

REGISTERED
SPEED POST



F.No.375/30/DBK/2020-RA
F.No.375/50/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.. 13/12/21

Order No. 286-287/21-Cus dated 13-12-2021 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 Applications under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. LUD-Cus-001-APP-2442-44-19 dated 14.05.2019 passed by the Commissioner (Appeals), Customs & GST, Ludhiana.

Applicant : 1. M/s Pakeeza Exports, Amritsar.
2. M/s S R International, Ludhiana.

Respondent : The Commissioner of Customs, Ludhiana.

ORDER

Two revision applications, bearing nos. 375/30/DBK/2020-RA dated 03.03.2020 & 375/50/DBK/2019-RA dated 22.08.2019, have been filed by the M/s Pakeeza Exports, Amritsar (hereinafter referred to as the Applicant-1) & M/s S R International, Ludhiana (hereinafter referred to as the Applicant-2), respectively, against the Order-in-Appeal No. LUD-Cus-001-APP-2442-44-19 dated 14.05.2019 passed by the Commissioner (Appeals), Customs & GST, Ludhiana, vide which the appeals filed by the Applicants against the Order-in-Original No. 17/ICD/ADC/2015 dated 26.03.2015, passed by the Additional Commissioner of Customs, I.C.D. GRFL, G.T. road, Sahnewal, Ludhiana, have been rejected.

2. Briefly stated, the Applicant-1 herein had filed certain Shipping Bills for the export of goods declared as "Woven fabrics containing 85% or more by weight of Synthetic Staple Fibres", for claim of drawback under Drawback Schedule Sl. No. 551202A, through M/s S.R. International, Custom House Agent (Applicant -2) and another. However, on an information to the effect that the Applicant -1 had misdeclared the goods with the intent to claim higher drawback, the officers of the Directorate of Revenue Intelligence (DRI) intercepted the consignments. After investigations, a show cause notice dated 23.11.2011 was issued to the Applicants. It was alleged therein that the Applicant-1 had exported "Woven fabrics of manmade staple fibre containing 65% polyester staple fibre and 35% of viscose staple fibre" falling under Drawback Schedule Sl. No. 551502A but misdeclared the same as "Woven fabrics containing 85% or more by weight of Synthetic Staple Fibres", falling under Drawback Schedule Sl. No. 551202A in order to avail higher drawback. It was further alleged that the Applicant-2 was actively associated with this wilful misdeclaration. The original authority, vide the above mentioned OIO dated 26.03.2015, had confirmed the demand of Rs. 1,94,027/- against the Applicant -1 in terms of Rule 16 of the Customs Central Excise duties and Service Tax Drawback Rules, 1995 along with applicable rate of interest. Besides a penalty of Rs. 1,00,000/- each was also imposed on Applicant -1 under Sections 114 and 114AA of

the Customs Act, 1962. The original authority also imposed penalty of Rs. 50,000/- each on the Applicant -2 under Sections 114 & 114AA of the Customs Act, 1962. The appeals filed by the Applicants herein were rejected by the Commissioner (Appeals).

3. The revision application has been filed by the Applicant -1, mainly, on the grounds that the misdeclaration occurred due to ignorance and not due to malafide intention; that the excess drawback amounting to Rs. 1,60,913/- had been deposited before issue of show cause notice; that the Duty Drawback Rules do not contain any provision for the imposition of penalty; and that the penalty imposed under Section 114 and 114 A of the Customs Act, 1962 is not attracted in the instant case. Applicant -2 has filed the revision application on the grounds that the Applicant was merely acting as a Customs House Agent in order to facilitate the clearance of Shipment; that the Applicant -1 in his statement before the DRI had never named the Applicant -2 that he was in knowledge about the actual description of the exported goods; and that as such the penalty is not imposable on the Applicant -2. Applicant -2 in his further written submissions, received via email on 22.11.2021, has submitted that the Show Cause Notice dated 23.11.2011 was issued by the DRI whereas the Hon'ble Supreme Court of India in the case of Cannon India & Others (in Civil Appeal No. 1827 of 2018 & others) has held that the DRI Officers are not the proper officers to issue show cause and therefore the show cause notice issued against them by the DRI also merited to be quashed and all the subsequent proceedings with reference to the SCN issued by the DRI are also liable to be quashed and set aside. It is further contended that the Customs had alleged failure to discharge obligations cast under Regulation 13(d) & (e) of the CHALR, 2004, and, hence, action could have been initiated under CHALR, 2004 and not under the Customs Act, 1962.

4. Personal hearing in the case of Applicant-1 was held on 10.12.2021, in virtual mode. Sh. Om Prakash, Advocate appeared for the Applicant -1 and submitted that the allegation of misclassification is not contested. However, this was not malafide

and the excess drawback has been paid back. Hence, a lenient view may be taken in respect of penalty under Section 114. As regards penalty under Section 114 AA, the same is not applicable as the export actually took place and remittances have been received. Sh. Chander Mani, Superintendent supported the order of Commissioner (Appeals). Personal hearing in the case of Applicant-2 was granted on 27.10.2021, 22.11.2021 & 08.12.2021. However, no one appeared for the Applicant. However, as per written submissions received on 22.11.2021, the Applicant does not require hearing. Sh. Chander Mani, Superintendent appeared for the department and supported the order of Commissioner (Appeals).

5. The RA No. 375/30/2020-DBK has been filed with a delay as the Applicant-1 had earlier mistakenly filed an appeal before CESTAT. The CESTAT, Chandigarh, vide Order No. A/60162/2020 dated 30.01.2020, dismissed the appeal as non-maintainable. Delay is condoned.

6.1 The Government has examined the matter carefully. At the outset, it is observed that the allegation of misclassification of export goods is not contested. The request of the Applicant -1 is limited to the point that the lenient view may be taken in respect of the penalty imposed under Section 114. This plea of leniency has been made on the grounds that the misdeclaration was due to ignorance. However, the Government observes that the Applicant-1 made the wrong declaration despite the manufacturer of the export goods clearly mentioning on the invoice "P/V Fabric 65/35". It is also correctly observed by the original authority that such goods are priced based on composition and, therefore, the Applicant-1 would have bought the export goods in full knowledge of their correct composition. Thus, the Government has no doubt that the misdeclaration was made intentionally.

6.2 Section 114 AA reads as under:

Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material

particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

The Government observes that the Applicant-1 had intentionally mis-declared the description and Drawback Schedule Sl. No. of the exported goods on the Shipping Bills. Hence, the Applicant -1 has not made a true declaration as regards to the contents of the goods exported in terms of Section 50 of the Customs Act, 1962. Thus, the imposition of penalty under Section 114 AA is merited. The defence based on the report of the Parliament's Standing Committee on Finance (2005-06), 14th Lok Sabha cannot be countenanced since the words of the statute are plain and clear. It is trite that "when the words of the statute are clear, plain and unambiguous, then courts are bound to give effect to that meaning, irrespective of the consequences". [Ref. Gurdevdatta Vks Maryadit & Ors. Vs. State of Maharashtra & Ors 2001 (4) SCC 534].

7.1 Applicant -2 has contended that the Show Cause issued by the Directorate of Revenue Intelligence merits to be quashed in view of the judgment of Hon'ble Supreme Court in the case of Canon India Pvt. Ltd. Versus Commissioner of Customs {2021(376)E.L.T.3(S.C.)}. Government observes that the judgment in question was passed in reference to a demand of duty raised under Section 28(4) of the Customs Act, 1962 whereas the instant case arises out of demand of erroneous drawback under Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

7.2 Section 28(4) reads as under:

"(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, -

- (a) collusion; or*
- (b) any willful mis-statement; or*
- (c) suppression of facts,*

by the importer or exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the

person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

The Rule 16 of the Drawback Rules is reproduced as below:

"16: Repayment of erroneous or excess payment of drawback and interest.- Where an amount of drawback and interest, if any, has been paid erroneously or the amount so paid is in the excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of Customs repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it shall be recovered in the manner laid down in sub-section (1) of Section 142 of the Customs Act, 1962 (52 of 1962)"

Thus, Section 28(4) empowers "the proper officer" to raise a demand of duty whereas Rule 16 empowers "a proper officer" to raise a demand of drawback which was paid erroneously. The use of the definite article "the" in Section 28(4) as against the use of indefinite article "a" in Rule 16 is significant. The Hon'ble Supreme Court has, in the case of M/s Canon India (supra), held that an officer of the Directorate of Revenue Intelligence cannot issue a show cause notice under Section 28(4) and it is only the officer who assessed and cleared the goods or his successor in office, who could do so. While arriving at this conclusion, the Hon'ble Supreme Court has observed as under:

"9. This Section empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts and confers the power of recovery on the "the proper officer". The obvious intention is to confer the power to recover such duties not on any proper officer but only on "the proper officer". This Court in Consolidated Coffee Ltd. and Another v. Coffee Board, Bangalore [(1980) 3 SCC 358] has held :-

"14. ... Secondly, and more importantly, the user of the definite article 'the' before the word 'agreement' is, in our view, very significant. Parliament has not said 'an agreement' or 'any agreement' for or in relation to such export and in the context the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export."

In Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. [(2001) 3 SCC 609] has held :-

"9. ... 'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines

what particular thing is meant; that, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person."

10. There are only two articles 'a (or an)' and 'the'. 'A (or an)' is known as the Indefinite Article because it does not specifically refer to a particular person or thing. On the other hand, 'the' is called the Definite Article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28(4), it could have used the word 'any'.

11. Parliament has employed the article "the" not accidentally but with the intention to designate the proper officer who had assessed the goods at the time of clearance. It must be clarified that the proper officer need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office. In this case, anyone authorised from the Appraisal Group. Assessment is a term which includes determination of the dutiability of any goods and the amount of duty payable with reference to, inter alia, exemption or concession of customs duty vide Section 2(2)(c) of the Customs Act, 1962."

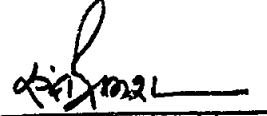
Thus, following the ratio of the Canon India (supra), demand under Rule 16 ibid can be raised by an officer of Customs duly authorised in this behalf and not merely by the officer (or his successor) who had sanctioned the drawback.

7.3 Therefore, the judgment in the case of Canon India does not support the subject contention of the Applicant-2 and it is rejected as unacceptable.

7.4 Another contention of the Applicant-2 is that they are not liable to penalty under Section 114 and 114AA of the Customs Act, 1962, since they were nearly preparing the Shipping Bills. The Government observes that the original authority has examined this aspect in detail and concluded that the Applicant-2 failed to conduct due diligence, contrary to their claim, in the statements made before DRI as they did not ask for the relevant information/test report and purchase invoice etc. to verify the description so as to determine the correct drawback serial number. It is also evident that the Applicant-2 did not check any of these aspects with the exporter (Applicant-1). Thus, the Applicant-2 has aided and abetted the Applicant-1 in misdeclaration and thereby made goods liable to confiscation. Further, admittedly,

the Shipping Bills containing wrong declaration were prepared by the Applicant-2. Therefore, the liability for penalty under Section 114AA also cannot be repelled.

8: - In view of the above, the Government holds that there is no infirmity in the conclusions arrived at by the lower authorities. The revision applications are rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

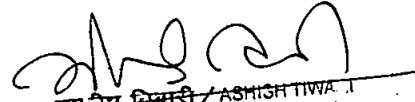
1. M/s Pakeeza Exports,
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Amritsar – 143 001.
2. M/s S.R. International,
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Phase V, Focal Point, Ludhiana – 141 010.

Order No. 286 -287/21-Cus dated 13-12-2021

Copy to:

1. The Commissioner of Customs, Ludhiana, Customs House, ICD, GRFL Complex, G.T. Road, Sahnewal, Ludhiana – 141 120.
2. The Commissioner (Appeals), Customs & GST, GST Bhawan, 'F' Block, Rishi Nagar, Ludhiana – 141 001.
3. Sh. Om Prakash, Advocate, 3248/71, Mohali (Punjab), Pin 160 071.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED



आसिस्टिन्ट कमिश्नरी / ASHISH TIWARI
सहायक आसिस्टिन्ट कमिश्नरी / Assistant Commissioner
केन्द्रीय वस्तु एवं सेवा कर, केन्द्रीय उत्पाद एवं सीमा शुल्क
C&ST, Central Excise & Customs
राजस्व विभाग / Department of Revenue
वित्त मंत्रालय / Ministry of Finance
भारत सरकार / Government of India
नई दिल्ली / New Delhi