

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH-COURT NO. 1**

CUSTOMS APPEAL NO. 50127 OF 2024

[Arising out of Order-in-Appeal No. CC(A)/Customs/D-II/ICD/TKDE/139-141/2023-24 dated 03.10.2023 passed by the Commissioner of Customs (Appeals) New Delhi]

M/S JBN APPARELS PVT LTD

.....APPELLANT

A-13, Okhla Industrial Area, Phase I
New Delhi-110020

Vs.

**COMMISSIONER OF CUSTOMS-NEW
DELHI ICD TKD**

.....RESPONDENT

Inland Container Depot, Tughlakabad,
New Delhi-110020

Appearance:

Shri Mukeshwar Nath Dubey, Mohd. Faraz Aneez, Shri P. Pathak and
Shri Ajay Kumar, Advocates – for the appellant

Shri Shashi Kant Sharma, Authorized Representative (DR) – for the
Department

With

**C/50128/2024,
C/50302/2024,**

**C/50129/2024,
C/50303/2024.**

C/50301/2024

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)**

FINAL ORDER NO'S. 50382-50387 /2025

**Date of Hearing :10/12/2024
Date of Decision : 07/03/2025**

P.V. SUBBA RAO

1. These six appeals have been filed by three exporters and the Revenue assailing the Order-in-Appeal dated 03.10.2023 passed by the Commissioner (Appeals), New Customs House whereby he partly modified the Order-in-Original dated

15.02.2022 passed by the Joint Commissioner and remanded the matter to him as follows:

ORDER

6.1. The valuation in respect of eight shipping bills is held in order.

6.2. The admissible export benefit in the eight shipping bills needs to be re-determined based on investigation and making the evidences available to the exporters. The case is remanded back to the Adjudicating Authority for this matter.

6.3. The Bonds and Bank Guarantees only related to redemption fine under Section 125 of Customs Act, 1962 and penalty under Section 114 of Customs Act, 1962 will be released.

6.4. The Bond and Bank Guarantee related to any export benefits available shall be adjudicated via de novo adjudication order.

2. **Customs Appeal No. 50127 of 2024** is filed by JBN Apparels Pvt. Ltd¹.

3. **Customs Appeal No. 50128 of 2024** is filed by Aastha Apparels Pvt. Ltd².

4. **Customs Appeal No. 50129 of 2024** is filed by JBB Apparels Pvt Ltd³.

5. **Customs Appeal No's. 50301, 50302 and 50303 of 2024** are filed by the Revenue.

6. The Joint Commissioner had, in his Order-in-Original, dropped all the proceedings against the three exporters- JBN, Astha and JBB- in respect of the shipping bills which were investigated. The operative part of the order is as follows:

1 **JBN**
2 **Astha**
3 **JBB**

ORDER

- (i) I drop the proceedings initiated in respect of Shipping Bills Nos. 1807036, 1807017 & 1807046 all dated 05.02.2019; 1807069 & 1807053 both dated 05.02.2019; shipping Bill Nos. 1710107, 1710004 & 1710110 all dated 31.01.2019.
- (ii) I hereby order for the release of the PD Bond of Rs. 2,61,83,717/- along with Bank Guarantee No. 10140100000090 dated 11.03.2019 of Rs. 8,64,063/- in respect of M/s. JBN Apparels Pvt. Ltd., PD Bond of Rs. 2,28,25,955/- along with Bank Guarantee No. 10140100000089 dated 08.03.2019 of Rs. 7,53,257/- in respect of M/s. Aastha Apparels Pvt. Ltd. & PD Bond of Rs. 5,35,38,778/- along with Bank Guarantee No. 10140100000091 dated 15.03.2019 of Rs. 18,00,000/- in respect of M/s. JBB Apparels Pvt. Ltd. submitted by the exporters at the time of provisional release of the goods covered under aforesaid Shipping Bills.
- (iii) I order that the all the aforesaid Shipping Bills may be finalised accordingly.

7. The facts of the case are that the three exporters filed shipping bills to export garments in the Inland Container Depot⁴, Tughlakabad⁵. On 08.02.2019, officers of the Directorate of Revenue Intelligence⁶ forwarded to the Principal Commissioner of Customs, ICD, TKD a letter sent by the Deputy Director of Income Tax (Investigation) New Delhi. In this letter, Income Tax reported that there was a surge in export activity and receipt of drawback, Merchant Exports Incentives Scheme (MEIS) and Refund of State Levies Scheme (ROSM) Scheme during 2017-18.

8. It must be pointed out that the drawback is a scheme whereby the Customs Department refunds to the exporter, the taxes incurred in manufacture of the exported goods. This is done on average basis as per the drawback schedule in which the

4 ICD
5 TKD
6 DRI

exporters are paid a certain percentage of Free on Board⁷ value of exports as drawback.

9. The MEIS scheme is an incentive scheme operated by the Director General of Foreign Trade⁸ under the Foreign Trade Policy⁹ which also gives an incentive for merchandise export as a percentage of FOB value. The ROSL scheme is also operated by the DGFT under which amounts are paid as a percentage of the FOB value towards reimbursement of state levies incurred on the exported goods. In other words, all the three scheme - one operated by the department by the Customs and two operated by the DGFT - provide incentives for exports as a percentage of FOB value.

10. Acting on the letter of the DRI, on 19.02.2019 the officers of Special Intelligence and Investigation Branch¹⁰ of ICD, TKD examined the export goods covered by three shipping bills of M/s Aastha Apparels Pvt. Ltd. and two shipping bills of M/s JBN and found that the goods and their details matched with the shipping bills. On 21.02.2019, the officers of ICD Pipava examined the goods covered by three shipping bills filed by M/s JBB and also found the goods matched with the declaration.

11. However, on the suspicion that the goods were overvalued, they were seized and later provisionally released on bond and were allowed to be exported. Samples of the seized goods were taken to the market to enquire about their value. Summons were

7 **FOB**
8 **DGFT**
9 **FTP**
10 **SIIB**

issued and statements were recorded and proceedings were initiated on the suspicion that the goods were overvalued. The appellants had waived the requirement of show cause notice but made written submissions and attended personal hearings. After considering the submissions, the Joint Commissioner passed the Order in Original dropping all proceedings.

12. Aggrieved by the order-in-original, the department filed appeals before the Commissioner (Appeals) on the following grounds:

- (i) The investigations by income tax showed four export firms including the three appellants herein were involved in trade related money laundering without proper stock in books of account and manipulated purchase bills. The companies from whom they had claimed to have purchased the export goods were found not existence with by the Punjab GST authorities.
- (ii) Order-in-Original was passed by the Joint Commissioner without ascertaining the stance of DRI on the said export shipments. DRI had asked to obtain NOC before releasing the export incentives.
- (iii) The order in original does not mention any investigation or enquiry done with respect to the above before accepting the values declared by the exporters.

- (iv) E-way data pertaining to 12 firms owned and controlled by Shri R.K Goyal did not show the physical movement of the goods from Punjab to Delhi and only invoices were being raised. Enquiry by DRI found that the goods were overvalued by 169 to 200 times.

13. On this appeal, the Commissioner(Appeals) passed the impugned order accepting the valuation in respect of all the shipping bills and releasing the bonds and bank guarantees pertaining to redemption fine and penalty. However, he ordered that admissible exports benefits in the 8 shipping bills need to be re-determined based on the investigation and the evidence available with the exporters and for that purpose remanded the matter to the Joint Commissioner.

14. The three appeals filed by the exporters are on the following grounds.

- (i) Since the Commissioner (Appeals) had found valuation in favour of the exporters, he should not have remanded the matter to the Joint Commissioner to determine the admissible export benefits.
- (ii) The Commissioner (Appeals) could have remanded the matter to the Joint Commissioner under section 128A (3)(b) (i) of the Customs Act only when the principles of natural justice had not been followed but such is not the case in these appeals.

- (iii) The Commissioner (Appeals) should have confined to the disputed subject matter, namely, the valuation of the export goods and the consequent export benefits follow. The Commissioner (Appeals) should not have remanded the matter to re-determine the export benefits on the basis of another investigation.
- (iv) The Commissioner (Appeals) erred in holding in para 5.12 that the order of the adjudicating authority and in paragraph 12.4 of his order that they were no adverse report on GST invoices was premature.
- (v) The Commissioner(Appeals) erred in remanding the matter only on suspicion because suspicion, however strong, cannot take place of evidence.
- (vi)** The overseas inquiry report by DRI is not relevant to the matter at hand. **The exporters, therefore, prayed that the impugned order may be set aside and the order of the Joint Commissioner may be restored.**

15. The three appeals filed by Revenue against the impugned order assert that the acceptance of value in the 8 shipping Bills by the Commissioner (Appeals) was not correct. The Commissioner (Appeals) accepted the value on the grounds that the department had not adduced any evidence to quantify over-

valuation and that the exporter explained the reason of difference in his valuation and the market value and that bank realization certificates were also available.

- (i) The Commissioner (Appeals) ignored the investigation report which shows that the supply chain in this case from Punjab to Delhi showed no movement of goods and only invoices were raised.
- (ii) He also ignored that overseas inquiry shows the substantial evidence to prove overvaluation of the goods which emerged out of DRI investigation.
- (iii) Bank realization of export proceeds cannot be a ground for accepting value. It is, therefore, prayed that the order of the Commissioner (Appeals) may be set aside and orders like direct any other direction as deemed fit by the Tribunal.

16. We have heard learned counsel for the exporters and the learned authorized representative appearing for the department and perused the records.

17. We find that the dispute in this case is regarding export incentives in the form of drawback, MEIS and ROSL. The suspicion of the department is that the exporters had overvalued their goods so as to claim excess export benefits. The department wants the FOB values to be re-determined and accordingly the export incentives to be recomputed.

18. *De hors* the facts of the case, the fundamental questions which need to be examined and answered are:

- a) What is the meaning of FOB value of the goods and who decides it?
- b) Does the Joint Commissioner, Commissioner (Appeals) or any other officer of Customs have the power to re-determine the FOB value of the goods and if so, under what legal provisions?
- c) If the assessable value of the export goods is re-determined under the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 by the proper officer, will it also change the FOB value?
- d) If the export incentives are based on FOB value, does any Customs officer have the power under the law to order that the export benefits shall instead be paid on the basis of some other value determined by the officer?

What is FOB value?

19. All three exports benefits in question in these appeals are to be paid as the percentage of the FOB value of the goods. FOB is one of the internationally accepted terms of commerce known as by INCOTERMS which determine the rights and liabilities of the buyer and seller in a transaction. If goods are agreed to be sold on FOB basis, the exporter is free once the goods are put on board the vessel and all risks and costs associated with transporting them up to destination thereafter is on account of the importer. Similarly, C & F is an INCOTERM in which in addition to the value of the goods the cost of freight is also to be

borne by the exporter and CIF is a term under which the cost, freight as well as the transit insurance are to be borne by the exporter. Business contracts are entered into under FOB, C&F or CIF basis or as per as per any other INCOTERMS. For instance, for a consignment, the parties may agree the goods will be sold for US\$ "X" on FOB basis and that settles the rights and liabilities of the buyer and seller in the transaction. **In short, FOB value is the transaction value of the goods agreed to between the buyer and the seller.**

Do the Joint Commissioner, Commissioner (Appeals) or any other officer of Customs have the power to re-determine the FOB value?

20. FOB value, as discussed above, is the transaction value i.e., the price paid or to be paid for the goods to be exported by the overseas buyer. It is the consideration for the goods which are to be exported. It is the product of negotiations and the contract between the buyer and the seller -whether it is a formal written contract or an informal one. The exported goods are the consideration which the overseas buyer would receive and the price is the consideration which the exporter would receive. Therefore, this price has to be determined only by the buyer and seller. Consideration, as per the Indian Contract Act, need not be adequate for the goods. It can be higher or lower and so long as some consideration is paid the contract is valid. There is a privity of contract between the buyer and the seller and they alone can decide the terms of contract and in case of non-compliance by one, the other can seek to enforce it. The

consideration or the transaction value cannot be modified by any stranger to the contract including any officer.

If the assessable value of the export goods is re-determined under the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 by the proper officer, will it also change the FOB value?

21. Section 14 of the Customs Act and the Customs Valuation (Determination of Value of Export Goods) Rules, 2007, empower the proper officer to reject the declared value and to re-determine the value. However, one should not confuse this power to be the power to re-determine the FOB value. Section 14 reads as follows:

"14. Valuation of goods.—(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf"

22. Import and export duties are usually levied as a percentage of the value in the Customs Tariff. The question as to what value should be taken as the value to determine the duties is answered in section 14. It shall be the transaction value for delivery at the time and place of import or export. However, Section 14 itself provides for rejection of the transaction value under certain circumstances and the Valuation Rules lay down the procedure for rejection of transaction value and determination of value using some other methods.

23. Even when the proper officer rejects the transaction value and re-determines the value- whether in import or exports- all that he does is to refuse to accept the declared transaction value as the assessable value for the purpose of determining the duty. He does not change and cannot change the transaction value- be it on FOB, C&F or CIF basis.

24. An illustration will make this distinction between the assessable value of the goods and their transaction value clear. 'A', an Indian living in Delhi imports a luxury car from his friend, 'B' in UK for, say £ 1,000/-. This is the consideration which 'A' will have to pay to 'B' and the car is the consideration which 'B' will give to 'A'. When the car is imported, the proper officer, finding that the transaction price is too low, rejects it and re-determines the value as, say, £ 5,000/-. The customs duty will have to be calculated on the re-determined value of £ 5,000/- and the importer 'A' will have to pay duty accordingly. However, the transaction value will continue to be £ 1,000/- as was agreed to between A and B. Neither can A remit more for the car nor can B demand £5,000/- to be remitted on the ground that the Customs had re-determined the value. **Therefore, the FOB value cannot be modified by anyone including any Customs officer. Nothing in the Customs Act confers any power on anyone to modify the transaction value between the buyer and seller- be it FOB, C&F or CIF or on any other terms.**

If the export incentives are based on FOB value, does any Customs officer have the power under the law to order

that the export benefits shall instead be paid on the basis of some other value determined by the officer?

25. The last question to be answered is if the drawback or other export incentives are to be provided as a percentage of the FOB value of the goods, does the Customs officer have any power to order that they shall, instead, be given as a percentage of some other value determined by him such as the assessable value? To answer this question, one needs to examine the powers under which the drawback or other export incentives are notified.

26. Section 75 of the Customs Act empowers the Central Government to, by notification, direct that drawback shall be allowed. Relevant extract of this section is below:

75. Drawback on imported materials used in the manufacture of goods which are exported.—(1) Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer, or being goods entered for export by post under clause (a) of section 84 and in respect of which an order permitting clearance for exportation has been made by the proper officer, **a drawback should be allowed of duties** of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, **the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods** in accordance with, and subject to, the rules made under sub-section (2):

(2) **The Central Government may make rules for the purpose of carrying out the provisions of sub-section (1)** and, in particular, such rules may provide-

(a) for the payment of drawback equal to the amount of duty actually paid on the imported materials used in the manufacture or processing of the goods or carrying out any operation on the goods or as is specified in the rules as the average amount of duty paid on the materials of that class or description used in the manufacture or processing of export goods or carrying out any operation on export goods of that class or description either by manufacturers generally or by persons processing or carrying on any operation generally or by any particular manufacturer or particular person carrying on any process or other operation, and interest if any payable thereon;

(aa) for specifying the goods in respect of which no drawback shall be allowed;

(ab) for specifying the procedure for recovery or adjustment of the amount of any drawback which had been allowed under sub-section (1) or interest chargeable thereon;

(b) for the production of such certificates, documents and other evidence in support of each claim of drawback as may be necessary;

(c) for requiring the manufacturer or the person carrying out any process or other operation] to give access to every part of his manufactory to any officer of customs specially authorised in this behalf by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to enable such authorised officer to inspect the processes of manufacture, process or any other operation carried out and to verify by actual check or otherwise the statements made in support of the claim for drawback.

(d) for the manner and the time within which the claim for payment of drawback may be filed;

(3) The power to make rules conferred by sub-section (2) shall include the power to give drawback with retrospective effect from a date not earlier than the date of changes in the rates of duty on inputs used in the export goods.

27. It is in exercise of this power under section 75, the Central Government notifies the rates at which drawback shall be allowed. Once the drawback schedule is notified by the Central Government, it is a direction to the officers that the drawback shall be paid accordingly. If the schedule prescribes drawback to

be given as a percentage of FOB value, that is the direction of the central government under section 75. The concerned Customs officers are bound to follow the directions of the Central Government. No power is conferred under the Act on the Commissioner or any other officer of customs to defy the notification issued by the Central Government and to determine the drawback based on any other value.

28. The MEIS and ROSL schemes are part of the FTP framed by the Central Government in exercise of the powers under section 5 of the Foreign Trade (Development & Regulation) Act, 1992¹¹ which reads as follows:

5. Foreign Trade Policy.—The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy:

Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette.

29. The power to frame FTP and to amend it has been conferred by FT(D&R)Act, 1992 exclusively on the Central Government. This power has not been conferred on any other officer including the Commissioner or any other Customs officer. If the FTP prescribes that incentives under MEIS or ROSL or any other scheme shall be provided as a percentage of FOB value, they should be so provided. It is not open to the Commissioner or any other officer of Customs to say that they shall instead be provided as a percentage of either assessable value or some

11 FT(D&R) Act

other value determined by him. That would be a gross violation of the policy.

30. The entire investigation in this case was commenced under the wrong presumption that the Customs officers had the power to re-determine the FOB value. The SCN was also issued under this presumption and both the Joint Commissioner and the Commissioner (Appeals) also proceeded under the same wrong presumption (although based on evidence found they had not modified the FOB value). The Committee which reviewed the impugned order also proceeded under this wrong presumption. A plain reading of the Customs Act and the FT(D&R) Act would have shown all these officers that they had no such powers under them. The only power under the Customs Act is to determine the assessable value of the goods and not to change the FOB value.

31. All three export incentives in dispute- drawback, MESI and ROSL are to be paid as a percentage of FOB value as per the notifications issued by the Central Government under the Customs Act and the FT(D&R) Act and no officer has the power to order that they should instead be paid as a percentage of any other value.

32. It also needs to be pointed out in this case that the bank realization certificates have been received in these cases confirming that the amount as per the FOB value have been received as remittances from the overseas buyers by the exporters herein.

33. One of the strange grounds taken in the appeals filed by the Revenue before Commissioner (Appeals) was that DRI had directed the Joint Commissioner to take an no objection certificate (NOC) from it before releasing the export incentives and the Joint Commissioner had erred in not obtaining an NOC from the Joint Commissioner accepting the values. The purported letter sent by DRI is a blatant interference in the adjudication process by the Joint Commissioner. DRI seems to have issued the letter under the wrong impression that it has the power to dictate how adjudication orders are passed by quasi-judicial officers. The Joint Commissioner was wise enough to ignore this letter from DRI but the department seems to have lost sight of the fact that quasi-judicial orders should be passed without fear or favour and without obtaining NOCs from any investigating agency.

34. To sum up:

- (i) FOB value is the transaction value, i.e., the price paid or to be paid for the goods as decided between the exporter and the overseas buyer.
- (ii) No stranger to the contract, including any Customs officer has any right to interfere with the FOB value of the goods.
- (iii) The Customs Act does not empower any officer to modify the FOB value of goods.

- (iv) Even if the transaction value is rejected under the Valuation Rules and the assessable value is determined following some other method, such re-determination of assessable value does not change the FOB value.
- (v) The power to notify rates of drawback is vested with the Central Government and if the rates of drawback are as a percentage of FOB value, drawback should be paid accordingly and no Customs officer has the power to ignore the FOB value and determine drawback based on any other value determined by him.
- (vi) The incentives under MEIS and ROSL are part of the FTP framed by the Central Government under section 5 of the FT(D&R) Act, 1992 and all officers are bound to follow the FTP. No Customs officer has the power to defy the FTP and say that MEIS and ROSL benefits should be paid, instead of FOB, based on some other values determined by him.
- (vii) Thus the entire investigation and the subsequent SCN and the adjudication proceedings were on the wrong impression that the Customs officers have the right to modify the FOB value or that drawback, MEIS and ROSL which, as per the drawback schedule and the FTP which have to be paid as a percentage of FOB

could, instead, be paid on some other value determined by the officers.

35. In view of the above we set aside the impugned order and restore the order of the Joint Commissioner upholding the declared FOB values with the modification that the FOB values stand accepted because the officer had no power to modify the FOB values nor any power to direct that the export incentives should be paid on some other values. The exporter's appeals are allowed and the Revenue's appeals are dismissed with consequential relief to the exporters.

[Order pronounced on **07/03/2025**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Tejo