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

APPEAL Nos. C/364,376,397/2010

(Arising out of Order-in-Original No. 09A/2010/CAC/CC/RBT dated 29.1.2010 passed by Commissioner of Customs (EP), Mumbai)

Mahesh P. Patel **Appellant**
Sudesh D. Nanaware

Vs.

Commissioner of Customs (EP), Mumbai **Respondent**

AND

Commissioner of Customs (EP), Mumbai

Vs.

Spectrum Fabrics

Appearance:

Shri Mithil Dave, Advocate, for appellant in C/364/10
None for appellant in C/376/19
Shri Chatru Singh, AC (AR) / Ms. Trupti Chavan, AC (AR), for Revenue

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)
Hon'ble Mr. Raju, Member (Technical)

Date of Hearing: 18.4.2018
Date of Decision: 08.5.2018

ORDER No. A/**86298-86300/2018**

Per: Ramesh Nair

These appeals are directed against order-in-original passed by the Commissioner. One appeal is filed by the Revenue on the ground that the adjudicating authority has not imposed penalty under Section 114A which is equal to the duty amount whereas he imposed penalty of Rs.20,00,000/- on M/s. Spectrum Fabrics under Section 112(a). Two appeals were filed by individuals, one by Shri Mahesh Purushotam Patel who is a Chartered Accountant and the other one Shri Sudesh Dagadoba Nanaware on whom the penalty under Section 112(a) of the Customs Act, 1962 was imposed on the ground that Shri Mahesh P. Patel, Chartered Accountant, had given a solvency certificate without verifying the documents for the purpose of issue of advance licence and his client M/s. Spectrum Fabrics has defrauded the Government by fraudulently obtaining the advance licence. Shri Sudesh D. Nanaware was imposed penalty under Section 112(a) on the ground that he being a consultant for obtaining the advance licence and also to arrange the sale of the advance licence. Therefore, the entire modus operandi of the fraud was created by these two appellants.

2. Shri Mithil Dave, learned counsel appearing on behalf of Shri Mahesh P. Patel, submits that the appellant has provided solvency certificate in respect of partners of M/s. Spectrum Fabrics in whose favour the Royalty Co-operative Bank has also given the solvency certificate. Therefore, it is not correct that the appellant has provided the certificate without any basis.

2.1 None appeared on behalf of Shri Sudesh D. Nanaware.

3. Shri Chatru Singh/Ms. Trupti Chavan, learned ARs appearing on behalf of the Revenue with respect to the two appeals filed by Shri Mahesh P. Patel and Shri Sudesh D. Nanaware, reiterates the finding of the impugned order. Ms. Trupti Chavan submits that both have played active role in facilitating the firm M/s. Spectrum Fabrics for obtaining the advance licence. On investigation, it was found that even the address of M/s. Spectrum Fabrics was wrong and the firm was not existing at the given address. In such case, solvency certificate given by the Chartered Accountant knowingly about the clear intention of fraud by M/s. Spectrum Fabrics, made himself liable for penalty. As regards the other appellant, Shri Sudesh D. Nanaware, she submits that he has played active role as consultant for obtaining the advance licence and even transferred the same. He was well aware about the entire fraud done by M/s. Spectrum Fabrics. Both have admitted their guilt in their respective statements recorded under Section 108 of the Customs Act. Therefore, the penalty under Section 112(a) was rightly imposed.

4. We have carefully considered the submissions made by both the sides. We find that as regards the appeal of Shri Mahesh P. Patel, in the impugned order, the adjudicating authority has recorded the finding as under:-

> "33. (i) Shri Mahesh Purushottambhai Patel, Chartered Accountant of M/s. Spectrum Fabrics, in his statement recorded by the DRI under Section 108 of the Customs Act, 1962 on 12.06.2003 accepted that he issued Certificates in

the name of M/s. Spectrum Fabrics, Surat, under his seal showing details of Export Performance for obtaining advance Licenses in the name of M/s. Spectrum Fabrics; that he had verified the Books of Accounts and seen Balance Sheet signed in original of both the Solvency Certificates, but they were not signed by any Chartered Accountant; that he had not verified their authenticity and he failed to verify the authenticity of the same. It was also stated by him that he never visited the factory premises of M/s. Spectrum Fabrics.

(ii) On behalf of Shri Mahesh Patel, the consultant Mr. Mithil Dave had made submissions as detailed at para 18** in this order. The contentions are broadly that Shri Mahesh Patel is a qualified Chartered Accountant and is having his practice since 1996 in Surat, he is not directly or indirectly concerned in any way with M/s. Spectrum Fabrics or any of the notice and their firms, that Shri Patel is qualified to issue Solvency Certificate and *I* or Export Performance Certificate and whatever he has done has been done in his professional capacity and after proper verification of the documents produced before him by Shri Yogesh Chalthanwala. It was also claimed that in the statement dated 12.6.2003 of Shri Mahesh P. Patel under Sectoin 108 of the Custom Act, 1962, "Certificates were issued without verifying the correctness of books of revenue" was written by the officers in place of " certificates were issued after proper verification of documents and records". I find that vide submissions made through letter dated 21.3.2007, the noticee is trying to retract his statement made in the year 2003. For four long years, Shri Mahesh Patel had not retracted the content of his statement which stands as admitted facts. I therefore, consider the retraction after 4 years an after thought.

(iii) It was further claimed by Shri Mithil Dave that the advance licenses were issued in the name of *Mis* Spectrum Fabrics and not in the name of Shri Mahesh Patel and therefore, it is the company which is accountable. They have quoted various judgments to support the claim. I consider each one of them -

(a) In the case of M/s. Pactil Electronics Pvt Ltd Vs Collector of Central Excise, Bombay-Il cited in 1987(28) ELT 315 (Tribunal), it was held that for Irregularities and illegalities committed by the Directors, the firm (which acts through its Directors) is liable for the omissions and commissions of the Directors, hence imposition of penalty on firm is justified. I find this matter has no relevance whatsoever to the subject case and more specifically in deciding the role of the Chartered Accountant Shri Mahesh Patel.

(b) In the case of M/s. Kandla Clearing Agency Pvt Ltd Vs Commissioner of Customs, Kandla cited in 2003 (158) E.L.T. 86 (Tri. - Del.) dated 17.9.2003, it was held that imposition of penalty on Custom House Agent is proper for filing documents knowingly on behalf of non-existent firm or using wrong name of client, while receiving payments from and

Making delivery to real importer. The quantum of penalty was however reduced because it was held that CHA had played an active but only secondary role in perpetuation of fraud. This case would not further the submissions of Shri Patel. In fact it only goes on to support the contention that the Chartered Accountant having prepared documents leading to issue of fraudulent advance licenses has played a secondary role and therefore is liable for penalty.

(c) In the case of M/s. Premier Packaging Limited Versus Collector of Central Excise, New Delhi cited in 1986 (26) E.L.T. 333 (Tribunal) dated 22.7.1986, it was held that Demand *I* Show cause notice only alleging short accountal of raw material is not tenable due to _lack of evidence of clandestine manufacture or surreptitious removal of manufactured goods. This case doesn't apply to the subject matter before me because as far as the role of Shri Mahesh Patel in the whole fraud of M/s. Spectrum Fabrics is considered, it is limited to issue of certificates without proper verification of the documents (fabricated by other notice) leading to issue of advance licenses resulting in fraud. The proposed penal action is not based on suspicion but the statement of Shri Patel himself in which he has accepted the fact of issuing the certificates to M/s. Spectrum Fabrics by not verifying the correctness of books of revenue. Another citation 1988(37) ELT 269 dated 4.7.1988 was also referred which was on identical issue as the one discussed above, therefore the facts and circumstances being different, the case has been quoted out of context.

(d) Regarding imposition of penalty or otherwise on Shri Mahesh Patel, other cases cited were Mis M.M. Raikhanna (2005 (186) ELT 322), CCE Vs Shal Dalitchand kapoor chand & co. (1989(41) EL T 167), Shri Kaigaontar & ors V s Gold Control Adm (1986 (23) EL T 523 (1)), Smt Vidya wati Vs State (1988(37)ELT 341(del)) and Laxmi Packaging (P) Ltd (1998(98)ELT 91(T)). I find that in the case of M.M. Raikhanna it was held by the Hon'ble tribunal that penalty on a person is not sustainable in the wake of no evidence produced to show that the advance licence would not be used in the manufacture of export goods. The ratio of this case is not applicable in the present case because herein there is an 'admitted' evidence of Shri Mahesh Patel that he had not verified the documents before giving the export performance certificates. Thus, the allegation of 'no evidence' by the noticee doesn't survive. I also find that the rest of the cases are either not relevant to the subject case or deals with cases wherein there is penalty and confiscation ordered in cases of lack of evidence against the appellants. As discussed herein above, the ratio of these cases are not applicable since the subject case matter.

(iv) After considering the charges in the Show Cause Notice and the evidences discussed hereinabove, I find that Shri Mahesh Patel, Chartered Accountant has issued false certificates which resulted in grant of advance licenses which would not have been otherwise issued and no duty free imports defrauding Governement's revenue would have taken place but for such false certificates. The noticee, admittedly, having not verified any of the records could not take up a plea of not having played in role of fraud. I find that the subject matter is squarely covered by Hon'ble High Court of Bombay's order dated 1.2.2006 in the case of Shri Shyam Chaganlal Agarwal vs. Commissioner of Customs (Import) cited in 2008 (226) ELT 176 wherein it was held accordingly. I therefore, hold Shri Mahesh Patel liable for penalty under Section 112(a) of the Customs Act, 1962."

4.1 From the above detailed finding of the learned Commissioner, it is seen that the appellant Shri Mahesh P. Patel has issued the solvency certificate on the basis of balance sheet which was not signed by the Chartered Accountant. Therefore, he was not supposed to issue any certificate which is not based on the audit of books account. Accordingly, on the basis of the certificate issued by the Chartered Accountant, Shri Mahesh P. Patel, M/s. Spectrum Fabrics obtained the advance licence fraudulently which resulted in huge revenue loss of Rs.1.46 crores customs duty to the Government exchequer. As per the role described by the adjudicating authority, it is clear that the appellant Shri

Mahesh P. Patel was knowingly involved in facilitating M/s. Spectrum Fabrics for entire fraud. Therefore, we do not see any reason to take any lenient view. Hence the penalty of Rs.5 lakhs imposed on Shri Mahesh P. Patel is justified and no interference is required. Accordingly, we uphold the penalty imposed under Section 112(a) on Shri Mahesh P. Patel.

4.2 Similarly, as regards the penalty imposed on Shri Sudesh D. Nanaware, we find that he is a consultant for obtaining the advance licence from DGFT. As per his advice, the entire fraud was committed. The adjudicating authority has given a detailed finding in the impugned order as regards the role of Shri Sudesh Nanaware, which is extracted below:-

> "32. (i) Shri Sudesh Dagadoba Nanaware, Proprietor of M/s. Tejal international, in his statement recorded by the DRI under Section 108 of the Customs Act, 1962 on 20.09.2004 stated that it was pre-decided by him and Shri .Jatinbhai Pancholi that he (Shri Sudesh Nanaware) would do consultancy work for issue of Advance Licenses in the name of M/s. Spectrum Fabrics, Surat, and Shri latin Pancholi would import duty-free yam andlor fabrics on the basis of the said ,Advance Licenses and then sell it in the open market without payment of appropriate Customs duties leviable thereon; that, he actively participated in all these activities and got issued Advance Licenses in the name of M/s. Spectrum Fabrics, Surat; that he had also done consultancy work for the issue of at least fifteen Advance Licenses in the name of M/s. Harihar Fiber, a company owned by Shri Jatin Pancholi.
>
> (ii) I have considered the detailed submissions made by the consultant on behalf of Shri Nanaware mentioned in the para 16 above of this order. The submissions have nowhere denied that Shri Nanaware was aware of the whole modus which was (as per his admission in the

statement dated 20.9.2004) planned by Shri Nanaware and Shri Jatin Pancholi. To quote the portion of statement "I (Nanaware) clarify that it was a pre-decided plan to make a duty theft, by way of making duty free import on the basis of advance licenses issued in the name of M/s. Tejal International and then to sell it in open market. It was also pre-decided that I will get issued Advance licenses in the name of M/s. Spectrum Fabrics, Surat and Shri Jatin Pancholi will import duty free yams and / or fabrics on the basis of Advance licences issued in its name and then to make sale of it in the open market without payment of appropriate customs duties."

(iii) Having admitted to a role in the whole fraud right from its inception stage and having never retracted these statements (facts), Shri Nanaware is trying to wash his hands off the whole act by stating now (after more than 3 years) that he was only looking after the consultant / liaisoning work for the issue of advance licences in the name of M/s. Spectrum Fabrics, Surat. This act, therefore, appears to be an after thought. All the case laws submitted by the consultant have been quoted out of context. In these cases, it was held that penalty was levied on brokers wherein their role was not established or arrived at by the adjudicator. In the subject case, it is clear that various documents were submitted to get advance licence issued in the name of M/s. Spectrum Fabrics were fabricated because it is now an established fact that there was no factory of M/s. Spectrum fabrics nor any manufacturing activity was ever contemplated. Having executed his role in the whole plan (for fraud) of duty evasion, one cannot take shelter saying the he was not involved in taking it to the logical conclusion. The fact of the matter is that, had there been no role of Shri Nanaware in obtaining the advance licenses by fraudulent means, there would never, have been any duty free import by M/s. Spectrum Fabrics nor any diversion of the goods. The fraud started by obtaining the advance licenses by way of fabricating false documents and Shri Nanaware performed his role to perfection by obtaining the advance licenses in the name of M/s. Spectrum Fabrics."

4.3 From the above finding, it can be seen that the appellant Shri Sudesh Nanaware, being a consultant, has admitted the pre-decided plan for committing the fraud.

Therefore, he was rightly imposed the penalty under Section 112(a). Accordingly, we uphold the said penalty.

5. As regards the Revenue's appeal, we find that the Revenue has sought to impose penalty under Section 114A for equal amount of the duty demand confirmed against M/s. Spectrum Fabrics. In this regard, we find that in the show cause notice, penalty under Section 114A was proposed. However, the adjudicating authority has neither discussed the issue of penalty under Section 114A nor any order was passed in the operative portion of the order. Therefore, the adjudicating authority has not decided the issue of penalty under Section 114A in the impugned order. Therefore, this issue first needs to be considered by the adjudicating authority. Accordingly, appeal of the Revenue is allowed by way of remand to the adjudicating authority. Appeals of Shri Mahesh P. Patel and Shri Sudesh D. Nanaware are dismissed.

(Pronounced in court on 08.5.2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

tvu