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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No. 380/38/DBK/16-RA /3924 Date of Issue: 13.09.2022

ORDER NO. 255 /2022-CUS (WZ)/ASRA/MUMBAI DATED 06.09.2022 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 : Pr. Commissioner of Customs, Mundra(Kutch)

Respondent: M/s. Gokul Agro Resources Ltd.

Subject : Revision Applications filed, under Section 129DD of the Customs Act, 1962, against the Order-in-Appeal No. Mun-Custm-000-App-255-15-16 dated 30.11.2015 passed by the Commissioner of Customs(Appeals), Ahmedabad.

ORDER

This Revision Application has been filed by Pr. Commissioner of Customs, Mundra(Kutch) (hereinafter referred to as "the applicant"), against the Order-in-Appeal No. Mun-Custm-000-App-255-15-16 dated 30.11.2015 passed by the Commissioner of Customs(Appeals), Ahmedabad.

2. Brief facts of the case are that M/s. Gokul Agro Resources Ltd, Plot No. 80 & 91, Meghpar-Borichi Road, Anjar (Kutchh) (hereinafter referred to as "the respondent"), is manufacturer and exporter of refined edible oils, fatty acids and acid oils. For such manufacturing activities, they are procuring by imports or indigenously, crude edible oils, bleaching earth, activated carbon, and are importing Flexi Tanks for packing of their export products under Advance License Scheme, and also claiming duty drawback on their exports. The Respondent claimed to have filed various shipping bills for export of refined castor oil packed in flexi tanks, under export obligation against Advance License and they further claimed duty drawback against the same shipping bills. But the Deputy Commissioner (DBK), MP & SEZ, Mundra, vide letter dated 23-1-2015 observed that along with the fulfillment of export obligation, the Respondent also claimed duty drawback on their exported goods. Since the Respondent claimed general drawback entry no. 9801 earlier, sought applicable drawback rates in terms of the entry no. 1515A of the drawback schedule. They submitted that they entered into various correspondences with the Deputy Commissioner of Customs, Mundra, seeking allowance of duty drawback, by amending the entry in the shipping bills from Sl. No. 9801 to Sl. No. 1515A of the drawback schedule, in terms of the proviso to Section 149 of the Customs Act, 1962.The deputy Commissioner, Mundra vide his letter No. VIII/48-154/AMD/EXP/MP & SEZ/2015-16 dated 9.9.2015 rejected the request of the Respondent for amendment of the entry from 9801 to 1515A on the grounds that,

"The subject case is not covered under proviso of para 8(b) of Notif. No. 92/2012 dated 04.10.2012 as the advance license, used for discharge of export obligation in claimed Shipping Bills, have been issued in terms of Notif. No. 96/2009.

Further, the proviso talks about the Central Excise allocation of DBK to be given in case of Advance License issued under Notif. No. 31/1997.

Also DBK schedule does not prescribe Central Excise allocation of DBK, it only prescribes two rates on Customs + Central Excise combined under entry 'A' and Customs Portion under 'B' "

Being aggrieved by the aforesaid order the respondent filed appeal before Commissioner of Customs(Appeals), Ahmedabad who vide Order-in-Appeal No. Mun-Custm-000-App-255-15-16 dated 30.11.2015 upheld their appeal .

3. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant had filed this revision Application under Section 129 DD of the Customs Act, 1962 before the Government on the following grounds :

i. the Commissioner of Customs (Appeals) has stated in his findings at para 8.7 & 8.9 of the impugned OIA that the lower authority has not given any reason and completely ignored the Section 149 of the Customs Act, 1962, is not proper and justifiable.

ii. the Commissioner of Customs(Appeals) has decided the case without keeping in view of the provision laid down under Para 8(b) of the Notification 92/2012-Cus(NT) dated 04/10/2012. Relevant portion of the notification is reproduced hereunder :

" (8) The rates of drawback specified in the said Schedule shall not be applicable to export of a commodity or product if such commodity or product is-

a)----------

(b) manufactured or exported in discharge of export obligation against an Advance License or Advance Authorization or Duty Free Import Authorization issued under the Duty Exemption Scheme of the relevant Export and Import Policy or the Foreign Trade Policy:

Provided that where exports are made against Advance Licenses issued on or after the 1" April, 1997, in discharge of export obligations in terms of Notification No.31/97 Customs, dated the 1" April, 1997, or against Duty Free Replenishment Certificate License issued in terms of Notification No 48/2000-Customs, dated the 25 April, 2000.

or against Duty Free Replenishment Certificate License issued in terms of Notification No 46/2002-Custom, dated the 27 April, 2002, or against Duty Free Replenishment Certificate License issued in terms of Notification No.90/2004-Customs, dated the 10 September, 2004, drawback at the rate equivalent to Central Excise allocation of rate of drawback specified in the said Schedule shall be admissible subject to the conditions specified therein:"

From the above, it is explicit that Notification No.92/2012 (NT) Cus. dated 04/10/2012 disallow the drawback rate, if the export is made against Advance Authorization scheme. Further, instant case, licenses were issued under Notification No. 96/2009-Customs dated 11.09.2009 and the said notification is not incorporated in proviso of Notification No. 92/2012 Customs(NT) dated 04.10.2012. Therefore, the proviso of Notification No.92/2012 Customs(NT) dated 04.10.2012 is not applicable in present case.

iii. Further in case of all Industry rates prescribed in schedule, there is no Central Excise allocation of drawback. There are only two kind of category i.e. 'A' which is for Customs & Central Excise both if CENVAT facility has not been availed and 'B' which is Customs allocation only when CENVAT facility has been availed. Thus, if drawback of Excise portion is to be given, same has to be decided under Brand Rate by Central Excise authority. Exporter has initially opted for the same under drawback code No.9801. Brand rate of Central Excise allocation is fixed on the basis of duty component borne by the exporter on domestically procured raw material. Further exporter/CHA had approached this office stating that only FLEXI TANK has been imported by them thus Advance License benefit can be extended to Flexi Tank packaging material only and on Refined Castor Oil they should be granted All Industry Rate of drawback prescribed in the drawback schedule. This appears entirely incorrect and against the spirit of Advance License Scheme. The License benefit has been given for procurement of Flexi Tanks without payment of duty for export of Refined Castor Oil falling under CTH 15153090. Thus, the export

product is Refined Castor Oil and export obligation has been fixed on value of export product i.e. Castor Oil packaged in Flexi Bags. As there is no value addition in import product i.e. flexi tank export obligation cannot be fulfilled in term of value by merely exporting Flexi Tanks thus value of export product has to be included in export price for computation of FOB value for fulfillment Export obligation. Once the value of Refined Castor Oil i.e. Export product is included in discharging export obligation, export product cannot be given benefit of drawback at All Industry Rate as it will tantamount to double benefit.

iv. the Commissioner of Customs(Appeals) has considered the contention of the exporter that both the Notifications i.e. 31/1997 dtd. 01.04.1997 and Notification No. 96/2009 dated 11.09.2009 are pari materia and the DGFT has wrongly mentioned the notification No. 96/2009 on their license for allowing the amendment in Shipping Bills without going through the content of the Notifications and without seeking the clarification from DGFT, the issuing authority of licenses. Further, it is not out of place to mention that Notification No. 96/2009 has neither issued in suppression of Notification No. 31/1997 nor is an amendment of Notification No. 31/1997. Thus, both notifications cannot be called pari materia. If all the Notifications issued under Advance License schemes are to be treated as pari materia then there is no need of such proviso under Notification No.92/2012

v. this order of Commissioner of Customs (Appeals) has all India repercussions, as all exporters exporting the goods under License issued within Notification No. 96/2009 will claim drawback. Further, in the para 17 of the condition sheet of License issued to the exporter it is specifically written that " No drawback shall be available for any duty paid material whether imported or indigenous unless such item(s) is/are endorsed on the authorization by R.A. in terms of para 4.1.14 of the FTP"

vi. under para 8.6, the Commissioner of Customs (Appeals) held that "the only amendment is required to be made is that instead of 9801 drawback Srl. No. may be amended to 1515A, and the Shipping Bills become Drawback Shipping Bills instead of Free Shipping Bills" without examining the fact of the case and the content of amendment. The issue is not for conversion of free Shipping Bills to Drawback Shipping Bills. The Shipping Bills were filed under Advance Authorization with claimed general Drawback Entry No. 9801 and not free Shipping Bills. Further, the Commissioner (Appeals) held that the case law cited by the appellant in the case of M/s. Pratiba Pipes & Structural (P) Ltd Vs. CC(EP), Mumbai (2014(314)ELT 161 (Tri-Mumbai) at para 8.8 of the said OLA without examining the issue as the said case law also pertain to conversion of free Shipping Bills to Drawback Shipping Bills.

vii. If free Shipping Bill has to be converted into Drawback Shipping Bill then the Commissioner is only competent to permit the conversion in terms of Board's Circular No. 36/2010-Cus dated 23.09.2010. The Commissioner of Customs (Appeals) has totally ignored this fact that this is not the case of conversion. The Order in-Appeal passed by the Commissioner of Customs (Appeals) is a total absurdity and misinterpretation of the law as well as Board's Instructions.

viii. prayed to set aside the Order-in-Appeal No.MUN-CUSTM-000-APP-255-15-16 dated 30.11.2015 passed by the Commissioner of Customs (Appeals), Ahmedabad or to grant any other relief as may be deemed fit under the law and in the interest of justice.

4. Personal hearing in the case was fixed for 23.02.2022,30.03.2022 and 05.04.2022. No one appeared for the respondent while the applicant has submitted the written submissions vide letter dated 30.03.2022, mostly reiterating the submissions made earlier.

5. Government has carefully gone through the relevant case records available in case files, perused the impugned Order-in-Original, Order-in-Appeal. It is observed that the applicant is aggrieved by Order-in-Appeal No. Mun-Custm-000-App-255-15-16 dated 30.11.2015. The issue to be decided in the instant case is whether the amendment in shipping bills to the extent of changing the drawback schedule from 9801 to 1515A can be allowed to the Respondent.

6. Respondent had sought allowance of duty drawback, by amending the entry in the shipping bills from Sl. No. 9801 to Sl. No. 1515A of the drawback schedule, in terms of the proviso to Section 149 of the Customs Act, 1962. By examining the content of the amendment, Government notes that in the instant case Section 149 shall be read with notification 92 /2012 dated 04.10.2012 which deals in the drawback claim when benefits of advance license has been taken simultaneously. Government finds that the said notification disallows the drawback rate, if the export is made against Advance Authorization scheme. Relevant portion of the notification is reproduced hereunder:

" (8) The rates of drawback specified in the said Schedule shall not be applicable to export of a commodity or product if such commodity or product is-

a)----------

(b) manufactured or exported in discharge of export obligation against an Advance License or Advance Authorization or Duty-Free Import Authorization issued under the Duty Exemption Scheme of the relevant Export and Import Policy or the Foreign Trade Policy:

Provided that where exports are made against Advance Licenses issued on or after the 1" April, 1997, in discharge of export obligations in terms of Notification No.31/97 Customs, dated the 1" April, 1997, or against Duty Free Replenishment Certificate License issued in terms of Notification No 48/2000-Customs, dated the 25 April, 2000. or against Duty Free Replenishment Certificate License issued in terms of Notification No 46/2002-Custom, dated the 27 April, 2002, or against Duty Free Replenishment Certificate License issued in terms of Notification No.90/2004-Customs, dated the 10 September, 2004, drawback at the rate equivalent to Central Excise allocation of rate of drawback specified in the said Schedule shall be admissible subject to the conditions specified therein:"

From the above, it is clear that drawback rates shall not be applicable to export of a commodity or product if such commodity or product is manufactured or exported in discharge of export obligation against an Advance License or Advance Authorization. In the instant case, the licenses were issued under Notification No. 96/2009-Customs dated 11.09.2009 and the said notification is not incorporated in proviso of Notification No. 92/2012 Customs (NT) dated 04.10.2012. Needless to say, there are a plethora of judgments holding that exemption notifications are to be construed strictly. Therefore, in absence of mentioning of notification 96/2009, the proviso of Notification No.92/2012 Customs (NT) dated 04.10.2012 is not applicable in the present case.

7. With respect to the Respondent's contention that the Notification No. 31/1997 and the Notification 96/2009 under which they have taken the advance license are Pari Materia, Government notes that both the notifications were issued separately and independently of each other and cannot be termed Pari Materia only by virtue of the fact that both notifications were issued under advance license scheme. The respondent has unnecessarily mixed two distinctly different notifications to further their cause. Condition 8(b) of the notification 92/2012-customs is unambiguous and specific. It specifically mentions notification 31/1997 for allowing benefit of drawback equivalent to central excise portion, whereas it excludes Notification 96/2009.

8. In light of the detailed discussions hereinbefore, the Government has come to the conclusion that since the proviso of Notification No.92/2012 Customs (NT) dated 04.10.2012 is not applicable in present case, the amendment in shipping bills to the extent of changing the drawback schedule from 9801 to 1515A cannot be allowed to the Respondent.

9. In view of above, Government sets aside the Order-in-Appeal No. Mun-Custm-000-App-255-15-16 dated 30.11.2015 passed by the Commissioner of Customs (Appeals), Ahmedabad.

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

ORDER No. 255/2022-CUS (WZ)/ASRA/Mumbai DATED 06.09.2022

To,

M/s Gokul Agro Resources Ltd.,
B-402, Shapath Hexa, Near Ganesh Meridian,
Opp. Gujrat High Court, Sola,
S.G. Highway, Ahemdabad -380060.

Copy to:

1. The Pr. Commissioner of Customs, Customs House, Mundra-370401.
2. The Commissioner of Customs (Appeals), 7th Floor, Mridul Tower, B/H Times of India, Ashram road, Ahmedabad-380009.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file.