TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

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

Appeal No. C/327 , 380 , 407 , 408 / 2005 -SM[BR] Date 20/05/2009

Assistant Registrar

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

To :
M/S. AIR IMPEX CARGO AGENCY
6/26, 3RD FLOOR, KD HOUSE, WEA, KAROL BAGH,
NEW DELHI.

[2]SHRI MADAN AGARWAL,
C-28, ANAND NIKETAN, NEW DELHI -110021
[3] SHRI B.B. GUPTA C-243 SARITA VIHAR
NEW DELHI- 110044
[4] SHRI V.P. GUPTA 43, GOPAL PARK
RAM NAGAR EXTENION DELHI-51.

M/S. AIR IMPEX CARGO AGENCY Appellant

Vs

COMMISSIONER OF CUSTOMS, (IMPORT & GENERAL) NEW DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 406 – 409 / 2009 -SM[BR] dated 12.5.2009 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   COMMISSIONER OF CUSTOMS, (IMPORT & GENERAL) NEW DE
   (IMPORT & GENERAL) NEW DELHI

2. Adv. / Consult
   MR.KAMALJEET SINGH
   J-144, PATEL NAGAR -I,GHAZIABAD.
   [2]SHRI BIPIN GARG ADV. B-1/1289-A,VASANT KUNJ NEW DELHI
   [3] SHRI L.P. ASTHANA ADV. R-163, SECOND FLOOR GREATER KAILASH, PART-I, NEW DELHI -48.

3 S.D.R
4 ~~J.C.D.R.~~
5 Bar association. CESTAT. New Delhi
6 Director Publications. Customs. Excise. I.P. Estate. New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd.. 21/35. West Punjabi Bagh. New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
16 Office Copy
17 Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

Customs Appeal Nos. 327, 380, 407 & 408 of 2005-SM

(Arising out of Order-in-Order No. 8/Adj./SN/05 dated 28.02.2005 passed by the Commissioner of Customs (Import & General), New Delhi).

DATE OF HEARING : 05.02.2009
DATE OF DECISION : 12.05.2009

FOR APPROVAL AND SIGNATURE :

HON'BLE MS. JYOTI BALASUNDARAM, VICE-PRESIDENT

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 ?	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

(i) M/s Air Impex Cargo Agency
(ii) Madan Agarwal
(iii) B.B. Gupta
(iv) V.P. Gupta

Appellants
(Rep by S/Sh. Kamaljeet Singh, Bipin Garg & L.P. Asthana, Advocates)

versus

CC, New Delhi ... **Respondent**
(Rep. by S/Sh. S.K. Panda, Jt. CDR & R.K. Verma, DR)

CORAM : HON'BLE MS. JYOTI BALASUNDARAM, VICE-PRESIDENT

Final **ORDER NO.** 406 to 409/09-SM(BR)

PER JYOTI BALASUNDARAM :

The brief facts of the case are that, information was received that M/s Unicorp Ltd., Okhla Industrial Area, New Delhi, and other sister concerns, were importing goods at highly over valued prices from certain related companies in Singapore in order to park ~~the~~ funds abroad and that in most of the cases goods were never cleared from Customs in spite of payments having already been made outside India. It was found that M/s Unicorp Industries Ltd. and M/s Advance Computers & Software Pvt. Ltd. were engaged in importing software and hardware (computer parts) from M/s Freesia Trading Pvt. Ltd., Singapore, and not clearing the same from Customs. All 47 such consignments imported by the above three companies comprised of computer parts, computer peripherals and software. Bills of entry were found to have been filed, in some cases, with a declared FOB value of 25 crores. Shri Arun Sogani, Managing Director of M/s Unicorp Industries Ltd., was managing all the three companies either as Managing Director or Director or Chief Executive. Statements of Shri V.P. Gupta, Company Secretary, Shri Ashok Sogani, Director, and Shri B.B. Gupta, Director of M/s Unicorp Industries Ltd. were recorded; statement of Shri Arun Sogani, Managing Director of M/s Unicorp Industries Ltd. was also recorded. Statements of Shri Madan Agarwal, Director, and all the partners of M/s Air Impex Cargo Agency (CHA), were also recorded. On the basis of the investigation, it transpired that three companies had been importing non-functional, pirated software, dummy ICs, ICs without any marking for parking the funds abroad with M/s Freesia Trading Pvt. Ltd. and even those funds were intended to be taken from the bank with the help of whom finances were raised for such imports. Show cause notices were, therefore, issued to all the three companies proposing confiscation of goods imported by them and seized by the Customs authorities under the provisions of Section 111(d), (l) and (m); proposing levy of appropriate duty; and also proposing penal action under Section 112(a) and the notices also proposed imposition of penalty on Shri Arun Sogani, Shri B.B. Gupta, Shri Madan Agarwal, Shri Ashok Sanghi, Shri V.P. Gupta, and M/s Air Impex Cargo Agency (CHA) [CHA was treated as a abettor of the importer]. The notice was adjudicated by the Commissioner of Customs, who upheld the charge of over invoicing of imported consignments, confiscated the goods under Section 111(d) & (m) and imposed penalties of Rs. 10,00,000/- each on M/s Unicorp Industries Ltd. and M/s Unicorp Overseas Ltd.; penalty of Rs. 5,00,000/- on M/s Advance Computers and Software Pvt. Ltd.; and penalties of Rs. 10,00,000/- each of Shri B.B. Gupta, Shri V.P. Gupta, Shri Madan Agarwal and Shri Ashok Sanghi; penalty of Rs. 5,00,000/- on M/s Air Impex Cargo Agency (CHA); and penalty of Rs. 30,00,000/- on Shri Arun Sogani, Managing Director of M/s Unicorp Industries Ltd. The appeals before the Tribunal have been filed by two Directors of M/s Unicorp Industries Ltd. as well as its Company Secretary and by the CHA.

2. I have heard both sides. Penalty has been imposed on Shri B.B. Gupta, who was looking after the work relating to import, such as, filing of bill of entry, clearance from Customs, procurement/purchases from the foreign suppliers in respect of components required for the manufacture of computers on the ground that he was under the knowledge of all illegal activities while working as Director in the Company. Statements of Shri B.B. Gupta were recorded on 04.08.1999 and 05.08.1999. In his statement, he *inter alia* stated as under :

"- **he was Director of M/s Unicorp Industries Ltd. from 1985 to 1998 and left the company in July, 98;**

- **he was Director (Works) and was looking after procurement, manufacturing, quality, imports and exports clearances;**

- **M/s Unicorp Industries Ltd. was mainly engaged in the manufacturing of computer peripherals, computer system and memory modules out of the imported components like floppy, disc drives, hard disc drive, IC's, mother boards, cabinets, memory chips and monitors;**

- **the work related to procurement/purchases from foreign suppliers in respect of the components required for the manufacture of the computers was handled by him;**

- **as regards the negotiation of prices in respect of the import items, he was either advised by their Singapore offices or by Sh. Arun Sogani, Managing Director;**

- **valuation of goods to be exported was undertaken by their Singapore offices;**

- the imports from Singapore were either directly from M/s Unicorp Industries (S) Pt. Ltd., (fully owned subsidiary of M/s Unicorp Industries Ltd) or through M/s Freesia Trading Pte., Singapore;

- the affairs of M/s Unicorp Industries (S) Pte. Ltd., Singapore were handled by Sh. Amit Jain who also managing the day to day affairs of Freesia Trading Co.

- the goods imported from Singapore were generally traded back to the same companies abroad;

- M/s Unicorp Overseas Ltd. at 242-243, Ph-IV, Udyog Vihar, Gurgaon, was floated for servicing the computers supplied by M/s Unicorp Industries Ltd. as well as from other suppliers;

- the clearance of the imported goods from customs was done against yellow bills of entry for warehousing, the goods were warehoused and then re-exported back to Unicorp Indus(S) Pte. Ltd. to M/s Freesia Trading Pte. Ltd. by adding a margin of 8-10% to its values;

- goods imported by them and not cleared from Customs were meant for export only;

- as per his knowledge there could be around 25 such consignments worth Rs. 20 crores, lying uncleared with Customs;

- the major exports by M/s Unicorp Industries Ltd. were only of trading done in respect of the imported goods."

In the statement recorded on the next day i.e 05.08.1999, he stated as under :

"- some of the shipments imported between Jan 98 to June 98 could not be cleared either due to late export orders or heavy demurrage;

- the consignments meant for domestic use were mainly from Taiwan and these were got cleared from the Customs by the company;

- M/s Unicorp Industries Ltd., used to import SIMM Card, Drams, CPU's for re-export purposes;

- Some export payments got delayed resulting in stoppage of further exports;

- The import orders got shipped and accumulated at Customs;

- The financial problems in South East Asia and heavy devaluation of their currencies."

In his statement dated 20.08.1999, Shri B.B. Gupta, has deposed as under :

"- from middle of the year 1997 onwards, there were serious financial problems;

- the company had to return a lot of money to non-banking financial institutions like L&T, Global Trust etc;

- the South East Asia crises also played a major role in their financial crises;

- the exports suddenly improved during 1997 because the imports were primarily for exporting the goods back and the company got finances from banks against these exports;

- M/s Unicorp Industries (S) Pvt. Ltd. office in Singalpore used to get the orders for export for Unicorp Industries Ltd., Delhi;

- **the re-imported software of security system was worth 20 to 50 thousands, rupees per piece in India market;**
- **during the visit to Singapore he used to interact with Sh. Amit Jain both for M/s Unicorp Industries (S) Pvt. Ltd. and Freesia Trading Pvt. Ltd.;**
- **the major consideration for exporting to its own subsidiary in Singapore was the bank finances."**

There is nothing in his statement to impute knowledge of under valuation of imported computer peripherals etc. by M/s Unicorp Industries Ltd. The evidence on record does not bring out any commission or omission on his part which would render the imported goods liable to confiscation under Section 111 of the Customs Act, 1962, therefore, I set aside the penalty imposed upon him.

3. As regards Shri V.P. Gupta, penalty has been imposed upon him on the ground that he was looking after the share department, liaison work with all Government Departments, account books and record keeping of the company for proper maintenance, RBI complaints and other related matters. He has stated that Shri Arun Sogani was looking after imports, exports and bank transactions relating to imports and exports. There is no material on record to establish that he looked after the import – export department or was involved in negotiations for import of goods. Since no omission or commission, on his part, so as to render imported goods liable to confiscation, has been established, penalty is not warranted. I, therefore, set aside the penalty imposed upon Shri V.P. Gupta.

4. As regards Shri Madan Agarwal, a non-working Director, who used to attend meetings, penalty has been imposed upon him on the ground that he could be held personally responsible for the irregularity which was within his knowledge and the company was working under his guidance, manipulating the banking system and the customs to borrow the money from the banks and parking funds abroad. However, there is nothing on record to show that the company was working under his guidance and the material on record clearly shows that it is Shri Ashok Sanghi under whose guidance the company was working. In the absence of any evidence of his omission or commission of any act so as to render imported goods liable to confiscation, penalty cannot be sustained and I accordingly set aside the same.

5. Penalty has been imposed on the CHA on the ground that he abetted the importers to obtain the loan by giving original Bills of Entry to the importers who used the same for parking funds abroad. The findings of the Commissioner against the CHA is contained in para 43 of the impugned order wherein he has relied upon the statement of Shri Raj Kumar, Partner of CHA, that all pending bills of entry were with the company and the bills of entry were taken back by the importer on the pretext that he had to take loan for demurrage and other charges from the bank on the basis of original documents, whereas the original documents being Customs documents cannot be given to the importer after filing the same in the Customs Department. There is no finding as to how the return of

original Bills of Entry to the importers helped them in the import at highly inflated price. The Department has not led any evidence to bring out knowledge of the CHA that the imported goods were over invoiced so as to hold the CHA guilty of abetment. Therefore, penalty imposed on the CHA is also not sustainable and is accordingly set aside.

6. In the result, the impugned order imposing penalties on the appellants, above mentioned, is set aside and the appeals are allowed.

(Pronounced in the open Court on the 12th day of May , 2009)

(JYOTI BALASUNDARAM)
VICE-PRESIDENT

Golay