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SPEED POST



371/78/DBK/2013-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHICAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue...01/5/15

ORDER NO. **02/2015-Cus** DATED **29. 04. 2015** OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF INDIA UNDER SECTION 129DD OF CUSTOMS ACT 1962.

Subject : Revision applications filed under Section 129DD of Customs Act 1962 against the Order-in-Appeal MUM-CUSTOM-AXP-APP-89 & 90-13-14 dated 18.6.2013 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III

Applicant : M/s Cotton Clothing Corporation of India, New Delhi

Respondent : Commissioner of Customs (Export), Mumbai Zone-III

ORDER

This revision application is filed by M/s Cotton Clothing Corporation of India, A-116, New Friends Colony, New Delhi-110066 (hereinafter referred to as the applicant) against the Order-in-Appeal No.MUM-CUSTOM-AXP-APP-89 & 90-13-14 dated 18.6.2013 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III with respect to Order-in-Original No.AC/SY/3377/2012/ADJ/ACC dated 16.12.2012 passed by the Asstt. Commissioner of Customs, DBK(XOS), ACC, Sahar.

2. Brief facts of the case are that the applicants were initially granted drawback for exports made by them. Subsequently, show cause notice was issued to the applicant for recovery of already sanctioned drawback on the ground that applicant failed to produce the evidence for realization of export proceeds in respect of impugned exported goods for which they were allowed drawback within the period allowed under Foreign Exchange Management Act, 1999 including any extensions of such period granted by the Reserve Bank of India and as per Rule 16(A) Sub-Rule (1) and (2) of Customs, Central Excise Duties & Service Tax Drawback Rules 1995 read with Section 75 A(2) of Customs Act 1962. Subsequently, the original authority vide impugned Order-in-Original confirmed the demand to the tune of Rs.7,13,398/- of already sanctioned drawback to be recovered from the exporter along with interest.
3. Being aggrieved by the said Order-in-Original, the applicant filed appeal before Commissioner (Appeals), who rejected the same and ordered that the stay application and appeal is hit by limitation clause and is rejected on merit.
4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision application under Section 129 DD of Customs Act, 1962 before Central Government on the following grounds:

4.1 The applicant on the issue of limitation stated that they had neither received the show cause notice nor the notice for personal hearing. The findings of Commissioner (Appeal) in this respect are erroneous as the department has completely failed to furnish the proof of sending of SCN and PH notice. As the applicant's office is in Delhi the next PH notice was received late. It is to be appreciated that it is a matter of fact that they have received all the bank realization certificates within the stipulated time and were in possession of the applicant all the time. They had nothing to gain in hiding/keeping the same with them. Had they received any communication, they would have furnished the same immediately to the department. It is not the case that they have received the BRCs late. Thus revenue were in haste in confirming the demand without making any serious efforts in, providing the basic opportunity to the applicant which is an apparent denial of natural justice. Thus on this ground alone, the order for recovery of drawback is likely to be set aside or otherwise the applicant may be granted the well deserving opportunity for submitting all the documents before the appropriate authority.

4.2 In terms of Section 128A of the Customs Act 1962, the Commissioner appeal has been divested with the power of remand and accordingly is an authority that was duty bound to find the factual position by giving the suitable opportunity to the applicants. It is completely and blatant denial of justice and the proceedings could have been terminated at the maximum Commissioner (Appeal) stage if she would have perused all the documents. The Commissioner (Appeal) held that the sub rule (1) of rule 5 of Customs (Appeals) Rules, 1982 states that the applicant shall not be entitled to produce before the Commissioner (Appeals) any additional evidence, whether oral or documentary, other than evidence produced by him during the course of proceedings before the adjudicating authority with certain exceptions and the applicant was not faced with any such exceptional circumstances. The Commissioner (Appeal) held



that she cannot appreciate the documents at this stage. The aforesaid rule clearly says "other than evidence produced by him during the course of proceedings before the adjudicating authority". The Commissioner should have appreciated the fact that it is not the case where some documents were presented earlier and in addition the applicant wanted to submit additional documents before her. She on one hand held that neither any reply to SCN was submitted nor personal hearing was attended by the applicant, then the question of submission of any document does not arise. In the instant case, the applicant was not at all given any valid opportunity to present their case. Thus these are obviously exceptional circumstances and in the interest of justice, the Commissioner (Appeal) should have at least given an opportunity to the applicant.

4.3 On merits of the case the, applicant has drawn attention to relevant provisions of law. Rule 16 of Drawback Rules, 1995 mentions about recovery of drawback in case the sale proceeds in respect of such export goods have not been realized by or on behalf of the exporter in India within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), i.e. six months including any extension of such period. However this is not the case here. The sale proceeds in all the cases have been received well in the stipulated time as evident from the table in the appeal papers and the copy of BRCs annexed with the appeal. In such situation there are no provisions for the recovery.

4.4 The Government intentions have always been to boost the export and for implementing same the export incentive schemes are declared time and again. The liberal policy and intentions of the Govt. become mare clear when one go through the provisions of sub rule 4 of rule 16A which states as under:

4) Where the sale proceeds are realized by the exporter after the amount of drawback has been recovered from him under sub-rule (2) or

sub-rule (3) and the exporter produces evidence about such realization within one year from the date of such recovery of the amount of drawback, the amount of drawback so recovered shall be repaid by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to the claimant.

The above rule clearly show that even after recovery the exporter produces the BRCs the Drawback shall be disbursed. However in the instant case the applicant is repeatedly informing about realization of export proceeds well in time even then the authorities have confirmed the order for recovery of drawback which is against the policy as well intentions of the Government.

4.5 The denial of drawback is wrong and without any basis. This is not a case where the export has not taken place. This is not a case where the foreign exchange has not been realized. This also not a case where the foreign exchange has been realized beyond the stipulated time. It is a case where the documents do existed at all the time but only owing to the communication gap the same could not be submitted. In view of above, the impugned order is not based on facts without any tangible evidence and is bad in law and hence the impugned order deserves to be set aside.

5. Personal hearing scheduled in this case on 27.3.2015 was attended by Ms Priyanka Goel, Advocate, on behalf of the applicant. She stated that their appeal has been rejected on the ground that the evidence submitted regarding export remittances before Commissioner (Appeals) is fresh evidence and cannot be considered. Whereas these are not fresh evidences but the very basis for the case to allow them the benefit and should be considered. Nobody attended hearing on behalf of department. However, the following submission was made by the Respondent vide their letter F.No.S/3-Misc-DBK(XOS)-887/2010-11/ACC dated 26.03.2015 :

- (1) The exporter was issued a Show Cause Notice dated 15.05.2010 with a Personal Hearings on any working day between 15.09.2010 to 16.09.2010 to Exporter's address as declared in the Shipping Bill but exporter had failed to reply the same. Further, before adjudicating the case, Personal Hearing intimation Memo dated 01.10.2012 and 31.10.2012 were sent to attend the Personal Hearing on 19.10.2012 and 07.11.2012 respectively. The Show Cause Notice dated 15.05.2010 as well as Personal Hearing intimation Memo dated 01.10.2012 and 31.10.2012 did not returned back by the postal authority. However, the exporter had neither attended the personal hearing nor submitted any written submission. Moreover, in Revision Application, the Appellant himself admitted that as the appellant office is in Delhi, the PH notice was received late. Therefore, the contention of the exporter that the appellant had neither received the show cause notice nor the notice for PH is wrong and baseless.
- (2) The exporter did not come up with the evidence for realization of export proceeds at any time before, during or after the issuance of Show Cause Notice, Personal Hearing, before the adjudicating authority. Therefore, a Demand of Drawback amount of Rs.7,13,398/- was confirmed vide Order-in-Original No.AC/SY/3377/2012/ADJ/ACC dated 16.11.2012.
- (3) Against the Order-in-Original No.AC/SY/3377/2012/ADJ/ACC dated 16.11.2012 AC/SY/3377/2012/ADJ/ACC dated 16.11.2012, the Appeal was filed by the exporter before the Commissioner(Appeal), Mumbai-III on 10.01.2013
- (4) The appeal was rejected vide Order-in-Appeal No. Mum-Custom-AXP-APP-89 & 90-13-14 dated 18.06.2013 passed by Commissioner Customs (Appeal), Mumbai-III. In the said order, at para 3, it is mentioned that during the personal hearing which was fixed on 12.03.2013, the authorized representative for the appellant stated that all BRCs received but not submitted as they did not know of the procedure; that CA certificate was submitted but was not able to show date of submission. Further, as per para 4 of the said Order-in-Appeal, the appellant stated that the Personal hearing memo was received late hence they could not attend hearing as their office is situated in New Delhi. Submission of CA

certificate to lower authority is not established. At para 5 of the said O-i-A, it is mentioned that before adjudicate the case, ample opportunities of personal hearing was given, no proof of realization of exports proceeds were made available to the Department. Appellant has not submitted proof of submission of documents to the lower authority. Therefore, the question of natural justice does not arise.

(5) In view of the above, the Order-in-Appeal Mum-Customs-AXP-APP-89 & 90-13-14 dated 18.06.2013 passed by Commissioner Customs (Appeal), Mumbai-III is proper and legal.

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. Government observes that the applicant was initially granted drawback for exports made by them. Subsequently, show cause notice was issued to the applicant for recovery of drawback already sanctioned on the ground that applicant failed to produce the evidence for realization of export proceeds in respect of impugned exported goods for which they were allowed drawback within the period allowed under Foreign Exchange Management Act, 1999 including any extension of such period granted by the Reserve Bank of India. Later on, the original authority vide impugned Order-in-Original confirmed the demand of already sanctioned drawback. Commissioner (Appeals) upheld the impugned Order-in-Original. Now, the applicant has filed this Revision Application on the ground mentioned in para (4) above.

8. Government observes that the provisions for recovery of drawback already sanctioned have been prescribed under Section 75 of the Customs Act, 1962 and Rule 16A of the Customs, Central Excise and Service Tax Duty Drawback Rules, 1995. The relevant provisions are reproduced as under:

"SECTION 75. Drawback on imported materials used in the manufacture of goods which are exported. - (1) Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer, or being goods entered for export by post under section 82 and in respect of which an order permitting clearance for exportation has been made by the proper officer, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to, the rules made under sub-section (2).

Provided that no drawback shall be allowed under this sub-section in respect of any of the aforesaid goods which the Central Government may, by rules made under sub-section (2), specify, if the export value of such goods or class of goods is less than the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf :

Provided further that where any drawback has been allowed on any goods under this sub-section and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), such drawback shall except under such circumstances or such conditions as the Central Government may, by rule, specify be deemed never to have been allowed and the Central Government may, by rules made under sub-section (2), specify the procedure for the recovery or adjustment of the amount of such drawback.

Rule 16A. Recovery of amount of Drawback where export proceeds not realized—

(1) Where an amount of drawback has been paid to an exporter or a person authorised by him (hereinafter referred to as the claimant) but the sale proceeds in respect of such export goods have not been realised by or on behalf of the exporter in India within the period allowed under **the Foreign Exchange Management Act, 1999 (42 of 1999)**, including any extension of such period, such drawback shall be recovered in the manner specified below.

Provided that the time-limit referred to in this sub-rule shall not be applicable to the goods exported from the Domestic Tariff Area to a special economic zone.

(2) If the exporter fails to produce evidence in respect of realisation of export proceeds within the period allowed under the Foreign Exchange Management Act, 1999, or any extension of the said period by the Reserve Bank of India, the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, as the case may be or Deputy Commissioner of Customs shall cause notice to be issued to the exporter for production of evidence of realisation of export proceeds within a period of thirty days from the date of receipt of such notice and where the exporter does not produce such evidence within the said period of thirty days, the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be or Deputy Commissioner of Customs shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within) thirty days of the receipt of the said order:

Provided that where a part of the sale proceeds has been realised, the amount of drawback to be recovered shall be the amount equal to that portion of the amount of drawback paid which bears the same proportion as the portion of the sale proceeds not realised bears to the total amount of sale proceeds.

(3) Where the exporter fails to repay the amount under sub-rule (2) within said period of)thirty days referred to in sub-rule (2), it shall be recovered in the manner laid down in rule 16.

(4) Where the sale proceeds are realised by the exporter after the amount of drawback has been recovered from him under sub-rule (2) or sub-rule (3) and the exporter produces evidence about such realisation within one year from the date of such recovery of the amount of drawback, the amount of drawback so recovered shall be repaid by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to the claimant.


8.1 The above provisions provide for recovery of drawback where the export proceeds are not realized within the period allowed under Foreign Exchange Management Act, 1999 including any extension of such period granted by the

Reserve Bank of India. However in the impugned case, the applicant has claimed that sale proceeds were received by them within the stipulated period and that the Commissioner (Appeals) has held that she cannot appreciate the documents at this stage. Under such circumstances, Government finds that the Bank Remittance Certificates are required to be verified to determine their validity and as to whether the export proceeds were received within the stipulated period as claimed by the applicant. It was the responsibility of the applicant to submit evidence of receipt of sale proceeds immediately upon receipt which they admittedly failed to do instead of waiting for adjudication proceedings to be initiated. However, in the interest of justice, the applicant is directed to approach the original authority within two weeks of receipt of this order with all relevant documents as presented before Commissioner (Appeals) to enable the authority to verify the same to its satisfaction in accordance with law and pass suitable orders. As such, the case is required to be remanded for fresh consideration.

9. Government, therefore, sets aside the impugned Orders and remands the case back to original authority for fresh consideration in the light of above observation. Reasonable opportunity of hearing is to be afforded to concerned parties and the applicant is directed to extend full cooperation.

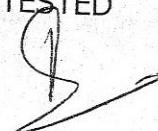
10. The Revision Application is disposed of in above terms.

11. So, ordered.


(Rimjhim Prasad)
Joint Secretary (Revision Application)

M/s Cotton Clothing Corporation of India,
A-116, New Friends Colony,
New Delhi-110066

ATTESTED



(भग्येश्वर शर्मा/Bhagyesh Sharma)
सहायक आयुक्त/Assistant Commissioner
C.B.C.C.

GOI ORDER NO. 02 /2015-Cus DATED 29 . 04 . 2015

Copy to:

1. Commissioner of Customs, (Export), Mumbai Zone-III, Air Cargo Complex, Sahar, Andheri East, Mumbai-400099
2. Commissioner of Customs (Appeals-III), New Customs House, Mumbai
3. The Assistant Commissioner of Customs, DBK (XOS), Air Cargo Complex, Mumbai
4. Ms Priyanka Goel, Advocate, A-103, Defence Colony, New Delhi-110024
- ✓ 5. Guard File.
6. PS to JS (RA)
7. Spare Copy



(B.P.Sharma)
OSD (Revision Application)