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SPEED POST

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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUEOffice 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.371/33/DBK/2021-RA | 9583

Date of issue: 03.08.23

ORDER NO. 5M/2023-CUS (WZ)/ASRA/MUMBAI DATED 27.7.2023
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. Biba Apparels Private Limited

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-787/19-20 dated 27.12.2019 passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by M/s. Biba Apparels Private Limited, (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. MUM-CUSTOM-AXP-APP-787/19-20 dated 27.12.2019 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that the Applicant had obtained drawback totally amounting to Rs.11,80,803/- 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 01.09.2017 and after due process of law, the adjudicating authority ordered recovery of demand amount of Rs.11,80,803/- alongwith interest and penalty of Rs.30,000/- vide Order-in-Original No. AC/JD/2178/2017-18/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. that the Customs Department has not produced any evidence of dispatching either Show Cause Notice or Order-in-Original to the communication address of the applicant as is mentioned on the IEC. However, the address mentioned in the O-I-O is that of "45-54, Whitehall, 143, August, Kemps Comer, Mumbai-400036", which had since changed from 15.06.2012.
- ii. that on perusal of provisions of Section-153 of the Customs Act,1962, the order, decision, summons or notice should be sent by the officer of Customs Department through registered- post or by courier. If same is not-served as per clause (a) then such order, decision, summons or notices shall be served by affixing on notice board of the customs house. In the instant case Custom Department has not sent SCN and

O-1-0 to the registered address of the applicant as is mentioned on the IC. Even though the address mentioned in the O-1-0 is that of "45-54, Whitehall, 143, August, Kemp's Corner, Mumbai- 400036", which had since changed from 15.06.2012, but for the same as well no evidence is shown that the SCN and O-1-0 was sent through registered post to the above address. Hence the provisions of section 153(b) of the Customs Act, 1962 cannot be made applicable in this case.

- iii. that as per O-I-O Facility Notice bearing no- 05/2017 dated 07.06.2017 and Public Notice bearing no.- 24/2017 dated 17.07.2017 have been issued for submission of Negative statement for export proceeds in terms of shipping bills. It is important to note that the Facility notice and Public notice issued by the Customs Department were only for general public and not for Applicant specifically. Again, no notice of such Facility Notice or Public Notice was ever received by the applicant in any manner. Hence the Applicant did not entertain such notices since those notices were general public notices not issued and sent specifically to Applicants. In this case, the impugned order-in-original bearing AC/JD/2178/2017-18/DBK (XOS)/ACC were shown to have been issued on 27.03.2018.
- iv. that the Department could not bring on record any valid authorization by the company authorizing the person, who has purportedly received the impugned Show Cause Notice and/or Order-in-Original. Under such circumstances, the impugned Show Cause Notice as well as Order-in-Original cannot be said to have been served to the Applicant. As such, there is also no proof of service of orders, if sent by post to the Applicant. Under such circumstances, the SCN and the O-I-O by the department can only be taken as served on 26.06.2019, when the same was received by the representative of the Applicant for the first time.
- v. That considering the observation made by the Hon'ble Bombay High Court in the case of Suresh Bafna vs Commissioner of Customs & others on 28 February, 2008, it is quite clear that the date of service of order shall be deemed to be the date on which it was received by

- the Applicant i.e. on 26.06.2019. Hence, the appeal cannot be treated as time barred and shall be decided on merits.
- vi. that as per the show cause notice dated 01.09.2017, the Applicant was asked to produce the BRCs for showing the amount of realization from exports. However, the show cause notice dated 01.09.2017 demanding payment of Rs. 11,80,803/- was pertaining for the period between 2007 to 2010 i.e., it was issued after the lapse of more than 7 years from the end of year 2010. Hence, the show cause notice was issued beyond reasonable time and does not hold any validity. As such the Applicant only received the copy of the Order-in-Original only on 26.06.2019 demanding the BRCs for a period more than 10 years. The documents asked for in the show cause notice are not readily available with the Applicant since the same pertains to a very old period and hence, the Applicant is not liable to maintain such records. However, the Applicant had received a confirmation letter from its Banker namely Standard Chartered Bank for BRC and that no payment is outstanding for exports made during that period for the period starting from year 2007 to 2010.
- vii. that the Custom Department passed the impugned order dated 27.03.2018 disregarding the fact that payment for a refund of duty drawback had already been made for an amount of Rs. 30,81,239/- vide Demand Draft No. 081203 dated 02.11.2017 drawn on Axis bank, Green Park. Further, all the export proceeds have been realized by the Applicant which is reflected in the Audited financial statement and CA Certificate duly attached. In the case of M/s. Adwait Lakshmi Industries vs The Joint Secretary on 19 April, 2017, the Madras High Court held that so long as the export proceeds are reflected in the documents produced, it will be valid even if it is not in a prescribed format.
- viii. that the demand raised as per, the impugned order dated 27.03.2018 is based on incorrect bills and facts. Since the original demand was made for an amount of Rs.11,80,803/- (Rupees Eleven Lakhs Eighty Thousand Eight Hundred and Three only) and after pointing out the

fact that the same shipping bill numbers were there in the order for which the payment was already made by the Applicant in the year 2017 against the order dated 2012. The demand was revised to Rs. 8,64,727/- (Rupees Eight Lakh Sixty-Four Thousand Seven Hundred and Twenty-Seven). This clearly shows that the Customs Authority was not clear of the true facts of the case and hence the amount computed is arbitrary and warrants immediate withdrawal of the impugned-order dated-27-03.2018.

- ix. that the penalty of Rs. 30,000 (Rupees Thirty Thousand only) imposed under the provision of Section 117 of the Customs Act, 1962 vide impugned order bearing no. AC/JD/2178/2017-18/DBK(OS) ACC dated 27.03.2018 is invalid since the Applicant received the Copy of the order, on 26.06.2019 only and no opportunity of being heard was given to the Applicant which is against the principles of natural justice.
- x. that the Applicant respectfully submits that the averments made hereinabove are exclusive, in the alternative and without prejudice to each other and the Applicant craves the leave of this Hon'ble Appellate Authority to add, amend, alter and improve the submissions made hereinabove. A personal hearing to explain our case more clearly is also requested. That as per the provision of Section 129DD (2) of the Customs Act, 1962, Revision application shall be made within three months from the date of the communication of the order against which the application is being made. However, due to the pandemic situation of COVID-19 and lockdown across the country, the timelines for filing revision application has been extended. In the instant case also this revision application is being filed after the expiry of three months from the date of communication of the order i.e. 09.01.2020 due to the pandemic situation of COVID 19 and lockdown, hence this revision application should be treated as filled within the period of limitation.

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

4.1 Personal hearing in the matter was held on 12.04.2023. Ms. Prapti Raut and Ms. Shikha Suman, Consultant appeared and submitted a written submission on the matter. They further submitted that they came to know about the OIO when their export consignment was stopped based on alerts in EDI. They submitted that appeal before Commissioner(A) was filed well within time from the date they became aware about OIO. They further submitted that all remittances have been received. They requested to set aside Order of the appellate authority.

4.2 In the additional submissions, the applicant has reiterated their earlier submissions broadly covering following aspects:

- Show Cause Notice and Order-in-Original sent on incorrect address;
- Eligible Duty drawback as per Sub-Rule (1) & (2) of Rule 16(A) of the Customs and Central Excise Duty Drawback Rules, 1995;
- Procedural lapse is not a ground for refusing Duty drawback.

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 totally amounting to Rs.11,80,803/- in respect of exports done 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 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 their address had changed from 15.06.2012 and that they became aware of the OIO when they came to know that an alert was placed on their shipment. Thereafter they received the OIO on 26.06.2019 after approaching the Customs Authorities and these facts were brought to the notice before Commissioner (Appeals) who has rejected the appeal on the ground of time bar. 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 the list of exporters mentioned in the Annexure to impugned Facility Notice. As the applicant failed to respond, a SCN was issued to them on 01.09.2017. 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 are in possession of CA certificate for the period 2004-2010 certifying the exports done and corresponding proceedings collected during the said period, 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-787/19-20 dated 27.12.2019 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.


(SHRAWAN KUMAR)

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

ORDER No. SH1 /2023-CUS (WZ)/ASRA/Mumbai dated 27.7.23

To,

M/s. Biba Apparels Private Limited,
13th Floor, Capital Cyber Scape,
Sector 59, Golf Course Extension Road,
Gurugram - 122 102.

Copy to:

1. Pr. Commissioner of Customs (Export),
Drawback (XOS) Section, Air Cargo Complex,
Sahar, Andheri (East), Mumbai - 400 099.
2. M/s. Vaidat Legale Service,
D-261, II Floor, Defence Colony,
New Delhi - 110 024.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file.