

SPEED POST



F.No. 373/91/DBK/2016-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 13/12/22

Order No. 381/22-Cus dated 13-12-2022 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 C.Cus-I No. 875/2015 dated 23.12.2015, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : M/s Chemplast Sanmar Ltd., Chennai.

Respondent : The Commissioner of Customs, Chennai-VII, Chennai.

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ORDER

A Revision Application No. 373/91/DBK/2016-RA dated 02.05.2016 has been passed by M/s. Chemplast Sanmar Ltd., Chennai (hereinafter referred to as the Applicant) against the Order-in-Appeal C.Cus-I No. 875/2015 dated 23.12.2015, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Order-in-Original No. 695/2015 dated 07.08.2015 passed by the Assistant Commissioner of Customs (Drawback), Chennai-VII Air Cargo Commissionerate, Chennai.

2. Briefly stated, the Applicants herein imported a helicopter, namely, Bell Model 429 Serial No. 57045 from supplier M/s. Bell Helicopter Asia Pte Ltd., Singapore and cleared the same, vide Bill of Entry No. 5485348 dated 16.02.2011, at the declared CIF value of USD 66,35,886/-. After being put to use and 05 months of import, one of the parts of this helicopter, namely, Aircraft Data Interface Unit (ADIU) malfunctioned and the supplier agreed for warranty replacement. Consequently, replacement of this item arrived Bill of Entry No. 38589 dated 30.05.2012, in courier mode, at declared CIF value of USD 1,25,290.80/-. The applicable Customs duty of Rs. 14,23,031/- was paid on the replacement part. The description of replacement part in the invoice was ADIU 429 warranty replacement part for Bell 429-S/N 57045. The defective ADIU was re-exported vide Shipping Bill No. 9009925 dated 15.06.2012 with claim of drawback under Section 74 of the Customs Act, 1962. The original authority, vide Order-in-Original No. 382/2014-DBK-AIR dated 06.06.2014, rejected the claim for drawback on the ground that ADIU under re-export was not separately imported and value cannot be assigned. On an appeal filed by the Applicant herein the matter was remanded to the original authority by the Commissioner (Appeals), vide OIA No. 86/2014 dated 20.11.2014. In the remand proceedings the original authority rejected the drawback claim again holding that there were different versions on the value of the item re-exported and that what was re-exported was only a part of which was imported. The appeal filed by the Applicant herein has been rejected by the Commissioner (Appeals).

3. The revision application has been filed, mainly, on the grounds that the original authority had exceeded the remit of the remand order; that the goods were re-exported and the Applicant had submitted all relevant details to establish the identity of the goods; that the value of the part had been identified by the supplier and the drawback claim is confined to the proportionate duty pertaining to ADIU only; that the Commissioner (Appeals) has erred in giving a finding that what had been imported is not re-exported; that the duty assessed on the helicopter originally imported also included the duty on the proportionate value of the ADIU; that the defective ADIU was not scrap but was in fact replaced; and that it was incorrect to

say that the Applicants had not established the market value of the product which was nothing but the value of the replacement part.

4. Personal hearing was held on 12.12.2022, in virtual mode. Ms. Sharanya Vijay K, Advocate appeared for the Applicant and reiterated the contents of the RA. No one appeared for the Respondent department nor any request for adjournment has been received. It is, therefore, presumed that the department has nothing to add in the matter.

5. The Government has examined the matter carefully. The revision application raises two issues viz.-

- (i) Whether drawback under Section 74 can be granted in respect of a part stated to have been incorporated in the goods originally imported and which part upon being found defective is being subsequently re-exported?; and
- (ii) What would be the market price in India of such a defective part entered for re-export for the purposes of Section 76 of the Customs Act, 1962?

6. The relevant extracts of Section 74 are reproduced below:

"SECTION 74. Drawback allowable on re-export of duty-paid good.- (1) When any goods capable of being easily identified which have been imported into India and upon which any duty has been paid on importation,-

- (i) are entered for export and the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51; or
- (ii) are to be exported as baggage and the owner of such baggage, for the purpose of clearing it, makes declaration of its contents to the proper officer under section 77 (which declaration shall be deemed to be an entry for export for the purposes of this section) and such officer makes an order permitting clearance of the goods for exportation; or
- (iii) are entered for export by post under clause (a) of section 84 and the proper officer makes an order permitting clearance of the goods for exportation,

ninety-eight per cent of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback, if -

- (a) the goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported; and
- (b) the goods are entered for export within two years from the date of payment of duty on the importation thereof:

Provided that in any particular case the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period as it may deem fit."

From clause (a) reproduced above, it is clear that to obtain benefit of Section 74 the goods entered for re-export have to be "identified----- as the goods which were imported". In other words, the goods entered for re-export should be the same goods which were earlier imported. In the present case, 'helicopter' was imported and 'ADIU' has been re-exported. ADIU is stated to be a part of the helicopter which was originally imported and on this basis it is claimed that the benefit of Section 74 shall be available to re-export of ADIU. The Government observes that though ADIU may be a part of helicopter, it is not same goods (i.e. helicopter) which were originally imported. A helicopter is manufactured by assembly of thousands of parts. When assembled into a helicopter, these parts lose their individual and specific identity and a new product, i.e., helicopter emerges after subsuming the identity of each of the parts. Therefore, it is not possible to accept that the 'ADIU' and the 'helicopter' are the same goods. Further, there is nothing in Section 74 to indicate that the provisions thereof shall be applicable in respect of the each of the parts of the goods which were imported earlier as a whole. As already stated, a helicopter consists of thousands of parts. If the contention of the Applicant was to be accepted, every time a part of the helicopter fails and is replaced, the importer would be eligible to claim drawback by assigning a value to such part on replacement value basis (the value having been not declared at the time of import as only the import value of helicopter was declared) and claiming drawback of duty on proportionate basis. This can continue till the helicopter outlives its useful life. During this period of say 15-20 years, the value of replacement parts is likely to increase due to inflation and other such factors. Thus, while the duty would have been paid on the original value of the helicopter at the time of import, the duty drawback would be availed on the duty proportionate to the value assigned to the part being re-exported on the replacement value basis at the time of re-export. Evidently, the sum total of drawback so claimed would be higher than the duty paid at the time of import. Thus, there is no doubt that the view canvassed by the Applicant would lead to a misuse of Section 74 and it cannot be accepted for this reason as well.

7. Further, the Applicant herein has sought to assign the value of the replacement part as the market price in India of the defective part re-exported. The Commissioner (Appeals) has held that the market price of a defective part cannot equal to the value of the replacement part. The Applicants have sought to dispute this finding of the Commissioner (Appeals) by relying upon the judgment of a Hon'ble Single Judge of Hon'ble Calcutta High Court in the case of Hindustan Malleable and Forgings Ltd. vs. Assistant Collector of Customs {(1992) (62) E.L.T. 7 (Cal.)}. The Government finds that a Division Bench of the Hon'ble Bombay High Court has, in a

subsequent judgment in the case of Kanubhai Engineering Ltd. vs. Union of India {(2003 (158) E.L.T. 571 (Bom.)}, held that in view of the Hon'ble Supreme Court's judgment in the case of Om Prakash Bhatia vs. Commissioner of Customs {(2003 (155) E.L.T. 423 (SC)}, the replacement value of a defective part cannot be the basis for determining the market price of the goods prevailing in the country. Hon'ble Bombay High Court has also on this basis distinguished the judgment of the Hon'ble Calcutta High Court in the case of Hindustan Malleable and Forgings Ltd. (supra). Thus, in the present case, the contention that the value of the replacement part may be taken as the market price in India of the defective part re-exported by the Applicants herein has to be rejected. Further, it has also been brought out that while as per the warranty supply invoice the value of replacement part was USD 125239.80, the manufacturer of the helicopter in an e-mail message had indicated the value, as on 18.12.2011, as USD 185175. There is no explanation forthcoming in respect of these different values being assigned in different communications of the supplier. Thus, the Government is in agreement with the lower authorities that the market price in India of a defective part entered for re-export cannot be determined by adopting or ascribing the replacement value of such a part.

8. In view of the above, the Government does not find any infirmity in the impugned Order-in-Appeal. The revision application is rejected.


(Sandeep Prakash)


Additional Secretary to the Government of India

M/s Chemplast Sanmar Ltd.,
No. 9, Cathedral Road,
Chennai-600086.

Order No. 387/22-Cus dated 13-12-2022

Copy to:

1. The Commissioner of Customs, Chennai-VII, Air Cargo Complex, New Custom House, Meenambakkam, Chennai-600027.
2. The Commissioner of Customs (Appeals-I), 60, Rajaji Salai, Custom House, Chennai-600001.
3. M/s. K. Vaitheeswaran, Advocate & Tax Consultant, Flat No.8/3 L8/4, Ground Floor, No. 8, Sivaprakasam Street, T. Nagar, Chennai-600017.
4. PA to AS(RA)
5. Guard File
6. Spare Copy

ATTESTED

अश्वनी कुमार लौ / Ashwani Kumar Lau
अधीक्षक / Superintendent (R.A. Unit)
राजस्व विभाग / Department of Revenue
वित्त विभाग / Ministry of Finance
Room No. 606, 6th Floor, B-Wing
14, Huda Vihara Building, New Delhi-110006