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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/520 /2006 - CU[DB]  Date **07/07/2011**

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

To :
CC AMRITSAR

THE MALL,AMRITSAR

**CC AMRITSAR** Appellant

Vs

**M/S BESTWAYS ENTERPRISES P LTD** Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/293/ 2011 CU|DB|** dated 06.07.2011

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
**M/S BESTWAYS ENTERPRISES P LTD**
C-144,INDUSTRIAL AREA
PHASE VII,SAS NAGAR
DISTT ROPAR

2. Adv. / Consult  MR. SUDHIR MALHOTRA, ADV.
13-R, HUKUM CHAND COLONY,
NEAR DAV COLLEGE, JALLANDHAR.

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**
**PRINCIPAL BENCH, NEW DELHI**
**Court No.III**

**C/Appeal No.520/2006**

(Arising out of order in appeal No.70-71/Cus/CHD/06 dated 8.5.2006 passed by the Commissioner of Central Excise (Appeals), Chandigarh)

Date of Hearing : 1.6.2011
Date of pronouncement: 06-07-11

For Approval and signature:

Hon'ble Ms. Archana Wadhwa, 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?

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 Department Authorities?

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CC, Amritsar — Appellants

Vs

M/s Bestway Enterprises (P) Ltd — Respondent

Appeared for the Appellant: Shri S.R. Meena, SDR
Appeared for the Respondent: None

Coram: **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
**Hon'ble Mr. Mathew John, Member (Technical)**

Final ORDER No. C/293/11

Per Mathew John:

The respondent imported second hand knitting machine having CIF value of Rs.66,84,185/- under Bill of Entry No. 958 dated 19.3.1996 at CFS Ludhiana and paid customs duty amounting to Rs.10,02,628/- at concessional rate of 15% in terms of Notification No.110/95-CE dated 5.6.1995. This exemption was available for goods imported under EPCG licence and condition of the licence was that they would export goods valued at four times the CIF value of the goods imported within five years of import of the machinery. But for the exemption, the customs duty to be payable was 25% basic customs duty along with CVD of 10%. The benefit availed under the notification was quantified at Rs.15,03,941/-. Condition 6 of the notification was that the importer should have installed the machinery in its factory and produced such installation certificate within 6 months from the date of completion of import.

2. The Revenue made out a case that the said machinery was not installed in the factory. There was failure on the part of the respondent to discharge the export obligation. As per show cause notice, the obligation fulfilled by the respondent was only to the extent indicated below:-

| Licencing year | % Export Obligation | Export obligation to be fulfilled in British Pounds | Export obligation to be fuifiled in R. | Export obligation fulfilled in Brithsh Pounds | Export Obligation fulfilled in Rs. |
|---|---|---|---|---|---|
| 18.3.96-17.3.97 | Nil | Nil | Nil | 171412.88 | 10,12,559 |
| 18.3.97 - 17.3.98 | 10 | 58156 | 31,61,360 | 37586.24 | 21,81,508 |
| 18.3.98 - 17.3.99 | 20% | 1163312 | 63,22,720 | 12536.60 | 9,62,575 |
| 18.3.99-17.3.00 | 30% | 174468 | 94,84,080 | Nil | Nil |
| 18.3.00-17.3.01 | 40% | 232624 | 3,16,13,600 | 655335.72 | 41,56,642 |
| Total | 100% | 581560 | 3,16,13,600 | 67535.72 | 41,56,642 |

3. Since there was failure to fulfill the export obligation, the respondent was issued with a show cause notice dated 7.3.2003 demanding customs duty to the extent of Rs. 15,03,941/ and also proposing confiscation of the machinery valued at Rs. 66,84,185/-. The show cause notice was adjudicated by order dated 31.12.05 holding that the machinery imported was liable to confiscation and also confirming customs duty demanded amounting to Rs. 15,03,941/- along with applicable interest. Further penalty of Rs. 5 lakhs was imposed on the respondent company under Section 112 of the Customs Act and penalty of Rs. 2 lakhs was imposed on Shri Gurpartap Singh, Director of the respondent company under Section 112 of the Customs Act, 1962.

3. Aggrieved by the order, the Respondent filed appeal before the Commissioner (Appeals). The Commissioner (Appeals) observed that the respondent has already remitted Rs.5,80,000/- as observed in page 3 of the show cause notice and also Rs. 10,856/- as intimated to the Assistant Commissioner vide letter

dated 8.5.01. He further observed that the Joint Director of Foreign Trade has discharged the EPCG licence vide his letter No. /AM/96/LIC/LDH/596 dated 10.12.02. He held that relevant date for demanding any additional customs duty was 8.5.01 i.e. the date on which the amount of Rs. 10,856/- was remitted. Therefore, he confirmed the duty demand only to the extent of duty already deposited by the appellant and set aside balance of the demand of duty, penalty and interest confirmed by the impugned order.

4. Aggrieved by the order of the Commissioner (Appeals), the Revenue has filed the present appeal. The main grounds in the appeal filed by the Revenue are as following:-

(i) The appellant had not produced the installation certificate as required under Condition No. 6 of the Notification;

(ii) The investigation report from Central Excise Division from Chandigarh revealed that no unit in the name of M/s Bestway Enterprises did not exist in Plot No. 144-C, Phase VII, Mohali;

(iii) As per the statement of Shri Gurpartap Singh dated 24.11.00, the appellant commenced production in 1997 only therefore, the goods exported by the appellant prior to the commencement of work in 1997, were produced using machinery other than that imported by the respondent company under above said DEEP licence and therefore, cannot be considered towards the discharge of export obligation;

(iv) Notification No. 110/95 dated 5.6.95 itself provides for demand of duty in case of such default and the said proviso does not prescribe any time limit. Further respondent had executed a bond for proper discharge of export obligation failing which the differential duty was to be paid as per terms of the bond. Therefore, it is the contention of Revenue that the finding of Commissioner (Appeals) that the demand is time barred is not correct.

5. Heard arguments on both sides and perused records.

6. We have studied the Show Cause Notice to find out whether the charge against the Respondent was that the company did not have a factory and they sold of the machinery without using it for manufacture of goods for export or whether they used the machinery for the intended purpose for some time but did not discharge the export obligation completely. To understand the ambivalent manner in which these issues are stated in the SCN, two of the paras of the SCN are re-produced below.

> *"On the basis of information that the party has not discharged the export obligation as per conditions of the Notification No.110/95-Cus dated 5.6.95, Exim Policy and EPCG licence, the investigations were undertaken by the Anti-smuggling Branch of Customs Commissionerate, Amritsar. It was found that the party did not produce any certificate from the jurisdictional Assistant Commissioner of Central Excise or Deputy Commissioner of Central excise or independent Chartered Engineer confirming installation and use of capital goods in his factory premises. The party also did not submit to Assistant Commissioner/Deputy Commissioner of Customs, CFS (PSWC), Ludhiana any date regarding fulfillment of export obligations even after*

*completion of initial period of export obligation. Thus the party did not fulfill the conditions No.4 and 6 of the Notification No. 110/95-Cus dated 5.6.95. Inquiry was got conducted by the Assistant Commissioner of Customs, CFS Ludhiana from Assistant Commissioner of Central Excise Division, Chandigarh who vide his letter C. No.VIII-Cus/20.29/97/8002 dated 22.7.99 informed that the present occupants of C-144, Phase VII, Mohali i.e. M/s Sigma Phoenix (India) Pvt Ltd did not have any knowledge that any party by the name of M/s Bestway enterprises Pvt Ltd existed in the said plat (copy enclosed as Ann I). Summons were issued to Shri Gurpartap Singh, Director of M/s Bestway Enterprises Pvt Ltd by the Superintendent, Customs (Anti-smuggling) Amritsar during February 2000 to Sept 2000 but he did not appear before the Superintendent fo tendering his statement. He appeared before the Superintendent Customs (Anti-Smuggling) Amritsar on 24.11.2000 and tendered his statement under Section 108 of the Customs Act, 1962 in which he stated that they imported the machinery under EPCG licence from England in 1996 through CFS Ludhiana and after installation of machinery, they commenced the production in 1997 and total production from the unit was exported to England. He stated that he looked after the production and sale aspect and he did not remember if the Central Excise authorities were informed about the installation of machinery. He stated that the plot on which the unit was installed belonged to the company. He further stated that due to non-remittance of foreign exchange by the foreign buyers, they could not cary on with the production and the machinery was divided between two parties of Directors. He further stated that out of total machinery, there machines were installed at Phase VIII, Focal Point, Ludhiana and production of cotton fabric from there was sold locally and the unit at Ludhiana was closed at* *the end 1998. He further stated that they are ready to pay the duty along with interest.*

*As per letter F No. EPCG-59/AM 96/Lic/LDH/156 dated 2.9.99 of Assistant Director General of Foreign Trade, Ludhiana addressed to the Assistant Commissioner of Customs, CFS Ludhiana, the party fulfilled 30.95% export obligation upto to 17.3.99 In view of the said letter, the party is required to pay in terms of para 4 of the Notification No. 110/95-Cus dated 5.6.95 the customs duty along with interest @ 24% corresponding to unfulfilled portion of the export obligation. The party vide his letter dated 30.11.2000 forwarded a copy of TR-6 challan for Rs 5,80,000/- along with chart of calculation of duty and interest to Deputy Commissioner, CFS Ludhiana. The party vie his letter dated 15.2.2001 supplied photocopies of shilling bills, BRCs and statement of export. Subsequently, in compliance to Assistant Commissioner, CFS, Ludhiana's letter C No.VIII/ Cus/PSWC/Lud/EPCG/13/95-96/324-25 dated 8.5.2001 the party vide his letter dated 23.5.2001 submitted a copy of TR-6 challan dated 21.5.2001 for Rs. 10,856/-. Summons were issued to Shri Gurpartap Singh on 21.2.02 for appearance on 25.2.02 but vide his letter dated 21.2.02 he intimated that he would appear on 4.3.02 with relevant documents such as electricity bills, purchase bills and export documents as the same were not readily available. He vi e his letter dated 5.4.02 stated that he has deposited Rs. 5,80,000/- vide TR-6 challan No.3057 dated 7.12.2000 and Rs. 10,856/- vide TR-6 challan No. 719 dated 21.5.01 and regarding any further liability, he would consult other directors and requested for some more time. He did not produce any record. Summons were issued to Shri Gurpartap Singh for 6.3.02, 7.5.02 and 21.5.02. He appeared on 21.5.02 before the Superintendent (AS) Customs Amritsar and stated that the machines which were previously lying at Ludhiana have been sifted to village*

*Thala on Phillaur-Nawanshahr Road. Regarding deposit of an amount of Rs. 5,80,000/-, he stated that he would have to check up fro his record. Again summons were issued to Shri Gurpartap Singh for appearance on 23.5.02 but vide his fax message dated 23.5.02, he requested for 15 days time to produce the relevant record. Summons were issued to Shri Gurpartap Singh for appearance on 3.6.02, 19.6.02, 27.8.02, 30.10.02, 12.11.02, 19.12.02 before Superintendent (AS) Customs Amritsar for further investigation but he did not appear. He vide his fax messages dated 29.8.02 and 30.12.02 only sought another date for appearance.*

*From the scrutiny of photocopies of shipping bills, BRCs and statement of exports submitted by the party, it is observed that the party has exported six consignments to UK i.e. three consignments ofFOB value at pounds [illegible] in 1996, two consignments of FOB value pounds 54,999.12 in 1997 and one consignment of FOB value pounds 12536.6 in 1998 (Details as per annexure II attached). Notification No. 110/95-Cus dated 5.6.95 and para 41(i) of Exim Policy 1992-97 clearly spell out that the export obligation is to be fulfilled by exporting the goods manufactured or produced by the use of the capital goods imported under EPCG scheme. Shri Gurpartap Singh Director of the party has admitted in his statement dated 24.11.2000 that after the installation of imported machinery the production was started in 1997. Thus in view of the explanation of export obligation given in Notification No. 11/95-Cus dated 5.6.95 and para 41(i) of Exim Policy 1992-97 the export goods valued at pounds 101496.2 cannot be counted towards discharge of export obligation as the same have not been manufactured with the use of machinery imported under the EPCG scheme vide EPCG licence No. 2081519 dated 18.3.96. The details of export obligation as per condition 3 of Notification No.*

*110/95-Cus dated 5.6.95 and actual export obligation fulfilled by the party is as under:-*

| Licencing year | % Export Obligation | Export obligation to be fulfilled in British Pounds | Export obligation to be fuifiled in R. | Export obligation fulfilled in Brithsh Pounds | Export Obligation fulfilled in Rs. |
|---|---|---|---|---|---|
| 18.3.96-17.3.97 | Nil | Nil | Nil | 171412.88 | 10,12,559 |
| 18.3.97 - 17.3.98 | 10 | 58156 | 31,61,360 | 37586.24 | 21,81,508 |
| 18.3.98 - 17.3.99 | 20% | 1163312 | 63,22,720 | 12536.60 | 9,62,575 |
| 18.3.99-17.3.00 | 30% | 174468 | 94,84,080 | Nil | Nil |
| 18.3.00-17.3.01 | 40% | 232624 | 3,16,13,600 | 655335.72 | 41,56,642 |
| Total | 100% | 581560 | 3,16,13,600 | 67535.72 | 41,56,642 |

7. There is no allegation that the factory did not exist at the time of import of the goods. Nor is there a clear charge that the Respondent sold the machinery without using it for the intended purpose. Stating that the occupant of plot No C-144, Phase-VII, Mohali during 1999 did not know a company by name M/s Bestway Enterprises Ltd. is different from making a charge that no factory of the company ever existed. Alleging that the Respondent did not produce installation certificate is different from stating that the Respondent did not install it at all. When we read the second of the paras re-produced above we conclude that the charge is only to the extent that the export obligation was not fully discharged.

8. For the charge as stated in two of the paras of the SCN reproduced above the penal consequences confirmed by the adjudication order was demand for full exemption benefit that was availed at the time of import and also penalties which add upto almost 50% of such exemption benefit availed. This order is directly in conflict with condition 4 of the notification which reads as under:

*"Condition No. 4:-*

*The importer produces within thirty days of the expiry of each year from the date of issue of the licence from 2nd year or within such extended period as the Assistant commissioner of Custom's or Deputy Commissioner of Customs may allow, evidence to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs showing the extent of export obligation fulfilled, and where export obligation of any particular year is not fulfilled in terms of the preceding condition, the importer shall within three months from the expiry of the said year pay an amount equal to that portion of the duty leviable on the goods but for the exemption contained herein which bears the portion as the unfulfilled portion of the export obligation bears to the total export obligation together with interest @ 24% per annum from the date of clearance of the goods."*

9. It appears that when the importer approached for discharge from obligations that he undertook at the time of import the concerned Superintendent has worked out the liability as per terms of Condition 4. At least there is no allegation in the SCN that the amount demanded at that time was not in conformity with condition 4. The SCN just wants to ignore condition 4 for the reason that installation certificate was not produced and export obligation was not fully discharged. When the importer did not produce installation certificate prompt action should have been taken. If any penalty was required to be imposed it should have been done at least when the importer approached the department for de-bonding. At that time also no action was taken. So it is to be assumed that it was not a violation serious enough to be acted upon.

10. In the circumstances we do not consider that any further amount is due from the Appellant and for this reason we do not want to interfere with the impugned order-in-appeal.

11. The Appeal is therefore dismissed.

(Order ~~-----~~ pronounced in the open Court on 06-07-11

(ARCHANA WADHWA)
Member (Judicial)

(MATHEW JOHN)
Technical Member

MPS*