

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Customs Appeal No. 434 of 2007

(Arising out of Order-in-Original No. 16/MDS/2007 dated 13.04.2007 passed by the Commissioner of Customs (Import & General, New Delhi)

M/s M.D. Overseas Ltd

10A, Scindia House
Connaught Place
New Delhi

...Appellant

VERSUS

C.C., New Delhi (Import & General)

New Customs House
Near I.G.I. Airport
New Delhi- 110037

...Respondent

APPEARANCE:

Shri Pradeep Jain and Shri Shubhankar Jha, Advocate for the Appellant
Shri Nikhil Mohan Goyal, Authorized Representative of the Department

CORAM :

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing/Decision: October 06, 2025

FINAL ORDER NO. 51586 /2025

JUSTICE DILIP GUPTA

The Commissioner of Customs (Import and General)¹ has by an order dated 13.04.2007 decided matters relating to M/s New Kailash Jewellery House, M/s M.D. Overseas Ltd. and M/s K.K. Exports. This appeal relates to that portion of the order passed by the Commissioner that relates to M/s M.D. Overseas Ltd.² The demand of Rs. 83,58,911/- has been confirmed under section 28 of the Customs Act, 1962³ with interest and penalty.

1 the Commissioner
2 the appellant
3 the Customs Act

2. It transpires from the records that earlier the Commissioner had passed an order dated 13.08.2004 in respect of the aforesaid three firms. The impugned order was set aside and the matter was remitted to the Commissioner for considering the issues afresh in the light of the observations made in the order. As a consequence of the remand order, the Commissioner passed the order dated 13.04.2007 which was assailed before the Tribunal in the present appeal. This appeal was allowed by order dated 13.06.2017 by remanding the matter to the adjudicating authority to first decide the issue whether the Directorate of Revenue Intelligence had the jurisdiction to issue the show cause notice. This order was assailed by the department before the Delhi High Court and by a judgment dated 24.05.2023 the order dated 13.06.2017 passed by the Tribunal was set aside and the appeals were restored before the Tribunal to be heard and decided on merits. This is how the matter has come up for hearing.

3. It appears from the records that the appellant had purchased 4 Gold Replenishment Licenses⁴ that were issued in favour of M/s Shivam Enterprises and M/s Shyam Exports. These licenses were issued under paragraph 8.37 of the Export and Import Policy for the year 1997-2007 which reads as follows:

"An exporter is eligible for freely transferable Replenishment (REP) Licence at the rate of 87% of the FOB value of exports of plain gold/platinum jewellery and articles thereof, and 80% of the FOB value of export of studded gold/platinum jewellery and article thereof. Besides, the exporter will be eligible for freely transferable Replenishment (REP) Licence at the rate of 70% of the FOB value of exports of plain silver jewellery and articles thereof, and 65% of the FOB value of export of studded silver jewellery and articles thereof. Such REP licences are

4 licenses

valid for import of items as given in Handbook (Vol.1)".

4. On 31.07.2002, the Directorate of Revenue Intelligence issued a show cause notice mentioning therein that the licenses that were issued to M/s Shivam Enterprises and M/s Shyam Exports were based on forged documents and in this connection, the show cause notice relied upon statements made by certain persons under section 108 of the Customs Act. The show cause notice, therefore, called upon the appellant to show cause as to why customs duty may not be recovered from the appellant and why penalties may not be imposed. The appellant submitted a reply to the show cause notice and denied the allegations made therein.

5. As noticed above, the show cause notice was earlier adjudicated upon by an order dated 13.08.2004 which was assailed by the appellant by filing Customs Appeal before this Tribunal which appeal, was allowed by way of remand. On remand, the Commissioner passed a fresh order dated 13.04.2007 which has been assailed in this appeal.

6. Shri Pradeep Jain, learned counsel for the appellant assisted by Shri Shubhankar Jha submitted that it is not the case of the department that the licenses that were issued to M/s Shivam Enterprises and M/s Shyam Exports were forged because for it is a case of the department that the licenses were issued on the basis of forged documents. Learned counsel has submitted that in such a situation, no fault can be found on the part of the appellant. In support of this submission, learned counsel for the appellant placed reliance upon a decision of this Tribunal in **M/s Apar Industries Ltd.**

versus **Commissioner of Customs (Export Promotion)**⁵ and **M/s Deep Exports** versus **CC, New Delhi**⁶. Learned counsel also submitted that statements made under section 108 of the Customs Act cannot be considered as relevant as the procedure contemplated under section 138B of the Customs Act has not been followed.

7. Shri Nikhil Mohan Goyal, learned counsel appearing for the department, however, supported the impugned order and submitted that it does not call for any interference in this appeal. Learned authorised representative submitted that the appellant was aware there was some issue in the licenses issued to M/s Shyam Exports and M/s Shivam Enterprises because it is after filing of the Bills of Entry, the appellant had written a letter to DGFT enquiring about the licenses and this would have been done only if the appellant was aware that there was some issue with the licenses. Learned authorised representative, therefore, submitted that since the appellant was a party to the fraud, no relief shall be granted to the appellant as fraud vitiated. Learned authorised representative also submitted in view of the statements made under section 108 of the Customs Act, it cannot be denied that appellant was party to the fraud and, therefore, the confirmation of demand against the appellant is justified.

8. The submissions advanced by the learned counsel for the appellant and the learned authorised representative appearing for the department have been considered.

9. The first issue that arises for consideration is whether the appellant, as a purchaser of the licenses can be fastened with duty

5 Customs Appeal No. 594 of 2004 decided on 13.05.2025
6 2016 (4)TMI 99- CESTAT New Delhi

liability when it is a fact that the licenses that were purchased had been issued and were not forged.

10. This issue was examined by a Division Bench of this Tribunal in **Apar Industries** and after consideration of the various judgments of Courts and the decisions of the Tribunal, it was held :

"**31.** What, therefore, transpires from the aforesaid decisions is that wherever the licensing authority has issued the licence/DEPB scrip on the basis of which the exemption is sought from customs duty, either by the original licence holder or by the transferee, even if the licence/DEPB scrip have been obtained by producing fraudulent/fake export documents or bank documents, then during the validity of the licence/scrip the exemption cannot be denied and the goods cannot be confiscated. This would be so, even if the licence is cancelled by the licensing authority subsequently after the imports have been effected. What is relevant is a valid licence/DEPB issued by the licensing authority and presentation of the same at the time of import of the goods and at the time of filing the Bill of Entry.

32. The position would be totally different if the licence/DEPB scrip or TRAs have not been issued by the DGFT and the same have been found to be fake or forged. In such a situation, customs duty exemption would not be available either to the original licence holder or to the transferee importer.

33. The above difference in the two situations has been elaborately explained by the Tribunal in **Deep Exports vs. Commissioner of Customs, New Delhi**⁷. After examination of the judgments of the Supreme Court and the High Court and the decisions of the Tribunal, it was held:

"12. Regarding lack of evidence on record to the effect that either the appellant or the commission agent had made any enquiry about the transferors. **We find that the REP licences transferred were genuine documents issued by the competent authority. Even if the appellants had made any enquiry with the DGFT themselves as**

7. 2016 (338) E.L.T. 742 (Tri. - Del.)

the issuing authority at the time of purchase or utilisation for import of gold, there is no way the validity of REP licence could have been put to question. This is clear from the fact that the fraudulent submission of forged bank document/shipping bills by the original exporters who obtained the REP licence was unearthed much later by the detailed enquiry of the officers. We find the original authority extensively quoted and relied on the decision of Hon'ble Supreme Court in **CC (Prev.) v. Aafloat Textiles (I) P. Ltd. - 2009 (235) E.L.T. 587 (S.C.)**. We have perused the said decision. The Hon'ble Supreme Court in that case was dealing with a **Special Import Licence (SIL) which was forged and was never issued by the DGFT**. The signature and security seal of the authority was forged. Now in the present case, the REP licences were issued by the competent authority and as such were genuine documents. However, the original parties/exporters made fraudulent representation by giving forged documents to obtain such REP licences. As such there is a clear difference in facts between the case decided by the Hon'ble Supreme Court and the present case. **In this connection, we may refer to the decision of the Hon'ble Supreme Court in East India Commercial Co. Limited - 2002-TIOL-138-SC = 1983 (13) E.L.T. 1342 (S.C.), it was held as under:**

"35. Nor is there any legal basis for the contention that licence obtained by misrepresentation makes the licence non est, with the result that the goods should be deemed to have been imported without licence in contravention of the order issued under Section 3 of the Act so as to bring the case within Clause (8) of Section 167 of the Sea Customs Act. Assuming that the principles of law of contract apply to the issue of a licence under the Act, a licence obtained by fraud is only voidable : it is good till avoided in the manner

prescribed by law. On May 1, 1948, the Central Government issued an order in exercise of the power conferred on it by Section 3 of the Act to provide for licences obtained by misrepresentation, among others, and it reads :

In the circumstances, we must hold that when the goods were imported, they were imported under a valid licence and therefore it is not possible to say that the goods imported were those prohibited or restricted by or under Chapter IV of the Act within the meaning of Clause (8) of Section 167 of the Sea Customs Act”.

The Apex Court in the case of Union of India v. Sampat Raj Dugar - 2002-TIOL-141-SC-Cus. = 1992 (58) E.L.T. 163 (S.C.) held that when on the date of import the goods were covered by a valid licence, subsequent cancellation of licence is of no relevant nor does it retrospectively render the import illegal. Again, in CC v. Sneha Sales Corporation - 2002-TIOL-440-SC-Cus. = 2000 (121) E.L.T. 577 (S.C.) held that licence obtained by misrepresentation or fraud does not make it non est as a result of its cancellation. As per Section 3 of the Import and Export Act misrepresentation or fraud renders a licence voidable. When the goods were imported and cleared before such cancellation, contravention of import cannot be alleged.

13. **Ld. AR relied on the decision of Hon’ble Punjab & Haryana High Court in Friends Trading Co. v. Union of India - 2011 (267) E.L.T. 33 (P&H) to contend that the appellant cannot escape the liability in view of cancellation of these REP licences by the competent authorities.** We have perused the said decision. The Hon’ble High Court did not accept the contention that when the licences were cancelled subsequently the benefit cannot be withdrawn which was availed earlier. The High Court relied on their decision

in *Munjal Showa Ltd. v. CC&CE (Delhi-IV)*, Faridabad - 2009 (246) E.L.T. 18 (P&H). **We find that these decisions were dealing with forged DEPB scripts. As already noted in the present case we are not dealing with forged licences. The licences have been issued by Competent Authority and were valid till they were cancelled by the competent authority. They were not forged licences.** Various case laws examined indicate that the consequences of bona fide buyer using a forged licence or bona fide buyer using a genuine licence but obtained on submission of fabricated or forged documents by the transferors vary.

14. Tribunal in *CC v. Patiala Castings Pvt. Ltd.* - 2012 (283) E.L.T. 269 examined this issue and held that in the absence of evidence that the transferee have not acted bona fide or was aware of the fraud committed by the original holder of licence, duty cannot be recovered from them.

15. **In a recent case while disposing of a large batch of appeals the Mumbai Bench of the Tribunal reported as 2015-TIOL-2090-CESTAT-MUM = 2015 (324) E.L.T. A127 (Tribunal), examined the whole gamut of case laws relevant to the issue and held that duty cannot be demanded from the transferors as in such situation where the licences were genuine but obtained by fraudulent representation they can be made only voidable and imports which happen prior to the cancellation cannot be held as improper.** The Tribunal also noted the insertion of new legal provision as Section 28AAA in the Customs Act, 1962 to meet such situation.

16. Considering the above analyses, we find that the duty demand confirmed by the impugned order cannot be sustained. We

accordingly set aside the impugned order and allow the appeal.”

(emphasis supplied)

34. The Punjab and Haryana High Court in **Pee Jay International vs. Commissioner of Customs**⁸ also clearly laid down this legal position, after an examination of the judgments:

“16. **In the case in hand, as has already been noticed above, there is a specific finding recorded by the first appellate authority and even by the Tribunal that the appellant was not party to the fraud with the seller of DEPB. DEPB was found to be a genuine document, though obtained by seller by producing some forged documents, to which the appellant was not a party.**

17. In view of our aforesaid discussion, we find merit in the present appeals. The same are allowed. First substantial question, as referred to in Para No. 3 is answered in favour of the assessee and against the revenue and as a consequence, there is no requirement to deal with other questions.”

(emphasis supplied)”

11. In view of the aforesaid decision of this Tribunal in **Apar Industries**, it has to be held that as the licenses were not forged, duty could not have been imposed on the appellant.

12. The second issue that arises for consideration is whether the statements recorded under section 108 of the Customs Act can be considered as relevant because it is on the basis of these statements, that learned authorised representative of the department has submitted that the appellant was a party to the fraud.

8. 2016 (340) E.L.T. 625 (P&H)

13. Such statements could not have been relied upon as the procedure contemplated under section 138B of the Customs Act was not followed. This is what was held by the Tribunal in **M/s. Surya Wires Pvt. Ltd. vs. Principal Commissioner, CGST, Raipur⁹**. The Tribunal examined the provisions of sections 108 and 138B of the Customs Act as also the provisions of sections 14 and 9D of the Central Excise Act, 1944 and observed as follows:

"21. It would be seen section 14 of the Central Excise Act and section 108 of the Customs Act enable the concerned Officers to summon any person whose attendance they consider necessary to give evidence in any inquiry which such Officers are making. The statements of the persons so summoned are then recorded under these provisions. It is these statements which are referred to either in section 9D of the Central Excise Act or in section 138B of the Customs Act. A bare perusal of sub-section (1) of these two sections makes it evident that the statement recorded before the concerned Officer during the course of any inquiry or proceeding shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made the statement is examined as a witness before the Court and such Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence, in the interests of justice, except where the person who tendered the statement is dead or cannot be found. In view of the provisions of sub-section (2) of section 9D of the Central Excise Act or sub-section (2) of section 138B of the Customs Act, the provisions of sub-section (1) of these two Acts shall apply to any proceedings under the Central Excise Act or the Customs Act as they apply in relation to proceedings before a Court. **What, therefore, follows is that a person who makes a statement during the course of an**

9. Excise Appeal No. 51148 of 2020 decided on 01.04.2025

inquiry has to be first examined as a witness before the adjudicating authority and thereafter the adjudicating authority has to form an opinion whether having regard to the circumstances of the case the statement should be admitted in evidence, in the interests of justice. Once this determination regarding admissibility of the statement of a witness is made by the adjudicating authority, the statement will be admitted as an evidence and an opportunity of cross-examination of the witness is then required to be given to the person against whom such statement has been made. It is only when this procedure is followed that the statements of the persons making them would be of relevance for the purpose of proving the facts which they contain."

(emphasis supplied)

14. After examining various judgments of the High Courts and the Tribunal, the Tribunal observed as follows:

"28. It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central Excise Act and section 138B(1)(b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to be provided for cross-examination of such persons. **The provisions of section 9D of the Central Excise Act and section 138B(1)(b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the**

statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/ investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence."

(emphasis supplied)

15. Thus, as both the submissions advanced by the learned counsel for the appellant have merit, the impugned order dated 13.04.2007 passed by the Commissioner cannot be sustained and is set aside. The appeal is, accordingly, allowed with consequential relief, if any.

(Dictated and pronounced in the open court)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)**