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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/637 – 638 /2005 - CU[DB]

Date 17/02/2009

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

To : 1. B.R.EXPORT
2. VINOD KUMAR GUPTA
H.NO.30, ROAD NO.5,
EAST PUNJABI BAGH,
NEW DELHI - 110 026

B.R.EXPORT Appellant
Vs
COMMISSIONER OF CUSTOMS, ICD, TUGHLAKABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No.** C/82-83/09-CUS. DATED 21.10.08 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 :
1. Respondent
COMMISSIONER OF CUSTOMS,
ICD, TUGHLAKABAD, NEW DELHI
2. Adv. / Consult
MR.PRADEEP JAIN,ADVOCATE
34 GUJRAT VIHAR, VIKAS MARG, DELHI-92
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
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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)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

C/637-38/05-Cus

[Arising out of Order-in-Original No.27/05 dt.7.4.05 passed by the Commissioner of Customs, New Delhi)

Hon'ble Mr. S.S.KANG, VICE PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

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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?

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. B.R.Export
Sh. Vinod Kumar Gupta — Appellant

Versus

Commissioner of Customs,New Delhi — Respondent

Appearance
Shri V.K.Agarwal, Adv. For Appellant
Shri A.K.Madan, Authorised Departmental Representative(DR) For Respondent

Coram: Hon'ble Mr. S.S.KANG, VICE PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Final
Date of decision: 21.10.08
Order No. C/82-83/09

Per Rakesh Kumar:

The allegation against the Appellants is that during the period from Oct'2001 to Jan'2002, they grossly over invoiced their exports of fraudulently claimed the drawback amounting to Rs.21,55,788/-. The basis of this allegation is that –

(a) When the value of the exported goods declared by the consignees in the UAE in the "Import bills" filed by them, which was procured through Consulate General of India in UAE, was compared with the FOB value of the same goods declared by the Appellant in the respective shipping bills, the import value declared by the consignee in the UAE were found to be about 1/25th of the FOB value declared by the Appellant in the shipping bills, and this indicates that very cheap and inferior quality goods were being exported by the Appellants by heavily over invoicing the same, with intention ~~for~~ to fraudulently claim duty drawback, and

(b) Shri Vinod Kumar Gupta, who is running the Appellant firm in the name of his uncle Shri Ram Prakash Gupta, has, in his statement dt.10.5.02 stated that he was exporting Readymade garments and socks to M/s. Hassan Abdullah Trading Co. UAE, and M/s. Saeed Al-Mutorshi Trading, UAE, that the company M/s. Hassan Abdullah Ali Trading, [illegible] is of his friend Shri Sanjay Agrawal who had told him to export the readymade garments to his company in Dubai at any rate, that he had over invoiced the consignments to claim higher drawback and that 20% of the profit being earned was being given by him to Shri Sanjay.

1.1 It is on this basis that the Commissioner vide the impugned order-in-original dt.7.4.05,has –

(a) confirmed the demand of drawback amounting to Rs.21,55,788/- under Rule 16A of the Customs & Central Excise Drawback Rules,1995 read with Section 76(1)(b) of the Customs Act,1962 alongwith interest on it at the applicable rate under Section 75A of the Act,

(b) held the readymade garments and socks valued at Rs.1,60,60,739/- exported to Dubai under six shipping bills, listed in Annexure 'A' to the show cause notice, liable to confiscation under Section 113 (d) of the Customs Act, but since the goods are not available for confiscation, has imposed fine of Rs2,00,000/- in lieu of confiscation' and

(c) imposed penalty of Rs.10 lakhs on Shri Vinod Gupta under Section 114 of the Customs Act,1962.

2. Heard both the sides.

2.1 Shri V.K.Agarwal, Advocate, the learned Counsel for the Appellants, made the following submissions:

(1) The Appellants had exported three consignments of Readymade garments to M/s. Saeed Al Mutorshi Trading, UAE and three consignments of Socks to M/s. Hassan Abdullah Trading Co.,UAE. The goods were allowed clearance after proper scrutiny and examination as the exports had been made under drawback claim. The Appellant have received the export proceeds in their bank account with the State Bank of Bikaner & Jaipur.

(2) So far as shipments of Readymade Garments are concerned, except for one photocopy of declaration filed by the consignee before Dubai Customs, which is also unsigned and unattested, the Department has not produced any material evidence to challenge the price of readymade garments declared by the Appellants. In respect of shipment of Socks, even the consignee's declaration is not produced.

(3) Drawback of Rs.9,60,096/- had been claimed in respect of export of three consignment of socks. The socks had been purchased in India at Rs.18/- per pair and had been exported at the FOB price of Rs.64/- per pair. No inquiry has been conducted by the Department that market price of the socks was less than the drawback claimed. Similarly, no such inquiry has been conducted in respect of readymade garments.

(4) If US$ 6380/- mentioned by the consignee in Dubai in the Import bill filed before Dubai Customs in respect of the three shipments of readymade garments, covered by the Shipping bills No.1185057 dt.19.10.01, 1185139 dt.19.10.01 and 1185243 dt.20.10.01 is accepted as correct, it would mean per piece price of Rs.10/- which is not possible. Therefore, without any other independent evidence, the price declared by the importer in Dubai cannot be taken on the sole basis for determining the correctness of the FOB price of export from India. Moreover, no inquiry has been conducted with the Appellant about issue of parallel invoice by them and there is no evidence in this regard.

(5) Hon'ble Supreme Court in case of CC, New Customs House, Mumbai vs Vishal Exports Overseas Ltd. reported in 2007(79)RLT.234(SC), while dismissing the Revenue's appeal has held that when the declared FOB value of Rs.157/- per piece of mugs is supported by the bank's remittance certificate and there is no evidence of the FOB price being not genuine, the same cannot be rejected even if it is 450% of the local purchase price of Rs.35/- per piece. Same view has been taken by the Tribunal in case of Guru Nanak Exports vs Commissioner of Customs, New Delhi reported in 2007(215)ELT.277.

(6) In view of Hon'ble Supreme Court's judgment in case of Priya Blue Inds. Ltd. vs CC reported in 2004(172)ELT.145(SC) held that

assessment cannot be reopened without review of shipping bill assessment. The Tribunal in case of Vittese Export Import vs Commissioner of Customs(Export Promotion), Mumbai, reported in 2008(224)ELT.241 has held that when during the assessment of the shipping bill , the declared FOB value and PMV were reduced by the assessing officer and this assessment was not challenged by the Department by filing a review appeal, it attained finality and by invoking charge of mis-declaration, the Revenue cannot ask for re-assessment of the consignment.

(7) No redemption fine in lieu of confiscation under Section 125 of the Customs Act,1962 can be imposed, in respect of the six consignments exported to Dubai, as the same are neither available for confiscation nor their export had been allowed against bond executed by the Appellant binding the Appellant to produce the goods when required by the Department. In this regard, reliance is placed on Tribunal's order in case of CC, Amritsar vs Indeep Impex reported in 2008(86)RLT.871(CESTAT-Del.)

2.2 Shri A.K.Madan, the learned Departmental Representative made the following submissions:

(1) The proprietor of the Appellant's firm is Shri Ram Kumar Gupta but on enquiry it was found that it was being run by his nephew Shri Vinod Gupta which shows that this firm had been opened by Shri Vinod Gupta in the name of his uncle with a view to earning undue duty drawback fraudulently by exporting very cheap quality garments and socks at highly over invoiced prices.

(2) Shri Vinod Gupta has not been able to provide the names of his suppliers of fabrics and socks and fabrication of garments.

(3) Shri Vinod Gupta in his statement dt.10.5.02 has admitted over invoicing of the exports. Shri Gupta , inspite of ample opportunity having

been given has not been able to produce the purchase invoice of the socks and the fabrics. The bills of the fabricators who are claimed to have made the garments, bear the dates after the dates of exports, which indicates that the same are bogus.

(4) The Assessments can be re-opened in the cases of fraud. In this regard, reliance is placed on Hon'ble Supreme Court's judgment in the case of UOI vs Jain Shudh Vanaspati Ltd. reported in 1996(86)ELT.460(SC) wherein it was held that SCN under Section 28 of the Customs Act can be issued for demand of duty without revising under Section 130, the clearance order passed under Section 47, if the clearance order had been obtained by fraud.

(5) The redemption fine in lieu of confiscation under Section 125 is imposable even if the goods held to be liable for confiscation under Section 113 are not physically available for confiscation.

(6) Since the PMV of the goods is less than the draw back claimed and since no remittance have been received, the drawback already claimed by the Appellant is not admissible to them and the same is recoverable from them with interest.

3. We have carefully considered the submissions from both the sides and perused the records. The point of dispute in this case is as to whether three consignments of readymade garments exported to M/s. Saeed Al Mutorshi Trading, UAE under shipping bills No.1185059 dt.19.10.01, 1185139 dt.19.10.01 and 1185243 dt.20.10.01 with declared FOB value of US$ 1,76,595/-(US$ 6.12 per piece) and three consignments of socks exported to M/s. Hassan Abdullah Trading LLC, UAE under shipping bills No.1202844 dt.15.1.02, 1202846 dt.15.1.02 and 1202847 dt.15.1.02 with declared FOB value of US$ 5616-/- (US$ 1.30 per piece) are over invoiced and whether

their prevailing market price(PMV) is less than the drawback claimed. Total drawback claimed in respect of three consignments of garments is Rs.11,95,694/- and in respect of three consignments of socks is Rs.9,60,094/- and drawback has been denied by the impugned order on the basis that the PMV of the goods exported is much less than the drawback claimed. The basis of the allegation is –

(a) the "import bill" filed by the consignee – M/s. Saeed Al Mutorshi Trading before Dubai Customs, in respect of the garments exported by the Appellants under shipping Bill No.1185057 dt.19.10.01, 1185137 dt.19.10.01 and 1185243 dt.20.10.01, in which the value of the goods, based on a parallel invoice issued by the Appellant, has been declared as US$ 6380/- FOB, as against the value of US$ 1,76,595/- in the three shipping bills filed before customs authorities in India and

(b) Statement dt.10.5.2002 of Shri Vinod Gupta of the Appellant's firm, recorded under Section 108 of the Customs Act,1962 and also the fact that inspite of having been given ample opportunity, Shri Vinod Gupta could not produce the purchase invoice in respect of the socks and the fabrics used for making the garments exported.

3.1 The Appellant's plea, on the other hand, is that just on the basis of the declaration filed by the consignee before the Customs authorities of the importing country, it cannot be concluded that the Appellant have over invoiced the goods, when no market inquiry for ascertaining the PMV of the goods was conducted and full remittance for these goods exported has been received.

3.2 We find that in this case market inquiry for ascertaining the PMV could not be conducted as neither any sample of the goods exported was available nor Shri Vinod Gupta of the Appellant's firm, inspite of being repeatedly asked, produced the purchase bills for the socks and the fabrics. The price declared by the consignees before the Dubai Customs, has, therefore, to be seen in the background of the Appellant's inability to either produce the purchase bills of the socks and fabrics used for making the garments exported or give the details of the persons from whom the socks and the fabrics had been purchased, and also the fact that the price declared by the consignee in the "import bill" filed before Dubai Customs, is backed by the Appellant's invoice, which in fact, is a parallel invoice issued by the Appellant. There is no denial from the Appellant that this invoice has not been issued by them. Shri Vinod Gupta, in his statement dt.10.5.02, which has not been retracted, has stated that overinvoicing was being done by him in order to claim higher drawback and that the profit earned in these exports was being shared by him with Shri Sanjay of M/s. Hassan Abdullab Trading Co., UAE. We, therefore, agree with the Commissioner's finding that the goods have been grossly over invoiced by the Appellant with intention to claim higher drawback and the PMV of the goods is much lower than the drawback claimed and therefore, in terms of the provisions of Section 76(1)(b) of the Customs Act, no drawback is admissible and the drawback paid to the Appellant is recoverable from them.

3.3 We do not accept the Appellant's plea that in view of Hon'ble Supreme Court's judgment in case of M/s. Priya Blue Ind. Ltd.(supra), the drawback cannot be recovered without reviewing the shipping bill assessment, as, held by Hon'ble Supreme Court in case of Jain Shudh Vanaspati Ltd.(supra), this principle is not applicable in the cases of fraud. Since the value of the goods has been misdeclared with intention to claim higher drawback, the Appellant would be liable for penalty under Section 114(iii) of the Act. However, as regards the redemption fine in lieu of

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confiscation, we are of the view that the provisions of Section 125 are applicable only in those cases where either the goods are physically available for confiscation or the goods had been allowed to be released for export against a bond executed by the exporter binding him to produce the goods when asked and since in this case, the goods had been allowed to be exported without any bond and the same are not available for confiscation, no redemption fine in lieu of confiscation can be imposed under Section 125. We are supported in this view by the Tribunal's judgement in the case of CC, Amritsar vs Indeep Impex, reported in 2008(86)RLT.871(CESTAT-DEL.).

4. In view of the above discussion, while we uphold the Commissioner's order confirming the demand of fraudulently claimed drawback of Rs.21,55,788/- alongwith interest, under Rule 16 & 16A of the Customs & Central Excise Duties Drawback Rules,1995 read with Section 75A of the Customs Act,1962 and also the order imposing penalty of Rs.10 lakhs on Shri Vinod Gupta under Section 114 of the Customs Act, we set aside the redemption fine of Rs.2 lakhs imposed on the goods held to be liable for confiscation, but which are not available for confiscation.

4.1 The appeal stands disposed off as above.

Pronounced on 17/2/09

(S.S.Kang)
Vice President

(Rakesh Kumar)
Member Technical

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