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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.371/53-54/DBK/2018-RA

2231

Date of Issue: 21.04.2023

HHH -
ORDER NO. H45/2023-CUS (WZ)/ASRA/MUMBAI DATED 19.04.2023
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. K.P.S. Exim Pvt. Ltd.

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

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-AXP-APP-654-655-17-18 dated 27.10.2017 passed by
the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by M/s. K.P.S. Exim Pvt. Ltd., (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. MUM-CUSTOM-AXP-APP-654-655-17-18 dated 27.10.2017 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that the Applicant had obtained a drawback amounting to Rs.17,69,428/- in respect of exports done by them. As the applicant failed to produce evidence for realization of export proceeds in respect of the concerned exports, a show cause notice was issued on 03.12.2010 and after due process of law, the adjudicating authority ordered recovery of demand amount of Rs.17,69,428/- alongwith interest vide Order-in-Original No. DC/YS/25/2014/DBK(XOS)/ACC dated 21.01.2014. Aggrieved, the Applicant filed an appeal which was rejected by the Commissioner (Appeals) vide impugned Order-in-Appeal.

3. Hence the Applicant has filed the impugned Revision Application mainly on the following grounds:

- i. The learned Commissioner of Customs (Appeals) erred in rejecting the Appeal and in upholding the order of the lower authority. The learned Commissioner failed to appreciate that the Applicant had a clean record. The department failed to pin point the exports for which the remittance was not received. The Applicant had filed all requisite documents from time to time. The department completely failed to establish that any remittance was outstanding. Even the impugned order does not disclose the details and particulars of the exports against which remittance is not received.
- ii. The Applicant undertakes to produce all the evidence before the Hon'ble Revision Authority.
- iii. The reliance of the Commissioner (Appeals) on the judgements reported in 2004 (178) ELT 55(SC)2004(171) ELT 296(SC), 2016(344) ELT 756(GOI) and 2016 (344) ELT 738(GOI) is misplaced. He failed

to appreciate that the said judgements were distinguishable on facts and not applicable to facts in the instant case.

- iv. The department has issued stereo type notices to all exporters calling upon them to produce BRCs, etc. for old exports. Mere inability in locating old BRCs or in obtaining bank certificate does not prove that remittance not received.

In the light of the above submissions, the applicant prayed to set aside the impugned order with consequential relief.

4. Several personal hearing opportunities were given to the applicant and the respondent-department viz. on 15.11.2022, 29.11.2022, 04.01.2022 and 18.01.2023. However, both of them did not attend on any date nor have they sent any written communication. Since sufficient opportunities have been given, the matter is therefore taken up for decision based on available records.

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

6. Government observes that the applicant had been sanctioned drawback in respect of exports made by them. However, the applicant had not produced evidence to show that the sale proceeds (foreign exchange) in respect of the exported goods had been realised within the time limit prescribed under FEMA, 1999. The applicant had therefore been issued show cause cum demand notice for recovery of the drawback sanctioned to them alongwith interest. The applicant, despite assuring to submit the required documents within one week/three weeks during personal hearings with the adjudicating authority held on 03.08.2012/24.09.2012, failed to comply. Hence, the adjudicating authority proceeded to confirm the demand for recovery of drawback sanctioned alongwith interest.

7. Government observes that the Circular No. 5/2009-Customs dated 02.02.2009 had set out a mechanism to monitor the realisation of export

proceeds. It is observed that exports involved in the instant case pertained to the period prior to 2010-11. The SCN was issued on 03.12.2010. The circular dated 02.02.2009 was in vogue and therefore the applicant was required to produce evidence of receipt of export proceeds before the Assistant/ Deputy Commissioner of Customs in terms of Rule 16A of the Drawback Rules, 1995/ Rule 18 of the Drawback Rules, 2017 within the period allowed under the FEMA, 1999.

8.1 The applicant has contended that *the department failed to pin point the exports for which the remittance was not received*. However, from the impugned OIO, Government observes that the details of shipping bills wherein remittances were not received had been provided in the annexure to the concerned Show Cause Notice.

8.2 As regards the other contention of the applicant that they had filed all the requisite documents from time to time, Government observes that the original authority has pointed out that though the applicant had sought time at the time of personal hearing to produce the required documents, they had never submitted it. The Appellate authority has also mentioned that the applicant had claimed that they had submitted Half Yearly Negative Statement from Chartered Accountant with the original authority and this fact was acknowledged by the original authority vide letter dated 16.07.2013. However, on verification the Appellate authority found that the said letter was issued by the original authority against some other demand notice. This act on the part of the applicant lead the Appellate authority to form an opinion that the applicant was trying to mis-lead the appellate authority by providing wrong reference as the documentary evidence. The applicant had also undertaken to produce all evidence before this authority, which they have failed to do. Therefore, Government finds no substance in this contention also.

9. Government observes that the Appellate authority has discussed the applicable statutory requirement elaborately before arriving at his conclusion. The relevant paras are reproduced hereunder:

9. Therefore since the Applicant has failed to fulfill statutory requirement under Section 75(1) of Customs Act, 1962 and Rule 16A(1) of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 read with Section 8 of Foreign Exchange Management Act, 1999 read with Regulation 9 of Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 and Para 2.41 of EXIM Policy 2004-2009, the Order of recovery of drawback claim along with interest and penalty is sustainable.

10. I find that it is settled law that if something is required to be done by law in a particular manner and in a particular time line, it has to be done in that manner only and not in any other manner and such requirement of law cannot be condoned. In case of State of Jharkhand vs Ambay Cements 2004 (178) E.L.T. 55 (S.C.), the Hon'ble Supreme Court has held that:

Exemption - Grant of - High Court cannot grant exemption overlooking statutory conditions for same, especially so if there was no challenge to validity of such a condition. [para 21]

Interpretation of statutes - Exemption provisions in taxing statute - Construction has to be strict and if condition under which exemption was granted stood changed by subsequent event, exemption would not operate. [paras 25, 26]

Interpretation of statute - Mandatory/directory rules - Mandatory rule must be strictly observed whereas substantial compliance is sufficient with directory rule. [para 27]

Interpretation of statute - Mandatory rule - Statute prescribing particular act to be done in a particular manner and laying down severe consequences for non-compliance - Such requirement would be mandatory. [para 28]

Interpretation of statute - Statutory prescription — Particular thing prescribed to be done in a particular manner - That thing cannot be allowed to be done in any other way. [para 28]

Interpretation of statute - Statute penal in character - It has to be strictly construed and followed. [para 28]

Same view was taken in case of Eagle Flask Industries Limited vs CCE, Pune 2004 (171) E.L.T. 296 (S.C.) that to claim benefit if condition like filing of declaration and giving of an undertaking as specified; which are not an

empty formality or mere procedural requirement are not complied with, it can be denied.

Government concurs with these findings of the Appellate authority.

10. In view of the findings recorded above, Government upholds the Order-in-Appeal No. MUM-CUSTOM-AXP-APP-654-655-17-18 dated 27.10.2017 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and rejects the instant Revision Application.

Shrawan
19/11/23

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. *MMH-AHS/2023-CUS (WZ)/ASRA/Mumbai dated 19.11.23*

To,
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Copy to:

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

~~2/~~ Sr. P.S. to AS (RA), Mumbai

~~3/~~ Guard file.