

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

Appeal No. C/424 -425/2006,461 /2006-463, 537 /2006 - CU[DB]

Date 12/10/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To : COMMISSIONER OF CUSTOMS, AMRITSAR
CUSTOMS COMMISSIONERATE, THE MALL,
AMRITSAR

COMMISSIONER OF CUSTOMS, AMRITSAR

Appellant

M/S SONA CASTING (P). LTD.

Vs

Respondent

I am directed to transmit herewith a certified copy of **Final order No. C/159-164/ 2010 CU[DB]** dated 08.10.2010 passed by the Tribunal under Section 129, (B) of the Customs Act, 1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent

M/S SONA CASTING (P). LTD.

G.T.ROAD, MANDI GOBINDGARH

2. Adv. / Consult

MR. SUDHIR MALHOTRA, ADV.,
13-R, HUKUM CHAND COLONY,
NEAR DAV COLLEGE, JALLANDHAR.

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4 J.C.D.R.

5 Bar association. CESTAT. New Delhi

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Assistant Registrar
(Customs Appeal Branch)

Please see remaining addresses at back.

M/S DEV STEEL FORGING INDUS.,
SODAL ROAD, JALLANDHAR.

M/S. CHOPRA METAL COMPANY
LAL BAZAR, JAURA GATE,
JALANDHAR.

M/S. DATT MULTIMETALS LTD.,
MANDI GOBINDGARH, PUNJAB.

M/S MITTAL MERCHANTS,
399, MADHOK PURA,
BHATINDA, PUNJAB.

M/S DANG STEEL PVT. LTD.,
B-XXIX-532/68-2,
SINGLA CYCLE ROAD,
OPP. DHANDARI RLY. STATION,
LUDHIANA, PUNJAB.

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB**

Customs Appeal No.424 of 2006

[Appeal arising out of Order-in-Appeal No.41-43/CUS/CHD/06 dated 28.02.2006
passed by the Commissioner of Customs & Central Excise (Appeals),
Chandigarh]

CC, Amritsar

Appellant

Vs.

M/s.Sona Castings

Respondent

Present for the Appellant: Shri Sumit Kumar, DR, Sri Vijai Kumar, DR &
Shri Mahesh Rastogi, DR

Present for the Respondent: Shri Sudhir Malhotra, Advocate

Customs Appeal No.462 of 2006

[Appeal arising out of Order-in-Appeal No.41-43/CUS/CHD/06 dated 28.02.2006
passed by the Commissioner of Customs & Central Excise (Appeals),
Chandigarh]

CC, Amritsar

Appellant

Vs.

M/s.Chopra Metal Company

Respondent

Present for the Appellant: Shri Sumit Kumar, DR, Sri Vijay Kumar, DR &
Shri Mahesh Rastogi, DR

Present for the Respondent: Shri Sudhir Malhotra, Advocate

Customs Appeal No.463 of 2006

[Appeal arising out of Order-in-Appeal No.41-43/CUS/CHD/06 dated 28.02.2006
passed by the Commissioner of Customs & Central Excise (Appeals), Chandigarh]

CC, Amritsar

Appellant

Vs.

M/s.Datt Multimetals Ltd.

Respondent

Present for the Appellant: Shri Sumit Kumar, DR Shri Vijay Kumar &
Shri Mahesh Rastogi, DR

Present for the Respondent: Shri Sudhir Malhotra, Advocate

Customs Appeal No.425 of 2006

[Appeal arising out of Order-in-Appeal No.44/CUS/CHD/06 dated 16.03.2006
passed by the Commissioner of Customs & Central Excise (Appeals),
Chandigarh]

CC, Amritsar

Appellant

Vs.

M/s.Mittal Merchants

Respondent

Present for the Appellant: Shri Sumit Kumar, DR, Sri Vijai Kumar, DR &
Shri Mahesh Rastogi, DR

Present for the Respondent: Shri Sudhir Malhotra, Advocate

Customs Appeal No.461 of 2006

[Appeal arising out of Order-in-Appeal No.45-46/CUS/CHD/06 dated 7.03.2006
passed by the Commissioner of Customs & Central Excise (Appeals), Chandigarh]

CC, Amritsar

Appellant

Vs.

M/s.Dang Steel Pvt.Ltd.

Respondent

Present for the Appellant: Shri Sumit Kumar, DR, Sri Vijai Kumar, DR &
Shri Mahesh Rastogi, DR

Present for the Respondent: Shri Sudhir Malhotra, Advocate

Customs Appeal No.537 of 2006

[Appeal arising out of Order-in-Appeal No.45-46/CUS/CHD/06 dated 17.03.2006
passed by the Commissioner of Customs & Central Excise (Appeals), Chandigarh]

CC, Amritsar

Appellant

Vs.

M/s.Dev Steel Forging Industry

Respondent

Present for the Appellant: Shri Sumit Kumar, DR, Sri Vijai Kumar, DR &
Shri Mahesh Rastogi, DR

Present for the Respondent: Shri Sudhir Malhotra, Advocate

Date of Hearing: 29.04.2010

Date of Pronouncement:08/10/2010

Coram:

Hon'ble Dr. Chittaranjan Satapathy, Technical Member

Hon'ble Mr. D. N. Panda, Judicial Member

Final order NO. C/159-164...../2010

ORDER

PER D N PANDA

1. Being aggrieved by the first appellate orders appearing in column 4 of the Table below, passed by the first appellate authority, following 6 (six) Appeals as appearing in column 2 of the table were filed by Revenue challenging those orders allowing use of DEPB scrips by the Respondent importers against their imports.

Sr. No.	Appeal No.	Appellants/Respondents	Impugned Order appealed
(1)	(2)	(3)	(4)
1.	C/424/06	Commissioner of Customs, Amritsar Vs.Sona Casting Pvt.Ltd	41 to 43/Cus/CHD/06 dated 28.02.2006 passed by the Commissioner (Appeals) Chandigarh
2.	C/462/06	Commissioner of Customs Amritsar v. M/s Chopra Metal. Co.	-do-
3.	C/463/06	Commissioner of Customs Amritsar v. M/s.Datt Multimetals Ltd.,Mandi Gobindgarh	-do-
4.	C/425/06	Commissioner of Customs Amritsar v. M/s Mittal Merchants	44 /Cus/CHD/06 dated 16.03.2006 passed by the Commissioner (Appeals) Chandigarh.
5.	C/461/06	Commissioner of Customs Amritsar v. M/s Dang Steel Pvt. Ltd.	45 & 46 /Cus/CHD/06 dated 17.03.2006 passed by the Commissioner (Appeals) Chandigarh.
6.	C/537/06	Commissioner of Customs Amritsar v. M/s Dev Steel Forging Industry.	-do-

2. The material facts and cause of action in respect of aforesaid appeals being similar and reason of decision by the learned first appellate authority also being same, those appeals are disposed commonly by this order. The material facts found by the authorities below in respect of each such appeal are as under:

Commissioner of Customs Amritsar
v.
M/s Sona Casting Pvt. Ltd.

C/462/06

Commissioner of Customs Amritsar
v.
M/s. Chopra Metal Company

C/463/06

Commissioner of Customs, Amritsar
v.
M/s.Datt Multmetal Ltd.

2.1. These 3 (three) appeals arose out of a common order in appeal passed by learned Commissioner (Appeals) setting aside demand of duty,

redemption fine, penalty and interest levied against these three respondents above in adjudication. Revenue being aggrieved came in appeal before Tribunal.

2.2 M/s Sona Casting Pvt. Ltd. G.T. Road, Mandi Gobindgarh, M/s. Chopra Metal Company, Lal Bazar, Jaura Gate, Jalandhar and M/s. Datt Multimetal Ltd, Mand, Gobindgarh utilized the DEPB No.3010011812/4/06/00 dated 18.9.2001 for import of goods, free of duty, in terms of Notification No.34/97-Cus dated 07.04.1997. In terms of Bill of Entry No. 1350 dated 22.09.2001 and 1355 dated 25.9.2001 goods were imported by M/s. Sona Casting Pvt. Ltd. Vide B.E. No.807 dated 26.09.2001 M/s. Chopra Metal Co. Jalandhar made import and M/s. Datt Multimetal Ltd. Made import vide B.E. No.1173 dated 25.09.2001. The DEPB scrip above were used by the Respondents for discharge of import duty. The scrip so used was transferred to the Respondents by M/s B. M. Forgings, B-XXX/228/2, Sherpur, Ludhiana. The Directorate General of Foreign Trade (DGFT), Ludhiana found that the Bank Certificate of Exports & Realization (BCER) on the basis of which the aforesaid DEPB scrip was obtained by the transferor was forged as confirmed by the concerned bank for which he cancelled the DEPB scrip being ab-initio void vide O-I-O issued from file No. 9/34/AM.02/ECA/LDH/39338 dated 01.01.2002.

2.3 A common adjudication order No. 18/ADC/CUS/05 dated 24.06.2005 was passed by the Addl. Commissioner, Customs (Preventive) Commissionerate, Amritsar in all the three cases aforesaid vide C. No. VIII-10(HQ)/Cus/Asr/Adj./15/02/3148 dated 27.06.2005. Demand of Rs.55,306/- (Rs.28,012/-BCD + Rs.27,294/- SAD) along-with interest was confirmed against M/s. Sona Castings Pvt.Ltd. and the goods valued at Rs.14,62,991/- imported vide Bill of Entry No. 1350 dated 22.09.2001 and 1355 dated 25.09.2001 were confiscated under Section 111 (o) of the Customs Act, 1962. As the goods were not available for confiscation, and already cleared for home consumption, redemption fine of Rs.35,000/- in

lieu of confiscation was imposed. A penalty of Rs. 5,000/- was also imposed under Section 112 of the Act.

2.4 Demand of Rs. 2,83,321/- (Rs.2,16,358/-BCD + Rs.66,963/- SAD) along-with interest was confirmed against M/s Chopra Metal Co. and the goods valued at Rs.10,69,009/- imported vide Bill of Entry No. 807 dated 26.09.2001 were confiscated under Section 111 (o) of the Customs Act, 1962. As the goods were not available for confiscation, and already cleared for home consumption, redemption fine of Rs. 50,000/- in lieu of confiscation was imposed. A penalty of Rs. 20,000/- was also imposed upon them under Section 112 of the Act.

2.5 Demand of Rs.55,411/- (Rs.28.065/-BCD + Rs.27,346/- SAD) along-with interest was confirmed against M/s. Datt Multimetal Ltd. and the goods valued at Rs.5,61,293/- imported vide Bill of Entry No. 1173 dated 25.09.2001 were confiscated under Section 111 (o) of the Customs Act, 1962. As the goods were not available for confiscation, and already cleared for home consumption, redemption fine of Rs. 30,000/- in lieu of confiscation was imposed. A penalty of Rs. 5,000/- was also imposed upon them under Section 112 of the Act.

2.6 Being unsuccessful in adjudication, all the 3 (three) Respondents, appealed to the learned Commissioner (Appeals) Chandigarh. He allowed their appeal in terms of a common Order-in Appeal No. 41 to 43/Cus/CHD/06 dated 28.02.2006 setting aside the duty demands, redemption fine, interest and penalty holding that no act or omission or commission were brought on record to substantiate that appellant connived or abetted in fraudulent procurement of DEPB and the Respondents had purchased the DEPB scrips in normal market parlance and made the payment therefor through bank transactions. Revenue being aggrieved by this order came in appeal before Tribunal in the aforesaid appeals.

2.7**C/425/06**

Commissioner of Customs Amritsar

v.

M/s Mittal Merchants

M/s Mittal Merchants, 399, Madhok Pura, Bhatinda utilized the DEPB scrip No.3010005599 dated 6.9.2000 for import of goods, free of duty, using Notification No.34/97-Cus dated 07.04.1997. The goods so imported wherein terms of Bill of Entry No. 0001929 and 0001930 both dated 05.12.2000 and the DEPB scrip used against the import was transferred to the Respondents by M/s ATM International, D-163, Focal Point, Jalandhar. Customs Authority of Amritsar Commissionerate verified the genuineness of the Bank Certificate of Exports & Realization (BCER) on the basis of which the aforesaid DEPB scrip was obtained. That was found to be forged with intent to obtain DEPB fraudulently. Accordingly DEPB scrip was cancelled by the Jt. DGFT, Ludhiana vide order issued from file No. 9/136/AM.2001/ECA/LDH/38806 dated 21.12.200, being *abinitio* void. Consequently adjudication order No. 23/ADC/CUS/05 dated 27.7.2005 read with corrigendum OIO No.20/ADC/CUS/06 was passed by the Addl. Commissioner, Customs (Preventive) Commissionerate, Amritsar, vide order in C.No. VIII-10(HQ)/Cus/Adj./88/2002/3626-35 dated 01.08.2005 and C. No. VIII-(HQ)10/CUS/ASR/88/2002/3856-66 dated 10.8.05 raising duty demand of Rs.1,04,315/- along-with interest against the Respondents and the goods valued at Rs.10,03,485/- imported vide Bill of Entry No. 0001929 and 0001930 both dated 5.12.2000 were confiscated under Section 111 (o) of the Customs Act, 1962. As the goods were not available for confiscation, and already cleared for home consumption, redemption fine of Rs. 20,000/- in lieu of confiscation was imposed. A penalty of Rs. 10,000/- was also imposed under Section 112 of the Act. Against such adjudication, in appeal learned Commissioner (Appeals) Chandigarh vide Order-in Appeal no. 44 /Cus/CHD/06 dated 16.03.2006 set aside the duty demands, redemption fine, interest and penalty on the ground that no act or omission or commission were brought on record to substantiate that appellant connived

or abetted in fraudulent procurement of DEPB and the Respondents had purchased the DEPB scrips in normal market parlance and made the payment therefor through bank transactions for which Revenue is in appeal against the first appellate order praying for restoration of order of adjudication.

2.8**C/461/06**

Commissioner of Customs Amritsar

v.

M/s Dang Steel Pvt. Ltd.

Revenue being aggrieved by the first appellate order passed by learned Commissioner (Appeals) setting aside demand of duty, redemption fine, penalty and interest levied came in appeal for restoration of order of adjudication. M/s Dang Steel Pvt. Ltd. B-XXIX-532/6-B/2, Singla Cycle Road, Opp. Dhandari Railway Station, Ludhiana utilized DEPB scrip No.3010011116/4/06/00 dated 09.08.2001 for import of goods, free of duty, using Notification No.34/97-Cus dated 07.04.1997 Import was made vide Bill of Entry No. 935 dated 14.08.2001. The DEPB scrip used above was transferred to the respondent by M/s Mukesh Steel Industries, Ludhiana, who earlier purchased the same from M/s M. R. International, Ludhiana. The Directorate General of Foreign Trade, Ludhiana found that the Bank Certificate of Exports & Realization (BCER) on the basis of which the aforesaid DEPB scrip was obtained, was forged as confirmed by the concerned bank. Therefore such scrip was cancelled by the Jt. DGFT, Ludhiana vide O-I-O issued from file No. 9/33/AM.02/ ECA/LDH/61 dated 20.12.2001 on the ground that the same was obtained on the basis of forged BCER. As the DEPB scrip was cancelled being ab-initio void, adjudication was done by Customs Authority in terms of order No. 15/ADC/CUS/05 dated 31.05.2005 was passed by the Addl. Commissioner, Customs (Preventive) Commissionerate, Amritsar, and issued under C.No. VIII-10(13)/Cus/Adj./HQ/2002/3137 dated 31.05.2005. Duty demanded was Rs. 1,73,194/- (Rs.84,000/-BCD + Rs.89,194/- SAD) along-with

interest. Goods value of Rs. 18,30,742/- imported were confiscated under Section 111 (o) of the Customs Act, 1962. As the goods were not available for confiscation, and already cleared for home consumption, redemption fine of Rs.90,000/- in lieu of confiscation was imposed. A penalty of Rs.20,000/- was also imposed upon them under Section 112 of the Act. Against the adjudication, in appeal, learned Commissioner (Appeals) Chandigarh vide Order-in Appeal no. 45 & 46 /Cus/CHD/06 dated 17.03.2006 set aside the duty demand, redemption fine, interest and penalty on the ground that no act or omission or commission were brought on record to substantiate that appellant connived or abetted in fraudulent procurement of DEPB and the Respondents had purchased the DEPB scrips in normal market parlance and made the payment therefor through bank transactions. Revenue is therefore in appeal against the above order passed by the Commissioner (Appeals) Chandigarh, praying for restoration of adjudication.

2.9**C/537/06**

Commissioner of Customs Amritsar
v.
M/s Dev Steel Forging Industry

Revenue being aggrieved came in appeal against first appellate order passed by learned Commissioner (Appeals) setting aside demand of duty, redemption fine, penalty and interest levied against the respondent in adjudication. M/s Dev Steel Forging Industry, Sodal Road, Jalandhar utilized the DEPB scrip No.30100113090/4/06/00 dated 20.11.2001 for import of goods, free of duty, using Notification No.34/97-Cus dated 07.04.1997. Import was made vide Bill of Entry No. 1068 dated 27.11.01. The DEPB scrip was transferred to the respondents by M/s M.R.International, Jalandhar. The Directorate General of Foreign Trade, Ludhiana found that the Bank Certificate of Exports & Realization (BCER) on the basis of which the aforesaid DEPB scrip was obtained was not issued by the concerned bank, but was forged. Thus the DEPB scrip was cancelled being ab-initio void by the Jt. DGFT, Ludhiana vide order issued from file No. 9/33/AM.02/ECA/LDH/61 dated 20.12.2001. As the DEPB was *abinitio* void adjudication

was made order No. 14/CUS/ADC/05 dated 25.05.2005 by the Addl. Commissioner, Customs (Preventive) Commissionerate, Amritsar, which was issued under C.No. VIII-10(36)/Cus/Adj./HQ/2002/2250-58 dated 26.05.2005. Duty demand of Rs.1,16,061/- was made followed by interest and goods valued at Rs.6,93,750/- were confiscated under Section 111 (o) of the Customs Act, 1962. As the goods were not available for confiscation, and already cleared for home consumption, redemption fine of Rs.50,000/- in lieu of confiscation was imposed. A penalty of Rs. 25,000/- was also imposed under Section 112 of the Act.

3. Commissioner (Appeals) Chandigarh vide Order-in Appeal no. 45 & 46 /Cus/CHD/06 dated 17.03.2006 allowed appeal of the assessee and set aside the duty demands redemption fine, interest and penalty on the ground that no act or omission or commission were brought on record to substantiate that appellant connived or abetted in fraudulent procurement of DEPB and the Respondents had purchased the DEPB scrips in normal market parlance and made the payment therefor through bank transactions. Revenue is therefore in appeal against the above order passed by the Commissioner (Appeals) Chandigarh, praying for restoration of adjudication.

4. Learned DR appearing for Revenue pleaded: **(1).** That adjudication was done following due process of law on the basis of evidence establishing loss of revenue caused by the Respondents using DEPB scrips obtained fraudulently by the transferor thereof. **(2).** When the transferor had no title over the fraudulent DEPB scrips and those were *nonest* in the eyes of law at all times and were void, the Respondents do not assume any title over the same. Accordingly the Respondents were bound to compensate Revenue for the losses due to use of scrips to discharge customs duty. **(3).** When the scrips were purchased in the market at a very low price, enquiry ought to have been caused by the Respondents from the JDGFT to ascertain genuineness of the same to protect their interest. But that was not done for

which the Respondent cannot be said to have exercised due care and diligence to prove its bonafide. **(4)**. When fraud was established that has unravelled all. Revenue's stand is fortified from the Apex Court judgment in the case of UOI Vs. Jain Shudh Vanaspati Ltd. – 1996 (86) ELT 460 (SC). **(5)**. So also fraud nullifies every thing as held by Apex Court in CC Vs. Candid Enterprises – 2001 (13) ELT 404 (SC) and in the case of Delhi Development Authority V. Skipper Construction Company (P) Ltd – AIR 1996 (SC) 2005. **(6)** Cheating was done to claim undue claim of DEPB Credit and Revenue was defrauded. The fraud committed by transferor of DEPB scrips avoid all judicial acts, ecclesiastical or temporal and the transferor had no title to transfer the DEPB credits to the Respondents for which the Respondents are liable to make good of losses suffered by Revenue. Accordingly the adjudication done against the Respondents is not interfereable following Apex Court judgment in the case of S P Chengalavaraya Naidu V. Jagannath – AIR 1994 SC 853. **(7)**. The DEPB credits issued being *ab initio* void was not transferable. It has been held by the Apex Court in the case of Ram Preeti Yadav V. UP Board of High School and Intermediate Education – AIR 2003 SC 4268 that no court in this land will allow a person to keep an advantage which he obtained by fraud . **(8)**. Tribunal in the case of CC Vs. D M Enterprises 2007 (213) ELT 414 held that fraudulently obtained DEPB Credits has no title on the face of law and it was held in DIC India Ltd. Vs. CC – 2008 (226) ELT 545 that DEPB credit obtained on the basis of forged and fake document does not confer any title on the claimant and others who use such *ab initio* void credits. **(9)**. Tribunal in the case of ICI India Ltd Vs. CC – 2009 (240) 290 held that transaction based on fraud continues to be tainted by the vice and the person committing the fraud is precluded from deriving any benefit. **(10)**. Similar view was also expressed by Tribunal in the case of Kamala Metachem Vs. CC – 2007-TIOL-2247-CESTAT-KOL and in the case of M/s Synotex Industries Vs. CC – 2008-TIOL—777-CESTAT-KOL. **(11)**. When the material evidence established fraud against Revenue white collar crimes

committed under absolute secrecy shall not be exonerated from penal consequence of law following Apex Court judgment in the case of K. I. Pavunny V. AC, Cochin – 1997 (90) ELT 241 (SC). **(12)**. It is cardinal principle of law which is enshrined in Section 17 of Limitation Act that fraud nullifies every thing, the adjudication was not time barred following Apex Court judgment in the case of CC. V. Candid Enterprise – 2001 (130) 404 (SC). **(13)**. Nothing demonstrates that the Authority below merely acted on imagination while the adjudication was based on cogent evidence.

5. Per contra, learned counsel appearing for the above respondents urged same grounds what that was argued before the learned first appellate authority which may be summarised thus: **(1)** the DEPB scrips issued by Joint Director General of Foreign Trade (JDGFT) in favour of the transferor were transferred to the respondents for proper consideration. **(2)** The DEPB scrips so acquired were utilised for discharge of customs duty on the imports. **(3)** When the DEPB scrips were cancelled by the JDGFT imports already made the respondents cannot be denied benefit of the DEPB scrips for no reason attributable to them as to the manner of acquisition of the same by the transferor. **(4)** When the DEPB scrips were voided by cancellation, the respondents had not committed any fraud or any wilful misstatement or suppression of facts to invite a proceeding under section 28 of the Customs Act, 1962. **(5)** The Show cause notice issued was barred by limitation when the respondents acted bonafide and utilised the same for discharge of duty. **(6)** There was no collusion of the respondents with the transferor of the scrips for which no penalty was imposed by the JDGFT on the respondents. Therefore extended period is not invokable in the present case following the ratio laid down by Hon'ble High Court of Punjab & Haryana in the case of CC V. Leader Valves Ltd. – 2007 (218) ELT 349 (P & H) which has been approved by Hon'ble Supreme Court as reported in CC V. Leader Valves Ltd. – 2008 (227) ELT A29 (SC). **(7)** When the DEPB scrips were not forged but were good scrips issued on

the basis of fabricated documents, the respondents are not liable to consequence under the law following the judgment in the case of M/s East West Exporters V. Assistant Collector of Customs. **(8)** When the goods were not available for confiscation, order of confiscation was unwarranted and no redemption fine was imposable. So also penalty was not imposable following judgment of Hon'ble High Court of Punjab Haryana in the case of CC V. Raja Impex Pvt. Ltd. - 2008 (229) ELT 185 (P&H) and Tribunal's decision in Chinku Exports V. CC - 1999 (112) ELT 400 (Tri) as affirmed by Apex Court in CC. V. Chinku Exports - 2005 (184) ELT A 36 (SC).

6. Heard both sides and perused records and gone through the citations made by them.

7. The principal issue involved in this case is whether the transferee respondents were entitled to the benefit of DEPB scrips fraudulently obtained by the transferor thereof and whether redemption fine and penalty was imposable when goods were not available for confiscation.

8. Evidence gathered by Revenue unambiguously proved that the DEPB scrips used by the respondents for discharge of customs duty were fraudulently obtained by the transferors and were transferred to them. They did not make any enquiry from JDGFT to ascertain genuineness of the same. It is established principle of law that fraud and justice are sworn enemies. An assessee acting un-cautiously and without being vigilant has no right to claim innocence when he fails to exercise due care and diligence. Failing to cause enquiry with the issuing authority of DEPB scrips crippled the assessee to claim its bonafide. Findings of the learned Adjudicating Authority do not appear to have been made suspiciously or under surmise but seems to have been based on cogent evidence.

9. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. It is also well settled

that misrepresentation itself amounts to fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. Of course, innocent misrepresentation may give reason to claim relief against fraud.

10. An act of fraud on Revenue is always viewed seriously. "Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It has been held by Apex Court in the case of Commissioner of Customs, Kandla V. Essar Oil Ltd – 2004 (172) ELT433 (SC) that by "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the deceived. Undue advantage obtained by the deceiver, will almost always call loss or detriment to the deceived. Similarly a "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See *S.P. Chagalvaraya Naidu v. Jagannath* [1994 (1) SCC 1].

11. In a leading English case i.e. *Derry and Ors. v. Peek* (1886-90) All ER 1 what constitutes "fraud" was described thus: (All ER p. 22 B-C) "fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false". This aspect of the matter has been considered by Apex Court in *Roshan Deen v. Preeti Lal* [2002 (1) SCC 100] *Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education* [2003 (8) SCC 311], *Ram Chandra Singh's case* (supra) and *Ashok Leyland Ltd. v. State of T.N. and Another* [2004 (3) SCC 1]. Suppression of a material

document would also amount to a fraud on the court. (see *Gowrishankar v. Joshi Amha Shankar Family Trust*, [1996 (3) SCC 310] and *S.P. Chengalvaraya Naidu's* case AIR-1994 SC-853. No judgment of a Court can be allowed to stand if it has been obtained by fraud. Fraud unravels everything and fraud vitiates all transactions known to the law of however high a degree of solemnity.

12. When the Assesseees acquired DEPB scrips from market without being an original acquirer, as an abundant caution, to avoid evil consequence of fraudulently obtained scrips, could have safeguarded its interest causing enquiry from JDGFT as to genuineness of the scrips. But that was not done. The respondents failed to acquire no title over the scrips but became beneficiary of ill got scrips. Notificational benefit was availed at the cost of public exchequer which is required to be surrendered for the undue gain made. Bonafides was not established by the respondents failing to cause enquiry from JDGFT. When such bona fide is not established, the respondents shall not avail the benefit of the ratio laid down by Hon'ble High Court of Punjab & Haryana in the case of CC V. Leader Valves Ltd. – 2007 (218) ELT 349 (P & H) which has been approved by Hon'ble Supreme Court as reported in CC V. Leader Valves Ltd. – 2008 (227) ELT A29 (SC).

13. In *East India Commercial Company Limited v. Collector*, 1983 (13) ELT 1342 (S.C.), it was held that even if a licence was void on account of fraud, this did not affect rights of a transferee unless the transferee had not acted *bona fide*. In the case of *Collector of Customs, Bombay v. Sneha Sales Corporation*, 2000 (121) E.L.T. 577 (S.C.) and *UOI v. Sampat Raj Dugar*, 1992 (58) ELT163 (S.C.), the view taken in *East India Commercial Company Limited's* case (*supra*) was followed. The said view was also followed by the Hon'ble Bombay High Court in *Taparia Overseas (P) Limited v. UOI*, 2003 (161) ELT 47, *K. Uttamlal (Exports) Pvt. Limited v. UOI*, 1990 (46) ELT 527 and Hon'ble Allahabad High Court in *Coolade Beverages Limited v. Commissioner of Central Excise, Meerut*, 2004 (172) ELT 451 and *H. Guru*

Investment (North India) Pvt. Limited v. CEGAT, New Delhi, 1998 (104) ELT 8. Hon'ble High Court of Punjab & Haryana in the case of *Golden Tools International v. Joint DGFT, Ludhiana*, 2006 (199) ELT 213, upheld cancellation of DEPB and levy of penalty under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992. Hon'ble court observed that the entire claim of the petitioners was based on falsehood. It was not in dispute in that case that furnishing of bank certificate of exports and realisation of export proceeds was a pre-requisite for issue of DEPB. Admittedly, the bank certificates furnished were fabricated documents. The observations of the former Lord Chief Justice of England, Sir Edward Coke, more than three centuries ago, that "fraud avoids all judicial acts, ecclesiastical or temporal", noticed by the Supreme Court in *S.P. Chengalvaraya Naidu v. Jagannath*, AIR 1994 SC 853, are apt for the instant case. The Apex Court has also observed that an act of deliberate deception with the design of securing something by taking unfair advantage of another is a "fraud". "Fraud" is a cheating intended to get an advantage. A person whose case is based on falsehood has no right to seek relief in equity. In *Commissioner of Customs v. Essar Oil Ltd.*, (2004) 11 SCC 364, their Lordships of the Supreme Court have observed that it is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. Being the ultimate beneficiaries of the DEPBs, the respondents were not innocent. Claim at the threshold was based on *non est* DEPB scrips. Therefore Revenue has rightly invoked extended period under section 28 of the Customs Act, 1962 to adjudicate the matter. The citations made by Revenue come to their rescue.

14. It has been held in *ICI India Limited V. C.C (port), Calcutta* - 2005 (184) E.L.T. 339 (Cal.) the DEPB licence/scrip is admittedly a negotiable one and is available in the market. Any one 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 licences/scrips were forged. These facts are not in dispute. The document itself having been found to be forged basing on which DEPB scrips were issued 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. This decision of Hon'ble Calcutta High Court was affirmed by Apex Court in appeal by ICI India Ltd. as reported in 2005 (187) E.L.T. A31 (S.C.). Thus invoking of extended period for adjudication was justified.

15. Hon'ble High Court of Punjab & Haryana in the case of Friends Trading Co. and Another V. Union of India – 2010 (254) ELT 652 P&H) have held as under.

16. Hon'ble High Court of Punjab & Haryana in the case of Friends Trading Co. and Another V. Union of India – 2010 (254) ELT 652 (P &H) have held as under: -

" The assessee has preferred this appeal under section 130 of the Customs Act, 1962 (in short, 'the Act') against the order dated 4-4-2006 Passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi [2006 (202) E.L.T. 611 (Tribunal)].

2. imported goods against DEPB Scrips without payment of duty. The assessee It was later found that DEPB Scrips were obtained by producing forged bank certificate of export and realization. The DEPB Scrips were cancelled by the competent authority. Accordingly, demand of duty was confirmed after notice. The assessee purchased DEPB Scrips from M/s. Vivek Impex Private Limited who purchased the same from M/s. Shyam International who had purchased the same from M/s. Parker Industries. The Commissioner of Customs held that any concession availed of on the basis of DEPB Scrips obtained by producing forged documents could not be retained. This view has been affirmed by the Tribunal.

3. identical issue in our recent order dated 1-9-2007 We examined an in CUSAP No. 27 of 2008 (*M/s. Munjal Showa Limited v. Commissioner of Customs and Central Excise (Delhi (IV), Faridabad)* [2009 (246) E.L.T. 18(P

& H)]. After considering the observations of the Hon'ble Supreme Court in *East India Commercial Company limited v. Collector* - 1983 (13) E.L.T. 1342 (S.C.) = AIR 1962 SC 1893, *Collector of Customs, Bombay v. Sneha Sales Corporation* - 2000 (121) E.L.T. 577, *Sampat Raj Dugar* - 1992 (58) E.L.T. 163 and *Aban Loyd Chiles Offshore Ltd. and others v. Commissioner of Customs, Maharashtra* - 2006 (200) E.L.T. 370 (S.C.) = (2006) 6 SCC 482, by the Bombay High Court in *Taparia Overseas (P) Limited v. UOI* - 2003 (161) E.L.T. 47 and *K. Uttamlal (Exports) Pvt. Limited v. UOI* - 1990 (46) E.L.T. 527 and by the Allahabad High Court in *Coolade Beverages Limited v. Commissioner of Central Excise, Meerut* - 2004 (172) E.L.T. 451 and *H. Guru Investment (North India) Pvt. Limited v. CEGAT, New Delhi*, 1998 (104) E.L.T. 8 and judgments of this Court in *Commissioner of Customs, Amritsar v. Vallabh Design Products* - 2007 (219) E.L.T. 73 and *Commissioner of Customs v. Leader Valves Ltd.* - 2007 (218) E.L.T. 349, it was held as under :-

"12. We do not find any applicability of the above judgment to the facts of the present case. In the present case, DEPB Scrip's were forged, which has been admitted even by the appellant before the Tribunal. Benefit of a forged document cannot be allowed to be retained. The judgment relied upon does not in any manner lay down that benefit of a forged document could be allowed to be retained. The principle laid down in the judgment relied upon which has been followed in other judgments cannot, thus, apply to the case of the present nature where benefit has been taken on the basis of a forged document.

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19. It is settled principle of common law that a purchaser steps into the shoes of the seller and does not acquire better title than the seller. This principle has also been recognized under Section 27 of the Sales of Goods Act, 1932.

20. The charge of duty is on the goods under Section 12 of the Act unless a case of exemption is made out, irrespective of intention of any person.

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24. For the purpose of duty, the Tribunal has clearly held that the documents being forged, the appellant could not be allowed to take advantage of exemption. The Tribunal noticed that the firm with whom the appellant entered into the transaction was not traceable. The appellant itself had come to the conclusion that the documents were forged. In these circumstances, if further opportunity has been given to the appellant on its own asking and for its own benefit, we do not find any error in the course adopted by the Tribunal so as to give rise to substantial question of law sought to be raised."

4. reference to judgments of the Hon'ble Supreme Court We also made a in *S.P. Chengalvaraya Naidu v. Jagannath*, AIR 1994 SC 853 and *Commissioner of Customs v. Essar Oil Ltd.* - 2004 (172) E.L.T. 433 (S.C.) = (2004) 11 SCC 364 and judgments of this Court in *Golden Tools International v. Joint DGFT, Ludhiana* - 2006 (199) E.L.T. 213 and *The Commissioner of Customs, Commissionerate, The Mall, Amritsar v. M/s. Parker Industries, Jalandhar* - 2007 (207) E.L.T. 658.

5. above, we do not find any ground to interfere with the In view of order upholding demand of duty on goods in respect of which exemption had been availed of on the basis of DEPB Scrips obtained against forged documents.

6. No substantial question of law arises.

7. The appeal is dismissed."

17. The ratio of the aforecited decision in Friends Trading Co. (supra) squarely applies to the present case of demand of duty on goods in respect of which also, exemption has been availed of, on the basis of DEPB scrips obtained against forged documents. We also find that the Hon'ble High Court of Punjab & Haryana have considered the decisions cited by the Respondents in this case such as East India Commercial (supra), Sneha Sales Corporation (supra), Sampat Raj Dugar (supra), Taparia Overseas (supra) and others. Moreover, DEPB scheme essentially provides for an alternative mechanism to compensate for duty paid on goods used in the export production. When DEPB scrips have been obtained without undertaking exports, the question of granting a duty benefit by the exchequer cannot arise. Why should public revenue suffer on account of a fraud committed by someone else, just because he has successfully transferred the scrip to the appellants after obtaining the same fraudulently?

18. Accordingly, we hold that the Assessee Respondents are not entitled to duty benefit under the DEPB scheme against fraudulently obtained DEPB scrips. Hence, we set aside the impugned Orders-in-Appeal and restore the Orders-in-Original. However, in the circumstances of these cases, penalties are set aside. Appeals are thus partly allowed in the above terms.

(Pronounced in open court 08.10.2010)

(Dr. CHITTARANJAN SATAPATHY)
TECHNIAL MEMBER

(D.N.PANDA)
JUDICIAL MEMBER