CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. C/973/2012

(Arising out of Order-in-Appeal No. 769/MCH/AC/Gr.VIIIB/2012 dated 11.09.2012 passed by Commissioner of Customs (Appeals), Mumbai-I)

Lark Chemicals Pvt. Ltd. **Appellant**
114, Marine Chambers,
11, New Marine Lines,
Mumbai 400 020

Vs.

Commissioner of Customs (E), Mumbai **Respondent**
New Custom House,
Ballard Estate,
Mumbai 400 001.

WITH

Appeal No. C/974/2012

(Arising out of Order-in-Appeal No. 762/MCH/AC/Gr.VIIIB/2012 dated 11.09.2012 passed by Commissioner of Customs (Appeals), Mumbai-I)

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114, Marine Chambers,
11, New Marine Lines,
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Vs.

Commissioner of Customs (E), Mumbai **Respondent**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Appearance:

Shri D.H. Nadkarni, Advocate for the Appellant
Ms. Trupti Chavan, Authorised Representative for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. A/**85781-85782/2019**

Date of Hearing: 23.01.2019
Date of Decision: 23.01.2019

PER: SANJIV SRIVASTAVA

These appeals are directed against order in appeal Nos 762 & 769/MCH/AC/Gr. VIIIB/2012 dated 11.09.20102 of the Commissioner Customs (Appeal) Mumbai. By the said orders Commissioner (Appeal) has upheld the orders of Assistant Commissioner Customs Gr. VII B/ NCH/ Mumbai holding as follows:

"Order No S/10-414/ACAO/GW/AC/Gr. VII B dated 06.05.2010

I hereby finalize the assessment at the declared value denying benefit of Notification No 203/9-Cu dated 19.05.1992.

1. *In view of the above, I confirm the demand of duty amounting to Rs 12,96,149/- (Rs Twelve Lakhs Ninety Six Thousand One Hundred and Forty Nine only) along with interest as applicable.*
2. *BG amount of Rs 1,64,347.25 and Rs 5,47,822,75 deposited by M/s Lark Chemicals may be adjusted towards their aforesaid liabilities."*

"Order No S/10-413/ACAO/GW/AC/Gr. VII B dated 06.05.2010

I hereby finalize the assessment at the declared value denying benefit of Notification No 203/9-Cu dated 19.05.1992.

1. *In view of the above, I confirm the demand of duty amounting to Rs 18,43,244/- (Rs Eighteen Lakhs Forty Three Thousand Two Hundred and Forty Four only) along with interest as applicable.*
2. *BG amount of Rs 19 lakhs deposited by M/s Lark Chemicals may be adjusted towards their aforesaid liabilities."*

2.1 Appellants had filed B/E for import of:-

- 8500 kgs of Absorbic Acid with assessable value of Rs 28,32,413/- and claimed duty exemption

Notification No 203/92 dated 19.05.1992 under Advance License No P/K/3491011 dated 31.03.1995 procured for a value consideration from M/s Jyoti Exports (India) Ltd Ahmedabad.

o 1000 kgs of Roboflavin (Vitamin B-2) with assessable value of Rs 21,91,291/- and claimed duty exemption Notification No 203/92 dated 19.05.1992 under Advance License No P/K/3499696 dated 24.10.1994 procured for a value consideration from M/s Roselabs Limited Ahmedabad Ltd.

2.2 Department was of the view against the said licenses importer could have imported much lesser quantity of the said goods. In view of department the transferor of license had while applying for the license inflated the unit prices of the raw materials. Thus relying on CBEC Circular No 23/96-Customs fated 19.04.1996, the benefit of exemption under notification No 203/92-Cus was sought to be restricted within the quantity specified in the license, although the value of imports was well within the value of imports specified in the license.

2.3 Since the importer did not produce any clarification with respect to excess quantity imported by them, department refuse the clearance of import goods. Aggrieved Appellants moved to High Court by filing a writ petition (WP No 843/1996 and 1347/1996). By the interim order High Court directed the department to release the consignment forthwith subject to the importer furnishing Bank Guarantee and bond. Subsequently High Court directed the department to issue Show Cause Notice to the appellants

2.4 Accordingly show cause notices were issued to the appellants denying the benefit of exemption under

Notification No 203/92-Cus for the quantity in excess of that specified in the license and demanding the duty on the declared value in respect of that specified quantity.

2.5 The show cause notices were adjudicated by the Assistant Commissioner as per the orders referred in para 1, supra.

2.6 Aggrieved appellants filed the appeal before Commissioner (Appeals) which were dismissed. Aggrieved appellant filed these appeals before the tribunal.

3.1 In their appeal appellants have challenged the order of Commissioner (Appeal) stating that-

a. Custom Authorities are not competent to question the decision of DGFT. The license was issued by DGFT to the transferor. The transferor has after completing the export obligations transferred the license to them on a valid consideration. Joint DGFT has clarified to transferor regarding correction in validity period of the license by permitting the request for revalidation and import part of DEEC was returned, as there was no need for any correction.

b. By issuance of Circular No 23/96-Customs dated 19.04.1996, CBEC has sought to restrict the power and authority of DGFT which is improper and not sustainable in law. They rely on following decisions in their support

Pradip Polyfils P Ltd [2004 (173) ELT 3 (Bom)]

Polynova Chemicals Ltd [2005 (179) ELT 173 (T)]

Kobian ECS India P Ltd [2003 157) ELT 662 (T)]

c. Department could not by way of circular subsequent to notification add new conditions thereby restricting the scope of exemption notification. {Inter Continental (India) [008 (226) ELT 16 (SC)], Rakesh Enterprises [1991 (56) ELT 39 (Bom)]}

d. Imported goods an license are valid as per para 49 of the policy book 1992-97 {Tata Iron and Steel Co [2004 (177) ELT 1004 (T-Bang)]

e. In case of provisional assessment demands under section 28 cannot be sustained.

f. Interest in connection with finalization of provisional assessments for period prior to 13.07.2006 cannot be sustained. {sterile Industries (India) Ltd [2008 (223) ELT 633 (T-Chennai)], Sah Petroleums Ltd {2009 (246) ELT 716 (T-Mum)]

g. Decision in case of Aafloat Textiles (I) Pvt Ltd relied upon by the lower authorities will not be applicable in the present case.

4.1 We have heard Shri D H Nadkarni Advocate for the Appellant and Ms Trupti Chavan Assistant Commissioner. Authorized Representative for the revenue.

4.2 Arguing for the Appellant, learned Counsel submitted that-

i. They had procured the Value Based Advance licenses from the Transferor and have imported the goods claiming exemption under the Notification No 203/92-Cus on the strength of the said licenses.

ii. Under the Value Based Advance License Scheme the main criteria for allowing the import duty free is the value specified in the License. As long as the value of goods imported against the said license, is within the prescribed value limit the benefit of duty exemption under Notification No 203/92-Cus

iii. In case of Pradip Polyfils P Ltd [2004 (173) ELT 3 (Bom)], Polynova Chemicals Ltd [2005 (179) ELT 173 (T), Kobian ECS India P Ltd [2003 (157) ELT 662 (T)] and Tata Iron and Steel Company [2004 (177) ELT 1004 (T)] it has been held that Customs Authority had no jurisdiction to amend the value mentioned in the license nor to question the as to whether the license was obtained by misrepresentation or otherwise.

iv. The value of the goods imported against the Advance License is within the values specified in the said license. Hence Custom Authorities have gone beyond their jurisdiction, by demanding the duty in respect of the goods in excess of quantity mentioned in the license.

4.3 Arguing for the revenue learned Authorized Representative reiterated the findings of the Assistant Commissioner and Commissioner (Appeals). She submitted relying of the order of Apex Court in case Aafloat Textiles that at the time of procuring the license appellants should have determined what their entitlement to import was. It was for them to satisfy themselves with regards the value mentioned in the License vis a vis the quantity of goods. Since the quantum of goods in terms of quantity imported far exceeds the quantity mentioned in the license itself, the benefit of Notification 203/92-Cus has been rightly denied by the authorities below in respect of quantities in excess of those mentioned in the license.

5.1 We have considered the submissions made in appeal and during the course of hearing along with the impugned order.

5.2 The short question for consideration in the present appeals is *"As to what determines the entitlement to duty free imports under a Value Based Advance License, the value mentioned in license or the quantity mentioned in the license."*

5.3 The case of revenue is based on the Circular No 23/96-Cus dated 19.04.1996. For ease of reference the said circular is reproduced below:

"Circular No. 23/96-Cus., dated 19-4-1996

From F. No. 605/96-DBK

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject: VBAL-Over valuation of import in Advance License application.

Commissioner of Customs, Bombay has informed that in a number of cases the exporters while applying for Value Based Licenses often state inflated unit prices in the application in order to obtain a license for a higher CIF value so long as they are able to meet the value addition prescribed. The licenses so obtained are, subsequently used for importing inputs at prevailing international prices with the result that quantities far in excess of requirements for export production, based on which the entitlement to CIF was calculated, can be imported. Thus, in addition to the flexibility permitted under the scheme for importing any one or more inputs upto full CIF value of license except for sensitive items, the exporters through above modus operandi take unintended benefits under the Scheme.

In terms of Rule 2(1) of the Foreign Trade (Regulation) Rules, 1993, "value" has the same meaning assigned to it as under Section 2(41) of the Customs Act, 1962. Therefore, for the purpose of obtaining Value Based Advance License, the exporters are required to declare prevailing international prices which correspond to valuation as per Customs Act. ***Since the Licensing authorities while issuing VABAL indicate quantity and value of all inputs in the DEEC Book (though quantity restrictions apply only for sensitive items), the unit price declared for obtaining license can be determined from the DEEC Book.*** *In all such cases where the variation between the price declared to the Licensing authorities and the price declared at the time of actual import is above 20%, the importer should be asked* 2.

*to substantiate such valuation and justify that the CIF price declared in the application before the Licensing authority were the then prevailing international prices**. In case importer is not able to justify the correctness of prices declared before the Licensing authorities, the matter should be referred to the concerned Licensing authority for corrective action being taken at their end. Director General, Foreign Trade has also been requested to issue suitable instructions in this regard."***

5.4 From the perusal of the said circular following is evident:-

i. On the VABAL, issued by the Licensing Authority, both quantity and value of imports permitted are mentioned. However the quantity restrictions mentioned in the license is applicable only in case of sensitive items and not in respect of all other items imported against the said license.

ii. The quantity and value mentioned in the license can be used for determination of unit price of items imported and in case the unit value so arrived exceeds the declared import price by more than 20%, importer should be asked to justify.

iii. In case the mismatch cannot be explained the matter should referred to the concerned licensing authority for taking corrective action.

iv. The said circular does not direct the Custom Authorities to suo motto deny the exemption available under the said license in term of value in respect of non sensitive goods on the basis of the quantities mentioned in the license.

5.5 Tribunal has in case of Tata Iron & Steel Company [2004 (177) ELT 1004 (T)] held as follows:

"9.*We have carefully considered the submissions made by both sides. We find that the main issue, whether the price* *mentioned in a license can be modified by the customs authorities, has been settled by the Supreme Court and other High Courts and Tribunals in various decisions, which were relied upon by the appellants. We find that in the case of Titan Medical Systems Pvt. Ltd. v. CCE (supra), the Supreme Court has observed as under:*

"As regards the contention that the appellants were not entitled to the benefit of the exemption notification as they had misrepresented to the licensing authority, it was fairly admitted that there was no requirement, for issuance of a license, that an applicant set out the quantity or value of the indigenous components which would be used in the manufacture. Undoubtedly, while applying for a license, the appellants set out the components they would use and their value. However, the value was only an estimate. It is not the respondents' case that the components were not used. The only case is that the value which had been indicated in the application was very large whereas what was actually spent was a paltry amount. To be noted that the licensing authority having taken no steps to cancel the license. The licensing authority have not claimed that there was any misrepresentation. Once an advance license was issued and not questioned by the licensing authority, the Customs authorities cannot refuse exemption on an allegation that there was misrepresentation. If there was any misrepresentation, it was for the licensing authority to take steps in that behalf."

10.*Therefore, following the ratio of the various decisions relied upon by the appellants, we find that the Commissioner of Customs has no jurisdiction to question Value Based Advance License whether such license*

was obtained by mis-representation or otherwise as has been held by the Supreme Court in the above cited cases.

11.*We also find that the correspondence between the Commissioner of Customs and JDGFT, Calcutta was neither* *disclosed to the appellants nor they were given any opportunity to present their case before the JDGFT. We also find that no proceedings for amendment of the license were initiated by the JDGFT, Calcutta. The appellants have imported LAM Coke within the value limit of VABAL. There is no charge that they had under-valued LAM Coke at the time of importation. They had also completed their export obligation. Therefore, there is no violation of the provisions of Customs Act. Customs authorities cannot go into the domain of licensing authority for taking action by modifying the value limit given in VABAL. In the circumstances, we do not find any merit in the order of the Commissioner and the same is set aside. Accordingly, the appeal is allowed."*

5.6 In case of Pradip Polyfils P Ltd [2001 (173) ELT 3 (Bom)] Hon'ble Bombay High Court has held as follows:

*"**7.** We have heard Counsel on both the sides. In this case, it is not in dispute that pursuant to the application made by the petitioners seeking benefit of DEPB Scheme in respect of export of filter plates and accessories made of Polypropylene, two DEPB licences were issued by the DGFT in favour of the petitioners. The endorsement made on the licences clearly show that the DEPB licences have been issued against the export of Polypropylene filter Plates and accessories as contained in the shipping bills furnished by the petitioners. The said DEPB licences were required to be forwarded to the Customs for verification of the particulars set out in the shipping bills and necessary endorsement thereon. Under Circular No. 15/97, dated 3-6-1997 the verification by the Customs authorities was restricted to the description, quantity and FOB value of the export product set out in the Shipping Bill. It is not the case of the Customs authorities that there is any discrepancy in the description, quantity and FOB value of the export product. Under the circumstances, when the DEPB licence is issued*

by the Licensing authorities specifically holding that the Petitioners are entitled to avail the benefit of the DEPB Scheme in respect of Polypropylene filter plates and accessories, the Customs authorities were, not justified, in rejecting the claim of the Petitioners on the ground that the Articles exported by the Petitioners were not covered under Chapter 39 ITC (HS) classification. Whether an item falls under Chapter 39 of ITC classification or not is for the licensing authorities to consider before issuing the licence. Even after the issuance of the licences, the licensing authorities have not taken any steps to declare that the said licences were wrongly issued. Once the 1icensing authorities have held that the export product is covered under the DEPB Scheme and have issued the DEPB licence, it is not open to the Customs authorities to hold that the said export product is not covered under the DEPB Scheme."

5.7 In light of the above circular and the decisions referred above it was for Custom Authorities after noting the mis-match in the declared unit value on Bill of Entry and that arrived on the basis of quantity and value mentioned in Value Based Advance License to refer the matter to licensing authority and seek corrections. In absence of any correction/ amendments in the license, the value of imported goods sought to be exempted by the said license cannot be suo motto altered by the Custom Authorities. In our view order of Commissioner (Appeal) and adjudicating authority is not only contrary to the decisions referred above but also contrary to circular No 23/96-Cus issue by CBEC and which has been used as basis for raising the demand.

5.8 In case Aafloat Textile (I) Pvt Ltd [2003 (235) ELT 587 (SC)] relied upon by the Commissioner (Appeal), Hon'ble Supreme Court has held as follows:

"19.*It was for the buyer to establish that he had no knowledge about the genuineness or otherwise of the SIL in question.*

20.*The maxim caveat emptor is clearly applicable to a case of this nature. As per Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edn. 2005 at page 721: Caveat emptor means "Let the purchaser beware." It is one of the settled maxims, applying to a purchaser who is bound by actual as well as constructive knowledge of any defect in the thing purchased, which is obvious, or which might have been known by proper diligence.*

21.*" Caveat emptor does not mean either in law or in Latin that the buyer must take chances. It means that the buyer must take care." (See Wallis v. Russell (1902) 21 R 585, 615).*

22.*" Caveat emptor is the ordinary rule in contract. A vendor is under no duty to communicate the existence even of latent defects in his wares unless by act or implication he represents such defects not to exist." (See William R. Anson, Principles of the Law of Contract 245 (Arthur L. Corbin Ed. 3d. Am. ed.1919) Applying the maxim, it was held that it is the bounden duty of the purchaser to make all such necessary enquiries and to ascertain all the facts relating to the property to be purchased prior to committing in any manner.*

23. *Caveat emptor, qui ignorare non debuit quod jus alienum emit. A maxim meaning "Let a purchaser beware; who ought not to be ignorant that he is purchasing the rights of another. Hob. 99; Broom; Co., Litl. 102 a : 3 Taunt, 439.*

24.*As the maxim applies, with certain specific restrictions, not only to the quality of, but also to the title to, land which is sold, the purchaser is generally bound to view the land and to enquire after and inspect the title-deeds; at his peril if he does not.*

25.*Upon a sale of goods the general rule with regard to their nature or quality is caveat emptor, so that in the absence of fraud, the buyer has no remedy against the seller for any defect in the goods not covered by some condition or warranty, expressed or implied. It is beyond all doubt that, by the general rules of law there is no warranty of quality arising from the bare contract of sale of goods, and that where there has been no fraud, a buyer who has not obtained an express warranty, takes all risk of defect in the goods, unless there are circumstances beyond the mere fact of sale from which a warranty may be implied. {Bottomley v. Bannister, [1932] 1 KB 458 : Ward v. Hobbs, 4 App Cas 13}. (Latin for Lawyers)"*

26.*No one ought in ignorance to buy that which is the right of another. The buyer according to the maxim has to be cautious, as the risk is his and not that of the seller.*

27.*Whether the buyer had made any enquiry as to the genuineness of the license within his special knowledge. He has to establish that he made enquiry and took requisite precautions to find out about the genuineness of the SIL which he was purchasing. If he has not done that consequences have to follow. These aspects do not appear to have been considered by the CESTAT in coming to the abrupt conclusion that even if one or all the respondents had knowledge that the SIL was forged or fake that was not sufficient to hold that there was no omission of commission on his part so as to render silver or gold liable for confiscation.*

28.*As noted above, SILs were not genuine documents and were forged. Since fraud was involved, in the eye of law such documents had no existence. Since the documents have been established to be forged or fake, obviously fraud was involved and that was sufficient to extend the period of limitation."*

From the above paras referred from the said decision it is quite evident that the case under consideration was in respect of a license that was obtained by fraud. When this license obtained by fraud, was presented by the buyer of said license Supreme Court held as above. In the case under consideration the issue is not in respect of license obtained by fraud. The issue is in respect of mis-match between the declared unit price of imported goods on Bill of Entry and that computed on the basis of quantity and value mentioned in the license. The real issue is vis a vis the amendment to the said license to resolve the mismatch. Since the facts of present case are clearly distinguishable we do not find the said decision to be applicable in present case.

5.9 In view of discussions as above we do not find any merits in the impugned orders of Commissioner (Appeals).

6.1 The appeals filed are allowed with consequential relief to the appellants.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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