

REGISTERED
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. 371/190/B/WZ/2019-RA/269 : Date of Issue 06.02.2023

ORDER NO. 170/2023-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 GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS
ACT, 1962.

F.No. 371/190/B/WZ/2019-RA

Applicant : Shri. Dhian Das

Respondent: Pr. Commissioner of Customs, CSMI, Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-1244/2018-19 dated
26.03.2019 issued on 29.03.2019 through F.No. S/49-
05/2019 passed by the Commissioner of Customs
(Appeals), Mumbai - III.

ORDER

This revision application has been filed by Shri. Dhian Das (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1244/2018-19 dated 26.03.2019 issued on 29.03.2019 through F.No. S/49-05/2019 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2(a). Briefly stated the facts of the case are that Customs Officers had intercepted the applicant on 08.09.2016 at the International Transit Lounge of the Chhatrapati Shivaji Maharaj International Airport (CSMIA), where he had arrived from Bangkok by Air India Flight No. AI 331/08.09.2016 and was further destined to fly to Delhi (AI348) / Ahmedabad (AI031). The personal search of the applicant led to the recovery of 06 pieces of gold, weighing 1187 grams, valued at Rs. 34,49,564/- which had been ingeniously concealed inside his body cavity i.e. rectum.

2(b). In similar manner, 5 other passengers had also been intercepted on 08.09.2016 and collectively 4681 grams of gold, valued at Rs. 1,36,03,547/- (realized amount) and foreign currency i.e. EURO 15,500/-, equivalent to INR Rs. 11,37,700/- were recovered. The aforesaid quantity of 1187 grams recovered from the applicant is included in the total 4681 grams recovered and seized on that day.

3. The Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide a common Order-In-Original No. ADC/AK/ADJN/292/2018-19 dated 27.09.2018 through F.No. S/14-5-55/2017-18 ADJN [SD/INT/AIU/91/2016-AP'D] ordered for the absolute confiscation of the seized gold weighing 4681 grams, valued at Rs. 1,36,03,547/- which includes the foreign currency and 6 pieces of gold weighing 1187 grams which had been concealed in the rectum by the

applicant , under Section 111(d), (l) & (m) of the Customs Act, 1962 and. Among the others, a penalty of Rs. 4,00,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III who vide his Order-in-Appeal Nos. MUM-CUSTM-PAX-APP-1244/2018-19 dated 26.03.2019 issued on 29.03.2019 through F.No. S/49-05/2019 disposed of the appeal by way of rejection as it was observed that appeal was not maintainable on account of non-payment of the requisite pre-deposit amount i.e. @ 7.5% of the penalty amount.

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

- 5.01. that the impugned order passed by the AA was bad in law and unjust;
- 5.02. that the AA had passed the OIA without granting personal hearing, even once and the principles of natural justice had not been applied.
- 5.03. that in the case of Ramesh Vasantbhai Bhojani reported in 2017 (357) E.L.T 63 (Guj.), the Hon'ble High Court of Gujarat had held that Commissioner (Appeals) has no power or authority to permit the appeal to be presented beyond ninety days and on the plea that the Commissioner (Appeals) does not accept memorandum of appeal unless accompanied by challan evidencing payment of pre-deposit and that the 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 the 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]

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

Under the circumstances, the applicant has prayed that the OIA may be set aside and to pass any other order as deemed fit.

6. Personal hearings in the case through the video conferencing mode was scheduled for 29.09.2022. Shri. N.J Heera, Advocate appeared for personal hearing on 29.09.2022 on behalf of the applicant. He submitted that gold is not a prohibited item. He requested to release it on RF and penalty. On the issue of pre-deposit before Commissioner (Appeals), he stated that he will inform correct status later.

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 on grounds of non-maintainability as the applicant had not paid the pre-deposit i.e. 7.5% of the penalty amount imposed by the OAA. Also, since the pre-deposit amount i.e. 7.5% of the imposed penalty had not been paid which was mandatory in terms of the provisions of Section 129E of the Customs Act, 1962, the AA had not found it necessary to grant a personal hearing and disposed of the case without going into its merits. While doing so, the AA has relied on the provisions of Section 129E, the case law in respect of Ranjit Impex vs. Appellate Deputy Commissioner, passed by the Apex Court and case law of Ramesh Vasantbhai Bhojani vs. UOI, more especially para 14, passed by the Hon'ble Gujarat High Court [2017 (357) ELT 63 (Guj.)].

8(a). In his defence, the applicant has relied on the case law of M/s. Nyati Hotels & Resorts Pvt. Ltd passed by the CESTAT, WZB, Mumbai [2018 (364) ELT 1081 (Tri-Mumbai)] wherein it was stated that *'On perusal of above both sections we find that both sections 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 turns deal only with the 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. Once the appeal has been filed within the time limit the same cannot be dismissed on the ground of late payment of pre-deposit amount. Further in the present case the appellant has made the pre-deposit as required under Section 35F although after filing of appeal. However, this cannot be a ground to dismiss the appeal. We are thus of the view*

that the reasoning adopted by the Commissioner (Appeals) is not correct. We thus set aside the impugned order and remand the case back to Commissioner (Appeals) to hear the case on merits and decide the appeal.'

8(b). Government notes that the A.A had issued the defective appeal notice (dtd 04.01.2019) to the applicant immediately after the statutory / condonable period of 90 days available to him (applicant) to file an appeal before the appellate authority. Thereafter, the matter was taken up by the appellate authority and having found out that the pre-deposit amount had still not been paid even after 90 days, the appeal was rejected and the AA did not find it necessary to grant a personal hearing.

9(a). Government notes that the aforesaid order in respect of M/s. Nyāti Hotels and Resorts Pvt. Ltd., relied upon by the applicant was passed by CESTAT on 13.04.2018.

9(b). Government has gone through the facts of the case and the aforesaid case laws relied upon in the OIA and the averments made by the applicant.

9(c). 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] passed on 10.07.2019, 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(d). 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-led the AA by stating that the pre-deposit had been paid. Government

notes that the AA prior to taking up the case had issued the defective appeal notice dated 04.01.2019 calling the applicant to make the payment of the pre-deposit amount. This step taken by the AA is in consonance with the observation of the Apex Court at para 9(d) above, even though this order had come subsequently. 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, which is preceding to the Apex Court Order dated 10.07.2019, the methodology enumerated by therein appears to have been followed by the AA. Government notes that it is settled law, that payment of pre-deposit as mandated in the statute, is mandatory and the A.A 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 that the averment made by the applicant citing the Tribunal's Order in respect of M/s. Nyati Hotels and Resorts Pvt. Ltd does not come to his rescue, more so, this case is antedated / precedes the Apex Court's Order dated 10.07.2019 cited above i.e. in respect of M/s. S.E Graphites Pvt. Ltd. Also, in the said case referred by the applicant, M/s. Nyati Hotels and Resorts Pvt. Ltd had paid up the pre-deposit whereas, in the extant case, the same had not been done. Infact, even in this revision application filed by the applicant, no evidence has been forthcoming that the pre-deposit amount had been paid. Therefore, Government finds no reason to interfere in the OIA passed by the AA is inclined to uphold the OIA passed by the AA.

12. 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, and cited by the AA at para 6 of the OIA [i.e. para 14 of case law of Ramesh Vasantbhai Bhojani vs. UOI, passed by the Hon'ble Gujarat High Court [2017 (357) ELT 63 (Guj.)], 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 an appeal a deliberate deficient appeal, is contumacious.

13. The Government finds no reason to interfere in the order passed by the AA and upholds the OIA.

14. Accordingly, the Revision Application filed by the applicant is dismissed.


31/1/23
(SHRAWAN KUMAR)

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

ORDER NO. 170/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2023

To,

1. Shri. Dhian Das, Village Mouli Baidwan, Mohali, Punjab – 140 308.
2. Principal Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal-2, Level-II, Sahar, Andheri, East, Mumbai – 400 099.

Copy to:

1. Shri. N.J Heera, Advocate, Nulwala Bldg, Ground Floor, 41, Mint Road, Opp. GPO, Fort, Mumbai – 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.