IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

WEST ZONAL BENCH AT AHMEDABAD

COURT - I

Appeal No.C/139,140/2012-DB

(Application No.C/Others/15961,16479/2014)

Arising out of: OIO No.KDL/COMMR/23/2011-12, dt.31.03.2012

Passed by: Commissioner of Customs, Kandla

Appellant:

M/s VVF (India) Ltd., Shri Rustom Godrej Joshi

Respondent:

CC Kandla

Represented by:

For Assessee: Shri V.K. Jain, Shri Krishna Kumar, Ms.Dimple Gohil Advocates.

For Revenue: Shri Raju, Commissioner (AR)

CORAM:

MR.M.V. RAVINDRAN, HONBLE MEMBER (JUDICIAL)

MR. H.K. THAKUR, HONBLE MEMBER (TECHNICAL)

Date of Hearing: 30.10.14, 10.11.14, 18.11.14

Date of Decision: 04.12.2014

Order No. A/12211-12212 / 2014, dt.04.12.2014

Per: M.V. Ravindran

These two appeals are directed against Order-in-Original No.KDL/COMMR/23/2011-12, dt.31.03.2012.

2. The relevant facts that arise for consideration are that the appellant (hereinafter referred to as VVF) is having manufacturing facility and had applied for and granted advance licence for import of duty free raw material for consumption thereof for manufacturing of final product for export purposes. In pursuance such advance licences issued, the appellant imported consignment of Acid Oildeclaring the same as acid oil. On an intelligence gathered, the Revenue Department were of an impression that the appellant had actually imported Palm Fatty Acid Distillate (PFAD) which attracts duty and is not covered under the licences granted to the appellant and were also of the view that PFAD and acid oil are technically and commercially different products. The Revenue authorities visited the premises of the appellant herein and drew the samples of imported goods lying in stock and sent the same for analysis to Visakhapatnam. On receipt of the analysis report from KRCL (??) Visakhapatnam, who opined that the imported goods were not Palm Acid Oil, but were having characteristics of PFAD. Subsequently, the Revenue authorities recorded various statements of the responsible persons in the main appellants (VVF) factory. On conclusion of such investigation, a show cause notice was issued to the appellant on the ground that they had mis-declared the goods which were imported and the said goods were not permitted to be imported under advance licenses. The appellant herein contested the show cause notice on merit and limitation. They contested before the adjudicating authority that the documents which were filed by them before the authorities were for Acid Oil; which were conforming to the specification as given in BIS-IS 12029:1986; they also submitted that the advance licences which were procured by them was based upon such specification and the chemical examiners report also indicate that the goods which were imported were Acid Oilas per BIS. The adjudicating authority did not agree with the contentions raised by the appellant and confiscated the goods which were seized, finally assessed the Bills of Entry holding that the product can be considered as PFAD as against declared description of acid oil denying the benefit of exemption Notification No.93/2004-Cus, confirmed the demand of the duty along with interest and imposed penalties on both the appellants.

3. When the matters were listed for disposal, Revenue filed two miscellaneous applications No.C/Others/15561/2014 and C/16479/2014 for bringing on record the ullage report as well as other documents and additional facts for deciding the said appeals. The said contentions were pressed by the ld.Commissioner (A.R.). Ld.Commissioner submits that the said ullage reports and various documents are necessary for deciding the issue as it is the case of the Revenue that the said products which was imported as declared by the appellant, was not correct and the goods when they were loaded at the port of export, they were PFAD. Ld.Counsel appearing on behalf of the appellant contested the said applications on the ground that these documents were never a part of the show cause notice nor relied upon documents. It is his submission that Department cannot bring on record any additional documents which were not part of original investigation. It is his submission that the departmental authorities did not recover these documents at the time of investigation and these documents were surfaced after the matter was listed for final disposal on an application made by the appellant. He would submit that the said additional documents, on which reliance is placed being not a part of the record, should not be admitted.

4. In our considered view, on perusal of the applications made by the departmental representative and on a specific query raised from the Bench, were informed by the Commissioner (A.R.) that these documents were not the part of the investigation and were collected by the department subsequently after the adjudication took place and more specifically when the matter was listed before the Tribunal. We deprecate the kind of applications made by the Department for adducing additional evidences which were not the part of the original investigation. On the face of it, these two applications need to be dismissed. Be that as it may, we consider the documents which were filed by the Revenue and will address to the applications in this order subsequently.

5. Ld.Counsel appearing on behalf of the appellant, after taking us through the entire case record would submit that the adjudicating authority has erred in coming to a conclusion that there was mis-declaration on the part of the appellant. He would take us through the Order-in-Original and submit that the products which were imported by the appellant had been declared by them as acid oil and not as palm acid oil. It is his submission that the conclusion of the chemical examiner as has been relied upon by the Department is also in his favour in as much as the said the report state that the product is other than pam acid oil which is irrelevant as the appellant has never declared the product as palm acid oil. After taking us through the BIS standard for acid oil, he would submit that the standards as laid down by BIS has been complied with by imported products as tested by the chemical examiner. It is his submission the appellant had never declared their product as palm acid oil or PFAD. It is his submission that the chemical examiner has also come to a conclusion that the goods which are imported are not PFAD but are having characteristics of PFAD and such a conclusion supports the declaration made by the

appellant that the products are acid oil. The submission of the ld.Counsel is that the conclusion of the chemical examiner therefore does not establish any mis-declaration on the part of the appellant.

5.1 He would then take us through the chemical examiners report which has been relied upon by the Department. He would submit that the chemical examiner after analyzing the product for BIS standard, created 6 additional criteria relating to iodine value (IV), Peroxide value (PV), colour, kerotenoid, Aldehyde test and higher free fatty acid contents and has applied the same for differentiating palm acid oil and PFAD. It is his submission that such differentiation is wholly irrelevant as the distinction which is sought to be done by the chemical examiner is between palm acid oil and PFAD and not about the acid oil; and such distinction is also baseless as there is no technical literature/book or material referred to by the chemical examiner or Revenue to support their stand as to differentiation based upon the 6 new additional criteria. It is his further submission that even if the 6 additional criteria invented by the chemical examiner are considered as relevant differentiating factors, 5 of these factors are supporting of the product being acid oilrather than PFAD; they being IV, PV, Aldehyde, colour and high FFA contents. It is his submission that the product imported by them conform to the specification of these 5 additional criteria. It is his submission that the only factor to which the appellants products which are imported do not conform is regarding kerotenoid contents; it is his submission that the parameters of kerotenoid value are not appearing in any authoratitive technical book; in the absence of such parameters, the conclusion reached by the chemical examiner needs to be rejected which has been amply demonstrated by the appellant by producing opinion of two independent technical experts i.e. UDCT Mumbai and Hard Court Butler Technological Institute Kanpur It is further submission that the chemical examiners report is incorrect for the reason that the chemical examiner had analysed the product imported by the appellant with reference to the samples of PFAD procured from the market and also with the samples of acid oil prepared in his own laboratory. It is his submission that the samples which are produced in the laboratory of the chemical examiner cannot be equated with the goods which are procured by the appellant internationally and the samples of PFAD cannot be considered as correct samples as the said drawal of samples should have been witnessed by independent persons or the representative of the importer. In short, It is his submission that the opinion of the chemical examiner Visakhapatnam needs to be discarded and even if it is accepted, it does not say that the products imported by the appellant are not acid oil.

5.2 As regards the violation of the conditions of Notification No.93/2004, It is his submission the adjudicating authority has held that the appellant violated the condition (vii) of the said notification. After taking us through the history of various notifications issued by the Customs Department, he would take us through the amended as well as un-amended Notification No.93/2004-Cus dt.10.09.2004. He would draw our attention to the said condition (vii) of said notification and submit that the said condition talks about the consumption or usage of the imported goods and restrict transfer of sale of the imported material as such. He would draw our attention to the applications made by the appellant for getting advance licence and submit that the appellant had sought the licences from the DGFT

authorities by undertaking to export 3 different products for which they sought free import of acid oil. It is his submission that the appellant had utilized the duty free imported raw material for manufacture of distilled fatty acid, distilled Behemic/eurisic acid and low grade mixed fatty acid. He would then draw our attention to the orders placed by them to the exporter of such acid oil and submit that they had contracted for import of acid oil as it is known in the international market and that they have consumed the said material for manufacturing of export goods as mentioned hereinabove. He would then submit that the allegation of violation of condition (vii) is based on mis-reading of Notification No.93/2004-Cus. He would submit that the said notification merely lays down an actual user condition and prohibits sale or transfer of imported material as such and the appellant had never sold or transferred acid oil as such in to the domestic tariff area. It is his submission that after the export obligations were fulfilled, appellant consumed the imported duty free material for manufacturing of final products which were cleared into DTA. He would then take us through the condition (viii) in the said notification and submit that the said condition specifically prohibits the sale or transfer of imported material as such or converting the same. He would further add that the said condition (viii) is in respect of merchant exporter and not applicable to a situation like manufacture of exporter as is appellants case. It is his submission the reading condition (vii) & (viii) of the notification, the legislative intent seems to be clear which indicate that the Condition (vii) does not the imported material to be used only in export production and the said distinction has been ignored by the adjudicating authority in the impugned order. It is his submission that the requirement of using the imported raw material only in export production was a stipulation which existed in pre-decisor notifications like 149/95-Cus, 37/97-Cus, and 50/2000-Cus, and has been expressly removed while issuing Notification No.93/2004-Cus. It is his submission that the notification has to be read and interpreted on its plain term, is the law which has been settled by higher judicial fora. He would also submit that the reliance placed by the adjudicating authority on Para No.4.1.5 of the Foreign Trade Policy 2004-2009 and on a letter dt.31.10.2006 of the Joint DGFT is totally mis-placed in as much as this provision of the FTP was deliberately not incorporated in the Customs exemption Notification No.93/2004-Cus. It is his submission that the Central Government has powers for exempting the provisions of original policy is under Section 25 of Customs Act, 1962 and by exercising such power, the Central Government has relaxed the onerous condition laid down by Para No.4.1.5 of FTP 2004-2009. It is his submission that such relaxation has been issued by the Central Government of India after considering all the aspects of the law and the adjudicating authority is not empowered on sitting in judgment and question of power of Central Government in granting an exemption with a view to relax the rigours of policy provisions.

5.3 It is his submission that without prejudice to the various contentions, if at all an external aid was to be used for interpreting the notification, the best way is to reference to itself. He would submit that the adjudicating authority has failed to appreciate the principle of contextual interpretation as has been enunciated by the Apex Court in the case of Aphali Pharmaceuticals 1989 (44) ELT 613 (SC), Hindustan Aluminum Corporation Ltd (1981) 3 SCC 578 and Chinnaswamy Gopalam (1964) 2 SCC 88 applying the principle as has been laid down by the Apex Court, the provision of Condition No.VII of Notification No.93/2004-Cus has to be viewed in the context of provisions therein as also the corresponding

provisions of other two notifications and the difference in the language of the provisions/condition (vii) & (viii).

He would rely upon the following case laws:-

i) Dolphin Drugs (P) Ltd Vs CC Mumbai

2000 (115) ELT 552 (Tribunal)

ii) Galaxy Surfactants Ltd Vs CC (EP) Mumbai

2006 (202) ELT 495 (Tri-Mum)

iii) Standard Industries Ltd Vs CC Trichy

2001 (136) ELT 124 (Tri-Mum)

iv) Jay Engineering Works Ltd Vs CC Chennai

2003 (162) ELT 680 (Tri-Bang)

v) United Machinery Works (P) Ltd Vs CC Coimbatore

1995 (79) ELT 477 (Tribunal)

vi) Prakash Pipes & Industries Ltd Vs Collr.of Customs

1993 (68) ELT 779 (Tribunal)

5.4 He would submit that the co-ordinate bench of the Tribunal in the case of Unimark Remedies Ltd in Final Order No.A/1258-1262/2014, dt.21.07.2014 has interpreted the said Notification No. 93/2004-Cus in a manner which is in favour of the Revenue. He would then take us through the findings recorded by the Bench in Para 14, 15 and 16 of the said order and submit that the findings are based

upon various arguments put forth before the Bench. He submits that the arguments as to notification being issued for relaxing the condition of rigoruous policy was never made before the Bench in the case of Unimark Remedies hence on this question of law itself, the said order is distinguishable and the ratio laid down in that case would be based upon the facts and circumstances of that case.

6. Ld.Commissioner (AR) appearing on behalf of the Revenue, would submit that in order to promote export, Government of India comes out with various export promotion schemes to facilitate exporters. It is his submission that the main purpose of the scheme is to make the export competitive internationally and to ensure that the taxes and duties are not exported. In pursuance of such an export incentive, appellant had applied for advance licences under Chapter 4 of FTP which mandated duty free import of inputs which are physically incorporated in export products. It is his submission that generally the manufacturers of export goods are required to import inputs which are indicated in the standard input-output norms (SION). He would submit that the Government of India has placed tremendous faith in and exporters and facilitated them by allowing the import of inputs duty free as declared by the exporters; wherever no SION are fixed, assessee is permitted to declare the consumption ratio himself. After making these submissions, he would take us through the advance licences which have been procured by the appellant and the applications for. He would submit that the appellant had given the specifications of the acid oil as containing FFA 70 to 80%, TFM 94% min., M/V 4% max., and eurisic 20% (max). It is his submission that after making such requirement of the basic inputs to the Government of India, appellant placed an order for acid oil which was not having the same specification and more so, it had no reference with regard to Euricic or Behemic acid contents. He would submit that the appellants had sought the advance licences for export of Euricic / Behemic acid, distilled fatty acid, and low grade mixed fatty acid. He would submit that when the goods were imported, there was no analysis carried out as to the contents of Euricic acid, hence the entire modus operandii of the appellant was to import palm acid oil or PFAD in the guise of acid oil. He would then submit that the appellant had procured the licences by playing fraud and not bringing specifications given to DGFT to the notice of technical committee and has been procuring the goods which are not acid oil. He would submit that in the case of Aafloat Textiles (India) Pvt.Ltd. 2009 (235) ELT 587, Honble Supreme Court has stated that an act of fraud on Court is always viewed seriously and collusion of conspiracy is nothing but deprivation of rights of others in relation to property and would render the transactions void ab initio. He would submit that the said ratio will apply in the case in hand as the appellants conduct was fraudulent in obtaining the licence. It is his further submission that the goods which were imported were not conforming to the specifications as has been declared by the appellant nor is there any evidence that there was Behemic / Euricic acid in the goods imported. After taking us through the various technical literatures as to the contents of the goods, he would submit that content of C20 or C22 is indicator of non-existence in the palm oil in the goods which were imported by the appellant and Behemic / Euricic acid being C20/C22, could not have been manufactured by them from the goods which were imported. He would further submit that as per the ullage report dt.10.06.2006, the material loaded in tanks of PFAD; when the goods arrived at Kandla on 23.06.2006, the master of MV Chemrod Wing made a arrival notice where he declared arrival of PFAD which was subsequently changed and forged and the description of PFAD was

removed and replaced by description PAO and there is no signature of either of the parties on the corrections. It is his further submission that the reliance placed on the expert opinion by the appellant is not correct as the said expert opinion does not say eurisic / behenic acid can be made out of fatty acid not containing any traces of eurisic / behenic acid. It is his submission that the appellants have deliberately with an intention to deceive, have not included complete specifications in their licences which has been proved by entries in the Ullage report and various documents like Bill of Lading etc. It is his further submission that the chemical examiner at Visakhapatnam specifically has brought out this commission and omission and the appellant is not able to establish that the goods which were imported are acid oil. It is further submission that the condition (vii) of Notification No.93/2004-Cus is violated in as much as the said notification also includes the definition of material which would indicate that the material means which are required for manufacturing of resultant product. It is his submission that he has demonstrated that as to the goods which are imported could not have been used for manufacturing of resultant product which are exported. It is his submission that the judgment of the Tribunal in the case of Hindustan Lever Ltd 2012 (281) ELT 241 fortifies his submission wherein the ratio is the material imported should be capable of being used in the manufacture of export product. It is his submission that the appellant has manufactured split fatty acid and sold the same in DTA is violation of condition (vii) of Notification No.93/2004-Cus.

6.1 It is his submission that as to the claim that the fraud, if any, has been done by the shipping agent or CHA and they were not a party to it, Hon'ble High Court of Kerala in the case of Harish Chappa Hassan 2010 (250) ELT 518 (Ker.) has held that even if there is no evidence to show that the mis-declaration was done by the appellant deliberately, his complicity cannot be brushed aside in as much as he is the ultimate beneficiary of fraud. Subsequently, he would take us through the technical literature wherein he would point out that the PFAD and PAD, Behemic / Euricic acid are never found. It is his further submission that the statements recorded of the various persons like Nitin Rane, Mr.George, Tapan Ghosh and Dr.Gaikwad would indicate that they procured locally manufactured mustard oil for manufacturing of Behemic / Euricic acid and exported the same indicating that they are manufactured from the goods imported i.e. acid oil. He would submit that the conditions of FTP are part of the notification, is the ratio which has been laid down by the co-ordinate of the Tribunal in the case of Unimark Remedies. He would read the relevant paragraph for the purpose.

6.2 It is further submission that at all stages viz. from application of licence to availment of benefit of notification, the appellant has accepted the condition of EXIM Policy and hence he has violated the provision of Condition (vii) of Notification No.93/2004-Cus. It is his further submission that the claim of the appellant that the colour test is irrelevant which is incorrect as colour test is one of the tests which indicate that the quality of the product and the source from where it has been obtained and kreiss test has been considered as most valid test to come to a conclusion. It is his submission that kreiss test is always a valid test for coming to a conclusion as to the impurities. For this purposes, he would rely upon

the technical literature of Protocol for Testing of Ayurveda Siddha & Unani Medicines, manual of methods of analysis of foods. It is his submission that the appeal deserves to be rejected.

7. In rejoinder, ld.Counsel would draw our attention to the applications made by the appellant to DGFT authorities. He would submit that the advance licence which is in question in this case has not been cancelled and the said application specifically declare that if the contents of Behemic / Euricic acid is found short in the goods imported, it would be made good from the process carried out from indigenous sources, hence there is no mis-declaration. It is his submission that Kreiss test which indicate the colour of the product does not state specifically as to that the product can be of palm origin or PFAD; it is a test only to determine whether the colour of the imported goods noticed is due to what reason. He would refer to very same technical literature on which ld.Commissioner (AR) has relied upon and bring to our notice that the said Kreiss test is also used to determine oxidation of any oil. He would then refer to BIS standards and submit that the said standards indicate that palm based oil generally tend to get coloured due to long storage and time taken for transportation in the tank. He would again emphasize that the additional documents which are brought on record today by the ld.D.R., are of no consequence in as much as these documents were never filed by the appellant if in one and these documents were recovered from the appellant during the visit which was conducted at the time of investigation. It is his further submission that the chemical examiner had never stated in his report that the product imported and declared by the appellant as acid oil was not an acid oil but something else. He would submit that the samples show the characteristics of PFAD and they are not palm acid oil. He would submit that the appellant has never declared or imported palm acid oil or PFAD.

8. Considered the submissions made at length by both sides and perused the records. First, we advert to the miscellaneous applications.

9. The Revenue has moved two miscellaneous applications seeking to bring on record some additional evidence in the form of Ullage Report and some other shipment related documents and emails in respect of two consignments of the subject goods imported on the vessel M T Chemrod Wing. According to the revenue these documents prove that the goods imported vide vessel MT Chemrod Wing were not Acid oilas declared by the Appellant but were infact PFAD as claimed by the Revenue.

9.3 Rule 23 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 is the only provision under which such miscellaneous applications for additional evidence can be entertained which reads as under:

RULE 23. Production of additional evidence.

(1) The parties to the appeal shall not be entitled to produce any additional evidence, either oral or documentary, before the Tribunal, but if the Tribunal is of opinion that any documents should be produced or any witness should be examined or any affidavit should be filed to enable it to pass orders or for any sufficient cause, or if adjudicating authority or the appellate or revisional authority has decided the case without giving sufficient opportunity to any party to adduce evidence on the points specified by them or not specified by them, the Tribunal may, for reasons to be recorded, allow such documents to be produced or witnesses to be examined or affidavits to be filed or such evidence to be adduced.

(2) The production of any document or the examination of any witness or the adducing of any evidence under sub-rule (1) may be done either before the Tribunal or before such departmental authority as the Tribunal may direct.

(3) Where any direction has been made by the Tribunal to produce any documents or to examine any witnesses or to adduce any evidence before any departmental authority, the authority shall comply with the directions of the Tribunal and after such compliance send the documents, the record of the deposition of the witnesses or the record of evidence adduced, to the Tribunal.

(4) The Tribunal may, of its own motion, call for any documents or summon any witnesses on points at issue, if it considers necessary to meet the ends of justice.

It can be seen from sub-Rule (1) to Rule 23 that parties to the appeal shall not be entitled to produce any additional evidence before the Tribunal except in the following situations:

(i) if the Tribunal is of the opinion that any documents to be produced or any witness should be examined or any affidavit is to be filed to enable it pass orders or for any sufficient cause;

(ii) if the adjudicating authority or the appellate or revisional authority has decided the case without giving sufficient opportunity to any party to produce evidence on the point specified by them or not specified by them.

It can be seen that additional evidence can be accepted only if either the Tribunal calls for it or where the parties to the appeal were not given sufficient opportunity to produce the said evidence before the lower authorities. In the instant case the additional evidence is not being produced at the instance or directions of the Tribunal. Also, the Revenue has not been able to show that it was not given sufficient opportunities to produce these documents earlier. To permit the Revenue to produce fresh evidence almost five years after the issuance of show cause notice and that too after the adjudication of the matter, while hearing an appeal filed by the Appellant importer will not only be totally unprecedented and unheard of, but will militate against the basic and fundamental principle that an appeal must be decided within the four corners of the case as originally made out in the show cause notice. The said law is laid down by the Supreme Court in a catena of judgments (Ballarpur Industries vs CCE 2007 (215) ELT 489 and Toyo Engineering 2006 (201) ELT 513) that a show cause notice is the foundation of a case and it is not permissible to confirm a liability against the assessee on a ground and basis which is different from the one as proposed in the notice. It is equally well settled position in law that the validity of an order has to be judged solely on the basis of the reasons assigned therein and not on the basis of fresh reasons or evidence produced in an appellate proceedings, as held by the Supreme Court in the case of Mohinder Singh Gill & Anr vs Chief Election Commissioner reported in (1978) 1 SCC 405. It was held by the Apex Court that the validity of an order is not to be judged by supplementing it with fresh reasons as otherwise, an order which is bad in the beginning may, by the time it comes to court on account of a challenge get validated by additional grounds later brought out.

9.4 It is not the Revenues case that they were not given sufficient opportunity at the stage of investigation or adjudication to produce such evidence or that such evidence could not be produced as it was a part of some privileged communication or record which could not have been produced. It is settled law that additional evidence cannot be brought on record to fill up, lacuna or gap, if any, in the investigation as also that the Revenue cannot undertake investigation in a piecemeal manner. The application for additional evidence filed by the Revenue is therefore devoid of any merits and therefore cannot be allowed. However, since both sides have taken a lot of effort and trouble in taking us through these documents and each of them have offered diametrically opposite interpretation of these documents, we have examined the relevance and the probative value of these documents.

9.5 The application for additional evidence in para 6 states that the Ullage report which is now sought to be introduced as an additional evidence was always available on record and was not made a part of the relied upon documents in the instant case. It then states with reference to this document, which was available in one of the DRI files which the Respondent was reviewing, that a letter dated 17.9.2014 was now written to the shipping agent calling for the records. It is further stated in para 6 that these documents now being sought to be relied were not brought to the notice of the Customs nor submitted to the Customs and that the importer had very cleverly manipulated the documents and avoided verification of the same by the Customs at the time of investigation and that it is only while scrutiny of the documents by the Customs from the DRI file that the said Ullage report was noticed. This

argument is totally incorrect. All the documents required are always collected by the premier investigating agency like DRI and suffice to say that if they did get these documents, then there is improper investigation, we reject the contentions.

9.6 We now examine the email correspondence. From the email trail attached to the application for additional evidence, all of which is between third parties, it appears that M/s Wilmar, from whom the appellant has purchased the goods in question, had booked various cargo holds in vessel MT Chemrod which fact comes out from email dated June 5, 2006 from the shipping line to M/s J M Baxi the Shipping agents in India (Exhibit D-1 of the additional evidence). From the said emails it can be seen that till 6.6.2006 the information provided by the Japanese Shipping line to its agency in India.

All the documents now produced along with the application are documents exchanged by the Shipping agency with the Shipping Company in Japan on one hand and the Customs on the other hand, yet the Commissioner, seeks to draw an adverse inference against the importer Appellant, and even goes to the extent of alleging without any basis or evidence that the manipulation and description must have been done at the instance of the importer. We find these suggestion and allegations to be totally baseless and presumptuous.

9.7 In the application for additional evidence filed by the Revenue it has been contended that the vessel arrival declaration which have been annexed as Exhibit A-1 and A-2, show manipulation as in one of the arrival reports. It is stated in the application that 2000 metric tonnes of PFAD was declared as arrived through vessel MT Chemrod, and in the said arrival report the description was corrected by hand and instead PAO was mentioned therein. While this change in description could only have been explained by the Shipping Agents, it is very likely that an incorrect description of the product had been corrected by the shipping agent, by applying white ink and writing the description PAO in hand. The fact that such a change was done by the Shipping Agent is not disputed. It is also not in dispute that J M Baxi., was the authorized agents for the shipping line and were therefore entitled to make corrections. We fail to see how an inference of forgery or manipulation of document can be reached when undisputedly the corrections were made by the shipping agency itself and not by the importer or any unauthorized third party. It is not as if every act of putting white ink is an act of manipulation or forgery, if the white ink is put to correct a mistake and is done by the author of the document or by a person duly authorized by that person, the same can only be construed as a correction and not as a manipulation or forgery.

9.8 In view of the above it is held that the application for additional evidence cannot be entertained in terms of the provisions of Rule 23 of the CESTAT Procedure Rules and that even otherwise the additional evidence does not further the case of the Revenue.

10. Insofar as the case on merits is concerned, demand for customs duty has been confirmed by the impugned order on the following two counts:

(a) 3500 MT of the goods imported vide vessel MT Pacific Sound and MT Chemroad Wing, were mis-declared as Acid Oil when they were in fact PFAD; and consequently the benefit of duty exemption flowing from Advance Licence which covered only Acid Oilwas not available.

(b) 5217.650 MT of Acid oil imported against Advance License had been utilised for manufacture of goods which were cleared for home consumption before fulfillment of the export obligation in violation of Condition (vii) of Exemption Notification No.93/2004-Cus dated 10.09.2004.

In so far as the first issue of alleged mis-declaration of the imported goods is concerned, the Appellant had declared the imported goods as Acid Oilwhile according to the Revenue the same were PFAD. In support of its contention the Revenue has primarily placed reliance on the test report of the Chemical Examiner, Visakhapatnam; his technical opinion; report of the Chemical Examiner, Kandla; as also statements of some of the Appellants employees.

10.1 The Appellant has submitted that the report of the Chemical Examiners and the technical opinion of the Chemical Examiner, Visakhapatnam, if read in their entirety do not establish a charge of mis-declaration and in fact prove that what had been imported was Acid Oil. It is not in dispute that BIS 12029-1986 lays down the specification for Acid Oil. It is also not in dispute that the results of the test undertaken by both the Chemical Examiners showed that the parameters of the products tested matched with that of Acid Oil. Neither the notice nor the impugned order have assigned any reason whatsoever for holding that the goods imported had been mis-declared as Acid Oil.

10.2 The entire evidence which has been relied upon in the notice in the form of the test results of the Chemical Examiner and the opinion of the Chemical Examiner, Visakhapatnam proceed on the presumption that the goods were declared by the Appellant as Palm Acid Oil and that they were required to examine as to whether what was imported was Palm Acid Oil or not. None of the Chemical Examiners have in their test reports examined and opined on the issue whether what had been imported was Acid Oilor not.

10.3 It is not in dispute that, Acid Oil is a by-product that arises in the process of chemical refining of any oil. On the other hand, Palm Acid Oil is specie in the genus of Acid Oil and covers only such Acid Oil which arises in the chemical refining of palm oil. As such the test results and the opinion of the Chemical Examiner are totally irrelevant to the dispute in hand as the same have been issued on the mistaken presumption that what was required to be examined was whether the goods imported were Palm Acid Oil or not. The adjudicating authority has in the impugned order refused to take cognizance of this error on the ground that the Appellant had raised the said contention only in the course of adjudication and not during investigation. We find this reason to be totally unacceptable as the Commissioner of Customs., Kandla while adjudicating the case was not acting as an Appellalte authority but as an adjudicating authority. A defense set up by a noticee cannot be rejected or brushed aside merely for a reason that the same was not put forth before the investigating agency. The stage of investigation is not a stage for making submissions. The stage of adjudication is the first stage where a noticee is called upon to make his submissions and to produce evidence in support of his submissions. The adjudicating authority is under an obligation to take on record the submissions made by the noticee as also the evidence produced by him and then come to a conclusion after examination in entirety along with evidence on record. The adjudicating authority cannot shut out or reject a defense merely because the investigating agency was not appraised of such a defense. On this short ground alone the order of the Commissioner needs to be set aside as there is, in effect no answer to be found to the appellants defense that the evidence on record does not dispute that the goods imported answer the description Acid Oil, as declared in the Bill of Entry. None of the reports or opinions relied upon in the notice say categorically that the goods imported were other than Acid Oil. An opinion that they were other than Palm Acid Oil is totally irrelevant as the Appellants never declared or claimed the goods to be Palm Acid Oil. The further opinion that the goods were found to have characteristics of PFAD is irrelevant as it is knowledge that Acid Oils and PFAD have the same characteristics. The chemical examiner, whose opinion forms the bed rock of Revenues case has himself considered that PFAD and Palm Acid Oil (which is one type of Acid Oil) are the same products obtained through two difference processes . It is therefore obvious that these two products will have the same characteristics. In the impugned order, it is noticed that the adjudicating authority has held that the report of chemical examiner has stated FFA content in terms of Palmetic, hence the Acid Oil imported could be Palm Acid Oil. In our view, this finding of adjudicating authority is baseless and incorrect in as much as from the technical literature produced, it is very clear that FFA content in oil is measured in terms of Palmetic or Steeric. The technical literature produced do not state that the measurement of FFA in terms of Palmetic is confirmatory of the oil being palm based. The show cause notice in the very first paragraph records and accepts that PFA and Acid oil fall under the same tariff classification and attract then same rate of duty. This being the accepted position, the conclusion in the opinion of the chemical examiner that the goods in question were other than palm acid oil and that they had the characteristic of PFAD are both irrelevant and both insufficient for drawing an inference that the goods were other than Acid oil as declared on the bill of entry and as covered by the advance licence. The finding of mis-declaration and the further finding that the goods imported were not covered by the description of the licence are therefore unsustainable.

10.4 The Learned Commissioner AR appearing for the Revenue has contended that the purchase order placed by the Appellant did not refer to the very same specification which was spelt out in the

application filed before the Norms Committee and that on import the goods were not tested to ascertain whether the same had enough content of Euricic acid, so as to meet the export obligation. This contention of the Revenue is not only irrelevant but also incorrect inasmuch as in the Application filed with the Norms committee the Appellant had specifically stated in the Application itself that they may use indigenous inputs to fulfill the export obligation for Euricic acid if the Euricic acid in Acid oilwas not sufficient to meet the export obligation. The endorsement to this effect appears in Page 149 of paper book-1. The same reads as under:

We may be using the indigenous inputs if necessary to some extent if:

a) Any delay in procurement of acid oil

b) depending upon Erucic content in the acid oil (Max. Erucic content is 20%).

10.5 In any case there are 3 export products viz., Distilled Erucic Acid/Benenic Acid, Distilled fatty Acid and Low Grade Mixed Fatty Acid which were to be manufactured from the imported Acid Oil. Further in the course of investigation itself the Managing Director of the Appellant Company had explained that Acid Oil exported from Malaysia was likely to be a mixture of Acid Oils while Dr. Gaikwad has in his cross examination dated 17.3.2011 clarified that Acid Oil is a by-product and sold at a very cheap value and only parameters such as FFA content, Moisture and Saponifiable Matter are specified while trading this product. Insofar as the question of testing of imported goods is concerned, the mere fact that these consignments were not tested by the Appellant cannot be a ground for drawing any adverse inference against the Appellant and suggesting that the specification of the imported goods may not have been in terms of the licence. It is settled law that burden of classification/valuation/determining the correctness of the exemption claim is on the Revenue and that if for this purpose the product was required to be tested; the burden in respect of the same was on the Revenue. In the absence of their being any evidence to show that what had been imported did not meet the parameters specified of the inputs in the licence, no adverse inference could be drawn against the Appellant. The submission of the learned AR that the goods actually ordered and imported by the Appellant were different from the goods in respect of which an application for licence was made. In our view this submission is totally irrelevant, as whatever may been the description of the inputs in the application, the licence as issued to the importer described the inputs as acid oil and also prescribed certain technical specification, all of which are admittedly met. It is significant that the licence that was issued to the Appellant was not containing the same description as claimed in the application for issue of licence. What was requried to be seen was the description on the licence and not the description on the application. If the Customs authorities felt that the licensing authorities had been mis-lead and the licence had been obtained through mis-representation as is now being suggested by the learned AR, the only course of action open to Revenue was to have brought this fact to the notice of the licencing authority, whereupon the licensing authority would examine whether or not there was any mis-representation in obtaining the licence. It is significant that in this case such reference was indeed made

to the licensing authority as recorded in the Show Cause Notice. The Licensing authority apparently did not find any substance in the complaint made by the Customs and therefore chose not to suspend, cancel or amend the licence in question even though some action was apparently taken by the licensing authority in respect of some other licences which are not the subject matter of the present dispute. Thus, the licence in question was valid at the time of import and has not been suspended, cancelled or annulled by the licensing authority notwithstanding the Customs intimation to them of an alleged mis-representation of facts. If the licensing authorities who are alleged to have been mis-lead themselves do not feel so, it is not open to the Customs authorities to take it upon themselves to assume such mis-representation to a third party and take action on the assumption that licence has been obtained by mis-representation. The law on this issue is now clearly settled by a catena of judgements, starting from East India Commerce, Sneha Sales Corporation, Sampatraj Duggar and Titan Medicals. It may be noted that in Sneha Sales Corporations case a licence was cancelled ab initio by the licensing authority and yet the Court held that the imports already made under a licence which came to be subsequently cancelled were not invalidated by virtue of a subsequent cancellation of the licence. Applying this principle of law to the facts of the present case, we hold that as long as the goods imported by the Appellant answer the description of the goods as given in the licence and as long as the licence remains valid and subsisting, the Customs authorities are obliged to accept the licence. The Customs authorities are not entitled to go beyond the licence and assume mis-representation of facts based on their interpretation of the licence application. We also find that there is no evidence on record to show that the goods imported by the Appellant did not contain eurisic / behenic acid. Even the sum total of various ingredients as contained in the opinion of the chemical examiner do not suggest that there was no Behemic / Euricic acid in the acid oil. It is significant that in the application itself the Appellant had stated that any shortfall in the content of Behemic / Euricic acid will be made good by use of indigenous material. The licence itself laid down an upper cap of 20% content without providing for lower cap. Therefore, as long as the Euricic acid contained in the imported consignment did not exceed 20%, it cannot be argued that the licence did not cover the goods.

10.6 The Learned Commissioner AR has also contended that the goods imported may not be of the specified description, as FFA% in the goods imported on testing were found to be between 81.48 to 91.23 % whereas it should have been between 70 to 80%. This contention is also untenable inasmuch as while in the application for grant of the licence the Appellant had stated that Acid oil would be such which had FFA 70-80%, however the licence which was issued to it as appearing on Page 229 Paper Book-I merely specifies that the item for import is Acid oil, without there being any specification as to the quality and the amendment sheet thereto which is at Page 228 states that the item to be imported under the licence is Acid Oil; Contents: TFM 94%, M/V 4%; Euricic Acid 20% max. The licence issued to the Appellant did not specify FFA as a limiting factor, unlike what has been argued by the Learned Commissioner AR.

10.7 The Learned Commissioner AR has also contended that Appellant could not have used any product of Palm origin for manufacture of Euricic Acid as oils of Palm Origin do not contain any Euricic Acid. What the Appellant had ordered for and imported was Acid Oil and not Palm Acid Oil as has been presumed. The Managing Director of the Appellant Company has in his statement, which the notice

itself has relied upon, clearly stated that the Acid Oil exported from Malaysia was likely to be a mixture of different Acid Oils which are stored together in a common storage tank. It is for this precise reason that while applying for licence on ad-hoc norm basis, the Appellant categorically stated that indigenous material may be used for fulfilling the export obligation for Euricic Acid, depending upon the Euricic Acid content in the Acid Oil imported.

11. Insofar as the second issue is concerned it is the Revenues contention that as Exemption Notification No.43/2002-Cus dated 19.4.2002 stipulates that exemption from payment of customs duty would be extended to goods imported into India against an Advance licence/authorization, issued in terms of para 4.1.1 of the Exim policy/Para 4.1.3 of the Foreign Trade Policy, all the conditions of the Exim/Foreign Trade Policy (FTP for short) become applicable to the Customs exemption Notification. It has been contended by the revenue that the stipulation in Para 4.1.5 of the FTP to the effect that an Advance licence/authorization holder will have the option to dispose of the resultant products manufactured out of duty free imports, once the export obligation is completed will also have to be read into the customs exemption notification. Accordingly, if an Advance licence/ authorization holder disposes of the resultant final product in the domestic market before completion of the export obligation it would tantamount to a violation of the FTP as also of the customs exemption notification and customs duty would be recoverable

11.1 The Appellant has submitted that the notification granting exemption from payment of duty to advance licence/authorisation holder is issued in terms of Section 25 of the Customs Act, 1962, which empowers that the Central Government to grant exemption either absolutely or subject to such conditions as may be specified in the notification to goods of any specified description, from the whole or a part of the customs duty thereof. It is in exercise of the powers that the Central Government has exempted to a manufacturer-exporter from onerous and stringent conditions of para 4.1.5 of the FTP regarding the utilisation of the imported duty free material for manufacture of goods to be cleared in the Domestic Tariff Area only after fulfillment of export obligation. This position clearly emerges if one compares condition (vii) and (viii) of Notification No.93/2004-Cus dated 10.9.2004, the notification with which we are concerned in the present proceedings. The said two conditions are being reproduced herein below for ease of reference.

(vii) that the said licence and the materials shall not be

transferred or sold;

(viii) that in relation to the said licence issued to a merchant

exporter, -

(a) the name and address of the supporting manufacturer is specified in the said licence and the bond required to be executed by the importer in terms of condition (iii) shall be executed jointly by the

merchant exporter and the supporting manufacturer binding themselves jointly and severally to comply with the conditions specified in this notification; and

(b) exempt materials are utilised in the factory of such supporting manufacturer for discharge of export obligation and the same shall not be transferred or sold or used for any other purpose by the said merchant exporter.

It can be seen from the above, that a merchant exporter who gets his goods manufactured from a supporting manufacturer is barred from using the duty free material for purposes other than discharge of the export obligation while for a manufacturer-exporter there is no such stipulation. The only stipulation qua a manufacturer-exporter is that the said license and materials should not be transferred or sold. It is not the Revenues case that this condition has been violated.

11.2 It is relevant to note here that the Central Government has been for the last at least 15 years been issuing three separate sets of exemption notification for advance licence/authorization holders, who obtain the licence for effecting physical exports; deemed exports and in respect of advance licence for annual requirement. Each of these notifications have separate set of conditions and stipulations with regard to utilisation of the duty free imported raw material.

It is seen that under Notification No.112/2009-Cus dated 29.9.2009 the Central Government has done away with the earlier stipulation of utilising the duty free imported goods only for manufacture of goods which are to be exported or as replenishments thereof, in a case where advance licence had been issued for deemed exports. The said Notification as in the case earlier Notifications governing manufacturer-exporter importing for physical exports only provides that the authorization shall not be transferred and material shall not be sold. Similar relaxation has been extended even to merchant exporters in case of physical exports vide Notification No. 96/2009 dated 11.9.2009. It is clear that the Central Government has deliberately been issuing exemption Notifications under the Advance license scheme with different stipulations and has in some cases relaxed the stipulation in para 4.1.5 of the FTP with respect to utilization of the duty free imported material.

It is also relevant to note that the earlier notifications viz., Notification No.149/1995-Cus dated 19.9.1995; Notification No.31/1997-Cus dated 1.4.1997, etc, had a specific clause even qua a manufacturer exporter to the effect that exempted material shall not be disposed of or utilised in any manner except for utilisation and discharge of export obligation before the export obligation under the said license has been discharged in full. Subsequently the Central Government has consciously and deliberately relaxed this condition with respect to advance license for a manufacturer- exporter. It is settled law as laid down by the Apex Court in the case of Commissioner of Trade Tax vs Kajaria Ceramics Ltd that were Notification are issued under the same section and for the same purpose and are a part of

a chain of progress without there being any overlap, then for the purpose of resolving the ambiguity the contents of the previous or subsequent notification can be looked into. The ratio laid down by the Apex Court applies in all fours to the facts of the present case as the Advance Licence Notifications are also a part of a chain of notification issued from time to time without any overlap, and accordingly the difference in the language of the Notification over a period of time has to be taken note of and given effect to.

11.3 A long line of decisions of this Tribunal have been cited by the Learned Counsel for the Appellants to contend that a prohibition against transfer or sale of duty free imports does not prohibit an importer from using the duty free material for domestic production. The decisions of the Tribunal are the following:

i) Dolphin Drugs Pvt Ltd vs CC

2000 (115) ELT 552 (Tri)

ii) U-Foam Pvt Ltd vs CC

2003 (154) ELT 633 (Tri-Chennai)

iii) Vorin Laboratories Ltd vs CC

2004 (168) ELT 107 (Tri-Chennai)

iv) Standard Industries Ltd vs CC

2004 (168) ELT 107 (Tri-Mumbai)

v) Jay Engineering Works Ltd vs CC

2003 (162) ELT 680 (Tri-Bang)

vi) Galaxy Surfactants Ltd vs CC

2006 (202) ELT 495 (Tri-Mum)

vii) Jindal Drugs Ltd vs CC

2007 (214) ELT 37 (Tri Mum)

viii) Areva T & D India Ltd vs CC

2009 (242) ELT 421 (Tri-Chennai)

ix) Global Exim vs CC

2010 (253) ELT 417 (Tri-Mum)

A contrary view taken by the Mumbai Bench in the case of Unimark Remedies Ltd in final Order No.A/1258-1262/14/CSTB/C-I dated 23.4.2014 was brought to our notice by the Counsel for the Appellant as well as the ld.A.R. The order of the Tribunal in Unimark Remedies Ltd. distinguishes the long line of decisions of the Tribunal cited by the importer in that case, only the ground that in those decisions the Tribunal had not looked at and considered the implications of condition in para 4.1.5 of the foreign Trade Policy. The said para 4.1.5 is extracted in para 13 of the Tribunals order. The Tribunal in the case of Unimark Remedies has proceeded on the premise that the provisions of para 4.1.5 prohibits use of duty-free imported inputs in production meant for indigenous market, except when the export obligation has already been fulfilled. It is not in dispute that the Exemption Notification No.93/2004-Cus does not contain any such prohibition, at least insofar as the manufacturer-exporter is concerned. The interesting question which therefore arises in this case is whether the provisions of para 4.1.5 can be read into and incorporated as a condition of exemption under Notification No.93/2004-Cus. In our view, the answer to this question is clearly in the negative. This is for the reason that the Exemption Notification No.93/2004-Cus is a notification issued under the exempting power of the Central Government, which is overriding in nature and therefore eclipses the more onerous and burdensome provisions of the Policy. One cannot overlook the fact that an Exemption Notification is issued by the Central Government with a view to give effect to and implement the policy of the government, as contained in the Foreign Trade Policy. By virtue of the exempting power available to the Central Government under Section 25 of the customs Act, 1962, it is always open to the Central Government to relax any obligation or condition of the Policy. To illustrate, a statutory document such as the Customs Tariff Act, 1985 may provide a rate of duty of 20% for a particular product but the Exemption Notification may exempt the same product from entire duty. Even though the Schedule to the Customs Tariff is a statute enacted by the Parliament, the Central Government is empowered by statute to grant exemption from duty by issuing a notification. In other words, any statutory obligation can be relaxed by the Central Government while exercising the powers conferred upon it by the statute

to grant exemption under Section 25 of the Customs Act. It is therefore natural for an Exemption Notification to contain provisions which are less onerous compared to the original Policy. The difference between the provisions of the Exemption Notification and the Policy (or the statute for that matter) cannot be regarded as a situation of conflict between the Policy and the Notification. Coming to the facts of the present case, it can be seen that insofar as a manufacturer-exporter is concerned, the Exemption Notification was unambiguous in providing in clause (vii) that the imported material was not permitted to be transferred or sold. This clause does not prohibit use of such duty-free material for manufacture of finished goods or domestic clearances. Clause (viii) of the very notification does contain such a prohibition, but only for a licence issued to a merchant-exporter. The distinction between clause (vii) and clause (viii) is clear and without ambiguity. The Central Government, while issuing the notification, chose to prescribe two separate and distinct conditions for two kinds of licence holders; manufacturer-exporters and merchant-exporters. Clause (vii) applies to manufacturer-exporters while clause (viii) applies only to a merchant-exporters. In regard to a manufacturer-exporter, the Central Government did not choose to incorporate the prohibition of the kind contemplated in para 4.1.5 of the Policy, though in regard to a merchant-exporter such a prohibition has been incorporated. It is not open to the Revenue to question this deliberate decision of the Central Government before the Tribunal. The Customs authorities are clearly bound to follow the provisions of the Customs Notification issued under Section 25 of the Customs Act, 1962. While acting as such, such Customs authorities are not justified in applying a restriction which has been consciously and deliberately relaxed by the Central Government while issuing the Notification. The order of the Tribunal in Unimark Remedies case does not deal with the overriding effect of an exemption notification. It also does not deal with the difference in the language of conditions of clauses (vii) and (viii) of the Notification. Even the legislative history in the form of various other notifications issued by the Central Government from time to time to implement the duty exemption scheme was not brought to the attention of the Tribunal. The said decision of the Tribunal is, therefore, no authority for the propositions that are being considered by us in this matter. It is settled law that a judgement is a binding precedent only for the proposition which have been urged, considered and decided by it. A judgement has no precedentiary value on a proposition which has never been urged or decided by the Tribunal (as held in the case of CCE vs Fiat India Pvt Ltd 2012 (283) ELT 161 and Sneh Enterpriese vs CC 2006 (202) ELT 7 (SC). Such an order is to be considered as rendered sub silentio and is therefore not a binding precedent.

11.4 For the aforesaid reasons we hold that the benefit of duty exemption under Notification No.93/2004 was wrongly denied to the subject goods and the finding that there was a contravention of condition No.(vii) of the said Notification is totally incorrect.

12. We accordingly hold that the goods imported by the Appellant were covered by the description of the licence produced by the Appellant and there was no contravention of condition (vii) of the Notification No.93/2004-Cus in using the goods for domestic production.

The alternative contentions of the Appellant that the material was imported as replenishment material in respect of another license held by it where under it had already fulfilled the export obligation is not being examined as the Appellants are entitled to succeed on its first entitlement itself as also on various issues.

The demand for duty, interest and penalties as also the order of confiscation are consequently set aside.

The Appeal of the Appellant company is allowed. Consequently the Appeal filed by its Managing Director against imposition of penalty on him is also allowed.

(Pronounced in Court on 04.12.2014)

(H.K. Thakur) (M.V. Ravindran)

Member (Technical) Member (Judicial)