

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. I

CUSTOMS APPEAL NO. 50025 OF 2020

(Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/ICD/Exp/TKD/632/2019 dated 20.09.2019 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi-110 037)

Isgec Heavy Engineering Ltd.

A5, Sector – 63,
Noida, Uttar Pradesh – 201 301

.....Appellant

VERSUS

Commissioner of Customs (Export),

ICD Tughlakabad,
New Delhi – 110 020

.....Respondent

APPEARANCE:

Shri B.L. Narasimhan, Shri Anurag Kapur, Ms. Osheeba Basir and Ms. Rubel Bareja,
Advocates for the Appellant

Shri Rakesh Kumar, Authorized Representative for the Department

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 01.09.2025
DATE OF DECISION: 16.10.2025

FINAL ORDER NO. 51591/2025

JUSTICE DILIP GUPTA:

Isgec Heavy Engineering Ltd.¹ has sought the quashing of the order dated 20.09.2019 passed by the Commissioner (Appeals), New Customs House near IGI Airport, New Delhi² by which the appeal filed by the appellant against the order dated 24.11.2015 passed by the Joint Commissioner (Export), ICD, Tughlakabad, New Delhi³ has been dismissed and the order of the Joint Commissioner has been upheld. The Joint Commissioner, by the order dated 24.11.2015, had imposed a fine of Rs. 35,00,000/- upon the appellant under section 125 of the Customs Act,

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1. the appellant
 2. the Commissioner (Appeals)
 3. the Joint Commissioner

1962⁴ and also imposed penalties upon the appellant under sections 114 and 114AA of the Customs Act.

2. The appellant was engaged in the business of manufacture and export of heavy engineering goods, including boilers and sugar plants⁵. These goods were manufactured by utilizing inputs and components manufactured by the appellant or domestically procured from supporting manufacturers.

3. The appellant entered various contracts with foreign buyers for supply of the goods. These contracts provided for payment of a lumpsum price by the foreign buyers for the supply of the goods. According to the appellant, the individual component cost or cost of inputs required for the manufacture of the goods was not agreed upon between the appellant and the foreign buyers. After the contract was entered, broad billing breakup of the goods was prepared by the appellant, as per the terms of the contract, which was approved by the foreign buyer. This broad billing break-up of the lumpsum amount of the boiler and sugar plants only provides the value of broad categories of parts of the boilers and sugar plants and does not provide value of individual items or component to be exported. However, the sum of all the invoices was the total value reflected in the contract. The appellant also claims that due to massive size of the goods, they were exported by the appellant in partial shipments consisting of various components of the boiler and sugar plants to be commissioned at the place of import. In a case where components were manufactured by the supporting manufactures, they were directly supplied to the port of export under Form ARE-1 by the supporting manufacturer. All such shipments exported by the appellant were covered under irrevocable Letters of Credit. Payments for such individual component of the goods were made to the appellant based on the invoices generated by

4. **the Customs Act**
5. **the goods**

the appellant for individual component on the basis of the broad billing breakup.

4. The goods exported through 16 shipping bills were seized because the values of components declared under ARE-1 were found to be lesser than the Free on Board⁶ values declared in the shipping bills.

5. A show cause notice dated 06.05.2014 was then issued to the appellant to show cause as to why:

- (i) The declared value of the exported goods should not be rejected under rule 8 of the Customs Valuation (Determination of Value of Exported Goods) Rules, 2007⁷ and re-determined under rule 5;
- (ii) The drawback amount of Rs. 16,07,372/- claimed in the subject shipping bills should not be reduced to Rs. 7,77,336/- based on the value worked out in terms of rule 5;
- (iii) The goods exported under the subject shipping bills should not be confiscated under section 113(d) and 113(i) of the Customs Act; and
- (iv) Penalties under sections 114 and 114AA of the Customs Act should not be imposed.

6. The relevant portions of the show cause notice are reproduced below:

10. Whereas, the exporter was asked to submit the copy of contract papers with overseas buyers and relevant purchase bills in respect of consignments covered under above Shipping Bills which were seized on 08.05.2012. Accordingly, the party submitted 7 ARE-1 to the corresponding Shipping Bills and 3 contract agreements between the party and M/s. Kampangpetch Bio Energy Co. Ltd., M/s Kakira Sugar Limited and M/s Compañia Agrícola Industrial Ingenio Palo Gordo S.A. (RUD-10)

6. **FOB**
7. **the 2007 Customs Valuation Rules**

| Sr. No. | Name of Overseas Buyer | Contract Price (in USD) |
|---------|--|-------------------------|
| 1. | M/s Kampangpetch Bio Energy Co. Ltd. | 20150000 |
| 2. | M/s Kakira Sugar Limited | 21555000 |
| 3. | M/s. Compania Agricola Industrial Ingenio Palo Gordo S.A | 12555000 |

On scrutiny of contract agreement between the party and their overseas buyers, the value of consignment can not be ascertained as the party has declared only contract prices in the said agreement. There is no discussion about item wise or consignment wise value in the said agreements. The exporter has submitted that he had filed Shipping Bills other than these 16 Shipping Bills to export goods in respect of the above said agreement with their overseas buyer and to reconcile the above said contract prices, he had loaded value in current 16 shipping Bills on pro-rata basis. **There is no provision in the Customs Act, 1962 under which value of one consignment can be loaded on pro-rata basis to reconcile the value of other consignment.**

11. Whereas, the goods have been exported by M/s. ISGEC Heavy Engineering Ltd. as per contract entered into by them with their overseas buyers i.e. M/s Kampangpetch Bio Energy Co. Ltd. M/s. Kakira Sugar Limited and M/s Compania Agricola Industrial Ingenio Palo Gordo S.A. **The exporter M/s ISGEC Heavy Engineering Ltd. was asked to explain the difference between their Shipping Bill price and ARE-1 price. The exporter vide their letter dt. 29.10.2013 submitted that difference between ARE-1 and Shipping Bill prices had been furnished in their statement recorded on 15.05.2012.** They also stated that ARE-1 form in respect of Shipping Bill No. 8452046 dt. 12.04.2012 is not available and copy of Proprietor's invoice towards purchase value has already been submitted. **The exporter vide their letter dt. 02.12.2013**

submitted that export billing is done on pro-rata basis against partial shipment which results in higher difference in FOB and ARE-1 value of residual/last shipments. There is no provision in Customs law & Rules which state that residual value of other consignments can be loaded in value of current consignment. There is no provision of Project Export in Customs Valuation (Determination of Valuation of Export Goods) Rules, 2007. As stated by Sh. R.C. Sharma, Deputy General Manager (Commercial) in his statement dt. 15.05.2012, he was asked time and again to submit the copies of invoices in respect of local purchase made to procure goods from their supporting manufacturer. But he failed to submit any of such invoices.

16. ***** There is no provision of Project Export in Customs Valuation (Determination of Valuation of Export Goods) Rules, 2007. The exporter has admitted in his statement dt. 15.05.2012 that residual value of other consignment has been added to the actual value of these consignments. **The declared value in export consignments exported vide said 16 Shipping Bills is not the actual value for transaction in terms of Rule 3 is inflated one as evident from ARE-1 & Purchase Order (RUD-11) and the exporter himself has admitted this fact in his written statement dt. 15.05.2012 that the residual amount of contract with their overseas buyers has been loaded on these particular consignments in order to reconcile the value of the contract which is not in confirmation with the provisions of Customs Valuation (Determination of Valuation of Export Goods) Rules, 2007.** The ARE-1 value can be taken as PMV (Present Market Value for determination of price for export).

19. Now, therefore, M/s. ISGEC Heavy Engineering Limited, A-4, Sector-24, NOIDA are hereby called upon to show cause to the Additional Commissioner (Export Shed), ICD, Tughlakabad, New Delhi within 30 days from the date of receipt of this notice as to why:-

- (a) The declared value Rs. 6,90,25,291/- of the goods exported vide Shipping Bills No. ***** should not be rejected under Rule 8 of the Customs Valuation (Determination of Value of Exported Goods), Rules, 2007 and be re-assessed to Rs. 3,42,39,898/- (as per Annexure 'A') under Rule 5 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007.
- (b) The drawback amount of Rs. 16,07,372/- claimed in the Shipping Bill No. ***** should not be reduced to Rs. 777335.99 (as per Annexure 'A') based on the value worked out in terms of under Rule 5 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007
- (c) The goods being exported under the Shipping Bills No. ***** and seized vide Panchnama dated 09.05.2012 should not be confiscated under Section 113(d) and section 113(i) of the Customs Act, 1962. However, as the goods were released provisionally and are not physically available for confiscation, why fine in lieu of confiscation should not be imposed on the same under Section 125 of Customs Act, 1962 and as to why the said fine should not be recovered by enforcing bond and bank guarantee submitted by the exporter.
- (d) Penalty under Section 114 and under Section 114AA of the Customs Act, 1962 should not be imposed upon the exporter for the aforesaid contraventions and deliberate omission and commission and as to why the said penalty should not be recovered by enforcing bond and bank guarantee submitted by the exporter."

(emphasis supplied)

7. The appellant filed a reply to the show cause notice and denied the allegations. The relevant portions of the reply are reproduced below:

"2. The noticee entered into individual contacts with the following foreign buyers for supply of boiler or sugar plant by the noticee:

- a) M/s. Kampangetch Bio Energy Co. Ltd., Thailand;
- b) M/s. Kakira Sugar Limited, Uganda
- c) M/s. Compania Agricola Industrial Ingenio Palo Gordo S.A., Guatemala
- d) M/s. Ingenio Magdalena S.A., Guatemala
- e) M/s. Arab Paper Manufacturing Co., Saudi Arabia; and
- f) M/s. Sugar & Allied Industries Ltd., Uganda

(individually herein after referred to as the "foreign buyer"). Copies of these contracts have been annexed as Annexure – 1.

3. These contracts provide for payment of lump sum price for the boiler/sugar plant by the foreign buyer to the noticee. The individual component cost or cost of inputs required for manufacture of such boiler/sugar plant, as the case may be, was not agreed between the noticee and the foreign buyer. **As per the terms of the contract, after entering into the contract broad billing break-up of the boiler/sugar plant is prepared by the noticee, which is approved by the foreign buyer.** This broad billing break-up only provides the value of broad categories or parts of the boiler/sugar plant and does not provides value of individual items or components to be exported by the noticee via several shipments. Representative copies of such broad billing break-up have been annexed as Annexure-2.

4. Due to the massive size of the boiler/sugar plant, as the case may be, the same was exported by the noticee to the foreign buyer in partial shipments consisting of various components of the boiler/sugar plant, to be commissioned at the place of import. These components were either manufactured by the noticee in India or procured by the noticee from various supporting manufactured by the noticee in India or procured by the noticee from various supporting manufacturers in India. Such third party components were supplied directly by the supporting manufacturer to the port of export under ARE-1.

Shipping bills for export of such components were filed by the noticee. Invoices in respect of such individual components were raised by the noticee, at the time of export, on proportionate basis (i.e., proportionate to the lump sum price agreed between the noticee and the foreign buyer).

5. All such shipments were covered under irrevocable letter of credit (herein after referred to as "LC"). Payment for such individual component of the boiler/sugar plant was made to the noticee based on the invoice generated by the noticee for such individual component on proportionate basis. Representative Copies of Bank Realization Certificates (herein after referred to as "BRC") along with the corresponding invoices have been annexed as Annexure-3."

(emphasis supplied)

8. The appellant also explained in the reasons for the difference in the value declared in the shipping bills and ARE-1 in paragraphs A.16, A.17 and A.18. These paragraphs are reproduced below:

A.16 The SCN has rejected the value of the individual components on the ground that value of such components as declared in the shipping bill by the noticee is more than the value declared in the ARE-1 prepared by the supporting manufacture. On account of such difference, the SCN has alleged over-valuation on part of the noticee and has rejected the value declared by the noticee in the shipping bills under Rule 8 of the Customs Valuation Rules.

A.17 It is submitted that FOB value of such components in the shipping bill is more than the value declared in the ARE-1 as the following cost and expenses were added in the value of such components by the noticee:

- Marketing Expenses;
- Overseas Agent's Commission;
- Inland transportation cost;
- Pre-shipment (FOB) expenses;

- Quality/Pre-shipment Inspection cost;
- Warranty obligation cost;
- Administrative cost relating to procurement of export goods;
- Design and engineering charges;
- Overheads; and
- Profit margin.

A.18 On account of addition of the aforementioned cost and expenses value of such components as declared in the shipping bill is more than the value declared in ARE-1.”

9. The appellant also explained why it was entitled to claim duty drawback on the FOB value declared in the shipping bills and the relevant paragraphs of the reply are reproduced below:

C.2. It is submitted that scheme for duty drawback at specified rates on export of goods manufactured in India has been provided under section 75 of the Customs Act. The manner and time limit for filing the claims are prescribed under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (herein after referred to as the “Drawback Rules”).

C.3. Under the duty drawback scheme, an exporter can opt for either All Industry Rate (herein after referred to as “AIR”) of duty drawback scheme or brand rate of duty drawback scheme. AIR of duty drawback is issued by way of Notification in the official gazette. During the relevant period, AIR of duty drawback was issued vide Notification No. 68/2011-Cus (N.T.) dated 22.09.2011 (herein after referred to as the “Drawback Notification”;

C.5. In terms of the aforementioned provision, it is submitted that in the present case the noticee is entitled to duty drawback at FOB value of exports made. The same cannot be restricted to the value declared in the ARE-1 in terms of Note 4 of the Drawback Notification. Therefore, in the present case the duty drawback benefit to the noticee cannot be restricted to the ARE-1 value and the same should

be made available to the noticee on FOB value of the export goods as declared in the subject shipping bills.”

10. The appellant also pointed out that the goods were not liable to confiscation and penalty could not be imposed under section 114 of the Customs Act.

11. The Joint Commissioner passed an order dated 24.11.2015 confirming the proposals made in the show cause notice on the ground that the appellant had intentionally overvalued the goods that were exported with an intent to avail higher duty drawback benefit. The total declared value of Rs. 6,90,25,291/- was rejected under rule 8 of the 2007 Customs Valuation Rules and re-determined as Rs. 3,42,39,898/- under rule 5 of the 2007 Customs Valuation Rules. Consequently, the duty drawback benefit of Rs. 16,07,372/- accruing the appellant was reduced to Rs. 7,77,336/-.

12. The appellant challenged the said order by filing an appeal before the Commissioner (Appeals) who, by order dated 20.09.2019, dismissed the appeal and confirmed the order passed by the Joint Commissioner. The relevant portions of the order are reproduced below:

“5.4 *** I find that the appellant informed that their export sale price is higher than their purchase price due to various costs, expenses in addition to purchase price. However, the appellant failed to provide amount wise distribution of cost and expenses under various heads. Therefore, the ARE-1 value were taken as PMV (Present Market Value) for determination of the price of the export goods.**

5.5 I find that the total value as per the ARE-1 involved in sixteen shipping bills has been arrived at as Rs. 3,42,39,898/- and the same is treated as the re-determined value in terms of Rule 5 of the Customs Valuation (Determination of value of Export Goods) Rules, 2007. *****

5.6 I find that as per the general notes to duty drawback, the figures shown in column (4) and (6) in the drawback schedule refer to rate of drawback expressed as a percentage of free on board (FOB) value of the export goods. **As already discussed hereinbefore, the FOB value of the impugned goods has been re-determined as Rs. 3,42,39,898/- under Rule 5 of the Customs Valuation (Determination of value of Export Goods) Rules, 2007 in respect of the goods attempted to be exported under the sixteen shipping bills and accordingly, the drawback is also required to be re-worked based on the re-determined FOB value which has been worked out as Rs. 7,77,336/-.**

5.7 I find that as already discussed hereinbefore, the impugned goods attempted to be exported under the sixteen shipping bills were overvalued with the intention to claim excess drawback and as such the goods have been rendered liable to confiscation under Section 113(i) of the Customs Act, 1962.

5.8 I find that the exporter has wrongly mentioned the transaction value (fob value) in the impugned sixteen shipping bills which act of omission and commission on the part of the exporter has rendered the goods liable to confiscation under Section 113(i) of the Customs Act, 1962 and as such also rendered the exporter liable to penalty under Section 114(iii) of the Customs Act, 1962. I also find that the exporter has subscribed to a declaration under Section 50(2) of the Customs Act, 1962 as to the truth of the contents mentioned in the shipping bills. However, value was found to be wrongly mentioned and the exporter by willfully and knowingly made the declaration in violation of the provisions of Section 50(2) **ibid and as such have rendered themselves liable to penalty under Section 114AA of the Customs Act, 1962."**

(emphasis supplied)

13. This appeal has been filed by the appellant to challenge the aforesaid order of the Commissioner (Appeals).

14. Shri B.L. Narasimhan, learned counsel for the appellant assisted by Shri Anurag Kapur, Ms. Osheeba Basir and Ms. Rubel Bareja made the following submissions:

(i) The appellant is entitled to avail duty drawback on the FOB value of the goods declared in the shipping bills. Thus, the appellant had rightly availed duty drawback on the FOB value of the subject goods;

(ii) The customs authorities have no power under law to change or re-determine the FOB value of the goods. The FOB value of the individual components declared by the appellant, therefore, could not have been rejected. In this connection, reliance has been placed on the following decisions of the Tribunal:

(a) **Jayantah Trading Co & Anr. vs. Commissioner of Customs, New Delhi⁸;**

(b) **JBN Apparels Private Limited vs. Commissioner of Customs, New Delhi⁹;**

(c) **Mahir Fashions Private Limited & Ors. vs. Commissioner of Customs-(ICD), New Delhi¹⁰;**

(d) **Mahajan Fabrics Private Limited vs. Principal Commissioner of Customs (Export)-New Delhi (ICD TKD)¹¹; and**

(e) **Modak Dyeing & Printing Co. Private Limited vs. Commissioner of Customs, New Delhi¹².**

(iii) The ingredients of section 14 of the Customs Act stood satisfied and so the question of invoking rule 8 of the 2007 Customs Valuation Rules does not arise;

8. Customs Appeal No. 53959 of 2023 decided on 06.06.2025

9. Customs Appeal No. 50127 of 2024 decided on 07.03.2025

10. Customs Appeal No. 332 of 2011 decided on 22.07.2025

11. Customs Appeal No. 51786 of 2022 decided on 19.05.2025

12. Customs Appeal No. 53962 of 2023 decided on 29.07.2025

- (iv)** The export price in full has been remitted to the appellant by the foreign buyer and so the question of over-valuation of such price by the appellant for availing higher rate of duty drawback does not arise;
- (v)** The value declared in the shipping bills is correct and in consonance with rule 5 of the 2007 Customs Valuation Rules and so the re-determination of the transaction value under rule 5 of the 2007 Customs Valuation Rules is incorrect;
- (vi)** The goods were not liable to confiscation under section 113 of the Customs Act;
- (vii)** Redemption fine imposed under section 125, when goods were not available for confiscation, is liable to be set aside; and
- (viii)** Penalty imposed under sections 114 and 114AA of the Customs Act is liable to be set aside.

15. Shri Rakesh Kumar, learned authorized representative appearing for the department, however, supported the impugned order and made the following submissions:

- (i)** The appellant had filed the shipping bills of heavy engineering goods with over-valuation as compared to the All-Industry Rate prices and it was found that the appellant had mis-declared the goods to be exported in terms of valuation along with wrong claim of the drawback benefits;
- (ii)** FOB values in shipping bills were substantially higher than the values reflected in ARE-1 Forms filed by supporting manufacturers. Goods under 16 shipping bills were seized under section 110 of the Customs Act on suspicion of over-valuation and potential excess duty drawback claim;

- (iii)** The appellant accepted the mistake of over-valuation by a letter dated 15.04.2013 and asked for the determination of drawback on the All-Industry Rate value as the FOB value;
- (iv)** The appellant, by letter dated 02.12.2013, also confirmed that the valuation was done on pro rata basis against partial shipments and residual value of other consignments;
- (v)** The declared value was correctly rejected under rule 8 of the 2007 Customs Valuation Rules read with section 14 of the Customs Act and re-determined under rule 5 of the Customs Valuation Rules read with section 14 of the Customs Act;
- (vi)** The seized goods were liable to confiscation under section 113 of the Customs Act; and
- (vii)** The duty drawback claimed by the appellant was rejected for all the 16 shipping bills as an attempt was made by the appellant to improperly export the goods.

16. The submissions made by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

17. The issue that arises for consideration is whether the appellant had overvalued the export goods in order to avail higher duty drawback.

18. It is noticed that the appellant had entered into individual contracts with the following foreign buyers (collectively referred to as the contracts) for supply of the goods:

- (a)** M/s. Kampangpetch Bio Energy Company Limited, Thailand;
- (b)** M/s. Ingenio Magdalena S.A., Guatemala;
- (c)** M/s. Compania Agricola Industrial Ingenio Palo Gordo S.A. Gautemala;
- (d)** M/s. Kakira Sugar Limited, Uganda;
- (e)** M/s. Sugar & Allied Industries Limited, Uganda; and

(f) M/s. Arab Paper Manufacturing Co., Saudi Arabia.

19. The contracts provide for payment of a lumpsum price by the foreign buyers for the supply of goods.

20. The relevant portions of one such contract entered into between the appellant and M/s. Kampangpetch Bio Energy Company Limited are reproduced below:

2.0 SCOPE OF SUPPLY

- 2.1 "Scope of Supply" shall have the meaning as defined in the Appendixes 2 to 10, and shall included the design, engineering, procurement and offshore supply of Machinery & Equipment for three numbers 150 TPH, 40 Bar (g) 450 ± 5deg.C Travelling Grate Bagasse Fired Boilers.
- 2.2 The SUPPLIER shall perform the Work and shall supply the Machinery & Equipment in accordance with the specifications and the drawings and guarantee that the Boiler Plants shall perform to all specifications in this Contract until the end of Warranty Period.

3.0 CONTRACT PRICE

- 3.1 **The Contract Price agreed for design, engineering, manufacturing, procurement, testing and supplying the Machinery & Equipment CIF Bangkok/Laem Chabang Port (as per INCOTERMS 2000) is US \$20,150,000.-(US Dollar Twenty Million One Hundred Fifty Thousand Only)**
- 3.2 The above Contract Price is inclusive of all costs, expenses, overheads, taxes, duties and levies which are levied on supply of the Machinery & Equipment and payable anywhere when such Machinery & Equipment are manufactured, procured and/or delivered CIF Bangkok/Laem Chabang Port. However, the OWNER shall be responsible to pay all taxes, duties and levies as are levied in Thailand on

the import of the Machinery & Equipment CIF Bangkok/Laem Chabang Port.

- 3.3 The above Contract Price shall be fixed and not subject to change, escalation or revaluation. However, in case the Delivery Date is delayed because of suspension being ordered by the OWNER or for other reasons attributable to the OWNER for more than 30 days, the Contract Price shall be subject to revision for the escalation to be mutually discussed and agreed between the OWNER and the SUPPLIER.

4.0 TERMS OF PAYMENT

- 4.1 **The OWNER shall pay the Contract Price of US \$20,150,000.-(US Dollar Twenty Million One Hundred Fifty Thousand Only) as under :-**

- (i) **10% of the Contract Price** shall be paid by direct transfer to SUPPLIER's Bank, as advance payment against submission of Proforma Invoice by the SUPPLIER along with Advance Payment Bank Guarantee for equivalent value as detailed in clause 5.1(i).
- (ii) **Balance 90% of the Contract Price** on prorata basis through an irrevocable Letter of Credit (as per the text agreed by both Parties), permitting payments at sight in New Delhi against CIF Bangkok/Laem Chabang Port (INCOTERMS 2000) shipment of Machinery & Equipment against submission of following documents:-
- (a) Signed Commercial Invoices (5 copies)
 - (b) 2/3 set of clean original Bill of Lading
 - (c) Certificate of Country of Origin of goods (5 copies)
 - (d) Packing List (5 copies)
 - (e) SUPPLIER's Certificate that three originals bill of lading and a complete set of non negotiable shipping documents have been sent to the OWNER.

- 4.2 **The Letter of Credit for 90% of the Contract Price in clause 4.1 above valid up to 30 days beyond the last shipment date**

provided in master schedule (Appendix 21) shall be arranged by the OWNER within 60 days from contract signing by the Parties through a Bank agreed by both Parties acceptable to the SUPPLIER. In case Delivery Date is extended, the Letter of Credit shall be extended as agreed by both Parties.

4.3 All bank charges for establishment of Letter of Credit, any amendment thereof or any other charges of the OWNER's Bank, shall be borne by the OWNER. However, all negotiations and other charges of SUPPLIER's shall be borne by the SUPPLIER."

(emphasis supplied)

21. The appellant had submitted a letter dated 15.05.2012 during investigation and the same was enclosed as relied upon document no. 4 to the show cause notice. The said letter describes in detail the factual position and is reproduced below:

"1. The seven shipping bills held up in Customs relate to partial shipments of machinery equipments and goods to our overseas buyers as follows:

| Shipping Bill No's. and Date | FOB Value (INR) | ARE-1 Value (INR) | Export Invoice No. | Name of Overseas Buyer |
|------------------------------|-----------------|-------------------|--------------------|---|
| 845445 12-04-2012 | 94,04,033.55 | 47,36,822 | ISGEC0088/F12 | M/s. Thip Kamphaenghet Bio Energy Co. Ltd., Thailand |
| 8688256 28-04-2012 | 2,74,896.80 | 31,980 | IJT/EXP-3390/F11 | M/s. Kakira Sugar Limited, Uganda |
| 8687973 28-04-2012 | 2,30,979.70 | 24,000 | ISGEC0075/F12 | |
| 8684271 28-04-2012 | 1,14,065.32 | 22,000 | ISGEC0074/F12 | |
| 8554408 19-04-2012 | 76,65,866.36 | 20,10,000 | ISGEC0073/F12 | |
| 8661049 26-04-2012 | 3,24,17,361.47 | 1,65,00,000 | ISGEC0120/F12 | |
| 8415702 10-04-2012 | 12,39,476.41 | 1,40,142 | IJT/EXP-3604/F11 | M/s. Compania Agricola Industrial Ingenio Palo Gordo, Gautemala |

2. In this connection we have to submit as follows:

- a) Export order price of machinery, equipments and goods is negotiated/settled with overseas buyer on lump sum basis.
- b) **Such negotiated sale price is split and distributed over various machinery, equipments and goods to be supplied to overseas buyers.**
- c) **As soon as the goods forming a container load are ready, export invoice is raised on approx pro-rata value basis in accordance with such split export order sale price break-up.**
- d) **Shipments to all above overseas buyers are covered by irrevocable LCs. Copies of each of following export LC and export order sale prices break-up settled with the overseas buyers are enclosed.**

| Name of Overseas Buyers | LC No. | LC Amount (in USD) |
|--|------------------|--------------------|
| M/s. Kakira Sugar Ltd. | 779-01-0100016-I | 15,930,000 |
| M/s. Thip Kamphaenghet Bio Energy Co. Ltd. | 8587IL10003555 | 18,135,000 |
| M/s. Compania Agricola Industrial Ingenio Palo Gordo | MBI-2010/00460 | 10,671,750 |

- e) **Each LC permits partial shipments and payments on pro-rata basis against shipping documents from time to time.**

3. Our export sale price (FOB) is higher than our purchase price (ARE-1 Value) inter-alia due to following main reasons:-

- a) **Our Export price includes following costs and expenses in addition to the purchase price of goods:-**
 - i) Marketing Expenses.
 - ii) Overseas agent's commission
 - iii) Inland transportation cost
 - iv) Pre-shipment (FOB) expenses
 - v) Quality/Pre-shipment Inspection cost
 - vii) Administrative cost relating to procurements of export goods
 - viii) Design and engineering charges
 - ix) Overheads
 - x) Bank Guarantee charges, LC Negotiation and other Bank charges.
 - xi) Insurance charges
 - xii) Favorable foreign exchange fluctuation
 - xiii) Reduction in ocean freight charges

- xiv) Our specialists frequent overseas travelling costs to attend Review Meetings with overseas buyers
- xv) Profit margin

- b) In certain cases residual pro-rata billing amount available at the time of last partial shipment of a particular export item is much higher than ARE-1 value of the goods of last partial shipment. This is because there is a lumpsum price which is to be distributed over part shipments running into hundreds and the accumulated effect of approximate pro-rata billings from time to time, gets magnified in the last few shipments.
- c) We supply quality goods in accordance with international standards and are able to secure export orders at prevailing international prices. We are a preferred supplier as we endeavour to meet delivery dates. This results in our being able to secure a high margin on various bought-out goods, though not necessarily in all cases.

4. Our Company and/or any of our Directors do not have any relationship with the overseas buyers and/or our supporting manufacturers.”

(emphasis supplied)

22. This is precisely what was stated by the appellant in the reply filed to the show cause notice.

23. The first and foremost issue that arises for consideration is whether the FOB value can be modified by a stranger to the contract.

24. The scheme for duty drawback on export of goods manufactured in India is provided under section 75 of the Customs Act and the manner and time-limit for filing the claims are prescribed under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995¹³. During the relevant period, All-Industry Rate of duty drawback was issued by a Notification dated 22.09.2011¹⁴. Note 4 to the Drawback Notification specifically

13. the Drawback Rules

14. the Drawback Notification

provides that the All-Industry Rate of duty drawback would be available as a percentage of FOB value of the export goods. Neither the Drawback Rules nor the Drawback Notification make any specific reference to the 2007 Customs Valuation Rules for determining the quantum of drawback. The drawback is disbursed on account of export of goods and realization of export proceeds. Therefore, the 2007 Customs Valuation Rules for redetermination of value of subject goods cannot be applied and the appellant would be eligible to avail duty drawback on the FOB value indicated on the shipping bills.

25. The FOB value, internationally known as INCOTERM, is an accepted commercial term which determines the rights and liabilities of the buyer and seller in a transaction. In pursuance of the terms of the contract, if it is agreed upon between the parties to the contract that the goods shall be exported on the basis of the FOB value, then the liability of the exporter is limited to the point where the goods are put on board and thereafter it is on account of the importer who undertakes all costs and risks till the goods are transported to the destination port. The FOB value is the product of negotiations and deliberations between the parties to the contract, which value cannot be modified by any stranger to the contract by virtue of the principle of "privity of contract". The FOB value of the individual components declared by the appellant, therefore, could not have been rejected.

26. The amount in the main contract was for the entire sugar plant/boiler. However, payments were made to the appellant as per the invoices raised by the appellant for the export of individual components. Thus, the price actually paid was the value as indicated in the corresponding shipping bills and the invoices generated by the appellant for such individual components, the total of which was equal to the price agreed as per the agreement

between the foreign buyer and the appellant. The values declared in the shipping bills have been rejected solely on the ground that there was a difference in the values of individual components as declared by the appellant in the shipping bills and the corresponding ARE-1 prepared by the supporting manufactures. There is no other evidence that was relied upon furnished to corroborate this allegation. The transaction value of the goods under section 14 of the Customs Act is the FOB value declared in the shipping bills.

27. This is what was precisely held by the Tribunal in **Jayantah Trading**. The said appellant exported garments under various shipping bills. On an allegation that Jayantah over-valued the goods in order to avail inadmissible duty drawback, a show cause notice was issued for re-determining the FOB value of the goods. The adjudicating authority re-determined the value of the goods and also imposed penalties. The Tribunal held that the customs officer cannot modify the FOB value:

"11. The question which arises is what is the FOB value and if it can be re-determined by the Customs Officers. FOB value is not defined in the Act. It refers to the "Free on Board" value agreed to between the buyer and the seller of the goods. It is the transaction value for the goods. **It is the price which the buyer agrees to pay the seller for the goods without including the costs of transportation and transit insurance.** FOB is one of the INCOTERMS i.e., international commercial terms which are the universally understood standards to determine the risks and responsibilities and liabilities of the buyers and sellers. If goods are sold on FOB basis, the seller is free from all his responsibilities once the goods are put on board the ship or aircraft. If goods are sold on C & F basis, the seller is also responsible for the transport of the goods upto the place of destination. However, the seller is not responsible for any risk which may occur

during the transportation. If the goods are sold on CIF basis, the seller is responsible for delivery of the goods including the cost of transportation and transit insurance upto the port of delivery. What is common in all these cases is that it is the price agreed to between the buyer and the seller.

12. It is a universally known principle that a stranger to the contract cannot change the terms of contract. If the buyer and seller agree to a particular price on FOB basis, no stranger to the contract including the Customs Officers, DRI etc., have any locus standi to modify the FOB value.

14. Generally speaking, the transaction value shall be the assessable value on which duty should be determined-whether it is import duty or export duty. However, there are circumstances under which the transaction value can be rejected by the Customs Officers and the value can be re-determined as per the Valuation Rules adopting other methods. **What needs to be noted is that if the transaction value is rejected and the value is re-determined by the officer, he is not changing and he cannot change the transaction value. All he is doing is refusing to accept the transaction value as the assessable value and is determining the assessable value through some other method.**

15. An illustration would make this position clear. 'A', an overseas seller sells goods to 'B' in India for \$ 1000. The proper officer of Customs rejects this transaction value and redetermines the value as \$2000. The assessable value will be \$2000 and duty has to be paid on this value. However, 'B' has to remit to 'A' only \$1000 as agreed to between them. The transaction value will continue to be \$1000 while the assessable value will be \$2,000/-. Both section 14 of the Act and the Valuation Rules are only meant to determine the assessable value and not to re-determine the transaction value. No power has been

conferred under the Customs Act or Rules on any officer to change the transaction value. **Therefore, the FOB value of the exported goods, which is the transaction value, cannot be modified by any officer. The re-determination of FOB value by the Additional Commissioner is without any authority of law.** The Commissioner (Appeals) erred in upholding such redetermination of FOB value.

16. The next question is if the drawback and other export incentives must be paid on the FOB value or on the value redetermined by the officer. If the drawback schedule provides for payment of drawback as a percentage of FOB value, it should be paid so. No officer has the power to modify the drawback schedule in any particular case and hold that it shall, instead, be paid on some value determined by him/ her.

17. A doubt may arise as to why drawback and other export incentives have been made payable as a percentage of the FOB value and not on the basis of the assessable value under the Act which is basis for determining the duty. The reason for this is self-evident. Drawback and other export incentives are given to encourage exporters to export and to obtain remittances of sale proceeds.

18. The remittance which the exporter is to obliged to obtain is the price for which the exporter had sold the goods. If the exporter had sold the goods for \$ 2000 he has to obtain remittance of \$2000. It will not be sufficient if the exporter obtains remittance of an amount equal to the value determined by the customs officer. There is a direct nexus between the drawback and other export incentives and the receipt of remittance. In fact, the drawback rules provide that if the remittance is not received, the drawback can be recovered. Similarly, in some schemes like Merchandise Export from India Schemes¹⁰, the exporter is required to apply for the scrip along with bank relieasing certificate showing that the remittance has been received. In other words, neither the transaction value (FOB value) nor

the obligation on the exporter to realize remittance of the FOB value can be modified by any customs officer. Therefore, export incentives also need to be paid accordingly as per rules.”

(emphasis supplied)

28. This is what was also held by a division bench of the Tribunal in **Mahir Fashions** and the relevant portion of the order:

“10. **What needs to be noted is that there is a clear distinction between the transaction value (which cannot be altered by any stranger to the contract) and the value under section 14 and the Valuation Rules (which can be determined by the proper officer).** If the proper officer rejects the transaction value and determines the assessable value through some other methods such as, the value of contemporaneous export goods of similar market assessment, etc., he refuses to accept the transaction value as the assessable value. He does not change the transaction value.”

(emphasis supplied)

29. It also needs to be noted that the full export price as declared in the shipping bills and the corresponding invoices has been received by the appellant.

30. The Commissioner (Appeals) was, therefore, not justified in placing reliance upon the values declared in the ARE-1 forms. The appellant has described in detail, as has been noted above, why the values reflected in the ARE-1 forms were lesser than the FOB values not only in the letter dated 15.05.2012 submitted by the appellant during the investigation but also in the reply filed by the appellant to the show cause notice. It was stated by the appellant that the following costs were added to the value of components by the appellant:

(i) Marketing Expenses;

- (ii) Overseas Agent Commission;
- (iii) Inland transportation cost;
- (iv) Pre-shipment (FOB) expenses;
- (v) Quality/Pre-shipment Inspection cost;
- (vi) Warranty obligation cost;
- (vii) Administrative cost relating to procurement of export goods;
- (viii) Design and engineering charges;
- (ix) Overheads; and
- (x) Profit margin.

31. In this view of the matter, the FOB value declared by the appellant could not have been rejected.

32. It would, therefore, not be necessary to examine whether the transaction value could have been re-determined under rule 5 of the 2007 Customs Valuation Rules.

33. Learned authorized representative appearing for the department placed reliance on that portion of the impugned order that places reliance on the statements made by persons under section 108 of the Customs Act. These statements cannot be considered as relevant as the provisions of section 138B of the Customs Act were not complied with. In this connection, reliance can be placed on the decision of the Tribunal in **M/s. Surya Wires Pvt. Ltd. vs. Principal Commissioner, CGST, Raipur**¹⁵. It is, therefore, not possible to accept this contention of the learned authorized representative.

34. The imposition of fine under section 125 of the Customs Act and imposition of penalties under section 114 and 114AA of the Customs Act, for the reasons above, cannot be sustained.

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35. It would, therefore, not be necessary to examine the other contentions raised by the appellant.

36. Thus, for all the reasons stated above, the order dated 20.09.2019 passed by the Commissioner (Appeals) is set aside and the appeal is allowed.

(Order Pronounced on **16.10.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Shreya