IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No. 454 of 2011

(Arising out of Order-in-Appeal No. 55/2011 (TRY) dated 21.11.2011 passed by the Commissioner of Customs & Central Excise (Appeals), Trichy)

M/s. Pallava Textiles Ltd. **Appellant**
No. 27-C, Sankari Bye-Pass Road
Pallipalayam, Erode – 638 006.

Vs.

Commissioner of Customs **Respondent**
Custom House, New Harbour Estate
Tuticorin- 628 004.

With

Customs Appeal No. 5 of 2012

(Arising out of Order-in-Appeal No. 56/2011 (TRY) dated 21.11.2011 passed by the Commissioner of Customs & Central Excise (Appeals), Trichy)

M/s. PKPN Spinning Mills Pvt. Ltd. **Appellant**
No. 6, Bye-Pass Road,
Pallipalayam, Erode – 638 006.

Vs.

Commissioner of Customs **Respondent**
Custom House, New Harbour Estate
Tuticorin- 628 004.

And

Customs Appeal No. 6 of 2012

(Arising out of Order-in-Appeal No. 58/2011 (TRY) dated 21.11.2011 passed by the Commissioner of Customs & Central Excise (Appeals), Trichy)

M/s. JPP Mills Pvt. Ltd. **Appellant**
S.F. No. 411 & 412, Patharai Village
Uppupalayam, Thiruchengodu Taluk
Pallipalayam, Erode – 638 006.

Vs.

Commissioner of Customs **Respondent**
Custom House, New Harbour Estate
Tuticorin- 628 004.

APPEARANCE:

Ms. Nivedita Mehta, Advocate for the Appellant
Smt. Anandalakshmi Ganeshram,
Authorised Representative for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

FINAL ORDER NOS. 40941-40943/2026

Date of Hearing: 04.03.2026
Date of Decision: 20.08.2026

Per M. Ajit Kumar,

These appeals arise out of three different Orders in Appeal (impugned Orders), and the issue being common, they were heard together and are disposed by this common order.

Factual Matrix

2. The appellants are manufacturers of viscose yarn and cotton blends and availed export incentives under the Duty Entitlement Pass Book (DEPB) Scheme. During scrutiny of their export documents, the DRI found that, in respect of certain exports made on CIF basis, the freight actually paid to the liners was higher than the freight declared in the shipping bills, resulting in inflation of the FOB value and consequential availment of excess DEPB benefits. The lower authority, after rejecting the declared value and redetermining the same, ordered confiscation of the goods under Section 113(h) and (i) of the Customs Act, 1962, demanded the differential duty with interest under Section 28AB and imposed penalties under Section 114A. The appeals filed before the Commissioner (Appeals) were dismissed. Hence, the present appeals.

3. The Ld. Advocate Ms. Nivedita Mehta appeared for the appellants and Ld. Authorized Representative Smt. Anandalakshmi Ganeshram, appeared for the respondent.

Submissions made by the Appellant

3.1 Ms. Nivedita Mehta the Ld. Counsel for the appellants submitted as follows:

A. Background of the dispute

The Appellants are engaged in the manufacture and export of viscose yarn and cotton blends, predominantly through Tuticorin Port. The exports were made on CIF basis, and the FOB value for DEPB purposes was arrived at by deducting the freight and insurance components from the CIF value. The Department alleges that the Appellants ought also to have deducted the Currency Adjustment Factor (CAF), Bunker Adjustment Factor (BAF) and ocean freight, while determining the FOB value. On this basis, it is alleged that the Appellants obtained DEPB scrips in excess of their entitlement. BAF represents compensation subsequently recovered by shipping lines/freight forwarders for unforeseen increases in freight costs, such as fuel price escalation or route diversions, while CAF represents compensation for unforeseen fluctuations in foreign exchange rates. **Both charges arise only subsequently, often after the goods reach the destination, and could not reasonably have been anticipated by the exporter while filing the shipping bill.** The Appellants submit that the demand raised on this basis is unsustainable both on jurisdiction and on merits.

B. Issue covered by the Tribunal's decision

At the outset, the Appellants submit that the issue is squarely covered in their favour by **M/s. Cheran Spinners Ltd. & Anr. Vs Commissioner of Customs, Tuticorin, Final Order Nos. 40752-40753/2025 dated 22.07.2025**, wherein, on an identical issue concerning deduction of CAF and BAF for determination of FOB value and recovery of alleged excess DEPB benefit under Section 28, the Tribunal held that such recovery under Section 28 was not permissible.

C. Demand under Section 28 is without jurisdiction

The Appellants submit that Section 28 can be invoked only for recovery of duty allegedly short-levied or short-paid from the person liable to pay such duty. The present demand, however, relates to alleged excess DEPB credit obtained on exports and subsequently utilised by the transferees for payment of import duty. The Appellants are exporters and are not the importers in respect of the imports against which the alleged short levy is sought to be recovered. Further, the validity and extent of credit available under a DEPB scrip issued by the DGFT cannot be unilaterally re-determined by Customs. The power to amend, cancel or recover excess DEPB credit lies with the licensing authority, namely, the DGFT. Reliance is placed on **Titan Medical Systems Pvt. Ltd. Vs CC** [2003 (151) E.L.T. 254 (S.C.)], **Commissioner of Customs, Mumbai Vs Adani Exports** [2024 (17) Centax 295 (Tri.-Ahmd.)], **Zuari Industries v. Commissioner** [2007 (210) E.L.T. 648 (S.C.)] and **Renuga Soft-X Towels Vs Commissioner of Customs, Tuticorin** [2006 (206) E.L.T. 948 (Tri.-Chennai)]. In the present case, although the Customs authorities had requested the Joint Director of

Foreign Trade, Coimbatore, to examine and reduce the DEPB credit to the extent allegedly in excess, no proceedings were initiated by the licensing authority. The decision in **Swati Industries** (supra), therefore, squarely applies.

D. CAF and BAF are not part of the freight declared in the CIF value

The Appellants submit that BAF represents compensation recovered by shipping lines towards unexpected increases in fuel-related costs, while CAF represents compensation towards fluctuations in foreign exchange rates. These charges may arise subsequently and are separately recovered by the shipping lines or freight forwarders. Since the CIF value declared to the foreign buyer did not include such subsequent charges, there was no question of deducting CAF or BAF from the CIF value for determining the FOB value. The Department has also not established that these charges formed part of the freight component included in the CIF value declared in the shipping bills.

E. No undervaluation or inflation of FOB value

The allegation of inflation of the FOB value is without factual basis. The exports were duly scrutinised and permitted by Customs, and the Department has not disputed the CIF value declared in the shipping bills. The freight forming part of the declared CIF value did not include the CAF and BAF subsequently charged by the shipping lines. Consequently, the subsequent recovery of such charges could not have resulted in any inflation of the FOB value declared at the time of export.

F. Demand is barred by limitation

Without prejudice to the contention that Section 28 itself is not invocable, the Appellants submit that the extended period of limitation is also unavailable. The allegation of suppression is founded merely on the assertion that the Appellants deliberately failed to disclose the ocean freight, CAF and BAF. Neither the show cause notice nor the orders of the lower authorities establish that the Appellants were aware that subsequently incurred CAF and BAF charges were required to be deducted from the FOB value declared at the time of export. There was, therefore, neither suppression of material facts nor any intent to avail an ineligible DEPB benefit. The decision in **TTK Prestige Ltd.** (supra) is relied upon.

G. No demand without reference to the relevant imports

The Appellants further submit that a demand of customs duty under Section 28 must relate to a specific import transaction and the corresponding Bill of Entry. In the absence of identification of the individual imports and the corresponding Bills of Entry giving rise to the alleged short levy, the impugned demand is legally unsustainable.

H. Penalty not imposable

Since the duty demand itself is without jurisdiction and unsustainable on merits as well as on limitation, the consequential penalties cannot survive. Further, where the amount demanded has already been paid before issuance of the show cause notice, penalty under Section 114 cannot be imposed. In the facts of the case, the ingredients necessary for invocation of Section 114A have also not been established.

I. Prayer

For the above reasons, the Appellants submit that the impugned Orders are unsustainable and pray that the same be set aside and the appeals allowed, with consequential relief, including refund of the amounts paid along with applicable interest.

Submissions made by the Respondent-Revenue

3.2 Smt. Anandalakshmi Ganeshram, Ld. Authorized Representative, submitted on behalf of the Revenue that:

A. BAF and CAF form part of freight

Bunker fuel is the fuel used aboard ships and that bunkering charges ordinarily form a substantial component of freight charged by shipping lines/freight forwarders. Whether recovered before sailing or subsequently as compensation, such charges called (BAF) remain part of the freight and cannot be treated as contingent or unrelated charges. Similarly, the CAF, being compensation for fluctuations in foreign exchange rates, is also attributable to freight and forms part of the freight value. Accordingly, BAF and CAF were required to be deducted, along with insurance, from the CIF/ CF value for determining the FOB value of the exported goods for DEPB purposes.

B. Suppression of actual freight

It was further submitted that an employee of the Appellant admitted that the Customs authorities were not informed of the actual freight subsequently paid to the shipping lines. Hence, the Appellant was aware that the freight declared in the shipping bills was only an approximate amount and, nevertheless, deducted it instead of the actual freight paid. This resulted in inflation of the FOB value and consequent availment of excess DEPB benefit. The non-disclosure of the actual freight was, therefore, deliberate suppression of material facts.

C. DEPB exemption and power to recover duty

The DEPB Scheme, as implemented through Customs Notification dated 22.04.2002, operates as a customs duty exemption. The power to grant exemption would necessarily include the power to recover duty where the exemption has been wrongly or excessively availed.

D. Applicability of Sections 113 and 114 of the Customs Act

Reliance was placed on the Full Bench decision of the Hon'ble Calcutta High Court in **Eurasian Equipment Chemicals Ltd. Vs Collector** [1980 (6) E.L.T. 38 (Cal.-FB)], wherein it was held that goods already exported could fall within the expression "export goods" under Section 2(19) of the Customs Act and that Sections 113 and 114 could apply thereto. The said decision was stated to have been followed by the Chennai Bench of the Tribunal in **Cargomer Vs Commissioner of Customs, Trichy** [2007 (215) E.L.T. 317 (Tri.-Chennai)].

E. Prayer

The learned Authorised Representative accordingly prayed that the appeals be rejected**.**

Discussion and Findings

4. We have carefully considered the submissions, both written and oral, of the rival parties to this dispute. The Revenue proceeds on the premise that BAF and CAF, being charges recovered by the shipping lines towards variations in fuel costs and foreign exchange rates respectively, necessarily form part of freight and, therefore, have to be deducted from the CIF value along with insurance for determining the FOB value for DEPB purposes.

5. More importantly, we find that the controversy before us is directly covered by the decision of this Bench in **M/s. Cheran Spinners Ltd.** (supra). The Bench speaking through one of us [Shri. P. Dinesha, Member (Judicial)], found that the appellants therein were manufacturers of viscose yarn and cotton blends exporting through Tuticorin under the DEPB Scheme. The Department had proceeded on the identical allegation that BAF and CAF ought to have been deducted from the CIF value, resulting in excess DEPB benefit. The demand was also sought to be recovered under Section 28 of the Customs Act, 1962. It was held as under:

> "5. At the threshold, we do not find any merit in the impugned order confirming the recovery of duty on the allegations of over-valuation. The case of the Revenue as we have extracted supra, in a nutshell, is that the importer/appellant had obtained DEPB scripts of a higher value than what it was entitled to. **<u>To arrive at this allegation, the Department has alleged that the CAF and BAF are required to be deducted from CIF, admittedly, which was not done by the Appellant.</u>**
>
> 6. The recovery of the above has been made by the Revenue under Section 28 of the Customs Act. On this aspect, we find that in the following orders, the Benches have held that the recovery of an alleged over valuation of DEPP is not permissible under Section 28 Supra: -
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> 1.**TTK Prestige Ltd. vs Commissioner of Customs, Bangalore** 2005(188) E.L.T. 385(Tri.-Bang.)
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>> "7....Another important point is that the Customs authorities do not have any jurisdiction to reduce the excess credit taken. The DGFT authorities have the proper jurisdiction. Until and unless the DGFT takes action we cannot even hold that the credit taken is irregular. In view of these facts, we cannot hold that there is short levy of Customs duty in respect of the goods imported by paying duty through the DEPB credit taken. The case laws cited by the learned Advocate and the Ministry's Circular are very relevant. Therefore the OIO cannot be sustained......"

2. **Swati Industries vs Commissioner of Customs, Amritsar** 2009 (248) E.L.T. 191(Tri.-Del.)

> "3.1.1....In such cases, the Customs Authorities are at liberty to pursue with the DGFT Authority to cancel the DEPB scrips to prevent abuse thereof, but they cannot recover the duty form the exporter when he has transferred those DEFB scrips to others. We also find that we are supported in our conclusion by Tribunal's decision in cases of Vijeta International v. CC, Mumbai reported in 2006(199)E.L.T.89 and Dharam Exports v. CC, Nhava Sheva reported in 2005(192)E.L.T.503...."

3. **Mercantile India vs Commissioner of Customs, Chennai** 2007 (214) E.L.T. 540 (Tri.-Chennai)

> "5....After considering the submissions, we find that what the show-cause notice and the Commissioner's order sought to recover under Section 28(2) of the Customs Act from the appellants was not any amount of duty but an amount of DEPB credit availed by them in connection with the exports cleared under the 56 Shipping Bills. It has been consistently held by this Tribunal that DEPB credit is not a duty and the same cannot be realized under Section 28 of the Customs Act vide Rammapati Exports (supra). By now, it is also settled law that the power to recover DEPB credit wrongly availed by an exporter is vested in DGFT vide Kobian ECS India Pvt. Ltd. v. Commissioner of Customs, Mumbai-2003 (157) ELT 662 (Tri-Mumbai), Dear Impex v Commissioner of Customs, Mumbai 2004 (175) E.LT. 611 (Tri-Mumbai), Suresh Enterprises v. Commissioner of Customs, Mumbai 2005 (179) ELT 466 (Tri-Mumbai) and TTK Prestige Ltd. v Commissioner of Customs, Bangalore - 2005 (188) ELT 385 (Tri-Bang.)...."

7. **<u>Also, it has been held in the above cases that the proper authority is the DGFT who alone can initiate any proceedings against the importer/appellant for recovery of DEPB credit claimed in excess and that the Customs Authorities cannot recover/realise the same under Section 28 ibid.</u>** It is a matter of record in this case on hand that though the Customs Authorities sought the intervention of DGFT alleging that the credit obtained at a higher rate by the Appellant but the DGFT did not accept the same and consequently, they did not also initiate any proceedings.

> 8. In view of the above discussion alone and with the support of decided cases, we are of the view that the impugned order deserves to be set aside, which we here by do. "

Hence the Tribunal, after considering the very same contention, held that there was no merit in recovery of the alleged excess DEPB benefit under Section 28.

6. The contention of Revenue that the DEPB scheme operates through a customs exemption notification and that the power to grant exemption necessarily includes the power to recover duty where the exemption is misused, cannot assist the Department in the present case. The demand in question is not founded upon a failure to satisfy a condition attached to an exemption at the time of import. It arises from the allegation that the exporter obtained DEPB credit in excess of its entitlement on account of an incorrect determination of FOB value. The nature of the alleged liability cannot be altered merely by describing DEPB as a customs duty exemption. The Tribunal in **Mercantile India** (supra), has specifically distinguished between customs duty and DEPB credit and held that the latter cannot be recovered under Section 28.

7. Once the very basis of the demand under Section 28 fails, the consequential demand of interest and the penalties imposed on the premise of availment of excess DEPB benefit cannot survive. We, therefore, find no justification to take a view different from the one taken by this Bench in **Cheran Spinners** (supra), particularly when the factual and legal controversy is substantially identical. Judicial discipline requires us to follow our own decision, particularly when it has not been shown to have been set aside, overruled, or varied by a

higher appellate forum. In view of the foregoing, the impugned orders confirming recovery of the alleged excess DEPB benefit under Section 28 of the Customs Act, 1962, along with interest and penalties, cannot be sustained.

Conclusion

8. The impugned Orders are accordingly set aside and the appeals are allowed with consequential relief, in accordance with law. The appeals are disposed of accordingly.

(Order pronounced in open court on 20.08.2026)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

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