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**(2016) 08 P&H CK 0286**  
**In the Punjab And Haryana At Chandigarh**  
**Case No : CWP No. 6600 of 2007 (O&M)**

Supreme Castings Ltd.

APPELLANT

Vs

Jt. Dir. General Of Foreign Trade, Ludhiana

RESPONDENT

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**Date of Decision :** 17-08-2016

**Acts Referred:**

**Citation :** (2016) 342 ELT 176 : (2017) 1 PLR 566

**Hon'ble Judges :** Rajesh Bindal and Harinder Singh Sidhu, JJ.

**Bench :** Division Bench

**Advocate :** Shri Jagmohan Bansal, Advocate, for the Petitioner; Shri I.P.S. Doabia, Advocate, for the Respondent

**Final Decision :** Allowed

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## Judgement

Harinder Singh Sidhu, J. - This writ petition has been filed praying for quashing the order dated 30-11-2004 (Annexure P-3) whereby the DEPB No. 3010005384, dated 25-8-2000 for Rs. 9,30,514/- was cancelled and a penalty of Rs. 2,00,000/- imposed on the petitioner and the order dated 7-2-2006 (Annexure P-6) whereby the appeal of the petitioner against that order has been dismissed.

2. The petitioner is a public limited company and is stated to be engaged in the manufacture of hand tools. It exported a consignment of hand tools under the Duty Entitlement Pass Book Scheme (for short "DEPB"). The material was exported under Shipping Bill No. 002216, dated 30-3-2000.

3. The petitioner obtained Bank Certificate of Export Realization (BCER) from their banker and applied for DEPB to the jurisdictional officer of Director General of Foreign Trade (DGFT) by filing one application in respect of three shipping bills. The DGFT after examining the copies of the shipping bills and BCER in respect of the three shipping bills issued a common DEPB of Rs. 9,30,515/- on 25-8-2000.

4. Respondent No. 1, issued a show cause notice dated 20-10-2003 proposing to impose penalty under Section 11(2) of the Foreign Trade (Development and

Regulation) Act, 1992 (for short the "1992 Act"). It was alleged therein that the petitioner in connivance with the custom officials had got ante-dated copy of shipping bill. The specific allegation was that the material was actually exported on 4-4-2000 whereas the shipping bill mentions the date as 30-3-2000. It was alleged that the petitioner got the shipping bill ante-dated to avoid the value cap which came into effect w.e.f., 1-4-2000. The petitioner was actually entitled to benefit of Rs. 1,00,980/- instead of the Rs. 2,72,752/- availed. Later on, through a corrigendum dated 5-7-2004, it was also proposed to cancel their DEPB ab initio. Pursuant thereto, vide order dated 30-11-2004 (Annexure P-3) of the Jt. Director General of Foreign Trade-Respondent No. 1, the DEPB dated 25-8-2000 for Rs. 9,30,514/- was cancelled. The cancellation order was passed in exercise of powers under Section 9(4) of the 1992 Act. Besides, a penalty of Rs. 2,00,000/- was imposed in exercise of the powers under Section 13 of the 1992 Act.

5. The petitioner filed an appeal against the aforesaid order before the Additional Director General of Foreign Trade-Respondent No. 2 which was dismissed vide order dated 7-2-2006.

6. Hence the writ petition.

7. Sh. Jagmohan Bansal Ld. Counsel for the petitioner has raised three contentions.

(i) The DEPB is a "scrip" and not a "licence" and hence it could not have been cancelled in exercise of power under Section 9(4) of the 1992 Act because the provision as existing on the date of passing of the impugned orders only enabled suspension or cancellation of a licence. "Licence" as defined in the 1992 Act meant a licence to import or export including a customs clearance certificate and any other permission issued or granted under the Act. It was only later by The Foreign Trade (Development and Regulation) Amendment Act, 2010 that the term "licence" has been substituted with the words "licence, certificate, scrip or other instrument bestowing financial or fiscal benefits" in Section 9(1), (3), (4) and (5). This amendment is not retrospective. Hence, it is after this amendment that the Director General can be said to have power to cancel the DEPB which is a scrip.

(ii) The validity period of the DEPB is only 12 months and no extension thereof is permissible. After the expiry of its validity, it is mere piece of paper of no worth. In the very nature of things, it cannot be cancelled after the expiry of its validity which in this case would be 24-8-2001.

(iii) From the Show Cause Notice issued to the petitioner and the impugned orders it is clear that the dispute was in respect of only one of the three shipping bills. As per the respondents for one of the shipping bills the petitioner was entitled to DEPB of Rs. 1,00,980/- as against Rs. 2,72,752/- obtained by it. Hence, if at all, the cancellation should have been in respect of the disputed amount for one shipping bill only and not the whole of the DEPB.

8. Mr. IPS Doabia Ld. Counsel for the respondents by referring to the order (Annexure P-6) states that the petitioner neither complied with the condition of mandatory pre-deposit before filing the appeal, nor despite sufficient opportunities being given, did he appear before the authorities to explain his defence. Hence, the appeal was rightly dismissed.

9. He further argued that the DEPB is in fact a "licence". The 2010 amendment whereby the term "licence" has been substituted with "licence, certificate, scrip or other instrument bestowing financial or fiscal benefits" is clarificatory in nature and cannot lead to the inference that prior to this amendment there was no power to cancel the DEPB.

10. Heard Ld. Counsel for the parties and perused the record.

11. At the outset it would be necessary to refer to the relevant provisions of the 1992 Act and the 2010 amendment.

The term licence is defined in Section 2(g), which as under :

"licence" means a licence to import or export and includes a customs clearance permit and any other permission issued or granted under this Act;"

12. Section 9 deals with the issue, suspension and cancellation of licence. This section is reproduced below :

"9. Issue, suspension and cancellation of licence. - (1) The Central Government may levy fees, subject to such exceptions, in respect of such person or class of persons making an application for a licence or in respect of any licence granted or renewed in such manner as may be prescribed.

(2) The Director General or an officer authorised by him may, on an application and after making such inquiry as he may think fit, grant or renew or refuse to grant or renew a licence to import or export such class or classes of goods as may be prescribed, after recording in writing his reasons for such refusal.

(3) A licence granted or renewed under this section shall -

(a) be in such form as may be prescribed;

(b) be valid for such period as may be specified therein; and

(c) be subject to such terms, conditions and restrictions as may be prescribed or as specified in the licence with reference to the terms, conditions and restrictions so prescribed.

(4) The Director General or the officer authorised under sub-section (2) may, subject to such conditions as may be prescribed for good and sufficient reasons, to be recorded in writing, suspend or cancel any licence granted under this Act :

Provided that no such suspension or cancellation shall be made except after giving the holder of the licence a reasonable opportunity of being heard.

(5) An appeal against an order refusing to grant, or renew or suspending or cancelling, a licence shall lie in like manner as an appeal against an order would lie under Section 15."

13. The amendment made to Section 9 by the 2010 Amendment Act is as under :

"9. Amendment of Section 9. - In Section 9 of the principal Act, -

(a) in sub-sections (1), (3), (4) and (5) for the word "licence", wherever it occurs, the words "licence, certificate, script or any instrument bestowing financial or fiscal benefits" shall be substituted;

(b) for sub-section (2), the following sub-section shall be substituted, namely -

"(2) The Director General or an officer authorised by him may, on an application and after making such inquiry as he may think fit, grant or renew or refuse to grant or renew a licence to import or export such class or classes of goods or services or technology as may be prescribed and, grant or renew or refuse to grant or renew a certificate, scrip or any instrument bestowing financial or fiscal benefit, after recording in writing his reasons for such refusal."

14. Duty Entitlement Passbook Scheme (DEPB) finds place in Chapter 7 of the Export and Import Policy, 1997-2002 as notified by the Central Government in Notification No. 1 (RE-99)/1997-2002, dated 31-3-2000. The relevant Paras 7.14, 7.15, 7.16 and 7.38 which explain the objective, period of validity, the manner of making application etc. are extracted herein below :

"7.14. For exporters not desirous of going through the licensing route, an optional facility is given under DEPB. The objective of Duty Entitlement Pass Book Scheme is to neutralise the incidence of customs duty on the import content of the export product. The neutralisation shall be provided by way of grant of duty credit against the export product.

Under the Duty Entitlement Pass Book Scheme (DEPB), an exporter may supply for credit, as a specified percentage of FOB value of exports, made in freely convertible currency. The credit shall be available against such export products and at such rates as may be specified by the Director General of Foreign Trade by way of public notice issued in this behalf, for import of raw materials, intermediates, components, parts packing material, etc.

The holder of Duty Entitlement Pass Book Scheme (DEPB) shall have the option to pay additional customs duty, if any, in cash as well.

#### 7.15. Validity

DEPB shall be valid for a period of 12 months from the date of issue.

7.16. DEPB and/or the items imported against it are freely transferable. The transfer of DEPB shall however be for import at the port specified in DEPB which shall be the port from where exports have been made. However, imports from a port other than the port of export shall be allowed under TRA facility as per the

terms and conditions of the notification issued by the Department of Revenue.

\* \* \*

7.38. (i) An application for grant of credit under DEPB may be made to the licensing authority concerned in the form given in Appendix 11-C along with the documents prescribed therein. The provisions of Para 7.2 shall be applicable for DEPB also. The FOB value in free foreign exchange shall be converted into Indian rupees as per the authorised dealer's T/T buying rate, prevalent on the date of negotiation/purchase/collection of document. DEPB rate of credit shall be applied on the FOB value so arrived. In case of advance payment, the FOB value in free foreign exchange shall be converted into Indian rupees as per the authorised dealer's T/T buying rate, prevalent on the date of receipt of advance payment.

15. As is clear from a reading of Para 7.14 the objective of Duty Entitlement Pass Book Scheme is to neutralise the incidence of customs duty on the import content of the export product. The neutralisation is to be provided by way of grant of duty credit against the export product.

The nature of DEPB has been explained by the Supreme Court in various cases.

16. In *Commr. of Customs v. Indian Rayon & Industries Ltd.*, (2008) 14 SCC 228, at page 234 : 2008 (229) E.L.T. 3 (S.C.), Hon"ble the Supreme Court explained about the nature of the scheme as under :

"16. xxxxxxxxxx

#### DEPB Scheme

Under this Scheme the exporters are issued DEPB scrips which allows them the specific amount to be utilised for payment of customs duty. The amount for which DEPB scrip is issued depends upon the rate for a particular export product. The Ministry of Commerce notifies DEPB credit rates for export of an item. The DEPB scrip is freely transferable and can be used to debit the payment of duty at the time of clearance of goods except capital goods and goods mentioned in negative list."

17. In *Liberty India v. CIT*, (2009) 9 SCC 328 : 2009 (241) E.L.T. 326 (S.C.), Hon"ble Court the Supreme Court explained that DEPB is essentially an export incentive the objective whereof is to neutralise the incidence of customs duty payment on the import content of export product.

18. In *Yasha Overseas v. CST*, (2008) 8 SCC 681 : 2015 (322) E.L.T. 7 (S.C.), the Hon"ble Supreme Court held that DEPB credit has its own intrinsic value and is thus clearly "goods" within the meaning of sales tax laws. It was held to be comparable with prepaid meal tickets or prepaid petrol coupons or accumulated flying miles which have intrinsic value and are marketable commodities. It was observed thus :

"59. We are afraid, we find the submission unacceptable. We are unable to see

DEPB either as a debt or as a beneficial interest in movable property not in possession of the claimant. To us it is plain that DEPB like REP licence has its own intrinsic value and the purchaser, on payment of consideration, buys something for its value. DEPB credit is thus clearly "goods" within the meaning of sales tax laws and its sale is clearly exigible to tax.

60. We may observe here, if DEPB (or for that matter REP licence!) has to be compared with a lottery ticket, it can only be compared with a lottery ticket that has won the prize. The prize-winning lottery ticket ceases to be a mere piece of paper having no value itself. It acquires inherent value and becomes itself a thing of value. Imagine a situation where prize-winning lottery tickets are freely available for sale. (As a matter of fact, clandestine sale of the prize-winning lottery ticket for conversion of black money into white is not completely unknown!) In buying the prize-winning lottery ticket the purchaser would pay the consideration for the value that the piece of paper has acquired and in that situation we fail to see how that ticket can be described as anything else but "goods".

61. If any more analogies are to be given one might compare DEPB with prepaid meal tickets or prepaid petrol coupons or accumulated flying miles. A meal ticket, a petrol coupon or flying miles credit has its own intrinsic value. If permitted free transferability those would soon become market commodities and would be sold and bought for their value as "goods".

62. In light of the discussions made above, the two questions framed at the beginning of the judgment are to be answered as follows :

The Constitution Bench decision in Sunrise does not alter the position in regard to levy of tax on sale of REP licence and on that issue the three-Judge Bench decision in Vikas continues to hold the field.

DEPB has an intrinsic value that makes it a market commodity. Therefore, DEPB, like REP licence qualifies as "goods" within the meaning of the sales tax laws of Delhi, Kerala and Mumbai and its sale is exigible to tax."

19. As per Para 7.15 of the Export Import Policy, the DEPB shall be valid for a period of 12 months from the date of issue. The DEPB in this case was issued on 25-8-2000. Thus, it remained valid only till 24-8-2001. The show cause notice for imposition of penalty u/s. 11(2) of the 1992 Act was issued on 20-10-2003. Thereafter another show cause notice-cum-corrigendum was issued on 5-7-2004 proposing to cancel the DEPB ab initio. It was thereafter that the order dated 30-11-2004 was passed cancelling the DEPB imposing penalty of Rs. 2,00,000/- on the petitioner. All these actions are after the expiry of the period of validity of the DEPB.

20. Assuming that the DEPB is comprehended within the meaning of the term licence and that the 2010 amendment was only clarificatory in nature and that the DEPB could be cancelled even under the un-amended Section 9(4) as argued

by the Ld. Counsel for the respondent, the question is could DEPB be cancelled ab initio after the expiry of its period of validity? If the answer to this question is in the negative then we may not need to consider the Contentions No. (i) and (iii) raised by the Ld. Counsel for the petitioner.

21. The DEPB whether considered as "goods" or as "a scrip" (which is defined in Black's Law Dictionary 9th Edition as - A document that entitles the holder to receive something of value), has worth or value only during its period of validity. On the expiry of that period it loses all value and becomes nothing more than a piece of waste paper.

22. Section 9(4) enables the Director General or officer authorised by him to cancel or suspend the licence.

23. The terms "cancel" and "suspend" are defined in Black's Law Dictionary-9th Edition as under :

"Cancel, vb. 1. To destroy a written instrument by defacing or obliterating it. 2. To terminate a promise, obligation, or right . {Cases: Contracts 251.}

suspend vb. (14c) 1. To interrupt; postpone; defer the fire alarm suspended the prosecutor's opening statement 2. To temporarily keep (a person) from performing a function, occupying an office, holding a job, or exercise a right or privilege. {Cases : Licenses 38; Officers and Public Employees 65.}"

24. Obviously for something (in this case the DEPB) to be cancelled or suspended it should be existing or subsisting. It is incongruous to cancel or suspend something that has ceased to exist. Obviously there is nothing subsisting to suspend or cancel, about a DEPB which has lost its validity, for it is no longer a DEPB but a piece of paper of no worth.

25. In M/s. Stella Industries (P) Ltd. v. State of Haryana (2009) 20 VST 62 (P&H) a Division Bench of this Court was considering the question as to whether an eligibility certificate granted under Rule 28A of the Haryana General Sales Tax Rules, 1975 could be withdrawn or cancelled after the benefit thereunder has been availed of or the currency of the eligibility certificate had expired. With reference to Rule 8(a) of the Rules, as per which, the eligibility certificate granted to an industrial unit was liable to be withdrawn at any time during its currency under specified circumstances, the learned Court held that the eligibility certificate could be withdrawn only during its currency and not after the maximum period for its validity had expired. The relevant extract from the judgment is as under :

"A perusal of the conditions of eligibility certificate granted to the petitioner shows that the maximum amount of benefit available to the petitioner was fixed and also maximum period during which the benefit could be availed of that is Rs. 1,63,66,999/- for the period from 28-3-1998 to 27-3-2005 respectively. It is further evident from condition No. 4 of the eligibility certificate, as extracted above, that the eligibility certificate shall cease to be operative with effect from

the date the unit reaches the ceiling of deferred/exempted amount of tax prescribed in the eligibility certificate, meaning thereby, the eligibility certificate will become inoperative on two conditions, firstly, when the maximum period provided for its validity, has expired or the maximum amount of benefit available thereunder has been availed of, whichever is earlier. In the present case, it is not in dispute that the benefit available to the petitioner was availed of by it by the year ending March 31, 2002. Meaning thereby, in terms of the conditions of eligibility certificate, the same ceased to be operative thereafter. Once it is so, no action possibly could be taken under sub-rule (8) of Rule 28A of the Rules, which enables the withdrawal of an eligibility certificate at any time during its currency. Once the currency of the eligibility certificate is over, power under sub-rule (8) of Rule 28A of the Rules cannot be exercised on the ground it is sought to be exercised by the respondents that is mis-statement or concealment of facts by the petitioner. The plea of the respondents that proceedings for withdrawal of eligibility certificate had been initiated during the currency of the same, have just, to be noticed and rejected, being without any merit. Plain language of sub-rule (8) of Rule 28A of the Rules provides that it is the withdrawal of the eligibility certificate, which has to take place during its currency and not that the process of withdrawal is to start during that period. Any order passed for withdrawal of eligibility certificate after its currency is over, would be clearly beyond the enabling provisions of sub-rule (8) of Rule 28A of the Rules."

SLP (Civil) No. 11053 of 2007 challenging the aforesaid decision was dismissed by Hon"ble the Supreme Court on 13-12-2007.

Though there is no Rule comparable to Rule 28A, in the Export Import Policy, but the judgment supports the conclusion that once the period of validity of the DEPB has expired no action to cancel or withdraw it can be taken because then there is no "DEPB" in existence to be cancelled and on which the cancellation order can operate. Cancellation of DEPB in such a situation is a meaningless order and can have no consequence.

26. Moreover, in Section 9(4) there is no power to cancel or suspend the licence retrospectively.

27. It is well settled that no action taken under a statute can have retrospective effect in the absence of a specific provision in the statute conferring such power.

28. In *M.D. University v. Jahan Singh*, (2007) 5 SCC 77, Hon"ble the Supreme Court held as under :

"19. The Act does not confer any power on the Executive Council to make a regulation with retrospective effect. The purported regulations, thus, could not have been given retrospective effect or retroactive operation as it is now well settled that in absence of any provision contained in the legislative Act, a delegatee cannot make a delegated legislation with retrospective effect.

20. In *Mahabir Vegetable Oils (P) Ltd. v. State of Haryana* this Court stated :



(SCC p. 633, paras 41-43)

"41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A delegatee therefore can make rules only within the four corners thereof."

29. Similarly it was held in *DDA v. Joint Action Committee, Allottee of SFS Flats*, (2008) 2 SCC 672, as under :

"76. An executive officer, in absence of any provision of a statute, cannot apply his own decision with retrospective effect. A delegatee is bound to act within the four corners of the delegation and not beyond the same.

77. Delegation of power in favour of an authority under a statute must also be tested in terms of the statutory provisions. No provision under the Act or the Regulations has been brought to our notice which empowers the delegatee to alter the terms and conditions of the contract with retrospective effect. The purported policy decision must, therefore, be tested not only having regard to the provisions of the statute but also having regard to Clause 4 of the offer."

30. A closely similar case under the 1992 Act is *Vikrant Overseas v. Union of India*, 2000 (123) E.L.T. 486 (P&H). In this case initially on September 8, 1998, the petitioner was granted a licence for the import of 3000 mt. tonnes of "Khas Khas" (poppy seeds). The petitioner was permitted to import the poppy seeds from "the country of origin - Pakistan, Afghanistan, Turkey and Australia."

31. On December 8, 1998, the Joint Director General of Foreign Trade, Amritsar, informed the petitioner that names of Pakistan and Afghanistan were deleted from the licence with effect from the date of issue of licence. He was informed that this action had been taken under "Para 8 of Foreign Trade (Regulation) Rules, 1993." Aggrieved by the retrospective amendment of its licence, the petitioner therein approached the Court through a Writ Petition.

32. A Division Bench of this Court held that as there was no provision in the Foreign Trade (Development and Regulation) Act, 1992 or Rule 8 of the Foreign Trade (Regulation) Rules, 1993, to amend the licence with retrospective effect, the impugned amendment of the licence with retrospective effect was illegal.

The relevant observation of the Court are as under :

"8. Counsel for the parties have been heard.

9. The questions that arise for consideration are :-

(i) Do the respondents have the jurisdiction to retrospectively amend an import licence?

(ii) Can the respondents amend an import licence retrospectively or otherwise without the grant of any opportunity to the importer?

(iii) Is the action of the respondents in initiating proceedings for the confiscation of the goods legal and, thus, tenable?

Regarding (i) :

With the object of providing for the development and regulation of foreign trade, the Parliament has enacted the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as the Act). The primary object of this Act is to facilitate "imports into and augment export from India.....". Section 9 of the Act inter alia provides for the issue of suspension and cancellation of licence. In Clause (2) "the Director General or an officer authorised by him" is competent to "grant or renew or refuse to grant or renew, a licence to import and export such class or classes of goods, as may be prescribed, after recording in writing his reasons for such refusal." A licence granted under Section 9 has to be in a prescribed form. It is valid for the period which may be specified therein. Terms, conditions and restrictions can also be imposed. The provision also authorises the competent authority to suspend or cancel a licence. Section 19 authorises the Central Government to "make rules for carrying out the provisions of the Act."

10. In exercise of the powers conferred by the Act, the Central Government has framed the rules called the Foreign Trade (Regulation) Rules, 1993. Rule 8 is material for the purposes of this case. It provides as under :-

"Rule 8 :

Amendment of licence :

The licensing authority may of its own motion or on an application by the licensee, amend any licence in such manner as may be necessary or to rectify any error or omission in the licence".

11. On a perusal of the provisions of the Act and the rules, we do not find any power with the licensing authority to retrospectively amend a licence. Mr. Gumber, learned counsel for the respondents, has stated before us that the authority has been amending the licence retrospectively "in routine". The counsel has conceded that there is no provision which may specifically authorise the licensing authority to amend a licence retrospectively.

12. Besides the lack of an express provision, even in principle, we find it difficult to accept the contention as raised on behalf of the respondents that the authority can retrospectively amend a licence. If such a wide power was conceded, the results can be catastrophic. A licence may be granted today for the import of a 1000 Mt. tonnes of a particular commodity. The person may place the order. The consignment may be received. One fine morning, the authority may retrospectively reduce the quantity to 1 Mt. ton. Who would make good the loss? Who would be responsible for the consequences? There is no answer on behalf of the respondents. In this situation, it is not surprising that neither under the Act nor the rules any power has been reserved with the authorities to modify a licence retrospectively."

33. There being no provision in Section 9(4) to cancel the licence with retrospective effect, on the ratio of the aforesaid case, it has to be held that the DEPБ could not have been cancelled ab initio from the date of issue.

34. The order of cancellation of the DEPБ being illegal and without jurisdiction the penalty imposed being a consequence thereof also cannot sustain.

35. In view of our decision on the aforesaid question, there is no necessity to opine on the first and third contentions of the Ld. Counsel for the petitioner.

36. Thus, this writ petition is allowed. The order dated 30-11-2004 (Annexure P-3) whereby the DEPБ No. 3010005384, dated 25-8-2000 for Rs. 9,30,514/- was cancelled and a penalty of Rs. 2,00,000/- was imposed on the petitioner and the order dated 7-2-2006 (Annexure P-6) whereby the appeal of the petitioner against that order has been dismissed, are quashed.