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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/162 /2010 - CU[DB] Date **28/01/2011**

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

To :
M/S KING EXPORTS,
C-142, FOCAL POINT, PHASE-V, LUDHIANA.

M/S KING EXPORTS, Appellant

Vs

C.C. (PREVENTIVE) AMRITSAR Respondent

I am directed to transmit herewith a certified copy of **Final order** C/49/ **2011 CU[DB]** dated 25.01.2011 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. (PREVENTIVE) AMRITSAR
CUSTOM HOUSE, CENTRAL
REVENUE BUILDING, THE MALL,
AMRITSAR 143001.
2. Adv. / Consult
MR.SUDHIR MALHOTRA.
13-R, HUKAM CHAND COLONY,
NEAR D.A.V COLLEGE,JALLANDHAR, PUNJAB.
3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. II

Customs Appeal No. 162 of 2010

[Arising out of Order-in-Original No. 02/Cus/10 dated 30.01.10 passed by the Commissioner of Customs (Prev) Amristar]

For approval and signature:

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

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3. Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4. Whether Order is to be circulated to the Departmental authorities?	:	Yes

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M/s. King Exports — Appellants

Vs.

Commissioner of Customs Amritsar — Respondent

Appearance:

Shri Sudhir Malhotra, Advocate for the Appellants
Shri Sumit Kumar, SDR for the Respondent

Reserved on :26.11.2010
Pronounced on :25.1.2011

Final **ORDER NO. C/49/11**

Per D.N.PANDA:

Being aggrieved by the order of the adjudication dated 30.1.10 disallowing the DEPB benefit of Rs.36,31,489/- to the appellant on the allegation that the same was obtained fraudulently by mis-declaration of exported goods and contravened the requirement of Notification No. 34/97-Cus dated 7.4.1997, the appellant has come in appeal before Tribunal. The adjudication order while denying the claim of the appellant also imposed of Redemption fine of Rs. 60 lakh in lieu of confiscation since goods were exported and not available for confiscation. Ld. Adjudicating Authority also imposed penalty of Rs.36,31,489/- under section 114 A of the Customs Act, 1962 (hereinafter referred to as "the Act") on the appellant for the above breach of law. While consequences as above arose against the appellants, the proceedings initiated against 13 others for the cause of buying DEPB scrips in question from the appellant were dropped on the ground that there was no allegation in the show cause notice either directly or indirectly about involvement of these noticees in the commitment of offence by the present appellant.

2.1 Opposing the adjudication, learned Advocate appearing on behalf of the appellant submitted that DEPB scrips in question were earned by the Appelalnt against export of appropriate description good exported as was held by the DGFT in terms of their communication in F.No. 01/80/162/973/ AM-05/DES-1/3903 dated 06.12.04 stating that the DEPB Committee of the DGFT Meeting No.16/05 held on 5.11.2004 as under (Ref: Page 123 of Appeal folder):

> " *The Committee considered the case as per details given in the Agenda. The Committee on perusal of the documents provided by the Customs as also the samples given thereof in consultation with the Technical authorities including those present in the meeting from DIPP and Min. of Steel confirmed that there is no doubt about the item in question being 'Draw Bars' and covered under SION at C-1017 & corresponding entry at sl. No. 265 of the DEPB schedule for Engg. Products. In other words, DEPB benefits are admissible to the item, sample of which had been provided by the Ludhiana Customs under sl. No. 265 of DEPB schedule for Engg. Products. A suitable communication may go to the customs authorities at Ludhiana."* [Emphasis supplied]

2.2 Ld. Counsel drew attention to Chapter 2 of the Foreign Trade Policy, 2004-2009 to submit that DGFT is the Authority to decide the issues relating to licence/ certificate/ permission under the Export Import Policy and their decision is final on such issues. He quoted para 2.3 of the said policy to support his contention which reads as under:-

> "*2.3* ***Interpretation of Policy***
>
> *If any question or doubt arises in respect of the interpretation of any provision contained in this Policy, or regarding the classification of any item in the ITC (HS) or Handbook (Vol. 1), or Handbook (Vol. 2), or Schedule of DEPB Rate the said question or doubt shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.*
>
> *If any question or doubt arises whether a licence / certificate/permission has been issued in accordance with this Policy or if any question or doubt arises touching upon the scope and content of such documents,*

their letter No. C.No. VIII/Cus/CFS /CONCOR/KE/02/2004 /1608 dated 25.10.04. Such a sample resulted with the answer as appearing at page 121-124 of the appeal record and the decision of the Committee was as stated herein before.

2.5. Counsel for the Appellant also drew attention to the certificate issued by Engineering Export Permission Council as per communication in file No. EPC/JL/0S:CRT:2004;06 dated 28.9.04 to submit that the said authority which is a concern of Ministry of Commerce certified that samples submitted by the appellants to them much before the period of export comprising the financial years 2002-2003 and 2003-2004 were draw bars in terms of drawings submitted by the appellants as attested under the signature of that authority and appearing at page 103 to 105 of the appeal folder. When export related to the above period, the goods exported were in conformity with the drawings forming part of the certificate of the Engineering Export Permission Council (EEPC).

2.6. According to ld. Counsel when the goods were exported without drawing any sample by Customs Authority from the export consignment, there can not be any arbitrary adjudication under any suspicion or surmise brushing aside the decision of DGFT which is the only Authority to decide on export issues in terms of Export-Import Policy as held aforesaid. Therefore there remains no controversy nor any allegation can be made by Revenue in absence of any sample drawn from export lot for technical opinion.

Therefore opinion of the DGFT shall be binding on the Customs Authority and adjudication is unsustainable.

2.7. Our attention was drawn to the certificate issued by National Institute of Secondary steel Technology on 30.9.04 [available at page 106 of Appeal folder]. According to him, that institute was established by Ministry of Steel, Government of India and they have technical expertise to opine on the drawings enclosed to their certificate. The study made by that Institute clearly shows that drawing No. 50830 related to "draw bar" only which is used by automobiles to tow trailers and the drawbar slides into a hitch receiver on the back of an automobile and fastens with a pin and clip. The certificate also stated that drawing No. 20005 related to draw bars which is attached to rear of the tractor and is used for dragging or towing agricultural machinery. The drawing and the certificate forms part of the file at page 106-108.

2.8. Learned Counsel further drew our attention to the clarification issued vide letter dated 29.9.2004 (available at page 109 of Appeal folder) by Institute for Auto parts Technology which is a UNDP/ UNIDO Assisted with Punjab Government Projects. The communication issued by that Institute on 29.9.04 exhibits that samples tested by that Institute resulted with the conclusion that the goods were draw bars for cars and tractors respectively. It is also indicated by the Institute that similar design, parts with various sizes can be used as draw bars. Similarly reference to page No. 115 in the appeal folder exhibit the conclusion of study of Research and Development Centre for Bicycle and Sewing Machine – a UNDP/ UNIDO Assisted Punjab Government project and show that drawing No. 50830 and 20005 fall in the category of drawbars. Both drawings were stamped and countersigned by authorised signatory of the Centre.

2.9. It was further submitted by the learned Advocate that when the co-noticees who were purchasers of DEPB scrips and user thereof succeeded before the adjudication authority finding no malafide in respect of transfer of genuine DEPB scrips by the appellant, this appellant can not be held guilty of obtaining such scrips. Therefore, the description of the goods on export documents do not speak against the appellant. The appellant had not obtained the scrips under fraud or misrepresentation against Revenue. Had scrips been obtained by fraud, beneficiary of the scrips would have been debarred to make use thereof. But no such action was taken against them. Rather proceeding against them was dropped in adjudication. Accordingly, this appellant should not face adverse consequence of the adjudication.

2.10. It was submitted on behalf of Appellant that the goods exported by Appellant has been disputed by the Revenue in vacuum, after the export was done without drawing any sample from exported consignments nor finding fault with the export. The goods having been eligible and entitled to DEPB benefit, DGFT as final authority granted appropriate credit to the appellant and such credits were found to be genuine in the hands of transferees thereof. Neither the customs classification nor the HSN classification bring the goods to the class of ball mount when nature and description of the goods does not prove to be ball mount. Hence, the appellant cannot be debarred to the benefit of DEPB scrips granted by the DGFT. Right export entitled the appellant to the benefit of DEPB scrips as sanctioned by DGFT which is controller of exports. Therefore, Customs classification has no role in respect of grant of DEPB scrips by DGFT which remained in tact without cancellation by that Authority even after adjudication.

2.11. Placing page 125 of the appeal folder, learned Counsel further submitted that in the table of DEPB credit rates prevailing during 2003 -2004, draw bar appears in S.No. 265 of that table. The description of the goods manufactured by the appellants being of the nature described in that Table, the DGFT Authority allowed DEPB credit to the appellants which cannot be denied by Adjudicating Authority.

2.12. It was further submitted on behalf of appellant that this appellant being manufacturer of same goods for a long time and invoices having been issued for the draw bar exported, there shall be no confusion by the Revenue to raise fictitious demand against the appellants without finding any change to the nature of goods. Ld. Counsel draw attention to page 180 of the Appeal folder to show some of the sample invoices showing sale of draw bars in the course of export. According to him, the goods that has already been exported leaves no controversy to question the appellant on DEPB claim when DGFT has no question on the matter nor found fault with the appellants in respect of DEPB claim on goods exported. There is also no dispute by Revenue about the process of manufacture of goods and the nature and the description thereof till export. Since no samples were drawn at the time of export the adjudication is baseless. Post export adjudication without any contrary evidence is a futile exercise made to raise demand arbitrarily.

3. To buttress his claim learned Counsel relied on the following decisions :

(1) PTC Industries Ltd. vs. UOI [2010 (252)ELT 42(ALL)];

(2) Blue Water Foods & Exports Pvt.Ltd. vs. CC [2010 (251)ELT 305(T)]; and

(3) Top Man Exports Ltd. vs. CC [2007 (208) ELT 353 (T)]

4. Per contra, contention of Revenues is that DPEB claim made by appellant was by mis-declaration of the description of the goods contravening terms of the Notification No. 34/97-CUs. dated 7.4.97. The goods exported were not draw bars but ball mounts. Once the characteristics of the goods changes DPEB benefit is not admissible. Adjudication was done following due process of law on the basis of cogent evidence showing procurement of ball-mounts from various manufacturers which were tractor parts

falling under Chapter sub-heading 8708 Central Excise Tariff Act, 1975 (CETA). But said goods were declared as draw bars to take the same to sub heading 7318.10 of CETA, 1975 in export documents. The goods ball-mount was not entitled to DPEB claim for which that was declared as draw-bars by the Appellant to make undue gain. Such practice was found to have been followed from the statement dated 30.9.04 of the partner [Shri Madan Lal Goyal] of the Appellant. Even statement dated 1.10.04 of Shri Goyal established the goods to be ball-mount instead of draw-bars. Shri Inderjeet Singh Chabra, partner of Continental Engineering Works in his statement dated 31.10.04 admitted that the goods exported by the appellant being supplied by them were ball-mounts. The appellant merely changed the name of the goods and exported the same to get undue advantage of getting DEPB scrips. The clarification of DGFT issued by letter dated 6.12.04 was not on the basis of the samples taken under any panchnama for which that cannot be relied. Evidence recorded proved admission of nature and characteristics of the goods for which, DGFT certificate shall not be of any use.

4.2. Learned DR relied on the decision of Apex Court in the case of Sheikh Mohd. Omar vs. CCE reported in AIR 1971 SC 293 and Om Prakash Bhatia vs. reported in 2003 (151) ELT 423 (SC) to submit that the mis-declaration when warranted confiscation and penalty, DEPB benefit is not admissible. He also relied upon the decision of Hon'ble High Court of Calcutta in the case of Euresion

Equipment and Chemicals Ltd. vs. CC reported in 1980 (06) ELT 38 (CAL) to submit that the goods exported were confiscable for which DEPB claim was inadmissible.

4.3. Learned DR further submitted that when ball mounts were tractor parts that cannot be called as draw bars for the obvious reason of the use thereof and DEPB benefit is not admissible to ball mounts. Draw bars and ball-mounts are different types of goods and one cannot be substitute to the other.

5. Heard both sides and perused the records.

6.1. There was no evidence on record to show that at any time Revenue has collected any sample of the goods exported by the appellants except the sample sent for opinion of DGFT relied upon by the Appellant. Neither before the export, nor in the course of export, nor after the export, goods of any description were collected from the control of the appellants for technical tests by Revenue to prove their contention that the goods were ball mounts but not draw-bars. Records also do not disclose as to whether Revenue has made any inquiry from the end of the importer about the nature and description of the goods exported. Reliance placed by the appellants on various examination reports and opinions of different institution made on the basis of drawings showing the goods were of description of draw-bars remained uncontroverted by Revenue without any technical examination done by them. So also there is technical opinion gathered by Revenue to prove their stand.

6.2 It was the contention of the appellant that the appellant was dealing with same goods for number of years and Revenue could not find any fault with them. Such an averment could not be controverted by the Revenue leading any evidence showing change in manufacturing process, drawing or design.

6.3 The Export-Import Policy had made specific provision for declaring the DGFT as an authority to have final say on the issues relating to export, as per Policy extract depicted hereinbefore. The evidence placed by the appellant showing the minute of the DGFT authority about the description and nature of the goods remains unassailable without any contrary evidence to that effect obtained by Revenue from that Authority. The Heading 8708 under CETA, 1985 speaks of parts and accessories of motor vehicle covered by heading 8701-8705. Heading 8701 deals with tractors (other than tractor of heading 8709). Heading 7318 deals with screws, bolts, nuts, coach-screws, screw books, rivets, cotters, cotter-pins, washers (including spring washers) and similar articles, of iron or steel, and threaded articles. Revenue could not demonstrate its case seeking technical reports or literature from tractor manufacturers about the description of the goods exported by the appellants.

6.4 Stand of Revenue that the goods exported were ball mounts remained as allegation only without proof thereof. In absence of any evidence from any of the tractor manufacturers or the sample tested in any laboratory recognised by law, opinion of the

DGFT authorities is not liable to be vitiated and Revenue did not challenge opinion of DGFT upon receipt of the same. Thus there is no scope to deny claim of the appellant. It may be stated that suspicion however grave may be is not a substitute of proof. In absence of cogent reason or evidence reversal of the opinion of the DGFT which is the ultimate authority to decide the DEPB claim arising out of export is impracticable.

6.5 For the reasons stated aforesaid and in absence of evidence from Revenue to deny the claim of the appellant, we are unable to agree with Revenue to revese the opinion of DGFT. So also we are unable to order the adjudication to be proper. For all such reasons, we also consider it redundant to go through the citations made by both sides since dispute in this appeal is in a narrow compass of admissibility of DEPB credit when beneficiary thereof were allowed to enjoy the scrips without finding fault in adjudication. We are also unable to hold that declaration of the appellants to be improper. Accordingly, we allow the appeal of the appellant with consequential relief, if any, to flow in accordance with law.

(Pronounced in the open Court on 25-1-2011)

(D.N.Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

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