

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.371/405/DBK/2022-RA
371/406/DBK/2022-RA

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Date of issue:

12.09.2023

651-
ORDER NO. 652/2023-CUS (WZ)/ASRA/MUMBAI DATED 11.9.2023
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.

Applicants : M/s. SKSK Landmark Pvt. Ltd.
M/s. SAR Clothing (India) Pvt. Ltd.

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

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal and passed
by the Commissioner of Customs (Appeals), Mumbai Zone-I.

ORDER

These Revision Applications are filed by two applicants against the following Orders-in-Appeal passed by the Commissioner of Customs (Appeals), Mumbai Zone-I:-

S. No.	Revision Application No.	Applicant Name (M/s.)	OIA No./date	OIO No./date
1	371/405/DBK/2022	SKSK Landmark Pvt. Ltd.	MUM-CUS-KV-GEN-51/22-23 dated 30.05.2022	164/2020-21/ICD(M)(X)/DRM dated 26.02.2021
2	371/406/DBK/2022	SAR Clothing (India) Pvt. Ltd.	MUM-CUS-KV-GEN-59/22-23 dated 10.06.2022	163/2020-21/ICD(M)(X)/DRM dated 26.02.2021

2. Brief facts of the case are that the Applicants had obtained drawback in respect of the export of goods during the period Jan'13 to Dec'15 but had failed to produce evidence of realization of export proceeds, hence, show cause cum demand notices for recovery of drawback amount were issued to them by the department. After due process of law, the adjudicating authority vide impugned Orders-in-Original passed following Order:

Applicant Name (M/s.)	Order
SKSK Landmark Pvt. Ltd.	Confirmed the demand for recovery of drawback amounting to Rs.10,83,010/- out of total demand of Rs.1,17,16,348/- alongwith interest.
SAR Clothing (India) Pvt. Ltd.	Confirmed the demand for recovery of drawback amounting to Rs.12,97,081/- out of total demand of Rs.40,48,52,240/- alongwith interest.

Aggrieved, 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 following grounds:

- i. The impugned order is non-speaking has been issued without application of mind and without considering the submissions made by the applicant. Thus, it is violative of the principles of natural justice.
- ii. The confirmation of demand of duty drawback is based on wrong footing. The Ld. Commissioner (Appeals) has wrongly considered the date of realization mentioned in e-BRC as "actual date of realization".

Further the Ld. Commissioner (Appeals) has acted against the Board Circular No. 33/2019- Cus. dated 19.09.2019 which is binding in nature.

- the Department has incorrectly/inadvertently considered the date of realization mentioned in e-BRC and disregarded the actual date of realization of export sale proceeds vide FITT.
 - the contention made by the Department that there is short realization of sale proceeds on account of deduction of foreign bank charges, commission, is legally untenable in light of the recent circular dated 16.09.2019 issued by CBIC.
- iii. Without prejudice, when export of goods and receipt of export sale proceeds is not in dispute, the benefit of duty drawback cannot be denied due to procedural lapses.
 - iv. Without prejudice to the above the recovery of duty drawback is legally untenable. In the absence of saving clause in Duty Drawback Rules, 2017, recovery of duty drawback prior to 2017 cannot be made.
 - v. The demand of duty drawback beyond five years from the date of export is bad in law and barred by limitation.
 - vi. No interest is chargeable when the duty drawback legitimately claimed is not recoverable.

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. Mr. Akhilesh Kangsia, Ms. Madhura Khandekar, and Ms. Ashmita Sharma, all Advocates appeared online on behalf of the applicants and submitted that shortfall in realization is due to agency commission and bank charges paid. They further submitted that bank's letter confirms the same. They further submitted the foreign exchange has been realized in all cases and BRC's were submitted. They made additional written submissions.

4.1 In the additional written submissions, the applicants inter alia contended as follows:

a. Contention of the customs department that there is short realization of sale proceeds on account of deduction of foreign bank charges, commission, etc. is untenable in light of CBIC Circular No. 33/2019-Cus. dated 16.09.19, and also the certificates from the AD Bank, both dated 04.01.2020. Circulars are binding in nature and the department cannot go against what is already clarified by them in their own circulars.

b. With respect to delay in realization of export proceeds, we placed reliance on the FED Master Direction No. 16/2015-16 dated 01.01.2016 (updated as on 12.05.2016) issued by the Reserve Bank of India on the issue of Export of Goods and Services. Para Nos. A.2, A.3, C.20 and C.30 were emphasized. Para C.30 of the Master Direction states that banks are required to update the EDPMS with data of export proceeds on "as and when realised basis". Therefore, in the present case, the exports were realised on time, however, the eBRC was generated beyond the stipulated period. The generation of e-BRC even belatedly implies that there was a deemed extension granted by the AD bank in terms of Para C.20. Therefore, the sales proceeds are deemed to be realized in the extended period permitted by the RBI in terms of sub-rule (4) of Rule 16A of the Drawback Rules, 1995.

c. Without prejudice, even if the Applicants had not received the e-BRC within the stipulated time limit, sub-Rule (4) of Rule 16A of the Drawback Rules, 1995 provides for recovery of the drawback from the Applicant and thereafter, once the Applicant submits the eBRC's, they are entitled to claim refund of the drawback paid / surrendered earlier. Therefore, even if the Applicants paid the drawback amount so claimed, they shall be entitled for refund of the same upon submission of the eBRC's. Therefore, this entire exercise is revenue neutral.

d. Further, export of goods and receipt of export sale proceeds are not disputed in the present case. Therefore, benefit of duty drawback cannot be denied due to procedural lapses. Liberal interpretation should be accorded in respect of technical lapses.

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

6. On perusal of records, Government observes that the applicants had obtained drawback with regard to exports done by them. Subsequently, demand notices for drawback disbursed were partly confirmed alongwith applicable interest as detailed at para 2 hereinabove, on the grounds that in some of the cases the realization date was beyond the stipulated time period and/or there was short realization of export proceeds. Commissioner (Appeals) has upheld the impugned OIOs.

7. Government observes that as regards delay in realization of export proceeds, the applicants have contended that *in terms of sub-Rule (4) of Rule 16A of the Drawback Rules, 1995 even if they paid the drawback amount so claimed, they shall be entitled for refund of the same upon submission of the e-BRC's. Therefore, this entire exercise is revenue neutral.* Government finds 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 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 aforesaid 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 Formika 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 aforesaid, 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 Exercise 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 the issue of short realization of export proceeds, the applicant has contended that the same is on account of deduction of foreign bank charges and agency commission and that in the light of CBIC Circular No.33/2019-Cus. dated 16.09.2019, the matter is untenable. 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. The applicants have submitted certificates from their AD Bank dated 04.01.2020 and also certain agreements with their agents in support of their contention. Taking these findings into cognizance, Government holds that

the entire matter pertaining to the deduction of bank charges 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 the matter afresh on merits keeping in view the instructions contained in Board's Circular dated 19.09.2019.

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

Shrawan
11/9/23
(SHRAWAN KUMAR)

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

ORDER No. *651-652*/2023-CUS (WZ)/ASRA/Mumbai dated *11.9.23*

To,

1. M/s. SKSK Landmark Pvt. Ltd.,
41, Jhowtala Road,
P.O. Ballygunge, PS Karaya,
Kolkata - 700 019.
2. M/s. SAR Clothing (India) Pvt. Ltd.
41, Jhowtala Road,
P.O. Ballygunge, PS Karaya,
Kolkata - 700 019.

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.