



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.

A	File No.	S/10-47/Adj/ADC/Transworld/2019-20
B	Order-in-Original No.	KDL/ADC/GCJ/08/2020-21
C	Document Identification Number	20200771ML00003R321B
D	Passed by	SH. GYAN CHAND JAIN, ADDITIONAL COMMISSIONER
E	Date of order	24.07.2020
F	Date of issue	24.07.2020
G	SCN No. & Date	SCN F.No S/15-12/UREA/SIIB/2018-19/Pt.V(Trans) dated 25.09.2019
H	Noticee(s)/Co-Noticee(s)	M/s Trans Agro India Private Limited (now known as M/s Transworld Furtichem Private Limited), 18 th Floor, Plot No. 9, Sector No. 17, Palm Beach Road, Sanpada, Navi Mumbai-400705

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 जुमाना 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 Trans Agro India Private Limited (now known as M/s Transworld Furtichem Private Limited), 18th Floor, Plot No. 9, Sector No. 17, Palm Beach Road, Sanpada, Navi Mumbai-400 705 (herein after also referred as "the importer" for the sake of brevity), having IEC No. 0306068923 in the name of M/s Trans Agro India Private Limited and after merger the same into M/s Transworld Furtichem Private Limited IEC NO. 0304057827, 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 purchase 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. 4234626 dated 31.12.2013 at Kandla port, for clearance of 3600 MTS Prilled urea technical grade in bulk purchased on High Sea Sales basis from MMTC Limited (original importer) valued at Rs.7,97,66,566/- on which customs duties amounting to Rs.2,06,21,636/- paid and the Out-of-Charged had been granted by the proper officer on 03.01.2014.

5. M/s Transworld Furtichem Private Limited, Mumbai vide their letter dated 16.02.2019(RUD-2) and 25.02.2019 (RUD-3) submitted zerox copies of high sea sale agreement dated 27.11.2013 with M/s MMTC Ltd, Mumbai, provisional invoice issued by M/s MMTC Ltd, copy of BE, copy of permission granted for import of Technical grade urea for industrial use issued by the Joint Director, Department of Fertilizer, Ministry of Chemicals & Fertilizers, copy of IEC, sales work sheet showing the sale of import of urea and copy of order of merger of company.

5.1. Statement of Shri Rizwan Abdul Aziz, Business Head of M/s Trans Agro India Private Limited now known as M/s Transworld Furtichem Private Limited, Navi Mumbai-400 705, was recorded on 20.03.2019, (RUD-4) wherein he, *inter alia* stated that M/s Trans Agro India Private Limited is engaged in trading activities; that M/s Trans Agro India Private Limited has been

merged into M/s Transworld Furtichem Private Limited and Mr Dilipkumar Gadia, Mr Pradeep Goyal are the directors; that they have obtained the GSTIN and registered as per GST law at Mumbai and Vadodara for trading of all agriculture product including technical grade urea since last 12 years; that he is looking after the import, marketing and handling, sales related work of our company and responsible being Business Head of the said company; that of M/s Trans Agro India Private Limited is having IEC No. 0306068923 and after merger the company into M/s Transworld Furtichem Private Limited, having IEC NO. 0304057827 and produce copy of the same.

5.2. Further, on being asked specifically regarding their purchase of Prilled Urea Technigal Grade(Industrial Use) on High Sea Sale basis from M/s MMTC Ltd., Mumbai in violation of restriction ladi down in the Policy at the time of import prior to 27.04.2015, he stated that M/s Trans Agro India Private Limited have a valid permission for import of Technical grade urea for industrial use issued by the Department of Fertilizer, Ministry of Chemicals & Fertilizers vide No. 6-4/2013-FM dated 11.12.2013 and No. 6-23/2013-FM dated 13.03.2014 and submitted coy of permission/license alongwith copies of Bill of Entry, invoice No. MB/FERT/TGU/172/TAI/302/ 2013-14 dated 20.12.2013 issued by M/s MMTC Ltd., Mumbai and also produce the details of sales of the imported prilled urea technical grade industrial use in respect of BE No. 4234626 dated 31.12.2013. He further stated that they entered into an agreement of High Sea Purchase of Technical Grade Urea with M/s MMTC Ltd., Mumbai, a State Trading Enterprise from time to time and filed BE No. 4234626 dated 31.12.2013 and cleared the same on payment of appropriate customs duties.

5.3. As regards the utilization/distribution certificate in respect of import made vide BE No. 4234626 dated 31.12.2013, he stated that the entire quantity has been sold and submitted list showing the details of sales made and will submit copies of invoice and excise gate pass; that the end use of their importer product i.e prilled urea technical grade industrial use is exclusive for the industrial use.

6. The Joint Director, Department of Fertilizer, Ministry of Chemicals & Fertilizers vide No. 6-4/2013-FM dated 11.12.2013 granted permission to import 11,000 MT Technical Grade Urea for industrial use through any state trading Enterprise i.e MMTC, IPL, STC or any other company under license from DGFT during the year 2013-14 subject to various conditions. As per condition Sr. No. xiv i.e TG urea users shall inform this department through STEs/any other company under licence from DGFT, from whom he/she is buying TG Urea giving information w.r.t product being produced by using TG Urea, quantity of TG Urea needed to manufacture one MT (or any other unit) of the product total quantity produced in last year & in last month, quantity of TG Urea used in that year/month respectively. It implies that the permission was

granted to the importer for domestic purchase of technical grade urea from STEs/ any other company under licence from DGFT but in the instant case the importer has purchased the Technical grade urea on high sea sales basis from M/s MMTC Ltd., a State Trading Enterprise which is to be considered as "Import" of goods which is contrary to the conditions of the permission granted by Ministry of Fertilizers. Therefore, it clearly indicates that the importer had violated the permission No. 6-4/2013-FM dated 11.12.2013.

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 3600 MT of Prilled urea technical grade in bulk having assessable value of Rs.7,97,66,566/-, in violation of provisions of Foreign Trade Policy enforced at the material time. The importer had paid total Customs duties of Rs. 2,06,21,636/- against the import and clearance of 3600 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/permission No. 6-4/2013-FM dated 11.12.2013 issued by the Joint Director, Department of Fertilizer, Ministry of Chemicals & Fertilizers in guise of licence issued by the DGFT. Thus, the act on the part importer for wilful mis-statement and the suppression of facts at the material time draw the attention that the goods were improperly imported into India and liable for confiscation under Section 111 of Customs Act, 1962.

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. 4234626 dated 31.12.2013 at Kandla port, for clearance of 3600 MTS 'Technical grade prilled urea' purchased on High Sea Sales basis from MMTC Limited (original importer) valued at Rs.7,97,66,566/- on which customs duties amounting to Rs.2,06,21,636/-, 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 F.No. S/15-12/UREA/SIIB/2018-19/Pt.V(Trans) dated 25.09.2019 was issued to Trans Agro India Private Limited now known as M/s Transworld Furtichem Private Limited, 18th Floor, Plot No. 9, Sector No. 17, Palm Beach Road, Sanpada, Navi Mumbai-400 705, asking them to show cause as to why:-

- (i) The Prilled urea Technical grade in bulk of 3600 MT valued to Rs.7,97,66,566/- covered under Bill of Entry No. 4234626 dated 31.12.2013 should not be held liable for confiscation under Section 111 (d) of the Customs Act, 1962;
- (ii) Penalty under Section 112 (i) of the Customs Act, 1962 should not be imposed on them.

DEFENCE REPLY AND PERSONAL HEARING

12. Vide letter dated 21.12.2019 the importer has filed their defence reply to the Show Cause Notice wherein they have inter-alia submitted that the action proposed in the notice is totally misconceived and unsustainable in law. They have submitted that the contention raised in the Notice that prior to 28-4-2015, "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 28-4-2015 would show that import of Urea was allowed through STC, MMTC and Indian Potash Limited. The word used in the said Heading 31021000 is "through" and not "by" STC, MMTC and Indian Potash. Thus the contention raised in the Notice is based on a total mis-reading of the words of the said Heading No.3102 1000 of the ITC (HS) Policy. When the import is allowed "through" STC, MMTC and Indian Potash, it means that any person may import "through" STC, MMTC and Indian Potash. All that it means is that the purchase order on the foreign buyer has to be placed by STC, MMTC and Indian Potash and that the importer in India has in turn to purchase the same from STC, MMTC and Indian Potash. There is no restriction anywhere in the Policy which prohibits a person in India from effecting such purchase from STC, MMTC and Indian Potash on High Seas basis and filing Bill of Entry. So long as the purchase of the Urea from the foreign supplier is effected by STC, MMTC or Indian Potash who in turn sell the same to a party in India whether on High Seas or otherwise, the import is clearly through STC, MMTC or Indian Potash.

They submitted that Para 2.11 of the Policy provides that STE(s) shall make any such purchases or sales involving imports or exports solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale in a non-discriminatory manner and shall afford enterprises of other countries adequate opportunity, in accordance with customary business practices, to compete for participation in such purchases or sales. This clearly shows that the purchase for the import has to be done by the STEs. So long as the purchase of the Urea from the foreign supplier is effected by STEs, the import is through STEs and this is sufficient compliance with the ITC HS Policy which requires import through STEs and there

is no restriction or prohibition that the Indian buyer from STEs cannot purchase the Urea from STEs on High Seas. Even the Government of India, Ministry of Chemical and Fertilizers, had by its letters 11th December 2013 & 13th March 2014 permitted them to import Technical Grade Urea through any State Trading Enterprise (i.e. MMTC, IPL, STC). When they are permitted to import through STE, it clearly means that purchase from the foreign supplier has to be by STE and that they in turn can purchase from the STE and file the Bill of Entry.

They further submitted that the contention in the Notice that the STEs must only file the Bill of Entry and STEs cannot sell the Urea on High Seas to the Indian buyer is baseless. There can be no rational or logic in contending that under the Import Policy although the STEs who have purchased the Urea from the foreign buyer can sell the same to the Indian buyer after clearance from customs, such sale cannot be permitted on High Seas before clearance of the Urea from customs. Such a contention is totally absurd and meaningless. The contention raised in the Notice, apart from being the result of a total mis-reading of the ITC (HS) Policy is totally contrary to and in complete disregard of the regular and accepted practice followed by customs for over several decades. It is a regular practice followed over several decades that in case of imports which are canalized through STEs, the STEs place the order on the foreign supplier and thereafter effect High Seas sale of the same to the Indian Buyers and cited the following judgments:

- (a) CC v Union Carbide India Ltd-1987 (27) ELT 241: This case pertains to the period **June 1975** when import of Manganese Ore was canalized through MMTC and in this case the Manganese Ore was sold on High Seas by MMTC to Union Carbide India Ltd,
- (b) Hyderabad Industries Ltd v U01-2000 (115) ELT 593 (SC): In this case before the Supreme Court, asbestos was canalized through MMTC who sold the same on High Seas to Hyderabad Industries and the Supreme Court held that duty was payable on the price charged by MMTC to Hyderabad Industries,
- (c) CC v Coromondal Fertilizers Ltd— 1988 (33) ELT 451: In this case rock phosphate and sulphur were canalized through MMTC who sold the same on High Seas to Coromondal Fertilizers Ltd.
- (d) Godavari Fertilizers & Chemicals Ltd v CC-1986 (81) ELT 535: In this case Phosphoric Acid was canalized through MMTC who sold the same on High Seas to Godavari Fertilizers & Chemicals Ltd.
- (e) SAIL v CC — 1999 (112) ELT 946: In this case, Lubricating Oil and Greases were canalized through Indian Oil Corporation who sold the same on High Seas to SAIL and the Tribunal held the import to be valid in law.

They further submitted that it can be seen 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 the Indian buyer.

The importer further submitted 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 is evident from the Board's Circular No.49/89-CX. 8 dated 2-11-1989 in which the procedure for taking Modvat Credit has been laid down in respect of the duty paid by Indian Oil Corporation in respect of import of Steel Sheets which was canalized through MMTC and which were purchased on High Seas by IOC from the canalizing agency, MMTC. The view taken in this circular is reiterated in Circular No. 23/90-CX.8 dated 9-4-1990.

They further submitted that it is contended in the Notice by relying on condition no. (xiv) of Permissions dated 11th December 2013 & 13th March 2014 granted to them by the Government of India, Ministry of Chemical and Fertilizers, that permission was granted to them only for domestic purchase of Urea from STE. They submitted that there is absolutely no such restriction in the said condition no. (xiv). Neither does condition no.(xiv) contain any restriction that purchase shall be made only domestically from STE nor does it prohibit purchase on High Seas. All that condition (xiv) stipulates is that the Department of fertilizers has to be kept informed through the STE from whom the Urea is purchased, about the product being produced from such urea, the quantity required , etc. There is absolutely no stipulation in condition (xiv) that urea has to be purchased from STE only domestically and not on High Seas. On the contrary, the Show Cause Notice has ignored the very first para of the said letters which grants permission to us to import the Urea through STE. If as contended in the Notice, they were only permitted to purchase domestically from the STE, the letters would not have said that they are permitted to import through STE. They submitted that if the contention in the Notice that STEs cannot sell the Urea on High seas Basis were to be correct, it would mean that the STEs and the Ministry of Chemicals and Fertilizers are themselves acting in contravention of law which is totally uncalled for.

They further submitted that it is contended in the Notice that they were aware that the goods were a canalized item and that they had suppressed the facts by producing the said Permissions dated 11th December 2013 & 13th March 2014 granted to them by the Government of India, Ministry of Chemical and Fertilizers in guise of license issued by DGFT. The said contention is totally meaningless and unintelligible. It is not understood as to how they can suppress the fact that the goods were canalized and as to how producing the

permissions granted by the Government of India, Ministry of Chemical and Fertilizers can amount to suppression of facts. It is also not understood as to how it is contended that the said permissions were produced in guise of license issued by DGFT. The allegations of suppression of facts are most irresponsibly made in the Notice. There is no contravention of the Policy or any other law, the question of the goods being liable to confiscation under Section 111(d) of the Customs Act 1962 and of them being liable to penalty under Section 112(a) of the said Act does not arise. Even otherwise, as submitted herein above, right from the 1970s, the consistent practice which has been accepted by customs is that where the import of any item is canalized through a STE, the STE places the order on the foreign buyer and purchases the same for import and thereafter sells the same on High Seas to the Indian buyer who files the Bill of Entry and to whom clearance is allowed by customs. It is settled law as laid down by the following judgments that where the import is in accordance with a consistent past practice, the question of confiscation under Section 111(d) and imposition of penalty under Section 112 of the Customs Act 1962 does not arise:

Gujarat State Export Corporation Ltd v UOI — 1984 (17) ELT 50

Memon Associates v CC — 1988 (34) ELT 367

Trident Agencies v CC — 1989 (45) ELT 116.

They further submitted that bill of entry is dated 31.12.2013 and the show cause notice is dated 25.09.2019. The Show cause notice issued after unreasonable period beyond five years of bill of entry is liable to be dropped on this ground itself and without prejudice to the aforesaid submissions, in any event, proposal to impose penalty on us under Section 112 (i) of the Customs Act 1962 is bad in law, the said clause (i) of section 112(a) has no application to the present case. The said clause (i) of section 112(a) applies to goods in respect of which a prohibition is in force under the Customs Act or any other law. There is no prohibition against the import of Urea. In this behalf they relied upon the Hon'ble Supreme Court judgement in the case of CC v Atul Automations P. Ltd.- 2019 (1) TMI 1324 in which it has been held that prohibition against import must mean that the goods are not allowed to be imported into the country, which is not the case with Urea.

They lastly submitted that the Show Cause Notice is totally unsustainable in law and is liable to be discharged and dropped.

13. In order to follow the principal of natural justice, Personal hearing was fixed on 12.02.2020 and 26.02.2020 in this case. Nobody appeared for the P.H, rather the party vide their letter dated 24.02.2020 requested to drop the SCN after considering their submissions made in reply to SCN vide their letter dated 21.12.2019 which has been mentioned in foregoing paragraph.

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 Prilled Urea Technical Grade of 3600 MT valued to Rs. 7,97,66,566/- covered under Bills of Entry No. 4234626 dated 31.12.2013 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 Trans Agro India Private Limited (now known as M/s Transworld Furtichem Private Limited) 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. 'Prilled Urea Technical Grade' 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 Trans Agro India Private Limited 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 Trans Agro India Private Limited would be considered as an importer.

17.1. The decisions cited by the importer in their defence reply to the SCN pertain to mis-description and valuation of the imported goods. Whereas, the present case pertains to improper import by the importer. Therefore, the decisions cited by the importer are not related and applicable to the present case.

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 Trans Agro India Private Limited now known as M/s Transworld Furtichem Private Limited would be considered as an importer and the goods viz. 'Prilled Urea Technical Grade' 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.

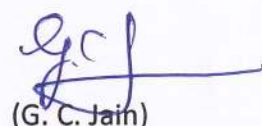
20. In view of the above discussion, it is unambiguously proven that M/s Trans Agro India Private Limited (now known as M/s Transworld Furtichem Private Limited) have imported the goods viz. 'Prilled Urea Technical Grade' having assessable value of Rs. 7,97,66,566/-, in violation of provisions of Foreign 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 6-4/2013-FM dated 11.12.2013 and No. 6-23/2013-FM dated 13.03.2014 issued by the Department of Fertilizer, Ministry of Chemicals & Fertilizers, were not at all complied with by the importer M/s Trans Agro India Private Limited now known as M/s Transworld Furtichem Private Limited, in respect to the import of 'Prilled Urea Technical Grade' 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 3600 MTs imported vide Bills of Entry No. 4234626 dated 31.12.2013, 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. Prilled Urea Technical Grade of 3600 MT valued to Rs. 7,97,66,566/- (Rupees Seven Crore Ninety Seven Lakhs Sixty Six Thousand Five Hundred Sixty Six Only) covered under Bills of Entry No. 4234626 dated 31.12.2013 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. 39,88,330/- (Rupees Thirty Nine Lakhs Eighty Eight Thousand Three Hundred Thirty Only) upon Trans Agro India Private Limited now known as M/s Transworld Furtichem Private Limited under Section 112 of the Customs Act, 1962 for acts of omission and commission as discussed above.



(G. C. Jain)

Additional Commissioner,
Customs, Kandla

Dated: 24.07.2020

F. No. S/10-47/Adj/ADC/Transworld/2019-20

By RPAD/ Speed post

To,
M/s Trans Agro India Private Limited
(now known as M/s Transworld Furtichem Private Limited),
18th Floor, Plot No. 9, Sector No. 17,
Palm Beach Road, Sanpada,
Navi Mumbai-400705

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