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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/223/B/2019-RA/198 : Date of Issue : 10.01.23

ORDER NO. 03 /2023-CUS (WZ)/ASRA/MUMBAI DATED 05.01.2023
OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY
TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE
CUSTOMS ACT, 1962

Applicants : Shri Abdul Kader Barikkad

Respondent : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTOM-PAX-APP-1253-2018-19 dated 29.03.
2019 (DOI-05.04.2019) through File No. S/49-73/2017
passed by the Commissioner of Customs (Appeals),
Mumbai-III

ORDER

This Revision application has been filed by Shri Abdul Kader Barikkad (herein referred to as the Applicant) against the Order-In-Appeal No. MUM-CUSTM-PAX-APP-1253-2018-19 dated 29.03.2019 (DOI-05.04.2019) through File No. S/49-73/2017 passed by the Commissioner of Customs (Appeals), Mumbai-III

2. Brief facts of the case are that on 7-08-2014, the Officials of AIU Customs had intercepted the applicant viz Shri Abdul Kader Barikkad, holding Indian Passport No K 0514445, near the exit gate of CSI Airport, Mumbai. The applicant passenger had arrived from Dubai by Flight No.9W-543 dated 06.08.2014. The passenger was questioned as to whether he was carrying any contraband/dutiable goods/gold and foreign/Indian currency in his baggage, to which he replied in negative. The detailed examination of his checked-in baggage, conducted in the presence of pancha witnesses and Gazetted officer of Customs resulted in recovery of 02 rectangular white coated gold sheet pasted in the side of the basket of Airport Trolley, totally weighing 932 grams valued at Rs.23, 81,698/-, The same were seized by the department under the reasonable belief that the same were attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962.

3. The adjudicating authority viz Additional Commissioner vide his OIO No. ADC/RR/ADJN-18/ 2015-16 dated 28-03-2016, ordered for: (i) absolute confiscation of the impugned gold sheets totally weighing 932 grams valued at Rs.23,81,698/-, under Section 111 (d), (1) & (m) of the Customs Act, 1962; (ii) imposed personal penalty of Rs.2,25,000/- on the applicant passenger under Section 112 (a) & (b) of the Customs Act, 1962; & (iii) confiscation of court exhibits i.e. the sticker mentioning 'Max load 90 Kg with images" used for concealing the impugned gold ,under Section 119 of the Customs act, 1962.

4. Aggrieved by this order, the Applicants filed appeals with the Appellate

Authority viz Commissioner (Appeals), Mumbai Zone-III who vide his order No. MUM-CUSTOM-PAX-APP-1253/18-19 dated 29-03-2019 disposed of the appeals on grounds that the same were time barred as the Appeals were filed beyond period of 90 days from the date of communication of the order.

5. Aggrieved with the above order the Applicants have filed this revision Application and marked the Commissioner Appeals as Respondent-1 and the Additional Commissioner of Customs, CSI Airport, Mumbai as Respondent-2, on the following grounds of appeal;

5.1. The Orders passed by the 2nd Respondent is are wrong, contrary to law and facts of the case.

5.2. The 2nd Respondent ought not to have ordered absolute confiscation of gold. Instead, the 2nd Respondent ought to have given the Application option to redeem the gold on payment of fine under Section 125 of the Customs Act, 1962.

5.3. In the alternative, the 2nd Respondent ought to have given an opportunity to re-export the gold considering the circumstances of the case.

5.4. Imposition of penalty is not justified.

5.5. The penalty imposed is highly exorbitant.

6. Personal hearings in the case were scheduled on 13.09.2022, 27.09. 2022, 11.10.2022 and 18.10.2022. However, no one appeared before the Revisionary Authority for personal hearing on any of the appointed dates for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

7. Government has carefully gone through the relevant records available in the case files and perused the impugned Order-in-Original and Order-in-Appeal and the Revision Applications. Government finds that though the

applicant has filed revision application against the Order in Appeal, they have not given any grounds against the Order in Appeal, they have only submitted as to how the Order in Original is not correct. Government finds that under sub section (4) of Section 129DD of the Customs Act, Central Government may, of its own motion, annul or modify any order referred to in sub-section (1), ie order passed under section 128A which is an Order passed by Commissioner (Appeals). Hence the Government is discussing only the merits of the Order in Appeal in this case.

7.1. Government observes from impugned Order-In-Appeal dated 29.03.2019 that the Commissioner (Appeals) has taken into consideration the provisions of Section 128 of the Customs Act, 1962 and has observed that the appeal had been filed beyond the period of sixty days and also beyond the condonable period of 30 days thereafter i.e. actual date of filing appeals were after the expiry of 90 days from the date of communication of the OIO. Without going into the merits of the case, the Commissioner (Appeals) has held that he has no powers to entertain an appeal filed beyond the period of 90 days and rejected the appeal as time barred. In doing so, Government finds that the Commissioner (Appeals) has noted that the impugned Order in Original dated 28-03-2016 had been received by the applicant on 08-04-2016, which the applicant has also admitted and submitted in their condonation of delay appeal. The reason given for the delay was only that they did not know any lawyer who handles such cases and their financial constraints.

7.2. On the issue of time bar and the number of days available to file an appeal with the Appellate Authority and the powers vested with him, Government observes that it is imperative to understand the provisions of Section 128 of the Customs Act, 1962.

The provisions of Section 128 of the Customs Act, 1962 which provides for appeal to Commissioner (Appeals) reads as under :

128.

Appeals to Commissioner (Appeals). –

(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

7.3. From the plain reading of the provisions of Section 128 of the Customs Act, it is clear that an appeal should be filed within sixty days from the date of communication of the decision or order that is sought to be challenged. However, in view of the proviso thereto, the Commissioner (Appeals) is empowered to allow the appeal to be presented within a further period of thirty days if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the period of sixty days. Thus, the Commissioner (Appeals) is empowered to extend the period for filing an appeal for a further period of thirty days and no more. Therefore, once there is a delay of more than ninety days in filing the appeal, the Commissioner (Appeals) has no power or authority to permit the appeal to be presented beyond such period.

7.4. The Appellate Authority has discussed the issue under para 5 of his Order. For the sake of clarity, the same is reproduced here,

“5.On perusal of the Form C.A.-1, I find that the date of communication of the impugned order dated 28.03.2016 is mentioned as 08.04.2016 and the appeal has been filed on 20.02.2017. The appellant has filed an application for condonation of delay stating that the appellant has received the order on 08.04.2016; that he could not contact with his lawyer in Mumbai, who appeared on his behalf before the Adjudicating authority; that since he does not know any lawyer who is dealing with these types of cases, he could not filed the same on time; that moreover financial constraints also delayed the filing as the Counsel instructed that 7.5% of the penalty amount should be pre-deposited. I find that as per the conditions stipulated under the proviso of Section 128 (1) of the Customs Act, 1962, delay of 30 days beyond the period of 60 days is condonable. However, in the instance, the delay is much more than 10 months which is beyond the scope of the condonation by the undersigned as appellate authority”.

7.5 This issue has been decided by the Supreme Court in the case of Singh Enterprises v. Commissioner of Central Excise, Jamshedpur, (2008) 3 SCC 70 = 2008 (221) E.L.T. 163 (S.C.), wherein the Court in the context of Section 35 of the Central Excise Act, 1944, which is in *pari materia* with Section 128 of the Customs Act, has held thus:

“8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are not vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was

submitted that the logic of Section 5 of the Limitation Act, 1963 (in short "the Limitation Act") can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the Legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period."

7.6. The above view is reiterated by the Supreme Court in *Amchong Tea Estate v. Union of India*, (2010) 15 SCC 139 = 2010 (257) E.L.T. 3 (S.C.) and *Commissioner of Customs and Central Excise v. Hongo India Private Limited*, (2009) 5 SCC 791 = 2009 (236) E.L.T. 417 (S.C.).

8. In the present case, by rejecting the appeals on the grounds of being time barred, Government notes that the appellate authority has passed a judicious and legal order. Government does not find sufficient ground to interfere in the same.

9. In view of above discussions, Government upholds the impugned Order in Appeal No. MUM-CUSTM-PAX-APP-1253-2018-19 dated 29.03.2019 (DOI-05.04.2019) through File No. S/49-73/2017 passed by the Commissioner of

Customs (Appeals), Mumbai-III and dismisses the instant revision applications as being devoid of merit.

10. Accordingly, the revision application is dismissed.


(SHRAWAN KUMAR)

Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER NO. 03/2023-CUS (WZ)/ASRA/MUMBAI DATED 05.01.2023

To,

1. Shri. Abdul Kader Barikkad, Padkkal House, Patla Post, Kasargod, Kerala-671124
2. The Pr. Commissioner of Customs (Airport), CSI Airport, Terminal-2, Level-2, Andheri (East), Mumbai-400099.

Copy to:

1. Shri K. M. Suresh Chandran, 9/426, Court Road, Kozhikode-673001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.