

BLACK-COLLARED CRIMES

"His heart as far from fraud as heaven from earth"

- William Shakespeare

Revenue frauds have a legend! Though they are termed as white-collared crimes by default, the present genre export frauds are not so soft and non violent to be called so! Whether it is a rebate scam or any other export fraud detected day in and out, the general response appears to that *"Okay, fine, I had predicted so !!!"* Nothing more, nothing else!!!! To cite a known example , Surat has been a hot bed for rebate frauds and continues to be so. This cancer has just spread precariously to other parts/zones in the country and continuous to remain malignant. Sadly, the best efforts to stop the pilferage of revenue, by plugging loopholes or streamlining the system, have just not been enough. It is the same story with almost all schemes which Government has initiated for the exporter fraternity. The dent done by the 'fraudulent' 10% of the said community has undone the excellent work done by the remaining 90%.

Bottom line is that the hard earned money of the tax payer continues to be pilfered and such frauds continue to bleed the economy of the country to a stage that we have turned indifferent towards the said issue. Whether it is a well publicized Rs 100 crore and more fraud or another one of those Rs 2 to 5 crore frauds, the story line is predictable. A few arrests, sequence of 'voluntary' statements, many undetected and unidentified links in the story, often a fictitious exporter, an elaborate show cause notice and that's all!!!! Once the show cause notice is issued and the ball shifts to the other side of the court the entire fizz is over!!! Post litigation, the scenario sometimes bewilders even the best of the cases, at times one dreads to read into the end result !!!

In the broadest sense, a fraud is a deception made for personal gain, although it has a more specific legal meaning, the exact details varying between jurisdictions. It is an admitted fact that commercial frauds have increased after liberalisation, while smuggling of conventional commodities like gold and silver has declined. Another accepted fact is that most common commercial frauds are related to export-oriented schemes like the duty exemption entitlement scheme (DEEC), the export promotion capital goods (EPCG), the duty entitlement pass book scheme (DEPB), and the duty

drawback, the DFRC Scheme and provisions pertaining to 100 per cent export units. Another area which surprisingly is not subjected to rigorous probing and left as a matter of fact is how come forex remittances are flowing into India in large amounts in case of bogus exports or overvalued exports and the channel through which the same are diverted and for what purpose. **May be I am jumping the gun, but whether export promotion schemes are eventually turning out to be a national security issue, could be subject matter in itself which needs to be addressed quickly.**

The issue, however, which is sought to be highlighted by this article is different though it has its genesis somewhere within the above paragraphs. Whether it is a DFRC fraud case or DEPB case, it is often noticed that the demand to recover the export benefits enjoyed by the exporter is issued to the party which has come under the clutches of the investigators. To cite, two different set of incidents

- i) A non existent exporter manages to show 'exports' fraudulently, manages transferable export benefits say DEPB / DFRC scrips, sells the same in the market , pockets the booty and remains anonymous even after the case is booked. The hapless importer in some corner of the country who has imported his goods by debiting from such scrips faces the music!! Slapped with a show cause notice, litigation is the only way out for him as the duty liability , per se, is too large to fathom !!!
- ii) Another case where the exporter has been slapped with the show cause notice for recovering the export benefits even though the said DEPB/ DFRC/ Advance Licence scrips have been sold to importers who have utilized the same for their imports. The difference originates from the fact that the exporter who is alleged to have fraudulently availed the export benefits is not a fictitious entity and hence the first option is not looked at.

It is generally perceived and infact also noticed that the Department prefers to demand duty / recover the export benefits from which ever party is available i.e to say if the exporter is not a fictitious entity , then the exporter will do . In case, the exporter could not be traced and had done the vanishing trick, he is branded a fly by night operator and the demand is set on the importer who has imported goods duty free on the basis of the DEPB /DFRC granted to the exporter.

Interestingly, even judiciary appears to have two views on the subject matter

Take one !!! Let us have a look at a recent judgment of Tribunal in Kamani Oil Industries [2006 (196) E.L.T. 21 (Tri. - Del.)] , The appellant therein imported and cleared a consignment of Sunflower oil in July, 1999. The customs duty payable on it was paid through DEPB licence, a valid way of discharging duty liability. Subsequently, a show-cause notice was issued, *inter alia* to the appellant alleging that the DEPB licence had been obtained by fraud and for that reason the payment of duty made in 1999 was not valid.

It was the submission of the appellant that they had purchased the DEPB credit for valid consideration and it was not aware of or involved in any fraudulent activity whatsoever. It was further submitted that the duty demand is contrary to the specific provision in the proviso to Section 28 and for that reason is to be held as illegal. It is being pointed out that the proviso relates to duty "not levied or short-levied ----- by reason of collusion ----- *by the importer* ----- or the agent or employee of the importer".

Tribunal held that Section 28 relates to recovery of duty not levied or short-levied on imports or exports. The liability to pay Customs duty is on the importer or the exporter. In this scheme of the law, the reference in the proviso to Section 28 to "importer or exporter" can only be to the importer or the exporter of the consignment which is liable to duty. The reference cannot be to other exporters or other importers. And accordingly the demand against the importer was set aside.

Similar school of thought was expounded by Tribunal in the following cases.

- (i) *M.C. Daver Aromatics P. Ltd. v. Commissioner of Customs, Mumbai* - 1999 (113) E.L.T. 91 (Tribunal);
- (ii) *Commissioner of Customs, Mumbai v. A. Shankar Rao* - 2002 (149) E.L.T. 387 (Tri. - Mumbai);
- (iii) *Scientific Pharmacy v. Commissioner of Cus. ACC., Mumbai* - 2001 (135) E.L.T. 1085 (Tri. - Mumbai);

- (iv) *Purulax Electric (P) Ltd. v. Commissioner of Customs, Mumbai* - 2001 (138) E.L.T. 786 (Tri. - Mumbai);
- (v) *Plastchem Industries v. Commissioner of Customs, Nhava Sheva* - 2000 (120) E.L.T. 775 (Tribunal);
- (vi) *Agnel Overseas Ltd. v. Commissioner of Customs, Mumbai* - 2000 (124) E.L.T. 1092 (Tribunal).

Hon'ble High Court in the case of Taparia Overseas Pvt. Ltd. reported at 2003 (161) ELT 47 (Bom). has held that import licence obtained by original licence holder by fraudulent means is invalid only from date of suspension and cancellation, goods imported and bill of entry filed prior to cancellation of licence, import having been made under valid licences goods not subjected to levy of customs duty. From the above, it is very clear that the Hon'ble High Court came to the conclusion that Customs Duty cannot be imposed on the goods so imported by using the forged DEPB scrip.

The other side of the coin.

In another case with similar connotations, duty liability on importer was upheld in J.K. Group Of Industries Vs Commissioner Of Customs, Kandla 2001 (136) E.L.T. 1184 (Tri. - Mumbai) . It was held therein held that the transferee of advance licence who actually imported the goods is the importer and not the original licensee and if there is any non levy or short levy, it can be recovered only from the actual importer.

In another case namely Ratinder Pal Singh Bhatia Vs Commissioner of Customs, Tughlakabad [2005 (190) E.L.T. 43 (Tri. - Del.)] , reference was made to the law laid down by the Tribunal in K. Sons Overseas (I) P. Ltd. v. C.C., Mumbai reported in 2001 (132) E.L.T. 93 and Jupiter Exports v. C.C. (Genl.), Mumbai reported in 2001 (131) E.L.T. 147 wherein it has been observed that in case of transfer of licences, the duty can be claimed on the imported goods, from the importer and not the exporter, who obtained the license initially. The same was relied upon and case decided accordingly.

However, some may note that the order of Jupiter Exports (supra) was disapproved By High Court Of Gujarat in Suresh Dhansiram Agarwal Versus Union Of India [2005 (183) E.L.T. 424 (Guj.)]. However, it is equally pertinent to note that the judgment of High Court was overruled by the judgment of Dharam Exports [2005 (192) E.L.T. 503 (Tri. - Mumbai)] . In the said case of Dharam Exports (supra), the judgment in the Jupiter Exports [supra] was relied on to hold the duty can be claimed on the imported goods, from the importer and not the exporter, who obtained the license initially.

In another interesting case where importer was held by Tribunal to be liable for fraud on DEPB conducted by some other exporter is De-Nocil Corpn. Protection Limited Versus Commissioner Of Cus., Mumbai [(2004) 171 ELT 209 Trib]

It is a school of thought that if no fraud or collusion is found on the part of the appellant, in that event, the appellant would be entitled to the benefit of the DEPB licences/scrips. In *United India Insurance Company v. Lehru*, (2003) 3 SCC 338, it was contended that it is just not possible for the appellant to verify the DEPB licences/scrips which is otherwise saleable, negotiable and available in the market and which the appellant had purchased *bona fide* for valuable consideration and utilized it for availing of the credit against its own import, stands in the same footing as a driving licence of the driver of the vehicle as it stood in the said case. Therefore, this is an important question of law that whether in the absence of any proof of collusion or fraud or absence of *bona fide* on the part of the appellant, the appellant could be deprived of the credit of the DEPB licences/scrips purchased by him *bona fide* for valuable consideration since found to be forged.

However, this view was distinguished by stating that the above was w.r.t some insurance company judgment in motor vehicles act. In the case of ICI India Limited vs. Commissioner of Customs (Port) , Calcutta [2005 (184) E.L.T. 339 (Cal.)], it was held that DEPB licences/scrips procured from market and that the question whether there was collusion or fraud on the part of the appellants in the issue of the DEPB licences/scrips becomes absolutely immaterial and irrelevant since no credit can be derived from a forged DEPB licences/scrips – It was held that Credit would be available on the strength of a valid DEPB only and if the same is forged, it is non est,

therefore, there is no valid DEP - The petition against the same filed by the said party was dismissed by Supreme Court as reported in 2005 (187) E.L.T. A31 (S.C.).

Given the two set of views and the prevalent practice at the field formations of issuing notice to the "convenient noticee", it is high time those concerned sit up and take notice of this legal infirmity and trash out the issue once and for all. The nation cannot afford such continued pilferage of Revenue and a serious note of the same should be taken and concrete steps taken to bring some semblance of legal sanity to this issue.

Before parting : Cannot stop myself from the topic of export frauds. Though belatedly , DGFT has come with revised guidelines for applicants of IEC code. PUBLIC NOTICE NO 37-(RE-2006)/2004-2009, dated: July 27, 2006. Hopefully, they will strictly implement the guidelines which can curb to a great extent the mass issuance of bogus IEC which is another strong reason for encouraging such export frauds. Hopefully guidelines such as IEC will be delivered only by speed post will be implemented seriously and immediate action will be taken if any thing suspicious is brought to light. Just a fodder of thought – let all IEC holders be asked to apply for a new IEC within a time frame of say one year from now . And make it mandatory that all those who do not apply for a new IEC will lose validity of their old IEC. Believe me, if the process of granting IEC is taken strictly as per the new guidelines with a firm eye on any suspicious indications, one big channel for fraudulent activity will be uprooted for ever.