



MAJESTY LEGAL
Advocates & Solicitors

"FEMA COMPLIANCE: TRIPARTITE AGREEMENT FULFILLED, DUTY DRAWBACK CANNOT BE DENIED"

"M/S INNOVATIVE CRAFTS VERSUS UNION OF INDIA & ORS"

Hon'ble Delhi High Court, in case of *M/S Innovative Crafts versus Union of India & Ors.*¹, held that since the export proceeds were realized within the period prescribed under FEMA, the petitioner is entitled to the grant of duty drawback, and there is no valid reason for the freezing of the petitioner's bank account. The Revenue had contended that the funds received as export proceeds came from a third party, not the consignee, and this third party was not listed as a 'Notifier' before the Customs Authority when the shipping bills were filed. However, the petitioner argued that under RBI Master Circular No. 14/2014-15, dated 01.07.2014, third-party payments for export transactions are permitted, provided certain conditions in clause B-2(v) of the Circular are fulfilled, which the petitioner claimed to have met.

Hon'ble Court observed that under Section 75(1) of the Customs Act, 1962, along with the proviso, duty drawback is disallowed if export proceeds are not received within the timeframe permitted under the Foreign Exchange Management Act (FEMA), 1999. However, RBI Master Circular No. 14/2013-14 (preceded by Circular No. 14/2014-15) in Rule B.2(v) allows receipt of foreign remittances from a party other than the consignee, subject to certain conditions, including the requirement of a tripartite agreement between the petitioner, the consignee, and the third party. Hon'ble Court found that the third-party documents were verified and confirmed by the bank, which was satisfied with the bona fides of the parties involved. Consequently, the petition was allowed.

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¹ W.P.(C) 14232/2022 & CM APPLs. 43462/2022, 45597/2022

² Majesty legal is a LAW FIRM established in 2013 by Ms. Mahi Yadav. Objective of this legal update is to provide insights on law, statutes and is personal in nature, not to be deemed as legal advice.



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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 30 July 2024

Judgment pronounced on: 15 October 2024

+ W.P.(C) 14232/2022 & CM APPLs. 43462/2022, 45597/2022

M/S INNOVATIVE CRAFTS

.....

Petitioner

Through: Mr. Akhil Krishna Maggu,
Mr. Vikas Sareen, Ms.
Maninder Kaur & Ms.
Oshin Maggu & Mr.
Ruchir Baswal Advocates.

Versus

UNION OF INDIA & ORS.

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Respondents

Through: Mr. Sunil Kumar Pandey,
SPC with Ms. Neha
Yadav, Adv. for R-1.
Mr. Aditya Singla, SSC
with Ms. Saakshi Garg &
Mr. Raghav Bakshi,
Advocates for CBIC.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

RAVINDER DUDEJA, J.

1. The present writ petition has been filed, seeking following reliefs:-

“i. issue an appropriate writ, order or direction of certiorari to set-aside/quash the impugned revision order number 272/22-Cus dated 18.08.2022 passed by the respondent number 2; and/or,

ii. issue an appropriate writ of mandamus order direction thereby directing the respondent number 3 to defreeze the bank account number 258755707372 of the petitioner held at IndusInd Bank, Moradabad branch.”

2. Petitioner is a sole proprietorship firm, engaged in the export of handicrafts.

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3. During the period 08.12.2014 to 13.12.2014, petitioner had exported 24 consignments of brass, copper and iron handicrafts to foreign buyer M/s. Metal Masters, UAE. Petitioner availed duty drawback on the export of aforesaid 24 consignments. The drawback of Rs. 89,77,007/- was assessed and duly allowed to be credited to the petitioner's bank.

4. On the basis of information received from IndusInd Bank, Moradabad Branch that the petitioner had multiple receipts in their bank accounts, which were claimed to be the duty drawback receipts, an enquiry was conducted and as a consequence of the same, the bank account of the petitioner was frozen by the Department. During enquiry, it was revealed that the exports were affected by the petitioner, having claimed to have purchased the exported goods from another firm named M/s. Maxwell Impex, which on enquiry, was found out to be non-existent. Further, it was noticed that the export proceeds against the subject exports was not from consignees but from third parties.

5 Show Cause Notice dated 27.06.2017 was issued to the petitioner for the recovery of drawback availed amount of Rs. 79,45,653/- in terms of Rule 16/16A of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 read with Section 76(1)(b) of the Customs Act, 1962 ["Act"] along with interest as applicable under Section 75A(2) read with Section 28AA of the Act, which was confirmed by the Additional Commissioner of Customs vide Order-in-Original dated 31.01.2018. Penalty of Rs. 1,50,00,000/- was also imposed on the petitioner under Section 114AA of the Act. Aggrieved, the petitioner filed an appeal before the Commissioner (Appeals), which was rejected. The revision application also came to be dismissed vide order dated

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18.08.2022 passed by the Additional Secretary to the Government of India. Feeling aggrieved, the present writ petition has been preferred by the petitioner.

SUBMISSIONS:

6. Learned counsel for the petitioner has submitted that the goods were exported in accordance with law and no provision of Customs Act was violated. Petitioner had made appropriate declaration at the time of export, and that is why, the goods were allowed to be exported and “Let Export Order” [“LEO”] was granted by the Customs Department. It is further submitted that all the export documents were in order and in compliance with the Act. No objection in respect of quality, quantity and weight were ever raised by the Customs and the entire export consignment was found as per declaration made by the petitioner. It is also submitted that every single penny of foreign exchange has been received by the petitioner and DGFT has issued all the BRCs of the petitioner.

7. It has been submitted that the order passed by the Revisional Authority is devoid of merit and without any basis, inasmuch as, no independent findings have been returned for upholding the impugned Order-in-Original and Order-in-Appeal and the penalty imposed is against the principles of natural justice. It is submitted that order has been passed arbitrarily and without application of mind and is therefore liable to be quashed and set aside.



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8. Per contra, learned counsel for the Revenue has submitted that the money, said to have been received as export proceeds, was not from the consignee but from a third party, which was not mentioned as 'Notifier' before the Customs Authority at the time of filing of shipping bills. It is further submitted that the amount of US\$ 121886,60 out of total proceeds of US\$ 1125500.64 had been received from the consignee M/s. Metal Masters while rest of the payment was received from three other entities which were not notified as third parties in the export documents. It is further submitted that neither the petitioner nor the bank submitted any documents to support the third party payments and the entity from whom the export goods were purchased, was non-existent.

9. In rebuttal, learned counsel for the petitioner submits that RBI Master Circular No. 14/2014-15 dated 01.07.2014 permits third party payments for export transactions subject to certain conditions specified in B-2(v) of the said Circular. It is submitted that every condition has been fulfilled by the petitioner. It is further submitted that petitioner had submitted a copy of Tripartite Agreement dated 05.10.2014, which was signed between the petitioner and buyer M/s. Metal Masters, as per which, petitioner was to receive payments from M/s. Bright View General Trading LLC, UAE, M/s. Radya Baqer Trading LLC, UAE, Galaxy Impex HK Ltd., Hong Kong and Allied Trend (HK) Trading Ltd., Hong Kong and the copy of the said Tripartite Agreement was submitted at the Office of the Customs Department and also with the banker of the petitioner i.e. Kotak Mahindra Bank Ltd. It is thus argued that the entire export proceeds having been realized within the stipulated period from the date of export as evident from the e-BRCs,

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petitioner is entitled to the grant of duty drawback.

ANALYSIS & CONCLUSION:

10. Section 75(1) deals with the drawback on imported materials used in the manufacture of goods which are exported. It reads as under:-

“Section 75 (1) alongwith the proviso of The Customs Act, 1962:

75. Drawback on imported materials used in the manufacture of goods which are exported.-(1) *Where it appears to the Central Government that in respect of goods of any class or description 5 [manufactured, processed or on which any operation has been carried out in India] 6 [,being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer],1 [or being goods entered for export by post under 2 [clause (a) of section 84] and in respect of which an order permitting clearance for exportation has been made by the proper officer], a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the 3 [manufacture or processing of such goods or carrying out any operation on such goods], the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to, the rules made under sub-section (2); [Provided that no drawback shall be allowed under this sub-section in respect of any of the aforesaid goods which the Central Government may, by rules made under subsection (2), specify, if the export value of such goods or class of goods is less than the value of the imported materials used in the 3 [manufacture or processing of such goods or carrying out any operation on such goods] or class of goods, or is not more than such percentage of the value of the imported materials used in the 3 [manufacture or processing of such goods or carrying out any operation on such goods] or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf:*

Provided further that where any drawback has been allowed on any goods under this sub-section and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the [Foreign Exchange Management Act, 1999 (42 of 1999)], such drawback shall [except under such circumstances or such conditions as the Central



Government may, by rule, specify,] be deemed never to have been allowed and the Central Government may, by rules made under sub-section (2), specify the procedure for the recovery or adjustment of the amount of such drawback.”

11. A plain reading of the aforesaid provisions makes it clear that the drawback shall not be allowed in case the sale proceeds in respect of the exports are not received in India within the time allowed under Foreign Exchange Management Act, [“**FEMA**”] 1999. However, RBI Master Circular No. 14/2013-14 dated 01.07.2013 (proceeded by Master Circular No. 14/2014-15 dated 01.07.2014) [“**RBI Circular**”] vide Rule B.2(V) permits the receipt of foreign remittances from an entity other than consignee of the exported goods subject to the conditions prescribed therein. Rule B.2(V) of the said RBI Circular is reproduced below:-

“(V) Third party payments for export/import transactions

Taking into account the evolving international trade practices, it has been decided to permit third party payments for export/import transactions can be made subject to conditions as under;

- a) *“Firm irrevocable order backed by a tripartite agreement should be in place. However, it may not be insisted upon in cases where documentary evidence for circumstances leading to third party payments/name of the third party being mentioned in the irrevocable order/invoice has been produced subject to:*
 - (i) *AD bank should be satisfied with the bona-fides of the transaction and export documents, such as, invoice/ FIRC.*
 - (ii) *AD bank should consider the FATF statements while handling such transactions.*
- b) *Third party payment should be routed through the banking channel only.*
- c) *The exporter should declare the third party remittance in the Export Declaration Form and it would be responsibility of the Exporter to realize and repatriate the export proceeds from such third party named in the EDF.*
- d) *It would be responsibility of the Exporter to realize and repatriate the exports proceeds from such third party named in the EDF;*
- e) *Reporting of outstanding, if any, in the XOS would continue to be shown against the name of the exporter. However, instead of the*



name of the overseas buyer from where the proceeds have to be realised, the name of the declared third party should appear in the XOS;

f) In case of shipments being made to country in Group II of Restricted Cover Countries, (e.g. Sudan, Somalia, etc.), payments for the same may be received from an Open Cover Country; and

g) In case of imports, the invoice should contain a narration that the related payment has to be made to the (named) third party, the Bill of Entry should mention the name of the shipper as also the narration that the related payment has to be made to the (named) third party and the importer should comply with the related extant instructions relating to imports including those on advance payment being made for import of goods. "

12. Thus, as per RBI Circular, there is requirement of Tripartite Agreement between the petitioner, the consignee firm and the said third party. The stand of the Department is that both petitioner and the officials of KMBL have failed to produce any document evidencing that there was a valid Tripartite Agreement between the parties, while the position taken by the petitioner is that the Tripartite Agreement dated 05.10.2014 was produced before the Authorized Bank and the respondent department.

13. Tripartite Agreement dated 05.10.2014 (Annexure P-14) has been executed between the petitioner M/s. Innovative Crafts and foreign buyer M/s. Metal Masters, FZC. Article 4 of the agreement provides for third party payments, which reads as under:-

“Article 4 : Third Party Payments:

The buyer will be sending payments from its Alfardan Exchange account which is the primary bank account of the buyer in U.A.E. and in case of any problems the buyer will be sending the payments from accounts of its sister concerns and/or related companies. The related companies from which the payments can be made are:

1. Bright View General Trading LLC, UAE (Business Partner/Customer)
2. Radya Baqer Trading LLC UAE (Business Partner/Customer)
3. Galaxy Impex HK Ltd., Hongkong (Business Partner/Customer)



4. Allied Trend HK Trading Ltd., Hongkong (Business Partner/Customer)”

14. The agreement therefore permits the third party payments on behalf of buyer M/s. Metal Masters.

15. The reasoning given in the impugned order passed in revision is that petitioner and AD Bank have failed to submit any document to support the third party payments. However, such observation has been made without taking note of the statements of Sh. Sameer Khan, Assistant Manager, KMBL and Sh. Ankit Jain, Branch Manager of KMBL, recorded under Section 108 of the Customs Act. The relevant extract of the statement of Sh. Sameer Khan is reproduced below:-

“Ques. 1- What is the basis of realization of BRC of Innovative Craft?

Ans.- When we have received inward remittance through foreign bank we have to inform to client (customer), Innovative craft and then client has submitted to inward disposal for credit the fund in A/c 6711494077 and after that client has dispatched export document to buyer and simultaneously submit GR document to Bank for BR alongwith document. Bank request letter, Invoice, Third Party Letter, Packing List, Transfer Document (Bill of Lading), SDF Form, Exchange Control Copy (Shipping Bill).

Ques. 2- Remittance received by Innovative Crafts is from multiple party though the consignee is Metal Masters, FZC, How?

Ans.- As per RBI guidelines bank can receive payments settled by multiple buyer payment with justified document i.e. (realization letter with parent company and sister concern company). Refer master circular export.

Ques. 4- Kindly provide the documents related to third party agreement in case of Innovative craft?

Ans.- **I will provide the documents related to third party agreement till 10th Nov 2016**, I will also provide GR realization document alongwith other documents required.”

16. Similarly, the statement of Sh. Ankit Jain, Branch Manager is reproduced below:-

“In response to Summon dated 20.12.2016, I present myself



today on 06.01.2017, to tender my voluntary statement under Section 108 of the Customs Act, 1962. I have been explained the provisions of Section 108 of the Customs Act, 1962 and I have fully understood the same that I have to tender my true and correct statement and this statement of mine can be used against me, my firm or any other person in any court of law or in any departmental proceedings as evidence.

I, Ankit Jain, state that in response of your summon dated 20.12.2016, the e-BRC in respect of the third party has been issued to M/s innovative crafts for the period Jan, 2015 to June, 2015 under the RBI Master Circular No. 14/2014-15 dated 01.07.2014, as per the Third party payments for export/ Import transactions under the above said master circular is as under:

"(v) Third party payments for export/Import transactions

Taking into account the evolving international trade practices, it has been decided to permit third party payments for export/Import transactions can be made subject to conditions as under:

- a) Firm irrevocable order backed by a tripartite agreement should be in place. However, it may not be insisted upon in cases where documentary evidence for circumstances leading to third party payments / name of the third party being mentioned in the irrevocable order/ invoice has been produced subject to: (i) AD bank should be satisfied with the bona-fides of the transaction and export documents, such as, invoice / FIRC. (ii) AD bank should consider the FATF statements while handling such transaction.
- b) Third party payment should be routed through the banking channel only;
- c) The exporter should declare the third party remittance in the Export Declaration Form and it would be responsibility of the Exporter to realize and repatriate the export proceeds from such third party named in the EDF;
- d) It would be responsibility of the Exporter to realize and repatriate the export proceeds from such third party named in the EDF;
- e) Reporting of outstanding, if any, in the XOS would continue to be shown against the name of the exporter. However, instead of the name of the overseas buyer from where the proceeds have to be realised, the name of the declared third party should appear in the XOS;
- f) In case of shipments being made to a country in Group II of Restricted Cover Countries, (e.g. Sudan, Somalia, etc.), payments for the same may be received from an Open Cover Country, and
- g) In case of imports, the Invoice should contain a narration that the related payment has to be made to the (named) third party, the Bill of Entry should mention the name of the shipper as also the



narration that the related payment has to be made to the (named) third party and the importer should comply with the related extant instructions relating to imports including those on advance payment being made for import of goods."

Our internal guidelines as on the date of processing the captioned third party export remittances are reproduced below:-

Sr. No.	Invoice	Bill of lading	EDF/GR/SO FTEX/EDI	FIRC	Comments
1.	Have both Buyer & Consignee Name	Have both Buyer & Consignee Name	Have both Buyer & Consignee Name	Either Buyer or Consignee	Can be Processed
2.	Have either Buyer or Consignee Name	Have either Buyer or Consignee Name	Have either Buyer or Consignee Name	Received from third party other than buyer	<u>For EDI Port</u> <ul style="list-style-type: none">AD satisfaction + basic declaration for <u>EDF Port(i.e. Non EDI Port)</u>Has to mention both parties <u>Softex</u> AD satisfaction + basic declaration

I state that our bank has followed all the RBI Master Circular No. 14/2014-15 dated 01.07.2014 Internal guidelines as;

- In the instant case, our bank has collected from the party, the Shipping Bill, Invoice, FIRC, SDF form, Bill of lading, request letter of the party and third party letter along with delay reason and discount letters, as required for processing of the transactions. The country of the third party remitter was also FATF compliant. The statements received from UAE and Hongkong both the countries are FATF Compliant.
- In the instant case, the payment received through the bank channels
- In the instant case, Export Declaration Form is not taken by our bank. for the EDI port the Shipping Bill is treated as Export Declaration form. The party has submitted the Exchange Control Copy of Shipping Bill, Original SDF Form to our bank. The computerized shippings bills issued from the EDI port have no provision to insert the name of the third party in SB/SDF. **The party**



has also submitted the letter to the bank for third party remittance wherein they submitted the name of the parties from the remittance was received.

- d) In the instant case, the party has submitted the letter to the bank for third party remittance wherein they submitted the name of the parties from the remittance was received.
- e) In the instant case, the party has already submitted the documents prior to 06 months as per RBI Master Circular, hence, in XOS reporting of the said client has not been done.
- f) In the instant case, the remittance has been received from UAE and Hongkong, which are not comes under Group II of Restricted Cover Countries.
- g) Not applicable in the instant case

I state that in respect of the internal guidelines of our bank, this case falls under the EDI port option wherein AD satisfaction and Basic declaration from the client is required. In the instant cases, the shipments were done from an EDI port. The computerized shipping bills issued from the EDI port have no provision to insert the name of the third party in SB/SDF. **The exporter client had declared the relationship between the third party remitter and the actual buyer and has also explained the circumstances necessitating remittances by a third party. Such declaration and explanations were to the bank's satisfaction and the bonafides of the parties involved in the transaction were prima-facie genuine. The country of the third party remitter was also FATF compliant. Therefore, we find that the transactions processed were in order and not violative of regulatory and our internal guidelines.**

I further state that the payments were received in our bank from the following parties 1. M/s Bright View General Trading LLC, UAE, 2. M/s Galaxy Impex HK Ltd, Hongkong, 3. M/s Metal Masters F Z C, UAE, 4. M/s Allied Trend (HK) Trading Ltd, Hongkong and 5. M/s Radya Baqer Trading LLC, UAE. **I state that the total 9 documents wherein 24 shipping Bills were involved for which BRC Issued by our bank and the documents related to the above said 9 documents (24 shipping Bills) has already been submitted to your office vide our office letter dated 20.12.2016, the following documents related to e BRC of M/s Innovative Crafts has been submitted i.e. Request Letter, Invoice, packing List, Bill of Lading, SDF Form/FIRC, Shipping Bill, third party letter, Delay reason and Discount letter.** I state that our bank has already submitted the Remittance Transaction Advice related to M/s Innovative Crafts, M/s Modern Crafts and M/s Harshita Overseas to your office on 21.12.2016. The accounts of M/s Innovative Crafts, M/s Modern Crafts and M/s Harshita Overseas has been closed by the parties in our bank.



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Question: As per our letter of even 30081 dated 22.12.2016, wherein we have asked if the said e-BRC issued in respect of M/s Innovative Crafts for remittance received from third party is being cancelled?

Answer: I state that as all the e-BRC are in used mode so we cannot cancelled the same. The same may be checked from the DGFT.

Question: Please intimate the outcome of any verification from your end regarding the veracity of M/s Innovative Crafts declaration pertaining to the third party as per our letter of even 30081 dated 22.12.2016.

Answer: I state that as the payments received through the banking channel, which Implies that the overseas parties are having an account with the banks. In this case, we have process the transactions as per the RBI Guidelines and as per internal process.

Question: Please intimate whether any action has been taken in respect of M/s Harshita overseas and M/s Modern Crafts which is owned by the family members of Smt. Meena Agarwal, the owner of M/s Innovative Crafts where third party remittance has been shown fraudulently (reference from letter of even no. 30081 dated 22.12.2016).

Answer: I state that the accounts in our branch have already been closed by both the parties i.e. M/s Harshita overseas and M/s Modern Crafts. The advices have already been provided to your office.

This is my true and correct statement tendered voluntarily without any duress, pressure, greed or threat. I will request you that Mr. Kapli Chawla, Associate Vice president, Office Address: Kotak Mahindra Bank, A-23, Yojna Vihar, Delhi-110092 (Mobile No. 9999195951) would be available locally as and when called for further enquiry in the case. This statement is typed by me on the computer installed in the SIIB office on my request.”

17. It may be noted from the statement of Sh. Sameer Khan, Assistant Manager, KMBL, that he undertook to provide the documents relating to third party agreement while Sh. Ankit Jain, Branch Manager,

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KMBL, *inter alia*, stated that petitioner had submitted a letter to the bank for third party remittance, furnishing the name of the parties from whom remittances were received. According to him, the exporter/client had declared relationship between the third party remitter and the actual buyer and explained the circumstances necessitating remittances by third party. According to him, such declarations and explanations were to the bank satisfaction and the bank was also satisfied of the bona fides of the parties involved in the transaction. He confirmed that the documents including the third party documents were submitted by the bank to the respondents. We may also take note that Tripartite Agreement was also submitted before the Revisional Authority. Thus, third party documents were already in place and were in possession of the bank much before the receipt of remittances. It is not the case of the respondents that the Tripartite Agreement is a forged and fictitious document.

18. The payments have been received by the bank from third parties, specifically named in the agreement dated 05.10.2014 and which was backed by a firm irrevocable purchase order dated 05.10.2014. The e-BRCs have been issued by the DGFT after verification from the bank confirming the receipt of payments.

19. The contention on behalf of the petitioner is that petitioner had made payments to the local supplier through banking channels, which is evident from his bank statement. There appears to be no investigation regards the payments made by the petitioner to the local supplier and therefore the view taken by the Revisional Authority regarding non-existence of the local supplier is not based on a proper investigation.

20. The bank witnesses have made it clear that payments were

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received through banking channels. Since export proceeds have been realized within the stipulated period as prescribed in FEMA, we are of the view that petitioner is entitled for the grant of duty drawback and there is no justification for freezing of the bank account of the petitioner.

21. For the aforesaid reasons, we are unable to sustain the order passed in revision dated 18.08.2022. The same is accordingly set aside with directions to the respondents to defreeze the bank account of the petitioner held at IndusInd Bank, Moradabad Branch.

22. The writ petition accordingly stands disposed of.

RAVINDER DUDEJA, J.

YASHWANT VARMA, J.

October 15, 2024

RM