

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

Appeal No. C/389 /2006-390 /2006,428 /2006 - CU[DB]

Date 17/06/2009

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

To :
M/S SWATI INDUSTRIES

D-74, PHASE- V, FOCAL POINT, DHANDARI KALAN,
LUDHIANA

M/S SWATI INDUSTRIES

Appellant .

Vs

Respondent

THE COMMISSIONER OF CUSTOMS, AMRITSAR

I am directed to transmit herewith a certified copy of **Final order No. C/225-227 2009 CU[DB]** dated 15.06.09

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, AMRITSAR

CENTRAL REVENUE BUILDING, THE MALL, AMRITSAR

2. Adv. / Consult : Sh. Sudhir Malhotra, Adv
13-R Hukam Chand Colony,
Near DAV College, Jalandhar

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 Publications 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 Kuni, 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

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18. KESHAV GARG

S/O SH.AMAR NATH, 73, BHARAT NAGAR, LUDHIANA


Assistant Registrar
(Customs Appeal Branch)

19. BAL KRISHAN GARG

S/O AMAR NATH, 52/7, BHARAT NAGAR, LUDHIANAN

**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 Nos. 428, 389-390 of 2006**

[Arising out of the Order-in-Original No. 02/Cus/06 dated 09/03/2006 passed by The Commissioner of Customs, Amritsar.]

For Approval and signature :

Hon'ble Shri D.N. Panda, Judicial Member

Hon'ble Shri Rakesh Kumar, Technical Member

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?

1. M/s Swati Industries	]	
2. Shri Keshav Garg S/o Shri Amar Nath	]	Appellant
3. Shri Bal Kishan Garg S/o Shri Amar Nath	]	

Versus

CC, Amritsar

Respondent

Appearance

Shri Sudhir Malhotra, Advocate – for the appellant.

Shri S.K. Panda, Authorized Representative (Jt. CDR) – for
the Respondent.

CORAM: Hon'ble Shri D.N. Panda, Judicial Member
 Hon'ble Sh. Rakesh Kumar, Technical Member

DATE OF HEARING : 11/05/2009.

DATE OF DECISION: 15/06/2009

Final Order No. C/225-227/09 Dated : _____

Per. Rakesh Kumar :-

The facts giving rise to these three appeals are, in brief, as under :-

1.1 M/s Swati Industries, D-74, Phase V, Focal Point, Dhandari Kalan, Ludhiana (hereinafter referred to as M/s Swati) are manufacturing and exporting steel clamps, steel clamp components, Bright bars, Spanners, rough forgings and machined forgings of non alloy steel. Shri Keshav Garg, his brothers Bal Krishan Garg and Shri Anand Sagar and his son Shri Vishal Garg are partners of M/s Swati. The finished products manufactured by them are exported to U.A.E., Australia and Saudi Arabia and the exports were being made under DEPB scheme. Acting on an information that M/s Swati were indulging in gross over invoicing of their exports in order to fraudulently avail the higher benefit under DEPB scheme, the officers of Directorate General of Revenue Intelligence searched the office as well as residential

premises of Shri Bal Krishan Garg on 16/6/04, but no incriminating documents were found. During search, on initial inquiry with the partners of M/s Swati, it was ascertained that two export consignments of Steel clamps and parts, of M/s. Swati under shipping bills No. 8188 dated 2/6/04 and 8667 dated 11/6/04 were pending clearance at CFS (CONCOR), Ludhiana. Export consignments were immediately detained and the samples drawn from them were sent to the CRCL as well as National Institute of Secondary Steel Technology (NISST), Mandi Gobindgarh. The tests by NISST reported the goods to be made of non-alloy steel. In the meantime inquiry was also made with Shri Bal Krishan Garg and Shri Keshav Garg. Shri Keshav Garg in his statement dated 16/6/04 recorded under Section 108 of Customs Act, 1962 stated that they were exporting the goods manufactured by them – Steel clamps and its components, bright bars, forgings etc. of non alloy steel to UAE, Australia, Saudi Arabia, that he had resorted to over valuation to avail excess DEPB benefits and percentage of over valuation varied from consignment to consignment, that in lieu of undue DEPB benefit claimed by them by over valuation, he is submitting a bank draft No. 567245 dated 16/6/04 of Rs. 25,00,000/- (Rupees Twenty Five Lakhs) in favour of Commissioner of Customs A/c PNB, Ludhiana, that if during

investigation it is found that they have taken any undue benefit in excess of Rs. 25,00,000/-, they would pay the differential amount, that they have been exporting the goods since March 2003, that the over valued amount was included in the payment received by them through Telegraphic Transfers (TTs), which was actually Hawala money and was delivered to the local Hawala person, whose details he does not know, that they have exported 48 containers to UAE and Australia and had taken DEPB benefit of Rs. 117 lakhs till date, that the payments from overseas – UAE and Australia were received through TTs in Punjab and Sind Bank, Saban Bazar, Ludhiana, that their major suppliers of raw materials – M.S. Rounds, Baran Steel, Alloy Steel & Furnace Oil were M/s Vee Kay Concast (P) Limited, M/s Ludhiana Steel Rolling Mills, M/s T.K. Steel Rolling Mills, M/s Kapoor Alloys etc., that their partners were visiting abroad to meet the buyers to settle the orders and prices, that the goods for export were cleared from their factories under ARE-1s to ICD, Ludhiana, that their clearing agent is M/s A.R. Shipping; that normally one Shri Raj Kumar handled the Customs clearance; that generally parallel invoices were raised by them, that over valued invoices were submitted to ICD, Ludhiana and actual invoices showing lower price were sent to overseas buyers, that they had not kept the

record of parallel invoices of lower value, that Shri Raj Kumar of M/s Ankur Impex, Ludhiana was handling the work relating to Customs documentation on part time basis and that they had exported steel clamps under invoice No. 198 dated 26/8/03 at Rs. 82.64 per kg., whereas in the market the same were available at lower price. Statement of Shri Bal Krishan Garg brother of Shri Keshav Garg was also recorded on 16/6/04 under Section 108 of Customs Act, 1962, wherein he gave a statement identical to the statement of Shri Keshav Garg. Statement of Shri Raj Kumar of M/s Ankur Impex who was doing the export documentation work relating to Customs of M/s Swati was also recorded on 16/6/04 under Section 108 of Customs Act, 1962, wherein he stated that he was doing the export documentation work and excise related work of M/s Swati, that after preparing the documents, the same were being handed over to M/s A.R. Shipping, CHA, who attended to the work of Customs clearance at ICD and that he was receiving all the payments from M/s Swati through cheques. On 17/6/04 another statement of Shri Raj Kumar was recorded under Section 108 of Customs Act, 1962, wherein he stated that M/s Swati Industries were exporting goods under DEPB Scheme mainly to Gulf countries, that he was getting directions and necessary materials for preparation of shipment documents from

Shri Bal Krishan Garg, that work relating to banks was dealt by Shri Bal Krishan Garg himself only, that he had knowledge that the exported goods were being over valued from M/s Swati Industries for getting more DEPB incentives, that percentage of over valuation varied from consignment to consignment but all this was decided by Shri Bal Krishan Garg, that for the purpose of over valuation a parallel set of invoices was prepared in M/s Swati as per the directions of Shri Bal Krishan Garg and all the records was kept by Shri Bal Krishan Garg himself, that the details for the preparation of over valued invoices were given to him by Shri Bal Krishan Garg himself and the same was handed over to CHA for clearance of the goods, that actual low price invoices were being kept by Shri Bal Krishan Garg, that he was handling over the pre-shipment documents prepared as per directions of Shri Bal Krishan Garg to the Manager of A.R. Shipping who was preparing the shipping bills on that basis for Customs clearance.

1.2 The market inquiries of prices of various items being exported by M/s Swati were conducted from M/s S.B. Industrial Corporation, Ludhiana, M/s Jindal Fasteners, Ludhiana and M/s Bansal Engineering Works, Ludhiana and the details of the prices of steel clamp fixed put lock, steel clamps (BRC), steel clamps (sleeves) and steel clamp (grave lock fixed) was as under :-

	S.B. Industrial Corporation	Jindal Fasteners	Bansal Engg. Works
Steel clamp fixed Put lock	Rs. 27/- per pc.	Rs. 45-48 per pc.	Rs. 45-48 per pc.
Steel Clamps (BRC)	Rs. 28/- per pc.	Rs. 50-52/- per pc.	Rs. 50-52 per pc.
Steel Clamps (sleeves)	Rs. 44/- per pc.	Rs. 62-65/- per pc.	Rs. 62-65 per pc.
Steel clamp (grave Lock fixed)	Rs. 70/- per pc.	Rs. 80-85/- per pc.	Rs. 80-85 per pc.

1.2.1 On protest of Shri Keshav Garg that the above persons are neither manufacturer nor exporter and that market inquiry must be made from persons who are either manufacturers or exports of these items, further market inquiry was conducted from M/s Perfect Forgings, Ludhiana and M/s Manish International, Ludhiana. M/s Perfect Forgings, Ludhiana was of the opinion that the C&F price of Ledger blade "shown to them was Rs. 11-12/- per pc., the C&F price of Bottom cup was Rs. 11-13/- per pc., the C&F price of Putlog Clamp was Rs. 38-45/- per pc., of Board Retaining Clamp was Rs. 50-56/- per pc., of Sleeve Clamp was Rs. 60-66/- per pc. and C&F price of Gravelock Girder clamp-Swivel Rs. 128-137/- per pc. Similar prices in respect of these items were reported by M/s Munish International, Ludhiana.

1.3 Further statement of Shri Keshav Garg was recorded on 11/3/05, wherein he stated that he has gone through his statement dated 16/6/04 and the same is true and voluntary, that while over invoicing the export goods, they used to inflate the value of certain invoices by 8% to 30% of the invoice value and this increase in the value was spread over of all the items of that particular invoice, that only some of the invoices were over valued to obtained higher rate of export incentives and all the invoices were not inflated, and that he used to personally handle the work of over invoicing and kept a private record of such over invoicing. He also gave the invoicewise details of the difference between declared inflated value and actual value in respect of 14 invoices No. 23 dated 17/4/03, 95 dated 10/6/03, 130 dated 03/7/03, 145 dated 09/7/03, 160 dated 21/7/03, 177 dated 31/7/03, 186 dated 11/8/03, 198 dated 26/8/03, 212 dated 01/09/03, 222 dated 06/3/09, 236 dated 17/9/03, 279 dated 30/10/03, 294 dated 12/11/03 and 428 dated 25/02/04. The total value of exports on the basis of these invoices came to Rs. 2,73,79,456.70 and the DEPB benefits in respect of the same worked out to Rs. 47,91,106.83.

1.4 On further inquiry it was found that 14 DEPB licences issued against the exports against the above-mentioned 14

invoices, had been sold to M/s Surindra Impex, Ludhiana, M/s Sanjeev Impex, Ludhiana and M/s Dee Kay Consultants, Ludhiana. M/s Surindra Impex, M/s Sanjeev Impex and M/s Dee Kay Consultants, on inquiry confirmed having purchased DEPB scrips from M/s Swati but stated that they have not made any duty free imports against those scrips. The Department, however, took the view that in view of misdeclaration of export value, M/s Swati are not eligible for any DEPB benefits whatsoever and that the amount of DEPB benefit taken by them by the way of issue of licences is recoverable from M/s Swati in cash. It is on this basis that a show cause notice dated 31/3/05 was issued to M/s Swati, Shri Bal Krishan Garg, Shri Keshav Garg, M/s Surindra Impex, M/s Sanjeev Impex and M/s Dee Kay Consultants for – (a) confiscation of the goods of declared value Rs. 2,73,79,456.70 under Section 113 (d) and 113 (i) of the Customs Act, 1962 readwith Section 50 (1) of Customs Act, 1962 as well as Rule 11 and 14 (2) of the Foreign Trade (Development & Regulations) Rules, 1993, for misdeclaration of the value, (b) denying the ~~amount~~ DEPB benefit amounting to Rs. 47,91,106.83 claimed and received by them and recovering the same in cash alongwith interest under Section 28AA and 28 AB of Customs Act, 1962 and also appropriate an amount of Rs. 25,00,000/- already

deposited by M/s Swati towards this demand and (c) imposition of penalty on M/s Swati, Shri Keshav Garg, Shri Bal Krishan Garg, Surindra Impex, Sanjeev Impex, Dee Kay Consultants under Section 112/114/114A of Customs Act, 1962 for their involvement in committing the export fraud.

1.5 It is only at the time of reply to the show cause notice submitted by M/s Swati, that Shri Keshav Garg and Shri Bal Krishan Garg pleaded that their statements recorded on 16/6/04 and 11/3/04 were incorrect and dictated statements and that they have deposited Rs. 25,00,000/- during investigation under compelling circumstances of threat of arrest and continued freezing of their bank accounts, which had been frozen by DRI vide letter No. 856 (21) LDH/2004/747 dated 16/06/2004 addressed to The Manager, Punjab and Sind Bank, Sabban Bazar, Ludhiana. The freezing was lifted by the DRI on 25/6/04.

1.6 After granting hearing to all the noticees, the Commissioner vide Order-in-Original No. 02/CUS/06 dated 09/03/06 – (a) denied the DEPB benefit amounting to Rs. 47,91,107/-, confirmed its demand and also ordered appropriation of an amount of Rs. 25,00,000/- deposited against this demand, (b) ordered confiscation of the exported goods valued at Rs. 2,73,79,457/-

under Section 113 (d) & (i) of Customs Act, 1962 and imposed redemption fine of Rs. 25,00,000/-, and (c) imposed penalty of Rs. 25,00,000/- on Shri Keshav Garg and penalty of Rs. 20,00,000/- on Shri Bal Krishan Garg under Section 114 of Customs Act, 1962. The penal proceeding against M/s Sanjeev Impex, M/s Surindra Impex and M/s Dee Kay Consultants were dropped as they had not imported goods against DEPB scrips purchased by them from M/s Swati. It is against this order that these three appeals have been filed by M/s Swati, Shri Keshav Garg and Shri Bal Krishan Garg.

2. Heard both the sides.

2.1 Shri Sudhir Malhotra, Advocate, the learned Counsel on behalf of the appellant made the following submissions :-

(1) The goods exported had been manufactured by the appellant themselves, who had cleared the same under ARE-1 (earlier known as AR-4). There is no difference between the ARE-1 price and the FOB price declared in the shipping bills. As per para 3 of the Board Circular No. 69/97-CUS dated 8/12/97, in case of manufacturer exporters, where the manufacturer exporter declared PMV higher than the AR-4 price, the higher PMV declared may be accepted upto 150% of the AR-4 value and the market inquiry is to be caused only if the PMV is more than 150%

of the AR-4 price and the exporter does not agree to lower the PMV below the 150% market value. In this case when the declared PMV was well within 150% of the ARE-1 price/FOB price, there was no justification for conducting market inquiry.

(2) In respect of three items, there is a value cap for the purpose of DEPB benefit fixed by the DGFT and the declared value are well within value cap.

(3) The extent of over invoicing is around 22% only. This much variation in prices is very much possible.

(4) The statements of the partners of M/s Swati are not their voluntary statements and had been recorded under pressure and threat of arrest and continued freezing of the bank account. These statements have been retracted while submitting the reply to the show cause notice.

(5) The DEPB scrips can be cancelled only by the DGFT who has not cancelled the DEPB scrips earned by the appellants. In any case, no duty can be demanded from the exporters for which there is no provision in the Customs Act, 1962.

2.2 Shri S.K. Panda, Joint CDR, the learned Departmental Representative, defending the impugned order pleaded that Shri Keshav Garg and Shri Bal Krishan Garg the partners of M/s Swati and Shri Raj Kumar who was doing the export documentation

work of M/s Swati, have confessed to over invoicing of exports from 8% to 30% with the intention of earning more DEPB benefits and though these statements were retracted, the retractions having been made only at the time of reply to the show cause notice and long after recording of the same, have to be rejected as after thoughts-more so, as these statements are supported by the market inquiry mentioned in para 14 of the adjudication order. He pleaded that in view of the statements of Shri Keshav Garg, Shri Bal Krishan Garg and Shri Raj Kumar, which are supported of market inquiry, the allegation of over invoicing stands proved.

3. We have carefully considered the submissions from both the sides and have perused the records.

3.1 On going through the impugned order and the show cause notice, we are of the view that irrespective of whether the allegation of over-invoicing of exports against the Appellants is correct or otherwise, the issue of demand of Rs. 47,91,107/- from M/s Swati can be taken up first. In this regard we find that this is a strange order and strange show cause notice, as neither the show cause notice mentions as to under which provision of the Customs Act, 1962, the amount of Rs. 47,91,107/- was sought to be

recovered from M/s Swati, neither the impugned adjudication order mentions as to under which provision of the Customs Act, this demand has been confirmed.

3.1.1. The allegation against the Appellants is that they inflated the FOB value from 8% to 30% in the shipping bills mentioned in para 17 of the impugned adjudication order and they did so in order to claim higher DEPB benefit. The total DEPB benefit has been quantified at Rs. 47,91,107/-. Since the DEPB scrips issued to M/s Swati had been sold by them to M/s Surindra Impex, M/s Sanjeev Impex, and M/s Dee Kay Consultants, the Department made inquiry with them, who stated that they have not used these scrips for any duty free imports. There is no inquiry as to whether they sold these scrips and if so to whom and whether the buyers have used those scrips for duty free imports. If the allegation of export over invoicing is upheld and the DGFT, the authority to issue, cancel or modify the DEPB scrips, cancels the scrips or reduces their value, the duty can be recovered only from the users of the DEPB scrips for duty free imports, not from the Exporter against whose exports the DEPB scrips had been issued. There is no provision in the Customs Act, 1962 to recover the wrongly taken DEPB benefit in cash from the exporter, if he has sold/transferred the DEPB scrips to someone else. We find

that other than Section 28 for demand of "non levied, short levied or erroneously refunded duty or non paid, short paid or erroneously refunded interest on duty, Section 28AA and 28 AB for demand of interest on non paid, short paid or erroneously refunded duty for the period of delay in its payment, Section 72 for demand of duty and interest on warehoused goods, Rule 16 readwith Rule 16A of Customs and Central Excise Duties Drawback Rules, 1995 issued by the Government under Section 75 of Customs Act, 1962 and Section 37 of the Central Excise Rules, for demand of erroneously paid drawback on export or for recovery of drawback paid which the exporter has to pay back as the sales proceeds have not been realized within the period stipulated in Foreign Exchange Management Act and Section 75A (2) for demand of interest on wrongly paid drawback for the period of delay in its payback, there are no other recovery provision in the Customs Act, 1962. Similarly it has not been pointed out to as whether there is any provision of the Foreign Trade (Development & Regulation) Act, 1992 or the Rules made or EXIM policy announced thereunder authorizing the Custom authorities to recover the excess DEPB benefit alleged to have been taken by an exporter in cash. The only situation in which Rs. 47,91,107/- could be recovered from M/s Swati (the exporter) as

duty, is if M/s Swati themselves had used these DEPB scrips for duty free imports and the scrips had been cancelled by the DGFT – but here, neither the scrips have been cancelled by DGFT, nor the imports have been made by M/s Swati. We, therefore, hold that irrespective of whether the allegation of export over invoicing against the Appellants is correct or otherwise, the demand of Rs. 47,91,107/- having been made from M/s Swati without any authority in this regard in the Customs Act, 1962, is illegal and, hence, the same is set aside. In such cases, the Customs Authority are at liberty to pursue with the DGFT Authority to cancel the DEPB scrips to prevent abuse thereof, but they cannot recover the duty from the exporter when he has transferred those DEPB scrips to others. We also find that we are supported in our conclusion by Tribunal's decision in cases of **Vijeta International vs. CC, Mumbai** reported in 2006 (199) E.L.T.–89 and **Dharam Exports vs. CC, Nhava Sheva** reported in 2005 (192) E.L.T. – 503.

4. The main point of dispute is as to whether M/s Swati have inflated the FOB value of the goods exported under 14 invoices mentioned in para 17 of the impugned order in original, for claiming higher DEPB benefit and whether the Appellants i.e. M/s Swati and its partners are liable for penalty on this ground under 114 of the Customs Act.

4.1 The main Appellant – M/s Swati are manufacturers and exporters of Bright bars, machined Steel Forgings, un-machined steel forgings, spanners, steel clamps and parts thereof, made of non-alloy steel (galvanized/un-galvanized). The exports were under DEPB claim and the export goods had been cleared from the factory under ARE-1 forms. The declared FOB value is the same as the value mentioned in the respective ARE-1. The average FOB price declared in the shipping bills in respect of Steel clamps, rough forgings, machined forgings, spanners and bright bars is Rs. 82.79 per kg., Rs. 71.8 per kg., Rs. 73.33 per kg., Rs. 55.75 per kg. and Rs. 27.61 per kg. respectively and it is not disputed that the declared FOB price in respect of Bright bars, un-machined steel forgings and machined forgings is within the value cap of Rs. 35/- per kg., Rs. 85/- per kg. and Rs. 105/- per kg. respectively fixed in the EXIM policy. The allegation against the Appellant is that in order to claim higher quantum of DEPB benefit, the declared FOB prices in respect of exports under 14 invoices mentioned in para 17 of the impugned order have been inflated by 8% to 30%. The evidence relied upon in support of this allegation is -

(A) the statements recorded under Section 108 of the Customs Act, 1962 of –

(a) Shri Bal Krishan Garg on 16/6/04,

(b) Shri Keshav Garg on 16/6/04 and 11/3/05 &

(c) Shri Raj Kumar on 17/6/04 and

(B) market inquiry conducted from various dealers, M/s S.B. Industrial Corporation, Ludhiana, M/s Jindal Fasteners, Ludhiana, M/s Bansal Engg. Works, Ludhiana, M/s Perfect Forgings, Ludhiana and M/s Munish International, Ludhiana as mentioned in para 12 and 14 of the Adjudication order.

4.1.1 Though it has been alleged that composition of the goods exported has been misdeclared, we find that this allegation is without any basis as the goods covered by shipping bills No. 8667 dated 11/6/04 and 8188 dated 2/6/04 are declared to be made of non alloy steel and on test of the samples drawn from their consignments, by NISST, Mandi Gobindgarh, the same were found to be of non-alloy steel. The CRCL report simply reports the samples to be of galvanized steel and does not say whether the same are made of alloy or non alloy steel.

4.2 As regards the correctness of the declared FOB value (which is same as the ARE-1 value) vis-à-vis the prices as found in market inquiry, we find that market inquiry has been conducted only in respect of certain types of steel clamps and their parts. So far as bright bars, machined and un-machined forgings are

concerned, no market inquiries have been conducted and their declared FOB value is well within the value cap fixed for these items by the DGFT and the DEPB claimed on these three value cap items is Rs. 25,16,512/-. Similarly no market inquiry has been conducted in respect of 'spanners'. As regards the steel clamps we find from the export invoices from page 139 to 216, of appeal memo of M/s Swati, that mainly steel clamp scaffoldings (fixed), steel clamp scaffolding (swivel) and small quantity of steel clamp (put log) have been exported at price of U.S. \$ 1.92 – 1.98 per pc., U.S. \$ 1.96 – 2.2 per pc. and U.S. \$ 1.55 per pc. respectively. The average export price of these steel clamp is Rs. 82/- per kg. The market inquiry has been conducted in respect of put log clamp, sleeve clamp, Grave lock/Girder clamp-swivel, Grave lock/Girder clamp fixed being exported under shipping bill 8667 dated 11/6/04 and 8188 dated 2/6/04 and their price varies from Rs. 40/- per pc. to Rs. 135/- per pc. There is no discussion in the impugned order as to whether the steel clamp (scaffolding – fixed/swivel) exported under the 14 invoices mentioned in para 17 of the order are the same as Board Retaining clamp, Sleeve clamp, Grave lock/Girder clamp fixed/swivel, in respect of which market inquiry was conducted. The only finding of Commissioner in this regard in para 34 of the impugned order is that market inquiry

shows the declared FOB price to be on higher side – but how much higher is not mentioned. On the contrary, in para 35 of the order the Commissioner says that the market inquiry has not been used as evidence in support of the allegation of export overinvoicing. Thus, in this case, the market inquiry does not lead to any conclusion, whatsoever.

4.2.1 While DEPB benefit available to an exporter is based on the actual FOB price of the goods exported, ITC Public Notice No. 10/97 (PN) 97-2002 dated 21/5/97 providing that the amount of DEPB credit in respect of export products whose DEPB rate is 15% or more, shall not exceed 50% of the Prevailing Market Value (PMV) of the goods, is a built in mechanism to check the misuse of DEPB scheme by inflating the FOB value. In respect of some items, there is a value cap. In this case it is not the allegation of the Department that the DEPB benefit claimed is more than 50% of the PMV of the goods or that in respect of the items with value cap – bright bars and machined and unmachined forgings, the declared per unit FOB value exceeds the value cap fixed in respect of these items the declared per unit FOB value in respect of Bright bars, machined and unmachined forgings is well within the value cap fixed for these items. The allegation against the Appellants is that in order to claim higher DEPB benefit, they

have inflated the FOB value by 8% to 30%. But as discussed above, the market inquiry in this regard does not lead to any definite conclusion. Moreover – just because of the prevailing market price of the goods is less than the declared FOB value for export, it cannot be concluded that the FOB value is inflated, as the domestic market and export market are different. The correctness or otherwise of the declared FOB value of the goods being exported to a country must be tested in accordance with the provisions of Section 14 (1) of the Customs Act on the basis of contemporaneous exports of identical or similar goods in comparable quantity to that country – not on the basis of prevailing domestic market price. The PMV as per the ITC Public Notice No. 10/97 (PN) 97-2002 dated 21/5/97 is relevant only for determining the quantum of DEPB benefit in case of export goods with DEPB rate of 15% or above. But it is not relevant for determining correctness of declared FOB value.

4.3 This leaves the oral evidence in support of the Department's allegation – i.e. the statement dated 16/6/04 of Balkishan Garg, Statements dated 16/6/04 and 11/3/05 of Shri Keshav Garg and Statement 17/6/04 of Shri Raj Kumar, which is the main evidence. While the statements dated 16/6/04 of Shri Bal Krishan Garg and Keshav Garg are identical and are corroborated by statement

dated 17/6/04 of Shri Raj Kumar (who in his statement dated 16/6/04 had not disclosed any knowledge about alleged export over invoicing by M/s Swati), Shri Keshav Garg in his statement dated 11/3/05 has again confirmed his statement dated 16/6/04 and has admitted to 8% to 30% over invoicing. These statements have been retracted by Shri Keshav Garg and Shri Bal Krishan Garg only in reply dated 26/9/05 to the show cause notice stating that the statements dated 16/6/04 and 11/3/05 of Shri Keshav Garg and dated 16/6/04 of Shri Bal Krishan Garg are not their voluntary statements but are the statements dictated by DRI officers, which they were forced to sign in face of threat of arrest and continued freezing of their bank account and that the bank account of M/s Swati had been frozen by DRI vide letter No. 856 (21) LDH/2004/247 dated 16/6/04 addressed to The Manager, Punjab and Sind Bank, Sabban Bazar, Ludhiana and it was de-freezed vide DRI's letter No. 856 (21) LDH/04/798 dated 25/6/04 to the bank and that in this manner the bank account of M/s Swati was kept frozen illegally from 16/6/04 to 25/6/04 in order to put pressure on the Appellants. While normally such belated retraction are rejected as after thoughts and the confessional statements recorded under Section 108 of the Customs Act are accepted as admissible evidence, in view of the following

circumstances we are of the view that the confessional statements of Shri Bal Krishan Garg, Shri Keshav Garg and Shri Raj Kumar are of doubtful probative value –

(i) Freezing of M/s Swati's bank account on 16/6/04 and instructing the bank to de-freeze the same on 25/6/04 indicates that there is substance in the contention of Shri Keshav Garg and Shri Bal Krishan Garg that they had been forced to give statements, as dictated by the DRI officers in face of threat of arrest and continued freezing of their bank accounts, which would have adversely affected their business and caused huge losses. Their confessional statements and then non-retraction and payment of Rs. 25,00,000/- on 16/6/04 towards allegedly higher DEPB benefit availed have to be seen in this background. As per Section 24 of the Indian Evidence Act, confession caused by inducement, threat or provision is not relevant in a criminal proceeding and the same principle would hold good for a quasi criminal proceedings. In this regard, Hon'ble Supreme Court in its judgment in case of **Vinod Solanki vs. UOI** reported in **2009 (233) E.L.T. – 157 (S.C.)**, while setting aside FERA Tribunal's order upholding penalty on the appellant Shri Vinod Solanki under the provisions of FERA, 1973, on the basis of recovery of Indian currency of Rs. 2,65,000/- from his house on 25/10/94 and his two confessional statements made on 26/10/94 and 27/10/94, which were subsequently retracted saying that the same had been recorded by illegally detaining him and subjecting him to threat and coercion,

has, in para 34, 35 & 37 of the judgment, observed as under

“34. A person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat etc. if the same is to be relied upon solely for the purpose of securing a conviction. With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession, which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion etc., but the requirement is that it may appear to the court as such.

35. In the instant case, the Investigating Officers did not examine themselves. The authorities under the Act as also the Tribunal did not arrive at a finding upon application of their mind to the retraction and rejected the same upon assigning cogent and valid reasons therefor. Whereas mere retraction of a confession may not be sufficient to make the confessional statement irrelevant for the purpose of a proceeding in a criminal case or quasi criminal case, but there cannot be any doubt whatsoever that the court is

obligated to take into consideration the pros and cons of both the confession and retraction made by the accused. It is one thing to say that a retracted confession is used as a corroborative piece of evidence to record a finding of guilt, but it is another thing to say that such a finding is arrived at only on the basis of such confession although retracted at a later stage.

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37. The allegation that he was detained in the Office of Enforcement Department for two days and two nights had not been refuted. No attempt has been made to controvert the statements made by appellant in his application filed on 28/10/1994 before the learned Chief Metropolitan Magistrate. Furthermore, the Tribunal, as also the Authorities, misdirected themselves in law insofar as they failed to pose unto themselves a correct question. The Tribunal proceeded on the basis that issuance and services of a show cause notice subserves the requirements of law only because by reason thereof an opportunity was afforded to the proceedee to submit its explanation. The Tribunal ought to have based its decision on applying the correct principles of law. The statement made by the appellant before the learned Chief Metropolitan Magistrate was not a bald statement. The inference that burden of proof that he had made those statements under threat and coercion was solely on the proceedee does not rest on any legal principle. The question of the appellant's failure to discharge the burden would arise only when the burden was on him. If the burden was on the revenue, it was for it to prove the said fact. The Tribunal on its independent examination of the

factual matrix placed before it did not arrive at any finding that the confession being free from any threat, inducement or force could not attract the provisions of Section 24 of the Indian Evidence Act."

Hon'ble Supreme Court in case of **KI Pavunny vs. Assistant Collector, Central Excise, Cochin** reported in **1997**

(90) E.L.T. – 341 (S.C.) has held that –

(a) confessional statement of accused, if found to be voluntary can form the sole basis for conviction and if retracted, the court is required to examine whether it was obtained by threat, duress or provision and whether the confession is truthful ;

(b) If found to be voluntary and truthful, inculpatory portion of retracted confession could be relied upon to base conviction, however, prudence and practice require that court should seek assurance by way of corroboration from other evidence adduced by prosecution and for this purpose, general corroboration would suffice, not for each detail contained in the confessional statement, and

(c) wealth of details by itself is not an assurance of its voluntary character – the totality of facts and circumstances should be taken into account.

Thus the ratio of the above-mentioned judgment is that confessional statement of a person would be admissible as

evidence only if it has not been obtained by threat, inducement or promise and the law does not say that the accused has to prove to the hilt that retraction of confession made by him was because of threat, coercion, promise, inducement etc. – the requirement is that it may appear to the court as such.

In this case there is no explanation from the Department as to why when M/s Swati's bank account was frozen on 16/6/04, supposedly to protect the interests of Revenue, why instructions for de-freezing were given on 25/6/04 when the matter was still under investigation. Prima facie, this action of the investigating officers appears to be with the sole purpose of pressurising Shri Bal Krishan Garg and Shri Keshav Garg into making statements as per their dictations. There does not appear to be any other explanation. This allegation of the Appellants has not been refuted by the Commissioner in the impugned order. Therefore the statements of Shri Bal Krishan Garg and Shri Keshav Garg, even though retracted only when submitting reply to the show cause notice, cannot be said to be their voluntary statements.

(ii) There is no recovery of any parallel invoices or any other record showing that two sets of invoices were being prepared. There is no evidence that the Appellant's foreign customers had declared to their respective customs authorities, value much lower than the FOB values declared for the same goods by the Appellants in the shipping bills presented to Indian Customs authorities. Full remittance for the goods exported has been received through the bank and

other than the retracted statements, there is no evidence indicating that the excess export proceeds received were being sent back to the foreign customers through Hawala. The declared FOB value is not such as to cause suspicion over its correctness, as there is no evidence that contemporaneous exports of identical or similar goods in comparable quantities have been made to the buyers in the same countries at much lower prices. The average over invoicing alleged in this case is about 22% and since export over invoicing involves sending the excess amount received back to the foreign customers through Hawala, which has a cost, it is doubtful whether any exporter in order to claim higher DEPB benefit (which in this case are from 14% to 20% of FOB) would go in for export over invoicing to the extent of 22% only. Thus the confessional statements of Shri Bal Krishan Garg and Shri Keshav Garg do not gel with the circumstances of this case. In contrast to this case, in case of **Naresh J. Sukhawani vs. UOI** reported in 1996 (63) E.L.T. – 258 – S.C., wherein Hon'ble Supreme Court held that statement of co-accused (Shri Dudani) can be used as a substantive evidence connecting the petitioner (Naresh Sukhawani) with the contravention of illegal export of foreign exchange –

(a) the petitioner Naresh J Sukhawani had been implicated by Shri Subhash Dudani in his confessional statement recorded under Section 108 of Customs Act, 1962, and

(b) Shri Subhash Dudani, in turn, had been implicated by one Shri S. Solanki who had been apprehended by the customs while trying to smuggle out foreign exchange worth Rs. 13,27,212/-

(iii) Even the statement dated 17/6/04 of Shri Raj Kumar who was handling the work of export documentation for M/s Swati on part time basis is of doubtful probative value as in his earlier statement dated 16/6/04, he had not disclosed any knowledge about export over valuation and parallel set of invoices by M/s Swati. Moreover being an exculpatory statement, it is of no evidence value without corroboration by other independent evidence.

4.3.1 In view of the above, we hold that the confessional statements of Shri Bal Krishan Garg, Shri Keshav Garg and Shri Raj Kumar are not reliable evidence in support of the allegation of export over invoicing – the statements of Shri Bal Krishan Garg and Shri Keshav Garg, have not only been retracted, but, as discussed above are hit by Section 24 of the Indian Evidence Act, as the same appear to have been obtained by the Investigating Officers by threat of continued freezing of M/s Swati's bank account.

5. In view of the above discussion, we hold that there is no evidence in support of the Department's allegation of export over invoicing against the Appellants and as such neither there are any

grounds for confiscation of any goods under Section 113 of the Customs Act, 1962 nor there are any grounds for imposition of penalty on the Appellants under Section 114 of the Customs Act. Therefore the impugned order ordering confiscation of the goods exported, imposing redemption in lieu of confiscation and imposing penalties on the Appellants is not sustainable and the same is set aside. In para 3.1 above we have already set aside the demand of DEPB benefit in cash amounting to Rs. 47,91,107/- against M/s Swati, as illegal and without any authority in this regard in the Customs Act, 1962. Accordingly, the appeals filed by M/s Swati and its partners – Shri Bal Krishan Garg and Shri Keshav Garg are allowed.

(Pronounced in open court on 15/6/09)

(Rakesh Kumar)
Technical Member

(D.N. Panda)
Judicial Member

PK