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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. 371/381/DBK/2022-RA/6262

Date of Issue: 21.08.2023

ORDER NO. 596/2023-CUS (WZ) /ASRA/Mumbai DATED 18.08.2023 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.

Applicant : M/s Sol Mobiles Pvt. Limited,
A-204, Kol Dongri CHS, Parsiwada, Sahar Road,
Andheri (East), Mumbai - 400 099.

Respondent : Commissioner of Customs (Export),
Air Cargo Complex, Sahar, Andheri (E),
Mumbai - 400 099.

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-AXP-APP-35/2022-23 dated 21.04.2022
passed by the Commissioner of Customs (Appeals)
Mumbai - III.

ORDER

This Revision Application has been filed by M/s Sol Mobiles Private Limited, Mumbai (here-in-after referred to as 'the applicant') against the Order-in-Appeal dated 21.04.2022 passed by the Commissioner of Customs, (Appeals) Mumbai – III. The said Order-in-Appeal decided an appeal against the Order-in-Original dated 09.07.2021 passed by the Deputy Commissioner of Customs, DBK (EDI), Air Cargo Complex, Mumbai.

2. Brief facts of the case are that the applicant is engaged in the trading of international branded mobile phones. They procured mobile phones locally from authorized channel partners in India and thereafter exported the same. The applicant claimed Drawback on such export of mobile phones from 20.05.2019, however, prior to this date they had not claimed Drawback on such exports and had exported the same goods under Free Shipping Bills without mentioning that they intended to claim Drawback on the goods exported. The applicant sought to claim Drawback on the goods exported by them for the prior period, i.e. from April 2018 to April 2019; the chronology of events that followed is as under: -

- The applicant submitted a letter dated 07.09.2019 addressed to the Joint Commissioner of Customs (Export), ACC, Mumbai claiming Drawback at the All Industry Rate with respect to the goods exported by them during the period from April 2018 to April 2019 in which they referred to Circular no.36/2010-Customs dated 23.09.2010 issued by the Board wherein it was clarified that the Commissioner may allow All Industry Rate of duty Drawback on goods exported under Free Shipping Bill, without conversion of such Free Shipping Bill to Drawback Scheme Shipping Bill, in terms of proviso to Rule 12(1)(a) of the Customs, Central Excise and Service Tax Drawback Rules, 1995;
- In reply to the said letter dated 07.09.2019 of the applicant requesting for Drawback, the Assistant Commissioner of Customs, ACC Exports (Shed), Mumbai vide letter dated 28.09.2019 informed the applicant that the Competent Authority had accepted their request for claiming All Industry Rate of Drawback with respect to the consignments

mentioned in their letter dated 07.09.2019 and asked them to claim Drawback from the concerned Section of the Commissionerate;

- The applicant, thereafter, vide letter dated 03.10.2019 requested the Assistant Commissioner of Customs, Drawback (EDI), Air Cargo Complex, Mumbai to disburse their Drawback claim as allowed to them, in terms of the letter dated 28.09.2019 of the Assistant Commissioner of Customs, ACC Exports (Shed), Mumbai;
- Thereafter, the Assistant Commissioner (DBK) vide letter 22.11.2019 called for several documents from the applicant, which was submitted by them vide letter dated 27.12.2019;
- Thereafter, the Assistant Commissioner (DBK) vide letter 29.09.2020 rejected the Drawback claim of the applicant on the following grounds:-
 - That request for conversion of free Shipping Bill to Drawback Shipping Bill should be made within three months from LEO date of the Shipping Bill and that the applicant had failed to comply with this condition;
 - No tangible reason was given by the applicant to justify their not claiming Drawback at the time of export;
 - That Drawback in terms of Section 75 of the Customs Act, 1965 is allowed on export of goods when import duty has been paid on the components/raw materials used in the manufacture of export goods; that the goods were not physically examined at the time of clearance.
- In response, the applicant vide letter dated 02.10.2020 to the original authority informed that there was no request for conversion of Shipping Bill in their case and also refuted all the other points raised by the original authority;
- In response the Deputy Commissioner, Drawback, ACC passed Order-in-Original dated 09.07.2021 vide which the claim of the applicant for Drawback was rejected on the same grounds which was mentioned in his earlier letter;

- Aggrieved, the applicant filed appeal before the Commissioner (Appeals), who vide the impugned Order-in-Appeal dated 21.04.2022 upheld the Order-in-Original dated 09.07.2021 and rejected the appeal.

3. Aggrieved, the applicant has filed the present Revision Application against the Order-in-Appeal dated 21.04.2022 on the following grounds:-

(a) That the Order-in-Appeal was incorrect on facts as well as in law; that the following facts were undisputed in the present case:

- i. Claim for Drawback at AIR for goods exported during the relevant period was filed in terms of Section 75 of the Customs Act read with para 4 of the Circular 36;
- ii. Duty Drawback had been claimed only for the Customs duty components. No Drawback has been claimed for GST (CGST or SGST or IGST);
- iii. They had provided complete details of the goods exported on which Drawback was claimed, which has been verified and also accepted by the Customs Department;
- iv. There was no requirement for conversion of free shipping bills into Drawback shipping bills for claiming AIR of duty Drawback on goods exported vide free shipping bills as evident from para 4 of the Circular 36;
- v. That the said Drawback claim was allowed and the same was intimated to them by the Asst. Commr. vide the Order dated 28.09.2019; that they were informed that duty Drawback at AIR as claimed by them for goods exported during the relevant period was accepted;
- vi. That no appeal against the said order dated 28.09.2019 had been filed by the Department and hence the same had attained finality;
- vii. That the Adjudicating authority vide Order dated 09.07.2021 had rejected the Drawback claim at AIR filed them, which was already adjudicated and allowed by the Assistant Commissioner vide Order dated 28.09.2019 for the goods exported during the relevant period.

- (b) That they had filed their Drawback claim at AIR on 07.09.2019 as per Section 75 of the Customs Act read with Rule 12 of the Drawback Rules, 2017 before the Joint Commissioner (Exports) and that after verification of the claim and the supporting documents, the Assistant Commissioner vide Order dated 28.09.2019 accepted their claim; that no appeal against the said order has been filed by the Department; that thereafter they approached the Drawback Division for disbursal of the Drawback claim wherein they were called upon by the Assistant Commissioner (DBK) to re-submit the documents pertaining to the Drawback claim which they had already submitted;
- (c) That their application for duty Drawback dated 07.09.2019 was filed under Section 75 of the Customs Act and any order adjudicating the said claim would be an appealable order in terms of Section 128 of the Customs Act, which provides for making appeal to the Commissioner (Appeals) and that if the Department was aggrieved by the Order dated 28.09.2019, the remedy of appeal under Section 128 of the Customs Act was available to them and in the absence of any such appeal challenging the Order dated 28.09.2019, the same has attained finality.
- (d) That in the present case, instead of going in an appeal, the Department re-adjudicated the Drawback claim vide the Order dated 09.07.2021; that the adjudicating authority while passing the (Second) Order dated 09.07.2021 was in lack of jurisdiction and hence, the present proceedings are liable to be dropped on this ground alone; they placed reliance in the case of Godrej & Boyce Mfg. & Co. Ltd. Vs. CCE, Bombay-II [1994 (71) ELT 429 (Tribunal)] wherein it was held that once the adjudication was done and the same was not challenged, it attains finality; it was held that the same cause of action cannot be adjudicated twice and that is the same cause of action was adjudicated twice, the same would be in total disregard to principles of Res judicata;
- (e) That the Order-in-Original dated 09.07.2021 passed by the original authority was not sustainable as the same was passed without issuance of any Show Cause Notice and was hence violative of the principles of natural justice and was liable to be set aside on this ground alone;

(f) That both the lower authorities had erred in rejecting their Drawback claim on the basis of treating the same as time barred in terms of clause 3(a) Circular no.36 as the same pertained to the time limit for applying for conversion of Shipping Bills whereas in their case there was no conversion of Shipping Bill as they had sought for Drawback in terms of Clause 4 which permitted the Commissioner to allow Drawback on AIR on free Shipping Bills too; that no physical verification was insisted upon in such cases;

(g) That for claiming Drawback under AIR there was no requirement to declare 'made in India' on the Shipping Bill and hence this reason given by the lower authorities to reject their claim was incorrect;

(f) That the reason that they had not provided details of actual import duty paid by the lower authorities for rejecting their claim was incorrect as they claim was for AIR Drawback which is based on rates fixed by the Government and there was no requirement to submit such proof; that as a trader they would never be in a position to ascertain the actual amount of import duty contained in the manufactured mobile phone and that the AIR is notified after considering the appropriate duty contained in the final product exported; they sought to place reliance on Board's Circular No.24/2001-CUS dated 20.04.2001 and Circular no.19/2005-Cus dated 21.03.2005 in support of their submissions;

(g) That the lower authorities had erred in relying on Instruction dated 25.09.2020 to reject the Drawback claimed by them for exports pertaining to the period April 2018 to April 2019, as the said instruction would be applicable prospectively and hence not applicable to their case.

In view of the above they prayed that the impugned Order-in-Appeal be set aside and their appeal be allowed with consequential relief; the Order dated 28.09.2019 be upheld as the same had attained finality; and hold that they are eligible to the Drawback claimed by them; and that such Drawback be sanctioned to them along with applicable interest.

4. Personal hearing in the matter was granted to the applicant and the respondent. Shri Prakash Shah, Sr. Lawyer and Shri Sajan Mishra, Lawyer appeared on 17.07.2023 on behalf of the applicant. They submitted that letter dated 28.09.2019 of the Assistant Commissioner, Export (Shed) is permission of Competent Authority to claim AIR Drawback on free Shipping

Bills. They further submitted the Order-in-Original and Order-in-Appeal has not disputed that permission was from Competent Authority as per Circular No.36/2010-Customs dated 15.07.2020. They further submitted that goods were locally manufactured and procured by the applicant and goods exported are not imported goods. They further submitted that clarification OSD (DBK) dated 25.09.2020 is erroneous and is contrary to the settled position of law. They also submitted an additional written submission, along with case laws. No one appeared on behalf of the Respondent.

5. Government has carefully gone through the relevant case records available, the written and oral submissions and also perused the impugned Order-in-Original and Order-in-Appeal.

6. Government notes that the issue involved is whether the applicant is eligible to the Drawback claimed by them with respect to the mobile phones exported by them under Free Shipping Bills during the period from April 2018 to April 2019. Government notes that it is the case of the applicant that they had inadvertently filed Free Shipping Bills as against filing Shipping Bills under the Drawback Scheme. Government finds that CBEC vide Circular no.36/2010-CUSTOMS dated 23.09.2010 had, amongst others, addressed this situation and issued the following clarification –

*4. Free shipping bills (shipping bills not filed under any export promotion scheme) are subject to 'nil' examination norms. Conversion of free shipping bills into EP scheme shipping bills (advance authorization, DFIA, DEPB, reward schemes etc.) should not be allowed. **However, the Commissioner may allow All Industry Rate of duty Drawback on goods exported under free shipping bill, without conversion of such free shipping bill to Drawback Scheme shipping bill, in terms of the proviso to rule 12(1) (a) of the Customs, Central Excise and Service Tax Drawback Rules, 1995.***

(emphasis provided)

Government finds that the applicant, on the basis of such clarification issued by the Board, vide their letter dated 07.09.2019 requested the jurisdictional Joint Commissioner to allow duty Drawback as per the All Industry Rate on the goods exported by them during the period from April 2018 to April 2019. Government finds that this request of the applicant was replied to by the Assistant Commissioner of Customs, ACC Exports (Shed),

Mumbai vide letter dated 28.09.2019. The contents of the said letter is reproduced below:-

“ Sub: Duty Drawback claim on export of branded mobile phones for the period from April 2018 onwards – reg:-

Please refer to your letter dated 07.09.2019 on the above mentioned subject.

The Competent Authority has accepted your request for claiming All Industry Drawback for the shipping bills mentioned in Annexure A, B, C & D to this letter.

This is for your information and further necessary action to claim your Drawback at concerned section of the Commissionerate.”

A harmonious reading of the extracts of the Circular no.36/2010-CUSTOMS and the above letter dated 28.09.2019 clearly brings out that –

- The Commissioner is the Competent Authority to allow Drawback at All Industry Rate in respect of goods exported under Free Shipping Bills;
- In the present case, the Competent Authority had accepted the request of the applicant to claim Drawback at AIR from the period April 2018 onwards in respect of the Shipping Bills submitted by them.

Government finds that the above mentioned letter dated 28.09.2019 of the ACC Exports (Shed), Mumbai has not been challenged by the Department. Further, Government also finds that neither of the lower authorities have questioned the veracity of the documents submitted by the applicant to the office of Commissioner while seeking to avail Drawback on the export consignments in question. Given the above position, Government finds that all that remained for the Assistant Commissioner holding charge of the Drawback Section was to sanction the Drawback claimed by the applicant in light of the order of the competent authority, as communicated by the Assistant Commissioner ACC Exports (Shed), Mumbai vide letter dated 28.09.2019.

7. Government notes that despite the above order, conveyed in no uncertain terms by the Assistant Commissioner ACC Exports (Shed), Mumbai, the Deputy Commissioner of Customs, DBK (EDI), Air Cargo Complex, Mumbai chose to ignore the same and proceeded to re-adjudicate the issue, which as stated earlier stood decided by the competent authority. Government notes that this action of the Deputy Commissioner of Customs, DBK (EDI), Air Cargo Complex, Mumbai was unwarranted and borders on judicial indiscipline. Government finds that this action of the Deputy Commissioner has given rise to needless litigation which has reached this stage. At the cost of repetition, it needs to be mentioned that the communication vide letter dated 28.09.2019 holding the applicant eligible to the Drawback claimed by them has not been challenged or set aside by any higher authority, and has hence attained finality. Thus, Government finds that the issue of whether the applicant is eligible to the Drawback claimed by them, in respect of their exports for the period from April 2018, stands decided in favor of the applicant and accordingly holds so.

8. Having held so, on examining the orders of the both the lower authorities, Government finds that the grounds raised therein to deny the Drawback claimed by the applicant to be irrelevant and frivolous. Delay in application for conversion of Shipping Bill being one such reason defies logic, as in this case there is no request by the applicant for such conversion, as the Drawback sought by them has been allowed to them by the Commissioner on the strength of Free Shipping Bills itself, as provided for by the Circular dated 23.09.2010 issued by the Board. Further, the emphasis on requiring the applicant, a trader, to provide proof of duty payment, does not have any legal basis and is contrary to the instructions by the Board in the regard. The Board vide Circular no.24/2001-Cus dated 20.04.2001 had in fact clarified that no evidence of actual duties suffered on imported or indigenous nature of inputs used should be insisted upon when Drawback is disbursed at All Industry Rate. Further, Government finds that the lower authorities have sought to apply an Instruction dated 25.09.2020 to consignments cleared during the period from April 2018 to April 2019 to deny Drawback, which is incorrect and uncalled for, as there was nothing in the said Instruction to indicate that the same was required to be applied retrospectively. Government finds it necessary to discuss the contents of the orders of the lower authority, not for the reason that these Orders have any legal validity, but to put on record that the purported

reasons on the basis of which Drawback was denied are indeed irrelevant and insufficient.

9. In view of the above, Government finds that the impugned Order-in-Appeal dated 21.04.2022, which upheld the Order-in-Original dated 09.07.2021, to be flawed and incorrect, and accordingly sets aside the same. Government holds that the applicant is eligible to the Drawback claimed by them at All Industry Rate for the period April 2018 to April 2019.

10. The subject Revision Application is allowed.

Shrawan
18/8/23

(SHRAWAN KUMAR)

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

ORDER No. 596/2023-CX (WZ) /ASRA/Mumbai dated 18.08.2023

To,

M/s Sol Mobiles Pvt. Limited,
A-204, Kol Dongri CHS, Sahar Road,
Andheri (East), Mumbai - 400 099.

Copy to:

1. Commissioner of Customs (Export), Air Cargo Complex, Sahar, Andheri (E), Mumbai - 400 099.
2. Commissioner of Customs (Appeals) Mumbai - III, Awas Corporate Point, 5th floor, Makwana Lane, Behind S.M. Centre, Andheri - Kurla Road, Marol, Mumbai - 400 059.
3. Sr. P.S. to AS (RA), Mumbai.
4. Notice Board.