**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,**
**EAST REGIONAL BENCH : KOLKATA**

**Appeal Nos.C/210/2008, C/234/2008, C/242/2008 & C/248/2008**

(Arising out of Order-in-Original No.05/CUS/CC(P)/WB/2008 dated 29.02.2008 and Order-in-Original No.07/CUS/CC(P)/WB/2008 dated 28.03.2008 all passed by the Commissioner of Customs (Preventive), W.B., Kolkata)

1) Subir Roy
2) Indian Mercantile Agency
3) Indo Foreign (Agents) Pvt. Ltd.
4) M.N.Roy & Sons.

…APPELLANT(S)

VERSUS

Commissioner of Customs (Preventive), W.B., Kolkata

…RESPONDENT (S)

APPEARANCE

Dr. Samir Chakraborty, Senior Advocate for Appellant No.1 & 4, Shri N.K.Choudhary, Advocate for Appellant No.3 and None for the Appellant No.2.
Shri S.Guha, AC(AR) for the Revenue

**CORAM:**

**HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER**
**Hon'ble SHRI V.Padmanabhan, Member (Technical)**

Date of Hearing/Decision : 09.10.2018

ORDER NO. FO/76791-76794/2018

**Per Bench :**

The present appeals are against the two adjudication orders i.e. Order-in-Original No.05/CUS/CC(P)/WB/2008 dated 29.02.2008 and Order-in-Original No.07/CUS/CC(P)/WB/2008 dated 28.03.2008 both passed by the Commissioner of Customs (Preventive), W.B., Kolkata.

2. The brief facts of the case are summarized below:

2.1. M/s. M.N.Roy & Sons (Proprietor Shri Subir Roy) were in the business of export of Cow Hides & Skin and other leather items. They exported various consignments of leather through Petrapole Land Customs Station. The shipping bills indicated the description as "Cow Split Wet Blue Leather" and "Cow Pickle Leather". During the period 06.01.2007 to 03.06.2007 they exported 11 consignments of these goods, which are the subject matter of the impugned order dated 29.02.2008. The subsequent Order dated 28.03.2008 dealt with export of 24 consignments during the period 18.12.2005 to 18.12.2006. The export of Hides, Skin, leather – tanned and untanned is specified in the Second Schedule of Export Tariff of the Customs Tariff Act, 1975 as liable to payment of export duty @60%. The exporter claimed the benefit of 'nil' rate of duty as per Notification No.133/2000-Cus dated 17.10.2000 which was available to various goods including "Finished Leather of Goat, Sheep and Bovine Animals and their young ones" (Sl.No.3). By availing 'nil' rate of export duty, the goods were exported.

2.2. The Directorate of Revenue Intelligence (DRI) investigated into the allegation that M/s. M.N.Roy & Sons were exporting unfinished leather items by mis-declaring the same as finished leather by wrongly claiming the benefit of Notification No.133/2000-Cus dated 17.10.2000. Investigations were undertaken by the DRI and the statement of Shri Subir Roy, Proprietor was recorded by them under Section 108 of the Customs Act, 1962. When questioned about the nature of process undertaken by them before export, Shri Subir Roy, Proprietor stated as follows:

> " *iv) cow split wet blue leather means when the raw skin tanned up to wet blue and raw skin became finished leather through four states – i) 1st stage was called pickled, ii) 2nd*

*stage was called as wet blue stage, iii) 3rd stage was called as crust stage and iv) 4th stage was called finish stage, mostly all leathers are tanned by these process;*
*v) after wet blue process the skin was being split into two layers in case of cow skin and the lower part after wet blue process was called split wet blue leather and 1st stage of tanning process for removing hair was generally called cow pickle leather which were derived from cow raw skin and both the items were not finished;*
*vi) they procured raw cow skin from small traders of Nomkal near Berhampore, Pajjipara near Berhampur, Naxal Bari near Siliguri and Raja Bazar, then they send the same to tannery for tanning up to pickle stage and pickle form of skin they exported;*
*v) they made the job work of cow pickle leather from Nurdrat Tanning Syndicate at Bantala;"*

2.3. After conclusion of investigations, the DRI was of the opinion that the goods which were exported were not finished leather, but were in the unfinished form, which will not be entitled to the benefit of 'nil' export duty granted by Notification No.133/2000-Cus dated 17.10.2000. Accordingly, show cause notices were issued proposing to demand customs duty for the goods already exported. These disputes were decided by issuing of the two impugned orders which are the subject matters of the present appeals. In addition to demanding export duty for consignments already exported, the Adjudicating Authority also imposed penalties on the exporter M/s. M.N.Roy & Sons as well as the following three Custom House Agents i) M/s. Fairdeal Enterprises, ii) M/s. Indo-Foreign Agents Pvt. Ltd. and iii) The Mercantile Agency who handled the export consignments. Personal penalty was also imposed on Shri Subir Roy, Proprietor.

3. Challenging the impugned orders, Ld. Counsel Dr. Samir Chakraborty, representing M/s. M.N.Roy & Sons as well as Shri Subir Roy, Proprietor of M/s. M.N.Roy & Sons submitted as follows:

a) At the time of the export of the various consignments of leather, the Customs Authorities had withdrawn samples and sent them to the Central Leather Research Institutes, Kolkata (in short CLRI) for testing of the same and for their opinion whether the exported goods are in the nature of (i) 'Cow Pickled' or 'EI tanned', (ii) Whether the commodity is prohibited for export as per Wild Life Protection Act. He submitted that the CLRI had categorically opined that the goods which were to be exported were in the nature of Cow Split Wet Blue Leather, which was allowed for export without any export licence.

b) Ld. Counsel further submitted that the items exported were covered under Sl.No.14 of the Second Schedule which prescribes an export duty @ 60%, but 'nil' rate of export duty was available to Finished Leather of Goat, Sheep and Bovine Animals and their young one as per Notification No.133/2000 (Sl.No.3). In this connection he submitted that there is an Explanation at the foot of the said notification which clarifies what should be construed as finished leather for the purpose of this notification. The Explanation reads as follows:

> " *Explanation.- For the purpose of this notification, "finished leather of goat, sheep and bovine animals and of their your ones" means the leather which complies with the terms and conditions specified in the Public Notice of the Government of India in the Ministry of Commerce No.3/ITC(PN)/92-97, dated the 27th May, 1992, as amended from time to time issued, under the provisions of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992)."*

c ) He submitted that what constitutes finished leather is required to be examined with reference to the ITC Public Notice given above. In the said ITC Public Notice, the export item is covered under "Industrial Leathers". The said entry in the ITC Public Notice is reproduced below for ready reference:

"*(iii) Industrial Leathers.* *Made usually from lower grade of goat/calf/sheep skins. Chrome or combination tanned and shall not shrink linerally more than 3% after 15 minutes boiling test at 100°C.Chrome content Cr.20*$_3$ minimum 2.5% based on 14% moisture. Substance minimum 0.5 mm but not exceeding 0.6 mm. This substance to be verified with a precision gauge where it has 100 divisions to 1mm.

Shall involve following minimum operations in manufacture, namely:-

(a) Levelling the substance with a variation of not more than 0.2 mm if not specified otherwise, in all portions of a skin or hide excluding bellied and shanks;
(b) Combination tanning;
(c) Fatliquoring;
(d) Setting;
(e) Staking/Boarding;
(f) Producing a clean flesh side by mechanical means;
(g) Shaving/snuffing of the grain;"

d) The Adjudicating Authority has come to the conclusion that the exported goods were unfinished leather, only by considering the statement given by Shri Subir Roy, Proprietor before the investigating officers. From the statement recorded, it cannot be inferred that the exported goods are unfinished leather articles. He further submitted that the Customs Authorities have failed to prove that the exported article have not satisfied the conditions listed in the ITC Public Notice referred above.

Further, he submitted that the examination of the exported goods by the CLRI has been done only to confirm whether the exported items are prohibited for export or whether it is in the nature of Cow Split Wet Blue Leather. No examination has been done to determine whether the processes listed in the ITC Public Notice have been subjected to on the exported goods. Accordingly, he submitted that the conclusion of the Adjudicating Authority that the exported goods were not finished leather, is not justified.

e) He referred to the copy of the Departmental 'Note for order' dated 28.04.2007 (part of appeal papers ) in which the apprising group has put up the note to the Assistant Commissioner who in turn has allowed export of Cow Pickled Leather with the benefit of Notification No.133/2000-Cus, without any objection.

f) With reference to the Order dated 28.03.2008, the ld. Counsel submits that the show cause notice in this case has been issued for a period more than the normal time limit by invoking the extended period of limitation under Section 28. He submitted that the department is not entitled to invoke the extended period once again particularly in view of the fact that a show cause notice has already been issued covering the same issue for an earlier period in which the extended period of limitation was already invoked.

g) Finally, he submitted that the impugned orders passed may be set aside since the same have been passed without any tangible evidence to conclude that the exported goods were not finished leather.

4. Ld. DR justified the impugned orders. His submissions are summarized below:

a) He reiterated the view taken by the Adjudicating Authority that the exporter at the time of investigation had explained the processes adopted for obtaining Cow Split Wet Blue Leather and Cow Pickled Leather. As admitted by him, these are at the intermediatary stage towards finished leather and are not finished leather of Bovine Animals. Accordingly, he submitted that the benefit of exemption granted by Sl.No.3 of the Notification No. 133/2000-Cus has been rightly denied by the Adjudicating Authority.

b) He also justified the denial of the benefit by mentioning that the ITC Public Notice referred by the Ld. Counsel has not specifically mentioned the Cow Split Wet Blue Leather or Cow Pickled Leather.

c) Finally, he submitted that the impugned orders may be sustained.

4. Heard both sides and perused the appeal records.

5. The dispute in the present case is regarding the payment of export duty on the leather items exported by M/s. M.N.Roy & Sons. They have exported several consignments described as "Cow Split Wet Blue Leather" and "Cow Pickle Leather", by claiming the benefit of 'nil' export duty as per Sl.No.3 of the Notification No.133/2000 dated 17.10.2000. The said Notification grants full exemption to "Finished Leather of Goat, Sheep and Bovine Animals and their young ones". The question therefore is whether the exported goods were finished ( as claimed by the exporter) or were unfinished or partially finished leather (as claimed by the Department). It is pertinent to note that the term 'Finished Leather' used in the

Notification is to be interpreted in terms of ITC Pubic Notice No.3/ITC(PN)/92-97, dated the 27th May, 1992 in terms of the Explanation appended at the foot of the said Notification.

6) Reference to the relevant ITC Public Notice (supra) reveals that Industrial Leathers are to be considered as finished, subject to certain minimum operations in manufacture which ought to carried out on them. List of the processes specified include Levelling, Fatliquoring, Shaving/snuffing of the grain and other processes specified in the ITC Public Notice. However, from the impugned order, it is seen that the adjudicating authority has not examined the exported goods from the perspective of whether they have been subjected to any or all of these processes.

7. We have perused some of the sample test reports obtained by the department from CLRI, Kolkata, on samples drawn from the export consignments. The test reports only confirmed the fact that the goods are permitted for export and that they are in the nature of Cow Split Wet Blue Leather. The test reports do not record what processes have been carried out on the leather which were being exported.

8. The main evidence relied on by the Adjudicating Authority in coming to the conclusion that the exported goods were infact unfinished leather intermidiatary leather is the oral evidence given by Shri Subir Roy, Proprietor. In terms of the statement of Shri Subir Roy, for leather to be considered as finished leather, 4 stages of processes is required to be undertaken out of which the exporter is undertaking only 2 such processes. Accordingly, he has admitted that the exported goods are not finished leather. But we note that the meaning of the term finished leather is required to be considered in terms of what is specified in the

ITC Public Notice referred above. The ITC Public Notice lists out a series of several processes which the leather should have been subjected to for considering the same as finished leather. But it is seen that the Adjudicating Authority has made no reference to the ITC Public Notice, nor has he examined whether the exported goods have been subjected to these processes or atleast some of these processes.

9. It is seen that the exported goods have been entered for export, the relevant bills of export have filed, goods examined, even samples drawn and opinion of CLRI taken and finally, allowed for export. In the bills of export benefit of exemption notification has been claimed and the same has been allowed. Before denial of such benefit at the stage of adjudication, the onus is on Revenue to establish that the exported goods had not satisfied the conditions of the notification. In our view, Revenue has failed to discharge such burden.

10. It is an established basic principle that the onus to prove a fact is on the person asserting it, as has been observed by the Hon'ble Supreme Court in the case of Commissioner of Trade Tax vs. Kajaria Ceramics [2005(191) ELT 20 (S.C.)]. The onus is on Revenue to establish that the conditions of the Notification were not satisfied. In the circumstances of the present case we are inclined to conclude that the Revenue has failed in satisfying the said onus. Consequently, the demand and penal proceedings against M/s. M.N.Roy & Sons as well as its proprietor are set aside.

11. Penalties also been imposed on 3 CHAs who have handled the various export consignments. Ld. Advocate, Shri N.K.Choudhary represents M/s. Indo Foreign (Agents) Pvt. Ltd. None has represented M/s. Indian Mercantile Agency.

12. After hearing Ld. Advocate Shri N.K.Choudhary, it is seen that penalty has been imposed on the M/s. Indo Foreign (Agents) Pvt. Ltd. under Section 117 of the Customs Act, 1962. It is submitted on behalf of the M/s. Indo Foreign (Agents) Pvt. Ltd. that they had filed the bills of entry on the bonafide belief that the goods do not attract export duty. Such documentation was filed on the basis of the export documents handed over to them by the exporter. As such, CHA cannot be held liable for any penalty.

13. As discussed in above paragraph, we have taken the view that the demand for export duty is not sustainable and have been set aside. Under the circumstances we find no justification for the penalty imposed on the three CHAs, which are also set aside.

14. In the result, the impugned orders are set aside and all the appeals are allowed.

(Dictated and pronounced in the open court.)

| S/d. | S/d. |
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| **(P. K. CHOWDHARY)**<br>**MEMBER (JUDICIAL)** | **(V. Padmanabhan)**<br>**MEMBER (TECHNICAL)** |

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