

Bharat Forge Ltd. and Others Vs. Commissioner of Customs (Export) Nhava Sheva

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-03-2012

Judge : The Honourable Mr. Ashok Jindal, Member (Judicial) & the Honourable Mr. P.R. Chandrasekharan, Member (Technical)

Appeal No. : APPLICATION NO: C/MA(Ors.)-743/2008 APPEAL NO: C/1048, 1065 & 1066/2007 [Arising out of Ord

Appellant : Bharat Forge Ltd. and Others

Respondent : Commissioner of Customs (Export) Nhava Sheva

Advocate for Pet/Ap. : For the Appellants : Shri T. Vishwanathan, Advocate. For the Respondent : Shri A.N. Sharma, Commissioner (AR).

Judgement :

P.R. Chandrasekharan:

The appeals and miscellaneous application are directed against order-in-original No. 28/07-08 dated 31/08/2007 passed by the Commissioner of Customs (Imports), Jawaharlal Nehru Custom House, Nhava Sheva.

2. The facts arising for consideration in this case are as follows. The main appellant M/s Bharat Forge Ltd., Pune, who is a manufacturer of automobile parts,

filed 137 Drawback Shipping Bills during the period 6-3-03 to 15-5-03 for export of goods described as,- (1) alloy steel forging, machined, manufactured through forging process; and (2) non-alloy steel forging, machined and manufactured through forging process, claiming drawback on these goods under sub-serial Nos.73.30 and 73.29 of the drawback schedule at the rates specified under notification No.33/02-Cus (NT) dated 29/05/2002 as amended and 26/2003 (Cus) (NT) dated 01/04/2003 under claim for all-industry rate of drawback under Section 75 of the Customs Act, 1962. Detailed enquiries conducted with the exporter revealed that the goods under export are Steering Knuckles, fully machined. All the documents related to the exports such as export invoice, packing list, ARE-1, shipping bill, bill of lading, insurance certificate, etc. were examined and it appeared that the appellant exporter had not given full description of the articles under export in the export documents. For example in the export invoice the product was described as 'steel forging machined, manufactured through forging process' along with the customer part no. and in the remarks column, they had mentioned the product as 'steering knuckle, full machined'. Similarly in the ARE1 document also similar description had been given. It was found that the product under export was steering knuckles, a sub-assembly of motor-vehicle part, falling under heading No. 87.08 of the Customs Tariff. There was no All-Industry Rate of Drawback available for 'steering knuckle' under any sub-serial no. under Chapter 87 in the Drawback Schedule. Therefore, it appeared that there was a deliberate mis-declaration on the part of the appellant to claim ineligible drawback amounting to Rs.5,09,70,429/-. As part of the investigation, statements of the concerned officials of the appellant firm were recorded, detailed manufacturing process of the impugned goods were obtained, purchase orders and all documents relating to export of the said goods were obtained. Thereafter, a show cause notice dated 15/03/2005 was issued proposing to deny the drawback claim amounting to Rs. 5,09,70,429/- and also proposing penal action against the exporter under section 114 (iii) of the Customs Act, 1962. A corrigendum dated 25/01/2007 was issued to the said show cause notice proposing to hold the export goods valued at Rs.23,84,68,604/- (F.O.B) liable to confiscation under section 113(i) and (ii) of the Customs Act and also proposing penal action on three officials of the exporting firm, namely, S/Shri Pramod Cholkar, Manager, Yashwant Y Choudhary,

Associate Vice-President and M.N. Deshmukh, Vice President of M/s Bharat Forge Ltd. and Shri. C.S. Parab, Partner of the CHA firm M/s Overseas Clearing Cargo (I) Pvt. Ltd. The case was adjudicated vide the impugned order wherein the goods exported under 137 shipping bills valued at Rs.23,84,68,604/- was held liable to confiscation under section 113(i) and (ii) of the Customs Act, 1962, with an option to redeem the same on payment of fine of Rs. 2 Crore. The drawback claim of Rs. 5,09,70,429/- was disallowed. A penalty of Rs.50 lakhs was imposed on the appellant firm and a penalty of Rs. 5 lakhs each was imposed on the three officials of the appellant firm, named above. Proceedings against the partner of the CHA firm was dropped. Hence the appellants are before us.

3. The Ld. Counsel for the appellant makes the following submissions:

3.1. During the period 6-3-03 to 15-5-03, the appellant had exported 7 types of items, namely,:-

- a) Machined Crankshaft;
- b) Forged Crankshaft;
- c) Steering Knuckle - machined;
- d) Front axle beam forging;
- e) Front axle beam, machined;
- f) Valve body, forged; and
- g) Stub axle, forged;

3.2. The goods were described broadly in the export documents along with the part no. of the customer. The goods were stuffed at the factory under the supervision and examination of central excise officers. The central excise officers had verified and confirmed the description of the goods in the ARE1 and the goods exported conformed to the relevant entry in the drawback schedule. In the case of steering knuckle, the shipping bills additionally described the product as 'steering knuckle - fully machined' in addition to 'alloy steel forging manufactured through

forging process' which was the broad description given in the drawback schedule.

3.3. The impugned order proceeds on the basis that the entire items exported are only steering knuckles which is factually incorrect. This position is evident from the statement of Mr. Vilas P. Panse and the certificate dated 30-5-03 of the Central Excise Department certifying the description of the goods under export also shows that the appellants have not only exported steering knuckle but also other goods as mentioned above. The Id. Commissioner has rejected this contention as an 'after thought' and his finding in this regard is not sustainable in law.

3.4. The Drawback schedule was aligned with the Customs Tariff at the 4 digit level, only w.e.f 02/05/2005, vide notification No. 36/05 'Cus (NT). Prior to 2005, the drawback schedule was not aligned with customs tariff at all and hence the principle of classification of a product under the central excise tariff or customs tariff cannot be applied to interpret entries in the drawback schedule.

3.5. Motor vehicle parts can be covered under various chapters such as 39,40,73,84,85,87 etc. of the Customs Tariff. Therefore, it is impossible to compare the classification at the two digit level. Therefore, eligibility to drawback has to be determined with reference to the description of goods given in the Drawback Schedule, irrespective of the classification under the Customs/Central Excise Tariff. If description given in the drawback schedule is taken as the basis, the products exported by them satisfy the description given in serial No. 73.29 and 73.30 of the Drawback Schedule.

3.6. The appellant was earlier exporting steering knuckles under DEPB scheme under the category 'Alloy steel/stainless steel forgings (machined) and the customs department in Pune, had raised an objection that steering knuckle is not a machined forging but are identifiable part of motor vehicles and hence not covered by DEPB. Accordingly DGFT issued a show cause notice for cancellation of DEPB. After representations by the appellant, the DEPB schedule was amended to read as 'identifiable ready to use machined parts/components made wholly or predominantly of alloy steel/stainless steel (not less than 90% by weight) manufactured through forging process' and with effect from 1-3-2000, DEPB was granted to the exports of steering knuckle. There were reports that DEPB was not

WTO compatible and the scheme would be abolished soon. Therefore, the appellant started exporting steering knuckle under claim for drawback under the all industry rate of drawback under serial nos. 73.29 and 73.30 as the entry therein was similar to the DEPB entry under which the goods were exported earlier.

3.7. There is no dispute that steering knuckle is an identifiable part and manufactured by the process of forging and hence satisfies the description given sl. No.73.29 and 73.30 of the drawback schedule. Hence the same is eligible for drawback.

3.8. The Id. Advocate relies on the following judicial decisions in support of his contention:-

(i) Shivaji Works Ltd [1995 (78) ELT 519] affirmed by apex court vide 1996 (87) ELT A-13];

(ii) PTC Industries Ltd. [2010 (252) ELT 42 (All)]

3.9. The appellant had exported 13067 nos. of steering knuckles weighing 2,35,206 kgs. The number of bushes used in the said knuckles is 26134, that is 2 nos. each in one steering knuckle. The weight of bushes is 1306.70 kgs. Hence, the appellants are eligible for drawback on 235435. 30 kgs of steering knuckles excluding the weight of the bushes.

3.10. In respect of other export goods (other than steering knuckles), denial of drawback is not correct.

3.11. The goods are otherwise covered by Sl.No.589 of the DEPB schedule which the appellants were claiming prior to the present exports and after the present exports. Therefore, if their claim is not found to be eligible under drawback, they should be permitted to convert the drawback shipping bills to DEPB shipping bills in the case of impugned exports and places reliance, inter alia, on the following case laws, namely:-

(a) Man Industries (India) Ltd. v. CC [2006(202) ELT 433;

(b) CC v. Man Industries [2007 (216) ELT 15]

(c) CC v. Metallic Bellows [2009 (241) ELT 181]

3.12. No penalty is imposable on the any of the appellants and claiming drawback under a particular entry of the drawback schedule can not be treated as mis-declaration. Imposition of redemption fine when the goods are not seized or available for confiscation is contrary to the decision of the Larger Bench in Shiva Kripa Ispat Pvt. Ltd. v. Commissioner [2009 (235) ELT 623] and the hon'ble Bombay High Court decision in [2009(248) ELT 122].

3.13. After withdrawal of drawback, the appellants are exporting under DEPB and are obtaining DEPB from DGFT.

4. The Id. Commissioner (AR) appearing for revenue makes the following submissions:-

4.1. The case involves deliberate mis-declaration of export goods with a view to claim ineligible drawback under the all industry rate when the product was not specified under the drawback schedule.

4.2. The product under export, steering knuckle, was sub-assembly of a motor vehicle part falling under CTH 87.08. The product which is obtained under forging process was subjected to various processes such as drilling and boring operations, cap hole drilling and tapping, taper bore operations and washing, grinding , broaching, number punching etc. as per customer's specifications. Thereafter it was filled with two garlock bushing and affixed with identification sticker and packed in clop lock box. However, the product was mis-classified as alloy/non-alloy steel forging, machined and drawback was claimed under sl. No. 73.29 and 73.30 of the drawback schedule which applies to articles of iron and steel.

4.3. From the statements recorded from Mr. Pramod Cholkar, Manager, Mr. Yashwant Choudhary, Associate Vice President and Mr. M.N. Deshmukh Vice President of the appellant firm, it is amply clear that the product is not only forged but subjected to a number of processes after forging and the product is a fully manufactured sub-assembly of a motor vehicle part meriting classification under

heading No. 87.08 of the Customs Tariff. The exporter knowingly mis-declared the description of the goods to avail undue drawback benefits.

4.4. The purchase orders for the product from the foreign buyer, gives the description of the goods such as spindle 'wheel, I beam, spindle assembly, steering knuckles and so on. However, these descriptions were not declared either in the export invoice or the shipping bill and the ARE 1 but only part nos. of the customer was given along with description matching with the entries given in the drawback schedule in respect of sl. Nos. 73.29 and 73.30. This was done deliberately to mis-lead the department that the goods under export are forged articles of iron and steel, whereas the fact was that they were motor vehicle parts falling under heading no. 87.08 of the Customs Tariff. These goods falling under the said heading were not specified under the drawback schedule as being eligible for all industry drawback rate. Thus there was a deliberate attempt to claim ineligible drawback.

4.5. From the drawings of the product and the manufacturing plan, it is very evident that the product was subjected to about 26 processes after forging and the product was fully finished and ready to use motor vehicle part/sub-assembly. Yet the benefit of drawback was sought to be claimed by mis-declaring the product as forged product of alloy/non-alloy steel.

4.6. The all industry rate of drawback schedule lists the products chapter wise. Under each chapter, the products eligible for the drawback are described sl. No. wise. From the first two digits of the sl. No., the Chapter under which the product should fall is made clear. A perusal of the drawback schedule for the impugned period would make this point very clear. Though several products under chapter 87 and particularly, motor vehicle parts, are listed in the drawback schedule, none of the products exported find a mention in the said schedule. Therefore, the argument of the appellant that so long as the product matches with the description given in the schedule without satisfying the other parameters to be eligible for drawback, is without any substance.

4.7. The very fact that the appellant was exporting the product earlier under DEPB scheme and after the present exports also had switched back to availing benefit

under the said scheme clearly shows that the product was not eligible for drawback under all industry rates.

4.8. In as much as the appellant has mis-declared the product under export with a view to claim ineligible drawback, their request for conversion of shipping bill from drawback to DEPB can not be permitted.

4.9. In as much as the export goods have been mis-declared with a view to claim ineligible drawback, the goods are liable to confiscation under the provisions of Section 113(i) and (ii) of the Customs Act, 1962.

4.10. Consequently imposition of fine in lieu of confiscation and penalty under section 114(iii) are valid and correct in law.

4.11. The Id. AR relies on the following decisions/circulars in support of his above contentions,-

a) CCE, Madras vs. Systems and Components Pvt. Ltd. [2004 (165) ELT 136]

b) Omprakash Bhatia vs. CC, Delhi [2003 (155) ELT 423 (SC)]

c) United Veneers (P) Ltd. CC, Cochin [1986 (26) ELT 322]

d) Shashikant M. Walhekar vs. CCandE [1990 (45) ELT 144]

e) Penguin(MFT) International vs. CC, Cochin [1988 (35) ELT 388]

f) Commissioner vs. Kitply Industries Ltd. [2011 (257) ELT 289 (SC)]

g) Jay Yushin Ltd. vs. CCE, New Delhi [2000 (119) ELT 718]

h) CC vs. India Steel Industries [1993 (67) ELT 760 (GOI)]

i) CBEC Circular Nos. 4/2003 dated 21-1-2003, 6/2003 dated 28-1-2003 and 40/2003 dated 12-5-2003.

5. Before we proceed with the matter, we need to consider and dispose the miscellaneous application filed by the appellant to take on record certain additional

evidence. This additional evidence relates to representation made by the appellant to the Finance Ministry against the orders passed by CC (Exports), Mumbai, in the instant case and the Ministry's examination and notings on the matter and certain directions given by the Ministry to the Chief Departmental Representative. The Ld. Commissioner (AR) strongly opposes the additional evidence on the following grounds. Under Rule 10 and 23 of the Cestat (Procedure) Rules, the appellant can not be allowed to raise a new plea which was not raised or considered by the adjudicating authority. The general principle is that the appellate authority should not travel outside the records before the adjudicating authority. Though Rule 23 of the Cestat (Procedure) Rules permit an exception, the same should be exercised sparingly and judiciously. Additional evidence should not be permitted to be produced to enable the party to fill up any lacuna. He relies on the judgment of the apex court in the Jain Exports Pvt. Ltd. case [1993 (66) ELT 537 (SC)] and Doypack Systems (Pvt.) Ltd. case [1988 (36) ELT 201 (SC)] in support of his above contention. He further submits that vide letter F. No. 609/112/2002 DBK dated 18th July, 2008, the CBEandC has informed the appellant that since the matter is pending before the CESTAT, they should await the final decision of the CESTAT on the same. He further points out the appellant has not brought on record how they have obtained copies of the notings in the Ministry's file and whether their source is legitimate or not.

5.1. The Id. Counsel fairly submits that they have not obtained copies of these notings under the cover of any letter issued by the Ministry and have obtained the same informally. He further submits that in civil or criminal proceedings, in considering whether evidence is admissible or not, the source is not relevant. If it is, it is admissible, the court is not concerned with how it was obtained. He places reliance on the judgment of the Judicial Committee in *Kuruma, son of Kaniu Appellant vs. The Queen Respondent* [1955 2 WLR 223 and 1955 A.C. 197] in support of his above contention.

6. We have carefully considered the rival submissions. We find from the records that the Ministry itself had informed the appellant vide letter dated 18th July, 2008 that as the matter is pending before the CESTAT, they should await the decision of the CESTAT. That being the position, the notings made in the Ministry's file has

no bearing on the case pending before CESTAT. In the Doypack Systems (Pvt) Ltd. case (cited supra), the hon'ble apex court laid down the principle that if the provisions of the statute are not ambiguous, notings in the files of the Government are not relevant, as the statute has to be interpreted in terms of the language used therein. In the instant case, the interpretation of the Drawback Schedule has to be made in terms of the language used therein and not based on the notings / interpretation given in the files of the Ministry on the appellant's representation. This position has been made clear by the Ministry itself to the appellant in their letter dated 18th July, 2008. Hence we reject the miscellaneous application for admission of additional evidence.

7. Now we take up the appeals for consideration. The first issue for consideration is whether the goods, namely, automobile parts exported by the appellant is eligible for all industry rate of drawback under serial no. 73.29 and 73.30 of the Drawback Schedule as it stood at the relevant time. We have also carefully perused the said Schedule notified under notification No. 33/2002-Cus (NT). A perusal of the said Schedule reveals that the goods are listed chapter wise. The chapter no. and the chapter heading are described first and thereafter, under each chapter the goods eligible for drawback are described serially. The first two digits in the serial no. represents the Chapter and the last two digits are the serial no. of the product. The Chapter No. and the headings are identical to that given in the Customs Tariff. In other words, to be eligible for drawback, the goods should fall under the Chapter of the Customs Tariff first and thereafter, it should satisfy the description given therein, as all goods in a chapter are not covered for all industry rate of drawback and only selected items falling in a Chapter are covered. In the instant case, the appellant has claimed drawback under Serial no. 73.29 and 73.30 which read as under:

“73.29

Non-alloy steel/carbon steel forgings (rough)/unmachined/semi-finished/machined/identifiable ready-to-use machined parts/components, manufactured through forging process, When CENVAT facility has not been availed.

Rs.19.

Rs.12

Rs.7

73.30

Alloy steel forgings (rough)/ unmachined/semi-finished/machined /identifiable ready-to-use machined parts/ components, manufactured through forging process, When CENVAT facility has not been availed.

Rs.30 per kg of steel content

Rs.19.50

Rs.10.50”

7.1. The Ministry vide circular No. 67/95-DBK dated 15-6-95 had made the following clarifications with respect to duty drawback all industry rates effective from 16-6-95.

“2. The most significant change made relates to harmonizing of the drawback TABLE with the Customs Tariff Act, 1975. As mentioned in the Press note, the description of the export goods has as far as possible been retained as per the description given in the existing Table, except where the same was not possible on account of the earlier entry being a composite one. In such cases, the composite entry has been split up to cover the products under the various chapter of the Customs Tariff, 1975, retaining the existing description as far as possible and prescribing a common rate of duty drawback against all the split up entries. Further, the alignment has been done only with reference to the chapter heading of the said Act. In other words, the first two digits of the revised heading refer to the corresponding chapter where as the subsequent two digits are the running numbers allotted for purposes of the drawback Table.”

While aligning the Drawback Schedule further with the Customs Tariff at the 4 digit level, the Ministry vide letter DOF No. 609/38/2005-DBK dated 2-5-2005, clarified as follows:-

“5. The existing drawback schedule is based on a mixed classification that has grown out of precedent and convenience over the decades. Basically, the first two digits reflect the chapter heading while the subsequent two digits are in most cases arbitrary, derived from precedent and convenience. It has been felt that the classification system to be used for notifying the All Industry Rates of Duty Drawback should be insulated from any charge of classificatory confusion. It has, therefore, been decided to adopt the HS classification as the basis for fixing drawback rates. Thus, the new drawback Schedule is now fully aligned with the HS nomenclature at the four digit level.”

7.2. From the above two circulars, two things are absolutely clear. The first two digits of the drawback schedule refer to the Chapter of the Customs Tariff under which the goods should fall. Where an entry falls under different Chapters, the same has been split up and incorporated in different chapters with the same rate of drawback. It has thus been made very clear that to be eligible for drawback under a particular serial no., the goods should fall under the chapter under which the serial no. is indicated and secondly, they should conform to the description given against the serial no. In the instant case, as is clearly admitted by the appellant's officials and as revealed from the manufacturing processes undertaken, the item steering knuckle falls under chapter 87 of the Customs Tariff and hence the all industry rate of drawback for the said item can not be claimed against goods for which rate has been prescribed under chapter 73. In respect other items of export also such as crankshafts, axle beams, valves, spindle assembly, etc. the same principle would apply. From the description of the goods given in the purchase order as also the coverage of CTH 87.08 of the Customs Tariff, it is abundantly clear that these are motor vehicle parts suitable for use as such and have been subjected to various processes after forging. Therefore, the claim of the appellant that these goods are eligible for drawback under serial nos. 73.29 and 73.30 as fully machined parts lacks substance and merit and we hold accordingly. Under Chapter 87, none of the products involved in the impugned order are covered either specifically or generally. Since the goods are not covered in the drawback schedule, the question of extending the benefit of drawback does not arise at all and we hold accordingly. It is also relevant to mention here that in the Drawback Schedule aligned at the 4 digit level with the Customs Tariff from

2005 onwards the impugned goods under export in the present case are notified under Chapter 87 under heading no. 87.08. For example. I beam of alloy and non alloy steel are figuring at Sl. No. 8708.09 and 8708.10 and steering knuckles at Sl. No. 8708.34 This also goes to show that drawback on these items could not have been claimed under sl. No. 73.29 and 79.30 at the relevant time.

7.3. The appellant has relied on the judgment of this Tribunal in the Shivaji Works Ltd. case (cited supra) which has been upheld by the hon'ble apex court in support of his contention that the impugned products under export are obtained under forging process, they are eligible for all industry rate of drawback under serial nos. 73.29 or 73.30. The above judgment dealt with eligibility to exemption of 'investment castings' under notification 223/88-CE. The said notification provided excise duty exemption on castings and cast articles falling under sub-heading 7325.10 under S.No.1 and under S.No.3, castings and cast articles falling under Chapters 84,85 or 87 were also given exemption. Since the goods were castings, this Tribunal held that the benefit of the said notification is available, even if the product is a cast article and not castings as the notification used the expression 'castings and cast articles' and all the chapters, namely, 73, 84,85 and 87 were covered by the notification. We do not know how the ratio of this judgment can apply to the facts of the present case. Under sl.nos.73.29 and 73.30 forgings(rough)/unmachined/ semifinished/machined/identifiable ready-to-use machined parts/ components, of steel manufactured through forging process, of both non-alloy steel and alloy steel have been notified under the drawback schedule. But under Chapter 87 no such product is notified. Therefore, if a product falls under chapter 87, benefit of drawback is not available merely because the product description matches with those given for goods falling under chapter 73. It has already been clarified in the circular dated 15-6-95 that if a composite product falls under different chapters, they have been split up and incorporated under respective chapters with the same drawback rate. This makes it absolutely clear that unless the product is notified under Chapter 87, the benefit of drawback can not be extended. Thus the facts involved in the present case are distinct and distinguishable from those involved in the Shivaji Works Ltd. case and the ratio can not apply to the present case. So is the position with respect to the other judgments relied upon by the appellant.

7.4. The next issue for consideration is whether the goods already exported are liable to confiscation and if so, whether penalty is imposable in the instant case. Section 113 of the Customs Act reads as follows:-

“113. The following export goods shall be liable to confiscation:-

(a)

(i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77;

(ii) any goods entered for exportation under claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback under section 75;

In the instant case, the appellant did not furnish the correct description of the goods under export either in the shipping bill or in the export invoice. In the shipping bill, the appellant declared the description given in the drawback schedule for sl. Nos. 73.29 and 73.30 and not the actual description of the goods. The goods were actually classifiable under heading No. 87.08 of the Customs Tariff and the said goods did not figure in the drawback schedule for all industry rates. The appellant sought ineligible drawback by mis-declaring the goods. Thus the impugned goods are liable to confiscation under the provisions quoted above and we hold accordingly.

7.5. The Id. Counsel for the appellant has submitted that in the instant case the goods have not been seized at all and hence they can not be confiscated. Section 113 deals with liability to confiscation and not actual confiscation. The said section nowhere states that the goods should be seized to determine the liability to confiscation. Liability to confiscation arises for violations of the provisions of the Customs Act, 1962 as specified in clauses (a) to (l) of section 113. This has nothing to do with the seizure of the goods. Therefore, the contention of the appellant in this regard is totally misplaced.

7.6. The appellant has argued that they exported the impugned goods under claim for drawback for the reason that they used to export these goods earlier under claim for DEPB vide sl. No. 529 and 530 of the DEPB schedule which read as follows:-

“529 Identifiable ready to use machined parts/components made wholly or predominantly of carbon steel/non-alloy steel (not less than 90% by weight) manufactured through forging process, not elsewhere specified.

530 Identifiable ready to use machined parts/components made wholly or predominantly of alloy steel/stainless steel (not less than 90% by weight) manufactured through forging process, not elsewhere specified.”

Since the description given in sl. Nos. 73.29 and 73.30 more or less matched with the entries in the DEPB schedule, they filed the drawback shipping bills under these sl. Nos. We have carefully perused the DEPB schedule and compared the same with the Drawback schedule. The DEPB schedule classifies the goods under different product groups such as Chemicals group, Textiles group and Engineering Group and so on. It does not refer to any particular Chapter or heading of the Customs Tariff. However, the drawback schedule categorises the products under different chapters of the Customs Tariff. Thus the basis of classification adopted for DEPB and Drawback are completely different and distinct and therefore, we do not find any merit in this contention. It is relevant to point out here that there was a doubt regarding eligibility of DEPB credit to steering knuckles. The matter was referred to the Ministry of Commerce and Industry who vide their letter No. 10/11-7-2003 clarified that export of steering knuckles (fully machined) made after 1-3-2000, DEPB benefit may be allowed under the separate entry created for parts/ready to use components, i.e., entry no. 589 of the DEPB schedule. When the matter itself was clarified only in July, 2003, how could the appellant, in respect of exports made in March to May 2003, be under the impression that the impugned goods are covered under 73.29 and 73.30 of the Drawback Schedule on the basis of similar entries in the DEPB schedule? This very clearly shows that this argument is only an afterthought so as to justify their wrongdoing.

7.7. The appellant has also claimed that they filed the impugned shipping bills under the Drawback scheme as they were under the apprehension that DEPB scheme is going to be withdrawn shortly as it was not WTO compatible. Neither in their reply to the show cause notice filed by the appellant nor in their submissions made before the adjudicating authority, the appellants have taken this plea. Only in the appeal filed before this Tribunal, this point has been raised for the first time. This point has nothing to do with the legality of the issue in hand and it is purely a question of fact which has not been raised before the adjudicating authority. Even in the statements recorded by the customs officers, none of the officials of the company has given any indication or explanation in this regard. Thus it is obvious that this argument is purely an afterthought and is rejected. Thus the conduct of the appellant in the instant case casts serious doubts about their bonafide.

7.8. The next issue for consideration is whether the appellant is liable to redemption fine and penalty. In the instant case no goods have been seized nor the goods appears to have been released provisionally under bond. The goods have been exported and are not available for confiscation. If that be so, the question of confiscation and imposition of fine in lieu of confiscation can not be sustained. Accordingly we set aside the fine of Rs. 2 crore imposed on the goods already exported.

7.9. As regards penalty imposed on the appellants, we find that the penalty has been imposed under section 114(iii) of the Customs Act on the main appellant and its officials. As per the provisions of the said section,

“114 Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be punishable-

(i) -----.

(ii) -----

(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act,

whichever is greater.

Thus mens rea is not required for imposition of penalty. Once the goods are liable to confiscation, penalty is imposable for any action or omission which rendered the goods liable to confiscation. In the instant case, the appellant has argued that the impugned goods were examined by the jurisdictional central excise officers who have certified the correctness of the declarations made and hence no malafide can be attributed on the part of the appellant. The export documents are shipping bills and export invoices which are filed before the customs authorities at the port of export. The documents filed before the excise officers are only the ARE 1s. The declaration as to the description and value and claim for drawback has to be made in the export documents which are filed before the customs. Therefore, merely because the goods have been examined by the central excise authorities does not absolve the appellants of their responsibility of making the correct declarations in the export documents. This can at best a factor for determination of quantum of penalty and not for imposition of penalty per se. As already stated above, mens rea is not required for imposition of penalty under section 114. In the instant case, the goods are liable to confiscation since the goods were attempted to be exported under a claim for ineligible drawback amounting to Rs. 5 crore approx. and this claim was not bona fide. Therefore the appellant is liable to penalty. Since this is an export transaction, we feel that the penalty of Rs. 50 lakhs imposed on the main appellant in the instant case is on the higher side and we reduce the same to Rs. 20 lakhs. As regards the penalty on the officials of the appellant firm @Rs.5 lakhs each, considering the fact that they did not stand to gain personally by filing wrong drawback claim, we are of the view that penalty on them is not warranted. Accordingly we set aside the penalty imposed on S/Shri. Pramod Cholkar, Manager and M.N. Deshmukh, Vice President of the appellant firm.

7.10. The last issue for consideration is whether the appellant be permitted to convert the drawback shipping bills into DEPB shipping bills in the instant case. We find that this plea has not been taken before the adjudicating authority by the appellant nor the adjudicating authority has given any finding in this respect. For conversion, an application for the same has to be made under Section 149 of the Customs Act, which does not seem to have been done in the instant case. In view

of this position, the appellant has to make an application for conversion of the drawback shipping bills involved in the instant case to DEPB shipping bills along with supporting documents if permissible and in accordance with law. If any such application is made, the adjudicating authority shall consider the same in accordance with law and decide the matter after giving a reasonable opportunity to the appellant to present their case.

8. In sum, we hold that the appellant is not eligible for duty drawback at all industry rates on the impugned goods under serial nos. 73.29 and 73.30 of the drawback schedule as it stood at the relevant time. The impugned goods, though exported, are liable to confiscation. In as much as the goods are not available for confiscation, the question of imposing fine in lieu of confiscation does not arise and accordingly the fine of Rs.2 crore imposed is set aside. The penalty on the main appellant is reduced from Rs. 50 lakhs to Rs.20 (Twenty) lakhs and penalties on the co-appellants, Mr. Pramod Cholkar, Manager and M.N. Deshmukh, Vice President are set aside.

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