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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/553 /2005 - CU[DB], C/M/718/2009, C/287/2006 WITH C/M/315/08 Date **24/06/2011**

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

To :
M/S SHIWALYA SPINNING AND WEAVING MILLS (P) LTD
B-XXX-796/1 SHERPUR BYE-PASS ROAD,
NEAR H.P.DHARAM KANTA, LUDHIANA

M/S SHIWALYA SPINNING AND WEAVING MILLS (P) LTD Appellant

Vs

CUSTOMS AND CENTRAL EXCISE, AMRITSAR & Vice-Versa Respondent

MISC. ORDER NO.C/126-127/2011

I am directed to transmit herewith a certified copy of **Final order No.C/256-257/ 2011 CU|DB|** dated 20.06.2011 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
CCE, AMRITSAR
NEW CUSTOM HOUSE,
'THE MALL', AMRITSAR

2. Adv. / Consult
MR.L.P ASTHANA
R-163, S.F., GREATER KAILASH-1,
NEW DELHI - 110 048.

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
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. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

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

DIVISION BENCH

Customs Appeal No.C/553/2005 with C/Misc/718/09

(Arising out of Order-in-Original No.18/Cus/2005 dated 16.3.2005 passed by the CCE, Amritsar)

For approval and signature:

Hon'ble Mr.M.V.Ravindran, Member (Judicial)
Hon'ble Mr.M.Veeraiyan 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?	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

M/s.Shiwalya Spinning & Weaving Mills (P) Ltd. Appellant

Vs.

CCE, Amritsar Respondent

Customs Appeal No.C/287/2006 with C/Misc/315/08

CCE, Amritsar Appellant

Vs.

M/s.Shiwalya Spinning & Weaving Mills (P) Ltd. Respondent

Present for the Appellant: Ms.Reena Khair, Advocate and vice versa
Present for the Respondent: Shri Amirsh Jain, SDR and vice versa

Coram:Hon'ble Mr.M.V.Ravindran, Member (Judicial)
Hon'ble Mr.M.Veeraiyan, Member (Technical)

M.O. No. C/126-127/11 **Date of Hearing: 18.05.2011**
Date of Decision: 20-06-2011
Final **ORDER NO.** C/256-257/11

PER: M.VEERAIYAN

1.1 Appeal No.C/553/05 is by M/s. Shiwaliya Spinning & Weaving Mills (P) Ltd. against the order of the Commissioner No. 18/Cus/2005 dt.16.3.05.

1.2 Appeal No.287/06 is by the department against very same order of the Commissioner seeking imposition of redemption fine on goods held liable to confiscation.

1.3 Miscellaneous application No.718 of 09 is for introduction of additional evidence in the form of certificate dt.26.5.09 given by manager (Import) CFS regarding the practice of customs officers signing

1.4 Miscellaneous no.315 of 08 seeking permission to introduce weighment slips relating to impugned consignments.

1.5 Both appeals one by the importer and other by the department are arsing out of same impugned order and are being dealt with common order.

2. Heard both sides extensively.

3. Department and the appellants were specifically permitted to file written submissions after the hearing was over on 18.5.11 and, accordingly, the same stand filed.

4. The relevant facts in brief are that the appellant imported during the period March 97 to June, 98,21 consignments of acrylic staple fibre from M/s.Hi Lingos, Taiwan. They filed bills of entry at CFS Ludhiana supported by respective invoices, packing lists and bills of lading. The goods were assessed, examined and were allowed clearances. In respect of consignments covered by six bills of entry, it was alleged that the country of origin had been misdeclared with a view to evade anti dumping duty and a show cause notice dated 31.3.2000 was

issued and separate proceedings were taken up. This issue relating to anti dumping duty is not directly relevant to the present proceedings. However, the department felt that in respect of consignments covered by 21 bills of entry (including six bills of entry relating to which anti dumping duty has been raised) there is mis-declaration of gross weight of the goods. The gross weight mentioned in the invoices and packing list were found to be lower than the gross weight declared on the related bills of lading. A show cause notice dt.8.5.2000 was issued proposing confiscation of the goods under Section 111(m) and proposing demand of differential duty of Rs.1,76,95,854/- alongwith interest and proposing imposition of penalty. Show cause notice was contested by the appellant and the Commissioner passed the following order:

"ORDER

Having regard to the foregoing discussions, I pass the following order:-

(i) I hold that the Acrylic staple fibre weighing 433236.3 Kgs valued at Rs.21000447/- found in excess of declared weight in the 21 Bills of Entry in question, is liable to confiscation under Section 111 (m) of the Customs Act, 1962. Since the goods are not available for confiscation, no order for their confiscation can be passed.

(ii) I confirm the demand of duty amounting to Rs.1,76,50,866/- (Rs.one crore seventy six lakhs fifty thousands eight hundred and sixty six) against M/s.Shiwalaya Spinning & Weaving Mills (P) Ltd.,Ludhiana under proviso to Section 28 (1) of the Customs Act, 1962. The said duty demand amount shall be paid alongwith interest at the applicable rates in terms of Section 28AB of the Customs Act, 1962.

(iii) I impose a penalty of Rs.1,76,50,866/- (Rs.one crore seventy six lakhs fifty thousands eight hundred and sixty six) on M/s.Shiwalaya Spinning & Weaving Mills (P) Ltd.,Ludhiana under Section 114 (A) of the Customs Act, 1962.

(iv) The duty demand alongwith interest and penalty imposed shall be paid forthwith."

5. The importer is challenging the demand of duty alongwith interest and imposition of penalty. The department is aggrieved that no redemption fine has been imposed by the commissioner.

6. Learned advocate for the appellant-importer assailed the order on the following grounds:

(a) The goods were physically weighed at the stage of assessment. Copies of some weighment slips, as also the examination reports on the Bills of Entry reflect this fact. Additionally, during the cross examination, this factual position has been confirmed. In the face of physical weighment, the findings of the Commissioner, which are based on the Bills of Lading, are totally unjustified.

(b) The weighment slips have been countersigned by the officers of customs. A certificate from the Warehousing Corporation has also been produced stating that a customs officer is posted at the warehouse, and he used to sign to confirm weighment of material in the CFS.

(c) There is, even otherwise, no reason to doubt the correctness of the weighment slips of Punjab State Warehousing Corporation. It must be presumed that the goods were weighed and the slips are correct. If there was any doubt regarding the genuineness of the weighment, the officers of the warehousing corporation, ought to have been examined by the Commissioner.

(d) The duty is on an ad valorem basis. The appellants have made the payment through the Bank. The foreign supplier has also confirmed the value and weight in its certificate. As there is no challenge to the value, no allegation of under-invoicing or extra remittance, the declared value must be taken to be correct.

(e) The demand is clearly barred by limitation. The entire case of the Department is based on the discrepancy in weights, as shown in the invoice and packing list on the one hand, and the weight as shown in the Bill of Lading. It is an admitted position that the Bill of Lading was submitted to the Customs Authorities, at the time of assessment. Therefore, the question of suppression of any facts does not arise.

(f) As regards, the 6 Bills Entry, it was not permissible for the Department to issue notices on a piecemeal basis. All the documents were available, when the earlier notice was issued, therefore, there was no occasion to invoke the extended period of limitation.

(g) She also adds in much as the duty is not demandable the question of holding any goods liable for confiscation and consequently imposing redemption fine does not arise.

7. Learned SDR supported the order of the commissioner in demanding duty alongwith interest and imposing penalty on the following grounds:

(a) All the 21 imported consignments of Acrylic Staple Fibre have been booked directly from Bangkok by M/s.Thai Acrylic Co.Ltd., Bangkok to notify party M/s.Shiwalya Spinning and Weaving Mills (P) Ltd., Ludhiana under the relevant Bills of Lading issued by the Shipping Lines and as per records all the containers mentioned in the Bills of Lading had been carried directly from Bangkok to the Indian Port via Singapore with seals in tact and without touching the Taiwan Port.

(b) The number of containers, number of bales loaded in each container & relevant container numbers declared on the Bills of Entry are tallying with relevant entries declared on the related Bills of Lading.

(c) As per investigations conducted, the gross weight of the goods mentioned in the Bills of Lading refers to the gross weight of the cargo (Acrylic Staple Fibre) and the gross weight of the cargo declared in the cargo declaration made in the IGM/SMTPs filed by both the Shipping Lines with Customs at the Port of import tallies with the gross weight of goods mentioned in the Bills of Lading. The gross weight of goods incorporated in the relevant entries made in the IGM register maintained by the Customs at CFS Ludhiana tallies with the gross weight of the goods mentioned on the referred Bills of Lading and corresponding IGMs/SMTPs.

(d) Both the Shipping Lines have not admitted any en-route pilferage of goods. The appellant has also not claimed any en-route pilferage of goods.

(e) As per disclosures made by the Shipping Lines during the investigations, the gross weight of the goods mentioned in the Bills of lading is the actual gross weight of cargo (Acrylic Staple Fibre) as per cargo booking notes filed by the said foreign exporter M/s.Thai Acrylic Co.Ltd., Bangkok.

(f) There is no evidence on record that weighment was done in the presence of the officer who recorded in the examination report. The weighment slips issued by the custodian PSCW were not signed by any Customs officer. There is no record of weight of individual bales in the examination report endorsed by the Customs on any of the Bills of Entry. Bills of Entry wise details showing the text of relevant examination reports of the Customs are enclosed for perusal please. In case of Bills of Entry mentioned at Sr.No. 1 to 6, the appellant at the time have declared the country origin of goods as Taiwan by submitting switched Bills of Lading whereas the goods were of Thailand origin attracting Anti dumping duty and admitted their liability of Anti dumping duty and deposited Rs.78,71,421/- during investigation before issuance of show cause notice dated 31.3.2000. In case of Bills of Entry mentioned at Sr.No.7 to 21 while summing up the individual gross weight of all bales, the resultant gross weight arrived at tallies with the gross weight of goods mentioned in the relevant Bill of Lading. Thus, the total gross weight/net weight mentioned in the packing lists filed alongwith the Bills of Entry is deliberately mentioned less to evade Customs Duty.

(g) In view of the above, it is evident from the facts of the case that the appellant have mis-declared the weight of imported goods in the Bills of Entry fraudulently by filing the manipulated invoice and relevant packing list with intention to evade payment of customs duty leviable thereon and thus have deliberately committed a fraud with the Govt. exchequer.

(h) As regards the prayer for imposition of redemption fine as claimed in the departmental appeal, he reiterates the grounds of appeal.

8.1 We have carefully considered the submission of both sides and perused the records. The imports have taken place during January, 97 to June, 98. Undisputedly, the importer has filed the bills of entry alongwith invoices, packing lists and bills of lading. The records indicate that all the consignments were examined by the customs officers and the examination reports indicate the correctness of weight ascertained. Some of the examination reports clearly refer to de-stuffing and conducting 100% examination. The reports clearly indicate the gross weight ascertained by the officers. The department is taking a stand that there is no evidence on record that weighment was done in the presence of officers who recorded the examination reports. It was also claimed that weightment slips issued by the custodian namely Punjab State Warehousing Corporation were not signed by the customs officers. Such submission appears to be not acceptable in the light of examination reports and since the officers, during cross examination, have confirmed that the goods had been physically weighed at the time of assessment.

8.2 The gross weights in the bills of lading issued by steamer Agents and those in the IGMs also filed by steamer Agents tallied. Whether gross weights in these documents referred to weight of the consignments together with the weight of containers or referred to only gross weights of the consignments without the weights of containers has not been looked into. The records indicate that the imported consignments acyclic fibre were ordered by weight and they were also packed in suitable packing materials. In respect of the consignments acrylic fibres before being put into containers also, there is a concept of gross weight and net weight. The foreign based supplier has also clarified/certified that they supplied the goods corresponding to weight mentioned in the bills of entry/packing lists.

8.3. There is also no evidence that any payments have been made in excess of the amounts ~~of~~ in invoices corresponding to alleged excess quantity of acyclic fibre.

9. Out of 21 consignments, in respect of six consignments, it is claimed that there was mis-declaration of country of origin throwing serious doubts on the documents produced. As already noted, the proceeding relating to the said six consignments related to anti dumping duty demand based on mis-declaration of country of origin. Merely because country of origin in respect of the consignments covered by 6 bills of entry was mis-declared, no presumption can be raised that there was under-declaration of weight in respect of the consignments in the invoices/packing lists.

10. In view of the above, demand is clearly unsustainable on merits.

11. Incidentally, since bills of lading indicating higher weights were also submitted alongwith bills of entry, the question of suppression of relevant material does not arise justifying invokation of extended period of limitation. However, this issue is only academic in nature as we have held that the demand is itself is not sustainable.

12. Similarly, departmental appeal seeking imposition of redemption fine on goods held liable for confiscation is also without merits. The question of granting option of redemption of goods which are not available for seizure /confiscation does not arise. However, this issue is again academic in nature as we have allowed the appeal of the party on merits.

13. Appeal of the party is allowed with consequential relief as per law.

14. Appeal of the department is rejected.

(pronounced in the open court on 20-6-11)

(M.V.RAVINDRAN)
MEMBER (JUDICIAL)

(M.VEERAIYAN)
MEMBER (TECHNICAL)

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