

(2019) 10 P&H CK 0079

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 702, 701 Of 2017(O&M)

Jairath International & Anr.

APPELLANT

Vs

Union Of India & Ors.

RESPONDENT

Date of Decision : 04-10-2019

Acts Referred:

Customs Act, 1962 — Section 2, 2(2), 2(18), 2(19), 2(25), 14, 17, 17(3), 17(4), 17(5), 27, 28, 28AAA, 46, 50, 51, 72, 75, 85, 142(1), 128, 129D
Central Excise Act, 1944 — Section 37
Finance Act, 1994 — Section 93A
Foreign Exchange Management Act, 1999 — Section 2(m), 2(q)
Customs, Central Excise Duties And Service Tax Drawback Rules, 1995 — Rule 2(a), 2(c), 16, 16A
Customs Valuation (Determination Of Value Of Export Goods) Rules, 2007 — Rule 1(3), 3, 4, 5, 6, 8
Constitution Of India, 1950 — Article 226

Citation : (2019) 10 P&H CK 0079

Hon'ble Judges : Jaswant Singh, J;Lalit Batra, J

Bench : Division Bench

Advocate : Jagmohan Bansal, Sourabh Goyal, Sunish Bindlish

Final Decision : Allowed

Judgement

Jaswant Singh, J

1. By this common order Civil Writ Petitions No. 701 & 702 of 2017 are disposed of as both the Petitions arise from same impugned order- in-original dated 25.11.2016. In CWP No 702 of 2017 there are two Petitioners and both are proprietorship concerns of same person-Prithvi Raj Jairath and CWP No. 701 of 2017 has been filed by an individual-Sh. Rajesh Dhanda on account of penalty imposed upon him. The Petitioners through instant petitions under Article 226 of the Constitution of India are seeking quashing of order-in-original dated 25.11.2016 (Annexure P-9) whereby Additional Commissioner of Customs, New Delhi has rejected declared Free on Board (for short 'FOB') value of the goods exported during 2007-08 to 2012-13 (upto April' 2012) and duty drawback

incentive availed at the time of export has been demanded and ordered to be recovered under Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (for short 'Drawback Rules, 1995').

FACTS:

2. The few facts emanating from record are that in CWP No. 702 of 2017 the Petitioner No. 1 & 2/Manufacturer Exporters during 2007-2008 to 28.4.2012 exported textile goods claiming benefit of duty drawback as permissible under Duty Drawback Rules, 1995, which were framed vide Notification No. 37/95-CUS (NT) dated 26.05.1995 in exercise of power conferred by Section 75 of Customs Act, 1962 (for short '1962 Act'), Section 37 of the Central Excise Act, 1944 and Section 93A (relating to Service Tax) of the Finance Act, 1994.

As required under Section 50 of the 1962 Act, the Petitioners as and when exported goods filed shipping bill declaring description, quantity, value, name of foreign buyer etc. A team of Custom Officers i.e. Inspector, Superintendent and Assistant Commissioner physically verified export goods and noted on shipping bill "as per invoice and packing list" or "value reduced for the purpose of duty drawback". The goods were examined and assessed in terms of Section 17 of the 1962 Act. It would be relevant to notice that prior to 8.4.2011, there was no self assessment which was introduced by Finance Act, 2011 w.e.f 8.4.2011. The Custom Officers permitted export of goods in terms of Section 51 of the Customs Act, 1962. As conceded by both parties, no separate assessment order was passed and drawback was released after export of goods.

2.1 The Petitioner realized export proceeds nevertheless 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 have mis-declared value of goods which were exported upto 26.4.2012. On the basis of investigation conducted by DRI, Joint Commissioner of Customs-Respondent No. 3 issued a Show Cause Notice dated 4.9.2014 (Annexure P-6) 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. The Petitioners vide their reply dated 1.7.2015 (Annexure P-7) contested show cause notice, however, Respondent No. 3 turned down all the submissions of the Petitioners and vide order-in-original dated 25.11.2016 (Annexure P- 9) rejected contention of the Petitioners and upheld reduced FOB value and confirmed demand of duty drawback as proposed in the show cause notice. The Respondent while passing order-in-original dated 25.11.2016 (Annexure P-9) imposed penalty upon Petitioner-exporters as well

Rajesh Dhanda holding that he has supplied goods to Petitioner-exporters at inflated price and excess duty drawback was passed on to him. Rajesh Dhanda has filed separate Writ Petition No. 701 of 2017 assailing same order-in-original dated 25.11.2016 (Annexure P-9).

3. Mr. Jagmohan Bansal, Counsel for the Petitioners has raised three issues, namely, (i) Reasonable period of limitation to issue show cause notice (ii) Absence of mechanism to raise demand of duty drawback, and

(iii) Power of Respondent to reassess value of goods already exported.

4. 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 rendered in CWP No.5111 of 2018 titled Famina Knit Fabs Vs UOI & Ors. reported as 2019-TIOL- 2208-HC-P&H-CUS.

5. In the present writ petitions, identical questions as in Famina Knit Fabs (Supra) are raised except question of effect of repeal of Drawback Rules, 1995 w.e.f. 01.10.2017. In the present cases, show cause notice dated 4.9.2014 (Annexure P-6) and order-in-original dated 25.11.2016 (Annexure P-9) came to be issued/passed prior to repeal of Drawback Rules, 1995 with effect from 1.10.2017.

6. In Famina Knit Fabs (Supra), 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.

On the question of reasonable period of limitation to issue show cause notice raising demand of duty drawback, relying upon judgment of Hon'ble Supreme Court in State of Punjab versus Bhatinda District Co-Op. Milk P. Union Ltd. 2007 (217) ELT 325 and this court in Gupta Smelters Pvt. Ltd. versus Union of India 2019 (365) ELT 77 (P&H), GPI Textiles Limited versus Union of India 2018 (362) ELT 388 (P&H), CCE Vs Hari Concast (P) Ltd. 2009 (242) E.L.T. 12, we have held that period of 5 years from the date of export/assessment is a reasonable period.

While taking cue from Sections 28, 28AAA & 75 of 1962 Act and relying upon judgment of Hon'ble Supreme Court in the case of Commissioner of Central Excise versus Larsen and Toubro 2015 (39) STR 913 as well of this court(DB) in the case of CWP No.4215 of 2016 titled as Laqshya Media Pvt. Ltd. Vs State of Punjab and Others decided on 23.08.2016, we have held that mechanism is absent in Duty Drawback Rules, 1995 thus demand under Rule 16 of Drawback Rules, 1995 is not sustainable.

We had left open question of power of Respondent-Department to reassess value of goods which have already been exported out of country.

7. From the record as well written submissions of Petitioner dated 9.9.2019, we find that show cause notice was issued on 4.9.2014 (Annexure P-6) and goods

were assessed/exported during 2007-08 to April' 2012. The demand for the period 2007-08 to Sept' 2009 was raised beyond 5 years from the date of export/assessment, however remaining demand was raised within 5 years from the date of export/assessment, thus partial demand had been raised beyond reasonable period of 5 years thus was not sustainable as held by us in *Famina Knit Fabs* (Supra).

By Show cause notice dated 4.9.2014 (Annexure P-6) followed by order-in-original dated 25.11.2016 (Annexure P-9), Respondent- Customs Authority has demanded and ordered to recover duty drawback under Rule 16 of the Drawback Rules, 1995. As held in *Famina Knit Fabs* (supra) and noticed hereinabove, mechanism to declare already paid drawback as excess and demand/recovery thereof is missing in Rule 16 of Drawback Rules, 1995, thus order-in-original dated 25.11.2016 (Annexure P-9) passed under Rule 16 of Drawback Rules, 1995 demanding duty drawback is not sustainable in the eye of law and deserves to be quashed.

8. We find that present case is squarely covered by our detailed findings recorded in *Famina Knit Fabs* (Supra), qua question of reasonable period of limitation and absence of mechanism to declare already paid drawback as excess and demand/recovery thereof.

While passing judgment in the case of *Famina Knit Fab* (Supra), we had left open question of power of Respondent to reassess value of goods already exported and re-determine entitlement of duty drawback. Judgment of the present petition was reserved on 05.09.2019, however Mr. Jagmohan Bansal on 20.9.2019 pointed out judgment dated 18.9.2019 of Hon'ble Supreme Court in the case of *ITC Vs CCE 2019- TIOL-418-SC-CUS-LB* to support his contention that Respondent has no power to reassess value of goods already exported and Rule 16 of Drawback Rules, 1995 is sort of execution proceeding. He further contended that in view of recent enunciation of law by Hon'ble Supreme Court, issue involved may be decided as it is pure question of law. In view of enunciation of law by Hon'ble Supreme Court, we deem it appropriate to deal with question of power of Respondent to re-assess shipping bill of goods which have already been exported out of country.

9. Contention of Petitioner is that prior to 08.04.2011, assessment was framed by Proper Officer under Section 17 of the Customs Act, 1962 and w.e.f. 08.04.2011 concept of self assessment was introduced. The Petitioner exported goods under physical supervision of the Respondent Officers, who prior to April' 2011 made assessment and after April' 2011 verified self assessment and either accepted or revised declared value for the purpose of drawback. Section 14 of 1962 Act and Rule 8 & 6 of the Valuation Rules, 2007 prescribe method to determine value of export goods. Neither Section 14 nor Valuation Rules empowers Respondent to reassess value of the already exported goods. The Petitioner at the time of export of goods declared value of goods which was after physical verification assessed. The Petitioner realized export proceeds and

accordingly duty drawback was released.

9.1 The goods in question have already been exported so these goods cannot be called as 'export goods' in view of definition under Section 2(19) of Act, 1962 whereas Section 14 of Act, 1962 as well as Valuation Rules, 2007 are applicable to "Export Goods" and not goods which have already been exported. In the present case, show cause notice has been issued under Rule 16 of Drawback Rules, 1995 and value of goods has been proposed to be re-determined in terms of Section 14 of Act, 1962 read with Valuation Rules, 2007. Neither 1962 Act nor Rule 16 of Drawback Rules, 1995 empowers Respondent to re-assess value of goods which stand exported. Under Punjab VAT Act, 2005; Haryana VAT Act, 2003 and Income Tax Act, 1961 there is specific provision which empowers Assessing Officer to re-assess already framed assessment whereas Respondent in the present case has proposed re-assessment of export goods under Rule 16 of Drawback Rules, 1995 and Section 14 of Customs Act, 1962 but neither Rule 16 nor Section 14 of the Customs Act, 1962 permits re-assessment of export goods.

Section 17 and 51 of the Act, 1962 empower Proper Officer to assess the Shipping Bill which is an appealable order. An exporter can file an appeal under Section 128 of the Customs, 1962 and Department can file appeal under Section 129 D of the 1962 Act seeking quashing/modification of Assessment Order. Department has no power to reassess already assessed value. As per Section 2(19) of the Customs Act, 1962 "Export Goods" means any goods which are to be taken out of India to a place outside India.

On the question of power to reassess value of goods already exported, Mr. Sourabh Goyal contended that as per definition of phrase 'Drawback' and 'Export' provided under Drawback Rules, 1995 Drawback is granted on account of export of goods so value can be rejected even after the goods have left India. Demand of drawback can be raised only after export of goods so department has right to re-determine value even after export of goods thus contention of Petitioner is fallacious. Drawback is consequential to export of goods and department as per Valuation Rules has power to reject already assessed value and re-assess value thereof.

Mr. Bindlish contended that DRI has been vested with power of assessment under Section 17 of the Act, 1962 so DRI has power to reopen any assessment and to conduct examination or test which it deems necessary. There is no provision which debars DRI to reopen the assessment and to conduct necessary examination. The DRI had made thorough investigation wherein it was found that Petitioner had mis-declared value of export goods and availed drawback in excess of what he was entitled thus DRI has power to reassess value of goods already exported.

Both the State Counsels in single voice contented that as per Rule 8 of Valuation Rules, 2007 which are framed in terms of Section 14 of 1962 Act, the Proper

Officer has power to reject declared value, in case he has reason to doubt the truth or accuracy of the value. The Proper Officer after rejecting value may determine value as per Rule 6 of the Valuation Rules, 2007.

10. Before proceeding further, it would be useful to understand scheme of 1962 Act which deals with import & export of goods.

Customs Act, 1962

SECTION 46 Entry of goods on importation.

(1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting electronically [on the customs automated system] to the proper officer a bill of entry for home consumption or warehousing in such form and manner as may be prescribed:

(2) *****

SECTION 47. Clearance of goods for home consumption.

(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:

(2) *****

SECTION 50. Entry of goods for exportation.

(1) The exporter of any goods shall make entry thereof by presenting electronically on the customs automated system to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in such form and manner as may be prescribed: (2) *****

SECTION 51. Clearance of goods for exportation.

(1) Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation :

(2) *****

Section 17 applicable w.e.f. 8.4.2011:

SECTION 17. Assessment of duty. - (1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the self-assessment of goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary:

(3) For verification of self-assessment under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, insurance policy, catalogue or other document, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefore under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

(6) Where reassessment has not been done or a speaking order has not been passed on reassessment, the proper officer may audit the assessment of the duty of the imported goods or export goods at his office or at the premises of the importer or exporter as may be expedient, in such manner as may be prescribed.

Explanation.- For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.

Applicable prior to 8.4.2011:

SECTION 17. Assessment of duty. - (1) After an importer has entered any imported goods under section 46, or an exporter has entered any export goods under section 50 the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.

(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in Section 85, be assessed.

(3) For the purpose of assessing duty under sub-section (2), the proper officer

may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which it is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information.

(4) Notwithstanding anything in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section(3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or documents or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.

(5) Where any assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification therefore under this Act, and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment in writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be.

SECTION 129D. Powers of Committee of Principal Chief Commissioner of Customs or Chief Commissioner of Customs or Principal Commissioner of Customs or Commissioner of Customs to pass certain orders. -

(1) x x x x x x x x

(2) The Principal Commissioner of Customs or Commissioner of Customs may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any officer of Customs subordinate to him to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Principal Commissioner of Customs or Commissioner of Customs in his order.

(3) & (4) *****

Emphasis Supplied

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, custom 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 Section 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.

11. The entire issue raised by Petitioner revolves around the definition of 'export goods' and application of Valuation Rules, 2007 to exported goods i.e. goods which have already been taken out of India. 'Assessment'; 'export'; 'export goods' and 'imported goods' have been defined under Section 2 of Customs Act, 1962. Relevant Sections are extracted as under:-

"Customs Act, 1962 Section 2(2) "assessment" includes provisional assessment, self- assessment, re-assessment and any assessment in which the duty assessed is nil.

Section 2(18) "export" with its grammatical variations and cognate expressions, means taking out of India to a place outside India; Section 2(19) "export goods" means any goods which are to be taken out of India to a place outside India;

Section 2(25) "imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.

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". Similarly, goods which have already been exported are no more 'export goods'. 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:

SECTION 14. Valuation of goods- (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf : Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:

Provided further that the rules made in this behalf may provide for,-

- (i) the circumstances in which the buyer and the seller shall be deemed to be related;
- (ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;
- (iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section:

Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

Explanation. - For the purposes of this section -

(a) "rate of exchange" means the rate of exchange -

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).

Customs Valuation Rules, 2007:

Rule 1. Short title, commencement and application.

(1) These rules may be called the Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

(2) They shall come into force on the 10th day of October' 2007.

(3) They shall apply to export goods.

Rule 6. Residual method. Subject to the provisions of rule 3, where the value of the export goods cannot be determined under the provisions of rules 4 and 5, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules provided that local market price of the export goods may not be the only basis for determining the value of export goods.

Rule 8. Rejection of declared value. (1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any export goods, he may ask the exporter of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such exporter, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, the transaction value shall be deemed to have not been determined in accordance with sub-rule (1) of rule 3. (2) At the request of an exporter, the proper officer shall intimate the exporter in writing the ground for doubting the truth or accuracy of the value declared in relation to the export goods by such exporter and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation. - (1) For the removal of doubts, it is hereby declared that -

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 6.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth or accuracy of the declared value after the said enquiry in consultation with the exporter.

(iii) The proper officer shall have the powers to raise doubts on the declared

value based on certain reasons which may include -

(a) the significant variation in value at which goods of like kind and quality exported at or about the same time in comparable quantities in a comparable commercial transaction were assessed.

(b) the significantly higher value compared to the market value of goods of like kind and quality at the time of export.

(c) the misdeclaration of goods in parameters such as description, quality, quantity, year of manufacture or production.

Emphasis Supplied

From above quoted Rules, it is apparent that transaction value of imported and export goods is the thumb rule to determine duty payable, however declared value may be rejected and proper officer may re- determine value applying Valuation Rules, 2007. Rule 1(3) provides that Valuation Rules, 2007 are applicable to 'export goods' and not goods which have already been taken out of India.

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. Relevant extracts of Drawback Rules, 1995 are as under:

Clause (a) and (c) of Rule 2, Rule 16 and 16 A of Drawback Rules, 1995:

Rule 2 (a) "drawback" in relation to any goods manufactured in India and exported, means the rebate of duty or tax, as the case may be, chargeable on any imported materials or excisable materials used or taxable services used as input services in the manufactured of such goods;

Rule 2 (c) "export" with its grammatical variations and cognate expressions, means taking out of India to a place outside India or taking out from a place in Domestic Traffic Area (DTA) to a special economic zone and includes loading of provisions or store or equipment for use on board a vessel or aircraft proceeding to a foreign port;

Rule 16. Repayment of erroneous or excess payment of drawback and interest. - Where an amount of drawback and interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of Customs repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it shall be recovered in the manner laid down in sub-section (1) of Section 142 of the Customs Act, 1962 (52 of 1962).

Emphasis Supplied

14. As cited by Mr. Bansal, Hon'ble Supreme Court in the case of ITC Ltd. Vs. Commissioner of Central Excise, Kolkata-IV 2019-TIOL- 418-SC-CUS-LB 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 Vs Commissioner of Customs 2004-TIOL-78-SC-CUS, Escorts Ltd. Vs Union of India & Ors. 2002-TIOL-2706-SC-CX and Collector of Central Excise, Kanpur Vs. 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. Reassessment is permitted only under Section 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 Para 41-44, 47 of the judgment in ITC Vs. CCE case (Supra) are reproduced as under:

"41. It is apparent from provisions of refund that it is more or less in the nature of execution proceedings. 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.

42. It was contended that no appeal lies against the order of self-assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals). Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder:

"128. Appeals to [Commissioner (Appeals)]. - - - (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the date of the communication to him of such decision or order:

[Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]

[(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of

them and adjourn the hearing of the appeal for reasons to be recorded in writing: Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]

(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).

44. The provisions under 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. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs 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. In Hero Cycles Ltd. v. Union of India 2009 (240) ELT 490 (Bom.) = 2009-TIOL-317-HC-MUM-CUS though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd.

(supra).

47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act."

15. Hon'ble Supreme Court in ITC Vs 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.

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 Vs. 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 Custom officers at the time of export of goods verify different particulars including value declared by an exporter. The declared value may be accepted or reassessed 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.

On plain reading of Section 17, 50 and 51 with Valuation Rules, 2007, we find that Respondent is neither vested with power of reassessment 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 Rule 6 & 8 of Valuation Rules, 2007. In view of judgment of Hon'ble Supreme Court in the case of ITC Vs 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.

Therefore, we hold that Respondent in terms of Rule 16 of Drawback Rules, 1995 as well Valuation Rules, 2007 has no power to re- assess 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 afore-stated findings as well.

Accordingly, present writ petitions are allowed on all the counts, namely, limitation, absence of mechanism and lack of power to frame reassessment of goods already exported; and hence the impugned order dated 25.11.2016 (P-9) is hereby quashed. No costs.