

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI**

**PRINCIPAL BENCH –COURT NO. 4**

**Customs Appeal No. 52295 of 2021**

(Arising out of Order-in-Original No. 07/2021/L.Y/COMMR/ICD/EXPORT/TKD dated 24.09.2021 passed by the Commissioner of Customs, ICD, Export, Tughlakabad)

**M/s Kothari Products Limited**  
24/19, The Mall, Kanpur-208001.

**Appellant**

**Versus**

**Commissioner of Customs (Export)  
New Delhi (ICD TKD)**  
Inland Container Depot (Export), Tughlakabad  
New Delhi – 110020.

**Respondent**

**With  
Customs Appeal No. 50004 of 2022**

(Arising out of Order-in-Original No. 06/2021/L.Y/COMMR/ICD/EXPORT/TKD dated 23.09.2021 passed by the Commissioner of Customs, ICD, Export, Tughlakabad)

**Mr. Mitesh Kothari**  
Executive Director  
M/s Pan Parag India Ltd.  
24/19, The Mall, Kanpur-208001.

**Appellant**

**Versus**

**Commissioner of Customs (Export)  
New Delhi (ICD TKD)**  
Inland Container Depot (Export), Tughlakabad  
New Delhi – 110020.

**Respondent**

**With  
Customs Appeal No. 50005 of 2022**

(Arising out of Order-in-Original No. 06/2021/L.Y/COMMR/ICD/EXPORT/TKD dated 23.09.2021 passed by the Commissioner of Customs, ICD, Export, Tughlakabad)

**M/s Pan Parag India Limited**  
24/19, The Mall, Kanpur-208001.

**Appellant**

**Versus**

**Commissioner of Customs (Export)  
New Delhi (ICD TKD)**  
Inland Container Depot (Export), Tughlakabad  
New Delhi – 110020.

**Respondent**

**And  
Customs Appeal No. 51201 of 2022**

(Arising out of Order-in-Original No. 06/2021/L.Y/COMMR/ICD/EXPORT/TKD dated 23.09.2021 passed by the Commissioner of Customs, ICD, Export, Tughlakabad)

**Mr. Mitesh Kothari**

Executive Director  
M/s Pan Parag India Ltd.  
24/19, The Mall, Kanpur-208001.

**Appellant**

**Versus**

**Commissioner of Customs (Export)  
New Delhi (ICD TKD)**

Inland Container Depot (Export), Tughlakabad  
New Delhi - 110020.

**Respondent**

**Appearance:**

Present for the Appellant: Shri Pramod Kumar Rai & Shri Anirudh, Advocates

Present for the Respondent: Shri Mihir Ranjan, Special Counsel

**CORAM:**

**Hon'ble Dr. Rachna Gupta, Member (Judicial)**

**Hon'ble Ms. Hemambika R. Priya, Member (Technical)**

**Date of Hearing : 08/01/2025  
Date of Decision : 25/03/2025**

**Final Order Nos.. 50436-50439/2025**

**Dr. Rachna Gupta**

The present order disposes of four appeals arising out of the similar order bearing such numbers and dates as are mentioned in the table below. The order is pronounced by the same Commissioner of Customs, ICD, Export, Tughlakabad on the same issue of wrong availment of benefit of Export Incentive Schemes.

The details of appeals are as follows:

<b>S. No.</b>	<b>Appeal No.</b>	<b>Name of appellant</b>	<b>Respective O-I-O</b>
1.	C/52295/2021	M/s Kothari Products Limited	07/2021/L.Y/COMMR/ICD/EXPORT/T

			KD dated 24.09.2021
2.	C/50004/2022	Mr. Mitesh Kothari	06/2021/L.Y/COMMR/ICD/EXPORT/T KD dated 23.09.2021
3.	C/50005/2022	M/s Pan Parag India Limited	06/2021/L.Y/COMMR/ICD/EXPORT/T KD dated 23.09.2021
4.	C/51201/2022	Mr. Mitesh Kothari	06/2021/L.Y/COMMR/ICD/EXPORT/T KD dated 23.09.2021

2. The facts of the case which culminated into the said orders, succinctly, are as follows:

2.1 An investigation was initiated based on the information about certain exporters i.e. M/s Pan Parag India Ltd. and M/s Kothari Products Ltd. that they were defrauding Government by misusing the Export Incentive Scheme namely, Duty Free Import Authorization<sup>1</sup> Scheme. Under this scheme, exporters were under obligation to indicate the technical characteristics, quality, specification and value of the essential oils used in the manufacture of pan masala/gutkha in their shipping bills at the time of export and thereafter applying for the DFIA licences under Chapter 4 of the Foreign Trade Policy 2004-09 and FTP 2009-2014. Notification No. 40/2006 dated 01.05.2006 also specifies the similar conditions that if perfumes, essential oil/aromatic chemical are the inputs of the export produce, the exporter shall give a declaration with regard to technical characteristics, quality and its specification in their shipping bills at the time of export. But the said exporters were not declaring the same in the Shipping Bills filed during the period from June 2006 to September 2011.

3. Based on said intelligence, the department conducted searches at the premises of the appellants including those of Directors of both the above named exporters and resumed certain documents. From the scrutiny thereof, it was observed that the

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**1 DFIA**

appellants are engaged in export of pan masala/gutkha for several years. They claimed rebate of central excise duty paid on export goods under Compounded Levy Scheme. The major raw material used in manufacture of export good were beetal nut, catechu, natural essential oil etc. Most of these raw materials were procured from domestic markets except that the appellants were sometimes, importing natural essential oils. They were getting DFIA licenses subsequently. But in most cases after fulfilling export obligation and after endorsement of transfer ability they used to sell said licences in the open market.

3.1 On the scrutiny of purchase invoices of the parfumes/essential oil/aromatic chemicals resumed from the premises of the exporter, the department observed that although they were importing or purchasing the essential oils under Chapter 33.1 of Customs Tariff 1975 but majority of their purchases were of the compound falling under CSH 33302019 viz. mixtures of odoriferous substances and essential oil as perfume base. This was got confirmed from the various suppliers of the appellants. The average cost of essential oil used by the customer in manufacture of their total production was found to be about Rs. 4300/- per kg. The department also observed that the application filed by the appellant for the issuance of the DFIA licenses at the office of Jt. DGFT were invariably having natural essential oil i.e. sandalwood oil, mint oil, vetiver oil, pachouli oil, rose as their inputs but in fact major quantity purchased and used by them in manufacture of export goods were actually medical component. This fact of using essential oils in huge quantities in the exported goods was not

disclosed by the appellant in their application for DFIA licenses. The same is alleged to be a clear case of suppression of vital facts. In order to obtain DFIA license, it was mandatory to mention the characteristic of the essential oil/aromatic chemical/perfumes in order to avail the concession under DFIA scheme.

3.2 Para 4.55.3 Handbook of Procedure<sup>2</sup> Vol. 1 (2004-09) and sub-clause (i) of Notification No. 40/2006-Customs dated 01.05.2006 and of Notification No. 98/2009-Cus. dated 11.09.2009 also specifies the similar conditions, that, if perfume/essential oil/aromatic chemical are the inputs of the export produce, the exporter shall give a declaration with regard to technical characteristics, quality and its specification in their shipping bills at the time of export. In the light of the same, exporter is bound to show nexus between the essential oil/perfume/aromatic chemicals actually used in the manufacture of export goods and the essential oil/perfume finally imported against the said exports (i.e. the DFIA license)

4. In view of the above observations, department formed an opinion that non-disclosure of the technical specifications of the ingredients used in the exported goods was consciously done by the appellant to avail wrong benefit of DFIA scheme. This amounts to violation of provision of 4.55.3 of Handbook of Procedures of Notification No. 40/2006 and Notification No. 98/2009, thereby rendering impugned exports as prohibited under Section 11 Act, 1992. In view of these observations, the show cause notices as mentioned above were served upon the respective appellants

proposing the impugned export consignments having the respective declared FOB value to be confiscated under Section 113(d) of Customs Act, 1962 and proposing that the penalty be imposed on the appellant company as well as on the co appellants i.e. the Managing Directors of the respective exporter, under Section 114 of the Customs Act, 1962. The said proposal has been confirmed vide the respective order in original as mentioned in the table above. Being aggrieved, the appellants are before this Tribunal.

5. We have heard learned counsels for the appellant and authorized representative for the Revenue.

6. Learned counsel for the appellant has mentioned that the DFIA scheme is administered by DGFT under Chapter 4 of FTP. Customs authorities are not competent to step into the jurisdiction of DGFT authorities regarding fulfillment of conditions for issuance of DFIA scrips. It is also mentioned that for failure to fulfill conditions for issuance of DFIA, DGFT had already issued SCN for cancellation of DFIA scrips ab-initio as has been acknowledged in present SCN itself. Revenue authorities independently can investigate and take actions if and only if Customs Act, 1962 or notifications issued there-under are violated by exporter or importer. DFIA is not issued under Customs Act, 1962. SCN does not allege any independent violation of Customs law. It is based on the premises that the export goods are prohibited under Section 11 of the FTDR, 1962. Officer of Customs have not been given any power to adjudicate any dispute under foreign Trade Development and Regulation Act, 1992. It is the authorities under FTDR Act, 1992, who can adjudicate disputes under FTDR Act. DGFT has not

declared that goods are prohibited under Section 11 of FTDR Act, 1992. The authorities under customs Act have not been empowered to declare any goods prohibited under Section 11 of the FTDR Act.

7. Coming to the allegations of non-compliance of the para 4.32/4.55 of HBP, Id. counsel submitted that non compliance thereof does not render the goods prohibited under Section 11 of FTDR. He submitted the present show cause notice is not with respect to any item imported by the appellants and it is purely with respect to the items exported i.e pan masala/gutkha. As far as the export items are concerned, admittedly, no prohibition or restriction has been brought on record no even alleged by the department. Para 4.32 and 4.55 of HBP not being of procedure does not deal with exportability of a product. Both these paragraphs (4.32/4.55 of HBP) are silent to the effect that pan masala/gutkha cannot be exported if the technical characteristics of the inputs used in manufacture thereof are not declared on shipping bills. The only consequence for the said non-compliance can be the denial of benefit in the form of DFIA scrips. The said denial still will not effect exportability of the finally manufactured goods. Although these paragraphs of Procedure of Hand Book non-compliance whereof have been alleged could have led to following consequences:

(a) The DFIA licenses on post export basis may not have been issued by DGFT or

(b) With respect to issue licenses, transferability should not have been endorsed by DGFT or

(c) DGFT may issue SCN under FTDR Act, 1992 for cancellation of DFIA, (which has been done as admitted in Para 19 of present SCN).

(d) When those licenses are presented for import of various inputs, customs should not allow duty free import of those inputs by claiming benefit of Customs Notifications which incorporate conditions similar to para 4.32/4.55 of HBP.

(e) In case imports are allowed SCN should be issued questioning those imports and demanding duty forgone.

8. Learned counsel further brought to notice that whether a product is allowed for export or not that has been elaborated under Chapter 1-2 of FTP and schedule 2 of ITC HS. It is impressed upon that paragraph 4.55/4.32 referred in show cause notice is simply irrelevant for deciding exportability of a product. Decision of this Tribunal in the case of **Prayag Exporters Pvt. Ltd. Vs. Commissioner of Customs, Mumbai**<sup>3</sup> is relied upon. With these submissions, it is impressed upon that since export goods are not prohibited for export they are not liable to confiscation under Section 113(d) of the Customs Act. Section 113(d) of the Act otherwise does not cover the confiscation with respect to goods under export incentive scheme to which are applicable Foreign Trade Policy and the competent authority vis-à-vis such schemes is DGFT.

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3 2000 (121) ELT 819 (Tribunal)

8.1 Further with respect to Customs Notification No. 40/2006 and 98/2009 Id. counsel submitted that both these notifications are issued under Section 25 of the Customs Act providing exemption to material imported under DFIA scheme. He submitted that appellants have not imported any item claiming benefit any of these notifications. Hence the question of violation thereof does not at all arise. Irrespective, even if there is violation of any of the conditions of these notifications the goods which are imported claiming the benefit of these notifications could become liable to confiscation. The order confiscating the exported goods is absolutely illegal and erroneous. None of these notifications make exported goods liable to confiscation nor there arises any reason for imposing penalty on the exporting firms and the Directors thereof. With these submissions order under challenge is prayed to be set aside and both the appeals are prayed to be allowed.

9. While rebutting these submissions learned special counsel for the department submitted that from June 2006 to September 2011, the appellants exported pan masala and gutkha from ICD TKD, IGI Airport, New Delhi and JNCH Nahva Sheva under the DFIA, SION based export incentive scheme. As per para 4.55/4.32 of the HBP also in terms of SION norms number E-94 and E-105 the appellants were required to disclose, in the shipping bills at the time of export, the technical characteristics, quality and specification of the natural essential oil used in the manufacture of exported goods pan masala and gutkha. The Customs Notification No. 40/2006 dated 01.05.2006 and Notification No. 98/2009 dated 11.09.2009 are corresponding notifications for imports. The importers under the

DFIA scrips were meant to allow the import of the inputs that were to be used for manufacture of pan parag and Gutka. The appellants never used various natural oils, such as sandalwood oil, geranium oil, mint oil, vetiver oil, kerwa oil, etc., to manufacture export products. They used synthetic essential oil which they procured locally. From the documents seized from appellant premises, department observed and formed opinion that the Appellant deliberately did not declare the technical characteristics of the essential oil on the Shipping Bill so that the importer could import a wide range of essential oils duty-free. As the appellant violated para 4.55/4.32 of the Handbook of Procedure, the export of goods became "prohibited" under Section 11 of the FTDR Act, 1992. Therefore, goods are correctly held liable for confiscation under Section 113(d) of the Customs Act, 1962, and the exporter and its Directors were rightly liable for penalty under Section 114 of the Customs Act, 1962.

10. Ld. Special Counsel submitted that the adjudicating authority has correctly held that Section 113(d) covers the present case as it talks about provisions of the Customs Act, 1962 and also about "any other law for the time being in force". Hence, Custom office is legally permitted to take action under Section 114(d) for violating the provisions of the Foreign Trade Policy and that of Handbook of Procedure. It is further submitted that the Adjudicating authority has correctly treated the goods as "prohibited" under Section 11 of the FTDR 1992. Decision in case **Om Prakash Bhatia Vs Commissioner of Customs**<sup>4</sup> and Hon'ble Supreme Court decision

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4 2003 (155) ELT 423(SC)

**in Sheikh Mohd Omer Vs. Collector of Customs, Calcutta & others<sup>5</sup>** is relied. The landmark decision of the Hon'ble Delhi High Court case titled as **Nidhi Kapoor Vs Principal Commissioner<sup>6</sup>** is also relied. He submitted that the primary question in this case is about the interpretation of the term "prohibited" arising in Section 125 of the Customs Act 1962. As per this, the customs authority can exercise discretion while granting a redemption option in the case of confiscated goods whose import/export is prohibited under the Customs Act or under any other law, as opposed to the case of other goods where they are mandatorily required to grant such an option to redeem. It was held that as the import/export of gold was not expressly prohibited under any law, the Court had to address the above question inter alia Sections 2(33),11,111,125 of the Customs Act read with Sections 3 and 5 of Foreign Trade Development Act, 1992 (FTDR Act) and Baggage Rule 2016.

11. Since, in the present case, it is not in dispute that the declaration of technical characteristics was deliberate, which violated the provision of FTP and HBP, the appellant's export goods become "prohibited." Moreover, the exporter and Shri Mitesh Kothari have not disputed that they did not declare the technical characteristics on the shipping bills or any technical characteristics before DGFT. Also, the Suppliers of the essential oil admitted during the investigation that they did not supply natural essential oil. Instead, they supplied "synthetic essential oil", Exporters never produced any evidence to disprove it.

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5 (1970) 2 SCC 728  
6 2023-TIOL-1020-HC-DEL-CUS"

12. As regards the relevancy of Notifications No. 40/2006 and 98/2009 to the present case, it is submitted that the adjudicating authority has correctly referred to the decision that Hon'ble Delhi High Court in **Collector of Customs Vs. Kothari Foods and Fragrance Pvt. Ltd.**<sup>7</sup> which accepted Revenue's contention that a reading Exemption Notification No. 40/2006-Cus and paragraph 4.55.3 of the HBP makes it clear that these declarations are required if the inputs enumerated in paragraph 4.55.3 are imported under the DFIA licenses.

13. Finally, Id. Special Counsel submitted that DGFT Kanpur had issued SCN dated 18.07.2012 to the appellant under Section 13 of the Foreign Trade Development & Regulation (FTD&R) Act, 1992, wherein it was, inter alia, alleged that the technical characteristic, quality and specifications of the essential oil used in the export product had not been mentioned on the shipping bill is contravention of 4.55.3 of the HBP 2004-09 thereby suppressing the facts from the licensing Authority while availing facility of transferable DFIA. DGFT vide OIO dated 15.12.2015 ordered the deletion of the import item "essential oil" at the time of endorsement of the transferability of the DFIA and imposed a penalty of three lakhs on the exporter and its Director. The appellate authority of DGFT vide OIA dated 31.08.2017 has upheld the OIO dated 15.12.2015 which clearly said that the said order is independent of the Customs Order, which the customs can issue the recovery of, among other things, penalties. Hence the adjudicating authority has correctly imposed

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7 2019 (366) ELT 474B

a penalty on the appellant and its Director under Section 114 of the Customs Act, 1962.

14. With these submissions and impressing upon no infirmity in the order under challenge the appeal is prayed to be dismissed.

15. Having heard both the parties at length and perusing four of these appeals we observe that the goods exported vide the respective shipping bills by M/s Pan Parag and M/s Kothari Products are held to be "Prohibited" for exports in terms of Section 11 of Foreign Trade (Development and Regulation Act), 1992 on account of non-declaration of technical characteristic of inputs used in the export product as was required by para 4.55/4.32 of Handbook of Procedure (HBP) and condition No. (i) of customs Notification No. 40/2006 and Notification No. 98/2009 relevant for DFIA Scheme. The export goods are ordered confiscation under Section 113(d) of Customs Act, 1962 on the ground of alleged mis-use of Duty Free Import Authorization (DFIA) Export Promotion Scheme. In view of these findings, we opine that the issue to be adjudicated in these appeals is

"Whether export goods become prohibited for export on account of non-declaration of technical characteristics of inputs on shipping Bills as was required in terms of DFIA Scheme."

16. To adjudicate the same, we foremost have perused that following are the admitted facts on record:

- (i) The appellants exported their manufactured goods i.e. pan masala and gutkha without claiming any exemption

from duty on these exports or any benefit of DFIA Scheme.

- (ia) Rebate under Compounded Levy Scheme was claimed but it has not connection with the benefits of DFIA Scheme.
- (ii) The appellant companies obtained the DFIA licence from Directorate General of Foreign Trade (DGFT) subsequent to the impugned exports;
- (iii) The appellant transferred these licences to third parties with the approval from DGFT authorities;
- (iv) The impugned show cause notices deals with shipping bills for export of pan masala and gutkha and the Bills of Entry for import of any item or utilization of any DFIA licence issued by the DGFT has not been questioned in the present show cause notice;
- (v) While exporting pan masala and gutkha the appellant exporter declared in the shipping bill itself that they shall be claiming DFIA for import of corresponding inputs;
- (vi) The technical characteristics of various inputs used in manufacture of the export products more importantly essential oils were not declared on the shipping bills as were otherwise required in terms of para 4.55 of HBP 2004-2009 read with Condition No. (i) of Notifications No. 40/2006 and 98/2009;

- (vii) Despite the said admitted lucane (at point (v) & (vi) above) the exports were not objected by the customs authorities during the relevant time and the goods got cleared.
- (viii) The non-declaration of input details on shipping bills was not even objected by the DGFT authorities. The authorities not even made any endorsement with respect to the technical specifications of the inputs while issuing the DFIA licences.
- (ix) Most of the Raw Materials were procured domestically except that sometimes essential oil were imported.
- (x) Appellants have not imported any item claiming benefit of Notification No. 40/2006 and 98/2009.

17. We now peruse the requisite notifications which are issued under Section 25 of Custom Act and observe that Notification No. 40/2006 dated 01.05.2006 was issued under Foreign Trade Policy of the year 2004-09 and Notification No. 98/2009 dated 11.09.2009 was issued for the foreign trade policy of the year 2009-14 condition No. (i) is same to both the notifications which reads as under:

**"Notification No. 40/2006-Cus. Dated 01.05.2006**

**Duty free import authorization- Exemption to materials imported there against** - In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act. 1962) (52 of 1962), the Central Government being satisfied that it is necessary in the public interest do so, hereby exempts materials imported into India against a Duty Free Import Authorisation issued in terms of paragraph 4.4.1 and 4.4.2 of the Foreign Trade Policy (hereinafter referred to as the said authorization) from the whole of the duty of Customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act,

1975 (51 of 1975) and from the whole of the additional duty, safeguard duty and anti-dumping duty leviable thereon, respectively under sections 3, 8 and 9A of the said Customs Tariff Act, subject to the following conditions namely:

- (i) that the description, value and quantity of materials imported are covered by the said authorization and the said authorization is produced before the proper officer of customs at the time of clearance for debit: Provided that in respect of resultant product specified in paragraph 4.55.3 of the Handbook of Procedures (Vol. I) of the Foreign Trade Policy, the materials permitted in the said authorization or a duty free import authorization for intermediate supply, as the case may be, shall be of the (same quality, technical characteristics and specifications as the materials used in the said resultant product."

The perusal makes it clear that this condition of both the notifications is relevant for duty free import of inputs such as essential oils. **It becomes clear that the notification is not applicable for exports at all.**

18. In the present case, the show cause notices have been issued with respect to the exports made by appellants. Apparently and admittedly no exemption from duty has been claimed on such exports. Further these notifications require that the product manufactured out of these imported inputs i.e. the Resultant Product should have same quality, technical specifications and characteristics as that of the imported materials used in the said resultant product

19. **In the present case we observe that the Revenue/department has failed to produce any evidence to prove that the exported goods were the resultant goods and were not of same quality, technical characteristics and specifications as those of the inputs used in the said resultant product. It becomes clear that**

**there is no evidence to support the violation of Condition No. (i) of both the notifications (40/2006 and 98/2009).**

20. Now we come to the alleged violation of the paragraphs of Handbook of Procedures; we observe that HBP is nothing but the procedural aspect of the Foreign Trade Policies being notified by the DGFT. Chapter 2 of FTP read with Chapter 2 of HBP deals with importability and exportability of various products. Chapter 4 of FTP read with Chapter 4 of HBP deals with duty exemption and remission schemes for promotion of exports. Para 4.55.3 of HBP reads as follows:

"However in respect of following items, exporter shall be required to give declaration with regard to technical characteristics, quality and specification in shipping bill. RA while issuing DFIA shall mention technical characteristics, quality and specification in respect of such inputs:

Alloy steel including Stainless Steel, Copper Alloy, Synthetic Rubber, Bearings, Solvent, **Perfumes/ Essential Oil/** Aromatic Surfactants, Relevant Fabrics, Marble, Articles made of polypropylene, Articles made of Paper and Paper Board, Insecticides, Lead Ingots, Zinc Ingots, Citric Acid, Relevant Glass fibre reinforcement (Glass fibre, Chopped | Stranded Mat, Roving Woven Surfacing Mat), Relevant Synthetic Resin (unsaturated polyester resin, Epoxy Resin, Vinyl Ester Resin, Hydroxy Ethyl Cellulose), Lining Material."

21. We also observe that para 4.41 of FTP clarifies that DFIA is issued to allow duty free import of inputs, fuel, oil, energy resources catalyst which are required for production of export product. DGFT by means of public notice, may exclude any product/products from purview of DFIA. The conjoint reading of both the provisions makes it clear that DFIA is issued to allow duty free import of inputs which are required for production of export products. **These licences can be issued prior to export, in which case actual use of imported inputs with export**

**obligations to be fulfilled subsequently. However, the DFIA licenses are also issued on post export basis where no actual user condition for imported inputs and no additional export obligation is to be fulfilled subsequently.**

22. As per para 4.46 of FTP these DFIA licenses which are issued on post export basis are the licenses where export obligations have been fulfilled and these licenses can be transferred to the third parties by the exporters even the duty free imported inputs can also be transferred to the third parties. Even the duty free imported inputs can also be transferred to the third parties. The appellants obtained DFIA post impugned exports and have also sold the said DFIA to the third parties. Such third parties could make duty free imports of the inputs.

23. Further though the technical specifications of the impugned inputs were not mentioned on the Shipping Bills while exporting the goods manufactured by the appellant. But apparently and admittedly no objection was raised at the relevant time and the goods were cleared.

Hon'ble Supreme Court in the case of **Titan Medical System Pvt. Ltd. Vs. Collector**<sup>8</sup> has held that in the absence of any action taken by the licensing authority, revenue cannot take any action that too on the allegations of misrepresentation/suppression on part of assessee. Thus we are of the opinion that non-compliance of condition of DFIA/Notifications in the shipping bills could affect the duty free import of inputs but shall have no effect on export of

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8 2003 (151) ELT 254 (SC)

products for which there is no evidence that the export goods were "resultant products" as mentioned in 4.55 of HBP.

24. Now coming to the law that regulate exports. Chapter 2 of Foreign Trade Policy regulates the same. As per provision 2.1 thereof **"Exports and Imports shall be free, except where regulated by FTP or any other law in force. The item wise export and import policy shall be, as specified in ITC (HS) notified by DGFT, as amended from time to time"**. Further as per General Notes to Export Policy:

"All goods other than the entries in the export licensing schedule along with its appendices are freely exportable. The free exportability is, however, subject to any other law for the time being in force. Goods not listed in the Schedule are deemed to be freely exportable without conditions under the Foreign Trade (Development and Regulations) Act, 1992 and the rules, notifications and other public notices and circulars issued there under from time to time. The export licensing policy in the schedule and its appendices does not preclude control by way of a Public Notice/Notification under the Foreign Trade (Development and Regulations) Act, 1992."

Goods listed as "Free" in the Export Licensing Schedule may also be exported without an export licence as such but they are subject to conditions laid out against the respective entry. The fulfillment of these conditions can be checked by authorized officers in the course of export."

Revenue has failed to produce any such law, rule, notification policy or any such thing, according to which there is restriction in export of pan masala and gutkha. **In such circumstance we hold that any condition on imports and non-compliance thereof cannot affect the exportability; Not specifically in the present case when DFIA was obtained post impugned export and was transferred also to third party and also when no exemption is availed by appellants while exporting pan masala and gutkha. More so for the reason the exported products were got manufactured from synthetic oils procured domestically.**

**The synthetic oils are not mentioned in para 4.55 of HBP. Revenue also has failed to produce any evidence that the exempted pan masala and gutkha were the Resultant Products of the duty free inputs i.e. the natural essential oils imported under DFIA.**

25. Now we analyze the question as to whether non compliance of condition of DFIA i.e. non-declaration of technical characteristics of inputs on the shipping bills as required under para 4.55/4.32 of HBP and under Notification No. 40/2006 dated 01.05.2006 and Notification No. 98/2009 dated 11.09.2009 for the purpose of duty free import of inputs can render the export goods as "Prohibited Goods" For the purpose, we look into the definition of "**Prohibited goods means goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.**" Apparently there was no condition on the export of pan masala and gutkha. The condition which is alleged to have been violated is the condition of import. Thus, it is clear that based on impugned allegations freely exportable pan masala and gutkha cannot be called as prohibited goods. **Above all, appellant has availed no benefit out of alleged non-declaration.**

26. Whether the order of confiscating the impugned export goods would still hold good? For the purpose we look into Section 113(d) of the Customs Act under which the adjudicating authority has ordered confiscation :

“113 Confiscation of goods attempted to be improperly exported etc. – The following export goods shall be liable to confiscation:-

(a) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force.”

The aforesaid section empowers the authority to confiscate any goods attempted to be exported contrary to any “prohibition” imposed by or under the Act or any other law for the time being in force. Hence, for application of the said provision, it is required to be established that attempt to export the goods was contrary to any prohibition imposed under any law for the time being in force.”

27. It is already held that the alleged non-compliance cannot render the export goods prohibited, the order of confiscation passed by adjudicating authority below is not sustainable. Once goods are not found to be liable for confiscation, penalty under Section 113(1) of the Customs Act, 1962 cannot be sustained. The penalty imposed is also required to be set aside.

28. Though the adjudicating authorities while holding contrary have relied upon the decision of Hon’ble High Court Delhi in the case of **Commissioner of Customs Vs. Kothari Foods & Fragrance Pvt. Ltd.**<sup>9</sup> But we observe that the said decision of Hon’ble Delhi High Court is purely with respect to entitlement of assessee for duty free import of inputs under the custom notifications in question and the decision nowhere deals with the exportability of the product. The Hon’ble Court nowhere says that the export products become prohibited for export due to non-declaration of details with respect to inputs. The issue discussed in

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9 2018-TIOL-2475-HC-DEL

that case was technical specifications whether Resultant Product or of the imported inputs are required to be mentioned on the shipping documents. On the other hand the issue to be adjudicated in the present case is as to whether the non-compliance of conditions of DFIA, Notifications and para 4.55/4.32 of BHP will render the exported goods 'prohibited'. Thus we hold that said decision is of no help to the Revenue and the adjudicating authority below have wrongly relied upon the said decision.

29. We further observe from the record that the Revenue authorities after initiating the investigation in the present matter, had informed the DGFT with respect to non-declaration of technical characteristics of inputs by the appellants in their shipping bills while exporting their manufactured pan masala/gutkha. Consequent thereto, DGFT had issued a show cause notice dated 18.07.2012 under Section 13 of FTDR Act, 1992 proposing cancellation/modification of licences as were issued and also proposing imposition of penalty in terms of Section 11 of FTDR Act, 1992 alleging that the technical characteristics, quality and specifications of essential oils used in the export product had not been mentioned on the shipping bills in contravention of para 4.55.3 of HBP 2004-09, therefore, suppressing the facts from the licensing authority. The joint DGFT vide order dated 14.12.2023 modified the licences issued by deleting inputs light natural essential oils, the technical clarifications whereof were not declared in the shipping bills, from the list of eligible imports and also imposed a penalty as was proposed 15.12.2015 ordered the deletion of the import item "essential oil" at the time of

endorsement of the transferability of the DFIA and also imposed penalty of three lakhs on the exporter and its Director. The appellate authority has confirmed the said order vide its order dated 31.08.2017.

30. In such circumstances, the present SCN issued by Customs Authority on the same set of allegations is not sustainable. The impugned order imposing penalties on exporter and their Director amounts to 'double jeopardy'. Appellate authority of DGFT had required customs to effect recovery of penalties imposed.

**Issuance of impugned SCN instead of initiating recovery proceedings is liable to be set aside being the act of encroachment of jurisdiction that too for such cause which stands already adjudicating by the competent authority.** The CEGAT in the case of **M.K. Fisheries Vs. Commissioner of Customs**<sup>10</sup> has held in Para 5 as under:

"..... Therefore we find that while the Customs cannot sit in judgment over any decision regarding quantum of DEPB to be credited in the passbook, yet in all fairness justice require that if the Customs find any variation between the description of the goods as declared on the shipping bill and as declared in terms of public notice issued by the Customs House for the same consignment they would be entitled to bring Such discrepancy to the notice of the DGFT and await for further orders on the quantum of credit to be given under DEPB from DGFT."

Similar view was taken by the Calcutta High Court in the case of *Kanhaiya Exports v. Commissioner of Customs - 2001 (133) E.L.T. 280* with regard to verification of the documents. This decision of the Calcutta High Court has been confirmed by the Division Bench of High Court as reported in *2001 (133) E.L.T. 537*,

In this view of the policy, procedure instructions and the law in the matter of DEPB, We cannot uphold the decision arrived at by the Commissioner to have impugned the exports and come to a finding that the exports made in this case were not entitled to DEPB under serial no. 86 of the Product Code 83 of the DEPB Schedule. Since all that was required, in the case was for the Commissioner to have reported the matter to the DGFT authorities and not sit in

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<sup>10</sup> 2002 (150) ELT 998

judgments over the grant and or determine entitlement of DEPB which were not within the jurisdiction of the Customs to do so. The order of determination of the eligibility or otherwise of DEPB as made in this case cannot be upheld.”

Since the same cause of action stand already adjudicated. We hold that the present show cause notice issued by the officer of Directorate of Revenue Intelligence amounts to nothing but jeopardy. The appellant cannot be penalized again for the same alleged act.

31. Finally it is observed that once it has been established on record that the Revenue has not challenged any assessment of imports under Bill of Entries nor has raised any issue of short levy of duty on account of illegal claim of exemption notification and now when the issue is with respect to export, on which no exemption from duty has been claimed, it has wrongly been held that the appellant has violated the conditions of the Customs Notification No. 40/2006 and that of 98/2009 at the time of export. We reiterated the findings that the conditions of importability of import cannot be applied to **'exportability of finished goods'**. There is nothing on record produced by the department to show that the pan masala and gutkha were otherwise exported contrary to any prohibition imposed under FTDR Act or under Customs Act. The violation of the conditions of importability of inputs/raw material are, therefore, held highly insufficient to hold that the goods exported are prohibited and the export thereof is improper specifically when there is no evidence that the export goods were the Resultant goods. **Also for the fact revealed during investigation from statement of various suppliers that the**

**appellants were procuring raw material domestically and were procuring synthetic oil except exceptionally. There is no evidence that the impugned goods were prepared from synthetic essential oil or the natural essential oil that too the one which was imported under DFIA Scheme.**

32. With these observations, we hold that the order of confiscating the exported goods (pan masala and gutkha) is not sustainable being contrary to the provisions is discussed above. The exported goods can be ordered confiscation only in case of illegal claim of export incentive scheme as already discussed above, admittedly present is not the case of claim of export incentive. We draw our support from the decision of this Tribunal in the case of **Shilpi Exports Vs. Collector of Customs, Calcutta**<sup>11</sup> wherein it has been held that clause (d) of Section 113 of the Act do not apply in cases (overvaluation in that case) for the reason that export of goods was not prohibited. This is the view taken by the Tribunal in an earlier decision titled as **Badri Prasad & Sons Pvt. Ltd. Vs. Collector of Customs, Delhi**<sup>12</sup> the appeal against the said decision has also been dismissed by Hon'ble Supreme Court in the decision reported as **2000 (115) ELTA219**.

33. In the light of entire above discussion, we hold that the goods exported i.e. pan masala and gutkha were freely exportable goods in terms of Foreign Trade Policy. Those have wrongly been called as prohibited for alleged violation of the conditions meant for duty free imports. Also there is no evidence proving connection between

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<sup>11</sup> 1996 (83) ELT 302 (Tribunal)

<sup>12</sup> 1995 (80) ELT 624 (Tribunal)

imported inputs and the export goods. The order confiscating those export goods and imposing penalty on the appellants is, therefore, not sustainable. Resultantly, we hereby set aside the order under challenge. Consequent thereto, all four appeals in hand are hereby allowed.

(Pronounced in open Court on 25/03/2025)

**(Dr. Rachna Gupta)**  
**Member (Judicial)**

**(Hemambika R. Priya)**  
**Member (Technical)**

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