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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/79 /2008-80 /2008 - CU[DB]   Date 30/03/2010

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

To :
JASJEET SINGH MARWAHA

PORPRIETOR OF M/S J.D.ENTERPRISES NO
4,RAJDOOT MARG, DIPLOMATIC ENCLAVE,
CHANAKYA PURI, N DELHI.

JASJEET SINGH MARWAHA   Appellant

Vs

C.C. NEW DELHI (IMPORT & GENERAL)   Respondent

I am directed to transmit herewith a certified copy of **Final order No.** C/39-40 2010 CU[DB] dated 30.3.10 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
   C.C. NEW DELHI (IMPORT & GENERAL)
   NEW CUSTOM HOUSE, NEAR I.G.I. AIRPORT, NEW DELHI 110037.
2. Adv. / Consult Ms. Kimmi Brara Marwaha, 4, Rajdoot Marg, Diplomatic Enclave, Chankya Puri, New Delhi-21

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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)
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12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
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(Customs Appeal Branch)

18 PRADEEP KHANNA, SOUND ERRIFIC, S-5, GREATER KAILASH-I, NEW DELHI

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No. 2, R.K. Puram,
NEW DELHI

CUSTOMS APEPAL NO. 79-80 OF 2008

[Arising out of Order-in-Appeal No. CC(A)/CUS/I&G/352-54/07 dated 31.12.2007 passed by the Commissioner of Customs (Appeals), New Delhi]

Dated of hearing/decision; 18th February, 2010

For approval and signature:

Hon'ble Mr. D.N. Panda, Member (Judicial);
Hon'ble Mr. Rakesh Kumar, Member (Technical)

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?	

1) Shri Pradeep Khanna,
M/s. Sound Tarrific,
2) Shri Jasjeet Singh Marwah, Proprietor,
M/s. J.D. Enterprises, CHA — Appellants

Vs.

CC (I&G), New Delhi — Respondent

Appearance:

Shri Ramji Sriniwasan, Sr. Advocate with
Ms. K. Brara, Advocate for the appellants;
Shri , Sumit Kumar & Shri Vijay Kumar,
Authorised Representative (SDR) for the Revenue

Coram:

Hon'ble Mr. D.N. Panda, Member (Judicial);
Hon'ble Mr. Rakesh Kumar, Member (Technical)

ORAL ORDER NO. C/39-40/10 **dated** 30/3/2010

Per RAKESH KUMAR:

The facts leading to these appeals are, in brief, as under:-

1.1 Shri J.D. Marwah is the proprietor of a CHA firm M/s. J.D. Enterprises, Rajdoot Marg, Chanakyapuri, New Delhi. On 15.9.2003 on receipt of an information that Shri Marwah has cleared various consignments by under declaring the value and mis-declaring the description or without payment of duty by production of false documents, in connivance with the importers, office premises of the CHA were searched by D.R.I. officers. In the course of search, among the documents seized were the files pertaining to imports made by M/s. Gurunanak Home Tech Exporter, M/s. E.I. Dupont India Ltd. (hereinafter referred to as EIDIL), M/s. Sight & Sounds India, M/s. Sounds Terrific and M/s. Universal Electronics. Statement of Shri Marwah was recorded by the investigating officers on 15.9.2003 under Section 108 of Customs Act, 1962, wherein he admitted that there is under valuation and mis-declaration of description in the imports made by the above mentioned importers and in particular he admitted that –

(a) A consignment of tags imported by EIDIL free of duty under exemption notification NO. 21/2002-Cus dated1.3.2002 was cleared through him and that for duty free clearance, a forged Apparel Export Promotion Council (AEPC) certificate had been produced to the Customs and this had been done in order to get regular business from EIDIL; and

(b) 4 Bills of Entry each on behalf of M/s. Sound Terrific and M/s. Sight & Sound had been filed for clearance of the goods declared as 'Flat Panel Display for Automatic Data Processing machines' at concessional rate of duty under notification No. 21/2002-Cus (Srl. NO. 325) and that in these imports also, the description of the goods had been mis-declared in order to avail the concessional rate of duty under the exemption notification.

1.1.1 Though in his statement he also admitted to certain irregularities done in respect of imports made by M/s. Gurunanak Home Tech Exporters and Universal Electronics, in these appeals we are concerned with the conduct of Shri Marwah in respect of imports made by EIDIL, M/s. Sounds Terrific and M/s. Sight & Sound India.

1.2 The investigating officers also recorded statements of Shri Sasi Kumar, Manager of EIDIL, Shri Sunil Khera, proprietor of M/s. Sight & Sound and Shri Pradeep Khanna, proprietor of M/s. Sounds Terrific.

1.2.1 Shri Sasi Kumar in his statement dated 3.2.2004 stated that their company was importing paper tags of Lycra for which Shri J.D. Marwah was appointed as the clearing agent; that their company was not registered with AEPC, that the certificate issued in his company's name found in the files seized from the office of the CHA Shri Marwah is forged and bogus, that they accept that the paper tags imported by them were not eligible for exemption and that the differential duty of Rs. 3,03,460/- has been deposited by them. Shri Sunil Khera and Shri Pradeep Khanna in their statements, also recorded under Section 108 of the Customs Act, 1962, stated that they were importing Plasma Monitors for trading for which Shri Marwah had been employed as CHA; that they paid lesser duty @ 15% + 16% + 4% by declaring the goods as "Flat Panel Display for Automatic Processing machines/Plasma Monitors for computers" under Tariff Heading 8471.60/8531.83 whereas the goods were later identified as T.V. attracting higher rate of duty of 25% + 16% + 4%; and that on the advice of CHA they have voluntarily paid differential duty of Rs. 3,18,181/- and Rs. 2,37,985/- respectively due to revised classification of the goods.

1.3 On completion of the investigation, a show cause notice dated 17.8.2004 was issued to EIDIL, Sounds Terrific, Sight & Sound India, Shashi Kumar of EIDIL and Sunil Khera, proprietor of Sight & Sound India and Shri Pradeep Khanna, proprietor of Sound Terrific and Jagjeet Singh Marwah, proprietor of M/s. J.D. Enterprises, CHA for –

(a) Recovery of differential duty amounting to Rs. 5,74,795/- along with interest on it from EIDIL and appropriation of an amount of Rs. 3,03,416/- already deposited by EIDIL towards this demand;

(b) Recovery of differential duty of Rs. 3,18,286/- along with interest on it at applicable rate from M/s. Sight & Sound India and appropriation of Rs. 3,18,181/- already deposited by them towards this demand;

(c) Recovery of differential duty amounting to Rs. 2,38,127/- along with interest from M/s. Sounds Terrific and appropriation of Rs. 2,37,985/- already deposited towards this demand;

(d) imposition of penalty on EIDIL, M/s. Sight & Sound India, and M/s. Sounds Terrific under Section 112(a) and 114A of the Customs Act, 1962, and

(e) imposition of penalty under Section 112(a) on Shri Sasi Kumar of EIDIL, Shri Sunil Khera, proprietor of M/s. Sight & Sound India, Shri Pradeep Khanna, proprietor of M/s. Sounds Terrific and J.S. Marwah, proprietor of M/s. J.D. Enterprises, CHA.

1.4. The show cause notice dated 17.8.2004 was adjudicated by the Additional Commissioner of Customs vide Order-in-Original dated 20.10.2006 by which the Additional Commissioner besides confirming the above duty demand along with interest, against EIDIL, M/s. Sight & Sound India, and M/s. Sounds Terrific, imposed penalties on them and Shri J.S. Marwah as under:-

Srl. No.	**Name of the noticee**	**Section under which penalty imposed**	**Amount in Rupees**
1	EIDIL	112(a) read with 114A	5,74,795/-
2	M/s. Sight & Sound India	112(a) read with 114A	3,18,286/-
3	M/s. Sounds Terrific	112(a) read with 114A	2,38,127/-

4	Shri Sasi Kumar of EIDIL	112(a)	25,000/-
5	Shri J.S. Marwa, CHA	112(a)	5,00,000/-

1.5 M/s. Sight & Sound India, M/s. Sounds Terrific, and Shri J.S. Marwah, filed appeals to the Commissioner (Appeals) against the above mentioned order of the Additional Commissioner. The Commissioner (Appeals) vide Order-in-Appeal No. CC(A)/...352-54/07 dated 31.12.2007 while upholding the duty demands against M/s. Sight & Sound India and M/s. Sounds Terrific and also upholding the penalties on them, reduced the penalty on Shri J.S. Marwah to Rs. 2 lakhs observing that while the statement dated 15.9.2003 given by Shri Marwah stands corroborated by the statements of the importer indicating that what had been cleared were Plasma Monitors and not "Flat Penal Display for Automatic Data Processing machine", so far as the allegation against Shri Marwah of producing forged AEPC certificate for duty free import of tags by EIDIL is concerned, this allegation cannot be accepted because neither the certificate alleged to be forged was relied upon by the department, nor such certificate was required in terms of exemption notification for claiming the exemption and, it is beyond comprehension as to why somebody would take a risk to forge something, while forging is not going to give him any benefit. No appeal has been filed by the department against this portion of the order of the Commissioner (Appeals) dropping the forgery charge against Shri Marwah and reducing the penalty on this ground to Rs. 2 lakhs. However, Shri Pradeep Khanna of M/s. Sounds Terrific and Shri Marwah filed appeals before the Tribunal against the order of the Commissioner (Appeals) which are registered as C/79 & 80/2008, respectively.

1.6 After issue of Order-in-Original dated 20.10.2006 passed by the Additional Commissioner, imposing penalty of Rs. 5 lakhs on Shri Marwah for his alleged mis-conduct, the Commissioner of Customs initiated proceedings for revocation of his CHA licence and as a first step in this direction, vide order dated 29.1.2007 issued under Rule 20 of Customs House Agent Licensing Regulation, 2004 (hereinafter referred to as CHALR) suspended the CHA license. Shri Marwah filed appeal No. 484/07 before the Tribunal against the order dated 29.1.07 of the Commissioner suspending the CHA license. The Tribunal vide order dated 4.6.2008 disposed of the appeal observing that since the appeal against the order dated 31.12.07 of the Commissioner (Appeals) is pending before the Tribunal, no intervention is required at this stage. Shri Marwah filed appeal before the Hon'ble Delhi High Court against the Tribunal's order dated 4.6.2008 and the Hon'ble Delhi High Court vide order dated 13.2.2009 while observing that no intervention is required at this stage, directed the Tribunal to expedite the appeals of Shri Marwah against the order dated 31.12.07 of the Commissioner (Appeals). The Hon'ble Delhi High Court in its order dated 13.2.2009 also observed that the Tribunal is not to be influenced by the observation made in its order. Pursuant to Hon'ble Delhi High Court's order dated

13.2.2009, appeal No. C/79 & 80/08 were taken up for final disposal and the Tribunal vide Final Order No. C/408-409/09 dated 14.9.2009 remanded the matter to the adjudicating authority for de novo adjudication with certain directions. Aggrieved by the Tribunal's order dated 14.9.2009 Shri Marwah filed Civil Writ Petition No. 13577/09 before the Hon'ble Delhi High Court and the Hon'ble Delhi High Court vide order dated 2.2.2010 set aside the Tribunal's order dated 14.9.2009 and directed the Tribunal to decide these appeals on merit on the basis of records/documents available with the Tribunal. Accordingly, these appeals were taken up for de novo decision on merit.

2. Heard both sides.

2.1 Shri Ramji Srinivasan, Sr. Counsel and Mrs. K. Brara, Advocate, representing Shri J.S. Marwah made the following submissions:-

(1) The allegation regarding forging of APEC certificate for duty free clearance of tags imported by EIDPIL has already been dropped by the Commissioner (Appeals) and no appeal has been filed by the department against this order. The only allegation which remains against the CHA Shri Marwah and which has been upheld by the Commissioner (Appeals), is regarding abetment of duty evasion in respect of the goods declared as "Flat Panel Display for Automatic Data Processing Machine/Plasma Monitors for computers" which according to the Departament were actually "Reception apparatus for television" attracting duty at higher rate. This allegation of the department is

without any basis as the "Flat Panel Display for Automatic Data Processing Machines" were actually meant for Data Processing machines, as declared.

(2) In all the eight consignments of "Flat Panel Display for Automatic Data Processing Machines/Plasma Monitors for computers" had been imported – four consignments by M/s. Sounds Terrific and four consignments by M/s. Sight & Sound India. In some of these consignments the description was declared as "Flat Panel Display for Automatic Data Processing Machines" and in remaining consignments the declared description was "Plasma Monitors for computer". In all these cases, the goods had been declared after examination by the Customs and in some cases the assessment itself was on first check basis i.e. first examination of the goods and then assessment of duty based on the examination report. From the perusal of the examination report on Bills of Entry, it will be seen that the customs officers on examination found the goods to be as per the declaration. In view of this, there is no basis for allegation of abetment of duty evasion by mis-declaration against Shri J.S. Marwaha. Since the goods were Flat Panel Display for Automatic Data Processing Machine, the concessional rate of duty under notification No. 21/02-Cus (Srl. No. 325 of table annexed to the notification) has been correctly availed.

(3) There is no admission by the importers that the goods imported were Reception apparatus for television. The examination reports by the

customs, as recorded on the Bills of Entry, also confirm that the goods on being examined were found to be as per the declared description i.e. Flat Panel Display for Automatic Data Processing Machine/Plasma Monitors for computers. The Commissioner (Appeals) in the impugned order-in-appeal has also given finding that there is no documentary evidence to counter the examination report. When on examination by Customs, the goods were found to be as per the declared description and this fact has been confirmed by the Commissioner (Appeals), there is no basis for allegation against Shri J.S. Marwaha, CHA that he had connived with the importers for duty evasion by deliberately mis-declaring the goods as "Flat Panel for display Automatic Data Processing Machine" and thereby fraudulently availing the concessional rate of duty under notification No. 21/02-Cus (Srl. No. 325) for which the importers were not eligible. M/s. NEC Corporation, Korea, supplier of the goods covered by all the Bills of Entry, vide his letter dated 25.11.2002 have confirmed that they manufacture Plasma Monitors for computer of screen size from 42 to 62 inches which also confirms that the goods imported were Plasma Monitor for use with computers.

(4) Just because the importers have paid the differential duty by treating the goods as Reception Apparatus for television, and hence classifiable under heading 85.28 of the Tariff, this action on the part of importers cannot be treated as their admission of guilt.

2.2.1. In view of the above, it was pleaded that there is no basis for upholding the allegation of abetment of duty evasion and imposition of penalty on Shri J.S. Marwaha under Section 112(a) of the Customs Act.

2.2. Shri Pradeep Khanna, proprietor of M/s. Sounds Terrific, appearing in person pleaded that the goods had been correctly declared as "Flat Panel for Automatic Data Processing Machines/Plasma Monitors for computers"; that the Customs examination also confirmed the declared description; and that just because the department is of the view that they are not eligible for concessional rate of duty under notification No. 21/02-Cus (Srl. No. 325), and the differential duty has been paid by them, this cannot be treated as admission of their guilt as there was no mis-declaration and no intention to evade payment of duty.

2.3 Shri Vijay Kumar and Shri Sumit Kumar, the learned D.Rs., defending the impugned order, pleaded that Shri Marwah abeted the duty evasion by mis-declaring the goods imported by M/s. Sounds Terrific and M/s. Sight & Sound India as "Flat Panel Display for Automatic Data Processing Machines/Plasma Monitors for computers" so as to fraudulently claim the benefit of concessional rate of duty under notification No. 21/02-Cus (Srl. No. 325), that false description of goods had been knowingly given in the Bills of Entry so as to claim the benefit of exemption notification; that the Hon'ble Supreme Court in the case of Surjit Singh Chabra vs. UOI, reported in 1997 (89) ELT 646 (SC) has held that confessional statement made before the Customs officers, even if retracted within 6 days, is an admission and binding since the Customs officers are not police officers; that the same view has been taken by the Supreme Court in the case of Bhana Khalpa Bhai Patel vs. Asst. Collector of Cus., Bulsar, reported in 1997 (96) ELT 211 (S.C.) and that since Shri Marwaha had abeted the duty evasion by mis-declaration, penalty under Section 112 (a) has rightly upheld by the Commissioner (Appeals).

3. We have carefully considered the submissions from both sides and perused the records. There are three main issues to be decided in this case –

(a) Were the goods imported eligible for concessional rate of duty under notification No. 21/02-Cus (Srl. No. 325)?

(b) If answer to question (a) above is in the negative, whether Shri Pradeep Khanna, proprietor of M/s. Sounds Terrific, is liable for penalty under Section 112(a) of the Customs Act, 1962?

(c) Is Shri J.S. Marwah, proprietor of M/s. J.D. Enterprises liable for penalty under Section 112(a) of the Customs Act, 1962?

Our answers to these questions are as under:-

4. **Were the goods imported eligible for exemption under notification No. 21/01-Cus (Srl. No. 325).**

4.1 The declared description of the goods, in question is "Flat Panel Display for Electronic Data Processing Machine" or "Plasma Monitor for computers" and the classification claimed in some bills of entry is under heading 84.71 and in other bills of entry under heading 85.31 and in every Bill of Entry, the benefit of concessional rate of duty applicable under Srl. No. 325 of the table annexed to the notification No. 21/02-Cus has been claimed. According to Department, the goods were "Reception apparatus for television" classifiable under heading 85.28. Before going into the question it would be worthwhile looking at the scope of the headings 84.71, 85.28 and 85.31 during the period of dispute.

4.2 During the period of dispute heading 84.71, 85.28 and 85.31 were as under:-

Chapter 84	**Machinery and mechanical appliances**	
84.71	**Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data on to data media in coded form and machines for processing such data, not elsewhere specified or included**	
8471.10 -	Analogue or hybrid automatic data Processing machines	15%
8471.30 -	Portable digital automatic data processing machines, weighing not more than 10kg, consisting of at least a central processing unit, a keyboard and a display	15%
-	Other digital automatic data processing machine :	
8471.41 -	Comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined	15%
8471.49 -	Other, presented in the form of systems	15%
8471.50 -	Digital processing units other than those of sub-heading 8471.41 or 8471.49, whether or not containing in the same housing one or two of the following types	15%

		or unit : storage units, input units, output units	
	8471.60 -	Input or output units, whether or not containing storage units in the same housing	15%
	8471.70 -	Storage units	Free
	8471.80 -	Other units of automatic data processing Machines	15%
	8471.90 -	Other	15%
85.28		**Reception apparatus for television, whether Or not incorporating radio-broadcast Receivers or sound or video recording Or reproducing apparatus; video-Monitors and video projectors**	
		- Reception apparatus for television, Whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus:	
	8528.12 -	Colour	30%
	8528.18 -	Black and white or other monochrome	30%
		Video monitors:	
	8528.21 -	Colour	30%
	8528.22 -	Black and white or other monochrome	30%
	8528.30 -	Video projectors	30%
85.31		**Electric sound or visual signaling Apparatus (for example, bells, sirens, Indicator panels, burglar or fire Alarms), other than those of heading 85.12 or 85.30**	
	8531.10 -	Burglar or fire alarms and similar Apparatus	30%
	8531.20 -	Indicator panels incorporating liquid Crystal devices (LCD) or light emitting Diodes (LED)	15%
	8531.80 -	Other apparatus	30%
	8531.90 -	Parts	30%

4.2.1. As per HSN Explanatory Notes to heading 85.28, "this heading covers video monitors which are receivers connected directly to the video camera or recorder by means of co-axial cables, so that all the radio-frequency circuits are eliminated. They are used by television companies or for closed-circuit television (airports, railway stations, steel plants, hospitals, etc.). These apparatus consist essentially of devices which can generate a point of light and display it on a screen synchronously with the source signals. They incorporate one or more video amplifiers with which the intensity of the point can be varied. They can, moreover, have separate inputs for red (R), green (G) and blue (B), or be coded in accordance with a particular standard (NTSC, SECAM, PAL, D-MAC, etc.)."

The Explanatory Note, however, mentions that the video monitors of this heading should not be confused with the display units of automatic data processing machines described in the Explanatory Note to heading 84.71.

4.2.2 However, w.e.f. 1.1.2007, the heading 84.71 and 85.28 of the Customs Tariff were amended and Video Monitor for use in Data Processing machines were taken out from heading 84.71 and were added to heading 85.28. In the Customs Tariff w.e.f. 1.1.07 there are specific sub-headings in heading 85.28 for monitors of the kind solely or principally used in automatic data processing machine of 84.71 and Video monitors other than cathode ray tube monitors, for use solely or principally with automatic data processing machine were specifically covered under the heading. Since in this case import have been made prior to 1.1.07, the same would be governed by the Customs Tariff, as it stood during the period prior to 1.1.2007 and accordingly for this period the "video monitors for use with automatic data processing machines" would be covered under heading 84.71.

4.2.3 Heading 85.31 during the period of dispute as well as during the period w.e.f. 1.1.2007 covers electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 85.12 or 85.30. As per HSN Explanatory Note to this heading, this heading in addition to burglar or fire alarms or signaling apparatus covers indicator panels, and the like for use e.g. in offices, hotels, factories for calling persons or for indicating whether a certain person or service is required, or for indicating whether a room is free or not or also lift indicators which indicate on an illuminated board whether lift is going up or down and where the lift is.

4.3 In our view, the classification of the goods in question, i.e. "Flat Panel Display for use in Automatic Data Processing machines/Plasma Monitors for computers" under heading 85.31 is totally ruled out. Since the monitors are meant for use with computers and since the imports are of pre – 1.1.07 period, the goods would be correctly classifiable under 84.71. The question now arises as to whether the same would be eligible for concessional rate of duty under notification No. 21/02-Cus (Srl. No. 325).

4.4 Notification No. 21/02-Cus dated1.3.2002 prescribes concessional rate of duty for the goods of description and falling under Chapter Heading as mentioned in column (3) and column (2) respectively of table annexed to this notification. Srl. No. 325 of the table annexed to this notification mentions concessional rate of duty of 15% for "Flat Panel Display of a kind used in Automatic Data Processing Machine and Telecommunication operators and falling under Sub-heading 8531.80."

4.4.1 From the description of the goods as given on the Bills of Entry – "Flat Panel for Automatic Data Processing Machine/Plasma Monitors for computers", which has been confirmed by the Customs authorities on examination, it is clear that the goods are monitors meant for use with Automatic Data Processing Machine and, accordingly, as discussed above, the same would be classifiable under Heading 84.71 and not under 85.28. But what is covered under Srl. No. 325 of the table annexed to notification No. 21/02-Cus is "Flat Panel Display of a kind used with Automatic Data Processing machine or Telecommunication apparatus classifiable under heading 8531.80." Since the goods are Video Monitors of Plasma type meant for Automatic Data Processing Machine classifiable under heading 84.71, the same would not be eligible for duty exemption as the exemption is applicable for Flat Panel Displays of heading 8531.80.

5. **Is the importer Shri Pradeep Khanna of M/s. Sound Terrific is liable to penalty under Section 112(a) of Customs Act, 1962.**

5.1 We find that the goods have been described as "Flat Panel Display for Automatic Data Processing Machines/Plasma Monitors for computers" and this description has been confirmed by the Customs authorities on physical examination. The Commissioner (Appeals) has held that there is no evidence on record to prove that the goods are something else and the report of the Customs officers is false. However, as discussed above, even if the goods are held to be as declared in the Bills of Entry, the same being classifiable under Heading 84.71 would not be eligible for concessional rate of duty under notification No. 21/02-Cus (Srl. No. 325). Just because the importer besides declaring the goods as "Flat Panel Display for Automatic Data Processing Machine/ Plasma Monitors for computers" also claimed the benefit of exemption under notification NO. 21/02-Cus (Srl. No. 325), he cannot be accused of mis-declaring the description, as on physical examination the goods were found to be as per declaration and it was always possible for the customs authorities to determine their correct classification and the eligibility for exemption. Penalty under Section 112(a) can be imposed only on a person who in relation to any goods does or omits to do any act, which would render such goods liable for confiscation under Section 111 or abets the doing or omission of such an act. Mis-declaration of the description of the goods would have rendered the goods for confiscation but in this case, as discussed above, the allegation of mis-declaration does not hold. In view of this, we are of the view that Shri Pradeep Khanna is not liable for penalty.

6. **Is Shri Marwah of M/s. J.D. Enterprises liable for penalty under Section 112(a)?**

6.1 Initially there were two allegations against him. First allegation was that he produced forged AEPC certificate for duty free clearance of consignments of tags imported by EIDIL and the second allegation against him is that in respect of import of Plasma Monitor by M/s. Sounds Terrific and M/s. Sight & Sound India, the description was deliberately mis-declared in order to avail concessional rate of duty.

6.2 As regards the first allegation of producing forged AEPC certificate, the Commissioner (Appeals) in his Order-in-Appeal has dropped this charge holding that the allegation of forgery cannot be accepted particularly when the production of AEPC certificate was not required under the said notification for claiming exemption and it is beyond comprehension as to why somebody would take a risk to forge something, forging of which is not going to give him any benefit. He also observed that AEPC certificate alleged to have been forged by Shri Marwah was not made part of the relied upon documents of the show cause notice. The department has not filed any appeal against this part of the order of the Commissioner (Appeals) and, hence, the Commissioner (Appeal)'s finding on this point become final. What now remains to be decided is, as to whether Shri Marwah has deliberately mis-declared the description of the goods in respect of imports made by M/s. Sight & Sound India and M/s. Sounds Terrific. However, as discussed above, when the goods on examination by the Customs were found to be as per declaration and as observed by Commissioner (Appeals), there is no evidence indicating that the Customs examination report is false, the allegation of mis-declaration of description against Shri Marwah would also fail. The Commissioner (Appeals), however, in this regard relies on admission of mis-declaration by the importers in their statements. However, on going through the statements of Shri Sunil Khera of M/s. Sight & Sound India and Shri Pradeep Khanna of M/s. Sounds Terrific, we find that while the show cause notice mentions that both these persons in their respective statements have admitted that the goods imported were actually "Reception Apparatus for television", while the same had been declared as "Flat Panel Display for Automatic Data Processing Machine/Plasma Monitors for computers", neither Shri Sunil Khera nor Shri Pradeep Khanna in their statements had made any such categorical admission that the goods imported were Reception Apparatus for television. While Shri Sunil Khera in his statement has stated that – "he admits that they have paid lesser rate of duty in respect of goods claimed as Plasma Monitor@ 15% + 16% + 4% whereas later their goods were identified as T.V. which attracted rate of duty @ 25% + 16% + 4% and in view of this their CHA advised them to pay the differential duty of Rs. 3,18,181/-", Shri Pradeep Khanna in his statement has only stated that he was importing Plasma Monitors and that differential duty amounting to Rs. 2,37,985/- as advised by the CHA has been deposited. None of these statements can be treated as admission of mis-declaration or the admission that the goods imported were not monitors for computers but were Television apparatus – more so when the examination by Customs confirmed that the goods were as per declaration and there is neither allegation nor evidence that the Customs officers had connived with the importers or CHA to give false examination report. While in the statement dated 15.9.03 of Shri Marwah there is an admission that 'in respect of imports by M/s. Sounds Terrific and M/s. Sight & Sound, while clearing the goods, the description of goods had been changed as "Flat Panel Display for Automatic Data Processing Machine" which attracts lesser rate of duty whereas the actual goods imported vide invoices attached to bills of entry should have been cleared at higher rate of duty and thus the goods have been mis-declared', and thus the statement would imply that fabricated invoices showing false description of the goods had been produced so as to claim assessment of duty at lower rate, there is no evidence that the invoices submitted by the importers to the Customs were fabricated invoices, not the actual invoices issued by the suppliers. Therefore, the statements of Shri Sunil Khera, Shri Pradeep Khanna and Shri J.S. Marwah can not be treated as

against themselves

evidence on the basis of which the examination reports of the Customs confirming the goods to be as per declared description can be discarded. Therefore, there is no mis-declaration of description and just because the benefit of exemption under notification No. 21/02-Cus (Srl. No. 325) had been claimed, it cannot be alleged that the false description had been given or the goods had been deliberately mis-declared. In view of the above discussion, we are of the view that there is no evidence to support the allegation of abetment of duty evasion against Shri J.S. Marwah and the lower authority order confirming penalty on him is not sustainable.

7. In view of the above discussion, while appeal No. C/80/08 filed by Shri J.S. Marwah is allowed, in respect of appeal No. C/79/08 filed by Shri Pradeep Khanna, while the Commissioner (Appeals)'s order regarding duty demand is upheld, the order regarding penalty is set aside.

(Order pronounced on 3/3/2010)

(D.N. PANDA)
MEMBER (JUDICIAL)

(RAKESH KUMAR)
MEMBER (JUDICIAL)

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