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**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, Cuff Parade,
Mumbai- 400 005

F. NO. 373/48/DBK/09-RA

3377

Date of Issue: 05.08.2022

ORDER NO. 240/2022-CUS(SZ) /ASRA/MUMBAI DATED 05.08.2022 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.

Applicant : M/s VMSV Exports Ltd..

Respondent : The Commissioner of Customs, Trichy/Tuticorin.

Subject : Revision Applications filed, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal No. 28/2008 dated 14.11.2008 passed by the Commissioner of Customs and Central Excise (Appeals), Trichy/Tuticorin.

Remanded by the Hon'ble High Court of Madras for fresh decision vide its Order dated 18.04.2022 in Writ Petition (MD) No.5071 of 2012 and M.P (MD) No. 1 of 2012.

ORDER

The present proceedings are in compliance of the Hon'ble High court of Madras, Order dated 18.04.2022 in Writ Petition (MD) No.5071 of 2012 and M.P (MD) No. 1 of 2012 wherein the subject Revision Application is remanded back to the Revisionary Authority for fresh decision.

2. This Revision Application is filed by M/s V.M.S.V. Exports Ltd. 1020, Rangai Gowder Street, Coimbatore 641001 (herein after referred to as the applicant) against the Order-in-Appeal No. 28/2008 dated 14.11.2008 passed by the Commissioner of Customs and Central Excise (Appeals), Trichy/Tuticorin with respect of Order-in-Original No.87/2007 dated 19-04-2007 passed by Assistant Commissioner of Customs, Tuticorin.

3. Brief facts of the case are that the applicant were sanctioned and paid an appropriate Drawback amount of Rs.2,26,671/-in respect of the drawback claims under the Shipping Bills viz i) SB No.1061314 dated 27-11-2001 for an amount of Rs. 19,714/-; ii) SB No.1061174 dated 27-11-2001 for an amount of Rs. 1,39,674/- and iii) SB No.1054463 dated 06-10-2001 for an amount of Rs. 1,07,283/-. However the export proceeds have not been realized within the stipulated period. As per Rule 16A of Customs and Central Excise Duties Drawback rules, 1995 where an amount of Drawback has been paid to an exporter or a person authorized by the exporter, but the export proceeds in respect of such export goods have not been realized by them or on behalf of the exporter in India within the period allowed under the FEMA, 1999 including any extensions of such periods, such Drawback shall be recovered in the manner specified under the said Rules. Therefore, Show Cause Notice No.313, 326 and 327 dated 16-11-2005 and 22-11-2005 had been issued to the applicant proposing recovery of the drawback amounting to Rs. 2,66,671/- i.e. (Rs. 19,714/- + Rs.1,39,674/- + Rs. 1,07,283/-). The applicant neither responded to the Personal hearing nor produced relevant documents for proof of export. The Adjudicating Authority vide Order in Original No. 87/2007 dated 19-04-2007 ordered to recover the duty drawback amount of Rs. 2,66,671/- along with interest. Being aggrieved by the Order in Original, the applicant filed an appeal before the Commissioner of Customs

(Appeals). The Appellate Authority vide Order in Appeal No. 28/2008 dated 14-11-2008 rejected the appeal and upheld the Order in Original.

4. Aggrieved by the Commissioner Appeal's Order, the applicant filed revision application under Section 129DD of the Customs Act, 1962. The Revisionary Authority vide Order No. 10/2011-Cus dated 20-01-2011, rejected the appeal and upheld the Commissioner Appeal's Order on the grounds that though the applicant had claimed that they received the BRCs then, no copy of such BRCs had been produced.

5. Aggrieved by Revisionary Authority's Order, the applicant filed a Writ Petition (MD) No.5071 of 2012 before the Hon'ble High Court of Madras on the following grounds:

a) The applicant submitted that they had failed to pay the amounts to the supplier of input nominated by the buyer. They submitted that since the amount was indirectly paid to the petitioner through the supplier input there was inward remittance on the payments made by the applicant. Hence the Order holding that the applicant had not filed any documents is not sustainable.

b) The RA Order has been passed by the Joint Secretary who is in the rank of the Commissioner (Appeals) and he is incompetent to pass the Order. The applicant submitted that only an Additional Secretary was competent authority to pass the Order under section 129DD of the Customs Act, 1962.

6. The Hon'ble High court vide Order dated 18-04-2022, set aside the RA Order and remitted the case back to the Revisionary Authority's office to pass a fresh Order and also that the Revisionary Authority passing the order should be in the rank of Additional Secretary. The High Court has directed that the exercise should be completed within Three months of receipt of copy of this order. The High Court Order has been received in this office on 14th June, 2022. In view of the said Order the case is taken up for deciding the case afresh

7. The grounds on which the applicant had filed the Revision application against the Order in Appeal No. 28/2008 dated 14-11-2008 passed by the Commissioner of Customs (Appeals), Trichy, are as follows:

7.1 The applicant submitted that the issue before the Commissioner (Appeals) was whether Forex for sale proceeds for the export goods was received by the exporter. The fact of export of goods was never in dispute. Therefore, the Commissioner has erred in addressing a non-issue in his Order-in-Appeal and rejecting the appeal of the applicant.

7.2 The export was made in October/November 2001. The applicant's unit ceased to function from 2002-03. Therefore, he had to trace the record when they were called for by the Assistant Commissioner in 2005.

7.3 The goods viz. ready to wear garments were ordered by Textile Network Ltd., Hong Kong. The foreign buyer had instructed the applicant to procure the requirement fabrics from the supplier of his choice and accordingly he directed the applicant to buy the fabrics from KAYEM Fabrics, Salem. The said KAYEM supplied the fabrics valued at Rs. 8,49,250/-. The applicant could not pay the said sum to KAYEM due to financial crunch. The Hong Kong buyer who has special relationship with KAYEM, imposed a condition that for the FOB value of USD 22972.30 relating to two Shipping Bills No. 1061174 and 1061314, he would release USD 16,488.46 to KAYEM towards price of the fabrics and pay the balance of USD 4242.64 to the applicant -vide letter dated 3.5.2002 of Textile Network Ltd.

7.4 Accordingly, the Textile Network Ltd, Hong Kong, sent two demand drafts K436413 dated 21.5.2002 for USD 16488.46 in favour of KAYEM Fabrics and demand draft K436414 dated 21.5.2002 for Rs. 4006.47 in favour of the applicant. Both the demand drafts were sent to KAYEM by Textile Network Ltd. who in turn, as per their letter dated 19.6.2002, sent the demand draft for USD 4006.47 mentioned above to the applicant. The applicant did not however accept the demand draft for USD 4006.47 as a matter of protest, since the foreign buyer ought to have sent the amount to

the applicant and it was for the applicant to settle his debt to Fabrics supplier i.e. KAYEM Fabrics, Salem. It may please be seen from the above that as against the FOB value of USD 22972.30, the foreign buyer has sent USD 16488.46 to the fabric supplier directly and he has encashed the demand draft. Therefore, the sale proceeds not yet realized is USD 6483.84 only.

7.5 As regards export as per Shipping Bill No. 1054463 dated 6.10.01 for a value of USD 16642, the applicant has received USD 12482.10 vide Bank advice -Karur Vysya Bank Ltd. dated 3.1.02. The supplier has refused to send the full invoice value. It is accordingly submitted that the amount not realized in respect of this Shipping Bill is USD 4180.70 only.

7.6 The applicant submitted that he will repay the Drawback amount proportionate to the amount of sale proceeds not realized along with interest, reserving his right to claim back as and when the above balance amount is fully realized.

8. A Personal hearing in the matter was granted on 13-07-2022. Shri Derek Sam, Advocate appeared online and informed that he is submitting a written submission. He further submitted that High Court has directed for considering documents. He further submitted that foreign exchange remittances have been received in all three shipping bills. In two cases, remittances were directly sent to suppliers, and in one case sent to them. These documents were submitted but have not been discussed by Original/Appellate authority. He requested to allow drawback from them.

9. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original, Order-in-Appeal, the earlier RA Order No10/11-Cus dated 20-01-2011, High Court Order dated 18-04-2022 and the Application.

10. Government observes that the earlier RA Order rejected the applicant's appeal, on the grounds that the applicant had not produced copy of the Bank Realization Certificate and hence the drawback sanctioned was liable to be recovered under Rule 16A of the Customs & Central Excise Duties Drawback Rules, 1995 read with the relevant provisions of the Customs Act, 1962. The

applicant filed Writ Petition against the said Order in Madras High Court in Madurai Bench.

The Madras High Court vide Order dated 18-4-2022 held as under:

“.....8.I have also perused the copy of the shipping bill No.1054463, dated 06.10.2001 and a copy of one Bank Realization Certificate (BRC).

9. The said Certificate appears to be covering one of shipping bill in the Order in Original No. 87 of 2007 dated 19-04-2007. Therefore to that extent, the issue may require re-consideration by the authority under Section 129DD of the Customs Act. Whether the petitioner can produce other collateral evidence to substantiate that there was indeed realisation in respect of the other two shipping bills or not is a matter can be decided by the first respondent or a competent authority....”

11. Government observes that it is a statutory requirement under Section 75(1) of Customs Act, 1962 & Rule 16A(1) of Customs, Central Excise & Service Tax Drawback Rules, 1995, read with Section 8 of FEMA, 1999 read with Regulations 9 of Foreign Exchange Management (Export of goods & Services) Regulations, 2000 & Para 2.41 of EXIM Policy 2005-2009 that export proceeds need to be realized within the time limit provided thereunder subject to any extension allowed by RBI.

12. Government further notes that the provisions of recovery of amount of drawback where export proceeds not realized has been stipulated Rule 16A of the Customs, Central Excise and Service Tax Duty Drawback Rules, 1995 and the relevant sub-rules (2) and (4) of the Rule 16A reads as under :

Rule 16A. Recovery of amount of Drawback where export proceeds not realised. -

(1) Where an amount of drawback has been paid to an exporter or a person authorized by him (hereinafter referred to as the claimant) but 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), 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 realization 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 shall cause notice to be issued to the exporter for production of evidence of realization 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 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 :

From perusal of above provision, it is evident that the drawback is recoverable, if the export proceeds are not realized within stipulated time limit or extension given by RBI, if any.

13. The applicant at the time of present personal hearing has submitted that they have received foreign exchange remittance in all the three shipping bills. However Government observes that they have submitted the following:

a) copy of two demand draft dated 21.05.2002 for USD 16488 and USD 4242.

b) Bank Realization certificate pertaining to one Shipping Bill viz No. 1054463 dated 06.10.2001. The export as per Shipping Bill No. 1054463 dated 6.10.01 is for a value of USD 16642, but the applicant has received USD 12482.10 only vide Bank advice -Karur Vysya Bank Ltd. dated 3.1.02.

c) TR-6 Challan dated 25.5.2012 for an amount of Rs. 72,000/- claiming that the amount is the proportionate drawback amount repaid with respect to the portion of non-realized export proceeds pertaining to all the three shipping bills.

14. On examination of Rule 16/16A of the Drawback Rules, the Government finds that drawback amount is recoverable only if the foreign proceeds for export of the goods has not been realized within six months from the export of the goods. In this case the applicant has enclosed the copy of only one BRC as stated above. In respect of the Bank Realization Certificate enclosed it is observed that: a) it pertains to SB No. 1054463 dated 06.10.2001; b) that export sale proceeds for the shipments made have been received/realized for an amount of USD 12482.10 instead of the correct amount of USD16642; c) the export proceeds has been realized within the stipulated period and d) the applicant has repaid the proportionate amount of the non realized export.

15. Though, the applicant have not submitted the Statement of Bank Realization in respect of the other two shipping bills, as such, it is opined that a fair chance to be given to the applicant to produce the evidence of realization of export proceeds before original authority for verification. Thus, Government holds that the BRCs / statement of Bank Realization are required to be verified by original authority to determine its authenticity, validity and as to whether the export proceeds were received within stipulated period including any extensions granted by RBI to the applicant. Therefore, the applicant are directed to submit the relevant BRCs / Statement of Bank Realization to enable verification of all the three shipping bills within 6 weeks of the receipt of this Order before the Original Authority for consideration in accordance with provisions of law.

16. In view of above circumstances, Government sets aside Order in Appeal No. 28/2008 dated 14-11-2008 passed by the Commissioner of Customs (Appeals), Trichy and remands the case back to the original authority for fresh consideration in the light of above observation after giving reasonable opportunity of hearing being offered to the applicant. The applicant is also

directed to furnish the evidence of realization of export proceeds for verification.

17. The Revision Application is disposed off in above terms.


(SHRAWAN KUMAR)

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

ORDER No. 240/2022-CUS(SZ) /ASRA/Mumbai DATED 05.08.2022

To,

- 1) M/s V.M.S.V. Exports Ltd.
1020, Rangai Gowder Street,
Coimbatore 641001.
- 2) AGOL Associates,
17, Customs Colony, 1st Cross Street, 4th Avenue,
Besant Nagar, Chenna-600090

Copy to:

1. The Commissioner of Customs Trichy/Tuticorin, Custom House, New Harbour Estate, Tuticorin-628004
2. The Commissioner of Customs & Central Excise (Appeals), No.1, Williams Road, Cantonment, Trichirappalli-620001.
3. The Assitant Commissioner of Customs, Custom House, Custom House, New Harbour Estate, Tuticorin-628004
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Notice Board.