IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL No.6 OF 2021
WITH
INTERIM APPLICAITON (L) NO.16390 OF 2021

The Commissioner of Customs Nhava Sheva-V … Appellant/Applicant

V/s.

VKC Nuts Private Limited … Respondent

Mr.Jitendra B. Mishra for the Appellant/Applicant.
Mr.Prakash Shah alongwith Mr.Jas Sanghavi i/by M/s PDS legal for the Respondent.

CORAM : DHIRAJ SINGH THAKUR AND
ABHAY AHUJA, JJ.
DATE : JULY 27, 2022.

ORAL JUDGMENT : (*Per Abhay Ahuja, J.*)

1. This is an appeal filed by the Commissioner of Customs under section 130 of the Customs Act, 1962 challenging an Order No.A/85730/2020 dated 11th September, 2020 passed in Appeal No.86973 of 2019 filed by VKC Nuts Private Limited, the respondent herein.

2. The relevant facts are that the respondent company *inter alia* had imported 791 bags of in-shell walnut under Bill of Entry No.9878513 dated 31st January, 2019 and claimed exemption under Notification No.98 of 2009-Cus dated 11th September, 2009 on the strength of the Duty Free Import Authorization (DFIA) Nos.0310704333 and 0310740591 against import

item of "dietary fibre" under Standard Input Output Norms (SION) E5. The said goods statedly were allowed to be cleared without payment of duty by debiting the DFIA scrip.

3. Thereafter, post clearance, upon information received, the appellant who is the Commissioner of Customs seized 791 bags of the said in-shell walnuts lying in the godown of one Hemkunt Agro Care Private Limited on the belief that the same are liable for confiscation on the ground that the benefit of duty exemption was wrongly claimed.

4. The respondent-company applied for provisional release of these goods. The adjudicating authority vide its order dated 28th June, 2019 permitted provisional release *inter alia* of 791 bags of the in-shell walnut upon the fulfillment of the condition of the bond of Rs.36,54,847/- covering the total value of the seized goods and furnishing bank guarantee of Rs.18,27,423/- with self-renewal clause and submission of undertaking/bond that respondent-importer shall pay the duty, fine and/or penalty as may be adjusted by the adjudicating authority.

5. Being aggrieved by the said order of conditional provisional release passed by the adjudicating authority, the respondent filed a customs appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Mumbai. The CESTAT vide its order dated 11th September, 2020 observed

that *prima facie* the imported in-shell walnuts were not liable for confiscation and set aside the order dated 28th June, 2019 of the adjudicating authority with a direction for unconditional release of the seized goods. The CESTAT further directed the return of the bank guarantee and the bond furnished earlier by the respondent-company.

6. Against the aforesaid order of the CESTAT, the Revenue is in appeal proposing the following questions as substantial questions of law for determination of this court :-

> "a. Whether the CESTAT was right in setting aside the condition imposed by the adjudicating authority for permitting provisional release of the seized In-shell Walnut?
> b. Whether the impugned order passed after ten months from the date of conclusion of hearing is justified?"

7. The Tribunal has relied upon the decision in the case of **Global Exim and ors. Vs. The Union of India and ors.**[1] of the Madhya Pradesh High Court as well as the decision of the co-ordinate Bench of the Tribunal in the case of **Uni Bourne Food Ingredients LLP Vs. Commissioner of Central Excise Hyderabad-II**[2] and observed that in the said cases, in-shell walnuts, have been allowed to be imported against the DFIA issued for export of assorted confectionery and biscuits under SION E1 and E5 respectively as input items viz. nut and nut products, relevant food flavour and flavouring agent/flavour improvers, dietary fibre and fruit/cocoa powder. The Tribunal also referred to the technical opinion dated 8th August, 2018 by the Joint Director, JNCH

1 MANU/MP/0508/2018
2 2019 SCC Online CESTAT 2970

Lab opining that walnuts may be used as a source of dietary fibre in the manufacture of biscuits/cookies and confectionery and that the same was not discussed by the Commissioner of Customs in the impugned communication of 28th June, 2019. Based on the aforesaid, to meet the ends of justice and as an interim measure, the Tribunal stayed the execution of bond/bank guarantee and submission of undertaking for payment of future adjudged dues till the final disposal of the case and allowed the appeal setting aside the impugned communication/order dated 28th June, 2019 with direction to the department for unconditional release of the seized goods and to return of the bond and bank guarantee furnished by the respondent-company.

8. At the outset, Mr.J.B.Mishra, learned counsel for the appellant Commissioner submits that though the hearing by the Tribunal was concluded on 11th November, 2019 the impugned order has been passed on 11th September, 2020 i.e. after 10 months.

9. He further submits that this is a case which is yet to be finally adjudicated and the order of the Tribunal is premature in as much as it obviates the need for securing the revenue by furnishing of bond/bank guarantee and undertaking in the interim, which is a fundamental requirement before any release of seized goods is ordered. He submits that as the benefit of duty exemption has been wrongly claimed, the 791 bags lying in the godown of Hemkunt Agro Care Private Limited which were

liable for confiscation were rightly seized under section 110. He draws the attention of this Court to section 111(o) of the Customs Act to submit that the said goods are liable for confiscation under the said provision.

10. With respect to the decision of the Madhya Pradesh High Court in the case of **Global Exim and ors. Vs. The Union of India and ors.** (supra), learned standing counsel submits that the said decision has not been accepted by the department but was not appealed against only on the ground of monetary limits fixed by the CBEC (now CBIC). He draws the attention of this court to section 131BA of the Customs Act to submit that non-filing of an appeal on the ground of low tax effect does not mean that the Department has acquiesced on the issue. With respect to the decision in the case of **Uni Bourne Food Ingredients LLP** (supra) he would submit that the department has not accepted the said decision and has filed an appeal before the High Court of Telangana.

11. Learned standing counsel further submits that the DYCC Report relied upon by the Tribunal does not represent the correct technical view in as much as although DYCC, Nhava Sheva has expertise in chemical analysis of goods, they do not have such expertise or mandate on food and nutrition science. In this view of the matter, he urges this court to frame the questions of law as proposed.

12. On the other hand, Mr.Prakash Shah, learned counsel for the respondent–company would submit that the case is clearly covered on merits by the decision in the case of **Global Exim and ors. Vs. The Union of India and ors.** (supra) and therefore, the unconditional release as ordered by the Tribunal is justified. Learned counsel draws the attention of this court to section 110A of the Customs Act with respect to provisional release and submits that the said release as ordered by the Tribunal is not in breach of this provision and submits that this court sustain the said order and dismiss the appeal.

13. We have heard Mr.Jitendra Mishra, learned standing counsel for the appellant and Mr.Prakash Shah, learned counsel for the respondent-company and with their able assistance we have perused the papers and proceedings in the matter.

14. Facts are not in dispute. The revenue is aggrieved that Notification No.98/2009-Cus dated 11th September, 2009 which allows duty free import of items on the condition that they are mentioned in the respective DFIA scrip or they are convincingly raw materials for the import items, mentioned in the said DFIA scrip has been violated, making the subject in-shell walnuts liable for confiscation under section 111(o) of the Customs Act, 1962 read with 46 of the said Act and the aforementioned notification.

15. The communication dated 28th June, 2019 of the Commissioner of Customs records in paragraph 17.1 that the importer has amply demonstrated with the help of documentary evidence that the 794 bags of in-shell walnuts seized at cold storage of M/s Rishi Ice and Cold Storage were imported by the importer under the DFIA scheme against import of "other confectionery ingredients, nut and nut products" and that the same were not liable to confiscation. However, in paragraph No.17.3 in respect of the subject 791 bags of the in-shell walnuts seized at M/s Hemkunt Agro Care Private Limited imported under the DFIA scrip against import item of "dietary fibre", it is recorded that the said goods have been seized and have been held to be liable for confiscation. In respect of both the sets of seized goods, provisional release has been permitted subject to a bond of Rs.36,54,847/- and bank guarantee of Rs.18,27,423/- and an undertaking to pay the duty/penalty adjudged by the adjudicating authority. There is no dispute that the seized walnuts held to be not liable for confiscation and imported under other confectionery ingredients, nut and nut products are the same as the walnuts imported as dietary fibre.

16. We observe that the seized walnuts in-shell were allowed to be cleared against import item of "nut and nut products" and "dietary fibre", following with the decision of the Madhya Pradesh High Court in the case of **Global Exim and ors. Vs. The Union of India and ors.** (supra) and the Tribunal decision in the case of **Uni Bourne Food Ingredients LLP Vs. Commissioner of**

Central Excise Hyderabad-II (supra). The Tribunal had also placed reliance on the opinion given by the Joint Director, Jawahar Customs House Laboratory vide report dated 8th / 27th August, 2018. The appellant has not disputed the said technical opinion but only stated that the said authority has expertise in chemical analysis of goods but do not have expertise or mandate on food and nutrition science and that opinion appears beyond their mandate and expertise.

17. In the case at hand, the issue is whether the subject walnuts in-shell are covered under the description of input entries 'dietary fibre' and therefore, whether same can be permitted for duty free clearance against the DFIA issued against the export under SION E5 which *inter-alia* permits duty free import of 'dietary fiber'.

18. The Tribunal has directed unconditional release on the basis of the decision in the case of **Global Exim and ors. Vs. The Union of India and ors.** (supra) of the Madhya Pradesh High Court as well as decision of the Tribunal in the case of **Uni Bourne Food Ingredients LLP Vs. Commissioner of Central Excise Hyderabad-II** (supra). The revenue has not accepted the decision in the case of **Global Exim and ors. Vs. The Union of India and ors.** (supra) but no appeal was filed in view of the low tax effect. The decision in the case of **Uni Bourne Food Ingredients LLP Vs. Commissioner of Central Excise Hyderabad-II** (supra) has also not been accepted by the department

and an appeal has been filed against the Tribunal in the Telangana High Court.

19. The Madhya Pradesh High Court in the case of **Global Exim and ors. Vs. The Union of India and ors.** (supra) has considered the very same notification dated 11th September, 2009 breach whereof has been alleged by the Revenue. The court observed that once the export obligation is discharged, the stipulation under paragraph No.4.1.15 of the Foreign Trade Policy (FTP) (2009-14) that only those actually used inputs in the export product shall be imported is not applicable to a DFIA transferee. Once the imported goods are covered under the description, quantity as mentioned within the overall CIF value allowed in the DFIA irrespective of the ITC(HS) members, there is no necessity to satisfy the requirement of paragraph No.4.1.15. Paragraphs No.33, 34 and 35 of the said decision are relevant and are quoted as under :-

> "33. The stipulation under Para 4.1.15 inserted vide notification No.31 dated 30.10.2013 to the extent that only those actually used inputs in the export product only shall be imported is not applicable to a DFIA transferee. Once the imported goods are covered under the description, quantity as mentioned within the overall CIF value allowed in the DFIA, irrespective of the ITC (HS) Nos, there is no necessity to satisfy the requirement of Para 4.1.15 of FTP-(2009-14) and notification No.90 dated 21.08.2014.
> 34. On a plain reading of para 4.1.15 abundantly makes it clear that the provisions has no application after the discharge of export obligation and endorsement of transferability. It can be applicable only when the DFIA holder import first and use in the resultant product for export. There is no provision of redemption of DFIA License after the discharge of export obligation. Once the import goods are covered under the

> description, quantity as mentioned within the overall CIF value allowed in the DFIA, (as amended upon competition of export), there is no necessity to satisfy the requirements of Para 4.1.15 of FTP. It is impossible to comply the condition which states that those inputs which are actually used in export product for availing DFIA exemption.
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> 35. The Division bench of Punjab & Haryana High Court in the case of Pushpanjali Floriculture Ltd., V/s. Union of India, 2016 (340) ELT 0032 (P&H) held that, "from the product which already stands exported, the inputs used in the manufacture of thereof should somehow be extracted, and only such inputs be allowed to be subsequently imported into India. To say the least, such requirement is manifestly absurd, and it's very incorporation, in the impugned Notification and Public Notice, reflective, as the learned Senior Counsel has correctly emphasized, of total non-application of mind, on the part of the authorities issuing the said Notification/Public Notice."

20. As can be seen, the said decision of **Global Exim and ors. Vs. The Union of India and ors.** (supra) relies upon the decision of the Punjab and Haryana High Court in the case of **Pushpanjali Floriculture Ltd., V/s. Union of India** decided on 1st July, 2016 in CQP No.12647 of 2016. The decision in the case of **Pushpanjali Floriculture Ltd., V/s. Union of India** (supra) has been challenged before the Apex Court and statedly is pending.

21. Paragraph No. 37 of the decision in the case of **Global Exim and ors. Vs. The Union of India and ors.** (supra) which refers to the Bombay High Court decision in the case of **A.V. Industries Limited Vs. Union of India**[1], is also pertinent. Paragraph No. 37 in the case of **Global Exim and ors. Vs. The Union of India and ors.** (supra) is quoted as under :-

> "37. The Bombay High Court in the case of A.V. Industries Ltd.,

1 2007(187) ELT 9 (Bom)

V/s. UOI, 2007 (187) ELT 9 (Bom) held that :-

> "When the import is in accordance with the import licence issued to the petitioner, the respondents cannot take shelter under the import policy and purport to take action against the petitioner."

22. Paragraphs No. 39, 40, 41 and 42 are relevant and are quoted as under :-

> "39. The petitioner is a bona-fide transferee of the said transferable DFIA cannot be denied exemption from payment of duties on the goods on the ground that only those actually used as inputs in the export product shall only be permitted for import which is applicable to a DFIA holder. Once the DFIA is made transferable by the licensing authorities, the Petitioner is not bound to show the actual use of the imported goods in the export product and is free to import any goods covered under the description and quantity mentioned within the overall CIF value allowed in the DFIA, (as amended upon competition of export), there is no necessity to satisfy the requirements of para 4.1.15 of FTP-(2009-14).
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> 40. The terms 'generic inputs' and 'alternative inputs' stipulated in Para 4.1.15 of FTP are not even defined under Chapter 9 of the Foreign Trade Policy.
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> 41. The petitioner No.1 is a DIFA transferee is entitled to import Alloy Steel Rods/Rounds/Billets and Hot Rolled/Cold Rolled Sheet/Wide Coils) covered under the DFIA's without showing actual use in the export product".
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> 42. In view of the above discussions, the writ petition of the petitioners are allowed in part in terms of the law laid down by the Punjab & Haryana High Court in the case of Pushpanjali Floriculture Ltd. (supra) and is accordingly, disposed of. No costs."

23. In the case at hand, we observe that the respondent-company has imported 791 bags of in-shell walnuts under Bill of Entry No.9878513 dated 31st January, 2019 and has claimed exemption under the said

notification dated 11th September, 2009 on the strength of the DFIA against import item of dietary fibre under SION E5. The said goods as mentioned earlier were cleared without payment of duty and exemption benefit was allowed. The custom authorities have however seized the said 791 bags lying in the godown of Hemkunt Agro Care Private Limited on the pretext that in-shell walnuts do not fit into the description of "dietary fibre". In our view, once the transferability of the DFIA having been approved and effected by the licensing authorities, customs authorities cannot impose restrictive condition on the transferee to deny the exemption sought as held in the decision of this Court in case of **A. V. Industries v/s. Union of India** (supra).

24. It is also not in dispute that as per law settled by this court in the case of **Shah Nanji Napsi Exports Private Limited Vs. Union of India and DGFT**, it has been held that the DFIA scheme does not lay down actual user condition and hence the subject in-shell walnuts were allowed to be imported under DFIA scrips.

25. We also note from the communication dated 28th June, 2019 referred to above, it is not disputed that in addition to subject import of 791 bags of in-shell walnuts imported under DFIA scrip against import item "dietary fibre" which were seized at Hemkunt Agro Care Private Limited for alleged violation of the said notification and held liable for confiscation under

section 111(o) of the Customs Act is the same communication by which 794 bags of the said goods viz. In-shell walnuts were imported under DFIA scrip against the import items of other confectionery ingredients, nut and nut products which were earlier seized from M/s Rishi Ice and Cold Storage were held not liable for confiscation and their seizure was vacated for a similar import of in-shell walnuts permitting provisional release of both sets of in-shell walnuts irrespective of whether the same were liable to confiscation or not under the same order of provisional release subject to bond/bank guarantee and undertaking has been passed, which in our view is arbitrary.

26. It is observed that the decision of Madhya Pradesh in the case of **Global Exim and others** (supra) though not accepted has not been appealed in view of the low tax effect. We are conscious that in accordance with section 131BA of the Customs Act if an appeal is not filed in view of the low tax effect that would not preclude the filing of an appeal on the same subject in another year. However, in view what we have observed above, in our view that should not come in the way in view of the well settled principles reiterated in the decision of the Madhya Pradesh High Court.

27. We also note that there is a technical opinion of the Joint Director, Jawahar Customs House Laboratory opining that the walnuts may be used as a source of dietary fibre in the manufacture of biscuits/cookies and confectionery. The revenue has not brought before us any evidence/report

contrary to the same.

28. The technical opinion by JNCH Lab dated 8th August, 2018 suggests that in-shell walnuts can be used as dietary fibre. The usability of walnuts in biscuits is well known. It is settled law that it would not be open to any one to take a contrary stand unless and until such technical opinion is displayed by specific and cogent evidence in the form of technical opinion. Our view is fortified by the decision of Gujarat High Court in case of **Inter Continental (India) v/s. Union of India, 2003 (154) ELT 37 (Guj)** and there is no contrary technical opinion produced before us.

29. We are therefore of the view that the proposed question (a) does not raise any substantial question of law.

30. Coming to question (b) as proposed by the Revenue, firstly we observe that there is no ground taken with respect to the said question. Secondly, there is no statutory limitation prescribed under the Customs Act to pass any order within any certain period of limitation after the conclusion of the hearing. Therefore, the said question in our view does not raise any question of law let alone a substantial one.

31. Section 110A of the Customs Act, 1962 provides for provisional release pending adjudication. For the sake of convenience, the said provision is

quoted as under :-

> "110-A – Provisional release of goods, documents and things seized or bank account provisionally attached pending adjudication.—Any goods, documents or things seized [or bank account provisionally attached under Section 110, may, pending the order of the adjudicating authority, be released to the owner or the bank account holder on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require."

32. As can be seen, the adjudicating authority has discretion with respect to the security and conditions that he may require while provisionally releasing the seized goods. It is settled law that what power or discretion that is vested in an adjudicating authority can also be exercised by the appellate authority or the Tribunal. The Tribunal has exercised its discretion and in our view rightly so to unconditionally release the goods dispensing with the condition of bank guarantee and bond/undertaking imposed by the adjudicating authority for release of the subject goods.

33. The order of unconditional release of the seized goods passed by the Tribunal cannot be faulted with. There is no error apparent or perveristy in the order of the Tribunal. The appeal does not raise any substantial question of law and is dismissed. No costs.

34. In view of the dismissal of the Appeal, the Interim Application also stands dismissed as infructuous.

(ABHAY AHUJA, J.) (DHIRAJ SINGH THAKUR, J.)