

REGISTERED
SPEED POST



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. 373/137/DBK/2015-RA / 1530 Date of Issue: 16.02.2022
F.No. 373/137-A/DBK/2015-RA

ORDER NO. 63-64/2022- CUS (SZ)/ASRA/MUMBAI DATED 15.02.2022
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. Impel Exports

Respondent : Commissioner of Customs, Bengaluru City

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No. 541 &
542/2014 dated 24.12.2014 passed by the Commissioner
(Appeals), Customs, Bengaluru.

ORDER

The impugned Revision Applications have been filed by M/s. Impel Exports, No. B 88/A, KSSIDC Industrial Area, Bommasandra, Bengaluru - 560099 (hereinafter referred to as Applicant-I) and Shri E. Rajkumar, Managing Partner, M/s. Impel Exports (hereinafter referred to as Applicant-II) against Orders-in-Appeal No. 541 & 542/2014 dated 24.12.2014 passed by the Commissioner (Appeals), Customs, Bengaluru.

2. Brief facts of the case are that the Applicant-I is a manufacturer of Flexible Intermediate Bulk Containers (FIBC)/Bulk Container Liners falling under CTH 39232990. The Applicant-I during the period from July 2011 to September 2011 exported 5 consignments of FIBC through ICD, Bangalore and claimed drawback under Sl. No. 630502A, as provided in schedule of All Industry Duty Drawback Rates 2010-11, in terms of provisions of Section 75 of the Customs Act, 1962. A Show Cause Notice was issued to Applicant-I as to why the goods exported under the 5 Shipping Bills should not be classified Sl. No. 3923000099 of Schedule of All Industry Rate Duty Drawback Rates 2010-11, and the inadmissible drawback amount of Rs.6,79,492/- sanctioned in respect of the 5 Shipping Bills should not be recovered. The original authority, Additional Commissioner of Customs, ICD, Bengaluru, vide Order-in-Original No. 500/2013 dated 09.10.2013:

- i. held that the goods exported under the 5 shipping bills be classified under Tariff Item No.39232990 of First Schedule of Customs Tariff Act, 1975 and under Sl.No.3923000099 of Schedule of All Industry Rate Duty Drawback Rates 2010-11.
- ii. confirmed the demand of the inadmissible drawback amount of Rs.6,79,492/- sanctioned under Section 75(2) of the Customs Act, 1962 read with Rule 16 of Customs, Central Excise duties and Service Tax Drawback Rules, 1995.

- iii. confirmed the demand of interest at appropriate rate under Section 75A(2) read with Section 28 AA of the Customs Act, 1962.
- iv. held that the goods valued at Rs.79,03,163/- and exported are liable for confiscation under Section 113h(ii) of the Customs Act, 1962.
- v. imposed a penalty of Rs.8,00,000/- in terms of Section 114 of the Customs Act, 1962.
- vi. imposed a penalty of Rs.5,00,000/- on Applicant-I in terms of Section 114AA of the Customs Act, 1962.
- vii. imposed a penalty of Rs.5,00,000/- on Applicant-II under Section 114AA of the Customs Act, 1962.

Aggrieved, both the Applicants filed an appeal which was rejected by the Commissioner (Appeals) vide impugned Orders-in-Appeal.

3. Hence, the Applicants have filed the impugned Revision Applications mainly on the grounds that:

- i. when the new provisions of DBK envisage the same rate, it is clear that the intention is not to deprive that rate for the earlier period. The introduction of new entry in the DBK Schedule must be construed to mean that it is introduced only to clear the possible ambiguity or to rectify the possible mischief created by the earlier provisions and not to disturb the earlier actions.
- ii. the product FIBC can be manufactured only out of fabrics woven out of HDPE/PP strips. It cannot be manufactured out of any other fabrics of synthetic textile materials like polyesters or polystyrenes. Now, if the product FIBC is considered as not falling under 630502 of the DBK Schedule, then there may not be any product on which a DBK may be payable under the said entry and the whole entry becomes otiose.
- iii. that every article made of plastic material need not necessarily fall under Chapter 39 of the Tariff Schedule. This is also clearly discernible from the provisions of Rule 1 of the General Rules for the Interpretation of the Schedule. For the purposes of classification, chapter heading is not relevant. What is relevant is the tariff description, section notes and chapter notes. There are several

articles like 'parts' though made of plastic material may fall under various chapters like chapter 84, 85, 87 etc. if they are suitable for use solely or principally with the goods falling under these chapters. Further, it is submitted that the impugned good can also be considered as an article made out of "Synthetic Fibre Material"

- iv. Assuming but not admitting that the impugned goods are classified under chapter 39 of the DBK Schedule, it is submitted that the product being a bag of huge size serving the purposes bulk packing. Thus, the impugned goods are specifically covered under entry no. 392321003 or 3923299003 of the DBK Schedule depending on whether the fabric is made of PE or PP. These entries attract a higher rate of drawback than the entry proposed in the show cause notice and if at all any excess amount was paid the same would have worked out to Rs. 3,33,349-00 and not Rs. 6,79,492-00. Both the learned lower authorities have not considered this alternate plea and simply confirmed the demand without recording any finding. This clearly reflects the bias and thus the order is vitiated for arbitrariness and capriciousness.
- v. It is submitted that the provisions of Draw Back Rules is a code by itself which contemplates payment and recovery in case of excess or erroneous payments. Nowhere the said Rules provide for imposition of any penalty in the recovery proceedings. Moreover, it is submitted that the officers who have scrutinised the claim have not raised any question about this claim. It is needless to emphasise that the claim passes through officers of several grade including the grade of class I i.e. Assistant Commissioner/Deputy Commissioner rank. When such senior rank officers have not raised any objection and passed the claim, it is clearly evident that the said officers also are convinced that the impugned goods are rightly classifiable under entry no. 6305 of the DBK Schedule. Under these circumstances, it cannot be gainsaid that the appellant is guilty of intentional misdeclaration.
- vi. It is a very well settled law that when the goods are not available physically, and where no bond/undertaking is taken from the exporter on the grounds of contemplated further enquiry, there

cannot be any order for the confiscation and imposing redemption fine. Both the learned lower authorities have failed appreciate this legal position and erred in imposing a redemption fine on the appellant.

- vii. The learned Commissioner has relied upon two case laws to sustain the imposition of penalty on the managing partner. It may be noted that both the cases are pertaining to clandestine manufacture and removal of goods where the fact of clandestine activity on the part of the firm was proved. It is submitted that the facts in this case is different and distinguishable. In this case, there is no any clandestine activity either on the part of the firm or the applicant.

In the light of the above submissions, the applicant prayed to set aside the impugned Order-in-Appeal or pass such other order/s as deemed fit in the facts and circumstances of this case.

4. Personal hearing in the case was fixed for 14.10.2021. Shri M.A. Narayana, Advocate attended the online hearing and reiterated the earlier submissions. On being pointed out that they have subsequently classified the product under Chapter 39, he stated that was because it had same drawback (as Ch.63). He submitted that penalty imposed on Company and Director without allegation of any mala fide on the issue of classification was totally unjustified. He requested to drop the penalty.

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

6. Government observes that the issue involved is whether the item 'Flexible Intermediate Bulk Containers' was misclassified by the Applicants and if yes was it with an intention to claim excess drawback?

7. Government observes that during the material period of export viz. July 2011 to September 2011, the relevant Notification fixing drawback

rates was Notification No. 84/2010 - Customs (N.T.) dated 17.09.2010 effective from 20.09.2010 till 30.09.2011. While Applicant-I had claimed drawback under Sl. No. 630502A of Schedule to said Notification, the adjudicating authority classified it under Sl.No.3923000099 ibid. The relevant extract of said Notification is reproduced hereunder:-

| Tariff Item | Description of goods | Unit | A | | B | |
|-------------|--|------|--|------------------------------|--|------------------------------|
| | | | Drawback when Cenvat facility has not been availed | | Drawback when Cenvat facility has been availed | |
| | | | Drawback Rate | Drawback cap per unit in Rs. | Drawback Rate | Drawback cap per unit in Rs. |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 |
| 63 | Other Made Up Textiles Articles; Sets; Worn Clothing and Worn Textile | | | | | |
| | I -Other made up textile articles: | | | | | |
| 6305 | Sacks and bags, of a kind used for the packing of goods | | | | | |
| 630502 | Flexible Intermediate Bulk Containers (FIBC) | KG | 10.3% | 17 | 3% | 5 |
| 39 | PLASTICS AND ARTICLES THEREOF | | | | | |
| | II. - WASTE, PARINGS AND SCRAP; SEMI MANUFACTURES; ARTICLES | | | | | |
| 3923 | Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics | | | | | |
| 3923000099 | Others | | 1% | | 1% | |

Admittedly, Applicant-I had taken central excise registration to manufacture articles of plastic falling under Ch.39 and were clearing the impugned product 'Flexible Intermediate Bulk Containers (FIBC)' under ch.39 in the domestic market. Further, in the subsequent period viz. w.e.f. 01.10.2011, a new entry was introduced under ch.39 in the Duty Drawback Schedule 2011-12 whereby the impugned product was classified under Tariff Item 3923909001. This also negates the contention of Applicant-I that if not under Ch.63 then the impugned goods are specifically covered under entry no. 392321003 or 3923299003 of the DBK Schedule. Therefore, Government

does not find any reason to differ with decision taken by the adjudicating authority in regard to classification of the impugned product.

8. Now, Government proceeds to decide whether the mis-classification of impugned goods was done by the Applicants intentionally to claim excess drawback. Government observes that in the concerned Shipping Bills and the export invoices the items exported had been described as 'Articles of Plastic'. The Applicant-II, in his statement recorded under Section 108 of the Customs Act, 1962 had stated that the items exported are made of Polyethylene and Polypropylene fabrics and that they had claimed drawback under Sl. No. 630502 during the period upto December 2011 and thereafter had started classifying the said item under CTH 39232990. Government observes from October 2011, vide Notification No.75-Cus(NT)/28.10.2011, a separate Tariff item 3923909001 for the goods Flexible Intermediate Bulk Containers (FIBC) had been inserted in the Schedule for Duty Drawback 2011-12. Further, the Board vide Circular No. - 42 / 2011-Cus., dated 22.09.2011 had issued clarification regarding classification dispute in respect of FIBC. The concerned para 13 of said circular is reproduced hereunder:

There has been a dispute regarding classification of FIBC (Flexible intermediate bulk containers). It has been represented that the field formations are classifying the FIBCs under Chapter 39 whereas the FIBC finds a specific mention under tariff item 630502 of the drawback schedule and the exporters are being denied drawback mentioned against the heading 630502 in the Drawback Schedule. It is hereby clarified that FIBCs which are made of manmade textile material would be classifiable under drawback tariff item 630502. FIBCs which are big or bulk bags or super sacks made of polymers of ethylene and other plastic material would however, be classifiable under chapter 39 of the drawback schedule.

Thus, it appears that classification of FIBC was an industry specific issue so much so that the Board had to issue a clarification. In the light of these

findings, Government does not see any mala fide intention behind misclassification of FIBC by the Applicants and drops the penalties imposed on them under Section 114 and 114AA of the Customs Act, 1962.

9. In view of above findings, the Government modifies the impugned Orders-in-Appeal No. 541 & 542/2014 dated 24.12.2014 passed by the Commissioner (Appeals), Customs, Bengaluru to the extent that the demand of Rs.6,79,492/-alongwith interest is confirmed and all other charges are dropped. The penalty imposed against Applicant-II is also dropped.

10. These Revision Applications are disposed of on above terms.


(SHRAWAN KUMAR)

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

ORDER No. 63-64 /2022-CUS(SZ)/ASRA/Mumbai dated 15.02.2022

To,

1. M/s. Impel Exports,
2. Shri E. Rajkumar,
No. B 88/A, KSSIDC Industrial Area,
Bommasandra, Bengaluru - 560 099.

Copy to:

1. Commissioner of CGST South,
C.R. Building, Queen's Road,
Bengaluru - 560 001.

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