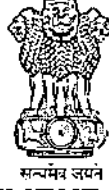


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SPEED POST



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

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F.No. 371/346/DBK/2019, 371/142/DBK/2019 / 724 Date of issue: 06.02.2023

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ORDER NO 153-154 / 2023-CUS(WZ)/ASRA/MUMBAI DATED 31.01.2023  
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.

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Applicants : M/s. Eagle Burgmann India Pvt. Ltd.,  
M/s. Ambertronics Engineers Pvt. Ltd.

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

Subject : Revision Applications filed, under Section 129DD of the Customs  
Act, 1962, against the Orders-in-Appeal passed by Commissioner of Customs  
(Appeals), Mumbai Zone-III.

## ORDER

These Applications have been filed by applicants against the following Orders-in-Appeal passed by the Commissioner of Customs (Appeals), Mumbai Zone-III :

S. No	Applicant	RA No.	OIO No. and Date	OIA No. and Date
1	M/s. Eagle Burgmann India Pvt. Ltd.,	371/346/DBK/2019	AC/JD/2480/2017-18/DBK(XOS)ACC dated 27.03.2018	Mum-Custm-Axp-App-337-19-20 dated 30.07.2019
2	M/s. Ambertronics Engineers Pvt. Ltd.	371/142/DBK/2019	AC/YK/6646/16-17/ADJ/ACC dated 31.03.2017	Mum-Custm-Axp-App-1206/18-19 dated 28.02.2019

2.1 Brief facts of the case are that the applicants in these cases are exporters 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) Sub-Rule (1) & (2) of Customs, Central Excise and Service Tax Drawback Rules, 1995, the 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. Further a Public Notice No. 19/2015 dated 02.12.2015 was issued by the Commissioner of Customs (Export), ACC, Sahar wherein, it was stipulated that the exporters will submit a certificate from the authorized dealer(s) or Chartered Accountant providing details of shipment beyond the prescribed time limit including the extended time limit, 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. Also, Facility Notices no. 05/2017 dated 07.06.2017, 08/2016-17 dated 18.08.2016 were issued for submission of Negative statement for export proceeds realized for exports done prior to 01.04.2013. All the exporters whose name appeared in the list

issued were required to submit BRCs/Negative statement for subject period before 15.07.2017, subsequently extended up to 31.07.2017.

2.2 As the exporters 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, show cause notices were issued to these exporters proposing to recover the amount of drawback already paid along with interest. The adjudicating authority passed the Orders-in-Original (detailed at Column No. 4 of Table at para 1 above) confirming the demand of drawback amount along with applicable interest and penalty as per Rule 16(A), Sub Rule (1) & (2) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 read with Section 117 of the Customs Act, 1962. Aggrieved, the applicants filed appeals, however the Appellate authority vide Orders-in-Appeal (detailed at Column No. 5 of Table at para 1 above) rejected the appeals holding them time barred, being filed beyond the time limit prescribed under Section 128 of the Customs Act, 1962.

3. Hence, the Applicants have filed the impugned Revision Applications mainly on the following identical grounds:

- i. Applicants had not received any Show Cause Notice, Personal Hearing Notices and even the impugned Order-in-Original. It is submitted that the Applicants came to know about OIO being passed against him only when an alert was put against his IEC. The Applicant submits that when such alert was put against his IEC, he further investigated on his own with the concerned department, only then he came to know that an Ex-Parte Order has been passed against him. M/s. Ambertronics Engineers Pvt. Ltd received the order on 04.01.2019 while M/s. Eagle Burgmann India Pvt. Ltd. received OIO on 30.05.2019.
- ii. The Applicants would like to submit that the impugned Order-in-Original was passed in violation of the principles of natural justice. It is a fact on record that the impugned Order-in-

Original was an ex-parte order because the Adjudicating Authority had not bothered to give a chance to the Applicant to justify their export realization without granting sufficient time for attending personal hearing to the Applicants. Moreover, the Applicant had neither received any Show Cause Notice nor received any facility notice in this matter. The Adjudicating Authority had passed the impugned Order arbitrarily without informing about any demand cum show cause notice and also without extending sufficient opportunity of personal hearing to the Applicants. Any order passed in violation of principles of natural justice may amount to violation of the Fundamental Rights guaranteed under the Constitution of India. The Hon'ble HIGH COURT OF BOMBAY in the matter of RAJMAL LAKHICHAND versus COMMISSIONER OF CUSTOMS, AURANGABAD. [2010 (255) E.LT. 357 (Bom.)] held that:

"62. It is a fundamental of fair procedure that before action is taken, the affected party should be given a notice to show cause about the proposed action and to seek his explanation. Any order passed without giving notice is against the principles of natural justice. The notice must be clear, specific and unambiguous and the changes should not be vague and uncertain. The object of notice is to give an opportunity to the person concerned, to present his case. Natural justice requires that the person directly affected by the proposed acts, decisions or proceedings be given adequate notice of what is proposed, so that he may be in a position to make representation on his own behalf or to appear at the hearing or inquiry (if any), and effectively represent his own case and answer the case he has to meet. The Apex Court has recognized that to treat the person in violation of principles of natural justice would amount to arbitrary and discriminatory treatment and will be against the fundamental principles of natural justice.63. The Supreme Court while interpreting Article

14 has given a dynamic interpretation on the concept of equality before the law. As per the Hon'ble Supreme Court, violation of the rules of natural Justice would amount to discrimination, where discrimination is the result of State action which would violate Article 14 of the Constitution. In short, as per the Supreme Court in certain cases, violation of the principles of natural justice may amount to violation of the fundamental rights of equality guaranteed by Article 14"

iii. The Hon'ble Tribunal in the matter of AMBAL MILLS LTD. Versus COMMISSIONER OF C. EX., COIMBATORE, (2000 (124) E.LT. 345 (Tribunal)) has held that:

"It is also seen that there is no clear appreciation of the enormous documentary evidence produced by the appellants to show that there was clearances of plain reel hanks. They have also produced evidence of the dealers and mills who have admitted about receipt of both types of yarn. This evidence is counter to the evidence produced after receipt of show cause notice but it was necessitated as the Applicants had to produce such material as the Collector had collected such evidence behind the back of the Applicants to hold against them. Therefore, these materials are required to be referred back to the Collector for de novo consideration. In that view of the matter the impugned order is set aside and the matter remanded to the Collector for de novo consideration to take all the material evidence produced on record and to rehear the Applicants in the light of the evidence produced by the department also. However, the question of calling any witnesses who have given the statements for cross-examination need not be raised at this stage. The evidence which is already on record and the evidence produced by the Applicants before the Tribunal requires to be re-appreciated with view to finding out whether there was any clandestine removals of one form of hanks

in the other form i.e cross hanks in the form of plain hanks in Erode and if so to what extent duty is required to be confirmed. The Applicants are entitled to go through the records of evidence which has already been produced that no such activity was done by them and there was no duty liability. The aspect of penalty could be arrived at if there is any duty computation."

- iv. The Applicants paid the Drawback demand under protest in order to remove the alert against his IEC. The Applicant submits that no export proceeds are pending for realization. The Applicant is submitting the self certified copies of the Statement of Bank Realization for all the impugned shipping bills in as much as evidence showing that no export proceeds are pending for realization in proof of realization of export proceeds against every shipment exported under duty drawback scheme.
- v. The Applicants submits that all the export proceeds have already been realized and no amount of export proceeds is pending for realization. The adjudicating authority had not only failed to give a fair chance to the Applicant to justify the realization but had also not bothered to grant the Applicant ample opportunities for personal hearing before passing the impugned order.
- vi. In such circumstances, before rejecting the Applicant's appeal merely on the ground of limitation, it would have been most prudent on the part of the Appellate Authority to have verified from the Department whether the said Order was ever served on/delivered to the Applicant or not. However, the Appellate Authority did not bother to do so and arbitrarily passed the subject Order-in-Appeal.
- vii. In view of above Applicants requested to set aside the impugned OIAs with consequential relief.

4. A Personal hearing was fixed in this case on 21.11.2022. Dr. Sanjay Kalra, Advocate on behalf of the Applicants, appeared online for hearing and

submitted that neither SCN nor OIO were accepted by them. He submitted that applicant came to know when their consignment was held up due to alert inserted on EDI system. He further submitted that BRCs have been received and were submitted to Department in 2015 itself.

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

6. Government observes that both the revision applications involve identical issue. The applicants have all been sanctioned drawback in respect of exports made by them. However, the applicants 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 applicants had therefore been issued show cause cum demand notices 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. Applicants have claimed that they have not received the copies of the respective SCNs & OIO's passed by the adjudicating authority deciding the show cause notices for recovery of drawback sanctioned and that they became aware of the respective OIO's only when their consignment was held up due to alert inserted on EDI system. These matters were carried in appeal before Commissioner (Appeals) who has rejected the appeals on the ground of being time bar. In these revision applications, the applicants have made out similar grounds to contend that the appeals were within time as they had filed the appeals within the statutory appeal period after the OIO's 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 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 any of the revision applications to the effect that the applicants had already submitted evidence before the Assistant/Deputy Commissioner to substantiate receipt of export proceeds before issue of notices. 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 Orders 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 applications is that the appeals filed by the applicants have been dismissed on grounds of time bar.

8. While passing the impugned orders, the Commissioner(Appeals) has observed that the applicants have obtained copies of the respective OIO's from TRC(Export) Section and not from Drawback(XOS) Section. It was averred by the Commissioner(Appeals) that the obtaining of orders in such manner was not 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 OIOs had actually been served on the applicants.

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.[paras 5, 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's. Needless to say, the onus to establish service of the order to the applicants was upon the Department and Commissioner (Appeals) has not given any findings as to how the onus has been discharged. However, the Commissioner (Appeals) has based his findings exclusively on the contention that since the copies of the order have been obtained from sources other than the office of the adjudicating authority, such date cannot be considered as the date of communication for the purpose of filing appeal before the appellate authority in terms of Section 128 of the Customs Act, 1962.

11. In view of the assertions made by the applicants regarding receipt of export proceeds, it would be travesty of justice if applicants 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 Orders- in-Appeal and directs the original authority to decide the cases 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 applicants are 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/s are disposed of on the above terms.

  
(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio  
Additional Secretary to Government of India.

ORDER No. 153-154 /2023-CUS(WZ)/ASRA/Mumbai dated 31.01.2023

To,

1. M/s. Ambertronics Engineers Pvt. Ltd., 17-B, Tarun Industrial Estate, New Nagardas Road, Mogra Pada, Andheri(E), Mumbai-400069.
2. M/s. Eagle Burgmann India Pvt. Ltd., Survey No. 91, 91/B, Plot No. 64 & 51 Ramtekadi Industrial Estate, Hadapsar, Pune, Maharashtra 411013.
3. The Commissioner of Customs (Exports), Air Cargo Complex, Sahar, Andheri(E), Mumbai – 400 099.

Copy to:-

1. KPS Legal, 5<sup>th</sup> Floor, Hitkari House, 284, Shahid Bhaghat Singh Road, Fort Mumbai- 400001.
2. 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.
3. Sr. P.S. to AS(RA), Mumbai.
4. Guard file.