

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 3

CUSTOMS Appeal No. 12134 of 2014-DB

(Arising out of OIO-02/COMMR/DRI/2014 Dated-28/02/2014 passed by Commissioner of CUSTOMS-AHMEDABAD)

Dharmesh R Gathani

Director Of M/S, Padmavati Agencies Pvt Ltd, B/S,
Shaishya Kids Campus,Near Aryavart-Iv,
Lane Opp Ymca, S G Highway,Ahmedabad
Gujarat

.....Appellant

VERSUS

C.C.-Ahmedabad

Custom House,
Near All India Radio Navrangpura,
Ahmedabad,
Gujarat

.....Respondent

APPEARANCE:

Shri. P D Ruchchh, Advocate for the Appellant

Shri. Dharmendra Kanjani, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

Final Order No. A/ 10907 /2022

DATE OF HEARING:28.06.2022
DATE OF DECISION:02.08.2022

RAMESH NAIR

This appeal is directed against the Order-In-Original No. 02/Commr/DRI/2014 dtd. 28.02.2014 passed by the Commissioner of Customs, Ahmedabad imposing penalty of Rs. 3,40,00,000/- under Section 112(a) and Rs. 1,45,00,000/- under Section 114AA of the Customs Act, 1962 on the Appellant for his alleged involvement in forged /fake VKGUY /DEPPB license and imports there under.

2. The brief facts of the case are that Appellant is one of the Director of M/s Padamavti Agencies Pvt. Ltd., the said company are engaged in the business of trading of various import export incentive licences such as DEPB, VKGUY, FMS,DFIA etc. issued by the Directorate General of Foreign Trade. Apart from trading of the said licenses, it also provide consultancy services in relations to the Government's various export incentive scheme. During the

period 2008-09 the Appellant's company had purchased 700 Licences from Shri Kalpesh Daftary of M/s Sankalp Creations Pvt. Ltd. and sold the same to M/s Hindalco Industries Ltd. Shri Kalpesh Daftary is a broker/trader dealing in sale and purchase of the duty free licences. On investigation by the DRI, 93 Licences out of 700 Licences purchased by M/s Padmavati Agencies Pvt. Ltd. from M/s Sankalp Creations Pvt. Ltd. in turn were sold to M/s Hindalco were found to be forged. The officers of DRI had searched many premises in different parts of country and withdrawn numerous documents during the investigation. Statements of many persons/ brokers, including appellant and other director of M/s Padmavati and its employees, were recorded by DRI during the course of investigation. The investigation conducted by DRI brought out that forged Duty Entitlement Pass Book (DEPB) / Vishesh Krishi and Gram Udyog Yojana (VKGUY) licences were used by M/s. Hindalco Industries Ltd. towards payment of Customs Duty at the time of importation. Accordingly, on completion of investigation, the DRI has issued show cause notice dtd. 05.11.2012 to M/s Hindalco for recovery of Customs duty and penalty. The said show cause notice was also proposed to impose penalty on Appellant and some other persons involving in forging of licences. The show cause notice was adjudicated by the Commissioner vide impugned order, who imposed a penalty of Rs. 3,40,00,000/- under Section 112(a) and Rs. 1,45,00,000/- under Section 114AA of the Customs Act, 1962 on the Appellant. Hence this appeal.

3. Shri. P D Ruchchh, Learned Counsel appearing for the Appellant submits that Ld. Commissioner has grossly erred in passing the impugned order without allowing cross examination of two witness namely Shri Kalpesh Daftary and Shri Sachin Koradia. Entire case against the Appellant is based on the statements of said persons. Appellant had consistently submitted before the Ld. Commissioner to allow cross examination of said two persons that too with the grounds for cross examination and detailed final reply to the show cause notice will be filed only after cross –examination. The Ld. Commissioner has therefore grossly erred in not permitting cross examination of these persons. As per the provisions of Section 138B(1)(b) of the Customs Act, 1962 once the Ld. Commissioner has choosen not to allow the cross examination of the witnesses, same cannot be relied upon against the appellant for upholding the allegation against him. He placed reliance on the following decisions.

- Andaman Timber Industries Vs. Commissioner of C.Ex., Kolkata –II 2015(324)ELT 641(SC)

- J & K Cigarettes Ltd. Vs. Collector of Central Excise- 2009(242)ELT 189 (Del.)
- Jindal Drugs Pvt. Ltd. Vs. UOI 2016(340)ELT 67 (P&H)
- Ambika International Vs. UOI 2018(361)ELT 90 (P&H)
- G-Tech Industries Vs. UOI 2016(339) ELT 209 (P&H)
- Flevel International Vs. Commissioner of Central Excise – 2016(332)ELT 416 (Del)

3.1 He submits that there is no credible and independent evidence which may establish or even remotely indicate that appellant or anybody from Appellant's company was aware of the forgery of 93 licences and its documents sold through them by Shri Kalpesh Daftary and his associates to M/s Hindalco. On perusal of the impugned notice that it is clear that entire planning of counterfeiting the licences, RAs, letters confirming genuineness of RAs, bank documents, letter heads of different firms etc. was undertaken by Shri Kalpesh Daftary in association with Shri Piyush Viramgama, Shri Niyaz Ahmed and Shri Vijay Ganhiya in such a precise manner that no one, except the said four persons, could make out at any state that the documents were forged till DRI got specific information. These facts have also been confirmed by the Ld. Commissioner in his findings at various stages. Therefore, only because the disputed licences were sold by Shri Kalpesh Daftary through Appellant to M/s. Hindalco, it cannot be inferred that he was aware of fraudulent forgery of licences and its documents, more so because neither Appellant has admitted the same at any stage nor does any other person in the investigation, except Shri Kalpesh Daftary, has said so.

3.2 He also submits that consequent to detection of fraud by DRI and having come to know that Shri Kalpesh Daftary and others have betrayed Appellant and his company by intentionally selling forged licences/documents, he had filed Police Complaint bearing FIR No. I 45 at Dahej Police Station on 18.07.2010. Consequent to the complaint, Shri Kalpesh Daftary was arrested on 15.09.2010 whereas Shri Piyush Viramgama and Shri Vijay Gadhiya were arrested on 11.10.2020 by the police. Apart from the Police Complaint in the said matter Appellant also filed Civil Suit in court.

3.3 He further submits that DRI had examined numbers of other persons including Executive and employees of M/s Hindalco, Shri Sashin Koradia-tax

consultant & his employees, Directors and employees of M/s. Kshitij Marine Services Pvt. Ltd. who handled import documents of M/s Hindalco, owners of M/s Accurate Multi Trade, M/s R.R. Impex, M/s Hindustan Continental Ltd., M/s Vani Exports and M/s MPG International etc. who had arranged billing of the 93 licences covered in this Notice. None was arrested nor was made Noticee by investigation believing that they were not aware of the forgery. There is no difference between Appellant case and the case of the above persons. The allegation against the Appellant is that he was aware of fake nature of licences and its documents and in spite of the same, he knowingly dealt with the said documents which ultimately rendered him liable to penal action under provisions of the Customs Act, 1962. However, the investigation has not defined anywhere in the notice as to how he was aware of the scandal. The conclusion drawn by Ld. Commissioner in the impugned order against the Appellant for imposing penalty is frolicsome and not sustainable in the eyes of law. Therefore the said order to that extent is required to be set aside.

3.4 He also submits that the only ground to impose penalty on Appellant is baseless statement of Shri Daftary, a co-accused. It is settled law that penalty not imposable merely on the basis of co-accused's statement. He placed reliance of the following decisions.

- Jagannath Premnath Vs. Commissioner of Customs, Mumbai – 2006 (198)ELT 442 (Tri. Ahmd.)
- Ashok Kumar Singh Vs. UOI – 2000 (124) ELT 33 (All)
- Vikram Singh Dahiya Vs. Commr. Of Cus. (Export), New Delhi – 2008 (223) ELT 619 (Tri. Del)
- Ashwinbhai Mohanlal Polra Vs. Commissioner of Cus. Ahmmedabad – 2004 (166) ELT 391 (Tri. – Mumbai)

3.5 He further submits that another ground for imposing penalty on Appellant by Ld. Commissioner are that there was delay in making payment of forged licenses and failed to explain about the accounts, cash transactions, heavy discount and use of the forged licenses at Mangalore port only etc. Appellant had submitted all the details to investigation agency through various letters and investigation had framed the charges against him based on selective documents and completely ignored other documentary evidences of purchase of other genuine licences and payment and receipts towards other transactions. Appellant also produced statement showing the genuine licenses purchased from Kalpesh Daftary and used at Mangalore Port, as statement showing other genuine licenses purchased on

heavy discount from Shri Kalpesh Daftary and sold to M/s Hindalco and a statement showing genuine licenses purchased from Shri Kalpesh Daftary wherein payment were made after gap of long time, so as to prove that base of allegation and confirmation of allegation are not correct at all.

3.6 Without prejudice he also submits that plain reading of Section of provisions of Section 112 makes it amply clear that the same provides for penalty for improper importation of goods into India or abatement in such importation. It is on record that neither he was importer of the goods nor had he or M/s Padmavati abetted in utilization of said 93 Licenses for payment of customs duty at Dahej Port. It is also undisputed fact that transaction relating to purchase /sale of VKGUY and DEPB licenses had taken place prior to importation and clearance of the imported goods therefore, allegation of the impugned notice that appellant had violated provisions of the Customs Act and made the imported goods liable to confiscation is absolutely unlawful. Hence no penalty can be imposed on Appellant. He placed reliance on the following decisions.

- Commissioner of Customs Vs. Sanjay Agarwal - 2011(269)ELT 153 (Guj.)
- Prakash Poonia Vs. Commissionr of Customs, Kandla - 2010 (252) ELT 442 (Tri. Ahmd.)

3.7 He further argued that when the person who actually committed the alleged offence (Importer in this case) has been totally left off from penal liability, the person assisting the alleged offender (Appellant) is entitled to the same benefit as extended to the importer. Accordingly no penalty was imposable on the Appellant.

4. Shri. Dharmendra Kanjani, Superintendent (Authorized Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order and placed reliance on the following decisions:

- 2021 (376) ELT 242 (SC) -Gov. of Kerala Vs. Mother Superior Adoration Convent
- 2004 (170) ELT 135 (SC) - Collector Of C..Ex., Culcutta Vs Alnoori Tobacco Products
- 2018 (361) ELT 1025 (Tri.-Del.) - Sardana Enterprises Vs. CC, New Delhi
- 2020 (372) ELT 109 (Tr.-Del.) - Him Logistics P. Ltd. Vs. CC, New Delhi ICD TKD Export

5. Heard both sides and perused the records. From the reading of the finding of the impugned order it shows that though the Commissioner has repeatedly observed that the present appellant along with Shri Kalpesh Daftary, Shri Piyush Viramgama, Shri Niyaz Ahmed and Shri Vijay Gadhiya were the key players in forged VKGUY /DEPB licences, no such clinching evidences stand relied upon by him against the Appellant. We have to keep in mind that we are deciding the penal liability of the present appellant which can arise only if the appellant knew that the licences in which he is dealing are forged/fake. We also notice that there is no evidence on record to show that it is the present appellant who had either himself forged the said licences or he was aware of the forgery of the licences. Ld. Commissioner in the impugned order itself held that licences were, in fact, forged by Shri Niyaz Ahmed at Kanpur using the photocopies of the corresponding genuine licences provided by Shri Kalpesh Daftary. This fact has been confirmed by Shri Piyush Viramgama as well as Shri Kalpesh Daftary in their statements. The said fact itself clearly established that Appellant has not forged the disputed licenses. We do not find any independent evidences which may establish that appellant was aware for forgery of licenses. Only because the disputed licences were sold by Shri Kalpesh Daftary through the Appellant to M/s Hindalco, it cannot be concluded that Appellant was aware of fraudulent forgery of licences.

5.1 It is on record that during the period 2008-2009 the Appellant's company had purchased 700 licences from Shri Kalpesh Daftary and sold the same to M/s Hindalco and also purchased about 1500 licences from other brokers/ exporters and sold the same to M/s Hindalco. No irregularity was noticed by the investigating authority other than 93 disputed licenses, therefore bonafide act of the Appellant cannot be doubted. In the present matter we also noticed that in fact Appellant themselves have become victim of the fraud, the same is also clear from the facts that after consequent to detention of fraud by DRI Appellant had filed Police Complaint against the said persons for committing offence under Section 406,420,466,467,468,471,472,474,120(B) and 34 of the Indian Penal Code. We also noticed from the submission of Appellant that M/s Hindalco had also lodged FIR against all the Directors of M/s Padmavati, M/s Vrinda and others with Dahej Police Station, however on investigation the Police of Bharuch filed Charge Sheet against Shri Kalpesh Daftary, Shri Piyesh Viramgama,

Shri Vijay Gadhiya and Shri Niyaz Ahmed in the Court of Additional Judicial Magistrate, F.C., Bharuch. However the appellant or any of its director was not made party in the alleged offence of forgery. This fact which is on record also prove that Appellant was neither intentionally involved in selling of forged licences nor were aware of such forgery. It clearly emerges that Appellant was bona-fide purchaser and seller of forged licenses and was also victim like Hindalco for forgery carried out by other persons. We also find that in the present matter M/s Hindalco has paid entire duty with interest and Ld. Commissioner also not imposed any penalty on M/s Hindalco on the ground that they have been acting in a bonafide manner. In the present matter appellant also acting in a bonafide manner and sold the disputed licence assuming that these are genuine licences like other licences which were sold to M/s Hindalco. We are therefore find that bonafide of the appellant is beyond doubt.

5.2 After going through the impugned order and facts on records, we also find that the entire case of the Revenue against the Appellant is based upon the statements of Shri Kalpesh Daftary co-noticee without there being any further evidence. In the impugned order for confirmation of penalty against the Appellant Ld. Commissioner relied upon the statements of Shri Kalpesh Daftary. In fact in this case when Appellant asked for cross-examination of Shri Kalpesh Daftary and other persons, whose statement was relied upon to implicate the appellant, the request of the appellant was denied by the Ld. Commissioner, therefore, the said statements cannot be admitted as piece of evidence as per Section 138B of the Customs Act, 1962, as observed by the Hon'ble High Court in *Basudev Garg & Ors. and J&K Cigarettes Ltd.* - 2009-TIOL-478-HC-DEL-CX. = [2009 \(242\) E.L.T. 189](#) (Del.) = [2011 \(22\) S.T.R. 225](#) (Del.). In fact of the present case, when the statements of Shri Kalpesh Daftary were heavily relied upon to penalise the appellant, the said statements being third party evidence and when the appellant seriously disputed the same, it was bounden duty on the part of the Ld. Commissioner to cross examine the witnesses and only thereafter such statements could have been relied as a piece of evidence, which Ld. Commissioner has gravely failed to do his duty. In this circumstances the statements lost its evidentiary value. Therefore due to non compliance of Section 138B of the Customs Act, 1962 on the part of Ld. Commissioner, the statements of Shri Kalpesh Daftary relied upon to fasten the penalties upon the appellant are not admissible as evidence.

5.3 We find that on the issue of cross examination in terms of Section 138B, in the matter of *Kallatra Abbas Haji* (supra) [1994 \(69. \) E.L.T. 212](#) (Ker.) the Hon'ble High court of Kerala has considered Section 138B of the Act of 1962 and it has held as follows :-

"25. True, Section 138B states that a statement made and signed by a person before any gazetted officer of customs is relevant to prove the truth of the fact it contains in any proceeding under the Act. But these statements are relevant only if the conditions prescribed under clauses (a) or (b) of Section 138B are satisfied. Here, there is no case that clause (a) applies. If at all, clause (b) alone can be attracted. Under this clause, the statement is relevant when (a) the person who made the statement is examined and (b) the statement is admitted in evidence after the authority forms an opinion that in the interest of justice and having regard to the circumstances of the case, it should be so admitted."

Similarly in the matter of *HIM Logistics Pvt. Ltd.* (supra) [2016 \(336\) E.L.T. 15](#) (Del.) it was considered a case, where the noticee was not granted the right to cross-examine in a proceeding under the Act of 1962. It has held that, the denial of the request for cross-examination vitiates the order-in-original. It has held as follows :-

"13.this right of cross-examination can be taken away. The court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay and expense which, under the circumstances of the case, the Court considers unreasonable. It is clear that unless such circumstances exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi-judicial proceedings."

In the matter of *Ciabro Alemao & Ors.* (supra) [2018 \(362\) E.L.T. 465](#) (Bom.) has considered Sections 108 and 138B of the Act of 1962 and has held as follows :-

"42. The CESTAT confused the issues of relevance and proof. A statement may be relevant, but it yet needs to be proved. The fact that a statement is made and recorded, and is statutorily said to be relevant, does not mean it is proved. That statement, like all testimony, must be subjected to recourse of cross-examination, to be drawn into the evidentiary pool to form a basis for reasoning or conclusion. Section 138B does not say, and could not say, what statements can be taken as proved even

without cross-examination. This, however, is how the CESTAT has misunderstood the section. All that the section says is that for want of production of a witness. This Section 108 statement does not automatically cease to become relevant. Questions of relevancy and proof are yet to determine by the Indian Evidence Act, and the CESTAT wholly failed to take these into account."

6. In the facts of the present case, it is on record that Ld. Commissioner has disallowed the request of cross-examination of persons and relied upon such statements as evidence. The impugned order-in-original does not record a finding that, any of the conditions specified under Sections 138B(1) of the Act of 1962 stands satisfied thereby such statements without cross-examination of such witness became absolutely irrelevant. In such circumstances, the adjudication proceedings conducted by the adjudicating authority and resultant the impugned order-in-original stands vitiated by breach of principles of natural justice. The impugned order-in-original is therefore legally not correct on this ground also.

7. In the impugned matter we also find that Ld. Commissioner only on the basis of statements of Shri Daftary who is also co-accused in the present case concluded that Appellant is involved in forged licences activity. We find that statements of said co-noticee cannot be adopted as a legal evidence to penalize the accused unless the same are corroborated in material particulars by independent evidence. In the case of *Surinder Kumar Khanna v. Intelligence Officer Directorate of Revenue Intelligence* - [2018 \(362\) E.L.T. 935](#) (S.C.) the Hon'ble Apex court in paragraphs 11 and 12 held as under :-

"11. in Kashmira Singh v. State of Madhya Pradesh MANU/SC/0031/1952; (1952) SCR 526, this Court relied upon the decision of the Privy Council in Bhuboni Sahu v. The King MANU/PR/0047/1949 : (1949) 76 Indian Appeal 147 at 155 and laid down as under :

"Gurubachan's confession has played an important part in implicating the appellant, and the question at once arises, how far and in what way the confession of an accused person can be used against a co-accused? It is evident that it is not evidence in the ordinary sense of the term because, as the Privy Council say in Bhuboni Sahu v. The King. "It does not indeed come within the definition of" 'evidence' contained in Section 3 of the Evidence Act., It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination." Their Lordships also point out that it is "obviously evidence of a very weak type..... It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities."

They stated in addition that such a confession cannot be made the foundation of a conviction and can only be used in "support of other evidence." In view of these remarks it would be pointless to cover the same ground, but we feel it is necessary to expound this further as misapprehension still exists. The question is, in what way can it be used in support of other evidence? Can it be used to fill in missing gaps? Can it be used to corroborate an accomplice

or, as in the present case, a witness who, though not an accomplice, is placed in the same category regarding credibility because the judge refuses to believe him except in so far as he is corroborated.

12. The law laid down in *Kashmira Singh* (supra) was approved by a Constitution Bench of this Court in *Hari Charan Kurmi and Jogia Hajam v. State of Bihar* MANU/SC/0059/1964 : (1964) 6 SCR 623 at 631-633 wherein it was observed :

"As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. As was observed by Sir Lawrence Jenkins in *Emperor v. Lalit Mohan Chuckerburty* a confession can only be used to "lend assurance to other evidence against a co-accused". In *re Periyaswami Moopan Reilly. J.*, observed that the provision of Section 30 goes not further than this : "where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence". In *Bhuboni Sahu v. King* the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board, observed that "a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved the case; it can be put into the scale and weighed with the other evidence". It would be noticed that as a result of the provisions contained in Section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the court is evidence; circumstances which are considered by the Court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in Section 30. The same view has been expressed by this Court in *Kashmira Singh v. State of Madhya Pradesh* where the decision of the Privy Council in *Bhuboni Sahu* case has been cited with approval."

8. As per our above discussion and finding which are reinforced by the judicial pronouncements, we are of the considered view that the impugned order imposing penalties on appellant is unsustainable and liable to be set aside. Accordingly, the impugned order is set aside to the extent it imposes penalties upon the present appellant. The appeal is allowed with consequential relief.

(Pronounced in the open court on 02.08.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

PRACHI