



**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.371/107/DBK/2021 / 6650

Date of Issue: 12.09.2023

ORDER NO. **644**/2023-CUS (WZ) /ASRA/Mumbai DATED **08**.09.2023 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 Cipla Limited,
Cipla House, Peninsula Business Park,
Ganpatrao Kadam Marg, Lower Parel,
Mumbai - 400 013.

Respondent : Commissioner of Customs (Export),
Air Cargo Complex, Mumbai.

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal no. MUM-CUSTOMS-APP-663/2020-21 dated 08.01.2021 passed by the Commissioner of Customs (Appeals), Mumbai, Zone - III.

ORDER

The subject Revision Application has been filed by M/s Cipla Limited, Mumbai (here-in-after referred to as 'the applicant') against the Order-in-Appeal dated 08.01.2021 passed by the Commissioner of Customs (Appeals), Mumbai, Zone - III, which decided an appeal filed by the applicant against the Order-in-Original dated 03.09.2020 passed by the Assistant Commissioner of Customs, (Export), ACC, Mumbai, which in turn had rejected the claim for Drawback filed by the applicant.

2. Brief facts of the case are that the applicant had exported pharmaceutical products during the period from January 2015 to June 2015 and had claimed Drawback at the relevant time. Thereafter, in terms of the Agreement between the applicant and the buyer, entered in the year 2003 and amended from time to time, the applicant received some additional consideration with respect to the above exports, from their buyer. The applicant vide their application dated 12.10.2017 requested the jurisdictional Assistant Commissioner to amend their Shipping Bills (138 Nos.) on account of receipt of such additional monetary consideration. This request of the applicant was considered, and they were allowed to amend the Shipping Bills to the extent of increasing the FOB value in view of the receipt of additional consideration vide Order F. No. S/6-Amend-605/2017-18 MCD(X) ACC dated 11.06.2018. Thereafter, the applicant vide their letters dated 09.06.2018 and 05.07.2018 filed supplementary claims seeking Drawback on the incremental FOB value. This claim of the applicant was rejected by the original authority vide Order-in-Original dated 03.09.2020. Aggrieved, the applicant preferred an appeal before the Commissioner (Appeals) resulting in the impugned Order-in-Appeal dated 08.02.2021. The Commissioner (Appeals) rejected the appeal on the following grounds –

- That the change in the FOB will not alter the quantum of Drawback due to the applicant and since the allowable drawback was already sanctioned to them, the supplementary claims for Drawback cannot be allowed;
- That the initial claims for Drawback was not provisional and hence the Drawback already disbursed to the applicant was final;

- That the contention of the applicant that their Drawback claim does not exceed one third of the market price is not true.

3. Aggrieved, the applicant has filed the subject Revision Application against the impugned Order-in-Appeal on the following grounds:-

(a) That their Drawback entitlement was well within the ambit and framework of Section 75 of the Customs Act, 1962 and the relevant rules; that since AIR is to be applied to the FOB value to arrive at the Drawback entitlement amount, pursuant to their amendment of the FOB value in the Shipping Bills under Section 149 of the Customs Act, 1962 vide Order dated 11.06.2018, they were entitled to drawback on the incremental value; that in the absence of any specific provisions, they had filed such claims under Rule 16 of the Drawback Rules, and that the said claims also fulfils all the conditions prescribed for claiming drawback under Rule 3 of the Drawback Rules as well; that it is a trite law that substantive benefit cannot be denied in absence of following of any procedure prescribed; they placed reliance on several decisions of the Tribunal and High Court in support of this contention'

(b) That provisional assessment was not applicable to export of capsules; that during the relevant period Section 18 of the Customs Act, 1962 covered only import consignments and that export consignments, governed by Section 50 of the said Act could not be subjected to provisional assessment; and that the same was amended by Finance Act, 2018 to also cover export consignments; and hence they had sought amendment under Section 149 of the Customs Act, 1962; that hence the finding in the impugned Order that the Drawback disbursed was final as they did not resort to provisional assessment of Shipping Bills was not proper and not in conformity with the Drawback Rules;

(c) That the entitlement of amount of Drawback is derived on the basis of AIR applied on the FOB value and the FOB value in the present had been enhanced, the drawback already disbursed to them was on the original value which was lesser than what they were entitled to and hence the present case also fell within the purview of Rule 16 of the DBK Rules.

(d) That the Commissioner (Appeals) had failed to understand the facts of the matter, amendment allowed under Section 149 of the Customs Act, 1962 and the Drawback claims filed in light of the amendment Order; that in the

present case they had entered into an Agreement with the buyer prior to carrying out any transaction of exports; that the said Agreement had the relevant provision for receipt of consideration, part of which was receivable at the time of export (1st tranche) and the balance (2nd tranche) was receivable after the capsules were further sold by the Buyer to its customers; thus the Agreement was documentary evidence which was in existence at the time of exportation;

(e) That in order to justify the application filed for amendment of their Shipping Bills they had submitted copies of FIRC's for balance consideration and an affidavit affirming receipt of the same, copy of the General Ledger of their Books of Account for the FY 2015-16 which indicated receipt thereof; that it was only after verification of all such documents that the Order dated 11.06.2018 was passed allowing amendment of their Shipping Bill indicating the enhanced FOB value;

(f) That their claims were filed within the statutory time limit inasmuch as pursuant to Order dated 11.06.2018 allowing amendment of the FOB values in the Shipping Bills they had filed applications dated 20.06.2018 and 05.07.2018 which was in compliance of Rule 13 of the Drawback Rules and hence not time barred; that even if the claims were supposed to have been filed under Rule 16 of the Drawback Rules, even then their claim was within the month period prescribed by Rule 16(1)(ii) of the Drawback Rules;

(g) That they have not resorted to over-valuation/mis-declaration of value and that the drawback claimed did not exceed one third of the market price; that in their case the enhanced FOB values declared by them were found to be correct by the Department; that they had claimed Drawback on the AIR and that the same was based on the FOB value and that the AIR rate fixed by the Government during the material period was 1.9% of the FOB and that they had claimed drawback at the same rate; that the rate claimed by them does not in any way exceed one third of the market value of their product; they sought to place reliance on Board Circular No.7/2003-Cus dated 05.02.2003 which had clarified that as a general rule it was the FOB value on the basis of which the Drawback should be calculated; that the decisions relied upon by the Commissioner (Appeals) where those wherein the exporters had resorted to over-invoicing, which was not true in their case; they relied upon the decision of CCC vs Globe Entertainments [2016 (332) ELT 38 (Bom.)] wherein it was held that when the agreement between the parties and the

transfer of consideration is through banking channels the ratio of the decision relied upon by the Commissioner (Appeals) would not be applicable;

(h) That they had claimed drawback by applying AIR and hence there was no need to establish nexus of duty suffered on procurements vis-à-vis incremental FOB and hence this ground raised by the Commissioner (Appeals) was not proper; that rejection of their Drawback claim was against the avowed policy of the Government to export goods and services and not taxes; that the intention of the legislature was to boost exports;

(i) That the impugned Order passed by the Commissioner (Appeals) was a non-speaking Order as the Commissioner (Appeals) had not considered the submissions made by them and had not discussed the judicial precedents cited by them; that it was passed without giving any cogent reasoning for rejection of drawback and hence deserves to be set aside.

In view of the above the applicant requested that the impugned Order-in-Appeal be set aside and that the drawback claimed be allowed to them along with interest.

4. The applicant made further submissions on 18.07.2023, wherein apart from reiterating the points already made in their earlier application, they submitted that the Drawback amount as determined under Rule 3 in the present case did not exceed one-third of the market price of the export product; that the total Drawback amount of Rs.20,43,74,251/- was well within the limit of one-third of the market value of the export product which was Rs.25,48,00,447/- and provided detailed calculation sheets indicating the same; that for filing of supplementary claim under Rule 16(1)(iii) of the Drawback Rules, the date of reassessment of the subject Shipping Bills should be taken into account and that in their case the Order dated 11.06.2018 allowed the amendment and that they had filed their claims on 19.06.2018 and 05.07.2018 and hence the claims were filed within the time limit prescribed; that as they were claiming the AIR, there was no requirement of any duty paid certificate in respect of the inputs used in the exported products.

5. Personal hearing in the matter was granted to the applicant and the respondent on 07.06.2023 and 21.06.2023. Shri Mahesh Barge, Director (Indirect Taxation), Shri Nitin Dube, Assistant Director (I.T.) and Shri Sitaram

Masurkar, Sr. Manager (I.T.) of the applicant firm appeared for the same. They submitted that based on the additional realization of sale proceeds they had requested for amendment in the Shipping Bills. They further submitted that based on amended Shipping Bills they filed supplementary/incremental drawback claim. They requested to allow the claim as the same was admissible to them. They also contended that minor procedural infractions could not take away substantive right. No one appeared for the respondent.

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

7. Government notes that the issue involved is whether the applicant is eligible to claim the differential Drawback, subsequent to the upward revision of the FOB values post the goods being exported. At the onset, Government notes that Drawback was sanctioned to the applicant when they had exported the goods in question on the FOB declared at the material time and no objections were raised by the Department at that point of time. Government notes that the applicant and their buyer abroad had entered into an Agreement in the year 2003, amended from time to time, on the basis of which the value of the exported goods have been arrived at. Further, Government finds that the jurisdictional Deputy Commissioner of Customs (Export), Air Cargo Complex, Mumbai had accepted the request of the applicant, subsequent to the revision of prices, to amend the FOB values in the relevant Shipping Bills vide Order-in-Original No.320/2018-19 dated 11.06.2018. The Order portion of the said Order-in-Original reads as follows -

“ I order amendment of Shipping Bills filed by M/s Cipla Limited for the period January 2015 to June 2015, in order to increase the FOB value in consequence of additional consideration received by them. The details of amendment in FOB value is outlined alongwith bills number in Annexure - I”

Thus, Government notes that in the present case the FOB values were enhanced subsequent to the export of goods based on the Agreement which existed at the time of export, and that additional consideration was received to that extent, a fact which has been accepted by the jurisdictional authorities, as indicated by the Order-in-Original dated 11.06.2018 referred above. It is in this context that Government examines the grounds on which the Commissioner (Appeals) has upheld the order of the original authority

rejecting the claim of the applicant for drawback on the differential enhanced FOB value.

8.1 Government finds that the Commissioner (Appeals) has held that the change in the FOB would not alter the quantum of Drawback due to the applicant as the allowable drawback was already sanctioned to them and thus the supplementary claims for Drawback were not admissible. Government finds this reason for denial of the supplementary claim to be flawed and incorrect as the applicant has claimed Drawback at the All Industry Rate and the same in this case is a percentage of the FOB value of the goods exported. Thus, it automatically follows that once the enhanced FOB values have been accepted by the Department and the Shipping Bills amended to that effect, the applicant becomes eligible to claim Drawback at the AIR as per the enhanced FOB values. Further, Government finds that the Commissioner (Appeals) has held that the initial claims for Drawback filed by the applicant was not provisional and hence the Drawback already disbursed to them was final. In this connection, Government finds merit in the submission of the applicant that during the material period, i.e. January 2015 to June 2015, their case would not be covered by Section 18 of the Customs Act, 1962 which provided for provisional assessment, inasmuch Government finds that the said Section covered only those cases where Customs duty was required to be paid by either an importer or exporter and did not cover cases involving payment of Drawback.

8.2 Having found so, Government also finds that in the present case, the claim for differential Drawback on the enhanced accepted FOB values cannot be rejected merely for the reason that the applicant had failed to resort to provisional assessment of the consignments exported. Government notes that it is an established principle that substantive benefits like Drawback should not be denied on procedural grounds. Government finds that the Hon'ble Supreme Court in the case of Mangalore Chemicals & Fertilizers Limited vs Deputy Commissioner [1991 (55) ELT 437 (SC)] while holding that substantial benefit provided could not be denied merely on procedural grounds had observed as under: -

"There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve."

... A distinction between the provisions of statute which are of substantive character and were built-in with certain specific objectives of policy on the one hand and those which are merely procedural and technical in their nature on the other must be kept clearly distinguished. What we have here is a pure technicality."

Government finds that in the present case, it would not make any difference to the stated objective of the Drawback scheme, irrespective of whether provisional assessment was resorted to or otherwise. Given the above, Government finds that Drawback, which is a substantial benefit granted to an exporter, cannot be denied merely for the reason that the applicant did not opt for provisional assessment of their export consignments and hence holds that the order of the Commissioner (Appeals) on this count will not hold good.

8.3 Lastly, the Commissioner (Appeals) has found that Drawback claimed by the applicant exceeded one third of the market price of the exported product, which Government finds was one of the reasons for rejecting the supplementary claims for drawback filed by the applicant. Government notes that both the lower authorities have cited this reason while rejecting the claim of the applicant, however, neither the original authority nor the Commissioner (Appeals) have mentioned any facts or figures to support this finding. Government finds this finding of the lower authorities to be without any basis. On the contrary, Government finds that the applicant, during the course of these proceedings, have provided detailed workings to indicate that this allegation was wrong and that the value of the exported products on which Drawback has been claimed is lower than one third of the market value of the said products in the domestic market. In this context, Government finds that the Commissioner (Appeals) has relied upon the decision of the Hon'ble Supreme Court in the case of *Misuki Exports Pvt. Limited vs Commissioner of Customs (Exporter-Seaport), Chennai [2007 (215) E.L.T. A76 (S.C.)]* wherein it was held that for the purpose of Drawback, the relevant price is that which prevails in the country and not the one which was obtained by the exporter from their overseas supplier. Government finds that this decision will not have any application here, as it is not the claim of the applicant that the Drawback claimed is less than one third of the value received by them from the overseas supplier; in fact, as stated earlier, in the present case the applicant has provided detailed working indicating that the values on which Drawback has been claimed is lesser than one third of the market price of the exported products in the domestic market. Thus, Government finds this

reason cited by the lower authorities to deny the supplementary/incremental drawback claimed by the applicant, to be incorrect and rejects the same.

9. Government finds that the original authority had allowed amendment of the FOB values in the Shipping Bills vide Order-in-Original dated 11.06.2018 and the applicant had applied for the differential Drawback vide their applications dated 19.06.2018 and 05.07.2018. It goes without saying that the applicant could not have claimed such differential Drawback until the FOB values in the Shipping Bill were amended, and hence Government finds that the applicant did file the supplementary/incremental claims for Drawback well within the prescribed statutory limit of three months. Thus, Government finds that the none of the reasons cited by the Commissioner (Appeals) for rejecting the supplementary claims for Drawback filed by applicant survives, and hence sets aside the impugned Order-in-Appeal.

10. In view of the above, Government holds that the applicant will be eligible to the differential/incremental Drawback claimed by them. The Revision Application is allowed.


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

ORDER No. GH4/2023-CUS (WZ) /ASRA/Mumbai dated 08.09.2023

To,

M/s Cipla Limited,
Cipla House, Peninsula Business Park,
Ganpatrao Kadam Marg, Lower Parel,
Mumbai - 400 013.

Copy to:

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

