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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/816 /2005,823 /2005,880 /2005 - CU[DB] Date 11/12/2008

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

To :
M/S SAMEERA APPARELS
D-136, OKHLA INDUSTRIAL AREA,
PHASE-I, NEW DELHI - 110020

(*) Please see addresses at back.

M/S SAMEERA APPARELS Appellant

Vs

THE COMMISSIONER OF CUSTOMS, NEW DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order No. C/651-653/08-CUS. DATED 03.12.08** 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 :

1. Respondent
   THE COMMISSIONER OF CUSTOMS,
   ICD, TUGHLAKABAD, NEW DELHI
2. Adv. / Consult
   MR.K.K ANAND, ADV.
   A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24
3. S.D.R
4. J.C.D.R.
5. Bar association. CESTAT. New Delhi
6. M/s. Deeparchi Publications. M-93. Marg. 46. Saket. New Delhi 110017
7. M/s Centax Publictions (P) Ltd.. 1512-B. Bhishm Pitamah marg. Opp. ICICI Bank of Defence Colony. New - 3
8. Excise & Customs cases. B-37. Sector -1. NOIDA - 201301 Gautam Budh Nagar. (U.P.)
9. Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10. Nidheshak publications. I.P.Estate. new Delhi
11. Taxmann Allied Service Pvt Ltd.. 21/35. West Punjabi Bagh. New Delhi - 110026
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
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
15. Office Copy
16. Guard file

Assistant Registrar

(Customs Appeal Branch)

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

Customs Appeal No. 816, 823 & 880 of 2005

[Arising out of Order-in-Original No. 47/2005 dated 9.6.2005 passed by Commissioner of Customs, Delhi]

For approval and signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K.Das, Member (Judicial)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : Yes
2. Whether it should be released under Rule 27: of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? Yes
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

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M/s. Sameera Apparels. Appellants
B.N. Jha
E.K. Raju

Vs.

Commissioner of Customs Respondent
New Delhi

Appearance:

Mr. K.K. Anand, Advocate for the Appellants
Mr. Vijay Kumar, SDR for the Respondent

CORAM:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K.Das, Member (Judicial)

Date of Hearing : 29.9.2008
Date of Decision : 3-12-08

Final **ORDER NO. C/1651-653/08**

Per M. Veeraiyan (for the Bench):

These appeals arise out of order-in-original No. 47/2005 dt. 9.6.2005

2. Heard both sides.

3. The relevant facts, in brief, are as follows:

a) The appellant firm received an order for export of garment and based on which they applied for an advance licence under DEEC scheme giving the specification of the raw materials required. They were issued with an advance licence No. 0510073982/4/03/00 dated 28.11.2002. permitting them to import fabrics 100% cotton printed / yarn dyed poplin fabrics with GSM of 97(+ or- 10%) .

b) They imported a consignment giving the description as 100% cotton printed / yarn dyed poplin fabrics and filed Bill of Entry No. 109765 dated 11.12.2002 through M/s. Rakesh Kapur Cargo Helpers, their Customs House Agent. Shri B.N. Jha G-card holder of their said CHA presented the Bill of Entry and the same was assessed by the assessing officers under second appraisement system. The assessment was , thus , done based on the documents submitted and marked for examination of the cargo before clearance.

c) The work of examination was entrusted to Shri Anil Gupta, appraiser. While the consignment was opened on 13.12.2002 for examination, it was noticed that detailed packing list was not available in the consignment accordingly, the CHA was directed to bring the detailed packing list.

d) On 16.12.2002 Shri B.N. Jha, G Card holder of M/s. Rakesh Kapur Cargo helper and one Shri Prem Kant Choudhary were found attempting to clear the said consignment of fabrics on the strength of customs gate pass No. 106698 dated 13.12.2002. The investigation revealed that the consignment sought to be cleared was not yet examined; the Customs gate pass appeared to be fake and the signature of Shri C.K. Jain, appraiser was found forged. The goods were seized for having attempted to clear clandestinely from the customs area.

e) The actual examination was thereafter undertaken; samples were drawn on 18.12.2002 and 27.12.2002 and sent for tests. The test-results indicated the GSM to be 108.7, 122.50, 126.56, and 122.78 which were in every case higher than the maximum of GSM of 106.7 permissible for import under the said advance licence.

f) The investigation also proved that Shri B.N. Jha entered into an arrangement with one Mani Kant Choudhary (brother of Shri Premkant Choudhary) who claimed good relations with Customs officers and agreed to clear the consignment from the Customs area. He was paid an amount of Rs.8,000/- to arrange for Customs clearance.

g) The investigation revealed that they attempted to remove the consignment without getting it examined using the forged gate pass.

h) Shri E.K. Raju, the Manager of the appellant firm was aware of the developments and arranged for the funds.

i) Shri Manikant Choudhary could not be contacted for his version as he went missing.

j) The original authority confiscated the goods under section 111(d), (j), (m) and (o) of the Customs Act and permitted redemption on payment of fine of Rs. 10,00,000/-. He demanded duty of Rs. 37,18,018/- ;

imposed penalty of Rs. Five lakhs on the appellant firm. He also imposed a penalty of Rs.75,000/= on E.K. Raju, personal manager of the appellant firm and Rs. 75,000/- on Shri B.N. Jha.

4. The learned advocate for the appellants made the following submissions:

a) The advance licence was applied based on orders for export received. The appellant firm was entitled to receive advance licence for any GSM. The GSM mentioned in the advance licence is not materially relevant in determining the quality or value of fabrics. In fact, the appellant sought for handlling over the licence so that they could produce an amended licence from the DGFT authorities and the request was not acceded to by the Customs authorities.

b) Shri Manikant Choudhary, who is reportedly the master mind behind the attempted removal using forged gate pass was not traced and his statement not recorded. The appellant firm had no knowledge about the attempt by Shri Manikant Choudhary and the understanding between Shri B.N. Jha and Shri Manikant Choudhary.

c) As the goods are importable duty free for use in the export production, there was no reason for them to resort to unfair means.

d) GSM varies from fabric to fabric, lot to lot, and even part to part. Such variation is beyond the control of the appellants. Imputation of knowledge on the appellants about mis-declaration of GSM is not justified.

e) The goods were subject to actual user condition and only requirement was to verify with the goods at the time of export. For the said purpose, the samples of imported consignments are required to be drawn and preserved to enable such comparison.

f) No forgery was done in the Bill of Entry. The forgery in the Customs gate pass was not known to the appellants.

g) In view of the seizure and subsequent proceedings by the Customs Authorities, they lost the order, the validity of the licence expired and the quota expired, and they have incurred heavy losses and demurrage. They reserved the right to take appropriate action in the Court of Law against the Customs authorities.

h) Section 111 (d) is not applicable as the goods are not prohibited for import. There is no violation attracting 111(m) as the variation in GSM is not significant and GSM is not significantly relevant for valuation and quality. 111(o) relates to post-importation violation which is not relevant in this case. There is no violation of 111(j) as the goods have not been cleared from customs area.

5. Learned SDR made the following submissions:

1) The invoice has reference to proforma invoice. From the weight and Area given, the GSM can be correctly calculated. The permissible GSM is 97 with + or - 10% . In other words, the maximum permissible limit of GSM is 106 .7 . In every case the GSM was found to be higher than the maximum permissible limit .

2) The imported consignment was not as per the advance licence and therefore, the benefit of exemption under the notification is not available. In view of the discrepancy, they have fraudulently planned to remove the consignment from the Customs area by preparing forged customs gate pass. Therefore, the orders of the original authority in respect of all the appellants should be sustained.

6.1 We have carefully considered the submission from both the sides and perused the records as well. At the outset, it is noted that the appellant firm applied for advance licence on the basis of export order said to have been received by them. For supplying the readymade garments as per the order, the fabric required as per the application made by the appellant firm is only 97 GSM. A variation of plus or minus 10% is permitted in terms of the licence. The maximum GSM of the fabric required for the export order is only 106.7. In all the cases, GSM was on the higher side. The issue here is not whether they will be eligible for advance licence for a different GSM or not. The issue is whether what was imported was required for the export product. It has not been shown that they placed any written order asking for fabrics whose specifications are compatible to the licence issued to them. It is a clear case of importing fabrics of different specifications than what was required for the export product. This is against the letter and spirit of DEEC Scheme enabling import of the raw material duty free in advance.

6.2 The assessment was done under the second appraisement system where the assessment based on documents produced is done. The description as per the advance licence, invoice and bill of entry were found to tally and accordingly, the assessment was completed. After assessment based on documents are done, the examination on the prescribed scale was to be undertaken and if found in order the goods would have been allowed to be cleared from Customs control. The appraising officer to whom the work of examination was assigned directed the CHA to produce the packing list, the said direction has not been complied with. Very dubious methods have been adopted to clear the consignment from the customs area without getting the goods examined using forged customs gate pass. It also appears that signature of another appraiser was sought to be forged. But for the alertness of some staff on duty, the appellants could have undoubtedly succeeded in their attempt to clandestinely remove the goods which were not according to the specification. They claimed that GSM varies fabric to fabric, lot to lot, etc., may be correct. However, the submission that such variation is beyond the control of the appellants is not entirely correct. It is not a case where they have placed orders to conform to the category permitted under the advance licence issued to them.

6.3. The claim that if the advance licence was released to them, they would have got suitable amendment to the licence can not be accepted. What is to be considered is whether the goods imported are as per description in the licence at the time of import. Since the import is in not in conformity with the licence, the mis-declaration is established.

6.4 The appellant had admitted that quota has expired and the validity of the licence permitting them to import for use in export has also expired. Further the export order has been lost long time back. Under these circumstances, the question of allowing duty free clearance does not arise.

6.5. Shri B.N. Jha was the G card holder of the CHA who handled the clearance work. He was aware that he has to produce the packing list as per the order dated 13.12.2002 of the appraiser. Under these circumstance, his feigning ignorance that he was not aware that their customs gate pass was forged cannot be accepted. His initial version that he arranged and paid Rs.8,000/- for arranging clearance of the consignment through underhand means appears plausible. Admittedly the personal manager was aware of the developments and was party to the above clandestine removal by providing the money sought for by Shri B.N. Jha.

7. In view of the above, the appeals are disposed of as follows:

a) We uphold the confiscation of the goods for not being in conformity with the declaration in the Bill of Entry and for having been attempted to be cleared clandestinely from the Customs area without getting the goods examined and by using the forged gate pass. However, the redemption fine is reduced from Rs.10 lakhs to Rs. 2,00.000/- (Rupees Two lakhs only).

b) Duty demand is upheld.

c) The penalty imposed on the appellant firm is reduced from Rs. 5 lakhs to Rs. 1,00,000/- (Rupees One lakh only)

d) The penalties imposed on Shri E.K. Raju and B.N. Jha are reduced from Rs. 75,000/- each to Rs. 20,000/- (Rupees Twenty thousand only) each .

(Pronounced in the open Court on 3/12/05)

(M. Veeraiyan)
Member(Technical)

(P.K.Das)
Member(Judicial)

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