REGISTERED SPEED POST

सत्यमेव जयते

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. 373/06/DBK/15-RA/4183 Date of Issue : 12.08.2021

ORDER NO. 175 /2021-CUS (SZ)/ASRA/MUMBAI DATED 28.07.2021 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.

Subject	:	Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order in Appeal No. C.Cus. No. 1869/2014 dt. 14.10.2014 passed by the Commissioner of Customs (Appeals), Chennai.
Applicant	:	M/s. NTL Logistic India P. Ltd. (previously known as M/s Logistics Plus India Pvt. Ltd.), Chennai.
Respondent	:	The Commissioner of Customs (Airport & Air Cargo), New Custom House, Meenambakkam, Chennai -600 027.

ORDER

This Revision Application has been filed by M/s. NTL Logistic India P. Ltd. (previously known as M/s Logistics Plus India Pvt. Ltd.) Chennai, (hereinafter referred to as "the applicant") against the Order in Appeal C.Cus. No. 1869/2014 dt. 14.10.2014 passed by the Commissioner of Customs (Appeals), Chennai.

2. The brief facts of the case are that the applicant imported Second hand tooling (brown support equipment and tooling) vide Bill of Entry(B/E) No.0768/06 dated 01.12.2006 for use by M/s GE International Inc as a temporary importation so as to re-export the same after completion of job work. After completion of job work, the goods were re-exported vide Shipping Bill No. 9002491 dt. 07.03.2007 under claim of drawback under Section 74 of the Customs Act, 1962. The applicant thereafter, filed a claim of drawback for an amount of Rs.45,15,390/- and the same was sanctioned. Subsequent to the sanction and payment of drawback, the Department found that Drawback department had originally issued a Deficiency Memo dated 26.07.2007 for rectification of the deficiencies and to produce evidence for payment of import duty. Such Memo was to be complied within 30 days. It was, therefore felt that the payment of drawback was erroneous and Department issued a Show Cause Notice dated 18/22.6.2011 proposing to recover the drawback amount as the applicant did not rectify the deficiency within 30 days from the date of Deficiency Memo as required in terms of Rule 5(4)(a) of the Re-export of the Imported Goods (Drawback of Customs Duties) Rules, 1995. The Deputy Commissioner of Customs (Drawback) vide Order in Original No. 663/2013-DBK-AIR dated 05.09.2013 confirmed the demand of erroneously paid drawback amount of Rs.45,15,390/ along with applicable interest under Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 read with Section 75(2) of the Customs Act 1962.

3. Being aggrieved with the aforesaid Order in Original, the applicant filed appeal before Commissioner of Customs (Appeals) Chennai, who vide Order in Appeal C.Cus. No. 1869/2014 dt. 14.10.2014 (impugned Order) upheld Order in Original No. 663/2013-DBK-AIR dated 05.09.2013 and rejected appeal filed by the applicant.

4. Being aggrieved by the impugned Order the applicant filed the present Revision Application mainly on the following grounds:-

4.1 The Commissioner Appeals has stated in the impugned order-in-appeal at para 9, that Rule 5(2)(b) of Re-export of Imported Goods (Drawback of Customs

Duties) Rules, 1995 requires copy of bill of entry and Rule 5(2)(d) requires evidence of payment of duty at the time of importation of goods and therefore, bill of entry and evidence for payment of duty are two separate requirements and that bill of entry cannot be accepted as payment of duty. Rule 5 lays the manner and time of claiming drawback and nowhere in the said rule it is stated that the bill of entry cannot be accepted as proof of payment of import duty. The bill of entry was stamped by the State Bank of India for payment of import duty and therefore, the stamping by the bank on bill of entry is evident that the import duty has been paid.

4.2 The drawback was sanctioned by the authority after satisfying himself as to the identity of the goods sought for export as per shipping bill No.9002491 dt.07.03.2007 with those given at the time of import as per Bill of Entry No.768 dt.01.12.2006. The bill of entry bears evidence for payment of duty for the goods at the time of import. Section 74 - proforma issued by the Superintendent of Customs, Custom House, Chennai bears the following:

> *"identity established with reference to related import documents, marks and numbers as declared in the export invoice -BE 768/1.12.06 attached"*

With regard to payment of duty, the report answers the question "whether Customs Duty has been paid on the import goods as follows:

> *"Yes - Vide SBI dated 4.12.2006"*

The bill of entry bears the stamp of SBI with regard to payment of duty on 04.12.006. Thus, the drawback was sanctioned strictly in accordance with the requirement of Section 74 of the Customs Act, 1962 and therefore it is vain to say on the part of the Commissioner Appeals that the drawback was erroneously sanctioned.

4.3 The only reason to order for recovery of the drawback is that the applicant did not answer to deficiency memo dated 26.07.2007 within 30 days but furnished the answer three months later at the time of personal hearing held on 22.11.2007. It is submitted that no such deficiency memo was received by them. An application was made under RTI Act to supply copy of the deficiency memo dt.26.07.2007, the record of personal hearing held on 22.11.2007. They were supplied as per Misc/50/2014-RTI dt.04.05.2014. It may please be seen that the deficiency memo dated 26.06.2007 has stated that the claim will be decided on merits if the documents are not supplied within 15 days. There is no mention that the claim will altogether be rejected. Further, the record of personal hearing does not mention about this deficiency memo. The personal hearing record states that *"the claimant "has since signed the Annexure II declaration. Regarding any proof of payment of duty they have already submitted triplicate copy of BE in original"*. It is explicitly clear that the authority who sanctioned the drawback was satisfied with the answers given to the deficiency memo, if any, at the time of personal hearing and hence sanctioned the drawback. It is not for the Deputy Commissioner who passed the impugned order to sit in judgment and that too after nearly six years. The order passed is therefore without jurisdiction and illegal.

4.4 The original authority sanctioned the drawback proves beyond a scintilla of doubt that he had found delay, if any, in replying to the deficiency memo, if any

was really issued, was not material with regard to sanction of drawback under Section75 of the Customs Act, 1962. The Deputy Commissioner who passed the Order-in-Original, has misconceived that in such cases where the deficiency memo was not answered within 30 days, the only course left is to reject the drawback claim altogether. It is submitted that the time limit fixed in Rule 5(4)(a) is for the purpose of calculating interest under Section 75A and that the delay in answering the deficiency memo would not render the claim itself as time barred and ineligible for drawback. Rule 4(a) states "*any claim which is incomplete in any material particulars or is without documents specified in sub-rule (2) shall not be accepted for the purpose of Section 75A* " The claim will be deemed not to have been filed. The deeming provision is with reference to Section 75A. A deeming provision cannot have universal application. Deeming provision is a legal fiction something that is in fact not true or in existence but has to be considered to be true or in existence. Deeming provision is for the purpose of Section 75A and not for Section 74 as otherwise the time limit mentioned in Rule 5(1) becomes redundant.

4.5 To say that the claim itself will have to be thrown out for not replying to deficiency memo in spite of the fact that the claimant complied with all requirement under Section 74 of the Act is preposterous. In this regard, the applicant would cite what was said about Justice V Krishna Iyer by the eminent jurist Shri Nariman.

"he would rather do justice overriding law than administering what he believed was injustice according to law"

They are not suggesting to override the law but not to interpret a beneficial provision so as to become a nullity.

4.6 Provision of 30 days to answer a deficiency memo is a procedure for calculating interest and to dispose of the claim as expeditiously as possible and to avoid unnecessary burden on the Government by paying interest. They rely on Modi Ravlon Ltd as reported in 2007 (209) E.L.T. 252 (Tri. - Mumbai) (Para No. 4) and Re:- Ace Hygiene Products Ltd 2012 (276) ELT 131 GOI (Para No. 8.)

4.7 The deficiency memo as found in the letter dated 29.09.2009 was issued by the adjudicating authority two years after sanctioning of the claim calling for TR6 challan. There was no TR6 challan and the payment details were available in the bill of entry itself. Further, the record of personal hearing held by the drawback sanctioning authority is absolutely clear that proof for paying duty was submitted by the applicant. The payment of duty is also found certified by the Superintendent of Customs, Chennai as seen from the proforma dated 08.03.2007 filed under Section 74. The letter dated 29.09.2009 was for a deficiency which was not at all in existence. The provocation for the Deputy Commissioner to reopen the issue and calling for documents which were very much available in the file is not clear.

4.8 In terms of Rule 5(4), the claim has to be returned with deficiency memo. In this case, the claim was not returned to the applicant. Further, deficiency memo has to be issued within 15 days. But it was issued after four months from the date of filing the claim by which time the prescribed period of three months as per Rule 5(1) had already lapsed. It cannot be the say of the Department that Rule 5(4) will apply only to the applicant and not to the officer sanctioning the drawback. On this ground too, there can be no rejection of drawback claim.

4.9 Rule 5 provides for extension of time for a total period of nine months. As the claim has been sanctioned even though the applicant is said to have not responded within 30 days, it shall be deemed that the delay, if at all it was there, had been condoned. It is submitted that the claim having not been rejected, the applicant had not been put to the necessity of applying for extension of time in terms of Rule 5(1). Delayed submission of reply to the deficiency memo cannot *ipso facto* lead to denial of drawback. The Asst. Commissioner who sanctioned the drawback did not consider it necessary for the applicant to get extension as the delay was caused by the Department as it asked for a document which was already there and the memo was issued after a lapse of three months from the date of claim. Even otherwise the claim was within the condonable period. Further the deficiency memo issued was irrelevant to a case under Section 74. In this regard, the Government of India order in revision petition of Xserve India Pvt. Ltd as reported in 2012 (276) ELT 429 (GOI) is a path finder. (The applicant reproduced paras 7 & 8 of the said GOI Order).

4.10 In their case condonation of delay is a *fait accompli* in as much as the drawback claim has been duly sanctioned by the Proper Officer after due process of law. There was also no deficiency in as much as all the documents as mentioned in Rule 5(2) were submitted along with the claim, the fact of which is not in dispute. There is no requirement to furnish TR6 challan. What is required is evidence for payment of duty at the time of importation. This evidence was staring at the face of the authority in the form of SBI stamp on the bill of entry. There was no need to issue deficiency memo. In any case, grant of personal hearing and subsequent sanction of drawback is an acceptance as to the eligibility of claim. In this regard, the judgement of the Bombay High Court as reported in 2013 (298) ELT 221 (Bom) is relied. (The applicant reproduced para No. 11 of the said Judgement).

4.11 The Order-in-original and the impugned order is arbitrary exercise of power. There is no justification to recover the amount of drawback already granted by the Proper Officer after satisfying himself as to the vital requirement viz., identity of goods and payment of duty, the evidence of which was available in the shape of bill of entry bearing SBI stamp for payment of duty and the certificate issued on the shipping bill as to the identity of goods. The so called deficiency memo was also not received. A copy of the deficiency memo said to have been issued is enclosed. It is stereotyped from without indicating the particular deficiency found. The deficiency memo is also irrelevant to a claim under Section 74 of the Act. There is also no mention in the record of personal hearing about the deficiency memo. The drawback was sanctioned after satisfying the identity of the goods, payment of duty and filing of claim within the time limit. The impugned order is an exercise in vain and motivated. The Deputy Commissioner has no authority to sit in judgment order passed sanctioning the drawback.

5. A personal hearing in this case was held on 12.03.2021 through video conferencing which was attended online by Mr. Derrick Sam, Advocate on behalf of the applicant. He submitted that TR-6 Challan is not available. He stated that duty was paid without challan and Bank stamped Bill of Entry. On being asked for copy of Bill of Entry, he stated that same is not available.

6. Subsequent to the personal hearing the applicant filed Additional submissions dated 26.03.2021 contending therein as under:-

In addition to the submissions made in the revision application, they would like to emphasize the fact that there was no separate procedure for payment of duty through a challan at the relevant time. All bills of entry, which were filed manually contained an endorsement by the bank in the column 'Stamp for collection/free number and date'. This indicated the fact of duty payment. Please find enclosed copy of the triplicate copy of the bill of entry No.0768/06 dated 1.12.2006. The State Bank of India, Meenambakkam Airport Branch has affixed a seal dated 4.12.2006 confirming the duty payment by the importer. It is requested that the Hon'ble Principal Commissioner may take judicial notice of the above fact. This fact may also be verified from the relevant Custom House. It is further brought to kind attention that the goods would not be permitted to be cleared unless the Proper officer is satisfied about the factum of duty payment. It is also submitted that an export incentive such as drawback cannot be denied on such procedural grounds. . For the reasons mentioned above and also for the reasons mentioned in the revision application, it is most humbly prayed that the revision application may be allowed and thus render justice.

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

8. Government observes that a Demand Notice No.S2/07/05/05/2891-Dbk-Air dated 18/22.06.2011 was issued to the applicant proposing to recover the erroneously paid drawback amount of Rs.45,15,390/ along with applicable interest as the applicant failed to adhere to the time limit of 30 days in submitting the documents sought as per the deficiency memo dated 26.07.2007 issued to them. The Deputy Commissioner of Customs (Drawback) vide Order in Original No. 663/2013-DBK-AIR dated 05.09.2013 confirmed the demand of erroneously paid drawback amount of Rs.45,15,390/ along with applicable interest under Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 read with Section 75(2) of the Customs Act 1962 with the following observations :-

> *"I observe that the exporters M/s Logistics Plus Pvt. Ltd. have submitted the required documents on 22.11.2007 as called for by the department after expiry of the 30 days time limit from the date of receipt of the deficiency memo dated 26.07.2007. As per Rule 5(4) (a) of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 the exporter should have submitted the documents within 30 days from the date of receipt of deficiency memo to treat it as a claim filed under Sub-rule (1)".*

9. The Commissioner (Appeals) while rejecting the appeal filed by the applicant observed as under:-

9. It is observed that Rule 5 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 has laid down the manner and time of claiming drawback on goods exported other than by post. The Rule 5(2)(b) ibid has required filing of copy of Bill of Entry or any other prescribed document against which goods were cleared on importation. Sub Rule (d) of Rule 5(2) requires Evidence of payment of duty paid at the time of importation of the goods. On a combined reading of both the above Sub Rules, it is observed that apart from the Bill of Entry the claimants have to submit evidence of payment of duty. This makes it explicit that Bill of entry and evidence of payment of duty are two requirements that are separate from each other. Thus Bill of Entry whether or not it has the details of payment of duty, cannot be taken as evidence for payment of duty. There has to be necessarily evidence for payment of duty other than the B/E. The appellant has waxed eloquent to drive home his point that bill of entry in itself was evidence for payment of duty and that a separate evidence is not required. This tantamounts to questioning the sagacity of the Statute. The Respondent can only, enforce the Statute and cannot condone the non fulfilment of the requirement of a statute even if it may outwardly appear redundant.

10. It, therefore, transpires that the Bill of Entry alone is not sufficient evidence of payment of duty. The Appellant has admitted that they have not produced any evidence for payment of duty at the time of sanction of drawback. This brings out that the underlying fact that drawback has been sanctioned even when one of the conditions as laid down under Rule 5(2) (d) of the. Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 was not fulfilled. Therefore, sanction of drawback was vitiated ab-initio.

11. Having said that, Rule 7 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 has called for repayment of erroneously paid drawback and interest thereof. This Rule has not laid down any time limit for issue of demand calling for repayment of erroneously paid drawback.

12. Rule 5(4) (b) is for the manner and time of claiming drawback on goods exported which is binding on the department. It clearly stated. "where exporter complies with requirements specified in deficiency memo within thirty day from the date of receipt deficiency memo, the same will be treated as a claim filed under sub-rule (1)". *In the instant case, the appellant failed to re-submit the claim within thirty days from the date of receipt of the Deficiency Memo to treat it as a claim filed under sub-rule(1). As long as the daim fulfills the conditions laid down under the Rule 5(4)(b) of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995, the department can accord beneficial provision. The Order passed for recovering the erroneously paid drawback has not arisen due to procedural lapses of technical nature. The very basic vital document, i.e. reply to the deficiency memo of the department complete in all aspects was not submitted within the time frame fixed by said Rule 5(4)(b) of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 to treat the claim as having been filed under these rules for sanction or otherwise.*

13. Thus the mention of the "deficiency memo as found in the letter dated 29.09.2009 was issued by the adjudicating authority two year after sanctioning of the claim " is erroneous, as department states that no such communication was sent to them on that date. The Deficiency Memo was issued vide letter dated 26.07.2007 before the claim was erroneously sanctioned and paid. *Had the appellant rectified the deficiency within permissible time limit, the claim would have been considered as a claim filed under the Rules ibid.*

10. Government observes that Rule 5(4)(a) of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 stipulates that any claim which is incomplete in any material particular or is found without the documents specified in sub-rule (2) shall not be accepted for the purpose of Section 75A of the Customs Act,1962 and such claim shall be returned to the claimant with the deficiency memo in the form prescribed by the Commissioner of Customs within fifteen days of submission and shall be deemed not to have been filed. But in the instant case, the applicant's drawback claim filed vide Shipping Bill No. 9002491/07.03.2007 was never returned in accordance with the above stated rule but a deficiency memo was issued on 26.07.2007. Therefore, provisions of Rule 5(4) (a) of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 are inapplicable in this case. However sub Rule (d) of Rule 5(2) of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 requires evidence of payment of duty paid at the time of importation of the goods. Besides the Bill of Entry No.768/01.12.2006, which bears the seal dated 4.12.2006 of the State Bank of India, Meenambakkam Airport Branch the applicant has not produced any other supporting document to confirm the duty payment on imported goods either before lower authorities or even this authority.

11. The applicant in Additional submissions dated 26.03.2021 has contended that there was no separate procedure for payment of duty through a challan at the relevant time and all bills of entry, which were filed manually, contained an endorsement by the bank in the column 'Stamp for collection/free number and date which indicated the fact of duty payment. Government observes that payment of duty through TR-6 Challans even in case of manual filing of Bill of entry was very much in vogue during the relevant time.

12. It is observed from the copy of Bill of Entry No.768/01.12.2006 produced by the applicant that the duty was assessed on 04.12.2006. From the seal of the State Bank of India, Meenambakkam Airport Branch below column **'Stamp for Collection/Free No. & Date'** in the copy of Bill of Entry shows "Clearing ....., thereby indicating that payment of import duty was made through cheque by the applicant on the same day i.e. 04.12.2006. In case of duty deposited with cheque or draft, the receipted challans are issued only on realisation of the amount of cheque or draft. Therefore, Bill of entry which bears seal of the Bank dated 04.12.2006 when the cheque was presented for the payment of import duty cannot be taken as proof of payment of duty unless there is proof of realisation of the cheque from the concerned Bank. For these reasons, proforma issued by the

Superintendent of Customs, Custom House, Chennai (para 4.2 supra) answering question relating to payment of duty by exporter as - "***Yes - Vide SBI dated 4.12.2006***" is also unacceptable. The applicant has also mentioned in Revision Application about letter dated 29.09.2009 issued by the adjudicating authority two years after sanctioning of the claim calling for TR6 challan. The applicant contended that there was no TR6 challan and the payment details were available in the bill of entry itself. Even if it is assumed (but not admitted) that there was no separate procedure for payment of duty through a challan at the relevant time, the applicant in response to letter dated 29.09.2009 could easily have produced any other documentary evidence such as Bank Statement/ Returns to prove the payment of import duty by them. Instead, the applicant only relied on the copy of Bill of Entry No.768/01.12.2006 as a proof of payment which cannot qualify as substantial evidence.

13. Therefore, Government concurs with the findings of the Commissioner (Appeals) at para 10 of the impugned Order that " *The Appellant has admitted that they have not produced any evidence for payment of duty at the time of sanction of drawback. This brings out that the underlying fact that drawback has been sanctioned even when one of the conditions as laid down under Rule 5(2) (d) of the. Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 was not fulfilled. Therefore, sanction of drawback was vitiated ab-initio".*

14. Government also observes that there is no time limit for recovery of erroneous Drawback and Hon'ble Punjab & Haryana High Court Famina Knit Fabs Vs UOI [2020(371) E.L.T. 97 (P&H)] and other judgments referred at para 10 of its judgement has observed that where no limitation period was provided for exercise of any power, period up to 5 years for exercise of such power was reasonable. Government further observes that litigation in the matter of limitation is being further agitated by the Department [by filing Special Leave Petition (Civil) in Hon'ble Supreme Court against the aforesaid Judgements of Hon'ble Punjab and Haryana High Court *viz. 2021 (375) E.L.T. A16 (S.C.), 2020 (371) E.L.T. A240 (S.C.) & 2019 (367) E.L.T. A242 (S.C.)]* on the premise that the period of limitation is such cases could be in excess of 5 years. Applying the ratio of the above cases, Government does not find anything inappropriate in issue of show cause notice for recovery of drawback when the payment of import duty itself has not been substantiated by the applicant with evidence.

15. In view of the above discussion, Government modifies and sets aside the Order in Appeal C.Cus. No. 1869/2014 dt. 14.10.2014 passed by the

Commissioner of Customs (Appeals), Chennai to the extent it upholds the Order in Original No.663/2013-DBK-AIR dated 05.09.2013 confirming the demand of erroneously paid drawback and remands the matter back to the Original authority, with directions to the applicant to submit any available proof of payment of import duty (other than Bill of Entry No.768/01.12.2006) to the original authority who will carry out necessary verification and take appropriate action in the matter.

16. The Revision application is disposed off in the above terms.

Shrawan 28/07/21

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

ORDER No. 175 /2021-CUS(SZ)/ASRA/Mumbai DATED 28.07.2021

To,
M/s. NTL Logistic India P. Ltd.
(previously known as M/s Logistics Plus India Pvt. Ltd.)
No.12/9, Krishnan Koil Street, Seaview Towers, Phase-II,
Chennai- 600 001

Copy to:-

1. Principal Commissioner of Customs (Chennai VII) (Air Cargo Commissionerate), New Custom House, Air Cargo Complex, Meenambakkam, Chennai-600016.

2. Commissioner of Customs (Chennai-IX) Appeals-I (Air) Commissionerate, Custom House, 60, Rajaji Salai, Chennai-600001.

3. Deputy / Assistant Commissioner of Customs (Drawback) (Chennai VII) (Air Cargo Commissionerate), New Custom House, Air Cargo Complex, Meenambakkam, Chennai-600016.

4. Sr. P.S. to AS (RA), Mumbai.

5. Guard file.

6. Spare Copy.