

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH – COURT NO. II

Customs Appeal No.50021 of 2023 (SM)

(Arising out of Order-in-Appeal No.CC (A) CUS/D-II/ACC/EXP/4730/2022-2023 dated 14.10.2022 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi)

M/s. Arihant Overseas (Prop.Raj Kumar Jain)

Appellant

X/3832, Street No.12, Shanti Mohalla,
Gandhi Nagar,
Delhi-31.

Versus

Commissioner of Customs

Respondent

Air Cargo Complex (Export),
New Customs House,
Near IGI Airport,
New Delhi.

APPEARANCE:

Ms. Seema Jain, Advocate for the appellant.

Mr. Mahesh Bhardwaj, Authorised Representative for the respondent.

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50704/2023

DATE OF HEARING:12.04.2023

DATE OF DECISION:25.05.2023

Anil Choudhary:

This appeal has been filed by the exporter, Arihant Overseas confirming the demand of duty draw back of Rs.35,37,385/- and further ordering confiscation of the goods already exported under draw back, under Section 113 (i) of the Customs Act and imposition of penalty of Rs.30 lakhs under Section 114 (iii) of the Act.

2. The brief facts are that the appellant was in the business of readymade garments and fabrics. The appellant obtained IEC No. in September 2000 and thereafter during the period 12.12.2000 to 08.06.2002, the appellant exported readymade garments vide 22 shipping bills (under Duty Draw back claim) to four buyers in Russia and one buyer in Poland. The total value of the exported goods was Rs.2,93,42,875/-, on which the sanctioned draw back amount was Rs.42,41,332/-. The appellant duly received the payments for the exports made and was in possession of the BRCs issued by the Bank. In July, 2003, the Asstt. Commissioner (Preventive), New Delhi vide letter dated 27.02.2003 informed the Branch Manager, Punjab National Bank, Bara Khamba Road, New Delhi that necessary inquiries in respect of the appellant have been completed, and the party is found to be genuine exporter and thus, the bank account of the appellant can be de-frozen.

3. Subsequently, on the basis of some intelligence, Revenue started inquiry and conducted search on 31.01.2006 at the premises of the appellant. The search was conducted in presence of Mr. Vipin Jain and Mr. Sunil Jain, the owners of the premises. They stated that the proprietor of Arihant Overseas is Mr. Raj Kumar Jain, who is out of station and they knew about the export, and will send him to the customs house, as desired. The appellant thereafter appeared before the customs authorities on 10.02.2006 and submitted all the documents pertaining to the export under draw back. Thereafter on 07.12.2006 and 12.12.2006, Mr. Raj Kumar Jain, Proprietor of the appellant again submitted copy of the shipping bills and BRCs as proof of exports and payments received from the Overseas buyers. The department also forwarded copy of the BRC's submitted by the appellant to the Manager, Punjab National Bank, International Banking Branch, DCM

Building, Barakhamba Road, New Delhi, vide letter dated 02.04.2007 requesting for verification of the enclosed BRCs with regard to the realization of the export proceeds, containing the details of source of remittance of sale proceeds, in which the remittance from the importer was received. Further, source of foreign remittance such as banking channels or through foreign tourist and the nature of currency whether INR or convertible foreign exchange was requested to be confirmed

4. In response, Punjab National Bank vide its letter dated 08.02.2012 confirmed the genuineness of the BRCs of the appellant.

5. In the course of investigation further statement of Mr. Raj Kumar Jain, Proprietor of M/s. Arihant Overseas was recorded on 05.04.2011, wherein, he, inter alia stated that he was in the business of trading in fabrics on wholesale basis and he took IEC code in the year 2000 for starting export business. Thereafter, he came in contact with the buyers situated in Russia on being introduced by some trade persons and thereafter he exported readymade garments to Russia. The goods were exported in Indian rupees, and were entitled to duty draw back incentives on those goods. After going through the copies of the shipping bills, he could identify the name of the buyers, to whom he had exported the goods. That he did not meet any consignee/buyer personally and deal was done through the contracts of trade people. That value of the goods exported by him during December, 2000 to June, 2002 was Rs.2,93,42,875/- and the draw back amount claimed was Rs.42,41,332/-. Besides this, he did not export anything. On being confronted with the documents received from Russia by DRI, wherein it had been revealed that Indian exporter had returned the money, back to the buyers in Russia, and in case of M/s.Arihant Overseas (Appellant), such

amount of money returned is Rs.96 lakhs. In reply, Mr. Raj Kumar Jain stated that he has nothing to say in this regard and reiterated that he had received all the payments regarding his exports, and had submitted all the BRCs, in proof.

6. Further, statement of Mr. Raj Kumar Jain was recorded on 13.12.2011, wherein he, *inter alia*, stated that he did not remember the exact name of the person through whom he negotiated and obtained contract of Russian parties, and he does not have contract with the Russian clients. He does not have any documentary evidence regarding the receipt of the goods by the buyer in the foreign country exported by him. He has received the payments for the exports made after dispatch. The goods were purchased by him from the various suppliers and is not in possession of the purchase bills, the matter being very old. There is no written agreement with the Russian buyers about opening of the LC and the instructions were received verbally all the times.

7. It appeared to Revenue that export incentives in the form of draw back have been availed by the appellant, corresponding to the exports made to the Russian Companies / buyers under Indo-Russia Rupee - Ruble Agreement. However, as per the information provided by the Consulate General of India, Moscow in Russia, the consignees/buyers have (morefully mentioned in Table I of the show cause notice, para-3) had not traded with Indian companies during the years 2002-2005. Further Mr. R.K. Jain in his statement stated that he cannot say anything, but he exported the goods and received the payments. Further, Mr. Jain stated that he did not have any evidence regarding the goods exported by him reached the Russian buyer in

the foreign country and he also stated that he did not have details from where the goods were purchased. Further as per statement of Mr. Jain there was no written agreement of any kind with the Russian consignee/buyer. They also do not know as to who opened the letter of credit in Russia. He stated that he has dealt with Russian clients through an agent/broker called Matoisha, whose address, he could not disclose. Thus, it appeared to Revenue that exports made vide shipping bills mentioned in table 1 to the show cause notice, never took place as per report received from Russian Customs, as consignee i) M/s. OOO Orlan and ii) M/s. Stroytehinter had not done any export – import business with Indian companies during the period 2000 – 2005. One of the consignees/buyers, M/s.OOO Sters had imported only black tea in granules. Even in that case, exporters were different.

8. The show cause notice refers to RBI Circular No.30 dated 28.09.1993 and Circular No.4 dated 05.09.1999, which stipulates that:-

"Funds from repayments of State Credits to be utilized for export of goods to Russian Federation only. No third country exports are to be permitted to be financed out of funds from such repayment of state credits."

As per paragraph 5 of AP (DIR series) Circular No. 12 dated 09.09.2000 issued by RBI under Section 10 (4) and section 11 (1) of Foreign Exchange Management Act, 1999 (42 of 1999) provides –

"Asian export of goods and services against repayment of State Credits granted by erstwhile Soviet Union will continue to be governed by the extant directions, as amended from time to time."

Para 4.17 of Export & Import Policy 1997 – 2002 reads as under; –

In the case of trade with Russia under the Debt Repayment Agreement, the Director General of Foreign Trade may issue, from time to time, such instructions or frame such schemes as may be required, and anything contained in this Policy, in so far as it is inconsistent with such instructions or schemes, shall not apply.

Further para-2.15 of Exim Policy 2002 – 2007 reads –

in case of trade with Russia under the Debt Repayment Agreement, the Director General of Foreign Trade may issue from time to time such instructions or frame such schemes as may be required and anything contained in this policy insofar as it is inconsistent with such instructions or schemes shall not apply.

9. DGFT had issued various circulars regulating exports to Russia under the debt repayment agreement, which states that RBI circular prescribing revised procedure may be followed. As per Circular No. 30 dated 28th September 1993; in case of goods exported to Russian Federation under repayment of State Credit Scheme, do not reach Russia and are diverted to other countries, it amounts to violation of provisions of RBI Circulars, which prohibit such exports under the said scheme. Violation of RBI circulars is the violation of provisions of para-2.15 of Exim Policy 2002 – 2007.

Section 3 of Foreign Trade (Exemption from application of rules of certain cases) Order 1993, Import Trade Regulation means the act and the rules and orders made thereunder, the exemption from the application of rules in case of imports or exports, which are not covered by the said exemption under this Section are regulated by virtue of this order to follow Foreign Trade (Regulation) Rules 1993. This means that the exporter has to inter alia truthfully declare the particulars including value, quality and description of the export goods.

10. It appeared to Revenue that appellant have wrongly taken the drawback benefit of ₹ 42,41,332/-, as the goods exported by them vide shipping bills morefully mentioned in Table 1 of the show cause notice, did not reach Russia. It further appeared that exports were cleared through Air

Cargo Exports, IGI Airport, New Delhi under the claim of drawback. Appellant have made exports under State Credit Scheme to Russia in violation of RBI circular A.D. (M.A) No. 30 dated 28th September, 1993 issued under Section 73 (3) of FERA, 1973 read with RBI AP: (DIR series) Circular No.12 dated 9th September, 2000, issued under section 10 (4) and 11 (1) of the Foreign Exchange Management Act ,1999 on account of the fact that the goods as declared for export before the Indian Customs, have not reached Russia at all. Thus, DGFT's Circular No. 13/95 dated 3rd July,1995 has also been violated leading to contravention of Section 11 (1) of Foreign Trade (Development and Regulation) Act 1992 read with the provisions of para-4.17 of the Exim Policy, 1997 – 2002 and para-2.15 of Exim Policy 2002 – 2007. Thus, when read with Section 3(2) and 3(3) of Foreign Trade (Development and Regulation) Act, 1992 makes such exports a violation of Section 11 of the Customs Act, 1962 as well.

11. It also appeared that appellant have wilfully misstated the particulars declared in the shipping bills with intent to fraudulently avail the benefit of drawback. It further appeared that particulars to the consignee in Russia, the destination of the exported cargo, the quantity and value of the goods allegedly exported have all been stated incorrectly in view of the discussion herein above. It further appeared that the goods ostensibly exported by the Appellant are liable for confiscation under Section under 113 (i) read with Section 113 (d) of the Customs Act, 1962. It further appeared that the goods allegedly exported did not reach the declared consignee in Russia and the money that came by way of remittances is not the sale proceeds, rather it is not relatable to the exports at all. Since the sale proceeds in respect of these exports have not been received, therefore the drawback taken by the

appellant shall be deemed to have been never allowed and consequently is required to be returned along with interest under Section 75 read the Section 75(A) of the Act, read with Rule 16 (A) of the Customs and Central Excise Drawback Rules, 1995.

12. Accordingly, show cause notice dated 26.12.2016 was issued invoking the extended period of limitation demanding the duty drawback amount of ₹ 42,41,332/- alleged to be availed fraudulently with further proposal to confiscate the goods already exported valued at ₹ 2,93,42,875 under Section 113 (d) & (i) of the Act alongwith interest and further penalty was also proposed under Section 114 (iii) of the Customs Act.

13. The show cause notice was adjudicated on contest by the Joint Commissioner vide order-in-original dated 16.03.2021 confirming the drawback demand of ₹.35,47,385. Further ordering confiscation of the goods on account of exports under drawback under Section under 113(i) of the Customs Act along with interest and further penalty of Rs.30 Lacs was imposed under section 114 (iii) of the Act.

14. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), *inter alia*, on the following grounds–

“14.1 That they filed shipping bills and handed over the goods for export; that order for export was given by proper officer; that goods were duly exported, thereafter, drawback was sanctioned; that sanction of drawback was as per law.

14.2 That recovery of drawback under Section 75 of the Customs Act, 1962 is limited to cases of non-realization of sale proceeds within time prescribed in FEMA, 1999; that there is no dispute that the sale proceeds were received within the time prescribed in FEMA and thus, sanctioned

drawback cannot be demanded from the appellant under Section 75 of the Customs Act, 1962.

14.3 That scope of Rule 16 of Drawback Rules cannot be expended to go beyond Section 75 of the Customs Act; that Rule 16 cannot be expended to cover what is not provided for in Section 75; that the case of the Department is that the consignee's were registered but did not make import, therefore, drawback was demanded; that Rule 16 cannot be brought into play to demand drawback on this ground. The appellant cited the case law of **Famina Knit Vs. UOI [2020 (371) ELT 97 (P&H)]**.

14.4 That the Assistant Commissioner (Preventive) Customs (Preventive) Commissionerate, New Customs House, New Delhi vide letter dated 27.02.2003 informed the Branch Manager, Punjab National Bank, that the appellant is found to be a genuine exporter, that therefore, there is no dispute regarding the export of goods by the appellant.

14.5 That on investigation by the Department regarding the genuineness of BRCs, Punjab National Bank vide letter dated 08.02.2012 confirmed the genuineness of the BRCs in question.

14.6 That RBI after due verification of the letter of Credit issued by Russian Federation Bank, released the drawback to the appellant; that the RBI Circular No.30 dated 28.09.1993 cited by the Adjudicating Authority states that funds from repayments of State Credits are to be utilized for export of goods to Russian Federation only; that no third country exports are permitted to be financed out of funds from such repayments of State Credits; that LC's were issued in the favour of the appellant and only after that the money was transferred in the appellants PNB accounts; the buyer has made the payments which itself proves that the buyer received the

goods.

14.7 That the export remittance once received by exporter, can be returned only through RBI; that in the repayment of State credits scheme, there is no direct transaction between exporter and importer; that receipts of sale proceeds or return can be only through RBI; that extensive enquiry has not been made about the money remitted back into the account of the importer.

14.8 That letter dated 11.07.2005 of Federal Customs Service, Russia is a vague statement giving some information, which is derived from records; that the statement in the letter can not be admitted as evidence without the documents, from which the said information was taken.

14.9 That the Revenue relies upon letter dated 06.11.2007 of Acting Head of Central Department AA Ufrutob to First Secretary Trade, Embassy of India, Moscow, stating that the money was sent by three Russian Companies to Indian exporters as pre-payment for delivery of goods to RF (Russian Federation) and returned as deliveries never took place on the territory of RF; that a floppy was enclosed with the said letter; that the appellant was provided a chart showing the name of importer, exporter, payments and return of payments, that the chart shows return of Rupees Ninety Six Lakhs from the appellant to Russian company against payment of Rupees Ninety Six Lakhs made to the appellant by the Russian Company; that there is no evidence that the print out was taken from the floppy; that there is no Panchnama witnessing the printout from the floppy, that printout was not taken in the presence of Raj Kumar Jain, Prop. of the appellant, that therefore, printout is not admissible as evidence to demand the drawback from the appellant.

14.10 That if the case of the Department is that the impugned goods did not reach the Russian Federation, then the burden of proof is on the Department as to where the goods went; that the department has not brought on record any evidence of diversion of the goods to any other country. The appellant further contended that if the case of the department is that the money was returned to the buyer, then the burden of proof is on the Department to show that the amount stated in overseas enquiry report was remitted by the Appellant; that the department failed to discharge its burden. The appellant relied on case laws of **Uniworth Textiles Ltd. Vs. CCE, Raipur [2013(288) ELT 161 (SC)]** and in **Ashok Kumar & Ors. [(2005) 8 SCC 760]**.

14.11 That the department conducted enquiries of imports of consignees; that in two shipping bills (7969901 & 6011186) buyers are different from the consignees; that there is no enquiry in respect of buyer; that, therefore, demand of drawback of Rs.9,90,000/- in respect of these two bills of entry, is illegal and unsustainable.

14.12 That alleged return of money was to one company only and that too restricted to Rs. Ninety Six lakhs only; that remaining drawback can not be denied.

14.13 That the show cause notice has been issued fourteen years after the exports and sanction of drawback; that case law of **CCE, Jaipur Vs. Raghuvar India Ltd. [2000(18) ELT 311 (SC)]** is of no help to the Revenue; that the show cause notice is beyond reasonable period and ought to be dropped on this ground alone. The appellant cited the case laws of **State of Punjab Vs. Bhatinda District Co op Milk P. Union Ltd. [2007 (217) ELT 325 (SC)]**. **Pratibha Syntex Ltd. Vs. Union of India**

[2013(287) ELT 290 (Guj.)] and Padmini Exports Vs. Union of India [2012 (284) ELT 490 (Guj.)].

14.14 That Section 113(d) deals with confiscation of goods sought to be exported, contrary to any prohibition; that there is no allegation that there was any prohibition for export of the goods exported by the appellant; thus Section 113(d) is not applicable in the present case; that Section 113(i) deals with confiscation of goods which do not correspond in respect of value or in any material particular with the declaration made; that there is no such allegation of any discrepancy in the declarations filed by the appellant in the shipping bills, that consequently the goods are not liable for confiscation under Section 113(i); that Section 113 (i) has a limited field of operation i.e. mis-declaration of material facts by the exporter; further it is not in dispute that the buyers have made the payments.

14.15 That the appellant did not do any act to render the goods liable for confiscation and thus the goods are not liable for confiscation, therefore, penalty is not imposable on the appellant.

15. However, the Commissioner (Appeals) rejected the grounds taken by the appellant, as well as the ground of limitation, and dismissed the appeal. Being aggrieved, the appellant is before this Tribunal.

16. Ld. Counsel further urges that the show cause notice is wholly barred by limitation. She further urges that the show cause notice has been issued without there being any adverse material on record, save and except the assumptions and presumptions. Pursuant to exports, the draw back was disbursed during the financial year 2002-2003 and further, the Customs Department, on being satisfied pursuant to inquiry, had released the attachment of bank account of the appellant in Feb., 2003. Further, in the

facts of the case, the appellant have admittedly exported the goods by air from India to Russia, and Revenue have not brought any evidence that the goods having been diverted to any third country. Further, Revenue have not brought any iota of evidence that the appellant have remitted back the sale proceeds to the consignee/buyer in Russia. The contentions of the appellants are supported by the bank statement, export documents, etc, which are all external evidence, not created by the appellant. The contention of the appellant are also supported by the fact that part of the proposed disallowance of draw back for Rs.6,93,947/- has been dropped by the Adjudicating Authority with respect to the goods exported to (i) Anna Phuui, Poland and (ii) Veera International, Russia. The amount of duty draw back is based on vague information received by the Customs Department, which have got no legs to stand. Further, under the facts and circumstances, there is no violations of the provisions of the Customs Act read with the Duty Draw Back Rules. Evidently, no enquiry has been made from the actual importers or the persons – importers, who are named in the bills of lading, shipping bill, etc. A buyer or importer situated in a foreign country is entitled to sell the goods in transit, which is commonly known in trade parlance as high-sea sales. In such case, the buyer or transferee of the goods takes the delivery of the goods by filing bill of entry and not the person, who is named in the shipping bill or bill of lading. Admittedly, there is no evidence that the appellant have returned Rs.96 lakhs to M/s. OOO Stroytehinter, Russia, as alleged by the Revenue. Accordingly, she prays for allowing the appeal with consequential benefits.

17. Ld. Authorised Representative, Shri Mahesh Bhardwaj relies on the impugned order.

18. Having considered the rival contentions, I find that the show cause notice has been issued after more than 13 years from 27.04.2003, when the Customs has closed the matter by writing to Punjab National Bank, to defreeze the bank account of the appellant. Thus, I hold that the extended period is not available to Revenue, and this ground is decided in favour of the appellant and against the Revenue.

19. So far the issue on merits is concerned, I find that the show cause notice is based on un-substantiated and vague facts, which have no legs to stand. Admittedly, the appellant have received the payment for the goods exported, which is duly supported by the BRCs issued and re-certified after verification by the Punjab National Bank. Further, there is no evidence brought on record by the Revenue that the appellant have returned any remittance received on account of exports to the buyer located in the foreign country. Further, Revenue have not brought on record any evidence of diversion of goods to any third country. I find that admittedly, the goods have been exported by air from India to Russia and thus, chances to diversion to third country is highly impossible, without the goods first reaching Russia.

20. In view of my aforementioned observations and findings, I allow this appeal and set aside the impugned order. The appellant shall be entitled to consequential benefits in accordance with law.

[Order pronounced on 25.05.2023]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)