CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, CHANDIGARH

CUSTOMS APPEAL NO. 2975/2012

[Arising out of Order-in-Original No. 01/SSS/CUS/2012 dated 31.05.2012, passed by the Commissioner of Central Excise, Delhi III.]

COMMISSIONER OF CENTRAL EXCISE **APPELLANT**
Delhi III

Vs.

RESPONDENT

SIDDHACHALAM EXPORTS (P) LTD.

APPEARANCE:
Ms Swati Chopra Authorised Representative for the Department
Shri Sanjeev Jain, Advocate for the Resondent

CORAM:
HON'BLE MR ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION: October 07, 2021

FINAL ORDER No. 60925 /2021

PER ASHOK JINDAL

Revenue is in appeal against the impugned order. This is second round of litigation. In earlier round of litigation, the matter went up to Hon'ble Apex Court and Hon'ble Apex Court remanded back the matter to the Adjudicating Authority to re-adjudicate the matter on merits.

2. The brief facts of the case are as under:

BRIEF FACTS OF THE CASE :

This order arises from the show cause notice issued vide C. No. VIII(ICD)6/TKD/SIIB/Invst./252003/21775 Dated: 11.09.2003 served on M/s Siddhachalam Exports Pvt. Ltd., WZ-101, Meenakshi Garden, Shivaji Marg, Tilak Nagar, New Delhi - 110018 and Mr. Sanjeev Jain, Director, M/s Siddhachalam Exports Pvt. Ltd., WZ-101, Meenakshi Garden, Shivaji Marg, Tilak Nagar, New Delhi - 110018 (hereinafter called noticèes'). That show cause notice conveyed as following:

1. M/s Siddhachalam Exports Pvt. Ltd., WZ-101, Meenakshi Garden, Shivaji Marg, Tilak Nagar, New Delhi - 110018 filed Shipping Bill Nos. J903000127, J-903000128, J-903000129, J-903000131, J-903000132, J903000133, J-903000 134, all dated 24.02.2003 themselves at ICD, Garhi Harsaru, Gurgaon, Haryana (Relied Upon Document No. 1) (RUD No. 1) (1-A to 1-G) for export of goods declared as 'ladies tops' (@Rs.390/- per piece) and 'denim shirts' (@Rs.417/- per piece) consigned to M/s Zao Jainyo Overseas, B.Yushinskaya Str., 1A, Hotel Sevastop 41 Corp. 4, Room 905, Moscow, Russia (total FOB Value Rs.4,14,63,360/- involving drawback claim of Rs. 49,75,536/-)

2. Based on a specific intelligence that the goods attempted to be exported have been grossly over-valued to claim undue benefits of drawback, the goods attempted to be exported vide the above mentioned Shipping Bills, the consignment of the ready made garments attempted to be exported by the exporter, was examined 100% on 26.02.2003 by the officers of SIIB, ICD, Tughlakabad., New Delhi in the presence. of two independent witnesses, authorized representative of the exporter and the officers of Export Shed ICD, Garhi Harsaru, Gurgaon, Haryana, Manager_(Operation), CWCL, Garhi Harsaru, Gurgaon and representative samples were drawn for conducting market enquiry vide Panchnama dated 26.02.2003 (RUD No. 2) drawn on the spot.

3. A market enquiry was conducted from M/s Skipper International, K-63, Fateh Nagar, Tilak Nagar, New Delhi - 110018. M/s Skipper International vide their letter dated 12.03.2003 (RIJD No. 3) opined that the samples of Ladies Tops and Denim Shirts were export surplus rejected garments having poor quality of fabric and stiching. M/s Skipper International gave the following Present Market Value of the items (Shipping Bill wise):

S. No. Shipping Bill No.	Item	PMV per pc (Rs.)
1. J-903000127 dt. 24.2.2003	Ladies Top Crape Denim Shirt	Rs. 45/-
2. J-903000128 dt. 4.2.2003 .	Ladies Top	Rs.40/-
3. J-903000129 dr. 4.2.2003	Ladies Top Terry Voil	Rs.70/-
4. J-903000131 dt. 24.2.2003	Ladies Top Poly Gorgette	Rs.40 / -
5. J-903000132 dt. 24.2.2003	Ladies Top Viscose	Rs.40/-
6. J-903000 133 dt. 24.2.2003	Ladies Top Viscose	Rs.40/-
7. 3-903000134 dt. 24.2.2003	Ladies Top Terry Voil	Rs.70/-

4. Based on the opinion given by M/s Skipper International, a Calculation Chart was prepared and enclosed as Annexure-A to the Show Cause Notice, based on which total Present Market Value of the consignments attempted to be exported vide the above said seven Shipping Bills,

1

came to Rs.56,04,000/- (as against declared FOB value of Rs.4,14,63,360/-) and an amount of Rs.3,56,328/- was admissible as Drawback (as against an amount of Rs.49,75,536/- claimed by the exporter as Drawback in the Shipping Bills). On perusal of this Calculation Chart prepared on the basis of opinion given by M/s Skipper International regarding the Present Market Value of the goods attempted to be exported vide the seven Shipping Bills, only in the case of the item Ladies Top Terry Voil (Total 42420 pcs) attempted to be exported vide Shipping Bill Nos. J-903000129 & J-903000134, both dated 24.2.2003, the Present Market Value of the item (i.e. Rs.70/- per piece) was found to be more than the drawback claimed by the exporter in the above said two Shipping Bills (i.e. Rs.46.80 per piece). In the case of all the other items, the Present Market Value of these goods (per piece) was found to be less than the Drawback claimed on these items (per piece). The goods covered under Shipping Bills Nos. J-903000127, J-903000129 and J-903000131 to J-903000 134 were seized under Section 110 of the Customs Act, 1962 vide panchnama dated 13.03.2003 (RUD No. 4).

5. Shri Sanjeev Jain, S/o Shri R.L. Jain, Director of the exporter firm, voluntarily appeared on 27.2.2003 before the Superintendent (SIIB), ICD', TKD to tender his voluntary statement. In his voluntary statement date 27.2.2003 (RUD No. 5), recorded under Section 108 of the Customs Act 1962 (hereinafter referred to as 'the Act'), Shri Sanjeev Jain, interalia, stated that he was a graduate from Hindu College; that he started his business of trading under the name of M/s Jain Enterprises at WZ-101, Meenakshi Garden, Shivaji Marg, Tilak Nagar and did trading of construction material, cement, steel etc. and the said firm is still existing; that in the year 1990, he established an export company by the name of M/s Siddhachalam Exports Pvt. Ltd. and Shri R.L. Jain, Smt. S.D. Jain, Smt. Renuka Jain, Mrs. Karuna Jain and himself were the Directors in that company for last many years; that he was an active Director looking after the business and rest of the Directors were sleeping Directors; that through this export firm, they had been exporting readymade garments, engineering goods, handicrafts, woolen garments, leather goods etc. that Shri Alok Dutta was their friend and was like partner in their export firm; that he knew Shri Alok Dutta for the past above 5 years; that by 'like partners', he meant Shri Alok Dutta had invested with their firm, that regarding the approximate investment amount of Shri Alok Dutta, he did not remember the same; that he did not remember, whether the Board of Directors have passed any resolution or approved the proposal of expecting the investment of Shri Alok Dutta; that he being the only working Director, was not required to seek the approval of Board of Directors of the Company in such matters; that on his instructions, his employees had prepared the seven Shipping Bills for the export of Ladies Tops and Denim Shirts at ICD,, Garhi Harsaru; that the Shipping Bills were filed on 24th February, 2003 and he had seen the Shipping Bills and export documents and the same were signed by the authorized signatory of their company; that the garments covered by the above seven Shipping Bills were got made by them; that he did not know the name of the firm from which the same were got manufactured ; that actually, they gave order to Shri S. Gupta, their agent; that he did not remember his address and telephone number; that Shri Gupta visited their office and collected his payments; that they made all the payments to Shri Gupta by cheque only; that the goods covered vide the above seven Shipping Bills too were supplied by Shri Gupta, to whom he had given the samples of the readymade garments; that the buyer of the present shipment was new to them and they were supplying the garments for the first time; that he was introduced to them by one Shri Sasha; that Shri Sasha was previously their buyer and was stationed at Volgograd, Russia; that one Shri Anatoly of M/s

Zao Janyo Overseas had met them in India in the months of July, September,. 2002 and he was the person who had negotiated the deal with them; that .firm subsequently placed a written order, for the supply of garments, which he would bring on his next visit; that the samples of the garments were approved by Shri Anatoly in the month of November 2002; that the supply of the garments was against Letter of Credit; that nobody from the buyer side carried, out any pre-export inspection of the shipment; that they preferred Garhi Harsaru instead of ICD, Tughlakabad or ICD, Patparganj since the goods (RMG) were fabricated at Gurgaon; that he did not remember the names of the fabricators, who fabricated the garments in their factory in Gurgaon; that Ladies Top and Denim Shirts found in their consignment at Garhi Harsaru had been purchased by them @Rs.150 to Rs.350/ - per piece; that at the time of supply of the garments, subject matter of above seven Shipping Bills, he had not seen the vouchers/invoice for the same; that he was not in a position to tell that whether any invoice etc. was handed over by Shri Gupta to their company for supply of garments; that they had not employed staff to carry out the inspection of the readymade garments received through Shri Gupta; that he had authorized Shri Rishi Pal (employee) and Mr. Alok Dutta to get the consignment cleared from the Customs & other agencies; that he was feeling, tired and, therefore, his subsequent statement may be recorded on some other day.

6. Shri Alok Dutta, S/o Shri K. Dutta, authorized representative of the exporter, voluntarily appeared on 27.2.2003 before the Superintendent (SIIB), ICD, TKD to tender his voluntary statement. In his voluntary statement dated 27.2.2003 (RUD N0. 6) recorded under Section 108 of the Act, Shri Alok Dutta, interalia, stated that he was an MBA from IMT, Ghaziabad; that after his MBA, he did a course in Mass Communication from IMT, Ghaziabad; that after his studies he opened a factory of ball bearing balls manufacturing under the name of M/s Dutta Forging, Meerut, Modipurarn, Village Parnada; that in that firm the manufacturing activity was still under process and the firm had a turn over of approximately Rs.1.75 crores; that besides that, he was also learning export business with M/s Siddhachalam Exports Pvt. Ltd., Tilak Nagar, New Delhi; that he came in contact with Shri Sanjeev Jain, M.D. of M/s Siddhachalam approximately 6 months back and that father of Shri Sanjeev Jain is the Director in M/s Siddhachalam Exports Pvt. Ltd.; that M/s Siddhachalam Exports Pvt. Ltd. has three Directors and they are Shri R.L. Jain, Smt. S.D. Jain and Mrs. Renuka Jain; that Smt. S.D. Jain is the wife of Shri R.L Jain and Smt. Renuka Jain is the wife of Shri Sanjeev Jain and they are residing at WZ-101, Meenakshi Garden, Shivaji Marg, Tilak Nagar and they are merchant exporters and are in the business of exporting RMGs, engineering items, electrodes and are importing iron ores; that he had been authorized by Shri Sanjeev Jain to represent them in respect of their export shipment; that M/s Siddhachalam Exports are merchant exporters for the last 14 years and had a turn over of approximately Rs.35 Crores and that Shri R.L. Jain was looking after procurement and Shri Sanjeev Jain was looking after logistics; that Smt. S.D. Jain and Smt. Renuka Jain were sleeping Directors in the said firm; that a consignment of Knitted T-Shirts had already been exported from ICD, Garhi Harsaru; that the-value of the said consignment was Rs.3.47 Crores (approximately).

7. The exporter vide his letter dated 05.03.2003 had requested for provisional release of the goods. The provisional release of the goods was allowed by the proper officer on execution of Bond for declared value of the goods (FOB) and furnishing of Bank Guarantee for 20% of the Bond value. Subsequently the Asst. Commissioner of Customs, ICD, Garhi Hrsaru, Gurgaon

was intimated vide letter of even No. 5992 dated 13.3.2003 to release the goods provisionally on execution of Bond and Bank Guarantee by the exporter. On 13.3.2003 the exporter executed Bond in the sum of Rs.4,14,63,360/- and furnished B.G. ôf Rs. 82,92,672/- which were accepted by the Asst. Commissioner, ICD, Garhi Harsaru and goods were released provisionally for export on 13.3.2003.

8. From the foregoing, it appeared that the exporter had attempted to export the consignment of Readymade Garments vide the above mentioned seven Shipping Bills by employing fraudulent practices and had grossly over-invoiced the value of RMGs with the intention of claiming undue benefits of Drawback more than he was entitled to and thus by his acts of omission and commission rendered the said RMGs liable to confiscation under the provisions of Section 113(d) and/or 113 (i) of the Act and exporter is also liable to penalty under Section 114 of the Act.

9. In the instant case, the exported goods had been over-valued several times in order to claim undue benefits of Drawback, the same is not possible without the directions/consent of senior functionaries of the export firm i.e. M/s Siddhachalam Exports Pvt. Ltd. Shri Sanjeev Jain, Director, M/s Siddhachalam Exports Pvt. Ltd. is the person who is actively involved in the export of goods and the huge over-valuation in the exported goods would not have been possible without his directions/consent, by his acts of omission, Shri Sanjeev Jain has also rendered himself liable to penalty under Section 114 of the Act.

10. The scheme of drawback is incorporated in Chapter X of the Act read with the Customs & Central Excise Duties Drawback Rules, 1995 (as amended) hereinafter referred to as the Rules'.

11. Relevant provisions of the Customs Act, 1962 and Allied Acts/Laws provide as under:
(i) Para 2.2 of the Export Import Policy, 2002-2007 provides that every exporter or importer shall comply with the provisions of the Foreign Trade (Development & Regulation) Act, 1992, the Rules and Orders made thereunder, the provisions of this policy ... and as well as provisions of any other law for the time being in force.
(ii) Section 11(1) f the Foreign Trade (Development & Regulation) Act, 1992 provides that no export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made thereunder and the Export and-Import policy for the lime being in force.
(iii) Section 11(5) of the Foreign Trade (Development & Regulation) Act, 1992 provides that where any contravention of any provision of this Act or any rules or orders made there under or the Export and Import Policy has been or is attempted to be made the goods together with any package, covering or receptacle and any conveyance shall, subject to such requirements and conditions as may be prescribed, be liable to confiscation by the Adjudicating Authority. '
(iv) Section 3(2) of the Foreign Trade (Development & Regulation) .Act, 1992 provides that the Central Government may also, by order published in the official gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any as may be made by or under the order, the import or export of goods.

(v) Section 3 (3) of the Foreign Trade (Development & Regulations) Act, 1992 provides that all goods to which any order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under Section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.

(vi) Rule 11 of the Foreign Trade (Regulation) Rules, 1993 reads as -

On the importation into, or exportation out of, any Customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the Bill of Entry or the Shipping Bill or any other documents prescribed under the Customs Act, 1962 (52 of 1-962) state the value, quality and description of such goods, certify that the quality and specification of the goods as stated in those documents are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe a declaration of the truth of such statement at the foot of each Bill of Entry or Shipping Bill or any other documents.

(vii) Rule 14(2) Foreign Trade (Regulation) Rules 1993, reads as follows:
No person shall employ any corrupt or fraudulent practice for the purpose of obtaining any licence or importing or exporting any goods.

(viii) Regulation 2 of Shipping Bills and Bill of Export (Form) Regulations, 1991, reads as follows:
A Shipping Bill to be presented by an exporter of goods shall be in the form specified in Annexure -1, Annexure-II, Annexure-III or Annexure-IV as the case may be, appended to these regulations.
The Clause (a) and (d) of the declaration specified in Annexure -I (Declaration to be filed in case of Export of goods under claim for drawback) to the Shipping Bill and Bill of Export (Form) Regulations, 1991 reads as:- -
(a) that the quality and specifications of the goods as stated in this Shipping Bill are in accordance with the terms of the export contract entered into with the büyer/consignee in pursuance of which the goods are being exported;
(d) that the present market value of the goods is as follows :-

(ix) Section 2(44) of the Customsn Act, 1962 reads as follows
"Value" in relation to any goods means the value thereof determined in accordance with the provisions of sub-section (1) of Section 14.

(x) Section 14(1) of the Customs Act, 1962 reads as follows
For the purpose of or any other law for the time being in force where under a duty of Customs is chargeable on any goods by reference to their value the value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale, for delivery at the time and place of importation or exportation as the case may be in the course of international trade, where the seller and the buyer have no interest in the business of each other .and the price is the sole consideration for sale or offer for sale.

(xi) Section 50 of the Customs Act, 1962 provides that (1) the exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a Shipping Bill, in the prescribed form and (2) the exporter of any goods, while presenting a Shipping Bill, shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

(xii) Relevant portion of Section 76 of the Customs Act, 1962 provides that (1) Notwithstanding anything hereinabove contained, no drawback shall be allowed:
(b) in respect of any goods, the market price of which is less than the amount of drawback due thereon.

(xiii) Section 113(d) of the Customs Act, 1962 provides that any goods attempted to be exported or brought within the limit of any Customs Area for the purpose of being exported contrary to any prohibitions imposed by or under this Act or any other law for the time being in force shall be liable to confiscation.

(xiv) Section 113 (i) of the Customs Act, 1962 provides that any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under Section 77.

(xv) Section 114 of the Customs Act, 1962 provides that any person who in relation to any goods does or omits to do any act which act or would render such goods liable to confiscation under Section 113 or abets the doing omission of such an act, shall be liable

(i) in this case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater.

(ii) in the case of goods under claim for drawback to a penalty not exceeding five times the amount of drawback claimed or one thousand rupees, whichever is greater.

12. In view of the foregoing facts and the provisions of the law discussed above, it appeared that:

(i) The FOB value of said 106200 pcs. of Ready Made Garments exported vide the seven Shipping Bill Nos. J-903000127, J-903000128, J903000129, J-903000131, J-903000132, J-903000133, J-903000134 all dated 24.2.2003 from ICD, Garhi Harsaru, Gurgaon is grossly mis-declared by artificially inflating it to Rs.4,14,63,360/- whereas its Present Market Price was estimated at Rs.56,04,000/- only, thereby rendering the said goods liable to confiscation under Section 113(i) of the Customs Act, 1962.

(ii) the said M/s Siddhachalan Exports Pvt. Ltd. attempted to export the said RMGs fraudulently in contravention/violation of the various provisions of the Act, Rules & Regulations as detailed in Para 21 of the Show Cause notice in as much as they knowingly with the intention to avail excess Drawback on the basis of artificially inflated F.O.B. value of the garments and knowingly provided such incorrect particulars/details in the Shipping Bill/Check List/Invoice/Packing List Drawback declaration and other documents submitted for generation of computerized Shipping

Bill thereby rendering the said RMGs liable to confiscation under Section 113(d) and/or (i) of the Customs Act 1962.

(iii) By mis-declaring the F.O.B. value of the aforementioned goods, the exporter fraudulently attempted to claim drawback of Rs.49,75,536/- on the inflated F.O.B. value of Rs.4,14,63,360/- declared in the Shipping Bill Nos. J-903000127, J-903000128, J-903000129, J-903000131, J903000132, J-903000133, J-903000134 all dated 24.2.2003.

(iv) The exporter i.e. M/s Siddhachalam Exports Pvt. Ltd. and its Director, Shri Sanjeev Jain by his acts and omissions have rendered, the aforesaid goods liable to confiscation under Section 113(d) and/or (i) of the Customs Act, 1962, and have rendered themselves liable for penalty under Section 114 of the Customs Act 1962.

13. Therefore, M/s Siddhachalam Exports Pvt. Ltd. WZ-101, Meenakshi Garden, Shivaji Marg, Tilak Nagar, New Delhi -110018 and Shri Sanjeev Jain, Director, M/s Siddhachalam Exports Pvt. Ltd., WZ- 101,. Meenakshi Garden, Shivaji Marg,TIlk Nagar, New Delhi - 110018 were called upon to show cause to the Commissioner of Customs (ICDs), ICD, Tughiakabad, New Delhi within 30 days of receipt of this notice as to why :

(i) the said 1,06,200 pcs. of RMGs of declared value of Rs.4,14,63,360/- (P.M.V. of Rs.56,04,000/-) exported by M/s Siddhachalam Exports Pvt Ltd. vide Bill Nos. J-903000127, J-903000128, J-903000129, J903000131, J-903000132, J-903000133, J-903000134 all dated 24.2.2003 seized under Panchnama dated 13.3.2003 should not be confiscated under Section 113(d) and/or (i.) of the Customs Act, 1962.

(ii) The value of the impugned goods covered under Shipping Bill Nos. J903000134 and J-903000129 both dated 24.2.2003 should not be reduced to Rs.29,69,400/- for Drawback purpose on the basis of market enquiry and the amount of Drawback of these two Shipping Bills should not be reduced to Rs.3,56,328/- (as per chart in Annexure) against the amount of Rs.19,85,256/- claimed by the exporter.

(iii) The value of the impugned goods covered under S/B Nos. J-903000128, J-903000131, J-903000 132, and J-903000 133 all dated 24.2.2003 should not be taken as Rs.26,34,600/- against the declared FOB value of Rs.2,49,19,560/- and Drawback amounting to Rs.29,90,280/- claimed in the above five shipping bills should not be disallowed under the provisions of Section 76(1)(b) of the Act as the market price of the goods covered under these five shipping bills appeared to be less than the amount of Drawback claimed thereon (as per chart in Annexure).

(iv) Penalty should not be imposed on M/s Siddhachalam Exports (P) Ltd. WZ-101, Meenakshi Garden, Shivaji Marg, Tilak Nagar, New Delhi and Shri Sanjeev Jain, Director, M/S Siddhachalam Exports Pvt. Ltd. under the provisions of Section 114 of the Customs Act, 1962.

A corrigendum to show cause notice was issued vide C. No. VIII(ICD)6/TKD / SIIB/Invest/2 5/2003/23962 dated 07.9.2003 that M / S Siddhachalam Exports Pvt. Ltd., WZ-101, Meenakshi Garden,. Shivaji Marg, Tilak Nagar, New Delhi - 110018 and Mr. Sanjeev Jam, Director M/s Siddhachalam Exports Pvt. Ltd., WZ-101, Meenakshi Garden, Shivaji Marg, Tilak Nagar, New Delhi - 110018 to show cause to the Commissioner of Central Excise, Delhi-Ill instead of the Commissioner of Customs ICDs), ICD, Tughlakabad, New Delhi

The case was adjudicated by the Commissioner Central Excise, Delhi- III, Gurgaon dropping the proceedings initiated vide the above cited show cause notice allowing the drawback on verification of the Bank Realisation Certificate by the department in each case.

Being aggrieved, the Revenue preferred an appeal against the said order- in – original before the CESTAT who allowed the appeal setting aside the order- in – original.

The CESTAT confirmed the reduction of drawback claim in case of consignments covered by Shipping Bill Nos. J-903000129 and 903000134 to Rs. 3,26,328/- and denial of drawback in respect of the other consignments. The CESTAT also levied a penalty of Rs. 5 lakhs each on the exporter and its Director Mr. Sanjiv Jain respectively.

The exporter filed an appeal before the Supreme Court against the Order of the CESTAT. The Hon'ble Supreme Court allowed the appeal. The orders passed by the Commissioner and the CESTAT were set aside and the matter was remitted back to the adjudicating authority for fresh consideration in accordance with law, after affording adequate opportunity of hearing to the exporter and directed that the entire exercise shall be completed within six months from the date of receipt of the copy of the judgment.It was also added that they have not expressed any opinion on the merits of the opinion rendered by M/s Skipper International or on the conduct of the exporter in not adducing any evidence in support of the value stated in the shipping Bills in question.

3. Thereafter the Adjudicating Authority examined the issue in detail and dropped the proceedings initiated against the respondents by way of issuance of show cause notice. Against the said order, Revenue is in appeal before us.

4. The learned Authorised Representative relied upon the order passed by this Tribunal in the earlier round of litigation vide Order dated 14.9.2006. It is further submitted by the learned Authorised Representative that at the time of export, samples were drawn and market inquiry was conducted. On the basis of market inquiry report, it was alleged in the show cause notice that there is over-valuation of the goods exported by the respondent. In that circumstances, the impugned order is to be set aside.

5. On the other hand, learned respondent appearing in person submits that at the time of export of goods by way of 7 shipping bills were examined on 24.02.2003 by the Inspector and Superintendent prior to SIIB Officers and they have accepted the invoice value as fair. It was alleged by SIIB that on specific information that rags were being exported by the exporter. The consignment was examined 100% on 26.02.2003 by SIIB officers. On examination, quality was found to be good and 100% examination was conducted wherein after everything was found in order, shipment was allowed for exports against Bank Guarantee. Samples were also drawn against 6 shipping bills to find out present market value. It is his submission that the show cause notice relied upon certain conclusion reached by one Shri Pankaj of M/s. Skipper International without any reference about the firm or the person, their expertise or competence or their backgrounds and experience. No notice was sent to the respondent for market inquiry nor to any representative of the respondent nor the respondent was present during the market inquiry. Therefore, the market inquiry is in gross violation of principles of natural justice. No other market inquiry was conducted. No concrete report was prepared on market survey. Therefore, the said market inquiry cannot be relied upon. It is his further submission that in respect

of shipping bill number J-903000133, no sample was drawn. Therefore, the market inquiry is not applicable to the shipping bill. He further submitted that Shri Pankaj representative of M/s. Skipper International later on retracted his opinion. Therefore the said report of market inquiry can not be relied upon. He also submitted that during the course of hearing an affidavit was sought by the Tribunal from the concerned officer and the same has been placed on record showing that the respondent was not present during the market inquiry. Moreover no contemporaneous export were found. In that circumstances, show cause notice deserves no merits. Therefore, the Adjudicating Authority has rightly dropped the proceedings initiated against the respondent in the impugned order.

6. Heard the parties and considered the submissions.

7. We have carefully considered the submissions made before us and documents placed and also have gone through the impugned order wherein the Adjudicating Authority has examined the issue in detail and observed as under:

Thus the Hon'ble Supreme Court found that the Commissioner and the CESTAT erred in not ascertaining the value of the export goods as per section 14 of Customs Act, 1962 and the Rules of 1988. The Hon'ble Supreme Court, therefore, set aside the orders passed by the Commissioner and the CESTAT and remanded the case to the adjudicating for deciding the case afresh.

I find that mainly two issues are involved in this case. First is as to what was the value of the export goods at the time of place of exportation and second is as to what was the market price of the said goods .

As regards the first issue as observed by the Hon'ble Supreme Court in this case the correct method of determining the value of the export goods is the procedure prescribed under section 14(1) of Customs Act, 1962 and particularized in Rule 4 of the 1988 Rules. As per section 2(41) of the Customs Act,1962 value in relation to any goods exported means value determined in accordance with the provisions of sub-section (1) of of section 14 of the Act. The Hon'ble Supreme Court in Om Prakash Bhatia Case also held that section 14 can be referred to find the true value of the goods sought to be exported. As per the section 14 the value of the said goods is deemed to be the price at which such or like goods are sold for delivery at the time and place of exportation in the course of international trade where (a) seller and the buyer has no interest in the business of each other; or (b) one of them has no interest in the business of the other.

The question is whether the price declared by the Noticee in the Shipping bills are the prices at which such or like goods were sold for delivery at the time and place of exportation in the course of international trade where (a) seller and the buyer has no interest in the business of each other; or (b) one of them has no interest in the business of the other. I find that there is nothing on record to show that such or like goods were sold for delivery at the time and place of exportation in the course of international trade at different prices i.e. at prices lower than those declared by the Noticee. There is also nothing on record and also there is no allegation in the show cause Notice that seller and the buyer has any interest in the business of each other; or one of them had any interest in the business of the other. I thus find that there is nothing on record to show that the prices declared by the Noticee were not the prices at which such or like kind of goods were sold for delivery at the time and place of exportation in the course of international trade, where (a) seller and the buyer has no interest in the business of each other; or (b) one of them has no interest in the business of the other. As per Rule 4(1) of the 1988 Rules the transaction value of imported goods (in this case export goods) shall be the price actually paid or payable for the goods when sold for export to India (in this case for export from India) adjusted in accordance with the provisions of Rule 9 of these rules. As per the facts on record the prices declared by the Noticee are the prices actually paid by the buyers as the full value as declared in the shipping bills have been realised and the Noticee have submiited the BRCs. As per Rule 4(2) of the said Rules the said transaction value under sub- rule (1) above shall be accepted subjected to the conditions mentioned therein. The conditions are viz the sale is in the ordinary course of trade, the sale does not involve abnormal discount, the sale does not involve special discount to exclusive agents, data exist with regard to adjustments etc. As the said conditions are fulfilled, the transaction value is to be accepted. The Hon'ble Supreme Court also in the case of this very Noticee have held that ordinarily the price received by the exporter in the ordinary course of business shall be taken to be the transaction value of goods under export in absence of any special circumstances indicated under section 14(1) of the Act and Rule 4(2) of the 1988 Rules and that the initial burden to establish that the value mentioned by the exporter in the shipping bill is incorrect lies on the Revenue. If the transaction value under rule 4 is rejected, the value must be determined by sequentially proceeding through Rules 5 to 8 of the 1988 Rules. Rule 5 provides for taking the price of identical goods exported at or about the same time as the goods being valued. In this case price of identical goods at or about the time of export of the impugned goods is not known. Rule 6 provides for considering the value of similar goods exported at or about the same time as being valued but in this case value of similar goods is also not on record. Rule 6A provides that if value can not be determined as per rule 4,5,and 6, the value shall be determined under rule7. Rule 7 provides deductive method if the value of goods sold by the buyer is known. It is also not the case here. Rule 7A speaks of computed value based on costing. I find that the costing particulars are also not on record. Rule 8 pertains to residual method i.e determining using reasonable means consistent with the principles and general provisions of these rules.

After going through the provisions of section 14 and of the 1988 Rules I find that the question arises is whether the value declared by the Noticee can be rejected in the circumstances in the present case.

I find that there is nothing on record to show that the Value of export goods declared by the Noticee were not the price at which like kind of goods were sold in the international market at the time and place of export. No enquiry was made with any other exporter of the goods of like kind and quality. There is no evidence on record in the form of any invoice showing sale of goods of like kind and quality in the international market at the time, or nearest thereto, of export. Though it is a fact that the Noticee has also not submitted any other evidence that the goods of like kind and quality were sold in the international market at the declared prices at the time and place of export. But the Hon'ble Supreme Court in the case of Sounds and Images v. CC- 2000(117) ELT 538 (SC) observed that it is always for the Customs authorities to establish by methods known to law that and in a satisfactory manner that the value of imported goods is not what importer says it is and what that value actually is. Same is applicable in case of export goods that the deprtment has to establish by methods known to law that and in a satisfactory manner that the value of export goods is not what exporter says it is and what that value actually is. That onus can not be shifted to the importer. As stated above the Hon'ble Supreme Court in the case of this very Noticee have stated that that the initial burden to establish that the value mentioned by the exporter in the shipping bill is incorrect lies on the Revenue. TheHon'ble Supreme Court in the case of CC v. Prodelin India- 2006 (202)ELT 13 (SC) held that Department is bound to accept the transaction value in absence of evidence that identical or similar goods have been imported at higher price. The Hon'ble Supreme Court in the case of CC v. South India Television - 2007 (214) ELT 3 (SC) that if charge of undervaluation is not supported by evidence or information about comparable imports, benefit of doubt goes to the importer. In Puja Poly Plastics it was held that burden of proving under- valuation is required to be discharged by production of affirmative evidence and not on the basis of suspicion, assumption or presumption. The show cause Notice instead of taking the price declared by the Noticee which has been realized also proposes to determine the value on the basis of the price told by Shri Pankaj. As stated above the Hon'ble Supreme court in the this case have held that instead of conducting market enquiry the value under section 14 should have been determined and that the market enquiry is the last resort. Even if the prices of the impugned goods told by Shri Pankaj are presumed to be the wholesale prices of the goods in India, the same can not be treated as the prices of goods in the course of International trade at the time and place of exportation.

Now it is fact on record that the sale proceeds has been received by the Noticee and in the circumstances I thus find that there is nothing on record that the prices declared by the Noticee were not genuine and as per the provisions of section 14 of the Customs Act,1962 the same are to be considered as the value of the said export goods. My view finds support from the following case laws:

(1). The Hon'ble Supreme Court in the case of Commissioner v. *Vishal Exports Overseas Ltd.* _ 2007(209) ELT 331 (SC) had held as under :-

"The first contention of the appellant herein to the effect FOB value being 450% more than the purchase value is unreasonable and cannot be accepted for the simple reason that there is no evidence on record to support such a contention. The Tribunal has also specifically held so and returned a final finding of fact that the FOB price was correctly shown by the assessee. Learned Counsel for the appellant could not show us anything concrete in support of his contention. From the orders of the first and the appellate authorities nothing can be found to hold that the FOB price was excessive or not genuine. The Tribunal has also given a finding that the Adjudicating Authority has arbitrarily computed the FOB value and have fixed the credit on that basis. We accept findings of the Tribunal in the absence of any concrete evidence having been put to support the contention of the ld. Counsel that the FOB price is inflated. In this behalf we cannot ignore the documents supplied by the assessee before the Revenue which we have already mentioned earlier. It is not a case of the Revenue that the assessee has not received the FOB price at all. That is clear from the BRCs. Therefore, the FOB price is supported amply by the BRCs with which no fault is found. Once that is clear, there will be no question to hold that the FOB is inflated".

(2). The Tribunal in the case of *Frost International Ltd.* v. Commissioner- 2006(206) E.L.T.451 (T) in an identical situation held as under:-

"Valuation (Customs) - FOB value - Overvaluation - Misdeclaration of FOB price - FOB price declared as Rs. 338.25 per T-shirt - Revenue failed to show that in the course of international trade, such or like goods exported at or about Rs. 35/- or Rs. 42/-, in the fact of language of Section 14 of Customs Act, 1962 - In absence of evidence of contemporaneous export at proposed value, Revenue's contention not acceptable - Revenue's submission on date of let export order preceding date of Bill of Lading, not relevant to determination of FOB value declared".

(3) In the case of Commissioner v. *Unimac (I) Ltd.* -2006(204) ELT.95 (T), the Hon'ble Tribunal in an identical situation held as under:-

"We also note that the case of the department is based on quotations and not on actual sale transactions, and quotations cannot be relied upon for the purpose of valuation. No sealed samples were drawn from the consignment exported from Madras and all enquiries were made with reference to other goods. Thus the goods taken for enquiry were not identical or similar. We also note that exports were allowed after due verification of all aspects.

(4) In the case of *Mitexco v. Commissioner -2003(155) ELT 69 (T),* the Tribunal held as under:-

"The judgment of the Larger Bench of the Tribunal reported in the case of Om Prakash Bhatia reported in 2001 (127) E.L.T. 81 upheld the powers of Customs to challenge of valuation of export goods. In that judgment the referral Order has been cited where the Appellant had claimed that the manner in which the valuation of exports were done was wrong (para 4). In a number of cases this plea is raised and the Tribunal on examination of facts has granted relief *Brooks International* [2002 (141) E.L.T. 547 (T)], *Reco Industries* [2001 (131) E.L.T. 694 (T)]. Fashion garments do not subject themselves to normal rules of valuation. A shirt stiched from the same material would cost anywhere from Rs. 500/- to Rs. 1800/- depending upon the brand name attached thereto. In the case of cosmetic the value addition between the manufacturing costs to the brand name price some time over 400%. *If one is to go by the cost of material and cost of manufacture plus a "reasonable margin of profit" then the value if every commodity would be much lower than the actual value in the market. In the case of readymade garments the profit margins are tremendous and the margin would depend upon many causes including on the skill of the seller and the gullibility of the buyer.*

(5) Relaince is also placed on the Tribunal's decision in *Indo Export House* v. *Commissioner* - 2004 (168) ELT 142 (Tri.-Del.), wherein it was found that the export proceeds had been realised and the same certified by the exporter's bankers and, on this basis, it was held that the Commissioner should have refrained from demanding the drawback amount.

As regards the second issue of ineligibility of drawback in case of market price lower than the drawback claimed I find that during market enquiry Shri Pankaj , authorized representative of M/s Skipper International opined that the samples of Ladies Tops and Denim Shirts were export surplus rejected garments having poor quality of fabric and stiching. M/s Skipper International gave the following Present Market Value of the items (Shipping Bill wise):

S. No. Shipping Bill No.	Item	PMVper pc ((Rs.)
1. J-903000127 dt. 24.2.2003	Ladies Top Crape Denim Shirt	Rs. 45/-
2. J-903000128 dt. 4.2.2003 .	Ladies Top	Rs.40/-
3. J-903000129 dr. 4.2.2003	Ladies Top Terry Voil	Rs.70/-
4. J-903000131 dt. 24.2.2003	Ladies Top Poly Gorgette	Rs.40 / -
5. J-903000132 dt. 24.2.2003	Ladies Top Viscose	Rs.40/-
6. J-903000 133 dt. 24.2.2003	Ladies Top Viscose	Rs.40/-
7. 3-903000134 dt. 24.2.2003	Ladies Top Terry Voil	Rs.70/-

From the above it is clear that even if the prices opined by Shri Pankaj are presumed to be true market prices of the said goods in India, the prices of the goods Rs. 70/- per pc. covered by shipping bills nos. J-903000129 dated 04.02.2003 and J-903000134 being more than amount of drawback Rs. 46.80 per pc. , the drawback claimed is allowable. Further the samples of goods covered by shipping bill No. J-903000133 were not taken and thus the price opined by Shri Pankaj in respect of the said goods can not be relied upon and thus there is no ground not to allow the drawback claimed in respect of the said goods.

Now, the question remains as to whether the drawback can be disallowed in respect of the goods covered by the remaining shipping bills. I find that based on the opinion given by Shri Pankaj total Present Market Value of the consignments attempted to be exported vide the above said seven Shipping Bills, came to Rs.56,04,000/- as against an amount of Rs.49,75,536/- claimed by the exporter as Drawback in the Shipping Bills. That is, total drawback claimed is not less than the total market price of the said goods as opined by Shri Pankaj. On 25.02.2003, the Customs authorities verified the value of export goods and after verification the shipping bills were signed by the Superintendent. It shows the officers who examined the goods on 25.02.2003 were satisfied that the goods including the prices thereof were as per the declaration in the shipping bills. The officers of SIIB took out samples for the purpose of market enquiry. Statement of Mr. Sanjeev Jain, Director of the Noticee was recorded by the Superintendent (SIIB) wherein he did not admit overvaluation of the goods. He stated the purchase price of the said goods and also stated that he paid he purchaseOn 12.03.2003, the market enquiry was conducted wherein Shri Pankaj opined that the samples of ladies tops and denim shirts were export surplus and export rejected garments having poor quality of fabric and stitching. He also gave the present market value of the items/samples supplied to him. The specifications and the brand of the samples examined were not mentioned and the brand of the samples examined was not mentioned in the market enquiry report. At the time of conducting the market enquiry, no notice was served on the Noticee and nobody was present from the Noticee's side. Further, Shri Pankaj, said to be the authorized representative of M/s Skipper International, who gave the opinion had failed to submit his authorization before the Commissioner. He was neither a Director, nor a partner, nor a sole proprietor. The market enquiry report submitted by him did not mention the brand or specification of the readymade garments. Neither did he mention therein that he had sufficient experience to give the said opinion, nor did it mention that identical garments had ever been purchased or sold by them at the given price. In fact he subsequently retracted his earlier opinion stating that he was not shown the goods but he signed on the paper/ report already prepared by the visiting customs officer. The officers who examined the goods found the goods and the prices thereof as per declaration. In case of goods contained in one of the containers Shri Pankaj stated in his report having seen the sample of the goods but no sample thereof was drawn as per the Panchnama. The report does not mention that he was expert about the export garments or that as to whether he consulted any person dealing with garments in their firm. He retracted his opinion/ statement stating that he was not shown the samples of the impugned goods but signed on the report already prepared by the customs officers. Further, the market enquiry was conducted in absence of the Noticee and it was not confronted or shown to the Noticee before issue of the show cause notice. It is a fact that the price of garments varies substantially depending on various factors viz brand, reputation of the person/ brand of the readymade garment, skill of the seller or buyer etc. The department instead of contacting any manufacturer, wholesale dealer or exporter of like kind and quality of readymade garments for market enquiry, approached a person who is said to be authorized representative of a firm who is said to have dealt in export surplus and export rejected readymade garments, that there is nothing in the said market enquiry report as to what was the brand, size, quality, material composition of the samples showed to him on the basis of which he told the prices of the said readymade garments, that Shri Pankaj later on retracted his report and stated in affidavit that he was not shown any sample and that he gave a false report by signing on the report already prepared by the visiting customs officers. It is a fact on record that the Noticee purchased and exported the readymade garments for the first time and therefore his bargaining capacity can not be compared with that of person/ firm dealing in export surplus and export reject readymade garments for a long time. Export surplus goods may be those goods which are of good quality manufactured as per specification of the foreign buyer in excess quantity in anticipation but the foreign buyer purchased lesser quantity. The exporter will be compelled to sell the remaining goods in local market at any available prices i. e lower than the normal wholesale price of the said goods. Similarly export rejects may be the good quality readymade garments manufactured as per specifications of a particular buyer, but rejected by the buyer because of any reason and the same will be sold to the buyers of export rejects at prices much lower than the normal market price of the said goods. Thus the prices at which a buyer of export surplus and export reject readymade garments purchases is not the market price of the goods at which the same are sold or purchased in the course of wholesale trade by other buyers of the said goods. Further, generally in market enquiry opinions of three or more persons dealing in goods of like kind and quality are obtained with documentary evidence but in this case enquiry was made with one person only about whom there is nothing on record of having ever dealt with goods of like kind and quality. Thus I find that the finding of overvaluation on the basis of statement of Shri Pankaj is, therefore, misconceived. In the circumstances, it has to be held that the PMV and export price determined by the Department are arbitrary and unrealistic and the same have to be discarded. In this connection I place reliance on the Tribunal's decision in the case of CC v. Unimac(I) Ltd.- 2008 (226) ELT 95 (Tri- Mumbai). This decision of Tribunal was upheld by the Apex Court in Commissioner v. Unimac (I) Ltd. -2008(226) ELT A33(SC)

And thereafter the Adjudicating Authority came to the conclusion that impugned market inquiry report is not corroborated with any concrete evidence of contemporaneous export or purchase or sale of the like kind and quality goods in India and is thus not sustainable and allowed the draw back claim of the respondent.

8. We further note that in this case, out of 7 shipping bills, in case of 6 shipping bills, the samples were drawn. Moreover, the goods were initially examined 100% and allowed to be exported after examination by SIIB officers finding the goods in order and shipment was allowed. The said order has attained finality. Moreover, the Revenue has heavily relied upon the market inquiry conducted by one Shri Pankaj and during the course of hearing an affidavit was also filed by the concerned officer and the same is taken on record which is as under:-

INDIA NON JUDICIAL

Government of National Capital Territory of Delhi

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सत्यमेव जयते

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NOTARY ★ GOVT. OF INDIA
NEELAM SHARMA
ADVOCATE
DELHI
REGD. NO.-8227
EXPIRY DATE
01/09/2025

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Before the Custom, Excise & Service Tax Appellate Tribunal Chandigarh

Customs Appeal No. 02975/2012

Commissioner of Customs & Central Excis Delhi-III- Gurugram ..Appellant

Vs

M/s Siddhachalam Export (P) Ltd .. Respondent

Affidavit

I, P.C. Dhanwaria Assistant Commissioner Customs (Export) ICD, Tugalkabad New Delhi do hereby solemnly affirms and declare as under: -

1. That market enquiry in respect of the export goods covered under the shiping bill No.s J-903000127, J-903000128, J-903000131, J-903000132, J-903000133, J-903000134 all dated 24.02.2021was conducted from M/s Skipper International K-63 Fateh Nagar Tilak Nagar New Delhi. During the market inquiry, the exporter M/s Siddhachalam Exports Pvt Ltd WZ-101 Meenakshi Garden Shivaji Marg, Tilak Nagar New Delhi-110018 was not present.

DEPONENT

P.C. पृथ्वी चन्द्र धनवारिया/PRITHVI CHAND DHANWARIA
सहायक आयुक्त (सीमा शुल्क)/Asstt. Commissioner (Customs)
अंतर्देशीय कंटेनर डिपो, (निर्यात), तुगलकाबाद, नई दिल्ली-20
I.C.D. (Export) Tughlakabad, New Delhi-20

VERIFICATION:

Verified at New Delhi on this 1st day of October 2021, that the contents of the affidavit are true and correct to my knowledge.

Identify the Deponent who signed/put T. in my presence

DEPONENT

NEELAM SHARMA ADVOCATE DELHI REGD. NO.-8227 EXPIRY DATE 01/09/2025 NOTARY GOVT. OF INDIA

ATTESTED
NOTARY (Govt. of India)
Neelam Sharma
Advocate
Ch. No. 155A, Gate No. 11,
Patiala House Courts,
New Delhi-110001
(M) 9899408301

01 OCT 2021

P.C. पृथ्वी चन्द्र धनवारिया/PRITHVI CHAND DHANWARIA
सहायक आयुक्त (सीमा शुल्क)/Asstt. Commissioner (Customs)
अंतर्देशीय कंटेनर डिपो, (निर्यात), तुगलकाबाद, नई दिल्ली-20
I.C.D. (Export) Tughlakabad, New Delhi-20

It is clear from the affidavit filed by the Departmental officer that neither the respondent nor his authorised representative of the respondent was present during the market inquiry, therefore, we hold that there is gross violation of principles of natural justice by holding the market inquiry, the same cannot be relied upon. Moreover, the said inquiry report is retracted by Shri Pankaj of M/s. Skipper International who pointed out that the Customs department has obtained the opinion from him without showing the goods to him and he has given false opinion on 12.3.2003. In that circumstances, the market inquiry report initially is not admissible evidence.

7. It is also a fact on record that no other evidence is produced by the appellant with regard to contemporaneous export of similar or like goods. In that circumstances, we do not find any infirmity in the impugned order. In view of this, we hold that the respondent is entitled for consequential relief arising out of these proceedings, if any.

8. In result, the appeal filed by the Revenue is dismissed by upholding the impugned order.

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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