

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

Customs Appeal No. 475 of 2009

(Arising out of Order-in-Original No. 13/2009 dated 30.01.2009 passed
by the Commissioner of Customs (General), Mumbai)

**M/s. Vrundavan Exports
C/2, Jaladarshan, Opp. Natraj Cinema,
Ashram Road,
Ahmedabad**

....Appellant

Versus

**Commissioner of Customs (General),
New Custom House,
Ballard Estate, Mumbai**

....Respondent

WITH

Customs Appeal No. 1221 of 2009

(Arising out of Order-in-Original No. 13/2009 dated 30.01.2009 passed
by the Commissioner of Customs (General), Mumbai)

**M/s. Narendra Industries
FP No. 331/7/B/2, Shivram State,
Opp. Water Tank, Dudheshwar,
Shahibaug,
Ahmedabad**

....Appellant

Versus

**Commissioner of Customs (General),
New Custom House,
Ballard Estate,
Mumbai**

....Respondent

Appearance:

Shri M.V. Doiphode, Advocate for the appellant
Shri R. Kumar, AC (AR) for the respondent

CORAM: Hon'ble Mr C J Mathew, Member (Technical)
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

FINAL ORDER No: A/85771-85772/2019

Date of hearing : 28-03-2019

Date of decision : 23-04-2019

PER: C J MATHEW

One of the appellants herein, M/s Vrundavan Exports, had filed a shipping bill for export of 'mix graphite guides and seal rings' to a buyer based in Dubai under claim for the benefit of Duty Entitlement Pass Book (DEPB) scheme in the Foreign Trade Policy. As the value was found to be inordinately high, and to be taken up for investigation, the exports were allowed provisionally after drawing representative samples. The original authority confiscated the goods while allowing these to be redeemed on payment of fine of ₹3,00,000/- and the value thereof was re-determined at a fraction of the declared value with concomitant reduction of entitlement under Duty Entitlement Pass Book scheme. Besides ordering recovery of the excess benefit, penalty of ₹5,00,000/- was imposed on the importer and on M/s Narendra Industries of ₹5,00,000/-, the other appellant, under section 114 of Customs Act, 1962.

2. It is contended by Learned Counsel for appellants that M/s Narendra Industries was penalised without authority of any specific

provision of Customs Act, 1962 as that enterprise was merely involved in job work, for and on behalf of the exporter, and, hence, outside the ambit of that law. It would appear from the submission made by Learned Authorised Representative that penalty was imposed on M/s Narendra Industries for having given misleading statements and inconsistent submission during the course of investigation. We take note that M/s Narendra Industries was not in any way concerned with the exports that commenced with filing of shipping bills, entry of goods for exportation, the declaration pertaining to the exports or in any commercial transaction thereafter. It is also not the case of Revenue that export did not occur or that the final form of the goods was deliberately altered to justify invoking of section 114 of Customs Act, 1962.

3. It would appear that the content of 'electrical grade carbon graphite moulding compound' in the final product is generally considered to be an appropriate indicator of the price. On the other hand, Learned Authorised Representative for the appellant contends that, at different times, the same exporter had cleared goods to their overseas customers without the claim of any benefit and at the same rate as was declared for the impugned consignments. Learned Counsel placed reliance on the decision of Hon'ble High Court of Bombay in *Commissioner of Customs (Import), Mumbai v. Finesse Creation Inc.* [2009 (248) ELT 122 (Bom)] to contest the imposition of redemption fine when the goods were not available for

confiscation. Placing reliance on the decision of the Tribunal in *Vrundavan Exports v. Commissioner of Customs (Ex), Mumbai [2005 (191) ELT 1036 (Tri-Mumbai)]*, he contends that customs authorities were not competent to sit in judgement over the decision of Directorate General of Foreign Trade on entitlement to the privilege of the scheme. It is also his contention that there has been no misdeclaration of the value and that adoption of local market price from the persons who are not in the business of exports does not suffice to relieve the obligation to determine value under Customs Act, 1962.

4. Learned Authorised Representative placed reliance on the decision of *Om Prakash Bhatia v. Commissioner [2003 (155) ELT 423 (SC)]* to defend the jurisdiction to proceed with valuation for the purpose of determination of the detriments, viz. fine on confiscated goods and penalty, even if no duty is leviable. The decision of Hon'ble Supreme Court in *Commissioner of Customs, Hyderabad v. Pennar Industries Ltd [2015 (322) ELT 402 (SC)]* and *Sheshank Sea Foods Pvt Ltd v. Union of India [1996 (88) ELT 626 (SC)]* were also cited to support the proposition that it was well within the jurisdiction of customs authorities to undertake valuation in such exports. Reliance was also placed on the decision of the Larger Bench of the Tribunal in *Rainbow Silks v. Commissioner of Customs (Export) ACC, Mumbai [2015 (325) ELT 599 (Tri-LB)]*.

5. From the rival submissions, it is seen the issues for resolution are the legality and propriety of confiscation of the export goods for having been overvalued, the denial of benefits under scheme in the Foreign Trade Policy and imposition of penalty. It has been clearly held by the Hon'ble Supreme Court, in *re Sheshank Sea Foods Pvt Ltd* and *Pennar Industries Ltd* that there can be no bar on proceedings for confiscation of goods and imposition of penalty under Customs Act, 1962 even if the goods themselves are not liable to duty. Likewise, the Tribunal has conferred approval to invoking of section 113 and 114 given that goods were prohibited within the meaning of Foreign Trade (Development Regulation) Act, 1992.

6. However, the applicability of resort to appraisal of value can arise only within the context of deviation from section 14(1) of Customs Act, 1962 and rules for valuation of exports was not in existence during the relevant period. There is no evidence on record to show that the appellant had not been in receipt of the amount transacted for the goods which could, then, have had a bearing on re-determining of transaction value. Reliance placed on ascertainment from local market does not in any way concord with the requirements of section 14 of Customs Act, 1962 which benchmarks time and place of exportation as critical to acceptance of a value. Furthermore, we find that the order restricting the entitlement to benefits of the scheme in the Foreign Trade Policy has been compounded with an order for recovery of excess eligibility arising therefrom. The scrip does not

conform any privilege; it prescribes a ceiling of eligibility for duty free import that is within the exclusive jurisdiction of the licensing authority. It is the utilisation of the scrip that triggers exemption from duty and, to the extent of ineligibility, arising from overvaluation of exports, can be proceeded against for recovery of the duty unpaid in consequence under section 28 of Customs Act, 1962. Hence, the appropriate course of action would have been to identify the bills of entry associated with the utilisation of the scrips emerging from such overvaluation and subject those to proceedings under section 28 of Customs Act, 1962. In the absence of such proceedings, a bland order of recovery is without legal authority as it does not have sanctity of law.

7. Confiscation of goods under section 113(1) of Customs Act, 1962 follows from misdeclaration of value. While the market value of the impugned goods appear to have been ascertained, it cannot, by any stretch of law, be adopted for the purpose of assessment under section 14 of Customs Act, 1962. It is also seen that though the export goods were claimed to have been manufactured by M/s Narendra Industries, as 'job-worker' from raw material supplied to them, investigation has not ascertained the factor of supply or of utilisation from them. In these circumstances, we do not find any acceptable finding to justify the reduction of value and which we set aside along with the penalty.

8. The penalty that was imposed on M/s Narendra Industries would also fail in the absence of finding of confiscability.

9. Accordingly, appeals are allowed.

(Order pronounced in the open court on 23.04.2019)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)