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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/791 /2008-792 /2008 - CU[DB]

Date 23/08/2011

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

To : 1. MOHAMMAD HUSSAIN GAURI, MANAGING PARTNER
2. M/S KANAK METAL INDUSTRIES
8/2, JODHANA IND. ESTATE, BASNI,
JODHPUR(RAJASTHAN)

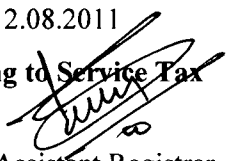
M/S KANAK METAL INDUSTRIES

Appellant

C.C.(JODHPUR)

Vs
Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/368-369/ 2011 CU[DB]** dated 12.08.2011
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.(JODHPUR)

HQ AT NEW CENTRAL REVENUE
BUILDING, STATUE CIRCLE, 'C'
SCHEME, JAIPUR 302005.

2. Adv. / Consult MR. O. P.AGARWAL & CO.
56, SECTION 7, N.P.H ROAD,
JODHPUR(RAJ)

3. C.D.R

4. Bar association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications 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 (Harvana)

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)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
COURT NO. IV**

**Date of Hearing : 2.6.2011
Date of Pronouncement : 12-08-11**

Custom Appeal No. 791-792 of 2008-Cus.

[Arising out of common Order-in-Original No. 12/08 dated 26.8.2008 passed by the Commissioner of Customs, Jodhpur]

Coram:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)

Hon'ble Shri Mathew John, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	<i>Yes</i>
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	<i>Yes</i>
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	<i>Seen</i>
4.	Whether order is to be circulated to the Department Authorities?	<i>Yes</i>

M/s Kanak Metal Industries
Mohammad Hussain Gauri, Managing Partner

Appellants

Vs.

CC, Jodhpur

Respondent

Appearance:

Appeared for Appellant : Shri L.P. Asthana, Advocate with
Ms. Neha Gulati, Advocate & Sh. O.P
Agarwal, C.A

Appeared for Respondent : Shri K.K. Jaiswal, SDR

Coram:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)

Hon'ble Shri Mathew John, Member (Technical)

Final Order No. C/362-369/11 dated 12.8.11

Per Mathew John:

The First Appellant is a partnership firm. The second Appellant is the Managing Partner of the firm. The first Appellant

is an exporter of stainless steel utensils. It claims DEPB benefit against such exports and such benefit is proportional to the FOB value of goods exported. Revenue has made out a case that during the period 2002-03 to 2004-05 the FOB values and "Present Market values" for export goods were mis-declared by the Appellants on the higher side to claim undue DEPB benefit.

2. Para 7.36A of Public Notice No. 10/97 (P.N.), 97-2002 dated 21-5-1997 provides that **the amount of Credit entitlement** rate, in respect of export products whose DEPB rate is 15% or more, **shall not exceed 50% of the PMV of the goods.**

3. The following Circulars of CBEC are relevant:

- (i) CBEC's circular 69/97-Cus dated 08-12-97;
- (ii) CBEC's circular 27/2000-Cus dated 05-04-2010;

3.1 Extracts from CBEC's circular 69/97-Cus dated 08-12-97 is reproduced below:

"1. As you are aware para 7.36A of Public Notice No. 10/97 (P.N.), 97-2002 dated 21-5-1997 provides that **the amount of Credit entitlement** rate, in respect of export products whose DEPB rate is 15% or more, **shall not exceed 50% of the PMV of the goods.**

2. Object of Limiting the amount of Credit Based on the Present Market Value (PMV) :

The condition of restricting the credit-amount under DEPB Scheme to 50% of the PMV was prescribed to prevent the exporters from obtaining excessive amount of credit by inflating the FOB price of the export product. It is stated that the FOB value may be higher, as per the contract between the exporter and foreign buyer, (depending on various factors) but the "**Present Market Value**" of the goods in an index of their local (wholesale/retail) price inclusive of excise duty, Sales tax and other local taxes plus cost of transportation. Accordingly the amount of credit is to be restricted with reference to the **domestic price of the product**, and not with reference to the FOB price declared on the GR Form/Shipping Bill.

3. Determination of PMV

- (i) Manufacturers - Exporters

(a) As regards Manufacturers - Exporters who export under AR4 from, where the AR4 value is declared as the PMV, the same shall be accepted.

(b) Where the Manufacturer-Exporter declared PMV which is higher than the AR4 price, (as PMV is inclusive of transportation costs and domestic duties and taxes) the higher PMV declared may be accepted up to 150% of AR4 value (exclusive of excise duty). Market enquiry may be caused only if PMV is more than 150% of AR4 price, and exporter does not agree to lower the PMV below the 150% mark.

(c) Where the Maximum Retail Price (MRP) is required to be printed on the products as per the Weights & Measures Act, the MRP indicated on the products may also be accepted as PMV.

(d) For the products for which manufacturers have a Printed Price list, or a Catalogue indicating the local price of the products, the price indicated on the price list/catalogue shall be accepted as PMV."

3.2. During the relevant time DEPB benefit was granted on aluminum utensils subject to a value cap of Rs.125 per Kg. So CBEC's circular 27/2000-Cus dated 05-04-2010 also is relevant which is re-produced below;

"Subject : Revised guidelines for determination/verification of the Present Market Value (PMV) under DEPB Scheme - Regarding.

Attention is invited to Circular No. 69/97-Cus., dated 8-12-1997, as amended by Circular Nos. 79/98-Cus., dated 22-10-1998, No. 23/99-Cus., dated 11-5-1999 and No. 37/99-Cus., dated 24-6-1999.

2. As a result of the Annual Review of the Exim Policy 1997-2002, para 7.36A of the Handbook of Procedure, Vol. 1 has been amended with effect from 1-4-2000 to the effect that PMV declaration shall not be applicable for products for which value cap exist irrespective of the DEPB rate of the product.

3. In view of the above, it has been decided by the Board that for all products exported under DEPB Scheme, wherever FOB value cap has also been notified along with DEPB rate, PMV will not be verified by the Custom House. Circulars mentioned in the first para above shall also stand amended to this effect."

4. Revenue conducted investigations about the cost of the goods exported and also about sale price of similar goods in the local market, and also purchase price of some of the goods bought by them from local market and exported. They ascertained the present market value of the goods manufactured in the factory of the Appellant at Rs. 65.80 per Kg. They also found that some of the exported goods were bought by them at a price of Rs. 70 per Kg but the goods were exported at a price of Rs. 123 per Kg. Based on such facts Revenue issued a Show Cause Notice proposing action as proposed in para 34 of SCN which is reproduced below:

"34 Now, therefore, M/s Kanak Metal Industries, 8/2, Jodhana Industrial Estate, Road No. 8 Basni, Jodhpur and Shri Mohammad Hussain Gauri, Managing Partner of M/s Kanak Metal Industries, Jodhpur are hereby called upon to show cause to the undersigned as to why :

- (i) The goods having declared FOB value of Rs.8.96 crores (correct value Rs.4,74,22,493/-) exported vide shipping bills as detailed in Annexure-A should not be confiscated under Section 113(d) & (i) of the Customs Act, 1962. Since the said goods have already been exported, why Redemption fine should not be imposed under Section 125 of the Customs Act, 1962.
- (ii) Penalty should not be imposed under Section 114(i) and (iii) of the Customs Act, 1962 on M/s Kanak Metal Industries, Jodhpur.
- (iii) Penalty should not be imposed under Section 114(i) and (iii) of the Customs Act, 1962 on Shri Mohammad Hussain Gauri, Managing Partner of M/s Kanak Metal Industries, Jodhpur."

5. The Show Cause Notice was adjudicated by the impugned order. The operative part of the order is re-produced below:

- "1. I determine the PMV as Rs.4,74,22,493/- in respect of 33 consignments of S.S. Utensils exported by M/s Kanak Metal Industries, Jodhpur from ICD Concor, Jodhpur during the period from 2002-03 to 2004-05 in place of the FOB/PMV Rs.8,96,21,671/- declared by the said exporter

and accordingly the benefit claimed under DEPB scheme needs re-consideration.

2. I confiscate the 33 consignments of S.S. Utensils exported by M/s Kanak Metal Industries, Jodhpur from ICD Concor, Jodhpur during the period from 2002-03 to 2004-05 valued at Rs.4,74,22,493/- having declared FOB value Rs.8,96,21,671/- under Section 113(d) and (i) of the Customs Act, 1962. Since the goods have already been exported. I impose Redemption fine of Rs.1,00,00,000/- (Rs. One crore only) under Section 125 of the Customs Act, 1962.
 3. I impose penalty of Rs.8,96,21,671/- (Rs. Eight crore ninety six lac twenty one thousand six hundred seventy one only) under Section 114(i) and (iii) of the Customs Act, 1962 on M/s Kanak Metal Industries, Jodhpur)
 4. I impose penalty of Rs.1,00,00,000/- (Rs. One crore only) under Section 114(i) and (iii) of the Customs Act, 1962 on Shri Mohammad Hussain Gauri Managing Partner of M/s Kanak Metal Industries, Jodhpur."
6. Aggrieved by the order the Appellants have filed this appeal.
7. For understanding the dispute and the confusion in the SCN and O-in-O a few points have to be noted. These are,-
- (i) FOB value and PMV are different. FOB is the value at which goods are sold to the buyer abroad. PMV is the value of the export goods in local market.
 - (ii) DEPB benefit is to be granted by applying the rate prescribed for the commodity on the FOB value of goods exported.
 - (iii) If such benefit is more than 50% of the PMV, it is to be restricted to 50% of PMV. Public Notice No. 10/97 (P.N.), 97-2002 dated 21-5-1997 does not say the DEPB rate is to be applied to PMV.

8. To illustrate let the DEPB rate be 20%. Let FOB value be Rs.100. Exporter can get DEPB credit of Rs.20. But if PMV is Rs. 30 only then DEPB credit will be Rs. 15 only. Annexure A to SCN is prepared with the understanding that DEPB benefit in such circumstances will be only Rs.6 and therefore the entire matter is initiated on wrong understanding of the provisions.

9. The confusion in this matter appears to emanate from circular para 5 of CBEC's circular 77/2002-Cus dated 27-11-2002. Extracts from the circular are given below:

"3. The issue has been examined in consultation with the Directorate General of Foreign Trade. It has been decided in modification of the instructions contained in the above referred circulars **that as a general rule, FOB value of the exports shall remain the basis for extending the DEPB credit** since FOB value is recognised as the basis of export transactions both in the EXIM Policy as well as in the Customs Act, 1962.

4. However, in cases of specific intelligence that the FOB declared is inflated or there is evidence confirming such over-valuation, the field formations should resort to market verification to ascertain the correct market price of the goods. In addition to above, market verification can also be initiated on receipt of intelligence or where the intelligence is gathered in respect of consignments entered for export to sensitive destinations and/or where the goods are sub-standard and it appears that the acceptance of the declared value would result in accrual of substantial unintended DEPB benefits. **But all such cases should be taken up for investigation only with the express written approval of the Commissioner of Customs.**

5. **In those cases where it is conclusively proved through the investigations that the FOB value had been artificially inflated/ manipulated by the exporter to avail of unintended higher DEPB benefits, the DEPB credit entitlement shall be worked out only on the PMV and not FOB value."**

10. Para 5 as quoted above does not say whether the DEPB rate is to be applied on the PMV or the benefit should be capped at 50% of PMV which is what the Public Notice Issued by DGFT envisages. So this sticky confusion appears to have rolled and gathered many issues that appeared during investigation and became a big mass in the form of the investigations and proceedings in this case and perhaps many more other cases. The

instructions of CBEC in para 4 of circular dt 27-11-2002 quoted has been of little help in stopping such meaningless investigations. DEPB benefit is granted by DGFT. So the public notice issued by DGFT should prevail over the circular of CBEC which is not very clear on the point whether the rate is to be applied on PMV or benefit is to be capped at 50% of PMV.

11. Apart from the confusion in the above circular, the confusion in this case is based also on the fact that the exporter had declared PMV and FOB price at almost the same level in the shipping Bills and Revenue found that PMV was in fact lower. But the benefit that accrues to the exporter due to wrong declaration of PMV as worked in Annexure-A to the SCN based on a wrong understanding of the Public Notice.

12. The interesting aspect of the O-in-O is that the revision in PMV ordered in the impugned order does not result in excess benefit to the exporter as may be seen from the following rough calculation.

1.	FOB Value declared	89621671
2	DEPB benefit at 20%-(actual rate varied from 13% to 20% but for 28 out of 33 Shipping Bills). This is why calculation is stated to be rough.	17924334
3.	PMV decided in O-in-O	47422493
4	Maximum DEPB that can be granted @50% PMV	23711246

Since amount at S. No 2 above is less than amount at S. No. 4 above no case of excess DEPB benefit comes out even as per the adjudicated values. So it is obvious that the entire case is based on wrong understanding of facts and law especially the understanding that DEPB benefit is to be restricted to 20% (appr) of Rs. 47422493 as seen from calculations in Annexure A to SCN. Here the submission of the Appellant that DGFT has so far not revised the DEPB benefit is taken note of.

13. Both the sides occasionally (not consistently) understand that both FOB and PMV are interchangeable. In the first place the Appellant has declared the same value as FOB Value and PMV in many shipping bills. On the other hand the adjudicating officer has used the expression "FOB/PMV" is used in para 1 of the operative part of the impugned order. The order fixes PMV of Rs. 4,74,22,493/- in place of "FOB/PMV" of Rs. 8,96,21,671/-. FOB value cannot be ordered to be replaced by PMV value and this portion of the order is patently wrong.

14. The grounds raised on behalf of the Appellant are the following:

- a) The department has made this case based on CBEC's circular 69/97-Cus dated 08-12-97 ignoring amendment to that circular made by circular 27/2000-Cus dated 05-04-2000. Since DEPB credit was allowed for the goods in question subject to value cap the enquiry regarding PMV is irrelevant as per the latter circular;
- b) The FOB value declared on the shipping Bills were realized. Therefore there is no case to question FOB price. They quoted a few decisions to support this argument;
- c) Department has not produced any evidence of export of such goods at a lower price by any other party. They rely on the decision of the larger bench of Tribunal in **Advance Exports Vs. CC -2007 (218) ELT 39**;
- d) Since FOB declared at the time of export was accepted by the assessing officer it cannot be revised without challenging the assessment order under section 129 (d) of the Customs Act. They have quoted a few decisions to support this argument;
- e) The Board's circular permits DEPB credit based on 50% of PMV. The DEPB credit based on FOB value is within this limit.

- f) DGFT has still not cancelled or modified the DEPB licenses already granted. So it is clear that DGFT does not agree with the impugned order.

15. Further the correctness of the PMV determined by the department is challenged on the following grounds:

- (i) The purchase price of export goods were taken without considering other cost elements like packing cost, cost of transportation, commission on sales and overhead expenses.
- (ii) As per Board's circular 69/97-Cus dated 08-12-97, where AR-4 value is declared as PMV the same shall be accepted.

16. The Ld DR on the other hand tries to demonstrate how the PMV declared in Shipping Bills are about Rs. 125 per Kg when the PMV was only about Rs. 65 to Rs. 70 per KG and goes on to argue how goods can be held to be liable to confiscation under section 113 of the Customs Act when material particulars declared are fraudulent.

17. Considered arguments on both sides.

18. The impugned order holds that the FOB value of export goods should have been declared at the price of the goods in the local market. This is without any legal basis. Any exporter is free to sell goods at a profit. So order fixing FOB value to be equal to PMV is hereby set aside.

19. Prima facie, the Present Market Value is not correctly declared. This mistake appears to emanate from wrong understanding of the expression. When the adjudicating officer himself is confused about this, the exporter cannot be penalized for such discrepancy. No benefit that is accruing to the exporter on account of the mis-declaration comes out. Whatever is demonstrated in Annexure A to SCN is based on wrong understanding of law. In the circumstance no case warranting confiscation of goods under section 113 (d) and (i) is made out.

There is also the issue that the goods were not available for confiscation and hence could not have been confiscated and redemption fine imposed.

20. Since no case to hold the goods liable to confiscation is made out penalties imposed under section 114 (i) and (iii) are also not sustainable.

21. With the result the two Appeals are allowed by setting aside the Order-in-Original.

(Pronounced in open Court on...12/8/11...)

(~~Arcana~~ Wadhwa)
Member (Judicial)

(Mathew John)
(Member (Technical))

RM