

REGISTERED 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, Cuff Parade,
Mumbai- 400 005**

F.No. 195/1008/13-RA

Date of Issue: 10/02/2020

ORDER NO. 165 /2020-CEX (WZ) /ASRA/Mumbai DATED 03.02.2020 OF THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Sterling Export Corporation, Ahmedabad.

Respondent ---:---Commissioner of Central Excise' Ahmedabad-1

Subject : Revision Applications filed under section 35EE of the Central Excise Act, 1944, against the Order-in-Appeal No. 50/2013 (Ahd-1)CE/AK/Commr(A)/Ahd dated 30.09.2013 passed by the Commissioner (Appeals-V), Central Excise, Ahmedabad.

ORDER

This revision application has been filed by M/s Sterling Export Corporation, Ahmedabad (hereinafter referred to as "the applicant") against the Order-in-Appeal No. 50/2013(Ahd-1)CE /AK/ Commr(A)/Ahd dated 30.09.2013 passed by the Commissioner (Appeals-V), Central Excise, Ahmedabad.

2. The brief facts of the case are that the applicant a Merchant Exporter engaged in the export of Dyed Fabrics Manufactured out of Spun Yarn Man Made Fibre & Fabrics made out of Spun Yarn from Man Made Fibre & Man Made Filament Yarn had filed two applications on 25.04.2000 & 26.4.2000 for the fixation of Brand Rate of Drawback with the Assistant Commissioner, Central Excise, Division-Rural, Ahmedabad of the then Ahmedabad Commissionerate and copy the same was endorsed to the Deputy Secretary, Drawback, Government of India, Ministry of Finance, Department of Revenue, New Delhi, with copies of the relevant Invoices and Shipping Bill. At the material period the Board had put the entire Brand Rate applications on hold for the reasons discussed at para 3 to 6 of Order-in-Appeal No. 50/2013(Ahd-1)CE /AK/ Commr(A)/Ahd dated 30.09.2013 (impugned order).

3. Thereafter, the Board vide letter F.No.606/8/2002-DBK(Part II), dated 16/21.04.2008 communicated to extend the benefit of Circular No.68/97-Cus. or 39/99-Cus. as the case may be, to those exporters who had filed Brand Rate application against the exports made prior to 06.07.2001. In view of this, the subject applications filed by the applicant were received from Board by Commissionerate of Central Excise, ~~Ahmedabad-I~~ on 28.08.2008 through Ahmedabad-II Commissionerate, under which they forwarded letters F.No. 606/8/2002-DBK(Part-II), dated 16/21.04.2008 alongwith its enclosures, issued by the Under Secretary (DBK), CBEC, New Delhi, i.e. file containing documents relating to Drawback claim filed by the applicant. On transfer and receipt of the applications from the Board for fixation of Brand rate of Drawback, the same were scrutinized by Central Excise Ahmedabad -I Commissionerate in light of Board's Circular No.14/2003-Customs, dated 06.03.2003.

4. The Assistant Commissioner (Drawback), Central Excise, Hq. Ahmedabad-I (Original authority) vide Order in Original No. 38/AC/DBK/2010 dated 24.06.2010 rejected both the applications filed by the applicant on 25.04.2000 and 26.04.2000 for fixation of Brand Rate of drawback in terms of Rule 6 & 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 on the ground of

delay in filing the applications with the competent authority with the following observations.

14.

a).....

b) As per applications, the claims were filed on 26.04.2000 and as per the Shipping Bills the goods left for export on 12.01.2000 and 21.12.99 respectively. As per Rule 6 and 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, the claim is to be filed within 60 days. As per proviso to the Rule 6 and 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules; 1995, the Commissioner of Central Excise can allow the exporter condoning the delay to file such application within a further period of 30 days. Thus there was delay of 45 and 67 days respectively in both the applications filed with respect to abovementioned Shipping Bills. As per Rule-17 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, the Central Government after considering the representation made by the exporter and for reasons to be recorded in writing, can exempt the exporter from the provisions of such rule and condone the delay.

15. *It also appeared that the exporter vide an application dated 25.04.2000 addressed to the Joint Secretary [Drawback], Ministry of Finance, Department of Revenue, New Delhi, made request seeking condonation of delay on the ground of sickness [Jaundice] and hospitalization of the Managing Partner of the firm. It was also pleaded that the firm was inactive and office staff was not geared up for filing appropriate application in absence of the Managing Partner. However, it appeared that despite taking up matter with the Board vide letter F.No.ICD/CCE-1/36/08-09-DBK dated 19.12.2008 and issue of subsequent reminders no reply or decision on the request of condonation of delay was received from the Ministry of Finance. The party failed to produce a letter from the Competent Authority regarding condonation of delay.*

16. *"There was a delay by 45 and 67 days in filing the application for fixation of Brand rate of Drawback. The delay was not condoned by the competent authority under rule 17 of the Customs and Central Excise Duties Drawback Rules, 1995. The exporter did not produce any condonation letter from the Joint Commissioner (Drawback) with whom an application was made for condonation of delay. Reminders sent by the department remained unanswered . In view of this it is evident that delay was not condoned. In the absence of condonation of delay applications are not entertainable and hit by time limitation. They are liable for rejection on time factor.*

5. Being aggrieved with the aforementioned Order in Original dated 24.06.2010 passed by the Assistant Commissioner (Drawback), Central Excise, HQ, Ahmedabad-I, the applicant filed appeal before Commissioner (Appeals-V), Central Excise, Ahmedabad on 25.07.2013 who dismissed the appeal on the ground of delay in filing the appeal with the following observations:-

"19. In the instant case, I find that the appellant has received the order on 28.06.2010 and filed an appeal on 25.09.2013 and has requested for condonation of delay but the delay is for 1183 days (after 60 days of prescribed time limit). Section 35 of the Central Excise Act 1944 confers power on the Commissioner (Appeals) to entertain an appeal within sixty days from the date of communication of the order. Further, power has been conferred on the Commissioner (Appeals) under the proviso to sub-section (1) of Section 35, to condone the delay of further period of 30 days on sufficient cause being shown. The delay is more than 30 days which is beyond the power of Commissioner (Appeals) to condone the delay. Hence, in view of the above, the appeal is liable to be dismissed. The Commissioner (Appeals) cannot condone delay beyond 30 days".

6. Being aggrieved, with the impugned order in appeal, the applicant has filed this Revision Application under Section 35EE of Central Excise Act, 1944 before the Central Government on the grounds mentioned in the Revision Application.

7. A Personal hearing held in this was fixed on 05.11.2019. However, the applicant filed additional written submission dated 26.10.2019 (received in this office on 21.11.2019) and requested to avoid formalities of Personal hearing and to decide the case on merits as explained. In their written submissions the applicants contended as under :-

7.1 During the period 1999-2001, Under Rule-6 of the Customs & Central Excise Duties Draw Back Rules 1995, (the said drawback Rules) they had filed 14 applications for fixation of Brand Rate of Drawback before Central Excise Ahmedabad to time to time, which were duly verified by the concerned officer as mandated under the said Rule and forwarded to Drawback Directorate, New Delhi for Brand Rate fixation.

7.2. These applications were pending / holding following the Circular No.39/2001-CUS and have prospective effect and retrospective effect. The Exporters had filed Writ Petition in various High Courts challenging the rejection/ pending. Hon'ble Bombay High Courts passed order in favour of exporters. Department filed SLP before Hon'ble Supreme Court against the Hon'ble High Court order. The Hon'ble Supreme Court vide its judgment dated 10.01.2007 dismissed the said SLP of Department.

7.3 Meantime the policy was changed and the concerned jurisdictional Central Excise Commissioner was permitted to fix the Brand Rate. Consequent to the orders of the High Court and Supreme Court, the Drawback Directorate, New Delhi transferred their pending cases of 14 applications to the Central Excise, Ahmedabad Commissionerate for fixation of Brand Rate. Accordingly, the Central Excise, Ahmedabad Commissionerate fixed 12 out of 14 Brand Rate applications and rejected the 2 applications as time barred under

Order in Original dated 24.06.2010. However, this order was not communicated to them and they were unaware of the said Order. They received the copy of the Order only on the 1st week of July 2013 from the department.

- 7.4 Being aggrieved by the said Order-in-Original, they preferred an Appeal before the Commissioner of Central Excise (Appeals). The Commissioner of Central Excise (Appeals) had dismissed the said appeal as time barred vide impugned Order-in-Appeal dated 30.09.2013.
- 7.5 The Assistant Commissioner (Drawback) rejected the both of the applications for fixation of Brand rate of Duty Drawback in terms of Rule 6 & 7 of the Customs and central Excise Duties Drawback Rules, 1995 on the ground of delay in filing the applications with the competent Authority. In this regard while preparing the application they approached the Jt. Secretary (Drawback), New Delhi for seeking ~~condonation of delay on the ground of sickness and hospitalization of the Managing partner of the applicant, that the firm was inactive and office staff was not geared up for filing appropriate applications in absence of the Managing partner. In the absence of delay condoned letter from the Board, Central Excise authority was not ready to verify the said applications. In this regard they approached the Board and received a letter dtd. 08/12/2000 from the Board to approach the jurisdictional Central Excise authorities for furnishing Verification report in the matter immediately (Copy marked as Exhibit "E" of the Revision Application). However, the Central Excise verified the said applications and forwarded them to the Deputy Secretary (Drawback), New Delhi for final fixation. It is also submitted that the order passed is in contravention to natural justice, without proper investigation/enquiry to collect facts though a considerable time of 2 years was taken to pass order. The Commissioner (Appeals) also failed to rectify the mistake as well. Hence, those orders deserve to be set aside.~~
- 7.6 Commissioner (Appeals) dismissed the appeal on the ground of delay in filing appeal. In this regard they submit that even after attending the P.H to the Assistant Commissioner (DBK), Central Excise they approached the concerned department in various levels several times to issue an Order. Thereafter, there was no response from the concerned department for a long time. They again approached the Chief Commissioner & Commissioner of Central Excise for issue an Order. In this regards, they obtained a copy of Order dated 24.06.2010 from the concerned department only on the 1st week of July, 2013. After receiving the said Order, they filed an appeal before the Commissioner of Central Excise (Appeals). As they had filed the appeal within the stipulated time limit of the receipt of the Order-in-Original and hereby request Government to kindly DO NOT CONSIDER THE APPEAL AS TIME BARRED.

7.7 Regarding Para No.17 of the Order in Appeal, they were unaware the statements of Assistant Commissioner, they came to know only when they received the Order in Appeal. Therefore, they request Government to ask the Assistant Commissioner of Central Excise proof towards delivery of the OIO, including postal receipt issued by the postal office where it was posted and also acknowledgement from the post office, where it was delivered to the Appellant. The Hon'ble Bombay High Court vide its judgment dated 26.07.2019 instructed that in the absence of evidence it may be considered as is in time (Enclosed copy of judgment dated 26.07.2019 for kind consideration)

7.8 The department has arbitrarily and without any justification whatsoever appears to have not posted the Order. Therefore, the Impugned Order is manifestly bad in law and should be set aside. The Honourable Supreme Court of India have confirmed repeatedly that no genuine claim should be denied on Procedural lapses / Technical grounds, under the following judgments:-

- i. Union of India Vs. A V Narasimhalu 1983 (13) ELT 1534 (SC).
- ii. Mangalore Chemical and Fertilizers Ltd.Vs.Dy.Commissioner1991 (51)ELT 437(SC)
- iii. Suksha International Vs. Union of India 1993 (39) ELT 503 (SC).
- iv. Formica India Vs. Collector of Central Excise 1995 (77) ELT 51 (SC).

The impugned orders should be set aside on this ground alone.

7.9 There are many decisions where it is held that procedural irregularities are condonable when the "factum of export is not disputed". In the instant case also there has never been a dispute about the export of goods. However, the rebate has been sought to be denied on the basis of condonable procedural irregularities. They seek to place reliance on the following decisions of the Government of India

- a) 2001 (131) ELT 726 (GOI) IN RE: M/s. Krishna Filaments Ltd.
- b) 1999 (111) ELT 295 (GOI) IN RE: M/s. Allanasons.
- c) 1994 (074) ELT 468 (GOI) IN RE: M/s. GTC Exports Limited.
- d) 1991 (054) ELT 319 (GOI) IN RE M/s. MRF Ltd.
- e) 2000 (115) ELT 855 (GOI) IN RE M/s Mandhana Industries Ltd.

8. In their counter submissions dated 14.02.2014 against instant Revision Application, the Deputy Commissioner (Tech), Central Excise, Ahmedabad-I submitted as under :-

"In this context it is viewed that at the initial stage, the claimant M/s Sterling Export Corporation, Ahmedabad, has failed in filing the claims in time and thereafter, in getting the condonation of delay permitted by the Ministry as provided under Rule 17 of DBK Rules, 1995. Further, after OIO No. 38/AC/DBK/2010 dated 24.06.2010 was issued and received by the claimant on 28.06.2010 (as per proof received from Post Office), they

maintained to delay in filing appeal with the Commissioner (Appeals) within 60 days' time as provided under Section 35(1) of CEA, 1944 and filed the appeal on 25.07.2013 i.e. after three years. The inordinate delay in filing the claim / appeal may not be neglected and the Revision Application filed by the claimant may not be entertained".

9. Government has carefully gone through the relevant case records available in case files, written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

10. Government observes that the adjudicating authority vide Order in Original No. 38/AC/DBK/2010 dated 24.06.2010 rejected both the applications filed by the applicant for fixation of Brand Rate of drawback in terms of Rule 6 & 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 on the ground of delay in filing the applications with the competent authority. On appeal being filed against the same by the applicant, the Commissioner (Appeals-V), Central Excise, Ahmedabad, vide impugned Order dated 25.07.2013 dismissed the appeal on the ground of delay in filing the appeal.

11. It is the contention of the applicant that Order in Original No. 38/AC/DBK/2010 dated 24.06.2010 was not communicated to them and they were unaware of the said Order. They received the copy of the Order only in the 1st week of July 2013 from the department and after receiving the said Order, they filed appeal before the Commissioner of Central Excise (Appeals). Hence, the appeal has been filed within the stipulated time limit of the receipt of the Order-in-Original and therefore, the same should not be considered as time barred.

12. Government finds it pertinent to reproduce para No. 17 of the impugned Order which reads as under:

17. I find that the Asstt. Commissioner (Drawback) A'bad-1 vide letter F.No. ICD/CCE-1136108-09/DBK dated 27.08.2012 along with a Daily Accounting Sheet dated 26.06.2010 and RPAD No. 3290 dated 26.06.2010 had written a letter addressed to the Post Master, Navrangpura Post Office, Navrangpura, Ahmedabad to ascertain the delivery of the said OIO No. 38/AC/DBK/2010 dated 24.06.2010 to the address mentioned in the above said OIO dated 24.06.2010. In respond to their, Assistant Manager, Mail Business Centre, Ahmedabad-380009 vide letter F.No. MBC/Comp/12-13 dated 30.08.2012 certified that the article RPAD No.3290 dated 26.06.2010 addressed to the appellatant has been delivered to the addressee on 28.06.2010 and also enclosed the letter distribution slip in which it is clearly indicated the receipt of the above said article No.3290 on 28.06.2010 by the appellatant. In view of the above facts, Asstt. Commissioner (Drawback) vide letter F.No.

1CD/CCE-1/36/08-09/DBK dated 31.08.2012 informed the appellant in respect of their letter dated 20.08.2012 that the Brand Rate Application pertaining to Shipping Bill No. 1000200362 dated 28.12.1999 & 1000192110 dated 08.12.1999 had been decided, vide 010 No. 38/AC/DBK/2010 dated 24.06.2010.

13. Government, finds that the Commissioner (Appeals) has given clear findings in the impugned order as regards receipt of the Order in Original dated 24.06.2010 by the applicant on 28.06.2010, based on reply received from Assistant Manager, Mail Business Centre, Ahmedabad vide letter F.No. MBC/Comp/12-13 dated 30.08.2012, which being an official document, genuineness of the same cannot be doubted and the same stands clarified by the Postal authorities.

14. As regards reliance placed by the applicant on Hon'ble High Court of ~~Judicaturē of Bōmbay's Judgment dated 26.07.2019 in Writ Petition No. 1768 of 2019~~ filed by M/s PSL Tex-styles Pvt. Ltd. (referred to at para 9.8 supra) the same is misplaced in view of the fact that Hon'ble High Court at para 5 of its Judgment has clearly observed that

"5. We find that there is no reason to disbelieve the statement of the petitioner on oath that the order dated 15 March 2011 of Commissioner (Appeals), being impugned before the revisional authority, was received on 18th December 2013. This particularly in the absence of any evidence being led by Revenue, that the Order dated 15 March 2011 of the Commissioner (Appeals) was served in the manner provided in Section 37C of the Act".

Whereas in the instant case the Commissioner (Appeals) has clearly brought on record, a letter F.No. MBC/Comp/12-13 dated 30.08. 2012 received from ~~Assistant Manager, Mail Business Centre, Ahmedabad alongwith letter distribution slip~~ clearly indicating the receipt of the above said article No.3290 (Order in Original dated on 24.06.2010) by the applicant on 28.06.2010. Therefore, the decision of the Commissioner (Appeal) is based on the factual evidence available on record and provided to him by the respondents in appeal.

15. Government from the impugned Order observes that there was delay of 1183 days in filing the said appeal by the applicant which is beyond the period of 60 days stipulated in Section 35 (1) of the Central Excise Act, 1944 and also further period of 30 days as stipulated under proviso to sub section (1) of Section 35 *ibid*. 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. The Hon'ble Supreme Court in the case of Singh

Enterprises v. Commissioner of Central Excise, Jamshedpur, 2008 (221) E.L.T. 163 (S.C.), has observed as under:

“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.”

16. The above view has been reiterated by the Supreme Court in Amchong Tea Estate v. Union of India, (2010 (257) E.L.T. 3 (S.C.) and Commissioner of Customs and Central Excise v. Hongo India Private Limited, 2009 (236) E.L.T. 417 (S.C.).

17. In the light of the above settled legal position, the Commissioner (Appeals) had no power to condone the delay beyond 90 days, therefore, Government holds that the Commissioner (Appeals) has rightly rejected the appeal on the ground of limitation and there is no reason to interfere with the said order.

18. Government also notes that Hon’ble Supreme Court Judgment in Raja Mechanical Co. (P) Ltd. Vs Commissioner Of C. Ex., Delhi-I [2012 (279) E.L.T. 481 (S.C.)] rejected the assessee’s stand before the Tribunal and before them that the orders passed by the adjudicating authority would merge with the orders passed by the first appellate authority and the Tribunal ought to have considered the appeal filed by the assessee on merits also. While doing so the Hon’ble Supreme Court in its judgment dated 19-4-2012 observed that “in view of the plethora of decisions of


this Court, wherein this Court has, categorically, observed that if for any reason an appeal is dismissed on the ground of limitation and not on merits, that order would not merge with the orders passed by the first appellate authority. In that view of the matter, we are of the opinion, that the High Court was justified in rejecting the request made by the assessee for directing the revenue to state the case and also the question of law for its consideration and decision. In view of the above discussion, we do not find any merit in this appeal".

19. Applying the rationale of the Hon'ble Supreme Court's Order discussed supra, and in as much as the applicant's appeal before the Commissioner (Appeals) in the instant case was hit by bar of limitation, Government cannot entertain the grounds on the merits of the case.

20. In view of position explained above, Government does not find any infirmity in the impugned Order-in-Appeal and therefore upholds the same.

21. The revision application is dismissed being devoid of merit.

22. So, ordered.


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

ORDER No. 165/2020-CX (WZ) /ASRA/Mumbai DATED 03.02.2020.

To,

M/s. Sterling Export Corporation.,
237+238/B, G.I.D.C. Industrial Estate,
Naroda, Ahmedabad -382330.

Copy to:

1. The Commissioner of CGST , Ahmedabad North, Customs House, 1st Floor, Navrangpura, Ahmedabad-380 009.
2. The Commssioner of CGST, (Appeals) Ahmedabad, Central Excise Bhavan, Ambawadi, Ahmedabad 380 015.
3. The Assistant Commissioner, CGST, Naroda Division, Jivabhai Mansion, near Ashram Road, Ahmedabad.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Spare Copy.