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

CUSTOM APPEAL NO.22 OF 2021

The Commissioner of Customs-II
JNPT, Custom House, Nhava Sheva
Raigad Maharashtra-400 707 … Appellant

Versus

Lucky Forms Pvt. Ltd.
Gala No.16, Samrat Mill Compound,
LBS Marg, Vikhroli (West),
Mumbai-400 079. … Respondent

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Mr. Jitendra B. Mishra a/w Ms. Maya Majumdar for the Appellant.
Mr. Vinit Dubey for the Respondent.

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CORAM : DHIRAJ SINGH THAKUR & ABHAY AHUJA, JJ.

DATE : 10 AUGUST 2022

P. C. :

. This is an appeal filed under Section 130(1) of the Customs Act 1962 against the Order dated 9 April 2019 passed by CESTAT, West Zonal Bench at Mumbai, whereby the Customs' Appeal No.226 of 2012 filed by the Respondent was allowed.

Briefly stated the material facts are as under :-

2 The Respondent is engaged in the manufacture of different types of paper products falling under Chapter 48 of the Central Excise Tariff Act, 1985. The Respondent on receipt of orders for export of mini ATM rolls from Overseas buyers, applied for grant of Advance Licenses for duty free import of thermal paper, which was to be used as raw material for export

of the ATM rolls. Based upon the application filed by the Respondent, the Office of the DGFT, Mumbai granted Advance Licenses in favour of the Respondent. The Advance Licenses issued in favour of the Respondent were governed by certain terms and conditions, some of which are reproduced hereinunder :-

> "An Advance Licence is issued to allow duty free import of inputs, which are physically incorporated in the export product (making normal allowance for wastage). In addition fuel, oil, energy, catalysts, etc., which are consumed/utilized in the course of their use to obtain the export product, may also be allowed under the scheme."
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> "Advance Licence is issued for duty free import of inputs, as defined in paragraph 4.1.3 subject to actual user condition. Such Licences are exempted from payment of basic customs duty, additional customs duty, education cess anti-dumping duty and safeguard duty, if any. However, the import for supplied covered under paragraph 8.2 (i) & (j) will not be exempted from the payment of applicable anti-dumping and safeguard duty, if any."
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> "Advance Licence and/or materials imported thereunder shall not be transferable even after completion of export obligation. However, the licencee will have the option to dispose off the product manufactured out of the duty free inputs once the export obligation is completed."

3 According to Notifications No.43/2002-Cus., dated 19 April 2022 and 93/2004-Cus., dated 10 September 2004, neither the Advance Licenses nor the material imported could be transferred or sold. The relevant clauses of the exemption, Notification No.43/2002-Cus., read with 93/2004-Cus., are also reproduced hereunder :-

> "1(v) that the export obligation as specified in the said licence (both in value and quantity terms) is discharged within the period specified in the said licence or within such extended period as may be granted by the Licensing Authority by exporting resultant products, manufactured in India which are specified in the said licence and in respect of which facility under rule 18 or sub-rule (2) of 19 of the Central Excise Rules, 2002 have not been availed."

> "1(vii) that the said licence and the materials shall not be transferred or sold."

The Advance licence also required that the import of goods be in accordance with Conditions 6 and 7, which are reproduced hereunder :-

> "(6) The exempt goods imported against this licence shall be utilized in accordance with the provisions of the Export Import Policy 2004-09 and the relevant customs Notification (No.93-2004-Cus., dated 1 September 2004) as amended from time to time."

> "(7) The Licence holder shall maintain a true and proper account of consumption and utilization of imported goods in the proforma given in Appendix 18 of the Handbook Vol-I 2004-09."

4 It is stated that the conditions of the Advance Licenses, the Foreign Trade Policy, as also exemption Notification No.43-2002-Cus., have been violated by the Respondent inasmuch as during the course of investigation, it was found that the Respondent M/s Lucky Forms Pvt. Ltd., had imported goods in the shape of Paper, Thermal Paper etc. at an aggregate assessable value of Rs.1,14,34,187/- involving a total import duty liability of Rs.64,72,389/- and cleared without payment of customs duty under 15 Bills of Entry which material was transferred or sold

without utilizing the same in the manufacture of export products, thus, violating its export obligations. It is also stated that the Respondent fulfilled its export obligations by procuring duty free materials from the local market by availing facility under sub-rule (2) of Rule 19 of the Central Excise Rules, 2002 in gross violation of the conditions specified by the exemption notifications and by misusing the the facility of duty free import under various Advance Licenses.

5 A show cause notice was issued to the Respondent and after considering its response, the Original Authority by virtue of the Order dated 23 December 2011, ordered the confiscation of the goods under Section 111(o) of the Customs Act 1962, providing an option to the Respondent to redeem the said goods on payment of redemption fine of Rs.15,00,000/-. The demand of Rs.64,72,389/- was also confirmed along with an equal amount as penalty and interest.

6 An appeal was preferred by the Respondent before the CESTAT, who by virtue of the Order impugned dated 9 April 2019 allowed the appeal on the ground that the Respondent had already achieved the requisite export obligation in respect of the license No.310272122 dated 1 June 2004 and further that the Respondent had also paid the essential excise duty along with interest in respect of the raw materials procured by it without payment of central excise duty. It further held that having duly complied with the export obligations, the Respondent could not have been saddled with the demands confirmed against it by virtue of the Order impugned.

7 Learned Counsel for the Appellant urged that the Tribunal in

passing the Order impugned had committed an error in not dealing with the issues, which had otherwise been dealt with in detail by the Original Authority. It was urged that the Tribunal had skirted the issue with regard to the violation committed by the Respondent of the express conditions of the Advance Licenses as also exemption Notifications bearing Nos.43/2000-Cus., and 93/2004-Cus., inasmuch as the raw materials imported by the Respondent had not been utilized for the manufacture of export products for fulfillment of their export obligations and sold them in the local market and thus misused the facility of duty free import allowed under various Advance Licenses and Notifications bearing Nos.43/2000-Cus. and 93/2004-Cus. It was also stated that the Respondent had utilized locally available materials for manufacture of goods for the purpose of fulfilling its export obligations, which would make the Respondent liable to pay customs duty along with interest as also penalty.

8 Learned Counsel for the Respondent, on the other hand, reiterated the stand as has been projected before the Tribunal.

9 We have heard learned Counsel for the parties and perused the material on record.

10 On a perusal of the Order impugned passed by CESTAT, it can be seen that the appeal preferred by the Respondent was allowed only on the ground that it had fulfilled its export obligations as was confirmed vide the letter dated 23 November 2005 issued by the Respondent. However, we find that the Tribunal has not at all dealt with the view expressed by the Original Authority in extenso as regards the manner, in which the goods imported under the export policy as also the terms and conditions of the exemption Notifications & the Advance Licenses were dealt with

contrary to their express conditions, which have been reproduced in the preceding paragraphs hereinabove and its impact on the Order passed by the said Authority as regards confiscation, duty liability, penalty and liability as regards interest in the backdrop of the judicial precedents relied upon by the said authority. Be that as it may, we set aside the Order impugned and remand the matter to the Tribunal for passing Orders afresh within a period of four months.

(ABHAY AHUJA, J.) **(DHIRAJ SINGH THAKUR, J.)**

RAJESH VASANT CHITTEWAN Digitally signed by RAJESH VASANT CHITTEWAN Date: 2022.09.06 12:23:25 +0530