



सीमा शुल्क आयुक्त का कार्यालय,
नवीन सीमा शुल्क भवन, नया कांडला
**OFFICE OF THE COMMISSIONER OF CUSTOMS,
NEW CUSTOM HOUSE, NEW KANDLA-370 210 (GUJARAT)**
Phone No: 02836-271468/469, Fax No. : 02836-271467.

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E	Date of order	29.05.2020
F	Date of issue	29.05.2020
G	SCN No. & Date	SCN F.No S/15-12/UREA/SIIB/2018-19 –Pt.II(Deep Traders) dated 15.10.2019
H	Noticee(s)/Co-Noticee(s)	M/s Deep Traders, Opp. Old GIDC, Khambat-Petlad Road, Kansar, Taluka-Khambhat, Gujarat-388630

1. यह अपील आदेश संबन्धित को नि प्रदान शुल्क:किया जाता है।
This Order - in - Original is granted to the concerned free of charge.
2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A (1) के अंतर्गत प्रपत्र सीए- 3 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 (1) (a) of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

**“सीमा शुल्क आयुक्त (अपील), कांडला
मंजिल वी 7, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009”
“THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
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 2/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 2/- under Court Fee Act it must accompanied by –
(i) उक्त अपील की एक प्रति और
A copy of the appeal, and
(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं.-6 में निर्धारित 2/- 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. 2/- (Rupees Two 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 नियम (अपील), अधिनियम शुल्क सीमा और 1982, 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, आयुक्त (अपील)के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।

An appeal against this order shall lie before the Commissioner (Appeals) 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.

BRIEF FACTS OF THE CASE

M/s Deep Traders, Opp. Old GIDC, Khambat-Petlad Road, Kansar, Taluka- Khambhat, Gujarat- 388630 (herein after referred as "the importer" for the sake of brevity), having IEC No. 5205031816, 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, during the period from April, 2012 to 27.04.2015 without having a licence for import of Urea from Director General of Foreign Trade (DGFT).

2. Whereas, a reference F.No. DRI/DZU/JRU/19/ENQ.30/2016 dated 07.03.2018 was received from the Joint 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. (RUD-1). 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.

2.1. 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;

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 conditions 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. Whereas, it appeared that Ministry of Chemicals and fertilizers were inviting tender for handling and distribution of Urea. Some third parties other than State Trading Enterprises were filing Bills of Entry and importing Urea, which they purchased on High Sea Sale basis. In fact, State Trading Enterprises were purchasing Urea from outside India and instead of directly importing into India they are selling Urea to third parties who have been issued tenders from Ministry of Chemical and Fertilizers for handling and distribution of Urea on High Sea Sale basis. In the process, ownership of Urea was being transferred and such third parties were filling the Bills of Entry.

4. Whereas, it appeared that the importer has filed Bills of Entry No. 7889329 dated 08.09.2012 at Kandla port, for clearance of 100 MTS Technical grade prilled urea purchased on High Sea Sales basis from MMTC Limited (original importer) valued at Rs.26,38,239/- on which customs duties amounting to Rs.6,82,050/- paid and the Out-of Charged had been granted by the proper officer on 13.09.2012.

5. Statement of **Shah Dipenkumar Maheshbhai, Proprietor** of M/s Deep Traders, Opp. Old GIDC, Khambhat-Petlad Road, Kansar, Taluka- Khambhat, Gujarat- 388630, was recorded on **25.03.2019, (RUD-2)** wherein he, *inter alia* stated that M/s Deep Traders is proprietorship firm engaged in trading activity of Cattle Feed and 'Technical grade urea' from last 19 years; that he is proprietor of M/s Deep Traders and looking after entire operations; that M/s Deep Traders is having IEC code NO. 5205031816; that they have a valid permission for import of 1200 MT Technical grade prilled urea during the year 2012-13 for industrial use; that he entered into an agreement of High Sea Purchase of technical grade prilled urea with M/s MMTC Ltd., Ahmedabad and filed BE No. 7889329 dated 08.09.2012 and cleared the same on payment of appropriate customs duties; that the end use of imported technical grade prilled urea is exclusive for the Industrial purpose; that he undertake to produce the details of sales of the imported technical grade prilled urea i.e High Seas agreement, invoice and other documents such as ledger, LR and bank transaction and copy of IEC and permission letter.

5.1. Further, M/s Deep Traders vide their letter dated 06.05.2019(**RUD-3**) submitted documents viz., copy of permission letter NO.. 6-1/2012-FM dated 19.04.2012 issued by

Ministry of Chemical & Fertilizers for import of technical grade urea of 1200 MT, MMTC covering letter issued by the Deputy Manager, MMTC Ltd., Ahmedabad vide F.No. MMTC/AHD/TGUREA/DEEP/2012-13 dated 27.04.2012 for permission issued by Ministry of Chemical & Fertilizers, copy of contract between M/s Deep Traders and MMTC, High Seas sales contract between M/s Deep Traders and MMTC, commercial invoice no. 1303/12-13 and 1305/12-13 both dated 21.08.2012, MMTC High Seas sales invoice, TR-6 challan and sales ledger.

6. The Asstt. Director, Department of Fertilizer, Ministry of Chemicals & Fertilizers vide F. No. 6-1/2012-FM dated 19.04.2012 granted permission to M/s MMTC Limited, New Delhi to import Technical Grade Urea of 1200 MTs for M/s Deep Traders for industrial use during the year 2012-13 subject to various conditions. As per condition Technical Grade Urea thus imported shall be sold to end users distributors/permission holding only. It implies that the permission was granted for domestic purchase of technical grade urea from MMTC 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. 6-1/2012-FM dated 19.04.2012.

6.1 As per the Article 15 of the High Seas Sale agreement/contract No. MMTC/FERT/TECHNICAL GRADE UREA/2012-13/26 dated 09.07.2012 for technical grade urea(Prilled) between M/s Deep Traders and MMTC Limited wherein it is mentioned that the *Department of Fertilizer (DOF) at the time of granting permission for import of technical grade urea has mentioned conditions which have to be followed and buyers may note the condition mentioned at sr. no. 1 to 9 and provide the documents as per conditions.* Thus, 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.

7. Whereas, 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.

7.1. Whereas, the Customs Act,1962 define 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;

7.2. As per the Foreign Trade (Development and Regulation) Act, 1992, definition of “Import” is “in relation to goods bringing into India any goods by land, Sea or Air”. The definition of “Importer” as per Foreign Trade (Regulation) Rules, 1993 “means a person who imports 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. Whereas, it appeared that no other importer, other than STEs and importers mentioned at para 3 above was permitted to import Urea during the material period. Thus, importer had imported total 100 MT of Technical grade prilled urea having assessable value of Rs. 26,38,239/-, in violation of provisions of Foreign Trade Policy enforced at the material time. The importer had paid total Customs duties of Rs. 6,82,050/- against the import and clearance of 100 MTs of Technical grade prilled 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. 6-1/2012-FM dated 19.04.2012 issued by the Department of Fertilizer, Ministry of Chemicals & Fertilizers in guise of licence issued by the DGFT. Thus, the act on the part importer for wilful mis-statement and the suppression of facts at the material time draw the attention that the goods were improperly imported into India and liable for confiscation under Section 111 of Customs Act, 1962.

9. Whereas, it appeared that importer had imported ‘Technical grade prilled 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 appeared that the goods imported by the importer vide Bills of Entry No. 7889329 dated 08.09.2012 at Kandla port, for clearance of 100 MTS ‘Technical grade prilled urea’ purchased on High Sea Sales basis from MMTC Limited (original importer) valued at Rs.26,38,239/10 on which

customs duties amounting to Rs.6,82,050/-, liable for confiscation under the provisions of Section 111 (d) of Customs Act, 1962.

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

11. Accordingly, a Show Cause Notice SCN F.No. S/15-12/UREA/SIIB/2018-19/Part-III/Deep dated 15.10.2019 was issued to M/s Deep Traders asking them to show cause as to why:

- (i) The Technical grade prilled urea of 100 MT valued to Rs. 26,38,239/- 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 (i) of the Customs Act, 1962 for the acts and omission on their parts.

DEFENCE REPLY AND PERSONAL HEARING

12. Vide letter dated 10.02.2020 the importer has filed their defence reply to the Show Cause Notice wherein they have inter-alia submitted that at the very outset they deny all the allegations, contentions and charges levelled against them. The importer has submitted that they have not contravened any of the provisions of the Foreign Trade Policy and therefore the goods which have been imported cannot be confiscated particularly when the goods, in question, have been imported on payment of Customs duties. They have further submitted that the Ministry of Chemical and Fertilizer had granted the permission for import of Technical Grade Urea for Industrial use, vide letter No. 6-1/2012-FM dated 19-04-2012. While giving the said permission to import the Technical Grade Urea for Industrial purpose, the Ministry of Chemical and Fertilizer had imposed various conditions but it has never been laid down the condition to the effect that the goods cannot be purchased on High Seas Sale basis from State Trading Enterprises. Further, the importer has also entered into an agreement with MMTC Ltd. and in terms of the said agreement, it is also required for the importer to follow some conditions and to provide some documents. Even in terms of the conditions, it was not the restriction on the part of the importer that the goods cannot be purchased from State Trading Enterprises on High Seas Sale basis. Further, the importer also entered into High Seas Sale Agreement with MMTC Limited, even there was no restriction under such agreement.

The importer has submitted that based on the High Seas Sale purchase agreement, the importer had purchased 100 MT of Technical Grade Urea from M/s MMTC, a State Trading Enterprise and filed only one Bill of Entry No. 7889329 dated 08-09-2012 for home consumption and also cleared the said consignments on payment of Customs duties. The payment of Customs duties is not under dispute at all. Since the consignment has been cleared on payment of Customs Duty, the question of confiscation of the goods does not arise at all. Even M/s MMTC Ltd., has not imposed any condition either in the agreement or in the High Seas agreement to the effect that the importer i.e. Deep Traders, cannot purchase the goods from State Trading Enterprises. As a matter of fact, since in the permission dated 19-04-2012 granted by Ministry of Chemical and Fertilizers, no condition to the effect that the Technical Grade Urea cannot be purchased from State Trading Enterprises based on High Seas Sale-purchase transaction, has not been imposed, the importer was naturally unaware about such provisions even if the same are laid down in Foreign Trade Policy. The importer was under bonafide impression that the goods i.e. Technical Grade Urea can be purchased even on High Seas Sale basis as no such condition/restriction was mentioned in the said permission.

The importer further submitted that the agreement with MMTC, does not state anything by which permission from the DGFT was required to be sought. It is also further submitted that there was also import of the same goods other than the present import consignment involved in the instant case, but in that case, no SCN has been issued. In the instant case, suppression of facts can never be alleged, in as much as, the importer had entered into agreement with MMTC Ltd., to purchase the goods. Further, the goods are cleared after filing the Bill of Entry and also payment of Customs duties. Once the goods have been cleared by filing the relevant documents before the Customs Authority and on payment of Customs duty, how the department can allege that the facts have been suppressed with intention to evade payment of Customs Duty. As regard the contention about non-fulfillment of conditions of the permission granted is concerned, the importer submit that they have not contravened any of the conditions of the said permission, in as much as, in terms of the said condition, it was required for the TG Urea user to inform the department through STEs/any other company under license from DGFT from whom he/she is buying TG Urea, giving information with respect to production being produced by using TG Urea, quantity of TG Urea needed to manufacture 1MT (or any other unit) of the product, total quantity produced last year and in last month, quantity of TG Urea used in that year/ month respectively. In view of the language of the said condition, it is submitted that it was required for the actual user of TG Urea to intimate the department and not the person like the importer as in the instant case, importer has purchased the TG Urea from M/s MMTC Limited, and therefore such TG Urea has been sold as such to different customers, and such different customers, in turn, have utilized TG Urea in the manufacture of the finished goods.

The importer also further submitted that the different customers, through whom the goods were sold were manufacture of chemical products and thereby TG Urea was an input for such customers. In view thereof, it is submitted that they were not utilizing TG Urea, but selling as such and thereby the importer was not the actual user. In view of such facts, the importer submit that the condition was not applicable to the importer. On perusal of the said condition, it would also be found that it was required for the actual users to give information regarding Input Output ratio in relation to consumption of TG Urea, the total quantity produced, and the quantity of the goods manufactured out of TG Urea. Since the importer was trader and not the manufacturer, the question of giving such details was not at all possible. The importer therefore submitted that the basic contention to raise the proposal to confiscate the goods and to impose penalty itself is not correct and legal and also not based on the facts of the case abd therefore such contention is not sustainable.

The importer further submitted that as stated above, they were registered as dealer, under Central Excise Act and Rules made thereunder. It is also further submitted that the importer has also filed quarterly return regularly in terms of the provisions of Cenvat Credit Rules, 2004 and during the relevant period, the importer has also given effect of the clearance of the TG Urea to different customers. It would be found that the importer has sold the TGU as such to the customers, and not utilized the same in manufacture any of the goods. It is therefore submitted that the question of fulfillment of the condition as mentioned in the permission dated 19-04-2012, does not arise.

Further, regarding Para 6 of the SCN, the importer submitted that the said contention is also based on assumption only, because the subject of the permission itself demonstrates that the permission has been granted for Import of Technical Grade Urea for Industrial use. In such situation, it is not understood how the SCN issuing authority has assumed that the permission was granted for domestic purchase of the TGU from STEs. It is reiterated that nowhere in the permission granted under letter dated 19-04-2012, it has been stated that the TGU cannot be imported on High Seas Sale basis producing from State Trading Enterprises. In absence of such condition, it cannot be said that the importer has violated the conditions of the permission granted under the letter dated 19-04-2012. It is therefore submitted that the said contention is also not legal and correct and hence not sustainable.

The importer further submitted that the goods in question, cannot be confiscated under Section 111(d) of the Customs Act, 1952, as the importer has not contravened any of the provisions of the Customs Act. Apart from this, the goods, in question, were got cleared from the Customs Authorities on payment of Customs duty. Further, in the instant case, the goods have not been imported contrary to any prohibition imposed by or under this Act, or any other law for the time being in force. Conversely, the Ministry of

Chemical and Fertilizers has granted the permission for import of Technical grade Urea for Industrial use. When the Ministry of Chemical and Fertilizers has granted the permission to import the Technical Grade Urea, it can never be alleged that the goods, in question, have been imported contrary to any prohibition as laid down under the Customs Act. In view thereof, it is submitted that the proposal which has been raised to confiscate the goods is not correct and legal.

The importer further submitted that the goods cannot be confiscated when the same are not available for confiscation. The goods can be confiscated even if the goods are not available for confiscation **but only when** the goods were released to the importer on an application made by it and on executing Bond and Bank Guarantee. This is not the situation in present case as neither the materials were seized nor released on executing Bond and Bank Guarantee.

The importer submitted that in the present case, confiscation of goods cannot be ordered to be confiscated as the same are not available and the corollary to the said fact that the penalty under Section 112(a) cannot be imposed on the importer. This issue is no more res integra as has already been decided by the High Court and the larger bench of CESTAT in following cases.

CCE Vs Raja Impex - 2008 (229) ELT 185 (T)

Shivkripa Ispat Pvt. Ltd. V. CCE, Nasik - 2009 (235) ELT 623 (T-LB)

CCE V/s Asoj Soft Caps Pvt. Ltd. - 2012 (280) ELT 88 (T-Ahmd)

Dupont Synthetics Pvt. Ltd. V/s CCE, Surat - 2010 (259) ELT 408 (T-Ahmd) Weston Components Ltd. V/s CCE - 2000 (115) ELT 278 (SC)

*Commissioner of Customs V/s Finesse Creation Inc - 2009 (248) ELT 122 (Born.)
[the ratio of the said judgement has been upheld by the H'ble Supreme Court reported in 2010 (255) ELT AA120 (SC)]*

Commr. of Customs V/s Sudarshan Cargo Pvt. Ltd.-2009 (248) ELT 122 (Born.)

In view of the ratios of the above referred judgements, the importer submitted that in the instant case, goods cannot be confiscated as not available.

The importer further submitted that as far as proposal to impose penalty under Section 112(a)(i) of the Customs Act, 1962, is concerned, it is submitted that penalty can be imposed when any person who in relation to any goods, does or omits to do any acts which act or omission would rather than such goods liable for confiscation under Section 111 or abets the doing or omission of such an Act, shall be liable for penalty in the case of goods in respect of which any prohibition is in force under this Act, or any other law for the time being in force. In this regard, it is submitted that in the present case, penalty under Section 112(a)(i) cannot be imposed as the goods were not imported contrary to any prohibition as laid down under the Customs Act, 1962. Since the goods are not liable for confiscation, penalty cannot be imposed.

Further, the importer also submitted that the SCN has not set out specific allegation against the importer. It has also not been elaborately explained how there was contravention of Section 112(a) of the Customs Act, 1962 and how the ingredients of the said Section have been satisfied. Nothing has been brought on record to show as to how the importer has deliberately disregarded the Law nor any evidence has been adduced by the department to show the importer has diverted the imported goods. The department has failed in it. And hence penalty cannot be imposed under the provisions of Section 112(a) of the Customs Act, 1962. In the instant case, as stated above, since the goods are not liable for confiscation, the question of imposition of penalty under Section 112(a) does not arise.

In this context, the importer placed reliance on the following judgements.

- I. C. Gandhi Texturising Indu. Ltd. V/s CCE-2014 (311) ELT 209 (T-Ahmd.)**
- Sharpscans Prints Ltd. V/s CC - 2007 (209) ELT 107 (T)**
- A.V. Swamy V/s CC - 2009 (240) ELT 419 (T)**
- P. Kumar V/s CC - 2009 (240) ELT 108 (T)**
- Avlon Syntex Pvt. Ltd. V/s CCE - 2007 (213) ELT 706 (T)**
- 5. S. Gupta Ws CC - 2001 (132) ELT 441 (T)**
- Maersk India Ltd. V/s CC - 2001 (129) ELT 444 (T)**

The importer lastly submitted that in such a case, confiscation of goods under Section 111(d) of the Customs Act, 1962 cannot be made and penalty under Section 112(a)(i) of the Customs Act, 1962 cannot be imposed and hence the present SCN deserves to be set aside and proceedings initiated in the SCN may be dropped with the consequential relief.

13. In order to follow the principal of natural justice, Personal Hearing was fixed on 12.02.2020, 26.02.2020 and 18.03.2020 in this case. Nobody appeared for Personal Hearing. However, the importer vide letter dated 24.02.2020 submitted that they have already filed reply vide letter dated 10.02.2020, the contents of which have been mentioned above, and requested to adjudicate the SCN on merits and in terms of the contents of reply filed by them in letter dated 10.02.2020.

DISCUSSION AND FINDINGS

14. I have carefully gone through the case records, documents relied upon under the Show Cause Notice, facts of the case and the submissions made by the importer. Accordingly, the SCN is taken into consideration for adjudication.

15. The main issue to be determined by me in this case is that whether the importer, having bought the goods from STE namely MMTC on "High Sea Sales" basis, imported the Technical Grade Prilled Urea of 100 MT valued to Rs. 26,38,239/10 covered under Bills of Entry No. 7889329 dated 08.09.2012 in contravention of the provisions of Foreign Trade Policy prevailing at the material time and thereby they have rendered the goods liable to confiscation under Section 111(d) of the Customs Act, 1962 and they have rendered themselves liable to penal action under Section 112 *ibid*.

Therefore, the prime issue to be decided in the present case is to determine whether importer M/s Deep Traders who had bought the goods from STE (MMTC) on "High Sea Sales" basis and filed Bills of Entry to get cleared the goods from the customs would be treated as importer or otherwise in view of the definitions provided under Customs Act, 1962 and Foreign Trade Policy as they were permitted to import the goods viz. 'Technical Grade Prilled Urea' through any STE or any other company under License from DGFT. The proposals made in the impugned show cause notice related to confiscation of imported consignment and penal action under Custom Act, 1962 are to be decided accordingly thereafter.

16. On going through the definition of the words viz. 'Import', 'Importer' and 'India' as provided under Section 2(23), Section 2(26) and Section 2(27) of the Customs Act, 1962, I find that in the instant case M/s Deep Traders would be considered as an importer as per Customs Act, 1962. The abstract of these sections is reproduced hereunder for ease of reference:-

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;

17. Further, I find that as per the Foreign Trade (Development and Regulation) Act, 1992 as amended from time to time, 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 imports goods and holds a valid IEC No.". As per Foreign Trade Policy importer means 'person who imports or intends to import and holds an IEC No.,

unless otherwise specifically exempted". Therefore, I find that as per Foreign Trade Policy too M/s Deep Traders would be considered as an importer.

18. To understand the "High sea sales" transactions, I have searched the literature available on the subject. The literature downloaded from the reputed websites is as under:

Website: wiki.scn.sap.com

Business Scenario

High sea sales is effected by exchange of documents at a point beyond the territorial waters to avoid custom duties. Means high sea sales is a sale made while its in sea only. Thus, High Sea sale takes place when the cargo is already loaded on a ship and sailing on the high seas (international waters, under no jurisdiction) without actually being sold to the final buyer yet. Seller is looking for a buyer, while shipment is on the way. Once the cargo is sold, the captain of the vessel is notified to change course and deliver it to the new buyer's port. High Sea Sales carried out outside the territorial jurisdiction of India.

Website: www.taxconnect.co.in

High Sea Sale Transaction means Sale Transaction done when goods are actually at High Sea i.e. during sea transit between Port of Loading and Port of Discharge. The date of transaction (agreement) should be between Bill of lading date and Vessel arrival date at Port of discharge. High Sea Sale is done mostly by Traders, sole Indenting Agent (of the Foreign Supplier) who buys in large quantity and then look out for buyers at Destination Country.

On concluding the High Sea Sales agreement the bill of lading (B/L) should be endorsed in favor of the new buyer. In respect of air shipment, High Sea seller should write to the airline/consol agent informing that an High Sea Sales agreement has been established with the High Sea Sales buyer and that the carrier document should be considered as endorsed in favour of High Sea sales buyer and further the Import General Manifest (IGM) should be filed by the carrier in name of High Sea buyer.

High Sea sale is considered as sale contract carried out outside the territorial jurisdiction of India. Accordingly, no sale tax is levied in respect of High Sea sales. The Custom documents (B/E) is either filed in the name of High Sea buyer or such Bill of entry as endorsement indicating High Sea buyer's name. The title of goods transfer to High Sea buyer prior to entry of goods in territorial jurisdiction of India. The delivery from customs is therefore on account of High Sea buyer.

These literature amply shows that the transaction taken place under High Sea Sales are considered as sale carried out outside the territorial jurisdiction of India and therefore levied no sale tax in respect of High Sea sales.

19. The above deliberation leads me to conclude that in the instant case M/s Deep Traders would be considered as an importer and the goods viz. 'Technical Grade Prilled Urea' bought by him from STE (MMTC) on "High Sea Sales" basis cannot be treated as imported through any STE or any other company under License from DGFT.

20. In view of the above discussion, it is unambiguously proven that M/s Deep Traders have imported the goods viz. 'Technical Grade Prilled Urea' having assessable value of Rs. 26,38,239/10, in violation of provisions of Foreign Trade Policy enforced at the material time as much as the condition stipulated for import through any STE or any other company under License from DGFT, as per permission / licence No. 6-1/2012-FM dated 01.05.2012 issued by the Assistant Director, Department of Fertilizer, Ministry of Chemicals & Fertilizers, were not at all complied with by the importer M/s Deep Traders, in respect to the import of 'Technical Grade Prilled Urea' made by them under the aforesaid Bills of Entry. Therefore, the said goods being restricted / canalised goods and imported in violation of FTP 2009-2014 are liable for confiscation under Section 111(d) of the Customs Act, 1962.

21. As discussed above, I find that the impugned goods imported by the importer in contravention of the provisions of FTP 2009-2014 as notified under Foreign Trade (Development & Regulation) Act, 1992, totally weighing 100 MTs imported vide Bills of Entry No. 7889329 dated 08.09.2012, are liable for confiscation under section 111(d) of Customs Act, 1962. However, the goods were not seized and are not available physically for confiscation. Further, I find that the importer by their act of commission and omission making the goods liable for confiscation under section 111(d) of Customs Act, 1962 has made themselves liable for penal action under section 112 of Customs Act, 1962.

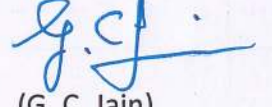
22. In view of the above, I pass the following order:

ORDER

- (i) I hold the goods i.e. Technical grade prilled urea of 100 MT valued to Rs. 26,38,239/- (Rupees Twenty Six Lakh Thirty Eight Thousand Two Hundred Thirty Nine Only) covered under Bills of Entry No. 7889329 dated 08.09.2012 liable to confiscation under section 111(d) of Customs Act, 1962. Since the goods were not seized and are not available, I refrain from imposing redemption fine under Section 125 of the Customs Act, 1962.
- (ii) I impose penalty of Rs. 1,31,912/- (Rupees One Lakh Thirty One Thousand Nine Hundred Twelve Only) upon M/s Deep Traders under Section 112 of the Customs Act, 1962 for acts of omission and commission as discussed above.



23. The said order is issued without prejudice to any other action that may be taken against the Noticees under the provisions of the Customs Act, 1962 and/or the Rules made there under and/or any other law for the time being in force.



(G. C. Jain)

Additional Commissioner,
Customs, Kandla.
Dated: 29.05.2020

F. No. S/10-54/Adj/ADC/Deep Traders/2019-20

By RPAD/ Speed post

To,
M/s Deep Traders,
Opp. Old GIDC,
Khambat-Petlad Road,
Kansar, Taluka-Khambhat,
Gujarat-388630

Copy to:

1. The Commissioner of Customs, Kandla.
2. The Deputy Commissioner of Customs, Group-II, Custom House, Kandla.
3. The Deputy/Assistant Commissioner(RRA/ TRC/SIIB) Custom House, Kandla.
4. The Superintendent(EDI), Custom House, Kandla with a request to upload the said order on the official website of this Commissionerate.
5. Guard File

