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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. 371/07/DBK/2019-RA / 2138

Date of issue: 12.04.2023

ORDER NO. 438/2023-CUS (WZ)/ASRA/MUMBAI DATED 11.4.2023
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. Ali Teppich Jallarpur

Respondent : Commissioner of Customs, Nhava Sheva-III, Mumbai Zone-II

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962, against the Order-in-Appeal No. 700
(Adjn.(I)/2018(JNCH)/Appeal-II dated 27.07.2018 passed by
Commissioner of Customs (Appeals), Mumbai-II.

ORDER

This Revision Application along with application for condonation of delay is filed by M/s. Ali Teppich Jallarpur, Ward No. 7, Nai Basti, Bhadohi, Uttar Pradesh - 221 401 (hereinafter both referred to as "the Applicant") against Order-in-Appeal(OIA) No. 700(Adjn.(I)/2018(JNCH)/Appeal-II dated 25.07.2018 passed by the Commissioner of Customs (Appeals), Mumbai-II.

2. In the application for condonation of delay, the Applicant has submitted that delay in filing the Revision Application happened as the applicant had to come all the way from Lucknow to Mumbai to seek the further course of action for which the Applicant had to seek legal opinion and had to find an advocate to proceed in the matter. In the process of seeking expert legal opinion and engaging a proper advocate, time elapsed and accordingly the delay occurred. Further, it was also not clear as to where the application has to be filed - at Delhi or at Mumbai, hence their application was delayed by 66 days. The Government, finding the grounds for delay reasonable is condoning this delay and is taking up the matter for deciding on merits.

3. Brief facts of the case are that a specific information was received by DRI Lucknow, that the applicant was trying to export a consignment of "Indian Hand knotted woolen Carpets (80% Wool & 20% Cotton)" which was mis-declared and over-valued in order to claim wrongful duty drawback. A team of officers from DRI, Lucknow examined the export consignment filed by the applicant vide Shipping Bill Nos. 9435157, 9435189, 9435211, 9435212 & 9435256 all dated 07.05.2015. The product, 'Hand Knotted woolen carpet' is classifiable under CTH 5701 and Drawback for the same is available under Drawback Serial no.570101A of the Drawback Schedule with Drawback Rate of 9.6% with a cap of Rs.678/- per square meter when Cenvat facility has not been availed. However, the product, 'Woven Woolen Carpets' is classified under CTH 5702 and Drawback for the same is available under Drawback Serial

no.570201A of the Drawback Schedule with Drawback rate of 9.7% with a cap of Rs.293/- per square meter, when Cenvat facility has not been availed. The test report of Indian Institute of Carpet Technology (IICT), Bhadohi indicated that the said goods were mis-declared in terms of type and composition. Since the carpets were woven and not knotted, it appeared that the goods had been misclassified under CTH 5701 instead of CTH 5702 with the sole purpose of getting higher value cap for drawback.

4. The consignment was seized and a Show Cause Notice was issued to the applicant to show cause as to why: (i) the subject goods should not be confiscated, (ii) Penalty should not be imposed on the them; (iii) claim for drawback should not be rejected for the subject goods to be exported, (iv) the duty drawback claimed in the previous Shipping Bills should not be rejected and duty drawback already claimed should not be recovered (v) the amount of Rs.5,00,000/- already deposited by the applicant during investigation should not be appropriated against the demands mentioned above.

5. The Adjudicating Authority vide Order-in-Original (OIO) No. 879/2016-17/ADC-NS-III/JNCH dated 16.03.2017 rejected the declared drawback claim of Rs.11,62,750/- in respect of live Shipping bills; rejected the drawback claim in respect of previous Shipping Bills under section 75 of Customs Act, 1962 read with Rule 16 of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and ordered to recover the amount of duty drawback of Rs.24,05,973/- received by the applicant in respect of these Shipping bills along with applicable interest under Rule 16 & 16A of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995; confiscation of impugned goods under section 113(i) and (ii) of Customs, Act, 1962, with an option to redeem the same on payment of redemption fine of Rs.10,00,000/-; and penalty of Rs.5,00,000/- was imposed on the applicant under section 114 (iii) of the Customs Act, 1962.

6. Aggrieved, the Applicant filed an appeal with the Commissioner (Appeals) who vide impugned Order-in-Appeal upheld the OIO in toto with only modification that the redemption fine of Rs.10,00,000/- was reduced to Rs.3,00,000/-

7. Aggrieved, the Applicant has filed the instant revision application mainly on the following grounds:

- a) The Applicant submits that the Commissioner failed to consider the fact that the live consignment confiscated was valued around Rs. 1.26 Crores and the drawback claimed was about Rs. 11.62 Lacs. The mishandling of the DRI officials during the panchnama has caused deterioration of the carpet which has obviously resulted in fetching no market value, in as much as the carpets, after examination, were not properly packed. Therefore, the goods ought to have been allowed to be taken back to town without any redemption fine. The Commissioner has erred in not completely setting aside the redemption fine. It is also a fact that the Commissioner has not even discussed the aspect of margin of profit. The imposing of fine of Rs.3 lakh is without any rationale and is against the spirit of Section 125 of the Customs Act, 1962.
- b) Under the Order-in-Original the Additional Commissioner of Customs had ordered confiscation of the goods meant for export under Section 113 (i) and (ii) of the Customs Act, 1962 and imposed a penalty of Rs. 5 lakh on the Applicant under Section 114 (iii) of the said Act. The Commissioner has merely upheld the harsh penalty of Rs.5 lakh imposed by the Additional Commissioner. He has come to a totally unsubstantiated conclusion as 'This is not the first offence committed by the Applicant. The quantum of penalty imposed is fair and reasonable.' The Commissioner's finding in this regard is totally baseless and he has unilaterally come to an unsubstantiated conclusion that the applicant had availed drawback to the tune of 24-25 lakhs by overvaluation of the

previous consignments as evident from the investigations. This finding is preposterous in as much as the Commissioner cannot come to such conclusion without actually ascertaining the quality and nature of the goods actually exported. The said goods were exported after due examination by the Customs assessing officials and issue of Let Export Order. Besides, the DRI officials did not provide or produce the samples of the past consignments. Neither the original adjudicating authority nor the Commissioner has seen the samples of the consignments. Hence the upholding of the imposing of penalty, merely on the ground of unsubstantiated grounds of past export is patently wrong and the impugned order is liable to be set aside.

- c) The demand of Duty drawback in respect of the past consignments is illegal as there is no evidence produced by the department to substantiate its claim that the goods were mis-declared or overvalued. There is not even any samples produced by the department. The Applicant had exported carpets in the past under Shipping Bill No. 2554991 dated 06.05.2014, 2580125 dated 07.05.2014, 2580174 dated 07.05.2014, 3047649 dated 31.05.2014, 3047650 dated 31.05.2014, 4925397 dated 10.09.2014, 5410704, 5410705, 5410708 dated 08.10.2014, besides 9011016 dated 15.04.2015, 9595565 dated 15.05.2015. The Original Adjudicating Authority in his Order-in-Original, in para 26 of the Order held that Axis Bank, Varanasi where the Applicant was having account, in letter dated 02.11.2015 stated that they had not issued any BRC. He also placed reliance on the statement dated 07.10.2015 of Shri. Naeem Ahmed admitting that remittances were not received in time. Accordingly, he came to the conclusion that drawback sanctioned in respect of the said shipping bills were recoverable from the Applicants. This is factually wrong as the Applicant has received the remittances of the value indicated in the said shipping bills. The Commissioner has failed to appreciate this factor. He has merely held in para 12 of the impugned order as "I find that the

Applicant had availed benefit of drawback claim to the tune of 24-25 lakhs by over valuation of their previous consignments as is evident from the investigations and statements of their representative".

- d) The Applicant submits that goods covered under the shipping bills referred above 2554991 dated 06.05.2014, 2580125 dated 07.05.2014, 2580174 dated 07.05.2014, 3047649 dated 31.05.2014, 3047650 dated 31.05.2014, 4925397 dated 10.09.2014, 5410704, 5410705, 5410708 dated 08.10.2014, besides 9011016 dated 15.04.2014, 9595565 dated 15.05.2015 were properly declared. The Custom Officers, after proper examination of the goods vis-à-vis the shipping bills allowed the goods to be exported. The department's allegation of mis-declaration of the goods exported is without any basis. The department has not produced any samples of the goods to substantiate their claim of mis-declaration and/or over valuation. In the absence of any positive evidence, the charge of mis-declaration is merely a conjuncture or surmise. The Commissioner has failed to appreciate the above facts. He ought to have set aside the order-in-original. It is also wrong to come to any conclusion that merely because the department is of the view that the live consignment of carpets was mis-declared, the same analogy can be applied to past exports. The Applicant submits that the past exports made of carpets were of the quality as declared in the respective Shipping Bills. The impugned order has been passed without appreciating the correct facts and the law and therefore the impugned order merits to be set aside.
- e) The Applicant submit that they have received remittance from the foreign buyers in respect of the past exports covered under the aforesaid shipping bills which is as per the declared value. There is no allegation even as to any flow back of any amount from the Applicant to their foreign buyers. In the absence of any such allegation, the finding of over valuation of the carpets is a totally misplaced notion. The Applicant relies on the following case laws on this issue.

- MAHAJAN FABRICS PVT. LTD. Versus COMMISSIONER OF C. EX., NEW DELHI [2017 (357) E.L.T. 1240 (Tri. - Del.)]
- JAYESH BHAVSAR Versus COMMISSIONER OF CUSTOMS (EXPORT), MUMBAI [2017 (358) E.L.T. 778 (Tri. - Mumbai)]
- STELLA INDUSTRIES PVT. LTD. Versus COMMISSIONER OF CUSTOMS, NEW DELHI [2017 (357) E.L.T. 1097 (Tri. - Del.)]

f) The original adjudicating authority had rejected the drawback claim in respect of the Shipping Bills on the ground of overvaluation. It is submitted that when the department has sought to reject the drawback claim on the ground of overvaluation, it is required to invoke the provisions of CUSTOMS VALUATION (DETERMINATION OF VALUE OF EXPORT GOODS) RULES, 2007. In the present case, the show cause notice had not invoked the provisions of the said Valuation Rules. It is also a fact that even in the order portion of the adjudication order, there is no specific rejection of the value in terms of the Valuation Rules. Therefore, the very order in original could not have sustained in the eyes of law and ought to have been set aside. In this behalf, the Applicant relies on the following case laws:

HARSHIT ENTERPRISES Versus COMMISSIONER OF CUSTOMS, TUTICORIN [2018 (362) E.L.T. 270 (Tri. - Chennai)]

- g) Though it is alleged in the show cause notice that the Surat based firms had not purchased or sold any goods from/to the Applicant firm it is mentioned that an amount of Rs. 2.5 crore was transferred to Surat based firms. The department has not investigated as to for what purpose the said amount was transferred. The investigation is therefore incomplete and the show cause notice, the confirmation of the same and the rejection of the appeal and the impugned order also are consequently without any basis. The impugned order is liable to be set aside.
- h) The Applicant submits that the market inquiry cannot be the sole basis for allegation as to over valuation. It requires other cogent evidence too. The Hon'ble CESTAT in the case of GOLDEN AGRO CORPORATION

Versus COMMISSIONER OF CUSTOMS, JAIPUR 1 (2017 (354) E.L.T. 655 (Tri. - Del.), in para 6.2 of the order, held as: *"The revenue has sustained the charge of undervaluation and have re-determined the value purely based on the market inquiry. The method of market enquiry for re-determination of the value for these goods is not free from doubt. There is no enquiry made with the experts in the field of subject goods namely Unbranded Coloured Chatons. The Revenue has re-determined the value under Rule 9 of CVR 2007 on the basis of market enquiry. However, from the facts it appears that market enquiry was not scientifically conducted and market enquiry in the absence of any corroboratory evidence cannot become sole basis for sustaining the enhancement of value as done by the impugned order. Therefore, the impugned order enhancing the value of these items cannot be legally sustained".*

It was also held in the case of COMMISSIONER OF CUSTOMS, NEW DELHI Versus KHUSHI TIME IMPEX PVT. LTD. [2017 (348) E.L.T. 691 (Tri. - Del.)] as: *Valuation (Customs) - Transaction value - Enhancement thereof- Market enquiry - Apart from market inquiries no other evidence on record disapproving transaction value – Well settled that market inquiries cannot be made basis for enhancing assessable value Impugned order setting aside demand, upheld - Section 4 of Customs Act, 1962. [para 7]*

Viewed in the backdrop of these case laws, the reliance on the market inquiry in the present case is wrong as there is no enquiry with any experts in the present case. Also, market inquiries cannot be basis for determining value. The Commissioner should have considered this and set aside the Order in Original on this ground. The Commissioner has erred in upholding the Order in Original and therefore the impugned order merits to be set aside.

- i) The Applicant had sought for cross examination of the officers who examined the past consignments and allowed the export thereof as this was of utmost necessity to ascertain the veracity of the declarations in the Shipping Bills vis a vis the goods exported. In the reply dated

15.11.2016 to the show cause notice the Applicant accordingly made such a request, besides the cross-examination of the witnesses. The original adjudicating authority did not even discuss the very valid request. The Commissioner ought to have set aside the order in original on this ground alone. However, the Commissioner also missed this point as apparently, he has not even discussed this in the impugned order. In respect of cross-examination he has simply held as; *'The request of the Appellant for cross-examination of the SIO who conducted the market survey is not justifiable, since Shri. Naeem Ahmed, the representative Of Appellant had himself admitted that the impugned goods had been overvalued. It is a settled law that statements recorded under section 108 of the Customs Act, 1962 is an admissible evidence.'* It is submitted that the Commissioner has obviously missed the Applicant's request of cross examining the witnesses as well as the officers who allowed the past exports. The Commissioner's observation and findings in this behalf is even against the principles of natural justice. The impugned order cannot therefore sustain in the eyes of law

- j) The Commissioner's reliance on the statements alone is not palatable under law. It is a well settled law that statement made under pressure/ threat/ coercion has no evidential value. It is a known fact that the DRI officials with a motif to make out the case, creates huge pressure/ threat on persons concerned to draw statements rather compel the persons concerned to give statements as per the wish of Investigating Officer. It is highly impossible for a common person to dare to protest the forceful activities of DRI officials. Thus, the actual fact becomes covered under the shadow of the statements forcefully drawn by the Investigating Officers. Although, the statements recorded under Section 108 of the Customs Act, 1962 are not comparable to the confession recorded by the Magistrate under Section 164 of the CRPC and as such the statements recorded under Section 108 of the Customs Act, 1962 are required to be corroborated by supportive documentary evidence. The stated statements

recorded by the Investigating Agency in this case however cannot be given any credence since the Department has not corroborated the same by supportive documentary evidence. The applicant relies on following case law:

- VINOD SOLANKI Versus UNION OF INDIA {2009 (233) E.L.T. 157 (S.C.)} TELE BRANDS (INDIA) PVT. LTD. Versus COMMISSIONER OF CUS. (IMPORT), MUMBAI [2016 (336) E.L.T. 97 (Tri. - Mumbai)]
- NAVDEEP ENGINEERING Versus COMMISSIONER OF CENTRAL EXCISE, THANE-II [2014 (313) E.L.T. 268 (Tri. - Mumbai)]

k) Without prejudice to the submission and contention that the goods exported in the past were of the quality and description as described in the Shipping Bills, it is also to be pointed that the department has not provided any working of the demand of Rs.24,05,973/-. It is not indicated as to whether even the alleged admissible drawback (Drawback Sr. No. 570201 A- of the Drawback Schedule with cap of Rs.293/-per square meter, as contended by the department) has been considered in the working of the demand. Therefore, the entire demand becomes unsustainable and should have been dropped. The Commissioner has not given any findings on this point and therefore the impugned order is bad in law and deserves to be set aside.

In view of above submissions, the applicant prayed to set aside the impugned Order-in-Appeal; to hold that no drawback amount is recoverable from the applicant; to hold that no penalty/line is imposable on the Applicant; and to provide any other relief as deemed fit.

8. A Personal hearing was held in this case on 17.02.2023. Shri Sanjay Kalra, Advocate appeared on behalf of the Applicant for the hearing and reiterated their earlier submissions. He submitted that no evidence was produced for past export against which foreign remittance has been received. He further submitted that SCN incorrectly mentions that export of low quality

carpets for past period was admitted in the statement. He further submitted that past export was correct in all respects and the Drawback given by the Department was correct.

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

10. Government observes that the issue involved in the instant matter is whether the Applicant had misclassified the consignment exported by them to claim higher drawback?

11. Government observes that the applicant had filed Shipping Bill Nos. 9435157, 9435189, 9435211, 9435212 & 9435256 all dated 07.05.2015 for the product, 'Hand knotted woolen carpet' classifiable under CTH 5701. The goods were seized by the Department on the basis of an intelligence that the same were mis-declared and misclassified to claim higher drawback and the product was actually 'Handloom woven woolen carpet' classifiable under CTH 5702. Subsequently, the seized consignment was confiscated and the demand for drawback sanctioned for past consignments was also confirmed along with imposition of redemption fine and penalty, as detailed at aforementioned para 5, vide impugned OIO.

12.1 Government observes that the applicant has contested the imposition of redemption fine against confiscation and penalty under section 114(iii) in respect of live consignment. Government observes that the original authority had imposed redemption fine of Rs.10,00,000 which was reduced to Rs.3,00,000/- by the appellate authority, considering the plea of the applicant that the market value of the confiscated carpets had reduced due to deterioration caused during examination by DRI officials. Government sees no basis in the contention of the applicant for further reducing or setting aside the redemption fine.

12.2 The other contention of the applicant is that the penalty imposed under Section 114(iii) of Customs Act, 1962 is too harsh. Government observes that section 114 of the Customs Act, 1962 reads as under:

Section 114. Penalty for attempt to export goods improperly, etc. -

Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable, -

iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.

Government finds that the declared FOB value of the goods attempted to export by the applicant was Rs.1,26,73,621/-. Therefore, the Government finds the decision of the original authority conforms to the provisions of the relevant section as regards imposition of penalty of Rs.5,00,000/-.

13.1 In respect of past export consignments, the Applicant has contended that:

- it is factually wrong on part of department to conclude that they had not received remittances of value indicated in shipping bills pertaining to past exports. Further, applicant submitted that remittances in respect of all these consignments have been received in full.
- The department's allegation of mis-declaration of the goods exported is without any basis. The department has not produced any samples of the goods to substantiate their claim of mis-declaration and/or over valuation. In the absence of any positive evidence, the charge of mis-declaration is merely a conjuncture or surmise. The Custom Officers, after proper examination of the goods vis-à-vis the shipping bills allowed the goods to be exported;

- The stated statements recorded by the Investigating Agency in this case cannot be given any credence since the Department has not corroborated the same by supportive documentary evidence.

It was further submitted that SCN incorrectly mentions that export of low quality carpets for past period was admitted in the statements.

13.2 Government observes from the investigations conducted by Department that no evidence regarding quality of product in past clearances has been brought out. Even the contents of the statement recorded under section 108 of the Customs Act, 1962 have not brought this aspect on record. Misdeclaration of current consignments raises doubt about past consignments. However, in order to make out a case for recovery of drawback, some evidences relating to past consignments need to be brought on record. Gathering of past test results, retesting of samples, enquiry with suppliers etc. could have brought actual quality of past consignment on record. In the absence of such evidences, allegation against past consignments remain unsubstantiated. Further, Government observes that one of shipping bills from the past exports is dated 15.05.2015. The procedure for examination of live consignment covered under the said 5 shipping bills all dated 07.05.2015 was carried out on 16.05.2015. Therefore, the department had the opportunity to carry out a detailed examination of the consignment covered under shipping bill no. 9595565 dated 15.05.2015. Considering all these factors, the Government finds evidence brought on record is insufficient to substantiate confirming of the demand for drawback sanctioned against past clearances. In this regard, the case laws relied by the applicant support their contention.

14. In view of the above findings, Government amends Order-in-Appeal No. 700(Adjn.(I)/2018(JNCH)/Appeal-II dated 25.07.2018 passed by the Commissioner of Customs (Appeals), Mumbai-II as far as confirmation of demand amounting to Rs.24,05,973/- towards duty drawback involved in past clearances by the applicant is concerned and partially allows the revision

application filed by the applicant: Thus, demand for recovery of drawback of Rs.24,05,973/- is set aside. Rest of the OIA confiscating the goods, rejecting drawback of Rs.11,62,750/- on current consignment, and imposition of penalty of Rs.5,00,000/- is upheld.

15. The Revision Application is disposed of on the above terms.

Shrawan
11/4/23
(SHRAWAN KUMAR)

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

ORDER No. *H38/2023-CUS(WZ)/ASRA/Mumbai dated 11.4.23*

To,

M/s. Ali Teppich Jallarpur,
Ward No. 7, Nai Basti, Bhadohi,
Uttar Pradesh - 221 401

Copy to:

1. Commissioner of Customs,
Nhava Sheva-III,
Jawaharlal Nehru Custom House,
Nhava Sheva, Taluka: Uran,
Dist.: Raigad, Maharashtra - 400 707.
2. M/s. KPS Legal,
5th Floor, Hitkari House,
284, Shahid Bhagat Singh Road,
Fort, Mumbai - 400 001.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file