



ALO Law Office- IDT Tax / Arbitration / Litigation

Date: 04.06.2025

CESTAT Delhi- Customs Cannot Invoke Section 28AAA Without DGFT Cancellation

The Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Delhi, has set aside the confiscation and penalty orders issued against New Era Trading Pvt. Ltd., a ready-made garments exporter, under the Customs Act, 1962. The case revolved around alleged misuse of the Focus Market Scheme (FMS) benefits, with the Revenue Department invoking Section 28AAA, alleging diversion of goods and fraudulent claims.

Background of the Case

New Era Trading Pvt. Ltd. had exported garments under the Focus Market Scheme to various countries including Panama and the Netherlands, on FOB (Free on Board) terms. The freight forwarding was handled by Concorde Shipping & Logistics India, based on buyer instructions.

Later, it was discovered that the goods, allegedly destined for notified countries, had actually landed in Dubai, a non-notified destination under the scheme.

This led to the issuance of a Show Cause Notice (SCN) in January 2020, alleging:

- Misuse of FMS scrips worth ₹4.14 crore
- Goods liable for confiscation under Section 113(d), (g), and (i)
- Proposal of penalties under Sections 114(iii), 114AA, and 114AB

Tribunal's Key Observations

1. Invalid Jurisdiction under Section 28AAA

CESTAT held that the Customs Department lacked jurisdiction to initiate recovery proceedings under Section 28AAA without prior cancellation of the scrip by the Director General of Foreign Trade (DGFT).

“The DGFT had neither cancelled the instrument nor even initiated proceedings for cancellation... thus, the customs authority could not proceed with recovery.”
— *CESTAT referencing Delhi High Court judgment in Amit Exports (W.P. (C) 17314/2022)*

2. Statement of Freight Forwarder Not Admissible

The tribunal rejected reliance on the Section 108 Customs Act statement of Imran Mirza, proprietor of the freight forwarding firm, as he was neither examined as a witness nor cross-examined.

“Statements recorded under coercion or outside adjudication proceedings cannot be considered valid evidence under Section 138B.”
— *CESTAT quoting Surya Wires Pvt. Ltd.*

3. Exporter Not Responsible Post Let Export Order

The tribunal upheld that once the Let Export Order (LEO) is issued in FOB contracts, the title and control pass to the buyer.

“After LEO, the exporter cannot be held responsible for onward shipping changes made by the freight forwarder.”
— *CESTAT citing CBIC Circular dated 28.02.2015*

Outcome of the Judgment

CESTAT set aside the entire adjudication order, which included:

- Recovery of ₹4.14 crore under Section 28AAA
- Confiscation under Section 113
- Penalties under Sections 114(iii), 114AA, and 114AB

Legal Significance

This judgment reinforces the legal position that:

- Customs authorities cannot unilaterally adjudicate FMS scrip misuse without DGFT’s prior cancellation;
- Procedural safeguards under Sections 108 and 138B must be followed strictly;
- The onus of proving misuse under export promotion schemes lies with the Department, not just on statements.

Conclusion

The ruling provides relief and legal clarity to exporters operating under Chapter 3 benefit schemes like FMS. It underscores the primacy of DGFT in matters of export benefit regulation and acts as a safeguard against arbitrary enforcement by customs authorities.

This Article has been written by Shri Ravi Shekhar Jha, Advocate Delhi High Court based on his interpretation of the law. He can be reached at his email id intelconsul@gmail.com or on his Mobile +91-9999005379.

Source: CESTAT Delhi

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Write to us at office@aadrikaalaw.com

Tel: +91-11-4999 2707 | +91-9999005379

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

PRINCIPAL BENCH- COURT NO. I

CUSTOMS APPEAL No. 55675 of 2023

(Arising out of Order-in-Original No. 05/2023/Pr.Commr/ICD/TKD/Export dated 27.04.2023 passed by the Principal Commissioner of Customs, ICD-Export, Tughlakabad, New Delhi)

New Era Trading Pvt. Ltd.

504, 5th Floor, Indraprastha Tower,
Plot No. 6, Community Centre,
Wazirpur Industrial Area,
Delhi- 110052

....Appellant

Versus

Principal Commissioner of Customs

ICD, Tughlakabad
NEW DELHI
110020

....Respondent

APPEARANCE:

Shri Ashirwad and Shri Virat sharma, advocates for the appellant
Shri Shashi Kant Sharma, 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. 50823/2025

JUSTICE DILIP GUPTA :

New Era Trading Pvt. Ltd.¹ has filed this appeal to assail the order dated 27.04.2023 passed by the Principal Commissioner of Customs, ICD-Export, TKD, New Delhi², confiscating 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

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- 1. the appellant**
 - 2. the Principal Commissioner**
 - 3. the Customs Act**

confiscation nor cleared under a bond, redemption fine in lieu of confiscation has not been imposed. The Principal 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 penalties have been imposed upon the Proprietor of the appellant under section 114(iii), 114AA and section 114AB of the Customs Act.

2. The appellant is engaged in the manufacture and export of Ready Made Garments. It entered into contracts for supplying Ready Made Garments⁴ to UAE, Sudan, Senegal, UK, Afghanistan, Armenia, Azerbaijan, Kazakhstan, Ethiopia, Germany, Myanmar under drawback Focus Market Schemes. 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

4. **the Goods**

5. **FMS**

6. **the Freight Forwarder**

'Panama' or 'Netherlands' in this case 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/Netherlands who sent the exporter copy of 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, 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 203 shipping bills during the period of dispute from March 2013 to September 2013. 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 the aforesaid countries. 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 statement, Imran Mirza stated that he had himself amended the Shipping Bills at the direction of the exporters.

8. A show cause notice dated 24.01.2020 was issued *inter alia* proposing to confiscate the goods and demanding ineligible benefit availed under the FMS equivalent to Rs. 4,14,06,583/- under section 28AAA of the Customs Act with interest. It also proposed to impose penalty under section 114AA, section 114(iii) and section 114AB of the Customs Act on the appellant.

9. The adjudicating authority passed the impugned 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. 4,14,06,538/- with applicable interest;
- (c) Dropped the demand of Duty Drawback;
- (d) Imposed penalty on the appellant under section 114AA, section 114(iii) and section 114AB of the Customs Act.

10. Shri Ashirwad, learned counsel for the appellant assisted by Shri Virat Sharma, 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 Principal Commissioner 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) Rajan Kumar, the proprietor of the appellant has filed a criminal complaint against Imran Mirza, proprietor of

7. DGFT

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

the Freight Forwarder regarding the false statement, alleging that instructions were given by the appellant for amending the shipping bills and exporting the goods to un-notified countries i.e., Dubai. The matter is pending before the Judicial Magistrate, First Class, Ludhiana; and

- (v)** No penalty could have been imposed under section 114(iii), section 114AA and section 114AB of the Customs Act.

11. Shri Shashi Kant Sharma, 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.

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

13. 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.

14. 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 said to inhere in the customs authority to doubt the issuance of the instrument. After referring to 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 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.

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 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 aforementioned 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)

15. 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 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:

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)

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

17. 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 in his own handwriting 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 Principal Commissioner, therefore, held that a transaction based on fraud precludes the party from deriving any benefit.

18. 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.

19. In this connection, reference can be made to the decision of the Tribunal in **M/s Surya Wires Pvt. Ltd. vs. Principal Commissioner, CGST, Raipur**⁹. 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

9. **Excise Appeal No. 51148 of 2020 decided on 01.04.2025**

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 (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."

20. 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-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."

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

22. 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.

23. 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. 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."

24. 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 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.

25. 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.

26. Penalties could not have been imposed under section 114AA and section 114(iii) of the Customs Act. The appellant claims that it was a bona fide exporter who exported goods in terms of the contract on FOB basis. The title of the goods passed to the buyer as soon as the Let Export Order was issued and the appellant was not responsible for any changes that may have been made in regard to the destination port. Section 114AA provides that if a person knowingly or intentionally makes, signs or uses or causes to be made, any material 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.

27. 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. The Principal Commissioner has confiscated the goods under section

113 of the Customs Act 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.

28. Penalty under section 114AB of the Customs Act could not have been imposed upon the appellant as the appellant had not obtained any instrument by fraud, collusion, wilful mis-statement or suppression of fact. Such allegations have been made in the impugned order based on statements of persons who were not examined by the Adjudicating Authority in accordance with the procedure prescribed under section 138B of the Customs Act. The statements, therefore, could not have been considered.

29. It is, therefore, not possible to sustain the order dated 29.05.2019 passed by the Principal Commissioner. It is, accordingly, set aside and the appeal is allowed.

(Order pronounced on **04.06.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

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