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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. 371/162/DBK/2019-RA / 2100
371/163/DBK/2019-RA

Date of issue: 11.04.2023

425-
ORDER NO. 426/2023-CUS (WZ)/ASRA/MUMBAI DATED 06.04.2023
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. Zegna South Asia Pvt. Limited

Respondent : Pr. Commissioner of Customs (Export), ACC, Mumbai.

Subject : Revision Applications filed under Section 129DD of the
Customs Act, 1962, against the Orders-in-Appeal No. MUM-
CUSTM-AXP-APP-1116-2018-19 dated 11.02.2019 and MUM-
CUSTM-AXP-APP-1117-2018-19 dated 11.02.2019 passed by
the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

Two Revision Applications are filed by M/s. Zegna South Asia Private Limited, 10th Floor, Maker Tower E, Cuffe Parade, Mumbai – 400 005 (hereinafter referred to as “the Applicant”) against Orders-in-Appeal No. MUM-CUSTOM-AXP-APP-1116-2018-19 dated 11.02.2019 and MUM-CUSTOM-AXP-APP-1117-2018-19 dated 11.02.2019 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2.1 Brief facts of the case are that the Applicant had filed applications for duty drawback under section 74(1) of the Customs Act, 1962 (98% of the duty paid on imported goods) for export of the goods which were part of an imported consignment. After carrying out the required verification, the drawback was sanctioned by the original authority vide following Orders-in-Original (OIO):

OIO No./date	Shipping Bill No./date	Drawback amount sanctioned
AC/INR/1037/DBK(M)/ACC dated 16.01.2016	000426/27.09.2014	Rs. 36,16,512/-
AC/INR/1032/DBK(M)/ACC dated 11.01.2016	000255/14.07.2014	Rs. 40,52,363/-

2.2 However, the Department (hereinafter referred to as ‘the respondent’) filed an appeal on the following grounds:

- i The FOB value of Export in the Shipping Bills is less than 50% of the assessable value of the import and the drawback is sanctioned on the complete import value wherein the amount realized is less than 50% of the import value which is shown from the BRC submitted.
- ii The identity of the goods is said to be established but the value of goods which is the actual identity is not verified.
- iii Since export related benefit is extended to provide exporter to earn foreign exchange, non-realized amount cannot be claimed for drawback.

The Appellate authority allowed the appeals vide impugned Orders-in-Appeal (OIA) and ordered for re-examination of genuineness of refund of duty paid under Section 75 of the Customs Act, 1975.

3.1 Hence, the applicant has filed the impugned Revision Application mainly on the grounds that:

- a) The Commissioner (Appeals) erred in setting aside the Order-in-Original sanctioning the drawback under Section 74 of the Customs Act 1962 and in remanding the matter, despite the fact that as per the examination report, the identity of the goods was established and the goods were found to be unused and were being re-exported within two years and the FOB value and PMV were found to be fair. The Commissioner (Appeals) should have dismissed the department's appeal since all the requirements of Sections 74 and 76 of the Customs Act 1962 were fully satisfied and complied.
- b) The Commissioner (Appeals) erred in holding that though the grounds of appeal filed by the department are not very elaborate and precise, they make lot of sense. He erred in not appreciating that each of the grounds raised by the department was irrelevant and extraneous to the issue of eligibility of Drawback under Section 74 of the Customs Act 1962.
- c) The Commissioner (Appeals) seriously and gravely erred in proceeding on the totally erroneous premise that the purpose of granting Drawback under Section 74 of the Customs Act 1962 of the duty suffered by the indigenous goods at the time of export is to make them competitive in the international market so that they can fetch foreign exchange. The said finding of the Commissioner (Appeals) is ex-facie and blatantly erroneous. He seriously erred in not appreciating that drawback under Section 74 is not in respect of duty suffered by indigenous goods. The drawback under Section 74 is in respect of re-export of imported goods. The very basis of the Order of the Commissioner (Appeals) is fallacious.

- d) By proceeding on the erroneous premise that the purpose of grant of drawback under section 74 is to make indigenous goods competitive in the international market, the commissioner (Appeals) has further erred in holding that since in the instant case the export value of the goods being re-exported was half of the import value, the same defeats the basic spirit of export incentive/refund of duty. The Commissioner (Appeals) seriously erred in not appreciating that drawback under Section 74 is not by way of export incentive but is by way of return of the duty paid on the imported goods since the same are being re-exported.
- e) The Commissioner (Appeals) erred in not appreciating that there is no provision which bars the grant of drawback on re-export if the FOB value is half of the import value. He erred in not appreciating that the eligibility to drawback under Section 74 is not dependent or conditional upon the export value being equal to the import value. The drawback that is paid under Section 74 is not of the value of the imported goods but of 98% of the duty paid on the import goods and such duty is re-paid as Drawback because the goods are re-exported within two years without being put to use.
- f) The Commissioner (Appeals) seriously erred in holding that since the export was to a related party, it further raises question mark on the declared value of the export. The said observation of the Commissioner (Appeals) is totally extraneous to the issue of Drawback under Section 74 of the Customs Act 1962. The issue of valuation of the goods being re-exported to a sister concern has no relevance to or bearing on the question of entitlement to drawback under Section 74. The only question which is to be examined under Section 74 is whether the goods being re-exported are the ones which were imported on payment of duty and whether the same were unused and whether the same are being re-exported within two years.
- g) The Commissioner (Appeals) erred in not appreciating that the only prohibition in Section 76 of the Customs Act 1962 is against the grant of

drawback in respect of any goods the market price of which is less than the amount of drawback due thereon or where the drawback due is less than Fifty rupees. The Commissioner (Appeals) erred in not appreciating that the said prohibition is not attracted in the present case.

- h) The Commissioner (Appeals) erred in not appreciating that the declared FOB value has been duly realized and received for which Bank Realization certificates have been submitted. It was not the case of the department in their Appeal that the said FOB value has not been realized or that the Market price of the goods is less than the amount of drawback.
- i) The Commissioner (Appeals) erred in not appreciating that Present Market value of mentioned in the Shipping Bill was found to be fair in the examination report and there was no evidence cited in the department's appeal to dispute the said Market price nor was there any allegation and evidence in the department's appeal to the effect that the market price of the goods was less than the Drawback amount of Rs.40,52,363/-. In the absence of any such allegation and evidence, the Commissioner (Appeals) should have rejected the department's appeal.
- j) The Commissioner (Appeals) seriously erred in holding that in the present case, in terms of the Re-export of Imported Goods (Drawback of customs duties) Rules 1995, permission from Reserve Bank of India for re-export of the goods may also be required. The said finding of the Commissioner (Appeals) is baseless as he has not specified the particular Rule or other provision under which permission from Reserve Bank of India is required for re-export. The very fact that the Commissioner (Appeals) has used the expression "may also be required" without specifying the particular provision of law itself shows that he himself is not sure that such RBI permission is required. In the present case the GR form had been duly filed by the Applicant declaring the FOB value and the same has been duly realized as per the Bank Realization

Certificate and there is no objection to the value raised by the Reserve Bank of India.

On the above grounds, the applicant prayed to set aside the impugned Order-in-Appeal and allow their RA with consequential relief.

3.2 The respondent submitted counter arguments on the impugned RA vide letter dated 09.10.2020 inter alia contending that:

- i. The Hon'ble Commissioner (A) has passed the Order after considering all the facts and intricacies of the case as well as submissions of the Appellant and observed that ground of appeal makes a lot of sense and needs to be looked into objectively. The Appellant's contention that Commissioner (Appeal) should have dismissed the department's appeal is neither proper nor sustainable.
- ii. It is fact on records that the FOB value of Export is Rs 79,20,159 which is less than 50% of the assessable value of Import i.e. Rs.1,60,01,505/-. It is worth mentioning that the export related benefits are extended to exporter to fetch foreign exchange. The Commissioner (Appeal) has correctly observed that in this case, the export value of exported goods under Section 74 is roughly half of the import value which defeats the basic spirit of export incentive / refund of duties. In view of it, it can be summarized that being lesser amount realized as export proceeds compared to assessable value of import, the drawback claimed in such cases will amount to loss to the exchequer in terms of quantum of foreign exchange, non-realized amount in terms of lesser value of export cannot be claimed for drawback.
- iii. The Commissioner (Appeal) has categorically observed in the case that export was made to the related party so it was incumbent on the lower authority/ drawback sanctioning Authority to look into the process followed for valuation for export purpose to specially when the goods were old and which remained unsold here and when depreciation rate of

personal clothing items are very high to examine whether the market value of the goods clear the bar raised by Section 76(1) of the Customs Act, 1962. The Commissioner (Appeal) has rightly observed the issue considering relevant aspects and upheld the department appeal accordingly.

In view of the above, the respondent prayed to reject the Revision application filed by the applicant.

4. A Personal hearing was held in this case on 15.02.2023. Shri Jaideep Patel, Advocate and Shri Vivek Whig, authorized representative appeared on behalf of the Applicant for the hearing and reiterated earlier points. They submitted a file stating same to be correlation documents. They further submitted that their claim is under section 74. They requested to allow the application.

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

6. Government observes that the issue to be decided in the instant case is whether grounds for rejection of drawback claim of the applicant are covered under Section 74 of the Customs Act, 1962.

7.1 Government observes that the relevant Section 74(1) of the Customs Act, 1962 reads as under:

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 which 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.....

(iii) are entered for export by post under 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 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

Government notes that the applicable statute under reference mandates that the goods should be identifiable to the satisfaction of the Assistant/Deputy Commissioner of Customs at the time of export. In this regard, a Circular No. 46/2011 – Customs dated 20.10.2011 issued instructions for strict compliance by the field staff. The relevant paragraph of this Circular is reproduced hereunder:

3. In the background of the recommendations/observations of the C&AG made in the said report, the following instructions are being issued for strict compliance.

3.1 Instructions relation to "identification of goods" and "determination of use" in terms of Section 74 of the Customs Act, 1962.

(a) In terms of the section 74 of the Customs Act, 1962, the export goods are to be identified to the satisfaction of the Assistant/Deputy Commissioner of Customs. This may require examination and verification of various parameters, including but not limited to physical properties, weight, marks and numbers, test reports, if any, documentary evidences vis-à-vis import documents etc., for

identification of the goods. If such export goods have been 'used after import', the same is to be determined besides establishing the identity of the goods.

7.2 In the instant matter, Government observes that the impugned OIOs describe in details about compliance of stipulated norms under Section 74 *ibid* by the applicant including establishing of identity of goods. The relevant para 4 of both OIOs is reproduced here under:

4. *The imported goods had been exported vide shipping bill no. 000255 dated 14.07.2014. The identity of the goods exported had been established and the declared FOB value and PMV of the goods was found to be fair by DC(Export Shed) on physical examination of the goods at the time of export. [OIO No. AC/INR/1032/DBK(M)/ACC dated 11.01.2016]*

4. *The imported goods had been exported vide shipping bill no. 000426 dated 27.09.2014. The identity of the goods exported had been established and the declared FOB value and PMV of the goods was found to be fair by DC(Export Shed) on physical examination of the goods at the time of export. [OIO No. AC/INR/1037/DBK(M)/ACC dated 16.01.2016]*

Thus, Government observes that physical identity of imported goods with the export goods has not been doubted by the respondent. The time limit of exporting the import goods within two years from the date of payment of duty on the importation was also found to have been complied by applicant. Thus, no violation of both the stipulated conditions under Section 74 *ibid* was found by the respondent.

8.1 Government observes that the respondent has contended that *the FOB value of Export is Rs 79,20,159 which is less than 50% of the assessable value of Import i.e. Rs.1,60,01,505/-*. Government finds this comparison as illogical, as from the total import consignment, only a portion was re-exported. The present market value (pmv) of this consignment was declared as Rs.87,12,167/-, which on verification was found as fair by the concerned

Customs officials as apparent from the concerned Shipping Bill No. 000426 dated 27.09.2014.

8.2 Government observes that the other contention of the respondent is that it is required to examine whether the market value of the goods clear the bar raised by Section 76(1) of the Customs Act, 1962. Government observes that Section 76 ibid reads as under:

Section 76. Prohibition and regulation of drawback in certain cases. -

(1) Notwithstanding anything herein before contained, no drawback shall be allowed -

...

(b) in respect of any goods the market-price of which is less than the amount of drawback due thereon;

In the instant case, Government observes that in Shipping Bill No. 000426 dated 27.09.2014, against pmv of Rs.87,12,167/-, a drawback of Rs.36,16,512/- was sanctioned and in Shipping Bill No. 000255 dated 14.07.2014, against pmv of Rs.1,00,40,855/-, a drawback of Rs.40,52,363/- was sanctioned vide the impugned OIOs. Thus, Government finds that in both the cases the condition stipulated under Section 76(1) has been complied and therefore this contention of the respondent is unfounded.

9. In view of the above discussion and findings, the Government sets aside the Orders-in-Appeal No. MUM-CUSTM-AXP-APP-1116-2018-19 dated 11.02.2019 and MUM-CUSTM-AXP-APP-1117-2018-19 dated 11.02.2019 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the impugned Revision Applications.


(SHRAWAN KUMAR)

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

ORDER No. ~~425~~-426/2023-CUS (WZ)/ASRA/Mumbai dated 06.11.2023

To,

M/s. Zegna South Asia Private Limited,
10th Floor, Maker Tower E, Cuffe Parade,
Mumbai - 400 005.

Copy to:

1. Pr. Commissioner of Customs (Export),
Air Cargo Complex, Sahar,
Andheri(E), Mumbai - 400 099.

 2. Adv. Jaydeep Patel,
801, Raheja Chambers,
Free Press Journal Marg,
Nariman Point, Mumbai - 400 021.
 3. Sr. P.S. to AS (RA), Mumbai
 4. Guard file
 5. Notice Board.
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