

2013 (1) ECS (98) (Tri-Mum)

IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. I

M/s Lark Chemicals Pvt. Ltd.

Versus

Commissioner f Customs, CSI Airport, Mumbai

Appeal No. C/584 & 622/04

(Arising out of Order-in-Original No. CMMR/MCT/ADJN/06/2004 dated 23.03.2004 passed by the Commissioner of Customs, Sahar Airport, Mumbai).

M/s Lark Chemicals Pvt. Ltd.
Mr. Ignatius John

Appellants

Vs.

Commissioner f Customs, CSI Airport,
Mumbai

Respondent

Appearance

Shri Anil Balani, Advocate
Shri V.R. Kulkarni, Dy. Commr, (AR)

for Appellant
for Respondent

CORAM

SHRI P.R. CHANDRASEKHARAN, MEMBER (TECHNICAL)
SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing : 20.11.2012
Date of Decision:17.12.2012

ORDER NO. A/09-10/13/CSTB/C-I

“In the present case, the cause of action arose in Mumbai and as per the admission of the Managing Director of the appellant firm, the goods were smuggled through passenger baggage of carriers. Therefore, we do not find any infirmity in the Commissioner in charge of Mumbai Airport adjudicating the matter.” [Para 6.1]

“It is well settled principle of statutory interpretation that a law should not be interpreted in such a way as to make its provisions redundant. In a smuggling activity it is sometimes impossible to precisely pinpoint where the activity took place. Merely because of that fact, it cannot be said that the law should not take its course. An offender can not be allowed to break the law and also enjoy the benefit of law.” [Para 6.2]

“In his statement dated 25.11.02 recorded under section 108 of the Customs Act, Mr. Jajodia had clearly admitted that he had arranged to smuggle 24 kgs of Mifepristone through carriers. This position has been reconfirmed by Mr. Jajodia in his further statement dated 17.12.2002 and also before the Addl. Metropolitan Magistrate when, he was arrested and applied for bail. These statements have never been retracted. If that be so, the department is not required to prove the foreign origin of the goods and the smuggled nature of the goods. It is a settled legal position that “admitted facts need not be proved” as held by the hon’ble High Court of Madras in the case of Govindasamy Raghupati [1998 (98) ELT 50 (Mad)]” [Para 6.3]

“Accordingly the Addl. CMM granted bail and also directed him to deposit a further sum of Rs. 25 lakhs, in addition to the amount of Rs. 1 crore already paid by Mr. Jajodia. When a fact has been admitted before a judicial authority and bail was obtained on such admission, we do not think there is any need for further evidence to show that the goods are smuggled. It is a well settled position in law that statements recorded under section 108 of the Customs Act is an admissible evidence under section 25 of the Evidence Act.”[Para 6.4.1]

Per P.R. Chandrasekharan

1. These two appeals are directed against Order-in-Original No. COMMR/MCT/ADJN/06/2004 dated 23.3.2004 passed by the Commissioner of Customs (Airport), Mumbai.

2. Acting on intelligence, the Directorate of Revenue Intelligence (DRI in short), intercepted three post parcels bearing Nos. 10963, 10568 and 10690 imported by Shri N.P. Jajodia , Managing Director M/s Lark Chemicals Pvt. Ltd., Mumbai, (ICPL, in short) the appellant herein. It was noticed that in respect of one post parcel, the goods were declared as “2-Metronidazole” and in respect of the other two post parcels, the goods were declared as “Mifepristone”. The consignments were attempted to be cleared under the guise of “trade samples” and the total value declared was US \$ 75 for customs purposes. Shri Jajodia claimed that he had imported these consignments for supply to M/s Cadilla Healthcare Ltd. against their confirmed purchase order. A show cause notice was issued proposing to revise the assessable value declared for the said goods of Rs. 20,49,300/- and demanding a duty of Rs. 11,68,320/- and imposing penalty, interest, etc. and the notice was adjudicated by the Commissioner of Customs (Imports), ACC, Sahar vide O-I-O NO. CC-67/2002 dated 18.12.2002 confirming the demands.

3. Further investigations carried out by DRI with Sri A.K. Sarkar, Vice President of M/s Cadilla Healthcare Ltd. revealed that during the past period also, the appellant has supplied 24 kgs of Mifepristone during April to June, 2002, having a total value of Rs. 176.28 lakhs. The relevant documents for the said supply produced by M/s Cadilla revealed that the goods had been manufactured by Tianjin Tiango International Economic Development Corporation (Tianjin in short). Sri Sarkar also revealed that in addition to the above goods. Sri Jajodia had also supplied 187 kgs. Dexamethasone Sodium Phosphate (DSP in short) totally valued at Rs. 198.37 lakhs and the said goods were also of Chinese origin and M/s Cadilla had specifically asked Mr. Jajodia to supply goods manufactured by M/s Tianjin. Sri. Sarkar also confirmed that they had not received any duty payment documents against the supply of these goods from Sri. Jajodia. The above facts were recorded by the DRI by way of statement dated 12.11.2002 under section 108 of the Customs Act from Sri. Sarkar.

- 3.1 Statement of Sri Jajodia was recorded under section 108 on 25.11.2002 wherein he admitted that he had arranged to smuggle 24 kgs of Mifepristone through carriers for supply to M/s Cadilla and he had not paid any customs duty thereon. However, he refused to divulge the names of the carriers who were engaged to smuggle the goods. As regards the supply of DSP Sri. Jajodia stated that they were not of Chinese origin but he had procured the same from M/s Earnest Healthcare Ltd. of Indore. He had fabricated false labels and test reports showing that the goods were manufactured by M/s Tianjin. He further stated that he had procured purchase invoices in the name of three non-existing Delhi based firms, namely, M/s Vishnu Pharma-chem, M/s Casio Pharma and

M/s Verma Pharmaceuticals and for accounting purposes bearer cheques were issued in the name of these firms. On 28-11-2002, Sri Jajodia submitted copies of 7 invoices issued by M/s Earnest Healthcare Ltd. showing supply of 187 kgs. of DSP.

- 3.2 Sri. Ignatius John, Chairman of Earnest Healthcare Ltd. was summoned and his statement recorded on 29.11.2002 wherein he interalia stated that his company had supplied 187 kgs of DSP to the appellant during April to June, 2002 and the said goods had been manufactured in September, 2000. However, he admitted that they had not paid any central excise duty on the same and submitted a demand draft for Rs. 4 lakhs on 6.12.02 towards central excise duty. A search of the factory premises of Earnest Healthcare was conducted on 9.12.02 which showed that the factory had been non-functional for a long time and certain incriminating documents were recovered. The statement of Sri John was again recorded on 12.12.02 wherein he confessed that his earlier statement dated 29.11.02 was incorrect and they had not sold any material to LCPL and the invoices showing the supply were fabricated at the behest of Mr. Jajodia who had promised financial assistance to his firm. Sri John also confirmed that they had not manufactured or sold DSP since 1999. Statements of other employees of Earnest Healthcare such as Chandrasekhar Vyas, Technical Director (on 17.12.02), Gurudayal Kaushik, Supervisor (13.1.2003), Sameera Gazge, Secretary of Mr. Jon (on 15.1.2003) were recorded which confirmed the fact M/s Earnest Healthcare had not supplied any DSP to M/s LCPL and the entire documentation for the supply were fabricated at the behest of Mr. Jajodia.
- 3.3 When Sri Jajodia was confronted with these evidences on 17.12.02, he admitted that Earnest Healthcare had not supplied the DSP and the entire transaction was fake. He further stated that these goods were actually sourced from 3 Delhi based firms and was supplied through one Harishbhai of Delhi Chemical Market and that he did not have any details of Sri. Harishbhai.
- 3.4 Sri. Jajodia was arrested and produced before the Additional Chief Metropolitan Magistrate on 17.12.2002 and he was remanded to judicial custody. Sri Jajodia moved bail application on health grounds. Sri. Jajodia had deposited an amount of Rs. 40 Lakhs towards duty liability before arrest and during the period of remand, he made a further deposit of Rs 60 lakhs. Before the Magistrate, Sri. Jajodia admitted his guilt who granted a conditional bail releasing him from remand subject to his depositing another amount of Rs. 25 lakhs before 15.2.2003 which was complied with by him.

- 3.5 Statements of employee of LCPL, namely, Pramod Ghanshyamdas Rungta were also recorded on 25.11.02 and 13.12.02 which confirmed the procurement of imported material for supply to M/s Candilla Healthcare but he did not know how they were imported and the entire import was managed by Mr. Jajodia. He further confirmed that the DSP supplied to M/s Cadilla Healthcare were imported and received from M/s Tianjin in original packing but pleaded ignorance about the mode of import and payment of customs duty on the said supplies. Statements of other employees, namely, P.S. Rappai Sales Executive and Sri. Nandkumar Bane, Accountant were recorded on 25.11.02 which revealed that Sri Jajodia had given purchase bills of M/s Vishnu Pharmachem, M/s Casino Pharma and M/s Varma Pharmaceuticals relating to purchase of Milepristone and DSP. The declared premises of M/s Vishnu Pharmachem, Verma Pharamaceuticals and Casino Pharma were visted by officers of DRI which revealed that no firms of Vishnu Pharmachem and Casino Pharma existed at the given addresses and the sales tax registration nos. indicated in their purchase bills were bogus as verified by the Sales tax authorities at Delhi. As regards M/s Verma Pharmaceuticals, a shop with the said name existed but Shri. Aditya Verma of the said firm stated that he had not supplied any goods to either M/s LCPL or to Mr. Jajodia and the purported bills issued by the said firm were forged. Statement of Sri. Vivek Jajodia, the other director of LCPL was also recorded and he stated that the day to day affairs of the company was being looked after by Sri. N.P. Jajodia and he did not deal with any affairs of the company.
- 3.6 When Sri Jajodia was confronted with these evidences and his statements were recorded on 24th, 26th and 27th February, 2003, he admitted that the goods procured and supplied were both of foreign and Indian origin. The Indian origin goods were procured through one Sri. Harishbai. He further, stated that in the case of goods of foreign origin, he was aware of their smuggled nature and agreed to pay the duty voluntarily.
- 3.7 The investigations conducted revealed that Sri. N.P. Jajodia , Managing Director of LCPL had run an organized syndicate to smuggle expensive chemicals into India and sold such chemicals to several parties, utilized the services of carries to smuggle the goods into India in contravention of the Customs Act and used the names of fictitious persons and firms to conceal the smuggled nature of the goods. He did not provide any information about the carriers working for him. Sri. N.P. Jajodia expired on 18.3.2003. Accordingly a show cause notice dated 21.7.2003 was issued to M/s LCPL demanding customs duty of Rs. 1,66,95,951/- at the rate applicable to baggage on a value of Rs. 2,78,25,987/- in respect of 10 types of chemicals for the supplies made by them during the period April to November, 2202 to their various customers adopting the

contemporaneous import value (CIF) of like materials imported through licit channels under the provisions of section 28 of the Customs Act, 1962 read with section 125 ibid along with interest thereon under section 28AB. The notice also proposed to confiscate the said goods under section 111 (d) and (1) of the Customs Act, and to impose penalty under section 114 A on M/s LCPL. Penalty was proposed on Mr. Vivek Jajodia, the director of the firm under section 112 (a) and on Mr. I. Johan of M/s Earnest Healthcare ltd. under section 112 (b).

3.8 The notice was adjudicated vide the impugned order and duty demand was confirmed under section 28 of the customs Act along with interest under section 28 AB. The amount of Rs. 145 lakhs paid during investigation was appropriated towards the duty demand. A penalty of equivalent amount was imposed under section 114A on M/s LCPL and a penalty of Rs. 5 Lakhs was imposed on Mr. Ignatius John, M.D. of M/s Earnest Healthcare under section 112 (b). No penalty was imposed on Mr. Vivek Jajodia as there was no direct evidence to implicate him in the smuggling activity. It is against this impugned order the appellants , M/s LCPL and Mr. I. John are before us.

4. The Ld. Counsel for the main appellant, M/s LCPL, makes the following submission:-

- 1) The import duty is demanded from the appellant under section 125 read with section 28 of the Customs Act on the ground that the goods supplied to M/s Cadilla Healthcare were smuggled goods. 10 items are enumerated in the show cause notice.
- 2) The notice relies on the statement dated 25.11.02 of Sri. N.P. Jajodia that he had arranged to smuggle 24kgs of Mifepristone through carriers and Sri. Jajadio died on 19.3.03.
- 3) The show cause notice alleges at all the chemicals value at about Rs. 3 Crore were arranged to be smuggled by Jajodia and were brought into India through personal baggage by carriers employed by Jajodia. As such it is alleged that section 76, 77 and 79 were contravened. For this reason baggage duty rate of 60% has been adopted for demand of duty.
- 4) The admission of Jajodia was only in respect of Mifepriston. There is no evidence of smuggling of other 9 items. Even for Mifepristone, the test reports of Cadilla does not tally with the Chinese Test reports;

- 5) Duty can be demanded from the owner of any baggage as per section 77 and 78. Admittedly, the appellant which is a corporate entity did not import Mifepristone in its baggage. Thus even if it subsequently dealt with such goods, import duty can not be demanded from it.
- 6) Commissioner of Customs, CSI Airport, who adjudicated the case has jurisdiction only over the goods imported through CSI airport, Mumbai. The department has not brought any evidence on record to establish that the goods involved in the instant case were “smuggled” through CSI Airport.
- 7) The goods are neither specified under section 123 nor notified under Chapter IVA. Therefore, the burden of proving that the goods are smuggled goods is on the department. This burden has not been discharged. The appellant has established that such goods are manufactured in India also. He relies on the following judgments in support of this contention:-
 - (a) National Radio Products – 2011 (263) ELT 236 (Cal)
 - (b) Ritu Kumar – 2006 (202) ELT 754 (Cal)
 - (c) Aakash Enterprises – 2006 (205) ELT 23 (Bom) affirmed by Supreme Court 2007 (215) ELT A103
 - (d) T.V. Mohammed – 2006 (204) ELT 90 (Tri)
- 8) Duty can not be demanded at the highest baggage rate in view of the law laid down by the hon’ble Apex Court and the Tribunal in the case of M. Ambalal & Co. 2010 (260) ELT 487 (SC) and 2012 (281) ELT 432 (T).

Accordingly he prays for setting aside the impugned order.

- 4.1 The counsel for the co-appellant, Mr. Ignatius John submits that his client issued invoices without supplying the goods at the behest of Mr. Jajodia who offered them financial assistance. They were not aware of the transactions undertaken by Mr. Jajodia and hence they can not be accused of abetting the offence of smuggling by Mr. Jajodia. Hence the penalty imposed on them is sustainable in law.
5. The Id. Dy. Commissioner (AR) appearing for the revenue re-iterates the findings of the adjudicating authority. He submits that the investigation started pursuant the detention and seizure of foreign post parcels imported by the appellant M/s LCPL wherein also the

goods involved were the same. It is an admitted position that the goods involved were of foreign origin and were smuggled into India through carriers and Mr. Jajodia did not give any details of the carriers. Once the goods are established as of foreign origin as evident from the statement of the buyer of the appellant, M/s Cadilla Healthcare Pvt. Ltd. and the confessional statement of Mr. Jajodia, the onus of proving that they are not smuggled lies on the appellant. It is a well-settled position in law that admitted facts need not be proved. As regards the imposition of penalty on the co-appellant, the Id. AR submits that Mr. John has admitted to issuing invoices without supplying the goods, thereby enabling the main appellant to show that they were locally procured and not smuggled. Therefore, he has abetted in the disposal of smuggled goods by M/s LCPL and therefore, he is liable to penalty. Accordingly he prays for upholding the impugned order.

6. We have carefully considered the rival submissions. Our findings and conclusions are discussed in the ensuing paragraphs.

6.1 As regards the issue of jurisdiction of the adjudicating authority in the present case, the said point has not been raised before the adjudicating authority either at the time of replying to the show cause notice or at the time of personal hearing. The appellants participated in the said proceedings without any demur or protest. Only in the appeal filed before this Tribunal, this issue has been raised which is clearly an afterthought. If a point has not been raised before the adjudicating authority and has not been considered by the said authority, it would be incorrect and inappropriate for the appellate authority to give a finding thereon. Be that as it may, M/s Lark Chemicals Pvt. Ltd. is situated in Mumbai and not any where else. The cause for investigation originated in Mumbai with the detaining of the post parcels and the subsequent seizure of the same and adjudication proceedings connected therewith. The Managing Director of the appellant firm Mr. N. P. Jajodia, has clearly admitted that the goods supplied to M/s Cadilla were brought through carriers in their baggage by mis/non-declaration. If that be so, it is only reasonable to presume that the goods were smuggled through passenger baggage through Mumbai airport. Mr. Jajodia has not divulged any details regarding the carriers or when or how they arrived with the goods. When pressed for the details in this regard, he refused to divulge the details as can be seen from his statements recorded under section 108 of the Customs Act. Therefore, the appellant can not take the plea now that the cause of action took place elsewhere. Smuggling by its very nature is a clandestine activity and only the person who engaged in the said activity would know the full details. When the said person refuses to divulge the details in this regard, he can not take the plea of lack of jurisdiction. In the case of K.P. Abdul Majeed vs. Collector of Customs & Central Excise, Cochin, 1995 (80)

RLT 35 (Madras), the hon'ble High Court of Madras held that if a cause of action has arisen in the territorial jurisdiction of a Commissionerate, the jurisdictional Commissioner can investigate and adjudicate the matter. In the present case, the cause of action arose in Mumbai and as per the admission of the Managing Director of the appellant firm, the goods were smuggled through passenger baggage of carriers. Therefore, we do not find any infirmity in the Commissioner in charge of Mumbai Airport adjudicating the matter.

- 6.2 It is well settled principle of statutory interpretation that a law should not be interpreted in such a way as to make its provisions redundant. In a smuggling activity it is sometimes impossible to precisely pinpoint where the activity took place. Merely because of that fact, it cannot be said that the law should not take its course. An offender can not be allowed to break the law and also enjoy the benefit of law. The hon'ble High Court of Karnataka in the Ralectronics case [1994 (71) ELT 25 (Kar)] held that – “ the power of investigation and collecting materials which may lead to further enquiry or adjudication is part of the machinery created by the law to prevent tax evasion. The machinery provisions in a fiscal legislation are to be liberally construed so as to effectuate the purpose behind the said machinery. Therefore, when the cause of action arises within the territorial jurisdiction of a particular officer, he is competent to have the matter investigated even in an area outside his jurisdiction. It is not a case of stretching the jurisdiction beyond his territory at all.”
- 6.3 It has been argued that there is no evidence led by the revenue to show that the goods are smuggled. Only in the case of Mifepristone, Mr. Jajodia had admitted in his statements that they were smuggled. Further, the test reports of Cadila do not tally with the Chinese test reports. In his statement dated 25.11.02 recorded under section 108 of the Customs Act, Mr. Jajodia had clearly admitted that he had arranged to smuggle 24 kgs of Mifepristone through carriers. This position has been reconfirmed by Mr. Jajodia in his further statement dated 17.12.2002 and also before the Addl. Metropolitan Magistrate when, he was arrested and applied for bail. These statements have never been retracted. If that be so, the department is not required to prove the foreign origin of the goods and the smuggled nature of the goods. It is a settled legal position that “admitted facts need not be proved” as held by the hon'ble High Court of Madras in the case of Govindasamy Raghupati [1998 (98) ELT 50 (Mad)].
- 6.4 As regards DSP, the initial version of Mr. Jajodia about its procurement was that the same was supplied by Earnest Healthcare. From the statements of Mr. I. John, MD of the

said firm, dated 12.12.02, 16.12.02 and 7.1.03, it is evident that the said goods had not been supplied by them and they had only issued fabricated invoices as per the request of Mr. Jajodia. This position has been further confirmed by the employees of Earnest Healthcare, namely, statement dated 17.12.2002 of Mr. Chandrasekhar Vyas who confirmed that they had not manufactured DSP since early 1999 and they did not have facility to manufacture huge quantity of 187 kgs. of DSP. This is further corroborated by Gurudyal Kaushik, Supervisor, in his statement dated 13.1.03 and by Ms. Sameera Gazge, Secretary of Mr. I. John dated 15.1.03. Thereafter, Mr. Jajodia changed the story and stated that he had procured DSP from 3 Delhi firms, namely, Vishnu Parma, Casio Pharma and Verma Pharmaceuticals. Of these Vishnu Pharma and Casio Pharma were found to be non-existent and Mr. Aditya Verma of Verma Pharamaceuticals had confirmed that they had not supplied any material to Mr. Jajodia or LCPL. Mr. Jajodia then took another plea that he had obtained DSP from one Mr. Harishbhai but he was not able to give any details about the whereabouts of the said Harishbhai. From the above, it is easily seen that Mr. Jajodia had kept on changing his stories and when one story was proved false, he restored to another one. If the goods indeed were procured locally, there should not have been any difficulty for him to identify the source of procurement.

6.4.1 There are other corroborative evidence to show that DSP supplied to M/s Cadilla were of foreign origin. In his statement dated 13.12.02, Shri. Pramod G. Rungta, an employee of LCPL, who had forwarded DSP to M/s Cadilla Healthcare had clearly admitted that “LCPL were dealing in imported chemicals and bulk drugs; whenever the imported materials were given to him for dispatches, they used to have similar type of labels and the certificates of analysis (COA) or test reports with them, that he used to send bills along with COA of their clients, that in view of his experience he can say that the Dexamethasone Sodium Phospahate covered by 33 invoices issued to M/s Cadilla was imported and received from M/s Tianjin and they were in original packing. He had further confirmed that during his working tenure with LCPL he had never seen LCPL procuring these goods from any Indian company and these were all imported goods”. Mr. Jajodia himself admitted to the smuggled nature of the goods supplied before the Additional Chief Metropolitan Magistrate at the time of filing his bail application on 20.12.02 (subsequent to his arrest on 17.12.02) and promised to pay the duty liability. Accordingly the Addl. CMM granted bail and also directed him to deposit a further sum of Rs. 25 lakhs, in addition to the amount of Rs. 1 crore already paid by Mr. Jajodia. When a fact has been admitted before a judicial authority and bail was obtained on such admission, we do not think there is any need for further evidence to show that the goods are smuggled. It is a well settled position in law that statements recorded under section 108 of the Customs Act is an admissible evidence

under section 25 of the Evidence Act. In *Illias vs Collector of Customs, Madras* decided on 31 October, 1968 [1970 AIR 1065, 1969 SCR (2) 613], the hon'ble supreme court held that even though the customs officers have been invested with many of the powers which an officer in charge of a police station exercises when investigating a cognizable offence he does not thereby become a police officer within the meaning of s. 25 of the Evidence Act and so the confessional statements made by accused persons to customs officials would be admissible in evidence against them. The apex court followed their decision to the same effect in the case of Romesh Chandra Mehta v. State of West Bengal. (1969) 2 S.C.R. 461.

6.4.2 Another corroborative evidence with regard to the foreign origin of DSP in the test reports for the product given by the Chinese manufacturer, M/s Tianjin recovered from M/s Cadilla to whom the said goods had been supplied by M/s LCPL. The said reports clearly mention the date of manufacture, date of expiry, batch no and also bears the seal of the manufacturer. The details given in the said test reports have been verified by M/s Cadilla in their laboratory and found to be tallying. This also goes to show that the DSP supplied to M/s Cadilla by M/s LCPL were of Chinese origin. As regards the difference in the test reports, we have perused them. The difference, if any, is very minor. For eg. as per the test report of the Chinese manufacturer, the assay for DSP for a particular batch is 99.74% whereas the same tested in the Cadilla's lab shows the same as 100.09%. While the Chinese manufacturer has followed the specifications given in British Pharmacopoeia, M/s Cadilla has followed the US Pharmacopoeia. The difference, if any, is very marginal, if one takes into account the difference in the testing conditions, dates of testing and the methodology used and so on. Therefore, on account of this insignificant variation, it can not be concluded that the material supplied to M/s Cailla were not of foreign origin. In the case of *CC, Bangalore vs. Vikram Jain* [2009 (244) ELT 504 (Kar)], the hon'ble high court of Karnataka held that the department is not required to prove with mathematical precision that the goods are smuggled or non-duty paid as authorities act based on suspicion to prevent revenue leakage. Once the goods are considered as of foreign origin, duty is cast on person from whom goods were seized to prove goods were duty paid. Goods have to be presumed as non-duty paid when evidence is not produced by person concerned with the duty payment.

6.5 In *COLLECTOR OF CUSTOMS, MADRAS AND OTHERS Vs. D. BHOORMULL* [2002-TIOL-253-SC-CUS], the hon'ble apex court held as follows:-

“30. It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178 A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a

fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, or universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it—"all exactness is a fake". El Dorado of absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in *Blatch v. Archar* (1774) 1 Cowp. 63 at p. 65 "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned : and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence' (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, presumption juris : but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property," though the latter is only a presumption of facts. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in

issue. It will only alleviate that burden to discharge which very slight evidence may suffice.”

- 6.6 It is in the light the above decision of the hon’ble apex court, one has to see whether the department has proved the charged of smuggling against the appellant. In the case before us the Department had clearly established the smuggled nature of the goods by conducting a thorough investigation. The claims made by Mr. Jajodia with respect to procurement of DSP from Indian sources were thoroughly verified and found to be bogus. Then the onus is on the appellant to prove that they have licitly procured the goods which they failed to do. The Hon’ble High Court of Bombay, in the case of Phoenix Mills Ltd. vs. UOI [2004 (168) ELT 310 (Bom)] held that – “There is an essential distinction between burden of proof and onus of proof. The burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Onus means the duty of adducing evidence.” In this case, the department established the nature of foreign origin of the goods from the documents recovered from M/s Cadilla and the statement of the VP of the said firm stating that they had procured Mifepristone and DSP of Chinese origin from M/s LCPL for which no duty paying documents were given to them. When Mr. Jajodia was confronted, he admitted to smuggling Mifepristone through carriers and as regards DSP, he stated that had procured them indigenously. The department verified the details of indigenous procurement as given by Mr. Jajodia and found them to be false. Then the onus shifts back to Mr. Jajodia and LCPL to adduce evidence about the licit procurement of DSP which they have completely failed to do. On the other hand the evidence by way of test reports of the original manufacturer and the statement of the VP of M/s Cadilla, statement of the employee Mr. Rungta, admission by Mr. N.P. Jajodia before the Addl. CMM at the time of consideration of bail clearly establish the smuggled nature of the goods. In view of these strong corroborative evidence available on record as to the nature of the goods, reliance placed by the appellant on a few judicial pronouncements (cited supra) in support of their contention fails completely.
- 6.7 An argument has been put forth by LCPL that they have not smuggled the goods themselves and therefore, they are not liable to pay any duty. This argument is completely misplaced. The goods were smuggled at their behest and on their behalf and they sold the smuggled goods. The bill for the supply of smuggled goods were issued in the name of M/s LCPL and it is LCPL who received the proceeds for the supply/sale of goods. Therefore, they are liable to discharge the duty liability in respect of the smuggled goods procured by them and we hold accordingly. Once the duty liability is upheld, the liability to pay interest is automatic and consequential.

- 6.8 A point has been raised by the counsel for LCPL that there is no evidence in respect of all the goods specified in the notice. There is some force in this submission. From the records it is seen that investigation has been conducted and evidence unearthed only in respect of 24 kgs. of Mifepristone and 187 kgs. of Dexamethasone Sodium Phosphate supplied to M/s Cadilla Healthcare Ltd. No such investigation has been conducted in respect of other 8 items supplied to various parties. Therefore, it can not be automatically presumed that they are all smuggled goods. No doubt there is an admission by Mr. N.P. Jajodia that they are also smuggled and he is willing to pay the duty thereon. However, the department to discharge the initial burden cast on them to prove that the said goods are of foreign origin and smuggled. Therefore, the value of these items has to be excluded for determination of duty and consequential imposition of penalty. If that is done, the value for the purpose of determination of duty would come down from Rs. 2,78,25,987/- to Rs. 2,45,38,009/- and it is only on this value duty demand can be made and we hold accordingly.
- 6.9 An argument has been advanced by the counsel for the appellant that duty can not be demanded at the highest (baggage) rate in view of the law laid down by the hon'ble apex court in the case of M. Ambalal & Co. cited supra and the decision of this Tribunal in the said case subsequent to the apex court judgment. There is merit in this argument. In the instant case for the purpose of calculation of duty, a rate of 60% adv. has been adopted which is the rate applicable for passenger's baggage under CTH 9803. The said heading applies to "All dutiable articles imported by a passenger or a member of a crew in his baggage". In the Ambalal case cited supra, the hon'ble apex court held that smuggled goods can not be considered as imported goods. Therefore, even if the goods have been brought into India by concealing the same in the baggage, the goods can not be classified as baggage. The Supreme Court has further held that in respect of smuggled goods, no duty exemption shall apply. Therefore, the rate of duty to be applied in the instant case in the tariff rate applicable on the goods after properly classifying the same. As per technical literature Mifepristone is a synthetic steroid compound used as a pharmaceutical and is also a powerful glucocorticoid receptor antagonist. Dexamethasone sodium phosphate is a Glucocorticoid. Their possible classification would be either under chapter 29 as an organic chemical or as a medicinal preparation under Chapter 30 of the Customs Tariff depending upon the condition / form of the goods at the time of their supply. Therefore, the quantification of duty has to be redone by the adjudicating authority after determining the classification first and applying the tariff rate of duty at the relevant time.

6.10 As regard the penalty imposed on M/s LCPL under section 114 A, the said section provides for imposition of penalty equal to the duty or interest determined in cases where the duty was not levied or was short-levied or the interest was not charged or paid or was part paid or the duty or interest was erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts. In the present case the charge of smuggling has been clearly established against the appellant. Therefore they are liable to penalty under the said section. However since the penalty has been imposed on the appellant under section 114 A equal to the duty demanded, the same would also undergo change depending on the revised duty determined.

6.11 Regarding the penalty imposed on Mr. I. John, the same has been imposed under section 112 (b) for abetting smuggling. To constitute abetment, the person should have knowledge that the goods are smuggled. In the statements recorded by the department from Mr. I. John, nowhere it is coming out that Mr. I. John in fact knew that the goods in respect of which he had issued the invoices were smuggled even though he knew that the invoices sought to be issued by his firm was in respect of goods supplied to M/s Cadilla. Further to impose penalty under section 112, liability of confiscation of the goods under section 111 has to be established. There is no proposal either in the show cause notice or in the impugned order holding the goods liable to confiscation. In view of the above, the penalty imposed on Mr. I. John is not sustainable in law.

7. To sum up, we uphold the findings of the adjudicating authority that the impugned goods, namely, 24 kgs. of Mifepristone and 187 kgs. of Dexamethasone Sodium Phosphate are smuggled and therefore, duty demand on them is sustainable under the proviso to section 28 (1) of the Customs Act, though not under CTH 9803 but under the appropriate classification applicable to the said goods. Therefore, we remand the matter back to the adjudicating authority for re-determination of the value and quantum of duty as discussed in paras 6.8 and 6.9 above and thereafter consider the quantum of penalty imposed under section 114A. Needless to say, the appellant shall be heard before re-classification and revaluation of the goods are done. The penalty imposed on Mr. Ignatius John is set aside as unsustainable in law. The appeals are disposed of in the above terms.

(Pronounced in Court on.....)