

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 8268/2017

**SHAH NANJI NAGSI EXPORTS PVT LTD
A COMPANY INCORPORATED UNDER COMPANIES ACT
HAVING ITS REGISTERED OFFICE AT ANAJ BAZAR
ITWARI, NAGPUR-440002**

Vs

**1) UNION OF INDIA
MINISTRY OF COMMERCE AND INDUSTRY UDYOG BHAWAN
MAULANA AZAD ROAD NEW DELHI-110011**

**2) DIRECTORATE GENERAL OF FOREIGN TRADE
UDYOG BHAWAN, HWING, GATE NO.2, MAULANA AZAD ROAD
NEW DELHI-110011**

**3) JOINT DIRECTOR GENERAL OF FOREIGN TRADE
1ST FLOOR, EAST WING, N S BUILDING, CIVIL LINES
OPP. VCA GROUND, NAGPUR-440001**

R K Deshpande & Vinay Joshi, JJ

Dated: March 29, 2019

**Appellant Rep by: Shri Vikram Nankani, Adv. assisted by Shri S Dewani,
Adv.**

**Respondent Rep by: Shri U Aurangabadkar, A S G I with Ms M Chandurkar,
Adv.**

Cus - FTP - As per SION, export item at serial No. E75 is 'maize starch powder' against which exporter is permitted to import "maize" without putting any condition or restriction as regards to variety, quality or characteristic in the said entry - Moreover, there is no such corresponding condition in licence - In its absence, any addition of words cannot be imported to change the equation - Import of popcorn maize is not excluded from the scope of term "maize" - Petitioner has imported maize which is capable of being used in the manufacturing of export goods namely maize starch powder - There is no "actual user condition" so as to restrict right of petitioner to import maize - So long as the export goods and the import item corresponds to the description given in the SION, it cannot be held to be invalid by adding something else which is not in the policy - Held that petitioner is entitled to import popcorn maize under DFIA scheme vide SION entry E75 - Petition partly allowed - respondents to take appropriate decision about issuance of authorisation, subject to the fulfillment of rest of the policy condition: High Court [para 27 to 30]

Petition partly allowed

Case laws cited:

**Standard Pencils (P) Ltd., Vs. Collector Of Central Excise, Madras, (2002)
7 SCC 433... Para 17**

**M/s Jain Exports (P) Ltd. and Another Vs. Union of India and others -
2002-TIOL-241-SC-CUS... Para 18**

**Commissioner of Central Excise, New Delhi Vs. Connaught Plaza
Restaurant Private Limited, New Delhi - 2012-TIOL-114-SC-CX... Para 18**

**Commissioner of Customs (Export) Vs. M/s. USMS Saffron Co. Inc. - 2016-
TIOL-3180-HC-MUM-CUS... Para 19**

**Commissioner of Customs-IV Vs. Lactose (I) Ltd. - 2017-TIOL-1855-HC-
MUM-CUS... Para 26**

JUDGEMENT

Per: Vinay Joshi:

The Government of India formulated a Foreign Trade Policy(FTP) in terms of Section 5 of The Foreign Trade (Development and Regulation) Act, 1992 to increase Indian International Trade Market. The main object of formulating FTP is to accelerate Indian business, generate employment and to earn foreign exchange. In order to achieve said object, FTP for the year 2015-20 was formulated to regulate foreign trade during the span of said five years. The FTP for the year 2015-20 provides a frame work and mechanism for increasing export of Indian goods. In order to increase the foreign trade, certain concessions have been accorded to Indian traders.

2. FTP 2015-20 formulated for the period from 1st April, 2015 to 31st March, 2020 floated a Duty Free Import Authorisation Scheme (DFIA) to regulate export vizaviz import of the goods. It is a post export scheme which gave exemption from basic custom duty while importing specified inputs. The design of the scheme is like, the merchant/export trader, has to file online application to the concerned regional authority before exporting the goods under DFIA scheme. It is stipulated that export shall be completed within the span of twelve months from the date of generation of particular file number. On completion of export and realization of proceeds, one has to apply for issuance of DFIA with the concerned authority. On each transaction, separate DFIA is issued as per the Standard Input Output Norms (SION). On issuance of authorisation the trader will get exemption from paying basic custom duty on the goods allowed to be imported under scheme.

3. The petitioner is a Private Limited Company engaged in the export business. Amongst other commodities, the petitioner is indulging into export of Maize Starch Powder since 2016. The petitioner procures Maize Starch Powder from the manufacturer and exports the same as a merchant exporter under DFIA scheme.

4. The DFIA is issued on post export basis for specified products, which are notified under SION. As per SION, the relevant entry E75 for exporting Maize Starch Powder is reproduced below:-

<i>Sr. No.</i>	<i>Export Item</i>	<i>Quantity</i>	<i>Import Item</i>	<i>Quantity allowed</i>
<i>E75</i>	<i>Maize Starch Powder</i>	<i>1 MT</i>	<i>1 Maize</i>	<i>1.568 MT</i>

5. In terms of SION E75 Entry, the petitioner has imported a quality of maize (popcorn) which is capable of manufacturing export goods namely maize starch powder.

6. The petitioner was earlier allowed to import maize (popcorn) on 17 occasions. However, petitioner's 10 applications were kept pending by respondent No. 3, and withheld issuance of DFIA licence. The petitioner's applications were for export of maize (corn) starch powder against which request was for grant of DFIA for import of maize (popcorn grade). It is petitioner's case that SION entry No. E75 permits import of "maize" as against export of maize starch powder. According to petitioner, the term maize includes all varieties of maize/corn like, flint corn, dent corn, hybrid, popcorn etc. The policy of Directorate General of Foreign (DGFT) has not specified the variety of maize which is permitted to import under the Scheme. The petitioner imported popcorn maize which can be used to manufacture maize starch powder. Though petitioner fulfilled the norms and conditions, the respondent withheld issuance of authorization which is subject matter of challenge in this petition.

7. The respondent - Union of India resisted the petition vide reply dated 23.01.2018. The respondent has not disputed the DFIA scheme as formulated by the Central Government under the Foreign Trade Act. It is stated that the regional authority issues DFIA which allows import of inputs without payment of basic custom duty. DFIA is being issued on post export basis i.e. only after the completion of export of goods. DFIA is issued only for the products notified by the DGFT as per SION. Precisely SION has fixed the importable item with its quantity for particular exportable item. SION E75 allows the import of 1568 kg of maize, on export of 1000 kg of maize starch powder.

8. It is the stand of Union of India that petitioner misused the DFIA scheme and committed fraud since 26.10.2016. It was noticed that instead of importing maize as permitted in SION list, the petitioner imported popcorn which is much costlier than maize and thus, causing heavy loss to the Government Exchequer. The petitioner's act is in gross violation of Clause 4.12(i) of the FTP 2015-20. The said clause prescribes that whenever SION permits use of generic inputs then the name of specific input together with quantity must be endorsed in the relevant shipping bill and it should match description in the relevant bill of entry.

9. Respondent also contended that, it is not commercially viable to manufacture maize starch powder from the imported popcorn which is four times costlier. The petitioner is misusing the DFIA scheme and by importing costlier quality of maize i.e. popcorn, selling it in the domestic market to earn huge profit. It is also informed that now the concerned SION entry has been deleted to prevent the abuse.

10 The authorities have withheld issuance of DFIA licence to the petitioner. The decision, if any, rendered by the adjudicating authority can be challenged by way of appeal as provided under statute. In instant case, the Court has considered the petitioner's grievance on prima facie basis and passed interim order dated 19.04.2018 which is reproduced below:-

"We had heard the learned counsel for the parties for a couple of hours on at least a couple of occasions. We had made certain queries on the previous date of hearing to the learned Assistant Solicitor General of India appearing for the respondents to which certain time was sought for the response.

The learned Assistant Solicitor General of India states on instructions that the respondents wish to engage a senior counsel for working out the writ petition.

We had heard the matter for a long time on more than a couple of occasions and we find that the petitioner has made out a very strong prima facie case on the basis of the paragraphs in the Duty Free Import Authorization Scheme for issuance of the authorization, as they appear to have completed all the formalities for the issuance of the authorization and almost 17 such authorizations had been issued in favour of the petitioner on similar set of facts.

In the aforesaid background, since a strong prima facie case is made out by the petitioner, we direct the respondents to issue the necessary authorizations in favour of the petitioner only on the condition that the petitioner furnishes an undertaking that the petitioner would be liable to pay the customs duty in case it ultimately fails in the writ petition.

It is however made clear that this order would govern the pending applications only."

11. The learned counsel appearing for the parties submitted that in such background, authorities may get influence by interim order of this Court while deciding the matter. In the wake of such position, we take up for adjudication the limited issue regarding the petitioner's entitlement to import popcorn maize under the scheme and leave it for the authorities to decide the rest of the technicalities.

12. The principle issue for consideration is about petitioner's entitlement for importing maize popcorn vide SION entry as E75 under DFIA scheme. FTP for the year 2015-20 allows DFIA on post export basis for specified

products, which are notified under SION. The petitioner has exported maize starch powder under DFIA scheme which is covered under SION entry E75. The said notified item permits import of maize of specified quantity in proportion. Under the scheme petitioner imported variety of maize namely popcorn maize and claimed authorisation i.e. exemption from paying basic custom duty.

13. On technical front respondent stated that, the petitioner's act of importing popcorn is in gross violation of para 4.12(i) of the FTP 2015-20 which contemplates that, when SION permits use of generic inputs or alternate inputs, the name of specific input should be endorsed in the relevant shipping bills. Therefore, the petitioner who is importing generic inputs i.e. maize, should endorse name of specific input i.e. popcorn maize in shipping bills, in absence it violates the policy condition. Secondly, it is the stand of the Union that the petitioner imported popcorn instead of maize which is much costlier than maize. The petitioner is misusing the authorisation by sale of popcorn in domestic market instead of using for manufacturing the export item. According to respondent it is not commercially viable to manufacture maize starch powder from the imported popcorn which is 4 times costlier. It is also the stand that the import is subject to actual user condition as per policy circular No. 2 dated 14.02.2017 issued by respondent No. 2.

14. Before entering into controversy, it would be apposite to reproduce the relevant provisions of DFIA:-

4.25 DFIA SCHEME

(a) Duty Free Import Authorisation is issued to allow duty free import of inputs. In addition, import of oil and catalyst which is consumed/utilised in the process of production of export product, may also be allowed.

(b) Provisions of paragraphs 4.12, 4.18, 4.20, 4.21 and 4.24 of FTP shall be applicable to DFIA also.

(c) Duty Free Import Authorisation Scheme shall not be available for import of raw sugar.

4.27 ELIGIBILITY

(i) Duty Free Import Authorisation shall be issued on post export basis for products for which Standard Input Output Norms have been notified.

(ii) Merchant Exporter shall be required to mention name and address of supporting manufacturer of the export product on the export document viz. Shipping Bill/Bill of Export/Tax Invoice for export prescribed under the GST rules.

(iii) Application is to be filed with concerned Regional Authority before effecting export under Duty Free Import Authorisation.

(iv) No Duty Free Import Authorisation shall be issued for an input which is subjected to preimport condition or where SION prescribes 'Actual User' condition or Appendix 4J prescribes pre import condition for such an input.

4.28 MINIMUM VALUE ADDITION

Minimum value addition of 20% shall be required to be achieved.

4.29 Validity and Transferability of DFIA

(i) Applicant shall file online application to Regional Authority concerned before starting export under DFIA.

(ii) Export shall be completed within 12 months from the date of online filing of application and general of file number.

(iii) While doing export/supply, applicant shall indicate file number on the export/supply documents viz. Shipping Bill/Bill of Export/Tax Invoice for supply prescribed under GST rules.

(iv) In terms of Para 4.12 of FTP, Whenever SION permits use of either (a) a generic input or (b) alternative input, the specific input together with quantity [which has been used in manufacturing the export product] should be indicated/ endorsed in the relevant Shipping Bill / Bill of Export /Tax invoice for supply prescribed under GST rules. Only such inputs may be permitted for import in the authorisation in proportion to the quantity of these inputs actually used/consumed in production, within overall quantity against such generic input/alternative input.

(v) In addition, if in any SION, a single quantity has been Indicated against a number of inputs(more than one input), then quantities of such inputs to be permitted for import shall be in proportion to the quantity of these inputs actually used/consumed in production and declared in Shipping Bill/Bill of Export/Tax invoice for supply prescribed under GST rules within overall quantity against such group of inputs. Proportion of these inputs actually used/consumed in production of export product shall be clearly indicated in Shipping Bill/Bill of Export / Tax invoice for supply prescribed under GST rules.

(vi) Separate DFIA shall be issued for each SION and each port.

(vii) Export under DFIA shall be made from a single port as mentioned in paragraph 4.37 of Handbook of Procedures.

(viii) Regional Authority shall issue transferable DFIA with a validity of 12 months from the date of issue. No further revalidation shall be granted by Regional Authorisation.

4.12 Accounting of Input

(i) Whenever SION permits use of either (a) generic input or (b) alternative input, unless the name of the specific input together with

quantity (which has been used in manufacturing the export product] gets indicated/endorsed in the relevant shipping bill and these inputs, so endorsed, within quantity specified and match the description in the relevant bill of entry, the concerned authorisation will not be redeemed. In words, the name/description of the input used (or to be used) in the Authorisation must match exactly with the name/description endorsed in the shipping bill.

15. The controversy revolves around the question, whether petitioner can be allowed to import maize popcorn against DFIA licence for export of starch powder under SION entry No. E75 when admittedly imported popcorn is not used to manufacture export product namely maize starch powder. Petitioner's learned counsel conceded that the imported maize popcorn is not used for manufacturing the export goods namely maize starch powder. According to him, there is no such actual user condition as well as the DFIA is transferable.

16. The petitioner sought clearance of popcorn against DFIA licence issued for export of starch powder as per entry at serial No. E75 of SION. Apparently the norms (E75) do not refer to any particular category of maize and it is petitioner's understanding that popcorn can be imported duty free against DFIA vide entry No. E75.

17. It is petitioner's contention that, normally entry which has been mentioned under the rules or norms should be construed as it stands. In this regard, petitioner relied on reported case of *Standard Pencils (P) Ltd., Vs. Collector Of Central Excise, Madras, (2002) 7 SCC 433*. In said case, the question was of interpretation of a term, in context to the exemption granted by the Central Government from paying excise duty. The Central Government by its Notification granted certain exemption for "Kumkum" (Bindi) under the Central Excise Act. It was the question whether the Kumkum pencil which is one of the form of "Kumkum" can avail benefit of Notification. In said context, it is held that the Central Government in its Notification has not confined the benefit of Notification to particular form of "Kumkum". There is no valid reason to exclude Kumkum in pencil form and therefore, the benefit has been accorded. According to petitioner, SION E75 refers the input commodity as "maize" without putting any restriction therefore, entry would cover maize of any quality, since the norms have not confined any quality of maize.

18. On similar line, the petitioner relied on reported case of *M/s Jain Exports (P) Ltd. and Another Vs. Union of India and others, (1988) 3 SCC 579 = 2002-TIOL-241-SC-CUS*. In said case, issue was whether import of industrial coconut oil was banned under Import Policy. It was observed that in relevant appendix there was no classification of coconut oil therefore all varieties of coconut oil should be taken as covered by said term. Precisely, it was observed that the term coconut oil as mentioned should take in its folds all varieties.

The Hon'ble Supreme Court in reported case of *Commissioner of Central Excise, New Delhi Vs. Connaught Plaza Restaurant Private Limited, New Delhi with connected matter*, (2012) 13 SCC 639 = **2012-TIOL-114-SC-CX**, ruled that in the absence of statutory definition in precise terms, words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding or according to their popular meaning. Therefore in absence of any definition, the general meaning of the word is to be construed.

19. The petitioner argued that it is not permissible for respondents to interpret policy condition. In this regard, reliance is placed on reported case of the *Commissioner of Customs (Export) Vs. M/s. USMS Saffron Co. Inc.* 2016 (344) ELT 161 (Bom.) = **2016-TIOL-3180-HC-MUM-CUS**. In said case, it is observed that if a particular Authorization does not contain any entry for restricting the item (Saffron), then, by an inferential process and when the Licensing Authority did not think it proper to insert it, it will not be permissible to read it in the same. It conveys that in absence of statutory restriction, by inference scope of entry cannot be restricted.

20. The respondents contended that the petitioner has imported popcorn, in gross violation of para 4.12(i) of the FTP 2015-20 which mandates that whenever SION permits use of generic inputs (maize in this case), the name of specific inputs (popcorn maize) should be endorsed in the relevant shipping bills and the relevant bills of entry. According to respondents maize is generic term used in SION E75 and therefore nonmentioning of specific input violates the above term, and consequently disentitles authorisation.

21. On the other hand, petitioner vehemently urged that the SION E75 entry i.e. "maize" itself is a specific term as against generic term. The petitioner would submit that Cereal is a generic term of which maize is species meaning thereby it is a specific term and therefore, Clause 4.12 would not apply. In short the quarrel is whether maize is generic or specific term, which would decide applicability of Clause 4.12.

22. Neither FTP 4.12 nor SION describes generic or specific terms, therefore, the general meaning of the word is to be construed. The term generic is an adjective relates to class of group or things or which is not a specific one. In other word use of generic term is for describing something that refers to whole class of similar things. Respondents' stand that maize is a generic term is based on the submission that there are different varieties of maize namely flint corn, dent corn, hybrid, popcorn etc. This argument does not stand to reason because maize itself is a quality of Cereal. When the term cereal is used, naturally unless it is specified, one cannot understand what it means. Naturally Cereal is generic term which covers all its types like corn, oat, wheat rice etc. However, when the term maize is used, it is a specific class of cereal apart from its interse varieties, therefore, the term maize can be well construed as a specific term and therefore, the provision of para 4.12(i) would not apply.

23. Respondents would submit that the general norms would indicate that, the items which are imported should be used for manufacturing resultant exportable items. The object of the scheme is to be looked upon to understand whether there exist actual user condition. For this purpose, respondents attracted our attention to the "general notes for all export products groups".

Note1:-

"1. The norms have been published in this book with a view to facilitate determination of the proportion of various inputs which can be used or are required in the manufacture of different resultant products. In many cases, the resultant products and the inputs required have been described in generic terms. The applicants shall, therefore, ensure that the goods sought for import and actually imported are those, which are used/required in the export product. The items allowed for import in the licence shall be correlated with the description of the export product in the Shipping bill by the exporter to be authenticated by Customs. For example, if the input allowed in the norms is 'relevant fabrics', only the specific types of fabric i.e. polyester or nylon etc. used in the export product shall be allowed. Similarly, if the norms provide for import of BOPP film against export of self adhesive tape, only BOPP film required for manufacture of Self Adhesive Tape will be allowed and not those, which are required as packing material."

Bare Perusal of Note 1 indicates that, there is no actual user condition but the input must be capable for use of export product. In absence of any specific word, the only requirement appears to be of capability of the input product to manufacture the export goods and no necessity to actually use the same. The plain reading of note1 nowhere conveys that there is actual user condition.

24. The statute should be read as a whole, in its context and scheme, to discover what each clause or word is meant and designed under the scheme. Interpretation of words and clauses must depend on the text and the context. There was no difficulty for the framers of the scheme to specifically lay down that the imported items must be used for manufacturing export items. However, in its absence the term 'can be used' must be interpreted as it stands. It simply conveys that the imported item should be potential to use but not necessary to be used. The scheme itself is of transferable authorisation and therefore in that context different interpretation cannot be made. Moreover, Clause 4.27(iv) conveys that wherever SION prescribes 'Actual User' condition, it will prevail. Herein, no such actual user condition is specifically prescribed by SION for relevant entry. Chapter 9 of the FTP 2015-20 specifically defines the term 'actual user' as a person who utilizes imported goods for manufacturing in his own unit. It means that actual user condition relates to a person and not to a product. Therefore, the argument advanced by the petitioner regarding actual user condition would not sustain.

25. It is not denied that popcorn maize has also similar starch contents as other varieties of maize, indicating that popcorn maize can be used to manufacture maize starch powder. The scheme never conveys that there is actual user condition attached to the import against the export obligation. It amounts to adding some conditions in the FTP when they never exist. Moreover, when the authorisation is made transferable under the scheme there is no question of actual user condition.

26. It reveals that DFIA scheme is distinct than Advance Authorization Scheme where raw material is to be imported on authorization and to be used for manufacturing purpose. Basically, DFIA is post export scheme in which exporter has to first export goods and after realization of proceeds, exporter has to make an application to the authority, who after verification, grant DFIA certificate which is transferable. Therefore, there is no actual user condition inbuilt under the scheme.

The respondents relied on the circular dated 14.11.2017 to impress about the actual user condition. It is countered on the point that the circular is in relation to the Advance Authorization Scheme and not about DFIA Scheme. Secondly, it is argued that the circular can not have retrospective effect. In this regard, petitioner relied on reported case of the *Commissioner of Customs-IV Vs. Lactose (I) Ltd. 2017 (355)ELT 541(Bom.) = 2017-TIOL-1855-HC-MUM-CUS*. In said case, it is ruled that the policy circular would apply only if it is issued prior to the date of issuance of licence meaning thereby it has no retrospective effect. In that light on the basis of circular entitlement cannot be denied.

27. As per SION export item at serial No. E75 is maize starch powder against which exporter is permitted to import "maize" without putting any condition or restriction as regards to variety, quality or characteristic in the said entry. Moreover, there is no such corresponding condition in licence. In its absence, any addition of words cannot be imported to change the equation. Precisely, import of popcorn maize is not excluded from the scope of term "maize". We may reproduced one of the licence details as under:-

Import Item:

Sr. No.	Item Description	Item Length	Import Quantity	CIF/Duty Saved (in Rs.)	CIF/Duty Saved (in FC)	Qty	Val.
1.	Maize (Corn)	12,0	635.82 M.T.	7,155,876.00	108,079.00 USD	Y	N
				7,155,876.00	108,079.00		

Export Item:

Sr. No.	Item Description	Item Length	Export Quantity	FOB (in Rs)	FOB (FC)
1.	Maize Starch Powder	19,0	405.5 M.T.	8,587,051.00 &	129,695.08 USD
				8,587,051.00	129,695.08

28. The petitioner has imported maize which is capable of being used in the manufacturing of export goods namely maize starch powder. There is no "actual user condition" so as to restrict right of petitioner to import maize. So long as the export goods and the import item corresponds to the description given in the SION, it cannot be held to be invalid by adding something else which is not in the policy.

29. In conclusion, we hold that petitioner is entitled to import popcorn maize under DFIA scheme vide SION entry E75 and answer accordingly. We are not inclined to go into the rest of the technicalities which are left to the authority to decide as per policy.

30. In the light of the above discussion, we partly allow writ petition and hold that under DFIA scheme vide SION entry No. E75, the petitioner is entitled to import popcorn variety of maize. In the light of above adjudication, respondents to take appropriate decision about issuance of authorisation, subject to the fulfillment of rest of the policy condition. Writ Petition stands disposed accordingly