

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

PRINCIPAL BENCH – COURT NO. 4

Customs Appeal No. 724 of 2005

(Arising out of Order-in-Original No. VIII (ICD)/6/TKD/Adj/Commr./88/05 dated 13.07.2005 passed by the Commissioner of Customs, ICD, TKD, New Delhi)

M/s Texcomash Export & Sh. N.K. Rajgarhia Appellant
Its Sole-Proprietor
D-52, Defence Colony,
New Delhi-110020

Versus

Commissioner of Customs, New Delhi Respondent
Inland Container Depot,
Tughlakabad, New Delhi-110020

Appearance:

Present for the Appellant: Shri A.K. Jain, Advocate

Present for the Respondent: Shri Rohit Issar, Authorized Representative

CORAM:

Hon'ble Dr. Rachna Gupta, Member (Judicial)

**Date of Hearing : 01/09/2025
Date of Decision : 03/11/2025**

Final Order No. 51655/2025

Dr. Rachna Gupta:

The present appeal is filed to assail the Order-in-Original No. 6/88/05 dated 13.07.2005. The appeal was earlier allowed by way of remand vide final order of this Tribunal, bearing No. 355/2005 dated 15.03.2005. Later again it was allowed vide final order bearing No. 56848-56849/2017 dated 25.08.2017 setting aside the

Show Cause Notice¹ for want of competent jurisdiction with the DRI officers to issue SCN. The issue was decided by hon'ble High Court, Delhi in the case of **Mangli Impex** in WP No. 441/2013. Pursuant to directions of remand by hon'ble High Court Delhi, the matter has been dealt with again.

2. The facts, in brief, relevant to be adjudicated are, that the appellants had made 29 export shipments of children's garments through ICD, Tuglakabad, New Delhi during November 1993 to June 1994 and 9 export shipments of ladies garments through Mumbai Customs House during September 1994 to October 1994.

3. During the course of examination of goods at the time of export, the proper officer formed the opinion that the goods have been highly over-invoiced with the intention of claiming inflated amount of drawback. Though the export was allowed provisionally but the market enquiries were conducted. Based whereupon the Assistant Collector of Customs, ICD passed the assessment order No. 21/1994 dated 16.05.1994 and 49/1994 dated 27.07.1994 reducing the value of Rs. 210/- per set for the purpose of drawback. The said order was appealed by the appellant. However, the Collector (Appeals), New Delhi vide Order-in-Appeal No. 135/ICD/1994 dated 27.01.1995 and 5/ICD/1995 dated 27.01.1995 rejected the appeals. The appellant preferred revision application against the said Order-in-Appeal. Vide Order No. 466-467/1995 dated 16.08.1995, the matter was remanded to Assistant Commissioner for de novo adjudication after making fresh enquiries

1 SCN

from reputed exporters in association with the representative of the appellants.

4. Meanwhile the drawback was paid to the appellant at the reduced value of Rs. 210 per set vide three cheques as below:

- (i) Cheque dated 01.06.1995 for Rs. 47,01,305/-;
- (ii) Cheque dated 24.08.1995 for Rs. 2,23,760/-; &
- (iii) Cheque dated 22.08.1995 for Rs. 39,56,017/-

Post remand also the value was assessed @ Rs. 210 per set only the initial order was one bearing No. 41/1995 dated 16.11.1995 and the Order-in-Appeal was bearing No. 406/1999 dated 26.03.1999. However, vide this appellate order, the FOB value of the goods was enhanced to Rs. 242/-. The department had not challenged the said order rather had accepted the value of Rs. 242/- for the purpose of appellant's entitlement to the drawback in a petition filed by the appellant in Delhi High Court. Based on the said observations and the subsequent investigation from Russian Customs culminating into a primary reported dated 21.06.1995, still the show Cause Notice bearing No. 29/C-1/1994 dated 07.01.2000 was served upon the appellants proposing confiscation of the goods exported by the appellant in terms of Section 113(b) and (l) of the Customs Act, 1962. The total amount of drawback claimed by them in respect of the consignment was proposed to be disallowed in terms of Section 75 and 76 of Customs Act, 1962 read with Rule 16 & 16A of the Customs and Central Excise Duties Drawback Rules, 1995. The amount of drawback of Rs. 88,87,082/- and Rs. 31,66,822/- which was earlier sanctioned to

them but was refunded by them to the department during the investigations, was also proposed to be appropriated. Penalty was also proposed to be imposed upon the appellant in terms of Section 114 of the Customs Act.

5. The said proposal was initially confirmed vide Order-in-Original bearing No. 61/2005 dated 13.07.2005 was passed vide which the confiscation of goods exported was ordered and the drawback amount of Rs. 31,66,822/- was disallowed. Appropriating the said amount as it was already deposited. Being aggrieved, the present appeal before this Tribunal was filed which was decided vide Final Order No. 355/2005 dated 15.03.2005 by setting aside the impugned order, it relates to 29 shipments of children's garments. However, with respect to the 9 shipments of consignment of ladies garments, since there were found no separate findings, the matter was remanded to the jurisdictional adjudicating authority directing to re-adjudicate the issue relating to 9 shipments of ladies garments. Pursuant to the said directions of remand the impugned order in original No. 6/88/2005 dated 13.07.2005 was passed, disallowing the drawback amount of Rs. 31,66,822/- under Section 75 read with Rule 16 & 16A of the Customs and Central Excise Duties Drawback Rules, 1995. Ordering appropriation of the said amount as it was already refunded by the importer-appellant and by ordering confiscation of the goods (ladies garments) of the 9 shipments in question. Being aggrieved, the appellant is before this Tribunal.

6. I have heard Shri A.K. Jain, learned counsel for the appellant and Shri Rohit Issar, learned Authorized Representative for Revenue.

7. Learned counsel for the appellant has submitted that the impugned order suffers from the *vice* of jurisdiction. It is submitted that the show cause notice was not issued by the proper officer as is required under Drawback Rule 16/16A but by ADG, DRI, New Delhi. It is submitted that decision of Hon'ble Apex Court in the case of **Cannon India Pvt. Ltd. Vs. Commissioner of Customs**² does not apply to the present case as the foundation of the said judgement of Supreme Court in review is Notification No. 44/2011-Cus. dated 06.07.2011 whereas the present case is of the year 2000 (SCN dated 07.01.2000) i.e. 11 years ago the said notification.

7.1 It is further submitted that Show Cause Notice issued under Drawback Rules, 1995 which came into being on 26.05.1995 superseding and omitting Drawback Rules, 1971. However, in respect of the exports shipments made thereunder between 19.09.1994 to 06.10.1994, applicability of 1995 Rules without any saving for recovery was void *ab initio*. Reliance is placed in the case of **Kolhapur Canesugar Works Ltd. Vs. UOI**³. Invocation of drawback Rule 16A which came into being on 06.12.1995 vide Notification No. 72/1995-Cus(NT), for recovery of drawback paid on 09.01.1995 was without jurisdiction, the rule not being retrospective. The case of **Rangi International** (GOI) in the case

2 2024 (265) ELT 17 (SC)

3 2000 (119) ELT 257 (SC)

of **Padmini Exports Vs. UOI** and 2020 (371) ELT 97 (P&H) in the case of **Famina Knit Fabs Vs. UOI** is relied upon.

7.2 It is further submitted that Section 73 of FERA, 1973 which Act was repealed on 29.12.1999 could not be made use of under drawback rules 16 & 16A ignoring Section 73A solely and exclusively meant for punishing the violation of Section 73 and only authorizing RBI for the same apart from the same not being covered by Section 67 FERA to be deemed as "prohibition" under Section 11 of the Customs Act. Export proceeds having already been received in India on 08.11.1994 and 09.11.1994 through authorized bank, drawback Rule 16A could not be invoked. Because of all the 9 shipments having admittedly reached Dubai, export was complete immaterial of the same not reaching Russia thereafter, thereby fully entitling the drawback in respect thereof. The 9 consignments exported 11 years ago and not available at all cannot be confiscated. Show cause notice dated 07.01.2000 received on 10.01.2000 seeking recovery of drawback under Drawback Rules 16 & 16A in respect of the export shipments made during 19.09.1994 to 06.10.1994, being beyond the period of 5 years, was barred by limitation. Reliance is placed on the decision in the case of **Padmini Exports Vs. UOI**⁴ and in the case of **Famina Knit Fabs Vs. UOI**⁵. Above all, the show cause notice was not to be issued ignoring the orders already passed by the GOI (RA) on 31.08.1998 and by CC (Appeals), Mumbai on 31.03.1999 allowing the drawback on FOB value basis in respect of all the subject 9 shipments.

4 2012 (284) ELT 490 (Guj.)

5 2020 (371) ELT 97 (P&H)

8. The learned Department Representative while rebutting these submissions mentioned that goods exported from Bombay in respect of 9 shipping bills had not reached Moscow, which is confirmed by the report of the Russian Customs as there were admittedly delivered in Dubai to M/s M.K. International as confirmed by the delivery order issued by the agent of the shipping company. As per the Reserve Bank of India's Circular no third country exports were permitted to be financed out of the funds from repayments of the state credit. M/s Texcomash Exports, the appellant had received the remittance in India rupees out of this fund of the state credit. Therefore, there is clear violation of the Reserve Bank of India Circular which was issued under Section 73(3) of the Foreign Exchange Regulation Act, 1973. Contravention of this Circular makes goods exported by M/s Texcomash Exports liable for confiscation under Section 113(d) of the Customs Act. The judgment cited by the exporter will not be applicable in this case as that case was not subject to Reserve Bank circular. In the given circumstances, the export remittances by Texcomash in respect of these 9 consignments since exports cannot be treated as export proceeds in respect of Russian consignee, as per the second proviso to Section 75(1) of the Customs Act, where any drawback has been allowed on any goods and the sale proceeds in respect of such goods are not received by the exporter in India within the time allowed under FERA 1973 and such drawback shall be deemed never to have been allowed and such amount is recoverable under Rule 16 and 16A of the Customs and Central Excise Duties Drawback Rules, 1995. Therefore,

disallowance of the drawback under Section 75 read with Rule 16 and 16A of the Customs and Central Excise Duties Drawback Rules, 1995, is right and justified. Impressing upon the competence of DRI officers to issue SCNs, as established by hon'ble apex Court, learned Departmental Representative has prayed for dismissal of appeal.

9. Having heard both the parties the rival contentions and perusing the entire record, it is observed that the appellant had exported children's garments vide 29 shipments and ladies garments, vide 9 shipments, to Russia under drawback during the period from November 1993 to June 1994. The export were alleged over-valued the value was reassessed at Rs. 210/- per set as the cost price of the impugned goods. However, Government of India vide Order No. 406/1999 dated 26.03.1999 after arriving at difference of 15% on account of transportation and other expenditure enhanced the FOB value to Rs. 242/- per set and ordered settlement of drawback as per law. The order was still challenged but at the second round of litigation also the value was maintained at Rs. 242/- for the amount of drawback to be settled on the said amount as per law.

10. The export were made in accordance of Protocol signed between India and Russia in the year 1992. According to which Indian Government was not required to pay the money to the Russian supplier but instead was to put the money to a special account to Reserve Bank of India. The Russian supplier had the right to use the money in this account for buying goods in the Indian market. It is observed that despite Government of India

enhanced the value at Rs. 242/- per set but the drawback was paid at the value of Rs. 210 per set and an amount of Rs. 47,01,305/-, Rs. 2,23,760/- and Rs. 39,56,017/- total amounting to Rs. 88,81,082/- was paid to the appellant vide separate cheques dated 01.06.1995, 24.08.1995 and 22.08.1995.

11. Later, at the stage of subsequent investigation and in response to a summon dated 19.02.1996, to exhibit the cooperation and to avoid any situation of doubt regarding his bona fide, the appellant had paid back the drawback amount to the Government by way of two Demand Drafts of Rs. 88,87,082/- and Rs. 31,66,822/-. At the conclusion of the investigations, the department observed that the market value of the garments exported by the appellant was less than the drawback claimed. Hence the drawback amount was proposed to be inadmissible to the appellant in terms of Section 76(1)(b) of the Customs Act. The said proposal was finally adjudicated by this Tribunal vide Final Order No. 355/2005 dated 15.03.2005 holding appellant entitled for the drawback, however, with respect to 29 shipments of children garments only. With respect to the 9 shipment having consignment of ladies garments, the matter was remanded back for the reason that the adjudicating authority in the order in original No. 56/2000 dated 28.11.2003 had not arrived at any findings.

12. Pursuant to that remand order the impugned order No. 61/2005 dated 13.07.2005 was passed still holding the appellant ineligible for the drawback amount of Rs. 31,66,822/- and also ordered the confiscation of those goods on the ground that the goods were not delivered to Russia. Also on the ground that the

Landing certificates with reference to these consignments found fraudulent by the Russian Customs. Circular No. 30/1993 dated 28.09.1993 issued by Reserve Bank of India and that the funds for repayment of state credits were to be utilized for export of goods to the Russian federation only and no third country exports were permitted to be financed out of the funds from such repayment of state credit. Since the goods were delivered in Dubai to M/s MK International as got confirmed by the delivery order issued by the agent of shipping company. The amount received as purported export remittances by the appellant were denied to be treated as export proceeds. As such, the drawback was disallowed to the appellant.

13. In the light of above discussed facts of the present case the only issue need adjudication herein is:

“Whether appellant is entitled to claim drawback in respect of 9 shipments of ladies garments which did not reach Russia.”

14. Foremost, we have perused the drawback Rules. Rule 2(a) reads as follows:

“Drawback” - In relation to any goods exported out of India, means the refund of duty paid on importation of such goods in terms of section 74 of the Customs Act;

Sub-Rule – (b) defined export" to mean with its grammatical variations and cognate expressions means taking out of India to a place outside India and includes loading of provisions or store or equipment for use on board a vessel or aircraft proceeding to a foreign port or airport.”

15. The perusal of both these provisions makes it abundantly clear that the moment any good is taken to a place outside India it amounts to export and the exporter is allowed to get the refund of duty paid on importation of such goods in the form of drawback. No rider in the entire drawback rules is found with respect to any condition including that of Circular No. 30/1993 dated 28.09.1993. There is no denial on the part of the department that the remittances were received by the appellant. Had the Circular No. 30/1993 being binding in case of no third country exports the RBI would not have released the remittance in Indian rupees out of the state credit funds. This observation, to my opinion is sufficient to falsify the findings in the impugned order in original.

16. It is also observed from the show cause notice itself that there has been an understanding that 9 containers shipped by Texcomash Export from Delhi to Moscow were to be taken delivery in Dubai itself on surrendering the original bills of landing by the party concern. It was observed to be a normal practice and as per law also delivery could be effected if the original bills of landing were surrendered (para 30 of show cause notice) recites the same. Not only this there were the Landing certificate issued with respect to these consignments as well that too from the Russian company. Any forgery if revealed during a further investigation being committed by the Russian company vis-a-vis the Landing certificate in the light of Drawback Rules in India is highly insufficient to deny the claim of drawback specifically when the goods have crossed Indian territory and to reach to a place outside India. Department has failed to produce any statutory provision or any other evidence

to support the findings of the impugned order. The reliance on Rule 16A of Customs & Central Excise Duties Drawback Rules 1995 is also not appropriate. The provisions do not have any retrospective effect. The exports in question were made at the time prior those rules came into effect. Hence denying drawback invoking the Rule 1995 to the export of the year 1993-94 is otherwise not legally permissible. The amount of Rs. 31,66,822/- as was already refunded by the appellant - exporter to the department is wrongly appropriated by the adjudicating authority below. Finally, the order confiscating the goods has no legs to stand upon when admittedly the goods were allowed to be released provisionally in the year 1995-96 itself.

17. In the totality of the entire above discussion without reflecting on other technical grounds which may support and strengthen the relief in favour of the appellant, I hold appellant entitled to the said amount of drawback on 9 consignments of ladies garments exported by the appellant to a place outside India. With these findings, the order under challenge is hereby set aside. Consequent thereto, the appeal is allowed.

(Pronounced in open Court on 03.11.2025)

(Dr. Rachna Gupta)
Member (Judicial)

RM