

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH – BANGALORE

Customs Appeal No. 20003 of 2020

(Arising out of order-in-appeal No.COC-CUSTOM-000-APP-24 to 26/2019-20 dated 24.06.2019 passed by the Commissioner of Customs (Appeals), Customs House, Cochin).

Anil Parmar

C-12/905, Sector-9, Om Shiv Sakthi Society
Charkop, Kandivli West
Mumbai-400 067.

Appellant

VERSUS

Commissioner of Customs

Customs House, Willingdon Island
Cochin-682009.

Respondent

WITH

Customs Appeal No. 20004 of 2020

(Arising out of order-in-appeal No. COC-CUSTOM-000-APP-24 to 26/2019-20 dated 24.06.2019 passed by the Commissioner of Customs (Appeals), Customs House, Cochin).

Mansukh M. Jagda

Prop. of M/s First Campaign
1902/B, Vrindavan Towers
Chikuwadi, Borivalli West
Mumbai-400092.

Appellant

VERSUS

Commissioner of Customs

Customs House, Willingdon Island
Cochin-682009.

Respondent

WITH

Customs Appeal No. 20005 of 2020

(Arising out of order-in-appeal No. COC-CUSTOM-000-APP-24 to 26/2019-20 dated 24.06.2019 passed by the Commissioner of Customs (Appeals), Customs House, Cochin).

Kishin S. Loungani

M/s R. Kishin & Co.,
Room No. 208 (207), 2nd Floor
Bherumal Chambers,
149, Zaveri Bazar, Mumbai-400002.

Appellant

VERSUS

Commissioner of Customs

Customs House, Willingdon Island
Cochin-682009.

Respondent

WITH

Customs Appeal No. 20303 of 2020

(Arising out of order-in-appeal No. COC-CUSTOM-000-APP-15 to 19/2020-21 dated 26.05.2020 passed by the Commissioner of Customs (Appeals), Customs House, Cochin).

Kamal Kishin Loungani

Room No. 208 (207), 2nd Floor
Bherumal Chambers,
149, Zavery Bazar, Mumbai-400002.

Appellant

VERSUS

Commissioner of Customs

Customs House, Willingdon Island
Cochin-682009.

Respondent

WITH

Customs Appeal No. 20304 of 2020

(Arising out of order-in-appeal No. COC-CUSTOM-000-APP-15 to 19/2020-21 dated 26.05.2020 passed by the Commissioner of Customs (Appeals), Customs House, Cochin).

Mansukh M. Jagda

Prop. of M/s First Campaign
1302/B, Vrindavan Towers
Chikuwadi, Borivalli West
Mumbai-400092.

Appellant

VERSUS

Commissioner of Customs

Customs House, Willingdon Island
Cochin-682009.

Respondent

WITH

Customs Appeal No. 20305 of 2020

(Arising out of order-in-appeal No. COC-CUSTOM-000-APP-15 to 19/2020-21 dated 26.05.2020 passed by the Commissioner of Customs (Appeals), Customs House, Cochin).

Kishin S. Loungani

M/s R. Kishin & Co.,
Room No. 208 (207), 2nd Floor
Bherumal Chambers,
149, Zavery Bazar, Mumbai-400002.

Appellant

VERSUS

Commissioner of Customs

Customs House, Willingdon Island
Cochin-682009.

Respondent

WITH

Customs Appeal No. 20306 of 2020

(Arising out of order-in-appeal No. COC-CUSTOM-000-APP-15 to 19/2020-21 dated 26.05.2020 passed by the Commissioner of Customs (Appeals), Customs House, Cochin).

Sudhir Pujara**Appellant**

Prop. of M/s Muktidaya Exports
Room No. 2A, Ganesh Krupa Chawal
Sania Compound, Dutt Mandir Cross Road
Near New Link Road
Dhanukarwadi, Kandiveli Mumbai

Now Residing at:-

A-104, Neelu Co-operative Housing Society
Nallasopara, Palghar Distt, Maharashtra.

VERSUS

Commissioner of Customs**Respondent**

Customs House, Willingdon Island
Cochin-682009.

AND

Customs Appeal No. 20307 of 2020

(Arising out of order-in-appeal No. COC-CUSTOM-000-APP-15 to 19/2020-21 dated 26.05.2020 passed by the Commissioner of Customs (Appeals), Customs House, Cochin).

Anil Parmar**Appellant**

(Prop. Ambe Traders)
C-12/905, Sector-9,
Om Shiv Sakthi Society, Charkhop,
Kandivli West, Mumbai-400 067.

VERSUS

Commissioner of Customs**Respondent**

Customs House, Willingdon Island
Cochin-682009.

APPEARANCE:

Shri Niveet Seth, Sh. Sarthak Sachdev, Sh. Prakash Shah, Sh. Mihir Mehta
Advocates for the appellants

Ms. Sangeeta D. S., Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. C. J. MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NOS. 20169 - 20176/2022

DATE OF HEARING: 04.01.2022
DATE OF DECISION: 24.03.2022

ANIL CHOUDHARY:

The issue involved is whether the appellants herein have connived in doing circular trading in order to claim wrongful benefit of duty drawback. This batch of appeals are against Order-in-Appeal No. COC-CUSTOM-000-APP-24 to 26/2019-20 dated 24.06.2019 and Order-in-Appeal No. COC-CUSTOM-00-APP-15 to 19/2020-21 dated 26.05.2020.

2. The case of the department in the present proceedings is that few firms were indulging in circular trading of footballs and other sports items under the claim of drawback.

3. It is the case of the department that based on specific intelligence received and developed by the Directorate of Revenue Intelligence ('DRI'), Cochin, which indicated that the Appellant Shri Kishin Loungani (Prop. R. Kishin & Co.) was exporting inflatable footballs made of PU, Winter Sport Gloves/ Football Goalkeeper Gloves and Golf Balls to Kamal international trading, Dubai. UAE (proprietor- Kamal Loughani), through port of Cochin wherein he was indulging in circular trading of footballs and other sports items under the claim for drawback and also availing other benefits under Chapter 3 of the Foreign Trade Policy. For ease of reference the appellants shall be referred to as-

- 1st Appellant – Kishin Loungani
- 2nd Appellant – Kamal Kishin Loungani
- 3rd Appellant – Sudhir Pujara
- 4th Appellant – Anil Parmar
- 5th Appellant - Mansukh M. Jagda

4. It is further case of the department that the export goods were highly overvalued and were also being re-imported in the name of two importers viz. Shri Anil Parmar (Prop. Ambe Traders) and Shri Sudhir Pujara (Prop. Muktidaya Exports) at a very low value, declaring the same to be of Chinese origin.

5. It is further case of the department that since huge amount of ineligible drawback and other export incentives had been availed, a watch was kept on the export consignment of Mr. Kishin Loungani at Cochin port.

6. The goods covered by the 14 shipping bills filed by Mr. Kishin Loungani were seized before export from Cochin port along with some goods which were seized from the private warehouses at Kon and Palaspe villages in Maharashtra, wherein the imported goods were stored by Mr. Anil Parmar.

7. Investigations were carried out, statements of various persons were recorded and 2 show cause notices dated 11.12.2015 and 28.04.2017 were issued to the Appellants.

8. The aforesaid show cause notices came to be adjudicated by two separate Orders-in-Original respectively dated 12.12.2017 and 17.09.2018.

9. Appeals filed by the Appellants against the said Orders-in-Original were rejected by the impugned Orders-in-Appeal dated 24.06.2019 and 26.05.2020.

10. The 1st proceedings which culminated into Order-in-Appeal dated 24.06.2019, pertain to confiscation of goods, covered under 14 shipping bills seized before export from Cochin port and the goods seized from the private warehouses at Kon and Palaspe villages in Maharashtra wherein the imported goods were stored by Mr. Parmar (one of the importers), under Section 113(d), (i) (ia) of the Customs Act. The amount of drawback claimed by Mr. Kishin Loungani (1stAppellant) in respect of the said 14 shipping bills were rejected.

11. 2nd proceedings which culminated into Order-in-Appeal dated 26.05.2020 pertain to recovery of drawback sanctioned/ pending sanction in relation to past exports under 545 shipping bills. The drawback of Rs. 15,37,11,193/- sanctioned and granted was sought to be recovered and balance amount of pending drawback claim of Rs. 6,22,75,310/- was rejected.

12. The broad allegations/findings of the lower adjudicating/ appellate authorities are as follows:

- (i) Appellant - Shri Kishin Loungani (Prop. R. Kishin & Co.) initially purchased certain quantity of sports goods from local market in India and exported it from Cochin.
- (ii) Appellant - Shri Mansukh Jagda (Prop. First Campaign) was declared as supporting manufacturer of the goods exported by the Appellant – Kishin Loungani.
- (iii) The exported goods were received in Dubai by the firms owned and/or operated by the Appellant - Shri Kamal Loungani, who is the son of the Appellant – Kishin Loungani.

- (iv) The said goods were imported in Mumbai in bulk in the name of Appellant - Shri Anil Parmar (Prop. Ambe Traders) and Appellant - Shri Sudhir Pujara (Prop. Muktidaya Exports), at much lower value.
- (v) The goods imported were again re-packed and exported from Cochin Port.
- (vi) The goods exported were of inferior quality and were overvalued to claim higher drawback.
- (vii) No FIRC was produced by the Appellant - Kishin Loungani.

13. We have heard Shri Prakash Shah, Advocate for Appellants – Sh. Kishin Loungani; Shri Sarthak Sachdeva, Advocate for Appellants – Anil Parmar & Sudhir Pujara – Appellant – Mansukh Jagda was not represented but filed written submissions. We have heard Ms. D. S. Sangeetha, Additional Commissioner (AR) on behalf of the Revenue.

14. We have examined the records and the written submissions filed by the Appellants including the 5th Appellant - Shri Mansukh Jagda (Prop. First Campaign).

15. We have also carefully examined the written submissions filed on behalf of the Revenue.

15.1 The Appellants and the Revenue, have raised following main contentions.

Submissions on behalf of Sh. Kishin Loungani & Kamal

The Appellants have contended, by relying upon the judgment of the Hon'ble Supreme Court in the case of Canon India Pvt.

Ltd. Vs Commissioner of Customs, 2021 (3) TMI 384 – Supreme Court and the judgment of Hon. Bombay High Court in the case of Commissioner of Customs (Export), Raigad Vs Reliance Industries Ltd., 2021 (12) TMI 859, that the show cause notices dated 11.12.2015 and 28.04.2017 issued by the Additional Commissioner of Customs, DRI, for rejection of the declared value of goods exported, under Rule 8 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 ('Valuation Rules') are without jurisdiction as Additional Commissioner of Customs, DRI is not the proper officer to re-determine the value assessed by the proper officer under Section 51 of the Customs Act, as the orders under Section 51 of the Customs Act were not originally passed by the Additional Commissioner, DRI.

15.2. It was submitted that the use of definitive article 'the' before the words 'proper officer' in Rule 8 of the Valuation Rules, manifest the intention of the Government of India that the power under Rule 8 the Valuation Rules can be exercised by 'the proper officer', who made the original assessment and not by any other officer or other proper officer. Reliance in this regard, was placed on the following judgments of the Hon'ble Supreme Court:

- (a) Consolidated Coffee Ltd. & Anr. Vs Coffee Board, Bangalore, (1980) 3 SCC 358
- (b) Shri Ishar Alloy Steels Ltd. Vs Jayaswals Neco Ltd., (2001) 3 SCC 609

15.3 It was further submitted that though the aforesaid judgments in the case of Cannon India and Reliance Industries are

dealing with demand under the provisions of Section 28 of the Customs Act, ratio thereof is clearly applicable to exercise of powers under Rule 8 of the Valuation Rules as well.

15.4 It was submitted that following the ratio of the judgment of the Hon'ble Supreme Court in the case of Canon India (supra), the Hon'ble Gujarat High Court in the case of CMR Chiho Industries Pvt. Ltd. Vs Union of India, 2021 (5) TMI 327 has held that Order of detention and seizure of the goods by the DRI is unsustainable.

15.5 In the present case, the detention and the consequent seizure of the goods is by the DRI and hence, in view of the aforesaid judgment the same is illegal and without jurisdiction.

16. The Ld. Counsel further contended that once the seizure itself is illegal and untenable in law, the entire proceedings are without jurisdiction.

16.1 It was submitted that though the above grounds on jurisdiction were not taken in the earlier adjudication/ appellate proceedings, it is well settled position in law that the question of jurisdiction can be raised at any stage. In support of this proposition, reliance was placed on the following judgments:

- (a) Commissioner of Sales Tax Vs Sarjoo Prasad Ram Kumar, 1976 (37) STR 533.
- (b) Jam Shri Ranjit Singhji Spg. and Wvg Mills Limited, 1991 (52) ELT 365
- (c) Nylex Traders Vs Commissioner of Customs (Preventive), Mumbai 2011 (274) ELT 71

16.2 It was submitted that the allegation of circular trading is completely baseless and based on assumptions and presumptions as the goods exported and imported were made of completely different material. The goods imported by other persons/ appellants at Nhava Sheva are footballs of Chinese Origin made of PVC, whereas the footballs exported by the Appellant – Kishin Loungani from Cochin are of Indian Origin and made of Polyurethane ('PU'). Hence, the purported findings that exported goods were re-imported and again exported repeatedly, and thereby indulged in circular trading, is not established and devoid of merits.

16.3 It was submitted that the country of origin in respect of the goods imported was declared as 'Republic of China' in the bills of entry filed. Certificate of Country of Origin issued by Dubai Chamber of Commerce certified that the goods imported were of Chinese origin.

16.4 It is clear from the records that the country of origin in respect of the goods exported was declared as 'India' in the shipping bills.

16.5 The said declarations made in the Bills of Entry filed for import of goods by the 3rd and 4th Appellant and the declaration made in the Shipping Bill for export of goods by the 1st Appellant are not disputed and it is clearly established that the goods imported and exported are different.

16.6 It was submitted that no proceedings were initiated in respect of imported goods for any alleged contravention of Section 111 of the Customs Act. Thus, the declared description and the Country of Origin in respect of imported goods are not in doubt and are not alleged as being mis-declared by the importer(s) in the present proceedings.

16.7 It was submitted that the Revenue to prove its case relied upon 2 test reports. 1st test report pertains to two samples allegedly drawn one from the goods seized at Panvel and the other from export consignments. The Chemical Examiner in the test report has not specified the details of the source from which the samples were drawn. From the test reports, it is not clear whether the football made from PU were from the sample drawn from the consignment seized at the Cochin port or from the warehouse of the 3rd Appellant, where the goods were seized. There is always a possibility of error when samples are marked as "A" and "B". 2nd test report confirmed that the sample of football exported from the Cochin port was made out of PU and the sample of football seized from the warehouse of 3rd Appellant was made out of PVC. The test reports supported the case of the Appellants that the goods imported and the goods exported were made from different material and the allegation of circular trading is not supported by any material evidence.

16.8 It was submitted that the expert opinion of the international footballer Shri M. M. Jacob appeared to be unreliable and inconclusive. Shri Jacob had given his purported opinion based on visual examination of two samples and according to him both the

footballs were of same quality and were made from low quality material.

16.9 It was submitted that the investigation of the department is incomplete and inconclusive and is lacking in many aspects and does not substantiate the allegation of over valuation and circular trading as there are no allegations/findings/investigation with regard to the following crucial aspects:

- (a) No cogent material as per law is produced to substantiate compensatory payment to the overseas buyer.
- (b) Except for the statement of the Appellant, who was not even examined under Section 138B of the Customs Act, no corroborative, cogent and conclusive material is on record to demonstrate that money is transferred overseas through hawala channels. Reliance in this regard, is placed on the judgment of the Hon'ble Supreme Court in the case of Commissioner of Customs, Mumbai Vs Tex-age, 2016 (340) ELT 3 (S.C.). Further, reliance was also placed on the following judgments:
 - Sanjay Kapoor Vs CC, 2004 (173) ELT 198
 - Reco Industries Vs CC, 2001 (131) ELT 694 (T)
 - Kohli Auto Vs CC, 2002 (139) ELT 137 (T)
 - K.K. Exports Vs CC, 2001 (132) ELT 296 (T)
 - Akshay Exports & Industries Vs CC, 2003 (156) ELT 268
- (c) The examination report regarding the exported goods and satisfaction of proper officer regarding declared value recorded in the EDI system for the concerned shipping bills have not been dealt with by the authorities below. The goods were examined before being exported as they were exported under the claim for drawback.
- (d) It was submitted that no reliable, cogent and material evidence was produced for transportation of imported goods from the warehouses of the importers located at (Kon, Palaspe) Panvel, Maharashtra to Cochin.

- (e) There is no co-relation or documentary evidence like any brand name, trade mark, batch number, logo etc. to suggest that the goods exported by the 1st Appellant and those imported by the 3rd and 4th Appellant are the same.

16.10 It was submitted that the show cause notice refers to certain emails and the attachments thereto exchanged between one Shri Nihar Pujara and the 1st Appellant. Shri Nihar Pujara is not a co-noticee and statement of Nihar Pujara is not forthcoming from the show cause notice or the relied upon documents. In any event, the said emails do not establish charge of over-invoicing with an intent to claim excess incentive by resorting to circular trading.

16.11 Significantly in the impugned Order, the Commissioner of Customs (Appeals) does not rely upon the emails to sustain the said charge.

16.12 It was submitted that the authorities below have grossly erred in holding that there were no records to determine the value under Rules 4 and 5 of the Valuation Rules and hence, the value is determined under Rule 6 of the Valuation Rules by resorting to market survey. The goods imported were common sports goods such as footballs manufactured with PU/PVC and other sports articles, for which the details of identical or similar contemporaneous imported goods are easily available.

16.13 It was submitted that resorting to Rule 6 of the Valuation Rules and determining the value as per the market survey can be undertaken as a last resort, when the export value cannot be determined as per the other Rules. Reliance in this regard was placed

on the judgment of the Hon'ble Supreme Court in the case of Siddachalam Exports Pvt. Ltd. Vs CCE, Del – III, 2011 (267) ELT 3 (S.C.).

16.14 It was submitted that, in any event, the market survey undertaken by Shri Jozy Joseph, Senior Intelligence Officer is inconclusive and cannot be relied upon as it does not provide any basis for arriving at the market value of the goods. No corresponding documents/ basis for determination of the market value have been provided.

16.15 It was submitted that in absence of any cogent evidence to establish that the son of the 1st Appellant i.e. the 2nd Appellant was an active partner of all the firms to which the goods were exported from India and the firms from which the goods were allegedly reimported into India, the declared transaction value for export goods cannot be rejected.

16.16 It was further submitted that the purported finding that the transaction is between the Appellant and his son is incorrect, and is merely based on the statement of person/s not examined under Section 138B and hence not relevant.

16.17 It was submitted that the market value of the footballs and other sports goods as determined by the department on the basis of the market survey is much higher than the amount of drawback claimed by the 1st Appellant and hence the same are not covered under the provisions of Section 76(1)(b) of the Customs Act. There

was a cap on the maximum drawback per piece in respect of footballs.

16.18 It was submitted that even from the rate of drawback, it is evident that the Revenue had already taken effective steps to curb any loss due to any over-valuation. The value declared by the 1st Appellant was less than the maximum prescribed permissible value for the purpose of drawback.

16.19 It was submitted that from the following circulars/ clarifications/ public notices it was clarified that that the objective of determining the present market value is to restrict the export incentives. This is further evident from Section 76(1)(b) of the Customs Act, that the market value should not be less than the drawback thereon:

- Circular No. 69/1997-Cus dated 8.12.1997
- Public Notice No. 22/2004 issued vide F. No. S/3-Misc/-PRO 67/2004 – ACC dated 27.05.2004 issued by Commissioner of Customs (Exp.)
- Circular No. 74/2020 dated 07.09.2000

16.20 It was submitted that as per the drawback schedule, irrespective of the declared Free on Board ('FOB') value, drawback cap per unit of football is Rs. 80. This meant that even though the drawback rate is 13.4%, the incentive value is restricted to Rs. 80, if the amount of drawback in percentage terms exceeds the drawback cap per unit of Rs. 80. In the instant case, drawback was restricted to Rs. 80 and therefore, the allegation of overvaluation for claiming excess incentive are legally not tenable.

16.21 It was submitted that sale consideration in respect of all the exports has been received by the 1st Appellant and the copies of the Bank realization certificates (e-BRC's) evidencing the same are available on the website of DGFT. Hence, the contention that consideration has not been received against the export of goods, is untenable in law.

16.22 It was further submitted that the entire case against the 1st Appellant is based on the statements of various persons purported to have been recorded under section 108 of the Customs Act, none of whom were examined in the adjudication proceedings as required under Section 138B of the Customs Act.

16.23 It was submitted that since the Revenue chose not to examine the persons whose statements were relied upon in the SCN, before the adjudicating authority, they are to be excluded from the evidence. Once these statements are excluded, there is no evidence on record to establish the allegation of circular exports/trading.

16.24 It was submitted that a statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under the Customs Act shall be relevant, for the purpose of proving, in any proceedings under the Customs Act, the truth of the facts which it contains only when the person who made the statement is examined in the case before the adjudicating authority and the adjudicating authority is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice. None of the

exceptions contained in Section 138B(1)(a) are recorded as reason to dispense with the mandatory examination. Reliance in this regard, was placed on the following judgments:

- CCE, Meerut-I Vs Parmarth Iron Pvt. Ltd., 2010 (260) ELT 0514 (All.)
- Krishna Brothers vs Commissioner of Customs, Cochin, 2017 (356) ELT 222 (Ker.)
- Jindal Drugs Pvt. Ltd. Vs Union of India, 2016 (340) ELT 67 (P&H)
- Additional Director General (Adjudication) Vs Its My Name Pvt. Ltd., 2021 (375) ELT 545 (Del.)
- Gaurav Mungad Vs CCE, Bhopal, 2021 (376) ELT 0069 (Tri - Del.)

17. Reliance was placed on the judgment of the Hon'ble Supreme Court in the case of Sukhwant Singh Vs State of Punjab, (1995) 3 SCC 367, wherein by relying upon Section 138 of the Indian Evidence Act, 1872, the Hon'ble Supreme Court has held that any witness has to be first examined in chief and that there is no meaning in tendering a witness for cross-examination only. The said judgment has been relied upon by this Tribunal in the case of Swiber Offshore Construction Pvt Ltd vs Comm. Of Cus., Kandla, 2014(301) ELT 119.

17.1 It was submitted that the reasons stated by the lower adjudicating authorities/ appellate authorities for contending that Section 138B of the Customs Act, will not be applicable in the present case are illegal and untenable. Reliance in this regard, was placed on the judgment of Gaurav Mungad (supra).

17.2 It was submitted that the case against the Appellant of alleged circular exports/trading cannot be proved solely based on

statements without independent corroboration with the evidence gathered. Reliance in this regard was placed on the judgment of the Hon'ble Supreme Court in the case of A. Tajudeen Vs Union of India, 2015 (317) ELT 0177 (S.C.) and this Tribunal in the case of Narendra Raval vs Commissioner of Customs, 2017 (347) ELT 565.

17.3 It was submitted that retraction of the statement by the 1st Appellant before the Hon'ble Kerala High Court cannot be ignored and brushed aside merely as an after-thought. Reliance in this regard was placed on the judgment of the Hon'ble Supreme Court in the case of Parle Bevarages Pvt. Ltd. Vs CCE, Bombay, 1998 (98) ELT 585 (S.C.).

17.4 The statements of the Appellants in other connected appeals, particularly the supplier viz. Shri Mansukh Jagda are contradictory and not conclusive and hence the same cannot be relied upon.

18. In view of the above submissions, it was contended that the confiscation, re-assessment of value, the recovery of drawback sanctioned under Section 75 and Rule 16 / Rule 16A of the Drawback Rules, and Denial of drawback are erroneous.

19. Further, it was submitted that fine and penalty under Section 114 and 114AA cannot be imposed on the 1st and 2nd Appellants.

19. For the 2nd Appellant(resident of Dubai), an additional point was argued that period under dispute in the above appeal is

prior to the amendment of Section 1(2) of the Customs Act vide Section 57 of the Finance Act, 2018 with effect from 29.03.2018. In terms of unamended Section 1(2) of the Customs Act, no action can be initiated against the 2nd Appellant (residing outside the territory of India). It is not the case of the department that amendment to Section 1(2) of the Customs Act vide Section 57 of the Finance Act, 2018 applies retrospectively.

Submissions on behalf of 3rd and 4th Appellants (Mr. Sudhir Pujara and Anil Parmar)

20. The Ld. Counsel for the 3rd and 4th Appellant substantially adopted the arguments made by the Ld. Counsel for the 1st and 2nd Appellant on jurisdiction, merits, non-observation of the procedure prescribed under Section 138B of the Customs Act, etc.

21. In addition to the arguments as stated above, to corroborate that the goods imported and exported are different, the 3rd and 4th Appellant submitted that the average weight of the footballs as declared in the import documents and the export documents is substantially different as both are made of different constituent materials viz. imported goods manufactured out of PVC and the exported goods manufactured out of PU.

22. The average weight of footballs exported by the 1st Appellant which was made out of PU was 429 Grams and the average weight of footballs imported by the 3rd and 4th Appellants was 250 Grams and 344 Grams respectively.

23. Further, it was contended during the course of the hearing that the investigation has missed out a crucial fact that the 3rd and 4th Appellants had sold the imported footballs and the other sports goods in the local market. Accordingly, it was submitted that no penalty under Section 114 and Section 114AA can be imposed on the 3rd and 4th Appellant.

Submission on behalf of 5th Appellant

24. The 5th Appellant-Mr. M Jagda was the supporting manufacturer in respect of the footballs and other sports goods exported by R. Kishin & Co.

24.1 It is submitted that the 5th Appellant had manufactured the footballs from PU and supplied the same to 1st Appellant for onward exports. The invoices for sale of manufactured goods from 5th Appellant to 1st Appellant are on record.

24.2 The 5th Appellant had not prepared or dealt with any false documents regarding the value and manufacture of the aforesaid exported goods and had not connived in any circular trading of the goods, as held in the impugned Order.

24.3 It is a fact on record that the footballs and other sports goods purportedly procured from the local market by 1st Appellant and declared as manufactured by the 5th Appellant, were Indian goods. However, the goods imported by the 3rd and 4th Appellants were of Chinese origin and hence there can be no circular trading in the facts of the present case.

24.4 Other arguments of the 5th Appellant are similar to those stated above. Accordingly, it was submitted that no penalty under Section 114 and Section 114AA can be imposed on the 5th Appellant.

Submissions on behalf of the Respondent Revenue

25. The issue in the judgment of Canon India (supra) is in relation to the power of the DRI Officers to issue SCN and/or raise demand under Section 28 of the Customs Act.

26. In the present case, the Additional Commissioner, has issued the SCN and the question of jurisdiction does not arise. Also, the judgment of Canon India (supra) deals with the demand under the provisions of Section 28 of Customs Act, which is different from the exercise of powers under Rule 8 of Valuation Rules. Hence the ratio of Canon Judgement cannot be applied in the present case.

27. The facts of the case in the CMR Chiho Industries Pvt Ltd Vs Union of India 2021 (5) TMI 327 is totally different from the present issue at hand and hence the said judgment cannot be relied upon.

28. The lower authorities have relied upon the statements made by various persons during the course of investigation which provides clear cut evidence of the role of each Appellant in the transaction and that has not been controverted by the Appellants.

29. In his statement, the 1st Appellant has admitted that the exports to different companies were only for namesake and that all the goods were being received by his son Shri Kamal Loungani who

then used to remove the goods from the packages and send them back to India.

30. Similarly, statement of driver - Shri Narendra Deoram, statement of Shri Kamlesh Parmar – supervisor, and all others are corroborated and it appears that the 1st Appellant has indulged in circular trading of footballs and other sports goods between Cochin-Dubai; Nhavasheva-Cochin. In several judgments, it has been held that statements of co-accused can be taken as evidence.

31. When the 1st Appellant was arrested and produced before the Honourable Additional Chief Judicial Magistrate, Ernakulam he neither retracted the statements given by him under Section 108 of the Customs Act nor made any complaint against the DRI officials before the magistrate at the time of remand. The allegations of coercion, threat, to record the statements appears to be an afterthought. Reliance is placed on the following judgments:

- Naresh J. Sukhwani Vs Union of India, 1996 (83) ELT 258 (S.C.)
- Telestar Travels Pvt. Ltd. Vs Special Director of Enforcement, 2013 (289) ELT SC

32. Further, reference is made to the judgment of the Hon'ble Supreme Court in the case of Surjeet Singh Chabra Vs Union of India, 1996 (10) TMI 106 – SC, wherein it is held that confession, though retracted, binds the Petitioner. Further, reliance in this regard, is placed on the following judgments:

- K.P. Abdul Majeed Vs Commissioner of Customs 2014 (309) ELT 671

- Commissioner of customs, Kerala Vs Om Prakash Khatri, Dhiraj Kumar Devasi, Surendra Singh Rao and Panna Gold Impex Ltd. 2019 (3) TMI 457 - Kerala high court

33. It is submitted that the failure to give the opportunity to cross-examine the witnesses is not violative of principle of natural justice. The Apex Court has reiterated the same in the case of Surjeet Singh Chhabra (supra). Reliance is further placed on the following judgments:

- Kanungo & Co. Vs CC, Calcutta & Ors., 1983 (13) ELT 1486 (S.C.)
- Telestar Travels Pvt. Ltd. (supra)
- Shri Odiyandi Ayyappa Muddaiah, Shri Rajendra Prakash Pawar and Mohammed Anif Vs CC, 2019 (8) TMI 337

34. Reliance is placed on the findings of the Order-in-Original No. 139/2018, wherein it is stated that the adjudicating authority has observed from available record, that the fact that goods have been reimported has not been declared at the time of filing the bill of entry. But going by the admission, it is clear that the imported goods were used in circular trading. It is also evident that the consignments had mixture of different varieties and the samples were drawn at random.

35. Since the issue of circular trading was master minded and the goods were transported to different godowns, in the light of the admission of the act of circular trading by the 1st Appellant himself, the contentions raised by the Appellants appear to be mere after-thought.

36. It was submitted that no evidence has been brought forward by the 1st and 2nd Appellant to prove that the relationship

between them has not influenced the price, which now cannot be considered as transaction value.

37. Though there are certain deficiencies in the investigation by the Revenue, in the case of undervaluation like in the present case, it is difficult to attain mathematical precision. In a quasi-judicial proceedings like this, the adjudicating/ lower appellate authorities are concerned more with the pre-ponderance of probability, rather than proof beyond reasonable doubt, as held by various judicial precedents. Reliance is placed on the following judgments:

- Carpenter Classic Exim Pvt. Ltd. Vs CC, Bangalore, 2006 (200) ELT 593 (Tri. – Bang.).
- CC, Madras and Ors. Vs D. Bhoormull, 1974 (4) TMI 33 - Supreme Court.

38. The 3rd and 4th Appellants do not deal with the same kind of goods all the time. They deal with variety of goods. Similarly, the export consignment is also different both the times and hence, there is a possibility that what is exported is imported next time in cyclical manner.

39. The test reports clearly show that the samples A and C belong to the goods seized from the godown of the 3rd Appellant. Sample A drawn from godown of 3rd Appellant was made of PU, while Sample C also drawn from godown of 3rd Appellant was made of PVC. This clearly shows that 3rd Appellant does not import similar type of goods at all the times. Similarly, Sample B and sample D both from export consignment are also different. There is preponderance of probability that both quality of goods are imported cyclically. What is

significant is the statement of the main person viz. 1st Appellant - Shri Kishin Loungani, which is in tandem with the statements of other persons involved.

40. Penalties have been rightly imposed on all the Appellants in view of the findings against them in the impugned Orders issued by the lower adjudicating and the Appellate authorities.

41. We have considered the rival contentions and submissions. Upon the perusal of the record and in view of the submissions made, we are of the considered opinion that entire case of the Revenue is based on the statements of the Appellants who are co-accused and various other persons like driver and other employees of the 1st Appellant, transporters, etc.

42. We find that entire case of the Revenue is mainly based on the statements, which are not corroborated with any independent credible evidence.

43. The Hon'ble Supreme Court in the case of A. Tajudeen Vs Union of India, 2015 (317) ELT 177 (S.C.), in a challenge relating to adjudication proceeding albeit by Enforcement directorate, has held as follows:

"3. Before adjudicating upon the merits of the controversy, it is essential to narrate the factual position leading to the issuance of the aforesaid memorandum dated 12-3-1990. The facts as they emerge from the pleadings, and the various orders leading to the passing of the impugned judgment rendered by the High Court of Judicature at Madras (hereinafter referred to as, the High Court) on 28-9-2006, are being chronologically narrated hereunder :-

.....

.....

16. Having given our thoughtful consideration to the aforesaid issue, we are of the view that the statements dated 25-10-1989 and 26-10-1989 can under no circumstances constitute the sole basis for recording the finding of guilt against the appellant. If findings could be returned by exclusively relying on such oral statements, such statements could easily be thrust upon the persons who were being proceeded against on account of their actions in conflict with the provisions of the 1973 Act. Such statements ought not to be readily believable, unless there is independent corroboration of certain material aspects of the said statements, through independent sources. The nature of the corroboration required, would depend on the facts of each case....."

44. Similar view is taken by the Hon'ble Supreme Court against excessive reliance merely on oral statements, in the following cases:

- Vinod Solanki v. UOI - 2009 (233) E.L.T. 157 (S.C.),
- Shafeek P.K. v . Commissioner of Customs, Cochin - 2015 (325) E.L.T. 199 (S.C.),
- Haricharan Kurmi v. State of Bihar - (1964) 6 SCR 623

45 During the course of the hearing, Learned Counsel for the Appellants have specifically brought to our notice certain deficiencies in the investigation and the Revenue in its written submissions admits that there is deficiency in the investigation, but according to revenue that is not fatal to its case. We find that the most crucial element in any case of circular trading is to establish the money trail to substantiate compensatory payment. We find that in the present case no material, much less credible material is produced to substantiate compensatory payment to the overseas buyer.

46. Except for the statement of the 1st Appellant, no other material and/or conclusive evidence is on record to show that money is transferred overseas. This Tribunal in the case of Tex-age Vs CC, Exports, Nhava Sheva, 2008 (221) ELT 0395 (Tri – Bom) has held as follows:

*"7. As regards allegation of flow-back of remittances by way of hawala, the stand of the department is that "& Co." cheques issued by the appellants were discounted by Pradeep Delia etc. and the cash so generated was returned to the appellants, who used it to generate remittances from abroad. The further finding is that foreign bill purchase credit enjoyed by the discounting firms of Satish Choudhary (against which advance remittance was obtained) was rotated. However, the record does not bring out how the cash was so used to generate remittances, or how the cash was rotated. It is also not alleged that the remitting firms in Dubai made payments out of their own pocket and the allegation is that Dirhams were procured from local Indians like Salam, Paicher and Zaida in Dubai. There is no allegation or finding that these three individuals were under the control of the appellants and **therefore, for the department to succeed in its allegation of over-invoicing and hawala, compensatory payments against supply of such Dirhams in India have to be established which has not been done and no one has been identified as the person or persons to whom such compensatory payments were made in India.**"*

(emphasis supplied)

47. The Hon'ble Supreme Court, in an appeal by the revenue, dismissed the appeal as reported in Commissioner of Customs, Mumbai Vs Tex-age, 2016 (340) ELT 3 (S.C.), and held as follows:

"3. A perusal of the judgment of the CESTAT shows that the entire material placed before it has been discussed and on that basis, a finding of fact is arrived at to the extent that the allegations of flow back of the remittances by way of Hawala could not be proved by the Department. It is further recorded by the CESTAT that the invoices etc. which were raised of particular amounts were duly checked by the Department at the time when the exports were being made. However, the entire amount as reflected in the said invoices was received by the respondents.

4. In view of the aforesaid finding of fact and in the absence of any evidence to show that the money was remitted by way of Hawala, we are of the opinion that the case of over-invoicing has not been established by the Department. We do not find any infirmity in the order of the CESTAT. The finding recorded is a

pure question of fact and no question of law arises for consideration.”

48. In the present case, the trail of flow back of money to the overseas buyer from the 1st Appellant, due to the alleged over-invoicing, is not established in the investigation. Further, the Respondent revenue has failed to establish the said money trail even during the hearing before this Tribunal.

49. We further find from records that the Revenue has failed to prove even by probability that the footballs and other sports goods exported were subsequently imported back and again exported the same. The footballs exported by the 1st Appellant from India were of Indian origin, manufactured from Polyurethane. Further, the exports were under the claim for drawback. The officer who passed order under Section 51 of the Customs Act was satisfied after examination of the exports, that they are as declared in the shipping bill. The goods imported by the 3rd and 4th Appellant were of Chinese origin and made from PVC, as declared in the Bills of Entry filed by the said importers. The Chinese origin of the goods is certified by the Dubai Chamber of Commerce. No inquiry appears to have been made from Dubai Chamber of Commerce. There is no allegation in the show cause notice nor was it contended by the Ld. Authorized Representative that the above documents are forged or manipulated. Further, no proceedings initiated in respect of imported goods for any alleged contravention of Section 111 of the Customs Act is brought on record by either side. Accordingly, it can be concluded that the declarations made in the import documents by the 3rd and

4th Appellants and the goods exported by the 1st Appellant are not disputed.

50. From the technical literature submitted by the Ld. Counsel of the Appellants, we understand that footballs are generally made from both PU and PVC. Footballs manufactured out of PU are costlier compared to those manufactured from PVC, which is a cheaper material. The 3rd and 4th Appellants in their written submissions have submitted a chart providing the weight of the footballs imported by them and the weight of the footballs exported by the 1st Appellant. From the perusal of the said chart, it appears that average per unit weight of the football imported by the 3rd and 4th Appellant is 250 Grams and 344 Grams respectively and those exported by the 1st Appellant is 429 Grams, which is substantially different. We find that the said argument of difference in weight has not been disputed by the revenue. This aspect of the matter is crucial, when there is no dispute as to vast difference in weight of imported and exported goods, it is difficult to hold that the same goods are repeatedly exported by 1st Appellant by way of circular trading.

51. The test reports issued by DYCC, Cochin are incomplete and inconclusive and do not further the case of the Revenue. It appears to us that contradictory results are achieved in respect of both the samples drawn. The manner of drawing of the samples appears to be questionable and prone to error. The samples drawn during the investigation from the seized export consignment at Cochin and from the godowns of the 3rd Appellant at Maharashtra have been referred to as 'A' and 'B' rather than providing the complete details of

the source from where it is drawn. Mentioning of alphabets against sample drawn is not fool proof and it raises substantial doubt especially in case when the results of the tests undertaken are contradictory. However, we find that the 2nd test report advances the case of the Appellant.

52. The expert opinion of international footballer Shri M. M. Jacob is based on the visual inspection of samples drawn from the seized export consignment at Cochin and from the godowns of the 3rd Appellant at Maharashtra. Shri Jacob stated that *"on physical examination, it is seen that the footballs from both the set of samples are of same quality and are made from low quality material"*. It appears that both the samples shown to Shri Jacob are the footballs made out of PVC and not made of PU. This is also contradictory to the claim of the Revenue that footballs made of both PVC and PU are exported. In our considered view, the Revenue failed to examine Shri Jacob in the adjudication proceedings to justify his expert opinion.

53. We further find that the Revenue has not undertaken any investigation against the claim of the 3rd and 4th Appellant that they have disposed the imported goods by way of sale in the local market.

54. At this juncture we would like to reproduce the submission made by the Ld. Authorized Representative for the revenue at paragraph F3 of the written arguments:

"..... it is submitted that Ambe Traders do not deal with same kind of goods all the time, they deal with both the varieties. Similarly, the export consignment is also different both the times. So there is a possibility that what is exported is imported next time in a cyclical manner."

55. From the above, it is clear that the case of the department is based on assumption and the investigation is not complete and conclusive. The case of circular trading is setup based on assumption and not proved definitively. We are constrained to observe that the contention of the Appellants that the goods imported and exported are different, deserves acceptance on merits.

56. We find that revenue, in paragraph E3 of its written submissions, accepts that "*.....it is submitted that there are certain deficiencies in the investigations on account of the above facts.*"

57. The Revenue has accepted that there are deficiencies in the investigations. We agree with the ratio of various judgments cited by the revenue that it is not required to prove its case with mathematical precision, however we find that the Revenue has failed to prove its case with even pre-ponderance of probability. In the present case, crucial aspects are not dealt with by the Revenue.

58. In a case of alleged circular trading, the crucial aspect is to prove that the goods exported and those subsequently imported are the same. Similarly, in case of alleged overvaluation of export goods with a claim of incentives, allegation of flow back of money from the exporter to the overseas buyer needs to be proved. We find that the Revenue has failed to prove the same.

59. We find that the above stated lapses in the investigation are serious and fatal to the case of the Revenue and crucial aspects for proving its case are overlooked and ignored by the Revenue. We find that the vital links to establish the case of the revenue are

completely missing. We find that in the peculiar facts of the present case, the case of the revenue is not proved even on pre-ponderance.

60. We further find considerable force in the argument that the goods exported by the 1st Appellant are common sports goods such as footballs manufactured with PU and other sports articles, for which the details of identical or similar contemporaneous goods are always available. Both the authorities below have grossly erred in holding that there were no records to determine the value under Rules 4 and 5 of the Valuation Rules and hence, the value is determined under Rule 6 of the Valuation Rules by resorting to market survey.

61. Even assuming that resorting to Rule 6 of Valuation Rules and determination of assessable value by market survey are correct, even then upon the perusal of report of market survey dated 25.08.2015 issued by Shri Joji Joseph, Senior Intelligence Officer, we find that the same is vague and devoid of any particulars or corresponding details/ documents and find ourselves unable to accept it as reliable. The complete text of the said report dated 25.08.2015 is reproduced below:

*"To
The Assistant Director
DRI, Cochin*

*Sir,
Sub: Market Survey of Footballs, Football Goal Keeper Gloves,
Golfballs and Winter Sport gloves - Reg*

As directed a market survey was conducted by me to ascertain the market price of Footballs, Football Golf keeper Gloves, Golf Balls and Winter Sport gloves, similar to specimen samples of the Footballs, Football Goal Keeper Gloves, Golf balls and Winter Sports gloves taken from the export/ import consignments of M/s R. Kishin & Company, Mumbai, M/s Ambe

Traders Mumbai. The prices of the above said goods as per the prevailing market price are tabulated below:

<i>Sr. no.</i>	<i>Name of the Item</i>	<i>Prevailing Market Price (in Rs.) per piece</i>
1.	Football	175/-
2.	Football Goal Keeper Gloves	75/-
3.	Golfball	15/-
4.	Winter Sport Gloves	90/-

Yours faithfully

*Place : Cochin
Date : 25.08.2015*

*Sd/-
Joji Joseph
Senior Intelligence Officer*

62. We find that such unilateral market survey report issued by the investigating officer, can never substitute the evidence required to subject a citizen to penal consequences.

63. We further find that apart from above report, the Revenue has failed to provide any conclusive evidence to substantiate that footballs exported were overvalued to claim ineligible drawback and more particularly when the 1st Appellant has produced Bank Realisation Certificate evidencing the receipt of export proceeds in convertible foreign exchange, as are downloaded from the website of DGFT.

64. We further find that the Revenue has failed to prove that (i) the footballs and other sports goods exported by the 1st Appellant were to the firms owned and/ or operated by the son of the 1st Appellant i.e. Shri Kamal Loungani, who is the 2nd Appellant and (ii)

the relationship between the 1st Appellant and the 2nd Appellant has affected the transaction value.

65. We find that there was a cap on maximum drawback per piece in respect of footballs. Hence, the Revenue had already taken effective steps to curb any loss due to any alleged over-valuation. We find that the market value determined as per the market survey is much higher than the amount of drawback claimed per piece and hence, the drawback claim is not hit by Section 76(1)(b) of the Customs Act. Accordingly, we hold that the revenue has failed to prove that the export goods are over-valued by the 1st Appellant.

66. The Ld. Authorized Representative for the Revenue has contended that when the 1st Appellant was arrested and produced before the Ld. Additional Chief Judicial Magistrate, Ernakulam, he neither retracted the statements given by him under Section 108 of the Customs Act nor made any complaint against the DRI officials before the magistrate at the time of remand. Hence, the retraction of statement is an afterthought by relying upon various judgments as stated above. It is further contended that statements recorded under Section 108 of the Customs Act are material piece of evidence and voluntary statements can be relied upon inspite of the retraction.

67. We find that the aforesaid contention is factually incorrect as the 1st Appellant has specifically submitted that the statements were retracted in a writ petition filed before the Hon'ble Kerala High Court challenging the detention and arrest of the Appellant, much prior to the issuance of both the above show cause notices. We find

that the retraction of the statement by the Appellant cannot be ignored and brushed aside merely as an after-thought especially when the documentary evidence proves otherwise.

68. We are of the view that ratio of the judgments cited by revenue are not applicable having regard to the fact in the present case, the statements are not supported or corroborated with other material evidence, which are in fact contradictory to the statements, the said judgments will not advance the case of the Respondent Revenue. The Appellants have disputed the correctness of the statements before us.

69. We also find considerable force in the argument of the Appellants that the authorities below have committed an error of law in admitting the statements of various persons in evidence, without complying with the mandatory requirement of Section 138B of the Customs Act.

70. We find that statements made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceedings under the Customs Act shall be relevant, for the purpose of proving, in any proceedings under the Customs Act, the truth of the facts which it contains only when the person who made the statement is examined in the case before the adjudicating authority and the adjudicating authority is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice. None of the exceptions contained in Section 138B (1)(a) are recorded as reasons

by the authorities below to dispense with the mandatory requirement of Section 138B.

71. The Hon'ble High Court for Allahabad in the case of CCE, Meerut-I Vs Parmarth Iron Pvt. Ltd., 2010 (260) ELT 0514 (All) has held as follows:

"If the Revenue chooses not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross-examination for the evidence or statement to be considered."

72. Similar view has been taken by the Hon'ble Delhi High Court in the case of Additional Director General (Adjudication) Vs Its My Name Pvt. Ltd., 2021 (375) ELT 545 (Del.).

73. The Ld. Authorized Representative for the Revenue placed reliance on certain judgments to support her case, that not allowing of cross examination is not a violation of principles of natural justice. Upon the perusal of the said judgments, it appears to us that the same are on a different proposition of law. The said judgments do not refer to Section 138B of the Customs Act. We find that none of the said judgments have held that statements can be admitted in evidence without complying with the mandatory requirement of Section 138B of the Customs Act. In view of the aforesaid, we hold that the judgments cited by the Ld. Authorized Representative for the Revenue do not advance the case of the Revenue.

74. In light of the above findings, since the statements are the basis on which the entire case has been set up by the Revenue against the Appellants, cannot be relied upon for the want of following

the procedure prescribed under Section 138B of the Customs Act. Thus the entire proceedings initiated by the Respondent Revenue fails, due to insufficient evidence.

75. In light of incomplete and inconclusive investigation on many of the crucial aspects and in absence of any material evidence corroborating and supplementing the allegations and/or the statements relied upon, and for the want of following the procedure prescribed under Section 138B of the Customs Act, we find that the Revenue has failed to prove its case of purported overvaluation of the footballs and other sports goods exported, and that of circular trading. Since we are convinced on the merits itself, we are not dealing with the other submissions made by the either parties especially on the point of jurisdiction, which is left open.

76. The authorities below have denied the drawback under Rule 16A by holding that the Appellant has failed to produce evidence in respect of realisation of export proceeds within the time allowed.

77. We find that the Appellant has produced bank realisation certificate for each of the exports, evidencing receipt of realisation of export proceeds. The said certificates are downloaded from the official website of the DGFT.

78. In view of the above, we hold that the denial of claim for drawback under Rule 16A is liable to be set aside.

79. In view of our above findings, we deem it appropriate not to go into other issues and more particularly the jurisdiction of the DRI to seize the goods and of the Additional Commissioner to issue notice.

80. Accordingly, we hold that the revenue has failed to establish violation of any provisions of Section 113 of the Customs Act and/or any provisions of the Duty Drawback Rules and hence, we are of considered opinion that no penalties can be imposed on any of the Appellants under Section 114 and Section 114AA of the Customs Act. In absence of any violation of provisions of Section 113 of the Customs Act, the goods are not liable to confiscation and seizure of goods is liable to be set aside. We order accordingly.

81. In light of the above findings, we set aside both the impugned Orders-in-appeals and allow the appeals filed by all the Appellants with consequential reliefs.

(Pronounced on 24.03.2022).

(Anil Choudhary)
Member (Judicial)

(C. J. Mathew)
Member (Technical)

Pant