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REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

To

Dated: 03/08/2017

Appellant as per address in table below
Respondent as per address in table below

Final Order No. C/A/70723/2017-CU[DB] dated 10/07/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 129-A(4) of the Customs Act, 1962.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	C/2324/2012	**Radhey International** A-49,new Multan Nagar, New Delhi.
		Name and Address of Respondent
2		C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH-201307

Copy To
3 Advocate(s) / Consultant(s):

K. K. Anand, Advocate
A-103, DEFENCE COLONY,
NEW DELHI,
DELHI
110024

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise, I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. I

APPEAL No. C/2324/2012-CU[DB]

(Arising out of Order-in-Appeal No.85/CUS/APPL/NOIDA/12 dated 23/03/2012 passed by Commissioner of Central Excise & Customs (Appeals). Noida)

Radhey International	**Appellant**
Vs.	
Commissioner of Customs & Central Excise, Noida	**Respondent**

Appearance:

Shri K.K. Anand (Appellant), Advocate for	for Appellant
Shri Rajeev Ranjan (Joint Commissioner)AR	for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing	:	10/07/2017
Date of Decision	:	10/07/2017

FINAL ORDER NO...70723/2017......

Per: Anil G. Shakkarwar

The present appeal is directed against Order-in-Appeal No. 85/CUS/APPL/NOIDA/2012 dated 23.03.2012 passed by Commissioner (Appeals) Customs and Central Excise, Noida.

2. Brief facts of the case are that the appellant are Merchant Exporter and had filed 11 Shipping bills dated 23.06.2010 for export of 100% Viscose/100% Cotton Ladies tops and dresses to M/s Awan & Channa, Durban, South

Africa. The combined assessable value of the goods involved in the said 11 Shipping bills was Rs. 98,24,691/-. It appeared to Revenue that the appellant did not follow proper procedure for export of goods. Therefore, the appellant were issued with a show cause notice dated 22.06.2011 wherein it was alleged that the above stated shipping bills were not entered in "export goods arrival register" maintained at CFS, STT, ICD, Dadri. It was also alleged that the entire consignment was divided in 11 Shipping bills in order to keep the drawback amount in respect of each shipping bill within the limit of Rs. 1 lakh so that the said shipping bill does not pass through ~~to~~ the screen of Assistant Commissioner of Customs. Statement of various persons associated were recorded such as Shri. Ajay Agarwal, proprietor of the appellant firm, Shri R.C. Chakravarty, Accountant of the appellant firm, Shri Kuldeep Buxi, Shri Mathew Kunnath partner of M/s Overseas Air Cargo Services, Customs House Agent, Shri Sunil Pandey, Shri Vivekananda Pandey, Shri Harish Sharma, Shri Mukul Mehta, proprietor of M/s Kanak Cargo and few other persons. On the basis of said statements it was alleged in the said show cause notice that the appellant in collusion with Customs Agent M/s Overseas Cargo Services, Shri Harish Sharma, forwarder, Shri Luv Kumar an employee of the Customs Agent, Shri Rajeev Chhibber, Shri Arvind Singh an employee of M/s H.A.H. Logistics Private Limited improperly exported Ready Made Garments at highly inflated price and got the goods custom cleared without observing proper Customs procedure prescribed for the export of the goods, with the sole intention to earn fraudulent drawback. It was further alleged that the appellant also mis-stated facts to the Customs Officers and thus contravened the provisions of Sections 50, 51 and 75 of the Customs Act, 1962. Therefore, the appellant were called upon the show cause as to why the subject goods should not be confiscated under Section 113 (g), [h(i)] of Customs Act, 1962, since the goods were not available for confiscation, why Redemption Fine should not be imposed on the appellant, why drawback amount of Rs. 10,30,624/- should not be rejected under Section 75(1) of the Customs Act, 1962 for violation of Section 51 of Customs Act, 1962 as the goods were not permitted for export by the proper officer, why penalty should not be imposed on appellant under Section 114 AA Customs Act, 1962 for violation of provisions of Section 113 (g), [h(i)] of the Customs Act, 1962 and why penalty should not be imposed under Section 114 AA of the said Act. Shri Ajay Agarwal was called upon to show cause as to why penalty should not be imposed on him under Section 114 of Customs Act, 1962 and under Section 114 AA of the same Act. The M/s Overseas Cargo Services, Shri Luv Kumar, Shri Harish Sharma and Shri Arvind Singh were also called upon to show cause as to why penalty on them should not be imposed under Sections 114 and 114 AA of Customs Act, 1962. The appellant ~~contested~~ contended before the Original

Authority that they have already submitted the copies of Bank realization certificate which proves that the goods were exported and that since consignment in question were comprised of 3 types of garments having different sizes, style and variety, therefore, accordingly different shipping bills were filed and that from the registration till ~~Late~~ Let Export Order the documents in the EDI System were handled by officers who had access to the system only through password, allowed them export and therefore, the possibility of any fraudulent entry in EDI System by unauthorized person was ruled out and that the goods were not overvalued and they further prayed that the proceedings may be dropped. The said show cause notice was adjudicated through Order-in-Original No. 42/ADC/2011 dated 24.12.2011. In Para 41.1 of the said Order-in-Original the Original Authority has recorded that perusal of the records of the case show that there has been export of the goods concerned. In Para 41.10 of the said Order-in-Original the Original Authority has given following chart regarding the details of the Realization of Foreign Exchange though the Bank in respect of 11 shipping bills, in respect of which said show cause notice dated 22.06.2011 was issued.

Ref. No.	Date	S/Bill No.	GR amount (USD)	In Rs.	Realised on
51540110	03/11/10	1279758	18997	886400.02	03.11.10
		1279748	19090	890739.40	03.11.10
		1279763	20120	938799.20	03.11.10
		1279713	19488	907583.63	03.11.10
		1279760	19586.75	905637.26	03.11.10

		1279700	19350	893002.50	03.11.10
		1279762	19687.50	908578.12	03.11.10
		1279750	20160	930384.00	03.11.10
		1279761	20280	935774.06	03.11.10
		1279759	20040	924645.60	03.11.10
		1279751	12470	577373.19	03.11.10
			209269.25	9698916.98	

In Para 41.11 of the said Order-in-Original the Original Authority has recorded that on sifting of evidence, as hereinabove before, it emerges that export of the goods have been allowed by the Customs. He further stated that in other words the goods were got cleared from Customs by hook or crook or in such a way that they were made to reach its destination. He has held that the goods were deemed to have been registered from 22:15:09 hours to 22:28:02 hours on 23.06.2010 and deemed to have been examined from 22:47:07 hours to 22:56:43 hours on 23.06.2010. The entry of the aforesaid shipping bills were neither made in the export goods arrival register maintained at CFS, Star Track Terminal and also held that the goods did not pass through proper Customs clearance. Therefore, he has held that allegations leveled against the appellant were true and accordingly, he passed the following order where is reproduced below:-

"i. I order confiscated of said RMG valued at Rs. 98,24,691/- under Sections 113 (g) and 113 (h) (i) of the Customs Act 1962, having been improperly and fraudulently exported.

ii. I impose redemption fine of Rs. 20,00,000/- (Rs. Twenty Lakh only) under Section 125 of the Customs Act, 1962.

iii. I reject the claim of drawback of Rs. 10,30,624/- (Rs. Ten Lakh Thirty Thousand Six Hundred Twenty Four only) under Section 75 (1) of the Customs Act, 1962.

iv. I impose penalty of Rs. 98,24,691/- (Rs. Ninety Eight Lakh Twenty Four Thousand Six Hundred Ninety One only) on M/s Radhey International, A-49, New Multan Nagar, New Delhi under Section 114 AA of the Customs Act, 1962 for violation of Sections 50, 51 and 113 of the Customs Act, 1962.

v. I refrain from imposing penalty under Section 114 of the Customs Act, 1962 as a penalty has been imposed under Section 114 AA of the Customs Act, 1962."

3. Aggrieved by the said order the appellant preferred appeal before Commissioner (Appeals). In the grounds of appeal before Commissioner (Appeals) the appellant contended that it is on the record as admitted by the Original Authority in Para 41.1 of the said Order-in-Original dated 24.12.2011 that the goods have been exported. The appellant contested that once it has been admitted that the goods have been exported there was no place for entertaining any suspicion. It was further contended that the value of the goods exported by the appellant has been realized and was admitted by the Original Authority as stated above. Appellant has further contended that in view of the fact that the goods have been exported and the export ~~process~~ proceed had been realized, the Commissioner (Appeals) may set aside the impugned

Order-in-Original. The learned Commissioner (Appeals) had decided the appeal through impugned Order-in-Appeal dated 23.03.2012. The learned Commissioner (Appeals) in Para 4.4 of her Order-in-Appeal has stated as follows:-

"There is no doubt that the impugned goods have been exported and the appellant might have received the export proceeds. But, these facts cannot mitigate the fraudulent nature of exports." And in view of his such findings she upheld the said Order-in-Original dated 24.12.2011 and rejected the appeal. Aggriecved by the said order the appellant is before this Tribunal.

4. The grounds of appeal are as follows:-

i. The Learned Both the authorities below have failed to appreciate that in the present case there is no allegation much less evidence that the goods in question have not been exported. Rather it is a fact on record and has been admitted in the opening line of Para 41.1 of the original order that the goods have been exported.

Relevant portion of Para 41.1 reads as under:

"41.1 A perusal of the records of the case shows that there has been an export of goods but the event of export is not free from rays of doubt and suspicion percolating through, out entire story."

ii. Once it has been admitted by the learned Both the authorities below that the goods have been exported, he ought to have considered the other facts attendant thereto in proper perspective being procedural requirements. It is settled law that suspicion howsoever grave cannot take place of evidence, therefore, the findings of the learned Both the authorities below being merely based on doubt and suspicion, cannot be countenanced.

iii. It is also a fact that the value of goods exported by the Appellant has been realized and BRC's were duly submitted to the investigating officers by the Appellant.

iv. The learned Both the authorities below have failed to appreciate that in the instant case the Shipping Bills with all due declaration were duly filed electronically, the goods in question are not prohibited and were not chargeable to export duty, the goods were duly exported and the value of export goods were realized, therefore, there is no contravention of the substantial export provisions of Section 50 and 51 of the Customs Act, 1962.

v. The learned Both the authorities below have failed to appreciate that the procedure regarding export of goods under EDI system has been laid down in the Paras 16, 17 and 18 of the CBEC's Customs Manual and Public Notice No. 8/97 dated 13/08/1997 issued by the Commissioner of Customs, Inland Container Depot, Tughlakabad, New Delhi. According to which on the basis of documents viz. invoice and packing lists, the details of export goods are declared in the prescribed format by the exporter/CHA, which is submitted to Service Centre (CMC), an agency authorized by the Customs to feed data in EDI system. Then a checklist is generated along with S/B number on the screen of EDI system without any human intervention. Thereafter S/B is processed by the Customs Officer on EDI system and thereafter the goods are allowed entry to the port for export on the strength of checklist. The custodian of respective Inland Container Depot endorses receipt of goods on the reverse of checklist. The goods so arrived at the Inland Container Depot are either examined or inspected by the Customs Officers as per auto-generated instructions contained in EDI system. The proper officer of Customs having satisfied himself that the goods can be allowed to be exported thereafter gives Let Export Order (LEO) and the goods are then handed over by the custodian to the concerned Shipping Line. After LEO, the print out of finally assessed S/B is taken in triplicate and duplicate i.e. exporter's copy and triplicate i.e. export promotion copy are handed over to the exporter or his CHA. It is apposite to mention that as per Appraising Manual of Customs the Public Notices issued by the Customs at major ports are applicable to all minor ports, if no such Public Notice has been issued in that minor port.

vi. It may kindly be appreciated that the EDI system is managed and maintained by the National Informatics Centre

(NIC), Government of India. According to the instruction issued by the Officer-in-Charge of the port, normally the EDI system is booted (started) in the morning at the start of office hours i.e. 09.30 hrs. and shut down at the close of office hours i.e. 18.00 hrs. after saving the data generated during the day. At times the system is allowed to be shut down by the Customs Officer-in-Charge of the Inland Container Depot beyond normal office hours if there is a rush of import or export works at the port.

vii. All the Customs Officers attending registration, processing, examination, LEO etc. relating to export of goods are allotted a unique password to access the EDI system. The CBEC has issued Circular F. No. 401/77/2009-CUS-III dated 15/05/2009 according to which the Customs Officers working at ICDs/Ports have been instructed not to divulge or share the password allotted to him with any other person. It is needless to say that the Instructions/Circular issued by the CBEC are binding on the Departmental Officers.

viii. In view of the procedure for clearance of export goods through EDI system enumerated above it is abundantly clear that right from the registration of S/B till LEO, the export document (S/B) in EDI system is handled only by the Customs Officers who can have access to the EDI system only by using password allotted to them. Moreover, the EDI system is accessible only till the close of office hours or such extended time as may be allowed by the Customs Officer-in-Charge of the Inland Container Depot.

ix. In the instant case:

a. Time of filing of checklist and printing thereof is 18.13 hrs. to 18.18 hrs. on 23/06/2010.

b. Time of registration is 22.15.09 hrs. to 22.28.02 hrs. on 23/06/2010;

c. Time of examination is 22.47.07 hrs. to 22.56.43 hrs. on 23/06/2010; and

d. LEO was given from 10.47.36 hrs. to 12.00.49 hrs. on 24/06/2010.

Impliedly, the EDI system at Inland Container Depot, Dadri was in operation at least till 22.56.43 hrs. on 23/06/2010 and the same could neither be in operation without the Customs Officers nor without the permission of the Officer-in-Charge of the Inland Container Depot, Dadri who incidentally is the learned ~~Both the~~ original authorities ~~below~~ himself. It is reiterated that the EDI system cannot be accessed without unique password which were allowed to the proper Officers of the Customs posted at Inland Container Depot. Therefore, there is no possibility of any fraudulent entry in the EDI system by unauthorized person nor has the learned Both the authorities below given any such finding and rightly so, as the different stages of work of registration; processing, examination, LEO etc. are attended by different officers having different password to access EDI system.

x. The facts narrated above clearly evince that the consignments in question did arrive at the port of Inland Container Depot, Dadri (not in dispute) and were available for examination till LEO was given and even till actual shipment thereof. In any case, as per EDI generated remarks on S/Bs that "This consignment was not opened for physical examination by Customs", it is clear that there was no order for physical examination of the consignments in question. It is reiterated that order for examination or inspection is auto generated in EDI system on random basis.

5. Heard the learned counsel for the appellant. Learned counsel has submitted that ~~of~~ all the due procedure was followed for for processing of the documents and ~~Late~~ Let Export Order was given by the Authorities of Customs Department, goods were exported and export proceeds were realized as recorded in the Order-in-Original. Therefore, there is no case for initiation of any action in the present case and show cause notice is not maintainable.

6. Learned AR has supported the impugned Order-in-Appeal.

7. During the hearing this Bench requested the representative of Revenue to clarify whether any cross objection has been filed by Revenue against the above stated

grounds of appeal to which the representative of Revenue has replied that Revenue has not filed any cross objection.

8. We have carefully gone through the records of the case and submissions made by both sides. We find that it is very clearly held by the Original Authority that the clearance for export of goods was given by the Customs Authorities that goods were exported and the export proceeds were realized. The Original Authority in the Order-in-Original has made some observations on few issues about the procedure followed. The appellant in the above stated grounds of appeal has very clearly submitted the procedure being followed in the EDI System and submitted that the entries in the EDI System are based on protection through password and therefore, we do not find any strength in the allegations leveled against the appellant in the said show cause notice about procedure being not followed. The requirement of admissibility of drawback is that the goods are exported and export proceeds are realized and at the time of export, shipping bills under the claim of drawback is filed and assessed accordingly. The above stated grounds indicate that the appellant had followed the proper procedure and Let Export Order was given by Customs Authorities and goods were exported and export proceeds were realized. Therefore, we do not find any evidence for the allegations made in the show cause notice. We therefore, hold that the said show cause notice is not

sustainable. Therefore, we set aside both the Order-in-Original and Order-in-Appeal impugned and direct the authorities below to allow the drawback involved in said 11 Shipping Bills within the period of 60 days from the receipt of this order. In above terms appeal is allowed.

(Dictated and pronounced in Court)

-Sd/-
(ANIL CHOUDHARY)
Member (JUDICIAL)

-Sd/-
(ANIL G. SHAKKARWAR)
Member(TECHNICAL)

Ankit

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10/08/17
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