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C.M.A.Nos.84 of 2013 & etc. batch

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 19.08.2024
Pronounced On : 30.10.2024

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN

**C.M.A.Nos.84, 807, 89, 90, 816, 18, 826, 783, 808, 809, 810, 86, 87,
253, 794, 795, 796, 789, 790, 779, 780, 781, 811, 782, 784, 787, 788,
822, 823, 824, 825, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806,
812, 813, 814, 815, 785, 786, 791, 792, 793, 817, 818, 819, 820, 821, 827,
828, 829, 85, 873, 88, 776, 777 & 778 of 2013**

and

C.M.A.Nos.3123 & 3653 of 2012

and

**CMA.Nos.1770, 1765, 1766, 1771, 1775, 1773, 1774, 1772, 1776, 1767,
1768 & 1769 of 2016**

and

**M.P.Nos.1, 1, 1, 1, 1, 1, 1, 1, 1, 2 & 2 of 2013 & 1 of 2012 and
W.M.P.Nos.25454 & 25456 of 2024 and**

**CMP.Nos.13161, 13162, 13158, 13159, 13163, 13152, 13153, 13160,
13154, 13155, 13156 & 13157 of 2016**

C.M.A.No.84 of 2013

Nemichand Desarlla,
Proprietor, Ganapathy Enterprises,
38, Strotten Muthiah Street, Sowcarpet,
Chennai-600 079.

.. Appellant

VS

1.The Commissioner of Customs



C.M.A.Nos.84 of 2013 & etc. batch

(Seaport Exports),
Customs House,
No.60, Rajaji Salai,
Chennai-600 001.

2.The Customs Excise & Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhawan Annexe, 1st Floor,
No.26, Haddows Road,
Chennai-600 006.
Rep. by its Assistant Registrar.

.. Respondents

Prayer in C.M.A.No.84 of 2013: Appeal filed under Section 130 of the Customs Act, 1962 against the Common Final Order No.701 to 767 of 2012 dated 22.06.2012 in Appeal No.C/408/07 Received by Appellant on 27.06.2012 passed by the Customs Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, confirming penalty amount against the Appellant imposed under Section 112(a) of the Customs Act, 1962.

Case Nos.	For Appellants	For Respondents
84, 86 & 87 of 2013	Mr.B.Satish Sundar	Mr.Rajnish Pathiyil (for R1) R2- Tribunal
1770, 1765, 1775, 1771, 1773, 1774, 1772, 1776, 1766, 1767, 1768 & 1769 of 2016	Mr.B.Hari Radhakrishnan	Mr.Rajnish Pathiyil (for R1) R2- Tribunal
807, 783 & 808 of 2013	Mr.Rajnish Pathiyil	Mr.S.Murugappan (for R1) R2- Tribunal
89, 90, 85 & 88 of 2013	Mr.B.Satish Sundar	Mr.Rajnish Pathiyil (for R1)



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816, 809, 789, 779, 822, 806, 813, 785, 821, 828 & 777 of 2013	Mr.Rajnish Pathiyil	R2- Tribunal R1 – Person not found R2- Tribunal
18 of 2013	Mr.S.Murugappan	Mr.Rajnish Pathiyil
826, 794, 795, 801, 802, 803, 791 & 827 of 2013	Mr.Rajnish Pathiyil	R1-Tapal not yet returned either served or unserved R2-Tribunal
810, 784, 788, 823, 792, 829 & 778 of 2013	Mr.Rajnish Pathiyil	R1-Incorrect address R2 - Tribunal
253 of 2013 3123 of 2012	Mr.S.Murugappan	Mr.Rajnish Pathiyil (for R2) R1- Tribunal
796, 780 & 793 of 2013	Mr.Rajnish Pathiyil	Mr.S.Murugappan (for R1) R2- Tribunal
790, 812 & 786 of 2013	Mr.Rajnish Pathiyil	R1 – No appearance R2- Tribunal
781, 782, 824, 825, 797, 798, 799, 800, 804, 805, 814, 815, 817, 818, 819 & 820 of 2013	Mr.Rajnish Pathiyil	Mr.B.Satish Sundar (for R1) R2- Tribunal
811 & 787 of 2013	Mr.Rajnish Pathiyil	R1 – No appearance R2- Tribunal
3653 of 2012	Mr.M.A.Mudi Mannan	Mr.Rajnish Pathiyil (for R2) R1- Tribunal
873 of 2013	Mr.S.Hari Radhakrishnan	Mr.Rajnish Pathiyil
776 of 2013	Mr.Rajnish Pathiyil	Mr.Joseph Prabhakar (for R1) R2- Tribunal

COMMON JUDGMENT

(Delivered by Dr.ANITA SUMANTH..J)



C.M.A.Nos.84 of 2013 & etc. batch

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This order disposes 78 Civil Miscellaneous Appeals filed at the instance of importers, licence brokers and traders, as well as the Commissioner of Customs challenging an order passed on 14.06.2012 by the Customs Excise and Service Tax Appellate Tribunal (CESTAT/Tribunal) at Chennai. Since C.M.A No.1766 of 2016 involving identical issues was not listed on that date, the matter was directed to be listed in a special list and forms part of the batch being disposed today by way of this common order.

2.The CESTAT, by way of the impugned order, disposed 67 appeals preferred by importers and traders of Duty Entitlement Pass Book (DEPB) scrips and Telegraphic Release Advice (TRA) challenging adjudication orders, alleging that the TRAs and DEPBs had been forged and constituted fabricated instruments.

3.Under the orders of adjudication, the authorities had confiscated the DEPB licences and TRAs and had raised demands of Customs Duty under Section 28(1) of the Customs Act, 1962 (Act) along with penalty under various provisions, including Sections 112(a) and 114(A) of the Act.



4.The CESTAT dismissed the appeals in full in the case of Satish Mohan Agarwal holding him to have played a pivotal role in the entire sequence of fraudulent events including the preparation of the fake DEPB scrips and TRAs. Penalty was also upheld.

5.In the case of the importers, the duty and interest was confirmed, and the penalties were set aside in full. In the case of the traders/brokers/ sub-brokers too, the duty and interest was upheld, and the penalty was reduced to 50%. As against the aforesaid conclusions, cross appeals have been filed by (i) Satish Mohan Agarwal challenging the confirmation of the adjudicatory order in full (ii) by the importers/licence holders/traders aggrieved by that portion of the order confirming part of the duty/penalty and (iii) by the Revenue contesting the deletion of duty, interest and part/whole of the penalty.

6.The substantial questions of law admitted for consideration are as follows:

'C.M.A.No.84 of 2013 (appeal filed by Nemichand Desarlla, who is a License Broker)

1.Is the 2nd respondent Tribunal right in confirming penalty of Rs.75,000/- on the appellant in terms of Section 112(a) of the Customs Act, 1962, especially when it has been shown and established that the appellant had no prior knowledge of the forged/fabricated nature of the DEPB Licence/TRAs, which was purchased in open market, being



freely transferable, and more so when such licence/TRAs came in sealed cover?

2.Is the findings of the 2nd respondent Tribunal at paragraph 12 of the order impugned as against the appellant sustainable? In this connection, is the Tribunal correct in entering a finding that the appellant should have made enquiries with Customs Authorities and others as to the validity of the licence sustainable in light of the fact that the licence/TRAs were purchased and sold in the ordinary course of business and there was not even a reasonable belief entertained as to the nature of the said licence/TRAs at that point of time?

3.Is the Tribunal right in penalizing the appellant on the charge of abetment of use of forged/fabricated DEPB/TRA by the importer for obtaining duty free clearance or imports, when the Tribunal itself has vacated the imposition of penalty on the importer consciously?

4.Has the Tribunal committed an error of jurisdiction inasmuch as no act of commission or omission or abetment of such is attributable to the appellant qua the liability of the goods imported for confiscation. In this regard, has the tribunal overlooked the fact that penalty under section 112 is confiscation related and inasmuch as there is no specific order of confiscation of the imported goods, can the appellant be made liable for penalty?

5.Is the order of the 2nd respondent Tribunal vitiated on account of the fact that it has taken into consideration irrelevant and extraneous material while leaving out germane and relevant ones as expatiated in the grounds?

6.Is the 2nd respondent Tribunal as a final fact finding body expected to sift, weigh and examine the evidences and material in detail before rendering findings and has such an exercise been done in the facts and circumstances of the present case?

7.Is the 1st respondent Tribunal right in holding that the appellant would still be liable for penalty, in spite of the fact that the main importer in the present case, who had approached the Settlement Commission, which had granted immunity from fine, penalty and confiscation?



8.Does, the Show Cause Notice and allegations survive against persons, who had not approached the Settlement Commission, in the case where the main party approaches the Settlement Commission by filing a settlement application against the show cause notice and gets the case settled with grant of immunity from penalty, fine, confiscation etc.?’

‘C.M.A.Nos.85 & 89 of 2013 (appeal filed by P.Suresh Kumar and Sohanlal, who are License Brokers)

1.Is the 2nd respondent Tribunal right in confirming penalty of Rs.50,000/- on the appellant in terms of Section 112(a) of the Customs Act, 1962, especially when it has been shown and established that the appellant had no prior knowledge of the forged/fabricated nature of the DEPB Licence/TRAs, which was purchased in open market, being freely transferable, and more so when such licence/TRAs came in sealed cover?

2.Is the findings of the 2nd respondent Tribunal at paragraph 12 of the order impugned as against the appellant sustainable? In this connection, is the Tribunal correct in entering a finding that the appellant should have made enquiries with Customs Authorities and others as to the validity of the licence sustainable in light of the fact that the licence/TRAs were purchased and sold in the ordinary course of business and there was not even a reasonable belief entertained as to the nature of the said licence/TRAs at that point of time?

3.Is the Tribunal right in penalizing the appellant on the charge of abetment of use of forged/fabricated DEPB/TRAs by the importer for obtaining duty free clearance or imports, when the Tribunal itself has vacated the imposition of penalty on the importer consciously?

4.Has the Tribunal committed an error of jurisdiction inasmuch as no act of commission or omission or abetment of such is attributable to the appellant qua the liability of the goods imported for confiscation. In this regard, has the tribunal overlooked the fact that penalty under section 112 is confiscation related and inasmuch as there is no specific



order of confiscation of the imported goods, can the appellant be made liable for penalty?

5.Is the order of the 2nd respondent Tribunal vitiated on account of the fact that it has taken into consideration irrelevant and extraneous material while leaving out germane and relevant ones as expatiated in the grounds?

6.Is the 2nd respondent Tribunal as a final fact finding body expected to sift, weigh and examine the evidences and material in detail before rendering findings and has such an exercise been done in the facts and circumstances of the present case?

‘C.M.A.No.86 of 2013 (appeal filed by Saptagir Camphor Ltd., who is an Importer)

1.Is the 2nd respondent Tribunal right in confirming duty and interest on the appellant, especially when it has been shown and established that the appellant had no prior knowledge of the forged/fabricated nature of the DEPB Licence/TRAs, which was purchased in open market, being freely transferable, and more so when such licence/TRAs came in sealed cover?

2.Is the findings of the 2nd respondent Tribunal at paragraph 10 of the order impugned as against the appellant sustainable? In this connection, is the Tribunal correct in entering a finding that the appellant should have made enquiries with Customs/DGFT Authorities and others as to the validity of the licence sustainable in light of the fact that the licence/TRAs were purchased and sold in the ordinary course of business and there was not even a reasonable belief entertained as to the nature of the said licence/TRAs at that point of time?

3..Has the Tribunal committed an error of jurisdiction inasmuch as no act of commission or omission or abetment of such is attributable to the appellant qua the liability of the goods imported for confiscation, especially when no order of confiscation has been passed by the 1st respondent and the



penalty imposed had been set aside by the 2nd respondent Tribunal itself in the impugned order?

4.Is the order of the 2nd respondent Tribunal vitiated on account of the fact that it has taken into consideration irrelevant and extraneous material while leaving out germane and relevant ones as expatiated in the grounds?

5.Is the 2nd respondent Tribunal as a final fact finding body expected to sift, weigh and examine the evidences and material in detail before rendering findings and has such an exercise been done in the facts and circumstances of the present case?

‘C.M.A.No.87 of 2013 (appeal filed by P.Suresh Kumar, who is a Licence Broker)

1.Is the 2nd respondent Tribunal right in confirming penalty of Rs.75,000/- on the appellant in terms of Section 112(a) of the Customs Act, 1962, especially when it has been shown and established that the appellant had no prior knowledge of the forged/fabricated nature of the DEPB Licence/TRAs, which was purchased in open market, being freely transferable, and more so when such licence/TRAs came in sealed cover?

2.Is the findings of the 2nd respondent Tribunal at paragraph 12 of the order impugned as against the appellant sustainable? In this connection, is the Tribunal correct in entering a finding that the appellant should have made enquiries with Customs Authorities and others as to the validity of the licence sustainable in light of the fact that the licence/TRAs were purchased and sold in the ordinary course of business and there was not even a reasonable belief entertained as to the nature of the said licence/TRAs at that point of time?

3.Is the Tribunal right in penalizing the appellant on the charge of abetment of use of forged/fabricated DEPB/TRA by the importer for obtaining duty free clearance or imports, when the Tribunal itself has vacated the imposition of penalty on the importer consciously?



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4. *Has the Tribunal committed an error of jurisdiction inasmuch as no act of commission or omission or abetment of such is attributable to the appellant qua the liability of the goods imported for confiscation. In this regard, has the tribunal overlooked the fact that penalty under section 112 is confiscation related and inasmuch as there is no specific order of confiscation of the imported goods, can the appellant be made liable for penalty?*

5. *Is the order of the 2nd respondent Tribunal vitiated on account of the fact that it has taken into consideration irrelevant and extraneous material while leaving out germane and relevant ones as expatiated in the grounds?*

6. *Is the 2nd respondent Tribunal as a final fact finding body expected to sift, weigh and examine the evidences and material in detail before rendering findings and has such an exercise been done in the facts and circumstances of the present case?*

7. *Is the 1st respondent Tribunal right in holding that the appellant would still be liable for penalty, in spite of the fact that the main importer in the present case, who had approached the Settlement Commission, which had granted immunity from fine, penalty and confiscation?*

8. *Does, the Show Cause Notice and allegations survive against persons, who had not approached the Settlement Commission, in the case where the main party approaches the Settlement Commission by filing a settlement application against the show cause notice and gets the case settled with grant of immunity from penalty, fine, confiscation etc.?’*

‘C.M.A.Nos.88 & 90 of 2013 (appeal filed by C.Mukesh Balar and P.Suresh Kumar, respectively, who are License Brokers)

1. *Is the 2nd respondent Tribunal right in confirming penalty of Rs.5,00,000/- on the appellant in terms of Section 112(a) of the Customs Act, 1962, especially when it has been shown and established that the appellant had no prior knowledge of the forged/fabricated nature of the DEPB Licence/TRAs, which was purchased in open market, being*



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freely transferable, and more so when such licence/TRAs came in sealed cover?

2.Is the findings of the 2nd respondent Tribunal at paragraph 12 of the order impugned as against the appellant sustainable? In this connection, is the Tribunal correct in entering a finding that the appellant should have made enquiries with Customs Authorities and others as to the validity of the licence sustainable in light of the fact that the licence/TRAs were purchased and sold in the ordinary course of business and there was not even a reasonable belief entertained as to the nature of the said licence/TRAs at that point of time?

3.Is the Tribunal right in penalizing the appellant on the charge of abetment of use of forged/fabricated DEPB/TRA by the importer for obtaining duty free clearance or imports, when the Tribunal itself has vacated the imposition of penalty on the importer consciously?

4.Has the Tribunal committed an error of jurisdiction inasmuch as no act of commission or omission or abetment of such is attributable to the appellant qua the liability of the goods imported for confiscation. In this regard, has the tribunal overlooked the fact that penalty under section 112 is confiscation related and inasmuch as there is no specific order of confiscation of the imported goods, can the appellant be made liable for penalty?

5.Is the order of the 2nd respondent Tribunal vitiated on account of the fact that it has taken into consideration irrelevant and extraneous material while leaving out germane and relevant ones as expatiated in the grounds?

6.Is the 2nd respondent Tribunal as a final fact finding body expected to sift, weigh and examine the evidences and material in detail before rendering findings and has such an exercise been done in the facts and circumstances of the present case?

7.Is the 1st respondent Tribunal right in holding that the appellant would still be liable for penalty, in spite of the fact that the main importer in the present case, who had approached the Settlement Commission, which had granted immunity from fine, penalty and confiscation?



8.Does, the Show Cause Notice and allegations survive against persons, who had not approached the Settlement Commission, in the case where the main party approaches the Settlement Commission by filing a settlement application against the show cause notice and gets the case settled with grant of immunity from penalty, fine, confiscation etc.?’

‘C.M.A.No.3653 of 2012 (appeal filed by K.I.International Ltd, who is an Importer)

1.Whether the goods imported by the appellant and duty paid under the DEPB licences which were not cancelled as false or fabricated or fake by DGFT, could be subjected to levy of Customs duty again?

2.Whether in the absence of knowledge on the part of the appellant that the licences purchased by them were fake or forged, the appellant be held liable, by invoking larger period of limitation and consequently, the demand is barred by limitation?

3.Whether the newly introduced Section 28 AAA of Customs Act effective from April, 2012 will operate retrospectively to levy duty on the goods imported and duty paid under DEPB licences validity issued by DGFT during 2003 because there was no provision under the Customs Act to levy duty on such circumstances during the relevant period?

‘C.M.A.No.253 of 2013 (appeal filed by M.K.Oil Corporation, who is a Trader/Importer)

1.When a demand has been made by invoking the extended period in terms of Section 28 of Customs act and when it is established that non-payment of proper duty is not on account of collusion or wilful misstatement or suppression of facts by the importer himself or his agent, then, is it still open to the respondents to recover the duties involved by holding that there is a fraud by others and that vitiates everything?



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2. When a demand has been issued in terms of the proviso to Section 28 of Customs Act, 1962, can the respondents confirm the demands by going beyond the scope of Section 28 holding that when fraud is involved, duty in any case has to be recovered?

3. When certain officials of the State itself are involved in the perpetuation of the fraud and when the appellants have acted on the basis of the documents emanating from the departments of the State, can the maxim “caveat emptor, qui ignorare non debuit quod jus alienum emit” (Let a purchaser beware; who ought not to be ignorant that he is purchasing the rights of another) be invoked?

4. Whether can the absence of due care or diligence be considered as substitutes for “collusion, wilful misstatement or suppression of facts” appearing in Section 28 of Customs Act, 1962?

5. When the first respondent has found that penalty is not imposable on the appellants, can still demand of duty by invoking the proviso to Section 28 be sustained?

‘C.M.A.No.3123 of 2012 (appeal filed by Sri Devi Extractions P. Ltd., who is a Trader/Importer)

1. When a demand has been issued in terms of the proviso to Section 28 of Customs Act, 1962, can the respondents confirm the demands by going beyond the scope of Section 28 holding that when fraud is involved, duty in any case has to be recovered?

2. Whether can the absence of due care or diligence be considered as substitutes for “collusion, wilful misstatement or suppression of facts” appearing in Section 28 of Customs Act, 1962?

3. When the first respondent has found that penalty is not imposable on the appellant, can still demand of duty by invoking the proviso to Section 28 be sustained?

C.M.A.Nos.777, 778, 779, 781, 782, 784, 785, 787, 788, 789, 791, 792, 794, 795, 797, 798, 799, 801, 802, 803, 804, 805, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822,



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823, 824, 825, 826, 827, 828 & 829 of 2013 (appeals filed by the Revenue)

1.As to whether the CESTAT was correct in setting aside the penalty imposed under Section 112(a) of the Customs Act, 1962 in the absence of any provision empowering such exercise of discretion under the Customs Act, 1962?

2.As to whether in the facts and circumstances of the case, the Tribunal was justified in setting aside the penalty without assigning any reason whatsoever when the finding rendered is contrary to the said order?

3.As to whether the Tribunal ought to have construed Section 112A in light of Section 114A and the Tribunal ought to have concluded that the penalty cannot be set aside?

4.As to whether the penalty contemplated under Section 112(a) of the Customs Act, 1962 which envisages imposition of penalty equal to the duty payable as determined under sub-section (2) of Section 28, and the interest payable thereon under Section 28AB or five thousand rupees whichever is higher, allows any scope for discretion to the adjudication authority to determine the penalty to an amount other than that which is mandated under Section 112(a) of the Customs Act, 1962?

C.M.A.Nos.1770, 1771, 1765, 1766, 1767, 1768, 1769, 1772, 1773, 1774, 1775 & 1776 of 2016 (appeals filed by the Satish Mohan Agarwal, who is the seller of DEPB scrips)

(i) Whether the Officers of the Directorate of Revenue Intelligence have jurisdiction to issue demand/show cause notice, as they are not 'Proper Officers' as defined under Section 2 (34) of the Customs Act, 1962 and consequently whether the impugned order is liable to be set aside on this ground?

(ii) Whether the Hon'ble Tribunal is right in upholding the imposition of penalty under Section 112 of the Customs Act, 1962 especially when Section 112 only empowers imposition of penalty on a person who acts or omits to do any



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act in relation to goods so as to render such goods liable to confiscation under Section 111?

(iii) Whether the Hon'ble Tribunal is right in holding that the demand is not barred by limitation in the face of requirement in sub-section 4 of Section 28 of the Customs Act, 1962 which states that the demand can be raised within a period of five years from the relevant date in a case where the duty was not paid by reason of collusion or wilful misstatement or suppression of facts by the importer or the agent or his employee in spite of the fact that the appellant did not colluded or make wilful misstatement or cause suppression any facts?'

C.M.A.Nos.776, 780, 783, 786, 790, 793, 796, 800, 806 & 807 of 2013 (appeals filed by the revenue)

1.As to whether the CESTAT was correct in setting aside the penalty imposed under Section 112(a) of the Customs Act, 1962 in the absence of any provision empowering such exercise of discretion under the Customs Act, 1962?

2.As to whether in the facts and circumstances of the case, the Tribunal was justified in reducing the penalty without assigning any reason whatsoever when the finding rendered is contrary to the said order?

3.As to whether the penalty contemplated under Section 112(a) of the Customs Act, 1962 which envisages imposition of penalty equal to the duty payable as determined under sub-section (2) of Section 28, and the interest payable thereon under Section 28AB or five thousand rupees whichever is higher, allows any scope for exercise of discretion to the Tribunal while considering the order of the adjudicating authority to determine the penalty to an amount other than that which is mandated under Section 112(a) of the Customs Act, 1962?

7.The conclusion of the CESTAT in the appeals are as follows:

'14.5 In view of the above findings, we hold that the importer appellants are liable to pay the duty and interest



adjudged against the imports made by them covered by the adjudications under appeal and the traders, brokers and sub-brokers of fake TRAs and DEPB scrips are liable to be penalised being instrumental in providing such instruments. We uphold the Orders-in-Original. However, in the fitness of the circumstances of the cases and to meet the ends of justice-

(1)Penalties are set aside against the importer-appellants while confirming the duty and interest demanded from them.

(2)We uphold the penalties imposed on appellant Shri Satish Mohan Agarwal in view of his pivotal role in the entire fraud beginning from making the fake, forged, false, fabricated and fraudulent DEPB scrips/TRAs.

(3)Penalties against the following abettor traders/Brokers/Sub-brokers in appeal are reduced by half as indicated hereunder. '

7.We first address the appeals of the importers/traders/licence agents/brokers. In this regard, we need only refer to the order of the CESTAT that has set out the background of the case in extenso.

8.The object of the Duty Entitlement Pass Book Scheme is to neutralize the incidence of customs duty on the import content of the product exported under the Scheme. An exporter applies for credit against exports, of the specified rates of import of raw materials, components, parts, packing material etc. The credit is sought with the Director General of Foreign Trade at the specified port, being the port of export.

9.The policy provides for DEPB scrips to be issued against exports. The scrips are freely transferable. DEPB scrips may also be issued by the



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DGFT against imports from ports other than the ports of export under the TRA facility as per the terms and conditions of relevant Notifications.

10. There was an investigation that was launched into the subject TRAs in the Chennai Port for clearance of imports. The investigation revealed that the TRAs were forged and fabricated, indicating that the DEPB scrips to which the TRAs related had not been transferred by the owner of the scrips to the importers in question.

11. This triggered a chain of events involving the importer, trader, brokers and sub-brokers all of whom had a hand in the fabrication and forgery. The subject TRAs were stated to be in connection with DEPB scrips registered in Nhava Sheva, Mumbai, which scrips had not been transferred by their registered owners. The investigation also revealed that no TRAs had been issued by Mumbai Customs to Chennai Customs House for use of the DEPB scrips mentioned therein for clearance of imports duty free at Chennai.

12. The individual appellants would argue that any discrepancy in the DEPB scrips and TRAs was on account of the negligence of the Customs authorities to make a proper enquiry and that there had been collusion involving the Customs officials who were also involved in the malpractices.



13.They refer to a communication dated 29.08.2005 from the Commissioner of Customs, Chennai to the Deputy Director, Directorate of Revenue Intelligence, Chennai, where the former states that in connection with the investigation into utilisation of fabricated TRAs and DEPB scrips at the Chennai Port, no verification had been carried out in Chennai as all the verification formalities would have been completed at the mother port.

14.The revenue draws attention to Section 46 of the Customs Act, which requires the importer to make a declaration in regard to the contents of the bill of entry. They argue that the declaration had evidently been false and thus the confirmation of the penalty by the CESTAT was in order.

15.In the context of the above rival submissions, useful reference may be made to the decision of the Punjab High Court in *Friends Trading Company v. Union of India* (254 ELT 652). After referring to the judgments of the Supreme Court in the cases of *S.P Chengalvaraya Naidu vs Jagannath* (AIR 1994 SC 853) and *Commissioner of Customs v. Essar Oil Ltd.* (172 ELT 433), the appeal was dismissed. The SLP as against that decision has also been dismissed by the Supreme Court in 258 ELT A 72.



16. In *ICI India v. Commissioner of Customs (Port, Chennai)* (184 ELT 339), the substantial question of law related to duty liability in the context of fake DEPB scrips. It was contended by the assessee in that case that there was no collusion on the part of that assessee and hence no portion of the liability would accrue to it and that it would be entitled to the benefit of the scrips.

17. This contention was rejected, the Court holding that there is no question of deriving any credit from forged scrips. While one may defend his case stating that there was no collusion or fraud, the liability for duty, interest and other statutory consequences are unavoidable.

18. The conclusions of the CESTAT are based upon the results of investigation which have established conclusively that the DEPB scrips and TRAs were fabricated and forged. The parties were thus held to be liable on the ground of fraud which, rightly has been held to vitiate the transactions in full.

19. The orders of the lower authorities and the order of the Tribunal, the final fact finding authority establishes clearly that the documents were fake. The explanations tendered by the individual appellants have also found to have no credence and nothing new is placed before us to persuade as to take a different view in this matter.



20.The questions of law raised for our consideration touch upon the factual findings rendered by the authorities. We see no reason to intervene in those findings as no perversity has been made out in any of the findings or in the appreciation of the facts and circumstances based upon which those findings have been rendered.

21.There is no question of law that arises for determination save what has been answered in the paragraphs to follow. The component of duty and interest have been confirmed in all cases and we find no cause to intervene. Some portion of the penalties have been reduced and the revenue is in appeal on this score.

22.As far as the Departmental appeals are concerned, a memo has been filed by the Commissioner of Customs to following effect:-

1. It is submitted that the prescribed lower monetary limit over which appeals are to be filed by the Customs Department before this Hon'ble Court has been revised by the Central Board of Indirect Taxes and Customs vide F.No.390/Misc./163/2010-JC dated 17.08.2011 for the purpose of reducing Government Litigation.

2. It is submitted that the monetary value of the following fifty-four Civil Miscellaneous Appeals (List Annexed with this Memo) are found to be below the prescribed monetary limit set as per F.No.390/Misc./30/2023-JC dated 02.11.2023.

It is therefore prayed that this Hon'ble Court may be pleased to take this memo on record, permit the Appellant



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to withdraw the fifty-four Civil Miscellaneous Appeals as enlisted in the table annexed and pass any further or other Orders as this Hon'ble Court deems fit in the facts and circumstances and thus render justice.

List of CMAs filed by Revenue

Sl. No.	Final Order No.	CMA.No.	Name of the 1 st Respondent
1	701 of 2012	776 of 2013	M/s.K.I.International Ltd.
2	702 of 2012	777 of 2013	Mr.Sashi Prakash Lohia
3	704 of 2012	778 of 2013	Mr.Neemichand Jain
4	705 of 2012	779 of 2013	Mr.Sashi Prakash Lohia
5	706 of 2012	780 of 2013	M/s.Sri Devi Extractions Pvt. Ltd.
6	708 of 2012	781 of 2013	Mr.Sohan Lal
7	709 of 2012	782 of 2013	Mr.P.Suresh Kumar
8	710 of 2012	783 of 2013	M/s.Suchitra Silk Pvt. Ltd.
9	712 of 2012	784 of 2013	Mr.Neemichand Jain
10	713 of 2012	785 of 2013	Mr.Sashi Prakash Lohia
11	714 of 2012	786 of 2013	M/s.Prashra Overseas Pvt. Ltd.
12	715 of 2012	787 of 2013	Mr.Pradeep Kabra
13	716 of 2012	788 of 2013	Mr.Neemichand Jain
14	717 of 2012	789 of 2013	Mr.Sashi Prakash Lohia
15	718 of 2012	790 of 2013	M/s.Symrise Pvt. Ltd.
16	720 of 2012	791 of 2013	Mr.Sashi Prakash Lohia
17	721 of 2012	792 of 2013	Mr.Neemichand Jain
18	722 of 2012	793 of 2013	M/s.Delphi – TVS Diesel Systems Ltd.
19	724 of 2012	794 of 2013	Mr.Sashi Prakash Lohia
20	725 of 2012	795 of 2013	Mr.Neemichand Jain



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21	726 of 2012	796 of 2013	M/s.M.K.Oil Corporation
22	728 of 2012	797 of 2013	Mr.C.Mukesh Balar
23	729 of 2012	798 of 2013	Mr.Suresh Kumar Jain
24	730 of 2012	799 of 2013	Mr.Suresh
25	731 of 2012	800 of 2013	M/s.Saptagir Camphor Ltd.
26	732 of 2012	801 of 2013	Mr.Sashi Prakash Lohia
27	734 of 2012	802 of 2013	Mr.Sashi Prakash Lohia
28	735 of 2012	803 of 2013	Mr.Neemichand Jain
29	736 of 2012	804 of 2013	Mr.P.Suresh Kumar
30	737 of 2012	805 of 2013	Mr.V.Venkatanarayana
31	738 of 2012	806 of 2013	M/s.Andhra Pradesh Paper Mills Ltd.
32	740 of 2012	807 of 2013	M/s.G.Tech Stone Ltd.
33	741 of 2012	808 of 2013	Mr.M.Vasudevan
34	742 of 2012	809 of 2013	Mr.Neemichand Jain
35	743 of 2012	810 of 2013	Mr.Sashi Prakash Lohia
36	744 of 2012	811 of 2013	Mr.Pradeep Kabra
37	745 of 2012	812 of 2013	Mr.Neemichand Jain
38	746 of 2012	813 of 2013	Mr.Sashi Prakash Lohia
39	748 of 2012	814 of 2013	Mr.Suresh
40	749 of 2012	815 of 2013	Mr.Ashok Kumar
41	750 of 2012	816 of 2013	Mr.Sashi Prakash Lohia
42	752 of 2012	817 of 2013	Mr.Sohan Lal
43	753 of 2012	818 of 2013	Mr.Ashok Kumar Jain
44	754 of 2012	819 of 2013	Mr.P.Suresh Kumar
45	755 of 2012	820 of 2013	Mr.Neemichand Desarlla
46	756 of 2012	821 of 2013	Mr.Sashi Prakash



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			Lohia
47	758 of 2012	822 of 2013	Mr.Sashi Prakash Lohia
48	759 of 2012	823 of 2013	Mr.Neemichand Jain
49	761 of 2012	824 of 2013	Mr.Mukesh Balar
50	762 of 2012	825 of 2013	Mr.Suresh Kumar
51	763 of 2012	826 of 2013	Mr.Sashi Prakash Lohia
52	764 of 2012	827 of 2013	Mr.Sashi Prakash Lohia
53	766 of 2012	828 of 2013	Mr.Sashi Prakash Lohia
54	767 of 2012	829 of 2013	Mr.Neemichand Jain

23.Mr.Rajnish Pathiyil, would, notwithstanding the instructions issued by the Commissioner of Income Tax, venture to make some submissions even on merits. Instruction in F.No.(II) / 399Vig) E-13/2013-14 dated 02.11.2015 fixes the monetary limits below which no appeal shall be filed before the High Court at a sum of Rs.1 crore. However, this does not preclude, in cases where the issue is seen to recur in several matters such as in the present appeals, a decision on the merits of the matter itself.

24.We find that the orders of adjudication have been upheld in so far as they relate to the duty and interest. Penalty levied on the person who was the mastermind, Satish Mohan Agarwal, has also been upheld. The Tribunal has exercised discretion to delete the penalty in the case of



the importers and reduce the penalty in the case of the traders and brokers. As far as the traders and brokers are concerned, we do not find the discretion exercised to be perverse.

25.However, as far as the importers are concerned, the Tribunal has deleted the penalty in full and we see no justification for the same. The discussion in regard to the liability of the importers has been set out at paragraph 10 and the Tribunal notes that the evidence gathered by Revenue unambiguously and succinctly proved that the TRAs used by the importer / appellants were fake, false, forged and fabricated.

26.The Tribunal stated at paragraph 10.3 as follows:

'When the importer appellants acquired DEPB scrips from market without being acquired from original acquirer, as an abundant caution, to avoid evil consequence of fraudulently obtained scrips, could have safeguarded their interest causing enquiry from JDGFT as to genuineness of the scrips. But that was not done. Such appellants failed to acquire title over the scrips but became beneficiary of ill got scrips. Notificational benefit was availed at the cost of public exchequer which is required to be surrendered for the undue gain made. Bona fides were not established by the appellants for which they submitted themselves to the loss of duty caused to Revenue by their act of use of DEPB scrips not acquired legitimately.'

27.The Tribunal quotes the former Lord Chief Justice of England, Sir Edward Coke, that *'fraud avoids all judicial acts, ecclesiastical or*



temporal' and the judgment of the Supreme Court in *S.P.Chengalvaraya Naidu v. Jagannath* [AIR 1994 SC 853].

28.Having stated that the importers had not conducted due diligence from the market and also having referred to the evidence gathered by Revenue that established the falsity of the scrips, we do not find any justification in the Tribunal having deleted the penalty on importers in full. The exercise of discretion as in the case of the traders/brokers would have been appropriate in the case of importers as well. Hence, we restore the penalty to the extent of 50% of the same in line with the penalty confirmed in the case of the brokers and traders. The revenue appeals are disposed as above.

29.One of the submissions made is that some of the co-noticees had approached the Settlement Commission for settlement of the issues arising from the common show cause notice and the Settlement Commission had accepted the settlement in their cases. Hence the individual appellants before us would seek to avail the benefit of those orders of the Settlement Commission based upon its status as a co-noticee, though it had not approached the Settlement Commission. The following cases are referred to by the parties in this regard:

(i) *Union of India v. Onkar S.Kanwar* [2002 (145) E.L.T.



266 (S.C.)]

(ii) *Yogesh Korani v. Union of India* [2003 (159) E.L.T. 3 (Bom.)]

(iii) *Modest Shipping (Agency) Pvt. Ltd. v. Chief Commissioner of Customs, Bombay* [2004 (167) E.L.T. 25 (Bom.)]

(iv) *S.K.Colombowala v. Commissioner of Customs (Import), Mumbai* [2007 (220) E.L.T. 492 Tri.-Mumbai]

(v) *Mukesh Garg v. Commissioner of Customs & Central Excise, Noida* [2012 (278) E.L.T. 303 (Del.)]

(vi) *Radiant Silk Mills (P) Ltd. v. Commissioner of Cus. & Cen. Ex., Jaipur* [2013 (288) E.L.T. 311 (Tri. – Del.)]

30.In the case of *Omkar S.Kanwar*, the Supreme Court considered

the effect of the Kar Vivad Samadhan Scheme and declarations filed thereunder. In that case, a declaration had been made by a Company in which *Omkar S.Kanwar* was a Director. He had contended that since the declaration made in the case of the company had been accepted, the benefit of that acceptance would enure even to the officers of the company so long as other stipulations under the scheme were satisfied.

31.The Department on the other hand, had contended that the scheme would be applicable qua a specific applicant alone. The Bench observed that, both views were probable views and concluded that the benefit must enure to the individual, in light of the settled position that if two views were possible, the one in favour of the assessee must be adopted.

32.Their conclusion was based on the Kar Vivad Samadhan



Scheme (Removal of Difficulties) Order where, if a declaration had been made in respect of certain tax arrears, and where in respect of the same arrear, a show cause notice had been issued to any other person, then the settlement in favour of the declarant would be deemed to be full and final in respect of other persons on whom show cause notices had been issued. Thus, an order providing a settlement in favour of the declarant will be deemed to be full and final in respect of the other persons as well.

33. Section 127-B of the Customs Act reads as follows:

'127-B. Application for settlement of cases.— (1) Any importer, exporter or any other person (hereinafter referred to as the applicant in this Chapter) may, in respect of a case, relating to him make an application, before adjudication to the Settlement Commission to have the case settled, in such form and in such manner as may be specified by rules, and containing a full and true disclosure of his duty liability which has not been disclosed before the proper officer, the manner in which such liability has been incurred, the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification, under-valuation or inapplicability of exemption notification [or otherwise] and such application shall be disposed of in the manner hereinafter provided:'

34. Section 127-B is clear in stipulating that the application for settlement should be in respect of a case relating to an importer, exporter



or any other person. 'Case' has been defined under Section 127-A(b) to mean any proceeding under the Act or any other Act for the levy, assessment and collection of customs duty, pending before an adjudicating authority on the date on which an application under Sub-Section (1) of Section 127-B is made.

35. In our view, the reference to 'case' under Section 127-B can only be to the case qua the declarant and cannot encompass the cases of all other co-noticees under the proceedings offered for settlement by the declarant. In fact, a common show cause notice normally contains the proposals in respect of several persons related to a common cause of action.

36. The proposals as relating to one noticee would also vary based upon the role and involvement of that person to that common cause of action. Therefore the contours of a 'case' as relevant to one noticee may or may not contain the same ingredients as in the 'case' of other co-noticees.

37. Section 127-B envisages that an applicant would have to make an application for settlement in a specified form containing a full and true disclosure of his duty liability before the proper officer, the manner in which the liability has been incurred and the additional amount of



customs duty offered by him. The co-noticees who have not approached the Settlement Commission in the present matters have not conformed to any aspect of the procedure as set out aforesaid.

38. Section 127-C sets out the procedure to be followed by the Settlement Commission on receipt of an application under Section 127-B in minute detail, such as admission, calling for report from the Commissioner in regard to the application, examination of records and report of the Commissioner and thereafter passing of an order.

39. Thus, in our considered view, there is a vast difference between the Kar Vivad Samadhan Scheme and the scheme of Settlement as envisaged under the Customs Act. At paragraph 14 of the judgement in *Onkar S. Kanwar* the Supreme Court states as follows:

'14. We have heard the parties. In our view, a reading of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order shows that where a declaration had been made in respect of a tax arrear and where in respect of the same matter a show cause notice had also been issued to any other person, then the settlement in favour of the declarant has to be deemed to be full and final in respect of other persons on whom show cause notices had been issued. It is settled law that when an Appeal is pending there is no finality to the proceedings. The proceedings are then deemed to be continuing. Undoubtedly, at one place the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order seems to state that the show cause notice should be pending adjudication. However, the same order also talks of the show cause



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notice being in respect of same matter on which the show cause notice has been issued to the main declarant. Then the Order provides that a settlement in favour of the declarant will be deemed to be full and final in respect of other persons also. This Order has to be read as a whole. If read as a whole, it is clear that a settlement by the main declarant is to operate as full and final settlement in respect of all other persons on whom show cause notice was issued in respect of the same matter. Thus read as a whole the words "pending adjudication" cannot be read to exclude cases where the proceedings are still pending in Appeal. Even otherwise the order has to be read along with the Kar Vivad Samadhan Scheme. Under the Kar Vivad Samadhan Scheme a party can file a declaration so long as the proceedings are pending. Thus, even though the show cause notice may have been adjudicated upon and an Appeal is pending a party could still take the benefit of the Kar Vivad Samadhan Scheme and file a declaration. The object of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order is to give benefit of a settlement by the main party (i.e. the Company in this case) to all other co-noticees. This being the object a classification, restricting the benefit only to cases where the show cause notice is pending adjudication, would be unreasonable. If read in this manner the Order would be discriminatory. An interpretation which leads to discrimination must be avoided. An interpretation, as suggested by Mr. Ganesh, would also be against the object of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order. It is therefore not possible to accept the submissions of Mr. Ganesh. In our view the reasoning given by the High Court of Kerala is correct and needs to be upheld.'

40. The individual appellants have relied on the opinion of the

Third Member of the CESTAT in the case of *S.K.Colombowala v.*

Commissioner of Customs (Import), Mumbai [2007 (220) ELT 492 (Tri-



Mumbai)], where the Third Member also discusses the judgment of the Supreme Court in the case of *Omkar S.Kanwar*. At paragraph 24 of the opinion, the Third Member states as follows:

'24.Although the distinction between the KVS Scheme and the Settlement mechanism is that, while the KVS Scheme provides for settlement of tax arrears of each individual person, including those of co-noticees, settlement mechanism provides for settlement of the entire case as a whole, the fact that only the person liable to pay duty can make an application for settlement does not mean that the case in so far as the remaining co-noticees can continue even after a final order of settlement has been passed in relation to the case.'

41.In *Omkar S.Kanwar*, the Supreme Court held that an application filed by the Company under the Kar Vivad Samadhan Scheme, would accrue to the benefit of the Director as well. In doing so, they specifically noticed that the object of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order is to extend the benefit of a settlement by the declarant to all other co-noticees.

42.Thus, any restriction placed on the benefit, as extending only to cases where the show cause notice is pending adjudication, would be unreasonable and discriminatory, as the Scheme did not contemplate such restriction. Thus, there was an express stipulation in the Removal of



Difficulties Order that an application under the Samadhan scheme would cover all other co-noticees as well.

43.The interpretation as above would not apply to the scheme of settlement under the Customs Act in light of there being no such express sanction of the nature available under the Kar Vivad Samadhan (Removal of Difficulties) Order. We are thus of the view that the conditions governing the Kar Vivad Samadhan Scheme are different from the scheme of settlement under Chapter XIV-A dealing with Settlement of cases.

44.The consequences of extension of benefit of settlement to co-noticees who have not approached the Settlement Commission, is that they too would be offered immunity if the declarant has been granted the same, without even having approached the Settlement Commission. There is thus no merit in the contention that an order passed by the Settlement Commission in the case of one declarant would apply in the case of other co-noticees as well. This question of law is answered in favour of the revenue.

45.The CESTAT had also ordered that appropriate disciplinary action be taken as against the officials of the Customs House and the Department of Revenue Intelligence due to whose involvement or



negligence the fraud was perpetrated. This Court had sought a status report with regard to the investigation initiated and the following status report has forwarded by the Principal Commissioner of Customs (General) Vigilance Section, Mumbai enclosed with the status report filed by Mr.Pathiyil reading thus:

'2. In this regard, in pursuance of the Investigation Report dated 01.12.2014 and DG (Vig.)/CVO, New Delhi, letter dated 01.10.2015, vide which it was advised to take disciplinary action against Shri Mustaq Chaudhary, UDC, Shri Sajid Khan, LDC and Shri Jitendra Padre, Sepoy, the status of the disciplinary action taken against the said officers are as follows:

(i) Shri Mustaq Chaudhary, then UDC:- Shri Mustaq Chaudhary, had already been dismissed from Govt. Service w.e.f. 02.05.2013 in another disciplinary case initiated against him, for his alleged involvement in large scale fraud in imports through JNCH by abusing warehousing facility. Since, he was not in Govt. Service and not bound by the CCS (Conduct) Rules, 1964, no action could be contemplated against him under CCS (CCA) Rules, 1965. For the said reasons, the disciplinary action against him was not suggested in this case, in the above said Investigation Report dated 01.12.2014.

(ii) Shri Sajid Khan, LDC: Shri Sajid Khan was on unauthorized absent from 02.05.2011. CIU, NCH, found it very difficult to trace out his whereabouts and correspondences made by CIU, NCH, on his number of addresses were received back undelivered. Therefore, under Rule 19 (ii) of the CCS (CCA) Rules, 1965, Shri Sajid Khan, LDC (TA) was dismissed from the Government service, vide Order dated 29.02.2016.



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(iii) *Shri Jitendra R. Padte, Sepoy:- Charge Memorandum dated 29.11.2016 for major penalty was issued to Shri Jitendra R. Padte. The Inquiry Officer was appointed to inquire into the case. The IO found the charges as "Not Proved". Subsequently, the Disciplinary Authority, vide Order dated 20.02.2020, dropped all the charges levelled against Shri Jitendra R. Padte in the said Charge Memorandum dated 29.11.2016 and exonerated him from the case.*

3. *This is for kind information and necessary action at your end.*

4. *This issues with the approval of the Pr. Commissioner of Customs (Gen.), NCH, Mumbai Zone-I.'*

46.The Civil Miscellaneous Appeals filed by the individual

appellants are disposed in terms of this order. No costs. Connected miscellaneous petitions are closed.

[A.S.M., J] [G.A.M., J]
30.10.2024

Index:Yes
Speaking order
Neutral Citation:Yes
vs

To

1.The Commissioner of Customs
(Seaport Exports),
Customs House,
No.60, Rajaji Salai,
Chennai-600 001.



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2.The Assistant Registrar,
Customs Excise & Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhawan Annexe, 1st Floor,
No.26, Haddows Road,
Chennai-600 006.



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C.M.A.Nos.84 of 2013 & etc. batch

DR. ANITA SUMANTH,J.
and
G. ARUL MURUGAN.,J

VS

**C.M.A.Nos.84, 807, 89, 90, 816, 18, 826, 783, 808, 809, 810, 86, 87,
253, 794, 795, 796, 789, 790, 779, 780, 781, 811, 782, 784, 787, 788,
822, 823, 824, 825, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806,
812, 813, 814, 815, 785, 786, 791, 792, 793, 817, 818, 819, 820, 821, 827,
828, 829, 85, 873, 88, 776, 777 & 778 of 2013
C.M.A.Nos.3123 & 3653 of 2012
CMA.Nos.1770, 1765, 1766, 1771,
1775, 1773, 1774, 1772, 1776,
1767, 1768 & 1769 of 2016**

30.10.2024