F NO. 371/24/B/16-RA

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Mumbai- 400 005

F NO. 371/24/B/16-RA /1152 Date of Issue: 23.03.2022

ORDER NO. 114/2022-CUS (WZ) /ASRA/MUMBAI DATED 22.03.2022 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 Sulphur Mills Ltd.

Respondent : Commissioner of Customs Mumbai-II

Subject : Revision Application filed, under section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. 110(Node)/2015(JNCH)-Appeal-I dated 20.11.2015 passed by the Commissioner of Customs (Appeals-I,II) JNCH, Nhava-Sheva,Mumbai.

ORDER

This Revision Application is filed by the M/s Sulphur Mills Ltd., 604/605, 349 – Business Point ,Western Express Highway , Andheri(East) Mumbai-400069 (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. 110(Node)/2015(JNCH)-Appeal-I dated 20.11.2015 passed by the Commissioner of Customs (Appeals-I,II) JNCH, Nhava-Sheva,Mumbai.

2. The Applicant ,an EOU had filed Shipping Bill no 3000005903 dated 12.12.2013 for re-exporting 4704 Kgs. of SONAK (Clodina FOP-Propagyl 15% wp) under section 74 of the Customs Act, 1962 claiming refund of duty paid on the goods re-imported vide B/E No. 3292830 dated 17.09.2013. At the time of examination the Customs officials found it difficult to establish the identity. The consignment was provisionally allowed vide order by Commissioner (Export) dated 30.12.2013 against PD Bond after sending sample to Geochem for test. The report from Geochem laboratory found the exported product SONAK (Clodina FOP-Propargyl 16 %). However, the original authority vide its order F.No. S/6-Gen87/DBK/13 D' Node(X) dated 21.08.2014 declared that identity of export goods was not matching with the re imported goods as batch numbers, manufacturing and expiry date are different Also the product which expired in September 2013 could not be as same as the one which was manufactured in November 2013. Being aggrieved by the aforesaid order-in-original the applicant filed appeal before the Commissioner of Customs (Appeals-I,II) JNCH, Nhava-Sheva,Mumbai, who vide Order-in-Appeal No. 110(Node)/2015(JNCH)-Appeal-I dated 20.11.2015 rejected their claim by holding that the goods in question could not be identified with the goods re-imported and failed to satisfy a necessary condition under section 74 of the Customs act 1962 vide which the drawback was claimed.

3. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant had filed this revision Application under Section 129DD of the Customs Act, 1962 before the Government on the following grounds :-

A. Identity of the impugned goods has been established –

i) the impugned order passed by the Hon'ble Commissioner of Customs(Appeals) is ex-facie untenable and unsustainable in law and is liable to be set aside.

ii) the provisions of Section 74 of Act provides for drawback on re export of duty paid goods subject to the satisfaction of the Assistant Commissioner or Deputy Commissioner as the goods exported are same as the goods which were imported.

iii) the goods exported are same as the goods which were imported, except the addition of the active ingredient and mere addition of the active ingredient to the impugned goods does not make the imported goods lose its identity.

iv) Hon'ble Deputy Commissioner of Customs and the Commissioner of Customs (Appeals) erred in holding that the identity of the impugned goods has not been established despite the fact that manufacturing, export, re-processing was done under the supervision of the Central Excise authorities. It is evident from the ARE-1 dated 05.12.2013 endorsed by the superintendent of Central Excise that the impugned goods re-exported are the same as material imported vide Bill of Entry 3292830 dated 17.09.2013 and were reprocessed under the supervision of the Central Excise authorities. It is submitted that merely because the shell life of the goods had expired or the imported goods were re-processed identity of the imported goods cannot be said to be lost.

v) in the case of agrochemical products of this nature, the active ingredient deteriorates over time and therefore the product as such degrades. In the present case, the active ingredient content is upgraded to desired level i.e. the products essentially remains the same as when imported. It would be pertinent to note that the said activity was carried out under Jurisdiction oversight of the Central Excise Authorities at every step.

vi) the test report certificate issued by Geo-Chem Laboratories also certified the description of goods as "Sonak (Clodinafop Propargyl-15% WP)" It is submitted that once the description is confirmed, the identity of the goods is deemed to be confirmed.

vii) The functions and the use of impugned goods remains the same even after the addition of the active ingredient. The impugned good remains the insecticide / pesticide even after the addition of the active ingredient.

viii) Hon'ble Deputy Commissioner of Customs erred denying the benefit of Section 74 of the Act on the ground that the batch number did not tally with the batch number of the goods which were imported. It is submitted that the batch number is the continuous number given to each manufacturing process and when the goods are re-worked the same Batch number cannot be allotted to the re processed goods.

Further, the difference in the batch number is on account of the administrative convenience and should not become ground for the denial of the benefit which the Applicant is eligible to.

ix) the Commissioner (Apposis) has erred in holding that the product Sonak (Clodinafop Propargyl -15% WP) is being produced regularly EOU by the Appellant and it cannot be clearly seen and identified from the records if the imported goods were re-exported or the fresh ones It is reiterated that the Customs Authorities cannot dispute the identity of the goods exported once the adding of active ingredient in

the imported gods was undertaken after due notification of the Central Excise Authorities.

x) Applicant had fiulfilled all the conditions required to be fulfilled under Section 74 of the Act.

xi) the Ld. Commissioner (Appeals) erred in relying upon the judgment in the case of Shasun Chemicals and Drugs Ltd., 2012 (277) ELT 409 as the same in not applicable in the present case

B. WITHOUT PREJUDICE TO THE ABOVE, THE APPLICANT IS ELIGIBLE FOR DRAWBACK UNDER SECTION 75 OF THE ACT –

i) Without prejudice to the above, assuming without admitting that the impugned goods were re-processed / manufactured and are not the same goods which were imported, it is submitted that the drawback should have been allowed under Section 75 of the Act. The Drawback under Section 75 of the Act is available on the goods imported which are used in the manufacture of the goods exported.

ii) Reliance is placed on the department Circular no. 40/2003 dated 12.05.2003 as amended by issued by the Central Board of Excise & Customs which instructs authorities to examine a benefit claimed under one 'duty exports scheme' to be shifted to another scheme for extending the benefit if it is so found that an exporter was entitled for the benefit under a scheme different from the one under which the exporter had claimed the benefit. It is submitted that by applying this circular, the customs authorities should have extended the benefit which the petitioner had claimed under Section 74 of the Act, treating it as the application is one filed for claiming relief under Section 75 of the Act. It is settled law that Circulars issued under Section 37A are binding on the department authorities.

iii) If the Applicant is not entitled for drawback under Section 74 of the Customs Act, it should have been granted under Section 75 of the Act.

C. WITHOUT PREJUDICE TO THE ABOVE, THE DUTY WAS ERRONEOUSLY PAID AT THE TIME OF IMPORT

i) Without prejudice to the above, assuming without admitting that the impugned goods have been re-processed, they have been wrongly denied the benefit of notification no. 158/95-Cus dated 14.11.1995. Thus due to the denial by the department in extending the benefit of the aforesaid notification at the time of import of impugned goods, the Applicant paid the Customs duty which was otherwise not payable.

ii) Without prejudice to the above, reliance is placed on the Notification No. 52/2003-Cus dated 03.06.1997, which provides exemption to the goods imported / procured by 100% EOU in respect of goods imported exportation due to failure of the buyer to take delivery or for re-export after repairs or remaking. Since the impugned goods imported by the Appellant are exempted under Notification No. 158/95-Cus and Notification No. 52/2003-Cus dated 14.11.1995, the benefit of the said Notification cannot be denied to the Applicant.

iii) It is a settled principle of law that the government cannot retain the money which they are not legally entitled to. Reliance is placed on the following judgments:

(1) Assistant Collector of Customs v/s. East Anglia Plastics India Ltd [1994 (74) ELT 29 (Cal.).

(2) Salonah Tea Company Ltd. etc. v/s. Superintendent of Taxes, Nowgong& Ors. etc. [1988 (33) ELT 249 (S.C.)

4. Personal hearing in this case was fixed for 22.09.2021, Sh. Mihir Mehta, Advocate and Sh. Vinod Shah , Director , appeared online and requested to allow their claim. They submitted that goods exported earlier were brought back for reprocessing and duty was insisted upon by customs. Once they re-exported goods after reprocessing, they should be allowed drawback under section 74. They further submitted , if that is not possible , drawback under section 75 be allowed.

5. Government has carefully gone through the relevant case records available in case files, oral & written submissions/counter objections and perused the impugned Order-in-Original and Order-in-Appeal.

6. On perusal of the Revisions Application, the Government notes that the impugned drawback claim was rejected on the ground that the goods re-exported are not identifiable with respect to the re-imported goods. Thus, the Applicant have not fulfilled the condition of Section 74 of the Customs Act, 1962. Hence , Government restricts its order on the following grounds -

a) Whether the applicant is eligible for drawback under section 74.
b) Can drawback be allowed under Section 75 if it is not allowed under Section 74 of the customs act 1962.
c) Whether import duty rightly collected by the Department while re-importing the goods.

7. It is pertinent to discuss the provisions of Section 74 of the Customs Act, 1962. The Section 74 of the Customs Act, 1962 is as under:-

> *" **SECTION 74. Drawback allowable on re-export of duty-paid goods.** - (1) When any goods capable of being easily identified which have been imported into India and upon which [1][any duty has been paid on importation, -*
>
> *(i) are entered for export and the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51; or*

(ii) are to be exported as baggage and the owner of such baggage, for the purpose of clearing it, makes a declaration of its contents to the proper officer under section 77 (which declaration shall be deemed to be an entry for export for the purposes of this section) and such officer makes an order permitting clearance of the goods for exportation; or

(iii) are entered for export by post under section 82 and the proper officer makes an order permitting clearance of the goods for exportation,

ninety-eight per cent of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback, if -

(a) the goods are identified to the satisfaction of the [2][Assistant Commissioner of Customs or Deputy Commissioner of Customs] as the goods which were imported; and

(b) the goods are entered for export within two years from the date of payment of duty on the importation thereof:

Provided that in any particular case the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period as it may deem fit.

(2) Notwithstanding anything contained in sub-section (1), the rate of drawback in the case of goods which have been ***used*** *after the importation thereof shall be such as the Central Government, having regard to the duration of use, depreciation in value and other relevant circumstances, may, by notification in the Official Gazette, fix.*

[(3) The Central Government may make rules for the purpose of carrying out the provisions of this section and, in particular, such rules may –

(a) provide for the manner in which the identity of goods imported in different consignments which are ordinarily stored together in bulk, may be established;

(b) specify the goods which shall be deemed to be not capable of being easily identified; and

(c) provide for the manner and the time within which a claim for payment of drawback is to be filed.]

(4) For the purposes of this section –

(a) goods shall be deemed to have been entered for export on the date with reference to which the rate of duty is calculated under section 16;

(b) in the case of goods assessed to duty provisionally under section 18, the date of payment of the provisional duty shall be deemed to be the date of payment of duty."

7.1 On perusal of Section 74, it is found that the basic condition for grant of drawback under Section 74(1) of the Customs Act, 1962 is that the exported goods should be identified w.r.t. goods which were imported. In the instant case, it is a admitted fact that reprocessing was done to upgrade active ingredient component to desired level in order to increase the shelf life of impugned agrochemicals. Government opines that though the re-processing activity is done under the Jurisdictional oversight of the Central Excise authority , the re-processing itself has changed the identity of the product and the same is corroborated from the fact that the manufacturing dates and expiry dates got changed subsequently. It is not possible that the re-exported goods and the re-imported goods are one and the same when they have the different manufacturing and expiry dates. The goods which got expired in September 2013 could not be the same goods which were manufactured in November 2013. Government observes that labeling the new manufacturing date to the expired re-imported goods by the applicant itself establishes that the goods in question are not the goods that were imported. It is contended by the applicant that the functions and the use of impugned goods remains the same even after the addition of the active ingredient. In this regards Government observes that it can not be concluded that the impugned goods are one and same merely on the fact that the function/use of the

impugned goods are same. Thus the identity of re-exported goods can not be established with the imported goods. As such the statutory condition of Section 74 of customs act , 1962, that goods are identified as goods which were imported is not satisfied.

8. Applicant has also submitted that drawback should have been allowed under Section 75 if it is not admissible under section 74 of the Act by placing reliance on the department Circular no. 40/2003 dated 12.05.2003 issued by the Central Board of Excise & Customs. In this regards Government observes that the above said notification is applicable to avail benefit of another export promotion scheme in the cases where the exporter is denied benefit of one export scheme by Customs/DGFT. Thus, Government finds that the said circular is regarding the conversion of shipping bill form one export scheme to another export scheme and do not applicable in respect of any change within the same scheme. Thus the aforesaid circular is not applicable in the instant case.

9. Now coming to the issue that the department collected customs duty wrongly at the time of re-import by denying the exemption under notification 158/95-Cus dated 14.11.1995. Relevant abstarcts of Notification No. 158/95-Cus dated 14-11-1995 for the purpose of the instant case are reproduced below :

> *"Goods manufactured in India and reimported for -*
> *(a) reprocessing; or (b) refining; or (c) re-making; or (d) subject to any process similar to the processes referred to in clauses (a) to (c) above.*
> *1. Such re-importation takes place within one year from the date of exportation.*
> *2. Goods are re-exported within six months of the date of re-importation or such extended period not exceeding a further period of six months as the Commissioner of Customs may allow;*
> *3. The Assistant Commissioner of Customs is satisfied as regards identity of the goods.*

4. The importer executes a bond to the effect (a) that such reprocessing, refining or remaking or similar processes; shall be carried out in any factory under Central Excise control following the procedure laid down under Rule 173MM of the Central Excise Rules, 1944 or in a Customs bond under provisions of Section 65 of the Customs Act, 1962 (52 of 1962); (b) that he shall maintain a due account of the use of the said reimported goods received in the premises specified in item (a) above and shall produce the said accounts duly certified by the officer of Central Excise or Customs, as the case may be, incharge of the factory or the bonded premises to the effect that the goods tendered for reimport are reprocessed, refined or remade or subjected to any process, as the case may be, from the said reimported goods; (c) that in case any waste or scrap arising during such operations and the importer agrees to destroy the same before the officer of Central Excise or Customs, as the case may be, or to pay on such waste or scrap the appropriate duties of customs as if such waste or scrap is imported; (d) that he shall pay, on demand, in the event of his failure to comply with any of the aforesaid conditions, an amount equal to the difference between the duty leviable on such goods at the time of importation but for the exemption contained herein : Provided that in case of reprocessing, refining or remaking or similar process, if any loss of imported goods is noticed during such operations, the quantity of such loss shall be exempted from the whole of the duties of customs (basic customs duty and additional customs duty etc.) subject to the satisfaction of the Assistant Commissioner of Customs that such loss has occurred during such operations."

9.1 From the contents of the Notification No. 158/1995-Cus., dated 14.11.1995 reproduced above it is clear that the goods can be re-imported duty free specifically for the purpose of reprocessing, refining or remaking or similar process subject to certain conditions. Applicant exported goods in the month of Nov./Dec. 2011 and re-imported in the month of September 2013. In this regards Government finds that the re-importation was done after one year of the export and thus failed to comply with conditions appeared at Sr. No. 2 of the said notification that 'Such re-importation takes place within one year from the date of exportation'. Government observes that customs duty was rightly collected from the applicant at the time of re-importation since the re-importation was done beyond one year and failed to meet the condition of the aforesaid notification. Further , Government notes that the Notification 52/2003 is

not applicable in the instant case. Thus , Department rightly denied the benefits of the said notifications to the applicant.

10. In view of above, Government finds no infirmity in the impugned order-in-appeal No. 110(Node)/2015(JNCH)-Appeal-I dated 20.11.2015 and upholds the same.

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

ORDER No.114/2022-CUS (WZ) /ASRA/Mumbai Dated 22.03.2022

To,
M/s Sulphur Mills Ltd.,
604/605, 349 – Business Point ,
Western Express Highway ,
Andheri(East) Mumbai-400069.

Copy to:

1. The Commissioner of Customs (Export), NS-III Zone-II, JNCH, Nhava-Sheva. Taluka-Uran, Dist. Raigad, Maharashtra – 400707.
2. The Deputy Commissioner of Customs,CWC CFS,Dronagiri,JNCH, Nhava-Sheva Taluka-Uran, Dist. Raigad, Maharashtra – 400707.
3. The Commissioner of Customs, Appeal-I,II, Mumai-II, JNCH,Nhava-Sheva, Taluka-Uran,Dist. Raigad, Maharashtra – 400707.
4. Sr. P.S. to AS(RA), Mumbai.
5. Guard File