

SPEED POST



F.No. 372/01/DBK/16-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue... 4.11.19.....

Order No. 33/19-Cus dated 01/11/2019 of the Government of India passed by Smt Mallika Arya, Principal Commissioner & Additional 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. Kol/ Cus/ Airport/ 13/ 2016 dated 10.12.2015 passed by the Commissioner of Customs (Appeals), Kolkata

Applicant : M/s Mallcom (India) Limited, Kolkata

Respondent : The Commissioner of Customs, 3rd Floor, Customs House, 15/1, Strand Road, Kolkata-700001

ORDER

A revision application No. F.No. 372/01/DBK/16-RA dated 28.04.2016 has been filed by M/s Mallcom (India) Limited, Kolkata, a unit at Falta Special Economic Zone (herein after referred to as "applicant") against the order No. Kol/ Cus/ Airport/ 13/ 2016 dated 10.12.2015 passed by the Commissioner of Customs (Appeals), Kolkata.

2. Brief facts of the case are that the applicant was granted approval as a SEZ unit vide LOP No. FEPZ/ LIC/ M-19/ 2001/ 13204 dated 27.02.2001 and has been holding an EEFC (Exchange Earner's Foreign Currency Account) thereafter. Vide notification no. FEMA 63/ 2002- RB dated June 21, 2002, paragraph 5 in the Schedule of the Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000 pertaining to special provision for EEFC Account of a unit in a Special Economic Zone (SEZ) was deleted. The applicant filed drawback claims amounting to Rs. 69,55,583/- with the customs authorities in respect of procurement of goods from the Domestic Tariff Area during the period October 2010 to August 2011 under SEZ Act 2005 and SEZ Rules 2006. Rule 30 (8) of said SEZ Rules provides that such- "*Drawback or Duty Entitlement Pass Book credit against supply of goods by Domestic Tariff Area supplier shall be admissible provided payments for the supply are made from the Foreign Currency Account of the Unit.*" . The applicant opened Foreign Currency Account on 13.01.2012. It was mandatory for a SEZ unit to make financial transactions only through the Foreign Currency Account (RBI notification FEMA 63/ 2002-RB dated 21.06.2002), which the applicant did not do. Adjudicating Officer (Assistant Commissioner of Customs, Falta SEZ) rejected the drawback claim of the applicant and the order of the Adjudicating Officer has been upheld the Commissioner of Customs (Appeals), Kolkata on the ground that the applicant being a SEZ unit should have carried out the transaction from Foreign Currency Account vide RBI notification FEMA 63/ 2002-RB dated 21.06.2002, which was to be followed mandatorily.

3. Personal hearing in the case was fixed on 22.08.2019. The respondent vide their letter dated 21.08.2019 submitted written submissions through the Specified officer Falta SEZ, Kolkata, which has been taken on record. Sh. Shyam Sundar Agrawal, Chief Financial Officer appeared for hearing on behalf of the applicant. He contended that Rule 30 (8) of SEZ Rules allows the duty drawback to a SEZ unit provided payments are made to the DTA unit through the Foreign Currency Account. The applicant produced the RBI notification no. FEMA/ 63/ 2002- RB dated 21.06.2002, RBI Circular No. 28 dated 03.10.2002 and an unsigned RBI letter dated 20.12.2002 addressed to the DGM/ JS, Department of Commerce.

The applicant also submitted written submissions dated 21.08.2019 reiterating the grounds of revision, which have been taken on record. The applicant vide their letter dated 02.09.2019 requested for one more personal hearing. Another date of personal hearing was fixed on 26.09.2019. Sh. Shyam Sundar Agrawal appeared on behalf of the applicant and submitted written submissions which have been taken on record. He submitted that opening a Foreign Currency Account was optional for a status holder SEZ unit. Since they were holding EEFC account prior to 2002, they continued to use the said account for financial transactions. Since no one appeared on behalf of the respondent, the case is being taken up for final disposal.

4. Government finds that the present case is regarding payments made from EEFC account of the applicant in respect of procurement of goods from the DTA. As per Regulation 4 of Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000 Exchange Earner's Foreign Currency (EEFC) Account is defined as under:

A person resident in India may open, hold and maintain with an authorised dealer in India, a Foreign Currency Account to be known as Exchange Earner's Foreign Currency (EEFC) Account, subject to the terms and conditions of the Exchange Earners' Foreign Currency Account Scheme specified in the Schedule.

As per Definitions of Regulations 2 (iii) of Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000 a Foreign Currency Account is defined as under:

'Foreign Currency Account' means an account held or maintained in currency other than the currency of India or Nepal or Bhutan.

The SEZ units are eligible to claim drawback in terms of Section 26 (1) (d) of the SEZ Act, 2005, Rule 30 (5) of SEZ Rules, 2006 and condition prescribed under Rule 30 (8) of SEZ Rules, 2006.

Section 26 (1) (d) of the SEZ Act, 2005 reads as under:

"26. (1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely: -

(d) drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a Special Economic Zone or Unit or services provided in a Special Economic Zone or Unit by the service providers located outside India to carry on the authorised operations by the Developer or entrepreneur.”

Rule 30 (5) of SEZ Rules, 2006 reads as under:

“30. Procedure for procurements from the Domestic Tariff Area.

(5) Where a Bill of Export has been filed under a claim of drawback or Duty Entitlement Pass Book, the Unit or Developer shall claim the same from the Specified Officer and jurisdictional Development Commissioner respectively and in case the Unit or Developer does not intend to claim entitlement of drawback or Duty Entitlement Passbook Scheme, a disclaimer to this effect shall be given to the Domestic Tariff Area supplier for claiming such benefits: Provided that the Duty Entitlement Passbook Scheme may be claimed by Domestic Tariff Area supplier from the Development Commissioner or their jurisdictional Regional Licensing Authority of the Directorate General of Foreign Trade.”

C.B.E. & C. Circular No. 43/2007-Cus., dated 5-12-2007 defines the Appropriate Authority for sanction and disbursement of drawback claims on supplies made by Domestic Tariff Area (DTA) units to units located in Special Economic Zone (SEZ).

Rule 30 (8) of SEZ Rules, 2006 provides that such *“Drawback or Duty Entitlement Pass Book credit against supply of goods by Domestic Tariff Area supplier shall be admissible provided payments for the supply are made from the Foreign Currency Account of the Unit.”*

The adjudicating authority in his order has mentioned that *“On verification of drawback claim file submitted by the said Zone Unit, on the basis of the Bank Realization Certificate, herein referred as B.R.C. issued by the Authorized Dealer Bank raised confusion and as such the matter was referred to the Reserve Bank of India, Kolkata regarding the Admissibility of Drawback with the B. R. C. It is revealed from the Reserve Bank of India, Kolkata vide their letter dated 13th February, 2012 under reference no. Kol.FED.2679/20.65.001/ 2011-12 on the basis of letter of the Citi Bank N.A., Kanak Building, Kolkata that M/s Mallcom India Ltd (MIL) has units in non SEZ areas and hence EEFC account can be*

opened and operated. They further informed that MIL had not informed them about them having a valid SEZ approval at the time of opening EEFC account. The transactions have been inadvertently routed through EEFC account instead of Foreign Currency Account. They have advised MIL to route all transactions relating to SEZ through Foreign Currency Account and not through EEFC account. MIL has opened Foreign Currency account with CITI bank on January 13, 2012."

It is observed that RBI's notification FEMA 63/ 2002-RB dated June 21, 2002 deleted paragraph 5 in the Schedule of the Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000. Vide this amendment Para 6A was inserted after Para 6 of the Regulations (supra) which specifically directed units in the SEZ not only to open a Foreign Currency Account (FCA) with an Authorised Dealer but also to route all financial transactions through this account.

RBI intimated this fact separately to all the 'authorised dealers in Foreign Exchange' through its A.P. (DIR Series) Circular No. 28 dated 03.10.2002 under the caption 'opening, holding and maintaining Foreign Currency Account in India by a unit in Special Economic Zones' (SEZs).

During the course of personal hearing the applicant submitted an unsigned RBI letter dated 20.12.2002 addressed to the DGM/ JS, Department of Commerce, which says that "*no restrictions have been placed on opening, maintaining and holding of any type of account/ deposit by a unit in SEZ*". This unsigned internal correspondence cannot be relied upon and merits no consideration. Further the applicant has relied upon RBI notification no. FEMA/ 63/ 2002- RB dated 21.06.2002 and RBI Circular No. 28 dated 03.10.2002.

RBI's notification FEMA 63/ 2002-RB dated June 21, 2002 deleted paragraph 5 in the Schedule of the "Regulation" relating to special provisions in respect of EEFC Account of a unit in a Special Economic Zone (SEZ). Vide this amendment Para 6A was also inserted after Para 6 of the Regulation (supra) which specifically directed units in the SEZ not only to open a Foreign Currency Account (FCA) with an Authorised Dealer but also to route all trade transactions through this account. RBI Circular No. 28 dated 03.10.2002 is addressed to All Authorised Dealers in Foreign Exchange intimating amendments in "Regulations" through RBI notification no. FEMA/ 63/ 2002- RB dated 21.06.2002.

A reference was sent by this office on 02.09.2019 to the Chief General Manager, Reserve Bank of India, Exchange control Department, Central Office, Mumbai-400001 wherein clarification was sought as to whether a SEZ unit could operate from the EEFC account post 21.06.2002.

The RBI vide their letter dated FEC C.O. Trade/ 1609/ 05.31.066/ 2019-20 dated 25.09.2019 replied that "*In terms of Para 5 of Schedule to erstwhile FEM (Foreign Currency Accounts by a person resident in India) Regulations, 2000, units in SEZ were allowed to maintain EEFC accounts in accordance with the provisions of the said para. This para was deleted vide Notification No. FEMA.63/ 2002-RB dated June 21, 2002. In terms of the said Notification, units in SEZ are permitted to hold and maintain Foreign Currency Account with an AD bank in India subject to the conditions mentioned therein.*"

Despite clear instructions on the subject the applicant continued to undertake financial transactions in respect of the SEZ unit through the EEFC account till 2012. The applicant opened a Foreign Currency Account in 2012 after realising their mistake.

Therefore it is observed that having a Foreign Currency Account (FCA) by SEZ unit is a mandatory condition prescribed by RBI vide Notification No. FEMA.63/ 2002-RB dated June 21, 2002 and thus cannot be treated as procedural. Even if it is presumed that the applicant was ignorant of this condition during the relevant period, the Government is of the view that the benefit of any sort cannot be claimed under the pretext of ignorance of law. Hon'ble High Court of Calcutta in the case of Provas Kumar Dey Vs Inspector of Central Excise and Others has *held that ignorance of law is no excuse and accordingly the petitioner was rightly found guilty for contravention of Rule 32(2) [1993(64)ELT23(Del.)]*. Hon'ble High Court of Delhi in the Case of Universal Cans & Containers Ltd vs Union of India has *held that once the law is made public then the principal of 'ignorance of law is no excuse' can be invoked [1987(31)ELT13(Cal)]*.

Reliance is further placed on Apex Court's order in the case of M/s Mangalore Chemicals and Fertilizers Ltd. Vs Deputy Commissioner [1991(55) ELT 437 (SC)] wherein it has been held as under:

"Interpretation of statute- Exemption and refund-Condition precedent-Distinction to be made between a procedural condition of a technical nature and a substantive condition- Non-observance of the former condonable while that of the latter not condonable as likely to facilitate commission of fraud and introduce administrative inconveniences."

Reliance is also placed on Madras High Court order in the case of Irabaz Shoe Company 2019 (365) E.L.T. 263 (Mad.) wherein it has been held as under:

“The purpose of Notification No. 43 of 2001, dated 26th June, 2001, is to ensure prevention of evasion of duty under the garb of export sales. Keeping the purpose in mind, it is not sufficient for a manufacture to come up and say that all the goods manufactured by him have been exported and therefore, he is entitled to the benefit of Rule 19 of Central Excise Rules. If such a view is taken that the conditions prescribed in Notification No. 43 of 2001, is only procedural then the entire purpose of issuing the said Notification, would be defeated.”

In light of the above judgments there is no force in the plea of the applicant that since there was no difference between EEFC account and FCA, therefore, the transaction from EEFC account post 21.06.2002 in respect of payments made to DTA suppliers are not irregular.

Reliance is placed on Order No. 142/2013-Cus., dated 28-5-2013 in case of Kariwala Green Bags [2014 (311) E.L.T. 843 (G.O.I.)] and Order No. 35/2018-Cus., dated 5-2-2018 in case of K.V. Aromatics Pvt. Ltd [2018 (364) E.L.T. 1185 (G.O.I.)] passed by the Revisionary Authority on similar issues.

5. In view of above discussion and the clarification issued by RBI on the subject vide their letter dated 25.09.2019, it is evident that the applicant is not eligible to claim drawback in respect of transactions made from the EEFC account during the material time.

Accordingly Government does not find any reason to interfere with the order of the Commissioner (Appeals) and hence revision application is rejected.


(Mallika Arya)

(Additional Secretary of the Government of India)

M/s Mallcom (India) Limited,
EN-12, Sector-V, Salt Lake,
Kolkata-700091.

Order No. 33/19-Cus dated 01/11/2019

Copy to:

1. The Commissioner of Customs, 3rd Floor, Customs House, 15/1, Strand Road, Kolkata-700001
2. The Zonal Development Commissioner, Falta Special Economic Zone (Customs wing), Falta, South 24 Parganas, West Bengal- 743504
3. The Commissioner of Customs (Appeals), 3rd Floor, Customs House, Strand Road, Kolkata- 700001.
4. PA to AS(RA)
- ~~5. Guard File.~~
6. Spare Copy

ATTESTED

N. Devi
1-11-19

(Nirmala Devi)

S.O (R.A.)