

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/207 /2006-209 /2006,220 /2006 - CU[DB]

Date 13/01/2012

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S. SHRI PRADEEP PATHAK CLEARING AGENCY
PURANI NAUTANWA BEHIND RAILWAY STATION
NAUTANWA, DIST MAHARAJGANJ, UTTAR PRADESH

M/S. SHRI PRADEEP PATHAK CLEARING AGENCY

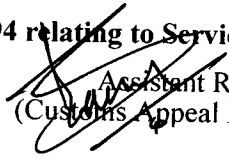
Appellant

C.C. LUCKNOW

MISC. ORDER NO.C/M/01/2012

Vs
Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/A/11-14/ 2012 CU[DB]** dated 11.01.2012 passed by the Tribunal under **Section 129, (B) of the Customs Act, 1962 & Financial Act 1994 relating to Service Tax**


Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C. LUCKNOW
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2. Adv. / Consult
MR.NAVEEN MULLICK
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5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. SHRI NAILESH SHAH,
15. SHRI PRADEEP N.SONI
16. M/S. SONAM INTERNATIONAL
SHOP NO.9, B-WING, DEVKI NAGAR,
EKSAR ROAD, BORIVALI (WEST), MUMBAI-400403.


Assistant Registrar
(Customs Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.**

Date of Hearing : 14.7.2011

Date of Pronouncement : 11-1-12

**Custom Misc. No. 709 of 2009 and
Custom Appeal No. 207-209 and 220 of 2006**

[Arising out of order in original No.5/Comm/Lucknow/05 dated 29.12.05 passed by the Commissioner of Customs & Central Excise, Lucknow]

Coram:

Hon'ble Shri S.S. Kang, Vice President

Hon'ble Shri Mathew John, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

M/s Sonam International
Shri Nailesh Shah
Shri Pradeep N. Soni
Shri Pradeep Pathak, Prop. M/s Pathak Clearing Agency

Appellants

Vs.

CC, Lucknow

Respondent

Appearance :

Appeared for the Appellant: Shri Naveen Malik, Advocate

Appeared for the Respondent: Shri R.K. Gupta, SDR

Coram: Hon'ble Mr. S.S. Kang, Vice President
 Hon'ble Shri Mathew John, Member (Technical)

Final Order No. C/A/11-14/12-Cus dated.....
 M.O. No. C/M/01/12-Cus
 Per **Mathew John**:

In this case Miscellaneous Application 709/2009 is seen on file. This was not listed for hearing. There was no argument regarding admission of the application. This application is for bringing on record certain technical literature which might have been relevant for deciding the actual nature of the goods. Now, the goods are not available for any further testing. We also note that tests have been conducted by authorities who are expected to know such literature. Considering the facts of the case and the stage of the case we do not find the technical literature to be of very significant. So the Miscellaneous application is dismissed, as not relevant, after having read the same.

2. There are four Appeals being decided in this proceeding. The main Appellant, M/s Sonam International, a proprietorship concern of Shri Kirtilal Shah, imported certain goods from Nepal declaring the goods as "Poultry Feed Supplement AV-107" in Bill of Entry No. 487/2002 dated 01-12-2002 filed at Land Customs Station Sonauli. The importer had claimed exemption under Notification 40/2002-Cus dated 12-04-2002. The goods were initially warehoused, apparently under section 49 of the Customs Act, but were finally assessed and released by Customs on 21-05-03. The goods were intercepted by Directorate of Revenue Intelligence on 23-05-03 at Ghaziabad and seized under the belief that the importer had mis-declared the goods in the Bill of Entry for claiming the exemption under Notification 40/2002-Cus dated 12-04-2002.

3. The case made out by DRI is that exemption under Notification 40/2002-Cus was meant for goods of Napalese origin; the goods imported were pure Calcium Di-Pantothenate, classifiable under Customs Tariff Heading 29.36 and the goods were imported from Germany (as indicated in the cost sheet submitted by importer at the time of import) by M/s Anvit Industries in Nepal and despatched to India without doing any manufacturing process in Nepal. While importing the goods into India the goods were described as "Poultry Feed Supplement-AV-107" classifying the goods under Customs Tariff Heading 23.09, and Central Excise Tariff Heading 23.02 with the fraudulent intention of claiming the said exemption. It was alleged by the Department that the import was in contravention of provisions of Indo Nepal Treaty of Trade, conditions of Notification 40/2002-Cus and Notification No. 9/96-Cus (NT) dated 22/01/96 issued under section 11 of the Customs Act.

4. A Show cause Notice issued in this matter to eight persons, including the four appellants before us, proposed confiscation of the seized goods under section 111 of the Customs Act and proposed penalties under section 112 of the Customs Act.

5. The Show Cause Notice was adjudicated by the order impugned before us. Under the order the impugned goods were absolutely confiscated and penalties were imposed on five persons as under:

(i)	M/s Sonam International	Rs.1 5,00,000
(ii)	Shri. Nailesh Shah Karta of M/s Sonam International	Rs. 15,00,000
(iii)	Shri Pradeep Soni, Manager & Power of Attorney Holder of M/s Sonam International	Rs. 5,00,000
(iv)	Shri Pradeep Phatak, Representative of the firm who cleared the goods from Customs	Rs. 15,00,000
(v)	Shri Kirti Lal Shah, Proprietor of M/s Sonam	Rs. 3,00,000

	International	
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Thus out of the five persons on whom penalties are imposed one is Sonam International, the proprietorship firm of Kirti Lal Shah and another is Shri. Kirti Lal Shah himself. Since these two parties claim that they are not separate, no separate appeals are filed. Thus there are only four appeals filed.

6. Notification 9/96-Cus (NT) dated 22-01-1996 reads as under:

"In exercise of the powers conferred by sub-section (1) of Section 11 of the Customs Act, 1962 (52 of 1962) and in supersession of the Notification No. 76/F.No.80/83/65-LCI dated the 19th June, 1965, published in the Gazette of India vide No. GSR 848, dated the 19th June, 1965, the Central Government being satisfied that for the prevention of smuggling it is necessary so to do, hereby prohibits the import from Nepal to India of goods which have been exported to Nepal from countries other than India:

Provided that machinery and equipment used in Nepal for the execution of a project may be allowed to be imported into India from Nepal after completion of the project subject to the following conditions namely:

7. Now it is proper to see the conditions of Notification 40/2002-Cus, which are reproduced below:

Condi on No	Condition
1.	<i>If the goods are wholly produced in Nepal.</i>
2.	<i>A (1) The goods are manufactured in Nepal wholly from Nepalese materials or Indian materials or Nepalese and Indian materials; or</i> <i>(2) The goods involve a manufacturing process in Nepal that brings about a change in classification at four digit level of the Harmonised Commodities Description and Coding System, different from those, in which all the third country origin materials</i>

used in the manufacture of such goods are classified and the manufacturing process is not limited to insufficient working or processing as indicated in the illustrative list below:

(i) Operations to ensure the preservation of articles in good condition during transport and storage (e.g., ventilation, spreading out, drawing, chilling, placing in salt, sulphur-dioxide or other aqueous solutions, removal of damaged parts and like operations);

(ii) Operations consisting or removal of dust, sifting or screening, sorting, classifying, matching (including the making up of sets), washing, painting, cutting up;

(iii) Changes of packing and breaking up and assembly of consignments;

(iv) Slicing, cutting, slitting, re-packing, placing in bottles or flasks or bags or boxes or other containers, fixing on cards or boards, etc., and all other packing or re-packing operations;

(v) The affixing of marks, labels or other like distinguishing signs on articles or their packaging;

(vi) Mixing of articles, whether or not of different kinds, where one or more components of the mixture do not meet the conditions laid down in para 1 (b) of Protocol to the Article V of the Treaty of Trade between His Majesty's Government of Nepal and the Government of India to enable them to be considered as manufactured or produced or made in Nepal;

(vii) Assembly of parts of an articles to constitute a complete article;

(viii) A combination of two or more operations specified in (i) to (vii) above.

B. The importer produces a certificate of origin in the Form indicated below, duly certified by an agency designated by His Majesty's Government of Nepal, in respect of the consignment, to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, that such goods have in fact been manufactured in Nepal.

---(Form of Certificate)

C. The products worked on or processed as a result of which the total value of materials, parts or produce originating from countries other than India or Nepal or of undetermined origin used -

i) does not exceed seventy five per cent. of the ex-factory price of the articles imported in the time period beginning from the 6th day of March, 2002, and ending on the 5th day of March, 2003; and

ii) does not exceed seventy per cent. in any subsequent time period, which commences on the 6th day of March in a given calendar year and ends on the 5th day of March of the subsequent calendar year; and

iii) the final process of manufacture is performed in Nepal.

Explanation - For the purpose of this notification, the value of materials, parts or

	<i>produce originating from countries other than India or Nepal shall be the CIF value at the time of importation of materials, parts or produce, at the point of entry in Nepal, where this can be proven to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs, or the earliest ascertainable price paid for the materials, parts or produce of undetermined origin in Nepal where the working or processing takes place.</i>
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8. The Appellants make the following submissions in this appeal.

8.01. The imported goods were covered by a certificate of origin issued by Nepalese Chamber of Commerce as required under condition-B of Notification 40/2002-Cus. If the Indian Customs had any suspicion about the certificate they should have checked up with the Government of Nepal as provided under Article-V of Indo Nepal Treaty of Trade and if required a joint visit should have been done to the factory in Nepal.

8.02. The goods were cleared after due scrutiny of documents, examination of goods and testing of samples by the Land Customs Station. So seizure of the goods subsequent to such clearance is bad in law. The proper authority to check the origin of goods is the customs authorities at India-Nepal border and not DRI officers from Lucknow.

8.03 The samples were not drawn by DRI in the presence of the Appellant and hence relying on test report of such samples is bad in law.

8.04 Statement of Shri. Sanjay P. Shah, Proprietor of M/s Sanjay Agencies which was one of the buyers of vitamins from the Appellant cannot be relied because he gave such statement due to trade rivalry and his cross examination was not allowed.

8.05 Statement of Shri. Pradeep Phatak, who was acting as the authorized representative of the Appellant at the Indo Nepal border for getting the goods cleared from customs, cannot be relied upon because it was taken under duress and was retracted.

8.06 The importer relies on Board's Circular No. 188/22/96-CX dated 26/03/96 to argue that animal feed supplements are classifiable under heading 23.09 of the Customs Tariff Act.

8.07. The importer relies on DGFT Policy Circular No. 44 (Re-99) 1997-2002 dt 25/11/99 to argue that the classification of animal feed supplements is under chapter heading 23.09 of Customs Tariff.

8.08. The importer relies on Board's circular No.112/2003-Cus dated 31-12-2003 to argue that the correct course of action for the department was to make a joint visit with the Napalese Customs to the factory of the exporter in Nepal to find out whether any manufacturing activity was done in Nepal on the goods. The circular reads as under:

"Subject : Exemption under Central Excise Notification No. 6/2002-CE dated 1.3.2003, vide Sl. No. 181 for chargeability of CVD on Import of copper/brass from Nepal-reg.

I am directed to say that divergence of practice regarding the exemption under Central Excise Notification No. 6/2002-CE dated 1.3.2002, vide Sl. No. 181 for chargeability of CVD on import of copper/brass from Nepal, has been brought to the notice of the Board.

2. Notification No. 6/2002-CE exempts copper producers from additional customs duty only if the manufacturer of such goods produces or manufactures copper from raw material other than copper ore or copper concentrate. Board's Circular 37/2001-Cus dated 18.6.2001 provides that if the condition of a notification is not verifiable, such exemption should not be extended. In the

case of copper/brass sheets imported from Nepal, normally it would appear that the verification of the source/raw material is not possible in a foreign territory. However, in this particular case, by virtue of the Indo-Nepal Treaty (para 5 of the Article 5 of the Treaty), the verification can be done by the Indian Customs, Hence, the issue is whether the exemption should be extended.

3. This matter was discussed in the Tariff Conference of Chief Commissioner of Customs held at Visakhapatnam on 25th and 26th September, 2003 (Agenda Point A-25).

4. The Conference noted that the condition regarding the kind of raw materials used for manufacture of the copper/brass given in the above referred Central Excise notification would require physical verification of the raw materials used for the production of export commodities made of copper/brass. Normally, such a condition would not be verifiable and therefore, the benefit of the Notification would not be extended. However, under the Indo-Nepal Treaty, Indian Customs authorities can visit the premises of the factories located in Nepal that are exporting goods to India. Hence, in a way the condition of the Notification can be verified.

5. The Conference came to the conclusion that the provisions under Indo-Nepal Treaty would override the conditions of the notification and hence, in the case of imports from Nepal under claim of the said Central Excise Notification, benefit can be extended on the basis of a declaration by the manufacturing company in Nepal. The option to undertake some physical verification of the premises of the manufacturer in Nepal would always be available with the Indian Customs, in terms of the provisions of the Treaty. In the case of copper/brass sheets, such verification may be undertaken by the Customs stations where such imports are noticed in large measure and the results of such verification may be circulated to all other formations.

6. The Board has accepted the recommendation of the Conference that the provisions of the notification should be read with the provisions of the Indo-Nepal treaty. It is accordingly clarified that in the case of imports from Nepal under claim of Notification 6/2002-C.E., Sl. No. 181, benefit can be extended on the basis of a declaration by the manufacturing company in Nepal. In case, on verification undertaken.

7. Field formations may finalise the pending assessments, if any, accordingly."

8.09. The Appellants submit that Importer makes the following further submissions that the appellant on its own, got one sample of the goods tested microbiologically from Ana Laboratories, Mumbai which indicated their findings as under:

Description	: White powder, slightly bitter
Specific rotation	: Nil
Content of Calcium	: 45.56%
Pantothenate	
(Estimated microbiologically)	

8.10. They further submit that there is difference between D-Calcium Pantothenate USP and DL-Calcium Pantothenate 45% Feed Grade. D- Calcium Pantothenate USP is a pure salt of D-Pantothenic Acid. It contains not less than 98% of D-Calcium Pantothenate activity, whereas DL-Calcium Pantothenate 45% Feed Grade contains only 45% D-Calcium Pantothenate which is active vitamin. D-Calcium Pantothenate USP is a product specified in US pharmacopia and it can be used by human beings in the form of tablets and capsules, whereas DL-Calcium Pantothenate 45% Feed Grade is not specified in US pharmacopeia and hence not permitted for use in human formulation.

8.11. In a similar case where the main appellant also was a party the Tribunal has set aside confiscation and penalty as reported as Baader Schulz Laboratories-2005 (188) ELT 40 (Tri) and therefore similar orders should be passed in this case also.

8.12. The value of goods have been increased from Rs. 11 lakhs to Rs. 33 lakhs without any basis.

9.01. The Ld SDR points out that this case is made on the basis of following test reports:

- a) Report C No. 35/Cus/2003-CL 97/DRI/30.5.2003 of the Central revenue Control Laboratory, New Delhi reporting that the sample is in the form of white coloured fine powder and answers positive test for Calcium Pantothenate
- b) Report No. 77694 dated 5.6.2003 of the Analytical Testing Corporation Lucknow reporting that the samples are Calcium D-Pantothenate 98.67 % (w/w) of standard quality and fit for human consumption.
- c) Another set of samples were again send for testing by micro biological method to M/s Analytical Testing Corporation, Lucknow on 6.6.2003. They vide their report No TR-77785 dated 11.6.2003 reported that the sample is Calcium D-Pantothenate (99.01% w/w – Assay on dried basis – microbiological method).
- d) Report S/23-20(5)/2003 Lab dated 13.6.03 of the New Custom House Laboratory Mumbai reporting that the sample is in the form of white fine crystalline powder, composed of Di-Calcium Pantothenate (Vitamin B-5).
- e) Certificate No. D/1309 dated 16.6.2003 of The Government Analyst, Uttar Pradesh, Lucknow reporting that the sample is of standard quality as defined in the Drugs Act, 1940 and the rules thereunder and is in the form of white powder and shows identify test positive for Calcium Pantothenate (100.6% w/w).

9.02. He points out that as per the admission of Shri. Pradeep Pathak, who was the authorized representative to get goods cleared from the customs, the goods were cleared on the basis of a report obtained from Analytical Test Corporation Lucknow by replacing the sample and the endorsement in the Bill of Entry regarding test result is this fraudulent report.

9.03. He further points out that a preliminary statement of Shri. Nailesh Shah was taken on 03-06-2003, when he stated that he was actually looking after the day to day affairs of the Appellant firm and requested for microbiological test of samples. Shri. Kirti Lal Shah, the proprietor of the appellant firm stated on 28-06-03 that the entire work relating the firm is being looked after by his elder son Shri. Nailesh Shah. However repeated summons issued to Shri Nailesh Shah on 04-06-2003, 12-06-2003, 09-09-2003, 27-10-2003, 04-12-2003, 09-01-2004, 26-02-2004 and 25-03-2004 were not responded to. Instead on 18-12-2003 he moved an anticipatory Bail Application before the Court of Sessions for Greater Mumbai. Against an undertaking given by the department that it will not arrest him, the Court directed him to appear before DRI officers on 18-12-2003. Still Shri. Nailesh Shah did not appear before the investigating officer. Against such back ground it is very clear that the Appellant did not have any reasonable explanation to give about the mis-declaration detected by the department and all the objection raised that the samples were not drawn in his presence and there was no joint visit to Nepal to find out whether the supplier had facilities for manufacture of the goods etc are just flimsy technical objection being raised without in bonafide ground for defence.

9.04. Further the SDR points out that the statements given by the following persons confirm mis-declaration in the description of goods in the Bill of Entry.

- (i) Statement dated 06-09-2003 from Shri. Nilesh Dhirajlal Sapriya, the Chemical-cum-Plant in Charge of M/s Baadar Schulz Laboratories;
- (ii) Statement dated 02-06-2003 of Shri. Sanjay P. Shah who was in charge of the affairs of M/s Sanjay Agencies, Valsad

who was another buyer of the product from Sonam International;

- (iii) Statement dated 31-05-2003 of Shri. Kalpesh Shah son of Shri. Kirtilal Shah, the proprietor of Sonam International;
- (iv) The statements dated 02-01-2004 and 03-01-2004 of Shri. Pradeep Pathak, who was the authorized agent of M/s Sonam International for clearing the goods from customs.

9.05. From the statement of Shri. Pradeep Pathak on 02-01-04 (para 21 of SCN), it is seen that samples from the consignment were drawn firstly on 04-01-03. One of the samples was sent to Custom House Laboratory at Mumbai according to which the sample was of pure Calcium Di-Pantothenate. Thereafter there was a request for re-drawing the sample and sending it to Analytical Testing Corporation, Lucknow. This sample so drawn on 04-03-2003 was sent through Shri. Pradeep Pathak who replaced the sample to get desired report. This report dated 28-02-05 from the said laboratory which showed content of Calcium Di-Pantothenate only to the extent of 49.37% only. After seizure of the goods by DRI, again samples were drawn and reports were sought from four different laboratories and all the reports confirmed that the goods were pure Calcium Di-Pantothenate.

9.06. Shri. Pradeep Pathak also informed that the certificate of origin attached to the Bill of Entry was a forged document.

10. We have considered arguments on both sides. The Appellant in the appeal memorandum had raised the issue that DRI had no jurisdiction to issue notice in this regard though this matter was not argued during hearing. This matter is now settled by the retrospective amendment brought out by The Customs (Amendment and Validation) Act, 2011 in section 28 of Customs Act 1962.

11. In this case the main issue to be decided is what was the nature of the goods imported and whether there was any manufacturing process done in Nepal on the imported goods to claim exemption under Notification 40/2002-Cus dated 12-04-2002. The claim of the importer is that there has been a change in the classification of the goods from one Customs Tariff Heading 29.36 to Heading 23.09 in Customs Tariff. If the test reports listed in para 8.01 above are taken to be correct, this change in classification is being achieved not by change in the characteristics of the goods originally imported into Nepal through any manufacturing process for later import Nepal to India but by arguments about what should be the classification. The next main defence is that if the Customs Authorities had doubt about manufacturing done in India, they should have conducted a joint inspection of the factory in Nepal. But here it is to be noted that when the matter was under investigation Shri. Nailesh Shah, the Karta of the firm, gave an initial statement on 03-06-2003 and after that he was absconding, not answering any summons and was seeking anticipatory bail. Even after bail was granted he did not appear before the Customs Authorities. So it is very obvious that he did not want any joint inspection at that stage. The next objection is that the samples were not drawn in his presence. When he was absconding the samples could not have been drawn in his presence. There was no such request when his preliminary statement was recorded on 03-06-2003. We also take note of the fact he did not raise this objection when the goods was still available and new samples could have been drawn. His original objection was only that the goods should have been tested microbiologically. This was done by revenue and the results were adverse to the Appellants. In the circumstances we do not find any merit in the arguments raised by the Appellant.

12. Thus the case of the department is proved based on test reports mentioned in para 8.01 above. The case is proved if the statement of

Shri. Pradeep Phatak is taken as correct. Though there is mention about retraction from the statement nothing is coming out which part of the statement was retracted when and what was the correct position of the facts as per retraction. The fact that cross examination of Shri. Pradeep Phatak was not allowed is not fatal to the case because the person himself is a notice and any statement during cross examination is only a self-certification about his innocence which has to be appreciated in the context of other evidences like test reports and behaviour of the parties during investigation. The statements of the buyers of the goods support the case of the department but it has hardly any evidentiary value because cross-examination of these witnesses was denied. When the goods were available for testing and were tested and found to be different from what was declared, the appellant was just trying to avoid coming before the department. His agent was accepting that the certificate was forged. In such circumstances the fact that department did not make enquiries with the Nepal Chamber of Commerce which is stated to have issued the certificate is not a major flaw in investigation. We do not find any need for any joint visit by the Indian Customs and Napalese Customs to the factory of the exporter to find out the correctness of the certificate issued.

13. Now the question is whether goods could have been confiscated absolutely. There is prohibition under Notf. 9/96-Cus (NT) (see para 5 above) dated 22-01-1996 for import of goods of third country origin from Nepal to India. Therefore the impugned goods were prohibited goods and liable to confiscation under 111(d) of the Customs Act. It is noted that this clause is specifically not quoted in SCN and Order-in-Original. However the fact that the goods were prohibited goods and were liable to confiscation under section 111 of the Customs Act is clearly brought out. So we do not find any thing wrong with the order confiscating the goods. In the case of prohibited goods there is

discretion for the adjudicating authority under section 125 of the Customs Act to release the goods against redemption fine. The said section reads asunder:

SECTION 125. Option to pay fine in lieu of confiscation. -

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods."

14. However the adjudicating authority has not recorded the reason for not giving such option. Where any authority has a discretion under a statute to do a thing, the authority has to exercise such discretion based on reason. The reason for not giving such option should be recorded. Since no such reason is recorded such absolute confiscation is bad in law. It is to be noted that the goods in question is not of a type which causes injury to public health or can cause damage or threat to the society if released into Indian market. In fact the counsel for appellant submits that the goods have been sold by the Customs in Indian market. In such a situation the goods should have been released to the importer against a redemption fine rather than the customs department selling the goods after absolute confiscation.

15. We do notice that the value of the goods declared in the Bill of Entry was Rs. 10,25,100/-. The value of seized goods was assessed at 33,00,000. Appellants have raised the objection that the basis for such assessment is not disclosed in the SCN or in the order-in-original. When the description was wrong the value declared cannot be accepted. This position is supported by Rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. The goods on test was actually found to be pure Calcium D-Pantothenate. The adjudicating authority had before him the price of pure DL Calcium Panthothenate declared by the appellant in cost sheets submitted by them as per documents at Sl. No. 34 and Sl. No. 35 of the RUDs annexed to the Show Cause Notice. So the value assessed cannot be faulted though this issue is not dealt with in the impugned order. This is a reasonable basis. Further it is seen that this point was not taken before the adjudicating authority. So we do not see any reason why this argument has to be accepted at this stage.

16. Thus overall we are in agreement with the findings in the impugned order. We find that the decision in the case of Badar Schulz Laboratories (Supra) is not applicable to the facts of the case because the sized goods contained Vitamin-E was only to the extent of less than 50% by weight as per test reports. Revenue was not able to establish how the goods were prohibited goods. IN this case the facts as coming out from findings recorded above are different.

17. However we feel that there was no good reason to confiscate the goods absolutely. We are of the view that the adjudicating authority should have given the option to redeem the goods on payment of appropriate redemption fine. We were given to understand that the confiscated goods have been disposed of by the department. We do not know how much was the sale proceeds. At any rate it is not appropriate for the Tribunal to decide the redemption fine and the

duty that was to be paid as per the provisions of section 125 (2) of the Customs Act.

18. In the matter of penalties we order that,-

(i) The penalty imposed on the firm is about 45% of the assessed value of seized goods. Considering that goods were absolutely confiscated, and the relief from such order is being granted only after more than 8 years, and thus the appellant has suffered severe penal consequence we reduce the penalty from Rs. 15,00,000/- to Rs. 7,50,000/- Further there is no ground to impose separate penalties on the firm and the proprietor of the firm. So the separate penalty on the proprietor Shri. Kirti Lal Shah is set aside.

(ii) From the records it comes out that the real person behind the manipulation is Shri. Nilesh Shah was in defacto control of the activities of the firm. So a penalty on him is warranted. But considering that the penalty on the firm itself is reduced to Rs. 7,50,000/- the penalty on Shri. Nilesh Shah is reduced to Rs. 5,00,000/-.

(iii) In the matter of penalty on Shri. Pradeep Soni, Manager and authorized Representative of Sonam International, for Rs. 5,00,000/- we find that he is only an employee of the firm and he was hardly responsible for the wrong declaration. Penalty is imposed on the ground that he should have been aware of the wrong doings. There is nothing coming out specifically about his commissions. So we set aside the penalty imposed on him.

(iv) Penalty on Pradeep Phatak, the representative of the Appellant to get Customs Clearance done we were of the view that the penalty of Rs. 15,00,000/- is high. He was involved in the replacement of samples. However he has come out with a clean statement of the facts

and needs leniency while determining penalty against him. So the penalty imposed on him is reduced to Rs.1,00,000/-

19. We remit the matter to the adjudicating authority to decide the issue of redemption fine and calculate the duty that was payable by the Appellant-firm. If the goods are still available it may be released on payment of redemption fine and duty payable as per section 125(2) of Customs Act. If not available, fine, duty and penalty may be deducted from sale proceeds and the balance amount if any should be refunded to the appellants.

20. Thus partial relief is given in the matter of absolute confiscation of seized goods and penalties imposed on the appellants.

(Pronounced on 11-01-12)

(S. S. Kang)
(Vice President)

(Mathew John)
Member (Technical)

RM