

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO.25 OF 2016

The Commissioner of Customs-IV
(Export), Air Cargo Complex, Sahar,
Andheri (East), Mumbai – 400 099. ...Appellant

Versus

Lactose (I) Ltd.
211, Laxmi Industrial Estate,
New Link Road, Andheri (East),
Mumbai – 400 053. ...Respondents

Mr. Pradeep S. Jetly for the Appellant.
Mr. Prakash Shah a/w. Mr. Jas Singhavi i/b PDS Legal for the
Respondent.

CORAM : A. S. OKA AND
RIYAZ I. CHAGLA, JJ.

DATE : 8 AUGUST 2017

JUDGMENT : (Per Riyaz I. Chagla, J.)

1. The Appellant being aggrieved by the impugned order dated 15th June 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short “CESTAT”) has preferred the

present Appeal on the question of law set out in paragraph No.4 of the Appeal, which reads thus:

“Whether CESTAT is right in law in holding that the Respondents are liable to import Lactose against DFIA licence when the same was admittedly not used as an ingredient in the export product?”

The Respondents (Appellant before CESTAT) had filed ex-bills of entry seeking clearance of lactose against Duty Free Import Authorization licence (for short “DFIA Licence”) 0310597347 dated 18th October 2010 issued against export of biscuits and against DFIA licence No.0310662278 dated 25th October 2010 against export of Metamitron. Sugar is permissible as one of the input allowed to be imported against the export of biscuits under Standard Input Output Norms (for short “SION”) vide Serial No.E-5 of (SION). The norms do not refer to any particular category of sugar and it has been the Respondent's understanding that lactose was eligible to be imported duty free against DFIA presented by the Respondents. A Policy Circular No.13/2011 dated 31st January 2011 was issued by the Director General of Foreign Trade (for short

“DGFT”) which clarified that import of Lactose/Mannitol Sodium Saccharine and other artificial sweetening agent is not allowed under SION E-5 input against No.2, i.e. sugar. The Respondents justified their claim for duty free clearance against the DFIA. The Respondents took the plea before the Adjudicating Authority that the licence had been issued prior to the said circular being issued and hence was inapplicable in the case of the Respondents. The Respondents requested for release of the imported goods by claiming the benefit of Notification No.98/2009. The Respondents vide their letter dated 1st May 2013 waived issuance of show cause notice and requested for personal hearing in the matter to decide the same on merits. A personal hearing was allowed, wherein the consultant of the Respondents appeared and made submissions which were similar to those contained in letter dated 30th April 2013 addressed by the Respondents. The consultant of the Respondents submitted that the DFIA licence submitted by them allows input “Sugar” and as per DGFT vide clarification letter dated 31st July 2008 it was stated that “sugar in the form of

lactose can be imported against DFIA licence for import of sugar”. The same was clarified in Board Circular 46/2007 dated 20th December 2007 and DGFT's Policy Circular dated 6th January 2009. The DGFT Policy Circular dated 24th March 2009 gave the exporter flexibility to import the alternative input/product mentioned in the SION. The licence being issued prior to the amending Circular dated 31st January 2011 made the said circular inapplicable and the import of lactose should be allowed under the DIFA licence. This plea of the Respondents was not accepted by the Adjudicating Authority, who held that the Respondents were not liable to import lactose in terms of the DGFT Circular dated 31st March 2011, as relevant date for determining the applicability of the licence is the date of the Bill of Lading/Airway Bill and therefore the Policy Circular which was issued prior thereto is very much applicable. The Adjudicating Authority by two orders dated 10th May 2013 did not extend the benefit of duty free import for the imported goods. The Respondents being aggrieved by the two orders dated 10th May 2013, preferred two appeals before the

Commissioner of Customs (Appeals). The Commissioner of Customs (Appeals) vide common order in Appeal dated 11th May 2013, rejected the Appeals filed by the Respondents. The Respondents being aggrieved by the order, preferred Appeals before CESTAT. The CESTAT by the impugned order dated 15th June 2015 held that the Circular dated 31th January 2011 was not applicable and placed its reliance upon the judgment of the **Madras High Court** in the case of *Hoewitzer Organics Chemical Ltd Organic Chemical Co. Vs. D.G.F.T., New Delhi* reported in **2013 (294) E.L.T. 7 (Mad.)** which held that the Policy Circular dated 31st January 2011 does not apply to a valid licence, already issued prior thereto. It was held that clarification issued by the Ministry of Commerce dated 31st July 2008 and the DGFT Policy Circular dated 24th March 2009 were issued prior to issuance of licence dated 15th April 2010 and extended the benefit of flexibility to import the alternative input/product mentioned in the SION and hence the subsequent circular issued after the grant of licence cannot be applicable to the goods imported under the licence. The CESTAT accordingly

held that the import of lactose against entry “sugar” listed in the DFIA dated 25th October 2011 issued against export of Metmitron is definitely not restricted by the Circular dated 31st January 2011. The CESTAT accordingly, held that the Respondents are entitled to the benefit of the Notification No.98/2009 – CUS in terms of the DFIA presented to the Customs and set aside the order of the Adjudicating Authority, Commissioner of Customs (Appeals). The Appellant being aggrieved by the impugned order has preferred the present Appeal.

2. Mr. Jetly, learned Counsel for the Appellant has submitted that the impugned order has arrived at an erroneous finding by placing reliance upon the judgment of the **Madras High Court** in the case of *Hoewitzer Organics Chemical Ltd Organic Chemicals Co. (Supra)*, as the facts therein were different from that of the present case. Mr. Jetly has submitted that the case decided by the Madras High Court was in relation to the said circular being issued subsequent to the date on which the licence was issued. In the present case the licence was

transferred on 18th February 2011 i.e. after the change in Policy by issuance of Circular dated 31st January 2011. Hence, the judgment of the Madras High Court would not be applicable to the facts of the present case. Mr. Jetly has contended that the change in Policy was known to the Respondents at the time when they had imported the input viz lactose and claimed the import to be duty free. The Respondents are not eligible to import lactose against DFIA according to the changed policy as lactose was admittedly not used as an ingredient in the export products. Mr. Jetly has accordingly submitted that the impugned order of CESTAT be set aside as it has erroneously held that the Respondents are entitled to the benefit of Notification No.98/2011 dated 11th September 2009, which provides for Duty Free Import Authorization.

3. Mr. Prakash Shah, learned Counsel appearing for the Respondents has supported the impugned order and has submitted that the policy circular issued by the DGFT will be valid only if it is issued prior to the date of issuance of the licence, the transferability of which is endorsed. Reliance is

placed upon Division Bench judgment of the Bombay High Court in the *Sonia Fisheries V/s. Union of India* reported in 1997 (90) E.L.T 22 (Bom.), paragraph 9 reads thus:

“Considering the aforesaid paragraphs of the Import and Export Policy, it is apparent that to the Petitioners quantity based Advance Licence was given on the condition of fulfilling their export obligations are stated in the Advance Licence. With regard to export there is no dispute. Paragraph 51 of the Export and Import Policy specifically provides that in respect of quantity based Advance Licences for which standard input-output norms have not been published, the quantitative norms will be as specified by the competent authority. On the basis of the said Policy after considering the Petitioners Application and after verifying the facts from them the Petitioners were given Advance Licence by reducing the quantity and also amount. One of the conditions of the said Licence is as under:

“(i) this licence shall be subject to the conditions in force relating to the goods covered by the licence as described in the relevant import Trade Control Policy Book, or any amendment thereof made upto and including the date of issue of the licence, unless otherwise specified.”

This term itself indicates that the relevant date for grant of Advance Licence is the date of issue of licence and the licence was only subject to the conditions relating to the goods covered by the licence or amendment thereof made upto and including the date of issue of the licence unless otherwise specified. Therefore, it cannot be said that even though the Petitioners have complied with their

obligation of export, when the Petitioners asked for endorsement of transferability on the basis of complying with the conditions of exporting the goods, the authority was entitled to withhold or suspend it and change the material terms of the licence, which permitted the petitioners to import duty free goods as per the advance licence. It cannot be said by any stretch of imagination that the norms published on 20th January, 1995 would have retrospective effect so as to permit the authorities to cancel or modify the Advance Licence granted prior to the said date, that too in cases where the the Petitioners have fulfilled their export obligations. Paragraph 51 of the Export and Import Policy itself provides that where norms are not fixed the quantity norms will be as specified by the competent authority and in the present case the Competent Authority after considering the Petitioners application has granted Advance Licence in September, 1993. That licence could not be modified on the basis of the norms passed on 20th January 1995. This would be totally arbitrary action. That norms cannot have any retrospective effect so as to adversely affect the rights granted to the Petitioners under Licence. The norms prescribed will take effect only from the date of its publication i.e. from 20th January 1995 and not from the earlier date.”

4. Reliance is also placed upon the judgment of the Supreme Court of India in *S. B. International Limited V/s. Assistant Director General of F.T.* reported in 1996 (82) E.L.T. 164 (S.C.), paragraph 10 reads thus:

“We are, therefore, of the opinion that the contention that a vested right accrues to an

applicant for issuance of advance licence on the basis of the norm obtaining on the date of application is unacceptable. The Scheme and the context militate against the contention. The fact that the policy is statutory in nature (delegated legislation) has no relevance on the question at issue. It would be wrong to equate the filing of an application for advance licence with the filing of a suit where it is held that appeal being a substantive right, the right of appeal inhering in the party on the date of filing of the suit cannot be taken away by a subsequent change in law.”

5. Mr. Shah has therefore submitted that the impugned order is justified in relying upon the Madras High Court judgment in the *Hoewitzer Organics Chemical Ltd Organic Chemicals Limited (Supra)* and holding that the subsequent Policy Circular dated 31st January 2011 does not apply to a valid licence, the transferability of which is endorsed thereon.

6. Having heard the arguments we are of the considered view that the issue of the Policy Circular being applicable provided it is issued prior to the date of issuance of licence is no longer *res integra*. We place our reliance upon the judgment of the Supreme Court of India in **S. B. International Limited (Supra)** and the judgment of the Division Bench of this

Court in **Sonia Fisheries (Supra)** which will apply to the facts of the present case. In a recent judgment of this Court in ***Commissioner of Customs (Export) V/s. USMS Saffron Co. Inc.*** reported in **2016 (344) E.L.T 161 (Bom.)**, it was held it is the DFIA Licence in question is material and where the DFIA does not contain any entry restricting saffron and the Licence Authority did not deem it proper to impose any liability, there was no violation of any of the conditions of the DFIA and the Notification No.98/2009 allowing the duty free import is applicable. In the present case it is an admitted fact that the DFIA Licence bearing endorsement of transfer was issued prior to the issuance of the Circular dated 31st January 2011 and hence, the Notification No.98/2009 dated 11th September 2009 was applicable in the case of the import of lactose. The CESTAT upon considering the facts of the present case is justified in arriving at the finding that the change in Policy would not be applicable to the licence issued prior thereto and hence the Respondents are entitled to the benefit of Notification No. 98/2009 – CUS, in terms of the DFIA present to the Customs.

We concur with the impugned order.

7. The present Appeal is dismissed with no order as to costs.

[RIYAZ I. CHAGLA J.]

[A. S. Oka, J.]