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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/611 /2005-613 /2005 - CU[DB] Date 13/01/2009

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

To :
1. M/S WELL WEAVE FABRICS PVT LTD.,
2. SH VISHNU KOGATA, DIRECTOR
3. SH ANIL KOGATA, MANAGER
   14, SAMDHANI BUILDING, PUR ROAD,
   BHILWARA (RAJASTHAN) - 311001

M/S WELL WEAVE FABRICS PVT LTD Appellant

Vs

THE COMMISSIONER OF CUSTOM, JAIPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No. C/05-07 2009 CU[DB]** dated 02.01.2009

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 CUSTOM, JAIPUR
   NCRB, STATUE CIRCLE, C-SCHEME, JAIPUR (RAJASTHAN)
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
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Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM, NEW DELHI

COURT – III

CUSTOMS APPEAL NO. 611, 612 & 613 OF 2005

[Arising out of Order-in-Original No. 03/2005-Cus dated 12.04.2005 passed by the Commissioner of Customs, Jaipur]

For approval and signature:

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

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 Departmental authorities?	

M/s. Well Weave Fabrics Pvt. Ltd.,
Shri Anil Kagotia,
Shri Vishnu Kagotia — Appellants

Vs.

Commissioner of Customs,
Jaipur — Respondent

Appearance:

Shri K.K. Anand, Advocate for the appellant;
Shri Fateh Singh, Departmental Representative, for the Revenue

Coram:

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

Date of Hearing/decision: 2nd January, 2009

FINAL ORDER NO. C/5-7/09 **dated** _________

Per M. VEERAIYAN:

These 3 appeals arise out of common order of the Commissioner No. 03/2005-Cus dated 12.4.2005.

2. Heard both sides and perused the records.

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

(a) The applicant company imported a consignment of power looms in September 2002. They filed Bill of Entry for clearing the consignment; they declared the description of the imported goods as looms along with accessories; they declared the year of manufacture of the looms as 1993; they declared the value as Rs. 1,45,36,950/-.

(b) They submitted certificate of foreign Chartered Engineer and invoice dated 30.7.2002 and two packing lists both dated 30.7.2002 in support of their claims made in the Bill of Entry.

(c) Since the imported goods were second-hand machinery, the same were got examined by Shri Shah a Chartered Engineer, in the panel for the said purpose. Shri Shah furnished his report dated 18.9.2002 agreeing with the prices declared for the consignment and confirming the year of the manufacture claimed by them to be correct.

(d) Subsequent examination by the officers of Preventive wing revealed that there were six numbers of new Jacquard machines and the Director of the company agreed to pay the duty involved on the said machines.

(e) A verification was got conducted with the help of Police Forensic Science Laboratory. 4 out of 10 looms were examined by them and, in respect of each of the looms, it was found that the original plates on the control panels and on the Dobby were missing. At the missing plate portion, four holes were found at each of the control panels and adhesive materials was found at missing plate portion on the Dobby. Aluminium plate was found on LHS of the each loom and was attached with two pins. The plates could easily be removed and fixed in the machine. Also embossed description "11/1988" was found on beam flanges which indicated the year of manufacture. Flanges were found tempered. In addition most of the printed Manual & setting instructions were found of the year 1989-90.

(f) A show cause notice issued alleging that the looms were more than ten years old requiring licence for import and proposing confiscation of the said looms and proposing demand of duty of Rs. 13.26 lakhs on 6 number of new Jacquard machines and proposing imposition of penalty on the appellants.

(g) The Commissioner held that the year of manufacture of looms were actually 1988-90 and was mis-declared as 1993; he held that the 6 number of new Jacquard machines were to be assessed separately and confirmed the duty on Jacquard machines. He, however, allowed the claim for the benefit of notification No. 21/2002-Cus dated 1.3.2002. The amount of duty on the Jacquard machines after allowing the benefit of the notification has not been specifically quantified in the order.

4. Learned Advocate after taking us through various documents like proforma invoice, foreign chartered engineer's certificate, invoice, packing lists, local chartered engineer's certificate, forensic report and manufacturer's certificate, made the following submissions:-

(a) There are contemporaneous imports of 1993 model of power looms at 19,000 U.S.$ per machine. They have declared transaction value at 29,500 U.S.$ per machine and proforma invoice and the final invoice clearly indicate the price declared is for the looms and all the accessories received along with looms. The department has not alleged /found that they have paid any amount in excess of the amount in the invoice.

(b) They have not mis-declared the year of manufacture of looms. The discrepancies noticed were relating only to certain accessories like control panel, flanges and dobby. Even if the said accessories were held to be of manufactured earlier to 1993, no inference could be drawn that the looms had not been manufactured during the year, 1993.

(c) Further, the Police Forensic Science Laboratory examined only 4 out of 10 looms and examination report cannot be extended to all the 10 looms.

(d) He fairly submits that he does not want to contest the order in Para iii, iv, & v inasmuch as the finding in Para iii is in their favour and the findings in Para iv & v relate to items involving small value. However, he pleaded that no penalty should be imposed for technical violation insofar as the same relates to Para iv & v.

(e) As the year of manufacture of the machine has been correctly declared and the overall value declared is also correct the goods should not be confiscated and no penalty should be imposed on the appellant company as well as the Director and Manager of the company.

(f) He relies on the decision of the Tribunal in the case of M.K. India Ltd. vs. C.C., Airport, reported in 2006 (206) ELT 376 (Tri.) wherein the issue of import of second-hand machinery has been decided in favour of the assessee in substantially same set of the facts.

5. Learned D.R. submits that the report dated 18.9.2002 of the Chartered Engineer Shri Shah was applicable only in respect of looms and not to the Jacquard machines. This has been clarified in his statement dated 20.9.2002. He submits that the Manager has personally visited Athens and got the goods inspected and shipped and supply is from the trader and not from the actual user or a manufacturer. There is some manipulation of number plates and the forensic lab report clearly

indicates that they themselves were involved in mis-declaring the year of manufacture of looms and imported new Jacquard without declaring same and some of the items were also found concealed.

6.1 We have carefully considered the submissions from both sides and perused the records. The operative part of the order of the Commissioner reads as follows:-

"(i) I confiscate the 10 nos. of secondhand looms having declared value of Rs. 1,45,36,950/- imported vide Bill of Entry No. 000335 dated 11.9.2002, which were seized on 3.12.2002, under Section 111(d), 111(m) and 119 of the Customs Act, 1962. However, since the same had already been release provisionally as per Hon'ble High Court's order, I impose fine of Rs. 25,00,000/- (Rupees twenty five lakhs) in lieu of confiscation under Section 125 of the Customs Act, 1962, in terms of the bond executed by the importer.

(ii) I confiscate the 6 nos. new Eltex Jacquards, which were found to be mis-declared as old & used and which were seized on 3.12.2002, under Section 111(f) and 111(m) of the Customs Act, 1962. However, since the same had already been released provisionally as per Hon'ble High Court's order, I impose fine of Rs. 5,00,000/- (Rupees five lakhs only) in lieu of confiscation under Section 125 of the Customs Act, 1962, in terms of the bond executed by the importer.

(iii) The Eltex Jacquards are eligible for benefit of Serial No. 251(1) of the Notification No. 21/2002-Cus and accordingly, the duty should be recovered on these Jacquards after extending the benefit of this notification in terms of the bond executed by the importer.

(iv) I confiscate one Sony Digital Video Camera, one Compaq Laptop and one Air Plastic Tub, totally valued at Rs. 1,97,500/-, which were found to be not declared in the import documents and which were seized on 3.12.2002, under Section 111(e), 111(f), 111(i) and 111(l) of the Customs Act, 1962. However, since the same had already been released provisionally as per Hon'ble High Court's order, I impose fine of Rs. 25,000/- (Rupees twenty five thousand only) in lieu of confiscation under Section 125 of the Customs Act, 1962, in terms of the bond executed by the importer.

(v) The duty should be recovered on merits on one Sony Digital Video Camera, one Compaq Laptop and one Air Plastic Tub as proposed in the show cause notice in terms of the bond executed by the importer.

(vi) I impose penalty of Rs. 10,00,000/- (Rupees ten lakhs only) on the importer under Section 112(a) of the Customs Act, 1962.

(vii) I impose penalty of Rs. 5,00,000/- (Rupees five lakhs only) on Shri Vishnu Kogata, Director of the importer under Section 112(a) of the Customs Act, 1962.

(viii) I impose penalty of Rs. 1,00,000/- (Rupes five lakhs only) on Shri Anil Kogata, Manager of the importer under Section 112(a) of the Customs Act, 1962."

6.2. We find that the appellant company has declared the year of manufacture of looms as 1993 and there was no specific declaration of the year of manufacture of the accessories. The Commissioner has held that the year of manufacture of the looms is 1988-1990 but the Jacquard machines are new. The Ld Advocate does not seriously contest the findings of the Commissioner that these Jacquard machines are new but contests finding relating to the year of manufacture of the looms. The claim of the Ld Advocate in this regard is not acceptable. The year of manufacture need not be printed only on the machine or its part. It is not uncommon to mention the year of manufacture in one of the attachment of the main machinery. It is like attaching registration number of car by means of name plate on the bumper of car. The country of origin/ year of manufacture etc can be inscribed in a plate/ label attached to the machine. We do not find any valid explanation as to why the plates were found removed from each of the control panel from each of the 4 looms which have been examined and why similar tempering in respect of flanges and dobbys of each of looms was resorted to. It was not the case of the appellant that there was any other indication on the looms or in other parts of the looms of the year of manufacture which support their claim. Whether this finding relating to 4 looms can be extended to other 6 looms? If the appellants felt that these 4 looms were different from other 6 looms, they were entitled to have asked for examination of the other looms, as well. The learned Advocate fairly conceded that there was no such request of the examination of the rest of the looms. Therefore, we hold that the finding of the Commissioner that all the looms were manufactured during the year 1988-90 and the same was mis-declared as of 1993 make is well founded and, therefore, there is violation of licensing regulation in importing the machineries of more than 10 years old with out the required licence.

6.3 The clarification from the manufacturer indicating the looms of certain specified numbers were manufactured in the year 1993 which is sought to be relied upon by the importer is not relevant. The imported consignments with tampered control panel, flanges and dobbys etc. can not be treated to be the looms referred to in the clarification of the manufacturer. For the reasons already recorded by us we are not inclined to accept the submission by the learned Advocate in this regard.

6.4 Next we take up the issue of valuation. We find that the appellant has declared the value of Rs. 29,500/- U.S.$ per looms. The proforma invoice and the final invoice clearly indicate the price declared is for the looms and all the accessories received along with looms. The department has not alleged /found that they have paid any amount in excess of the amount in the invoice. Learned Advocate has submitted the customs authorities have been assessing the 1993 model loom at 19,000 U.S.$ per loom contemporaneously. This has not been refuted. While it is not advisable to compare the value of one consignment of second hand machineries with that of other, we find that the price declared in respect of the present consignment is much above the contemporaneous prices. Under these circumstances the claim of the learned Advocate that the value of Jacquard stands included in the overall value declared seems reasonable and acceptable. The learned Advocate fairly conceded that the new Jacquard are being imported at 5800 U.S.$ per machine. Therefore, we hold that these 6 number of Jacquard machines shall be assessed at 5800 U.S.$ per machine after extending the benefit of concession already allowed in Sl. No. iii of the order of the Commissioner. However, the value of the consignment of the looms excluding the 6 Jacquard machines shall be taken by deducting the value of 6 Jacquard machines from the overall value of Rs. 1,45,36,950/-.

6.5 The proforma invoice and the final invoice clearly indicate the price declared is for the looms and all the accessories received along with looms. The packing lists also refer to various accessories. We are not inclined to agree with the finding that the Jacquard machines have been imported with out declaring. The From the above violation of licensing restriction will apply to only the looms and not the Jacquard. This is being taken note of by us in imposing the quantum of redemption fine and penalty. As already noted the Ld Advocate does not contest the order in Para iv, & v inasmuch the items involve small value.

6.6 While we have concluded that there is a mis-declaration about the year of manufacture of looms, we are unable to find any reliable evidence about the direct involvement of the Director and Manager of the appellant company that they had personal knowledge about mis-declaration and intention of violating the licensing regulation. Accordingly, we hold that there is no justification for imposing penalty on the Director and Manager of the appellant company.

7. In the light of the above, we dispose of the appeals as follows:-

(a) We uphold the confiscation of the looms but reduces the redemption fine from Rs. 25,00,000/- (Rupees twenty five lakhs) to Rs. 10,00.000/- (Rupees ten lakhs only).

(b) We set aside the confiscation of 6 number of Jacquard machines and consequently the redemption fine imposed on them.

(c) The duty on the Jacquard machines and the rest of the consignment shall be determined in the light of our findings in the previous paragraphs.

(d) We uphold the order of the Commissioner in Para iii, iv & v as uncontested.

(e) We reduce the penalties imposed on M/s. Well Weave Fabrics Ltd. from Rs. 10,00,000/- (Rupees ten lakhs) to Rs. 2,00,000/- (Rupees two lakhs only).

(f) We set aside the penalties on Shri Anil Kagotia and Shri Vishnu Kagotia.

8. Appeal of M/s. Well Weave Fabrics Ltd. is partly allowed as above. The appeals by Shri Anil Kagotia and Shri Vishnu Kagotia are allowed with consequential relief.

(Dictated & pronounced in the Open Court.)

(M.VEERAIYAN)
MEMBER (TECHNICAL)

(P.K. DAS)
MEMBER (JUDICIAL)

RK