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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. 371/49/DBK/2023-RA /892 Date of issue: 05.01.2024

ORDER NO. 128 /2024-CUS (WZ)/ASRA/MUMBAI DATED 31.01 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. Varsha Fabexpo LLP

Respondent: Pr. Commissioner of Customs (Export), ACC, Mumbai

Subject : Revision Applications filed, under Section 129DD of the Customs Act, 1962, against the Order-in-Appeal No. Mum-CUSTM-AXP-APP-483/19-20 dated 29.08.2019 passed by Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application has been filed by M/s. Varsha Fabexpo LLP (hereinafter referred as 'applicant') against the Order-in-Appeal No. Mum-CUSTM-AXP-APP-483/19-20 dated 29 08.2019 passed by Commissioner of Customs (Appeals), Mumbai Zone-III

2 Briefly stated, facts of the case are that Demand-cum-Notice was issued to the exporter by speed post As per the OSD (DBK)'s instructions, a Public Notice No 19/2015 dated 02 12.2015 was issued wherein it was stipulated that the exporters will submit a certificate from the authorized dealer (s) or Chartered Accountant providing details of shipment which remain outstanding beyond the prescribed time-limit including the extended time, if any, allowed by the authorized dealer/ RBI on a 6-monthly basis. Such certificate shall be furnished by the exporter, authorized dealer wise for each port However, none of the exporter submitted the proof of their export realization in the prescribed format, wherein they were required to submit BRC/Negative Statement till the time as mentioned in the said Demand-cum-Notices. Further the said demand-cum notices were returned back by the postal authorities with the remarks unclaimed/ incorrect address. To conclude the matter, a Facility Notice No. 08/2016-17 dated 18.08.2016 was issued to sensitize all the exporters/ their CHAs and in case their name was reflecting in the list of defaulters, they should immediately contact the Dy Commissioner of Customs, Drawback (XOS) Section between 22.08.2016 to 29 08.2016 for personal hearing on all working days and within working hours with all the required documents. Also, an IEC alert was fed in the EDI systems against the Exporter. Even then the said Exporter has not submitted the proof of their export realization as prescribed. Further two more opportunities were granted to the applicant for personal hearing. Under these circumstances, the adjudicating authority vide impugned order confirmed the demand of drawback with applicable interest as per their respective Demand cum Notice issued to the Applicant and also imposed penalty under section 117 of the Customs Act, 1962.

Aggrieved, the applicant filed appeal, however, the Appellate authority vide impugned OIA rejected the appeal holding them time barred, being filed beyond the time limit prescribed under Section 128 of the Customs Act, 1962.

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

i. the respondent has rejected Applicant's appeal on the ground of the same being barred by the limitation. In this regard, it is submitted that the respondent has wrongly decided the issue of 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 revisionist 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 the revisionist. That the revisionist had come to know about the said Order-in-Original only when its shipments were withheld and/or bank accounts were freezed upon instructions from the Tax Recovery Cell (Export) Section of the Customs Department. It is then that the revisionist 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.

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

iii 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/ RTI 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 cogitadimpossibilia, which means that the law does not compel a man to do that which is impossible. Because 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, revisionist relies upon the judgment of the Hon'ble Supreme Court in the case, Collector, Land Acquisition, Anantnag vs. Mst Katiji, JT 1987 (1) SC 537.

iv. they 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, Because the Sub-Rule 4 of Rule 18 of the Customs and Central Excise Duties Drawback Rules, 2017 and Sub-Rule 4 of Rule 18 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 provides for the repayment of recovered drawback to the exporter, even in case where the foreign exchange are realized after recovery of drawback from the exporter.

v. In view of above Applicant requested to set aside the impugned Order-in-Appeal.

4 Personal hearing in this case was scheduled on 10/17.10.2023. Applicant vide letter dated 11.10.2023, requested to forgo the personal hearing and to

decide the matter on merits. Therefore, Government proceeds to decide the case on merits on the basis of 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 applicant has 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 along with interest and penalty. The applicants did not respond to the intimations for personal hearing and therefore the adjudicating authority proceeded to confirm the demand for recovery of drawback sanctioned along with interest and penalty at the applicable rate. Applicant has claimed that they have not received the copies of the SCN & OIO passed by the adjudicating authority deciding the show cause notice for recovery of drawback sanctioned and that they became aware of the OIO only when its shipments were withheld and/or bank accounts were freezed 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. This matter was carried in appeal before Commissioner (Appeals) who has rejected the appeal on the ground of being time bar.

7. Government observes that the Circular No. 5/2009-Customs dated 02.02.2009 had set out a mechanism to monitor the realization of export proceeds The circular dated 02.02.2009 was in vogue and therefore the applicants were required to follow the instructions contained therein and were duty bound 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 Government observes that no ground has been made out in the revision application to the effect that the applicant had already submitted evidence before the Assistant/Deputy Commissioner to substantiate receipt of export proceeds before issue of notice The applicants ground regarding submission of evidence of realisation of foreign exchange is that they furnished such evidence before Commissioner (Appeals) and not at any time before that. Government observes that the impugned Order by the Appellate authority are passed during the year 2019. Even if it is presumed that the applicants claim about receipt of foreign exchange is accurate, the record suggests that the applicants have not been diligent and did not intimate the Department about the receipt of foreign exchange. However, the proximate cause for the revision application is that the appeals filed by the applicant has been dismissed on grounds of time bar.

8. 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 Saral 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 Applicants only on question of power with Commissioner(Appeals) for delay condonation without ascertaining factum 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 Applicants, 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 — Applicants 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 Applicants'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, J 944 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.[paras5, 6, 7, 8, 9, 11]"

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 Osa 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 infers from the judgments cited that it is incumbent upon the appellate authority to confirm service of the order. The factum of service of order cannot be based upon presumption. In the present case, the Commissioner (Appeals) has not made any effort to ascertain actual date of service. The Commissioner (Appeals) was required to call for the records from the office of the adjudicating authority to corroborate the actual service of the order. He has not made any attempt to counter the submissions of the applicants stating that they had not received the OIO Needless to say, the onus to establish service of the order to the applicant was upon the Department and Commissioner (Appeals) has not given any findings as to how the onus has been discharged

11. In view of the assertions made by the applicant regarding receipt of export proceeds, it would be travesty of justice if applicant realized sale proceeds 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 sets aside 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 original authority is directed to pass appropriate order in accordance with the law after following the principles of natural justice, within 8 weeks from the receipt of this order

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

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

ORDER No. 128 /2024-CUS (WZ)/ASRA/Mumbai dated 31.01.2024

To,

1. M/s. Varsha Fabexpo LLP, 44B Devdeep Apt, flat No. 401, 4th Floor, Tilak Tagore Road, Santacruz(W), Mumbai-400054.
2. The Pr Commissioner of Customs(E),Air Cargo Complex, Sahar, Andheri(E), Mumbai – 400099.

Copy to:-

1. The Commissioner of Customs (Appeals) Mumbai, Zone – III, 5th floor, Awas Corporate Point, Makwana Lane, Behind S.M. Centre, Andheri – Kurla Road, Marol, Mumbai – 400 059.
2. Sr. P.S. to AS(RA), Mumbai.
3. Guard file.