REGISTERED / AD

FAX : 011-26108426

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Dated: 02/02/2015

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **C/A/50214-50215/2015-CU[DB]** dated **29/01/2015**

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(CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	C/406-407/2008	C.C. (ICD) NEW DELHI ICD, TUGHLAKABAD, NEW DELHI 110020.,
		NAME AND ADDRESS OF RESPONDENT
2		KADMABRI WORLDWIDE, 73/37-38, ISHWAR MARKET GANDHI GALI, FATEHPURI,DELHI. ,,
3		, KULTAR EXPORTS, 73/35, IIND FLOOR,ISHWAR MARKET GANDHI GALI, FATEHPURI,DELHI.,,

,

Copy To
4Advocate(s) / Consultant(s): SH T,R,RUSTAGI,ADV
SD-84, TOWER APARTMENTS
PITAMPURA, DELHI-34

--

: 5. Bar Association, CESTAT, Delhi

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

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

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

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

10 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

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

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

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

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

Asstt. Registrar(CUSTOMS Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.

Division Bench

COURT NO. 2

Appeal No. C/406 and C/407/2008

(Arising out of OIA No. CC(A)/Cus/ICD/D-II/55/08 and OIA No. CC(A)/Cus/ICD/D-II/54/08 dt.29.1.2008 passed by Commissioner of Customs, New Delhi)

CC, ICD, TKD, New Delhi **Appellant**

Vs.

M/s.Kadmabri Worldwide **Respondent**
M/s.Kultar Exports

Appearance:
Present for the Appellant: Ms.Ranjana Jha, JCDR
Present for the Respondent: Shri T.R.Rastogi, Advocate

Coram: Hon'ble Mr. D.N. Panda, Judicial Member
Hon'ble Mr. Manmohan Singh, Technical Member

Reserved on: 23/07/2014
Pronounced on:

FINAL ORDER No. 50214-50215/2015

PER: MANMOHAN SINGH

Revenue have come in appeal against the Order-in-Appeal No. CC(A)/Cus/ICD/D-II/55/08 and Order-in-Appeal No. CC(A)/Cus/ICD/D-II/54/08 dt.29.1.2008 passed by Commissioner of Customs, New Delhi. Commissioner (Appeals) set aside Order-in-Original No.68/SNB/2007 and OIO No.68/SNB/2007 dt.30.04.2007 passed by the Adjudicating authority i.e. Assistant Commissioner of Customs (Export Shed), New Delhi and held that the assessee were entitled for DEPB benefit at declared export price.

2. The facts of the case as stated in the Commissioner (Appeals)'s order are stated below to appreciate the issue involved in the ap

that the appellants M/s.Kadmabri Worldwide filed two shipping Bills No.1543780 dated 07.11.2005 and ~~and~~ M/s.Kultar Exports filed two shipping bills No.1532727 and No.1532729 dt.27.9.2006 for export of Man Made Filament Yarn with or without embroidery and made ups of one or more man made filament yarn under DEPB scheme. The description of the goods declared was Man Made Filament Yarn with or without embroidery and made ups of one or more man made filament yarn. The export goods under Shipping Bill No. 1543780 and dated 07.11.2005 and shipping Bill No.1532727 dated 27.9.2006 were examined by the SIIB Officers in association with shed Officers and in the presence of CHA. Representative samples were drawn from the shipment in the presence of CHA by the SIIB Officers and were sealed in separate envelopes, which were signed by the representative of CHA and the SIIB officers for conducting market enquiry. Export was allowed provisionally.

3. Market enquiry conducted resulted in following comparison between the FOB value declared by the exporter and Present market Value is given in following chart

In respect of M/s.Kadambri Worldwide:

Sl. No.	S/Bill No.	Dated	Description of The goods	FOB Value Rs./yd	Jagdish & Sons	Kedarnath & Ratanlal
1	1543780	07.11.2005	Polyester Viscose Fabric	132.00	20-22	20-21

96·

ng'

In respect of M/s.Kultar Exports:

Sl. No.	S/Bill No.	Dated	Description of The goods	FOB Value Rs./yd	Jagdish & Sons	Kedarnath & Ratanlal
1	1532727	27.9.2006	Polyester Fabric	128.00	21-23	22-23

Outcome of the market enquiry revealed that the value declared by the appellants in both the above mentioned shipping bills was higher in comparison to market value, it was observed that the appellants by declaring FOB value @ Rs.132.00/128.00 per Metre of the fabric attempted to avail excess DEPB benefit which was not due to them in as much as the value arrived at as a result of market enquiry was very low in comparison to the said shipping bills. The case was decided by the Adjudicating authority who decided that the value of the impugned goods @ Rs.22.00 per Metre in respect of shipping bill No.1532727 dated 27.09.2006 was correct market price. Similarly in respect of value of impugned goods at the rate of Rs.22/- in respect of shipping bill No.1543780 was correct market price.

4. Ld.Counsel of the assessee contested before the Commissioner (Appeals) that overvaluation held by the department and that there was no overvaluation of goods exported to M/s.Pardesh Mulla Khail Kamawal Co.Ltd.,Kabul which were in the normal course of international trade on the negotiated price. It was further contented that the entire export value had been realized which was evident from the bank realization certificate issued by Lord Krishna Bank. It was also emphasized that since foreign buyer was an independent firm and the entire export proceeds have been realized and the value declared by the assessee has been proved to be genuine. Reliance was placed of Tribunal in the case of Shilpi Exports vs. CC-1998 (83) ELT 302 confirmed by the Supreme Court as reported 2000 (115) ELT A219

and S.Chander Shekhran vs. CC-2000 (132) ELT 751 confirmed by the Supreme Court as reported in 2003 (154) ELT 353.

5. Reference was also made to judgement of Supreme Court in the case of CC vs.Vishal Exports Overseas Ltd.-2007 (79) RLT 234 (SC) wherein the charge of the department was that the FOB value (Rs.150 per piece of mugs) was inflated to get more DEPB. The Supreme Court did not accept the contention of the department that the FOB value was 450% more than the purchase value in view of receipt of entire FOB price. The Supreme Court observed that the "FOB price is supported amply by the BRCs..." Reference was also made to the judgment of the Tribunal in the case of Polynova Chemicals Industries vs. CC-2005 (179) ELT 173 (Tri.) and Frost International Ltd. vs. CC (Exports)-2006 (76) ELT 388 (Tri.) The Commissioner (Appeals) after relying on the Supreme Court judgment in the case of CC vs. Vishal Exports Overseas Ltd.-2007 (209) ELT 331 (SC) held that mere large difference between the domestic price and the export price was no ground for holding that the export price was a mis-declaration or that over-invoicing was involved. In the above said case, the variation between the domestic price and the export price was in the range of 450%.

6. Reference was also made to the Tribunal's judgment in the case of CC, Mumbai vs. Frost International Ltd.-2005 (188) ELT 122 (Tri.Mum.) wherein it was held that the declared value was acceptable in view of similar goods having been exported at price declared by the exporter on an earlier occasion also and no objection was raised.

Accordingly, Order-in-Original was set aside holding that the assessee were entitled to DEPB at the declared export price.

7. On the other hand, ld.JCDR Ms.Ranjana Jha submitted that findings of the Commissioner (Appeals) were not based on proper appreciation of facts. Reliance has been made on certain judgements of the Tribunal and Supreme Court without evaluating common factors. She contended that proper market enquiry was undertaken as per Board's Circular No.77/2002-Cus dated 27.11.2002 and these enquiries were conducted with reputed dealers and it indicated overvaluation of price of fabric more than 600% approximately. Further, difference was very large in declared FOB price and price ascertained through market enquires. No factor could justify such increase in the value when prudent business person during international trade was fully aware of the prevailing market price of the polyester yarn which is duly reported in the economic daily and what could be possible value addition and what could be likely prevailing price in India and likely price available abroad. Further market enquiry conducted with renowned trade person like Jagdish & Sons and Kedarnath and Ratanlal clearly pointed out that the value has been stated over by 600% with the sole purpose of claiming higher DEPB to enrich at the cost of the Revenue.

8. Reference was also made to various judgements of the Tribunal some of these were confirmed by the Supreme Court were having different facts and could not be applied without specifically looking to the factors involved in the present case. No doubt arises on the investigation conducted by the department that overvaluation has

been undertaken for availing higher DEPB benefit. Since Revenue has come up in appeal against the order passed by the Commissioner (Appeals), Reference was made to circular No.26/4/2001 wherein it has been stated that in case **over-invoicing of export goods, PMV shall be determinative factor for allowing DEPB benefit.** Reference was also made to the Circular No.63/2002-Cus dated 27.9.2002, Circular No.77/2002-Cus dated 27.11.2002 and Circular No.7/2003-Cus dated 5.2.2003.

9. In the above circulars, reference was also made to the Larger Bench judgement of the Tribunal in the case of Om Prakash Bhatia vs. CC-2001 (127) ELT 81 wherein it was held that section 14 of the Customs Act would apply to export valuation also. Reliance was placed on the judgment of Hon'ble Calcutta High Court in the case of Pankaj vs. Seth-1997 (90) ELT 31 (Cal.), judgement of the Tribunal in the case of Globe Traders vs. CC, Mumbai-2004 (166) ELT 92 (Tri.-Mum.) wherein it was pointed **out that the drawback claim could be reduced in the light of market enquiries**. Reference has also been made to the judgement in the case of Sigma Industries vs. CC, New Delhi-2000 (124) ELT 315 (Tri.) wherein it has been held that valuation done by the contemporary exporters was to be kept in mind for determining DEPB credit.

10. Revenue also challenged findings of the Commissioner (Appeals) wherein it was held that difference between the declared price and actual price was not very significant and DEPB was allowable. Central Board of Excise and Customs by its Circular NO.77/2002-Cus dated 27.11.2002 clarified that many unscrupulous exporters were availing

unintended DEPB benefits. In order to curb such practice, **Government through these circulars laid down that wherever, the declared FOB value was more than the Present Market Value (PMV) as declared by the exporter or as ascertained by the Customs authorities, the present market value shall be the basis for granting DEPB credit**.

11. Ms.Ranjana Jha, ld.JCDR during the course of hearing before the Tribunal invited attention to section 14 of Customs Valuation of the goods and read with larger bench decision of the Tribunal in the case of Om Prakash Bhatia contended that Valuation Rules 2007 were also applicable for determining export price. **It was held by the Supreme Court that market price of the goods prevailing in the country was the relevant consideration for purpose of getting drawback, and not the price of the goods which the exporter expects to receive from the overseas purchaser. In respect of over-invoicing of readymade garment when margin of profit appears, on the face of it, unreasonable, it was for the exporter to establish that true export value has been stated in the shipping bills.**

12. Respondents supported the impugned orders. Heard both sides and gone through the records to appreciate the rival contentions. The present appeals have been filed by the Revenue against the Order of the Commissioner (Appeals) who has held that DEPB claim could not be denied merely on the basis of value of goods ascertained from the market enquiry and where full payment has been received from the exporters/respondents. He also referred to several judgements to support his finding.

13. The Revenue in their appeals, referred to the judgements passed by the Supreme Court in the case of Om Prakash Bhatia-2003 (155) ELT 423 (SC) wherein it was held by the hon'ble Supreme Court that market price prevailing in the country and not the price which exporters accepted from the overseas buyers was relevant consideration for getting drawback. It was also held that where margin of profit appears to be unreasonable it was for the exporter to establish that true value was declared in the shipping bills.

14. The Revenue has also pointed out that while market price was in the range of Rs.20-22 per metre, the respondents declared FOB value at Rs.132 per metre. It has also been highlighted in the appeals that findings of the Commissioner (Appeals) to the effect that variation between margin of profit Rs.80 per yard and net export price Rs.102 per yard was not significant, was factually incorrect.

15. On careful examination of the impugned order, we find that the same has been passed in a very casual manner. The Commissioner (Appeals) has passed the order totally unaware of the facts and figures involved in the case as pointed out by the Revenue. His finding that there was no significant difference between the maximum market price of Rs.80 per yard and export price of Rs.102 per yard was based on the imaginary figures as the actual figures involved in the present matter are market price of Rs.20-22 per metre and FOB value of Rs.132 per metre. The FOB value was discovered by the Revenue through market enquiry. It is also observed that the Commissioner (Appeals) has passed the order based on the wrong facts and figures. Obviously when he was unmindful of the correct facts and figures, he

(Appeals) has passed the order based on the wrong facts and figures. Obviously when he was unmindful of the correct facts and figures, he could not appreciate the context of applicability of judgement quoted by the Revenue and the respondents/exporters. As consequence, it would be inappropriate for us as final fact finding authority to base our decision on Order-in-Appeal which does not take into account the facts involved, the extant of law, value of exported goods, administrative guidelines on the issue of applicability of judgement quoted by both sides.

16. On consideration of facts, figures and circumstances, we find that it to be fit case for reconsideration by the lower appellate authority. Accordingly, we remand the matter back to the Commissioner (Appeals) without considering anything on the merit of the case with direction to decide the matter afresh on the basis of correct facts and figures after taking into account the applicable export valuation rules and the relevant judgements as well as administrative guidelines for implementation of law. It is also ordered that Revenue and exporters should be afforded the opportunity to present their case in de novo adjudication so that proper natural justice would be granted to both sides.

17. In view of above observations, departmental appeals are disposed of by way of remand to the lower appellate authority.

(Pronounced on 29/01/2015.)

(Manmohan Singh) **Technical Member**	14.1.2015 **(D.N. Panda)** **Judicial Member**

mk