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SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/160/B/WZ/2019-RA/SSS : Date of Issue 01.02.2023

ORDER NO. 147/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2023
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.

Applicant : Ms Varkha

Respondent : 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-CUSTM-PAX-APP-1240/2018-19 dated
26.03.2019 issued on 29-03.2019 through F.No. S/49-
04/2019 passed by the Commissioner of Customs
(Appeals), Mumbai – III.

ORDER

This revision application has been filed by Ms Varkha (herein referred to as Applicants) against the Order-In-Appeal No. MUM-CUSTM-PAX-APP-1240/2018-19 both dated 26.03.2019 issued on 29-03.2019 through F.No. S/49-04/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Briefly stated facts of the case are that the on 08.09.2016, the AIU officers intercepted Ms Varkha holding Indian Passport in the International Transit Lounge of CSI Airport, Mumbai from Bangkok by Flight No. AI 331 dated 08.09.2016 and further destined to fly to Delhi (Flight no. AI 348)/Ahmedabad (Flight No. AI 031). The personal search of the Applicants resulted in recovery of six pieces of gold weighing 1185 grams valued at Rs.34,43,752/- which were cleverly concealed in three black coloured oval shaped packages and wrapped with black adhesive tape. The impugned gold was seized under the provisions of Customs Act, 1962.

3. After due process of law and investigations, the Original Adjudicating Authority (OAA) viz, Addl. Commissioner of Customs, CSMIA, Mumbai vide Order-in-Original No. ADC/AK/ADJN/292/2018-19 dated 27.09.2018 ordered for the absolute confiscation of six pieces of gold weighing 1185 grams valued at Rs.34,43,752/- six pieces of gold weighing 1185 grams valued at Rs.34,43,752/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and a penalty of Rs. 4,00,000/- under Section 112(a) and (b) of the Customs Act, 1962 was imposed on the Applicant.

4. Aggrieved by this order, the Applicants filed an appeal with the Commissioner of Customs (Appeals), Mumbai – III who vide Orders-In-Appeal No. MUM-CUSTM-PAX-APP-1240/2018-19 both dated 26.03.2019 issued on 29-03.2019 through F.No. S/49-04/2019 rejected the appeal without going into the merits of the case on the grounds of non-maintainability, as the applicant had

failed to pay the pre-deposit 7.5% of the amount demanded on account of penalty imposed vide impugned OIO at the time of filing the appeal.

5. Aggrieved with the above order, the Applicant has filed this revision application on the following grounds:

5.1 that the Order was passed without applying the principles of natural justice;

5.2 that the Applicant submits that in case of Ramesh Vasantbhai Bhojani in the Hon'ble High Court of Gujarat reported in 2017 (357) E.L.T 63 (Guj.) has held that :-

Appeal to Commissioner (Appeals) Limitation Delay in filing Condonation of delay General principles Appeal to be filed within sixty - days from the date of communication of decision or order sought to be challenged Commissioner (Appeals) empowered to extend period for filing appeal for further period of thirty days and no more No power or authority to Commissioner (Appeals) to permit the appeal to be presented beyond ninety days Section 128 of Customs Act, 1962. [2008 (221) E.L.T. 163 (S.C.); 2010 (257) E.L.T. 3 (S.C.); 2009 (236) E.L.T. 417 (S.C.) relied on]. [para 8]

Appeal to Commissioner (Appeals) Pre-deposit whether condition precedent for filing of appeal Appeal dismissed as filed beyond condonable delay of thirty days provided under proviso to Section 128 of Customs Act, 1962 On writ petition, inter alia, contending that office of Commissioner (Appeals) does not accept memorandum of appeal unless accompanied by challan evidencing payment of pre- deposit and appeal could not be filed within prescribed period of limitation as it took some time to arrange pre-deposit, which was made within condonable period of thirty days HELD: Filing of appeal and entertaining of appeal are not synonymous Party may file an appeal within prescribed period of

limitation though it may not be in a position to make the pre-deposit within such time While Commissioner (Appeals) cannot entertain an appeal unless pre-deposit is made, he cannot insist upon payment of pre-deposit as a condition precedent for filing an appeal Condition contained in clause (6) of Form No. C.A.-1, has no statutory basis and hence, there cannot be any insistence on payment of pre-deposit prior to filing the appeal Authorities duty bound to accept memorandum of appeal if filed in prescribed form, without insisting upon challan evidencing payment of pre-deposit accompanying it If the appeal comes up for hearing and pre-deposit not paid, Commissioner (Appeals) may refuse to entertain it and dismiss it on that ground Assessee had proceeded on assumption that appeal papers would not be accepted without such challan and had let statutory period lapse, thereby non-suiting himself as Commissioner (Appeals) had no power or authority to condone delay beyond period of thirty days, even if sufficient cause is shown - No infirmity in order of Commissioner (Appeals) Sections 128 and 129E of Customs Act, 1962. [paras 12, 13, 14]

5.3 The Applicant submits that in case of NYATI HOTELS & RESORTS PVT. LTD in the Hon'ble CESTAT, WEST ZONAL BENCH, MUMBAI reported in 2018 (364) E.L.T 1081 (Tri-Mumbai.) has held that

Appeal to Commissioner (Appeals) Limitation Pre-deposit Dismissal of appeal on ground that mandatory pre-deposit under Section 35F of Central Excise Act, 1944 was made after three months of passing of adjudication order HELD: That assessee made pre-deposit as required under Section 35F ibid although after filing of appeal cannot be a ground to dismiss appeal Once appeal was filed within time limit it could not be dismissed on ground of late payment of pre-deposit amount Commissioner (Appeals) to hear appeal on merits Section 35 of Central Excise Act, 1944. Sections 35 and 35F ibid are independent and have got

no overriding effect on the other. Section 35(1) is in respect of type of appeal which can be filed before the Commissioner (Appeals) and it does not deal with entertaining appeal by Commissioner (Appeals). Section 35F in turn deals only with entertaining the appeal subject to condition of pre-deposit of seven and half per cent. It nowhere prescribes the time limit for making pre-deposit and the provisions of Section 35F cannot be read in context of Section 35(1) as it has got no application. The non-payment of pre-deposit is curable defect. Any appeal can be entertained only when it is filed. Obviously the question of entertaining the appeal comes at the time of filing of appeal which has to be filed within stipulated period. [para 4]

5.4 In view of the above the applicant requested to set aside the impugned Order in Appeal.

6. Personal hearing was scheduled for 24.11.2022. Shri. N.J Heera, Advocate appeared for personal hearing and reiterated his submissions. He submitted that Quantity of gold is small, and applicant is not a habitual offender. He requested to release the goods on Redemption fine and penalty.

7. Government has gone through the facts of the case. At the outset, Government observes that the AA had rejected the appeal filed by the Applicant No. 1 and 2, on grounds of non-maintainability as they had not deposited 7.5% of the penalty amount imposed by the OAA.

8(a). At para 4 of the OIA, the AA has observed as follows,

"4. I have gone through the facts and submissions of the case. On perusal of the Form CA-1, I find that the appellant has mentioned that the pre-deposit i.e. 7.5% of the imposed penalty has been paid. However, on scrutiny of the documents, I find that the appellant has failed to produce credible evidence showing payment of pre-deposit 7.5% of the imposed penalty while filing the appeal against the

impugned order-in-original which is mandatory in terms of the provisions of Section 129E of the Customs Act, 1962. The defective appeal notice dated 04.01.2019 was also issued to the appellant but the appellant has not paid the requisite amount of pre-deposit so far.”

8(b). Government notes that the A.A had issued the defective appeal notice (dtd 04.01.2019) to the Applicant, but the applicant had not paid the requisite amount of pre-deposit. Thereafter, after the expiry of the condonable period, the matter was taken up by the appellate authority and having found out that the pre-deposit amount had not been paid so far, the appeal was rejected without following the principles of natural justice. i.e the personal hearing had been dispensed with.

9(a). Government notes that the A.A has relied on the judgement of the Hon'ble Gujarat High Court in the case of Ramesh Bhojani vs. U.O.I reported in 2017-TIOL-990-HC-AHM-CUS. Para 14 of the case law which has been reproduced by the AA in the OIA is copied below;

“14. From the language employed in section 129E of the Act, it is evident that the same mandates that the appeal shall not be entertained unless the pre-deposit is made. Filing of an appeal and entertaining of an appeal are not synonymous. A party may file an appeal within the prescribed period of limitation though it may not be in a position to make the pre-deposit within such time. Considering the fact that the Commissioner (Appeals) has no power to condone the delay beyond a period of thirty days, an appeal, even when there is a delay, has to be filed within a period of ninety days from the date of receipt of the order-in-original, it may be that a party may not be in a position to arrange for the amount of pre-deposit within such period. However, that by itself, should not be a ground to totally non-suit such party, more so, when what the statute provides is that the appeal shall not be entertained unless such pre-deposit is made. As held by the Supreme Court in the above referred decision, a condition to entertain an appeal does not mean that the memorandum of appeal shall be returned because of such non-compliance pertaining to predeposit and that the only consequence is that

the appeal shall not be entertained, which means the appeal shall not be considered on merits and eventually has to be dismissed on that ground. Therefore, while the Commissioner (Appeals) cannot entertain an appeal, namely, hear and decide it unless the pre-deposit is made, he cannot insist upon payment of predeposit as a condition precedent for filing an appeal. The condition contained in clause (6) of Form No.C.A.-1, has no statutory basis and hence, there cannot be any insistence on payment of pre-deposit prior to filing the appeal. In these circumstances, if such a practice is in fact prevailing, namely, that the memorandum of appeal is being returned if the same is not accompanied with the challan evidencing payment of pre-deposit, such conduct on the part of the respondent authorities has no legal basis. The respondent authorities are duty bound to accept the memorandum of appeal if the same is filed in the prescribed form, without insisting upon the challan evidencing payment of pre-deposit accompanying the same. If the appeal comes up for hearing and the pre-deposit is not paid, the Commissioner (Appeals) may refuse to entertain the same and dismiss it on that ground."

9(b). Government notes that the AA had not returned back the memorandum of appeal for non-compliance but in fact had pointed out the deficiency and had sent a communication to the applicant during the mandatory / condonable period available to the applicant, that the pre-deposit @ 7.5% of the quantum of penalty imposed was required to be paid.

9(c). In this regard, para 5 of the order pertaining to the case referred to in the above judgment dated 24/06/2011 in Ranjit Impex vs. APPELLATE DY. COMMISSIONER AND ANR. SLP(Civil) No(s).27073/2011 in WA No.730/2011 is copied below,

5. As far as the first issue is concerned, it is needless to say that the conclusion arrived at by the Division Bench is absolutely justified, for a condition to entertain an appeal does not mean that the Memorandum of Appeal shall be returned because of such non-compliance pertaining to pre-deposit. The only consequences that the appeal shall not be entertained which means the appeal shall not be considered on merits and eventually has to be dismissed on that ground.

9(d). On the issue of 'when the payment of the pre-deposit is required to be made', para 12 and 13 of the Order of the Apex Court in the case of M/s. S.E. Graphites Pvt. Ltd. Vs. State of Telangana & Ors. [Civil Appeal No.7574 of 2014] is reproduced below,

"12. In addition, the appellant-assessee has rightly placed reliance on the decision of this Court in Ranjit Impex (supra). In that case, the Court considered almost similar stipulation in Section 51 of the Tamil Nadu VAT Act, 2006. Indeed, the second proviso therein uses the expression no appeal shall be "entertained," unlike the expression used in the provisions under consideration that the appeal so preferred "shall not be admitted". We are conscious of the fact that the first proviso pertaining to maximum period of delay to be condoned by the Appellate Authority, also uses the expression "admit the appeal." That expression "admit", however, must be read to mean filing, institution or presentation of the appeal in the office of the Appellate Authority. Whereas, the expression "admitted" used in the second proviso will have to be construed as analogous to expression "entertained." We are inclined to take this view as the setting in which the provisions under consideration appear leaves no manner of doubt that it is ascribable to the event of taking up the appeal for consideration, for the first time, to admit it on merits or otherwise and/or for condonation of delay in filing the appeal, as the case maybe. Before that event occurs, it is open to the appellant to deposit the tax dues in respect of which the appeal is preferred and produce proof of such deposit before the Appellate Authority.

13. This view is reinforced from the exposition of this Court in Ranjit Impex (supra), wherein the view taken by the Division Bench of the High Court of Madras that the proof of deposit of tax has to be produced at the time when the appeal is taken up for consideration, but not at the time of filing or presentation of the appeal, has been upheld."

9(e). Further, at para 17 of the aforesaid case i.e. M/s. S.E Graphites Pvt. Ltd, the Apex Court, the following observation has been made,

17. While parting, we may observe that taking advantage of the interpretation given by us, it is possible that some unscrupulous litigant (assessee) may file an appeal within the limitation period but keep it under defect so that the same does not proceed for consideration before the Appellate Authority. To obviate such a mischief, we hold and direct that the Appellate Authority shall be obliged to take up every singular appeal for consideration for admission on merits

and/or for condonation of delay in filing the appeal for the first time, no later than thirty days from the date of its filing, institution or presentation in the office of the Appellate Authority. This direction shall be complied with by all concerned meticulously, without any exception. That is the only way to secure the interests of the Revenue and at the same time to effectuate the purpose underlying the proviso regarding the deposit of specified amount of tax dues.

10. Government notes that while filing the appeal before the AA, the Applicant had mis-represented by stating that the pre-deposit had been paid. In terms of the guidance of the Apex Court at para 9(e) above, Government notes that the AA had issued the defective appeal notice which was within the statutory / condonable period. The applicant had not rectified the defect / deficiency which needless to state was required to be done within the condonable period.

11. Government notes that while rejecting the appeal filed by the applicant, the AA has squarely applied the ratio of the aforesaid judgements of the Apex Court. Government notes that it is settled law, that payment of pre-deposit as mandated in the statute, is mandatory and the AA cannot sidestep the same. The AA has no power to waive-of the payment of pre-deposit amount. Further, the AA has no power to condone delay exceeding 90 days. In this case, from the facts it is clear i.e. considering the date of the OIA, the same has been passed after lapse of more than 90 days (i.e. the appeal period). Therefore, Government finds that the OIA passed by the AA is legal and proper. Government finds no reason to interfere in the same and is inclined to uphold the OIA passed by the AA.

12. Moreover, Government notes that in the extant Revision Application, the applicant has not come forward with any evidence of payment of the mandatory pre-deposit.

13. Coming to the contention that principles of natural justice had not been followed, Government finds that this averment is specious, especially as held by Hon'ble Apex Court, mentioned at para 9(a) above, i.e. '.....while the

Commissioner (Appeals) cannot entertain an appeal, namely, hear and decide it unless the pre-deposit is made', it is clear that the appeal is to be rejected without going into the merits and wasting the court's time. The applicant was aware that the statutory pre-deposit had not been paid by him during the statutory / condonable period and his act of filing a deliberate deficient appeal, is contumacious.

14. The Government finds no reason to interfere in the Orders passed by the AA and upholds the OIA No. MUM-CUSTOM-PAX-APP-1240/2018-19 dated 26.03.2019.

15. Accordingly, the Revision Application filed by the Applicant is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. 147 /2023-CUS (WZ) /ASRA/MUMBAI DATED 30.01.2023.

To,

1. Ms Varkha, House No. B8/114, Kharkhas Colony, Near Rose Garden, Patiala-147001.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal 2, Level - II. Sahar, Mumbai 400 099.

Copy to:

1. A.M Sachwani / V.M Advani / N.J Heera / R.R Shah, Advocates, Nulwala Bldg, Ground Floor, 41 Mint Road, Opp. G.P.O, Fort, Mumbai - 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Noticeboard.