



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5795 OF 2023

Sidhartha Corporation Pvt. Ltd.,)
 [Through Mr. Praveen Kumar Bhandari, Authorized)
 Official], 205, 2nd Floor, JK Chambers, Plot No.76,)
 Sector – 17, Vashi, Navi Mumbai – 400 703) ...Petitioner

V/s.

1. Union of India)
 Through the Secretary, Department of Revenue,)
 Ministry of Finance, North Block, New Delhi – 110)
 001)
 2. The Commissioner of Customs [NS-I], Jawaharlal)
 Nehru Custom House, Nhava Sheva, Tal. Uran, Dist.)
 Raigad, Maharashtra – 400 707)
 3. The Additional Commissioner of Customs)
 [The Adjudicating Authority], Office of the)
 Commissioner of Customs [NS-I], Nhava Sheva, Tal.)
 Uran, Dist. Raigad, Maharashtra – 400 707) ...Respondent

Mr. R.K. Tomar a/w. Mr. Gaurav S. Sartare for petitioner.
 Mr. J.B. Mishra a/w. Mr. Ram Ochani for respondent nos.2 and 3.

**CORAM : K.R. SHRIRAM &
JITENDRA JAIN, JJ.
DATED : 26th AUGUST 2024**

ORAL JUDGMENT (PER K.R. SHRIRAM, J.) :

- 1 By consent, taken up for hearing. Therefore, Rule.
 Rule made returnable forthwith.
- 2 Petitioner is engaged in export of agricultural commodities, products and spices from various ports in India. Petitioner is a three star export house recognised by the Government of India and has been allotted

Import Export Code (IEC) No.0700012770.

3 Petitioner has filed this petition under Article 226 of the Constitution of India alleging violation of the principles of natural justice and contravention of provisions of Section 28AAA of the Customs Act, 1962 (the Act). Petitioner prays for setting aside the order-in-original being Order-in-Original No.135/2021-22/ADC/NS-I/Gr.I&IA/JNCH dated 17th August 2021 passed in F. No.S/6-Gen384/2018-19/Gr.7H [S/10-Adj-48/ 2021-22/Gr.I&IA].

4 Under the Focus Product Scheme (FPS) implemented by the Directorate General of Foreign Trade (DGFT) under the Foreign Trade (Development and Regulation) Act, 1992 and Rules made thereunder and under Chapter 3 of the Foreign Trade Policy, a person, upon export of goods and upon realisation of the foreign exchange, as incentive for exports, is entitled to receive duty credit scrips. These scrips can be utilized to discharge customs duty payable on imports. These scrips are commonly referred to as FPS license and are freely transferable. There are no restrictions.

5 Against the exports made by petitioner during the year 2014, DGFT issued to petitioner FPS license dated 24th September 2014 for a value of Rs.20,65,447/-. As the FPS license was freely transferable, petitioner sold the FPS license to one M/s. Ashish Enterprises, Mumbai.

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M/s. Ashish Enterprises, Mumbai registered the said FPS license at Chennai Port on or about 30th September 2014. The said M/s. Ashish Enterprises further sold it to one M/s. R.K. Exports, Mumbai and finally the said FPS license was utilized for the purpose of customs duty payment at Nhava Sheva Port by one Mitashi Edutainment Pvt. Ltd. against two Bills of Entry No.6970054 dated 7th October 2014 and 7029162 dated 10th October 2014.

6 The Revenue realised that the said FPS license was fraudulently re-registered at Nhava Sheva Port on or about 26th December 2014 in the name of petitioner. It also came to be known to the Revenue that the said FPS license was mis-utilized at ICD Tughlakabad vide Bills of Entry No.7892759 dated 5th January 2015 and 8311586 dated 16th February 2015 filed by one M/s. City Graphics and M/s. GFC Weld House respectively, through Customs Broking firm M/s. Imexcon (CHA License No.020/1988). In response to summons dated 2nd June 2017 issued under Section 108 of the Act, petitioner submitted details in respect of obtaining the said FPS license and its sale to M/s. Ashish Enterprises, Mumbai. Representative of petitioner also appeared before the Revenue and his statement under Section 108 of the Act was recorded. Petitioner's representative one Paresh Gadhvi denied any role of petitioner in the fraudulent re-registration of the said FPS license and its excess utilization/mis-utilization. This has been admitted in the orders passed by respondent. At the same time, when

petitioner realised in September 2017 or thereabout that an alert was placed on its IEC which resulted in its export shipments being held up at various ports, petitioner approached the office of the Revenue. Petitioner says it was orally told to pay the customs duty alongwith interest and mandatory penalty of 15%. It is petitioner's case that finding no other alternative, as its shipments were held up, petitioner wrote a letter dated 14th September 2017 after paying a total amount of Rs.29,73,352/- on 13th September 2017. Of this Rs.20,65,153/- was towards customs duty and interest was Rs.9,08,194/-. It is respondents' case that petitioner, by its letter dated 14th September 2017, had admitted to pay the amount of Rs.29,73,352/- and also waived any show cause notice. Petitioner, according to respondents, was ready to pay the mandatory penalty of 15% also.

7 It is petitioner's case that this letter was written and the amounts were paid since its shipments were held up at various ports and, therefore, as recorded in paragraph 3.2 of the show cause notice, since 27th September 2017 petitioner has been addressing various communications for refund of the amount paid stating that the amount was paid under protest. Petitioner is seeking refund of not only the customs duty and interest paid totaling to Rs.29,73,352/- but is also seeking refund of Rs.3,09,774/- that it paid towards the mandatory penalty. Petitioner is

claiming refund of a total amount of Rs.32,83,126/-.

8 Once this amount was paid, the alert on petitioner's IEC was removed. Thereafter, the Adjudicating Authority decided to adopt a shortcut approach. The Adjudicating Authority did not consider any of the submissions of petitioner or deal with any submissions made by petitioner during the personal hearing but passed a non speaking order simply saying that recovery has been made from petitioner and, therefore, nothing further has to be done. The Adjudicating Authority does not even give a finding against petitioner but simply relies on provisions of Section 28AAA of the Act to hold petitioner liable to pay the customs duty alongwith interest for excess utilization/mis-utilization of FPS license. The Adjudicating Authority also recorded that petitioner has paid the amounts mentioned. Thereafter, has only reproduced Section 28(4), 28(5) and 28(6) of the Act and straightaway passed the order without any discussion. The Adjudicating Authority directed the duty amount and the interest amount paid to be appropriated in accordance with Section 28AAA(1) and Section 28AAA(2) of the Act respectively, and the penalty amount in accordance with Section 28(6) of the Act. The Adjudicating Authority does not discuss anywhere how Section 28AAA of the Act is applicable to petitioner and how the amounts could be appropriated under Section 28(6) of the Act when petitioner's stand consistently has been that it was paid under protest. From

the provisions of Section 28AAA of the Act, in our view, it appears that the same will not be applicable to petitioner's case in as much as the Revenue has accepted the fact that petitioner had sold FPS license to M/s. Ashish Enterprises, who sold the same to M/s. R.K. Exports, who then sold the same to Mitashi Edutainment Pvt. Ltd. Nowhere it is alleged that petitioner has obtained any FPS license by means of collusion or willful suppression of facts.

9 Petitioner carried this order dated 11th December 2018 in appeal before the Commissioner of Customs (Appeals), who accepted that the investigation has revealed that the FPS license that was issued to petitioner was transferred to M/s. Ashish Enterprises and subsequently, M/s. Ashish Enterprises sold the said license to M/s. R.K. Exports who then sold the same to Mitashi Edutainment Pvt. Ltd. The Appellate Authority found that the order passed by the Adjudicating Authority was passed without following the principles of natural justice and, therefore, quashed the order and remanded the matter for fresh decision. Therefore, in accordance with the said order dated 14th June 2019, the matter was remanded to respondent no.3.

10 Respondent no.3 has made very startling observations in the order dated 17th August 2021 which is impugned in the petition. Infact reading the order, we would have thought, even the Revenue would have

challenged the same because of the observations made by respondent no.3. For ease of reference, the discussion and findings starting from paragraphs 11 to paragraph 14 of the impugned order dated 17th August 2021 is scanned and reproduced hereinbelow :

DISCUSSION AND FINDINGS

11. I have carefully gone through the records of the case and written and verbal submissions made by the noticee. The issue is regarding double utilization of FPS license issued to the noticee. The first instance of its utilization at Chennai Port is clear. The FPS license was utilized in full by M/s Mitashi Edutainment who as confirmed in their statement are still in possession of the original copy of the concerned FPS license.

A FPS License having same details was registered at JNCH after the original was utilized in full at Chennai. This re-registered license was further utilized by two importers at ICD Tughlaqabad.

All the above events took place in year 2014. In 2017 the investigation unit received a draft Local Audit Inspection Report on the subject of misutilization/reutilization of Duty scrips at various ports by re registering the licenses by changing date of license and port codes. The present case was one of such reported case. SIIB accordingly conducted investigation as detailed above. As the noticee paid the duty amount and interest vide letter dated 21.09.2017, the investigation was concluded w/s 28 (6) of Customs Act, 1962. The Investigation Report was sent to concerned Group vide letter dated 09.05.2018 for adjudication. The case was adjudicated vide order dated 14.12.2018 and the after appropriating the duty and interest paid under Section 28 AAA of the Act, the proceedings was closed under Section 28 (6) ibid. Aggrieved the noticee filed appeal before Commissioner (A) who vide order dated 14.06.2019, inter alia issued following directions:

6.5 I observe that the impugned order has been passed against the appellant for mis-utilization of licence, recovery has been made and proceedings concluded without issue of SCN. It is an essential principle of natural justice that while passing any quasi-judicial decision an affected party a notice(SCN) containing the grounds of the proposed action should be given to the affected party before passing such order in quasi-judicial proceedings. An order passed concluding the proceedings under section 28(6)(i) of the Customs Act, 1962 is a quasi-judicial order before passing of which the ingredients of compliance of notice have to be complied with by the Adjudicating Authority. In the circumstance, I hold that the impugned order is passed without following the essential principles of natural justice. Hence I think it just and proper that the OA decided the matter afresh issue SCN and after granting oral hearing to the appellants in compliance of principles of natural justice. The department will be at liberty to cause necessary investigation as deemed fit

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6.6 In view of above, I think it just and proper to remand the matter to the Original authority for fresh decision following the principles of natural justice. Since, the matter is remanded to the OA on the primary issue of violation of natural justice, I refrain from giving decision on merits and all aspects of decision of the case on merits by the OA are kept open. The OA should decided the matter afresh after looking in the submission of the appellant, issue of SCN and after granting effective hearing to the appellant in compliance of principle of natural justice. The appellant is also directed to co-operate with the Original Authority and should appear before him for personal hearing as and when fixed.

Accordingly the present show cause notice dated 3.03.2020 has been issued.

12. On going through the show cause notice I find that no further investigation has been conducted and only the findings of IR dated 09.05.2018 have been relied upon in the present show cause notice. As discussed above the license in original is still with the first user M/s Mitashi Edu. It is therefore obvious that the license which was re-registered at INCH was a forged one. The process of registration as laid down vide PN 4/2013 dated 05.02.2013 has inbuilt mechanism for prevention of such fraud. The PN has been reproduced as below:

PUBLIC NOTICE No. 04 /2013 DATED 05.02.2013 (Referred / amended vide S.O.No. 05/2013)

Subject: Procedure to be followed in case of Registration of Duty Credit scrips issued under Served from India Scheme Certificate (SFISC) VisheshKrishi and Gram UdyogYojana(VKGUY); Target Plus Scheme (TPS); Focus Market Scheme (FMS) and Focus Product Scheme (FPS)-reg

Para (2) of Public Notice No. 139/2011 Dated 23.11.2011 Amended as follows.

- a) The original scrip including Annexure, along with their photocopy, and copies of Bank Realization Certificate (BRC) shall be presented with application to the TA (License) in License Section. The TA shall give acknowledgement (time and date of receipt) to scrip holder/CHA and also endorse the time and date of receipt on the application. Then TA shall hand over file with these documents to Appraising Officer (AO)/Supdt in License Section.*
- b) The ACAO License shall check the Alert Register and if there is no alert, shall endorse No Alert with his/her signature and stamp on the file and on original scrip.*
- c) Supdt/Licence shall confirm the genuineness of licences from the DGFT website. If not available will call confirmation from DGFT by fax/Email.*
- d) Copy of verification of genuineness of scrip, will be downloaded by TA (License) from DGFT Website and it will be linked with relevant file, and bring out the facts of cross check/verification, and send file to AO/Supdt (License).*
- e) Once the genuineness of License is confirmed and there is No Alert and if no discrepancy is noticed the AO/Supdt (License) shall register the scrip in the EDI system. The AO/Supdt (License) shall keep a copy of the Scrip & Annexure in the file. The Job Number and Registration Number generated by EDI system will be endorsed on original scrip and its photocopy by AO/Supdt (License) after which the TA (License) will return original scrip to scrip holder/CHA against written acknowledgment on the photocopy of scrip in the file.*
- f) After verification of all details as mentioned above (a) to (e) Scrip will be registered on the same day or latest by the next working day.*
- g) DC/ADC/Licence shall on random basis select 10% of scrips for verification of the genuineness of Shipping Bills and BRCs by the licensing branch. For such selected scrips, TA Licence shall check the FOB value as per shipping bills in Annexure attached with scrip and actual realized as per copy of BRCs, and the admissible entitlement. The report of the TA (License) shall be noted in the file. Meanwhile AO/Supdt (License) shall send file to Supdt (EGM) for crosschecking Annexure details with Customs EDI details of shipping bills/EGM filing status, and where relevant the product exported (relevant for FPS scheme) or destination country (relevant for FMS) and Supdt. (EGM) shall send report to AO/Supdt. Licence within two working days and AO/Supdt. Licence shall put up consolidated report to DC/ADC /Licence on the next working day. h) However, if any discrepancies are noticed in the process of crosscheck and/or verification, the AO/Supdt (License) shall evaluate the courses of action and refer the matter to DC/AC (License) who will take further actions to appropriately handle and redress the discrepancies. This procedure shall be reviewed on*

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receipt of guidance from Board and/or on start of online transmission of reward scrips. Difficulties, if any, in implementation, may be brought to notice.

A scrutiny of the above PN shows that a proper procedure for checking the genuineness of the documents and scrip submitted was laid down in para b, c, d and e of the above PN and only after all these steps were followed the scrip could have been registered in EDI. As in the present case the scrip in original is still with its original user, it is obvious that a forged scrip was registered at JNCH. A proper examination of the concerned registration file and the officers who had registered the license is necessary to ascertain the people involved in this fraudulent activity.

Further the re-registered license was used by two importer in ICD Tughlaqabad. They have neither been summoned nor any verification at Tughlaqabad end has been done to ascertain as to how and from whom they got the re-registered scrip. The persons involved in re-registration are required to be traced to reveal the full truth. No efforts in this direction is seen in the investigation.

The investigation has closed the investigation only because the importer admitted his liability to pay duty and paid it with interest and penalty. However, it is on record that they paid the amount as an alert was put against their IEC in system because of which they were not able to fulfil their export order and were under tremendous pressure. It is there on record that immediately on payment the alert was removed. The importer, also lodged a protest immediately after making payment and have been consistently following up.

13. I am of view that on the basis of investigation conducted no conclusive inference regarding role of the importer can be drawn and the allegation can not be treated to be based on evidence of reasonable strength. Just because the importer admitted to pay duty, it can not be inferred that he was involved in bogus registration. This case does not appear to be a case of obtaining scrip from DGFT by collusion, willful misstatement or suppression of facts. It is a case where in all probability a forged scrip was registered at JNCH as the original scrip was always in custody of original user.

In view of incomplete investigation and lack of proper evidence it is not justified to confirm charges against the importer. However till it is proved conclusively after investigation that the scrip registered was a forged one, it may not be possible to absolve the importer from liability cast upon them by Section 28 AAA that the person in whose name scrip is shown to be issued shall be liable for payment of exemption of duty availed against the scrip.

14. The undersigned is not authorized to cause any further investigation. As under the present facts and circumstances no conclusive decision can be taken for or against the party I am constrained to not alter the order passed by the earlier adjudicating authority vide F No S/16-Gen-384/2018-19 Gr 7 H/ S/10-Adj-98/2018-19 Gr I A dated 14.12.2018.

Ranjiv
17/8/21
(Rajiv Ranjan)

Additional Commissioner of Customs
Gr. I & IA, I, JNCH

To,
M/s. Siddhartha Corporation Pvt. Ltd.
205, 2nd Floor, J K Chambers,
Plot No. 76, Sector 17,
Vashi, Navi Mumbai-400703

Received original
order on 20/08/2021

C. Pramod
C. Pramod

Copy To,

1. The Pr. Commissioner of Customs(NS-I), JNCH, NhavaSheva, Mumbai-II
2. The Dy. Commissioner of Customs, CAC, JNCH, NhavaSheva, Mumbai-II.
3. Office Copy

Ranjiv
TRUE COPY

11 In paragraph 12, respondent no.3 has observed that no further investigation has been conducted and only the findings of investigation

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report dated 9th May 2018 have been relied upon and he has given a finding that the license, which was re-registered at JNCH, was a forged one. Respondent no.3 has also noted that the process of registration, as reflected in the public notice dated 5th February 2013, issued by the office of the Commissioner of Custom (Export) has inbuilt mechanism for prevention of such fraud. Respondent no.3 has reproduced paragraph 2 of the public notice, as amended. Respondent no.3 has accepted that in the present case, the scrip in original is still with its original user and hence, it is obvious that a forged scrip was registered at JNCH. Respondent no.3 has also further concluded that the re-registered license was used by two importers in ICD Tughlakabad but neither of them have been summoned nor any verification at Tughlakabad end has been done to ascertain as to how and from whom they got the re-registered scrip and no effort in this direction is seen in the investigation. Respondent no.3 has also observed that the investigation has been closed only because petitioner admitted to pay duty and paid it with interest and penalty and it is on record that petitioner paid the amount as an alert was put against IEC in system because of which petitioner was not able to fulfill its export order and was under tremendous pressure and petitioner also lodged a protest immediately after making payment and has been consistently following up.

12 Therefore, one thing is certain that petitioner has nowhere admitted its liability and petitioner had paid the amounts only in view of the tremendous pressure that was on petitioner to fulfill its export order and because an alert was put against IEC in system. It is also clear that no investigation has been conducted and SIIB(X), JNCH has only adopted a shortcut approach without investigating to trace the full truth. This method is unacceptable and has to be deprecated. Respondent no.3 has also accepted that in view of incomplete investigation and lack of proper evidence it is not justified to confirm charges against petitioner. Respondent no.3 has stated that he is not authorised to cause any further investigation and no conclusive decision can be taken for or against the party and he is constrained to not alter the original order dated 14th December 2018. We find this conclusion rather strange and it is this conclusion with which petitioner is upset.

13 Mr. Tomar submitted that after holding petitioner cannot be held liable, respondent no.3, instead of referring the matter to the concerned superior officers for further investigation, has passed the impugned order.

Mr. Mishra submitted that petitioner can adopt an alternate remedy by filing an appeal.

14 We do not wish to add to the misery of petitioner. We say this because notwithstanding petitioner having filed an appeal and the matter remanded for fresh adjudication, the Adjudicating Authority, i.e., respondent no.3, without discharging his duty properly, has simply reiterated what is stated in the original order dated 14th December 2018 against which petitioner had filed an appeal.

In the circumstances, we shall exercise our jurisdiction and hereby quash and set aside the impugned order dated 17th August 2021 passed by respondent no.3.

15 Respondent no.2 is directed to investigate how a forged scrip was registered at JNCH and how re-registered license was used by two importers in ICD Tughlakabad. Respondent no.2 shall also investigate why none of those parties were neither summoned nor any verification at Tughlakabad end has been done and ascertain the truth. Respondent no.2 shall also investigate as to how despite the procedure mentioned in Public Notice No.4 of 2013 re-registration of license was permitted at JNCH. These directions are not exhaustive and the aim should be to find out the real truth and hold the guilty liable.

16 In view of the above, respondent no.2 shall refund the amount of Rs.32,83,126/- to petitioner together with applicable interest from 1st October 2017 till payment in accordance with law and this amount shall

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be paid to the account registered with the Department within four weeks of this order being lodged with respondent no.2. At the time of refunding this amount, petitioner shall give a bond or indemnity as required by respondent no.2 in accordance with law.

17 Rule made absolute.

18 Petition disposed.

(JITENDRA JAIN, J.)

(K.R. SHRIRAM, J.)