IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL Nos. C/508, 773/08 & C/846/08

(Arising out of Order-in-Original No. 187/07 CC(I)JNCH dated 18.3.2008 passed by Commissioner of Customs (Import), Nhava Sheva)

Kamal Agarwal **Harbhajan Singh Sandhu**	**Appellant**
Vs.	
Commissioner of Customs (I), Nhava Sheva	**Respondent**

AND

Commissioner of Customs (I), Nhava Sheva	**Appellant**
Vs.	
Amba Expo Fab	**Respondent**

Appearance:

Shri Vinay Ansurkar, Advocate, for appellant Kamal Agarwal
None for other assessees
Ms. Trupti Chavan, Assistant Commissioner (AR) and Shri Ahibaran, Additional Commissioner (AR), for Revenue

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)
Hon'ble Mr. C.J. Mathew, Member (Technical)

Date of Hearing: 12.2.2018
Date of Decision: 27.2.2018

ORDER NO……………………………

Per: Ramesh Nair

The present appeals are filed by the appellants, Shri Kamal Agarwal and Shri Harbhajan Singh Sandhu and one appeal is filed by the Revenue.

2. The facts of the case are that M/s. Amba Expo Fab has obtained advance licence from the DGFT for duty free import of PFY/POY by falsely declaring themselves as manufacturer-exporter whereas no manufacturing unit exists at the factory address declared by them and has imported a number of consignments free of customs duty, against the DEEC advance licences with actual user condition issued under Duty Exemption Entitlement Scheme (DEEC) and the same has been diverted into domestic market instead of using the same in manufacture of export goods. The charge on the appellant Shri Kamal Agarwal is that being the Executive Director of M/s. Aren Shipping Agency Pvt. Ltd., he conspired with Shri Harbhajan Singh Sandhu, Shri Vinod Gard and Jitendra Shasikant Shah and helped Shri Harbhajan Singh Sandhu and Shri Vinod Gard in the diversion of one consignment of 18,900 kgs. of imported polyester yarn valued at Rs.12,42,820/- involving duty which was forgone amounting to Rs.8,79,621/- by fraudulently utilizing the advance licences of Amba Expo Fab. Shri Kamal Agarwal also helped Shri Harbhajan Singh Sandhu and Shri Vinod Garg in diverting the said consignment into the domestic market of Ludhiana. Shri Kamal Agarwal was also involved himself in

helping Shri Harbhajan Singh Sandhu and Shri Vinod Garg of M/s. Royal Industries in the diversion of one consignment into the domestic market in contravention to the provisions of Notification No.43/2002-Cus. dated 19.4.2002. As regards the role of Shri Harbhajan Singh Sandhu, the Commissioner in the impugned order found that he entered into a conspiracy with Shri Yogesh Arvind Chalthanwala and Shri Jitendra Shashikant Shah and imported polyester yarn duty free by fraudulently availing the benefit of advance licence which was issued on the basis of misdeclaration in the name of Amba Expo Fab. Shri Harbhajan Singh Sandhu had imported one consignment of 18,900 kgs. of polyester yarn valued at Rs.12,42,820/- involving duty of Rs.8,79,621/- by fraudulently utilizing the advance licence of Amba Expo Fab. Learned Commissioner in considering the above role of both the appellants, imposed penalty of Rs.2,00,000/- each on both the appellants. Therefore, these appellants are before us. In the Revenue's appeal, the Revenue is seeking enhancement of penalty of Rs.75,00,000/- under Section 114A equal to the confirmed duty of Rs.3,47,48,553/-.

3. Shri Vinay Ansurkar, learned counsel appeared on behalf of the appellant, Shri Kamal Agarwal. However, none appeared on behalf of Shri Harbhajan Singh Sandhu and Amba Expo Fab. Shri Ansurkar submits that the appellant, Shri Kamal Agarwal is Executive Director of a shipping

agency who is not supposed to handle the goods and documents regarding advance licence. Therefore it cannot be said that he conspired in fraudulent benefit of advance licence by the importer. He prayed for setting aside the penalty.

4. Ms. Trupti Chavan, learned Assistant Commissioner (AR) and Shri Ahibaran, learned Additional Commissioner (AR) appearing on behalf of the Revenue, submit that both the appellants were admittedly involved in fraudulent benefit of advance licence as the goods were diverted in the domestic market and both the appellants were well within the knowledge of the entire modus operandi. Therefore the penalties imposed on the appellants are legal and proper which do not require any interference. In the Revenue's appeal it is sought to enhance the penalty from Rs.75,00,000/- to equal to the duty of Rs.3,47,48,553/- under Section 114A. Learned ARs submit that under Section 114A, there is no option to impose a reduced penalty. Therefore, the Commissioner has erred in imposing the reduced penalty without giving any reasoning.

5. We have carefully considered the submissions made by both the sides. We find that as regards the appeal of Shri Kamal Agarwal, he is Executive Director of a shipping agency, though as per his job, he is not supposed to handle the documents particularly related to advance licence. However,

from the facts of the case, it is revealed that Shri Kamal Agarwal also conspired in the fraudulent availment of the benefit of advance licence for diversion of the goods in the domestic market. However, considering the overall role of Shri Kamal Agarwal, we find as per his responsibility towards the entire episode is limited. Accordingly he deserves some leniency. We, therefore, reduce the penalty on Shri Kamal Agarwal from Rs.2,00,000/- to Rs.1,00,000/-. As regards the appeal of Shri Harbhajan Singh Sandhu, we observe that he is the person who imported and cleared the goods by using the advance licence and the goods were diverted to domestic market. Therefore, he was directly involved in the fraud of advance licence and was the next gainer of the benefit derived from the said fraud. Therefore, the penalty imposed of Rs.2,00,000/- on Shri Harbhajan Singh Sandhu is just and proper. We do not see any reason to interfere in the penalty imposed on Shri Harbhajan Singh Sandhu. Accordingly we uphold the penalty imposed of Rs.2,00,000/- on Shri Harbhajan Singh Sandhu. Accordingly his appeal is dismissed.

6. As regards the Revenue's appeal, we find that there is no dispute that the total duty confirmed is Rs.3,47,48,553/- invoking the proviso to Section 28(1) of the Customs Act, 1962. However, the learned Commissioner imposed penalty of Rs.75 lakhs under Section 114A of the Customs Act. Once

customs duty was confirmed under the proviso to Section 28, the ingredients to invoke Section 114A in relation to the entire duty stands invoked. Therefore, the Commissioner has gravely erred in not imposing the penalty of Rs.3,47,48,553/- under Section 114A. This issue has been settled in the case of *UOI* vs. *Dharmendra Textile Processors* reported in 2008 (231) ELT 3 (SC) that penalty under Section 114A should be mandatorily imposed equal to the duty confirmed. Therefore, the learned Commissioner had no discretion to reduce the penalty from the equal of the duty confirmed. In view of this legal position, we are of the view that the Commissioner has wrongly imposed penalty of Rs.75,00,000/- against the assessee, which should have been Rs.3,47,48,553/-. We, therefore, enhance the penalty from Rs.75,00,000/- to Rs.3,47,48,553/-.

7. As per our above discussion, the appeal of Shri Kamal Agarwal is partly allowed. The appeal of Shri Harbhajan Singh Sandhu is dismissed. The Revenue's appeal is allowed in the above terms.

(Pronounced in court on 27.2.2018)

(C.J. Mathew)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

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