R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.CJ.

CUSTOM APPEAL NO. 68 OF 2018

Mahesh P. Patel .. Appellant

Versus

The Commissioner of Customs (EP) .. Respondent

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- Mr. Bharat Raichandani a/w Ms. Pragya Roolwal, Mr. Rajan Mishra i/by Vaibhav Patankar for the Appellant
- Mr. Pradeep S. Jetly for the Respondent

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CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.

DATE : DECEMBER 12, 2018.

P.C.:

1. Since a short issue arises in this appeal, with the consent of the learned counsel for the parties, we have heard the appeal finally. For the purpose of final disposal of the appeal, following substantial question of law is framed:-

> "(i) Whether in the facts and circumstances of the case, the Hon'ble CESTAT was justified in holding the penalty of Rs. 5 Lacs imposed by the respondent vide the order-in-original No. 09A/2010/CAC/CC/RBT dated 29.1.2010?"

The above question arises in following background:-

The appellant - assessee is a Chartered Accountant. The Custom Authorities found that one M/s. Spectrum Fabrics had made import of polyester fabrics without payment of duty under the Duty Exemption Entitlement Certificate ("**DEEC**" for short) under advance licenses and the goods so imported were illegally diverted to the local market instead of utilizing the same for production and export of goods. A show cause notice was issued on the said importer in December, 2006. The appellant herein was one of the co-noticee. Allegations against him contained in the said show cause notice read as under:-

> " **Shri. Mahesh P. Patel,** Chartered Accountant, has abetted in the aforesaid fraud. He has issued Export Performance Certificate and Solvency Certificate in the name of M/s. Spectrum Fabrics, without verifying the facts and authenticity of the documents produced before him. The certificates issued by him enabled M/s. Spectrum Fabrics to fraudulently obtain Advance Licenses from the office of DGFT, Mumbai, for duty-free import of fabrics and to divert them into the open market, in violation of the conditions prescribed in the raid Advance Licenses. For his acts of omission and commission, he is liable for penalty under Section 112 of the Customs Act, 1962."

2. The appellant opposed the proposal for imposition of penalty as contained in the above show cause notice. The Commissioner of Customs by his order dated 29.1.2010 imposed a penalty of Rs. 5 Lacs on the appellant under Section 112(a) of the Customs Act, 1962 ("**the Act**" for short). The Commissioner referred to the statement of the appellant recorded by the authorities under Section 108 of the Act and held as under:-

> (d) Regarding imposition of penalty or otherwise on Shri. Mahesh Patel, other cases cited were Mis. M.M. Raikhanna (2005 (186) ELT 322), CCE Vs. Shal Dalitchand Kapoor Chand & Co (1989(41) ELT 167), Shri. Kaigaontar & Ors. Vs. Gold Control Adm (1986 (23) ELT 523 (1), Smt. Vidya Wati Vs. State (1988 (37) ELT 341(del)) and Laxmi Packaging (P) Ltd (1998(98) ELT 91(T)), I dins that in the case of M.M. Raikhana, it was held by the Hon'ble Tribunal that penalty on a person is not sustainable in the wake of no evidence produced to show that the advance licence would not be used in the manufacture of export goods. The ratio of this case is not applicable in the present case because herein there is an 'admitted' evidence of Shri. Mahesh Patel that he had not verified the documents before giving the export performance certificates. Thus, the allegation of 'no evidence' by the noticee doesn't survive. I also find that the rest of the cases are either not relevant to the subject case or deals with cases wherein there is penalty and confiscation ordered in cases of lack of evidence against the appellants. As discussed herein above, the ratio of these cases are not applicable since the subject case matter.
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> (iv) After considering the charges in the Show Cause Notice and the evidences discussed herein above, I find that Shri. Mahesh Patel, Chartered Accountant has issued false certificates which resulted in grant of advance licenses which would not have been otherwise issued and no duty free imports defrauding Government's revenue would have taken place but for such false certificates. The noticee, admittedly, having not verified any of the records could not take up a plea of not having played in role of fraud. I find that the subject

matter is squarely covered by the Hon'ble High Court of Bombay's order dated 1.2.2006 in the case of Shri. Shyam Chaganlal Agarwal Vs. Commissioner of Customs (Import) cited in 2008 (226) ELT 176 wherein it was held accordingly. I therefore, hold Shri. Mahesh Patel liable for penalty under Section 112(a) of the Customs Act, 1962."

3. The appellant challenged the said order of the Commissioner of Customs before the Customs, Excise & Service Tax Appellate Tribunal. By the impugned judgment dated 8.5.2018, the Tribunal dismissed the appeal. After referring to the discussion concerning the appellant in the order passed by the Commissioner, the Tribunal concluded as under:-

"4.1 From the above detailed finding of the learned Commissioner, it is seen that the appellant Shri. Mahesh P. Patel has issued the solvency certificate on the basis of balance sheet which was not signed by the Chartered Accountant. Therefore, he was not supposed to issue any certificate which is not based on the audit of books of accounts. Accordingly, on the basis of the certificate issued by the Chartered Accountant, Shri. Mahesh P. Patel, M/s. Spectrum Fabrics obtained the advance licence fraudulently which resulted in huge revenue loss of Rs. 1.46 Crores customs duty to the Government exchequer. As per the role described by the adjudicating authority, it is clear that the appellant Shri. Mahesh P. Patel was knowingly involved in facilitating M/s. Spectrum Fabrics for entire fraud. Therefore, we do not see any reason to take any lenient view. Hence, the penalty of Rs. 5 Lacs imposed on Shri. Mahesh P. Patel is justified and no interference is required. Accordingly, we uphold the penalty imposed under Section 112(a) on Shri. Mahesh P. Patel. "

4. Having heard the learned counsel for the parties and having perused the documents on record, we notice that in the show cause notice, the only allegation against the appellant was that as a chartered accountant, he has abated in the fraud committed by the principal importer since he had issued Export Performance Certificate and Solvency Certificate in the name of said M/s. Spectrum Fabrics without verifying the facts and authenticity of the documents produced before him. As per the show cause notice, these certificates issued by the appellant enabled M/s. Spectrum Fabrics to fraudulently obtain advance licenses from the Director General of Foreign Trade ("**the DGFT**" for short") for making duty free imports of the fabrics which were diverted into local market in violation of the condition of the advance licence.

5. The show cause notice itself, is thus, sufficiently clear. Against the appellant, only allegation was that he had issued certificates without full verification. This in turn, enabled the importer to obtain advance licence. This advance licence was utilized for making duty free import of goods which were in breach of the condition of license diverted into local market. In so far as the appellant - assessee is concerned, his involvement even as per the show cause notice was confined to issuing certificates without full verification.

6. In the final order of the adjudication also, the Commissioner came to confirm the allegations made in the show cause notice without traveling beyond them, which any case, he could not have. He referred to the assessee's statement recorded under Section 108 of the Act and concluded that the arguments advanced on behalf of the assessee were in the nature of retraction of the statement which the assessee had never retracted earlier. The Commissioner held that the assessee had certified that he (the assessee) had verified the books of accounts which in fact he had not done.

7. Since the Commissioner had made a reference to the assessee's statement under Section 108 of the Act, we have also perused such a statement. In the said statement, the only exculpatory part was that the assessee admitted his mistake in giving the certificate without having balance sheet duly certified by the chartered accountant for which he had charged Rs. 3000/-.

8. The sum total of the material on record would be that at the very outset, the department's allegations against the assessee in the show cause notice were that he had issued certificates such as Solvency Certificate and Export Performance Certificate without full verification of the records. The show cause notice further clarifies that on the strength of such certificates, the importer could obtain advance licence from DGFT. On the strength of such advance licence, duty free imports were made. In breach of the conditions of advance licence, the goods were diverted to the local market. Even according to the show cause notice and the ultimate conclusions confirmed by the Commissioner in his penalty order, the role of the assessee ends with issuing the certificates. There is no allegation that the assessee was either part of or aware of impeding fraud which the importer intended to perpetrate. Whatever be the fault of assessee in exercising the due diligence in issuing the relevant certificates, even according to the department as emerges from the show cause notice and the order of the Commissioner, no role was played by him in so far as the imports and illegal diversion of the imported goods to local market are concerned. The Commissioner has confirmed penalty under Section 112(a) of the Act which envisages imposition of penalty on any person who in relation to any goods does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111 or abates the doing or omission of such act. While ordering confiscation of the goods by the said order imposing penalty on the appellant, the Commissioner has relied on clause (o) of Section 111 of the Act. This clause makes goods brought from a place outside India liable to confiscation if the goods are exempted, subject to any condition from duty or any prohibition in respect of the imports and in respect of which the condition is not observed which non-observance is without sanction of the proper officer.

9. Even accepting the allegations contained in the show cause notice against the assessee and the final findings of the Commissioner in the penalty order, it cannot be stated that the assessee either had done or committed to do any act which would render the goods liable to confiscation under Section 111 of the Act. With equal force even the abatement clause contained in clause (a) of Section 112 of the Act would not apply since it is not the allegation of the department against the appellant that he had in any manner either directly or indirectly aided or facilitated the importer to commit the fraud.

10. The Tribunal in the impugned judgment erroneously expanded the findings of the Commissioner by observing that the role prescribed by the adjudicating authority to the assessee was of knowingly being involved in facilitating the importer to commit the fraud. This was neither the allegations contained in the show cause notice nor was the findings of the Commissioner. In fact the allegations and the findings clearly were that the assessee had acted without due care and issued the certificates without full verification.

11. In these circumstances, impugned order of the Tribunal against the appellant is set aside Question answered in favour of the appellant. The appeal is disposed of.

[M.S. SANKLECHA, J.] **[AKIL KURESHI, J]**