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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. NO. 380/148/DBK/16-RA/3345 Date of Issue: 11/12/2018

ORDER NO.1013/2018-CUS (WZ) /ASRA/Mumbai DATED 30.11.2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicant : Commissioner of Customs(Export), Air Cargo Complex, Sahar, Andheri(East), Mumbai 400 059

Respondent : M/s Astor Corporation Ltd.
Kasturi Bldg., 5th Floor,
171/172, Jamshedji Tata Road,
Mumbai 400 020

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-AXP-APP-573-15-16 dated 07.01.2016 passed by the Commissioner of Customs(Appeals), Mumbai Zone-III.

ORDER

This revision application is filed by Commissioner of Customs(Export), Air Cargo Complex, Sahar, Andheri(East), Mumbai 400 059(hereinafter referred to as "the Applicant") against the Order-in-Appeal No. MUM-CUSTM-AXP-APP-573-15-16 dated 07.01.2016 passed by the Commissioner of Customs(Appeals), Mumbai Zone-III.

2.1 The respondent had imported "Chocolate" and filed Bill of Entry no. 3797607 dated 13.11.2013. The goods were assessed to duty amounting to Rs. 38,50,144/- which was paid by importer vide TR Challan No. 2007463087 dated 16.11.2013. However, FSSAI had given rejection report NCC No. NCC201300027931 dated 13th November 13 which stated that "This office is not in a position to issue NOC of the product mentioned above as the result of inspection/ analysis shows that the sample do not confirm to purification under the FSS Act, 2006 and Rules and Regulations made there under". It is further stated that, "As the product is multi piece pre-package and does not confirm to the labeling specification under 2.2.2 of the FSS (P&L) Rules, 2011". Since the import had taken place in contravention of the Food Safety and Standards Regulations, 2011, the imported goods became "Prohibited Goods" in terms of Section 25 of the Food Safety and Standards Act, 2006. Therefore, the Adjudicating Authority vide Order-in-Original No. ADC/SKS/258/2013-14 GR.I Adjn. ACC dated 26.12.2013 confiscated the said goods under Section 111(d) of the Customs Act, 1962 and the same were allowed for re-export on payment of redemption fine of Rs. 12,00,000/- under Section 125 in lieu of confiscation, penalty of Rs. 6,00,000/- was imposed on the importer under Section 112(a) of the Customs Act, 1962.

2.2 The importer/appellant exported the goods vide Shipping Bill No. 00761 dated 06.01.2014 and filed drawback claim under Section 74 of the Customs Act, 1962. The claim of the importer for seeking refund of duty paid at the time of import was rejected by the Adjudicating Authority on the premise that since the goods were not delivered to importer, the import was not complete as per definition provided under Section 2 of Customs Act,

1962. Adjudicating Authority relied upon the Judgment passed by Mumbai CEGAT in case of Tata Consultancy Services V/S CC[1990(49)ELT 565(Tri-Mumbai)] and held that Section 74 of the Customs Act, 1962 was not applicable to the case as the goods had never come under the control of the claimant and hand been sent back by the customs authorities after adjudication when they were satisfied that the goods had been illegally sent to the importer(claimant) by the foreign supplier. The adjudicating authority rejected the drawback claim filed under Section 74 of the Customs Act, 1962 vide Order-in-Original No. CAO/JA//27/DBK/ACC dated 6.09.2014.

3. Being aggrieved by said order, importer filed an appeal with the Commissioner of Customs (Appeals) on the grounds that the reliance on judgement in the case of Tata Consultancy is not justifiable and is without application of mind since the case was of wrong shipment by the supplier and the Tribunal approved the refund of duty under Section 27 after re-export of goods. The department did not consider that the tribunal in its order did not judge on the aspect whether claiming drawback under Section 74 was barred or not entertainable.

4.1 Hon'ble Commissioner of Customs (Appeals) vide his Order-in-Appeal No. MUM-CUSTM-AXP-APP-573-15-16 dated 07.01.2016 had found that there was absolute misinterpretation of the provisions of Section 74 of the Customs Act, 1962 where there is no such condition that for claiming repayment of duty already paid on imported goods, the goods must be cleared from home consumption. If such an interpretation is accepted then the provisions of Section 69 and 74 will become redundant. The Commissioner (Appeals) further observed that the Hon'ble Supreme Court had in the case of M.J. Export Ltd V/s CEGAT [1992(60)E.L.T. (S.C)] held that the interpretation that imported goods can be re-exported only after being warehoused for some time and cannot be exported otherwise has no basis in logic. There is nothing in the provisions of the Act to compel an importer even before or when importing the goods to make up his mind whether he is going to use or sell them in India or whether he proposes to re-export them.

4.2 Commissioner of Customs (Appeals), has observed that the adjudicating authority has not given any finding as to whether the appellant was not able to satisfy any of the condition as envisaged under Section 74 ibid while exporting the impugned goods. Commissioner of Customs (Appeals) had found that the reliance on the judgment of Tata Consultancy is wholly misplaced and the adjudicating authority failed to appreciate the fact that in the subject case the department itself was pleading for duty claim to have been lodged under Section 74 rather than Section 27 and Tribunal nowhere held that the parallel remedy under Section 74 is illegal and not permissible.

4.3 Commissioner of Customs (Appeals) averred that the impugned order fails on this account and also cannot be held as a speaking order based on reason. The adjudicating authority not only failed to understand and interpret the law in a judicious manner but also failed to draw logical inference. Commissioner of Customs (Appeals) further noted that none of the case laws cited by the respondent were relevant in the facts and circumstances of the case at hand and were clearly distinguishable. In view of above findings, the Commissioner(Appeals) held that the order passed by the adjudicating authority was not legal and proper and deserved to be set aside.

5. The Department had filed an appeal before the Hon'ble CESTAT, West Zone, Mumbai vide Appeal No. C/86013/2016 with a prayer to set aside the order of Commissioner of Customs (Appeal). Hon'ble CESTAT vide its order no. N87951/16/CV dated 06.06.2016 passed order as under:

"As per the Section 129A the issue involving payment of duty drawback is not appealable before this Tribunal. Therefore, the appeal is dismissed as not maintainable. Revenue is at liberty to file Revision Application before the Revisionary Authority, Government of India".

6. In the meantime, the respondent filed Writ Petition No. 17441 oF 2016 before the Hon'ble High Court, Bombay with a prayer to refund the amount of Rs. 37,31,140/- in terms of Order-in-Appeal dated 07.01.2016. The

Hon'ble High Court, Bombay vide its Order in Writ Petition No. 8814 of 2016 dated 22nd August 2016 directed as under:

"If in the Revision Application no interim orders are obtained by the respondents within four weeks, then, immediately after the expiry of four weeks, they shall release the amount as directed to be refunded under the appellate order and subsequently the Writ Petition was disposed-off."

7. The Department found that the Order passed by the Commissioner(Appeals) was not legal and proper. The Department has therefore filed revision application on the following grounds:

(i) Section 26A of the Customs Act, 1962 permits refund of import duty in cases where importer does not claim drawback under any other provisions of the Customs Act and does not apply to goods regarding which an offence has been committed under the Customs Act, 1962.

(ii) Commissioner(Appeals) had failed to appreciate that the respondent had filed drawback claim under Section 74 of the Customs Act, 1962. The respondent had submitted before the adjudicating authority that no foreign exchange was involved in the export and drawback under Section 74 was different from drawback under Section 75 of the Customs Act, 1962 and that they are eligible for drawback of duty paid on the imported goods.

(iii) Commissioner(Appeals) failed to note that the imported goods had not been cleared by the Customs authorities due to non-fulfillment of conditions of FSSAI & hence redemption for re-export of goods and penalty was imposed on the importer.

(iv) The import had taken place in contravention of the provisions of food safety standards and therefore the goods were prohibited goods liable for confiscation and the importer was liable for penalty.

(v) Import as per Section 2 of the Customs Act, 1962 means bringing goods into India whereas in the present case the goods were not delivered to the importer. Hence, import was not completed. Drawback

under Section 74 of the Customs Act, 1962 was available only after import on payment of duty.

(vi) Section 51 of the Customs Act, 1962 does not permit export of prohibited goods.

(vii) Drawback is also a kind of refund of import duty and is not permissible for offending goods under Section 26A of the Customs Act, 1962.

8. The respondent was issued a show cause notice under Section 129DD of the Customs Act, 1962 vide letter F. No. 380/148/DBK/16-R.A. dated 8.11.2016 calling upon them to show cause why the impugned Order-in-Appeal should not be annulled or any other orders be passed on the grounds set out in the revision application filed by the Department. Thereafter, personal hearing was granted in the matter on 27.09.2018. The respondents filed a letter on 18.09.2018 in response to the intimation for personal hearing. They stated that they had received only a bare copy of the Revision Application. They further stated that their Advocate Shri Sujay Kantawala had appeared on their behalf before the Commissioner(Appeals) and that the Commissioner(Appeals) was pleased to modify the order and reduce the fine and penalty imposed. It was further stated that the goods had been re-exported prior thereto. They stated that since Shri Sujay Kantawala was held up in a pre-fixed matter before the Hon'ble Sessions Court at Alibaug on 27.09.2018, they requested for the personal hearing to be adjourned to any other date. The respondent also requested for a complete set of the Revision Application filed by the Department alongwith all annexures.

9. However, on 27.09.2018 Shri Harsh Gokal, Director and Shri Amit Tugala, Manager of the respondent appeared for personal hearing. The respondent pleaded that in view of the orders of the Commissioner(Appeals), the instant revision application be dismissed.

10. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the

impugned Order-in-Appeal and Order-in-Original. Government observes that the Hon'ble High Court of Bombay has directed vide its Order dated 22.08.2016 in W.P. No. 8814 of 2016 filed by the respondent that if the Department does not obtain any interim orders within four weeks, immediately after the expiry of the four weeks, the amount as directed to be refunded under the appellate order is to be released to the respondent. It is observed that the Department has also prayed for grant of stay against the impugned Order-in-Appeal. However, since the period of four weeks from the date of the order of the Hon'ble High Court has elapsed long since, the Department would have acted upon the directions to release the amount directed to be refunded under the appellate order. The prayer for stay of the impugned order has therefore become infructuous.

11. Government observes that the respondent had initially imported "Chocolate" which was assessed on 2nd check basis and duty was paid by the importer. However, the FSSAI declined to issue NOC to the impugned goods as the inspection/analysis of the samples did not conform to the specifications under FSS Act, 2006 and the rules and regulations made thereunder. Moreover, the product was a multi-piece package which did not conform to the labeling specifications under FSS(P&L)R, 2011. As the imported goods contravened the provisions of the Food Safety and Standards Regulations, 2011, the imported goods became prohibited goods in terms of Section 25 of the Food Safety and Standards Act, 2006 and became liable for confiscation. The importer also became liable for penalty. The goods were ordered to be confiscated with option to redeem them on payment of fine and penalty was imposed on the importer by the adjudicating authority. The said redemption fine and penalty was further reduced by the Commissioner(Appeals).

12. The importer after re-export of the goods filed a drawback claim under Section 74 of the Customs Act, 1962 read with Re-export of Imported Goods(Drawback of Customs Duties) Rules, 1995 on 1.02.2014. The main contention of the original authority while rejecting the drawback claim was that drawback is allowable only when re-export is done after import on

payment of duty and that the goods in this case had never come under the control of the claimant and had been sent back by the customs authorities after adjudication. In this case, there is no dispute about the fact that duty was paid by the importer at the time of import of goods. It is observed from the record that the Additional Commissioner of Customs(Import), Air Cargo Complex, Mumbai had vide his Order-in-Original No. ADC/SKS/258/2013-14 GR.I Adjn.ACC dated 26.12.2013 confiscated the goods with an option to redeem the goods for the purpose of re-export on payment of redemption fine of Rs. 12,00,000/-. It would therefore follow that the goods were allowed to be re-exported only after payment of the redemption fine. The ground of the Department in the revision application regarding Section 26A of the Customs Act, 1962 does not have any relevance as the respondent has filed a drawback claim and not a refund claim.

13. In so far as the contentions regarding the fact of the goods not having been cleared is concerned, Government observes that the appellate authority has appositely placed reliance upon the judgment of the Hon'ble Supreme Court in the case of M. J. Exports Ltd. vs. CEGAT[1992(60)ELT 161(SC)]. As held therein by the Apex Court, there can be no compulsion on the importer to clear the goods for home consumption and then re-export the goods. It would also be pertinent to mention that Section 74 of the Customs Act, 1962 envisages re-export of imported goods on which duty has been paid and allows drawback of such duty. The definition of "drawback" under Rule 2 of the Re-export Of Imported Goods(Drawback of Customs Duties) Rules, 1995 in relation to any goods exported out of India means the refund of duty paid on importation of such goods in terms of Section 74 of the Customs Act. There is no dispute about the fact that the respondent in the present case has paid duty on the impugned goods. It is also not in dispute that the goods have not been cleared into the territory of India for home consumption. The respondent has been imposed a redemption fine for importing prohibited goods under separate adjudication proceedings to redeem the goods for re-export. The respondent has also been penalized for their acts of importing prohibited goods. Hence, no legitimate right accrues

to retain the duties paid by the respondent on the imported goods which have subsequently been re-exported.

14. As regards the contentions in the revision application filed by the Department that the goods were not delivered to the importer, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of M. J. Exports Ltd. vs. CEGAT[1992(60)ELT 161(SC)] wherein it was held that there is no condition that export of imported goods cannot be allowed without bonding or warehousing the goods on import. Therefore, this ground in the revision application filed by the Department does not sustain. The bar under Section 51 of the Customs Act, 1962 which does not permit export of prohibited goods cannot be invoked in the present case where the Department itself has allowed the goods for re-export on payment of redemption fine.

15. In the circumstances, Government does not find any merit in the revision application filed by the Department. The impugned Order-in-Appeal passed by the Commissioner(Appeals) is upheld and the revision application filed by the Department is rejected.

16. So ordered.

30.11.18

(ASHOK KUMAR MEHTA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 1013 /2018-CUS (WZ) /ASRA/Mumbai DATED 30.11.2018.

ATTESTED

11.12.18

S.R. HIRULKAR
Assistant Commissioner (R.A.)

To,

M/s Astor Corporation Ltd.
Kasturi Bldg., 5th Floor,
171/172, Jamshedji Tata Road,
Mumbai 400 020

Pr. Comm.(RA) & ex-off. Addl. Sec. to the Govt. of India * Mumbai *

Copy to:

1. The Commissioner of Customs(Exports), Air Cargo Complex, Mumbai,
2. The Commissioner of Customs(Appeals), Mumbai-III, Awas Corporate Point(5th Floor), Makwana Lane, Behind S. M. Centre, Andheri-Kurla Road, Marol, Mumbai 400 059,
3. The Deputy Commissioner, DBK(M), Air Cargo Complex, Sahar, Mumbai,
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.