

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench**

Customs Appeal No. 85361 of 2020

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP (NCH)/2019-20 dated 18.12.2019 passed by the Commissioner of Customs (Appeals), Mumbai-III)

Aayush M. Agarwal

Brij Villa Bungalow,
Brijwasi Estate, Near Marriot Hotel,
Parle Point, Surat 395 007.

Appellant

Vs.

**Addl. Commissioner of Customs, Mumbai
Import-I**

New Custom House, Ballard Estate, Mumbai 400 001.

Respondent

AND

Customs Appeal No. 85364 of 2020

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP (NCH)/2019-20 dated 18.12.2019 passed by the Commissioner of Customs (Appeals), Mumbai-III)

M/s. Daffodil Exports

Brij Villa Bungalow,
Brijwasi Estate, Near Marriot Hotel,
Parle Point, Surat 395 007.

Appellant

Vs.

**Addl. Commissioner of Customs, Mumbai
Import-I**

New Custom House, Ballard Estate, Mumbai 400 001.

Respondent

Appearance:

Shri D.H. Nadkarni, Advocate, for the Appellant

Shri D.S. Maan, Deputy Commissioner, Authorised Representative for
the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 13.01.2023

Date of Decision: 13.01.2023

FINAL ORDER NO. A/85326-85327/2023

These appeals are directed against Order-in-Appeal No. MUM-CUSTM-AMP (NCH)/2019-20 dated 18.12.2019 passed by the Commissioner of Customs (Appeals), Mumbai-III. By the impugned order, Commissioner (Appeals) has held as follows:-

"12. In view of the above the adjudicating authority has rightly held that the exported goods were liable for confiscation under Section 113(d) and Section 113 (1) of the Customs Act, 1962. it is evident that the Appellant Nos. 1 and 2 are liable for penalty under the provisions of Section 112 (a) and Section 112 (b) of the Customs Act, 1962. Since the Appellants have submitted false documents such as ARE-Is and Invoices showing the export of fabrics as procured from the actual manufacturers, for transacting the business for the purpose of Customs Act, 1962, both the Appellants have rendered themselves liable for penalty under Section 114 AA of the Customs Act, 1962.

13. Under the circumstances as discussed above. I do not find any reason to interfere with the impugned Order in original. The appeals filed by the appellants is rejected. The two appeals are disposed of accordingly."

1.2 Original authority by his order held as follows:-

"ORDER

i. The benefit claimed on the DEPB Scrips for duty credit of Rs.21,98,806/- by M/s. Daffodils Exports, is denied ab-initio.

ii. I order the confiscation of goods of FOB Rs. 3,76,39,317/- as per Annexure "A" and which has been exported under Section 113(1) of Customs Act, 1962. As the goods are not physically available, I do not impose any redemption fine in lieu of confiscation.

iii. I impose a penalty of Rs.21,98,806/- on M/s. Daffodils Exports" under Section 114A of the Customs Act, 1962.

iv. I impose a penalty of Rs 3,00,000.00 (Rupees, Three Lakhs Only) upon Shri Ayush M Agarwal under Section 112 (a) & (b) of the Customs Act, 1962.

v. I impose a penalty of Rs 3,00,000.00 (Rupees Three Lakhs Only) on M/s. Daffodil Exports Impex under Section 114AA of the Customs Act, 1962.

vi. I impose a penalty of Rs 3,00,000.00 (Rupees Three Lakhs Only) on Shri Ayush M Agarwal under Section 114AA of the Customs Act, 1962.

.....

This order is issued without any prejudice to any other action that may be taken against the said goods / noticees and / or against any other firm / persons concern, under the provisions of the Customs Act, 1962 and or any other law for the time being in force, in India"

2.1 A letter dated 11.03.2008 was received from Thane Commissionerate that some units were issuing bogus invoices for passing fraudulent Cenvat credit to claim bogus rebate.

2.2 After completion of investigation, central excise authorities issued a show cause notice dated 30.09.2008 to M/s. Muni Group of Companies and other 78 noticees for demand of rebate fraudulently claimed and also for imposition of penalty on the various persons involved. Investigation carried out by central excise officers reached to the conclusion that ARE-1s issued were bogus and the goods which were exported under DEPB shipping bills were never manufactured at the address given by the unit. As such the exporter exported the goods under DEPB scheme and availed DEPB benefit under the DEPB scheme fraudulently. Summons were issued to appellant 1 for investigation of such export firm. However, even after repeated summons, the exporter did not turn up.

2.3 From the above it appeared to the Revenue that no goods were manufactured in the premises of the supporting manufacturers. Their ARE-1s were bogus and no goods were transshipped for export and the goods mentioned in ARE-1 were in fact not exported thereby the exporter has misdeclared/misrepresented the details in the export documents.

2.4 Appellants have on the basis of exports made succeeded in obtaining DEPB licences which were subsequently transferred to various importers who in turn utilized the DEPB scrips for duty

free import in terms of Notification No. 34/97-Cus. dated 07.04.1997. Accordingly show cause notice was issued to the appellants asking them to show cause as to why:-

"i. The goods of FOB Rs. 3,76,39,317/- as per Annexure "A" exported should not be confiscated u/s 113(i) of Customs Act, 1962 for the reasons that Invoices, and ARE-1 were fake and goods were not what were stated to be. As the goods were not what was declared, they are liable to confiscation and are not readily physically available, therefore why fine u/s 125(1) of Customs Act, 1962, should not be imposed.

ii. Penalty should not be imposed on M/s. Daffodil Exports under Section 114, 114A and/or 114AA of Customs Act, 1962 for exportation of goods by means of producing the fake invoices and ARE-1 for avilment of undue DEPB credit.

iii. The benefit claimed on the DEPB Scrips for duty credit of Rs. 21,98,806/- should not be denied ab-initio.

iv. Personal penalty should not be imposed on Shri Ayush M Agarwal Proprietor of M/s Daffodils Exports for using bogus ARE-1s under which fraudulent exports were effected, under section 114 of the Customs Act, 1962."

3.1 I have heard Shri D.H. Nadkarni, Advocate for the appellant and Shri D.S. Maan, Deputy Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that:-

- Export of goods in the entire period is not in dispute. In fact after following due process, Customs authorities have allowed for export of the said goods.
- Role of Customs authorities is confined to the verification of correctness of export declaration regarding description, quantity and FOB value of the export products and it is for the licensing authorities granting credit to ensure that credit is permitted by them as correct as notified by DGFT, as held in:
 - Pradip Polyfils P. Ltd. [2004 (173) ELT 3 (Bom)]

- Polynova Chemicals Ltd. [2005 (179) ELT 173 (T)]
- Kobian ECS India P. Ltd. [2003 (157) ELT 662 (T)]
- Penalty under Section 114A of the Customs Act, 1962 is applicable only to the importer and the appellant is not the importer.
 - Chowhan Exports [2000 (121) ELT 833 (T)]
 - Nippon Audiotronix [2000 (120) ELT 736 (T)]
 - Paresh Parekh [2008 (221) ELT 411 (T)]
- Penalty under Section 112(a) and (b) of the Customs Act is not applicable as the appellants are not the importers. This penalty is neither proposed nor a part of the adjudication proceedings. The impugned order upholds the penalty under these sections which were never part of the proceedings. Penalty cannot be upheld in the said section.
 - Ballarpur Industries Ltd. [2007 (215) ELT 489 (SC)]
 - Raphael Pharmaceuticals Pvt. Ltd. [1988 (38) ELT 11 (AP)]
- The issue in the present case is for the period 01.09.2004 to 31.12.2004 which is prior to insertion of Section 114AA of the Customs Act on 13.07.2006. Penalty under said Section could not be imposed as held in the following decisions:-
 - Elgi Equipments Ltd. [2001 (128) ELT 52 (SC)]
 - Mithilesh Kumari [1989 (40) ELT 257 (SC)]
 - Otis Elevator Co. (I) Ltd. [2007 (345) ELT 509 (Bom.)]
- The DEPB licence has till date not been cancelled by the DGFT authority nor any proceedings initiated against the appellant for cancellation of the DEPB licence. The order imposing penalty without any order for cancellation of DEPB licence by DGFT is bad in law.
 - Sanjay Agarwal [2011 (269) ELT 153 (Guj.).

3.3 Arguing for the Revenue, learned AR reiterates the impugned order and submits:-

- Appellant is not denying that central excise invoice and ARE-1 attached to the shipping bills were fake and bogus.
 - Selective Minerals & Colour Indus. P. Ltd. [2017 (349) ELT 790.
 - The ground that DEPB licence granted to the appellant has not been cancelled by the DGFT and was valid and

legal cannot be the ground for lower imposition of penalty as held in Munjal Showa Ltd. [order dated 23.09.2022 in Civil Appeal No. 2576 of 2020 and Civil Appeal No. 5608 of 2011].

- In the case of Selective Minerals & Colour Indus. P. Ltd. [2017 (349) ELT 790 (Tri.-Mumbai)] it has been held that Customs authorities are justified to denial of the claim as the appellant has submitted fake ARE-1 and central excise invoices.
- It is settled law that mention of wrong provision of law when the power exercised is available even though under a different provision is by itself not sufficient to invalidate the exercise of that power, as has been held in Pradyumna Steel Ltd. [1996 (82) ELT 441 (SC)].

4.1 I have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 For upholding the order of the adjudicating authority, Commissioner (Appeals) has observed as follows:-

"6. I observe that Appellant Nos. 1 and 2 purchased the textiles from brokers who were found to be fictitious. The brokers who were traced refused that they had arranged delivery of the goods originating from the units of Muni Group at Bhiwandi and stated that they had merely brought two parties in contact. This shows that the goods had not originated from the units of Muni Group and the goods which are being exported by them are not covered by the documents being used by them for export. Also the factories from which the documents in the form of Invoice and ARE-1 were issued and no goods were manufactured, existed only on paper.

7. I also observe that there was systematic planning by the Muni Group and Appellant Nos. 1 and 2 to not only evade Central Excise duty by way of fraudulent availment of CENVAT credit, but also evade payment of customs duty which had arisen by way of a ramification from the background of the evasion of Central Excise duty. I also observe that the Appellant No. 1 had knowingly purchased bogus ARE-Is from Muni Group, showing

units of Muni Group as the supporting manufacturer and intentionally tried to claim duty benefit shown in the respective ARE-1s, just by presenting the documents to the Customs Authorities at the time of export along with the non-duty paid textile fabrics procured by them from the open market.

8. I further find that the Department has discharged the burden on the Appellant Nos. 1 & 2 to establish the fact that CENVAT credit had been used by the Muni Group for issuing bogus AREs. Further, I observe that there is strong force in the contention made in the Show Case Notice that when there is no existence of the fabrics mentioned in the ARE-1s, the question of the exporter obtaining these fabrics and exporting the same would be totally false and baseless.

9. I observe that invoices, ARE-Is issued were bogus / fake and the goods which were exported under the DEPB shipping bill were not manufactured at the address given in the ARE-1 by the Mont group. In this regard, I observe that the Appellant No. 1 through his authorized representative ie. Appellant No. 2 had exported the said goods under DEPB scheme, and availed DEPB benefit under the DEPB scheme which was not admissible to them. The resultant product of the inadmissibility of the DEPB benefit under the DEPB Scheme not being admissible to Appellant had a cascading effect on the DEPB licence which was obtained by them through Appellant No. 2. I observe that the Appellant No. 1, subsequent to the exports of the impugned goods had succeeded in obtaining the DEPB licence fraudulently which had the net cascading effect on the DEPB licence itself making it ab initio void.

10. From the above. I find that the invoices, ARE-1 issued were bogus / fake and the goods which were exported under the DEPB Shipping Bill were not manufactured at the addresses given in the ARE-1 by Muni Group. As such, I find that the Appellant No. 1 through Appellant No. 2 had exported the goods of FOB value amounting to Rs. 3,76,39,317/- under DEPB scheme. Further the appellants had fraudulently claimed DEPB benefit to the tune of Rs. 21.98.806- under DEPB Scheme which was not admissible to them. I also find that there is clear evidence indicating that

Appellant Nos. 1 and 2 were very well aware of the fact that the goods that were exported by them were actually procured locally and not from the actual manufacturers as claimed in the various AREs. Even then they had resorted to subterfuge by misrepresenting the same were procured from the actual manufacturers.

11. I further find that Hon'ble Supreme Court in Civil Appeal Nos. 554-557 of 2005 with CA No. 85 of 2007 [Tata Iron and Steel Co. Ltd. v. Commissioner- [2015 (319) ELT. 546 (S.C.)] decided on 27.04.2015 has held that:-

2. In the facts of the present case, we find that the original licence holder, namely, Indian Card Clothings Company Limited had deliberately suppressed the fact of having availed Modvat credit under Rule 57A of the Central Excise Rules, 1944, and made willfully wrong declaration to the licensing authority to obtain the endorsement of transferability of the same while transferring the licenses to the appellant herein. In view thereof the extended period of limitation would be available to the authorities for the purpose of claiming the duty even against the appellant herein, who is the transferee of the licence in question.

Thus, the issues of whether extended period of limitation available for recovery of the duty against the licenses obtained fraudulently from transferee of such licenses though the mis-declaration has been made by the original license holder and whether the demand of duty against the transferee is sustainable in such cases have been settled by Apex Court by superseding all the earlier Orders. In view of the above settled position, the extended period of limitation is clearly invocable while demanding duty from the importer who has imported goods under DEPB Licenses obtained by fraudulent means."

4.3 In the present case I find that there is no denial of the fact that the goods have actually been exported against the shipping bills filed by the appellant. The shipping bills are the prescribed documents for all the purposes of Customs and there is no case that these goods as declared in the shipping bills were misdeclared in any respect of value, description or quantity.

4.4 In the case of Lark Chemicals Pvt. Ltd. [2019 (369) ELT 1372 (Tri.-Mumbai)] following has been held:-

"5.6 In case of Pradip Polyfils P. Ltd. [[2001 \(173\) E.L.T. 3 \(Bom.\)](#)] Hon'ble Bombay High Court has held as follows :

"7. We have heard Counsel on both the sides. In this case, it is not in dispute that pursuant to the application made by the petitioners seeking benefit of DEPB Scheme in respect of export of filter plates and accessories made of Polypropylene, two DEPB licences were issued by the DGFT in favour of the petitioners. The endorsement made on the licences clearly show that the DEPB licences have been issued against the export of Polypropylene filter Plates and accessories as contained in the shipping bills furnished by the petitioners. The said DEPB licences were required to be forwarded to the Customs for verification of the particulars set out in the shipping bills and necessary endorsement thereon. Under Circular No. 15/97, dated 3-6-1997 the verification by the Customs authorities was restricted to the description, quantity and FOB value of the export product set out in the Shipping Bill. It is not the case of the Customs authorities that there is any discrepancy in the description, quantity and FOB value of the export product. Under the circumstances, when the DEPB licence is issued by the Licensing authorities specifically holding that the petitioners are entitled to avail the benefit of the DEPB Scheme in respect of Polypropylene filter plates and accessories, the Customs authorities were, not justified, in rejecting the claim of the petitioners on the ground that the Articles exported by the petitioners were not covered under Chapter 39 of ITC (HS) classification. Whether an item falls under Chapter 39 of ITC classification or not is for the licensing authorities to consider before issuing the licence. Even after the issuance of the licences, the licensing authorities have not taken any steps to declare that the said licences were wrongly issued. Once the licensing authorities have held that the export product is covered under the DEPB Scheme and have issued the DEPB licence, it is not open to the Customs authorities to hold that the said export product is not covered under the DEPB Scheme."

5.7 *In light of the above circular and the decisions referred above it was for Customs Authorities after noting the mismatch in the declared unit value on Bill of Entry and that arrived on the basis of quantity and value mentioned in Value Based Advance Licence to refer the matter to licensing authority and seek corrections. In absence of any correction/amendments in the licence, the value of imported goods sought to be exempted by the said licence cannot be suo motu altered by the Customs Authorities. In our view order of Commissioner (Appeals) and adjudicating authority is not only contrary to the decisions referred above but also contrary to Circular No. 23/96-Cus. issued by C.B.E. & C. and which has been used as basis for raising the demand.*

5.8 *In case Aafloat Textile (I) Pvt. Ltd. [[2009 \(235\) E.L.T. 587 \(S.C.\)](#)] relied upon by the Commissioner (Appeals), Hon'ble Supreme Court has held as follows :*

"19. It was for the buyer to establish that he had no knowledge about the genuineness or otherwise of the SIL in question.

20. The maxim caveat emptor is clearly applicable to a case of this nature. As per Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edn. 2005 at page 721 : Caveat emptor means "Let the purchaser beware." It is one of the settled maxims, applying to a purchaser who is bound by actual as well as constructive knowledge of any defect in the thing purchased, which is obvious, or which might have been known by proper diligence.

21. "Caveat emptor does not mean either in law or in Latin that the buyer must take chances. It means that the buyer must take care." (See Wallis v. Russell (1902) 21 R 585, 615).

22. "Caveat emptor is the ordinary rule in contract. A vendor is under no duty to communicate the existence even of latent defects in his wares unless by act or implication he represents such defects not to exist." [See William R. Anson, Principles of the Law of Contract 245 (Arthur L. Corbin Ed. 3d. Am. ed. 1919)] Applying the maxim, it was held that it is the bounden duty of the purchaser to make all such necessary enquiries and

to ascertain all the facts relating to the property to be purchased prior to committing in any manner.

23. Caveat emptor, qui ignorare non debuit quod jus alienum emit. A maxim meaning "Let a purchaser beware; who ought not to be ignorant that he is purchasing the rights of another. Hob. 99; Broom; Co., Litl. 102 a : 3 Taunt, 439.

24. As the maxim applies, with certain specific restrictions, not only to the quality of, but also to the title to, land which is sold, the purchaser is generally bound to view the land and to enquire after and inspect the title - deeds; at his peril if he does not.

25. Upon a sale of goods the general rule with regard to their nature or quality is caveat emptor, so that in the absence of fraud, the buyer has no remedy against the seller for any defect in the goods not covered by some condition or warranty, expressed or implied. It is beyond all doubt that, by the general rules of law there is no warranty of quality arising from the bare contract of sale of goods, and that where there has been no fraud, a buyer who has not obtained an express warranty, takes all risk of defect in the goods, unless there are circumstances beyond the mere fact of sale from which a warranty may be implied. {Bottomley v. Bannister, [1932] 1 KB 458 : Ward v. Hobbs, 4 App Cas 13}. (Latin for Lawyers)"

26. No one ought in ignorance to buy that which is the right of another. The buyer according to the maxim has to be cautious, as the risk is his and not that of the seller.

27. Whether the buyer had made any enquiry as to the genuineness of the license within his special knowledge. He has to establish that he made enquiry and took requisite precautions to find out about the genuineness of the SIL which he was purchasing. If he has not done that consequences have to follow. These aspects do not appear to have been considered by the CESTAT in coming to the abrupt conclusion that even if one or all the respondents had knowledge that the SIL was forged or fake that was not sufficient to hold that there was no omission of commission on his part so as to render silver or gold liable for confiscation.

28. As noted above, SILs were not genuine documents and were forged. Since fraud was involved, in the eye of law such documents had no existence. Since the documents have been established to be forged or fake, obviously fraud was involved and that was sufficient to extend the period of limitation."

From the above paras referred from the said decision it is quite evident that the case under consideration was in respect of a licence that was obtained by fraud. When this licence obtained by fraud, was presented by the buyer of said licence Supreme Court held as above. In the case under consideration the issue is not in respect of licence obtained by fraud. The issue is in respect of mismatch between the declared unit price of imported goods on Bill of Entry and that computed on the basis of quantity and value mentioned in the licence. The real issue is vis-a-vis the amendment to the said licence to resolve the mismatch. Since the facts of present case are clearly distinguishable we do not find the said decision to be applicable in present case."

4.5 To determine whether the DEPB licence has been obtained by fraud and to cancel the same the proper authority is DGFT as per Import-Export Policy. A letter dated 21.12.2009 was written to the Joint Director, DGFT, Surat by Assistant Commissioner, SIIB (Export) to cancel the said scrips. Joint Director has till date not issued any notice to the appellant for cancellation of the said scrips nor any proceedings have been initiated. In such a situation Customs authorities could not have adjudicated upon the issue holding that the DEPB scrips were obtained by way of fraud.

4.6 Interestingly it is noticed that while the show cause notice proposes imposition of penalty under Sections 114, 114A and 114AA of the Customs Act. Order-in-original has been passed imposing penalty under Sections 114A, 114AA and Section 112(a) and (b). In the impugned order, penalty has been upheld under Section 112(a) and (b) and also under Section 114AA of the Customs Act, while holding that the goods were liable for confiscation under Section 113(d) and (i) of the Customs Act. Show cause notice specifically provided for imposition of penalty under Section 114. None of the authorities

i.e. adjudicating authority or the appellate authority, have held that penalty to be imposed under the said section. On the contrary they have imposed penalty under Section 112(a) and (b) of the Customs Act, which are in any way not applicable as they are in relation to the imported goods and not in relation to the export of goods. For contravention leading to confiscation under Section 113(d) and (i) penalty under Section 114 has been provided for. Penalty under Section 114AA has also been imposed on the appellant.

4.7 The reliance placed by learned AR on the decision in the case of Selective Minerals & Colour Indus. P. Ltd. [2017 (349) ELT 790 (Tri.-Mumbai)] is totally misplaced as in the said case in para 5 following has been observed:-

*"5. The primary contention of the appellant is that they have not misdeclared the description and that the test samples drawn had confirmed the goods to be in accordance with the declaration. It is their further contention that the entry at Serial No. 23 of the rate-list under the product Group Code 90 merely specified the description and a rate without any further condition for eligibility. Learned Counsel relies on the decision of the Tribunal in Commissioner of Customs v. Emami Ltd. [[2004 \(167\) E.L.T. 523](#) (Tri.-Kolkata)], Kobian ECS India Pvt. Ltd. v. Commissioner of Customs, Mumbai [[2003 \(157\) E.L.T. 662](#) (Tri.-Mumbai)] and Dewas Soya Limited v. Union of India [[2009 \(235\) E.L.T. 821](#) (Del.)] and further decision in the matter of Union of India v. Dewas Soya Limited [[2011 \(270\) E.L.T. 17](#) (Del.)]. **It is seen from the records that the Directorate General of the Foreign Trade had clarified vide letter dated 23rd May 2002 that the exporter would not be eligible for credit if inputs allowed in the Standard Input Output Norms (SION) entry at Serial No. K-195 (Misc. Product Group) had not been used in the manufacture of the product.** That their manufacturing process does not utilise these two ingredients has been admitted by the appellant. Accordingly, the decision of the original authority to withhold the approval for allowing credit does have the sanctity of law. It is also seen that the original authority had permitted conversion of the said shipping bills to free status. Accordingly, denial of credit alone*

would have sufficed; more so, in the absence of any allegation of suppression or misdeclaration in the proceedings before the adjudicating Commissioner. For this reason, there is no justification for either the confiscation of goods or the imposition of penalties. For this reason, the impugned order is modified by setting aside the confiscation as well as penalties imposed on both the appellants."

4.8 The order of the Tribunal is based on the actual clarification given by the Director General of Foreign Trade in the said matter.

4.9 In the case of Sanjay Agarwal [2011 (269) ELT 153 (Guj.)] Hon'ble Gujarat High Court has observed as follows:-

"8. Section 111 of the Act, which provides for "Confiscation of improperly imported goods, etc." lays down the modes of importing goods brought from a place outside India which would render the goods liable to confiscation. In view of the provisions of Clause (o) thereof, any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under the Act or any other, law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer, would be liable to confiscation. Thus Section 111 of the Customs Act comes into play provided the goods are brought from a place outside India by adopting any of the modes specified thereunder so as to render the goods are liable to confiscation.

9. Section 112 of the Act reads thus :

"12. Penalty for improper importation of goods, etc. - Any person -

(a) 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 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing,

selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111, 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 the value of the goods or five thousand rupees, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under Section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;

(v) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

10. *On a plain reading of Section 112 of the Act, it is apparent that the same provides for penalty for improper importation of goods, etc. Thus any person who acts or omits to do any act in relation to goods so as to render such goods liable to confiscation under Section 111 or acquires possession of or deals with goods in the manner provided under clause (b) of Section 112 would be liable to penalty as laid down thereunder. Thus, both, Section 111 and Section 112 of the Act operate in relation to improper importation of goods.*

11. *Coming to the facts of the present case, the respondent herein is alleged to have been involved in a transaction relating to purchase of DEPB licenses by M/s. Rajshanti Metals Ltd. Undoubtedly, the transaction relating to purchase of DEPB licences, is at a stage prior to clearance of the goods under the Customs Act. The alleged act of the respondent, therefore, cannot be said to be an act or omission pertaining to improper importation of goods. Hence, apart from the fact that there is no evidence of any direct involvement of the respondent as regards forgery of the licences, even otherwise the provisions of Section 111 and 112 of the Act would not be attracted so as to vest the Customs Authorities with the power to take action against the present respondent in connection with his alleged involvement in the purchase of the DEPB licences. Insofar as the Customs authorities are concerned, they are competent to take action against such persons who have used the forged DEPB licences to import goods, which would result in improper importation of goods as laid down under Section 111, and consequently would fall within the purview of Section 112 of the Act."*

4.10 In the case of Nippon Audiotronix Ltd. [2000 (120) ELT 736 (Tri.)], following has been held:-

"8. *In Collector of Customs, Cochin v. Trivandrum Rubber Works Ltd. [1999 \(106\) E.L.T. 9](#) (SC), the Supreme Court had to consider whether notice issued under section 28(2) to a clearing agent was a proper notice under that section. Their Lordships took the view that notice contemplated by Section 28 can only be to a person chargeable to duty. In the case of imports, it is the importer to whom notice is to be issued. Such a notice cannot be to an importer's clearing agent. This position applies on all fours to the present case. In the instant case the importer is M/s. Nippon Audiotronix Limited. So notice under section 28(2) can only be to the Company. The penalty contemplated by Section 114A can only be on the person liable to pay the duty and not to any other person. Viewed in this light, the order imposing penalty under section 114A on the Director is illegal.*

9. *Learned Departmental Representative tried to sustain the penalty imposed on the Director under section 112 of the Act. Adjudicating Authority in the impugned order had categorically stated that the provisions contained in section 112 are not*

invoked for imposing penalty on the Managing Director. Since the adjudicating authority has consciously excluded Section 112 and invoked the provisions contained in Section 114A only, it is not now open to the Revenue to try to sustain the order under section 112. Consequently, we vacate that part of the order which imposes penalty on Shri K.S. Goindi, Managing Director.

10. *Third point urged by the Learned Counsel is that Section 114A could not be invoked in relation to imports effected prior to 28-9-1996. Section 114 imposes penalty on the person who is liable to pay duty as determined under section 28(2). Circumstances which warranted an order under section 28(2) should have come into existence subsequent to 28-9-1996 for invoking section 114A. If the situation arose prior to 28-9-1996 the penalty under section 114A cannot be imposed on the importer. Penalty under section 114A can be imposed on persons who created situation warranting action under section 28(2) subsequent to 28-9-1996 only. Article 20 of the Constitution of India specifically stated that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. Nor can he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In view of the specific provision contained in Article 20(1) of the Constitution, no importer can be made liable to pay a penalty contemplated by Section 114A in relation to an act done prior to its coming into force. Section 114A came into statute book only with effect from 28-9-1996. Major portion of the imports were anterior to that date. In relation to such imports, no penalty as contemplated by Section 114A could be imposed. According to the Learned Counsel representing the appellant duty on all the goods imported subsequent to 28-9-1996 comes only to Rs. 27,49,000. Penalty under section 114A in relation to such goods can also amount to Rs. 27,49,000. So, penalty imposed on the company has to be limited to Rs. 27,49,000. We do so and the impugned order modified accordingly."*

4.11 In the case of Kobian ECS India P. Ltd. [2003 (157) ELT 662 (Tri.-Mumbai)], following has been held:-

"3. *After hearing both sides and considering the material it is found -*

(a) The provisions regarding DEPB Scheme are contained in Paras 7.14 to 7.17 of Import-Export Policy, 1997-2002 (April, 2000 Edition). The procedure regarding applying for DEPB and obtaining credit are contained in Paras 7.38 to 7.53 of the Handbook of Procedures, Vol. 1. During the period in question, DEPB on post-export basis alone was to be granted. The provisions regarding grant of DEPB credit on pre-export basis have been deleted during the periods in question. Perusal of the relevant policy paras reveal that when the exporter, exports the goods under cover of DEPB Shipping Bills. At the time of export, the Customs Department will examine the goods vis-a-vis the description given on the shipping bill to ensure that the goods described on the shipping bill alone are actually exported. The Customs Department would also verify the FOB value declared by the exporter with regard to Present Market Value (PMV), and hand over the Export Promotion Copy of Shipping Bill to the Exporter.

(b) The exporter after realising the export sale proceeds, will apply to the prescribed authority in the office of the Director General Foreign Trade Ministry of Commerce (herein after refer to a DGFT) in the form prescribed in Appendix 11C of the Handbook of Procedures, along with prescribed documents, such as Export Promotion Copy of Shipping Bills, export realisation certificate. The applicant also indicates the product description and the rate of credit available to the said goods as per the rate prescribed by the DGFT in the DEPB Schedule. The DGFT issue Duty Entitlement Pass Book licence and a Pass Book after scrutiny of the application form in Appendix 11C. The DGFT grants the DEPB rates, as claimed, on the export goods, which had been verified by the Customs Department. The credit given in the Passbook can be utilized for payment of duty on the imported goods. At the time of payment of duty on the imported goods debit the Passbook, the Customs once again verify the DEPB Licence.

(c) *The Central Board of Excise and Customs vide Circular dated 17-4-97 has described the procedure to be followed under DEPB Scheme. In its circular dated 3-6-1997 in paras 1 and 2 the Board has directed as under.*

"Attention is invited to Circular No. 10/97-Cus. dated 17-4-97 whereby detailed guidelines for operation of duty entitlement passbook scheme were issued. The said circular provides for the exporters to declare in the shipping bill the serial number of the export products in the public notice issued by the DGFT and the rate claimed. It was further provided that correctness of this declaration should be verified by processing the shipping bill and also at the time of examination of the goods.

2. This matter has been re-examined. It has been decided that the role of customs authorities should be confined to verification of correctness of exporter's declaration regarding description, quantity and FOB value of the export product. It will be for the licensing authorities granting credit to ensure that credit is permitted by them at the correct rate as notified by the DGFT."

(d) *The CEGAT in the case of M.K. Fisheries v. Commissioner of Customs - [2002 \(150\) E.L.T. 998](#) has held in Para 5 as under :*

".....Therefore we find that while the Customs cannot sit in judgment over any decision regarding quantum of DEPB to be credited in the passbook, yet in all fairness justice require that if the Customs find any variation between the description of the goods as declared on the shipping bill and as declared in terms of public notice issued by the Customs House for the same consignment they would be entitled to bring such discrepancy to the notice of the DGFT and await for further orders on the quantum of credit to be given under DEPB from DGFT."

Similar view was taken by the Calcutta High Court in the case of Kanhaiya Exports v. Commissioner of Customs - [2001 \(133\) E.L.T. 280](#) with regard to verification of the documents. This decision of the Calcutta High Court has been confirmed by

the Division Bench of High Court as reported in [2001 \(133\) E.L.T. 537](#).

(e) In this view of the policy, procedure instructions and the law, in the matter of DEPB, we cannot uphold the decision arrived at by the Commissioner to have impugned the exports and come to a finding that the exports made in this case were not entitled to DEPB under serial no. 86 of the Product Code 83 of the DEPB Schedule. Since all that was required, in the case was for the Commissioner to have reported the matter to the DGFT authorities and not sit in judgments over the grant and or determine entitlement of DEPB which were not within the jurisdiction of the Customs to do so. The order of determination of the eligibility or otherwise of DEPB as made in this case cannot be upheld.

(f) The DEPB Schedule describe PC Boards' without any qualification or restrictions. Relying on the case of Atari (India) Electronics - [1990 \(45\) E.L.T. 321](#) it could be held that both kinds of Circuit Boards i.e. plain or unpopulated or printed and populated could be covered as PC Boards. The Commissioner has come to a finding 'In fact the items imported was fully assembled item to be used as an add on card for computer' is a finding arrived without any material or expert agencies reports on record. Para 1 of the impugned order reads as -

".....Examination of the goods by the customs officers showed that goods were misdeclared. The item being exported was not a PC board as claimed, but was a Populated Printed Circuit Board containing various components and was infact a fully assembled component of computer system. The goods were infact thus found to be Populated PCB. 'Mercury multimedia KOB N 620, Graphic Processor with 32 MB memory size optimized for Pentium III SSB and AMD-3D NOW'. The item is also described as Graphic Accelator. The packing list also showed that the goods were described by the exporter as 'Graphic Accelerator Multimedia for graphic processing and video acceleration purposes for enhanced screen

resolution, colour depths and refresh rate'. This description was not appearing either in the invoice or in the Shipping Bill. It, therefore, appeared that the goods were misdeclared with an attempt to claim DEPB that was not available....."

These charges, as made and how the goods constitute to be an add on card and why add on card cannot be a PCB, have not been clearly and conclusively established by giving reasons in the findings. The declaration in the Shipping Bills need not always be in technical details explaining the functions. It is not brought out in the order that the packing list was suppressed or kept away from the Customs Officers. Infact the declaration made on the Shipping Bill, as seen from Para 1 of the impugned order was 'Printed Circuit Board Double Sided (AGP Card TNT2/M84)'; which would indicate that the 'Card nature' with technical specification was indeed declared. The charge of misdeclaration therefore cannot be upheld.

(g) The finding of the Commissioner that Rule 14 of the Foreign Trade (Regulation) Rules, 1993 especially sub-rule (2) thereof read with Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 the goods should be deemed to render the export goods, prohibited goods and therefore liable for confiscation under Section 113(d) and 113(i) of the Customs Act, 1962 on consideration is found to be not correct interpretation of law. Even if the alleged misdeclaration finding is to be upheld. It is found that Foreign Trade (Regulation) Rules, 1993 issued vide Ministry of Commerce Notification No. GBR 791(E), dated 30-12-1993 have been issued under the powers confirmed by Section 19 of the Foreign Trade (Development and Regulation) Act, 1992 by the Central Government and not under the powers which would be exercised by the Central Govt. to issue an order under Section 3(2) of the Foreign Trade (Development and Regulation) Act, 1992, which would vide sub-section (3), would then deem then to be a prohibition under Section 11 of the Customs Act, 1962. Besides of Rule 14(1) and 14(2) of Foreign Trade (Regulation) Rules, 1993 on a plain reading, would cover declaration for obtaining a licence and import any goods and DEPB's would not be covered by the word

'Licence' as defined in the Foreign Trade (Development and Regulation) Act, 1992. A claim for DEPB export would not be a declaration for import. In this view of the matter, the liability for confiscation of the goods, being prohibited goods, under Section 113(d) and/or 113(i), as brought out by the Commissioner cannot be upheld. Confiscation arrived at under Section 113(d) or/and 113(i) cannot be upheld.

(h) Ones goods are not found to be liable for confiscation, penalty under Section 114(i) of the Customs Act, 1962 cannot be sustained. The penalty imposed is required to be set aside."

4.12 Similar view has been expressed by the Tribunal in the case of Polynova Chemicals Ltd. [2005 (179) ELT 173 (Tri.-Mumbai)].

4.13 The decisions relied upon by the learned AR do not advance the case of the Revenue.

4.14 The decision in the case of Munjal Showa Ltd. [order dated 23.09.2022 in Civil Appeal No. 2576 of 2020 and Civil Appeal No. 5608 of 2011] holds as follows:-

"5. It was/is the case on behalf of the assessee that in the facts and circumstances of the case, the Department was not justified in invoking the extended period of limitation.

5.1 Relying upon the decision of this Court in the case of Commissioner of Customs (Preventive) Vs. Aafloat Textiles India Private Limited and Ors., (2009) 11 SCC 18, it is submitted that as observed and held by this Court even in the case of a fraud, an inquiry was required to be made whether the appellant(s) - buyer(s) had knowledge that DEPB Scripps were forged or fake.

6. While opposing the present appeal, Shri Vikramjit Banerji, learned ASG has submitted that in the present case, admittedly the DEPB licences/Scripps purchased by the appellant(s) of which the exemption benefit was availed, are found to be forged and fake. It is submitted that, therefore, the appellant(s) being beneficiaries of such forged and fake DEPB licenses/Scripps were liable to pay the Customs Duty of which the exemption benefit was availed against such DEPB licenses/Scripps. It is submitted

that as rightly observed by the High Court as well as by the Tribunal that fraud vitiates everything and therefore, such forged/fake DEPB licenses/Scripps are void ab initio. It is submitted that therefore, no error has been committed in confirming the Customs Duty.

7. We have heard the learned counsel appearing on behalf of the respective parties at length.

8. From the judgment and order passed by the Tribunal and even from the findings recorded by the Department, it has been found that the DEPB licenses/Scripps, on which the exemption benefit was availed of by the appellant(s) (as buyers of the forged/ fake DEPB licenses/Scripps) were found to be forged one and it was found that the DEPB licenses/Scripps were not issued at all. A fraud was played and the exemption benefit was availed on such forged/fake DEPB licenses/Scripps.

9. In that view of the matter and on the principle that fraud vitiates everything and such forged/fake DEPB licenses/Scripps are void ab initio, it cannot be said that the Department acted illegally in invoking the extended period of limitation. In the facts and circumstances, the Department was absolutely justified in invoking the extended period of limitation.

10. It is also required to be noted that the moment, the appellant(s) was/were informed about the fake DEPB licenses, immediately they paid the Customs Duty, may be under protest. The Customs Duty was paid under protest to avoid any further coercive action. Be that as it may, the fact remains that the DEPB licenses/Scripps on which the exemption was availed by the appellant(s) was/were found to be forged one and, therefore, there shall be a duty liability and the same has been rightly confirmed by the Department, which has been rightly confirmed by the Tribunal as well as the High Court.

11. Now, so far as the submission on behalf of the buyer(s) - appellant(s) relying upon the decision of this Court in the case of Aafloat Textiles India Private Limited and Ors. (supra) is concerned, whether the buyer(s) had a knowledge about the fraud or the forged / fake DEPB licenses/Scripps and whether the appellant(s) - buyer(s) was/were to take requisite precautions to find out about the genuineness of the DEPB licenses/Scripps

which they purchased, would have a bearing on the imposition of the penalty, and has nothing to do with the duty liability. It is to be noted that in the present case so far as the penalty proceedings are concerned, the matter is remanded by the Tribunal to the adjudicating authority, which is reported to be pending."

Similar view has been expressed in the case of Pradyumna Steel Ltd. [1996 (82) ELT 441 (SC)] stating as follows:

"3. *It is settled that mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power. Thus, there is a clear error apparent on the face of the Tribunal's order dated 23-6-1987. Rejection of the application for rectification by the Tribunal was, therefore, contrary to law."*

4.15 All these judgments are not applicable in the present case as it is not the case of the erroneous mention of the provisions of the Act under which penalties have been imposed. Show cause notice has stated different provisions for imposition of penalty. Adjudicating authority imposed penalty under different provisions and the appellate authority modified the same under different provisions as seen. It is not the case of wrong mention but it is a case of a conscious decision taken under which penalty has been imposed and upheld. These decisions do not advance the case of the Revenue in this regard.

4.16 The decision in the case of Mercedes Benz India Pvt. Ltd. & others [Final Order No. 50031-50060/2020 dated 09.01.2020] applies in the present case because the issue is not in regard to upholding penalty under Section 114AA of the Customs Act in respect of export of goods, but the issue is whether penalty could have been imposed under the provisions of a section which was not even existent at the time when the offence was alleged to be committed.

4.17 Similarly, the case of Munjal Showa Ltd. (supra) is with regard to the penalties imposed on the persons importing the goods under DEPB scrips found to be forged and fake. Appellant

is neither an importer nor has claimed any benefit of any exemption under any DEPB scrips found to be forged and fake. In such a situation the said judgment also does not advance the case of Revenue.

4.18 Appeals are allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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