

F. No. 373/257/DBK/14-RA
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F. No. 373/75/DBK/15-RA
F. No. 373/76/DBK/15-RA

SPEED POST

REGISTERED 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, Cuff Parade,
Mumbai- 400 005**

F. No. 373/260/DBK/14-RA
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F. No. 373/76/DBK/15-RA }

Date of Issue: 02-06-2020

ORDER NO. ¹⁵⁵⁻⁶¹ /2020-CUS(SZ)/ASRA/Mumbai DATED 01.09.2020 OF
THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO
THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE
CUSTOMS ACT, 1962.

Applicant : M/s Birdy Exports Private Limited,
No. 68, 2nd Stage, Industrial Suburb,
Yeshwanthpur, Bangalore- 560 002.

Respondent : The Commissioner of Customs, Bangalore.

Subject : Revision Applications filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal
No.05/2014 dated 16.04.2014 passed by the
Commissioner of Customs(Appeals), Banaglore.

ORDER

The Revision Application No. 373/260/DBK/14-RA is filed by the M/s Birdy Exports Private Limited (hereinafter referred to as "the applicant") against the Order-in-Appeal 05/2014 dated 16.04.2014 passed by the Commissioner of Customs (Appeals), Banaglore.

2. Brief facts of the case are that the applicant are exporter of goods and are availing duty drawback in terms of the Duty Drawback Scheme without availing Cenvat facility. The duty drawback availed by the applicant was 7.1% in lieu of non availment of Cenvat. The applicant were investigated by the officers of SIIB in 2012 and it was alleged that their eligibility to drawback was 2%, since they were availing Cenvat credit on input services during the period 13.06.2006 to 06.09.2012 but were declaring in their declaration at the time of export of goods that they were not availing Cenvat credit. A Show Cause Notice was issued to the applicant requiring them to show cause as to why the purported excess drawback of Rs. 2,44,56,374/- (Rupees Two Crores Forty Four Lakh Fifty Six Thousand Three Hundred Seventy Four Only) should not be demanded under Central Excise Duties and Service Tax Drawback Rules, 1995. The Show Cause Notices also proposed the recovery of interest, confiscation of goods and imposition of Penalty on the applicant as well as on the Managing Director, Finance Head and Administration in-charge of the applicant. The adjudicating authority vide Order in Original No. 851/2013 dated 30.09.2013 confirmed the demand along with interest. The Adjudicating Authority also imposed personal penalty of Rs.25,00,000/- each on the Managing Director, Finance Head and the Administrative In-charge.

3. Being aggrieved, the applicant preferred the appeal before the Commissioner of Customs (Appeals), Bangalore. The appellate Authority vide stay order no. 22/2013 dated 31.12.2013 passed ex-parte directing the applicant to pre-deposit an amount of Rs. Five Crores in terms of Section 129 E of the Customs Act, 1962. Thereafter, the Appellate Authority vide impugned Order in Appeal rejected the appeal filed by the applicant for non-

compliance with the provisions of Section 129E of the Customs Act, 1962 holding that the applicant did not fulfilled the conditions of stay.

4. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant have filed this Revision Application on the following grounds that :

- 4.1 The applicant have cited various case laws to prove that the impugned Order in Appeal is contrary to the law.
- 4.2 The appellate authority failed to take cognizance of the fact that when the applicant has a prima facie case in his favour whether on merits or time bar, ordering pre-deposit causes hardship to the applicant. The rejecting of appeal is therefore a fit one to be quashed.
- 4.3 On reversal of Cenvat credit with interest from a date much before non availment of cenvat credit was a condition under the relevant notification, it cannot be said that there has been intent to defraud.
- 4.4 It is well settled rule of natural justice that the party suffering adverse consequences ought be given a hearing before such order is passed against him.
- 4.5 The department did not appreciate the aspect that the applicant was availing drawback prior to 29.08.2008 when there was no requirement to reverse cenvat credit attributable to input service and as such continued to do so even after 29.08.2008.
- 4.6 The department had not appreciated the issued holistically.
- 4.7 The findings of the order have the effect of taking away with the right hand what the law confers with left.
- 4.8 The confirmation of demand without invoking the provisions of Section 28 of the Customs Act, 1962 are not sustainable. The demand of duty cannot be under any other provisions of law let apart a beneficial piece of legislation.

- 4.9 The fact is cenvat credit availed inadvertently had been reversed along with interest.
- 4.10 Principal of Natural Justice violate by not offering personal hearing.
- 4.11 The Show Cause Notice has no jurisdiction.
- 4.12 That if they are not eligible for higher rate of drawback , then they would be entitled for refund of accumulated cenvat credit availed on export of goods in terms of Notification No. 5/2006-CE(NT) as amended.
5. A Personal hearing in the matter was granted on 09.12.2019. Shri A.R.J. Nayak, Advocate and Shri Diwakar, Finance Head attended the personal hearing.
6. Government has carefully gone through the relevant case records & written submissions and the impugned Order-in-Original and Order-in-Appeal.
7. Government observes that in the instant case the applicant alleged to have availed the drawback of duty at the higher rate i.e. 7.1% , whereas they were eligible for the drawback at rate of 2%, since they were availing Cenvat Credit during the period 13.06.2006 to 06.09,2012. The Adjudicating Authority vide his order dated 30.09.2013 following due process of law confirmed the demand and ordered recovery of Rs. 2,44,56,374/- as erroneously excess granted drawback and also ordered for recovery of interest under the provisions of Rule 16 of Customs, Central Excise and Service Tax Drawback Rules, 1995. The penalty of Rs. 25,00,000/- each was also imposed on the Managing Director, Finance Head and Administration in-charge of the applicant.
8. The applicant have submitted that on noticing the discrepancy they paid an amount of Rs. 99,19,105/- on various dates which were prior to the date of issuance of show cause notice. Further an amount of Rs. 23,98,785/- was paid in the month of January & February 2013. All the

above payments said to have made towards the reversal of Cenvat Credit availed on input services for the period 2006-2012. Thus it is seen that they have paid/reversed major portion of the Cenvat credit prior to issuance of the Show Cause Notice.

9. It is observed that the applicant have availed the drawback of Rs. 2,44,56,374/- against which they have reversed the Cenvat Credit, alleged to be ineligible for, to the tune of Rs. 1,23,17,890/- (Rs. 99,19,105/- + 23,98,785/-). Under the circumstances, it is opined that insisting of pre-deposit to the tune of Rs. 3,79,82,110/- (Rupees Three Crores Eighty Two Thousand One Hundred Ten Only) which is even more than the duty demanded would cause severe hardship to the applicant.

Government opines that the applicant have made a strong case against the demand deserving consideration of the issue on merits without insisting on pre-deposit. In this regard Government places reliance on the ratio held by the Hon'ble High Court Allahabad in case of Standard Gram Udyog Sansthan Versus Union Of India [2016(344) ELT) 79)All.) that "*In view of decision of Tribunal in 2013 (291) E.L.T. 409 (Tribunal) in a similar matter, petitioner has a strong prima facie case in his favour and Commissioner (Appeals) directions of 25% pre-deposit, would cause serious prejudice - Pre-deposit fully waived and appellate authority directed to decide appeal expeditiously.*"

In view of the above discussion, Government opines that there is substance in the prayer of the applicant for consideration of the issue on merits without insisting on pre-deposit.

10. As regards imposition of personal penalties to the office bearers of the applicant, the Appellate Authority have issued following stay orders granting conditional stay to the Shri Denis Germain, Managing Director, Shri G.R. Rengarajrn, Finance Head and Shri S. Subramanya, Admin In-charge of the applicant company.

Sr. No.	Stay Oder No. Date	Condition	Name of person	Date of filing stay application
1.	05/2014 dt. 30.10.2014	Subject to pre-deposit of Rs.3,50,000/-	Shri Denis Germain, Managing Director	18.11.2013
2.	06/2014 dt. 30.10.2014	Subject to pre-deposit of Rs.3,50,000/-	Shri G.R. Rengarajn, Finance Head	18.11.2013
3.	07/2014 dt. 30.10.2014	Subject to pre-deposit of Rs.3,50,000/-	Shri S. Subramanya, Admin In-charge	18.11.2013

11. It is found that after enactment of Finance Act (No.2), 2014 with effect from 06.08.2014, Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962 have been substituted with new sections to provide for mandatory pre-deposit as a percentage of the duty demanded where duty demanded is in dispute or where duty demanded and penalty levied are in dispute. The amendment provisions apply to the appeals filed before Commissioner (Appeals) or Tribunal after 06.08.2014. Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962 contain specific saving clause to provide that all pending appeals/ stay applications filed till the enactment of the Finance Bill, 2014 shall be governed by the erstwhile provisions.

12. It is observed that appeals in the impugned stay applications were filed prior to 06.08.2014 by the applicants and hence the pre-deposit is not mandatory requirement in these cases. In view of the fact that the applicant have reversed the entire cenvat credit alongwith interest, as envisaged from the Order in Original, and in absence of any mandatory requirement for pre-deposit, the Government holds that the present case / issue essentially deserves decision on merit without insisting on pre-deposit.

13. The Government finds that the following Revision Applications have been filed by Shri Denis German, Managing Director, Shri G.R. Rengarajan, Finance Head and Shri S. Subramanya, Admin In-charge of the applicant company on whom the personal penalty was imposed by the original authority.

Sr. No.	Revision Application No.	Order in Appeal	Applicant
1.	373/259/DBK/14-RA	05/2014 dt. 16.04.2014	Shri Denis German, Managing Director
2.	373/258/DBK/14-RA	05/2014 dt. 16.04.2014	Shri G.R. Rengarajan, Finance Head
3.	373/257/DBK/14-RA	05/2014 dt. 16.04.2014	Shri S. Subramanya, Admin In-charge
4.	373/74/DBK/15-RA	05/2015 dt. 07.01.2015	Shri S. Subramanya, Admin In-charge
5.	373/75/DBK/15-RA	06/2015 dt. 07.01.2015	Shri G.R. Rengarajan, Finance Head
6.	373/76/DBK/15-RA	04/2015 dt. 07.01.2015	Shri Denis German, Managing Director

13.1 The Applicants in Revision Applications (1 to 3 above), being aggrieved parties to the impugned Order in Appeal on the issue of order of imposition of Personal Penalty by the Original Authority, these matters are also restored to the Appellate Authority for decision on merits after following the principles of natural justice.

13.2 It is seen that the matter pertaining to Revision Applications mentioned at Sr. No. 4 to 6 have arisen out of original cause i.e. Order in Original No. 851/2013 dated 30.09.2013 wherein the personal penalties were imposed on Shri Denis German, Managing Director, Shri G.R. Rengarajan, Finance Head and Shri S. Subramanya, Admin In-charge. The individual appeals filed by these aggrieved persons were decided by the Appellate Authority by issuing the separate Order in Appeals as mentioned against the Revision Application in the above table. The Orders in Appeal 04/2015, 05/2015 and 06/2015 all dated 07.01.2015 are pertaining to the individual appeal filed by the respective applicants. Since the original cause as well as grounds of filing these revision applications are same, Orders in Appeal 04/2015, 05/2015 and 06/2015 all dated 07.01.2015 are also liable to be set aside.

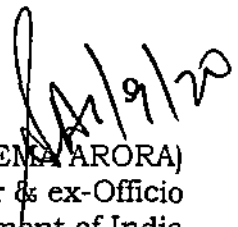
14. In the circumstances the Government sets aside impugned Order in Appeals and the matter is remanded back to the Commissioner (Appeals) for giving findings on merit on all grounds which have been raised before him and pass a well-reasoned order without insisting for pre-deposit, within 8 weeks from the date of issue of this order.

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15. The following revision applications are disposed off in the above terms.

Sr. No.	Revision Application No.	Applicant
1.	373/259/DBK/14-RA	M/s Birdy Exports Pvt. Ltd.
2.	373/259/DBK/14-RA	Shri Denis German, Managing Director
3.	373/258/DBK/14-RA	Shri G.R. Rengarajan, Finance Head
4.	373/257/DBK/14-RA	Shri S. Subramanya, Admin In-charge
5.	373/74/DBK/15-RA	Shri S. Subramanya, Admin In-charge
6.	373/75/DBK/15-RA	Shri G.R. Rengarajan, Finance Head
7.	373/76/DBK/15-RA	Shri Denis German, Managing Director

16. So ordered.


(SEEMA ARORA)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No. 155-61 /2020-CUS(SZ)/ASRA/Mumbai dated 01.09.2020.

To,

1. M/s Birdy Exports Private Limited,
No. 68, 2nd Stage, Industrial Suburb,
Yeshwanthpur, Bangalore- 560 002.
2. Shri Denis German, Managing Director,
M/s Birdy Exports Private Limited,
No. 68, 2nd Stage, Industrial Suburb,
Yeshwanthpur, Bangalore- 560 002.
3. Shri G.R. Rengarajan, Finance Head.
M/s Birdy Exports Private Limited,
No. 68, 2nd Stage, Industrial Suburb,
Yeshwanthpur, Bangalore- 560 002.
4. Shri S. Subramanya, Admin In-charge
M/s Birdy Exports Private Limited,
No. 68, 2nd Stage, Industrial Suburb,
Yeshwanthpur, Bangalore- 560 002.

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F. No. 373/76/DBK/15-RA

Copy to:

1. The Principal Commissioner of Customs, Airport & Air Cargo Complex, Air India SATS Air Freight Terminal, IInd Floor, Devanahalli, Bengaluru- 560 300.
2. The Commissioner of Customs (Appeals), 4th Floor, BMTC Building, Above BMTC Bus Stand, Old Airport Road, Domlur, Bengaluru- 560 071.
3. Sr. P.S. to AS (RA), Mumbai.
4. Guard file.
5. Spare Copy.