IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

Appeal Nos. C/195 to 197/2012

(Arising out of Order-in-Appeal No.13/2012, 14/2012 and 15/2012 all dated 29.5.2012 passed by the Commissioner of Customs and Central Excise (Appeals), Trichy)

Rajesh, Proprietor
M/s. Rajesh Associates — Appellant

Vs.

Commissioner of Customs, Tuticorin — Respondent

Appearance

Shri N. Viswanathan, Advocate for the Appellant
Shri A. Cletus, Addl. Commissioner (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **20.04.2018**

Final Order Nos. **41315-41317 / 2018**

Per Bench

Brief facts are that M/s. Rajeswari Enterprises filed two Bills of Entry for import of crude palm oil availing duty exemption under Notification No..21/2002 (Sl. No. 34). The importer filed four TRAs all dated 22.6.2004 pertaining to the DEPB license for various dates claiming adjustment of duty of Rs.45,12,296/- against the duty payable amount of

Rs.45,63,303/-. On verification, it was found that the TRAs were not issued to Tuticorin Port but to Chennai Port and also nto issued in favour of M/s. Rajeswari Enterprises. On verification of genuineness of the DEPB license from Jt. DGFT, Mumbai, it was found that the said licenses were bogus and forged. On inquiry, it was found that the importer purchased the above four DEPB license on premium from Shri Rajesh of M/s. Rajesh Associates, a broker named T. Rajasekaran of M/s. Seven Seas International, Madurai. Show cause notice was issued for confiscation of the goods for demand of duty along with interest and for imposing penalty under section 112(a) / 114A of the Customs Act, 1962. M/s. Rajeswari Enterprises and T. Rajasekaran approached Settlement Commission and settled the case thereby obtaining immunity from confiscation and penalty and prosecution. After due process of law, the original authority adjudicated the show cause notice of the appellant herein and imposed penalty of Rs. 8 lakhs each under section 112(a) of Customs Act, 1962 in all the three appeals. In appeal, Commissioner (Appeals) upheld the same. Hence these appeals.

2. On behalf of the appellant, ld. counsel Shri N. Viswanathan submitted that the entire case has been settled by the importer and others who had approached the Settlement Commission and therefore applying the decision in

the case of S.K. Colombowala Vs. Commissioner – 2007 (220) ELT 492, when the case is settled before the Settlement Commission, then the same cannot be adjudicated against other co-noticees, that the case of all co-noticees comes to end once order of Settlement Commission is passed in respect of a person who files an application before the Settlement Commission. He therefore pleaded that the penalty imposed on the appellant cannot sustain.

3. It is also argued by him that mere forged nature of the scrip cannot lead to the conclusion that the appellant has any role in such fraudulent use of DEPB scrips. The appellant came to know of the fact of fraudulent nature of DEPB scrip only when the importing company and their agent informed him over the phone and later Police complaint was filed against them. The appellant immediately arranged to repay and reimbursed the money received from the importing company to avoid any Police action against him. The DRI recorded statement from the appellant as well as his father wherein it has been clearly deposed that they do not have any knowledge about the forged nature of the scrips and that they have dealt with the same only in the usual course of their business. That the appellant has been implicated only because he has acted as a broker in the transfer of the alleged fake DEPB license to the importing company. The appellant has explained his

innocence in the reply to the show cause notices. The department has not been able to adduce any evidence to establish that appellant had connived in any manner for forging fraudulent use of the DEPB scrips.

4. The ld. AR Shri A. Cletus reiterated the findings in the impugned order. He submitted that the issue when one noticee has applied before the Settlement Commission and the case has been settled, would put an end to the proceedings against other co-noticees was considered by the Tribunal in the case of KI International Ltd. – 2012 (282) ELT 67 (Tri. Chennai) wherein the Tribunal on similar set of facts has held the decision rendered in S.K. Colombowala to be *per incuriam*. Therefore, the decision in the case of S.K. Colombowala cannot be applied to the facts of the case. It is argued by him that the appellant having acted as a broker for transfer and use of DEPB licence is liable for penalty. There is no requirement under section 112(a) to establish *mens rea* on the part of the offender. Even in the absence of *mens rea*, when the appellant has attempted to use the DEPB to make wrongful gain is liable to penalty. That therefore the impugned order does not call for any interference.

5. Heard both sides.

6. The ld. counsel for appellant has placed reliance on the decision in the case of S.K. Colombowala to argue that since

the main importer has settled the matter before the Settlement Commission and the confiscation having been set aside, no case would survive against the appellant who is a co-noticee to the proceedings. This has been controverted by the ld. AR by relying on the decision in the KI International (supra). In the said case, the Tribunal had held the decision in S.K. Colombowala to be *per incuriam* and observed that the order of Settlement Commission will not settle the dispute of other litigants who have not approached the Settlement Commission. This Tribunal had referred the issue in this very same case for Larger Bench and the Larger Bench vide order reported in 2013 (298) ELT 540 (Tri. LB) had declined to answer the reference, giving the appellant liberty to pursue the appeal on merits.

7. Keeping aside the debate with regard to the above decisions, let us analyse the issue on the facts and evidence presented before us. There is nothing brought out from records that the appellant had indulged in any conscious act while dealing with the DEPB scrips. The department has failed to establish that the appellant had prior knowledge that the DEPB scrips / license were fraud at the time of transfer of such scrips by him to the importer. Further, the immediate reaction of the appellant in reimbursing the money received itself would show that he had no knowledge of the fake nature of the scrips. In fact, we have to say that the appellant has become a

victim of the dealings as he did not know about the fake nature of the scrips. He had scouted for brokering under reference and there is nothing to establish his involvement in the chain of events. The ld. counsel for appellant has relied heavily on the decision in the case of CC Vs. Sanjay Agarwal – 2011 (269) ELT 153 (Guj.). The Hon'ble High of Gujarat in the said case observed that when there is no evidence of any direct involvement of the broker as regards forgery of the license, penalty cannot be saddled upon the broker for mere involvement in transfer of the license in the normal course of business. The relevant paragraphs are reproduced as under:-

> "10. On a plain reading of Section 112 of the Act, it is apparent that the same provides for penalty for improper importation of goods, etc. Thus any person who acts or omits to do any act in relation to goods so as to render such goods liable to confiscation under Section 111 or acquires possession of or deals with goods in the manner provided under clause (b) of Section 112 would be liable to penalty as laid down thereunder. Thus, both, Section 111 and Section 112 of the Act operate in relation to improper importation of goods.
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> 11. Coming to the facts of the present case, the respondent herein is alleged to have been involved in a transaction relating to purchase of DEPB licenses by M/s. Rajshanti Metals Ltd. Undoubtedly, the transaction relating to purchase of DEPB licences, is at a stage prior to clearance of the goods under the Customs Act. The alleged act of the respondent, therefore, cannot be said to be an act or omission pertaining to improper importation of goods. Hence, apart from the fact that there is no evidence of any direct involvement of the respondent as regards forgery of the licences, even otherwise the provisions of Section 111 and 112 of the Act would not be attracted so as to vest the Customs Authorities with the power to take action against the present respondent in connection with his alleged involvement in the purchase of the DEPB licences. Insofar as the Customs authorities are concerned, they are competent to take action against such persons who have used the forged DEPB licences to import goods, which would result in improper importation of goods as laid down under Section 111, and consequently would fall within the purview of Section 112 of the Act.

> 12. In the light of the aforesaid discussion, it cannot be stated that the impugned order of the Tribunal suffers from any legal infirmity so as to warrant interference."

8. Following the same, we are of the considered opinion that the penalties imposed on the appellant cannot sustain and requires to be set aside which we hereby do. The impugned orders are set aside and the appeals are allowed with consequential relief, if any.

(Operative portion of the order was
pronounced in open court)

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

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