

SPEED POST



F. No. 380/161/SZ/DBK/2016-R.A.
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 12/11/23....

Order No. 03 / 23-Cus dated 12.01.2023 of the Government of India, passed by Sh. Sandeep Prakash, 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. C. Cus I No. 241/2016 dated 27.05.2016, passed by Commissioner of Customs (Appeals-I), Chennai.

APPLICANT : The Pr. Commissioner of Custom, Chennai-VII, Air Cargo Complex, Chennai.

RESPONDENT : M/s GVK Gautami Power Ltd., Secunderabad.

ORDER

A Revision Application No. 380/161/SZ/DBK/2016-RA dated 10.10.2016 has been filed by the Pr. Commissioner of Customs, Air Cargo Complex, Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal C. Cus I No. 241/2016 dated 27.05.2016, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, on an appeal filed by M/s GVK Gautami Power Ltd., Secunderabad (hereinafter referred to as the Respondent), set aside the Order-in-Original No. 76/2016 dated 06.02.2016, passed by the Deputy Commissioner of Customs (Drawback) Air Cargo Complex, Chennai, to the extent it partly rejected the drawback claim filed by the Respondents herein.

2. Brief facts of the case are that the Respondents herein had imported components for Power Generation Equipment i.e., Gas Turbine, under Bill of Entry No. 7598237 dated 06.08.2012, on payment of Customs duty. After clearance, the Respondents found that 63 pieces of turbine blades so imported were not as per their requirements and these were re-exported to the overseas supplier, under Shipping Bill No. 9004732 dated 21.03.2013, under a claim of drawback in terms of Section 74 of the Customs Act, 1962. The goods were examined at the time of re-export and were found to be in original packing and their identity was established to the satisfaction of the Deputy Commissioner of Customs (Exports). However, the examination report stated that the goods were taken into use after import. Pursuant to this examination report, the original authority sanctioned the drawback amount of Rs. 2,23,09,1341/-, against the total duty paid on the imported goods, i.e., Rs. 2,97,45,512.60. In the appeal filed by the Respondents herein, the Commissioner (Appeals) held that on the basis of documentary evidence the goods were not used and ordered that the differential drawback may be paid.

3. The revision application has been filed, mainly, on the grounds that the Commissioner (Appeals) has allowed the claim of the appellant, i.e., Respondents herein on the basis of new evidence produced at the appellate stage when the goods had already been re-exported and were not available for examination; that, in the present case, the proper officer, i.e., Deputy Commissioner of Customs (Exports) has clearly stated that the goods are in original packing and have been taken into use after importation; that, therefore, drawback has been correctly paid @ 75% of the Customs duty paid at the stage of import; that the Respondent herein or the authorized Customs broker had not contested the issue at the time of examination when the goods were available for getting expert opinion; that in terms of Rules 4 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995, the Commissioner of Customs, if he is satisfied that the exporter or authorized agent has for reasons beyond his control failed to comply with the

provisions thereof he may after considering the representation exempt such exporter or his authorized agent from the provisions of this clause; that, therefore, if the Respondent or the authorized agent had any grievance against the examination report, they should have made a representation to the Commissioner in terms of Rule 4 *ibid*; that instead the Respondents had after a lapse of 19 months from the date of exportation claimed that the subject goods were not used by them after importation; that the Respondents had also failed to file any appeal, under Section 128, against the examination report within the 60 days before the Commissioner (Appeals); and that, therefore, the appeal could not have been allowed by the Commissioner (Appeals). A written reply dated 24.01.2017 has been filed by the Respondents herein. Respondents have also filed written submissions dated 16.12.2022 by email.

4. Personal hearing in the matter was held on 16.12.2022, in virtual mode. Sh. Arvind Kumar, Appraiser appeared for the Applicant department and Ms. S. Thenmozhi, Advocate appeared for the Respondent. Both sides made initial submissions. However, while proceeding with the hearing, it was noticed that several relevant documents were not on record. Therefore, both the parties were advised to file requisite documents and the hearing was adjourned to be held on 03.01.2023. In the hearing held on 03.01.2023, Sh. Arvind Kumar, AO reiterated the contents of the RA. Ms. S. Themmozhi, Advocate reiterated the Written Reply filed earlier. She stated that the plant was closed at the relevant time due to stoppage of gas supply and, therefore, the subject blades, which had been imported for overhaul, remained unused. She also undertook to file a chronological, factual summary by 06.01.2023. Pursuant to the hearing held on 03.01.2023, the Respondents filed written submissions on facts by e-mail on 06.01.2023. The department also filed short submissions by e-mail on 06.01.2023.

5.1 Government has carefully examined the matter. At the outset, certain preliminary issues raised by the Applicant department need to be addressed. It has been contended that the Applicant should have resorted to the remedies available under Rule 4 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 and appeal under Section 128, in case they were aggrieved with the examination report of the Deputy Commissioner of Customs (Exports).

5.2 It is to be observed that the Applicants herein had made a claim of drawback under Section 74 *ibid*, which claim was to be decided by the Assistant/ Deputy Commissioner of Customs (Drawback). The Board has, *vide* Circular No. 46/2011-Customs dated 20.10.2011, clarified that this may require examination and verification of various parameters, including but not limited to physical properties, weight, marks, and numbers, test reports, if any, documentary evidence *vis-à-vis* import documents etc.. Therefore, examination report is not the only document that the Assistant/Deputy Commissioner of Customs has to take into consideration while deciding the claim. Board has further

clarified that all claims of drawback under Section 74 ibid, have to be decided by way of speaking order after following the principles of natural justice. In the present case, the matter was, accordingly, decided by the original authority. In this process, the Respondents herein also made submissions regarding 'determination of use', which were eventually not accepted by the original authority. Therefore, any appeal to Commissioner (Appeals) at the stage of examination report itself would have been premature.

5.3 As far as the Rule 4 ibid is concerned, the proviso to clause (a) of the said Rule has been relied upon by the department to contend that if there was a grievance against the examination report, they could have made a representation to the Commissioner of Customs. The said Rule 4 is reproduced as under:

"Rule 4. Statements/Declarations to be made on exports other than by post.-

In the case of exports other than by post, the exporter shall at the time of export of the goods-

(a) state on the shipping bill or bill of export, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback under Section 74 and make a declaration on the relevant shipping bill or bill of export that-

(i) the export is being made under a claim for drawback under section 74 of the Customs Act;

(ii) that the duties of customs were paid on the goods imported;

(iii) that the goods imported were not taken into to use after importation;

OR

(iii) that the goods were taken in use;

Provided that if the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, is satisfied that the exporter or his authorized agent has, for reasons beyond his control, failed to comply with the provisions of this clause, he may, after considering the representation, if any, made by the such exporter or his authorized agent, and for the reasons to be recorded, exempt such exporter or his authorized agent from the provisions of this clause.

(b) furnish to the proper officer of customs, copy of the Bill of Entry or any other prescribed documents against which goods were cleared on importation, import invoice, documentary evidence of payment of duty, export invoice and packing list and permission from Reserve Bank of India to re-export the goods, wherever necessary."

On a plain reading, it is apparent that as per clause (a), certain statements/declarations have to be made by the exporter. The declaration pertinent to the present case is as per sub-clause (iii) of clause (a), i.e., whether the goods were taken into use or not. The

Respondent herein had made the requisite declaration and claimed that the goods were not taken into use. Requisite declaration having been made, there is no question of seeking exemption therefrom by making a representation to the Commissioner. Therefore, proviso to clause (a) of Rule 4 ibid had no applicability in the nature of present dispute.

5.4 In view of the above, the Government does not find any merit in the subject contentions of the Applicant department.

6. On merits, it has been explained that the turbine blades in question had been imported for the Gas Turbine Power Plant of the Respondents herein, which had commenced commercial operation from June 2009. However, from November, 2010 the production started falling due to the gas supply cuts pursuant to the orders of the Government of India. The supply was completely cut off from March, 2013. The Gas Turbines require periodical inspection and overhaul. Since the plant had commenced operation in 2009, Type-C inspection, was due in 2013. As such, the Respondents had imported goods, in dispute, as back-up for replacement as and when the overhaul is conducted and replacement is required. However, the overhaul and C-inspection could not be carried out since the estimated operating hours had not reached the recommended 36,000 hours due to gas supply shortage and in March, 2013 plant itself was shut down. In the meantime, in November, 2012, the Respondents became aware that the imported blades had certain manufacturing defects regarding which many users had expressed concern in a user conference held at Sydney. This led to exchange of several emails between the Respondents and the foreign supplier and the foreign supplier agreed to replace/exchange the imported blades with the newer version and asked the Respondents to return the imported blades by the end of March, 2013. Accordingly, the blades were re-exported on 16.03.2013. It has also been brought out and noted by the Commissioner (Appeals) that the foreign supplier has, vide letter dated 26.08.2015, addressed to the Respondents herein confirmed that the blades exported by the Respondents and received by the foreign supplier were new and not put into use. Further, it is to be observed that the examination report itself records that the goods were in original packing. In the background of the correspondence exchanged and the documents placed on records, it is apparent that the Type-C inspection and overhaul did not take place and plant itself had been shut down in March, 2013. Further, the Respondents and the foreign supplier had been exchanging correspondence for replacement of the imported blades by newer versions from November, 2012 itself and the re-export was, accordingly, made in March, 2013. This position coupled with the fact that the goods were found to be in the original packing and the subsequent affirmation by the foreign supplier that the goods received by them on re-export were not put to use, substantiates the contention of the Respondents herein that the goods were not taken into use. As such, the Government does not find any infirmity in the impugned Order-in-Appeal. While holding so, the Government also notes that the documents relied upon by the Commissioner (Appeals) were also produced before

the original authority, which is evident from the Order-in-Original itself. This also includes the letter dated 26.08.2015 of the foreign supplier confirming that the goods were not put into use. Therefore, it is incorrect of the Applicant department to allege that the Commissioner (Appeals) had allowed the claim of the Respondent on the basis of new evidence produced at the appellate stage.

7. In view of the above, the Revision Application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India


The Pr. Commissioner of Customs,
Chennai-VII, New Custom
House, Air Cargo Complex,
Meenambakkam,
Chennai- 600016.

Order No. 03 /23-Cus dated 12.01.2023

Copy to:-

1. M/s. GVK Gautami Power Ltd., Paigah House, 156-159, Sardar Patel Road, Secunderabad-500003, Andhra Pradesh.
2. The Commissioner Customs (Appeals-I), 60, Rajaji Salai, Custom House, Chennai-600001.
3. Smt. S. Thenmozhi, Advocate, No. 12 (Old No. 22) "V"-Block, 14th Street, Anna Nagar, Chennai-600040.
4. P.S to A.S (RA)
5. Guard File
6. Spare Copy
7. Notice Board

ATTESTED


अश्वनी कुमार लो / Ashwani Kumar Lau
अधीक्षक / Superintendent (R.A. Unit)
राजस्व विभाग / Department of Revenue
वित्त विभाग / Ministry of Finance
Room No. 006, 6th Floor, B-Wing
14, Hudco Vicheta Building, New Delhi-110003