

(1996) 03 OHC CK 0001

In the Orissa High Court

Case No : Writ Petition No's. 2022 and 3586/95

Raj Exports

APPELLANT

Vs

National Aluminium Co. Ltd.

RESPONDENT

Date of Decision : 01-03-1996

Acts Referred:

Central Excise Rules, 1944 — Rule 12(1), 13(1), 191A, 191B, 56A
Customs Act, 1962 — Section 25, 25(1), 74, 9(4)
Customs Tariff Act, 1975 — Section 3

Citation : (1996) 87 ELT 349

Hon'ble Judges : Susante Chatterji, Acting C.J.; D.M. Patnaik, J

Bench : Division Bench

Advocate : G. Ramaswamy, S.S. Das and A. Dutt, for the Appellant; B.M. Patnaik, I. Mohanty, P.C. Mohapatra, S. Mohanty, P.K. Chowdhury, B.K. Sahoo, Govind Das and S.K. Padhi and SCGSC, for the Respondent

Judgement

1. Both O.J.Cs 2022/95 and 3586/95, as suggested and agreed by the learned lawyers for the respective parties, have been considered together, O.J.C. No. 2022/95 is at the instance of Fair Exports Private Ltd. and its Director and Shareholder Mr. Sunil Maheshwari against the National Aluminium Co. Ltd., Assistant Collector of Customs, D. D. Foreign Trade and M/s. Hindustan Lever Ltd. praying, inter alia :-

To admit the writ petition and issue a RULE NISI calling upon opposite parties to show cause as to why the goods imported against the licences bearing Nos. 3390229 dated 30-6-1993 and 3390244 dated 8-7-1993 or to be imported against licences Nos. 3390218, 3390216 and 3390214 shall not be given duty free clearance forthwith and if opposite parties fail to show cause or show insufficient cause make the said Rule absolute;

And

Issue a writ in the nature of mandamus or any other appropriate writ, order or direction directing the opposite party No, 2 to give duty free clearance of the

goods imported against the value based advance licence Nos. 3390229 dt. 30-6-1993 and 3390244 dated 8-7-1993 or to be imported against licence Nos. 3390218, 3390216 and 3390214;

And

In the alternative issue an appropriate writ, order of direction to opposite party No. 1 to forthwith transfer valid transferable licence to the petitioner acceptable to opposite party No. 2 in lieu of the licence bearing Nos. 3390216, 3390244, 3390214 and 3390229 transferred earlier;

And

In the alternative issue writ in the nature of mandamus and/or any other appropriate writ, order or direction commanding the opposite party No. 1 to make payment of any duty that is liable to be paid by the petitioners and/or their agents under the aforesaid five licences towards the goods imported;

And

Issue a writ in the nature of mandamus or any other appropriate writ, order or direction commanding opposite party No. 3 to extend the validity of the licences bearing Nos. 3390218, 3390216, 3390244, 3390214 and 3390229;

And

Issue a writ in the nature of certiorari or any other appropriate writ, order or direction quashing the letter issued by opposite party No. 2 dated 20th March, [1995] bearing No. F. No. S.16-DESC/6724 (Imp)/95 GR;

And

Order exemplary cost against the opposite parties and in favour of the petitioner;

And

Grant such further relief/reliefs as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case.

O.J.C. No. 3586/95 is at the instance of M/s. Raj Exports, a partnership firm represented by its Partner Jaspal Singh against National Aluminium Co. Ltd., Assistant Collector of Customs, Kandla Port, D.C. Foreign Trade, Assistant Collector of Customs (A), Vishakapatnam and Fair Exports Private Ltd. seeking the reliefs as follows :-

To admit the present writ petition and issue a RULE NISI calling upon opposite parties to show cause as to why the goods imported against the licence bearing Nos. 33902.18, 3390216 and 3390214 shall not be given duty free clearance forthwith and if opposite parties fail to show cause or show insufficient cause make the said rule absolute;

And

In the alternative issue an appropriate writ, order or direction to opposite party No. 1 to forthwith transfer valid transferable licence to the petitioner acceptable to opposite party Nos. 2 and 4 in lieu of the licence bearing Nos. 3390218, 3390216 and 3390244 transferred earlier;

And

In the alternative issue writ in the nature of mandamus and/or any other appropriate writ, order or direction commanding the opposite party No. 1 to make payment of any duty that is liable to be paid by the petitioner and/or their agents under the aforesaid licence towards the goods imported;

And

Order exemplary cost against the opposite party and in favour of the . petitioner;

And

Grant such further relief/reliefs as this Hon"ble Court may deem fit and proper in the facts and circumstances of the case.

2. It is stated in details by Fair Exports Private Ltd. that it has purchased licences bearing Nos. 3390218, 3390216, 3390244, 3390214 and 3390229 from opposite party No. 1, National Aluminium Company Ltd. (hereinafter referred to "NALCO" for the sake of brevity) in order to import caustic soda lye, duty free to the extent of Rs. 7,40,67,482. The said licences were alleged to be endorsed as transferable by opposite party No. 3, D.G., Foreign Trade, who is the licensing authority empowered under the Import Export Policy to endorse the licence. Duty-free clearance of goods against such advance licences are stated to be in the nature of export incentives granted to an exporter, instead of giving cash incentives or any other duty/excise exemption or any concessions of import duty on imported raw materials. Under the scheme of the policy such advance licence represents a benefit to an exporter which can be translated in tangible terms. In the present case licence was granted to opposite party No. 1 who in turn by selling the same and having it endorsed by opposite party No. 3 D.G., Foreign Trade, has received its value and thus availed for itself the export benefit. In the given circumstances, the remedy for any defect in the procurement of any licences and/or transfer thereof, is that the duty ought to be strictly recovered from NALCO. As far as the petitioners are concerned, they are bona fide purchaser of the said licences and have purchased the same on the representation of opposite party No. 1 (NALCO) and opposite party No. 3 (D.G., Foreign Trade) and as such, goods imported against the said licences cannot be withheld by the Custom authorities. There are allegations that the clearance of goods have been withheld purportedly on the ground that opposite party No. 1, NALCO has availed of Modvat concessions under the excise rules and thus could not transfer the said licences in terms of para 67 of the import export policy. It is placed on record that admittedly the entry of the said concessions have been reversed and duly accounted for. In the said circumstances, there is no subsisting

defect in the transfer of the licences and as such, goods imported against the same ought to be cleared.

3. An alternative case has been made out that in any event NALCO, opposite party No. 1, is liable to provide the petitioners with valid licences acceptable to custom authorities for the import of goods for consideration which has already been paid by the petitioner-company. It would be highly unreasonable, as submitted, if the petitioner-company is required to pay any sum in addition to what it has paid as consideration for the licences in question.

4. The aforesaid writ petition is seriously opposed by opposite party No. 2, Assistant Collector of Customs, Apprising Group-VII, by filing a comprehensive affidavit. NALCO has filed its own affidavit. It is the case of the Custom authorities that M/s. Fair Exports Private Ltd., petitioner, is not the importer, nor the Department had demanded any duty from it. It is contended that M/s. Fair Exports has no locus standi to file this writ petition challenging the leviability of duty for which the liability is on the importer (Hindustan Lever Ltd.). The petitioner purchased the licence from NALCO and transferred to M/s. Indocon Finance, New Delhi on 30-5-1994 by receiving full and final consideration and in turn this licence was transferred to M/s. Metec Asia, Bombay, on 29-11-1994 by M/s. Indocon Finance, New Delhi and finally to Hindustan Lever Ltd. (the Importer) on 7-2-1995 by M/s. Metec Asia, Bombay. These transfers were by payment of full and final consideration and the last transferee, i.e., Hindustan Lever Ltd. is the Importer. Neither Hindustan Lever Ltd. is the petitioner nor the Hindustan Lever Ltd. has asked for any relief and as such, the petitioner has no locus standi to challenge the same. Besides, it is asserted that the petitioner having availed the benefit under the said five import licences by way of transferring the same to Hindustan Lever Ltd., and. Raj Exports Khari Baoli for consideration and the validity of the said transferred import licences having expired after six months of the dates of transfer the petitioner has no cause of action in the manner as alleged. It is contended that from the Departmental clarification issued by Nagpur Collectorate of Excise & Customs Department, published in ELT-Volume 72, NALCO came to learn that input stage credit under Rule 57A of the Central Excise Rules should not be availed in respect of "any of the inputs" used in the manufacture of exported goods to make import licences under the said Rule eligible for transfer.

5. NALCO allegedly calculated the excise concessions it had availed in respect of other inputs like Lime, Soda Ash, CGM and Furnace Oil under five import licences and other value-based import licences. On purported calculation NALCO found that it had availed of Excise concession to the tune of Rs. 40,65,319 in respect of 8 licences including the five licences which it had transferred to the petitioner. Thereafter suo motu NALCO debited an amount of Rs. 40,65,319 in favour of Central Excise in the personal ledger account. Subsequently, Central Excise was intimated about the aforesaid reversal of the Modvat credit. In substance, by this reverse entry in the PLA, NALCO refunded the Excise concession which it had

earlier availed.

6. The Custom authorities have placed on record the statutory provisions as envisaged u/s 25 of the Customs Act, 1962 regarding power to grant exemption from duty and the scope of Section 57A of the Central Excise Rules, 1944 (Part-IV) and the EXIM Policy 1992-97 as regards "Value based Advance Licence". They have also raised the question regarding transferability of Advance Licence and the impact of transferability of licences/materials imported against them. The objection of the Custom authorities is mainly that on the basis of fraud and mis-declaration given by the Opposite Party No. 1, Licensing Authority endorsed the transferability with a rider that "However this shall not preclude the customs authorities from taking action against the Licence holder for any misrepresentation, mis-declaration and default detected subsequently." Under the exemption Notification No. 203/92, it is prescribed that in order to be eligible for duty exemption, the export obligation is to be discharged by not obtaining any input stage credit and other benefits as stipulated on any of the inputs used in the manufacture of goods exported. This aspect is an independent mandatory condition and is over and above the conditions prescribed under the EXIM policy and the Handbook of Procedure.

7. It is further placed on record by the Custom authorities that between December, 1994 and January, 1995 the Customs authorities uncovered that many of the licences under VBAL (Value-Based Advance Licence) Scheme have availed double benefits running into hundreds of crore contrary to the statutory provisions, for which investigation and penal action is on. On 31-1-1995 a comprehensive public notice was issued by the Customs Authority, Bombay, in which it was stated inter alia that the transferee of the licences before procuring the licences should satisfy themselves that the licences covered the goods sought to be imported by them in accordance with the conditions of Notification No. 203/92. On 7-2-1995, the Hindustan Lever Ltd. (Importer) purchased the licence from M/s. Metec Asia, Bombay, the third transferee. M/s. Hindustan Lever Ltd. imported a consignment of 4,200 MT of Caustic Soda Solution from Romanda and filed a Bill of Entry bearing No. 5983, dated 16-2-1995 in the regular assessment Group-IIA (where all dutiable goods relating to the said items are assessed) seeking to assess into bond and warehouse the goods in the private bonded warehouse of M/s. V.V.F. & Co. Ltd., Hay Bunder Road, Sewree, Bombay, a sister concern of the Importer. The Bill of Entry was assessed provisionally under Test Bond and the goods were passed into Bond on 22-2-1995. The normal bonding period is one year and bond period expires on 21-2-1996. Apparently, realising that the licence purchased by the Hindustan Lever Ltd. being ineligible to obtain duty exemption in respect of the imported goods under Notification No. 203/92 and realising that the fraud and mis-declaration committed by NALCO is likely to be exposed and the Customs authorities are insisting upon proper verification in view of the public notice, M/s. NALCO in order to cover up the mis-declaration refunded Rs. 40,65,319 representing input credit benefits already availed by them, as per their calculation. It is claimed that even this is not a true reflection

of the actual amount of Modvat claimed under Rule 57A and the amount is more than few crores of rupees.

8. The Custom authorities further add that M/s. Hindustan Lever Ltd. filed ex-bond bill of Entry (Green Bill of Entry) on 15-3-1995 seeking clearance of a part of the consignment under DEEC Scheme and claimed exemption from payment of duty under Notification No. 203-Cus./92, dated 19-5-1992 as amended. They have produced the aforesaid value based advance licences bearing No. 3390229, dated 30-6-1993 and No. 3390244, dated 8-7-1993. The importer, M/s. Hindustan Lever Ltd., while claiming benefit under Notification No. 203/92, filed a declaration alongwith the ex-bond bill of Entry given by M/s. NALCO (original licensee) clearly declaring therein that they have not availed any benefit under Rule 56A/57A/191A/191B of the Central Excise Rules, 1944 in respect of the export under the said DEEC Scheme. The Department through verification of the documents and inquiries found that M/s. NALCO have exported the goods through Visakhapatnam Port during the year May 1993 and that they have availed Modvat credit under Rule 57A on inputs used in manufacture of the exported goods "Calcined Alumina" manufactured in their factory at Damanjodi, Koraput (Orissa). The import licence which was required to be registered at the specified port of import as specified in the condition (iv) of the Notification No. 203/92 was registered at Visakhapatnam. Since Modvat credit was availed in clear contravention of the condition (v) of the said notification, duty exemption is not available. M/s. NALCO were well aware of the provisions of the Act and the Rules and by making false declaration before the licensing authority they got the licence made freely transferable contrary to the clear provisions of the Policy, Para-67 of the EXIM Policy, 1992-97.

9. It is also placed on record that on 30-3-1995 NALCO has received a letter from the Joint Director General, Foreign Trade that the transferability has been regularised. The said letter and transferability notwithstanding the law empowers the Custom authorities to take action as para-126 of the Hand Book of Procedure 1992-97 clearly provides that the discharge of export obligation and consequent transferability shall not preclude custom authorities from taking action against the licence holder for any mis-representation, mis-declaration and default detected subsequently. Further, the exemption is guided by exemption notification where there is no provision for post facto regularisation and refund / reversal of the credit availed. The said order of the Licensing Authority is without jurisdiction and is not binding on the Customs authorities. The Customs authorities have accordingly passed an order disallowing the benefit of duty-free exemption. The mandatory provisions of law prohibiting availment of input credit cannot be lawfully equated with availment and subsequent refund/reversal after repeated false declarations and to thwart the penal action, if possible. It is made clear that the custom authorities have lawfully denied the exemption under Notification No. 203/92 and the importers are free to clear their goods on payment of appropriate duty. The amount of credit availed is much more running into few crores and not Rs. 40,65,319, as calculated by M/s. NALCO.

10. Mr. G. Ramaswamy, Senior Counsel, appearing for the petitioner, Fair Exports Private Ltd. has mainly argued that under the Act, the J.D.G.F. T. is the authorised authority to grant or cancel the licence. The power of grant includes the power to cancel the licence if the the J.D.G.F.T. is satisfied that it is obtained by misrepresentation. It is open to J.D.G.F.T. or the delegated authority to issue a show cause notice u/s 9(4) of the Act. This power of cancellation is with the J.D.G.F.T. and in law since J.D.G.F.T. has power to grant licence as the licensing authority, he is also the cancelling authority. In the present case, the licence is endorsed by NALCO in favour of Fair Exports on 20-5-1994. Before this NALCO was the licensee. NALCO applied for transferability and the same was allowed on 20-5-1994. On 16-2-1995 NALCO realised that as there was mistake on account of the wrong interpretation of the old circular and further realised the position by virtue of the fresh clarificatory circular of 1994 and thereafter, there was reversal which has been allowed. They realised that the transferability can be cancelled for misrepresentation, and before the authority took action, they voluntarily informed the licence granting authority about the mistake and bona fide reasons therefor. On such move by NALCO the J.D.G.F.T. could have taken action and proceeded to cancel the transferability. The competent authority was satisfied, with the bona fides and validity of the same and decided not to cancel the licence, but wrote a letter to the effect that the transaction has been regularised. It only means the communication of the J.D.G.F.T. intimating that no action is to be taken to cancel, but he is entitled to do so. He relied upon the case reported in 1989 (24) ECR 765 that the licence issued is not void, but voidable at the instance of J.D.G.F.T. and is good until set aside and not void/nullity/nonest. The J.D.G.F.T. has accepted position and has stated on affidavit that he has nothing to do more. In view of this, it is presumed to be valid until shown to be contrary by the Department.

11. Mr. Ramaswamy has high-lighted that Rule 56A provides that a manufacturer can take credit for duty paid on the input and have that credit entered into P.L.A. Under the Excise Law so long as there is a credit in favour of the assessee and there is no debit against him by the Department, he need not pay the duty. In such a case it can be said that as he has taken permanent advantage of the credit and had never paid the Department, it is possible to say that he had availed Modvat. But where a person does not appropriate the credited amount permanently and converts to its own use but voluntarily reverse the entry and pays back to Department, the position of law then is that assessee has not availed of Modvat. Therefore, the conditions are satisfied. According to him, the crucial date as it would be relevant to note, the only consequence of applicability of para 67 is import free of duty. Para-67 does not exempt import from duty. The non-payability of import duty arises not by para-67 but by Notification No. 203 issued u/s 25 of the Customs Act which provides that imports made under transferred VBAL (Value-Based Advance Licence) is free from duty. The question as to whether duty is payable is to be determined only when the Bill of Entry is submitted to the Customs authorities. This is very clear from the decision

reported in *Bharat Surfactants (Private) Ltd. and Another Vs. Union of India (UOI) and Another*, .

Therefore, as Mr. Ramaswamy submits, that if at the time of presentation of Bills of Entry which alone is the crucial date for leviability of duty, in law, the assessee has not availed Modvat.

12. The entire aspect of the submissions of Mr. Ramaswamy is that since NALCO did not avail any Modvat and/or it has reversed by refunding the amount purportedly obtained under Modvat, there is no bar and/or impediment to avail the exemption under Notification for importing the goods as per VBAL (Value-Based Advance Licence). In the event, NALCO has committed anything wrong, the petitioner being a bonafide dealer transferee of the licence, cannot be subjected to pay duty to get release of the goods. He has further added that in the event the court finds that any duty is still payable, NALCO should be directed to make payment and not the petitioner.

13. Mr. B.M. Patnaik, learned Senior Advocate, appearing for NALCO has submitted that the stand of NALCO is two fold :-

(i) NALCO supports the contention of the writ petitioner to enable release of the imported goods duty free.

(ii) The grievance of the petitioner against NALCO is thoroughly misconceived. The petitioner has wrongly claimed that NALCO has misrepresented and/or misdeclared in the manner as alleged.

14. In order to reiterate the claim of customs authorities to levy duty, Mr. Patnaik argues that the common case of Customs and NALCO is that object of Para 67 (Chapter VII-Duty Exemption Scheme) is that a licensee/transferee of licensee shall not be allowed to get double benefit, i.e., benefit of duty-free import under the said para 67 and benefit of input stage credit under Rule 56A or 57A of Central Excise Rules in respect of the same input used in manufacture of export product. He develops his argument by explaining, inter alia, that if the words "any of the inputs used in manufacture of export product" in para 67 of EXIM Policy (Chapter VII-Duty Exemption Scheme) is construed as "any of the inputs used in manufacture of export product specified in the licence" in terms of para 49 of EXIM policy, there will be no double benefit and there will be no loss of revenue and much less revenue to the tune of Crores of Rupees as contended by the Custom.

15. Mr. Patnaik goes on submitting that the double benefit occurs when the exporter gets the benefit of duty-free clearance (Import) under the VBAL, i.e., exemption from Customs duty in respect of a particular input of the export product under para-49 of DEEC scheme and also avails benefit of inputs stage credit under Rule 57A of the Central Excise Rules, for the same input of the export product. For example, he submits, for an export product if there are four inputs allowed for importation as per the input output norms provided under right

81 of the EXIM Policy, the VBAL shall specify the above four inputs. Total value allowed for importation of these four inputs is specified in the VBAL. (In VBAL value of individual inputs are not mentioned, only total value of all inputs are mentioned). The licensee/transferee of the licence has the flexibility in VBAL to import one or some or all the inputs within the overall value specified in the VBAL. In the event, the licensee/transferee of the licensee imports only one input for the full value of the VBAL he gets the benefit of duty free import for the value of all the four inputs. For the other three inputs which were not imported though specified in the VBAL, if the licensee/transferee of licensee purchases the same indigenously and avails benefit of inputs stage credit under Rule 57A, in that situation it gets double benefit.

16. Mr. Patnaik asks the Court to appreciate that in order to prevent licensee/transferee of the licensee from, getting double benefit in para 67 of the EXIM policy and also in Custom Notification No. 203/92 condition (V), stipulation has been made regarding non-availment of input stage credit under Rule 56A or 57A for any of the inputs used in the manufacture of exported goods (specified in VBAL as contended, to be construed by NALCO). According to Mr. Patnaik, the purpose for which this provision is kept in para 67 and in Custom Notification No. 203, does not get defeated if the clauses are read as "any of the inputs mentioned in the VBAL".

17. Mr. Patnaik submits that the interpretation of the Custom as to the provision of Para 67 of the Custom's notification is that "any inputs" should be read as "all inputs" used in manufacture of export product and not confined to any inputs mentioned in the "VBAL." In that case the concept of no duty (excise and custom) on inputs used for exported goods as per the policy under Import Trade Control Act and also under Duty Draw Back Rule under Custom and Central Excise Act would stand defeated. The contention of Custom as made out in the case is that even if one input, caustic soda lye, as in the present case, is mentioned in VBAL and is licensed to be imported duty free, the pre-condition of transferability of VBAL is that licensee must not have availed input stage credit in respect of the other four inputs used in manufacture of export product, whereas NALCO's contention is that the interpretation, of Custom is not correct inasmuch as availing input stage credit in respect of four other inputs would not constitute double benefit. Mr. Patnaik highlights that it could never be the intention of rule-making authority that under para 67 of the EXIM Policy that the licensee/transferee of the licence would lose the benefit of exemption of Central Excise Duty by way of input stage credit in respect of inputs which it was not allowed under VBAL to import duty free.

18. Mr. Patnaik gives emphasis on the point that in the present case five inputs are used and have been used for manufacture of export product "Calcined Alumina". Only one input, i.e., "Caustic Soda Lye" comes within the purview of duty exemption scheme as caustic soda lye is the only input mentioned at page 363 (Vol. II) of Hand Book Producer as per input/output norms in terms of para

51 of the EXIM Policy (Chapter VII Duty Exemption Scheme). This only input i.e. "Caustic Soda" is mentioned in all the five VBALs. Hand Book of Procedure Vol. I (issues under Clause 16 of EXIM Policy) does not prescribe input and output norms in respect of the other four inputs that is Lime, Furnace Oil, Soda Ash and CCM used for manufacture of export produce "Calcined Alumina" and as such, the other said four inputs would not and do not come within the purview of Duty Exemption Scheme and as such, are not specified in the five VBALs in terms of para 51 (Duty Exemption Scheme of EXIM Policy). NALCO, as (sic) Mr. Patnaik addresses, has availed input stage credit, i.e., benefit of non-payment of Central Excise Duty in respect of these four inputs. NALCO, as he adds, has not availed input stage credit in respect of caustic soda Lye. As such, NALCO has not availed double benefit, i.e., benefit of exemption from import duty and benefit of exemption from Central Excise Duty by way of input stage credit in respect of any one of the five inputs used in the manufacture of export product, i.e., Calcined Alumina. In this context extract from para 108 at page 38 and para 109B at page 39 and page 363 (Item No. 727) of Vol. II of the Hand Book of Procedure (issued under para 16 of EXIM Policy) are brought to the notice of the Court. The aforesaid extract indicates, inter alia :-

"Licenses will be issued only for products for which standard input and output and value addition norms have been published."

Paragraph 109B provided, inter alia :-

"Where standard input output and value addition norms have not-been published, value based licences shall not be issued."

19. The entire spirit of argument of Mr. B.M. Patnaik is, that the original stand taken by NALCO in the affidavit filed in the Court is not correct. Under wrong impression NALCO had returned Rs. 40,65,319 under misconception and/or under erroneous conception. On proper scrutiny and examination, Mr. Patnaik submits that actually no benefit under Modvat was availed by NALCO and under the licence as per Scheme of VBAL, there is no bar to obtain the benefit of duty-free import. NALCO has rightly transferred the licence as per the prescribed procedure of transferability and the transferee is thus entitled to get the release of the goods duty free. The entire Scheme under EXIM Policy and the Notification for exemption made properly be appreciated by the Court and on such proper appreciation, the stand taken by Custom should be overruled.

20. Mr. Govind Das, learned Senior Counsel, appearing for the Customs authorities, opposite party No. 2, has submitted that the stand taken by the NALCO vis-a-vis., writ petitioner, is contrary to all accepted and settled principle of law, inasmuch as they are trying to substitute the language of the statute, which is otherwise plain, simple and clear. The case of the Customs is, Mr. Das emphasises, that duty exemption as claimed by the importer is not admissible due to non-fulfilment of the condition No. V(a) of the Notification No. 203/92. In fact, NALCO has obtained Modvat credit on inputs used in the manufacture of the

[goods] exported, i.e "Calcined Alumina". This fact was [suppressed] by them giving repeated erroneous declarations before the Customs at the time of export of the goods, and before the licensing authority at the time of seeking transferability of the licence. The holder of the licence, M/s. NALCO, themselves would not have been eligible for duty exemption for contravention of the conditions of Notification No. 203/92. The benefits or the entitlements which are not available to the original licensee cannot be made available to any subsequent transferee.

21. Mr. Das has developed his argument by submitting, inter alia, that the language used in Condition V(a) of Notification No. 203/92 as well as Para 67 of the EXIM Policy makes it abundantly clear that under the Value Based Advance Licensing Scheme, the importer-exporter is required to export the [goods by not] availing Modvat credit on any of the inputs used in the manufacture of export products. A plain reading of the provisions of para 67 of the EXIM Policy, which deals with the transferability of the Advance Licence of both VBAL and QBAL shows that different language has been used deliberately because of difference in the nature and scope of the schemes. The same distinction has been made in the customs duty exemption Notification No. 203/92 for VBAL and Notification No. 204/92 for QBAL. In VBAL, the Modvat credit is to be availed in respect of any of the inputs used in the manufacture of the export goods, while in QBAL, Modvat credit is available but neither the licence nor the imported inputs are transferable for inputs for which Modvat credit is availed, as clearly made out in the respective Customs Exemption Notification. Mr. Das has taken the Court in between the lines as to the relevant Notification for proper appreciation of the entire dispute raised between the parties.

22. It is pointed out that the policy makes a distinction between VBAL and QBAL from Drawback angle in paragraphs 70 and 70A. Attention of the Court is drawn to the admissibility of Drawback as per paragraphs 70 and 70A and it is added that from the above, it would be plain and clear that in respect of QBAL, the facility of transferability is not available in respect of only, those inputs for which Modvat credit has been availed. The said paragraph for QBAL also refers to inputs permitted under the licence. In the first paragraph relating to VBAL, the language used is different from second paragraph and the clear intention is that in case of VBAL, the exporter should not avail the Modvat credit in respect of any of the inputs used in the manufacture of the export products.

23. Mr. Das further submits that if Modvat has been availed in respect of one, some or all of the inputs used in the manufacture of the export prod nets, then the transferability is not permissible.

24. According to Mr. Das there are different schemes for the benefit of the exporters, which exist independently and/or simultaneously. It is highlighted that amongst the different schemes, VBAL is the most popular and widely used as it has greater flexibility of importing and in case of transfer, the licence carries a better premium. The meaning of the word "any" as commonly understood is one,

some or and unnecessary interpretation may complicate the issue. The legal interpretation of the word "any" has to be judged in the context of the entire paragraph in which it has been used. He argues that the availability in India is not a criteria for giving or not giving the licence. One may have licence for all of the inputs (a), (b) and (c), (d) subject to use of conditions. The licence is not necessarily for one input. In most cases, the licences are for more than one input. It is up to the exporter to choose whether he wants to import all the inputs or one of the inputs as per his convenience. The Customs duty exemption available is substantial as can be seen from the very fact that it has been operating since 1992 and majority of the exporters are operating under the said scheme.

25. The levy and exemption of customs duty is governed under the Customs Act. Exemptions are available only if all the conditions of the Exemption notifications are complied with or fulfilled. The burden to prove duty exemption satisfying the conditions are on the claimant. The right to duty-free exemption cannot flow from any other statute or authority.

26. It is placed on record that condition V(a) of Notification No. 203/92 clearly stipulates that the export obligation is discharged by exporting the goods in respect of which no input stage credit is obtained. It is claimed by the Customs authorities that NALCO exported the goods during the period 1992-93. At the time of export of the goods at Vizag, they had misdeclared that they have not availed or utilised Modvat credit in respect of the goods exported. While applying for transferability to the licensing authority, they had also misdeclared that they have not availed or utilised Modvat credit in respect of the goods exported. It is submitted that in reality they had availed of the Modvat credit. They had not only taken the credit for their self-maintained register. Actually they had also utilised the said credit. A portion of the credit of Rs. 40 lakhs (they claim the total amount of credit availed by them) in respect of the exported goods, but according to the Department this is only a part and according to rough estimate, it would be more than two crores of rupees. The original contention of NALCO is that since they have paid back the Modvat credit, it should be treated as if they have not availed or obtained. This stand, Mr. Das submits, is thoroughly misconceived. The right approach may be appreciated by the Court that what is relevant is whether the condition imposed under paragraph V(a) has been contravened or not. NALCO obtained/availed Modvat credit at the time of manufacture, export and claim of transferability etc. This clearly shows that the condition V(a) has been contravened and by making a partial payment they cannot claim the benefit under VBAL and the transferee asked for the relief in the manner as prayed in the present writ petition. The very process of liberalisation embodies in itself an obligation on the part of the assessee not to suppress or misdeclare anything wrongly.

27. Mr. Das has also drawn the attention of the Court as to the submission made by NALCO regarding duty exemption scheme and Duty Drawback Scheme.

According to him the original stand of NALCO and the subsequent stand, as argued by Mr. B.M. Patnaik, are both misconceived. It is strongly argued that while interpreting a notification, recourse to other notification is not permissible, because each notification is independent. Reliance is made to the decision of Tata Iron and Steel Co. Ltd. Vs. Union of India (UOI), . If the language of exemption notification is deficient to bring out the real intention of the Government, it is not for the Court to supply the deficiency and reliance is made to the decision reported in Assistant Collector of Central Excise, Customs House, Pondicherry and Another Vs. New Horizon Sugar Mills (P) Ltd., Pondicherry, . It is contended that the operation of [exemption] notification has to be judged not by the object which the rule-making authority has in mind but by the words which it has employed to effectuate the legislative intent. Reference is made to 1978 (2) E.L.T. 350 (SC) (Hemraj Goverdhandas v. Asstt. Collector).

28. The entire spirit of Mr. Das's argument is that duty exemption is a composite scheme involving both revenue and the licensing aspects. Availment or otherwise of Modvat is a matter relating to fiscal statute. Non-availing of Modvat in respect of any of the inputs is a basic feature of the scheme. Exemption Notification No. 203/92, which is a part of fiscal statute refers to it as a mandatory condition for according duty exemption. But paragraph 67 of EXIM Policy also incorporates the condition of non-availment of Modvat in relating to transferability. The condition is a part of fiscal enactment. It has to be appreciated Mr. Das submits, that Exemption Notification issued under fiscal laws has to be strictly construed. Words used therein to be understood according to their plain phraseology and not on any presumption. Reference is made to Union of India Vs. Pillaiyar Soda Factory, .

The Exemption Notification has to be interpreted by the words used therein and nothing can be added, amended or constructed to make up its deficiency. Reference is made to a case reported in 1983 (12) E.L.T. 24 (Delhi). Taxing statutes, rules and notifications issued thereunder, as he argues, will have to be understood strictly and with the aid of the language employed therein. There is no scope for any element of intention or any element of speculation about intention while interpreting taxing statute.

29. Mr. Das has tried to demonstrate that the mis-declaration and suppressions made by M/s. NALCO are face on the face. They have made the same repeatedly with the intention to avail "Double Benefit" contrary to the provisions of law. In the past M/s. NALCO have themselves availed of the benefit of duty-free import by misdeclaring and suppressing the fact of availment of Modvat credit. The submission of M/s. NALCO is self-contradictory inasmuch as in one hand they claim that as the Customs Act and the Foreign Trade (Development & Regulations) Act provide for relevant adjudication and appeal procedures, the two reliefs claimed may not be entertained in the facts and circumstances of the present case. True it is that it may not be open to the Customs authority to challenge the validity and transferability of the five VBALs. But it must be noted

that the validity of five VBALs expired in November, 1994 and, therefore, revalidation by D.G.P.T. without authority of law cannot be relied on. The present contention of NALCO as to non-availment of Modvat on "caustic soda Lye" is also not correct as would be revealed from the Modvat records RG 23A, Parts I and II maintained by M/s. NALCO. The plea of bona fide error is oft quoted plea by every economic offender to dilute or contain the penal consequences. The writ petitions are absolutely speculative in nature and no relief may be granted to the petitioners as it is emphasized.

30. Patiently, we have heard the lengthy submissions made on behalf of the respective parties as aforesaid. We have diligently considered the materials on record to understand their points rightly as per their pleadings and the submissions made by counsel on their behalf. Precisely, we find two questions have been raised by the writ petitioners to seek reliefs by way of release of the imported goods duty free. Admittedly, there is a licence for importing the goods and the conditions of licences bearing Nos. 3390229, dated 30-6-1993, 3390244, dated 8-7-1993 and licences Nos. 3390218, 3390216 and 3390214 are placed in records in order to indicate duty-free clearance. Undisputedly, the petitioners are the transferees on the footing that the licences are transferable. Successive transfers were made as pleaded. There is a specific prayer for quashing of the letter issued by opposite party No. 2, Assistant Collector of Customs, appraising Group VI, New Custom House, Ballar Estate, Bombay, dated 20th March, 1995 bearing No. F. No. S/16-DEEC/6724 (Impt)/95 GR. There is a further prayer to issue an appropriate writ to command opposite party No. 3, D.G., Foreign Trade, 4, Esplanade East, Calcutta-69, to extend the validity of the licences bearing Nos. 3390218, 3390216, 3390244, 3390214 and 3390229. There is, however, an alternative prayer for issuance of a writ to command opposite party No. 1, NALCO, to make payment of any duty that is liable to be paid by the petitioner and/or their agents under the aforesaid five licences towards the goods imported.

31. The tenders for five Value-Based Advance licences for Caustic Soda Lye of the value for Rs. 7,40,67,482 were called by Press being NIT No. PDC/AA/E-29/94. In response to the said notice inviting tender the petitioner-company had by their letter dated 3rd May, 1994 submitted their bid to NALCO with an earnest money of Rs. 5,00,000. There was a negotiation between the petitioners and NALCO and a final revised offer was made on 9th May, 1994.

32. The aforesaid licences are transferable in terms of para 67 of the Export Import Policy read with Para 127 of the Hand Book of Procedure 192/197. For proper appreciation and by way of ready reference, said para 67 of the Export Import Policy is quoted hereinbelow :-

"67. A Value Based Advance Licence or the materials imported against it may be freely transferable after the export obligation has been fulfilled export proceeds realised and the Bank Guarantee/LUT redeemed. The export obligation should have been discharged by .exporting goods in respect of which benefit of Rule 191A or 191B of the Central Excise Rules, 1944 or input stage credit under Rule

56A or Rule 57A of the Central Excise Rules has not been availed of in respect of any of the input used in the manufacture of export products.

A value Quantity Based Advance Licence (except Advance Intermediate Licence and Special Imprest Licence) or the materials imported against it may be freely transferable after the export obligation has been fulfilled, export proceeds realised and the Bank Guarantee/LUT redeemed. This facility shall not be available in respect of inputs for which input stage credit under Rule 56A or Rule 57A of the Central Excise Rules, 1944 has been availed. Export obligation should have been discharged by exporting goods in respect of which benefit of Rule 191A or 191B of the Central Excise Rules, 1944 has not been availed in respect of inputs permitted under the said licence.

The facility of transferability shall not be permissible to the duty free licence on which import of "Acetic Anhydride" is allowed."

Similarly the facility of sale/transferability of Acetic Anhydride imported against a duty free licence shall also be prohibited."

Similarly a reference may be made to the relevant portion of para 27 which runs as :-

"127...

(iii) After redemption of the BS/LUT the licensing authority shall endorse and allow the transferability on the permissible licences against which the imports have not been made or have been made partially."

33. From the materials on record, we find that Caustic Soda Lye was imported on the basis of the licences and the said goods arrived at Bombay Port during the middle of February, 1995. The bill of entry for the said goods were submitted. The importers claimed that the said Caustic Soda Lye did not attract any customs duty, as the same was imported against the aforesaid duty-free licences.

34. The petitioner claim that NALCO by their letter dated 17-2-1995 confirmed that the benefit of Rule 191A or 191B of the Central Excise Rules, 1944 had not been availed in respect of any of the inputs used in the manufacture of the exported product and no inputs stage credit under Rule 56A or 57A of the Central Excise Rules had been availed of in any of the inputs used in the manufacture of the export product. But, however, opposite party No. 2, Assistant Collector of Customs, asked for a non-utilised certificate of Modvat from the Central Excise Department, Rayagarh. From the materials on record, it further appears that NALCO had claimed the Modvat benefits to the extent of Rs. 40,65,313 and the earlier certificate/confirmation issued by the NALCO was not correct. The Central Excise Department sent a letter dated 12th March, 1995 addressed to the Assistant Collector of Customs, stating that the Central Excise Department was aware that the said licences have been transferred and, therefore, action has been taken as to Modvat credit availed by opposite party No. 1, NALCO.

35. Now the dispute, as canvassed before us, is that if the conditions of Value-Based Advance Licences are not fulfilled, such as, if the benefits under MODVAT scheme are availed, there cannot be double benefit. It is the consistent case of the petitioner involved in one aspect that no benefit was obtained under MODVAT and even if any benefit was contained by NALCO, the same was reversed and there is no bar and/or impediment for the transferee of the licences, such as the petitioners, to get the [release] of the imported goods duty free.

36. The second aspect of the dispute is that there is a claim, by the petitioners against NALCO on the ground, inter alia, that the petitioners are bona fide transferees for the value. On the face value of the licences the same appear to be transferable and since they have purchased the aforesaid transferable licences and acted bona fide, equity stands in their favour and an appropriate writ may be issued to command NALCO to pay the duty, if necessary, and to command a writ to the Customs authorities to release the goods forthwith.

37. Regarding the dispute between the petitioner and the NALCO, so far as the claim and counter-claim as to whether the duty is payable by NALCO or by the petitioners, is not required to be adjudicated by the writ Court in this forum. If there is any dispute between the petitioner and NALCO inter se, over the transfer of the licences and/or to any consequences thereof regarding the liability of payment of duty, they are to seek their reliefs before any forum other than the arena of the writ Court. We have made it clear at the stage of hearing that with regard to the alternative reliefs of the petitioners, this Writ Court is not going to adjudicate the dispute nor such a dispute which involves adjudication of disputed question of facts on evidences has to be decided in this jurisdiction. This point remains open to be decided in the appropriate forum and in accordance with law.

38. Regarding the main prayer of the writ petitioners, the case is precisely that regard being had to the materials on record, if the Court finds that no Modvat benefit was obtained by NALCO and under VBAL, the licences being transferable, customs authorities cannot insist upon payment of duty in the manner as done in the instant case.

39. To resolve this dispute, we find that Section 25 of the Customs Act, 1962 provides power to grant exemption from duty. It is as follows :-

"25. Power to grant exemption from duty :-

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, goods of any specified description from the whole or any part of duty of Customs leviable thereon."

40. We also find from Rule 57A of the Central Excise Rules, 1944 that the provisions of this section shall apply :

"Rule 57A :- (1) The provisions of this Section shall apply to such finished

excisable goods (hereinafter referred to as the "final products") as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty u/s 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the "specified duty") paid on the goods used in or in relation to the manufacture of the said final products (hereinafter referred to as the "inputs") and for utilising the credit so allowed towards payment of duty or excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this Section and the conditions and restrictions that may be specified in the notification :

Provided that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted..."

The EXIM Policy, 1992-97 indicates the concept of "Value Based Advance Licence" and it is provided therein that under the Value-Based Advance Licence, any of the inputs specified in the licence may be imported within the total CIF value indicated for those inputs, except inputs specified as sensitive items. The sensitive items may be imported only to the extent of the quantity or value specified in the licence. However, flexibility shall be available for the import of a sensitive item in excess to the extent of 20% of its quantity indicated in the licence within the overall CIF value of a value-based licence. This flexibility shall also be admissible where the import restriction for a sensitive item is only in terms of value. Under a Value Based Advance Licence, both the quantity and FOB value of the exports to be achieved shall be specified. It shall be obligatory on the part of the Licence holder to achieve both the quantity and FOB value of the exports specified in the licence. It is further provided that a Value Based Advance Licence shall specify :-

- "(a) the names and description of items to be imported and exported;
- (b) the GIF value of imports;
- (c) The FOB value and quantity of exports;
- (d) for sensitive items, or where the competent authority considers it necessary to do so, quantity or GIF value or both of each sensitive item shall also be specified in the licence."

41. The transferability of advance licence is not in dispute. The detailed procedure to have the effect thereof, there is a procedure as laid down in Handbook of Procedures, 1992-97 with effect from 31-3-1994. It is categorically indicated therein that a redemption of Bank Guarantee/LUT shall not preclude the Customs authority from taking action against the licence holder for any misrepresentation, misdeclaration and default detected subsequently.

42. Regarding exemption to materials imported against Value-Based Advance Licence, we find that in exercise of powers conferred by Sub-section (1) of

Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India, against a Value-Based Advance Licence issued in terms of para 49 of the Export and Import Policy (Ist. April, 1992- 31st March 1997) from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty leviable thereon u/s 3 of the said Customs Tariff Act, subject to the following conditions :-

"(i) that the materials imported covered by a Value Based Duty Exemption Entitlement Certificate issued by the licensing Authority in the form specified in the Schedule annexed to this notification;

(ii) That the importer at the time of clearance of the imported materials

(a) produces proof of having executed a bond or a legal undertaking before the Licensing Authority concerned for complying with the conditions of this notification; and

(b) makes a declaration before the Assistant Collector of Customs binding himself to pay on demand an amount equal to the duty leviable but for the exemption, on the imported materials in respect of which the conditions specified in this notification have not been complied with;..."

43. So far as the facts of the present case are concerned, there is no inconsistent and contradictory stand between the Licensing Authority and the Customs Authority. We find from the records that the Deputy Director General of Foreign Trade has sworn an Affidavit on 7-4-1995- stating clearly that five licences were granted to NALCO and they are valid up to March, 1995 and the transferability of the licences was subject to the condition mentioned in letter dated 20th May, 1994. It has further been placed on record that if conditions are violated, it is open for the customs authorities to take appropriate action according to law and there is no conflicting interest of opposite party No. 3 as against opposite party No. 2 in this case as the said letter itself authorised that action may be taken by customs authorities for violation of the licences. It is also placed on record that revalidation of the licences are not necessary since goods have already been imported and lying for clearances and further invalidation is not permissible after the licences have been transferred. Opposite party No. 3 has no further action to take in this matter. The affidavit runs further that the licences were applied, for and granted at Calcutta and goods were imported at Bombay and there are violation of the conditions of licence and opposite party No. 3 has nothing to support the petitioner if the customs take appropriate actions as permitted under law. The relevant exemption notification is noted as follows :-

"Exemption to materials imported against value based advance licence :- In exercise of the powers conferred by Sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into

India, against a Value Based Advance Licence (hereinafter referred to as the said licence) issued in terms of para 49 of the Export and Import Policy 1 April, 1992-31 March 1997, from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty leviable thereon u/s 3 of the said Customs Tariff Act, subject to the following conditions, namely :-

(i) that the materials imported are covered by a Value-Based-Duty Exemption Entitlement Certificate (hereinafter referred to as the said certificate), issued by the Licensing Authority in the form specified in the Schedule annexed to this notification;

(ii) that the importer at the time of clearance of the imported materials -

(a) produces proof of having executed a bond or a legal undertaking before the Licensing authority concerned, for complying with the conditions of this notification; and

(b) makes a declaration before the Assistant Collector of Customs binding himself to pay on demand an amount equal to the duty leviable but for the exemption, on the imported materials in respect of which the conditions specified in this notification have not been complied with :

Provided that a bond or a legal undertaking and the declaration shall not be necessary in respect of imports made after discharge of export obligation in full, as evidenced by endorsement of Licensing Authority in the said certificate;

(iii) that the said licence and the said certificate is produced before the proper officer of customs at the time of clearance of imported goods out of customs control:

Provided that no such imported materials shall be permitted clearance under this notification unless a debit entry has been made, in the said licence and the said certificate, by the proper officer of customs;

(iv) that the imports and exports are undertaken from sea ports at Bombay, Calcutta Cochin, Kandla, Mangalore, Marmagoa, Madras, Nhava Sheva, Paradeep, Tuticorin and Visakhapatnam, or through any of the airports at Ahmedabad, Bangalore, Bombay, Calcutta, Delhi, Jaipur, Varanasi, Srinagar, Trivandrum, Hyderabad and Madras or through any of the inland container Depots at Bangalore, Coimbatore, Delhi, New Gauhati Goods Shed, Moradabad, Ludhiana and Hyderabad :

Provided that the Collector of Customs may by special order and subject to such conditions as may be specified by him., permit imports and exports from any other sea port, airport, land customs station or inland container depot;

(v) that the export obligation is discharged, within the period specified in the said certificate or within such extended period as may be granted by the Licensing Authority by exporting goods manufactured in India in respect of which -

(a) no input stage credit is obtained under Rule 56A or 57A of the Central Excise Rules, 1944 (hereinafter referred to as the said rules);

(b) facility, under Rule 191A or Rule 191B as in force immediately before the 1st October, 1994 or under Rule 12(1)(b) or Rule 13(1)(b) of the said rules, has not been availed; and

(c) drawback has not been claimed either u/s 74 of the Customs Act, 1962 or Customs and Central Excise Duties Drawback Rules, 1971;

(vi) exempt materials shall not be disposed of or utilised in any manner, except for utilisation in discharge of export obligation, before the (sic) has been discharged in full and export proceeds realised :

Provided that Acetic Anhydride in respect of which the benefit of this notification is claimed shall be utilised by the importer in his own factory or in the factory of any other manufacturer indicated in the said certificate even after discharge of export obligation and realisation of export proceeds;

(vii) where benefit of the notification is sought by a person other than licence, such benefit shall be allowed against the said licence and the said certificate only if it bears endorsement of transferability by the Licensing Authority:

Provided that benefit of this notification shall not be allowed to a transferee of licence for import of Acetic Anhydride except where the licence is endorsed for transferability before 24th November, 1993, and is transferred to an actual user who undertakes to use the Acetic Anhydride in his own factory;

(viii) Notwithstanding anything contained in conditions (vi) and (vii) above, the endorsement of transferability or disposal of materials shall be allowed in respect of licences issued for the export of all kinds of writing instruments (including gift sets and refills/nibs) on fulfilment of export obligation only in favour of manufacture of writing instruments.

Explanations - In this notification. -

(i) "Export and Import Policy April 1992-March 1997 means the Export and Import Policy 1 April, 1992 - 31 March, 1997 published vide Public Notice of the Government of India in the Ministry of Commerce No. I-LTC(PN)/92-97, dated the 31st March, 1992 as amended from time to time.

(ii) "Licensing Authority" means an authority competent to grant a licence under Imports (Control) Order, 1955 made under the Imports and Exports (Control) Act, 1947 (18 of 1947);

(iii) "Materials" means -

(a) raw materials, components, intermediates, consumables, computer software and parts required for manufacture of export product:

Provided that in the case of electronic goods and all kinds of writing instruments

(including gift sets and refills /nibs), all export items covered by one serial number in the Standard Input Output and Value Addition norms as contained in Handbook of Procedures, 1992-97, Volume-II, published, vide Public Notice No. 121 (PN)/92-97, dated the 31st March, 1993, of the Government of India in the Ministry of Commerce, shall be deemed to be single export product:

Provided further that nothing contained in this notification shall apply to import of Acetic Anhydride against licences issued after 24th November, 1993, except where such licences together with the quantity required, for manufacture of the export product mentioned, therein have been issued with the approval of the Advance Licensing Committee in the office of the Director General of Foreign Trade :

(b) spares and mandatory spares, within a value limit of 5% of the value of the licence issued up to the 31st March, 1993, which are required to be exported along with the export product; and

(c) packaging materials required for packing of export product."

The exemption notification is obviously attracted on fulfilment of the conditions of licences.

44. We have further considered the lengthy arguments made on behalf of NALCO that if the benefits available under Modvat scheme and the benefits also available under VBALs scheme are appreciated, notice has to be taken to the salient facts of the present case regarding importing of the inputs for manufacturing of the products to be exported by NALCO. It is argued before this Court that strictly speaking NALCO is not subject to pay any duty for the goods to be manufactured for export. Much emphasis has been laid upon the words "any of the inputs" expressed in the aforesaid Scheme to appreciate whether in the present case NALCO has made double benefit or not. The restriction of non-availment of Modvat credit in respect of any of the inputs, is found not only condition precedent for transferability, but more important it is a mandatory condition of the Customs Exemption Notification No. 203/92 as quoted above, and the Customs authorities are to see whether notwithstanding the transferability, conditions of Notification No., 203/92 have been fulfilled or not. Factually, the dispute arose as to whether NALCO has availed Modvat credit in respect of "Caustic Soda Lye" and an attempt has been made by the Customs Authority to draw attention of the Court to peruse the Modvat credit Register (RG 23A Part-I) showing clearly that NALCO had availed Modvat credit on "Caustic Soda Lye" during the relevant period. Two contradictory stands have been taken by the NALCO.

First it is asserted as if whatever benefits obtained under Modvat scheme, have been reversed, so it must be construed to a clean scale to get benefit under the VBAL scheme. Secondly, by detailed analysis, an argument has been advanced that with regard to the inputs there is no availment of any benefit under Modvat scheme as spelt out, and there is no bar and/or impediment to receive the

benefit under the VBAL Scheme in the manner as claimed and since the licence is transferable, the transferee is equally entitled to get the benefit of duty-free import in respect of those items.

45. On proper scrutiny, we find that, in fact, by a reversal the breach of conditions of the exemption Notification cannot be restored. Besides, there is a factual dispute as to the actual amount of benefit consumed by NALCO and there is a dispute raised by the Customs that there is more amount than what is stated by NALCO as to the Modvat benefit enjoyed by NALCO. Within the scope of the writ petition, it is not possible to investigate this aspect without production of proper evidence by both sides. It is, however, clear to this Court that the second stand to interpret the expression used in Modvat and VBAL Schemes to bail out NALCO regarding the conditions as per Exemption Notification relied upon by the Customs authorities, is fallacious. To us, the second attempt is no doubt ingenious, but as per facts of the case, the same is without merit. Each and every word expressed in Modvat and VBAL scheme, has to be interpreted as per text and in the background of context. No pedantic grammatical understanding in isolation of the entire comprehensive meaning should be adhered.

46. It is needless for us to dwell at length to discuss about the ratio of a number of reported decisions cited from the Bar in respect of the stands taken " by the respective parties. It is a settled principle of law that to interpret fiscal laws, each and every word expressed in the statute has to be construed strictly and there cannot be any liberal interpretation with greater flexibility. The text and the context, are very important. The canons of law as to the interpretation of revenue statute are well guided and we find that if the conditions to avail the exemption have not been fulfilled by the original licence holder and/or the subsequent licence holder, it is obviously open to the customs authorities to demand duty by strict reference to exemption notification. In this regard, it is found that Hindustan Lever appreciating the difficulties did not come forward to get release of the goods, in another case. Be that as it may, we find that the stand taken by the Customs authorities to demand duty is lawful and justified. Either the petitioners or the NALCO cannot ask for relief for issuance [of] any writ to get the imported goods released without payment of lawful duty. The bona fide nature of transfer of licences as claimed by the petitioners is not considered by this Court on merit. It is open to the petitioners to take proper steps if they are entitled to sue NALCO in the proper forum to get the reliefs as they deserve.

47. Nor the forgoing reasons, we hold that the petitioners are not entitled to the reliefs as prayed for. On the same ratio, the other writ petition which was heard simultaneously is disposed of. Both the writ petitions fail and hence are rejected. There will be, however, no order as to costs.

48. I have gone through the leading judgment of my learned brother the acting Chief Justice rendered with brevity and clarity. I have no disagreement with the conclusion arrived with regard to the competency of the Customs authority,

opposite party No. 2, to demand the duty on the goods in question.

49. It has been made clear in the leading judgment that the inter se disputes as to the liability for payment of the duty between the NALCO and its transferee-licensees are not required to be adjudicated by this Court. The competency of the Customs authorities to detain the goods until the duty is paid has been held to be valid.

50. Opposite party No. 3, the Director General, Foreign Trade, in his counter has admitted the authority of the Customs officials to check and detain the goods in question if there has been any violation of the conditions of the licences under the Export and Import policy. The Joint Director of Foreign Trade under Annexure-7 on 30-3-1995 addressed to the opposite party NALCO stated that since the latter had reversed the credit availed u/s 57A of the Central Excise Rules, 1944, the transferability of the licence so granted had been regularised.

51. Annexure K/2, at page 192 of the brief, is the letter dated 21-8-1995 of the Director General, Foreign Trade addressed to the Commissioner of Customs, Bombay stating that to him it appeared that transferability of the licence granted to NALCO was irregular since the power to grant such permission under the provisions of para-21 of the EXIM policy vested with the Director General of Foreign Trade and not the Joint Director.

52. Thus, it is abundantly clear that one officer of the same department questions the authority of another officer and the action taken by it as irregular. This itself manifests an unhappy state of affairs creating utter confusion. This has resulted in unnecessary litigation, wastage of public money and time.

53. This Court by its order dated 26-4-1995 had directed opposite party No. 2, the Customs authority, to consider the question of liability of duty on the basis of the letter tendered in Annexure-5. However, this Court subsequently by its order dated 15-5-1995 in Misc. Case No. 2953 of 1995 directed the Customs authorities to release the goods in favour of M/s. Hindustan Lever Ltd., but at the same time kept open the matter of levying customs duty to be payable by either NALCO or its transferees.

54. The matter of leviability of duty and the liability of the party to pay the duty and get the goods released is with opposite parties 2 and 3. From the counter of opposite party No. 2, the Customs authority, it is found that the duty payable comes around twenty two crores of rupees and the demand is obviously against NALCO, opposite party No. 1, who is asked to pay the amount. Since it is opposite parties 2 and 3, the Central Government authorities, who are to sort out the dispute with regard to the leviability of duty or to release the goods without payment of duty, they should not be allowed to keep the matter in a state of flux, thereby leaving the transferees for value to move in wilderness. It would be appropriate if the opposite parties 2 and 3 settle the matter and raise the demand for duty to be payable by the party liable preferably within a period of three months from the date of judgment. With these observations I concur with

the main judgment delivered by my learned brother.