REGISTERED
SPEED POST

सत्यमेव जयते

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. 371/235/DBK/2021-RA / 6361 Date of issue: 24.08.2023

ORDER NO. 607/2023-CUS (WZ)/ASRA/MUMBAI DATED 23.8.2023 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. Primetals Technologies India Pvt. Ltd.

Respondent : Pr. Commissioner of Customs, Nhava Sheva-II

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962, against the Order-in-Appeal No. 17(Export Docks)/2021(JNCH)/Appeals dated 22.03.2021 passed by Commissioner of Customs (Appeals), Mumbai-II.

ORDER

This Revision Application is filed by M/s. Primetals Technologies India Pvt. Ltd. (hereinafter both referred to as "the Applicant") against Order-in-Appeal (OIA) No. 17(Export Docks)/2021(JNCH)/Appeals dated 22.03.2021 passed by the Commissioner of Customs (Appeals), Mumbai-II.

2. Brief facts of the case are that the applicant had filed a shipping bill for export of goods to Mexico under claim of drawback amounting to Rs.5,62,801/- However, the original authority observed that the applicant had inflated the value of goods to avail undue duty drawback and hence restricted the drawback benefit to 150% of cumulative value of all purchase invoices, vide Order-in-Original (OIO) No. 572/2019-20/ADC/CAC/NS-II/JNCH dated 30.10.2019. Aggrieved, the Applicant filed an appeal with the Commissioner (Appeals) who vide impugned Order-in-Appeal upheld the OIO.

3. Hence, the Applicant has filed the instant revision application mainly on the following grounds:

a) the denial of genuine duty drawback claims by citing overvaluation to the extent of 271% and country of origin of exported goods is completely fallacious, grossly erroneous, vague, entirely based on wrong footing as it is without any legal backing. It is submitted that the department has arbitrarily compared the purchase value of goods with the FOB value of exported goods, without appreciating the value additions and profit element at the Applicant's end. Perusal of the first proviso to the Section 75 of CA, 1975 indicates that the Government may specify certain rules where duty drawback benefit will not be allowed where the export value of certain goods is less than the value of imported materials used in manufacture/ process of such goods. The corresponding rules have been provided in Rule 8 of Drawback Rules, 2017. The second proviso further

states that where drawback has already been allowed and the sale proceeds are not received by exporter within time frame allowed by Foreign Exchange Management Act, 1999 ('FEMA, 1999'), shall duty drawback will be recoverable by the Government. On similar lines, Rule 18 of Drawback Rules, 2017 provides that where export proceeds are not realized within time frame prescribed under FEMA, 1999, recovery of duty drawback shall be initiated by the department. The Applicant submits that it is not the case of the department that the Applicant has short received the export sale proceeds or received the sale proceeds after the stipulated period as provided in FEMA Act. Therefore, the same is not being rebutted vide the present revision application. Reference is also made to Rule 9 of Drawback Rules, 2017 which deals with the upper limit of Drawback amount or rate. The rule states that drawback amount or rate shall not exceed one third of the market price of the export product. The Applicant submits that it is also not the case of the department that there has been a contravention of Rule 9 insofar that the drawback amount does not exceeds 1/3rd of the market price of export goods. Thus, the perusal of the relevant provisions read with Rules indicates that nowhere does the provision provide for denial of duty drawback on the ground that the FOB value of exports is a certain percentage higher than the purchase value of inputs. Furthermore, there is no mentioning that duty drawback is allowable only subject to condition that the goods exported has India as "country of origin". In other words, no provision under Customs Act restricts or denies the duty drawback by comparing the FOB value of exports with the total price of purchases.

b) It is also a settled principle in law that SCN is a foundation of a proceeding which must be specific with respect to the allegations made therein and not vague. If the reasons / allegations are absent or not proved, it will be considered that an assessee has not been provided proper opportunity to defend the issue. Further, SCN is the foundation of

any proceedings and hence, must be specific and reasoned. In this regard, reliance is placed on the decision in the case of CCE, Bangalore v. Brindavan Beverages (P) Ltd - 2007 - VIL- 45- SC- CE. In the case of CC (II) Airport Special Cargo, Mumbai v. Samir Vora — 2015 (330) ELT 609 (Tri.- Mumbai), the Hon'ble Tribunal Mumbai, in the context of EXIM policy, held that rejection of FOB value on a criteria, not prescribed anywhere in Customs Act, is legally erroneous. The Hon'ble Tribunal vide para 18.21 specifically held that the department has failed in discharging the burden cast upon it to produce any tangible evidence in respect of the charge of over-valuation at the exporter's end.

c) It is also important to note that in the present case, the department proceeded to reject the FOB value without undertaking any market inquiry in respect of goods exported from India. Further, no evidence was placed on record that the price of like goods is lower than the FOB price or that the export proceeds was not fully realized in foreign exchange. Therefore, it is apposite to state that the department has failed to discharge its burden to adduce any evidence the charge that there has been overvaluation of the exported goods. The judgment of the Hon'ble Tribunal in the case of Samir Vora was later affirmed by the Hon'ble Supreme Court in the case of Commissioner v. Adani Enterprises Ltd. - 2016 (342) ELT A50 (SC). Further reliance is also placed on the following decisions:

- CC, Calcutta v. South India Television (P) Ltd - 2007 (214) ELT 3 (SC)
- Sumeet Exports (India) v. CC(I), Nhava Sheva - 2019 (370) ELT 423 (Tri. Mumbai)
- Akshay Exports v. Collector [2003 (156) E.L.T. 268]

In light of the above, it is submitted that the very foundation of the present proceedings is legally erroneous and devoid of merits, as the adjudicating authority and the Ld. Commissioner (Appeals) has failed to establish or substantiate how there has been an instance of

overvaluation of exported goods. Consequently, the denial of duty drawback vide the present proceedings depicts the pro-Revenue approach adopted by the Ld. Commissioner (Appeals), as the authority has failed to discharge its function as a quasi-judicial authority.

d) The Ld. Commissioner (Appeals) vide para 6 and para 9 of the impugned order observed that the FOB value of exported goods have been overvalued to the extent of 271% of total cumulative value of purchases. Further, vide para 8 of the impugned order, the appellate authority observed that it is noticed that the subject goods were purchased from the local market and exported by declaring the same at a higher value. It is submitted that such an observation of the Ld. Commissioner (Appeals) depicts that the department has been in complete ignorance of the transactions and value additions undertaken/ engineering/ other costs incurred at the Applicant's end. It is important to note that the Applicant did not export the goods outside India in as-is condition as originally purchased from the domestic vendors. It is submitted that apart from the goods/components purchased by the Applicant from its domestic vendors amounting to Rs. 1,19,31,361/-, the Applicant incurred substantial amount of cost and expenditure towards undertaking engineering, preparing of detailed drawings/ designs, software automation. Apart from these costs, the Applicant also added its mark up (profit element) to the cost before finalizing the FOB price at which the goods were ultimately exported. Therefore, firstly the Ld. Additional Commissioner and subsequently, the Ld. Commissioner (Appeals) proceeded to allege and observe overvaluation without rejecting the transaction value at the first place, which was supported by valid reasons. This shows that the department has blatantly ignored the provisions and methodology provided in the Customs Act, 1962, read with Customs Valuation Rules, which is also violative of the principles of natural justice. In support, reliance is placed on the following judgments:

- Guru Rajendra Metalloys India Pvt. Ltd v. Commr. of Customs, Ahmedabad - 2020 (374) E.L.T. 617 (Tri. - Ahmd.).
- C. C. (Import) Nhava Sheva v. Bharathi Rubber Lining & Allied Services (P) Ltd - 2013 (287) ELT 124 (Tri.- Mumbai)

e) It is important to note that the Ld. Commissioner (Appeals) vide Para 9 of the impugned order also specifically observed that the adjudicating authority has not disputed the fact that the transaction value declared in the shipping bill is not the actual transaction value of the exported goods. Under such circumstances, the department itself is in tacit acceptance of the fact that the transaction is genuine in nature, thus the duty drawback benefit cannot be disallowed on arbitrary grounds. It is also important to note that in the present case, that the entire foreign exchange (sale proceeds) have also been realized by the Applicant through proper banking channels. Under such circumstances, there cannot be any instance that the Applicant would have derived some additional benefit by resorting to overvaluation of exported goods.

f) The Applicant humbly submits that subject goods in the present matter cannot be held liable for confiscation under Section 113(i) of the Customs Act. Perusal of provisions of Section 113(i) of the Customs Act indicates that the section provides for confiscation of goods, which do not correspond in respect of value or in any material particular with the entry made under the Act. There is no mis-declaration of value alleged. It has been demonstrated above that the department has not produced any evidence of misdeclaration of value of exported goods. It is reiterated that there is no mala fide that can be attributed on the Applicant. Reliance in this regard is placed on the decision of the Hon'ble CESTAT Bangalore in the case of Suryakiran International Ltd v. CC, Hyderabad- 2010 (259) ELT 745 (Tri.- Bang).

g) It is submitted that the imposition of penalty under Section 114(iii) of CA, 1962 is in addition to the confiscation of goods ordered under

Section 113 of CA, 1962. The Applicant craves leave to refer to the detailed submissions made in preceding paragraphs inasmuch that there is no mala fide intention attributable to them so as to impose penalty under Section 114(iii) of CA, 1962. It is also important to note that neither the Ld. Additional Commissioner nor the Ld. Commissioner (Appeals) has cited any reason or specified as to how such penal provisions are applicable to the case of the Applicant. It is submitted that the imposition of penalty under such section is warranted only in a scenario where goods have been improperly exported by an assessee. Such an action at the end of exporter must be supported by the presence of mens rea at its end.

- Shilpi Exports v. CC, Calcutta- 1996 (83) ELT 302 (Tribunal)
- Express Transport (P) Ltd v. CC, Nhava Sheva - 2007 (220) ELT 157 (Tri.Mumbai)
- Akbar Badruddin Jiwani v. Collector of Customs 1990 (47) E.L.T. 161
- Kaka Carpets v. CCE (Adjudication), New Delhi - 2020 (373) ELT 286 (Tri.- Chennai).

In view of above submissions, the applicant prayed to set aside the impugned Order-in-Appeal; to allow the claim of duty drawback amounting to Rs.5,62,802/-; to hold that transaction value has been correctly declared by them; to hold that no penalty/fine is imposable on them; and to provide any other relief as deemed fit.

4. A Personal hearing was held in this case on 21.06.2023. Shri Apoorva Parihar, Advocate, Shri Shekhar Sonar and Shri Chandrasekhar appeared on behalf of the Applicant and submitted that the department has alleged over valuation without any evidence. They further submitted that no market enquiry was conducted. They requested to allow the application. They further requested one week's time to submit additional submissions.

5. In their additional written submissions, the applicant has interalia stated that:

a) as per Circular No. 7/2003-Cus., dated 05.02.2003 issued by CBIC, it is not optional but mandatory for the customs department to conduct market enquiry if there is any doubt or if they prima facie feel that assessee has resorted to over-valuation. In the present case, the department has neither conducted any market enquiry nor have they produced any evidence of any contemporaneous export data to reject the FOB value. This is the most crucial aspect which has been overlooked by the lower authorities while passing the Orders. This is fatal to the entire proceeding. Needless to mention that Circulars are binding on the departmental authority.

b) The lower authorities while rejecting the declared FOB value have also failed to take into consideration various costs borne by the Applicants such as 'cost of engineering personnel', 'cost of supply chain management', etc. This aspect was duly submitted before the lower authorities by the Applicants during the personal hearing. In any case, market value of the goods exported can't be compared with / incomparable with the inputs or spares cost only. What has been done in the present matter is that components purchased from the local market and their price has been compared with the price of the final goods exported which is completely perverse.

c) It is also submitted that since no mala fide intention can be attributed to the Applicants, goods have been incorrectly held liable to confiscation. In any case, it is a settled law that goods already cleared for import/export cannot be held liable to confiscation.

d) It is now a well-established principle of law that where goods are not available for confiscation, redemption fine cannot be imposed under Section 125 of the Customs Act, 1962. Reliance is placed on the decision of the Hon'ble Bombay High Court in Finesse Creation Inc. —2009 (248) ELT 122 (Bom.) which has been affirmed by Hon'ble Supreme Court in Commissioner Vs. Finesse Creation Inc. — 2010 (255) ELT A120 (SC).

Also, refer: Vikas Chandra vs. Commissioner —2003 (158) ELT 316 (T), Kripa Ispat vs. CCE & CC —2009 (235) ELT 623 (Tri. - LB).

e) Lastly, once goods are not liable to confiscation, no penalty can be imposed in terms of Section 114(ii) of the Customs Act. Refer: Shilpi Exports Vs. CC — 1996 (83) ELT 302

6. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original, Order-in-Appeal and the Revision Application.

7. Government observes that the issue involved in the instant matter is whether the Applicant had overvalued the consignment exported by them to claim higher drawback?

8. Government observes that the applicant had received an overseas order for supply of industrial machinery/equipment – 'Automation project for Rebar Mill'. The applicant fulfilled the order by outsourcing it to various vendors. Subsequently, they filed Shipping Bill No. 5739860 dated 22.07.2019 for the 30 packages containing goods falling under chapter 85, 84 & 90, having FOB value of Rs.3,16,83,658/-, claiming duty drawback amounting to Rs.5,62,801/-. The department observed that the FOB value was 271% of the cumulative value of supplier tax invoices and found it in contrast with fair trade practices. Therefore, it was concluded that the applicant had resorted to overvaluation of goods in order to claim undue export benefits and hence the original authority restricted the drawback benefit to 150% of cumulative taxable value, imposed redemption fine of Rs.1,00,000/- and a penalty of Rs.50,000/-. The appellate authority upheld the OIO.

9. Government observes that valuation of export goods is governed by Customs Valuation (Determination of Value of Export Goods) Rules, 2007 (here-in-after referred to as 'the Valuation Rules'). As per Rule 8 of these Rules, if the department has reasons to doubt the accuracy of transaction value

declared by the exporter in accordance with Rule 3, the value shall be determined by proceeding sequentially in accordance with rules 4 to 6 of the said rules, viz. comparison with goods of like kind and quality exported, computed value method and residual method respectively. Government observes that in the instant case the impugned OIO does not indicate that the stipulated procedure was adopted to arrive at the conclusion that the applicant had inflated the value of the export goods.

10. In this regard, Government finds support in the judgment of Hon'ble Apex Court in the case of Siddachalam Exports Pvt. Ltd. [2011 (267) E.L.T. 3 (S.C.)] wherein it was held as under:

> *16. It is settled that the procedure prescribed under Section 14(1) of the Act and particularized in Rule 4 of the 1988 Rules has to be adopted to determine the value of goods entered for exports, irrespective of the fact whether any duty is leviable or not. It is also trite that ordinarily, the price received by the exporter in the ordinary course of business shall be taken to be the transaction value for determination of value of goods under export, in absence of any special circumstances indicated under Section 14(1) of the Act and Rule 4(2) of the 1988 Rules. The initial burden to establish that the value mentioned by the exporter in the bill of export or the shipping bill, as the case may be, is incorrect lies on the Revenue. Therefore, once the transaction value under Rule 4 is rejected, the value must be determined by sequentially proceeding through Rules 5 to 8 of the 1988 Rules. (See: Commissioner of Customs (Gen), Mumbai v. Abdulla Koyloth - JT 2010 (12) SC 267 = 2010 (259) E.L.T. 481 (S.C.).).*
>
> .
>
> .
>
> .
>
> *19. In the present case, as stated above, neither the adjudicating authority i.e., the Commissioner of Central Excise nor the CESTAT has dealt with the matter as per the procedure prescribed under the Act. At the threshold, instead of first determining the value of the goods on the basis*

of contemporaneous exports of identical goods, the Revenue erroneously resorted to a market enquiry. If for any reason, data of contemporaneous exports of identical goods was not available, the procedure laid down in Rules 5 to 8 of the 1988 Rules was required to be followed and market enquiry could be conducted only as a last resort. It is evident that no such exercise was undertaken by the Commissioner and interestingly he, acting as an appellate authority, proceeded to test the evidentiary value of the report submitted by M/s. Skipper International and rejected it on the ground that it does not depict if the identical garments had ever been purchased by the said concern. Observing that in the absence of any other independent evidence relating to market enquiry, there was no other corroborating evidence to support the allegation of inflation in FOB value, he dropped the proceedings initiated vide show cause notice dated 11th September 2003. Similarly, it is manifest from the CESTAT's order that revenue's appeal has been accepted mainly on the ground that report of M/s. Skipper International was worthy of credence and the exporter had failed to produce any evidence to establish that export value stated in the shipping bills was the true export value. In our opinion, both the said authorities have failed to apply the correct principles of law and therefore, their orders cannot be sustained.

20. Resultantly, for the reasons as enumerated, the appeal is allowed; the orders passed by the CESTAT and the Commissioner are set aside and the matter is remitted back to the adjudicating authority for fresh consideration in accordance with law, after affording adequate opportunity of hearing to the exporter. The entire exercise, in terms of this order, shall be completed within six months from the date of receipt of a copy of this judgment. Needless to add that we have not expressed any opinion on the merits of the opinion rendered by M/s. Skipper International or on the conduct of the exporter in not adducing any evidence in support of the export value stated in the shipping bills in question.

11. Government observes that the original authority has considered tax invoices of 5 suppliers of the applicant who had supplied 'foreign origin goods' and arrived at the conclusion that FOB value is 271% of cumulative value of supplier tax invoices. In this regard, the applicant has contended that *'the Applicant did not export the goods outside India in as-is condition as originally purchased from the domestic vendors. It is submitted that apart from the goods/components purchased by the Applicant from its domestic vendors amounting to Rs. 1,19,31,361/-, the Applicant incurred substantial amount of cost and expenditure towards undertaking engineering, preparing of detailed drawings/ designs, software automation. Apart from these costs, the Applicant also added its mark up (profit element) to the cost before finalizing the FOB price at which the goods were ultimately exported.'* These aspects do not find any mention in the Orders of lower authorities. Government observes that Rule 5 of the Valuation Rules reads as under:

> *5. Computed value method. -*
>
> *If the value cannot be determined under rule 4, it shall be based on a computed value, which shall include the following :-*
>
> *(a) cost of production, manufacture or processing of export goods;*
> *(b) charges, if any, for the design or brand;*
> *(c) an amount towards profit.*

Therefore, Government agrees with the aforesaid contention of the applicant that all elements which have gone into manufacture/assembling of export goods including profit should be considered to ascertain correctness of the declared transaction value of the export goods. Government therefore conclude that the evidences brought on record do not suffice to prove the allegation of over valuation of export goods.

12. In view of the above discussion and findings, the Government sets aside Order-in-Appeal No. 17(Export Docks)/2021(JNCH)/Appeals dated 22.03.2021 passed by the Commissioner of Customs (Appeals), Mumbai-II and allows the instant Revision Application by remanding the matter to the original authority for fresh consideration in accordance with law. The applicant should be provided reasonable opportunity of hearing and submission of required documents.

Shrawan 23/8/23

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

ORDER No. 607 /2023-CUS(WZ)/ASRA/Mumbai dated 23.8.23

To,

M/s. Primetals Technologies India Pvt. Ltd.,
Plot No. D-41/1, TTC Road No.20, TTC Industrial Area,
MIDC Industrial Area, Turbhe, Navi Mumbai – 400 705

Copy to:

1. Pr. Commissioner of Customs (Export),
   Nhava Sheva-II,
   Jawaharlal Nehru Custom House,
   Nhava Sheva, Taluka: Uran,
   Dist.: Raigad, Maharashtra – 400 707.

2. M/s. V. Lakshmikumaran,
   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