IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 75944 of 2021

(Arising out of Order-in-Original No. KOL/CUS/PR.COMMISSIONER/PORT/33/2021 dated 07/09/2021 passed by Commissioner of Customs (Port), Kolkata)

M/s. Nidhi Distributors
(Anurag Bagaria, Advocate
6 Old Post Office Street, 2nd Floor, Room No. 69A/2, Kolkata-700001)

Appellant

VERSUS

Commr. of Customs (Port), Kolkata
(Customs House, 15/1, Strand Road, Kolkata-700001)

Respondent

APPEARANCE :
Mr. Rajeev Agarwal & Mr. Siddharth Agarwal both Advocate for the Appellant
Mr. S. Debnath, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.75618/2024

Date of Hearing : 23 February 2024
Date of Decision: 23 February 2024

PER R. MURALIDHAR:

The Appellant has exported T-shirts and Gents shirts under Seventeen (17) Shipping Bills during the period June 2002 to July 2002 and they exported 16 consignments during the period August 2002. Samples were drawn from the second lot of 16 Shipping Bills. The samples were sent to NTCL (National Textile Corporation Limited), Calcutta on 23/10/2002 and on the same day NTCL has submitted their report. The Department has sent further samples on 01/04/2003 to NIFT, Delhi which sent its Report on 02/04/2003. Based on PMV estimate given by NTCL, Calcutta, the Show Cause Notice was issued to the Appellant seeking to deny the Drawback claims filed by them. After due process, the Adjudicating Authority rejected the Drawback Claims. Being aggrieved, the Appellants filed their Appeal before the Tribunal. The Tribunal vide its Order No. S-772/A/500/KOL/06 dated 25/05/2006 remanded the matter to the Adjudicating Authority to grant Cross Examination of the persons conducting sample testing of the consignments. The Adjudicating Authority after due process, once again rejected the Drawback claim. Being aggrieved, the Appellants approached the Tribunal with their Appeal. The Tribunal on the ground that the Show Cause Notice was issued by DRI and the issue was being litigated before the Hon'ble Supreme Court, remanded the matter to the Adjudicating Authority once again. The Adjudicating Authority took up the adjudication process once again on the ground that the Supreme Court's outcome is not relevant in this case and has passed an Order agreeing with the Order passed by the earlierAdjudicating Authority. Being aggrieved, the Appellant is before the Tribunal.

2. The Learned Counsel appearing on behalf of the Appellant submits that in case of 17 Shipping Bills wherein the exports had taken place during the period June to July 2002, no samples were drawn by the Department. The Report given by NTCL/NIFT cannot be used by the Department to deny the Drawback Claim of Rs.38,63,529/- in respect of these 17 Shipping Bills. In respect of the exports carried out under the 16 Shipping Bills, he submits that the sample was drawn and was sent for testing to NTCL, Calcutta by the Department on 23/10/2002 and on the same day NTCL has given the Report. This shows that probably no proper procedure was followed by the testing authority before coming to the conclusion on the PMV. He questions as to how they could have tested and given the Report on the same day when the samples were given by the Department. In respect of the testing carried out by NIFT, Delhi, he points out that the samples were sent to them vide Department's letter dated 01/04/2003. Immediately on the next day i.e. 02/04/2003, NIFT has given their Test Report. Here also the procedure followed by NIFT to come to their conclusion is questionable. Only on account of these doubts, they have sought the Cross Examination of the persons conducting the test for coming to their conclusions. He points out that this cross-examination sought was not granted to them and this Bench

vide their Order dated 25/5/2006 remanded the matter only to grant the Cross Examination of such persons. He submits that on the ground that the test was conducted by a panel of persons and not by an individual and such persons cannot be made liable to give any evidence under Cross-Examination, both the entities have refused the request. Therefore, the Adjudicating Authority has gone ahead with the adjudication order without granting the cross-examination, which was directed to be given by the Tribunal. Therefore, he submits that even on this count, the OIO passed is legally not sustainable. He further submits that though they have made pleadings towards having received the export proceeds in respect of all the Shipping Bills, this was also not considered nor verified by the Adjudicating Authority before he rejected their Drawback claims. He submits that though the exports have taken place during the period June 2002 to August 2002, the Appellant has been made to run from pillar to post for claiming the Drawback of about Rs.74 lakhs. During the interim period, the Proprietor has expired. The present Appellant has filed the Miscellaneous Petition to substitute her name as the Appellant which was granted by this Bench vide Miscellaneous Order No. 75003/2024 dated 08/01/2024. In view of these submissions, he prays that the present Appeal may be allowed.

3. The Learned AR reiterates the findings of the Adjudicating Authority and submits that based on the Test Report given by NTCL, Kolkata the Drawback claims have been rejected.

4. Heard both sides and perused the documents and Appeal Papers.

5. Coming to the first case of 17 Shipping Bills, the exports have taken place in June and July 2002. Admittedly, no samples were drawn by the Department nor any samples were tested by NTCL or NIFT. In such a case, the Department could not have relied on the Test Report of NTCL/NIFT in respect of second lot of Shipping Bills to deny the Draw Back claim. In respect of first set of 17 Shipping Bills, on this count itself, we set aside the

impugned Order and allow the Drawback claim of Rs. 38,63,529/- subject to the condition specified at Paragraph 10 below.

6. In respect of 16 Shipping Bills, as rightly pointed out by the Appellant, both the testing agencies have completed the test and also issued the Test Report in a record time of 24hrs/48hrs. This gives cause of some kind of doubt as to whether proper procedure was followed before coming to a conclusion about PMV. Secondly, we see that though the Department itself has obtained both the certificates, the first one from NTCL and second one from NIFT, the Revenue has straightway proceeded on the assumption that only the NTCL Test Report is applicable.

7. On comparing the Test Reports given by both the entities, it is seen that in case of T-shirt, NTCL has taken the view that PMV will be Rs. 35/piece whereas NIFT has taken the value to be Rs. 40-50/piece. We see that Appellant has claimed drawback of Rs. 40.36/T-shirt.

8. In respect of Gents Shirt, the PMV was taken as Rs. 50-55/shirt by NTCL whereas the NIFT has taken as 65-80/shirt. The Appellant has claimed drawback of Rs. 50.31 which is lower than PMV arrived at by both the entities. Therefore, we find that in case of Gents shirts, the Department has absolutely no reason to deny the drawback claim as the rate adopted by the appellant was lower than the PMV arrived at by both the entities.

9. In respect of Knitted T-Shirt, while NTCL has taken a rigid stand of Rs. 35/piece while NIFT has taken a flexible value of Rs. 40-50/piece. Therefore, we do not see any reason to deny the claim of the Appellant as they have claimed @ 40.3 per knitted T-shirt. Considering these details, we hold that the Appellant is eligible for drawback claim of Rs. 34,84,611/- in respect of the second set of 16 Shipping Bills also.

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10. It is seen from the records that the Appellant has been claiming that they have received the export proceedings in respect of all the 33 consignments. This fact has not been verified at the Adjudication level. Only for the limited purpose of verifying the BRC in respect of the 33 Consignments, we remand the matter back to the Adjudicating Authority. If on verification the fact is found to be correct, the Appellant should be granted the refund of the drawbacks in respect of both the sets of exports as per law. As the original Appellant has been substituted by the present appellant by way of the Misc. Order cited supra, the refund amount is to be granted to her.

11. The Appellant has also prayed that they would be eligible for interest on the drawback which is being paid to them now since they have filed the drawback claim in 2002 itself. We direct the Adjudicating Authority to go through the statutory provisions and case laws on this issue and accordingly grant the refund of the drawback and interest, if any, as per law.

12. Since the Appeal is being allowed, all the penalties imposed and confiscation ordered stand set aside.

13. Since the issue pertains to the year 2002, the Adjudicating Authority is directed to complete the proceedings within 3 months from the date of communication of this Order.

(Dictated and pronounced in the open court.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

Pooja