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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.371/50/DBK/16-RA / 1845

Date of Issue: 24.02.2022

ORDER NO. 103/2022-CUS (WZ) /ASRA/MUMBAI DATED 23.02.2022
OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO
THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE
CUSTOMS ACT, 1962.

Applicant M/s Akshita Exports,(prop Shree Ram Synthetics (P) Ltd)
701,7th Floor, Metro Tower, Near Kinnary Cinema,
Ring road, Surat 395002

Respondent : The Commissioner of Customs (Export), ACC, Mumbai

Subject : Revision Applications filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-AXP-APP-29 & 30-16-17 dated 28.04.2016 passed by
the Commissioner of Customs (Appeals), Mumbai Zone III

ORDER

This Revision Applications has been filed by Akshita Exports, (prop Shree Ram Synthetics (P) Ltd, 701,7th Floor, Metro Tower, Near Kinnary Cinema, Ring road, Surat 395002 (hereinafter referred to as the 'applicant') against the Order-in-Appeal No MUM-CUSTM-AXP-APP-29 & 30-16-17 dated 28.04.2016 passed by the Commissioner of Customs (Appeals), Mumbai Zone III

2. The facts briefly stated are that a demand of Rs. 3,04,534/- being drawback obtained against the 5 shipping bills Nos. 6155178 dated 16.10.2006, 6179024 dated 11.11.2006, 6215736 dated 19.12.2006, 6207779 dated 11.12.2006 and 6140238 dated 30.09.2006 by the applicant was confirmed by the lower authority vide order-in-original No AC/TK/180/2013/DBK(XOS)/ACC(X) dated 04.12.2013 for failing to produce evidence in respect of realization of export proceeds within the period allowed under the Foreign Exchange Management Act, 1999 and as per rule 16(A) sub rule (1) & (2) of Customs, Central Excise duties and Service Tax Drawback rules, 1995 read with section 75 A(2) of Customs Act, 1962 and Section 28A of Customs Act, 1962.

3. Being aggrieved with the impugned order, the applicant filed an appeal before Commissioner of Customs (Appeals), Mumbai Zone III. The Appellate authority vide Order-in-Appeal No. Order-in-Appeal No MUM-CUSTM-AXP-APP-29 & 30-16-17 dated 28.04.2016 upheld the impugned order and rejected the appeal filed by the applicant. The Appellate Authority made the following observations.

i) The sales proceeds in respect of the said shipping bills were neither received within the stipulated time limit as per Rule 16(A) Sub Rule [1] & [2] of Customs Central Excise Duties and Service Tax Drawback Rules, 1995, nor the applicant produced an evidence of extension by the RBI.

ii) Drawback is an incentive given by Government to the exporters who earn valuable foreign exchange by giving back of duties paid on inputs used in manufacture exported goods but when export proceeds are not realised, reason for which exporter got drawback gets nullified.

iii) The proviso to Section 75 of the Customs Act, 1962 read with Rule 8 Foreign Exchange Rules, 1974 (or FEMA, 1999) make it clear that the drawback amount shall disallowed (and/or recovered) if the full export value of the goods exported is not received by exporter within stipulated time of six months from the date of the export of the goods. The Rules do not provide for waiver of the condition on any ground

iv) The records disclose that the export proceeds were not received within stipulated time limit and there is no extension granted by RBI for realisation of export proceeds beyond the permissible time limit of six months as per Rule 8 of Foreign Exchange Rules, 1974 (or FEMA, 1999).

v) The main plea raised by the Appellant that the notice for recovery was issued in 2010 for the drawback granted in respect of shipping bills of 2006 i.e. after four years is time barred and there is a limitation for recovery of drawback, is not only factually incorrect but amounts to misinterpretation of relevant provisions.

vi) In the instant case, sale proceeds were realised after prescribed limit stipulated as per Rule 8 of Foreign Exchange Rules, 1974 (or FEMA, 1999) and there was neither any permission sought from RBI for extension nor any reasons cited with documentary evidences about bonafide delay in realisation of foreign exchange

vii) There is no time limit fixed in terms of Rule 16A for initiation of recovery process of drawback already paid to the exporter by way of issuance of notice and the obligation has been casted on the exporter to produce evidence of realisation with proof of extension allowed by RBI in case of realisation after six months.

viii) Even under Foreign Exchange Management Act, 1999 or Rule 8 of erstwhile FERA, 1974, there is no time limit fixed for Customs to initiate the process of recovery of drawback in respect of late realisation of export

proceeds where no extension or relaxation of condition of realisation beyond the prescribes period of six months is accorded by RBI

4. Aggrieved by the Order-in-Appeal, the applicant has filed the Revision Applicant on the following grounds

i) That the impugned OIA has been passed without rebutting the contentions and case laws relied upon due to which it is required to be quashed with consequential relief to the revision applicant.

ii) That the applicant relies upon following binding precedents to contend that the interpretation made by department in the impugned Order-in-Appeal against grant of drawback only due to delay in realisation of export proceeds cannot stand legal scrutiny.

a) Hindustan Lever Limited vs Union of India [2011 (264) E.L.T. 173 (Bom.)]

b) Kaling Vanidhya vs Commissioner of Customs, Chennai [2007 (207) E.L.T. 667 (Mad.)]

c) Pratibha Syntex Ltd vs Union of India [2013 (287) E.L.T. 290 (Guj.)]

d) Padmini Exports vs Union of India [2012(284) E.L.T 490(Guj)]

5. The applicant, vide letter dated 26.11.2018, filed additional submissions as under

5.1 The order-in-original was passed inspite of submission of BRCs from IndusInd Bank and Citi Bank vide applicants letter dated 11.01.2012. Inspite of both the authorised banks accepting the delayed receipt of export proceeds and issuing the bank realisation certificates, the Deputy Commissioner ordered recovery of drawback which is nothing but illegal. This is because once banks (authorised dealers) accepted realisation dates and issued BRCs without any reservation and without referring to RBI about delay, customs cannot refuse to accept the BRCs without any reference to banks which issued the BRCs. Because banks have a statutory obligation to report to RBI if realisation dates are beyond prescribed periods/ norms for extension/relaxation.

5.2 Master Circular No. 8/2005-06/01/07/2005 updated as on 01.10.2006 of RBI, vide paragraph C-10(iii) therein states that in case of "Status Holder" in terms of FTP, time limit for exports proceeds realisation is one year. The applicant is a Star Export House and hence eligible for one year period at the first instance. Hence shipping bill no 6179024 deserves to be automatically excluded for drawback recovery as export proceeds have been realised within one year.

5.3 The applicant placed reliance on Paragraphs C-15 & C-16 of the RBI Master Circular dealing with extension of time. The procedural provisions beyond one year for realisation could not be followed because bank refused to accept the documents due to exports being made to Sudan. Though the proceeds were realised through banking channels, because of HDFC bank not accepting documents exchange control copies, the procedure of extension of time could not be followed. The circumstances of HDFC bank not accepting documents has been explained in letter dated 07.09.2011.

6. Personal hearing was scheduled in this case for 21.10.2021 or 28.10.2021. Shri Vishwamitra Srivastava, Manager for the applicant appeared online for the personal hearing. He submitted that the remittance has been realised and evidence had been submitted. He requested for dropping the demand raised merely on the ground of non realisation of remittance.

7. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

7.1 Government has meticulously considered all facets of the case and holds that whether the export proceeds were realized in time as per the RBI guidelines is central to the issue.

7.2 Government notes that the show cause notice has been issued to the applicant for recovery of drawback amount sanctioned and paid to them for failure to submit the Bank Realisation Certificates as required under Section

16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. The contention of the applicant is that the evidence of the receipt of the export proceeds have been submitted to the department before the issue of the order-in-original.

7.3 The Government notes that Rule 16 of the Drawback Rules 1995 states that

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

7.4 Further the provisions of Rule 16(2), 16(3) of the Drawback Rules 1995 state as under

*(1) Where an amount of drawback has been paid to an exporter or a person authorised by him (hereinafter referred to as the claimant) but the sale proceeds in respect of such export goods have not been realised by or on behalf of the exporter in India within the period allowed under **the Foreign Exchange Management Act, 1999 (42 of 1999)**, including any extension of such period, such drawback shall be recovered in the manner specified below.*

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

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

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

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

7.5 Government notes that in the instant case the show cause notice for the recovery of sanctioned drawback amount on 30.04.2010 and the applicant submitted the BRCs vide letters dated 11.01.2012 and again on 27.03.2012 i.e after a lapse of 20 months from the date of issue of the show cause notice. From the records it is seen that the BRC's were not submitted within the stipulated time period as allowed under FEMA, 1999 and no extension obtained by the applicant from the Reserve Bank of India has been submitted. The applicant also claims that in response to the show cause notice, they had submitted a NOC from HDFC Bank and letter dated 10.10.2013 from Indusind Bank and also submissions vide applicants letter date 11.01.2012, detailing the receipt of the export proceeds in full. Government notes that the impugned order-in-original has been issued by the sanctioning authority on 04.12.2013 after submission of the BRC's by the applicant.

7.6 The provisions of Rule 16(4) of the Drawback Rules 1995 state as under


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

7.7 As regards the contention and submission of the applicant that the show cause notice was barred by limitation of time, Government is of the considered view that in the absence of time limit for recovery being specified in the provisions of the Drawback Rules, 1995, a reasonable period, dependent on the facts and circumstances of each case would be in order. Government opines that considering the delays caused by the applicant in submission of the documents, the averments of the applicant on this issue does not hold.

7.8 Government notes that the submission of the BRC's claimed by the applicant to have been submitted by them needs to be verified in terms of the contents Rule 16(4) of the Drawback Rules, 1995.

8. In view of the above observations, Government sets aside the impugned Orders-in-Appeal No. MUM-CUSTOMS-APP-29 & 30-16-17 dated 28.04.2016 passed by the Commissioner (Appeals), Mumbai-III and allows the revision applications and remands the case back to the original authority for causing verification as stated in foregoing paras. The applicant shall submit the BRC's to the adjudicating authority for consideration and acceptance in accordance with the law. The original authority will complete the requisite verification expeditiously within eight weeks from the date of receipt of this order and pass a speaking order. A reasonable opportunity for hearing will be accorded to the applicant.

9. The Revision Application is disposed off on the above terms


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

ORDER NO. 103/2022-CUS (WZ) /ASRA/MUMBAI DATED 23.02.2022

To,

M/s Akshita Exports, (prop Shree Ram Synthetics (P) Ltd)
701, 7th Floor, Metro Tower, Near Kinnary Cinema,
Ring Road, Surat 395002

Copy to :

1. The Commissioner of Customs (Export), Air Cargo Complex, Sahar, Andheri (East), Mumbai 400 099
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. Sr. P.S. to AS (RA), Mumbai.
4. Guard File.
5. Spare copy.