CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW D ELHI
PRINCIPAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 50468 OF 2021

[Arising out of Order in Original No. 04/COMMR/MS/PACE/ICD-PPG/2020 dated 28.08.2020 passed by the Commissioner of Customs, ICD TKD, New Delhi]

SMT. VISHAKHA ARORA **Appellant**
A-20, Lekha Park, Maqbool Road,
Amritsar

Vs.

COMMISSIONER OF CUSTOMS- -NEW DELHI(ICD TKD) **Respondent**

WITH

50469/2021, 50470/2021, 50471/2021,
50609/2021, 50610/2021.

Appearance:
Present for the Appellant : None
Present for the Respondent: Shri S K Rahman, Authorised Representative

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO's. 58547-58552 /2024

DATE OF HEARING: 13/08/2024
DATE OF DECISION: 09/09/2024

P. V. SUBBA RAO

1. These six appeals assail the Order in Original[1] dated 28.08.2020 passed by the Commissioner of Customs, ICD, Patparganj, New Delhi whereby he decided the proposals in the Show Cause Notice[2] dated 25.07.2011 issued to 32 noticees. He dropped the proposals to impose penalty on five noticees and confirmed the demands, imposition of fines

---

1 Impugned order
2 SCN

and penalties against the remaining 27 noticees. Six of these 27 noticees filed these appeals assailing the decisions against them in the impugned order.

2. **Customs Appeal No. 50471 of 2021** is filed by M/s. Subal Exports. **Customs Appeal No. 50470 of 2021** is filed by M/s. Chirag Exports. **Customs Appeal No. 50609 of 2021** is filed by M/s. Kay Aar Exim. **Customs Appeal No. 50610 of 2021** is filed by Shri Rajinder Arora assailing the penalty of Rs. 10,00,000/- imposed on him. **Customs Appeal No. 50469 of 2021** is filed by Shri Subal Khanna assailing the penalty of Rs. 1,00,000/- imposed on him. **Customs Appeal No. 50468 of 2021** is filed by Ms. Vishaka Arora assailing the penalty of Rs. 5,000/- imposed on her.

3. There are no appeals by any of the other noticees or by the Revenue.

4. All these appeals were listed on 20.9.2023 but since nobody appeared on behalf of the appellants, they were adjourned to 6.12.2023 when also nobody appeared but a written request was received seeking adjournment on medical grounds from the counsel of the appellants. The matter was adjourned to 31.1.2024. Nobody appeared on behalf of the appellants on this date and so, it was adjourned to 19.3.2024. Nobody appeared on behalf of the appellants on this date also. Learned authorised representative for the Revenue had submitted that the matter may be decided on merits since large amount of drawback is involved in these appeals. The matter was adjourned to 8.05.2024 making it clear that no adjournment shall be

granted and the appeal may be decided on merits even if the appellants do not appear. On 8.05.2024, Shri Rohit Nain appeared as counsel for the appellants and stated that he would shortly submit his Vakalatnama and prayed for a short adjournment. The matter was adjourned to 24.07.2024. It was made clear that no further adjournments shall be granted to the appellants. On 24.7.2024, the following order was passed.

> "On 08.05.2024, following order was passed:
>
> "Shri Rohit Nain has appeared on behalf of the appellant and states that he shall be filing his vakalatnama shortly. He has sought an adjournment. As prayed, list on July 24, 2024. In view of the earlier orders passed, it is made clear that no further adjournment shall be granted to the appellant."
>
> 2. In spite of aforesaid order, the appellant has again sought an adjournment stating that they wish to engage a new counsel for arguments. It was noted in the earlier order that Shri Rohit Nain, learned counsel stated that he shall be filing his Vakalatnama shortly. The communication does not even refer to the last order dated 08.05.2024 and in a routine manner, the appellant has sought an adjournment.
>
> 3. Learned authorised representative appearing for the department has pointed out that the issue relates to alleged total export promotion benefit of Rs. 45 crores.
>
> 4. We could have proceeded to hear the matter even in the absence of the appellant but it is considered appropriate to grant an opportunity to the appellant. The appellant has sought two weeks time to file the paper book. List on August 13, 2024. It is made clear that this appeal and the connected appeal shown at Serial No. 12-14 and 16-17 may be decided on merits even if the appellant does not appear. Parties may in the meantime submit their synopsis/compilation."

5. Today, when the matter was called none appeared on behalf of the appellants and nor is there any communication. Under these circumstances, we find it appropriate to decide the matter on merits.

6. The question as to how this Tribunal should deal with cases where the party does not appear was decided by the larger bench of Supreme Court in **Balaji Steel Re-rolling Mills vs Commissioner[3].** The relevant extract of this judgment is below:

> **"9.** Section 35C(1) of the Act which deals with the powers of the Tribunal reads as under :-
>
> > **"35C. Orders of Appellate Tribunal.** - (1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary."
>
> **10.** Rule 20 of the Rules which gives a power to the Tribunal to dismiss the appeal for default in case the appellant does not appear when the appeal is called on for hearing reads as under :-
>
> > **"RULE 20. Action on appeal for appellant's default.** - Where on the day fixed for the hearing of the appeal or on any other day to which such hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or hear and decide it on merits :
> >
> > Provided that where an appeal has been dismissed for default and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the dismissal and restore the appeal."
>
> **11.** From a perusal of the aforesaid provisions, we find that the Act enjoins upon the Tribunal to pass order on the appeal confirming, modifying or annulling the decision or order appealed against or may remand the matter. It does not give

---

3 2014 (36) S.T.R. 1201 (S.C.)

> any power to the Tribunal to dismiss the appeal for default or for want of prosecution in case the appellant is not present when the appeal is taken up for hearing.
>
> Xxxxxxx
>
> **13.** Applying the principles laid down in the aforesaid case to the facts of the present case, as the two provisions are similar, **we are of the considered opinion that the Tribunal could not have dismissed the appeal filed by the appellant for want of prosecution and it ought to have decided the appeal on merits even if the appellant or its counsel was not present when the appeal was taken up for hearing**. The High Court also erred in law in upholding the order of the Tribunal."

(**emphasis supplied)**

7. As the appellants have not appeared despite several opportunities having being given to them, we proceed to decide these on merits.

8. We have gone through the appeals and heard learned authorised representative for the Revenue.

9. The following submissions were made in the Memo of these six appeals:

(i) The impugned order is a non-speaking order and was passed without considering all the submissions made by the appellants before the Commissioner at the time of adjudication;

(ii) There has been a long delay in passing the impugned order. The SCN was issued in 2011 and the order was passed in 2019 and such a long delay vitiates the order;

(iii) As per section 28(9) the order has to be passed within six months or one year and if it is not passed within that time, it will be as if no SCN has been issued;

(iv) Constructive res judicata will apply to these cases because the goods had already been exported after the Shipping Bills were assessed and the proper officer in each case gave Let Export Orders. The assessment of the shipping bills attained finality and there was no review of their assessment by the department;

(v) The SCN was issued by the Commissioner of Customs, ICD, Tughlakabad answerable to the Commissioner, ICD, Tughlakabad but the impugned order was passed by the Commissioner, ICD, Patparganj;

(vi) Various departmental instructions issued through circulars of CBEC with respect to conducting market enquiry to determine the prices of goods in case of exports were not followed. The departmental officers are bound to follow the CBEC's circulars;

(vii) The appellants had sought cross examination of the persons whose statements were relied upon but the cross examination was allowed only of some persons and not of others. Therefore, the statements of those persons who were not allowed to be cross-examined cannot be relied upon to fasten liability on the appellants;

(viii) The entire case was built on 3 fabricated and planted samples;

(ix) The samples which were tested pertained to 13 live shipping bills and those consignments are part of another SCN and consequential proceedings;

(x) The live consignments whose samples were tested and where the market enquiries were conducted are not part of the SCN issued in this case;

(xi) The assertion that Shri Rajinder Arora owned or controlled eight firms is baseless and incorrect;

(xii) The goods were exported at the declared transaction values.Therefore, the impugned order may be set aside and the appeals may be allowed.

10. Shri Shaikh Khader Rahman, learned authorised representative for the Revenue made the following submissions.

(i) The impugned order was passed by the Commissioner in respect of 32 noticees to the SCN. He refrained from imposing any penalty against 5 noticees and there is no appeal from the Revenue with respect to these five noticees. Of the remaining 27 noticees, only 6 have filed these appeals. The impugned order therefore, attained finality qua the remaining noticees of the SCN;

(ii) In all 439 Shipping Bills were filed by the exporter noticees to the SCN at Inland Container Depots[4] at Tughlakabad and Pataprganj to export 31,080 rolls of woollen carpets 1,310 rolls of synthetic carpets claiming duty drawback and also benefit of Focus Product Scheme[5] of the Directorate General of Foreign Trade[6];

(iii) Under the duty drawback scheme, the exporters who export goods manufactured in India are given drawback as a percentage of Free on Board (FOB) value of the export goods as per the drawback schedule which gives the percentage to be given as drawback for different types of goods;

(iv) FPS is an incentive scheme of DGFT to incentivise export of certain products and the exporter is given scrips by the DGFT which can be used to pay duty on imports or traded in the market and the buyer of the scrips can use them to pay duty on his imports. FPS is available in addition to the drawback;

(v) The exporters mis-declared the exported goods as hand-made carpets but had actually exported cheap machine made carpets at highly inflated prices;

---

4 ICD
5 FPS
6 DGFT

(vi) The exporters overvalued carpets(mainly woollen and some synthetic) and availed export benefits in the form of (a)duty drawback to the tune to the tune of Rs18.75 crores (which has been availed by the exporters and is demanded) (b) drawback to the tune of Rs6.45 crores, (which was pending for sanction and is rejected) totalling Rs. 25.2 crores Further, Rs 20 crores was demanded as the duty foregone which was not paid by the importers by availing "Focus Product Scheme" scirps. This demand is made treating the exporter noticees as 'deemed importers';

(vii) The appellants exported overvalued woollen synthetic carpets with an intention to avail in eligible drawback amount and FPS credit . The extent of over valuation by these appellants is as follows:

name of exporter	no of S/B	quantity exported (Sq. meters)		declared FOB value Rs Cr	re determined value Rs Cr	Dbk amount
		woollen	synthetic			
Subal exports	43	56721	-	40.81	1.55	2.6
Chirag Exports	28	4991.5	39060	24.58	0.665	1.48
Kay Aar Exim	1	648.67	-	0.328	0.179	0.02

(viii) The exporters claimed to have got the goods manufactured in India but on verification, it was found that there were no such manufacturers at all;

(ix) It was also found that the carpets which were exported from ICD Tughlakabad and ICD Patparganj were thereafter reimported in the name of another firm through Nhava Sheva port at a fraction of the export price. The marks and numbers of the carpets which were exported match with those that were imported which establishes that the same goods were imported back for a low price. Some samples are as follows:

Exporter Subal exports	Importer Romex International
SB Nos dt.	BE No. dt.
1655914,1655915,1655916&1657182 all dt. 12-10-2010; 1659624, 1659625,1659626&1659627 all dt. 13-10-2010	979178 dt. 29-11-2010
Exporter Chirag Enterprises	Importer Romex International
SB Nos dt.	BE No. dt.
1665696, 1665700,165694 & 16656 97 all dt. 14-10-2010	970890 dt. 24-11-2010
Exporter Rasim Enterprises	Importer Romex International
SB Nos dt.	BE No. dt.
1646854,1646853, 1646851 & 1646849 all dt.10-10-2010	970890 dt. 24-11-2010
Exporter Aar Vee Enterprises	Importer Romex International
SB Nos dt.	BE No. dt.
16596628, 1659629&1659631 all dt. 13-10-2010 ;1655917, 1655919 & 1655918 all dt. 12-10-2010	970890 dt. 24-11-2010

(x) The mastermind in this scheme is Rajinder Arora who opened 8 firms to export carpets. He procured cheap machine made carpets from Badhoi/Mirzapur from one supplier Shri Zaheeruddin and showed them in the shipping

Bills as hand-made carpets made in Amritsar and procured from several suppliers viz., RP textiles K S Traders , ABC overseas KS Trading, Ram trading ,Solitaire trading. Gurunanak Hand looms Deol Traders. Khurnana Trading. Prakash Traders at Amritsar Ludhiana and Jalandhar;

(xi) On verification, all these so called suppliers were non-existent. However, Rajinder Arora transferred vast sums of money to the bank accounts of these 'suppliers';

(xii) The money transferred to these accounts was used in four ways-

a. Some money was used to buy several Visa forex cards which were then sent to Dubai where they were encashed by Shri Mohd. Amin- the buyer of the carpets who remitted the money back to India as sale proceeds of the carpets exported at vastly inflated prices.

b. Some money was transferred to the actual suppliers of the carpets at Badhoi/ Mirzapur who supplied the machine made carpets which were actually exported mis-declaring them as hand made carpets.

c. Some money was sent to the Customs Broker who handled the imports of Romex International in whose have the carpets were reimported. The Customs broker used the money to pay duty on the carpets which were reimported into India from Dubai.

d. Some money was transferred to the hawala operators based in Surat.

(xiii) Thus, a circular trading system was operated first buying cheap machine made carpets from Bhadhoi/Mirzapur and declaring them as hand made carpets supplied by several non-existent firms in Amritsar and claiming vast amounts of drawback and then importing the carpets back into India at low prices through Nhava Sheva port in the name of another firm owned by Rajinder Arora;

(xiv) Vast sums of money was transferred to the accounts of these non-existent suppliers at Amritsar and these funds were used to pay the actual supplier of the cheap carpets from Mirzapur, to buy visa forex cards and send them to Dubai to the importer Md. Amin who would remit the amounts back as the price paid for the carpets at highly inflated prices, to pay the customs duty when re-importing these cheap carpets and to pay some hawala operators;

(xv) Even the complete sale proceeds of the exported goods were not received. Of the declared export value of Rs. 419 crores, only Rs. 68 crores of remittances were received. Thus, to the extent the sale proceeds were not received, drawback has to be recovered under Rule 16A of the Drawback Rules;

(xvi) Samples of the carpets were tested and found to be synthetic carpets of low GSM 492 to 738 GSM (grams per

square meter). The Carpet Export Promotion Council (CEPC) explained that carpets of such low can only be machine made carpets. Focus Product benefit is not admissible on these carpets;

(xvii) The FPS scrips have been obtained by cheating and misrepresentation on the basis of wrong applications/ declarations before the DGFT;

(xviii) Exports of imported or re-imported goods does not entitle the exporter to scrips of FPS as per Para 3.17.2 of Foreign Trade Policy. Therefore, any such scrips which were issued on the basis of such misrepresentation are ***ab initio*** null and void. Therefore, any Customs duty foregone on the basis of these FPS scrips is fully recoverable in terms of the provisions of Section 28(1) of the Customs Act, 1962;

(xix) The Deputy DGFT, Amritsar by his letter dated 28.04.2011, informed that all licences to the eight exporting firms, were issued without BRC' on the basis of undertaking submitted by the exporters as they were Exports Houses and in majority of the cases, the remittances have not been received;

(xx) The learned counsel for the appellants sought cross examination of co-noticees and associated persons which were allowed and the details of cross examination has been incorporated in the impugned order;

(xxi) The contention of the appellants that the samples taken for valuation were planted was not proved as the officers who drew samples were cross examined by the learned counsel for the appellant during adjudication and it could not be established that the samples were not genuine;

(xxii) Another contention of the appellants is that there was inordinate delay in passing the impugned order. The reasons for this are that the SCN was issued to 32 noticees, ran into 560 pages and had 325 relied upon documents. The replies of all had to be received, personal hearing had to be granted to all and wherever requests for cross-examination were made, they had to be considered. In all cases where the appellants deserved a cross examination, it was allowed. The details of the cross-examination in each case had to be recorded. The impugned order was passed after considering all these and hence it took time;

(xxiii) Another contention of the appellants was that the Order-in-Original was time barred as it was passed beyond the time limit laid down under section 28(9) of the Customs Act. This submission has no force because Explanation 4 to section 28 clearly indicates that the limit under section 28(9) will not apply to SCNs issued before 29.3.2018. The SCN in this case was issued on 25.7.2011 and therefore, the time limit laid down in section 28(9) will not apply;

(xxiv) The contention of the appellants that the SCN was issued without jurisdiction insofar as the demand of drawback is concerned is not correct. Recovery of drawback was proposed under Rules 16 and 16A of the Drawback Rules and the exports took place through ICD Patparganj and ICD Tughlakabad. The SCN was issued by the Commissioner, ICD Tughlakabad and adjudication was done by the Commissioner, ICD Patparganj as common adjudicating authority;

(xxv) The appellant stressed that constructive res judicata would apply and the officers had no power to review their earlier decisions. The exports were allowed and the drawback was sanctioned. However, where the export proceeds are not realised, the drawback can be recovered as per Rules 16 and 16A of the drawback Rules.

11. We have considered the submissions in the appeals and the submissions advanced by the learned authorised representative for the Revenue and perused the records.

Jurisdiction

12. In the appeals, the jurisdiction of the Commissioner has been questioned. Learned authorised representative submitted that the Shipping Bills in question were filed at ICD Patparganj and ICD Tughlakabad both of which fell at the time of the issue of SCN under the jurisdiction of the Commissioner of Customs, Tughlakabad who issued the SCN. Thereafter, in 2016, ICD Patparganj was made into a

separate Commissionerate. Therefore, some bills of entry covered by the SCN fell under the jurisdiction of Commissioner, Patparganj and some fell under the jurisdiction of Commissioner, Tughlakabad. The Central Board of Excise and Customs had issued Customs Notification No. 94/2016-Customs (NT) dated 1 July 2016 appointing Commissioner, ICD Patparganj as the common adjudicating authority to decide the matter arising out of this SCN. Learned authorised representative placed a copy of the notification before us. **We, therefore, find that both the Commissioner ICD Tughlakabad who issued the SCN and the Commissioner ICD Patparganj who issued the impugned order had the jurisdiction to do so.**

13. It has also been submitted by the appellants that the impugned order was issued much beyond the time limit laid down under section 28(9) of the Customs Act, which reads as follows:

> "(9) The proper officer shall determine the amount of duty or interest under sub-section (8),-
>
> (a) within six months from the date of notice, in respect of cases falling under clause (a) of sub- section (1);
>
> (b) within one year from the date of notice, in respect of cases falling under sub-section (4).
>
> **Provided** that where the proper officer fails to so determine within the specified period, any officer senior in rank to the proper officer may, having regard to the circumstances under which the proper officer was prevented from determining the amount of duty or interest under sub-section (8), extend the period specified in clause (a) to a further period of six months and the period specified in clause (b) to a further period of one year:
>
> **Provided** further that where the proper officer fails to determine within such extended period, such proceeding shall be deemed to have concluded as if no notice had been issued."

14. However, Explanation 4 to section 28 clearly indicates that the limit under section 28(9) will not apply to SCNs issued before 29.3.2018. It reads as follows:

> **"Explanation 4** - For the removal of doubts, it is hereby declared that notwithstanding anything to the contrary contained in any judgment, decree or order of the Appellate Tribunal or any Court or in any other provision of this Act or the rules or regulations made thereunder, or in any other law for the time being in force, in cases where notice has been issued for non-levy, short-levy, non-payment, short payment or erroneous refund, prior to the 29th day of March, 2018 (13 of 2018), being the date of commencement of the Finance Act, 2018, such notice shall continue to be governed by the provisions of section 28 as it stood immediately before such date."

15. The SCN in this case was issued in 2011 well before 29.3.2018. Therefore, there is no force in this submission of the appellants.

Recovery of duty foregone under section 28

16. Demands of duty foregone have been confirmed in the impugned order under section 28. The case of the department is that the appellant exporters had, by mis-representation, obtained FPS scrips from the DGFT and further transferred them to others and others imported goods using these scrips. Since the scrips were obtained through mis-representation and in violation of various provisions of the Foreign Trade Policy, the duty foregone, i.e., the duty which the transferees of the scrips would have paid but which they had not by using the scrips is ordered to be recovered under section 28 from the appellant exporters.

17. It is a matter of record that the FPS scrips were issued by the DGFT office in Amritsar. Investigations by the Customs authorities revealed several mis-representations regarding the exports based on

which the FPS scrips were issued. These were communicated to the DGFT and there was a letter from DGFT Amritsar that action is being taken. However, there is nothing on record that the FPS scrips have been cancelled ab initio by DGFT. The Commissioner of Customs has no power or authority under the FTP to either issue or to modify or cancel FPS scrips.

18. We also find that section 28 provides for recovery of duty not levied, not paid, short levied or short paid from the person responsible to pay the duty, i.e., the importer. A notice to recover it can be issued within a normal period of one year or an extended period of five years if the non levy, short levy, etc. is due to fraud, mis-representation or suppression of facts by the person responsible to pay the duty or his agent.

19. In this case, the persons responsible to pay the duty are the importers and not the exporters whose scrips they used. Of course, it is an anamolous situation if the exporter obtains scrips by fraud or mis-representation and transfers them for a consideration and the importer uses them instead of paying duty. Once the fraud is discovered, the liability to pay duty will be on the importer and not on the exporter who had actually committed the fraud or misrepresentation.

20. To fill this lacuna, section 28AAA was introduced in 2012 to enable recovery of such duty from the exporter. It reads as follows:

> **Section 28AAA. Recovery of duties in certain cases. -**
>
> **(1) Where an instrument issued to a person has been obtained by him by means of**-
>
> (a) collusion; or

(b) wilful misstatement; or

(c) suppression of facts,

for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), or any other law, or any scheme of the Central Government, for the time being in force, by such person or his agent or employee and such instrument is utilised under the provisions of this Act or the rules or regulations made or notifications issued thereunder, by a person other than the person to whom the instrument was issued, **the duty relatable to such utilisation of instrument shall be deemed never to have been exempted or debited and such duty shall be recovered from the person to whom the said instrument was issued**:

Provided that the action relating to recovery of duty under this section against the person to whom the instrument was issued shall be without prejudice to an action against the importer under section 28.

Explanation 1 - For the purposes of this sub-section, "instrument" means any scrip or authorisation or licence or certificate or such other document, by whatever name called, issued under the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), or duty credit issued under section 51B, with respect to a reward or incentive scheme or duty exemption scheme or duty remission scheme or such other scheme bestowing financial or fiscal benefits, which may be utilised under the provisions of this Act or the rules made or notifications issued thereunder.

Explanation 2 - The provisions of this sub-section shall apply to any utilisation of instrument so obtained by the person referred to in this sub-section on or after the date on which the Finance Bill, 2012 receives the assent of the President, whether or not such instrument is issued to him prior to the date of the assent.

(2) Where the duty becomes recoverable in accordance with the provisions of sub-section (1), the person from whom such duty is to be recovered, shall, in addition to such duty, be liable to pay interest at the rate fixed by the Central Government under section 28AA and the amount of such interest shall be calculated for the period beginning from the date of utilisation of the instrument till the date of recovery of such duty.

(3) For the purposes of recovery under sub-section (2), the proper officer shall serve notice on the person to whom the instrument was issued requiring him to show cause, within a period of thirty days from the date of receipt of the notice, as to why the amount specified in the notice (excluding the interest) should not be recovered from him, and after giving that person an opportunity of being heard, and after considering the representation, if any, made by such person, determine the amount of duty or interest or both to be recovered from such person, not being in excess of the amount specified in the notice, and pass order to recover the amount of duty or interest or both and the person to whom the instrument was issued shall repay the amount so specified in the notice within a period of thirty days from the date of receipt of the said order, along with the interest due on such amount, whether or not the amount of interest is specified separately.

> (4) Where an order determining the duty has been passed under section 28, no order to recover that duty shall be passed under this section.
>
> (5) Where the person referred to in sub-section (3) fails to repay the amount within the period of thirty days specified therein, it shall be recovered in the manner laid down in sub-section (1) of section 142.]

21. The note on this clause by the Finance Minister when introducing the Finance Bill 2012 explains its purpose and it reads as follows:

> "The provisions of the Customs Act enable recovery of duty not-levied, or short-levied by reason of collusion, or willful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter. Certain cases have been detected relating to utilization of instruments, such as duty credit scrips, where the instrument was obtained by means of collusion or wilful mis-statement or suppression of facts by the person to whom the instrument was issued or his agent or employee and not by the importer who utilized it. A new section 28AAA is being inserted to provide for recovery of duties, from the person to whom the instrument was issued without prejudice to any action that may be taken against the importer. (clause 116)"

22. The above note on clause makes it clear beyond any shadow of doubt that section 28 was not and is not a legal provision to recover duties foregone from the persons to whom any instruments (such as FPS scrips) are issued.

23. For these reasons, the demand of duties foregone under section 28 from exporter-appellants, including the interest on such duties, cannot be sustained and needs to be set aside. Consequently, penalties imposed under section 114A which are linked to demands of duty under section 28 also cannot be sustained and need to be set aside.

Drawback

24. Insofar as the drawback is concerned, learned authorised representative submitted that it was denied and was recovered for the following reasons:

(i) The goods that were exported were not manufactured in India but were those which were imported. Such goods are not eligible for the drawback as per the drawback schedule.

(ii) The goods which were exported were not hand made carpets but cheap machine made carpets procured from Bhadhoi/Mirzapur at low prices. They were mis-declared as hand made carpets and were exported at highly inflated prices. Thus, there was not only mis-declaration of the nature of the goods but also their value. Therefore, they are not entitled to drawback claimed.

(iii) The carpets were of 442 to 738 GSM and the Carpet Export Promotion Council reported that such carpets cannot be made by hand and can only be machine made.

(iv) The carpets were put through a circular marketing, first exporting them to Dubai and then re-importing them in the name of another firm through Nhava Sheva port.

(v) The money was sent to the accounts of 'suppliers' who bought Visa forex card and sent them to Dubai where they were encashed and the amount was sent to the appellant as remittances.

25. In their appeals, the appellants, inter alia, submitted that the samples used for market survey, etc. were samples from live consignments and those shipping bills were part of a different SCN and those reports cannot be used against them with respect to the Shipping Bills in dispute.

26. We agree with the learned authorised representative for the Revenue that if goods which were imported and re-exported, such goods will not be eligible for drawback at the rates prescribed in the drawback schedule. If imported goods are re-exported the exporter will be entitled to drawback equal to 98% of the duty paid at the time of import under section 74 of the Act which reads as follows:

> **Section 74. Drawback allowable on re-export of duty-paid goods. -**
>
> **(1) When any goods capable of being easily identified which have been imported into India and upon which any duty has been paid on importation, -**
>
> **(i) are entered for export and the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51**; or
>
> (ii) are to be exported as baggage and the owner of such baggage, for the purpose of clearing it, makes a declaration of its contents to the proper officer under section 77 (which declaration shall be deemed to be an entry for export for the purposes of this section) and such officer makes an order permitting clearance of the goods for exportation; or
>
> (iii) are entered for export by post under clause (a) of section 84 and the proper officer makes an order permitting clearance of the goods for exportation, **ninety-eight per cent of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback,** if -
>
> (a) the goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported; and
>
> (b) the goods are entered for export within two years from the date of payment of duty on the importation thereof :
>
> **Provided** that in any particular case the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period as it may deem fit.
>
> ******

27. The purpose of drawback is to ensure that the export goods do not suffer any duties. If imported goods are re-exported, as per section 74 of the Customs Act, the exporter is entitled to drawback of 98% of the duties paid at the time of import. On the other hand, if goods manufactured in India are exported, drawback is sanctioned under section 75 of Customs Act which effectively nullifies the effect of taxes and duties suffered in their manufacture. Section 75 of the Customs Act reads as follows:

> **SECTION 75. Drawback on imported materials used in the manufacture of goods which are exported. -**
>
> (1) Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer, or being goods entered for export by post under clause (a) of section 84 and in respect of which an order permitting clearance for exportation has been made by the proper officer, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, **the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to, the rules made under sub-section (2):**
>
> *****
>
> (2) The Central Government may make rules for the purpose of carrying out the provisions of sub-section (1) and, in particular, such rules may provide -
>
> (a) for the payment of drawback equal to the amount of duty actually paid on the imported materials used in the manufacture or processing of the goods or carrying out any operation on the goods or as is specified in the rules as the average amount of duty paid on the materials of that class or description used in the manufacture or processing of export goods or carrying out any operation on export goods of that class or description either by manufacturers generally or by persons processing or carrying on any operation generally or by any particular manufacturer or particular person carrying on any process or other operation, and interest if any payable thereon;
>
> (aa) for specifying the goods in respect of which no drawback shall be allowed;

> (ab) for specifying the procedure for recovery or adjustment of the amount of any drawback which had been allowed under sub-section (1) or interest chargeable thereon;
>
> (b) for the production of such certificates, documents and other evidence in support of each claim of drawback as may be necessary;
>
> (c) for requiring the manufacturer or the person carrying out any process or other operation to give access to every part of his manufactory to any officer of customs specially authorised in this behalf by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to enable such authorised officer to inspect the processes of manufacture, process or any other operation carried out and to verify by actual check or otherwise the statements made in support of the claim for drawback.
>
> (d) for the manner and the time within which the claim for payment of drawback may be filed;
>
> ****

28. The Drawback Rules were framed under this section and All Industry Rates of Drawback in the drawback schedule are notified for different goods (usually as a percentage of the FOB value) by the Central Government. These rates apply to goods manufactured in India and not to imported goods. Therefore, if the goods exported under any shipping bill declaring them to have been manufactured in India are found to have actually been imported goods, the drawback claimed by the exporter is not admissible and if it is erroneously paid, it needs to be recovered.

29. We also agree with the learned authorised representative for the Revenue that if the nature or value of the goods was mis-declared in the Shipping Bills and drawback was claimed on such mis-declared goods and values, the drawback will not be admissible on such Shipping Bills.

30. We also agree with the learned authorised representative for the Revenue that if the sale proceeds are not remitted within the time laid

down under the Foreign Exchange Management Act, the drawback is not admissible and if drawback is already paid, the same can be recovered under Drawback Rule 16A. Learned authorised representative submitted that of the declared export value of Rs. 419 crores, only Rs. 68 crores have been remitted.

31. However, from the impugned order, we are unable to decipher as to which are the shipping bills to which each of the above applies. For this purpose, we find it appropriate to remand the matter to the original authority insofar as the impugned order pertains to the appellants herein to compute:

a. Shipping bills where the goods or their samples were examined or tested or where a market survey was conducted and the nature of the goods or the value was found to be mis-declared and the drawback claimed is denied for that reason;

b. Shipping bills where the goods were exported and drawback was paid but the exporter failed to receive the remittance for the export and produce evidence and hence the drawback is ordered to be recovered under Rule 16A of the drawback rules;

c. Shipping bills where the exported goods were found to have not been manufactured in India but were found to have been imported and re-exported and hence the drawback is ordered to be recovered.

32. Needless to say that if there are any shipping bills where there is no evidence of mis-declaration of the nature of the goods exported or their value or evidence that the goods were actually imported and re-exported and where the remittances were received, drawback cannot be denied.

33. The Commissioner should also examine from the records, the assertion of the appellants that the Shipping Bills were finally assessed and were not reviewed by the department and thus had attained finality.

34. Based on the above, the liability of goods to confiscation under section 113 and the penalties need also to be re-determined.

35. In view of the above, all six appeals are disposed of as below:

a. Demand of duty foregone on account of the use of FPS scrips issued to the appellants is set aside as it is beyond the scope of section 28.

b. Consequently, interest on the demands under section 28 and any penalties imposed on the appellants on this count are also set aside.

c. Demand of drawback and interest thereon from these six appellants needs to be recomputed confining it only on such shipping bills filed by the appellants in which remittance of the export proceeds is not received, or there is evidence of mis-declaration of the nature of the goods or

value, or there is evidence that the exported goods were actually imported and then re-exported.

d. Order of confiscation or holding the goods liable to confiscation and imposition of penalties against the appellants also need to be re-computed as above.

36. All the six appeals are partly allowed and the impugned order insofar as it pertains to the six appellants herein is set aside to the extent of demands of duty foregone under section 28, interest thereon and consequential penalties. The matter is remanded to the Commissioner to re-compute the demand of drawback recovery as above and pass an order after giving an opportunity of being heard to the appellants. Since the matter is old, we expect the Commissioner to decide the matter as early as possible and preferably within a period of six months from the date of this order.

[Order pronounced on **09/09/2024**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

Tejo