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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, Cuffe Parade,
Mumbai - 400 005

F.No. 371/368/DBK/2018-RA/1106 Date of issue: 21.02.23

ORDER NO. 249 /2023-CUS (WZ)/ASRA/MUMBAI DATED 20.02.2023 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. The India Thermit Corporation Limited

Respondent : Commissioner of Customs (Export), Mumbai.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962, against the Order-in-Appeal No. MUM-CUSTM-SMX-80-2018-19 dated 24.07.2018 passed by the Commissioner of Customs (Appeals), Mumbai Customs Zone-I.

ORDER

1. This Revision Application is filed by M/s. The India Thermit Corporation Limited, 84/22, Fazalganj, Kanpur, Uttar Pradesh – 208 012 (hereinafter referred to as "the Applicant") against Order-in-Appeal No. MUM-CUSTM-SMX-80-2018-19 dated 24.07.2018 passed by the Commissioner of Customs (Appeals), Mumbai Customs Zone-I.

2. Brief facts of the case are that the Applicant had filed an application for duty drawback under section 74(1) of the Customs Act, 1962 (98% of the duty paid on imported goods) for the goods exported vide Shipping Bill No. 1000000003 dtd.12.06.2015 which were earlier imported vide Bill of entry No.8157348 dtd.31.01.2015 on payment of custom duty of Rs.74,42,079/-. The export goods were examined under the supervision of AC, Docks and from the examination report, (i) the identity of the exported goods w.r.t. import goods was established, (ii) it was found that the goods were re-exported within the prescribed time limit as per Section 74 of the Customs Act, 1962 and (iii) the export goods were found to be new. But the adjudicating authority, vide Order-in-Original No.45/VNB/AC/DBK(EXP II)/15-16 dated 29.04.2016, rejected the drawback claim on the grounds that the description, weight, size, quantity and value of the export goods as mentioned on the export documents does not match with the particulars mentioned on the import documents; that the export goods are not capable of identification, hence not fulfilling the conditions envisaged under section 74(1) of the Customs Act, 1962. Aggrieved, the applicant filed an appeal which was rejected by the Commissioner (Appeals) vide impugned Order-in-Appeal on the ground that *'what was imported was fitted/assembled in the export goods which is altogether a new item/different goods and hence goods imported have lost their identity.'*

3.1 Hence, the applicant filed the impugned Revision Application mainly on the grounds that:

a) the Ld. Appellate Authority totally disregarded the "Examination Report" on the triplicate copy of the Shipping Bill given by the Docks staff under the supervision of AC/ Docks (Export), wherein it has been clearly stated that the identity of the goods is established with the import documents......
b) the Ld. Appellate Authority has not disclosed the conditions which have not been fulfilled by the revisionist with regard to the Drawback Claim and the reasons for the same.
c) the Ld. Appellate Authority has denied the drawback refund u/s 74 of the Customs Act, 1962 on the ground that drawback is not allowed when the goods exported are not "as such" the goods which were imported, which is not at all relevant.
d) the Ld. Appellate Authority had not gone into the merits of the case and seems to have not understood that the capital goods imported by the revisionist was a part of the machine that had been exported by the revisionist and that the imported capital good had just been fitted/ assembled in the "Flash Butt Welding Machine" exported by the revisionist and that the said capital good is though clearly identifiable and that the identity of the capital good cannot- be equated with the identity of the machine exported.
e) when the Ld. Appellate Authority had denied the Drawback Claim, then, the said authority must have ordered for refund of the cenvat credit reversed alongwith interest thereon.

On the above grounds, the applicant prayed to set aside the impugned Order-in-Appeal and allow their drawback claim or alternatively to allow the refund of Rs. 40,20,996/- (Rs. 18,86,748/- towards 50% duty reversed + Rs. 2,47,500/- towards interest on the same + Rs. 18,86,748/- towards 50% duty not claimed on capital goods).

4. A Personal hearing was held in this case on 20.12.2022. Ms. Rubel Bereja, Advocate appeared on behalf of the Applicant for the hearing and submitted that AC Docks had given examination report confirming identity of the goods. She further submitted that certain additional goods were exported alongwith imported goods and that Section 74 does not stipulate that imported goods should be exported as such or addition of some more fittings/goods with imported goods will take their eligibility of drawback. She requested to allow the application.

5. The applicant also filed additional submissions inter alia on the following grounds:

a) the impugned order passed by the Ld. CCA merely reiterates the findings of the Order-in-Original dated 29.04.2016 to the extent of identity of the imported goods, as a foregone conclusion without paying heed to some of the material contentions of the Applicant. It does not address all the submissions and arguments put forth by the Applicant vide their written submissions in that appeal, arguments advanced during the personal hearing and additional written submissions submitted after the Personal hearing.
b) That no cogent reason whatsoever has been assigned for the basis of such conclusion. Hence, the impugned order is arbitrary as it does not provide any relevant reasons or justifications for dismissing the submissions on the Applicant. The impugned order has been passed without application of mind.
c) Reliance in this regard is placed on the case of Coca Cola (I) Pvt. Ltd. v. CST, Delhi, 2015 (40) S.T.R. 547 (Tri-Del.), wherein it has been held that not passing of a reasoned order and merely copying the contents of the SCN in the order being passed reflects complete non-application of mind
d) the Ld. CCA has upheld the Order-in-Original dated 29.04.2016 based on the ground that the imported goods have lost their identity and the exported goods are altogether a new item/different goods. Thus, it has

been held that the identity of goods cannot be deemed established in respect of the import documents.

e) In this regard, it is humbly submitted that the imported goods are easily identifiable from the documentary evidence on the imported goods have been assembled into and have become part and parcel of the exported goods. These imported goods are merely mounted on the truck so that the final product can function as a mobile welding system for repairing of railway tracks. The imported goods i.e. Rail welding System AMS 100 is fitted/assembled in the exported goods and is thus clearly identifiable even after the assembling activity.

f) In order to substantiate the above submission, reliance is placed on the following documentary evidence. It is submitted that the impugned order has disregarded that the identity of the imported goods has been established through the said documents:

- The Examination Report on the triplicate copy of the Shipping Bill No. 1000000003 dated 12.06.2015 states that "...identity of the goods is established with the import documents...". The impugned order has not provided any reasons to reject the findings of the examination report.
- It is submitted that upon import, the Superintendent of Customs had endorsed the remark Schlatter India Ltd., Switzerland type AMS100.0.4/350 SN 266431495.03.2014" on the Bill of Entry No. 8157348 dated 31.01.2015. Thus, there is no discrepancy and the identity of imported and exported goods is same as per the Customs Department.
- The Applicant's Shipping bill for exported goods clearly states that export is under claim of duty drawback under Section 74 of the Customs Act. The Shipping Bi111000000003 dated 12.06.2015 further entails reference to the Bill of Entry No. 8157348 dated 31.01.2015 and description of imported goods.

- It is also submitted that the Applicant had also furnished a declaration from its suppliers of Imported goods i.e.; Schlatter Industries stating that the general model serial no. for the imported goods Is AMS 100 which is mentioned on the invoice to the applicant is same as AMS 100.0.4/350 Serial No. 266431495.03 2014 which is mentioned on the welding head of the exported goods. Thus, the identity of the imported goods is established based on above declaration

g) It is further submitted that no dispute was raised at the time of clearance for export of goods considering the pre-existing documents. All the aforesaid documents are in alignment and the identity of goods is very well established from same.

h) Reliance is also placed on the following cases, wherein the Courts/ Tribunals have held that identity of the imported goods can be established from the documentary evidence in absence of physical examination:
   - Commissioner of Cus. & S.T., Bengaluru v. Carl Zeiss India Pvt. Ltd., 2021 (376) E.L.T. 457 (Kar.)
   - Semi Conductor Complex Ltd. 2012 (275) E.L.T. 285 (G.O.I.)
   - Scan Geographical AS 2011 (273) E.L.T. 452 (G.O.I.).

i) Nevertheless, it is submitted that in the instant case, the department has conducted physical examination of goods at the time of the export. The Examination Report on the triplicate copy of the Shipping Bill No. 1000000003 dated 12.06.2015 was issued only after such physical examination. Therefore, the Applicant's claim merits eligibility for duty drawback. Further, all the above-mentioned documentary evidence in addition to the Examination Report establish that the goods imported are same as the re-exported goods. Thus, the identity of the goods is ascertainable through analysis of the pre-existing documents which were available at the time of export.

j) The impugned order rejected Applicant's claim on the ground that imported goods fitted/assembled in the exported goods have lost their identity and the exported goods are altogether a new item/different goods. Thus, the identity of goods cannot be deemed established in respect of the import documents.

k) In this regard, it is submitted that Section 74(1) of the Customs Act prescribes that imported goods should be capable of being easily identified and duty ought to have been paid on importation thereof. It is submitted that Section 74 nowhere prescribes that the imported goods must be re-exported 'as such'. It is further submitted that if the interpretation of Ld. CCA is accepted, that would lead to Section 74 contemplating a situation that goods must be exported 'as such'. This interpretation is in clear violation of Section 74(1). The Department cannot interpret a legislation by adding words which are not present.

l) Thus, if an imported item (which is a part of a final product) is fitted/assembled for manufacturing of the final product, same can be easily identified as a part of the final product. Hence, an imported item fitted/assembled as part of a final product which is then exported, does not lose its identity for the purpose of determination of re-export.

m) Reliance has been placed on the case of State of Karnataka v. Azad Coach Builders Private Limited, 2010 (262) E.L.T. 32 (S.C.), wherein the assessee supplied bus bodies to the exporter who was manufacturing and exporting buses and claimed exemption on sales of bus bodies as penultimate sales in the course of export under Section 5(S) of the Central Sales Tax Act, 1956. However, the exemption for deemed export was denied holding that such a transaction was one of inter-state sales and that 'bus bodies' and 'buses' are two different commodities and the bus bodies as such were not exported, but complete buses. As per the department, goods exported was different from the goods purchased. The Hon'ble Supreme Court inter alia held:

"the test to be applied is whether there is an inseverable link between the local sale or purchase on export and if it is clear that the local sale or purchase between the parties inextricably linked with the export of the goods, then a claim under Section 5(3) for exemption of State Sales Tax is justified, in which case, the same goods theory, has no application."

n) The above principle has been consistently followed by Indian Courts the following cases:

- Exide Industries Ltd v. State of Maharashtra and Others, 2014 SCC On Line Bom 808
- Zip Industries Ltd. v. Commercial Tax Officer, Chennai (2018) 18 GSTL 585 (Mad.)
- KPL International Ltd. v. Commercial Tax Officer, 2019 SCC OnLine Mad 22684

o) Further, reliance is also placed on the Supreme Court judgment in the case of Thermax Private Ltd. v. Collector of Customs, 1992 (61) E.L.T. 352 (S.C.) wherein it was highlighted that when the appellants had established correlation between the cartons cleared by them for export and those actually exported by their customers and, therefore, it was not open to the Commissioner to reject the "Form-H" certificates produced by the appellants as proof of export.

p) In the case of CCE, Kanpur v. International Corrugators, 2005 (191) E.L.T. 742 (Trl.-Del), it was held that corrugated boxes supplied by the SSI unit to their customer for packing shoes (for export) were not to be treated as a clearance for home consumption and hence not to be taken into account in the determination of aggregate value of clearances under Notification No. 8/2000-C.E. (SSI exemption).

q) Therefore, based on the afore-mentioned jurisprudence, it is submitted that in the instant case as well, it is evident from the documents on record that the imported goods are used in the manufacturing of exported goods. The identity of the imported goods is not lost, but ascertainable from the same. Therefore, the very imported goods have been re-exported in the instant case and such re-export satisfies the conditions laid down by Section 74 (1) of the Customs Act. Thus, the

impugned order is liable to be set aside and Applicant's claim for duty drawback must be allowed.

r) It is evident from perusal of the Para 8.1 of the impugned order and the CENVAT certificate on record, that the Applicant had reversed the 50% CENVAT Credit initially utilized by it i.e., 18,86,747/- along with interest of Rs. 2,47,500/-. Further, it was also confirmed by the Range Officer in the CENVAT certificate that the Applicant had not availed the balance 50% CENVAT Credit in the subsequent Financial Year in respect of the imported goods.

s) It is submitted that the Applicant has not availed any CENVAT Credit of countervailing duty paid on import of goods as it was under the impression that its drawback claim was valid. Thus, in arguendo in absence of the claim of duty drawback, the amount of Countervailing duty paid on import of goods must have been available to the Applicant as credit/cash refund. Since the relevant period for the current period is Financial Year 2015-16, a refund of Rs. (Rs.40,20,996/-) 86,748/- towards 50% reversed CENVAT credit, Rs.2,47,500/- towards interest on same, Rs. 18,86,748/- towards balance 50% CENVAT Credit not claimed on capital goods) ought to be allowed to the Applicant.

6. 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 and the Revision Application.

7. Government observes that the drawback claim of the applicant was rejected on the grounds that the particulars of the export goods as mentioned on the export documents do not match with the particulars mentioned on the import documents and therefore the export goods are not capable of identification as required under Section 74 of the Customs Act, 1962.

8.1 Government observes that the relevant Section 74 of the Customs Act, 1962 reads as under:

Section 74. Drawback allowable on re-export of duty-paid goods. -

(1) When any goods capable of being easily identified which have been imported into India and upon which any duty has been paid on importation, -

(i) are entered for export and the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51; or

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ninety-eight per cent of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback, if -

(a) the goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported; and

(b) the goods are entered for export within two years from the date of payment of duty on the importation thereof

Government notes that the applicable statute under reference mandates that the goods should be identifiable to the satisfaction of the Assistant/Deputy Commissioner of Customs at the time of export. In this regard, a Circular No. 46/2011 – Customs dated 20.10.2011 issued instructions for strict compliance by the field staff. The relevant paragraph of this Circular is reproduced hereunder:

3. In the background of the recommendations/observations of the C&AG made in the said report, the following instructions are being issued for strict compliance.

3.1 Instructions relation to "identification of goods" and "determination of use" in terms of Section 74 of the Customs Act, 1962.

(a) In terms of the section 74 of the Customs Act, 1962, the export goods are to be identified to the satisfaction of the Assistant/Deputy

Commissioner of Customs. This may require examination and verification of various parameters, including but not limited to physical properties, weight, marks and numbers, test reports, if any, documentary evidences vis-à-vis import documents etc., for identification of the goods. If such export goods have been 'used after import', the same is to be determined besides establishing the identity of the goods.

8.2 In the instant matter, Government observes that the impugned OIO mentions about an examination report dated 12.06.2015 recorded on the reverse of triplicate copy of concerned Shipping Bill, which is reproduced below:

"Examined the goods under supervision of AC/Docks. The imported machine is fitted/mounted on the truck alongwith Diesel Gen Set, Assembly, Crane Boom System etc. The marks & nos. checked & tallied with imported invoice & Bill of Entry. I/L, Opened & examined all Vfd the identity of the goods is established with import documents. Vfd the goods are re-exported within time limit as per Section 74 of the Customs Act 1962. The goods are new as per embossed Mfg year on the machine. ARE-I value Rs.5,66,08,750/-."

8.3 Government observes that the concerned Bill of Entry dated 31.01.2015 has following handwritten remarks by the Customs officer:

Markings
(1) Schlatter Ind.Ltd., Switzerland,
Type AMS 100.0.4/350
SN 266431495.03 2014
(2) Rattal Top Therm
SK 3374140
Air/ Water Heat Exchanger

Government notes that the above details are reproduced in the concerned shipping bill dated 12.06.2015, and Export invoice/Packing list dated 09.04.2015. Thus using these marking details, the goods imported were

verified with the export goods by the concerned officer at the Docks, as apparent from the examination report.

8.4 Further, the Export invoice provides the detailed list of items being exported. Government observes that totally 9 items were exported, out of which 8 items were shown as indigenous and 1 item as imported. The description of imported item was given as 'Rail Welding System AMS 100' weighing 4310 kgs which matches with the details provided in the concerned import documents. Further, the applicant has submitted a letter dated 30.04.2018 from the Supplier, M/s. Schlatter Industries AG, Switzerland, confirming that they had sold 'AMS 100 Flash Butt Welding System' and that general model no. AMS 100 written on their invoice was same as AMS 100.0.4/350 mentioned on the product. Therefore, Government finds no substance in the grounds given by the Original authority that *export goods cannot be identified with import goods as a new identical product assembled with the help of imported and indigenous goods.*

8.5 Government observes that the Appellate authority had relied upon case law of Kailash Vahan Udyog Ltd. In the said case, various items such as Axels with accessories, Tyres, Tubes & Flaps, Rim, Spacer Ring, clamps Brake systems, King pin were imported and were fitted on Tipper Trailer. The Revisionary Authority had noted that '*applicant has already availed rebate of duty paid on exported goods. At the same time they have also availed Cenvat credit. Applicant is stated to him availed drawback of Customs Portion also. Since the drawback claim is not admissible to them when rebate is already claimed, they have attempted to make out a case for drawback claim under Section 74 of Customs Act. As discussed above the goods exported are Tipper Trailer and the imported inputs are used on this manufacture of Tipper Trailer. As such it is not a case of re-export of imported goods.*' However, Government finds the said case law inapplicable in the instant matter as the item imported in the instant case has not changed its essence and has remained as 'Rail

Welding System' even after assembling with indigenous goods and mounting on a truck. Further, in the instant case, the applicant has returned the cenvat availed alongwith interest and they had given an affidavit as regards non-claiming of rebate in respect of impugned import and export.

9. In view of the above discussion and findings, the Government sets aside the Order-in-Appeal No. MUM-CUSTM-SMX-80-2018-19 dated 24.07.2018 passed by the Commissioner of Customs (Appeals), Mumbai Customs Zone-I and allows the impugned Revision Application.

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 249 /2023-CUS (WZ)/ASRA/Mumbai dated 20.02.23

To,

M/s. The India Thermit Corporation Limited,
84/22, Fazalganj, Kanpur, Uttar Pradesh – 208 012.

Copy to:

1. Commissioner of Customs (Export),
   New Custom House, Ballard Estate,
   Mumbai – 400 001.

2. Ms. Rubel Bareja
   c/o V. Lakshikumaran,
   2nd Floor, B&C Wing, Cnergy,
   Appa Saheb Marathe Marg,
   Prabhadevi, Mumbai - 400 025

3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Notice Board.