IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Customs Appeal No.76023 of 2014

(Arising out of Order-in-Original No.KOL/CUS/PORT/30/2014 dated 31.03.2014 passed by Commissioner of Customs(Port), Kolkata.)

Shri Kailash Chandra Keyal, Director
M/s. Premium Ferromet Private Limited
(Room No.1A, (5th Floor), Kolkata-700069.)

...Appellant

VERSUS

Commissioner of Customs(Port), Kolkata

.....Respondent

(Custom House, 15/1, Strand Road, Kolkata-700001.)

WITH

(i) Customs Appeal No.76024 of 2014 (M/s.Premium Ferromet Private Limited vs. Commissioner of Customs(Port), Kolkata); (ii) Customs Appeal No.75250 of 2017 (M/s.MORTEX (India) Vs. Commissioner of Customs(Port), Kolkata); (iii) Customs Appeal No.75375 of 2017 (Shri Mahesh Keyal, Partner, M/s.MORTEX (India) Vs. Commissioner of Customs(Port), Kolkata); (iv) Customs Appeal No.75376 of 2017 (Shri Kailash Chandra Keyal, Authorized Person, of M/s.MORTEX (India) Vs. Commissioner of Customs(Port), Kolkata);

(i) (Arising out of Order-in-Original No.KOL/CUS/PORT/30/2014 dated 31.03.2014 passed by Commissioner of Customs(Port), Kolkata.)

(ii-iv) (Arising out of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/74/2016 dated 16.12.2016 passed by Commissioner of Customs(Port), Kolkata.)

APPEARANCE

Shri Rajeev Agarwal, Advocate for the Appellant (s)
Shri S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI RAJU, MEMBER(TECHNICAL)

FINAL ORDER NO. 75661-75665/2021

DATE OF HEARING : 28 July 2021
DATE OF DECISION : 25 August 2021

P.K. CHOUDHARY :

All the instant appeals involving identical issues are taken up together for disposal by this common order.

2. Appeal Nos. C/76023/2014 and C/76024/2014 have been filed by M/s. Premium Ferromet Pvt. Ltd. and its Director, Sri Kailash Chandra Keyal against Order in Original no. KOL/CUS/PORT/30/2014 dated 31.03.2014 wherein the demand proposed in Show Cause Notice DRI F No. 70/KOL/APP/2012 dated 04.04.2013 under Section 124 of Customs Act, 1962 have been confirmed for recovery of drawback amount under Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 for the period April 2008 and May 2008. Penalty has also been imposed on the Company as well as the Director under Section 114(iii) of the said Act.

3. Appeals No. C/75250/2017, C/75375/2017 and C/75376/2017 have been filed by the partnership Firm, M/s. Mortex (India), Shri Mahesh Chandra Keyal, Partner and Shri Kailash Chandra Keyal, Authorised Person of the said Firm against Order in Original No. KOL/CUS/COMMR/PORT/74/2016 dated 16.12.2016 read with Corrigendum Order dated 02.02.2017 wherein demand for recovery of DEPB amount as proposed in the Show Cause Notice DRI F No. 62/KOL/APP/2012/514 dated 29.11.2013 issued under Section 124 and Section 28 of said Act have been confirmed for the period 2008-09 to 2012-13 along with penalty under Section 113(i) and Section 114AA of the said Act. Penalties have also been imposed on the above individuals who are in appeal before us.

4. Sri Rajeev Kumar Agarwal, learned Advocate, appeared for the appellants and Shri S.S.Chattopadhyay, learned Authorized Representative appeared for the Revenue.

5. The learned Advocate appearing for the assessee submitted that in case of the appellant Company, Premium Ferromet, the proceedings were initiated by the Directorate of Revenue Intelligence for recovery of the Drawback amount on the ground that Ferro Silicon exported by them during the period in dispute were not of Indian origin. He submitted that in the course of adjudication, the appellant duly submitted that the exported goods were of Indian origin, however, the adjudicating authority, i.e. the learned Commissioner of Customs, negated their submissions, as observed in para 26 of the order, by stating that the appellant for the first time claimed the goods to be of Indian origin. He submitted that the noticee is entitled to contest the allegations levelled at the adjudication stage and that the learned Commissioner could not simply brush aside the defence submitted in reply to show cause notice. He also submitted that the notices were issued merely on the basis of statements of authorized representatives of certain suppliers, claiming the goods to have been imported from Bhutan, without allowing any cross examination.

He relied on the decision of the Hon'ble Punjab & Haryana High Court in the case of **Jairath International vs. UOI 2019 (370) ELT 116 (P&H),** to submit that the adjudicating authority has no power to re-assess the shipping bills which has already been assessed by the Proper Officer while ordering clearance under Section 51 of the Act. He submitted that the above decision of the High Court is based on the Supreme Court decision in the case of ITC Ltd. v. Commissioner of Central Excise, Kolkata-IV - 2019-TIOL-418-SC-CUS-LB. He submitted that the legal position has now been settled that when the assessment was not challenged in appeal, the Department could not re-assess the said shipping bills and order for recovery of drawback already granted under the Drawback Rules.

He also relied on the following decisions where similar view has been taken :-

- **Century Knitters India Ltd & Others vs. UOI & Others 2019-TIOL-2447-HC-P&H-CUS**
- **Axiom Cordages Ltd. vs. CC (vide Final Order no. A/85727 dated 11.09.2020) decided by the CESTAT, Mumbai Bench**

In respect of appeals filed by Mortex (India) and its partners, the learned Advocate made similar submissions that recovery of DEPB also could not be made since the shipping bills were not challenged by the Department. He also disputed the jurisdiction of the DRI to issue notices and also contested the demand on the grounds of limitation. On same counts, he submitted that penalty is not imposable on the appellants. He also filed detailed written submissions which have been duly perused and considered.

6. The learned Authorized Representative appearing for the Revenue reiterated the findings made by the learned Commissioner in the impugned adjudication orders and submitted that since the goods were not of Indian Origin, the exports benefit for DEPB and Drawback have rightly been denied and the same is recoverable from the appellants, even though the shipping bills were not challenged by the Department.

7. Heard both sides through video conferencing and perused the appeal records.

8. The issue that requires determination is whether the Department could dispute the grant of DEPB and Drawback benefit in the facts of the present case.

We have carefully perused the decision in the case of Jairath International (Supra). In the above mentioned case, the DRI issued Show Cause Notices on the basis of investigation initiated by it to allege that the assessee exporter had fraudulently obtained drawback amount. The DRI conducted search at the various premises of the exporters on the basis of which the DRI alleged that the drawback amount was fraudulently obtained on the basis of willful wrong declaration with ulterior motive to defraud the Revenue. Demand proposed in the Show Cause Notice was confirmed against which the assessee approached the High Court. The High Court, while relying on the judgements of the Hon'ble Supreme Court, held that the Department has no power to reassess a shipping bill which was duly assessed by proper officer at the time of export of goods to dispute the export benefit already allowed to the assessee without challenging the shipping bills. It would be relevant to reproduce the relevant paragraphs of the observations made in the case of Jairath International (Supra) as below:-

> ***"****10. Before proceeding further, it would be useful to understand scheme of 1962 Act which deals with import & export of goods. …………….*
>
> *As per scheme of 1962 Act, at the time of import, bill of entry is filed under Section 46 of 1962 Act and at the time of export shipping bill is filed under Section 50 of the 1962 Act. In case of bill of entry as well shipping bill assessment is framed under Section 17 of 1962 Act. In both cases, Customs authorities under Section 47/51 of 1962 Act permit clearance after being satisfied that goods are not prohibited and importer/exporter has paid duty if any assessed. There is no prescribed form in which an order of assessment is made. Prior to 8-4-2011, assessment was framed by Proper Officer and w.e.f. 8-4-2011 importer/exporter makes self-assessment which is subject to verification by Proper Officer who may accept or reject self-assessment and reassess bill of entry/shipping bill.*

Endorsement made on bill of entry/shipping bill is an order of assessment which is appealable by any person (Section 128/129D) aggrieved. The Revenue as well as assessee may prefer an appeal against order of assessment. The Respondent-department has power of reassessment under Sections 17(4) & (5) of 1962 Act and there is no other provision which permits reassessment. In case of assessment by Proper Officer as well self-assessment and reassessment, value of 'export' and 'imported goods' is determined…..

It is apparent from above definition of 'export goods' that the goods which have already been taken out of India do not remain export goods instead are referable as exported goods. The definition of 'imported goods' makes things more than clear that goods which have already been cleared are not "imported goods". <u>Similarly, goods which have already been exported are no more 'export goods'.</u> In the definition part as well in the various Sections of 1962 Act and Rules made thereunder, we find that word 'imported goods' or 'export goods' has been used which shows true intention of the legislature.

12. Value of "export goods" and "imported goods" is determined under Section 14 of the 1962 Act. Government in exercise of power conferred by Section 14 of the 1962 Act has framed Valuation Rules, 2007 which prescribe manner to determine value of "export goods" where value declared by exporter is rejected. Section 14 of 1962 Act and relevant Rules of Valuation Rules, 2007 are extracted as under :………….

<u>13. As per Rule 16 of Drawback Rules, 1995 Claimant (Exporter) shall on demand by Proper Officer shall repay the amount of drawback which has been erroneously or paid in excess of what the Claimant is entitled to.</u> Relevant extracts of Drawback Rules, 1995 are as under :

14. As cited by Mr. Bansal, <u>Hon'ble Supreme Court in the case of ITC Ltd. v. Commissioner of Central Excise, Kolkata-IV - 2019-TIOL-418-SC-CUS-LB</u> has dealt with question of maintainability of refund application under Section 27 of the Customs Act, 1962, where self-assessment qua bill of entry has not been challenged by the Importer *before Appellate Authority under Section 128 of 1962 Act. Hon'ble Supreme Court after noticing its earlier judgments in the case of Priya Blue Industries v. Commissioner of Customs - 2004-TIQL-78-SC-CUS = 2004 (172) E.L.T. 145 (S.C.), Escorts Ltd. v. Union of India &Ors. - 2002-TIQL-2706-SC-CX = 1998 (97) E.L.T. 211 (S.C.) and Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd. - 2000 (120) E.L.T. 285 (S.C.) has held that Section 27 is more or less in the nature of execution proceedings and it is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise. Order of self-assessment qua Bill of Entry is an appealable order and Revenue as well Assessee may prefer an appeal against order of self-assessment. The provisions of Section 27 cannot be invoked in the absence of amendment or modification having been made in the Bill of entry on the basis of which self-assessment has been made and the refund proceedings are in the nature of execution for refunding amount. Re-assessment is permitted only under Sections 17(3)(4) & (5) of the 1962 Act. It will virtually amount to an order of assessment or reassessment in case Assistant Commissioner or Deputy Commissioner while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27 of the 1962 Act. Relevant Paras 41-44, 47 of the judgment in ITC v. CCE case (supra) are reproduced as under :…………….*

15. Hon'ble Supreme Court in ITC v. CCE (supra) has made it clear that self-assessment or assessment made by proper officer under Section 17 read with Section 2(2) of 1962 Act is an assessment so an importer is bound to file appeal under Section 128 for its modification if he wants to claim refund under Section 27 of the 1962 Act because Section 27 is sort of execution and while deciding refund application an Assistant Commissioner cannot modify assessment made at the time of import. Thus, it is evident that refund claims which were earlier entertained on admitted/conceded mistakes would not be maintainable without being corrected in appellate proceedings.

16. We on examination of the scheme of the 1962 Act and in view of the judgment of Hon'ble Supreme Court in case of ITC v. CCE (supra) find that Rule 16 of Drawback Rules, 1995 is also in the nature of execution proceedings thus an officer even higher in rank than proper officer, who framed assessment at the time of export, cannot modify a shipping bill qua value and consequent entitlement of duty drawback while issuing notice or passing order under Rule 16 of the Drawback Rules, 1995. The contention of the counsel for Respondents that as per Valuation Rules, 2007 proper officer has power to re-assess value of goods even though already exported is untenable. As noted in Famina Knit Fab (supra) and hereinabove, Valuation Rules are applicable to 'export goods' and these Rules are not enabling provisions to frame re-assessment. Section 14 empowers to frame Rule to reject declared value and re-determine value of export goods. The Valuation Rules, 2007 are framed in exercise of power conferred by Section 14 of 1962 Act. Rule 1(3) and 8 of Valuation Rules permit to reject value of 'export goods'. As per definition of export goods, the goods which stand exported are not 'export goods' so Valuation Rules, 2007 are not applicable to goods already exported. Valuation Rules, 2007 would come into play as soon as the proper officer gets power to reassess already assessed shipping bill. Prior to 8-4-2011, it was proper officer who used to frame assessment and w.e.f. 8-4-2011 he gets first opportunity to doubt the self-assessed value at the time of export and, secondly, he may prefer an appeal before Appellate Authority. A team of Customs officers at the time of export of goods verify different particulars including value declared by an exporter. The declared value may be accepted or re-assessed and in case re-assessed value is not accepted by exporter, proper officer has to pass speaking order. Thus, as per scheme of the 1962 Act, department is not remediless and Courts are bound to interpret law as such. Courts while interpreting law can neither add nor subtract any word from the plain language irrespective of consequences. It is the legislature who has to rectify, repair or amend the law in case any judgment interpreting law is not acceptable or is contrary to intent and purport of enactment.

> *17. On plain reading of Sections 17, 50 and 51 with Valuation Rules, 2007, we find that Respondent is neither vested with power of re-assessment of goods already exported under Rule 16 of Drawback Rules, 1995 nor Valuation Rules, 2007. The goods which stand exported do not fall within ambit of 'export goods' as defined under Section 2(19) of 1962 Act, thus Respondent cannot invoke Rules 6 & 8 of Valuation Rules, 2007. In view of judgment of Hon'ble Supreme Court in the case of ITC v. CCE (supra), we find that shipping bill either self-assessed or assessed by proper officer is amenable to appeal by both sides. Respondent by way of show cause notice under Rule 16 of the Drawback Rules, 1995 cannot modify assessed shipping bill.*
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> *18. Therefore, we hold that Respondent in terms of Rule 16 of Drawback Rules, 1995 as well Valuation Rules, 2007 has no power to reassess a shipping bill which was duly assessed by proper officer at the time of export of goods. In the present case, goods in question stood exported thus impugned order is not sustainable in view of our aforestated findings as well.*
>
> *19. Accordingly, present writ petitions are allowed on all the counts, namely, limitation, absence of mechanism and lack of power to frame re-assessment of goods already exported; and hence the impugned order dated 25-11-2016 (P-9) is hereby quashed. No costs..."*

Further, in the case of **Century Knitters India Ltd (Supra)**, the High Court took the same view as held in the case of Jairath International (Supra). The relevant paragraphs of the decision is extracted below:-

> *"3. The Petitioners realized export proceeds, however Directorate of Revenue Intelligence (DRI) initiated an investigation against the Petitioners alleging that Petitioners are fraudulently availing duty drawback by grossly overvaluing the goods in the export documents. The DRI searched various premises of the Petitioners on 26.4.2012*

and concluded that Petitioners had mis-declared value of goods which were exported upto 26th April' 2012. On the basis of investigation conducted by DRI, Joint Commissioner of Customs, (SIIB), ICD, Delhi i.e. Respondent No. 3 issued common impugned Show Cause Notice dated 31.7.2014 (Annexure P-1) calling upon the Petitioners to show cause as to why declared FOB value of exported goods should not be rejected in terms of Rule 8 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 (for short 'Valuation Rules, 2007') read with Section 14 of the 1962 Act and re-determined in terms of Rules 6 & 8 of the Valuation Rules, 2007. The Petitioners were further called upon to show cause as to why duty drawback should not be disallowed and recovered from them under Rule 16 of Drawback Rules, 1995. ……..

5. After having scrutinized record of the case and heard arguments of both sides, we find that issues raised in present petitions are squarely covered by our judgment dated 20/09/2019 in Famina Knit Fabs Vs UOI, 2019-TIOL-2208-HC-P&H-CUS and judgment dated 04.10.2019 in Jairath International and another Vs UOI CWP No. 702 of 2017.

6. In the present writ petitions, concededly identical questions as raised in Famina Knit Fabs&Jairath International are raised. In both judgments, we have held that inspite of availability of alternative remedy available under 1962 Act, writ petition is maintainable in view of involvement of pure questions of law as well jurisdiction and law enunciated by Hon'ble Supreme Court and followed by this court time and again………….

While adjudicating Famina Knit Fabs Vs UOI, 2019-TIOL-2208-HC-P&H-CUS, we had left open question of power of Respondent-department to reassess value of goods which have already been exported out of country,
<u>however keeping in view law laid by Hon'ble Supreme Court recently in the case of ITC Vs Commissioner of Central Excise 2019-TIOL-418-SC-CUS-LB, we in the case of Jairath International and another Vs UOI</u>

> *CWP No. 702 of 2017 decided on 4.10.2019 have held that Respondent has no power to reassess value of goods already exported.*
>
> *7. Thus in view of our findings in the case of Famina Knit Fabs Vs UOI 2019-TIOL-2208-HC-P&H-CUS and Jairath International and another Vs UOI CWP No. 702 of 2017 decided on 4.10.2019, the present writ petition deserves to be allowed. Accordingly, writ petition is allowed and impugned show cause notice dated 31.7.2014 qua Petitioners is hereby quashed."*

We also note that the Tribunal in the case of **Axiom Cordages Ltd. vs. CC vide Final Order no. A/85727 dated 11.09.2020** in the matter of disallowing the export entitlement in the form of MEIS has taken identical views as above and observed that-

> *"10. In the present case, it is an undisputed fact on record that the order(s) passed by the proper officer of Customs during the relevant period 2015-2017, in permitting exportation of goods including classification and other aspects as per Section 51 ibid were considered as legal and proper by the Commissioner of Customs. This is evident from the fact that no specific order was passed by such competent authority in directing the officer subordinate to him for filing of appeal before the Commissioner (Appeals), as mandated in sub-section (2) of Section 129D of the Act. In fact, the materials available on records suggest that no appeals were filed by the Department against the assessment orders passed on the Shipping Bills before the Commissioner (Appeals) under Section 128 of the Act. Hence, the issue of classification and other facets concerning exportation of subject goods covered under the already assessed Shipping Bills was attained finality and any issues arising out of finalisation of such Shipping Bills cannot be questioned or agitated by the Department subsequently by initiating show cause proceedings against the exporter, the appellant herein. In other words, unless and until the order passed under Section 51 of the Act is dealt with in the manner prescribed by the appellate authorities, such order stands and the*

correctness or otherwise cannot be questioned subsequently by issuance of a show cause notice.

11. The issue with regard to the effect of non-filing of an appeal against the assessment order and denial/claim of benefit arising out of such assessment at a subsequent stage is no more open for any debate, as per the well settled principle of law laid down by the Hon'ble Supreme Court in the case of Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd., reported in 2000 (120) ELT 285 (S.C.). The relevant paragraph in the said judgment is quoted below: …………………..

12. Though, the above judgment was delivered in context with refund claim under the Central Excise statute, but the principle decided therein is squarely applicable to the facts of the present case inasmuch as legality or propriety of a statutory order cannot be questioned or disturbed subsequently by passing an order on the issue, which has already been considered and dealt with on the previous occasion, while passing the order under Section 51 of the Act. Further, the issue with regard to filing of appeal against an order passed under the statute has also been dealt with by the Hon'ble Supreme Court in various occasions. In the case of Shabina Abraham (supra), the Hon'ble Supreme Court have held that "in interpreting a taxing statute, equitable consideration are entirely out of place and it cannot be interpreted on presumptions or assumptions; the taxing statute is to be interpreted in the light of what is expressly expressed and provisions cannot be imported so as to supply any assumed deficiency." In the case of M.A. Merchant (supra), the Hon'ble Apex Court have ruled that "if an assessment has already been made and completed, the assessee cannot be subjected to re-assessment unless the statute permits that to be done." Such view was also endorsed by the Hon'ble Apex Court in the case of Vatika Township (P) Ltd. (supra), holding that "assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective." In view of the above referred well laid principles of law *enunciated by the Hon'ble Apex Court, we are of the considered opinion that change in classification of subject goods through the impugned proceedings, without challenging the assessed Shipping Bills, should not stand for judicial scrutiny....*

In view of the above, we find that the issue is no longer *res integra* as the same has been squarely decided by the Hon'ble Punjab and Haryana High Court in the case of Jairath International (Supra) and Century Knitters India Ltd (Supra) following the Supreme Court decision in the case of ITC Ltd (Supra).

Since the legal position stands already decided by the Hon'ble High Court as well as earlier decisions of this Tribunal, we are of the view that the impugned adjudication orders cannot be legally sustained and hence, the same are set aside.

All the five appeals herein are therefore allowed in full with consequential benefit as per law.

(Order pronounced in the open court on 25 August 2021.)

SD/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

SD/

(RAJU)
MEMBER (TECHNICAL)

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