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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. 371/314/DBK/2019-RA / 1460

Date of Issue: 13.03.2023

ORDER NO. 319/2023-CUS/ASRA/MUMBAI DATED 13-03-2023 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 H.S. Expolinks.

Respondent: Commissioner of Customs (Appeals), Mumbai Zone-III.

Subject : Revision Application filed, under Section 129DD of the Customs
Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-AXP-
APP-219-2019-20 dated 26-06-2019 passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application was filed by the M/s H. S. Expolinks (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. MUM-CUSTM-AXP-APP-219-2019-20 dated 26-06-2019 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. The issue in brief is that the Applicant was granted drawback amount of Rs. 2,48,035/- (Rupees Two Lakh Forty-eight Thousand and thirty-five Only) for the exports made by them during the period from 01.01.2004 to 31.12.2008. The Applicant did not submit the evidence for realization of export proceeds in respect of the shipping bills relating to the drawback amount claimed. As they failed to produce evidence for realization of export proceeds in respect of the said export goods within the period allowed under the Foreign Exchange Management Act, 1999 including any extension of such period granted by the Reserve Bank of India, Show Cause Notice dated 26-08-2010, was issued to the Applicant. The Assistant Commissioner of Customs, DBK (XOS), ACC, vide his Order-in-Original Nos. AC/NKM/1200/2012/ADJ/ACC dated 28-04-2012 confirmed the demand and ordered recovery of Rs. 2,48,035/- along with appropriate interest. Aggrieved by the aforesaid Order, the Applicant then filed appeal with the Commissioner of Customs (Appeals), Mumbai Zone-III, who vide his Order-in-Appeal No. MUM-CUSTM-AXP-APP-219-2019-20 dated 26-06-2019 rejected their appeal on the grounds that the appeal has been filed beyond the condonable period of 30 days i.e. beyond 90 days and hence not condonable under Section 128 of the Customs Act, 1962.

3. Being aggrieved, the Applicant then filed the current Revision Application on the following grounds:

i) That the impugned order is an ex-parte order inasmuch as the Applicant was never heard on merits resulting in denial of natural justice.

ii) That the only singular reason for rejection of the Appeal was that the Applicant had failed to file the Appeal within the prescribed time

period of 60 days; that the question of payment of any amount demanded on account of duty drawback and penalty imposed vide Impugned order did not arise as there was no drawback to be returned to the Government, in view of the fact that all the export proceeds had been fully realized.

iii) That the Lower Authority ought to have verified that the Applicant had not received the Show Cause Notice dated 26.08.2010 and was therefore not able to reply to the same and was also not able to inform the Lower Authority about the compliance of Rule 16[A] Sub-Rule [1] & [2] of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995; that the impugned order specifically mentions that "the envelope containing P.H. Intimation letter returned back with remark "UNCLAIMED", exporter did not attend any above mention PH". This averment itself proves that the Adjudicating Authority was well aware that the exporter had left the premises in view of the "UNCLAIMED" remark mentioned on the envelope containing the PH intimation but still chose to mention that the exporter did not attend the said PH. This is not only contradictory but shows the bias of the Adjudicating Authority.

iv) That the firm of the Applicant was closed down in the year 2009 and the postal correspondence received on the address was returned 'UNCLAIMED' which is evident from the Speed Post Acknowledgement; that they were aware about the issuance of the OIO only when they received the Recovery Notice at his residential address.

v) That as per the provisions of Section 122A of the Customs Act, 1962, the adjudicating authority is required to grant from time to time the opportunity of being heard to a party in proceedings and that the Adjudicating Authority upon sufficient cause being shown at any stage of proceedings adjourn the hearing and record the same in writing and that the Adjudicating Authority was required to give three adjournments.

vi) That the sale proceeds of the goods exported by the Applicant have been duly realized by the Applicant and the remittance has been received by Indian Bank, the bankers of the Applicant. Indian Bank has

issued letter dated 6.03.2018 stating that they have already issued BRC for the period viz. 1.7.2008 to 31.12.2008. It is further mentioned that they had issued NIL certificate of export pending realization on 06.03.2018 for the same period

vii) That in view of the receipt of the remittance by Indian Bank, the bankers of the Applicant, with regard to the sale proceeds of the goods exported by the Applicant, the demand of Drawback amount of Rs. 2,48,035/- to be recovered from the Applicant / Exporter vide show cause notice dtd. 26.08.2010 along with interest at applicable rate ought not to be confirmed and needs to be set aside. Further, no proceedings have been initiated by the FEMA Authorities against the Applicant for non-realization of export proceeds too.

In view of the above, the applicant requested to set aside the impugned OIA No. MUM-CUSTOM-AXP-APP-219/19-20 dated 26.06.2019 and the demand of drawback along with the interest or alternatively remand the matter to the adjudicating authority or the Appellate Authority.

4. A personal hearing in the case was fixed on 15.11.2022, 29.11.2022 and 2.12.2022. On 02.12.2022, Shri N. J. Heera, Advocate and Shri V. M. Advani, Advocate appeared for the hearing and submitted that they came to know about the OIO only when for recovery proceedings arrears demand was sent to home. They submitted that appeal was filed within time from the date OIOs were received. They further submitted that relevant remittances have been received and they have submitted the same along with RA application. They requested to allow the application.

5. Government has carefully gone through the relevant case records available in case files, oral & written submissions, perused the impugned Order-in-Original, Order-in-Appeal and the Revision Application.

6. Government notes that the Applicant had not received the Order in original as they had closed their business in 2009 and they did not receive the same in time, hence the impugned Orders-in-Original was passed without giving an opportunity of hearing to the Applicant. Since they did not get the

OIO in time they could not file the appeal against the OIO in time. Government therefore does not agree with the Commissioner Appeal's Order of holding the appeal as not maintainable due to delay in filing the appeal. In the given facts and circumstances and also in the larger interest of justice, Government would be looking into the merits of the case.

7. 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 notes that the Applicant had not received the Order in original as they had closed their business in 2009 and the Adjudicating Authority has affirmed this point in his discussion in the OIO that the SCN and the PH intimation were returned back with the remark 'Unclaimed'. The impugned Order-in-Original was passed without giving an opportunity of hearing to the Applicant.

10. Government observes that the applicant in his impugned appeal has claimed that the export proceeds have been realized in full and are in possession of the Negative statements issued by Indian Bank for the period from 1-07-2008 to 31-12-2008. The applicant has submitted the copy of negative certificates dated 31-12-2008 along with the appeal. The certificate states that export proceeds for exports shipments made during the period 1-07-2008 to 31-12-2008 have been received.

11. In this case Government observes that in the OIO the period for the drawback paid is shown as 01-01-2004 to 31-12-2008 and the Negative certificate submitted is for the period from 01-07-2008 to 31-12-2008. The

verification of documents would be essential in this case and hence Government directs the original authority to decide the case after due verification of documents in terms of extant Drawback Rules and Rule 16[A] of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. The applicant is requested to provide all the documents evidencing receipt of foreign remittances to the concerned authorities. The Original Adjudicating Authority is directed to pass appropriate Order in accordance with law after following principles of natural justice.

12. In view of the above discussion and findings Government sets aside Order in Appeal No. MUM-CUSTOMS-APP-219/19-20 dated 26.06.2019 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

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


13/2/23
(SHRAWAN KUMAR)

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

ORDER No. 349/2023-CUS /ASRA/Mumbai

Dated 13-02-2023

To,

1. M/s H. S. Expolinks, C/o Advani Sachwani & Heera Advocates, Nulwala Building, Opp. G.P.O.,41, Mint Road, Fort, Mumbai-400001
2. The Commissioner of Customs (Export), Air Cargo Complex, Sahara, Andheri (East), Mumbai-400099

Copy to:

- 1) The Commissioner of Customs (Appeals), Mumbai-III, Awas Corporate Point (5th Floor), Makwana Lane, Behind S.M. Centre, Andheri-Kurla Road, Marol, Mumbai-400059.
- 2) The Assistant Commissioner of Customs (Export), Air Cargo Complex, Sahar, Andheri (East), Mumbai-400099
- 3) Advani Sachwani & Heera Advocates, Nulwala Building, Opp. G.P.O.,41, Mint Road, Fort, Mumbai-400001
- 4) Sr. P.S. to AS (RA), Mumbai
- 5) Notice Board
- 6) Spare Copy.