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

Appeal No. C/301-314 & 535-536 AND 539 /2005 - CU[DB] Date 23/10/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S SRG INTERNATIONAL
VILLAGE KANGANWAL ROAD, JUGIANA,
LUDHIANA

M/S SRG INTERNATIONAL Appellant

Vs

C.C. (PREVENTIVE) AMRITSAR Respondent

I am directed to transmit herewith a certified copy of Final order No.C/395-411/08-CUS. DATED 16.10.08

passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :
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12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
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Assistant Registrar
(Customs Appeal Branch)

17. M/S. GARG FORGING & CASTING LTD.
VILLAGE KANGANWAL ROAD, JUGIANA, LUDHIANA

P.T.O

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. II

Customs Appeal Nos. 301-314 of 2005 and 535-536 and 539 of 2006

[Arising out of the Order-in-Original No. 17/Cus/2005 dated 31/03/2005 passed by The Commissioner of Customs, Amritsar.]

For Approval and signature :
Hon'ble Shri S.S. Kang, Vice President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:
3.	Whether their Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities?	:

M/s SRG International & ors. — Appellant

Versus

CC, Amritsar — Respondent

Appearance

Shri Kamal Jit Singh, Advocate – for the appellant.

Shri R.K. Verma, Authorized Representative (DR) – for the respondent.

CORAM:**Hon'ble Shri S.S. Kang, Vice President**
Hon'ble Sh. Rakesh Kumar, Member (Technical)

DATE OF HEARING : 25/06/2008.
DATE OF DECISION: 16-10-08

Final Order No. C/395 to 411/08 Dated : 16/10/08

Per. Rakesh Kumar :-

This is a common order in respect of Appeal No. C/301-314 of 2005 filed by M/s SRG International, Ludhiana (hereinafter referred to as M/s SRG) and 13 other appellants and three review appeals No. C/535,536 and 539 of 2006 filed by the Revenue against the impugned order-in-original No. 17/Cus/05 dated 14/03/05 passed by Commissioner of Customs, Amritsar. The facts of the case leading to these appeals are, in brief, as under.

1.1 M/s SRG, M/s Garg Forging & Castings Ltd., Ludhiana (hereinafter referred to as M/s Garg Forging), M/s Ragini Steels Pvt. Ltd., Ludhiana (hereinafter referred to as M/s Ragini), M/s Garg Concast Ltd., Ludhiana (hereinafter referred to as M/s Garg Concast), M/s SRG Forge Overseas, Ludhiana (hereinafter referred to as M/s SRG Forge) and M/s Goodwill Impex, Ludhiana (hereinafter referred to as M/s Goodwill) are six companies of which one Shri Vinod Garg is either proprietor or Managing Director and all these companies are controlled by Shri Vinod Garg. These companies were exporting steel and rubber products declared to be – 'Gear cutting tools of cobalt bearing High Speed Steel', 'Heat resistant rubber tension tape', 'track wheel' etc. under drawback & DEPB claim. On receipt of information that Shri Vinod Garg was making fraudulent Drawback and DEPB claims by mis-declaring the goods being exported in the name of various companies owned/controlled by him, the officers of DRI, detained and examined 16 export containers declared to contain 'Gear cutting tools made of high speed steel', 'heat resistant rubber tension tape' and 'Track wheel'. These containers had already been cleared by the Customs officers of CFS Ludhiana and were on way to Nhava Sheva for shipment. The goods, covered by 74 shipping bills, declared to be valued at Rs. 8.69 crores, were, on examination, found to be cut pieces of bars and rods of mild steel, rubber tape of pre-vulcanized rubber and track wheels in unmachined and semi-finished condition and their actual value was determined by a chartered engineer as Rs. 44.05 lakhs. The samples of the goods drawn were also tested by the Central Revenue Control Laboratory (CRCL), which also confirmed that the gear cutting tools were just cut pieces of bars & rods of mild steel instead of high speed cobalt bearing steel, the rubber tape were of un-vulcanized steel and track wheel were in unfinished condition. The total amount of drawback and DEPB benefits claimed on the basis of the declared value was Rs. 3.06 crores as against their actual market value of Rs. 44.05 lakhs. It was also found that the test of the samples drawn from these very containers by the customs officers of CFS Ludhiana showed the goods to be as per the declaration, which indicated that the goods actually exported were different from the goods from which the samples had been drawn and this indicated collusion between the Exporter and the Customs officers of CFS Ludhiana. The 16 containers were placed under seizure. A show cause notice No. 855 (14) ASR/2000/313-330 dated 22/05/01 was issued to the exporters for confiscation of the seized goods, disallowing the drawback & DEPB benefit and imposition of penalty under Section 114 of the Customs Act. Since these six companies had exported goods declared as – 'Gear cutting tools of high speed steel', 'heat resistant rubber tension tape' and 'Track wheel' earlier also under drawback & DEPB claim, on reasonable belief that in those exports also the description may have been misdeclared, investigations into past exports of these items by the six companies of Shri Vinod Garg were initiated. In course of investigation, inquiry was conducted with – (a) the custom officers of CFS Ludhiana – Shri M.P. Singh, Inspector; Shri T.N. Dhar, Inspector; Shri D.R. Ahuja, Superintendent and Shri A.K. Kaul, Superintendent who had examined the goods ; (b) Shri Vinod Garg and his brother Shri N.D. Garg ; (c) Manjit Singh, the authorized signatory of the above-mentioned six companies of Shri Vinod Garg and (d) other employees of shri Vinod Garg - Shri Sanjeev Kumar, Shri Shambhu Kumar, Shri Vineet Kumar Saggar , Shri Kumar Gupta and Shri Pratap Nath Pandey.

1.1.1 The customs officers, on inquiry, after explaining the procedure for processing of the shipping bills and examination and clearance of export cargo, stated that while 'Gear cutting tools of high speed steel' and 'heat resistant rubber tape' had been exported under drawback claim, 'Track wheels' had been exported under DEPB and that as per the Board's circular, samples had been drawn only from the goods exported under drawback claim where the quantum of drawback claim was more than Rs. one lakh. They, however, could not give any explanation as to why in respect of the 16 containers examined by the DRI after clearance from CFS Ludhiana, while as per the test report of the samples drawn by the DRI officers, the goods were substandard/semi-finished, as per the test of the samples drawn by them (the custom officers of CFS, Ludhiana), the goods were prime quality goods.

1.1.2 On inquiry with Shri Vinod Garg, he in his statements dated 22/06/2000 and 25/08/2000 stated that while 'heat resistant rubber tape' had been purchased for export from outside, the – 'Gear, cutting tools of high speed steel', and 'Track wheels' had been manufactured in his factory – M/s Garg Forging and produced the purchase bills for purchase of 'heat resistant rubber tension tape' and raw material for manufacture of 'Gear cutting tools of high speed steel' and 'Track wheel'. But the firms who are supposed to have supplied these items – M/s Krishna Hardware & Mill Store, New Delhi; M/s R.K. Steel Traders, Mandi Gobindgarh; M/s Rama Krishna Steel Traders, Mandi Gobindgarh; M/s Jindal Alloys, Mandi Gobindgarh and M/s Jyoti Steel, Mandi Gobindgarh, were on inquiry, found to be fictitious. However, in the bank accounts of M/s Jindal Alloys, M/s Jyoti Steels, M/s Krishna Hardware & Mill Store and M/s Rama Krishna Steel in State Bank of Hyderabad, Ludhiana, the proprietors of these firms were shown to be Shri N.D. Garg, brother of Shri Vinod Garg, and Shri Shambhu Kumar, Shri Vineet Kumar, Shri Sanjeev Kumar and Shri Pratap Nath Pandey, who are employees of the companies of Shri Vinod Garg and as per the bank's record, all these accounts had been opened on introduction from Shri N.D. Garg and Shri Manjit Singh. From the statement dated 06/08/02 of Shri Manjit Singh it appeared that in the factory of M/s Garg Forging, only bogus production of 'Gear cutting tools made of high speed steel' was being shown without actually producing this item.

1.1.3 In course of inquiry it was also learnt that Shri Vinod Garg was also exporting the same items i.e. 'Gear Cutting tools of high speed steel', 'heat resistant rubber tape' and 'track wheels' under drawback & DEPB claim in the name of M/s Contessa Commercial Co. (P) Ltd., Kolkata, M/s SRM (P) Ltd., Kolkata, M/s ASK Exports, Kolkata and M/s Varun Enterprises, Bhagalpur, from CFS Ludhiana and these companies were controlled by one Shri Sunil Kishorepuria. Shri Manjit Singh was signing the export documents of these companies also as authorized representative of these companies. Shri Sunil Kishorepuria in his statements dated 21/08/02 and 22/08/02 admitted that he allowed Shri Vinod Garg to export goods in the name of M/s Contessa Commercial Co., M/s SRM Pvt. Ltd., M/s ASK Exports and M/s Varun Enterprises on commission of 1.5% of the export turnover, that he accepts the liability of paying back the drawback of Rs. 2.6 crores already taken by Shri Vinod Garg by making exports in the name of these four companies, that he has surrendered the pending drawback claim of Rs. 92 lakhs and that he has paid an amount of Rs. 11.30 lakhs towards his liability.

1.1.4 The shipping bills filed by M/s SRG, M/s Garg Forging, M/s Ragini, M/s Garg Concast, M/s SRG Forge and M/s Goodwill mentioned M/s U.K. International, Leicester; M/s EXIM Agency, Isle of MAN, U.K.; M/s Kar & Man Ltd., England; M/s British Motor Co., Leicester, U.K.; M/s Brockel Motor Agency, England and M/s Dairy Rice Edible Nuts and Pulses, Leicester, U.K. as the consignees. On inquiry through Indian High Commission in London, all these firms/ companies were found to be fictitious.

1.1.5 Inquiry was conducted with the concerned shipping lines about eleven container shipped under shipping bills No. 2343-2350 dated 06/04/2000, 2719-2728 dated 27/04/2000, 1538-1540 dated 13/3/2000, 2298-2305 dated 03/04/2000, 168-169 dated 03/02/2000 and 1541-1543 dated 13/03/2000 filed by M/s Garg Forging, M/s SRG, M/s Goodwill, M/s Ragini, M/s Garg Forging and M/s Goodwill and it was found that while all these consignments had been exported to U.K., the same had been offloaded at Dubai and cleared by M/s Aljabriah Metals Trading, Sarjah and in the documents filed before UAE customs for clearance, the value declared for

'Gear cutting tools', and 'heat resistant rubber tape' was U.S. $ 119/- per M.T. and U.S. $ 230 per M.T. respectively as against their FOB value of U.S. $ 7900/- per M.T. and U.S. $ 2100/- per M.T. respectively as declared in the shipping bills. Inquiry was made with State Bank of Hyderabad through which export proceeds had been received, the bank, vide letter No. DRI/674 dated 05/2/03 furnished the required information which showed that export-proceeds had been received from firms/persons other than those shown in the shipping bills. In most of the cases, the export proceeds had been received from Canada (Toranto), Dubai, U.S.A., U.A.E., Singapore, Egypt, Thailand, Israel and in some case, even from Mumbai.

1.2 In view of the above, a show cause notice No. 855 (14) ASR/2000/Pt/IV/1331 dated 03/10/2000 was issued to the Appellants asking them to show cause as to why –

(a) the goods exported by M/s SRG, M/s Garg Forging, M/s Ragini, M/s Garg Concast, M/s Goodwill and M/s SRG Forge, declared to be valued at Rs. 2,11,39,342/, on which drawback amounting to Rs. 1,25,04,440/- is pending and the goods declared to be valued at Rs. 6,31,29,863/- on which drawback amounting to Rs. 3,68,18,331/- has already been paid, should not be held to be liable to confiscation under Section 113 of the Customs Act, for misdeclaration of their description, quality and value, and why the drawback amounting to Rs. 1,25,04,440/- should not be disallowed and the drawback amounting to Rs. 3,68,18,331/- already paid should not be recovered with interest ;

(b) penalty under Section 114 of the Act should not be imposed on the above-mentioned six companies ; and

(c) penalty under Section 114 and 117 of the Act should not be imposed on Shri Vinod Garg, Shri N.D. Garg, Shri Sanjeev Kumar, Shri Shambhu Kumar, Shri Kumar Gupta, Shri P.N. Pandey, Shri Vineet Kumar and Shri Manjit Singh.

The show cause notice also show caused the custom officers Shri D.R. Ahuja, Superintendent; Shri A.K. Kaul, Superintendent; Shri T.N. Dhar, Inspector and Shri M.P. Singh, Inspector for imposition of penalty on them under Section 114 & 117 of the Act for conniving with Shri Vinod Kumar Garg in this drawback/DEPB fraud.

1.2.1 Subsequent to the issue of the show cause notice, some more evidence was collected and the same was incorporated in the show cause notice dated 03/10/02 vide addendum No. 855 (14)ASR/2000/239 dated 08/04/04.

1.3 The show cause notice was adjudicated by Commissioner, Customs, Amritsar vide the impugned order in original No. 17/Cus/2005 dated 14/03/05 by which –

(a) the goods v/a Rs. 2,11,39,342/- on which drawback claim is pending and the goods v/a Rs. 6,31,29,863/- on which drawback had already been paid, were held to be liable to confiscation under section 113 (d), 113 (i) and 113 (ii) of the Act, observing that since the goods have already been exported ,the same are not available for confiscation ;

(b) pending drawback claim of Rs. 1,25,04,440/- was disallowed and the demand for wrongly paid drawback amounting to Rs. 3,68,18,331/- alongwith interest was confirmed under Rule 16 of the Customs & Central Excise Drawback Rules, 1995 read with Section 75 of the Customs Act ; and

(c) penalties were imposed on all the noticees under section 114 of the Act except the four customs officers, in respect of which the penal proceedings were dropped.

1.3.1 While M/s SRG, M/s Ragini, M/s Garg Concast, M/s Goodwill, M/s Garg Forging, M/s SRG Forge, Shri Vinod Garg, Shri N.D. Garg, Shri Manjit Singh, Shri Sanjeev Kumar, Shri Shambhu Kumar, Shri Vineet Kumar, Shri P.N. Pandey and Shri Kumar Gupta, have filed appeals against the Commissioner's order challenging the denial of drawback and imposition of penalty on them, the Revenue has filed three review appeals No. C/535/06, C/536/06 and C/539/06 challenging the portion of the impugned order observing that since the goods have already been exported, the same are not available for confiscation and accordingly not imposing redemption fine in lieu of confiscation. The Revenue's appeals seek imposition of redemption fine in lieu of confiscation in respect of the goods held by the adjudicating authority to be liable for confiscation under Section 113 (d), 113 (i) and 113 (ii) of the Act.

2. Heard both the sides.

2.1 Shri Kamal Jeet Singh, Advocate, the learned counsel on behalf of the Appellants in appeal No. C/301-314/05, made the following submissions :-

(1) The present show cause notice alleges that since the seized goods, subject matter of another show cause notice, were found to have been misdeclared, the earlier consignments where the export has already been completed, must also have been misdeclared. Since the CRCL reports for these exports were in order, it has been alleged that the Appellants substituted the samples with the connivance of the offices. But the impugned order has dropped the penal proceedings against the officers on the ground that there is no evidence of their connivance with the exporters. Therefore there is no basis for denying the drawback/DEPB benefit on imposing penalty on the Appellants.

(2) Admittedly the goods had been exported out of India and the remittance had also been received by the Appellant companies, as certified by the banks. Hence drawback is admissible. In this regard reliance is placed on Hon'ble Supreme Court's judgment in case of **CC vs. Sun Industries [1988 (35) E.L.T. – 241 (SC)]** and Tribunal's judgment in case of **Wescon Exports Pvt.**

Ltd. vs. Commissioner [2007 (209) E.L.T. – 371 (Trib.)].

(3) The alleged demand has been made on the basis that the Appellants had misdeclared the description, weight, value etc. of the goods and on the same ground, Shri Vinod Garg was detained under COFEPOSA. But the detention order was quashed by the Hon'ble Supreme Court on the ground that there has been no misdeclaration in view of CRCL's reports. When the samples drawn by the officers were tested by the CRCL and the test reports confirmed the declared description of the goods, there is no basis for these proceedings.

(4) Addendum to show cause notice cannot be issued after receipt of reply to the show cause notice [Mahindra & Mahindra vs. CCE – 2006 (196) E.L.T. – 62 (T)]. Moreover the addendum introduces additional evidence in form of statements of Shri Vinod Garg, N.D. Garg, Manjit Singh and Vineet Saggar, which being involuntary, have been retracted. Moreover the statements of Shri Vinod Garg, N.D. Garg and Manjit

Singh had been recorded when they had been illegally detained. As per Tribunal's judgment in case of Aman Kirshor Prasad vs. CC, reported in 2006 (75) R.L.T. – 384, no reliance can be placed on statement recorded during illegal detention, which has been retracted later.

(5) Nothing has been brought on record as to who has stated that none of the foreign buyers existed at the given address and there have been diversion of goods. No evidence in this regard has been brought on record.

(6) Export is complete as soon as the goods leave territorial waters and remittance has been received in full and the custom authorities have no jurisdiction either for confiscation of the goods or to impose penalty. In this regard, reliance is placed on Tribunal's judgment in case of **J.G. Exports vs. CC – 2000 (121) E.L.T. – 754 (Trib. – LB)**, which has been affirmed by Hon'ble Supreme Court vide judgment reported in **2003 (154) E.L.T. – 353 (S.C.)**. No penalty can be imposed for the goods which are not available for confiscation [**Thomas Duff & Co. vs. Collector – 2000 (123) E.L.T. – 330 (Cal.)**]

(7) From every consignment, as per the prescribed procedure, three samples are drawn by the officers

wherever it is decided to draw the sample. 1st sample is sent to CRCL, 2nd sample is given to the exporter and 3rd sample is kept in the customs office for record. When the Revenue doubts the declared description and quality of the goods exported, the third samples, available in the office should have been got tested by the CRCL but this has not been done. In absence of any concrete evidence of misdeclaration, the benefit of doubt should go to the appellants.

2.2 Shri R.K. Verma, the learned Departmental Representative ,made the following submissions :-

(1) There was no manufacture of export goods in the factory, as confirmed by Shri Manjit Singh, the authorized signatory. The records were maintained to justify export by making false entries in the Central Excise records like RG-1 register and this fact has been accepted by Shri Manjit Singh in his statement. The fact that the goods being exported were sub-standard, is clear from the fact that immediately after detection of the fraud by DRI, certain consignments declared to be 'gear cutting tools of high speed steel', 'heat resistant rubber tension tape', 'track wheels', which were meant for export and were about to be presented to the Customs at CFS, Ludhiana, were called back by Shri Vinod Garg.

(2) 'Heat resistant rubber tension tape' and raw material for 'gear cutting tools' and 'track wheels' shown to have been purchased from certain firms which, were found to be non-existent. This was obviously deliberate act to thwart any attempt by the Revenue to reach the origin of the goods to know the actual description and value thereof.

(3) Shri Vinod Garg and Shri Manjit Singh in their statements have clearly admitted that the goods imported in past were similar to the goods seized by DRI.

(4) The goods are shown to have been exported to various firms in U.K. but on inquiry it was found that none of those consignees did not exist. Not only this, the export proceeds of the goods exported to the consignees in U.K. have been received from countries other than the consignee country – mostly from Canada (Toranto), Dubai, U.S.A., U.A.E., Thailand and even in some cases, from Mumbai. This is a clear indication that the exports were not genuine.

(5) On inquiry, it was found that the containers consigned to U.K. have been diverted to Dubai. Although the information about diversion of containers could be collected in respect of 11 containers only, yet it is very significant in view of the fact that the buyers firms, all of U.K., are fictitious. It was also found that

the goods diverted to Dubai were cleared there, by a person by declaring value, which is small fraction of their declared FOB value before the Indian Customs Authorities. The value of 'gear cutting tools' was declared in Dubai as U.S. $ 119-120 per M.T. as against their declared FOB value of U.S. $ 7900 per M.T. and similarly the value of heat resistant rubber tape was declared in Dubai as U.S. $ 230 per M.T. as against their declared FOB value of U.S. $ 2100 per M.T. before the Indian customs. This clearly shows that the goods exported were sub-standard/scrap and not the prime quality gear cutting tools of high speed steel, heat resistant rubber tape and track wheel.

(6) Shri N.D. Garg, brother of Shri Vinod Kumar Garg in his statement dated 24/08/03 admitted that the firms belonging to him were created on paper only to facilitate his brother by showing bogus invoices, that the goods exported to the parties in U.K. were diverted to Dubai, that those goods could never be accepted in U.K., but in Dubai their agent managed their clearance and that the difference between the declared value received from foreign countries and actual value of exported goods was being returned to one Shri Harmeet Rajpal alias Inder Pal Singh alias Bobby in Dubai, through hawala transactions.

(7) Since the goods exported have been misdeclared in terms of value description in quality, the same would be liable for confiscation under Section 113(d), 113 (i) and 113 (ii) of the Act. Even though the goods are not available for confiscation but still personal penalty is imposable on appellant under Section 114 of the Customs Act. In this regard, reliance is placed on Hon'ble Calcutta High Court judgment in the case of **Euresian Equipment and Chemical Limited and others vs. Commissioner of Customs and others** reported **1980 (6) E.L.T. – 38 (Cal.)**.

(8) Main reliance has been placed by the appellants during course of hearing on the fact that the test reports in respect of the samples drawn at the time of export show the goods to be as per the description in the shipping bills. In this regard, it is to submit that a common investigation was initiated by the DRI. However, since, the investigation also involved seizure of goods, one show cause notice was issued in respect of seized goods and the other show cause notice was issued for the past exports. The impugned order is in respect of past exports. The present matter i.e. the impugned order cannot be viewed separately from the adjudication order passed in respect of the seized goods. The goods that were seized by the DRI from 16 containers and which were clearly found to have been misdeclared with regard to description, quality and value, on chemical analysis,

were shown to have been purchased from the same non-existent fictitious firms. Most importantly, the samples drawn by the DRI from the seized consignment fail the test, i.e. differed from the description in the shipping bill, and for the samples drawn by the customs officers from CFS, Ludhaina from the same consignments, test is positive i.e. the test results match with the description in the shipping bill. From this factual position, only one thing can be concluded, which is that the samples were not drawn from the export consignments by the officers at CFS, Ludhiana but had been supplied by the exports. Although the charge of collusion on the part of Customs officers has been set aside by the adjudicating authority for the want of any collaboration, yet in view of plethora of concrete evidence, as mentioned above, the only conclusion that can be reached is that the samples were indeed different from the export goods.

(9) The appellant's Act is a well though of conspiracy where the origin of the export goods cannot be traced as the firm supplying the goods exported or raw material of the goods exported do not exist and the buyers of the export goods do not exist and the sale proceeds for the goods have been received from different countries other than U.K. It has been held by the Tribunal in the case of **Olypia Overseas – 2008 (223) E.L.T. 114** that receipt of foreign exchange remittance is no defence where over valuation and inferior quality of export goods is

exclusively proved. Hon'ble Calcutta High Court in the case of **Collector of Customs vs. Pankaj V. Sheth** reported in **1997 (90) E.L.T. 31** held that remittance of full foreign exchange into India, is not sure indication of the declared value being correct.

3. We have carefully considered the submissions from both the sides. In this case during May-June 2000 a total of 16 containers covered by 74 shipping bills, declared to contain gear cutting tools made of high speed steel, heat resistant rubber tension tapes and track wheels and which had been cleared by the Customs officers of CFS, Ludhiana were intercepted by the DRI – 15 containers were intercepted at Nhava Shiva and one container at Ludhiana and on examination of the samples drawn from these consignments, it was found that the goods declared as gear cutting tools of high speed steel were actually bars and rods of mile steel, the goods declared as heat resistant rubber tension tapes were actually made of unvulcanised rubber and the track wheels were in unmachined, and unfinished condition and that the value of the goods was much less than the amount of draw back claim in respect of the same. At that time on enquiry at

the CFS Ludhiana, it was found that from those very consignments, the customs officers at Ludhiana had also drawn 5 samples out of which 4 samples had passed i.e. the report of the chemical examiner indicated the goods to be as per declaration. Since, this indicated connivance between customs officers and exporter and since in past the same exporting firms had exported goods declared as 'gear cutting tools of high speed steels', 'track wheels' and 'heat resistant rubber tension tapes' under draw back/DEPB claim, it was suspected that those exports also may be misdeclared and goods heavily over invoiced in order to claim drawback and DEPB benefit and accordingly the investigations were conducted. The main point of dispute is as to whether the goods declared as 'gear cutting tools of high speed steel', 'track wheels' and 'heat resistant rubber tension tapes', exported by M/s Garg Forging, M/s SRG International, M/s SRG Forge, M/s Ragani Steel, M/s Garg Concast and M/s Goodwill had also misdeclared in terms of description, quality and value and if so, whether the drawback claim would be admissible in respect of the same. Another question to be decided in respect of the review appeal filed by the Revenue is as to whether in respect of the goods exported in past, which if held as liable for confiscation under Section 113(d), 113 (i) and 113 (ii) of Customs Act, redemption fine in lieu of confiscation under Section 125 of the Customs Act can be demanded from the exporters, when the goods have already been exported out of India and as such are not available for confiscation.

4. As regards the first point of dispute, we for the reasons given below, hold that the goods exported by the above-mentioned six firms had been misdeclared in terms of description, quality and value and no draw-back would be admissible in respect of the same:-

(1) Shri Vinod Garg in his statement dated 22/06/2000 and 25/08/2000 has stated that in the earlier exports of goods declared as 'gear cutting tools of cobalt bearing high speed steel', the appearance, content and quality were same as they are in respect of the goods described as 'Gear cutting tools of high speed steel' in the containers seized by the DRI at Mumbai/Ludhiana and only the grading of the high speed steel may vary as per the order, that the actual nature, appearance, content and quality of the goods declared as 'heat resistant rubber

tension tapes' in past export were identical to the goods of the same description found in the containers seized at JNPT Mumbai/Ludhiana and that the appearance, nature and quality of the goods declared as – 'track wheels' in the past consignments were also same as that of the goods of the same description in the containers seized JNPT Mumbai/ Ludhiana. Though Shri Vinod Garg has claimed that while the heat resistant rubber tension tape have been procured from outside for export and the gear cutting tools of high speed steels and track wheels have been manufactured in his factory, M/s Garg Forging & Casting, the firms from which the purchase of heat resistant rubber tension tape and the raw material for gear cutting tools of high speed steels and track wheels are claimed to have been purchased, have been found to be non-existent. On inquiry with the bank, where the companies/firms, which are claimed to have supplied heat resistant rubber tension tape and raw material for Gear cutting tools of high speed steel and track wheels, have their account, it was found that in the bank records Shri Shambhu Kumar, Shri Vineet Kumar, Shri Sanjeev Kumar and Shri Pratap Nath Pandey, the employees of Shri Vinod Garg , have been shown as the proprietors and all these accounts had been opened on introduction by Shri N.D. Garg or Shri Manjit Singh an employee of Shri Vinod Kumar Garg. Subsequently, Shri Manjit Singh in his statements dated 06/08/02 and 07/08/02 admitted that there was no production of gear cutting tools of cobalt bearing steel in the factory of M/s Garg Forging and casting and only the production of this item had been shown in the RG-1 register, as per the directions of Shri Vinod Garg and N.D. Garg and that the goods which were presented before the Customs at CFS, Ludhiana for export by declaring as 'gear cutting tools of cobalt bearing steel, had not been manufactured in the factory of M/s Garg Forging & Casting but had actually been purchased from the market. Though Shri Manjit Singh subsequently vide letter dated 08/08/02 retracted his statements, this retraction has to be treated as an afterthought. Hon'ble Bombay High Court in the case of **Vinod Solanki vs. UOI** reported in **2008 (228) ELT 17 (Bom)** has held that mere bald statement that confessional statement has been recorded under coercion and duress, by itself ,is not sufficient to discard the said confession and the burden to prove that the statement was obtained under duress and coercion lies on the person retracting the same. When no gear cutting tools of cobalt bearing high speed steel, or track wheel had been manufactured in the factory of M/s Garg Forging Casting and the firms from which the purchase of heat resistant rubber tension tape and the raw material for gear cutting tools of high speed steel of track wheels is claimed to have been made found to be non-existent, it is clear indication that the goods exported were not as per the declaration, otherwise there would have been no necessity to conceal origin of the goods in this manner.

Immediately after detection of this fraud by the DRI officers, some consignments, claimed to be of gear cutting tools of high speed steel and heat resistant rubber tape, which were meant for export and were just outside the CFS Ludhiana, were called back on the instructions of Shri Vinod Garg and Shri N D Garg and the same were later on sold as scrap.

(2) The goods are shown to have been exported to several consignees in U.K., but on overseas inquiry, it was found that none of them. In respect of 11 containers exported under shipping bill no. 2343-2350 dated 06/4/2000, 2719-2728 dated 27/04/2000, 1538-1540 dated 13/3/2000, 2298-2305 dated 03/4/2000, 168-169 dated 03/2/2000 and 1541-1543 dated 13/3/2000 it was found that though the same were meant for the parties of U.K., on inquiry it was found that the same has been diverted to Dubai and there, the same has been cleared by one Shri Harmeet Rajpal, alias Inder Pal Singh alias Bobby and in the import documents filed at Dubai, the value of gear cutting tools had been declared as U.S. $ 119-120 per M.T. as against their declared FOB value of U.S. $ 7900 per M.T. and similarly the value of heat resistant rubber tapes was declared as U.S. $ 230 per M.T. as against their FOB value of U.S. $ 2100 per M.T. declared before the Customs Authorities at CFS, Ludhiana. Though the evidence of diversion of export containers to Dubai and the value of the goods declared

before Dubai Customs is available only in respect of 11 containers, this evidence is significant in the background of the fact that none of the consignees in U.K. to whom the goods are to shown to have been exported, exist. In fact, Shri Vinod Garg in his statement dated 31/10/2000, which has not been retracted, has stated that in respect of all the exports, the Bills of lading were being issued upto Dubai and he could not state whether the goods exported by him to buyers in U.K. reached U.K. or not. The value of the goods declared at Dubai clearly indicates that the goods of sub-standard quality and had been grossly misdeclared in terms of description, quality and value. It has been pleaded that the containers which have been diverted to Dubai, had been purchased by some parties on high sea sale basis. But it is inconceivable as to how an importer in U.K. importing gear cutting tools of high speed steel and heat resistant rubber tension tape @ U.S. 7900 per M.T. and U.S. $ 2100/- per M.T. respectively would sell the same on high sea sale basis @ 119-120 U.S. $ per M.T. and U.S. $ 230 per M.T. respectively. Moreover, as per the inquiry from the exporter's bank – State Bank of Hyderabad, Ludhiana, the remittance in respect of export consignments had been received from countries other than the country of destination shown in the shipping bills While exports are to UK, the remittance has been received from countries like Canada (Toranto), U.S.A., U.A.E., Thailand etc. and in some cases even from Mumbai. This clearly indicates that what has been claimed by the Appellants as remittance from the export consignments is not genuine remittance coming from the consignees shown in the shipping bills. Even if the consignee sell the goods at high sea sale basis to some other persons, the high sea sale buyer will make payment to the consignee and not to the exporter in India. The information regarding remittance received from the bank under letter No. DRI/674 dated 05/02/03 corroborates the statement dated 24/08/03 of Shri N.D. Garg, brother of Shri Vinod Garg that the goods exported were sub-standard goods which would never have been accepted in U.K. but their agent in Dubai managed their clearance in Dubai, that in place of 'gear cutting tools of high speed steel' they had exported cut pieces of round bars of mild steel of value at Rs. 15 to Rs. 20 per k.g. and that the difference between the declared invoice value and the actual value of the exported goods was being sent to Shri Harmeet Rajpal alias Inder Pal Singh alias Bobby in Dubai through hawala.

(3) The DRI officers, while conducting inquiry into the fraud committed by Garg group of companies, found that the same goods i.e. 'gear cutting tools of high speed steel', 'heat resistant rubber tension tape' and 'track wheels' had been exported, from CFS, Ludhiana during the same period, by M/s Contessa Commercial Co. Pvt.

Ltd., Kolkata; M/s SRM Pvt. Ltd., Kolkata; M/s ASK Exports, Kolkata and M/s Varun Enterprises, Bhagalpur, which, on inquiry were found the owned/controlled by one Shri Sunil Kishorepuria, Shri Manjit Singh, was acting as authorized representative of these companies of Sunil Kishorepuria. Shri Sunil Kishorepuria, in his statements dated 21/08/02 and 22/08/02 has admitted the export fraud having been committed by Shri Vinod Kumar Garg through his (Shri Kishorepuria's) group companies, with his consent. Shri Kishorepuria in his statements admitted that he allowed Shri Vinod Kumar Garg to use the names of his companies for export of goods by him (Shri Vinod Kumar Garg), that sourcing of the export goods, clearance from Customs, and foreign exchange remittance was to be handled by Shri Vinod Kumar and he (Shri Kishorepuria) was to get 1.5% of the export turnover as commission and that he has admitted his liability of paying back the already claimed drawback of Rs. 2.6 crores and he has already surrendered the pending drawback claim of about Rs. 92 lakhs. This statement of Shri Sunil Kishorepuria has not been retracted by him. The goods exported through the companies of Shri Kishorepuria had been procured through the same fictitious firms – M/s Krishna Hardware & Mill Store, M/s R.K. Steel Traders, M/s Rama Krishna Steel Traders, M/s Jindal Steel and M/s Jyoti Steel and the fraud in respect of these exports has been admitted by Shri Kishanpurva. Therefore, the goods exported i.e. through M/s SRG, M/s Garg Forging, M/s Ragini, M/s Garg Concast, M/s SRG Forge and M/s Goodwill concast cannot be different from those exported in the name of M/s Contessa Commercial, M/s ASK Exports, M/s SRM Pvt. Ltd. and M/s Varun Enterprises. The statement of Shri Sunil Kishorepuria regarding the use of his companies by Shri Vinod Kumar Garg in export fraud has also been corroborated by Shri N.D. Garg in his statement dated 25/08/03 wherein he has admitted that Shri Vinod Kumar Garg had exported similar goods in the name of four companies of Shri Kishorepuria, during the same period.

(4) Shri Narsi Das Garg in his statements dated 23/08/03 and 24/08/03 has clearly admitted that the firms M/s Krishna Hardware and Mill Store, M/s R.K. Steel Traders, M/s Rama Krishna Steel Traders, M/s Jindal Steel and M/s Jyoti Steel had been opened in the name of their employees and these were only paper firms for facilitating the transaction of goods for export by his brother Shri Vinod Kumar Garg, that the export orders were being received through one Shri Inder Pal allies Harmeet Rajpal allies Bobby of M/s Al Jabriah of Dubai through fax or courier, that as per his directions, the export documents used to be prepared in the name various fictitious firms of U.K. while the goods exported were being diverted to Dubai, that the reason for

diversion was that the exported goods exported under in the name of various firms/companies owned and controlled by Shri Vinod Kumar Garg had been misdeclared in terms of value, quality and content and those goods could never be accepted by anybody in U.K., that in Dubai their agent managed the clearance of these goods and arranged to send the export proceeds to them, that the export goods declared as heat resistant, rubber tension tape were actually of poor and inferior rubber and the goods declared as 'alloy steel forgings' were of mild steel having small grinding and the goods declared as 'gear cutting tools made of cobalt bearing high speed steel' were in fact cut pieces of mild steel round bars, that the gear cutting tools of cobalt bearing high speed steel had never been manufactured in their factory – M/s Garg forging and casting and only false production records had been prepared to show their production, that the difference between the amount of declared value, sent from foreign countries and the actual value of export goods was being returned to Shri Inder Pal Singh alias Harmeet Rajpal alias Bobby in Dubai through hawala transaction. The above statements of Shri N.D. Garg, though subsequently retracted, are corroborated by the evidence, as mentioned above – otherwise there is no rational explanation as to how the remittance in respect of the goods exported was being received from countries other than the country of the consignees. Moreover Hon'ble Supreme Court in case of **Naresh J. Sukhwani vs. Union of India** reported in **1996 (64) ECR – 346 (S.C.)** has held that statement of a co-accused recorded under Section 108 of the Customs Act implicating the petitioner is usable as a substantive evidence connecting him with the contravention of illegal export of foreign exchanges, that statement recorded under Section 108 of Customs Act is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973 and, therefore, it is a material piece of evidence collected by Customs official under Section 108 of the Customs Act and that such a statement can be used as a substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. In this case, the above-mentioned statements of Shri N.D. Garg, even though retracted, are corroborated by other independent evidence and therefore the same can be used as substantive evidence against the Appellants including Shri N.D. Garg.

(5) It has been emphasized by the Appellants that the basis of the Revenue's case is the allegation that the customs officers posted at CFS, Ludhiana – D.R. Ahuja, A.K. Kaul, T.N. Dhar and M.P. Singh had connived with Shri Vinod Kumar Garg in this fraud and this very foundation of Revenue's case stands demolished, as not only the Commissioner in the impugned order has dropped the penal proceedings against these

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departmental officers, even the departmental disciplinary proceedings against these officers has been dropped for the want of evidence. While it is true that the Commissioner in para 59.7 of the order has dropped the penal proceedings against these officers and this decision of the Commissioner has not been challenged by the Revenue in the review appeals, and, as mentioned in para 59.8 of the impugned order, even the disciplinary departmental disciplinary proceedings have also been dropped against them, we have reservations about this decision of the Commissioner, as the reasons recorded by the Commissioner for dropping penal proceedings against these officers are not convincing. The allegation of connivance against these officers was based on the fact that in May 2000, sixteen containers covered under 74 shipping bills filed by various companies of Shri Vinod Kumar Garg had been presented to the CFS, Ludhiana for customs clearance and these officers, after examining the goods and drawing 5 samples, had cleared the same and on test by the CRCL, the test reports in 4 out of 5 samples were in the exporter's favour and the goods were found as per declaration. However, when the DRI officers, after clearance of these containers by the CFS Ludhiana intercepted those containers and examined the goods, each container was found to be having only sub-standard goods – the goods declared as heat resistant rubber tension tape were found to be made of un-vulcanized rubber, the goods declared as gear cutting tools of cobalt bearing high speed steel were found to be just bars and rods of mild steel and the goods declared as track wheel were found to be in unfinished condition. The Commissioner's orders does not discuss at all as to how the samples drawn by the officers at CFS, Ludhiana were found to be of prime quality goods, while those very containers from which the samples have been drawn, on examination by the DRI subsequent to their clearance from CFS, Ludhiana were found to be containing sub-standard goods. In view of this and also in view of the fact that not only the firms from which the purchase of heat resistant rubber tension tape and raw material for gear cutting tools of high speed steel and track wheels is shown to have been made to be non-existent and also the fact that all the consignees were not-existent and the goods after their shipment, instead of being received by consignees, as mentioned in the shipping bills, had been diverted to Dubai, where the same had been cleared by M/s Al Jabriah Metals Trading by declaring value which is very small fraction of declared FOB value, it is clear that notwithstanding the test reports of the samples drawn by officers of CFS, Ludhiana, in respect of the previous consignments, reporting the goods to be as per declaration, the goods exported were, indeed, substandard and the samples which had been tested by the CRCL were not genuinely drawn samples.

(6) Hon'ble Supreme Court's order in respect of COFEPOSA detention of Shri Vinod Garg, referred to by the Appellants' counsel, is with regard to the exports made in the name of M/S National Steel Product Co. where the test of the samples could not through any light as to whether the goods being exported were machined forgings. In this case the exports are by other companies of Shri Vinod Garg .

(7) When the consignees in U.K. were non-existent and fictitious, but still remittance was received by the exporters from countries other than the country of consignees and inquiry in respect of 11 containers meant for some buyers in U.K. revealed that the consignments had been diverted to UAE where the same had been cleared by M/s Al Jabriah by declaring value, which is a very small fraction of the FOB value declared before the Indian Customs authorities, and when the firms/ companies from which heat resistant rubber tension tape and raw material for gear cutting tools of high speed steel and track wheels are claimed to have been purchased have been found to be fictitious, notwithstanding the test reports of the samples supposed to have been drawn by the customs officers of CFS Ludhiana, reporting the goods to be as per declaration, the only conclusion which can be drawn is that the entire operation organized by Shri Vinod Kumar Garg

with the help of his brother Shri N.D. Garg and his employees was a fraud to claim drawback and DEPB benefit from the Government by exporting low value sub-standard goods by misdeclaring the same and high value prime quality goods.

4.1 In view of the above, we concur with the Commissioner's finding that the goods, in question, had been grossly misdeclared in terms description, quality and value with intention to claim drawback and since their actual value was much less than the amount of drawback claimed, no drawback was admissible and the penalty has been rightly imposed on M/s SRG, M/s Garg Forging, M/s Ragini, M/s Garg concast, M/s Goodwill and M/s SRG Forging, Shri Vinod Kumar Garg. Shri N.D. Garg and Shri Sanjeev Kumar, Shri Shambhu Kumar, Shri Vineet Kumar, Shri P.N. Pandey and Shri Kumar Gupta and Shri Manjit Singh. Looking to the nature of the fraud, we do not interfere with the quantum of penalties imposed on the Appellants as drawback frauds of this type are more serious than the cases of customs duty evasion by misdeclaration of value or description – the drawback frauds are more like plunder of the Government treasury. Therefore deterrent penalty is warranted on every person also has committed or abetted such fraud.

5. Coming to the second question, as to whether in respect of the goods which have been held by the Commissioner to be liable to confiscation under Section 113(d), 113 (i) and 113 (ii) of the Customs Act, whether the redemption fine in lieu of confiscation under Section 125 of Customs Act could be imposed, we find that on this point the Commissioner in the impugned order has observed that since the goods have already been exported, the same are not liable for confiscation and accordingly he has not imposed any redemption fine in lieu of confiscation under Section 125 of Customs Act. However, this portion of the Commissioner's order has been challenged by the Revenue in the three review appeals No. – C/535/06, C/536/06 and C/539/06. The review appeals have been filed on the following grounds, as given in the review authorisation No. 02/06 dated 10/03/06 passed by the Committee of Chief Commissioners :-

(i) The order of Commissioner is not legal and proper in as much as the Commissioner should have confiscated the offending goods under Section 113(d), 113 (i) and 113 (ii) of Customs Act and imposed fine in lieu of confiscation under Section 125 of Customs Act.

(ii) The order passed by the Commissioner in not confiscating the offending goods is not in consonance with the provision of Section 125 of Customs Act, which provides that whenever confiscation of any goods is authorized, in case of non prohibited goods, the adjudicating authority shall give an option to pay fine in lieu of confiscation. Hence, once the goods are held as an offending in nature, even if the said goods are not easily available for confiscation, the same are ought to be ordered as confiscated and appropriate fine in lieu of confiscation should have been imposed by the Commissioner in terms of Section 125 of Customs Act.

6. During the period of dispute, sub-Section (1) of Section 129D provided that the Committee of Chief Commissioner of Customs may, of its own motion, call for and examine the records of any proceedings in which the Commissioner of Customs as an adjudicating authority has passed any decision or order, under the Customs Act for the purpose of satisfying itself as to the legality or propriety of order and may by order, direct such Commissioner to apply to the Appellate Tribunal

for determination of such points arising out of the decision or order as may be specified by the Committee of Chief Commissioners in its order. As per sub-Section (4) of Section 129D, when a direction for filing review appeal before Appellate Tribunal has been issued by the Committee of Chief Commissioners to a Commissioner, the Commissioner within a period of one month from the date of communication of the directions of the Committee of Chief Commissioner, shall file an appeal against his order before the Appellate Tribunal. Sub-section (1) of Section 129D, as it is stood during the relevant period, did not provide for a situation where there is disagreement between the two Commissioners on the question of legality or propriety of an order passed by a Commissioner. On going through the review direction dated 10/03/06 issued by the Committee to Chief Commissioners, we find that there is disagreement between the two Chief Commissioners on the question of confiscation of the goods and imposition of redemption fine and the two Chief Commissioners have recorded diametrically opposite views on this issue in this order and as such, there is no opinion of the Committee of Chief Commissioners on the issue being contested. The review direction has been signed by both the Chief Commissioners based on the Board's Circular No. 825/2/2006/CX dated 06/02/06 according to which in case two Members of the Committee of Chief Commissioners take different view i.e., one Member takes a view to file appeal and the other Member opposes this, the decision of the Committee should be to file the appeal. It is based on this circular of the Board that the Committee of Chief Commissioners, in spite of their diametrically opposite views on the question of confiscation of the goods and imposition of redemption fine when the goods are not physically available for confiscation, have signed this review authorization directing the Commissioner to file a review appeal before the Tribunal. We are of the view that this is not a valid review authorisation as the Committee of Chief Commissioners has failed to arrive at a definite conclusion on the issue involved and review authorisation cannot be issued just on the basis of the Board's circular that in the case of disagreement between the two Chief Commissioners constituting the Committee, the view of the Chief Commissioners proposing the review appeal would prevail. There is no such provision in the Act. It is only in the Finance Act, 2008 that a specific provision was made for reference to the Board in case of disagreement between the two Chief Commissioners of the Committee of Chief Commissioners, on the question of legality and proprietary of the Commissioner's order, but this provision cannot be given retrospective effect. In view of this, the three appeals of the Revenue have to be dismissed, as the same are not backed by a valid review authorisation.

8. In view of the above, the 14 appeals filed by M/s SRG International and others and 3 appeals filed by Revenue against the impugned order are dismissed.

(Pronounced in open court on 16-10-08)

(S.S. Kang)
Vice President

(Rakesh Kumar)
Member (Technical)

PK