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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/548 /2006 - CU[DB] Date **24/02/2011**

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

To :
M/S BORNEO SHIPPING
27-A-B ROYD STREET,1-A,ABHINANDAN,
KOLKATA – 700 076

M/S BORNEO SHIPPING Appellant

Vs

C.C.. N.DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order** **C/94/ 2011 CU[DB]** dated 22.02.11 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.. N.DELHI
NEW CUSTOM HOUSE, NEAR IGI
AIRPORT NEW DELHI
110037
2. Adv. / Consult A.K. UTTAM, ADV.
D-234/79, CHAMBER NO.302,
6TH COMMUNITY CENTRE,NARAINA,
NEW DELHI.
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)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

Court No.IV

C/Appeal No.548/2006-Cus

(Arising out of order in appeal No.2/GS/CC/DRI/NCH/06 dated 31.5.2006 passed by the Commissioner of Central Excise (Adju),New Delhi)

Date of Hearing:15.2.2011

For Approval and signature:

Hon'ble Mr Ashok Jindal, Judicial Member
Hon'ble Mr.Mathew John, Technical Member

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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 would be released under Rule 27 of the CESTAT (Procedure) rules, 1982 for publication in any authoritative report or not? No

3. Whether their lordships wish to see the fair copy of the order? No

4. Whether order is to be circulated to the Department Authorities? No

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M/s Borneo Shipping — Appellants

Vs

CC, New Delhi — Respondent

Appeared for the Appellant: Shri Anil Uttam, Advocate
Appeared for the Respondent: Shri Sonal Bajaj, SDR

Coram: **Hon'ble Mr Ashok Jindal, Member (Judicial)**
Hon'ble Mr. Mathew John, Member (Technical)

Final ORDER No. C/ 94/11

Per Mathew John:

Heard the Ld. Counsel for the Appellant and the Ld. Departmental representative.

2. This is a case where the Appellant acted as a shipping agent for certain exports to Russia in respect of which certain types of fraud were detected by the department. One element of the fraud was that the Appellant did not truthfully indicate the dates of the Bills of Lading issued for the impugned exports and in the process helped the exporters to claim drawback fraudulently. The advocate appearing for the Appellant is not very conversant with the detailed facts of the case but he submits that as a shipping agent they have violated no law which could lead to penalty under the Customs Act. According to him the date of any Bill of Lading should be hardly of any concern to the Customs Department. His main argument is that neither the Show Cause Notice nor the adjudication order states the provision of the Customs Act contravened by them. On the other hand the Departmental Representative argues that this is a case wherein the exporters defrauded the government of valuable foreign exchange and also got fraudulent draw back to the tune of about Rs.20.6 crores and the appellant facilitated such fraud. He argues that no leniency should be shown to the Appellants.

3. We have gone through the adjudication order appealed against and the Appeal Memorandum very carefully. For appreciation of the case it is necessary to first summarize the relevant facts.

4. This Appeal filed by M/s Borneo Shipping Ltd arises out of proceedings initiated vide Show Cause Notice DRI. F. No. 50

C/19/2003-CI dated 24-12-2004 issued by Directorate of Revenue Intelligence, Headquarters, New Delhi. The said SCN was adjudicated by the Commissioner of Adjudication, New Custom House, New Delhi, vide his order No. 02/GS/CC/DRI/NCH/2006 Dated 31-05-2006.

5. Investigations conducted by DRI unearthed fraudulent exports, made by M/s Lindt Exports and M/s High Tech Engineers, two proprietary concerns of Shri. Rajeev Verma, purportedly to Russia, against which exports, drawback totalling to about Rs.20.6 crores was availed. The investigation showed that the consignees in Russia did not exist, the goods did not reach Russia, Bank Realisation Certificate for export proceeds were forged, there were mis-declarations in the value of goods etc. The main noticees to the SCN were the two firms as aforesaid and the proprietor Shri. Rajeev Verma. Shri. Rajesh Verma, brother Shri. Rajeev Verma was also a noticee. Further three shipping agents who had issued Bills of Lading for the impugned consignments were also noticees. The Appellant is one of the three shipping agents.

6. The allegation in the SCN against the three shipping agents was that in the concerned Bills of Lading, they did not truthfully indicate the date of receipt of the goods in their custody and the dates in the Bill of Lading were manipulated to facilitate fraudulent receipts of export proceeds. The gap between the date of receipt of the export goods by the shipping agent and the date of the corresponding Bill of lading was in some cases as much as three to four months.

7. Realization of foreign exchange is a necessary condition for sanction of drawback as is seen from the second proviso to section 75 of the Customs Act, 1962 which reads as under:

"**Provided** further that where any drawback has been allowed on any goods under this sub-section and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), such drawback shall be deemed never to have been allowed and the Central Government may, by rules made under sub-section (2), specify the procedure for the recovery or adjustment of the amount of such drawback."

The necessary procedure in this regard is laid down in Rule 16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. The export proceeds were not realised as required under the Foreign Exchange Management Act, 1999 (42 of 1999), in as much as the goods were exported to countries other than Russia but export proceeds were settled in the manner as applicable to exports to Russia. The case made out against the shipping agents is that they helped the firms of Shri. Rajeev Verma, in showing realization of export proceeds in a fraudulent manner by their act of falsely indicting the dates of Bill of Lading. Since goods were exported with false declaration regarding consignee, country of export etc and since the exports were contrary to prohibitions laid down in section 11 of the Foreign Trade (Development And Regulation) Act, 1992 in the matter of realization of foreign exchange and also under false claim for drawback the goods were held to be liable to confiscation under section 113(d) and 113 (i) of the Customs Act. Consequently penalty under section 114 of the Customs Act has been imposed on the main noticee namely Shri. Rajeev Verma. Further penalties have been imposed on the three shipping agents on the basis of the charge that they helped Shri Rajeev Verma in exporting goods contrary to prohibitions in force and hence penalties have been imposed on the shipping agents under section 114 of the Customs Act. The present appellant is one such shipping agent on whom penalty of Rs. 2,00,000/- has been imposed under section 114 of the Customs Act. In this Appeal the Appellant is challenging the penalty imposed.

8. During the relevant time export proceeds of goods exported to Russia were being settled through "State Credit Scheme" and not by remittance of freely convertible foreign exchange. The case made out in the SCN is that the goods which were declared in the export documents to be for Russia were booked for transit through Finland and after landing of the goods in Finland, the goods vanished without actually getting exported to Russia. But fraudulent receipt of export proceeds through "State Credit Scheme" was arranged and drawback claimed fraudulently.

9. The present appellant is not concerned with mis-declaration regarding the value of the goods and there is no need to examine that aspect in this order. The present appellant is concerned only with false declaration of the dates in the Bills of Lading to facilitate fraudulent settlement of export proceeds. The fraud brought out in the SCN is that the shipping agents issued Bills of Lading with dates much later than the actual receipt of the goods in the custody of the shipping agents. This may prima facie looks to be innocuous but that is not the case. The diversion of the goods at Finland and its sale in some unknown destination could help the exporter to raise money in convertible foreign exchange and its remittance through hawala operators in such convertible currencies to unknown persons to facilitate with undue profit, the payments to clandestine operators who opened the Letters of Credit for settlement of the export proceeds in Indian Ruppees from "Repayment of State Credit Scheme". The dates of the Bills of Lading were shown as dates after which the LCs were opened so that the documents got negotiated by the banks for settlement from "Repayment of State Credit Scheme" without any hassles. If the dates of Bills of Lading indicated the actual dates on which the

Shipping Agents took possession of the goods, such dates would have been prior to the dates of Letters of Credit and therefore the banks would not have negotiated the Bills of lading and made payments from "Repayment of State Credit Scheme". It is in this manner that the shipping agent helped the exporter in claiming fraudulent drawback.

10. Against the brief sketch of the fraudulent scheme as above the arguments raised by the appellant can be examined and findings given.

11. The main fact noticed is that the Appellant did not contest the issue regarding differences in dates before the adjudicating authority. Para 11 on page 60 of the SCN states that in some cases the delay from the date of receipt of the goods by shipping agents to the date of the Bill of Lading was as much as three to four months. This fact is not seen challenged in the adjudication proceedings. It is not contested in the present Appeal Memorandum either. Their only contention is that the Bills of Lading were issued only when the shipper asked them for the Bills of Lading and they issued the Bill of lading showing the dates on which Bills of Lading were so issued. They argue that they, unlike the other two shipping agents, were just agents for shipping lines and not responsible for onward transportation and hence provisions of Multimodel Transportation of Goods Act were not applicable to them. They argue that they were governed by the Hauge Conventions in the matter of issue of Bill of Lading and under the said conventions Bill of Lading is to be issued only when demanded by the exporter. Since the exporter made the demand only after a few months, Bills of Lading were issued showing the date of issue of the Bill of lading and not date of receipt of the goods. For appreciating this argument relevant clauses of Article-III of The

Hague Rules as amended by the Brussels Protocol 1968 are reproduced below:

"Article III

1. -------

2. -------

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. **Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods** as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

5. -------

6. --------

7. ------

8. ------- "

12. The Appellant is relying on Clause 3 of Article-III reproduced above. This clause cannot be interpreted to mean that they can show the date of Bill of Lading as the date of issue of the Bill of Lading. Clause 4 of this article is relevant here. It says that "a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods". A receipt has to indicate the date of receipt. Without that a document which gives the title to the goods covered by the Bill of Lading becomes meaningless. In this case the Bills of Lading were issued after the delivery of the goods abroad, out of the custody of the shipping line. So the act is prima facie fraudulent. We are not able to agree with the argument canvassed.

13. Another ground raised is that the SCN was issued without supplying any relied upon documents and hence the adjudication order is passed in violation of principles of natural justice. This is basically a question of fact and it is to be verified whether this contention was raised before the adjudicating authority. The reply given by the appellant before the adjudicating authority is not submitted along with appeal papers and hence this contention can be verified only with reference to what is recorded in the Order-in-Original. It is seen from para 150 of the order, summarizing the submissions made by the appellant before the adjudicating authority that no such ground was argued. So we do not find any merit in this argument at this appellate stage.

14. The next argument is that mensrea of the Appellant is not established beyond all reasonable doubts. A fraud ipso facto indicates mensrea. Further in the matter of penalty in civil proceedings the standard of proof required is not the same as the standard in criminal penalties.

15. We are also not impressed by the argument that the exact provisions of Customs Act contravened by them while issuing the Bills of Lading with wrong dates is not quoted. The case is not that the Customs Act prescribes what the date of Bill of Lading should be. The matter is that Bill of lading has been issued in a fraudulent manner and this act helped the exporter in showing realization of foreign exchange in a manner contrary to law prescribed in this regard. Thus the exporter exported the goods contrary to prohibition under section 11 of The Foreign Trade (Development And Regulation) Act, 1992 and this act of the exporter rendered the goods liable to confiscation under section 113 (d) of the Customs Act and hence the shipping agent is liable to penalty under section 114 of the Customs Act as an abettor to this offence.

16. Thus this is a case involving fraud with intention of defrauding the government on realization of foreign exchange and also with intention of claiming drawback against fraudulent shipping documents. The Appellants have helped the main fraudster in perpetrating the fraud by issuing Bills of Lading showing the dates as desired by the fraudster in contravention of established practices of shipping trade and helping him to export of goods contrary to prohibition prescribed under law in force. Thus we find the charge against them of commission of wrongful act which made the export goods liable to confiscation is substantiated and therefore there is no merit in the Appeal.

17. We therefore reject the Appeal.

(ASHOK JINDAL)
Member (Technical)

(MATHEW JOHN)
Member(Technical)