

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

Dated: 17/11/2014

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. C/A/54356-54416/2014-CU[DB] dated 10/11/2014

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/269-329/2010	CC ICD NEW DELHI ICD, TUGHLAKABAD, NEW DELHI 110020.
		Name and Address of Respondent
2		SKIPPER ELECTRICALS INDIA LIMITED, F-667-668, RIICO INDUSTRIAL AREA, PHASE-II, BHIWADI. ,,
3		SEIL POWER GEARS LIMITED, F-667-668, RIICO INDUSTRIAL AREA, PHASE-II, BHIWADI. ,,
4		SHRI JITENDRA SACHDEVA, DIRECTOR OF M/S SKIPPER ELECTRICALS INDIA LIMITED AND M/S SEIL POWER GEARS LIMITED, F-667-668, RIICO INDUSTRIAL AREA, PHASE-II, BHIWADI. ,,

5

SMT. POONAM SACHDEVA,
DIRECTOR OF
M/S SKIPPER ELECTRICALS
INDIA LIMITED AND M/S
SEIL POWER GEARS
LIMITED, F-667-668, RIICO
INDUSTRIAL AREA, PHASE-
II, BHIWADI. ,,

6

C.D. INTERNATIONAL,
A-8, NETAJI SUBASH PLACE,
BIGJOS TOWER,
PITAMPURA, DELHI. ,,

7

CHEMICAL DE
ENTERPRISES,
180-A, GALI ABDUL HALIM,
DELHI. ,,

8

MAGNUM PAPERS LTD.,
18/41, SITE-IV, SAHIBABAD
(UNIT-II), INDL. AREA,
201010.,,

9

ASIAN TEX EXPORTS,
P-19, RANDAV NAGAR,
MAYUR VIHAR, PHASE-I,
DELHI. ,,

10

SHREY INDUSTRIES PVT.
LTD.
153, SIKOF INDL. COMPLEX,
KATHUA, (J&K) ,,

11

M.L..M INDIA LTD.
2964, KUCHA MAIDASS,
BAZAR SITARAM, DELHI-

12

,
CENTURY ALUMINUM MFG.
CO. LTD.
113-PARK STREET, PODDAR
POINT, 3RD FLOOR, NORTH
BLOCK, KOLKATA. ,,

13

,
PASUPATI ACRYLON LTD.,
M-13, CONNAUGHT CIRCUS,
MIDDLE CIRCLE, NEW
DELHI. ,,

14

.
R.S. OVERSEAS PVT. LTD.
31-B, BHAGWANT SINGH
MARKERT, BAHADUR GARH
ROAD, DELHI. ,,

15

,
KARAN POLYMERS,
7/81, ARJUN GALI, VISHWAS
NAGAR, SHAHDARA, DELHI.
”

16

,
FLAIR IMPEX,
101 PATEL HOUSE, RANJIT
NAGAR COMPLEX, NEW
DELHI. ,,

17

,
SHREE KRISHNA
INTERNATIONAL,
342, SHIVAJI MARKET,
VILLAGE-PITAMPURA,
DELHI. ,,
,

SETHI OIL & SOAP
INDUSTRIES,
30114, GALI NO. 4, MASTER
MOHALLA, LIBASPUR,
DELHI. . ,,

INDISAN EXPRESS NEWS
PAPERS (MUMBAI) LTD.,
EXPRESS TOWERS,
NARIMAN POINT, MUMBAI.

SANTOSH MARKETING,
H-54, EAST JYOTI NAGAR,
LONI, SHAHDARA, DELHI. ,,

INTEX TECHNOLOGIES
INDIA LTD.,
D-18/2, OKHLA INDL. AREA,
PHASE-II, NEW DELHI. ,,

MAGPIE INDIA,
400, GDILT NORTH EX.
TOWERS, A-09, NETAJI
SUBASH PLACE, RING
ROAD, PITAMPURA, DELHI. ,,

SMD INTERNATIONAL (P)
LIMITED,
A-09, NETAJI SUBASH
PLACE, OD-ITL, RING ROAD,
PITAMPURA, DELHI. ,,

K.P. INTERNATIONAL,
F-47, D.B. GUPTA MARKET,
KAROL BAGH, NEW DELHI. ,,

25

,
SAFFIRE INTERNATIONAL
PVT. LTD.
H-3, GT KARNAL ROAD,
INDL. AREA, DELHI. ,,

26

,
ANKIT ELECTRONICS,
11, OLD LAJPAT RAI
MARKET, DELHI. ,,

27

,
HARYANA IMPEX PVT. LTD.
203, AMBER TOWER,
MANIWALA BAGH,
AZADPUR, DELHI. ,,

28

,
NUPUR OVERSEAS,
C-5, MANDOLI INDL. AREA,
VILLAGE- SABOLI, DELHI. ,,

29

,
PANCHSHEEL SOAP
FACTORY,
C-2, 13, PHASE-II, MAYAPURI
INDL. AREA, NEW DELHI. ,,

30

,
ALLIANCE ALLOY PVT. LTD.
PLOT NO. 42, SECTOR-6,
FARIDABAD. ,,

31

.
RUPSY ENTERPRISES,
6364, 2ND FLOOR, ROOM NO.
9, GANPATI MARKET, NAYA
BANS, DELHI. ,,

32

,
UNIVERSAL STEEL
COMPANY,
TA-9611, TUGLAKABAD
EXTENTION, OPPO. TARA
APARTMET, NEW DELHI. ,,

33

,
OMEGA UDYOG,
B-30, DDA MARKET,
RAGHUBIR NAGAR, DELHI. ,,

34

,
PRINT CRAFTS,
16-A/19 WEA, AJMAL KHAN
ROAD, NEW DELHI. ,,

35

,
SIDDARTHA MARKETING,
308, VILLAGE-
KARKARDUMA, DELHI-
110092 ,,

36

.
LAXMI SALES
CORPORATION,
10489, SADAR THANA ROAD,
NEW DELHI. ,,

37

.
NSN TRADING CO. PVT. LTD.
22, SAWAN PARK
EXTENSION, ASHOK VIHAR,
PHASE-III, DELHI. ,,

38

.
PANNU IMPEX,
203, AMBER TOWER,
AZADPUR, COMMERCIAL
COMPLEX, DELHI. ,,

39

,
KAKS AND BILLS PVT.
LIMITED,
325, MASJID MOTH, SOUTH
EXTENSION-II, NEW DELHI.
,,

40

,
CHADHA TYRE TRADERS,
69, TRANSPORT CENTRE,
ROHTAK ROAD, NEW DELHI.
,,

41

,
NARAYANI OVERSEAS,
WZ 1503, NANGALI RAI, NEW
DELHI-110046. ,,

42

,
S.S. METALS,
E-3, NEHRU GROUND,
FARIDABAD. . ,,

43

,
APS ENTERPRISES PVT. LTD.
17113, RAJEEV NAGAR,
MANDOLI, DELHI-110093,,

44

,
RMI METAL (P) LTD.,
VILLAGE-LIWASPUR, P.O.
BAHALGARH, SONEPAT. ,,

45

,
KIRAN METALS,
PLOT NO. 69, SECTOR-27-A,
FARIDABAD, HARYANA. ,,
,

SIGHT & SOUND INDIA,
B-73, 1ST FLOOR, GREATER
KAILASH-I, NEW DELHI. ,,

,
RADHA KISHAN KHUSHI
RAM,
A-14/1, MAYAPURI PHASE-I,
NEW DELHI. ,,

,
RADIUM IMPORTS PVT. LTD.
2544/6, 3RD, FLOOR, BEADON
PURA, NEW DELHI. ,,

,
INSULATING MATERIAL
CORPORATION,
9, VITHALDAS ROAD, 2ND
FLOOR, 23, BULAKIDAS
BLDG, ABOVE VIRESHWAR
HOTEL, LOHAR CHAWL,
MUMBAI. ,,

,
ELECTRO TRANS,
42-B. VITHALDAS ROAD,
DEVKARAN MANSION NO. 9,
LOHAR CHWL, MUMBAI. ,,

,
A J CORPORATION,
80/90, LOHAR CHAWL, 1ST
FLOOR, UMRIGAR BLDG,
MANGALDAS ROAD,
MUMBAI. ,,

,
VIJAI ELECTRICALS LTD.,
5-3-648/1 AND 2, SOMAJIGUDA, OFFICE
RAJ BHAWAN ROAD, HYDERABAD. ,,

53

,
GAURAV ENTERPRISES
1826/II/68, BHAGIRATH
PALACE, CHANDANI
CHOWK, DELHI,,

54

,
CAPITAL POWER SYSTEMS
LTD.
B-38/B-40, SECTOR-IV,
NOIDA (UP),,

55

,
SARA INDUSTRIES
6-56/2/IE, PLOT NO. 170 P P
IDPL KUKATPALLY,
HYDERABAD.,,

56

,
GR TRADERS
63, KITOHEEN GARDEN LANE,
LOHAR CHAWL, MUMBAI,,

57

,
JAGDISH ELECTRONICS
(INDIA) PVT. LTD.
GAT NO. 62, PIRANGUT
VILLAGE, LAVALE PHATA,
MULSHI TALUKA, PUNE.,,

58

,
ARIHANT SYSTEMS &
ELECTRICAL PVT. LIMITED
24/4866, ANSARI ROAD,
DARYAGANJ, NEW DELHI ,,

,

59

JAQUAR & COMPANY
LIMITED
A-6, WAZIRABAD INDL.
AREA, DELHI.,,

60

JAQUAR MERCANTINE
D-26, SMA CO-OPERATIVE
INDL. ESTATE, GT KARNAL
ROAD, DELHI.,,

61

DEEPAJ TRADERS
8/03, SUCH ANGAN SOCIETY,
STATION ROAD,
NALASOPARA (WEST),
DISTT. THANE.,,

62

ZILLION IMPEX PVT.
LIMITED
A-161, 1ST FLOOR, PREET
VIHAR, DELHI.,,

--

Other Appellants and Respondents as per Annexure

Copy To

63 Advocate(s) / Consultant(s):

**PIYUSH KUMAR,ADV
B-25, LAJPAT NAGAR - III,
NEW DELHI**

64 Additional Party's Name & Address :

65 Bar Association, CESTAT, Delhi

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

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

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

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

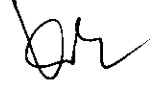
70 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

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

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

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

74 C.D.R. 75 Office Copy 76 Guard File



Asstt. Registrar(CUSTOMS Appeal Branch)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
COURT NO. III**

Customs **Appeal No. 269-329/2010-EX[DB]** *Cu*

[Arising out of Order-In-Original No. VIII (ICD) TKD/Adj./Commr./71/2008/10198 dated 26-02-2010 passed by CCE, Noida]

For approval and signature:

Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Mr. Rakesh Kumar, Technical Member

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

CCE, Delhi

Appellant

Vs.

M/s. Skipper Electricals India Ltd.

Respondent

Coram: Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Mr. Rakesh Kumar, Technical Member

Appearance:

Shri Amresh Jain, DR for the Appellants
Shri S.Vasudaran, Shri Avinash Mehta, Shri M.S.Bhatia,
Shri Piyush Kumar & Ms. Reena Rawat, Advocate for the
Respondent

Date of Hearing: 17.09.2014

Date of Decision:

54356 - 54416/2014

FO ORDER NO. /2014



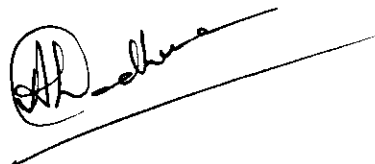
Per Ms. Archana Wadhwa:

Being aggrieved with the order passed by the Commissioner (Appeals) vide which he has vacated the show cause notice issued to the respondents, revenue has filed the present appeals. As all the appeals are directed towards the same impugned order passed by the Commissioner, we pass a common order in all the appeals.

2. As per facts on record in pursuance of an intelligence collected that M/s. Skipper Electricals (India) Ltd., Bhiwadi (hereinafter referred to as M/s. SEIL for brevity sake), and M/s. Seil Power Gears Ltd. Bhiwadi (hereinafter referred to as M/s. SGPL for brevity sake), both sister concerns, were exporting their products i.e. transformers and parts thereof to the African Countries viz. Nigeria & others, under Export Promotion Schemes viz Duty Entitlement Pass Book, Duty Free Replenishment Certificate/Duty Free Import Authorization (DEPB, DFRC, DFIA) etc. by over-valuation of the same on account of trade/agency commission, the matter was taken up for investigation.

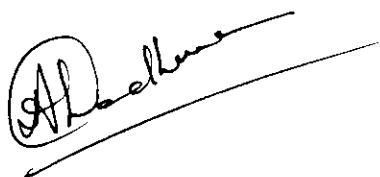
3. Searches were conducted on 6.8.2007 at the premises of the said companies and relevant documents were seized wherever found.

4. From the documents seized, retrieved from the laptop and received from the Bank, Ports, Transferees of the DEPB/DFRC Licenses and statements of various persons, M/s SEIL and M/s. SPGL and investigations carried out, it appeared that M/s. SEIL and M/s. SPGL were exporting their goods by declaring commission @ 12.5% of f.o.b.



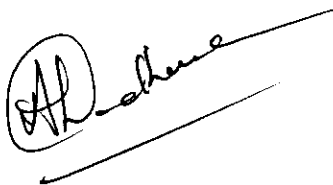
value for the foreign agents in the invoices and shipping bills filed before Customs and claiming export incentives on total f.o.b. value inclusive of 12.5% commission. However, in the invoices sent to their overseas buyers, they were not declaring the said commission. It appeared that, there was no foreign agent involved with regard to securing/procuring the export orders mainly from the government agencies of Nigeria. These government agencies were awarding the export orders to the manufacturer on the basis of tenders filed by them along with drawing and designing of the goods. Thus, M/s. SEIL and M/s. SPGL had inflated the export value to the extent of 12.5% on account of commission and had availed undue export incentives on the inflated value.

5. From the Tender/Export Order documents seized from the office of M/s. SEIL and M/s. SPGL, It appeared that they were exporting Power Distribution Transformers and parts thereof by filing the tender documents with various government agencies of Nigeria and Sri Lanka on the basis of open Bid announced/circulated. In accordance with open Bid, they were submitting Tender Form along with Design and Drawing of Sample and Photograph, Various Test Results, ISO Certificate, Catalogues of the Company and Proforma Invoice of the goods to be supplied. In the Tender Form, there was no clause regarding dealing through any foreign agent. They were exporting these goods against the contract made between the overseas buyer and exporter. The contract contained various aspects viz. scope of work, delivery/completion period, total contract cost, validity of offer,

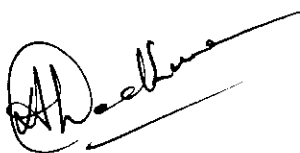
A handwritten signature in black ink, appearing to be 'A. H. S. S.', is written over a horizontal line.

terms of payment, contract documents, packing, guarantee, rejection and acceptance. In the contract also, there was no clause regarding any dealing through foreign agent or any mediator in the said deal. The contract bore the signature of the exporter and overseas buyers and witnesses. There was no signature of the foreign agent in the contract. The terms of payment indicated that the payment would be made against a confirmed and irrevocable, 100% cash backed letter of credit. Subsequently, irrevocable letter of credit used to be executed by the overseas buyer in favour of exporter through their banker. In the letter of credit also, there was no clause regarding foreign agent/mediator. Thus, it appeared that there was no foreign agent/agent/mediator in procurement of export orders from the government agencies which also transpired from the various statements.

6. In accordance with contract and letter of credit, M/s. SEIL and M/s. SPGL used to export the goods to their overseas buyers under the Shipping Bills filed by claiming the export incentives viz DEBP, DFRC, DFIA etc. Further, from the Invoice and Shipping Bills filed by the exporter before the customs authorities it appeared that they were regularly declaring commission at the flat rate 12.5% of f.o.b. value (in most of the cases) whereas on scrutiny of the invoices sent to the overseas buyer, it was found that there was no declaration regarding commission. Thus, it appeared that there was no agent for procuring the export orders thereby no commission was declared in the invoices sent to the overseas buyers.

A handwritten signature in black ink, consisting of a circular emblem followed by a stylized name, with a long horizontal line extending to the right.

7. In view of the above, it was evident that M/s. SEIL and M/s. SPGL were admittedly securing/procuring their export orders through open bids announced/published by the government agencies by way of various means viz. New Papers, Web Sites etc. Further, one of their buyers, M/s GTA Engineering Nigeria Ltd. was their subsidiary company. Thus, there was no agent between the exporters and buyers of the goods in connection with procurement of export orders. Thus, M/s. SEIL and M/a. SPGL were inflating the prices of exported goods to the extent of 12.5% of f.o.b. by claiming the commission in order to avail undue export incentives on inflated value. The DGFT's Policy Circular No. 55 (RE-98) dated 10th December 1998 & Circular No. 24 (RE-2004)2002-07 dated 14th Jan. 2004 and CBEC Circular No. 64/2003-Cus dated 21.07.2003 clearly stipulate that export incentives was permissible on f.o.b. value without deducting the agency commission up to the limit of 12.5% of f.o.b. value. It was also clarified that agency commission exceeding this limit should be deducted from the f.o.b. value for granting export incentives under Drawback/DEPB/Advance License/DFRC Schemes. From these instructions, it was clear that if agency commission was more than 12.5% of f.o.b., it has to be restricted only up to 12.5% of f.o.b. and if it was less than 12.5% than it has to be taken on actual basis for granting the export incentives. Furthermore, as per CBEC's Circular dated 21.7.2003, the agency commission was payable to the agent who helped abroad for securing their export contracts. Also, from Master Circular No. 09/2006-07 dated 1.7.2006 of RBI, it was clear that agency commission should be paid in connection with export and



no commission can be claimed in respect of exports by Indian firms to their subsidiaries. In this case, the contracts/orders were obtained directly through open tender by the exporters and there did not appear to be any role of any agent for securing the export order. Thus, no agency commission at all appeared to be admissible and accordingly, the excess export incentives availed on such overvalued amount appeared to be recoverable.

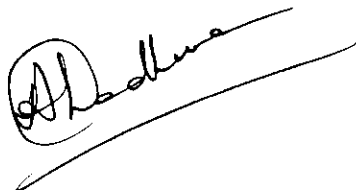
8. On the above basis, the respondents were issued show cause notice for denying the various export benefits obtained by them. The other notice, who were transfer of DEBP,DFRC,DFIA license and had availed the exemption from duty, were called upon the show cause against denial of the import benefits the respondents contested the show cause notice on various grounds, which stand accepted by the Commissioner. Hence the present appeal.

9. For better appreciation of the reasons adopted by Commissioner, we reproduced the relevant para^{from} the impugned order of Commissioner:-

59.1. I further observe that the main points to be determined in the case are the following:

i) The commission claimed by M/s. SEIL & M/s. SPGL cannot be allowed as there was no mention about the payment of Commission in the tender documents.

ii) They were sending part of their export to M/s. GTA Engineering Nigeria Ltd. And as per the RBI master Circular dated 01.07.06 payment of commission was prohibited on export made by Indian partners towards equity participation in an overseas wholly owned subsidiary. M/s. GTA Engineering was a subsidiary of M/s SEIL.



iii) M/s. SEIL & SPGL were inflating the prices of export goods to the extent of 12.5% of FOB by claiming the commission in order to avail export incentive on inflated value.

iv) DGFT's Policy Circular No 55 (Re-98) Dated 10.12.98 and Circular No. 24 (Re-2004)/2002-07 Dt. 14.01.2004 and CBEC Circular No. 64/2003 Customs dated 21.07.2003 clearly stipulate that export incentives are permissible on FOB value without deducting the agency commission upto the limit 12.5% of FOB value. Agency commission exceeding this limit should be deducted from FOB value for granting export incentives.

v) Hence, if agency commission was more than 12.5% of FOB it was to be restricted to 12.5% of FOB and if it was less than 12.5% than it was to be taken on actual basis for granting the export incentives.

vi) No agency commission can be claimed in respect of export by Indian firm to their subsidiary as per master circular of 9/2006-07 dated 01.07.2006 of RBI.

vii) The correct transaction value of the exported goods was only 87.5% of the declared value.

viii) Hence, the export incentive was obtained through fraudulent means by inflating the declared value in the Shipping Bill and consequential legal penalties should follow.

59.2. On going through the Show Cause Notice and the reply of M/s. Skipper Electricals India Ltd. which was the merged entity of M/s SEIL and M/s. SPGL, I observe the following:-

a) It was seen from Para 8.2 of the Show Cause Notice that they were exporting the goods on the basis of filing the tender documents to various government agencies in Nigeria on the basis of open bid announced through Newspaper, short notices, magazines, web etc.

b) It was also seen that the tender documents reflected the same price which was declared by M/s. Skipper Electricals India Ltd. in their shipping bills.

c) The tender was based on open bid and that too by government agencies and the amount was actually received by the exporter.

Hence, I do not find any merit in the contention that the prices was inflated by 12.5 and the value of export good should have been taken as 87.5 of the declared value.

d) The RBI master Circular 06/2007 speaks only about prohibition on payment of commission towards equity participation in overseas wholly owned subsidiaries by an Indian Partner. In the instant case annexure A-1 to the Show Cause Notice, shows the commission paid abroad. None of the amount had gone towards equity participation on M/s. GTA Engineering Nigeria Ltd. Hence, the payment of commission was not hit by the RBI circular.

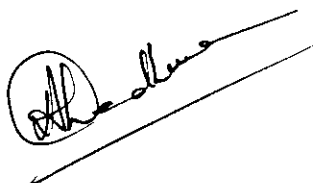
e) Based on DGFT and CBEC circular that a commission upto 12.5% was allowed to be paid by the exporter without affecting the value of the export incentives. The exporter had actually taken only 2.9 crores which came to an average of 4 to 5% as against the limit of 12.5% claimed /claimable.

f) The contention at para 8.7 of the Show Cause Notice that a reading of DGFT Policy Circular No. 55 dated 10.12.98 and No. 24 dated 14.01.2004 along with CBEC Circular No. 64/2003 Customs dated 21.07.2003 shows that if agency commission was less than 12.5% than it has to be taken on actual basis for granting the export incentive, does not appear to be correct. On a proper reading of Circular what comes out clearly was that any commission paid upto the limit of 12.5% of the FOB value need not be deducted from the FOB value for granting export benefits and anything above 12.5% should be limited to maximum of 12.5% limit. There was nothing in these Circulars that any thing less than 12.5% was to be restricted to actual as mentioned in para 8.7 of the Show Cause Notice.

59.3. From the above it can be seen that:

I The exports were mainly to government agencies on the basis of tenders called by an open bid.

II It was commonsense and reasonable that when an open tender was called by any government agency for purchasing any goods it was the lowest tender, which was accepted and to get the order the tender has to be placed with the lower price, which clearly shows that the allegation of inflating the price by 12.5% by the tenderer (i.e. the exporter) while filing a tender was totally misconceived as it will be a



self defeating proposition because higher price may lead to rejection of bid.

III. Further the entire sum as per the tender which was same as the value declared in the shipping bills had been received by the exporter as evidenced from the Bank document annexed to the Show Cause Notice.

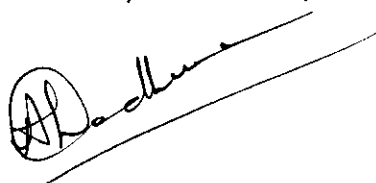
IV. There was no requirement either under the Custom Act or under DGFT's regulation that the shipping bills and the tender documents should have specific clause regarding the amount of commission paid and the reasons for payment of such commission.

V. Though the party had claimed 12.5% on the shipping bills, the actual commission paid hardly comes to 4-5% as evidenced from annexure-I to the Show Cause Notice which also shows the bonafide of the party. In case the party was having malafide, they could have easily sent out foreign exchange of 12.5% of the FOB as agency commission abroad so as to keep this money in Accounts abroad. The same was not done by the party.

VI. It can be seen from Annexure A-I to the Show Cause Notice, there was no payment of Commission towards equity participation in the overseas wholly owned subsidiary Co. of M/s. SEIL in Nigeria i.e. M/s. GTA Engineering Nigeria Ltd. Hence, there was no violation of RBI circular.

(a) The agency commission paid to various persons was shown in Annexure A-I to the Show Cause Notice and M/s. GTA Engineering Ltd. was not one of them. Further though it had been claimed that 125% commission shown in Shipping Bill was to be paid towards export of goods made to M/s GTA Engineering Ltd. no proof has been adduced by the DRI to show that this amount of commission or even a lesser amount was paid to M/s GTA Engineering Ltd. The perusal of the records also shows that no commission was paid. Claiming a commission to be payable was something different from making an actual payment.

(b) The RBI master circular and the various other circulars by the DGFT and Customs department has nowhere stated that the party should declare the name of the agents, the reasons for payment of commission to the agents or the help rendered by these agents or any

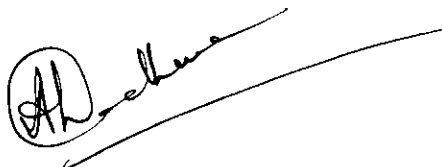


other reasons for paying the commission to the agents to be mentioned anywhere in the Shipping Bill, in the tender documents or in the invoices. It has also been observed that there is no provision under Foreign Trade Policy (FTP) Customs Act and the Foreign Exchange Management Act (FEMA) which stipulate that the name and address of overseas agent to whom commission is paid should be incorporated in the contract tender documents, letter of credit, Shipping Bills, etc. Further, on a perusal of exports happening from ICD, Tughlakabad it has been found that exporters generally do not mention the name of the overseas agent in the Shipping Bill, contract and order forms and the department is consistently granting the export benefits on full FOB as long as the said commission paid to the overseas agent is within the limit of 12.5% of FOB.

VII. The charges against the exporters mentioned in Para 12.1 were as follows "It appears that there was no foreign agent in procuring the export order from the government agencies and other private companies and there was no clause in any of the documents for an agent and related agent commission. But the exporters appears to be claiming the foreign agent commission in the export documents fraudulently for inflating FOB value of exports in order to avail undue export incentives and had shown realization of export proceeds through illegal means, in violation of the Foreign Exchange Management Act 1999 and Regulations issued there-under and all the RBI guidelines issued in this regard, as detailed above thus, these can not be construed as export proceeds at all". And in Para 10 "the exporter had realized export proceeds to the extent of inflated value but the same appears to have been realized on the other grounds which have no nexus with the exported goods. It is also settled law that realization of the declared export value by the exporter does not prove that export value had been correctly declared."

VIII. Based on the discussion above, I find the allegation that the price of export goods was inflated by 12.5%, is totally misconceived and preposterous. Since, the value declared in the shipping bills was same as confirmed in the tender documents, as mentioned in the invoices and as was received by them as remittance remained factually correct, I come to the conclusion that export incentives were taken correctly. Hence, none of the charges are proved against the exporter.

IX. Since, no charges survives against the exporter, hence, the import made by the various importers using the export incentive,



received by the importers and transferred to these importer, were also done correctly. As the demands against the said notices, are not being confirmed, so, I am also not waiting for the receipt of the RUDs (Relied upon Documents) by the said notices from the DRI for finalizing the issue."

10. We appreciate the contentions made by both the sides, ^{and} ~~we~~ have gone through the impugned order. The dispute relates to the so called commission paid by the Respondent to the foreign persons.

11. We really fail to understand the objection of the Revenue. On one hand, it is being contended that no commission was payable as the entire contract between the respondents and their foreign buyers was a direct contract and no Commission Agent was involved. As per the Respondents, the said commissions are not exactly in the nature of the commission interests, the same are in the nature of the reward to the foreign persons, which have held the appellant in various fields and which stands paid to them through their own pocket. This fact reveal that the appellant have received the entire ^{consideration} ~~construction~~ from the one buyer and the export benefits filed on the entire consideration so ^{received} ~~receipt~~ without being effected by any payment made by them to the foreign agent.

12. Apart from that we also note that the Central Board of Excise and Customs Circular No. 64/2003-Cus dated 21.07.2003 has stipulated as under:-

"4. The issue has been examined in the Board. It is observed that RBI has not revised its earlier instructions as regards the limit of payment of agency commission. Therefore, it is clarified that the field formations may continue to permit export benefits on f.o.b. value without deducting agency commission if such commission is up to the limit of 12.5% of f.o.b. value. Agency commission exceeding this limit

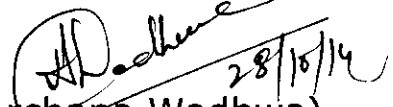


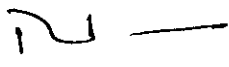
should be deducted from the f.o.b. value for granting export benefits under Drawback/DEPB/Advance Licences/DFRC Schemes."

13. It is clear from the Circular that any commission up to the limit 12.5% is not required to be deducted from FOB value for grant of export benefits. The said circular is fully applicable to the facts of the present case.

14. In view of the above, we find no merits in the Revenue's appeals. The same is accordingly rejected.

(Pronounced in the open court on 10/11/14 AD)


(Archana Wadhwa)
Member(Judicial)


(Rakesh Kumar) 10/11/14
Member(Technical)

Jyoti