

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

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 139 of 2011

(Arising out of Order-in-Original No. 07/2011 dated 11.01.2011
passed by the Commissioner of Customs (Export), Nhava Sheva)

M/s Gala International Pvt. Ltd.

.... Appellant

30/27, 1st Floor, East Patel Nagar,
New Delhi – 110 008

Versus

Commissioner of Customs (Export)

.... Respondent

JNCH, Nhava Sheva, Dist. Raigad,
Maharashtra – 400 707

Appearance:

Shri Anil Balani, Advocate for the Appellant

Shri Manoj Kumar, AC, Auth. Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MR. S. SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85943 / 2019

Date of Hearing: 08.01.2019

Date of Decision: 08.01.2019

Per: Dr. D.M. Misra

This is an appeal filed against Order-in-Original No.
07/2011 dated 11.01.2011 passed by the Commissioner of
Customs (Export), JNCH, Nhava Sheva.

2. Briefly stated the facts of the case are that the
appellants are in the business of export of various types of
goods. They have filed three shipping bills all dated

31.01.2006 for export of Dyed and Printed Fabrics made from 100% Polyester Filament Yarn of a total FOB value of Rs.1,55,47,700/- under DEPB Scheme claiming total DEPB amount of Rs.12,12,721/-. Department after carrying out the necessary market enquiry re-determined the FOB value at Rs.67,97,095/- and the benefit of DEPB was proposed to be reduced to Rs.5,45,773/-. Consequently, a show-cause notice was issued to the appellant on 23.5.2006 proposing confiscation of the goods seized and released provisionally under Section 113(d), 113(h) and 113(i) of the Customs Act, 1962 read with Section 11 and 14 of the Foreign Trade (Regulation) Rules, 1993 for mis-declaration of quantity, value and excess DEPB claim of Rs.6,66,947.59; imposition of penalty under Section 114 of the Customs Act, 1962. On adjudication, the Present Market Value (PMV) was re-determined as Rs.69,97,095/-, the goods were directed to be confiscated and allowed to be redeemed on payment of fine of Rs.5.00 lakhs, and imposed penalty of Rs.50,000/- under Section 114 of the Customs Act, 1962. Aggrieved by the said order, the appellant filed an appeal before this Tribunal. This Tribunal vide order No. A/379/2008/CSTB/C-I dated 7.7.2008 remanded the matter to the adjudicating authority to allow cross-examination of the witnesses and decide the case afresh. Consequently, the adjudicating authority allowed further hearing to the appellant and confirmed the confiscation of the goods and released provisionally with an option to redeem the same on payment of fine of Rs.5.00 lakhs, re-determined the FOB value as Rs.69,97,095/- and restricted

the DEPB claim to Rs.5,45,773/- and also imposed penalty of Rs.50,000/- under Section 114 of the Customs Act, 1962. Hence the present appeal.

3. At the outset, learned Advocate Shri Anil Balani for the appellant has submitted that in the first round of litigation before this Tribunal, on a pleading by the appellant that without allowing the cross-examination of the witnesses namely, M/s Teratex and M/s Mangalam Textiles, on the basis of the opinions of the said witnesses, the market value of the fabrics was accepted as Rs.23/- to Rs. 25/- per yard, this Tribunal observing that there has been violation of principles of natural justice, remanded the matter to the adjudicating authority to allow cross-examination of the said witnesses. However, contrary to the said direction, the learned adjudicating authority observed that the summons addressed to the said witnesses, were returned as "not delivered" by the postal authorities. However, the learned Commissioner has relied upon the opinions of the said two witnesses in confirming the present market value for determination of FOB value and consequently, re-calculated the DEPB benefit. He has submitted that not allowing cross-examination of the witnesses, whose opinions have been relied upon in directing confiscation' rejection of transaction value etc., has resulted in violation of principles of natural justice. In support, he has referred to the judgment of the Hon'ble Supreme Court in the case of *Andaman Timber Industries Vs. Commissioner of Central Excise, Kolakata-II* – 2015 (314) ELT 641 (SC).

3.1 He has further submitted that even though the learned Commissioner has, in the impugned order, observed that the entire export proceeds has been realized and BRC was placed on record, but ultimately rejected the DEPB benefit. This is in contradiction of the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Mumbai Vs. Tex-Age - 2016 (340) ELT 3 (SC)*. It is his contention that the learned Commissioner failed to appreciate that when the FOB value was realized in full, reduction of the same on the basis of un-established PMV and reducing the DEPB benefit is bad in law. Further, he has submitted that in the statements, no one has categorically admitted that DEPB benefit has been excessively claimed. Further, he has submitted that in DEPB cases, the jurisdiction lies with the DGFT and not with the Customs. In support, he has referred to the judgment of this Tribunal in the case of *Asha Enterprises Vs. Commissioner of Customs (Seaport). Chennai - 2008 (230) ELT 461 (Tri-Chennai)* and *Alphonse Joseph Vs. Commissioner of Central Excise & Customs, Bangalore - 2006 (204) ELT 487 (Tri-Bang)*.

4. Learned AR for the Revenue reiterates the findings of the learned Commissioner.

5. We have carefully considered the submissions advanced by both sides and perused the records. This Tribunal in the first round of litigation, considering that there has been violation of principles of natural justice, remanded the matter to the adjudicating authority observing as follows: -

"The finding of over-invoicing is based upon market enquiry reports dated 23.2.2006 of M/s. Tera Tex and M/s. Mangalam Textiles, of Kalbadevi, Mumbai both of whom opined that the fabrics were made of 100% polyester yarn of very light GSM and such fabric was commonly available in the market for approximately Rs.23/- to Rs.25 per yard. The appellants had asked for copies of these reports in their reply dated 14.3.2007 to the show cause notice and also sought cross-examination of two persons who had furnished the above opinions. It is their submission that till date copies of the two reports have not been supplied to them. What has been supplied under cover of letter dated 8.6.2006 is copy of panchnama, copies of various statements, copies of invoice, shipping bills, and packing list. The Revenue is not in a position to rebut the plea of the appellants of non-furnishing of the above reports. Further the Commissioner has not recorded any finding on the request of the appellants for cross-examination. Therefore, the Commissioner's order suffers from the vice of contravention of the principles of natural justice. In the interests of justice, we set aside the impugned order and remit the case to the jurisdictional Commissioner for fresh decision in accordance with law after supplying copies of the reports of M/s. Tera Tex and M/s. Mangalam Textiles to the appellants and considering their request for cross-examination. All issues are left open for fresh decision by him. Orders are to be passed afresh after extending a reasonable opportunity to the appellants of being heard in their defence."

6. The learned Commissioner in the *de novo* proceedings referred to the remand order of this Tribunal and recorded that there was no dispute on the PMV arrived at on the basis of necessary market inquiry with cloth merchants M/s Mangalam Textiles and M/s Teratex. The export value of the goods was ascertained as Rs.45.80 per yard by adding the transportation charges, packing charges, marking/labeling, freight and profit margin. Further, he has observed that even though the departmental proceedings is not Court proceedings necessarily requiring the examination and cross-examination of the witnesses, the appellant's request was accepted as per Tribunal's order and since notices sent to the address of the said Mangalam Textiles and Teratex were returned with remark "Left", cross examination of the witnesses could not

materialize. In nutshell, thus cross-examination of M/s Mangalam Textiles and M/s Teratex could not be completed in accordance with the direction of this Tribunal. However, the learned Commissioner instead of deleting the said evidence, relied upon the same in para 25 of the impugned order. The findings of the learned Commissioner (Appeals) relying upon the opinion of M/s Mangalam Textiles and M/s Teratex without subjecting them to cross-examination, in our opinion, cannot carry any evidentiary value, hence ought to be discarded. Also, we find that the learned Commissioner himself observed that the entire FOB value declared by the appellant has been received and necessary BRC was filed with the Customs. In these circumstances, reducing the DEPB benefit on the basis of PMV, which could not be established by way of cross-examination of the cloth merchants namely, M/s Mangalam Textiles and M/s Teratex and confirming consequential action on the basis of aid market inquiry, in our opinion, cannot be sustained.

7. In the result, the impugned order is set aside and the appeal is allowed.

(Dictated and pronounced in open court)

(Dr. D.M. Misra)
Member (Judicial)

(S. Srivastava)
Member (Technical)