IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

Sl.No.	Appeal No.	Appellant v. Respondent
1.	C/193/2008	CC (EXPORT) MUMBAI **-Vs-** Ashok Fashions Ltd.
2	C/624/2008	Bhalchandra V. Jadhav **-Vs-** CC (EXPORT) MUMBAI
3	C/752/2008	CC (EXPORT) MUMBAI **-Vs-** Asheema Fashions Pvt. Ltd
4	C/87685/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS SONMEZ EXPORTS
5	C/87686/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS SILKON SILK MILLS
6	C/87687/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS G D IMPEX
7	C/87688/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS RAMGOPAL POLYTEX LTD
8	C/87689/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS GUJARAT SYNTHETICS OXIDE PVT LTD
9	C/87690/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS LIBRA FILAMENTS LTD
10	C/87691/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS WELSPUN POLESTERS INDIA LTD
11	C/87692/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS GOYAL IMPEX
12	C/87693/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS UNIQUE PROCESSORS P LTD
13	C/87694/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS GUPTEX P LTD
14	C/87695/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-**

		MS ANJANI AGRICO IMPLEMENTS LTD
15	C/87696/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS KISHTEX EXPORTS P LTD
16	C/87697/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS GOYAL IMPEX
17	C/87698/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS ASHUTOSH TEXTILES
18	C/87699/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS ASSOCIATED CHEM CORP
19	C/87700/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS MANGALAM IND
20	C/87701/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS SUZLON FIBERS LTD
21	C/87702/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS NIDHI SYNTHETICS PVT LTD RENAMED AS SUZLON FASHIONS PVT LTD
22	C/87703/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS VEEKAY TORCITOI PVT LTD
23	C/87704/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS ANJANI AGRICO IMPLEMENTS LTD
24	C/87705/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS AASHNA EXPORTS
25	C/87706/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS ISHAN IMPEX
26	C/87707/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS JAGHAR TEXTILES PVT LTD
27	C/87708/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS BATRA TRADING
28	C/87709/2017	C.C., MUMBAI(EXPORT PROMOTION) **-Vs-** MS SHALU DYEING AND PRINTING MILLS P LTD

(Arising out of Order-in-Original No. 30/2008/CAC/CC/KS dated 122.03.2008 passed by Commissioner of Customs (Adjudication), Mumbai)

Appearance:

Ms. Vinitha Sekhar, Jt. Commr (AR) for appellant
Shri Karan Singhal, C.A. for respondent

CORAM:

Hon'ble Mr. Raju, Member (Technical)
Hon'ble Mr. P. Dinesha, Member (Judicial)

Date of Hearing : 23.04.2018
Date of Decision : 11.06.2018

FINAL ORDER NO: A/86669-86696/2018

Per: Raju

These appeals have been filed by revenue against importers who were bonafide buyers of DEEC licenses and against whom no demand of duty has been confirmed in the impugned order. Appeal has also been filed by Sh Bhlachandra V Jadhav, employee of Anmol Shipping Agency, against imposition of penalty.

2. The facts of the case are that certain Advance licences were obtained by mis-declaring the goods exported as 100% Polyester Filament yarn whereas these were actually manmade fibre made from 100% polyester staple fibre. The compositions of the material and the weight of the material were enhanced in order to get extra and undue duty free entitlement of polyester

filament yarn as exempt material against the said exports. It was alleged that the forgery and fabrication was being carried out by Shri Ashok Pokharkar in connivance with Shri Dayaram Agarwal of Ashok Fashion and Shri Suresh Agarwal of M/s Asheema Fashions Pvt. Ltd. and Asheema Exports. Different sets of same invoices were prepared for exports by Shri Dayaram Agarwal and Shri Suresh Agarwal. While one set of invoices having common description as "100% Polyester voil" was used for sending to clearing agent, negotiating banks, DGFT and indenter, the second set of invoices bearing more specific description of goods as " Dyed Fabric / Sarees / made from 100% polyester filament yarn / texturized yarn" and indicating the weights of exported goods and exempted material was enclosed with the original, duplicate and export promotion copy of shipping bills submitted to customs. In the second set on invoices the weight and compositions of the goods was enhanced and thereby misdeclared.

3. M/s Amol Shipping Agency (M/s ASA), operating under the license of M/s Roopmohan Enterprises, a licensed Custom House Agent was handling the bulk of the export clearances of the consignments of fabrics for various exporters. Search was conducted at the office, residence of the proprietor and godown of M/s ASA and certain incriminating documents were recovered. Statement of Shri Vasant Baburao Pokharkar, brother of Ashok Baburao Pokharkar was recorded and he admitted that they

were fabricating test reports and shipping bills for extra monetary consideration. He also submitted a list of exporters for whom they had fabricated the documents. Statement of Shri Ashok Pokharkar, the proprietor of M/s ASA was recorded and he admitted to have fabricated the test reports of SASMIRA. He stated that he had got blank test reports of SASMIRA from one Subhash Agarwal of M/s Asheema Fasions Pvt. Ltd, which he was using to fabricate the test reports. He further revealed the modus operandi of the fraud carried out by them. He used to make fabricated / forged test report and shipping bills. Statements of Ms. Saida Sayed and Ms. Sumati H. Shetty, typist of M/s ASA were recorded who admitted to have made fabricated test reports and shipping bills as per the directions of Ashok Pokharkar. Statement of Balachander Jadhav, employee of M/s ASA was recorded who admitted to have forged the signature in the test reports and other documents. Statement of Suresh Chandra Sharma, Proprietor of M/s Roopmohan Enterprises, CHA was recorded wherein he admitted to have sublet his license for an advance of Rs.40,000/- and monthly rent of Rs.5000/-. He also admitted to have signed blank shipping bills, Bills of Entry for Ashok Pokharkar. The factory premises of M/s Ashok Fashions, Ahmedabad, one of the exporters for whom Ashok Pokharkar had forged documents was searched on 9.8.95. It was revealed that they had obtained 13 Advance licences covered under 76 Shipping bills.

4. Shri Ashok Pokharkar in his statement admitted that Shri Dayaram D. Agarwal, Chairman and Managing Director of M/s Ashok Fashions Ltd. and Shri Suresh Agarwal of M/s Asheema Fashions Pvt. Ltd. and M/s Asheema Exports had informed him that they intend to export carbonised fabrics and the same was to be mis-declared as fabrics made out of 100% Polyester Filament yarn in order to get duty free entitlement of polyester filament yarn as exempt material against the said exports; that after discussion Shri Dayaram Agarwal and Shri Suresh Agarwal agreed to pay him 1% of the FOB value as his clearing agency / forwarding charges and for undertaking the job of arranging the examination of carbonised fabrics as fabrics made out of 100% polyester filament yarn and also towards the enhancement of the weight in export promotion copies, he agreed to pay him @ Rs 5000/- in respect of consignments consisting of 15 bales and above and @ Rs. 3000/- for other consignments.

5. It was alleged that Sh Ashok Pokharkar fabricated the Test reports of SASMIRA on the basis of the abovementioned second set of invoice. He had obtained many such blank test reports of SASMIRA from Subhash Agarwal, proprietor of M/s Asheema Exports and brother of Dayaram Agarwal. The test reports were typed by his own employees Ms Saida and Ms. Sumati and the signature of the scientist of SASMIRA was forged by one of his employee Balachandra Jhadav. Further he would also forge and fabricate the EP copy of the Shipping bill by enhancing the

composition and weight of the goods. These were later submitted for the purpose of Audit to the Customs Department.

6. The Advance licenses were obtained from DGFT by submitting these forged shipping bills. 45 licenses were issued to M/s Asheema Fashions Pvt. Ltd. and 10 licenses were issued to M/s Asheema Exports. Similarly 13 licenses were issued to M/s Ashok Fashions. The advance licenses were later transferred to different importers who had caused imports against these licenses. Details of these importers are as follows:

Sr no	Transferees in the case of M/s Asheema Fashions Pvt. Ltd. and M/s Asheema Exports	Transferees in the case of M/s Ashok Fashions
1	M/s Goyal Impex	M/s Veekay Torcitoi Pvt. Ltd.
2	M/s Ishaan Impex	M/s G.D. Impex
3	M/s Ashutosh Textiles	M/s Goyal Impex
4	M/s Ramgopal Polytex Ltd.	M/s Anjani Agrico Implements
5	M/s Anjani Agro Implements Ltd.	M/s Gujrat Synthetics Oxide Pvt. Ltd.
6	M/s Kishtex Exports P Ltd.	M/s Libra Filaments Ltd.
7	M/s Guptex P Ltd.	M/s Jaghar Textiles Pvt. Ltd.
8	M/s Associated Chem Corp	M/s Suzlon Fibres Ltd.
9	M/s Aashna Exports	M/s Nidhi Synthetics Pvt. Ltd. (remaned as Suzlon Fashions Pvt. Ltd.)
10	M/s Shalu Dyeing and Printing Mills P. Ltd.	M/s Welspun Polesters India Ltd.

11	M/s Unique Processors P. Ltd.	
12	M/s Silkon Silk Mills	
13	M/s Batra Trading	
14	M/s Mangalam Ind.	
15	M/s Sonmez Exports	

7. The DGFT, Ahmedabad cancelled 45 licenses issued to M/s Asheema Fashions Pvt. Ltd. and suspended 10 licenses issued to M/s Asheema Exports. (para 30.2) of the OIO. Similarly the DGFT, Ahmedabad issued show cause notice for cancellation of 12 out of the 13 licenses issued to M/s Ashok Fashions.

8. SCN was issued on 3.7.1997 demanding duty from M/s Ashok Fashions and the importers who have caused imports against these licenses along with proposal for penalty against various people. Similarly an SCN dated 14.7.2007 was issued to M/s Aheema Fashions Pvt. Ltd. and M/s Asheema Exports and the importers who had caused imports against these licenses. The Adjudicating Authority vide order dated 20.11.2007 confirmed the duty on M/s Ashok Fashions however dropped the demand against the various importers who had imported against the Advance Licenses obtained through fraud. Similarly in the case of M/s Asheema Fashions Pvt. Ltd. and M/s Asheems Exports, the Adjudicating Authority vide order dated 12.3.2008 confirmed the duty on M/s Asheema Fashions Pvt. Ltd. and M/s Asheema Exports however dropped the demand against the various importers who had imported against the Advance

Licenses obtained through fraud. Revenue is in appeal against the said orders.

9. Ld AR argued that while absolving the importers of all the charges, the Adjudicating Authority held that it would be against the various judicial pronouncements cited by the Transferee Importers to require the transferee to pay customs duty on the goods imported against the subject license, but he has not discussed any of these judgements. It was argued that the finding of the Adjudicating Authority in this regards are not legally correct and proper. She argued that once it has been established that the Government revenue has suffered, it need to be indemnified, by the transferee and by the license holder. One cannot transfer a better title than he himself possesses and hence the transferee of the licence cannot claim to be in better position than the license holder. Transferee of the license who is the importer in this case cannot escape the liability on imported goods arising out of non-fulfillment of export obligation and is required to pay duty which has been demanded from them. She relied on the decision of the Hon'ble High Court of Calcutta in the case of ICI India Limited vs. Commissioner of Customs (Port), Calcutta reported in 2005 (184) ELT 339 (Cal.)which had held as follows:-

> *"In this case, the document itself having been found to be forged whether there was collusion or fraud on the part of the appellant in the issue of the DEPB licences/scrips becomes absolutely immaterial and irrelevant since no*

> *credit can be derived from a forged DEPB. The credit is made available on the strength of a valid DEPB. If the DEPB is forged, then the same is non est and therefore, there is no valid DEPB. As such no credit can be derived thereunder. In such circumstances, one may defend his case that one may not be liable for collusion or fraud and exposed to other penalties therefor, but still then one would be liable to pay the duty and interest and for other statutory consequences which one cannot avoid."*

10. She pointed out that the above decision was upheld by Hon'ble Supreme Court vide order dated 17.1.2005 reported in *2005 (187) ELT A31 (SC)*.

11. She also relied on the decision of the Hon'ble Supreme Court in the case of Commissioner of Customs vs. Candid Enterprises has held reported in *2001(130) E.L.T.404* that *fraud nullifies everything*. Hon'ble Supreme Court in the case of *Commissioner of Customs vs. Essar Oil Ltd. reported in 2004 (172) ELT. 0433 SC* had held that *Fraud as is well known vitiates every solemn act. Fraud and justice never dwell together.*

12. She also relied on the decision of the Hon'ble Supreme Court in the case of *Commissioner of Customs (Preventive) vs. Aafloat Textiles (I) Pvt. Ltd. reported in 2009 (235) ELT 0587 (SC)* while explaining the principle of Caveat emptor i.e. the buyer be aware held in that a buyer of a license should establish that he made enquiry and took precautions to find out the genuineness of the license which he is purchasing. If he has not

done that, the consequences have to follow. Further the Hon'ble court also held that when fraud is involved, in the eye of law such documents had no existence. Since the documents have been established to be forged or fake obviously fraud was involved and that was sufficient to extend the period of limitation.

13. She also relied on the decision of the Hon'ble Supreme Court in the case of *Tata Iron and Steel Co. Ltd. vs. Commissioner of Customs, Mumbai reported in 2015 (319) ELT 546 (SC)* wherein it was held that when the original license holder had deliberately suppressed the facts and made willfully wrong declaration to the licensing authority to obtain the endorsement of transferability of the same while transferring the licenses, extended period of limitation would be available to the authorities for the purpose of claiming duty from the transferee of the license.

14. She argued that the Hon'ble High Court of Punjab and Haryana in the case of *Friends Trading Co. vs. Union of India reported in 2010 (254) ELT. 652 (P & H)* that the duty can be demanded on the importer who purchased DEPB scrips obtained by producing forged documents. She pointed out that the above judgement of High Court was upheld by Hon'ble Supreme Court as reported in *2012 (281) ELT. A106 (SC)*. She pointed out that the Hon'ble High Court of Punjab and Haryana in subsequent

case of *Friends Trading Co. vs. Union of India reported in 2011 (267) ELT. 33 (P& H)* held that importer steps into the shoes of seller of the forged documents and does not stand on a better footing and cannot be allowed to retain benefit illegally obtained. Fraud or suppression continues if document is not genuine and contrary interpretation would defeat the legislative intention and will enable perpetuation of fraud. It further held that the purchaser or successor of fraudulently obtained DEPB stand on the same position as predecessor.

15. She also relied on the following decisions of the Tribunal to the effect that once a license has been obtained by fraud by submitting forged documents, the duty can be demanded from the Transferee Importer:

a) Apar Ltd. vs. Commissioner of Customs (Exports) reported in 2012 (276) ELT. 534 (Tri- Mumbai)
b) CC Amritsar vs. Sona Casting reported in 2011-TIOL-162-SC-CUS
c) J.M. Tex (P) Ltd. vs. Commissioner of Customs (EP), Mumbai reported in Mumbai CESTAT order no. A/2156-2160/13/CSTB/C1 dated 17.10.2013
d) Dow Agrosciences India Pvt. Ltd. vs. Commissioner of Customs (Mumbai) reported in 2012 (283) ELT. 524 (Tri-Mum)
e) Eastern Silk vs. Commissioner of Customs (Airport), Kolkatta reported in 2016-TIOL-457-CESTAT-KOL
f) C. Pinto vs. Commissioner of Customs (Mumbai) reported in 2017 (352) ELT. 194 (Tri- LB)

16. She submitted that government cannot be deprived of its rightful duty just because the fraud was committed by the seller of the license and the purchaser was not involved in the fraud. Absolving the transferee from payment of the duty which otherwise should have been paid not only deprives the government of its rightful duty but also increases the tax burden on the other members of the society. Besides it in an indirect way legitimises the fraud. She relied on the decision of the Hon'ble High Court of Kerala in the case of *Neptune Trade Links Pvt. Ltd. vs. Commissioner of Customs, Cochin reported in 2012 (284) ELT. 29 (Ker.)* wherein it was held that the purchase of DEPB credit has nothing to do with Customs Department which cannot be held liable for fraud, if any, committed by the seller against the purchaser. Remedy is available to the purchaser against the seller and not against the Custom House.

17. She argued that 45 licenses issued to M/s Asheema Fashions Pvt. Ltd. were cancelled and 10 licenses issued to M/s Ashok Fashions were suspended. Similarly in the case of M/s Ashok Fashion for 12 out of 13 licenses, the DGFT had issued SCN for cancellation of the licenses. She argued that even if all the licenses have not been cancelled, most of them have been suspended and duty can be demanded by Customs Authority for violation of the conditions of notification no. 204/92-Cus dated 19.5.1992. She relied on the decision of Tribunal in the case of M/s Eastern Silk vs. Commissioner of Customs (Airport), Kolkatta, while following the principles laid down by the Hon'ble

Supreme Court in the case of *Commissioner of Customs, Hyderabad vs. Pennar Industries and Others reported in 2015-TIOL-162-SC-CUS* it was held that even if the licensing authority have not taken any action in respect of DFIA licenses, still the Customs Authority can demand duty.

18. In respect of penalty she argued that once goods are held liable to confiscation, penalty under section 112 is automatically attracted. Similarly once the demand is confirmed under section 28 of the customs act invoking extended period, then mandatory penalty under section 114 A is also attracted.

19. The Learned Counsel for the transferees submitted that they were bonafide transferees. He relied on the fact that their bonafides have not been doubted. They were not part of any forgery or fraud. The licences were obtained from DGFT and they could not have doubted the licences issued by DGFT. He relied on the following decisions:-

(a) *M/s TVS Motors Co Ltd v. Cus, Chennai – 2018-TIOL-941-CESTAT-MAD*
(b) *Alpha Chemie Sapthagiri vs. Cus, Mumbai – 2016-TIOL-2504-CESTAT-MUM*
(c) *Pee Jay International v. Cus:MANU/PH/1736/2016*
(d) Munjal Showa Ltd. vs Cus & Ex., Faridabad – 2009 (246) ELT 18 (P&H)

20. We have gone through rival submissions. The facts not in dispute are:-

i) Forgery and fraud was done by the transferor of the licences

ii) There was no role whatsoever on transferees in such forgery or fraud

iii) The transferees were not aware of the forgery or fraud committed while obtaining licenses

21. A number of decisions have been cited in support of their case by either side.

22. We will first examine the decision relied in the impugned order first. The impugned order first examines the decision of Hon'ble Apex Court in the case of *Sampat Raj Dugar 1992 (58) ELT 163 (SC)* holding that the ration of the said decision and the concept of deemed importer will not apply to the instant case as the facts are different in so far as there is no abandonment of goods and the transferee of license continues to be the owner of the goods. We agree with the arguments of the adjudicating authority that the transferor of the license can not be held to be the importer. In this case the transferee becomes the holder of license after the same is transferred. In that sense there is no difference between the importer and the holder of license in the instant case. Thus the ratio of the said decision cannot be applied to facts of the instant case in the manner they have been applied. The decision in the case of Sampat Raj Dugar (supra) was given in totally different circumstances. So far as appellants are concerned no other decisions have been examined. The

commissioner has granted relief to the transferee importers by observing as follows:-

> *"It is seen that although the adjudicating authority has absolved the transferee importers of all charges, leveled against them in the subject show-cause notice as well as the corresponding liabilities, on the grounds that it would be against the various judicial pronouncements cited by the transferee importers to require the transferees to pay customs duty on the goods imported against these licences, but he has not discussed any of these judgements in his order.*
>
> *In the light of what has been stated above, one can clearly see that the various acts of commission and omission have occurred at the point of export and the "transferee importers" are not the parties actively concerned with the various acts of commission and omission made by the licence holder, at the point of exports. Therefore, there is no question of requiring them to pay customs duty on the goods imported against these licences, the import having been effected by them as a "bonafide transferee" of the respective licences. The bonafide transferees have presented before me various legal arguments stating that they are neither liable to customs duty nor to any penalty. <u>I do not consider it necessary for me to go through the various arguments and discuss the various case laws furnished in support of their stand.</u> It has already been concluded by me in the preceding paragraphs that, it is the licence holder, who is liable to pay customs duty in the respect of the input material imported against the said licences, even in cases where the actual import has been made by a person, other than the licence holder."*

23. It is seen that both the sides have cited plethora of case laws which are relevant to the facts of the case. The impugned order does not examine any of arguments or the case law. It grants relief by just stating that there is no need to discuss the case law. To that extent the impugned order is not a speaking order. The grounds of review are very limited on this issue. It reads as under:-

"It is seen that although the adjudicating authority has absolved the transferee importers of all charges, leveled against them in the subject show-cause notice as well as the corresponding liabilities, on the grounds that it would be against the various judicial pronouncements cited by the transferee importers to require the transferees to pay customs duty on the goods imported against these licences, but he has not discussed any of these judgements in his order."

24. There is merit in the grounds of appeal as the impugned order does not deal with the case laws on the issue but relies on the same. It is not clear as to which case laws he has relied upon and for what reasons. As can be seen from arguments of both sides there are plethora of case law on the issue and Commissioner was required to examine the same and state specifically why he agrees or disagrees with them. The impugned order in so far as it relates to the appeal filed by revenue against the transferee importers is concerned is not a speaking order and is therefore set aside and the matter remanded to the original adjudicating authority to determine the issue afresh with cogent reasons and speaking order. Appeals of revenue against transferee importers are allowed by way of remand.

25. Shri Balchander V. Jahadav is in appeal against the OIO of Commissioner passed in the case of M/s Asheema Fashions P. Ltd. for imposition of penalty of Rs. 4,00,000 under section 112(a) and 114(i) of the Customs Act, 1962. Sh Balchander V. Jhadav has in his appeal challenged the imposition of penalty

under section 112(a) of Customs Act on the ground that he was not involved in any act of importation. It has been argued that he was a mere employee of the Anmol Shipping Agency acting as per directions of his superior. It has also been argued that the license was never suspended or revoked by the licensing authority. Balchander V. Jhadav had admitted in his statements recorded under section 108 of the Customs Act, 1962 that he had forged the signatures of various persons on the instructions of his employer, Shri Ashok Pokharkar of M/s Anmol Shipping Agency. The persons whose signatures were forged were stated to be scientists and in-charge of SASMIRA, authorized signatory of steamer agents, appraisers, IAO, Clerks, Assistant Collectors Preventive Officers etc. in his statement he also stated that besides forging the signatures on bills of lading and SASMIRA test report, he had also forged the signatures of the Appraising Officers in the Part–F of the DEEC book for the purpose of auditing. Shri Ashok Pokharkar had also admitted in his statement that Shri Balchander V. Jhadav had forged the documents. In these circumstances penalty on Sh Jhadav is fully justified. His appeal is dismissed.

(order pronounced in Court on 11.06.2018)

(P. Dinesha)
Member (Judicial)

(Raju)
Member (Technical)

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