

FNS Agro Foods Ltd. Vs Commissioner of Cus. (Preventive), Delhi

Court: DELHI HIGH COURT

Date of Decision: May 11, 2016

Citation: (2016) 337 ELT 31

Hon'ble Judges: Dr. S. Muralidhar and Vibhu Bakhru, JJ.

Bench: Division Bench

Advocate: Shri Vakul Vardhan Gautam, Advocate, for the Petitioner; Shri Satish Kumar, Senior Standing Counsel, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Dr. S. Muralidhar, J.â€"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 had 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 Yojana ("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 breeding and milch purposes.

(ii) quality control and inspection under Notes 3 and 4 respectively as well as condition stipulated at Notes 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 authorised 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 authorised 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 authorised 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 authorised 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 authorised 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 authorised 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 Sections 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;

(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 be 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 be 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 System Pvt. Ltd. v. Collector of Customs, New

Delhi - 2003 (151) E.L.T. 254 (S.C.). 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 Handbook 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 recognised 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 System 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.