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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/625 /2005-627 /2005 - CU[DB] Date 10/08/2009

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

To : PANKAJ GANDHI, R/O 1, VIJAY NAGAR,
BATALA ROAD, AMRITSAR

PANKAJ GANDHI Appellant

Vs

THE COMMISSIONER OF CUSTOMS, NEW DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order No.** C/337-339/ 2009 CU[DB] dated 03.08.09 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,
   ICD, TUGHLAKABAD, NEW DELHI
2. Adv. / Consult
   MR.PIYUSH KUMAR,ADV
   B-25,LAJPAT NAGAR-III,N.DELHI
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
18. M/S SATYAM EXIM, MAIN ROAD,
    TUKMIRPUR, BEHIND SUNDER BUILDER,
    DELHI - 110094
19. M/S R M CORPORATION,
    316, KATRA HARI SINGH.,
    AMRITSAR - 143006

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

C/Appeal Nos. 625-27/2005-Cus(Br)

(Arising out of order in original No.32/2005 dated 15.4.2005 passed bythe Commissioner of Customs, Tughlakabad, New Delhi)

1. Shri Pankaj Gandhi — Appellant
2. M/s Satyam Exim
3. M/s R.M. Corporation

Vs

CC, New Delhi — Respondent

Appeared for the Appellant : Shri Piyush Kumar
Ms. Reena Rawat, Advocates

Appeared for the Respondent : Shri Vijay Kumar, SDR

Coram: **Hon'ble Mr.D.N. Panda, Judicial Member**
Hon'ble Mr. Rakesh Kumar, Technical Member

Date of Hearing: 21.7.09

Final Order No. C/337-339/09 /2009

Per D.N. Panda:

There being a common cause giving rise to the proceeding, all the three appeals were taken up together for analogous hearing and disposal by this common order.

2. Learned Counsel Shri Piyush Kumar appearing on behalf of the appellants Shri Pankaj Gandhi in Appeal Case No. C/625/05, M/s Satyam Exim in Appeal Case No. C/626/05 and M/s R.M. Corporation in Appeal Case No.627/05 argues that the imported consignment of Nylon Yarn made during different periods had been arbitrarily valued by the Customs without any material evidence

gathered for such valuation. Only because there was search conducted to the residential premises of M/s R.M. Corporation, M/s A.N. Sales Corporation and M/s Satyam Exim, Revenue had made the allegation that the impugned consignments were under-valued. He pleads that in one batch of consignment, the valuation has been adopted to be 1.15 US $ while for the similar goods, the valuation adopted was 2.15 US $. Such method of valuation is not based on any basis or any cogent evidence. Learned Adjudicating Authority had only placed on record that the goods imported by one M/s Global Fibre was the same goods what the appellant M/s R.M. Corporation and M/s Satyam Exim had imported through the impugned bills of entries. He does not dispute that the goods imported by these two appellants whom he represents were sold to M/s A.M. Corporation whose Manager is Shri Pankaj Gandhi and he is the appellant in this batch of appeals also. He submits that the basis on which goods imported by these appellants and M/s Global Fibre were comparable have not been brought on record for comparison. There is nothing on record to show the date of import of goods by M/s Global Fibre was the same as that of the import made by the appellant and the goods imported by same as well as from same supplier abroad.

3. Learned Counsel submits that the goods imported by the appellant were not identical or similar in terms of quality, quantity and specification of both. Further, whether the test report of M/s Global Fibre showing the composition of goods has any basis to compare with the composition of goods to the appellants were not

on record. Therefore, the goods of both cannot be claimed by Revenue to be comparable.

4. Learned Counsel's second argument is that the statement recorded in the course of investigation, to implicate the appellant, lost its credence due to retraction of the same on the next date before a Magisterial Court. He therefore, challenges the adjudication order on the ground that the goods imported by the appellants were not tested in any laboratory to find out the contents of the goods for appropriate valuation. Learned Counsel opposes the evidence brought against the appellant submitting to be unreliable. Therefore, he prays that the statement of the buyer of the goods has no relevance when the customs failed to establish the character and nature of the goods sold by the appellants. Accordingly, all the three appeals may be allowed. Learned Counsel has also made a specific submission in the case of Pankaj Gandhi that the said appellant was neither been issued a show cause notice nor been charged with any offence. Therefore, there was a pre-determined mind to deny justice to this appellant. Accordingly, false implication of this appellant to the case vitiates the proceeding.

5. Learned DR Shri Vijay Kumar has made sincere effort to bring probable value of the evidence relied upon by Revenue, Although there was no direct evidence brought out by him to suggest that the goods imported were of the same nature and character as claimed by Revenue. In absence of laboratory test, in respect of the impugned goods, he relies on the packing slips recovered in the course of search from the buyer of the goods i.e.

M/s A.N. Sales Corporation. But the panchnama appearing at page 92-98 in the appeal folder of M/s Satyam Exim does not indicate the date of manufacture of the impugned goods. That gives a doubt whether the packing slips related to the impugned consignments.

6. Learned DR has seriously objected to the retracted statements while statements were given voluntarily by the deponent. He relies on the judgement in the case of Surjeet Singh Chhabra Vs Union of India reported in 1997 (89)ELT 646 (SC). His argument is that the customs authorities not being police officers, any statement recorded under Section 108 of Customs Act, 1962 is reliable evidence. Relying on page 104-105 of the appeal folder in the case of Satyam Exim, learned DR submits that the specification of the goods imported by the appellant is same as that was in the case appearing in page 104-105 of the appeal folder. This is because the importer has purchased the goods from the same manufacturer. Therefore, the valuation that was made by Revenue was on the same specification and that was not done arbitrarily as pleaded by the appellant's Counsel.

7. Learned DR relies on the decision in the case of Toplane Vs CC(Prev), Kolkata reported in 2009 (238) ELT 95 (Tri.-Kol) to support his submission that valuation if objectively done, remains unchallenged. The objective of the Revenue in this case was genuine. He also relies on the decision in the case of Sai Impex Vs CC reported in 1992 (62) ELT 616 (Tribunal) to contend that valuation is done to bring the goods to the reasonable value in the market. When the manufacturer's invoice was available, that was

an important piece of evidence. Therefore, all the three appeals should be dismissed.

8. Heard both the sides and perused the record.

9. Principal question of law that arises in these appeals is whether comparability of goods has been proved with evidence. The only basis that was adopted by Revenue was that goods imported by M/s Global Fibre were comparable with the goods imported by the two appellants i.e. M/s R.N. Sales Corp and M/s Satyam Exim. To say the goods are comparable, the essential requirement was that two goods were not different from each other by their nature, character and specification and all other features which can be perceived by senses present equally in both types of goods. If such facts are not on record, it can be said that there was no evidence to claim the goods were comparable. Revenue had no test report in respect of both the goods claimed to be comparable. In absence of any technical test report, two goods cannot be said to be comparable. The invoice that was relied by Revenue does not show the specification of the goods of these two appellants whether similar to the goods imported by M/s Global Fibre. Added to this, the manufacturers invoices appearing at page 105 in the file of Satyam Exim, only indicates that the said document related to M/s Global Fibre. All that law expects is specification of goods at page 105 should have agreed with the gods of appellants to draw the conclusion that the goods of these appellants were comparable with contemporaneous invoices. Therefore, without any cogent evidence on record, it is not possible to hold that the goods were comparable. Accordingly, two goods

although look alike by two different eyes by no means be same for a third eye. Reliance by Revenue on Toplane's case for the valuation purposes is baseless when Revenue has failed to prove the identity of the goods for better comparison.

10. When we are unable to find that the goods were comparable, there is no necessity to enter into valuation. However, so far as the valuation the valuation is concerned, it is noticeable feature in this case is that subsequent to search, the goods were exposed to valuation @ ~~21.5~~ 2.15 US $ while the same goods, before search was valued at 1.15 US $. When there is a huge gap in between these two periods, that gap should have been fulfilled by cogent evidence suggesting the valuation claimed by Revenue. There is no material to show that such a huge difference has basis and backed by cogent evidence. When there is no evidence to suggest that the documents of the appellants are unreliable, the appellant may not be dealt unequally under the law. When the valuation fails to stand, the valuation adopted by Revenue is to be given go bye. To the extent material available on record, suggests that the enhancement was for valid reasons adduced by Revenue, Revenue would succeed. But nothing cogent evidence is on record.

11. So far as the retraction of evidence is concerned, it may be stated that the oral evidence is short lived. That provided support to Revenue. But that was retracted before a Magisterial Court subsequently. Once that is retracted, the burden of prof is on Revenue to show that what was stated before retraction was still supported and corroborated by cogent evidence and retraction was malafide and with ulterior motive. Collectoral evidence does not

exist to prove stand of Revenue. There is no dispute that the oral evidence recorded under Section 108 has evidentiary value. But law does not sanction such evidence once impeached before a Magistrate. If there is no collateral evidence to suggest that the deponent was gained over through any unjust enrichment or motive, the retraction may not be invalid in the eye of law. Revenue has no evidence to discard the retraction showing that the same was malafide and ill motived.

12. So far as the appellant Pankaj Gandhi is concerned, the appellant's plea was that he was denied [illegible] process of natural justice. That remained uncontroverted when show cause notice was not issued to him. This appellant should succeed on this legal ground alone.

13. The other two appellants M/s Satyam Exim and M/s R.N. Corporation succeed for no evidence to prove their import was comparable goods and their goods not liable to be valued at a higher amount. The goods imported by the appellants were not established by any report to prove the same to be same with the goods compared. In the result, all the three appeals are allowed.

(Order dictated and pronounced in the open Court).

(D.N. Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

MPS*