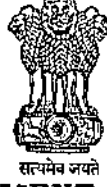


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

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. 371/52/DBK/2017-RA(Mum) / 1670 Date of Issue: ~~04.2022~~

ORDER NO. 165 /2022-CUS (WZ) /ASRA/Mumbai DATED 27.04.2022 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 Polydrug Laboratories Pvt. Ltd.,
202, Navbharat Estate,
Zakaria Bunder Road,
Sewri (West), Mumbai - 400 015.

Respondent : Deputy Commissioner (Exports),
CFS, Mulund (West)

Subject: Revision applications filed under Section 129DD of the Customs Act, 1962 against the Order in Appeal No. MUM-CUSTOMS-SMP -134/2017-18 dated 15.09.2017 passed by the Commissioner of Customs (Appeals-I), NCH, Mumbai.

ORDER

This Revision Application is filed by M/s Polydrug Laboratories Pvt. Ltd., 202, Navbharat Estate, Zakaria Bunder Road, Sewri (West), Mumbai- 400 015 (hereinafter referred to as the 'applicant') against the Order-In-Appeal No. MUM-CUSTOM-SMP-134/2017-18 dated 15.09.2017 passed by the Commissioner of Customs (Appeals-I), NCH, Mumbai

2. The facts of the case briefly stated are that the applicant had exported goods during 01.01.2004 to 31.12.2010 and received drawback amounting to Rs.12,53,847/-. While going through EDI records, it was noticed that proof of remittance for the shipments were not submitted and were outstanding. Accordingly, in terms of Rule 16A(2) of the Customs, Central Excise Duties and Service Tax Drawback Rules 1995 read with Section 75(1) of the Customs Act, 1962, a demand notice dated 21.06.2012 was issued to the applicant. Since the applicant failed to respond to the demand notice and did not submit Bank Realization Certificates, the Assistant Commissioner of Customs vide Order-in-Original dated 19.10.2012 confirmed the demand of drawback of Rs.12,53,847/ and interest thereon. Aggrieved by the order dated 19.10.2012, the applicant had filed the appeal before Commissioner of Customs (Appeals). JNCH. Nhava Sheva. The Appellate Authority vide Order-in-Appeal No. 683(CFS-MULUND)2013 (JNCH)/exp-170 dated 30.07.2013, remanded the matter back to original authority with direction to applicant to submit bank attested copies of Bank Realization Certificates to the adjudicating authority as evidence of realization of export proceeds in respect of the shipping bills in question and for necessary verification and also directed to extend full payment if the BRCs were proper and covered the entire payments. Thereafter, the applicant submitted the BRC's in respect of 162 shipping bills. Against 52 shipping bills, the applicant had realized FOB in full. However, in case of remaining 110 shipping bills, it was found that the applicant had realized less than the declared FOB and accordingly recovery of proportionate drawback

amount of Rs. 11,079/- was confirmed vide Order-in-Original No. 05/2015-16/1CD (M)(X) dated 11.12.2015.

3. Being aggrieved by the Order-in-Original, the applicant filed appeal before the Commissioner of Customs (Appeals-I), NCH, Mumbai. The Appellate Authority vide Order-In-Appeal No MUM-CUSTOMS-SMP -134/2017-18 dated 15.09.2017 dismissed the appeal and upheld the Order-in-Original. The Appellate Authority made the following observations

i) that the issues of requirement of submission of BRC's by the applicant and its proper verification by the department and extending of full benefit only in those cases where full payment received reached finality and the same are binding to both the applicant as well as the department

ii) that in the impugned order-in-original the details of all the 110 shipping bills where the applicant had realized less FOB value or paid excess commission beyond the limit of 12.5% as prescribed vide CBEC Circular No. 64/2003 has been mentioned and the applicant has not disputed the same.

iii) that the applicant in case of 52 Shipping Bills had realized the entire amounts of the FOB value and in the remaining cases, the applicant has not produced any evidence for the assertion that less realization is on account of bank charges for remitting the amount.

iv) that drawback is paid on the condition that exporter shall repatriate the full export value of the goods and it is obligatory on the part of the applicant that the amount representing the full value of goods exported should be realized and repatriated to India within a stipulated period from the date of export and in case of non/short realization of export proceeds, the applicant was required to surrender the drawback/proportionate drawback.

v) That the mistake was on part of the applicant in claiming excess drawback which could not be noticed Customs officials while processing and sanctioning such excess claim and that under the provisions of Section 75 of the Customs Act, 1962, Rule 16 and 16A of the Customs, Central Excise

Duties and Service Tax Drawback Rules, 1995, remedy to correct such error by way of initiating demand/recovery proceeding of erroneous payment of drawback is provided.

vi) that the demand of excess drawback on account of commission beyond the limit of 12.5% has been confirmed in 9 cases only and in the rest cases reason for confirming the demand of drawback is less realization of sale proceeds as provided under Rule 16A(2) of the Drawback Rules, 1995 and drawback has to be recovered proportionately.

4. Aggrieved by the said order, the applicant filed this Revision Application on following grounds :-

i) That the Order-in-Appeal clearly acknowledges that as per CBEC circular No. 5/2009 Customs dated 02.02.2009 issued vide F. No. 609/167/2003-DBK, the Board has decided that the exporters will submit a certificate from the authorized dealer or chartered accountant providing details of shipment which remain outstanding beyond the prescribed time limit including the extended time, if any, allowed by the authorized dealer/RBI on a 6 monthly basis. Therefore, once the authorized dealers certificate were placed on record, the Dy. Commissioner was obliged to accept the same and that the Appellate Authority had erred in not upholding the binding CBEC circular.

~~ii) That the bankers had issued the certificate to the effect that there was no~~
outstanding and the adjudicating authority had no right to denounce the binding CBEC circular. Therefore, the order is contrary to the CBEC circular and needs to be set aside.

iii) That the Customs officials are only authorized to monitor those case where the realization is less than US\$25000 because no SDF declaration is filed in that case. The Shipping Bills having value in excess of US\$ 25000 are monitored as per the XOS statement to be released by the RBI.

iv) that the RBI has not reported these Shipping Bills as outstanding because the bankers have discharged the SDF declaration therefore once again,

there cannot be any demand raised in respect of these shipments. All this was brought to the notice of the Appellate Authority.

v) That the SCN's should not be delayed to the detriment of the exporters even if the time limit is not specified in the law. The ratio of the case of Pratibha Syntex Ltd vs Union of India [2013 (287) E.L.T. 290 (Guj.)] clearly applies in the instant case because the facts are exactly the same. The show cause notice has been issued after more than 3 years without spelling out that how the recovery amount is determined. Therefore, there is no reasonableness visible in terms of time and recovery values in respect of the shipments and the impugned order needs to be set aside.

5. A Personal Hearing in the matter was fixed for 16.11.2021 or 23.11.2021. Shri Rajeev Gupta, Consultant appeared online for the same on behalf of the applicant on 23.11.2021 and reiterated their earlier submissions. He also drew attention to Circular No 05/2009-Cus dated 02.02.2009 and stated that once negative certificate regarding export realisation has been submitted there is no need to ask for individual BRC's.

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

~~7. In the instant case, the Government finds that the recovery of excess drawback duties sanctioned and paid to the tune of Rs. 11,079/- along with interest was confirmed by the adjudicating authority vide impugned Order-in-Original in cases where the FOB value has not been realised in full. Further, the appeal filed by the applicant was dismissed by the Appellate Authority vide Order-in-Appeal No. MUM-CUSTOMS-SMP -134/2017-18 dated 15.09.2017.~~

7.1 The Government finds that the applicant having challenged the notice for recovery of excess drawback amount received by them being time barred, it is therefore, pertinent to refer the relevant statutory provisions. From the perusal

of Section 75 of the Customs Act, 1962 and Rule 16 / 16A of the Drawback Rules, 1995, it is observed that Drawback Rules, 1995 have been framed under Section 75 of the Customs Act, 1962. Drawback, being an export incentive in the form of cash award admissible under Duty Drawback Rules, 1995, an exporter becomes entitled to it on export of goods and realization of export proceeds (foreign currency). Further, Rule 16 of the Drawback Rules provides 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. Rule 16 of the Drawback Rules, 1995 does not provide for any time limit for making recovery of excess drawback paid erroneously. The question, therefore, is when Rule 16 does not prescribe any period of limitation, whether action can be taken thereunder after any length of time, or whether the concept of reasonable period has to be read into it. In this regard, it is by now well settled by the Supreme Court in a catena of decisions that if the statute does not prescribe any period of limitation, the power thereunder has to be exercised within a reasonable time. The 'reasonable period' would, of course, depend upon the facts and circumstances of each case. Government observes that the averments made by the applicant on this count are misplaced, and holds that the SCN is not time barred.

7.2 In this regard, the Hon'ble Supreme Court in the cases of Collector vs. Raghuvar (India) Ltd. [2000 (118) E.L.T. 311 (S.C.)] and Govt. of India vs. Citadel Fine Pharmaceuticals - [1989 (42) E.L.T. 515 (S.C.)] hold that in the absence of specific period, action should be taken within reasonable period, thus every action in the absence of prescribed period should be initiated within reasonable period and what would be reasonable period would depend upon facts and circumstances of each case.

7.3 Government also notes that Circular No 05/2009-Cus dated 02.02.2009, for 'Systems Alert for monitoring Realisation of Export Proceeds in EDI' has been issued under which the procedure for monitoring of realisation of export proceeds has been issued. Para 4 of the said Circular is reproduced as under:

*"In view of this change, particularly considering that under the statute, the drawback payment is ultimately linked to the realization of export proceeds, it has become necessary for the Department to put in place an in-house monitoring mechanism to monitor the realization of such proceeds for exports made under the Drawback Scheme. Extensive consultations were held with field formations and trade & industry in this regard, and subsequently, the matter was examined by the Board. For monitoring the realization of export proceeds for drawback purposes, the Board has decided that the exporters will submit a certificate from the authorized dealer (s) or chartered accountant providing details of shipment which remain outstanding beyond the prescribed time limit including the extended time, if any, allowed by the authorized dealer/RBI on a **6 monthly basis**. Such certificate shall be furnished by the exporter, authorised dealer wise for each port. In order to put the exporters on notice at the time of export itself, an endorsement on the exporter's copy of shipping bill would be made specifying the due date for realization of export proceeds."*

7.4 Government further notes that the applicant has stated that they had submitted the 'negative statement' from the Bank and the submission of the same by the applicant has been acknowledged in the impugned Order-in-Original and also by the Appellate Authority.

7.5 Government notes that despite the submission of the 'Negative statements' in terms of Circular No 05/2009-Cus dated 02.02.2009, by the applicant, the same have not been discussed in the impugned Order-in-Original and Order-in-Appeal and the appeal was rejected on the grounds of less realization of sale proceeds, which is contradictory.

8. In view of the above observations, Government sets aside the impugned combined Order-In-Appeal No. MUM-CUSTOMS-SMP-134/2017-18 dated 15.09.2017 passed by the Commissioner of Customs (Appeals-I), NCH, Mumbai.

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


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

ORDER NO. 165 /2022-CUS (WZ) /ASRA/MUMBAI DATED 27.04.2022

To,
M/s Polydrug Laboratories Pvt. Ltd.,
202, Navbharat Estate,
Zakaria Bunder Road,
Sewri (West), Mumbai – 400 015.

Copy to :

1. The Pr. Commissioner of Customs (~~Export~~) (General), New Custom House, Ballard Estate, Mumbai 400 001
2. The Commissioner of Customs (Appeals), Mumbai-I, 2nd Floor, New Customs House, Ballard Estate, Mumbai 400 001.
3. The Deputy commissioner of Customs, (~~Export~~), Inland Container Depot, Mulund (East), Mumbai 400 081.
4. Sr. P.S. to AS (RA), Mumbai.
5. Notice Board.
6. Spare copy.