CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 2

Customs Appeal No. 20058 of 2015

(Arising out of Order-in-Original No. 27/2014 Commr. dated 25.09.2014 passed by the Commissioner of Customs, Mangalore.)

M/s. Dream Logistics Company (India) Pvt. Ltd.
'Dream Chambers',
Near Bus Stand,
Yellapur,
Karnataka – 581 359. ....**Appellant(s)**

VERSUS

Commissioner of Customs,
Mangalore Customs Commissionerate,
New Custom House, Panambur,
Mangalore – 575 010. ....**Respondent(s)**

APPEARANCE:

Mr. M. S. Nagaraj, Advocate for the Appellant
Mr. M. Sreekanth, Asst. Commr. (AR) for the Respondent.

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 22276 /2025

Date of Hearing: 05.12.2025
Date of Decision: 05.12.2025

PER: P.A. AUGUSTIAN

The issue in the present appeal is regarding finalization of the assessments of 'Iron Ore Fines' & 'Lumps' in terms of Section 14 (1) and Section 18 (2) of the Customs Act, 1962 read with the Customs Valuation (Determination of Price of Exported Goods) Rules, 2007.

2. The brief facts are the Appellant was engaged in trading/ export of 'Iron Ore Fines' and 'Lumps' during the period from June 2008 to

August 2010. The Shipping Bills filed for export of the goods during the period were assessed provisionally by the proper officer of Customs, the duty as assessed was paid and 'Let Export Orders' (LEOs) were issued for export of the goods. Alleging under valuation in 2009, DRI started investigation and issued show cause notice (SCN) on 07.02.2013 demanding differential duty against 15(fifteen) shipping bills with proposal for confiscation of the goods and demand of duty. Thereafter Adjudication Authority as per the order dated 25.09.2014 finalized the assessments by rejecting the Free on Board (FOB) value under Rule 8 of Customs Valuation Rules (Export), 2007, confirmed demand of differential duty, appropriated the amount paid and also imposed penalty. Aggrieved by the said order, present appeal is filed.

3. When the appeal came up for hearing, Learned Counsel for the appellant submits that the impugned orders are prima facie unsustainable since the goods were provisionally cleared and out of 15(fifteen) shipping bills which are provisionally assessed, differential duty is payable only against few shipping bills. Further submits that the Larger Bench of the Hon Tribunal in the case of **ITC Ltd. Vs. CCE, Mumbai - 2004 (170) ELT 33 (Tri - LB)** has held that when the assessments are provisional, the show cause notice (SCN) could not have been issued. The Hon'ble Tribunal held that:-

> *"16. Following the ratio of the above decision the Tribunal took the view that show cause notice dated 25-9-1987 has been issued prematurely and that it could not have been issued under law because it was not in dispute that the show cause notice had invoked the provisions of Section 11A and the proviso thereof. Once notice could not have been issued for recovery of any short levy or non levy etc. even if such short levy or non levy was due to suppression or any wilful intention on the part of the noticee such penal liability could not be divorced from the demand of duty on this count. The show cause notice was; therefore set aside and it was held that the Order-in-Original No. 4/96, dated 12-8-96 which was passed pursuant to the above show cause notice cannot survive. The Tribunal therefore held that the Revenue can use any material contained in the impugned notice as independent material to*

support the finalization of assessment, after making this material known to the appellants in writing and after considering their response thereto both in writing and on personal hearing.

17. It was on the basis of the above finding the Tribunal gave the following directions.

(b) The Jurisdictional Assistant Commissioner is directed to expeditiously address himself to the finalisation of the provisional assessments as already detailed above;

(c) In view of the aforesaid judicial decisions, we find that the Revenue shall be at liberty to examine the issue of any short levy, non-levy and consequent penal liability only after the finalisation of the assessment, etc. as per law."

3.1 In the Civil Appeal No. 4166/2000 [2003 (154) E.L.T. 358 (S.C.)] filed by the Revenue against the decision of Chennai Bench was disposed of by the Hon'ble Supreme Court in the following manner:-

"It is stated by the Counsel for the assessee that pursuant to the order of this Court dated 21-7-2000, the Excise authorities have, by their order dated 26-7-2001 finalised the provisional assessments. We are told that the Respondent, ITC Ltd. had thereafter filed an Appeal to the Commissioner (Appeals) who has also disposed of the same by his appellate order dated 30-8-2002. We are informed that as per the direction contained therein, the final figures of the duty payable and paid by ITC were drawn up by the Excise Authorities and communicated to ITC.

In these circumstances, the question of law raised in the Appeal does not survive for consideration and we accordingly express no opinion on the same.

The Appeal is accordingly disposed of as infructuous".

3.2 Similarly, the revenue challenged the Larger Bench judgment before the Hon Supreme Court. The Hon Supreme Court in the case of CCE & C, Mumbai Vs. ITC Ltd - 2006 (203) 532 (SC) has held as under:

"17. Section 11A of the Act provides for a penal provision. Before a penalty can be levied, the procedures laid down therein must

> *be complied with. For construction of a penal provision, it is trite, the golden rule of literal interpretation should be applied. The difficulty which may be faced by the Revenue is of no consequence. The power under Section 11A of the Act can be invoked only when a duty has not been levied or paid or has been short-levied or short-paid. Such a proceeding can be initiated within six months from the relevant date which in terms of sub-section (3)(ii)(b) of Section 11A of the Act (which is applicable in the instant case) in a case where duty of excise is provisionally assessed under the Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof. A proceeding under Section 11A of the Act cannot, therefore, be initiated without completing the assessment proceedings.*
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> *…………….*
>
> *19. The question as to non-levy or short-levy of an excise duty would arise only when the levy had been levied in accordance with law. When a duty is levied, it becomes payable which in turn would mean legally recoverable".*

4. Learned Counsel submits that the allegations of mis-declaration, suppression of facts and non-payment or short payment of Customs Duty would arise only after finalization of assessments and adjustment of the duty paid or payable in terms of Section 18 (2) of the Customs Act, 1962. There was no legal justification for issue of show cause notice (SCN) for finalization of the assessments by the Commissioner of Customs under Section 18 (2) of the Customs Act, 1962, instead of the Proper Officers. Thus, allegations of mis-declaration or suppression of facts on the part of the exporter before finalization of assessments are without basis and not sustainable. Learned Counsel also relied on the decisions:-

(i) CC, Mumbai Vs. K C Shah – 2004 (171) ELT 476 (Tri – Mum)

(ii) ITC Ltd. Vs. UOI – 2010 (250) ELT 189 (Del)

(iii) CCE, Madras Vs. Indian Oil Corporation Ltd. – 2002 (141) ELT 334 (Mad)

(iv) CCE Vs. India Tyre & Rubber Co. Ltd.

(v) Surya Wires Pvt. Ltd. & Others Vs. Pr. Commissioner of Central Tax and Central Excise, Raipur – 2025-TIOL-736-CESTAT-DEL

(vi) G Tech Industries Vs. UOI – 2016 (339) ELT 209 (P&H)

(v) Prakash Raghunath Autade Vs. UOI – 2022 (380) ELT 264 (Bom)

(vi) Jindal Drugs Pvt. Ltd. Vs. UOI – 2016 (340) ELT 67 (P & H)

(vii) Nilesh Siyani Vs. Commissioner of Customs, Kandla – 2024 (387) ELT 626 (Tri. – Ahm.)

(viii) Vectra Advanced Engineering Pvt. Ltd. Vs. CCE, Chennai – II - 2019-TIOL-2334-CESTAT-MAD

(ix) Indroyal Furniture Company Pvt. Ltd. Vs. Tirunelveli – 2019-TIOL-1134-CESTAT-MAD

(x) CC (imports), Mumbai Vs. Ganapati Overseas – 2023 (386) ELT 802 (SC)

(xi) CC, Mumbai Vs. Vishal Exports Overseas Ltd. – 2007 (209) ELT 331 (SC)

(xii) Siddhachalam Exports Pvt. Ltd. Vs. CCE, Delhi – 2011 (291) ELT 572 (Tri. – Mumbai)

(xiii) Majan Fabrics Pvt. Ltd. Vs. CCE, New Delhi – 2017 (357) ELT 1240 (Tri – Del)

5. Learned Counsel submits that as regards the issue on merit, Learned Counsel submits that the onus of provisional and final assessment of the goods exported correctly based on proper documents for payment of Customs Duty during the relevant period (for the period prior to 08.04.2011) under Section 18 of the Customs Act, 1962 was on the Proper Officer of Customs. Para 2 of the show cause notice (SCN) refers to the documents furnished by the Appellant and relevant

documents collected from the jurisdictional Customs Office and Bankers concerned. There is no recovery or seizure of any document which was not submitted to the Proper Officer of Customs. There is no ground made out in the SCN that the Appellant had not submitted the documents as required for finalization of assessments of the Shipping Bills listed in Annexure A to the SCN.

6. As regards finding given by the Adjudication Authority that the appellant had mis-declared the value, Learned Counsel submits that the Adjudication Authority as per Para 12 of the impugned Order has recorded that the show cause notice (SCN) alleges that the exporter amended the Contracts enhancing the prices and thus mis-declared the value. Thus tabulated the Shipping Bills where the prices were enhanced and also summarized the submission by the Appellant that the assessments were provisional, the prices of export goods were enhanced by way of amendments to Sale Contracts, enhanced price was shown in the Final Invoices, the price received as per Final Invoices were corroborated by Bank Realization Certificates (BRC) which form the basis for finalization of assessments; therefore, the allegations of mis-declaration of quantity or price is not correct on facts and not sustainable. However, the Commissioner has rejected the submissions. In this regard, Learned Counsel also draws our attention to the Circular No. 12/2014-Cus dated 17.11.2014.

7. Learned Counsel further submits that the evidence relied by the Adjudication Authority cannot be considered as admissible evidence since it is not under Section 138B of the Customs Act, 1962 made applicable to adjudication proceedings in terms of sub Section (2). In this regard, Learned Counsel relied on the judgment of the Tribunal in the matter of **Surya Wires Pvt. Ltd. & Others (supra)** where it is held that:-

> *"28. It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central Excise Act and section 138 B (1) (b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under*

section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to be provided for cross-examination of such persons. The provisions of section 9D of the Central Excise Act and section 138 B (1) (b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during the inquiry/ investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence".

8. As regards the difference of price, Learned Counsel submits that as per the finding of the Commissioner itself, it is admitted that as per Rule 3 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007, the price actually paid or payable as to be adopted for assessment and from the shipping bills enumerated in Para 12 of the impugned order, the Final Invoices, which are the basis for determination of the price/ transaction value of the export goods, show higher price as per the amended Sale Contracts than the price shown in the Provisional Invoices. The Bank Realization Certificates (BRCs) corroborate the higher Price realized as per the Final Invoices.

9. Learned Authorized Representative (AR) for the Revenue reiterated the findings in the impugned order and submits that the Adjudication Authority has considered the issue in detail and only thereafter confirmed the demand. Thus, impugned order is sustainable.

10. Heard both sides and perused the records.

11. We find that the Larger Bench of the Tribunal in the case of M/s.**ITC Ltd. (supra)** held that, when the assessments are provisional, the show cause notice (SCN) could not have been issued. The allegations of mis-declaration, suppression of facts and non-payment or short payment of Customs Duty would arise only after finalization of assessments and adjustment of the duty paid or payable in terms of Section 18 (2) of the Customs Act, 1962. There was no legal justification for issue of SCN for finalization of the assessments by the Commissioner of Customs under Section 18 (2) of the Customs Act, 1962, instead of the Proper Officers.

12. Accordingly, impugned order is set aside, and Jurisdictional Assistant Commissioner is directed to expeditiously address himself to the finalisation of the provisional assessments and the Revenue shall be at liberty to examine the issue of any short levy, non-levy and consequent penal liability only after the finalisation of the assessment, etc., as per law. Revenue can use any material contained in the impugned notice as independent material to support the finalization of assessment, after making this material known to the appellants in writing and after considering their response thereto both in writing and in the personal hearing.

13. In view of the above discussion the Appeal is allowed by way of remand in the above terms.

(Operative portion of the order was pronounced in open court on conclusion of hearing.)

(P. A. AUGUSTIAN)
MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)
MEMBER (TECHNICAL)

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