F. No. 371/61/DBK/2014-RA
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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No. 371/61/DBK/2014-RA
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F.No. 371/63/DBK/2014-RA / 1239 Date of Issue: 23.02.2021

ORDER NO. 43-45/2021-CUS (WZ)/ASRA/MUMBAI DATED 12.02.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMA ACT, 1962

Applicants : 1. M/s Rajguru Enterprises Pvt Ltd.
2. Shri Ramesh Bafna, Director of M/s Rajguru Enterprises Pvt Ltd
3. Shri Pravesh Bafna, Director of M/s Rajguru Enterprises Pvt Ltd

Respondent : Commissioner of Customs(Appeals), Mumbai -II.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal Nos. 296(ADJN.-EXP)/2013(JNCH)/EXP-73 dated 26.03.2013, 144(ADJN.-EXP)/2013(JNCH)/EXP-25 dated 27.02.2013 and 143(ADJN.-EXP)/2013(JNCH)/EXP-73 dated 27.02.2013 passed by the Commissioner of Customs (Appeals), Mumbai-II

ORDER

These three Revision Applications have been filed by M/s Rajguru Enterprises Pvt Ltd, Shri Ramesh Bafna and Shri Pravesh Bafna, Directors of M/s Rajguru Enterprises Pvt Ltd, A/20, Bharat Nagar, M.S. Ali Road, Grant Road(E), Mumbai 400 057 (hereinafter referred to as "the Applicants") against the Orders-in-Appeal Nos. 296(ADJN.-EXP)/2013(JNCH)/EXP-73 dated 26.03.2013, 144(ADJN.-EXP) / 2013 (JNCH)/EXP-25 dated 27.02.2013 and 143(ADJN.-EXP)/2013(JNCH)/EXP-73 dated 27.02.2013 passed by the Commissioner of Customs (Appeals), Mumbai-II.

2. The issue in brief is that the officers of Customs (Preventive), Marine and Preventive Unit, Mumbai booked a case against the Applicants for over valuation of the Stainless Steel Utensils exported by them in order to avail excess duty drawback. The office of the Applicant No. 1 was searched under panchnama dated 09.04.2010 and certain documents along with computer CPU were withdrawn for further investigation. During the course of panchnama, the officers also took print outs of certain mails and its attachments from the 'Inbox' and 'Sent' boxes of email account of the Applicants viz. rajguru@yahoo.com, duly countersigned by the Shri Ramesh Bafna, Applicant No. 2, an authorized signatory who stated that he himself looks after the affairs of the company. During the panchnama, it was informed by Shri Ramesh Bafna that his son Shri Pravesh Bafna, Applicant No. 3 and Shri Bhavarlal Rajpurohit are the directors of the said company and Dr.Sudhir Dhanesha is the main agent who procures export orders for them. On scrutiny of the documents and printouts of the emails withdrawn under panchnama dated 09.04.2010, it was observed that in certain cases the Applicants were presenting overvalued export invoices before the Customs Authorities and separately sending the actual value invoices to overseas consignees. Hence a Show Cause Notice dated 09.09.2011 was issued to the Applicants. The Additional Commissioner(Export), JNCH,

Nhava Sheva, Raigad vide Order-in-Original No. 101/2011 dated 28.12.2011 held that

(i) The excess duty drawback amounting to Rs.29,27,774/-(Rupees Twenty Nine Lakhs Twenty Seven Thousand Seven Hundred and Seventy Four Only) already claimed on the export consignments was to be disallowed and to be recovered from Applicant No.1 under Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 read with Section 28(2) of the Customs Act, 1962, read with the proviso thereto, along with the appropriate interest;

(ii) The goods valued at Rs. 58.56 lakhs (Rupees Fifty Eight Lakhs Fifty Six Thousand Only) pertaining to Shipping Bills Nos. 8329837 dated 07.04.2010 and 8326817 dated 05.04.2010 which were seized for attempt to be exported on the inflated invoices, were to be confiscated under Section 113(h) (ii) of the Customs Act, 1962. However, an option to redeem the same was given on payment of Redemption Fine of Rs.18,00,000/- (Rupees Eighteen Lakhs Only) under Section 125 of the Customs Act, 1962;

(iii) Amount of Rs.10,00,000/-(Rupees Ten Lakhs Only) paid by Applicant No.1 during investigation, being amount of refund of excess duty drawback, against the above said excess duty drawback, interest, penalty and fine imposed was appropriated.

(iv) The Show Cause Notice also proposed the appropriation of an amount of Rs.43,61,566/- being amount pending for sanction which was withheld by the Assistant Commissioner of Customs, Drawback Section, JNCH. In this connection, the appropriate authority i.e. The Assistant Commissioner of Customs, Drawback Section, JNCH, Uran, Raigad, was directed to examine the admissibility of drawback pending for sanction and the admissible amount of drawback shall be appropriated.

against the above said excess duty drawback, interest, penalty and fine imposed.

(v) Penalties of Rs.30,00,000/- (Rupees Thirty Lakhs Only) on Shri Ramesh Bafna, Applicant No. 2 and Rs.20,00,000/- (Rupees Twenty Lakhs Only) on Shri Pravesh Bafna, Applicant No. 3 under Section 114(iii) and / or Section 114AA of the Customs Act, 1962 were imposed.

3. Aggrieved, the Applicants filed separate appeals before the Commissioner of Central Customs (Appeals), Nhava Sheva, Mumbai-II:

(i) In the case of appeal filed by the Applicant No. 1, the Commissioner of Customs(Appeals) vide Orders-in-Appeal Nos. 296(ADJN.-EXP) / 2013 (JNCH) /EXP-73 dated 26.03.2013 upheld the Order-in-Original dated 28.12.2011 and rejected their appeal.

(ii) In the case of appeal filed by the Applicant No. 2, the Commissioner of Customs(Appeals) vide Interim Order No. 46/2012(Adj. Export)/JNCH/EXP-34 dated 14.12.2012 ordered for pre-deposit of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) under Section 128A of Customs Act, 1962, otherwise the appeal will be disposed off, on non-compliance. Being aggrieved by this interim order, the Applicant-2 filed Miscellaneous Application dated 11.01.2013 for modification of the order. The Commissioner of Customs(Appeals) vide Final Order-in-Appeal No. 144(ADJN.-EXP) / 2013 (JNCH) /EXP-25 dated 27.02.2013 dismissed the Miscellaneous Application dated 11.01.2013 as well as the main appeal No. S/49-54/2012-MISC JNCH filed by the Applicant No. 2 for noncompliance with the provisions of Section 129E of the Customs Act.

(iii) In the case of appeal filed by the Applicant No. 3, the Commissioner of Customs(Appeals) vide Interim Order No. 45/2012(Adj. Export)/JNCH/EXP-33 dated 14.12.2012 ordered for pre-deposit of Rs. 10,00,000/- (Rupees Ten Lakhs Only) under Section 128A of

Customs Act, 1962, otherwise the appeal will be disposed off, on non-compliance. Being aggrieved by this interim order, the Applicant No. 3 filed Miscellaneous Application dated 11.01.2013 for modification of the order. The Commissioner of Customs(Appeals) vide Final Order-in-Appeal No. 143(ADJN.- EXP)/2013(JNCH)/EXP-73 dated 27.02.2013 dismissed the Miscellaneous Application dated 11.01.2013 as well as the main appeal No. S/49-53/2012-MISC JNCH filed by the Applicant No. 2 for noncompliance with the provisions of Section 129E of the Customs Act.

4. Aggrieved, the Applicants preferred statutory appeals before the CESTAT, Mumbai. The Hon'ble CESTAT vide its final Order No. S/597-599/14/CSTB/C-1 dated 23.06.2014 disposed the appeal as non-maintainable, accordingly dismissed the same with liberty to the Applicants to file the same before the appropriate authority within a period of 30 days.

5. The Applicants filed the current three Revision Applications on the following grounds:

(i) The Applicants exported in the normal course of business consignments of Stainless Steel Utensils from Nhava Sheva Port. The goods were exported under duty drawback shipping bills, after due and proper examination and the declarations made therein were accepted by the department. Whereas exports were made regularly under various shipping bills, the instant duty drawback demand had been raised only in respect of 12 shipping bills detailed in Annexure *'A' to the SCN.*

(ii) The drawback was claimed / granted at the All Industry Rate of 12.5% with a maximum cap value of Rs.224/- per kg. Therefore, there was not even possibility of any over-valuation to claim excess drawback.

The value proposed in the SCN for stainless steel utensils was not even the value at which stainless steel scrap would be available.

(iii) Procurement value of goods in India either for exportation directly or after manufacturing utensils from the raw material, as evidenced by the documents taken over in search on the date of commencement of investigation was not even doubted in the SCN. The value computed as per these irrefutable evidences was made available on record and the same being comparable with the actual transaction value declared at the time of exportation, even on preponderance of probability, there was no merit in the allegations of over-valuation.

(iv) There was no allegation regarding the goods having been incorrectly declared in quality and quantity. The Drawback had been claimed at the All Industry Rate of 12.5% with a maximum cap value of Rs.224/- for Kg. as per the Drawback Schedule applicable for fixing of the said rates. The Applicants had not made any declaration or contribution in any manner in getting this rate fixed.

(v) No Specific Brand Rate had been determined or claimed under the provisions of Section 75 of the Customs Act, 1962 read with Rule 6 or/and Rule 7 of the Customs, Central Excise and Service Tax Drawback Rules, 1995. There was no allegation in the show cause notice of any incorrect declaration which was required to be made or any failure to produce any information or document and Account Books etc. which were required to be submitted by the Applicants under Rule 9 of the said rules. Therefore, there was no cause to call for any liability to confiscation under Section 113(h)(ii) and impose penalty under Section 114(iii) of the Customs Act, 1962 as also penalty under Section 114AA of the Customs Act 1962 on Applicant No. 2 & 3.

(vi) There were no goods which were not included or were in excess of those included in the entry made under the Customs Act or entered for exportation under claim of Drawback but not corresponding in any material particular with any information furnished by the Applicants under this Act 'in relation to fixation of rates of Drawback under Section 75 of (e) the Customs Act', to call all for any liability to confiscation under Section 113(h)(ii).

(vii) The goods pertaining to Shipping Bill No. 8329837 dated 07.04.2010 and 8326817 dt.5.4.2010 with declared FOB of Rs.44.34 Lakhs and Rs.14.22 lakhs respectively were therefore not liable to confiscation.

(viii) There was no false or incorrect statement or declaration or document produced or made for the purposes of the Customs Act. the penalty under Section 114AA was not called for.

(ix) When there was no case for over valuation of the export goods, and the demand of drawback was not sustainable, the Order to recover the Drawback was erroneous. Therefore, the direction to appropriate the amount of Rs.10 Lakhs and or other entitled Drawback amounts illegally frozen and not sanctioned, was also illegal.

(x) The Customs Valuation (Determination of Value of Export Goods) Rules. 2007 would be applicable to determine the valuation of the goods as the Exports in this case had been done in 2009 and 2010 and they relied on the judgment of Hon'ble Supreme Court in Sidhachalam Exports (supra).

(xi) The contemporaneous value of the identical/similar goods exported by the Applicants from same Nhava Sheva port was available with the adjudicating authority, however investigation officers abdicated their duties to examine the valuation aspect on that basis.

(xii) The so called invoices at lower values obtained from the computer were not signed and thus cannot be transaction value for comparable goods since an unsigned invoice is not an invoice in law. Moreover, there was no evidence that the said lower value invoices showed the correct transaction value. The Applicants had disclosed the bank accounts wherein sale proceeds and Drawback claims were to be received. No adverse enquiries from these bank accounts had been found to establish that sale proceeds equivalent to the amount shown in the invoices and the shipping bills had not been received by the Exporter.

(xiii) During the investigations suppliers were examined and there was no statement which disputes the authenticity of the suppliers and the cost of the material procured. The statement of only one such supplier had been given to the Applicants, in the relied upon documents supplied, a perusal of the same would indicate that the said relied upon statement was not incriminating the Applicants in any manner and goes to indicate that the purchases were in the normal course of the business.

(xiv) In view of the submissions in the paras herein above, it was amply clear that their prices when worked out on 'computed basis' method with the appropriate profit margins and loadings permitted as per CBEC instructions there was no cause to even suspect their FOB value for the purposes of Drawback sanctioned, much less seize the same and propose the confiscation. There was no material to allege that Foreign Exchange repatriation of the FOB amounts declared had not been effected even when the department had been disclosed the bank account numbers. Therefore, the valuations as declared and accepted by the Proper Officer, leading to assessment and 'Let export order' cannot be re-opened by these proceedings or/and the proposal of confiscation ordered.

(xv) If the amounts mentioned on the so called lower invoices are examined one can find on comparing, the prices therein with the cost price of the goods in the hands of the notice, the prices reflected in such lower invoices is much lower than the said cost, in some cases merely 1/7th of the cost of production which is a conservative estimate. It would be obvious that no one would sell the goods at prices far lower than the cost of production on a continuous basis. The amount shown on such lower FOB invoices are inherently unworthy of credence for acceptance.

(xvi) The said invoices at lower amounts have been explained to facilitate foreign buyers. In Ajay Apparels [2006 (204) ELT 131 (T]) it has been held as-

> *"3.3 The tendency of the Department to accept whatever declaration is made to a foreign Customs Department and thereafter make out a case under the Indian Customs Act on the assumption that no misdeclaration could be made before the foreign Customs officers cannot be sustained. Merely because some documents have been produced before the Dubai Customs to cheat import duties to be paid to Dubai Customs will not ipso facto lead to a conclusion that the valuation given under the Indian Custom Act and documents thereunder are incorrect. Valuation has to be determined as per the provisions of the Customs law applicable at the point of export or the import. In the present case the FOB values of comparative goods and the goods impugned under these proceedings is same. Other goods and the FOB values declared for them are not questioned. We cannot abandon the principle of comparable goods values at the point and time of delivery at the port of export, Haldia in this case. In this view of the matter the FOB values as declared cannot be found to be incorrect and cannot be interfered with. "*

Therefore, the so called invoices with lower amounts of FOB mentioned therein are not relevant at all to upset the valuations approved by the 'Proper Officer' of Customs. There was no corroborative evidence, of any repatriation of Foreign Exchange

equivalent to FOB values declared and accepted, was brought on record.

(xvii) It is an accepted fact that the Applicants were exporting goods for the last few decades. The export turnover for the year 2008-09 was Rs.26 crores and 2009-10 was Rs.16 crores and no other shipping bills are alleged as containing any mis-declaration of value or of quantity and quality. The notice only impugned 12 shipments even though the total number of so called parallel invoices and invoices from unknown sources were more.

(xviii) The Ld. Commissioner (Appeals) have not considered the written submissions dated 15.03.2013 of the Applicants, by which they had also placed on record the data available in the EDI system in respect of certain shipping bills which clearly reveals that the subject export goods were duly examined, by selecting the packets at random as per system generated examination order. The "Departmental Comments View" clearly shows that the goods were opened and examined as per the system order by the Custom Authorities before permitting clearance for exports. Such primary evidence was suppressed in the Show Cause Notice as well as in the adjudication proceedings, warranting adverse inference against the Department.

(xix) Applicant No. 2 in his statement had given the explanation for the invoices showing different amounts which were produced before the Customs and which were alleged to have been found in the Company's computer, which has been ignored. He has submitted in his statement that the invoices presented to the Customs show the correct FOB value. His readiness to reimburse suspected excess duty Drawback availed and payment of the cheque towards the same has to be understood in the light of the requirement of provisional release of seized goods. This cannot be assumed as an admission of deliberate attempt to claim ineligible Drawback amounts when the FOB values shown to Customs in India are not proved, even alleged as a result of

in the notice, to be non-repatriated through banks whose declarations have been correctly given to the investigators. The statement does not implicate the Applicant No. 2 or/and Applicant No. 3 in any fashion. In fact para 12(xii) of Applicant No. 2's statement dated 20.4.2010, as evident from the show cause notice itself, clarifies the correct state of affairs as follows-

> *'xii. Sometimes, as per the requirement of the foreign buyer, for the purpose better known to them, they prepare invoices showing lesser value of the export goods and the invoices recovered from the computer under panchnama dated 9.4.2010 are such invoices provided to the foreign buyer"*

(xx) The Ld. Adjudicator relied on Dr. Sudhir Dhanesha's statement which was not called for cross-examination, although he is the person who had booked the export orders, and had not even been made a noticee in the show cause notice for abetting in the alleged offence. This would make the statement of Dr. Sudhir suspect and it appears to have been obtained on a false promise. Such statements are totally unreliable and need material corroboration in all aspects which was not available from other records.

(xxi) The Ld. Commissioner (Appeals) grossly erred in holding that the impugned Order-In-Original was issued in compliance of instruction contained in CBEC F. No. 437/ 143/2009-Cus.IV (pt) dated 15.04.2011. He totally disregarded the contention of the Applicant that, the Ld. Adjudicator in Para 45 of the impugned Order-In-Original has observed after noting the amendment to Section 28 and Circular 44/11-Cus dt. 23.09.2011 that-

> *'45. However, a doubt has arisen as to whether show cause notices issued under Rule 16 of Customs, Central Excise and Service Tax Duty Drawback Rules 1995, the said amendment is also applicable. Accordingly the issue has been referred to the board for clarification which is awaited.'*

Therefore, it is apparent that the impugned Order-In-Original had been issued under a doubt about the jurisdiction of the SCN issuing authority viz. Additional Commissioner, Marine Preventive. The Adjudicating Authority itself was not satisfied about his jurisdiction to demand under Rule 16. Therefore, the Ld. Commissioner ought to have considered that, since jurisdiction would go to the root of the proceedings and when a doubt is entertained about the same by the Ld. Adjudicator any order consequent thereto would be void before the doubt is settled.

(xxii) Section 28 of the Customs Act, 1962 had no application in the facts of the instant case relating to alleged demand of drawback paid on exportation of goods. The findings of the Adjudicating Authority are self-contradictory inasmuch as he also holds that there is no time limit in issuance of notice in respect of drawback cases.

(xxiii) In Para 47 of the impugned Order-in-Original, the Ld. Adjudicator has accepted the plea that two notices issued on the same subject, viz., one notice dated 30.08.2010 which was issued by Additional Commissioner, Customs Preventive Commissionerate, Mumbai and the second show cause notice was issued on 09.09.2011 by the Additional Commissioner of Customs, Custom House, JNCH. These two notices are verbatim the same and no new material has been brought out in this second notice. Therefore, as per Arya Bhandar Pit Ltd Vs CC [1994 (69) ELT 631 (Cal.)], the second notice is a nullity and is void ab-initio. Though the first notice has not been withdrawn or dropped the adjudicator vide the impugned order has decided the second notice issued on 09.09.2011. The second notice has been issued after submission of the Applicant that the notice dt.30.08.2010 was not issued by the proper officer having jurisdiction to demand the recovery of drawback amounts. It is well settled law that repeated show cause notices cannot be issued and gaps therein cannot be filled up after filing of the reply to the notices. Therefore, the present

proceedings initiated and continued vide notice 09.09.2011, are bad in law and the impugned order deserves to be set aside on this ground itself.

(xxiv)The demand was confirmed by interpreting in para 46 of impugned Order-in-Original that the SCN was also issued under Section 28 of the Customs Act and Circular 44/11-Cus would rightly applicable. The following plea was taken by the Applicants in their preliminary reply dated 15.6 2011 as regards drawback payments -

> *"The same if paid erroneously has to be recovered by a Notice to be issued and determined by the Proper Officer in the Drawback Department in JNCH under the Provisions of Rule 16 of the Customs, Central Excise and Service Tax Drawback Rules 1995. Under Rule 16A of these Rules significantly the Authority prescribed is Deputy Commissioner/Assistant Commissioner of Customs. But Rule 16A is applicable only when it is a case of recovery of Drawback on the grounds of non-repatriation of sale proceeds. Duties conferred or imposed on a Deputy Commissioner or Assistant Commissioner of Customs can be discharged by any other officer of Customs to whom they are subordinate. However, the duty conferred on a 'Proper Officer' cannot be discharged until the Senior Officer is also designated as a Proper Officer'. The present demand notice for repayment of Drawbacks sanctioned by the 'Proper Officer' of Customs is beyond the jurisdiction of the Additional Commissioner of Customs, Preventive and also the Additional Commissioner, JNCH who cannot adjudicate and determine this demand of Drawback under Rule 16 which is not issued by the 'Proper Officer' of Customs under the Customs. Central Excise and Service Tax Drawback Rules 1995 and which unlike a demand under 16A is not required to be issued by a Assistant Commissioner or Deputy Commissioner. The Drawback repayment demand therefore for any amount cannot survive."*

There was no finding on this plea. Section 28(1) of the Customs Act provides interalia recovery of duty and interest not paid short levied or erroneously refunded. This Section 28(1) does not refer to Drawback erroneously paid. 'Drawback' cannot be understood to be 'duty' under

the Customs Act, which is defined under Section 2(15) of Customs Act 1962. Even interest on drawback amount is recoverable under section 75A(2), but not under section 28AB, as section 28 itself is not applicable. Or otherwise, section 75A(2) would be otiose and redundant. Drawback is an amount sugeneris and cannot be equated to refund of duty envisaged under Section 28(1). The entire scheme of Customs, Central Excise, and Service Tax Drawback Rules 1995 is a code in itself prescribing for fixation of Drawback amount and its claim and mode of recoveries. Section 28 of the Customs Act 1962 is not an omnibus provision for recovery of all kinds of amounts. Therefore it cannot be applied to recovery of Drawback. The Applicants relies on the decision of the Supreme Court in the case of CCE V/s Raghuvar (India) Ltd [2000 (118) E.L.T. 311 (S.C.)] and Mohindar Steels Ltd V/s CCE [2002 (145) E.L.T. 290 (Tri. - LB)], wherein it has been held that in tax administration provision of one Scheme cannot be imported to apply in another scheme which is self-contained. Therefore the provisions of Section 28 of the Customs Act, cannot be applied and incorporated as an omnibus authority to apply to drawback which are paid under a consolidated self-contained scheme and is not duties or refunds of Customs.

(xxv) The value of Export goods has to be the correct 'Transaction Value' declared to the Customs Authorities and accepted by the Proper Officer of Customs who have assessed and passed the shipping bills after satisfying on physical examination and inspection of the export goods, and issued appealable let Export Orders'. The present proceedings therefore cannot be initiated without challenging those orders of assessment which are quasi-judicial in nature.

(xxvi) The finding of the adjudicator that an unsigned invoice can be relied for the transaction value for comparable goods was not based on sound legal footing, since an unsigned invoice is not an offer or

acceptance or valid contract for sale of goods. An unsigned invoice has no validity in law.

(xxvii) There was no cogent material on record to conclude that the Applicants adjusted any excess payments towards interest/charges on the delayed payment of earlier supplies, so as to reject the plea of the Exporter that the Bank Accounts where the sale proceeds and drawback amounts had been received do not show anything adverse to establish that sale proceeds equivalent to the amount shown in the invoices presented to the Indian Customs as well as the bankers had either not been received or any part thereof had been adjusted as alleged.

(xxviii) The uncorroborated statements of the Applicant No. 2 & 3 and Shri Sudhir Dhanesha cannot be used as conclusive evidence, since the validity of the statements were to be judged from corroboration and if the statement as recorded alleged that excess amounts were adjusted towards interest/delayed payments, it was incumbent to show corroborating evidence of delay in receipt of payment leading to any such huge interest liability. The Ld Commissioner (Appeals) grossly erred in placing reliance on the statements of the Applicant No. 2 & 3 as placed by the adjudicator when such statements are not corroborated and are contradictory. These statements could not be used to arrive at any adverse findings against the Applicants and/or to implicate them. The Ld. Commissioner (Appeals) ought to have considered that the Ld. Adjudicator had come to the conclusion that the invoice submitted to the Customs was showing an amount for which payments were received. This would go to upset the crux of the charge that a higher amount invoice was shown to the Customs and the true transaction value was concealed and a lower value invoice was submitted to the consignee.

(xxix) The Ld. Commissioner (Appeals) ought to have considered that, the statement of Dr. Sudhir Dhanesha dated 08.05.2010 was to the effect :

> *"You have also shown me the respective invoices which were filed with the Customs authorities but bore different FOB value end I have put my dated signatures on all these invoices as a token of having seen and read the same. In this connection I state that I have dealt with the consignees mentioned in the above invoices and that except for the invoices issued to M/s Osman Enslading Co. Ltd., the value shown in the invoices recovered under panchanama dt.9.4.10 and the invoices as mentioned in the 2nd table (which we in the possession of the customs) show the correct value of supply and that inflated invoices in respect of the above mentioned supplies, were produced before customs authorities by M/s Rajguru Enterprises P. Ltd. and that these goods were not of goods quality. However, I have no role to play in the submission of manipulated invoices before customs authorities and that the recovery of the payments against said supplies was the look out of Shri Ramesh Bafna. "*

The same ought to have been considered as an involuntary and/or false deposition since supplies to Osman Elsading Co. Ltd, had also been impugned in the said notice at SI.No. 9, 11, 12 of the Annexure 'A' to the SCN as also the statement abruptly concludes on the Dr Dhanesha absolving himself from all responsibilities and shifting it on the Applicants, by terming the goods to be not of good quality. There is no evidence of goods not being of good quality. From the samples drawn of the consignments under seizure for testing purpose no report adverse to the declared quality by test or market enquiries had been brought out on record. The quality of the goods and the quantity was not in question. It appears that the Dr. Dhanesha has been induced and / or coerced to sign on the prepared statement which is typed. Notwithstanding the endorsement in the hand writing of the Dr. Dhanesha, this oral evidence only would go to prove that once he has agreed to sign the statement he had been allowed to go. Hence

confronted with contradictory statement of Applicant No. 2, and neither further statements were recorded from him nor was he issued the SCN for penalty as an abettor. This appears to be the inducement / promise kept to obtain the said oral statement

(xxx) The entire case was built mainly only on the oral statements. The reliance on the statement of Dr. Sudhir Dhanesha and others without giving cross examination as requested, and without any finding on such request would render the order bad in law. Reliance was placed on Arya Abhushan Bandar V/s CC [2002(143) ELT 25(S.C.)] and CCE V/s Parmarth Iron Pvt Ltd [2010 (260) E.L.T. 514 (All.).

(xxxi) The Applicants prayed that three Orders-in-Appeal, two dated 27.02.2013 and one 26.03.2013 be annulled with consequential reliefs

4. A personal hearing in the case was held on 26.07.2018 and was attended by Shri Nilesh Sawant, Advocate, on behalf of the three Applicants. The Applicants reiterated the submission filed through their 3 RAs and pleaded that the impugned Orders-in-Appeal be set aside and their RAs be allowed. However, there was a change in the Revisionary Authority, hence a final hearing was granted on 04.12.2020 and was attended by Shri Suresh Balasubramanian, Advocate, on behalf of the three Applicants. The Applicants contested that without redetermination of transaction value, the issue of recovery of drawback, if any, should not have been decided. Invoking Section 133(ii) for confiscation is not legally tenable and as this is for brand fixation which was not the case here. Imposing penalty on the Directors holding them defacto owners is not permissible in the law. Commissioner(Appeals) did not consider that entire penalty amount of Rs. 50 lakhs was already appropriated, hence rejection of appeals was not proper.

5. The Applicants vide letter dated 08.12.2020 further submitted their written submission as given below:

(i) The second SCN was issued by the M&P Wing for the same goods without referring to the first SCN. The second SCN was just a replica of the first SCN with only the change of the issuing authority. This is not permissible.

(ii) The case hinges on the alleged invoice copies obtained by Customs from undisclosed sources. Reliance on such unauthenticated photocopies has been held not permissible by the Supreme Court of India in the case of Commissioner of Customs, Visakapatnam vs Truwoods Pvt. Ltd [2016 (331) E.L.T. 15 (S.C.)].

(iii) Duplicate invoice cannot be acted upon even otherwise. The decision of the Hon'ble CESTAT in the case of Commr. Cus., Kandla Vs Dimple Overseas [2005 (190) ELT 58 (Tri-Mumbai)] supports the stand that duplicate sets of invoices cannot be taken cognizance of. Similarly, the issue of having one set of invoices for Customs and another set of invoices for overseas buyers has been analyzed and the fact that the second set of invoices has not been presented to Customs has been highlighted in the decision of Hon'ble CESTAT in Commr. of Cus., C.Ex. & S.T. Hyderabad vs G.M.K. Products Pvt. Ltd. [2020 (373) E.L.T.692 (Tri-Hyd.)].

(iv) Separate value was taken for claiming back the alleged excess drawback paid. As has been held in the decision in the matter of Jairath International vs Union of India [2019 (370) ELT 116 (P&H)] by the Hon'ble High Court of Punjab & Haryana, Customs does not have power under Rule 16 of Customs, Central Excise and Service Tax Drawback Rules, 1995 as the said Rule 16 is in the nature of execution proceedings. In fact, the said decision holds that in the case of goods already exported, no action can be taken. It would suffice to infer that the action of deciding the value for drawback under Rule 16 is not permissible.

(v) There can be only one value for all purposes and that can only be the F.O.B value declared in the shipping bill. If the value is not acceptable, the same has to be legally challenged and the methods prescribed in the Valuation Rules have to be applied. This principle has been laid down in the decision of the Government of India in the revision application filed in RE: Paramount Product Pvt Ltd. [2019 (369) ELT 1688 GOI)1].

(iv) Drawback is sanctioned as a % of the F.O.B value of the goods exported subject to certain other conditions. Rule 3 of the Customs and Central Excise Duties Drawback Rules, 1995, stipulates the mechanism for determining the extent of drawback permissible. Since the said Drawback Rules do not contain any definition for the term "value" and that the Drawback Rules are framed under Customs Act, 1962 and the entire Rules are subjected to the provisions of Customs Act, 1962, the value has to be determined in terms of Section 14 of the Customs Act, 1962 and the Valuation Rules framed thereunder. This would show that there cannot be any other short-cut for taking a different value.

(v) CBEC Circular 07/2003-Cus. dated 05.02.2003, also fortifies this stand. Para 5 of the said Circular stipulates that in those cases where it is conclusively proved through verification that the FOB value had been artificially inflated / manipulated by the exporter to avail of unintended higher drawback benefits, the cases shall be investigated and decided on merits in terms of Section 14 and 113 read with Sections 76(1)(b) and 114 of the Customs Act, 1962. Here it should be noted that the Circular which is binding on the field formations has not provided any exceptions to this requirement.

(vi) Since the SCN as well as the Order-in-Original held the goods liable to confiscation under Section 113 of the Customs Act, 1962 for inflated values, and the value in terms of Customs Act, 1962 can only be the

value determined in terms of Section 14 of the Customs Act. 1962 and the Valuation Rules framed thereunder, again the re-determination of the 'value' can only be in terms of Section 14 and in the absence of the same, Section 113 and 114 cannot be invoked vis-a-vis the value declared.

(vii) The SCN and the subsequent Order-in-Original held that the goods liable to confiscation under Section 113(h) (ii) [the provision is only (ii) and not a sub-clause of 113(h)]. The said sub-section applies to cases where declarations have been filed for obtaining brand rate, which was not the case here.

(vii) There was insufficiency in even inadmissible evidence. Though 14 cases (two live consignments and 12 past shipping bills) had been identified to be having duplicate invoices, it could be noticed that only 8 of them was having invoices found in the office of the exporter and in 6 cases only photocopies of documents obtained from undisclosed sources was shown as evidence. Again in one case, the consignee name itself was not matching in the case of the invoice given to Customs and the one found in the exporter's office.

(viii) The Value determination was improper. The value cannot be determined in any other short cut method sans the Valuation Rules. In the instant case, since value has not been re-determined in accordance with law, the same is not acceptable.

(ix) Regarding Penalty on Directors, for imposing a penalty, the two Directors had been shown as de-facto owners. It was on record in the statement of Applicant No. 3, that the entire share holdings of the company were held between his parents. Thus Applicant No. 3 was not even a shareholder. Again the ratio of shares held by Applicant No. 2 was also not ascertained. Hence there was no reason to hold either of them as de-facto owners. Also the company being a private

limited company, any penal action to be taken against the company has to be taken against the company and the liability cannot be fastened even on the de-facto owners. On this count the penalties had been wrongly imposed on the Directors. Though Applicant No. 2 had categorically stated that he was handling the entire affairs of the company, for no reasons, Applicant No. 3 had been made a noticee and penalty had been imposed on him.

6. Government has carefully gone through the relevant case records, oral & written submissions and has perused the impugned Orders-in-Original and Orders-in-Appeals. The Applicants filed three Revision Applications, details of which are as given below:

Sl. No.	Revision Application	OIA dt	Dt OIA recd by Applicant	Date filed in CESTAT	CESTAT order dt	Date RA filed	Date RA & COD recd
1	371/61/DBK/2014-RA	26.3.13	5.4.13	1.8.13	30.6.14	28.7.14	28.07.14
2	371/61/DBK/2014-RA	27.2.13	13.3.13	1.8.13	30.6.14	28.7.14	28.07.14
3	371/61/DBK/2014-RA	27.2.13	13.3.13	1.8.13	30.6.14	28.7.14	28.07.14

Appellants filed the Revision Applications along with Miscellaneous Application for Condonation of Delay (herein after as 'COD').

7. Government first proceeds to discuss the issue of delay in filing these three revision applications. It is clear that Applicants have filed the revision application within one month from the date of Cestat order as per directions of the Cestat. However, there was delay of 63 to 86 days from the date of receipt of OIA excluding the time spent in proceedings before CESTAT. As per provisions of Section 129DD of Customs Act, 1962, the revision application can be filed within 3 months of communication of Order-in-Appeal and delay up to another 3 months can be condoned provided there are justified reasons for such delay.

8. In view of judicial precedence that period consumed in pursuing bona fide appeal before wrong forum is to be excluded in terms of Section 14 of Limitation Act, 1963 for the purpose of reckoning time limit of filing revision application under Section 35EE of Central Excise Act, 1944 or corresponding section of Customs Act particularly when preamble of OIA mentioned Cestat as forum for appeal against the said OIA. The Applicants request for condonation of delay excluding time consumed in the CESTAT Appeal proceedings is required to be considered accordingly. Government, in exercise of power under Section 129DD of Customs Act, 1962 condones the delay and takes up revision application for decision on merit.

9. From the perusal of records, submission of applicants, and record of personal hearing; Government observes that the Applicant No.1 is holding valid IEC and is a regular exporter of Stainless Steel Utensils from Nhava Sheva Port with substantial annual turnover and Applicant No. 2 and 3 are Directors of the Applicant No.1. Instant issue was raised based on suspicion that the Applicants are engaged in over valuation of the Stainless Steel Utensils exported by them in order to avail excess duty drawback. Office premises of the Applicant, factory premises of the Applicant, two consignments of Applicant, premises of all the suppliers of Applicant, bank accounts and transactions of the Applicants, etc. were examined in this regard. A Show Cause Notice dated 09.09.2011 was issued to the Applicants which was confirmed by the Additional Commissioner(Export), JNCH, Nhava Sheva, Raigad vide Order-in-Original No. 101/2011 dated 28.12.2011 against the Applicants. In the case of appeal filed by the Applicant No. 1, the Commissioner of Customs(Appeals) vide Orders-in-Appeal Nos. 296(ADJN.-EXP) / 2013 (JNCH) /EXP-73 dated 26.03.2013 rejected their appeal. The Commissioner (Appeals) dismissed appeals of Applicant 2 and Applicant 3 on the ground of not complying with the directions of pre deposit.

10. Government notes that apart from the evaluation of evidences in the case on merits, several legal and technical points have also been raised by the Applicants. Government takes up the issue on merits first.

11. Instant case of overvaluation of exported consignments to claim excess drawback of Rs. 29.27 lakhs in 12 shipping bills and two live shipping bills is essentially based on evidence of 8 unsigned duplicate invoices recovered from the premises of applicant and 6 photocopies of duplicate invoices whose source is unknown. In respect of these unsigned/photocopy of duplicate invoices, Applicant 2 in his very first statement, recorded immediately after initiation of investigation, had submitted that sometimes, as per the requirement of the foreign buyer, for the purpose better known to them, they prepare invoices showing lesser value of the export goods and the invoices recovered from the computer are such invoices provided to the foreign buyer. It is also seen that out of many invoices recovered from the premises, in six invoices value shown was lower than the value mentioned in the corresponding invoices presented to Indian Customs. Similarly, in two unsigned proforma invoices recovered from the premises, value shown was Rs. 144 per kg as compared to value of Rs 224 per kg mentioned in the two live shipping bills. Source of other six photocopies of invoices has not been identified. Government finds that in view of categorical submission of the Applicants, whether these invoices were prepared as per the requirement of overseas buyers, or the same were reflecting the actual value of goods and the value declared to Indian Customs was inflated was required to be examined with corroborative evidences.

12. Applicants were exporting stainless steel utensils by purchasing from several suppliers as well as from manufacturing in their factory. All the suppliers as well as their manufacturing premises were investigated to find out the purchase price and the cost of manufacture of utensils. Value arrived at by supplier side investigation has not corroborated over valuation of exported goods. Applicants have submitted that the value computed as

per these evidences was available on record and the same was found comparable with the actual transaction value declared to Indian Customs at the time of exportation. Therefore, purchase documents & records did not indicate over-valuation of exported goods.

13. Stainless steel utensils were being exported from the same port by many exporters during the relevant time. Value of contemporaneous export of identical/similar goods could have been easily obtained to compare correctness or otherwise of the value declared by the Applicants. The Applicants have contended that contemporaneous value of the identical/similar goods exported by the Applicants themselves from same Nhava Sheva port was available, however investigation officers either did not examine or did not find anything to support the valuation aspect on that basis. Even Adjudicating Authority and the Appellate Authority did not take contemporaneous value of identical/similar goods into account while passing their orders.

14. Applicants have submitted that the Drawback had been claimed at the All Industry Rate, and there is a value cap of Rs.224/Kg. as per the Drawback Schedule. Any attempt to over value the exported goods would have been futile as value would have been limited with this value cap. There was no allegation regarding the goods having been incorrectly declared in quality or quantity. Thus the allegation of over valuation does not get any support from the fact that drawback claimed was at All Industry rate and goods had a value cap.

15. The Applicants have submitted they had disclosed the bank accounts to investigation wherein sale proceeds and drawback were being received. Investigation was carried out with the banks to ascertain bank realization. There was no material to allege that Foreign Exchange repatriation of the FOB amounts declared had not been effected even when the department had verified the bank accounts. Enquiries from these bank accounts have not

found any discrepancy regarding receipt of sale proceeds equivalent to the amount shown in the invoices and the shipping bills.

16. Applicants have contended that statement of Dr. Dhanesha cannot be taken as evidence without giving an opportunity of cross examination as requested. They also submitted that Dr Dhanesha, has been induced and / or coerced to sign on the prepared statement which he agreed to sign in return of not being made noticee in the SCN. He was never confronted with contradictory statement of Applicant No. 2, and neither further statements were recorded from him nor was he issued the SCN for penalty. Therefore, statement of Dr Dhanesha, in absence of any documentary evidence and in view of above facts, does not have much credence.

17. In Ajay Apparels [2006 (204) ELT 131 (T)], Hon'ble Tribunal in an identical matter has held as-

> *"3.3 The tendency of the Department to accept whatever declaration is made to a foreign Customs Department and thereafter make out a case under the Indian Customs Act on the assumption that no misdeclaration could be made before the foreign Customs officers cannot be sustained. Merely because some documents have been produced before the Dubai Customs to cheat import duties to be paid to Dubai Customs will not ipso facto lead to a conclusion that the valuation given under the Indian Custom Act and documents thereunder are incorrect. Valuation has to be determined as per the provisions of the Customs law applicable at the point of export or the import. In the present case the FOB values of comparative goods and the goods impugned under these proceedings is same. Other goods and the FOB values declared for them are not questioned. We cannot abandon the principle of comparable goods values at the point and time of delivery at the port of export, Haldia in this case. In this view of the matter the FOB values as declared cannot be found to be incorrect and cannot be interfered with. "*

Therefore, a few duplicate invoices stated to be prepared on the request of overseas buyer with lower amounts of FOB mentioned, without any corroborative evidence, of misdeclaration in quantity or quality of goods from suppliers of goods, any variation in repatriation of Foreign Exchange

equivalent to FOB values declared and received, etc. cannot be sufficient to establish a case of overvaluation of exported goods.

18. Hon'ble Supreme Court of India in the case of M/S. Siddachalam Exports vs Commissioner Of Central Excise decided on 1 April, 2011 held that,

> *"It is settled that the procedure prescribed under Section 14(1) of the Act and particularized in the 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."*

Once a few duplicate invoices (signed or unsigned) were recovered from the premises of Applicant that burden appeared to have been discharged by the Revenue. However, when it was submitted by the Applicant that these few invoices out of recovered invoices, were prepared at the request of overseas buyers for their convenience, burden had again shifted back for establishing correct value with corroborative evidences.

19.1 Regarding seizure of goods in two live Shipping Bill No. 8329837 dated 07.04.2010 and 8326817 dt.5.4.2010 with declared FOB of Rs.44.34 Lakhs and Rs.14.22 lakhs respectively, applicants have submitted that the seizure has been proposed based on two duplicate proforma invoices indicating average value of Rs 144/kg as against declared value. No discrepancy in quantity and quality of goods examined thoroughly was found. Verification with suppliers did not bring out any over valuation. Contemporaneous verification of value also did not indicate anything adverse to doubt the correctness of the declared value.

19.2 The SCN proposed the goods liable to confiscation under Section 113(h)(ii). The said sub-section applies to cases where declarations have been filed for obtaining specific brand rate, which was not the case here. Facts of the case clearly bring out that applicants were exporting goods under All Industry rate. Since no specific brand rate has been claimed under the provisions of Section 75 of the Customs Act, 1962 read with Rule 6 or/and Rule 7 of the Customs, Central Excise and Service Tax Drawback Rules, 1995, therefore, there was no ground for confiscation under Section 113(h)(ii). The goods pertaining to live Shipping Bill No. 8329837 dated 07.04.2010 and 8326817 dt.5.4.2010 were therefore not liable to confiscation.

20. Since the allegation of overvaluation and consequent demand of drawback itself does not survive, the question of imposition of penalty on directors become superfluous. There is no false declaration or mismatch in quantity or quality of goods exported by the Applicants. Therefore, Government does not find any ground to penalize the Applicant 2 and Applicant 3.

21. Applicants have submitted that two notices were issued on the same subject, viz., one show cause notice dated 30.08.2010 which was issued by Additional Commissioner, Customs Preventive Commissionerate, Mumbai and the second show cause notice was issued on 09.09.2011 by the Additional Commissioner of Customs, Custom House, JNCH. These two notices are verbatim the same and no new material has been brought out in this second notice. They further submitted that though the first notice has not been withdrawn or dropped, the adjudicator vide the impugned order has decided the second notice issued on 09.09.2011. Applicants also submitted that it is well settled law that repeated show cause notices cannot be issued and gaps therein cannot be filled up after filing of the reply to the notices. Applicants accordingly contented that the present proceedings initiated and continued vide notice 09.09.2011, are bad in law and the

impugned order deserves to be set aside on this ground itself. Government finds that since matter do not survive on merits, examination of this technical ground is unnecessary.

22. Applicants made another submission that Section 28(1) of the Customs Act provides interalia recovery of duty and interest not paid short levied or erroneously refunded. This Section 28(1) does not refer to Drawback erroneously paid. 'Drawback' cannot be understood to be 'duty' under the Customs Act, which is defined under Section 2(15) of Customs Act 1962. Even interest on drawback amount is recoverable under Section 75A(2), but not under Section 28AB, as Section 28 itself is not applicable. They further submitted that Drawback cannot be equated to refund of duty envisaged under Section 28(1). Therefore, it has been contended that Section 28 cannot be applied to recovery of Drawback. Government finds that since matter do not survive on merits, examination of this ground also does not serve any purpose.

23. Another submission of Applicants relates to determination of value under the Customs Valuation (Determination of Value of Export Goods) Rules. 2007 before demanding drawback on the exported goods. Value in terms of Customs Act, 1962 can only be redetermined in terms of Section 14 of the Customs Act. 1962 and the Valuation Rules framed thereunder. In the instant case, since value has not been re-determined in accordance with the law, the demand of drawback was not sustainable, and the Order to recover the Drawback was erroneous. Applicant has relied upon the decision of Hon'ble Punjab & Haryana High Court in the matter of Jairath International vs Union of India [2019 (370) ELT 116 (P&H)] wherein High Court has held that Customs does not have power to reassess a shipping bill under Rule 16 of Customs, Central Excise and Service Tax Drawback Rules, 1995. Government does not find it necessary to examine this ground also in view of above findings.

24. Above revision applications are decided on above terms.

12/02/2021

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No 43-45/2021-CUS(WZ) /ASRA/Mumbai DATED 12.02.2021

To,

1. M/s Rajguru Enterprises Pvt Ltd,
   A/20, Bharat Nagar, M.S. Ali Road,
   Grant Road(E),
   Mumbai 400 057

2. Shri Ramesh Bafna, Director
   M/s Rajguru Enterprises Pvt Ltd.,
   A/20, Bharat Nagar, M.S. Ali Road,
   Grant Road(E),
   Mumbai 400 057

3. Shri Pravesh Bafna, Director
   M/s Rajguru Enterprises Pvt Ltd.,
   A/20, Bharat Nagar,
   M.S. Ali Road,
   Grant Road(E),
   Mumbai 400 057

Copy to:

1. The Commissioner of Customs(Appeals), Mumbai –II, JNCH, Nhava Sheva, Tal: Uran, Dist. Raigad, Maharashtra 400 707.
2. The Pr. Commissioner of Customs (Export), JNCH, Nhava Sheva, Tal: Uran, Dist. Raigad, Maharashtra 400 707.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy.

ATTESTED
23/2/21
CS Shreedhar
Superintendent
रिवीजन एप्लीकेशन
Revision Application
मुंबई इकाई, मुंबई
Mumbai Unit, Mumbai