

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. 373/10/DBK/15-RA / 7409 Date of Issue: 29/12/2021

ORDER NO. 327/2021-CUS (SZ) /ASRA/MUMBAI DATED 28-12-2021
OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO
THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL
EXCISE ACT, 1944.

Applicant : M/s Paark Creation.

Respondent : Commissioner of Central Excise & Customs (Appeals),
Coimbatore Customs.

Subject : Revision Applications filed under Section 129DD of
Customs Act, 1962 against Order in Appeal No. CMB-
CEX-000-APP-225-14 dated 20.11.2014 passed by
Commissioner of Customs, Central Excise, & Service
Tax, (Appeals) Coimbatore.

ORDER

This Revision Application has been filed by M/s Paark Creation, situated at SF. No, 278/1, Ramasamy Layout, 60 Feet Road, Perichipalayam South, Tirupur-641605 (hereinafter referred to as the "applicant") against Order-in-Appeal No. CMB-CEX-000-APP-225-14 dated 20.11.2014 passed by Commissioner of Customs, Central Excise, & Service Tax, (Appeals) Coimbatore.

2. The brief facts of the case are that the applicant was granted drawback amount of Rs. 4,10,652/- on the goods exported through ICD, Tirupur. As the applicant failed to produce evidence for realization of export proceeds in respect of the said export goods within the period allowed as per the provisions of Section 75 of Customs Act, 1962 read with the provisions of Foreign Exchange Management Act (FEMA), 1999 including any extension of such period granted by the Reserve Bank of India. Therefore, Show Cause Notice vide C.No. VIII/23/45/2008-ICD-TPR dated 07-10-2009 was issued to the applicant proposing to recover an amount of Rs 4,10,562/- (being the drawback paid to them) under the provisions of Rule 16A of the Customs, Central Excise, & Service Tax Drawback Rules, 1995, alongwith the interest under Section 2 of section 75A of the Customs Act, 1962. The Adjudicating authority vide OIO No.722/2014-AC Customs (BRC) dated 13.03.2014 ordered recovery of amount of Rs.4,10,562/- along with the interest.

3. Being aggrieved with the said Order in Original, the applicant filed appeal before Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore on the grounds that they had filed the BRCs to the department through their CHA who had facilitated the export within the stipulated time limit of one year and that they had neither received the SCN nor the Personal hearing memo. Commissioner Appeal vide his OIA No. CMB-CEX-000-APP-225-2014 dated 20.11.2014 rejected the applicant's appeal due to non-compliance of mandatory provisions of the Section 129E of the Customs Act, 1962.

4. Being aggrieved with the impugned Order in Appeal, the applicant filed the instant Revision Applications mainly on the following common grounds:-

4.01 The applicant submitted that the Appellate Authority rejected the appeal due to noncompliance of the mandatory provisions of Section 129E of Customs Act, 1962 without going into the merits of the case

4.02 The applicant submitted that the new provisions under Section 129E of Customs Act, 1962, inserted vide Finance Bill 2014 and effective from 06.08.2014, requires to pre-deposit of 7.5% of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute in pursuance of a decision or an order passed by an officer of Central Excise Lower in rank than the Commissioner of Central Excise, for entertaining the appeal by the Commissioner (Appeals). The definition of duty as per the provisions of Section 2(15) Customs Act, 1962 is as under:

"Duty" means a duty of Customs leviable under this Act

Therefore the above provisions would be applicable only for the appeals filed where the duty leviable under Customs Act, 1962 is in dispute. It is also submitted that the above provisions cannot be made applicable to the cases of drawback on which appeals are filed as the "Draw Back" is not the duty leviable under Customs Act, 1962. The Appellate Authority has concluded that the demanded drawback is also duty without any legal backing. It is amply clear that the pre-deposit is required to be paid in case of duty or penalty are in dispute.

4.03 The issue dealt with is the repayment of drawback paid to the appellants for the export of goods on unsustainable grounds. When the statute has specifically mentioned that the duty means a duty of Customs leviable under the Customs Act, 1962, the Appellate Authority has covered the drawback which is not leviable or demanded under Customs Act, 1962.

4.04 The applicant further submitted that the appellants had also requested the Commissioner to proceed with appeals without insisting the pre-deposit as the same is not mandatory in the case of appellants being draw back cases and the copy of the above representation was also sent to the Chief Commissioner, Coimbatore, Member Customs and Chairman CBEC, New Delhi requesting to issue suitable directions to the Commissioner (Appeals) to proceed with the appeals filed by the appellants without insisting the pre-deposit as the same was not mandatory in draw back cases.

4.05 The impugned order is devoid of merit and in gross violation of the principles of natural justice and on factually inconsistent reasoning. The subject Order of Recovery pertains to the period of February, 2007 to October 2007 in respect of exports made under 5 shipping Bills as listed in the order in original. The applicant had filed the BRCs through the CHA who had facilitated the export within the stipulated time limit of one year. The Adjudicating Authority passed the above order in original without examining the factual position and without causing necessary verification of the records available with his own office and without observing the principles of natural justice by issuing the show cause notice or granting the Personal Hearing. The applicant should have been extended an opportunity to explain their stand or to file the documents if any required once again if the documents already filed are not traceable in the office of the Adjudicating Authority for which the applicant cannot be held responsible.

4.06 The Order of Recovery has been sent by post was received by the applicant. Therefore, they are clueless as to how the Show Cause Notice and intimations for PH were not received. The applicant have already filed the BRCS involved in this case to the department. The applicant enclosed the copy of negative certificates issued by the Chartered Accountant that there was case of pending realization during the half years ending 30.06.2007 and 31.12.2007. Further the applicant had

submitted the bank details in the SB itself and a simple verification with the Bank would have settled the issue as the only concern of the department is the realization of sale proceeds.

4.07 The applicant submitted that they have not contravened any provisions of law warranting any action on the appellants and the demand of drawback with interest unjustifiable, unwarranted and unsustainable especially when the statutory provisions have been complied with by the appellants and they were forbidden from taking part from participating the adjudication proceedings. All the above Irreversible factors were explained to the First Appellate Authority and also filed the negative certificates, but the appellants did not get justice from the First Appellate Authority who rejected the appeal for alleged noncompliance of provisions of Section 129E of Customs Act, 1962.

4.08 In a similar case where the BRCs were available with the exporter but could not be produced to the adjudicating authority because neither show cause notice nor the Order in Original specifically mentioned the shipping Bills in relation to which the BRCs were required to be produced, the Hon'ble Revisionary Authority vide Order No. 51/2013-Cus Dated 08.02.2013 in Re: M/s Maestro Fashions, Tirupur, remanded the case back to the Original Authority for considering the issue afresh. In the present case they have already submitted BRCs to the ICD and obtained acknowledgment from the Superintendent on the covering letter. Applying the ratio of the aforesaid order of the Revisionary authority end of the justice will be met if matter is sent back to original authority to verify the BRCs and pass appropriate orders afresh.

4.09 In view of the above, the applicants requested to set aside the impugned orders for the above reasons, and pass any other order as may be deemed fit.

5. A personal hearing in these cases was fixed on 12.10.2021. Shri Sankaranarayana K., Consultant, appeared for the hearing on behalf of the applicant. He appeared online and stated that they were not given opportunity to submit BRCs which are available. He stated that written submission has been submitted and requested to drop the case by setting aside the OIAs.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original, Order-in-Appeal, as well as oral and written submissions.

7. Government observes that in this case, aggrieved by the Assistant Commissioner's OIO No.722/2014-AC-BRC Cell dated 13.03.2014, the applicant had filed appeal with the Commissioner Appeal. The appeal was filed under 129E of the Customs Act, 1962 which prescribes mandatory pre-deposit as per the Finance Act, 2014. The applicant's contention is that they are not required to pay the pre-deposit since under provisions of Section 2(15) of Customs Act, 1962, the term duty does not cover Drawback. The Commissioner (Appeals), without going into the merits of the case rejected their appeal on the grounds of noncompliance of mandatory provisions of Section 129E of the Customs Act, 1962 and aggrieved by the impugned order, the revision application has been filed by the applicant on both the grounds i.e against the Commissioner Appeal's Order and on merits. In the given facts and circumstances and also in the larger interest of justice, Government would be looking into the merits of the case.

8. 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.

8. 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 :

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. 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.

9. Government observes that the applicant has claimed that the realization of export proceeds in respect of the impugned Shipping Bills pertaining to February 2007 to October 2007 were received within the prescribed time limit and the same was reported to the Customs Authorities through their CHA.

10. The applicant has submitted the copy of negative certificates dated 01.09.2014, issued by the Chartered Accountant for the half year ending 30.06.2007 and 31.12.2007. The certificate states that export proceeds for exports shipments made during the period 01-01-2007 to 30-6-2007 and 01-07-2007 to 31-12-2007 have been received, but fails to give the details and date of receipt of such remittances.

11. In this case though the applicant has submitted the Chartered Accountant's certificate, the details of realization of the export proceeds needs to be verified. Government directs the applicant to submit all the details such as Bank Realisation Certificate, Realization of sale proceeds, etc to the original adjudicating authority and the adjudicating authority is directed to decide the case based on its merits within 8 weeks from the receipt of this Order.

12. Revision Application is disposed off in the above terms.


28/12/21

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

ORDER No. /2021-CUS (SZ) /ASRA/Mumbai Dated

To,

M/s. M/s Paark Creation,
SF. No, 278/1,
Ramasamy Layout,
60 Feet Road, Perichipalayam South,
Tirupur-641605

Copy to:

1. Pr. Commissioner of Customs, No.6/7, ATD Street, Race Course Road, Coimbatore-641018
2. Commissioner of Customs (Appeals) Coimbatore Customs, No.6/7, ATD Street, Race Course Road, Coimbatore-641018
3. ~~Sr. P.S.~~ to AS (RA), Mumbai
4. Guard file
5. Notice Board.