

SPEED POST



F.No. 380/37/DBK/2017-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHICAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue.....

11/11/19

Order No. 44/19 dated 11-11-2019 of the Government of India passed by Smt. Mallika Arya, Principal Commissioner & Additional Secretary to the Government of India, under under Section 129DD of the Customs Act, 1962.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No.CCA (Cus/ ACE/ 2439-40/ 2015 dated 31.12.2015 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi-110037.

Applicant : The Commissioner of Customs, Air Cargo Export, Delhi

Respondent : M/s DCS International Trading Private Limited.

ORDER

A Revision Application No. 380/37/DBK/2017-RA dated 07.09.2017 has been filed by the Commissioner of Customs, Air Cargo Export, Delhi (hereinafter referred to as the applicant) against the Order-In-Appeal No. CCA (Cus/ACE/ 2439-40/ 2015 dated 31.12.2015 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi-110037 whereby the Order-in-Original no. RLM/ ACE/ 66/ 2015 dated 13.05.2015 passed by the Joint Commissioner of Customs, Air Cargo Export, Delhi has been set aside to the extent of confirmation of demand of Rs.1,92,97,378/- in respect of 108 Shipping Bills and denial of drawback amount of Rs. 20,86,067/- in respect of six Shipping Bills for which drawback amount was not yet disbursed. However, in respect of Shipping Bills which were filed after 12.12.2012 and for which samples had been drawn the case was remanded back to the original adjudicating authority with the direction to pass a fresh order after the receipt of the test report.

2. The brief facts of the case are that respondent had filed 114 Shipping Bills under claim for drawback prior to 12.12.2012 for the goods declared as *Human hair, double drawn washed & cleaned well dressed* under RITC 05010010. The said Shipping bills were assessed finally and accordingly the drawback was disbursed except in respect of 6 Shipping bills for which drawback amount had not been released. The SIIB branch of ACC, Export, during the scrutiny of Shipping Bill No. 2991502 dated 12.12.2012 bearing the same description of goods which was declared on 114 Shipping Bills filed prior to 12.12.2012 observed that the goods in question were not '**un-worked**' but '**worked**' and were therefore rightly classifiable under Chapter 67 where the rate of drawback was nil instead of 1% as was being claimed by the respondent under Chapter 05 of the drawback schedule. Accordingly, the samples were drawn and sent for testing and export consignments were allowed clearance provisionally after conversion of drawback Shipping bills into non drawback Shipping bill as per the request of the respondent. This fact has been stated in Order-in-Original. CFSL vide their report dated 31.12.2013 in respect of the impugned goods stated that *the root ends and tip ends are arranged together; in some of the hairs, the process of coloring has been done; the presence of cuticle shows that the process of making the hairs cuticle free has not been done; and the cutting has been done from one end in most of the hairs.* It has also been

observed by the adjudicating authority that the respondent had prior to September, 2011 classified the impugned goods under Chapter 67 so as to claim benefit under the erstwhile DEPB scheme wherein the description of the goods remained the same. Show cause Notice was issued in respect of 114 Shipping Bills and also in respect of 16 Shipping Bills for which samples were drawn for testing alleging that the export goods were rightly classifiable under Chapter 67 and not under Chapter 05 where the rate of drawback is Nil instead of 1%. The case was decided vide their Order in Original No.RLM/ACE/66/2015 dated 11.05.2015 holding that the goods are rightly classifiable under RITC 67030010. Accordingly adjudicating authority confirmed the demand of erroneous duty drawback amounting to Rs.1,92,97,378/- which had already been disbursed and paid to the respondent and for the amount of Rs.20,86,067/- in respect of Shipping Bills wherein drawback amount had not been disbursed. Adjudicating authority also ordered for appropriation of amount of Rs.2,03,13,339/- and Rs. 17,04,874/- deposited subsequently by the respondent in lieu of the same and also imposed a penalty of Rs.20 lacs on the respondent and Rs. 5 lacs and Rs. 2 lacs respectively on two Directors of the respondent.

Being aggrieved the respondents filed an appeal before the Commissioner (Appeals) who set aside the Order-in-Original and dropped the demand of drawback confirmed against the 114 Shipping Bills filed prior to 12.12.2012 and also remanded the case back to the adjudicating authority in respect of the balance 16 Shipping bills for which samples were drawn for testing. The applicant filed an appeal before the CESTAT on 04.04.2016 along with a stay application on 28.06.2016. Hon'ble CESTAT granted stay order no. 51095/2016- CU [DB] dated 08.08.2016. Hon'ble CESTAT vide their final order no. C/A/53549/2017- CU [DB] dated 02.05.2017 (received by the applicant on 22.06.2017) held that the appeal against the order of the Commissioner (Appeals) under Section 128 of Customs Act, 1962 with regard to payment of drawback will not lie before the Tribunal and dismissed the appeal of the Applicant. Accordingly, the applicant filed the present Revision Application on 07.09.1997.

3. The revision application has been filed mainly on the grounds that the Commissioner (Appeals) has wrongly dropped the demand of erroneous drawback and penalty in respect of impugned 114 Shipping Bills filed prior to December, 2012 by not taking cognizance of Statement dated 14.12.2012 of the Director of the respondent. The test report of CFSL

confirmed that the impugned goods (hair) were 'worked'. The respondent had themselves mentioned classification under RITC 67030010 in respect of the past shipments when the impugned goods were exported under DEPB scheme and later on they changed the classification to RITC 0501 after the closure of DEPB scheme with effect from 03.09.2011. It is observed that there was no Drawback incentive on the goods classifiable under CTH 6703 at the material time.

Further the applicant has submitted that order of Commissioner (Appeals) in remanding back the case to the lower adjudicating authority in respect of the balance 16 shipping bills is erroneous in the light of Hon'ble Supreme Court judgment dated 01.07.2007 in Civil Appeal no. 6988/2005 in the case of M/s MIL India Limited [2007 (210) ELT 188 (S.C.)].

4. Personal hearing was fixed on 25.09.2019 in this case. No one appeared on behalf of the applicant or the respondent on this date. However, the applicant vide their letter dated 25.09.2019 requested for a copy of the Revision Application. Another date of hearing was fixed on 07.10.2019. Sh. B. K. Singh, Advocate and Sh. R. N. Singh, consultant appeared on behalf of the respondent. They contended that there is no evidence with the applicant that the impugned consignments were of 'worked' hair. The respondent submitted their written submissions vide their letter dated 21.10.2019 and reiterated the point they had made during the hearing. Since no one has appeared on behalf of the applicant on the second date also nor any request for adjournment has been received the case is being taken up for final disposal.

5. On examination of the relevant case records, the Commissioner (Appeals)'s order, counter-reply, additional submissions and the Revision application, it is observed that the main issue to be decided here is the classification of 'impugned goods' as to whether they fall under RITC05010010 or RITC6703. It is on record that the description of the goods remained the same during the entire period i.e. prior to September, 2011, between September, 2011 to December, 2012 (12.12.2012) and after 12.12.2012. However, the respondent has been changing the classification of goods from time to time so as to avail benefit of export incentives scheme available to them from time to time. This fact has been admitted by the respondent in their letter dated 13.02.2013 addressed to Dy. Commissioner, Export Commissionerate, Air Cargo, New Customs House, New Delhi -110037.

The explanatory notes to Harmonised commodity description and coding system w.r.t Subheading 0503 under Chapter 5 and Subheading 6703 under Chapter 67 are reproduced as follows:-

Chapter 0501

"This headings cover human hair, unworked, whether or not washed or scoured, including hair laid parallel but not arranged so that the root ends and tip ends are respectively together, and waste human hair."

Chapter 6703

"with the exception of human hair which has been simply washed, scoured or sorted to length but not arranged so that the root ends and tips respectively are together and waste of human hair (heading 05.01), this heading covers human hair which has been dressed or otherwise worked (for example, thinned, bleached, dyed, waved or curled) for use in pastiche (e.g., manufacture of wigs, curls or switches) or for other purposes."

From the plain reading of the both the headings it is observed that the main difference between the classification of the human hair in respective above mentioned headings is the 'dressing' of the hair or otherwise 'worked'. It is also on record and also admitted by the respondent themselves that the impugned goods i.e. human hair are dressed. -In all these cases the human hair were declared as dressed by respondent himself on the export documents. Once the human hair are dressed these automatically falls under RITC 6703 and not under 0501. It is also on record that the Director of the M/s DCS International has himself accepted in his statement dated 30.05.2013 before the Customs authorities that they had inadvertently claimed drawback against the impugned Shipping bills since they had 'worked' on human hair which were exported. Test from the CSFL laboratory also confirm that the human hair are worked and hence rightly classifiable under RITC6703. Thus the contention of the Commissioner (Appeals) that classification of the impugned export goods prior to 2012 can not be challenged as there were no samples drawn from the respective consignments is not tenable. It is observed that the respondent has been exporting the identical goods since 2011 bearing the same description. At no stage have they brought forth any evidence to establish that there has been any change in the description

warranting change in classification of the impugned goods. In the light of this, Government is of the view that the human hair exported in respect of 114 Shipping Bills prior to 12.12.2012 are rightly classifiable under RITC 6703 and not under RITC 05010010.

6. The respondent has contended that after completion of assessment under Section 17 of the Customs Act, 1962 except for the cases where the goods are assessed provisionally, an appeal was required to be filed before the appellate authority challenging the classification of the goods which was not done in this case by the applicant. The applicant issued a Show cause Notice for the recovery of erroneously paid drawback which is not the correct course of action as per the provisions of Customs Act, 1962. Government is of the view that the respondent's plea is not maintainable at this stage as this issue was never raised before the Commissioner (Appeals) and there are no findings on this aspect in the Order-in-Appeal.

7. As far as the respondent's other argument that the revision application filed by the applicant is time barred is concerned it is observed that as per Section 129DD(2) of Customs Act, 1944 the application under subsection (1) i.e. Revision application can be made within 3 months from the date of communication to the applicant of the order against which the application is being made. However, proviso to sub section (2) provides discretion to allow the applicant to present the application within a further period of 3 months if the Government is satisfied that the applicant was prevented by sufficient cause from presenting the application within the normal period of 3 months. Applicant had wrongly filed an appeal in CESTAT against the impugned Order-in-Appeal. If the period consumed in pursuing the appeal before CESTAT is excluded, it is observed that the applicant had taken 168 days in filing the Revision Application i.e. 90 days for filing the appeal with CESTAT usually which should have been Revisionary Authority in ordinary course and subsequently 78 days in filing before Revisionary authority after dismissal of appeal by tribunal. Therefore, the Government is of the view that this delay is only account of filing the appeal before the wrong forum and seems to be bonafide mistake and is condonable and hence allowed in terms of Section 129DD(2) of Customs Act, 1962.

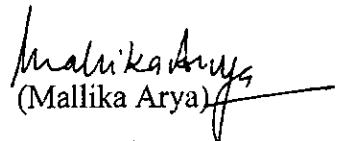
8. As far as the power of Commissioner (Appeals) to remand the case back to the original authority is concerned it observed that the remand powers of Commissioner

(Appeals) stands withdrawn with effect from 11.05.2001 vide Finance Act of 2001. Hon'ble Supreme Court in its judgment dated 01.07.2007 in Civil Appeal No. 6988/2005 in the case of M/s MIL India Limited [2007(210)ELT 188(s.c.)] has noted the provisions of amended law, which is reproduced below:

"In fact, the power of remand by the Commissioner (A) has been taken away by amending Section 35A with effect from 11-5-2001 under the Finance Bill, 2001. Under the Notes to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35A so as to withdraw the powers of the Commissioner (A) to remand matters back to the adjudicating authority for fresh consideration. Therefore, the Commissioner (A) continues to exercise the powers of the adjudicating authority in the matters of assessment."

Hence Commissioner (Appeals) has been authorized to act as an Adjudicating Authority and is obliged to pass necessary orders if it is found that the original Adjudicating Authority has passed an order which is not legal and proper. Accordingly, Commissioner (Appeals) is directed to decide the classification in respect of sixteen Shipping bills on merits which were remanded back to adjudicating authority.

9. In view of the above discussions, the Commissioner (Appeals) order is set aside on the ground that the impugned export goods are rightly classifiable under RITC6703. The order of adjudicating authority in respect of 114 Shipping Bills filed prior to 12.12.2012 is upheld. As regards the balance 16 Shipping Bills Commissioner (Appeals) order, Revision Application is allowed by way of remand to the Commissioner (Appeals) for final disposal.


(Mallika Arya)

Additional Secretary to the Government of India

1. Commissioner of Customs, Air Cargo Export, New Customs House, Near IGI Airport, New Delhi-110037.


2. M/s DCS International Trading Private Limited, 33/ 33-A, Rana Road Industrial Area, Shivaji Marg, Delhi-110015.

Order No. 44/19 dated 11-11-2019

Copy to:

1. Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi-110037.
2. PA to AS(RA)
- ✓ 3. Guard File.
4. Spare Copy

ATTESTED


(Nirmala Devi)

S.O (Revision Application)