IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

Appeal No. C/00039/2012

Arising out of Order-in- Appeal No.C. Cus No.688/2011, Dated: 26.09.2011
Passed by the Commissioner of Customs (Appeals), Chennai

Date of Hearing: 20.01.2019
Date of Decision: 29.01.2019

M/s SHABEER ENTERPRISES

Vs

COMMISSIONER OF CUSTOMS (PORT-IMPORT)
CHENNAI

Appellant Rep by: Shri S Murugappan, Adv.
Respondent Rep by: Shri A Cletus, ADC AR

CORAM: Sulekha Beevi C S, Member (J)
Madhu Mohan Damodhar, Member (T)

Cus - Assessee had filed the bill of entry for clearance of goods declared as 36,000 kgs. of Betel Nuts classifying the same under CTH 08029019 - They further claimed benefit of notfn 105/99-Cus., which is a Free Trade Agreement [FTA] notification for goods imported from SAARC countries - The goods had been declared as imported from Bangladesh - The original authority rejected the benefit of notfn on the ground that when the importer is claiming Special Origin Criteria under para 10 of the Schedule, letter "D" should have been mentioned in box 8 of the Country of Origin Certificate [COO]; whereas, the COO certificate submitted shows Origin Criteria as "B" 65.83% - As per the said notification in question, the imported goods should fulfill the Origin Criteria even in Notfn 73/95 (NT) - As per which, the non-contracting party's cost/materials involved in the imported goods should not exceed 60% of F.O.B. value of the goods - Even the Division Bench of High Court of Kerala in the case of *Mustafa Traders*, has reiterated that DGFT had jurisdiction to issue notification under section 5 of the FTDR Act - With regard to second contention of the assessee that the percentage content in respect of non-origin material has been raised to 70% by Notfn 73/1995 (NT), this aspect has also been competently analysed by the LAA - No infirmity found in the said conclusions - In the event, no merit is found in the appeal, for which reason, it is dismissed: CESTAT

Appeal dismissed

Case laws cited:

M/s. S. Mira Commodities Pvt. Ltd - 2008-TIOL-732-HC-MAD-CUS... Para 2

M/s. HRB Boarding & Lodging Pvt. Ltd., Vs Union of India - 2015-TIOL-1500-HC-MAD-CUS... Para 4.3

Director-General of Foreign Trade, New Delhi Vs M/s. Mustafa Traders reported in 2016 (339) E.L.T.215 (Ker.)... Para 4.4

FINAL ORDER NO. 40215/2019

Per: Bench:

Appellants had filed bill of entry dated 21.07.2011 for clearance of goods declared as 36,000 kgs. of Betel Nuts with declared value of Rs.11,84,433/-, classifying the same under CTH 08029019. Appellants further claimed benefit of notification No.105/99-Cus., which is a Free Trade Agreement [FTA] notification for goods imported from South Asian Association for Regional Co-operation [SAARC] countries. The goods had been declared as imported from Bangladesh. The original authority rejected the benefit of notification on the ground that when the importer is claiming Special Origin Criteria under para 10 of the Schedule, letter "D" should have been mentioned in box 8 of the Country of Origin Certificate [COO]; whereas, the COO certificate submitted shows Origin Criteria as "B" 65.83%. Appellants filed an appeal before the Commissioner (Appeals), who vide the impugned order dated 26.09.2011 upheld the order of original authority. Hence this appeal.

2. When the matter came up for hearing on behalf of the appellants, learned advocate Shri S. Murugappan made oral and written submissions, which can be broadly summarised as under:-

(i) Jurisdictional High Court in the case of *M/s. S. Mira Commodities Pvt. Ltd., reported in 2009 (235) E.L.T.423 (Mad.)* = *2008-TIOL-732-HC-MAD-CUS* has held that fixing Tariff value at Rs.35/- in the Foreign Trade Policy as not in accordance with law. Hence, goods under reference cannot be confiscated.

(ii) Bangladesh is a least developed country and as per Notification No.73/1995 (NT), dated 07.12.1995 the percentage content in respect of non-origin country material can be upto 70%. In the present case, it is 65.83% and hence the benefit should be extended, though by clerical error Col. No.8 of the Country of Original Certificate mentions Sl.No."B" instead of Sl.No."D".

3. On the other hand, the learned Authorised Representative for the Revenue Shri A. Cletus supports the impugned order. He submits that when goods are not wholly manufactured from the goods of the contracting parties, the origin of imported goods should be given as "B" followed by percentage of cost/materials from non-contracting parties and it should not extent 60% of the F.O.B. value of the imported goods.

4.1 Heard both sides and have gone through the facts of the case. The issue in dispute concerns the eligibility of the imported goods for the benefit of availing FTA Notification No.105/99-Cus.

4.2 As per the said notification in question, the imported goods should fulfill the Origin Criteria even in Notification No.73/95 (NT). As per which, the non-contracting party's cost/materials involved in the imported goods should not exceed 60% of the F.O.B. value of the goods. Ld. advocate has contended that the said Tariff notification has been amended by Notification No.68/2000 (NT), dated 10.11.2000, whereby, the percentage limit of 60% has been increased to 70%.

4.3 Ld. advocate has relied upon the judgment of Hon'ble jurisdictional High Court in the case of M/s. S. Mira Commodities Pvt. Ltd., (supra) which had, inter alia, held that price fixing under FTDR Act is not sustainable. We find that the jurisdictional High Court has itself distinguished the ratio, earlier laid down in M/s. S. Mira Commodities Pvt. Ltd., (supra), in a subsequent judgment, in the case of *M/s. HRB Boarding & Lodging Pvt. Ltd., Vs Union of India reported in 2015 (322) E.L.T.452 (Mad.)* = *2015-TIOL-1500-HC-MAD-CUS*. The relevant portion of that judgment is reproduced as under:-

"19. It is to be noted that the petitioners have come forward with the present Writ Petitions challenging only the Notification No. 65, dated 4-8-2012 by which, it seems that the petitioners are aggrieved by imposition of floor price at US $60 per sq.mt. and they had no grievance in respect of earlier Notifications, which imposed US $ 50 per sq. mt. As discussed above, it is no doubt true that the DGFT has no power to amend the policy. However, it is to be noted that the Central Government made the amendments in the Schedule 1 (Imports) of the ITC (HS) Classifications of Export and Import Items, by publishing in the Gazette of India Extraordinary Part II in terms of above referred to Section 3(2) of FTDR Act, in and by which, the Import under the Exim Codes 6802 10 00, 6802 21 10, 6802 21 20, 6802 21 90, 6802 91 00 and 6802 92 00 were permitted freely provided CIF value is US $ 60 and above per square metre. This was given effect to by the DGFT by the Notification No. 65 (RE-2010)/2009-2014, which has been impugned in these writ petitions. In fact, the Notification announcing the Foreign Trade Policy, 2009-2014 was published under the aegis of the DGFT who is also an Ex-Officer Additional Secretary to the Government of India. Therefore, the DGFT not only assumes the power as a delegatee of the Central Government under Section 6 of the FTDR Act, but also competent as an authorized officer on behalf of the Central Government. The DGFT discharges the official functions allotted to him as a limb of the Central Government but also as a delegatee under Section 6 of the FTDR Act.

20. In the present case, the DGFT has not resorted to change of categorization of items, i.e. from the category of 'free export' to category of 'restricted export', but as a sequel to earlier notification No. 18, which fixed the floor price of US $ 50 per square meter, the present impugned Notification has been issued. Therefore, I do not find any illegality or irregularity in the impugned notification in order to interfere with the

same. The reliance placed upon "M/s. Mira Commodities case and M/s. Bimal Kumar Modi case by the learned counsel for the petitioner, cannot be made applicable to the present case inasmuch as in the said decisions, it has been held that the DGFT has resorted to amend the import & export policy, which is not permissible under the provisions of FTDR Act, but in exercise of Section 5 of the FTDR Act, the Central Government is only empowered to formulate and announce the export and import policy.

21. Therefore, when the DGFT Notification dated 4-8-2011 allowed free import of marble blocks/tiles provided the CIF value is US $ 60 and above per sq. mt., the petitioners were expected to declare the same, however, contrary to the same, they have declared below the US $ 60 and thereby, the authority has rightly confiscated the same and therefore, confiscation of the goods is justified."

4.4 We find that even the Division Bench of the High Court of Kerala, in the case of *Director-General of Foreign Trade, New Delhi Vs M/s. Mustafa Traders reported in 2016 (339) E.L.T.215 (Ker.)*, has reiterated that DGFT had jurisdiction to issue notification under section 5 of the FTDR Act.

4.5 Viewed in this light, the reliance of the Ld. advocate on the ratio laiddown in the case of M/s. S. Mira Commodities Pvt. Ltd., (supra) will not help his case.

5.1 With regard to the second contention of the learned advocate that the percentage content in respect of non-origin material has been raised to 70% by Notification No.73/1995 (NT), dated 07.12.1995. We find that this aspect has also been competently analysed by the LAA and the following cogent findings arrived at:-

"The importer contended that the said non-Tariff notification has been amended by Customs Notification No.68/2000 (NT), dated 10.11.2000, whereby, the said percentage is made 70% instead of 60%. In this aspect, I find that the said amendment says that the said percentage is changed to 70% [non-contracting origin] for the product originating in least developed contracting States. As per SAPTA Agreement, Least Developed Countries are notified by United Nations and Bangladesh is one of the Least Developed Countries. However, I find that as per II (b)(3) of the Schedule to the Customs Notification No 73/1995 (NT), dated 07.12.1995 when the importer is claiming Special Origin Criteria under para 10 of the said Schedule in the box 8 of the Country of Origin Certificate letter "D" should be entered. Whereas, the Country of Origin Certificate submitted by the importer shows Origin Criteria as "B" 65.83%. Therefore, I hold that the subject goods are not fulfilling the Origin Criteria as prescribed in the said notification and hence not eligible for the benefit of Customs Notification No.105/1999-Cus."

We are unable to find any infirmity in the above conclusions.

6. In the event, no merit is found in the appeal, for which reason, it is dismissed.

(Pronounced in open court on 29.01.2019)