

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 20238 of 2017

(Arising out of Order-in-Appeal No. 710-711/2016 dated 21.12.2016
passed by the Commissioner of Customs (Appeals), Bengaluru.)

M/s. Ganapathi Fishing Lines

Pvt. Ltd.,

Pragati, No. 714, 10th Cross,
5th Main, M.C. Layout,
Vijayanagar,
Bangalore – 560 040.

Appellant(s)

VERSUS

The Commissioner of Customs

Central Revenue Building,
Queens Road,
Bangalore – 560 001.

Respondent(s)

And

Customs Appeal No. 21694 of 2017

(Arising out of Order-in-Appeal No. 712-713/2016 dated 21.12.2016
passed by the Commissioner of Customs (Appeals), Bengaluru.)

PAN Synthetics Pvt. Ltd.,

Sy. No. 24, Peddanapalya Village,
Taverekere Hobli,
Magadi Main Road,
Bangalore South Taluk,
Bangalore – 562 130.

Appellant(s)

VERSUS

The Commissioner of Customs

Central Revenue Building,
Queens Road,
Bangalore – 560 001.

Respondent(s)

APPEARANCE:

Mr. B.N. Gururaj, Advocate for the Appellant

Mr. K.A. Jathin, Deputy Commissioner (AR) with Mr. Maneesh Akhoury,
Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS R BHAGYA DEVI, MEMBER
(TECHNICAL)

Final Order No. 20041 - 20042 /2025

DATE OF HEARING: 27.11.2024

DATE OF DECISION: 29.01.2025

PER : R BHAGYA DEVI

M/s. Ganapathi Fishing Lines Pvt. Ltd. (Appellant-I) and M/s. Pan Synthetics Pvt. Ltd. (Appellant-II) have filed this appeal against Order-in-Appeal No. 710-711/2016 dated 21.12.2016 and against Order-in-Appeal No. 712-713/2016 dated 21.12.2016 respectively.

2. Brief facts of the case are that in both the appeals M/s. Bilwa Labs was issued with DEPB license based on his exports claimed to be 'Industrial Salt'. On investigation it was found that the goods actually exported by M/s. Bilwa Labs was 'Potassium Chloride' i.e. 'Muriate of Potash', a fertilizer which was a restricted item for export. The DEPB license obtained by Bilwa Labs by fraudulent means was sold in the open market to Appellant-I and II who in turn used these DEPB scrips to import goods during the relevant period. Since, the goods imported were based on the fraudulently obtained DEPB license/DEPB scrips notices were issued denying the benefit of DEPB scrips, and the Commissioner in the impugned orders confirmed the duties against the above appellants (importers) along with interest and also imposed equivalent penalty on the appellants under Section 114A of the Customs Act, 1962. Aggrieved by these orders the appellants are in appeal before us.

3. The Learned Counsel submitted that during the period of dispute they had purchased the DEPB licenses from open market from M/s. Maharaja Exem Trade Pvt. Ltd., Bengaluru, which were originally issued to M/s. Bilwa Labs who had obtained the DEPB

license by mis-declaring the export goods as Industrial Salt. These DEPB licenses since was obtained fraudulently were cancelled by the DGFT by an order dated 10.03.2010. It is submitted that the person who obtained the DEPB scrips fraudulently, whose found guilty of mis-declaration of export goods has been let off with penalty under Section 117, while the appellants who are *bona fide* purchasers in the open market are saddled with demand of duty, interest and penalty equivalent to duty which cannot be sustained.

3.1 It is further submitted that the limitation under proviso to Section 28 cannot be invoked since there is no collusion or wilful statement of suppression of facts by the importer or his agent or his employee, since the exporter in this case was M/s. Bilwa Labs who had obtained the DEPB scrips fraudulently. It is also stated that the DEPB scrips were purchased on a *bona fide* belief and at the time of purchase they were valid scrips and at the time of clearance of imports these DEPB licenses were valid and accepted by the authorities concerned. Therefore, the payment of duty by debit in the scrips was a valid payment of duty. Relied on the following decisions:

- **CC Vs. Leader Valves Ltd. 2007 (218) ELT 349 (P&H),**
- **Pee Jay International Vs. CC 2016 (340) ELT 625 (P&H),**

3.2 Finally, it is submitted that the bills of entry were neither reviewed nor appealed against by the revenue under Section 129D (2) of the Customs Act, 1962, hence the show-cause notice invoking suppression cannot be sustained.

4. The Authorized Representative on behalf of the Revenue submitted that since the DEPB licenses were obtained fraudulently even though they were valid at the time of import the fraudulent

nature of the licenses remains and any imports made on such fraudulently obtained licenses cannot be held to be valid. Therefore, the Commissioner has rightly demanded duty along with the interest and imposed penalty on the appellants.

5. Heard both sides.

6. The questions to be decided is whether:

- a. the appellants who imported/cleared goods without payment of duty by using DEPB scrips which were later found to be obtained by fraudulent means are liable to duty;
- b. the demand is time barred; and
- c. the appellants are liable to penalty under Section 114A of the Customs Act, 1962.

7. It is an admitted fact that the DEPB licenses used by the appellants were obtained fraudulently by M/s. Bilwa Labs by mis-declaring Potassium Chloride (Muriate of Potash) as Industrial Salt. In similar set of facts this Tribunal vide Final Order No.20966-20967/2024 dated 08.10.2024 observed as follows:

"The exporter M/s. Bilwa Labs had obtained the DEPB scrips fraudulently by declaring 'Muriate of Potash' as 'Industrial Salt' at the time of export for claiming the benefit of DEPB scheme is not under dispute. However, the claim of the appellant is since these DEPB scrips are freely available in the open market for purchase and they had purchased valid DEPB scrips and at the time of import, they were considered to be valid DEPB scrips, hence there cannot be demand of duty on them. It is also claimed that since the demand is time barred, the demand of duty cannot be sustained and accordingly, the interest and penalty is not sustainable.

6.1 The matter is no longer res integra in as much as the Hon'ble Supreme Court in the case of Munjal Showa Ltd. vs. Commissioner of Cus. & Ex, Delhi (supra) observed as follows:

"8. From the judgment and order passed by the Tribunal and even from the findings recorded by the Department, it has been found that the DEPB licenses/Scrips, on which the exemption benefit was availed of by the appellant(s) (as buyers of the forged/ fake DEPB licenses/Scrips) were found to be forged one and it was found that the DEPB licenses/Scrips were not issued at all. A fraud was played and the exemption benefit was availed on such forged/fake DEPB licenses/Scrips. 9. In that view of the matter and on the principle that fraud vitiates everything and such forged/fake DEPB licenses/Scrips are void ab initio, it cannot be said that the Department acted illegally in invoking the extended period of limitation. In the facts and circumstances, the Department was absolutely justified in invoking the extended period of limitation. 10. It is also required to be noted that the moment, the appellant(s) was/were informed about the fake DEPB licenses, immediately they paid the Customs Duty, may be under protest. The Customs Duty was paid under protest to avoid any further coercive action. Be that as it may, the fact remains that the DEPB licenses/Scrips on which the exemption was availed by the appellant(s) was/were found to be forged one and, therefore, there shall be a duty liability and the same has been rightly confirmed by the Department, which has been rightly confirmed by the Tribunal as well as the High Court."

6.2 This Tribunal in the case of *Eastern Silks Indus. Ltd. vs. Commr. of Cus. (Airport/Admn.)*, Kolkata (*supra*) observed that:

"9. Appellants who imported the goods against transferable DFIA Licenses have also taken an argument that they have purchased the DFIA Licenses under a bona fide belief that the same were genuine. It is thus their case that they cannot be held as party to the fraud and extended period cannot be made applicable for demanding duty.

Transferee appellants have relied upon an order dated 31-8-2015 passed by the co-ordination bench, Mumbai in the case of *Incos ABS (India) Ltd. & Others v. C.C., Kandla*. In this order it has been held by CESTAT, Mumbai that transferees cannot be held responsible for duty and that extended period is not applicable while demanding duty.

With due respect we differ with the view expressed orders passed by CESTAT, Mumbai as several case laws, including some recently decided by the Apex Court, were not brought to the notice of CESTAT, Mumbai. On this issue Delhi CESTAT in the case of C.C., Amritsar v. Sona Castings [2010 (259) E.L.T. 693 (Tri.-Del.)] held that fraud vitiates everything and transferee is also responsible to pay duty against such scripts obtained fraudulently. This conclusion drawn is based on several quoted case laws of Apex Court and High Courts of Kolkata & Punjab & Haryana. The ratio laid down by Calcutta High Court in the case of ICI India Ltd. v. C.C. (Port), Calcutta [2005 (184) E.L.T. 334] is squarely applicable to the facts of the present appeal. This order of the Calcutta High Court has also been affirmed by Apex Court as reported at 2005 (187) E.L.T. A31 (S.C.) where invocation of extended period was also justified. Jurisdictional Calcutta High Court in the case of ICI India Ltd. v. CC (Port), Calcutta (supra) held as follows :

"2. Relying on the judgment of the learned CEGAT in Appeal No. C/358/2000-NB(D), dated 26th September, 2002 [2003 (151) E.L.T. 336 (T)] Dr. Pal contends that there is a finding that there was no collusion on the part of the appellant. Therefore, according to him, if no fraud or collusion is found on the part of the appellant, in that event, the appellant would be entitled to the benefit of the DEPB licences/scripts. Relying on the decision in United India Insurance Company v. Lehu, (2003) 3SCC 338, Dr. Pal contends that it is just not possible for the appellant to verify the DEPB licenses/scripts which is otherwise saleable, negotiable and available in the market and which the appellant had purchased bona fide for valuable consideration and utilized it for availing of the credit against its own import, stands in the same footing as a driving licence of the driver of the vehicle as it stood in the said case. Therefore, this is an important question of law that whether in the absence of any proof of collusion or fraud or absence of bona fide on the part of the appellant, the appellant could be deprived of the credit of the DEPB licences/scripts purchased by him bona fide for valuable consideration since found to be forged.

4. The DEPB licence/scrip is admittedly a negotiable one and is available in the market. Anyone can purchase it from the market and avail of the credit out of it. This was so done by the appellant. But ultimately it was found that the said DEPB licence/scrips were forged. These facts are not in dispute as we find from the finding of the learned CEGAT. The only question that has been put forward, on the basis of the finding of the facts without challenging the same, is about the effect of absence of collusion on the part of the appellant, as pointed out earlier, in relation to the availability of the credit under the forged DEPB scrips. But in the decision in United India Insurance (supra), the forgery related to the driving licence of the driver engaged by the insured, but the Insurance Policy was not found to be forged. The question would be different if the document itself, on the strength whereof credit is claimed is forged. In that event, the same cannot be equated with merely an irregularity in the licence of the driver driving the vehicle in relation to the liability of the insurer in relation to a valid insurance policy under the Motor Vehicles Act providing for compulsory insurance to secure third party interest. In this case, the document itself having been found to be forged whether there was collusion or fraud on the part of the appellant in the issue of the DEPB licences/scrips becomes absolutely immaterial and irrelevant since no credit can be derived from a forged DEPB. The credit is made available on the strength of a valid DEPB. If the DEPB is forged, then the same is non est and therefore, there is no valid DEPB. As such no credit can be derived thereunder. In such circumstances, one may defend his case that one may not be liable for collusion or fraud and exposed to other penalties therefor, but still then one would be liable to pay the duty and interest and for other statutory consequences which one cannot avoid."

9.1 A script obtained from the Licensing authority fraudulently cannot give licence to any transferee to avail any Customs duty exemption. Fraud in common parlance means dishonest dealing, deceit or cheating etc. It makes no difference whether fraud is committed by outrightly forging of documents or by willful

misdeclaration/misrepresentation. A fraud is a fraud and there are no categories of mild frauds and severe frauds in taxation matters. Further in a recent case of *Tata Iron & Steel Co. Ltd. v. C.C., Mumbai* [2015 (319) E.L.T. 546 (S.C.)] on the issue of applicability of extended period in such cases it has been held by Apex Court as follows : "[Order] - The only question in the present appeals is as to whether the customs authorities could invoke the provisions of proviso to Section 28 of the Customs Act, 1962, to avail the benefit of extended period of limitation.

2. In the facts of the present case we find that the original licence holder, namely, Indian Card, Clothings Company Limited had deliberately suppressed the fact of having availed Modvat credit under Rule 57A of the Central Excise Rules, 1944, and made willfully wrong declaration to the licensing authority to obtain the endorsement of transferability of the same while transferring the licenses to the appellant herein. In view thereof, the extended period of limitation would be available to the authorities for the purpose of claiming the duty even against the appellant herein, who is the transferee of the licence in question."

9.2 In view of the above observations and settled proposition of law, it is held that demands against the appellants are not time barred. 10. So far as the argument of Shri S.K. Mehta (Advocate), with respect to on Section 28AAA(1) of the Customs Act is concerned, it is relevant to reproduce this Section as follows : "Section [28AAA. Recovery of duties in certain cases. - (1) Where an instrument issued to a person has been obtained by him by means of - (a) Collusion; or (b) Wilful misstatement; or (c) Suppression of facts, For the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), by such person or his agent or employee and such instrument is utilized under the provisions of this Act or the rules made or notifications issued thereunder, by a person other than the person to whom the instrument was issued, the duty relatable to such utilization of instrument shall be deemed never to have been exempted or debited and such duty shall be recovered from the person to whom the said instrument was issued. Provided that the

action relating to recovery of duty under this section against the person to whom the instrument was issued shall be without prejudice to an action against the importer under Section 28.”

10.1 It is the argument of Learned Advocate that duty if any can only be demanded from the person in whose name DFIA Licenses were obtained fraudulently. It is observed that Section 28AAA of the Customs Act, 1962 has been made effective from 28-5-2012 and cannot be made applicable to the present proceedings for the periods prior to 28-5-2012. This provision has been made to give the department a tool also to recover Customs duty even from a person other than the importer of the goods. It is also observed that proviso to Section 28AAA(1) does not absolve the actual importer from payment of duty. Further Hon’ble Apex Court in the case of Tata Iron & Steel Co. Ltd. v. C.C., Mumbai (supra) has held that extended period is available to the Revenue for demanding duty from the transferees also. State cannot be deprived of its share of duty if the same is claimed exemption by fraudulent acts of the exporters in the present proceedings.

11. In view of the above observations duty demands and interest have been correctly confirmed by the Adjudicating authority against all the appellants. However, we are of the considered opinion that penalties are not imposable upon the transferee appellants as they have no knowledge of the nature of goods used and exported by the manufacturers/exporters. Accordingly, penalties imposed upon the transferee appellants are set aside.”

7. In view of the above, we do not find any reason to interfere with the impugned order as far as the demand of duty is concerned. However, since the appellants were not aware of the fact that the goods imported by them were based on the fraudulently obtained DEPB scrips, the question of imposing penalty on them does not arise. Accordingly, we set aside the penalty.

8. Appeals are partly allowed by confirming the duty demand along with the interest and setting aside the penalty under Section 114A of the Customs Act, 1962”.

8. In view of the above, the demand of duty along with interest is upheld and for the reasons that at the time of import, the appellant was not aware of the fraudulently obtained DEPB licenses, the question of imposing penalty does not arise, hence penalty set aside.

9. Appeals are partially allowed.

(Order pronounced in Open Court on 29.01.2025.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

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