



REGISTERED
SPEED POST

F.No. 380/62/DBK/14-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

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

Date of Issue.....28/3/16..

ORDER NO. 32/2016-CUS DATED 22.03.2016 OF THE GOVERNMENT OF INDIA,
PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF
INDIA, UNDER SECTION 129DD OF THE CUSTOM ACT, 1962.

Subject : Revision Application filed, under section 129 DD of the
Customs Act 1962 against the Order-in-Appeal No.57/2014
dated 27-3-2014 passed by the Commissioner of Customs &
Central Excise (Appeals), Trichy.

Applicant : Commissioner of Customs, Tuticorin-628004.

Respondent : M/s Sudhama Hosieries, New Tirupur.

ORDER

This Revision Application is filed by the applicant Commissioner of Customs, Tuticorin against the Order-in-Appeal No.57/2014 dated 27.03.2014 passed by the Commissioner of Customs & Central Excise (Appeals), Trichy with respect to Order-in-Original No. 446/2013 dated 22.10.2013 passed by Assistant Commissioner of Customs, Customs House, Tuticorin. M/s Sudhama Hosieries, New Tirupur is the respondent in this case.

2. Brief facts of the case are that the respondent exported their goods valued at Rs.54,83,526/- vide 12 Shipping Bills during July, 2010 under the duty drawback scheme at all industry rates under the provisions of Section 75 of the Customs Act, 1962. The respondent was sanctioned drawback and the same was paid to them. However, since the respondent had failed to produce the proof of realization of export proceeds, Show Cause Notice dated 21.03.2012 was issued to them, inter-alia, demanding the ineligible drawback along with interest thereon. After following the due process of law, the lower authority, vide his Order-in-Original No.457/2012 dated 15.05.2012 confirmed the demand amounting to Rs.5,03,240/- (equivalent to the drawback sanctioned to them) along with the applicable interest thereon under relevant provisions of the Customs Act, 1962. Penalty amounting to Rs.50,000/- was also imposed under the provisions of Section 117 of the Customs Act, 1962. In compliance, the respondent repaid the said ineligible drawback along with interest and the penalty amount on 31.01.2013. Meanwhile they received the requisite certificate evidencing realization of export proceeds. Since the certificates demonstrated that the export realization had been received within a period of one year from the relevant date, they filed a refund claim dated 09.02.2013 and the same was rejected by the lower authority as not in proper format. Again the respondent filed the refund claim on 13.05.2013 enclosing BRCs for the refund of said repaid drawback amount in terms of Rule 16 (4) of the Customs, Central Excise and Service Tax Drawback Rules 1995. However, the lower authority rejected the refund claim vide impugned Order-in-Original on the grounds that the respondent had not filed an appeal against the said Order and that the same had attained finality.

3. Being aggrieved by the said Order-in-Original, the respondent filed appeal before Commissioner (Appeals) who set aside the impugned Order-in-Original and allowed the respondent's appeal.

4. Being aggrieved by the impugned Order-in-Appeal, the applicant department has filed this revision application under Section 129 DD of Customs Act, 1962 before Central Government on the following grounds:

4.1 Commissioner (Appeals), while passing the order, had failed to consider the fact that the provision to rule 16A (4) has been amended vide Notification No.49/2010-Cus.(N.T.) dt. 17.06.2010 wherein it was amended that the evidence of sale proceeds must be produced within a period of three months from the date of realization of sale

proceeds. Further such period of three months could be extended by period of nine months by making an application to the concerned Commissioner of Customs and Central Excise.

4.2 Having such relaxations in the conditions of Rule 16(4) of Customs, Central Excise Duties and Service Tax Drawback Rules 1995, the respondent had failed to produce the evidence of sale proceeds within three months from the date of realization, even though such realization was done within the period of one year as stipulated by law.

4.3 Hence, in the circumstances discussed above, the said Order-in-Appeal No. 57/2014 (TIN), dated 27.03.2014, passed by the Commissioner (Appeals), Trichy, setting aside the Order-in-Original No.446/2013, dated 22.10.2013, passed by the Assistant Commissioner of Customs (Refund), Custom House, Tuticorin, is not proper and legal.

5. A Show Cause Notice was issued to the respondent under Section 129DD Customs Act 1962 to file their counter reply. They vide letter dated 10.10.2014 submitted the parawise cross objection on the ground of revision application. They have mainly submitted that:

5.1 The department did not file any cross objections before the Commissioner to the grounds of appeal filed by the respondent viz. respondent in this revision petition. The para F of the ground of Appeal cited the provision as it stood prior to the amendment of Rule 16(A)(4) of the Customs, Central Excise Duties and Service Tax Drawback Rules 1995. This ground was not cited by the Adjudicating Authority in Order-in-Original. This ground was also not taken before the Commissioner (Appeals) by filing cross objection. The amendment was not in the knowledge of the respondent. The copy of the appeal was sent to the department and also the notice of personal hearing was marked to the department. The department did not point out the amendment made to the said Rule before the Commissioner (Appeals) and did not file any cross objection or filed any submission during the personal hearing. No representative of the department attended the personal hearing. Now it is not open to the department to take this ground before the Revisionary Authority.

5.2 The respondent submits that in a similar case of confirmation of demand of drawback due to non-production of Bank Realization Certificates(BRCs), the department accepted the Order-in-Appeal and allowed the respondent to produce the BRCs before the Assistant Commissioner. In this case, only because the respondent had paid back the drawback sanctioned when it was demanded, he should not be penalized citing procedural infractions. The department cannot take different stand in this case and refuse to allow production of BRC's before the lower authority for reconsideration of the confirmed demand, only due to the reason that the drawback was paid by the sincere and law obedient exporter. For his sincerity the exporter is being punished. If the drawback had not been paid by the exporter then the department would have

allowed production of BRCs and dropped the demand of drawback and the liability of the exporter to pay back the drawback would have been cleared.

5.3 In the case of M/s Ramkumar Fashions, Tirupur vs the Assistant Commissioner of Customs, St. John ICD, Tuticorin, (Order-in-Appeal No.21/2012 dated 27.06.2012 against Order-in-Original No.183/2012 dated 21.02.2012 where the BRCs had been furnished belatedly after the Order in Original passed by the Assistant Commissioner, Customs House, Tuticorin confirming the demand for the recovery of drawback sanctioned, the Commissioner (Appeals), Trichy on appeal by the exporter, ordered the appellant to produce the BRCs to the lower authorities for verification and to allow the Drawback as per law. In the cited case department did not file Revision petition against the Order-in-Appeal. The department cannot take different stand in the present case and refuse to pay the refund of recovered drawback accepting the BRCs produced.

5.4 While passing the Order-in-Original, the Assistant Commissioner failed to notice that the department did not respond to the letter of the noticee dated 23.05.2012 submitting the BRCs and did not inform the noticee that it was not considered. If it was done, the noticee would have gone on appeal against the Order-in-Original. Since the noticee had not received any reply for their letter dated 23.05.2012 they thought the issue of pending shipping bills had been settled. The noticee was under the impression that the issue was merely technical as the foreign exchange was realized within the permissible time and the BRCs were produced. Therefore the exporter paid back the drawback received and claimed refund by producing the BRCs and based on the Order-in-Appeal.

5.5 The Assistant Commissioner did not consider the submission of the respondent that where the sale proceeds are realized by the exporter after the amount of drawback has been recovered from him under sub-rule (2) or sub-rule (3) to Rule 16 of Drawback Rules, and the exporter produces evidence about such realization within one year from the date of such recovery of the amount of drawback, the amount of drawback so recovered shall be repaid by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to the claimant so recovered shall be repaid by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to the claimant.

5.6 The Assistant Commissioner did not discuss the applicability of Rule 16(A)(4) of the Customs, Central Excise Duties and Service Tax Drawback Rules 1995 under which the refund claim was filed. He also did not point out any amendment to the said Rule. The Assistant Commissioner did not hold that due to the amendment of Rule 16(A)(4) by Notification No.49/2010-Cus (NT) dated 17.06.2010, the refund claim is being rejected. When the refund claim was not rejected on this ground of amendment, and when the department did not take this ground before the appellate authority neither by filing cross objection nor by representing during personal hearing, the department is precluded in taking this ground before the revisionary authority and it is not legally sustainable.

5.7 The notice relied on the following judgements:

- M/s Sanket Industries Ltd, issued on Order No.198/2011-Cx dated 24.2.11
- Suksha International v. UOI, 1989 (39) E.L.T.503 (S.C.),
- Union of India v. A. V. Narasimhalu, 1983 (13) E.L.T.1534 (S.C.),
- Mangalore Chemicals and Fertilizers Lid. vs. Dy. Commissioner, 1991 (55) E.L.T.431 (S.C.).

6. Personal hearing was scheduled in this case on 13.04.2015, 07.05.2015 and 07.03.2016. Hearing held on 07.05.2015 was attended by Shri Krishnakumar R.S., Advocate on behalf of the respondent wherein it was requested to uphold impugned Order-in-Appeal. The applicant department vide their letter dated 21.04.2015 and 03.03.2016 requested to decide the case on merit.

7. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

8. Government notes that the respondents were initially sanctioned drawback claims. Subsequently, the original authority vide impugned Order-in-Original confirmed the demand of already sanctioned drawback on the ground that the respondent failed to submit proof of export realization. The original authority also imposed penalty of Rs.50,000/- under Section 117 of the Customs Act 1962. Subsequently, the respondent filed a refund claim in terms of Rule 16(4) of the Drawback Rules, 1995 on the ground that they have produced proof of export realization, which was made within stipulated time limit. The original authority rejected the refund claim on the ground that the respondent had not filed an appeal against the impugned Order-in-Original and as such, the impugned Order-in-Original attained finality. Commissioner (Appeals) set aside impugned Order-in-Original and decided the case in favour of the respondents. Now, the applicant department has filed this Revision Application on grounds mentioned in para (4).

9. Government observes that the applicant department is contesting that Rule 16A(4) has been amended vide Notification No.49/2010-Cus (NT) dated 17.06.2010, wherein it has been stipulated that the evidence of sale proceeds must be produced within a period of three months from the date of realization of sale proceeds and that further such period of three months could be extended by period of nine months by making an application to concerned Commissioner of Customs and Central Excise; that the respondent failed to submit proof of export realization within 3 months from date of realization and as such, liable to pay back amount of already sanctioned drawback. The Commissioner (Appeals) has allowed the refund of drawback recovered from the respondent under the provisions of erstwhile Rule 16A(4) *ibid*. The respondents have given various contentions against ground of Revision Application. The main issue for decision is whether refund claim under Rule 16A(4) is admissible or not. In view of rival contentions, Government proceeds to decide the case in light of statutory provisions relating to drawback.

9.1 Government notes that Rules 16(A)(4) has been amended vide Notification No.49/2010-Cus (NT) dated 17.06.2010 and the said rule reads as under after amendment:

"(iv) In rule 16A, in sub rule (4), -

(a) for the words "within one year from the date of such recovery of the amount of drawback", the words "within a period of three months from the date of realisation of sale proceeds" shall be substituted;

(b) after the words "to the claimant", the words "provided the sale proceeds have been realised within the period permitted by the Reserve Bank of India" shall be inserted;

(c) the following proviso shall be inserted, namely:-

"Provided that-

(i) the Commissioner of Customs or Commissioner of Customs and Central Excise, as the case may be, may extend the aforesaid period of three months by a period of nine months provided the sale proceeds have been realised within the period permitted by the Reserve Bank of India;

(ii) an application fee equivalent to 1% of the FOB value of exports or Rs. 1000/- whichever is less, shall be payable for applying for grant of extension by the Commissioner of Customs or Commissioner of Customs and Central Excise, as the case may be."

A plain reading of above provision reveals that the applicability of three months or further nine months (in case of extension by the Commissioner), for submission of proof of export realization from the date of such realization as the case may be, is only under circumstances when the sale proceeds are realized by the exporter after the amount of drawback is recovered from him. However, in impugned case, the facts are different. The exports proceeds are said to be received in the year 2010, while the demand was confirmed vide impugned Order-in-Original dated 14.05.2012 and the amount confirmed paid by the respondent on 31.01.2013. As such, this is not a case where the realizations of export proceeds were made after demand for already sanctioned drawback was confirmed. The applicant has claimed to have realized the export proceeds well before recovery of drawback. As such, Rule 16A(4) will not apply to impugned case.

10. Government further notes that the Commissioner (Appeals) held that the exporter is eligible for repayment of drawback recovered from them in terms of Rule 16A(4), if he is able to recover the proceeds of export within one year of the recovery of the drawback amount and produces evidence of realization of foreign exchange. In this regard, as discussed above, Rule 16A(4) is applicable only in a specific scenario i.e. where the re-payment of drawback amount by the recipient has been made but the sale proceeds are realized subsequently. Further, the evidence of such realization has to be produced within three months (or further six months in case of extension by Commissioner) from the date of such realization. In the present case, the foreign

remittance is claimed to have realized by the respondent first and the amount was repaid by them later. Moreover, no proof of realization of export proceeds was furnished by them within the stipulated period of three months. The enabling statutory provision viz. Rule 16A (4) for refund of drawback recovered will undisputedly be subject to provisions of the said Rule. Therefore, the Commissioner (Appeals) has clearly erred in holding the refund as admissible once the that Bank Realization certificates were produced by the exporter within a period of one year from the date of recovery of drawback.

11. Further, Government finds merit in the observation of the original authority that the Order No. 457/2012 dated 15.05.2012 for recovery of drawback amount had become final as it had been accepted by the applicant who did not challenge it any appellate forum and paid the confirmed dues. Therefore, Government holds that question of any refund of duty paid pursuant to such an order which has attained finality does not arise.

12. Government also notes that the basic issue in the whole matter from the beginning is whether refund under the said rule is admissible or not. Then there is no merit in the plea of respondent that as the original order did not discuss applicability of Rule 16A (4) under which refund claim was filed, the department is precluded in taking this ground before the revisionary authority.

13. In view of the above discussions and facts, Government holds that no refund is admissible under Rule 16A(4) of the Customs, Central Excise and Service Tax Drawback Rules, 1995 and the impugned Order-in-Appeal is thus set aside as not being legal and proper.

14. Revision Application is allowed as above.

15. So, ordered.




(RIMJHIM PRASAD)

Joint Secretary to the Government of India

Commissioner of Customs
Custom House, New Harbour Estate
Tuticorin-628004.

Attested.



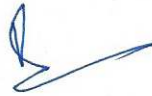
BHARGAT PRASAD
OSD (R.A. WING)

ORDER NO. 32/2016-CUS DATED 22.03.2016

Copy to:

1. M/s Sudhama Hosieries, Shet No.23, Netaji Apparel Park, Ettiveerampalayam Post, New Tirupur-641666
2. Commissioner of Customs & Central Excise (Appeals), No.1, Williams Road, Cantonment, Tiruchirapally-620001
3. The Assistant Commissioner of Customs, Office of the Commissioner of Customs, Custom House, New Harbour Estate, Tuticori-628004
4. Guard File.
5. PA to JS (RA)
6. Spare Copy

ATTESTED



(B.P. Sharma)
OSD (Revision Application)

BHAGWAT P. SHARMA
OSD (R.A. WING)