

SPEED POST
REGISTERED 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. 371/118/DBK/2020-RA / 2019

Date of Issue: 26 .09.2023

ORDER NO. 685/2023-CUS (WZ) /ASRA/MUMBAI DATED 26.09.2023 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 Gyscoal Alloys Limited,
2nd floor, Mrudul Tower, Behind Times of India,
Ashram Road, Ahmedabad - 380 009.
- Respondent : Principal Commissioner of Customs, Ahmedabad,
Custom House, Near All India Radio,
Navrangpura, Ahmedabad - 380 009.
- Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.AHD-
CSTM-000-APP-604-19-20 dated 22.01.2020 passed by
the Commissioner of Customs (Appeals), Ahmedabad.

ORDER

The subject Revision Application has been filed by M/s Glyscoal Alloys Limited, Ahmedabad (here-in-after referred to as 'the applicant') against the Order-in-Appeal dated 22.01.2020 passed by the Commissioner of Customs (Appeals), Ahmedabad, which decided an appeal filed by the applicant against the Order-in-Original dated 06.03.2019 passed by the Assistant Commissioner of Customs, ICD-Sanand, Ahmedabad, which, in turn had confirmed the demand seeking to recover Drawback sanctioned to the applicant.

2. Brief facts of the case are that the applicant was issued a Show Cause cum Demand Notice seeking to recover Drawback amounting to Rs.78,25,330/- sanctioned to them, as it appeared that they had not realized the foreign exchange involved on the goods exported by them within the period allowed under the Foreign Exchange Management Act, 1999 (FEMA, 1999) as required under Section 75(1) and Section 7A(2) of the Customs Act, 1962 read with Rule 16(A) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (DBK Rules, 1995). The Show Cause Notice covered those consignments where the export proceeds were not received, and also those consignments where the payments were received after the period of six months from the date of export. The original authority, vide Order-in-Original dated 06.08.2019, confirmed the demand raised and also imposed a penalty of Rs.1,00,000/- on the applicant. Aggrieved, the applicant filed an appeal before the Commissioner (Appeals) who rejected the appeal and upheld the order of the original authority.

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

(a) That the Order-in-Original was an ex-parte order and their requests for adjournment were ignored; that the Commissioner (Appeals) had also failed to take these submissions into consideration;

(b) That the Show Cause Notice had failed to indicate the date of credit of the amount of drawback and that they submitted a worksheet wherein the first 38 entries, the drawback amount was credit to their account prior to 27.05.2015; that the Show Cause Notice was dated 25.05.2018 and hence was issued beyond a period of three years and was hence time barred in respect of these 38 entries which involved an amount of Rs.39,53,965/-; they sought place reliance upon the decisions of Padmini Exports vs UOI [2012 (284) ELT 490 (Guj)] and Pratibha Syntex Limited vs UOI [2013 (287) ELT 290 (Guj)] in support of their argument;

(c) That as far as the rest of the entries from Sr.no.39 to 80, in most cases they had received export proceeds and that BRC in respect of them was issued by the DGFT; they submitted a work sheet indicating the above details; that in respect of those entries where they are yet to submit BRC they were trying their best to get the receipt of payment;

In view of the above they submitted that the impugned Order-in-Appeal be set aside and the demand for recovery of drawback, interest and imposition of penalty be quashed.

4. Personal hearing in the matter was granted on 10.05.2023 and 17.05.2023. Shri Devashish Trivedi, Advocate, appeared on behalf of the applicant on 17.05.2023 and reiterated their earlier submission and tendered additional written submission dated 17.05.2023. He further submitted that the period beyond three years in the Show Cause Notice cannot be invoked and therefore Show Cause Notice was time barred by limitation to that extent. He also submitted a judgment dated 09.12.2021 of the Hon'ble High Court of Gujarat in SCA No.20484 of 2019. He further submitted that BRCs in most cases have been received. No one appeared on behalf of the respondent.

4.1 The applicant vide their written submission dated 17.05.2023, apart from reiterating their earlier submissions, submitted that out of the four Shipping Bills wherein the payments were outstanding, they had received the whole payment in respect of one of the Shipping Bill and part payment was received in respect of another one and furnished copies of BRCs towards the same. In light of the above, they once again requested that the impugned Order-in-Appeal and Order-in-Original be quashed.

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

6. Government observes that the applicants had obtained drawback with respect to the goods exported by them. Subsequently, demand notices for the Drawback disbursed were confirmed by the original authority along with applicable interest on the grounds that the applicant had either failed to submit the BRCs indicating realization of sale proceeds or the BRCs submitted indicated that payments were received beyond the period of six months stipulated under the FEMA, 1999. The appeal filed by the applicant was rejected by the Commissioner (Appeals) vide the impugned Order-in-Appeal. Government finds that the applicant has challenged the impugned Order-in-Appeal on the following grounds:-

- i) That part of the demand raised was time barred as the Show Cause Notice was issued after a period of three years with respect to some consignments;
- ii) That in most of the cases they had received the sale proceeds from abroad and that BRCs to that extent were submitted to the Department, albeit after the stipulated period of six months; that such delay was only a procedural lapse and Drawback should not be denied to them for this reason.

7. Government first addresses the issue of limitation raised by the applicant. Government finds that the Show Cause Notice seeks to recover inadmissible Drawback under Rule 16 of the DBK, Rules, 1995. Government notes that the said Rule by itself does not prescribe any time limit. However, Government finds that this issue is no more *res-integra* and has been set to rest by the Hon'ble High Court of Punjab & Haryana in a decision, pronounced much later to the cases cited by the applicant in this context. Government notes that the Hon'ble Court in the case of *Famina Knit Fabs vs UOI* [2020 (371) ELT 97 (P & H)], while answering the question "*Whether demand of duty*

drawback under Rule 16 of the Drawback Rules, 1995 can be made without any reasonable period of limitation?" it had held as under:-

"From the perusal of judgments cited by both sides, it is quite evident that every action including show cause notice must be issued within reasonable period where no limitation is prescribed. Taking cue from Section 28 of Act, 1962 which prescribes maximum 5 years period to issue show cause notice even in case of fraud, wilful misstatement and afore-cited plethora of judgments, we find that in every case 3 years period may not be reasonable (as otherwise held by Gujarat High Court in Pratibha Syntex case (supra), however notice issued after the expiry of 5 years cannot stand in the eyes of law. .."

In light of the above decision of the Hon'ble High Court, Government finds that the Show Cause Notice in the instant case has been issued well within the permissible time limit, as none of the cases covered therein are beyond five years from the date of the Show Cause Notice. Thus, Government finds that the submission of the applicant on the issue of limitation will not survive and rejects the same.

8. Having found so, Government now proceeds to address the second issue raised by the applicant that in many cases they had received the payments from their clients abroad and submitted the same, albeit, later than the prescribed six months period. Government finds that the Show Cause Notice itself indicates that BRCs were received in a few cases, but proceeds to demand the Drawback disbursed even on such consignments as the export proceeds were realised after a period of six months. At this juncture, Government finds it pertinent to examine Rule 16A(4) of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995, which 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 the amount of drawback has been recovered, the same has 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 Show Cause Notice and the submissions of the applicant during these proceedings, the applicant had produced valid evidence indicating realization of export proceeds in several cases. Government observes that no other discrepancy as regards impugned export realization was pointed out by the Department. Government finds that the Hon'ble Madras High Court had occasion to decide this very issue in the case of M/s. Sabare International Limited vs. Revision Authority [2022 (5) TMI 395], wherein it 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.

Given the above, Government finds that in the instant case too, the applicant will be eligible to the Drawback claimed by them on those consignments where they have furnished the BRCs to the Department, even if the same was done after the expiry of the stipulated period.

9. Government notes 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. Government finds that the Hon'ble Supreme Court had re-affirmed this principle in its decision in the case of *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 them the benefit on technical grounds by holding that the time when they could have done so, had elapsed. The Hon'ble High Court of Bombay in the case of *Madhav Steel v. UOI* [2016 (337) E.L.T. 518 (Bom.)], while relying on the above decision, had 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."

The above cited decisions make it abundantly clear that Drawback in the present case cannot be denied on the technicality that BRCs were furnished by the applicant after the expiry of the stipulated period.

10. In view of the above, Government finds the decisions of the lower authorities, wherein the Drawback disbursed has been demanded and sought to be recovered in those cases where the applicant had submitted BRCs after

the expiry of the stipulated period, to be incorrect. Government sets aside the impugned Order-in-Appeal and remands the case back to the original authority for the purpose of verifying the BRCs submitted by the applicant and dropping the demand raised to that extent if the same are found to be in order. The applicant will be provided proper opportunity to furnish the relevant BRCs/documents.

11. The Revision Application stands disposed of in the above terms.

Shrawan
26/9/23

(SHRAWAN KUMAR)

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

ORDER No. 685/2023-CUS (WZ) /ASRA/Mumbai dated 26.09.2023

To,

M/s Gyscoal Alloys Limited,
2nd floor, Mrudul Tower, Behind Times of India,
Ashram Road, Ahmedabad – 380 009.

Copy to:

1. Pr. Commissioner of Customs, Ahmedabad, Custom House, Near All India Radio, Navrangpura, Ahmedabad – 380 009.
2. Commissioner of Customs (Appeals), Ahmedabad, 7th floor, Mrudul Tower, Behind Times of India, Ashram road, Ahmedabad – 380 009.
3. Shri Devashish K. Trivedi, Advocate, D-307, Ganesh Meridian, Opp. High Court of Gujarat, S.G. Highway, Ahmedabad – 380 060.
4. Sr. P.S. to AS (RA), Mumbai.
5. Notice Board.