IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST BLOCK-II, R.K. PURAM, NEW DELHI.

Date of Hearing:26.12.2011
Date of Decision:26.12.2011

Hon'ble Smt. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Rakesh Kumar, Member (Technical)

---

1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3. Whether Their Lordships wish to see the fair copy of the Order?

4. Whether Order is to be circulated to the Departmental authorities?

Customs Appeals Nos.720 & 723 of 2007

[Arising out of Order-in-Appeal No.95/Cus/Appl/Ldh/07 dated 10.08.2007 in Appeal No.C/720of 2007 and Order-in-Appeal No.98/Cus/Appl/Ldh/07 dated 27.08.2007 in Appeal No.723 of 2007 passed by the Commissioner of Customs & Central Excise, Jalandhar]

CC, Amritsar — Appellant

Vs.

M/s. Patiala Castings Pvt. Ltd. — Respondent

Appearance: Rep. by Shri Rajendra Gupta, DR for the appellant.
Rep. none for the respondent.

CORAM : **Hon'ble Smt. Archana Wadhwa, Member (Judicial)**
Hon'ble Shri Rakesh Kumar, Technical Member

Final Oral Order No. C/A/109-110/12-Cus.

Per Rakesh Kumar:

The facts giving rise to these two appeals filed by the Revenue are, in brief, as under:

1.1 M/s. ATM International, D-163, Focal Point, Jalandhar, were issued DEPB scrips against some exports claimed to have been made by them. These DEPB scrips were, thereafter, transferred on sale to the respondent. Against these DEPB scrips, the respondent made duty free imports. Subsequent to the clearance of the goods by the respondent free of duty against DEPB scrips, the department made inquiries against M/s. ATM International and it was found that the DEPB scrips had been obtained by them by producing fake and fabricated documents. On submission of a report in this regard, the Director General of Foreign Trade, from whose office DEPB scrips had been issued, cancelled the same. Since by that time the goods imported against these scrips by the respondent had already been cleared by them, the respondent were issued show cause notices along with M/s. ATM International for recovery of duty payable on the goods and which had not been paid, under provisions of Section 28 (1) of Customs Act, 1962, along with interest on it under Section 28 AB ibid. The show cause notices were issued by invoking extended period under proviso to Section 28(1) of Customs Act, 1962. The show cause notices were adjudicated by the Joint Commissioner vide Order-in-Original No.6/JC/05 dated 26.10.2005 and 09/JC/CUS/05 dated 22.11.2005 by which –

(a) duty demands of Rs.1,91,619/- and Rs.1,51,961/- respectively were confirmed against the respondent along with interest under proviso to Section 28(1) of Customs Act, 1962 read with Section 28 AB ibid; and

(b) penalty of Rs.1,90,000/- and Rs.1,50,000/- respectively was imposed under Section 112 of the Customs Act, 1962 on M/s. ATM International, Jalandhar; and

(c) While penalty was imposed on each partner of M/s.ATM International under Section 112 of Customs Act, 1962, no penalty was imposed on the respondent under Section 112 and also the proposal for confiscation of the goods was dropped on the ground that the same were not available for confiscation.

1.2. The respondent filed these appeals before the Commissioner (Appeals) against these orders of the Joint Commissioner and the Commissioner (Appeals) vide Order-in-Appeal No.95/CUS/APPL/LDH/07 dated 10.08.2007 and Order-in-Appeal No98/Cus/Appl/Ldh/07 dated 27.08.2007 set aside the Joint Commissioner's order and allowed the appeals following the judgemenet of Hon'ble Punjab & Haryana High Court in the case of **Commissioner of Customs Vs. Leader Value Ltd.** reported in **2007 (218) ELT 349** holding that when the importer importing the goods free of duty against DEPB scrips is not a party to the fraud and he had merely purchased the DEPB scrips under bonafide belief that the same had been correctly issued, the duty can not be demanded from the importer (Respondent) and, in any case, the extended period under proviso to Section 28(1) of Section cannot be invoked for demand of duty. Against these orders of the Commissioner (Appeals), these two appeals have been filed by the Revenue.

2. Shri R.K. Gupta, ld. Departmental Representative assailed the impugned order by reiterating the grounds of appeal in the Revenue's appeal and emphasized that –

(a) Hon'ble Punjab & Haryana High Court in the case of **Friends Trading Company Vs. Union of India reported in 2010 (254) ELT 652 (P&H)** wherein identical issue was involved, has taken a contrary view and SLP filed before the Apex Court against this judgement of the Hon'ble High Court has been dismissed by the Apex Court vide judgement reported in **2010 (258) ELT A-72 SC;**

(b) When DEPB scrips issued to M/s. ATM International have become non est as the same have been cancelled by the DGFT, in view of the judgement of the Hon'ble Calcutta High Court in the case of **ICI India Ltd. Vs. Commissioner of Customs, Calcutta reported in 2005 (184) ELT 348 (Cal.),** no credit can be derived from such non est DEPB Scrips;

(c) When the DEPB Scrips used to avail exemption under the relevant exemption notification have been cancelled and made ab-initio void by the DGFT, no duty exemption can be availed against the same and if it has been wrongly availed, right of public exchequer can not be allowed to lapse merely because the respondent who utilized the DEPB scrips, did same on bonafide belief - and duty exemption availed on an invalid and ab-initio cancelled the DEPB scrips is liable to be recovered;

(d) In view of the judgement of the Apex Court in the case of **Commissioner of Customs, Mumbai Vs. Jagdish Cancer &**

Research Centre reported in **2001 (132) ELT 257 (SC),** the limitation period under Section 28(1) of Customs Act, 1962 would not be attracted for recovery of duty.

Shri Gupta, ld. DR, therefore, pleaded that the impugned orders-in-appeal passed by the Commissioner (Appeals) are not correct.

3. None appeared for the Respondent.

Since notice of hearing had been sent to the respondent neither anybody appeared for the respondent nor there is any request for adjournment, in accordance with Rule 21 of the CESTAT Procedure Rules, so far as the respondent are concerned, the matter is being decided ex parte.

4. We have carefully considered the submissions made by the learned Departmental Representative and have perused the records. In this case, undisputed facts are that –

(a) *the respondent had obtained the DEPB scrips in question from M/s. ATM International against which duty free imports had been made by them;*

(b) *The DEPB scrips, in question, had been issued to M/s. ATM International by Joint DGFT, Ludhiana on the basis of their claim regarding certain exports having been made by them;*

(c) *At the time of imports by the respondent against DEPB scrips, in question, the same were valid and had not been cancelled; and*

(d) *it is only after the clearance of the goods against DEPB scrips, in question, that the inquiry was started and on being found that M/s. ATM International had obtained the DEPB scrips on the basis of forged and fabricated documents, the DEPB scrips, in question, were cancelled ab initio by the Joint DGFT, Ludhiana.*

There is also no dispute about the fact that the respondent had no knowledge about the licence having been obtained by M/s. ATM International by fraud or by mis-representation and there is not even allegation in this regard against the respondent.

5. The point of dispute in this case is as to whether in these circumstances the duty foregone can be recovered from the respondent by invoking extended period under proviso to Section 28(1) of 1962. We find that the identical issue was involved in the case of **Commissioner of Customs Vs. Leader Valves Ltd. reported in 2007 (218) ELT 349 (P&H)**, wherein Hon'ble High Court has mainly relying upon the judgement of the Apex Court in the case of **East India Commercial Company Ltd. Vs. Collector of Customs reported in 1983 (13) ELT 1342 (SC)** held that in such circumstances, duty cannot be demanded from the importer, who made duty free import against the DEPB scrips purchased by him from another person under bona fide belief. In this regard, the findings of the Hon'ble High Court in para-9 of its order are reproduced below:-

> *"9. After hearing learned Counsel for the parties, we are of the considered view that this appeal is devoid of any merit. The assessee-respondent admittedly is not a party to the fraud. There are categorical findings that they have purchased DEPB from the open market in the bona fide belief of its being genuine. They had paid full price and accordingly, have availed the benefit. Merely because at a later stage, the DEPB has been found to be fabricated and fake on the basis of BCER, the assesseee-respondent could not be deprived of the benefits which were legitimately available to them. It is also worth noticing that the assessee-respondent was never issued any show cause notice before cancelling the DEPB which was obtained by M/s. Parker Industries and obviously the notice was also to be issued to them alone. We are further of the view that notice under Section 28 of the Customs Act could not be issued to the assessee-respondent because a period of six months stipulated by Section 28 of the Customs Act stood already expired and the rights of the parties had been crystalised. The revenue cannot avail the extended period because the assessee-respondent could not be accused of mis-representation, collusion or suppression of the facts within the meaning of proviso postulated by Section 28 of the Customs Act. Therefore, there is no merit in this appeal."*

5.1 The Apex Court in the case of M/s. East India Commercial Company Ltd. Vs. Collector of Customs (supra) relied upon by Hon'ble Punjab & Haryana High Court in its above mentioned judgement has held as under:-

> *"35. Nor is there any legal basis for the contention that licence obtained by misrepresentation make the licence nonest, 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 Customs Act. Assuming that the principles of law of contract apply to the issue of licence under the Act, a licence obtained by fraud is only voidable; it is good full avoided in the manner prescribed by law".*

5.2 The Apex Court in its judgement in the case **of Collector of Customs, Bombay Vs. Sneha Sales Corporation** reported in **2000 (121) ELT 577** has followed its abovementioned earlier judgmenet in the case of **East India Commercial** (supra). The case of **Sneha Sales Corporation** is identical to the present case. In the case of Sneha Sales Corporation, M/s. Surjan Singh Balbir Singh obtained four advance licences against which the goods could be imported free of customs duty. These licences were first transferred by them to M/s. Chakradhar International Ltd., who, in turn, transferred the same, to M/s. Sneha Sales Corporation. M/s Sneha Sales Corporation imported Polyester Yarn against these licences. Subsequently, when on the basis of investigation by Customs it was found that M/s. Surjan Singh Balbir Singh had obtained the licences by fraud, the same were cancelled by the Joint Controller of Import & Export. However, before cancellation of the licences by the Licensing Authority, the duty free imports had already been made by M/s. Sneha Sales Corporation. In this case, in para-4 and 5 of the judgement, the Apex Court held as under:-

> *"4. Sh. Anoop Choudhary, the learned Senior Counsel appearing for the appellant in support of the appeal, has urged that the Tribunal was in error in interfering with the order passed by the*

Collector regarding confiscation of the goods as well as the imposition of penalty. As regards confiscation under Section 111(d) of the Act the submission of the learned counsel is that since the licences have been cancelled by Deputy Chief Controller of Imports and Exports ab initio the Collector was right in holding that there was no valid authorization for the import of the goods and goods have been imported in contravention of the provisions of the Import (Control) Order, 1955 read with Imports and Exports (Control), Act, 1947. We are unable to accept this contention of the learned counsel in view of the law laid down by this Court in East India Commercial Company Ltd. vs. Collector of Customs, Calcutta (supra) wherein this Court has said:-

> *"Nor there is any legal basis for the contention that licence obtained by misrepresentation makes the licence hones, with the result that the goods should be deemed to have been imported without licence in contravention of the order issued under S.3 of the Act so as to bring the case within clause (8) of s. 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."*

5. In the aforementioned decision of this Court it has been clearly laid down that in a case where the licence is obtained by misrepresentation or fraud it is not rendered non est as a result of its cancellation so as to result in the goods that were imported on the basis of the said licences as being treated as goods imported without a licence in contravention of the order passed under Section 3 of the Import and Export Act that fraud or misrepresentation only renders a licence voidable and it becomes inoperative before it is cancelled. In the present case the licences were cancelled by order dt. December 18, 1986 after the goods had been imported and cleared. The Tribunal was, therefore, right in holding that the import of the goods was not in contravention of the provisions of Import and Export Order, 1955 and Import and Export (Control) Act, 1947 and the goods were not liable to be confiscated on that basis under Section 111(d) of the Act".

5.3. Larger Bench of the Tribunal in the case of **Hico Enterprises vs. Commissioner of Customs, Mumbai** reported in **2005 (189) ELT 135 (Tri. LB)** following the Apex Court's judgement in case of East India Commercial (supra) has held as under:-

"30. (a) Assuming that the original licence-holder has committed fraud and obtained the transferability by mis-representation, even

then the rights created by the licence in favour of the present importer is valid.

(b) Generally there is a finality attached to every transaction – whether under a contract or otherwise. The general principle is 'fraud vitiates everything' affects the finality attached to a transaction. However, such a transaction is voidable and not void ab initio. In other words, the person on whom fraud is committed i.e. the person who is defrauded has the option of treating the transaction as binding or disown the same.

(c) In East India Commercial Co. Ltd. vs. CC-1983 (13) ELT 1342 (SC), the contention of the Revenue was that the licence has been obtained by the importer by mis-representation and hence, the licence issued to him was non est in the eyes of law. This contention of the Revenue was rejected by the Supreme Court. It was also held by the Supreme Court, that even if principles enunciated under the law of contract are applied and the licence is treated as a contract between the Government and the licence-holder, the licence is voidable at the instance of the licensing authority and the licence does not become void ab initio. Therefore, the transferred licence and transferee has the option and they do not hold a licence which is void.

31. (a) the general principle is that no one can give what he has not got. However, there are exceptions to this principle. This general principle and the exceptions are provided in Section 29 of the Sale of Goods Act, 1930. Section 29 of the Sale of Goods Act reads as under:-

> *"29. Sale by person in possession under voidable contract.- When the seller of goods has obtained possession thereof under a contract voidable under Section 19 or Section 19A of the Indian Contract Act, 1872 (9 of 1972), but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."*

Reference may also be made to the commentary on Sale of Goods by P.S. Atiyah, 8th Edition wherein it has been stated as under:

"The great practical importance of this rule is that, if a person buys goods by fraud and disposes of them before the other party avoids the contract, a buyer in good faith from the fraudulent party acquires a good title."

(b) The principle contained in Section 29 of the Sale of Goods Act will apply to the present case since licence has been held to be goods by Supreme Court in Vikas Sales Corporation v. CCT- 1996 (4) SCC

433. The Supreme Court held that transferable REP licence is 'goods', for the purposes of Section 2(7) of the Sale of Goods Act.

Though Section 29 of the Sales of Goods Act refers to the buyer acquiring a title under a voidable contract, this principle has been applied by the Supreme court in 1968(2) SCR 797 in the case of Ningawwa v. Byrappa Shiddappa Hireknrabar.

Therefore, it is to be reiterated that the transferee-importer has attained a good title to the licence and the endorsement of transferability cannot be held to be not valid in the hands of the importer, who is a bona fide purchaser of the licence.

32. The issue referred to the Larger Bench is covered by the decision of Bombay High Court in Taparia Overseas-

(a) The very issue has been decided by the Bombay High Court in Taparia Overseas (P) Ltd. -2003 (161) ELT 47 (Bom.) After referring to various decisions and the book titled 'Keer on Law of Fraud and Mistake', it is held as under:-

> *"It is thus no doubt true that as a general rule, if a transaction has been originally founded on fraud, the original vice will continue to taint it, and not only is the person who has committed fraud is precluded from deriving any benefit under it, but an innocent person is so likewise, unless there has been some consideration moving from himself. In the cases at hand, it is not in dispute that all the petitioners had obtained licences for valuable consideration without any notice of the fraud alleged to have been committed by the original licence holders while obtaining licences. If that be so, the concept that fraud vitiates everything would not be applicable to the cases where the transaction of transfer of licence is for value without notice arising out of mercantile transactions, governed by common law and not by provisions of any statute."*

(b) This decision was followed by the Bombay High Court itself in Sanjay Sanwarmal Agarwal v. UOI – 2004 (169) ELT 261 (Bom.). In this case, it has been held in respect of advance licence under EXIM Policy. The licence of the transferee was suspended by the Licensing Authority on the ground of initiation of enquiry by Customs authorities against the transferor and imported goods of the transferee were seized. The licence was transferred on completion of export obligation and after audit of DEC books by Customs authorities. In such circumstances, it is observed that the Customs authorities were wrong in not accepting the licence and goods were not liable to duty entitling the petitioner to claim refund of duty paid under protest.

> *33. Where transfer has been effected without notice to the transferee of alleged fraud, the concept of fraud vitiate everything is not applicable as licence was transferred for value arising out of importable transaction governed by any law."*

5.3.1 This judgement of the Tribunal has been affirmed by the Apex Court vide judgement reported in 2008 (228) ELT 161 (SC).

5.4 In our view, the ratio of the above mentioned judgements of the Apex Court and Larger Bench of the Tribunal is squarely applicable to the facts of this case.

6. In case of **Friends Trading Co. vs. UOI** reported in **2010 (254) ELT 652 (P&H)**, cited by the Revenue, DEPB scrips against which duty free import had been made by them, had been purchased by them from the original holder M/s Parks Industries. Subsequent to imports, the DEPB scrips were cancelled by the DGFT on the ground that the same had been obtained by M/s Parks Industries fraudulently by producing forged bank certificate of realization of export proceeds. There was no allegation against M/s Friends Trading Co. that they were aware of the fraud committed by the transferor M/s Parks Industries. In this case Hon'ble Punjab & Haryana High Court while upholding the recovery of duty from M/s Friends Trading Co. has distinguished the Apex Court's judgements in case of **East India Commercial vs. Collector (supra)** and **Collector of Customs, Bombay vs. Sneha Sales Corporation (supra)** by relying upon its earlier judgement in case of **M/s Munjal Showa Ltd. vs. CCE, Delhi** reported in **2009 (246) ELT 18 (P&H)**. But on going through para 12 of the judgement in case of M/s Munjal Showa Ltd. reproduced in para 3 of the judgement, it is seen that in case of M/s Munjal Showa Ltd. the DEPB scrips in question, were forged

scrips, not the DEPB scrips actually issued by the DGFT on the basis of forged documents. In another case of M/s Friends Trading Co. decided by the Tribunal vide order reported in **2011 (267) ELT 57 (Tribunal)** where the facts and the issue involved are identical, we find that while in para 13 of the order, the Tribunal has taken note of the judgements of the **Apex Court in case of East India Commercial (supra), CC, Bombay vs. Sneha Sales Corporation (supra) and UOI vs. Sampat Raj Dugar** reported in **1992 (58) ELT 163 (SC),** wherein it was held that even if a licence was obtained by fraud, this did not affect the right of a transferee unless the transferee had not acted bonafide, and various judgements of High Courts and Tribunal wherein the abovementioend judgements of the Apex Court have been followed, it has not discussed as to how these judgements are not applicable.

7. There is difference between a forged DEPC scrip, which is ab initio void, even if the same has been transferred on sale and a DEPB scrip actually issued by the DGFT, though on the basis of forged documents provided or false declaration mode by the exporter, which is like a voidable contract. The two categories of DEPB scrips cannot be equated. In the former case, where the DEPB scrip, being forged/ fabricated, is ab-initio void, the judgement of Apex court in case of **Aafloat Textile Industries** reported in **2009 (235) ELT 587 (SC)** will apply and duty can be demanded even from the transferee who had made duty free imports against the forged scrip and for this purpose, the principle of caveat emptor being applicable, longer limitation period under proviso to Section 28 (1) would be applicable, while in the latter case, where the DEPB scrip had been validly issued by the DGFT, but being obtained by fraud/ misdeclaration on the part of the

exporter, was subsequently cancelled, the judgement of the Apex Court in case of East India Commercial (supra) and Sneha Sales Corporation (supra) will apply and duty can not be recovered from the transferee if before the cancellation of the DEPB scrips duty free imports had been made by the transferee **and there is no evidence showing that the transferee had not acted bonafide or was aware of the fraud committed by the original holder of the DEPB scrip.**

8. Under the law of the contracts when a contract between two parties has been entered into by fraud or mis-representation on the part of one party and for this reason, the contract is a voidable contract which can rescinded by the other party, the right of rescission is lost if before rescission, the third party acting in good faith, acquires rights in the subject matter of the contract. Thus, when a person obtains some goods from another person by fraud and before the seller is able to avoid the contract, he disposes of the same to a bonafide third party, the seller can not recover the goods from the third party. Since as held by the Apex Court in the case of East India Commercial (supra), principles of law of contract apply to the issue of import licence, the above mentioned principle would apply to the present case also and unless it is proved that the respondent in this case, who obtained the licence on transfer/purchase basis from M/s. ATM International, had knowledge about licence having been obtained by M/s. ATM by fraud, the duty cannot be demanded from them, when at the time of import, the licence was a valid licence and had not been cancelled. In this case, there is neither allegation nor any evidence to show that the appellant

had knowledge about the fraudulent mis-representation of M/s ATM International in obtaining the DEPT scrips.

9. In view of this, we do not find any merit in the Revenue's appeals. The same are dismissed.

[Operative portion of the order pronounced in open court]

(Archana Wadhwa)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

Ckp.