

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI**

**PRINCIPAL BENCH – COURT NO. I**

**Customs Appeal No. 52173 of 2019**

(Arising out of Order-in-Original No. SKS/COMMR/ACE/07/2019 dated 13.06.2019 passed by the Commissioner of Customs (Exports), New Delhi)

**M/s Nidhi Enterprises**

118/2393, 1<sup>st</sup> Floor, Chhata Shahji  
Chawri Bazar, Delhi-110006

**Appellant**

VERSUS

**Commissioner of Customs, (Export),  
New Delhi**

Air Cargo Export, New Customs House,  
New Delhi

**Respondent**

**AND**

**Customs Appeal No. 52174 of 2019**

(Arising out of Order-in-Original No. SKS/COMMR/ACE/07/2019 dated 13.06.2019 passed by the Commissioner of Customs (Exports), New Delhi)

**Shri Sudarshan Kumar Jain**

Partner: M/s Nidhi Enterprises  
118/2393, 1<sup>st</sup> Floor, Chhata Shahji  
Chawri Bazar, Delhi-110006

**Appellant**

VERSUS

**Commissioner of Customs, New Delhi**

Air Cargo Export, New Customs House,  
New Delhi

**Respondent**

**Appearance**

Shri S.C. Jain, Advocate – for the Appellant.

Shri Rakesh Kumar, Authorized Representative – for the Respondent.

CORAM : **HON'BLE MR JUSTICE DILIP GUPTA, PRESIDENT**  
**HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**DATE OF HEARING : 18/10/2022**  
**DATE OF DECISION : 16/11/2022**

**Final Order Nos. 51072-51073/2022**

**P.V. Subba Rao**

These two appeals have been filed assailing the order-in-original <sup>1</sup> dated 17.3.22017 passed by the Commissioner of Customs (Exports), Inland Container Depot<sup>2</sup>, Tughlakabad and hence are being disposed of together. Customs Appeal No. 52173/2019 is filed by the importer M/s. Nidhi Enterprises<sup>3</sup> assailing the confirmation of demand of Rs. 57,14,129 along with applicable interest and imposition of an equal amount as penalty under section 114A. Appeal No. 52174/2019 is filed by Shri Sudarshan Kumar Jain<sup>4</sup> assailing the penalty of Rs. 10,00,000 under section 112(a) (ii) and the penalty of Rs. 1,00,000 under section 114AA imposed on him.

2. The undisputed facts of the case are that Nidhi is in the business of importing and trading paper based articles. It imported goods under 29 Bills of Entry using various duty free licenses issued by the Directorate General of Foreign Trade<sup>5</sup> to various persons under various export promotion schemes such as Duty Free Import Authorisation<sup>6</sup>, Focus Product Scheme<sup>7</sup> Focus Market Scheme<sup>8</sup>, Village and Khadi Gramodyog Yojna<sup>9</sup> and Duty Entitlement Passbook<sup>10</sup>. These licences/scrips are transferable and after the exporter fulfils its export obligations under the licence, it can sell

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<b>1</b>	<b>Impugned order</b>
<b>2</b>	<b>ICD</b>
<b>3</b>	<b>Nidhi</b>
<b>4</b>	<b>Jain</b>
<b>5</b>	<b>DGFT</b>
<b>6</b>	<b>DFIA</b>
<b>7</b>	<b>FPS</b>
<b>8</b>	<b>FMS</b>
<b>9</b>	<b>VKGUY</b>
<b>10</b>	<b>DEPB</b>

them to anyone else who can then import goods against the licence/scrip duty free. Usually, the licences/scrips are sold at a discount, say, at 95% of the value of the duty exemption available under the licence. For imports under each of the schemes under which the licences/scrips are issued by DGFT, there is a corresponding exemption notification under the Customs Act. Thus, when the licence issued by the DGFT is produced before the customs for clearance, appropriate value is debited from the licence/scrip and goods are cleared without the importer paying the duty in cash in terms of the corresponding exemption notification.

3. During the relevant period, details of the licences/scrips issued by the DGFT were not getting transmitted from the DGFT's server to the Customs server. Instead, the licensee had to bring them to the Customs officers to get the details entered by a Customs officer into the Customs Electronic Data Interchange (EDI) system. Thereafter, as the Bills of Entry were assessed utilising the licence, appropriate amounts would be debited from the licence in the Customs EDI. At the time of clearance of the goods, the licence/scrip had to be produced before the officer.

4. Based on intelligence, investigations were conducted by the Customs officers and it was found Shri Sharafat Hussain alias Sharafat Ali has been in the business of trading in these licences. He also was also a G card holder in the Customs Broker M/s. Kirti Cargo. Investigations further revealed that Shri Sharafat Hussain, along with Shri Vinod Pathror, used the User IDs of the Customs officers and entered wrong details of the licences in the Customs EDI system enhancing the value of the duty free entitlement, by

entering fake and forged licences and by entering the same licence multiple times. Using such licences, several importers cleared their consignments without paying duty. The appellant Nidhi is one of such importers. Jain is a partner in Nidhi.

5. After completing the investigations, Show Cause Notice <sup>11</sup> dated 17.3.2017 was issued to the appellants covering the period 16.2.2013 to 3.6.2015 which culminated in the passing of the impugned order confirming the demand of duty with interest and imposition of penalties as discussed above. The operative part of the order is as follows:

"(i) I demand duties of Customs (BCD+CVD) amounting to Rs. 57,14,129/- (Rupees Fifty Seven Lakh Fourteen Thousand One Hundred and Twenty Nine only), as per the table in Annexure-A to this notice from M/s Nidhi Enterprises, 118/2393, 1<sup>st</sup> Floor, Chhata Shahji, Chawri Bazar, Delhi-110066 under Section 28(4) of the Customs Act, 1962 as amended along with applicable interest under Section 28(4) of the Act *ibid*. The duty payment under protest is vacated. I also appropriate the duty of Rs. 40,55,421/- (Rupees Forty Lakhs Fifty Five Thousand Four Hundred and Twenty One only) already paid.

(ii) I do not order confiscation of the impugned goods.

(iii) I impose a penalty of Rs. 57,14,129/- (Rupees Fifty Seven Lakh Fourteen Thousand One Hundred and Twenty Nine only) under Section 114A of the Customs Act, 1962 on M/s Nidhi Enterprises, the Noticee No. 1.

(iv) I do not impose penalty under Section 112(a)(ii) of the Customs Act, 1962, on M/s Nidhi Enterprises, the Noticee No. 1.

(v) I do not impose any penalty under Section 114AA of the Customs Act, 1962 on M/s Nidhi Enterprises.

(vi) I impose a penalty of Rs. 10,00,000/- (Rupees Ten Lakh only) under Section 112(a)(ii) of the Customs Act, 1962 on Shri Sudarshan Kumar Jain, Noticee No. 2 and Partner in M/s Nidhi Enterprises.

(vii) I impose a penalty of Rs.1,00,000/- (Rupees One Lakh only) under Section 114AA of the Customs Act, 1962, on Shri Sudarshan Kumar Jain, Noticee No. 2 and Partner in M/s Nidhi Enterprises.

(viii) I impose a penalty of Rs. 50,00,000/- (Rupees Fifty Lakh only) under Section 112(b)(ii) of the Customs Act, 1962, on Sh. Sharafat Hussain, 'G' Card holder of M/s Kirti Cargo.

(ix) I impose a penalty of Rs. 2,00,00,000/- (Rupees Two crores only) under Section 114AA of the Customs Act, 1962 on Sh. Sharafat Hussain, 'G' Card holder of M/s Kirti Cargo.

(x) I impose a penalty of Rs. 50,00,000/- (Rupees Fifty Lakh only) under Section 112(b)(ii) of the Customs Act, 1962 on Shri Vinod Kumar Parthror.

(xi) I impose a penalty of Rs.2,00,00,000/- (Rupees Two Crores only) under Sections 114AA of the Customs Act, 1962 on Sh. Vinod Kumar Pathror for their acts of omission and commission discussed in the preceding para.

(xii) I impose a penalty of Rs. 50,000/- (Rupees Fifty Thousand only) under Section 112(a)(ii) of the Customs Act, 1962 on, M/s Kirti Cargo as discussed in the preceding paras.

(xiii) I do not impose any penalty under Section 114AA of the Customs Act, 1962 on M/s Kirti Cargo."

6. Learned counsel for the appellant made the following submissions.

- a) No duty is payable by the appellant because Nidhi is a bonafide purchaser of the duty credit scrips and it was not aware of the modus operandi adopted by Shri Sharafat Hussain and Shri Pathror. It had purchased the scrips at a discount of 2% to 5% of the face value of the scrips and it had paid the purchase price through banking channels to Shri Sharafat Hussain.
- b) The SCN and the impugned order have not put forth any substantive evidence that the appellant was aware of the modus operandi.
- c) The department had registered FIRs against Shri Sharafat Hussain and Shri Pathror but not against the appellants. It shows that the department also accepted that the appellants were not involved in the fraud.
- d) It was not possible for the appellant to find out about the illegality committed with respect to the scrips and therefore, the appellant should not be asked to pay the duty.

e) The appellant is a bonafide purchaser of scrips and hence no duty should be confirmed against it. Reliance is placed on the following case laws:

**i) CC Amritsar vs Vallabh Design Products<sup>12</sup>**

**ii) Indian Acrylics Ltd. Vs Commissioner of Customs, Kandla<sup>13</sup>**

**iii) Pee Jay International vs Commissioner of Customs<sup>14</sup>**

**iv) Commissioner of Customs, Amritsar vs Patiala Castings Pvt. Ltd.<sup>15</sup>**

f) There is a high possibility of the involvement of the Customs officials in this scam and they may have benefitted from it.

g) The Customs EDI system is a completely secure system access to which is protected by UserID (known as SSOID) and password for each official and therefore the scam could not have taken place without the connivance of the officers. No investigation has been carried out regarding the role of the officers.

h) Thus, the SCN was pre-mature as the role of the officers was not investigated.

i) In respect of five Bills of Entry, the scrips which were used fully covered the imports even if the illegally enhanced value in the system is ignored. The demand must be dropped to that extent. This resulted in an error in quantification to the extent of Rs. 16,58,705/-.

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**12 2007(219) ELT 73 (P&H)**  
**13 2016(341)ELT A22(SC)**  
**14 2016(340) ELT 625 (P&H)**  
**15 2012(283) ELT 269(Tri-Del)**

- j) Extended period of limitation was wrongly invoked as there was no fraud, mis-statement or suppression on the part of the appellants.
  - k) No penalty should have been imposed on the appellant - Nidhi as it had imported goods in good faith.
  - l) The partner in a firm and the firm are not separate entities and hence, no separate penalty should have been imposed on Jain, partner of Nidhi since a penalty has already been imposed on Nidhi.
  - m) The SCN was issued without jurisdiction as it has been issued by the Commissioner of Customs (Export) ICD, Tughalkabad, Delhi and it has been adjudicated by Commissioner of Customs (Exports) Air Cargo Export, New Custom House, New Delhi.
  - n) For the above reasons, the impugned order may be set aside in its entirety.
7. During hearing, learned counsel for the appellant submitted that even if the benefit of the licences/scrips is denied to the appellant following the principle 'fraud vitiates everything', it is still entitled to at least that portion of the exemption in the five bills of entry where the legitimate limit of the exemption in the scrip was still available. It is only the excess amount of credit which can be denied. Further, since the appellant was not a party to the fraud and there is no evidence of involvement of the appellant in the fraud, penalties must be set aside.
8. On behalf of the respondent Revenue, learned authorized representative made the following submissions.

- i) **The period of violation is from 30/08/2013 to 26/02/2015** when there was no system of exchange of data between DGFT and Customs EDI and the genuineness of the scrips was to be verified from physical copies as per paragraph 3.11.3 of Chapter 3 of the Foreign Trade Policy. This system of verification of physical scrips was phased out much later after the system of online exchange of information between DGFT and Customs EDI was put in place and CBIC Circular No 11/2019 dated 09/04/2019 was issued.
- ii) While the scrips were freely transferable in the market, Nidhi did not follow the procedures of buying, owning physical copy of the scrip, getting it registered, etc. and has relied totally on fraudsters for buying, registration and using them to pay the duty.
- iii) Fraud nullifies everything- whether it is carried out wilfully or recklessly. Nidhi cannot profit from the fraudulent scrips even if it is not the one which has committed the fraud and it was only negligent and careless while using the fraudulent scrips.
- iv) Nidhi used various Licences/duty free scrips mainly FPS and FMS which were issued to various exporters such as M/s K.S. Impex, M/s Best Exports, Sh. Durga Exports which it had purchased from M/s



Zealous Overseas Pvt. Ltd. floated by Sh. Sharafat Hussain.

- v) These licenses were forged with multiple registrations with other Ports, registration of non-existent Licenses, registration with enhanced value, etc.
- vi) Shri Jain, partner of Nidhi accepted that he had bought these licenses not from the exporter directly but through Shri Sharafat Hussain who would use the scrips to pay duty. He had not given any authorisation either to M/s Zealous International owned by Sh Hussian or even to the Custom House Agent M/s Kirti Cargo for clearance of goods through customs. He had accepted that it was mistake on his part to rely on Shri Hussain.
- vii) Jain also confirmed that they never had a copy of the licences/scrips which were utilised for payment of Customs Import duty, let alone verified them. The debit Notes/tax invoices issued by Shri Sharafat Hussain also do not mention which DEPB/FPS/FMS licences were sold to Nidhi. All these prove that Nidhi had not even taken the basic care of finding which licence/scrip it had purchased and whether the licence covers its duty liability or not and in which Bill of Entry it has used the licence to pay duty. A bonafide buyer should follow the concept of Caveat Emptor (i.e., Buyer Beware).

- viii) As an importer, Nidhi could have filed its own Bills of Entry or authorised a licensed Customs Broker to file the Bills of Entry. In this case, the Bills of Entry were filed indicating M/s. Kirti Cargo as the Customs Broker. However, **the Proprietor of M/s Kirti cargo Sh. Ramesh Chadha had accepted that he had sublet the CHA License to Shri Sharafat Hussain for a fixed amount of Rs 25,000/-per month.** Nidhi neither authorised Kirti (the Customs Broker) nor Shri Sharafat Hussain who actually filed the bills of entry using the Customs broker ID of Kirti.
- ix) Nidhi never bought the licenses/ scrips from the licensee exporter or even from Sharafat Hussain nor has it verified if they were genuine. It relied totally on Sharafat Hussain to clear its consignments duty free using some licences. Sharafat Hussain, in turn, bought from the licences/scripts from the licensee exporters in the name of M/s Zealous Overseas Pvt. Ltd (in which he was a Director), forged/ manipulated them in the Customs EDI system with the help of Shri Vinod Pathror who was not even an employee of the Customs Broker Kirti Cargo but posed as such.
- x) Shri Rajesh Kumar Jain , accountant of M/s K.S. Impex Ltd (RUD 20),original Exporter, in his statement dated 14.09.2016, stated that License No

0519001934, 0519001935, and 0519001145 were sold to M/s Zealous Overseas (Owner Sh Sharafat Hussain), *which were*, after being forged in terms of enhancement of value, used by M/s Nidhi Enterprises.

xi) Similarly, *M/s. Zealous Exims India (Director Sharafat Hussain) bought* License No 0510389153 dated 27/06/2014 from the exporter M/s Jechand Khushaldas Overseas Co. *and fraudulently enhanced its value while entering in the Customs EDI* from Rs 7,19,837 to Rs 21,29,688/- was used to pay import duty for M/s Nidhi Enterprises.

xii) Nidhi has submitted several invoices drawn by Shri Sharafat Hussain in the name of M/s Zealous Overseas purportedly for purchase of DEPB/FPS/FMS scrips by Nidhi. However, none of these even indicate the details of the scrip being sold and bought. All these invoices mention are the Bills of Entry in which scrips were used. The least anyone genuinely buying a scrip which entitles one to duty free import is expected to at least have an invoice for the possess a copy of the scrip. Nidhi had neither. Thus, the submission on behalf of Nidhi that the scrips were purchased in good faith cannot be accepted.

xiii) Therefore, the demand of duty invoking extended period of limitation along with interest must be

sustained in this case. Similarly, the penalties imposed on Nidhi and Jain also need to be upheld.

xiv) Imports under the Focus Product Scheme (FPS) are exempted by Notification No. 92 /2009 – Customs dated 11.09.2009. **This exemption is available subject to some conditions including that said scrip is produced before the proper officer of customs at the time of clearance for debit of the duties leviable on the goods, but for this exemption.**

xv) Similarly, imports under the Focus Market Scheme (FMS) are exempted by Notification No. 93 /2009 – Customs dated 11.09.2009. This exemption is available **subject to some conditions including that said scrip is produced before the proper officer of customs at the time of clearance** for debit of the duties leviable on the goods, but for this exemption.

xvi) The Central Board of Excise and Customs<sup>16</sup> issued circular no. 05/2010- Customs dated 16.03.2010 regarding *Verification of genuineness, of duty credit scrips issued under Chapter 3 of FTP, before registration*. Paragraph 2(e) of this circular states as follows:

As regards the duty credit scrips issued under Chapter 3 of FTP, **the verification of genuineness of scrips in terms of Para 3.11.3 of the HBP v.1 shall be done before allowing registration of**

**such scrips.** Further, the Commissioner may cause random verification of the shipping bills based on which the said duty credit scrip has been issued to ascertain the genuineness of such shipping bills. A quarterly report on the outcome of the said verification may be forwarded to the Board, which should include inter alia the details of the discrepancies noticed during the verification and the measures taken to redress such discrepancies. This procedure will be reviewed once online transmission of the duty credit scrips issued under Chapter 3 of FTP is operationalized.

xvii) This was reiterated in Board's circular no. 17/2012 dated 5/7/2012.

xviii) Paragraph 3.11.3 of the Handbook of Procedures (Vol. 1) of Foreign Trade Policy 2009-14 also required that the genuineness of the duty scrip must be verified by the Customs authorities before registering it. It reads as follows:

**Port of Registration**

3.11.3- Duty Credit Scrip (including splits) shall be issued with a single port of registration which shall be the port of export. After issue of Duty Credit Scrip, but before registration with Customs, the Applicant can change the port of registration from RA concerned. Before registration, authorities shall verify genuineness of Duty Credit scrip, from RA concerned, until EDI system of message exchange is put in place. However, applicant may use Duty Credit Scrip for imports from any other port (that includes ICD/LCS) after obtaining TRA from authorities at port of registration. The above procedure shall be applicable only in respect of EDI enabled ports. In case of exports through non-EDI ports, the port of registration shall be the port of exports.

- xix) Similarly, the Board's circulars for the earlier periods 68/2000, 72/2003, 8/2009 and 50/2011 required the original licence covering the description and value of goods to be presented in case of TRA registration at the port of registration.
- xx) Similar instructions were given in Board's circular 14/2015 emphasising expeditious verification of the Shipping Bills or Bills of Export numbers while registering the scrip.
- xxi) Even the instructions issued at the Commissionerate level by Standing Order No. 2/2012 issued by the office of Commissioner of Customs, ICD TKD N Delhi dated 03.02.2012 also provides the mechanism for original license to be presented before Customs Authorities for any amendment/ manual debit/ manual registration.
- xxii) Standing Order No. 02 /2015 dated 02/11/2015 issued by the Commissioner of Customs ICD TKD Export, in continuation of previous practice a detailed procedure has been outlined to be followed for verification and registration of scrips under chapter 3 of the FTP Reward/incentive Schemes of FTP 2009-14 like FPS, FMS, VKGUY, SFIS and assessment of BOEs under GP VII where duty is sought to be paid through use of these Scrips. As per Para (a) of the said Order the Original Scrip

issued by DGFT including its Annexure along with one photocopy and copies of BRCs shall be presented with Application in prescribed Format to the EA/TA in License section by License holder or his authorised representative.

xxiii) Standing Order No 04/16 dated 30.05.2016 issued by The Commissioner of Customs ICD TKD (Export) as per Para(i) has also provided such mechanisms for verification of scrips at pre-Registration stage including verifying the genuineness of such scrips with backing shipping Bills.

xxiv) **Thus, the Foreign Trade Policy and the Handbook of procedures under which the duty free scrips were issued required the physical copies of the licences to be verified before allowing clearances. The corresponding exemption notifications issued under the Customs Act also required such verification. Various circulars issued by the Board from time to time and the Standing Orders issued by the Commissionerate from time to time also required not only verification of the scrips but also the shipping bills and bills of export under which the goods have been exported against the licence/scrip. Thus, there was never any room for the importer to presume that the**

**goods could be cleared without paying duty without possessing and presenting a valid scrip. Not only did the appellant not have a scrip in its possession, it was also not aware as to which scrip it was buying. All the appellant did was ask Shri Sharafat Hussain to clear its goods without paying duty and paid a percentage of the duty so saved to Shri Sharafat Hussain. Thus, there is nothing in the entire documents to show good faith or genuine belief on the part of the appellant.**

xxv) Therefore, the appellant cannot claim the benefit of the exemption notification even when the scrip has covered its duty liability in the case of any Bill of Entry. No physical copy of the scrip was produced at the time of clearance of the goods or else the fraud would have been detected.

xxvi) The extended period of limitation has therefore, been correctly invoked and penalties have also been correctly imposed.

xxvii) The partnership firm is different from the partners and therefore, imposition of penalty both on Nidhi (the partnership firm) and Jain (the partner) is sustainable.

xxviii) Both appeals may therefore be dismissed.



9. Learned authorised representative relied on the following case laws:

- i) **Aaflaot Textiles<sup>17</sup>** in which Supreme Court upheld the invocation of extended period of limitation where there was fraud though the fraud was not committed by the appellant.
- ii) **ICI India Ltd Vs CC (Port) Kolkata<sup>18</sup>** in which Calcutta High Court held that question whether there was collusion or fraud on the part of the Appellants in the issue of DEPB Licenses becomes absolutely immaterial and irrelevant since no credit can be derived from a forged DEPB Licenses/Scrups.

10. On the appellant's submission that the SCN was premature as the role of the officers in the case was not investigated, learned authorised representative submitted that the role, if any, of the officers in this fraud is being investigated by the Central Bureau of Investigation<sup>19</sup> under relevant laws and the present appeal under the Customs Act is only with respect to the duty, interest and penalties on the importer.

11. On the appellant's submission that the SCN was issued without jurisdiction as it has been issued by the Commissioner of Customs (Export) ICD, Tughalkabad, Delhi and it has been adjudicated by Commissioner of Customs

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**17** 2009(235) ELT 587(SC)  
**18** 2005(184) ELT 339(Cal)  
**19** CBI

(Exports) Air Cargo Export, New Custom House, New Delhi, learned authorised representative submits that ICD, Tughlakabad had only one Commissioner until Notification No. 77/2014-Customs (NT) dated 16<sup>th</sup> September 2014 was issued by the Government of India, inter alia, creating a separate Commissioner (Export) in ICD Tughlakabad. Commissioner (Export), ICD, Tughlakabad was, among others, assigned the work pertaining to imports of goods under various export promotion schemes such as the imports in dispute in this appeal. Later, by public notice No. 5/2018 dated 9 April 2018, the work pertaining to imports under the export promotion schemes was assigned to Commissioner (Imports), ICD, Tughlakabad. The period relevant to this case was 30 August 2013 to 30<sup>th</sup> June 2015 and the Show Cause Notice dated 17 March 2017 was issued by Commissioner (Export), ICD, Tughlakabad who was the jurisdictional Commissioner.

12. As regards the adjudication of this show cause notice by Commissioner of Customs (Export), New Custom House, IGI Airport, New Delhi, he draws our attention to the first paragraph of the impugned order which states that as per Notification No. 91/2018-Customs (NT), dated 5.11.2018, the Central Government delegated the powers of assigning cases for adjudication to the Chief Commissioners. This notification reads as follows:

**Notification No.91/2018-Customs (N.T.)**

New Delhi, the 5<sup>th</sup> November, 2018

G.S.R.\_\_\_\_\_ (E). -In exercise of powers conferred by clause (a) of section 152 of the Customs Act, 1962 (52 of 1962), the Central Government hereby directs that the powers exercisable by the Central Board of Indirect Taxes and Customs under sub-section (1) of section 5 of the Customs Act, 1962, **shall also be exercised by the Principal Chief Commissioner or Chief Commissioner of Customs for the purposes assigning the cases for adjudication of show cause notices issued under the provisions of the said Act** or rules, regulations made there under, within his jurisdiction.

[F.No. 450/150/2017-Cus. -IV]

(Zubair Riaz)  
Director (Customs)

13. By order no. 1/2018 dated 15.11.2018, the Chief Commissioner had assigned the work of this adjudication to the Commissioner of Customs (Exports), Air Cargo complex, New Custom House, New Delhi who has adjudicated the matter.

14. We have considered the submissions from both sides. The undisputed facts of the case are that Nidhi imported goods by 29 Bills of Entry as listed in the annexure to the show cause notice using various duty free scrips/licenses which were issued in the name of other persons/entities. Such licences/scrips were transferable. Nidhi had not obtained physical copy of any of the licences or scrips which it was supposed to have purchased. It was also not aware as to which licence or scrip, if any, it had purchased. The invoices which it received from firms of Shri Sharafat Hussain also did not indicate which scrip or licence was being sold.

15. Nidhi imported goods and asked Shri Sharafat Hussain to clear the goods by filing the Bills of Entry and paid a percentage of the duty chargeable to Shri Sharafat Hussain. Shri Sharafat Hussain, in turn, used fake or forged or manipulated licences/scrips to pay duty online and clear the goods. Of the 29 Bills of Entry in respect of 7 Bills of Entry the value of the licences was wrongly

entered to a higher amount by Shri Sharafat Hussain along with Shri Vinod Pathror in the Customs EDI system and they were used to pay the duty. In respect of the remaining Bills of Entry, the licences did not exist at all or were registered multiple times. The fact that these frauds happened is undisputed. The submission of the learned counsel for the appellant is that since it had not committed the fraud and it had paid a percentage of the value of duty payable to Shri Sharafat Hussain it should not be required to pay the duty again and, therefore, the demand is not sustainable. It is also the contention of the learned counsel that since it had not committed the fraud the extended period of limitation has been wrongly invoked by the Department in the show cause notice.

16. As an alternative submission, learned counsel submits in respect of those Bills of Entry where the licence existed but its value was enhanced in the Customs EDI system it should be allowed the benefit of the scrips to the extent it was valid.

17. It is further the submission of the learned counsel that since the fraud was committed within Customs EDI system which cannot be accessed to enter the details of the scrips without user ID and password of the customs officer there is every likelihood the involvement of customs officials in the scam. Unless this is investigated the show cause notice was premature.

18. It is further his submission that since the appellant is a bonafide importer, no penalty should be imposed upon it when the demand is confirmed. Further, it is the submission that the appellant Nidhi is a partnership firm and Shri Jain is one of the

partners and once the penalty has been imposed on the firm it cannot also be imposed on the partner. For these reasons, learned counsel prays that the impugned order may be set aside in its entirety.

19. Learned counsel also questioned the jurisdiction of the officer who issue the show cause notice and the officer who passed the impugned order and relied on the judgment of Supreme Court in **Cannon India Private Limited Vs. Commissioner of Customs**<sup>20</sup> to assert that the show cause notice and the impugned order were issued without jurisdiction and hence are void. It is his submission that the show cause notice has been issued by the Commissioner of Customs (Export), ICD Tughlakabad, New Delhi demanding duty payable at the time of import and it has been adjudicated by the Commissioner of Customs (Export), Air Cargo Export, New Customs House, New Delhi.

20. We first proceed to deal with the issue of the jurisdiction. A perusal of the first paragraph of the impugned order clarifies the position. Learned authorized representative further for the Revenue also clarified that during the relevant period imports under various export promotion scheme (commonly known as group-VII) from ICD, Tughlakabad fell under the jurisdiction of Commissioner of Customs (Export), ICD, Tughlakabad who issued the show cause notice dated 17.3.2017. By Notification No. 91/2018-Cus (NT) dated 5.11.2018 the Central Government has delegated the powers to the Chief Commissioner to assign the work of adjudication to any other Commissioner in his zone. Accordingly, order No. 1/2018

dated 15.11.2018 was issued by the Chief Commissioner of Customs (Delhi Zone) assigning the SCN herein to Commissioner of Customs (Export), Air Cargo, New Delhi who adjudicated and passed the impugned order. Therefore, the submission of the learned counsel for the appellant on the question of jurisdiction is misplaced. The judgment in **Cannon India Limited** was with respect to the jurisdiction of the officers of the Directorate of Revenue Intelligence<sup>21</sup> to issue SCN under Section 28 of the Act. In this case, the SCN was issued by the jurisdictional Commissioner of Customs. This power of assigning any SCN for adjudication has been delegated to the Zonal Chief Commissioner by the Government. The Zonal Chief Commissioner had assigned this SCN to the Commissioner of Customs (Export), Air Cargo, New Delhi who passed the impugned order. We, therefore, find that the SCN was issued and the impugned order was passed by an officer who had the jurisdiction. We now proceed to deal with the substantive issues.

21. The first question to be answered is that whether in a case where forged or manipulated scrips or licences have been used for clearance of goods and there is no evidence that the fraud was committed by the importer, demand can be raised for the duty on the importer and if so whether extended period of limitation can also be invoked. This issue is no longer *res integra* and it has been settled by the Supreme Court in **M/s Munjal Showa Ltd. Vs. Commissioner of Customs And Central Excise (Delhi-IV) And**

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**M/s Friends Trading Co. Vs. Union of India And Ors.**<sup>22</sup>. The Supreme Court was seized of a matter where forged/fake DEPB licences/scrips were used to pay duty on imported goods. After completing investigation, show cause notices were issued invoking the extended period of limitation which were challenged both on the ground of limitation as well as on the ground that though the scrips were forged, the importers had no intention to evade the customs duty. The Commissioner of Customs passed orders confirming the duty which was upheld by the Tribunal and the High Court. Aggrieved, the appellant appealed to the Supreme Court which upheld the confirmation of the demands invoking extended period of limitation. However, insofar as the penalties were concerned, Supreme Court held that whether the buyers had knowledge of fraud or forged/fake DEPB licences/scrips and whether the buyers were to take precautions to find out the genuineness of the scrips which they had purchased would have a bearing the imposition of penalty, though it has nothing to do with the duty liability. For that purpose only the matter was remanded to the adjudicating authority. Paragraphs 7 to 12 of this judgment are reproduced below:

“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/Scrips.

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.

12. In view of the above and for the reasons stated above, both the appeals fail and are accordingly dismissed. As the penalty proceedings are reported to be pending pursuant to the remand order passed by the Tribunal, we direct the adjudicating authority to complete the penalty proceedings on remand, at the earliest preferably within a period of six months from today.

With this, both the appeals are dismissed. No costs.”

22. Similarly in the case of **Mercedes Benz India Ltd. & Others Vs. Directorate of Revenue Intelligence**, this Tribunal in the Final Order Nos. 50031-50060/2020 dated 9.1.2020<sup>23</sup> upheld the demand of duty on the importers where fraudulent/forged DEPB scrips or licences were used. Respectfully following these decisions, we hold that duty can be demanded from the importer



invoking extended period of limitation where fraudulent or forged licences/scrips are used to clear the goods even if the importer itself has not committed the fraud or forgery and even if there is no evidence that the importer knew about it because 'fraud vitiates everything'.

23. The alternative submission of the learned counsel for the appellants in this case is that it should at least be allowed the benefit of the licences/scrips which were not forged but whose value was enhanced in the Customs EDI system to the extent the licences were valid. To consider this submission, the conduct of the importer and what precautions it had taken while purchasing and using those licences/scrips must be examined. It is also important to examine whether in terms of the relevant exemption notification the appellant had fulfilled the conditions.

24. For every duty free scheme formulated by DGFT, a corresponding exemption is issued under Section 25(1) of the Customs Act, 1962. The notifications align with the corresponding paragraphs of the Foreign Trade Policy and also spell out the conditions subject to which the exemption notification is available. For instance, Notification No. 92/2009-Cus. dated 11.09.2009 provided exemption from duty when the goods are imported into India against a duty credit scrips issued under the Focus Product Scheme (FPS) subject to some conditions. Condition No. 2 states **"that the said scrip is produced before the proper officer of customs at the time of clearance for debit of the duties leviable from the goods but for this exemption."** Similarly exemption Notification No. 95/2009-Cus. exempts goods imported

against a duty credit scrip issued under the Vishesh Krishi and Gram Udyog Yojana<sup>24</sup> as per paragraphs 3.1 and 3.2 of Foreign Trade Policy. Condition No. 1 of this exempts reads; **“that the scrip has been issued to an exporter of products specified in paragraphs 3.13.2 of the Foreign Trade Policy by the Licensing Authority or Regional Authority and it is produced before the proper officer of customs at the time of clearance for debit of the duties leviable on the goods.”**

25. Similarly Notification No. 93/2009-Cus. exempts the goods imported against a duty credit scrips issued under the Focus Market Scheme (FMS) as per paragraph 3.14 of the Foreign Trade Policy. Condition 2 of this exemption notification also states **“that the said scrip is produced before the proper officer of customs at the time of clearance of the duties leviable on the goods, but for the exemption.”**

26. Likewise, all exemption notifications under various schemes require the scrip or licence to be presented before the proper officer of customs at the time of clearance of the goods. **It is also undisputed that the scrips and licences were fully transferable.** After fulfilling the export obligation, the exporter can transfer it of anybody else for a consideration. The buyer, then steps into the shoes of the exporter and will have the same rights of the licensee exporter. As may be seen in all the notifications, the exporter was required to produce the scrip/licence at the time of clearance of the goods. The buyer of the scrip/licence cannot acquire any right over and above what was available to the

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exporter nor can he be placed in a better position than the exporter. The irresistible conclusion is that buyer of the scrip also has to produce the scrip or licence for debit at the time of clearance of the goods. While an arrangement is made by the customs Department to have an online ledger of the scrips since there was no online transfer the data from DGFT to the Customs and a mechanism of online verification to check the genuineness, the scrip or licence had to be physically produced before the proper officer at the time of clearance. This responsibility under the exemption notifications and under the Foreign Trade Policy has neither been diluted nor extinguished by the system of registration of scrips/licences under the Customs EDI system. Any arrangement for the registration in the Customs EDI system does not, and cannot, in any way modify the conditions of exemption notifications which have to be construed strictly as has been held by the Supreme Court in the case of **Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar**<sup>25</sup> and in case of any doubt, the benefit of doubt must go in favour of the Revenue and against the assessee. CBEC Circular No. 5/2010 and 17/2012 and various public notices issued by the Commissionerate discussed above also clarify this aspect again and again that the physical scrips/licences must be produced. Learned authorized representative for the Revenue submits that only in 2019 when a mechanism online verification of the scrips/licences was introduced, the requirement of physical scrips or licences done away with.

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27. In this particular case, undisputedly the appellant has not only NOT produced the scrips or licenses for verification or debit at the time of clearance of the goods, but it was, in fact, oblivious of which licences or scrip, if any, was purchased by it. The appellant had only paid percentage of the duty payable to Shri Sharafat Hussain who in turn, used this forged or value enhanced scrips to clear the goods. There is no evidence of the transfer of scrips to the appellant and certainly there is no evidence whatsoever that the scrips/licences have been produced for physical verification before the proper officer at the time of clearance of goods.

28. The question which needs to be answered is what has actually been purchased by the appellant from Shri Sharafat Hussain's firm in these cases if it had not purchased the licences/scrips. None of the invoices produced before us indicate any licence/scrip. They mention only the Bill of Entry number and an amount which is a percentage of the amount of duty not paid in that Bill of Entry. Effectively, the appellant purchased the benefit of an exemption notification from Shri Sharafat Hussain and not scrip/licence.

29. **There is no provision to transfer the benefit of any exemption either under the policy or any notification or any provision of the law. The licences and scrips are transferable and if they are transferred, the transferee consequently gets the benefit of the exemption notification. Without transferring the licence/scrip, the benefit of exemption cannot be transferred.** An example will further clarify the difference. Indian Railways have now made tickets

transferable between family members. When 'A' buys a railway ticket 'A' earns a right to travel in a particular train on a date between the stations and occupy the allotted berth/seat. If 'A' transfers the ticket to his family member 'B' the right to travel is also transferred as a consequence. Without transferring the ticket, 'A' cannot simply say let 'B' travel instead of me because the right to travel flows from the ticket and cannot be separated from it. Just like railway tickets, the licences/scrips issued by the DGFT are also NOT bearer instruments which can be used by anyone to claim exemption. They are issued to the licensees/scrip holder who can freely transfer them to anybody else but without such a transfer, the benefit of the exemption itself cannot be transferred. The invoices issued by the companies owned by Shri Sharafat Hussain to the appellant produced before us do not indicate that any licence/scrip was transferred to the appellant Nidhi. Consequently, Nidhi never had any licence/scrip with it nor was even aware as to the benefit available under which licence/scrip issued to whom and/or transferred who was used in the Bill of Entry was known to the appellant. The question of producing the scrip or licence at the time of clearing the goods does not arise as a consequence. As the appellant had not fulfilled the requirements of either getting the licence/scrip transferred to it or producing it at the time of clearance as required under exemption notifications, we do not find any reason to hold that the appellant is entitled to the benefit of exemption notifications even to the extent that the manipulated licence has covered part of the duty debited.

30. Insofar as the demand of interest is concerned, interest under Section 28AA follows from the demand under Section 28 of the Customs Act. As we have held that the duty is payable the interest liability follows.

31. Insofar as the imposition of penalty is concerned, it is the contention of the learned counsel for the appellant that it was a bonafide buyer of duty free scrips and, therefore, no penalties must be imposed upon it. It is also the contention of the learned counsel for the appellant that since the scam would not have been possible without involvement of some customs officers, the show cause notice is premature because the role of such officers has not been investigated. As far as the role of the officers in the matter is concerned, learned authorized representative submits that the matter has been sent to the CBI who are investigating the matter. We find that in respect of the appellant only duty, interest, fine and penalty are relevant in this case but if any officers are involved, it will be a much more serious matter which will have to be investigated with respect to the violations of other laws such as Prevention of Corruption Act also. Investigation in this regard has been handed over to CBI. Even if the officers were involved, it does not, in any way, dilute the liability of the appellants in terms of duty, interest or penalties.

32. Regarding the submission of learned counsel that since it is a bonafide importer, no penalty should be imposed on it, we find that the Supreme Court in the case of **M/s Munjal Showa Ltd.** has dealt with this issue and in paragraph 11 of the judgment held that the question as to whether the buyers had the knowledge about the

fraud or forged licences and whether buyers were required to take precautions to find out about the genuineness of the licences which they have purchased would be bearing on the penalty. For that purpose, the Supreme Court had remanded that matter to the adjudicating authority.

33. We proceed to examine the question of penalty imposed upon the appellant based on these two parameters:

- (a) Knowledge of the fraud or forgery;
- (b) Precautions taken while buying the scrap and the responsibility for taking precaution.

34. We do not find any evidence of appellants' knowledge of fraud or forgery of the scrips/licences in this case. However, as far as the question of responsibility to take precautions and if such precautions were taken are concerned, we agree with the learned authorized representative that **caveat emptor** (Buyer Beware) is a well established principle and it requires the buyer of any goods to take reasonable precautions with respect to what he is buying. When one is buying an instrument for lakhs of rupees and claiming benefit of exemption from customs duty from it and such an instrument is numbered and is issued by any authority, it would be reasonable to expect that the buyer would know what instrument it is buying from who and in whose name it was issued originally. Even if one buys a car from another one would at least check the registration number of the car, make, model, etc. In the present case, none of purchase invoices produced by the appellant even indicate the licence or scrip which the appellant bought. The invoices show that the appellant bought the benefit of exemption

which is not transferable and it had not bought the licences/scrips which were transferable. For this reason, the appellant neither received physical licences/scrips nor has it produced at the time of claiming the benefit of the exemption. **Effectively, so far as the appellant is concerned instead of paying duty to Government exchequer it had paid a percentage of the amount equivalent to the duty to the firms of Shri Sharafat Hussain.** Shri Sharafat Hussain, in turn, used manipulated/forged licences to clear the Bills of Entry. In our considered view, this does not even remotely meet the requirement of caveat emptor. Under these circumstances, we find no reason to hold that the appellant was a genuine buyer of licences/scrips and had purchased them in good faith.

35. Penalty of an amount equal to the duty not paid was imposed on Nidhi under section 114A. This is a mandatory penalty imposable when a demand invoking extended period of limitation and since we have upheld the confirmation of the demand invoking extended period of limitation, we also uphold the imposition of penalty under section 114A.

36. Penalty of Rs.10,00,000 under section 112(a) (ii) and penalty of Rs. 1,00,000 under section 114AA were imposed on Jain, partner of Nidhi. The fifth proviso to section 114A reads as follows:

**Provided** also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

37. Penalty under section 112(a) (ii) on Jain (the partner) and penalty under section 114A on Nidhi (the partnership firm) in this case arise out of the same cause of action and therefore, penalty



under section 112 cannot be sustained as penalty has been imposed under section 114A which we have upheld.

38. Penalty under section 114AA is imposable only if **knowingly or intentionally** a false declaration, statement or document is made, signed or used. This section reads as follows:

**Section 114AA. Penalty for use of false and incorrect material**

If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

39. In the factual matrix of this case, we find that there is no evidence that Nidhi or its partner Jain had knowledge of the fraud/forged licences/ scrips being used to clear the goods and therefore, the penalty under section 114AA cannot be sustained.

40. In view of the above, the impugned order is upheld except to the extent of imposition of penalties on Shri Jain. **Customs Appeal No. 52173 of 2019** filed by M/s. Nidhi Enterprises is rejected. **Appeal No. 52174 of 2019** filed by Shri Sudarshan Kumar Jain is allowed and penalties of Rs. 10,00,000 under section 112(a) (ii) and of Rs. 1,00,000 under section 114AA imposed on him are set aside with consequential benefits, if any, to him.

(Pronounced in open Court on 16.11.2022)

**(Justice Dilip Gupta)**  
**President**

**(P.V. Subba Rao)**  
**Member (Technical)**

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