

SPEED POST



F. No. 375/26/DBK/2021-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..20/7/22

Order No. 235/ 22-Cus dated 20-7-2022 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. CC(A)/Cus/D-I/Exp/NCH/1478/2020-21, dated 17.02.2021, passed by Commissioner of Customs (Appeals), New Custom House, New Delhi.

APPLICANT : M/s. SMG India, New Delhi (through its proprietor Sh. Parag Garg).

RESPONDENT : The Commissioner of Customs (Export), Air Cargo, New Delhi.

ORDER

A Revision Application No.375/26/DBK/2021-RA dated 01.06.2021 has been filed by M/s. SMG India, New Delhi (through its proprietor Sh. Parag Garg) (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)/Cus D-I/Exp/NCH/1478/2020-21, dated 17.02.2021, passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi. The Commissioner (Appeals), vide the impugned Order-in-Appeal, has rejected the appeal of the Applicant, against the Order in Original No. SKM/JC/ACE/126/2018 dated 23.03.2018, passed by the Joint Commissioner of Customs, Air Cargo, Export Commissionerate, New Delhi.

2. Brief facts of the case are that, on the basis of an intelligence from the Directorate of Revenue Intelligence, to the effect that the Applicant was engaged in the fraudulent export of leather goods to certain consignees in Russia under the Indo-Russian Rupee Rouble Agreement, an investigation was initiated against the Applicant. On investigation, it was alleged by the Respondent department that the goods exported never reached the final destination, i.e., Russia. Further, on inquiry, it was found that the amount said to have been received as export proceeds against the impugned exports from the Russian consignees was returned to the same Russian consignees from whom it was received. Accordingly, a demand cum show cause notice dated 03.01.2017 was issued to the Applicant for the recovery of drawback availed amount of Rs. 8,01,789/- along with interest, in terms of Rule 16/16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995; read with the provisions of Section 75(1) of the Customs Act,

1962, which was confirmed by the Joint Commissioner of Customs, Air Cargo, Export Commissionerate, vide the above-mentioned Order-in-Original dated 23.03.2018. Penalty of Rs. 3,00,000/- was also imposed on the Applicant. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which was rejected.

3. The revision application has been filed, mainly, on the ground that the Show Cause Notice was time barred as the drawback had been demanded for the period 2000 to 2005 and the Show Cause Notice was issued in 2017; that the show cause notice is void ab-initio as the Joint Commissioner of Customs, Air Cargo Export, New Custom House, New Delhi is not the proper officer to issue the said show cause notice; that the adequate opportunities were not provided at the time of passing the OIO which is against the principles of natural justice; that BRCs were received and no evidence of returning back the money to the foreign buyers; and that the penalty cannot be imposed under Section 114 (iii) of the Customs Act, 1962.

4. Personal hearing, in virtual mode, was held on 15.07.2022. Sh. A.K. Seth, Advocate appeared for the Applicant and reiterated the contents of the revision application. He highlighted that:

- i) The goods were exported in 2003 & 2004 whereas the show cause notice was issued in 2017, i.e., with an unreasonable delay.
- ii) The Consulate at Dubai has confirmed that goods were sent from Dubai to Moscow.

- iii) No paper trail as evidence has been produced to substantiate return of money received as remittance.
- iv) The goods are not liable to confiscation under Section 113 (d) & (i) of the Customs Act, 1962 and hence penalty is not imposable under Section 114.
- v) This not being a case under section 123, onus to prove is on the department.

None appeared on behalf of the Respondent department nor any request for adjournment has been received. Therefore, the matter is taken up for disposal based on records.

5.1 The Government has examined the matter carefully. At the outset, three preliminary issues raised by the Applicant are taken up for consideration.

5.2 The Applicant has contended that the show cause notice dated 03.01.2017 was issued by the Joint Commissioner of Customs, who is not the competent authority to issue such a notice under the provisions of Rule 16A of the Rules *ibid*. This contention has been raised as, in terms of the said Rule 16A, the Assistant Commissioner or the Deputy Commissioner of Customs, shall cause notice to be issued to the exporter where an amount of Drawback has been paid to the exporter but the sale proceeds in respect of exports goods have not been realised within the period allowed under the Foreign Exchange Regulations Act, 1999. However, the Government finds that, as per Section 5(2) of the Customs Act, 1962, an officer of Customs may exercise the powers and discharge

the duties conferred or imposed on any other officer of Customs who is subordinate to him. Therefore, there is no infirmity in the Joint Commissioner of Customs issuing a show cause notice under Rule 16A, which show cause notice as per said Rule could have been issued by the Assistant Commissioner of Customs, an officer subordinate to the Joint Commissioner.

5.3 Another contention of the Applicant is that the show cause notice is time barred. The show cause notice in the instant case has been issued under Rule 16 and 16A *ibid*. Both the Rules do not prescribe any period of limitation. In the case of *State of Punjab vs. Bhatinda District Cooperative Milk P. Union Ltd.* {2007 (217) ELT 325 (SC)}, the Hon'ble Supreme Court has laid down the law, in this regard, in following manner. "17. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant facts." Similarly, in the case of *Government of India vs. Citedal Fine Pharmaceuticals* {1989 (42) ELT 515 (SC)}, the Hon'ble Supreme Court has held that "In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable period, would depend upon the facts of each case. Whenever a question regarding the inordinate delay in issuance of notice of demand is raised, it would be open to the assessee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in facts and circumstances of the case notice of demand for recovery was made within reasonable period. No hard and fast rule can be laid down in this regard as the

determination of the question will depend upon the facts of each case." The Government finds that in the case of Drawback, the Drawback is sanctioned and paid to the exporter even before the export proceeds are realised. In terms of Rules 16A, it is thereafter the obligation of the exporter to submit proof of realisation of the proceeds within the time period specified in this behalf. Further, in the present case, the authorities had to conduct cross border investigations involving two others sovereign territories. Therefore, the delay in issuance of the show cause notice does not appear to be inordinate or unreasonable. The judgment of Hon'ble Gujarat High Court, in the case of Padmini Exports vs. Union of India [2012 (284) ELT 490 (Guj)], has been cited by the Applicants in support of their case. It is observed that the said judgment relates to a case under Rule 16 whereas in the present case the show cause notice issued under Rule 16 as well as under Rule 16A. Further, the judgment in the case of Padmini Export has been passed in the facts of that case.

5.4 It is also the contention of the Applicants that adequate opportunities were not provided to them by the original authority before deciding the case. It is observed that the show-cause notice in the instant case was issued on 03.01.2017, which was disposed of by the original authority, vide order dated 23.03.2018, i.e., after about 14½ months. The Applicant did not file any reply to the show cause notice. Further, three opportunities for personal hearing were granted by the original authority but the Applicant did not avail of the opportunity for personal hearing. Thus, it is apparent that the original authority had to decide the matter ex-parte as the Applicants failed to defend themselves in the

adjudication proceedings despite adequate opportunities. In this background, the present contention of the Applicant has no merits.

6.1 On merits, it is the contention of the department that the export goods never reached their final destination, i.e., Moscow in Russian Federation. It is further contended that the money said to have been received as export proceeds was immediately thereafter returned. On the other hand, the Applicant has contended that as per the investigations caused by the department at Dubai, the goods which had reached Dubai from New Delhi were consigned from Dubai to Moscow. It is also contended that while the export proceeds were received by them as per the Bank records, return of such proceeds is not supported by any documentary evidence. Upon careful examination of case records and the orders of the lower authorities, the Government observes that:

- (i) The Applicants had produced copies of Airway Bills and made declaration on the Shipping Bills showing shipment to Moscow. However, upon inquiry, the Air India, through whom the export goods were shipped, informed that all shipments were actually consigned to Dubai and not to Moscow. Therefore, the Airway Bills submitted which show the final destination as Moscow and the declaration made on the Shipping Bills are contrary to the information provided by the Air India. Though in the inquiries caused at Dubai, the agent at Dubai confirmed that the goods were shipped to Moscow from Dubai, however, no corroborative evidence has been submitted to substantiate that the goods shipped to Moscow actually pertained to the Applicant herein.

- (ii) A letter dated 06.11.2007 issued by the Head of Central Enforcement Department, Russian Federation has been placed on record by the department which confirms that the deliveries of export goods never took place on the territory of Russian Federation. It has also been confirmed therein that the money against the contracts was sent to Indian exporters as pre-payment for the delivery of goods and returned as deliveries never took place. Therefore, it is evident that the export goods never reached Russian Federation and the payments made against the exports were pre-payments or advance payments, which were returned by the exporter (i.e., the Applicant) as the deliveries never took place.

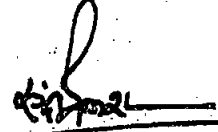
6.2 In the above background, it is apparent that the Applicants placed on record Airway Bills and made declarations on the shipping bills showing destination as Moscow whereas, upon investigations, it was found that the goods were consigned to Dubai. A lot of emphasis has been placed by the Applicants on the statement made by the agent at Dubai to the effect that the goods were subsequently consigned to Moscow, however, it is on record that this subsequent shipment to Moscow could not be proved on the basis of documents. On the other hand, the department has placed on record the confirmation from the Government of Russian Federation that the deliveries to the Russian consignees never took place. It is trite that the confirmation by a sovereign Government has to be given preference over the statements made by private parties which are not supported by documentary evidence. Thus, the Government has no hesitation in agreeing with the lower authorities that the export goods never reached Russia.

6.3 It is the contention of the Applicants that the export proceeds in the case have been received and the department's allegation of return of money is not supported by documentary evidence. However, as brought out hereinabove, the Government of Russian Federation has confirmed that the payments in the present case were pre-payments which were returned as the deliveries did not take place. Even otherwise the fact that the deliveries never took place in Russia is confirmed by the Russian authorities and as such the view taken by the lower authorities that the proceeds, if any, received could not be correlated to the subject exports as these were never completed. In this light, the contention of the Applicant that the export proceeds were received is not acceptable.

6.4 It is evident that, in the present case, the Applicant fraudulently claimed to have made exports to Russia. The declarations made on the shipping bills and the Airway bills produced have been found to be incorrect. The Hon'ble Supreme Court has, in the case of Commissioner of Customs Kandla vs. Essar Oil Ltd. [2004 (172) ELT 432 (SC)], held that fraud vitiates every solemn act; that fraud and justice never dwell together; and that fraud is anathema to all equitable principles.

7. In view of the above, it is evident that subject exports were made in contravention of various provisions of the Custom Act, 1962, Drawback Rules, 1995 and the FEMA, 1999. Therefore, it has been correctly held that the goods are liable to confiscation under Section 113(d) & (i). Consequently, penalty is imposable under Section 114 of the Act.

8. As such, the Government does not find any merit in the present Revision Application and the same is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

M/s. SMG India, (through Sh. Parag Garg, Proprietor)
H-84, Shivaji Park,
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Order No. 235/22-Cus dated 20-7-2022

Copy to:

1. The Commissioner of Customs (Export), Air Cargo, New Custom House, New Delhi-110037.
2. The Commissioner of Customs (Appeals), New Custom House, New Delhi 110037.
3. Sh. A.K. Seth, Advocate, Q-14B, Jangpura Extensions, New Delhi-110014.
4. P.S. To A.S (RA)
5. Guard File
6. Spare Copy

ATTESTED

Gehata
20/7/22

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