

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 86332 of 2014

(Arising out of Order-in-Original CAO No. 11/2014/CAC/CC(ADJ)/SJ dated 31.01.2014 passed by the Commissioner of Customs (Adjudication), Mumbai)

Lark Chemicals Private Limited

.... Appellant

114, Marine Chambers
11, New Marine Lines
Mumbai-400 020.

Versus

**Commissioner of Customs (General)
Mumbai**

....Respondent

2nd Floor, New Custom House,
Ballard Estate, Mumbai - 400 001.

And

Customs Appeal No. 86455 of 2014

(Arising out of Order-in-Original CAO No. 11/2014/CAC/CC(ADJ)/SJ dated 31.01.2014 passed by the Commissioner of Customs (Adjudication), Mumbai)

Micro Labs. Limited

.... Appellant

No.27, Race Course Road
Bengaluru - 560 001.

Versus

**Commissioner of Customs (General)
Mumbai**

....Respondent

2nd Floor, New Custom House,
Ballard Estate, Mumbai - 400 001.

Appearance:

Shri D.H. Nadkarni, Advocate for the Appellant

Shri Ram Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85849 – 85850/2024

Date of Hearing: 03.05.2024

Date of Decision: 02.09.2024

Per: M.M. PARTHIBAN

These appeals have been filed by M/s Lark Chemicals Private Limited, Mumbai and M/s Micro Labs Limited, Bangalore (herein after referred together, for short, as 'the appellants') against Order-in-Original No. 11/2014/CAC/CC(ADJ)/SJ dated 31.01.2014(herein after referred to, for short, as 'the impugned order') passed by the Commissioner of Customs (Adjudication), Mumbai.

2.1 Brief facts of the case are that M/s Lark Chemicals Pvt. Ltd., and M/s Micro Labs Limited, the appellants herein, *inter alia*, are engaged in manufacture of pharmaceutical products. In pursuance of their manufacturing operations, they had purchased Value Based Advance Licenses (VABAL) viz., No. P/K/2145479 dated 19.07.1994 and P/K/3491011 dated 31.03.1995 in respect of M/s Lark Chemicals Pvt. Ltd., and No. P/K/2145480 dated 19.07.1994 in respect of M/s Micro Labs. Ltd., from the original license holder namely M/s Robinson Impex (1) Ltd. (hereinafter referred to as 'M/s Robinson') (earlier known as M/s Jyoti Exports (1) Ltd.). The said VABAL licenses were issued to M/s Robinson in terms of Notification No. 203/92-Cus. dated 19.05.1992 read with the provisions of Export & Import Policy, 1992-1997.

2.2 On the basis of information received by Customs authorities informing them that certain merchant exporters based in Ahmedabad are misusing VABAL scheme by exorbitantly over invoicing their exports, thereby claiming duty free benefits on imports in collusion with manufacturers, search operations were conducted on various premises and certain incriminating documents were recovered pertaining to exports.

2.3 On further investigation by the Customs authorities, it was found that M/s Robinson had resorted to over-valuation of the exported goods to avail higher/undue VABAL benefit. M/s Robinson procured the exported goods for Rs.1,33,64,004/- from different manufacturers of the pharmaceutical products; the export price of the said goods was declared as Rs. 8,91,90,375/- in the shipping bills; on the basis of said exports, M/s Robinson got eighteen VABAL licenses from the DGFT on post-export basis. As the export obligation was already completed, the

said licenses were made transferable by the DGFT. Some of the said licenses were sold to various importers and both the appellants are one of the transferees of such licenses.

2.4 On completion of investigation, a Show Cause Notice (SCN) dated 20.05.1998 was issued by the Commissioner of Customs, Gujarat to the appellants and other similar ten other transferees of VABAL licenses from M/s Robinson. The Central Board of Excise & Customs (CBEC) vide Notification no. 37/2003-Customs (N.T.) dated 03.06.2003 empowered the Commissioner of Customs (Adjudication), Mumbai as the common Adjudicating Authority. Accordingly, the Commissioner (Adjudication) vide Order-in-Original dated 31.01.2014 adjudicated the case wherein the customs duty in terms of proviso to section 28 (1) of the Customs Act, 1962 was confirmed along with interest. Further, penalty under section 114A of ibid was also imposed on various noticees, and the appellants are part of such noticees on whom duty demand and penalty was imposed.

3. Being aggrieved, with the above dated 31.01.2014, the appellants have filed these appeals before the Tribunal.

4.1 Learned Advocate appearing for the appellants have submitted that in the case of the appellants, it is a settled position of law that even a license obtained by fraud or mis-representation of facts is only voidable and not void ab-initio. It is good in law until it is voided. Thus, even a license obtained by fraud or mis-representation is valid in law until such time that it is cancelled by the licensing authority. In the present case, he stated that no such fraud is involved and the licenses were valid and subsisting at the time when the appellants purchased the same as transferees, and also when the goods were imported and cleared. Therefore, he submitted that the subsequent suspension or cancellation of the licenses cannot affect the imports made prior to such suspension and cancellation.

4.2 Learned Advocate further submitted that the only condition of the relevant notification in respect of VABAL which applies to the transferee is that the license should have been made transferable and other conditions of the notification do not apply to the transferee. Therefore, the benefit of Notification would be available to the transferee as held

by the Tribunal in the case of *Goodluck Industries Ltd. Vs. Commissioner of Customs, Kolkata*- 1999 (108) E.L.T. 818 (Tribunal). This decision has been affirmed by the Hon'ble Supreme Court in [200 (120) E.L.T. A66 (SC)]. This view has also been approved by the Supreme Court in *Jindal Dye Intermediate Ltd. Vs. Collector of Customs, Mumbai* - 2006 (197) E.L.T. 471 (SC).

4.3 He further submitted that learned adjudicating authority had placed reliance on *Sravani Impex P Ltd.*- 2010(252) E.L.T. 19(A.P.), wherein it was held that when the DEPB scrips have been sold to third parties, the only course open to the Customs is to demand repayment of DEPB Credit from the original licensee-exporter under Section 28 of the Customs Act 1962. Learned Advocate further supported his stand that duty cannot be demanded from the transferees, by claiming that this position was perhaps recognized by the Government when it introduced Section 28 AAA in the Customs Act with effect from 28.05.2012. Section 28AAA provides that in such cases duty shall be recovered from the person to whom the instruments (such as DEPB, VABAL-Advance license) are issued. Learned Advocate argued that since the law has not been so clear that duty could be demanded from the transferee, it has been amended in order to introduce a separate provision as Section 28AAA in the Customs statute. As such provisions apply w.e.f. 28.05.2012 by a new insertion in the Customs Act, 1962 by the Finance Act, 2012, these do not have retrospective application to their case where SCN was issued on 20.05.1998. Further, the duty demand has been made by invoking extended period, which issue had been decided by the Larger Bench of the Tribunal by holding that the demand is barred by limitation as held in the case of *Continental Foundation Jt. Venture Vs. Commissioner of Central Excise, Chandigarh-I* - 2007 (2016) E.L.T. 177 (S.C.), which was upheld by the Hon'ble Supreme Court.

4.4 In support of their stand, learned Advocate had relied upon the following case laws:

(i) *Ajay Kumar & Co. Vs. Commissioner of Customs, Amritsar* - 2006 (205) E.L.T. 747 (Tri. - Del.) confirmed by the Hon'ble Supreme Court.

(ii) *Municipal Corporation of Delhi Vs. Gurnam Kaur* - 1989 AIR 38, 1998

(iii) Hico Enterprises Vs. Commissioner of Customs, Mumbai – 2005 (189) E.L.T. 135 (Tri. – L.B.)

5.1 Learned Authorized Representative (A.R.) appearing for Revenue, submitted that in the instant case, the original License holder viz., M/s Robinson' had obtained 18 VABAL licenses on the basis of following misrepresentation / suppression: -

(i) Value of the exported goods inflated from Rs. 1,33,64,004 to Rs.8,91,90,375;

(ii) Transferability of the licenses was obtained on the basis of undertaking that sale proceeds have been realized in full, though not even 50% of the sale value was realized;

(iii) Five VABAL licenses were surrendered to the DGFT unutilized; which shows means rea on the part of the original license holder.

(iv) The original license holder did not rebut the allegations alleged in the SCN and did not participate in the adjudication proceedings; thus, admitting their complicity in the fraud.

5.2 In view of the above, learned AR submitted that the original licensee holder obtained the said 18 VABAL licenses and got them transferable from DGFT fraudulently and sold the same in the market. In view of the above, he submitted that on the basis of the decision taken in *Tata Hitachi Construction Machinery Company Ltd.* [2015 (319) E.L.T. 546 (S.C.)], the appellants/transferees are liable to pay duty along with interest.

6. Heard both sides and perused the records of the case. Further, the arguments advanced by learned Advocate and learned Authorized Representative of the Department have been considered by us. We have also perused the additional written submissions given in the form of paper books.

7. The issue in dispute is to decide whether the denial of benefit of Value Based Advance Licenses (VABAL) to the appellants-transferee of such Licenses is permissible? and whether recovery of customs duty under Section 28 *ibid*, which was foregone on import on utilizing the VABAL Licenses, that were alleged to have been obtained by the transferor M/s. Robinson by resorting to overvaluation; and whether penalty imposed on the appellants under Section 114A *ibid*, are legally sustainable or not?

8.1 In the impugned order, the learned Commissioner had examined the various issues involved in the case as referred above and confirmed the adjudged demands on the appellants as well as imposed penalty on them.

8.2 In arriving at the conclusions for passing the above stated order, the Commissioner of Customs in the impugned order, have discussed the issued and given his views as follows:

"6.1I have carefully gone through the contents of the Show Cause Notice, the documents relied upon therein and the submissions by the notices in writing and during the course of hearing. It is alleged in the notice that:-

a. M/s Robinson Impex (I) Ltd. (formerly known as "Jyoti Exports"/"Jyoti Exports (India) Ltd") have resorted to gross over valuation of the goods exported under the DEEC scheme with an ulterior motive to avail higher entitlements of the C.I.F. value of inputs allowed to be imported duty free and appeared to have contravened the provisions of Section 18 (1) and 67 of the Foreign Exchange Regulation Act (FERA) 1973, Rule 11 of the Foreign Trade (Regulation) Rules, 1993, read with Section 11 (1) and Section 50 (2) of the Customs Act 1962, thereby, rendering the goods exported under various Shipping Bills detailed in Annexure "A" to the Show Cause Notice (SCN) with declared value of Rs.8,91,90,375/- (Rupees Eight Crore Ninety One Lakh Ninety Thousand Three Hundred Seventy Five only) liable to confiscation under Section 113 (d) of the Customs Act 1962;

b. Import duty amounting to Rs.2,80,80,388/- (Rupees Two Crore Eighty Lakh Eighty Thousand Three Hundred Eighty eight only) (As shown in Annexure-'B' of the SCN) on CIF value of duty free imports along with interest @20% per annum is liable to be recovered from the notices to SCN under provisions to Section 28 of the Customs Act 1962;

xxx

xxx

xxx

xxx

6.2. *Having examined the contents of the notice, I find that the core issue involved in the case is the allegation of over valuation of goods exported under the DEEC scheme, stating that M/s Robinson Impex (I) Ltd. have over invoiced/ over-valued the export prices to the tune of Rs. 7,58,26,371/- having procured the goods at Rs. 1,33,64,004/- while their export prices declared on the Shipping Bills was Rs. 8,91,90,375/-. The merchant exporter has not contended against the allegation of over-valuation of the export goods leveled against them in spite of being given enough opportunities to appear. Initially, they had asked for an extension of 6 weeks for submission of their reply to the SCN. However, in spite of being granted enough time and opportunities of hearing to them, they had not attended the hearing or rebutted the charges leveled against them in the Show Cause Notice. Many other noticees, viz. the manufacturers of the said goods, the receiver of the goods, the commission agents and their Directors / Partners*

have contended that they had no role in the subject exports and thus, were not liable for penal action at all. Some have raised the issue of jurisdiction also. The importers have added that they were the genuine and bona fide buyers of the licences in usual course of business against a consideration. Some noticees have initially raised the question of non-receipt of relevant documents - relied as well as non-relied which were later provided to them as per the records and therefore, that issue has been taken care of and does not call for any further discussion.

xxx xxx xxx xxx

6.8.1 M/s Lark Chemicals Pvt. Ltd have raised the specific issue that in one of their licences Advance Licence No. P/K/2145479 dated 19.07.1994 for US\$180000, the SCN was issued and later proceedings dropped vide an Order-in-Original No. CAO/No.117/97-CAC/CC-1 dated 19.05.1997 on the issue of availability of Notn No. 203/92; that the Order had attained finality; and that without challenging the Order dated 19.05.1997, no demand could be raised on the Noticees by simply issuing a fresh Show Cause Notice. However, I find that the earlier adjudication was on a different issue and the new issue of procuring of Advance Licences in fraudulent manner had not come to light till then. Therefore, those proceedings were different and independent of the present case, and do not come in the way of the adjudication in this matter in respect of the said licence.

6.8.2 M/s Lark Chemicals Pvt. Ltd further stated that in the other Licence No. P/K/3491011 dated 31.03.1995 issued by DGFT to M/s Jyoti Exports which they had procured from M/s Robinson Impex (1) Ltd (formerly M/s Jyoti Exports), the goods were released as per the order of Hon'ble High Court at Bombay in their Writ Petition, against a Bank Guarantee of Rs. 19 lakhs; that later the matter was decided vide order dated 06.05.2010 against which they filed an appeal before the Commissioner of Customs (Appeal), Mumbai which is pending. The status of the appeal filed before the Commissioner (Appeal) was checked and it was found that the appeal was already decided. It was also learnt that aggrieved by the same order-in-appeal passed by the Commissioner (Appeal), M/s Lark Chemicals Pvt. Ltd had filed an appeal before the Hon'ble CESTAT, Mumbai.

xxx xxx xxx xxx

6.11 Moreover, some of the importers have contended that since they have not resorted to any willful mis-declaration or suppression of facts therefore, the extended period of demand under proviso to Section 28 of the Customs Act 1962 was not liable to be invoked in the present case. However, I find that the provisions of the said Section do not require that the willful mis- declaration or the suppression of facts should be essentially done by the importer themselves. Here, the willful mis-declaration or suppression of facts by their predecessor, ie., the merchant exporter to acquire the advance licence in a fraudulent manner is enough to invoke the extended period under the provisions of the Section 28 for demand of duty. Any other interpretation will defeat the intendment of the

proviso to Section 28 and will enable fraud to be perpetuated without any remedy. Even if case of criminal liability or penalty may stand on different footing, purchaser or successor of fraudulently obtained Advance Licence stands in the same position as his predecessor. If the extended period of limitation could be invoked against the original holder of fraudulently obtained Advance Licence, the same could be invoked against successor or purchaser. It finds support from the case of Friends Trading Co. vs Union of India reported in 2011 (267) E.L.T. 33 (P & H) wherein it is held that:-....

xxx

xxx

xxx

xxx

6.14 Therefore, in view of the foregoing, I confirm the duty on all importers and the import duty is recoverable from the importers of the goods viz. M/s Robinson Impex (1) Ltd, M/s Micro Labs Ltd., Bangalore, M/s Romit International, Mumbai, M/s Milind Associates, Madras, M/s Robinson Pharma, Ahmedabad and M/s Lark Chemicals, Mumbai to the extent the duty exemption was availed by them along with the applicable interest.

6.15 Having discussed as above, I conclude that M/s Robinson Impex (1) Ltd have acquired VABAL Licence fraudulently by way of suppressing/ mis-stating the correct value of goods exported and accordingly, has rendered the export goods liable for confiscation under Section 113 (d) of the Customs Act 1962. M/s Robinson Impex (1) Ltd themselves and the other importers, viz. M/s Micro Labs Ltd., Bangalore, M/s Romit International, Mumbai, M/s Milind Associates, Madras, M/s Robinson Pharma, Ahmedabad and M/s Lark Chemicals, Mumbai who have bought the licences from the said merchant exporter and have imported the goods duty free under the licence so fraudulently obtained, I hold them liable to pay the Import duty amounting to Rs.2,80,80,388/- (Rupees Two Crore Eighty Lakh Eighty Thousand Three Hundred Eighty Eight only) at appropriate rate of duty on CIF value of duty free imports along with interest @ 20% per annum invoking extended period under proviso to Section 28 of the Customs Act 1962. They are also liable to penalty under Section 114 A of the Customs Act 1962 as once it is held that duty is liable to be recovered from the importers under proviso to Section 28 of the Customs Act 1962, necessary ingredients to impose penalty under Section 114 A of the Act have also been attracted against them. Section 114A prescribes that where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of Section 28 shall also be liable to pay a penalty equal to the duty or interest so determined. Further, the Board, vide circular no. 61/2002-Cus. dated 20.09.2002, has clarified that the penalty under section 114A of the Customs Act, 1962 should be equivalent to duty and interest. The Hon'ble Supreme Court in case of Union of India Vs Arviva Industries reported in 2007(209) ELT 5(S.C.) has held that the CBEC Circulars are binding on the Department and thus, I hold that

penalty equal to sum total of the duty and rest is imposable on above stated importers under Section 114A of the Customs Act 1962."

8.3 From the above conclusions arrived in the impugned order, it transpires that the short question for consideration in the present appeals is proper determination of the fact that what exactly is the criteria for entitlement to duty free imports under a VABAL License, whether the value mentioned in licensee or the quantity mentioned in the license.

9.1 In this regard, we find that Central Board of Excise and Customs (CBEC) had issued the Circular No. 23/96-Customs dated 19.04.1996 clarifying the position. For ease of reference, the said circular is reproduced below:

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

*F. No. 605/96-DBK
Government of India
Ministry of Finance
(Department of Revenue)
Central Board of Excise & Customs*

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

Commissioner of Customs, Bombay has informed that in a number of cases the exporters while applying for Value Based Licences often state inflated unit prices in the application in order to obtain a licence for a higher CIF value so long as they are able to meet the value addition prescribed. The licences 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 licence except for sensitive items, the exporters through above modus operandi take unintended benefits under the Scheme.

2. 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 Licence, the exporters are required to declare prevailing international prices which correspond to valuation as per Customs Act. Since the Licencing 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 licence can be determined from the DEEC Book. In all such cases where the variation between the price declared to the Licencing authorities and the price declared at

the time of actual import is above 20%, the importer should be asked to substantiate such valuation and justify that the CIF price declared in the application before the Licencing authority were the then prevailing international prices. In case importer is not able to justify the correctness of prices declared before the Licencing authorities, the matter should be referred to the concerned Licencing authority for corrective action being taken at their end. Director General, Foreign Trade has also been requested to issue suitable instructions in this regard."

9.2 From plain reading of the CBEC circular, it transpires that the issue of over valuation of products in order to obtain VABAL licenses, in its acceptance or rejection and further following up with the licensing authorities etc., have to be addressed in the following manner:

- (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 be referred to the concerned licensing authority for taking corrective action.
- (iv) The said circular does not direct the Customs Authorities to *suo motu* 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.

9.3 We further find from the records that in terms of the above instructions of CBEC, the reference enquiry was made by jurisdictional customs authorities vide their letter dated 24.11.1997 to the jurisdictional DGFT authorities. To this enquiry, the Deputy Director General of Foreign Trade, Office of the Joint DGFT, Ahmedabad vide their reply letter in File No. 08/F-8/12/ECA/GEN/AM-97 dated 22.12.1997, had informed the status of the three licenses involved in the present appeals, along with some other licenses, in the following manner:

- (i) License No. P/K/2145479 dated 19.07.1994 – File No. of the JDGFT is "429-am95" and status is "BCW/Transferability allowed..."

(ii) License No. P/K/2145480 dated 19.07.1994 – File No. of the JDGFT is “42..-am95” and status is “BCW/Transferability allowed...”

(iii) License No. P/K/491011 dated 31.03.1995 – File No. of the JDGFT is “1854-am95” and status is “File to be trace out position will be intimated later on.”

It is also found that such reply of DGFT authorities covered 44 licenses dealing with four different license holders including M/s Robinson. Some of the licenses have been shown with the status of ‘cancellation issued’, ‘SCN issued for cancellation’ etc. However, in respect of the three licenses related to the appeals in the present case, there is no such action was indicated in the DGFT’s reply letter. Thus, from the above reply, it transpires that DGFT authorities have taken action on certain licenses, where they found it fit for taking further necessary action as per the merits of the case. In the three VABAL licenses, relating to the appeals before us there is no indication of such action for cancellation having taken by DGFT authorities or any information provided by Revenue that such an action was later taken by DGFT authorities. Thus, we find that in terms of the CBEC instructions too, the impugned order directing the recovery of demand has no legal basis and is contrary to the directions contained in the aforesaid circular. Therefore, we are of the considered view, that the impugned order confirming the duty on the appellants and imposition of penalty on them is not sustainable.

10.1. In this regard, we also find that the Tribunal in similar matter of the self-same appellant M/s Lark Chemicals Pvt. Ltd. have held that inasmuch as the facts of the case establish that the VABAL license has not been obtained by fraud, the ratio of the *Aafloat Textile (I) Pvt. Ltd.* decided by the Hon’ble Supreme Court in the case of licenses obtained forged documents does not apply for the case involving issue of amendment in the license. The relevant paragraphs of the said order are extracted and given below:

"5.5 *Tribunal has in case of Tata Iron & Steel Company [2004 (177) E.L.T. 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 licence 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 licence, 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 licence. 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 misrepresentation 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 undervalued 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) E.L.T. 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 of 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 licensing 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 Customs Authorities after noting the mismatch in the declared unit value on Bill of Entry and that arrived on the basis of quantity and value mentioned in Value Based Advance Licence to refer the matter to licensing authority and seek corrections. In absence of any correction/amendments in the licence, the value of imported goods sought to be exempted by the said licence cannot be suo motu altered by the Customs Authorities. In our view order of Commissioner (Appeals) and adjudicating authority is not only contrary to the decisions referred above but also contrary to Circular No. 23/96-Cus. issued by C.B.E. & C. and which has been used as basis for raising the demand.*

5.8 *In case Aafloat Textile (I) Pvt. Ltd. [[2009 \(235\) E.L.T. 587 \(S.C.\)](#)] relied upon by the Commissioner (Appeals), 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 licence that was obtained by fraud. When this licence obtained by fraud, was presented by the buyer of said licence Supreme Court held as above. In the case under consideration the issue is not in respect of licence obtained by fraud. The issue is in respect of mismatch 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 licence. The real issue is vis-a-vis the amendment to the said licence 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)."

10.2 From the records placed in the file, we also find that the three VABAL licenses relate to amendment in respect of quantity etc., which have been subsequently considered by the jurisdictional DGFT authorities. In the case of three VABAL licenses relevant to the present appeals necessary amendments have been issued as follows: License No. P/K/491011 dated 31.03.1995, amendment was issued on 11.08.1995; License No. P/K/2145479 dated 19.07.1994, amendment was issued on 02.03.1995 and for License No. P/K/2145478 dated 19.07.1994, amendment was issued on 01.03.1995. Thus, it clearly proves that the jurisdictional DGFT/licensing authorities have not found the present three licenses to be a case involving forgery, where further action of cancellation of license etc. have been initiated.

10.3 Further, we also find that in the case of Ajay Kumar & Co (supra), the Tribunal vide order dated 18.04.2006 have held that if the scrips/licenses were valid at the time of import, then subsequent cancellation of the same on the ground of fraud etc. will not have bearing on the transferee appellant. The relevant paragraphs of the said order of the Tribunal is extracted below:

"5. After hearing both the sides duly represented by Shri Mohan Jaikar, Id. Advocate and Shri S.M. Tata, Id. SDR, we find that the Hon'ble Supreme Court in the case of Union of India v. Sampatraj Dugar [[1992 \(58\) E.L.T. 163 \(S.C.\)](#)] has held that cancellation of Import Licence cannot be held to be retrospective and cannot be pressed into service when the same was valid at the time of importation of the goods. To the similar effect is another decision of the Hon'ble Supreme Court in the case of Collector of Customs, Bombay v. Sneha Sales Corporation [[2000 \(121\) E.L.T. 577 \(S.C.\)](#)] laying down that Import licence having been cancelled after import and clearance of goods, import cannot be said to be in contravention of the provisions of Imports and Exports (Control) Act, 1947. In the case of Taparia Overseas (P) Ltd. v. Union of India [[2003 \(161\) E.L.T. 47 \(Bom.\)](#)] it was held that transfer of licence to transferee for value without notice of fraud by original licence holder is governed by common law and not by provisions of any statute. As such, transaction cannot be held to be void ab initio but voidable at the instance of party defraud. The Hon'ble Court observed that inasmuch as, the procedure was followed by the transferee while getting the licence transferred in their names and the petitioner had obtained licences for valuable consideration without any notice of the fraud alleged to have been committed by the original licence holder while obtaining licences. If that be so, the concept that fraud vitiated everything would not be applicable to the cases where the transaction of transfer of licence is for value without notice arising out of mercantile transactions, governed by common law and not by provisions of any statute. Accordingly, the Hon'ble Court held that goods imported and Bill of Entry filed prior to cancellation of licence has to be held as having been made under valid licences and goods cannot be subjected to levy of Customs duty.

6. By applying the ratio as laid down by the Court in the above decisions, to the fact of the present case, it has to be held that the imports made under the DEPB Scrips, which were valid at the time of import, the subsequent cancellation of the same on the ground that original allottee procured them by fraud will not have any bearing upon the imports made by the appellant. There is nothing in the impinged order to reflect upon any mala fide on the part of the appellant or to show that he was a party to the fraudulent obtaining of scrips by M/s. Parker or had any knowledge about the tainted character of the scrips. As such, we are of the view that the imports made by the appellant in terms of the said scrips cannot be held invalid."

The aforesaid order of the Tribunal was also upheld by the Hon'ble Supreme Court and the relevant paragraph of the same is extracted below:

"2. Background facts in a nutshell are as follows :

Appellant acquired and/or purchased transferable Duty Entitlement Pass Book (in short the 'DEPB') including licenses dated 6-11-2000 and 20-11-2000 issued in the name of M/s. Parker Industries. By show cause notices dated 30-5-2002, 12-6-2002 and 26-7-2002 appellant was called upon to show cause why an amount of Rs. 12,45,174/- could not be recovered and demanded in terms of proviso to Section 28(1) of the Customs Act, 1962 (in short the 'Act'). Noticee denied the allegations.

However, Commissioner of Customs, Amritsar confirmed the demand along with interest and penalty. Same was held to be jointly payable by the original license holder and licensee. It was held that goods were liable in confiscation under Section 111 of the Act.

The Tribunal allowed the appeal by respondent holding the demand to be barred by limitation. The High Court upheld the view.

3. *In this appeal challenge is to the aforesaid conclusions. Learned counsel for the respondent pointed out that no role was ascribed to it in the show cause notice.*

4. *It is seen that in view of the fact that in the show cause notices, there was no reference to the alleged infraction of M/s. Parker Industries, the transferor of the license in question. The judgments of the CESTAT and the High Court do not suffer from any infirmity to warrant interference. It is to be noted that in Commissioner of Customs (Import) Bombay v. M/s. HICO Enterprises [2008 (11) SCC 720] similar view was taken. The appeal is dismissed."*

10.4 We further that in the case of *Hico Enterprises* (supra), the Larger Bench of the Tribunal has held that benefit of notification cannot be denied to the transferee on the ground of breach of conditions of the notification. The relevant paragraphs of the said order are given below:

"42. *As seen from the material on record, the Duty Exemption Scheme, which is part of the EXIM Policy 1992-97, is administrated by the Directorate General of Foreign Trade. Notification No. 203/92-Cus. has been issued to effectuate the exemption scheme laid down in Chapter 7 of the EXIM Policy. For this reason, issuing VBAL or QBAL, DEEC, execution of bond, legal undertaking, monitoring of import and export item, fulfilment of export obligation, realization of export proceeds, discharge of bond and legal undertaking have all been vested with the licensing authority. Certain special powers have been given to the DGFT/or the licensing authority to exercise the same in public interest. The Customs officers, while implementing the Notification 203/92-Cus., cannot question or appear to question the decisions and actions of the competent authority in the said Directorate unless it is strictly permitted by the terms of the Notification. The plain reading of condition (vii) makes it abundantly clear that benefit of Notification is to be extended to a person other than a person to whom the licence has been issued, if there is an endorsement of transfer by the licensing authority both on the VBAL and the DEEC. Benefit of Notification, cannot, therefore, be denied to the transferee on the ground of breach of condition (va). The Customs Authorities cannot question the powers of the licensing authorities unless it is mentioned in the Notification.*

43. *Thus, in view of the aforesaid discussion, we are of the considered opinion that the principles evolved in the case of Goodluck Industries and upheld by Apex Court and followed*

subsequently in other cases, is to be made applicable to the case on hand, since it is based on sound principle of law. Consequently, we uphold the contentions raised by the appellants while negating the contentions raised by the Department. Therefore the legal maxim LEX NON COGIT AD IMPOSSIBILIA can be invoked and benefit of the same be given to the transferee of the licence for claiming exemption under the Notification. The transferee cannot be called upon to fulfil the condition (v)(a) of the Notification No. 203/92-Cus. It is the original licensee, who has to satisfy the above referred condition, but not the transferee of the licence. In the result, the reference is answered accordingly."

The aforesaid order of the Tribunal was also upheld by the Hon'ble Supreme Court by its judgement dated 29.04.2008 in dismissing the Civil Appeal No.2418 of 2006, filed by the department.

11. In view of the above analysis of the legal provisions and on the basis of the orders passed by the Tribunal and the judgement of the Hon'ble Supreme Court, we find that the impugned order dated 31.01.2014 with regard to confirmation of adjudged demands along with interest and imposition of penalties are not sustainable.

12. In the result, by setting aside the impugned order dated 31.01.2014, the appeals are allowed in favour of the appellants.

(Order pronounced in open court on 02.09.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)