



सीमा शुल्क आयुक्त का कार्यालय
 1व सीमा शुल्क गृह : पणंबूर : मंगलूर - १०
OFFICE OF THE COMMISSIONER OF CUSTOMS
NEW CUSTOM HOUSE: PANAMBUR: MANGALORE-10

सी.सं./C.No.VIII/10/15/2009 अधिर्णिया/Adjn Passed on :16.7.2010
 क्रम सं./Sl.No. 05/2010 (Commr) Issued on :20.7.2010

मूल आदेश
ORDER-IN-ORIGINAL

Passed by Shri M.Ajit Kumar, Commissioner of
 Customs, New Custom House, Mangalore, 575 010.

उद्देशिका
P R E A M B L E

१. यह प्रति उस व्यक्ति के व्यक्तिगत उपयोग के लिए बेशुल्क दी जाती है, जिसके लिए जारी की जाती है।

1. This copy is granted free of charge for the private use
 of the person to whom it is issued.

२. कोई भी व्यक्ति जो इस आदेश से व्यथित है, वे इस आदेश के विरुद्ध, सीमा शुल्क और केंद्रीय उत्पाद
 शुल्क (अपील्स) नियम 1982 के साथ संलग्न प्रपत्र फार्म सी.ए.-3 (चार प्रतियों में) में सीमा शुल्क अधिनियम
 1962 की धारा 129(1) के अधीन संगठित अपलेट ट्रीब्यूल, जो पहली मंजिल, डब्ल्यू.टी.सी. भवा,
 एफ.के.सी.सी.आई. कॉम्प्लेक्स, के.जी. रोड, बेंगलूर-560 009 में स्थित है, उाको अपील कर सकते हैं ।
 इस आदेश के पावती के 3 महीनों के अंदर अपील दायर कराा चाहिए। इस अपील में यायालय शुल्क स्टॉप
 रु.4/-(रुपये चार मात्र) लगााा चाहिए ।

2. Any person deeming himself aggrieved by this order may
 appeal against the order in Form C.A-3 (in quadruplicate)
 appended to the Customs and Central Excise (Appeals)
 Rules, 1982 to Appellate Tribunal constituted under Section
 129(1) of the Customs Act 1962, situated at 1st Floor, WTC
 Building, FKCCI Complex, K.G. Road, Bangalore-560009. The

appeal must be filed within 3 months from the date of communication of this order. An appeal should bear a Court Fee Stamp of Rs.4/- (Rupees Four only).

जिसके साथ मिलिखित जरूरी है:

It must be accompanied by:

a) आदेश (मूल) के दो प्रतियाँ, जिसमें एक प्रमाणित प्रति होना चाहिए और जिसपर यायालय शुल्क नियम, 1870 के खंड मुद्दे सं. 6 में विनिर्दिष्ट के अनुसार 0.5 रुपये (पचास पैसे मात्र) की यायालय शुल्क स्टॉप होना चाहिए।

a) Four copies of order in original (one copy of which shall be a certified copy) and must bear a court fee stamp of 0.50 paise only as prescribed under Schedule I, Item 6 of the Court Fees Act 1870.

b) रु.1,000/- की क्रॉस की गई बैंक ड्राफ्ट, जहाँ बेंच स्थित है, उस स्था के कोई भी राष्ट्रीय बैंक में ट्रिब्यूल के सहायक रजिस्ट्रार के नाम हों और डिमांड ड्राफ्ट के साथ अपील प्रपत्र होना चाहिए।

b) A crossed Bank draft of Rs.1000/- drawn in favour of the Assistant Registrar of the tribunal on a branch of any Nationalised Bank located at the place where the Bench is situated and the demand draft shall be attached with the form of Appeal.

३. इस आदेश के विरुद्ध अगर कोई व्यक्ति अपील करा चाहते हैं तो वे अपील करो के पहले लगाये गये दंड तथा माँगे गये शुल्क को भुगता करे और अपील के साथ ऐसे भुगता के साक्ष्य प्रस्तुत करे, ही तो सीमा शुल्क अधिनियम, 1962 की धारा 129 ई के उल्लंघा के कारण अपील अस्वीकृत किया जा सकता है।

3. Any person desirous of appealing against this order shall pending the appeal, deposit the duty demanded or penalty levied therein and produce proof of such payment along with the appeal, failing which the appeal is liable to be rejected for non-compliance of the provisions of Sec 129 E of the Customs Act 1962.

BRIEF FACTS OF THE CASE

M/s. S. Kushalchand & Co imported 14,212 Kgs of 'cocoa powder' vide Tiger Star Voyage 020. They filed two Bills of Entry NO.230412 and 230413 both dated 5.6.2009 for clearance of these goods. M/s S. Kushalchand & Co had acquired three transferable licences DFIA No.0310444317 dtd 26.9.2007, No.0310428441 dtd 1.5.2007 and No.0310428434 dtd 1.5.2007 which were issued for export of biscuits. On completion of export the Bond/LUT were released by the DGFT, Mumbai and these licenses were made transferable. All these licences permitted import inter alia of maida/atta/flour falling under ITCHS 11010000 or 19019090 against export of biscuits. Release Advises to Mangalore port were issued by Nhava Sheva Customs Authorities, for items 'maida/atta/flour' for a quantity of 28000 Kgs valued at US\$ 44,102/-

2. The importers were informed vide letter S-12/17/2008 Appg dtd 14.5.2009 that the subject authorization did not allow of 'cocoa powder'. M/s Kushalchand & Co. filed an appeal to CESTAT, Bangalore being Appeal No. C/349/09. The Hon'ble CESTAT vide order 1162/2009 dated 24.09.2009 directed the Commissioner to hear the appellants and pass speaking order within two months from the date of receipt of the order. The Order was received in the office of the Commissioner of Customs, Mangalore on 23.10.2009.

3. Accordingly personal hearing was conducted on 30.10.2009. Based on the oral submissions and written submissions made during the personal hearing it was held in para 14 of the order that what was allowed to be imported

against these duty free import authorizations is only what is listed as an input against Sl no. E5 of SION. Further the order held that in the Indian Standard flour and cocoa powder are referred to as two distinct ingredients of biscuits. In the Harmonized System cocoa powder is classified specifically in Chapter 18 distinct from flour, which is classified in Chapter 11. For the for reasons discussed in detail, the product 'maida/atta/flour' occurring as an inputs for end product biscuits in the Standard Input Output Norms or in the Duty Free Import Authorization presented for clearance of the imported goods, does not cover the product 'Cocoa powder' imported. The Commissioner of Customs, Mangalore vide Order in Original No 14/2009 dtd 6.11.2009 ordered for finalization of provisional assessments of the Bills of Entry accordingly.

3. Aggrieved by the above Order M/s Kushalchand & Co filed appeal No.C/595/2009 before CESTAT, Bangalore. CESTAT Bangalore vide Order No.1553/2009 dtd 29.12.2009 remanded matter to the original authority for examining the amendment sheets received later. The Hon'ble CESTAT in para 6 of the order held as under;

"6. We find that DFIA produced before the Commissioner covered, among others, mida/atta/flour of ITCHS code 19019090. The amendment sheets since received cover mostly goods which appeared in the original DFIA import item list, but without the ITCHS code against each entry as in the original licence. We find that as per chapter note 2(b), Chapter 19 covers, flour, meal and powder of vegetable origin of any chapter, other

than flour, meal or powder of dried vegetables (heading 0712) of potatoes (heading 1105) or of dried leguminous vegetables (heading 1106). As the impugned order was passed without the Commissioner seeing all the amendment sheets now produced before us, we are of the opinion that the matter should be remanded back to the Commissioner of Customs, Mangalore for examining the amended sheets and any other relevant clarification/ circulars to adjudicate the matter afresh following the principles of natural justice."

5. Since the amendment sheets were not produced before this office and were directly produced before the Hon'ble CESTAT, this office vide letter dated 08/03/2010 requested the party to forward the amendment sheets so as to comply with CESTAT's remand orders. In reply to the letter the party's C&F Agent M/s Devshi Bhanji Khona Vide letter dated 09/03/2010 have forwarded the photocopies of the amendment sheets of DFIA licences. Since the party had only given the department copies of the document this office vide letter dated 11/03/2010 wrote to the Joint Director, DGFT, Mumbai to confirm the authenticity of the licence. Since no reply was received from the DGFT this office send several reminders dated 05/04/2010, 21/04/2010 and 28/05/2010 to the DGFT. The DGFT have finally vide two separate letters both dated 25/05/2010 have attested and confirmed the authenticity of the DFIA, DFIA pre-import list and amendment sheets. This office has then vide letter dated 11/06/2010 informed M/s Kushalchand & Co of the PH fixed for 22/06/2010 or 29/06/2010 as per their convenience. M/s Kushalchand have appeared for the PH on 29/06/2010 through their authorized representative.

Written Reply

6. M/s Kushalchand vide their letter dated 07/05/2010 have stated that the order of the Hon'ble CESTAT accepted their contention that the imported item cocoa powder is covered under the term 'flour' as per the description in the authorization and that the matter was remanded back to this office for the limited purpose of examining the amendment sheets of the said DFIA. Again vide their letter dated 15/06/2010 that they shall be appearing for the personal hearing on 29/06/2010. Further vide their letter dated 21/06/2010 they have authorized Shri Ashok Nair to be present before this office and show the concerned amendment sheets for examination.

Record of Personal Hearing

7. Shri Ashok Nair appeared for personal hearing on behalf of the Company. He reiterated the points given in their letter dated 7.5.2010. He also stated that in the light of the fact that the amendment sheet do not show the classification heads of the imported item, 'flour' must be read in its general meaning which would include 'cocoa powder' and hence they may be allowed to import 'cocoa powder' under the transferable DFIA produced by them.

FINDINGS:

M/s S. Kushalchand & Co had filed two Bills of Entry nos 230412 and 230413 dated 05/06/2009 for clearance of 14212.800 Kgs of alkalized cocoa powder , each , against DFIA Licence No No.0310457340 dtd 10.01.2008 issued to Rama Exports. Initially vide letter dated 6.5.09/9.5.09 party filed Release Advises against 3 DFIA licences, viz 0310428434/1.5.07, 0310428441/1.5.07 and 0310444317 dtd 26.9.07. Same were rejected on the grounds that there is no mention of cocoa powder in the import list enclosed therein. The importers were informed vide letter S-12/17/2008 Appg dtd 14.5.2009 that the subject authorization did not allow of 'cocoa powder'. M/s Kushalchand & Co. filed an appeal to CESTAT, Bangalore being Appeal No. C/349/09. Subsequently on 15.5.09, party requested for issue of non utilization certificate in respect of Release Advises against the above three licences as the port of clearance was mentioned as Old Mangalore Port. The release advise submitted in respect of licence No.0310457340/10.1.08 pertains to clearance at Mangalore Customs. To avoid delay asked the assessee to file P.D Cum Test Bond. Accordingly the above 2 Bs/E were filed against the release advise in respect of Licence No.0310457340/10.1.08. Confirmation regarding the authenticity of the license from DGFT was submitted vide DGFT's letter dated 25.5.2010 received in this office on 2.6.2010 and personal hearing granted to the importer on 22.6.2010 or 29.06.2010 whichever date was convenient to them.

8. I have gone through the facts of the case carefully and have heard the party's representative personally. The limited issue to be decided here is in terms of the order of remand made by the Hon'ble CESTAT and referred to in para 4 above. I have examined the amendment sheets produced before me. I find that M/s Kushalchand & Co had filed two Bills of Entry nos 230412 and 230413 dated 05/06/2009 against which the above mentioned DFIA licence No. 0310457340 dtd 10.01.2008 was produced. All the licences including those mentioned in para 7 permitted import inter alia of maida/atta/flour falling under ITCHS 11010000 or 19019090 against export of biscuits.

The issue that arises for consideration are;

- 1) Whether the amendment sheets will gain primacy over the DFIA licence for the import vide Bills of Entry nos 230412 and 230413 dated 05/06/2009, and
- 2) Whether 'flour' must be read in a general manner to include 'cocoa powder' and hence they may be allowed to import 'cocoa powder' under the transferable DFIA produced by them.

I shall take up the issue sequentially.

a) Whether the amendment sheets will gain primacy over the DFIA licence.

9. Prima facie I find that two issues militate against the acceptance of the importers views in this regard.

a) The amendment sheets is a document that has come up much after the issue of the DFIA licence which clearly permitted import inter alia of maida/atta/flour falling under ITCHS

19019090 only against export of biscuits. They were not and could not be in existence at the time of the licence and cannot be now used to complete an assessment, which is against that permitted in the original licence. There is no change in the nomenclature of the goods which are permitted import, only that the amendment sheet has been issued to incorporate certain modifications with respect to quantity, CIF value etc. The importer has not shown any policy provision to show that the amendment sheet will have any over riding power over the original licence so as to convert a specific heading into a generic one.

b)The maxim '*quando aliquid prohibetur fieri, prohibetur ex directo et per obliquum*' which means "Whenever a thing is prohibited, it is prohibited whether done directly or indirectly." Can also be interpreted to state that which cannot be done directly cannot be done indirectly. If the original Duty Free Import authorization (DFIA) licenses have clearly permitted the import of flour covered under ITCHS 11010000 or 19019090 only against export of biscuits, it cannot be held that post-importation this classification has no relevance in assessment of the imported goods.

b)Whether 'flour' must be read in a general manner to include 'cocoa powder'

10. I find that this issue has already been discussed elaborately by my predecessor vide his order 14/2009 dated 06/11/2009. The same is reproduced below;

"The ITC (HS) classification of Import Export Item is completely aligned with the Customs Tariff upto eight digits. Both are based on the Harmonized Commodity Description and Coding System evolved by the

World Customs Organization (WCO). The interpretative notes of the Customs Tariff can therefore be used to determine classification of product under the ITC (HS) classification of Import Export Items and to determine the scope of inputs mentioned in Standard Input Output Norms (SION)

In the Customs Tariff products of milling industry fall under Chapter 11. This includes 'prepared flour, meals or starches of heading 1901' in terms of chapter note 1(b). 'Flour' is commonly understood to refer to 'maida'. Even if we go beyond common parlance and refer to the Harmonized System 'flour' is defined as a 'finely ground meal of any cereals'. Flour of wheat, meslin and other cereals like maize and rye is classified in Chapters 1101 and 1102. Similarly flour of dried leguminous vegetable and potatoes is also classified under the same Chapter 11 which covers products of milling industry. Chapter 19 of the Harmonized System covers preparations of cereals and flour. Even in chapter 19 the term 'flour' has been defined to mean 'cereal flour' of Chapter 11 and 'flour' of vegetable origin.

Chapter 18 of Customs Tariff covers 'Cocoa cocoa preparations'. Tariff item 18050000 specifically covers cocoa powder. In terms of Rule 3(a) of the General Rules for the interpretation of Customs Tariff, 'the heading which provides the most specific description shall be preferred to heading providing a more general description'. These Rules also apply to interpretation of the ITC(HS) schedule. In terms of

these notes also cocoa powder would be classified under chapter 1805 00 00 and not as flour falling under chapter 11 or anywhere else in the Customs Tariff or ITC (HS) Schedule. There is incidentally, no mention of flour in Chapter 18

Chapter 19, in turn, specified that the term 'flour' referred in heading 19.01 covers only cereal flour and meal of Chapter 11 or other specified vegetable origin. The reference to chapter 1901 90 90 against the entry 'Maida/Atta/Flour' in the sheet attached to the DFIA license cannot be said to allow import of cocoa powder. As already indicated cocoa powder is specifically classifiable elsewhere. This Chapter would cover 'maida/atta/flour' which satisfy the condition of this chapter. In any case, for the forgoing reasons cocoa powder is not a flour and would be classifiable under Chapter 18 and not under Chapter 11 or chapter 19.

The importer during the personal hearing had referred to the Indian Standard specification for biscuits (IS 1011:20002). This lists the ingredients, methods of sampling; and, test for biscuits. Among the essential ingredients listed is 'maida or flour'. Among the optional ingredients are a number of cereals and cereal products such as rice flour, malt flour, wheat 'atta' etc. The Indian Standard also lists cocoa powder among these optional ingredients. The importer relied on this to further contention that cocoa powder is an ingredient of biscuits. No doubt the Indian Standard indicate that cocoa powder is an

ingredient of biscuits. This however, is in addition to flour. If anything this would suggest that the two are distinct products and not interchangeable. In any case what is allowed to be imported against these Duty Free Import Authorization is only what is listed as an input against cereal number E-5 of the Standard Input Output Norms.

The importer during the personal hearing also extensively referred to the dictionary meaning of flour. The Chambers²¹ Century Dictionary cited by them defines flour as obtained flour as obtained by 'finely ground milling of wheat or any other cereal grain' or 'a dried powdered form of any other vegetable material, for example potato flour'. This fact corresponds to the Customs Tariff where flour refers to cereal flour of chapter 11. This Chapter in turn covers inter alia flour of cereals and flour of dried leguminous vegetables. These do not cover cocoa powder. The Oxford dictionary also referred by the importer defines flour as a 'powder obtained by grinding grain'. The Dictionary of Food & Science and Technology also cited by them defines flour as 'powders made from finely ground sifted cereal grains'. The Words and Phrases of Central Excise and Customs edited by S.B.Sarkar has suggested that for the purpose of heading 19.01 of Customs Tariff the term 'flour' means not only cereal flour but also flour meal and powder of vegetable origin. All these definitions in fact confirm that the expression flour as used in the Duty Free Import Authorization as well as Standard Input Output Norms is interchangeable with

'maida' and refers to grinding cereals or a powder of vegetable origin. This would not cover cocoa powder. Cocoa is a product classified in the Customs Tariff at chapter 18 and distinct from cereals (Chapter 10) or vegetables (Chapter 12).

The importers referred to clarification No.01/94/180/DFIA/AM/08/PC 1/4367 dated 14.1.2008 issued by DGFT and mentioned other clarifications issued by Ministry of Commerce , DGFT or Department of Revenue to establish their case that one export obligation is discharged and the DFIA becomes transferable it is not necessary to insist on close nexus between the goods imported and export product. This is correct. However, this argument would have been relevant if (for instance) the input listed in the DFIA had been cocoa powder and Customs had sought to deny the benefit of Duty Free Import authorization on the ground that it was not an input for biscuits. In the present case that is not the issue. The product listed is 'maida/atta/flour' and the importer claims that cocoa powder is included in this description. The present dispute is not related to determining nexus.

The importers reliance on the decision of Tribunal in the case of Reckitt and Column of India Ltd., Calcutta Vs Collector of Central Excise, Calcutta (1985{22}ELT 216[Tribunal]) is similarly of no avail. That decision dealt with the interpretation of an entry 'preparation with a basis flourwhich by mixing with or boiling in milk or water can be used

for making beverages” . The CEGAT was dealing with the question of whether ‘Purity Barley’ and ‘Robinsons’s Patent Barely’ was covered under this heading. The Tribunal in the course of their discussion mentioned that the term flour is not restricted to wheat. That may indeed be so. However, flour is undoubtedly restricted to cereals. The scope of the term flour has not been interpreted to include what is not covered in Chapter 11 of the Harmonized System.

The Prevention of Food Adulteration Act refers to ‘solvent extracted oils and edible flour’. This refers only to ground material obtained from ‘specially prepared de-oiled meal, that is, the residual material left over when oil is extracted by a solvent from oil-cake immediately following the single-pressing of good quality edible oil seeds’. This is a narrow interpretation relating to a specific process of solvent extraction of oil

The Essential Commodities Act 1955 similarly defines “edible flour” as ‘edible ground material prepared from de-oiled meat which is derived from oilcakes or oilseeds or oil bearing materials as a result of solvent extraction of oil from such materials’. This is again a similarly restricted interpretation of a particular process of solvent extraction of oil and in no way helps the importers.

In common parlance flour is understood to refer to ‘maida’. The Duty Free Import Authorization produced

by the importer have also used the two terms as interchangeable. In the Indian Standard flour and cocoa powder are referred to as two distinct ingredients of biscuits. In the Harmonized System cocoa powder is classified specifically in Chapter 18 distinct from flour which is classified in Chapter 11. For the foregoing reasons I hold the product 'maida/atta/flour' occurring as an inputs for the end product biscuits in the Standard Input Output Norms or in the Duty Free Import Authorization presented for clearance of the imported goods does not cover the product cocoa powder imported. I direct the provisional assessments to be finalized accordingly."

11. I am in agreement with the above views and I feel that even if we are to accept the importers plea and the amendment sheets were to be construed in the sense in which they are understood by the trade, by the dealer and the consumer, the understanding of 'flour' in the common parlance of trade would not include 'cocoa powder'. The importer has not led evidence to show anything to the contrary. In fact he has himself described the goods in the Bills of Entry as 'Alkalized Cocoa Powder' and not as 'Cocoa Flour'. Further the items are described as 'maida/atta/flour' are of the same kind, class or nature. An important aid to interpretation is the phrase '*Noscitur a sociis*' or that a word is understood "from its associates" (literally, "A man is known by the company he keeps.").

The meaning of questionable or doubtful words or phrases may be ascertained by reference to the meaning of other

words or phrases associated with it. In this regard the term 'flour' is to be understood as denoting those classes of ground vegetable powder which originate from cereals. 'Atta' is obtained from grinding complete wheat grains. It is a whole wheat-flour made from hard wheat grown across the Indian subcontinent. Whereas 'Maida' is a finely-milled wheat flour used to make a wide variety of North Indian breads such as *paratha* and *naan*. Both the products have their origin in wheat. In the common terminology, 'flour' is a powder made of cereal grains, other seeds, or roots and in India is commonly understood to refer to 'maida'. Further when 'flour' is used in conjunction with 'atta' and 'maida' it can only be understood to be a cereal based powder. However in a taxing statute where the Tariff itself gives clarity to the use of the words, reference to trade parlance etc is not necessary. In **Indo International Industries v. Commissioner of Sales Tax, Uttar Pradesh [1981] 3 S.C.R. 294**, the Apex court ruled thus:

"It is well-settled that in interpreting items in statutes like the Excise Tax Acts or Sales Tax Acts, whose primary object is to raise revenue and for which purpose they classify diverse products, articles and substances resort should be had not to the scientific and technical meaning of the terms or expressions used but to their popular meaning, that is to say, the meaning attached to them by those dealing in them. If any term or expression has been defined in the enactment then it must be understood in the sense in which it is defined but in the absence of any definition being given in the

enactment the meaning of the term in common parlance or commercial parlance has to be adopted."

In **Collector of Central Excise, Shillong v. Wood Craft Products Ltd. (1995) 3 SCC 454 : (1995) 77 ELT 23 (SC)**.

The Apex Court held;

"Since the Central Excise Tariff Act, 1985 is enacted on the basis and pattern of the HSN, the same expression used in the Act must, as far as practicable, be construed to have the meaning which is expressly given to it in the HSN when there is no indication in the Indian tariff of a different intention."

The ratio laid down in Wood Craft Products Ltd. was followed and reiterated in **Collector of Central Excise, Hyderabad v. Backelite Hylam Ltd., (1997) 10 SCC 350 : (1997) 91 ELT 13 (SC)** and in **Collector of Customs, Bombay v. Business Forms Ltd. Thr. O.L. (2002) 142 ELT 18 (SC)**. In this case the issues are clear with a reference to the Tariff. As discussed above, as per the Customs Tariff products of milling industry fall under Chapter 11. This includes 'prepared flour, meals or starches of heading 1901' in terms of chapter note 1(b). Chapter 19, in turn, specified that the term 'flour' referred in heading 19.01 covers only cereal flour and meal of Chapter 11 or other specified vegetable origin. There is incidentally, no mention of flour in Chapter 18. This being so in interpreting items in a statute like the Customs Act whose primary object is to raise revenue there is no necessity to borrow the definitions from the Prevention of Food Adulteration Act, The Essential Commodities Act, Indian Standard specification for Biscuits etc.

12. Having regard to the facts and circumstances of the matter as discussed above, I pass the following order.

O R D E R

I order finalization of provisional assessment of the Bills of Entry NO.230412 and 230413 both dated 5.6.2009 where in "Alkalised Cocoa Powder" was imported on the basis that the Duty Free Import Authorization presented for clearance of the imported goods does not cover the product 'Alkalised Cocoa Powder'. Appropriate duty may be collected accordingly.

(M AJIT KUMAR)
COMMISSIONER

To

M/s Kushalchand & Co
Suite No.B-1 & 2, Jay Chambers
Service Road, Opp Western Express Highway
Vile Parle (East)), Mumbai – 400 057

BY R.P.A.D

Copy submitted to the Chief Commissioner of Customs, P.B. No.5400, Queen's Road
Bangalore.

Copy to : Deputy Commissioner of Customs (Appraising), NCH, Mangalore.