F.No. 375/31/DBK/2019-RA

REGISTERED
SPEED POST

F.No. 375/31/DBK/2019-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 11/11/21

Order No. 254/21-Cus dated 10-11-2021 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 under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. LUD-CUS-001-APP-2096-2098-19 dated 14.02.2019, passed by the Commissioner (Appeals), Customs & CGST, Ludhiana.
Applicant	:	M/s Campbell International, Ludhiana
Respondent	:	The Commissioner of Customs, Ludhiana.

ORDER

A revision Application No. 375/31/DBK/2019-RA, dated 07.05.2019, has been filed by M/s Campbell International, Ludhiana (hereinafter referred to as the Applicant) against the Order-in-Appeal No. LUD-CUS-001-APP-2096-2098-19 dated 14.02.2019, passed by the Commissioner (Appeals), Customs & CGST, Ludhiana, vide which the appeal filed by the Applicant against the Order-in-Original No. 06/DC/BRC/OWPL/LDH/2015 dated 30.01.2016, passed by Deputy Commissioner of Customs, Ludhiana, has been rejected.

2. Brief facts of the case are that the Applicant filed drawback claims in respect of Shipping Bills Nos. 742744 dated 04.02.2012, 7890486 dated 06.03.2012 and 692621 dated 31.12.2011 with the jurisdictional customs authorities, for a total amount of Rs. 6,46,235/-, which were sanctioned. Subsequently, on scrutiny, it was observed by the office of Respondent that the Applicant had failed to submit the proof to the effect that the export proceeds in respect of the aforesaid Shipping Bills had been realized, in terms of Rule 16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. Accordingly, Show Cause Notice dated 01.05.2015 was issued to the Applicant. Vide the above mentioned OIO dated 30.01.2016, the demand of Rs. 2,00,184/- was confirmed by the original authority in respect of the Shipping Bill No. 7424744 as only a sum of USD 67,342 was realized instead of USD 68690 and Shipping Bill No. 7890486 as the export proceeds were realized beyond the stipulated period of twelve months. The demand in respect of Shipping Bill No. 6925621 dated 31.12.2011 was dropped as the export proceeds were realized within the stipulated period of twelve months. The appeal filed by the Applicant herein against the said Order-in-Original was rejected by the Commissioner (Appeals), vide the impugned Order-in-Appeal dated 14.02.2019.

3. The revision application has been filed on the grounds that the export proceeds in respect of Shipping Bill No. 7890486 dated 06.03.2012 were realized but the same were realized beyond the stipulated period of twelve months as the buyer was facing some problem in Afghanistan and in respect of the Shipping Bill No. 7424744 and 6925621 whole of the payment had been realized much before the stipulated period of twelve months; and that the export proceeds stood realized before the issue of

show cause notice proposing the recovery of the drawback, hence, in terms of sub-rule of Rules 16A, there is no cause for recovery. Accordingly, it has been prayed that the impugned Order may be set aside.

4. Personal hearing, in virtual mode, was held on 08.11.2021. Sh. Rajinder Singh, Consultant, appeared for the Applicant and stated that written submissions shall be filed on the same day i.e. 08.11.2021 by email. He requested that the case may be decided in the light of contentions put forth in the revision application as well as the written submissions to be filed today. He further stated that no further hearing is required after the filing of written submissions. Sh. Chandra Mani, Superintendent appeared for the respondent department and supported the order of Commissioner (Appeals). The written submissions were submitted by the Applicant on 09.11.2021

5.1 The Government has carefully perused the case papers including the Written Submissions dated 09.11.2021.

5.2 Following contentions have been raised by the Applicant in the revision application and the Written Submissions dated 09.11.2021, which need to be examined for disposal of the case:

(i) The export proceeds, in respect of Shipping Bills No. 7424744 dated 04.02.2012 had been realized to the tune of USD 67342 instead of USD 68690 because the Applicant had to allow additional discount of USD 1348 and as such the USD 67342 was realizable and the same had been realized in full, within the stipulated period of time. The export proceeds in respect of Shipping Bill No. 7890486 dated 06.03.2012 were realized beyond the stipulated period of time due to some unrest in Afghanistan.

(ii) The show cause notice had been issued proposing the recovery of drawback under the Rule 16A ibid whereas Order-in-Original has ordered the recovery under Rule 16 ibid. Hence, the original authority has gone beyond the scope of show cause notice.

(iii)The Rule 16A (4) ibid prescribes that where the sale proceeds are realized after the amount of drawback has been recovered, the amount of drawback so recovered, shall be repaid to the claimant. Since in this case, the sale proceeds have been fully realized, the whole exercise of recovery of drawback and repayment of the same amount in terms of Rule 16A (4) ibid would be revenue neutral.

5.2 In respect of the first contention of the Applicant, the Government observes that as per Regulation 9 of the Foreign Exchange Management (Export of goods and services) Regulations, 2000, as amended vide Notification No. FEMA. 176/2008-RB dated 23.07.2008, the period of realization of export proceeds is specified as 'twelve months'. It is observed and also admitted by the Applicant that in respect of Shipping Bill No. 7424744 dated 04.02.2012 only a sum of USDD 67342 was realized instead of USD 68690. Original authority, vide the above mentioned OIO, has already dropped the demand in respect of USD 67342 and only confirmed the demand in respect of the balance amount of USD 1348 which was not realized. The contention that this amount could not be realized due to a post export discount offered to the customer does not support the case of the Applicant in as much as neither the said amount was written off by the competent authority nor the value of the export goods has been revised, as per law. Hence, there is no infirmity, on this count, in the confirmation of demand in respect of the Shipping Bill No.7424744 dated 04.02.2012. As regard the Shipping Bill No. 7890486, it is on record and also admitted by the Applicant that the export proceeds were realized beyond the stipulated period of time. Government observes that, in terms of second proviso to Section 75(1), the drawback is deemed to have never been allowed if the export proceeds are not realized within the time permitted under the Foreign Exchange Management Act, 1999. Further, as per, Rule 16A(1) ibid, the drawback is recoverable if the export proceeds are not realized within the period allowed under the Foreign Exchange Management Act, 1999, including any extension of such period. Admittedly, in the instant case, export proceeds have not been realized within the period allowed nor has the extension been granted by the

competent authority under FEMA. Thus, the drawback, sanctioned and paid, is recoverable from the Applicant even in respect of Shipping Bill No. 7890486.

5.3 It is contended by the Applicant that while the show cause notice had been issued under Rule 16A ibid, the original authority had confirmed the demand under Rule 16 ibid. The Government observes that the show cause notice dated 01.05.2015 proposed recovery of the drawback under Rule 16A ibid. In the Order-in-Original dated 29.01.2016, in the 'Discussions and Findings' portion, the original authority has found the drawback amount of Rs. 2,00,184/- recoverable under Rule 16A only. However, in the 'Order' portion, a reference has been made to Rule 16 ibid. The Government observes that, as per sub-rule (3) of Rule 16A, *"(3) Where the exporter fails to repay the amount under sub-rule (2) within the said period of thirty days referred to in sub-rule (2), it shall be recovered in the manner laid down in Rule 16."* Thus, it appears that the original authority having found the amount to be recoverable under Rule 16A(2), ordered for its recovery in the manner laid down under Rule 16, in accordance with sub-rule (3) of Rule 16A. Further, even if it is presumed that the reference to Rule 16 has been wrongly made, it is settled by a catena of judgments of the Hon'ble Supreme Court that mentioning of a wrong provision or non-mentioning of a provision does not invalidate an order if the court and/or the statutory authority had the requisite jurisdiction therefor. In the case of *Ram Sunder Ram vs. Union of India & Ors. {2007 (9) SCALE 197}*, the Supreme Court has held that *"It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law."* Similarly, in the case of *N. Mani vs. Sangeetha Theatres & Others {(2004) 12 SCC 278}*, the Apex Court has held that *"9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law."* Thus, there is no infirmity, on this count, in the Order passed by the original authority.

5.4 The last contention of the Applicant herein is that as the export proceeds have been fully realized, the drawback even if recoverable under Rule 16A(2) has to be repaid under Rule 16A(4) and, as such, the entire exercise of recovery and repayment would be revenue neutral. At the outset, the Government further observes that entire proceeds have admittedly not been realized in respect of the Shipping Bill No. 7424744. The Government observes that as per Rule 16A (1) *"(1) Where an amount of drawback has been paid to an exporter or a person authorized by him (hereinafter referred to as the claimant) but the sale proceeds in respect of such export goods have not been realized by or on behalf of the exporter in India within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), including any extension of such period, such drawback shall be recovered in the manner specified below."* Further, the sub-rule (2) reads as *"(2) If the exporter fails to produce evidence in respect of realization of export proceeds within the period allowed under the Foreign Exchange Management Act, 1999, or any extension of the said period by the Reserve Bank of India, the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, as the case may be or Deputy Commissioner of Customs shall cause notice to be issued to the exporter for production of evidence of realization of export proceeds within a period of thirty days from the date of receipt of such notice and where the exporter does not produce such evidence within the said period of thirty days, the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be or Deputy Commissioner of Customs shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within thirty days of the receipt of the said order:".* As per the second proviso to Section 75(1) of the Customs Act, where any drawback has been allowed on any goods and sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under FEMA, such drawback shall be deemed never to have been allowed and the Central Government may by rules specify the procedure for recovery or adjustment of the amount of such drawback. The Rule 16A has been notified in pursuance of this provision of Section 75 (1) of the Customs Act. It is apparent on a plain reading of Section 75(1) and Rule 16A that the export proceeds should be realized within the

period allowed under the FEMA, including any extension of such period. As such for repelling any action initiated under Rule 16A, the exporter has not only to show that the export proceeds have been realized, he also has to show that such proceeds have been realized within the period allowed under FEMA. In the present case, as already held above, the export proceeds have been realized beyond the period allowed under FEMA. Further, the sub-rule (4) prescribes that where the sale proceeds are realized after amount of drawback has been recovered, the amount of drawback so recovered shall be repaid. The Government finds that the provision of sub-rule (4) shall come into effect only if the export proceeds had been realized within the period allowed under FEMA. Interpretation suggested by the Applicant herein to the effect that the drawback shall be repayable, in terms of sub-rule (4), even if export proceeds have been realized beyond the period allowed under FEMA would render the words and phrases, *"within the period allowed under the Foreign Exchange Management Act, 1999"; "within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), including any extension of such period"; and "within the period allowed under the Foreign Exchange Management Act, 1999, or any extension of said period by the Reserve Bank of India"* used in the second proviso to Section 75(1), Rule 16A(1) and Rule 16A(2), respectively, redundant and otiose, which is not acceptable in law. Further, the provisions of a subordinate legislation (, i.e., Rule 16A(4)) cannot be used to dispense with the requirements of the present statute (,i.e., Section 75(1)) [Ref. UOI vs. Uttam Steel Ltd. {2015 (319) ELT 598 (SC)}]. Therefore, this last contention of the Applicant also does not merit consideration.

6. In view of the above, the revision application is rejected.

(Sandeep Prakash)
Additional Secretary to the Government of India

M/s Campbell International,
E-127, Phase-IV Focal Point,
Ludhiana – 141010.

F.No. 375/31/DBK/2019-RA

Order No. 254/21-Cus dated 10-11-2021

Copy to:

1. The Commissioner of Customs, Custom House, ICD, GRFL Complex, G.T. Road, Sahnewal, Ludhiana – 141120.
2. The Commissioner of Customs (Appeals), Ludhiana, GST Bhawan, F-Block, Rishi Nagar, Ludhiana – 141001.
3. Sh. Rajinder Singh, Consultant, 53, Hardev Nagar, Near Canal Road, Kpt. Road, Jalandhar City – 141001.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

Attested

Poonam Guggal

(Poonam Guggal)
SO(P&V).