REGISTERED
SPEED POST

F.No. 375/32-33/DBK/2018-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
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NEW DELHI-110 066

Date of Issue 09/2/2021

Order No. 38-39/21-Cus dated 09-02-2021 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India under section 129DD of the Custom Act, 1962.

Subject : Revision Applications filed under section 129 DD of the Customs Act 1962 against the Order-in-Appeal No.CC(A)Cus/D-II/ICD TKD(Exp)/537/2016 dated29.06.2016, passed by the Commissioner of Customs (Appeals), Delhi.

Applicant : 1. M/s Avanti Overseas Pvt. Ltd.
2. Sh. Sidharth Modi

Respondent : Commissioner of Customs (Exports), ICD, TKD, New Delhi

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ORDER

Revision Application Nos.375/32-33/B/2018-RA dated 13.04.2018 have been filed by M/s Avanti Overseas Pvt. Ltd, and Sh. Sidharth Modi, (hereinafter referred to as the applicants) against the Order-in-Appeal No.CC(A)Cus/D-II/ICD/TKD(Exp)/537/2016 dated 29.06.2016, issued by the Commissioner of Customs (Appeals), Delhi. Commissioner (Appeals), vide the above mentioned Order-in-Appeal, has rejected the appeal, inter-alia, on the grounds that they were an EOU Unit and representations to this effect were made to the Income Tax authorities. Hence the drawback is not admissible to them.

2. The brief facts of the case are that an intelligence was received by DRI, Delhi that some Export Oriented Units (EOUs) had adopted a modus operandi for availing simultaneous export benefits under different Export Promotion Schemes from different authorities/departments by resorting to mis-declaration. The applicants M/s Avanti Overseas Pvt. Ltd and itsManaging Director, Sh. Sidharth Modi were also involved in the similar type of modus-operandi. Applicants had obtained license from SEZ, Noida and they had declared themselves as an operational EOU to the Income Tax authorities to avail exemption from payment of Income Tax under Section 10 B of the Income Tax Act, 1961. However, they had suppressed their identity of being an EOU to Customs authorities and claimed duty drawback on the exported goods. Adjudicating authority, vide Order-in-Original no. VIII/ICD/TKD/6/Adj/Addl.Commr/93/2014 dated 19.10.2015, had confirmed the

demand and recovery of duty drawback amount ofRs. 6,91,70,843/- from M/s Avanti Overseas Pvt. Ltd. Besides, penalty of Rs. 1,00,00,000/- and Rs. 50,00,000/- was also imposed on M/s Avanti Overseas Pvt. Ltd. and Sh. Sidharth Modi, under Sections 114(iii) of the Customs Act, 1962, respectively. Penalty of Rs. 50,00,000/- was also imposed on Shri Sidharth Modi under Section 114 AA. Aggrieved, the applicants filed appeals before the Commissioner (Appeals) who rejected the appeals. The instant revision applications have been filed mainly on the ground that their unit was not operational as EOU during the relevant period when the goods were exported and hence the drawback is admissible to them.

3.1 Personal hearing in virtual mode was held on 06.01.2021. Sh. A.K. Prasad, Advocate,attended the hearing on behalf of the applicants. Sh. A.K. Prasad, submitted that one of the applicants, namely, Shri Sidharth Modi had expired on 15.06.2020 and a death certificate dated 16.07.2020, issued by the South Delhi Municipal Corporation, has been placed on record. Therefore, the proceedings against Sh. Sidharth Modi should abate. Sh. Prasad reiterated the submissions made in the revision application and further written statement filed on 04.01.2021. He also highlighted the following:

i) The claim of drawback has been disputed only on the ground that the Unit is a 100% EOU. Apart from that there is no other dispute.

ii) The applicant had obtained the Letter of Permission dated 31.3.2006 from the Development Commissioner, NOIDA SEZ to set up new undertaking under the EOU Scheme 2004-2009, subject, inter-alia, to the condition that Unit will be

Customs Bonded. The LOP was extended for one more year, i.e. upto 31.3.2010.

iii) The legal undertaking was accepted by the Office of Development Commissioner, NOIDA SEZ, vide letter dated 5.10.2006 wherein it is specifically stated that the Unit will be treated as working under 100% EOU scheme from the date from which it starts functioning under the Custom Bond.

iv) The private bonded warehouse license was issued by the Central Excise, Panipat on 13.4.2010, i.e., when the LOP dated 31.3.2006 had already expired. Therefore, the 100% EOU never came into operation.

v) The Deputy Commissioner (Drawback), ICD, Tughlaqabad had vide letter dated 24.7.2012 brought the above position to the notice of Assistant Commissioner, Central Excise, Panipat and sought an NOC to release the drawback claims. The Assistant Commissioner of Central Excise, Panipat vide letter dated 27.7.2012 stated that the license to operate as Customs Bonded Warehouse was issued by Central Excise, Panipat on 13.4.2010 whereas the LOP had already expired on 31.3.2010. Thus, technically, the Unit never became operational under 100% EOU scheme. In this background, the Central Excise, Panipat conveyed no objection to disbursal of drawback by port of export.

vi) Despite such clear position with reference to department's own records, the matter was reopened by the DRI apparently on the misunderstanding that

their existing DTA unit had been converted into a 100% EOU, which is incorrect.

vii) The claim in respect of benefits under Income Tax was made for the existing DTA Unit and not for the proposed new Unit. Presuming without admitting that the claim was made with reference to the new Unit, such a claim constitutes a mis-declaration under the Income Tax Act and the remedy lies with the appropriate authority under the Income Tax Act not by way of denying the benefit of drawback under the Customs Act.

viii) The demand has been made for the exports made during 2006-07 to 2009-10, i.e. after 8 years. Admittedly, there is no limitation prescribed under Rule 16 of Drawback Rules, 1995. However, department already having made enquiries in 2012 with the jurisdictional Central Excise officers on the same issue, the demand issued after 8 years is not reasonable. Therefore, as per settled law, the demand is time barred.

ix) On the issue of aprobate and reprobate, he highlighted that a representation made to another authority cannot be used to deny them their statutory right and relied upon the judgment of the Supreme Court in P.R. Deshpande (C.A. No. 4587 of 1995) in this regard.

3.2 Upon being asked, Shri Prasad requested for 15 day time to file written submission to elaborate on the steps and procedure involved in setting up of 100% EOU and to furnish documents to substantiate their claim that the proposed 100% EOU was to be set up as a new Unit within the same premises and it is not a case of conversion of an existing DTA Unit into a 100% Unit.

3.3 On behalf of the Department, Smt. Nisha Chopra, Assistant Commissioner and Shri Ramesh Kumar, Superintendent requested for 15 days time to file written submissions in response to the revision applications. Requests made for filing written submission in 15 days by both the parties was accepted.

3.4 Applicant submitted their written submission on 20.01.2021 wherein they explained the procedures as to when an EOU unit becomes operational. Respondent department has not made any submissions, till date, nor any request for extension of time has been received. Hence, the matter is being taken up for decision based on material available on records.

4. The Revision Applications have been filed on 13.4.2018 against the order dated 29.6.2016 of Commissioner (Appeals). It has been brought on record that the applicants had, in the interim, approached the CESTAT to assail the Commissioner (Appeal)'s order. The CESTAT disposed off the appeal as non maintainable, as the same is barred by provisions of Section 129(A) of the Customs Act, 1962, vide Final Order no. 51071-51072/2018 dated 16.3.2018. Subject Revision Applications have been filed on 13.4.2018 that is within three months from the date of the Final order of the CESTAT and are, therefore, admitted.

5. In respect of RA No. 375/32/DBK/18-RA dated 13.4.2018, it has been brought on record that the applicant, Shri Sidharth Modi has expired on 15.6.2020, during the pendency of the RA and a death certificate issued by the Municipal Authority has been placed on record. The lower authorities have imposed penalties on Shri Sidharth Modi under Section 114 (iii) and Section 114(AA) of the Customs Act, 1962.

The proceedings against him being only penal in nature, the RA filed by Shri Sidharth Modi (deceased) is liable to be disposed of as having abated.

6. The RA No. 375/33/DBK/2018-RA dated 13.4.2018 has been filed by M/s Avanti Overseas Pvt. Ltd., challenging the order of Commissioner (Appeals) upholding the order of the lower authority, confirming the demand of duty drawback of Rs. 6,91,70,843/- in respect of goods exported during 2006-07 to 2009-10, under Rule 16 of the Customs and Central Excise Duties, Drawback Rules 1995 along with interest under the provisions of Section 75(A)(2) of the Customs Act, 1962. Penalty of Rs. 1 Crore, imposed under Section 114(iii), has also been challenged. The lower authorities have held that the applicant held a License in form of Letter of Permission (LOP) issued by the Development Commission, NOIDA Export Processing Zone and therefore, Drawback is not admissible in respect of the exports made by the applicant in terms of the relevant notifications nos. 81/2006-Customs (NT) dated 13.7.2006, 68/2007-Customs (NT) dated 16.7.2007, 103/2008-Customs (NT) dated 29.8.2008, 84/2010-Customs (NT) dated 17.9.2010, 68/2011-Customs(NT) dated 22.9.2011. The applicant has vehemently argued that it was not an EOU as the permission for customs bonding warehouse was issued only on 13.4.2010 by the jurisdictional Central Excise authority, by when the LOP had already expired. Thus, the fundamental issue that needs determination for deciding the instant RAs is whether the applicant was a 100% EOU for the purpose of drawback.

7.1.1. The Government observes that the Customs and Central Excise Duties Drawback Rules, 1995 were issued in excise of the powers conferred by Section 75 of the Customs Act, 1962, Section 37 of the Central Excise Act, 1944 and Section

93A read with Section 94 of the Finance Act, 1994. In Section 61(2) of the Customs Act, 1962, the 100% EOU has been defined, under Explanation Clause (ii) as under:

"(i) "hundred percent export-oriented undertaking" has the same meaning as in clause (ii) of Explanation 2 to sub-section (1) of section 3 of the Central Excise Act, 1944 (1 of 1944) ".

7.1.2 Clause (i) of the Explanation 2 under section 3 of the Central Excise Act 1944, defines the 100% EOU as under: -

""hundred percent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act."

7.1.3 Therefore, a 100% EOU has been defined to mean as an undertaking which has been approved by the Board appointed in this behalf by the Central Government, in exercise of the powers conferred by Section 14 of the Industries (Development and Regulation) Act, 1951 (IDR Act) and the rules made under that Act.

7.2 It is the contention of the applicant that the definition provided under Section 3 of the Central Excise Act cannot be made applicable for the purpose of drawback and even if were to be applicable, the LOP has been issued to them by the Development Commissioner and not by the Board appointed by the Central Government in exercise of the powers conferred by Section 14 of the IDR, Act 1951.

As brought out herein above, the relevant Drawback Rules have been notified in exercise of the powers conferred under Customs Act, 1962 as well as the Central Excise Act, 1944. Therefore, the argument that the definition provide in the Central Excise Act would not apply for drawback purposes cannot be accepted. The other limb of the argument that they do not fulfill the definition under the Central Excise Act, since LOP has been issued by the Development Commissioner and not by Board constituted under Section 14 of the IDR Act, 1951, also cannot be accepted in as much as the power to issue approvals for setting up EOU was delegated to the Development Commissioner of the EPZ by the Government under Press Note No. 6 (1998 series) dated 10.7.1998, issued vide F.No. 10(53)/97-IP, by the Department of Industrial Policy and Promotion.

7.3.1. The Government further observes that in terms of the relevant Customs notifications, vide which the respective Drawback Schedules were notified for the relevant period (as enumerated in para 6 above), the drawback is not admissible if a commodity or product is "manufactured or exported by a unit licensed as hundred percent Export Oriented Unit in terms of the provisions of the relevant Export and Import Policy and the Foreign Trade Policy."

7.3.2 As per the Foreign Trade Policy, 2004-09, applicable during the period when the LOP was issued to the applicant, the EOU is defined to mean, in para 9.24 thereof, as under:

> *"9.24 "EOU" means Export Oriented Unit for which an LOP has been issued by the Development Commissioner".*

7.3.3 Thus, as per relevant Foreign Trade Policy also, a unit to which an LOP has been issued by the Development Commissioner, is an Export Oriented Unit. The Government observes that the original authority has held that the applicant was an EOU on this ground only.

7.3.4 It is also noted that, as per para 6.3.7 of the relevant Handbook of Procedures, Vol.I, *"LOP/LOI issued to EOU/EHTP/STP/BTP units by the concerned authority would be construed as an authorization for all purposes."*. This provision further reinforces the view that the applicant is to be treated as a 100% EOU.

7.3.5 In view of the discussion above, the Government finds that the order of the original authority as upheld by the Commissioner (Appeals) holding that applicant is 100% EOU for the purpose of Drawback, during the relevant period, cannot be faulted.

8.1 The applicant has argued in detail that as per Customs Act and the procedure followed, a EOU has to be first licensed as Customs Bonded Warehouse in terms of the relevant provisions of the Customs Act and thereafter permission to manufacture in bond has to be granted by the competent authority before EOU can become operational and manufacture goods for export. Therefore, the contention appears to be that even if the applicant had a valid LOP, it was not an operational EOU during the relevant period and as such, the benefits cannot be denied to them.

8.2 The Government observes that the relevant notifications bar availment of drawback in respect of goods *"manufactured or exported"* by the EOUs. Therefore, even if the goods are not manufactured by an EOU but are exported by it, the

drawback will not be admissible. The use of word *"or"* in the relevant notifications makes it amply clear that the drawback will not be admissible if the exported goods were either manufactured by or exported by the EOUs. As such, even though the goods in the instant case may not have been manufactured in bond, since the applicant was holding a valid LOP as EOU, which is sufficient for holding it as an EOU for drawback purposes, drawback is not admissible in respect of the goods exported.

9.1 It has been brought out that during the relevant period, the applicant made representations to the Income Tax authorities that they were a EOU and claimed deductions under Section 10B of the Income Tax Act, 1961, while all through not disclosing this status to the Customs authorities and thereby claiming drawback on the exports made by them. The principle of *Aprobate and Reprobate* has, therefore, been applied in support of the case against the applicant. The applicant has assailed the applicability of this principle stating that in terms of the Honb'le Supreme Court's judgment, in the case of ***P.R. Deshpande Vs. Maruti Balram Haibatti (MANU/SC/0491/1998)***, the principle of aprobate and reprobate cannot be applied to deprive them of their legitimate claim for drawback under the Customs Act, 1962. It is observed that in the case of P.R. Deshpande (supra), the Honb'le Supreme Court has held that rule of estoppel has no application when statutory rights and liabilities are involved and an undertaking to the court cannot deprive the person of his right of appeal and from invoking a constitutional remedy. However, in the present case, the issue is not that of an undertakingbeing used to deny a statutory right to the applicant. Rather in this case, as already held by lower authorities and upheld hereinabove, the applicant was 100% EOU for the purposes

of drawback and the principle of aprobate and reprobate has been applied to repel an argument that they were not an EOU since they had made and claimed benefit as a EOU before another statutory authority i.e. the Income Tax. Thus, the issue herein is that whether applicant can be allowed to avail benefit of drawback under the Customs Act and rules made thereunder, on the claim that they were not an EOU, while simultaneously availing benefits under the Income Tax claiming that they were in fact, an EOU. As such, the judgement in P.R. Deshpande (supra) cannot be applied in the fact of this case.

9.2 The Government further observes from the assessment orders issued by the Income Tax authorities, which have been placed on record by the applicant, that for the relevant assessment years, the Income Tax authorities have specifically recorded that the applicant was a EOU and income from operations as an EOU has also been quantified for the purpose of Section 10B of the Income Tax Act, 1961. Thus, there was a positive averment before the Income Tax authorities that the applicant was not only an EOU but they were also obtaining income from operations as an EOU.

9.3 At this stage, it is argued by the applicant that even if a mis-declaration was made by them, such mis-declaration was before the Income Tax authorities and, therefore, remedy, if any, is under Income Tax Act and not by denying drawback under the Customs Act and the rules made there under. The Government is constrained to observe that this is a deceptive argument. The applicant all through knew their status as EOU in terms of valid LOP. They never approached the Development Commissioner for withdrawal of the LOP on the grounds that permission for bond had not been given by the competent authority. Infact, they

sought extension of LOP up to 31.03.2010. Applicant used their status as EOU to obtain Income Tax benefits, all through keeping the customs authorities in dark about their stratagem. Even when the enquiries were made by jurisdictional Customs authority with the jurisdictional Central Excise authorities, which the applicant was aware of, the applicant did not come clean. Now, at this stage when action, if any, for demand of tax under the Income Tax Act has got barred by limitation, an argument has been advanced that the remedy for the Government lies under the Income Tax Act.

9.4 It is obvious that the intentions of the applicant were fraudulent as on one hand they have represented themselves as an EOU before the Income Tax authorities and claimed exemptions from the Income derived from such EOU and on the other hand continued representing themselves as a non-EOU despite having a valid LOP as an EOU.

9.5 The Hon'ble Supreme Court has, in the case of ***Commissioner of Customs, Kandla Vs. Essar Oil Ltd. [2004 (172) ELT 0433 (SC)]***, held that fraud is an act of deliberate deception with the intention of securing something by taking unfair advantage of another. Fraud and justice never dwell together. Fraud as is well known vitiates every solemn act. Fraud is an anathema to equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine.

9.6 Thus, the present contention of the applicant does not merit consideration.

10.1 Another defense of the applicants is that the LOP was issued in respect of a new unit to be set up within the same premises as the existing DTA unit. Since the EOU never became operational, the export was made by the DTA unit and, as such, the drawback is admissible.

10.2 Para 6.32 of the Handbook of Procedures, Vol.I reads as under:

> *"6.32 If an industrial enterprise is operating both as a domestic unit as well as an EOU/EHTP/STP/BTP unit, it shall have two distinct identities with separate accounts, including separate bank accounts. It is, however, not necessary for it to be a separate legal entity, but it should be possible to distinguish the imports and exports or supplies affected by the EOU/EHTP/STP/BTP units form those made by the other units of the enterprise."*

10.3 Thus, as per para 6.32 ibid, an industrial enterprise can operate both a DTA unis as well as an EOU, without them being separate legal entities. However, such units shall have to maintain distinct identities with separate accounts. In the present case, there is no averment or claim that separate identities or accounts were indeed maintained. In fact, as noted above, the Income Tax Returns of the applicant Avanti Overseas were filed as an EOU and the assessing officer has recorded that the *"assessee company was 100% EOU"*, without any mention or distinction being made with the DTA unit. Further, the auditor's certificates and the company financials, as available on records, also record one common account with entire turnover being assigned to the EOU.

10.4 In view of the above, there is no merit in this defense of the applicants, as well.

11.1. It has been further contended by the applicant that the demand should be treated as time barred since it has been issued much after the drawback was availed and even after the enquiry was made by the customs authority with the jurisdictional Central Excise authorities.

11.2 The Government observes that the demand in the instant case has been made under Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. Rule 16 does not prescribe any period of limitation. The Hon'ble Supreme Court has, in the case of ***Citedal Fine Pharmaceuticals [1989 (42) ELT 515 (SC)]***, held that *"In the absence of any period of limitation it is settled that the authority is to exercise powers within a reasonable period and what would be the reasonable period would depend upon the fact of each case and whenever a question regarding inordinary delay issue of demand notice is raised, it would be open to the assessee to contend that it is bad on grounds of delay."*

11.3 In the present case delay is alleged as the demand has been raised even after earlier inquiry made by the customs authorities did not result in any adverse report. However, as already brought out hereinabove, the conduct of the applicant has been deceptive and fraudulent. Specifically, the applicant failed to disclose the full facts in the first inquiry. As such, it is not open to the applicant to, now, contend that the demand has not been issued within a reasonable period.

12. In view of the above, the revision application no. 375/33/DBK/2018-RA filed by M/s Avanti Overseas Pvt. Ltd. is rejected. The revision application no. 375/32/DBK/2018-RA filed by Shri Sidharth Modi is disposed of as having abated.

(Sandeep Prakash)
Additional Secretary to the Government of India

1. M/s Avanti Overseas Pvt. Ltd
   D-37, South Extension, Part-2,
   New Delhi-110049.

2. Sh.Sidharth Modi (Deceased)
   D-37, South Extension, Part-2,
   New Delhi-110049

Order No. 38-39 /21-Cus dated 09-02-2021

Copy to:

1. The Commissioner of Customs (Exports), ICD-Tughlaqabad, New Delhi-110007.
2. The Commissioner of Customs (Appeals), New Custom House, New Delhi-110037.
3. Shri K.K. Anand, Advocate, A-103, Defence Colony, New Delhi-110024.
4. PA to AS(RA)
5. Guard File.
6. Spare Copy

Attested

(Nirmla Devi)
Section Officer (REVISION APPLICATION)