

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

PRINCIPAL BENCH, COURT NO. 1

**CUSTOMS APPEAL NO. 51689 OF 2022**

[Arising out of Order-in-Appeal No. CC(A)/D-1/Exp/NCH/163-164/2022-23 dated 28.04.2022 passed by the Commissioner of Customs, (Appeals) New Delhi]

**NASIB EXPORTS**

**Appellant**

485/1-A-A/2, BasaiDarapur,  
New Delhi

Vs.

**PRINCIPAL COMMISSIONER, CUSTOMS-  
NEW DELHI(AIR CARGO EXPORT)**

**Respondent**

New Customs House, Near IGI Airport,  
New Delhi

**WITH  
CUSTOMS APPEAL NO. 51690 OF 2022**

[Arising out of Order-in-Appeal No. CC(A)/D-1/Exp/NCH/163-164/2022-23 dated 28.04.2022 passed by the Commissioner of Customs, (Appeals) New Delhi]

**PAWAN TANWAR**

**Appellant**

WZ-408A, BasaiDarapur,  
New Delhi-110015

Vs.

**PRINCIPAL COMMISSIONER, CUSTOMS-  
NEW DELHI(AIR CARGO EXPORT)**

**Respondent**

New Customs House, Near IGI Airport,  
New Delhi

**Appearance:**

Shri Bharat Bhushan, Advocate for the appellant  
Shri Girijesh Kumar, Authorised Representative for the department

**CORAM:**

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

**FINAL ORDER NOS. 58007-58008 /2024**

**Date of Hearing/Decision: 07/08/2024**

**P. V. SUBBA RAO:**

The Order-in-Appeal<sup>1</sup> dated 28.4.2022 passed by the Commissioner (Appeals) upholding the Order-in-Original<sup>2</sup> dated 9.7.2021 passed by the Joint Commissioner is assailed in these two appeals by M/s. Nasib Exports and Shri Pawan Tanwar. The Joint Commissioner had, in the OIO, decided the proposals made in the Show Cause Notice<sup>3</sup> dated 29.3.2017 and (a) disallowed export incentives availed by Nasib exports on the strength of various DFRC licences; (b) ordered recovery of basic customs duty of RS. 20,22,228/- foregone along with interests; (c) ordered recovery of drawback of Rs. 1,47,743/- paid to Nasib exports with interest; (d) appropriated a sum of Rs. 6,00,000/- paid during the investigation; and (e) imposed penalty of Rs. 10,00,000/- each on Shri Harminder Singh and Shri Pawan Tanwar.

2. Learned counsel for the appellants submitted that in this case, the SCN dated 29.3.2017 was issued after more than ten years- well beyond even the extended period of limitation of five years provided for under section 28. According to the learned counsel, the SCN itself was badly time-barred and hence the impugned order upholding the OIO confirming the proposals in such a time barred SCN cannot be sustained.

3. Learned authorised representative for the Revenue submitted that the SCN in this case was not issued under section

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**1     Impugned order**  
**2     OIO**  
**3     SCN**

28 (which has a time limit) at all but it was issued under section 124 and there is no time limit to issue SCN under section 124.

4. We have considered these submissions on the preliminary question of limitation because if the SCN is time-barred, it will not be necessary for us to examine the merits of the case at all.

5. We find that learned counsel for the appellants is correct in his assertion that the SCN was issued beyond 10 years. The investigations were initiated in 2007 by the Special Intelligence and Investigation Branch<sup>4</sup> of the Commissionerate in respect of the exports under Duty Free Replenishment Scheme<sup>5</sup> made during April 2006 to February 2007 and exports under drawback scheme made by the exporter during April 2006 to February 2007. Therefore, the relevant period for this SCN was prior to 2007. The SCN was issued on 29.03.2017 i.e., ten years even after the commencement of the investigation by the SIIB.

6. Learned authorised representative for the Revenue is also correct in his assertion that this SCN was not issued under section 28 but under section 124. It is clearly stated in the SCN that it was being issued under section 124 and section 124 does not stipulate any time limit for issuing the SCN. It now needs to be examined if the proposals in the SCN fall within the scope of section 124 or not.

7. Section 28 provides for issue of SCN for recovery of duties not levied, not paid, short levied, short paid or erroneously

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**4 SIIB**  
**5 DFRC**

refunded and it prescribes a normal period of limitation of one year and an extended period of limitation of five years if the not levy, short levy, etc. was on account of collusion, any wilful mis-statement or suppression of facts by the importer or his agent. There is no provision to recover duties beyond five years in any case.

8. Section 124 provides for issue of SCN for confiscation of goods or imposition of penalty. It reads as follows:

**"124. Issue of show cause notice before confiscation of goods, etc.—**No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person—

(a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral.

Provided further that notwithstanding issue of notice under this section, the proper officer may issue a supplementary notice under such circumstances and in such manner as may be prescribed."

9. Clearly, any notice under section 124 can be issued only for confiscation of goods or imposition of penalty. The proposals in the SCN were as follows:

"23. Now, therefore, M/s Nasib Exports, B-17, 2nd Floor, Mayapuri, Phase-II, New Delhi - 110064 and Shri Pawan Tanwar, s/o Shri Prem Prakash Tanwar, r/o WZ-408A,

BasaiDarapur, New Delhi-110015 are hereby called upon to show cause to the Additional Commissioner of Customs, New Customs House, New Delhi within 30 days from the date of receipt of this Show Cause Notice or within such extended period as the adjudicating authority may on sufficient cause being shown, allow as to why:-

(a) Export incentives availed on the strength of fraudulently obtained DFRC Licence No.0510180922, 0510180921, 0510179456, 0510203116 and 0510203514 which have already been kept under DEL by DGFT vide Orders dated 14/2/2008, 29/4/2008, 29/4/2008 & 19/1/2009 may not be disallowed and Export incentives already availed against RAs got issued by them against these fraudulently obtained DFRC Licences should not recovered from them;

(b) Benefit of Basic Customs Duty (foregone) amounting to Rs.2022228/- (as per details given in Para 17 hereinabove) with appropriate interest thereon should not be denied to them and demanded from them pursuant to DGFT DEL Orders dated 14/2/2008, 29/4/2008, 29/4/2008 & 19/1/2009;

(c) Drawback amount of Rs.1147743/- already disbursed to them should not be demanded from them under the provisions of Rules 16A of the Customs and Central Excise Duties Drawback Rules, 1995 as they have not submitted relevant BRCs till now and why an amount of Rs.6,00,000/- (details as mentioned in Para 8 & 14 hereinabove) already deposited voluntarily during the course of investigation may not be appropriated against the said demand;

(d) Interest at the appropriate rates on the above amount of Rs.1147743/- under the provisions of sub-section (2) of Section 75A of the Customs Act, 1962 read with Rule 16A of the Customs and Central Excise Duties Drawback Rules, 1995 at the rates fixed under Section 28AA of the Act ibid should not be demanded and recovered from them;

(e) A complaint before the appropriate authority be not lodged under Section 142 of the Negotiable Instruments Act, 1881 for allegedly violating the provisions of Section 138 of the Negotiable Instrument Act, 1881 as their cheques were returned by the respective banks for the reason of "Insufficient funds";

(f) Separate penalty upon S/Shri Harminder Singh and Pawan Tanwar for allegedly admitting of having committed economic fraud should not be imposed under the provisions of Section 114 of the Customs Act, 1962."

10. It is clear from the above, that there are three types of proposals in the SCN and these have been confirmed by the OIO and the confirmation was upheld by the impugned order:

- (a) To deny export incentives on the allegedly fraudulently obtained DFRCs and consequently recover the duty not paid along with interest;
- (b) Recover the drawback paid in some cases where the appellant had not produced bank realization certificates evidencing receipt of the remittances against the exports;
- (c) Impose penalty on the appellants under section 114.

**11. Of these, only the proposal to impose penalty on the appellants under section 114 falls within the scope of section 124 under which the SCN was issued.** Denial of export incentives and consequently recover any duty which was not paid falls squarely under section 28 and no notice under that section can be issued beyond five years. The SCN has not been issued under section 28 and, therefore, these proposals cannot be sustained. **These proposals clearly fall beyond the scope of a notice under section 124.**

**12. Recovery of drawback for not receiving the remittances is also clearly beyond the scope of any notice issued under section 124.** Paying drawback or recovering wrongly paid drawback or recovering drawback because the remittances for the exported goods were not received, are in the nature of execution proceedings flowing from the assessment of the Shipping Bill. These are not adjudication proceedings and cannot change the assessment of the Shipping Bill or the mutual liabilities between the Revenue and the exporter.

13. Drawback is an incentive provided by the Government to exporters to nullify the effect of the duties incurred in the manufacture of the exported goods. It is usually paid as a percentage of the Free on Board (FOB) value of the exported goods as soon as the export is completed. There is no separate adjudication proceeding for sanction of drawback and the officer sanctioning drawback cannot modify the assessment of the Shipping Bill. He simply has to pay the drawback as per the assessed Shipping Bill. Thus, it is in the nature of an execution proceeding.

14. If any drawback is paid erroneously, the exporter will have to repay it as per Rule 16 of the Drawback Rules, 1995 which is also in the nature of an execution proceeding and there is no procedure of adjudication under Rule 16 of the Drawback Rules. The erroneous payment should be evident from the Shipping Bill.

15. The exporter is required to obtain the remittance of the sale proceeds in foreign currency within the time given in Foreign Exchange Management Act, (FEMA) which is usually one year. If the exporter fails to get the remittance, as per Rule 16A of the Drawback Rules, he has to repay the drawback paid to him and this process is also, likewise, an execution proceeding. The difference between Drawback Rules 16 and 16A is that Rule 16 deals with cases where the payment was erroneous. Rule 16A, on the other hand deals with cases, where there was no error in payment but the exporter failed in its obligation to

receive the remittance. If the exporter does not repay the drawback under Rule 16A, it can be recovered from him under Section 142 (like recovery of any arrears).

16. Rule 16A also provides that if after the drawback is recovered, if the exporter gets the remittance in respect of the exports, then the drawback will be paid again to him.

17. Clearly, none of these proceedings - the payment of drawback or recovery of erroneously paid drawback or recovery of drawback if the exporter fails to get the remittance of the export proceeds or payment of the repaid drawback if the exporter gets the remittance- are NOT adjudication proceedings where the rights and liabilities of the exporter are decided or altered. All these give effect to the assessed Shipping Bill - the entitlement of the exporter to drawback under it and the liability of the exporter to realize the foreign exchange within time or to repay the drawback paid to him. The relevant extracts of Rules 16 and 16 A of the Drawback Rules and Section 142 of the Customs Act are as follows:

**"16. Repayment of erroneous or excess payment of drawback and interest.** Where an amount of drawback and interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of Customs repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it **shall be recovered in the manner laid down in sub-section (1) of section 142 of the Customs Act, 1962** (52 of 1962).

**16A. Recovery of amount of Drawback where export proceeds not realised.** (1) Where an amount of drawback has been paid to an exporter or a person authorised by him (hereinafter referred to as the claimant) but the sale proceeds in respect of such export goods have not been realised by or on behalf of the exporter in India within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999),

including any extension of such period, such drawback **shall be recovered in the manner** specified below.

Provided that the time-limit referred to in this sub-rule shall not be applicable to the goods exported from the Domestic Tariff Area to a special economic zone.

(2) If the exporter fails to produce evidence in respect of realisation of export proceeds within the period allowed under the Foreign Exchange Management Act, 1999, or any extension of the said period by the Reserve Bank of India, **the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, as the case may be or Deputy Commissioner of Customs shall cause notice to be issued to the exporter for production of evidence of realisation of export proceeds** within a period of thirty days from the date of receipt of such notice and where the exporter does not produce such evidence within the said period of thirty days, the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be or Deputy Commissioner of Customs **shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within thirty days of the receipt of the said order :**

Provided that where a part of the sale proceeds has been realised, the amount of drawback to be recovered shall be the amount equal to that portion of the amount of drawback paid which bears the same proportion as the portion of the sale proceeds not realised bears to the total amount of sale proceeds.

**(3) Where the exporter fails to repay the amount under sub-rule (2) within said period of thirty days referred to in sub-rule (2), it shall be recovered in the manner laid down in rule 16.**

**(4) Where the sale proceeds are realised by the exporter after the amount of drawback has been recovered** from him under sub-rule (2) or sub-rule (3) and the exporter produces evidence about such realisation within one year from the date of such recovery of the amount of drawback, **the amount of drawback so recovered shall be repaid by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to the claimant.**

**Section 142. Recovery of sums due to Government.—(1) Where any sum payable by any person under this Act including the amount required to be paid to the credit of the Central Government under section 28B is not paid,—**

**(a) the proper officer may deduct or may require any other officer of customs to deduct the amount so payable from any money owing to such person** which may be under the control of the proper officer or such other officer of customs; or

(b) the Assistant Commissioner of Customs or Deputy Commissioner of Customs] **may recover or may require any other officer of customs to recover the amount so payable by detaining and selling any goods belonging to such person** which are under the control of the Assistant Commissioner of Customs or Deputy Commissioner of Customs or such other officer of customs; or

(c) if the amount cannot be recovered from such person in the manner provided in clause (a) or clause (b)—

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18. The nature of the recovery of drawback under Drawback Rules was examined at length by the **Punjab & Haryana High Court** in **Jairath International<sup>6</sup> vs. Union of India**. The question before the High Court in that case was whether in the proceedings to recover drawback under Rule 16, the assessed Shipping Bill could be modified. It was held that the proceedings under Rule 16 were in the nature of execution proceedings and cannot modify or change the assessment. The relevant portion of the judgment is as follows:

**16. We on examination of the scheme of the 1962 Act and in view of the judgment of Hon'ble Supreme Court in case of *ITC v. CCE (supra)* find that Rule 16 of Drawback Rules, 1995 is also in the nature of execution proceedings** thus an officer even higher in rank than proper officer, who framed assessment at the time of export, cannot modify a shipping bill *qua* value and consequent entitlement of duty drawback while issuing notice or passing order under Rule 16 of the Drawback Rules, 1995. The contention of the counsel for Respondents that as per Valuation Rules, 2007 proper officer has power to re-assess value of goods even though already exported is untenable. As noted in *Famina Knit Fab (supra)* and hereinabove, Valuation Rules are applicable to 'export goods' and these Rules are not enabling provisions to frame re-assessment. Section 14 empowers to frame Rule to reject declared value and re-determine value of export goods. The Valuation Rules, 2007 are framed in exercise of power conferred by Section 14 of 1962 Act. Rule 1(3) and 8 of Valuation Rules permit to reject value of 'export goods'. As per definition of export goods, the goods which stand exported are not 'export goods' so Valuation Rules, 2007 are not applicable to goods already exported. Valuation Rules, 2007 would come into play as soon as the proper officer gets power to reassess already assessed shipping bill. Prior to 8-4-2011, it was proper

officer who used to frame assessment and w.e.f. 8-4-2011 he gets first opportunity to doubt the self-assessed value at the time of export and, secondly, he may prefer an appeal before Appellate Authority. A team of Customs officers at the time of export of goods verify different particulars including value declared by an exporter. The declared value may be accepted or re-assessed and in case re-assessed value is not accepted by exporter, proper officer has to pass speaking order. Thus, as per scheme of the 1962 Act, department is not remediless and Courts are bound to interpret law as such. Courts while interpreting law can neither add nor subtract any word from the plain language irrespective of consequences. It is the legislature who has to rectify, repair or amend the law in case any judgment interpreting law is not acceptable or is contrary to intent and purport of enactment.

19. These execution proceedings are not covered under an SCN issued under section 124.

20. Thus, the only proposal in the SCN which is covered by section 124 is the proposal to impose penalty under section 114.

It reads as follows:

**"114. Penalty for attempt to export goods improperly, etc.**

**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, or abets the doing or omission of such an act, shall be liable,—**

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty 5 [not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act], whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher: Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;

(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.”

21. A plain reading of the above section shows that it provides for imposing penalty on persons for certain acts or omissions which rendered the export goods liable for confiscation under section 113. There is no proposal in the SCN to hold any goods liable to confiscation under section 113. In the absence of any proposal to confiscate goods or to hold goods liable for confiscation under section 113, penalty cannot be imposed under section 114.

22. Learned authorised representative drew our attention to that part of the OIO in which the Joint Commissioner held that some goods were liable to confiscation under section 113 and therefore imposed penalty under section 114. This finding of the Joint Commissioner is clearly beyond the SCN and it explicitly violates section 124 which stipulates that no order of confiscation can be passed without issuing an SCN. **The imposition of penalty under section 114 cannot, therefore, be sustained.**

23. To sum up:

(a) the impugned order upholding the order in original passed by the Joint Commissioner is issued in pursuance of the SCN issued under section 124 under which notice can be issued only for confiscation of goods and imposition of penalty;

(b) the only proposal in the SCN falling within the scope of section 124 is the imposition of penalty under section 114; this cannot be sustained because there is no proposal to confiscate export goods or holding the export goods liable to confiscation under section 113 which is a necessary pre-requisite for imposing penalty under section 114;

(c) the remaining proposals in the SCN fall beyond the scope of any SCN issued under section 124.

24. In view of the above, both appeals are allowed and the impugned order is set aside.

(Order pronounced in open court)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

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

Tejo