



**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.195/70/WZ/2017-RA / 6289

Date of Issue: 21.08.2023

ORDER NO. 341 /2023-CX (WZ) /ASRA/Mumbai DATED 19.08.2023
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 ABB India Limited,
22A, Shah Industrial Estate,
Off Veera Desai Road, Andheri (West),
Mumbai - 400 053.
- Respondent : Commissioner of Customs (Export - II), Mumbai - I,
New Custom House, Ballard Estate,
Mumbai - 400 001.
- Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-SXP-37/2017-18 dated 23.06.2017 passed
by the Commissioner of Customs (Appeals), Mumbai
Customs Zone - I.

ORDER

The subject Revision Application has been filed by M/s ABB India Limited, Mumbai (here-in-after referred to as 'the applicant') against the Order-in-Appeal dated 23.06.2017 passed by the Commissioner of Customs (Appeals), Mumbai Zone - I, which decided an appeal filed by the applicant against the Order-in-Original dated 12.01.2016 passed by the Assistant Commissioner of Customs, Export Section - II, NCH, Mumbai.

2. Brief facts of the case are that the applicant had manufactured and exported one 'Power Transformer 125 KVA' under the Advance License Scheme vide Shipping Bill dated 09.12.2011. The said product was imported back by them for the purpose of being repaired vide Bill of Entry dated 27.01.2014. The applicant availed the benefit of notification no.158/95-Cus dated 16.12.1996 which provided exemption from payment of import duty subject to the fulfilment of conditions therein which included - re-export of the imported goods within six months from the date of import and furnishing of Bond and Bank Guarantee. On being requested by the applicant, the Commissioner of Customs had extended such period for re-export to 27.01.2015, however, as their request for further extension of the time limit was not acceded to by the Department, they paid duty of Rs.1,09,56,314/- along with interest of Rs.26,79,944/- on 15.06.2015.

3. Thereafter, the applicant vide letter dated 12.12.2015, informed the Customs Authorities that they had finished carrying out the repair work on the imported Transformer and intended to re-export the said same and sought permission to file Shipping Bill under Section 74 of the Customs Act, 1962. The Assistant Commissioner of Customs, Export Section - II, NCH, Mumbai vide Order-in-Original dated 12.01.2015 rejected this request of the applicant for the reasons that they had not fulfilled the condition of notification no.158/95 as they had paid duty on the said goods, and, the goods were out of the Customs control for nearly 24 months. The original authority, while holding so, allowed the goods to be exported under a Free Shipping Bill. Interestingly, the said Order-in-Original also records that the issue was placed before the Additional Commissioner of Customs, Export - II, who, while denying the permission to the applicant for filing Shipping Bill under Section 74 of the Customs Act, 1962 directed the lower authorities

pass a speaking order in the matter. The Order-in-Original further records that the Additional Commissioner had allowed the said exports under a Free Shipping Bill and had also ordered 100% examination of the goods under the supervision of the Assistant Commissioner (Dock) so as to establish the identity of the goods with the import documents. The applicant exported the said Transformer vide Shipping Bill dated 21.12.2015 under a Free Shipping Bill, as their request for filing a Shipping Bill under Section 74 of the Customs Act, 1962 was denied. Aggrieved by the Order-in-Original dated 12.01.2016, the applicant filed appeal before the Commissioner (Appeals) who vide the impugned Order-in-Appeal dismissed the same and upheld the order of the original authority.

4. Aggrieved by the impugned Order-in-Appeal, the applicant has filed the subject Revision Application on the following grounds: -

(a) They submitted that they are entitled to claim drawback in respect of the goods exported out of India in terms of Section 74 of the Customs Act, 1962 as the same covers those instances where drawback of duties paid is being claimed on goods imported into India and not used; that for granting drawback in terms of Section 74(1), all that is required to be satisfied is that the goods are easily identifiable and the goods are entered for export within two years from the date of payment of duty upon importation; that if these two conditions are satisfied, then 98% of the duty paid on such goods at the time of importation shall be returned as Drawback;

(b) That in the present case, what has been re-imported into India is a transformer and that a transformer is used in the transmission of electricity; that the transformer in question has not been used in the transmission of electricity hence it could not be said that it had been used after importation; that an article could be said to be used if it has been put to use for the purpose for which it is generally used; that all that has happened in the instant case is that the transformer underwent repair in India and was not used in the transmission of electricity; that merely because repair activity has been undertaken, it cannot be said that the goods have been put to use; that during the period of importation and re-exportation they never used or even intended to use the transformers for the generation of electricity; that they never performed any activity other than repair work and they sought to rely on the Chartered Engineer Certificate dated 19.1.2016 submitted by them wherein it had been clearly stated that the goods have not been used;

that the lower authorities had ignored this certificate and they also cited several decisions in support of their contention;

(c) They submitted that the goods had been examined by the Customs officers at the time of importation and exportation and the identity has been clearly established; that examination report too was available; that no dispute had been raised on this aspect; that the Customs officers erroneously assumed that drawback was being claimed under Section 74(2) and came to the conclusion that re-export is being undertaken beyond the period mentioned in the notification issued under that Section;

(d) Without prejudice to the earlier submission, they also submitted that they were entitled to avail drawback in terms of Section 75 of the Customs Act in respect of the goods exported out of India; that the term manufacture as defined under Rule 2(e) is wide enough to bring within its purview activities including repairs undertaken in India; that the transformer was imported into India by them for the sole purpose of undertaking repairs; and duty was paid on the said goods pursuant to the importation of the same into India; repairing activity was undertaken on the goods and thus the goods exported out of India underwent manufacturing operation in India;

(e) That since a defective transformer was imported and a non-defective and fully functional transformer was exported, they had by way of repair converted the transformer into a new product, thereby making itself eligible to avail the benefit of the scheme of drawback in terms of Section 75;

(f) That even though the application for drawback is filed under Section 74 of the Customs Act, the said application may be considered as being made under Section 75 of the Customs Act; that wrong quoting/non-quoting of a particular provision cannot dis-entitle an assessee from claiming the benefits entitled to him under law and placed reliance on the decision of the Hon'ble Tribunal in the case of Cummins India Ltd v. Commissioner of Customs, Pune [2012-TIOL-500-CESTAT-MUM];

(g) They finally submitted that if drawback of the Customs duty in respect of the transformer exported out of India is denied to them, then the objective of the Customs Act, 1962 will be defeated;

(h) They further submitted that the purpose of only giving partial drawback to goods imported and put to use, is to account for depreciation

in the value of the goods; thus drawback granted is lesser than the duty paid; that in the present case, the imported goods were defective, and the same were repaired and re-exported; thus, the value of the goods, at the time of re-export, was much higher than the value at the time of import; they also submitted that the original authority and the Commissioner (Appeals) had rejected their application on different grounds which was not sustainable; they lastly provided para-wise rebuttal to the findings of the Commissioner (Appeals) in the impugned Order-in-Appeal.

In view of the above, the applicant prayed that the impugned Order-in-Appeal may be set aside and Drawback claimed be granted to them under Section 74(1) of the Customs Act, 1962 or alternately under Section 75 of the Customs Act, 1962.

5. Personal hearing in the matter was held on 24.01.2023 and Shri Akhilesh Kangria, Advocate and Ms Madhura Khandekar, Advocate appeared online on behalf of the applicant. They submitted that Commissioner (Appeals) has erred in passing the Order-in-Appeal. They contended that Section 74(1) and not Section 74(2) should be attracted. They submitted that transformer was not put to use. They further submitted that 18 month time limit is for Section 74(2). They requested to allow their claim.

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

7. Government notes that the issue for decision is whether the applicant is eligible for Drawback under Section 74(1) as claimed by them or under Section 74(2) of the Customs Act, 1962 as held by the Commissioner (Appeals). Government finds that in the present case the following facts are not in dispute: -

- The applicant had manufactured and exported one 'Power Transformer 125 KVA' vide Shipping Bill dated 09.12.2011;
- The exported Transformer was imported back by them for the purpose of being repaired vide Bill of Entry dated 27.01.2014;
- The applicant paid duty of Rs.1,09,56,314/- along with applicable interest on 15.06.2015 on the imported Transformer after being

denied further extension of the period for carrying out repairs on the same;

- The applicant exported the said Transformer vide Shipping Bill dated 21.12.2015 under a Free Shipping Bill, as their request for filing a Shipping Bill under Section 74 of the Customs Act, 1962 was denied;
- The Transformer in question having been imported on 27.01.2014 and re-exported on 21.12.2015, the goods in question were re-exported within two years of the same being imported.

Government finds that the applicant has claimed that they are eligible for Drawback on the exported goods under Section 74(1) of the Customs Act, 1962, whereas, the Commissioner (Appeals) has held that the said export was covered under Section 74(2) of the Customs Act, 1962 and hence in terms of notification no.19-Cus. dated 01.03.2008 as amended by notification no.23/2008-Cus dated 01.03.2008, as the exports were made after 18 months of import, the applicant was eligible to 'NIL' Drawback.

8. Government finds that at this juncture, it would be pertinent to examine the provisions of Section 74 of the Customs Act, 1962. The same is reproduced below: -

" Section 74. Drawback allowable on re-export of duty-paid goods.

(1) When any goods capable of being easily identified which have been imported into India and upon which¹ any duty has been paid on importation, -

(i) are entered for export and the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51; or

(ii) are to be exported as baggage and the owner of such baggage, for the purpose of clearing it, makes a declaration of its contents to the proper officer under section 77 (which declaration shall be deemed to be an entry for export for the purposes of this section) and such officer makes an order permitting clearance of the goods for exportation; or

(iii) are entered for export by post under² [clause (a) of section 84] and the proper officer makes an order permitting clearance of the goods for exportation,

ninety-eight per cent of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback, if -

(a) the goods are identified to the satisfaction of the ³[Assistant Commissioner of Customs or Deputy Commissioner of Customs] as the goods which were imported; and

(b) the goods are entered for export within two years from the date of payment of duty on the importation thereof:

Provided that in any particular case the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period as it may deem fit.

(2) Notwithstanding anything contained in sub-section (1), the rate of drawback in the case of goods which have been used after the importation thereof shall be such as the Central Government, having regard to the duration of use, depreciation in value and other relevant circumstances, may, by notification in the Official Gazette, fix...."

09. A reading of the above portion of Section 74 of the Customs Act, 1962 clearly indicates that the said Section pertains to the Drawback allowable on those goods which had been imported into India on payment of duty and were then exported. The present case differs from such cases that are covered by Section 74, as in the present case, the goods were first exported and then re-imported back into the country without payment of duty. Thus, Government finds that Section 74 will not be applicable to the present case, as it would cover only those cases where goods imported on payment of duty were sought to re-exported. Further, Government finds that the applicant had imported the goods exported earlier, without payment of duty by availing the benefit of notification no.158/95-Cus dated 16.12.1996 and that they had paid the applicable duty on the goods imported as they had failed to adhere to the conditions laid down therein inasmuch as they failed to export the goods within the time permitted. Government finds that such payment of duty due to non-compliance of a condition of a notification allowing duty free import, cannot be construed to be similar to a situation wherein goods were imported on payment of duty in the normal course. Given the above, Government finds that the said export consignment in question stands precluded from the situations envisaged under Section 74 of the Customs Act, 1962. Thus, Government holds that the applicant will not be eligible to claim Drawback under Section 74 of the Customs Act, 1962, for the consignment in question.

10. Government finds that the applicant has submitted that even if it was found that they were ineligible to claim Drawback under Section 74, they

would be entitled to claim drawback under Section 75 of the Customs Act, 1962. Government finds that the Commissioner (Appeals) has also considered this plea of the applicant and has held they were free to approach the proper officer of Customs for their claim under Section 75, which the proper officer would be free to decide as per law. Government agrees with this view of the Commissioner (Appeals) and leaves this option open to the applicant.

11. In view of the above, the subject Revision Application is rejected.

Shrawan
18/8/23
(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No 34 / 2023-CX (WZ) / ASRA / Mumbai dated 18.08.2023

To,

M/s ABB India Limited,
22A, Shah Industrial Estate, Off Veera Desai Road,
Andheri (West), Mumbai - 400 053.

Copy to:

1. Commissioner of Customs (Export - II), Mumbai - I, New Customs House, Ballard Estate, Mumbai - 400 001.
2. Commissioner of Customs (Appeals), Mumbai Customs Zone - I, New Custom House, Ballard Estate, Mumbai 4 00 001.
3. M/s V. Lakshmikumaran & others, 2nd floor, B & C Wing, Cnergy IT Park, Appa Saheb Marathe Marg, Prabhadevi, Mumbai - 400 025.
4. Sr. P.S. to AS (RA), Mumbai.
5. Notice Board.