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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. 373/255/DBK/2014-RA / 3923

Date of Issue: 10.08.2020

ORDER NO. 96 /2020-CX (WZ)/ASRA/MUMBAI DATED 06/07/2020 OF THE GOVERNMENT OF INDIA PASSED BY SMT SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s SCHWING Stetter (India) Pvt. Ltd., Chennai.

Respondent : Commissioner of Customs(Appeals), Chennai

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal C.Cus.No. 539/2014 dated 26.03.2014 passed by the Commissioner of Customs (Appeals), Chennai.



ORDER

This Revision Application is filed by M/s SCHWING Stetter (India) Pvt. Ltd., F-71, SIPCOT Industrial Park, Irungattukottai, Sriperumbudur, Chennai -602 105 (hereinafter referred to as "the Applicant") against the Order-in-Appeal C.Cus.No. 539/2014 dated 26.03.2014 passed by the Commissioner of Customs (Appeals), Chennai.

2. The issue in brief is that the Applicant is a 100% subsidiary of M/s SCHWING GmbH, Germany and is hold Central Excise registration and are engaged in the manufacture of Concrete pumps, Concrete Mixers and Batching Plants falling under chapter Heading 84134000 and 84743110 and they also imports certain types of Concrete pumps and sells it to customers in India and abroad. The Applicant vide their letter No. ACCTS/KJ/DBK/211 dated 17.08.2005 had filed a drawback claim under Section 74 of Customs Act, 1962 for the export of concrete pumps vide Shipping Bill No. 2098969 dated 30.06.2005 and further requested the department to exempt them from filing Annexure-II application and also permit them to file drawback application without Annexure-II. On perusal of the documents, it was noticed that the Applicant had not exported the goods under manual shipping bill in accordance with Public Notice No. 210/98 dated 09.11.1998. Consequently, the department vide letter dated 04.10.2005 issued to the Applicant stating that their claim for drawback under Section 74 of the Customs Act, and moreover as per Rule 4(a)(i) of Re-export of imported goods [Drawback of Customs Duties] Rules, 1995, the export is being made a claim for Drawback under Section 74 of the Customs Act and as per Rule 5(2)(a) of Re-export of imported goods [Drawback of Customs Duties] Rules, 1995, the exporter has to produce the Triplicate copy of shipping Bill bearing the examination report as required under Section 74 of the Customs Act, 1962 recorded by the proper officer of the Customs at the time of export has to be produced for processing of the drawback claim. Since the goods have not been examined with reference to the concerned Bill of Entry at the time of export to establish the identity of goods being exported, their claim for drawback under Section 74 cannot be processed for not following the procedure under Section 74 of the Customs Act. The



Applicant again vide their letter dated 02.02.2006 had requested the department to condone the procedural lapse as a special case as admitted by them. In response the department vide letter dated 15.03.2006 accorded a Personal Hearing on 13.04.2006. Subsequently, the department vide letter dated 16.09.2011 issued to the Applicant reiterating the stand taken in letter dated 14.10.2005 and informed that the issue was disposed long back in 2005. Aggrieved the Applicant then filed Writ Petition before the Hon'ble High Court of Madras. The Hon'ble High Court vide its Order No. 15556/2012 dated 06.11.2012 passed the following judgement -

"In view of the above, no mandamus as sought form can be issued in this writ petition except giving liberty to the petitioner to submit the reply with relevant records to the authority and canvass the issue on merits and in accordance with law. Writ Petition stands disposed as above."

In remanded Order, the Assistant Commissioner of Customs (Drawback, Customs(Seaport-Export), Chennai vide Order-in-Original No. 22189/2013 dated 21.10.2013 rejected the claim as the Applicant could not produce the examination report recorded by the proper officer of the Customs at the time of export as required under Section 74 of the Customs Act, 1962. Being aggrieved, the Applicant then filed appeal with the Commissioner of Customs (Appeals), Chennai who vide Order-in-Appeal C.Cus.No. 539/2014 dated 26.03.2014 rejected the appeal as the jurisdictional Commissioner's denial to give exemption cannot be challenged in the Commissioner(Appeals) forum.

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

- (i) The Commissioner(Appeals) has failed to note that the order passed by him suffered from non application of mind without considering the facts on record and the documentary evidences produced in the form of documents like Bill of Entry/import invoice/packing list/Shipping Bills/ARE-1 Copy/ Export invoice/packing list. The words, *"The appellants have exported concrete pumps"* in Para 6 of the Order-in-Appeals shows that the Commissioner(Appeals) failed to note what was imported and then re-exported was only one pump and not 'pumps'.



- (ii) The Commissioner(Appeals)'s observations are totally erroneous in as much as, "...if only the fact Of mentioning as -re export" were recorded in the export documents, the whole issue would not have arisen". The fact that Model number, Serial number and make of the Pump in the Bill of Entry and other import documents are tallying with the export documents which was duly signed by the Inspector of Central Excise who was physically present at the time of re-export, was mentioned by the Commissioner(Appcals), but did not recognized/considered during evaluation of the case. This fact clearly established that the pump which was imported earlier was alone exported.
- (iii) The Commissioner(Appeals) failed to note that the case laws cited are relating to non-denial of substantial benefits to exports on account of procedural infractions. There is no whisper of any discussions and the case laws cited have been simply ignored to the detriment of the applicant's claim without any legal basis.
- (iv) The Commissioner(Appeals) failed to understand that any goods exported would be eligible for drawback either under Brand Rate or All Industry Rates. The Applicant honestly declared that the pump that they had exported was the one which was imported about 3 months back vide Bill of Entry No. 764557 dated 05.03.2005 and submitted the drawback claim under re-export of imported goods which was only subjected to mere evaluation test and not used, and the very same imported pump was exported without any modification vide Shipping Bill No 2098969 dated 30.06.2005.
- (v) The observation of Commissioner(Appeals) that no drawback shall be allowed in respect of any goods the market price of which is less than the amount of drawback due thereon and this aspect can be verified only on inspection /examination of the goods at the time of export and since this was not done the compliance of the above provision could not be verified. In the instant case, it is totally irrelevant and immaterial since the Commissioner(Appeals) has not considered the fact that the Applicant have realized proceeds for the export of the above pump from their overseas



importer viz., M/s Schwing Gmbh amounting to Euro 59,300/- (Rs, 31,44,469/-) and the drawback claimed is well below the FOB value of Rs. 32,34,815/ - declared in ARE-1/Shipping Bill.

- (vi) The Commissioner(Appeals) had failed to take into account the evidence furnished by the Applicant in the form of Bank realization certificate for Euro 59,300/- (Rs, 31,44,469/-) for the export of the above pump.
- (vii) The Commissioner(Appeals) had failed to realize that the requirements of Rule 4(a)(i), (ii) and (iii) of Re-export of Imported goods (Drawback of Customs duties) Rules had been substantially complied with since the pump was imported and the same pump was exported as can be seen from the Model number, Serial number and make of the Pump and realization of proceeds for the same.
- (viii) The Commissioner(Appeals) had failed that mere non submission of Annexure II (i.e., Proforma for claiming Drawback of re-export of duty paid goods under Section 74 of the Customs Act, 1962) by itself would disentitle the substantive right of the Applicant to receive the Drawback.
- (ix) Their case is squarely covered by the decision in the case of MODI REVLON LTD Versus Commissioner of Customs (Import), Mumbai [2007: (209) ELT 252 (Tri. Mumbai)] wherein it was held-

"I agree with the above contention of the learned Advocate. It seems that there is no dispute that the appellants were entitled to drawback in respect of the re-exported goods. If the information is otherwise available and the authorities can be satisfied the identity of the re-exported goods, Drawback should not be disallowed on the procedural and technical ground that drawback shipping bills was not filed."

- (x) The Observation of the Commissioner(Appeals) in Para 8 of Order-in-Appeal sounds surprising. It was very clear from the records available that the value of the goods exported was Rs. 31,44,579/ as seen from the BRC and the drawback claimed was Rs. 5,12,380/-. This clearly proved that they



satisfied the condition relating to Rule 4 of Re-export of Imported goods (Drawback of Customs Duties) Rules, 1995.

- (xi) The Observation of the learned Commissioner(Appeals) in Para 9 of Order-in-Appeal had stated that the Commissioner(Exports) had not condoned the procedural lapse. The attempt to get condonation for the procedural lapse was an approach by the Applicant to settle the issue amicably and in favour of theirs. If condonation was not considered, then their case was to be considered by the drawback sanctioning authority on the basis of documents and the case laws cited in support of the drawback claim made. The agitation of the Applicant before the Hon'ble High Court of Madras was also against non condonation of procedural lapses in the said case. Further the drawback sanctioning authority viz., the Assistant Commissioner (Drawback) has not stated in his Order-in-Original that the Commissioner has not granted condonation of procedural infractions on the part of the Applicant. Therefore, the observations of Commissioner(Appeals) regarding condonation by Commissioner (Exports) are totally unwarranted and travelled beyond the scope of the dispute.
- (xii) The Commissioner(Appeals) had failed to appreciate that the sum and purport of Public Notice 210/98 dated 09.11.1998 was to establish and ensure the identity of both the imported and re exported goods are one and the same. The lower authority had failed to realize that non-filing of the Shipping bill in the manual mode and filing the same in EDI mode by itself would not lead to assumptions of non identity of goods and thereby leading to denial of substantive right to drawback, especially in a situation where the exporter is able to adduce proof as to the identity of the goods from other possible quarters to establish the fact the imported pump through the B/E and the exported pump through the EDI shipping bills was one and the same.
- (xiii) The Commissioner(Appeals) had incorrectly applied the ratio of the decision of the Hon'ble Single Judge in the case of Medopharm Vs Joint Secretary in W.P 21014/2011 dated 27.04.2012 by the Hon'ble High Court of Madras



which has no similarities with the appellants case and was totally different from that of the Applicant. In the case of Medopharm, export of some chemicals were involved whose identity could be ascertained only by way of drawing samples, the Applicant's goods stand on a different footing being huge pump (that are used in pumping concrete to great heights in construction industry) whose identity could be very easily established by way serial numbers embedded in the pump. Further, in the case of Medopharm they had not even filed shipping bill at the time of export, while the case of the Applicant stood on a different footing as the running serial number of the imported and re exported pump was available in the import as well as the export documents.

- (xiv) The Commissioner(Appeals) had failed to discuss the case laws cited by the Applicant and failed to reason as to how the case laws relied upon by the them were not applicable to the present set of facts.
- (xv) The Applicant is a Large Tax Payer Unit, paying crores of rupees as taxes and duties to the exchequer and not a fly by night operator. The genuine export effort should not be brought to naught by harping on technicalities.
- (xvi) The Applicant prayed that only procedural infraction of non filing of Annexure-II should not come in the way of grant of eligible drawback to a genuine export transaction made by them. Further prayed for the total setting aside of the Order-in-Appeal and consequential sanction of Drawback of Rs. 5,12,380/- and thus render justice..

4. A personal hearing in the case was held on 22.10.2018 which was attended by Shri J Balaji, Manager Accounts and Shri Swapnil Chitre, Assistant Manager(Legal) on behalf of the Applicant. However, there was a change in the Revisionary Authority, hence a final hearing was granted on 09.12.2019. Shri J Balaji, Senior Manager Accounts attended the hearing on behalf of the Applicant. The Applicant reiterated their earlier submission and submitted that re-exported after 3 months and procedural lapse of non submission of Annexure II and ARE-1 was signed by Excise officers and sought condonation. They cited few case laws.



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

6. Government observe that the Applicant vide their letter No. dated 17.08.2005 had filed a drawback claim under Section 74 of Customs Act, 1962 for the export of concrete pumps vide Shipping Bill No. 2098969 dated 30.06.2005 with a request to exempt them from filing Annexure-II application and also permit them to file drawback application without Annexure-II. The Applicant then vide their letter dated 29.2005 filed the Annexure-II along with other documents. The Department then vide letter dated 04.10.2005 informed the Applicant that though they had filed the Drawback Shipping Bill under EDI system, the examination report as required under Section 74 of the Customs Act, 1962 recorded by the proper officer of the Customs at the time of export had not been produced by the Applicant to establish the identity of goods being exported hence the claim for Drawback under Section 74 cannot be processed further.

7. Government observes that export was physically supervised as vide Annexure-C-I dated 30.06.2005, the jurisdictional Inspector of Central Excise, Poonamallee V Range, Poonamallee Division, Chennai had examined and duly countersigned signed the Examination report for Factory sealed Packers/Containers of Central Excise goods along with the ARE-1 Sl.No. 004/2005-06 dated 30.06.2005. Further, the EP copy of the Shipping Bill dated 2098969 dated 30.06.2005 shows that the consignment was not opened for physical examination by Customs and the Preventive Officer, Customs has allowed the Let Export on 01.07.2005. Government notes that the Applicant filed drawback claim under Section 74 of the Customs Act, 1962. However, none of the documents for export filed by the Applicant i.e. ARE-1, Shipping Bill, Export Invoice show that the said concrete pump was the one that was re-exported. Further, there was no mention of the import documents/details. Government finds that the Applicant had not followed the procedures laid down as per Rule 4 and 5 of Re-Export of Imported Goods (Drawback of Customs duties) Rules, 1995.




8. Government finds that the most important legal requirement under Section 74 of the Customs Act, 1962 is to establish the identity of the re-exported goods with reference to the import documents, which in the current case the Applicant failed to. Government is in agreement with the findings of the original authority and has correctly relied on the judgment of the Hon'ble High Court, Madras in W.P. No. 21014/2011 dated 27.04.2012 in the case of Medopharm Vs Joint Secretary to Govt. of India.

9. In view of the above, Government upholds the impugned Order-in-Appeal C.Cus.No. 539/2014 dated 26.03.2014 passed by the Commissioner of Customs (Appeals), Chennai.

10. The Revision Application is rejected in terms of above.

11. So, ordered.



(SEEMA ARORA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 96 /2020-CX (WZ)/ASRA/Mumbai DATED 06/07/2020.

To,
M/s SCHWING Stetter (India) Pvt. Ltd.,
F-71, SIPCOT Industrial Park,
Irungattukottai, Sriperumbudur,
Chennai -602 105.

Copy to:

- 1) Commissioner of Customs (Appeals), Chennai
- 2) The Commissioner of Customs (Sea Port-Export, Custom House, 60, Rajaji Salai, Chennai 600 001.
- 3) Sr. P.S. to AS (RA), Mumbai
- 4) Guard file
- 5) Spare Copy.

ATTESTED

B. LOKANATHA REDDY
Deputy Commissioner (R.A.)

