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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.371/303A/DBK/2019-RA /4521 Date of issue: 11.07.2023

ORDER NO. 530/2023-CUS (WZ)/ASRA/MUMBAI DATED 10.07.2023 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. Prestige Polymers (I) Pvt. Ltd.

Respondent : Commissioner of CGST & Central Excise, Ujjain

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. IND-EXCUS-000-APP-045/19-20 dated 17.05.2019 passed by the Commissioner (Appeals), Customs, CGST & Central Excise, Indore (M.P.).

ORDER

This Revision Application is filed by M/s. Prestige Polymers (I) Pvt. Ltd., (hereinafter referred to as "the Applicant") against the Order-in-Appeal (OIA) No. IND-EXCUS-000-APP-045/19-20 dated 17.05.2019 passed by the Commissioner (Appeals), Customs, CGST & Central Excise, Indore (M.P.).

2. Brief facts of the case are that the Applicant is a trader and had obtained Letter of Approval (LOA) from Indore Special Economic Zone, Pithampur, Dhar (M.P.) for setting up a unit for trading of various goods. The goods were procured from DTA and through imports.

2.1 On 18.05.2016, M/s. Vintage Exim, New Delhi exported 28560 pairs of 'Men Sandals' made of textile material against five invoices having total declared value of Rs.3,33,86,640/- at the rate of Rs.1169/- per pair of sandals. In accordance with the SEZ Scheme the Applicant filed five Bills of Export all dated 18.05.2016 under the claim of duty drawback. At the time of clearance, the department observed that the export goods have not been declared correctly in as much as the classification of the goods appeared to be 640499 of the DBK Schedule and not 640403. Similarly, the value of goods viz. Rs.1169/- per pair of sandal appeared to be on the higher side. Therefore, the export of goods was allowed on provisional assessment basis.

2.2 After necessary investigations, the provisional assessment of the five Bills of Export Nos. 30803 to 30807 all dated 18.05.2016 were finalized under Section 17 of the Customs Act, 1962 by the adjudicating authority vide Final Order No. ISEZ/CUS/13-02/Provisional/Prestige/2016 dated 04.10.2016 whereby it was held that:

(i) the item 'Men Sandals' is classified under "Item No.640499 — Others" of the Drawback Schedule to the Notification No.110/2015-Cus(NT) dated 16.11.2015 where rate of drawback is 1.9% as against the 8% under Item No.640403 declared by the trader and;

(ii) the valuation of the item 'Men Sandals' is assessed at Rs.150/- per pair.

Thus, the total value of goods under all the five Bills of Export numbering 30803-30807 dated 18.05.2016 was assessed at Rs.42,84,000/- against the declared total value of Rs.3,33,86,640/-. 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. That the Appellate Authority has failed to consider that the Adjudicating Authority has passed the assessment order with regard to 5 bills of export finalizing the assessment order under Section 17 of the Customs Act, 1962. The Section 26(1)(a) of the SEZ Act, 2005 provides for exemption for any duty of Customs under the Customs Act, 1962 of any other law for the time being in force. The provisions of Customs Act, 1962 do not apply to the Applicant which is an SEZ unit in the light of Section 51 of the SEZ Act, 2005 which stipulates that the SEZ Act, 2005 would have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Further since Section 17 of the Customs Act, 1962 has not been notified to apply on SEZ and hence the very application of the said provisions is automatically not allowed.

ii. That without prejudice to the foregoing even the procedure under Section 17 has not been followed since as per the provisions of the Customs Act, 1962 the proper officer is required to pass a speaking order within 15 days of the passing of provisional assessment order which has again not been done. The correct procedure for assessment of the goods supplied by DTA supplier is to put notice to them and seek all clarification from the said supplier. Therefore, in such a condition the order which has been passed against the Applicant is misplaced and contrary to the provisions of law.

iii. That the Appellate Authority has failed to appreciate that the Adjudicating Authority has not given any Show Cause Notice and instead along with the order passed by the Adjudicating Authority

certain documents had been annexed which is normally done along with the Show Cause Notice. If the Applicant is not aware as to what documents have been relied by the authority in the Show Cause Notice then he would be prevented from effectively filing its reply and the procedure of adjudication would be reduced to a mere formality. That even there is no preamble to the so called show cause notice which is a mandatory requirement by law.

iv. That with regard to issue of personal hearing, the Appellate Authority has held that the Applicant was required to appear on 12.09.2016 and 30.09.2016 but no one appeared. The Applicant had categorically stated that there is no letter / reference of any communication where under the date of 16.09.2016 was conveyed and further obviously after 16.09.2016 the further hearing could not have been fixed for 12.09.2016. The Appellate Authority has failed to consider that the Applicant was provided only one hearing i.e. 05.09.2016. Further, even the Learned Tribunal has held that the Applicant was in jail from 06.09.2016 to 06.01.2017 and only upon being released from jail, he approached the Learned SEZ authority to provide him copies of the Customs cases. It is submitted that the Learned Appellate Authority has failed to appreciate that whereas no letters for personal hearing were received by the Applicant however, the Adjudicating Authority in its order has held that vide letter dated 06.09.2016 the Applicant was informed to attend personal hearing on 16.09.2016 but no one attended the personal hearing and he further states that the next date of personal hearing were fixed on 12.09.2016 and 30.09.2016 but again the trader is not appeared. It is submitted that then the date of hearing of 12.09.2016 had already gone by then how could the next date be fixed on 12.09.2016 since 12.09.2016 had already gone by when the date of hearing was fixed on 16.09.2016.

v. That the Learned Appellate Authority has failed to address the issue as to how and when the Show Cause Notice was issued to the Applicant. He has merely stated that the Applicant was provided copy of chemical analysis report of M/s. Choksi Laboratories Ltd., Indore and the valuation report of government approved valuer M/s.

D.K. Jain & Co. vide letter dated 06.09.2016 but when and where was the Show Cause Notice issued if at all, it was. That later two documents were handed over and personal hearing were given when the Applicant was in jail and yet the appellate authority has held that the Applicant was given sufficient opportunity to appear in person but did not appear. That the Learned Appellate Authority has failed to appreciate that as per the provisions of Customs Act, 1962 or even of SEZ Act, 2005 there is a specific provision to issue Show Cause Notice, supply documents and provide personal hearing and the absence of either of these are fatal to the case or in other words are held to be in violation of the principles of natural justice and the impugned order deserves to be set-aside on this ground alone. That further the Learned Appellate Authority has recorded that Appellant had asked the cross examination of the person on whose report price of goods was ascertained however, he had failed to appreciate that the cross examination was not granted. It is submitted that if the cross examination of the person requested is not granted then the report and the manner on which the calculation was arrived itself becomes subject to suspicion.

vi. It is further submitted that that the assessable value which has been reduced from Rs.1169/- per pair to Rs. 150/- per pair is contrary to the provisions of Customs Act, 1962, CEVR, 2007 as well as the law laid down by the Hon'ble Supreme Court in the matter. It is submitted that the valuation of export goods has been made in accordance with the Section 14(1) read with provision of Custom Valuation (Determination of Value of Export Goods) Rule,2007 which categorically stated that if the transaction value is not acceptable to the department then the determination would be done as per the provision of Rule 4 to 6 sequentially for redetermining the value of the goods after properly rejecting the value declared by the exporter. However, in the instant ease the department without following the said procedure directly relied on the value suggested by chartered engineer, which is not even permissible in law, to use for the purpose of assessment. It is further submitted that the chartered engineer without submitting any proof suggested price of goods in

market although he has not conducted any market inquiry. The applicant had relied on judgment of Hon'ble Supreme Court in the matter of Siddachalam Export Pvt. Ltd. Vs. Commissioner of Central Excise, Delhi-II, reported as 2011 (267) ELT 3 (SC). However, the Learned Appellate Authority has cryptically stated that export valuation Rules had been frequently followed and the ratio of the Hon'ble Supreme Court judgment is not applicable in present context.

vii. That the goods in the present case were procured from DTA Supplier (exporter) in SEZ and were exported to Djibouti against an order given by foreign purchaser in UAE. The goods were exported to Djibouti declaring the value of Rs. 1231.45 and the importer in foreign country in Djibouti has accepted and cleared the consignment. That in view of this the reduction of the price from Rs.1169/- per pair to Rs. 150/- per pair is arbitrary, whimsical and unreasonable. That even the rejection of transaction value which has not been made as per the CEVR, 2007 and has re-assess the goods on the basis of present market value given by Chartered Engineer is also not justified as Chartered Engineer certificate is not supported by the provisions contained in CEVR, 2007.

viii. That the authorities have erroneously classified the goods under tariff item 640499 despite the fact that the same is clearly covered by 640403. It is submitted that the export item Sandal find a specific mention under sub-heading 640403 and not elsewhere. That CTH 6404 defines the material which clearly stated that footwear with outer sole of rubber, plastic, leather or composition leather and upper of textile material. It means the outer sole is of rubber, plastic, leather or composition material but the upper of textile material and the description of impugned goods tallying with the same and the department has no objection on description as well as on CTH. Similarly, the drawback schedule 6404 has defined the product "footwear with outer sole of rubber, plastic, leather or composition leather and upper of textile material". That the tariff which is applicable to classification of goods is applicable to the drawback schedule as well. The chapter number and the chapter heading are

described first and thereafter, under each chapter the goods eligible for drawback are described serially. The first two digits in the serial no. represents the Chapter and the last two digits are the serial no. of the product. The Chapter No. and the headings are identical to that given in the Customs Tariff. In other words, to be eligible for drawback, the goods should fall under the Chapter of the Customs Tariff first and thereafter, it should satisfy the description given therein, as all goods in a chapter are not covered for all industry rate of drawback and only selected items falling in a Chapter are covered.

ix. That in this matter, the applicant relied upon Circular No. 67/95-DBK dated 15-6-1995 and letter DOF No. 609/38/2005-DBK dated 2-5-2005 and submitted that the circulars were considered by the Learned Tribunal in the case of Bharat Forge Ltd. Vs. Commissioner of Cus. (Export), Nhava Sheva, reported as2012 (284) E.L.T. 280 (Tri. - Mumbai).

x. That further the departmental circular is binding on its officers and as per the law laid down in the case of CCE Vs. Dhiren Chemical Industries, reported as (2002) 2 SCC 127, it had been held that if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue.

xi. That further as per Rules for interpretation of the first Schedule to the Customs Tariff Act as per paragraph 1 of Customs notification No.110/15-Cust. (NT) dated 16.11.2015, the tariff item and description of goods in the said schedule are aligned with the tariff items and description of goods in the first schedule to the Customs Tariff Act, 1975 at the four digit level only. The description of goods given at the six digit or eight digit or modified six or eight digit in the said schedule are in several cases not aligned with the description of goods given in the said first schedule to the Customs Tariff Act, 1975. As per paragraph 2 of the aforementioned notification, the general rule for interpretation of the first schedule to the said Customs Tariff Act, 1975 shall mutatis mutandis, apply for classifying the export goods listed in the said schedule i.e. drawback schedule.

xii. That the applicant relies on the order passed by the revisional authority in the case or In Re: Ajanta Electrical, reported as 2011 (271) E.L.T. 457 (G.O.I.). The purpose of inclusion in Customs Tariff is to standardize the manner in which the nomenclature in the schedule is to be interpreted so as to reduce the classification schedule. The headings are of paramount importance and as per the HSN Explanatory Notes, the headings are expected to cover the broad ambit of classification since it is impossible to cover all the goods specifically in titles. The HSN explanatory notes states that the goods which answer to the description which more particularly identifies them, the description is more specific. It is stated that the authorities below have failed to appreciate that Rules 1 to 4 are related and must be applied in sequence, whereas Rule 5 & 6 stand on their own to be applied as needed.

xiii. That further with regard to the procedure as to how the value of goods was arrived at Rs. 1169/- per pair the Applicant had even before the passing of any of the orders by its communication dated 19.07.2016 stated that the Applicant was a merchant exporter and not the manufacturer as such and were not in a position to give the technical details as to the composition of the product. That the said value of Rs. 1169/- per pair includes the commission of 12% given to the procurement agent and payment of commission is a prevalent practice for procuring the goods from traders at a competitive price. The normal rate of commission is between 10-15% depending on the quantum of goods. The transaction value is always based on various factors and change from product to product. That however, the authorities below did not consider the reasoning provided by the Applicant.

xiv. That even the application of Section 18 of the Customs Act, 1962 with regard to provisional assessment of duty was bad in law not only because the Applicant was an SEZ Unit and the Special Economic Zone Act, 2005 was the only applicable Rule but also the provisional assessment of duty is not applicable to bills of export. Further, the material against bill of export had already been exported and the said did not involve any kind of export duty. That the product i.e. Men

Sandals made of textile material do not attract any kind of export duty.

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

4. Personal hearing in the matter was held on 24.02.2023. Shri Priyadarshi Manish, Advocate appeared before me and reiterated earlier submission. He submitted that because of Section 51 of SEZ Act, process followed by Customs for valuation will not apply. He also contested the classification of goods adopted by the Customs authorities. He also contested the value adopted by Govt. approved Valuer and he stated that proper market enquiry was not conducted. He 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 Order-in-Original and Order-in-Appeal.

6. Government observes that the main issue involved in the instant case is classification and valuation of export consignment of 'Sandals' on which drawback has been claimed by the applicant.

7. Government observes that the applicant, a merchant exporter having a unit in Indore SEZ, had filed five Bills of Export all dated 18.05.2016 under claim of duty drawback. The item to be exported was 'Man Sandals' made of polyurethane soles and textile uppers. The applicant had claimed drawback @ 8% under Tariff Item (TI) 640403 of the Schedule to Notification No. 110/2015 - Customs (N.T.) dated 16.11.2015 declaring value @ Rs.1169/- per pair. As the declared classification appeared incorrect and the declared value appeared high, therefore, the export of goods was allowed on provisional assessment basis. Subsequently, the adjudicating authority, on the basis of necessary investigations, finalized the assessment by classifying the impugned item under TI 640499 of the Schedule to said Notification and assessing its value @150/- per pair.

8. As regards classification issue, Government observes that the TI 640403 whereunder the applicant has claimed classification of impugned product for the purpose of claiming duty drawback reads as under:

Sandals of leather-cum-synthetic/ textile materials

Thus, the upper of footwear needs to be made up from leather-cum-synthetic material or leather-cum-textile material, to be eligible for classifying under said TI. As the upper of impugned product is made up entirely from textile material with no traces of leather, Government observes that the it does not conform to the description given against the TI. The case law of Bharat Forge Ltd. relied upon by the applicant also emphasizes on this aspect. The para 7.2 of said case law is reproduced hereunder:

> *"7.2. From the above two circulars, two things are absolutely clear. The first two of the drawback schedule refer to the Chapter of the Customs Tariff under which the goods should fall. Where an entry falls under different Chapters, the same has been split up and incorporated in different chapters with the same rate of drawback.* ***It has thus been made very clear that to be eligible for drawback under a particular serial no., the goods should fall under the chapter under which the serial no. is indicated and secondly, they should conform to the description given against the serial no.***"

Government, therefore, concurs with finalization of classification of impugned export goods done by the lower authorities.

9.1 As regards valuation of the export goods, Government observes that the Appellate authority has elaborated on this aspect vis-à-vis the relevant legal provisions at para 7.3.3 to para 7.3.6 of the impugned OIA and concluded that procedure prescribed under the Customs Valuation (Determination of value of Export goods) Rules, 2007 has been followed scrupulously by the original authority while determining the value of export goods.

9.2 Government finds no basis in the contention of the applicant that *the department without following the procedure laid down under Section 14(1) read with provision of Custom Valuation (Determination of Value of Export Goods) Rule,2007 relied on the value suggested by chartered engineer, which is not even permissible in law, to use for the purpose of assessment.* The applicant has not put forth any valid reason for disproving the valuation done by the Government approved valuer. Their contention that no supporting document with regard to market enquiry creates doubt on the veracity of report of Government approved valuer holds no water in the absence of any contrary evidence brought on record by them. It is standard practice to use expertise of certain persons to arrive at the correct value of goods. Chartered Engineers or Government approved Valuers are experts who assist Customs in fair implementation of law. Therefore this contention does not survive.

10. As regards the Applicant's contention that *the provisions of Customs Act, 1962 do not apply to the Applicant which is an SEZ unit in the light of Section 51 of the SEZ Act, 2005 which stipulates that the SEZ Act, 2005 would have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.* Government observes that this is a new ground and has not been part of appeal filed before Commissioner (Appeals) or in their correspondence with the original authority. The empowering Section 129 DD ibid allows only modifying/annulling of Orders passed under Section 128A ibid and therefore any grounds not pleaded before lower authorities, cannot be considered at this stage. Further, Section 51 of SEZ Act, 2005 is to take care of a situation where there is conflict between the provisions of SEZ Act and any other Act. Valuation of import or export goods is specifically covered under the Customs law and there is no contrary provision under SEZ law. Therefore, this contention also falls flat as it has no legs to stand.

11. In view of the above discussion and findings, the Government upholds the Order-in-Appeal No. IND-EXCUS-000-APP-045/19-20 dated 17.05.2019 passed by the Commissioner (Appeals), Customs, CGST & Central Excise, Indore (M.P.) and rejects the instant Revision Application.

Shrawan 10/7/23

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

ORDER No. 530 /2023-CUS (WZ)/ASRA/Mumbai dated 10.7.23

To,
M/s. Prestige Polymers (I) Pvt. Ltd.,
K-4/4, Model Town-I
New Delhi – 110 009.

Copy to:

1. Commissioner of CGST & Central Excise, Ujjain,
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2. Shri Priyadarshi Manish, Advocate,
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3. Sr. P.S. to AS (RA), Mumbai

4. Guard file.