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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  
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F.No. 373/350/DBK/2014-RA | 2531

Date of Issue: 05.04.2021

ORDER NO. 87/2021-CUS (SZ)/ASRA/MUMBAI DATED 30.03.2021 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.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. COC-CUS-000-APP-237/2014 dated 10.07.2014 passed by the Commissioner of Customs (Appeals), Cochin.

Applicant : M/s Ambadi Enterprises Ltd

Respondent : Commissioner of Customs, Cochin.

ORDER

This Revision Application is filed by the M/s Ambadi Enterprises Ltd., Opp. Dharmपुरi Colony, Thottada, Kannur, Kerala-670 007 (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. COC-CUS-000-APP-237/2014 dated 10.07.2014 passed by the Commissioner of Customs (Appeals), Cochin.

2. The issue in brief is that the Applicant exporters of jute mats had filed a Shipping Bill No. 1635997 dated 02.12.2009 under the Drawback Scheme and had subsequently claim a drawback account of Rs. 8,46,070/- (Rupees Eight Lakhs Forty Six Thousand and Seventy Only). The Department had raised query in the EDI System asking the Applicant to produce a BRC negative statement from a competent authority. In reply the Applicant furnished a certificate from their auditor which showed the above mentioned shipping bill in the pendency list. As per the relevant provision of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (Drawback Rules), the drawback paid out has to be recovered if the sales proceed of the exported goods have not been realized within the prescribed period. Hence the Applicant was issued a Demand letter and a personal hearing was granted. The adjudicating authority Assistant Commissioner of Customs (Drawback), Custom House, Cochin vide Order-in-Original No. 13/2012 dated 20.07.2012 confirmed the demand issued under Rule 16A of the Drawback Rules for recovery of the amount of Rs. 8,46,070/- along with interest. Aggrieved, the Applicant then filed appeal with the Commissioner of Customs (Appeals), Cochin who vide his Order-in-Appeal No. COC-CUS-000-APP-237/2014 dated 10.07.2014 rejected their appeal and upheld the Order-in-Original dated 20.07.2012.

3. Being aggrieved, the Applicant then filed the current Revision Application on the following grounds:

- (i) The Applicant fulfills the requirements of the provisions of Rule 16A(5) of the Drawback Rules and hence the demand of drawback claimed was unjustified.
- (ii) The consignee abroad was not traceable and hence no payment from them in the form of foreign exchange reserves were forthcoming. The Applicant perused the matter with the Office of High Commissioner of India, Canada and Vice-Consul vide letter dated 28.07.2012 and subsequent e-mail communication informed the Applicant that the consignee could not be traced in Canada. Further, an attempt was made to protest for non-payment of bill of exchange through an attorney in Toronto, Canada at the instance of Toronto Dominion Bank and in his report the Attorney informed the non-availability of the persons in the given address. Accordingly, an application for claim of the amount was filed under Policy No. ETP 0070006524 with Export Credit Guarantee Corporation of India and the same was sanctioned vide Ref. No. C&D/16056 dated 01.03.2011. As to the requirement of write off of the realization of sales proceeds by the Reserve Bank of India, the realization has been written off by the AD Category-I Bank, namely the HSBC Bank as per the RBI Master Circular No. 06/2010-11 dated 01.07.2010.
- (iii) Therefore, as per the Rule 16A(5) of the Drawback Rules, the Applicant fulfills the requirements such as-
  - (a) the documentary evidence to prove that the non- realization of sale proceeds is compensated by the Export Credit Guarantee Corporation of India Ltd. under an insurance cover;
  - (b) the Reserve Bank of India through AD Category- I bank had written off the requirement of realization of sale proceeds on;
  - (c) and documentary evidence from the concerned Foreign Mission of India about the fact of non-recovery of sale proceeds from the buyer.

Therefore the impugned or demanding the drawback amount from the Applicant was not in consonance with the relevant provisions.

- (iv) The Appellate Authority had failed to appreciate the requirements of write off by the RBI and the correspondences from the Foreign Mission of India submitted by the Applicant, rather extrapolated the same to deny the substantive benefit rightfully available to the Applicant.
- (v) The requirement of write off by the RBI, has been understood to have been done by the RBI itself by the Commissioner(Appeals). The RBI vide Part-3, C-22 of the Master Circular No. 06/2010-11 dated 01.07.2010 have delegated the power of write off to the AD Category -I Banks. The relevant portion is reproduced below for easy reference:

*"C.22. Write off in case of payment of Claims by ECGC and private insurances companies regulated by Insurance Regulatory and Development Authority (IRDA)*

- (i) *AD Category – 1 banks shall, on an application received from the exporter supported by documentary evidence from the ECGC and private insurance companies regulated by IRDA confirming that the claim in respect of the outstanding bills has been settled by them, write off the relative export bills and delete them from the XOS statement.*
- (ii) *Such write-off will not be restricted to the limit of 10 present indicate above.*
- (iii) *Surrender of incentives, if any, in such cases will be as provided in the Foreign Trade Policy.*
- (iv) *the claims settled in rupees by ECGC and private insurance companies regulated by the IRDA should not be construed as export realization in foreign exchange."*

Accordingly, the write-off given by the HSBC Bank, one of the AD Category-1 Bank authorized by the RBI was very much appropriate and satisfied the condition set out in the said Rule.

- (vi) As to the requirement of a certificate from the Foreign Mission at the country to which export had taken place, though the Rule used the word certificate, in effect it envisages the Foreign Mission to carry out verification about the fact of non-recovery of sale proceeds from the buyer. In the absence of any format prescribed for such a certificate, the Foreign mission through repeated and constant efforts by the Applicant had issued a letter to the consignee in Canada and the Vice Consul of Indian High Commission

through mail correspondences with the Applicant had informed that they had written to the addresses provided by the Applicant and the same have returned undelivered. The Vice Consul further advised the Applicant to take legal action against the consignee in India. This effort on the part of the Applicant to obtain certificate from the Foreign Mission of India and their response undoubtedly establishes the fact that the sales proceeds from the buyer cannot be recovered and the documents submitted by the Applicant suffice the requirement of the certificate, especially in the absence of any specific format for the same.

- (vii) The amendment to the Rule 16 (A) of the Drawback Rules, 1995 by inserting Sub-Rule (5) clearly conveys the intention of the Government to not to recover the amount of drawback paid to the exporter. Hence, denying the same on peripheral grounds goes against the legislative intent.
- (viii) The Sub-Rule (5) of Rule 16A of Drawback Rules, 1995 has been inserted vide Notification No. 30/2011-CUS(NT) dated 11.04.2011 is categorical in stating that "*Where sale proceeds are not realised by an exporter within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), but such non- realisation of sale proceeds is compensated by the Export Credit Guarantee Corporation of India Ltd. under an insurance cover and the Reserve Bank of India writes off the requirement of realisation of sale proceeds on merits and the exporter produces a certificate from the concerned Foreign Mission of India about the fact of non-recovery of sale proceeds from the buyer, the amount of drawback paid to the exporter or the claimant shall not be recovered.*"
- (ix) Of the three requirements given in the said Rule, the requirements of write off by the RBI and the Certificate from the Foreign Mission of India are not clearly defined and should be read and understood from the perspective of the legislative intent. As has been mentioned in the previous para, the RBI vide Master Circular No. 06/2010-11 dated 01.07.2010 delegated the write off powers to the AD Category I Banks and hence the write off given by such banks should be taken at face value as if the same has been given by the RBI. Similarly, in the absence of any prescribed format for the foreign mission certificate, the letter and mail communication to the affect that the

sale proceeds have not been recovered from the foreign buyer needs to be accepted in the place of certificate. In this case the non-recovery of the sale proceeds from the buyer has been established beyond doubt and most importantly it is a mere procedural requirement. Because, compensation of non-realized amount from the foreign buyer has been done by the ECGC only after making sure that the sale proceeds have not been realized. Hence, demanding back the drawback paid to the Applicant on procedural ground is not as per law as the substantive benefit due to the Applicant cannot be denied on the unsubstantiated procedural grounds.

(x) The Applicant prayed that the Order-in-Appeal dated 10.07.2014 be set aside.

4. The Assistant Commissioner of Customs (Review Cell), Cochin vide letter dated 22.10.208 submitted cross objections on the following grounds:

- (i) Under Rule 16A(2) of Drawback Rules, 1995, drawback granted has to be recovered if the sales proceeds was not realized within the period allowed under FEMA,1999.
- (ii) As per the Notification No. 30/2011-Cus (NT) dated 11.04.2011 under Sub rule (5), in the present case the Applicant had not furnished any evidence for repatriation of foreign exchange against Shipping Bill No. 1635997 dated 02.12.2009. Also the Applicant had failed to fulfill the conditions namely RBI writing off the requirement of realization of sales proceeds on merits and producing a certificate from the concerned Foreign Mission of India about the fact of non recovery of sales proceeds from the buyer.
- (iii) As per the Notification No. 30/2011-Cus (NT) dated 11.04.2011 where the sales proceeds are not realized by an exporter, RBI has to write off the requirement of sales proceeds and the Applicant had to produce a certificate from the concerned Foreign Mission of India about the fact of non-recovery of sales proceeds from the buyer. In this case the Applicant had not fulfilled the conditions.