

SPEED POST



F. Nos. 372/68/DBK/2018-RA
372/69/DBK/2018-RA
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 27/7/21.

Order No. 136-137/21-Cus dated 26/07 2021 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Custom Act, 1962.

- Subject : Revision Applications under Section 129 DD of the Customs Act 1962 against the Orders-in-Appeal Nos. KOL/CUS(CCP)AA/1399/2018 & KOL/CUS(CCP)AA/1398/2018 both dated 31-07.2018 passed by the Commissioner of Customs (Appeals), Kolkata.
- Applicant : 1. M/s Radhagovinda Fabrics Pvt. Ltd., Kolkata.
2. M/s R.D. Fashion, Kolkata.
- Respondent : The Commissioner of Customs (Preventive), Kolkata.
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ORDER

The Revision Applications, bearing nos. 372/68/DBK/2018-RA & 372/69/DBK/2018-RA both dated 08.11.2018, have been filed by Sh. Prosanto Saha as Director on behalf of M/s Radhagovinda Fabrics Pvt. Ltd., Kolkata (hereinafter referred to as the Applicant-1) and as Proprietor of M/s R.D. Fashion, Kolkata (hereinafter referred to as the Applicant-2) against the Orders-in-Appeal Nos. KOL/CUS(CCP)AA/1399/2018 & KOL/CUS(CCP)AA/1398/2018, both dated 31-07.2018, passed by the Commissioner (Appeals), Kolkata. The Commissioner (Appeals) has rejected the appeals filed by the Applicants herein for failing to make pre-deposit in terms of Section 129E of the Customs Act, 1962.

2. Briefly stated, in these cases, the original authority confirmed the demands of duty drawback amounting to Rs. 10,29,62,276/- (in case of Applicant-1) and Rs. 10,53,18,242/- (in case of Applicant - 2), on account of non-realization of export proceeds, in terms of Rule 16A of the Customs Central Excise Duties and Service Tax Drawback Rules 1995. The Commissioner (Appeals) has rejected the appeals for non-compliance with the requirements of Section 129E in as much as the Applicants failed to make requisite pre-deposit.

3. The revision applications have been filed, mainly, on the grounds that the matter relates to drawback and is not related to the demand of duty short paid or excess refund of duty. Therefore, the question of mandatory pre-deposit under Section 129E does not arise.

4. Personal hearing in the matter was held, in virtual mode, on 23.07.2021. Ms. Debi Parbat, Advocate appeared for the Applicants in both the cases, wherein the issue involved is same. Ms. Parbat reiterated the contents of RA. No one appeared for the respondent department and no request for adjournment has been received. However, the department has filed the detailed parawise comments, vide letter dated 30.06.2021. Therefore, the matter is taken up for final disposal based on records.

5. The Government has carefully examined the matter. The instants RAs have been filed on 08.11.2018 whereas the impugned Orders-in-Appeal were received by both the Applicants on 06.08.2018. Thus, the RAs have been filed beyond the normal period of limitation of 03 months as provided under Section 129DD(2) of the Customs Act. No applications for condonation of delay, explaining the reasons for delay, have been filed, even though the Applicants were advised to do so vide letters dated 26.12.2018. Hence, the RAs are liable to be dismissed as barred by limitation.

6.1 On merits, the issue involved in both of these revision applications is whether pre-deposit is required to be made in terms of Section 129E of the Customs Act, 1962 while filing appeals before the Commissioner (Appeals) in the cases related to demand and recovery of drawback.

6.2 Section 129E of the Customs Act, 1962 reads as under:

"Section 129E. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. – The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal, -

- (i) under sub-section (1) of Section 128, unless the appellant has deposited seven and a half percent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of customs lower in rank than the Principal Commissioner of Customs or Commissioner of Customs;*
- (ii) against the decision or order referred to in clause (a) of sub-section (1) of Section 129A, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;*
- (iii) against the decision or order referred to in clause (b) of sub-section (1) of section 129A, unless the appellant has deposited ten per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against :*

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014."

The drawback claims, herein, have been made under the Drawback Rules of 1995 wherein the drawback is defined under Rule 2(a) as: "(a) "drawback" in relation to

any goods manufactured in India and exported, means the rebate of duty or tax, as the case may be, chargeable on any imported materials or excisable materials used or taxable services used as input services in the manufacture of such goods;". Thus, it is apparent that drawback is nothing but the rebate or refund of duty or tax chargeable on the imported materials and excisable materials used in the manufacture of goods on taxable services. As such, any demand of drawback is nothing but a demand of duty or tax chargeable on the materials used in the manufacture of exported goods.

6.3 Further, Section 129E was inserted in the Customs Act, with effect from 06.08.2014. Immediately thereafter, several representations were made to the Board representing that the drawback is not a duty, and hence, Section 129E would not apply to these cases. The position was clarified by the Board, vide Circular No. 993/17/2014-CX dated 05.01.2015, as under:

"5. *Several representations have been received by the Board stating that some Commissioners (Appeals) have been insisting on pre-deposit in cases of demand of erroneous drawback granted. It has been represented that drawback is not a duty and hence the amended provisions would not apply to such cases.*

6. *The issue has been examined. Drawback, like rebate in Central Excise, is refund of duty suffered on the export goods. Section 129E stipulates that appellant filing appeal before the Commissioner (Appeals) shall pay 7.5% of the duty demanded where duty and penalty are in dispute. Accordingly, it is clarified that mandatory pre-deposit would be payable in cases of demand of drawback as the new section 129E would apply to such cases."*

6.4 The contemporaneous exposition of law is a well recognised principle of interpretation of statutes. In the case of *Oswal Agro Mills Ltd. vs. Collector of Central Excise* {1993 (66) ELT 37 (SC)}, the Hon'ble Supreme Court has observed that "*But the contemporaneous construction placed by administrative or executive officers charged with executing the statute, although not controlling, is nevertheless entitled to considerable weight as highly persuasive.*" Similarly, in the case of *Spentex Industries Ltd. vs. Commissioner of Central Excise* {2015 (324) ELT 686 (SC)}, the Hon'ble Supreme Court has relied upon the judgment in *Desh Bandhu Gupta* {(1979) 3 SLR 373} wherein the Apex Court has cited with approval the judgment of the Hon'ble Calcutta High Court in the case of *Mathura Mohan Saha vs. Ram Kumar Saha* ILR 43 Cal. 790 : (AIR 1916 Cal. 136) wherein it has been held that "*It is a well-settled principle of construction that Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it.*" Similar observations have been made by the Hon'ble Allahabad High Court in the case of *Shahnaz Ayurvedics vs. Commissioner of Central Excise* {2014 (173) ELT 337 (All.)} wherein the Hon'ble High Court has held that "*Circulars of the Board are binding on the Tax department, they are in the nature of contemporanea expositio furnishing legitimate aid the construction to the relevant provisions.*"

6.5. In view of the above, there is no doubt that the provisions of 129E of the Customs Act, 1962 are applicable to the cases relating to the demand and recovery

of drawback. Therefore, the Government finds no infirmity in the impugned Order-in-Appeal.

7. The revision applications are rejected for the reasons brought out hereinabove.



(Sandeep Prakash)

Additional Secretary to the Government of India

1. M/s. Radhagovind Fabrics Pvt. Ltd.,
31/1, Chatawalla Gali, 3rd Floor,
Room No. – 302, Kolkata – 700012
2. M/s. R.D. Fashion,
31/1, Chatawalla Gali, 3rd Floor,
Room No. – 302, Kolkata – 700012.

Order No. 136-137/21-Cus dated 26/07/2021

Copy to:

1. The Commissioner of Customs (Preventive), Customs House, 3rd Floor, 15/1, Strand Road, Kolkata- 700001.
2. The Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700001.
3. Ms. Debi Parbat Das, Advocate
4. PA to AS(RA)
5. Guard File
6. Spare Copy

ATTESTED



आशीष तिवारी / ASHISH TIWARI, J
सहायक आयुक्त / Assistant Commissioner
केन्द्रीय वस्तु एवं सेवा कर, केन्द्रीय उत्पाद एवं सीमा शुल्क
CGST, Central Excise & Customs
राजस्व विभाग / Department of Revenue
वित्त मंत्रालय / Ministry of Finance
भारत सरकार / Government of India
नई दिल्ली / New Delhi