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SPEED POST



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.371/220/DBK/2020-RA | 4795 Date of issue: 25.07.23

ORDER NO. 536 /2023-CUS (WZ)/ASRA/MUMBAI DATED 19.07.2023
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. GE T&D India 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-1157/19-20 dated 20.01.2020 passed by
the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by M/s. GE T&D India Limited (previously known as M/s. Areva T&D India Limited), (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. MUM-CUSTOM-AXP-APP-1157/19-20 dated 20.01.2020 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.5,82,922/- in respect of the 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 24.08.2017 and after due process of law, the adjudicating authority ordered recovery of demand amount of Rs. 5,82,922/- alongwith interest and penalty of Rs.25,000/- vide Order-in-Original No. AC/JD/1984/2017-18/DBK(XOS)/ACC dated 27.03.2018. Aggrieved, the Applicant filed an appeal which was rejected by the Commissioner (Appeals) vide impugned Order-in-Appeal being time barred under Section 128 of the Customs Act, 1962.

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

- i. The Ld. Commissioner (Appeals) has failed to consider the fact that:
 - a) the Order-in-Original dated 27.03.18 was issued to an incorrect and incomplete address. Therefore, there was no valid service of the Order in 2018; and
 - b) the certified copy of the Order-in-Original dated 27.03.18 was issued to the Applicants only on 25.09.19 which was received by them on 26.09.19. This certified copy of the Order was issued in pursuant to Order dated 25.09.19 of Joint Commissioner of Customs (Exports), ACC, Sahar at the request the Applicants. Thus, the Order-in-Original dated 27.03.18 was served to the Applicants only on 26.09.19. Accordingly, an appeal against the Order-in-Original was filed on

21.11.19 i.e. within ninety (90) days as prescribed under section 128 of the Customs Act, 1962. This aspect has been overlooked completely. Accordingly, the impugned Order dated 20.1.2020 being incorrect is liable to be set aside.

- ii. The impugned Order-in-Appeal dated 20.01.20 has been passed ex-parte, in gross violation to the principles of natural justice. The Ld. Commissioner (Appeals) has incorrectly dismissed the appeal as being time-barred by holding that the date of issue of the Order-in-Original is the date of the Order i.e. 27.03.18, and that the Applicants have failed to file an appeal against the above Order within a period of 90 days as prescribed under Section 128.
- iii. The Order-in-Original dated 27.03.18 demands drawback only on the ground that the Applicants have not submitted proof of realisation of export proceeds in the form of BRC (Bank Realisation Certificate) to the customs department. That the Applicants are otherwise entitled for drawback and have been sanctioned drawback in accordance with the Rules, is not in dispute. The Applicants submit that they have already submitted BRC's pertaining to fifty-five (55) shipping bills vide their letter dated 26.07.19. Further, the Applicants undertake that they shall submit the BRC's pertaining to the remaining sixteen (16) shipping bills once the same are traced by them since they belong to an older period and requires some time due to multiple changes in management over the years.
- iv. Regulation 9 (1) of Foreign Exchange Management (Export of Goods and Services) Regulation, 2000 was introduced under Notification No. FEMA.23 / 2000-RB dated May 3, 2000. The said Regulation provides that after exportation of the goods out of India, the exporter should realise and repatriate export proceeds to India within six months from the date of export. Vide A. P. (DIR Series) Circular No. 50 dated June 03, 2008 the time limit has been enhanced from six months to twelve months from the date of export. It is submitted that the Applicants have realized the export proceeds in respect of the goods exported out of India within the said time limit or within the extended time, as stipulated in Regulation 9 issued under Notification No. FEMA.23 / 2000-RB dated 03.05.2000 and Master

Circular No. 09/2000-10 dated 01.07.2009. This is evident from the copies of bank statements duly certified by the authorised dealer banks as submitted by the Applicants vide their letter dated 26.07.19.

- v. In any case, since the Applicants have now placed on record BRCs evidencing realisation of export proceeds, the entire proceedings initiated are liable to be set aside. The Hon'ble Supreme Court in Hotline Tele tube & Components Ltd.- Order dated 16.02.1998 in Civil Appeal NO. 5908 of 1998 has reversed the order passed by the Hon'ble Bombay High Court and held that delay in submitting the end-use certificates cannot be ground to deny the benefit of Notification otherwise available.
- vi. Rule 16A of Drawback Rules, 1995 does not prescribe any format of evidence required to be produced by the exporter. It also does not prescribe any time limit, within which the exporter has to produce the proof of realisation of export proceeds. The only stipulation in Rule 16A is realisation of export proceeds within the time limit prescribed under FEMA. Therefore, the evidence furnished by the Applicants in the form of Bank Reconciliation Certificates vide letter dated 26.07.19 for the shipping bills pertaining to the period 2009-11 duly record that the export proceeds were realised in the year 2010 and the same should suffice as material and acceptable evidence under Rule 16A. The Authorized Dealer bank namely, Citi Bank has issued Bank Statement that the Applicants have realised the export proceeds
- vii. Without prejudice to the above, the Applicants submit that delay in submission of evidence of realization of export proceeds is merely in the nature of a procedural lapse and hence benefit of the scheme cannot be denied for this reason alone. It is evident from the BRCs submitted, that the export proceeds were realized in 2010 itself.
- viii. It is settled law that a lapse in following procedure alone cannot be a ground to deny benefit to an assessee where all other substantive conditions stand satisfied as held in the case of Mangalore Chemicals & Fertilizers Vs. Dye Commissioner — 1991 (55) ELT 437 (SC). Similar observations were made by the Apex Court in the

Formika India Vs. Collector of Central Excise — 1995 (77) ELT 511 (SC), in observing that once a view is taken that the party would have been entitled to the benefit of the Notification had they met with the requirement of the concerned rule, the proper course was to permit them to do so rather than denying to them the benefit on the technical grounds that the time when they could have done so had elapsed.

- ix. The Applicants submit that there is no challenge to assessment of the shipping bills in question by the Customs department. In absence of this, demand and recovery of drawback is bad in law as held by the Hon'ble Punjab High Court in *Jairath International & Other Vs. Union of India* reported at 2019 (10) TMI 642 at para 15 following the decision of the Hon'ble Supreme court in ITC case reported at 2019 (9) TMI 802.

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 17.05.2023. Ms. Madhura Khandekar, Advocate and Ms. Ashmita Sharma, Advocate appeared online and informed that a written submission has been mailed. They submitted that SCN & OIO were sent on incomplete address. They further submitted that appeal was filed within time from the date OIO was received. They further submitted that relevant BRC's are available and no drawback is recoverable from them. They 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 applicant had been sanctioned drawback in respect of exports done by them under 71 Shipping Bills, during the period 2009-2011. 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 and penalty. The applicant did not respond to the intimations for personal hearing and therefore the adjudicating authority proceeded to confirm the demand for recovery of drawback sanctioned along with interest at the applicable rate. The applicant has claimed that they had not received the SCN, PH Notices and OIO passed by the adjudicating authority deciding the show cause notice for recovery of drawback sanctioned as the same were issued on an incorrect and incomplete address and that they became aware of the OIO in the month of June 2019 when an alert was raised against their IEC code. Thereafter they received the OIO on 26.09.2019 after approaching the Customs Authorities and this matter was brought to the notice before Commissioner (Appeals) who has rejected the appeal on the ground of time bar. In the revision application, the applicant has made similar grounds to contend that the appeal was filed within the statutory appeal period after the receipt of the OIO. In the given facts and circumstances and also in the larger interest of justice, Government would be looking into the merits of the case.

7. Government observes that the Facility Notice No. 5/2017 dated 07.06.2017 had set out a mechanism to monitor the realisation of export proceeds in respect of EDI shipping bills with LEO date prior to 01.04.2013. As per this notice all exporters mentioned in the Annexure enclosed therein were required to submit details of export realization received/certificate from authorized dealers/chartered accountants before 15.07.2017 which was subsequently extended till 31.07.2017. The applicant's name appeared in list of exporters mentioned in the Annexure to impugned Facility Notice. As the applicant failed to respond, a SCN was issued to them on 24.08.2017. The applicant has contended that they had furnished evidence regarding realization of export proceeds before Commissioner (Appeals). However, the appeal filed by the applicant was dismissed on the grounds of time bar by the Appellate authority.

8. Government notes that since the rejection by Appellate Authority is on the grounds of limitation and the applicant has contended that the impugned OIO and other related correspondence was not received by them and also their averment that they have already submitted proof of realisation of export proceeds in the form of BRC (Bank Realisation Certificate) pertaining to 55 Shipping Bills vide their letter dated 26.07.2019 and will submit BRC's pertaining to remaining 16 Shipping Bills, it is in the interest of justice that these claims of the applicant be taken up for verification.

9. In view of the above discussion and findings, the Government sets aside Order-in-Appeal No. MUM-CUSTOM-AXP-APP-1157/19-20 dated 20.01.2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the instant Revision Application by remanding the matter to original authority for appropriate verification. The applicant should be provided reasonable opportunity for submission of required documents.


19/7/23
(SHRAWAN KUMAR)

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

ORDER No. 536/2023-CUS (WZ)/ASRA/Mumbai dated 19-7-23

To,
M/s. GE T&D India Limited,
Magnet House, N.M. Marg,
Ballard Estate,
Mumbai - 400 001.

Copy to:

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

2. M/s. V. Lakshmikumar,
2nd Floor, B & C Wing, Cnergy IT Park,
Appa Saheb Marathe Marg,
Prabhadevi, Mumbai - 400 025.

3. Sr. P.S. to AS (RA), Mumbai

4. ~~Guard file.~~