

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

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH
M.M. Kumar and Rajesh Bindal, JJ.

COMMISSIONER OF CUSTOMS*Versus***LEADER VALVES LTD.***CUSAP No. 15 of 2006, decided on 15-3-2007*

EXIM - DEPB issued on basis of forged document, Bank Certificate of Export Realisation (BCER) - Cancellation of - Assessee not a party to fraud and had purchased DEPB from open market in the bona fide belief of its being genuine - Assessee paid full price and availed the benefit - Merely because at a later stage, the DEPB has been found to be fabricated and taken on basis of BCER, assessee could not be deprived of the benefits which were legitimately available to them. [para 9]

Demand (Customs) - Limitation - Cancellation of DEPB issued on basis of forged document Bank Certificate of Export Realisation (BCER) - Assessee never issued any show cause notice before cancelling the DEPB which was obtained by other party - Notice under Section 28 of Customs Act, 1962 could not be issued to assessee because a period of six months stipulated by Section 28 ibid stood already expired and rights of parties had been crystallized - Revenue cannot avail extended period because assessee could not be accused for mis-representation, collusion or suppression of facts within the meaning of proviso stipulated by Section 28 ibid. [para 9]

Appeals dismissed**CASES CITED**

Aban Loyd Chiles Offshore Ltd. v. Commissioner — 2006 (200) E.L.T. 370 (S.C.) — *Referred* [Para 8]
Birla Corporation Ltd. v. Commissioner — 2005 (186) E.L.T. 266 (S.C.) — *Referred*..... [Para 8]
S.P. Chengalvaraya Naidu v. Jagannath — AIR 1994 SC 853 — *Referred*..... [Para 7]
Collector v. Sneha Sales Corporation — 2000 (121) E.L.T. 577 (S.C.) — *Referred*..... [Para 8]
Commissioner v. Essar Oil Ltd. — 2004 (172) E.L.T. 433 (S.C.) — *Referred*..... [Para 7]
Commissioner v. Parker Industries — 2007 (207) E.L.T. 658 (P & H) — *Referred*..... [Para 7]
East India Commercial v. Collector — 1983 (13) E.L.T. 1342 (S.C.) — *Referred*..... [Para 8]
Golden Tools International v. Joint Director General of Foreign Trade — 2006 (199)E.L.T. 213 (P & H) — *Referred* [Para 7]
New India Assurance Co. v. Kamla — AIR 2001 SC 419 — *Referred*..... [Para 7]
Taparia Overseas Pvt. Ltd. v. Union of India — 2003 (161) E.L.T. 47 (Bom.) — *Referred*... [Para 5]

REPRESENTED BY : S/Shri M.S. Guglani with Ashwani Kumar Bansal, Advocates, for the Petitioner.
S/Shri Sudhir Malhotra and Jagmohan Bansal, Advocates, for the Respondent.

[Judgment per : M.M. Kumar, J.] - The revenue has filed three appeals namely CUSAP Nos. 14, 15 and 17 of 2006 under Section 130(1) of the Customs Act, 1962 (for brevity 'the Customs Act') by challenging the order dated 5-5-2005, 1-6-2005 and 27-4-2004 respectively passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for brevity 'the Tribunal'). As common question of facts and law have been raised in all these appeals, we decide them by a common order. The revenue has assailed the order passed by the Tribunal on the principal ground that once the Joint Director (General) of Foreign Trade had cancelled the Duty Exemption Pass Book which is commonly known as DEPB Scheme issued to M/s. Parker Industries, 184, Dilbagh Nagar, Jalandhar which order was upheld in appeal by the Additional Director General of Foreign Trade then the assessee-respondent who had purchased the DPEB from M/s. Parker Industries were not entitled to avail any benefit. For the sake of convenience, the facts are being referred from CUSAP No. 15 of 2006.

2. The Government of India in order to boost export had announced various concessions including exemption from payment of Central Excise duty, Customs duty and formulation of various schemes under the Import and Export Policy, known as EXIM Policy, which is formulated under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (for brevity 'the Act'). DEPB is one of those schemes framed-under the EXIM policy which is in the nature of a licence to import material without payment of Customs duty and is in the form a pass-book. The pass book is issued against exports and fixed percentage of value of exports made is credited in the DEPB pass-book which is accounted for against the imports. According to the procedure an application for obtaining DEPB is made to the Joint Director General of Foreign Trade on a prescribed form accompanied by a bank certificate of exports and realisation of export proceedings in addition to other documents. The application for obtaining DEPB can be made even before realisation of export proceedings if the export proceedings are not realised within a period of six months or within the extended period then the DEPB holder is liable to pay an amount equal to DEPB availed along with interest at the rate of 24 per cent from the date of issue of DEPB till the date of deposit. It is further appropriate to mention that DEPB has been made saleable and the purchaser can avail the same benefits which could have

been availed by the original exporter. The Duty Entitlement Pass-Book(s) Scheme reads as under :

"...Under this scheme, the exporter is given duty entitlement at notified rates, which enable him to import inputs required for export production duty-free. He can also make use of this credit to import freely importable goods and or such credit can be transferred. The DEPB scrip is transferable scrip and it is regularly traded in the market.

(d) That the main features of the DEPB scheme as operated under the Export Import Policy are the following :-

(i) Duty exemption under the scheme is available against export of goods.

(ii) The exemption is to be availed by debiting credits, which is to be earned at the specific rate notified by DGFT for the relevant product which is exported.

(iii) The DEPB credit is subject to realisation of export proceeds. If the export proceeds are not realised within six months or such extended period as allowed by R.B.I., the D.E.P.B. Holder has to pay cash equivalent to the credit amount."

3. The assessee-respondent No. 1 i.e. M/s. Leaders Valves Ltd. was a beneficiary of DEPB scrip No. P/L 3053128, dated 2-1-1998 which was transferred to it by M/s. Parker Industries, Jalandhar. The later had obtained the afore-mentioned DEPB scrip fraudulently by forging Bank Certificate of Export Realisation (for brevity 'the BCER') purported to have been issued by Punjab and Sind Bank, Mota Singh Nagar, Jalandhar. On the basis of the forged certificate they applied to the Joint Director General of Foreign Trade, Jalandhar for issuance of transferable Duty Entitlement Pass-Book which were then issued to them by the Joint Director General Foreign Trade. On the basis of the afore-mentioned DEPB scrip, the assessee-respondent M/s. Leader Valves effected import of goods by payment/off setting import duties against credit available in the said DEPB scrip by utilising the DEPB scrip for import of the goods under Bill of Entry 109 dated 6-1-1998 free of duty in terms of Notification No. 34/97-Cus., dated 7-4-1997. The duty otherwise realisable was Rs. 1,14,860/-.

4. When the fraud came to light, the Joint Director of Foreign Trade, Ludhiana cancelled the DEPB already issued to M/s. Parker Industries on the basis of forged BCER in respect of shipping bill dated 16-1-2002. After recording the finding, the Commissioner Customs, Amritsar passed the order-in-original on 23-7-2004 (Annexure A/1) holding as under:

"However, I find nothing on record to infer that M/s Leader Valves Ltd., S. 3 & 4 Industrial Area, Jalandhar had purchased the freely transferable DEPB scrip otherwise than in a *bona fide* manner and utilised the same towards debit/exemption of duty and there is nothing to suggest of his having colluded with the exporter who obtained the DEPB scrips by fraudulent manner. Therefore, I do not hold them liable to penal action under Section 112 of the Customs Act, 1962.

In view of the above, I pass the following orders :-

Order

1. I hold the goods valued at Rs. 3,28,171/- imported vide Bill of Entry No. 109, dated 6-11-1998 liable to confiscation under Section 111(o) of the Customs Act, 1962 but since the goods are not available hence no order for their confiscation.
- 2.1 Order the recovery of duty amounting to Rs. 1,14,860/- from M/s. Leader Valves Ltd. S. 3 and 4, Industrial Area, Jalandhar under Section 28 of the Customs Act, 1962.
3. I order the recovery of interest due from M/s. Leader Valves Ltd., S. 3 & 4 Industrial Area, Jalandhar, under Section 28 AB of the Customs Act, 1962.
4. I impose personal penalty of Rs. One lakh fourteen thousand only on M/s. Parker Industries, 184, Dilbagh Nagar, Jalandhar under Section 112(b) of the Customs Act, 1962.
- 5.5 I refrain from imposing penalty on M/s. Leader Valves Ltd., S. 3 & 4, Industrial Area, Jalandhar

Sd/- MS Negi,

Commissioner Customs, Amritsar."

5. The assessee-respondent approached the Tribunal which in turn placed reliance on the findings recorded by the Commissioner in the order-in-original (Annexure A/1) holding that there is nothing on the record to conclude that the assessee-respondent had purchased freely transferable DEPB scrip otherwise than in a *bona fide* manner and utilised the same towards debit/exemption of duty. Accordingly, they were not found liable to penal action under Section 112 of the Customs Act, 1962. The Tribunal placed reliance on the categorical finding of the Commissioner further to conclude that once the penal action under Section 112 of the Customs Act could not be initiated against the assessee-respondent, no duty was recoverable from them under Section 28 of the Customs Act. The Tribunal drew support from a judgment of the Bombay High Court in the case of *Taparia Overseas (P) Ltd v. Union of India - 2003 (161) E.L.T. 47*. The operative part of the order of the Tribunal reads as under :

"In the face of these findings Id. Commissioner could not legally order the recovery of the duty under Section 28 of the Customs Act. In this context, the law laid down by the Hon'ble Bombay High Court in the case of *Taparia Overseas (P) Ltd. v. Union of India* reported in 2003 (161) E.L.T. 47 can be read with advantage..... The case of the appellants squarely stands covered by the law laid down in that case, keeping in view the above referred facts and findings of the Commissioner reproduced above, in their favour. Therefore, the impugned order is set aside and the appeal of the appellants is allowed with consequential relief as per law."

6. It is appropriate to mention that the Joint Director General Foreign Trade vide its order dated 16-1-2002 had cancelled the DEPB issued on the basis of forged document BCER.

7. Mr. M.S. Guglani and Mr. Ashwani Kumar Bansal, learned Counsels for the appellant had vehemently argued that once the certificate ceased to exist on account of cancellation order by the Joint Director General of Foreign Trade then the very basis of seeking exemption from payment of duty is knocked out and the assessee-respondent was liable to pay duty. In support of his submission, learned counsel have placed reliance on a judgment of Hon'ble Supreme Court in the case of *S.P. Chengalvaraya Naidu v. Jagannath*, AIR 1994 SC 853 and argued that "fraud avoids all judicial acts, ecclesiastical or temporal". He has also placed reliance on another judgment of the Hon'ble Supreme Court in the case of *Commissioner of Customs v. Essar Oil Ltd.* 2004 (172) E.L.T. 433 (S.C.) = (2004) 11 SCC 364. He further relied upon a Division Bench judgment of this

Court rendered in the case of *M/s. Golden Tools International v. Joint Director General of Foreign Trade, Ludhiana - 2006 (199) E.L.T. 213 (P&H)*. (CWP No. 15278 of 2004, decided on 22-11-2005). Learned Counsel has also cited a judgment of Hon'ble the Supreme Court in the case of *New India Assurance Co. v. Kamla and others*, AIR 2001 SC 419 and argued that once a driving licence has been found to be forged then its mere renewal by a statutory authority does not get it legally sanctified. He has submitted that a fabricated and forged document would continue to be the same and any benefit obtained on that basis must be considered illegal and unlawful. Learned Counsel also placed reliance on a Division Bench judgment of this Court in the case of the *Commissioner of Customs v. M/s. Parker Industries, Jalandhar - 2007 (207) E.L.T. 658 (P & H) - (Customs Act Appeal No. 1 of 2006 decided on 7-11-2006)*.

8. Mr. Sudhir Malhotra and Mr. Jagmohan Bansal, learned Counsels for the respondents, have submitted that DEPB scrip was transferred to the assessee- respondent on 2-1-1998 by M/s. Parker Industries and the benefits by the assessee-respondent were available on 6-1-1998 which amounted to Rs. 1,40,860/-. The Joint Director General of Foreign Trade cancelled the DEPB availed by the assessee-respondent on 16-1-2002 (Annexure A/3). It has been emphasised that under Section 28 of the Customs Act, no notice could be issued to the assessee/respondent as the period of six months available for the purpose had expired. The extended period of limitation of five years admissible under the proviso to Section 28 of the Customs Act, would not be available to the revenue because there are categorical findings recorded by the Commissioner Customs and Excise, Amritsar that the respondent had not purchased the freely transferable DEPB scrip otherwise than in a *bona fide* manner and utilised the same towards debit/exemption of duty. Learned Counsels have submitted that there is further finding that the assessee-respondent had neither colluded with the exporter nor obtained DEPB fraudulently and the Commissioner had not held them liable to any penal action under Section 112 of the Customs Act. In support of their submission, learned Counsel placed reliance on various judgments including the judgment of Hon'ble the Supreme Court in the case of *Aban Loyd Chiles Offshore Ltd. v. Commissioner of Customs - 2006 (200) E.L.T. 370*; *East India Commercial v. Collector of Customs - 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 (S.C.)* and *Birla Corporation Ltd. v. Commissioner of Central Excise, 2005 (186) E.L.T. 266 (S.C.)*.

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 mis-representation, 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.

10. In view of the above, all the three appeals fail and the same are hereby dismissed.