(2015) 01 CESTAT CK 0005

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 46, 47, 48, 49 Of 2009

M/s. Hem Chand Gupta & Sons Shri lai Dev Gupta And Ors. APPELLANT

Vs

C.C. (ICD), New Delhi RESPONDENT

Date of Decision : 12-01-2015

Acts Referred:

Customs Act, 1962 — Section 2(18), 2(34), 4, 5, 5(2), 17, 17(2), 18, 28, 28(11), 28AA, 37, 51, 75, 75(1), 75A(2), 82, 100, 103, 106, 106A, 110(1), 110(3), 111(d), 113, 113(d), 113(i), 114, 139, 142, 142(1), 144
Customs And Central Excise Duties Drawback Rules, 1995 — Rule 16, 16A
Foreign Trade (Development & Regulation) Act, 1992 — Section 3(2), 3(3), 7, 11
Foreign Trade (Regulation) Rules, 1993 — Section 2(b), Rule 11, 11(A), 14(d)
Central Excise Act, 1944 — Section 11A, 37
Finance Act, 1994 — Section 73
Customs (Amendment And Validation) Act, 2011 — Section 28(11)
Constitution Of India, 1949 — Article 141

Citation : (2015) 01 CESTAT CK 0005

Hon'ble Judges : D.N. Panda, J;Manmohan Singh, Technical Member

Bench : Division Bench

Advocate : Dr. G.K. Sarkar, Shd. ?Prashant Srivastav, Sanjay lain, Dr. Ajay Kumar, A.K. Sharma, S.K. Misra

Final Decision : Allowed

Judgement

1. Pursuant to the direction of Honâ??ble Supreme Court on 17/02/2014 in Civil Appeal Nos. 5204-5205 of 2012 with W.P. (CRL) No. 86 of 2012

and Civil Appeal Nos. 5206-5207 of 2012 with W.P. (CRL) No. 85 of 2012 directing the Tribunal to hear and decide the appeals in these cases before

it, those were taken up for hearing on day to day basis and proceeding recorded on each day of hearing serving copy thereof on both sides. It may be

stated that the appellants were before Apex Court against stay order dated 01.02.2011.

2. Two exporters viz. M/s. Hem Chand Gupta (Appeal No.C/46/2009)and GEE DEE International (Appeal No.C/47/2009)exported

garment during the period 01.10.1999 to 10.10.2003 under â??Repayments of State Credit Schemeâ? to Russia. Revenue alleging that these

exporters did not make export to Russia, ordered recovery of the drawback paid to them on such exports. These exporters along with their proprietors

were accordingly brought to adjudication and a order dated 06.11.2008 was passed against them in view of common cause, facts and issues

involved on the basis of common investigation result and evidence gathered by DRI against them. Such adjudication gave rise to the consequences

hereinafter described against which they came in appeal before Tribunal. Having heard all the appeal analogous and noticing common facts in issues

involved and common evidence used against all of them in adjudication, all the appeals are disposed by this common order.

2.1 In the appeals filed by the exporter, M/s. Hem Chand Gupta and Sonsa nd its proprietor Shri Jaydev Gupta, they have challenged following

consequences of Adjudication :-

(i) Confiscation of the ready-made garments valued Rs.58,02,22,972/- exported by M/s. Hem Chand Gupta and Sons made under Section 113(d)

and 113(i) of the Customs Act, 1962 and imposition of fine of Rupees six crores on M/s. Hem Chand Gupta & Sons in lieu of confiscation since

goods were not physically available for confiscation.

(ii) Drawback amount of Rs.6,58,22,845/- availed by M/s. Hem Chand Gupta and Sons was ordered to be recovered under Rules 16 and 16A of

the Customs and Central Excise Duties Drawback Rules, 1995 and demand thereof raised.

(iii) Interest on the drawback demanded was ordered to be recovered in terms of the provisions of Section 28AA read with Section 75A(2) of the

Customs Act, 1962.

(iv) Penalty of Rupees two crores was levied on M/s. Hem Chand Gupta and Sons ,6/844-45, Main Bazar, Mehrauli, New Delhi-110030 under

Section 114 of the Customs Act, 1962.

(v) Penalty of Rupees Fifty Lakhs was imposed on Shri Jai Dev Gupta, R/o. 6/844-45, Main Bazar, Mehrauli, New Delhi-110030 under Section

114 of the Customs Act, 1962.

2.2 Rs. 25 Lakhs deposited by M/s. Hem Chand Gupta and Sons was appropriated in adjudication towards payment of fine/penalty/drawback

amounts demanded in adjudication.

2.3 In appeals filed by the exporter, M/s. GEE DEE Internationa land its proprietor Shri Kapil Dev Gupta, they have challenged following

consequences of Adjudication :-

(i) Confiscation of the readymade garments valued Rs.71,59,35,844/- exported by M/s. GEE DEE Internationa lmade under Section 113(d) and

113(i) of the Customs Act, 1962 and imposition of fine of Rupees seven crores twenty five lakhs on M/s. GEE DEE International imposed in lieu

of confiscation since goods were no physically available for confiscation.

(ii) Drawback amounts of Rs.7,96,78,663/- availed by M/s. GEE DEE International, was ordered to be recovered under Rules 16 and 16A of the

Customs and Central Excise Duties Drawback Rules, 1995 and demand thereof raised.

(iii) Interest on the drawback demanded was ordered to be recovered in terms of the provisions of Section 28AA read with Section 75A(2) of the

Customs Act, 1962.

(iv) Penalty of Rupees two crores fifty lakhs was imposed on M/s. GEE DEE Internationa, lB-16, Lawrence Road Industrial Area, Delhi under

Section 114 of the Customs Act, 1962.

(v) Penalty of rupees fifty lakhs was imposed on Shri Kapil Dev Gupta, R/o 6/844-45, Main Bazar, Mehrauli, New Delhi-110030 under Section

114 of the Customs Act, 1962.

2.4 Rs. 25 Lakhs deposited by M/s. GEE DEE Internationa lwas appropriated towards payment of fine/penalty/drawback amounts demanded in

adjudication.

3. Investigation made following allegations :-

(a) M/s. Hem Chand Gupta and Sons and M/s. GEE DEE International had exported ready-made garments tRo ussia during the period 01.10.1999 to

10.10.2003 under â??Repayments of State Credit Scheme.â? Investigation with the concerned shipping lines brought to light that the exported

consignments were delivered at Dubai/Bander Abbas and in Kotka Port. Freights were collected by the shipping line for that destination only. The shipping lines mentioned final destination as Russia/Rostov on the Bill of Lading issued by them. They transported none of the consignment to the

declared destination in Russia. Further it was reported by Consulate General of India in Moscow, Russia that Central Enforcement Department vide

letter dated 11.07.2005 informed that the consignees in Russia were not engaged in export or import and the advances paid by them were returned

back to their account.

(b) In few instances buyers at the port in turn disposed off/sold the goods to other clients (not relatable in any way to the buyers originally indicated in

the shipping/customs documents in India) in other countries and at times in Russia. There was also gross overvaluation of the exported readymade

garments.

(c) The amounts claimed to have been received as â??sale proceedsâ?? were not sale proceeds of the goods exported and L/Cs were fraudulently

encashed by the exporters for which they were not eligible to claim any drawback against the goods exported by them as tabulated in Annex-A and

B to the SCN.

(d) The amount received by the exporters from the State Credits was misappropriation of bank money from the ESCROW accounts maintained for

the purpose. Those were not due payments (remittances) for exports made to Russia. The drawback availed by the exporters was inadmissible in

terms of provisions contained in Rule 16A of the Customs and Central Excise Duties (Drawback) Rules, 1995 read with Section 75(1) of the Customs

Act, 1962.

(e) The exporters made over valuation of their export consignments as stated in Para 22 to 25 of SCN. The documents received from Dubai Customs

and Finland Customs showed that the extent of over-invoicing was varying from 1220% to 2540% on various export consignments made under

Repayment of State Credit Scheme, while the market value of the goods exported from India was much less than the price declared to the Indian

Customs. That made the exports liable to confiscation under Section 113(i) of the Customs Act, 1962.

(f) As per Para 4.17 of the EXIM Policy, 1997-2002 and Paras 2.15 and 2.40 of EXIM Policy, 2002- 07, relating to the exports under Debt

Repayment Agreement with the erstwhile USSR, export to third country was not allowed. But exports were made to countries other than Russia.

Accordingly such exports were made in violation of the instructions issued by the DGFT under para 4.17 of the EXIM Policy, 1997-2002 and Paras

2.15 and 2.40 of EXIM Policy, 2002-07, making the exported goods liable to confiscation under Section 113(d) of the Customs Act, 1962 by virtue of

Section 11 of the Foreign Trade (Development & Regulation) Act, 1992 read with Section 3(2) & 3(3) of the Foreign Trade (Development &

Regulation) Act, 1992.

(g) As per the RBI A.D. (G.P. Series), Circular No. 5, dated May 31, 1999, while outlining the scheme on Export of goods to the Russian Federation

on consignment basis against repayment of State Credits provided that under this facility, Indian exporters who have been granted permission by

Reserve Bank to export goods to Russian Federation on consignment basis would first ship the goods and store them in Customs Bonded Warehouses

(CBW) of their choice in the Russian Federation. There was no allowance for or provisions to have the storage in and disposal in third countries.

(h) There was a clear attempt to subvert and mislead the investigations by one Mr. Gandhi of M/s. Auto Trans shipping Co. LLC, Dubai, an associate

and connected with the business of the Indian exporters, who prima facie, was only incidentally involved in the movement of the export goods and who

ostensibly stood nothing to lose by the outcome of enquires undertaken by the DRI.

(i) One Shri Jaidev Gupta was the mastermind behind fraudulent exports of the goods appearing in Annex-A and B to the impugned show cause

notice. He managed and controlled all the activities to perpetuate fraud including Customs clearance of the exported goods. The goods exported in

the name of the above two firms, were shown to have been routed through Dubai, Bander Abbas and Kotka port to Russia. But the exports were

actually destined to these ports and disposed off in the local market or diverted to countries other than Russia. Accordingly the exported goods did not

reach Russia. Such act resulted in violation of Circular No. 30, dated 28.9.93 and A.D. (G.P. Series) Circular No. 4, dated 05.09.1999 issued by

Reserve Bank India.

(j) The General Manager, Punjab National Bank International Banking Division, New Delhi stated that had the bank been in the knowledge of manipulations/forgery, particularly on the basis of documents tendered by the exporters suggesting that the goods would not reach Russia, they would

not have negotiated the documents under the LCâ??s.

(k) Values of the goods exported by M/s. Hem Chand Gupta and Sons and M/s. GEE DEE Internationa lwere inflated with intent to avail

undue duty drawback rendering all such goods liable to confiscation under Section 113(d) and 113(i) of the Customs Act, 1962 read with

Rule 11 and 14(d) of the Foreign Trade (Regulation) Rules, 1993.

(l) For the act of omission and commission by exporters and smuggling the goods, the goods were liable to confiscation under Section 113 of the

Customs Act, 1962. Shri Jaidev Gupta and Shri Kapil Dev Gupta, M/s. Hem Chand Gupta and Sons and M/s. GEE DEE International

were also liable to penal action under Section 114 of the Customs Act, 1962.

(m) Duty drawback was availed making wilful misstatement and suppression of facts misusing the â??Repayments of State Credit Schemeâ? as well

as actual price of the exported goods. That was recoverable under the proviso to Section 75 of the Customs Act, 1962 read with Rules 16 and 16A of

the Customs and Central Excise Duties Drawback Rules, 1995.

(n) The exporting firms M/s. Hem Chand Gupta and Sons and M/s. GEE DEE Internationa lwere liable to pay interest on the drawback taken

under Section 75A(2) of the Customs Act, 1962.

4. Ld. Adjudicating Authority hearing the Parties and examining the materials before him framed following issues :-

(i) â??Whether the export goods have reached the buyers of the goods in Russia.â??

(ii) â??Whether the goods were over valued.â??

5. Search was conducted to different premises of both the exporters on 15/10/2003. Various documents were recovered therefrom and taken into

custody by investigation. Statements were also recorded from the proprietors of exporters as well as shipping line, bank and others. Overseas enquiry

was conducted to examine whether there was overvaluation of export consignments and also whether the exports were made in accordance with RBI

Circular and law.

6. Shri Jaidev Gupta stated that most of the readymade garments were exported

to Russia and also to Ukraine, Bishkek and Mexico. Final

destination, ports of discharge for ultimate destination were given as per address intimated by the buyers and shipping bills and bill of lading contained

such address. Shipping lines were: M/s. Miracle shipping live and M/s. See House Shipping line as well as Sea Sky. He categorically stated that :

(i) In the bill of lading, port Rashid, Jabel Ali, Bander Abbas and Kotka were shown as port of discharge and Rostov/Russia was shown as final

destination.

(ii) Sea freight was paid by foreign buyer and ports of destination were mentioned as per foreign buyersâ?? telephonic address. Agents of buyers

used to receive their goods at the Port of discharge and forward the same from there to Russia on the strength of bill of lading and other export

documents.

(iii) According to the Russian buyers they preferred to take delivery of the exported goods at the port of discharge for onward transportation through

big trucks/trailers since such mode of transport attracted less cost of transportation than the cost charged by shipping lines.

(iv) Against the question asked to Shri Jaidev Gupta as to why the final destination of the exported goods were shown as Rostov/Russia in the

documents submitted to the bank when the Russian buyers used to take delivery of the same at the Port of discharge, he stated that after opening of

L/C by the Russian buyers in the bank, the Russian buyers used to inform telephonically about the port of discharge to be shown in the export

documents and the terms of their L/C was FOB, Mumba iwhich meant that his firm had to pay freight upto Mumbai and after that, all the freight

was to be borne by Russian buyers. When Russian buyers wanted an early delivery of the goods then they used to request for mentioning port of

discharge as Dubai/Bander Abbas as transit of goods was 15/20 days shorter than Kotka Route.

(v) They did not receive any complaint from RBI and PNB regarding not reaching of exported goods or any other complaint which could show that

their exported goods did not reach Russia.

7.1 When Shri Rajiv Bakshi, Director ofM s. Sea Sky Cargo and Travel Pvt. Ltd .was examined, he stated that the shipping line delivered

container load cargo at the port of discharge as mentioned on the shipping bill and the bill of lading. They off loaded the container at the port of

discharge and the goods sent to consignee was taken delivery by the nominated agents of consignee against production of original bill of lading.

Thereafter the container load cargo was further transported upto final destination under own arrangement of the consignee.

7.2 Shri Gaurav Sethi marketing manager of M/s. Omega Shipping Agency Pvt. Ltd .gave details of 27 containers sent to port of discharge which

were destined to Dubai which were delivered there at.

7.3 M/s. Dragon Shipping Pvt. Ltd. informed status of 16 bill of lading, issued to M/s. Miracle shipping line on account of M/s. Hemchand Gupta &

Sons & M/s. GEE DEE International. Proof of delivery of containers in Dubai was submitted by them.

7.4 M/s. Stalian System Pvt. Ltd. informed about 40 bills of lading issued to M/s. Miracle Shipping on account of both the appellants. They also

showed proof of delivery of the goods in Dubai.

7.5 Similarly M/s. Cosco Shipping Pvt. Ltd. confirmed about 45 bills of lading and delivery of containers in Dubai.

7.6 Overseas enquiry from Consulate General of India in Dubai revealed that oneM /s. Happy Life Pvt. LLC ,trading Company had cleared goods

in Dubai declaring much lower value of the import. However there was no record available in Dubai container terminal or Dubai customs

pertaining to some containers.

7.7 Enquiry made by Consulate General of India in Bander Abas through Dubai (UAE) Customs revealed that 4 containers were received at Shaheed

Rajai Port at Bander Abbas. Goods were loaded from those containers and were loaded in different containers and sent back to Dubai on instruction

from one Mr. Gandhi of M/s. Auto Trans Shipping Co. LLC, Dubai. Consulate General of India in Bander Abbas received reply from port authority

that only one different container was received in Bander Abbas by a ship named Clipper which was destined to Afghanistan and was cleared by M/s.

Rohtash and TUOS Co.

7.8 Enquiry with High Commission of India in London revealed that by letter dated1 0.12.2004, Finland Customs informed that some containers had

arrived at Kotka port on different dates and were transferred to Aurbind International Customs warehouse ILP International Logisitics. From these warehouses the consignments were transferred/transported to Russia. However the consignments were not the same as compared to the name of the

consignments named in shipping bills at the time of export from India. There was also value difference in goods.

7.9 Ld. Adjudicating Authority found that the country of origin of the goods in some cases was China.

Arguments on Behalf of Appellants

8.1 Dr. G.K. Sarkar, ld. counsel on behalf of all the appellants submitted that Honâ??ble Supreme Court inC ivil Appeal No. 5204/2005 and No.

5205/2005 as well as Appeal No. 5206/2012 and No. 5207/2012 and W.P. (Crl.) No. 85/2012 directed the Tribunal on 17.02.2014 to

proceed for hearing and decide the appeal pending before it in accordance with law at the earliest. Consequent upon such directions, all the

appellants are before the Tribunal, whose appeals were listed as Appeal No.C/46/2009, No. C/47/2009, No. C/48/2009 and C/49/2009 listed today in

sl. Nos. 6, 7, 8 and 9 of cause list of 27.10.2014. Appeal Nos. C/48/2009 and C/49/2009 are by the proprietors of the appellants in Appeal Nos.

C/46/2009 and C/47/2009. Prayer of all the appellants was that their appeals may be heard analogous and decided expeditiously since aforesaid civil

appeals are directed to be listed before the Honâ??ble Supreme Court during first week of December, 2014.

8.2 Opening his arguments, Dr. Sarkar, ld. counsel submitted that by an interim order/proceeding recorded on 22.04.2009, Tribunal directed Revenue

to furnish certain information and reply which goes to the root of the matter. But that has not yet been furnished by Revenue and stay order against

appellants was passed with utter disregard to such fact. Therefore, such fact has been brought to the notice of the Honâ??ble Supreme Court along

with synopsis to the civil appeal by appellants explaining the dates and events of the case. Also, there is a ground in the civil appeal to the effect that

the direction made by Tribunal as above ought to have been considered by the coordinate Bench while passing stay order subsequent to that. The

appellants are prejudiced when the Revenue has not complied to the above direction of the Bench. This ground alone is enough to remand the matter

to the ld. adjudicating authority to grant fair opportunity to the appellants for hearing afresh and pass appropriate re-adjudication order taking into consideration the direction of the Tribunal passed on 22.04.2009 and the directions if any that may be given in these appeals upon disposal thereof.

8.3 With the above preliminary objections, Dr. Sarkar proceeded to argue on various legal issues as recorded hereinafter.

8.4 Export of garments were made by the appellant M/s. Hem Chand Gupta & Sons in Appeal No. C/46/2009 and the appellant M/s. GEE DEE

International in Appeal No. C/47/2009. Both the appellants were manufacture exporters and made export of garments during the period 01.10.1999

to 10.10.2003. Against such exports, they were paid drawback to the tune of Rs.6,58,22,845/- and Rs.7,96,78,663/- respectively.

8.5 Ld. adjudicating authority proceeded to adjudicate the matter misconceiving that Circular No. 5, A.D. (G.P. Series), dated 31.05.1999 issued

by Reserve Bank of India (RBI)shall be applicable to the case of the exporter appellants while Circular No. 4, A.D. (G.P. Series), dated

19.05.1999 only governed the exports made by both the exporter appellants under settlement against repayment of state credit of Russia.

The Circular No. 4 requires the Russian Central Bank to nominate a bank in Russia for issuing Letter of Credit (LC) in favour of exporterT. he

exporter in India was required to export negotiating LCs through nominated bank of RBI, so that the export proceeds are reimbursed

by RBI to the nominated bank of India for ultimate payment to the exporter appellants against LCs. Accordingly, there was no direct

payment made by the importer in Russia to the exporter in India. The nominated bank for the appellant was Punjab National Bank (PNB).

That bank received all export proceeds against the exports made by appellants. That is verifiable from Page 294 of the appeal folder. The letter

issued by PNB was in accordance with Circular No. 4, dated 19.05.1999 of RBI.

8.6 3.3 Explaining the contents of the Circular No.5, dated 31.05.1999, ld. counsel submitted that the said circular is applicable to the export of

tea and tobacco exports only. That is not extended to export of garments. The exports made by the appellants were garments but not tea and

tobacco. That too Circular No. 5, dated 31.05.1999 of RBI speaks about the consignment based exports, whereas the exports made by the

appellants were not consignment based. Therefore, both the circulars operated on their own field without conflicting with each other. The Circular

No. 5 has its own conditions, which are altogether different from Circular No. 4. In Circular No. 5, approval of RBI was condition precedent for

exporters to ship their goods and store them in customs bonded warehouses in Russia before clearance thereof. In the present appeals, such

condition was not existing since Circular No. 4, dated 19.05.1999 applies.

8.7 There was no dispute in respect of bank realisation against all the exports made through PNB. Against an application made by

appellants under RTI Act, 2005 to the RBI, they clarified that there was no dispute at all in respect of the exports made by the appellant in respect of

the documentation made through PNB. This is verifiable from Page 94 of the appeal folder (running Page 64 of Order- in-Original). Appellants say

that the reply to RTI application is verifiable from Pages 72 and 73 of the additional evidences submitted. Those two pages deal with reply of

RBI by letter No. DAP.CO.RIA.7051/07.50.01/2009-10, dated 24.11.2009 .According to ld. counsel, considering Page 294 of the appeal

folder and Page 72 of the additional evidence in paper book, it can be construed that none of the LCs were recalled nor readjustments

made. RBI could not trace the documents related to LC No. 5861, dated 17.09.1999. Both the banks, i.e., PNB and RBI have acted under Circular

No. 4, dated 19.05.1999. Therefore, there is no question of application of Circular No. 5 of RBI to the case of both the exporter appellants.

8.8 Showing distinction between Circular Nos. 4 and 5 as above, ld. counsel submitted that ld. adjudicating authority in Page 94 of appeal folder

(Page 64 of Order-in-Original) committed grave error in making adjudication following Circular No. 5. He further relied onp ara 38.12 at Page 73 of

Order-in-Original (running Page 103 of appeal folder) and para 38.15 at Page 75 of Order-in-Original to contend that the adjudication

proceedings made on wrong premises of Circular No. 5 is liable to be discarded. According to appellants, when the authority had invoked a wrong

circular, his findings have become erroneous for which those are liable to be set aside.

8.9 Arguing on the point of jurisdiction, ld. counsel submitted that DRI is not empowered to issue notice under Rules 16 and 16A of Drawback

Rules, 1995. He supports such contention placing reliance on the judgment of Apex Court in the case of CC Vs. Syed Ali [2011 (265) ELT 17

(S.C.)]. He specifically submits that paras 14 and 15 of the judgment say that it is only the officers of Customs, who are assigned the functions of

assessment, which of course would include re-assessment, working under jurisdictional collectorate within whose jurisdiction Bill of Entry or baggage

declarations had been filed and the consignments had been cleared for home consumption, have jurisdiction to issue notice under Section 28 of the

Act. He submits that similar analogy shall apply to Rules 16 and 16A of Drawback Rules, 1995. Emphasising the ratio laid down in para 16 of

the said judgment, ld. counsel submitted that the authority who assessed Bill of Entry and clearance for home consumption ordered is the â??proper

officerâ? and no other officers can exercise his jurisdiction. He further relies on the decisions reported in Nylex Traders Vs. CC (Preventive),

Mumbai [2011 (247) ELT 71 Mumbai)], Deepak Agro Foods Vs. State of Rajasthan [2008 (228) ELT 5510 (SC)], Kiran Singh & Others Vs. Chaman

Paswan & Others [AIR 1954 SC 340], Jagmittar Sain Bagat & Others v. Director, Health Services, Haryana [2013 (10) SCC 136] and Shree

Subhalaxmi Fabrics Pvt. Ltd. Vs. Chandmal Baradia & Others [2005 (10) SCC 704]. Relying on the respective paragraphs in those judgments, it is

the submission of the ld. counsel that the DRI has no power to issue the notice in respect of the cases, where jurisdiction is exercisable by the

â??customs officersâ?? only, who has assessed the appellants.

8.10 It was further submitted by the ld. counsel that soon after the judgment of the Apex Court in the case of Syed Ali (supra), even Board has

issued Circular No. 24/2011-Cus., dated 31.05.2011 explaining the position that the officer who has assessed the Bill of Entry and Shipping

Bill is the proper officer to initiate proceeding arising out of his assessment or adjudication. Relying on para 5 of the circular, he says that

so far as Rule 16 or 16A is concerned, it is only the appropriate â??jurisdictional customs authorityâ? has power to issue notice, if he opines to call

back the drawback earlier ordered by him for the reasons stated in those rules. Therefore, DRI has no jurisdiction to sit over the jurisdiction of

jurisdictional customs officer to proceed against appellants issuing the impugned Show Cause Notice. Accordingly, the adjudication touching the

jurisdiction issue which goes to the root of the matter is liable to be set aside for want of jurisdiction which is primary in nature.

8.11 Explaining the provisions contained in Rules 16 and 16A of Drawback Rules, 1995, ld. counsel submitted that both the rules have their own

field. Rule 16A is invokable where there is any material received from RBI brining out allegation that there was no realisation of the

export proceeds. Appellantsâ?? case is not the case of unrealised export proceeds. He further submits that this aspect of law has been well

explained by the Honâ??ble High Court of Allahabad in the decision reported in Mayfair Leather Exports Pvt. Ltd. Vs. Union of India [2011 (272)

ELT 193 (All.)]. He relies on para 19 thereof in this behalf.

8.12 It was submitted on behalf of the appellant that Rule 16 is invokable where there was any erroneous excess payment of drawback made. But

that is also not the case of Revenue against appellants. Revenue has simply proceeded under Circular No. 5 to make allegations against the

appellants without examining the basic elements of Rules 16 and 16A of Drawback Rules, 1995. Added to that, when the present practice of

Revenue is to issue notice for exercising power under Rules 16 and 16A by jurisdictional officer but not by DRI, that shows that the Department

has acted in excess of its jurisdiction contrary to the law laid down in the case of Syed Ali (supra) by the Apex Court. An example of issuance of

such Show Cause Notice was cited by him placing a copy of Show Cause Notice No. VIII/ICD/ 6/TKD/SIIB/AMMVEE/DRI/118/2014/38447, dated

01.09.2014. Accordingly, exercise of jurisdiction by DRI invoking Rules 16 and 16A is patently illegal. He accordingly submitted that when

the matter goes to the root, that ground alone is enough to set aside the adjudication. For this proposition, ld. counsel relied on the decisions in the

cases of Deepak Agro, Kiran Singh & Others, Jagmittar Sain, Shree Shublkakshm i(supra) and in the case of Chandana Impex Pvt. Ltd.

Vs. CC, New Delhi [2011 (269) ELT 433 (S.C.)].

8.13 It was further submitted by the ld. counsel that Show Cause Notice was first issued on 27.03.2006. Thereafter, one addendum was issued on

31.08.2006. Such addendum, for the first time raised allegation that the export proceeds realised have gone back to the account of importers in Russia

while the Show Cause Notice dated 27.03.2006 did not make such allegation. Thus, the very Show Cause Notice issued on 27.03.2006 was baseless

and attempted to cure the defect by addendum dated 31.08.2006. When there was no basis in law to make allegation, the addendum cannot make

allegations which were not made in original Show Cause Notice.

8.14 Arguing on the point of limitation, ld. counsel submitted that there is no limitation prescribed by Rule 16 or 16A of Drawback Rules, 1995.

Therefore, the litigation should not be protracted by Revenue beyond the period laid down by Honâ??ble High Court of Gujarat in the case of

Padmini Exports Vs. Union of India [2012 (284) ELT 490 (Guj.)] and followed in the case of Pratibha Syntex Ltd. Vs. Union of India [2013 (287)

ELT 290 (Guj.)]. Honâ??ble High Court was guided by the decision of the Apex Court in the cases of Govt. of India Vs. Citedal Fine

Pharmaceuticals [1989 (42) ELT 515 (S.C.)] and Collector of Central Excise, Jaipur Vs. Raghuvar (India) Ltd. [2000 (118) ELT 311 (S.C.)].

8.15 Placing reliance on para 13 of the decision in the case of Collector of Central Excise, Jaipur Vs. Raghuvar (India) Ltd. (supra), it is the

submission of the appellant that a reasonable period is a prescription of law following doctrine of res judicata and doctrine of finality as well as

sanctity. Such principles debar other side from entering into protracted litigation. The period of three years construed by law in absence of limitation

prescribed in Rules 16 and 16A as laid down by Honâ??ble High Court of Gujarat in the case of Padmini Exports Vs. Union of India (supra) is a

good period which is to be followed. That cannot be given go-bye. Following such principles, when original Show Cause Notice was issued on

27.03.2006, the recovery goes back to the period 27.03.2003. Accordingly, major part of the recovery is time barred. Alternatively, if the addendum

is considered, which was issued on 31.08.2006, the recovery gees to 31.08.2003. That also takes away the major part of the recovery from the

adjudication. But none of the authority below followed the principles laid down by the Apex Court either in the case of Govt. of India Vs. Citedal Fine

Pharmaceuticals (supra) or in the case of Collector of Central Excise, Jaipur Vs. Raghuvar (India) Ltd. (supra). He further cited that recently in the

case of CCE, Chandigarh Vs. Sawan Mal Shibu Mal Steel Rolling Mills, even Honâ??ble High Court of Punjab and Haryana has prescribed the

limitation period in absence of law relating to limitation on penalty as reported in 2014-TIOL-1769-SC-P&H-CX.

9.1 On the second day of hearing, ld. Counsel for appellant submitted that there was gross violation of natural justice for following reasons:

(i) Non relied upon documents were not returned back to the appellant for leading defence,

(ii) Prayer for returning of non relied upon documents was not entertained,

(iii) The statements recorded from different persons not relied upon were not returned or exposed to appellant,

(iv) Cross-examination of the authors of the statement was not allowed.

9.2 Emphasizing the issues raised above by the appellant, it was submitted that for no supply of non relied upon documents (NRUDs), appellant

was compelled to make interim reply to the show cause notice dated 27.03.2006. This is evident from para 10.2 of the reply to show cause

notice at Page 208 of the appeal folder. Appellant specifically prayed ld. Commissioner to pass an appropriate order for return of such NRUDs

but that was turned down.

9.3 Inviting attention to Circular No.42/88, dated 24.05.1988 of CBE&C, ld. Counsel submitted that Ministry of Finance required the return of the

NRUDs soon after the show cause notice is issued. This was with a view to substantially reduce the time taken by the parties to inspect the

documents. Object of the said circular was again reiterated by Circular No.171/05/96-CX, dated 2/2/96. Thereafter, again Ministry of Finance vide

letter F. No. 207/09/2006-CX.6, dated 8/09/2006 required the field officer to return back the NRUDs to the person from whose custody that was

seized. It was also categorically conveyed by Government that such documents are not only required to discharge various statutory

obligations but also unnecessarily occupies space of offices. Therefore, CBE&C expected thats how cause notice should incorporate a

clause therein that NRUDs and records may be collected by the concerned persons within 30 days of receipt of show cause notice. The

said notice is also required to state the designation and address of the officer responsible for returning the NRUDs and record.

Therefore, no return of NRUDs destroys right of aggrieved to lead defence.

9.4 To support his contention, ld. Counsel relied on the decision of Honâ??ble High Court of Bombay in the case of Silicon Graphics System (India)

Private Limited Vs. Union of India â?" 2006 (204) ELT 247 (Bom.). Appellant relied onP ara 14 thereof specifically to emphasize that the reason why NRUDs are not returned, gives rise to an important question. This results ind enial of the process of natural justice. It was submission of ld.

Counsel that NRUDs may be irrelevant for Revenue but is relevant to the assessee to raise defence .Therefore, the Authority acting

contrary to Board Circular has grossly violated natural justice.

9.5 Ld. Counsel further relied on the decision of the Honâ??ble High Court of Allahabad in the case of Novamet Industries Vs. Union of India â?

2008 (227) ELT 363(All.). Placing para 28 of the judgment, he says that this is a valuable right and that cannot be denied. He further relied on the

decision of the Tribunal in the case of Sri Vasavi Industries Limited Vs. CCE, Bolpur â?" 2009 (234) ELT 475 (Tri. - Kolkata) to submit that non

supply of documents results in violation of natural justice. Further, reliance was placed in this regard on the decision of the Honâ??ble High Court of

Madhya Pradesh in the case of Mulji Gokuldas Vs. CCE, Madras â?" 2000 (126) ELT 44 (M.P.). Paras 3 and 4 of the said judgment was placed to

show that without supply of documents, appellant cannot be pressed to suffer.

9.6 Appellantâ??s further submission was that on the basis of decision in the case of Eco Plywood Private Limited Vs. CCE, Bangalore â?" 2010

(261) ELT 297 (Tri.-Bang.) copy of recorded statement of witnesses if not provided to assessee for leading defence, that results in violation of natural

justice. Similarly, when authors of the depositions are not subject to cross-examination, that also results in denial of natural justice. Appellantsâ??

right to get copies of statements and cross-examine authors of statement was denied. That caused detriment to justice.

9.7 It was specifically submitted that para 8.5 of the appeal folder at Page 202 mentions oral evidence of Shri Deepak Kumar, Shri Santosh

Kumar and Shri Vijender Kumar which were beneficial to the appellant to lead defence. But their statements were neither provided to the

appellant to lead defence nor cross-examination allowed.

9.8 Reliance was placed on the decision in the case of Subhnen Decor Private Limited Vs. CCE, Vapi reported in 2010 (251) ELT 105 (Tri.-Ahmd.),

Shri Ganesh Dyeing and Textile Processing Company Surat Vs. CCE, Baroda reported in 1986 (23) ELT 257 (Tribunal) for cross-examination. It was

submitted that when such examination not allowed that result in denial of justice.

9.9 The Tribunal by its order dated 22/04/2009 had specifically directed Revenue to bring to the notice of the Tribunal as to the request on cross-

examination whether made by appellant and whether copies of statements recorded were provided to the appellant. Till today, there is no reply by

Revenue.

9.10 At this stage. ld. DR objected to the position of the appellant on the ground that in para 38.6 at Page 71 of the Order-in-Original, ld.

Adjudicating Authority very well dealt about NRUDs without remaining silence. Similarly, ld. Commissioner in para 38.14 at Page 103 of the

appeal folder dealt no reliance on the statement recorded for adjudication. Since certain statements were not relied upon by the Adjudicating

Authority, those were irrelevant for the appellant.

9.11 Appellants submitted that Notice Issuing Authority had pre-determined mind and acted under bias against the appellant which is clear from

reading paras 26.2 of SCN at Page 132 of appeal folder. He says that the pre-judged mind is also reflected from paras 25.2 and 25.3 at Pages 130

and 131 of the appeal folder. The Notice Issuing Authority reached to pre-conceived notion against appellant using the words â??it is clearâ?. He

made up his mind in para 25.2 to bias the mind of Adjudicating Authority. Similarly, using the word â??suchâ?? in para 23.3 of show cause

notice, the authority further biased by his pre-determined version. All such elements raised bias against the appellant in view of the word used â??no

trace of reason are logic, justifying that such a transaction could have any economic rationaleâ?. This clearly throws light that the Notice

Issuing Authority has pre-conceived notion to allege against the appellant so that the adjudication process shall be made with a bias against appellants.

Following such tactics, the Notice Issuing Authority biased the mind of Adjudicating Authority. To support his contention. ld. Counsel relied upon the

judgment of Apex Court in the case of ORYX Fisheries Private Vs. Union of India -2011 (266) ELT 422 (S.C.). Emphasis was placed on paras 22,

23 and 27 of the judgment.

9.12 According to the appellant, reasonable opportunity to defend can be said to have been given if the appellant is told about the totality of the

charges leveled against him or entire allegation is made clearly in the SCN without the practice of issuance of Addenda. The Investigating Authority

came in piecemeal to make allegations at its convenience. When the SCN was issued, there was no allegation of the nature which finds place in the

addenda. Therefore, according to para 33 of the judgment, principle of natural of justice was violated because justice is not only to be done but

appears to have been done. Confidence of the appellant on the Authority was shacked by a pre- determined mind of investigation. Appellant further

relied on the decision in the case of SBQ Steels Limited v. CCE & ST-Guntur â?" 2014 (300) ELT 185 (A.P.) to submit that a show cause notice with

a pre-determined mind vitiates the adjudication proceeding. To support such contention, para 15 of the judgment was placed. Para 16 of the

judgment was also placed to show how bias has resulted by pre-determined mind by use of the language appearing in paras 26.2, 25.2 and 25.3 of

show cause notice. Precisely, ld. Counsel argued that an empty ritual was only followed without a real exercise being done to do justice to the

appellant.

9.13 Arguing that denial of cross-examination has resulted in denial of natural justice. ld. Counsel invited attention to the order of the Tribunal

passed on 22/04/2009. It was submitted that Tribunal consciously asked for details relating to cross-examination. But Revenue has failed to provide

relevant information. Inviting attention to Pages 196 and 197 of the appeal folder, it was submitted that ld. Authority had total disregard to the

prayer for cross-examination of the authors of the depositions and the persons who were given reports against appellant. Without testing

of the material used against the appellant, by cross-examination, grave injury was caused to them.

9.14 With the aforesaid submissions, ld. Counsel says that once Tribunal comes to a conclusion that the issue of jurisdiction goes to the root of the

matter as argued on 27.10.2014, there is no necessity to look into other issues or merit of the case since jurisdiction is primary in administration of

justice.

9.15 It was also submission of the ld. Counsel that procedure of export has been explained in written brief filed in Tribunal on 3/09/2010. Attention to

para 2.3 thereof was invited. Reading of that para shows that there was identified importers and export details available in paras 146 to 183 of the

appeal folder. Different LCs were opened by each of the importer against different consignments. Russia being a land locked country, the goods went through intermediary ports, i.e. Bandar Abbas (Iran), Jabal Ali (Dubai), Kotka (Finland) and Llychebisk (Ukrain.) Upon arrival of the

goods in those Sea ports, consignments moved to Russia by road.

9.16 Inquiry made with Customs abroad resulted with reporting of the arrival of consignments in Kotka. Apart from the goods sent by sea, 14

consignments were sent by air customs. Customs Authority did not doubt any of the air shipments. Entire methodology of shipments is

explained by appellant in Pages 239 to 257 of appeal folder and no complaint of non receipt of consignment was received by shipping agencies. This

proves that the appellants have exported goods to Russia.

9.17 Reliance was placed on Pages 96 and 97 of the appeal folder to submit that the Dubai Customs Report showed non receipt of certain

consignments. But that is unbelievable for the reason that shipping agencies have sent the goods to the destination and remittances came from Russia.

Bank realization also proved export realisation. Therefore, allegation of no shipment is ruled out. Relying on Page 93 from the appeal folder, appellants

submit that there was realization of L.Cs apparent from para 36.22 of adjudication order. Therefore, Revenue has no scope to doubt as to

consignments not sent by the appellants. Since no proceeding was initiated against the appellants under FEMA nor by RBI which had issuedC ircular

No. 4 on 19.05.1999, allegation of no export cannot be made. Further, realization of export proceeds having been made, the appellants are not liable

to be dealt to the detriment of justice. Once export is not doubted and remittance of the export proceed is evident from para 38.2 of the adjudication

order, the appellants are entitled to draw back. That cannot be denied.

9.18 Relying on RUD-30 at Pages 12 and 26 of volume 5 of the paper book, appellants submitted that even Russian Authorities have stated that

no criminal proceedings were initiated against Russian importers. Therefore, the allegation made suspiciously on the basis of Xerox copies of

correspondences of Dubai Customs has no fore in law.

10.1 Ld. Counsel for all the four appellants submitted that the letter dated 30.12.2003 relied upon by investigation and Ld. Adjudicating Authority at

Pages 70 and 125 of Adjudication order has no relevance since there Is no reference about any of the appellants in that letter. Baseless allegation

in bold letters has been made against the appellants. That can be appreciated from Page 125 of the appeal folder. That disclosed pre-conceived

mind of investigation. They biased ld. Adjudicating Authority for adjudicating against the appellant. To support his contention, he relies on the decision

reported in the case of Oryx Fisheries Pvt. Ltd. Vs. UOI [2011 (266) E.L.T.-422 (S.C.). The haste and hurry allegation of the investigation is patently

clear from the communication received from Dubai Customs. This can be appreciated from letter dated 21/06/2004 wherein Indian Customs were

informed that actual movement of goods to Bandar Abas is subject to verification. When no verification was completed, the haste and

hurry communication of investigation caused prejudice to the appellant. Accordingly the show cause notice issued at the premature stage

makes the adjudication unsustainable.

10.2 It was further submitted by Shri Sarkar, ld. Advocate that show cause notice issued prematurely is prejudicial to the interest of Justice and the

appellant was deterrently dealt under law. Without thorough investigation and cogent evidence to make allegations, the Authority proceeded with a

predetermined mind against appellant. Incomplete investigation was informed by letter dated 21/06/2004 of Consulate General of India. That does not

bring out any allegation against appellant. Accordingly, the RUD-26 has no evidentiary value. It has come to record that the Russian importers

have genuinely imported goods from India which was established by Happy Life General Trading Co., as appearing in the communication of

Consulate General of India.

10.3 Ld. Counsel also submitted that the investigation made its exercise on the basis of the hearsay evidence which is contrary to law and the show

cause notice based on such hearsay evidence is detrimental to the interest of the justice. Placing Page 128 of the appeal folder and drawing

attention to para 24.1, he submits that the investigation observations were not supported by any cogent evidence. Therefore without any evidence

which can speak for itself, the appellants cannot be held deterrently. To be more specific he draws attention to Page 1051 of RUD-27 to submit that

the whole content therein was without evidence. He relies on the Apex Court judgment in the case of Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri &

Ors. in 2011 (2) of SCC 532 to plead that hearsay evidence is no evidence and any decision based on such evidence shall be arbitrary.

10.4 Placing Page 98 of the appeal folder it was submitted by the ld. Counsel that allegation on return of money to the account of the importer in

Russia is exhibited by Page No. 1633 of RUD-35 of letter dated 21/02/2006 as well as letter dated 28/04/2006 (Pages 1636-1637 of RUD-

36) referred to in Page 98 of the Adjudication order. The facts recorded in Page 98 are totally without evidence. Similarly, Page 1636 is a fax

message which has no credence in law nor has evidentiary value. Photocopies received is not admissible in evidence following the judgment

of Supreme Court reported in the case of C.C.E., Bombay Vs. East Punjab Traders [1997 (89) E.L.T. 11 (S.C.)] [paras 5 & 6] A. ccording to

him, the contents of the fax message in photocopies are doubtful and these documents (refer Pages 1223-1224 RUD-29, Page 1633 RUD-35,

Page 1636-1637 RUD-36) suffers from various Irregularities like difference in signature of Shri P.I. Margun and variations in his

designation. At this juncture, Revenue opposed to the proposition on the ground that if Government has conducted enquiry through Government

machinery of other country, that cannot be doubted.

10.5 It was further argued by ld. Counsel that para 6.10 of SCN and Pages 198-199 deals with allegation made in addendum. An addendum atP age

199 has no basis since there was no advance payment received by the appellant at any time from any of the Russian importers.

10.6 Entire adjudication having been made on suspicion, following para 13 of Apex Court judgment reported in the case of C.C., New Delhi Vs.

Prodelin India Pvt. Ltd., 2006 (202) E.L.T. 13 (S.C.), it was pointed out that if contradiction or rebuttal to the pleading of the assessee is not made by

Revenue, that binds the authority and that authority is said to have admitted the contentions of the appellant. Once the appellant has shown that

allegation in addendum is baseless and without any evidence and that was not contradicted, stating any reason by Revenue in the adjudication, entire

allegation in addendum becomes baseless and cannot be used against the appellant. Similarly, he relies on the decision of the Tribunal in the

case of Hindustan Construction Co. Ltd. Vs. C.C.E., Chandigarh â?" 1997 (89) E.L.T. -123 (Tri.)affirmed by Supreme Court in 1999 (106)

E.L.T. A67 (S.C.) to submit that for no rebuttal by revenue to the contentions of the appellant in para 6.10 at Pages 198 and 199, that is admitted by

Revenue. Hence appellant cannot be held guilty.

10.7 Appellant further submitted that in case of any allegation made, burden of proof is on the person alleging the same. The person who alleges

has to bring the evidence to show that the other side committed offence or omission or made breach of law. Revenue has failed to discharge its

burden of proof to show that appellants had received advance payment. Similarly revenue failed to show evidence as to how the money has gone to

different accounts in Russia and who has remitted that money. In absence of established channel of remittance and identity of the persons who

remitted money from India to Russia, no allegation of sending back of money to A/c of â??000 Business Kantâ? can sustain and appellant is not liable

to answer. There was no allegation of Hawala transaction in the show cause notice. In the case of Uniworth Textile Ltd., (S.C.) and in the decision of

UOI & Ors. Vs. Ashok Kumar and Ors. [Appeal (Civil) 4792 of 1999)] it is the necessity of law that the person alleging has to prove his allegation

without any uncertainty. Ld. Counsel reiterates that exports were made properly which is evident from Page 961 of RUD 26. Placing Page 961-979

of the RUD-26 and specifically citing Page 964, it was submitted on behalf of the appellant that goods have gone from ICD, Tuglakhabad to Russia.

10.8 On the point of valuation drawing attention to Page 136 of the appeal folder, appellants submitted that there was an allegation of over valuation

of exported goods to the extent of 1220% to 2540% which is absurd. Revenue failed to establish its allegation without any market enquiry done or any

contemporaneous evidence exposed to appellants. Rather Pages 260 to 291 of the appeal memos which are contemporaneous shipping bills placed by

the appellant as evidence exhibits the value of goods which do not show over valuation made by appellant.

10.9 Appellants submitted that the value declared in the shipping bills, were not at all inflated when a bunch of compilation of contemporaneous

evidence filed in the course of hearing shows no overvaluation of goods made. Specifically inviting attention to Page 265 and Page 291 of appeal

folder, it was submitted by the appellant that the whole allegation of overvaluation has no basis in absence of any contemporaneous evidence or

market enquiry reports brought by revenue to record. In short, appellantâ??s submission was that ld. Adjudicating Authority as well as investigating authority acted arbitrarily alleging overvaluation of the goods baselessly.

10.10 Placing Pages 16 and 19 of reported decision in the case of Siddachalam Exports Pvt. Ltd. Vs. C.C.E., Delhi-III, 2011 (267) E.L.T. 3

(S.C.), appellants submitted that there is a codified procedure to determine the assessable value of exports. Section 18 of Customs Act read with the

Valuation Rules, 1988 at the relevant print of time answers the methodology of valuation. Customs authority failed to take note of law of this country

to find out whether there was over valuation. The 1988 valuation rules were given goby Adjudicating Authority. He further relied on (para 6 and of 7)

of C.C.E., Calcutta Vs. South India Television Pvt. Ltd., 2007 (214) E.L.T. 3 (S.C,.)to fortify his argument that over valuation was not

determined according to the Section 18 of the Customs Act, 1962 read with the Valuation Rules of 1988 for which such allegation cannot be made

against appellant. Accordingly he submitted that once there is a codified law in this country any value declared abroad is liable to be discarded. That is

the ruling of the Tribunal in the case of Ajay Apparels Vs. C.C. (Port) Kolkata, 2006 (204) E.L.T. -131 (Tri. - Calcutta) - Paras 3.2-3.4.

Appellant did not inflate the value at all and once the value declared in shipping bill is realized through bank, the value so declared should be adopted

by Customs. Relying on para 9 of the Apex Court decision in the case of C.C., N.C.H., Mumbai Vs. Vishal Exports Overseas Ltd., 2007 (209)

E.L.T. 331 (S.C.), appellant says that when there is no dispute on bank realization, Revenue has no option to adopt any value at its choice and any

whimsical adoption shall be contrary to the decision of the Supreme Court. He further relied on the decision of the Tribunal in the case of Frost

International Ltd. Vs. C.C., Export (JNCH), Mumbai, 2006 (206) E.L.T. 451(Tri.-Mum .a)ffirmed by Supreme Court in 2007 (207) E.L.T.

A103 (S.C.).

10.11 Appellants submitted that Delhi Bench of Tribunal has already dealt Russian export in case of Lindt Exports Vs. C.C.E., NCH, New Delhi

has reported in 2011 (269) E.L.T. 88 (Tri.-Del.) and held that demand on the allegation of non export to Russia may not be sustainable and return

back of the drawback amount merely on the ground of no export does not sustain. Accordingly, Tribunal waived requirement of pre deposit on the

count of demand made against drawback issue.

10.12 On the point of imposition of redemption fine it was grievance of the appellant that redemption fine is imposable when goods exist

for confiscation at the time of export. In the present case no goods existed for confiscation. Therefore redemption fine is not imposable

following the Large Bench decision reported in Shiv Kripa Ispst Pvt. Ltd. Vs. C.C.E. and Cus Nasik reported in 2009 (236) E.L.T. 623 (Tri.-

LB), Chinku Exports Vs. C.C., Calcutta in 1999 (112) E.L.T. 400 (Tri.) affirmed by Supreme Court reported in 2005 (184) E.L.T. A36

(S.C.), C.C.I., Mumbai Vs. Finesse Creation Inc. reported in 2009 (248) E.L.T. 122 (Bom .)and in the case of C.C., Amritsar Vs. Raja

Impex Pvt. Ltd. reported in 2008 (229) E.L.T. 185 (P & H).

10.13 Appellants further submitted that when there was no confiscation, there was no scope to levy penalty either under Section 113(d) or

under Section 113(i) read with Section 114 of Customs Act, 1962. Since goods were not prohibited no penalty can be imposed under Section

114 read with Section 113(d). Similarly when there was no evidence of mis-declaration no penalty is imposable under Section 114 taking Section 113(i)

of Customs Act, 1962 into account. It is also curious to note that the clause under which penalty was imposable was absent in the show cause notice.

That deprived the appellant from defending. Therefore without mentioning relevant clause any penalty imposed under Section 114 is contrary to the

law as laid down by Apex Court in Amrit Food v. C.C.E., U.P. reported in 2005 (190) E.L.T. 433 (S.C.).

10.14 There was imposition of penalty both on the firms as well as on the proprietor thereof simultaneously. This is also contrary to law.

Arguments on behalf of revenue

11.1 Opposing the submissions of the issue of jurisdiction made by the appellants, ld. Departmental Representative submitted that the investigating

authorities were declared to be â??customs officersâ? by Notification dated 07.07.1997. Their territorial jurisdiction was well defined by

Notification No.17/2002-Cus(N.T.), dated 07.03.2002. By virtue of these two Notifications, they were competent enough to act as â??proper

officersâ?? of customs in terms of the meaning of Section 2(34) of Customs Act, 1962. This is exactly the observations of the Honâ??ble High Court

of Gujarat in para 30 of the judgment in the case of Swathi Menthol & Allied

Chemicals Ltd. Vs. Joint Director, DRI [2014 (44) Tax Man.com 79

(Guj.)]. This contains all the Notifications finding place in para 26 of the said judgment. The Apex Court in the case ofC C Vs. Syed Ali [2011 (265)

ELT 17 (S.C.)] has not taken into consideration these two Notification while delivering judgment therein. That judgment was delivered on

18.02.2011 and soon after that on 06.07.2011, Notification dated 06.07.2011 was issued. That made amply clear that the intelligence officers are

also empowered to exercise the power under Sections 17 and 28 of Customs Act, 1962 as â??proper officersâ?? of customs under Section 2(34) of

Customs Act, 1962.

11.2 Ld. DR further submitted that Notification dated 07.03.2002 itself had defined jurisdiction of the intelligence officers for the purpose of

Sections 17 and 28 of Customs Act, 1962. Therefore, there is no ambiguity to understand that intelligence officers have all along jurisdiction to

exercise power under Sections 17 and 28 of the Act as â??proper officersâ?? under Section 2(34) of Customs Act, 1962. If both the Notifications,

dated, 07.07.1997 and 07.03.2002 are read together that clearly shows the position of law laid down by the Honâ??ble High Court of Gujarat in

para 30 of the judgment in Swathi Menthol & Allied Chemicals Ltd. (supra).

11.3 When the DRI had jurisdiction as argued above, Shri Sanjay Jain says that the said intelligence officers are alsoâ ??customs officersâ?? under

Section 2(34) of the Act and they had jurisdiction to issue Show Cause Notice even against violation of Rules 16 and 16A of Drawback Rules, 1995.

He further pointed out that much before the judgment in the case of Syed Ali (supra) and the judgment of Honâ??ble High Court Gujarat cited

above, the Tribunal in the case of Sun Knitwear Pvt. Ltd. Vs. CC, (Adjudication), Mumbai [2008 (10) STR 523 (Tri. - Bang.)h]ad declared

that DRI officers have power to issue notice against violation of Rules 16 and 16A of Drawback Rules, 1995. For this, he relied on para 4 of the

decision. So also, he reads para 8 thereof to emphasis on proper jurisdiction of such officers.

11.4 To support his arguments, ld. Departmental Representative further says that Honâ??ble High Court of Karnataka in the case ofS ri

Meenakshi Apparels Pvt. Ltd. Vs. CC, Mumbai [2010 (258) ELT 481(Kar.)] has held that DRI has jurisdiction to issue notice against violation of Rule 16 or 16A of the Drawback Rules, 1995. Ld. Departmental Representative places reliance on para 5 of the decision in this regard.

11.5 Arguing on the point of applicability of Circular No. 5 of RBI to the present appeals, it was the contention of the ld. Departmental

Representative that those two circulars co-exist and it cannot be said that the contents of the Circular No. 5 are not applicable to the present case

when both the circulars have been issued under the repayment of State credit scheme. In Page 173 at para 13 of the Show Cause Notice, mandate

of Circular No. 4 issued by RBI was brought to the notice of the appellant calling for his defence. It was clearly stated in para 3(i) that the said

circular requires â??funds for repayment of state credit to be utilised for export of goods to Russian Federation only. No third country

exports are to be permitted to be financed out of such payment of creditâ?. Therefore, the whole allegation was based on the basis of

Circular No. 4 of RBI. Mere mentioning of Circular No. 5 in adjudication order does not invalidate the adjudication. It was clearly brought out to

the notice of the appellant that violation was made by the appellant returning back the money to the importer and that established that there were no

exports made to Russia. That invited the consequence of law. The details of the return of money was brought out in the addendum dated

31.08.2006 forming part of the original Show Cause Notice dated 27.03.2006. To support his contention, he says that addendum has not

impaired right of the noticee to defend and relied on the decision of Honâ??ble High Court of Karnataka in the case of Gemini Dyeing and Printing

Mills Ltd. Vs. CC, Bangalore [2014 (304) ELT 51(Kar.)]. Para 28 of the judgment was specifically placed to show that reading of Show Cause

Notice dated 27.03.206 and addendum dated 31.08.2006 does not materially affect the allegations made against appellant. Therefore, the original

Show Cause Notice and addendum are full fledged documents to bring out allegations against the appellants giving full opportunity of rebuttal.

11.6 On the point of limitation. ld. Departmental Representative submits that when fraud was committed against Revenue, there is no question of

adjudication barred by limitation. This can be appreciated relying on para 11 of the judgment of Honâ??ble High Court of Gujarat in the case of

Dadri Inorganics Pvt. Ltd. Vs. CC [2010 (260) ELT 61 (Guj.)]. According to Revenue, although no limitation is prescribed either in Rule 16 or in

16A of the Drawback Rules, 1995, no plea of bar of limitation can be entertained when fraud was committed against Revenue.

11.7 On the count of NRUDs, it was submitted by ld. Departmental Representative that one Shri Jaidev Gupta has taken back such NRUDs for

Shri Hemchand Gupta as proprietor and M/s. GEE DEE Internationa las authorised signatory thereof. A copy of the same forming part of

Annexure C to the Show Cause Notice was filed. It was observed by the Bench that the said Annexure does not bear any date on it

proving date of return of NRUDs to Shri Jaidev Gupta. It was the submission of the ld. counsel that NRUDs were not provided to the

appellant for which this is specifically stated in the interim reply to the Show Cause Notice filed on 25.07.2007 and specifically pleading was that

the reply was an interim reply.

11.8 In view of the above controversy, ld. Departmental Representative was directed to produce the investigating record to substantiate Page 124 of

Annexure C claimed to have formed part of the Show Cause Notice itself and prove whether this was brought to the notice of the appellant

while issuing the original Show Cause Notice or addendum thereto. It may be mentioned that Page 125, which forms part of Annexure

C dated 07.09.2006 was signed by Shri Jaidev Gupta. Therefore, it appears that the documents referred to in Sl. No. 1-37 of Annexure C

filed did not form part of Show Cause Notice because those were given on 07.09.2006 to Shri Jaidev Gupta while original Show Cause

Notice was issued on 27.03.2006. To verify all these aspects, Revenue were directed produce the investigation records.

11.9 On the point of cross-examination, ld. Departmental Representative invited attention to Page 104 of the appeal folder to place para 38.1.6. He

submits that in absence of specific names of persons, who were required to be cross-examined, Revenue was handicapped to proceed. When the

appellant was not clear, it lost its right of cross-examination following the ratio laid down in the judgment cited in the adjudication order. Further,

appellant did not show the reason why cross- examination was sought. He further submitted that some persons were abroad and it was not possible to

call them as witnesses for cross-examination.

11.10 On the point of market enquiry, it was submitted by Revenue that Page 93 of appeal folder shows how appellant made over-valuation of the

export to be enriched by the claim of drawback at the cost of Revenue. Even Page 19 showing para 23 of the adjudication order (at Page 48 of appeal

folder) brings out by Table No. 2 how there was lower value declared to Dubai Customs while higher value was declared to Indian Customs. Further,

Table No. 3 shows that containers stated therein were not received in Dubai. Appellantâ??s modus operandi of no delivery of goods in Russia was

proved. Such modus operandi also shows that the appellant declared higher value of the goods not reached Russia but claimed the drawback

unlawfully.

12.1 Ld. DR, Shri Sanjay Jain, submitted that the goods were not exported to Russia directly. Those were sent to Dubai and other Intermediary ports.

When the goods reached Dubai sea port, one Happy Life General Trading Company was found to be receiving the goods. He explains that the route

of transport through Dubai to Russia involved Bander Abbas in between. Container goes to Dubai then from Dubai to Bander Abbas and from Bander

Abbas, the containers go by truck to Russia. Similarly, the other route for export to Russia was to transship the goods to Kotak (Finland) sea port and

there from by road to Russia.

12.2 Many documents, received from the Consulate General Office, showed that major part of the consignments did not reach Russia although the

appellant claims that the exports were made to Russia. Inquiry was caused at Dubai sea port and also at Bander Abbas. That revealed no receipt of

goods in Russia. He places para 22 from Page 48 of appeal folder in this regard. Reading Pages 20 and 40 of Order-in-Original, ld. DR, submits that it

is a full proof case of Revenue that the containers did not reach even Dubai in many cases. He lays emphasis on para 24 of Order-in-Original at para

23 thereof as well as para 24.2 at Page 25. Customs made every effort to cause the investigation to ascertain whether the goods reached Russia. But

there was no cooperation by Bander Abbas Customs. Therefore, further enquiry could not be proceeded. The outcome of investigation appears in

para 27 at Page 24 of the show cause notice.

12.3 Ld. DR further submitted that State Credit Scheme has been explained in para 7 of the judgment reported inR ajiv Verma versus Union of

India â?" 2007 (218) ELT 200 (Del.). According to the ld. DR, it is the responsibility and obligation of the exporter to ensure Customs that the

goods have reached Russia before claiming drawback. But in many cases when the goods did not reach Russia, the drawback claim was proved to be

false. He emphasized on paras 11, 12 and 13 of the judgment to show that when the goods did not reach Russia, the export was nothing but smuggling.

Therefore, action under Section 113(d) and 113(i) of Customs Act, 1962 was justified. Further, when fraud was committed against Customs, there is

no question of any time bar plea available to the appellants following the decision of the Apex Court in CC (Preventive) Vs. Affloat Textiles (India

Ltd.) - and the decision in 2001 (130) ELT 404(S.C.).

13.1 Copies of the proceeding recorded from 27.10.2014 to 31.10.2014 were provided to both sides in the Court on 12.11.2014. Revenue submitted

that grievance of the appellant that NRUDS were not supplied has no basis when Page Nos. 123, 124 and 125 of investigation record is read.

Annexure â??Câ? available at Page 125 on the investigation record, is crux of the issue. This categorically shows that the documents referred in that

particular page formed part of Annexure â??Câ? to the addendum dated 31.08.2006, issued to the appellant. Hardly, within a week of issuance of

addendum, the documents were returned back to the appellant. Even the undated Page 124 also shows that the NRUDs were returned back on

07.09.2006. There is no dispute about the return of NRUDs. Even the appellant was rightly served the Show Cause Notice and the documents

covered by the Show Cause Notice dated 27.03.2006 were returned back as per acknowledgement dated 27.03.2006, appearing at Page 123 of the

investigation record. The documents referred to in Page 123 were NRUDs which were returned upon completion of investigation. Similarly, the

documents referred to at Page 125 were relied upon documents. Accordingly, there should not be any confusion.

13.2 At this juncture, attention of ld. Departmental Representative was invited to the the grievance of the appellant that till interim reply to the Show

Cause Notice was filed on 25.12.2007, NRUDs were not supplied and even thereafter not supplied. This grievance of the appellant has to be

addressed by the Revenue on proper verification of records.

14.1 Shri Sanjay Jain, ld. DR, appearing along with the Officers of the DRI has examined the investigation record and found out that the letter dated

28.04.2006 (which is annexed as Page 9 of his written submissions) shows that â??OOO Business Kantâ? was not at all an importer or exporter and

during the period December, 2002 to June, 2003 money was returned to that concern in respect of different contracts. Therefore, there was no

question of any export made by appellant to that concern during the period October, 1999 till 10.10.2003. Thereafter, the payments received from

that importer were returned back by appellant as was informed by letter dated 28.04.2006 of the First Secretary (Trade) Import of India in Moscow.

There were various contracts entered into by that importer with the appellant as appearing in that letter.

14.2 It was further submission of ld. DR that letter dated 11/07/2005 of the First Secretary (Ref: Page 11 of written submission filed by DR on

13/11/2014) brings out that the parties listed in that letter were registered in Russia as foreign trade participants. But they did not make any export or

import operations during 2000 to 2005. He emphasizes that those two letters having come to the First Secretary from Russian Customs that cannot

be disbelieved. Therefore, such credential letters formed part of show cause notice issued as addendum, requiring the appellants (addendum issued on

31/08/2006) to submit defence their defence. The appellant did not dispute the facts stated in such letters.

14.3 Drawing attention to Page 1063 of volume 5 of the paperbook, DR submitted that letter dated 24/12/2004 of Shri S.C. Varshenay sent to the

Additional Director General, DRI when read with Page No. 1073 and 1074 (Ref : RUD-28) points out that certain consignments were not consigned

by the appellant from Kotka to Russia. Particularly, Page 1064 read with 1074 brings out that the consigner was a party from USA who made

consignments to a consignee in Russia, who was different from the consignee claimed by the appellants. That throws lights that the appellant did not

make any export by the Carnet referred to in the letter at Page 1064 to Russia. Page 130 of appeal folder read with para 25.1 of the show cause

notice brings out the allegations came out from Pages 1064, 1073 and 1074 of volume 5 of the paper book.

14.4 Shri. Sanjay Jain, ld. DR further submitted that the signatures appearing on the fax messages are matter of fact and no question thereon was

ever raised by the appellant at any stage before the authority below. Therefore, they do not have right to raise any issue on signature of the Authority as different or veracity of fax message before this Court at this stage.

14.5 Ld. DR submitted that so far as the pleading of the appellant that Circular 5 was applied to make adjudication, that is devoid of merit for the

reason that wrong mentioning of circular does not vitiate proceeding, following the ratio laid down â?" 1996 (82) ELT 441 (S.C.). He further states

that investigation has already asked for certified copy of the concerned letters issued by Russian Customs where signature of the

authority of that country is questioned by the appellant. But it would take 4 weeks time.

14.6 Further, reiterating that NRUDs were supplied to the appellant. ld. DR submitted that 34 documents appearing in annexure-â??Câ?? forming

Serial No. 1 to 34 thereof were provided to the appellant along with the original show cause notice issued on 27/03/2006. Other 3 documents as

appearing at Serial Nos. 35 to 37 were provided by the addendum issued on 31/08/2006. Therefore, there was no deprivation of opportunity of rebuttal

to the appellant.

REJOINDER OF APPELLANTS

15.1 In rejoinder, Dr. G.K. Sarkar, ld. Counsel for the appellants submitted that allegation of no export made to Russia, violating RBIâ??s circulars is

baseless since none of the provisions of the Customs Act, 1962 have been invoked to prove that the exports were not made. Therefore, there was no

violation made by the appellant, so far as the RBIâ??s Circular No. 4 is concerned. Because the goods have gone and not available physically, no

confiscation was made. That proves that there was export of goods made by appellants to the destination. RBI Circular No. 4 prescribes the

procedure for â??outright exportâ? and that circular was followed. Appellant not being required to keep the goods in any of the warehouse in

Russia, RBIâ??s Circular No. 5 is not applicable to the case of the Appellant.C ircular No. 4 when read, that leads to the conclusion that

export of goods to Russia under State Credit is an essential element but warehousing of the goods in Russia was not relevant for that

circular. Therefore, the Circular No. 5 cannot be pressed to the case of the appellant since Circular No. 4 applies. The most important requirement of

Circular No. 4 is that no export is to be made to third country.

15.2 According to Shri Sarkar, ld. Counsel, documents filed before the Customs

Authority clearly proves that exports were made to Russia under

State Credit for which that was allowed. Therefore, no adverse inference can be drawn when there was no export made to third country.

15.3 Ld. Counsel submitted that letter dated 2/11/2010 issued by RBI shows that once the goods were exported, documents filed by exporter are

negotiated by nominated bank of exporter appellant with bank of importer. That establishes that goods reached the destination as stipulated in the

export documents. Therefore, allegation of violation of RBIâ??s circular has no basis because of clarification of RBI given by letter dated 2/11/2010.

Added to that, his further reply to Revenueâ??s contention is that title over goods vests on importer upon filing of shipping bill. To make such

proposition of law, he relied on the judgment in the case of British India Steam Navigation Company Limited Vs. Shanmulgha Vilas Cashew

Industries and Ors. - 1990 (3) SCC 481 .He places para 13 and 14 of the said judgment to fortify his argument that shipping Bill when filed,

export is made and title over the goods passes to the importer. This complies to the requirement of RBI Circular No. 4, further clarified by letter dated

2/11/2010 of RBI (copy filed along with miscellaneous application).

15.4 Shri Sarkar, ld. Advocate further submitted that copy of the letter dated as 11/07/2005 at Page No. 11 submitted by Revenue brings out that

â??OOO FIRMA Ageti, OOO Orlamâ?, â??OOO Leotek Companyâ?, â??OOO Alroas Tradingâ? and â??OOO Stronytehinterâ?

were reported by the Russian Customs to have made no export-import operations during the period 2000-2005. This is wrong because Page No. 146

relating to Hemchand Gupta and 161 relating to Gee Dee International, of the appeal folder appearing in the show cause notice demonstrate

that consignments at Serial No. 1 to 7 in Page No. 146 and consignments at Serial No. 1 to 6 at Page 161 of appeal folder proved that the air

shipments made by these appellants not being disputed by Revenue, were exports and those firms were engaged in export during the relevant period

exhibited by the airways bills mentioned in those pages. Therefore, the letter dated 11/7/2005 has no credence in law and the contents therein

are, is, unbelievable. Further, two letters, i.e., 28.04.2006 and 11.07.2005 being zerox copy that is not admissible in evidence following the Apex

Court Judgment in East Punjab Traders - 1997 (87) E.L.T. 11 (S.C.).

16.1 In further rejoinder, ld. Counsel further submitted that judgment in the case of Syed Ali â?" 2011 (265) ELT 17 (S.C.) has been successively

followed by Honâ??ble Supreme Court in the case of Chandna Impex Pvt. Ltd. Vs. CC, New Delhi â?" 2011 (269) ELT 433 (S.C.)R. atio

laid down therein was also followed by Honâ??ble High Court of Punjab and Haryana in the case of Era International Vs. Union of India â?" 2011

(274) ELT 6 (P & H). Similarly the ratio was followed in the case of Sree Enterprises Vs. CC, Hyderabad â?" 2011 (274) ELT 12 (A.P.).

Ratio of Syed Ali judgment was also accepted by the Government for which Notification No. 44/2011-Cus., dated 6.7.2011 was issued conveying

the position that officers notified therein shall be the â??proper officerâ?? for the purpose of Section 17 and 28 of Customs Act, 1962. That was

also clarified by Circular No. 44/2011-Cus., dated 23.9.2011. This notification shall be prospective in nature and ADG DRI becameâ ??proper

officerâ?? from the date of that notification.

16.2 Sri Sarkar, ld. Counsel for appellants clarified that even after incorporation of sub-section (11) to Section 28 of the Customs Act, 1962 to

empower investigating officers as â??proper officerâ? for the purpose of Sections 17 and 28 that does not provide solution since there was no

notified officer for the purpose Rule 16 and 16A of Drawback Rules, 1995. Law requires that â??proper officerâ? should be notified officer in

terms of Section 2(34) of Customs Act, 1962 for different purposes of the Act. He submitted that notified â??proper officerâ?? is assigned specific

function under a specific section of the law to carry out that function intended by law as â??proper officerâ?. Therefore para 14 of Syed Ali

judgment categorically says that to discharge function of proper officer under proper section that officer should have been notified for the purpose of

that section. In the present case, the officer who exercised power to issue notice was not the officer notified under Section 2(34) of Customs Act,

1962 to be a proper officer for the purpose of Rule 16 of the Drawback Rules, 1995. Reading para 16 of Syed Ali judgment, he submitted that it is

categorically held that an officer notified under Sections 4 and 5 of the Act does not ipso-facto become a â??proper officerâ?? under Section 2(34)

of the said Act unless he is specifically notified to be so. In the present case, the officer who exercised the power under Rule 16A of the Drawback

Rules, 1995 was not the â??proper officerâ?? notified under Section 2(34) of the Act.

16.3 Bringing out a difference to the principle laid down in Sri Meenakshi Apparels Pvt. Ltd. Vs. CC, Mumbai â?"2 010 (258) 481 (Kar.) and in

Sun Knitwear P. Ltd. â?" 2010 (10) STR 523 (Tri.-Bang.), ld. Counsel submitted that these two judgments were rendered much before Syed Ali

judgment which is noted in the case of Tejus Proprietary case reported as Tejus Rohitkumar Kapadia Vs. Union of India â?" 2012 (275) ELT 175

(Bom.).

16.4 Relying on para 31 of judgment of Honâ??ble Gujarat High Court in the case of Swati Menthol & Allied Chem. Ltd. Vs. Jt. Director, DRI â?

2014 (304) ELT 21 (Guj.), it was also submitted by the ld. Counsel that said judgment is not applicable to the present case because in that case

show cause notice was issued on 24.1.2013 which is the date after notification dated 06.07.2011 and sub-section (11) to Section 28 of

Customs Act, 1962 was incorporated. Therefore according to para 27 of the judgment, for the purpose of Sections 17 and 28, the officer may be

proper officer. But to act as a â??proper officerâ? for the purpose of Rule 16 and 16A of the Drawback Rules, 1995 they should be officer

notified under Section 2(34) of Customs Act, 1962 read with these Rules. Furthermore para 27 of the judgment erroneously quoted the notification.

The proper notification is as per Page 15 of the documents filed on 14.11.2014 by the appellant. Therefore, Swati Menthol case is not applicable to

the present case of the appellant.

16.5 On limitation, ld. Counsel submitted that there is no limitation prescribed by Rule 16 and 16A of Drawback Rules, 1995. Therefore, Revenue

cannot make any improvement to its case submitting judgment of Honâ??ble High Court of Gujarat in the case of Dadri Inorganics Pvt. Ltd. Vs. CC

â?" 2010 (260) ELT 61 (Guj.). Like Section 28, there is no extended period prescribed for the purpose of Rules 16 and 16A. Therefore ratio laid in

the case of Pratibha Syntex Ltd. Vs. Union of India â?"2 013 (287) ELT 290 (Guj.) and Padmini Exports Vs. Union of India â?"2 012 (284) ELT

490 (Guj.) holds the field.

16.6 Sri Sarkar stated that so far as relied upon document in Annexure â??Câ? at Page 125 of investigation file is concerned, these documents were supplied to the appellant on 7.9.2006. Therefore, neither at the time of issuance of original show cause notice nor at the time of

issuance of addendum, the documents referred in Annexure â??Câ? were supplied to the appellant. Accordingly the appellant was

deprived of process of natural justice.

16.7 Explaining rationale behind the grant of drawback. ld. Counsel submits that Para 17 of the judgment of Supreme Court in the case of Liberty

India Vs. CIT â?" 2009 (241) ELT 326 (S.C.), Honâ??ble Curt has categorically held that drawback is an incentive but neither it is Customs

duty nor Central Excise duty. Such incentive flows from the scheme of duty drawback declared by the Central Government in terms of Section 75

of the Customs Act, 1962. Therefore neither Section 28 of Customs Act, 1962 nor Section 11A of Central Excise Act, 1944 nor Section 73 of Finance

Act, 1994 apply to the Drawback Rules, 1995. At this stage he stated it would be beneficial to reproduce para 17 of the judgment of Liberty India to

appreciate the rationale behind duty drawback as under :-

17. The next question is - what is duty drawback? Section 75 of the Customs Act, 1962 and Section 37 of the Central Excise Act, 1944

empower Government of India to provide for repayment of customs and excise duty paid by an assessee. The refund is of the average

amount of duty paid on materials, of any particular class or description of goods used in the manufacture of export goods of specified

class. The Rules do not envisage a refund of an amount arithmetically equal to customs duty or central excise duty actually paid by an

individual importer-cum-manufacturer. Sub-section (2) of Section 75 of the Customs Act requires the amount of drawback to be determined

on a consideration of ail the circumstances prevalent in a particular trade and also based on the facts situation relevant in respect of each

of various classes of goods imported. Basically, the source of duty drawback receipt lies in Section 75 of the Customs Act and Section 37 of

the Central Excise Act.â?? [emphasis supplied].

16.8 Sri Sarkar explained that considering earlier notifications were suffering from pitfalls, an elaborate Notification No. 40/2012-Cus., dated

2.5.2012 was issued clearly describing different sections under which â??proper officerâ?? is empowered to exercise the power conferred by that section. Such notification was not there prior to 2.5.2012. As a result of which position is very clear that para 17 of Supreme Court judgment in

Syed Ali case still holds field.

16.9 For appellants it was submitted that Revenueâ??s submission that case was made by Adjudicating Authority under Circular No. 4 of RBI,

suffers from fallacy when para 38.3, para 38.41, para 38.8, para 38.11 and 38.12 of order of adjudication appearing at Pages 44 to 95, 97, 101 to 104

of appeal memo is read. Department proceeded under Circular No. 5 erroneously and grave error was committed. Therefore adjudication is

baseless following apex court decision respected in â?" 2003 (151) ELT 481 (S.C.). Similarly, when adjudication is beyond the scope of show cause

notice, following judgments also declared that to be bad :

(1) CCE, Nagpur vs. Ballapur Industries Ltd. â?" 2007 (215) 489 (S.C.).

(2) CCE, Bhubaneswar-I vs. Champdany Industries Ltd. â?" 2009 (241) ELT 481 (S.C.).

(3) Kemrock Industries & Exports vs. C.C.E. â?" 2007 (210) ELT 497 (S.C.).

16.10 Relying on para 7 of the judgment in the case of Central Board of Dawoodi Bohra Community v. State of Maharashtra â?"2 010 (254) ELT

196 (S.C.), Sri Sarkar explained the meaning of the word â??per incuriamâ??. According to him when adjudication fails to be framed according to

the show cause notice that is vitiated. Relying on RUD 26, he submitted that movement of goods made to Russia by launch was proved from seal of

Dubai Customs. Declaration of export was given to Dubai Customs. Such documents were also seized by investigation from shipping line.P age 961

of the RUD-26 shows truck no. and driverâ??s name. Therefore these documents form part of the investigation and do not rule out movement

of goods from Dubai to Russia. 101 containers left for export to Russia, 27 were via Kotka and 74 containers were via Dubai. Investigation

has failed to prove that no export was made to Russia. Explaining that it is not necessary that importer should only receive goods. He explained that

documents placed by Revenue showing address of USA consigner does not make any difference in law following the decision of Honâ??ble Kerala

High Court in the case of Proprietor, Carmel Exports & Import Vs. CC, Cochin â?"2 012 (276) ELT 505 (Kerala). He placed reliance on para 15

of the judgment which reads under :

â??15. Coming to the submission that the appellant is only a â??name lenderâ? for the import of goods by one Anwar, we shall presume

for the time being that the appellant is only a name lender, but the actual beneficiary of the import is one Anwar. We called upon learned

counsel for the respondents to place the relevant provision which prohibits such an activity on the part of an Import Export Code Number

holder. Learned counsel for the respondents categorically made a statement that he is not able to place any such prohibition in law except

Section 7 of the Foreign Trade (Development and Regulation) Act, 1992, which reads as follows :-

7. Importer-exporter Code Number. - No person shall make any import or export except under an Importer-exporter Code Number granted

by the Director General or the officer authorised by the Director General in this behalf, in accordance with the procedure specified in this

behalf by the Director Generalâ??

The expression â??importâ? occurring in the said section means bringing into India of goods as defined under Section 2(e). There is

nothing in the law which requires an importer to be either the consumer or even the buyer of the goods also. Even otherwise, we are of the

opinion that it is a matter of common sense that no importer would consume all the materials imported. Necessarily, the goods imported are

meant for sale to the consumer, in which case, if an importer, who enjoys the facility of I.E. Code imports certain goods in the normal

course of business on the strength of a contract entered by such importer with either a consumer or a trader who eventually sells the

imported goods to consumers. We do not understand what can be the legal objection for such a transaction especially where the import of

such goods is otherwise not prohibited by law. At any rate, if the respondents have any tenable legal objection on that count, the

respondents must pass an appropriate order indicating the legal basis on which the action is proposed and also the nature of the action

proposed for such perceived violation of law on the part of the respondents after giving a reasonable opportunity to the importer to meet

the case against him. Instead of proceeding to determine the duty leviable on the imported goods by following the appropriate procedure or passing an order of confiscation if they believe that they are justified in the facts and circumstances, the respondents, it appears, are

indefinitely detaining the goods without any appropriate order being passed thereon. Such a course of action, in our opinion, is absolutely

illegal.â?? [Emphasis supplied]

16.11 Submitting that adjudication was made under suspicion under the advice of Russian customs, Id. Counsel submitted that Id. adjudicating

authority acted on the documents having no evidentiary value. He says that suspicion however grave may be, shall not be substitute of proof following

the decision in the case of Hari Charan Kurmi and logia Hajam- AIR 1964 SC 1184. Submitting that addendum is baseless, he says that

according to ratio laid down in para 29 of the judgement in the case of Gemini Dying and Printing Mills Ltd. Vs. CCE- 2014 (304) ELT 51

(Kar.), Revenue failed to establish that addendum has substance of the main show cause notice.

16.12 It was further explained by Sri Sarkar that Russian customs documents were used under presumption in adjudication which is not

prosecution. Revenue does not get benefit under presumption unless that is proved with precision in a prosecution. He further submits that evidence

gathered by the Revenue is subject to test by cross examination. But that was not allowed those have no evidentiary value.

17. Heard both sides and perused the record.

ISSUES CAME UP DURING HEARING

18. The contentions raised by appellants in the course of hearing involved various issues like that DRI (Notice issuing authority) has no jurisdiction to

issue the notice following the decision of the Hon'ble apex court in the case of CC Vs. Syed Ali [2011 (265) ELT 17 (SC) (supra); goods exported

were in accordance with Circular No.4 of RBI without Circular No.5 being applicable; Relevant NRUDs were not provided thereby principle of

natural justices was violated; show causing being foundation of the adjudication that was issued in piecemeal; first Notice was issued on 23.07.2006

and Addendum was issued on 31.08.2006 causing detriment to justice; cross-examination of authors of market reports and suppliers as well as the

other persons not provided to the appellants; order of the Tribunal passed on 22.04.2009 was failed to be complied by Revenue depriving appellant to the course of natural justice; statements recorded from different persons which were beneficial to the appellants to lead defence were not provided;

adjudication based on Circular No.5 of RBI while Circular No.4 was applicable; the Notice issuing authority had a clear bias to pre-judge the matter

as evident from the Show Cause Notice; allegations were made under suspicion without cogent evidence; allegations made against the appellants

were without discharge of burden of proof by Revenue; appellant was prevented to file final reply while interim reply to Show Cause Notice was filed

due to non-supply of NRUDs; market enquiry was conducted behind back of the appellants; overseas enquiry made behind back of the appellants

were not supported by evidence and mere Xerox copies of certain papers were provided without allowing cross-examination of authors thereof which

was contrary to the decision of the Hon'ble apex court; without any evidence of money trail, return back of advance to certain Russian importers were

alleged baselessly and burden of proof was not discharged; destination and name signature of authors of foreign enquiry report differed absolutely

proving unworthiness and inadmissibility thereof in evidence; low value declared to Dubai customs remained unsubstantiated; there was no enquiry to

the mode of transport from Dubai, Bander Abbas and Kotka ports; adjudication was time barred in absence of provision relating to limitation

prescribed by Rules 16 and 16A of Drawback Rules, 1995; hearsay evidences were used in adjudication; in absence of any contrary evidence from

RBI and PNB as well as FEMA authorities appellant was prejudiced by a pre-determined mind of notice issuing authority as well as adjudicating

authority; confiscation of goods was unwarranted when those were not available and drawback is not duty, nothing is recoverable from the appellants

for the genuine exports made as evident from shipping bills. Penalty is not impossible in absence of any cogent evidence against appellants. Without

cogent evidence of alleged over- valuation, denial of drawback is unjustified; contemporaneous evidences adduced by appellants were ignored; Bill of

lading issued upon shipment was proof passing of title of goods and property therein transferred to Consignee. On all these grounds adjudication was

assailed to be bad and uncalled for. However principal issues are dealt by this order considering that the secondary issues were covered by principal

issues.

FINDING AND CONCLUSION BY TRIBUNAL

19. Both the appellants were manufacturer of garments and exporter thereof to Russian importer under ""Repayment of State Credit"" during the period

01.10.1999 to 10.10.2003 through Dubai, Bander Abbas, Llychebisk (Ukrain) and Kotka since Russia is a land lock country not connected by sea.

They were procuring minor quantities of garments from market to make export thereof while major quantity of garments were manufactured by them

in their own manufacturing units. Several consignments were exported by them in 101 containers during the above period covered by different

shipping bills as appearing in Annexures - ""A"" and ""B"" to the Show Cause Notice. Annexure - ""A"" depicts exports made by M/s. Hem Chand

Gupta & Sons and Annexure - ""B"" shows exports made by M/s. GEE DEE Internationa.l The importers in Russia were: ""000 Firma Ageti"",

000 Sters"", ""000 Orlan"", ""000 Leotek Company"", ""000 Alros Trading"" and ""000 Business Kant"".

AIR SHIPPING BILLS NOT DISPUTED

20. There were exports of garments in 101 containers to Russia during the impugned period. 27 containers were sent through Kotka and 74

containers were sent through Dubai and Bander Abbas since Russia is and land lock country. The details of shipping bills in Annexure-A to SCN

show that 6 (six) shipping bills relating to M/s. Hem Chand Gupta & Sons and 8 (eight) shipping appearing in Annexure-B to SCN relating to

M/s. GEE DEE Internationa lwere Air cargo shipments consigning goods to Russia. Export of goods to the importers thereof remained

unquestioned by customs and no evidence was led by Revenue to show that no exports were made to Russia. Similarly there was also no allegation

against exports made to the concerns vlz., ""000 Firma Ageti"", ""000 Sters"", ""000 Orlan"", ""000 Leotek Company"", ""000 Alros Trading

through sea. There was no allegation of return back of any money to the accounts of those importers. Therefore drawback claimed in respect of the

exports made by Air Cargo and sea to those 5 (Five) importers is neither questionable nor drawback against exports recoverable without any evidence

to the contrary led by Revenue. In the course of hearing, Revenue calculated the draw back claimed by Hemchand Gupta & Sons in respect of

these importers was Rs.1,11,76,116/- and by Gee Dee International, the claim was Rs.1,15,10,104/- on such account. Such drawback was

payable to the appellant and no recovery thereof is warranted.

DISPUTE ON EXPORTS THROUGH SEA CUSTOMS

21.1 The dispute between the parties centered round the export of goods to the importer ""000 Business Kant"" through sea customs from

Mumbai port in terms of shipping bills appearing in Annexures - ""A"" and ""B"" to the Show Cause Notice. The goods consigned by the appellants

were FOB, Mumbai. Russia is a land lock country. Therefore, ports of discharge wereD ubai, Bander Abbas, Llychebisk and Kotka. Transport

costs from Mumbai to aforesaid ports of discharge were borne by both the importers. At those ports goods were cleared by agents of importers

furnished declaration and it was their obligation to transport the goods from port of discharge to Russia. The shipments to Russia through Kotka port

were discharged at Finland and thereafter the consignments were destined to be transported to Russia by Road.

21.2 Customs has not examined the routing of the goods from Finland to Russia threadbare container-wise and shipping bill wise. Bald conclusion was

drawn on the basis of overseas enquiry report stating that one shipping bill covering goods delivered at Finland were transported to different places.

The destination of such routing did not come to record nor details of buyers and sellers enquired by Revenue.

21.3 So far as shipment to Russia through the port of discharge at Dubai, Bander Abbas and Llychebisk (Ukrain) are concerned, Revenue's

allegation was that upon clearance of the goods thereat, those were diverted to different places. But, neither extensive enquiry was conducted to

locate trail of transport of goods nor destination of delivery thereof or the buyers to whom the goods were delivered were identified.

Neither cogent or credible evidence in that respect was gathered by Revenue except overseas report gathered by investigation

suggesting that the value declared at those ports were very low and the Russian importers were not engaged in the import and export business during

the impugned period as well as preliminary payments given by ""000 Business Kant"" were returned back to its accounts. On the contrary,

appellants' plea was that Russia being a land locked country, there was no direct transportation to that country except air and shipment made through

Dubai, Bander Abbas and Kotka ports. Upon landing of the export goods in Dubai, those have gone to Bander Abbas by small ferries and thereafter

the goods have gone by trucks to the final destination in Russia at the cost of the importers. Agents of importers took delivery of goods at the ports of

discharge and they had responsibility to deliver the same to the importers in Russia. Revenue confirms that the goods went to the ports of

discharge. But failed to find trail of movement of goods shipping bill wise even though drawback was claimed on that basis.

21.4 In absence of objective enquiry, the respondent Revenue had no answer on each shipping bill when the overseas report relied by them was

challenged by appellant on two counts viz., (1) the reports were made on hearsay material and (2) authenticity thereof doubted since signature of

foreign agency officer differed on each document and following the Apex Court decision in Collector of Customs, Bombay Vs. East Punjab

Traders - 1997 (89) E.L.T. 11 (SC), copy of a copy is not admissible in evidence.

21.5 In this case Hon'ble Supreme Court noticed that majority of members of the Tribunal pointed out that the documents obtained from Japan was

inadmissible in evidence as the documents were copies of copies not duly authenticated and could not, therefore be relied upon for concluding that

there was a misdeclaration of value as alleged by the Customs authorities in the Show Cause notice. The majority of members also pointed out that

these documents, which are photocopies, do not bear the signature either of the exporter, the forwarding agent, the stevedore or the Customs officer.

In fact, they do not bear any signature whatsoever and, therefore, the authenticity of these documents was suspected and it was not possible to

presume that the originals were duly signed. Hon'ble Court held that in order to raise presumption under section 139 of the Customs Act, 1962, the

basic facts is to be laid. Even though they bear serial number and stamp of Japan Customs, the fact remains that they are copies of copies and

indisputably bear no signature of the exporter, the forwarding agent, the stevedore or the Custom Officer; no signature at all of any of them. The

discrepancy in regard to copies bearing the seal of Customs, Hon'ble Supreme Court accepted majority view of Tribunal. In the present case the

overseas report suffering from above defects became in-admissible in evidence and failed to be credible. Further there was apparent difference in three signatures of same Officer of foreign agency on three different reports. Even here was change of designation apparent

from one of the reports [Ref: Letter dated 11.7.2005 - pages 1223-1224 of SCN enclosed to letter dated 03.10.2005 of Embassy of India

in Moscow, letter dated 21.02.2006 of Central enforcement Department of Russia - page 1663 of SCN, letter dated 28.4.2006 of

Central enforcement Department of Russia - pages 1636-1637 of SCN]

RETURN OF PREMINARY PAYMENTS TO ""000 BUSINESS KANT

22.1 Although Revenue alleged that the preliminary payments made by importer ""000 Business Kant"" went back to their account, there was no

evidence of the identity of remitter, source of remittance and bank account as well as the bank from which the advances has gone from

India. Remittances from India cannot go without Reserve Bank of India (RBI) permission. Neither enquiry was made with RBI, nor

with FEMA authority to ascertain remittance particulars. If the money had been remitted into the account of above importer, extensive enquiry

ought to have been made. But that was not done. Added to that, the correspondence received from Central Enforcement Russia only stated that the

money had gone to the account of ""000 Business Kant"". That communication does not exhibit the nature and manner of enquiry conducted in Russia.

The correspondence was unauthentic being copy of copy for which that is inadmissible in advance following the ratio laid down in East Punjab

Traders Case (Supra). Revenue failed to discharge its burden to prove who remitted the money and through which channel that had gone following

the ratio laid down in the case of Kishan Chand Chelaram Vs. Commissioner of Income Tax - 1980 (Supp) sec 660 .There was no material

evidence on record to demonstrate that the appellants send back money to the account of ""000 Business Kant"" in Russia nor there is any evidence on

record to show the channel through which money had gone when foreign remittance cannot go without RBI permission. No enquiry was done with

RBI nor any proceeding initiated under FEMA. Whether reference was made to such authorities, nothing could be explained by Revenue.

22.2 As has been held by Apex Court in the case of Kishan Chand (Supra), the burden was on Revenue to show that the amount stated in overseas

enquiry report (found to be unauthentic) was remitted by appellant. But that was not done. The Authorities dealing with the cases of hawala

money should have been informed for necessary investigation before conclusion was drawn by Revenue in the matter. Therefore, in

absence of any cogent evidence relating to source of money, identity of remitter, channel of remittance, RBI permission, it is difficult to believe the

story of Revenue as to return of preliminary advance to the account of ""000 Business Kantâ? and there was no allegation of going back of money to

the importers viz., ""000 Firma Ageti"", ""000 Sters"", ""000 Orlan"", ""000 Leotek Company"", ""000 Alros Trading"". Accordingly allegation of

Revenue remained in myth without discovery of truth. No complaint from Reserve Bank of India nor from Punjab National Bank on the LCs opened

and paid came to record.

22.3 It is also held by Apex Court in the case of Uniworth Textiles Ltd. Vs. C.C.E., Raipur-2013 (288) E.L.T. 16 (SC)that it is cardinal

postulate of law that the burden of proving any form of malafide lies on the shoulder of the one alleging. In the case of UOI Vs. Ashok Kumar &

Ors. - (2005) 8 SCC 760 it is held that ""it cannot be overlooked that burden of establishing malafides is very heavy on the person who alleges. The

allegations of malafides are more often easily made than proved, and the very seriousness of such allegation demand proof of a high order of

credibility."" In the present case, allegation of return of money remained unproved by Revenue.

22.4 If contentions of Revenue that preliminary payment received by appellants from ""000 Bank Kant"", Moscow has gone back to the account of

the later and no export was made to that concern, as reported by overseas enquiry report dated 28.4.2006 of the Central Enforcement Department

of Russia is accepted, it establishes that no consideration was received by appellant to make export to that importer and if the importer has abused

the State Credit Scheme, it is left open to the importing country to proceed against the importer. Revenue otherwise has established that

exports made even on account of ""000 Bank Kant"" were cleared at the ports of discharge at Dubai, Bander Abbas and Kotka. This proves that

goods have gone from India to a place outside India satisfying the meaning of the term ""export"" defined by section 2(18) of the Act. There

may be misdeclaration in the shipping bills for which penal provision are enacted in law to deal such aspect. But drawback on export to Dubai,

Bander Abbas and Kotka to the extent permissible in law is undeniable.

22.5 In the case of British India Steam Navigation Co. Ltd. Vs. Shanmugha Vilas Cashew Industries - (1990) 3 SSC 48, 1it has been held

that bill of lading passes title over goods from consigner to consignee. The goods having gone from India to outside India, there was export and title

over goods passed on issuance of bill of lading.

APPLICABILITY OF CIRCULAR N0.4

23.1 The appellants contended that their exports were made on outright sale basis, which remained undisputed by Revenue. Accordingly Circular

No.04, dated 19.05.1999 of RBI, was applicable to the exports made by Appellant. But adjudication was completed under RBI Circular

No.05, dated 31.05.1999 as has been recorded in the adjudication order while show cause notice was issued on the basis of the mandate of

Circular No.4. According to that Circular, the settlement procedure in respect of export under repayment of State Credits Scheme underwent

changes. Such changes were notified and came into force with effect from 01.07.1999. Further, the Bank for Foreign Economic Affair (BEFA),

Moscow was to issue Letter of Credits (LCs) or confirm the LCs issued by other banks in Russia by order of Russian importers denominated in

rupees in favour of Indian exporters of goods and services carrying the reference ""Reimbursement against repayment of State Credits"" and send the

same to the nominated bank in India and advise RBI. The LC was to show description of goods to be shipped and other particulars like serial number,

date and amount thereof, period of presentation date of expiry. That bank in India after receiving the LCs were required to seek confirmation of re-

imbursement from General Manager, Deposits Accounts Department (DAD), RBI, Mumbai. The nominated bank in India in respect of the appellants

was Punjab National Bank (PNB)as per Annexure-I to the Circular No.04. The nominated bank was to submit the claim to RBI and RBI was to

make payment to the nominated bank. RBI was to make payment to the nominated bank subject to availability of balance in the central account of

BEFA with RBI. Funds from repayment of state credit were prescribed by the Circular to be utilized for export of goods to Russian Federation only

and no third country exports were permitted to be financed out of funds from such repayment of State Credit. When pleading of appellant is that

Russia is land locked country and exports were to be made through Dubai, Bander Abbas and Kotka, in absence of any contention and evidence from

Revenue to repel such argument it is difficult to hold that export was made to third country and when Revenue did not find any evidence of diversion

of goods to any third country.

23.2 The revised procedure prescribed by Circular No.04 came into force in respect of LCs opened from 01.07.1999 only. The LCs opened upto

30.06.1999 were to continue to be settled under the procedure of Circular No.30, dated 20.09.1999. This made clear that the appellants' exports

having been made from 15.05.1999 to 01.10.1999 such exports were governed by Circular No. 04 dated 19.05.1999 in absence of evidence to show

that LCs were opened in favour of appellants prior to 01.07.1999.

23.3 Circular No.05, dated 31.05.1999 issued by RBI dealt with export of goods on consignment basis to the Russian Federation against

repayment of state credits. This facility was extended to the export of tea and tobacco initially. But the appellants were exporters of

garments. Therefore this circular was not at all applicable to them in absence of extension of the facility under that circular to other goods like

garments. This Circular also prescribed that the exporter was required to submit application to RBI through nominated bank to make export on

consignment basis. Only on receipt of approval from RBI the exporter may ship the goods and stock them in Customs Bonded Warehouse

of his choice in the Russian Federation. The exporter after identifying the buyer was to finalise the sale contract and arrange with the latter to

open irrevocable LC in his favour through BEFA. The delivery order was to be issued by exporter authorizing the warehouse in Russian Federation to

release the specified quantity of goods. All such stipulations and conditions of prior approval and warehousing of goods was not prescribed

by Circular No.4 dated 19.05.1999.

23.4 Ld. Adjudicating Authority applied Circular No.5 to the case of both the exporters which is erroneous since Adjudication ought to have been

made under Circular No.4. Therefore, the adjudication was made erroneously on presumption.

ORAWBACK - MEANING, CHARACTER AND RULE RELATING TO RECOVERY

THEREOF

24.1 Export being essential to earn foreign exchange for funding imports, Government has granted various incentives to the exporters. One such

incentive is drawback which neutralizes the taxes and duties on the inputs so that the pricing of the exportable goods becomes competitive in the

international market. The inputs suffering duty on import thereof or domestically procured, when used is manufacture of the finished goods meant for

export the manufacturer gets drawback as a percentage of FOB notified from time to time. The standard rate of drawback is fixed for various

products as all India rates and notified from time to time. This is in consonance with the change in rate of excise duty and customs duty.

24.2 The character and nature of drawback was explained by Apex Court in para 17 of the judgment in Liberty India Vs. Commissioner of

Income Tax - 2009 (241) E.L.T. 326 (SC) holding that drawback is an incentive. Therefore it is not refund of duty to the manufacturer. The said

para 16 and 17 of the Judgment read as under:

16. DEPB is an incentive. It is given under Duty Exemption Remission Scheme. Essentially, it is an export incentive. No doubt, the object

behind DEPB is to neutralize the incidence of customs duty payment on the import content of export product. This neutralization is provided

for by credit to customs duty against export product. Under DEPB, an exporter may apply for credit as percentage of FOB value of exports

made in freely convertible currency. Credit is available only against the export product and at rates specified by DGFT for import of raw

materials, components etc.. DEPB credit under the Scheme has to be calculated by taking into account the deemed import content of the

export product as per basic customs duty and special additional duty payable on such deemed imports. Therefore, in our view, DEPB/Duty

Drawback are incentives which flow from the Schemes framed by Central Government or from Section 75 of the Customs Act, 1962, hence,

incentives profits are not profits derived from the eligible business under Section 80-IB. They belong to the category of ancillary profits of

such Undertakings.

17. The next question is - what is duty drawback? Section 75 of the Customs Act, 1962 and Section 37 of the Central Excise Act, 1944

empower Government of India to provide for repayment of customs and excise duty paid by an assessee. The refund is of the average

amount of duty paid on materials, of any particular class or description of goods used in the manufacture of export goods of specified class.

The Rules do not envisage a refund of an amount arithmetically equal to customs duty or central excise duty actually paid by an individual

importer-cum-manufacturer. Sub-section (2) of Section 75 of the Customs Act requires the amount of drawback to be determined on a

consideration of all the circumstances prevalent in a particular trade and also based on the facts situation relevant in respect of each of

various classes of goods imported. Basically, the source of duty drawback receipt lies in Section 75 of the Customs Act and Section 37 of the

Central Excise Act. ""[Emphasis supplied]

24.3 The Drawback Rules, 1995 (hereinafter referred to as 1995 Rules) deals with the subject of drawback. Rule 2 (a) of the said Rules defined

drawback"" as under:-

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 manufacture of such goods.

24.4 In terms of Rule 3, drawback is allowed subject to provisions of Customs Act, 1962, Central Excise Act, 1944 and the Finance Act, 1994 and the

Drawback Rules, 1995 was framed to achieve the object of the concerned provision in false statements such laws.

24.5 Rule 12 prescribes the statement/declaration to be made on exports other than by post while exporting goods to claim drawback. The said rules

read as under:-""Statement/Declaration to be made on exports other than by Post. In the case of exports other than by post, the exporters-

(1) Shall at the time of export of the goods-

(a) state on the shipping bill or bill of export, the description, quantity and such other particulars as are necessary for deciding whether the

goods are entitled to drawback, and if so, at what rate or rates and make a declaration on the relevant shipping bill or bill of export that -

(i) A claim for drawback under these rules is being made;

[(ii) in respect of duties of Customs and Central Excise paid on the containers, packing materials and materials and the service tax paid on

the input services used in the manufacture of the export goods on which drawback is being claimed, no separate claim for rebate of duty or

service tax under the Central Excise Rules, 2002 or any other law has been or will be made to the Central Excise authorities:]

[Provided that if the Commissioner of Customs is satisfied that the exporter or his authorised agent has, for reasons beyond his control,

failed to comply with the provisions of this clause, he may, after considering the representation, if any, made by such exporter or his

authorised agent, and for reasons to be recorded, exempt such exporter or his authorised agent from the provisions of this clause];

Furnish to the proper officer of Customs, a copy of shipment (b) invoice or any other document giving particulars of the description,

quantity and value of the goods to be exported.

Where the amount or rate of drawback has been determined

(2) Under rule 6 or rule 7, the exporter shall make an additional declaration on the relevant shipping bill or bill of export that - there is no

change in the manufacturing formula and in the (a) quantum per unit of the imported materials or components, if any, utilised in the

manufacture of export goods; and the materials or components, which have been stated in the (b) application under rule 6 or rule 7 to have

been imported, continue to be so imported and are not being obtained from indigenous sources.

24.6 Rule 13 prescribes the manner and time for claiming drawback on goods exported, which reads as under:-

Manner and time for claiming drawback on goods exported other than by post. Triplicate copy of the Shipping - (1) Bill for export of

goods under a claim for drawback shall be deemed to be a claim for drawback filed on the date on which the proper officer of Customs

makes an order permitting clearance and loading of goods for exportation under section 51 and said claim for drawback shall be retained

by the proper officer making such order.

The said claim for drawback should be accompanied by the (2) following documents, namely :-

(i) copy of export contract or letter of credit, as the case may be,

(ii) copy of Packing list,

(iii) copy of [ARE-1], wherever applicable,

(iv) insurance certificate, wherever necessary, and

(v) copy of communication regarding rate of drawback where the drawback claim is for a rate determined by the [Commissioner of Central

Excise or the Commissioner of Customs and Central Excise, as the case may be.] under rule 6 or rule 7 of these rules.

If the said claim for drawback is incomplete in any (a) (3) material particulars or is without the documents specified in sub- rule (2), shall be

returned to the claimant with a deficiency memo in the form prescribed by the Commissioner of Customs within 10 days and shall be deemed

not to have been filed for the purpose of section 75A.

where the exporter resubmits the claim for drawback after (b) complying with the requirements specified in the deficiency memo, the same

will be treated as a claim filed under sub-rule (1) for the purpose of section 75A.

For computing the [period of [one month]] prescribed under (4) section 75A for payment of drawback to the claimant, the time taken in

testing of the export goods, not more than one month, shall be excluded.]

Subject to the provisions of sub-rules (2), (3) and (4), [(5) where the exporter has exported the goods under electronic shipping bill in

Electronic Data Interchange (EDI) under the claim of drawback, the electronic shipping bill itself shall be treated as the claim for

drawback.]''

24.7 At the time of export, an exporter is required to state on the shipping bill or bills of export the description, quantity and necessary particulars to

exhibit whether the goods were entitled to drawback and if so at what rate and make a declaration with relevant shipping bill of the export that a claim

of drawback under 1995 Rules is made. The claim of drawback is to accompany copy of export contract or letter of credit (LC) as the case may be.

24.8 Rule 16 of 1995 Rules has empowered a ""proper officer"" of customs who has acted as such under Section 51 or 82 of the Act as the case

may be to demand the drawback with interest if any, if such drawback was paid erroneously or paid in excess than that is due and such drawback

recovered in terms of section 142(1) of Customs Act, 1962. Rule 16 reads as under:

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).

24.9 Rule 16A of 1995 Rules which deals with recovery of amount of drawback in certain circumstances reads as under:-

Recovery of amount of Drawback where export proceeds not realised. Where an amount of drawback has been - (1) paid to an exporter or

a person authorised by him (hereinafter referred to as the claimant) but the sale proceeds in respect of such export goods have not been

realised by or on behalf of the exporter in India within the period allowed under [the Foreign Exchange Management Act, 1999 (42 of

1999)], including any extension of such period, such drawback shall [, except under circumstances or conditions specified in sub-rule (5),]

be recovered in the manner specified below :

[Provided that the time-limit referred to in this sub-rule shall not be applicable to the goods exported from the Domestic Tariff Area to a

special economic zone.]

[If the exporter (2) fails to produce evidence in respect of realisation of export proceeds within the period allowed under the Foreign

Exchange Management Act, 1999, or any extension of the said period by the Reserve Bank of India, the Assistant Commissioner of Customs

or the Deputy Commissioner of Customs, as the case may be} shall cause notice to be issued to the exporter for production of evidence of

realisation of export proceeds within a period of thirty days from the date of receipt of such notice and where the exporter does not

produce such evidence within the said period of [thirty days, the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as

the case may be} shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within [thirty days] of the receipt of the said order :

Provided that where a part of the sale proceeds has been realised, the amount of drawback to be recovered shall be the amount equal to

that portion of the amount of drawback paid which bears the same proportion as the portion of the sale proceeds not realised bears to the

total amount of sale proceeds:

Where the exporter fails to repay the amount under (3) subÂ¬rule (2) within said period of [thirty days] referred to in sub-rule (2), it shall

be recovered in the manner laid down in rule 16.

Where the sale proceeds are realised by the exporter after (4) the amount of drawback has been recovered from him under sub-rule (2) or

sub-rule (3) and the exporter produces evidence about such realisation [within a period of three months from the date of realisation of sale

proceeds], the amount of drawback so recovered shall be repaid by the [Assistant Commissioner of Customs or Deputy Commissioner of

Customs] to the claimant [provided the sale proceeds have been realised within the period permitted by the Reserve Bank of India].]

[Provided that

(i) the Commissioner of Customs or Commissioner of Customs and Central Excise, as the case may be, may extend the aforesaid period of

three months by a period of nine months provided the sale proceeds have been realised within the period permitted by the Reserve Bank of

India;

(ii) an application fee equivalent to 1 % of the FOB value of exports or Rs. 1000/- whichever is less, shall be payable for applying for grant

of extension by the Commissioner of Customs or Commissioner of Customs and Central Excise, as the case may be.]

Where sale proceeds are not realised by an exporter [(5) within the period allowed under the Foreign Exchange Management Act, 1999 (42

of 1999), but such non-realisation of sale proceeds is compensated by the Export Credit Guarantee Corporation of India Ltd. under an

insurance cover and the Reserve Bank of India writes off the requirement of realisation of sale proceeds on merits and the exporter

produces a certificate from the concerned Foreign Mission of India about the fact of non-recovery of sale proceeds from the buyer, the amount of drawback paid to the exporter or the claimant shall not be recovered.]

The circumstance calling for recovery under Rule 16A of 1995 Rules is if sale proceed of exports are not realized within the period allowed under

FEMA, 1999 or such extended period as may be granted. In the present case, there is no allegation of no realization of the sale proceed of

exports since those were realized through the LCs and that remained undisputed. Accordingly, Rule 16A is not invokable in the present case.

Therefore, the only rule invoked in the adjudication was Rule 16 of 1995 Rules. A/ legation was that drawback was paid on the over-valued FOB of

export revealed the market enquiry as well as and overseas enquiry. Further a/ legation was that the importers were not engaged in export and import

and preliminary payments received from ""000 Business Kant"" in Russia were returned back to the said importer. It is very strange to note that

while Revenue says that preliminary payments received from ""000 Business Kant"" have gone back to the account of said concern there was no

enquiry made to ascertain whether any such payments were remitted by appellants only to that concern from India or any arrangement was made in

that behalf.

MEANING OF PROER OFFICER AND JURISDICTION

25.1 Appellants' contention was that Rule 16 is not invokable because the officer who issued the Show Cause Notice was not a ""proper officer.

Such contention gave raise to the issue whether Asst. Director General of ORI was a proper officer. The term ""proper officer"" has been defined in

section 2(34) of the Act, which reads as under:-

proper officer"", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions

by the Board or the Commissioner of Customs;[Emphasis supplied]

25.2 Interpretation of the term ""proper officer"" by Apex Court in the case of Commissioner of Customs Vs. Sayed Ali 2011 (265) E.L.T. 17

(SC) in Para 13 of the judgment is as under:

13. Section 2(34) of the Act defines a ""proper officer"", thus :

2. Definitions:-

(34) ""proper officer"", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those

functions by the Board or the Commissioner of Customs;

It is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be â??proper

officersâ? in terms of Section 2(34) of the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the

governing test to determine whether an â??officer of customsâ?? is the â??proper officerâ??.â?? Â

[Emphasis supplied]

25.3 Following the principle laid down by Apex Court in above case it is clear that only the Customs officer who is assigned the â??specific

functionsâ? of assessment and reassessment of duty in the Jurisdictional area where the export was effected, by either the Board or the

Commissioner of Customs, in terms of Section 2(34) of the Act is contemplated to be â??proper officerâ?? to issue notice for the purpose of Section

16 of 1995 Rules. It follows that any other reading of Rule 16 would render the provision of Section 2(34) of the Act otiose. Therefore, the test

contemplated under Section 2(34) of the Act is that of specific conferment of such functions. Accordingly, in order to exercise power under Rule

16 of 1995 Rules there should have been specific assignment to the notice issuing authority to perform such function, by Board or the Commissioner.

25.4 Appellants submitted that the decision in the case of Syed Ali (supra) was applied by Honâ??ble High Court of Mumbai in the case of Tejus

Proprietary Concern of Teju Rohitkumar Kapadia Vs. Union of India [2012 (275) ELT 175 (Bom.)] .According to him precedent being Syed

Ali judgment, Tribunal is bound to follow the same binding precedent. It is binding obligation of Tribunal to consider the position of law as expounded

by Hon'ble Supreme Court in Syed Ali case to determine as to whether the principle laid down therein was attracted to the facts of the present case.

Failing to do so, will vitiate the order of the Tribunal.

25.5 Tribunal being a judicial body, it has supreme duty to follow the precedents in the legal system. Defiance to judgment of Hon'ble Supreme Court

should not be made as a matter of constitutional principle. Consistency in the judicial process lies at the heart of judicial function. That should not be

disrupted. It is necessary for courts and Tribunals to rely importance of the judicial consistency and certainty in decision making.

25.6 Ld. Counsel placed reliance on Para - 5 of the judgment in Teju Rohitkumar Kapadia (supra) to buttress his claim that jurisdiction goes to the

root of the matter and following the judgment in the case of Kiran Singh & Others Vs. Chaman Pawan & Others [AIR 1954 SC 340]w,here a

proceeding is made without jurisdiction both territorial and substantial that results in failure of justice and lack of jurisdiction brings the order to nullity.

Similarly, relying on the judgment in the case of Jagmital Sain Bhagat and Others Vs. Director of Health Services, Haryana & Others [2013

(10) SCC) 136], appellants' submission was that jurisdiction of the court cannot be conferred by consent of parties or acquiescence or waiver.

25.7 Law is well settled that if a court has no jurisdiction over a matter, but passes an order, it would amount to nullity. When the legislature

intended to confer jurisdiction to perform certain specific assignment that has to be done by assigning and not merely by consent. The

question of lack of jurisdiction can be raised at any stage of the proceeding. Once the forum is found to have no jurisdiction, the finding of the

court becomes irrelevant and becomes non-executable. Neither an authority nor a court can derive jurisdiction apart from statute. Therefore,

the ""proper officer"" to perform certain function under the respective provision of law has to be conferred jurisdiction in terms of Section 2(34) of the

Act by Board or the commissioner to perform such functions in terms of a mandate.

25.8 An officer without specific assignment under Rule 16 of 1995 Rules has no power to usurp jurisdiction on any ground whatsoever in case such

an authority does not have jurisdiction on the subject matter. It is a cardinal principle of law that an authority lacking jurisdiction unless restrains him,

he causes prejudice to interest of justice. Therefore, the Show Cause Notice issued by ORI officials, who are not entrusted with specific functions

under Rule 16 of 1995 Rules by Board or Commissioner to issue the same to the appellants, lack Jurisdiction under that Rule over the appellant. The

notice issuing authority proceeded without jurisdiction. Appellants' prayer was that on this ground alone, the adjudication can be stricken down. Such

prayer does not appear to be unreasonable, but entertainable having considerable force.

25.9 There is no difference to the law laid down in different Judgment cited as above. Therefore, an effort was made to find out the intention of the

Circular No.4/99-Cus., dated 15.02.1999, issued by the Board. That circulars permits the PRI officers to undertake investigation of cases

detected by them and to issue Show Cause Notices on completion of investigations. But the said circular does not state on what subject the DRI

officers are competent to issue Show Cause Notice. Examination of Notification No. 19/90-Cus., (N.T.), dated 26.04.1990 was made. That

Notification confers territorial jurisdiction on the DRI officers. But the decision in Syed Ali (supra) categorically holds that territorial

jurisdiction is not the test under Section 2(34) of the Act. The conferment of the function is essence of that section. Accordingly, it would

be difficult to hold that Show Cause Notice issued to the appellants invoking Rule 16 of 1995 Rules was in accordance with law.

26.1 Revenue relied on the decision in the case of Swathi Menthol & Allied Chemicals Ltd. Vs. Joint Director, DRI [2014 (44) Taxman.com

79 (Guj.)]. In this case, the Show Cause Notice was issued on 24.01.2013, i.e., after insertion of sub-section (11) to Section 28 of the Act by

Customs (Amendment and Validation) Act, 2011. Therefore, for the period before the said date, law laid down in the case of Syed Ali (supra)

judgment applies. It may be added that the very insertion of sub-section (11) to Section 28 is in challenge before the Honâ??ble High Court of Delhi

in W.P. (C) No. 441/2013 in the case of Mangli Impex.

26.2 Revenue relied on the decision in the case of Sun Knitwear Pvt. Ltd. Vs. CC, (Adjudication), Mumbai [2008 (10) STR 523 (Tri. -

Bang.)] to submit that DRI officials had power to issue Show Cause Notice under Rule 16/16A of 1995 Rules. With great respect it may be stated

that law declared in the case of Syed Ali (supra) holds the field. The judgment in Sri Meenakshi Apparels Pvt. Ltd. Vs. CC, Mumbai [2010

(258) ELT 481 (Kar.)] was rendered on 30.08.2010, which was before the decision in the case of Syed Ali made on 18.02.2011. Therefore,

law declared in the case of Syed Ali applies in terms of Article 141 of the Constitution.

27.1 Under Section 17(2) of the Customs Act, 1962, the â??proper officerâ?? conducts verification of the self-assessment of the goods assessed, to

satisfy as to, whether self assessment was done correctly or re-assessment is warranted. Upon examination and satisfaction of shipping bills he allows the export consignment to leave India in terms of under Section 51 of the Act, issuing â??let exportâ?? order. Thus the verification in the Customs

area is done by â??proper officerâ?? under Section 17 of the Act and let export order is given under Section 51 of the Act. This let export order

is given by â??proper officerâ??. Recognition of such â??proper officerâ?? by these two sections of the law is significant because the officer who

acted under Section 51 of the Act is envisaged by law to perform an assignment given to him under Section 75 due to use of the term â??proper

officerâ? therein. It is necessity of law that there should not be two different â??proper officersâ? for the purpose of Sections 51 & 75 of the Act

in view of nature of the assignment assigned under Section 75 to the proper officer who had acted under Section 51 of the Act. This creates a

doubt as to whether any officer other than the officer, who performed the functions under Sections 17 and 51 of the Act shall be

â??proper officerâ? to issue notice for the purpose of Section 75 of the Act and Rule 16 of 1995 Rules. Law expects that same â??proper

officerâ? who acted under Sections 17 and 51 of the Act is expected to act under Section 75 of the Act to examine whether the drawback granted

earlier was granted erroneously or paid in excess than that was due. Accordingly, any other officer, who has not performed his duty under Sections 17

and 51 of the Act is not expected by law to be the â??proper officerâ?? for the purpose of Section 75 of the Act as well as the Rule 16 of the 1995

Rules.

27.2 Curiously, the Notification No.40/2012-Cus(N.T.), dated 02.05.2012 issued by Government has notified that the DRI officers to be

â??proper officerâ? for the purpose of Sections 37, 100, 103, 106, 106A, 110(1), 110(3), 144 and 145 of the Act to carry put the object of

Section 2(34) of the Act. Even this Notification has not conferred powers on the officers of DRI under Sections 17, and 51 and 75 of the

Act nor Rule 16 of 1995 Rules.

27.3 For the first time, Notification No.44/2011-Cus(N.T.), dated 06.07.2011 notified the DRI officers to be â??proper officerâ? for the

purpose of Sections 17 and 28 of the Act to give effect to the object of Section 2(34) of the Act. But they have not been empowered to act under

Section 51 of the Act for which they are deprived of acting as â??proper officerâ?

under Section 75 of the Act. This shows that they were not

â??proper officerâ?? prior to 06.07.2011 for the purpose of Section 17 of the Act. Accordingly, in absence of the power being vested under

Section 51 of the Act with the DRI officers, they fail to exercise jurisdiction under Section 75 of the Act as well as Rule 16 of 1995 Rules.

27.4 There is another aspect of the matter which can be looked from the angle of sub-section (11) inserted to Section 28 of the Act. This sub-section

came into statute book by Section 2 of Customs (Amendment and Validation) Act, 2011 with the legislative mandate that the persons appointed as

officers of Customs shall be deemed to have and always had the power of the assessment under Section 17 and shall be deemed to have been and

always had been â??proper officerâ?? for the purposes of this section. Even this amendment does not speak whether the officer envisaged by sub-

section (11) of Section 28 shall be the proper officer for the purpose of Section 75 of the Act to perform the functions under Rule 16 of 1995 Rules.

sub-section (11) of Section 28 was introduced on 16.09.2011. Honâ??ble High Court of Delhi in Writ Petition (C) No.441/2013 in the case of

Mangli Impex by an order dated 04.02.2013 observed that there appears to be an apparent conflict between the explanation 2 which appeared

under sub-section (11), which was introduced subsequently. The conflict arises because sub-section (11) of the Act has a non obstante provision, is

non obstante in relation to any judgment, decree or order of any Court of law. Tribunal or other authority and not in relation to other provisions of the

Act, which includes Explanation 2 to Section 28 of the Act, which had come into force earlier. For such reason, notice was issued by Honâ??ble

Court. Honâ??ble Court further directed that in the meanwhile proceedings may go on and the adjudication order may be passed by adjudicating

authority. However, that order shall not be given effect to until further directions from the Honâ??ble Court.

27.5 A survey was made to certain judgments on the jurisdiction issue while passing this order. In the case of Pahwa Chemicals Pvt. Ltd. Vs.

CCE, Delhi [2005 (181) ELT 339 (S.C.),] the issue involved was under Central Excise Act, 1944 as to whether Superintendent, Collector and Dy.

Commission to adjudicate a case after 14.05.1992 shall be competent to issue Show Cause Notice under Section 11A of Central Excise Act, 1944.

The Court answered that the definition of â??Central Excise officerâ? given by Section 2(b) of Central Excise Act, 1944 brought the officers to the

fold of â??Central Excise officerâ? which included the subordinates as well as the collector. When the Central Excise officer is invested by power by

Board to be â??Central Excise officerâ?, he was recognized as â??Central Excise officerâ? to exercise the power under Section 11A of Central

Excise Act, 1944. The decision in the case of Pahwa Chemicals Pvt. Ltd. (supra) was followed in Aeonâ??s Construction Products Ltd. Vs.

CCE, Chennai [2005 (184) ELT 120 (S.C.)] .This is also a case of issuance of Show Cause Notice under Central Excise Act, 1944 by

Superintendent. Following the same principles of investment of power in the case of Pahwa Chemicals (supra), the issue was answered in favour of

Revenue. In the case of Durga Prasad, Etc. Vs. H.R. Gomes, Superintendent (Prev.), CE, Nagpur [1983 (13) ELT 1501 (S.C.)]it, was held

that Collector of Customs vested with power, delegating such power to his subordinate, still has power to act as â??proper officerâ?? under Section

110(3) of Customs Act, 1962. Honâ??ble court did not go into detail whether there is a difference between â??functionsâ?? on one hand and

â??power and dutiesâ?? referred to in Section 5(2) of the Customs Act, 1962 on the other. But in the case of Syed Ali (supra), a detailed discussion

on the interpretation of Section 2(34) of the Act was made and it is held that an officer of customs if assigned certain functions by Board or

commissioner can only perform such functions. The decision of Honâ??ble High Court of Allahabad in the case of Raghunath International Ltd.

Vs. Union of India [2012 (280) ELT 321 (All.)] was looked into. This decision was rendered on 21.05.2012 under Central Excise Act, 1944

without considering the law laid down by Honâ??ble Supreme Court in the case of Syed Ali (supra), which is a latest decision with logical

reasons stated therein analysing the meaning of â??proper officerâ? under Section 2(34) of the Act. This clearly throws light that the word

â??proper officerâ? used in various parts of the Customs law scattered through different provisions therein needs specific assignment to be

performed under different sections of the Statute to serve respective purpose of the relevant sections. The meaning of â??proper officerâ? given

under Section 2(34) in Customs Act, 1962 does not exist in Central Excise Act, 1944 due to different object of both the statutes.

CONFISCATION

28. Section 113(d) of the Act requires any goods attempted to be exported or brought within the limits of Customs area for the purpose of being

exported, contrary to any provisions imposed by or under the Customs Act, 1962 or any other law for the time being in force are liable to confiscation.

Honâ??ble Supreme Court in the case of Om Prakash Bhatia Vs. CCE, Delhi [2003 (155) ELT 423 (S.C.) i]n para -7 held that Section 113(d)

empowers the authority to confiscate any goods attempted to be exported contrary to any prohibition imposed by or under the Act or any other law for

the time being in force. Hence, for application of the said provision, it is required to be established that attempt to export the goods was contrary to any

prohibition imposed under any law for the time being in force. Section 2(33) of the Act defines â??prohibited goodsâ?? which reads as under : -

â??prohibited goodsâ? means any goods the import or export of which is subject to any prohibition under this Act or any other law for

the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted

to be imported or exported have been complied with.â??

[Emphasis supplied]

From the above definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time

being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject

to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods

are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 of the Customs Act, 1962 which

empowers the Central Government to prohibit either â??absolutelyâ?? or â??subject to such conditionsâ?? to be fulfilled before or after

clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the

purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled

before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made dear by Apex Court in Shekih

Mohd. Omer Vs. Collector of Customs, Calcutta and Others [(1970) 2 SCC 728]wherein it was contended that the expression

â??prohibitionâ?? used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions

imposed by clause (3) of the Import Control Order, 1955. The Court negatived the said contention and held thus : -

â??â?¦What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to â??any

prohibition imposed by any law for the time being in force in this countryâ? is liable to be confiscated. â??Any prohibitionâ? referred to

in that section applies to every type of â??prohibitionâ?. That prohibition may be complete or partial. Any restriction on import or

export is to an extent a prohibition. The expression â??any prohibitionâ? in Section 111(d) of the Customs Act, 1962 includes

restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions

â??prohibitingâ?, â??restrictingâ? or â??otherwise controllingâ?, we cannot cut down the amplitude of the word â??any prohibitionâ?

in Section 111(d) of the Act, â??Any prohibitionâ? means every prohibition. In other words all types of prohibitions. Restrictions is

one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is dear that import of living animals of all

sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues.â??

[Emphasis supplied].

29. In the present case, the investigation alleged that as per Para 4.17 of the EXIM Policy, 1997-2002 and Para 2.15 and 2.40 of EXIM Policy, 2002-

07, relating to the exports under Debt Repayment Agreement with the erstwhile USSR, export to third country was not allowed and exports were

made to countries other than Russia. Accordingly such exports were made in violation of the instructions issued by the DGFT under para 4.17 of the

EXIM Policy, 1997-2002 and Para 2.15 and 2.40 of EXIM Policy, 2002-07, making the exported goods liable to confiscation under Section 113(d) of

the Customs Act, 1962 by virtue of Section 11 of the Foreign Trade (Development & Regulation) Act, 1992 read with Section 3(2) & 3(3) of the

Foreign Trade (Development & Regulation) Act, 1992. There is also an allegation that there was a violation of Rule 11(1) of the Foreign Trade

(Regulation) Rules, 1993. All these violations rendered the goods to be confiscated being the prohibited goods.

30. It may be stated that the principles laid down in the above case was explained in paras 17 and 18 of the judgment in the case of Siddachalam

Exports Pvt. Ltd. Vs. C.C.E. Delhi-III, 2011 (267) E.L.T. 3 (S.C.). For convenience of reading, the said paras are reproduced as under :-

â??17. In Om Prakash Bhatia v. Commissioner of Customs, Delhi - (2003) 6 SCC 161 = 2003 (155) E.L.T. 423 (S.C.), while dealing with a

similar case of fraudulent drawback claim by deliberately over-invoicing ready-made garments, this Court rejected the plea of the exporter

that Section 113(d) of the Act was not applicable to the facts of that case as the goods were not prohibited goods; (ii) the exporter was

required to declare the value of the goods expected to be received from the overseas purchaser and not the market value of such goods in

India and (iii) since in that case, no duty was payable on the export, Section 14 of the Act could not be applied to determine the value of the

goods. It was, inter alia, held that the definition of â??prohibited goodsâ? in Section 2(33) of the Act indicates that if the conditions

prescribed for import or export of the goods are not complied with, it would be considered to be â??prohibited goodsâ?. It was held that for

determining the export value of the goods, it is necessary to refer to the meaning of the word â??valueâ? as defined in Section 2(41) of the

Act and the same must be determined in accordance with the provisions of sub-section (1) of Section 14 of the Act. The Court observed thus :

â??...For determining the export value of the goods, we have to refer to the meaning of the word â??valueâ? given in Section 2(41) of the

Act, which specifically provides that value in relation to any goods means the value thereof determined in accordance with the provisions of

sub-section (1) of Section 14.

Section 14 specifically provides that in case of assessing the value for the purpose of export, value is to be determined at the price at which

such or like goods are ordinarily sold or offered for sale at the place of exportation in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for sale. No doubt. Section 14 would be

applicable for determining the value of the goods for the purpose of tariff or duty of customs chargeable on the goods. In addition, by

reference it is to be resorted to and applied for determining the export value of the goods as provided under sub-section (41) of Section 2.

This is independent of any question of assessability of the goods sought to be exported to duty. Hence, for finding out whether the export

value is truly stated in the shipping bill, even if no duty is leviable, it can be referred to for determining the true export value of the goods

sought to be exported.â??

18. The opinion expressed in Om Prakash Bhatia (supra) has been reiterated by this Court in Bibhishan v. State of Maharashtra - (2007) 12

SCC 390. It has been held that the definition of â??prohibited goodsâ?? in the Act is a broad one and the said provision not only brings within

its sweep an import or export of goods which is subject to any prohibition under the Act, but also any of the law for the time being in force.â??

[Emphasis supplied]

31. Honâ??ble Supreme Court in the above case has held that if there is a prohibition imposed under law for the time being in force, violation of that

prohibition renders the goods confiscasable. Therefore, confiscation of the goods of the appellants is justified in these cases where the goods did not

reach the destination of Russia. However, there were no cogent evidence from investigation to show that the goods were diverted since extensive

enquiries were not done in respect of goods shipped to Dubai and Bander Abbas. The goods which went to Kotka cannot be said to have been

diverted elsewhere for no evidence in that regard. The overseas report relied by investigation and adjudicating authority had no credence for the

reasons elaborately stated hereinbefore and being â??copyâ?? of the â??copyâ?? was not admissible in evidence.

32. Alternatively even if confiscation is held to be proper, the goods have already gone out of India and not available for confiscation. Accordingly,

there cannot be imposition of redemption fine, following the decision of the Larger Bench of the Tribunal in the case of reported in Shiv Kripa Ispat

Pvt. Ltd. Vs. C.C.E. and Cus Nashik reported in 2009 (236) E.L.T. 623 (Tri.-LB), Chinku Exports Vs. C.C. Calcutta in 1999 (112)

E.L.T. 400 (Tri.) affirmed by Supreme Court reported in 2005 (184) E.L.T. A36 (S.C.), C.C.E., Mumbai Vs. Finesse Creation Inc.

reported in 2009 (248) E.L.T. 122 (Bom.) and the High Court in the case of C.C. Amritsar Vs. Raja Impex Pvt. Ltd. reported in 2008

(229) E.L.T. 185 (P & H).

Over-valuation

33. There was also an allegation that FOB was inflated to get higher drawback. Against the contention of the appellants that on a number of

occasions, market enquiries were conducted by customs authorities and in all cases wherever market enquiries were conducted, the declared values

were found to be in consonance with the market price, was rejected by ld. Adjudicating authority for no good reason. The only reason stated by that

Authority was that the same did not relate to the goods shipped or covered in the impugned Show Cause Notice. Appellant also contested that during

the course of investigation, DRI had resumed a number of samples from the premises of the appellants for the purpose of enquiry and recorded

statements from certain persons. But copies of those statements were not give to the appellants. Ld. adjudicating authority discarded such plea of the

appellant on the ground that the statements do not form part of relied upon documents and were not relied upon. This reason also appears to be

illogical since any statement collected from authors thereof should from part of public record and appellant was entitled to copy of the same since that

was collected behind their back which cannot be claimed by Revenue to be irrelevant.

34. It may be stated that when market enquiry was conducted, appellants were entitled to know the result thereof and also entitled to the copies of the

statements recorded from the persons in the course of enquiry. Although there were market enquiry reports on record, those were not examined

objectively under law. Similarly contemporaneous evidences were produced before the ld. adjudicating authority. Those were also ignored. It may be

appreciated that not only justice is to be done, but that must be seemed to have been done. In the present case, examination of documents on record

relating to market enquiry was neither done nor was copies of the statements brought to record to evaluate the statements of the authors thereof.

Therefore, it may be held that there was violation of natural justice in this regard. Further, granting no cross-examination also violates principles of

natural justice.

35. Section 11(1) of Foreign Trade (Development and Regulation) Act, 1992 provides that no export or import shall be made by any person except in

accordance with provision of the said Act, and Rules as well as export and import policy for the time being in force. Rule 11 states that the value,

quality and description of goods should be declared truthfully in accordance with terms of export contract entered into with the buyer or consignee in

pursuance of which goods were exported. When the export value is not correctly stated and overvaluation is made defeating the object of some

statutes, it would amount to violation of the condition for export of the goods. Over-invoicing would result in irregular transaction in foreign

currency. However, this proposition depends on facts and circumstances of each case. It may be stated that if the goods are easily available in the

market, then it would be difficult to arrive at a conclusion that a foreign buyer as prudent businessman would pay 10 times more than prevailing market

price of ready-made cloths. It is the exporter who has to establish that true export value was stated in the shipping bills. Section 14 of the Act

contemplates that the price at which such like goods are ordinarily sold or offered for sale in the course of international sale that would be value of

goods.

36. Keeping in view of the aforesaid guidelines, value of exported goods ought have been determined following the principle laid down in para 16 of

the judgment by Honâ??ble Supreme Court in the case of Siddachalam Exports Pvt. Ltd. (supra) which is reproduced as under for convenience

of reading : -

â??16. It is settled that the procedure prescribed under Section 14(1) of the Act and particularized in Rule 4 of the 1988 Rules has to be

adopted to determine the value of goods entered for exports, irrespective of the fact whether any duty is leviable or not. It is also trite that

ordinarily, the price received by the exporter in the ordinary course of business shall be taken to be the transaction value for determination

of value of goods under export, in absence of any special circumstances indicated under Section 14(1) of the Act and Rule 4(2) of the 1988

Rules. The initial burden to establish that the value mentioned by the exporter in the bill of export or the shipping bill, as the case may be, is

incorrect lies on the Revenue. Therefore, once the transaction value under Rule 4 is rejected, the value must be determined by sequentially

proceeding through Rules 5 to 8 of the 1988 Rules. (See : Commissioner of Customs (Gen.), Mumbai v. Abdulla Koyloth - JT 2010 (12) SC

267 = 2010 (259) E.L.T. 481 (S.C.).). [Emphasis supplied]

37. Honâ??ble Supreme Court in the case of Siddachalam Exports Pvt. Ltd. (supra) also noticed that when there is a codified procedure of law

prescribes determination of value of export goods on the basis of contemporaneous evidence relating to identical goods and the procedure laid down in

Rules 5 to 8 of 1998 Rules does not apply to such case where contemporaneous evidence exists. It would be proper to reproduce the Paras 19 and 20

of the said judgment to appreciate the Principle of law relating to valuation of export goods laid down by Apex Court:

â??19. In the present case, as stated above, neither the adjudicating authority i.e., the Commissioner of Central Excise nor the CESTAT

has dealt with the matter as per the procedure prescribed under the Act. At the threshold, instead of first determining the value of the goods

on the basis of contemporaneous exports of identical goods, the Revenue erroneously resorted to a market enquiry. If for any reason, data of

contemporaneous exports of identical goods was not available, the procedure laid down in Rules 5 to 8 of the 1988 Rules was required to be

followed and market enquiry could be conducted only as a last resort. It is evident that no such exercise was undertaken by the

Commissioner and interestingly he, acting as an appellate authority, proceeded to test the evidentiary value of the report submitted by M/s.

Skipper International and rejected it on the ground that it does not depict if the identical garments had ever been purchased by the said

concern. Observing that in the absence of any other independent evidence relating to market enquiry, there was no other corroborating

evidence to support the allegation of inflation in FOB value, he dropped the proceedings initiated vide show cause notice dated 11th

September, 2003. Similarly, it is manifest from the CESTATâ??s order that revenueâ??s appeal has been accepted mainly on the ground that report of M/s. Skipper International was worthy of credence and the exporter had failed to produce any evidence to establish that export

value stated in the shipping bills was the true export value. In our opinion, both the said authorities have failed to apply the correct

principles of law and therefore, their orders cannot be sustained.

20. Resultantly, for the reasons as enumerated, the appeal is allowed; the orders passed by the CESTAT and the Commissioner are set aside

and the matter is remitted back to the adjudicating authority for fresh consideration in accordance with law, after affording adequate

opportunity of hearing to the exporter. The entire exercise, in terms of this order, shall be completed within six months from the date of

receipt of a copy of this judgment. Needless to add that we have not expressed any opinion on the merits of the opinion rendered by M/s.

Skipper International or on the conduct of the exporter in not adducing any evidence in support of the export value stated in the shipping

bills in question,â?? [Emphasis supplied]

LIMITATION

38. It was also the contention of the appellants that in absence of the limitation provisions in Rule 16/16A of 1995 Rules, there cannot be open ended

litigation to perpetuate. Honâ??ble Supreme Court in the case of Govt. of India Vs. Citadel Fine Pharmaceuticals [1989 (42) ELT 515 (S.C.)]

has held that in absence of any period of limitation, it is settled that every authority is to exercise its power within a reasonable period. What would be

the reasonable period would depend upon the facts of each case. Similarly the Honâ??ble Court in the case of Collector of Central Excise,

Jaipur Vs. Raghuvar (India) Ltd. [2000 (118) ELT 311 (S.C.)] has held that it is not for the Courts to import any specific period of limitation by

implication where there is really none, though courts may always hold when any such exercise of power had effect of disturbing the right of a citizen

that it should be exercised within a reasonable period. In order to appreciate above principle, relevant para of the judgment is reproduced below :-

â??13. Any law or stipulation prescribing a period of limitation to do or not to do a thing after the expiry of period so stipulated has the

consequence of creation and destruction of rights and, therefore, must be specifically enacted and prescribed therefor. It is not for the

Courts to import any specific period of limitation by implication, where there is really none, though Courts may always hold when any such

exercise of power had the effect of disturbing rights of a citizen that it should be exercised within a reasonable period.â? [Emphasis

supplied]

39. It may be stated that the decision in the case of Raghuvar (India) Ltd. (supra) was rendered by 3 judges Bench while the decision in the case of

Citadel Fine Pharmaceuticals (supra) was rendered by 2 Judges Division Bench.

40. The decision of Honâ??ble High Court of Gujarat in the case of PratibhaS yntex Ltd. Vs. Union of India [2013 (287) ELT 290 (Guj.)]and

the decision in the case of Padmini Exports Vs. Union of India [2012 (284) ELT 490 (Guj.)]held that drawback erroneously paid being

recoverable through Rule 16 of 1995 Rules and there is no prescription of any reasonable period, the proceeding is time barred when show cause

notice was issued after a reasonable period. Honâ??ble Court in the case of Padmini Exports (supra) noticing that show cause notice was issued in

2000 in respect of drawback paid prior to 1996, that was invalid and the order passed pursuant to that would be unsustainable. Honâ??ble Court in

the case of Pratibha Syntex Ltd. (supra) has observed that the Show Cause Notice having been issued after a period of more than three years from

the date of drawback claimed cannot by any stretch of imagination be said to have been issued within a reasonable period of time. Accordingly, the

Show Cause Notice was held to be bad on the ground of time bar and the adjudication arising from that notice became unsustainable. In the present

case, original Show Cause Notice was issued on 27.03.2006 and the Addendum was issued on 31.08.2006 for recovery of drawback

relating to the period was 01.10.1999 to 10.10.2003. Therefore the Show Cause Notice issued on 27.03.2006 does not appear to be beyond a

reasonable period. Accordingly, the plea of time bar is untenable.

Imposition of penalty

41. So far as imposition of penalty is concerned mens rea plays a vital role to determine quantum thereof. That aspect was not looked into in the

adjudication. Mechanically penalties have been imposed in page 77 of the adjudication order without stating any reason as to imposition and

determination of quantum thereof, which appears to be disproportionate, in existence of conflicting evidence on record.

42. Having dealt with the principal issues hereinbefore, other allied issues raised by the appellants are not considered specifically in this order.

43. In the light of the above, all the appeals are allowed.

(Pronounced in the open Court on 12.01.2015)

