

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. 371/370/DBK/19-RA | 2094 Date of Issue : 10.04.2023

ORDER NO. 409 /2023-CUS /ASRA/MUMBAI DATED 30-3-2023
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 TDA Auto Works Pvt. Ltd
Respondent : The Commissioner of Customs (Appeals), Mumbai-II.
Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order in Appeal No.
137(SIIB(Exp))/2019(JNCH)/Appeal-I dated 14-06-2019 passed
by the Commissioner of Customs (Appeals), Mumbai-II

ORDER

This Revision Applications have been filed by M/s TDA Auto Works Pvt.Ltd. (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. 137(SIIB(Exp))/2019(JNCH)/Appeal-I dated 14-06-2019 passed by the Commissioner of Customs (Appeals-I), Mumbai-II.

2. The Brief facts of the case are that the applicant had filed a Shipping bill no. 5418404 dt. 22.01.2016 for export of 2500 pcs of "Front Wheel Bearing" and other items, at a declared FOB value of Rs. 46,35,168/-, under the Drawback Scheme, claiming Drawback of Rs. 1,33,564/-. During the examination it was noticed that the said goods "FR. WHEEL BEARING (AUTOMOTIVE PARTS)" (item no 1 of C/List), were found to be engraved with marks as "ILJINT "KOREA" "KH 2A12". There was no packing for the bearings under export and it was put in a transparent plastic cover without any markings. It appeared that the bearings under export had not undergone any manufacturing process in India and hence, they may not be eligible for drawback as per Section 75 of Customs Act, 1962. The subject goods (Sr. no 2 to 15) under S/Bill no 5418404 dt-22.01.2016, were released provisionally. As per the observation of the docks examining staff, it appeared that the subject goods were not manufactured or not gone through any manufacturing process in India. Detailed investigations were carried out and the statement of the applicant and the supplier of the goods were recorded. The same revealed that the procurement of the said goods (Front Wheel Bearing) was not established and the impugned goods were not purchased/acquired from M/s Mahavira Trading Company. Therefore, it appeared that the exporter M/s TDA Auto Works Pvt Ltd failed to provide evidence that the goods were manufactured in India and hence the same were not eligible for drawback of Rs. 49,219.38/- under section 75 of Customs Act, 1962. A show cause notice was served to the applicant. The same was adjudicated by the Joint Commissioner of Customs, NS-II, JNCH vide OIO No903/2018-19/JC/NS-II/CAC/JNCH dated 12-10-2018 wherein the drawback claim of Rs. 1,33,564/- under the Shipping Bill 5418404

dated 22.01.2016 was rejected and restricted it to Rs. 84,345/-; ordered the goods valued at Rs 49,219/- liable to confiscation under section 113 (1) & (1) of the Customs Act, 1962. However, since the goods were not physically available for confiscation, refrained from imposing redemption fine; imposed a penalty of Rs. 50,000/- on the exporter under Section 114(ii) of the Customs Act, 1962.

3. Aggrieved by the aforesaid Order in Original, the Applicant filed appeal with the Commissioner of Customs (Appeals), Mumbai-II who vide his OIA No. 137(SIIB(Exp))/2019(JNCH)/Appeal-I dated 14-06-2019 upheld the Order in Original and dismissed the appeal filed by the Applicant.

4. Aggrieved by the said Order-in-Appeal, the Applicant filed the present appeal on the following grounds.

4.1. That the definition of "manufacture" provided under the Central Excise Act, 1944 has been deliberately ignored and / or mis-interpreted; that on the very same grounds, the Revenue had investigated the exports of the Applicant in the year 2014. During that period, each of the export consignments of the Applicant were provisionally released only after it furnished the Bond for every consignment. The Applicant was put to unreasonable hardship for no fault of theirs. However, having not found anything, the investigations was closed vide letter F. No. SG/MISC-44/2014-SIIB(X) dated 06-08-2014.

4.2 They submitted that it was alleged that the said goods had engraved markings as "ILJIN KOREA" "KH 2A12". It was considered "KOREA" to mean as if the said goods were manufactured in Korea and the same were of Korean Origin. However, instead of proving as to the Country of Origin of the said goods to be Korea, the burden was cast on them to prove the Country of Origin of the said goods as India. They submitted that while making the allegation, it was the responsibility of the one who made the allegations to prove beyond reasonable doubt its allegation. The OA had no evidence to suggest that the said goods were of Korean Origin. It had failed to even trace

the origin of the said goods to any importer, who might have imported the said goods in case the same were imported (without admitting that the same were imported at all).

4.3 As regards the words "KOREA" engraved on the said goods, they submitted that until it was specifically mentioned "MADE IN KOREA" or "PRODUCE OF KOREA or any other words to mean that the said goods were produced or originated from any other country including Korea, it could not be attributed the origin of the same to Korea. The engraving of words "KOREA" did not in any manner mean that the goods were of Korean origin or for that matter of foreign origin..

4.4 Notwithstanding the fact that the said goods could not be said to be of Korean origin/ foreign origin, assuming (and not at all admitting) that the same were imported goods, in that case also, the process of manufacture had been done. Provisions of Section 2 of the Central Excise Act, 1944 gives definition of the "manufacture As per the said provisions. even packing, re-packing, labelling etc, amounts to manufacture. The said goods (Free Wheel Bearings) were put in transparent plastic covers, 65 such bearings in plastic bags were packed in cartons and the cartons were packed in gunny bags, with markings by marker pen as "51720-02000-65 Pc TDA/57". The Pallet containing such cartons was found stuck with paper sticker indicating the name of exporter, consignee, marks and no. and. pallet no. With all these packings found and recorded in the said SCN itself, there was no ground to say that the said goods were not manufactured or processed in India in terms of the definition of "manufacture" as given in Section 2 (f) (iii) of the Central Excise Act, 1944

4.5. Under Section 2(f) of the Central Excise Act, the definition of the "Manufacture" is provided, which reads as under-

Section 2(f): "manufacture" includes any process, -

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the Section or Chapter Notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or

(iii) Which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his account;

4.6. The goods exported by the Applicant, which are subject of the present proceedings, are "Free Wheel Bearings" falling under Central Excise Tariff Head and Customs Tariff Head 8708 9900 (both being the same). The said goods appear in the Third Schedule at Sr. No. 100. Reading the above three paras together will show that packing or re-packing, labelling etc. amounts to manufacture in terms of the definition of manufacture under Section 2(f)(iii) of the Central Excise Act, 1944. Accordingly, the said export goods (Free Wheel Bearings) are manufactured in India and the Country of Origin is also India.

4.7. That the said goods were procured by the Applicant from the local market. The said goods were purchased against a tax paid invoice. The said goods are not branded goods as no brand name appears on them. It is not the case of the Revenue that the same were clandestinely procured in contravention of any law of the land. Further, at the time of examination of the said goods by the Customs officers, the same were found in packing of cartons in gunny bags bearing labels. Para 2 of the SCN dated 28-01-2017 clearly provides the details of the packing of the said goods. Hence this clearly explain that the said goods were manufactured in terms of the

definition of "manufacture" contained under Section 2 (f) (iii) of the Central Excise Act, 1944.

4.8. They further submitted that assuming (and not admitting) that the said goods were imported by someone and sold into the Indian open market and that they bought the same from such open market, even in that case said goods could not be termed as imported goods. It was submitted that after import of any goods for home consumption on payment of Customs duty, the said goods became domesticated and could no more be termed as imported goods. Section 2 (25) of the Customs Act, 1962 define the imported goods as any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption. Therefore, the said goods could not be termed as imported goods. Definition of "imported goods" as provided in Section 2 (25) of the Customs Act, 1962 is as under:

Section 2 (25): Imported Goods: "imported goods" mean any goods brought into India from a place outside India but does not include which have been cleared for home consumption;

The above definition of imported goods clearly says that once the goods are cleared from Customs, the same are no more imported goods. In view of the same, it can be safely said that the said export goods are entitled to claim of drawback under the provisions of Customs Act, 1962 read with provisions of the Customs, Central Excise Duties and Service Tax Drawback Rules 1995.

4.9. The Courts in India have at many times deliberated on the definition of "manufacture", The Applicant relied on the order of the Hon'ble CESTAT in the matter of Honda Motors India Ltd. Vs. Commissioner of Central Excise, Chennai - II reported vide 2015 (318) E.L.T. 163 (Tri.-Chennai).

4.10. The Director of the Applicant has stated in his statement that the said goods were purchased from the local market. He even gave details of the said local purchases, the sellers of the said goods and the invoices against which the said goods were purchased. The said goods are not

branded goods therefore its manufacturer cannot be ascertained. The Director of the Applicant has correctly stated in his statement that he did not know about the manufacturer of the said goods. Under the circumstances, having not purchased the said goods from the manufacturer, he cannot be expected to know about the manufacturer of the said goods. There is no misstatement or misrepresentation of giving of false information attracting any of the penal provisions under the Customs Act, 1962.

4.11. The Appellate Authority has even gone beyond the scope of the said O-in-O and made a new / fresh allegation that there was gross over-valuation of the export goods (para 6.7 of the impugned order). The allegation of over- valuation does not appear in the SCN or the said O-in-O. In fact there is no mention of over-valuation in either the SCN or the said O-in-O. Without any basis the Appellate Authority has gone beyond the contours of the facts of the case and held the allegation of the over-valuation against the Applicant while upholding the said O-in-O.

4.12. That the Applicant has purchased the said goods from a trading firm M/s. Mercury Enterprises, Delhi. This firm (M/s. Mercury Enterprises) had in turn, purchased the said goods from M/s. Mahavira Trading Co., Rohtak. The Revenue itself has confirmed the fact of purchase of the said goods by the Applicant from the said M/s. Mercury Enterprises, Delhi. Under the circumstances, in case there is any concealment of fact or mis- statement, it is on the part of the said M/s. Mahavira Trading Co., Rohtak and not on the part of the Applicant and its Director. In case the said goods are found to be of foreign origin (which the Noticee and its Director do not admit at all), the onus of proving the same or otherwise is between the Revenue and the said M/s. Mahavira Trading Co., Rohtak. The Applicant and its Director cannot be held guilty of any wrong done by anybody up the supply chain of the said goods. The Applicant relies on the order of the Hon'ble CESTAT in the matter of Vinayak Exim Vs. Commissioner of Central Excise, Mumbai - I reported vide 2016 (340) E.L.T. 716 (Tri.- Mumbai).

4.13. That the Appellate Authority has upheld the said O-in- O in respect of provisions of Section 113(i) of the Customs Act, 1962 invoked by the Revenue and confirmed by the Original Authority. The said provisions of the law relate to valuation of the goods and there is no dispute in respect of the same. Accordingly, the invocation of Section 113(i) of the Customs Act, 1962 does not stand the legal scrutiny. Further, Section 113 (ii) of the Customs Act, 1962 relates to any information which does not correspond to any material particular in respect of the export goods. However, the Applicant has provided all the information within its control correctly and such information has no adverse bearing on the claim of the drawback. In fact, the information is correct and the Applicant is entitled to the lawful drawback amount claimed by it, which has been illegally rejected by the Adjudication Authority.

4.14. That imposition of penalty under Section 114(iii) of the Customs Act, 1962 is also unwarranted. This provision of law deals with cases where any act of the exporter leads to liability to confiscation of the export goods. As explained above, there are no grounds for confiscation of the export goods as all the declarations made by the Applicant are correct as per law. The pre-determined and biased attitude of the Adjudicating Authority and the Appellate Authority has led to passing / upholding of the order for rejection of drawback and imposition of penalty. The impugned order is unsustainable under the law of the land.

4.15. Based on the above facts, it is obvious that the said goods are of Indian Origin and the Applicant is legally entitled to claim drawback upon export of the same. It is submitted that the Applicant has claimed "All Industry Rate of drawback and no brand rate or any other special rate of drawback has been claimed. The Applicant has also not claimed any refund of import duty or any other duty paid on the said export goods. Being a

merchant exporter, the Applicant is legally and rightfully entitled to claim the said "All Industry Rate" of drawback, which it has claimed as per law.

In view of the above, the applicant requested the impugned order dated 14-06-2019 may be held as unsustainable and set aside; that the drawback amount of Rs.49,219/- claimed by the Applicant may be allowed along with interest and disbursed to the Applicant as per law; that the penalty of Rs.50,000/- imposed on the Applicant may be set aside as untenable under the law,

5. A personal hearing in this case was given on 06-12-2022. Mr R.K.Tomar, Advocate, appeared online and submitted that they have repacked and labelled the goods. He further submitted that they are eligible for the drawback. He requested to allow the claim

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

7. Government observes that the issue in this case is that the applicant exported Front Wheel bearings and other items at a declared FOB value of Rs 46,35,168/-and intended to claim drawback of Rs.133564/-. The Front wheel bearings had markings of "Iljin Korea KH@A12" and the applicant had claimed drawback of Rs.49,219/- for the impugned product out of the total goods. The Adjudicating authority had rejected the drawback claim on the grounds that no manufacturing activity was carried out on the said goods and hence not eligible to claim drawback under Section 75 of the Customs Act, 1962 and the decision has been upheld by the Appellate Authority. The issue to be decided is whether the lower authorities are correct in rejecting the drawback claim.

8. On going through the records Government observes that the applicant has claimed drawback under Section 75 Of the Customs Act, 1962 wherein

Drawback is granted on imported materials used in the manufacture of goods which are *exported* (1) *Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer or being goods entered for export by post under and in respect of which an order permitting clearance for exportation has been made by the proper officer a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods.....*

Further Section 2(f) of CEX Act has defined manufacture as " any process —
 (i) incidental or ancillary to the completion of a manufactured product;
 (ii) which is specified in relation to any goods in the section or Chapter notes of 11[The First Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to 12[manufacture; or] 13[(iii) **which in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;**]

From the above it is understood that to claim drawback under section 75 of the Customs Act, some manufacturing/processing/operation should be carried out in India on the imported goods. Section 2(f) (iii) has defined manufacturing as in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer.

9. The SCN and the OIO contends that the "There was no packing for the bearings under export and **it was put in a transparent plastic cover without any markings. 65 bearings were found packed in a plain carton, which was again packed in a gunny bag, with a marking by marker pen as "51720-02000-65 Pc TDA/57". The pallet containing such cartons was found stuck with paper sticker indicating the name of exporter, consignee, marks and no. and pallet No.** There was no indication on the packages that they contain bearings or its model no. or name of the manufacturer on the packages". The process of the product being put in plastic cover, again packed in gunny bag, markings, paper sticker indicating the name of the exporter etc. indicates as the process of repacking and labelling has been carried out. Section 2(f)(iii) states that manufacture includes any process in relation to the goods specified in third schedule involves packing.

10. Government finds that in this case the applicant has obtained the goods from the local market and he has given the documents evidencing the tax invoices, name of the supplier, etc. The supplier has also confirmed that he has sold the goods to the applicant. Further the Department has also stated that the goods are put in a transparent plastic cover, packed in plain carton, and the same are again put in gunny bags and also that the pallet contains sticker indicating the name of the exporter etc.

11. In view of the above Government finds that the goods exported has undergone the process of packing. The department's contention that the markings of Korea on the wheels show that the goods are imported goods and are being exported as such does not hold true. Even if the same had been imported, it is deemed to be duty paid when it is obtained in the local market and since repacking and labelling has been carried out on the same the applicant is eligible to claim the drawback under Section 75 of the Customs Act, 1962. The department has not brought any evidence to show that the goods have been smuggled or brought, in any other fraud manner. On the contrary the goods have been repacked and labelled with the name of

the exporter and thus the process of packing has been carried out on the goods. Government therefore finds that the applicant is eligible for the drawback claimed.

12. Government sets aside the Commissioner (Appeal-I), Mumbai-II, Appeal's OIA No. 137(SIIB(EXP))/ 2019(JNCH)/Appeal-I dated 14-06-2019 and allows the Revision application filed by the Applicant.

13. Revision Application filed by the applicant is disposed off in the above terms.


(SHRAWAN KUMAR)

Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No. 409 /2023-CUS/ASRA/Mumbai DATED 30-3-2023

To,

1. M/s TDA Auto Works Pvt Ltd, 2 A, Sanghrajka House, GR FLR, 431 Lamington Road, Mumbai-400004.
2. The Commissioner of Customs, Nhava Sheva-II, Jawaharlal Nehru Customs House, Nhava Sheva, Tal-Uran, Dist-Raigad, Maharashtra-400707

Copy to:

1. The Commissioner of Customs(Appeals-I), Mumbai-II, Nhava Sheva, Jawaharlal Nehru Customs House, Nhava Sheva, Tal-Uran, Dist-Raigad, Maharashtra-400707
2. The Joint Commissioner of Customs, Nhava Sheva-II, Jawaharlal Nehru Customs House, Nhava Sheva, Tal-Uran, Dist-Raigad, Maharashtra-400707
3. Shri R K Tomar, 403, 4 Floor, Vikas Premises, 11, NGN Vaidya Marg (Bank Street), Fort, Mumbai 400023
4. Sr. P.S. to AS (RA),Mumbai
5. Spare Copy
6. Notice Board.