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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.371/129/DBK/2022-RA/6491 Date of issue: 05.09.2023

ORDER NO. 623/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.8.2023 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. Ashoka Incorporation

Respondent : Pr. Commissioner of Customs (Gen.), Mumbai

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUS-KV-GEN-108/2021-22-NCH dated 30.11.2021 passed by the Commissioner of Customs (Appeals), Mumbai Zone-I.

ORDER

This Revision Application is filed by M/s. Ashoka Incorporation, (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. MUM-CUS-KV-GEN-108/2021-22-NCH dated 30.11.2021 passed by the Commissioner of Customs (Appeals), Mumbai Zone-I.

2. Brief facts of the case are that the Applicant had obtained drawback against export of goods under Shipping bill No. 7110313 dated 16.01.2008, but had failed to produce evidence of realization of export proceeds, hence a show cause cum demand notice for recovery of total drawback amounting to Rs.7,40,368/- was issued to them on 23.01.2017. In response, the applicant submitted a letter from their Bank evidencing realisation of export proceeds for said Shipping Bill. After due process of law, the adjudicating authority vide Order-in-Original No. 75/2020-21/ICD(M)(X)/AC/AKS dated 27.08.2020 confirmed the demand to the extent of Rs.2,41,652/- alongwith applicable interest as a part of export proceeds was realised beyond the stipulated period of one year. Aggrieved, the Applicant filed an appeal which was rejected by the Commissioner (Appeals) vide impugned Order-in-Appeal.

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

i. that the Commissioner of Customs (Appeals) neglected the arbitrary use of adjudicatory powers conferred on the Adjudicating Authorities, for passing the impugned orders, whereby the amount for the Demand of Drawback in OIO dated 15.03.2017 was enhanced from Rs.2,02,902/- to Rs.2,41,652/- OIO dated 27.08.2020.

ii. that the impugned Order-in Appeal as well as Order-in-Original is passed in violation of the principles of natural justice. Any order passed in violation of principles of natural justice may amount to violation of the Fundamental Right to Equality guaranteed under the Constitution of India. This fact was specifically brought in the notice of the Hon'ble Commissioner (Appeal) in the appeal memorandum as

well as at the time of hearing by the Advocate of the appellant. But the Hon'ble Commissioner (Appeals) instead of asking the adjudicating authority, as to why impugned order was passed without following the principles of natural justice, has instead has refused to interfere with the impugned order by the adjudicating authority.

iii. that always there is a reasonable time to take any action by any authority and in this case also a reasonable time may be considered as one to two year maximum. The goods were exported vide Shipping Bill No. 7110313 dated 16.01.2008 and Export proceeds were realized in 2010. But till 2010 no demand was raised by the department. The department has issued the Demand cum Show Cause Notice on 23.01.2017 i.e. after 9 years of export and 7 years of realization of export proceeds. Therefore, it is a time barred demand. Hence, the impugned Order in Original is liable to be set aside. Furthermore, the provision sub-rule (5) of Rule 16A of the Customs, Central Excise and Service Tax Drawback Rules, 1995 based on which the department has ordered to recover the amount has been introduced on 11.04.2011 but the export was completed in 2008. Therefore, it cannot be applicable to the present ease. Thus the whole order is liable is to set aside. Reliance is placed on the following case laws:

- Prakhar Estates Pvt. Ltd. versus Union of India, [2016 (336) E.L.T. 495 (Guj.)]
- Commissioner of C.Ex. & ST, Surat versus Atul Ltd. [2017 (358) E.L.T. 825 (Tri. – Ahmd.)]
- Pratibha Syntex Ltd. Versus Union of India [2013 (287) E.L.T. 290 (Guj)]
- Famina Knit Fab Versus Union of India [2020 (371) E.L.T. 97 (P & H)]

iv. that the Commissioner of Customs (Appeals) has failed to appreciate that the provision sub-rule (5) of Rule16A of the Customs, Central Excise and Service Tax Drawback Rules, 1995, based on which the department has ordered to recover the amount, has been introduced

on 11.04.2011 but the export was completed in 2008. Therefore, the said provision is not applicable to the impugned export of goods under duty drawback scheme.

v. that the actual motto being the whole drawback scheme is to compensate the duty incidence to some extent to the exporters. It is agreed that there is a time specification for realization of export proceeds. But in this case the export was completed in 2008 and the export proceeds have been realized in 2010. When the export proceeds have been realized the question of recovery should not arise because Rebate/drawback are export-oriented schemes hence recovery on technical grounds is to be avoided. The Applicant relies on the following case laws:

- UOI versus A.V.Narsimhalu [1983 (13) E.L.T. 1534 (SC)]
- Sanket Industries Ltd. [2011 (268) E.L.T. 125 (G.O.I.)]
- Nana Desi Ainnurruvar versus RA New Delhi [2020(372)ELT 551(Mad.)]

vi. that goods which have already been taken out of India are not the 'export goods'. The Applicant also submit that 'Assessment'; 'export'; 'export goods' and 'imported goods' have been defined under Section 2 of Customs Act, 1962. It is apparent from above definition of 'export goods' that the goods which have already been taken out of India do not remain export goods instead are referable as exported goods. The definition of 'imported goods' makes things more than clear that goods which have already been cleared are not "imported goods". Similarly, goods which have already been exported are no more 'export goods'. The department by way of show cause notice under Rule 16 and/ or rule 16A of Customs, Central Excise and Service Tax Duties Drawback Rules, 1995 cannot modify assessed shipping bill because mechanism of recovery is absent in Duty Drawback Rules, 1995 thus demand under Rule 16 of Drawback Rules,1995 is not sustainable. The Applicant relies on the following case laws:

- Jairath International versus UOI [2019 (370) E.L.T. 116 (P&H)]

vii. that when the amount itself is not recoverable, the question of interest does not arise.

viii. that there was no manipulation whatsoever in realizing the export proceeds for the exports under the Shipping Bill No. 7110313 dated 16.01.2008. The Applicant submits that there was a delay on the part of the overseas client to pay the balance amount of USD 35,961 which resulted in such discrepancy. Moreover, there is no allegation against the Applicant of any such malafide intention to claim illegal drawback. The Commissioner of Customs (Appeals) has not considered the same, yet she has passed such Order in Appeal dated 30.11.2021, which is legally not tenable.

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

4. Personal hearing in the matter was held on 27.06.2023. Shri Sanjay Kalra, Advocate appeared on behalf of the applicant and submitted that BRC for specific Shipping Bill has been submitted. Remittance was received partly in Feb'08 and partly in March'10. He further submitted that Rule 16 and various judgments on the subject confirm that once remittances have been received, no recovery of drawback can be initiated.

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. On perusal of records, Government observes that the applicant had obtained drawback amounting to Rs. 7,40,368/- with regard to exports done by them vide Shipping bill No. 7110313 dated 16.01.2008. Subsequently, a demand notice totally amounting to Rs.7,40,368/- was issued for recovery of drawback disbursed as the export proceeds had not been realized. An amount of Rs. 2,41,652/- was confirmed alongwith applicable interest, vide impugned OIO, on the ground that the realization date was beyond the stipulated period of one year. Commissioner (Appeals) has upheld the impugned OIO.

7. Government observes that Rule 16A(4) of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 reads as under:

> *(4) Where the sale proceeds are realised by the exporter after the amount of drawback has been recovered from him under sub-rule (2) or sub-rule (3) and the exporter produces evidence about such realisation within one year from the date of such recovery of the amount of drawback, the amount of drawback so recovered shall be repaid by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to the claimant.*

From the above provision, Government notes that even if amount of drawback has been recovered, the same is to be repaid on submission of evidence of realization of export proceeds by the exporter. Thus, the intention of the legislature is very clear that if export proceedings have been realized, the eligible drawback needs to be released to the exporter. In the instant case, as apparent from the letter dated 03.03.2017 of Central Bank of India, Mandvi branch, the export proceedings totally amounting to USD1,16,408/- (Rs.47,88,405) had been received in four installments. Thus, the applicant had produced valid evidence against realization of export proceeds, which the department has also not disputed. Government observes that no other discrepancies as regards impugned export realizations were detected by the department. It is undisputed that rebate/drawback and other such export promotion schemes are incentive-oriented beneficial schemes intended to boost export and to earn more foreign exchange for the country and in case the substantive fact of export having been made is not in doubt, liberal interpretation is to be accorded in case of technical lapses if any, in order not to defeat the very purpose of such scheme.

8. Similar observation was made by the Hon'ble Apex Court in the *Formika India* v. *Collector of Central Excise* 1995 (77) E.L.T. 511 (S.C.), while 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. In the case of Madhav Steel v. UOI [2016 (337) E.L.T. 518 (Bom.)], Hon'ble Bombay High Court had also put forth similar views. The relevant paras from this judgment are reproduced hereunder:

> *23. We, therefore, hold that the aforestated particulars set out in the documents produced by the petitioners, establishes beyond any doubt that the goods purchased by the petitioners from the manufacturer are the goods sold by the petitioners to the exporter and the same have been exported by the said exporter. The respondent No. 2 has, therefore, erred in concluding that the petitioners could not prove beyond doubt that the goods cleared on the payment of duty for home consumption, were subsequently exported through shipping bills mentioned in the Order-in-Appeal dated 22nd December, 2004. As held by the Hon'ble Supreme Court in its decision in the case of Mangalore Chemicals and Fertilizers Limited (supra), technicalities attendant upon a statutory procedure should be cut down especially, where such technicalities are not essential for the fulfillment of the legislative purpose. The Hon'ble Supreme Court has again held in the case of Formica India v. Collector of Central Excise (supra), that the benefit should not be denied on technical grounds. Reliance by the respondents on the judgment of the Hon'ble Supreme Court in the case of Indian Aluminium Company Limited (supra), is not well-founded. In that case, refund of octroi was claimed after lapse of a long time. Further, admittedly, declaration in Form-14 was not filed. In the circumstances, there was no scope for verification. Therefore, the Hon'ble Apex Court refused to exercise its discretion and dismissed the SLP.*
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> *24. In view of what is aforestated, we hold that the order dated 29th May, 2006 passed by the respondent No. 2, is erroneous and perverse and is hereby quashed and set aside. Rule issued is made absolute and the respondents are directed to forthwith pay to the*

petitioners the amount of Rs. 9,87,777/- claimed by them by three rebate claims under Rule 18 of the Central Excise Rules, 2002 under three AREs all dated 28th March, 2003.

9. In view of the above discussion and findings, the Government sets aside the Order-in-Appeal No. MUM-CUS-KV-GEN-108/2021-22-NCH dated 30.11.2021 passed by the Commissioner of Customs (Appeals), Mumbai-I and allows the instant Revision Application.

Shrawan 30/8/23

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

ORDER No. 623/2023-CUS (WZ)/ASRA/Mumbai dated 30.8.23

To,

M/s. Ashoka Incorporation,
C/o. Hanish Vikmani,
335/26, Zaveri Niwas, Telang Road,
Matunga, Mumbai – 400 019.

Copy to:

1. Pr. Commissioner of Customs (General),
   New Custom House, Ballard Estate,
   Mumbai – 400 001.

2. M/s. KPS Legal,
   A Wing,702-703-704, Mahavir Icon,
   Plot No.89/90, Sector-15,
   CBD Belapur, Navi Mumbai – 400 614.

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