

SPEED POST



F. No. 373/196/DBK/SZ/2022-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 10/2/23

Order No. 44 / 23-Cus dated 10.2.2023 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. 71/2021-TRY (CUS) dated 30.03.2021, passed by Commissioner of Customs & Central Excise (Appeals), Tiruchirapalli.

APPLICANT : M/s Harrow Exports, Kannur.

RESPONDENT : The Commissioner of Customs, Tiruchirapalli.

ORDER

A Revision Application No. 373/196/DBK/SZ/2022-RA dated 18.04.2022 has been filed by M/s Harrow Exports, Kannur (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 71/2021-TRY (CUS) dated 30.03.2021, passed by the Commissioner of Custom & Central Excise (Appeals), Tiruchirapalli. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, rejected the appeal filed by the Applicants herein against the Order-in-Original No. 02/2020-Custom (BRC) dated 03.03.2020, passed by the Assistant Commissioner of Customs, ICD, Tirupur.

2. Briefly stated, the Applicants herein had made exports against 09 shipping bills, and claimed drawback amounting to Rs. 6,37,620/-, which was sanctioned. However, subsequently, on verification, it appeared that the Applicants herein had failed to produce the evidence of realisation of export proceeds in respect of exports made and, hence, a show cause notice dated 28.09.2010 was issued to them under Rule 16A of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995. The original authority, vide the Order-in-Original No. 291/2010 dated 21.02.2012, ordered for recovery of the drawback amount along with the interest applicable. The appeal filed by the Applicants herein was rejected by the Commissioner (Appeals), as time barred, vide the Order-in-Appeal No. CMB-CEX-000-APP-209-13 dated 18.06.2013. The revision application No. 373/73/DBK/13-RA filed by the Applicants herein against the Order-in-Appeal dated 18.06.2013, was rejected by the Government, vide Order No. 45/2014-Cus dated 31.03.2014. Subsequently, on issue of alert regarding recovery of arrears arising out of the Order-in-Original dated 21.02.2012, the Applicants herein paid the amount of Rs. 6,37,620/- along with interest of Rs. 11,54,463/-, under TR-6 challan dated 04.09.2019. The Applicants also submitted the copies of BRCs evidencing the realisation of export proceeds against the drawback claims covered under Order-in-Original dated 21.02.2012 and requested for repayment of the drawback amount along with interest paid by them, vide letter dated 12.09.2019. The original authority, vide the aforesaid Order-in-Original dated 03.03.2020, allowed the claim for repayment of the recovered drawback amount to the extent of Rs. 5,68,678/- but rejected the claim for repayment of recovered drawback amount of Rs. 60,949/- in respect of shipping bill No. 000768 dated 28.03.2019. The claim for repayment of interest amount of Rs. 11,54,463/- was rejected, in toto, on the grounds that there is no provision in the Drawback Rules to allow refund of interest recovered from the exporter on non-realisation of sales proceeds. The appeal filed by the Applicants herein has been rejected by Commissioner (Appeals), vide the impugned Order-in-Appeal. The Applicants herein, thereafter, impugned the Order-in-Appeal dated 30.03.2021 before the Hon'ble Madras High Court in Writ Petition No. 16036 of 2021, where the revisionary authority was not a party. The Hon'ble High Court disposed off the said Writ Petition, vide Order dated 08.03.2022, with the following directions:

- "That the petitioner can approach the revisional authority under Section 35EE of the Act by filing a revision within a period of two weeks from the date of receipt of a copy of this order.
- Once such revision is filed, the same shall be entertained and decided by the revisional authority within a period of 60 days thereafter, as the issue to be

decided in the said revision is only with regard to the claim of the petitioner for getting interest.

- It is made clear that the revisional authority shall give notice to the petitioner and the Revenue, fix a date for personal hearing and after hearing to both parties, such a decision as indicated above shall be made."

The instant revision application was filed on 18.04.2022 pursuant to the receipt of aforesaid Orders of the Hon'ble High Court, on 06.04.2022, before the revisionary authority at Mumbai. Pursuant to the redistribution of territorial jurisdiction, the case was received by this authority and has been taken up for disposal, after the aforesaid Order of the Hon'ble High Court was brought to notice by the Id. Counsel for the Applicants, vide his letter dated 02.01.2023.

3. The revision application has been filed, mainly, on the grounds that once the drawback amount paid by the Applicants is returned to them then it is apparent that the said amount was not required to be paid and, hence, the interest also could not have been retained; that the interest is compensatory in nature and once the compensation fails the interest cannot be retained; that no money can be retained by the Government without authority of law and in absence of any authority allowing the Government to retain amount on the ground that there is no provision for refund of interest is violative of Article 265 of the Constitution; that the Hon'ble Delhi High Court has, in the case of *Birinder Kaur Bajwa vs. Dir. (Drawback), Department of Revenue* {2010 (255) ELT 511 (Del.)}, held that the department could not retain the amount of drawback and interest recovered from the exporter when the exports proceeds had been realised; that the Hon'ble Supreme Court has dismissed the appeal filed by the department in the matter as reported in 2017 (350) ELT A173 (SC).

4. Personal hearing in the matter was fixed on 23.01.2023, which was adjourned to 27.01.2023 at the request of the learned Counsel for the Applicants. However, no one appeared for either side in the personal hearing fixed on 27.01.2023 nor any request for adjournment was received. Therefore, last and final opportunity was granted on 09.02.2023. In the personal hearing held, in virtual mode, on 09.02.2023, Sh. JV Niranjana, Advocate appeared for the Applicants and reiterated the contents of the RA. He explained that in pursuance of Order-in-Original No. 291/2010 read with Order-in-Appeal dated 18.06.2013, the Applicants had paid back the drawback amount of Rs. 6,37,620/- alongwith interest of Rs. 11,54,463/-. Subsequently, upon accepting the proof of realisation of export proceeds, the original authority, vide OIO dated 03.03.2020, allowed repayment of drawback amount of Rs. 5,68,678/-, while rejecting the claim for repayment of recovered drawback amount of Rs. 60,949/-. The original authority also rejected the repayment of interest recovered amounting to Rs. 11,54,463/-. In his submission, the department cannot retain the interest amount since the principal amount itself was not payable. No one appeared for the Respondent department on any of the dates fixed for hearing nor any request for adjournment has been received. Since sufficient opportunities have been granted, it is presumed that the department has nothing to add in the matter.

5. Government has carefully examined the matter. At the outset, it has to be noticed that in terms of sub-section (2) of Section 129DD of the Customs Act, 1962, a revision application shall be made within three months from the date of communication to the

applicant of the order against which the application is being made. Further, as per proviso to the said sub-section (2), the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within further period of three months. Therefore, a revision application has to be filed within a maximum period of six months from the date of communication of the order impugned, including the condonable period of three months. In the present case, Order-in-Appeal impugned herein has been admittedly communicated to the Applicants on 01.04.2021, whereas the revision application has been filed on 18.04.2022, which is beyond the limitation period including condonable period prescribed under Section 129DD *ibid*. However, the Government observes that the revision application has been filed in compliance of the Order of the Hon'ble Madras High Court, in its writ jurisdiction, directing the Applicants to file "a revision within a period of two weeks from the date of receipt of a copy of this order." It has been further ordered that "once such revision is filed, the same shall be entertained and decided by the revisional authority". Therefore, the Government proceeds to decide the subject revision application, in terms of the Order dated 08.03.2022 of the Hon'ble Madras High Court in Writ Petition No. 16036 of 2021.

6.1 On merits, short point involved in the present revision application is whether the interest amount which was recovered by the department along with the drawback should be returned to the Applicants herein since the drawback amount recovered from them itself has been returned.

6.2 It is observed that as per second proviso to sub-section (1) of Section 75 of the Customs Act, 1962, where any drawback has been allowed on any goods under the said sub-section and the sale proceeds in respect of such goods are not received by the exporter in India within the time allowed under FEMA, 1999, such drawback, except under such circumstances or such conditions, as the Central Government, may by rules specify, be deemed never to have been allowed and the Central Government may by rules specify the procedure for the recovery or adjustment of the such drawback. Rules 16 A *ibid* has been notified in pursuance thereof. As per sub-rule (1) of Rule 16A where an amount of drawback has been paid to an exporter but the sale proceeds in respect of such goods are not realised within the period allowed under FEMA, including any extension of such period, such drawback shall be recovered in the manner specified. As per sub-rule (2), when an exporter fails to produce evidence in respect of realisation of export proceeds within the time allowed, the Assistant/Deputy Commissioner of Customs shall issue a show cause notice to the exporter for production of evidence of realisation of export proceeds within a period of 30 days from the date of receipt of such notice and where exporter does not produce such evidence within the said period of 30 days, the Assistant/Deputy Commissioner of Customs shall pass an order of recovery of the amount of drawback so demanded within 30 days of the receipt of the said order. Sub-rule (3) of Rule 16A prescribes that where the exporter fails to repay the amount under sub-rule (2), within the said period of 30 days, it shall be recovered in the manner laid down in Rule 16. It is further prescribed, *vide* sub-rule (4), that where the sale proceeds are realised by the exporter after the amount of drawback has been recovered from him under sub-rule (2) or sub-rule (3) and the exporter produces evidence about such realization within one year from the date of such recovery of the amount or drawback, the amount of drawback so

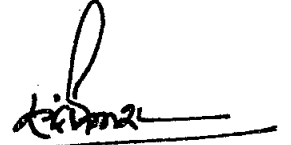
recovered shall be repaid by the Assistant/Deputy Commissioner of Customs to the claimant. In the instant case, the amount of drawback paid was recovered along with the interest applicable much after the period of 30 days, hence, it would appear that the recovery was made in terms of sub-rule (3) of Rule 16A read with Rule 16.

6.3 As recorded by the original authority in para 10 of the Order-in-Original dated 03.03.2020, out of the 09 shipping bills covered by the instant case, in respect of 08 shipping bills, i.e., except shipping bill No. 000768 dated 20.08.2009, the sale proceeds were realised on 19.01.2010, evidently within the time period specified under FEMA. Further, the original authority has recorded that the realisation was made even before the issue of show cause notice on 28.09.2010 and copies of BRCs were produced "once again on 09.11.2010." In this background, the original authority has allowed the repayment of the recovered drawback amount of Rs. 5,68,678/- corresponding to the 08 shipping bills in respect whereof the export proceeds were realised within the time period specified. In the conspectus of these facts and circumstances, it is apparent that the export proceeds were realised within the time specified under FEMA, 1999 and there was no cause for initiating the process of recovery of drawback and applicable interest in terms of sub-rule (1) read with sub-rule (3) of Rule 16A. Therefore, the action taken for recovery of drawback and applicable interest is ab-initio void. In this light, the recovery of drawback amount to the extent of Rs. 5,68,678/- and the interest applicable, restricted to this drawback amount of Rs. 5,68,678/-, is also without any authority of law.

6.4 The Applicants herein have relied upon the judgment of Hon'ble Delhi High Court in the case of Birinder Kaur Bajwa (supra) in support of their case. In that case, the exporter had made exports under 37 shipping bills, during 1996-97, and had availed duty drawback. However, the exporter could not realise the export proceeds within the period of six months which was provided for realisation of export proceeds. In the meanwhile, on 16.06.1999, the exporter at the instance of the department paid duty drawback amount of Rs. 14,58,368/- along with applicable interest of Rs. 7,57,135/-. Subsequently, on 25.01.2001, the exporter received a ex-post facto permission from the RBI extending the date of realizing the sale proceeds, which was already realised sometime in August to October 2000. On a request made by the exporter, the department rejected the repayment of drawback amount along with the interest applicable on the grounds that the Rule 16A (4) prescribes period of one year from the date of recovery of drawback for submission of evidence regarding realisation of sale proceeds and since in that case the evidence was not produced within the prescribed period the repayment was not permissible. The Hon'ble High Court held that the Rule 16A (4) did not come into play at all as by virtue of Rules 16A (1) no recovery of drawback was liable to be made from the exporter in view of the fact that the exporter had realised the sale proceeds within the extended period, even though, such extension was granted ex-post facto. In this light, the Hon'ble High Court allowed the return of the entire amount including the interest recovered from the exporter. The Government observes that the present case stands on a better footing in as much as the export proceeds have been realised within the time specified and the evidence thereof was made available even before the order to recover the drawback along with the interest was made, vide Order-in-Original dated 21.02.2012.

6.5 In view of the above, there is no doubt that the interest amount paid by the Applicants herein corresponding to the amount of drawback allowed to be repaid, i.e., Rs. 5,68,678/-, cannot be retained and has to be repaid to the Applicant herein.

7. The revision application is, accordingly, allowed with a direction to the original authority to repay the recovered interest amount corresponding to the repaid drawback amount of Rs. 5,68,678/-, to the Applicants herein.



(Sandeep Prakash)

Additional Secretary to the Government of India


M/s Harrow Exports,
TTN 344A-14, Kaoser Complex,
Kannur-670002.

Order No. 44/23-Cus dated 10.2.2023

Copy to:-

1. The Commissioner of Customs, Tiruchirapalli, No.1, Williams Road, Cantonment, Tiruchirapalli-620001.
2. The Commissioner of Customs & Central Excise (Appeals), No. Williams Road, Cantonment, Tiruchirapalli-620001.
3. The Assistant Commissioner of Customs, ICD-CONCOR, SF No. 353-353, Palladam Road, Vidyalayam, Veerapandi Post, Tirupur-641605.
4. Sh. J.V. Niranjan, Advocate, 18, Veerabhadran Street, Nungambakkam, Chennai-600034.
5. PPS to A.S (RA)
6. Guard File
7. Spare Copy
8. Notice Board

ATTESTED


20/2/2023
Joint Secretary (RA, UIC)
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Ministry of Finance
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