CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No.550 of 2010

(Arising out of Order-in-Original No.CCP/ADJ/PD/04/2010 dated 31/03/2010 passed by the Commissioner of Customs(Preventive),Mumbai.

Shri Parag Bhavsar **... Appellant**
6th Sai Krupa Society,
Behind Janpath Hotel,
Mehsana-384002.

Versus

Commissioner of Customs (Preventive) **.... Respondent**
New Customs House, 2nd Floor,
Ballard Estate
Mumbai 400 001

With

Customs Appeal No.551 of 2010

(Arising out of Order-in-Original No.CCP/ADJ/PD/04/2010 dated 31/03/2010 passed by the Commissioner of Customs(Preventive), Mumbai.

M/s Palam Pharma Pvt.Ltd **... Appellant**
27/28, Jayshree Market,Opp. Taluka Panchayat
Mehsana-384002.

Versus

Commissioner of Customs (Preventive) **.... Respondent**
New Customs House, 2nd Floor,
Ballard Estate
Mumbai 400 001

And

Customs Miscellaneous Application No.85211 of 2019

In

Customs Appeal No.594 of 2010

(Arising out of Order-in-Original No.CCP/ADJ/PD/03/2010 dated 31/03/2010 passed by the Commissioner of Customs(Preventive),Mumbai.

Shri Manish Laltikumar Bhavishi **... Appellant**
505/506 Tripoli Building,
Skyline Oasis Complex
Kirol Marg, Ghatkopar (West)
Mumbai-400086

Versus

Commissioner of Customs (Preventive) .... Respondent
New Customs House, 2nd Floor,
Ballard Estate
Mumbai 400 001

And

Customs Appeal No.614 of 2010

(Arising out of Order-in-Original No.CCP/ADJ/PD/04/2010 dated 31/03/2010 passed by the Commissioner of Customs(Preventive),Mumbai.

Shri Rajesh Sheth ... Appellant
1/64, Dasha Shrimali Nagar,
Narsingh Lane, Opp: N.I. High School,
Malad (West)
Mumbai-400064.

Versus

Commissioner of Customs (Preventive) .... Respondent
New Customs House, 2nd Floor,
Ballard Estate
Mumbai 400 001

And

Customs Appeal No.623 of 2010

(Arising out of Order-in-Original No.CCP/ADJ/PD/04/2010 dated 31/03/2010 passed by the Commissioner of Customs(Preventive),Mumbai.

M/s Hetero Labs Ltd ... Appellant
Hetero House, House No.8-3-166/7/1
Erragadda
Hyderabad-500018

Versus

Commissioner of Customs (Preventive) .... Respondent
New Customs House, 2nd Floor,
Ballard Estate
Mumbai 400 001

And

Customs Appeal No.624 of 2010

(Arising out of Order-in-Original No.CCP/ADJ/PD/04/2010 dated 31/03/2010 passed by the Commissioner of Customs(Preventive),Mumbai.

M/s Hetero Drugs Ltd ... Appellant
Hetero House, House No.8-3-166/7/1
Erragadda
Hyderabad-500018.

Versus

Commissioner of Customs (Preventive) .... Respondent
New Customs House, 2nd Floor,
Ballard Estate
Mumbai 400 001

And

Customs Miscellaneous Application No.85212 of 2019
In
Customs Appeal No.633 of 2010

(Arising out of Order-in-Original No.CCP/ADJ/PD/04/2010 dated 31/03/2010 passed by the Commissioner of Customs(Preventive),Mumbai.

Shri Manish Laltikumar Bhavishi ... Appellant
505/506 Tripoli Building,
Skyline Oasis Complex
KirolMarg, Ghatkopar (West)
Mumbai-400086
Complex

Versus

Commissioner of Customs (Preventive) .... Respondent
New Customs House, 2nd Floor,
Ballard Estate
Mumbai 400 001

Appearance:

Shri Nirav P. Shah, Advocate for the Appellant

Shri Ramesh Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUAMR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85184-85190/2020

Date of Hearing: 21.08.2019

Date of Decision:04 .02.2020

Per: P. Anjani Kumar

Heard both sides and perused records of the case.

2. Brief facts of the case are that Shri Manish Bavishi and Shri Tajdin Nazarali Charania were intercepted outside the Customs Arrival Hall (after they passed through Green Channel), in early hours of 20.02.2007, on arrival from Dubai; Pharmaceutical formulations in commercial quantity worth two lakh of rupees was found in their baggage and were seized under reasonable belief that the same were liable for confiscation; the seizure was dealt in separate proceedings. Office and godown premises of M/s Balaji Pharma Chem, belonging to Shri Manish Bavishi, were searched; Certain documents/records, a laptop computer and stock of 85 sealed packets of 1 kg each (approx.) bulk drugs 'Miglitol' and 1 sealed packet of 1 kg of 'Ethynal Estradiol', totally valued at Rs 50 Laks were seized.

2.1. Shri Manish Bavishi , in his statement on 20.02.2007, deposed that he used to import Pharmaceutical Bulk Drugs (PBD) from China; in April 2006, his FDA licence was cancelled due to sale of Ketamine to traders; he also imported some consignments directly and then sold on High Sea Sale basis to M/s Palam Pharma, whose director Mr. Parag Bhavsar is his friend; he used to procure some pharmaceutical high value bulk drugs like Mifepristone, Misoprostol, Miglitol, Vitamin B12, etc. through air passengers sent by him to Hong Kong for the said purpose, in groups; he recruited/formed a group of 16 to 17 passengers who used to travel to Hong Kong/Bangkok in groups of four, six or eight passengers at a time and made arrangement for booking of flight tickets with a travel agent M/s Sadhana Tour and Travels; the said PBD used to be brought by him or his employee to his storage premises; the bulk drugs were further packed in aluminum foil bag and sealed; they were further cleared to various companies after affixing labels for quantity, manufacturing date, expiring date, batch no. etc; the smuggled PBD were sold by him under commercial invoice of M/s Palam pharma to show legitimacy of the sale; invoices, to show that the smuggled goods were procured locally, were made in the name of M/s. Reliable Agencies & M/s. Premier Trading Company, owned by Kamlesh Bhai & Raju Bhai; payment for the above sale received used to be credited into the account of the M/s. Palam Pharma & subsequently cheques were issued to M/s. Reliable Agencies & Premier Trading Company, who encashed such cheques and returned cash after subtracting a commission of 2%. During the course of the search of office of Kamlesh Bhalani and Shri Rajesh Seth, copies of 123 invoices issued by M/s Reliable

Agency to Palam Pharma Pvt Ltd were retrieved from the computer; invoices which are on record and corresponding invoices taken from the records of M/s Palam Pharma, match w.r.t description of the goods, quantity, Batch No., manufacturing date & Expiry date.

2.2. Various statements were recorded as under.

(i). Shri Atul Manilal Doshi, an employee of Shri Manish Bavishi, admitted that on many occasions he travelled to Bangkok on behalf of Manish Bavishi and has carried pharmaceutical drugs for him and that all the tickets were booked and paid for by Shri Manish Bavishi through M/s Sadhana Travels, Colaba.

(ii). Shri Parag Bhavsar, Director of M/s Palam Pharma, stated on 22.02.2007 that he procured bulk drugs from M/s Reliable Agencies, Bhiwindi; he used to deal only with Shri Manish Bavishi; though M/s Palam Pharma received the sale bills of M/s Reliable Agencies, no bulk drugs were ever received; Shri Manish Bavishi informed him that the bulk drugs would be directly dispatched to the buyer firms; he would be paid 3% commission.

(iii). Shri Prem Gobindram Mani, Proprietor of M/s Sadhana Travels Services, stated on 04.07.2007 that Shri Manish Bavishi used to regularly purchase domestic and international airline tickets from himself and his friends; from 2005 onwards, he started booking airline tickets in groups of 6, 8 or 10 passengers for Bangkok and Hong Kong through Colombo.

(iv). Shri Tajdin Nazarali Charania stated on 27.02.2007 that he travelled along with the passengers/carriers of Shri Manish Bavishi to Hong Kong and Bangkok; he had made more than 15-16 trips with Shri Bhavishi and others; he gave a detailed account of smuggling of the pharma drugs through passengers.

(v). Shri Kamlesh J Balani, the ex-partner of M/s Reliable Agency stated on 28.02.2007 that M/s Reliable Agency and M/s Premier Trading Agency were established in the name of Rajesh Doshi and Vijayendra Jadav who were employed with him; they had issued challans and tax invoices showing sale of pharmaceutical bulk drugs but no goods had been transacted; they had issued some tax invoices of M/s Reliable Agencies and M/s Premium Trading Company showing sale of various pharmaceutical bulk drugs to M/s Palam Pharma, to show legitimate acquisition by Shri Manish Bavishi; amount received in cheques was returned in cash for a discount. Shri Rajesh Sheth, partner of M/s Reliable Agency stated on 23.03.2007, confirmed the statement of Shri Balani. Shri Sandeep Gandhi of M/s Globe Pharma, stated on 11.09.2007 that he had issued three sale invoices of M/s Globe Pharma evidencing sale of 50 Kgs of Miglitol and 10 Kgs of Meropenem to M/s Palam Pharma Pvt Ltd, Mehesana at the behest of Shri Manish; however, no pharma drugs were transacted; he did not know who had supplied the goods to the party.

2.3. The enquires were made from M/s Hetero Drugs Ltd./ Hetero Labs Ltd, Hyderabad & Baddi, Himachal Pradesh, who purchased PBD from M/s Palam Pharma; it was also confirmed by M/s Hetero Drugs Ltd, Mumbai that 25 Kgs of Miglitol (WIP) received from M/s Palam Pharma was lying in stock and that payment of Rs.1,82,79,000/- was yet to be made; an amount of Rs.1,17,73,320/- was pending on account of purchase of bulk drugs by M/s Hetero Labs Ltd. Scrutiny of the documents submitted by M/s Hetero Drugs/Hetero Labs revealed that the Pharma drugs were received by through "ON DOT Courier" from Mumbai. Shri K V Bhaskara Reddy, GM (Finance), M/s Hetero Drugs Ltd confirmed purchase of PBD from M/s Palam Pharma. Enquires, conducted with M/s MacLeod's Pharmaceuticals, and revealed that they have purchased 4 kg of 'Meropenem' from M/s Palam Pharma Pvt Ltd, which were procured on the strength of invoice of M/s Reliable Agency.

2.4. On conclusion of the investigation Show Cause Notices, F. No. DRI/MZU/B/Inv-09/06-07/653 dated 17.08.2007 with an addendum dated 12.12.2007 and an SCN dated F. No. DRI/MZU/B/Inv-09/06-07 dated 28.09.2007 were issued. The same to be confirmed by the commissioner of Customs vide Orders in originals No CCP/ADJ/PD/03/ 2010 and No CCP/ADJ/PD/04/2010 both dated 31.03.2010, confiscating seized goods i.e. 77 Kgs are 'Miglitol', 8 Kgs are 'Mifepristone' and 1 Kg of 'Ethynal Estradiol at the ware house of Shri Manish Bavishi; confiscating 4 kg of 'Meropenem' from the premises of M/s Macleod's; confiscating the sale proceeds amounting Rs.2,96,47,100/- pending payment at the hands of M/s Hetero Drugs Ltd. & M/s Hetero Labs Ltd and imposing penalties on different persons involved as under. Hence, the following appeals are filed.

Appellant	Appeal No.	Order in original	Penalty under Section 112 (a) & 112 b) Rs.
Manish Bhavishi	C/594/2010 C/Misc/85211/2019	03/2010 dt 31.03.2010.	30,00,000/-
do	C/633/2010 C/Misc/85212/2019	04/2010 dt 31.03.2010	1,00,00,000/-
Parag Bhavsar	C/550/2010	do	20,00,000/-
Rajesh Seth	C/614/2010	do	25,00,000/- 25,00,000/-
Hetero Labs Ltd	C/623/2010	do	25,00,000/- 25,00,000/-
Hetero Drugs Ltd.	C/624/2010	do	25,00,000/- 25,00,000/-
Palam Pharma	C/551/2010	do	25,00,000/- 25,00,000/-

Appeals No C/594/2010 and C/633/2010

3. Learned Counsel for Shri Manish Bhavishi submits a synopsis of events and submits that no Customs duty was demanded in the Show Cause Notice or confirmed in the OIO in respect of seized goods; absence of demand of Customs duty cast serious doubt on the theory of DRI that the seized goods were smuggled into India; no evidence indicating source of goods/ smuggling of goods seized at MacLeod's Pharmaceuticals and/or supplied to Hetero Drugs Ltd/Hetero Labs Ltd is established; many pharma companies though referred in paras 72 are not made party to the proceedings; the names of M/s Hetero Labs Ltd and M/s MacLeod's Pharmaceuticals are missing in discussion; allegation of smuggling is based on retracted statement (retracted before magistrate on 21.02.2007) of the Appellant and Tajdin Charania; Tajdin Charania in his statement dated 20.02.2007 only referred to smuggling of consignment of pharma drugs which was found in his possession at the time of interception at airport; no evidence of whatsoever nature adduced that the seized drugs were also smuggled and if so when it was smuggled. Learned Counsel further submits that transactions concerning purchase and sale of pharma drugs discussed in OIO at the most can only reveal channelizing of such sales for intended benefit to all the stake holders in the form of commission/profit; does not reveal the smuggled nature of such pharma drugs; conclusion solely based on the retracted statement of appellant without corroboration as held in Hyderabad Bottling Co - 1996 (83) ELT 627 (Tri) and exercising right to remain silent cannot be construed as admission of guilt as held in Maneka Gandhi – 1978 AIR 597 & Nandini Satpati – 1978 AIR 1025; Kamlesh Bhalani of M/s Reliable Agencies and M/s Premium Trading Company said in his statement that invoices were issued to M/s Palam Pharma without goods. However, said statement does not reveal that the goods were smuggled into India without payment of Customs duty; even from the statement of Shri Sandeep Gandhi of M/s Globe Pharma, it is not coming forth that the pharma drugs were smuggled into India; Atul Manilal Doshi stated on 20.02.2007 that though he travelled many times and carried pharma drugs for Manish Bavishi, states that he was not aware of the nature of pharma drugs carried by them.

3.1. Learned counsel submits that Section 111 (d) & (l) of Customs Act not applicable since the impugned pharma drugs which are freely importable, are not ‘prohibited goods’; Section 112 (a) of Customs Act is not applicable to the present case since the goods are not liable to confiscation; neither the investigation nor the findings have established that the goods were smuggled; in case of town seizure the onus to establish smuggled nature of goods solely rest on the department since Section 123 of the Customs Act,1962 does not apply as per Circular No. 95/2003-Cus dated 06.11.2003. He submits that provisions of Customs Act cannot be invoked neither proceedings therein can be initiated for violation of the Drugs & Cosmetics provisions; FDA has filed charge sheet for violation of Section 21 & 22, 18 (a) (i) and 27 (d) of the Drugs & Cosmetics Act.

3.2. Learned counsel submits that Principles of Natural Justice were and sufficient opportunities of hearing not granted; the Appellant requested copies of relied upon documents and inspection of original documents vide letter dated 12.10.2007; Vide letters dated 18.10.2007 and 23.11.2007, the Appellant requested copies of documents seized from his office; DRI vide letter dated 18.12.2007, informed that documents can be provided only on completion of investigation; as per Section 110 (4) of the Customs Act, 1962, person from whose custody any documents are seized shall be entitled to make copies thereof or take extracts therefrom in the presence of an officer of customs; vide Order dated 24.01.2008 the Hon'ble Bombay High Court gave direction to provide documents; DRI vide letters dated 12.02.2008 & 15.02.2008 certified copies of some documents were provided to the Appellants. Counsel submits that Personal hearing was fixed given on 20.01.2009, 0.02.2009 and 16.02.2010; however, after change of adjudicating authority, only one hearing on 16.02.2010 was granted by the new adjudicating authority; as per Section 122A of Customs Act, 1962 minimum three hearings have to be granted by the adjudicating authority; inspection of original documents completed only on 17.02.2009; hence, any hearing given before this date is not in line with discharge of principles of natural justice; the appellants vide letters dated 17.01.2009, 15.02.2010 and 17.2.2010, requested for postponement of hearing; however, no further opportunity of hearing granted to him on the grounds for not allowing fresh hearing as mentioned; reply filed on 15.02.2010 vide letter dated 12.02.2010) was not considered by the learned adjudicating authority; request for cross examination, although made in reply to the Show cause Notice, it was not allowed; hence, the statements of such persons, who were not cross examined cannot be relied; principles of natural justice are also violated since the request for cross examination not entertained; he relies upon following.

(i). Shalimar Rubber Industries – 2002 (146) ELT 248 (SC),
(ii). Lakshman Exports Ltd – 2002 (143) ELT 21 (SC),
(iii). Swadeshi Polytex Ltd – 2000 (122) ELT 641 (SC)
(iv). Kalpena Industries Ltd – 2018 (361) ELT 271 (Bom).
(v). 2016 (334) E.L.T. 71 (Tri.Mumbai)
(vi). K.I.Pavunny (1997) 3 Scc 721
(vii).Hyderabad Bottling Co. (P) Ltd 1996 (83) ELT 627 (Tribunal)
(viii). Circular: 95/2003-Cus.Dated 06 Nov.2003
(ix). Notification under Section 123
(x). Metal King 2013 (292) ELT 266 (Tri-Mum)
(xi). Sultan Durani 2007 (220) ELT 820 (Tri-Mum)
(xii). Kalyani Dey 2000(126) ELT 319 (Cal) =
(xiii).Chempi Fine Chemicals 2014 (308) ELT 157 (Tri-Mum)
(xiv)Mansuklal Parmar 2003 (161) ELT 435(Tri-Bang)
(xv). Swarup Enterprise 2015(324) WLR 517 (Tripura)

Appeals No C/550/2010(Shri Parag Bhavasar) and C/551/2010 (M/s Pharma Labs)

4. Learned Counsel for the appellants submits that reply to the show cause notice was filed and the questions of law was raised that penalties can be imposed on any person if he is anyway concerned with the confiscated goods; commissioner did not consider the same; it is not disputed that giving license of F.D.A. of one company firm to another person for importing the legally allowed goods in the name of the said firm is not an offence; domestic sale and purchase of the goods on the said license on behalf of the said company/firm is also not an offence; Shri Parag Bhavsar, director of the appellant, was not aware of the fact the license of his firm was misused by Manish Bhavishi for importing smuggled goods in the name of his firm; statements of Manish Bhavishi, Parag Bhavsar and co-noticees and the person who brought the smuggled goods do not reveal that Parag Bhavsar, director of M/s. Palam Pharma Pvt Ltd was aware of the smuggling activities of Shri Manish Bavishi; the documents recovered in this case do not connect the appellant with smuggling; statement of the appellant on 22-2-2997, only reveals that he is concerned only with sale and purchase of goods domestically in legal manner; each transaction done by the firm is through cheques payments and not by cash; there was no ulterior motive of appellant in the said purchase and sale of bulk drugs, and by this act appellant cannot be charged for any abatement; appellant believed Shri the Manish Bhavishi and there was no *mens rea* and ulterior motive on his part; reply to the show cause notice was filed and the questions of law was raised that penalties can be imposed on any person if he is anyway concerned with the confiscated goods; commissioner did not consider the same. Learned commissioner erred in arriving at the conclusion that the appellant earned huge amount of profit; the appellant has not earned any profit.

Appeals No C/623/2010 (M/s Hetero Labs Ltd) and C/624/2010

(M/s Hetero Labs Ltd)

5. Learned Counsel for the appellants submits the appellants are manufacturers of bulk drugs/intermediaries and P or P medicines with a turnover of about Rs.5000 Cr; during the course of business, he purchased certain quantities of raw materials from M/s Palam Pharma Pvt Ltd; after enquiries with regards to availability of materials, Mumbai office of the appellant placed purchase orders and received the goods; transaction was duly recorded in their books; as the invoice issued by the supplier contains all the details such as make; CST number, Drug License number etc., Copies of sample invoices and C-Forms, the appellant had no reason to suspect that the said goods as smuggled by the supplier; DRI issued show cause notice selectively proposing penalty only on the appellant and another sister concern, though the main noticee in this case supplied goods alleged to have been smuggled by him to various manufacturers as discussed in the impugned order); such discrimination is illegal and improper; penalty under Section 112(a) and 112(b) cannot be imposed without proving abatement/knowledge in the alleged smuggling of goods by the main noticee; penalty cannot be imposed under Section 112(b) on a corporate entity since only a natural person has the mens rea. it is a settled legal position that imposition of penalty on *bona fide* purchaser without mens rea is not correct as held in the following cases of CC, Amritsar Vs. Kamal Kapoor 2007 (216) ELT 21 (P&H) and Prasanta Sarkar

Vs Commissioner of Customs (Prev.), Mumbai 2007 (209) ELT 220 (Tri-Mumbai); *mens rea* is an essential ingredient for imposing penalty under Section 112(b) of the Act and department did not bring out any evidence suggesting the involvement or knowledge of the appellant in smuggling as held in the following cases.

(i). Shankeshwar Metal Corporation Vs Commissioner of Customs (Imports),
Mumbai 2014 (312) ELT 344 (Tri-Mumbai)
(ii). Rajesh Gandhi Vs CC (Adjudication), Mumbai 2008 (227) ELT 530 (Tri-Mumbai)
(iii). CC (Export), Mumbai Vs M.K. Industries 2008 (230) ELT 91 (Tri-Mumbai).
(iv). Nazir-Ur-Rahman Vs CC, Mumbai 2004 (174) ELT 493 (Tri-Mumbai)
(v). Sandeep Shah Vs CC (Gen.), Mumbai 2007 (218) ELT 569 (Tri-Mumbai)
(vi). Sunil Kumar Jaiswal Vs CCE, Lucknow 2006 (206) ELT 164 (Tri-Del.)
(vii). CC (Import & General), New Delhi Vs Buhariwal Logistics 2016 (332) ELT 278 (Del.)
(ix). Gokul Textiles Vs CC, Chennai 2007 (218) ELT 299 (Tri-Chenai).
(x). Metro Marine Services Pvt Ltd Vs CC, Kandla 2008 (223) ELT 227 (Tri-Chennai).

Appeal No C/614/2010 (Shri Rajesh Seth)

6. Learned Counsel for the appellants submits in the entire Notice there is no allegation that the Appellants had any role to play in the alleged illegal imports; there are no findings in the impugned Order that the Appellants were in any way concerned with the alleged illegal imports; still the Adjudicating Authority proceeded to impose penalty; allegation against the appellants is that they have issued the invoices at the behest of one "Mr. Bhavishi without actually receiving or selling any goods. He submits that the Appellants never dealt with the impugned goods in any manner whatsoever; as detailed in para 13 (ii) of the SCN, goods were directly sent to M/s. Palam Pharma by Mr. Bavishi and the Appellants had no role to play in actual delivery; in absence of any findings contrary to the above no penalty can be imposed on the Appellants under Section 112(b) of the Customs; Para (iv), (vi) and 13(i) in SCN admits that Mr. Bavishi was also importing Pharmaceutical drugs on payment of duty; thus, it is erroneous to presume that the all goods dealt with by Mr. Bavishi were illegal; there were no reasons for the Appellants to harbor any belief that Mr. Bavishi is dealing in the goods imported illegally. He submits that its alleged that impugned invoices have been issued at the behest of Mr. Bavishi, by M/s Reliable Agencies, which is Proprietary concern of Mr. Rajesh Doshi; no SCN was issued to Mr. Rajesh Doshi; this renders impugned Notice bad in Law. He further submits that adjudicating Authority admits, at para 72, that there is a burden cast upon him to ascertain the origin of the goods; however in he was not able to find origin of the goods to determine smuggled nature of the goods; there was no evidence or finding whatsoever in the Notice and no finding in the impugned order that 4kg of Meropenem seized at the premises of M/s. MacLeod's Pharmaceuticals and the goods sold to M/s Hetero Drugs Ltd and M/s Hetero Labs Ltd. were smuggled, apart from the generic statement of smuggling by Mr. Manish Bavishi; Ld. Adjudicator proceeds on a presumption that the goods were smuggled without any evidence; Authority failed to appreciate that SCN concedes the fact that Palam Pharma was dealing in identical goods being purchased on High Sea Sale basis; therefore in absence of any evidence that these 4kgs bulk drugs were smuggled is at the most a presumption and cannot be sustained; Ld. Authority also failed to appreciate that the goods are not covered by Section 123 and therefore burden is cast on department to adduce sufficient evidence that he goods are smuggled; in absence of any such evidence imposition of penalty is illegal. Learned Counsel further submits that proposal for confiscation of the goods is made under section 111 (d) and 111(1); however, the impugned order fails to record any findings as to how the goods have been rendered liable for confiscation by the acts or omissions of the present Appellant; even if the allegation is taken on face value, the goods were rendered liable for confiscation under 111(d) & (l) even before the appellant was ever in picture; therefore, no penalty is imposable on the appellant.

7. Shri Ramesh Kumar, learned Authorized Representative, appearing for Revenue submits that Shri Manish Bavishi in his statement dated 20.02.2007, revealed modus operandi adopted by him showing as to how he used to recruit and send carriers abroad; from whom he used to book the air tickets; how his person at Hong Kong used to purchase PBD and hand over to these carriers/passengers; how he used to reimburse the price of PBD. Shri Bavishi accepted that he had supplied the smuggled PBD to end users like Hetero Drugs Ltd under the cover of invoice of M/s Palam Pharma Pvt. Ltd., who backed these sales by the invoices issued by M/s Reliable Agencies/Global Pharma; invoices of Reliable Agencies & Globe Pharma etc were obtained from Mr Kamlesh Bhalani and Mr Rajubhai (Rajesh Sheth) for a consideration of 2% commission; he revealed addresses of his office and godown where 85 Kgs of such bulk drugs were seized; consequent to above disclosure, statements of Shri Parag Parasar Proprietor of Sadhana Travels Services, on 22.02.2007, of Tajdin Nazarali Charania on 27.02.2007, of Kamlesh Balani on 28.02.2007 and of Rajesh Sheth dated 9.4.2207 were recorded; all these persons corroborated the revelations by Shri Bavishi. Learned AR submits that there are a number of case laws wherein it was held that retracted confessional statement can be the sole basis of conviction when there is corroboration of such confession; in this case, confession of Shri Manish Bavishi, was corroborated by all the co-accused in their statements; it was also corroborated by material seized from co-accused; all invoices, issued by them to M/s Palam Pharma and further issued by M/s Palam Pharma to M/s Hetero Drugs Ltd / Hetero Lab Ltd were recovered from Shri Kamlesh Balani; They had not supplied any PBD to M/s Palam Pharma He submits that in view of the statements of Shri Kamlesh Balani and Shri Rajesh Sheth (both partner and operate M/s Reliable Agencies) and Shri Sandeep Gandhi (Authorised representative of M/s Globe Pharma) that they had issued invoices in the name of the M/s Palam Pharma at the behest of Shri MB, without selling any pharmaceutical bulk drugs as claimed in the invoices. He relies on the following.

(i). *1996 (83) ELT 258 (SC)*

(ii). Naresh J Sukhawani Vs UOI, 2016 (331) ELT 33 (Del)

(iii). S.N Ojha Vs CC, 1997(90) ELT 241 (SC)

(iv). KI Pavunny Vs ACCE Cochin, 2014(309) ELT 671 (Ker)

(v).K.P. Abdul Majeed Vs CC, Cohin, 2016 (332) ELT 693 (Delhi)

7.1. Shri Ramesh Kumar submits, in respect of seizure of 85 Kgs of Pharmaceutical Bulk Drugs of 1 kg packets each (approx.) of 'Miglitol' and 1 sealed packet of 1 kg each of 'Ethynal Estradiol' from the Warehouse (godown), that Shri Manish Bavishi claimed that these goods were procured by him from M/s Parekh & Co., Calcutta against Invoice No. 053//06/07 dated 22.01.2007 and 056/06/07 dated 27.01.2007; on being summoned, Hasmukh Harilal Parekh, Proprietor of M/s Parekh & Co., Kolkata, claimed that the said goods were supplied to him by M/s Blessing Products & Co., Kolkata; on enquiries it was found that the said premises i.e. address of M/s Blessing Products & Co., was in dilapidated condition and un-inhabited for last 2-3 years; Shri Hasmukh Harilal Parekh, in his statement dated 16.08.2007 admitted that he had not supplied any Pharma Bulk Drugs to M/s Balaji Pharma (Mr Manish Bavishi); invoices were prepared and issued by him as per the request of Shri Manish Bavishi for some money; this statement though retracted, on 24.08.2007, was confirmed again on 04.10.2007. Therefore, he submits that department has discharged the initial burden to show that the goods were smuggled in nature, appellants could not disporove the same; they have rendered the goods liable for seizure and themselves liable for penalty.

7.2. Countering the allegation those principles of natural justice were violated, Shri Ramesh Kumar submits that Shri Manish Bavishi filed a WP No.498/2008 for direction to the DRI for providing documents to him; Hon'ble Bombay High Court vide order dated 24.1.2008 directed the DRI to make available the copies of documents; according DRI letter dated 25.1.2008, Shri Bavishi was asked him to approach their office for taking copies of all documents seized from his office; he did not take the same; again DRI vide 2nd letter on 31.01.2008 asked Shri Bavishi to approach their office take copies which are ready; said communication also mentions the name of the officer along with phone numbers of senior officers; Shri Bavishi did not turn up; DRI has issued 3rd letter on 7.2.2008, 4th letter on 15.02.2008, 5th letter on 16.5.2008 and 6th letter on 29.05.2008 requesting Shri Bavishi to approach their office to carry out inspection of desired documents; ultimately, he as examined the documents in the presence of his advocate, as acknowledged by him in his letter dated 26.08.2008 and 17.01.2009, after a year. Learned AR submits that first PH was given on 20.1.2009; Shri Bavishi vide his letter dated 17.1.2009 requested for adjournment stating that he wants to inspect documents; second time PH was given on 10.02.2009; Shri Bavishi requested for adjournment vide letter dated 4.2.2009 citing reason that he has not completed inspection of documents; third time PH was given on 16.02.2009, then MB again sought adjournment. He filed reply ultimately on 10.02.2010. Fourth time PH was given on 16.02.2010, however he again requested for adjournment and sought three-month time; Adjudicating authority held that the request of Shri Bavishi was not meritorious as he had been provided with all documents in February 2009; request for postponement of PH was devoid of merits and adjudicating authority proceeded with adjudication on the basis of available records including his reply to SCN on 10.02.2010; in this background, Principle of Natural Justice were not violated; principles meant to prevent injustice were being misused by the appellant to prevent justice.

7.3. On the allegation that cross-examination was not granted, Learned AR submits that cross examination was sought of the co-accused; confession by Shri Manish Bavishi on 20.02.2007 was corroborated by all of them; there was nothing new which could come out of cross examination; it was held in Fortune Impex Vs CC Calcutta 2001 (138) ELT 556 (Tri-Kolkata) (Affirmed by SC), that Cross examination not to be allowed of all witnesses if no specific reason given; further it was held in Surjeet Singh Chhabra Vs UOI 1997 (89) ELT 646 (SC) that, not allowing of Cross examination of witnesses where petitioner has confessed, is not violative of principles of natural justice; it was held in Kanungo & Co Vs CC Calcutta & Others 1983 (13) ELT 1486 (SC), that Principles of natural justice do not require that in every matter, the person who has given information should be examined in the presence of the Appellant or allowed to be cross-examined by the person concerned in respect of the statements made before the customs authorities.

7.4. On the issue of confiscability, of goods recovered from the factory of M/s Macleod's and sale proceeds amounting Rs.2,96,47,100, deposited by M/s Hetero Drugs Ltd & Hetero Labs Ltd, Learned AR submits that once the main accused confessed in his statement and co-accused have corroborated and further evidence in the form of Invoices issued in this regard are available, burden then shifts to the accused to prove his counter; He submits that it was held in, CC Madras Vs D Bhoormull 1983(13) ELT 1546 (SC) and Shah Guman Mal Vs State of Andhra Pradesh 1983(13) ELT 1631 (SC), that the department is not required to prove its case with mathematical precision; demonstrable degree is nothing more than a prudent man's estimate as to the probabilities of the case.

8. Learned AR, reacting to the submissions on behalf of Shri Parag Bhavsar, Director of M/s Palam Pharma, submits that it has come out from the statement dated 22.2.2007 of Shri Parag Bhavsar that when he asked Shri Bavishi about M/s Reliable Agencies, he was told that this firm is known to Bavishi and he would get 3% commission on invoice value; After getting 3% commission, Shri Parag Bhavsar closed his eyes and had not bothered to know about the procurement of those PBDs, documents related to import or any other related documents for which he had issued invoices to end users of those smuggled PBDs; the argument that they have not earned any profit has no substance as Shri Parag Bhavsar, admitted he was offered him 3% commission for accepting the invoices of M/s Reliable Agencies and further issuing sale invoices to end Users; M/s Palam Pharmaceutical Pvt Ltd., has also gained from these transactions due to the commission given; in view of above, both the M/s Palam Pharmaceutical Pvt Ltd and his Director are liable for penal action under section 112(a) and 112(b); he relies upon Pradeep Mater Batches Pvt Ltd Vs CC Mumbai 2017 (348) ELT 692 (Tri-Mum).

9. Reacting to submissions on behalf of Shri Rajesh Sheth, partner of Shri Kamlesh Balani, Learned AR submits that his role is more or less similar to Shri Parag Bhavsar, Director of M/s Palam Pharmaceutical Pvt Ltd; Shri Rajesh

Sheth along with his partner is responsible for issuing invoices of M/s Reliable Agency, without actual providing any goods; they have consciously engaged in the nefarious smuggling of PBDs for a commission of 2%; they received cheques from M/s Palam Pharmaceutical Pvt Ltd, encashed the same and handed over cash to Shri Bavishi after deducting their 2% commission; similarly, M/s Globe Pharma, who also issued invoices in the same fashion without supplying the goods are liable for penalties under Section 112(a) and 112(b).

10. Regarding the submissions on behalf of M/s Hetero Drugs Ltd and M/s Hetero Labs Ltd, Learned AR submits that M/s Hetero Drugs Ltd and M/s Hetero Labs Ltd were not aware of smuggled nature of the PBDs; Adjudicating Authority gave a clear finding, at para 84.2, that M/s Hetero Drugs and M/s Hetero Labs received PBDs directly from Mumbai through M/s On Dot Courier, Mumbai; they were aware that the PBDs were of Chinese origin and were not dispatched by M/s Palam Pharmaceutical Pvt Ltd from Mehsena, Gujarat; they had not even asked for import documents, though being aware that imported PBD require a licence; Shri Parag Bhavsar stated that whenever there was any query on the quality of these bulk drugs, M/s Hetero Drugs Ltd. and M/s Hetero Labs Ltd used to deal with Shri Manish Bavishi for clarification; on paper Shri Bavishi was not related to their transaction with M/s Palam Pharma or M/s Reliable Agency; it indicates that they are aware that the impugned goods are not legally imported; he relies on the case of Sachidananda Banerjee, ACC Calcutta Vs Sitaram Agarwala – 1999 (110) ELT 292 (SC) and submits that for levy of penalty under section 112(b), the words "*reasons to believe*" indicate the existence of reasonable grounds; in this case there exists basic ingredient regarding knowledge of nature of goods by these firms; therefore imposition of penalty is justified.

11. On hearing the rival contentions, we find that the issues that requires consideration in the case are as to whether

(i). 77 Kgs are 'Miglitol', 8 Kgs are 'Mifepristone' and 1 Kg of 'Ethynal Estradiol' seized at the premises of ware house of Shri Manish Bavishi on 20.2.2007, and 4 kg of

Meropenem seized at the premises of M/s MacLeod's' are liable for confiscation under Section 111(d) and 111(l) of the Customs Act, 1962 read with provisions of the Drugs & Cosmetics Act, 1940; and

(ii). sale proceeds amounting Rs.2,96,47,100 deposited by end users was liable for confiscation under Section 121 of the Customs Act being the sale proceed of smuggled goods; and

(iii). different appellants as above have rendered themselves to pay penalty under Section 112(a) and/or 112(b) of Customs, Act, 1962.

12. The issue raised by the appellants, as regards the seizure is concerned, in these cases is that the department has not proved that the goods are smuggled in nature and hence, not liable for confiscation. It has been argued that the goods are not notified under Section 123 and therefore, burden of proof is on the department. Going by the facts of the case it is seen that Shri Manish Bavishi/his accomplice were caught in the airport while carrying goods in commercial quantity without declaring them and without showing any intent to discharge the applicable duty on the same. Shri Manish Bavishi and Shri Charania in their statements dated 20.2.2007, accepted that they have been smuggling bulk drugs in this manner for quite some time.

13. Shri Manish Bavishi revealed the *modus operandi as to* how he recruited persons for sending abroad; how and from whom he booked the air tickets; how his person at Hong Kong purchases bulk drugs and hands over to the carriers/passengers sent by Shri Manish Bavishi; how he reimburses the price of those PBD to representative of the person who paid for PBD at Hong Kong; he had supplied the bulk drugs to end users like Hetero Drugs Ltd under the cover of invoices of M/s Palam Pharma Pvt. Ltd; M/s Reliable Agencies/Globe Pharma used to issue invoices of for a consideration of 2% commission; no material were physically supplied against these invoices. Shri Kamlesh Bhalani and Shri Rajesh Sheth have confirmed the statement of Shri Manish

Bavishi. Shri Bavishi has himself given the address of the godown where 85 Kgs of such bulk drugs were seized.

14. On being asked about the procurement of the 85 kg drugs, Shri Bavishi has stated that they were supplied by one Shri H.H. Parekh of Kolkata, who claimed that the goods were supplied by M/s Blessings Product Company; said company was found to be non-existing; the courier through which the goods were claimed to have been dispatched from Kolkata was also found to be non-existing; the claims made by Shri Parekh regarding the ownership of impugned goods the writ petitions filed by him before Hon'ble High Court of Mumbai were dismissed and costs were imposed; Shri Parekh accepted that he has made the claim at the behest of Manish Bavishi; though he retracted his statement initially, later confirmed the same. The department by proving that the goods were not licitly procured has discharged the initial burden; the appellants could not prove any licit procurement of the impugned goods; this fact when seen in juxtaposition with the accepted smuggling by Shri Bavishi and others leads to the only conclusion that the goods were smuggled. It is being argued that the goods are not notified goods. It is not the case of the department either that the goods are notified. Customs officers are not expected to seize only notified goods. They are duty bound to check smuggling of other goods. It is also argued that Customs authorities are not empowered to take action against violations under Drugs and Cosmetics Act, 1940 and that there are other agencies for the same. We are afraid such an argument would make the function of customs department redundant as most or all of the goods imported/smuggled would fall under one authority or the other. A harmonious construction would necessitate understanding that the roles of customs officers and others are complementary in nature. When the goods are moved across the international borders, it is the duty of customs officers to take action and when it relates to any activity within the country concerned departments can take action. The action taken by customs may not necessarily preclude action if any to be taken by the respective agency. At the time of seizure, there were reasons to believe that the impugned goods were smuggled in violation of the Customs Act, 1962 also in violation of Drugs and Cosmetics Act, 1940. The perpetrators of smuggling have accepted that they have been indulging in the activity; the goods have been found in their premises disclosed by themselves; no proof of licit procurement has been produced; when the seizure was made in 2007, Shri Parekh attempted to show a document dated 2006, which too was not established. In terms of Section 10 (c) of Drugs and Cosmetics Act, 1940, no person shall import any drug for the purpose of which a licence is prescribed, otherwise than under, and in accordance with such licence. Further as per Drugs and Cosmetics Rules, 1945, an import licence in form 10, shall be required for the import of drugs, excluding those specified in Schedule-X, and an import licence in form 10A shall be required for the import of drugs specified in schedule-X. Obviously these conditions related to import will have to be looked into by the Customs officers at the time of import. They may inform authorities enforcing Drugs and Cosmetics Act, 1940 for necessary action at their end in relation to such drugs. However, for the purposes of Customs Act, 1962, such drugs become prohibited goods and are liable for confiscation. Customs authorities cannot allow these goods to mingle with the goods in the country and jeopardize the public health at large while taking care of the revenue implications. Besides, the said Drugs are also subject to the condition of registration with the licensing authority in Form 40 either by the manufacturer himself, having a valid wholesale license for sale or distribution of drugs under these Rules, or by his authorized agent in India. In the present case, PBDs are smuggled in contravention of these statutory provisions. We find that Hon'ble Apex Court, in the case of *Maharashtra State Board of Secondary and Higher Education* Vs *K.S. Gandhi & Others* (1991) 2 SCC 716, held that

> *"37. It is thus settled law that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. It is open to the authorities to receive and place on record all the necessary facts though not proved strictly in conformity with the Evidence Act. The evidence must be germane and relevant to the facts in issue. In grave cases like*

> *forgery, fraud, conspiracy, misappropriation, etc. seldom direct evidence would be available. Only the circumstantial evidence would furnish the proof…… There must be evidence direct or circumstantial to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial from which to infer the other fact which it is sought to establish…….. The standard of proof is not proof beyond reasonable doubt 'but' the preponderance of probabilities tending to draw an inference that the fact must be more probable. Standard of proof cannot be put in a strait jacket formula. No mathematical formula could be laid on degree of proof. The probative value could be gauged from facts and circumstances in a given case. The standard of proof is the same both in civil cases and domestic enquiries."*

Under the circumstances, we find that the standard of proof in a case like this would obviously different from other cases. When Shri Bavishi himself has agreed about the smuggling activity in general and was corroborated by others and when they could not produce any evidence of legal procurement, it has to be construed that the department has discharged its burden and thus, we have no hesitation in concluding that the goods are smuggled in nature and accordingly the provisions of Section 11(d) and (l) of Customs Act, 1962 are attracted. Therefore, we find that the confiscation of goods is justified.

15. One more submission made by the appellants is that they have retracted statements and thus, the same lose evidentiary value. We find that the persons concerned have accepted the *modus operandi* to the knowledge of which, they alone are privy of. Retraction is an understandable after thought employed by the persons to wiggle them out of the legal tangle. We find that the activity of smuggling has not only been accepted by Shri Manish Bavishi but by others involved in the completion of the acts of commission and omission in this regard. We find that retraction, if any, would have had some face value if they could establish licit procurement of the impugned goods. In the absence of the same retraction has no meaning. We find that retracted statements can also be relied on as held by Apex Court in the case of K.I. Pavunny 1997 (90) E.L.T. 241 (SC). We find that

Customs Officers are not Police Officers and the statements recorded by them, even if confessional in nature, are admissible as evidence. Hon'ble Apex Court ruled, in *Surjeet Singh Chhabra* v. *UOI* 1997(89)ELT 646(SC), that a confessional statement made before a Customs Officer, though retracted within six days, is an admission and binding.

16. We find that another argument taken by the appellants is that the principles of natural justice have been violated and that the adjudicating authority has not given opportunity for being heard and request for cross examination was not granted. Learned counsel for the appellant states that they requested for copies of relied upon documents and inspection of original documents vide letter dated 12.10.2007; Vide letters dated 18.10.2007 and 23.11.2007, the Appellant requested copies of documents seized from his office; vide Order dated 24.01.2008 the Hon'ble Bombay High Court gave direction to provide documents; DRI vide letters dated 12.02.2008 & 15.02.2008 certified copies of some documents were provided to the Appellants. Counsel submits that Personal hearing was fixed given on 20.01.2009, 0.02.2009 and 16.02.2010; however, after change of adjudicating authority, only one hearing on 16.02.2010 was granted by the new adjudicating authority; as per Section 122A of Customs Act, 1962 minimum three hearings have to be granted by the adjudicating authority; inspection of original documents completed only on 17.02.2009; hence, any hearing given before this date is not in line with discharge of principles of natural justice; the appellants vide letters dated 17.01.2009, 17.2.2009 and 15.02.2010, requested for postponement of hearing; however, no further opportunity of hearing granted to him on the grounds for not allowing fresh hearing as mentioned; reply filed on 15.02.2010 vide letter dated 12.02.2010 was not considered by the learned adjudicating authority; request for cross examination, although made in reply to the Show cause Notice, it was not allowed. The learned AR submits that ample opportunities were provided to Shri Manish Bavishi, but he always tried to delay the issue without any sufficient reasons; Hon'ble Bombay High Court directed DRI to make available records within one-week time;

the appellant took eight (8) months' time to inspect and collect the documents; as the appellant was using tactics to delay, the adjudicating Authority after providing him ample opportunity, passed the order; there is no merit in his argument that principle of natural justice has been violated.

17. We find that the instant case is made basically on the statements of the persons involved; Shri Manish Bavishi his statement dated 20.02.2007; Shri Tajdin Nazarali Charania in his statement on 20.2.2007 Shri Parag Bhavsar, Director of M/s Palam Pharma, in his statement dated 22.02.2007; Shri Kamlesh J Balani and Shri Rajesh Sheth, partners of M/s Reliable Agency in their statements dated 28.02.2007 and 23.03.2007 have accepted the modus operandi. Shri Atul Manilal Doshi, an employee of Shri Manish Bavishi, stated on 20.2. 2007 that on many occasions he travelled to Bangkok on behalf of Manish Bavishi and has carried pharmaceutical drugs for him. Shri Prem Gobindram Mani, in his statement dated 04.07.2007, admitted that Shri Manish Bavishi used to purchase domestic and international airline tickets regularly from himself and his friends. Shri Bavishi retracted the statement before magistrate on 21.2.2007 and DRI submitted a rebuttal on 7.3.2007. The submissions made by them in respect of the legal procurement of goods seized at his ware house from H.H. Parekh have fallen flat and Shri Parekh himself has accepted that he has arranged for only documents at the behest of Shri Bavishi and no goods were sent. We find going by the records that the appellants have taken a long time than suggested by Hon'ble High Court in obtaining the documents. The proceedings of adjudication/hearing have started in 2009 and continued till 2010 due to adjournments. We find that the first PH was given on 20.1.2009; Shri Bavishi vide his letter dated 17.1.2009, requested for adjournment stating that he wants to inspect documents; second time PH was given on 10.02.2009, Shri Bavishi again requested for adjournment vide his letter dated 4.2.2009 citing reason that he has not completed inspection of documents; third time PH was given on 16.02.2009, Shri Bavishi sought adjournment; he filed reply ultimately on 10.02.2010; fourth time PH was given on 16.02.2010; however, he again requested for adjournment and sought three-month time. Adjudicating authority held that the request of Shri Bavishi was not meritorious in view of the above. We find that understandably, the appellant has a vested interest in prolonging the proceedings. In such a case, the departmental officers cannot play in to their hands of the appellants in procrastination of the proceedings. We find that legal remedies under the act cannot be allowed to be misused by the people who have indulged in smuggling activities by which they have not only put the public health and Revenue at peril. That would be travesty of justice. We find that sufficient opportunities of hearing have been given by the adjudicating authority.

18. Learned counsel of Shri Manish Bavishi that cross-examination of Shri Parag Bhavsar, Director of M/s Palam Pharmaceutical Pvt Ltd, Kamlesh Bhalani& Rajesh Seth of M/s Reliable Agency and Sandeep Gandhi of M/s Globe Pharma was not allowed to him is also violation of Principle of Natural Justice. We find that the persons asked for cross-examination are co-accused in the subject case. Further, what was confessed by Shri Manish Bavishi in his statement dated 20.02.2007 was corroborated by all the persons involved. Therefore, we find that the adjudicating authority came to a conclusion that the cross examination would have not served any purpose and nothing new would have emerged out of such cross-examination. We find that Apex Court observed in, Surjeet Singh Chhabra Vs UOI 1997 (89) ELT 646 (SC), that not allowing of Cross examination of witnesses where petitioner has confessed, is not violative of principles of natural justice. Apex Court also observed in Kanungo & Co Vs CC Calcutta & Others 1983 (13) ELT 1486 (SC) that Principles of natural justice do not require that in every matter, the person who has given information should be examined in the presence of the Appellant or allowed to be cross-examined by the person concerned in respect of the statements made before the customs authorities. Moreover, in the case of Kalapena (Supra) Hon'ble Mumbai High Court, relied upon by the appellants, held that that

> **16.** Though we are conscious of the fact that right of cross-examination may not be construed as an

> indispensable right under the scheme of the Customs Act, we are of the view that the right of cross-examination is not infringeable rule. We would not hesitate to hold that the said right necessarily attributed by reasonable opportunity and by principles of natural justice, its availment would depend on the nature of proceedings involved and the provisions of the statute; though we do not intend to lay down that it is an absolute right vested in a party.

In view of the above, we find that learned commissioner has taken the decision in view of the circumstances of the case. We find that thus, the principles of natural justice are not violated.

19. We find that the appellants have relied upon the following cases. We find that Apex Court in the case of CCE, Bangalore Vs Srikumar Agencies
(Civil Appeal Nos. 4872-4892 of 2000, decided on 27-11-2008) held that

> ***5.*** *Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.*
>
> *The following words of Lord Denning in the matter of applying precedents have become locus classicus:*
>
> *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."*

Therefore, we are of the view that each case needs to be decided on the basis of evidence available in that case. It is also well-settled position of law that any decision of a judicial forum is strictly applicable only to the facts of the case discussed therein. We find that the cases submitted by the appellants are on different set of facts.

20. Coming to the seizure of 4 kg of 'Meropenem' at MacLeod's' Pharmaceuticals, Andheri (East), Mumbai, we find that enquiries revealed that these PBD which were sold by M/s Palam Pharma on the strength of invoice issued by M/s Reliable Agency and M/s Premier Trading Agency. It has come out that they had purchased 4 kg of 'Meropenem' from M/s Palam Pharma Pvt Ltd. The 4 Kg of Meropenem was sold by

Palam Pharma on the strength of invoice of M/s Reliable Agency. Shri Parag Bhavsar, Director of M/s Palam Pharma, in his statement on 22.02.2007 accepted that he did not know owner of M/s Reliable Agencies but he used to deal only with Shri Manish Bavishi; he was told that Reliable Agencies was a firm known to Shri Bavishi and there was nothing to worry about; no bulk drugs were ever received by them; Shri Manish Bavishi informed him that the bulk drugs would be directly dispatched by him; he would be paid 3% commission of the bill value. Further, Shri Kamlesh J Balani, the ex-partner of M/s Reliable Agency, stated, on 28.02.2007,that they had issued some tax invoices of M/s Reliable Agencies and M/s Premium Trading Company showing sale of various pharmaceutical bulk drugs without actually selling any goods to show its legitimate acquisition on account of Manish Bavishi. Shri Rajesh Sheth, in his statement dated 23.03.2007, reiterated and confirmed the contents of the statement of Shri Kamlesh Bhalani. We find that the appellants could not prove the legal acquisition of the goods. Therefore, in the circumstances of the case, the same are treated as smuggled goods and hence, liable for confiscation under Section 111(d) & (l) Customs Act, 1962.

21. Regarding the confiscation of sale proceeds of goods supplied to M/s Hetero Drugs Ltd, Hyderabad &Baddi, Himachal Pradesh, we find that none of the Noticees has challenged confiscation of PBD and the sale proceed of PBD from M/s Hetero Drugs Ltd. Shri K V Bhaskara Reddy, GM (Finance), M/s Hetero Drugs Ltd confirmed purchase of PBD from M/s Palam Pharma. We find that it was confirmed by M/s Hetero Drugs Ltd, Mumbai that 25 Kgs of Miglitol (WIP) received from M/s Palam Pharma was lying in stock at their Baddi Unit. Scrutiny of the documents submitted by M/s Hetero Drugs/Hetero Labs revealed that even though the invoices were issued by M/s Palam Pharma, the Pharma drugs were received by them through “ON DOT Courier” from Mumbai and not from Mehsana where M/s Palam Pharma is situated. M/s Hetero drugs vide their letter dated 10.4.2007, confirmed that they have purchased goods from M/s Palam

Pharma and amounts a below are due in respect of M/s Hetero Drugs Limited

Bill No.	Date	Amount in Rs.
195	11.01.07	3549600.00
201	19.01.07	1774800.00
194	11.01.07	3549600.00
Invoice Not Recd	04.02.07	1975000.00
Invoice Not Recd	17.02.07	1975000.00
Invoice Not Recd	08.02.07	1975000.00
Invoice Not Recd	09.02.07	3480000.00

And the following are pending from M/s Hetero Labs Ltd.

Bill No.	Date	Amount in Rs.
85	14.10.06	622000.00
99	18.11.06	3366000.00
139	06.12.06	2423520.00
138	06.12.06	484500.00
193	09.01.07	4855200.00
36	01.07.06	21100.00

During the course of the search at the office of Kamlesh Bhalani and Shri Rajesh Seth, the documents retrieved from the data of the computer copies of 123 invoices issued by M/s Reliable Agency to Palam Pharma Pvt Ltd. Some of these invoices are on record and corresponding invoices are also taken from the records of M/s Palam Pharma. These two invoices match w.r.t description of the goods, quantity, Batch No., manufacturing date & Expiry date. In view of the discussion above, we find that these good too are to be treated as smuggled and hence liable for confiscation under Section 111(d) & (l) of the Customs Act, 1962.As the goods are not available for confiscation, confiscation of sale proceeds is required to be upheld in terms of Section 121 of the Customs, Act, 1962.

22. Appellants have also raised the issue that no duty has been demanded on the seized goods. We find that this is not a case of legal import of goods. The question of duty does not arise when goods are confiscated absolutely. Only when the goods are allowed to be redeemed, such goods shall be cleared on payment of duty in addition to the fine in lieu of confiscation.

23. As regards the penalties imposed on different appellants, we have held that we do not have any doubt in holding that the goods, seized at warehouse of Shri Manish Bavishi, seized at MacLeod's and received by M/s Hetero Drugs and Hetero Labs against the invoices of M/s Palam Pharmaceuticals Pvt Ltd, backed by invoices issued by Shri Kamlesh in the name of M/s Reliable Agency and others, are those which were smuggled by Shri Manish Bavishi through air passengers sent by him. He did not have any Licence in Form 10, for the import of bulk drugs, issued by FDA. Therefore, we hold that Shri Manish Bavishi has involved himself in omissions and commissions can be relied for confiscation of the goods and consequentially the sale proceeds wherever applicable liable for confiscation. We find that Shri Manish Bavishi has been the kingpin and masterminded the smuggling operations. He has meticulously planned to send couriers to smuggle bulk drugs from china and other countries; he used to arrange for affixing labels w.r.t description of the goods, quantity, Batch No., manufacturing date & Expiry date in his factory/warehouse; he has utilised the services of M/s reliable agencies and others to issue invoices showing procurement by M/s Palam Pharma. He refused to sign the Panchnama drawn after extracting the details of CDs before independent Panchas; refused to give any clarification on the material details available in the print outs. For all the acts of commission and omission as discussed above, he has rendered himself liable for penalty. Showing any lenience to perpetrators of evasion of duty while playing with the lives of people, would be against the interests of justice. We find that his role has been established in both the cases i. e. appeals Nos C/633/2010 and C/594/2010. We find that in respect of Appeal No C/594/ 2010 he has been imposed a penalty of 30 lakhs and One Crore in respect of Appeal No C/633/ 2010. Looking in to the long litigation; fact that the sale proceeds have been confiscated and other circumstances of the case we are inclined to reduce the penalty in respect of Appeal No C/594/ 2010 from 30 lakhs to 10 lakhs and penalty in respect of Appeal No C/633/ 2010 from one Crore to 30 lakhs.

24. Coming to the issue of levy of penalty on others in respect of other appeals, we find that in respect of appeals C/550/2010 and C/551/2010 by Shri Parag Bhavasar and M/s Pharma Labs) we find that though they have issued invoices in their names to M/s Hetero labs and M/s Hetero drugs for a discount, it has not been established that they were in the knowledge that the goods were smuggled goods. Shri Bhavsar has stated that Shri Manish Bhavishi has told them that M/s Reliable Agency were genuine and there was nothing to worry and that goods would be directly dispatched; he was not aware of the fact the license of his firm was misused by Manish Bavishi for importing smuggled goods in the name of his firm. We find from the statements of Manish Bhavishi, Parag Bhavsar and others do not reveal that Parag Bhavsar, director of M/s. Palam Pharma Pvt Ltd was aware of the smuggling activities of Shri Manish Bavishi. Other than the above, nothing has come on record to show that they have knowledge that they are dealing in smuggled goods. We also find that whereas, the statements of the concerned persons talk about profit earned by them to be about 2-3 %, learned Commissioner finds that they have earned huge profit. We find that commissioner has not given any evidence to that effect. We find that nothing has been brought on record to show that appellants have committed any acts of omission or commission in respect of Customs, Act, 1962. It is also not established that they are guilty of dealing with the goods which are liable for confiscation. Therefore, we find that penalty cannot be levied on either Shri Parag Bhavsar or M/s Pharma Labs. Moreover, M/s Pharma labs being a company, cannot be said to have a mens rea to impose penalty under Section 112(b).They may have helped Shri Manish Bavishi, after the goods have been illegally smuggled in to India. We are of the opinion that the word 'abets' should be read in conjunction with act/omission necessarily under the Customs, Act, 1962. The allegation of abetting, if any, is in relation to the sale and purchase of bulk drugs in the course of trade within India. The whole allegation is that they have issued invoices without receiving or sending goods physically. In that case, they cannot be alleged to have dealt with goods within the meaning of Section 112(b) of the Customs, Act 1962, more so when the knowledge of the goods being smuggled is absent. If the appellants have committed any offence under Drugs and Cosmetics, Act, 1940 the concerned agencies would take necessary action. Therefore, we hold that penalty is not imposable either on Shri Parag

Bhavasar or on M/s Palam Pharma either under Section 112 (a) or under Section 112(b) of the Customs, Act, 1962.

25. Learned counsel for M/s Hetero Labs Ltd and M/s Hetero Drugs Ltd submits that the appellants are manufacturers of bulk drugs/ intermediaries and P or P medicines with a turnover of about Rs.5000 Cr; after enquiries, they placed order on M/s Palam Pharma Pvt Ltd; transaction was duly recorded in their books; they had no reason to suspect that the said goods as smuggled by the supplier; penalty under Section 112(a) and 112(b) cannot be imposed without proving abatement/knowledge in the alleged smuggling of goods by the main noticee; penalty cannot be imposed under Section 112(b) on a corporate entity since only a natural person has the mens rea; department did not bring out any evidence suggesting the involvement or knowledge of the appellant in smuggling. We find that the appellants have purchased the drugs in the course of their business. They have recorded the transactions. They have given all the relevant details asked by the investigation. They have even deposited the sums payable to M/s Palam Pharma (or Shri Bavishi) with the investigation. We find that they have proved their *bona fides*. We find that Ld. Commissioner while deciding not to impose penalty on Macleod's' observed that nothing is brought on record by the investigation to implicate them in the modus operandi set up by Manish Bavishi and his associates; merely because they were in urgent need of said material, they followed the advice given by their loan licensee and procured the bulk drugs which are still lying and seized; except being in possession of the impugned bulk drugs, there is nothing on record that they had knowingly placed orders for the same with Manish Bavishi; much more evidence ought to have been culled out so as to hold them liable for any penalty. We find that all these ingredients are available with Hetero Labs and Hetero Drugs. The only difference being that the drugs have been utilised. If the investigation started some time before material would have been available with them. It is on record that some material was lying in work in progress. There is nothing on record to show that they had the knowledge that the goods were smuggled. Therefore, we find that they have not committed any act in violation of Customs Act, 1962. Moreover, they being companies, penalties under Section 112(b) cannot be levied.

26. Learned counsel for Shri Rajesh Seth of M/s Reliable Agency submits that in the entire Notice there is no allegation that the Appellants had any role to play in the alleged illegal imports; there are no findings that the Appellants were in any way concerned with the alleged illegal imports; allegation against the appellants is that they have issued the invoices at the behest of one "Mr. Bhavishi without actually receiving or selling any goods; Appellants never dealt with the impugned goods in any manner whatsoever; goods were directly sent to M/s. Palam Pharma by Mr. Bavishi and the Appellants had no role to play in actual delivery; as accepted in SCN, Mr. Bavishi was also importing Pharmaceutical drugs on payment of duty; thus, it is erroneous to presume that the all goods dealt with by Mr. Bavishi were illegal; there were no reasons for the Appellants to harbor any belief that Mr. Bavishi is dealing in the goods imported illegally; it is alleged that impugned invoices have been issued at the behest of Mr. Bavishi, by M/s Reliable Agencies, which is Proprietary concern of Mr. Rajesh Doshi; no SCN was issued to Mr. Rajesh Doshi; this renders impugned Notice bad in Law; commissioner wrongly finds that there is a burden cast upon him to ascertain the origin of the goods; there was no evidence that 4kg of Meropenem seized at the premises of M/s. MacLeod's Pharmaceuticals and the goods sold to M/s Hetero Drugs Ltd and M/s Hetero Labs Ltd. were smuggled. Ld. Commissioner observes that they were not having any genuine business and was therefore, a benami non-existent firm. We find that this does not constitute any omission or commission under the Customs, Act 1962. Therefore, ongoing through the rival submissions and records of the case, we find that the contentions of the appellant are justified. Further, we find that the findings above, we made at Para 24, hold good for the other appellants M/s Hetero Labs Ltd, M/s Hetero Drugs Ltd and Shri Rajesh Seth also.

27. In the result

(i). Appeal No C/594/2010 is partially allowed by reducing the penalty imposed to Rs 10,00,000 (Rs Ten Lakhs Only).

(ii). Appeal No C/633/2010 is partially allowed by reducing the penalty imposed to Rs 30,00,000 (Rs Thirty Lakhs Only).

(iii). Appeals C/550/2010, C/551/2010, C/623/2010, C/624/2010 and C/614/2010 are allowed.

(iv). Miscellaneous applications are accordingly disposed of.

(Pronounced in court on 04.02.2020)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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