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 : 12/10/2017.
DATE OF DECISION : 06/11/2017.

Customs Appeals No. 50469-50471 of 2017

[Arising out of the Order-in-Original No. 12/2016 dated 28/11/2016 passed by The Commissioner of Customs (Preventive), Jodhpur, Jaipur.]

M/s Jai Exports]
Shri Mahaveer Agarwal] Appellants
Shri Mukesh Agarwal]

Versus

CC (Preventive), Jodhpur Respondent

Appearance

Shri Tarun Gulati, Advocate - for the appellant.

Shri Govind Dixit, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice Dr. Satish Chandra, President**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 57647-57649/2017 Dated : 06/11/2017

Per. B. Ravichandran :-

The appeals are against common impugned order dated 09/12/2016 of Principal Commissioner of Customs (Preventive), Jodhpur. The said order has been issued in pursuance of remand direction of the Tribunal vide final order No. 54999-55001 of 2014 dated 13/10/2014. This is a third round of litigation before the Tribunal. The case was remanded twice and it is before us for third time.

2. The brief facts of the case are that the main appellant (M/s Jai Export, Jodhpur) is a partnership firm engaged in export of hand tools. The other two appellants are partners of the exporting firm. The case against the appellants is that they have knowingly mis-declared the export value in the shipping bills and availed ineligible DEPB benefit in violation of various provisions of Foreign Trade (Development and Regulation) Act, 1992, Foreign Trade (Development and Regulation) Rules, 1993, Foreign Exchange Management Act, 1999, Customs Act, 1962 readwith Shipping Bill and Bill of Export (Form) Regulations, 1991 and Notification No. 27/2001-CUS (NT) dated 31/05/2001. Based on an intelligence received from Income Tax Department with reference to financial irregularities in the accounts of the main appellant, the officers of customs conducted certain follow up investigation, by scrutinizing the documents, recording statements of partners of the exporting firm, sellers of hand tools and various other information including overseas verification. On completion of investigation, the Revenue initiated proceedings against the appellants to re-determine the export value of goods exported by the main appellant and to impose penalties on the main appellant and the other two appellants. The case covered 133 consignments of hand tools with a declared value of Rs. 18.37 crores and claim for benefit under DEPB scheme to an extent of Rs. 2,92,91,117/-. The period involved was 11/12/2001 to 14/10/2003. The case of the Revenue is mainly on the ground that :-

(a) the appellants floated a sister concern M/s Shree Nath Textiles, Jodhpur in their own premises and shown as if the said proprietorship firm, owned by one of the partners of the main appellant, carried out job work on the purchased hand tools. This is to show an inflated export value on the ground that the goods purchased from the market were processed with value addition and thereafter exported ;

(b) in large number of cases, the purchase price was shown abnormally high in collusion with suppliers of hand tools as evidenced from the enquiry conducted at the supplier's end ;

(c) the purchase invoices were manipulated/forged in order to mis-represent the true value of these purchased items to justify inflated FOB value of export goods;

(d) the true costing of hand tools was suppressed in the books of accounts of the appellant. Exaggerated indirect cost was shown with reference to exported goods to justify the inflated FOB.

3. The case against the appellant was adjudicated by the Original Authority vide order dated 08/02/2008. On appeal, the Tribunal vide final order No. C/117-119 of 2011 dated 17/03/2011 set aside the said order and remand the matter for a fresh decision. Pursuant to the said remand direction, the Original Authority passed denovo order on 28/03/2013. When the mater came up on appeal before the Tribunal, the case was again remanded vide final order No. 54999-55001 of 2014 dated 13/10/2014. The Tribunal directed the Original Authority mainly to examine all the points raised by the appellants more

specifically with reference to errors and assumptions made in the show cause notice; examination of conditions prescribed in Section 9D of the Central Excise Act, 1944 and the ratio of the decision of Hon’ble Delhi High Court in **J&K Cigarettes vs. CC, Delhi – 2007 (242) E.L.T. 189 (Del.)** with reference to cross examination of witnesses who did not appear before the Adjudicating Authority; applicability of the ratio of the decision of the Tribunal in **Kanak Metal Industries vs. CCE, Jodhpur – 2012 (275) E.L.T. 115 (Tri. - Del.)**. The Original Authority decided the case pursuant to second remand direction, which resulted in the present impugned order.

4. The Original Authority after examining the various submissions of the appellants, evidences available on record and the decided case laws referred to, issued the final order. He ordered that goods with FOB value of Rs. 17.66 crores exported by the appellants were liable for confiscation. He imposed penalties of Rs. 8 crores and Rs. 2 crores each on the main appellant and the other two appellants (partners) under Section 114 (i) of the Customs Act, 1962, respectively.

5. The learned Counsel appearing on behalf of all the appellants submitted that the undisputed facts of the case are that the appellants made the impugned exports. The same were to unrelated parties. There is no allegation of improper flow back of any extra consideration or non-remittance of any foreign exchange as per the declared value. The statements of persons

who were not cross-examined cannot be relied upon. The remand directions of the Tribunal were not complied with by the Original Authority. The imposition of penalty and confiscation is beyond the scope of the remand order of the Tribunal. The submissions of the suppliers cannot be relied upon in terms of Section 138B of Customs Act, 1962 readwith Section 138 of the Indian Evidence Act, 1872. The ratio of the decision in **Kanak Metal Industries** (supra) is squarely applicable to the present case. Reliance was also placed on the decision of the Tribunal in **Sitaram Ramdhan & Co. vs. CCE, Jaipur – 2015 (330) E.L.T. 210 (Tri. – Del.)** and **P.M. International vs. CC – 2016 – TIOL – 1347 (CESTAT – Del.)**

6. It was further submitted that the outcome of cross-examination made in the earlier round of adjudication justifying purchase price was brushed aside by the impugned order. The investigation has not been done properly as the rates were adopted only based on size of the impugned goods without any regard to type or quality. The evidences produced regarding value addition of purchased goods have been ignored. Similarly, evidence on the value of similar goods exported were also ignored. The overseas enquiry cannot be relied as the importer in Dubai had under valued the goods and the same cannot be basis for rejecting the FOB value of export goods. The investigations started with the information received from Income Tax Department. When the proceedings against the appellant were closed by the Income Tax Authorities there is no justification for

the Customs Authorities to persist with the charge of over-valuation of export goods.

7. The learned AR contested the submissions made in these appeals. He submitted that cross-examination of witnesses have been conducted and the Original Authority have examined the reliability of evidence after such cross-examination. Non-availability of witnesses for cross-examination and the application of Section 9D to deal with such situation has also been examined by the Original Authority. The plea of the appellant that the statements of witnesses who have not been cross-examined should be discarded is not legally sustainable. The exception made in Section 9D has been examined to the facts of the present case. The substantial over-valuation of export goods with malafide intend of availing ineligible DEPB benefit has been established with corroborative and comprehensive evidences brought out during investigation. The appellants were attempting to take shelter by showing illustrative discrepancies in a few supporting evidences to contend that the whole case against them is without evidences. The available evidence have clearly brought out the modus operandi of the appellant in exporting goods with highly inflated FOB value and the evidences should be viewed in a cumulative manner. The Original Authority is correct in imposing penalties on all the three appellants.

8. We have heard both the sides and perused the appeal record. First, we take up the point raised by the appellants

regarding the Original Authority not adhering to the remand direction of the Tribunal while deciding the case afresh. We have carefully gone through the impugned order. We note that all the major points raised by the appellants have been dealt with by the Original Authority. None of the significant issues raised by the appellant with reference to purchase of impugned goods, documentation and legal points regarding cross-examination and reliance placed by the Revenue on various evidences collected during investigation have been left out by the Original Authority. The point for decision is whether the analysis of evidences and legal provisions, as made by the Original Authority is sustainable or not.

9. In the remand direction, the Original Authority was asked to examine the application of Section 9D of Central Excise Act (Section 138B of Customs Act, 1962) and the directions of Hon'ble Delhi High Court in **J&K Cigarettes** (supra) with reference to cross-examination of persons who gave statement under Section 14 of the Customs Act before the officers. The appellant contended that Shri Subhash Chander (M/s Vikas Tools) and Mohd. Ramzan (M/s Kingsons Forgance) did not appear for cross-examination and the Adjudicating Authority should not have relied on their statements. We note that the non-appearance of these two persons for cross-examination and its implication on the evidentionary value of the statements given by them has been examined by the Original Authority elaborately. It has been noted that both persons were called on 4 occasions to

appear for cross-examination. Both the persons, citing ill health, either sought adjournment or expressed their inability to attend the hearing. The Original Authority noted that the statements as supported by documentary evidences available with the Department are admissible evidence and considered the inability of the witness to be present due to ill health and the fact that matter was already taken up for adjudication twice and cannot be kept pending indefinitely. The Original Authority concluded that in the given circumstances their presence could not be obtained without much delay and it was unreasonable to delay the proceedings further. We are in agreement with the detailed examination by the Original Authority. The evidences available in the form of documents are corroborated and the statements given by these persons only added to such corroboration. We find that the Original Authority is correct in proceeding with the adjudication after recording the detailed reasons for taking various evidences including the statement of these persons while analyzing the case.

10. Regarding the cross-examination of Shri Musafir Ali, it would appear that the appellants relied on certain answers given during cross-examination in their support. This is mainly with reference to sale of hand tools which required further value addition and working before being shipped out of country. The Original Authority recorded that the statements rendered by Shri Ali during the course of investigation was very categorical and specific. It is clear that the cross-examination brought out

various self-contradiction in the deposition of Shri Ali. For example, with reference to duplicate bill of invoice No. 46 the product was mentioned as chrome plating combination plier whereas Shri Ali as supplier stated in cross-examination that they did not carry out chrome plating. Finding serious infirmities in certain depositions made during cross-examination, the Original Authority appreciated the facts as emerging from the original statements which were corroborated by the documents and deposition by other persons including Shri Mahaveer Agarwal. On careful consideration of the examination of the Original Authority with reference to various statements and cross-examinations of the connected persons we are of the considered view that these are correctly analysed and appreciated and the cumulative analysis of such evidence cannot be questioned. There is no reason for us to arrive at a different conclusion on these evidences.

11. Regarding the application of the decision of the Tribunal in **Kanak Metal Industries** (supra) to the facts of the present case, we note that issue has been examined by the Original Authority. It is recorded that in the said case, there was no challenge to the FOB value of export goods. The Adjudicating Authority had determined the PMV of the export goods on the basis of local marketing enquiry and had equated the said value as the FOB value for calculating the DEPB benefit. The Tribunal held that the Revenue cannot fix FOB value equal to PMV. Distinguishing the facts of the present case it was recorded that

the FOB value declared by the appellant is found to be based on various manipulated and forged documents and the over-invoicing of purchase and thereafter inflated nature of FOB value has been established by cogent evidence.

12. The appellants contested the impugned order on the ground that the case was initiated based on information passed on Income Tax Department. When the Income Tax Department accepted the books of accounts of the appellant the Customs Authorities have no case. We note that both the authorities are operating on different legal jurisdiction with different scope and requirements. In any case, in the present proceedings by the Customs Authorities, substantial and categorical evidences have been collected and analysed before concluding that the impugned goods have been over-valued at the time of export in order to avail ineligible DEPB benefit. Regarding the contention that the Department did not rely their own market enquiry, we note that value of a few items have been checked in the market. However, considering the documentary evidences and manipulation of purchase invoices, the Revenue proceeded to analyse these evidences for a conclusion.

13. We note that M/s Shree Nath Textiles, a proprietorship concern of Shri Mukesh Agarwal, one of the partners of the main appellant's firm had no facility to process the hand tools and there is a over-reaching control of the said unit by the main appellant's firm. The claim that the main appellant and M/s Shree

Nath Textiles got the impugned goods processed from other job workers could not be established by any sustainable evidence by the appellant.

14. Regarding the claim of the appellant that certain exports through JNPT Port cannot form part of the present proceedings, the same has been accepted by the Original Authority and accordingly the same were excluded from the present proceedings. Regarding reliance placed on certain details collected from overseas sources with reference to import value of the impugned goods in Dubai, the Original Authority examined the issue (para 5.30.3) and concluded that the same is a corroborative evidence to indicate that the transaction with overseas buyer with reference to impugned goods are not transparent and found a clear basis for the Department to question the FOB value of the goods. Regarding absence of any evidence regarding non-realization of foreign exchange on declared FOB value, we note that the realization of foreign exchange by itself will not sanctify the FOB value. This aspect has been examined by the Original Authority and relying on various decisions of the Tribunal and Hon'ble Supreme Court it was held that in the presence of categorical evidence regarding manipulation of FOB value, the realization of foreign exchange cannot be the defence to uphold the declared FOB value.

15. Finally, we note that the appellant also contested the confiscability of the impugned goods, we note that the Original

Authority after examining various decisions of the Apex court and also of this Tribunal held that the impugned goods were liable for confiscation under Section 113 (d) of the Act.

16. On careful consideration of the impugned order and the submissions made by the appellant, we find no reason to interfere with the findings of the Original Authority on merits of this case.

17. However, we note that the over-valuation of the impugned export goods resulted in inadmissible higher DEPB credit as a benefit to the exporter amounting to Rs. 2,14,07,535/-. The Original Authority had imposed a penalty of Rs. 8 crores on the main appellant and further penalty of Rs. 2 crores each on the partners of the main appellant. We note considering the quantum of improper benefit sought to be derived, as mentioned above, the penalty is on the higher side. Accordingly, we hold that the penalties can be reduced to Rs. 4 crores (main appellant) and Rs. 1 crore each on the other two appellants in terms of Section 114 (i) of the Customs Act, 1962. Except for this modification in the quantum of penalties, the appeals are otherwise dismissed.

(Order pronounced in the open court on 06/11/2017.)

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

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