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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**  
8<sup>th</sup> Floor, World Trade Centre, Cuffe Parade,  
Mumbai- 400 005

F. NO. 371/302/DBK/2021-RA/2437

Date of Issue: 17.10.2023

ORDER NO. 722/2023-CUS (WZ) /ASRA/MUMBAI DATED 11.10.2023 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 Peekay International,  
62/502, Motilal Nagar No.1,  
Road no.1, H.S. Rupwate Marg,  
Goregaon (W), Mumbai - 400 104.
- Respondent : Principal Commissioner of Customs, (General),  
New Custom House, Ballard Estate,  
Mumbai - 400 001.
- Subject : Revision Application filed under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No.MUM-  
CUS-PK-GEN-40/2021-22 dated 19.07.2021 passed by  
the Commissioner of Customs (Appeals), Mumbai  
Customs, Zone - I.

## ORDER

The subject Revision Application has been filed by M/s Peekay International, Mumbai (here-in-after referred to as 'the applicant') against the Order-in-Appeal dated 19.07.2021 passed by the Commissioner of Customs (Appeals), Mumbai Customs, Zone - 1, which decided an appeal filed by the applicant against the Order-in-Original dated 26.02.2019 passed by the Assistant Commissioner of Customs (Export), ICD Mulund (Export), Mumbai.

2. Brief facts of the case are that the applicant was issued a Show Cause cum Demand Notice dated 03.03.2016 seeking to recover Drawback amounting to Rs.56,09,496/- sanctioned to them with respect to 60 Shipping Bills, as it appeared that they had not realized the foreign exchange involved on the goods exported by them during the period 01.01.2012 to 31.12.2014. The demand was confirmed by the original authority vide Order-in-Original dated 21.02.2017. The applicant filed appeal before the Commissioner (Appeals) who vide Order-in-Appeal dated 03.07.2018 remanded the case back to the original authority for being decided afresh after providing opportunity to the applicant to make their submissions. In denovo proceedings, the original authority found that in six cases the applicant had received the remittance in full and the demand to that extent was dropped. However, in the rest of the 54 cases, the original authority found that the remittances were lesser than the FOB Values and hence held that in terms of Rule 18 of the Customs and Central Excise Duties Drawback Rules, 2017 (DBK Rules), drawback to the extent of the unrealized foreign remittance amounting to Rs.8,53,871/- was recoverable and confirmed the demand to that extent. Aggrieved, the applicant filed appeal before the Commissioner (Appeals) who vide the impugned Order-in-Appeal upheld the order of the original authority and rejected the appeal filed by the applicant.

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

(a) That the impugned Order-in-Appeal has gone beyond the scope of remand inasmuch as it is trite and undisputed that the Order-in-Original

dated 21.02.2017 and Order-in- Appeal dated 29.06.2018 were issued on the sole factum that they did not provide proof of realization of foreign exchange; that the matter was remanded back only for verification of the documents produced by them indicating realization of foreign exchange and this was the only dispute between them and the Department; that contrary to clear and explicit directions in the Order-in-Appeal dated 29.06.2018, once again an Order-in-Original dated 27.02.2019 was passed on entirely different reasons than the *lis* such ex- facie illegal manner of passing the Order-in-Original dated 27.02.2019 has been given the stamp of approval vide the Impugned Order; that this act of justifying the re-quantification of the eligible drawback is incorrect and ex-facie illegal; that the entire proceedings, commencing from 2016 was on the sole basis that they had to realize export proceeds; that at no point of time was the issue at hand that the exporter had claimed excessive drawback or the like and hence the entire proceedings were beyond the scope of the proceedings itself; they relied upon the following decisions in support of their submission:-

- Chopra Electricals vs CCE, Delhi – I [2017(357)ELT 768 (Tri-Del.)]
- Jeevan Diesels and Electricals Limited vs CCE, Cus Bengaluru [2017 (353) ELT 78 (Kar)]
- Serve Packaging Limited [2016 (340) ELT 6 (Mad.)]
- Dura Syntex Limited vs CCE, Vadodara [2004 (178) ELT 559 (Tri-Mumbai)]

(b) That the Order-in-Original dated 27.02.2019 there were clear findings that they had realized the export proceeds within the time prescribed under law; that the impugned Order did not address this averment raised by them and hence is not maintainable in law as the same was unreasonable and non-speaking; they relied on the decisions of the Hon'ble Supreme Court in UOI vs Essel Mining & Industries Ltd. [(2005) 6 SCC 675] and Siemens Engineering and Mfg. Co. vs UOI [(1976) 2 SCC 981]; they further submitted that vide the impugned Order the Department was bypassing statutory mechanism of appeal and seeking to open an issue which was never present and even this issue was raised before the Commissioner (Appeals) who failed to take cognizance of the same;

(c) That even on merits they had satisfied requirements for eligibility of drawback; that the gravamen in the Impugned Order was that the net FOB

Value of the goods exported by them was less than the actual foreign exchange realized thereof, which was on account of commission paid by them to their foreign agent;

(d) That the fact that commission paid by them should not be deducted from the value on which drawback is claimed has been the subject matter of discussion by the Central Board of Excise and Customs (rechristened as the Central Board of Indirect Taxes and Customs) and vide Circular No. 64/2003-Cus dated 21.07.2013, it has been clarified that no deduction is to be done from the FOB value for availing export benefits as long as the commission is to the extent of 12.5% of the FOB value of the goods; that in their case the commission paid by them in all cases was less than the prescribed ceiling of 12.5% per the Circular supra;

(e) That the finding in the impugned Order that they could not take shelter of such commission for the reason that they were not an authorized dealer and therefore, could not have paid the said commission was patently illegal and illogical; that the commission at the time of export was recorded in the Shipping Bill and they received payment of net of such commission and therefore, there is no aspect of any further payment or repatriation of any commission; that it was also not in dispute that they had received the net payment vide normal banking channels only and hence, such finding was patently illegal and hence deserved to be quashed forthwith.

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 07.06.2023 and 21.06.2023. Shri Mayank Jain, Advocate, Shri Mihir Gupta, Advocate and Shri Pradeep Gadodia, Proprietor appeared on behalf of the applicant. They submitted that reduction in realization was on account of commission paid which was within permissible limit of 12.5% as permitted by CBIC Circulars. They further submitted that Customs and Central Excise Duties Drawback Rules, 2017 does not save old rules. They requested one week time to make additional submissions. No one appeared on behalf of the respondent.

4.1 The applicant vide their additional written submissions received on 19.06.2023, apart from reiterating their earlier submissions, submitted that:-

(a) That the entire proceedings being under the 1995 Drawback Rules, is ex-facie without jurisdiction in light of the superseding 2017 Drawback Rules, that the Show Cause Notice was issued in the year 2016 under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (DBK Rules, 1995) and that the Order-in-Original dated 21.02.2017 under Rule 16A(2) of DBK Rules, 1995 and thereafter after the above mentioned litigation the matter was remanded resulting in the Show Cause Notice being revived;

(b) That the Government introduced Drawback Rules, 2017 to replace the DBK Rules, 1995 and Rule 20 of the DBK Rules, 2017 provided the 'Repeal and Saving' Clause and that the same did not cover the present proceedings for recovery of drawback duty for non-realization of export proceeds as they do not fall under any of the situations enumerated under Rule 20(2) of the DBK Rules, 2017;

(c) That vide Rule 20 of the DBK Rules, 2017, the entire proceedings initiated vide Show Cause Notice issued in 2016 is vitiated in law; that Rule 20 cesses the operation of the DBK Rules, 1995 in entirety and therefore all the proceedings, including the issue of the said Show Cause Notice issued in 2016 under Rule 16A would also be vitiated in law; that the power to adjudicate such Show Cause Notice was derived from Rule 16A and hence the above implies that the Department does not have the power to adjudicate the Show Cause Notice post 01.10.2017; they relied upon the decision of the Hon'ble High Court of Punjab & Haryana in the case of Famina Knit Fabs vs UOI [2020 (371) ELT 97 (P&H)] in support of their contention;

In view of the above, they once again prayed that the impugned Order-in-Appeal dated 20.07.2021 be set aside.

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 of Rs.56,09,496/- with respect to the goods exported by them vide a total of 60 Shipping Bills. Subsequently, demand notice for the Drawback disbursed was confirmed by the original authority and this decision in appeal was overturned by Commissioner (Appeals) who remanded the case for being decided after taking into account the BRCs furnished by the applicant. The original authority, in denovo proceedings, vide Order-in-Original dated 26.02.2019 found that in the case of 54 Shipping Bills the export remittance realized was less than the FOB value on which Drawback was availed and proceeded to confirm Rs.8,53,871/- which was proportionate to such non-realized remittance and dropped the rest of the demand. It was contended by the applicant before the Commissioner (Appeals) that the difference in the amount realized was on account of Commission paid by them to their foreign agent and that drawback was permitted on such amount subject to the Commission not exceeding 12.5% of the FOB value as clarified by the CBEC vide Circular No.64/2003-Cus dated 21.07.2003. The Commissioner (Appeals) in the impugned Order-in-Appeal found that as per the RBI Circular No. AD(MA Series) 17 dated 19.05.1999, referred to in the said CBEC Circular, only authorized dealers were allowed to remit the commission to the overseas agent/beneficiary. The Commissioner (Appeals) held that since the applicants were not an authorized person/dealer as per the RBI guidelines, they would not be eligible to drawback to the extent of the Commission paid and proceeded to uphold the order of the original authority.

7. Government finds that it is not in dispute that the Commission paid by the applicant to their agents abroad did not exceed the limit of 12.5% of the FOB value as prescribed by the RBI and clarified by the CBEC vide Circular dated 21.07.2003 referred above, as the said claim of the applicant has not been disputed by the respondent Department. Given the above, Government finds that the short issue for decision is whether the Commissioner (Appeals) was correct in holding that the applicant was not eligible for the Drawback denied by the original authority as they were not an authorized person/dealer

in terms of the RBI regulations to remit the Commission abroad. Government finds that it is pertinent to examine the said RBI Circular and the para referred to by the Commissioner (Appeals) is reproduced below: -

*"1. Agency Commission on Exports*

*In terms of paragraph 6E 2(1)(a) of the Exchange Control Manual (ECM) authorised dealers have been permitted to allow remittance of commission on exports subject to the condition, among others, that the amount of commission should have been declared on GR/PP/SOFTEX/SDF form or the exporter has submitted a No Objection Certificate from Customs authorities or Department of Electronics, Government of India, as the case may be. On a review, it has been decided that authorised dealers may allow remittance of commission on exports within the prescribed limit (i.e. 12.5% of invoice value) even in cases where the amount of commission has not been declared on Export Declaration Forms by the exporters, without insisting on a No Objection Certificate from Customs authorities or the Department of Electronics, as the case may be, after satisfying themselves about the reasons adduced by the exporter for not declaring the amount of commission on relative Export Declaration Form and provided a valid agreement/ written understanding between the exporter and the Overseas agent/ beneficiary for payment of commission subsists."*

A reading of the above makes it clear that the situation envisaged by the said Circular which requires an authorized dealer to the make the remittance towards Commission is when the 'Commission' was not declared in the Export Declaration Forms by the exporter at the time of export and was required to remit it separately. Government notes that in the present case the original authority has clearly recorded that with respect to the Shipping Bills in question, the FOB value declared by the applicant was inclusive of the 'Commission' payable to their foreign agents. Government finds that in the present case, the Commission payable was deducted, and the balance was then remitted by their buyer situated abroad and hence the question of the applicant requiring to remit any money abroad towards Commission did not arise. Thus, clearly the present case is different from the case envisaged in the RBI Circular which has been relied upon by the Commissioner (Appeals). Thus, Government finds that the reason cited by the Commissioner (Appeals) to deny drawback of Rs.8,53,871/- towards non-realized remittance will not hold good and the impugned Order-in-Appeal upholding the demand for Drawback on this count, will not survive. Government finds that the applicant is eligible to the Drawback of Rs.8,53,871/- which has been denied

by the lower authorities and accordingly holds so. Consequently, the demand raised to recover the same will not survive.

8. In view of the above, Government sets aside the impugned Order-in-Appeal dated 19.07.2021. The subject Revision Application is allowed.

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

ORDER No. 722/2023-CUS (WZ) /ASRA/Mumbai dated 11.10.2023

To,

M/s Peekay International,  
62/502, Motilal Nagar No.1,  
H.S. Rupwate Marg, Road no.1,  
Goregaon (W), Mumbai - 400 104.

Copy to:

1. Principal Commissioner of Customs, (General), New Custom House, Ballard Estate, Mumbai - 400 001.
2. Commissioner of Customs (Appeals), Mumbai - 1, 2<sup>nd</sup> floor, New Custom House, Ballard Estate, Mumbai - 400 001.
3. M/s Khaitan & Co., One World Center, 10<sup>th</sup> & 13<sup>th</sup> floors, Tower 1C, 841, Senapati Bapat Marg, Mumbai - 400 013.
4. Sr. P.S. to AS (RA), Mumbai.
5. Notice Board.