

REGISTERED
SPEED POST



F.No. 375/30/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. 23/11/21.

Order No. 265/21-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 filed under section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. LUD-EXCUS-001-APP-2118-2019 dated 19.02.2019, passed by the Commissioner (Appeals), Customs & CGST, Ludhiana.

Applicant : M/s K.S. World Wide Exports Pvt. Ltd., Ludhiana.

Respondent : The Commissioner of Customs, Ludhiana.

ORDER

Revision Application No.375/30/DBK/2019-RA dated 01.05.2019 has been filed by M/s K.S. World Wide Exports pvt. Ltd., Ludhiana, (hereinafter referred to as the Applicant) against the Order-in-Appeal No. LUD-CUS-001-APP-2118-2019 dated 19.02.2019, passed by the Commissioner (Appeals), Customs & CGST, Ludhiana. Commissioner (Appeals), vide the above mentioned Order-in-Appeal, has rejected the appeal of the Applicant, against the Order- in-Original No.23/DC/BRC/LDH/2016 dated 09.03.2016 passed by the Deputy Commissioner of Customs, CFS, OWPL, Ludhiana.

2. Brief facts of the case are that the Applicant filed drawback claims in respect of 02 Shipping Bills, i.e., Shipping Bill Nos. 1143371 and 1442668 both dated 24.08.2012, with the Deputy Commissioner of Customs, Drawback, CFS, OWPL, Ludhiana, for a total amount of Rs.94,858/-, 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 Bill 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 27.07.2015 was issued to the Applicant and the demand of Rs. 94,858/- was confirmed by the original authority, vide aforesaid Order-in-Original dated 09.03.2016. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), which was rejected on the ground that the export proceeds were realized beyond the stipulated time period.

3. The revision application has been filed, mainly, on the grounds that 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. Further, the export proceeds had been realized and, therefore, the amount already paid cannot be recovered.

4. Personal hearing was fixed, in virtual mode, on 07.10.2021, 27.10.2021 and 22.11.2021. Sh. Chandra Mani, Superintendent, appeared on behalf of the respondent department and supported the order of Commissioner (Appeals). None appeared for the Applicant on all the above mentioned dates nor any request for adjournment has been received. As sufficient opportunities have been granted, the case is being taken up for final decision.

5.1.1 The Government has examined the matter carefully. It is contended by the Applicant that they had realized the export proceeds and, hence, the substantial benefit cannot be denied. It is observed that the export proceeds were not realized within the stipulated time period. Further, it is not the contention of the Applicant 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 and the Central

Government may, by rules, specify the procedure for the recovery of such drawback. 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.

5.1.2 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*. 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 redundant and otiose.

5.1.3 Proviso to sub-rule (2) of Rule 16A *ibid* has been cited to plead that if order of recovery had been passed before actual realization of export proceeds, it would have the force of law but after realization of export proceeds, there is no cause for recovery, even if the proceeds are not realized within the time period allowed. The Government does not find any merit in this contention of the Applicant. As already

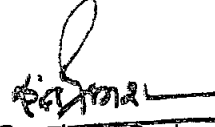
stated, Rule 16A has been legislated to give effect to the provisions of the second proviso to the sub-section (1) of Section 75 *ibid*. The aforesaid second proviso provides that the drawback shall be deemed never to have been allowed if the sale proceeds are not received within the time period allowed under FEMA. Thus, the interpretation put forth by the Applicant on the proviso to Rule 16A(2) would amount to dispensing with the requirements of the parent statute, i.e., Section 75(1), which is not permissible in law [Ref. UOI vs. Uttam Steel Ltd. {2015 (319) ELT 598 (SC)}]. The decision of Tribunal, in the case of *Indo Export House* {2004 (168) ELT 142 (Tri-Del.)}, is not applicable in this view of the matter.

5.1.4 As such, the contentions of the Applicant, on this count, are not acceptable.

5.2 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 27.07.2015 proposed recovery of the drawback under Rule 16A *ibid* read with Section 75A of the Customs Act, 1962. In the Order-in-Original dated 09.03.2016, in the 'Discussions and Findings' portion, the original authority has found the drawback amount of Rs. 94,858/- 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, no infirmity can be ascribed, on this count, to the Order passed by the original authority.

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



(Sandeep Prakash)

Additional Secretary to the Government of India


M/s K.S. World Wide Exports Pvt. Ltd.,
Near Octroi Post, Village Mangli,
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Ludhiana 141010.

Order No. 265/21-Cus dated 22-11-2021

Copy to:

1. Commissioner of Customs , Container Freight Station, OWPL, C,-205, Phase – V, Focal Point Bhandhari Kalan, Ludhiana – 141010.
2. Commissioner (Appeals), Customs & CGST, F-Block Rishi Nagar, Ludhiana.
3. PS to AS(RA)
4. Guard File.
5. 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