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## 2013 (295) E.L.T. 739 (Tri.-Del) [20-03-2013]

### 2013 (295) E.L.T. 739 (Tri. - Del.)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. III]

Ms. Archana Wadhwa, Member (J) and Shri Rakesh Kumar, Member (T)

**COMMISSIONER OF CUS., AMRITSAR**

*Versus*

**GOPI CHAND KRISHAN KUMAR BHATIA**

Final Order No. 56045/2013(PB), dated 20-3-2013 in Appeal No. C/262/2008

**Import - Duty exemption scheme - Eligible for duty free import in respect of DEPB scrip cancelled after receipt of goods - Licence issued against misrepresenting/forged documents - On transfer of licence, appellant imported goods in March, 2000 and DGFT cancelled the licence on 7-12-2004 - HELD : Respondent obtained DEPB scrip on transfer and at the time of its use he was not aware of fraud committed by seller/transferee - Provisions of Section 29 of Sales of Goods Act, 1930 read with Sections 19 and 19A of Contract Act, 1872 applicable - Respondent to be treated as having good title to DEPB scrip. [para 8]**

**Appeal allowed**

#### CASES CITED

- Collector v. Sneha Sales Corporation — 2000 (121) E.L.T. 577 (S.C.) — Relied on..... [Para 8.1]  
 Commissioner v. Aafloat Textiles (I) Pvt. Ltd. — 2009 (235) E.L.T. 587 (S.C.) — Relied on [Para 8]  
 Commissioner v. Hico Enterprises — 2008 (228) E.L.T. 161 (S.C.) — Relied on..... [Para 5]  
 Commissioner v. Leader Valves Ltd. — 2007 (218) E.L.T. 349 (P & H) — Relied on [Paras 1, 7, 8.1]  
 East India Commercial Co. Ltd. v. Collector — 1983 (13) E.L.T. 1342 (S.C.) — Relied on [Paras 8, 8.1]  
 Friends Trading Co. v. Commissioner — 2011 (267) E.L.T. 57 (Tribunal) — Distinguished [Para 8.1]  
 Golden Tools International v. Joint Director General of Foreign Trade — 2006 (199) E.L.T. 213 (P & H) — Distinguished [Para 7]  
 Hico Enterprises v. Commissioner — 2005 (189) E.L.T. 135 (Tribunal-LB) — Relied on [Paras 5, 8]  
 ICI India Ltd. v. Commissioner — 2003 (151) E.L.T. 336 (Tribunal) — Distinguished.... [Para 6]  
 Philco Exports v. STO — (2001) 124 STC 503 (Cal.) — Relied on..... [Para 8]  
 Vikas Sale Corporation — (1996) 102 STC 106 — Relied on..... [Para 8]  
 Weston Components Ltd. v. Commissioner — 2000 (115) E.L.T. 278 (S.C.) — Referred..... [Para 1]

REPRESENTED BY : Shri Nagesh Pathak, DR, for the Appellant.  
 None, for the Respondent.

**[Order per : Rakesh Kumar, Member (T)].** - The respondent had imported some goods against DEPB licence obtained by them on transfer from M/s. Amber Exports and cleared the same under Bill of entry No. 2270, dated 31-3-2000. The transferable DEPB scrip had been issued on 15-9-2000. Subsequently, it was found that the DEPB licence had been issued by the Licencing Authority against misrepresenting/forged documents produced by the exporter and the DEPB scrip was subsequently cancelled *ab initio vide* DGFT order dated 7-12-2004. However, before cancellation of the DEPB scrip, the respondent had made duty free import against the same. The Jurisdictional Additional Commissioner confirmed the duty demand of Rs. 54,932/- along with interest against the respondent and beside this, also imposed redemption fine of Rs. 25,000/- as the goods were not available for confiscation. On appeal being filed to the Commissioner (Appeals), the Commissioner (Appeals) by the impugned order, following the judgment of Hon'ble Punjab & Haryana High Court in the case of *C.C. v. Leader Valves Ltd.* reported in 2007 (218) E.L.T. 349 (P&H) set aside the Additional Commissioner's order. In respect of redemption fine, he also followed the Apex Court's judgment in the case of *Weston Components Ltd. v. C.C., New Delhi* reported in 2000 (115) E.L.T. 278 (S.C.), wherein it had been held that redemption fine can be demanded when the goods had been released against bond/undertaking, while in this case the goods had

been unconditionally released without any bond or undertaking. Against this order of the Commissioner (Appeals), this appeal has been filed by the Revenue.

2. None appeared for the respondent.

3. Heard Shri Nagesh Pathak, learned DR, who pleaded that since the DEPB scrip against which the duty free import had been made by the respondent, had been obtained by fraud, the respondent cannot get the benefit of duty free import inasmuch as the DEPB scrip had been cancelled. He, therefore, pleaded that the impugned order setting aside the duty demand and confiscation of redemption fine is not sustainable.

4. We have heard learned DR and perused the record.

5. We find that in this case the originally the DEPB scrip had been issued by the Licencing Authority to M/s. Amber Export, part of which had been transferred to the respondent, against which the respondent had made duty free import. The DEPB scrip was cancelled only after the import had been affected. It is not the case of the Revenue that the respondent were also a party to the fraud committed by the exporter - M/s. Amber Exports, as there is no allegation that the respondent had knowledge about obtaining of DEPB scrip by M/s. Amber Export by fraud or misrepresentation. In view of these circumstances, we are of the view that the issue involved in this case is squarely covered by Larger Bench of the Tribunal in the case of *Hico Enterprises v. C.C., Mumbai* reported in 2005 (189) E.L.T. 135 (Tri.-LB), which had been upheld by the Apex Court *vide* judgment reported in 2008 (228) E.L.T. 161 (S.C.).

6. Tribunal's judgment in case of *ICI India Ltd.* reported in 2003 (151) E.L.T. 336 (Tri.-Del.), relied upon in the Revenue's appeal is not applicable to the facts of this case as this is not a case where the DEPB scrip were fake or forged. In this case, the DEPB scrip had been issued by the Licensing Authority, though against misrepresentation and production of forged documents by the exporter.

7. Judgment of Hon'ble Punjab & Haryana High Court in case of *Golden Tools International* reported in 2006 (199) E.L.T. 213 (P&H) is not applicable to this case, as in this case, what the Hon'ble High Court has upheld is imposition of penalty on the Exporter M/s. Golden Tools International under Foreign Trade (Development & Regulation) Act, 1992 for obtaining DEPB scrip by producing forged documents. The question as to whether a *bona fide* transferee not having any knowledge about the DEPB scrip having been obtained by fraud, could make duty free imports against the DEPB scrip, prior to its cancellation by the DGFT, was not before the Hon'ble High Court. This question was considered by Hon'ble High Court in the case of *C.C. v. Leader Valves Ltd.* (supra) and the ratio of that judgment is in favour of the respondent.

8. In the background of the facts that -

- (a) DEPB scrip/licence had been actually issued by DGFT, though against misrepresentation and forged papers produced by the exporter;
- (b) there is neither allegation nor evidence that the respondent was aware of the fraud committed by the exporter - M/s. Amber Exports at the time of making imports; and
- (c) at the time of import, in March 2000, the DEPB scrip was valid as the same was cancelled only on 7-12-2004; .

the principle that fraud nullifies everything would not be applicable to the respondent, as -

- (i) issue of DEPB scrip to an exporter by DGFT against certain stipulated export performance is like an agreement in the nature of grant and when the DEPB scrip has been issued against forged papers produced or misrepresentation by the Exporter, the agreement would be a voidable agreement and the DEPB scrip would be valid till it is cancelled;
- (ii) in terms of Apex Court's judgment in case of *Vikas Sale Corporation* reported in [1996] 102 STC 106 and judgment of Hon'ble Delhi High Court in case of *Philco Exports v. STO* reported in (2001) 124 STC - 503 (Cal.), REP licence and DEPB scrip are 'goods' attracting sales tax on their transfer on sale;
- (iii) in this case, when the respondent had obtained the DEPB scrip from M/s. Amber Exports on transfer and at the time of its use for duty free imports, he was not aware of the fraud committed by the seller/transferor M/s. Amber Exports, it is the provisions of Section 29 of the Sales of Goods Act readwith Sections 19 and 19A of the Contract Act which would be applicable and the respondent would have to be treated as having good title to the DEPB scrip;
- (iv) it is the above principle which has been followed by the Apex Court in case of *East India Commercial* reported in 1983 (13) E.L.T. 1342 (S.C.) (para 35) and by the Tribunal in the case of *Hico Enterprises v. C.C., Mumbai* (supra) (paras 30 and 31); and
- (v) the cases like this case, where a DEPB scrip actually issued by DGFT, though obtained by fraud by the Exporter, is used by a *bona fide* transferee who had no knowledge about the fraud committed by the Exporter, cannot be compared with the cases where the DEPB scrip had been forged/fabricated by a person and had not been issued at all by the DGFT and the forged/nonest DEPB scrip had been used for duty free imports by another person - in the second category of cases, it is the judgment of the Apex Court in case of *Aafloat Textiles* reported in 2009 (235) E.L.T. 587 (S.C.), which would apply.

8.1 The cases like the present case are governed by the principles laid down in the Apex Court's judgments in cases of *East India Commercial* (supra), and *Collector v. Sneha Sales Corporation* reported in 2000 (121) E.L.T. 577 (S.C.) and Hon'ble Punjab & Haryana High Court's judgment in case of *Leader Valves Ltd.* (supra). Though a Coordinate Bench of the Tribunal in case of *Friends Trading Co.* reported in 2011 (267) E.L.T.

57 (Tri.-Del.) has taken a contrary view on this issue, in that judgment the distinction between void licence and voidable licence has not been considered.

9. In view of the above discussion, we do not find any merit in the Revenue's appeal. The same is dismissed.

(Dictated and pronounced in open court)

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