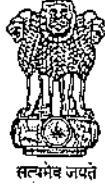


REGISTERED SPEED POST



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  
8<sup>th</sup> Floor, World Trade Centre, Cuffe Parade,  
Mumbai- 400 005

F. No. 371/44/14-RA/5977

Date of Issue:- ~~09.2020~~  
16.10.2020

ORDER NO. 204/2020-CUS(WZ)/ASRA/MUMBAI DATED 15.09.2020  
OF THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA,  
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO  
THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS  
ACT,1962.

Sl.No.	Revision Application No.	Applicant	Respondent
1	371/44/14-RA	M/s Polydrug Laboratories Pvt. Ltd., 202, Navbharat Estate, Zakaria Bunder Road, Sewri (West), Mumbai - 400 015.	Commissioner of Customs, Mumbai- II.

**Subject:** Revision applications filed under Section 129DD of the Customs Act, 1962 against the Order in Appeal No. MUM-CUSTOM-AXP-APP-11&12/14-15 dated 30.04.2014 passed by the Commissioner of Customs (Appeals), Mumbai Zone - III.

**ORDER**

This Revision application is filed by M/s Polydrug Laboratories Pvt. Ltd., 202, Navbharat Estate, Zakaria Bunder Road, Sewri (West), Mumbai- 400 015 (hereinafter referred to as the 'applicant') against the Orders-In-Appeal No. MUM-CUSTOM-AXP-APP-11&12/14-15 dated 30.04.2014 passed by the Commissioner of Customs (Appeals), Mumbai Zone - III.

2. The applicants are manufacturer cum merchant exporters. The applicant had cleared goods for export under various shipping bills during the period from April 2007 to October 2007. The drawback sanctioning authority observed that as per the Ministry's Circular No. 64/2003-Cus dated 21.07.2003, the Agency Commission is to restricted to 12.5% of the FOB value of goods exported and any amount exceeding this limit should be deducted from FOB value for granting export benefits under various export promotion schemes including duty drawback scheme. The exporter had exported the goods under various shipping bills and claimed and received the higher drawback which was not admissible to them by claiming Agency Commissioner exceeding the permissible limit of 12.5%. As such, the Drawback Sanctioning Authority issued Show Cause cum Demand Notice No. S/3-Misc-125/2010 DBK- EDI dated 07.07.2011 to the applicant under Rule 16 of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 read with Section 75 A(2) of Customs Act, 1962, for recovery of the drawback amount of Rs. 6,931/- (Rupees Six Thousand Nine Hundred Thirty One Only) along with interest. The adjudicating authority confirmed the demand of drawback amount of Rs. 6,931/- along with interest at applicable rate vide Order in Original No. DC/RNV/229/12/ADJ/ACC dated 21.01.2012.

3. Being aggrieved by the Order in Original, the applicant filed appeal before the Commissioner of Customs (Appeals), Mumbai - III. The appellate authority vide Order in Appeal No. MUM-CUSTOM-AXP-APP-11 & 12/14-15 dated 30.04.2014 dismissed the appeal and upheld the Order in Original.

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

4.1 The recoveries are made on the basis of audit objection because the formula for deduction of commission was not fed into the EDI system. If the formula is

not fed into the system even after almost a decade then the customs officials are responsible for the lapse.

4.2 The audit is of the department & not of the exporter. Therefore, the audit objection is against the wrong doings of the officials of the department & the audit objection cannot be applied to the exporter.

4.3 As per the legal requirements, the SCN should be issued by the department within 12 months from the date of audit. Therefore, the SCN is illegal. The ACC Customs cannot violate all the provisions of the law and recover money illegally from the exporter.

4.4 The Customs officials are simply indulging into abuse of official position by not only asking the refund of excess amount but require the exporter to bear the penal rate of interest for 4 years.

4.5 The Authority cannot recover interest on the refund to be made by exporter without the law authorising the recovery of interest. There is no provision in Rule 16 of the Drawback Rules, 1995 for the recovery of interest.

4.6 The period of drawback payment is ranging from April 2007 to October 2007 & after a lapse of more than 4 years, the SCN demanded interest from the exporter, which is entirely illegal.

4.7 The department should understand that FOB value given in Shipping Bills is statistical value and not the true FOB value of the Shipping Bills, therefore no recoveries are to be made on that basis.

4.8 The RBI has specified the limit of 12.5% commission on the invoice value and not the FOB Value.

4.9 Commission is part of the FOB value & restriction of 12.5% is only for the purpose of the disbursement of the incentive.

4.10 No information about the duty drawback assessment was given to the exporter. Therefore, there is no way the exporter is in a position to know whether the duty drawback is correctly disbursed or not.

5. A Personal Hearing in the matter was fixed on 21.12.2017, 09.01.2020 and 15.01.2020. Shri Rajeev Gupta, Consultant attended the same on behalf of the applicant on 15.01.2020.

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

7. In the instant case, the Government finds that the recovery of excess drawback duties sanctioned and paid to the tune of Rs. 6,931/- along with interest was confirmed by the adjudicating authority vide impugned Order in Original. The excess payment of drawback amount said to have been claimed and received by the applicant by claiming Agency Commission exceeding the permissible limit of 12.5 % as per the Ministry's Circular No. 64/2003-Cus dated 21.07.2003. Further, the appeal filed by the applicant was dismissed by the Appellate Authority vide Order in appeal MUM-CUSTOM-AXP-APP-11 & 12/14-15 dated 30.04.2014.

8. Pertaining to the issue under consideration, it is found that the Circular No. 64/2003-Cus dated 21.07.2003 absolutely spells out that the field formations may continue to permit export benefits on FOB value without deducting agency commission if such commission is up to the limit of 12.5% of FOB value. Also it is directed vide impugned circular that Agency Commission exceeding this limit should be deducted from the FOB value for granting export benefits under Drawback/DEPB/Advance Licences / DFRC schemes.

From the plain reading of the issue discussed in the impugned Circular, it is clear that the deduction on account of Agency Commission from FOB value is permitted to the extent of 12.5 % while granting the export benefits under Drawback Scheme. Thus there is no ambiguity as far as the provisions in this regards and the applicant also do not have any objection on this issue. It is therefore incontestable fact that the excess drawback paid on Agency Commission exceeding the permissible limit as per above circular is not admissible and hence such excess drawback paid to the

exporter is liable for recovery under the provisions of the Act and Rules made thereunder. Further, it is observed that the SCN dated 07.07.2011 contains details of the excess payment of drawback amount claimed and received by the applicant shipping bills wise in the instant case. In the light of above, the argument of the applicant that no information with regard to the assessment of drawback amount was given to them is not just and proper.

9. The Government finds that the applicant have challenged the recovery of excess drawback amount received by them being time barred. It is, therefore, pertinent to refer the relevant statutory provisions. From the perusal of Section 75 of the Customs Act, 1962 and Rule 16 / 16A of the Drawback Rules, 1995, it is observed that Drawback Rules, 1995 have been framed under Section 75 of the Customs Act, 1962. Drawback, being an export incentive in the form of cash award admissible under Duty Drawback Rules, 1995, an exporter becomes entitled to it on export of goods and realization of export proceeds (foreign currency). Further, Rule 16 of the Drawback Rules provides that where an amount of drawback and interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of Customs, repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it shall be recovered in the manner laid down in sub-section (1) of Section 142 of the Customs Act, 1962. Rule 16 of the Drawback Rules, 1995 does not provide for any time limit for making recovery of excess drawback paid erroneously. The question, therefore, is when Rule 16 does not prescribe any period of limitation, whether action can be taken thereunder after any length of time, or whether the concept of reasonable period has to be read into it. In this regard, it is by now well settled by the Supreme Court in a catena of decisions that if the statute does not prescribe any period of limitation, the power thereunder has to be exercised within a reasonable time. What would be a reasonable period would, of course, depend upon the facts and circumstances of each case.

10. In this regard, the Hon'ble Supreme Court in the cases of *Collector v. Raghuvar (India) Ltd.* — 2000 (118) E.L.T. 311 (S.C.) and *Govt. of India v. Citadel Fine Pharmaceuticals* - 1989 (42) E.L.T. 515 (S.C.) hold that in the absence of specific period, action should be taken within reasonable period, thus every action in the absence of prescribed period should be initiated within reasonable period and what

would be reasonable period would depend upon facts and circumstances of each case.

11. Further, Section 75A(2) of the Customs Act, 1962 contemplates where any drawback has been paid to the claimant erroneously, the claimant shall, within a period of two months from the date of demand, pay in addition to the said amount of drawback, interest at the rate fixed under Section 28AB from the date of expiry of the said two months to the date of recovery of such drawbacks. In view of the said provisions, the applicant in the instant case is liable to pay interest on the inadmissible drawback amount received by them.

12. In view of above position, Government does not find any infirmity in the impugned order-in-appeal and therefore upholds the same.

13. The revision application is thus rejected being devoid of any merit.

14. So ordered.

  
(SEEMA ARORA)

Principal Commissioner & Ex-Officio  
Additional Secretary to Government of India.

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

Copy to :

1. The Commissioner of Customs (Export), Air Cargo Complex, Sahar, Andheri (East), Mumbai - 400 099.
2. The Commissioner of Customs (Appeals), Mumbai -III, Awas Corporate Point, 5<sup>th</sup> floor, Makwana Lane, Behind S.M.Centre, Andheri -Kurla Road, Marol, Mumbai - 400059.
3. The Deputy commissioner of Customs, DBK(EDI), Air Cargo Complex, Sahar, Andheri (East), Mumbai - 400 099.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File.
6. Spare copy.