IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Customs Appeal No.191 of 2012

(Arising out of Order-in-Original No.07/Cus/CC(P)/WB/2012 dated 14.03.2012 passed by Commissioner of Customs (Preventive), Kolkata)

Commissioner of Customs (Preventive), Kolkata
15/1, Strand Road, Kolkata-700001

Appellant

VERSUS

M/s Jai Vikshu Niketan Private Limited
132/1, M.G.Road, 4th Floor, Near Himalaya Hotel, Kolkata-700007

Respondent

Appearance:
Shri Manish Mohan, Authorised Representative for the Appellant
Shri Arijit Chakraborty, Advocate for the Respondent

CORAM:
HON'BLE SHRI SANJIV SRIVASTAVA, TECHNICAL MEMBER
HON'BLE SHRI P.DINESHA, JUDICIAL MEMBER

FINAL ORDER NO.75474/2022

DATE OF HEARING : 29.07.2022
DATE OF DECISION : 29.07.2022

Per Sanjiv Srivastava :

This appeal filed by revenue is directed against Order-in-Original No.07/Cus/CC(P)/WB/2012dated 14.03.2012passed by Commissioner of Customs (Preventive), Kolkata, demanding the proceedings against the exporters for overvaluation of the export consignments to Bangladesh for availing higher benefit of DEPB scheme.

2.1 Pursuant to an intelligence, DRI, Kolkata initiated an investigation into overvaluation of five export consignments of respondents. The said consignments declared as "Synthetic Fabrics and made-ups' and attempted to be exported to Bangladesh under DEPB scheme were intercepted at Mahadipur Land Customs Station on 10-01-2009. As they were found to be highly overvalued they were seized on 11-01-2009 under Section 110 of Customs Act, 1962 and released provisionally and allowed export to Bangladesh on execution of Bond covered by Bank Guarantee by the exporter.

2.2 Market enquiry in respect of the goods, attempted to be illegally exported, revealed that the declared value was highly inflated and over-invoiced by more than 3 (three) times as the ascertained collective value.

2.3 It was also observed that the Bangladesh government allows shipment only against Letter of Credit, the export consignment against Letter of Credit were only shown/declared to Bangladesh Customs while the consignments against DA basis were not declared to the Bangladesh Customs in order to facilitate the Bangladeshi importer for which they prepared duplicate manifest by fabricating and forging the export documents with the signatures and seals of Custom officers with fake rubber stamps.

2.4 During search conducted at the premises of Custom House Agents, Rubber Stamps, having impression of Inspector of Customs & Superintendent of Customs, Mahadipur Land Customs Station and one N. C. Das were recovered along with incriminating documents. Investigations revealed that the said Custom House Agent had prepared duplicate invoice for the subject consignments for submission to Bangladesh Customs along with export manifest which had impression of those rubber stamps with forged signature of Customs officer named N. C. Das to give impression to Bangladesh Customs that those documents were genuinely passed by Indian Customs. However, there was no Customs officer by the name of Shri N.C.Das posted at the LCS at the material time.

2.5 On examination of the concerned Bills of Export under DEPB, it is found that mode of payment in respect of most of export consignments was on

DA basis, which was not valid as per Import Policy in Bangladesh. Further, the report of the 6th meeting of SAARC sub-group on CUSTOMS CO-OPERATION held in SAARC Secretariat, Kathmandu reveals that for import of goods into Bangladesh Letter of Credit is considered as a mandatory document.

2.6 Investigation with State Bank of India, Burtalla Street Branch, Kolkata, the Banker of the noticee firm revealed that Bills drawn under Letter of Credit were not negotiated or discounted by them and were sent for collection as per the instruction of the exporter. In respect of the Bills under D.A., Bank informed that the remittances were received from entities other than the foreign buyer/consignees.

2.7 Investigation with Bangladesh Customs Authority through the Customs Overseas Intelligence Network (COIN) at Kathmandu revealed that the declared value before the Bangladesh Customs Authority in respect of the said export consignments was much lower than the value declared Indian Customs Authority for the said consignments. It was further revealed that through manipulation and forgery by the exporter, his agents and his CHA, the export consignments covered under DA mode of payment had been merged with the consignment covered under L/C by showing the consolidated value equivalent to the L/C amount to pass through Bangladesh Customs legally.

2.8 Thus the exporter is found to have devised a unique method of mis statement and forging of export documents with the purpose of getting undue export benefit by exporting the goods to Bangladesh under the cover of letter of credit.

2.9 Investigation explicitly revealed that the export documents like Bills of Export, Invoices, Packing List etc. that were submitted to Indian Customs for the purpose export and the export documents produced before

Bangladeshi Authority were two completely different set of documents with particulars like value and quantity of the consignments forged and fabricated to suit two different purposes.

2.10 The documents involving both D.A. as well as Letter of Credit were not being negotiated in the manner as prescribed under the provisions of Para 3 (1) (a) of Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 notified under Notification No. FEMA 14/2000-RB dated 03.05.2000 and therefore the transactions effected relating to such exports cannot be construed as a normal business transaction in terms of prevailing commercial statutes. Consequently, the remittances as received against the Bills of export where mode of payment has been shown as D.A. appears to be an illegal movement of foreign exchange across international borders carried out solely for the purpose of availment of undue post export benefit by the exporter in the exporting country by claiming such inward remittances as sale proceeds of the exported goods.

2.11 Accordingly, the invoices of the concerned export consignments were not genuine and valid commercial documents for the purpose of legal transaction and consequently the value as declared were rejected in terms of provision of Rule 8 of Customs Valuation (Determination of value of export goods) Rules, 2007.

2.12 The residual method under Rule 6 of Customs Valuation (Determination of value of export goods) Rules, 2007, was resorted to re-determine the value of the export goods. Accordingly, on market inquiry the valuation of the said export consignment was redetermined

2.13. A show cause notice was issued rejecting the declared value u/r 8 of Customs Valuation (Determination of value of export goods) Rules, 2007 and proposing confiscation of the export consignments u/s 113(d) & (i) of the C.A.'62 and imposition of penalty u/s 114 & 114AA of the said Act

2.14 The Commissioner of Customs (Preventive), W.B., Kolkata vide the impugned order dropped all the charges as had been made out in the said SCN against the noticees.

2.15 Aggrieved revenue has filed these appeals stating following grounds:

(a) The adjudicating authority rejected the market enquiry report of DRI in the instant case, on the ground that the noticee firm was not associated in the said enquiry and the wholesale dealers were not aware of export trade. Fresh market verification was therefore conducted in presence of the representatives of the noticee firm by the members of the market verification subcommittee of S&D unit which was formed by the adjudicating authority and report submitted by the said subcommittee was accepted. Accordingly, the adjudicating authority held that there was no over-valuation and/or mis-declaration of export value by the exporter in the instant case.

(i) In the instant case, DRI caused the necessary enquiry with the wholesale dealers in the local market to ascertain the value of the goods under export. It is an established fact that the sellers in the open market do not seek any information on the ultimate fate of the goods put up for sale by them as their principal effort is to sell goods to maximize profit. In such a scenario, the ignorance and unawareness of the export trade by the said wholesale dealers cannot be a ground for rejection of DRI's market enquiry as has been held by the Adjudicating Authority.

(ii) The goods procured from the open market have a value relevant to a particular period of time. It appears that while DRI conducted the market enquiry on 08-04-2009, 14-04-2009 and 20-04-2009 i.e. within three months of the detection of the case, whereas the market verification committee of S&D unit under the

Commissioner conducted the fresh enquiry in local market after a lapse of three years from the date of export that too with the representative of the exporter, thereby prejudicing the market verification process itself.

(iii) Not associating the noticee/exporter in the market verification conducted by DRI in course of investigation cannot be a ground for rejection of the market enquiry report in as much as law does not speak anything to the effect that the market enquiry should be conducted in presence of the noticee.

(iv) Doctrine of natural justice was followed as the Adjudicating Authority allowed the noticee firm to cross examine the proprietors of the said wholesale dealers with whom DRI made the market enquiry. As such, there was no need of further market inquiry as conducted under order of the Adjudicating Authority.

(b) In the Order, the Commissioner has observed that the exporter had submitted some purchase documents before the adjudicating authority from which it revealed that rate of purchase of goods were at a value higher than the FOB value declared by the exporter. But it appears that veracity and genuineness of the alleged purchase documents as mentioned by the Commissioner was not ascertained before putting reliance on such documents by the adjudication authority. As the purchase documents were not submitted to the investigating authority during the investigation, reliance on those documents by the adjudicating authority is not justified.

(c) The adjudicating authority appears to have erred while concluding that there was no overvaluation as the COIN report citing Bangladesh records, says that Customs duty was evaded in Bangladesh. The investigation and the SCN itself has stated the very important fact that the noticee firm has first overvalued the goods to avail undue export benefits under DEPB and then forged and fabricated the export documents to facilitate fast and smooth clearance of such consignments by his counterpart in Bangladesh through Bangladesh Authorities. Mere establishment of undervaluation in a foreign country is not sufficient ground to conclude that there was no overvaluation by exporter in India.

(d) The Adjudicating Authority appears to have erred in not taking cognizance of the fact that the documents involving both D.A. as well as Letter of Credit were not being negotiated in the manner as prescribed under the provisions of Para 3 (1) (a) of Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 notified under Notification No. FEMA 14/2000 RB dated 03.05.2000 and therefore the transactions effected relating to such exports cannot be construed as a normal business transaction in terms of prevailing commercial statutes. Consequently, the remittances as received against the Bills of export where mode of payment has been shown as D.A. appears to be an illegal movement of foreign exchange across international borders carried out solely for the purpose of availment of undue post export benefit by the exporter in the exporting country by claiming such inward remittances as sale proceeds of the exported goods.

(e) The Adjudicating Authority has held that the noticees including the CHA, agents, and employees though conspired to fabricate duplicate sets of documents complete with Indian Customs officers seal & signature such forgery are not actionable under Indian Customs Act, 1962 unless they are presented before Indian Customs for any purpose covered by Indian Customs Act. The fraudulent acts indulged by the exporter along with his accomplices in the instant case though not punishable under the Customs Act per se, it however shows the mensrea of the exporter to indulge in illegal activities. By supplying forged set of export documents to his counterpart in Bangladesh, the exporter had only facilitated acceptance of his grossly over-invoiced export consignments so as to gain undue enrichment by availing undue DEPB benefit.

3.1 We have heard Shri Manish Mohan, Additional Commissioner, Authorized Representative, on behalf of appeallnat revenue and Shri Arjit Chakraborty, Advocate for the respondent.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 For dropping the charges against made against the respondent Commissioner has in the impugned order has observed as follows:

"The charges framed in the show cause notice and specific proposals are based mainly on following grounds:

i. Overvaluation of export goods i.e. synthetic fabrics by the exporter in order to avail undue DEPB benefit

ii. Mode of payments for export to Bangladesh was not accepted and allowed in Bangladesh for import in terms of prevailing import policy of Bangladesh

iii. Fraudulent acts indulged by the exporter, CHA, clearing agent and their employees to facilitate importers of Bangladesh to evade customs duty payment in Bangladesh.

I propose to deal with each issue serially:

(1) Charge of Overvaluation :- It has been alleged that the exporter i.e. M/s Jai Vikshu Niketan Pvt. Ltd. had declared FOB value of goods at Rs. Rs.3,12,30,560/- in respect of 5 bills of export from no. Bs/Exp No. 92 96/EXP/MAU/DEPB/MDPR/2009, all dated 06.01.2009 for export to Bangladesh through Mahadipur LCS. The value according to the DRI ought to be re-determined under Section 17 of the Customs Act, 1962 at Rs.96,71,200/-. In view of alleged mi-declaration in respect of FOB value,

DRI also proposed confiscation of the goods under Section 113(d) and 113(i) of the Customs Act, 1962.

The valuation of the goods was arrived at by DRI on the basis of market verification of samples of fabrics that were drawn at the time of examination of the export goods. The market verification of the samples were made by the investigating agency from M/s. R.N. Textile, 22 Armenian Street, Kolkata -700 001, M/s. A.M. International, 20 Strand Road, Kolkata – 700 001 and M/s. Suman Trading Company, KumirJalka Road, Srirampore, Hooghly. The offer price of synthetic fabrics as quoted by the above named dealers is given below:

Sl. No.	*Name of the wholesale dealer*	*Offer price of synthetic fabrics colour blue having width 36"*	*Offer price of synthetic fabrics colour white having width 36"*
1	*Suman Trading Co.*	*Rs. 32.00 per mtr.*	*Rs. 21.50 per mtr*
2	*A.M. International*	*Rs. 33.00 per mtr.*	*Rs. 18.00 per mtr.*
3	*R.N. Textiles*	*Rs. 32.00 per mtr.*	*Rs. 22.00 per mtr.*

Accordingly, the investigation came to the conclusion that Rs. 33 for fabrics (colour blue) Rs 22 for (colour white) were reasonable in the whole sale trade and collective value of the export goods covered under impugned bills of export ought to have been Rs. 1,11,51,198.85.

The exporter had reflected value of the export goods in their invoices no. ...... all dated 01.01.09 in respect of all the shipping Bills for synthetic fabrics at US $ 2.00/US $ 1.50 per meter i.e. Rs.94.80/Rs.71.00 per meter. The exporter disputed the value of the goods computed by the investigating agency through market verification in SCN and wanted the samples of fabrics sealed in presence of Customs officers to be verified in market in presence of Customs officers and themselves so that they get correct value of goods. Since they were not present physically during market verification done by the investigation, they wanted the verification to be done in their presence. They also submitted that as per CBEC circular 37/99 dated

24.06.99 on DEPB restricting DEPB benefit to 50% of market value of export goods which is not violated in the present case and contested the market value arrived by the DRI. In the present case even if the valuation preferred by DRI is accepted the DEPB benefit is less than 50% of market value.

I find that they also wanted to cross-examine the proprietors of whole sale dealers from whom DRI made market verification. As per available records, I find that Sri Suman Chakraborty, Proprietor of M/s. Suman Trading Company and Sri Apporva Murkerjee, Proprietor of M/s. A.M. International was examined by Sri N.K. Chowdhury, advocate of Sri Ashoke Das, proprietor of M/S A.S. Traders. The exporter during personal hearing before me pleaded that valuation done in SCN was not acceptable as the noticees were not involved in the verification process and since samples were available in Mahadipur LCS, it is possible to subject it again for market verification. They also added that actual value of goods was only marginal lower than the FOB (profit + cost added further). They also admitted that remittance was to come substantially from Dubai. In view of above submission of the exporter in regards to market verification of the export consignment, sealed samples of the exported goods lying at Malda Customs Division were brought to this office to determine the contemporaneous value of the export goods.

It was decided that fresh market verification will be conducted by members of market verification subcommittee of S&D Unit (working under joint pricing committee of this Commissionerate of CCP), W.B.) jointly with authorized representative of said exporter and conversant officers of DRI, Kolkata Zonal Unit on 05.12.2011, 07.12.2011 and if required further on 09.12.2011. Accordingly letters dated 23.11.11 was issued to ADG, DRI, KZU requesting to depute conversant officer to take part in the above market verification and submit their report for finalization of Adjudication *proceedings. Vide letter DRI F. No. 4/Kol/APP/2009/9552 dated 02.01.12 received from ADG, DRI, KZU, it was informed that "in course of investigation by DRI, market enquiry was conducted by DRI officers, details of which are given in Para-16 of SCN. As DRI is the investigating agency, DRI officers cannot be part of any market enquiry as desired by the adjudicating authority. Further necessary action may therefore be taken as deemed fit". It was then necessary to conduct the market verification without presence of investigating agency in order to meet ends of natural justice.*

Market enquiry report dated 30.12.2011 conducted jointly by the members of the market verification committee and Mr. Nathmal Jajodia, Director of M/s. Jai Vikshu Niketan and Sri Sandeep Jati, authorized representative of M/s. A.S, Traders reveal that market enquiry was conducted at the following whole sale dealers in Kolkata.

1. *M/s. S. S. International, 68, Cotton Street, Kolkata -700 007.*
2. *M/S. Jain Textile, 150/2, M. G. Road, Kolkata- 700 007.*
3. *M/s. Shree Balajee Trading Co., 13A, Madan Mohan Burman Street, Kolkata – 700 007.*
4. *M/s. Om Trading, 11, Sudder Street, (Gr. Floor), Kolkata – 700 016.*
5. *M/s. Fashion India, 4, Chowrangee Lane, Kolkata – 700 016.*

The result of the Joint market verification report is reproduced below in tabular form:

S No			Value (per mtr.) in Rs.									
			M/s. S. S. International		M/S. Jain Textile		M/s. Shree Balajee Trading Co.		M/s. Om Trading		M/s. Fashion India	
	Description of Samples	Qty	2011	2009	2011	2009	2011	2009	2011	2009	2011	2009
1	Synthetic fabrics (Phiroza blue colour)	01 pc	80	73	80-85	70	90	75	82-85	Running business for last one year	81-84	68
2	Synthetic fabrics	01 pc	78	71	70-75	64	87	72	75-80	Do	69-73	62

	(white colour)											
3	*Synthetic fabrics (black colour)*	*01 pc*	*80*	*73*	*80-85*	*70*	*90*	*75*	*85-90*	*do*	*Not dealing at pressen t*	*68*

The above market enquiry made jointly by the Customs Officers and representative of exporters suggests that the lowest and highest whole sale price of the white colour export fabrics in the year 2009 were Rs. 62.00and RS.72.00 respectively. For blue and black colour fabrics the lowest and the highest price was Rs. 68.00 and Rs.73.00 in 2009 respectively. The FOB price shown by the exporter in their invoice and bill of entry was Rs.71.10 and Rs. 94.80. The market price shown in the SCN by the investigating agency was Rs.22.00 for white fabrics and Rs.33.00 for blue colour fabrics.

Joint fresh market verification of the export goods was felt essential in the interest of arriving at the correct market price as the exporter contested the market verification conducted by the investigating agency without intimating the exporter. The result of fresh market verification indicates that the price of fabrics shown in market enquiry report of the investigating agency is abnormally low and hence liable for rejection. Moreover, wholesale price of fabrics as per the fresh market verification is marginally lower than the declared F.O.B value. The F.O.B value is inclusive of profit element of the exporter and other incidental charges. The investigating agency also did not allege that the impugned goods were purchased by the exporter from local market at a lower price when the purchase documents were available with them to arrive at the correct market value of the impugn goods. Accordingly, I reject the market enquiry report of the investigating agency as market verification conducted afresh with representative of exporter does not support the allegation of over invoicing since contemporaneous price of the goods was only marginally lower than the FOB price shown by the exporter in Customs documents.

Overvaluation is also being alleged on the ground that much lower value was declared in Bangladesh for the same consignment. This I propose to deal now.

I find from para (3) of the letter File.No.05/07 (24) Con/1&1/08 472 dated 10.08.09 issued by Director General, Directorate of Customs Intelligence and Investigation Govt. of the Republic of Bangladesh made available through overseas enquiry by the Embassy of India, Kathmandu (Nepal) that the importer made "....an ill attempt for evasion of Customs duty by giving untrue declaration & concealing the actual transaction value of the consignments". Accordingly, charge of overvaluation by the Indian Exporter as per untrue declaration & concealing the actual transaction value declaration made by Bangladesh importer before the Bangladesh Customs cannot stand. On the contrary the overseas investigation vindicate that undervaluation was made on Bangladesh side by the Bangladesh importer to evade payment of Customs duty.

The charge of confiscation of vehicles under section 115(2) of the Customs Act'1962 used for carrying goods under cover of subject 5 bills of export cannot stand as I have rejected the charge of over valuation of export consignment covered under the bills of export in question.

*(2) **Mode of payment**: - In the impugned SCN, it has been alleged that in case of export to Bangladesh, payment by opening of Letter of Credit was the only mode of payment accepted and allowed as per Bangladesh import policy. In the present case the exporter had shown the mode of payment in the bills of export on DA basis in respect of shipping bill nos. 92, 93, 94 and 95/EXP/MAU/DEPB/MDPR/2009 dated 06.01.2009. In respect of bill of export no. 96//EXP/MAU/DEPB/MDPR/2009 dated 06.01.2009 mode of payment was under letter of credit no. 094108010537 dated 27.12.2008. Since, the payment terms in 4 bills of export was shown as DA basis, the*

goods covered under these bills of export were not permissible for export to Bangladesh. In support of their contention, they have relied upon a report of the 6th meeting of the SAARC sub group on Customs Co-operation held in SAARC secretariat, Kathmandu, wherein import of goods into Bangladesh, letter of credit is considered mandatory documents with other statutory documents Bill of entry, proforma invoice, packing list etc.

The exporter in their written submission stated that DA system of payment is accepted all over India and there is no difficulty if a foreign buyer place an order with an Indian exporter and provide for payment on DA basis, the exporter cannot be held liable for any illegal action of the foreign party. It is for the foreign buyer to handle once of the goods reach Bangladesh and the exporter cannot be taken to task. Even today hundred & thousands of exports are being allowed to Bangladesh through various LCSs on DA basis. They have also submitted that as per master circular no. 9/2009-10 dated July, 1, 2009, it is stated that there is no specific instruction issued by RBI against making export on DA basis.

It is true that the Letter of Credit is one of the recognized modes of payment in exportation of goods outside India. However, from a bare perusal of the guidelines issued by the Reserve Bank of India vide Master Circular No. 09/2009-10 dated July 1, 2009 it would be amply clear that the instructions on export of goods and services including manner of payment and monitoring of realization/follow up have been consolidated in a generalized manner and the same is applicable to exports on DA basis also. The Exim Policy of India and the guidelines issued by the Reserve Bank of India in that behalf rather do not provide that export to Bangladesh shall be against L/C only. What Bangladesh law requires cannot be concern in terms of law as applicable in India. In view of such guidelines of the Reserve Bank of India, which also regulates the flow of foreign exchange into and outside India the *contention of the department that the subject exportation cannot be made under DA is unacceptable and as such the Issue No. 2 is answered in negative.*

(3) ***Fraudulent acts indulged by the exporter, CHA, clearing agent and their employees to facilitate importers of Bangladesh evade customs duty payment in Bangladesh****:*

I find that entire charge is based on the fact that the noticees including the CHA, agents, and employees conspired to fabricate duplicate sets of documents complete with Indian Customs officers seal &signature. It is also apparent that one set of documents presented before and passed by the Indian Customs was not forged. It is the second set of documents meant to be presented before Bangladesh Customs by importer from Bangladesh side which is forged specifically with a view to show a lower …..”

4.3 From the impugned order it is evident that the Commissioner has determined the value of impugned export consignments on the basis of the verification jointly undertaken jointly by the members of the market verification committee and Mr. Nathmal Jajodia, Director of M/s. Jai Vikshu Niketan and Sri Sandeep Jati, authorized representative of M/s. A.S, Traders. It is also noted by the Commissioner for the joint verification of the market price of the impugned goods, he had invited the conversant officers of DRI. Commissioner also refers to the communication made by the ADG DRI, refusing to be the part of such joint market verification. He notes that, *Vide letter DRI F. No. 4/Kol/APP/2009/9552 dated 02.01.12 received from ADG, DRI, KZU, it was informed that “in course of investigation by DRI, market enquiry was conducted by DRI officers, details of which are given in Para-16 of SCN. As DRI is the investigating agency, DRI officers cannot be part of any market enquiry as desired by the adjudicating authority. Further necessary action may therefore be taken as deemed fit”.* Having agreed not to participate in the joint verification of the market value of export consignments, department cannot question the enquiry report relied upon by the Commissioner. It is not even the case of revenue that these enquiries were conducted fraudulently. During the adjudicating proceedings commissioner has duly ordered for such market verification on the basis of the same sample that were drawn from the export consignment at the time of seizure. On the examination of the same samples and verification undertaken Commissioner has re-determined the market value of the export consignments and concluded that the value as declared by the exporters was genuine. Revenue in their appeal have sought to place reliance on the market enquiries that were conducted by the DRI without associating the exporter with the same.

4.4 It is basic law of evidence that every evidence that is to be adduced in a proceedings against the person should be tested for it veracity and authenticity by the person adjudging the issue. In this case Commissioner has got the market verification done and have rejected the market enquiries undertaken by the DRI. In our view the approach of the Commissioner cannot be faulted.

4.5 Admittedly the market enquiries conducted by the DRI during the course of investigation were conducted without participation of the exporter or his authorized representative. The enquiries so done behind the back of the exporter cannot be solely relied for determining the market value of export goods. In case of Chiman Desai [2000 (125) E.L.T. 204 (Cal)] Hon'ble Calcutta High Court has observed as follows:

"….Apart from the faulty determination of the question it appears that exhaustive enquiries were made but unfortunately all these enquires were ex parte and without notice to the petitioner and behind his back. It has now been held that these proceedings are quasi-judicial proceedings and

therefore enquiries upon the results of which the Customs authorities rely, cannot be made behind the back of the person concerned…."

4.6 Tribunal has in case of Asha Enetrprises [2008 (230) ELT 461 (T-Chennai)] held as follows:

"8. *As regards the finding of misdeclaration of value, we find that the Commissioner had used results of market enquiry for the purpose. However, the details of the enquiry such as the persons contacted, whether they dealt with similar fabrics and the results were not intimated to the appellant. Information gathered at the back of the exporter cannot be used to penalize him in adjudication. In the instant case, confiscation and penalty were ordered based on the results of the market enquiry made without involving the appellant in any manner."*

4.7 In case of bard Exports [2018 (363) ELT 903 (T-Mum)] tribunal observed:

"4. On going through the impugned order of the Commissioner, we note that the entire case of the Revenue is based upon the result of two market enquiries. We note that the ready-made garments were Baba Suits, Boys trousers, Boys T- shirt-knitted, etc. The first market enquiry conducted by the Revenue was from a number of small stores selling more or less the said goods. The market survey specifically says that "identical ready-made garments were not available in the said shops, some what similar goods are available". We observe here that the value of the clothing depends upon the number of factors including the quality of fabric used, stitching quality, brand name and art work done on the same. A baba suit may be available in the market at a price of Rs. 50/- or Rs. 500/- or more. Similarly, in respect of second market survey also there is nothing on record to indicate that the type of garments available in the market were identical to the type of garments exported by the assessee. As such, we agree with the assessee that overvaluation of the consignments cannot be proved

by making reference to the market enquiry without there being any indication of comparability of the goods. We also find that though the appellant has produced the invoices of the suppliers but the same stand dismissed by the adjudicating authority on the flimsy ground without being any concrete evidence to show that the same do not stand issued by the said supplier. The adjudicating authority has raised the same flimsy doubt about the correctness of the said invoices, even in those cases where the supplier has come forward and has admitted having supplied the goods. Such attitude of the Revenue cannot be appreciated.

4.1 The onus to prove overvaluation falls upon the Revenue and is required to be discharged by production of evidence. This was so observed by the Tribunal in the case of Akshay Exports & Inds. v. Commissioner of Customs - 2003 (156) E.L.T. 268 (Tri.-Kolkata). The said decision stands approved by the Hon'ble Supreme Court when the appeal filed by Revenue was rejected. In the absence of positive evidence, the value of export cannot be rejected on the basis of market enquiry or on the flimsy ground. In any case, we note that the appellant had admittedly received the entire remittance of the export proceeding by way of BRCs. If that be so, the Revenue's case that there was overvaluation of the goods does not stand. The appellant having been able to sell the goods even at higher value to their foreign buyer and having realized the entire consideration for the export consignments, is entitled to the drawback, admissible to him under the law."

4.9 Once Commissioner has concluded that the value as declared by the respondent to the Custom Authorities in India is genuine, other charges made against the exporter do not survive. Even if there are certain irregularities found in the export vis a vis the legal requirements in the destination country, (Bangladesh), the same could not be made a ground for proving the misdeclaration of value. For the irregularities committed vis a vis the legal requirements in Bangladesh, it is for the Bangladesh Authorities to proceed against the importer/

exporter of the goods. Neither show cause notice nor the appeal conclusively makes an assertion to that effect.

5.1 The appeal filed by the revenue is dismissed.

(Operative part of the order was pronounced in the open Court)

Sd/

(Sanjiv Srivastava)
Member (Technical)

Sd/
(P. Dinesha)
Member (Judicial)

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