



REGISTERED  
SPEED POST

**F.No.373/359/DBK/14-RA**

GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE  
(REVISION APPLICATION UNIT)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue...31.8.15...

**ORDER NO.22/2015-Cus DATED 30.07.2015** OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129 DD OF THE CUSTOM ACT, 1962.

Subject : Revision Application filed under Section 129 DD of the Custom Act, 1962 against the Order-in-Appeal No. CMB-CEX-000-APP-110/2014 dated 9.9.14 passed by the Commissioner of Custom, Central Excise & Service Tax (Appeals), Tiruchirapalli.

Applicant : M/s Texport Industries Pvt. Ltd., Bangalore.

Respondent : Commissioner of Customs, Tiruchirappalli.

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**ORDER**

This revision application is filed by M/s Texport Industries Pvt. Ltd., Bangalore (hereinafter referred to as applicant) against the Order-in-Appeal No. CMB-CEX-OOO-APP-110/2014 dated 9.9.14 passed by the Commissioner of Custom, Central Excise & Service Tax (Appeals), Tiruchirapalli with respect to Order-in-Original passed by the Assistant Commissioner of Customs(Draback), Custom House, Tuticorin.

2. Brief facts of the case are that the applicant has exported goods for an amount of Rs.64,33,993/- covered under Shipping Bills No. 1891278 dated 01.03.2008,1889228 dated 27.02.2008 and 1879906 dated 08.02.2008 under the claim for Drawback. The applicant was sanctioned and paid drawback amounting to Rs.7,15,378/- under the provisions of the Customs, Central Excise and Service Tax Drawback Rules, 1995. Since the applicant had not produced documentary evidences for realization of the sale proceeds for Rs.64,33,993/- against the said Shipping Bill, it appeared that the said applicant had contravened the provisions of Rule 16A of the said Rules read with Second proviso to Section 75(1) of the Customs Act, 1962 in as much as he had not produced evidences for realization of the sale proceeds for Rs.64,33,993/-. After due process of law, the adjudicating authority demanded the ineligible drawback already availed by the applicant with applicable interest.

3. Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioner (Appeal), who rejected the same.

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 submits that the sub-rule 5 of Rule 16A of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 introduced as per Notification No.30 /2011 dated 11.04.2011 states that the drawback paid shall not be recovered on compliance of the following:

- (a) Sale proceeds have not been realized by the exporter within the period allowed under FEMA, 1999.
- (b) Non-realization is compensated by Export Credit Guarantee Corporation of India Ltd. under an insurance cover.
- (c) Reserve Bank of India writes off the sale proceeds on merits.
- (d) The Foreign Mission of India issues a certificate as to the non-recovery of sale proceeds from the buyer.

The applicant has fulfilled all the above vide para 3(c) at page 2 of the Order-in-Original. The Commissioner Appeals has therefore erred in ordering recovery of the drawback amount.

4.2 The applicant submits that the Assistant Commissioner has relied on pre-amended Rule 16A and notifications and circulars issued by RBI prior to the introduction of sub-rule 5 of Rule 16A and ordered for recovery of drawback and the same has been confirmed by the Commissioner (Appeals). The applicant submits that the Commissioner (Appeals) has erred in acting on pre-amended Rule 16A. He also erred in holding that sub-rule 5 of Rule 16A introduced on 11.04.2014 cannot have retrospective effect for the exports made in 2008.

4.3 The applicant submits that amendments made which are beneficial to the assessee can have retrospective effect. In the case of CCE Vs. Mysore Electrical Industries [2006 (204) ELT 517 (SC)] the issue was whether the ruling under Rule 37B of the Central Excise Act issued by the Board re-classifying the Single Panel Circuit Breakers under CTH 85.37 as against the previously approved. The applicant submits that the rationale of the said judgement has to be applied not only to Board's ruling under Section 37B of the Central Excise Act or Circular but also to notifications amending the rule thereby granting benefit to the assessee. After all a ruling under Section 37B has statutory effect. A blinkered view of the above judgements of the Apex Court is repugnant to the settled interpretation of statutory provisions. What is to be seen is the ratio decided in the judgement.

4.4 The applicant submits that this question was considered by Himachal Pradesh High Court in the case of CCE Vs. Himachal Aluminium Pvt. Ltd - 2009 (236) ELT 47 (HP). The above said judgment was also relied by the Madras High Court in the case of Karvembu & Co Vs. U.S. Dept of Revenue [2010 (20) STR 591 (Mad)].

4.5 It is submitted that it is a settled law that in procedural matters, the law prevailing on the date of issue of show cause notice has to be taken into consideration. It is further submitted that the Hon'ble Supreme Court in the case of Rochiram & Sons Vs. Union of India reported in 2008 (226) ELT 20 (S.C.) has held that substantive laws are generally not retrospective unless specified contrary by legislative, whereas procedural laws may be retrospective unless shown to the contrary. In the present case by way of inserting sub-clause (5) to Rule 16A, the Central Government has listed out the situation where the drawback sanctioned need not be surrendered on complying certain procedural conditions. Therefore, it is undisputable that Rule 16A is procedural in nature. The Hon'ble High Court of Bombay in the case of Uttam Steel Ltd Vs. Union of India {2003 (158) ELT 274 (Bom)} has held that any amendment in procedural law shall have retrospective effect even if it is not specifically mentioned that the amendments has retrospective effect.

4.6 It is submitted that it will be invidious distinction, if the exporter who filed shipping bill on 10.04.2011 asked to shell out the drawback amount while the one who made it on 11.4.2011 avails the benefit.

4.7 It is submitted that the demand notice was issued on 15.04.2014 and at this time the amended rule alone can apply. To illustrate, it is submitted that Rule 9 of the Central Excise Rules, 1944 prescribed a maximum period of one year to raise any demand for duty. With effect from 06.08.1977, the period was substituted by five years. The question was whether five year period can be invoked in a case where one year period was already over. The Supreme Court said in the case of Mysore Rolling Mills Pvt. Ltd Vs. CCE, Belgaum [1987 (28) ELT

50 (SC)] thus: "*once the rule comes into existence and jurisdiction under the rule is involved, it has got to cover a period upto five years prevailing the date of issue of notice*". In other words, the law as it prevailed on the date of issue of notice will prevail.

5. Personal hearing was scheduled in this case on 26.3.15. Shri Derrick Sam, Advocate attended hearing on behalf of the applicant. Nobody attended the hearing on behalf of the department. The Department vide their written submission dated 4.12.2014 mainly reiterated contents of impugned Orders.

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

7. On perusal of the records, Government observes that the original authority confirmed the demand of already sanctioned drawback under Rule 16A of the Customs, Central Excise and Service Tax Drawback Rules, 1995, Section 8 of FEMA 1999 and RBI Circulars read with proviso to Section 75(1) of the Customs Act, 1962 on the ground that the applicant failed to realize sale proceeds in respect of impugned exports. Commissioner (Appeals) upheld impugned Order-in-Original. Now, the applicant has filed this Revision Application on grounds mentioned in para (4) above.

8. Government notes that the applicant has contended that though they failed to realize foreign remittance, their loss was compensated by Export Credit Guarantee Corporation (ECGC) and their authorized dealer Canara Bank wrote off the requirement of the export sale proceeds realization and that as such, drawback availed by them is not liable for recovery in terms of amendment made in Rule 16A by insertion of sub-rule (5) vide Notification No.30/2011 dated 11.4.2011. However, lower authorities have held that eligibility under said sub-rule (5) of said Drawback Rules, 1995 which was introduced only w.e.f. 11.4.2011 vide Notification No.30/2011 dated 11.4.2011, is applicable only for exports made after 11.4.2011 and not before that and as such, exports made by the applicant during period of February/March 2008 are not eligible for benefit under

above said provision. In view of rival contentions, Government now proceeds to examine various statutory provisions relating to this case.

8.1 The applicant has placed heavy reliance on sub-rule (5) of the Rules 16A of the said Custom, Central Excise Duties and Service Tax Drawback Rules, 1995, which was introduced vide Notification No.30/2011 dated 11.4.2011. The said notification reads as under:

*"[To be published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i)]*

*Government of India  
Ministry of Finance  
(Department of Revenue)*

**Notification No. 30/2011 - Customs (N.T.)**

*New Delhi, 11<sup>th</sup> April, 2011*

**G.S.R 312 (E).** - *In exercise of the powers conferred by section 75 of the Customs Act, 1962 (52 of 1962), section 37 of the Central Excise Act, 1944 (1 of 1944) and section 93A read with section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules further to amend the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, namely:-*

1. (1) *These rules may be called the Customs, Central Excise Duties and Service Tax Drawback (Second Amendment) Rules, 2011.*

(2) *They shall come into force on the date of their publication in the Official Gazette.*

2. *In the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, in rule 16(A)-*

*(i) in sub- rule(1), after the words " such drawback shall", the following words shall be inserted, namely:-*

*"except under circumstances or conditions specified in sub-rule (5),"*

*(ii) after sub-rule (4), the following sub-rule shall be inserted, namely:-*

*"(5) Where sale proceeds are not realised by an exporter within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), but such non- realisation of sale proceeds is compensated by the Export Credit Guarantee Corporation of India Ltd. under an insurance cover and the Reserve Bank of India writes off the requirement of realisation of sale proceeds on merits and the exporter produces a certificate from the concerned Foreign Mission of India about the fact of non-recovery of sale proceeds from the buyer, the amount of drawback paid to the exporter or the claimant shall not be recovered."*

**F.No. 005/39/2010-DBK  
(RAJESH KUMAR AGARWAL)**

**Under Secretary to the Government of India**

*Note.- The principal rules were published vide notification No. 37/95-Customs (N.T.), dated the 26<sup>th</sup> May, 1995, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R.441(E), dated the 26<sup>th</sup> May, 1995, and was last amended by notification number 9/2011-Customs (N.T.), dated the 10<sup>th</sup> February, 2011 vide number G.S.R. 80 (E), dated the 10<sup>th</sup> February, 2011."*

The important aspects of the said Notification No.30/2011 dated 11.4.2011, by which said sub-rule (5) of Rule 16A was introduced are as follows:

- (a) Vide Clause 1(2) of the said Notification, the above said amendment comes into force on the date of their publication in the official Gazette i.e. only from 11.4.2011;
- (b) The benefit under sub-rule (5) of the Rule 16(1) of the said Rules, 1995 is applicable only on cumulative fulfilment of certain conditions namely:
  - (i) Sale proceeds have not been realized by the exporter within the period allowed under FEMA, 1999,
  - (ii) Non-realization is compensated by Export Credit Guarantee Corporation of India Ltd. under an insurance cover,
  - (iii) Reserve Bank of India writes off the sale proceeds on merits and
  - (iv) The Foreign Mission of India issues a certificate as to the non-recovery of sale proceeds from the buyer.

8.2 As mentioned in part (a) above, the amended Rules came into effect only from 11.4.20011, whereas, the impugned exports pertain to year February/March 2008. As such, the provision of sub-rule (5) of Rule 16(A), which came into effect only from 11.4.2011 cannot be extended to exports of 2008 for which export remittances had to be realized within 12 months from the date of export. Any action for recovery will be governed by the provisions of law as it existed as soon as the amount became due. There is no mention in the said Notification that the Notification applies retrospectively. Rather the Notification itself speaks in categorical terms that the amended Rule shall come into force from 11.04.2011 only. As such, contention of the applicant regarding retrospective nature of said sub-rule (5) of Rule 16(A) is not tenable.







8.3 The applicant has placed reliance of various case laws in general and decision of High Court of Mumbai in the case of Uttam Steel Ltd. Vs UOI 2003(158) ELT 274 (Bom) in particular in favour of their contention on this aspect. Government notes that facts of the case of M/s Uttam Steel Ltd. are different as it pertains to changes in procedure of an already existing law viz. change in time limit prescribed within already existing Section 11B of Central Excise Act 1944. In the present case, an absolutely new Rule has been introduced and the date from when it will become effective, is also specified in the notification. Therefore, the ratio of said judgements cannot be made applicable to this case. Further, Hon'ble Supreme Court has laid down the principle in the case of ITC Ltd. Vs CCE, New Delhi 2004 (171) ELT 433 (S.C.) and Paper Products Ltd. Vs. CC 1999(112) ELT 765 (S.C.) that simple and plain wording of applicable statutory provisions as elaborated vide relevant Notifications/Circular are to be strictly adhered to and no liberal interpretation is permissible.

8.4 In view of the above, Government holds that as Rule 16(A)(5) of the Customs, Central Excise and Service Tax Drawback Rules 1995, as amended, was made effective w.e.f. 11.4.2011 only and all export proceeds due to be realized prior to this date would not be covered by the relaxation provided thereunder. The provision of Sub-rule 5 of Rule 16(A) ibid have rightly been held to be inapplicable by the lower authorities in the present case.

9. Government further notes that the lower authorities have also dealt in detail various circulars of the Reserve Bank of India and provision of Foreign Trade Policy (FTP) 2009-14 issued by the Department of Commerce. From an analysis of these provisions, the lower authorities have concluded that write off of foreign exchange on default of foreign buyer and compensation of the same by way of ECGC does not entitle the exporter to drawback benefit. It is an undisputed fact that at the material time i.e. the period to which the impugned Shipping Bills belong and the period when the realization of export proceeds

become due pertains to a period when the said RBI circulars and provisions of FTP 2009-14 were in force and Rule 16A (5) did not exist. The detailed findings of lower authorities regarding recovery of drawback amount in view of the said RBI circulars have also not been challenged by the applicant and Governments finds that such findings of lower authorities and orders thereof continue to hold ground.

10. In view of above discussions, Government finds no infirmity in impugned Order-in-Appeal confirming recovery of drawback with appropriate interest and hence, upholds the same.

11. Revision Application is thus rejected being devoid of merit.

12. So, ordered.

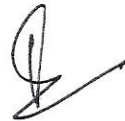


(RIMJHIM PRASAD)

Joint Secretary to the Government of India

M/s Texport Industries Pvt. Ltd.  
No.154, 3<sup>rd</sup> Cross, 5<sup>th</sup> Main  
Yeshwantpur Industrial Suburb  
Bangalore-560022

Attested



OSD (RA)  
(B.P. Sharma)

(भगवत शर्मा / Bhagwat Sharma)  
सहायक आयुक्त (अतिरिक्त) Assistant Commissioner  
C.B.E.C.-O.S.D. (Revision Application)  
वित्त मंत्रालय (राजस्व विभाग)  
Ministry of Finance (Deptt. of Rev.)  
भारत सरकार / Govt. of India  
नई दिल्ली / New Delhi

**GOI ORDER NO.22/2015-Cus DATED 30.07.2015**

Copy to:-

1. Commissioner of Customs, No.1, Williams Road Cantonment, Tiruchirapalli-620001
2. Commissioner of Customs & Central Excise (Appeals), No.1, Williams Road Cantonment, Tiruchirapalli-620001
3. The Assistant Commissioner of Customs (DBK), Customs House, No.1, Tuticorin-628004
4. Shri Derrick Sam, Advocate C/o Shri Hari Radhakrishnan, Advocate, 17, 1<sup>st</sup> Cross Street, IV Avenue, Besant Nagar, Chennai-600090
5. PA to JS (Revision Application)
6. Guard File
7. Spare Copy.

ATTESTED



(B.P. Sharma)

OSD (Revision Application)