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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/436 & 596 /2006 - CU[DB] Date 12/10/2010

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

To :
M/S. JAINA INTERNATIONAL
JAMIA NAGAR, BASTI SHEIKH,
JALANDHAR .

M/S. JAINA INTERNATIONAL Appellant

Vs

COMMISSIONER, COMMISSIONER OF CUSTOMS & CENTRAL EXCISE Respondent

I am directed to transmit herewith a certified copy of **Final order No. C/165-166/ 2010 CU[DB]** dated 08.10.10 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
COMMISSIONER OF CUSTOMS,DELHI-IV,
NEW CGO COMPLEX, NH-IV, FARIDABAD, HARYANA.
2. Adv. / Consult
MR.NAVEEN MALHOTRA, 470, LAWYER'S CHAMBERS,
PATIALA HOUSE COURTS, NEW 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 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
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Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

Customs Appeal Nos.436 of 2006

[Appeal arsing out of Order-in-Original No.43/KKJ/Adjn/2005-06 dated 31.03.2006 passed by the Commissioner of Customs & Central Excise , Delhi-IV, Faridabad]

M/s.Jaina International

Appellant

Vs.

CC, Delhi-IV, Faridabad

Respondent

Present for the Appellant:Shri Sudhir Malhotra, Advocate for Sri R.Chopra, Adv.
Present for the Respondent: Shri Sumit Kumar, DR, Sri Vijai Kumar, DR & Shri Mahesh Rastogi, DR

Customs Appeal Nos.596 of 2006

[Appeal arsing out of Order-in-Original No.43/KKJ/Adjn/2005-06 dated 31.03.2006 passed by the Commissioner of Customs & Central Excise , Delhi-IV, Faridabad]

CC, Delhi-IV, Faridabad

Appellant

Vs.

M/s.Jaina International

Respondent

Present for the Appellant: Shri Sumit Kumar, DR, Sri Vijai Kumar, DR & Shri Mahesh Rastogi, DR
Present for the Respondent: Shri Sudhir Kumar, Advocate for Sri R.Chopra, Advocate.

Date of Hearing: 29.04.2010
Date of Pronouncement: ...01/10/2010

Coram:

Hon'ble Dr.Chittaranjan Satapathy, Technical Member
Hon'ble Mr. D. N. Panda, Judicial Member

Final order **NO.**...C/165 – 166.........**/2010**

ORDER

PER D N PANDA

Both assessee and Revenue are in Appeal. Assessee is in Appeal with the prayer for setting aside the impugned order which resulted with following consequences under Customs Act, 1962:

(i). 18000 pcs. of Tent Peg exported vide Shipping Bill No. 3343 dated 7.5.2003 under the description of "Cold Chisel" declaring value thereof as Rs.12,63,620/- were confiscated under Section 113(d) of the Customs Act, 1962 in view of actual value of Rs.3,24,000/- revealed from market enquiry.

(ii). 36,000 pcs. of Aldrop exported vide Shipping Bill No. 3344 dated 7.5.2003 under the description of "Gate Latch" declaring value thereof as Rs.16,83,255/- were confiscated under Section 113(d) of the Customs Act, 1962 in view of actual value of Rs.3,27,600/- revealed from market enquiry.

(iii). 9600 pcs. of parts of garden rakes exported vide Shipping Bill No. 3345 dated 7.5.2003 under the description of 'garden Rakes' declaring value thereof as Rs.7,71,374/- were confiscated under Section 113(d) of the Customs Act, 1962 in view of actual value of Rs.96,972/- as per market enquiry .

(iv). The goods mentioned in (i), (ii) and (iii) above were provisionally allowed to be exported against Bond and Bank Guarantee and such goods not being available for confiscation, penalty of Rs.2,00,000/- (Rupees Two Lakhs only) on M/s Jaina International, Unit-II, Basti Sheikh, Jalandhar was imposed under Section 114 of the Customs Act, 1962.

(v). DEPB Benefit for the exports of goods mentioned at (i), (ii) and (iii) above was denied.

2. Revenue is in Appeal with the grievance that learned Adjudicating Authority did not impose redemption fine on the goods exported even though released provisionally against bond and bank guarantee when those were not available for confiscation.

3. M/s Jaina International, Unit-II, Basti Sheikh, Jalandhar filed Shipping Bills No. 3343, 3344 and 3345 all dated 7.5.2003 at ICD, Ballbhgarh, Faridabad for export of above mentioned items to M/s

Goodwill Building Material Trading, P.O. Box. No. 6513, Dubai, (U.A.E) for export of:

(i) 1500 dozen COLD CHISELS 12" made of Forging Quality Carbon Steel having FOB value of Rs.12,63,620/- and PMV Rs. 18,89,982/- claiming therein DEPB amounting to Rs.1,76,906.80;

(ii) 3000 dozen GATE LATCH made of Mild Steel – 8", 10" and 12" having FOB value of Rs.16,83,255/- and PMV Rs.18,51,580/- claiming therein DEPB amounting to Rs.3,02,985.90 and

(iii) 9600 pieces of GARDEN RAKES made of Iron and/or Steel-10", 12", 14", 16" having FOB value of Rs.7,71,374/- and PMV Rs.8,48,511.50/- claiming therein DEPB amounting to Rs.1,38,847.32.

4. Consignments being bound for Dubai, enquiries were conducted as to valuation and classification of the goods. Samples in respect of Shipping Bill No. 3343 were sent to CRCL to verify the raw material used for manufacturer of goods covered by the said shipping Bill. Enquiry was also made from the Range Office about the domestic price. In respect of Shipping Bill No. 3344 and Shipping Bill No. 3345, during examination it was observed that value per kg of the concerned goods were Rs.141 per kg and Rs.275 per kg respectively and that appeared to be overvalued for which enquiry in domestic market was conducted to ascertain value of such goods.

5. Authorities noticed that the Assessee had filed shipping bills to export low quality Garden/Hand tools at a higher value of Rs.275/- to Rs.300/- per kg. as against value of Rs.40/- per kg. in domestic market. That was done to fraudulently claim undue export incentives. It was also found from ICD, PDG that proprietor of the Appellant Shri O.P. Jain was involved in crores of rupees export fraud and investigation against him was in progress. He was also found to have been arrested by Amritsar Customs for similar type of fraud and released on bail. Accordingly, the matter proceeded for thorough investigation.

6. Enquiry from proprietor of M/s OST International, 586, MIE Bahadurgarh, Haryana on 6.8.2003 revealed that the approximate value of the samples were as under :-

(1) Aldrop of all sizes approx. Rs.35/- per kg.

(2) Garden Rack without handle of all sizes approx. Rs.37/- per kg.

(3) Tent Peg approx. Rs.18/- per piece.

The proprietor of M/s OST International opined that on the basis of his experience as manufacturer exporter, item no. (3) referred to above was not 'Chisel' but a 'Tent Peg' as it had pointed tip and shape and hence it cannot be a Chisel.

7. On the basis of market enquiry, the values of items attempted to be exported i.e. "Aldrop", "Garden Rack" (without handle) and "Tent Peg" were found to be even less than the DEPB benefits claimed on these items. Thus the goods were seized on 14.8.2003 under Section 110 of the Customs Act, 1962 on the reasonable belief that the description and value of the goods had been mis-declared intentionally by the Assessee to avail higher DEPB benefits for which such goods were liable for confiscation under Section 111 of the Customs Act, 1962. However, on the request of the Appellant for provisional release of seized goods, those were released and shipment was allowed on 15.9.2003, on execution of bond for Rs.37 Lacs and Bank Guarantee of Rs.7.50 Lacs.

8. Result of investigations and scrutiny of documents revealed as under:-

(a) The garden rakes dispatched from the factory for export were found to be without handle for which the export goods were to be considered as Part of "Garden Rake" and not Garden Rake. DEPB benefits were available on "Garden Rakes" and not on the parts as such to claim undue export benefits. The Appellant had mis-declared the Parts of Garden Rakes as Garden Rakes and had also inflated the value of the same to get extra DEPB benefits.

(b) On export Invoices and Shipping Bill, the item Chisel has been described as made of "Forged Quality Carbon Steel", whereas in the Invoice No. 2 and correspondent A.R.E.I No. 2 dated 30.4.2003, the item was described as "Cold Chisel" without mentioning quality of raw material (Steel) used.

(c) The CRCL report indicated the sample to be made of steel and having 0.6% by weight of carbon.

(d) The Chemical Analysis Report submitted by party of M/s Khan Chand Hans Raj, Jalandhar did not contain report No., date of issue and the description/quality and quantity of the Steel received for analysis.

Market inquiry revealed value of "Tent Peg" at Rs. 18/- per piece. DEPB benefits was available on "Chisel" and not on "Tent Peg". The Appellant was found to have mis-declared the item "Tent Peg" as "Chisel" and had also inflated the value of the same to get DEPB benefits unduly.

(e) On export invoices and shipping bills, the item described as "Gate Latch made of mild steel" differed with A.R.E. I Form and the description "Gate Latch Hardware goods (Aldrop appeared. Market enquiry revealed that the item exported was Aldrop and not Gate Latch. "LATCH" is a device that holds something in place by entering a notch or cavity; specifically: the catch which holds a door or gate when closed even if not bolted. The item exported by the Assessee failed to conform to the technical specifications but mis-declared "Aldrop" as Gate latch and also inflated the value to get DEPB benefits unduly.

9. The Assessee did not dispute the report of CRCL except submitting before the Authority below that the goods were made of carbon steel of appropriate alloy composition taking into consideration its rigid, tuff and ruff use and sometimes those are referred to as "chisel made of forged quality carbon steel". Chemical analysis report issued by M/s Khan Chand Hans Raj in respect of the steel used for the manufacturing of cold chisel submitted by Assessee vide letter dated 27.12.2003 indicated the carbon percentage as "035/45". That report did not bear any reference/serial no., date or description/quality/quantity of the sample received for analysis. But the grade of the sample was shown as EN 8. There was no correlation in said report with the composition of steel used in manufacture of export goods. The Appellant also failed to produce any printed literature regarding "Carbon steel" to justify their claim of goods having "forged quality carbon steel" for which CRCL report was established. Goods exported were found to have pointed tip and shape, and opined as "Tent Peg" during the course of market enquiry. The Appellant without any evidence being adduced for rebuttal merely disputed the same and contended that it was "chisel". The printed literature submitted by the Assessee listed that item under Art No. 532 "Mason chisel flat & cross cut" and the picture showed two types of same grips. The goods purported to be exported were without grips and therefore the literature failed to disclose the item to be "chisel". It was accordingly concluded that the export goods were not "cold chisels" but tent pegs.

10. On the aforesaid premises, it was held by Authorities below that the Appellant had mis-declared the goods and over valued the exported goods to claim undue export benefits and also violated the provisions of the EXIM Policy 2002-07, Foreign Trade (Development & Regulations) Act, 1992, Foreign Trade (Regulation) Act, 1993 and provisions of Customs Act, 1962. The goods were thus held to be liable to confiscation under Section 113(d) of Customs Act, 1962 read with the provisions of Foreign Trade (Development & Regulations) Act & Rules and penal consequences of law under Section 114 of the Customs Act, 1962 followed.

11. Learned Advocate for the appellant submitted that there was no dispute on the quantity of goods. There was correct disclosure of description of the goods according to user criteria of the goods. Cross examination of Sri Suri, the proprietor of M/s OST International revealed that he was neither being an exporter nor a manufacturer had dealt with the goods which were subject matter of export. He stated that the price indicated by him was doubling the price of raw material. His version was therefore baseless. So also expert opinion relied upon by the Revenue was unworthy. Similarly when inquiry was made from range office of the Department to ascertain domestic price, result of enquiry was not considered in adjudication. The alternative plea of the appellant was to forgo DEPB claim and neither penalty nor redemption fine be imposed. It was further submitted that Revenue appeal has no merit since neither benefit was claimed nor received by the appellant.

12. Learned DR appearing on behalf of Revenue submitted that the assessee resorted to misdeclaration of description and value of goods. The laboratory test report remained uncontroverted. Also market inquiry revealed about the usage of goods and their nature as well as character. Accordingly appropriate valuation was done. What that was not popularly known in the market was claimed by the assessee to be so. The chemical analysis report and market enquiry report was safely adopted. Conduct of the assessee was questionable in view of his involvement in crores of rupees fraud for which he was arrested by Amritsar Customs. Value of the goods declared by assessee was excessive and high to claim DEPB benefit at the cost of Revenue for which confiscation was ordered. Assessee failed to rebut the evidence tendered by Proprietor of M/s OST International leading evidence although he merely challenged his no involvement in manufacture or export of the subject goods. Chemical analysis report of CRCL established assessee's goods to be of misdescription. Even technical literature produced by assessee failed to describe the goods seized. Over valuation of goods was established. The adjudication was justified and redemption fine as well as penalty was imposable. Assessee's appeal is accordingly liable to be dismissed and Revenue appeal being merited should be allowed.

13. Heard both sides and perused records and gone through the citations made by them.

14. Principal issue involved in these two appeals was whether exports were made making misdeclaration of description and value of goods to invite the consequence of adjudication and whether redemption fine was imposable. Evidence gathered by Revenue unambiguously shows that the goods intended to be exported were misdeclared as to their description as well as value. Those were Over-valued to make excess DEPB claim. No cogent evidence was led to show that the goods were not overvalued. Result of enquiry proved misdeclaration. Show cause notice brought the Assessee to the charge. Corroborative and cogent evidence like CRCL report proved misdeclaration of description and thereby over-valuation proving unlawful claim of DEPB credit made for the acts of the Assessee calling for confiscation of goods. Findings of the learned Adjudicating Authority do not appear to have been made suspiciously or under surmise but seems to have been based on cogent evidence.

15. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. It is also well settled that misrepresentation itself amounts to fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. Of course, innocent misrepresentation may give reason to claim relief against fraud.

16. An act of fraud on Revenue is always viewed seriously. "Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It has been held by Apex Court in the case of Commissioner of Customs, Kandla V. Essar Oil Ltd - 2004 (172) ELT433 (SC) that by "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the deceived. Undue advantage obtained by the deceiver, will almost always call loss or detriment to the deceived. Similarly a "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See *S.P. Changalvaraya Naidu* v. *Jagannath* [1994 (1) SCC 1].

17. In a leading English case i.e. *Derry and Ors.* v. *Peek* (1886-90) All ER 1 what constitutes "fraud" was described thus: (All ER p. 22 B-C) "fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false". This aspect of the matter has been considered by Apex Court in *Roshan Deen* v. *Preeti Lal* [2002 (1) SCC 100] *Ram Preeti Yadav* v. *U.P. Board of High School and Intermediate Education* [2003 (8) SCC 311], *Ram Chandra Singh's* case (supra) and *Ashok Leyland Ltd.* v. *State of T.N. and Another* [2004 (3) SCC 1]. Suppression of a material document would also amount to a fraud on the court. (see *Gowrishankar* v. *Joshi Amha Shankar Family Trust,* [1996 (3) SCC 310] and *S.P. Chengalvaraya Naidu's* case AIR-1994 SC-853. No judgment of a Court can be allowed to stand if it has been obtained by fraud. Fraud unravels everything and fraud vitiates all transactions known to the law of however high a degree of solemnity.

18. When the Assessee made misdeclaration as to value of goods, the burden of proof was on the declarant. But that was not discharged. The assessee was intimately connected with the goods and knowingly suppressed entire fact till discovery by Revenue. Therefore alternate plea of the appellant that it shall forgo claim of DEPB and redemption fine and penalty may not be imposed is of no avail since goods were allowed to be exported provisionally against execution of bond and bank guarantee. Once goods were confiscable for commitment of an offence under law, the offence so committed cannot be construed to be an act of innocence by compromise or surrender to law. Thus both redemption fine and penalties were imposable.

19. Aforesaid finding leads to the conclusion that appeal of the assessee is devoid of merit and liable to be dismissed. So far as Revenue's appeal is concerned, we noticed that goods were in existence for which export was allowed under bond and bank guarantee. Thus confiscation was warranted and redemption fine was also imposable. Therefore we direct the learned adjudicating authority to impose appropriate redemption fine granting opportunity of hearing to the assessee, while we hold that levy of penalty was justified. Revenue thus succeeds in its appeal.

(Pronounced in the open Court on 08/10/2010)

(Dr. CHITTARANJAN SATAPATHY)
TECHNIAL MEMBER

(D.N.PANDA)
JUDICIAL MEMBER