IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CUSAP No. 13 of 2014 (O&M)
Date of decision: September 07, 2016

M/s Pee Jay International

.. Appellant

v.

Commissioner of Customs

.. Respondent

CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mr. Jagmohan Bansal, Advocate for the appellant.

Mr. Sharan Sethi, Advocate for the respondent in CUSAP No. 13 of 2014 and

Mr. Amit Goyal, Advocate for the respondent in CUSAP No. 14 of 2014.

...

Rajesh Bindal J.

1. This order will dispose of two appeals bearing CUSAP Nos. 13 and 14 of 2014, as common questions of law and facts are involved.

2. However, the facts have been extracted from CUSAP No. 13 of 2014.

3. The assessee is in appeal against the order dated 21.10.2013 passed in Appeal No. 619 of 2006-Cus., by Customs, Excise & Service Tax Appellate Tribunal, New Delhi (for short, 'the Tribunal') raising the following substantial questions of law:

"(a) Whether duty can be demanded from an importer who is not a party to fraud committed by an exporter ?

(b) Whether demand against the appellant is sustainable when demand against identically situated persons has already been dropped ?

(c) Whether extended period of limitation can be invoked, in view of various judgments of this Hon'ble Court ?

(d) Whether impugned order is perverse and contrary to record ?”

4. Learned counsel for the appellant submitted that the appellant purchased one DEPB scrip No. 3010006203 dated 10.10.2000 from M/s Beni Exports, Jalandhar. The same was utilised for discharging duty liability on goods imported by the appellant vide Bills of Entry dated 12.10.2000 and 19.10.2000. The department finding that DEPB obtained by M/s Beni Exports, Jalandhar, which was purchased by the appellant, was obtained by using certain forged documents, cancelled the same. Thereafter, show cause notice was issued to the appellant proposing to recover the benefit of duty payment availed of by the appellant on the basis of that DEPB. The contention of the appellant is that when DEPB was purchased by it and the date on which it was utilised for payment of duty, it was a valid scrip, hence, the appellant cannot be made liable for any action. The department may take action against the person, who got DEPB issued by submitting forged documents. The adjudicating authority confirmed the demand. The order was upheld in appeal by the first appellate authority as well as the Tribunal.

5. While referring to the order passed by the first appellate authority, learned counsel for the appellant submitted that a specific finding has been recorded that there was no material on record to show that the appellant abetted or connived with exporter to fraudulently obtain DEPB scrip. The appellant had purchased freely transferable DEPB scrip in

bonafide manner. The Tribunal also recorded a finding that there are no allegations of misrepresentation or fraud, collusion or suppression of facts on the part of the appellant/importer. He further submitted that on the basis of the aforesaid finding recorded in favour of the appellant, penalty was set aside. In case, the appellant had been afforded opportunity of hearing before cancellation of DEPB granted to the person, from whom he had purchased, the appellant could have raised legal issues to defend the case as ultimately on account of cancellation of DEPB, which was issued to a third party, from whom the appellant had purchased the same, the appellant cannot be made to suffer. It was a bonafide purchase for consideration. Relying upon the judgment of Hon'ble the Supreme Court in Commissioner of Customs (Imports), Bombay v. Hico Enterprises, 2008 (228) ELT 161 (SC), this court in Commissioner of Customs, Amritsar v. Vallabh Design Products, 2007 (219) ELT 73 (P&H); Commissioner of Customs v. Leader Valves Ltd., 2007 (218) ELT 349 (P&H), CUSAP No. 23 of 2006—Commissioner of Customs, Amritsar v. Fertichem India, decided on 27.1.2009; CUSAP No. 4 of 2009—Commissioner of Customs (Preventive) Amritsar v. M/s Deebee Marketing Pvt. Ltd., decided on 21.4.2009 and M/s Gheru Lal Bal Chand v. State of Haryana and another, 2011(4) PLR 440, it was submitted that in case the benefit under DEPB purchased by a person for consideration had been utilised before it was cancelled, the importer cannot be made liable for any action. Action can be taken against the person who committed fraud. He further submitted that in the case of the appellant, DEPB itself was not a forged document. He further submitted that even the larger Bench of the Tribunal in Binani Cement Ltd. v. Commissioner of Customs, Kandla, 2010 (259) ELT 247 (Tri.-Ahmd.) held the same opinion.

6. On the other hand, learned counsel for the respondent, while referring to a Division Bench judgment of this Court in Friends Trading Co. v. Union of India, 2011 (267) ELT 33 (P&H) (hereinafter referred to as Friends Trading Co.'s case 1 (supra), submitted that all the issues sought to be raised by the appellant were considered therein and it was opined that buyer of DEPB from the person who had obtained the same by submitting forged documents, is also liable. Earlier order passed by this court in Munjal Showa Limited v. Commissioner of Customs and Central Excise (Delhi (IV), Faridabad, 2009 (246) ELT 18 (P&H) was referred to, where on the principle of "buyer be ware", purchaser of DEPB was held liable as it was his duty to ascertain whether the scrip being purchased by it was forged or not. In the case in hand, the appellant as well could have made enquiry from the department. There is nothing on record to suggest that the appellant ever made any enquiry. The order passed by the Tribunal does not call for any interference. No substantial question of law arises.

7. Heard learned counsel for the parties and perused the paper book.

8. The facts, which are not in dispute are that the appellant purchased DEPB Scrip No. 3010006203 dated 10.10.2000 from M/s Beni Exports, Jalandhar. It was utilised to discharge duty liability on the goods imported by the appellant vide Bill of Entries dated 12.10.2000 and 19.10.2000. More than one year thereafter, Director General of Foreign Trade cancelled DEPB issued to M/s Beni Exports, Jalandhar vide order dated 24.10.2001. As a result thereof, the appellant was issued show cause notice dated 14.11.2002 for withdrawing the benefits already availed of on

the basis of DEPB purchased by the appellant. After considering the reply filed by the appellant, the adjudicating authority vide order dated 24.5.2005 confirmed demand of the customs duty and the special additional duty, benefit of which was availed of by the appellant on the basis of DEPB purchased by it from M/s Beni Exports, Jalandhar. In addition, it was held that the goods imported by the appellant were liable for confiscation, however, as the goods were not available, having already been cleared for home consumption, redemption fine of ₹ 1,00,000/- was imposed in lieu of confiscation. Personal penalty on the appellant was also imposed. In appeal filed by the appellant against the aforesaid order before the Commissioner (Appeals), the demand of duty was confirmed, however, penalty was set aside. The Commissioner (Appeals), while setting aside the penalty, recorded the following findings:

> "As regards to imposition of penalty of Rs. 4,85,453/- and Rs. 30,000/- on the appellant No. 1 and 2 under Section 114A and Section 112 of the Act respectively, I find that there is nothing on record to prove in any way that they have abetted or connived with the exporters to fraudulent obtain the DEPB scrips. However, it is on record that the appellants had purchased the freely transferable DEPB scrips in the bona fide manner and utilised the same towards exemption of duty."

9. The appellant filed further appeal before the Tribunal. Even the revenue also preferred appeal against the order passed by the Commissioner (Appeals). One Member of the Tribunal opined that the appeals were liable to be dismissed applying the principle of "buyer be ware". However, another Member opined that the appeal filed by the assessee was required to

be allowed, whereas the revenue's appeal was meritless. The matter was referred to be considered by third Member on difference of opinion. After the matter was considered by third Member, the appeal filed by the appellant as well as the department were rejected. The department was raising the issue regarding levy of penalty, whereas the appellant was concerned about the demand of duty, as penalty had been set aside.

10. In Vallabh Design Products' case, (supra), this court dismissed the appeal filed by the revenue involving identical issue finding that the importer therein was not a party to the fraud and there was categoric finding that he had purchased DEPB from the open market in bonafide belief of its being genuine. Reliance was placed upon an earlier judgment of this Court in Leader Valves Ltd.'s case (supra). There also, similar findings were recorded.

11. The same view was later followed in Fertichem India and M/s Deebee Marketing Pvt. Ltd.'s cases (supra).

12. The judgment of this Court in Munjal Showa Limited's case (supra) is distinguishable on facts as in that case, transfer release advices issued against DEPB scrip were forged and even DEPBs were also forged. There was no finding recorded by the Tribunal or the authorities in that case that the assessee acted bonafide. The earlier judgments of this court in Vallabh Design Products and Leader Valves Ltd.'s cases (supra) were distinguished while recording that the importer in those cases had acted bonafide. Paragraph 15 thereof is extracted below:

> "15. We may also make a brief reference to the judgments of this court in *Vallabh Design Products* (supra) and *Leader Valves Ltd.* (supra), wherein a finding was clearly recorded that

the importer had acted bona fide which finding was affirmed."

13. In Friends Trading Co.'s case 1 (supra), the assessee's appeal was dismissed while relying upon the earlier judgment of this court in Munjal Showa Limited's case (supra) specifically noticing that the Tribunal in that case had recorded a finding that bonafides had not been established by the assessee, hence, the assessee was not entitled to place reliance upon the judgment of this court in Leader Valves Ltd.'s case (supra). In Friends Trading Co. v. Union of India, 2010 (254) ELT 652 (P&H), the earlier judgment in Munjal Showa Limited's case (supra) was followed.

14. In Commissioner of Customs (Preventive) v. Aafloat Textiles India Private Limited and others, (2009) 11 SCC 18 as well, it was found that special import licences on the basis of which the buyer had claimed the benefit were, in fact, forged documents. It was under these circumstances, the maxim *"caveat emptor"* was applied. In cases, where scrip itself is forged, the fact could be found out in case the buyer seeks to verify this from the office issuing the scrip. However, it is not possible in a case where the scrip is genuine, but for the purpose of issuance thereof, the party concerned may have used some forged documents.

15. A similar issue was considered by a Division Bench of this Court in M/s Gheru Lal Bal Chand's case (supra). It was a case, where under Haryana Value Added Tax Act, 2003, a purchasing dealer is entitled to get input tax credit on production of a statutory form. The claim was sought to be denied by the department while holding that the statement made in the form was not correct as the selling dealer had not paid the tax, for which the certificate was issued. This court opined that liability can be fastened on a person, who either acts fraudulently or is a party to the

collusion or connivance with the offender. Genuineness of the certificate can be examined by the authority. In case of falsity, action should be taken against the selling dealers, except in the case of plea of fraud, collusion or connivance between the parties. Relevant paras thereof are extracted below:

> "25. In legal jurisprudence, the liability can be fastened on a person who either acts fraudulently or has been a party to the collusion or connivance with the offender. However, law nowhere envisages to impose any penalty either directly or vicariously where a person is not connected with any such event or an act. Law cannot envisage an almost impossible eventuality. The onus upon the assessee gets discharged on production of Form VAT C-4 which is required to be genuine and not thereafter to substantiate its truthfulness by running from pillar to post to collect the material for its authenticity. In the absence of any malafide intention, connivance or wrongful association of the assessee with the selling dealer or any dealer earlier thereto, no liability can be imposed on the principle of vicarious liability. Law cannot put such onerous responsibility on the assessee otherwise, it would be difficult to hold the law to be valid on the touchstone of articles 14 and 19 of the Constitution of India.
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> 26. The rule of interpretation requires that such meaning should be assigned to the provision which would make the provision of the Act effective and advance the purpose of the Act. This should be done wherever possible without doing any violence to the language of the provision. A statute has to be

read in such a manner so as to do justice to the parties. If it is held that the person who does not deposit or is required to deposit the tax would be put in an advantageous position and whereas the person who has paid the tax would be worse, the interpretation would give result to an absurdity. Such a construction has to be avoided.

27. In other words, the genuineness of the certificate and declaration may be examined by the taxing authority, but onus cannot be put on the assessee to establish the correctness or the truthfulness of the statements recorded therein. The authorities can examine whether the Form VAT C-4 was bogus and was procured by the dealer in collusion with the selling dealer. The department is required to allow the claim once proper declaration is furnished and in the event of its falsity, the department can proceed against the defaulter when the genuineness of the declaration is not in question. However, an exception is carved out in the event where fraud, collusion or connivance is established between the registered purchasing dealer or the immediate preceding selling registered dealer or any of the predecessors selling registered dealer, the benefit contained in Form VAT C-4 would not be available to the registered purchasing dealer. The aforesaid interpretation would result in achieving the purpose of the rule which is to make the object of the provisions of the Act workable, i.e., realization of tax by the revenue by legitimate methods."

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.

(Rajesh Bindal)
Judge

(Harinder Singh Sidhu)
Judge

September 07, 2016
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Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No