CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi
PRINCIPAL BENCH – COURT NO. 4

Customs Appeal No. 50761 Of 2019

[Arising out of Order-in-Original No. DLI/CUS-PREV/OPD/COMMR/10/2018 dated 05.12.2018 passed by the Principal Commissioner of Customs, New Customs House, New Delhi]

R. K. GOYAL **: Appellant**
Director of M/s Candex Filament Pvt. Ltd.
851, Industrial Area A, Ludhiana Punjab

Vs

Commissioner of Customs, New Delhi **: Respondent**
Preventive New Customs House, Near IGI
Airport, New Delhi

with
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M/s Candex Filament Pvt. Ltd. **: Appellant**
851, Industrial Area A, Ludhiana Punjab

Vs

Commissioner of Customs, New Delhi **: Respondent**
Preventive New Customs House, Near IGI
Airport, New Delhi

APPEARANCE:
Ms. Saksham Garg, Advocate for the Appellant
Shri S. K. Rahman, Authorized Representative for the Respondent

CORAM :

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 55850-55851/2024

Date of Hearing:16.02.2024

Date of Decision:31.05.2024

DR. RACHNA GUPTA

The present order disposes two appeals arising out of the same impugned order and one of the appellant being the Director for the another appellant (the company).

2. The facts relevant for the impugned adjudication are that the department got a specific intelligence that M/s Candex Filament Private Limited (one of the appellant) is exporting goods, namaly, Readymade Garments (Ladies Dresses) by mis-declaring and overvaluing these goods, (through CHA M/s Karan Logistics). Acting upon the above specific intelligence, five consignments of the appellant-exporter covered under Shipping Bills Nos. 2677803, 2677868, 2677764, 2677670 and 2678044 all dated 06.02.2018 were put on hold. However, the goods with respect to two Shipping Bills i.e., 2677868, 2677764 were not yet brought in the Export Shed, ICD Tughlakabad. The remaining 3 Shipping Bills i.e., 2677670, 2677803 and 2678044 were found lying therein. The goods covered under the said three shipping bills were claimed to be made from the fabric which was imported by M/s Kwality Overseas Private Limited against Advance Authorization No. 3010084520 dated 19.03.2012. The said Advance Authorization, as per the provisions of export import policy was for import of input items (as per detail in the said license) for CIF value of USD 8.00 lacs (Rs. 3,95,20,000/-) with an obligation to export goods as mentioned in the authorization for FOB value of USD 1120000 (Rs. 5,53,28,000) within the stipulated Export Obligation (EO) period which expired on 18.03.2014.

3. The goods of 3 shipping bills were examined in the presence of G-card holder M/s Karan Logistic, Shri Ranjan Mittal. The goods were found to be bad quality, old and torn ladies readymade garments with

no specification about any brand name, manufacturing date etc. The quantity of those garments was also found short than the declared quantity in the respective shipping bills. Observing the mis-declaration in terms of quantity as well as quality, the goods were seized under Section 110 of the Customs Act, 1962 and were proposed for confiscation in terms of Section 113 of the Customs Act, 1962. After drawing the representative samples of the goods for further investigation that the goods were re-stuffed and re-packed and were handed over to the Custodian M/s Concor ICD, TKD, Export Shed, New Delhi for safe custody.

4. On the physical examination and examining the contents of the advance authorization, department observed that the goods should have been made of the material/fabric as was imported by M/s Kwality Overseas Private Limited against the said authorization. However, GSM measured for the goods under these shipping bills in presence of Shri Ranjan Mittal was found much less than the GSM of the fabric as was imported under the said authorization. The GSM of the goods under impugned shipping bills was found to be in the range of 35 GSM to 120 GSM as contrary to the GSM of the imported fabric which was in the range of 105 GSM to 355 GSM. Thus, there was found no corelation between the exempted-imported goods/fabric and the goods which were being exported vide impugned shipping bills. The declaration that the impugned goods have been manufactured out of the said exempted-imported fabric was thus apparently wrong.

5. The department summoned the Director of the exporting firm (M/s Candex Filament Private Limited), namely, Shri Rakesh Kumar Goyal. However, despite repeated several summons, he did not appear except that an employee of M/s Candex Filament Private

Limited. Shri Rabindra Kumar Dash appeared before customs preventive office on 28.02.2018. However, he out rightly denied to know anything about the goods as to whether the goods under export have been manufactured out of raw material i.e. exempted fabric/raw-material as was imported under Advance Authorization in favour of M/s Kwality Overseas Private Limited. Since, Shri R. K. Goyal (the another appellant) did not appear despite repeated efforts on part of the department that the department in order to ascertain the factual position with reference to the contents and authenticity of Advance Authorization took up the matter with DGFT, Ludhiana who vide their letter dated 13.03.2018 forwarded the copy of the said advance authorization. Perusal whereof revealed that the said authorization (the details whereof already quoted above) was not transferable. The stipulated period for meeting the export obligation under said authorisation expired on 18.03.2015. Since M/s Kwality Overseas Private Limited (the Advance Authorization License Holder) had failed to submit documents evidencing the fulfilment of export obligation against the said advance authorization that the matter was adjudicated vide Order-in-Original dated 02.06.2017 by imposing penalty of Rs. 8.00 Crores of M/s Kwality Overseas Private Limited. From the perusal of IEC bearing No. 1201001811 of M/s Kwality Overseas Private Limited, and IEC bearing No. 3010002572 of M/s Cadex Filament Private Limited, department observed that these are the related companies as Shri R K Goyal is mentioned as the common Director of both these companies. However, the said fact was never disclosed to the department nor it was disclosed that the period of Advance Authorization had already expired.

6. Though the samples from the goods were drawn in the presence of G-card holder customs broker of the appellant. But since, Shri R. K. Goyal had never appeared that the department offered second option of re-examination and therefore drawl of samples in the presence of exporter himself and the re-examination of the fresh drawn samples. However, despite repeated letters and despite acknowledging availability of appellant's representative at the time of re-examination, the appellant failed to appear. Instead, appellant replied vide their letter dated 09.03.2018 submitting that segregation of cargo is not possible as the goods are made after clubbing of various types of fabrics. The samples which were drawn vide Panchnama dated 22/23.02.2018 were still forwarded to Textile Committee to provide the GSM of each sample for further investigation. Vide Test reports dated 23.02.2018 with respect to the goods of three impugned shipping bills, it was reported that GSMs of sample fabrics are much less than the GSMs of raw material said to have been used in those goods.

7. Meanwhile, the appellant requested that they were willing to withhold the benefit of exempted material against the advance authorization dated 19.03.2012 with respect to the goods covered under three impugned shipping bills dated 06.02.2018 and agreed to submit the requisite bonds and bank guarantees for an amount of Rs. 7,29,858/-, for amount of Rs. 8,36,533/- and for an amount of Rs. 8,93,013/- against three of the shipping bills dated 21.03.2018. The NOC from customs preventive for provisional release of the said goods was also granted vide letter dated 22.03.2018, however, the appellant did not get the goods released. The goods of remaining two shipping

bills, since had, by them arrived in the cargo shed, also got subsequently examined with the same outcome.

8. Based on these observations, department formed an opinion that the goods of impugned five shipping bills all dated 06.02.2018 were attempted to be exported under Annual Advance Authorization No. 3010084520 dated 19.03.2012 and 3010061589 dated 11.06.2009. However, the export obligation period for the said Annual Advance Authorisation had already expired and the ADGFT had already cancelled the said authorization. But appellants, concealing these facts, attempted to export the old, torn and bad quality readymade garments wrongly and fraudulently utilizing under the advance authorizations and by misdeclaring that the garments are manufactured out of fabric/raw material as was imported under said advance authorization in favour of M/s Kwality Overseas Private Limited. It was opined that Shri Rakesh Kumar Goyal, Director of M/s Candex Filament Private Limited with an intent to make illegal gains by mis-utilising the provisions of the Foreign Trade Policy (2015-20) and also the Customs Act, 1962 has committed the offense. With these observations, a show cause notice No. 03/2018-19 dated 10.05.2018 was served upon M/s Candex Filament Private Limited (the exporter) and Shri Rakesh Kumar Goyal (its Director) proposing confiscation of the goods covered under five of the impugned shipping bills with denial of benefit of Annual Advance Authorization Scheme in respect of those goods and denial to export the same under the garb of discharge of export obligation of the advance authorization in favour of M/s Kawality Overseas Private Limited, the penalties were also proposed to be imposed upon both the appellants. The said proposal has been

accepted vide the Order-in-Original No. 10/2018 dated 05.12.2018. Being aggrieved, the appellants are before this Tribunal.

9. We have heard Ms. Saksham Garg, Advocate for the Appellant and Shri S. K. Rahman, Authorized Representative for the Respondent.

10. Learned Counsel for the appellant submits that the whole case is based on assumptions and presumptions. The correct facts have not properly been appreciated by the adjudicating authority. The appellant Shri Rakesh Kumar Goyal is erroneously confirmed as the common Director of two companies, namely, M/s Kwality Overseas Private Limited and M/s Candex Filament Private Limited. It has been the appellant's contention since the stage of filing reply to the show casue notice is that M/s Candex Filament Private Limited has purchased stock lot goods from M/s Kwality Overseas Private Limited. Thus, concealment has wrongly been alleged against the appellant Shri Rakesh Kumar Goyal. It is impressed upon that the Department was well aware about the fact that the advance authorization has already been cancelled. Not mentioning of such cancellation which otherwise was in the knowledge of the Department, cannot be alleged as suppression or concealment on part of appellant. The goods were initially seized on the ground that they are torn, old and are inferior quality goods. The seizure memo dated 06.02.2018 had several discrepancies. Since the seizure itself was not in accordance with the provisions of law, the confiscation of the goods seized is not at all sustainable. The goods were seized on the pretext of those been undervalued still no investigation has been made for the purpose of determination of valuation. The order of confiscating such goods is liable to be set-aside on this ground as well.

11. Learned Counsel further mentioned that the drawl of sample from the consignments under five of the shipping bills was absolutely improper even the re-examination thereof. The appellant has expressed his dis-satisfaction regarding the same on several occasions but the same was not considered. It is mentioned that forty three (43) samples of 20cm each were drawn from 1.25 lacs ladies garments were drawn which is highly dis-proportionate sample to give the correct picture. The conclusion of complete consignment being overvalued on the basis of such less number of samples is not at all sustainable. The test reports also have no significance, as none of these reports mention anything about the goods being old torn and very bad/inferior quality as has been claimed in the Panchnama dated 16.02.2018.

12. The investigation authorities as well as the adjudicating authority have failed to appreciate that ladies dress are made out of different fabrics as were used for different purposes as that of lining, sleeves, neck line etc. The conclusion of mis-declaration or under-valuation of the entire dress, therefore, cannot be drawn based on the examination of only 20cm square sample thereof. The reluctance of appellant for re-examination of the goods was not only practically difficult due to unpacking and repacking of huge consignment but was also leading to unnecessary financial loss to the appellant and could have worsen the conditions of the goods. These reasons are sufficient to falsify the criteria's based whereupon the penalties have been imposed on the appellant. Above all none from M/s Kwality Overseas Private Limited but actual manufacturer of the garments and the advance authorization holders were called upon at the time of drawing the samples.

13. It is further mentioned that the appellant was involved in third party exports, hence, has wrongly been held responsible for any lapse with respect to advance authorization in favour of M/s Kwality Overseas Private Limited. The goods in question were neither prohibited nor contravened any provision hence, have been improperly seized contrary to the Circular No. 33/2005 dated 02.08.2005. Thus the detention of the goods as well as the retention thereof was arbitrary on part of the department despite that the appellant had furnished requisite guarantees. The extended detention has resulted into huge losses due to incurring demurrage charges for the entire detention period to the appellants due to which the export order also got cancelled. The allegations for the difference in weight are not sustainable as the goods were declared on the basis of unit price instead of on the basis of weight of each unit. The findings in the impugned order are therefore any cogent basis. With these submissions, the order under challenge is prayed to be set-aside and the appeal is prayed to be allowed.

14. While rebutting the submissions and contesting the same, learned Authorized Representative mentioned that the shipping bills clearly indicated that the goods meant for export were supplied by M/s Kwality Overseas Private Limited and the appellant was exporting the same as merchant exporter, however, the proper declaration regarding the description (composition and GSM) quality and quantity of the exported goods, though a pre-requisite but was absolutely missing in the shipping bills. This failure had led to the seizure of the goods requiring their confiscation and imposition of penalty on the company and its Director as well. No doubt, the company is separate legal entity but it cannot make the decisions on its own. Learned

Authorized Representative impressed upon that the most crucial role therefore is played by the Director who are eyes and brains for the company to carry out all necessary functions and to do the entire decisions making. The IEC Code of both the companies i.e. of M/s Kwality Overseas Private Limited and of M/s Candex Filament Private Limited revealed that the appellant Shri Rakesh Kumar Goyal is the common Director for both the said companies. From the statement of Shri R. K. Das, it has come as corroboration on record that Shri R. K. Goyal was controlling the affair of both the companies.

15. Further, there is no denial of the appellant that the goods were exported under such advance authorization in favour of M/s Kwality Overseas Private Limited which had already lapsed due to which even the penalty on the Director of M/s Kwality Overseas Private Limited was imposed. These facts were never brought to the notice of the department. Hence, there is no infirmity as far as the order of imposition of penalty of both the appellants is confirmed. The exporter was given the option to get the goods released on provisional basis by submitting the bonds and bank guarantees and to export the same at the earliest. But, the appellants took inordinate long time to submit the bond and bank guarantees which caused delay in releasing the goods for export.

16. Learned Authorized Representative further impressed upon that the submission of the appellant that they were ready to forgo their export benefit would not come to their rescue as they were not otherwise entitled for it as the goods were being exported by utilizing and expired advance authorization. Further since the delay in getting provisional release was due to appellant’s own fault, department cannot be held responsible for increased demurrage charges. The

release order was given by the department on the very next day of submission of bond and bank guarantee. Learned Authorized Representative has alleged appellant's to have distorted the facts of the case and to mislead the Tribunal by putting forward wrong facts. The goods were actually attempted to be exported by mis-declaring their quality as well as the quantity, that too on pre-text of being under the export obligation but of the expired advance authorization. Above all, the samples examinations as well as test reports well establish that the goods attempted to be exported were not made of the same material/fabric/raw-material which was imported as exempted (without payment of duty) under the said advance authorization. In support of his submissions, Learned Authorized Representative has relied upon the decision of Hon'ble Punjab and Haryana in the case of **Friends Trading Company vs. Union of India reported as 2011 (2) TMI 382 (P&H)** wherein it has been held that the extended period of limitation is invokable not only against the original holder of fraudulent or forced DEPB but also against the successor or purchaser thereof. With these submissions and reiterating the findings of the order under challenge, Learned Authorized Representative has prayed for the present appeals to be dismissed.

17. Having heard the rival contention and perusing the entire records, we observe and hold as follows:-

Since the day of detention of the goods till the issuance of the show cause notice (SCN), the appellant Shri R. K. Goyal had never appeared before the investigating authorities despite being served with the repeated summons. Para 7 of the show cause notice, reflects the amount of efforts on the part of department to secure the presence of

Shri R. K. Goyal appellant. He even failed to appear before the original adjudicating authority except that a letter dated 29.11.2018 was submitted by him as a written reply to SCN. The order under challenge was prayed to be set-aside on the ground that the appellants were not the advance authorization license holder and they were making the third party export only being the merchant-exporter. Hence, appellants cannot be held responsible about the GSM of the raw material nor of manufactured garments, nor even about weight of the goods to be exported. Failure to mention the date of impugned export license (19.03.2012) is not an offence as the license holder i.e. M/s Kwality Kwality Overseas Private Limited had already applied extension of time for the export period.

18. We observe that these submissions have been dealt with in order-in-original dated 02.06.2017 passed with respect to the show cause notice dated 01.12.2016 as was issued to M/s Kwality Overseas Private Limited proposing an action under Section 11(2) of Foreign Trade (Development and Regulation) Act, 1992 and Rule 7 of Foreign Trade (Regulation) Rules, 1993 for contravening the condition of advance license No. 3010084520 dated 19.03.2012 as was accorded/issued by Joint Director of General Trade Ludhiana. Another show cause notice dated 16.03.2017 was issued to M/s Kwality Overseas Private Limited proposing similar action. It was held in the said order that **M/s Kwality Overseas Private Limited has not fulfilled the export obligation as per the provisions of Exim Policy. Resultantly, a penalty of Rs. 8.00 Crores was imposed upon M/s Kwality Overseas Private Limited vide said order of 02.06.2017.**

19. Apparently and admittedly, the appellants have attempted to export the goods vide impugned five shipping bills based on said advance authorization which already got cancelled on 02.06.2012. **There is nothing on record produced by the appellant to support the contention that the extension of said advance authorization was applied for and was pending consideration on the date of filing of impugned shipping bills.** It is also apparent from the said order of 02.06.2017 that M/s Kwality Overseas Private Limited also did not appear before the investigating authority despite repeated summons. Thus it stands proved that appellant have declared and utilized an already lapsed authorization while importing the goods under the impugned shipping bills.

20. We further observe that the Department got the opportunity to have the exporter/importer code (IEC) of both the companies i.e. of M/s Kwality Overseas Private Limited and of M/s Candex Filament Private Limited. The documents show that Shri R. K. Goyal, (one of the appellant) as the common Director of both the said companies. No clarification was brought on record about this observation as appellant failed to appear before the investigating officer as well as before the adjudicating authority. No documents ever were provided by him either during the investigation or at the stage of adjudication. The copies of advance authorization as well as IEC Codes were obtained by the department from the office of DGFT, Ludhiana. **The documents have sufficiently revealed that both the companies were controlled by Shri R. K. Goyal who had attempted to export the goods under export obligation of such authorization, the Export obligation period whereof had already expired.** Not only this, the authorization itself had already lapsed and the penalty on the Director

had already been imposed, who is none but Shri R. K. Goyal himself. In the light of this apparent conduct of the appellant, we do not find any infirmity in the findings in order under challenge where misrepresentation, concealment and suppression of facts have been alleged against the appellant.

21. Coming to the confirmation of allegation about goods to be mis-declared as per quantity and quality, we observe that initially the sample of the goods were examined in the presence of Shri Ranjan Mittal, the G-Card holder of the Customs broker of the appellant and Shri Ravinder Kumar Das, the legal executive of exporter-appellant M/s Candex Filament Private Limited. The GSM of the fabric measured based upon the method described in Para 3.2 of the show cause notice was found to be much less than the GSM of the imported exempted fabric from which the goods attempted to be exported were supposed to be manufactured. **The variation in the GSM not only supports the allegation of mis-declaration about the quality of the fabric. This also proves that the goods which were attempted to be exported as export obligation of an advance authorization were not manufactured from the fabric which was imported as fabric/raw material imported as exempted under said advance authorization license.** These observations, therefore, falsify the claim of the appellant that the readymade garments (ladies dresses) i.e. the goods which were to be exported vide impugned five shipping bills have been made out of raw-material imported against authorization dated 19.03.2012. The said observation has been made the basis for order of confiscation of the impugned goods and imposition of penalty on the appellant by the adjudicating authority

below. Since the appellant has not produced on record anything contrary thereto, we find no reason to differ from those findings.

22. Coming to the appellant's request as per their reply, praying for re-drawing of the samples and re-examination thereof in their presence, we observe that the department readily accepted the said request and offered second option for re-examination and fresh drawl of the samples. However, despite conveying that appellant's representative shall be available, appellant failed to make themselves available for re-drawl of samples and re-examination thereof. Rather vide their letter dated 21.03.2018, it was categorically stated by the appellant that the exporter did not want any re-examination of goods to be exported nor the fresh drawl of the samples thereof. The customs broker of the exporter-appellant M/s Karan Logistics also despite its request for re-examination and despite acknowledgement for their G-Card holder to remain present for the purpose has also failed to make itself available at the time of re-examination. The department still drew fresh samples and got them re-examined, this time, from a technical authority i.e. Textile Committee. The said Committee vide test reports dated 01.03.2018 to 08.03.2018 in respect of goods of 3 shipping bills have clarified while corroborating the earlier examination/outcome of earlier testing that the GSM of the sample fabric (goods to be exported) is much less than the GSM of the raw-material said to have been used in manufacture of the said goods. This raw material was imported under Advance Authorization dated 19.03.2012. **The Reports specifically clarified that the composition of fabric declared in the said three shipping bills is different from the composition found in the lab test of the imported sample fabrics. Similar were the subsequent reports**

with respect to the goods of remaining two shipping bills. Nothing has been produced by the appellant to prove that the export obligation had been properly discharged by the appellant, it was incumbent for appellant to show that the impugned goods have manufactured out of the imported/exempted fabric. Apparently and admittedly, the goods were old and torn ladies garments in bad condition. No evidence is produced on record about the circumstances due to which the newly manufactured garments could have been ruined to the extent of those getting old and torn.

23. Coming to the allegations about delay in provisionally realising the goods resulting into financial losses to the appellant, we observe from the record as follows:-

The department while accepting the request of the appellant about their willingness to withhold the benefit of exempted material against the impugned advance authorization in respect of the goods covered under impugned shipping bills, had immediately provided, shipping bill wise segregation of bonds and bank guarantees vide their letter dated 15.03.2018. Those bonds were submitted on 21.03.2018 and the order of releasing the goods provisionally was granted on the next dateon 22.03.2018. But it is apparent on record that the appellant had not taken the release. **Department vide their letter dated 12.04.2018 sensitized the exporter-appellant that they can either get the goods released or can get those warehoused in terms of section 49 of Customs Act, 1962. However, no communication was received from the appellant as it was never earlier received since the time of issuance of the show cause notice.** We do not find anything on record which may support the appellant’s contention that the goods were not provisionally released on account of department faults and that he suffered financial losses due to department's fault. We rather hold contrary that the appellant had throughout been non-cooperating and has been concealing and manipulating the facts. He failed to take the provisional release of the goods despite the order in that respect. The department rather vide their letter dated 22.03.2018 had requested CONCOR to waive of all demurrage charges against the goods under impugned these shipping bills dated 06.02.2018. Hence, we do not find any fault on the department.

24. The another contention of the appellant that the appellants were simply acting as the merchant exporter/third party exporter, we observe that it has already come on record that M/s Kwality Overseas Private Limited and M/s Candex Filament Private Limited, both were connected companies, Shri R. K. Goyal-appellant being common Director of both these companies who only had got filed the impugned shipping bills wrongly representing the export by M/s Candex Filament Private Limited to be in discharge of export obligation against the advance authorization of M/s Kwality Overseas Private Limited that too an year later the said authorization had already cancelled and years later since the period for compliance of export obligation under said authorization had already lapsed. Otherwise also as rightly observed by the original adjudicating authority that **the appellant has failed to furnish any documentary evidence as that of contract between the advance license holder (M/s Kwality Overseas Private Limited) and third party exporter (M/s Candex Filament Private Limited) with respect to the impugned goods be exported by the appellant as merchant-exporter.** No such shipping bill has been produced by the appellant which may indicate

the proposed export to be a third party export. Rather the shipping bills were filed jointly being signed by the advance license holder as well as the export order holder. This fact is sufficient to confirm the noticed fraud played upon by Shri R. K. Goyal while using the IEC of two of its companies to defraud the Government exchequer. In addition the goods since were found to be of poor quality as contrary to the declaration of those being newly manufactured goods. This declaration has rightly been held basis for order of confiscation of these goods.

25. The entire above observed facts are sufficient for us to hold that the exempted raw-material as was imported by M/s Kwality Overseas Private limited under the advance authorization license dated 19.03.2012 was not at all used for manufacture of the goods as were attempted to be exported by the appellants. The test reports corroborate the same. No evidence is produced by the appellants to falsify those reports. Nothing is produced to falsify the findings of order-in-original dated 02.06.2017. Hence, we do not find infirmity in the order under challenge passed based on those reports and the other facts as investigation by the department. We hereby uphold the same. As a result thereto both the appeals are hereby dismissed.

(Order pronounced in the open Court on 31.05.2024)

(Dr. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y.