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SPEED POST



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.380/57/DBK/2014-RA | 3119

Date of Issue: 25.06.2021

ORDER NO. 137/2021-CUS (WZ)/ASRA/MUMBAI DATED 31.05.2021
OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO
THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL
EXCISE ACT, 1944.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
77/2014/Cus/Commr(A)/AHD dated 21.01.2011 passed
by the Commissioner of Customs(Appeals), Ahmedabad.

Applicant : Commissioner of Customs, Vadodara.

Respondent : M/s Apollo Tyres Ltd. Vadodara.

ORDER

This Revision Application is filed by Commissioner of Customs, Ahmedabad (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. 77/2014/Cus/Commr(A)/AHD dated 21.01.2011 passed by the Commissioner of Customs(Appeals), Ahmedabad.

2. The issue in brief is that the M/s Apollo Tyres Ltd., Village Limda, Taluka Waghodia, District - Vadodara 391 760 (hereinafter as "the Respondent") had imported the goods viz "Poly Butadiene Rubber PBR 01" falling under CTH 40022000 of the Customs Tariff Act, 1975, under the Bill of Entry No. 2485535 dated 20.06.2013 and which was cleared by ex-bond, bill of entries as detailed under :

Supplier	Item	NWT in MT	Supplier's Invoice No. & dt	Ex. Bond Bill of Entry No & dt.
L.G. Chemical Ltd.	PBR-01	151.200	20611336 dt 22.05.13	2583944 dt 01.07.13
L.G. Chemical Ltd.	PBR-01	151.200	20611337 dt 22.05.13	2583922 dt 01.07.13

- (i) Subsequently, the Respondent vide their letter Ref.BRC/E/FCL/962 dated 28.11.2013 informed that the imported goods have been rejected on quality grounds. The said manufactured goods were to be re-exported under Section 74 of the Customs Act, 1962 and that the Indian Customs EDI System (ICES) does not allow to file the shipping bill for drawback allowable on re-export of duty paid goods and requested for manual filing of Shipping Bill.
- (ii) The Respondent vide letter dated 09.09.2013, mentioned therein the reason for the rejection i.e. the item PBR-01(Poly Butadiene Rubber) had been imported from M/s L.G Chemicals Ltd., South Korea, but the material was to be returned to supplier due to quality rejection and as such had requested for Re-Export of the goods under Section 74 for returning the imported goods back to the shipper. They also mentioned that all the import clearance has been made from the Customs station INBRC6, vide Bill of Entry: Warehouse 2485535 dated 20.06.2013 and Ex-bond 2583922 dated 01.07.2013. This will absolve them to submit the import documents again.

- (iii) In response to the above request for re-export under Section 74 of the Customs Act, 1962, the Department vide office letter dated 17.10.2013 (F.No.BOE No.2485535/20.06.2013) requested the Respondent to submit all the relevant documents related to the import and rejection of the said goods and the documentary evidence of having paid the import duty together with export invoice, packing list, RBI's permission to re-export the goods as applicable and also furnish the declarations w.r.to that the imported goods were taken / not taken into use after importation and documentary evidence regarding rejection of the imported goods.
- (iv) The Respondent vide letter dated 18.10:2013 submitted their reply stating therein that "Drawback" 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, hence query at Sr.No.1 is not applicable. The documents mentioned at Sr.No.2, are either to be submitted at the time of export i.e. at the time of presentation of Shipping Bill in Customs, as per the Para 4 or at the time of claiming drawback as per the Para 5 of the Re-export of Imported goods Drawback of Customs Duties) Rules, 1995.
- (v) As per the request of the Respondent who is an ACP client also, the permission for manual filing of Shipping Bill on the ground that the EDI system does not allow filing the Shipping Bill under drawback scheme was sought and the same was granted by the Commissioner of Customs, Ahmedabad vide letter F.No.V111/48-04/Sys/Cus/2013 dated 30.10.2013 with direction to ensure that there is no revenue loss and all the procedures are being strictly followed as per the Customs Act, 1962 and rules framed there under before clearance of the said goods.
- (vi) The importer filed the Manual Shipping Bill No. 01/13/DBK dated 31.10.2013 under claim for drawback under Section 74 (i.e. up to 90% of the Customs duty paid). The Examination Officer visited the warehouse for examination of the said cargo with Superintendent (Export). During the physical examination of the goods meant for re-

export under Section 74 of the Customs Act, 1962 which was earlier imported vide Bill of Entry No.2485535 dated 20.06.2013 by the Respondent, it was noticed that the description of the goods/marks No. mentioned in Import documents viz. Bill of Entry, Bill of Lading, Invoice, Packing List at the time of import were not matched with Description/marks mentioned on the goods presented for export. Description of the goods, marks nos. mentioned in Import documents viz. Bill of Entry, Bill of Lading, Invoice, Packing List was "Polybutadiene Rubber PBR 01", whereas description/marks nos. mentioned on the goods meant for export were found as "BR 1208".

- (vii) Hence it was found that the goods were not the same which were previously imported by the importer as per condition under Section 74 of the Customs Act, 1962 for grant of drawback @98% of the Customs duties leviable at the time of importation.
- (viii) After following due process of law, the Assistant Commissioner of Customs, ICD Dashrath, Vadodara vide Order-in-Original No. 04/2013-14 dated 21.12.2013 held that the Respondent had contravened the provisions of Section 74 of the Customs Act, 1962 in as much as they failed to satisfy the proper officer that the re-export goods were the same which were imported and described in the import documents; hence disallowed re-export, ordered confiscation of the goods under Section 113 with redemption fine of Rs. 70 lakhs under Section 125, imposed penalty of Rs. 46,51,309/- under Section 114 and Penalty of Rs. One lakh under Section 112 of the Customs Act, 1962.
- (ix) Aggrieved, the Respondent filed an appeal before the Commissioner of Customs(Appeals), Ahmedabad on the following grounds:
- (a) There was no dispute that the goods imported and exported were the same described as PBR 01, and the disallowance of re-export was for the consignment described as PBR 01 1208 which was acceptable/compatible grade.
- (b) There was no dispute with regard to the identify of goods, facts of rejection and re-export, hence the provision of Section 74 were

misconstrued for disallowing re-export. The two consignments were covered under the in-bond BOE, first of PBR 01 1280 and the second PBR 01 1208. While the first one was accepted by them, grade 1208 were rejected and presented for re-export. Adjudicating authority had not considered these aspects.

(c) There was no dispute with regard to import duty payment on the goods, hence substantial benefit in the form of 98% drawback on re-export of such goods cannot be denied merely on technical goods.

(d) Orders of confiscation, fine and penalty were wrongly issued as none of the provision of Section 112, 113, 114 and 115 are invocable in their case.

The Commissioner(Appeals) vide Order-in-Appeal No. 77/2014/Cus/Commr(A)/AHD dated 21.01.2011 set aside the Order-in-Original dated 21.12.2013 and allowed the appeal with consequential relief.

(x) Simultaneously, the Commissioner of the Customs, Ahmedabad had reviewed the Order-in-Original dated 21.12.2013 and found that the same is not proper and legal and hence filed an appeal before the Commissioner of Customs(Appeals), Ahmedabad on the following grounds:

(a) In the instant case, mis-declared 151.200 MT of Poly Butadiene Rubber BR-1208, valued at Rs. 1,90,99,689.84 import vide Bill of Entry No. 2485535 dated 20.06.2013 for re-export, under claim of drawback was ordered to be confiscated under Section 113 of the Customs Act, 1962, penalty under Section 114 and Section 112 of Act ibid and option to redeem said confiscated goods was granted under Section 125 of the Act. As per Section 122 of the Act, an Assistant Commissioner of Customs or Deputy Commissioner of Customs is empowered to adjudicate cases where the value of the goods liable to confiscation does not exceed five lakh rupees.

(b) The subject case involving confiscation of goods in excess of five lakh rupees was therefore not within the competence of Assistant

Commissioner of Customs to adjudicate and the same was required to be set aside.

3. Aggrieved, the Applicant Department filed the current Revision Application on the following grounds:-

- (i) The Appellate Authority had allowed the department's appeal in similar case, where the original adjudicating authority had crossed the limit of powers of adjudication, by remanding back the same for adjudication by proper authority. Here in present case, the original adjudicating authority had decided the case involving confiscation of goods having value exceeding Rs. 5,00,000/- (which is in Power of the Joint/ Additional Commissioner as per Section 122 of the Customs Act, 1962) which is not correct. In such condition, the appellate authority should remand back the case to proper adjudicating authority without going into merits. In the instant case, the department's appeal has neither been clubbed with party's appeal nor decided.
- (ii) It would be decided judicially, if the case was remanded back by the appellate authority without going on merits for adjudication by the proper officer who is Additional/Joint Commissioner of Customs in present case. There are many orders of same Appellate Authority, wherein in such cases, the case was remanded back. One for example is Order-in-Appeal No. 129-130/2014/Cus/Commr(A)/AHD dated 14.03.2014 passed in case of M/s. Aishwarya Plast Exports Pvt. Ltd., Vadodara.
- (iii) In view of the above, the instant Order-In-Appeal No. 87/2014/Cus/Commr (A)/AHD, dated 07.02.2014 passed by the Commissioner (Appeal) is not proper and legal and therefore, the same may be set aside and case may be remanded back to proper adjudicating authority.

4. Personal hearing in the case was fixed on 26.09.2018, 05.12.2019 and 12.12.2010. No one appeared on behalf of the Applicant. The Respondent

vide their letter dated 04.2019 requested to grant additional time and adjourn the hearing as their records pertaining to the captioned matter were misplaced and they are trying to locate the same. In view of change in Revisionary Authority, the personal hearing in the matter was fixed for 11.01.2021, 18.01.2021 25.01.2021 and 28.01.2021. No one appeared on behalf of the Applicant. On behalf of the Respondent, Shri Joseph Kodianthara, Advocate, Shri Susanth Reddy, Associate Manager, Taxation and Ms Pooja Sharma, Group Manager, Taxation appeared online. They submitted that Order-in-Appeal passed by the Commissioner(Appeals) is judicious and need to be maintained. They submitted that Department has filed appeal merely on the ground that Order-in-Original should have been passed by the Joint Commissioner, instead of Dy. Commissioner. They submitted that in any case, Order-in-Originals passed by the DC or JC would lie in appeal before Commissioner(Appeals), hence it is inconsequential. They further submitted that its order of Commissioner(Appeal) only against which revision application has been filed.

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

6. On perusal of the records, Government observes that current case of the mis-declared goods of 151.200 MT of Poly Butadiene Rubber BR-1208, valued at Rs. 1,90,99,689.84 import vide Bill of Entry No. 2485535 dated 20.06.2013 for re-export, under claim of drawback adjudicated by the Assistant Commissioner of Customs, ICD Dashrath, Vadodara vide Order-in-Original No. 04/2013-14 dated 21.12.2013 wherein it was ordered to be confiscated under Section 113 of the Customs Act, 1962, penalty under Section 114 and Section 112 of Act ibid and option to redeem said confiscated goods was granted under Section 125 of the Customs Act, 1962. Aggrieved the Applicant filed an appeal before the Commissioner(Appeals). The Commissioner(Appeals) vide Order-in-Appeal No. 77/2014/Cus/Commr(A)/AHD dated 21.01.2011 set aside the Order-in-

Original dated 21.12.2013 and allowed their appeal with consequential relief.

7. The Government observes that the Commissioner of Customs, Ahmedabad on reviewing the above Order-in-Appeal has filed the current Revision Application only on the grounds that the original adjudicating authority had crossed the limit for powers of adjudication and requested to remand the case to the proper authority i.e. Joint /Additional Commissioner as per Section 122 of the Customs Act, 1962 as the case involves confiscation of goods having value exceeding Rs. 5,00,000/-.

8. Government observes that on the said issue, the Commissioner (Appeals) in findings in Para 11 of the Order-in-Appeal stated that

"11. However, before parting, I must mention that the adjudicating authority has passed the impugned order beyond his jurisdiction, as section 122 empowers him to adjudicate confiscation of goods and imposing penalty only in cases where the value of the goods liable to confiscation does not exceed Rs. 5 lakhs. Copy of the subject shipping bill available on record reveals the FOB value of impugned goods as Rs. 2,08,71,648/- which could be adjudged only by an officer not below the rank of Joint Commissioner, He must eschew passing order without referring to law and instructions concerning jurisdiction. However, since I am deciding this case on merits based on irrefutable facts and evidence available on records as discussed supra, and have come to conclusion that confiscation under section 113 of the Act in this case is legally not sustainable, as also penalty under section 114 of the Act, the question of another proceeding for de-novo adjudication by an officer of the rank of Joint Commissioner who is empowered to adjudicate such case under section 122 of the Act, and whose order is appealable before this same authority, would be futile, dilatory and certainly, it would not be in the interest of justice to the appellant whose goods are lying in customs areas awaiting export."

Here Government is in agreement with the findings of the Commissioner(Appeals) that remanding the case to the original authority is futile and would result in just delaying the matter which is not in the interest of justice. Further Government finds that the Commissioner(Appeals) has legally decided the case on merits.

10. In view of the above position, Government finds no infirmity in the Order-in-Appeal No. 77/2014/Cus/Commr(A)/AHD dated 21.01.2011 passed by the Commissioner of Customs(Appeals), Ahmedabad and, therefore, upholds the same and dismisses the Revision Application filed by the Department being devoid of merits.

Shrawan
31/5/21
(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No 137/2021-CUS (WZ) /ASRA/Mumbai DATED 31.05.2021

To,
The Commissioner of Customs,
Ahmedabad,
Customs House, Near All India Radio,
Navrangpura,
Ahmedabad - 380 009.

Copy to:

1. M/s Apollo Tyres Ltd., Village Limda, Taluka Waghodia, District - Vadodara 391 760
2. Sr. P.S. to AS (RA), Mumbai
- ~~3. Guard file~~
4. Spare copy