

(2016) 02 GUJ CK 0091

GUJARAT HIGH COURT

Case No: Tax Appeal No. 22 of 2016

Commissioner of Customs,
Kandla

APPELLANT

Vs

Indian Acrylics Ltd.

RESPONDENT

Date of Decision: Feb. 11, 2016

Citation: (2016) 336 ELT 474

Hon'ble Judges: Harsha Devani and G.R. Udhwani, JJ.

Bench: Division Bench

Advocate: Ms. Amee Yajnik, Advocate, for the Appellant

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Harsha Devani, J.(Oral)—By this appeal under Section 130 of the Customs Act, 1962 (hereinafter referred to as "the Act"), the Commissioner of Customs, Kandla has called in question the order dated 22nd April, 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad (hereinafter referred to as "the Tribunal") in Appeal No. C/298/2007 [2015 (325) E.L.T. 753 (Tri.)] by proposing the following questions stated to be substantial questions of law :-

- (i) "Whether in the facts and circumstances of the case the CESTAT has erred in holding that extended period cannot be invoked in the present case and has erred in not appreciating the fact that the DEPB Scrips in the instant case were obtained by the importer fraudulently?"
- (ii) "Whether the CESTAT has erred in not appreciating the fact that fraud was involved in the present case and the DEPB Scrips in question have no existence in the eye of law?"
- (iii) "Whether the CESTAT has erred in not considering the decision of Hon'ble Calcutta High Court in the case of **ICI India Limited v. Commissioner of Customs**

(Port), Kolkatta reported in 2005 (184) E.L.T. 339 (Cal.), wherein it is held that "the credit available on the strength of a valid DEPB only and if the same is forged, it is non est, therefore there is no valid DEPB?"

(iv) "Whether the CESTAT has erred in not appreciating the fact that in the matter of import under fake/fraudulent DEPB licence when the document itself having been found to be forged, whether there was collusion or fraud on the part of the importer in the issue of DEPB licences/Scrips becomes absolutely immaterial and irrelevant since no credit can be derived from a forged DEPB?"

2. The facts stated briefly are that the importer purchased transferable DEPB scrips on 25th August, 2000 from the open market which were originally issued to M/s. Supreme Castings Limited (the exporter) against their export. The importer imported chemicals through Kandla Port on the basis of the DEPB scrips without payment of duty. In 2004, it was found that the exporter obtained the transferable DEPB scrips fraudulently by ante-dating the Shipping Bill No. 2216, dated 30th March, 2000 pertaining to cargo against shipping bill which was received in CFS on 4th April, 2000 when the value applicable cost to grant DEPB for export was reduced. The said DEPB scrip was cancelled by the DGFT authorities. A show cause notice dated 18th April, 2005 came to be issued by the Commissioner of Customs proposing to demand customs duty of Rs. 12,35,362/- along with interest and to impose penalty under the Act on the importer. It was also proposed to confiscate the goods under Section 125 of the Act as well as to impose penalties. The Commissioner of Customs, Kandla, by an Order-in-Original, confirmed the demand of duty along with interest and imposed penalty of equal amount of duty on the importer.

3. The importer carried the matter in appeal before the Tribunal which by the impugned order held that the extended period of limitation could not be invoked in the facts of the present case and accordingly held that the demand was barred by limitation and set aside the order passed by the adjudicating authority.

4. Ms. Amee Yajnik, learned senior standing counsel for the appellant submitted that the Tribunal has erred in holding that the extended period of limitation cannot be invoked in the present case inasmuch as the Tribunal has not appreciated the fact that the DEPB scrips were obtained by the importer fraudulently. It was submitted that having regard to the fact that the initial DEPB scrips were obtained through fraud, the same would vitiate everything and hence, DEPB scrips in question did not have any existence in the eye of law. It was further submitted that the Tribunal has failed to consider the decision of the Calcutta High Court in the case of **ICI India Limited v. Commissioner of Customs (Port), Calcutta, 2005 (184) E.L.T. 339 (Cal.)**, wherein it has been held that credit can be availed only on the strength of a valid DEPB and if the same is forged, it is non est and, therefore, there is no valid DEPB. It was urged that the Tribunal was not justified in not appreciating the fact that in the matter of import under fake/fraudulent DEPB licence, when the document itself is

found to be forged, whether there was collusion or fraud on the part of the importer in the issue of DEPB licence/scripts becomes absolutely immaterial and irrelevant since no credit can be derived from a forged DEPB. It was accordingly urged that the appeal deserves to be admitted on the questions as proposed or as may be deemed fit by this Court.

5. This Court has considered the submissions advanced by the learned advocate for the appellant and has perused the order passed by the adjudicating authority as well as the impugned order passed by the Tribunal.

6. As can be seen from the impugned order passed by the Tribunal, the Tribunal has recorded that there is no dispute as regards the fact that the importer purchased DEPB scrips from the open market on 25th August, 2000 and imported chemicals from Kandla Port without payment of duty in September, 2000. During the investigation, it was found that the exporter M/s. Supreme Castings Limited had manipulated the export document to facilitate the extra benefit under the DEPB scheme and accordingly, the licence was cancelled by the DGFT authorities in November, 2004 where after a show cause notice came to be issued to the importer. The Tribunal took note of the fact that the adjudicating authority had not given any finding that the importer had not paid the duty by reason of any collusion or any wilful misstatement or suppression of facts. Before the Tribunal, strong reliance was placed on behalf of the Revenue on the above referred decision of the Calcutta High Court wherein it was held that one may not be held liable for collusion or fraud and exposed to other penalties but would still be liable to pay duty and interest and other statutory consequences which one cannot avoid. The Tribunal, noted that there was no dispute that the importer had availed credit on the basis of the DEPB scrips which were issued by the DGFT authorities. At the time of import of goods, the DEPB scrips were not forged. That subsequently, upon finding that the exporter had manipulated the export document to avail the extra benefit, the DGFT cancelled the DEPB scrips in 2004. The Tribunal observed that there was no dispute that the importer imported the goods on the basis of the documents which were valid at the time of importation and, therefore, such document was valid till it was not set aside. Relying upon the decision of the Jurisdictional High Court in the case of **M/s. Prayagraj Dyeing and Printing Mills Pvt. Ltd. v. Union of India, 2013 (290) E.L.T. 61 (Guj.)**, wherein the Court had held that where the appellants did not have any role in the fraud and no fraud had been practised by said person, the Revenue cannot get the benefit of extended period of limitation when such person is not party to the fraud, the Tribunal held that the extended period of limitation cannot be invoked and that the demand of duty with interest was not sustainable as barred by limitation and consequently, the imposition of penalty was not warranted.

7. From the facts noted herein above, it is apparent that the impugned order passed by the Tribunal is based upon findings of fact recorded by it upon appreciation of the evidence on record. The Tribunal has thereafter merely applied the decision of

the Jurisdictional High Court to the facts of the case by holding that the extended period of limitation could not be invoked in the facts of the present case. The conclusion of the Tribunal being based upon findings of fact recorded by it does not give rise to any question of law much less, a substantial question of law so as to warrant interference. The appeal, therefore, fails and is accordingly rejected.