

COMMISSIONER OF CUSTOMS, KOLKATA  
v.  
M/S. PEERLESS CONSULTANCY SERVICES PVT. LTD.

MAY 24, 2007

[DR. ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

*Customs Act, 1962:*

*S. 113 (d) and 114—Export under Duty Entitlement Pass Book Scheme—Assessee exporting steel balls and making a claim under the Scheme—Revenue alleging subject goods grossly over invoiced and declared FOB and PMV to be highly inflated to avail higher DEPB credit—Show Cause Notice to assessee—Demand confirmed by Commissioner—Tribunal setting aside order of Commissioner—Held: Tribunal set aside the order of Commissioner without discussing as to how his conclusions were erroneous—Matter remitted to CESTAT for adjudication afresh—Foreign Trade (Regulation) Rules, 1993—r. 11.*

Respondent company, which was engaged in the business of computerized printing, exported for the first time consignments of steel balls of a total declared value of Rs. 14.63 crores under Duty Entitlement Pass Book (DEPB) Scheme. The Revenue found that the subject goods were grossly over invoiced in order to avail higher DEPB credit. Accordingly, a show cause notice was issued to the respondent company for gross mis-declaration of material facts and the value of the steel balls and willful misstatement and suppression, and violation of s.113(d) of the Customs Act, 1962 read with Rule 11 of Foreign Trade (Regulation) Rules, 1993 as also for penal action under s. 114 of the Customs Act. The Commissioner confirmed the demand. However, the CEGAT allowed the appeal of the assessee and set aside the order.

In the appeal filed by the Revenue it was contended that the Tribunal failed to note that the findings recorded by the Commissioner were based on the evidence tendered by the company indicating that there was a mis-declaration and misstatement only with the object to boost the value to get higher DEPB benefit. It was submitted that the Tribunal, did not give any reason for setting aside the elaborate order passed by the Commissioner.

**A** Allowing the appeal and remitting the matter to the CESTAT, the Court

**HELD:** The Commissioner had in detail referred to various aspects to conclude about over-invoicing. The applicability of Circular No.69/97 would depend upon the factual scenario of a particular case. What the Tribunal appears to have done is to refer to the arguments of parties and then came to abrupt conclusions without discussing in detail as to how the conclusions of the Commissioner were erroneous. That having not been done the order is vulnerable. Accordingly, the order of the Tribunal is set aside. The CESTAT would adjudicate the matter afresh. [Para 19 and 20] [790-B, C]

**C** *Commissioner of Custom, New Custom House, Mumbai v. Vishal Exports Overseas Ltd., (2007) 9309 ELT 331 SC, cited*

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5415-5417 of 2002.

**D** From the Final Judgment and Order No. A-141-143 dated-11.02.2002 of the Customs, Excise & Gold (Control) Appellate Tribunal, EZB Kolkatta in Appeals No. C/R-292-294/2001.

P. Vishwanath Shetty, Sr. Adv., G. Umopathy, S.J. Aristotle and B. Krishna Prasad, Advs. with him for the Appellant.

**E** S.K. Bagaria, Sr. Adv., Sanjay Ghosh, Ms. Anitha Shenoy, Saurabh Suman Sinha, Piyush Kumar and Navneet Panwar for the Respondent.

The Judgment of the Court was delivered by:

**F** **DR. ARIJIT PASAYAT, J.** 1. Challenge in these appeals is to the orders passed by the Customs excise and Gold (Control) Appellate Tribunal, EZB Kolkata (in short the 'CEGAT') allowing the appeals filed by the respondent holding that the guidelines contained in circular No. 69/97-CUS dated 8.12.1997 issued by the Government of India, Ministry of Finance, Department of Revenue, New Delhi, as it has not succeeded in making out a case against respondent as the Present Market Value (in short the 'PMV') declared is not more than 150% of the AR 4 value. Accordingly the order passed by the Commissioner of Customs (Post) Kolkatta was set aside.

2. Background facts in a nutshell are as follows:

**H** 3. The Respondent Company which is engaged in the business of

computerized printing exported for the first time consignments of steel balls of a total declared value at Rs. 14.63 crores to one M/s. Ria Multiple Enterprises of Malaysia under Duty Entitlement Pass Book (in short the 'DEPB') Scheme. Incidentally, the consignee is also a dealer of computer and information technology based products who also acts as General Insurance Agent. Exports were made under DEPB scheme and a claim of Rs.3.20 crores was made. A

4. In the light of information received by DRI of gross over-invoicing of the goods to avail higher DEPB credit, it conducted investigation which revealed *inter alia* that: B

(i) The declared P.M.V. varies between 98.35% to 124% of the declared Export Price (described as 'FOB'). C

(ii) The shipments were effected between 11.06.99 and 25.08.99 as per Bill of Lading date and as per the contract, the terms of payments is DA 60 days'.

(iii) Till 31.5.2000, the assessee received payment for 3 consignments only and further till 11.10.2000 they received payment of only 5 consignments out of 16. D

(iv) The declared FOB value for different size Steel Balls comes as under:

Steel Balls 3.17mm size Rs.0.70 per pc. E

Steel Balls 6.35mm size Rs.1.30 per pc.

(v) It has been claimed that the PMV was declared on the basis of price quoted by the local suppliers and the variation in the declared PMV is due rejection on quality check. F

(vi) The FOB value of the consignment was fixed on the basis of price agreed upon by the foreign buyer.

(vii) The FOB value declared is highly inflated only to avail greater amount of DEPB Credit.

(viii) The explanation offered to substantiate highly declared FOB vis-à-vis the PMV has no basis in as much the agreement of precision quality, quality control checking by an expert, are all after thought having no consistency and no evidence whatsoever could be produced in this regard. G

(ix) Neither the export nor the foreign buyer or even the local H

A suppliers are regular dealers of Steel Balls in as much neither the exporter nor the local suppliers could produce any piece of evidence of sale of such Steel Balls to any other party in India or abroad excepting the production of evidence of sale by M/s. S.F. Forging to one M/s. Arlun Automobile, that too for the purpose of export under DEPB scheme.

B (x) Surprisingly the suppliers had received only about 1/4th or 1/3rd of the so called value amount but did not receive huge sum of money which was due as balance of payment towards supply of goods for over an year.

C (xi) Based on the aforesaid revelation, the declared PMV as well as the FOB value seems to be very high compared to the actual market value of the goods.

D (xii) It appears that the entire deal had taken place in a manner which is not consistence with normal trade practice and the declared FOB value as well as the PMV had been highly inflated with intent to wrongly avail export benefit under DEPB Scheme.

E 5. Accordingly, alleging gross misdeclaration of material facts and the value of the steel balls and willful misstatement and suppression and violation of Section 113(d) of Customs Act, 1962 (in short the 'Act') read with Rule 11 of Foreign Trade (Regulation) Rules 1993 (in short the 'Foreign Trade Rules') and for penal action under Section 114 of the Customs Act, a Show Cause Notice was issued asking to show cause as to why -

(i) the PMV and FOB value should not be taken as Rs.2,80,52,027/ and Rs.2,73,60,806/- respectively.

F (ii) The permissible DEPB credit against the goods exported should not be taken as Rs.60,19,377/-.

(iii) The goods exported cover 16 Nos. of Shipping bills having total declared FOB value of Rs.14,91,89,854.00 shall not be held liable for confiscation under 113(d) of the Act.

G (iv) Penal action shall not be taken against the exporter and its Director Sri Parasmal Lodha and Sri N.R. Bachhawat authorized signatory under Section 114 of the Act.

H 6. In support of the appeal learned counsel for the appellant submitted that Sri Parasmal Lodha who was the Director of the respondent Company

had clearly admitted about the following aspects:

(i) The Company's main line of business is computerized printing. A

(ii) The benefit of DEPB scheme attracted to venture into steel balls export and also took the risk of exporting to the party on credit which is a big risk

(iii) The payment was to be made within 60 days and the payments were delayed by over 6-18 months. B

(iv) 90% of the payment was already received and the balance was to be cleared by 15.4.01 i.e. after the enquiry started in the year 2000. C

(v) He does not have any idea about the international price of steel balls.

(vi) He received major payments from buyer only after September 2000 and he cleared the claimed outstandings of local suppliers. D

(vii) He was aware of the process or method used for checking the quality of the steel balls. But he had engaged an expert.

7. On the basis of the aforesaid materials the Commissioner recorded the following findings:

"(1) Background facts clearly indicate that the whole exercise was not done in the usual course of business and there was definitely something wrong. E

(2) The exporter does not know the international price of his exported products, cannot produce any evidence regarding the quality of his goods, can submit quotations of only those companies from whom he purchased the goods and above all, exports goods worth Rs.14.91 crore were without the cover of any letter of credit and it sat tight when remittance of Rs.14.91 crores did not come within the stipulated time. F

8. All these clearly show that the shipping bills and the export invoices do not reflect the correct transaction value. He was therefore, inclined to hold that the subject goods were over invoiced with an intent to wrongly avail higher DEPB credit and the PMV indicated on the shipping bills was also inflated. He rejected the FOB value as well as the declared PMV. He held that the FOB value and the PMV of the subject goods need to be ascertained on G  
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A the basis of the findings of the market enquiry.

9. With regard to PMV, the Commissioner held as under:

B “I find that the guidelines for verification of the PMV and the FOB Value have been suitably followed by DRI. Nowhere in the above mentioned 3 circulars issued by the Board, it is stated that the PMV would be challenged/rejected/modified on the basis of evidence of contemporaneous export. It is to be done on the basis of the findings of the market enquiry only. I, therefore, accept the proposal of ascertaining the PMV and the FOB value as given in the show cause notice.”

C 10. The Commissioner accordingly *inter alia* held as follows:

D “The subject goods exported under claim of DEPB credit did not correspond to the declaration made regarding the same on the shipping bills in respect of the value and DEPB benefit, since it was declared on the shipping bills that the benefit under the DEPB scheme would not exceed 50% of the present market value. The same should be deemed to be prohibited in terms of Rule 11 and 14 of the Foreign Trade (Regulation) Rules, 1993 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 and Section 11 of the Customs Act, 1962 and, therefore, should be held liable for confiscation under Section 113(d) of The Customs Act.”

E 11. He accordingly confirmed the demand made in the Show Cause Notice.

F 12. Aggrieved by the orders passed by the Commissioner, the respondent filed appeal before the CEGAT.

13. Allowing respondents' appeals, CEGAT accepted the stand of the assessee. Its conclusions were essentially as follows:

G “The PMV, in our view, cannot be challenged by going into the cost of manufacture. Market enquiry into the prices of the steel balls of size 6.3mm and 3.17 conforming to AISI:316 Grade should have been ascertained from the market which has not been done. The burden to prove that PMV is inflated one is on the Department which has not been discharged. It is mentioned in the show cause notice itself that the local suppliers had supplied the exported goods at price ranging from Re.1 to Rs.1.25 per piece of 6.35 mm and Re.0.56p to Re0.70p per piece of 3.17 mm. There is no allegation in the show cause

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notice against the local suppliers nor there is any mention that the payment made to local suppliers subsequently flowed back to the Appellants.” A

“In view of these guidelines, the Revenue has not succeeded in making out a case against the Appellants as the PMV declared is not more than 150% of AR4 value. Accordingly, we set aside the impugned order and allow all the appeals”. B

14. According to appellant, the Tribunal has failed to note that the findings recorded by the Commissioner were based on the evidence tendered by the company from which it can be clearly inferred that there has been a mis-declaration and misstatement only with the object to boost the value to get higher DEPB benefit. The entire transaction is vitiated by misstatement, mis-declaration and suppression of material facts which has not been considered by the Tribunal.” C

15. It is pointed out by the learned counsel for the appellant that absolutely no reason has been indicated by the Tribunal to set aside the elaborate order passed by the Commissioner. There were clear findings of over invoicing. So far as Circular No.69/97 is concerned, it only delineates the general principles. The fraudulent transaction was clearly established. Approach of the Tribunal is relevant from the abrupt conclusions arrived at. D

16. In response, learned counsel for the respondent submitted that the issues involved in the appeal relate to the DEPB credit allowable to the respondent under the Export and Import Policy, 1997-2002 (in short the ‘EXIM Policy’). With reference to para 7.25 of the EXIM Policy, DEPB was allowable as a percentage of FOB value of exports. In para 7.36 of the Handbook of Procedures, 1997-2002 (in short the ‘Handbook’), if the rate of credit entitlement was 15% or more, the credit shall not exceed 50% of the PMP of the export product. E F

17. In the present case, the foreign buyer purchased the goods for agreed FOB and made full payment. Entire export proceeds have been realized in foreign currency and copies of bank remittances/FIRC were filed. There is no allegation or finding that the foreign buyer was a related person. FOB was fully supported by all export documents such as invoices and shipping bills and by the documents as regards its realization such as BRC/FIRC. G

18. It is stated that the expressions ‘FOB’ and ‘PMV’ were not defined in the EXIM Policy. However, the method of determination was laid down by H

A the Ministry of Finance in the Circular No.69/97.

19. It is submitted in almost identical case in *Commissioner of Custom, New Custom House, Mumbai v. Vishal Exports Overseas Ltd.* (2007) 9309 E.L.T. 331 S.C., this Court has dismissed the appeal filed by the Revenue.

B 20. We find that the Commissioner had in detail referred to various aspects to conclude about over-invoicing. The applicability of Circular No.69/97 would depend upon the factual scenario of a particular case.

C 21. In the instant case, what the Tribunal appears to have done is to refer to the arguments of parties and then came to abrupt conclusions without discussing in detail as to how the conclusions of the Commissioner were erroneous. That having not been done the order is vulnerable. Accordingly, we set aside the order of the CEGAT and remit the same to it for fresh adjudication. It is to be noted that present CEGAT is known as Customs Excise and Service Tax Appellate Tribunal (in short 'CEGAT').

D The appeals are allowed to the aforesaid extent. We express no opinion on the merits of the case.

R.P.

Appeals allowed.