

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
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F.No. 371/84/DBK/13-RA / 76

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ORDER NO. 218 /2020-CUS(WZ)/ASRA/MUMBAI DATED 22.12.2020 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 the Order-in-Appeal No. 649(DRAWBACK)/2013(JNCH)/EXP-139 dated 18.07.2013 passed by the Commissioner of Customs(Appeals), Mumbai-II, JNCH, Nhava Sheva.

Applicant : M/s Time Technoplast Ltd., Andheri, Mumbai

Respondent : Commissioner of Customs (Exports), JNCH, Nhava Sheva.

ORDER

This Revision application has been filed by M/s Time Technoplast Ltd., 102, Todi Complex, 35 SakiVihar Road, Andheri (East), Mumbai 400072 (hereinafter referred to as "the applicant") against Order in Appeal No. 649(DRAWBACK)/2013(JNCH)/EXP-139 dated 18.07.2013 passed by the Commissioner of Customs (Appeals), Mumbai-II, JNCH, Nhava Sheva.

2. The Brief facts of the case are that the applicant had imported the consignment of "Machinery for working plastic blow moulding machine" under Bill of Entry No. 867350 dated 25.01.2010 for home consumption. The said goods were re-exported vide Shipping Bill No. 3000000954 dated 18.05.2011. The applicant had filed the said Shipping Bill under claim of duty drawback under Section 74 of the Customs Act, 1962 for refund of duty paid on the said imported goods. The export goods had been examined under the supervision of the AC/DC docks (Exports) and identity of the goods were tallied with respect to import documents. Thereafter, the applicant had applied for the drawback claim on 12.12.2011. The let export order date was 24.05.2011.

3. In terms of Section 74 of the Customs Act, 1962 and as per the Re-export of imported goods(Drawback of Customs Duties) Rules,1995 a claim for drawback under these rules shall be filed in the format at annexure II within three months from the date on which an order permitting clearance and loading of goods for exportation under Section 51 is made by proper officer of customs, provided that the Assistant Commissioner of Customs or Deputy Commissioner of Customs may, if he is satisfied that the exporter was prevented by sufficient cause to file his claim within the aforesaid period of three months, allow the exporter to file his claim within a further period of three months. As per procedure laid down in Rule 5 of the drawback claims, the delay of another six months may be condoned by the concerned Commissioner of Customs.

4. Since, the appellant had filed the drawback claim under Section 74 of the Customs Act 1962 and the said claim was not filed within three months from the date of Let Export Order (LEO), the applicant vide letter dated 03.02.2012 requested Deputy Commissioner of Customs to condone the delay in filing the said drawback claim. The reason for delay given by the applicant was that the CHA was shifting his office and due to this they had submitted the documents late. They also explained that

delay in submission was due to loss of documents; that FIR was lodged and subsequently they submitted it to the office, but during submission of their claim, no FIR copy and reason had been explained. Thereafter, the Deputy Commissioner of Customs, Drawback Section, JNCH vide Order No. 32/2012 dated 29.05.2012 rejected the claim as condonation for delay was rejected by the Commissioner of Customs (X) in the file on 15.03.2012 stating that the reason given by the exporter is not convincing.

5. Aggrieved by the impugned Order in Original No. 32/2012 dated 29.05.2012, the applicant filed appeal before the Commissioner of Customs (Appeals), Mumbai-II, JNCH, Nhava Sheva. However, Commissioner (Appeals) vide Order in Appeal No. 649(DRAWBACK)/2013(JNCH)/EXP-139 dated 18.07.2013 upheld the Order in Original No. 32/2012 dated 29.05.2012 and rejected the appeal filed by the applicant.

6. Being aggrieved by the Order in Appeal No. 649(DRAWBACK)/2013(JNCH)/EXP-139 dated 18.07.2013 the applicant has filed the present Revision Application on the following grounds :-

6.1 Ld. Commissioner (Appeals) has erred in passing the impugned Order without considering and appreciating the submissions made, provisions of law, judgments, CBEC instructions, etc. cited and, hence, impugned Order is not sustainable, inasmuch as:

(i) that there was genuine reason for delay in filing the drawback claim in view of loss of documents by CHA during shifting of office and an FIR dated 11.06.2011 was also filed;

(ii) that there is a provision for condonation of delay which has not been appreciated judiciously by the Ld. Lower Authorities;

(iii) that the decision of refusal to grant extension by the Ld. Commissioner is not reasoned as his decision was communicated by the Deputy Commissioner vide his letter dated 22.3.2012, without assigning any reason for non-consideration for the request for extension of period for filing drawback claim under clauses (i), (ii) and (iii) of proviso to Rule 5(1) of Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995;

(iv) that the impugned Order does not even consider all the grounds raised before Commissioner (Appeals) and hence, is non speaking order.

6.2 The submissions as detailed hereinafter would substantiate that the impugned Order is not sustainable.

- That the reasons for requesting for extension of time, condonation of delay in filing the claim, as brought on record, is as under:

"The CHA was shifting his office and due to this they had submitted the documents late. He also explained that delay submission is due to documents had lost. FIR was lodged and subsequently they submitted it to the office, but during submission of their claim, no FIR copy and reason has been explained."

EXHIBIT-"I" is the copy of FIR dated 11.6.2011.

- that from the above, it is clear that there was genuine reason for not filing the drawback claim within the initial period of three months from the date of order permitting clearance and loading of goods for exportation.

6.3 That as per clause (i) proviso to Rule 5 of Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995, ACC/DCC is empowered to extend the period by three months and the Ld. Commissioner is further empowered to extend the time by a further period of six months;

(ii) That said authorities are empowered to grant extension or refuse extension after recording in writing the reasons for refusal.

~~(iii) That application for granting extension has to be filed on payment of requisite application fees;~~

6.4 For ease of reference clause (i), (ii) and (iii) of proviso to Rule 5(1) of Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 are reproduced below:

X X X X X

X X X X X

xxxxx

- (i) The Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, may extend the aforesaid period of three months by a period of three months and that the Commissioner of Customs or Commissioner of Customs and Central Excise, as the case may be, may further extend the period by a period of six months;
- (ii) The Assistant Commissioner of Customs or Deputy Commissioner of Customs Excise, or Commissioner of Customs and Central Excise, as the case may be, may, on an application and after making such enquiry as he thinks fit, grant extension or refuse to grant extension after recording in writing the reasons for such refusal;
- (iii) An application fee equivalent to 1% of the FOB value of exports or Rs.1000/- whichever is less, shall be payable for applying for grant of extension by the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be and an application fee of 2% of the FOB value or Rs.2000/- whichever is less, shall be payable for applying for grant of extension by the Commissioner of Customs or Commissioner of Customs and Central Excise, as the case may be]."

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From the above it is clear that reasons for refusing extension are to be recorded.

6.5 In the instant case, the decision to refuse grant of extension by the Commissioner has been communicated by Ld. Deputy Commissioner of Customs, vide his letter dated 22.3.2012. The said letter neither reveals the reasons for such refusal nor letter of refusal by Commissioner has been forwarded to them. Under the circumstances, such decision of Commissioner refusing the extension, as communicated by Deputy Commissioner of Customs by his letter dated 22.3.2012, is not sustainable.

6.6 That principle of natural justice requires that before any adverse decision is taken a personal hearing should be afforded. The decision of Commissioner communicated through Deputy Commissioner by his letter dated 22.3.2012 is in violation of principles of natural justice the same is not sustainable.

6.7 The substantial benefit of drawback cannot be denied for curable and procedural lapse of not filing drawback claim within the stipulated period of time, where there is a provision for extension of time in deserving cases.

6.8 ~~Ld. Commissioner (Appeals) does not appreciate the fact that Ld. Deputy Commissioner in his Order accepts the compliance of Section 74 and the stipulation mentioned in Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995, except the lapse of not filing of claim within the stipulated period of three months. Therefore, for curable and forgivable procedural lapse of not filing drawback claim within the stipulated period of time, substantial benefit cannot be denied.~~

- (i) Madhav Steel - 2010-TIOL-575-HC-MUM-CX
- (ii) Barot Exports 2006 (203) ELT 321 (GOI)
- (iii) CCE v. Siddhartha Soya - 2006 (205) ELT 1093 (GOI)
- (iv) Modern Process Printers - 2006 (204) ELT 632 (GOI)
- (v) Tablets India Ltd. - 2010-TIOL-652-HC-MAD-CX
- (vi) CCE v. T.I. Cycles - 1993 (66) ELT 497 (T)
- (vii) Simplex Mills Ltd. - 2000 (122) ELT 613 (GOI)
- (viii) Upkar International - 2004 (169) ELT 240 (T).

6.9 It is a settled position of law that substantial benefit of refund of drawback is not deniable, when the fact of export is not in dispute, which view gets substantiated from the following judgments:

- (i) Mangalore Chemicals & Fertilizers — 1991 (55) ELT 437 (SC)
- (ii) Wood Papers Ltd. - 1990 (47) ELT 500 (S.C.)
- (iv) Indian Farmers Fertilizers - 1995 (75) ELT 218 (Guj)
- (v) Breach Candy Hospital - 2000 (118) ELT 271 (Tri-LB) (18-H)

6.10 The letter dated 22.3.2012 issued by DCC afforded a personal hearing on 11.4.2012, while simultaneously communicating decision of Commissioner of rejection of request for condonation of delay in filing their application of drawback. This is not in accordance with law, justice and equity. ~ ~ ~

6.11 Government of India in its Order No. 287/2009-Cus dated 9.12.2009 in the case of XSERVE INDIA (PVT.) LTD. reported in 2012 (276) ELT 409 (GOI) in para 7 & 8 has held as under:

"7. On perusal of records, it is noticed that lower authorities have rejected the drawback claim as time-barred under Section 74 of Customs Act, 1962 read with Rule 5(1) of Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995. So, the issue to be decided is whether this drawback claim is time-barred. The lower authorities have admitted that the drawback claim was actually filed on 6-4-06 and deficiency note was issued by the department the same day to produce certain documents viz. TR-6 challan in original, BOE Copies, Cenvat Non-availment certificates, Annexure-I & II etc. Exporter produced the document at later date. However, the Bank Realization Certificate was filed on 1-9-2006 which is treated as date of filing the drawback claim. 8. Applicant has contended that the drawback claim was filed under Section 74 of Customs Act along with an office note which clearly established the fact that goods were examined and identity of goods was established. There is no other requirement of submission of such documents under Section 74. All these documents are required for sanction of drawback claim under Section 75. In this regard, it is observed that the documents mentioned in Rule 5(2)(a) to (g) was filed within extended period and only BRC which is not specified in Rule 5(2) was only submitted as 1-9-06 for the reason that Bank issued the same quite late. The main conditions of Section 74 of Customs Act, 1962 that the identity of re-exported goods is established w.r.t. to imported goods and goods are entered for export within two years from the date of payment of duty on importation thereof, are fulfilled. The drawback claim was initially filed on 6-4-06 and the other document required as per deficiencies pointed on the margin of drawback claim papers, were complied within the extended period of 3 months. Department was required to issue proper deficiency memo within 15 days which they failed to issue. The documents specified in Rule 5(2)(a) to (g) were submitted within extended period of 3 months which can be condoned by Assistant Commissioner. In view of above discussions and findings, Government notes that applicant had submitted all document mentioned in Rule 5(2)(a) to (g) within extended period of 3 months and therefore Assistant Commissioner should consider the condonation of delay and decide the drawback claim on merit. Government sets aside the impugned orders and remands the case back to original adjudicating authority for de novo adjudication by considering the condonation of delay upto extended period of 3 months as suggested above and sanction the drawback claim on merits. A reasonable opportunity of being heard is to be given to the applicant."

The above judgment would support their case.

7. A personal hearing was held in this case on 09.12.2020. Shri Ashok Shukla , General Manager, Exim and Shri Gopal Jadhav, Assistant Manager, EXIM, appeared for hearing. They reiterated their submissions filed through Revision Application and requested that delay of four months in filing the Drawback claims may be condoned. They further submitted that substantial benefits should not be denied for curable procedural delay.

8. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused Order-in-Original and the impugned Order-in-Appeal. The short issue in the present case is that the applicant had filed drawback claim under Rule 5(1) of the Re-export of Imported Goods(Drawback of Customs Duties) Rules, 1995 beyond a period of 6 months from the date of let export order(24.05.2011). The condonation of delay beyond 6 months and upto a period of one year from the date of let export order falls within the discretion of the Commissioner of Customs to condone. The applicant was informed by the Deputy Commissioner that their request for condonation of delay had been rejected by the Commissioner of Customs as reasons given were not found convincing.

9. Government observes that the applicant has made certain submissions about the reasons for delay in filing the drawback claim. They have stated that their CHA was shifting office and due to this reason they had submitted the documents late. They had also explained that documents had been lost and that they had lodged an FIR. The Deputy Commissioner has stated that the request for condonation of delay submitted by the applicant was rejected by the Commissioner of Customs in the file on 15.03.2012 stating that the reason given by the exporter was not convincing. The Commissioner(Appeals) has rejected the appeal filed by the applicant on the same basis. The edifice on which the rationale for rejection by the lower authorities in these proceedings is based on the question as to whether the "exporter was prevented by sufficient cause".

10. In this regard, Government adverts to the text of Rule 5 of the Re-export of Imported Goods(Drawback of Customs Duties) Rules, 1995.

"Rule 5. Manner and time of claiming drawback on goods exported other than by post. - (1) A claim for drawback under these rules shall be filed in the form at Annexure II[See Customs Series Form No. 109 in Part 5] within three months from the date on which an order permitting clearance and loading of goods for exportation under Sec. 51 is made by proper officer of customs :

Provided that -

- (i) the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, may extend the aforesaid period of three months by a period of three months and that the Commissioner of

Customs or Commissioner of Customs and Central Excise, as the case may be, may further extend the period by a period of six months;

- (ii) the Assistant Commissioner of Customs or Deputy Commissioner of Customs or Commissioner of Customs, as the case may be, may, on an application and after making such enquiry as he thinks fit, grant extension or refuse to grant extension after recording in writing the reasons for such refusal;”

11. Government observes that the Rule 5 was amended vide Notification No. 48/2010-Cus(NT) dated 17.06.2010; i.e. before the date of let export order(24.05.2011). The words “if he is satisfied that the exporter was prevented by sufficient cause to file his claim” in the first proviso to sub-rule (1) of Rule 5 of the Re-export of Imported Goods(Drawback of Customs Duties) Rules, 1995 has been deleted by this amendment. The effect of this amendment would be that the request for condonation of delay would not have to pass the test of satisfying the Assistant Commissioner/Deputy Commissioner/Commissioner that the applicant was prevented by sufficient cause to file claim. However, the said officers could make enquiries as found fit and thereafter grant extension or refuse extension after recording the reasons for refusal in writing. It would be pertinent to note that the reason for rejection does not emanate out of any enquiry made by the Commissioner in terms of clause (ii) to sub-rule (1) of Rule 5 of the Rules. Government further observes that in para 4 of the CBEC Circular No. 13/2010-Cus dated 24.06.2010, the Board has instructed that in the event where the AC/DC or Commissioner decides not to grant extension, they may do so after recording in writing the reasons for such refusal and the same is to be communicated to the applicant through a speaking order. This sentence is followed by drawing attention to Circular No. 14/2003-Cus dated 06.03.2003 stating that delays may generally be condoned on receipt of the exporters application in this regard.

12. The statute, the rules and other delegated legislations are binding on the field formations. The instructions issued by the Board are binding on the officers as has been reiterated time and again by the various courts. In the present case, the applicant’s request for extension of time limit was well within the powers vested in the Commissioner of Customs to condone and the Board had directed that the field formations be liberal in exercise of these powers in favour of granting extension. However, the Commissioner of Customs has rejected the request on file on 15.03.2012

on the ground that the reason given by the exporter is not convincing. From the facts recorded in the order passed by the Deputy Commissioner, it appears that the Commissioner of Customs was not satisfied by the reasons advanced and has therefore rejected the request for extension without passing a speaking order. The rejection of the request for extension in such manner was in violation of the limited scope for exercise of discretion under the rule as amended and the instructions issued by the Board. In the light of the above facts, Government finds that the applicant's request for condoning the delay merits consideration.

13. Government therefore modifies the OIA No. 649(DRAWBACK)/2013(JNCH)/EXP-139 dated 18.07.2013 accordingly and directs that the drawback claim filed by the applicant be examined on merits and sanctioned to the applicant, if found otherwise admissible.

14. Revision application filed by the applicant is disposed off in the above terms.

Shrawan
22/12/2020
(SHRAWAN KUMAR)

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

ORDER No 218 /2020-CUS(WZ)/ASRA/Mumbai DATED 22.12.2020

To

M/s Time Technoplast Ltd.,
55, Corporate Avenue, 2nd Floor, Saki Vihar Road,
Andheri(East), Mumbai 400 072.

Copy to :

1. Commissioner of Customs, Nhava Sheva-II, Jawaharlal Nehru Customs House, Nhava Sheva, Tal: Uran, Dist.-Raigad, Maharashtra-400707,
2. Commissioner Of Customs, (Appeals), Jawaharlal Nehru Customs House, Nhava Sheva, Dist.-Raigad, Maharashtra-400707
3. Assistant/Deputy Commissioner Of Customs (Drawback), Jawaharlal Nehru Customs House, Nhava Sheva, Dist.-Raigad, Maharashtra-400707
4. Sr.P.S. to AS (RA), Mumbai.
5. Guard File.
6. Spare copy.