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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/171 /2001,173 /2001 Date 08/07/2008

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

To :
M/S BROOKS INTERNATIONAL,
THROUGH MANISH SINGH PROPRIETOR
A-43, DSIC, PACKING COMPLEX,
KIRTI NAGAR, NEW DELHI
M/S BROOKS INTERNATIONAL THROUGH MANISH SINGH PROPRIETOR — Appellant

Vs

COMMISSIONER OF CUSTOMS ICD — Respondent

I am directed to transmit herewith a certified copy of Final order No.C/163-165/08-CUS. DATED 09.06.08 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
   COMMISSIONER OF CUSTOMS ICD
   TUGHLAKABAD NEW DELHI - 110020.

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 Delhi -
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 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file
16. M/S MANITOBA INC., 121,
    MANSAROVER GARDEN NEW DELHI.
17. M/S OVERSEAS BUSINESS, 168,
    AMBIKA VIHAR, PASCHIM VIHAR, NEW DELHI.

Assistant Registrar
(Customs Appeal Branch)

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 No. 171 to 173 of 2001

[Arising out of the Order-in-Original No. SKS/CC/ICD/TKD/106208/2000 dated 23/11/2000 passed by The Commissioner of Customs, New Delhi.]

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? : No

2. Whether it would 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? : No

4. Whether order is to be circulated to the Department Authorities? : No

M/s Brooks International & Ors. — Appellant

Versus

CC, New Delhi — Respondent

Appearance

Shri K.K. Anand, Advocate – for the appellant.

S/Shri R.K. Verma, Authorized Representative (DR) and A.P.S. Suri, Jt. Cdr. – for the Respondent.

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

DATE OF HEARING : 09/06/2008.

Final Order No. C/163-165/08 Dated : 9/6/08

Per. Rakesh Kumar :-

The facts of this case, in brief, are that in December 1998 the appellants – M/s Brooks International, A-43, DSIDC Packing Complex, Kirti Nagar, New Delhi (hereinafter referred to as M/s Brooks) ; M/s Manitoba Inc., 121, Mansarover Garden, New Delhi (hereinafter referred to as M/s Manitoba) and M/s Overseas Business, 168, Ambika Vihar, Paschim Vihar, New Delhi (hereinafter referred to as M/s Overseas) filed certain shipping bills under drawback claim for export of readymade garments (hereinafter referred to as RMG). The declared FOB value and the duty drawback claimed for the goods being exported are as under :-

	Exporter	No. of shipping bills	Declared FOB value	Duty draw back involved
1.	M/s Brooks	11	Rs. 1,74,62,286/-	Rs. 31,43,210/-
2.	M/s Manitoba	11	Rs. 1,74,62,286/-	Rs. 31,43,210/-
3.	M/s Overseas	12	Rs. 1,64,69,015/-	Rs. 29,53,624/-

1.1 The DRI officers, on the basis of some prior information examined the above-mentioned export consignments in presence of pancha witnesses and in all the consignments, the goods were found to be old and used readymade garments of Hong Kong, Korea, U.S.A., U.K., Sri Lanka and Indonesia origin. The prevailing market value (PMV) of the goods being exported by M/s Brooks, M/s Manitoba and M/s Overseas were ascertained with the help of two persons as Rs. 13,64,675/-, Rs. 13,54,750/- and Rs. 13,81,750/- respectively. Since the goods were found to be old and used and hence not eligible for drawback in terms of Rule 3 of the Customs & Central Excise Drawback Rules, 1995, since draw back also appeared to be inadmissible under Section 76 (1) (b) of the Act for the reason that the PMV of the goods appeared to be less than the Drawback claimed and since FOB value and description of the goods appeared to have been misdeclared with intention to claim duty drawback, which was not admissible, three show cause notices each dated 23/12/99 were issued to M/s Brooks, M/s Manitoba and M/s Overseas, which were adjudicated by the Commissioner vide order dated 23/11/2000 by which –

(a) the duty drawback in respect of these consignments was disallowed ; and

(b) the export consignments of M/s Brooks, M/s Manitoba and M/s Overseas were confiscated under Section 113 (d) & 113 (i) of the Act with option to be redeemed on payment of redemption fine of Rs. ten lakhs each.

As per this order, for penalty on the exporters under Section 114 of the Customs Act, separate show cause notices were to be issued by the DRI.

1.2 The Tribunal vide order No. A/242-244/02-NB dated 6/2/02 allowed the appeals of the Appellants with consequential relief on the following grounds :-

(1) The goods are not liable to confiscation under Section 113 (d) as the same are not covered by the definition of 'prohibited goods', as given in Section 2 (33) of the Act.

(2) The goods are not liable for confiscation under Section 113 (i), as there was, apparently, no misdeclaration of any material facts in the shipping bills by the Appellants, so as to attract the provisions of this Section.

(3) Section 76 nowhere speaks of confiscation of the goods besides disallowing drawback when the value of the export goods is less than the amount of drawback claimed.

1.3 The Revenue filed an civil appeal to Hon'ble Supreme Court as [CA No. 4559-4561/2002] against the Tribunal's order and the Hon'ble Court vide its judgment dated 06/6/07 set aside the Tribunal's order dated 06/2/02 and remanded the matter back to the Tribunal for de-novo decision of the question of confiscation of the goods under Section 113 (d) of the Act in the light of the Hon'ble Court's judgment in case of **Om Prakash Bhatia vs. Commissioner of Customs, Delhi** reported in **2003 (155) E.L.T. 423 (S.C.)**, wherein it was held that not declaring the correct value, quality, description and specification of the export goods in the shipping bill or import goods in the bill of entry, would amount to contravention of the provisions of Rule 11 of the Foreign Trade (Development & Regulation) Rules, read with Section 11 (1) of the Foreign Trade (Development & Regulation) Act, 1992 and such exports/imports would be in contravention of the provision of

Section 11 of the Customs Act, 1962 and thereby attracting the provisions of Section 111 (d)/113 (d) of the Act.

2. Heard both the sides.

2.1 Shri K.K. Anand, Advocate, the learned counsel for the Appellants made the following submissions :-

(i) one limb of the Tribunal's order regarding misdeclaration of market value of the goods has not been challenged by the Revenue before the Hon'ble Supreme Court. Therefore the Tribunal's findings on this point in the order No. A/242-244/02-NB-D dated 06/2/02 become final.

(ii) The opinions of two persons regarding market value of the goods, relied upon by the Revenue are identically worded and obviously typed on the same typewriter, which casts doubts on their authenticity.

(iii) Other than the opinion of two persons – Shri Manoj and Shri Girish, there is no other evidence of the goods being over invoiced.

(iv) Since there is no misdeclaration of market value, there is no question of confiscation of the goods.

2.2 The learned departmental representative – Shri A.P.S. Suri, Jt. CDR and Shri R.K. Verma, Senior DR pointed out that the fact that the goods have been misdeclared in respect of their description, quality and value, is clear from the report of the physical examination of the goods, which had been conducted in presence of independent pancha witnesses from which it is clear that in all the consignments, the goods were old and used garments of Sri Lanka, Hong Kong, Korea, China, Bangladesh, U.K., U.S.A. and Indonesia origin, that a substantial quantity of garments are soiled and stained, that the export goods are nothing but rags, that in view of the condition and quality of the goods, their value has been correctly determined, that since the Appellants have misdeclared the description, quality and value of the goods, the same are liable for confiscation under Section 113 (d) & (i) of the Act and that since the goods are not of Indian origin, but are ~~and an~~ old and used imported garments, no drawback is admissible.

3. We have given careful consideration to the submissions of both the sides. Hon'ble Supreme Court, vide its order dated

24/5/07 has set aside the Tribunal's order No. A/242-244/02-NB dated 06/2/02, which had set ~~setting~~ aside the confiscation of the goods and has remanded the matter for considering the question of confiscation of the export consignments, keeping in view the principles set out in the case of Om Prakash Bhatia vs. Commissioner of Customs (Supra).

3.1 Hon'ble Supreme Court in case of Om Prakash Bhatia (Supra) has held that as per the provision of Section 2 (33) of the Act, the "prohibits goods" include the goods in respect of which the conditions, subject to which the export or import is permitted, have not been complied with, that misdeclaration of value, quality or other specification of the export goods in the shipping bill would be in contravention of the provisions of Section 11 (1) of the Foreign Trade (Development & Regulation) Act, 1992 read with Rule 11 of the Foreign Trade (Development & Regulation) Rules and therefore such misdeclaration would attract the provisions of Section 113 (d) of the Customs Act, 1962. In this regard, Hon'ble Supreme Court's observations in para 6,7,8 & 9 and 15 to 19 of its order are as under :-

"6. Next – as the order for confiscation of goods is passed by referring to Section 113 (d) of the Act, we would refer to the same. It reads as under :-

> **"113 Confiscation of goods attempted to be improperly exported etc.** – The following export goods shall be liable to confiscation :-
>
> (d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, **contrary to any prohibition imposed by or under this Act or any other law for the time being in force."**

7. The aforesaid Section empowers the authority to confiscate any goods attempted to be exported contrary to any 'prohibition' imposed by or under the Act or any other law for the time being in force. Hence, for application of the said provision, it is required to be established that attempt to export the goods was contrary to any prohibition imposed under any law for the time being in force.

8. Further, Section 2 (33) of the Act defines "prohibited goods" as under :-

> "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."

9. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in *Shekih Mohd. Omer v. Collector of Customs, Calcutta and Others* [(1970) 2 SCC 728] wherein it was contended that the expression 'prohibition' used in Section 111 (d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control

Order, 1955. The Court negatived the said contention and held thus :-

'...What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111 (d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111 (d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restrictions is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."

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15. It is true that Section 50 of the Act *inter alia* provides that before exporting the goods the exporter shall make entry thereof by presenting to the proper officer in the case of goods to be exported, a shipping bill and a bill of export in prescribed form. The shipping Bill and Bill of Export (Form) Regulations, 1991 *inter alia* prescribes the said form. After that form is amended w.e.f. 15-6-2001, it is stated exporter shall state "*Value – FOB/PMV where applicable*". We are not required to deal with this aspect in this appeal as the goods were sought to be exported in the year 1998.

16. From the aforesaid provisions, mainly, Section 2 (41) read with Section 14 of the Act and Section 18 of the Foreign Exchange Regulation Act, 1973, it is crystal clear that :-

(a) Exporter has to declare full export value of the goods (sale consideration for the goods exported).

(b) Exporter has to affirm that the full export value of the goods will be received in the prescribed manner.

(c) If the full export value of the goods is not ascertainable, the value which the exporter expects to receive on the sale of the goods in the overseas market.

(d) Exporter has to declare true or correct export value of the goods, that is to say, correct sale consideration of the goods. Criterion under Section 14 of the Act is the price at which such or other goods are ordinarily sold or offered for sale in the course of international trade where the seller and buyer have no interest in the business of each other and the price is the sole consideration for sale or offer for sale.

17. To the same effect Rule 11 of the Foreign Trade (Development and Regulation) Rules, 1993 provides. This Rule is to be read along with Section 11 (1) of the

Foreign Trade (Development and Regulation) Act, 1992, which *inter alia* provides that no export or import shall be made by any person except in accordance with the provisions of this Act, the rules and the orders made thereunder and the export and import policy for the time being in force. Rule 11 reads thus :-

> "**11. Declaration as to value and quality of imported goods.** – On the importation into, or exportation out of, any customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the bill of entry or the shipping bill or any other documents prescribed under the Customs Act, 1962 (52 of 1962), state the value, quality and description of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe to a declaration of the truth of such statement at the foot of such bill of entry or shipping bill or any other documents."

18. Hence, in cases where the export value is not correctly stated but there is international over-invoicing for some other purpose, that is to say not mentioning true sale consideration of the goods, then it would amount to violation of the conditions for import/export of the goods. The purpose may be money laundering or some other purpose, but it would certainly amount to illegal/unauthorized money transaction. In any case, over-invoicing of the export goods would result in illegal/irregular transactions in foreign currency.

19. Learned Senior Counsel Mr. Dave submitted that in some cases, exporter may get much higher value of the goods than the market price prevailing in the country and therefore, merely because higher export value is mentioned, it cannot be inferred that it is not the true sale consideration. In some cases, this hypothetical contention may be right. However this would depend upon facts and circumstances as well as evidence on record in each case. If the goods are easily available in the market, then it would be difficult to arrive at the conclusion that a foreign buyer – a prudent businessman would pay ten times more than the prevailing market price of readymade clothes, particularly, in the days where information is easily available through internet or various other sources. In any case, when margin of profit appears, on the face of it, unreasonable, it is for the exporter to establish that it was true export value stated in the shipping bill. Section 14 itself contemplates that the price at which such or like goods are ordinarily sold or offered for sale in the course of international trade would be the value of the goods."

4. In this case, the fact of misdeclaration of description and quality of the goods is clear as all the export consignments, on examination ~~was~~ were found to be of old and used readymade garments of U.K., U.S.A., Hong Kong, China, Bangla Desh,

Sri Lanka and Indonesia origin, a substantial quantity of which was stained and soiled. In other words, the goods sought to be exported under drawback claim as ~~on~~ RMG, are imported rags. The examination report has not been challenged by the appellants. Since the goods are actually rags, their value obviously can not be what has been declared and therefore we are inclined to agree with the opinion of the two persons regarding their actual value, relied upon by the Revenue. We, therefore, hold that this is a case of fraudulently claiming huge amount of duty drawback by exporting imported rags by misdeclaring the same as RMG manufactured in India. In view of deliberate misdeclaration of value, quality and description of the goods, the provisions of Section 11 of the Foreign Trade (Development & Regulation) Act, read with Section 11 (1) of the Foreign Trade (Development & Regulation) Rules have been contravened and therefore the goods are "prohibites goods" in terms of Section 2 (33) of the Customs Act and hence the same are liable for confiscation under Section 113 (d) of the Act. Moreover, since the goods were attempted to be exported under drawback claim by misdeclaring their description, quality and value, while no drawback was admissible in respect of these goods, the provisions of Section 113 (i) of the Act would also be attracted, which provides for confiscation of "any dutiable or prohibited goods, or goods entered for exportation under claim for drawback, which do not correspond in any material particular with the entry made under this Act."

5. Since the goods are old and used garments i.e. rags originated from various countries like U.K., U.S.A., China, Hong Kong, Sri Lanka etc. even without going into the question of the market value, no drawback is admissible.

6. We accordingly, uphold the order-in-original dated 23/11/2000 of the Commissioner and reject these appeals.

(Operative part of the order pronounced in open court)

(S.S. Kang)
Vice President

(Rakesh Kumar)
Member (Technical)

PK