CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 187 of 2009

(Arising out of Order-in-Original No. 38/2008 dated 19/12/2008 passed by Commissioner of Customs, MANGALORE)

M/s. Solaris Chemtech Industries Ltd **....Appellant**
(formerly Known As Solaris Chemtech Limited)
Binaga Karwar
Thana
Uttar Kannada
Karnataka
581307

VERSUS

C.C.E. & S.T.-Mangalore **....Respondent**
7th floor...trade centre,
bunts hostel road,
mangalore,
karnataka
575003

WITH

Customs Appeal No. 188 of 2009

(Arising out of Order-in-Original No. 38/2008 dated 19/12/2008 passed by Commissioner of Customs, MANGALORE)

UMESH K.SHENOY **....Appellant**
Vice President M/S Solaris Chemtech Industries Limited (Formerly Known As Solaris Chemtech Ltd) Binaga Karwar

VERSUS

C.C.E. & S.T.-MANGALORE **....Respondent**
7th floor...trade centre,
bunts hostel rd.,
mangalore,
karnataka
575003

AND

Customs Appeal No. 189 of 2009

(Arising out of Order-in-Original No. 38/2008 dated 19/12/2008 passed by Commissioner of Customs, MANGALORE)

N.D.NAIK **....Appellant**
Deputy Manager (Sales & Logistics) M/S
Solaris Chemtech Industries Limited
(Formerly Known As Solaris Chemtech Ltd)
Binaga, Karwar

VERSUS

C.C.E. & S.T.-MANGALORE **....Respondent**
7th floor...trade centre,
bunts hostel rd.,
mangalore,
karnataka
575003

APPEARANCE:

Shri Ravi Raghavendra, Shri, Syed Peeran,
Advocates for the Appellant
Lakshmi kumaran & sridharan
world trade centre no.404-406, 4th floor, south wing brigade gateway campus no.26/1, dr. Rajkumar road,
bangalore
karnataka
560 055
Shri Gopa Kumar, Jt. Commissioner,
Authorized Representative for the Respondent

CORAM: HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO. 21284-21286/2019

DATE OF HEARING: 19th September, 2019
DATE OF DECISION: 20th December, 2019

PER: P. ANJANI KUMAR

Heard both sides at length and perused the records of the case.

2. Briefly stated the facts of the case are that the Appellants are engaged in the manufacture of Caustic Soda in all forms and Technical Grade Phosphoric Acid; they import Rock Phosphate of 73/75 BPL grade from M/s Jordan Phosphate Mines Co. Limited. Jordan (hereinafter referred to as JPMC), Jordan under contracts entered; during the period from January 2001 to November 2006, the Appellants have imported 26 Shipments of Rock Phosphate through Karwar Port; out of 26 imports, 25 imports have been finally assessed based on the documents furnished by the Appellants; import effected per vessel MV Al MANSOOR-1 under Contract dated 02.03.2006 is not yet finalized; out of the 26 imports, 24 are covered under three different supply contracts; remaining two imports are individual transactions; they were availing Franchise (discount) and Quantity/Loyalty Rebate on the imports.

2.1. In all the subject 26 imports of Rock Phosphate effected by the Appellants at Karwar Port during the years 2001-2007 (up to September) Franchise as applicable at the rate of USD 0.50 PMT / 1% FOB Price and Quantity/Loyalty Rebate at the rate USD 1.00 PMT was deducted from the contracted Price agreed upon, on supply of goods in the respective contracts and the reduced amount was paid by the appellants to the supplier. Revenue contends the eligibility of such discounts and have issued a Show Cause Notice dated 28.05.2008, proposing to disallow the discounts claimed under Section 4(2) of Customs, Act,1962; seeking duty of Rs 14,76,598 on account of discounts disallowed and allegation of excess quantity imported along with interest and penalties. The same was confirmed by Commissioner of Customs, Mangalore; vide impugned order No. 38/2008 dated 19.12.2008, along with the interest and penalties. Penalties were imposed on Shri Umesh. K. Shenoy and Shri K.D. Naik. A corrigendum dated 29.01.2008 was also issued.

3. Learned Counsel for the appellants submits that JPMC, the supplier, vide its letter dated 10.07.2008, has clearly explained 'Franchise' and 'Quantity Rebate' used in the Contracts; it was also clarified, vide appellant's letter dated 20.03.2007, that 'Franchise' is a commercial term understood by the supplier and the buyer as representing discount given to taking care of small variations in the draft survey between load port and discharge port; this was confirmed in the statement of Shri N.D. Naik on 09.04.2007; Similarly, the Appellants were entitled to Quantity Rebate on lifting the total contracted quantity and on making payment.

3.1. Learned Counsel for the appellants submits that the term 'Discount' has been defined in S.B. Sarkar's, 'Words & Phrases of Excise, Customs & Service Tax' as, *'a reduction made from the gross amount or value of something as (a) (1) a reduction made from a regular or list price'.* It is also defined as 'a deduction taken or allowance made'. Tribunal observed in Indica Laboratories Pvt. Ltd Vs CCE, Ahmedabad - 2007 (213) ELT 20 (Tri-LB), that *'Discount basically means a reduction in the sale consideration'.* The Apex Court in the case of *Union of India Vs. Bombay Tyre International Pvt. Ltd* reported *in 1984 (17) ELT 329 (S.C.)* (clarificatory order) has held that discount by whatever name it is called remains as a discount. The said decision was re-affirmed by the Apex Court in *the case of* Purolator India Ltd Vs Commissioner of Central Excise, Delhi-III [2015 (323) ELT 227 (SC) wherein, it was observed as under:

> *The expression "actually paid or payable for the goods, when sold" only means that whatever is agreed to as the price for the goods forms the basis of value, whether such price has been paid, has been paid in part, or has not been paid at all. The basis of "transaction value" is therefore the agreed contractual price.*

In this case the supplier and the appellants have agreed that Franchise and discount are the same and hence the allegation of undervaluation is unsustainable.

3.2. Learned Counsel for the appellants submits 'Quantity Discount' is a form of 'discount'; impugned Order accepts that quantity discount is a permissible reduction from the assessable value but denied the Appellant's claim on the only ground that the quantity rebate allowed retrospectively in the last shipment is improper and incorrect. The imports were undertaken with respect to a particular contract entered to with the supplier. The total quantity contracted to be shipped was imported in piece meal basis and the quantity rebate was rightly claimed only in the last of the imported shipment. Reliance is placed on the decision of Supreme Court in case of Maya Appliances (P) Ltd Vs Addl. Commissioner of Commercial Taxes, reported at 2018 (10) GSTL 6 (SC), wherein in the context was Sales Tax enactment, it was held that all trade discounts are allowable as permissible deduction and the same cannot be disallowed merely because discount was not deducted from each invoice. An assessee must establish from its accounts that discount relates specifically to sales with reference to which it is allowed and the discount must be in regular trade practice of dealer or contract or agreement entered into in particular case.

3.3. Learned Counsel for the appellants further submits that the value declared by the appellants represents the true and correct value of the goods in question; it is also not in dispute that the Appellants have not paid any amount over and above the invoice price to their supplier either directly or indirectly; it is also not the case of the department that the Appellants and the supplier are related to each other; prices declared in the Bills of Entry, satisfy all the criteria laid down in Section 14 of the Customs Act, 1962 and therefore, to be accepted; department has committed a fundamental error while trying to add the discounts allowed to the 'price paid or payable'; department tried to arrive at the 'actual assessable' in violation of Rule 4 and Rule 9 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988; Appellants relied on the decision of the Hon'ble Supreme Court in the case of Eicher Tractors Vs CC - 2000 (122) ELT 321(SC) wherein, it was held that unless the price paid for the transaction falls within the exceptions contained in the proviso under sub-rule (2) of Rule 4 of the Valuation Rules, the Customs authorities are bound to assess the duty on the transaction value; transaction value cannot be rejected unless the department is able to show that there is any other consideration which is attributable to the present transaction which has been borne by the Appellant; revenue having not discharged its burden of proof and leading evidence of contemporaneous imports at higher price, the contractual price cannot be rejected as the 'transaction value'; any attempt to reject the value declared cannot be contrary to the principles of valuation contained in Section 14 of the Act. He placed reliance is placed on the following decisions:

(a) *CC, Calcutta vs South India Television (P) Ltd - 2007 (214) ELT 3 (SC)*
(b) *Virat Enterprises Vs. CC - 2001 (132) EL T 691*
(c) *Jindal Strips Ltd Vs CC - 2001 (133) EL T 57 affirmed by 2003 (156) ELT A 38S('SC)*
(d) *Polychem Ltd Vs. CC —2001 (135) ELT 1061*
(e) *Time zone Entertainment P. Ltd v. CC - 2017 (351) EL T 308 (Tri-Mum)*
(f) *CC, Bangalore vs. CMC Ltd - 2016 (343) EL T 929 (Tri.-Blr)*

3.4. Learned Counsel for the appellants further submits that demand raised on the ground of excess receipt is not sustainable; the difference between the quantity of excess receipt and short receipt by the Appellants is minimal; investigation has ignored the cases where the Appellants have received quantities less than the B/L quantity; in such cases, the Appellants would be entitled to a refund, if the finding of the investigation is to be accepted; the difference between the excess and short receipt by the Appellants is only 246.08 MT; department was aware that the Rock Phosphate that was imported is hygroscopic in nature and thus, it tends to absorb moisture quickly; quality specifications in the Supply Contracts had stipulated addition in the quantity of goods when imported as a result of moisture content that would account to 1% to *3%* of the total quantity of the goods received; there are also possibilities of short receipt of the goods, because of its hygroscopic nature; it was agreed between the parties after considering several factors that that the quantity ordered could be plus or minus 10% as per the contract; in some shipments quantity lifted for a particular contract was less and in some cases in excess; at no time, the appellants neither mis-declared the assessable value of the goods, nor had not declared the excess receipt with an intent to evade payment of duty.

3.5. Learned Counsel for the appellants further submits that the demand of duty is barred by limitation; the show cause notice is dated 28.05.2008, demanding differential customs duty in respect of the imports made between 2001 and 2007; though the assessments were provisional, the assessments in respect of 21 Bs./E was finalized on 17.04.2007; Section 28 of the Act is to reckon from 17.04.2007, the demand in respect of these 21 Bs/E a barred by limitation; the findings of the Commissioner on willful misstatement and suppression of facts is without any basis or evidence; Appellants had filed the Bills of Entry and the value as indicated in the invoice and other relevant particulars was also declared in the Bills of Entry; consignments imported were provisionally assessed by the Customs authorities and the Appellants had requested the authorities to keep the assessments open until completion of the respective contractual obligations; they rely on Jagatjit Industries Ltd., vs CCE, Jallandar reported at 2014 (308) ELT 509 (Tri-Del), wherein Tribunal held that once provisional assessment has been finalized by the department and attained finality, longer period of limitation under Section 11A of the Central Excise Act would not be attracted; Appellants discharged the duty liability on the B/L quantity; the quantity received can be ascertained only after the receipt of the goods at the Appellants' premises; department cannot allege short-payment with an intention to evade, as the Appellants held the view that duty was rightly discharged on the B/L quantity; Tribunal held in the case of Mangalore Refinery Pvt Ltd vs CC, Mangalore, 2006 (205) ELT 753 (Tr-Ban) that duty needs to be paid on B/L quantity; the said decision was overturned by the Apex Court only in the year 2015 (2015 (323) ELT 433), wherein the Apex Court held that duty was required to be paid on the quantity of goods at time of importation; longer period of limitation cannot be invoked unless there is an element of fraud, collusion or any willful misstatement or suppression of fact, as held in the following.

- *CCE Vs. Chemphar Drugs & Liniments reported in 1989 (40) ELT 276 (SC)*
- *Padmini Products Vs CCE - 1989 (43) 195 (SC.)*
- *Pusham Pharmaceuticals Company Vs CCE, Bombay - 1995 (78) ELT 401 (SC)*
- *Ugam Chand Bhandari Vs CCE -2004 (167) ELT 491 (SC)*
- *M/s Continental Foundation Joint Venture Holding, Naphtha HP Vs CCE, Chandigarh/i-I- 2007 (216) ELT 177 (SC)*

3.6. Learned Counsel for the appellants further submits the provisions of Section 11 1(m) of the Act are not invokable in the present case as the Appellants have not mis-declared any material particulars; consequently confiscation of the consignments in question is wholly untenable; once the proposal to confiscate the goods under Section 111(m) is established to be untenable, no penalty can be imposed under Section 112(a), 114A of the Customs Act, 1962; since the demand of duty itself is not maintainable, the demand *for* interest under Section 28AB is also not maintainable.

4. Learned AR, appearing for the revenue, reiterates the findings of commissioner in the OIO and submitted a written brief containing the claims of the appellants and rejoinder. He submits that the impugned order was issued after detailed investigation and elaborate discussion on the factual and legal aspects of the various issues uncovered; there was deliberate attempts by the importer in availing undue and abnormal discounts, suppression of information related to the contracts signed, mis-declaration of value, non-declaration of excess quantity received and misinformation to the Customs for requesting for Provisional assessment.

4.1. On the claim of Franchise discounts, Learned AR submits that the franchise claimed as discount by the SCL is an abnormal discount and involves the situation covered under Rule 4(2) (a) and Rule 4(2)(b) of the CVR, 1988.

- The commercial invoices did not give particulars of any deduction of "franchise" from the supply price; *Franchise* is not defined in the contracts of various periods; officials of the SCL gave different, inconsistent meanings for the *word franchise;*
- SCL has explained that it is a discount given to address issues of handling losses at load port and discharge port and to take care of small variations in draft survey determinations; however, SCL has availed this discount even when the quantity discharged at load port was higher than the B/L quantity; even though there was no short receipt in respect of 26 consignments, "franchise" was availed as discount; there was specific provision in the contract to lodge insurance claim in case of short receipt.
- The term *franchise* appeared in contracts from 1999 onwards only when duty was imposed on rock phosphate;
- When the discount is claimed, the element is necessary to be disclosed; in the instant case, it was not disclosed to Customs; on the pretext of *franchise,* an abnormal reduction in the ordinary competitive price is adopted to evade customs duty; therefore, situation covered under Rule 4(2) (a) and Rule 4(2)(b) of the CVR, 1988 existed.

4.2. On the claim of 'Quantity Rebate', claimed in the last consignment retrospectively Learned AR submits that SCL had not requested Customs to keep earlier consignments open till the last shipment and they had treated each consignment as an independent and isolated transaction, though it was imported under the concerned supply contracts; they also availed quantity discounts for consignments after the expiry of the contract.

- SCL got some of the earlier consignments finalized by not disclosing the actual facts
- SCL irregularly claimed quantity rebates in consignments after the expiry of the contract. (in the case of consignment imported by M V Aziza-II)

- The supplier had allowed the quantity rebate to suit the needs of their buyer, though in violation of contractual terms and SCL claimed the discounts in an inconsistent manner.
- Tribunal Held in Indian Aluminium Co Vs Commissioner 2003(161) ELT 1061 (Tri) that if terms of the contract not met, the discounts are deniable.

4.3. Learned AR also submits that the price declared in the commercial invoice is an adjusted price availing abnormal discounts in the guise of franchise and quantity rebate and hence it is not the actual transaction value under Rule 4 of the CVR read with section 14 of the Customs Act and hence to be rejected and re-determined as per Rules 5 to 8 of CVR; Rule 5 could not be taken as no price of identical goods imports available; Rule 6 could not be taken as data on similar goods also not available; Rule 7 and 7A also cannot be invoked; Hence proceeded under Rule 8, by using reasonable means as per the CVR; The actual and true transaction value was arrived at by adopting the basic contracted sale price by disallowing abnormal discounts, claimed without any basis in the contract and without satisfying the contractual conditions; department did not propose to add any amount to arrive at the transaction value; thus, the Rule 8 was correctly invoked in arriving at the transaction value.

4.4. Learned AR further submits that the appellants adopted two different pricing for cargo of the same consignment having the same origin, quality and specifications; appellants relied on the price of the expired contract (for which obligations were already completed) for 5000 MT of rock phosphate imported by M.V. Aziza -I (out of the total quantity of 6800 MT); the balance 1800 MT was priced as per the new contracted price; Thus, the price declared for the 5000 MT was improper; the quantity rebate also irregularly claimed for it under the expired contact though the obligation under it was already availed and full quantity discount availed in the last consignment imported in M V AZIZA-I; Purchase order for the AZTZA-TI shipment indicated price of USD 83.37 PMT for the full consignment of 6800 MT; E-mail correspondence found as evidence of this irregular adjustment done; SCL has not replied to the observations by the department; the price of the

5000 MT revised based on the value of the identical item imported under the same vessel.

4.5. Learned AR further submits that there was mis-declaration of prices of consignments imported per MV LADY NORA and MV SANTE, which were not covered under any contract, but by adopting Franchise and Quantity Rebate; message pertaining to the import of the consignments tender evidence to this mis-declared price (USD 67.20 instead of USD 68.50)

4.6. Learned AR further submits that in few imports receipt of excess quantity of cargo than that declared in the Bs/L was found; The information on excess cargo was not declared to Customs; the confidential office note recovered uncovers the modus operandi in mis-declaring the actual quantity; as held by Apex Court, in Mangalore Refinery and Petrochemicals Ltd Vs C.C Mangalore 2015(323) ELT 433 (SC), Quantity actually received into shore tank in India should be the basis for payment of Customs duty.

4.7. On the issue of limitation, Learned AR submits that Department was not aware of the entire facts of the shipments and there was deliberate suppression of various details as shown above with an intent to evade payment of customs duty; the importer mis-declared value and quantity; Hence, duty demanded on these counts is in order. He submits that the roles played by Mr. Shri Umesh K. Shenoy and Shri N. D. Naik were unearthed amply from their own submissions and factual evidences like emails and other correspondences handled by them; being aware of the facts, they have filed wrong declarations before the Customs with intent to evade payment of Customs duty; hence, the penalties imposed on them are justified.

5. Heard both sides and perused the records of the case. We find that the appellants have imported 26 consignments of Rock Phosphate from M/s JPMC, Jordan under contracts. Brief issues that require consideration in the instant case are as to whether the appellants are eligible for 'Franchise Discount' and 'Quantity discount' on the imports of rock phosphate made by them at karwar port and whether extended period is invokable in the instant case. Whereas the appellants submit that the discounts are genuine; discounts under any name are to be allowed and that they have not paid over and above the contracted price.

6. Learned commissioner finds in respect of 'Franchise' discount that the contract does not define franchise; it is not openly disclosed in the documents or to the department; the adjustments were hidden and disclosed in each invoice; though it is supposed to be a compensation for short received quantity as stated by Shri N.D. Naik, it was availed in respect of imports per MV Pearl Luck an MV Thorsky even though excess quantity was discharged; No such discount was availed before 1999, when there was no duty on import of Rock Phosphate; the term 'Franchise discount' is unheard in commercial parlance, therefore, price paid or payable becomes transaction value as per Apex Courts decision in the case of Ispat Industries 2006 (202) ELT 561 (SC) and reduced price cannot be accepted as per IMFA Ltd 2000(123)ELT 988. The appellants submit that JPMC, the supplier, vide its letter dated 10.07.2008, has clearly explained 'Franchise' and 'Quantity Rebate' used in the Contracts; it was also clarified, vide appellant's letter dated 20.03.2007, that 'Franchise' is a commercial term understood by the supplier and the buyer as representing discount given to taking care of small variations in the draft survey between load port and discharge port; this was confirmed in the statement of Shri N.D. Naik on 09.04.2007. They submit that deduction is basically a reduction from the list price and needs to be allowed by whatever name it's called; Apex Court held, in the case of *Union of India Vs. Bombay Tyre International Pvt. Ltd 1984 (17) ELT 329 (S.C.)* (clarificatory order), that discount by whatever name it is called remains as a discount; the said decision was re-affirmed by the Apex Court in the case of *Purolator India Ltd Vs Commissioner of Central Excise, Delhi-III [2015 (323) ELT 227 (SC).*

7. We find that the main objection of the department with respect to the 'Franchise' is that it's not known in commercial parlance; it's not disclosed in each invoice and it's availed even when quantity received was not short. We find that these arguments of the department do not hold water. It is not for the department to come to a conclusion as to whether such and such discount is commercially known. What is important is to see as to what the contracting parties understand the same as and as to whether the same is really passed on. The contract entered in to by the appellants with M/s JPMC mentions franchise to be at the rate of US$0.50 PMT to be adjusted in invoice. Going by the language it is a reduction in the price and it is passed on to the appellants and is adjusted in the invoice. There is no condition with reference to this discount that it will be passed on only in cases where there is short receipt and will be withdrawn in case the receipt quantity is actual or higher that the contracted quantity. In the absence of such mechanism in the contract, department cannot say that the discount is not admissible. In the absence of any condition attached to the discount, it cannot be denied on the basis of a statement of an officer of the appellants that it is for the sake of taking care of the difference in quantities. We find that Apex Court in the case of Bombay Tyre International (supra) and Purolator India Ltd (supra) held that discount, under any name, if passed on, cannot be disallowed. Going by the ratio of the cases, we find that the 'Franchise' is a discount and has been passed on to the appellants. In the absence of any allegation to the effect that supplier and appellants are related, such discount cannot be disallowed.

8. Learned commissioner observes on the issue of 'quantity discount' that the appellants have claimed the discount retrospectively in the last shipment; the appellants did not seek for provisional assessment on this basis, though they sought the same subject to production of documents; the appellants claimed discount, in terms of contract dated 28.4.2004, for 45000MT was already terminated; the appellants on pretext of minutes of meeting 2-3-2006, availed this discount in respect of part consignment of MV Azizia-II; Email dated 20.3.2006 indicates how the discount was manipulated in the records and documents; Shri N.D. Naik exerted pressure on Customs department to accept; Customs Cooperation Council Technical Committee advisory (Note Article 1) defines credit to be an amount already paid. If the price is already paid the same becomes part of transaction value in terms of Section 14 of Customs, Act 1962; JPMC have clarified that import of 45000 MT was completed vide invoice 685/26.1.2006 for imports per MV Azizia-I and that quantity rebate was claimed in each shipment; though there is one bill of lading for 6800 MT they placed two invoices showing value of USD 79.32 PMT for 5000 MT and of USD 93.48 PMT for 1800 MT and as held in Indian Aluminum Indian Aluminium Co 2003(161) ELT 1061 (Tri), if terms of the contract not met, the discounts are deniable. He also observed that The appellants have imported consignments per MV Lady Nora and MV Sanie without any contract and availed discounts; regarding the imports per MV Azizia-II, MV Lady Nora and MV Sanie they have not put forth any arguments on the allegations contained in Para 14.1to 15.1 of the SCN. Learned counsel for the appellants submits that 'Quantity Discount' is a form of 'discount'; impugned Order accepts that quantity discount is a permissible reduction from the assessable value but denied the Appellant’s claim on the only ground that the quantity rebate allowed retrospectively in the last shipment is improper and incorrect. The imports were undertaken with respect to a particular contract entered to with the supplier. The total quantity contracted to be shipped was imported in piece meal basis and the quantity rebate was rightly claimed only in the last of the imported shipment.

9. Ongoing through the contract we find that in respect of quantity rebate there is a condition that the discount is upon lifting and payment of certain quantity and that JPMC would release this amount to BILT along with the settlement of dispatch/demurrage of last shipment. We find that the dispute is with the Vessel MV Azizia-II; department claims that there are two invoices for the Vessel and they were showing different prices; the appellants contends that out of the 6800 MT, 5000 MT belong to the earlier contract for 45000 MT which was extended to these 5000 MT by virtue of Minutes of a Meeting. The department further relies on the e-mail dated 23.03.2006 sent by Sh. N.D. Nayak, Deputy Manager (Sales & Logistics) of the appellants to M/s TICL; the said e-mail reads as under:

"During last shipment, Deputy Commissioner of Customs has not agreed for the adjustment of quantity rebate of USD 45000 saying such adjustment is not acceptable. After a lot of persuasion/discussion/arguments, they have as a special case accepted under protest. It means that they can re-assess during the final audit for the full value of USD 45000 in the last shipment

The Department further contends that imports as per MV Lady Nora and MV Sante are not eligible for quantity discount as the imports were not under any contract.

10. As we have found above, the quantity discount was agreed upon by both the parties subject to fulfillment of the condition that the contracted quantity is lifted. If both the parties agree to increase the quantity available for discount even though by way of a Minutes of Meeting, holding such discount is not permissible defies any logic. We see that there is nothing significant in the e-mails transacted to show that such a quantity discount was not extended and was only shown to the Customs authorities with an intent to evade payment of duty. As long as the discount is given, in course of the international trade, and as long as there is no flow back of money from the importer to the supplier, such discounts cannot be held to be not permissible as to hold that It is not understood as to why Revenue thinks that to be eligible the discount should be only under a contract. We find that the Revenue has not levelled any such allegation against the appellants that they and their foreign suppliers are related and that there is any flow back of money. We find that Hon'ble Supreme Court in the case of Eicher Tractors, 2000 (122) ELT 321 (SC) held that a discount is a commerciably acceptable measure, which may be resorted to by a vendor for a variety of reasons including stock clearance. A price list is really no more than a general quotation. It does not preclude discounts on a listed price. In view of the same, it is to be concluded that discounts are admissible. We do not find any reason to doubt the discounts availed by the appellant, more so, when Revenue has failed to establish under-invoicing by way of evidence or information about comparable imports. It is the Department's burden under-valuation by evidence/information about comparable imports. Under circumstances where such burden has not been discharged, the benefit of doubt should go to the importer as held the Apex Court in the case of South India Television Pvt. Ltd. (supra). In view of the above, we find that the discounts availed by the appellants are allowable.

11. The appellants submitted that the demand notice was issued on 28.05.2008 and demands differential duty in respect of the imports made between 2001 to 2007. Moreover, the assessments in respect of 21 of the 26 Bill of Entry have been finalized. Revenue contends that the appellants have sought for provisional assessment on the plea of submission of documents and not on the issue of adjustment of quantity discount till the end of the contract. Revenue shows the alleged e-mail correspondence and non-disclosure of excess receipt of goods in the appellant's premises as reasons for alleging suppression of facts. However, we are not inclined to buy this argument. Assessments, once made provisional, shall be provisional for all purposes; there was nothing to stop the Revenue from going through the contracts and seeking further clarification from the appellants on any of the issues. As the appellants have been continuously importing the same item at the same Port over the years, the charge of suppression of fact cannot be sustained. The appellants have paid duty as per the discharge quantity at the Port of discharge. There is force in the contention of the appellants that the weight, of the imported item i.e. Rock Phosphate, being hygroscopic in nature, is bound to change as per the climatic conditions. The submissions of the appellant that sometimes they receive in excess and sometimes they receive short are plausible. Therefore, allegations based on excess receipt in the factory are not maintainable.

12. For the above reasons, we find that the discounts availed by the appellants are of commercial nature and no case has been made either on the basis of evidence in the form of higher contemporaneous prices or flow back of money, we find that the discounts have to be allowed. In view of the above, we find that no case is made for demand of duty. Consequentially, imposition of penalty is also not sustainable. Accordingly, the appeals are liable to be allowed.

13. In view of the above, the impugned order is set aside and the appeals are allowed with consequential relief, if any as per law.

(Order pronounced in the open court on 20th December, 2019)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

pk/pak