

REGISTERED SPEED POST AD



**GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE**

**Office of the Principal Commissioner RA and  
Ex-Officio Additional Secretary to the Government of India  
8<sup>th</sup> Floor, World Trade Centre, Cuffe Parade,  
Mumbai- 400 005**

F. No. 371/64-B/DBK/14-RA /194

Date of Issue: 07.01.2020

ORDER NO. 0\ /2020-Cus(WZ) /ASRA/MUMBAI DATED 03.01.2020 OF THE GOVERNMENT OF INDIA PASSED BY SMT.SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Gemini Exports  
A-201-202, Navbharat Estate,  
Zakaria Bunder Road,  
Sewri(West), Mumbai 400 015

Respondent : Commissioner of Customs, Mulund CFS & General, Mumbai

Subject : Revision Applications filed, under Section 129DD of the Customs Act, 1962 against the OIA No. 2705(Export)/2014(JNCH)/IMP-2571 dated 11.07.2014 passed by the Commissioner of Customs(Appeals), Jawaharlal Nehru Custom House, Sheva, Mumbai-II.

**ORDER**

The revision application has been filed by M/s Gemini Exports, A-201-202, Navbharat Estate, Zakaria Bunder Road, Sewri(West), Mumbai 400 015 (hereinafter referred to as "the applicant") against OIA No. 2705(Export)/2014(JNCH)/IMP-2571 dated 11.07.2014 passed by the Commissioner of Customs(Appeals), Jawaharlal Nehru Custom House, Sheva, Mumbai-II.

2.1 The applicant had exported goods and received drawback. As per EDI records, the remittances for the period from 01.01.2004 to 31.12.2010 had not been realized and were outstanding. A Demand Notice dated 30.06.2012 was issued to the applicant under Rule 16A of the Drawback Rules read with Section 75 of the Customs Act, 1962 calling upon them to repay the drawback amount or to submit Bank Realisation Certificate(BRC) within 15 days of receipt of the Demand Notice. It was mentioned in the Demand Notice that if the exporter failed to produce evidence of repatriation of export proceeds in respect of the relevant shipping bills or failed to repay the aforementioned drawback amount, proceedings for recovery of the amount with interest would be initiated under Rule 16A(1) of the Drawback Rules issued under Section 75 of the Customs Act, 1962 and Section 37 of the Central Excise Act, 1944 and Section 93A/Section 94 of the Finance Act, 1994. The applicant had not come forward to submit BRC or repay the the drawback amount within the stipulated period as Rule 16A(2) of the Drawback Rules within 30 days.

2.2 The Assistant Commissioner took up the case for adjudication. He observed that the applicant had received Rs. 1,13,002/- as drawback but as per the EDI records they had failed to repatriate the sale proceeds for the goods exported during the period from 01.01.2004 to 31.12.2010 into India. The exporter had also failed to respond in any way to the Demand Notice dated 30.06.2012 issued to them. He observed that there was a clear provision under Section 75 of the Customs Act, 1962 read with Rule 16A of the Drawback Rules stipulating that where export remittance is not received, the drawback shall be recovered from the exporter. The Assistant Commissioner therefore vide his OIO No. 171/2012-13 dated 19.10.2012/14.11.2012 confirmed the demand of Rs. 1,13,002/- and interest thereon under Section 75A(2) read with Section 75(1) of the Customs Act, 1962 read with Rule 16A of the Drawback Rules.

3. Aggrieved by the OIO No. 171/2012-13 dated 19.10.2012/14.11.2012 passed by the Assistant Commissioner, the applicant filed appeal before the Commissioner(Appeals). Commissioner(Appeals) observed that the OIO had been issued and dispatched to the applicant under Speed Post on 23.11.2012 which was never returned back by the Postal Authorities and therefore he concluded that the applicant had very well received the same. He therefore averred that the applicant had no scope to contend that the OIO had not been received by them. He then referred the provisions of Section 128 of the Customs Act, 1962 and took note that the appeal had been filed on 03.03.2014 by the applicant, which was over and above the appeal period of sixty days. Proviso to Section 128(1) vests the Commissioner(Appeals) with power to condone delay in filing appeal for a further period of thirty days. However, the delay in filing the appeal was beyond the powers of Commissioner(Appeals) to condone and therefore without going into the merits of the case, the Commissioner(Appeals) vide OIA No. 2705(Export)/2014(JNCH)/IMP-2571 dated 11.07.2014 rejected the applicants appeal as barred by limitation.

4. The applicant has thereafter filed Revision Application under Section 129DD against the OIA dated 11.07.2014 on various grounds on the merits of the case. The applicant also made submissions stating that the view taken by the Commissioner(Appeals) that the OIO dated 19.10.2012 was issued, dispatched, not returned by the postal authorities, therefore deemed to be received by the applicant and hence the appeal was time barred was not amenable. The applicant stated that this finding of the Commissioner(Appeals) was a grievous error to the detriment of the applicant. They placed reliance upon the decision in the case of Margra Industries Ltd. vs. CC, New Delhi[2006(202)ELT 244(Tri-LB)] wherein it was held that service of communications was to be effected by resort to the provisions of Section 153 of the Customs Act, 1962 and Section 37C of the CEA, 1944. It was further held that dispatch by speed-post/registered post was not sufficient proof of valid service when proof of delivery was absent.

5. The applicant was granted a personal hearing on 30.08.2018. Shri Rajiv Gupta, Consultant and Shri Javed Solkar, Export Executive appeared on behalf of the applicant. They reiterated their earlier submissions. It was pointed out that the impugned OIA in para 5 thereof acknowledges receipt of the certificates issued by their

Chartered Accountant evidencing the realisation of export proceeds. It was submitted that the impugned OIA has rejected the appeal on limitation, that the principles of natural justice had not been complied by the Department and that no reply had been made to the SCN S/6/Misc-65/09-10 CFS/SCN 968. The applicant filed written submissions on 03.09.2019 reiterating their earlier submissions on merits as well as limitation.

6. Government has carefully gone through the revision application, the order-in-original, the impugned order-in-appeal, the written submissions filed by the applicant and their submissions at the personal hearing. The issue involved is the recovery of drawback sanctioned to the applicant due to non-realisation of export proceeds. Demand notice had been issued to the applicant which the applicant had allegedly failed to respond to. The adjudicating authority held that the applicant had failed to produce evidence of realisation of export proceeds and had also not paid back the drawback amount sanctioned to them. He therefore confirmed the demand for recovery of drawback and interest thereon. The appeal filed by the applicant against the adverse OIO has not been passed on merits by the Commissioner(Appeals). The Commissioner(Appeals) has rejected the appeal filed by the applicant against the OIO dated 19.10.2012 as being time barred.

7. Government observes that Commissioner(Appeals) has in the impugned order gone by the version of the Department that the OIO dated 19.10.2012 had been issued and dispatched to the applicant under Speed Post on 23.11.2012. The basis for the conclusion drawn by the appellate authority is that the Speed Post containing the OIO had not been returned back to the Department by the Postal Authorities. However, there is no mention of any acknowledgment having been received to confirm the delivery of the OIO to the applicant. Therefore, the fact of receipt of the Speed Post by the applicant is based on a surmise and not on the basis of any credible factual basis. It is a matter of common knowledge that the Speed Post service provided by the Postal Authorities also facilitates the ascertainment of receipt by the addressee. However, the record does not reveal that any such evidence was available with the lower authorities.


8. Be that as it may, the provisions of Section 153 of the Customs Act, 1962 detail the modes for service of orders issued by the Department. The said section as it existed in 2012 did not contain the option of delivery by Speed Post. The provision for delivery

of communications by Speed Post was inserted only in 2018(w.e.f. 29.03.2018) by section 99 of the Finance Act, 2018. The Hon'ble High Court of Bombay had deliberated upon the correctness of service of order by Speed Post in the case of New Drug & Chemical Co. vs. Union of India[2015(325)ELT 313(Bom)]. Their Lordships held that since Speed Post did not find mention in Section 153 of the Customs Act, 1962 and since there was not even an acknowledgment in token of service by Speed Post, it was not valid service in law. The Government notes that there are other judgments of High Courts which are at variance with the judgment of the Hon'ble High Court of Bombay. However, the judgment in the case of New Drug & Chemical Co. vs. Union of India[2015(325)ELT 313(Bom)] having been rendered by the jurisdictional High Court is binding. Government therefore holds that the service of the OIO by Speed Post was not a valid service in terms of Section 153 of the Customs Act, 1962 as it stood at the relevant time. As a corollary thereto, the applicants claim that they have not received the order sent by Speed Post is maintainable. Therefore, the order of the Commissioner(Appeals) impugned in these proceedings holding that the appeal filed by the applicant was barred by limitation is unsustainable.

9. Government, therefore, remands the matter back to the Commissioner(Appeals) for decision on merits. The appeal filed by the applicant may be disposed of within six weeks of receipt of this order after following due process of law by adhering to the principles of natural justice.

10. The revision application filed by the applicant is disposed off in the above terms.

11. So ordered.

  
 ( SEEMA ARORA )  
 Principal Commissioner & Ex-Officio  
 Additional Secretary to Government of India

ORDER No. ~~U~~ / 2020 CX (WZ) / ASRA/Mumbai DATED 03-01-2020

To,

M/s. Gemini Exports  
 A-201-202, Navbharat Estate,  
 Zakaria Bunder Road,  
 Sewri(West), Mumbai 400 015

Copy to:

1. The Commissioner of Customs(General), Mumbai
2. The Commissioner of Customs(Appeals), Mumbai
3. Sr. P.S. to AS (RA), Mumbai
- ✓4. Guard file
5. Spare Copy