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F.No. 371/11/DBK/13-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue.....

21/5/14

ORDER NO. 114/14-Cus DATED 05.05.2014 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D.P.SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129 DD OF THE CUSTOM ACT, 1962.

Subject : Revision application filed under Section 129 DD of the Custom Act, 1962 against the order-in-appeal No.880/MCH/755/MCH/DC/Drawback/2012 dated 11.09.2012 passed by the Commissioner of Custom (Appeals), Mumbai Zone-I.

Applicant : M/s Kailash Vahan Udyog Ltd., Pune

Respondent : Commissioner of Customs (Export Promotion), Mumbai

ORDER

This revision application is filed by the applicant M/s Kailash Vahan Udyog Ltd., Pune against the order-in-appeal No. 755/MCH/DC/Drawback/2012 dated 11.09.2012 passed by the Commissioner of Custom (Appeals), Mumbai Zone-I with respect to order-in-original passed by the Deputy Commissioner of Customs (DBK), New Custom House, Mumbai Zone-I.

2. Brief facts of the case are that M/s Kailash Vahan Udyog Ltd. submitted details of five Shipping Bills & requested to settle their drawback claim amounting to Rs. 6,99,535/- under Section 74 of the Customs Act, 1962. On going through the AREs-1 submitted by applicants it was noticed that they had been availing CENVAT credit facility in terms of CENVAT Credit Rules, 2004 and also claimed rebate of duty on the export goods under Rule 18 of the Central Excise Rules, 2002. In this case the identity of the re exported goods could not be established since the imported goods were fitted with the final export goods and not exported in same condition as it was imported. Therefore the export of the said goods was held as not within the purview of the Section 74 of the Act. The adjudicating authority vide impugned Order-in-Original rejected the drawback of Rs. 6.99.355/- claimed under section 74 of the Customs Act, 1962 read with provision of Re-export of Imported Goods Rules, 1995.

3. Being aggrieved by the said order-in-original, applicant filed appeal before Commissioner (Appeal), who rejected the same.

4. Being aggrieved by the impugned order-in-appeal, the applicant has filed this revision application, under Section 129 DD of Customs Act, 1962 before Central Government on the following grounds:

4.1 Applicant submits that the Commissioner (Appeals) has grossly erred in holding that the identity of the goods was lost once the auto components were fitted on the trailers as the items exported were trailers and not the auto components. Applicant respectfully submits that it had filed the Shipping Bill under claim for drawback under

section 74 clearly bringing out that it was exporting the auto components which were earlier imported by it under the 5 Bills of Entry, details of which were clearly mentioned on the body of the Shipping Bill. The export goods were described as trailers and it was declared that the auto parts were fitted on these trailers. Section 74 comes into operation when articles are imported and thereafter re-exported, and the items re-exported are easily identifiable. It is an undisputed fact that the items imported were re-exported as such without being put to any use except for fitment on the trailer. The examination report prepared by the Assistant Commissioner of Customs (Docks) clearly certifies that the imported items were unused. The Shipping Bill was assessed by the drawback section of the Custom house and an examination order was given by it to the Assistant Commissioner (Docks) to certify as to whether the identity of the goods was established and whether the goods were being re-exported as per the time limit prescribed under section 74 of the Customs Act, 1962 and whether the imported items were used or not used.

4.2 Applicant submits that the examination report after examining the Bill of Entries, Invoices and Packing List very clearly stated, that the identity of the goods was established with respect to import documents and that the goods were unused and were being re-exported within the time limit prescribed under section 74 of the Customs Act, 1962. Applicant submits that the examination report was very clear and there was no ambiguity in the same. It was clearly stated that the identity of the goods was established with respect to import documents. Once the identity of the goods was established the purpose of section 74 was served and the drawback sanctioning authority could not have sat in judgment over the report of the Assistant Commissioner being a coordinate authority unless the examination report was challenged and set aside by an Appellate Authority. It is Applicant's submission that both the original as well as the appellate authority have erred in questioning the examination report given by the Assistant Commissioner and the orders are therefore liable to be set aside on this ground alone.

4.3 Applicant places its reliance on the circular issued by the Board vide Circular No.5/2001-Cus dated 19.01.2001 where hangers were being imported for being used in the packing of the readymade garments and readymade garments were re-exported along with the hangers and it was clarified by the Board that even though the items exported was readymade garments, the exporter will be entitled to drawback of duty paid on hangers re-exported along with readymade garments, under section 74 and to facilitate the same, the exporter was required to declare the hangers and readymade garments separately on the Shipping Bill. Applicant submits that his case is similar to that the readymade garments exported along with hangers as it has in its Shipping Bill very clearly brought out that auto components were imported under the Bill of Entry indicated in the Shipping Bill and the item exported was trailer on which these auto components were fitted. In such circumstances, the auto components had to be treated as re-exported and thus drawback should have been sanctioned under section 74 of the Customs Act, 1962 and the impugned order to the contrary is liable to be set aside on this ground.

4.4 Applicant submits that since no new facts came to the notice of the department nor any fresh documents were filed and therefore if the department was of the view the Shipping Bill under claim for drawback under section 74 could not have been entertained and instead should have been filed under section 75 of Customs Act, 1962, it should have guided the applicant to go in for an all industry rate or brand rate under section 75 of the Customs Act, 1962. Had the department so guided the applicant and rejected the claim at the very time of its filing instead of keeping it pending for 2.5 years without any reason, the applicant would have filed its claim under section 75 of the Customs Act instead of section 74. In view of this the applicant's plea of now allowing him to file claim under section 75 should not have been rejected as has been done by the Commissioner (Appeals) and applicant should have allowed to now file the claim under section 75. It is a settled law that the department cannot take advantage of its own wrong and subject an assessee to higher liability arising out of its own errors and actions as held by the Hon'ble Supreme Court in the case of Priyanka Overseas Pvt.

Ltd. Vs Union of India reported in 1991(51) ELT 185 (SC). Since in this case a Shipping Bill under claim of drawback under section 74 was entertained by the department and an examination order was given under section 74 and conducted under section 74 and the identity of the goods was clearly established along with its unused nature, if the department was still of the view that the claim should have been filed under section 75, it should have advised the applicant at that very time and having failed to do so for 3 years they cannot deprive the applicant of its lawful drawback claim when the fact of export is not being disputed and allowed the applicant to file claim under section 75 if it felt that it could not be sanctioned under section 74. The order is therefore clearly liable to be set aside.

5. Personal hearing was scheduled in this case on 07.08.2013, 30.10.2013 & 10.04.2014. Hearing held on 10.04.2014 was attended by Ms. Nishtha Singh, advocate on behalf of the applicant who reiterated the grounds of revision application. Nobody attended hearing on behalf of respondent department on any of these hearings.

6. Government has carefully gone through the relevant case records, oral and written submissions and perused the impugned order-in-original and order-in-appeal.

7. Government notes that in the instant case the applicant imported tyre and fitted them in trucks which were finally exported and filed drawback claim under section 74 of Customs Act, 1962. The original authority held that the goods exported were not same as imported goods and not exported as such and therefore, the applicants are not eligible for drawback claim under section 74 of the Customs Act, 1962. Accordingly, original authority rejected the drawback claims. Commissioner (Appeals) upheld impugned Order-in-Original. Now, the applicant has filed this Revision Application on ground mention in para (4) above.

8. Government finds that the original authority has considered the impugned issue in his Order-in-Original and in relevant paras has observed as under:-

"9. Further, there is no doubt about use of the imported goods, in respect of which drawback under section 74 of the Act has been claimed, in the manufacture of the export goods

and also about the difference in the description of the export goods and that of the import goods as indicated in the following table:

Description of the imported goods	Chapter Heading No.	Description of export goods	Chapter Heading No.
Axels with accessories Tyres, Tubes & Flaps, Rim, Spacer Ring, clamps Brake systems, King pin	87169010, 40119900, 87089900, 84669400, 73182990	Tipper Trailer	87164000

As per the provisions of Section 74 of the Act, drawback is admissible only when the export goods are capable of being easily identified which have been imported into India and upon which any duty has been paid on importation. In the instant case of the exporter, the imported goods were used in the manufacture of the export goods. Therefore, it can be said that the same are easily identified. Thus, the import goods were not re-exported as such and the identity of the same was lost when the same were fitted with the export goods. Therefore, the export of the said goods was not within the purview of Section 74 of the Act. The plea of the exporter that the export goods were examined and identity of the import goods fitted with the said export goods was also established with the import documents to the satisfaction of the Assistant Commissioner of Customs (Docks) will not serve the purpose as the export goods were different from those imported goods. While examining the export goods, the same might have been examined by the Dock officers by opening the packages, etc., but the fact still remains that the export goods were different from those imported.

9. It is important to note that the goods exported must be very same goods which had been imported earlier. Further, provisions of section 74 of the Act are applicable only when the goods imported are themselves re-exported as such. If the goods have been used in the manufacture or in other process and the goods had lost the identity, drawback under section 74 of the Act is not allowable. Hon'ble High Court of Madras while delivering a judgment in a similar situation, gave an example of imported printed pouch roll which were used in packing of export goods and held that duty paid on imported printed pouch roll can not be claimed as drawback under section 74 (Best Nut Corporation Vs. ACC DBK 2000 (122) ELT 11 (Mad)). This because upon having been used for packaging, the identity of the imported material is lost. Similarly, in the instant case of the exporter, the identity of Axels with accessories Tyres, Tubes & Flaps, Rim, Spacer Ring, clamps Brake systems, King pin, etc. which were imported by them and used in the manufacture of export goods i.e. Trailers, had lost the identity of because the description of export goods and that the imported goods was different. Therefore, the provisions of Section 74 of the Act are not applicable in the instant case consequently the drawback claim for Rs. 6,99,535/- is not admissible."

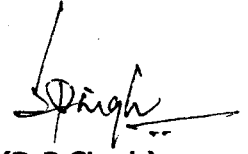
9 The Commissioner (Appeals) has further discussed the contention of the applicant w.r.t. observation of original authority and did not find any merit in these contentions and upheld the impugned Order-in-Original. Government notes that applicant has already availed rebate of duty paid on exported goods. At the same time

they have also availed cenvat credit. Applicant is stated to him availed drawback of Customs Portion also. Since the drawback claim is not admissible to them when rebate is already claimed, they have attempted to make out a case for drawback claim under section 74 of Customs Act. As discussed above the goods exported are Tipper Trialer and the imported inputs are used on this manufacture of Tipper Trialer. As such it is not a case of re-export of imported goods. The lower authorities have rightly rejected the claim of applicant. Government is in agreement with the findings of the appellate authority.

10. In view of above discussion Government finds no infirmity in order of Commissioner (Appeals) and hence upholds the same.

11. The revision application is thus rejected being devoid of any merits.

12. So, ordered.



(D.P.Singh)

Joint Secretary to the Government of India

M/s Kailash Vahan Udyog Ltd.,
Village Dhanore,
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Taluka Khed,
Distt- Pune - 412105.

(Attested)

(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
CBEC-OSD (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

Order No. 114/14-Cus dated 05.05.2014

Copy to:-

1. Commissioner of Customs (Export Promotion), Drawback Section, 3rd Floor, Annexe Building, New Custom House, Ballard Estate, Mumbai-400 001.
2. The Commissioner Customs (Appeals) Mumbai Zone-I, New Custom House, Ballard Estate, Mumbai - 400 001.
3. Deputy Commissioner of Customs (DBK), New Custom House, Ballard Estate, Mumbai-400 001
4. Ms. Nishtha Singh, Advocate, TLS Legal, Advocate, 19th Floor, Nirmal 241/242 Nariman Point, Mumbai 400 021. .
5. PS to JS (Revision Application)
6. Guard File
7. Spare Copy.



(Bhagwat P. Sharma)
OSD (Revision Application)