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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. 380/17/DBK/15-RA/4526 Date of Issue: 25/08/2021

ORDER NO. 185 /2021 -CUS (SZ) /ASRA/MUMBAI DATED 17-8-2021 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 Applications filed under Section 129DD of the Customs Act, 1962 against Order in Appeal No. C.Cus II No.310/2014 dated 24.12.2014 passed by the Commissioner of Customs(Appeals-II), Chennai.
Applicant	:	Commissioner of Customs (Exports),Chennai-IV, Chennai.
Respondent	:	M/s MGM Diamond Beach Resort Pvt. Ltd., Centre No.1, 9th Street, Dr. Radhakrishnan Salai, Mylapore, Chennai- 600 004.

ORDER

This Revision Application has been filed by the Commissioner of Customs (Exports), Chennai-IV Commissionerate (hereinafter referred to as "the applicant" or "the Department") against Order in Appeal No. No. C.Cus II No.310/2014 dated 24.12.2014 passed by the Commissioner of Customs (Appeals-II), Chennai.

2. The brief facts of the case are that M/s MGM Diamond Beach Resorts P. Limited, Chennai (respondent) had imported used "Big Top Circus Tent Equipment Seating Artist Pops (Theatrical Equipment) (Travelling Circus)" vide Bills of Entries No.3951979 dated 30.11.2013 and 4016296 dated 07.12.2013 and paid an amount of Rs.26,84,940/- as duty and cleared the goods for home consumption on 20.12.2013. Subsequently, the exporter had filed the Shipping Bill No.130352 dated 07.03.2014 for re-export of the imported goods and claimed Rs.26,31,241/- as drawback (98% of the duty paid) under the proviso to the Re-export of Imported Goods (Drawback of Customs Duties) Rules 1995 read with Section 74 of the Customs Act 1962.

3. The Assistant Commissioner of Customs (DBK), Custom House, Chennai, after processing the drawback claim of the exporter sanctioned an amount of Rs.22,82,199/- vide Order in Original No. 29614/2014 dated 19.09.2014 as drawback. The Lower Authority had calculated the period of usage from 20.12.2013 (date of clearance of the goods for home consumption) to 23.03.2014 which worked out to 93 days and accordingly sanctioned 85% of the duty paid in terms of Notification No.23/2008-Cus dated 01.03.2008 issued under Section 74 of Customs Act 1962.

4. Being aggrieved by the aforesaid Order in Original the respondent filed an appeal with the Commissioner (Appeals) on the grounds that he has re-exported the goods within 90 days of import and that he is eligible for 98% of the duty paid as drawback and requested the Commissioner (Appeals) to direct the LAA for sanctioning the shortfall of 13% of the duty drawback i.e.Rs.3,49,042/-. Commissioner (Appeals) vide Order in Appeal No. C.Cus II No.310/2014 dated 24.12.2014 (impugned Order) held that as per Notification No.23/2008 dated 01.03.2008 issued under Sec.74 of the Customs Act 1962, the appellants are eligible for 95% of the import duty paid as drawback amount. He accordingly set aside the Order-in-Original No.29614/2014 dated 19.09.2014 and allowed the appeal with a direction to the lower authority to sanction the differential drawback of Rs.3,49,042/-.

5. The Commissioner of Customs (Exports), Chennai-IV Commissionerate (the applicant) found that the order passed by the Commissioner(Appeals) was not legal and proper and filed Revision Application mainly on the following grounds:-

5.1 The Commissioner (Appeals) has held that the number of days between the date of clearance of goods on importation and the date of shipping bill for re-export is 87 days which is less than 90 days. The Commissioner (Appeals) while calculating the period of usage has taken the date of filing of the Shipping Bill which is not correct.

5.2 As per Notification No.23/2008-Cus dated 01-03-2008, the period of usage is prescribed as **"the length of period between the date on which the goods are cleared for home consumption and the date when the goods are placed under customs control for export".** From the above it is very clear that for the purpose of calculating the number of days of usage from the date of clearance of goods for home consumption, **the main criteria** is the date on which the goods were placed in the customs control for the purposes of examination and issuance of export order but **NOT** the date on which the shipping bill was filed as held by the Appellate Authority. Therefore the said stand has no statutory backup.

5.3 The Commissioner (Appeals) has held that in principle the appellants are eligible for 95% of the import duty paid as drawback and accordingly it was ordered that they are eligible for the amount claimed i.e., Rs.26,31,241/- . However, it is seen that the party had paid an amount of Rs. 26, 84,940/- as import duty at the time of clearance of the goods. Thus, it is seen that the Appellate Authority had clearly erred in arriving at the amount of drawback on 95% of the import duty paid, as the Appellate Authority relied on the appellant's version of the drawback amount claimed (i.e., Rs. 26,31,241/-) which is 98% and not 95%. Hence, the amount as held eligible by the Appellate Authority i.e., Rs. 26,31,241/- has been arrived on a wrong premise and as such the same is incorrect and not acceptable.

5.4 The Commissioner (Appeals) has further held in the impugned order that the Lower Authority has not given any reasons for restricting the drawback claim to 85% of the claimed amount. In this regard, it is to submit that the same is incorrect. The lower authority has discussed in Para '5' and '6' of the Order-in-Original while arriving at the number of days of usage as 93 days. The LAA had calculated the number of days of usage taking into consideration the date of out of charge (i.e. 20.12.2013) and the date when the goods were entered for Re-export/ examination (i.e. 23.03.2014). Reply was furnished to the cross objections stating that the period of usage (93 days) was arrived at by calculating the no. of days between the date on which the goods were cleared for home consumption (20.12.2013). It was also informed that as the period of usage was more than 90 days, the amount was restricted to 85%.

5.5 Further, the Appellate Authority's interpretation of the provisions of Notification No. 23/2008-Cus dated 01.03.2008 in arriving at the period of usage is on wrong footing and secondly, the Appellate Authority had equally

erred in arriving at the differential drawback amount to be paid, based on the wrong premise of 98% of the import duty paid, as claimed by the appellant. Therefore, the impugned Order-in-Appeal is factually incorrect, and also legally not tenable.

6. The respondent while replying to show cause Notice dated 07.10.2015 issued under Section 129DD of the Customs Act, 1962 filed cross objections vide reply dated 07.10.2015 contending therein as under :-

6.1 The goods for re-export were presented to the Customs Authority in their authorized premises vide Shipping Bill dated 21.02.2014 and after much follow up, the Drawback application was put up on 07.03.2014. The very fact that the seal affixed by the Customs authority on the shipping bill on 07.03.2014 and further directions given by the Assessment Officer to open and verify the goods were recorded on the same Shipping Bill on 07.03.2014, proves the point that the goods were placed under Customs Control for export within 90 days of import.

6.2 Going by the logic of calculating "the length of period between the date on which the goods are cleared for home consumption and the date when the goods are placed under customs control for export", it is proved here that the goods were imported on 20.12.2013 and placed at Customs for inspection on 21.02.2014 and admitted by them as per official records on 07.03.2014, the duration of which was only 78 days. It is proved beyond doubt that the goods were kept for customs inspection and admitted by them for inspection and thereafter re-export formalities were completed within the time span of 90 days.

6.3 The Commissioner (Appeals) has held in principle that they were eligible for 95% of the Import duty paid as drawback and accordingly payment of differential amount was ordered by him. The actual amount of 10% of duty works out to Rs.2,68,494. There is a clerical error due to which the amount is erroneously shown as Rs.3,49,042/- by the Commissioner(Appeals) in the impugned Order dated 24.12.2014.

6.4 In para (iv) the Commissioner of Customs and Exports has mentioned that the calculation of number of days of usage was done taking into consideration the date of out of charge i.e. 20.12.2013 and the date when the goods were entered for Re-export/inspection i.e. 23.03.2014 which works out to 93 days. The respondent exporter sought to highlight that this calculation was not correct and the actual date of the goods kept for inspection at the disposal of the Customs Authority was 07.03.2014 for which substantial evidences were submitted earlier and also now. The Appellate Authority has clearly indicated that they were eligible for a total amount of 95% of the import duty paid. As such they are entitled to the additional 10% refund which is Rs.2,68,494.

7. Personal hearing in this case was held through video conferencing on 26.03.2021 which was attended online by Shri V. Mohan, President, HR & IR on behalf of the respondent. No one appeared on behalf of the applicant department. He submitted that goods were produced before customs for re-

export well within 90 days, any delay thereafter cannot be blamed on them. He therefore, requested for upholding Commissioner (Appeals) Order in the matter.

8. Government has carefully gone through the relevant case records and perused the order-in-original, order-in-appeal and cross objections filed by the respondent.

9. The issue for decision in the case is determination of the exact point of cessation of period for counting the number of days of usage of the imported goods from the date of their clearance for home consumption. The count of these days is required to be arrived at to determine the exact percentage of import duty to be paid as drawback to the respondent in terms of Notification No. 23/2008-Cus dated 01.03.2008.

10.1 Government observes that the statutory provisions which allow grant of drawback in such situations would be germane to the facts of the case. The power to grant drawback on re-export of duty paid goods emanates from Section 74 of the Customs Act, 1962. Sub-section (2) of Section 74 of the Customs Act, 1962 reads as follows :

> *"(2) Notwithstanding anything contained in sub-section (1), the rate of drawback in the case of goods which have been used after the importation thereof shall be such as the Central Government, having regard to the duration of use, depreciation in value and other relevant circumstances, may, by notification in the Official Gazette, fix."*

10.2 Notification No. 23/2008-Cus dated 01.03.2008 has been issued under sub-section (2) of Section 74 of the Customs Act, 1962 to allow drawback on re-export of imported goods. The notification has been validly issued and there is no dispute about the admissibility of drawback in the case. The dispute here is restricted to the computation of the length of time for which the goods were available for use in the hands of the exporter; viz. the correct interpretation of the phrase *"Length of period between the date of clearance for home consumption and the date when the goods are placed under Customs control for export"* in the Table appended to the Notification No. 23/2008-Cus dated 01.03.2008 which is reproduced hereinafter.

TABLE

S. No.	***Length of period between the date of clearance for home consumption and the date when the goods are placed under Customs control for export***	***Percentage of import duty to be paid as Drawback***
(1)	*(2)*	*(3)*
	Not more than three months	*95%*
	More than three months but not more than six months	*85%*

	More than six months but not more than nine months	*75%*
	More than nine months but not more than twelve months	*70%*
	More than twelve months but not more than fifteen months	*65%*
	More than fifteen months but not more than eighteen months	*60%*
	More than eighteen months	*Nil*

It can be seen from the Table that in keeping with the objective of sub-section (2) of Section 74 of the Customs Act, 1962, the scheme of the notification is such that it factors in the duration of use by conversely reducing the benefit of drawback available to the exporter. There is consensus in the views of the Department and the exporter that *"the date of clearance for home consumption"* would be the date when the imported goods are given out of charge by Customs.

11. Government now proceeds to examine the rival contentions of the Department and the exporter with regard to "the date when the goods are placed under Customs control for export". The Department has contended in the revision application that the date when the goods are entered for re-export/examination i.e. 23.03.2014 was more than 90 days after the date when the imported goods were given out of charge(20.12.2013) and therefore the exporter was eligible only for 85% of import duty paid as drawback. The Department has also pointed out that the Commissioner (Appeals) has erred even in terms of his calculation of the number of days being less than 90 days by allowing drawback @ 98% of import duty paid whereas the notification allows 95% of import duty paid as drawback for a period upto 90 days. On the other hand, the exporter has contended in the cross objections dated 07.10.2015 filed by them that the date when the goods had been placed under Customs control for export would be the date when the goods were approved for inspection by the Customs authorities; viz. 07.03.2014. The exporter has contended that this date was only 78 days from the date of clearance for home consumption and therefore they were eligible for drawback of 95% of import duty paid on the goods. The exporter has conceded in the cross objections filed by them that they were eligible for 95% of import duty paid and not 98% of import duty paid as allowed by the Commissioner (Appeals) in the impugned OIA.

12.1 Since the aspect that goes to the root of the matter is the interpretation of the phrase *"Length of period between the date of clearance for home consumption and the date when the goods are placed under Customs control for export"*, it would follow that the place where customs first gains control over the export

goods must be identified. It would be relevant to note that the length of period has been stipulated to end "when the goods are placed under Customs control for export". In other words this endpoint for computation of length of period for exported goods is distinctly the beginning of the time period when the goods are placed under Customs control for export and not the point in time when the goods are cleared for export by issue of Let Export Order. In this regard, attention is drawn to sub-rule (1) of Rule 13 of the Customs and Central Excise Drawback Rules, 1995 specifying the manner and time for claiming drawback. This sub-rule sets out that the triplicate copy of the shipping bill for export under claim of drawback is deemed to be a claim for drawback filed on the date when the proper of customs makes an order permitting clearance and loading of goods for exportation under Section 51. On the other hand, in Board Circular No. 13/2010-Cus dated 24.06.2010 which sets out the revised time limits for filing brand rate claim, it has been specified that the claim is to be filed within 3 months from the date of Let Export Order. It is therefore clear that where the Legislature intended to set the bar for time limit as Let Export Order, it has been specified as the date of order permitting export under Section 51 or by specifically mentioning it as the date of Let Export Order. Government is of the considered view that intention of the legislature was that the stipulation of "date when the goods are placed under Customs control" in the Notification No. 23/2008-Cus dated 01.03.2008 has been made to limit the length of period to the exact point in time that the exporter ceases to have control over the goods and the goods come under the control of customs authorities. Therefore, the endpoint for computation of length of period for exported goods in respect of which drawback has been claimed would be the point in time when the goods come under Customs control.

12.2 It would stand to reason that the point where "goods are placed under Customs control" must derive from the definition of "customs area" in the Customs Act, 1962. The definition of "customs area" in clause (11) of Section 2 of the Customs Act, 1962 is reproduced hereinafter.

> *"(11) "customs area" means the area of a customs station or a warehouse and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities;"*

It can be seen from the definition of "customs area" that it is an area of a customs station or a warehouse and includes areas where export goods are ordinarily kept before clearance by Customs. The definition broadens the scope of a customs area by including within it any area in which imported goods or export goods are ordinarily kept and can be a place other than a customs station

(customs port, customs airport, international courier terminal, FPO, land customs station) or a warehouse (public warehouse under section 57, private warehouse under section 58, special warehouse under section 58A). The question that emerges on going through this definition is which are the places other than customs station or warehouse which qualify as "customs area".

13. On delving further, Government finds that Section 8 of the Customs Act, 1962 empowers the Principal Commissioner of Customs or the Commissioner of Customs to approve proper places for the unloading and loading of goods and to specify the limits of any customs area.

> *"**SECTION 8. Power to approve landing places and specify limits of customs area.** – The Principal Commisstoner of Customs or Commisstoner of Customs may, -*
>
> *(a) approve proper places in any customs port or customs airport or coastal port for the unloading and loading of goods or for any class of goods;*
> (b) *specify the limits of any customs area."*

Every CFS is approved under the provisions of this section by the jurisdictional Commissioner. In the present case, the goods have been exported by the respondent exporter from the CFS of M/s Allcargo Logistics Ltd. M/s Allcargo Logistics Ltd. has duly been approved as a CFS by the jurisdictional Commissioner of Customs. The approval for CFS includes the specifying of the premises of the concerned CFS as a customs area under Section 8 of the Customs Act, 1962. Therefore, it is clear beyond doubt that a CFS approved by the jurisdictional Commissioner of Customs is "customs area".

14.1 Government observes that in this case there are distinct milestones in the process for export of goods. The process begins with the filing of shipping bill. It must be borne in mind that the export goods are not required to be produced physically at the time of filing shipping bill. The goods arrive thereafter at the docks and are examined by the port authorities who duly check the quantity of the goods with the shipping bill filed by the exporter. The shipping bill has been entered into the system on 07.03.2014. At this point, the concerned officer has assigned the consignment to a Customs Officer for examination. Thereafter, when the goods were received in the CFS on 19.03.2014, the Customs Officer has examined the consignment and then entered the examination report in the system on 23.03.2014. The Let Export Order was given on 22.04.2014.

14.2 It is in the background of these activities carried out by the respondent exporter and the customs authorities that the relevant "date when the goods are placed under Customs control for export" is to be determined. The term "Customs control" in Notification No. 23/2008-Cus dated 01.03.2008 has not

been defined in the Act or the notification. However, it is clear that the CFS is a customs area. Therefore, it can safely be inferred that the CFS being a customs area where Customs Officers are stationed would be the place where the goods are placed under Customs control for export. Government finds that the contents of para 2.2.1 of CBEC Circular No. 50/2020-Cus dated 05.11.2020 fortify this view.

> *"**2.2 Container Freight Station***
>
> *2.2.1 An off seaport (or port) facility having such fixed installations or otherwise, equipment, machinery etc., providing services for handling/clearance of laden import, export containers for home use, warehousing, temporary admissions, re-export, etc. under customs control and with storage facility for customs bonded or non-bonded cargo."*

It would be apparent from the reading of the definition of CFS that it is a facility providing services for handling/clearance of export containers for re-export under customs control. Similarly, the Hon'ble High Court of Madras has in its judgment dated 06.08.2019 in the case of P. Perichi Gounder Memorial vs. Commissioner of Customs (Appeals-II), Chennai [2019 (368) ELT 495 (Mad)] recorded its observation in the following words.

> *"19. A perusal of Section 2(b), read in conjunction with Sections 45 and 141(2) of said Act leaves no doubt in the mind of this Court that both CFS and the Steamer Agent would qualify as Customs Cargo Services Provider. There is also no disputation that they function under the control of the Customs Department."*

The Hon'ble High Court has found that both the CFS and the steamer agent function under the control of the Customs Department. Incidentally, the name of the CFS in the proceedings before the Hon'ble Court is "All Cargo Global Logistics Ltd.". It is therefore substantiated by the judgment cited and the contents of the Board Circular that the CFS' premises are under the control of the Customs Department and therefore the date when the goods enter the CFS would be the date when the goods are placed under Customs control for export.

15.1 The respondent exporter has contended that the date when the goods are approved for inspection by Customs authorities on 07.03.2014 should be the date when the goods are placed under Customs control for export. On perusal of the shipping bill, Government finds that 07.03.2014 is the date when the shipping bill has been entered in the system and received by the Customs. It is the date when the consignment was marked for inspection by Customs Officer in CFS. However, the factual position is that the goods have been received in the CFS only on 19.03.2014. The ***"Admitted"*** stamp affixed by the custodian of the CFS on the shipping bill indicates that the goods have been received in the CFS

of Allcargo Logistics Ltd. on 19.03.2014. 19.03.2014 is therefore the date when the goods have entered the customs area and are under Customs control for export. Needless to say, the date when the goods are actually examined by the Customs; i.e. 23.03.2014 cannot be the date when they came under Customs control as the goods were already in the Customs area in the CFS and were under Customs control from 19.03.2014 onwards.

15.2 Taking into consideration the date when the imported goods had been given out of charge by Customs as 20.12.2013 and the date when the goods have been placed under Customs control for export being 19.03.2014, the length of period calculated in terms of Notification No. 23/2008-Cus is within three months. The respondent exporter is therefore eligible for 95% of import duty to be paid as drawback. However, the Commissioner (Appeals) has allowed 98% of import duty to be paid as drawback in the impugned OIA. While responding to the revision application filed by the Department, the respondent exporter has conceded that they are eligible to drawback of 95% of import duty and not the excess amount claimed. As such, the maximum percentage of import duty payable as drawback under Notification No. 23/2008-Cus dated 01.03.2008 is 95% and therefore the sanction of amount in excess of 95% import duty as drawback is beyond the scope of the notification, hence untenable. Since the respondent exporter has already conceded that they are eligible only for 95% of import duty as drawback, Government does not find it necessary to discuss the inadmissibility of this excess import duty allowed to them by the lower appellate authority.

16. Government therefore modifies the impugned OIA No.C. Cus II No.310/ 2014 dated 24.12.2014 passed by the Commissioner of Customs (Appeals-II), Chennai by holding that 95% of import duty would be payable as drawback. The original authority is directed to sanction the remaining 10% of import duty as drawback to the respondent exporter within four weeks of receipt of this order.

17. The revision application filed by the Department is disposed off in the above terms.

17/08/21

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

ORDER No.185/2021-CUS (SZ) /ASRA/Mumbai DATED 17.08.2021

To,

Commissioner of Customs (Chennai-IV)
(Export Commissionerate)
Custom House, 60, Rajaji Salai, Chennai-600001.

Copy to:

1. M/s MGM Diamond Beach Resort Pvt. Ltd., Centre No.1,
   9th Street, Dr. Radhakrishnan Salai, Mylapore, Chennai- 600 004.

2. Commissioner Of Customs Chennai-X, Appeals-II (Sea)
   Commissionerate, Custom House, 60, Rajaji Salai, Chennai-600001.

3. Deputy Commissioner of Customs (Drawback) , Chennai IV
   Commissionerate, Custom House, 60, Rajaji Salai, Chennai-600001.

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

5. Guard file.

6. Spare Copy.