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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.371/269-271/DBK/2018-RA /6222 Date of issue: 16.08.2023

585-
ORDER NO. 587 /2023-CUS (WZ)/ASRA/MUMBAI DATED 16.08.2023 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, 1962.9958138845

Applicant : M/s. Prestige Polymers 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-068-070/18-19 dated 25.04.2018 passed by the Commissioner (Appeals), Customs, CGST & Central Excise, Indore (M.P.).

ORDER

These three Revision Applications are filed by M/s. Prestige Polymers Pvt. Ltd., (hereinafter referred to as "the Applicant") against the Order-in-Appeal (OIA) No. IND-EXCUS-000-APP-068-070/18-19 dated 25.04.2018 passed by the Commissioner (Appeals), Customs, CGST & Central Excise, Indore.

2. Brief facts of the case are that the Applicant had a unit in Indore Special Economic Zone (ISEZ), Pithampur, Dhar (M.P.) for carrying out trading and export of goods. They had obtained duty drawbacks but had failed to produce evidence for realization of export proceeds, hence demand notices were issued to them and after due process of law, the Specified Officer, ISEZ ordered recovery of demand amounts vide following Orders:

Order for recovery of duty drawback No. /date	Amount involved (in Rs.)
ISEZ/CUS/03-01/LOA/Prestige/2016/1177 dated 19.01.17	40,83,717/-
ISEZ/CUS/03-01/LOA/Prestige/2016/1167 dated 20.01.17	42,44,733/-
ISEZ/CUS/03-01/LOA/Prestige/2016/1331 dated 30.01.17	39,49,550/-

Aggrieved, the Applicant filed three appeals which were rejected by the Commissioner (Appeals) vide impugned Order-in-Appeal on the grounds of being time barred and for non-compliance of statutory requirement of pre-deposit of 7.5% of disputed amount.

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

i. That the impugned order has been passed by the Appellate Authority in a mechanical manner dismissing the appeal on the basis of limitation and that the Revisionist had not made payment of pre-deposit of the appeal. The Learned Appellate Authority in the only personal hearing provided to the Revisionist had never raised this contention about either of the two issues but still the Revisionist had

explained about the same in his application for condonation of delay as also in his written submission none of which had been considered.

ii. That the Learned Appellate Authority has exclusively relied on the incorrect version of the Adjudicating Authority about serving of order dated 19.01.2017 by speed post which was unilaterally stated by letter dated 19.04.2018 of the Adjudicating Authority as per the Learned Appellate Authority. That however, the Revisionist was never asked to explain as to whether it was correct that he had received the copy of order dated 19.01.2017 by speed post itself whereas on the other hand the Revisionist have categorically stated in their appeal that only by email dated 20.03.2017 they had received the order.

iii. That no proof of the speed post has been placed on record by the Adjudicating Authority if any such speed post has been sent and had been received since at that time since 04.10.2016 the DRI officers did not even allow the security guard to be present at the factory premises therefore, it is highly doubtful as to who has received the copy of the speed post, if at all it had been sent. That even in the case of Central Excise Act, 1944 where similar provisions as regarding service of the order has been stipulated, it has been held by the Hon'ble Bombay High Court in the case of Amidev Agro Care Pvt. Ltd. Vs. Union of India, reported as 2012 (279) E.L.T. 353 (Bom.) with regard to service by speed post as not been the correct mode of service.

iv. That assuming though not admitting even if the service of photocopy of the order by email is taken to be the starting point for the said limitation still there has been no delay in filing the present appeal. That the service by email was done on 21.03.2017 and thereafter, the writ petition was filed by the 19.05.2017 i.e. within a period of 59 days and the writ petition was disposed of only on 19.07.2017 but the order was uploaded only on 29.07.2017 and thereafter, the Revisionist has filed the Special Leave Petition on 17.08.2017 and the Special Leave Petition was disposed of on 12.01.2018 and on that date itself the appeal had been filed. That therefore, there has been no delay whatsoever in filing the said appeal. That the Learned Authority has erred to hold that the appeal has been filed beyond the prescribed appeal period of 60 days. That the Learned Appellate Authority has

failed to appreciate that since the Revisionist was pursuing the legal remedy even if it is presumed though not admitted to be a wrong legal remedy still there are a catena of judgments which have held that the delay in such circumstances ought to be condoned and the Revisionist had specifically relied upon the judgment of the Hon'ble Supreme Court of M.P. Steel Corporation Vs. CCE reported as (2015) 7 SCC 58.

v. That further the reasons as to why the Revisionist was availing the alternate legal remedy was on account of various reasons including that he had been supplied a photocopy of the order and that too without a preamble and hence the Revisionist was not aware as to before which authority he should file the appeal and further since the Revisionist was an SEZ unit governed by the SEZ Act, 2005 and in view of Section 51 of the SEZ Act, 2005 which had an overriding influence hence the Revisionist had bonafidely approached the Hon'ble High Court in writ jurisdiction.

vi. That since the Revisionist has been misled in the absence of the preamble of the order dated 19.01.2017 hence as per Section 5 of the Limitation Act, 1963 the delay if any ought to be condoned. This is more so as the delay which has occurred is bonafide and the time spent in legal proceedings ought to be excluded. That the Hon'ble Bombay High Court in the case of Dwarkadhish Sakhar Karkhana Ltd. Vs. Commr. of Central Excise, reported as 2014 (308) E.L.T. 47 (Bom.) has held that the Tribunal, has taken a hyper technical view of the matter. It does not hold that the explanation given is false or that the conduct of the Appellants is such that they were utterly negligent, careless and acted mala fide, then, there was no need to take such a view. In fact, liberal principles ought to have been applied and delay deserved to be condoned since once the explanation given is found to be genuine and not false, then, holding that the delay does not deserve to be condoned because the Appeal was not filed immediately was not in accordance with law. The delay deserves to be condoned by applying the liberal principles and which are too well settled. The Applicant deserves to be given a chance to agitate their case on merits as they have acted bona fide. There are the principles which should have been

invoked and applied and having not done that, we are unable to sustain the order under challenge.

vii. That it is further stated that in order to challenge the order which was perverse the Revisionist had approached the Hon'ble Indore High Court by way of filing writ petition bearing No. W.P.(C) No.3460/2017 on 19.05.2017 with regard to the receipt of copies of order dated 19.01.2017, 20.01.2017 and 30.01.2017 passed by the Specified Officer, SEZ, Indore however, the Hon'ble High Court was pleased to direct the Revisionist to file appeal against the aforesaid order and against this an appeal was preferred by the Revisionist however, the Hon'ble Supreme Court by order dated 12.01.2018 was pleased to clarify that observations made in the impugned order 19.07.2017 on merits would not stand against the Petitioner in consideration of the matter by the Appellate Tribunal. That however the time spent in availing the remedy before another Court and change of events which lead to the filing of the appeal were not considered by the Learned Appellate Authority who has dismiss the appeal on grounds of limitation.

viii. That the order dated 19.01.2017 has been passed under the provision of Rule 16A(2) under Customs, Central Excise and Service Tax Rule, 1995. That this order is liable to be set-aside on various grounds since firstly, it was passed without jurisdiction; secondly no personal hearing was provided to the Revisionist and no opportunity to defend their case has been provided to Revisionist and thirdly the adjudicating authority has not appreciated the fact that it is not a fit case for recovery of drawback amount. Further in addition to the same even the authority has relied on certain provisions for justifying their reasoning which is not even the part of the show cause notice. That hence the impugned order has travelled beyond the Show Cause Notice which was issued to the Revisionist.

ix. That the Revisionist has claimed the drawback amount on the basis of supply made by the Domestic Tariff Area unit in terms of provisions of Rule 24 read with Rule 30(5) of SEZ Rules 2006. That the combined reading of both the provision stated that if a bill of export has been filed under a claim of drawback the units shall claim the same from

the Specified Officer and in case the unit does not intend to claim entitlement of drawback a disclaimer to this effect shall be given to Domestic Tariff Area supplier for claim. That the procedure for grant drawback claim has been defined in Rule 24 which proviso of Rule 24 (l)(a) stated that the specified officer shall follow the drawback rule 1995, circulars and instructions made in this regard to sanction of duty drawback claim and the interest on delay payment which means the application of drawback Rule 1995 is restricted in reference to the sanctioning to duty drawback and counting the interest. That in other words in case of supply by Domestic Tariff Area unit against the bill of export the unit of SEZ can claim drawback and the supplier only claim in case of disclaimer to this effect would be given in favour of supplier. The specified officer shall be disbursing authority for the same and he shall follow the drawback rule 1995, Circular and instruction in this regard to sanction to duty drawback claim and the interest on delay payments. The Specified Officer has failed to appreciate that the Rule 16A is not applicable in the case of export made from DTA to SEZ and therefore the impugned order is passed without jurisdiction or excess exercise of the power and therefore illegal and is an example of legal malice and hence is liable to be set aside on this ground alone.

x. It is further submitted that the Specified Officer has relied on Rule 25 read with Rule 34 of SEZ Rules, 2006 for the refund of the drawback amount and the reliance of the Specified Officer is totally misplaced and the same has not even been mentioned in the demand notice. That therefore, the impugned order has travelled beyond the Show Cause Notice and hence is liable to be set-aside on this ground alone. That the Hon'ble Supreme Court in the case of Commr. Of Customs v. Toyo Engg. India Ltd., reported as (2006) 7 SCC 592, had held that the Department cannot travel beyond the show-cause notice.

xi. It is submitted that as per the Rule 25 of SEZ Rules, 2006 where an entrepreneur does not utilize the goods on which drawback have been availed for the authorized operation or unable to duly account for the same the entrepreneur shall refund an amount equal to the drawback availed. Section 34 states that the goods admitted in to SEZ shall be used by unit for carrying out the authorized operation but if the goods

admitted are utilized for the purpose other than the authorized operation duty shall be chargeable on such goods. It is submitted that the reliance of the Specified Officer is misplaced as it is not the case of the department that the goods which had come into SEZ has not been utilized for authorized operation or unable to duly accountable. They stated that in demand notice for submissions of documents / evidence regarding export of the goods within 180 days. That the Specified Officer has failed to appreciate the provision of Rule 37 of SEZ Rules, 2006 which states about permissible duration of goods which are admitted to SEZ for either utilization or for export and the said validity period would be mentioned in the letter of approval issued to the unit. In other words, as per the provisions of Rule 37 the permissible duration of the goods within SEZ is the period mentioned in letter of approval issued to the unit and in the present case it is 5 years. It is submitted that the provisions of Rule 37 is supported by the proviso of Rule 16(a) of the Drawback Rules, 1995 which bars the application of limitation mentioned in FEMA for realization of amount as the goods exported from DTA to SEZ unit is also export and goods are permitted to stay more than 9 months or whatever the time mentioned in LOA. In the instant case the permissible duration for the goods is five years. That in reference to the aforesaid even the reliance placed by the Specified Officer for passing the order is misreading and misconstruction of the provisions and the said has been taken first time in the order and it is not permissible in law.

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 25.07.2023. Shri Anmol Arya, Advocate appeared online and submitted that applicant had retracted their statement. He requested 10 days' time to make additional written submission.

However, the applicant has neither filed any additional submission nor any other communication in this regard has been received, 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 main issue involved in the instant case is whether provisions of Rule 16A of the Customs, Central Excise and Service Tax Drawback Rules, 1995 are applicable to a SEZ unit for recovery of amount paid towards duty drawback?

7. Government observes that the applicant, a merchant exporter having a unit in Indore SEZ, had filed claims for duty drawback which were sanctioned vide three separate Orders-in-Original for Rs.40,83,717/-, Rs.42,44,733/- and Rs.39,49,550/- passed by Specified Officer, ISEZ, Pithampur. As the applicant failed to comply with condition of submitting Bank Realization Certificate within 180 days from the date of export, three demand notices were issued respectively for recovery of amount towards duty drawback paid to them. These demand notices were confirmed vide Orders dated 19.01.2017, 20.01.2017 and 30.01.2017 respectively as the applicant failed to respond to the demand notices. The applicant filed appeals against these Orders which were rejected by the Appellate authority on the grounds of being time barred and for non-compliance of statutory requirement of pre-deposit of 7.5% of disputed amount vide the impugned OIA.

8. The first contention of the applicant is that the Special Leave Petition filed by them in the matter was disposed of on 12.01.2018 and on that date itself the appeal under Section 128 of the Customs Act,1962 had been filed. Therefore, there had been no delay whatsoever in filing the said appeal. Government observes that in this regard, the Appellate authority has explained in detail at para 7.1 of the impugned OIA as to how the total number of days, after deducting the period during which the matter was pending in Courts, exceeded the maximum allowable period of 90 days from

the date of communication of impugned demand orders till the date of filing of appeal. The para is reproduced hereunder:

> *7.1 However, I find that the Appellant has claimed the receipt of these 3 orders on 20.03.2017 by e-mail. Even if taking the date of communication of order as 20.03.2017 as asserted by the Appellant, I find that the impugned appeals are filed after 30 days beyond prescribed time limit of 60 days specified under Section 128 of the Customs Act, 1962. I find that the Appellant has also filed application for condonation of delay in filing the impugned appeals on the ground that the period when the issue was before the Court has to be excluded and thus the delay is only of 29 days. In this regard I find that impugned orders were claimed to have been communicated to the Appellant on 20.03.2017 as asserted by Appellant themselves and the Appellant filed Writ Petition before the Hon'ble Indore High Court on 19.05.2017. The said Writ Petition was decided on 19.07.2017 and the Appellant filed Special Leave Petition before Hon'ble Supreme Court on 17.08.2017 which was disposed on 12.08.2018. Even if period from 19.05.2017 to 19.07.2017 and from 17.08.2017 to 12.01.2018 is excluded then also there is delay beyond 30 days over and above prescribed appeal period of 60 days. Such delay cannot be condoned by the Commissioner (Appeals) because as per the statutory provisions the delay of 30 days only beyond prescribed appeal period of 60 days can be condoned by the Commissioner (Appeals).*

Further, the other ground for rejection of appeal filed by the applicant was non-compliance of statutory requirement of pre-deposit of 7.5% of disputed amount as required under Section 129E of the Customs Act, 1962. Government observes that the applicant has not contested this ground in the instant Revision Application.

9. The Applicant has also contended that the Rule 16A of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 (hereinafter referred to as 'the Drawback Rules') is not applicable in the case of export

made from DTA to SEZ and therefore the impugned order is passed without jurisdiction. Government observes that Chapter IV of SEZ Rules,2006 is regarding 'Terms and Conditions for availing exemptions, drawbacks and concessions to every Developer and entrepreneur for authorized operations' and the Rule 25 ibid under this Chapter reads as follows:

> *25. Where an entrepreneur or Developer does not utilize the goods or services on which exemptions, drawbacks, cess and concessions have been availed for the authorized operations or unable to duly account for the same, the entrepreneur or the Developer, as the case may be, shall refund an amount equal to the benefits of exemptions, drawback, cess and concessions availed without prejudice to any other action under the relevant provisions of the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Central Excise Tariff Act, 1985, the Central Sales Tax Act, 1956, the Foreign Trade (Development and Regulation) Act, 1992 and the Finance Act, 1994 (in respect of service tax) and the enactments specified in the First Schedule to the Act, as the case may be:*

Government observes that the Drawback Rules are issued under section 75 of the Customs Act, 1962, section 37 of the Central Excise Act, 1944 and section 93 A read with section 94 of the Finance Act, 1994 and therefore all the provisions thereunder are applicable to a SEZ unit. Rule 16A of Drawback Rules provides for recovery of amount of Drawback where export proceeds are not realized. In the instant matter, the applicant had claimed drawback for export of goods obtained from DTA. Therefore, in the light of aforesaid Rule 25, the applicant was liable to refund the amount which it had received towards drawback as they had failed to provide any proof against realization of export proceeds. Since they failed to abide by said Rule, the department resorted to Rule 16A of Drawback Rules. Government finds no anomaly in these steps taken by the department.

10. The Applicant has further contended that *the Specified Officer has relied on Rule 25 read with Rule 34 of SEZ Rules, 2006 for the refund of the drawback amount and the reliance of the Specified Officer is totally misplaced and the same has not even been mentioned in the demand notice.* In this regard, Government finds that both the demand notices and the resultant Orders were issued under Rule 16A(2) of the Drawback Rules. The Rules 25

and 34 of SEZ Rules,2006 have been mentioned in the Orders to bring forth the point that the applicant was required to voluntarily refund the amount equivalent to drawback availed for non-utilization of goods (on which drawback was availed) for authorised operations. Therefore, Government finds no basis in this contention of the applicant.

11. In view of the above discussion and findings, the Government finds no infirmity in the impugned Order-in-Appeal dated 25.04.2018 and upholds the same. The subject Revision Application is rejected.

16/8/23

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

ORDER No. 585-587/2023-CUS (WZ)/ASRA/Mumbai dated 16.8.23

To,

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

Copy to:

1. Commissioner of CGST & Central Excise, Ujjain,
   29, GST Bhavan, Administrative Area,
   Bharatpuri, Ujjain – 456 010.

2. Priyadarshi Manish & Anjali J. Manish,
   437, Basement, Mathura Road,
   Behind Bhogal Bus Stop,
   Jangpura, New Delhi – 110 014.

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

4. Guard file.