

CASE NO.:
Appeal (civil) 2269 of 2004

PETITIONER:
Commissioner of Customs, New Customs House, Mumbai

RESPONDENT:
M/s. Vishal Exports Overseas Limited

DATE OF JUDGMENT: 12/02/2007

BENCH:
Tarun Chatterjee & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T

V.S. SIRPURKAR, J.

Final order of Customs, Excise & Gold (Control) Appellate Tribunal (hereinafter called "the Tribunal" for short) allowing the appeal filed by M/s. Vishal Exports Overseas Limited (hereinafter called "the assessee" for short) is in challenge at the instance of Commissioner of Customs (hereinafter called "the Revenue" for short).

The assessee exported 4.8 lakh pieces of coffee mugs between February and November, 2001. The export price (FOB) was US \$3.40 per piece. The exported goods were eligible for Duty Entitlement Pass Book (DEPB) Benefit/Scheme. Accordingly, the same was claimed as per Rules at the rate of 11% or 10%. The assessee had declared a market value of Rs.52.50 per piece which was worked out at 150% of the assessee's purchase price which was Rs.35/- per piece. These purchases were made from the manufacturers in Rajasthan and as per the clearance documents of Central Excise (AR-4), Rs.35/- was the price per piece.

The Assistant Commissioner of Customs proceeded against the assessee by alleging that the assessee had mis-declared the FOB value at US \$3.40 (Rs.150/-) per piece. It was the view of the Department that the price was inflated to get more DEPB benefit. The original order ensued wherein it was held that the export price was not genuine considering the local purchase price to be Rs.35/- per piece only. It was held that the export price could not be as high as Rs.157/- (450%) and that it was unlikely that there would be such a vast variation between the domestic price and export price acceptable in the competitive export market. By making his own calculations, the FOB price was computed and fixed at Rs.80/- per piece in place of Rs.157/- per piece by the Assistant Commissioner. It was further ordered that the assessee would be entitled to DEPB credit on the basis of the FOB price of Rs.80/- per piece and not at the sale price. Holding the declared FOB price of Rs.157/- per piece or US \$3.40 per piece a mis-declaration, the Assistant Commissioner held that the goods were liable to be confiscated and the penalty under Section 114 of the Customs Act was also ordered.

Commissioner (Appeals) upheld the order in appeal filed by the assessee. The Commissioner (Appeals) held that the assessee was not liable to any further benefit than the one which was granted by the adjudicating authority. On appeal, the Tribunal set aside the orders of the authorities below and allowed the appeal. It is against this order that the present statutory appeal has been filed.

Shri R. Basant, Learned Advocate appearing on behalf of the Revenue assailed the order of the Tribunal and pointed out that there

could not be such a vast variation in between the domestic price of Rs.35/- per piece and the declared FOB value of Rs.157/- per piece, therefore, it was obvious that the assessee had claimed inflated price with the sole objective of getting undeserved DEPB credit. Learned counsel secondly contended that the Tribunal had not taken into consideration the evidence on record regarding the price. Lastly, the learned counsel contended that the matter was completely covered by a decision of this Court in Om Prakash Bhatia vs. Commissioner of Customs, Delhi reported in 2003 (155) ELT 423 (SC)=(2003) 6 SCC 161.

As against this Shri M.Chandrasekharan, Senior Counsel drew our attention to the Export and Import Policy (1st April, 1997 \026 31st March, 2002) and more particularly at para 7.25 which reads as under:

"Under the Duty Entitlement Pass Book (DEPB) Scheme an exporter shall be eligible to claim credit at a specified percentage of FOB value of exports made in freely convertible currency. The credit shall be available against such export products and at such rates as may be specified by the Director General of Foreign Trade by a Public Notice issued in this behalf.

xx xx xx xx"

Learned Senior Counsel argues that the basis for the benefit of DEPB is the FOB value in support of which voluminous evidence was given by the assessee and more particularly such evidence was in the form of (i) S/Bs (print-outs); (ii) Invoices; (iii) Packing lists; (iv) Bills of Lading; (v) BRCs; and (v) AR4s. Learned counsel painstakingly points out that there was no dispute anywhere regarding the BRC which showed that the FOB price claimed by the assessee was, actually, received by the assessee. According to the learned counsel it was unthinkable that the party to which the exports were made would act hand-in-glove with the assessee to make inflated payments to the assessee with the sole objective of obliging the assessee so as to enable him to get undeserved DEPB credit. He points out that the fixing of the price at Rs.80/- per piece by the Adjudicating Authority as also by the Commissioner (Appeals) was based on no evidence. Learned counsel further urged that those authorities could not have been allowed to "imagine" the price. Learned counsel further invites our attention to the findings by the Tribunal in para 4 of its judgment wherein the Tribunal has clearly held that there was no material on record to indicate that the export price declared by the appellant was not genuine or that the transaction was at a different price. Our attention was also drawn by the learned counsel towards further finding that the market value declaration made by the appellant is also fully supported by its purchase price from the manufacturer in India. Learned counsel also argued that the Tribunal has correctly held that the finding regarding the FOB price being Rs.80/- per piece was based on the computation of the price from manufacturer's price which had no relation with the price in export trade. Our attention was further drawn to the finding that there was no evidence whatsoever to support the finding that the export price is not genuine and was mis-declared with the intent to avail higher DEPB benefit. Lastly, the learned counsel pointed out that the aforementioned judgment in Om Prakash Bhatia's case (supra) could not be pressed into service because that judgment was in the draw-back scheme and not related to DEPB Scheme.

We have considered the matter in the light of the above contentions.

The first contention of the appellant herein to the effect that the FOB value being 450% more than the purchase value is unreasonable and cannot be accepted for the simple reason that

there is no evidence on record to support such a contention. The Tribunal has also specifically held so and returned a final finding of fact that the FOB price was correctly shown by the assessee. Learned counsel for the appellant could not show us anything concrete in support of his contention. From the orders of the first and the appellate authorities nothing can be found to hold that the FOB price was excessive or not genuine. The Tribunal has also given a finding that the Adjudicating Authority has arbitrarily computed the FOB value and have fixed the credit on that basis. We accept findings of the Tribunal in the absence of any concrete evidence having been put to support the contention of the learned counsel that the FOB price is inflated. In this behalf we cannot ignore the documents supplied by the assessee before the Revenue which we have already mentioned earlier. It is not a case of the Revenue that the assessee has not received the FOB price at all. That is clear from the BRCs. Therefore, the FOB price is supported amply by the BRCs with which no fault is found. Once that is clear, there will be no question to hold that the FOB is inflated.

As per the policy also the credit has to be linked with the FOB price. Again we cannot ignore the fact that the PMV is also correctly fixed and is within the permissible limits i.e. 150% of AR4 value. The market value is fixed at Rs.52.50. That has also been found to be in order by the Tribunal. Therefore, we accept the finding of the Tribunal in this behalf and reject the contention of the learned counsel for the Revenue.

It was lastly contended that the matter is covered by the decision in Om Prakash Bhatia's case (supra). This was clearly against draw back scheme and not DEPB credit. We have carefully seen the judgment. We do not find that on the basis of the factual scenario therein it applies in any manner to the present controversy. There the factor of over-invoicing was found established. In the present case on the factual aspect also the FOB price could not be said to be inflated. In our opinion the aforementioned judgment would be of no consequence and help to the Revenue.

In view of the above we are of the opinion that the appeal has no merits and it must be dismissed. It is accordingly dismissed.

There will be no order as to costs.