K G Exports vs Commissioner, Customs (Export)-New ... on 4 June, 2025

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH- COURT NO. I

CUSTOMS APPEAL No. 51488 of 2022

(Arising out of Order-in-Appeal No. CCA/CUSTOMS/D-II/ICD/TKD/EXPORT/2002-2003/2021 dated 09.03.2022 passed by the Commissioner (Appeals) of Customs, New Customs House, New Delhi)

M/s K.G. Exports ....Appellant
5, Mohindra Enclave,
Moti Nagar,
Ludhiana- Punjab (141010)

Versus

Commissioner of Customs (Export) ....Respondent

New Delhi AND CUSTOMS APPEAL No. 52124 of 2022 (Arising out of Order-in-Appeal No. CCA/CUSTOMS/D-II/ICD/TKD/EXPORT/2002- 2003/2021 dated 09.03.2022 passed by the Commissioner (Appeals) of Customs, New Customs House, New Delhi) Manish Dua ....Appellant C/O. M/s K.G. Exports 5, Mohindra Enclave, Moti Nagar, Ludhiana- Punjab (141010) Versus Commissioner of Customs (Export) ....Respondent New Delhi APPEARANCE:

Shri Naveen Bindal, advocate for the appellant Shri Girijesh Kumar, authorised representative of the department CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL) Date of Hearing : 23.12.2024 Date of Decision : 04.06.2025 FINAL ORDER NO's. 50827-50828/2025 C/51488, 52124/2022 JUSTICE DILIP GUPTA :

Customs Appeal No. 51488 of 2022 has been filed by M/s K.G. Exports1 to assail the order dated 09.03.2022 passed by the Commissioner of Customs (Appeals)2 rejecting the appeal filed by the appellant for setting aside order dated 26.11.2018 passed by the Additional Commissioner of Customs. The Additional Commissioner of Customs by the said order dated 26.11.2018 confiscated the goods exported under section 113(d), (g) and (i) of the Customs Act, 19623 but as the goods had been exported and were not available for confiscation nor cleared under a bond, redemption fine in lieu of confiscation was not imposed. The Additional Commissioner also ordered for recovery of the ineligible Focus Market Scrips from the appellant under section 28AAA of the Customs Act with applicable rate of interest. The amount of drawback under rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 has been dropped, but penalty has

been imposed upon the appellant under sections 114AA and 114 (iii) of the Customs Act.

2. Customs Appeal No. 52124 of 2022 has been filed by Manish Dua, Partner of the appellant to assail that part of the order dated 09.03.2022 passed by the Commissioner (Appeals) that dismisses the appeal filed by Manish Dua and upholds the penalty imposed upon him by the Additional Commissioner by order dated 26.11.2018 under section 114AA and section 114 (iii) of the Customs Act.

1. the appellant

2. the Commissioner (Appeals)

3. the Customs Act C/51488, 52124/2022

3. The appellant is engaged in the manufacture and export of Ready Made Garments. It entered into contracts for supplying Ready Made Garments4 to companies based in U.A.E. To encourage exports to remote markets, the Government introduced the Focus Market Scheme5, designed to offset higher freight costs borne by buyers. Under the FMS, exporters often offer reduced prices to customers in designated countries like Panama. This approach ensures competitiveness by partially absorbing the elevated freight costs, aligning with the objectives of the FMS. As per the contracts, the appellant was required to supply the goods on the prices stated in the agreement on FOB terms and to a place notified by the buyer. In terms of the contract, Concorde Shipping & Logistics India6 was solely responsible for undertaking shipping as per the instructions of the buyer. According to the appellant, the buyer used to instruct the appellant telephonically to export the goods to a particular country which was „Panama and accordingly, the appellant would send the goods along with the export documents, such as commercial invoice and packing list to the Customs House Agent for customs clearance for making exports to Panama who sent the exporter copy of the Shipping Bills to the appellant. The TR-1 and TR-2 copy of the Shipping Bills were forwarded to the Freight Forwarder.

3. According to the appellant, since the contract between appellant and buyer was on FOB basis, as soon as the Let Export Order was issued, title in the Goods passed to the buyer and the appellant would no longer be the owner of the Goods. Thereafter,

4. the Goods

5. FMS

6. the Freight Forwarder C/51488, 52124/2022 the Freight Forwarder, being the representative of the buyer, was responsible for arranging the Shipping Lines and getting the Goods ultimately exported. The appellant claims that it was, therefore, not responsible for the movement of Goods thereafter and was also unaware of any communication between the buyer and Freight Forwarder.

4. On receipt of the exporter copy of Shipping Bills and Bill of Lading issued by the Freight Forwarder, the appellant claimed the benefit under the FMS. Accordingly, the appellant claimed benefits on goods exported through 23 shipping bills out of 40 shipping bills during the period of dispute from 2014-15 and 2015-16. All the export documents in possession with the appellant established that the Goods were exported to Panama.

5. An investigation was initiated by the Commissioner (Export), ICD, Tughalkabad, New Delhi, on the alleged misuse of the benefits of the FMS and other licenses issued under Chapter 3 of the Foreign Trade Policy 2009-14.

6. The appellant claims that later it came to know that the Goods were actually not exported to Panama. The appellant enquired with the buyer regarding change in the country of destination. It was informed by the buyer that they had directed Imran Mirza, proprietor of the Freight Forwarder, to deliver the consignments to Dubai.

7. The appellant further claims that during investigation it could not be established that the appellant was involved in changing the country of destination, except the statement of Imran Mirza. In his statements Imran Mirza stated that he made changes in the country C/51488, 52124/2022 of destination at the instructions of Manish Dua, Partner of the appellant manually to change the country of destination and Port of Discharge to Jebel Ali.

8. Manish Dua, Partner of the appellant company in his statement stated that all the export documents received by him mentioned the country of export as Panama and he did not instruct anybody to change the country of export.

9. A show cause notice dated March 10, 2017 was issued inter alia proposing to demand ineligible benefit availed under the FMS equivalent to Rs. 44,11,386/- under section 28AAA of the Customs Act with interest. It also proposed to impose penalty under section 114 and section 114AA of the Customs Act on the appellant and Manish Dua.

10. The Additional Commissioner passed the following order :

> (a) Holding the Goods liable for confiscation under section 113(d), (g) and (i) of the Customs Act, but refrained from imposing any redemption fine;
>
> (b) Confirmed recovery of Rs. 44,11,386/- with applicable interest;
>
> (c) Dropped the demand of Duty Drawback;
>
> (d) Penalty of Rs. 50 lacs on the appellant under section 114(iii) of the Customs Act and penalty of Rs. 25 lacs under section 114AA of the Customs Act.
>
> (e) A penalty of Rs. 3 lacs on Manish Dua under section 114(iii) of the Customs Act and penalty of Rs. 2 lacs under section 114AA of the Customs Act.

11. The Commissioner (Appeals) dismissed the two appeals filed by the appellant and Manish Dua by an order dated 09.032022. The observations are as follows:

> C/51488, 52124/2022 "5.2 I find that it is established fact on record that the Appellant with the help of its freight forwarder Shri Imran Mirza, Proprietor of the freight forwarder M/s.

Concorde Shipping & Logistics India had diverted their consignments cleared for export from ICD, TKD. New Delhi to destinations other than the destinations declared in their Shipping Bills by way of fraudulent amendment in TR-1/TR-2 coples of the shipping bills. The amendments were never authorized by the proper officer. This was dons with clear intention to avail undue benefit of Focus Market Scheme (FMS), under Chapter 3 of Foreign Trade Policy by showing a country as "Country of Destination". which was notified under Chapter 3 of Foreign Trade Policy for availing benefit of FMS and after clearances of such Shipping Bills by the Customs, fraudulently amending the Transference Copies (TR-1/TR-2 copies of the Shipping Bills to change the "Country of Destination to a country, which is not notified under Chapter 3 of Foreign Trade Policy for availing benefit of above said scheme i.e., Jebel Ali (United Arab Emirates). This position gets established from statement of Sh.

Imran Mirza, who admitted that he had made those amendments on the instruction of Sh. Munish Dua, Partner of Mis K.G. Export. The fact of change in destination has not been disputed in appeal. The plea of the Appellant No. 2 that the change was not in his knowledge is not sustainable in light of the fact that the containers were booked for UAE/Jabel Ali. Thus there was no plan to export goods to declared destinations. It is also evident that the Appellant were aware of change in destination and still availed inadmissible duty credit scrips from DGFT and returned that same only when investigation was Initiated. This clearly indicate the malafide C/51488, 52124/2022 intention of the Appellant. Any change in particulars in shipping bills without approval of the proper officer of the Customs attract action under the Customs Act, 1962. Thus, I find that, there is no reason to interfere with the Impugned Order.

xxxx 5.5 So far as the imposition of penalty under Section 114 of the Act on the Appellant is concerned, I find that the Appellant had directed Sh. Imran Mirza to make those amendments. Its clearly indicates towards malafide intention of the Appellant in such unauthorised amendments and unauthorised diversion of export goods. Thus, the appellant actively concerned with the goods pertaining to the amended shipping bills. I find that this act of the Appellant had made, the goods liable for confiscation under Section 113 of the Act. Therefore, I find that the Adjudicating authority has rightly penalised the Appellant under Section 114(ii) & 114 AA of the Customs Act 1962.

5.6 The appellant has contended that penalties cannot be levied on the Partner and the Partnership Firm simultaneously. I disagree with the contention of appellant, I find that M/s K.G. Exports is a partnership firm where there are three partners. One of them, Shri Munish Dua, Partner in M/s K.G. Exports, had directed Shri Imran Mirza. Proprietor of Mis. Concorde Shipping & Logistics India, to make necessa□□amendments in the TR-I/TR-2 copies of the Shipping Bills so as to export the goods to Jebel Ali, instead of the destination originally printed on those Shipping Bills. Thus, I

find that the adjudicating authority has imposed penalty on Shri Munish Dua one of partner in M/s K.G. Exports correctly. It is settled position of law that the partnership firm and its C/51488, 52124/2022 partners are independent legal identities and can be penalised simultaneously."

(emphasis supplied)

12. Shri Naveen Bindal, learned counsel for the appellant made the following submissions:

> (i) The show cause notice issued under section 28AAA of the Customs Act is without jurisdiction. This is for the reason that a demand under this section can be made only after the Directorate General of Foreign Trade7, which is the concerned regional authority, initiates action for cancellation of the instrument but adjudication can take place only after the instrument has been cancelled by DGFT. In the present case, the DGFT has not cancelled the instrument. In fact, even steps had not been initiated by the DGFT for cancellation of the instrument. In support of this contention, learned counsel place reliance upon the judgment of the Delhi High Court in M/s Amit Exports vs. Union of India & ors;8
>
> (ii) The appellant is a bona fide exporter who made exports on FOB basis and was not involved in any changes made of the destination country;
>
> (iii) The impugned order passed by the Commissioner (Appeals) has placed reliance upon the statement of Imran Mirza made under section 108 of the Customs Act in which the appellant has been implicated. The statement of Imran Mirza cannot be considered as evidence in view of the provisions of section 138B of the Finance Act;
>
> (iv) Manish Dua, partner of the appellant denied that he had instructed Imram Mirza to carry out any amendment in the shipping bills.
>
> (v) No penalty could have been imposed upon the appellant and Manish Dua under section 114(iii) and section 114AA of the Customs Act.

7. DGFT

8. W.P. (C) 17314/2022 decided on 22.11.2024 C/51488, 52124/2022

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

> (i) The DGFT has informed the concerned Commissionerate that they are in the process of taking action on the instrument though, the license has not been cancelled as yet. Even, otherwise, section 28AAA of the Customs Act would be applicable as the instrument was obtained by means of collusion or willful statement or suppression of facts;

(ii) In any case, there is no requirement that unless the DGFT cancels the instrument, the customs officers will not have the jurisdiction to decide the matter; and

(iii) The pre-requisite of DGFT cancelling the instrument is not warranted in a case where the issue of collusion, willful misstatement or suppression of facts exist and in the present case this fact has been proved beyond doubt.

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

15. The first issue that arises for consideration is whether jurisdiction under section 28AAA of the Customs Act could have been invoked without the DGFT having initiated process for cancellation of the license and whether adjudication could be done as the DGFT did not cancel the instrument.

16. This issue was examined by the Delhi High Court in M/s Amit Exports. The Delhi High Court held that it was not possible to recognize a right that may be to said to inhere in the customs authority to doubt the issuance of the instrument. After referring to C/51488, 52124/2022 the FTP 2015-20, the Delhi High Court held that it provides in paragraph 2.57 that it would be the decision of the DGFT on all matters pertaining to interpretation of policy, provisions in the handbook of procedures and so it would be impermissible for the customs authority to deprive a holder of the instrument the benefits that can be claimed, absent any adjudication of declaration of invalidity by the DGFT. The relevant portion of the judgment of the Delhi High Court is reproduced below:

"104. As we read the various provisions enshrined in the FTDR Act alongside the FTP as well as the FTDR Rules, we find ourselves unable to recognize a right that may be said to inhere in the customs authorities to doubt the issuance of an instrument. We, in the preceding parts of this decision, had an occasion to notice the relevant provisions contained in the FTDR Act and which anoint the DGFT as the central authority for the purposes of administering the provisions of that statute and regulating the subject of import and exports. The FTP 2015-20 in unequivocal terms provides in para 2.57 that it would be the decision of the DGFT on all matters pertaining to interpretation of policy, provisions in the Handbook of Procedures, Appendices, and more importantly, classification of any item for import/export in the ITC (HS) which would be final and binding. The FTP undoubtedly stands imbued with statutory authority by virtue of Section 5 of the FTDR Act.

105. Of equal importance are the FTDR Rules and which too incorporate provisions conferring an authority on the Director General or the licensing authority to suspend or cancel a license, certificate, scrip or any instrument bestowing financial or fiscal benefits. Once it is held C/51488, 52124/2022 that the MEIS would clearly qualify as an instrument bestowing financial or fiscal benefits, the power to cancel or suspend would be liable to be recognized as being exercisable by the Director General on the licensing authority alone. It would thus be wholly impermissible for the customs authorities to either ignore the MEIS certificate or deprive a holder thereof of

benefits that could be claimed under that scheme absent any adjudication or declaration of invalidity being rendered by the DGFT in exercise of powers conferred by either Rules 8, 9 or 10 of the FTDR Rules. The customs authorities cannot be recognised to have the power or the authority to either question or go behind an instrument issued under the FTDR in law.

106. Taking any other view would result in us recognizing a parallel or a contemporaneous power inhering in two separate sets of authorities with respect to the same subject. That clearly is not the position which emerges from a reading of Section 28AAA. Quite apart from the deleterious effect which may ensue if such a position were countenanced, in our considered opinion, if the validity of an instrument issued under the FTDR Act were to be doubted on the basis of it having been obtained by collusion, wilful misstatement or concealment of facts, any action under Section 28AAA would have to be preceded by the competent authority under the FTDR Act having come to the conclusion that the instrument had come to be incorrectly issued or illegally obtained. The procedure for recovery of duties and interest would have to be preceded by the competent authority under the FTDR Act having so found and the power to recover duty being liable to be exercised only thereafter.

C/51488, 52124/2022

107. Section 28AAA would thus have to be interpreted as contemplating a prior determination on the issue of collusion, wilful misstatement or suppression of facts tainting an instrument issued under the FTDR Act before action relating to recovery of duty could be possibly initiated. A harmonious interpretation of the two statutes, namely, the Customs and the FTDR Acts leads us to the inescapable conclusion that the law neither envisages nor sanctions a duality of authority inhering in a separate set of officers and agents simultaneously evaluating and adjudging the validity of an instrument which owes its origin to the FTDR Act alone. It is these factors, as well as the role assigned to the DGFT which perhaps weighed upon courts to acknowledge its position of primacy when it come to the interpretation of policy measures referable to the FTDR Act as well as issues of classification emanating therefrom.

108. This clearly flows from what our High Court held in Simplex Infrastructure when it approved the view expressed by the Gujarat High Court in Alstom India and which had held that export benefits claimed and enjoyed pursuant to approvals granted as per the provisions of the FTDR Act could not be reviewed or redetermined except in accordance with the procedure prescribed therein. A similar view came to be expressed by the Allahabad High Court in PTC Industries and where it was held that any doubt with respect to the description or classification of exported goods would have to be referred for the consideration of the DGFT. The Allahabad High Court had thus concurred with the view expressed by the Bombay High Court and which too had observed that benefits which could be claimed under a Duty

> Entitlement Pass Book license could not be denied by the customs authorities C/51488, 52124/2022 on the basis of their own perception on the subject of appropriate classification. The Bombay High Court had held that as long as the licensing authority had desisted from either reviewing the grant or cancelling the license, it would be wholly impermissible for the customs authorities to deprive the importer or the exporter of benefits. The view expressed by the Gujarat, Allahabad and the Bombay High Courts stands reiterated in the two subsequent decisions of Autolite and Jupiter Exports. The principles culled out in the aforenoted decisions are in line with what the Supreme Court had succinctly observed in Titan Medical Systems (P) Ltd. Vs. Collector of Customs. We are thus of the firm opinion that it would be impermissible for the customs authorities to either doubt the validity of an instrument issued under the FTDR Act or go behind benefits availed pursuant thereto absent any adjudication having been undertaken by the DGFT. An action for recovery of benefits claimed and availed would have to necessarily be preceded by the competent authority under the FTDR Act having found that the certificate or scrip had been illegally obtained. We have already held that the reference to a proper officer in Section 28AAA is for the limited purpose of ensuring that a certificate wrongly obtained under the Customs Act could also be evaluated on parameters specified in that provision. However, the said stipulation cannot be construed as conferring authority on the proper officer to question the validity of a certificate or scrip referable to the FTDR Act."

(emphasis supplied)

17. In this connection, it may also be important to refer to the TRU letter dated 01.06.2012 highlighting the budget changes on the eve C/51488, 52124/2022 of the enactment of the Finance Act, 2012. The relevant portion of the letter is reproduced below:

> "11.2 Recovery of duty in case of instrument issued under Foreign Trade (Development and Regulation) Act:
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> Section 28AAA has been inserted in the Customs Act through Section 122 of the Finance Act, 2012 to provide for recovery of duties from the person to whom an instrument such as credit duty scrips was issued where such instrument of law, action for recovery of duty can be initiated under the said provision.
>
> Field formations are advised to issue demands as soon as DGFT/concerned regional Authority initiates action for
>
> cancellation of an instrument but the matter may be decided only after the instrument has been cancelled by DGFT."

(emphasis supplied)

18. The impugned order, therefore, is without jurisdiction as the DGFT has neither cancelled the instrument nor even initiated proceedings for cancellation of the instrument.

19. This apart, the impugned order has relied upon the statement of Imran Mirza, the proprietor of the Freight Forwarder, that the manual amendments in the copies of the shipping bills were made by him on his own handwriting on the directions of Manish Dua, partner of the appellant and that to endorse the said manual amendments, he had forged the signatures of the Customs Superintendent and appended the stamps of the Customs Superintendent. The Additional Commissioner and the Commissioner (Appeals), therefore, held that a transaction based on fraud precludes the party from deriving any benefit.

C/51488, 52124/2022

20. The issue that arises for consideration is whether the statement of Imran Mirza recorded under section 108 of the Customs Act could be considered as evidence under section 138B of the Customs Act.

21. In this connection, reference can be made to the decision of the Tribunal in M/s Surya Wires Pvt. Ltd. vs. Principal Commissioner, CGST, Raipur9. The Tribunal examined the provisions of sections 108 and 138B of the Customs Act as also the provisions of sections 14 and 9D of the Central Excise Act, 1944 and observed as follows:

> "21. It would be seen section 14 of the Central Excise Act and section 108 of the Customs Act enable the concerned Officers to summon any person whose attendance they consider necessary to give evidence in any inquiry which such Officers are making. The statements of the persons so summoned are then recorded under these provisions. It is these statements which are referred to either in section 9D of the Central Excise Act or in section 138B of the Customs Act. A bare perusal of sub-section (1) of these two sections makes it evident that the statement recorded before the concerned Officer during the course of any inquiry or proceeding shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made the statement is examined as a witness before the Court and such Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence, in the interests of justice, except where the person who tendered the statement is dead or cannot be found. In view of the provisions of sub-section (2) of section 9D of the Central Excise Act or sub-section (2) of section 138B of the Customs Act, the provisions of sub-section
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> 9. Excise Appeal No. 51148 of 2020 decided on 01.04.2025 C/51488, 52124/2022 (1) of these two Acts shall apply to any proceedings under the Central Excise Act or the Customs Act as they apply in relation to proceedings before a Court. What, therefore, follows is that a person who makes a statement during the course of an inquiry has to be first examined as a witness before the adjudicating authority and thereafter the adjudicating authority has to form an opinion whether having regard to the

> circumstances of the case the statement should be admitted in evidence, in the interests of justice. Once this determination regarding admissibility of the statement of a witness is made by the adjudicating authority, the statement will be admitted as an evidence and an opportunity of cross-examination of the witness is then required to be given to the person against whom such statement has been made. It is only when this procedure is followed that the statements of the persons making them would be of relevance for the purpose of proving the facts which they contain."

22. After examining various judgments of the High Court and the Tribunal, the Tribunal observed as follows:

> "28. It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central Excise Act and section 138B(1)(b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to be provided for cross-
>
> C/51488, 52124/2022 examination of such persons. The provisions of section 9D of the Central Excise Act and section 138B(1)(b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence."

23. In this view of the matter, the statement of Imran Mirza made under section 108 of the Customs Act would not be relevant.

24. The learned authorized representative appearing for the department submitted that since fraud vitiates everything, the notice under section 28AAA of the Customs Act was validly issued for establishing fraud. To support the contention, learned authorized representative placed reliance upon the statement of Imran Mirza, which statement as noticed above made under section 108 of the Customs Act cannot be considered as evidence as Imran Mirza was not examined by the adjudicating authority nor was the statement admitted in evidence.

25. Learned counsel for the appellant submitted that the goods were exported on FOB and therefore, once the goods are put on board the vessel, the title of the goods is transferred to the buyer.

C/51488, 52124/2022 Learned counsel also submitted that after the Let Export Order is issued, any amendment made by the Freight Forwarder cannot be attributed to the appellant as an exporter has no control over the goods and it is the responsibility of the Shipping Line to ship the goods to the foreign buyer. Learned counsel relied on the CBIC Circular dated 28.02.2015,, the relevant portion of which is reproduced below:

> "6. In the case of clearance of goods for export by manufacturer exporter, shipping bill is filed by the manufacturer exporter and goods are handed over to the shipping line. After Let Export Order is issued, it is the responsibility of the shipping line to ship the goods to the foreign buyer with the exporter having no control over the goods. In such a situation, transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer exporter and place of removal would be this Port/ICD/CFS."

26. The submission of the learned counsel for the appellant is partly true. Insofar as the transaction between the exporter and the overseas buyer is concerned, if the goods are sold on FOB basis, the title shifts to the buyer. It is also true that once the Let Export Order is issued, the exporter may not have control over the goods. However, it also needs to be noted that insofar as the scrips under the Focus Market Scheme are concerned, the exporter will be entitled to these scrips if and only if the goods reach the destination market and not otherwise. The only beneficiary under this Scheme is the exporter. It is not the overseas buyer or the freight forwarder or the Shipping Line. Paragraph 3.20.3 of the Handbook of Procedures specifically requires the exporter who applies for scrips under the C/51488, 52124/2022 FMS to submit, inter alia, one of the following documents as a proof of landing of export consignment in specified Focus Market:

> i. A self-attested copy of import bill of entry filed by importer in specified market, or ii. Delivery order issued by port authorities, or iii. Arrival notice issued by goods carrier, or iv. Tracking report from the goods carrier duly certified by them, evidencing arrival of export cargo to destination Focus Market, or v. Lorry receipts for transportation of goods from Port into the Focus Market, or vi. For Land locked Focus Market, Lorry receipts of transportation of goods from Port to Land locked Focus Market, or vii. Any other documents that may have satisfactorily prove to RA concerned that goods have landed in/reached the Focus Market.

27. Clearly, if the exporter applied for FMS scrips, it is the responsibility of the exporter to ensure that the goods reach that market and to produce proof as above. The responsibility of the exporter does not end with obtaining the Let Export Order. In this case, neither side produced before us the documents which were produced as proof that the goods reached the Focus Market. The Customs authorities investigating the matter should have summoned the relevant documents from the DGFT. Either the goods must have reached the Focus Market or if they were diverted, the exporter may have submitted fake documents as proof of landing or the DGFT may have issued the scrips without obtaining the proof of landing. The impugned order, however, does not address this issue.

28. Section 114AA provides that if a person knowingly or intentionally makes, signs or uses or causes to be made, any material C/51488, 52124/2022 particular, in the transaction of any business for the purposes of the Customs Act, shall be liable to a penalty not exceeding five times the value of goods. The Principal Commissioner has relied upon the statement made under section 108 of the Customs Act that the changes were made on the instructions given by the appellant. This statement, for the reasons stated above, cannot be relied upon as evidence. Thus, penalty under section 114AA of the Customs Act could not have been imposed upon the appellant.

29. Section 114(iii) of the Customs Act provides that any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113 of the Customs Act shall be liable to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under the Customs Act, whichever is greater. Though, the Principal Commissioner has confiscated the goods under section 113 of the Customs Act. This confiscation has been directed for the reason that the appellant and Imran Mirza colluded. This finding is again based on the statement made by Imran Mirza under section 108 of the Customs Act, which statement cannot be relied upon for the reasons stated above. Confiscation of goods would, therefore, have to be set aside and consequently, penalty under section 114(iii) of the Customs Act could not have been levied upon the appellant.

30. For same reasons, penalties under section 114(iii) and section 114AA of the Customs Act could not have been imposed on Manish Dua. The imposition of penalties, therefore, would have to be set aside.

C/51488, 52124/2022

31. It is, therefore, not possible to sustain the order dated 09.03.2022 passed by the Commissioner (Appeals). It is, accordingly, set aside and the two appeals are allowed.

(Order pronounced on 04.06.2025) (JUSTICE DILIP GUPTA) PRESIDENT (P.V. SUBBA RAO) MEMBER (TECHNICAL) Diksha