

F.No. 380/146/DBK/2016-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue... 8/3/21

Order No. 52/21-Cus dated 05-03-2021 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India under section 129DD of the Custom Act, 1962.

Subject : Revision Application filed under section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. CC(A)Cus/D-II/ICD/369-376/2016 dated 28.04.2016, passed by the Commissioner of Customs (Appeals), Delhi.

Applicant : Commissioner of Customs (Export), ICD, TKD, Delhi

Respondent : M/s S.S. Automotive, M/s Bajaj International, M/s IOC Auto Sales, M/s Nine Enterprises, M/s Indian Overseas Commercial Co., M/s five enterprises, M/s Seven Auto Trader, Shri Satpal Bajaj.

ORDER

A Revision Application No.380/146/DBK/2016-RA dated 04.08.2016 has been filed by Commissioner of Customs (Export), ICD, TKD, Delhi, (hereinafter referred to as the applicant) against the Order No. CC(A)Cus/D- II/ICD/369-376/2016 dated 28.04.2016, passed by the Commissioner of Customs (Appeals), Delhi. Commissioner (Appeals), vide the above mentioned Order-in-Appeal, has allowed the appeal of M/s S.S. Automotive, (herein after referred to as the respondent-1) M/s Bajaj International, (herein after referred to as the respondent -2) M/s IOC Auto Sales, (herein after referred to as the respondent-3) M/s Nine Enterprises, (herein after referred to as the respondent-4) M/s Indian Overseas Commercial Co., (herein after referred to as the respondent-5) M/s five enterprises, (herein after referred to as the respondent-6) M/s Seven Auto Traders, (herein after referred to as the respondent-7) Shri Satpal Bajaj (herein after referred to as the respondent-8) by setting aside Order-in-Original No. 101/2015/RR/JC/Exp/ICD/Tkd dated 18.11.2015.

2. Brief facts of the case are that the respondent-1 filed six Shipping Bills under claim of drawback for the goods declared as agriculture or horticulture machinery parts. On the basis of an intelligence that the value declared in respect of the exported goods is overvalued, the SIIB unit examined the subject six consignments. On investigation, it was alleged by the department that the value of the exported goods was highly inflated and the respondent -1, in collusion with all other respondents, had attempted to export the goods in question on inflated value with the intent to avail higher quantum of drawback which was otherwise not admissible.

Accordingly, a show cause notice dated 06.11.2013 was issued to the respondent-1 to show cause as to why the declared value of Rs. 11,08,87,671/- should not be rejected under rule 8 of the Customs Valuation (determination of value of Exported Goods) Rules, 2007 and the value should not be re-determined at Rs.1,98,18,140/-. In addition, respondent 1 and all other respondents were asked to show cause as to why penalty under Section 114 and 114AA of the Customs Act, 1962 be not imposed upon them for alleged acts of commission and omission. Vide the above said Order-in-Original dated 18.11.2015, the value of exported goods was re-determined as Rs. 1,98,18,140/- for drawback purpose. Besides, the exported goods were confiscated and ordered to be released on payment of redemption fine of Rs. 20,00,000/- and penalty of Rs. 1,00,00,000/- and Rs. 50,00,000/- was imposed under Section 114 and 114 AA of the Customs Act, 1962, respectively, on the respondent-1. Besides, penalty of Rs. 5,00,000/- each under Section 114 and Rs. 5,00,000/- each was also imposed under Section 114 AA on the respondent No. 2 to 8. Aggrieved, all the respondents filed appeals before the Commissioner (Appeals) who set aside the Order – in – Original dated 18.11.2015 with consequential relief.

3. The instant revision application has been filed on the ground that the BRCs were not submitted within one year from the date of export; that the receipt of BRCs is not the only criteria for accepting the declared transaction value; that the Commissioner (Appeals-) cannot accept any additional evidence produced during the course of appellate proceeding which were otherwise not produced at the time of adjudication proceedings before the adjudication authority; and that the invoice

issued by the respondent – 1 are fake as it was found during the course of investigation that the 2 firms who had purportedly supplied the goods to respondent -1 were non-existent.

4. Personal hearing was granted on 16.09.2019, 09.10.2019, 14.11.2019, 27.11.2019, 16.12.2019, 31.12.2019, 24.01.2020, 06.01.2020, 22.01.2021, 08.02.2021 and 01.03.2021. Sh. R.K. Jain, Consultant, attended the hearing on behalf of the respondent – 1, on 16.12.2019, before the then AS (RA). Sh. Jain, stated that they had furnished the BRCs in reply to Show Cause Notice before the adjudicating authority and no additional evidence has been produced before the Commissioner (Appeals). The BRCs were received within the time limit of six months. He also submitted the copies of BRCs and reply to Show Cause Notice evidencing that the BRCs were submitted before the adjudicating authority. The applicant department appeared for hearing on 22.01.2021 and on 08.02.2021. A written submission dated 05.02.2021 was submitted in the personal hearing held on 08.02.2021. Sh. Amit Kumar, Advocate, attended the hearing on behalf of respondent-8 on 01.03.2021. He sought another adjournment. It was pointed out to him that this is the eleventh opportunity and hence further adjournment cannot be granted. Sh. Amit Kumar, stated that he has nothing further to say in the matter. As sufficient opportunity has been granted to all respondents, the matter is taken up for disposal as per records.

5.1 Government has examined the matter. At the outset, it is clear that the case of the applicant to challenge the export value is based on the fact that the two firms who were said to have supplied the goods to the firms, which in turn supplied the said goods to applicant for export, were non-existent and in consequent market inquiry the value was found to be inflated. Commissioner (Appeals) has set aside the OIO dated 18.11.2015, mainly, on the ground that the export proceeds in the case had been realized and hence the export valuation cannot be challenged. Government observes that when the supply chain of the goods exported is missing, it justifiably raises question on the genuineness of goods and its value. The market enquiry conducted by the department, in this background, and the value certified by the Chartered Engineer bring out that the value of the exported goods declared by the respondent – 1 was on a higher side. Government observes that the respondent -1 had not produced any evidence on record either before the adjudicating authority or before the Commissioner (Appeals) to negate the findings of the market enquiry and Chartered Engineer report with regard to the value of the goods. Also as regard to the two non-existent firms in supply chain, the respondent-1 did not produce any evidence that the two firms existed. Respondent-8, in his statement dated 24.06.2013, recorded under Section 108 of the Customs Act, 1962, had admitted that the two firms in the supply chain of the exported goods were non-existent. It is also on record that the said statement was never retracted by the respondent-8. Further, the Government observes that the realization of export proceeds is not conclusive to prove that the value declared in respect of the export goods is genuine. Hon'ble High Court of Calcutta, in the case of Collector of Customs vs

Pankaj V. Sheth {1997(90)E.L.T. 31 (Cal.)} has held that remittance of full foreign exchange into India is not sure indication of declared export value being correct. In the case of Om Prakash Bhatia vs. Commissioner of Customs, Delhi {2001(127)ELT81(Tri-LB)}, wherein the department had alleged overvaluation in respect of exports made under claim of Drawback, a 5 member bench of the Tribunal followed the decision in Pankaj V. Seth (Supra) and upheld the act of the department to resort to market inquiry to ascertain the correct value.

5.2 The Commissioner (Appeals) has also heavily relied upon the decision of CESTAT in the case of Hemchand Gupta vs. Commissioner of Customs (ICD), New Delhi {2015(330)ELT161(Tri-Del)} to hold that the reliance on market inquiry was not correct in law. However, the Government observes that in the case of Hemchand Gupta the Tribunal took such a view as the market inquiry records were not shared with the exporter, which is not the position in the present case. It is also to be noted that in the present case the outcome of market enquiry is on the same lines as Chartered Engineer's report.

5.3 The case laws relied upon in the written submissions dated 16.12.2019, viz., 2012(276)ELT412(GOI), 2014(304)ELT659(GOI) and 2016(344)ELT677(GOI) relate to rebate of duty of excise wherein, in accordance with the condition of relevant notification, it has been held that rebate of excise duty paid on the exported goods can be granted only if export proceeds are realized. In the case reported as 2013(288)ELT418(Tri-Delhi) relating to DEPB scheme, the Tribunal has held that market value based on the opinion of three other exporters can only be approximate and a more convincing proof is needed. In the present case, the market enquiry and

Chartered Engineer's report corroborate each other. Further, the export value of the goods is 222% more than the purchase price admitted by the exporter and no viable explanation is forthcoming to support this inflation in value. As such, the case laws relied upon do not support the case of respondent.

5.4 In view of the discussion above, the Government finds that the original authority had decided the case correctly and the Commissioner (Appeals) has decided the appeals in favour of the respondents herein without proper appreciation of facts and law.

6. Accordingly, the revision application is allowed; the impugned OIA is set aside and the OIO dated 18.11.2015 is restored.

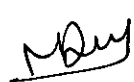


(Sandeep Prakash)

Additional Secretary to the Government of India

The Commissioner of Customs
(Exports),
ICD, TKD, Tughlaqabad,
New Delhi 110001.

Attested



(Nirjala Devi)

Section Officer (REVISION APPLICATION)

Order No. 52/21-Cus dated 05-03-2021

Copy to:

1. M/s S.S. Automotive Pvt. Ltd., GN-3, Shivaji Enclave, Ground Floor, Rajouri Garden, New Delhi- 110027.

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2. M/s Bajaj International, 2688/4, 1st Floor, Opp. Minerva Cinema, Kashmere Gate, Delhi.
3. M/s IOC Auto Sales, 2688/10, 1st Floor, Lothian Road, Kashmere Gate, Delhi.
4. M/s Nine Enterprises, A-261, Office No. A, Shastri Nagar, Delhi.
5. M/s Indian Overseas Co., 2687, Opp. Minerva Cinema, Kashmere Gate, Delhi.
6. M/s Five Enterprises, A-761, Office No. B, Shastri Nagar, Delhi.
7. M/s Seven Auto Traders, B-607, Gali No. 22, Sant Nagar, Burari, Delhi.
8. Shri Satpal Bajaj, 2688/4, 1st Floor, Opp. Minerva Cinema, Kashmere Gate, Delhi-110006.
9. Commissioner of Customs (Appeals), Delhi, New Custom House, New Delhi 110037
10. PS to AS(RA)
11. Guard File.
12. ~~Spare Copy~~