

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH

CUSTOMS APPEAL NO. 594 OF 2004

(Arising out of Order-in-Original No. 27/2004/CAC/CC/CMM dated 17.03.2004 passed by the Commissioner of Customs (EP), Mumbai)

M/s Apar Industries Ltd.

Apar House, 5, Corporate Park,
Sion Trombay Road, Chembur,
Mumbai

.....Appellant

versus

**Commissioner of Customs
(Export Promotion)**

2nd Floor, New Custom House,
Ballard Estate,
Mumbai

.....Respondent

APPEARANCE:

Shri D.B. Shroff, Senior Advocate, Shri Mihir Mehta, Shri Suyog Bhawe and Shri Ananta Khandiat, Advocates for the Appellant

Shri Manish Mohan and Shri Priyesh Bheda, Authorized Representatives for the Department

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
 HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

DATE OF HEARING: 04.04.2025

DATE OF DECISION: 13.05.2025

FINAL ORDER NO. 85782/2025

JUSTICE DILIP GUPTA:

This appeal has been filed by M/s. Apar Industries Ltd.¹ for quashing the order dated 17.03.2004 passed by the Commissioner of Customs (Export Promotion), Mumbai² confirming the demand of customs duty amounting to Rs. 71,05,031/- under section 28(1) of the Customs Act, 1962³ with interest on the goods imported by the appellant. The imported goods have also been confiscated under of sections 111(d) and 111(o) of

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1. **the appellant**
 2. **the Commissioner**
 3. **the Customs Act**

the Customs Act but as the goods were not available for confiscation, a fine of Rs. 25,00,000/- has been imposed on the appellant in lieu of confiscation in terms of section 125 of the Customs Act.

2. The goods imported by the appellant under four Bills of Entry were cleared under the Duty Exemption Pass Book Scheme⁴ and, therefore, were exempted from payment of basic customs duty and additional duty of customs in terms of the Customs Notification No. 34/97-Cus. dated 07.04.1997⁵.

3. A show cause notice dated 30.09.2002 was, however, issued to the appellant and 15 others under sections 28 and 124 of the Customs Act alleging that the DEPB scrips were obtained fraudulently on the basis of forged documents and were cancelled by the DGFT, Mumbai by orders passed in May/June 1999. It further stated that the benefit of the Customs Exemption Notification was availed by the appellant for clearance of goods and, therefore, these goods were cleared without payment of customs duty but the benefit of this Customs Exemption Notification would not be available to the importer as the two conditions set out in the Customs Exemption Notification were not complied with. The show cause notice, therefore, called upon the appellant to show cause as to why:

- "(a) demand totaling Rs. 71,05,031/- raised vide
Less Charge Demand Show Cause Notices
issued to them by Assistant Commissioner of
Customs, Group VII, NCH, Mumbai, under
section 28(1) of the Customs Act, 1962 should
not be confirmed;
- (b) the goods imported valued at Rs.
2,99,05,421/- should not be held liable to
confiscation under Sec. 111(o) of the Customs

4. DEPB
5. the Customs Exemption Notification

Act, 1962. However the same are not available for confiscation,

- (c) penalty should not be imposed on them under section 112 of the Customs Act, 1962 in lieu of confiscation; and
- (d) the interest due in terms of Section 28AB should not be demanded."

4. The appellant filed a reply to the show cause notice and denied the allegations made therein. The appellant also placed reliance upon certain decisions to contend that since these scrips themselves were not forged documents but alleged to have been obtained on the basis of forged or fabricated documents, the appellant would be entitled to exemption from payment of customs duty in terms of the Customs Exemption Notification. The Commissioner, by the order dated 17.03.2004, did not accept the contentions advanced by the appellant and confirmed demand of duty holding that the cases relied upon by the appellant were in connection with licenses and not scrips. The Commissioner concluded that the two conditions set out in the Customs Exemption Notification were not satisfied. Accordingly, the Commissioner passed the following order in respect of the appellant:

"ORDER

(1) Demand of Customs duty amounting to Rs. 71,05,031/- on the impugned goods valued at Rs. 2,99,05,421/- is confirmed under the provisions of Section 28(1) of the Customs Act, 1962 and M/s. Apar Ltd., Mumbai are directed to pay the said amount, along with interest, if any, due thereon in terms of Section 28 AB *ibid*.

(2) The impugned imported goods valued at Rs. 2,99,05,421/- are confiscated under provisions of Section 111(d) and 111(o) of the Customs Act, 1962. However, since the goods are not available for confiscation, M/s. Apar Ltd is directed to pay a fine

of Rs. 25,00,000/- (Rupees Twenty Five Lakhs only) in lieu of confiscation of the said goods in terms of Section 125 of the Customs Act, 1962.

(3) Penalty under Section 112(a)/114A of Customs Act, 1962, is imposed on the noticees as under :-

S.No.	Name Noticee	of	Amount penalty	of	Relevant Section Under Customs Act, 1962.
1.	M/s. Apar Ltd.		Rs. 25,00,000/-		114A

*****"

5. It is this portion of the order passed by the Commissioner that has been assailed in this appeal.

6. When the matter came up for hearing before a Division Bench of the Tribunal, it was noticed that though the learned counsel for the appellant placed reliance upon certain decisions to contend that the appellant cannot be held liable since the scrips were cancelled only after the imports, but the Division Bench, by order dated 08.03.2017, referred the following issue to decided by a Larger Bench of the Tribunal:

"Whether a scrip, entitling imports without payment of duty, if found to be of sinister provenance, though acquired in the normal course of trade should be held against the importer for imposition of penalty."

7. However, when the matter came up before the Larger Bench of the Tribunal, the reference was returned to the Division Bench. This is how the matter is now listed before the Division Bench.

8. The following contentions have been advanced by Shri D.B. Shroff, learned senior counsel for the appellant assisted by Shir Mihir Mehta, Shri Suyog Bhawe and Shri Ananta Khandiat:

- (i)** The appellant purchased the DEPB scrips from the original scrip holders or through brokers and made payment through proper banking channels. When it is not a case of the department that the scrips used by the appellant for imports were fake or forged, the appellant cannot be held liable to pay duty;
- (ii)** The customs authorities have to verify the details of exports given in the DEPB scrips and it is only after checking its own records that an endorsement with rubber stamp and signature is made on the face of the scrips. The DEPB scrips in dispute were valid at the time of clearance of the goods and were utilized much prior to their cancellation;
- (iii)** Scrips obtained by mis-declaration/mis-representation are voidable and not void ab-initio. In this connection, reliance has been placed on certain decisions, to which reference shall be made at appropriate stage; and
- (iv)** The show cause notice does not invoke the extended period of limitation, though, the show cause notice was issued after the expiry of the time stipulated in section 28(1) of the Customs Act. The impugned order, therefore, deserves to be set aside for this reason also.

9. Shri Manish Mohan and Shri Priyesh Bheda, learned authorized representatives appearing for the department, however, supported the impugned order and contended that the issue stands settled by decisions in favour of the department, to which reference shall be made at the

appropriate stage. Learned authorized representative submitted that the appellant is in regular business of import/export and so had a responsibility to check the veracity of the scrips it had purchased. Learned authorized representative also contended that the issue of invocation of the extended period of limitation under the proviso to section 28(1) of the Customs Act was not raised by the appellant either before the Commissioner or in this appeal.

10. The submissions advanced by the learned senior counsel for the appellant and the learned authorized representative appearing for the department have been considered.

11. According to the appellant, it had purchased the DEPB scrips in the normal course of business for valuable consideration through pay orders/cheques without knowledge of the fact that the said scrips had been obtained on the basis of forged documents and so the appellant cannot be asked or required to pay customs duty. The appellant also contends that the scrips were valid at the time of export and were cancelled subsequently.

12. The DEPB is an Export Promotion Scheme conceived and implemented by the Directorate General of Foreign Trade⁶ in the Ministry of Commerce, Government of India. In terms of the Scheme, the exporters, based on the exports made by them, are entitled to apply to the DGFT for obtaining the DEPB scrips. The DEPB scrips are then issued by the DGFT after a process of verification of the export documents submitted by the exporter. On the strength of these scrips issued to the exporter, the exporter can import any good duty free to the extent of the value mentioned in the scrips. To operationalize the Scheme, Customs

6. DGFT

Exemption Notification was issued exempting the goods from payment of basic customs duty when imported on the strength of valid DEPB scrips. In terms of the prevailing Export Import Policy or Foreign Trade Policy provisions, the DEPB scrips are saleable/tradeable in the market for consideration.

13. The issue, therefore, that would arise for consideration is as to what will be the customs duty liability on the goods imported by either the original scrips holder or the transferee of the scrips on the strength of such DEPB scrips issued by DGFT in the following situations:

- (i)** Where the DEPB scrips have been validly issued by the licensing authority and the same are valid on the date of import of the goods even though the DEPB scrip had been obtained through mis-representation or producing fraudulent/fake documents before the licensing authority;
- (ii)** Where the import has been effected on the strength of DEPB scrips which have not actually been issued by the licensing authority, but have been found to be forged or fake; and
- (iii)** Where the DEPB scrips issued by the DGFT, even if based on mis-representation or production of fraudulent export documents have been cancelled by the licensing authority after the imports were effected.

14. The contention of the learned senior counsel for the appellant is that once a DEPB scrip has been issued by the licensing authority, even if the same has been obtained by fraudulent means or by mis-representation or by producing fraudulent documents, till the time it is cancelled by the licensing authority in a manner known to law, the same would be valid for all the imports effected till the date of its cancellation and the imports

effected on the strength of the scrips prior thereto would be eligible for exemption from payment of customs duty, and the goods so imported cannot be considered as illegally imported under any of the provisions of the Customs Act.

15. Learned senior counsel, therefore, drew a distinction between two set of cases, namely, where the scrip itself is a forged and fabricated document and where the scrip was issued, but it was obtained on the strength of fraudulent documents.

16. In the instant case, it is not in dispute that the scrips were validly issued by the DGFT but they were subsequently cancelled after the imports had been effected for the reason they were obtained on the basis of fraudulent documents.

17. To examine this issue, it would be pertinent to refer to the judgment of the Supreme Court in **East India Commercial Co. Ltd., Calcutta vs. Collector of Customs, Calcutta**⁷. The Supreme Court dealt with the provisions of the erstwhile Imports and Exports (Control) Act, 1947 dealing with licence and section 167(8) of the Sea Customs Act, 1878, corresponding to section 111(d) of the Customs Act. It was submitted by the customs department that since the licence was obtained by misrepresentation, the licence is not valid for import and, therefore, the imported goods are liable for confiscation. The Supreme Court rejected this submission and the relevant observations are:

"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

7. 1983 (13) E.L.T. 1342 (S.C.)

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. *****

This order, therefore, authorised the Government of India or the Chief Controller of Imports to cancel such licences and make them ineffective. The specified authority has not cancelled the licence issued in this case on the ground that the condition has been infringed. We need not consider the question whether the Chief Controller of Imports or the Government of India, as the case may be, can cancel a licence after the term of the licence has expired, for no such cancellation has been made in this case. **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."**

(emphasis supplied)

18. In **Collector of Customs, Bombay vs. Sneha Sales Corporation**⁸, the Supreme Court after making reference to the judgment of the Supreme Court in **East India**, observed as follows:

"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 and 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

8. 2000 (121) E.L.T. 577 (S.C.)

before it is cancelled. **In the present case the licences were cancelled by order dated 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."**

(emphasis supplied)

19. The Bombay High Court in **Taparia Overseas (P) Ltd. vs. Union of India**⁹, after referring to the aforesaid two judgments of the Supreme Court in **East India** and **Sneha Sales**, observed as follows:

"31. ***** **On the above canvas of settled law; recognised by the Apex Court and catena of decisions of the various High Courts including of this Court, it is clear that a licence obtained by fraud is not void ab initio and is merely voidable. It is good till avoided in the manner prescribed by law.**

36. **It is true that legal fraud vitiates everything even judgments and orders of the Court, but the question is: as to what extent this concept can be imported in commercial transactions, where question of transfer of properties is life and soul of trade.** In a mercantile transactions, as well as in those connected with real properties, the general rule undoubtedly is, that a person cannot transfer to another a right which he does not himself possesses. The rule of caveat emptor spells out two exceptions to the rule, one in cases for encouragement of commerce such as sales in market overt, and other to the transfer of negotiable instruments. **Take for example, if the seller has endorsed and delivered to the buyer the Bill of Lading or any**

9. 2003 (161) E.L.T. 47 (Bom.)

other documents of title to the goods and the buyer has endorsed and delivered it to his sub buyer, then the sub buyer, provided he has taken the document in good faith, as well as for valuable consideration, is entitled to the goods free from any right in the original seller to stop them, and thus his position is better than that of the original buyer, same is a position of sales in market-overt.

Without attempting to enumerate the various rights which are assignable, either by the express act of the parties, or by the operation of law, we may observe, generally, the maxim assignatus utitur jure auctoris, i.e. an assignee is clothed with the rights of his assignor is subject to many restrictions, shortly enumerated hereinbelow. (See Broom's Legal Maxims, tenth Edition, p. 302)

Assignatus utitur jure auctoris (Hal. Max, p.14) - An Assignee is clothed with the rights of his assignor.

"This maxim applies generally to all property, real and personal, and refers to assigns by act of parties, as where the assignment is by deed; and to assigns by operation of law, as in the case of an executor. All rights of the assignor in the thing assigned must pass from him to the assignee by virtue of the assignment, for duo non possunt in solido unam rem possidere. It should be observed, also that the thing assigned takes with it all the liabilities attached to it in the hands of the assignor at the time of the assignment, except in cases for the encouragement of commerce, such as sales in market overt, negotiation of promissory notes, bills of exchange, etc., and, in the case of equities, where the assignee is a bona fide purchaser for value without notice."

[Emphasis supplied]

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.

On the above canvas, having examined the well settled, established and well recognised concept of law that the effect of fraud is not to render the transaction void ab initio but renders it voidable at the instance of the party defrauded and transaction continues valid until the party defrauded has decided to avoid it.

37. Alternatively, let us consider it from another angle assuming that licence comes to an end upon it is suspension and/or cancellation, in catena of cases, it is laid down that the date of import of goods would be the date on which the Bill of Entry was presented under section 46. This legal position is clear from the decision of the Apex Court as laid down in Union of India v. Apar Ltd. 1999 (112) E.L.T. 3 (S.C.) and Garden Silk Mills v. Union of India - 1999 (113) E.L.T. 358 (S.C.). The same is the view taken by the Apex Court in Sampat Raj Durgar case (cited supra). Imports against replenishment Licences were permitted duty free if the importers produced an import Replenishment Licence the goods or the materials were imported into India. **In the instant cases when the goods were imported into India, and even when the Bills of Entry were filed, neither were the licences suspended nor the same cancelled. In all these cases, Bills of Entry were filed by the petitioners well before the suspension and/or cancellation of the licences in question, thus the imports were**

made under valid licences, the goods could not be subjected to levy of customs duty in the peculiar facts and circumstances of the cases in hand."

(emphasis supplied)

20. The Special Leave Petition filed by the Union of India against the said judgment of the Bombay High Court was dismissed by the Supreme Court on 24.03.2006 in **Union of India vs. Blue Blends & Textur. Mfg. Co. Ltd.**¹⁰.

21. In **The Commissioner of Customs (Import) Mumbai vs. Coromandal Fertilizers Ltd.**¹¹, the Bombay High Court again reiterated the views earlier expressed in the context of DEPB scrips obtained on the strength of documents obtained by fraudulent means. The observations are:

"7. Some what similar view has been expressed by the Division Bench of this Court in Taparia Overseas Pvt. Ltd. Vs. Union of India, (2003) 161 ELT 47. In the said case, import license was obtained by original license holder by fraud. The license was transferred for value without notice. The goods were imported under such license. The Court held that the cancellation of valid license would only operate from the date of cancellation or from suspension thereof. The goods imported prior to cancellation of license would be validly imported."

22. In the context of DEPB scrips validly issued by DGFT, but having been obtained by the exporter by producing forged bank certificates of export realization before the licensing authority, and in the context of imports effected by the transferee of the DEPB scrips, the Punjab and

10. 2017 (349) E.L.T. A93 (S.C.)

11. Customs Appeal No.11 of 2018 decided on 05.12.2018

Haryana High Court in **Commissioner of Customs vs. Leader Valves Ltd.**¹² affirmed the decision of the Tribunal and observed:

"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 finding that they had 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 assessee-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 crystallized. The revenue cannot avail the extended period because the assessee-respondent could not be accused of misrepresentation, collusion or suppression of facts within the meaning of proviso postulated by Section 28 of the Customs Act. Therefore, there is no merit in this appeal."

(emphasis supplied)

23. The Special Leave Petition filed by the department against the aforesaid judgment of the Punjab and Haryana High Court was dismissed by the Supreme Court on 10.03.2008 and the decision is reported in **2008 (227) E.L.T. A29 (S.C.)**¹³.

12. 2007 (218) E.L.T. 349 (P & H)

13. Commissioner of Customs vs. Leader Valves Ltd.

24. This view was reiterated by the Punjab and Haryana High Court in **Commissioner of Customs, Amritsar vs. Vallabh Design Products**¹⁴ and the observations are:

"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 finding that it had purchased DEPB from the open market in the bona fide belief of its being genuine. The assessee-respondent had paid full price and accordingly had availed the benefit."

25. The Special Leave Petition filed by the department before the Supreme Court was dismissed on 18.07.2016 and the decision is reported in **2016 (341) E.L.T. A222 (S.C.)**¹⁵.

26. All the aforesaid decisions clearly hold that a licence/scrip obtained by fraud is not void ab-initio and is merely voidable. The concept that fraud vitiates everything would not be applicable if the licence/scrip had been obtained for valuable consideration without any notice of fraud having being committed by the original licensee/scrip holder while obtaining licence/scrip. The decisions also hold that cancellation of the scrips after the imports had been made on the basis of the scrips would not have any impact on the import as at that point of time the scrips were valid.

27. Learned authorized representative appearing for the department, however, placed reliance on the decision of the Supreme Court in **Munjal Showa Ltd. vs. Commissioner of Cus. & C. Ex. (Delhi-IV)**¹⁶.

28. The Supreme Court dealt with a case where the DEPB scrips and the Transfer Release Advices¹⁷, on the basis of which the imports were sought

14. **2007 (219) E.L.T. 73 (P & H)**

15. **Commissioner of Customs vs. Vallabh Design Products**

16. **2022 (382) E.L.T. 145 (S.C.)**

to be cleared duty free, were found to be forged and had actually not been issued by DGFT at all. It is in such circumstances that the Supreme Court held:

"8. From the judgment and order passed by the Tribunal and even from the findings recorded by the Department, it has been found that the DEPB licenses/Scrips, on which the exemption benefit was availed of by the appellant(s) (as buyers of the forged/ fake DEPB licenses/Scrips) were found to be forged one and it was found that the DEPB licenses/Scrips were not issued at all. A fraud was played and the exemption benefit was availed on such forged/fake DEPB licenses/Scripps.

9. In that view of the matter and on the principle that fraud vitiates everything and such forged/fake DEPB licenses/Scrips are void ab initio, it cannot be said that the Department acted illegally in invoking the extended period of limitation. In the facts and circumstances, the Department was absolutely justified in invoking the extended period of limitation."

(emphasis supplied)

29. The judgment of the Supreme Court in **Commissioner of Customs (Preventive) vs. Aafloat Textiles (I) P. Ltd.**¹⁸ deals with a case of import of goods on the strength of forged Special Import Licence which was never issued by DGFT. It is taking in consideration this fact that the Supreme Court held:

"28. As noted above, SILs were not genuine documents and were forged. Since fraud was involved, in the eye of law such documents had no existence. Since the documents have been established to be forged or fake, obviously fraud was

17. TRAs

18. 2009 (235) E.L.T. 587 (S.C.)

involved and that was sufficient to extend the period of limitation.”

30. The judgment of the Punjab and Haryana High Court in **Friends Trading Co. vs. Union of India**¹⁹ and the decision of the Tribunal in **Mercedes Benz India Private Ltd. and others vs. Commissioner of Customs, Delhi**²⁰ are also on the same lines in as much as in these cases also, the DEPB scrips and the TRAs were forged and were not actually issued by the DGFT. The High Court and the Tribunal, therefore, held that the transferee importers were not eligible for the exemption under the Customs Exemption Notification since the documents based on which the exemption was sought did not exist in the eye of law at any point of time.

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

19. 2011 (267) E.L.T. 33 (P&H)

20. (2022) 1 Centax 328 (Tri.-Del.)

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**²¹. 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 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

21. 2016 (338) E.L.T. 742 (Tri. - Del.)

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 where 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**²² 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)

35. The submission of learned senior counsel for the appellant that the facts in dispute are the same as that in the decision of the Tribunal in **Deep Exports** and so the appellant would be entitled to all the favourable consequence that follows is justified. This decision, as set out above, has comprehensively examined all relevant decisions and provides appropriate benchmark on entitlement to retain the privilege of exemption arising

22. 2016 (340) E.L.T. 625 (P&H)

from use of transferred scrips that, even if cancelled subsequently, were not void to the extent that these are not forged or fake at the time of import. The goods, not bring prohibited for import nor imported subject to any condition, were incorrectly held as liable to confiscation under section 111 of Customs Act and penalty imposed under section 112 will not, therefore, survive. .

36. The submission advanced by the learned senior counsel for the appellant that the impugned order deserves to be set aside also for the reason that the show cause notice dated 30.09.2002 was issued beyond the period of six months stipulated in section 28(1) of the Customs Act, as it stood at the relevant time, and the proviso to section 28(1) of the Customs Act was not invoked now needs to be examined. Elaborating this submission, learned senior counsel pointed out that though the thirteen Bills of Entry were filed during the period July 1998 to November 1998, but the show cause notice that was issued on 30.09.2002 does not contain any reason for invoking the extended period of limitation of five years contemplated under the proviso to section 28(1) of the Customs Act. Learned senior counsel also pointed out that the order passed by the Commissioner also does not contain reasons for invoking the extended period of limitation.

37. To examine this issue, it would be appropriate to reproduce section 28(1) of the Customs Act, as it stood at the relevant time, and it is as follows:

"28. Notice for payment of duties, interest, etc.
– (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, **the proper officer may, –**

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) **in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest** which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, **requiring him to show cause why he should not pay the amount specified in the notice:**

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words 'one year' and 'six months', the words 'five years' were substituted"

(emphasis supplied)

38. It needs to be noted that earlier seven show cause notices, each dated 29.01.1999, had been issued to the appellant but they were not proceeded with and it is the show cause notice dated 30.09.2002 that has been adjudicated upon by the impugned order. The normal period of limitation within which the show cause notice could have been issued under section 28(1) of the Customs Act, as it stood at the relevant time, is six months. Thus, if the notice was issued on 30.09.2002, the proviso to section 28(1) of the Customs Act was required to be invoked and it was imperative for the department to have mentioned reasons for invocation for the extended period of limitation in the show cause notice. The show cause notice, however, does not make any mention of invocation of the

extended period of limitation. The impugned order passed by the Commissioner also does not make any mention for invoking the extended period of limitation. The entire demand that has been confirmed falls in the extended period of limitation.

39. Though, this ground was neither taken by the appellant in reply to the show cause or in the grounds of appeal, but as it relates to the jurisdiction of the Commissioner passing the order, the learned counsel for the appellant was permitted to raise this ground as it goes to the root of the matter.

40. The impugned order dated 17.03.2004 passed by the Commissioner, therefore, deserves to be set aside for this reason also.

41. As the order has been set aside, the claim of interest and imposition penalty also deserve to be set aside.

42. Thus, for all the reasons stated above, the order dated 17.03.2004 passed by the Commissioner is set aside and the appeal is allowed.

(Order pronounced on **13.05.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.J. MATHEW)
MEMBER (TECHNICAL)