

REGISTERED
SPEED POST



F.No. 375/43/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. 266/21-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-2096-2098-2019 dated 14.02.2019, passed by the Commissioner (Appeals), Customs & CGST, Ludhiana.

Applicant : M/s Sapphire International, Ludhiana.

Respondent : The Commissioner of Customs, Ludhiana.

ORDER

Revision Application No.375/43/DBK/2019-RA dated 14.06.2019 has been filed by M/s Sapphire International, Ludhiana, (hereinafter referred to as the Applicant) against the Order-in-Appeal No. LUD-CUS-001-APP-2096-2098-2019 dated 14.02.2019, passed by the Commissioner (Appeals), Customs & CGST, Ludhiana. Commissioner (Appeals), vide the above mentioned Order-in-Appeal, has, inter-alia, rejected the appeal of the Applicant, against the Order- in-Original No.31/DC/BRC/LDH/2016 dated 15.03.2016 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. 7224694 dated 21.01.2012 and 8919339 dated 15.05.2012, with the Deputy Commissioner of Customs, Drawback, CFS, OWPL, Ludhiana, for a total amount of Rs.10,81,584/-, 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 12.08.2015 was issued to the Applicant and the demand of Rs. 10,81,584/- was confirmed, along with applicable interest, by the original authority, vide the aforesaid Order-in-Original dated 15.03.2016. 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 ground that the sale proceeds have been realized in full; and, hence, substantial conditions of export and realization of export proceeds have been complied with. Written submissions dated 28.10.2021 have also been filed wherein it is submitted 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. It is further contended that 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. Further, under Rule 17 (power to relax) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, Government has the power to relax the provisions of the Drawback Rules, if the exporter has failed to comply with any of the provisions of these rules, for the reasons beyond his control.

4. Personal hearing, in virtual mode, was held on 22.11.2021. Sh. V.K. Puri, Advocate, appeared on behalf of the Applicant and reiterated the contents of the

Revision Application and written submissions dated 28.10.2021. Sh. Chandra Mani, Superintendent, supported the order of Commissioner (Appeals).

5.1.1 The Government has examined the matter carefully. It is contended by the Applicant that they had realized the export proceeds and complied with the substantial conditions. It is observed that the export proceeds were not realized within the stipulated time period. Further, the delayed realization of export proceeds has not 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.

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(1) redundant and otiose. 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 12.08.2015 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 to be 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 reads as: "*(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.

5.3.1 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 hereinbefore, 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 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, it has been held by the Hon'ble Supreme Court, in the case of *UOI vs. Uttam Steel Ltd. {2015 (319) ELT 598 (SC)}*, that the provisions of a subordinate legislation (, i.e., Rule 16A(4) in the present case) cannot be used to dispense with the requirements of the parent statute (, i.e., Section 75(1)).

5.3.2 The judgment of Hon'ble Madras High Court in the case of Nana Desi Ainnurruvar {2020 (372) ELT 551 (Mad.)} has been relied upon to support the dropping of demand in case of delayed receipt of foreign remittance. However, the Government observes that the limited issue before the Hon'ble Court, in the said case, was imposition of penalty under Section 117 ibid when export proceeds had been realized belatedly. The decision of Tribunal, in the case of Indo Export House {2004 (168) ELT 142 (Tri-Del.)} has no applicability in view of the discussion above.

5.3.3 Therefore, the subject contention of the Applicant does not merit consideration.

5.4. Applicant has also contended that the Government has the power to condone the delay in realizing the export proceeds in terms of Rule 17 of the Customs, Central Excise & Service Tax Drawback Rules, 1995. Government observes that Rule 17 authorizes the Central Government to relax any provision of the Drawback Rules, 1995, provided the Central Government is satisfied that the exporter or his authorized agent has failed to comply with the Drawback Rules, 1995 for the reasons which was beyond their control. As stated hereinabove, realization of export proceeds is governed under the Foreign Exchange Management Act, 1999 and not under the Customs Act, or the Drawback Rules. Therefore, any relaxation in provisions relating to realization of export proceeds can be considered by the authority competent to do so, only under the provisions of FEMA and not under the

Drawback Rules. As such, this last contention of the Applicant also does not have any merit.

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


(Sandeep Prakash)

Additional Secretary to the Government of India


M/s Sapphire International,
Plot No. 7, Opposite Municipal Water Tank,
Sherpur Kalan,
Focal Point,
Ludhiana 141010.

Order No. 266/21-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. Sh. V.K. Puri, Advocate, A-184, Sarita Vihar, New Delhi – 110076.
4. PS to AS(RA)
5. Guard File.
6. Spare Copy.

Attested


(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