

REGISTERED
SPEED POST



F.No. 375/33/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. 256/21-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-2294-2019 dated 11.04.2019, passed by the Commissioner (Appeals), Customs & CGST, Ludhiana.

Applicant : M/s Deep Cycle Industries, Ludhiana

Respondent : The Commissioner of Customs, Ludhiana.

ORDER

A revision application no. 375/33/DBK/2019 dated 09.05.2019 has been filed by M/s. Deep Cycle Industries, Ludhiana (hereinafter referred to as the Applicant) against the Order-in-Appeal No. LUD-CUS-001-APP-2294-2019 dated 11.04.2019 passed by the Commissioner (Appeals), Customs & CGST, Ludhiana. The Commissioner (Appeals) has rejected the appeal filed by the Applicant herein against the Order-in-Original No. 37/DC/BRC/LDH/16 dated 15.03.2016 passed by the Deputy Commissioner of Customs, CFS, OWPL, Ludhiana, vide which the Deputy Commissioner has confirmed the demand and recovery of the drawback amount of Rs. 80,939/- along with applicable interest, against the Applicant herein.

2. Briefly stated, the Applicant herein had made exports under claim of drawback against Shipping Bill Nos. 1054484 dated 01.07.2007 and 1061339 dated 12.12.2007 and had been sanctioned a total drawback amount of Rs. 3,75,329/-. Subsequently, on scrutiny, it was observed that the export proceeds had not been realized against the aforesaid Shipping Bills and, hence, a show cause notice dated 07.07.2015 was issued, under Rule 16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 read with Section 75A of the Customs Act, 1962, for recovery of drawback amount of Rs. 3,75,329/-, along with applicable interest. The original authority, after considering the submissions made by the Applicant in response to the show cause notice, found that the part of export proceeds, in respect of Shipping Bill 1054884 dated 01.07.2007, had been realized beyond the period of six months specified under the relevant regulations issued by the Reserve Bank of India and, accordingly, confirmed the demand of Rs. 80,939/- along with interest applicable thereon, vide the aforesaid Order-in-Original dated 15.03.2016. Balance demand was dropped. 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 11.04.2019.

3. The revision application has been filed on the grounds that the export proceeds of USD 15247.90, in respect of Shipping Bill No. 1054884 dated

01.07.2007, were realized between 04.06.2008 to 22.09.2008, which is within the period of one year stipulated vide the RBI's Notification No. FEMA 176/2008-RB dated 23.07.2008, which has retrospective effect; 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 (4) 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 submitted that the written submissions dated 07.11.2021 forwarded by email may be taken on record. He reiterated the contents of the RA and the Written Submissions dated 07.11.2021. Sh. Chandra Mani, Superintendent appeared for the department and supported the order of Commissioner (Appeals).

5.1 The Government has carefully perused the case papers including the Written Submissions dated 07.11.2021. At the outset, it is observed that certain submissions have been made in the Written Submissions dated 07.11.2021 with reference to the concluded proceedings against a Party, which is not a party in the present proceedings. The Government rejects these submissions as baseless and for being extraneous to the present proceedings.

5.2 On a combined reading of the revision application and the Written Submissions dated 07.11.2021, it is observed that the following contentions put forth by the Applicant herein need to be examined and decided for disposal of the instant revision application:

- (i) The export proceeds, in respect of relevant exports, were received between 04.06.2008 to 22.09.2008 which was within the period of one year permitted as per the RBI's Notification dated 23.07.2008, which has retrospective effect.

- (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 show cause notice was issued on 07.07.2015 for recovery of drawback which was sanctioned and paid on 29.10.2007, i.e., after seven years and eight months, which is barred by limitation.
- (iv) 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.

5.3 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, *"The amount representing the full export value of goods or software exported shall be realized and repatriated to India within six months from the date of export:"*. The aforesaid Regulations of 2000 were amended vide Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2008, notified vide Notification No. FEMA. 176/2008-RB dated 23.07.2008. As per the Amendment Regulations, the period of 'six months' in Regulation 9 ibid was changed to 'twelve months'. It is further observed that the Regulation 1(ii) of the Amendment Regulations, 2008 reads as *"(ii) They shall deemed to have come into force on the 3^d day of June 2008.@"*. Therefore, it is apparent that the period of realization of export proceeds was changed from a period of 'six months' to a period of 'twelve months', as per the Regulations notified on 23.07.2008, which were deemed to have come into force on 03.06.2008. Thus, amending regulations themselves specified the extent of retrospective application, i.e., with effect from 03.06.2008 to 23.07.2008. In view of this specific provision in the Regulations, the contention of the Applicant that the Regulations had unlimited

retrospective effect, i.e., the change in period of realization of export proceeds would be applicable even before 03.06.2008 is unacceptable. When the regulation making authority itself has specified the period of retrospective operation there is no warrant in law to deviate from the same. It is also observed that as per the unamended Regulations of 2000, the period of realization of export proceeds was 'six months', which as per the Written Submissions dated 07.11.2021 of the Applicant themselves had ended on 30.04.2008. As such, the specified period of realization of 'six months' had ended much before the Amendment Regulations of 2008 came into effect from 03.06.2008 and the cause for recovery had already arisen. Therefore, there is no merit in the present contention of the Applicant.

5.4 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*. Hence, the original authority had proceeded beyond the scope of the show cause notice. The Government observes that the show cause notice dated 07.07.2015 proposed recovery of the drawback under Rule 16A *ibid* read with Section 75A of the Customs Act, 1962. In the Order-in-Original dated 15.03.2016, in the 'Discussions and Findings' portion, the original authority has found the drawback amount of Rs. 80,939/- 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 in the 'Order' portion, 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, looked at from any perspective, no infirmity can be ascribed, on this count, to the Order passed by the original authority.

5.5.1 The Applicant has further contended that the show cause notice is barred by limitation as it has been issued beyond the period of five years which would be reasonable period of limitation under Rule 16 of the Drawback Rules, 1995. In support of this contention, the judgments of the Hon'ble Punjab & Haryana High Court in the cases of *Famina Knit Fabs vs. Union of India* {2020 (371) ELT 97 (P & H)}, *GPI Textiles Limited vs. Union of India* {2018 (362) ELT 388 (P & H)}, *Gupta Smelter Pvt. Ltd. vs. Union of India* {2019 (365) ELT 77 (P & H)} & *Hari Concast (P) Ltd.* {2009 (242) ELT 12 (P & H)} and that of the Tribunal in the case of *Hem Chand Gupta & Sons* {2015 (330) ELT 161 (Tri. – Del.)} have been cited.

5.5.2 At the outset, it needs to be observed that the show cause notice was issued, in the present case, under Rule 16A *ibid*, which does 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 the 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 factors.” 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 the facts and circumstances of the case notice or demand for recovery was made within reasonable period. No hard and fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case.”

5.5.3 The Government finds that in the case of drawback, the drawback is sanctioned and paid to the exporter even before the export proceeds are realized. In terms of Rule 16A *ibid*, it is thereafter the obligation of the exporter to realize the proceeds within the time period specified in this behalf and to provide evidence in respect of realization to the Customs authorities. In the present case, there is not even an averment that the Applicant, at any stage before the issue of show cause notice, informed the department about realization or non-realisation of export proceeds. As such, the Applicant was in default of the obligations cast upon him under Rule 16A *ibid* when the show cause notice came to be issued. In view of this clear default, that too when the Applicant was already enjoying the benefits of drawback, the time taken in issue of the show cause notice cannot be held to be unreasonable. Further, in a trust based incentive system like drawback, fairness and justice would demand that a strict view is taken against a party that is in breach of trust.

5.5.4 The Hon’ble Punjab & Haryana High Court has, in the case of Famina Knit Fabs (*supra*), held that a period of five years is a reasonable period for a notice issued under Rule 16 of the Drawback Rules, 1995 whereas in the present case the notice has been issued under Rule 16A *ibid*. It would also be relevant to highlight

here that while holding so, the Hon'ble High Court has itself made a distinction between the proceedings under Rule 16 and those under Rule 16 A of the Drawback Rules. The judgment in the case of GPI Textiles Limited (supra) relates to a case where adjudication of a demand under Section 11A of the Central Excise Act, 1944, was badly delayed and notice for hearing was issued after 16 years of issuance of show cause notice whereas the judgment in the case of Gupta Smelter Pvt. Ltd. (supra) relates to finalization of a provisional assessment where show cause notice for final assessment was issued after more than five years of drawing of samples, receipt of test report and provisional assessment. Similarly, the case of Hari Concast (P) Ltd. (supra) relates to proceedings for imposition of penalty initiated after five years and it is not to a case of recovery of drawback under Rule 16A. As regards the decision in Hem Chand Gupta & Sons (supra), the Tribunal has in the facts of the case held that the show cause notice was issued within a reasonable period. As such, the judgments relied upon by the Applicant herein are not applicable in the facts of the present case and do not support the contention put forth by the Applicant.

5.5.5 In view of the discussion above, the Government holds that the subject show cause notice has been issued within a reasonable period, in the facts and circumstances of the present case and in the nature of the statute.

5.6 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. 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, the export proceeds have been realized beyond the period allowed under FEMA. Further the sub-rule (4) prescribes that where the sales proceeds are realized after amount of drawback has been recovered, the amount of drawback so recovered shall be repaid. The Government finds that the provisions 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. In any case, the provisions of a subordinate legislation (, i.e., Rule 16A(4)) cannot be used to dispense with the requirements of the parent 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

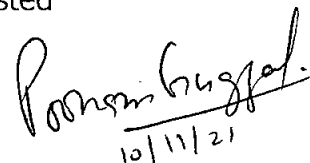
M/s Deep Cycle Industries,
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Order No. 256/21-Cus dated 10-11-2021

Copy to:

1. The Commissioner of Customs, Custom House, ICD, GRFL Complex, G.T. Road, Sahnewal, Ludhiana – 141120.
2. The Commissioner (Appeals), Customs & CGST, 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)
Supdt