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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
EXCISE APPEAL BRANCH

Appeal No. : E/3465/2006-EX[DB], E/3466/2006-EX[DB]

Dated: **23/07/2012**

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

M/s MKU Pvt Ltd,4,Gandh
Gram,G.T.Road.Kanpur

SH GOPAL KRISHNA GUPTA,PRESIDENT (Appellant)

VS

C.C.E.KANPUR (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/840-841/2012-EX[DB]** dated **18/07/2012** passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

Copy To,

1. Respondent
C.C.E.KANPUR
117/7, Saravodaya Nagar, Kanpur.

2. Advocate(s) / Consultant(s): SH. PRAMOD KUMAR RAI, ADV., 808, L&T BUILDING, SECTOR-18 B, DWARKA, N. DELHI-75

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-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
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Assistant Registrar
EXCISE Appeal Branch

14, **SH GOPAL KRISHNA GUPTA,PRESIDENT**
M/s MKU Pvt Ltd,4,Gandh
Gram,G.T.Road.Kanpur

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

COURT NO. I

DATE OF HEARING : 28/05/2012.
DATE OF DECISION : 18/07/2012.

Excise Appeals No. 3465-3466 of 2006

[Arising out of the Order-in-Original No. 18/Commr/MP/06 dated 31/07/2006 passed by The Commissioner of Central Excise, Kanpur.]

Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, 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?	:
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?	:

M/s MKU Pvt. Ltd.] Appellants
Shri Gopal Kirshna Gupta, President]

Versus

CCE, Kanpur Respondent

Appearance

Shri Pramod Kumar Roy, Advocate – for the appellant.

Shri S.R. Meena, Authorized Representative (DR) - for the Respondent.

CORAM : **Hon'ble Shri Justice Ajit Bharihoke, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. A/840-841/2012-Ex(BR)

Per. Rakesh Kumar :-

The facts leading to these appeals are, in brief, as under.

1.1 The appellant manufacture "Synthetic Web Equipment – Disruptive pattern, consisting of – pack with aluminium frame, haversack, ammunition pouches, frog bayonet and belt waist (hereinafter referred to as SWE) for supply to Ministry of Defence and para-military forces. The dispute is about classification of this product. While the appellant were classifying this product as "textile made up" under sub-heading 6307.90 of the tariff and paying duty on that basis at 8% adv. + edu. Cess, according to Department its correct classification is under sub-heading 420200 of the tariff as – "haversack" where the rate of duty is 16% adv. + edu. Cess. On this basis a show cause notice dated 3/5/06 was issued to the appellant for –

(a) demand of allegedly short paid duty amounting to Rs. 57,62,331/- in respect of clearances of SWE, during period from April, 2005 to March 2006, alongwith interest on this duty at the applicable rate under Section 11AB of Central Excise Act, 1944 ; and

(b) imposition of penalty on the appellant company under Rule 25 (1) (a) of the Central Excise Rules, 2002 and on Shri Gopal Kirshna Gupta, President of the appellant company under Rule 26 of the Central Excise Rules, 2002.

1.2 The show cause notice was adjudicated by the Commissioner vide order-in-original No. 18/Commr/MP/06 dated 31/7/06 by which –

(a) the duty demand of Rs. 57,62,331/- was confirmed against the appellant company under Section 11 A (1) alongwith interest on this duty under Section 11AB ;

(b) Rs. 12,36,053/- already paid by the appellant company prior to adjudication were appropriated towards this duty demand ; and

(c) while penalty of Rs. 56,62,331/- was imposed on the appellant company under Rule 25 (1) (a) of the Central Excise Rules, 202, penalty of Rs. 50,000/- was imposed on Shri Gopal Kirshna Gupta under Rule 26 ibid.

1.3 Against this order of the Commissioner, these two appeals have been filed.

2. Heard both the sides.

3. Shri Pramod Kumar Roy, Advocate, the learned Counsel for the appellant, pleaded that the goods, in question, i.e. SWE are used by personnel of military and para-military forces as an article of apparel and are part of soldier's infantry combat clothing which are worn by soldiers during their combat duty, that the purpose of SWE is to enable a soldier to carry essential articles over a long distance, that different components of SWE are meant as pockets for keeping different items, that SWE is worn on the body of soldier as readymade garment with the help of backless straps, belt waist etc., that as per essential character of the goods, in question, and also as per the functional test for the purpose of its classification, the goods, in question, would be classifiable as "textile made up" under heading 63.07, not as

travel goods under heading 42.02, that from the photographs of persons wearing SWE, shown to the investigating officers, it is clear that SWE is worn by a soldier and in SWE there are pockets as well as arrangement to carry different items such as pack with aluminium frame, haversack, ammunition pouches, frog bayonet and belt waist, that it is totally wrong to call the SWE as haversack and classify the same under heading 4202 as travel goods, that Canadian International Tribunal in its judgment in case of **Rui Royal International Corporation vs. President of Canadian Border Service Agency (appeal No. AP – 2010 – 003)** has held that "emergency tow straps" for the purpose of towing a vehicle are classifiable under 63079099 as "textile made up" not under heading 8701 or 8705 as parts and accessories of motor vehicles, that ratio of this judgment is applicable to this case also, that since in this case, dispute is only over the classification, and there was no deliberate contravention of the provisions of Central Excise Act, 1944 or of the rules made thereunder, in any case, there is no justification for imposition of penalty equal to the duty demand on the appellant company under Rule 25 (1) (a) and separate penalty on Shri Gopal Kirshna Gupta, President of the appellant company, under Rule 26 of the Central Excise Rules, and that in view of this, the impugned order is not correct.

4. Shri S.R. Meena, the learned DR, defended the impugned order reiterating the findings of the Commissioner in it and emphasised that –

(a) SWE is nothing but a bag worn strapped across the shoulder for carrying equipments or supplies, specially a soldier travelling case and the same cannot be called a "textile made up" or combat clothing ;

(b) main component of SWE is haversack which is nothing but a strong bag slung from shoulders of a soldier for carrying his belongings and other item - pouch ammunition, belt waist and frog bayonet are fitted in and around the haversack – pouch ammunition is tied by the soldier on his waist, belt waist is so designed, as to fit in with the strap of haversack being carried on the soldier's back and thereby hold the haversack firmly and frog bayonet is used to hold bayonet and is attached with belt waist ;

(c) SWE is not a combat clothing or an article of apparel or readymade garment in the pattern of dress, - it is an item like a rucksack or a bag for a soldier for keeping his belongings during his movement ; and

(d) in view of the nature and use of SWE, the same is correctly classifiable under 4202 as "rucksack".

He also pleaded that since the appellant company and its President have suppressed the relevant facts from the Department with intention to evade the duty by misclassifying the goods, penalty has been correctly imposed on the appellant company and its President.

5. We have carefully considered the submissions from both the sides and perused the records.

6. The point of dispute in this case is the classification of "Synthetic Web Equipment (disruptive pattern) consisting of pack with aluminium frame, haversack, ammunition pouch, frog bayonet and belt waist." While according to the appellant, this items is classifiable under heading 63.07 as "textile made up", according to the Department this item is classifiable under heading 4202 as "rucksack and similar containers".

7. Heading 42.02 and 63.07 are reproduced below :-

"**4202 Trunks, suit cases, Varity cases, Executive cases, brief cases, school sachets, spectacle cases, Binocular cases, camera cases, musical instrument cases, gun cases, holster and similar containers; travelling bags, insulated food or beverage bags, toilet bags, rucksacks, hand bags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewellery boxes, powder boxes, cutlery cases and similar containers; of leather or of composition leather, of sheeting of plastic, of textile material, of vulcanised fibre or of paper board, or wholly or mainly covered with such material or with paper.**

63.07 other made up articles, including dress patterns.

The sub-headings of this heading cover -

"**(i) floor cloths, dish cloths, dusters and similar cleaning cloth ;**

(ii) life jackets and life belts and

(iii) other textile made ups."

7.1 Both the headings, 4202 and 6307 are identical to the corresponding HSN headings.

8. 'Webbing' is a strong fabric woven as a flat strip or tube of varying width and fibres. It is made from cotton/flax fibre, and synthetic fibres such as nylon, polyester, polypropylene etc. Webbing fabric is used in climbing equipment, parachute equipment, personal load carrying equipment for soldiers etc. The term "Webbing equipment" for armed forces is personal load carrying equipment made of webbing. The purpose of webbing equipment is to hold everything a soldier needs to operate for 48 hours – pouches/bags for keeping ammunition/weapon ancillaries, food, water bottle, communication equipment, layout, entrenching tools etc. The term "disruptive pattern" means camouflage pattern. Thus the synthetic webbing equipment, in question, is basically a set of containers made of disruptive pattern webbing cloth, to meet the operating requirements of a soldier on march or during combat duties.

9. These are two parts of heading 4202 –

(i) "Trunks, suit cases, Varity cases, instrument cases, ….. gun cases, holsters <u>and similar containers</u> ;

(ii) "Travelling bags, Toilet bags, rucksacks, hand bags, shopping bags, …. Map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, … powder boxes, cutlery cases and <u>similar containers</u>, ….."

9.1 From a perusal of heading 4202 it is clear that this heading covers various types of containers made of leather, composition leather, plastic sheet, textile material, vulcanised fibre or paper board.

9.2 According to HSN Explanatory notes to heading 4202 –

> "The expression – "similar containers" in the first part includes hat boxes, camera accessory cases, cartridge pouches, sheathes for hunting or camping knives, portable tool boxes or cases, specially shaped or internally fitted to contain particular tools with or without their accessories etc."

9.2.1 Therefore ammunition pouches, and frog bayonets, in our view, would be covered by heading 4202.

9.3 As regards "haversack", the same is a sack made of webbing cloth, which can be carried on one's back and is secured with two straps that go over the shoulders. The haversack is a container similar to "rucksack" covered by second part of heading 4202. "Pack with aluminium frame" is also a backpack made of webbing cloth and in our view, is similar to "rucksack". Therefore, "pack with aluminium frame" and 'haversack' are covered by heading 4202.

9.4 Belt waist is worn around the waist and is so designed as to fit in with the straps of haversack being carried over on the soldier's back and thereby hold the haversack firmly. Frog bayonet is also attached to this belt. As per HSN explanatory notes to heading 63.07 – "belts which although worn around the waist, do not have the character of belts of heading 62.17 e.g. belts for occupational use (electrician, aviation, parachutists etc.); webbing carrier straps and similar articles are covered by this heading i.e. 63.07, except for straps having the character of articles of saddlery or harness. The waist belt being basically webbing carrier belt would be covered by heading 63.07 of the tariff.

9.5 Since as discussed above "pack with aluminium frame" "haversack", "ammunition pouch", "and frog bayonet" made of webbing cloth are correctly classifiable under 4202, their classification under 6307 is ruled out in view of chapter note 1 to chapter 63 according to which headings 63.01 to 63.07 cover only those textile made ups which are not more specifically described in other headings of Section XI (under which Chapter 63 falls) or elsewhere in the nomenclature.

9.6 Thus, while "Pack with Aluminium frame", "haversack" "ammunition pouch" and "frog bayonet", of webbing cloth is correctly classifiable under heading 4202, the "belt waist" of webbing cloth is correctly classifiable under heading 6307. The duty demand is however, required to be reworked out on this basis.

10. As regards penalty, while the penalty of Rs. 57,62,331/- has been imposed on the appellant company, under Rule 25 (1) (a) of Central Excise Rules, 2002, penalty of Rs. 50,000/- has

been imposed on Shri G.K. Gupta, President of the appellant company.

10.1 On the question of penalty, Commissioner's findings in para 69 of the impugned order are as under –

> "In the instant case, the party failed to pay the full amount of duty, thereby contravening the provisions of Rule 4 of Central Excise Rules, 2002 and failed to assess their goods, thereby contravening the provisions of Rule 6 of the Rules ibid. Thereby the party is definitely liable to penalty under Rule 25 (1) (a) of Central Excise Rules, 2002. However, the provisions of Section 11AC are not invokable in the facts and circumstances of the present case."

10.2 Since as per the Commissioner's findings in the impugned order, this is not a case of deliberate evasion of duty by resorting to fraud, wilful misstatement, suppression of facts etc., in our view, penalty equal to the duty demand confirmed on the appellant company is not called for and the same merits reduction. As regards the penalty on Shri G.K. Gupta under Rule 26 ibid, since for imposition of penalty under this rule *mens-rea* is required/be provided i.e. it has to be proved that the person had dealt with the excisable goods in the manner as mentioned in this rule knowing very well or having reason to believe that the goods were liable for confiscation, and since as per the Commissioner's findings, this is not a case of deliberate duty evasion, the penalty on Shri G.K. Gupta, President of the appellant company under Rule 26 of the Central Excise Rules, 2002 is not sustainable and the same is liable to be set aside.

11. In view of the our above findings -

(a) while the Commissioner's order regarding classification of "pack with aluminium frame" "haversack", "frog bayonet" and "ammunition pouch" classifying the same under heading 4202 is upheld, his order regarding classification of "belt waist" under 4202 is set aside, as the same is correctly classifiable under 63.07 – the Commissioner is to re-determine the duty demand on this basis after hearing the appellant company ; and

(b) while penalty under Rule 26 on Shri G.K. Gupta, President of the appellant company is set aside, the penalty on the appellant company under Rule 25 (1) (a) is reduced to Rs. 5 lakhs.

The matter is thus, remanded to Commissioner only for re-quantification of the duty demand on the basis, as mentioned above.

11.1 The appeals stand disposed of, as above.

(Pronounced in the open court on 18/07/2012.)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

PK