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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/501 /2006-504 /2006 - CU[DB] Date **13/01/2012**

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

To :
1. M/S. NEERAJ SALUJA
2. M/S. DHIRAJ SALUJA
3. M/S. SALUJA EXIM LTD.
   106, INDUSTRIAL AREA, BADDI (HP)

M/S. SALUJA EXIM LTD. Appellant

Vs

COMMISSIONER OF CENTRAL EXCISE (ADJUDICATION), NEW DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/A/07-10/ 2012 CU[DB]** dated 11.01.2012 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
COMMISSIONER OF CENTRAL EXCISE (ADJUDICATION),
ROOM NO. 214, 2ND FLOOR, NEW
CUSTOMS HOUSE, NEAR IGI
AIRPORT, NEW DELHI 110037

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE,
NEW DELHI-110029

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-3
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
14. M/S. SALUJA EXIM
    90, INDUSTRIAL AREA,
    BADDI (HP)

Assistant Registrar
(Customs Appeal Branch)

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

Date of Hearing : 23.8.2011
Date of Pronouncement : 11-1-12

Custom Appeal No. 501-504 of 2006

[Arising out of Order-in-Original No. 04/GS/CC/DRI/NCH/2006 dated 1.5.2006 passed by the Commissioner of Central Excise, New Delhi]

Coram:

Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Shri Mathew John, Technical Member

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
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?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

M/s Saluja Exim Ltd.
M/s Saluja Exim
Shri Dhiraj Saluja
Shri Neeraj Saluja

Appellants

Vs.

CCE, New Delhii

Respondent

Appearance:

Appeared for Appellant : Shri A.R. Madhav Rao, Advocate
Shri R.K. Hasija, Advocate

Appeared for Respondent : Shri R.K. Gupta, DR

CORAM: Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Shri Mathew John, Technical Member

Final Order No.C/A/07-10/12-Cus dated............

Per **Mathew John:**

This proceeding is for deciding four appeals. All the appeals arise from the same impugned order. The first Appellant M/s Saluja Exim is a partnership firm of Shri. Dhiraj Saluja the third appellant and his wife Smt. Reema Saluja. The second appellant M/s Saluja Exim Ltd is a limited company with Shri. Dhiraj Saluja and Smt. Reema Saluja as its Directors. The fourth appellant is Shri. Neeraj Saluja, brother of Shri. Dhiraj Saluja he was actively involved in conducting the business of the first two appellants.

2. The case against the Appellants is that during the period May 2003 to Dec 2004, the first appellants and second appellants exported goods by overvaluing export goods with the fraudulent intention of claiming undue export benefits like DEPB credit and drawback. There was also the charge that in the case of certain export consignments, export proceeds were not realized within 180 days from the date of export. The DEPB scripts so obtained were sold to different importers who imported goods without payment of customs duty by making use of such scrips. In some cases scrips were only partially used. The actions proposed under the Show Cause Notice were to hold the exported goods liable to confiscation under section 113 of the Customs Act, to impose penalty for their actions rendering the goods liable to confiscation, to demand the ineligible drawback granted to the first two appellants, to disallow the unutilized portion of the DEPB scrips and to demand the duty foregone on account of the imports made using the DEPB scrips sold by the first two appellants. Adjudication of the Show Cause notice resulted in following consequences among other consequences.

(i) DEPB credit of Rs. 1.5 crores was denied to Saluja Exim and Saluja Exim Ltd on account of exports for which export proceeds were not realized in 180 days from date of export (para 132 (iii) of impugned order).

(ii) DEPB credit of Rs.2,43,55,968/- and Drawback of Rs.1,33,342/- were denied on the ground there was overvaluation of export goods (para 132(iv) of impugned order).

(iii) Rs. 20,30,779/- was demanded from M/s Saluja Exim and Saluja Exim Ltd towards credit amount utilized by them from DEPB scrips for payment of customs duty (para 132 (v) of impugned order).

(iv) Rs. 9,55,429/- was denied as unutilized portion of DEPB credit (para 132 (vi) of impugned order).

(v) An amount of Rs.2,92,63,810/- was demanded on account of Customs duty foregone on account of utilization of credit in DEPB scrips issued to Saluja Exim Ltd. and utilized by various importers for importing goods without customs duty (para 132 (vii)-Table A of impugned order);

(vi) An amount of Rs.70,55,898/- was demanded on account of Customs duty foregone on account of utilization of credits in DEPB scrips issued to Saluja Exim and utilized by various importers for importing goods without customs duty (para 132 (vii)-Table-B of impugned order).

(vii) An amount of Rs. 3,48,24,503 paid by the two main appellants during investigation was adjusted towards duties demanded from them (para 132 (ix) of impugned order.

(viii) Penalty of Rs.2,92,63,810/- was imposed on Saluja Exim Ltd and Rs.70,55,898/- as imposed on Saluja Exim under section 114A of Customs Act (para 132 (xii) of impugned order).

(ix) Penalty of Rs. 50 lakhs each was imposed on Dhiraj Saluja and Neeraj Saluja under section 114 of the Customs Ac (para 132 (xiii) of impugned order).

(x) Penalty of Rs. 50 lakhs each was imposed on Dhiraj Saluja and Neeraj Saluja under section 112 of the Customs Act (para 132 (xiv) of impugned order).

3. Aggrieved by the order the Appellants have filed this appeal. We have heard the arguments on both sides and perused the records.

4. The main submissions of the Appellants are the following:

(i) Customs Department has no jurisdiction to deny DEPB credit.

It is argued that DEPB licenses are issued by the Licensing Authority and the Customs Department is only to act as per the license issued. If there was anything wrong with the evidences submitted for claiming the benefit it is for the licensing authorities to take action and customs on its own cannot cancel the benefit of licenses issued. The following decisions are relied on for the above argument.

(a) Vrundavan Exports Vs. CC-2005 TIOL-1156-CESTAT

(b) Prayag Exporters Pvt. Ltd VS. CC-2000 (121) ELT 819

(c) Badri Prasad Pvt. Ltd VS. CC 1995 (80) ELT-624

(d) Shilpi Exports Vs. CC-1996 (83) ELT-302

(ii) No duty can be demanded from the exporter of the goods.

The Appellants have not imported any goods but were only exporters. So no demand of duty can be made under section 28 on the Appellants. The decisions in K. Sons Overseas India Pvt. Ltd VS. CC-2001 (132) ELT 93 (tri) and Jupiter Exports Vs CC-2001 (131) ELT 147 (Tri).

(iii) All requirements of Notification 45/2002-Cus dated 22-04-2002 have been fulfilled.

If at all there is any liability on the appellants for goods imported. It is argued that all the conditions of Notification 45/2002-CUs is satisfied and there can be no case for demand of duty on imports

(iv) The export goods were not over-invoiced.

It is submitted that the department is relying only on the statements of Shri. Dhiraj Saluja and Shri. Neeraj Saluja to prove over valuation. These statements were taken under duress. The Kolkata Customs which had investigated the matter of overvaluation had adjudicated the matter concluding that there was no over valuation. Further there can be overvaluation of a maximum of 15% if the statements are taken as the basis. The reason for concluding that the entire DEPB benefit against certain exports are not correctly claimed is not understood. If DEPB benefit presuming 15% over valuation can be only to the extent of Rs. 59,23,397 for both Saluja Exim and Saluja Exim Ltd. taken together for the impugned period.

(v) When the goods are not available for confiscation such goods cannot be held to be liable to confiscation.

(vi) No penalty can be imposed under section 114A of the Customs Act.

(vii) When no duty was payable by the Appellants no penalty can be imposed on the Appellants.

5. The arguments of Revenue are as under:

(i) The Licensing Authority had also issued a SCN dated 14-08-07 in the matter and adjudicated the SCN vide order dated 10-06-2011. The DGFT had cancelled 39 DEPB transferrable scrips and imposed penalty on M/s Saluja Exim Ltd., Shri Dheeraj Saluja and Shri. Neeraj Saluja. The Ld. SDR draws attention to para 6 of the order where the adjudicating authority has taken note of the fact that the entire dues have been paid by the appellants in pursuance of the investigations conducted by DRI. After claiming benefit of such deposit before the licensing authority the Appellants cannot now claim that no such amount was payable.

(ii) The appellants are deemed importers as per provisions in Notification 45/2002 dated 22-04-2002 (having regard to condition Nos. (i) and (ii) of the notification as examined by the adjudicating authority in para 110 of the impugned order. So duty can be demanded from the appellants.

(iii) The requirement that the license should be obtained by proper means is an implied condition. Now the DGFT itself has cancelled the licenses. So the argument that all the conditions of the notification have been complied with is not correct.

(iv) Overvaluation is proved through various evidences like the 10 fraudulent bank accounts opened by the appellants into which money has been transferred by the Appellants and from which cash was withdrawn for payment to Hawala operators. The spiral binding diary submitted by Shri. Gulshan Kochar the hawala operator shows entries regarding remittance of money through Hawala route into the account of the appellants. Thus over-invoicing is proved with good evidence. In the matter of overvaluation it is to be noted that the overvaluation is worked out on the basis of amounts transferred into the bogus accounts and the amounts are not worked out for each consignment. This amount may be only about 15% of the total value of exports made by the appellants.

(v) As per the provisions of section 113 (i) any goods entered for exportation which do not correspond to in any material particular with information furnished with the entry made is liable to confiscation. In this clause expression like "attempted to be exported" used in some of the other clauses of the same section is not used. So it is obvious that goods can be held to be liable to confiscation even after actual export. As per decisions of the Courts goods have to be available for confiscating the goods but these decisions are not applicable for holding the goods to be liable to confiscation.

(vi) When the goods are held to be liable to confiscation penalty can be imposed under section 114A of the Customs Act.

6. We have considered arguments on both sides and perused the records.

7. We have also perused the order dated 10-06-2011 passed by the Joint Director of Foreign Trade, Ludhiana submitted by the AR. It is seen from para 6 and 7 of the order that that authority has not separately evaluated the evidence before passing the order but has relied on the order passed by the Commissioner of Customs, which order is appealed against in this proceeding. So we do not want to rely on that order in any manner for deciding this appeal.

8. It is argued that Customs Authorities have no jurisdiction to deny DEPB credit and the same can be done only by officials of DGFT. But the moot point is that it is customs authorities who assess the value of export goods based on which DGFT allows DEPB credit. Customs Authorities have jurisdiction to investigate overvaluation. Based on the results of such investigation DGFT takes further action. In fact in this case DGFT has already relied on the impugned order and passed order dated 10-06-2011 cancelling the DEPB credit.

9. The objection taken by appellants that there is no proposal to deny credit on account of non-realization of export proceeds is correct to some extent because there is no such clear proposition in para 29 of the SCN. However the issue of non-realization of export proceeds are mentioned in para 7 of the notice where there is an admission by Dhiraj Saluja about such fact and willingness to remit and amount of Rs. 1.5 crores on this count. But we note some discrepancy in this matter which is explained later in this order.

10.1. Now we have to deal with the issue whether duty can be demanded from the appellants who were original holders of the DEPB licenses in circumstances where the licenses where obtained fraudulently which licenses were sold to bonafide purchasers who bought it good faith and imported goods using credit in such DEPB credit. The Appellants argue that under section 28 of the Customs Act, duty can be demanded from importers only. So let us examine the said section. The said section reads as under:

"28 Notice for payment of duties, interest etc. (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(b) in any other case, within six months, from the relevant date, serve notice <u>on the person chargeable with the duty or interest</u> which has not been levied or charged or which has been so short levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful misstatement or suppression of facts by the <u>importer or the exporter</u> or the agent or employee of the importer or exporter, the provisons *of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted."*

10.2. This section does not state that duty should be demanded from the importer. It states that duty should be demanded from person chargeable with duty. Even the first proviso talks about issuing notice to the importer or the exporter. Further Section 2 (26) of Customs Act defines "importer" as

> *(26) "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer;*

It may be noted that no explanation is given for the expression "person holding himself out to be the importer". It is to be interpreted with reference to the situation. When customs duty is paid through an instrument granted by Government to an exporter for the purpose of paying import duty and when that instrument is used for paying import duty on any goods, such exporter as the holder of the duty exemption certificate is holding out to be the importer not withstanding that the imported goods were not for his use. One of the most salient objectives of Customs Act is to collect import duties. If obligation arising on this count is discharged through an instrument granted to any person that person is holding out to be the importer for payment of import duty, even if he sells the instrument to another person and that person presents the instrument to the department. The sale can be only in respect of the bonafide right and not the adverse consequence arsing from fraud played on the government. In the situation at hand the short levy has occurred due to the actions of the appellants who made mis-declarations of value and sold it to others who bought the licenses in normal course of transaction. The adjudicating authority after hearing the importers have arrived at the conclusion that the importers were not to be faulted and the appellants were the persons chargeable to duty in the facts of the case. In this regard the Adjudicating authority has relied on the finding of the Gujarat High Court in the case of **Suresh Dhansiram Agarwal Vs. UOI** and Others - 2005 (183) E.L.T. 424 (Guj.) for arriving at this conclusion. In this matter we are differing with the decisions of the Tribunal which is not taking note of the decision of Gujarat High Court in the case of **Suresh Dhansiram Agarwal** (supra).

10.3. The appellants are questioning this finding on the basis of the following decisions:-

(a) **K. Sons Overseas India Pvt Ltd Vs. CCE -** 2001 (132) ELT 93 (T)

(b) **Jupitor Exports Vs. CCE** -2001 (131) ELT 147 (T).

(c) **Dharam Exports Vs. CC-** 2005 (192) ELT 503 (Tri-Mum)

(d) **Classic ITM Vs. CC** Final Order No. C/258-261/11 dated 22-06-2011

10.4 Such decisions have been helping fraudsters to claim DEPB benefit fraudulently sell the DEPB to others and throw the challenge "catch me if you can". Gujarat High Court has considered such situation in case of Suresh Dhansi Ram Aggarwal (Supra) and concluded that revenue lost on account of DEPB licenses obtained fraudulently can be recovered from exporters.

10.5 We note the observations of Gujarat High Court and agree with the finding of the adjudicating authority in this regard.

11. The next issue to be considered is whether there was overvaluation. The evidences relied upon by Revenue to prove overvaluation is the fact that the appellants had opened 10 bogus bank accounts in Centurion Bank, Ludhiana to which money was transferred from the accounts of the appellants and cash was withdrawn from these accounts. The statements of Shri. Neeraj

Saluja on 26-12-2003 and 27-12-2003 prove that such money was paid to hawala operator Shri Gulshan Kochar to remit it back to the foreign buyer who remitted money into the account of the appellants purporting it to be value of export goods. There are some supporting documents as seen at page 2 to 18 of File B-76 recovered from the Rahon Road Office of Neeraj Saluja showing details of instructions given to Gulshan Kochar. Extracts from a note book stated to be maintained by Hawala operator and produced by him is also relied upon as evidence. This extract is not a very reliable evidence because the diary itself was not produced and only a photocopy of one page said to be relating to the period 19-11-03 to 17-12-03 covering an amount of US $ 6,58,948 was only produced. Revenue is also relying on the admission of Shri. Dheeraj Saluja and Shri. Neeraj Saluja admitting that the exported goods were overvalued to the extent of 10% to 15% and stating that such DEPB benefit on account of overvaluation works out to 2.5 crores. Thus there are evidences showing overvaluation.

12.1 Now the question is to see how the quantum of DEPB credit to be denied is worked out. In this regard we reproduce para 83 of the impugned order below:

> *"83. The record reveals that by adopting the above modus operandi, M/s Saluja Exim and M/s Saluja Exim Ltd, though the active participation of Shri Dhiraj Saluja and Shri Neeraj Saluja, exported RMGs by over-invoicing the same and received the foreign remittances of inflated values during the period from June 2003 to December, 2003, the details of shipping bills, invoice nos. shipping bill and invoice wise amount of foreign exchange remitted, FIRC no and ate and the name of the issuing bank [Centurion Bank] are mentioned in the Annexure B 1 and B 2. These annexures are based on the information/charts furnished by the State Bank of Bikaner & Jaipur, SSI Branch, Ludhiana vide their letters dated 23.2.2004 placed on record. It is evident from these charts that the names of the remitters have been shown as the same*

which Shri Gulshan Kochhar mentioned in his statements stating that these were the overseas buyers whose names were used for telegraphic transfer (TT) purposes. It is further seen from these charts of State Bank of Bikaner and Jaipur, SSI Branch, Ludhiana that a total amount for s 18,63,95,343/- was received as foreign remittance into the bank account no. 579126 of M/s Saluja Exim Ltd and Rs. 2,94, 60,707/- in account no. 577639 of M/s Saluja Exim Ltd during the above period i.e. total amount of Rs. 21,58,56,050/- US $ 46,94,287/- in respect of which FIRCs were issued. The information provided by the said Centurion Bank manifests the receipt of foreign remittances of US S 58,39,165 in the said bank accounts of M/s Saluja Exim and M/s Saluja Exim Ltd during the period from April 2003 to 25.12.003. Page no. 65 of the spiral binding diary maintained by Shri Gulshan Kochhar reveals the account of the amounts transferred to the bank account of M/s Saluja Exim of one month. It manifests the transfer of US dollars 6,58,948 into the account of M/s Saluja Exim between 19.11.03 to 17.12.03. As manifest by the statements of Shri Gulshan Kochhar, he admittedly routed the foreign remittances to the bank accounts bearing nos as 579126 and 577639 of M/s Saluja Exim Ltd and M/s Saluja Exim through hawala n the said Centurion Bank. In the absence of any retraction by Shri Gulshan of his statement or any contradictory evidence on record to the above page of diary maintained by him, I find that this piece of evidence is sufficient to corroborate the disclosures made by Shri Gulshan in his statements regarding the transfer to the above said foreign remittances to the Centurion Bank accounts of M/s Saluja Exim and M/s Saluja Exim ltd. The amount of DEPB works out to be Rs. 3,93,55,968/- and drawback as Rs. 1,33,342/- in respect of shipping bills for which remittances had been received in the Centurion Bank during the said period. The DEPB licenses for the above amount were sold by the exporters to various *importing firms (details of notices given in the brief facts above). The bank account statements [Transaction History Enquiry- Currency A/cs] pertaining to the said ten bank accounts of the said bogus firms. Shri Dhiraj Saluja in his statement dated 25.12.03 clearly admitted the over valuation and disclosed the extent of over-valuation by stating that the goods from their said firms were exported by inflating the values by 10-15%. He also admitted the hawala game by stating that the said 10-15% of the invoice value of the gods exported by them had reached their bank accounts through other channels. He disclosed that his brother Shri Neeraj Saluja had complete knowledge as to how the inflated value of the invoices was remitted in their bank accounts. He admitted that he was ware of thebogus firms to which cheques had been issued on behalf of their firm M/s Saluja Exim by his brother. He unvdield that Shri Neeraj Saluja had told him the same and that he (Shri Neeraj Saluja) knew as to what was done with the money withdrawn from the accounts of the said ten bogus firms as he was looking after the financial affairs of the company. He also brought out that total paymdent/remittacnes of Rs. 12.5 to 13 crores was pending from some overseas buyers for the last over 6-7 mnths and that he had already availed drawbakck benefit of Rs. 1.5 crores against the said exports. He expressed his knowledge about the mandatory provison to get the remittances within 180 days. Shri Dhiraj Saluja, in his further statement dated 26.12.03 brought to the fore that they had availed drawback/DEPB of Rs. 18.5 crores by that time out of which, stating from June 2003 till that time they had over inocied to the tune of 10-15% of invoice value, the drawback/DEPB credit came to Rs. 2.5 crores. He expressed his willingness to return the export incentive of /Rs. 1.5 crores approx.. taken by them for which no export remittances had been received. Shri Neeraj Saluja also admitted the over-valuation of the export goods and the modus-operandi in his* *statement dated 26.12.03 by stating that they had been over-invoicing and receiving over-invoiced remittances through Telegraphic Transfer in Centurion bank and for the said purpose, he had opened ten bogus accounts in the same bank for withdrawing the over-invoiced amounts. He disclosed that the percentage of over-invoicing varied from 15-20% and that he knew Shri Gulshan of Delhi through whom he was getting foreign remittances arranged in respect of the inflated prices. He brought to the fore that he had made an arrangement with his overseas buyers under which they would be given belter discounted prices and they would in turn allow them to raise inflated invoices and to mention their references in swift messages received from telegraphic transfers for such over-invoiced remittances arranged by Shri Gulshan through hawala operation. He brught to the fore that there was no practive of mentioning of L/C on swift messages for Telegraphic transfer remittances and the same was done for not giving any indication about linkage to hawala. He further disclosed that they had made arrangements of over-invoicing with their buyers at Dubai and Russia and had been getting remittances for over-invoiced part through Telegraphic Transfers (TT) in Centurion Bank, Ludhiana. He put forth that they had claimed the incentive of about 16-18 crores. He admitted that they had adopted unfair means to over-invoice the export goods from June 2003 onwards in order to avil undue drawback/DEPB to the extent of Rs. 4 crores including s. 1.5 crores of incentive for which no payment had been received from overseas buyers by that time. He also expressed his willingness to retun the same. In his further statement dated 27.12.03, shri Neeraj Saluja brought out that all the transactions in the bank accounts pertained to the money received on account of over-invoicing of exports and through hawala channels. About the transactions of the said ten bogus bank accounts of the bogus firms, he brought to the fore that the amount of tne trasactnions came to Rs. 30* *crores of which 70% were under DEPB and 30% under drawback. He stated that the incentive under DEPB being 14% of the FOB drawback availed by them came to Rs. 4 crore in the said ten accounts. The disclosure made by Shri Neeraj Saluja manifest that he was fully aware of the transactions of the said bogus bank accounts of the said bogus firms and about the drawback scheme rates and the DEPB rates. The production, finance, accounts, receipt of foreign remittances and payments was the responsibility of Shri Neeraj Saluja. For production activities, supervision he had been frequently visiting their Baddi units to supervise and ensure that the export goods were prepared as per the designs and requirements of the buyers. For accounts side, he was dealing with the work relating to banking and was maintaining the bank books to fill/prepare self cheques for withdrawal of amounts from the bank. Shri Surender Pal in his statement dated 25.12.03 stated that his main work was to fill/prepare the cheques as per directions of Shri Neeraj Saluja, dhiraj Saluja and Shri R.S. Salua for signatures, as bank books in respect of all the bank accounts of the above firms were maintained by him' that the job of deposit of cheques, demand drafts or cash in bank accounts of the above firms or companies was performed by the employees of accounts section and they used to inform him after deposit, to update his bank books; that employees of the accounts section i.e. Chetan Kumar, Jai Kumar or Sanjeev Kumar used to inform him about the foreign remittances received credited in their bank accounts in respect of exported goods of above firms to enable him to make entries in his bank books; that manly Shri Sanjev Kumar used to visit the banks to withdraw the cash on self cheque withdrawal on behalf of Neeraj Saluja and Dhiraj Saluja or R.S. Salauja and after withdrawal of the cash from the bank, handed over to the above mentioned persons."*

12.2 After going through the above findings we note two major defects in the findings. These are,-

(i) The Shipping bills in respect of which export proceeds have not been realized within 180 days from date of export is not specified.

(ii) The extent of overvaluation is not clearly quantified. Further there are inherent contradictions in the findings and quantification as may be seen from the following paragraphs.

13.1 Para 22 of the SCN states that DEPB credit and drawback in respect of shipping bills for which remittance is received in Centurion Bank, Feroze Gandhi Market, Ludhiana is proposed to be denied. DEPB credit of Rs. 1,50,00,000/- on account of non-realization of export proceeds plus Rs. 2,43,55,968/- on account of overvaluation are denied as per para 132 (iii) and 132 (iv) of the impugned order. This corresponds to Rs. 3,93,55,968/- mentioned in para 22 of SCN. But this amount corresponds to Shipping Bills for which foreign exchange was received in Centurion Bank, Ludhiana. Thus an amount of Rs. 1.50 crores is denied on the ground that foreign exchange is not realized and the same amount is stated to be received in Centurion Bank. We see this as a contradiction. As already mentioned the appellants have raised the issue that there was no proposal to deny credit on account of non-realization of export proceeds.

13.2 Since the goods were already exported it was not possible to determine the extent of overvaluation for each exported item. So in this case overvaluation could have been determined only with reference to money remitted back to the purchasers or as per the admission of Shri. Dhiraj Saluja and Shri. Neeraj Saluja.

13.3 The amount transferred to the 10 bogus accounts was Rs. 29.94 crores. This is admitted to be remitted abroad through hawala route. If this corresponds to overvaluation of 15% of export realization (as per admission statement) then the total export realization should be around 199.6 crores. But we are not able to see exports to that extent from the case records. 70% of this is amount of Rs. 29.94 crores is stated to be in respect of exports under DEPB. DEPB credit at that time is stated to be 14% of value of export goods. So excess DEPB benefit on account of overvaluation works out to 2.9 crores approximately. But the amount denied is Rs. 2,43,95,688. So this calculation is also not matching.

13.4 The appellants had accounts in State Bank of Bikaner and Jaipur (SBBJ), Ludhiana also. The total value of exports of the two firms during the relevant time received in SBBJ was Rs. 21.58 crores ($4694287) and Rs. 26.85 crores (approximate) corresponding to US $ 5839165 in Centurion Bank thus totaling to Rs. 47.43 crores. If this value is overvalued to the extent of 15%, the extent of overvaluation is 6.18 crores. Only 70% of this is stated to be in respect of exports under DEPB claim. 14% of such overvaluation is only 60.56 lakhs only. This is not the DEPB credit denied.

13.5 There is also slight inconsistency between credit denied and amount demanded back. Total credit denied is 1,50,00,000/- plus Rs. 2,43,55,968/- equal to 3,93,55,968/-. Out of this 9,55,429/- is denied as unutilized. So the utilized credit is to the extent of 3,84,00,539/-. The total amount demanded as utilized is (2,92,63,810+70,55,898+20,30,779)=3,83,50,487/-. This can be on account of the fact that the amount of Rs. 1,50,00,000 is only an approximate figure. This discrepancy is not very alarming as other discrepancies pointed out.

13.6 Thus the basis on which credit is denied and demand for duty is confirmed is not coming out clearly.

14. The Appellants submits that they have been denied DEPB for the full export value of certain shipping bills. The basis for picking up such shipping Bills as in Annexure-C1 to SCN is not clear as already explained. If there was 10% to 15% overvaluation it is to be determined whether it is proper to deny the entire DEPB credit on account of such exports. No law authorizing such total denial is brought to our notice. The decision of the Tribunal in Merchant Export Vs. CC-2003 (162) ELT 466 also approves grant of credit to the extent of the actual value of goods exported rather than denial of the total credit. So in our view credit can be denied only to the extent of credit earned on account of overvaluation.

15. In view of the above facts we find that the impugned order is not sustainable. But we would like to give an opportunity to the adjudicating authority to re-adjudicate the matter after giving an opportunity to the appellants to present their case. If any DEPB credit or drawback is to be denied the following aspects may be clearly brought out,-

(i) The Shipping Bills in respect of which export proceeds have not been realized in the time frame stipulated for the purpose are to be identified and listed.

(ii) If any amounts are to be denied on account of overvaluation, the quantum of overvaluation should be arrived at on a reasonable basis and the same should be brought out clearly. Only in respect of the quantum of overvaluation DEPB credit should be denied.

16. While re-adjudicating the matter there is a need to re-examine the issue whether the time frames for realization of export proceeds have been extended by the competent authority for any consignemnts and export proceeds have been realized in such extended time.

17. It is very obvious that the amount that can be recovered from the Appellants in cash will be only to the extent of ineligible

credit utilized for payment of customs duty and this aspect also has to be kept in mind while adjudicating the case afresh.

18. For reasons explained above the consequences ordered against the appellants in the impugned order are set aside and the matter is remanded for de-novo adjudication as per directions above.

(Pronounced in Court on 11/01/2012)

(Archana Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)

RM