

2012 (2) ECS (126) (Tri-Chen)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, SOUTH ZONAL BENCH AT CHENNAI

**K.I.International Ltd.
Versus
Commissioner of Custom, Chennai**

Arising Out of Order-in-Original No.6934/07 dt. 26.11.2007 passed by the Commissioner of Central Excise (Adjudication), Chennai

CORAM:

Dr. Chittaranjan Satpathy, Hon'ble Technical Member

Mr. D.N. Panda, Hon'ble Judicial Member

Date of hearing : 14.6.2012

Date of decision: 14.6.2012

Final Order No. 701 to 767/12 dt 14.06.12

It is established principle of law that fraud and justice do not dwell together. An assessee acting in defiance of law has no right to claim innocence when he fails to exercise due care and diligence. Failing to cause enquiry with the issuing authority of DEPB scrips/TRAs crippled the importer appellants to claim bona fide. [Para 10.2]

When the importer appellants acquired DEPB scrips from market without being acquired from original acquirer, as an abundant caution, to avoid evil consequence of fraudulently obtained scrips, could have safeguarded their interest causing enquiry from DGFT as to genuineness of the scrips. But that was not done. Such appellants failed to acquire title over the scrips but became beneficiary of ill got scrips. Notification benefit was availed at the cost of public exchequer which is required to be surrendered for the undue gain made. [Para 10.3]

It is settled title if such title was not acquired legitimately. Therefore, if there was no genuine sale of DEPB scrips by originals owners thereof, the purchaser fails to acquire title over the same. [Para 10.6]

Penal provisions are enacted to suppress the evil of defrauding Revenue which is an anti-social activity adversely, affecting the public revenues, the earning of foreign exchange, the financial stability and the economy of the country. Such provisions should be construed in manner which would suppress the mischief, promote their object, prevent their subtle evasion and foil their artful circumvention. [Para 12.2]

Enactments like Customs Act 1962, and Customs Tariff Act 1975, are not merely taxing statutes but are also potent instruments in the hands of the Government to safeguard interest of the economy. One of its measures is to prevent deceptive practices of undue claim of fiscal incentives. Evidence Act not being applicable to quasi-judicial proceeding, preponderance of probability came to rescue of Revenue and Revenue was not required to prove its case by mathematical precision. Exposing entire modus operandi through allegations made in the show cause notice on the basis of evidence gathered by Revenue against the appellants was sufficient opportunity granted for rebuttal. [Para 14.1]

[Order Per: D.N. Panda, Member (J)]

1. This batch of 67 appeals preferred by importer appellants and traders of DEPB scrips and TRAs against different adjudication orders detailed below arose out of common cause of alleged use of false and fabricated Telegraphic Release Advice (TRA) by importers to clear their goods imported duty free using no rightful acquisition of DEPB scrips and such instruments traded by traders, brokers and sub-brokers to make that available to importer appellants causing detriment to the interest of Revenue for which they faced different consequences of law by the impugned orders as mentioned against each hereunder:-

2. In view of the aforesaid common cause, all the appeals were heard analogous and disposed by this common order with the consent of the parties. However, at the outset, it is desirable to briefly state the scheme of DEPB and TRA scheme, back ground of the case, modus operandi followed by parties, law of the land arresting fraud against Revenue and abetment for appreciation of the conclusion of Tribunal.

3. DUTY ENTITLEMENT PASS BOOK (DEPB) AND TELEGRAPHIC RELEASE ADVICE SCHEME

3.1 Duty Entitlement Pass Book (DEPB) is a scheme formulated under Para 7.43 of the Hand Book of Procedure of EXIM Policy 1997-2002 and Para 4.3 of Hand Book Procedure of EXIM Policy 2002-2007 by the Government of India issued under section 5 of the Foreign Trade (Development & Regulation) Act, 1992, with a view to facilitate and augment foreign trade by genuine importers. The object of the said scheme is to neutralize the incidence of Customs duty on the import content of the export product. The neutralization is provided by way of grant of duty credit against the export products

3.2 Under the DEPB scheme, an exporter may apply for credit with the DGFT at the port of export. The credit shall be available against such export products and at such rates as may be specified for import of raw materials, intermediates, components, parts, packaging material etc. According to the Policy, the DEPB scrips issued against genuine exports are freely transferable and such scrips are permitted to be utilized to make import at the port specified therein, which is the port of export.

3.3 Against the DEPB scrips issued as above by DGFT, imports from a port other than the port of export are allowed under TRA (Telegraphic Release Advice) facility as

per the terms and conditions of the Notification issued by the Department of Revenue, In this scheme, the importers are given the facility to discharge duty liability through debits against DEPB scrips under Notification No.34/97-Cus dated 7.4.1997 and 45/2002-Cus dated 22.4.2002. In addition, importer can avail the benefit of “Nil” rate of Special Additional Duty (SAD) under Notification No.23/02-Cus dated 1.3.2002 against the utilization of DEPB license under Notification No.34/97-Cus, dated 7.4.1997.

4. BACK GROUND OF THE CASES

4.1 Investigation into the impugned TRAs used at the Chennai Port for clearance of different imports covered by different adjudications under appeal in this batch of appeals revealed that these imports were made against false, fake, forged and fabricated TRAs indicating DEPB scrips which were not at all transferred by owners thereof to the importer appellants as stated by the owners thereof and traders, brokers and sub-brokers appellants herein were engaged in illicit trading and dealing of such instruments and supplied the same to importer appellants in these appeals showing that the DEPB scrips mentioned in the TRAs were registered at the Jawaharlal Nehru Customs House, Nhava Sheva, Mumbai. Those scrips were not at all actually transferred by registered owners thereof of that port of export.

4.2 It was also discovered by investigation that no TRAs were issued by Mumbai Customs to Chennai Custom House for use of the DEPB scrips mentioned therein for clearance of imports duty free at the Chennai port. The impugned TRAs produced by the importer appellants were found to be false, fake, forged and fabricated and were not at all genuine. That jeopardized interest of Revenue causing loss of duty.

4.3 In no uncertain terms investigation established that forged and fabricated TRAs were used by the importers purchasing the same from the open market from the traders, brokers, and sub-brokers thereof. These intermediaries were instrumentality in the chain of deal causing loss to Revenue for which all of them became answerable through Show Cause Notices. They failed to contradict the evidence gathered by investigation except claiming innocence.

5. CONDUITS TRADING IN FAKE, FALSE, FORGED AND FABRICATED TRAs with DEPB scrips

5.1 Shri Sashi Prakash Lohia, Proprietor of M/s Pankaj Impex was found to be main conduit in trading the false, forged, fake and fabricated TRAs with DEPB scrips mentioned therein in Chennai getting that from Satish Mohan Agarwal from Delhi having his address No.1598, Main Bazar, Paharganj, New Delhi-110055. Therefore, his statement u/s 108 of Customs Act, 1962 was recorded on 17.11.2004 which revealed the story of investigation. He stated that he was trading in DEPB scrips in the name of M/s Pankaj Impex having office at No.1, 6th floor, Alsa Towers, P.H. Road, Kilpauk, Chennai-10 and also trading in REP/DEPB licence in the name of M/s Sashi Trading Corporation, from No. 83, NSC Bose road, Chennai 600 001. After Closing Down, the business activity of Sashi Trading Corporation, he started Pankaj Impex in the year 1996 and with his wife as Proprietrix, he started another firm in the name of M/s Prabha International. He got IE code for both firms and was purchasing DEPB scrips from

Sathish Agarwal of New Delhi, which were given to him at lower values. Shri Sathish Agarwal was also selling him DEPB scrips under TRAs of Mumbai port and he had not obtained any DEPB scrips on transfer from any original exporter.

5.2 Shri Lohia further stated that all the DEPB scrips with TRAs which were purchased by him from Shri Sathish Agarwal were sold by him to various importers and brokers in Chennai. Shri Satish Agarwal was trading in DEPB licences from New Delhi in the name of M/s. Casino Electronic Private Ltd. and was raising debit note in the name of different companies with their addresses for trading in the DEPB scrips viz. 1) M/s. K.K. Trading, Pradhan Building, 1st floor, Room No.19, Tank Bunder Road, Mazgaon, Mumbai. 2) M/s Evergreen Enterprises, BMC Building, No.5, 1st floor, Room No.26/27, S.S. Road, Mumbai 3) M/s. Jayant H Sanghvi, No.127, C BIT Block, Lakshminayarayan Lane, Matunga Mumbai 4) M/s Universal Enterprises No. 80-C/22, Sector 10, Kopar Khairani, Navi Mumbai.

5.3 According to terms of deal, Shri Satish Agarwal was sending the DEPB scrips under TRAs and other documents in sealed cover by courier and collecting the sale proceeds of the DEPB licence as per the debit note given to him, Shri Lohia also stated that he used his brother-in-law's company viz. PI Trading Corporation for trading in the DEPB scrips. Payment against the DEPB scrips and TRAs purchased were made by him in the above mode.

5.4 Evidence gathered by investigation and verified in Customs port at Mumbai revealed that all the DEPB scrips covered by TRAs were used in the impugned imports by appellants importers. Few such importers who are not in appeal went to Settlement Commission to settle their dispute which arose out of investigation resulting in use of false, fake, forged and fabricated TRAs without being issued by Mumbai Customs or without the DEPB scrips sold by real owners of such scrips in whose name the scrips were registered. The importers who did not go to the Settlement Commission came in appeal in some of the aforesaid appeals. S/Shri Sashi Prakash Lohia and Sathish Mohan Agarwal were mastermind behind sale of the forged, fake and fabricated TRAs covering DEPB scrips to the tune of Rs.4.75 crores and the sale proceeds thereof went to some fictitious companies.

5.5 Summons were issued under Section 108 of the Customs Act, 1962 to Shri Sashi Prakash Lohia on 28.03.05, 04.04.05, 15.04.05, 21.04.05 & 09.05.05 and to Shri Sathish Mohan Agarwal on 02.12.04, 30.03.05, 25.04.05 & 27.05.05. But they did not respond to the same. Therefore, complaint under Section 174 & 175 of Indian Penal Code read with Section 108 of the Customs Act, 1962 was filed in the Court of learned Additional Chief Metropolitan Magistrate Court, Economic Offence-I, Egmore and they were exposed to criminal prosecution.

6. **SUMMARY OF ARGUMENTS ON BEHALF OF APPELLANTS**

Learned counsels appearing on behalf of Appellants summarily argued as under:

- (1) The DEPB scrips/ TRAs were genuine and the appellants being buyers thereof for proper consideration cannot be faulted and they are not liable to penal consequences of law.
- (2) The DEPB scrips/TRAs acquired were utilized for discharge of customs duty on the genuine imports for which that cannot be questioned when customs clearances were allowed at the time of import. So also negligence of Customs Authorities to detect discrepancy in the scrips and TRAs shall not make appellants liable to penal consequences.
- (3) When the DEPB scrips/TRAs were rightly issued by the port of registration, that cannot be questioned and benefit thereof cannot be denied nor questioned for no reason attributable to appellants since those were acquired by importers on payment of consideration.
- (4) There was no fraud committed by appellants to be dealt by Section 28 of the Customs Act, 1962.
- (5) The Show cause notices issued were barred by limitation when the appellants acted bona fide and utilized the same for discharge of duty
- (6) When the DEPB scrips were not forged but were good scrips issued, the appellants are not liable to any consequence under the law.
- (7) The sub-brokers and brokers not having made huge profit except earning 0.5% profit on the deal, imposition of heavy penalties on them is unwarranted and uncalled for.
- (8) That Govt. should provide safeguard measures against forgery of DEPB scrips/TRAs
- (9) Statements used against appellants were exculpatory and shall not implicate appellants.
- (10) The newly introduced Section 28AAA of Customs Act, 1962 not being retrospective, the buyer importers are not liable to pay duty and interest.

7. ARGUMENTS ON BEHALF OF REVENUE

Learned DR appearing for Revenue supported the adjudication order submitting that Sri Sashi Prakash Lohia and Sri Satish Mohan Agarwal masterminded the trading with the forged and fabricated TRAs indicating DEPB scrip details therein to defraud Revenue for which the adjudication orders do not require any interference and the appellants do not deserve any leniency.

8. FRAUD IN THE EYES OF LAW

8.1 It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. It is also well settled that misrepresentation itself amounts to fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. Of course, innocent misrepresentation may give reason to claim relief against fraud.

8.2 An act of fraud on Revenue is always viewed seriously. "Fraud" and collusion vitiate even the most solemn proceeding in any civilized system of jurisprudence. It is a concept descriptive of human conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter.

8.3 It has been held by Apex Court in case of Commissioner of Customs, Kandla v. Essar Oil Ltd.-2004 (172) E.L.T. 433 (S.C.) that by "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill-will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the deceived. Undue advantage obtained by the deceiver, will almost always call loss or detriment to the deceived. Similarly a "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See S.P. Chengalvaraya Naidu V. Jagannath[1994(1) SCC 1])

8.4 In a leading English case i.e. Derry and Ors. V. Peek (1886-90) All ER-1 what constitutes "fraud" was described thus: (All ER p. 22 B-C) "fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false". This aspect of the matter has been considered by Apex Court in Roshan Deen v. Preeti Lal [2002(1) SCC 100] Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education [2003 (8) SCC 311], Ram Chandra Singh's case (supra) and Ashok Leyland Ltd. v. State of T.N. and Another [2004 (3) SCC 1]. Suppression of a material document would also amount to a fraud on the court, (see Gowrishankar v. Joshi Amha Shankar Family Trust, [1996 (3) SCC 310.] and S.P. Chengalvaraya Naidu's case AIR-1994 SC-853). No judgement of a Court can be allowed to stand if it has been obtained by fraud. Fraud unravels everything and fraud vitiates all transactions known to the law of however high a degree of solemnity.

9. **FINDINGS AND CONCLUSION BY TRIBUNAL**

Heard both sides and perused records. The principal issue involved in the batch of appeals is whether the importer appellants were entitled to the benefit of fake, forged and fabricated DEPB scrips/TRAs and whether the traders, brokers and sub-brokers supplying such instruments were liable to penal consequence of law under Customs Act, 1962. So also whether Settlement Commission's order passed in case of some importers who are not in appeal before Tribunal shall bind Tribunal to grant immunity to traders, brokers and sub-brokers of fake, false forged and fabricated DEPB scrips/TRAs

IMPORTERS LIABILITY

10.1 Evidence gathered by Revenue unambiguously and succinctly proved that the TRAs used by the importer appellants were fake, false, forged and fabricated for discharge of customs duty and caused prejudice to Revenue. Similarly, the traders, brokers and sub-brokers supplying such instruments were conduit and instrumentality in commitment of offence of causing loss to Revenue consciously and deliberately having intimate connection to each other. Neither the importer appellants nor the conduits could demolish the evidence gathered by Revenue making enquiry from DGFT Authority. Their ill-design was unearthed by investigation.

10.2 It is established principle of law that fraud and justice do not dwell together. An assessee acting in defiance of law has no right to claim innocence when he fails to exercise due care and diligence. Failing to cause enquiry with the issuing authority of DEPB scrips/TRAs crippled the importer appellants to claim bona fide. Findings of the learned Adjudicating Authority do not appear to have been made suspiciously or under surmise but seems to have been based on cogent evidence.

10.3 When the importer appellants acquired DEPB scrips from market without being acquired from original acquirer, as an abundant caution, to avoid evil consequence of fraudulently obtained scrips, could have safeguarded their interest causing enquiry from JDGFT as to genuineness of the scrips. But that was not done. Such appellants failed to acquire title over the scrips but became beneficiary of ill got scrips. Notificational benefit was availed at the cost of public exchequer which is required to be surrendered for the undue gain made. Bona fides were not established by the appellants for which they submitted themselves to the loss of duty caused to Revenue by their act of use of DEPB scrips not acquired legitimately.

10.4 The observations of the former Lord Chief Justice of England, Sir Edward Coke, more than three centuries ago, that “fraud avoids all judicial acts, ecclesiastical or temporal”, noticed by the Supreme Court in *S. P. Chengalvaraya Naidu v. Jagannath*, AIR 1994 SC 853, are apt for the instant case. The Apex Court has also observed that an act of deliberate deception with the design of securing something by taking unfair advantage of another is a “fraud”. “Fraud” is a cheating intended to get an advantage. A person whose case is based on falsehood has no right to seek relief in equity. In *Commissioner of Customs v. Essar Oil Ltd.*, (2004) 11 SCC 364 = 2004(172) E.L.T 433 (S.C.), their Lordships of the Supreme Court have observed that it is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. Being the ultimate beneficiaries of the fake TRAs, the importer Appellants were not innocent. Claim at the threshold was based on fake TRAs. Therefore, Revenue has rightly invoked extended period under Section 28 of the Customs Act, 1962 to adjudicate the matter.

10.5 It has been held in *ICI India Limited v. C.C. (port), Calcutta – 2005* (184) E.L.T 339 (Cal.) that the DEPB licence/scrip is admittedly a negotiable one and is available in the market. Anyone can purchase it from the market and avail of the credit

out of it. But, ultimately if it is found that the said DEPB scrips were not acquired lawfully nor transferred by original owners thereof credit cannot be derived from forged TRA. The decision of Hon'ble Calcutta Court was affirmed by Apex Court in appeal by ICI India Ltd. as reported in 2005 (187) E.L.T. A31 (S.C). Thus invoking of extended period for adjudication was justified and importer appellants were liable to consequence under Customs law.

10.6 Following decision of Hon'ble High court of Punjab & Haryana in the case of Friends Trading Co. and Another v. Union of India – 2010 (254) E.L.T 652 (P&H), it can be said that it is settled principle of common law that purchaser does not acquire better title if such title was not acquired legitimately. Therefore, if there was no genuine sale of DEPB scrips by original owners thereof, the purchaser fails to acquire title over the same. This principle has also been recognized under Section 27 of the Sales of Goods Act, 1932. Judgment of the Hon'ble High Court of Punjab & Haryana was affirmed by Apex Court as reported in 2010 (258) ELT A 72 (SC). It has also been held by the Hon'ble High Court of Bombay in a batch of cases reported as CC, Mumbai V. M/s Vaibhav Exports, Mumbai & Others – 2009 – TIOL – 673 – HC- MUM – CUS that forged licences, in law are no licences. The argument regarding non-applicability of Section 28AAA of Customs Act, 1962 retrospectively does not get appreciation in a fraud involving the deals of fake DEPBs/TRAs which nullifies everything and makes the importers liable to pay duty and penalty.

11. ORDER OF SETTLEMENT COMMISSION WHETHER SETTLES THE DISPUTE OF LITIGANTS WHO WERE NOT BEFORE THE COMMISSION

It was plea of the appellants covered by adjudication orders Nos. 6949/07 dated 30.11.2007, 6947/2007 dated 30.11.2007, 6944/07 dated 30.11.2007, 6948/2007 dated 30.11.2007, 6946/2007 dated 30.11.2007 and 7453/2007 dated 25.3.2008 that the importers covered by the said adjudications having settled their dispute before Settlement Commission and immunity from penalty and prosecution having been granted to them, the trader, broker and sub-broker appellants covered by those adjudications cannot be called upon to pay penalty out of same adjudication. Hon'ble Supreme Court in the case of S. P. Chengalvaraya Naidu V. Jagannath reported in (1994) 1 SCC 1 laid down the law that the principle of “finality of litigation” cannot be pressed to the extent of such and absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank loan dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation. Thus plea of these appellants are baseless and being misconceived are devoid of merit and they are liable to penalty under law for the unlawful act. The order of the Tribunal in the case of S.K. Colombowala V CC (Import) Mumbai – 2007 (220) ELT 492 (Tri.-Mum) does not come to rescue to these appellants since that decision did not take into consideration the law laid down by Apex court in the case of Chengalvaraya Naidu (supra). Accordingly, the orders passed by Settlement

Commission and in case of importers are not binding on Tribunal to grant relief to the appellants who were not before the Settlement Commission and fraud and Justice being sworn enemy of each other, the appellants in aforesaid appeals are barred to take undue advantage of orders of Settlement Commission since they were not before the Commission. Further, the doctrine of finality does not immune these appellants who defrauded Revenue.

12. LIABILITY OF FAKE DEPB/TRA TRADERS, BROKERS AND SUB-BROKERS

12.1 Forged, fake, false and fabricated TRAs converging DEPB scrips/ TRAs came into circulation as per story of Sri Sashi Prakash Lohiya as has been out at the preceding paragraphs. The brokers and sub- brokers facilitated sale thereof to various importers to cause jeopardy to Revenue. If a person intimately attaches himself to certain acts and omissions questionable under law and also establishes his active involvement, his conscious knowledge to such act or omission is proved and when he is not a stranger to the questionable act or omission, he also fails to be exonerated from charges having failed to discard the evidence gathered by investigation against them. When the TRAs were sold at throw away price, they would have enquired from Mumbai Customs or brought to notice of DRI or Chennai Customs. But they did not. Silence was equivalent to speech of their concealed plan to cause subterfuge to Revenue causing loss of duty.

12.2 Penal provisions are enacted to suppress the evil of defrauding Revenue which is an anti-social activity adversely, affecting the public revenues, the earning of foreign exchange, the financial stability and the economy of the country. Such provisions should be construed in manner which would suppress the mischief, promote their object, prevent their subtle evasion and foil their artful circumvention. Thus construed, the term fraud within the meaning of these penal provisions is wide enough to take in its fold any one or series of acts committed. Such act or acts being reasonably proximate to the clearance of imports duty free on the basis of forged documents, the trader, broker and sub brokers of fake, false and fabricated TRAs containing DEPB scrips are liable to penalties under law.

12.3 Evidence Act does not insist on absolute proof for the simple reason that perfect proof in this imperfect world is seldom to be found. That is why under Section 3 of the Evidence Act, a fact is said to be 'proved' when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This definition of 'proof' does not draw any distinction between circumstantial and other evidence. Thus, if the circumstance listed aforesaid establish such a high degree of probability that a prudent man ought to act on the supposition that there was abetment to the offence of use of fake, false, forged and fabricated DEPB scrips and TRAs to clear imports duty free in contravention of the law. Thus, without detaching themselves from the deal of aforesaid ill-designed deal to defraud Revenue entire conduit is liable to consequences under law.

13. ADJUDICATIONS WERE NOT TIME BARRED

13.1 It is cardinal principle of law which is enshrined in Section 17 of Limitation Act that fraud nullifies everything. The adjudications were not time barred following Apex Court judgment in the case of CC. v. Candid Enterprises – 2001 (130) E.L.T 404 (S.C.). Nothing demonstrated that the Authority below merely acted on imagination while the adjudication was based on cogent evidence. All the adjudications were done following due process of law on the basis of evidence establishing loss of revenue caused by the appellants supplying and using the false, forged and fabricated TRAs covering the DEPB scrips not acquired legitimately for use in clearance of imports at Chennai port. Such instruments were non est in the eyes of law at all times and were void. The importer appellants did not acquire any title over the same. Accordingly, the importer appellants were bound to compensate Revenue for the losses they caused due to use of fraudulently acquired scrips to discharge customs duty. Similarly, the traders, brokers and sub-brokers being conduit to make the questionable instruments available to the appellants were equally liable in abetting the commitment of the offence of dealing with fake and false DEPB scrips and TRAs.

13.2 When fraud was established that has unraveled all. Revenue's stand is fortified from the Apex Court judgment in the case of UOI v. Jain Shudh Vanaspati Ltd. – 1996 (86) E.L.T 460 (S.C). So also fraud nullifies everything as held by Apex Court in CC v Candid Enterprises- 2001 (130)E.L.T, 404 (S.C) and in the case of Delhi Development Authority v. Skipper Construction Company (P) Ltd. AIR 1996 (SC) 2005. Cheating was done to claim undue claim of DEPB credit and Revenue was defrauded.

13.3 The fraud committed by the appellants void all judicial acts, ecclesiastical or temporal and the importer appellants had no title over the DEPB scrips/TRAs for which they are liable to make good of losses suffered by Revenue. Tribunal in the case of CC v. D.M. Enterprises -2007 (213) E.L.T 414 held that fraudulently obtained DEPB credits has no title on the face of law and it was held in DIC India Ltd. v. CC – 2008 (226) E.L.T 545 that forged and fake DEPB credit/TRAs do not confer any title on the claimant and others who use such ab initio void credits. In the case of ICI India Ltd. v. CC – 2009 (240)E.L.T 290, it has been held by Tribunal that transaction based on fraud continues to be tainted by the vice and the person committing the fraud is precluded from deriving any benefit. Similar view was also expressed by Tribunal in the case of Kamala Metachem v. CC – 2007-TIOL-2247-CESTAT-KOL and in the case of M/s. Synotex Industries v. CC-2008-TIOL-777-CESTAT-KOL. When the material evidence established fraud against Revenue, white collar crimes committed under absolute secrecy shall not be exonerated from penal consequence of law following Apex Court judgment in the case of K.I. Pavunny v. AC, Cochin – 1997 (90)E.L.T 241 (S.C.). Thus, the adjudications were not time barred and Section 28 of the Customs Act, 1962 was rightly invoked by the Adjudicating Authority in view of fraud committed against Revenue.

13.4 We also find that while upholding the decision of the Tribunal in the case of R.S. Trade Link v. CC. New Delhi – 2010 (255) ELT 572 (Tri.-Del.), the Hon'ble High Court of Delhi has held in the case of Rahuljee & Company Ltd. v. CC New Delhi – 2011 (267) ELT 313 (Del.) as follows :-

“15. We do not find any illegality in the reasoning recorded by the Tribunal in this regard which is as under :-

6.1.1 As regards the duty liability, since there is no dispute about the fact that the advance license against which duty fee imports of copper/brass scrap have been made by these importers, are forged and had never been issued by DGFT, in view of-

(a) Hon’ble Madras High Court’s judgment in case of East West Exporters v. AC. Customs reported in 1993 (68) E.L.T 319 (Mad)

(b) Hon’ble Calcutta High Court’s judgment in case of ICI India Ltd. v. CC. Calcutta reported in 2005 (184) E.L.T 339 (Cal), the SLP to Hon’ble Supreme Court against which has been dismissed vide order reported in 2005 (187) E.L.T. A31(S.C), and

(c) Judgment of Hon’ble Punjab & Haryana High Court in of case of CC, Amritsar v. ATM International reported in 2008 (222) E.L.T 194 (P&H), the imports would have to be treated as if made without any advance licence and accordingly the customs duty exemption would not be available and since the goods had been cleared by availing full duty exemption, the imports would be liable to pay the duty.

6.1.2. As regards the applicability of extended period for recovery of duty under proviso to Section 28(1) of the Customs Act, 1962, the legal position on this point is now very clear in view of Hon’ble Supreme Court’s judgment in case of CC (P) v. Afloat Textiles (I) P. Ltd. reported in 2009 (235) E.L.T 587 (S.C) wherein invoking the principle of Caveat Emptor the Apex Court has held that in such cases the extended period for recovery of duty under Section 28 (1) of the Customs Act would be applicable. In this regard, para 23, 24, 25,26,27,28 and 29 of this judgment are reproduced below:-

“23. Caveat emptor, qui ignorare non debuit quod jus alienum emit. A maxim meaning “Let a purchaser beware; who ought not to be ignorant that he is purchasing the right of another.”

24. As the maxim applies, with certain specific restorations, not only to the quality of, but also to the title to , land which is sold, the purchaser is generally bound to view the land and to enquire after and inspect the title deeds; at his peril if he does not.

25. Upon a sale of goods, the general rule with regard to their Nature or quality is caveat emptor, so that in the absence of fraud, the buyer has no remedy against the seller for any defect in the goods not covered by some condition or warranty, expressed or implied. It is beyond all doubt that, by the general rules of law there is no warranty of quality arising from the bare contract of sale of goods, and that where there has been no fraud, a buyer who has not obtained an express warranty, takes all risk to defect in the goods, unless there are circumstances beyond to mere fact of sale from which a warranty may be implied.

26. No one ought in ignorance to buy that which is the right of another. The buyer according to the maxim has to be cautious, as the risk is his and not that of the seller.

27. Whether the buyer had made any enquiry as to the genuineness of the licence within his special knowledge. He has to establish that he made enquiry and took requisite precautions to find out about the genuineness of the SIL which he has purchasing. If he has not done that, consequences have to follow. These aspects do not appear to have been considered by the CESTAT in coming to the abrupt conclusion that even if one or all the respondents had knowledge that the SIL was forged or fake that was not sufficient to hold that there was no omission of commission on his part so as to render silver or gold liable for confiscation.

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

16. In view of the above, discussion, we do not find any infirmity or perversity in the findings of the learned Tribunal. Consequently, the question as framed is answered in the affirmative in favour of the Department and against the appellants.”

14. **CONCLUSION**

14.1 Enactments like Customs Act 1962, and Customs Tariff Act 1975, are not merely taxing statutes but are also potent instruments in the hands of the Government to safeguard interest of the economy. One of its measures is to prevent deceptive practices of undue claim of fiscal incentives. Evidence Act not being applicable to quasi-judicial proceeding, preponderance of probability came to rescue of Revenue and Revenue was not required to prove its case by mathematical precision. Exposing entire modus operandi through allegations made in the show cause notice on the basis of evidence gathered by Revenue against the appellants was sufficient opportunity granted for rebuttal. Revenue discharged its onus of proof and burden of proof remained un-discharged by appellants. They failed to lead their evidence to rule out their role in the offence committed and prove their case with clean hands. No evidence gathered by Revenue were demolished by appellants by any means.

14.2 Materials on record revealed that neither investigation nor process of investigation was challenged to be perverse. Modus operandi of all the appellants proved to be mala fide due to various dubious practices adopted and secret arrangements made by them through fake TRAs presented to Chennai customs and clearance of imports were made without genuine DEPB scrips acquired. What was apparent was not proved to be real. Chain of evidence established nexus of the persons involved to serve their ill will. Investigation brought out entire deliberate acts and omissions of appellants to the fold of law. Nexus of each other and their close proximity came to light by cogent evidence

gathered by DRI during investigation and very minutely evaluated and assessed by learned Adjudicating Authority in the adjudication process.

14.3 Crystal clear factual findings of the learned Adjudicating Authority and echoing evidence on record do not demonstrate that adjudications were made suspiciously or under surmise. All pleadings of the appellants were ill-founded. Show Cause Notice properly brought them to charge exhibiting civil and evil consequences for opportunity of rebuttal. Nothing was dealt behind their back. Investigation story was backed by evidence and not impeachable.

14.4 Corroborative and cogent evidence gathered by investigation directly and surrounding circumstances proved nexus of the appellants and does not make investigation story unbelievable. Looking to the entire genesis of the case, it can irresistibly be concluded that investigation has very successfully proved its case. Oblique motive of all the appellants to be enriched at the cost of Revenue was proved. They had defrauded Revenue. Fruits of forbidden tree being always forbidden, the importer appellants had no right to make gain out of fake TRAs covering DEPB scrips obtained fraudulently. They are, therefore, liable to pay the duty lost in the imports made by them, along with interest thereon.

14.5 In view of the above findings, we hold that the importer appellants are liable to pay the duty and interest adjudged against the imports made by them covered by the adjudications under appeal and the traders, brokers and sub-brokers of fake TRAs and DEPB scrips are liable to be penalized being instrumental in providing such instruments. We uphold the Orders-in-Original. However, in the fitness of the circumstances of the cases and to meet the ends of justice-

(1) Penalties are set aside against the importer-appellants while confirming the duty and interest demanded from them.

(2) We uphold the penalties imposed on appellant Shri Satish Mohan Agarwal in view of his pivotal role in the entire fraud beginning from making the fake, forged, false, fabricated and fraudulent DEPB scrips/TRAs.

(3) Penalties against the following abettor traders/Brokers/Sub-brokers in appeal are reduced by half as indicated hereunder: -

Arising Out of Order-in-Original No.6934/07 dt. 26.11.2007 passedd by the Commissioner of Central Excise (Adjudication) Chennai

S.No.	Appeal No.	Appellant and Respondent	Status	Reduced Penalty (Rs.)
1.	C/74/08	Sashi Prakash Lohia (Pankaj Impex) V CC (Sea-export) Chennai	Broker/ Trader in License/TRA	12,50,000/-

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15. Before parting with these cases, we may state that interest of justice demands the negligent officers involved in the aforesaid cause against the State need also be proceeded against with sternly so that it may serve as lesson to others. A democratic Government does not mean lax Government. The rules or procedure and / or principles of natural justice are not meant to enable the guilty to defeat objects of Customs Act, 1962. The wheels of justice may appear to grind slowly but is the duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless. Hence, we order a full investigation of these cases by the office of DG (Vigilance), CBEC so that appropriate disciplinary action is taken against officials of the Custom House & DRI due to whose involvement or negligence such as fraud could be perpetuated.

16. All the 67 appeals are dismissed except for setting aside and reducing penalties in some of the cases as indicated above.

(Operative part of the decision was pronounced in open court on 14.6.2012)