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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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\+ **W.P.(C) 6114/2014 & CM No. 14851/2014**

FNS AGRO FOODS LTD. & ORS ..... Petitioners

Through: Mr. Vakul Vardhan Gautam, Advocate.

versus

COMMISSIONER OF CUSTOMS (PREVENTIVE) DELHI & ANR. ..... Respondents

Through: Mr. Satish Kumar, Senior Standing counsel.

AND

6.

\+ **W.P.(C) 10709/2015 & CM No. 27485/2015**

FNS AGRO FOODS LTD. & ORS. ..... Petitioners

Through: Mr. Vakul Vardhan Gautam, Advocate.

versus

COMMISSIONER OF CUSTOMS (PREVENTIVE) DELHI & ANR. ..... Respondents

Through: Mr. Satish Kumar, Senior Standing counsel.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R

% **11.05.2016**

Dr. S. Muralidhar,J.:

1. Petitioner No. 1, FNS Agro Foods Limited, and its directors (Petitioner Nos. 2 to 5) have filed these two writ petitions seeking to challenge the impugned show cause notice ('SCN') dated 28th March 2014 issued by the

Commissioner, Central Excise, Noida on behalf of the Commissioner of Customs (Preventive), Delhi (Respondent No. 1) and SCN dated 19th February 2015 issued by the Commissioner of Customs (Export), Navi Mumbai, Maharashtra again on behalf of Respondent No. 1.

Background Facts

2. The background to these writ petitions is that Petitioner No. 1 is engaged in the export of frozen boneless buffalo meat falling under ITC (HS) Code No. 02023000 of Export Import Policy 2009-14 and Chapter sub-heading 02023000 of Customs Tariff Act, 1975 ('CTA'). It is stated that the Petitioner has been issued IEC No. 0595040144 by the Director General of Foreign Trade ('DGFT'), New Delhi on 14th November 1995.

3. It is stated that the meat processing plant of Petitioner No. 1 is located at Manesar, Gurgaon (Haryana) and its corporate and registered office is at Sarva Priya Vihar, New Delhi. It is stated that the meat processing plant is duly approved and registered by Agriculture and Processed Food Products Export Development Authority ('APEDA') under registration certificate dated 3rd September 1996. It is stated that Petitioner No. 1 availed export incentives for the export of frozen buffalo meat under Duty Exemption Pass Book Scheme ('DEPB') and Vishesh Krishi and Gram Upaj Yojena ('VKGUY').

4. It is further stated that under Serial No. 21 of Chapter 2 of Export Policy, 2009-14 ('Export Policy'), the export of frozen boneless buffalo meat is permissible subject to the following conditions:

> (i) export allowed on production of a certificate from the designated veterinary authority of the State from which the meat or offals emanate, provided they are from buffaloes not used for breading and

milch purposes.

(ii) quality control and inspection under Note 3 and 4 respectively as well as condition stipulated at Note 6 and 8 of the Export Policy have to be fulfilled.

5. It is stated that the issue concerning the suspension and cancellation of Importer-export Code (IEC) is governed under Sections 7 and 8 of the Foreign Trade (Development and Regulation) Act, 1992 ('FTDR Act') respectively and Rules 9 and 10 of the Foreign Trade (Regulation) Rules, 1993 ('FTR Rules'). The DGFT or an officer authorized by him (licensing authority) is the competent authority to issue suspension and cancel any licence certificate, scrip or any instrument bestowing financial or fiscal benefits to the importer or exporter.

6. Under Sections 13 and 14 of the FTDR Act, the DGFT or an officer authorized by him is empowered to adjudicate contravention of provisions of FTDR Act, Rules, Order and Foreign Trade Policy and impose penalties upon the exporter/importer/beneficiary of license certificate after following the principles of natural justice.

7. Petitioner No. 1 procures dressed carcasses in four pieces in refrigerated trucks from the Government of Rajasthan's slaughter house situated at Jaipur, for the purpose of processing of frozen boneless buffalo meat. The consignments are accompanied by the ante mortem report of the Veterinary Doctor, i.e., designated veterinary authority of the State as well as receipt of the slaughter house, certifying that the meat or offals are from buffalo not used for breeding and milch purposes. The dressed carcasses are processed and converted into pieces of desired sizes according to the requirement of the

buyer, packed and stored at minus 18 degree C temperature at the meat processing plants of Petitioner No. 1.

8. By its letter dated 18th January 2006, Petitioner No. 1 requested the Deputy Director Animal Husbandry, Gurgaon, Haryana to draw samples of meat processed by it for bacteriological test etc. in order to comply with the condition set out in para 21 of Chapter 2 of the Export Policy. This request was declined by the Deputy Director Animal Husbandry, Gurgaon stating that no Veterinary Surgeon has been designated in Haryana for drawing of samples and that the required laboratory testing facility is not available.

9. Thereafter, Petitioner No. 1 requested the Deputy Director Animal Husbandry, Gurgaon, Haryana to permit them to get their samples drawn by the Veterinary Officers of Meerut Division in Uttar Pradesh ('UP') and thereafter get it tested at Animal Husbandry Disease Diagnostic Laboratory, National Capital Territory of Delhi ('NCT of Delhi'). It is stated that this permission was given and pursuant thereto a request was made to the Veterinary Department of Meerut Division to draw samples from the meat processing unit of Petitioner No. 1 and send it for testing to the diagnostic laboratory in the NCT of Delhi.

10. It is stated that after the Veterinary Officer of the Meerut Division drew the sample they were tested by the Assistant Director Animal Husbandry Department at the disease diagnostic laboratory, NCT of Delhi. The test report and the certificate issued by the Veterinary Officer accompanied the export documents were submitted by Petitioner No. 1 and on that basis the Customs Officials issued 'let export order'. On the basis of the let export order, the DGFT issued the requisite certificates to Petitioner No. 1 to avail the benefit of DEPB and VKGUY Scheme.

11. On receipt of 'intelligence' that Petitioner No. 1 has been exporting frozen buffalo meat without valid veterinary health certificates, and without any inspection of the export goods or the ante mortem or post mortem reports of the animals slaughtered and that there was a resultant contravention of the Export of Raw Meat (Chilled/Frozen) (Quality Control and Inspection) Rules, 1992 ('the 1992 Rules'), the Customs officers conducted simultaneous searches on 10th October 2011 at the corporate office at Sarvapriya Vihar, New Delhi and the meat processing plant of Petitioner No. 1 at Manesar, Gurgaon (Haryana). The Customs Officers of the Preventive wing at Delhi seized all the documents available on the spot under *Panchanamas* dated 10th October 2011 as well as documents pertaining to the export made by Petitioner No. 1 which included all the certificates issued by designated veterinary authority of Jaipur.

12. During the course of the investigation Respondent No. 1, statements were recorded under Section 108 of the Customs Act, 1962 ('Act') of several witnesses including Veterinary Assistant Surgeon, Incharge of Disease Diagnostic Laboratory, Palam, Delhi; Veterinary Officer, Noida (UP) and one at Meerut. The statement of a Director of Petitioner No. 1 was also recorded.

13. It is stated that upon conclusion of the investigation, Respondent No. 1 by his letter dated 26th March 2012 requested the Joint Director General Foreign Trade ('Jt. DGFT') to examine the question of the allegedly unauthorized export of frozen buffalo meat made by Petitioner No. 1 under DEPB/VKGYU Scheme and take action against Petitioner No. 1 since Jt. DGFT was the competent authority in terms of the export import policy to take such action.

Proceedings before the DGFT

14. Pursuant to the above letter, the Dy. DGFT stopped issuance of DEPB/VKGUY Scheme/FMS/FPS to Petitioner No. 1 until further clearance was received from the Enforcement Section of Jt. DGFT. A SCN was issued to Petitioner No. 1 by the Dy. DGFT on 10th April 2012. The crux of the SCN was that Petitioner No. 1 had not complied with the statutory provisions in the ITC (HS), Export Schedule-2, Chapter-2 of the Export Policy concerning the export of frozen buffalo meat and offals. The further allegation was Petitioner No. 1 had been hiring the services of two veterinary doctors of UP who had no jurisdiction whatsoever in relation to the meat processing plant of Petitioner No. 1 at IMT Manesar, Haryana. It was further stated that the Disease Diagnostic Laboratories at Palam and Moti Bagh in Delhi were not competent to exercise any jurisdiction for issuing the Veterinary Health Certificates since the exports were made from the Manesar Plant in Gurgaon (Haryana). It was further stated in the SCN that APEDA had approved the Manesar plant of Petitioner No. 1 only for meat processing whereas dressed carcasses were shown to have been procured from the government slaughter houses. There was no certificate issued by the said slaughter houses certifying ante and post mortem report of the animals. It was accordingly alleged that "non-adherence to the restrictions prescribed in ITC (HS), *prima facie* have rendered exports of M/s. F.N.S. Agro Foods Limited unauthorized." It was further stated that no claim under the DEPB/VKGUY Scheme was, therefore, also inadmissible to Petitioner No. 1. Accordingly, Petitioner No. 1 was asked to show cause why its IEC should not be suspended under Section 9(4) of FTDR (Regulations) Rules, 1993; why it should not be declared a defaulter and placed in the Denied Entity List ('DEL') so that benefit under Exim Policy is stopped and why the penalty should not be imposed under Section 11 (2) read with Sections 13 and 14 of the FTDR Act.

15. In the course of the adjudication of the SCN, information was sought by the Director General Animal Husbandry and Dairy Department, Haryana, Panchkula whether Petitioner No. 1 had in fact approached the Deputy Director Intensive Cattle Development Project, Gurgaon for designating a Veterinary Officer. The Director of Petitioner No. 1 appeared before the Dy. DGFT on 15th May 2012 and 7th June 2012 and submitted the relevant documents.

16. The Dy. DGFT on 23rd May 2012 sought a status report from Respondent No. 1. In response thereto, the Additional Commissioner of Customs (Preventive), Delhi informed the Dy. DGFT that they were in the process of issuing a SCN to Petitioner No. 1 and that a copy thereof would be provided to the Dy. DGFT. Subsequently on 26th June 2012 the Additional Commissioner of Customs (Preventive) informed the Dy. DGFT that they could not issue an SCN to Petitioner No. 1 under the FTDR Act and that has been done by the Jt. DGFT, New Delhi.

17. On 26th July 2012, the DGFT again wrote to Respondent No. 1 , i.e., the Collector of Customs (Preventive), Delhi asking him to clarify the following points:

> "(a) If authorized Govt. doctor is not available in the respective exporting state then how exporters will export the goods after getting testing certificate on the basis of sample drawings. Has Custom issued any instructions to deal with such cases? If yes, then a copy of the same may please be provided to this office.
>
> (b) Has custom notified the name and address of authorized slaughter house for Haryana State, if yes then a copy of the same may please be supplied to this office? If name has not been notified by custom then, is there any restrictions for Haryana exporters to not procure the carcasses/meat from authorized slaughter house of nearby state like slaughter house of Jaipur Nagar Nigam."

18. In response to the above letter, Respondent No. 1 replied on 31st July 2012 referring to the export schedule of Foreign Trade Policy (ITC HS Classification Book) and particularly Table-B, Chapter-2 Meat and Edible Offal. Further clarifying Question at (a) the Collector of Customs stated as under:

> "It is therefore incumbent upon the very policy making body (DGFT in this case) to devise alternatives in case authorized Government doctor(s) is/are not available in the respective exporting State and as to how the exporter will export goods in such a situation. The Customs has at no point of time, issued any instructions to deal with such cases presumable due to the fact that we do not frame Import/Export Policy not being our Charter of duties."

19. As regards question (b) it was simply stated that "nothing prevents the exporter from procuring dressed carcasses from neighbouring state in the absence of government slaughter houses in the State where the processing plant is located. However, they have to be accompanied by Veterinary Health Certificates from the veterinary doctor supervising the respective government approved slaughter houses that the dressed carcass was indeed sourced from there-which, as this office has already informed, has not been provided in this case."

20. A further letter issued by the Dy. DGFT on 5th September 2012, was replied to by Petitioner No. 1 on 11th September 2012 informing that they had submitted the necessary certificate dated 19th June 2008 issued by the designated Veterinary Authority, Jaipur from where the subject meat or offal emanated and which showed that the animal is male and cannot be used for milching and breeding. Thus they had fulfilled

Condition No. 1 of Sl. No. 23 of Chapter 2 of Export Policy. It was clarified that there was no government designated veterinary authority in Haryana and therefore, Petitioner No. 1 had approached the Veterinary Officer of Meerut Division and requested for testing at the Disease Diagnostic Laboratory, NCT of Delhi.

21. By an order dated 24th September 2012 the Dy. DGFT came to the conclusion that Petitioner No. 1 had not violated any of the conditions of export of frozen buffalo meat in terms of the Exim Policy and that they had not committed any fraud under the DEPB/VKGUY Scheme warranting any penalty under Section 11 (2) & (4) read with Section 13 of the FTDR Act. Thus, all the charges against the Petitioners were dropped.

SCN by the Customs Commissionerate at Noida

22. After waiting for more than a year and half, the Commissioner of Customs, Central Excise and Customs, Noida issued the impugned SCN dated 28th March 2014 asking Petitioner No. 1 and its directors (Petitioner Nos. 2 to 5) to show cause why

> (i) Frozen boneless buffalo meat valued at Rs. 28,69,97,814 exported through ICD Dadri during the year 2008 to 2011 in contravention of provisions of the ITC (HS) read with Export (Quality Control and Inspection) Act, 1963 the 1992 Rules and Order issued vide S.O. 203 dated 15th January 1993 should not be held liable for confiscation in terms of the provisions of Section 113 (d) read with Section 11 of the Act and Section 11 of FTDR Act and Rules 11 and 14 of FTR Rules;
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> (ii) Since the goods are not available for confiscation, appropriate fine should not be imposed in lieu of confiscation in terms of the

provisions of Section 125 of the Act;

(iii) Customs duty equivalent to VKGUY/DEPB credit amounting to Rs. 1,14,70,689 already sold in open market by Petitioner No. 1 as detailed in RUD-12 should not be demanded from it by treating them as 'deemed importer' under provisions of Section 28 of the Act read with Notification No. 41/2005-Customs 9.5.2005 and provisions and conditions on the VKGUY/DEPS licence as the case may be.

(iv) Further why the proviso to Section 28 (1)/28(4) for extended period of five years should not be invoked for recovery of the wrongly availed VKGUY/DEPB credit.

(v) interest at appropriate rates should not be demanded from them on the amount of customs duty demanded from them as per (1) above in terms of the provisions of the Section 28AB of the Act.

(vi) Penalty should not be imposed upon them in terms of Sections 114 and 114AA of the Act for various acts of omissions and commissions by them as aforesaid, relating to fraudulent exporting of prohibited goods.

(vii) Penalty should not imposed upon Mr. M. Salim Khatri, Mr. Fazlu Rehman Khatri, Mr. Abdul Nasir Khatri and Mr. Naushad Khatri, all the directors of Petitioner No. 1 under Sections 114 and 114AA of the Act for various acts of omissions and commissions by them as aforesaid, relating to fraudulent exporting of prohibited goods.

23. The Petitioners replied to the said SCN on 17th April 2014 requesting for

copies of the relied upon documents ('RUDs') without which a proper reply could not furnished to the SCN. After waiting for the said RUDs, the Petitioners filed W.P. (Civil) No. 6114 of 2014 seeking quashing of the SCN.

The present writ petitions

24. By an order dated 12th September 2014 notice was issued to the Respondents in W.P. (Civil) No. 6114 of 2014 and the Court noted *inter alia* the submissions of learned counsel for the Petitioner, that in respect of the very same issue, two draft notices had been prepared. One had been sent to the Bombay Collector and the other to the Commissioner of Customs, Noida. While till then the Collector of Customs at Bombay had not issued any SCN in view of the earlier decision of the Dy. DGFT, the Commissioner of Customs, Noida had issued the impugned SCN. Counter affidavit and rejoinder-affidavit have been filed by the Respondents and Petitioners respectively in Writ Petition (Civil) No. 6114 of 2014.

25. During the pendency of W.P. (Civil) No. 6114 of 2014, the Collector of Customs (NS-II), Navi Mumbai, Maharashtra issued the second impugned SCN dated 19th February 2015, which too was challenged by the Petitioners in the second W. P. (Civil) No. 10709 of 2005. While directing notice to issue in the said petition on 20th November 2015, the Court directed it to be heard along with W.P. (Civil) No. 6114 of 2014.

26. This Court has heard the submissions of Mr. Vakul Vardhan Gautam, learned counsel for the Petitioners and Mr. Satish Kumar, learned Senior standing counsel for the Respondents.

Submissions on behalf of the Petitioner

27. The principal submission of Mr. Gautam is that in respect of the very

same issue which forms the subject matter of the impugned SCNs, the Dy. DGFT passed a detailed adjudication order exonerating the Petitioners from any violation of the FTDR Act or the FTR Rules. Therefore, on the same set of allegations no further SCN could have been issued by Respondent No. 1, i.e., the Commissioner of Customs (Preventive), Delhi. Mr. Gautam pointed out that the alleged violation of the Act as mentioned in the SCN is consequent upon the purported violation of the FTDR Act, of which the Petitioners had been exonerated by the DGFT after a detailed enquiry. Therefore, the very exercise of issuing the impugned SCNs stood vitiated.

28. Mr. Gautam placed reliance on the decision of the Supreme Court in ***Titan Medical Systems Pvt. Ltd. v. Collector of Customs, New Delhi 2003 (151) ELT 254 (SC).*** He also referred to the Circular No. 15/97-Cus. issued by the Department of Revenue, Ministry of Finance, Government of India dated 3rd June 1997 which had clarified that as regards DEPB Scheme the role of the Customs authorities is confined to verification of correctness of exporter's declaration regarding description, quality and F.O.B. value of the export product and that the question of violation of the requirements of the Hand-Book of Procedure in terms of the Export and Import Policy should be examined by the DGFT. He referred to Section 9 of the FTDR Act which questioned the DGFT powers regarding issue, suspension and cancellation of licence. He also referred to the FTDR Rules which specifically empower the DGFT to suspend the operation of licence or cancel licence.

Submissions on behalf of the Respondent

29. Mr. Satish Kumar, learned Senior standing counsel for the Revenue on the other hand sought to defend the impugned SCN by referring the paragraphs thereunder which alleged violation of the Act by the Petitioners. He submitted

that the Petitioners should respond to the SCN and participate in the adjudication proceedings and thereafter pursue their remedies in accordance with law.

30. According to Mr Satish Kumar, the Petitioners had contravened Rule 5 of the 1992 Rules since they failed to obtain a valid veterinary health certificate from the designated veterinary of the State Animal Husbandry Department, Government of Haryana. He submitted that the Petitioners had contravened Section 50 of the Act since they had made incorrect declarations before the Customs authority at the time of filing of shipping bill by submitting invalid veterinary health certificates. It is further submitted that by violating the provision of ITC (HS) classification of Import and Export Items, Schedule II thereby contravening the provisions of Section 11 of FTDR Act, Petitioner No. 1 had rendered the goods exported by them prohibited under Section 11 of the Act. Thus the goods had become liable for confiscation under Section 113 (d) of the Act. Reliance was placed on the decision of the Supreme Court in ***Chengalvaraya Naidu v. Jagannath AIR 1994 SC 853***. According to the Respondents, the entire DEPB credit and VKGUY benefit availed by the Petitioners during the past five years were payable by them along with interest and penalty under Sections 114 and 114A of the Act.

Analysis and Reasons

31. The Court has carefully perused the impugned SCNs dated 28th March 2014 issued by the Customs Commissioner, Noida and 19th February 2015 issued by the Customs Commissioner at Nhava Sheva, Mumbai. One is virtually a carbon copy of the other. Further, the SCNs refer to the violation of ITC (HS) inasmuch as certificate has not produced to the designated authority of a State. Reference is specifically made to FTDR Act and FTDR Rules as

regards violations. It may be recalled that the SCN issued by the Dy DGFT had also alleged violation of the FTDR Act, the FTR Rules, the Customs Act and the schemes of Government of India including the DEPB and VKGUY. The broad sub-headings of the impugned SCNs read as under:

(A) Provisions under ITC for export of meat and meat products

(B) Provisions of the Export of Raw Meat (Chilled/Frozen) (Quality Control and Inspection), Rules 1992

(C) Directorate of Animal Husbandry of all State Governments recognized as agencies for the inspection of Raw Meat (Chilled/Frozen)

(D) Government of India Order issued by S.O. 203 dated 15th January 1993

(E) Specification in Schedule VII of the Government of India Order issued by S.O. 203 dated 15th January 1993

(F) Prevention of Cruelty to Animals Act, 1960 (59 of 1960) and Prevention of Cruelty to Animals (Slaughter House) Rules, 2001.

(G) Provision under Customs Act

(H) DEPB and VKGUY Schemes

(I) Foreign Trade (Development and Regulation) Act, 1992

32. In part VI of the SCNs the discussion turns to export of prohibited goods. This is nothing but a repetition of the same allegations which were been examined in detail by the Dy DGFT. Then follows the discussion on 'Wrong Availment of Export Incentives' which again sets out the same allegation of violation by the Petitioners of the FTDR Act and the requirement of submitting certificates. The further discussion is on the other violations of the provisions of Export (Quality Control and Inspection) Act, 1963. The SCNs refers to the statement during the investigation. This is the very same material which was sent by the Customs Authorities to the DGFT on the basis of which SCN was issued by the Dy DGFT on 10th April 2012

and which resulted in the order dated 24th September 2012 of the DY DGFT whereby the charges against the Petitioners were dropped.

33. As observed by the Supreme Court in ***Titan Medical Systems Pvt. Ltd. v. Collector of Customs, New Delhi*** (*supra*) if the licence issuing authority, which in this case is the DGFT, has not questioned the veracity of the transactions undertaken under the licence, the Customs authorities cannot refuse exemption on an allegation that there was any misrepresentation. It was held that if there was any misrepresentation it was the licensing authority which had to take steps to cancel the licence.

34. The impugned SCNs do not refer to alleged violations of the Act that are not consequential upon the alleged violations of the FTDR Act or FTR Rules. As already noticed, this aspect has already been examined thoroughly by the Dy DGFT while passing the order dated 24th September 2012. In fact, as can be seen from the body of the order, the Dy DGFT during the course of those proceedings consulted the Customs authorities and sought their clarifications on various aspects which have been referred to hereinbefore.

35. Mr. Satish Kumar was unable to point out any portion of the impugned SCNs which is any different from the SCN and the consequent adjudication order passed by the Dy. DGFT. In the circumstances, the impugned SCNs issued to the Petitioners, more than one and half years after the Dy DGFT exonerated them of the very same allegations, is nothing but a harassment of the Petitioners and an abuse of the process of law.

36. The Court accordingly quashes the SCN dated 28th March 2014 issued by the Commissioner, Central Excise, Noida and the SCN dated 19th February 2015 issued by Commissioner of Customs (Export), Navi Mumbai,

Maharashtra and all the proceedings consequent thereto.

37. The writ petitions are allowed but in the facts and circumstances of the case, with no orders as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

MAY 11, 2016
Rm