REGISTERED SPEED POST AD

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. 371/53/DBK/2016-RA /1877 Date of Issue: 17.05.2022

ORDER NO. 178/2022-CX(WZ)/ASRA/MUMBAI DATED 12.5.2022 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.

Applicant : M/s Sharda Corporation
Om Shrinivas CHSL,
1st Floor, 101-103,
C. P. Tank Road,
Mumbai 400 004

Respondent : Commissioner of CGST & Central Excise, Palghar

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. SK/227/TH-II/2016 dated 17.05.2016 passed by the Commissioner of Central Excise(Appeals-I), Mumbai.

ORDER

The revision application has been filed by M/s Sharda Corporation, Om Shrinivas CHSL, 1st Floor, 101-103, C. P. Tank Road, Mumbai 400 004(hereinafter referred to as "the applicant") against Order-in-Appeal No. SK/227/TH-II/2016 dated 17.05.2016 passed by the Commissioner of Central Excise(Appeals-I), Mumbai.

2. The applicant is engaged in the manufacture of stainless steel utensils/plastic utensils and export thereof. On 10.11.2008, the applicant had filed an application for fixation of brand rate of drawback for products exported vide Shipping Bill No. 6545120 dated 02.08.2008. This application was rejected as time barred vide letter dated 12.01.2009. Upon filing a request with the Joint Secretary(Drawback Section), the Joint Secretary(Drawback Section), New Delhi condoned the delay in filing application for fixation of brand rate under Rule 17 of the Customs and Central Excise Duty Drawback Rules, 1995 as communicated vide his letter F. No. 609/349/2008-DBK dated 16.12.2010. Thereupon, the Additional Commissioner, Central Excise, Thane-II took up their claim for scrutiny. However, he found that the FOB value of the exported goods in the shipping bill was less than the CIF value of the imported inputs used in the manufacture of exported goods and held that no drawback can be determined in terms of Rule 8(2) of the Drawback Rules. The Additional Commissioner rejected the application for fixation of brand rate of drawback vide his letter F. No. MBI/JCH/CCE/41/Th-II/08 dated 17.02.2012.

3. Aggrieved by the rejection of their application for fixation of brand rate of drawback vide letter F. No. MBI/JCH/CCE/41/Th-II/08 dated 17.02.2012, the applicant filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) followed due procedure and granted personal hearing to the applicant. He found that the claim for brand rate of drawback was not determinable in terms of Rule 8(2) of the Drawback Rules as the FOB value of the exported goods was less than their CIF value. The Commissioner(Appeals) therefore vide his Order-in-Appeal No. SK/227/Th-

II/2016 dated 17.05.2016 upheld the letter dated 17.02.2012 and rejected the appeal filed by the applicant.

4. The applicant has now filed revision application against Order-in-Appeal No. SK/227/Th-II/2016 dated 17.05.2016 on the following grounds :

(i) The Commissioner(Appeals) had failed to appreciate that they had achieved positive value addition. He erred in relying on the FOB value in the shipping bill which was only Rs. 16,88,943/- and ought to have taken into account the BRC which showed that the applicant had in fact realized an amount of Rs. 18,76,156/- towards export of their finished product which was higher than the value of the components imported by the applicant viz. Rs. 17,37,041/-.

(ii) The Commissioner(Appeals) had not taken cognizance of the fact that the exchange rate keeps fluctuating and that the exchange rate fixed in the customs notification does not keep pace with the actual exchange rate which is prevailing. The bank which was not bound by the customs notification had calculated the correct FOB value of the applicants export and accordingly credited the applicants account.

(iii) It was not taken into consideration that even in dollar terms, the export FOB value of US $ 40,260 was higher than the CIF value of US $ 37,400. Moreover, while applying for brand rate of drawback, the applicant had not claimed drawback on the locally procured screws and packing material.

(iv) The appellate authority also failed to note that the imported components had in fact suffered duty of Rs. 5,50,701/- which has never been disputed by the Department.

(v) The Commissioner(Appeals) had erred in holding that the application for brand rate was hit by Rule 8(2) of the Drawback Rules as they had successfully demonstrated that the FOB value of export was always higher than the CIF value of their imports.

(vi) The reliance on Circular No. 14/2003-Cus dated 06.03.2003 was misplaced. The Commissioner(Appeals) ought to have held that only the actual amount of export proceeds realized were relevant and that there was no doubt that the export proceeds were higher than the import cost.

(vii) The appellate authority had erred in relying upon GOI Order in the case of Dulichand Narender Kumar Exports Pvt. Ltd. as that case was distinguishable on facts.

(viii) An error had been committed in holding that there was doubt about the veracity of the transaction. The applicant submitted that every transaction does not result in windfall profit. Since the business of exports is extremely competitive, the margins are very slim and at times losses are also incurred. The objective of the exporter is always to make a profit in the long term by building a healthy relationship with the foreign buyer. It was further averred that if good quality is maintained, the reputation improves and handsome profits can be earned.

(ix) The applicant contended that the Commissioner(Appeals) had erred in rejecting their appeal on suspicion and doubt which was completely unfounded and baseless. It was pointed out that these were not the reasons for rejection of their application in the first place.

5. The applicant was granted personal hearing on 22.10.2021. Shri Anil Balani, Advocate appeared online on behalf of the applicant and reiterated their earlier submissions. He submitted that actual export realization was higher than the value of import. He further stated that the rate of exchange was Rs. 43/- for US $ at the time of import and Rs. 41/- for US $ at the time of export. They requested to allow the drawback as there was no doubt about the export and duty payment.

6.1 The applicant filed written submissions wherein they contended that Rule 8(2) of the Drawback Rules only states that the FOB value of export

should be higher than the CIF value of the import. The FOB value of the export goods was Rs. 18,74,991/- and the CIF value of the imported goods was Rs. 17,37,042/- and this fact had been recorded by the Ld. Commissioner(Appeals) in para 6.3 of the impugned OIA. Therefore, the assumption that the export value was lower than the import value was erroneous. They further submitted that there was a vast difference between the rate of exchange on the date of import and the date of export and the import had taken place on 17.07.2008 and the export took place after 15 days i.e. on 02.08.2008. It was averred that the lower authorities had failed to appreciate that the difference between FOB value of export and the CIF value of import is merely occurring due to the difference in exchange rate as per the Customs notification which does not concern the applicant in the present case. The rate of exchange at the time of import was Rs. 43.20 for the month of July 2008 and the rate of exchange at the time of export was Rs. 41.95 as per Customs notification which itself creates a significant difference of Rs. 1.25 per US $. The difference of Rs. 1.25 directly reduced the profit margin of the applicant by 3% and is a notional reduction which ought not to have been considered by the lower authorities.

6.2 The applicant averred that in the normal course of business, businessmen consider the exchange rate provided by the RBI as well as the Bank Rate and this is the actual value to be considered while calculating positive value addition and hence is an actual positive value addition for the calculation of duty drawback. They further stated that they enjoyed a difference of Rs. 0.03 between the RBI reference rate and the rate of remittance at the time of import and export. Therefore, inspite of the difference of Rs. 1.25 between the two rates as per the Customs notifications, they enjoyed the benefit of Rs. 0.06 thereby reducing the difference created by the exchange rates on the profit margin by 3%. The applicant submitted that the only reason for the Commissioner(Appeals) rejecting their appeal was that the margin of profit was a mere US $ 2860 which caused him to doubt the genuineness of the transaction. They stated that these doubts were unfounded. They contended that it was common

knowledge that international trade was very competitive and that margins were slim, that this was their first attempt and that their profit margin was reasonable. The applicant further stated that unscrupulous parties overvalued exports for inflating the incentives and benefits whereas they were being punished for being transparent and honest.

6.3 The applicant averred that profits would have been higher if taxes were lower. It was pointed out that over Rs. 5.5 lakhs were suffered towards import of duties of Customs. The purpose of applying for brand rate of drawback is to ensure that only goods are exported and taxes suffered in India are not exported. The applicant opined that the lower authorities had completely misunderstood the scheme and spirit of the drawback rules. They also submitted that the Commissioner(Appeals) had wrongly relied upon the decision of the Government in the case of Dulichand Narender Kumar Exports Pvt. Ltd. In the light of these submissions, the applicant prayed that their revision application be allowed.

7. Government has carefully gone through the impugned OIA, the OIO, the revision application filed by the applicant, the written submissions filed by the applicant and their submissions at the time of personal hearing. The issue for decision in the revision application is whether the applicant would be entitled for fixation of brand rate of drawback for goods exported under SB No. 6545120 dated 02.08.2008. The lower authorities have rejected the application for fixation of brand rate of drawback on the ground that FOB value of the exported goods was lesser than the CIF value of the imported materials.

8.1 The applicant has made out several grounds in support of their claim for fixation of brand rate on the exported goods. However, before going into the merits it would be appropriate to examine Rule 8 of the Drawback Rules and the executive instructions issued by the CBEC for fixation of brand rate of drawback which go to the root of the matter. The text of Rule 8 of the Drawback Rules is reproduced hereinafter.

"**8. Cases where no amount or rate of drawback is to be determined.** – (1) No amount or rate of drawback shall be determined in respect of any goods under rule 3, rule 6 or, as the case may be, rule 7, the amount or rate of drawback of which would be less than one per cent of the F.O.B. value thereof, except where the amount of drawback per shipment exceeds five hundred rupees.

Provided that this sub-rule shall not apply in the case of –

(a) drawback on exports made in discharge of export obligation against Advance Licence issued under the Export and Import Policy notified by the Central Government under section 5 of the Foreign Trade (Development and Regulation) Act, 1992(22 of 1992), or

(b) export made by post.

(2) No amount or rate of drawback shall be determined in respect of any goods or class of goods under rule 6 or rule 7, as the case may be, if the export value of each of such goods or class of goods in the bill of export or shipping bill is less than the value of the imported materials used in the manufacture of such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture of such goods or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf."

8.2 The reading of the rule reveals that brand rate of drawback is not to be determined when the export value of the goods is less than the value of imported materials used in the manufacture of such goods. The rule is very clear and unambiguous. Going further, the CBEC has issued specific instructions vide Circular No. 14/2003-Cus dated 06.03.2003 to facilitate the trade. This circular contains a separate para to amplify the requirement of value addition in terms of Rule 8(2) of the Drawback Rules, 1995. The relevant para is reproduced below for the sake of lucidity.

"**(iv) Value Addition :** Fixation of Brand Rate of drawback is, *inter alia*, subject to the satisfaction of Rule 8(2) of the Drawback Rules which stipulates that the f.o.b. value of the export goods should be more than the c.i.f. value of the imported inputs which are declared to have been utilised for manufacture of the export goods. A specimen of the calculation sheet regarding the Value Addition is

attached. In case of the corresponding Brand Rate letters which are issued for a period of time, the minimum f.o.b. value of the export item satisfying the condition may also be specified."

8.3 In such manner Rule 8(2) of the Drawback Rules and the Board Circular dated 06.03.2003 prescribe the FOB value of the exported goods and the CIF value of the imported inputs as parameters to ensure that there is value addition on the imported materials at the time of export. It would also be pertinent to mention here that the Value Addition Working Sheet appended to the Board Circular clearly denotes the FOB value and CIF value with the abbreviation "Rs." to indicate that it is to be calculated in Indian Rupees. To summarize the inference that ensues from the relevant rule and the circular, brand rate of drawback is not to be fixed when the FOB value of the exported goods is lower than the CIF value of the imported materials.

9.1 Government now proceeds to examine the grounds made out by the applicant in their revision application. The attempt on the part of the applicant to supplant the export realization as per the BRC in place of the FOB value of the exported goods is unacceptable. Rule 8(2) of the Drawback Rules read with Circular No. 14/2003-Cus dated 06.03.2003 provides the formula to ascertain value addition to be the FOB value as per shipping bill for exported goods and the CIF value as per the Bill of Entry for the imported materials. The Rule 8(2) of the Drawback Rules and the circular clearly set out the standard to compute value addition. When the FOB value has been prescribed as the norm for export goods, there can be no adjustment or substitution by any other factor. The applicant has made out an elaborate argument about the rate of exchange being the cause for the FOB value of exported goods being lesser than the CIF value of the imported materials. Government is of the considered view that where the statutory provisions of relevant rules and circulars are explicit, there is no scope for interpretation by way of reading or adding words into them. Hence, these submissions cannot be given any credence.

9.2 Insofar as the submissions for accepting the purported FOB value of US $ 40,260 as higher than the CIF value of US $ 37,400 is concerned, Government has already taken note of the very obvious mention of the abbreviation "Rs." in the Value Addition Working Sheet appended to the Circular No. 14/2003-Cus dated 06.03.2003. This abbreviation does not leave any room for doubt about the fact that both FOB value and CIF value must be considered in "Rs." terms for determining the value addition in terms of Rule 8(2) of the Drawback Rules. The lower authorities have accordingly adopted the CIF value and FOB value in rupee terms to decide the admissibility of the application for fixation of brand rate of drawback. In this view, the applicants submission that the higher FOB value in US $ be accepted for fixation of drawback would flout the clear instructions of the Board in the matter and hence cannot be accepted. The applicant has also made out a submission that the imported components had suffered duty of Rs. 5,50,701/-. As such, there is no denial about the fact that the imported materials have been subjected to the levy of customs duty as they should be. The fact that the imported materials suffered customs duty did not by itself entitle the applicant to the benefit of fixation of brand rate of drawback. The question upon which the fixation of brand rate of drawback hinged was whether there was value addition on the imported materials used in the exported goods and that being answered in the negative, their application for fixation of brand rate had been rejected.

9.3 The applicants contention that the Commissioner(Appeals) has rejected their application for fixation of brand rate of drawback on grounds of suspicion and doubt is not correct. The impugned order is based on cogent and reasoned findings. The Commissioner(Appeals) has also very appositely relied upon the ratio of the decision of the Government in the case of Dulichand Narender Kumar Exports Pvt. Ltd. In that case, the Government has gone through the Drawback Rules as well as the Circular No. 14/2003-Cus dated 06.03.2003 to arrive at the final conclusion that brand rate of drawback cannot be fixed in a case which shows negative value addition.

10 In the light of the observations recorded hereinbefore, the Order-in-Appeal No. SK/227/TH-II/2016 dated 17.05.2016 passed by the Commissioner of Central Excise(Appeals-I), Mumbai is upheld. The revision application filed by the applicant is rejected as being devoid of merits.

Shrawan 12/05/22

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

ORDER No. 478/2022-CX(WZ) /ASRA/Mumbai DATED 12.5.2022

To,
M/s Sharda Corporation
Om Shrinivas CHSL,
1st Floor, 101-103,
C. P. Tank Road,
Mumbai 400 004

Copy to:

1) The Commissioner of CGST & Central Excise, Palghar
2) The Commissioner of Central Excise(Appeals-III), Mumbai
3) Sr. P.S. to AS (RA), Mumbai
4) Guard file