CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. C/291/2010

(Arising out of Order-in-Original No. 170/2009 CC(I) JNCH dated 31.12.2009 passed by Commissioner of Customs (Import), JNCH, Sheva)

M/s. Fastforward **Appellant**
84/B, 4, Brindavan Society,
Thane (W) 400 061

Vs.

Commissioner of Customs (I), N.S. **Respondent**
JNCH, Post Uran,
Dt. Raigad,
Sheva 400 707

WITH

(i) **Appeal No. C/303/2010 (Charles Patrick)**
(ii) **Appeal No. C/304/2010 (Petrosolv (I) Co.)**
(iii) **Appeal No. C/308/2010 (Sai Sradha Exim P Ltd)**
(iv) **Appeal No. C/309/2010 (Bhaskar Kolakkat)**
(v) **Appeal No. C/310/2010 (Rajasekhar Pillai)**
(vi) **Appeal No. C/315/2010 (Santon Shipping Services)**

(Arising out of Order-in-Original No. 170/2009 CC(I) JNCH dated 31.12.2009 passed by Commissioner of Customs (Import), JNCH, Sheva)

Appearance:

Ms. Pooja Reddy, Advocate for the 1st Appellant
None for others
Shri Bhushan Kamble, Authorised Representative for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER No. A/**85750-85756/2019**

Date of Hearing: 08.01.2019
Date of Decision: 08.01.2019

PER: SANJIV SRIVASTAVA

These appeals are filed by the Appellants against order in original No 170/2009 CC(I), JNCH dated 31.12.2009 of Commissioner Customs (General) Mumbai. By the said order Commissioner has held as follows:

"*22 In view of the above I pass following order:*

(1) The duty free raw material imported by M/s Surya Pharmaceuticals Ltd valued at Rs 1,16,21,395/- are confiscated u/s 111(o) of CA'62. I order enforcement of the conditions of the Bond executed by the importer and impose a fine of Rs 30,00,000/- (Rupees Thirty Lakhs only) on M/s Surya Pharmaceuticals Ltd in terms of Section 125 of the CA'62.

(2) I confirm a duty of Rs 48,83,442/- along with interest on M/s Surya Pharmaceuticals Ltd in terms of Section 28(2) and Section 28AB of CA'62

(3) I impose a penalty of Rs 10,00,000/- (Rupees Ten Lakh only) on M/s s Surya Pharmaceuticals Ltd in terms of Section 112(a) of CA'62.

(4) On account of the imports made under 47 DEPB License, I confirm a duty of Rs 1,32,28,562/- along with interest on M/s Sai Shradha Export Pvt Ltd in terms of Section 28(2) and Section 28AB of CA'62

(5) There shall be a penalty of Rs 1,32,28,562/- on M/s Sai Shradha Export Pvt Ltd under Section 114Aof the Customs Act, 1962. However if they pay the entire amount of demand now confirmed and the interest leviable thereon within 30 days from the receipt of this order, the penalty amount shall stand reduced to s 33,07,140/- (being 25% of the above penalty amount) in terms of first and second proviso to Section 114A of Customs Act, 1962, provided that the reduced amount of penalty is also paid within the

said time limit. The amount of Rs 5,00,000/- paid by SSEPL during investigations may be adjusted towards duty liability. There shall be no penalty on SSEPL u/s 112 (a) in terms of the fifth proviso to Section 114A.

(6) The 14 export consignments under DEEC Scheme, covered under B/L No JNPT/SIN/0335/1 dated 26.11.05 and having declared value of Rs 1,52,60,075/- are confiscated u/s 113(h) of CA'62. However considering that these goods have a meager market value, I offer the same for redemption to exporter, M/s Sai Shradha Export Pvt Ltd on payment of redemption fine of Rs 10,000/- (Rupees Ten Thousand Only) in terms of Section 125 of CA'62.

(7) Export goods covered under the 66 Shipping Bills under DEPB Scheme, having declared value of Rs 13,88,88,553/- are held liable for confiscation u/s 113h(i). However the same are already exported and not available for confiscation.

(8) I impose penalty as under on the following persons for their acts of commission/ omission which have rendered the above mentioned export goods liable for confiscation.

- *i. Rs 25,00,000/- (Rupees Twenty Five Lakhs Only) on M/s Sai Shradha Export Pvt Ltd u/s 114 (iii) of CA'62*
- *ii. Rs 20,00,000/- (Rupees Twenty Lakhs Only) each on Shri Bhaskar Kolkkat and Shri Rajashekar Pillai u/s 114 (iii) of CA'62*
- *iii. Rs 40,00,000/- (Rupees Forty Lakhs Only) each on Shri Charles Patrick and Shri Subramaniam Devar u/s 114 (iii) of CA'62*
- *iv. Rs 5,00,000/- (Rupees Five Lakhs Only) on M/s Petrosolv India Co u/s 114 (iii) of CA'62*

(9) I impose a penalty of Rs 5,00,000/- (Rupees Five Lakhs Only) each on M/s Fast Forward [CHA No 11/879] and M/s Santon Shipping Services [CHA No 11/1231] u/s 112(b) of CA'62.

(10) *The proposal to demand duty and impose penalty against the 23 firms who had utilized the 47 fraudulently obtained DEPB licenses in question is dropped."*

2.1 Pursuant to the intelligence regarding malpractices in export of pharmaceutical drugs by M/s Sai Shradha Exim Pvt Ltd (SSEPL), merchant exporter, their premises were searched and various incriminating documents like copies of 66 ARE-1 purportedly issued by manufacturers and sales invoices of three dealers/ indenters were recovered. 14 ARE-1's issued by M/s Surya Pharmaceuticals Ltd (SPL) for clearance of export goods from its factory for export under DEEC Scheme (third Party) were also recovered. Documents relating to purchase of large quantity of *"Soap Stone Powder"* and empty carbuoys were also recovered. LR's issued by transporter and several other documents like copies of Shipping Bills, Bill of Ladings, applications for DEPB Licenses etc were also recovered.

2.2 Detailed investigation and scrutiny of the documents was undertaken. In respect of live consignments of 14 Shipping Bills on its way to Singapore revealed that SSEPL procured pharmaceutical bulk drugs like "Amoxicillin Trihydrate" and "Cafadroxil" from SPL under 14 ARE-1's for third party exports against SPL's DEEC Licenses. The said goods were diverted in the local market and SSEPL filled empty carbuoys with soap stone powder in Mhape godown of M/s Petrosolv India Company (PIC) and exported the same by mis-declaring as *"Pharmaceutical Bulk Drugs"* under 14 DEEC Shipping Bills and the 14 ARE-1's recovered.

2.3 Though it is apparent that duty free imported goods under DEEC License were used in the manufacture of goods meant for export, but failure to export the same vitiates and contravenes the provisions and conditions of such duty free imports. Hence the duty free imports of inputs as well as the finished goods containing such inputs become liable for confiscation besides warranting penal action against the errant persons.

2.4 Similar investigations were carried out in respect of 66 Shipping Bills under claim of DEPB Credit. Investigations revealed that SSEPL had declared the goods on these Shipping Bills as *"Ranitidine HCL-USP or Roxythromicin B P or Erythromycin USP"* purportedly procured from three Central Excise registered units viz M/s TASC Pharmaceutical Ltd Pune, M/s Loyal Chemicals Pvt Ltd Bhavnagar and M/s Halcyon Labs Pvt Ltd Ahmedabad. All the three units declined having supplied any goods to SSEPL or to any of three indenters. Investigations also revealed that three indenters were also nonexistent and fake. All the payments made against such purchase were made in the name of some lowly paid employees of PIC, and subsequently withdrawn in cash by Mr Charles Patrick, Managing Partner of PIC through its employee Shri Suresh Pande. Enquiries made with Singapore Customs revealed that the goods exported against three Shipping Bills were declared as *"Natural Soap Stone Powder"* before the Singapore Customs. Thus it was confirmed that the gods as declared were never exported and 47 DEPB licenses having total duty credit of Rs 1,32,31,753 were obtained by fraud/ misdeclaration.

2.5 Shri Subramaniam Devar, Director of SSEPL and also Manager (Logistics) of PIC played a crucial role in entire fraud, as he supplied the fabricated ARE-1's, ordered for soap stone powder and empty carbuoys, supervised the packing/ transportation of export goods to the port, made contacts with foreign buyers etc.

2.6 Two Directors of SSEPL viz Shri Kolakkat and Shri Rajshekar Pillai were partners in fraud and co-operated with the Shri Subramanian in the entire fraud. Shri Charles Patrick masterminded the misdeclaration of export goods and allowed his infrastructure, godown and personnel for storage/ substitution and other activities relating to frauds. He was main beneficiary and key player since he was managing the export affairs of SSEPL through his aides, Shri Subramaniam Devar and Shri Suresh Pandey. He was found siphoning off the entire amount received by M/s SSEPL in its accounts purportedly as export remittances. The amounts received in the account of M/s SSEPL was in turn paid purportedly towards supply of export goods to nonexistent suppliers which in turn was found to be en-cashed by Shri Charles Patrick through a web of firms created by him in name of lowly paid employees and with the help of cheque discounting from M/s Rajguru Impex (India) Pvt Ltd.

2.7 M/s Fast Forward and M/s Santon Shipping Services, Both CHA had presented fabricated ARE-1's/ export documents to the custom Authorities along with goods misdeclared as bulk drugs. They had allowed their licenses to be used for such mis declared fraudulent exports and have abetted illegal acts committed by M/s SSEPL.

2.8 The exports of misdeclared goods was made through Nhava Sheva and imports were made through Kandla, ICD Tughlakabad and Nhava Sheva. Therefore a SCN answerable to different jurisdictional Commissioners was issued by the investigating agency. CBEC vide Notification No 12/2009-Cus (NT) dated 20.01.2009 appointed Commissioner of Customs (Import) JNCH Nhava Sheva as common adjudicating authority in the matter.

2.9 Commissioner has vide his order referred in para 1, supra adjudicated the matter. Aggrieved appellants have filed these appeals.

3.1 We have heard Ms Pooja Reddy Advocate for M/s Fast Forward and Shri Bhushan Kamble, Assistant Commissioner, Authorized Representative for Revenue. None of the other appellants were represented during the hearing despite notice.

3.2 Arguing on behalf of her clients namely M/s Fast Forward, learned Counsel submitted that they being the CHA acted only to present the documents submitted by the exporter for export/ import clearance of the goods. They were not aware of the fraud committed by the exporters, by presenting the soapstone powder instead of declared goods namely pharmaceutical products. Even the show cause notice and order in original do not record any act on their part which had rendered the goods liable for confiscation. By filing the papers as submitted to them by importer/ exporter they have performed the function assigned to them under CHALR, 2004 and in case of any misconduct on their part under the said regulations, necessary action needs to be taken in terms of the said regulations. In fact action has been proposed against them under the said regulations and Commissioner Customs (General) Mumbai has vide his order CAO No 175/2009/CAC/CC(G)SLM/CHA (Admn) dated 18.12.2009, forfeited the entire amount of Security deposit made by them for the grant of CHA License. Thus she submitted that penalty under 112 (b) of the Custom Act, 1962 cannot be justified.

3.3 Arguing for the revenue learned Authorized Representative took us through various paragraphs of order whereby the case of revenue has been expounded. He submitted that this is a clear case of export fraud wherein the cheap stone powder was exported by declaring the same as Pharmaceutical Products. Show Cause Notice and adjudication Order brings out the entire chain and trail of events in a lucid manner, which lead to such export fraud. In this case even the beneficiaries of the fraud have been identified and action initiated against them. Economic fraud of such nature should be viewed seriously and maximum possible sentence/ punishment in such cases is warranted. Heb specifically pointed to para 21(8) of the order wherein the role of CHA's has been discussed. Thus he submitted that order of Commissioner should be upheld.

4.1 We have considered the submissions made in all the appeals and during the course of arguments along with the impugned order.

4.2 In the present case the notices have been issued to all the appellant at number of times, but there was no response from most of the appellants except M/s Fast Forward. Since all the matters arise out of the same order which is of 2009 and nearly 10 years have elapsed in interest of justice all the appeals have been taken up for consideration and disposal.

4.3 Commissioner has in his order recorded following findings in para 21 of his order. Findings recorded are reproduced below:

21. I have gone through the records of the case and the submissions of the noticees, both written and oral. I find that:

(1) There are two sets of consignments which are covered in this SCN. In one set an export consignment of 14 Shipping Bills under the DEEC Scheme was involved. This consignment, which was on its way to Singapore, was called back and re-examined. The test result of this consignment confirmed that the goods were soapstone powder and not the pharmaceutical bulk drug as declared. The other set of export fraud involved 66 Shipping Bills exported under the DEPB Scheme. In this case the firms whose name appeared as manufacturer on the ARE-1s accompanying the Shipping Bills have all confirmed that they have never supplied any 'Pharmaceutical Bulk drug' to the concerned exporter or to any of the indenters investigated. Also the indenting firms through whom and non existent. Further, large quantities of 'soapstone powder' and 'empty carbuoys' were purchased for which no plausible explanation of its disposal/sale etc could be provided by the concerned noticees. Even the overseas Customs have confirmed that

some of the consignees declared their consignments as 'soapstone powder' before the overseas Customs. These observations and other related evidences joined together confirm that what has been exported under these 66 Shipping Bills were not 'pharmaceutical bulk drugs' as declared, but 'soapstone powder'.

(2) This SCN is one in a series of SCNs involving the same persons in the same roles. Shri Charles Patrick and Shri Subramaniam Devar are the two leading and common characters in this SCN as well as in all related SCNs. Shri Charles Patrick is the mastermind and brain behind this fraud and Shri Subramaniam Devar, his employee was the person who acted and supervised the execution of the plan. The two Directors, Shri Kolakkat and Shri Pillai were aware of the whole plot and whole heartedly participated in the racket. They have allowed the duo of Charles Patrick and Subramaniam Devar to use their company name for the fraud, obviously for handsome remunerations.

(3) Regarding the exports under the DEEC Scheme, the issue of evasion of excise duties due to diversion of goods under ARE-1 to local market has been dealt with, in a separate SCN. Since the export obligation for the duty free import of raw materials by M/s Surya Pharmaceuticals has not been fulfilled, they are liable to make good the duty foregone of Rs 48,83,442/- on these imported raw materials. The duty free imported raw materials were imported on execution of a bond for fulfillment of export obligation. Since the export obligation has not been fulfilled, these imported material are liable for confiscation u/s 111(o) of CA'62. The importer, M/s Surya Pharmaceuticals Ltd is also liable for penalty u/s 112(a) of CA'62. These imported goods valued at Rs 1,16,21,395/-, though not available for confiscation, can be confiscated as these were cleared under a bond and the conditions of the bond can be enforced for the purpose of imposing a fine in lieu of penalty. Judgement in the case of Western Component Ltd. vs CCE [2000(115) ELT 278(SC) refers.

(4) The export goods covered under 14 DEEC Shipping bills and having a declared value of Rs 1,52,60,075/ has been found misdeclared and are liable for confiscation u/s 113 (h)(i) of CA'62. These goods are actually soapstone powder having a very meager market value. M/s SSEPL, Shri Bhaskar Kolakkat, Shri Rajasekhar Pillai, Shri Charles Patrick and Shri Subramaniam Devar are liable for penalty u/s 114(iii). The export goods are available for confiscation and hence a redemption fine u/s 125 is also leviable.

(5) Regarding the fraudulent export under the 66 Shipping Bills in question, the goods having a declared value of Rs 13,88,88,553/- already exported were misdeclared nd hence liable for confiscation u/s 113(h)(i) of CA'62 and M/s SSEPL, Shri Bhaskar Kolakkat, Shri Rajasekhar Pillai, Shri Charles Patrick and Shri Subramaniam Devar are able for penalty u/s 114(iii).

5) The 47 DEPB licenses were found to be obtained by fraud and hence the duty redit of Rs 1,32,28,562/- utilized for payment of duty on imported goods needs to be ecovered. Demands of duty under Section 28(1) have been raised on the 23 firms who ave purchased these scripts from open market and utilized them for payment of duty on e consignments imported by them. These firms claim that **they are bona-fide urchasers of the license for value without notice of fraud**; there is nothing to

purchasers of the license for value without notice of fraud; there is nothing to contradict it in the SCN. Further, licenses obtained through fraudulent means is not void, but voidable and is good till avoided in the manner prescribed by law, as has been held in the case of East India Commercial Vs CC [1983(13) ELT 1342(SC)] and it is never disputed that at the time of importations under these licenses by these firms, these licenses were neither suspended nor cancelled. It is a well settled law that transferees who have purchased a license from the open market without any knowledge of the fraud committed by the original license holder cannot be held liable for payment of duty. Judgement in the case of Taparia Overseas Pvt. Ltd. vs UOI [2003 (161) ELT 47 (Bom)] and those mentioned at Para 18(4) above. It is the perpetrators of the fraud, who have already gained by selling these licenses for value, are to be held liable for the duty payable. *The person who himself is guilty of fraud can never be permitted to avail himself any benefit of it*, ruled Hon'ble Supreme Court in the case of Fedco (P) Ltd. Vs S N Billigrami [1999(110) ELT 92(SC)]. SSEPL in their submission has stated that duty can be demanded u/s 28, only from the 'importer'. I do not agree with this contention as this Section allows the proper officer to demand duty from 'the person chargeable to duty'. The legislature has deliberately avoided using the term 'importer' and has left it open to the proper officer to decide as to who is the person chargeable to duty in the given case. The 'DEPB credit' was given to SSEPL and they have sold this credit for value in the open market. There are two ways one can utilize the credit obtained in a DEPB license. One can import the goods themselves and pay the Customs duty against the credit available to them or one can sell the DEPB Credit for value in the open market at a rate determined by market conditions. In this case, since it is conclusively held that what had been exported were not what was declared in the Shipping Bills, the credited amounts in the 47 DEPB License are held to be not available to the original license holder. The original license holder is thus required to return the credit; in this case since the original license holder is not an importer, he has to return the credit by returning the value of the credit. I am, therefore, of the view that M/s Sai Shradha Export Pvt Ltd is 'the person liable to pay the duty' of Rs 1,32,28,562/-. The loss of revenue was due to willful misstatement and suppression of the actual description of goods exported; hence the proviso to Section 28(1) as well as penal provisions u/s 114A are invokable.

(7) There is a proposal in the SCN to confiscate such goods imported by utilizing the 47 fraudulently obtained DEPB Licenses and the 66 export consignments which were misdeclared. However, none of these goods are available for confiscation. The legal

position is: when the goods are seized, the possession /custody of the goods is with the department though the ownership continues to be with the party and when they are confiscated, both the ownership and the custody vest with the Govt. These goods have already been cleared and are not available, may be even with the importer himself, nor is there any bond or security against the same; they are neither available for confiscation, nor can any fine in lieu of confiscation be imposed in respect of these consignments. Judgments in the cases of Sun Exports Vs CC[2008(228)ELT 545(T --M)] and CC Vs. Kiran Jewels [2008 (230)ELT 627 (T – M)] refer.

(8) The role of the two CHAs in this whole affair is not at all above board. Such a big fraud could not been committed in so many consignments over such a long period of time without their knowledge and / or connivance; they cannot be as blissfully ignorant (about the whole fraudulent scheme) as they plead to be. They have failed miserably to honour the trust reposed on them (by the Department) while acting as CHAs; rather, they have betrayed the same. I, therefore, hold them as abettors liable for penalty u/s 112(b) ibid. Further, both these CHA companies appear to have violated provisions of the CHA Licensing Regulations by subletting/renting their licenses for use by other persons: this aspect may be taken up by the concerned authorities under the said regulations.

4.4 From the findings of the Commissioner as recorded above the case of export fraud has been well made out against all the other appellants except the two CHAs. In our view sufficient evidence has been brought on record to uphold the charges made against them and the penalties proposed on them along with confiscation of goods and demand of duties are justified. In our opinion in such cases of economic offences where such fraudster are playing with the economic fabric of the country strict actions as provided under the law is warranted.

4.5 In case of the CHA namely M/s Fast Forward and M/s Santon Shipping Services when Commissioner himself is recommending the action under CHALR, 2004 we do not find any justifiable reason for imposition of penalty under Section 112(b) of the Customs Act, 1962. Even show cause notice or OIO do not bring out how the knowledge of fraud could be imputed to them. In result we do not find any result for upholding penalties imposed by Commissioner on the two CHAs.

5.1 In view of discussion as above we allow the appeals filed M/s Fast Forward (C/291/2010) and M/s Santon Shipping Services (C/315/2010) and dismiss all the other appeals filed by rest of the appellants.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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