CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Customs Appeal No. 85460 of 2013

(Arising out of Order-in-Original No. 42/2012 dated 30.11.2012 passed by Commissioner of Customs (Export), JNCH, Nhava Sheva)

M/s. Shubh Fab Tex **Appellant**
603, Sambhavnath Bldg.,
Shubh Shanti Complex,
R.S. Road, Anjurpatha,
Bhiwandi, Thane 421 303.

Vs.

Commissioner of Customs (Export) **Respondent**
Nhava Sheva
Jawaharlal Nehru Custom House,
Nhava Sheva, Tal. Uran,
Dist. Raigad 407 707.

WITH

(i) 85475 of 2013 (M/s. Albatross Shipping Ltd.); (ii) 85476 of 2013 (Raghavan Nambiar); (iii) 85477 of 2013 (Krishnan Venkatesh); (iv) 85659 of 2013 (Yogesh Ramchandra Adak); (v) 85660 of 2013 (Nityam Khosla); (vi) 85661 of 2013 (M/s. Teamglobal Logistics Pvt. Ltd.); (vii) 85944 of 2013 (Ananda Moorthy); (viii) 85945 of 2013 (M/s. Freight Connection India Pvt. Ltd.); (ix) 85948 of 2013 (Farhad T. Dhotoo); (x) 86164 of 2013 with C/CO/91063 of 2013 (M/s. O.K. Cargo Craft Pvt. Ltd.); (xi) 86260 of 2013 (V. Ramanarayanan); (xii) 86261 of 2013 (Rajesh Kalicharan Mehra); (xiii) 86316 of 2013 (M/s. Warner Industries); and (xiv) 86378 of 2013 (M/s. Relay Shipping Agency Ltd.)

(Arising out of Order-in-Original No. 42/2012 dated 30.11.2012 passed by Commissioner of Customs (Export), JNCH, Nhava Sheva)

Appearance:

Shri A.K. Prabhakar, Consultant for 1st appellant
Shri V.K. Ramabhadran, Sr. Advocate for appellants 2 to 10, 12, 13 & 15
Shri C.M. Sharma, C.A. for appellant 11
Shri Jeetu Motwani, Advocate for appellant 19
Shri A.P. Kothari, Authorised Representative for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. A/**86506-86520/2019**

Date of Hearing: 07.06.2019
Date of Decision: 29.08.2019

PER: SANJIV SRIVASTAVA

The appeals as detailed in table below are directed against the order in original No 42/2012 dated 30.11.2012 of Commissioner Custom (Export) Nhava Sheva. By the impugned order Commissioner has absolutely confiscated the 25.260 Metric Tons of *"Red Sanders Wood Logs"* valued at Rs 2,02,08,000/- mis-declared on the shipping bill No 9296841 dated 27.01.2011 as *"Synthetic Filament Yarn other than Sewing Thread Polyester Texturized Yarn"* having value of Rs 8,94,919/- While confiscating the said goods absolutely as these goods are prohibited for exports, Commissioner has imposed penalties as indicated in the table on various person who are appellants before us.

S. No	Appeal No	Appellant	Penalty in Rs' Lakhs		
			Section 114(i)	Section 117	Total
1	C/85460/2013	Shubh Fab Tex	33	-	33
2	C/85475/2013	Albatross Shipping Ltd	20	1	21
3	C/85476/2013	Raghavan Nambiar	10	1	11
4	C/85477/2013	Krishnan Venkatesh	10	1	11
5	C/85659/2013	Yogesh Ramchandra Adak	10	1	11
6	C/85660/2013	Nityam Khosla	10	1	11
7	C/85661/2013	Teamglobal Logistics Pvt Ltd	100	1	101
8	C/85944/2013	Ananda Moorthy	10	1	11
9	C/85945/2013	Freight Connection India Pvt Ltd	100	1	101
10	C/85948/2013	Farhad Dholoo	10	1	1
11	C/86164/2013	O K Cargo Craft Pvt Ltd	33	-	33
12	C/86260/2013	V Ramanarayanan	10	1	11
13	C/86261/2013	Rajesh Kalicaharan Mehra	10	1	11
14	C/86316/2013	Warner Industries	100	-	100

15	C/86378/2013	Relay Shipping Agency Ltd	20	1	21
16	C/Cross/91063/2013	In Appeal C/86164/2013			

2.1 We have heard Shri A K Prabhakar, Consultant for Appellant 1, Shri V K Ramabhadran, Advocate for Appellants 2 to 10, 12, 13 and 15, Shri C M Sharma, Chartered Accountant for Appellant 11 and Shri Jeetu Motwani, Advocate for Appellant 14. We have also heard Shri A P Kothari, Additional Commissioner, Authorized Representative for the Revenue.

3.1 Commissioner has in para 43 and 46 of his order recorded as follows:

"43. I find that framing of penal charges against the said actual exporters/ owners of the goods has kept reserved by the investigating agency till they are traced and apprehended. Therefore, the show cause notice did not propose penalties against the actual exporters. I acceded to the proposal made in the show cause notice.

46. With regard to Shri Kishor Ghag, Shri Pramod, Shri Deepak and Shri Atul Jadhav and any other person/ firm or company who claim to be the exporters/ owners of the subject goods:

(i) I re-determine the value of the goods (declared as 'synthetic filament yarn other than sewing thread polyester texturised yarn'), covered under shipping bill no 9296841 dated 27.01.2011, of a declared value of Rs 8,94,919/- and found to be "Red Sanders Wood Logs" of a total net weight of 25,260 metric tons, as Rs 2,02,08,000/- as per the provisions of Customs Valuation (Determination of Value of Export Goods) Rules, 2007 read with section 14 of the Customs Act, 1962 for reasons and in the manner described under para 24.1 above and I order absolute confiscation of the said goods under sections 113 (d) and 113(i) of The Customs Act, 1962 read with Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 for reasons given in the foregoing paras.

(ii) I order absolute confiscation of the goods, covered under shipping bill No 9214488 dated 04.01.2011, declared as 'synthetic filament yarn other than sewing thread polyester texturised yarn' of a declared FOB value of Rs 8,95,500/- under sections 113(d) and 113(i) of the Customs Act, 1962 read with Section 3 of the Foreign Trade (Development and Regulation) Act, 1992"

Since the order of absolute confiscation of 25.26 Metric Tons of *'Red Sanders Wood Logs'* valued at R 2,02,08,000/- sought to be exported by mis-declaring them as *'synthetic filament yarn other than sewing thread polyester texturised yarn'* of a declared FOB value of Rs 8,95,500/- against the shipping bill No 9214488 dated 04.01.2011 is not under challenge in appeals before us, nor the actual owners/ exporters of the said goods are not before us we do not pronounce anything in respect of the said portion of order. Any finding recorded in this order may not be construed as in favour of or against the order of Commissioner contained in the said paras.

4.1 Para 29 of Show Cause Notice specifically states as follows:

"29 Framing of penal charges against Shri Kishor Ghag, Shri Pramod, Shri Deepak and Shri Atul Jadhav of M/s Jadhav Freight Forwarders, Shri Sameer Gohil of M/s Central Cargo Express Movers and any other person/ firm or company who claim to be the exporters/ owners and any other person/ firm or company found to be the exporters/ owners of the subject goods are reserved till they are traced; separate show cause notice in this respect will be issued in due course as and when they are traced."

To the same effect are findings recorded by the Commissioner in para 43 of the order referred in para 3.1 above. From the above facts as recorded in show cause notice it is quite evident that the appellants before us are neither the exporters/ owners of the goods absolutely confiscated by the impugned order.

4.2 Commissioner has in para 40, 41 & 42 of his order has recorded as follows:

"*40. The modus operandi followed in this case was that the actual exporters obtained a container from the container service provider and fake invoices were made and signatures & rubber stamps of concerned Central Excise Authorities were forged. The contraband goods were clandestinely stuffed in the container and used the vehicles fitted with false number plates and brought inside the CFS. Once the container was brought inside the CFS, after obtaining Gate Officer's endorsement, the goods were registered and LEO was obtained. By following the same modus operandi, though the past export was consignment was exported vide shipping bill no 9214488 dated 4.1.2011, the present consignment vide shipping bill no 9296841 dated 27.1.2011 was seized before it was exported.*

41. With regard to the present Exports : As per the show cause notice, the container no. BAXU 5021903 and agent seal was procured from M/s Freight Connection India Pvt. Ltd, the container owner/operators by M/s Team Global Logistics Pvt. Ltd, a Freight Forwarding Firm, and then the same was handed over to Shri Pramod/Shri Deepak/Atul Jadhav of M/s Jadhav Freight Forwarders on the basis of communication done through e-mail and phone calls. The exporter mentioned in the booking slip was 'Anad Exports'. Other than the name of the exporter 'Anand Exports', no other details of the said exporter such as address, phone number, e-mail address, was mentioned in the said booking slip. M/s. Team Global Logistics Pvt. Ltd did not enquire with the booking party about the details of the said exporter. I further find that M/s Jadhav Freight Forwarders was non-existent and Shri Pramod/Shri Deepak/Atul Jadhav, who were considered to be among the actual exporters/owners of the goods or their agent, used the said container no. BAXU 5021903 for attempting illegal export under shipping bill filed in the name of M/s Shubh Fab Tex and absconded as soon as investigation started. By following the same modus operandi, in the past, they exported the contraband goods vide shipping bill no. 9214488 dated 04.01.2011 in the container no. BLJU 4080018. The container, in the past exports, was provided directly to Atul Jadhav of M/s Jadhav Freight Forwarders by M/s Albatross Shipping Ltd. the container line, and the exporter (shipper) mentioned in the booking slip was 'Silver Exports' whereas the container was used for illegal export under shipping bill no. 9214488 dated 04.01.2011 filed in the name of M/s Shubh Fab Tex.

a. I find that Container security seal no. 623007 C. EX. KALYAN, used for sealing container no. BAXU 5021903 was issued by M/s Warner Industries to Shri Sameer Gohil of M/s Central Express Cargo Moovers. However, investigations further revealed that the said M/s Central Express Cargo Moovers was a non-existent firm. I further find that the said seal appeared to denote that it was issued by Central Excise, Kalyan, the jurisdictional Central Excise Range mentioned in Invoice No. EXP/SFT/22 dated 24.01.2011 pertaining to the goods under seizure. It is clear from the above that the act of providing the said seal by M/s Warner Industries to Shri Sameer Gohil of M/s Central Express Cargo Moovers and their failure to verify the genuineness of M/s Central Express Cargo Moovers, as to whether the said firm existed at the address provided to them, especially when the firm was not known to them, and who did not represent any container line, shipping line, or any government organizations, resulted in use of the said seal by the actual exporters for sealing container no. BAXU 5021903, stuffed with Red Sanders wood logs, and attempted to smuggle the goods

b. I further find that the actual exports never came forward to claim the ownership of the goods. I further find that the persons viz. Shri Kishor Ghag, who filed the subject shipping bills, Shri Pramod, Shri Deepak and Shri Atul Jadhav of M/s Jadhav Freight Forwarders, who procured the containers no. BAXU 5021903 and BLJU 4080018 used to smuggle the subject goods and Shri Sameer Gohil of M/s Central Express Cargo Moovers, who procured the seal no. 623007 (C. EX. KALYAN) used to seal the container no. BAXU 5021903, were the actual exporters of the subject goods or their agents. I find that M/s. Jadhav Freight Forwarders was a non-existent firm Efforts were made to trace the above named persons during investigation, but in vain Their disappearance from the investigations give strength to the fact that these persons were the actual exporters / owners of the red sanders or 'de facto exporters'. During and after investigations no person came forward to claim the ownership of the goods and they did not cooperate with the investigations. Even at the time of personal hearings, held before me, they did not appeared and they did not file defence reply to the show cause notice.

c. With regard to the valuation of the goods, I find that the goods were undoubtedly misdeclared as synthetic filament yarn other than sewing thread polyester texturised yarn, but in fact, the goods were red sander wood logs. Therefore the value declared by the exporters is liable to rejection under Rule 8 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 and the value should be re-determined under Rule 3 of CVR, 2007 by proceeding sequentially through Rule 4 to 6. Since there was no bona fide transaction of goods of the kind and quality Rule 4 was not applicable. Since there was no details of manufacturers, cost of production available, valuation under Rule 5 also could not be determined. Since there was expert opinion of Wild Life Inspector available, which was appropriate in this case, the value of the goods was re-determined under Rule 6 of the CVR, 2007, to be Rs. 2,02,08,000/-.

d. With regard to the confiscation of the goods, I find that Red Sanders wood logs, classified under Tariff item HS Code 4403 99 18 and 4403 99 90, was prohibited for export as specified under S. No. 154 of Chapter 44 of the Schedule 2 (Export Policy) of the ITC (HS) read with para 2.1 of the Foreign Trade Policy 2009-2014 (notified by the Central Government vide notification no. 1/2009-2014 dated 27.08.2004 issued by the DGFT). Further, Export of any wood in the form of logs, classified under Tariff item HS Codes 4401 10 00; 4401 21 00 and 4401 30 00 which falls under S No. 143 of Chapter 44 of Schedule 2 (Export Policy) of the Foreign Trade Policy 2009-2014 is also prohibited for export as per the said Export Policy. Therefore, the said goods are also liable to confiscation under section 113 (d) and 113 (i) of the Customs Act, 1962 read with section 3 of the Foreign Trade (Development and Regulation) Act, 1992, as the goods which were entered for exportation did not correspond in respect of the description of the goods and value declared in the said shipping bill.

e. With regard to M/s. Shubh Fab Tex, I find that Shri Biren Gala was the Proprietor of M/s. Shubh Fab Tex. The subject shipping bill no. 9296841 dated 27.01.2011, which pertains to present attempted export, was filed under IEC No. 0306002221 held by M/s Shubh Fab Tex, the exporter as declared in the said shipping bill. However, as per the version of Shri Biren Gala, they did not file the said shipping bill. During investigation it was revealed that the actual exporters of the goods used the IEC No. 0306002221 of M/s Shubh Fab Tex, for exporting the subject goods. However, the actual exporter was not available during investigation as well as adjudication proceedings. It is clear from the above that M/s Shubh Fab Tex were not vigilant about the probable misuse of IEC No. 0306002221 held by them and M/s. Shubh Fab Tex failed to take precaution to preclude the misuse of their IEC by unscrupulous persons, which allowed the actual exporters to use their IEC to smuggle the subject goods.

i. As per Para 4 of Facility Notice no. 41 of 2009 dated 10.07.2009 issued by Commissioner of Customs (Import), JNCH that "the importers/exporters/CHA are advised to convey the details of the B/E or S/B which were not filed by them immediately on receipt of such details against their respective IEC or CHA number to facilitate the department in initiating suitable action in respect of such documents filed by unscrupulous elements. They were also requested to undertake such exercises periodically to see that their names are not misused or impersonated by others for violating law of the land".

ii. Public Notice no. 10 of 2010 dated 03.02.2010 issued by Commissioner of Customs (Import), JNCH stipulates that "in case of any discrepancy or if any B/E or S/B which was not filed by the CHAs/importers/ exporters, has been registered in his/their name, he/they may immediately report the same to the Customs. It is, therefore, imperative that CHA/importers/exporters take up those cases on day to day basis and report back to Customs in case of any discrepancy. It would be the responsibility of the CHAs/importers/exporters to verify both the above aspects on daily basis and in case they fail to do so, the concerned CHA/importer/exporter will be precluded from pleading ignorance at the time of subsequent investigation, if any".

I find that M/s. Shubh Fab Tex disregarded the instructions contained in the said Facility Notice and Public Notice. This fact was admitted by Shri Biren Gala in his statement dated 9.6.2011. Had they complied with the said instructions, the said attempt to export the contraband goods would not have taken place. The said failure/omission on the part of M/s Shubh Fab Tex has allowed the actual exporters to use the said IEC held by M/s Shubh Fab Tex in their attempt to improperly export the said goods and rendered the goods liable to confiscation under sections 113 (d) and 113 (i) of the Customs Act, 1962 and hence M/s Shubh Fab Tex are liable to penalty under section 114 (i) of the Customs Act, 1962.

f. With regard to the CHA M/s. O.K. Cargo Craft Pvt Ltd, the subject shipping bill no. 9296841 dated 27.01.2011 was filed under the said CHA firm. I find that Shri Jayesh Odhavaji Bhanushali, Managing Director, M/s O. K. Cargo Craft Pvt. Ltd's version was that they did not file the said shipping bill. During investigation it was revealed that the CHA did not comply with the instructions of Facility Notice and Public Notice. The above facts were admitted by Shri Shri Jayesh Odhavaji Bhanushali in his statement recorded on 2.2.2011, wherein he admitted that his company failed to comply with the instructions contained in para no. 4 of Facility Notice no. 41/2009 dated 10.07.2009 and instructions issued vide Public Notice no. 10 of 2010 dated 03.02.2010. It is clear from the above that M/s O. K. Cargo Craft Pvt. Ltd were not vigilant about the probable misuse of CHA licence held by them, they failed to take precaution to preclude the misuse of their CHA licence by unscrupulous persons, which allowed the actual exporters to use their CHA licence for the said shipping bill. I further find that M/s O. K. Cargo Craft Pvt. Ltd disregarded the instruction issued vide Facility Notice no. 41 of 2009 dated 10.07.2009 and instructions issued vide Public Notice no. 10 of 2010 dated 03.02.2010. The said failure/omission on the part of M/s OK Cargo Craft Pvt. Ltd allowed the actual exporters to use the said CHA licence in

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their attempt to improperly export the subject goods and rendered the goods liable to confiscation under sections 113 (d) and 113 (i) and therefore, M/s O. K. Cargo Craft Pvt. Ltd are liable to penalty under section 114 (i) of the Customs Act, 1962. The show cause notice proposed penalty under Section 117 of the Customs Act, 1962 against the CHA without giving any justification. On going through the merits of the case, I do not find any valid reason to impose penalty under Section 117 of the Customs Act,. 1962. Therefore, I am not imposing penalty under Section 117 of the Customs Act, 1962 against the CHA M/s. O K Cargo Craft Pvt Ltd.

Their contention vide letter dated 18.11.2011 was that there was no evidence to show that CHA had acted knowingly in alleged shipments and further contended that use of forged / fake documents was also evident in the show cause notice. Their main contention was that since they had no knowledge, no penalty could be imposed against them. I find that there is no force in this argument. I find that the CHA failed to comply with the instructions contained in the Facility Notice and Public Notice. If they were vigilant in their actions, the said attempt of exports would have been foiled.. Their acts of omissions rendered the goods liable to confiscation. Therefore, penalty under Section 114(i) of the Customs Act, 1962 is justifiable against the CHA.

g. With respect to M/s Team Global Logistics Pvt. Ltd, freight forwarders, I find that they obtained container no. BAXU 5021903 from M/s Freight Connection India Pvt. Ltd, the container owners/container and then provided to one Shri Pramod/Deepak/Atul Jadhav/ of M/s Jadhav Freight Forwarders. M/s Team Global Logistics Pvt. Ltd was the intermediary between the container line, M/s Freight Connection India Pvt. Ltd and the end recipient, Shri Pramod/Deepak/Atul Jadhav / of M/s Jadhav Freight Forwarders. I further find that M/s Team Global Logistics Pvt. Ltd booked the said container through e-mail sent to M/s Freight Connection India Pvt. Ltd, and handed over the Delivery Order for container to Shri Pramod/Deepak/Atul Jadhav/ of M/s Jadhav Freight Forwarders. The above fact is supported by the statement of Shri Yogesh Ramchandra Adak, Sales Manager recorded on 21.02.2011. He further admitted that the said container and agent seal was provided to Shri Pramod/Deepak/Atul Jadhav/ of M/s Jadhav Freight Forwarders on the basis of e-mail received from the said Shri Pramod/Deepak/Atul Jadhav / of M/s Jadhav Freight Forwarders; that he or any other director or employee of his company did not know Shri Pramod/Deepak/Atul Jadhav/ or M/s Jadhav Freight Forwarders, the firm they represented; though they were new clients no attempt was made to verify the existence or bona fides of the said persons or firm; they did not take any precautions against the possible misuse of the container; the said container was provided to Shri Pramod/Deepak/Atul Jadhav by his staff under his instructions. It is evident from the above that M/s Team Global Logistics Pvt Ltd were not vigilant about the proba misuse of the container and seal provided by them, they failed to take precaution to preclude the misuse of the container and seal by unscrupulous persons. Though they were new clients, no attempt was made to verify the existence or bona fides of Shri Pramod/Deepak/Atul Jadhav/ or M/s Jadhav Freight Forwarders or whether they truly represented the exporter, they never received any authority letter from the exporter to indicate that Shri Pramod/Deepak/Atul Jadhav/ or M/s Jadhav Freight Forwarders acted on their behalf. I further find that the booking slip of M/s Jadhav Freight Forwarders relating to issue of container no. BAXU 5021903 submitted by Shri Yogesh Ramchandra Adak showed that apart from the name of the exporter 'Anad Exports', no other detail such as phone no. or email address was mentioned in the said booking slip, yet M/s Team Global Logistics Pvt. Ltd did not enquire with the booking party about details of the exporter nor ascertained whether such exporter did exist. I find that Shri Pramod, Deepak, Atul Jadhav and their associates, the actual exporters, used the said container to smuggle the subject goods under shipping bill filed in the name of M/s Shubh Fab Tex. It is clear that M/s Team Global Logistics Pvt. Ltd deliberately turned a blind eye to the illegal export activities of the said exporters in order to gain quick business and they did not show any concern whether the party to whom they were providing the container for the purpose of exporting goods was the exporter or CHA or their authorized representative. The said omissions on part of M/s Team Global Logistics Pvt. Ltd resulted in use of the said container for the purpose of smuggling of subject goods. M/s Team Global Logistics Pvt. Ltd abetted Shri Pramod/Deepak/Atul Jadhav/M/s Jadhav Freight Forwarders and their associates, the actual exporters, to smuggle the subject goods for which they charged an amount of $ 356 (Rs 15,913/-) to Shri Pramod/Deepak/Atul Jadhav/M/s Jadhav Freight Forwarders for services rendered by them. The said failure/ omissions on part of M/s Team Global Logistics Pvt. Ltd; the said act of providing the containers to the actual exporters, persons who were neither the legal exporters nor the CHA and the said act of abetting the actual exporters in their attempt to improperly export the said goods has allowed Shri Pramod, Deepak, Atul Jadhav, and their associates, the actual exporters, to smuggle the subject goods and rendered the goods liable to confiscation under sections 113 (d) and 113 (i) and M/s Team Global Logistics Pvt. Ltd were liable to penalty under section 114 (i) of the Customs Act, 1962. M/s Team Global Logistics Pvt. Ltd by abetting Shri Pramod/Deepak/Atul Jadhav/M/s Jadhav Freight Forwarders, who were neither the legal exporter nor the CHA, in contravening the provisions of 146 (1) of the Customs Act, 1962 and Regulation no. 3 (a) of the Customs House Agents Licensing Regulations, 2004 have, in addition, rendered themselves liable to penalty under section 117 of the Customs Act, 1962. M/s. Team Globe Logistics Pvt Ltd filed defence reply dated 21.11.2011 to the show cause notice. On perusal of the defence reply, I find that there is no force in their arguments. Therefore, cannot be taken into account.

For SHUBH FAB TEX

h. With regard to Yogesh Ramchandra Adak and Shri Nityam Khosla, I find that Shri Yogesh Ramchandra Adak was the Sales Manager of M/s Team Global Logistics Pvt. Ltd, who looked after the business of providing containers to clients. Shri Yogesh Ramchandra Adak in his statement dated 19.02.2011 admitted that he was responsible for providing the said container no. BAXU 5021903 to Shri Pramod/Deepak/Atul Jadhav/M/s Jadhav Freight Forwarders. He further admitted that he as well as other staff involved in providing the said container acted in conformity with the company policy, which was geared to augment their business, decided by Shri Nityam Khosla, Managing Director, M/s Team Global Logistics Pvt. Ltd. It is clear from the above that in terms of section 140 (a) of the Customs Act, 1962, both Shri Yogesh Ramchandra Adak and Shri Nityam Khosla were liable to penalty under sections 114 (i) and 117 of the Customs Act, 1962, for the aforesaid offences committed by them and their company, M/s Team Global Logistics Pvt. Ltd.

i. With regard to M/s Freight Connection India Pvt. Ltd, the container no. BAXU 5021903 and agent seal were provided by them to M/s Team Global Logistics Pvt. Ltd. The said container and bottle seal were further provided to Shri Pramod, Deepak, Atul Jadhav, who (along with their associates) and used the said container for smuggling the subject goods. Investigation revealed that they did not enquire with M/s Team Global Logistics Pvt. Ltd as to who was the exporter or the authorised CHA, or as to who would use the said container and seal for exporting the goods; the delivery order for the said container was issued in the name of M/s Team Global Logistics Pvt. Ltd, they charged an amount of Rs 11,443/- to M/s Team Global Logistics Pvt. Ltd for their services. All the above facts were supported by the statement of Shri Anand Moorthy recorded on 21/22.06.2011, wherein he further admitted that their marketing and booking staff who dealt with booking and issue of the said container acted in conformity with the company policy, which was geared to augment their business, decided by Shri Farhad Dholoo, Managing Director, M/s Freight Connection India Pvt. Ltd. It is clear from the above that M/s Freight Connection India Pvt. Ltd were not vigilant about the probable misuse of the container and seal owned/provided by them and they failed to take precaution to preclude the misuse of the container and seal by unscrupulous persons. Shri Pramod, Deepak, Atul Jadhav, who (along with their associates) and the actual exporters were the end recipients of the said container and they used the said container to smuggle the subject goods. I find that M/s Freight Connection India Pvt. Ltd did not ascertain or even enquire about the exporter who would use the said container for stuffing the goods. The said omission on part of M/s Freight Connection India Pvt. Ltd resulted in use of the said container for the purpose of smuggling of subject goods. Further, by providing the said container and seal to person/firm who were neither the legal exporter nor the CHA, M/s Freight Connection

India Pvt. Ltd abetted M/s Team Global Logistics Pvt. Ltd and Shri Pramod, Deepak, Atul Jadhav and the actual exporters, to smuggle the subject goods; M/s Freight Connection India Pvt. Ltd deliberately turned a blind eye to the illegal export activities of M/s Team Global Logistics Pvt. Ltd and the said exporters in order to gain quick business. The said failure/ omission on part of M/s Freight Connection India Pvt. Ltd; the said act of providing the container to M/s Team Global Logistics Pvt. Ltd and Shri Pramod, Deepak, Atul Jadhav who were neither the legal exporters nor the CHA and the said act of abetting the actual exporters in their attempt to improperly export the said goods rendered the goods liable to confiscation under section 113 (d) and 113 (i) of the Customs Act, 1962 and M/s Freight Connection India Pvt. Ltd are liable to penalty under section 114 (i) of the Customs Act, 1962. Further, M/s Freight Connection India Pvt. Ltd by abetting M/s Team Global Logistics Pvt. Ltd and Shri Pramod, Deepak, Atul Jadhav and their associates, who were neither the legal exporter nor the CHA, in contravening the provisions of 146 (1) of the Customs Act, 1962 and Regulation no. 3 (a) of the Customs House Agents Licensing Regulations, 2004 have, in addition, also rendered themselves liable to penalty under section 117 of the Customs Act, 1962.

j. With regard to Shri Anand Moorthy and Shri Farhad Dholoo, I find that Shri Ananda Moorthy, Manager (Operations), M/s Freight Connection India Pvt. Ltd was In-charge of activities related to providing the said container. Shri Anand Moorthy admitted in his statement recorded on 21.06.2011, that he as well as other staff involved in providing the said container acted in conformity with the company policy, which was geared to augment their business, decided by Shri Farhad Dholoo, Managing Director, M/s Freight Connection India Pvt. Ltd. In view of the above, I find that in terms of section 140 (a) of the Customs Act, 1962, both Shri Ananda Moorthy and Shri Farhad Dholoo are liable to penalty under sections 114 (i) and 117 of the Customs Act, 1962, for the aforesaid offences committed by their company, M/s Freight Connection India Pvt. Ltd.

Their version in their defence reply dated 17.11.2011 is that they released the container to M/s. Team Global Logistics in good faith and they acted in a proactive manner. I find that this contention cannot be not considered to be genuine and valid. As discussed supra, they did not enquire with M/s Team Global Logistics Pvt. Ltd as to who was the exporter or the authorised CHA, or as to who would use the said container and seal for exporting the goods. The said omission on part of M/s Freight Connection India Pvt. Ltd resulted in use of the said container for the purpose of smuggling of subject goods.

For SHUBH FAB TEX

k. With regard to M/s. Warner Industries, I find that they issued container security seal no. 623007 C. EX. KALYAN, used for sealing container no. BAXU 5021903 which was stuffed with Red Sanders wood logs, to Shri Sameer Gohil of M/s Central Express Cargo Moovers, however, the said M/s Central Express Cargo Moovers was found to be non-existent. I further find that the said seal appeared to denote that it was issued by Central Excise, Kalyan, the jurisdictional Central Excise Range mentioned in Invoice No. EXP/SFT/22 dated 24.01.2011 pertaining to the goods under seizure. It is clear that the act of providing the said seal by M/s Warner Industries to Shri Sameer Gohil of M/s Central Express Cargo Moovers and their failure (omission) to verify the genuineness of M/s Central Express Cargo Moovers, as to whether the said firm existed at the address provided to them, especially when the firm was not known to them and who did not represent any container line, shipping line, or any government organizations, resulted in use of the said seal by the actual exporters for sealing container no. BAXU 5021903, stuffed with Red Sanders wood logs, and smuggle the goods and rendered the said goods liable to confiscation under the Customs Act, 1962. In all 250 container security seals, the seal no. 623007 C. EX. KALYAN among them, were issued by M/s Warner Industries to Shri Sameer Gohil for which they received an amount of Rs 3,938/- from the said Shri Sameer Gohil. M/s Warner Industries by providing the said seal to Shri Sameer Gohil of M/s Central Express Cargo Moovers abetted the said Shri Sameer Gohil (and his associates) in smuggling the subject goods which has rendered the goods liable to confiscation under provisions of the Customs Act, 1962. The said failure/ omission on part of M/s Warner Industries, the said act of providing the seal to Shri Sameer Gohil, who (along with his associates), and the said act of abetting the actual exporters in their attempt to improperly export the said goods has rendered the goods liable to confiscation under section 113 (d) and 113 (i) and M/s Warner Industries are therefore liable to penalty under section 114 (i) of the Customs Act, 1962. M/s. Warner Industries filed defence reply 2.11.2007, which has no force. They intimated that they had given statement during investigations.

42. **With regard to past exports :** Investigations revealed that the goods covered under shipping bill no. 9214488 dated 04.01.2011, declared as 'synthetic filament yarn other than sewing thread polyester texturised yarn' of a declared FOB value of Rs 8,95,500/- and already exported and delivered to the consignee (past export) were actually contraband/prohibited goods. I find that in this case also, the Export Invoice no. EXP/SFT/21 dated 01.01.2011 was fake and forged. The goods were shown to be stuffed in the container at factory of M/s. S.R. Fabric, but investigations revealed that this factory was non-existent. The de jure exporter, M/s Shubh Fab Tex denied filing *the said shipping bill or having anything to do with the said goods.* Shri [illegible] Proprietor M/s Shubh Fab Tex stated that signature and the rubber stamp on the

invoice did not belong to him and his firm did not have any factory stuffing permission and he did not know any firm by the name of S. R, Fabrics or M/s O. K. Cargo Craft Pvt. Ltd. The CHA, M/s O. K. Cargo Craft Pvt. Ltd denied filing the said shipping bill. The actual exporters/owners of the goods disappeared from the scene as soon as investigation started. I further find that so far, the exact nature of the goods could not be confirmed in absence of the goods and the fact that the actual exporters/owners of the goods were not available for questioning. Though, the goods were not available to know the exact nature of the goods, on studying the sequence of events and the statements of some Noticees confirmed that the said goods were also contraband goods, therefore, the said goods are liable to confiscation under section 113 (d) and 113 (i) of the Customs Act, 1962 read with section 3 of the Foreign Trade (Development and Regulation) Act, 1992.

a. With regard to M/s. Shubh Fab Tex, I find that shipping bill no. 9214488 dated 04.01.2011 was filed under IEC No. 0306002221 held by M/s Shubh Fab Tex, the exporter declared in the said shipping bill. During investigation, it was unearthed and as per the version of Shri Biren Gala, Proprietor M/s Shubh Fab Tex that he denied having filed the said shipping bill or having anything to do with the said exports. M/s Shubh Fab Tex were not vigilant about the probable misuse of IEC No. 0306002221 held by them, they failed to take precaution to preclude the misuse of their IEC by unscrupulous persons. Further, M/s Shubh Fab Tex disregarded the instructions issued vide Facility Notice no. 41 of 2009 dated 10.07.2009 and the instructions issued vide Public Notice no. 10 of 2010 dated 03.02.2010. The said failure/omission on the part of M/s Shubh Fab Tex allowed the actual exporters to use the said IEC held by M/s Shubh Fab Tex in their attempt to improperly export the said goods and rendered the goods liable to confiscation under sections 113 (d) and 113 (i) and M/s Shubh Fab Tex are therefore, liable to penalty under section 114 (i) of the Customs Act, 1962.

b. With regard to the CHA M/s. O.K. Cargo Craft Pvt Ltd, I find that shipping bill no. 9214488 dated 04.01.2011 was filed under CHA licence no. 11/887. However Shri Jayesh Odhavaji Bhanushali, Managing Director, M/s O. K. Cargo Craft Pvt. Ltd, denied having filed the said shipping bill or having anything to do with the said exports. It is the fact that the CHA failed to comply with the instruction contained in Facility Note no. 41/2009 dated 10.07.2009 and instructions issued vide Public Notice no. 10 of 2010 dated 03.02.2010. Therefore, M/s O. K. Cargo Craft Pvt. Ltd were not vigilant about the probable misuse of CHA licence held by them and they failed to take precaution to preclude the misuse of their CHA licence by unscrupulous persons, which allowed the actual exporters to use their CHA licence no. to the said shipping bill. The said failure/omission on part of M/s O. K. Cargo Craft Pvt. Ltd has allowed the actual exporters to use the said CHA licence held by M/s O. K. Cargo Craft Pvt.

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Ltd in their attempt to improperly export the subject goods and rendered the goods liable to confiscation under sections 113 (d) and 113 (i) and M/s O. K. Cargo Craft Pvt. Ltd and they are liable to penalty under section 114 (i) of the Customs Act, 1962.

c. With regard to M/s. Albatross Shipping Ltd, they provided container no. BLJU 4080018 and agent seal to Shri Atul Jadhav of M/s Jadhav Freight Forwarders. As per the statement dated 28.06.2011 of Shri Pramod Pathare of M/s Albatross Shipping Ltd, they booked the said container no. BLJU 4080018 in the name of M/s Silver Exports on the basis of e-mail received from Shri Atul Jadhav of Jadhav Freight Forwarders. Delivery Order for the said container was also issued by them in the name of M/s Silver Exports. They did not have any document to indicate that Shri Atul Jadhav/Jadhav Freight Forwarders were the representatives of M/s Silver Exports or M/s Shubh Fab Tex or M/s O. K. Cargo Craft Pvt. Ltd and they did not ask for any such detail from the person from M/s. Jadhav Freight Forwarders who communicated with them.

i. Shri Krishnan Venkatesh, the General Manager of M/s Albatross Shipping Ltd admitted that the said business of providing container no. BLJU 4080018 to M/s Jadhav Freight Forwarders and its shipment was done under his instructions and he denied the statement given by Shri Pramod Pathare that the policy and procedure for providing the containers was decided by him and he further admitted that the policy and procedure for providing the containers was decided by Shri Raghavan Nambiar, the CEO, M/s Albatross Shipping Ltd. It is thus clear that Shri Raghavan Nambiar, Chief Executive Officer, M/s Albatross Shipping Ltd was responsible for overall business of the company whereas the General Manager was responsible for the commercial activities of the company. It was seen from the booking slip of M/s Jadhav Freight Forwarders and BL No. NSA/JBL/FCL/20110039 dated 05.01.2011 relating to issue and shipment of container no. BLJU 4080018, that the name of the shipper mentioned on the said booking slip was 'Silver Exports' whereas the name of the exporter (shipper) mentioned on the said BL was M/s Shubh Fab Tex. It is clear from the above above that M/s Albatross Shipping Ltd disregarded the fact that their booking party (Shri Atul/M/s Jadhav Freight Forwarders) changed the name of the exporter after the container was obtained by them, and failed to take cognizance of this significant detail and enquire with M/s Shubh Fab Tex as to whether the said container was in fact booked on their behalf.

ii. It is evident from the above that M/s Albatross Shipping Ltd were not vigilant about the probable misuse of the container and seal owned/provided by them, they failed to take precaution to preclude the misuse of the container and seal by unscrupulous persons. The said omission on part of M/s Albatross Shipping Ltd

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resulted in use of the said container for the purpose of smuggling of subject goods. I find that M/s Albatross Shipping Ltd deliberately turned a blind eye to the illegal export activities of the said actual exporters in order to gain quick business. The said failure/ omission on part of M/s Albatross Shipping Ltd; the said act of providing the container to Shri Atul Jadhav/ M/s Jadhav Freight Forwarders, who were neither the legal exporters nor the CHA and the said act of abetting the actual exporters in their attempt to improperly export the said goods has rendered the goods liable to confiscation under section 113 (d) and 113 (i) and M/s Albatross Shipping Ltd were liable to penalty under section 114 (i) of the Customs Act, 1962. Further, M/s Albatross Shipping Ltd by abetting Shri Atul Jadhav/ M/s Jadhav Freight Forwarders, who were neither the legal exporter nor the CHA, in contravening the provisions of 146 (1) of the Customs Act, 1962 and Regulation no. 3 (a) of the Customs House Agents Licensing Regulations, 2004 have, in addition, rendered themselves liable to penalty under section 117 of the Customs Act, 1962.

d. With regard to Shri Krishnan Venkatesh and Shri Raghavan Nambiar, I find that Shri Krishnan Venkatesh in his statement dated 04.07.2011 admitted that the subject shipment was done under his instruction, and he as well as other staff involved in providing the said container acted in conformity with the company policy, which was geared to augment their business, decided by Shri Raghavan Nambiar, the CEO, M/s Albatross Shipping Ltd. The foregoing facts support his statement. Hence, in terms of section 140 (a) of the Customs Act, 1962, both Shri Krishnan Venkatesh and Shri Raghavan Nambiar were liable to penalty under sections 114 (i) and 117 of the Customs Act, 1962, for the aforesaid offences committed by their company, M/s Albatross Shipping Ltd.

i. Their contention was that none of the goods were available, therefore, section 113 and 114 could not be imposable. I find no force in this argument. Even if the goods were not available, the goods can be confiscated and Redemption Fine and further penalties can also be imposed. To support this, I rely on the judgments in the case of **M/s Dadha Pharma P. Ltd. V/s Secretary to the Govt. of India [Writ Petition Nos. 1856 to 1859 of 1975, decided on 14.10.1977, 2000(126). E.L.T.535]**, the Hon'ble High Court of Madras has held that action can be taken under Section 112 of the Customs Act, 1962 even if goods are not available for confiscation. It further held that Section 110 as well as Section 111 ibid speaks of liability to confiscation and not actual confiscation.

ii. Their further contention was that providing container could not be considered as abetment in the fraud. I find that the said container was booked by Shri Atul Jadhav of M/s. Jadhav Freight Forwarders, which is evidenced from the statement of Shri Pramod Pathare. As per this statement it was noticed that M/s Albatross handed over container no. BLJU 4080018 and agent seal to M/s. Shri Atul Jadhav

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without verifying the genuinity of exporter. I further find that the said container was booked in the name of M/s. Silver Exports, however, the Bill of Lading showed the name of M/s. Shubh Fab Tex. They did not even notice the change in the name of the exporter. The sequence of events, as enumerated above, undoubtedly establish that M/s. Albatross Shipping abetted the actual exporter in their smuggling activity.

iii. The version of Shri Nambiar and Shri Venkatesh was that they did not get involved in the day to day operations. I find that the company policy was decided by Shri Raghavan Nambiar and Shri K. Venkatesh and hence they have got involved in the operations and transactions. Therefore, penalty on them is imposable.

e. With regard to M/s. Relay Shipping Agency, I find that they were the shipping agent and vessel agent and authorised representative of the master of the vessel which shipped the containers no. BLJU 4080018 out of India. They did not receive any copy of shipping bill passed by the customs officer from the exporter or the CHA. They relied on M/s Albatross Shipping Ltd, the container line to verify details of exporter, CHA and that the shipping bill was passed by the customs and Let Export order given in respect of the above shipment. It is clear from the above that though the subject shipping bill was duly passed by the proper officer, the same was not handed over to M/s Relay Shipping Agency Ltd by the exporter or the authorised agent. The reliance of the Shipping Agent, in turn, on the Container Provider to verify bona fides of the exporter/CHA is in contravention to provisions of per section 40 (a) of the Customs Act, 1962. The failure/omission on part of M/s Relay Shipping Agency Ltd not to receive the shipping bill from the legal exporter or the authorized CHA and the action of loading the said container on board the foreign going vessel and shipped it out of India without receipt of the shipping bill from the legal exporter or the authorised CHA and by abetting the actual exporters in improper export of the said goods has rendered the goods liable to confiscation under section 113 (d) and 113 (i) and M/s Relay Shipping Agency Ltd are liable to penalty under sections 114 (i) of the Customs Act, 1962. Further, M/s Relay Shipping Agency Ltd have, in addition, have rendered themselves liable to penalty under sections 117 of the Customs Act, 1962 for contravention of provisions of section 40 (a) by loading the said containers on board the foreign going vessel without receipt of the shipping bill from the legal exporter or the CHA.

f. With regard to Shri Rajesh kalicharan Mehra and Shri V. Ramnarayan, I find that Shri Rajesh Kalicharan Mehra, Manager (Operations), M/s Relay Shipping Agency Ltd was the person in charge of activities related to shipment of the said container no. BLJU 4080018 out of India and Shri V. Ramnarayan was the Director of M/s Relay Shipping Agency Ltd which were responsible for the conduct of business of the company and the person who determined its business policy and working procedure.

The marketing and operation staff of their company worked as per policy and procedure decided by them. They were directly responsible for the business activities of their company. Hence, in terms of section 140 (a) of the Customs Act, 1962, both Shri Rajesh Kalicharan Mehra and Shri V. Ramnarayan are liable to penalty under sections 114(i) and 117 of the Customs Act, 1962, for the aforesaid offences committed by M/s Relay Shipping Agency Ltd.

4.3 Section 114 & 117 of the Customs Act, 1962 under which the Commissioner has imposed penalties on the appellants before us are reproduced below:

SECTION 114. Penalty for attempt to export goods improperly, etc. *- Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable, -*

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher:

Provided *that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the penalty so determined;]*

(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.

SECTION 117. Penalties for contravention, etc., not expressly mentioned. –

Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding one lakh rupees.

4.4 **Penalties under Section 114 of Customs Act, 1962:**

From plain reading of Section 114, it is evident that the said section is applicable only in respect of a person who has in relation to any goods omitted to do any act, the omission of which would have rendered the goods liable for confiscation under Section 113 of the Customs Act, 1962. Since in the present case as discussed in para 4.2, we do not find anything ascribed to any of appellant as an act of commission or omission which would have rendered the goods liable for confiscation under section 113 of the Customs Act, 1962. In fact M/s Shubh Fab Tex, in whose name the Shipping Bills were filed was not even aware of the fact of filing of the shipping bill by the fraudsters in his name. Not even an iota of evidence has been recorded in the show cause notice or in the impugned order to show/ attribute any knowledge to any of appellants in respect of the fraud being done by the fraudsters, who were involved in the illegal export/ attempt to illegally export the red sanders. The show cause notice and the order in original have proceeded to impose penalties on the appellants not for abetting or for any act of omission or commission leading to confiscation of goods as per section 113 of the Customs Act, 1962. Not even investigations reveal that the appellants have not acted in manner expected of them in normal course of business to facilitate the fraud being perpetuated by the fraudsters. In absence of any such charge or finding in the impugned order, that any of appellant has deliberately knowingly or unknowingly assisted in commission of fraud by the fraudsters, we are not in position to uphold the penalties imposed under Section 114 of the Customs Act, 1962. To the same effect view has been taken by the tribunal and High Court in similar circumstances in following decisions.

Bimal Kumar Jain [2004 (177) ELT 389 (T-Mum)]

"b) There is no material which could be relied upon of the involvement to extend a remote concert of the

appellant with the subject exports, especially as regards any act or abetment thereof or to any act or omission which would render the goods liable to confiscation. The appellants alleged acts, about procurement of the exporting firm by purchase from a Chartered Accountant, is not corroborated in any manner in the impugned order as also the alleged knowledge about procurement of the garments. Introduction of Shri Chandragupta established, would only render such abetment & assistance in the realm of 'Preparation to Export' and not 'attempt or successful exports'. "Preparations to Export" is not covered under Section 113(d) which covers 'attempts' and or Section 113(1), which covers "goods entered for exportation under claim for drawback which do not correspond in any material particular with the entry made under the Act or….." As entry in the case of Exports would, as per Section 2(16) of Customs Act, 1962 would be 'entry' made only on the Shipping Bill filed, under Section 50 of the Act. No actions, wilful participation or knowledge thereof in this activity, after such an entry was made, under Section 50 of the Customs Act, 1962, is brought out in the order against the appellant. The penalty under Section 114 of the Custom Act, 1962 as arrived could be therefore not upheld."

IDBI Bank Ltd [2011 (274) ELT 439 (T-Del)]

6. *It is seen that the finding against Shri Ravinder is one of carelessness and failure to perform his duties. These might constitute facts to institute departmental proceedings against Shri Ravinder but we are of the view that these facts are not adequate to constitute an offence under Section 114 of the Customs Act. This is because the penalty under Section 114 can be imposed only on a person who in relation to any goods does or omits to do any act which act or omission would render the goods liable to confiscation. There is no evidence forthcoming that Shri Ravinder had handled the impugned goods or even handled documents about which he was aware that* *they related to goods liable to confiscation under Section 113 of the Customs Act. So we are of the view that the penalty imposed on Shri Ravinder under Section 114 of the Customs Act is not maintainable.*

D S Cargo Service [2009 (247) ELT 769 (T-Del)]

7. *We find that penalties were imposed under Section 114 of the Customs Act which provides that any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 113, or abets the doing or omission of such an act, shall be liable for penalty. In the present case, there is no material available on record that the appellants did anything or committed anything in connivance or with the knowledge of the exporter. So, in the facts and circumstances of the case, in our view, the imposition of penalties under Section 114 of the Act are not warranted. We are not concerned with the case of the exporter. In any event, there is no material available that the CHA and his employee had any knowledge on the quality, quantity and value of the export goods.*

Bharatkumar Bakorbhai Parmar [2008 (231) ELT 30 (Guj)]

"6. *On the basis of statements of co-noticees and these three respondents and the finding was arrived at by the Commissioner of Custom that these persons have failed to discharge their duties properly and they registered the old vehicles without calling for old documents, without taking the road test and by not making all the entries in the records of registration books. On the basis of these facts, the learned Commissioner of Customs came to be conclusion that lapses/involvement of these persons have been brought out in the forgery of three registration books. It appears that all the three respondents, who are either Clerk, Junior Clerk or Head Clerk have acted at the behest of Shri D.T. Mehta, who is R.T.O Inspector. Since he is the superior authority in hierarchy, they have acted as per his instructions. However, even Commissioner has* *not attributed any motive to these three persons and on the basis of instructions issued by Mr. D.T. Mehta they have acted. The penalty imposed on them by the Commissioner amounting to Rs. 7 lacs, Rs. 9 lacs and Rs. 12 lacs is, therefore, unjustified. The Tribunal has considered this aspect of the matter in its order and it was observed by the Tribunal that all the four applicants including Mr. Mehta and present three respondents are employed in the office of Regional Transport Officer, Nadiad. Mr. D.T. Mehta examined the case in question following the application for registration. In the application he has written against the column the year of manufacture 'not known'. The year of the manufacturing was shown in the affidavit of owner. Shri Jagdishbhai P. Parikh, Head Clerk, said in his statement that the year of manufacture was not filled in his register and registration certificate issued was because of the advice received from Mr. D.T. Mehta. Why Mr. Mehta chose to write 'not known' in the application was not satisfactorily explained nor why he could not take steps to ascertain the year of the manufacture. However, the Commissioner's order does not indicate how this would have facilitated the smuggling of the cars. The Tribunal, therefore, observed that the duplicate registration certificate which was presented to the Custom at the time of export showed the year of manufacture to be 1960, 1961 and 1962. However, there is nothing to connect the applicant with these years being shown. The Tribunal further observed with regard to Mr. D.T. Mehta that whether his functioning as a motor vehicle inspector was contrary to the guidelines of his department would not be relevant for the purpose of imposition of penalty under Section 114 of the Act unless it can be shown that his acts or omissions were significant and facilitated to the export. Neither of these requirements was satisfied. Since all the three respondents are subordinate to Mr. Mehta, they were duty bound to act as per his instruction. There is nothing on record to show that they have played any active role in facilitating an illegal export* *of Vintage cars. To some extent, the role of Mr. Mehta in this entire transaction is found questionable. For that purpose, we have already issued notice for final disposal in Tax Appeal No. 1975 of 2006. This being the finding of fact by the Tribunal, we are of the view that no substantial question of law arises out of the order of the Tribunal and hence all the three Appeals are accordingly dismissed."*

Sekar & Sekar Process [2010 (262) ELT 385 (T)]

3. *I have heard both sides. The finding of the Commissioner against the appellants is contained in paras 28 to 30 of the impugned order. He has held that the exporters arranged export consignments without even meeting or knowing the credentials or genuineness of Shri Rajkumar. They did not verify the personal details and even accepted advance payment from him. He has held that the change of port and absence of Shri Rajkumar has raised suspicion about the genuineness of the exporters in doing the exports and that their acts of commission and omission indirectly facilitated S/Shri Rajkumar, Suresh and Kumar to indulge in smuggling of red sanders logs. The Commissioner has held that the exporters have been given free hand to arrange the trailer container and CHA handled the goods that reached the Chennai Port, while it was for the exporters to make their own arrangements to avoid this type of exigency and, therefore, the exporters cannot absolve themselves from their responsibilities relating to the export consignments. While I agree with the finding that an exporter cannot absolve himself from his responsibility for the export consignment, this cannot be stretched to hold that exporter is liable to penalty under Section 114 in the absence of any evidence on record to show that any acts of commission or omission on his part rendered the goods liable to confiscation under Section 113. The goods were stuffed in the container under the Central Excise supervision and the red sanders logs were substituted en route to the Chennai Port. It is intriguing to find that the seals were not tampered with and they were* *intact at the time of examination of the consignments. The impugned order does not contain any material to conclude that the exporter either knew that the goods were liable to confiscation or did something or omitted to do something which commission or omission tendered the goods liable to confiscation; Therefore, penalty under Section 114 cannot be sustained."*

M. Renganathan [2017 (345) ELT 95 (MAD)]

"4. The main plea of the learned Standing Counsel appearing for the department is that the first respondent, while acting as Customs House Agent, has not verified the authenticity of the documents and by such act of negligence, has abetted and aided in the smuggling of the red sander wooden logs, which are prohibited for export, and, therefore, the penalty imposed under Section 114(i) of the Customs Act is justified.

5. The role played by the first respondent, even as per the finding of the Original Authority, is as under:

51. I find that the custom house agent has not discharged his duty in the normal course of his service. He signed the customs document given by some Shri S.S.Sivakumar for monetary considerations, which paved the way for unauthorized persons access to the customs clearing formalities and enabled unscrupulous persons in facilitating the smuggling of prohibited goods.

6. With regard to the above said finding of the Original Authority, the Tribunal, in the order under challenge, held as under:

4. I find that apart from a vague allegation in para 51 of the impugned order (supra) that the appellant had failed to discharge his functions as a CHA, in the entire order, there is no finding of a positive role of the appellant in the attempt to smuggle out red sander wood logs or the manner in which he abetted the attempt. For failure to discharge functions as a CHA, penalties are provided in the Custom House Agents' Licensing Regulations. In the *absence of any finding showing that the appellant had abetted the failed effort to smuggle out prohibited red sander wood logs, I find that penalty imposed on the appellant under Section 114(i) is not sustainable. Accordingly, the appeal filed by Shri I.Sahaya Edin Prabhu is allowed.*

7. The Tribunal has rendered a categoric finding that there is no finding of a positive role of the first respondent in the attempt to smuggle out red sander wooden logs. Even in the order of the Original Authority, it is held that the custom house agent has not discharged his duty in the normal course of his service. As rightly observed by the Tribunal, for failure to discharge functions as a Custom House Agent, penalties are provided in the Customs House Agents Licensing Regulations. Therefore, imposition of penalty under Section 114(i) of the Customs Act is unwarranted. We, therefore, find no reason to differ with the finding of the Tribunal."

In view of the decisions as above we are not in position to uphold the penalties imposed under Section 114(i) of the Customs Act,1962.

4.5 Penalties under Section 117 of Customs Act ,1962

Commissioner has imposed penalties on some of the appellants as indicated in table in para 1 under Section 117 of Customs Act,1962. From the scheme of Section 114 and Section 117, it is quite evident that penalties under Section 114 and 117 could not have been imposed simultaneously. Penalty under Section 117, could have been imposed only in cases where the Custom Act, do not prescribe for imposition of penalty under any other provision. Once we have set aside the penalties under Section 114, we proceed to examine the penalties imposed under Section 117. In fact the Commissioner in his order have observed that appellants on whom the penalties under section 117 have been imposed were negligent in some manner in fulfilling the statutory responsibilities in the manner in they should have been done. They could have been more careful in respect of their clients/ customers so that such frauds could have been prevented. In our view the penalties imposed under is necessary to deter appellants and signal to them to be more careful while conducting their business in relation to imports and exports of goods. However in our view the end of justice will be met if the penalties of Rs 1,00,000/- (Rupees One Lakhs) imposed by Commissioner under Section 117, is reduced to Rs 20,000/- (Rupees Twenty Thousand Only.)

5.1 In view of discussions as above

i. Appeal No C/85460, 86164 & 86316/2013 filed by the appellants on whom only penalty under Section 114(i) has been imposed are allowed.

ii. Appeal No C/85475, 85476, 85477, 85659, 85660, 85661, 85944, 85945, 85948, 86260, 86261 & 86378/2013 filed by the appellants on whom penalty both under Section 114(i) and 117 have been imposed are allowed to the extent of setting aside the penalties imposed under Section 114(i) and reducing the penalties imposed under Section 117 to Rs 20,000/- (Rupees Twenty Thousand only).

iii. Cross objection C/Cross/91063/2013 in Appeal No C/86164/2013 is disposed accordingly.

(Order pronounced in the open court on 29.08.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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