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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  
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Mumbai- 400 005

F.No.371/358/DBK/2022-RA / 6582

Date of issue: 07.09.2023

ORDER NO. 638/2023-CUS (WZ)/ASRA/MUMBAI DATED 07.9.2023  
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. Barato Exports  
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-190/21-22 dated 30.03.2022 passed by the  
Commissioner of Customs (Appeals), Mumbai Zone-I.

## ORDER

This Revision Application is filed by M/s. Barato Exports, (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. MUM-CUS-KV-GEN-190/21-22 dated 30.03.2022 passed by the Commissioner of Customs (Appeals), Mumbai Zone-I.

2. Brief facts of the case are that the Applicant had obtained drawback but had failed to produce evidence of realization of export proceeds in respect of the export of goods during the period 01.01.2012 to 31.12.2014, hence, a show cause cum demand notice for recovery of total drawback amounting to Rs.29,89,374/- against 19 shipping bills was issued to them on 30.04.2016. After due process of law, the adjudicating authority vide Order-in-Original No. 104/2020-21/ICD(M)(X)/AC/AKS dated 23.11.2020, passed following Order:

- (i) Confirmed demand of Rs.23,45,528/- alongwith applicable interest pertaining to 13 shipping bills as realization of export proceeds was found to be beyond the period stipulated by RBI.
- (ii) Imposed penalty of Rs.10,000/- on the applicant.

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 Hon'ble Commissioner of Customs (Appeals) ought to have appreciated the facts that the adjudicating authority had erred in holding that the Applicant had not furnished proof of their export realization. The Appellate authority did not appreciate the fact that the adjudicating authority in his order had not given specific finding as to whether the Bank Realization Certificates produced by the applicant had contained required particulars as specified for allowing drawback or not. The adjudicating authority did not go into details and

confirmed the demand of drawback of Rs.23,45,528/- along with applicable interest in respect of the exports made under the impugned S/bills. The facts remain that the proofs in the form of original BRCs' & E-BRCs were submitted repetitively. The Hon'ble Appellate authority in para '8' of the impugned Order-in-Appeal had stated that *"the exports in respect of subject 19 S/Bills were made in 2012 to 2014. Out of the subject 19 S/Bills remittances against the goods exported vide 13 S/Bills was not realized within the stipulated time period as stipulated under Regulation 9(1) of the Foreign Exchange Management (Export of Goods and Services) regulations, 2000 and in the case of 10 S/Bills the export proceeds received was less in comparison to the FOB on which drawback was received."* It is pertinent to mention here that since, export remittances were received well within the stipulated period the Applicant did not take extension of time from the RBI. Therefore, Appellate authority finding that the applicant did not take permission from RBI regarding extension of time is not correct. Moreover, inspection of the letters received from the IT Branch of M/s. Vijaya Bank, Bangalore, it can be drawn that the Applicant had received foreign remittances within the stipulated time prescribed by the RBI. Hence no violation under Regulation 9(1) of the Foreign Exchange Management (Export of Goods and Services) regulations. Therefore, the applicant submits that the drawback received against the above stated 13 S/Bills (under dispute) is proper. It to submit that due to delay in the submission of export related documents for uploading of E-BRC in the DGFT Site and late uploading, the realization dates differ from the actual realization. The applicant further submits that the actual realization dates are as per the BRC certificate issued by the AD CODE Bank.

ii. that the Appellate authority did not appreciate the fact that the adjudicating authority had not considered the truthfulness of the Chartered Accountant Certificates for the period 01.04.2012 to 31.03.2014 wherein the CA had certified that the exporter had realized the export proceeds for the above-mentioned period and

nothing was left to be realized. That as per the CBEC Circular No.5/2009 dated 02.02.2009 either BRC or CA Certificate is sufficient proof for realization of export proceeds. But without considering the clarification issued by the CBEC vide above Circular the adjudicating authority had passed the order as if BRC is the only proof of realization of export proceeds. Thus, clearly overturned CBEC Circular which is not permissible in law.

- iii. that the Appellate authority did not appreciate the fact that the order passed by the adjudicating authority was not proper as he failed to consider the fact that the show cause notice was not issued within reasonable period of limitation and was time barred. The applicant or their agents or employees had not suppressed anything and there was no collusion, willful mis-statement or suppression of facts by them. All the claims of the drawback have been separately shown on the Shipping Bills as well as Bill of Lading. The applicant further states that there was no separate claim to be filled for drawback claimed and the same was sanctioned on the basis of drawback S/Bills and Bills of Lading. Demand is not sustainable in Law. The demand is barred by law of limitation. The Applicant craves leave to submit that the Show Cause Notice cum Demand Notice was issued on 31.04.2016 whereas the exports had taken place during 2012-13, 2013-14.
- iv. that as per Annexure-I to the order-in-original some insignificant amount of export proceeds had not been received due some reasons not at the hands of the exporter The applicant, further, bring to your kind notice that the realization of all export proceeds of export done during impugned period have been realized within stipulated period as can be seen from the certificates issued by the applicant's Banker M/s. Vijaya Bank. That, in rule 16A, in sub-rule (2) has been substituted vide Notification No. 10/2006 Customs (N.T.) dated 15/02/2006) *Provided that where a part of the sale proceeds has been realised, the amount of drawback to be recovered shall be the amount equal to that portion of the amount of drawback paid which bears the same proportion as the portion of the sale proceeds not realised bears to*

*the total amount of sale proceeds.* The applicant submits that according to above the demand of drawback should be proportional to the amount of realized export proceeds. But in the instant case the original authority has demanded full drawback amount even though realization of export proceeds has been received through proper banking channel. That these documents show the genuineness of the exports and that the applicant has complied with all the statutory and procedural requirements for proper and lawful claim of the drawback against the impugned S/Bill.

- v. that in terms of sub-rule of Rule 16, even where the Drawback is recovered the same is refundable if the exporter produces evidence within one year. In the instant case the export proceeds were realized well within the stipulated period. Therefore, even if the applicant deposits the Drawback amount with the applicable interest, the applicant is eligible for the refund of such drawback amount returned by the Applicant. Therefore, the demand of drawback amount with applicable interest, even after realization of exports proceeds against the all the subject shipping is bad in law. The Hon'ble Appellate authority ought to have taken this into account would have set aside the Order-in- Original padded by the adjudicating authority.
- vi. that in view of the receipt of remittance by the Appellant's Banker's, the recovery of Drawback+ interest+ penalty amounting to Rs.23,45,528/- from the Applicant is illegal. The appellate authority ought to have appreciated this fact and ought to have gone into the merits of the case. Further, the Hon'ble Appellate Authority ought to have appreciated that there was no violation on the part of the Applicant and accordingly, ought to have considered the fact that receipt of drawback on the part of the applicant was legitimate. The Applicant relies on the judgements of the Hon'ble Calcutta High Court in the matter of Commissioner of Customs, Mumbai vs Terai Overseas Ltd. reported in 2003(156) ELT 841 (Cal.). In the said judgment, the Hon'ble Court has ruled that liberal approach is to be adopted and drawback cannot be denied on mere technicality or by adopting a

narrow and pedantic approach, especially since drawback is an incentive scheme for augmenting exports. Government of India in case of 2018 (363) E.L.T.821 (G.O.I) held that *"it is manifest that the applicant has realised the sale proceeds well in time and as a result the applicant 's case is not covered under Rule 16/16A of Drawback Rules 1995. White non-submission of CA Certificate on 6 monthly basis as per CBE & C. Circular is certainly a lapse, it cannot be termed as violation of above Drawback Rules."* Thus, the applicant has correctly availed drawback.

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 28.06.2023. Ms. Reema S. Deshnehare, Advocate appeared on behalf of the applicant and submitted that the foreign exchange has been realized in all cases and BRC's were submitted. She further submitted that there was delay in some cases, but once remittances have been realized, recovery of drawback is not permissible as per drawback rules. She requested to drop the penalty as well once drawback is not recoverable.

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 with regard to exports done by them vide 19 shipping bills. Subsequently, demand notice for drawback disbursed totally amounting to Rs. 23,45,528/- was confirmed alongwith applicable interest and penalty of Rs.10,000/- in respect of 13 shipping bills on the ground that the realization date was beyond the stipulated time period and in 10 shipping export remittance was less compared to the FOB on which drawback was availed. 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 (hereinafter referred to as the Drawback Rules) 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 Annexure to the impugned OIO, the applicant had produced valid evidence against realization of export proceeds. 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.*

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.*

In a recent judgment passed by Hon'ble Madras High Court in the case of M/s. Sabare International Limited vs. Revision Authority [2022 (5) TMI 395], with reference to said Rule 16A(4) *ibid* it was held as under:



9. A reading of the above provision seems to indicate that where the sale proceeds are realized 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 realization 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 of Deputy Commissioner of Customs to the claimant.

10. In this case, the recovery has been made long after the export realization. Considering the same and considering the fact that there is indeed an export realization, the case of the petitioner deserves a favorable disposal by the respondents.

11. Under these circumstances, I am inclined to dispose of this writ petition by remitting the case back to the 3rd respondent/the Assistant Commissioner of Customs, to take note of Rule 16A(4) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and to dispose of the same on merits and in accordance with law, in the light of the Bank Realization Certificate produced by the petitioner on 22.09.2009.

9. As regards, short realization of export proceeds, Government agrees with the contention of the applicant that in view of provisions of Rule 16A(2) of the Drawback Rules, recovery of drawback should be the amount in the same proportion as the portion of the sale proceeds not realised bears to the total amount of sale proceeds. The applicant has further contended that they have substantially realized the export proceeds and some insignificant amount had not been received. In this regard, Government observes that the Central Board of Indirect Taxes & Customs, vide Circular No. 33/2019-Customs (issued vide F. No. 609/19/2019-DBK) dated 19.09.2019, has clarified that duty drawback is not recoverable where the export proceeds realized are short on account of bank charges deducted by foreign banks and agency commission up to the limit of 12.5% of the FOB value. Thus, Government holds that this matter pertaining to the short realisation of export proceeds and recovery of proportionate drawback amount corresponding thereto needs to be relooked. Therefore, the matter is

remanded back to the original authority with the direction to decide this matter afresh, on merits keeping in view the instructions contained in Board's Circular dated 19.09.2019 and provisions of Rule 16A(2) ibid.

10. The Revision Application is disposed of with the above directions.

*Shrawan*  
*7/9/23*

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

ORDER No. *638*/2023-CUS (WZ)/ASRA/Mumbai dated *07.9.2023*

To,

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Copy to:

1. Pr. Commissioner of Customs (General),  
New Custom House, Ballard Estate,  
Mumbai - 400 001.
2. Sr. P.S. to AS (RA), Mumbai
3. ~~Guard file.~~