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**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**  
8<sup>th</sup> Floor, World Trade Centre, Cuff Parade,  
Mumbai- 400 005

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F. NO. 371/49/DBK/13-RA/139

Date of Issue: 20-04-2018

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ORDER NO. 197/2018-CUS (WZ) /ASRA/Mumbai DATED 20-04-2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129 DD OF THE CUSTOMS ACT, 1962.

**Applicant** : M/s. A to Z Embroidery, A-17, Iraniwadi, Near Squator's Colony, Chincholi Gate, Malad (E), Mumbai - 400 097.

**Respondent** : Commissioner of Customs (Appeals), Mumbai- Zone III, Mumbai-400059.

**Subject** : Revision Applications filed under section 129 DD of the Customs Act, 1962 against the Order -in-Appeal No.Mum Custom-AXP-APP-11&12/13-14 dated 04.06.2013 passed by the Commissioner of Customs (Appeals) Mumbai-III.

## ORDER

This revision application is filed by M/s. A to Z Embroidery, Mumbai (hereinafter referred to as "the applicant") against the Order-in-Appeal Mum-Custom-AXP-APP-11&12/13-14 dated 04.06.2013 passed by the Commissioner of Customs (Appeals) Mumbai-III.

2. The applicant, M/s. A to Z Embroidery, had exported the goods against various shipping bills under duty drawback scheme during the period June, 2004 to October, 2005. Against these exports, the Custom authority has granted drawback amount of Rs.3,91,144/- to the applicant M/s. A to Z Embroidery, under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. However, the Deputy Commissioner of Customs, DBK (XOS), ACC, Sahar, vide Show Cause Notice bearing F.No.5/3-Misc/DBK (XOS) -20/ACC/2010 dated 17.02.2010 informed the applicant that as per their record, export proceeds in respect of all the shipping bills as detailed in the Annexure to the Show Cause Notice had not been realized even after the expiry of the prescribed time limit and therefore, directed the applicant to show cause within 15 days from the date of receipt of the Notice as to why said drawback amount should not be recovered from them along with interest thereon. The Assistant Commissioner of Customs, DBK (XOS), ACC, Sahar, vide Order in Original No. DC/CGT/346/348/2011/ADJ/ACC dated 19.03.2011 confirmed the demand for recovery of duty drawback amount of Rs.3,91,144/- along with Interest thereon,

3. Being aggrieved, the applicant filed appeal before before Commissioner (Appeals), Customs, Mumbai-III. Commissioner (Appeals) while rejecting the appeal as time barred vide Order in Appeal No. Mum-Custom-AXP-APP-11&12/13-14 dated 04.06.2013 observed that :

*"in the instant case the date of issuance of order is 23.03.2011 whereas the appeal is filed on 21.12.2011. Even after considering date of communication of the impugned order to appellant as on 11.04.2011 (as claimed by the appellant in Appeal Memo), there is a delay of approximate 194 days from the prescribed time limit of 60 days from the date of Communication of the original order. Under the proviso the*

*Commissioner (Appeals) has been given the power to condone the delay for a further period of 30 days. In this case the appeal was filed beyond the period within which the appeal could be entertained by the Commissioner (Appeals) even by applying the provisions under the proviso. The Commissioner (Appeals) has no powers to entertain an appeal filed beyond the period of 90 days. The issue has also been decided in the matter of Abhishek Auto Industries Versus Commr. Of Cus. Mumbai (Import)- 2003(160) E.L.T. 695 (Tri-Del). Therefore, the delay is not condonable".*

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

4.1 they had submitted all the relevant documents i.e. 'BRC', a proof of realization of export proceeds duly signed and issued by the Bank, immediately on receipt of the SCN on 21.07.2010. But, the Learned Adjudicating Authority, by totally ignoring the acknowledgment given for the receipt of BRC, and even without making any mention of such receipt in the Order dated 19.03.2011, had wrongly and incorrectly confirmed the demand for recovery of drawback amount of Rs.3,91,114/- together with interest thereon.

4.2 In view of the above facts, the Order dated 19.03.2011, confirming the demand for recovery of drawback amount together with interest; itself is bad in law and un-sustainable.

4.3 they further and again obtained all the 15 certificates, showing half yearly BRC / Negative List in the prescribed form duly signed and stamped by the Bank, confirming no export Realization is pending during the periods from 01.01.2004 till 30.06.2011, in terms of CBEC Circular No.5/2009-Customs dated 02.02.2009 and the same was placed on record before the Appellate Commissioner of Customs, while filing Appeal

memorandum, and the same is attached herewith and marked as "Annexure-C".

- 4.4 there is a delay in obtaining the above certificates from the bank in terms of the board circular, which resulted in delay in filing this 'appeal before the Appellate Authority and therefore special request has been made in the Petition filed before the Commissioner of Customs (Appeals) for condonation of delay in filing the Appeal.
- 4.5 the Appellate Authority has made a great error in law by denying the condonation in the circumstances when the initial issue with department for initiating the demand was for non realization of export proceeds, which was once sorted out by producing the evidence thereof, there cannot be any other alternative ground for rejection of the claim of the appellant not even limitation ground.
- 4.6 the impugned order dated 04.06.2013 of the Appellate Commissioner of Customs, rejecting the Appeal of the Appellate is on baseless and un-sustainable grounds when initial issue was for non-receipt of / realization of export proceeds, was sorted out, there cannot be any other ground for rejection including limitation. Had the Appellant's evidences submitted to the lower adjudicating authority initially on 21.07.2010, before passing the impugned order dated 19.03.2011, considered, accounted and mentioned in the order, the said order should have been passed in favor of Appellant and there would not be an appeal and delay in filing the Appeal. When the basic reason of dispute was settled, there cannot be an alternative ground of rejection, which the Appellate Authority had failed to consider and thereby rejected the Appeal on irrelevant grounds.



4.7 In view of the above facts & evidence, it is more than enough to prove the genuineness, authenticity and reasonableness of the eligibility of drawback claim to the Appellant, which are initially denied & ignored, even after having the same on record of the Respondent and hence, both the impugned order needs to be set aside.

4.8 The Appellant reserves its right to make, alter, amend any of its above submissions and make additional or further submissions on or before or at the time of personal hearing granted by your honour.

5. A Personal hearing was held in this case on 17.01.2018 and Mr. Shabbir Khan, Proprietor, and Mr. Vikram, Consultant and Mr. Irfan A Khan, son of Proprietor, appeared for hearing. They reiterated the submissions along with written submissions filed on the day of hearing. It was pleaded that Order in Appeal be set aside and Revision Application be allowed.

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

7. Government observes from impugned order dated 04-06-2013 that the Commissioner (Appeals) has taken into consideration the provisions of Section 128 of the Customs Act, 1962 and has observed that the appeal had been filed beyond the extended period of thirty days of actual date of filing of appeal inasmuch as, the appeal has been preferred as late as 194 days. Without going into the merits of the case, the Commissioner (Appeals) has held that he has no powers to entertain an appeal beyond the period of 90 days and rejected the appeal as time barred.

8. The provisions of Section 128 of the Customs Act, 1962 which provides for appeal to Commissioner (Appeals) read as under :

**"128.**

*Appeals to Commissioner (Appeals). -*

*(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order:*

*Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.*

*(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:*

*Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.*

*(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."*

9. From the plain reading of the provisions of Section 128 of the Customs Act, it is clear that an appeal should be filed within sixty days from the date of communication of the decision or order that is sought to be challenged. However, in view of the proviso thereto, the Commissioner (Appeals) is empowered to allow the appeal to be presented within a further period of thirty days if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the period of sixty days. Thus, the Commissioner (Appeals) is empowered to extend the period for filing an appeal for a further period of thirty days and no more. 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. This issue has been decided by the Supreme Court in the case of Singh Enterprises v. Commissioner of Central Excise, Jamshedpur, (2008) 3 SCC 70 = 2008 (221) E.L.T. 163 (S.C.), wherein the Court in the context of Section 35 of the Central Excise Act, 1944, which is in *pari materia* with Section 128 of the Customs Act, has held thus :

*"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."*

10. The above view is reiterated by the Supreme Court in Amchong Tea Estate v. Union of India, (2010) 15 SCC 139 = 2010 (257) E.L.T. 3 (S.C.) and Commissioner of Customs and Central Excise v. Hongo India Private

Limited, (2009) 5 SCC 791 = 2009 (236) E.L.T. 417 (S.C.). In the light of the above settled legal position, the reference to various case laws by the applicant vide written submissions dated 19.01.2018 is out of place.

11. In view of above discussions, Government upholds the impugned Order in Appeal No. Mum-Custom-AXP-APP-11&12/13-14 dated 04.06.2013 and dismisses the instant revision application as being devoid of merit.

12. So, ordered.



20/4/2018

(ASHOK KUMAR MEHTA)

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

ORDER No. 197/2018-CUS (WZ) /ASRA/Mumbai DATED 20.04.2018.

To,

M/s. A to Z Embroidery,  
A-17, Iraniwadi, Near Squator's Colony,  
Chincholi Gate, Malad (E),  
Mumbai - 400 097.

Copy to:

1. The Commissioner of Customs(Export), Air Cargo Complex, Sahar, Andheri (East), Mumbai - 400 099.
2. The Commissioner of Customs (Appeals) Mumbai-III, Awas Corporate Point (5<sup>th</sup> Floor), Makwana Lane, Behind S.M.Centre, Andheri- Kuria Road, Marol, Mumbai-400059.
3. The Deputy / Assistant Commissioner DBK (XOS), Air Cargo Complex, Sahar, Andheri (East), Mumbai - 400 099.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.