any act, can render such goods liable to confiscation. In the instant case, owing to the diligence of the noticee in importing the goods in consonance of law contrary to alleged violation, subsequently gives no reason for confiscation of goods.

12.13 It has been held in plethora of judgments that question of confiscating the goods would not arise if there are no goods available for confiscation. The noticee relied on the following judgments:

- (a) Mercedes Benz India Pvt. Ltd v. CCE Pune III; CESTAT

Mumbai, 2017

- (b) The Commissioner of Customs v. M/s Finess Creation Inc; 2009 (248) ELT 122 - affirmed by the Apex Court in 2010 (255) ELT A120 (SC)
- (c) Shiv Kripa Ispat Pvt. Ltd. v. CCE; 2009 (235) ELT 623 (T-LB) - affirmed by the Hon'ble Bombay High Court in 2015 (318) ELT A259 (Bom)

12.14. It is argued that since the goods were released by the concerned officers only after proper assessment and on payment of applicable duty without any bond or undertaking, the same cannot be held liable for confiscation in view of settled legal position. When the goods are not available for seizure, no confiscation can be ordered in physical absence of such goods.

Penalty under Section 112 (a)(i) of the Customs Act, 1962 is not imposable.

12.15. In context of imposition of penalty, the noticee reproduced Section 112 (a)(i) of the Act and submitted that the case of confiscating goods not available for such confiscation does not arise in the light of the judgments stated hereinabove and thus, penalty under Section 112 cannot be imposed.

12.16. It is submitted that the noticee was importing the impugned product for the first time and in compliance to prevalent trade practice as implemented over several decades. Hence, relying in a bonafide manner on the permission granted by the Department and EXIM policy imported the said goods and through STE viz. Indian Potash Ltd.

12.17. It is argued that imports of goods through Indian Potash Ltd., the said goods were correctly imported as per the existing EXIM Policy conditions then applicable and in consonance with the permission letter dated 04.03.2014 of the Ministry of Chemicals & Fertilizers, the allegation that the goods were rendered liable for confiscation under Section 111(d) and consequently, question of imposition of penalty under Section 112(a) of the Act, is legally not sustainable.

RECORD OF PERSONAL HEARING:

13. Shri Hiren D. Ruparel, Custom Broker, appeared for personal hearing on 29.05.2019 and draw attention to the written submission dated 25.05.2019. He also requested to take lenient view and drop the proceedings in the matter.

DISCUSSION AND FINDING:

14. I have gone through the show cause notice dated 09/07/2018, the written submission dated 04.08.2018 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. 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 importer 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 importer has also referred to a letter No. 6-23/2013-FM dated 04.03.2014 of Ministry of Chemical & Fertilizers wherein the importer has been permitted to buy the Technical Grade Urea through any State Trading Enterprises (i.e. MMTC, IPL and STC). The interpretation of the importer 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.

15. 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."

16. 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”.

16.1 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 definition of the importer under the Customs Act, 1962 and the para 2.11 of the Foreign Trade Policy, the importer should be invariable STEs only. Whereas after purchasing of goods on High Seas Sale basis from STEs and themselves filing the Bill of entry, the noticee M/s. Balaji Wooddecor 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 letter No. 6-23/2013-FM dated 04.03.2014. I find that the Condition No. (xiv) of the letter No. 6-23/2013-FM dated 04.03.2014 of Ministry of Chemical & Fertilizers addressed to noticee 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. The Permission letter No. 6-23/2013-FM dated 04.03.2014 of Ministry of Chemicals & Fertilizers state that permission is for import of urea through STEs, viz., MMTC, IPL, STC and condition (v) reads **“Technical Grade Urea thus imported shall be sold to end users distributors/ permission holders only.....”**

16.2 The word used in condition (v) of the letter dated 4.3.2014 of Ministry of Chemicals & Fertilizers; is **“sold”** which clearly indicates domestic sale as no word High sea Sale is mentioned. Even condition (xiv) of the said letter dated 04.03.2014 which noticee has quoted, mentions that TG Urea users shall inform the Department through STE 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 Chemicals & 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. Balaji Wooddecor Pvt. Ltd. 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. Balaji Wooddecor Pvt. Ltd. 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 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. Balaji Wooddecor Pvt. Ltd. have violated the Policy provision provided under para 2.11 of the Foreign Trade Policy 2009-14 and the imports of 500 MTs of Technical Grade Urea covered under one Bill of Entry as detailed in Table-A of the Show Cause Notice and collectively valued at Rs.1,05,60,524/- is liable for confiscation under Section 111(d) of the Customs Act, 1962.

17. I find that notice 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 to Coromandal Fertilizers Ltd., phosphoric acid which was also canalized item was sold by MMTC to Godavari Fertilizers & Chemicals Ltd. etc., etc.. The notice 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 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 support their view that steel sheets which were canalized through MMTC were purchased by IOC from MMTC on High sea Sale basis.

18. 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 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 an 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 17 supra need to be distinguished as they are not applicable to the subject case due to peculiar facts & circumstances of the case. In view of the above, I 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.

19. In view of the afore said 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 Indian Potash Limited 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 500 MT of Technical Grade Urea valued at Rs. 1,05,60,524/- imported by M/s. Balaji Wooddecor Private Limited, New Delhi is liable for confiscation under Section 111(d) of the Customs Act, 1962 for importing the said goods in violation of para 2.11 of Foreign Trade Policy (2009-2014). I also hold that M/s. Balaji Wooddecor Private Limited, New Delhi is 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.

19.1 In context of subject case , I find that 500 MT of Technical Grade Urea under Bill of Entry No. 8108906 /27.01.2015 was assessed finally and the Technical Grade Urea was not available for confiscation as already given out of charge on 02.02.2015 as detailed in Table A of the Show Cause Notice. 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. others vs CCE Nasik [2009(235)ELT623-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 [295(318)ELT A-259(Bom)] has upheld the decision of Hon'ble Tribunal in case of M/s 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.

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

:: ORDER ::

- (i) I hold that 500 MT of Technical Grade Urea imported and cleared by M/s. Balaji Action Wooddecor Pvt. Ltd., G-11, Udyog Nagar, Main Rohtak Road, Delhi- 110041 under Bill of Entry No. 8108906 dated 27.01.2015 filed by them and which is valued at Rs.1,05,60,524/- and on which the importer M/s. Balaji Action Wooddecor Pvt. Ltd. paid duty of Rs. 24,13,409/- 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, and not available for confiscation, I do not impose the redemption fine.
- (ii) However, I impose a penalty of Rs.8,50,000/- (Rupees_Eight Lakh Fifty Thousands Only) on M/s. M/s. Balaji Action Wooddecor Pvt. Ltd., G-11, Udyog Nagar, Main Rohtak Road, Delhi- 110041 in term of Section 112(a) (i) of the Customs Act, 1962.



31/7/2019

(PRASHANT KADUSKAR)

Additional Commissioner
Custom House, Mundra.

F. No. VIII/48-12/Adj/ADC/MCH/18-19

Date: 31.07.2019

By Speed post

To

M/s. Balaji Action Wooddecor Pvt. Ltd.,
G-11, Udyog Nagar, Main Rohtak Road,
New Delhi- 110 041

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.