F. No. 371/65/DBK/2021-RA

REGISTERED
SPEED POST

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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No 371/65/DBK/2021-RA/226 Date of issue 11.01.2024

ORDER NO. 68/2024-CUS (WZ)/ASRA/MUMBAI DATED 5.1.2024 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicants - M/s. Sidha Exports

Respondent - Commissioner of Customs (Export), ACC, Mumbai

Subject - Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-AXP-APP-635/2020-21 dated 24.12.2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by M/s Sucha Exports against the Order-in-Appeal No MUM-CUSTM-ANP-APP-635/2020-21 dated 24.12.2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2.1 Brief facts of the case are that the applicant is an exporter who had exported the goods under Drawback Scheme as provided under Section 75 of the Customs Act, 1962 and had obtained drawback towards the said exports. In terms of Rule 16(A)(1) & (2) of the Customs, Central Excise and Service Tax Drawback Rules, 1995, an exporter is under obligation to produce evidence to show that the sale proceeds [foreign exchange] in respect of goods exported have been realized within the time limit prescribed under the Foreign Exchange Management Act (FEMA), 1999. In this regard, a Facility Notice no. 05/2017 dated 07.06.2017 had been issued for submission of Negative Statement/Bank Certificates for export proceeds realised against shipping bills with LEO date prior to 01.04.2013. All the exporters whose name appeared in the list enclosed with the said Facility Notice were required to submit BRCs/Negative statement for subject period before 15.07.2017. Subsequently, vide Public Notice No. 24/2017 dated 17.07.2017, the period for submission of documents was extended till 31.07.2017.

2.2 As the applicant had failed to produce evidence to show that sale proceeds (foreign exchange) in respect of goods exported were realized within the time limit prescribed under the Foreign Exchange Management Act (FEMA), 1999, a show cause cum demand notice dated 06.02.2020 was issued to them proposing to recover the amount of drawback already paid amounting to Rs.3,17,776/- alongwith interest. The adjudicating authority passed the Order-in-Original No. DC/RBP/573/2010/ADJ/ACC dated 12.04.2010 confirming the demand of drawback amount alongwith applicable interest as per Rule 16(A), Sub Rule (1) & (2) of the Customs, Central Excise Duties and Service Tax

Drawback Rules, 1995 read with Section 75A(2) of the Customs Act, 1962. Aggrieved, the applicant filed an appeal, however the Appellate authority vide the impugned Order-in-Appeal rejected the appeal holding them time barred, being filed beyond the time limit prescribed under Section 128 ibid.

3. Hence, the Applicant has filed the impugned Revision Application mainly on the following grounds:

1. The Commissioner (Appeals) has rejected applicant's appeal solely on the ground of the same being barred by limitation. Section 128 of the Customs Act, 1962 prescribes three months as the period of limitation for filing of the appeal and the said period of three months is to be reckoned from the date of communication of the Order-in-Original. That the applicant had never received the Demand-cum-Notice, any intimation regarding personal hearing and Order-in-Original as the entire proceedings were conducted ex parte against them. That the applicant had come to know about the said Order-in-Original only when its shipments were withheld and/or bank accounts were frozen upon instructions from the Tax Recovery Cell (Export) Section of the Customs Department. It is then that the applicant immediately applied for the copy of the said Order-in-Original and filed the appeal well within three months from the date of receiving the copy of the said Order-in-Original from the Tax Recovery Cell (Export) Section or the RTI Section of the Customs Department. In this regard, the Hon'ble Madras High Court in O.A.O.A.M. Muthia Chettiar v. CIT [ILR 1951 Mad 815] has observed: "*If a person is given a right to resort to a remedy to get rid of an adverse order within a prescribed time", limitation should not be computed from a date earlier than that on which the party aggrieved actually knew of the order or had an opportunity of knowing the order and therefore must be presumed to have the knowledge of the order*. The Hon'ble Madras High Court took the view that even the omission to use the words "from the date of communication" in Section

33-A(2) of the Indian Income Tax Act does not mean that limitation can start to run against a party even before the party either knew or should have known about the said order. A similar question arose before the Madras High Court in Annamalai Chetti v. Col. J.C. Cleate [(1883) ILR 6 Mad 189], wherein Section 25 of the Madras Boundary Act 28 of 1860 limited the time within which a suit may be brought to set aside the decision of the settlement officer to two months from the date of the award, and so the question arose as to when the time would begin to run. The High Court held that the time can begin to run only from the date on which the decision is communicated to the parties *"If there was any decision at all in the sense of the Act"*, says the judgment, *"it could not date earlier than the date of the communication of it to the parties; otherwise they might be barred of their right of appeal without any knowledge of the decision having been passed"*. Adopting the same principle, a similar construction which has been placed by the Hon'ble Madras High Court in K.V.E. Swaminathan alias Chidambaram Pillai v. Letchmanan Chettiar [(1930) ILR 53 Mad 491] on the limitation provisions contained in Sections 73(1) and 77(1) of the Indian Registration Act 16 of 1908. It was held that in a case where an order was not passed in the presence of the parties or after notice to them of the date when the order would be passed the expression *'within thirty days after the of the order'* used in the said sections means within thirty days after the date on which the communication of the order reached the parties affected by it. These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. Thus, in the present case, the date of communication of the Order-in-Original to the applicant was

the date when the copy of the said Order-in-Original was supplied to the applicant by the Tax Recovery Cell (Export) Section of the Customs Department, not when the said Order-in-Original was passed.

ii Because the respondent recorded in para 3 of the appeal order that SCN and letters for Personal hearings issued to them in year 2010 got returned with remark "Left" however on the very same address they received the reply of RTI letter dated 13.02.2020, even after 10 years; that impugned Order was also issued on the very same address. As far as the question of RTI reply having been received on the same address is concerned, it is submitted that the exporter approached to the RTI section for receiving the reply. However RTI reply was not issued to him and he was informed by RTI department that the RTI reply had been dispatched to his earlier address. Thereafter the exporter was left with no option than to approach the post office. Accordingly the exporter approached the post office and requested them to give RTI reply to him personally, which was obliged by the post office

iii. The Commissioner (Appeals) has wrongly treated the purported date of service of order as provided under Section 153 of the Customs Act, 1962 as the date of communication of the Order-in-Original. Commissioner (Appeals) utterly failed to appreciate, consider and record any finding upon applicant's specific submission in the appeal that it had never received the copy of Order-in-Original when it was passed. That the Commissioner (Appeals) also utterly failed to require the Adjudicating Authority to prove the service of Order-in-Original as contemplated under Section 153 of the Customs Act, 1962. That the burden to prove the service of order upon the applicant was entirely upon the Adjudicating Authority as it was the fact especially within its knowledge. In this regard, the relevant provision under the law is reproduced herein under.

"Section 106 *Burden of proving fact especially within knowledge*:

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

The Hon'ble Madras High Court had in its recent judgment dated 11.12.2017, in the case titled 'M/s. Ru's Marketing and Creative Vs. The Commissioner of Service Tax,' Civil Misc. Appeal No. 3141 of 2017 filed under Section 35-G of the Central Excise Act against the order dated 09.03.2017, passed by the Customs, Excise, and Service Tax Appellate Tribunal, held as under:

"11. It is trite law that limitation has to be reckoned only from the date when the actual service has been effected, subject to fulfilling the mandatory requirement of showing proof of delivery. In the case on hand, the service of notice was effected on the appellant only on 23.12.2011 and there is nothing on the record to show that it was served on 9.5.11. Further, the order has been dispatched through speed post on 9.5.11, as is evident from the letter of the Superintendent(Appeals). However, prior to 10.5.13, service through speed post having not been a recognised/approved mode of service, it cannot be treated as service for reckoning the period of limitation. For the sake argument, even if the order is said to have been delivered by RPAD on 9.5.11, which apparently has not happened in this case, no proof having been filed to support such delivery, which is the mandatory requirement as per Section 37C (1) (a) of the Act, it is clear that the service of notice in the manner as prescribed under Section 37C (1) (a) has not been effected. Therefore, in the absence of any consideration and finding upon the issue of date of communication of the order upon the applicant, the impugned Order-in-Appeal is based entirely upon surmises and conjectures and liable to be set aside on this count alone."

The Adjudicating Authority, in the present case has failed to prove that the Order-in-Original was duly communicated to the applicant as provided under Section 153 of the Customs Act, 1962. Therefore, the period of limitation for filing the appeal before the Commissioner (Appeals) could not have started until the applicant obtained the copy of the Order-in-Original from the Tax Recovery Cell (Export) Section of the Customs Department.

iv. It was impossible for the applicant to file the appeal against the Order-in-Original until it obtained the copy of the same from the Tax Recovery Cell (Export) Section of the Customs Department. It is submitted that

the impugned Order-in-Appeal is against the legal doctrine, expressed in the maxim i.e. *Lex non cogit ad impossibilia*, which means that the law does not compel a man to do that which is impossible.

v It is settled law that the provision relating to limitation should be construed liberally while adopting a justice oriented approach. That a hyper technical and pedantic approach should not be adopted. That no person stands to benefit by deliberately filing an appeal beyond limitation, that effort should be made to decide the matter on merit, rather than of rejecting the same on technical grounds of limitation. In this regard, applicant rely upon the judgment of the Hon'ble Supreme Court in the case, Collector, Land Acquisition, Anantnag Vs. Mst. Katiji, JT 1987 (1) SC 537

vi The Commissioner (Appeals) has been passing contradictory orders upon appeals with the identical facts. It was opined that the Commissioner (Appeals) had been allowing all the appeals wherein the appellant obtained the copy of the Order-in-Original from the Drawback (XOS) Section, Air Cargo Complex, while rejecting all appeals wherein the appellants obtained the copy of the Order-in-Original from the Tax Recovery Cell (Export) Section or RTI Section of the Customs Department.

vii. The applicant had annexed with its appeal the evidences of realization of foreign exchange (sale/export proceeds) in the form of BRCs/negative statement in respect of the goods exported within the period prescribed under the Foreign Exchange Management Act, 1999. Thus, the applicant did not commit any violation of any provision of the Customs Act, 1962 or of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995

viii. It was pointed out that the 2nd proviso to Section 75(1) of the Customs Act, 1962 and Rule 18 of the Customs and Central Excise Duties Drawback Rules, 2017 provides for the recovery of sanctioned drawback from the exporter only when the foreign exchange

(sale/export proceeds) in respect of the goods exported is not realized within the period prescribed under the Foreign Exchange Management Act, 1999. However, the applicant, in the present case, had annexed with its appeal the evidences of realization of foreign exchange (sale/export proceeds) in the form of BRCs/negative statement in respect of the goods exported within the period prescribed under the Foreign Exchange Management Act, 1999

ix. The applicant submitted that sub-rule 4 of Rule 18 of the Customs and Central Excise Duties Drawback Rules, 2017 and sub-rule 4 of Rule 16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 provide for the repayment of recovered drawback to the exporter, even in case where the foreign exchange (sale/export proceeds) are realized after recovery of drawback from the exporter.

4. Several personal hearing opportunities were given to the applicant and the respondent-department viz. on 09.08.2023, 23.08.2023, 08.09.2023, and 15.09.2023. However, they did not attend on any date. However, an email dated 20.09.2023 was received, requesting to decide the matter on merits. The matter is therefore taken up for decision based on available records.

5. Government has carefully gone through the relevant case records, written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

6. Government observes that the issue involved in the instant case is that the applicant had been sanctioned drawback in respect of exports made by them. However, the applicant had not produced evidence to show that the sale proceeds (foreign exchange) in respect of the exported goods had been realised within the time limit prescribed under FEMA, 1999. The applicant had therefore been issued show cause cum demand notice for recovery of the drawback sanctioned to them alongwith interest and penalty. The applicant did not respond to the intimations for personal hearing and therefore the

adjudicating authority proceeded to confirm the demand for recovery of drawback sanctioned alongwith interest and penalty at the applicable rate. The applicant has claimed that they have not received the copies of the impugned SCN & OIO and that they became aware of the OIO only when proceedings were initiated for recovery of the drawback. These matters were carried in appeal before Commissioner (Appeals) who has rejected the appeal on the ground of being time barred In the revision application, the applicant has made similar grounds to contend that the appeal was within time as they had filed the appeal within the statutory appeal period after the OIO had been communicated to them.

7 Government observes that the Circular No 5/2009-Customs dated 02.02.2009 had set out a mechanism to monitor the realisation of export proceeds. The SCN has been issued on 06.02.2010. The circular dated 02.02.2009 was in vogue and therefore the applicant was required to produce evidence of receipt of export proceeds before the Assistant/Deputy Commissioner of Customs in terms of Rule 16A of the Drawback Rules, 1995/ Rule 18 of the Drawback Rules, 2017 within the period allowed under the FEMA, 1999. The applicant has contended that they furnished such evidence before Commissioner (Appeals) and not at any time before that. However, the proximate cause for the revision application is that the appeal filed by the applicant has been dismissed on grounds of time bar.

8. While passing the impugned OIA, the Commissioner (Appeals) has observed that the impugned OIO bears the remark "Not for Appeal purpose" and hence was not issued to the applicant in terms of Section 153 of the Customs Act, 1962 and held that the date of receipt of the orders in such manner could not be considered as the date of communication of order. The appeal before the Commissioner (Appeals) has been dismissed solely on the ground that the appeal has been filed beyond 60 days of the statutory time limit for filing appeal and the 30 days of condonable period. In this regard,

Government observes that the Commissioner (Appeals) has not made any attempt to ascertain as to whether the OIO had actually been served on the applicant.

9.1 Government observes that there are several binding judgments which provide insights on how proper service of orders is to be determined. It would be apposite to make reference to these judgments. The relevant headnote of the judgment of the Hon'ble Supreme Court of India in the case of Surai Wire Craft Pvt. Ltd. vs. Commissioner of Customs, Central Excise & Service Tax[2015(322)ELT 192(SC)] is reproduced below

> *"Appeal to Commissioner(Appeals) — Limitation — Date of service of order - - Commissioner(Appeals), Tribunal as well as High Court rejecting appeal of appellant only on question of power with Commissioner(Appeals) for delay condonation without ascertaining fiction of date of actual service of order— Failure to take notice of Statutory provisions of service of order leading to gross miscarriage of justice - Affected party requires to be served meaningfully and realistically – Adjudication order issued at back of appellant, having not been properly served, came to his knowledge only on 26-7-2012 — Appeal filed on 22-8-2012, being within time, no question of condonation of delay Appeal allowed — Appellant directed to appear before Commissioner(Appeals) on 3-8-2015 for hearing — Section 35 of Central Excise Act, 1944 [paras 7,8,9,10]".*

9.2 A case involving facts similar to those in the instant case had received the attention of the Hon'ble High Court of Bombay in the case of Soham Realtors Pole Star vs. Commissioner of Central Excise, Customs & Service Tax, 288[Bom]. The relevant portion of the head-note thereof is reproduced below

> *"Appeal to Commissioner(Appeals) — Limitation — Delay in filing — Condonation - Scope of— Instant case COD application rejected merely on ground that department took proper steps for effecting service of impugned order — Question of condonation of delay is independent of date of service of impugned order as said date relevant only for determining length of delay — Reasons of delay in filing appeal have nothing to do with date of service of order — Appellate authority not recording any finding on correctness of appellant's plea of having received certified copy of adjudication order much later — Further findings on proper service of order also incorrect as sequence of procedure prescribed in Section 37C of Central Excise Act, 1944 not followed — As substantial amount of demand already stood deposited, matter remanded to Commissioner(Appeals) for reconsideration of issue and take a decision within 6 months - Section 35 of Central Excise Act, 1944*

9.3 The relevant headnote of the citation where the Hon'ble High Court of Madras had occasion to deal with the issue of service of order in the case of Oss Shipping Pvt. Ltd. vs. CCE, Chennai [2015(325)ELT 486(Mad.)] is reproduced below:

> *"Order — Adjudication order — Service of— Said order reportedly sent by Department by registered post — No acknowledgment card produced by Department — Service of order not complete — Section 37C of Central Excise Act, 1944. [paras 5, 6]"*

10. Government observes from the impugned OIO that the concerned SCN and PH letters were not be served on the applicant as the envelopes containing the same were returned by the postal authorities with remarks "Left". The OIO was also sent on the same address. In this regard, the Commissioner (Appeals) has averred that since RTI reply dated 13.02.2020, even after 10 years was received by the applicant on the same address, hence they would have received the order-in-original also. In reply, the applicant has contended that as *the RTI reply was not issued to him and he was informed by RTI department that the RTI reply had been dispatched to his earlier address. Thereafter, the exporter was left with no option than to approach the post office. Accordingly, the exporter approached the post office and requested them to give RTI reply to him personally, which was obliged by the post office.* Government observes that the address of the applicant in impugned OIA is different from that in OIO – whereas in the OIA it is Dev Darshan Towers, Bhayander, the same in OIO is Vraj Vihar Apartment, Bhayander. Therefore, the above contention of the applicant appears reasonable.

11. Government, therefore, finds that in view of the assertions made by the applicant regarding receipt of export proceeds, it would be travesty of justice if applicant has realized sale proceeds, and still the recovery orders are sustained exactly on the same ground of non-realisation of sale proceeds. Therefore, appropriate verification would be vital to settle the issue once and for all. Government therefore modifies the impugned Order-in-Appeal and directs the original authority to decide the case after due verification of

documents in terms of the extant drawback rules and specifically Rule 16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995/ Rule 18 of the Customs and Central Excise Duties Drawback Rules, 2017. The applicant is required to provide the documents evidencing receipt of foreign remittances to the concerned authorities. The orginal authority is directed to pass appropriate order in accordance with the law after following the principles of natural justice, within eight weeks from the receipt of this order.

12. The impugned Revision Application is disposed of on the above terms.

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 63/2024- CUS(WZ)/ASRA/Mumbai dated 5.4.24

To,

1. M/s. Sucha Exports,
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Copy to:-

1. The Commissioner of Customs (Exports),
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2. Shri Lovish Sharma (Advocate),
3, Abul Fazal Road, Basement, Bengali Market, New Delhi – 110 001

3. Sr. P.S. to AS(RA), Mumbai

4. Guard file