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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. 371/48/DBK/16-RA/6069

Date of Issue: 27.10.2022

ORDER NO. 298 /2022-CUS (WZ)/ASRA/MUMBAI DATED 20.10.2022
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. Shree Balaji Exim India

Respondent: Commissioner of Customs, Custom House, Mundra

Subject : Revision Applications filed, under Section 129DD of the Customs
Act, 1962, against the Order-in-Appeal No. Mun-Custm-000-
App-004-16-17 dated 12.04.2016 passed by the Commissioner
of Customs(Appeals), Ahmedabad.

ORDER

This Revision Application has been filed by M/s. Shree Balaji Exim India, 2584/1, 1st Floor, Industrial Area, A Extn., Ludhiana(Punjab) (hereinafter referred to as "the applicant"), against the Order-in-Appeal No. Mun-Custm-000-App-004-16-17 dated 12.04.2016 passed by the Commissioner of Customs(Appeals), Ahmedabad.

2. Brief facts of the case are that the applicant had filed two shipping bills through their CHA for export of goods declared as "blended kids full sleeves T-shirt" under CTH 61099090 claiming drawback under drawback schedule 610902A from Mundra Port. Investigation initiated by the officers of SIIB, Custom House, Mundra revealed that the applicant overvalued the said consignment in order to avail higher drawback. Consignment was placed under seizure under reasonable belief that the goods were overvalued, vide panchnama dated 15.12.2014. Statements of the authorized representative of the applicant were also recorded. The seized consignment was released against bond of Rs.2,35,00,000/- on request of the applicant. As the shipment did not take place within 15 days of filing the shipping bills the said shipping bills got purged by the system and two new shipping bills were filed in place of previous shipping bills. Due to the change in exchange rates, there was change in FOB value as well as amount of DBK claimed. The applicant filed two new shipping bills for export of the goods declaring the FOB as Rs.182.12 per piece and claimed drawback under DBK tariff item No.610902A but the correct value was lower than the declared FOB value. From the cost certificate produced by the applicant and the statement of the authorized representative of the applicant the per piece cost of the said goods comes to Rs.120.37 and after adding notional profit as claimed by the applicant the same comes to Rs.150.46. This certificate was issued after taking into consideration various charges incurred during the production of the said goods. The value mentioned as 'declared' in the shipping bills was liable to be rejected and it did not reflect the correct value in terms of Section 14(1) of the Customs Act, 1962. Show cause notice No.S/43-18/SIIB/2014-

15 dated 28.04.2015 was issued to the applicant which was adjudicated vide impugned order vide which the adjudicating authority rejected the FOB value of the export goods covered by the two new shipping bills, declared by the applicant totally amounting to Rs.2,39,66,992/- and re-determined the same to Rs.1,98,22,192/-; rejected the duty drawback amounting from Rs.22,76,864/- and re determined the drawback amount to Rs.18,83,108/-; ordered that at the time of disbursal of the drawback claim necessary action may be taken; ordered for confiscation of seized goods of 132000 Pcs and since the same have already been released provisionally under Bond, Imposed redemption fine of Rs.4,00,000/-; imposed penalty of Rs.2,00,000/- on the appellant under Section 114(II) of the Customs Act, 1962 and did not impose penalty under Section 114AA of the Customs Act, 1962; ordered to enforce the provisions of Bond of Rs.2,35,00,000/-. Being aggrieved by the aforesaid order-in-original the applicant filed appeal before the Commissioner of Customs(Appeals), Ahmedabad., who vide the Order-in-Appeal No. Mun-Custm-000-App-004-16-17 dated 12.04.2016 partially allowed their appeal by reducing the redemption fine and penalty.

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 Impugned order was passed without considering the nature of the export goods, prevailing practice of exports and without taking into consideration of defense reply filed by them. Hence the same requires to be set aside to the extent it relates to imposing any amount of redemption fine or penalty, besides upholding rejection of declared FOB value with drawback restriction as ordered by the original authority, in the interest of natural justice on the facts, evidences and grounds described as follows.
- ii. The goods were exported against a written order issued by the overseas buyer wherein the mutually agreed per unit price was quoted as USD 2.95 as against the unit rate of USD 2.90 declared the applicant while

- filing shipping bills. The same has not been considered by the adjudicating authority.
- iii. Para 10 of the subject SCN clearly states that Bank Realization Certificate in respect of two previous shipping bills Nos. 5870769 and 5870773 both dated 04.11.2014 for identical exports made by the applicants were acceptable. Adjudicating authority and the first appellate authority have not applied their mind to this fact and have not stated the reasons for not accepting the BRCs for this particular consignment. Thus, both the impugned orders have been passed in a highly arbitrary manner.
 - iv. The value declared by them for export goods was realized and necessary BRC was also submitted by them. When foreign exchange equal to FOB value has been realized as per BRC against export invoices, department cannot dispute such value unless irrefutable evidences in the form of financial flow back etc. are brought on records. No reason for not accepting the BRCS for the consignment has been stated.
 - v. The adjudicating authority has not followed the guidelines fixed by the Board vide Circular No.69/1997-Cus dated 08.12.1997 for rejecting declared FOB value. As per the said Circular FOB value cannot be rejected if it is within 150% of the manufacturer's price. The FOB re-determined by the adjudicating authority is Rs.150.46 per unit which is well within 150% limit prescribed by the Board. The C.A. certificate submitted by them has been stretched with hypothetically to cook up a case of overvaluation.
 - vi. Both the authorities have not appreciated the normal course of international trade wherein the exporter is bound to take adequate precaution against the fluctuating currency rates by loading additional risk factors.
 - vii. Both the original authority and the first appellate authority have not considered this fact while fixing the gross profit at 25%, which is a general rate followed by the applicants in normal cases. Even otherwise, it is not understood as to how the authorities could any way consider

- the profit margin of 25% as sacrosanct for all exports, irrespective of the nature goods and transaction involved.
- viii. As per Board's Circular No.37/2007-Cus dated 09.10.2007 bonafide exporters should not be made to suffer on the ground of valuation.
- ix. The department could not bring out an iota of evidence indicating financial flow-back from overseas buyer to the appellant. It is established principle of law that merely leveling allegations of undervaluation or overvaluation without bringing out any financial flow-back to substantiate the point, would be bad in law and cannot stand test of law. They relied on various judgments in this regard.
- x. The alleged overvaluation in the case was only to the tune of a mere 17% of the declared value, involving a meager sum of Rs.3.50 Lakhs towards duty drawback as against an export involving transactions in foreign currency with a declared FOB value of Rs.2.35 Crores.
- xi. In the case of Synfab Sales 2015 (318) ELT 38 (SC), Hon'ble Supreme Court has upheld an observation by the Tribunal that though there was an allegation of undervaluation, yet there was no whisper of any evidence or pro-back additional consideration from the buyer to the manufacturer either directly or through any channel. Further, in the case of Advance Exports - 2007 (218) ELT 39 (Tri.Ahd) it has been unambiguously stated held that FOB value cannot be rejected if it is within 150% of the manufacturer's price; that foreign exchange equal to FOB value had been realized as per Bank Realisation Certificate against export invoices; that the declared value of export goods cannot be rejected under Section 114 of the Customs Act, 1962, In the absence of contemporary export of identical goods at lower price; and that the burden of establishing the correct value of goods lies upon the Revenue.
- xii. the critical point is that in cases of allegations of undervaluation or overvaluation, the onus is on the department to prove with sufficient evidence relating to comparable goods Imported/exported in comparable quantity from/to the same country of origin/destination and at comparable time. This stand has also been taken in the case of

Kailashchandra Jain - 1996 (86) ELT 529 (Tri.Del) as well as in case of Margra Industries Ltd. - 2004(171) E.LT. 334 (Tri.-Del.). Further, Hon'ble Tribunal in the case of Spices Trading Corporation - 1998 (104) ELT 665 held that transaction value is to be adopted unless Department can produce objective reasons and strong evidence to show that the declared value was not bona fide. Thus the burden to discharge the obligation that declared value was not bona fide rests solely with Department. No corroborative evidences or information has been brought out by the adjudicating authority or the first appellate authority to buttress their act of rejection of transaction value.

xiii. That the applicants also place reliance upon the following decisions by Hon'ble Tribunal, the ratio of which are squarely applicable In the present case:

- a. Satish Gupta-2006 (202) ELT 438 (Tri.Del): No overvaluation in the absence of evidences of monetary flow back of export proceeds from the exporter to appellant.
- b. Frost International Ltd. - 2006 (206) ELT 451 (Tri.Mum): No mis-declaration of FOB price when the Revenue failed to show that in the course of International trade, such or like goods at or about the proposed value: Even if department's claim of PMV as correct, drawback cannot be rejected for the reason that it is well within 150% of PMV in terms of Board's Circular No. 69/97-Cus., dated 8-12-1997: Material on record does not establish any artificial inflation/manipulation of FOB value by exporter; PMV correctly declared by exporters and appellants entitled to drawback as claimed.
- c. Tex Age-2008 (221) ELT 395 (Tri.Mum): No overvaluation can be alleged when the actual export and realization of remittance not disputed.
- d. Ajay Apparels-2006 (204) ELT 131 (Tri.Kol): FOB value found to be correct and exporter receiving bank realization of same. In such circumstances. there was no question of recovery of

sanctioned drawback especially there was no legal provision therefor.

- e. Amit Modi-2005 (286) ELT 237 (Tri.Dell: Contemporaneous export value cannot be relied if quality of export goods different.
 - f. Texcomash Exports - 2000 (117) ELT 396 (Tri): Department's charge of overvaluation cannot be substantiated having not examined the credentials of the witness.
- xiv. CA certificate itself is not a conclusive evidence.
- xv. In view of above, Applicant has requested to set aside the impugned Order in Appeal.

4. Respondent vide their letter dated 30.03.2022 made their following submissions:

- i. The Exporter has filed two shipping bills both dated 10.12.2014 for export of "blended kids full sleeves T-shirt" under CTH61099090 declaring the FOB per PC at Rs. Rs.178.35 (later Rs.182.12 on change of exchange rate) and claimed DBK accordingly. During investigation, the goods were found to be overvalued as per the analysis of Cost Certificate dated 5.1.2015 issued by the Chartered Accountant which was submitted by the exporter themselves, the cost sale comes to Rs.120.37 per unit after taking into consideration of cost of raw material, manufacturing cost, financial expenses, selling overhead etc. Further, Shri Subhash Duggal, authorized representative of the Exporter in his statement agreed that the profit margin for this particular product is at 25%, Therefore, adding the said profit margin of Rs.30.09 (being 25% of cost of Rs.120.37) into the cost of the product the same comes to Rs.150.46. From the above, it appears that the declared value of the export goods in the shipping bill was substantially higher than the actual value of the said goods.
- ii. Now, as per provisions under Section 14 (1) (iii) of the Customs Act 1962 which provides for determination of value under Customs valuation (Determination of Value of Export Goods) Rules 2007, in cases where

there are reasons to doubt the truth or accuracy of such value declared. Since in the present case the value declared by the exporter is not the true correct value, the same is to be determined under the provisions of Customs Valuation (Determination of Value of Export Goods) Rules 2007. Accordingly, applicability of Rule 4 to 6 of the said Valuation Rules, 2007 is required to be considered sequentially to arrive at the correct and fair FOB value of the subject consignments of Blended kids full sleeves T-shirts, attempted to be exported illicitly.

- iii. On Applicability of Rule 4 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007, the same provides for determination of export value by comparison. Since absence of any comparable Export data of similar export consignments during the relevant period the provisions of Rule 4 of the said rules could not be invoked in the present case.
- iv. The Rule 5 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 provides for determination of value by the method of computation i.e. by addition of the cost of production, manufacturing or processing, charges, if any, for the design or brand and an amount towards profit. In the present issue as per the cost data submitted by the Chartered Accountant of exporter the total cost of sale for single unit of blended kids full sleeves T-shirt comes to Rs. 120.37/- and after addition of profit of 25% as admitted by the exporter himself, the same comes to Rs. 150.46/- per piece. Therefore, as per provisions made under Rule 5 of the said Valuation Rules, the correct price worked out to Rs.150.46 per pieces only and total value of the cargo is to be determined on the basis of Rs.150.46 per piece only.
- v. From the above, it appears that the Exporter had mis-declared the value of cargo by taking the price at Rs.178.35 (later Rs.182.12 on change of exchange rate), whereas the actual value is required to be worked out by taking Rs.150.46 per piece only. Therefore, the value of the goods is liable for rejection and re-determination under rule 5 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

vi. With regard to confiscation of the goods, the provisions under Section 113(i) of the Customs Act, 1962 provides for confiscation of the goods attempted to be improperly exported if the same entered for exportation which do not correspond in respect of value of in any material particular with entry made under the said Act. In present case, it is proved that the exporter had mis-declared the value of "blended kids full sleeves T-shirt" on the higher side, with an intention to avail higher amount of drawback, which was wrong on their part and not in accordance with the law. Accordingly, I hold that the impugned goods are liable to confiscation under Section 113(1) of the Customs Act, 1962 and exporter is liable for penalty under section 114(iii) and 114AA of the Customs Act,1962. In view of above the respondent requested to set aside the order in Appeal.

4. Personal hearing in this case was scheduled on 14.10.2021, 21.10.2021, 23.03.2022, 30.03.2022. However, neither the applicant nor respondent appeared for the personal hearing on the appointed dates, or made any correspondence seeking adjournment of hearings despite having been afforded the opportunity on more than three different occasions and therefore, Government proceeds to decide these cases on merits on the basis of available records.

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-004-16-17 dated 12.04.2016 wherein their appeal was partially allowed by reducing the redemption fine and penalty. Appellate Authority rejected the excess drawback amount on ground of overvaluation and the Revision application is filed against the same.

6. Government notes that the applicant themselves produced the cost certificate issued by the Chartered Accountant which clearly indicates the cost of sales as Rs. 120.37 per unit goods. Therefore, there is no reason left

to question the credibility of the certificate when it has been submitted by the applicant themselves. Further, as observed at Para 5(iii) of the OIO that the Shri Subhash Duggal, authorised representative of the Exporter in his statement had agreed with the per piece cost for Blended Kids Full Sleeves T-Shirts at Rs. 120.37/-. Government finds that the Department is right in considering this cost as the manufacturing cost. The profit margin of 25% is further added in this cost by the Department to arrive at the FOB value of Rs 150.46/- which is well below the FOB value as declared by the Applicant in their drawback claim. Applicant argued that this profit margin of 25% is a general rate followed by them in normal cases and it is not proper to fix the profit at 25% irrespective of nature of goods and the transaction involved. Government finds that Department fixed this 25% profit margin relying on the statement given by the representative of the applicant themselves which is recorded in the OIO at Para 5(v). Therefore, Government notes that this profit margin has been correctly considered as per the statements given by themselves and thus FOB value of Rs. 150.46/- has been correctly determined by the department.

7. Applicant argued that lower authorities did not consider the fact that the foreign remittance equal to the FOB value has been realised as per BRC and therefore Department cannot allege overvaluation in absence of any evidence that proves the financial flow-back from the overseas buyer. Government notes that the cost certificate which then corroborated by their statements recorded during the course of investigation are sufficient evidence to prove the overvaluation. Therefore, this argument of the Applicant is not sustainable. Further, Applicant has placed reliance on various case laws. Government finds that the case laws as relied by the Applicant are not relevant as the facts and circumstances of the present case are different than that of the case relied. In the present case the cost certificate produced by the applicant themselves and their statements are sufficient enough to support the case.

8. With regards to the confiscation and penalty, Government finds that

appellate authority has discussed this issue in detail before reducing the quantum of redemption fine and penalty and therefore warrants no interference.

9. In view of the above discussion and findings, the Government does not find any reason to interfere with or modify the Order-in-Appeal No. Mun-Custm-000-App-004-16-17 dated 12.04.2016 passed by the Commissioner of Customs(Appeals), Ahmedabad and upholds the same.

10. Revision application is disposed off in above terms.


(SHRAWAN KUMAR)

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

ORDER No. 298/2022-CUS (WZ)/ASRA/Mumbai DATED 20.10.2022

To,

1. M/s. Shree Balaji Exim India, 2584/1, Ist Floor, Industrial Area, A Extn., Ludhiana(Punjab)-141003.
2. The Pr. Commissioner of Customs, 5B, Port User Building, Adani Port, Mundra Kutch, Gujrat -370421.

Copy to:

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