

SPEED POST



F.No. 380/20/DBK/2017-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...13/9/21

Order No. 174/21-Cus dated 10/09/2021 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 Application filed under section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. CC (A) Cus/ D-II/ ICD/ TKD/Exp/88-90/2017 dated 10.03.2017, passed by the Commissioner of Customs (Appeals), New Delhi.

Applicant : Commissioner of Customs (Exports), Tughlakabad, Delhi.

Respondent : M/s Fancy Images, Noida.

ORDER

A Revision Application No. 380/20/DBK/2017-RA dated 21.06.2017 has been filed by the Commissioner of Customs (Exports), Tughlakabad, New Delhi-110020 (hereinafter referred to as the Applicant) against the Order No. CC (A) Cus/ D-II/ ICD/ TKD/Exp/88-90/2017 dated 10.03.2017, passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, T-3, Delhi-110037. Commissioner (Appeals), vide the above mentioned Order-in-Appeal, has allowed the appeal of M/s Fancy Images, Noida (hereinafter referred to as the Respondent) against the Order-in-Original no. 05/2016 dated 28.01.2016, passed by the Joint Commissioner of Customs (Export), Tughlakabad, New Delhi, vide which the Joint Commissioner had confirmed the demand and recovery of the already disbursed drawback amount of Rs. 6,91,048/-, under the provisions of Rule 16 of the Customs & Central Excise Duties Drawback Rules, 1995 alongwith interest as per Section 75A (2) of the Customs Act, 1962.

2. The brief facts of the case are that an intelligence was received by DRI, Delhi that some Export Oriented Units (EOUs) had adopted a modus operandi for availing simultaneous export benefits under different Export Promotion Schemes from different authorities/departments by resorting to mis-declaration. The Respondent had obtained license from SEZ, Noida and also their premises was licensed as Private Customs Bonded Warehouse under Section 58 of the Customs Act, 1962. Further, they had declared themselves as an operational EOU to the Income Tax authorities to avail exemption from payment of Income Tax under Section 10 B of the Income Tax Act, 1961. However, they had suppressed their identity of being an EOU to the Customs authorities and claimed duty drawback on the exported goods. Based on the investigations conducted by the DRI, a show cause notice dated 23.12.2014 was issued in respect of exports made through ICD, Tughlakabad. The Joint Commissioner of Customs (Exports), Tughlakabad, confirmed the demand and recovery of already disbursed drawback amounts, vide the aforesaid OIO dated 28.01.2016. Aggrieved, the Respondents herein filed an appeal before the

Commissioner (Appeals) who vide the OIA dated 10.03.2017 set aside the OIO dated 28.01.2016. The Commissioner (Appeals), relied upon the judgment of Tribunal in the Respondent's own earlier case {2017-TIOL-410-CESTAT-DEL} to allow the appeal.

3. The grounds of revision application are that All Industry rate of drawback is not admissible to the 100% EOU in terms of notification no. 68/2007-Cus (NT) dated 26.07.2007 etc.; that the respondent failed to disclose on the relevant shipping bills their 100% EOU status; that facts of the instant case are different from those in Karle International (case) {2012 (281) ELT 486 (Kar.)}; and that as per the relevant Export and Import Policy and the Foreign Trade Policy drawback is not admissible to an 100% EOU.

4. Cross objections dated 05.08.2017, written submissions dated 19.09.2019 and further written submissions dated 14.08.2021 have been filed by the Respondent. It has been contended that in the case of Karle International it has been decided that if the export goods are manufactured out of duty paid raw material a 100% EOU is eligible for AIR DBK since notification no 68/2007-Cus (NT) cannot override the provisions of Section 75 of the Customs Act; that the exports were made out of duty paid raw material; that the ratio decidendi of Karle International is squarely applicable to the case in hand; that the 100% EOUs are not debarred from duty drawback completely; and that in their own earlier case, the Tribunal has set aside the demand vide Order dated 03.01.2017 {2017-TIOL-410-CESTAT-DEL}. In the further submissions dated 14.08.2021, it has been brought out that the decision in Karle International has been followed by the Hon'ble Madras High Court in CBEC vs. KG Denim Ltd. {2020 (371) ELTd 646 (Mad.)}; that since the goods have been manufactured out of duty paid raw material, the matter is revenue neutral [UOI vs. Zenith Spinnes {2015 (326) ELT 23 (SC)}]; and that the matter may be decided at the earliest in view of Board's Circular F.No. 201/01/2014-CX dated 26.06.2014 issued in respect of need to follow judicial discipline.

5. Personal hearing, in virtual mode, was held on 06.09.2021. Sh. D.K. Chaudhary, Superintendent, appeared on behalf of the Applicant and submitted that the judgment in Karle International is not applicable in the facts of the case. He further stated that though the raw material was duty paid the machines etc. used were imported duty free. Sh. Alok Agrawal, Advocate, attended the hearing on behalf of the Respondent. Sh. Alok Agarwal, reiterated the replies filed earlier and submitted that the ratio of Karle International is applicable as the duty paid raw material was used.

6.1 The Government has carefully examined the matter. The issue that is required to be decided herein is that whether the drawback at All Industry rate is admissible in respect of the goods exported by an 100% EOU unit, which are manufactured out of duty paid raw material.

6.2 Before proceeding further, it would be appropriate to highlight the following facts that are salient to the determination of issue involved:

- (i) A LOP dated 21.07.2003 was issued to the Respondent for conversion of existing DTA Unit under EOU Scheme. This LOP was valid for 05 years and expired on 13.06.2008.
- (ii) A Licence for private bonded warehouse and in bond manufacture sanction order was issued on 31.01.2005. The unit started commercial production w.e.f. 01.02.2005.
- (iii) The subject exports were made during 2006-07 to 2010-11.
- (iv) The Respondent had used duty free raw material to export goods under free shipping bills whereas export goods manufactured out of duty paid raw material were exported under claim of Drawback/DEPB benefits.
- (v) Commissioner (Appeals) has held that the Respondent had neither taken any credit on the inputs nor any credit on capital goods in relation to export of goods on which drawback was claimed.

Thus, there is no doubt that the subject exports were made by the Respondent by using duty paid raw material for manufacture of exported goods. The contention of the Applicant department is that All Industry rate of drawback is not admissible to an EOU in view of the notification no. 26/2003-Cus (NT) and its successor notifications. On the other hand, the Respondent has defended its case not on the ground that they were not an EOU but on the ground that the export goods were manufactured out of the duty paid raw material and, hence, they are eligible for drawback irrespective of their EOU status.

6.3 It is observed that the Commissioner (Appeals) has heavily relied upon the judgment of Tribunal in the Respondent's own earlier case to decide the present case in favour of the Respondent herein. The Tribunal's judgment is in turn based on the judgment of Hon'ble Karnataka High Court in Karle International, on the other hand, the department has contended that the Karle International case is in respect of the DTA exporter getting the goods manufactured by EOU on job work basis wherein the Hon'ble Karnataka High Court held that the DTA exporter was entitled to Duty Drawback even if such goods were directly exported from the premises of such EOU. Hence, the ratio of Karle International is not applicable in the present case. The Government observes that the ratio decidendi of the judgment in Karle International is contained in para 14 thereof wherein it has been held that *"Under Section 75, to be eligible for Duty Drawback, all that the exporter has to satisfy is that the goods are manufactured, processed or on which any operation has been carried out in India. It is immaterial where the said manufacturing or processing has taken place. It may be in his Unit or it may be in EOU Unit. Guiding principle is, it should have been manufactured or processed in India and exported."* Further, in Karle International also the main ground to deny the claim was based on notification no. 67/98-Cus (NT) i.e. the predecessor notification of the notifications involved herein. The Hon'ble High Court, however, repelled this argument and held that the rights conferred in the statute, i.e., under Section 75 of the Customs Act, 1962 cannot be taken away by issuing circulars. The revenue challenged this order before

the Apex Court [*Commissioner v. Karle International* - 2015 (323) ELT A.74 (S.C.)], which was rejected as follows:-

"Admittedly, the decision of the Madras High Court in the case of the respondent-assessee itself, on the same issue has not been challenged by the Revenue. In that view of the matter, we decline to entertain these Special Leave Petitions which are dismissed accordingly."

The review petitions were also dismissed by the Apex Court [2017 (348) ELT A27 (SC)].

6.4 As pointed out by the Hon'ble Supreme Court, while rejecting the SLPs in *Karle International*, the Hon'ble Madras High Court had in an earlier case of the same assessee taken an identical view, which was not even challenged by the Revenue. In this case reported as *Commissioner of Customs, Tuticorin vs. LT Karle & Co.* {2007 (207) ELT 358 (Mad.)}, the Hon'ble Madras High Court had held that a drawback claim on duties suffered on inputs cannot be denied on the ground that goods were manufactured by 100% EOU.

6.5 The Government further observes that in the case of *CBEC vs. KG Denim Ltd.* (supra), the Hon'ble Madras High Court has followed the judgments in *Karle International* (supra) and the *LT Karle & Co.* (supra) and held that the right vested by statutory provisions cannot be taken away by Circulars issued from time to time.

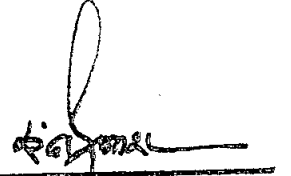
6.6 To summarise, the dictum of the above cases is that:

- (i) To be eligible for drawback, the exporter has to satisfy that the goods are manufactured in India and it is immaterial where the said manufacturing has taken place.
- (ii) The exporter cannot be denied AIR DBK, if he is satisfied with the same.
- (iii) The rights conferred under Section 75 cannot be taken away by Circulars etc.

In the present case, it is admitted that the exported goods were manufactured in India out of duty paid raw material. Therefore, the benefit of AIR drawback under

Section 75 cannot be denied only because these goods were manufactured and exported by a 100% EOU. The contention of the department that though raw material used was duty paid, the machines used were imported duty free also has no legs to stand as in the case of Karle International, the goods were got manufactured by a DTA unit from a functional 100% EOU unit, which evidently would have used duty free machines to manufacture the export goods.

7. In view of above discussions, Government does not find any reason to interfere with the order of the Commissioner (Appeals) and the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India


Commissioner of Customs (Exports),
ICD Tughlakabad,
New Delhi-110020.

Order No. 174/21-Cus dated 10/09/2021

Copy to:

1. M/s Fancy Images, A-88, Sector-V, Gautam Budh Nagar, Noida
2. Commissioner of Customs (Appeals), New Custom House, Near IGI Airport, Delhi-110037.
3. Joint Commissioner, ICD (Export), Tughlakabad, Delhi-110020.
4. PS to AS(RA)
5. Guard File.
6. Spare Copy.

Attested


(लक्ष्मी राघवन)
(LAKSHMI RAGHAVAN)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi