Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10351 of 2014

(Arising out of OIA-387-389-2013-CUS-COMMR-A—JMR dated 21/10/2013 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

Genom Boitech Pvt Ltd **.........Appellant**
A-604, Delphi, Orchard Avenue,
Hiranandani Business Park, Powai,
Mumbai, Maharashtra

VERSUS

C.C.-Jamnagar(prev) **.........Respondent**
Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

WITH
Customs Appeal No.10352 of 2014

(Arising out of OIA-387-389-2013-CUS-COMMR-A—JMR dated 21/10/2013 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

Shashi Singh **.........Appellant**
A-604, Delphi, Orchard Avenue,
Hiranandani Business Park, Powai,
Mumbai, Maharashtra

VERSUS

C.C.-Jamnagar(prev) **.........Respondent**
Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

AND
Customs Appeal No.10353 of 2014

(Arising out of OIA-387-389-2013-CUS-COMMR-A—JMR dated 21/10/2013 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

Chandramauleshwar Prasad Singh **.........Appellant**
A-604, Delphi, Orchard Avenue,
Hiranandani Business Park, Powai,
Mumbai, Maharashtra

VERSUS

C.C.-Jamnagar(prev) **.........Respondent**
Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

APPEARANCE:
Shri. Dayananda K., Chartered Accountant for the Appellant
Shri. A R. Kanani, Superintendent (AR) for the Respondent

CORAM: **HON'BLE MEMBER (TECHNICAL), MR. RAJU**
HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

Final Order No. 10230-10232/2025 Dated 08.04.2025

Interim Order No. 31-33/2024

DATE OF HEARING: 26.07.2024
DATE OF DECISION:13.09.2024

SOMESH ARORA

The appellant is a Manufacturer Exporter Company engaged in the manufacture and export of Medicine Products. The appellant is 100% EOU having LOP No 128(2005)/SEEPZ-SEZ/EOU/1A-II/01/05-06/3409 dt 01.04.2005. The appellant has also been exporting various medicine products against CT-1 under DEPB Scheme. Intelligence was received by DRI to the effect that two containers loaded with the medicine had been discharged at the port of Pipavav and were lying unclaimed by the importer. It was also revealed through intelligence that the subject consignments were earlier exported by the Appellant from some other port by availing the benefit of DEPB. The containers were shipped from Odessa Port of Ukraine by M/s Private Party Oderig and were said to contain Pharmaceuticals/Medicines and the consignments were consigned to the appellant. Appellant as per its version came to know about the above consignment only after receiving the summons from the department. The appellant had earlier exported the goods in question to M/s Biologica (UK) Ltd and not to M/s Private Party Oderig and M/s Private Party Oderig was the customer of Biologica and the appellant never exported those goods directly to M/s Private Party Oderig. Appellant had refused to accept and clear the above consignment since as per them they were not aware of the said shipment and they have not imported the said goods. The appellant had remitted Rs. 13,00,219/- being the amount of Central Excise duty not paid at the time of export of such medicines. Further, benefit of DEPB amounting to Rs, 3,36,333/- availed on export of the said medicines and which was later utilized in payment of import duty was also reimbursed by the appellant.

2. Subsequently, a show cause notice was issued to the appellant alleging that as per Rule 43A of the Drugs and Cosmetics Rules, 1945 read with CBEC Circular No 450/08/2007-Cus dated 22.1.2007, Pipavav is not the notified port to import the impugned goods. On adjudication, confiscation was upheld and the duty of Rs.13,00,219, penalty under Section 112(a) of Rs.13,00,219 and penalty of Rs.10,00,000 under section 114A on the company and penalty of

Rs.5,00,000 each on the two employee directors was imposed under section 112(a). In reply to the SCN, the appellant denied the ownership of the goods due to the fact that as soon as the goods were cleared from the customs; the appellant had relinquished the title of the goods. Once the title of the goods was already transferred to the buyer M/s Biologica (UK) Ltd, the question of again retransferring the same to appellant does not arise. Further, the appellant has not ordered for the return of the goods as the contract for the particular shipment was concluded and completed at that point of time only. Further, the appellant has not returned the sale proceeds for the returned goods and the appellant has no intention to return the said amount. The SCN culminated in the order in original confirming the demands along with interest and penalty in which various factual claims by the appellant were contested by other evidences by the department. An appeal was preferred by the appellant against the order in original, same was dismissed by the appellate authority. Being aggrieved, appellant has preferred this appeal, inter alia, on the below grounds below:

Grounds taken by the party

The appellant is not liable for any duty and consequential penalties and interest for the following reasons:

- The exporters had paid the freight by themselves and sent the consignment in the name of the appellant.
- Appellant has never ordered for the goods.
- All the goods exported by the party were never purchased from the appellant. He had purchased from the customer of the appellant
- Due to the expiry of such goods, they had returned to India in the name of the appellant without even obtaining any confirmation.
- There is no demand of amount for the goods sent by the said exporter viz Private Party Oderig and this clearly shows that they had returned expired goods to India without the appellant's consent.
- The goods are totally expired and hence the value of the goods should be NIL
- The statement given by the directors clearly stated that they were not aware of re-import at all and came to know only when the summons came from DRI.
- The levy was equal to excise duty. However notification 94/96-customs cannot be applied for the following reasons;
- The central excise duty payable on such goods at the **time of importation is NIL as the value of the goods is NIL**

- **ii.** The goods were re-imported after the period of one year and hence notification 94/96-Cus. cannot be applied.
- **iii.** The appellant has not returned any amount outside India for the exports made and hence there is no requirement to claim back DEPB benefits.

- Appellant had requested to destroy the goods as abandoned under section 23 of the act. As the appellant had never imported or ordered to import, always appellant can request for the destruction of the goods.
- As per section 20 of the Act, all the provisions of valuation under customs is applicable for re-imported goods. In the given case, value of the goods is Nil as held in the order itself. Therefore, there should not have been any duty on such NIL valued goods.
- For not committing any mistake, no penalty should be imposed on the appellant.
- As per section 114A, simultaneous penalty under Section 112 and 114A cannot be imposed. However the order has levied penalty under both the sections.
- For no fault of director's employees, penalty under section 112(a) has been imposed to the extent of Rs.5 lakh each.

3. During the course of investigation, it was clearly stated and identified the origin of the goods. It is stated that all such unclaimed goods were originally manufactured by various third parties and procured by the appellant against CT-1 certificate and exported by the appellant against DEPB benefits. It is also a fact examined and verified by the department that all such goods have been procured as merchant exporter and not exported as manufacturer exporter. When the goods were not ordered by the appellant or when the export from other country is not based on the appellant's direction or request, law cannot impose onus of import on the appellant. In fact, the law has anticipated such situations and made provision in Section 23 to abandon or relinquish the title of the goods before the clearance of disputed goods. Hence, as per the provisions of Section 23(2) of the Customs Act, the appellant had expressed his willingness to relinquish the title of the goods though the appellant does not have the title to the goods as claimed by the customs

4. The department has snatched the natural right given under Section 23 of the Act. The learned Commissioner has held that the appellant has failed to file the bill of entry as required under Section 46 of the Act and hence violated the provisions. The learned Commissioner has not proved that the appellant is

the owner/importer of the goods. Unless the owner/importer of the goods is established, the question of filing bill of entry under Section 46 does not arise. It is held that the appellant has re-imported the goods and hence as per the provisions of Notification 94/96-Cus, the appellant has been forcibly made to pay customs duty to the extent of excise duty not paid at the time of export along with the DEPB credit claimed.

5. Appellant submits that Notification No 94/96 – Cus is applicable only when the re-import takes within one year from the date of export. As per proviso (a) to the Notification, in case of goods exported against DEPB, the goods should be re-imported within one year from the date of export. Once the goods are re-imported beyond the said period, the question of taking back the benefit of DEPB or applying the Notification No 94/96-cus does not arise. In view of this, the learned Addl. Commissioner has wrongly applied the Notification, which has been wrongly upheld by the FAA. As per Section 20 of the Customs act, all the provisions of valuation are applicable for the re-imported goods. In other words, the provisions of Section 14 read with any valuation rule are applicable for re-imported goods also. It is held in the order in appeal that the goods are not fit for human consumption and also the shelf life of the goods are expired. Once the shelf life is expired, the value of the goods is zero and hence based on the provisions of Section 14 read with provisions of Section 20 and 23 of the Act, the learned Commissioner should not have confirmed duty demanded from the appellant. Appellant is neither the importer nor the owner and it is only the department's assumption and presumption that appellant is the owner / importer of the goods, the relinquishment of the same should have been allowed. The impugned OIA is silent on this issue. Further, the issuance and monitoring of DBPB is governed in Chapter 4 of the Exim Policy and Hand book of Procedure. As per paragraph number 4.45 of the Hand Book of Procedure, Import Export Policy, before issuance of the DEPB certificate, the regional authority / licensing authority has to ensure that the bank realization certificate (BRC) has been submitted. Once the BRC is filed and license is issued and thereafter the money received is not returned, the question of recovering the duty benefit involved in DEPB does not arise. The learned Commissioner has wrongly applied the provisions of Notification No 94/96-Cus. Since the Exim policy does not permit the customs authorities to recover the duty benefit of DEPB in case of return of goods beyond the stipulated period of one year from the date of export, the action of the department is beyond the scope of the legal provisions and hence the appellant requests the Hon'ble CESTAT not to appropriate the amount towards DEPB benefit availed by the appellant. Further, the appellant will also

make an application for claiming the refund of the same. Against this objection, the appellate authority has not given any ruling. The goods were lying for more than 2 years in the port. As the goods were not warehoused and also de-stuffed, they should not have wasted more than 26 months to start the investigation itself after knowing the background of the issue from liners and agent of liners. This clearly shows that there is no suppression of the facts and therefore the penalty should not have been imposed under Section 114A of the Customs Act. Further, the provisions of section 112(a) and 114A are wrongly invoked, the appellant pray to the Hon''ble CESTAT to set aside the order in appeal.

6. As against this the department's crystallized stand reiterated through A.R is contained in the following findings in the Order-In-Original upheld by Order-In-Appeal is as follows:-

> *22. "I find that the re-imported consignment was actually exported earlier by GBPL. This fact has been admitted by Shri CMP Singh, one of the Directors of the company during the course of recording of panchnama dated 03.01.2010, that the said consignment of medicine was exported by them to Ukraine and he had also produced certain export documents pertaining to the said consignment, further it is also mentioned in the panchnama that the sticker pasted on each of the cardboard boxes had the name of the manufacturing company as Genom Biotech Private Ltd. It is also a fact that the Bills of Lading produced by Shri Bhavik Chandarana, Executive Operations, Maersk India Pvt. Ltd clearly showed the consignee of the said consignment as GBPL, Andheri, Kurla Road, Mumbai. I also find that Shri CMP Singh has admitted to the fact that they had exported the goods in question to M/s Biologica (UK) Ltd., UK and M/s Private Party Oderig was a customer of M/s Biologica (UK) Ltd. It is also a fact on record that Shri Sashi Singh, admitted in his statement that the email id through which M/s Safamarine had communicated the details regarding the re-import of the said consignment, was their official email id. He also admitted to the fact that the invoices w.r.to the reimport of the consignment were for the shipment of the rejected export consignments to India back to their company M/s Genom Biotech Pvt Ltd., Mumbai. Shri Sashi Singh has also admitted in his statement dated 01.03.2011. the medicines exported by them were exported back by their buyers due to losing the expiry date and its potency. It is also an admitted fact that they were still having business transactions with M/s Private Party Oderig, Ukrain. Further scrutiny of the various correspondence of M/s Safamarine, Ahmedabad it is clear that GBPL had initially agreed to clear the cargo and subsequently they instructed Safmarine to auction the same. Further, I find that Shri Sashi Singh Director, of GBPL had requested the Assistant Commissioner, Customs House, GPPL, Pipavav for destruction of the medicine consignments lying at CFS, GPPL, Pipavav Port for the reason that the same had lost its usability/ potency and expired by Sept'07 ie much before its import at Pipavav Port. Hence there is no force in the argument put forth by GBPL that they were not aware about the export of said consignment by M/s Private Party Oderig. It is merely an afterthought with the sole intention of evading the duty liability and penal action.*
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> *23. I find that the Port of Pipavav was not notified, for import of drugs/medicines under the CBEC Circular No 450/08/2007-Cus. IV dated 22.01.2007. This fact was known to GBPL as admitted by Shri Sashi Singh in his statement dated 01.03.2010 that they had violated the provisions of the Customs Act by import of expired medicines at Port of Pipavav which was not notified for such imports. Further Rule 30 of the Drugs and Cosmetics Rules, 1945 prohibits the import of any drugs after*

expiry of its potency or usability. As already discussed in the Para 22, it was well known to GBPL that the consignment contained in the two containers had already crossed its expiry date. Hence it is proved beyond doubt that GBPL had knowingly caused import of expired medicine consignments, which had lost its potency and was not fit for use, at the Port of Pipavav, which was not a notified port for import of drugs. Hence they had knowingly violated the provisions contained in the Customs Act as well as the Drugs and Cosmetics Rules 1945. The said consignment is therefore illegal import and is liable to be confiscated under section 111 (d) of the Customs Act 1962 read with Rule 30 of the Drugs and Cosmetics Rules 1945. Since the usability/potency of the medicine consignment has already expired by September 2007 and the same are no more fit for use, and the use of same may also have a hazardous effect, I find that the same needs to be disposed off as per the provisions contained in Section 110(1A) after following the procedure prescribed under Section 110 (1B) of the Customs Act 1962. ***The question framed at para 21(a) is answered accordingly.***

24.1 I find that the medicine consignment, imported in two containers was earlier exported by GBPL, under various shipping bills availing the benefit of exemption from payment of excise duty either by way of claiming rebate or by way of export without payment of duty under bond. Hence it is an undisputed fact that the said goods have not suffered the duty of excise hence in view of provisions contained in Notification 94/96- Cus dtd 19.12.1996, they are liable to pay the customs duty equivalent to the duty of excise leviable at the time of export.

Section 46 (1) provides that ***"the importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form"****. GBPL was therefore required to file the Bill of entry for clearing the imported consignment on payment of appropriate duty of customs. They however failed to come forward to file the bill of entry and claim the goods in spite of repeated letters and correspondence in this regard. They subsequently requested for destruction of the said consignment. GBPL had knowingly abstained from filing the bill of entry since it was known to them that the medicine consignment consisted of expired medicines import of which was prohibited. They thereby suppressed this fact thereby rendering the goods liable to confiscation. Shri Shashi Singh and Shri CMP Singh admitted this fact and voluntarily deposited the duty involved i.e duty equivalent to the duty of excise foregone at the time of export on the said goods imported. GBPL has argued in their submission that they were forced to make the aforesaid payment. However it transpires from the facts of the case that GBPL had made the payments on 10.03.2010 and 02.08.2010. The statements of the Directors were recorded on 08.03.2010, 05.07.2010 and 01.03.2011 and the Show Cause Notice was issued on 27.12.2011. The relevant portions of the statements are reproduced below:*

(a)Statement dated 08:03.2010 of Shri C.M.P. Singh, Director:

"Question. 11. In view of the above consignments of medicine exported by you whereas subsequently re-imported at Pipavav Port do you agree to the fact that the export benefit availed on the same needed to be returned/withdrawn? Also do you agree to the fact that the exemption of the Central Excise duty whereas availed on such exports also needed to be denied and refunded to the Government of India?

Answer. 11. Yes we agree to the fact that the Central worked out the Cen tral Excise Duty and the DEPB beriefit, Blofach Pvt. Ltd. Excise Duty leviable on the home clearance of such products required to be refunded to then Government account for the reasons the said goods after export wre re-imported. Under the circumstances we also intend to surrender the

benefit of export availed in the form of DEPB credit. Therefore we have For Go availed by us in the said statement presented by me today subject to the further modification therein if any felt by the department in future. The Central Excise Duty as per calculation worked out to Rs. 11,27,761/- and DEPB benefit ou Au avalled by us on the impugned goods is Rs. 1,45,829/- and which we are ready to deposit voluntarily in terms of Notification 94/96- Customs. WE have got the Demand Draft bearing No 255385 dated 25.02.2010 isdsued from the SBI, in favour of CBEC. totally amounting to Rs. 12,73,590/- and amount intended to the deposited through TR-6 Challan. The amount may not be exactly the same however we undertake to make differential payment whatever arises and intimated to us by your office."

(b)<u>Statement dated 01.03.2011 of Shri Bashi Singh. Director.</u>

"Question.6. Do you agree to the fact that it was illegal on part of GBPL to allow re-import of the medicines after the same lost it's potency Le after it was expired? Also was not this illegal on part of GBPL to allow even re-import at Port of Pipavav and then not coming forward to claim the same? Answer. 6. I agree to the fact that we have suppressed the fact of import from Customs and thereby violated provisions of Customs Law. Further I accept that violation of Customs Act, 1962 has taken place by Importing expired medicine in India and which took place at Port of Pipavav which was not notified for such imports. Because of the reasons realizing the mistake as explained above we made payment of duty voluntarily on the re-imported consignments equivalent to the amount of Central Excise Duty, leviable on such goods at the time of export and also reimbursed the amount of DEPB credit proportionately availed against such exports subsequently utilized in payment of Customs Duty."

However, it is a fact on record that during the intervening period after making the said payments, or after recording of statements none of the Directors have filed any retraction of their statements or lodged any protest. It has been held by Hon'ble Tribunal in the case of COMMISSIONER OF CUSTOMS (IMPORT), MUMBAI Versus VIDEOMAX ELECTRONICS reported in 2011 (264) E.L.T. 466 (Tri. Mumbai) that " ***........That highly belated claims to the contra made in the reply to the show-cause notice cannot be accepted as a valid retraction of the confessional statements made by him under Section 108 of the Customs Act, 1962"***

Hence the claim in the reply that they were forced to make the payment of duty cannot be accepted as a retraction of their statement under Section 108 and their argument is only an afterthought.

24.2 GBPL have further argued that they had relinquished their claim under Customs Act 1962. However, I find that the proviso to Section 23(2) stipulates that, ***"Provided that the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force."***

Hence by virtue of the abovementioned proviso, GBPL is not entitled to relinquish the title of the imported goods and are rightfully the importers as well as owners of the imported goods. Hence being the importer they were required to file the Bill of entry for import under Section 46 of the Customs Act 1962. Hence they were rightly required to pay the duty of customs on re-import equivalent to the duty of Excise *foregone at the time of export of said goods as calculated in the Annexure-A to the Show Cause Notice along with interest under Section 28 AA of the Customs Act, 1962. Since the said duty has already been paid by GBPL, the same should be appropriated against the confirmed dues.* ***The question framed at Para 21 (b) & (d) is answered accordingly.***

25. I find that GBPL was well aware of the fact that the medicine consignment imported in the two containers were part of the same goods that was exported by them earlier availing benefit of export under the DEPB scheme. However, they deliberately did not come forward at the time of landing of said consignment at Pipavav Port to claim the said goods and they willfully did not file the Bill of entry in violation of the provisions of Section 46 of the Customs Act 1962 with the intention of not paying the duty of customs due thereon and to illegally retain the benefit of DEPB credit availed by them on export of such goods. I also find that this illegal import was made suppressing the fact that the import pertained to expired medicines, import of which is specifically prohibited under the Drugs and Cosmetics Rules, 1945. Hence the extended period of limitation is rightly invokable in the present case. GBPL had defrauded the department by illegally importing medicinal consignment and trying to retain the undue DEPB benefit availed by them. Hence they are required to reimburse the benefit of DEPB availed on such returned goods as calculated in the Annexure-A to the Show Cause Notice. Since the said Hiotech Pvt. Ltd. For Gen duty has already been paid by GBPL, the same should be appropriated against the confirmed dues. ***The question framed at Para 21 (c) is answered accordingly.***

26.. I find from the discussions in the foregoing paras that, GBPL has deliberately suppressed the fact of import of expired medicinal goods, which was specifically prohibited under Rule 30 of the Drugs and Cosmetics Rules, 1945 and secondly the Port of Pipavav was not a notified port for import of medicines in terms of Rule 43A of the Drugs and Cosmetics Rules 1945. It is also a fact that GBPL was involved in the business of manufacture and export of medicine and ignorance of the above facts on their part cannot be accepted by any stretch of imagination. Hence GBPL have willingly caused the said violation of the Provisions of Customs Act and have rendered the imported goods liable for confiscation and have also rendered themselves liable to penal action under Section 112(a) and Section 114 A of the Customs Act 1962. I find that the goods imported are specifically prohibited under the Drugs and Cosmetics Rules, 1945, hence this offence committed by GBPL had rendered themselves liable to penal action under Section 112(a). Hence I hold that GBPL is liable to penalty under Section 112(a) as well as Section 114 A of the Customs Act 1962. ***The question framed at Para 21 (e) is answered accordingly.***

27. I find that Shri CMP Singh and Shri Sashi Singh, both directors of GBPL were responsible for the re-import of the expired medicine consignment at the port of Pipavav. It transpires from the record of investigation and the statements recorded that they in collusion with their overseas customers caused the import of such illegal consignment and subsequently did not take proper action for claiming a said consignment with the sole intention evading the payment of Customs duty thereon and also illegally retaining the export benefit availed on such re-imported cargo. They suppressed. vital information by failing to file the Bill of Entry in spite of repeated instructions. They have also confessed in their respective statements as already discussed that they were well aware about the violation of the provisions of the Customs Act and were equally aware about the fact that all the imported medicines had already lost their usability or potency as is apparent from their statements and from their letter to the Assistant Commissioner, Pipavav, for destruction of the said consignment. They have thereby caused the imported goods to be liable for confiscation and have also rendered themselves liable for penal action under Section 112(a) of the Act 1962. Since the said duty has already been paid by should be appropriated *against the confirmed dues.* ***<u>The question framed at Para 21 (f) is answered accordingly.</u>***

28. I find from the discussions in the foregoing paras that, GBPL has deliberately suppressed the fact of import of expired medicinal goods, which was specifically prohibited under Rule 30 of the Drugs and Cosmetics Rules, 1945 and secondly the Port of Pipavav was not a notified port for import of medicines in terms of Rule 43A of the Drugs and Cosmetics Rules 1945. It is also a fact that GBPL was involved in the business of manufacture and export of medicine and ignorance of the above facts on their part cannot be accepted by any stretch of imagination. Hence GBPL have willingly caused the said violation of the Provisions of Customs Act and have rendered the imported goods liable for confiscation and have also rendered themselves liable to penal action under Section 112(a) and Section 114 A of the Customs Act 1962. I find that the goods imported are specifically prohibited under the Drugs and Cosmetics Rules, 1945, hence this offence committed by GBPL had rendered themselves liable to penal action under Section 112(a). Hence I hold that GBPL is liable to penalty under Section 112(a) as well as Section 114 A of the Customs Act 1962."

7. Considered. We are in the matter dealing with expired medicines which were attempted to be imported into India and that too on an unauthorized Port. It is quite clear from the records that identity of goods which got re-imported into India was same as exported and on whom exports benefits were taken by the exporter, who is also, *inter alia*, appellant before us. The goods were duly owned, under Section 23 of Customs Act, 1962 duly identified by them through its directors. It is also on record that the goods exported were to M/s Biologica (UK) Ltd but came back through M/s. Private Party Odering, Ukraine. It is also on record that appellant were having business dealing with even M/s. Private Party Odering, Ukraine. Only stand taken by the directors of GBPL on behalf of it is that neither the Company nor the directors etc. were aware of re-import of such goods at Pipavav Port. The department has relied upon the preponderance of probability specially the fact that M/s. Private Party Odering, Ukraine named them as importers, there were letters sent by the Pipavav Port authority stated to be not received due to change of address as also various emails issued by Shri. Gopinath Balan, Branch Manager, which are admitted to be given at their correct e-mail address. That they had initially directed M/s. Safmarine to Clear the Cargo and later on to auction the same. The department has therefore imputed knowledge also to the directors Shri. CMP Singh and Shri. Shashi Singh as they were shown to be misstating the fact of knowledge. It is also highly unlikely that M/s. Private Party Odering, Ukraine would send the consignments even if expired at Pipavav Port which was not authorized port for the purpose and that too making appellants as a consignee or importer without their knowledge of goods. The directors of the Company have given testimonial evidence and concurred that the goods to be

same as exported. Department is also of the view that since they had official dealings with M/s. Private Party Odering, Ukraine, it was also highly unlikely that they will send the consignment back to them without information and that too till date of summons, will not inform them about it. We agree by preponderance of probability that knowledge cannot be denied. Therefore, denial of export benefit which was duly paid by them on 02.08.2010 as also the recovery of, DEPB credit etc., which too has been paid them, is correctly appropriated by the adjudicating authority. Same is upheld. Since, there was no retraction about admission that the goods were same as exported from India, the submission at such belated stage by the appellant that they were forced under threat to pay or face consequences in future is clearly properly rejected by adjudicating authority as after thought and not worthy of any credence. The department has correctly and with testimonial and other evidences as indicated above in produced part of the order rejected various claims of the party. Party has also represented itself as owner while requesting under Section 23 of Customs Act, 1962, while relinquishing and is also an importer as per various documents. Therefore, the contention of no knowledge till summons is clearly intended to misguide. We also endorse various submissions rejected by the adjudicating authority, as appropriate in law and on facts. We find that a highly damaging attempt on importing expired medicines on Indian soil was made, though thwarted by the Indian Customs, it is also noted that once pointed out the appellant duly paid back the benefits and deserve consideration for their this act.

7.1 We find that there was no intent to default on exports benefits at the time of export and same were properly claimed and become deniable only due to supervening events of medicines having expired while still being in Ukraine or UK, sending of such expired goods and that too on unauthorized port makes the importation illegal and therefore penalty becomes imposable, due to knowledge as inferred by the lower authority and as flows from the preponderance of probability.

7.2 We are therefore, inclined to impose penalty but reduce the same due to following reasons:-

i. No remittance for the expired goods have been stated to be given back to the for present exporters i.e. M/s. M/s. Private Party Odering, Ukraine of aforesaid consignment. Therefore, the sale proceeds are still retained by the appellant.
ii. Sending the expired goods was an illegal act primarily of the person who imported and re-exported the same to India. The cover up on knowledge

despite asking for getting clearance first to M/s. Safmarine makes them liable for penalty.

iii. The penalty is therefore, reduced to Rs. 5,00,000/- on M/s. Genom Biotech Pvt. Ltd. under Section 112(a) of the Customs Act, 1962. Simultaneous penalty levied under Section 114A of the Customs Act, 1962 cannot be sustained as a penalty under section 112(a) has been imposed, same cannot therefore be levied under Section 114A, as per statutory provision

7.3 The penalty on both the directors i.e. Shri. CMP Singh and Shri. Shashi Singh of Rs. 5,00,000/- each is also likewise reduced to Rs. 2, 00,000/-

8. Appeal is partly allowed in the above terms.

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi

<u>RAJU</u>

9. I have gone through the order recorded by Learned Brother. I am unable to agree with the same. In the instant case the facts recorded in para 1 and 2 of the order of learned brother. From the said facts following is noticed.

10. Consignment of certain expired medicines was received in the jurisdiction of Jamnagar Customs (Preventive) addressed in the name of the appellants. The appellants had not called for the said consignment or paid for the same. The appellant had never ordered the goods. The freight was paid by exporter. Appellant had not given any consent to the exporter for sending the said goods. The goods were expired medicines. Appellant came to know about the goods only when the customs approached them. Thereafter appellant had requested to destroy the goods as abandoned under Section 23(2) of the Customs Act, 1962.

11. Learned Commissioner had treated appellant as importer and charged the appellant that they had failed to file the bill of entry as required under Section 46 of the Act and hence the investigation started.

12. Earlier the appellant had received an order for certain medicines. The appellant had exported consignment of medicines under DEPB to M/s Private

Party Oderig located in Ukraine on the basis of the order received from M/s Biologica (UK) Ltd located in U.K. M/s Biologica (UK) Ltd. had directed the appellants to send the goods to M/s Private Party Oderig located in Ukraine. The appellant had received the entire consideration for the export from M/s Biologica (UK) Ltd. and no part of the said consideration has been remitted back.

13. The proceedings in this case culminated in demand of customs duty, recovery of DEPB credit, imposition of penalty under Section 112A, 114A of M/s Genom Biotech Private Limited. Penalty was also imposed on Shri CMP Singh, Director of Genom Biotech Private Limited and on Shri Shashi Singh, Director of M/s Genom Biotech Private Limited under Section 112A of the Customs Act.

14. The contention of the lower authorities has been that because the consignment which was exported by the appellant was sent back after expiry by the consignee although without the consent of the appellant, it is the responsibility of the appellant to clear the same. There is no consent on the part of the appellant for re-import of expired medicines.

15. In these circumstances, the appellant cannot be treated as importers. The definition of importer under Section 2(26) of the Customs Act reads as follows:

> (26) "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes [any owner, beneficial owner] or any person holding himself out to be the importer;

From the definition, it is clear that only an owner or a beneficial owner or any other person holding himself out to be an importer can be treated as an importer. In the instant case, the appellant have not paid for the consignment and therefore the appellant are neither owner or beneficial owners. The appellants are also not holding themselves out to be importer. In these circumstances, the appellant cannot be treated as importers. From the facts of the case, it is apparent that the appellants were not even aware of the fact that the consignee has sent the goods at his own cost to accord In India. They came to know only when the customs approached them. Section 46 of the Customs Act reads as follows:

> *"**SECTION 46. Entry of goods on importation**. — (1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting [electronically] [on the customs automated system] to the proper officer a bill of entry for home consumption or warehousing [in such form and manner as may be prescribed] :*
>
> *[**Provided** that the [Principal Commissioner of Customs or Commissioner of Customs] may, in cases where it is not feasible to make entry by presenting electronically [on the customs automated system], allow an entry to be presented in any other manner :*
>
> ***Provided** further that] if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.*

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

[(3) The importer shall present the bill of entry under sub-section (1) [before the end of the day (including holidays) preceding the day] on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing :

*[**Provided** that the Board may, in such cases as it may deem fit, prescribe different time limits for presentation of the bill of entry, which shall not be later than the end of the day of such arrival:*

***Provided** further that] a bill of entry may be presented [at any time not exceeding thirty days prior to] the expected arrival of the aircraft or vessel or vehicle by which the goods have been shipped for importation into India :*

*[**Provided** also that] where the bill of entry is not presented within the time so specified and the proper officer is satisfied that there was no sufficient cause for such delay, the importer shall pay such charges for late presentation of the bill of entry as may be prescribed.]*

(4) The importer while presenting a bill of entry shall [* *] make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, [and such other documents relating to the imported goods as may be prescribed].*

[(4A) The importer who presents a bill of entry shall ensure the following, namely:—

(a) the accuracy and completeness of the information given therein;

(b) the authenticity and validity of any document supporting it; and

(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.]

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa."

It puts responsibility on a importer to file bill of entry for the goods. In the instant case, the appellants are neither owner nor beneficial owners nor are holding themselves to be an importer and therefore, cannot be treated as an importer. Consequently, there is no responsibility on the appellant to file the bill of entry under Section 46.

16. In the aforesaid circumstances, I am of the opinion that no liability to duty or penalty can be affixed on the appellants.

17. The appeals deserve to be allowed.

(RAJU)
MEMBER (TECHNICAL)

Neha

Difference of Opinion

In view of above, the matter may be placed before Hon'ble President to appoint a Third Member for resolution of the following question:

1. Whether in the facts and circumstances of the case, the appellant can be treated as an importer?
   And/or
2. Whether the appellant is liable to any penalty in the present circumstances and on the basis of evidence available of construed knowledge?

(Pronounced in the open court on 13.09.2024)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi

INTERIM ORDER NO. 9-11/2025

Date of Hearing : 19.03.2025
Date of Decision : 21.03.2025

R. MURALIDHAR:

The matter has been placed before me as third member with the following questions:

- Whether in the facts and circumstances of the case, the appellant can be treated as an importer?

- Whether the appellant is liable to any penalty in the present circumstances and on the basis of evidence available of construed knowledge?

2. Both sides have appeared before me and have made their oral and written submissions.

3. The main submissions of the learned consultant appearing on behalf of the appellant is that:

(i) They have exported the goods to M/s Biologica (UK) Ltd. and not to M/s Private Party Oderig.

(ii) The expired goods out of the consignments exported by the appellant was sent back by M/s Private Party Oderig without any intimation to the appellant.

(iii) The export order was executed to M/s Biologica (UK) Ltd and payment has been received from them towards the export realization. Till date the amount is available with the appellant and has not been demanded back by the overseas importer.

(iv) Without prejudice to the above submissions, the goods has zero value since they are all expired drugs, hence no duty can be demanded.

(v) The demand has been made in terms of Notification No. 94/96-Cus dated 16.12.1996 wherein the re-importation is required to be done within one year whereas in this case the goods have been re-imported after more than two years. Hence, the demand made by invoking Notification 94/96-Cus dated 16.12.1996 is not legally sustainable.

4. The learned consultant also relies on the detailed observations and findings given by the Hon'ble Member (Technical) after which he has come to a conclusion that the appellant is not required to be burdened with any liability on account of customs duty, excise duty or penalty.

5. In view of the above submissions, the learned consultant prays that the appeal may be allowed.

6. Learned Authorised Representative appearing for Revenue submits that in the statements given by Shri Shashi Singh, Director, it is conceded by him that they are aware of their transactions and initially they had asked M/s Safamarine to clear the goods and instructed them to auction the same and subsequently they have made a request to the Assistant Commissioner, Custom House, Pipavav for destruction of the expiry goods. These show that the appellant is very much aware that the goods were exported to the appellant only. He draws our attention to the relevant para 22 of the Order-in-Appeal to this effect. He relies on the detailed observations and findings of the Hon'ble Member (Judicial) and supports the same and prays that as held by Hon'ble Member (Judicial), the impugned order may be modified and be implemented.

7. Heard both the sides, perused the appeal papers and the written and oral submissions made by both the sides.

8. In the submissions recorded on 01.03.2010, Shashi Singh, Director of Genom Biotech Private Limited (GBPL) has answered as under:

> *"**Question.6.** Do you agree to the fact that it was illegal on part of GBPL to allow re-import of the medicines after the same lost it's potency Le, after it was expired? Also was not this illegal on part of GBPL to allow even re-Import at Port of Pipavav and then not coming forward to claim the same?*
>
> ***Answer:6.** I agree to the fact that we have suppressed the fact of import from Customs and thereby violated provisions of Customs Law. Further I accept that violation of Customs Act, 1962 has taken place by importing expired medicine in India and which took place at Port of Pipavav which was not notified for such Imports.. Because of the reason's realizing the mistake as explained above we made payment of duty voluntarily on the re-imported consignments equivalent to the amount of Central Excise Duty, leviable on such goods at time of export and also re-imbursed the amount of DEPB credit proportionately availed against such exports and subsequently utilized in payment of Customs Duty.*
>
> ***Question.7.** Your claim that GBPL was not aware of the Imported goods consigned at Pipavav Port In two containers, because Biologica (UK) Ltd, UK or M/s Private Party Oderig, Ukraine had not informed you about the goods being sent back to India, which were earlier exported by you is not acceptable looking to the fact that even after that you-still export the medicines to them regularly. Do you agree to above?*
>
> ***Answer.7.** Except for the fact that we have business still with M/s Private Party Oderig, Ukraine but not with Biologica (UK) Ltd, UK anymore, I agree to the above fact, however I have to explain that exporting goods even today to Mis private party Oderig, Ukraine are due to commercial considerations. But the medicines are exported back to India by these parties, due to losing the expiry date and It's potency. After medicines get expired or lose their potency, they find It difficult to dispose off the same in their country and therefore sending it back to India. We have vehemently lodged our protest with these parties for such exports of our medicines back to India."*

9. This shows that the appellant is aware of the transactions with the exporter. On specific query from the Bench as to how the export was taking place, the learned consultant submits that the overseas importer was M/s Biologica (UK) Ltd. and they had directed the appellant to consign the material directly to M/s Private Party Oderig. Because of such instructions, it gets clarified that the appellant was aware that the goods have been consigned to M/s Private Party Oderig only but the payment was being made by M/s Biologica (UK) Ltd., since they were the importers. From the investigations and verification, it has also come to light that the goods which have entered at Pipavav Port are the same which were exported earlier by the appellant.

10. In the statement recorded by Shri C.P. Singh, Director of Genom Biotech Private Limited (GBPL), it is seen from question No. 7 that letters were dispatched on 13.03.2008, 19.03.2008 and 02.04.2008 which all were not received by them with the postal authority's remark as ***"not claimed"***. When this was queried by the Bench, the learned consultant submits that the appellant was not available in the address given in these letters. On a specific

query whether the appellant was never in the address given in these letters, he was not able to confirm the same. In some other cases they have also denied the receipt of E-mail even though they have confirmed that the E-mail id pertains to them. When all these facts are taken up together, I find that the appellant has not been able to conclusively prove that they were not aware of the sending back of the expired drugs by M/s Private Party Oderig. The mere fact that they have not returned the export proceeds to M/s Biologica (UK) Ltd., cannot come to the rescue of the appellants. Since admittedly they were carrying on multiple transactions both with M/s Biologica (UK) Ltd. as well as with M/s Private Party Oderig, they may be maintaining a running account for their transactions which has not been properly investigated by the Revenue.

11. So far as the appellant's argument that the value of the consignment should be treated as nil, since it pertains expired drugs, this can come to their rescue only if the Pipavav Port is designated as a proper port for import of medicines. Since this could not have been imported at Pipavav Port, even in the case of normal pharma products, the import could not have been cleared on payment of customs duty.

12. In respect of the argument of the appellant about re-importation required to be made within one year, the office of Authorised Representative provides the copy of the Notification 135/99-cus dated 27.12.1999 wherein the period for re-importation has been increased from one year to three years. Therefore, even this argument of the appellant cannot be legally sustained.

13. After considering all these facts, I am in agreement with the conclusion arrived at by the Hon'ble Member (Judicial) to hold that in this case, modification of the penalties would serve the purpose, as has been held by him at para 7.2 and 7.3 of the interim order.

14. Matter to be posted before the regular bench.

(Order pronounced in the open court on 21.03.2025)

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Neha

MAJORITY ORDER

Date of Hearing : 08.04.2025
Date of Decision : 08.04.2025

SOMESH ARORA:

In view of majority decision as above, the appeal is partly allowed.

(Dictated & Pronounced in the open court)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(SATENDRA VIKRAM SINGH)
MEMBER (TECHNICAL)

Neha