

REGISTERED
SPEED POST



373/104/DBK/13-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

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

Date of Issue..22/6/15

ORDER NO. 13/2015-CUS. DATED 19.06.2015 OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF INDIA UNDER SECTION 129DD OF CUSTOMS ACT, 1962.

Subject : Revision applications filed under Section 129DD of Customs Act 1962 against the Order-in-Appeal No.CMB-CEX-000-APP-258-13 dated 26.08.13 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore

Applicants : M/s Primo Fashions, Tirupur

Respondent : Commissioner of Central Excise & Customs Coimbatore

ORDER

This Revision Application is filed by M/s Primo Fashions, Tirupur (hereinafter referred to as applicant) against the Order-in-Appeal No.CMB-CEX-000-APP-258-13 dated 26.8.13 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals) Coimbatore with respect to Order-in-Original No.75/2013-(ACC) dated 1.03.2013 passed by the Assistant Commissioner of Customs, Air Cargo Complex, Coimbatore.

2. Brief facts of the case are that the applicant was initially granted drawback for exports made by them. Subsequently, Show Cause Notice was issued to the applicant for recovery of already sanctioned drawback on the ground that applicant failed to produce the evidence for realization of export proceeds in respect of impugned exported goods for which they were allowed drawback within the period allowed under Foreign Exchange Management Act, 1999 including any extensions of such period granted by the Reserve Bank of India. Later on, the Original Authority vide impugned Order-in-Original confirmed the demand of already sanctioned drawback and also imposed penalty.

3. Being aggrieved by the said Order-in-Original, the applicants filed appeals before Commissioner (Appeals), who rejected the same as the BRC submitted along with the appeal did not show the date of realization of the export proceeds.

4. Being aggrieved by the impugned Order-in-Appeal, the applicants have filed these revision applications under Section 129 DD of Customs Act, 1962 before Central Government on the following grounds:

4.1 That the impugned order is devoid of merit and in gross violation of the principles of natural justice. The order has been passed on factually inconsistent reasoning. As per the Show Cause Notice C. No. VIII/23/541/2006 ACC(BRC) dated 18.01.2007 the applicants were directed to show cause as to why the duty draw back to the tune of Rs.51,929/- should not be demanded from them as the applicant had not produced the evidence

of realization of export proceeds in respect of the export goods within the period allowed under the Foreign Exchange Regulation Act, 1973, including any extension of such period granted by the Reserve Bank of India. This is factually incorrect. The show cause notice was reported to have been issued on 18.01.2007. However, the applicants did not receive the above show cause notice. In this regard it is submitted that during the material period the applicants had done only one export for which the BRC was submitted to the Customs Authorities vide their representation dated 7.12.2005, duly acknowledged by the Superintendent of Customs, Air Cargo Complex, much before issuance of show cause notice. No further communication was received from December, 2005 to October 2012 and therefore, the applicants were under the genuine impression that the issue has been closed. However, the applicants received a personal hearing intimation letter dated 17.10.2012 as per which the applicants were directed to appear for the PH on 29.10.2012. As the issue mentioned in the show cause notice was non receipt of BRC, the applicants filed another representation dated 22.10.2012 enclosing the copy of relevant BRC (which was acknowledged by the Superintendent on 25.10.2012) four days in advance of date fixed for the Personal Hearing.

4.2 Since the applicants had filed the BRC which is the subject matter of Show Cause Notice and Personal hearing well in advance, the applicants did not attend for the Personal Hearing fixed on 29.10.2012, on the reasonable belief that the department would close the issue as the applicants had submitted the BRC on two occasions under proper acknowledgements and no purpose would be served by simply appearing before the respondent. However, to the utter shock and dismay to the applicants, they received the impugned Order in Original issued by the respondent which has been passed without taking into consideration of the facts and circumstances of the case. The Adjudicating Authority passed the above Order-in-Original without examining the factual position and without causing necessary verification of the records available with his own office and without observing the principles of natural justice. Precisely the orders have been passed in gross violation of the principles of natural justice and without verifying the records duly

submitted by the applicants and made available to the Adjudicating Authority much before the adjudication orders.

4.3 In this case the show cause notice was issued on 18.01.2007 and the Order-in-Original has been passed on 28.03.2013 (which was received by the applicants on 03.04.2013). Hence the orders have been passed after 6 years from the date of show cause notice. While taking up any issue for a final decision, in all fairness, the applicants should have been extended another opportunity to explain their stand or to file the documents if any required in this regard. It is also submitted that deciding any case without offering sufficient chances of Personal Hearings is in gross violation of the principles of natural justice.

4.4 It may be seen that the Adjudicating Authority has come to a factually incorrect conclusion that the applicants have not filed the evidence of realization of export proceeds in respect of the said exported goods within the period allowed under the Foreign Exchange Maintenance Act, 1999, including any extension of such period granted by the Reserve Bank India though the applicants had filed the BRC on 7.12.2005 itself and again a copy on 25.10.2012 itself under proper acknowledgement, much before the date of personal hearing. The Adjudicating Authority has failed to verify these records and facts available with his own office and passed the order of recovery in haste. Therefore, the orders passed are liable to be set aside.

4.5 It was alleged that there was no response from the applicants to the Show Cause Notice. The applicants had filed the BRC even before the issuance of show cause notice and therefore there was no necessity to file the reply as the required documents have since been filed. Again a copy was also furnished on 25.10.2012 under proper acknowledgement. Hence the orders have been passed on inconsistent reasoning and without taking into consideration of the reply filed by the applicants. On this score also the orders are liable to be set aside. The Adjudicating Authority have passed orders concluding that the applicants have failed to comply the provisions in terms of Section 75 of Customs Act, 1962 and

Rule 16A ibid and assuming that they have no evidence whatsoever to prove the realization of the export proceeds for the subject export. By virtue of the explanation offered in the preceding paragraphs, it is demonstrated by the applicants beyond any doubt that they not only realised the sale proceeds within the time limit and also informed the department under proper acknowledgement as required under the provisions of law. However, the Adjudicating Authority has failed to take into these submission or documents into consideration and orders have been passed with a pre-concluded decision. This is contrary to the normal adjudication proceedings in the matter of Drawback and much against the spirit of the procedures.

4.6 That in spite of all the above submissions along with documentary Proof the first Appellate Authority rejected the appeal on the grounds that the applicants failed to participate in the adjudication proceedings and the column of date of realization was found left blank in the BRC produced. Both the above observations are factually incorrect. As regards participation In the adjudication proceedings, it is submitted that no show cause notice has been received by the applicants and the fact has not been disputed at all. In the absence of any show cause notice the allegation that the applicants have not participated in the proceedings is unfair and unsustainable. Further on receipt of PH intimation, the original BRC had been filed before 4 days ahead of PH. As the issue involved in the intimation is on submission of BRC which has been done, there was no necessity to attend the PH hence not attended. The First appellate authority did not dispute the fact of filing the original BRC before the Personal Hearing Date. As regards the missing of date of realization in the BRC it is only a clerical omission which could have been sought for from the bank as the BRC is the bank document and the applicants cannot do anything on this. It is surprising, shocking and unfortunate on the part of First Appellate Authority to conclude that the amount was not realized as there was no date of realization. Copy of BRC is attached and it may be observed that col. 1 to 14 have been filled with all details including the amount realized and it is not known how the First Appellate Authority can conclude that the amount has not been realized merely because the date of realization column was not filled in column 15.

Therefore, it is submitted that the orders passed by the First Appellate Authority are contrary to the factual position and liable to be set aside on account of the submissions made earlier.

4.7 In a similar case where the BRCs were available with the exporter but could not be produced to the adjudicating authority because neither the Show Cause Notice nor the Order in Original specifically mentioned the Shipping Bills in relation to which the BRCs were required to be produced, the Revisionary Authority, vide Order No. 51/2013-Cus dated 08.02.2013 M/s Maestro Fashions, Tirupur Vs Commissioner of Customs and Central Excise, Coimbatore remanded the case back to the original authority for considering the issue afresh. In the present case, the appellant has already submitted the BRCs to the ICD and obtained acknowledgement from the Superintendent in the covering letter.

4.8 That in view of the above the impugned Orders may be set aside.

5. Personal hearings was scheduled in this case on 25.3.2015. Personal hearing was attended by Shri R. Arumugam, Consultant on behalf of the applicant, who reiterated the grounds of revision application. Nobody attended hearing on behalf of the respondent Department.

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

7. Government observes that the applicants were initially granted drawback for exports made by them. Subsequently, Show Cause Notice was issued to the applicants for recovery of already sanctioned drawback on the ground that applicants failed to produce the evidence for realization of export proceeds in respect of impugned exported goods for which they were allowed drawback within the period allowed under Foreign Exchange Management Act, 1999 including any extensions of such period granted by the Reserve Bank of India. Therefore, the Original Authority vide the impugned Order-in-Original confirmed the demand of already sanctioned drawback and also imposed penalty. Commissioner (Appeals)

upheld impugned Order-in-Original on the grounds that the applicants have not realized the sale proceed from their buyers abroad which is evident from the Bank Realization Certificates submitted by them which does not show date of realization of export proceeds. Now, the applicants have filed this Revision Application on ground mentioned in para (4) above.

8. Government observes notes that it is a statutory requirement under Section 75 (1) of Customs Act, 1962 & Rule 16 A (1) of Customs, Central Excise & Service Tax Drawback Rules 1995, read with Section 8 of FEMA 1999 read with regulations 9 of Foreign Exchange Management (Export of goods & Services) Regulations 2000 & para 2.41 of EXIM policy 2005-2009 that export proceeds need to be realized within the time limit provided there under in this case subject to any extension allowed by RBI.

9. Government further notes that the provisions of recovery of amount of drawback where export proceeds not realized has been stipulated Rule 16A of the Customs, Central Excise and Service Tax Duty Drawback Rules 1995 and the relevant sub-rules (2) and (4) of the Rule 16A reads as under:

~~16A. Recovery of amount of Drawback where export proceeds not realised-~~

(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 or Deputy Commissioner of Customs 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 or Deputy Commissioner of Customs 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:

(In rule 16A, in sub-rule (2) has been substituted vide Notification No. 10/2006 - Customs (N.T.) dated 15/02/2006)

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.

(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."

10. From perusal of above provision, it is evident that the drawback is recoverable, if the export proceeds are not realized within stipulated time limit or extension given by RBI, if any. In this case, it is an undisputed fact that the date of realization of export proceeds was not mentioned in Bank Realization Certificate submitted by the applicant. In absence of mention of date of realization of export proceeds, it cannot be concluded that realization of export proceeds were made by the applicant and were made within stipulated time limit including extension, if any, allowed by the RBI. The applicant has therefore failed to establish that export proceeds realization were made by them and were made within stipulated time including extension of RBI, if any. Under such circumstances, Government finds that the applicants are liable to pay drawback availed by them for the reasons of failure to realize export proceeds within stipulated time limit. Therefore, the lower authorities have rightly confirmed the recovery of said drawback amount along with interest and imposed penalty.

11. As discussed above, Government finds that as the applicant has clearly failed to comply with statutory requirements and fulfil their statutory obligations, the drawback is recoverable from them. Therefore, the Order for recovery of drawback claim along with interest & penalty cannot be faulted with.

12. In view of above, Government finds no infirmity in order of Commissioner (Appeal) and hence, upholds the same.

13. The revision application is therefore rejected being devoid of merit.

14. So, ordered.


(RIMJHIM PRASAD)

JOINT SECRETARY TO THE GOVERNMENT OF INDIA

M/s Primo Fashions
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Tirupur-641607

GOI ORDER NO. 13/2015-CX DATED 19.06.2015

Copy to:

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 2. Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore, 6/7 A.T.D.Street, Race Course Road, Coimbatore-641018
 3. The Assistant Commissioner of Customs, Air Cargo Complex, Peelamedu, Coimbatore-641014
 4. RA Associates, No.59 (First Floor), 30 Feet Road, Nar Kamaraj Statue, Krishnaswamy Nagar, Ramanathapuram, Coimbatore--641045
 - ✓ 5. Guard File.
 6. PA to JS (RA)
 7. Spare Copy
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ATTESTED



(B.P.SHARMA)
OSD (REVISION APPLICATION)

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