

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

PRINCIPAL BENCH,
COURT NO. I

E-HEARING

CUSTOMS APPEAL NO. 51722 OF 2022

[Arising out of the Order-in-Original No. 108/2019/AP/ADC/Export/ICD/TKD dated 24/06/2019 passed by Commissioner of Customs (Appeals), New Delhi – 110 037.]

M/s Kritika Enterprises,

.....Appellant

1st Floor, N – 1, Shop No. 2,
Sector – 12, Noida
Uttar Pradesh – 201 201.

Through its Proprietor,
Chandra Prabha Sharma,
w/o Shri Arun Kumar Sharma

Versus

Commissioner of Customs (Appeals),

....Respondent

New Customs House, Near IGI Airport,
New Delhi – 110 037.

APPEARANCE:

Shri B. Venugopal, Advocate for the appellant.
Shri Shashi Kant Sharma, Authorized Representative for the
Department

CORAM:

HON'BLE JUSTICE MR. DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50472/2025

DATE OF HEARING : 12.12.2024

DATE OF DECISION: 09.04.2025

P.V. SUBBA RAO

M/s Kritika Enterprises, Noida¹ filed this appeal to assail
the order-in-appeal dated 23.10.2020² passed by the
Commissioner of Customs (Appeals), New Delhi whereby he

-
- 1. appellant**
 - 2. impugned order**

rejected the appeal filed by the appellant and upheld the order-in-original dated 26.04.2019 passed by the Additional Commissioner, Customs. The operative part of the order-in-original is as follows :-

- (i) I hereby reject the declared FOB value of Rs. 1,36,75,185/- (Rupees One Crore Thirty Six Lakh Seventy Five Thousand One Hundred and Eighty Five only) for Shipping Bill No. 9826250 dated 22.12.2018 under Rule 8 of the Customs Valuation (Determination of Export Goods) Rules, 2007 and re-determine the value at Rs. 8,06,600/- (Rupees Eight Lakh Six Thousand Six Hundred only) under Rule 6 of the Customs Valuation (Determination of Export Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962.
- (ii) I hereby confiscate the impugned goods having re-determined value of Rs. 8,06,000/- under Section 113 (i) of the Customs Act, 1962. However, as the goods have been released provisionally, I impose Redemption fine of Rs. 8,00,000/- (Rupees Eight Lakh only) under Section 125 of the Customs Act, 1962 in lieu of confiscation.
- (iii) I also impose a penalty of Rs. 12,00,000/- (rupees Twelve Lakh only) on M/s Kritika Enterprises, Delhi under Section 114 (iii) of the Customs Act, 1962.
- (iv) I also impose a penalty of Rs. 12,00,000/- (Rupees Twelve Lakh only) on M/s Kritika Enterprises, Delhi under Section 114 (AA) of the Customs Act, 1962.
- (v) I order that the Bank Guarantee submitted by M/s Kritika Enterprises be encashed against the above redemption fine and penalty, if the same are not deposited by the Noticee within 30 days of issue of this order”.

2. The appellant filed Shipping Bill dated 22.12.2018 to export Oil Filters declaring Free on Board (FOB) value of Rs.1,36,75,185/-. It paid IGST of Rs. 24,61,534/- and did not claim any rebate of State levies, but claimed Merchandise

Exports Incentive Scheme (MEIS) @ 3%. The consignment was examined by the customs officers and the goods were alleged to have been over-valued to claim higher IGST refund/MEIS. It was detained through a memorandum dated 07.02.2019. Statement of Shri Amit Kumar Sharma, the authorized representative of the appellant was recorded and the department conducted a market survey based on which it re-determined the FOB value of the export goods as Rs. 8,06,600/- against the declared value of Rs. 1,36,75,185/-.

3. On request of the exporter, the consignment was released provisionally on execution of bond and bank guarantee and it was allowed to be exported. Thereafter, the Additional Commissioner passed an order dated 26.04.2019 rejecting the FOB value and re-determining it under Rule 6 and Rule 8 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007³ read with Section 14 of the Customs Act, 1962⁴. He confiscated the goods under Section 113 (i) of the Act and allowed their redemption on payment of fine of Rs. 8,00,000/- under Section 125 of the Act. He also imposed a penalty of Rs. 12,00,000/- under Section 114 (iii) of the Act and the penalty of Rs. 12,00,000/- under Section 114AA of the Act on the appellant. This order of the Additional Commissioner was upheld by the Commissioner (Appeals) through the impugned order.

3. Rules
4. the Act

Submissions of the appellant :-

4. Learned counsel for the appellant made the following submissions :-

(i) The confiscation of the export goods and imposition of penalties are contrary to Section 124 of the Act because the Order-in-Original was passed without issuing a show cause notice and granting personal hearing on the ground that the exporter had waived the show cause notice as well as personal hearing.

(ii) The statement of Mr. Amit Kumar Sharma, Authorized Representative admitting that the goods were over-valued was not voluntary.

(iii) As per Section 124 of the Act, issue of show cause notice is mandatory even if the exporter waived the show cause notice.

(iv) The original authority rejected the declared value under Rule 8 and re-determined it under Rule 6 of the Valuation Rules based on market enquiry. This rule reads as follows :-

“Rule 6 Residual method :

(1) Subject to the provisions of rule 3, where the value of the export goods cannot be determined under the provisions of rules 4 and 5, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules provided that local market price of the export goods may not be the only basis for determining the value of export goods”.

(v) The so called market enquiry is nothing but the opinions of two traders namely M/s Space and Space, New Delhi and M/s Arshi Automobile, U.P. who are said to have experience in business of auto spares and who, after seeing the samples, gave their opinions about the market value of the goods. Therefore, the re-determined value of export goods under Rule 6 is on the face of it, is not correct and cannot be sustained.

(vi) During investigation, the appellant had provided details of the purchase of the impugned goods like details of vendors, certified copies of invoices, E-way bills, details of payment, etc. to substantiate the declared value of the impugned goods. The department did not conduct any further enquiries to verify the details provided by the appellant.

(vii) Both the confiscation of the goods and imposition of penalties therefore, need to be set aside.

Submissions on behalf of the Revenue :-

5. Learned authorized representative for the Revenue vehemently supported the impugned order and made the following submissions :-

(i) The appellant had filed the shipping bill to export oil filters claiming IGST refund of Rs. 24,61,534/- and MEIS @ 3% amounting to Rs. 4,10,256/-. On examination

the goods were found to be over-valued and, therefore, market enquiry was conducted and on the basis of market enquiry the FOB value was re-calculated as Rs. 8,06,600/- compared to the declared FOB value of Rs. 1,36,75,185/-. The goods were provisionally released and were allowed to be exported on bond and bank guarantee. In his statement dated 07.02.2019, the appellant waived the show cause notice and personal hearing and accordingly the adjudicating authority re-determined the value of the goods under Rule 6 of the CCR rejecting the declared value under Rule 8. Consequently the exported goods were also held liable for confiscation and redemption fine was imposed under Section 125 and penalties were also imposed under Section 114 and 114AA. These findings were upheld by the Commissioner (Appeals) in the impugned order.

(ii) The appellant's submission that no show cause notice was issued deserves to be rejected because the appellant had, in his statement, waived the show cause notice as well as personal hearing. Therefore, the appellant cannot now say that the principles of natural justice were violated as no show cause notice was issued.

(iii) The market enquiry was conducted on 12.04.2019 by the department during which the authorized representative of the appellant was also present.

Therefore, the Additional Commissioner correctly upheld the re-determination of the value.

(iv) As the appellant had mis-declared the value of the export goods, they were held liable for confiscation under Section 113 and redemption fine was imposed as goods had already been exported after being provisionally released. Therefore, there is no infirmity in the imposition of redemption fine.

(v) Consequently, the penalties under Section 114 and 114AA have also been correctly imposed.

6. We have considered the submissions on both sides and perused the records.

7. By the impugned order, the Commissioner (Appeals) upheld the re-determination of the FOB value of the export goods under Rule 6 after rejecting the declared value under Rule 8. The case of the department is that the appellant had declared a high value in the shipping bill so as to claim excess benefit of MEIS and IGST refund.

8. The question which needs to be answered is what is the meaning of FOB value and whether the customs officers have the right to re-determine it under the Act and Rules.

9. The Free on Board or FOB is one of the INCOTERMS – which are the terms used in international commerce. These are universally understood and accepted. The INCOTERMS make

the costs, risks and liabilities of the buyer and seller explicit. For instance, if the goods are exported on FOB basis, the seller is responsible until the goods are put on Board the vessel or aircraft. All costs and risks up to loading the goods on to the ship or aircraft are on the seller's account. The seller is free once the goods are put on board. The costs and risks associated with transportation to the destination, etc., are all on account of the buyer.

10. Similarly, if the agreement is to sell goods on C&F basis the seller is responsible for the costs and freight i.e., in addition to the cost of the goods, the seller is also responsible to bear the cost of freight up to the port of destination. However, the transit insurance is on account of the buyer. If the goods are insured, the cost of the insurance is to be borne by the buyer and if the goods are not insured, the risk is on the buyer.

11. Another INCOTERM is CIF in which cost, insurance and freight are included in the seller's responsibility. If the goods are, for instance to be sold on CIF, Dubai basis the exporter from India will be responsible for all costs including the freight and transit insurance till the goods reach Dubai port.

12. There are also other INCOTERMS such as FAS (Free alongside ship), FOR (free on road/rail), Ex-works, etc. What needs to be noted is when a value is expressed as FOB C&F etc. what is being expressed is the transaction value which the

buyer and seller have agreed upon. This is the consideration which the buyer agrees to pay the seller for the goods on the terms indicated. Only the buyer and the seller who are parties to the contract can decide the transaction value of the goods. No other person, including the custom officers can determine or re-determined the transaction value whether it is on FOB basis, CIF basis, C&F basis or otherwise.

13. The powers of the customs officers under the Act and Rules to determine the value of imported goods or export goods is the power to determine the value for the purpose of assessing the duty. In case of imports, it is meant for determining the import duty and in case of exports it is meant for determining the export duty.

14. Section 14 of the Customs Act provides that for the purpose of Customs Tariff Act, 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, but it provides for some exceptions. These exceptions include the conditions under which the transaction value can be rejected and the value can be re-determined as per rules. It needs to be noted that the Customs Tariff Act and the schedules thereunder determine the amount of duty payable. As per Section 12 of the Customs Act, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force, on

goods imported into or exported from India. Duties on most goods are charged on ad-valorem basis and, therefore, the value of the goods is important. Section 14 provides for determining the value and also provides for the Government to make Rules for the purpose. These Rules include conditions under which the transaction value can be rejected and the value can be determined by other means. Section 12 and Section 14 of the Act are reproduced below :-

“Section 12 : Dutiable goods : Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975, or any other law for the time being in force, on goods imported into, or exported from, India.

Section 14. Valuation of goods.

(1) For the purposes of the Customs Tariff Act, 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:

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling

charges to the extent and in the manner specified in the rules made in this behalf:

Provided further that the rules made in this behalf may provide for,-

(i) the circumstances in which the buyer and the seller shall be deemed to be related;

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section:

Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value”.

15. The Customs Valuation (Determination of Value of Export Goods) Rules 2007 have been framed under Section 14 of the Act to determine the export value of the goods. Rule 3 provides that the value shall be the transaction value subject to Rule 8. Rule 8 provides for rejection of the declared value

under certain conditions. Rules 4 to 6 provide for re-determination of value if the transaction value is rejected under Rule 8. In this case, the Additional Commissioner rejected the value under Rule 8 and re-determined the value under Rule 6. However, no export duty is chargeable on the goods. Therefore, re-determination of value under Section 14 and the Valuation Rules is irrelevant.

16. The Additional Commissioner, however, held that the FOB value stands re-determined under Rule 6. This is not correct because the FOB value is the transaction value, i.e., the price paid or to be paid by the buyer to the exporter as agreed to between them. No stranger to a contract, including the customs officers have any right to re-determine the transaction value between the buyer and the seller. If the transaction value is rejected under Rule 8 and the value is re-determined, the customs officer, refuses to accept the transaction value as the value for determining the export duty. He, thereafter determines the value through some other method provided in the Rules.

17. An illustration will make this distinction between FOB value and assessable values clear. 'A' a resident of India buys a luxury car from his friend 'B', a resident of U.K. for \$ 1,000. 'B' sends the car to India and 'A' files the Bill of Entry declaring the transaction value of \$ 1000. On examination, the customs officer, finding the value to be too low, re-determines it as,

say, \$ 5000. The assessable value will be \$ 5,000 on which the import duty has to be paid. However, the transaction value continues to be \$ 1,000. While 'A' has to pay duty calculated on a value of \$ 5,000, he has to remit only \$ 1,000 to 'B' as agreed to. 'A' has no obligation to remit more than \$ 1,000 even if the customs officer determines the value for calculation of duty as \$ 5,000. The consideration (price) could be lower or higher than the market value of comparable goods and the transaction is still valid. The FOB value in the present case is the transaction value. The officers had no right to change the transaction (FOB) value of the goods. Therefore, the order of the Additional Commissioner reducing the FOB value is not correct and the Commissioner (Appeals) was not correct in upholding such an order.

Confiscation, Fine and Penalty

18. The Additional Commissioner held that the export goods were liable for confiscation under Section 113(i) and since they had already been exported after being provisionally released on bond and bank guarantee, he imposed a redemption fine under Section 125 in lieu of confiscation. Section 113 (i) reads as follows:

113. Confiscation of goods attempted to be improperly

exported, etc.

1. - The following export goods shall be liable to confiscation:-

.....

(i) **any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act** or in the case of baggage with the declaration made under section 77;

19. The case of the department is that since the appellant had declared a much higher value and the value, on re-determination by the officers was found to be lower, the export goods were liable to confiscation under Section 113(i). The argument appears attractive on the face of it. The exporter has an obligation to indicate the correct value of the goods in the Shipping Bills. The question is what value will he be in a position to declare. Obviously, while filing Shipping Bill, he can and must correctly indicate the transaction value. Similarly, in a Bill of Entry, the importer can only indicate the transaction value. Neither the exporter nor the importer has any right or obligation to reject the transaction value and determine the value through any of the other methods indicated in the Valuation Rules. The power to reject the transaction value under Rule 8 of the export valuation Rules is conferred on the proper officer, who alone can, reject the transaction value and redetermine the value under any of the other methods. At the time of filing the Shipping Bill, the exporter will have no mechanism of knowing if the proper officer will find the transaction value acceptable as assessable or if he would reject it and if he rejects it, what he would find as the correct

re-determined assessable value. Therefore, it is impossible for any exporter to anticipate what value the proper officer would determine and file the Shipping Bill accordingly. Law does not require anyone to do the impossible task of predicting if the proper officer would find the value acceptable or reject and re-determine it and if so, what value he would re-determine as the assessable value. At the time the Shipping Bill, neither the exporter nor even the officer can indicate what the re-determined value would be. Therefore, the only obligation on the exporter is to correctly declare the transaction value in the Shipping Bill.

20. If the transaction value is 'X' as is evident from the records and the exporter declares 'Y' as the value, then Section 113(i) gets attracted and the export goods will be liable to confiscation. Export goods will not be liable to confiscation when the value declared in the Shipping Bill is as per the transaction value but the proper officer rejects it and determines the value through some other method.

21. In view of the above, confiscation of the goods under Section 113 (i) and consequential imposition of redemption fine cannot be sustained and need to be set aside.

22. Penalty under Section 114 is attracted if the export goods are confiscated. Since in this case, confiscation under Section 113 itself cannot be sustained, penalty under Section 114 also cannot be sustained.

23. Penalty was also imposed by the Additional Commissioner under Section 114AA. This section reads as follows:

114AA. Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

24. The case of the department is that the appellant had knowingly declared wrong value and hence penalty is imposable. As discussed above, since the appellant has to only declare the transaction value and has neither any obligation nor power under the law to re-determine the Value under some other method, and further since he has no obligation whatsoever under the law to predict what value the proper officer may determine, the appellant had not mis-declared the value in the Shipping Bill. Therefore, penalty under Section 1114AA is not imposable on the appellant.

25. To sum up:

- (i) The FOB value of goods is the transaction value of the goods between the exporter and the overseas buyer.
- (ii) No stranger to the contract of sale including the Customs officer has any right to re-determine the FOB value.

- (iii) Section 14 of the Customs Act and the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 empower the proper officer to determine the value, i.e., the assessable value to determine duty under the Customs Tariff Act, 1975 or under any other law. They do not empower the proper officer to re-determine the transaction value which is a product of negotiation between the buyer and the seller.
- (iv) Unless there is documentary evidence that the FOB value declared in the Shipping Bill is not correct and the true FOB value is something else as per the documents, the declared FOB value has to be accepted. The Customs Act and Rules cannot be applied to re-determine the FOB value.
- (v) Once the FOB value is decided, the benefits which are based on the FOB value automatically follow.
- (vi) The re-determination of the FOB value by the Additional Commissioner is without any authority of law and it has been wrongly upheld by the Commissioner (Appeals) in the impugned order.
- (vii) Export goods are liable to confiscation under Section 113(i) if the goods are not as per declaration in the Shipping Bill in respect of value or any other parameter. The value required to be declared by the exporter is only the transaction value.

(viii) The exporter has no obligation whatsoever to do the impossible task of anticipating if the proper officer would accept the declared transaction value or would re-determine it and if so, what would be the re-determined value and file the Shipping Bill accordingly.

(ix) Therefore, the finding that the goods were liable to confiscation under Section 113(i) and the redemption fine imposed are liable to be set aside.

(x) Consequently, penalties under Section 114 and 114AA are also liable to be set aside.

26. The appeal is allowed and the impugned order is set aside with consequential relief to the appellant.

(Order pronounced in open court on 09/04/2025.)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

PK