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

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 11701 of 2016-DB

(Arising out of OIA-KDL-CUSTM-000-APP-022-16-17 dated 16/06/2016 passed by Commissioner of CUSTOMS-KANDLA)

Petrochem Middle East India Pvt Ltd ....Appellant
230, Hubtown Solaries, 2nd Floor,
N S Phadke Marg, Opp. Telli Gally, Andheri(e)
Mumbai, Gujarat

VERSUS

Commissioner of Customs-Kandla ......Respondent
Custom House,
Near Balaji Temple,
Kandla, Gujarat

APPEARANCE:
Shri Anil Balani, Advocate for the Appellant
Shri Sanjay Kumar, Superintendent (AR) for the Respondent

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

Final Order No. 12373/2024

DATE OF HEARING: 20.06.2024
DATE OF DECISION: 16.10.2024

RAMESH NAIR

This appeal is filed against Order-In-Appeal No. KDL-CUSTM-000-APP-022/16-17 dated 16.06.2016 passed by the Commissioner of Customs, (Appeals), Ahmedabad by which Order-In-Original No. KDL/ADC/RKC/21/2015-16 dated 18.12.2015 has been upheld confirming duty demand under Proviso to Section 28(1) upon the appellant who is importer and transferee of license issued by DGFT.

1.1 Briefly the facts are that exporter, namely Super Trading Co. obtained three post export DEPB and Focus Market Scheme Licenses from DGFT, out of which, one such Focus Market Scheme License No. 0310569321 dated 13.4.2010 was purchased by the appellant through broker namely Shri Milan Sevantilal Doshi of M/s. Milan Overseas, and the same was utilized by the appellant for duty free imports under bills of entry No. 340495 dated 15.4.2010 and 342227 dated 26.4.2010.

1.2 By Show cause notice dated 28.1.2015 a demand of duty so forgone totally amounting to Rs. 19,01,494/- was demanded under proviso to section 28(1) jointly and severally from the appellant and from the exporter/Original license holder on the ground that the said license was fraudulently obtained by the exporter and that the same have been cancelled ab-initio by DGFT on 21.02.2014.

1.3 The appellant replied to the said Notice by its reply dated 23.3.2015, it was mainly submitted that notice is barred by limitation provided by proviso to section 28(1) of the Act; that extended period is not invokable to demand duty against the appellant as there is no allegation of any collusion or willful misstatement or suppression of facts against the appellant, and that they had purchased the said license through broker on payment of valuable consideration and after due diligence, and hence recovery of duty from the appellant amounts to double jeopardy.

1.4 However, learned Additional Commissioner of Customs, Kandla confirmed the demand of duty against the appellant under proviso to section 28(1) of the Act along with interest, and further imposed penalty under section 114A of the Act and held the goods liable to confiscation under section 111(d), 111(j) and 111(o) of the Act. The appellant preferred an appeal to the Commissioner of Customs (Appeals) Ahmedabad who has upheld the said Order of Additional Commissioner by his Order dated 16.6.2016, hence the present appeal of the appellant.

2. Shri Anil Balani learned Counsel appearing for the appellant mainly submitted that authorities below have failed to appreciate the facts of present case wherein license was issued by the DGFT and that goods were

not imported based on forged license; that absent any allegation of appellants knowledge or involvement with the alleged fraudulent licenses, appellant has to be held a bona fide transferee of license which was valid and subsisting on the date of import and clearance of goods, that authorities erred in not appreciating that Apex Court Judgment in the case of Aafloat Textiles (I) Pvt. Ltd – 2009 (235) ELT 587 (SC) where the license itself was forged would not be applicable and the Judgment of Ajay Kumar and Co. - 2009 (238) ELT 387 (S.C) where the license was fraudulently obtained by the transferor would be applicable. He further relied upon the decision of Tribunal in the case of Ineous ABS (India) Ltd which was passed after considering all the old and new judgments on the subject. He placed reliance on the following decisions in support of his case on inapplicability of larger period of limitation in the facts of the case:-

- Scientific Pharmacy – 2001 (135) ELT 1085
- Purulax Electric Private Limited vs CC – 2001 (138) ELT 786
- A. Shankar Rao - 2002 (149) ELT 387
- Adani Exports Ltd.-2006 (198) ELT 335.
- Hico Enterprsies v CC – 2005 (189) ELT 135. (Tribunal (LB) upheld by Supreme Court in 2008 (228) ELT 161 (SC).
- Leader Valves Ltd. – 2007 (218) ELT 349 (P&H) upheld by Supreme Court in 2008 (227) ELT A29
- Vallabh Design Products – 2007 (219) ELT 73 (P & H).
- Binani Cement Ltd. - 2009 (238) ELT 33 (Guj.);
- DSM Anti-Infectives India Ltd.- 2009 (246) ELT 648 (Tri.- Del.)
- Patiala Castings Pvt.Ltd. - 2012 (283) ELT 269 (Tri.-Del.) ;
- Balarpur Industries Ltd.- 2012 (275) ELT 88(Tri.-Del.).
- Indian Acrylics Ltd. [2015 (325) ELT 753 (Tri.-Ahmd.)

3. Shri Sanjay Kumar, learned Superintendent (AR) appearing for the revenue reiterated the impugned Order and relied upon the judgment in the case of Munjal Showa Ltd – 2022 (382) ELT 145 (SC) and further pointed out that in Civil Appeal No. 5608/2011 the DEPB scrip was procured fraudulently in support of argument that duty demand against the importer

is sustainable even where the license itself is not forged but is obtained by fraudulent means. Countering the same, counsel for the appellant relied upon the findings in paras 8 and 10 of the said judgment to submit that the ratio of the said judgment relied upon by AR is restricted only to forged/fake licenses and scrips and that there is no adverse findings against genuine licenses/scrips i.e. the licenses/scrips actually issued by DGFT. He further relied upon the case of Wadhwani Commodities Trading & Ors – Final Order No. 75915/2016 dated 4.7.2023 of Tribunal whereby judgment of Munjal Showa was distinguished.

4. We have carefully considered the submissions made by both the sides and perused the records. The issue that arises for consideration is whether duty demand upon the appellant, who has in the normal course of business, obtained from open market a Focus Market Scheme license issued by DGFT which was valid and not cancelled by the DGFT on the date of imports by the appellant is sustainable an whether the demand being under extended period is hit by limitation in the facts of the present case.

4.1 It is observed from the records of the case that the said license was issued and made transferable by the DGFT, and the same was valid and subsisting on the dates of imports and clearance of the consignments by the appellant. Further, customs have duly verified the said license before clearance of the consignments imported by the appellant. It is further noticed that in their statements recorded under section 108 of the Customs Act, Shri Sanjay Raturi, Manager (Taxation) and Shri Chandresh Shah, Manager (Logistics) of the Appellant inter alia stated that they had purchased the said license from broker M/s. Milan Overseas and they had taken the requisite precautions before buying the said license from the open market i.e. the IEC verification from DGFT website, particulars of license details from DGFT website, checking of license, registration and balance from the Customs Department, all the payments were made through Bank and relevant invoices of Milan Overseas, bank statements, bills of entry and copy of license were also submitted.

4.2 It is further observed from the records of the case that admittedly and undisputedly the alleged fictitious exports and fraud have been allegedly committed by the exporter/original license holder and its proprietor, and there is no allegation or evidence that the appellant was aware about the alleged fraud perpetrated by the exporter, in the circumstances, duty forgone on the said license should be recovered only from the exporter/original license holder, however, duty demand has been confirmed against the appellant.

4.3 It is observed that show cause notice is dated 28.1.2015 raised demand of duty for the goods imported during April 2010; the notice is thus issued invoking extended period of limitation provided under proviso to section 28 (1) of the Act, however as discussed in the foregoing paras, appellant is bonafide transferee of license for a valuable consideration. Consequently, larger period of limitation cannot be made applicable to demand duty as against the appellant. In this behalf, reliance is placed on the judgment of Hon'ble Gujarat High Court in the case of Commissioner of Customs, Kandla V Indian Acrylics Ltd – 2016 (336) ELT 474 (Guj.) as under:

> *"**[Order per : Harsha Devani, J. (Oral)]. -** By this appeal under Section 130 of the Customs Act, 1962 (hereinafter referred to as "the Act"), the Commissioner of Customs, Kandla has called in question the order dated 22nd April, 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad (hereinafter referred to as "the Tribunal") in Appeal No. C/298/2007 [2015 (325) E.L.T. 753 (Tri.)] by proposing the following questions stated to be substantial questions of law :-*

(i) "Whether in the facts and circumstances of the case the CESTAT has erred in holding that extended period cannot be invoked in the present case and has erred in not appreciating the fact that the DEPB Scrips in the instant case were obtained by the importer fraudulently?"

(ii) "Whether the CESTAT has erred in not appreciating the fact that fraud was involved in the present case and the DEPB Scrips in question have no existence in the eye of law?"

(iii) "Whether the CESTAT has erred in not considering the decision of Hon'ble Calcutta High Court in the case of ICI India Limited v. Commissioner of Customs (Port), Kolkatta reported in 2005 (184) E.L.T. 339 (Cal.), wherein it is held that "the credit available on the strength of a valid DEPB only and if the same is forged, it is non est, therefore there is no valid DEPB?"

(iv) "Whether the CESTAT has erred in not appreciating the fact that in the matter of import under fake/fraudulent DEPB licence when the document itself having been found to be forged, whether there was collusion or fraud on the part of the importer in the issue of DEPB licences/Scrips becomes absolutely immaterial and irrelevant since no credit can be derived from a forged DEPB?"

2. *The facts stated briefly are that the importer purchased transferable DEPB scrips on 25th August, 2000 from the open market which were originally issued to M/s. Supreme Castings Limited (the exporter) against their export. The importer imported chemicals through Kandla Port on the basis of the DEPB scrips without payment of duty. In 2004, it was found that the exporter obtained the transferable DEPB scrips fraudulently by ante-dating the Shipping Bill No. 2216, dated 30th March, 2000 pertaining to cargo against shipping bill which was received in CFS on 4th April, 2000 when the value applicable cost to grant DEPB for export was reduced. The said DEPB scrip was cancelled by the DGFT authorities. A show cause notice dated 18th April, 2005 came to be issued by the Commissioner of Customs proposing to demand customs duty of Rs. 12,35,362/- along with interest and to impose penalty under the Act on the importer. It was also proposed to confiscate the goods under Section 125 of the Act as well as to impose penalties. The Commissioner of Customs, Kandla, by an Order-in-Original, confirmed the demand of duty along with interest and imposed penalty of equal amount of duty on the importer.*

3. *The importer carried the matter in appeal before the Tribunal which by the impugned order held that the extended period of limitation could not be invoked in the facts of the present case and accordingly held that the demand was barred by limitation and set aside the order passed by the adjudicating authority.*

4. *Ms. Amee Yajnik, learned senior standing counsel for the appellant submitted that the Tribunal has erred in holding that the extended period of limitation cannot be invoked in the present case inasmuch as the Tribunal has not appreciated the fact that the DEPB scrips were obtained by the importer fraudulently. It was submitted that having regard to the fact that the initial DEPB scrips were obtained through fraud, the same would vitiate everything and hence, DEPB scrips in question did not have any existence in* *the eye of law. It was further submitted that the Tribunal has failed to consider the decision of the Calcutta High Court in the case of ICI India Limited v. Commissioner of Customs (Port), Calcutta, 2005 (184) E.L.T. 339 (Cal.), wherein it has been held that credit can be availed only on the strength of a valid DEPB and if the same is forged, it is non est and, therefore, there is no valid DEPB. It was urged that the Tribunal was not justified in not appreciating the fact that in the matter of import under fake/fraudulent DEPB licence, when the document itself is found to be forged, whether there was collusion or fraud on the part of the importer in the issue of DEPB licence/scrips becomes absolutely immaterial and irrelevant since no credit can be derived from a forged DEPB. It was accordingly urged that the appeal deserves to be admitted on the questions as proposed or as may be deemed fit by this Court.*

5. *This Court has considered the submissions advanced by the learned advocate for the appellant and has perused the order passed by the adjudicating authority as well as the impugned order passed by the Tribunal.*

6. *As can be seen from the impugned order passed by the Tribunal, the Tribunal has recorded that there is no dispute as regards the fact that the importer purchased DEPB scrips from the open market on 25th August, 2000 and imported chemicals from Kandla Port without payment of duty in September, 2000. During the investigation, it was found that the exporter M/s. Supreme Castings Limited had manipulated the export document to facilitate the extra benefit under the DEPB scheme and accordingly, the licence was cancelled by the DGFT authorities in November, 2004 whereafter a show cause notice came to be issued to the importer. The Tribunal took note of the fact that the adjudicating authority had not given any finding that the importer had not paid the duty by reason of any collusion or any wilful misstatement or suppression of facts. Before the Tribunal, strong reliance was placed on behalf of the Revenue on the above referred decision of the Calcutta High Court wherein it was held that one may not be held liable for collusion or fraud and exposed to other penalties but would still be liable to pay duty and interest and other statutory consequences which one cannot avoid. The Tribunal, noted that there was no dispute that the importer had availed credit on the basis of the DEPB scrips which were issued by the DGFT authorities. At the time of import of goods, the DEPB scrips were not forged. That subsequently, upon finding that the exporter had manipulated the export document to avail the extra benefit, the DGFT cancelled the DEPB scrips in 2004. The Tribunal observed that there was no dispute that the importer imported the goods on the basis of the documents which were valid at the time of importation and, therefore, such document was valid till it was not set aside. Relying upon the decision of the Jurisdictional High Court in the case of M/s. Prayagraj Dyeing and Printing Mills Pvt. Ltd. v. Union of India, 2013 (290) E.L.T. 61 (Guj.), wherein the Court had held that where the appellants did not have any role in the fraud and no fraud had been practised by said person, the Revenue cannot get the benefit of extended period of limitation when such person is not party to the fraud, the Tribunal held that the extended period of limitation cannot be invoked and that the demand of duty with interest was not sustainable as barred by limitation and consequently, the imposition of penalty was not warranted.*

> ***7.*** *From the facts noted hereinabove, it is apparent that the impugned order passed by the Tribunal is based upon findings of fact recorded by it upon appreciation of the evidence on record. The Tribunal has thereafter merely applied the decision of the Jurisdictional High Court to the facts of the case by holding that the extended period of limitation could not be invoked in the facts of the present case. The conclusion of the Tribunal being based upon findings of fact recorded by it does not give rise to any question of law much less, a substantial question of law so as to warrant interference. The appeal, therefore, fails and is accordingly rejected."*

In view of foregoing, impugned Order by which demand of duty under proviso to section 28(1) and penalty under section 114A of the Act has been confirmed as against the appellant is liable to be set aside on the ground of time bar alone.

5. Accordingly, the impugned order is set aside and appeal is allowed with consequential relief, if any, in accordance of law.

(Pronounced in the open court on 16.10.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha