

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

(1) Customs Appeal No.445 of 2009-CU (DB)

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.]

Shri Dinesh Sharma,
Proprietor of
M/s. Balaji Impex India,
34/17, East Patel Nagar, New Delhi.
And
2911/4, Chuna Mandi,
Paharganj, New Delhi.

Appellant

VERSUS

Commissioner of Customs (Preventive)
New Customs House,
Near IGI Airport, New Delhi.

Respondent

With

(2) Customs Appeal No.453 of 2009-CU (DB)

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.]

Shri Davinder Singh Dawer @Goldy
1559, Main Bazar,
Paharganj, New Delhi.

Appellant

VERSUS

Commissioner of
Customs (Import & General),
New Customs House,
Near IGI Airport, New Delhi.

Respondent

With

(3) Customs Appeal No.454 of 2009-CU (DB)

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.]

M/s.Darbar Exports
T-376-377,6-Tooti Chowk,
Paharganj, New Delhi.

Appellant

VERSUS

Commissioner of
Customs (Import & General)
New Customs House,
Near IGI Airport, New Delhi.

Respondent

With

(4) Customs Appeal No.455 of 2009-CU (DB)

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.]

Shri Jugal Kishore Dawer,
Proprietor of
M/s.Darbar Exports,
T-376-377,6, Tooti Chowk,
Paharganj, New Delhi.

Appellant

VERSUS

Commissioner of
Customs (Import & General),
New Customs House,
Near IGI Airport, New Delhi.

Respondent**With****(5) Customs Appeal No.456 of 2009-CU (DB)**

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.]

M/s.GTB Exports
1559, Main Bazar,
Paharganj, New Delhi.

Appellant

VERSUS

Commissioner of
Customs (Import & General),
New Customs House,
Near IGI Airport, New Delhi.

Respondent**With****(6) Customs Appeal No.457 of 2009-CU (DB)**

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.]

Ms. Kiran Dawer,
Proprietor of
M/s.G.T.B. Exports,
1559, Main Bazar,
Paharganj, New Delhi.

Appellant

VERSUS

Commissioner of
Customs(Import & General),
New Customs House,
Near IGI Airport, New Delhi.

Respondent**With**

(7) Customs Appeal No.458 of 2009-CU (DB)

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.]

M/s. Hazrat Mart

T-2565, Chuna Mandi,
Paharganj, New Delhi.

Appellant

VERSUS

**Commissioner of
Customs (Import & General),**

New Customs House,
Near IGI Airport, New Delhi.

Respondent**With****(8) Customs Appeal No.459 of 2009-CU (DB)**

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.]

**Smt. Isha Dawer,
Proprietor of**

M/s.Hazrat Mart, T-2565,
ChunaMandi, Paharganj, New Delhi.

Appellant

VERSUS

**Commissioner of
Customs (Import & General),**

New Customs House,
Near IGI Airport, New Delhi.

Respondent**With****(9) Customs Appeal No.460 of 2009-CU (DB)**

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.]

**Shri Bharat Gambhir,
Proprietor of**

M/s.G.H. Creation, R/o X-1705/A,
Gali No.17, Rajgarh Colony,
Delhi.

Appellant

VERSUS

**Commissioner of
Customs (Import & General),**

New Customs House,
Near IGI Airport, New Delhi.

Respondent**With****(10) Customs Appeal No.461 of 2009-CU (DB)**

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.]

Shri Dinesh Sakhuja
Proprietor

M/s.Samriti Enterprises,
R/o 578, Gali Kaitwali,
Paharganj, New Delhi.

Appellant

VERSUS

Commissioner of
Customs (Import & General),

New Customs House,
Near IGI Airport,New Delhi.

Respondent

With

(11) Customs Appeal No.462 of 2009-CU (DB)

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.)

M/s.Ganpati Incorporation

M-566, First Floor, Guru Harkishan Nagar,
Paschim Vihar, Delhi.

Appellant

VERSUS

Commissioner of
Customs (Import & General),

New Customs House,
Near IGI Airport,New Delhi.

Respondent

With

(12) Customs Appeal No.463 of 2009-CU (DB)

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.)

Shri Varun Bhandari,
Proprietor

M/s.Ganpati Incorporation,
M-566, First Floor, Guru Harkishan Nagar,
Paschim Vihar, Delhi.

Appellant

VERSUS

Commissioner of
Customs (Import & General)

New Customs House,
Near IGI Airport,New Delhi.

Respondent

With

(13) Customs Appeal No.469 of 2009-CU (DB)

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.)

M/s.Samriti Enterprises

B-330, Sudarshan Park,
Moti Nagar, New Delhi.

Appellant

VERSUS

**Commissioner of
Customs (Import & General)**

New Customs House,
Near IGI Airport, New Delhi.

Respondent**With**

(14) Customs Appeal No.470 of 2009-CU (DB)

(Arising out of Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi.)

M/s.G.H. Creation

3088, Sangtarashan Street,
Near Police Post, Paharganj,
New Delhi.

Appellant

VERSUS

**Commissioner of
Customs (Import & General)**

New Customs House,
Near IGI Airport, New Delhi.

Respondent**APPEARANCE:**

Shri J.M. Sharma, Consultant in Appeal No.C/445 of 2009 and
Dr. G.K. Sarkar, Advocate for the other appellant(s).
Shri Sunil Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.50716-50729/2022

DATE OF HEARING:30.03.2022
DATE OF DECISION:22.08.2022

ANIL CHOUDHARY:

The brief issues involved in these appeals arising from common impugned order are whether (i) the appellants are *bona fide* exporters or simply freight forwarders, (ii) the appellant(s) are bogus firms, and (iii) whether the appellant(s) overvalued the exported goods for availing undue Drawback/DEPB benefits.

2. Shri Dinesh Sharma, proprietor of M/s. Balaji (Appeal no. C/445/2009) are in the export of textiles from year 2001; they have obtained IEC certificate and obtained permission for transaction in foreign exchange and have accordingly opened up current accounts in Punjab National Bank etc; they have exported fabric, apparel, made ups to CIS countries and availed DEPB and drawback benefits. Other importers who are similarly placed are as below:

Name of the appellant	Proprietor / Partner
1. M/s. BalajiImpex India, East Patel Nagar, New Delhi	Shri Dinesh Sharma
2. M/s. Darbar Exports, Paharganj, New Delhi.	Shri Jugal Kishore Dawer
3. M/s. G.T.B. Exports, Paharganj, New Delhi	Ms. Kiran Dawer
4. M/s. Hazrat Mart, Paharganj, New Delhi	Ms. Isha Dawer
5. M/s. G.H. Creation, Paharganj, New Delhi	Shri Bharat Ghambhir
6. M/s. Samriti Enterprises, Moti Nagar, New Delhi.	Shri Dinesh Sakhuja
7. M/s. Ganpati Incorporation, PaschimVihar, Delhi	Shri Varun Bhandari

2.1. On the basis of the intelligence received to the effect that one Shri Davinder Singh Dawar alias Goldy was infact managing the exports in the name of other exporters and has been availing the DEPB scrips and drawback benefits and was also over invoicing the exports, investigations were re-initiated into the activities; various residential premises of the aforesaid exporters were searched and documents were recovered; statements of Shri Goldy and others were recorded; oversea enquiries were conducted through Customs Overseas Information Network (COIN).

2.2. On the basis of the investigation conducted, it appeared to the department that:-

- Shri Goldy was involved in manipulation of exports to avail benefits and in over invoicing exports; he used to purchase fabrics from local market and exported the same in the name of different exporters;
- He used to collect foreign currencies from the tourists from CIS countries visiting India and was depositing the same into the accounts of various exporters;
- He used to collect / procure foreign exchange from the local dealers and remitted this amount into the accounts of various exporters, allegedly for the exports made.
- Shri Goldy was the kingpin and has managed the Customs clearance and export procedures in the Air Cargo compliance as confirmed by CHA.
- Shri Goldy accepted that he prepared covering letters and the tenders on behalf of the foreign buyers in his office at Paharganj, New Delhi;
- COIN, Dubai vide letter dated 31.3.2005 informed that one M/s. Alijaburi Trading Company, to whom M/s. Balaji Impex (India) exported goods were not found to have existed.
- COIN, London vide letter dated 17.5.2005 informed that the consignee of M/s. Nisha Overseas / M/s. JDJ Jurex, SP Z.o.o. Olawa did not deal with them directly.
- COIN, London vide letter dated 26.8.2005 informed that goods destined to (IPNOSDOO) Belgrade at Customs cleared the goods.

- Report received from Indian Embassy at Moscow vide letter dated 16.8.2005 indicated that M/s. Akshay Trading, New Delhi had exported the goods;
- Some of the local manufacturers of fabric accepted that they have sold fabrics which pertain to the exporters whereas some were found to be non existing.
- Shri Goldy managed exports of about 146.91 Cr worth of exports and availed drawback / DEPB benefit to the tune of Rs.20.93 Cr were availed.
- exports made by Shri Goldy was in violation of Customs Circular No. 61/98 dated 25th August,1998.
- drawback of Rs. 10,75,15,922 and DEPB credit of Rs.10,18,30,387 is liable to be recovered, jointly and/or severally from Shri Goldy and other exporting firms, under Proviso to Section 75 of the Customs Act read with Rule 16 and Rule 16A of the Customs & Central Excise Duties Drawback Rules, 1995.

3. Accordingly, a common show cause notice, dated 08.12.2006 was issued, by the Directorate of Revenue Intelligence, Delhi Zonal Unit, New Delhi, to several persons, proposing to hold the goods exported, valued at Rs.32,68,91,021, liable for confiscation under Section 113 (d) and (i) of the Act; to recover the drawback of Rs. 10,75,15,922 and DEPB credit of Rs.10,18,30,387 from exporters as well as importers; to impose penalties and to appropriate the amount deposited by the exporting firms - M/s. Darbar Exports etc. during investigation. The SCN was adjudicated, Order-in-Original No.03/APSS/CC/DRI/NCH/2009 dated 27.03.2009, passed by the

Commissioner of Central Excise (Adjudication), New Delhi, confirming the confiscation of goods already exported but not imposing any fine in lieu of the confiscation as the goods were not available for confiscation; recovery of duty jointly or severally from the exporting firms/its proprietors and/or Mr. Goldy and imposing Penalties. However, the proposed demands against the importer/purchasers of the DEPB scrips were dropped. Being aggrieved, the various appellants as cited above, have filed appeals under discussion.

4. Shri J.M Sharma, learned counsel, appearing for Mr. Dinesh Sharma, Proprietor of M/s Balaji Impex India, *inter-alia submits that* that the appellant had filed an interim reply to the SCN on 23.01.2007 denying the allegations; a prayer was made for an opportunity to cross-examine the witnesses in the adjudication proceedings; vide letter dated 15th June, 2007, a request was made for supply of the relied upon documents; vide another letter dated 24th July, 2008 his request for inspection of the original documents was repeated. He submits that as directed by the department, the appellant visited the office of the DRI on 26.09.2008, for inspection; but the inspection of documents could not be carried out as the concerned staff was not available and the fact was intimated to the Adjudicating Authority immediately vide letter dated 27.09.2008; the appellant again visited the office of the DRI in the 3rd week of October, 2008; inspection was not allowed on the flimsy ground that a written instruction from the Adjudicating Authority was required; Adjudicating Authority was requested to issue suitable directions to the DRI to permit inspection of the documents/RUDs. He submits

that the impugned order-in-original was passed in gross violation of the principles of natural justice, causing prejudice to this appellant, without allowing inspection of documents, without allowing cross-examination of the witnesses and without granting opportunity of personal hearing.

4.1. Learned Counsel further submits that commissioner ordered for recovery of duty drawback/DEPB scrips jointly and severally from the appellant – Balaji Impex and Mr. D.S.Dawar @Goldy; the same is illegal and not sustainable; it is well settled law that the Adjudicating Authority while passing the adjudication order should determine and finally conclude the duty liability of each person, specifying the duty required to be paid individually; in the present case, the Adjudicating Authority has ordered recovery from 2 persons, jointly or severally, without clearly specifying the amount to be recovered from each of them; therefore, in view of the following decisions the order is legally bad and liable to be set-aside.

- (i). *Famous Textile Vs CCE -2005 (190) ELT 361 (T-Mumbai)*
- (ii). *Shree Aravindh Steels Ltd. Vs CCE – 2007 (216) ELT 332 (T-Chennai)*
- (iii). *Golden Tobacco Ltd. Vs CCE – 2015(317) ELT164Z(T-Delhi)*
- (iv). *Thar Dry Port Vs CC, Jodhpur-2017(358) ELT 1214 (T-Delhi)*

He submits that vide above orders, it was held that to demand the customs duty, it is necessary to identify the person, who is liable to pay such duty in terms of the provisions of the Customs Act; duty cannot be confirmed jointly and severally against multiple persons; duty demanded jointly and severally on more than one person is not legally sustainable.

4.2. Learned counsel submits also that the impugned order is also bad for demanding the amount of drawback jointly under

Rule 16 and 16 A of the Drawback Rules, without separately specifying the amount recoverable under each Rule, in as much as Rule 16 and Rule 16 A operate in different situations; Rule 16 provides, "for recovery of drawback, which has been wrongly paid; s Rule 16 A provides for recovery of drawback, in case, where remittances have not been received; as per evidence on record, admittedly, the export proceeds or remittances have been received by the exporting firms in convertible foreign exchange through proper banking channel in accordance with the foreign exchange laws; therefore, the provisions of Rule 16A are not attracted; further, Rule 16 is also not attracted as the goods were properly presented for export by filing shipping bill along with the supporting documents and after proper inspection and verification and the customs have allowed the export and issued the export promotion copy of the shipping bill for availing the export benefits. He submits that the impugned order has been passed in gross violation and ignoring the instructions contained in Board Circular No. 61/98– Customs dated 28th August, 1998, particularly, the instructions contained in para-3 and 4 (i) and (iii).

4.3. Learned Counsel submits further that the show cause notice has been issued wholly without jurisdiction; the Additional Director General, DRI, DZU, New Delhi did not have jurisdiction to issue the show cause notice proposing recovery of duty drawback/DEPB under Section 28 of the Customs Act read with Rule 16 and 16 A of the Duty Drawback Rules, during the period of dispute; the functions as an Adjudicating Authority had not been assigned to the Additional Director General of DRI. He relies on Apex Court decision in the

case of **Syed Ali - 2011 (265) ELT 17**; Calcutta High Court decision in the case of **Navneet Kumar versus Union of India - 2018 (362) ELT 17** and submits that Hon'ble High Court held that the officers of DRI are not authorised under the notification or circular to discharge any functions under the Customs Act, 1962 by a conferment of authorization by the Board or the Commissioner of Customs, exercising powers under Section 2(34) of Customs Act; even the retrospective amendment in Section 28(11) of the Customs Act, inserted in 2011 would not apply to the show cause notices issued prior to the date of insertion (16.09.2011).

4.4. Learned Counsel further urges that the impugned order is also bad as the learned Commissioner held that the goods already exported (not under seizure or under the Custody of the Adjudicating Authority) are liable to confiscation under Section 113 (d) and (i) of the Customs Act, 1962 ; such confiscation cannot be sustained as the goods have already been exported and do not fall within the definition of "Export Goods" as defined under Section 2(19) *ibid*, which defines Export Goods as – goods, which are about to be taken out of India (still lying within India).

4.5. Learned Counsel further urges that the finding of learned Commissioner that the foreign exchange transactions were done in violation of Regulation 13 of the Foreign Exchange Management (Export of Goods and Services Regulation 2000) is not sustainable; all the payments for export of goods were received in accordance with Regulation 4 of Foreign Exchange Management (manner of receipt and payment) Regulations, 2000 and within the period specified in Regulation 9 of the FEMA (export of goods and services)

Regulation, 2000; till date Foreign Exchange Management Authority have not questioned the Foreign Exchange Transactions; there is no evidence on record to suggest that the appellants contravened any of the provisions of the Foreign Exchange Management Act or the Regulations made thereunder.

4.6. Learned Counsel further urges that order imposing penalty under Section 114 of Customs Act, 1962 is bad; penalties are not attracted for the alleged irregular availment of the duty drawback; no penalties are attracted for the alleged irregular receipt of DEPB scrips under Section 114 *ibid*.

5. Dr.G.K. Sarkar, Advocate, appearing on behalf of Mr. Davinder Singh Dawar @Goldy and other appellants, *inter alia*, submits that the show cause notice issued in the instant case by the ADG-DRI for recovery of draw back/DEPB credit in relation to export of goods during the year 2000-2004 is wholly without jurisdiction; Rule 16 of Drawback Rules provides for recovery of drawback by the proper officer and Section 28 also provides for recovery of duty by the proper officer; Hon'ble Supreme Court in the case of **Canon India Private Ltd.,Vs. CCE - 2021 (376) ELT 3 (SC)**, while considering a case of demand raised by DRI under Section 28 held that DRI is not the proper officer and hence the show cause notice issued by DRI for recovery is without jurisdiction; Apex Court observed that it is necessary to see whether the DRI is an authority in law to issue show cause notice under Section 28 (4) of the Act for recovery of duty, when the goods have been cleared pursuant to import by the Deputy Commissioner of Customs, who decided that the goods are exempted; Section 28(4) of the Act empowers the recovery of duty

not paid, part paid or erroneously refunded by reason of collusion, willful mis-statement or suppression of facts and confers the powers of recovery on 'the proper officer'; obvious intention is to confer the power to recover such duty not on any officer but only on 'the proper officer'; use of the definite article 'the' before the 'proper officer' indicates that the power has been conferred on the 'proper officer', who had earlier assessed the duty etc. in the first instance, and the power consciously conferred on that officer; the nature of power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import or export is broadly a power to review the earlier decision of assessment; such a power is not inherent in any authority; the power has been so conferred specially on 'the proper officer', which must necessarily mean the proper officer, who in the first instance assessed and cleared the goods.

5.1. He submits that Hon'ble Supreme Court reiterated its earlier ruling in the case of Syed Ali (supra); The Apex court observed – from a cogent reading of Section 2(34) and 28 of the Act, it is manifest that only such a customs officer, who has been assigned the specific functions of assessment and re-assessment of duty in jurisdictional area, where the import/export concerned have been affected, by either the Board or the Commissioner of Customs in terms of Section 2(34) of the Act, is competent to issue notice under Section 28 of the Act; Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose, in as much as, as contemplated under Section 2(34) of Act, for specific conferment of such functions. He submits that the ruling of Hon'ble Supreme Court

in the case of Canon India has been followed and reiterated in the subsequent rulings by the Apex Court in the case of M/s. Agarwal Metals & Alloys in Civil Appeal No. 3411 of 2020; in CC, Kandla Vs Sunland Metal Recycling Industries, C.A. No. 5053/2021; in Kitchen Essentials and others versus Union of India – 2021-TIOL-2015-HC-MUM-CUS and by Tribunal in Dhiren Enterprises Vs CCE(Adj.) and Switzer Engineering Labs Vs CC (Import).

5.2. Learned Counsel further submits that the jurisdiction of DRI with respect to issue of notice for recovery under Rule 16 and 16 A of drawback rules was considered by the Tribunal in the case of **Hem Chand Gupta and Sons vs. CCE - 2015 (330) ELT 161**, wherein it was held that DRI is not the authority as they are not the proper officer to issue show cause notice for recovery; notification No. 40/2012-Cus., dated 2nd May, 2012 notified the DRI officers to be proper officers for the purpose of the specified sections and to carry out the object of Section 2(34) of the Act; such powers conferred for the 1st time vide Notification No. 44/2011-Cus., dated 06.07.2011 for the purposes of section 17 and 28 of the Act, to give effect to the objects of section 2(34); but they were not empowered to act under section 51 (assessment of bill of entry) or section 75 (export benefits). Thus, the DRI officers were not the proper officers prior to 06.07.2011; Revenue carried the order of this Tribunal in **Hem Chand Gupta** to Hon'ble Supreme Court and thereafter, withdrew the appeal for filing the same before Hon'ble High Court; subsequently, the High Court held the matter against Revenue; thus, the ruling in the case of **Hem Chand Gupta (supra)** specifically with respect to Rule 16 and Rule 16A of the Drawback rules, has

attained finality.

5.3. Learned Counsel submits further that invocation of Rule 16 A is bad, as this Rule is applicable only in cases, where sale proceeds have not been realized; it is not the case of Revenue that appellant have not received the sale proceeds of the exported goods; there is no evidence as regards non-receipt of sale consideration of the exported goods; Rule 16A has been amended vide Notification No.10/2006-Cus., dated 15.02.2006. Prior to amendment w.e.f. 15.02.2006, there was no scope for the Department to issue show cause notice *suo moto* without receipt of information from RBI as held by the Hon'ble Allahabad High Court in the case of **Mayfair Leather Exports (Pvt.) Ltd. Vs. Union of India - 2011 (272) ELT 193 (Allahabad)**. He submits that jurisdiction goes to the root of the matter, and, therefore, the whole proceedings initiated by the DRI is without jurisdiction and vitiated; Reliance is placed on the ruling of the Hon'ble Supreme Court in the case of **Deepak Agro Foods Vs State of Rajasthan – 2008 (228) ELT 510.**

5.4. Learned Counsel submits also that so far the demand for recovery of DEPB credit under Section 28 is concerned, there was no such provision empowering the Customs Department to recover the import duty from the exporters; to overcome the situation, the Government inserted Section 28AAA w.e.f. 28.05.2012 by which, it has been provided that "where an instrument issued to a person has been obtained by means of collusion or willful mis-statement or suppression of facts and such instrument is used by a person other than the person, to whom the instrument is issued, the duty relatable to utilization of such instrument shall be deemed never to

have been exempted or debited and such duty shall be recovered from person to whom, the said instrument was issued”; during the material time, no recovery of DEPB credit can be made from these appellants /exporters by invoking Section 28 of the Customs Act, 1962.

5.5. Learned Counsel submits also that allegation has been made against the appellant - M/s. D.S. Dawar alias Goldy with respect to 14 firms, which made exports of readymade garments to CIS countries; Shri Goldy is concerned with only 6 out of 14 firms viz.:- M/s. Darbar Exports, M/s.GTB Exports, M/s.Hazrat Mart, M/s.G.H. Creation, M/s. Smriti Enterprises and M/s.Ganpati Incorporation; These six firms are owned by relative she is in no way concerned with others like M/s. Balaji Impex, M/s.Pawansut International, M/s. Nisha Overseas, M/s. S.K. Traders, M/s. Shanawaz Garments, M/s. A.K.S International, M/s. Akshay Trading and M/s Simran Impex India; demand in respect of other 8 firms has been fastened jointly or severally on Mr. Goldy by misreading by the statements recorded during the course of investigation.

5.6. Learned Counsel submits also that the show cause notice wrongly quotes the statement of Shri Goldy (in para-19); it has been quoted that “his buyers used to visit Delhi and purchase the export goods themselves”, whereas, he actually stated that “my buyers of exported goods used to come to Delhi and purchase the export goods themselves from us.” He submits that further, the statement of Mr. Ajay Verma, through whom the appellant –Goldy and others sold DEPB licenses, has been mis-quoted (para-51) to say “On being asked whether he had processed DEPB licenses or prepared export

documents in respect of M/s.Pawansut International, M/s. Nisha Overseas, M/s. Simran Impex, M/s. Akshay Trading, M/s. S.K. Traders, M/s. Balaji Impex India, M/s. Shanawaz Garments and M/s.AKS International, Ajay Verma stated that he had processed around 05 DEPB licenses for M/s Akshay Trading and that Shri Goldy used to give him all the documents and commission in cash, however, the actual statement of Shri Ajay Verma, recorded on 12.05.2005, was "Initially, I processed DEPB licenses for only two-companies namely M/s Darbar Exports, M/s GTB Exports; later, he also gave DEPB license processing tome in respect of four more firms namely, M/s Hazrat Mart, M/s G.H. Creation, M/s Samriti Enterprises and M/s Ganapati Incorporation and about 8 other firms he stated that "I only processed DEPB license with DGFT - CLA, New Delhi in respect of M/s. Akshay Trading; Smt Sunita Barar used to give me, AWB invoices, EPcopy, DEPB copy, BRC for processing of DEPB license as well as verification; I had processed around 5 DEPB licenses in respect of M/s Akshay Trading"; it is evident that Revenue have conveniently distorted the statement of Shri Ajay Verma to show as if all the documents relating to the aforementioned 8 firms used to be given by Mr. Goldy. These eight exporting firms also produced several documents in support of their independent existence; their independent nature is also corroborated by the statement of Sh. Benkichidanand, Manager of M/s Global Trust Bank, where all the fourteen exporting firms have their bank accounts.

5.7. Learned Counsel have further relies on the CBEC Circular No. 61/98-Cus., dated 25.08.1998, dealing with the issue of buyers coming to India from CIS countries for making purchases of

readymade garments, etc; the said circular provides and clarifies that so long as there is clear linkage between the goods purchased in India and their export on an appropriate shipping bill filed under Section 50 of the Customs Act, prescribed for DBK/DEPB Scheme, even if the buyer is a tourist visa holder and the foreign exchange was declared by him on arrival to the Customs on a Currency declaration form and the same was duly en-cashed with an authorized dealer, then such goods will have to be treated as export from India; the provisions of Exchange Control Manual also allow such goods to be exported and paid for under the Regulations framed under FERA (now FEMA) against convertible currency brought into India and converted into Indian rupees; the Circular further provides the conditions to be fulfilled, namely – to file shipping bills by the Indian exporter/ seller or any other authorized representative, foreign currency declaration form to be produced given by foreign visitors / tourists at the time of arrival in India; all the conditions as prescribed in the Circular No. 61/98 has been complied with in the present case(s).

5.8. He further submits that the exporting firms having their valid IEC, were registered with AEPC (Apparel Export Promotion Council) had filed proper shipping bills alongwith supporting invoices, packing lists and declarations that the shipping bill is under export incentives (DEPB/drawback); such goods have been duly assessed and cleared by the proper officers of Customs following the due procedure of law as prescribed; remittances have been realized in accordance with the law; RBI Notification No. 14/2000-RB dated 03.05.2000, provides that notwithstanding anything contained in

Regulation 3, payment for export may also be received by the exporter as under, namely, in the form of a bank draft, cheque, foreign currency notes/ travelers cheque from a buyer during his visits to India provided the foreign currency so received is surrendered within the specified period to the authorized dealer of which the exporter is a customer. He submits that there are several instances in the export(s) made by these appellants wherein part payment has been received in advance and part payment is received after export and Bank Realisation Certificates have been issued; further, all the exporting firms are assessed to Income Tax and have filed their separate income tax returns showing exports sales; they also maintained proper accounts which have been audited by the Chartered Accountant as per relevant laws; thus, the allegation of revenue that such exports are not genuine is by way of bald allegation; exports being found genuine and authorities have duly sanctioned the export incentive in accordance with law; demand jointly and severally is bad in law as held in *Sanjiv Kumar Mittal vs. Deputy Commissioner (TRC)- 2021 (44) GSTL 14 (Del.)*.

5.9. He further submits that under the facts and circumstances, invocation of extended period of limitation is bad and not tenable, there being no mis-statement or fraud or collusion etc. on the part of the appellant; he relies on the ruling of the Apex Court in *Uniworth Textiles Ltd. vs. CCE, Raipur -2013 (288) ELT 161 (SC)* and *Sarabhai M. Chemicals vs. CCE, Vadodara -2005 (179) ELT 3 (SC)*.

5.10. He further submits that no reliance can be placed on the statements recorded during investigation; the statement of Mr.

Goldy was recorded for four days continuously and thereafter he was arrested and produced before the Magistrate Court; at the very first opportunity on being produced before the Magistrate Court, he retracted, stating that the same have been recorded under coercion and the statement was recorded as dictated by the Officers; so far the statements of the other co-noticees are concerned, all have retracted from their statements in their reply to the show cause notices; further, two witnesses examined during adjudication have also not supported the case of Revenue; several persons, whose statements were relied upon by the Revenue, were not examined in the adjudication proceedings; such statements are not reliable in terms of the provisions of Section 138B of the Customs Act as held in *Andaman Timber Industries V/s CCE*.

5.11. He further submits that the show cause notice and the impugned order are self-contradictory; on the one hand, it has been alleged that the goods exported were overvalued for claiming undue export benefits, whereas, on the other hand, Revenue have contended that there is no actual export and the appellants are simply packers and forwarders not entitled to export benefits; the overwhelming evidence on record in the shape of trade transactions by the appellants, including the purchase of fabrics/readymade garments, fabrication of garments and thereafter export, supported by the turnover/ transactions in their bank statements and also declared before the tax authority, Income Tax etc, such allegations do not stand; so far the allegation of overvaluation is concerned, no alternate or fair price of the exported goods have been suggested and worked out by the Revenue as per rules, and as such the

allegation of overvaluation is simply a bald allegation, which is not corroborated; in the case of allegation of overvaluation, Revenue have failed to support or corroborate with the evidences in the form of contemporaneous exports.

5.12. He further submits that the reports received from the COIN London, COIN Dubai and Embassy of India, Moscow, have supported the genuineness of the transaction of the exports; the only adverse remarks is that some of the importers in those countries have declared lesser value for clearance than the declared export value in India; no adverse inference can be drawn for such declared value (lower value) by the importers; it cannot form basis to support the allegations of overvaluation in respect of the exported goods; he relies on *Ajay Apparels Vs. Commissioner of Customs (Port), Kolkata* – 2006 (204) ELT 131 (Tri-Kolkata) (upheld by the Hon'ble Kolkata High Court 2009 (233) ELT 828; the appellant exporters have filed shipping bill under export incentives with supporting documents and such goods for export were properly inspected and evaluated by the Customs Officers, and only thereafter, the LET export orders were given; admittedly, there is no allegation of any collusion between the Customs Officers and the appellants; as such the allegations in the show cause notice are wild and baseless; the show cause notice is also bad for non-joinder of necessary parties, as in this case, the Customs Officers, who evaluated the goods and issued export orders under Section 51.

6. Shri Sunil Kumar, learned Authorised Representative for Revenue, reiterates the findings in the impugned order and submits that Shri D.S.Dawar @ Goldy, in the statements recorded on

29.06.2004, 30.06.2004, 01.07.2004 and 02.07.2004, *inter alia*, admitted that he was controlling and managing all the activities of the 6 firms, which were owned by his family members/friends; he has claimed more drawback by overvaluation; he has claimed drawback illegally on the goods purchased by the foreign buyers/tourists by showing the same as exports from his aforementioned 6 firms by way of over-invoicing; there was stiff competition; foreign buyers/tourists used to bargain for some extra facilities like free boarding/lodging, lunch/dinner, free packing/or material, free customs clearance, free sightseeing, free transportation etc; to cover such expenses, he had to overvalue to the extent of 20% for claiming drawback/DEPB.

6.1. Authorised Representative further submits that the Proprietors of various firms i.e. Shri Jugal Kishore Dawar of Darbar Exports; Smt Kiran Dawar of M/s GTB Exports; Smt Esha Dawar of M/s Hazrat Marg; Shri Dinesh Sharma of M/s Balaji Impex; Shri Varun Bhandari of M/s Ganpati Incorporation and Shri Dinesh Sakhuja, of M/s Samriti Enterprises, in their voluntary statements, have stated, *inter alia*, that they were proprietors of their respective firms on papers for namesake only; Shri Goldy used to control and manage all the activities of their firms; Shri Goldy used to take major share of export benefits in respect of the exports from their firms; they did not sign the export documents like invoices, packing list etc; they were signing the documents on the dotted line on being asked by Shri Goldy; these statements were never retracted. He submits that the proprietors of the other eight firms have stated to the effect that they were not knowing much details of exports through their firms;

they used to sign blank cheques and handover the same to Shri Goldy; they were getting a paltry fixed sum or 20 – 25% of the export benefits for lending name of their firms; these statements too have not been retracted.

6.2. Shri Sunil Kumar further submits Shri G.S. Bagga of M/s. Nisha Overseas, Shri Dinesh Sharma of M/s. Balaji Impex India, Shri Akash Bansal of M/s AKS International, in the statements, *inter alia*, stated that Shri Goldy used to collect foreign currency from foreign tourists upon their arrival in India; deposit the same in bank accounts of his firms as advance payments received from foreign buyers; withdraw the entire amount in Indian currency and return the same to the tourists/buyers, who used to buy the merchandise of their choice from the open market and leave it with Shri Goldy for packing and forwarding to the destinations specified by them; after having received the goods merely for the purpose of packing and shipping, Shri Goldy then used to put on the garb of an exporter and prepare invoices at substantially higher rates on behalf of his bogus firms and ship the goods collected from the said tourists under various export promotion schemes; Shri Goldy used to illegally procure foreign currency from local moneychangers to meet the difference between the so-called advance payment and the declared/over invoiced price and deposit the same in the bank accounts as export proceeds; post shipment, Shri Goldy used to claim export promotion incentives available only to *bonafide* exporters; on being confronted with these statements Shri Goldy never expressed his disagreement to the contents of such statements.

6.3. Shri Sunil Kumar submits also that Shri Jugal Kishore Dawar stated that his signatures were forged on the export documents relating to 29 shipping bills; Shri Goldy could give details in this regard; Shri Dheeraj Anand, an employee of M/s Balaji Impex India, stated that he used to prepare export invoices of M/s Balaji Impex India and M/s Pawansut International in the office of Shri Dinesh Sharma; he used to prepare a new set of invoices mentioning the name of buyers in the prescribed column as shown in the exchange control copy; letters showing as written by foreigners were actually prepared by him; he did all this as directed by Shri Dinesh Sharma; he never received any message, e-mail or letter from any overseas buyers; he had never seen any buyer or his representative in his office.

6.4. Learned authorised representative submits further that on investigation, some of the garment suppliers/fabricators were found to be non-existent at the addresses provided by Shri Goldy; it appeared that some of the fabricators did not have infrastructure/manpower to supply the goods exported by Shri Goldy or the supply of the garments/fabric which was at much lower price when compared with the export prices of the goods; retracted statements have evidentiary value if there is corroborative evidence which supports the statement; he relies on Surjeet Singh Chhabra 1997 (89) ELT 696, K. I. Pavunny 1997 (90) ELT 241 and Naresh J. Sukhwani 1996 (83) ELT 258 (SC) and submits that the inculpatory statement given by Shri Goldy though retracted is reliable; retraction of inculpatory statement is only by way of afterthought to escape the consequences of violations of law committed. Learned

authorised representative places reliance also on the report received from COIN Dubai and COIN London and submits that the information received from overseas also supports the case of Revenue.

6.5. Learned authorised representative further submits that it has been rightly held that the goods which have already been exported are liable to confiscation under Section 113(d)&(i) and the appellants have been rightly held liable to penalty under Section 114 of the Act; the contention of the appellants that confiscation is bad as the goods have already been exported, and are not 'export goods' as defined under Section 2(19) of the Customs Act, is incorrect as per *Eurasian Equipment & Chemicals Ltd., and others* 1980 (6) ELT 38 (Cal.); it is a case of mis-declaration of value of goods in order to claim export incentives, which was otherwise not permissible; he relies on *Merchant Exports Ltd.*, 2005 (190) ELT A175. He submits that even as per the Board Circular No. 61/1998-Cus., the appellants were not entitled to export incentives; they being not the genuine exporters but simply freight forwarders; it has been rightly held in the impugned order that the appellants are liable to repay the amount of DEPB scrips to revenue, which are obtained fraudulently and thereafter utilised by other importers pursuant to transfer; so far the demand of the export incentives jointly and severally is concerned, admittedly the proprietors of the exporting firms have stated that they were proprietors for namesake only, all the business activities were controlled by Shri Goldy, who has also been benefited by way of sharing the export incentives received by way of duty drawback/DEPB.

6.6. Learned authorised representative further submits on the

reliance on Canon India Private Ltd.,(supra)as to jurisdiction of the DRI to issue show cause notice that Canon India Private Ltd., (supra) dealt with the issue of classification and benefits thereof; there is no issue involved of fraud and forgery as in the present case; the said ruling is not applicable in the facts of the present case; he relies on Sevelle Products Ltd Final Order Nos. 52058 – 52059 dated 17th December 21; vide Section 87 of the Finance Act, 2022,Section 3of the Customs Act (classes of officers of Customs) has been substituted, which now includes the officers of DRI, officers of Preventive, officers of Audit Wing as officers of Customs; further, Section 88 of the Finance Act, 2022 amends Section 5 of the Customs Act, wherein under Section 5(1) of the Customs Act - (powers of officers of customs), subsection (1A)have been inserted; sub Section (1A) which provides that without prejudice to the provisions contained in subsection (1), the Board may, by notification, assign such functions as it may deem fit, to an officer of customs, who shall be `the proper officer' in relation to such functions; sub-section (1B) provides that within their jurisdiction assigned by the Board or the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, by order, assign such functions, as he may deem fit, to an officer of Customs, who shall be the proper officer in relation to such functions; new sub-section (4) stipulates conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A), the Board may consider any one or more of the following criteria, including, but not limited to – a) territorial jurisdiction, b) persons or class of persons, c) goods or class of goods; d) cases or class of cases; e) computer assigned random assignment; and f) any other

criterion as the Board may, by notification, specify; sub-section (5) provides that "the Board may, by notification, wherever necessary or appropriate, require two or more officers of Customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act"; Section 97 of Finance Act, 2022 further provides that - notwithstanding anything contained in any judgement, decree or order of any court, tribunal, or other authority, or in the provisions of the Customs Act, 1962 –

- (i) anything done or any duty performed or any action taken or purported to have been taken or done under Chapters V, VAA, VI, IX, X, XI, XII, XIIA, XIII, XIV, XVI and XVII of the Customs Act, as it stood prior to its amendment by this Act, shall be deemed to have been validly done or performed or taken;
- (ii) any notification issued under the Customs Act for appointing or assigning functions to any officer shall be deemed to have been validly issued for all purposes, including for the purposes of Section 6,
- (iii) for the purposes of this section, sections 2, 3 and 5 of the Customs Act, as amended by this Act, shall have and shall always be deemed to have effect for all purposes as if the provisions of the Customs Act, as amended by this act, had been in force at all material times.

Further Explanation provides – for the purposes of this section, it is hereby clarified that any proceeding arising out of any action taken under this section and pending on the date of commencement of this act shall be disposed of in accordance with the provisions of the Customs Act as amended by this act.

6.7. Learned authorised representative submits also that in view of Section 97 of the Finance Act, 2022, which starts with the non-*obstante* clause, the decisions of the courts, tribunal and authority on the issue in relation to the actions (jurisdiction) taken under Chapter V and other chapters, as specified, of the Customs Act have been ousted; thus, by this Section all actions taken under these chapters have been declared to have been validly taken even if there is a contrary decision of any court, in the matter; thus, the show cause notice issued by the officers of DRI in the instant case has been validated by the provisions of the Finance Act, 2022 with retrospective effect; accordingly, the appeals be dismissed.

7. Heard both the sides and perused the records of the case. The main allegation in the instant case is that Shri Goldy has manipulated the exports and has wrongly availed the export benefits; he has collected money from the visiting tourists from CIS countries and deposited such amounts in to the accounts of various manufacturers showing the same to be advance payment for the fabrics / clothes purchased or imported by such tourists; he has procured foreign currency from local money lenders and such money was arranged to be put to the different companies in whose name the exports were made showing the same to be final payment; he used to withdraw money from the respective accounts. It appears that the main case of the Department is evidenced by the statement of Shri Goldy and other exporters and local manufacturers; reports received from Customs Overseas Network and statement of the CHA. We find that appellants strongly contend that they are actual individual exporters; they have received payment for the export; they have received the foreign exchange as per guidelines issued by RBI; the customs officers have examined the cargo and have cleared for export; therefore, export benefits were rightly taken; DRI has no jurisdiction to issue the show cause notice to recover drawback or DEPB; Rule 16 and Rule 16A of the Drawback rules cannot be invoked and the impugned having confirmed the demands jointly and severally is bad in law and is liable to be set aside; as the goods held to be liable for confiscation are not export goods provisions of section 113 and 114 cannot be invoked.

8. We find that the department has heavily relied upon the statements of Shri Goldy and others. Learned counsel for Shri Goldy submits that the statement was recorded continuously for 4 consecutive days and as such it can be inferred that the statement was given under duress and that the same is retracted on the first available opportunity when he was produced before a magistrate and others have retracted the statements during the course of submissions to the adjudicating authority; the Show Cause Notice extracted statements in part to suit the argument of the Revenue. We find that the department's case is that even retracted statements can be relied upon if corroboration is evident; investigation conducted corroborates the statements of Shri Goldy and others; others have not retracted their statements.

9. We find that it is beneficial to have a look at the statements of Shri Goldy recorded on 29.06.2004, 30.06.2004, 01.07.2004 and 02.07.2004. We find that Shri Goldy has inter alia stated that

- his father was in the business of woolen garments under the name and style of Darbar Exports; he along with his brothers helped his father in the said business wherein they were often dealing with foreign tourists since 1994;
- this concern closed in the year 1996; he learnt Russian language which helped him in interacting with the foreign buyers/ Tourists from CIS countries;
- he floated a new concern for export in the name of M/s. Darbar Exports, under the proprietorship of his elder brother Jugal Kishore Dawar; they used to export readymade garments and made-ups to CIS countries, Dubai, Poland,

etc; in April, 2002; he opened another firms like GTB Exports, M/s. Hazrat Mart, M/s. G.H. Creations in the names of his sisters-in-law and nephew;

- M/s. Pawansut Enterprises, and M/s. Nisha Overseas were not managed by him but he was helping these concerns in booking space in Airlines for the export of goods by them;
- he came to know Shri Raghubir Prasad Sharma of Pawansut through one Shri Dinesh Sharma; Shri Raghubir Prasad Sharma required assistance in the export procedures particularly for booking of space in Airlines, etc; he had come in contact with one Shri Bagga of M/s. Nisha Overseas, about 8 months back; Shri Bagga requested to assist him in booking of space in Kyrgystan Airlines for export of goods in the name of M/s. Nisha Overseas; he provided assistance as and when requested by them. Sometimes, the buyers/consignee happened to be the same, whom he was helping.
- as regards his interest, Mr. Goldy stated that since he was the exporter himself exporting the goods to the CIS countries, therefore, he was getting preference in sending the goods by the concerned Airlines
- he was not getting any consideration for helping M/s. Pawansut Enterprises and M/s Nisha Overseas;
- he was involved in trading of goods particularly the textiles and readymade garments to foreign visitors since 1993, and due to good relation, he came in contact with other buyers through the previously known buyers;

- on being asked whether he had documentary evidence to show the purchase of fabrics and woolen garments and bills of fabrication, etc. he stated that he had the bills and would provide the same in due course; he used to keep such bills, invoices, packing lists, etc., in his office or with his Chartered Accountant;
- Purchase price of fabrics, garments and the fabrication charges depend upon the product; there were no minimum or maximum prices and that he could not give the exact price range of the goods purchased and fabricated;
- He used to make payment to fabrics and woolen garment suppliers through Account payee cheques and sometimes in cash; payments made to fabricators was generally in cash;
- he was the authorized signatory, who was operating bank accounts of M/s. Darbar Exports and M/s. GTB Exports;
- he used to receive advance payment and was also utilizing his own funds;
- he prepared covering letters and the tendering letters on behalf of the foreign buyers in his office at Pahar Ganj; approximately 50% of the foreign remittance in convertible foreign exchange were received in cash and remaining amount through telegraphic transfer – TT;
- the DEPB licenses have been obtained from DGFT, Delhi and thereafter, sold through one broker, Shri Ajay Verma;
- he had done Airlines bookings in respect of the above firms and he had no other manner of concern with them; he did not remember their contact nos; he had no financial relationship with these firms or persons;

- he did not know M/s. Balaji Impex (India) or its proprietor;
- he admitted the over-invoicing in the export goods; he had exported the goods of about Rs.6.5 crores from the four firms and had claimed export incentives of about Rs.1.3 Cr; due to over-invoicing, part of draw-back/DEPB claim are wrong /illegal.

10. We find that though the department relies upon heavily on the statement of Shri Goldy, Shri Goldy has retracted his statement at the time of first opportunity when he was arrested and produced before the Court of Magistrate on 2nd July 2004, which is in immediate succession after recording of statement over four days in continuity. We further find that the Adjudicating Authority also denied cross-examination of several persons, whose statements have been relied upon. Thus, we find that his statements are not reliable in view of the provisions of Section 138B and also in view of the ruling of Hon'ble Supreme Court in the case of **Andaman Timber Industries**. We also find that Revenue has not relied upon the statement of the suppliers and fabricators which were recorded in the course of investigation. Thus we find that the impugned order is bad for placing selective reliance on the evidence on record.

11. Further, on perusal of the statements of Shri Goldy, we find that the same are general in nature and are not at all inculpatory of his involvement as a freight forwarder, at least as far as the alleged dealings of the 14 companies are in question, as being brought out by Revenue. Shri Goldy has accepted to the extent of helping others in getting Airline Bookings and as to undervaluation by his firms. However, he retracted his statements. Department came to the

conclusion that Shri Goldy was involved in manipulation by over-invoicing the exports by all the exporters whereas he has only stated, as far as his dealings with two of the companies are concerned that about 10% of the value used to be shown as commission in the invoices and rest of the amount as advance payment and adjusting them against their future exports and thus, rotated the money. It is not understood as to how the department came to the conclusion on the basis of the statements of Shri Goldy. This assumes significance as Shri Goldy retracted his statements and the other exporters and manufacturers and fabricators, whose statements were relied upon by the department, have not been examined by the adjudicating authority in terms of Section 138B of the Customs Act, 1962. We find that none of the foreign tourists/ Buyers was examined and their statements were recorded.

12. We further find that the statement recorded from Shri Goldy during investigation is not reliable piece of evidence, it has been recorded for four consecutive days by detaining him in the DRI office and on fourth day his arrest has been shown and produced before the Magistrate Court. The statement is also not reliable as the same has been retracted at the first available opportunity when Mr. Goldy was produced before the Magistrate. We also find that Revenue have, distorted version of the statement of Mr. Goldy and Mr. Ajay Verma in the show cause notice to suit their allegation. We also find that the statement of Mr. Bagga is not reliable as he has stated that he met Mr. Goldy at Dubai. It is pertinent to note that it was not independently proved that Shri Goldy has visited Dubai during those dates. Department could have made enquiries with the Airlines to

ascertain the fact. Moreover, the claim of Shri Goldy that he has never visited Dubai has not been controverted with evidence.

13. We find that the only person who stated that Shri Goldy has given all the Customs documents, required for exports, on behalf of all the exporters was the Customs Broker. We find that the said Custom Broker is not alleged to have colluded with the exporters or Shri Goldy for facilitating the overvalued exports in order to avail Drawback or DEPB. We are of the considered opinion that mere submitting the documents to the Custom Broker does not make Shri Goldy a Freight forwarder. At best he could be a middle man facilitating the Customs Clearance and may have got a commission. These are not denied by Shri Goldy. Further we find that none of the persons, whose statements have been relied upon, have been examined by the adjudicating authority, in terms of Section 138 B of the Customs Act, 1962, to ascertain the facts of the so called inculpatory statements. In fact cross examination as requested by different exporters was not allowed. We further find that two of the persons, Mr.Sontokh Singh and Mr. Hemant Chowdhury, whose statements were relied upon, have not supported the allegations of Revenue during the cross examination.

14. In the facts and circumstances of the case, we find that the individual exporters have exported the goods, filed shipping bills and have received the drawback or DEPB as the case may be on completion of all the formalities. Neither the customs officers nor the RBI authorities have ever questioned their exports or the remittances received thereof. All the individual exporters had IEC in their names. In view of our discussion above, we find that the

Department has not conclusively established that Shri Goldy was a freight forwarder and does the export benefits have accrued to him. As we found above no action whatsoever has been taken on the CHA or custom broker though his statement was recorded to the effect that Shri Goldy used to handover all the documents like shipping bills, invoices, etc. in respect of the export consignments of the fourteen exporters in question. This being so we find that it is incorrect to call that Shri Goldy was the freight forwarder and has availed export benefits in violation of the provisions of the customs act and the CBEC circular cited above. We further find that the appellant herein are genuine traders and exporters as they have done the transaction of purchase and sale on their own account which is supported by their documents particularly their bank accounts. A freight forwarder or a C&F agent is engaged in the work of receiving the goods, storing and thereafter clearing and forwarding as per the directions of the principal. A C&F agent does not purchase or sell the goods on his own account. It appears that Shri Goldy simply works as an agent of the principal. We find , on the other hand, that the independent nature of the various exporters is corroborated by the statement of Sh. Benkichidanand, Manager of M/s Global Trust Bank, where all the fourteen exporting firms have their bank accounts.

15. It appears that the evidence for over valuation relied upon by the Revenue is nothing but a bald report from COIN Dubai / London stating that the prices declared by the foreign buyers in their countries of import are generally less than the prices declared to Indian customers; one of the foreign importers stated that he did

not deal with the exporters directly etc. One more evidence relied upon by the Revenue is the statement of Shri Goldy which was later retracted. We find that these two sets of evidence do not support the case of the Department in any manner whatsoever. The valuation declared to the customs in importing countries is not indicated except stating that they are generally low. Even assuming that the prices declared were low the same by itself cannot constitute the evidence for over valuation by the Indian exporter. The foreign importers possibly could have undervalued the goods in their respective countries of import. In these circumstances, it is for the customs / importing countries to take necessary action. The COIN reports did not indicate if any action has been initiated against the said importers in foreign countries. No evidence has been put forth to prove that the foreign buyers have remitted the amounts, over and above the prices indicated in invoices, through non banking channels. It is on record that the foreign exchange remittances have been received by the respective exporters in their bank accounts as per the FOB value declared in the respective shipping bills. This being the case the charge of over valuation is not conclusively established. Moreover we find that value for the purpose of exports, under the provisions of Customs Act 1962, is nothing but transaction value. If the Indian exporter can bargain and sell the goods at a higher price to the foreign buyer, the same cannot be held to be over valuation. It is the transaction value that constitutes the valuation for the purpose of exports and not certainly the intrinsic value of the goods in Indian markets.

16. Moreover, we find that in this case no samples were drawn and no market survey was also conducted to indicate the market prices vis-à-vis the FOB prices declared in shipping bills. In the circumstances, the charge of over valuation remains only an assumption and presumption. Such assumption and presumption cannot be the basis for alleging and confirming under valuation. Moreover, we find that the provision of section 74, 75, etc. of Customs Act 1962 have been complied with and no action to recover the excess drawback or the DEPB benefit under Rule 16 and 16 A of drawback rules has been made up by the Department. It is not the case of the Department that the export products are not released. In such circumstances the only conclusion that can be drawn is that the export benefits have been fraudulently or wrongly availed. In the facts and circumstances of the case the shipping bills were filed and customs officers have duly examined and cleared them for the exports and therefore, charge of wrong availment cannot be sustained in the absence of charge of collusion against the officers of customs also. In the instant case the same was not even alleged. Hence, we find that the charge of under valuation is not sustainable.

17. Thus, We find that Revenue have not discharged the onus to prove over valuation of the goods exported, as alleged. We further find the allegation of over valuation is vague, as there is no determination of actual or fair transaction value. We further find that the scheme for grant of DEPB/duty drawback benefits, works on the procedure of inspection/ verification by the Customs Authorities. There is no allegation of any mis-giving or connivance on the part of the customs officers, who have evaluated and assessed the shipping

bills under export promotion.

18. We find that the show cause notice is self-contradictory. On one hand, it is alleged that the goods have been overvalued for the purpose of availing undue export incentives, on the other hand, no alternate transaction value or fair value of the goods have been suggested in the show cause notice. Not even a single consignment / shipping bill filed under export incentive scheme was intercepted on the allegation of overvaluation. Further, it has been alleged that Mr. D.S. Dawar alias Goldy is the actual exporter and the 14 exporting firms are only name lenders, having no independent identity. Such allegations seem to be bald and not corroborated in view of the separate transactions by each of them recorded in their separate books of accounts, all were registered with the Apparel Export Promotion Council, and all are granted the IEC code by the DGFT. They all have made independent purchase of the goods for export and/or purchased fabrics and got ready-made garments fabricated from fabricators, for which they have produced vouchers. Their independent nature is also corroborated by the statement of Sh. Benkichidanand, Manager of M/s Global Trust Bank, where all the fourteen exporting firms have their bank accounts. Further, they have properly documented the export transaction, filed shipping bills declaring the same to be under export incentives and after proper assessment and verification, the proper officer of customs have issued LET export order under Section 51 of the Customs Act. There is no allegation of any connivance between the appellant exporters and the customs officers and as such, we find that the allegations of Revenue are not corroborated. We further find that the appellant have satisfied all the conditions, as prescribed by the CBEC in

Circular No. 61/98–Cus., dated 25.08.1998, for availing the export benefits in accordance with law. The instructions of the Board are binding on the Officers of the Department.

19. We further find that none of the DEPB scrips issued to the exporting firms/ appellants have ever been cancelled by the DGFT till date. Under such circumstances, demand of Customs duty on the allegation of receiving such scrips irregularly is bad in law and on facts. We further find that, Proprietors of M/s S. K. Traders, M/s AKS International, M/s Simran Impex, M/s Balaji Impex, M/s Nisha Overseas M/s Shanwaj Garments etc, in their statements, have clearly submitted that they have had nothing to give and take from M/s D.S. Damer @ Goldy; their statement was taken forcibly during investigation by the officers of DRI; their trade transactions including exports are genuine; they have also produced numerous documents in support of their contentions at the adjudication stage.

20. We further find that Rule 16 of the Drawback Rules is not invokable, as admittedly, the appellant exporters have received the payment for the goods exported and presented the BRC before the Authority and only thereafter, they have been granted export incentives. So far the invocation of Rule 16A of the Drawback Rules is concerned, for recovery of drawback erroneously granted, the same is also bad in the facts and circumstances, and further action under the said rule can be taken only by 'the proper officer', who initially assessed the shipping bills. We find further that no case is made for invoking Rule 16A has been made as no collusion etc has been alleged or proved consequent to which the said draw back could have been stated to have been wrongly issued. We further find

that as required by Board Circular No 61/98 the appellants have fulfilled all the conditions for availing the exports benefits; they have filed appropriate shipping bill under Section 50 of the Act; they have received the foreign currency alongwith currency declaration form, wherever applicable from the visiting tourist/ buyer and such foreign currency has been deposited in the bank in India through the account of the exporter. There is no allegation of any mismatch of currency declaration form and the encashment certificate. Further the circular also permits deposit of foreign currency received by the Indian exporter in the bank. Admittedly, the foreign buyers/tourists declared their foreign currency at the time of arrival in India to the customs officer who issued currency declaration form as per law.

21. We find further that the circular further provides that a written contract may not be insisted upon. However, the appellant exporters have produced written contracts at the time of clearance of the goods or at the time of examination of cargo. There is no dispute of any mis-match of any signature with respect of the contract. Thus we find that the export benefits have been rightly allowed to the appellant exporter. In view of the above, there are reasons to believe that there is genuine export as the goods have gone to a place outside India, the goods have been exported by a person who exports or intends to export having his IEC number and have received remittance from the foreign buyer in convertible foreign currency.

22. We further find that the impugned order is bad as in case of some of the appellants, they did not have proper opportunity to contest as they were not given the copy of the relied upon

documents. In the case of Shri Goldy though provided the opportunity of inspection of the documents, was not provided sufficient time, which was prayed, for filing appropriate reply to the show cause notice. Shri Dinesh Sharma was made to run from pillar to post to inspect the documents and impugned order was passed without the appellant inspecting the documents and without the appellant filing a written reply. Therefore, we find that the impugned order is passed in serious violation of principles of natural justice.

23. We further find that the order of confiscation of the goods under Section 113(d) & (i) is bad as the goods have already been exported and are not available for confiscation. Under the scheme of the Customs Act, upon order of confiscation, the property in the goods vests with the Central Government, whereas, under the facts and circumstances of the present case, the goods are no more available. Further, the allegation of Revenue, that the appellants are not the proper exporters or merchant exporters and are only freight forwarders/Packers, does not stand in view of the transactions, in foreign currency in the bank accounts of the appellant exporters. No prudent man will pay the price of the goods to the appellant exporters simply for the purpose of packing and forwarding, as alleged. We further find that no case of concealment, fraud, mis-statement etc. has been made out as alleged. Accordingly, we hold that the show cause notice is bad for invocation of extended period of limitation.

24. We further find that the impugned order confirmed the recovery of drawback or DEPB jointly and severally from Shri Goldy and other

Exporters. Such confirmation would undoubtedly indicate that neither the show cause notice nor the adjudication order is convinced as to who are the persons that committed the alleged irregularity or is not sure of which amount is payable by whom. The department alleges that Shri Goldy was the kingpin or mastermind and has managed the exports in the name of various exporters. In case the department was convinced about the same, they should have called upon him alone to show cause and confirm the demands on him. Alternatively, they could have confirmed the same on individual exporters. But that would have contradicted the department's stand that Shri Goldy was the kingpin. We find that this method of confirming demand jointly and /or severally has not found favour with the Tribunal and Courts in a number of cases, and as such is not legally tenable and acceptable. For this reason alone, the impugned order is liable to be set aside. We find that as per our discussion above, the department could not prove the other allegations in the Show Cause Notice with legally acceptable evidence, remanding the matter to the original authority for a fresh consideration would not serve any purpose. Therefore, we are not inclined to do so.

25. To sum up, we find, in view of our discussion above, that the impugned order suffers from the following incurable infirmities:

(i) The show cause notice and the impugned order rely heavily on statements which are not corroborated; the main person who is alleged to be a freight forwarder was questioned continuously for four days and he has retracted the statements at the immediate opportunity; while others have retracted in the course

of their submissions or written replies to the show cause notice.

(ii) The order is issued in violation of the principles of natural justice; Some appellants were not given opportunity to inspect the relied upon documents and some have given a very minimal time; request for cross examination have not been acceded to by the adjudicating authority; The two persons who were cross examined did not support the allegations of the Revenue.

(iii) Even when the Department heavily relied upon the statements for proving the case, adjudicating authority has not examined the statements in terms of section 138B of Customs Act, 1962.

(iv) The reports from Customs Overseas Information Network, relied upon by the Revenue are general in nature and inconclusive.

(v) Though over valuation of exports is alleged no samples were drawn and no market enquiries were conducted.

(vi) Though all the consignments have been examined and permitted to be exported by the customs officers, it was not alleged that there was a collusion by the exporters or Shri Goldy with the customs officers to avail export benefits wrongfully.

(vii) No action appears to have been taken against the custom house agent and no collusion has been alleged with the said custom house agent, though he has stated that export documents in respect of fourteen exporters have been given to him by Shri Goldy and the fees for the said custom clearance was also paid by Shri Goldy.

(viii) Even when the different exporters have separate IECs; exported goods separately; filed relevant shipping bills along with invoices; got the consignments cleared by customs after due

examination; obtained exchange control copy of the shipping bill and realized the export proceeds in the designated bank accounts as permitted by the DGEFT, Department alleges that the exports are fraudulent without any evidence.

(ix) The impugned order confirms the demands Jointly and/or severally; this action is neither legally acceptable nor practically implementable.

26. Further, we find that the appellants have also agitated the issue of jurisdiction of DRI to issue Show Cause Notice under Rule 16/Rule 16A of Drawback Rules and Section 28 of the Customs Act, 1962 relying on the judgments in the case of Syed Ali, Cannon India and others (all supra). The Learned authorised Representative on the other hand submits that in terms of the amendments brought in from time to time, including the one in 2022, the action taken by DRI is validated retrospectively. We find, as per the discussion above, that the impugned order is not maintainable on merits as no concrete tangible corroborative evidence is brought on record to sustain the allegations that Shri Goldy was a freight forwarder/kingpin exporting in the names of various firms for claiming undue export benefits; other exporters were dummy and that the goods were overvalued. Because of the above reason and considering the fact that Hon'ble Apex Court is seized of the matter in the review petition filed by the department, we are not taking up the issue of jurisdiction of DRI and are inclined to keep the same open.

27. In view of the above discussion, facts of the case and the ratio of the decisions in cases relied upon by the appellants; we are of the considered opinion that the impugned order is not sustainable and is liable to be set aside. Accordingly, we set aside the impugned order and allow all the appeals with consequential relief, if any, as per law.

(Pronounced in the open Court on 22/August/2022).

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Ckp