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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. C/629/2006 AND 274 /2007 –SM[BR] Date 07/04/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi
To :
1. M/S ATM INTERNATIONAL
2. SHRI. ASHOK KUMAR

D-163, FOCAL POINT, JALANDHAR.

M/S ATM INTERNATIONAL — Appellant

Vs

C.C.AMRITSAR — Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 577- 578 /2008-SM[BR] dated 4.4.2008 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   C.C.AMRITSAR
   THE MALL, AMRITSAR.
2. Adv. / Consult SHRI. BIPIN GARG ADV.
   B-1/1289-A, VASANT KUNJ NEW DELHI -110070
3. S.D.R.
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, marg. 43, saket, New
7. M/s Centax Publictions (P) Ltd., 1512-E, Bhishm Pitamah
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301
9. R.Venkatraman Constt. 44-B, S.Suncity, Ghaziabad -
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh,
12. Co, Law Institution
13. TAX INDIA, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
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Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI, COURT NO.1

CUSTOMS APPEAL NOS 629 OF 2006 AND 274 OF 2007-SM(BR)

[Arising out of order-in-appeal No. 27-29/Cus/APPL/LDH/2006 dated 28.8.2006 and order-in-appeal No.73/Cus./APPL/LDH/2006 dated 29.12.2006 passed by the Commissioner of Customs (Appeals), Jalandhar]

Date of Hearing: 10/11.03.2008
Date of Decision: 04.04.2008

Hon'ble Mr. Justice S.N. Jha, President

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	:	No
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3. Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4. Whether Order is to be circulated to the Departmental authorities?	:	No

M/s. ATM International
Shri Ahsok Kumar
Appellant
[Rep. by: Shri Bipin Garg, Advocate]

Versus

CC, Amritsar
Respondent
[Rep. Shri Sumit Kumar, DR]

Coram: Hon'ble Mr. Justice S.N. Jha, President

Final ORDER No. 577-578/08-SM(BR)

Per Justice S.N. Jha:

These two appeals arising from the same adjudication order but different orders-in-appeal and involving the same dispute were heard together and are disposed of by this common order.

2. The appellant in Customs Appeal No.629 of 2006, M/s. ATM International, is a partnership firm. The appellant in Customs Appeal No.274 of 2007, Ashok Kumar, is one of its partners.

3. The case of the Revenue is that M/s. ATM International was engaged in fraudulent availment of credit in the export of goods under DEPB scheme. Investigation which followed intelligence reports to this effect revealed that it had obtained DEPB scrips from the Joint Director General of Foreign Trade, Ludhiana on the strength of forged Bank Realization Certificates (BRCs). The concerned bank, namely Oriental Bank of Commerce, Overseas Branch, Jalandhar had reported that the BRCs were not issued in respect of ten shipping bills, and they were forged by the exporter. The DEPB scrips so obtained were registered with the office of Deputy Commissioner of Customs at CFS (OWPL), Ludhiana. They were later transferred to various buyers for consideration. The buyers made duty free imports on the strength of those DEPBs.

4. Show cause notices were issued to the buyers as well as M/s. ATM International and its partners. The buyers were asked to show cause why imported goods valued at Rs.14,06,027/- should not be confiscated under Section 111(o) of the Customs Act, and penal action taken against them under Sections 112/114A of the Act and, also, duty amounting to Rs.5,60,025/- be not recovered under Section 28 with interest. The appellants herein were called upon to show cause why penalty under Section 112 of the Customs Act for abetting the evasion of customs duty be not imposed. By final order dated 15.6.2005, the Additional Commissioner confirmed the demand of Rs.5,60,025/- against the buyer in question, namely, Pee Jay International and imposed redemption fine of Rs.1,00,000/-

in lieu of confiscation; as against the appellants penalties of Rs.1,00,000/- (in the case of M/s. ATM International) and Rs.50,000/- (in the case of Ashok Kumar) were imposed. The said orders were upheld by the Commissioner (Appeals) as regards the appellants vide orders dated 28.8.2006 and 29.12.2006 respectively. They have further come in appeal to this Tribunal.

5. Shri Bipin Garg appearing for the appellants submitted that there is no restriction on sale of DEPB scrips in the market. The appellants sold relevant DEPB scrips bonafide for consideration and learned Commissioner committed error in imposing penalty on them, particularly, when penalties were not imposed on the buyer i.e. M/s. Pee Jay International. Counsel submitted that in any view, without cancelling the DEPB licence by the concerned authority, no penal consequential action could be taken against the appellants. Cancellation, if any, can have only prospective effect and will not affect past transaction. Counsel also submitted that the show cause notice was vague as it did not specify the clause(s) of Section 111 of the Customs Act which had allegedly been contravened by the appellants. It was pointed out that in the own cases of the appellants – Customs Appeal Nos.298 to 316 and 319 of 2006-SM(BR) preferred by the Department, and Customs Appeal No.C/579/06-NB(S) of 2006 preferred by the appellant M/s. ATM International against identical orders of the lower authorities- this Tribunal has recorded finding in favour the appellants, and dismissed the appeal of the Department and allowed that of the appellant.

6. It may straightaway be mentioned here that the order of the Single Member Bench dated 13.9.2006 in Customs Appeal Nos.298-316 and 319 of 2006 (supra) stands set aside by the Punjab & Haryana High Court vide

decision titled Commissioner of Customs Vs. ATM International reported in 2008 (222) ELT 194 (P&H)). The other order, dated 1.12.2006, allowing the appeal (Appeal No.C/579/2006) of the appellant was passed relying on the earlier order dated 13.9.2006. The said order having been set aside by the Punjab & Haryana High Court, it is clear that the appellant cannot draw any sustenance from the order.

7. As a matter of fact, the above decision of the Punjab & Haryana High Court squarely covers the dispute. The decision was rendered giving reference to the same ten shipping bills and DEPB Nos. - detailed in paragraph 2 of the judgment which are subject of the impugned show cause notice and orders. It may, however, be clarified here, as stated by the Counsel, that the present proceeding relates only to three(out of ten) shipping bills viz.004410, 004739, 004687 corresponding to DEPBs viz. 3010002171 and 3010002059, and Bills of Entry Nos. 000289 dated 17.2.2000 and 00977 dated 3.6.2000 under which acrylic tow valued at Rs.13,05,760/- and Australian greasy wool valued at Rs.1,00,267/- (totaling Rs.14,06,027/-) were imported. The DEPB licence enables the party to import goods without paying duty. In the instant case, the concerned importer made duty free clearances by mis-utilizing the DEPB scrips transferred by the appellant resulting in evasion of customs duty to the tune of Rs.4,73,560/-.

8. The investigation in course of which statements of appellant Ashok Kumar alias Lucky and other partners were recorded revealed that they had obtained DEPB scrips on the strength of substituted documents i.e. shipping bills and forged Bank Realization Certificates and subsequently transferred them to the importer i.e. M/s. Pee Jay International which imported the goods free from duty. Copies of the relevant BRCs pertaining to the shipping

bills in question along with other shipping bills as well as letter of the officers of the Oriental Bank of Commerce, Overseas Branch, Jalandhar to the effect that the said BRC had not been issued by them, were shown to Ashok Kumar; he not only admitted his signatures on those certificates but also accepted the fact that the BRCs were not genuine. He stated that he used to hand over BRCs form, duly signed by him, to one Vinod Marwaha of Ludhiana who sold them. He also admitted that DEPBs were signed by him.

9. The Calcutta High Court in **ICI India Ltd. Vs. Commissioner of Customs(Port), Calcutta,** 2005(184) ELT 339 (Cal.) has held that where forged DEPB licences/scrips are procured from market, the question as to whether there was collusion or fraud on the part of appellants in the issuance of the licences/scrips becomes absolutely immaterial and irrelevant since no credit can be derived from a forged DEPB licence/scrips. Credit is available on the strength of a valid DEPB and if the same is forged, it is to be treated as non est. The decision was upheld by the Supreme Court vide 2005 (187) ELT A-31 (SC).

10. The question as to whether penalty can be imposed on the procurer of the DEPB licence/scrip where the same is not imposed on the transferee has been answered in the negative in the Punjab & Haryana High Court in **Commissioner of Customs, Amritsar Vs. Parker Industries** 2007 (207) ELT 658 (P&H) in these words :-

> "10.......Merely because penalty has not been imposed on the transferee on that ground, it is no ground to treat the respondent at par with the said transferee. The original allottee has to be accountable under the law for committing fraud and also for its consequences. The order of the Tribunal, amounts to treating innocent and guilty at par. Guilt of the respondents stands established and consequences thereof have to follow. The respondent has, thus, been held liable for illegal import as a result of wrongful act of the respondent. Judgments relied upon do not support the case of the respondent and are only in support of an innocent transferee, who may not be aware of fraud, which principle cannot be extended to the

> respondent against whom finding of fraud has been duly recorded, which has not been set aside or which has not been shown to be illegal."

It may also be useful to quote the observations of the Punjab & Haryana High Court in the own case of the appellant referred to above i.e. 2008 (222) ELT 194 as under :-

> "10. .....The Adjudicating Authority in para 24 of its Order-in-Original has recorded categorical findings of fraud concluding that it was proved beyond any doubt that DEPB Scrips were obtained by respondent No.2 Ashok Kumar on the basis of fake Bank Certificate of Export and Realization and the same were cancelled *ab-initio* by the licensing authority. It has also placed reliance on an administration made by respondent No.2 in para 27 of its order (supra) admitting that the Bank Certificate of Export and Realisation were signed by him and that those were forged. Once the finding of fraud and forgery have come on record then the order of the Adjudicating Authority cannot be set aside either by the Appellate Authority or the Tribunal on technical grounds that under Section 112 of the Act, penalty could have been imposed only on the importer or any person who abets the importer."

11. The submission that the show cause notice did not specify the clause(s) of Section 111 of the Customs Act and, therefore, there was violation of principles of natural justice has also been rejected by the Punjab and Haryana High Court in the own case of the appellant in these words :-

> "11. .....Such an admission supported by other evidence cannot be ignored on mere technical ground that show cause notice did not specifically mentioned clauses (a) or (b) of Section 112 of the Act, especially when no prejudice is shown to have suffered by the assessee-respondents. We feel unable to agree with the view taken by the Tribunal that the department in show cause notice issued to the respondents, was required to specify whether respondents were proceeded against under clause (a) or (b) of Section 112 of the Act. The principles of natural justice are not mere formalities required to be performed by the authorities. After issuance of show cause notice a detailed reply was filed and then opportunity of hearing was also afforded to the respondents. It has nowhere been explained as to how interest of the assessee-respondents were adversely affected by non-specification of clauses (a) or (b) of Section 112 of the Act. It cannot be laid down as a rule of law that in cases where said clauses of Section 112 of the Act have not been specified then in all cases such show cause notice is liable to be quashed and the orders passed thereafter are liable to be set aside. We are unable to read anything of that nature in the judgment of Hon'ble Supreme Court in the case of *Amrit Foods* (supra) on which reliance has been placed by the learned counsel for the assessee-respondents. We are also of the view that the judgment in *M/s. Parker Industries* passed by a Division Bench of this Court (supra) has reversed the view taken by the Tribunal upholding the submission made by the revenue. The assessee-respondents have placed reliance on the judgment of the Tribunal when the matter was argued before the Appellate Authority and the Tribunal. Therefore, for the abovementioned

> additional reason, the view taken by the Tribunal and the Appellate Authority is unsustainable and, thus, liable to be set aside."

12. It was vehemently argued that unless and until the DEPB licence/scrip are cancelled by the appropriate authority, no penal action can be taken against the appellants. Attention was drawn to the order of the Joint Director General of Foreign Trade dated 21.12.2001 and it was submitted that the DEPBs cancelled by the said order were other than those involved in the instant case and no order has been passed cancelling the DEPBs in question. It is not possible to accept the submission in view of the definite finding recorded by the Punjab & Haryana High Court in para 10 of the judgment in the own case of the appellant (supra) to the effect that the DEPB scrip obtained by Ashok Kumar on the basis of a fake Bank Certificate of Export and Realization was cancelled *ab initio* by the licensing authority. It is not possible to ignore the said finding of the High Court in an inter-party proceeding.

13. We also do not find any substance in the contention that the cancellation, if any, is prospective and would not result in the adverse penal consequences retrospectively. A similar contention has been rejected in the case of **Parker Industries** (supra). It has been held that cancellation in the context of Section 9(4) of the Foreign Trade (Development & Regulation) Act, 1992 means revocation of the licences which operates retrospectively so as to include both unutilized and utilized scrips.

14. Before concluding I consider it appropriate to refer to the observations of the Apex Court on the point of fraud and consequences thereof in the case of **S.P. Chengalvaraya Naidu Vs. Jagannath,** (1994) 1 SCC 1, as under :-

> " 'Fraud avoids all judicial acts, ecclesiastical or temporal' observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgmednt or decree obtained by playing fraud on the court is a nullity and *non est* in the eyes of law. Such a

> judgment/decree -by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

15. I am of the view that the dispute herein is fully covered by the decision of the Punjab & Haryana High Court in the own case of the appellants, 2008(222) ELT 194 and the orders of this Tribunal relied upon by the counsel are of no help.

16. In the result, I find no merit in these appeals which are accordingly dismissed.

[Pronounced in the open Court on 04 -04-2008]

[Justice S.N.Jha]
President

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