

SPEED POST



F. No. 373/188/DBK/2016-R.A.
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. 18/10/22

Order No. 322/22-Cus dated 17-10-2022 of the Government of India, passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

SUBJECT : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. VIZ/CUSTM/000/APP/033/16-17 dated 13.07.2016, passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Visakhapatnam.

APPLICANT : M/s. Vasudha Pharma Chem Ltd., Visakhapatnam.

RESPONDENT : The Commissioner of Customs, Visakhapatnam.

ORDER

A Revision Application No.373/188/DBK/2016-RA dated 30.09.2016 has been filed by M/s. Vasudha Pharma Chem Ltd., Visakhapatnam (hereinafter referred to as the Applicant) against the Order-in-Appeal No. VIZ/CUSTM/000/APP/033/16-17 dated 13.07.2016, passed by the Commissioner (Appeals), Customs Central Excise & Service Tax, Visakhapatnam. The Commissioner (Appeals) has upheld the letter F. No.S23/302/2011-AP (DBK) dated 28.11.2013 of the Assistant Commissioner of Customs (Drawback), Visakhapatnam.

2. Briefly stated, the Applicants herein had imported 16,000 Kgs of Meta Chloro Benzyl Cyanide (MCBC) from China, vide Bill of Entry No. 9230513 dated 06.02.2013 and paid customs duty amounting to Rs. 29,08,348/-. After using a part of the imported goods for manufacture of the designated chemical, the quality was found to be not upto the mark and, hence, the Applicant herein made a Supplementary Agreement to return 8,000 Kgs of unused goods to the supplier /original exporter, who agreed to supply new goods in lieu thereof. The Applicant had availed CENVAT credit to the tune of Rs. 19,95,765/- corresponding to the additional duty of customs paid on the goods and reversed proportionate CENVAT credit of Rs. 9,97,883/-. The unused 8,000 Kgs goods were presented for export, vide shipping Bill No. 1064/13 dated 28.05.2013, under claim of drawback, in terms of Section 74 of the Customs Act, 1962. However, the Respondent department allowed the shipment of the consignment making a remark "without claim for drawback of export duty since appropriate section 26A of Customs Act which is already time barred". The Applicants thereafter, vide the letter dated 22.10.2013, requested the department to allow their claim for drawback under Section 74, which was rejected by the original authority, vide aforesaid letter dated 28.11.2013. The appeal filed by the Applicants herein has been rejected by the Commissioner (Appeals), vide the impugned Order-in-Appeal.

3. The revision application has been filed, mainly, on the grounds that Section 26A of the Customs Act, 1962 is not applicable in their case; that Section 26A covers the return of entire quantity of the goods which had not been used in India except for the purpose of any checks carried out; that, in the present case, 8,000 kgs out of the 16,000 kgs lot imported had been used and only balance 8,000 kg was returned; that it is incorrect of the original authority to say that the goods had not been identified to the satisfaction of the AC (Docks), since there is no such observations made on the shipping bill; that all the documentary evidences were submitted by them and it was the duty of the department to identify the goods to their satisfaction; that their bank had certified that it is the same goods which were returned; and that, therefore, the orders passed by the authorities below are incorrect.

4. Personal hearing in the matter was held on 14.10.2022, in virtual mode. Sh. Ravi Babu, DGM appeared for the Applicant and requested that the written submissions dated 29.09.2022 may be taken on record. He reiterated the contents of the RA and written submissions dated 29.09.2022. Sh. Jagan Mohan, AC supported the orders of lower authorities.

5.1 The Government has examined the matter carefully. At the outset, following facts discernible from the records of the case need to be noted:

- (i) The Shipping Bill No. 1064/13 dated 28.05.2013 has been filed with a claim of drawback under Section 74 of the Customs Act, 1962 and a declaration to this effect is clearly made on the face of the Shipping Bill.
- (ii) Following examination order has been endorsed: "IN THE PRESENCE OF AC (D). Inspect the goods. Verify the description w.r.t. import documents and export documents. Establish the identity of the goods as they are being re-exported."
- (iii) Following examination report has been endorsed by the EO and the AO (Docks): "As directed, inspected the goods in presence of AO(D), AC(D) and CHA on 06.06.2013 with reference to import documents. Verified marks and numbers. Cargo: colourless liquid declared as Meta Chloro Benzyl Cyanide. Detailed observation in F. No. 523/168/2012-AP(I) on NSP pages 27 to 30."
- (iv) AC (Docks) has made following observations in respect of the examination report: "Export of the consignment is allowed without claim for drawback of import duty since the appropriate section is 26A of Customs Act, 1962 which is already time barred."

Thus, it is clear that the goods were tendered for export under claim of drawback under Section 74 and examination report was prepared accordingly. However, the AC (Docks) suo-motu observed that appropriate section is Section 26A, which is time barred. There is nothing in the remarks of AC (Docks) to indicate that identity of the goods was not established to his satisfaction whereas the AC (Drawback), while rejecting the request of the Applicants, has stated that the goods under subject shipping bill are not identified to the satisfaction of the Assistant Commissioner.

5.2 In the conspectus of these facts, the Government observes that the AC (Docks) who was entrusted with the duty of identifying the goods did not do so and on his own recorded that the claim was correctly to be made under Section 26A, which is time barred. In other words, the AC (Docks) suo-motu changed the nature of the claim to the detriment of the Applicant herein without affording any opportunity to them to make their case. This injustice has been compounded by the AC (Drawback) by recording that the goods were not identified to the satisfaction of the Assistant Commissioner whereas AC (Docks) had, in fact, recorded nothing in his report to indicate that the identity was not established. It is also observed that Section 26A of the Customs Act also requires that the identity of the goods, which had been earlier imported and were tendered for export under the said Section 26A, should be identified to the satisfaction of the Assistant Commissioner/Deputy Commissioner as the goods which were imported. Therefore, both in terms of Section 26A and Section 74 the requirement of export goods being identified to the satisfaction of the Assistant Commissioner or Deputy Commissioner as the goods which were earlier imported apply. It is also to be noted that the issue whether Section 26A was applicable and whether the claim under said Section 26A was time barred was outside the purview of the AC (Docks). Even if, he was of the opinion that the claim was to be made under Section 26A, he ought to have examined the goods and recorded his satisfaction or otherwise regarding the identity of the goods. The issue of applicability of the statutory provision and time bar would, in any case, be in the purview of the officer

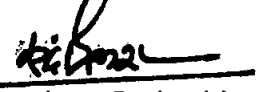
who would be sanctioning the refund in terms of sub-section (1) of Section 26A. Thus, the following is apparent:

- (i) The AC (Docks) acted beyond his jurisdiction by changing the nature of the claim from Section 74 to Section 26A as well as by holding it as time barred under Section 26A.
- (ii) These actions of AC (Docks) are in the teeth of the principles of natural justice as the exporter was given no opportunity to defend his case.
- (iii) In fact by refusing to record his satisfaction or otherwise with reference to identity of the goods, as he was required to do in terms of the examination order, the AC (Docks) has refused to discharge his duty.
- (iv) The AC (Drawback) has compounded the injustice done by the AC (Docks) by holding that the goods were not identified to the satisfaction of the Assistant Commissioner and thereby rejecting the claim.

The Commissioner (Appeals) has not taken note of these illegalities. As such, there is no doubt that the orders of the authorities below cannot be sustained on this basis itself.

5.3 The Applicants have pointed that they had placed on records copies of several documents establishing the entire chain from import of goods till their re-export. These documents are the relevant Bill of Entry, Import Invoice dated 06.01.2013, Import Packing List dated 06.01.2013, Import Bill of Lading dated 16.01.2013, Supplementary Agreement dated 07.04.2013 between the supplier and Applicant herein and the OC No. 812/2013 dated 04.06.2013 issued by the Superintendent, Anakapalle Range. The Supplementary Agreement brings out that *"because the quality of part of the goods (8000 kgs) is not correspond with buyer's specifications"*, both parties had, inter-alia, agreed that the seller shall ship new 8000 kgs goods *"after receiving the corresponding quantity of the unqualified materials returned by the buyer."* The Range Superintendent i/c of the factory of the Applicant has also certified that the Applicant wish to re-export 8000 kgs of the product imported earlier, due to quality reasons, and are going to reverse proportionate CENVAT credit of Rs. 9,97,883/-. This certificate dated 04.06.2013 also gives reference of Export Invoice No. VPCL/V-3/D/174/2013-14 dated 03.06.2013. None of these documents have been factually disputed by the authorities below. However, the Commissioner (Appeals) has refused to give credence to the Range Superintendent's certificate stating that *"On perusal of the certificate dated 04.06.2013 issued by the Central Excise Range Superintendent, it is observed that facts based on records only have been certified by him. Nowhere in the certificate it was confirmed that the cargo presented for export vide the Shipping Bill No. 1064/13 is the same cargo that was imported vide BE No. 9230513 dated 06.02.2013."* The Government finds that the first part of the observation of the Commissioner (Appeals) actually supports the case of the Applicants in as much as it establishes that certification by the Superintendent is based on records. As far as the second part of the observations is concerned, the Commissioner (Appeals) appears to have not noticed that the Range Superintendent has given reference of the Export Invoice, which covers the Shipping Bill and has thereby confirmed the link. It is not the case of the department that given Export Invoice does not cover the subject Shipping Bill. As such, the Government finds that the identity of the export goods as those which had been imported earlier is established with reference to the records. Consequently, it is held that the Applicants are eligible for the benefit of the drawback under Section 74 of the Customs Act, 1962 in respect of the subject export consignment.

6. In view of the above, the Revision Application is allowed with consequential relief and the orders of the authorities below are set aside.



(Sandeep Prakash)

Additional Secretary to the Government of India

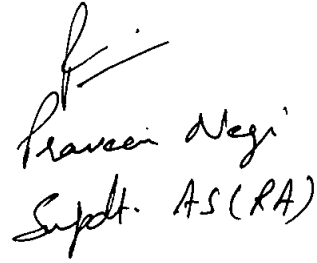
M/s. Vasudha Pharma Chem Ltd.,
Plot No. 79, Jawaharlal Nehru
Pharma City, Parawada,
Visakhapatnam-531021.

Order No. 322/22-Cus dated 17.10.2022

Copy to:-

1. The Commissioner of Customs, Customs House, Port Area, Visakhapatnam-530035.
2. The Commissioner (Appeals), Customs, Central Excise & Service Tax, 4th Floor, Custom House, Port Area, Visakhapatnam-530035.
3. Sh. S.C. Choudhary Chief Adviser M/s G.R. Kumar & Co, Chartered Accountants No. 9, Merry Life Apartments, Doctor's Colony Peda Waltair, Vishakhapatnam-530017.
4. P.S TO A.S (RA)
5. Guard File
6. Spare Copy

ATTESTED



Praveen Negi
Supt. AS(RA)