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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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No. 371/32/DBK/2016-RA /724
371/33/DBK/2016-RA
371/33A/DBK/2016-RA

Date of issue: 06.10.23

ORDER NO. 714-716 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.9.2023 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-I : M/s. Sarvodaya Suitings Limited
Shri Sushil Kumar Jain
Shri Kamlesh Kumar Jain

Respondent : Commissioner of Customs, Export, Nhava Sheva-II, Mumbai Zone-II

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962, against the Order-in-Appeal No. 51 to 53 (Adj-Exp)/2016(JNCH)/Appeal-I dated 26.04.2016 passed by Commissioner of Customs (Appeals-I), Mumbai-II.

ORDER

These three Revision Applications are filed by M/s. Sarvodaya Suitings Limited, Shri Sushil Kumar Jain and Shri Kamlesh Kumar Jain (hereinafter referred to as – Applicant-I, Applicant-II and Applicant-III respectively) against Order-in-Appeal (OIA) No. 51 to 53 (Adj-Exp)/2016(JNCH)/Appeal-I dated 26.04.2016 passed by the Commissioner of Customs (Appeals-I), Mumbai-II.

2. Brief facts of the case are that as per intelligence collected by the officers of the DRI, Jaipur, the Applicant-I had claimed higher rate of drawback on the goods exported by them since the year 2006-07. It was gathered that the Applicant-I had declared export goods under the description "Dyed fabrics manufactured out of spun yarn from man-made fiber P/V" or "woven fabrics of synthetic staple fiber containing 85% or more by weight of synthetic staple fiber" or "woven fabrics of synthetic" and claimed drawback under Sr. No. 551202A instead of Sr. No. 551502A where the rate of drawback was lower and had thus obtained excess drawback. The goods exported were therefore, liable for confiscation under Sec.113(h)(i) of the Customs Act, 1962 and all the Applicants were liable for penalty under Sec.114 of the said Act.

3. Therefore, after necessary investigations, a show cause cum demand notice dated 19.12.2011 was issued by DRI for recovery of differential drawback amounting to Rs.1,41,17,513/-, Rs.4,76,111/- (for exports done from ICD Bhilwara) and Rs.93,439/- (for exports done from Mundra Port) against excess drawback obtained by the Applicant-I by claiming drawback under Sr. No. 551202A instead of Sr. No. 551502A of the drawback schedule since the year 2006-07 to 2009-10.

4. The Adjudicating Authority vide Order-in-Original (OIO) No. 262/2014-15 dated 14.01.2015 ordered recovery of excess duty drawback availed by the Applicant-I, amounting to Rs. 1,41,17,513/-, Rs.4,76,111/- and Rs.93,439/- along with applicable interest; confiscated the goods exported in the past but

did not imposed any redemption fine as the goods had already been exported and hence were not available for confiscation; imposed a penalty of Rs.1,46,87,063/- on the Applicant-I and a penalty of Rs.10,00,000/- each on Applicant-II and Applicant-III. Aggrieved, the Applicants filed separate appeals with the Commissioner (Appeals) who vide impugned common Order-in-Appeal rejected them and upheld the OIO in toto.

5.1 Hence, the Applicant-I has filed the instant revision application mainly on the following grounds:

a) Classification adopted by the Applicant-I is correct. There is no suppression or misrepresentation by the Applicant-I in the present case.
b) In any case, to determine classification of goods is the responsibility of Customs.
c) Entire demand is beyond normal reasonable period of Limitation. There is no suppression of facts much less an intention to evade payment of duty. The demand is therefore time barred.
d) The dispute in the present case is entirely covered by the decision of Gujarat High Court in Padmini Exports, 2012 (284) E.L.T. 490 (Guj.)
e) Assessments made in the shipping bills have become final without being challenged by the department. Therefore, recovery of drawback without challenging the assessment order is bad in law.
f) Exported Goods are not liable for Confiscation.
g) Imposition of penalty is not sustainable.
h) Interest is not payable.

5.2 The Applicant-II and Applicant-III have filed the revision application on the grounds that:

a) The goods in question were not liable for confiscation under Section 113. Therefore, imposition of penalty under Section 114 is premature and legally unsustainable.
b) The invocation of Section 114 requires presence of mens rea.

In view of above submissions, the Applicants have prayed to set aside the impugned Order-in-Appeal; to hold that no drawback amount is recoverable from them; to hold that no penalty/fine is imposable on them; and to provide any other relief as deemed fit.

6. A Personal hearing was held in this case on 18.07.2023. Ms. Madhura Khandekar and Ms. Asmita Sharma, Consultants appeared on behalf of all the three Applicants for the hearing and submitted that the applicants did not mis-declare, therefore, no penalty should have been imposed. They further submitted that there is delay in issuing SCN. They also submitted that incorrectly mentioning drawback heading should not be held against them as department could have corrected the same. They contended that penalty imposed is extremely harsh.

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

8. Government observes that the Applicant-I is engaged in manufacture and export of Polyester/Viscose suitings. During the period 2006-07 to 2009-10, they had carried out these exports claiming drawback under Sr. No. 551202A of the drawback schedule. On the basis of intelligence that excess drawback had been obtained by the Applicant-I by claiming drawback under Sr. No. 551202A instead of Sr. No. 551502A of the drawback schedule, a show cause notice dated 19.12.2011 was issued by DRI for recovery of differential drawback amounting to Rs. 1,41,17,513/-, Rs.4,76,111/- (for exports done from ICD Bhilwara) and Rs.93,439/- (for exports done from Mundra Port). The original authority confirmed the demand notice along with interest and penalty, as detailed at aforementioned para 4, vide impugned OIO. The appellate authority has upheld the OIO.

9. Government observes that the Applicant-I has contended that the classification of impugned export goods adopted by them under Sr. No. 551202A is correct as the department had raised no objections at the time of export, though time and again, samples from export consignment had been drawn and further for this reason exported goods are not liable for confiscation. In this connection, Government observes that the original authority has explained the export process at the department's end, at para 15 and 16 of the impugned OIO, which is reproduced hereunder:

> *15. Thus, to execute the intention of fetching the higher rate of drawback available under the tariff item no. 551202A, the exporter adopted ingenious methodology to defraud the EDI system. Under EDI System, exporters are required to file declarations in prescribed format through the Service Centers of Customs. A checklist is generated for verification of data by the exporters/ CHA. After verification, the data is submitted to the System by the Service Centre operator and the System generates a Shipping Bill Number, which is endorsed on the printed checklist and returned to the exporters/ CHA. The shipping bill is generated on the basis of declaration and invoice submitted by the exporter or their CHA. The above declaration contained numerous details including ITC (HS) code, DBK serial number and item description. If the exporter has mentioned the Drawback serial no. as 551202A, RITC number as 5512, the description of goods under reference (Woven Fabric of Polyester 65% and Viscose 35%, either as of the three below;*
>
> *i. "Woven fabrics of synthetic staple fibres, containing 85% or more by weight of synthetic staple fibre dyed Polyester: 65%, Viscose: 35% (Textile Fabric)",*
>
> *ii. "Woven fabrics of synthetic staple fibres, containing 85% or more by weight of synthetic staple fibre P/ V"*
>
> *iii. "Woven fabrics of synthetic staple fibres, containing 85% or more by weight of synthetic staple fibre Dyed"*

16. The EDI system, in all the above three condition will read the description as "Woven fabrics of synthetic staple fibres, containing 85% or more by weight of synthetic staple fibre dyed" and accordingly generate the shipping bill with classification of the goods under Chapter heading 5512 as well as drawback under DBK heading 551202A. If the exporters had declared the RITC number as 5515 and description as "other woven fabrics of synthetic staple fibre containing 85% or more by weight of Man-made staple fibre", the EDI system would have classified the above goods under heading 5515 and drawback under item serial number 551502A. Therefore, the Exporters were deliberately declaring the wrong description of the goods & RITC number before Customs authorities in commercial invoice/ declaration and accordingly on the basis of said invoice/ declaration, shipping bills are generated under EDI system by showing the said fabric under heading No. 5512 and relevant drawback tariff item number 551202A.

17. Pursuant to confirmation of intelligence equally corroborated with the technical analysis of HSN, Customs Tariff, Drawback schedule, EDI system and definitions given in the book published by the Textile Committee, the DRI initiated investigation against the exporters including M/s. Sarvodaya Suitings Ltd.....

Government concurs with these findings and dismisses this contention of the Applicant-I and holds that impugned exported goods were mis-declared and wrongly classified for unlawful gains and were therefore aptly confiscated as per existing provisions in law.

10. As regards the contention that the demand is beyond the reasonable period of limitation, Government observes that in respect of absence of upper period restrictions for recovery of drawback under Rule 16 of the Customs, Excise & Service Tax Drawback Rules, 1995, the Hon'ble Supreme Court in the case of *Citedel Fine Pharmaceuticals* [1989 (42) E.L.T. 515 (S.C.)] had held that

in the absence of any period of limitation it is settled that authority is to exercise powers within a reasonable period and what would be the reasonable period would depend upon the facts of each case .... [para 6]. Further, Government observes that Hon'ble High Court of Punjab & Haryana has in the case of M/s. Famina Knit Fabs [2020 (371) E.L.T. 97 (P & H)] and Jairath International [2019 (370) E.L.T. 116 (P & H)] held that as limitation period in the Rule 16 of the Customs, Central Excise and Service Tax Duties Drawback Rules,1995, is not specified hence, five years from the relevant date is the reasonable period. In the instant matter, the SCN was issued on 19.12.2011 covering receipt of drawback during the period 2006-07 to 2009-10, and thus was issued within the reasonable time. The case laws relied upon by the Applicant-I become infructuous in the light of the above cited latest judgments.

11. As regards, the contention of the Applicant-I that demand for recovery of drawback without challenging the assessment order is bad in law, Government observes that the Customs, Central Excise Duties and Service Tax Drawback Rules,1995 (hereinafter referred to as 'Drawback Rules,1995) is in itself a complete code and has inbuilt mechanism to deal with the correction /consequences of any contravention of provisions contained therein. On applying the principles of the judgment passed by Hon'ble Apex Court in the case of M/s. Jain Shudh Vanaspati Ltd. [1996 (86) E.L.T. 460 (S.C.)] it clearly stands established that Show Cause Notice and Order-in-Original issued under applicable Drawback Rules,1995 are proper and valid and it is not required to review the initial order sanctioning the drawback claimed and then raise a demand for recovery of erroneous payment of drawback.

12. The common contention of all the three Applicants is that the penalty imposed under Section 114 of Customs Act, 1962 is not sustainable. Government observes that section 114 of the Customs Act, 1962 reads as under:

Section 114. Penalty for attempt to export goods improperly, etc. -

Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable, -
...

From a plain reading of the Section 114, it is evident that penalty under this section is imposable in respect of the goods held liable for confiscation and it has nothing to do with the actual confiscation of the goods. In view of the fact that the impugned goods had been mis-declared to avail excess drawback, render the goods liable for confiscation and the applicants who were responsible for making such incorrect declaration liable to penalty. However, considering the fact that the issue was common to many more exporters of similar goods and DRI had taken simultaneous action against them, Government agrees with the Applicant-I that imposing 100% penalty amounting to Rs.1,46,87,063/-, equivalent to total excess drawback availed, is quite harsh. Therefore, Government reduces the same to Rs.25,00,000/-. The penalty of Rs. 10,00,000/- each on Applicant-II and Applicant-III is retained.

13. In their additional written submission dated 19.07.2023, the applicants have inter alia submitted a copy of letter dated 20.02.2008 from The Synthetic & Rayon Textiles Export Promotion Council (SRTEPC) and contended that as per said letter 'Dyed Polyester Viscose Suitings' is covered under Sr. No. 551202 of the Drawback schedule, and therefore they were under bonafide belief that they have to claim drawback under Sr. No. 551202. Government observes that the name of addressee is not visible on the said letter of SRTEPC except the words 'Pvt. Ltd.' and 'Agiary lane'. Further, the letter does not find mention in the impugned OIO/OIA, hence it appears it was not produced before the investigating/adjudication and appellate authority. Further, there is no reference to it in the Revision Application filed on 17.06.2016. Therefore, it appears an afterthought on part of the applicants to cover up their act of wilful mis-declaration. The contention is thus rejected.

14. In view of the above findings, Government amends Order-in-Appeal No. 51 to 53 (Adj-Exp)/2016(JNCH)/Appeal-I dated 26.04.2016 passed by Commissioner of Customs (Appeals-I), Mumbai-II as far as imposition of penalty on Applicant-I is concerned. Rest of the OIA, confiscating the impugned goods, ordering recovery of differential drawback amount and imposition of penalty on Applicant-II & Applicant-III is upheld.

15. The Revision Application is disposed of on the above terms.

Shrawan 28/9/23

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

ORDER No. 714-716/2023-CUS(WZ)/ASRA/Mumbai dated 28.9.23

To,

1. M/s. Sarvodaya Suitings Limited,
Sarvodaya Mansion, Plot No. 1-S-1 to 4,
Basant Vihar, Opp. Mewar Mill Compound,
Bhilwara, Rajasthan – 311 001.

2. Shri Sushil Kumar Jain,
Director, M/s. Sarvodaya Suitings Limited,
Sarvodaya Mansion, Plot No. 1-S-1 to 4,
Basant Vihar, Opp. Mewar Mill Compound,
Bhilwara, Rajasthan – 311 001.

3. Shri Kamlesh Kumar Jain,
Director, M/s. Sarvodaya Suitings Limited,
Sarvodaya Mansion, Plot No. 1-S-1 to 4,
Basant Vihar, Opp. Mewar Mill Compound,
Bhilwara, Rajasthan – 311 001.

Copy to:

1. Commissioner of Customs, Export
Nhava Sheva-II, Mumbai Zone-II,
Jawaharlal Nehru Custom House,
Nhava Sheva, Taluka: Uran,
Dist.: Raigad, Maharashtra – 400 707.

2. M/s. V. Lakshmikumaran,
2nd Floor, B & C Wing, Cnergy IT Park,
Appa Saheb Marathe Marg,
Prabhadevi, Mumbai – 400 025.

3. Sr. P.S. to AS (RA), Mumbai

4. Guard file