

REGISTERED  
SPEED POST



F.No. 375/42/DBK/2019-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue... 22/11/21

Order No. 264/21-Cus dated 22-11-2021 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. 429-CUS/APPL/LKO/2018 dated 14.08.2018, passed by the Commissioner (Appeals), Customs, Central Excise & CGST, Lucknow.

Applicant : M/s RNZ Exports Ltd., Kanpur.

Respondent : The Commissioner of Customs (Preventive), Lucknow.

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**ORDER**

A revision application No. 375/42/DBK/2019-RA dated 10.06.2019 has been filed by M/s RNZ Exports, Jaipur (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 429-CUS/APPL/LKO/2018 dated 14.08.2018, passed by the Commissioner (Appeals), Customs, Central Excise & CGST, Lucknow, vide which the appeal filed by the Applicant against the Order-in-Original No. 47/AC/Air Cargo/LKO/2017-18 dated 25.10.2017, passed by the Assistant Commissioner of Customs, CCSI Airport, Amausi, Lucknow, has been rejected.

2. Brief facts of the case are that the Applicant filed drawback claims in respect of 02 Shipping Bills, bearing No. 1247 dated 11.02.2016 and No. 1345 dated 02.03.2016, with the jurisdictional customs authorities, for a total amount of Rs. 1,46,118/-, which was 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 16.05.2017, was issued to the Applicant and the demand of Rs. 93,445/-, along with the applicable interest, was confirmed by the original authority in respect of Shipping Bill No. 1247, vide the above mentioned Order-in-Original dated 25.10.2017. A penalty of Rs. 10,000/- was also imposed under Section 117 of the Customs Act, 1962. The appeal filed by the Applicant herein against the above said Order-in-Original was rejected by the Commissioner (Appeals), vide the impugned Order-in-Appeal dated 14.08.2018.

3. The revision application has been filed on the grounds that the export proceeds have been fully realized within the stipulated time period; that the substantial benefit cannot be denied due to procedural lapses; that when drawback is not recoverable, interest is also not recoverable; and that penalty cannot be imposed as the applicant had a bonafide intention/reason for not producing the said BRCs.

4. Personal hearing, in virtual mode, was held on 22.11.2021. Sh. Anuj, Shukla, Advocate, appeared for the Applicant and reiterated the contents of the revision application. He submitted that all proceeds have been realized though beyond the stipulated time period. However, in view of Rule 16A(4) it will be a revenue neutral exercise. Sh. A. K. Mishra, Joint Commissioner supported the order of Commissioner (Appeals).

5. The instant RA has been filed with a delay as the appeal was initially filed at the wrong forum, i.e., CESTAT. Delay is condoned.

6.1.1 The Government has examined the matter carefully. It is contended by the Applicant that they had realized the export proceeds in full and have also submitted the copies of three BRCs in respect of the Shipping Bill No. 1247 dated 11.02.2016. On perusal of the BRCs, it is observed that the date of realization is shown therein as 28.12.2017, 01.01.2018 and 01.01.2018 whereas the Shipping Bill is dated

11.02.2016. Thus, it is clear that the export proceeds were not realized within the stipulated time period, a fact also admitted by the Applicant during the course of personal hearing. Further, the Applicant has not submitted any evidence to prove that the delayed realization has been regularized by the RBI/AD Bank. Government observes that, in terms of the second proviso to Section 75(1) of the Customs Act, 1962, where any drawback has been allowed on any goods and sale proceeds in respect of such goods are not received within the time period allowed under FEMA, 1999, such drawback shall be deemed never to have been allowed. Further, as per Rule 16A *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.

6.1.2 Further, the provisions of rule 16A *ibid*, enabling recovery of drawback where export proceeds are not realized within the period allowed under FEMA, including any extension of such period, have been framed to give effect to the provisions made in the parent statute, i.e, section 75(1) *ibid*. Therefore, by no stretch of imagination, can the provisions of rule 16A be termed merely as a procedural requirement. It is to be observed that drawback is paid before realization of export proceeds and recovery thereof is initiated if such proceeds are not realized within the period prescribed, including any extension of such period. If the requirement of realization within prescribed period is not treated as a mandatory condition; the

process of recovery shall remain an unending exercise and thereby render the provisions of the second proviso to section 75(1) and the Rule 16A(1) redundant and otiose. As such, the contentions of the Applicant, on this count, are not acceptable.

6.2 Another 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*

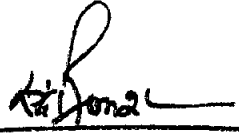
*or Deputy Commissioner of Customs shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within thirty days of the receipt of the said order:”. As already brought out herein before, as per the second proviso to Section 75(1), where 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 Rule 16A and Section 75 (1) that the export proceeds should be realized within the period allowed under the FEMA, including any extension of such period. As such, for resisting 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 brought out, 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 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. In any case, as held by the Hon'ble Supreme Court in the case of *Union of India vs. Uttam Steel Ltd. {2015 (319) ELT (598 (SC)}*, the provisions of a subordinate legislation (, i.e., Rule 16A(4) in this case) cannot be used to dispense with the requirements of the parent statute (,i.e., Section 75(1)). Therefore, this contention of the Applicant also does not merit consideration.

6.3 Thus, the Government agrees with the lower authorities that the drawback, alongwith applicable interest, is recoverable in the instant case.

7. The imposition of penalty under section 117 *ibid*, has also been assailed in the instant RA. The Government observes that section 117 enables imposition of penalty on any person who contravenes any provisions of the Act or abets any such contravention, where no express penalty is provided elsewhere for such contravention. In the present case, the contraventions, as above, are explicit. However, keeping in view the facts and circumstances of the case, the amount of penalty imposed is reduced to Rs. 1,000/-.

8. The revision application is disposed of in above terms.



(Sandeep Prakash)  
Additional Secretary to the Government of India

M/s RNZ Exports Ltd.,  
Hindustan Tannery Compound Jaimau,  
Kanpur, Uttar Pradesh -208010

Order No. 264/21-Cus dated 22-11-2021

Copy to:

1. The Commissioner of Customs (Preventive), Hall No. 3, 5<sup>th</sup> & 11<sup>th</sup> floor, Kendriya Bhawan, Sector-H, Aliganj, Lucknow 226024.
2. The Commissioner (Appeals), Customs & CGST, 3/194, Vishal Khand-3, Gomati Nagar, Lucknow.
3. Sh. Anuj Shukla, Advocate, 320, Murli Bhawan, 10-A, Ashok Marg, Lucknow, Uttar Pradesh.
4. PA to AS(RA).
5.  Guard File.
6. Spare Copy.

ATTESTED

