REGISTERED SPEED POST

सत्यमेव जयते

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

F.No. 371/61/19, 371/63/19, 371/70/19, 371/72/19, 371/80/19, 371/82/19, 371/103/19, 371/111/19, 371/167/19, 371/217/19, 371/218/19, 371/219/19, 371/315/19, 371/383/19, 371/468/19. Date of Issue :- 16.02.2021 925

ORDER NO. 23-37/2021-CUS (WZ) /ASRA/MUMBAI DATED 04.2.2021 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.

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

Sl. No.	Revision Application /Order in Appeal No.	Applicant	Respondent
1.	371/61/DBK/2019-RA against OIA No. MUM-CUSTM-AXP-APP-996/18-19 dated 28.12.2018	M/s. Bee Gee Handicrafts, New Delhi	The Commissioner of Customs, (Export),Air Cargo Complex, Sahar, Andheri(E),Mumbai –400099.
2.	371/63/DBK/2019-RA against OIA No. MUM-CUSTM-AXP-APP-998/18-19 dated 28.12.2018	M/s Lakhani Dyestuffs Pvt Ltd., Mumbai	Do
3.	371/70/DBK/2019-RA against OIA No.MUM-CUSTM-AXP-APP-986/18-19 dated 28.12.2018	M/s M. Tech Innovations Ltd., Pune	Do
4.	371/72/DBK/2019-RA against OIA No. MUM-CUSTM-AXP-APP-977/18-19 dated 28.12.2018	M/s NTB International Pvt Ltd., Pune	Do
5.	371/80/DBK/2019-RA against OIA No.MUM-CUSTM-AXP-APP-979/18-19 dated 28.12.2018	M/s Ginza Industries Ltd. Mumbai	Do
6.	371/82/DBK/WZ/2019-RA against OIA No.MUM-CUSTM-AXP-APP-990/18-19 dated 28.12.2018	M/s Bonnevie Pharma Pvt Ltd., Mumbai	Do
7.	371/103/DBK/2019-RA against MUM-CUSTM-AXP-APP-1103/18-19 dated 31.01.2019	M/s Cosmos Pharma, Thane	Do
8.	371/111/DBK/2019-RA against MUM-CUSTM-AXP-APP-1105/18-19 dated 31.01.2019	M/s Surya Sea Food Exports, Tuticorin	Do
9.	371/167/DBK/2019-RA against	M/s United Export	Do

	OIA No. MUM-CUSTM-AXP-APP-1109/18-19 dated 31.01.2019	Consortioum, Solapur	
10.	371/217/DBK/2019-RA against OIA No. MUM-CUSTM-AXP-APP-1291/18-19 dated 29.03.2019	M/s Omtex Healthwear Pvt Ltd. Mumbai	_____Do_____
11.	371/218/DBK/2019-RA against OIA No. MUM-CUSTM-AXP-APP-1302/18-19 dated 29.03.2019	M/s Kalanee Impex Pvt Ltd. Mumbai	_____Do_____
12.	371/219/DBK/2019-RA against OIA No. MUM-CUSTM-AXP-APP-1300/18-19 dated 29.03.2019	M/s Prakash Eyewear Pvt Ltd., Thane	_____Do_____
13.	371/315/DBK/2019-RA against OIA No. MUM-CUSTM-AXP-APP-57/19-20 dated 30.04.2019	M/s Khizer Exports, Mumbai	_____Do_____
14.	371/383/DBK/2019-RA against OIA No. MUM-CUSTM-AXP-APP-355/19-20 dated 30.07.2019	M/s Minda Corporation Ltd., Pune	_____Do_____
15.	371/468/DBK/2019-RA against OIA No. MUM-CUSTM-AXP-APP-362/19-20 dated 30.07.2019	M/s Indoworth, Pune	_____Do_____

ORDER

These 15 Revision Applications have been filed by the applicants against the Orders-in-Appeal passed by the Commissioner of Customs (Appeals)Mumbai Zone-III as shown in the following Table:-

TABLE

Sl. No.	Applicant	Revision Application No.	Order in Original No. & Date	Order in Appeal No. & Date
1	2	3	4	5
1	M/s Bee Gee Handicrafts, New Delhi	371/61/DBK/2019-RA	DC/SM/2590/2012/ADJ/ACC dated 12.02.2012	MUM-CUSTM-AXP-APP-996/18-19 dated 28.12.2018
2	M/s Lakhani Dyestuffs Pvt Ltd., Mumbai	371/63/DBK/2019-RA	AC/YK/5711/2016-17/ADJ/ACC dated 30.03.2017	MUM-CUSTM-AXP-APP-998/18-19 dated 28.12.2018
3	M/s M. Tech Innovations Ltd., Pune	371/70/DBK/2019-RA	AC/YK/4876/2016-17/ADJ/ACC dated 22.03.2017	MUM-CUSTM-AXP-APP-986/18-19 dated 28.12.2018
4	M/s NTB International Pvt Ltd., Pune	371/72/DBK/2019-RA	AC/YK/5494/2016-17/ADJ/ACC dated 31.03.2017	MUM-CUSTM-AXP-APP-977/18-19 dated 28.12.2018
5	M/s Ginza Industries Ltd. Mumbai	371/80/DBK/2019-RA	AC/YK/6654/2016-17/ADJ/ACC dated 31.03.2017	MUM-CUSTM-AXP-APP-979/18-19 dated 28.12.2018
6	M/s Bonnevie Pharma Pvt Ltd., Mumbai	371/82/DBK/2019-RA	AC/YK/6525/2016-17/ADJ/ACC dated 30.03.2017	MUM-CUSTM-AXP-APP-990/18-19 dated 28.12.2018
7	M/s Cosmos	371/103/DBK/2019-RA	AC/YK/6584/2016-	MUM-CUSTM-AXP-APP-1103/18-19 dated

	Pharma, Thane		17/ADJ/ACC dated 31.03.2017	31.01.2019
8	M/s Surya Sea Food Exports, Tuticorin	371/111/DBK/2019-RA	AC/YK/5555/2016-17/ADJ/ACC dated 31.03.2017	MUM-CUSTM-AXP-APP-1105/18-19 dated 31.01.2019
9	M/s United Export Consortioum, Solapur	371/167/DBK/2019-RA	AC/RGB/4700/2016-17/ADJ/ACC dated 17.03.2017	MUM-CUSTM-AXP-APP-1109/18-19 dated 31.01.2019
10	M/s Omtex Healthwear Pvt Ltd. Mumbai	371/217/DBK/2019-RA	AC/YK/5207/2016-17/ADJ/ACC dated 30.03.2017	MUM-CUSTM-AXP-APP-1291/18-19 dated 29.03.2019
11	M/s Kalanee Impex Pvt Ltd. Mumbai	371/218/DBK/2019-RA	AC/YK/5782/2016-17/ADJ/ACC dated 31.03.2017	MUM-CUSTM-AXP-APP-1302/18-19 dated 29.03.2019
12	M/s Prakash Eyewear Pvt Ltd., Thane	371/219/DBK/2019-RA	AC/YK/5472/2016-17/ADJ/ACC dated 31.03.2017	MUM-CUSTM-AXP-APP-1300/18-19 dated 29.03.2019
13	M/s Khizer Exports, Mumbai	371/315/DBK/2019-RA	AC/YK/5384/2016-17/ADJ/ACC dated 31.03.2017	MUM-CUSTM-AXP-APP-57/19-20 dated 30.04.2019
14	M/s Minda Corporation Ltd., Pune	371/383/DBK/2019-RA	AC/JD/3237/2017-18/DBK(XOS)/ACC dated 28.03.2018	MUM-CUSTM-AXP-APP-355/19-20 dated 30.07.2019
15	M/s Indoworth, Pune	371/468/DBK/2019-RA	AC/JD/2741/2017-18/DBK(XOS)/ACC dated 27.03.2018	MUM-CUSTM-AXP-APP-362/19-20 dated 30.07.2019

2. The 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 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, a Facility Notice no. 08/2016-17 dated 18.08.2016 was issued to sensitize all the exporter/their CHA s that in case their name is in the list of defaulters, they should immediately contact the Dy. Commissioner of Customs, Drawback (XOS) Section between 22/08/2016 to 29/08/2016 for personal hearing on all working days and within working hours with all the required documents.

3. As the exporters in all these cases 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 alongwith interest.

4. Adjudicating authority passed the Orders in Original (detailed at Column No. 4 of Table at para 1 above) confirming the demand of drawback amount alongwith 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 75A(2) and Section 28A of the Customs Act,1962.

5. Being aggrieved, the applicant filed appeal before Commissioner of Customs (Appeals)Mumbai Zone-III who vide Orders in Appeal detailed at Column No. 5 of Table at para 1 above) rejected the appeals being time barred holding them filed beyond time limit prescribed under Section 128 of the Customs Act, 1962.

6. All fifteen applicants being aggrieved by the OIA's filed Revision Applications (as detailed at column 2 & 3 of the Table at para 1 above) before this authority on the following identical grounds.

i) The Commissioner (Appeals) has rejected applicants appeals solely on the ground of the same being barred by limitation. Section 128 of the Customs Act, 1962 prescribes three months as the period of limitation for filing of the appeal and the said period of three months is to be reckoned from the date of communication of the Order-in-Original. That the applicants had never received the Demand-cum-Notice, any intimation regarding personal hearing and Order-in-Original as the entire proceedings were conducted ex parte against them. That the applicants had come to know about

the said Order-in-Original only when its shipments were withheld and/or bank accounts were frozen upon instructions from the Tax Recovery Cell (Export) Section of the Customs Department. It is then that the applicants immediately applied for the copy of the said Order-in-Original and filed the appeal well within three months from the date of receiving the copy of the said Order-in-Original from the Tax Recovery Cell (Export) Section or the RTI Section of the Customs Department.

ii) In this regard, the Hon'ble Madras High Court in O.A.O.A.M. Muthia Chettiar v. CIT [ILR 1951 Mad 815] has observed: "If a person is given a right to resort to a remedy to get rid of an adverse order within a prescribed time", limitation should not be computed from a date earlier than that on which the party aggrieved actually knew of the order or had an opportunity of knowing the order and therefore must be presumed to have the knowledge of the order". The Hon'ble Madras High Court took the view that even the omission to use the words "from the date of communication" in Section 33-A(2) of the Indian Income Tax Act does not mean that limitation can start to run against a party even before the party either knew or should have known about the said order.

iii) A similar question arose before the Madras High Court in Annamalai Chetti v. Col. J.G. Closte [(1883) ILR 6 Mad 189], wherein Section 25 of the Madras Boundary Act 28 of 1860 limited the time within which a suit may be brought to set aside the decision of the settlement officer to two months from the date of the award, and so the question arose as to when the time would begin to run. The High Court held that the time can begin to run only from the date on which the decision is communicated to the parties. "If there was any decision at all in the sense of the Act", says the judgment, "it could not date earlier than the date of the communication of it to the parties; otherwise they might be barred of their right of appeal without any knowledge of the decision having been passed".

iv) Adopting the same principle a similar construction which has been placed by the Hon'ble Madras High Court in K.V.E. Swaminathan alias Chidambaram Pillai v. Letchmanan Chettiar [(1930) ILR 53 Mad 491] on the limitation provisions contained in Sections 73(1) and 77(1) of the Indian Registration Act 16 of 1908. It was held that in a case where an order was not passed in the presence of the parties or after notice

to them of the date when the order would be passed the expression "within thirty days after the making of the order" used in the said sections means within thirty days after the date on which the communication of the order reached the parties affected by it. These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. Thus, in the present case, the date of communication of the Order-in-Original to the applicants was the date when the copy of the said Order-in-Original was supplied to the applicants by the Tax Recovery Cell (Export) Section of the Customs Department, not when the said Order-in-Original was passed.

v) The Commissioner (Appeals) has wrongly treated the purported date of service of order as provided under Section 153 of the Customs Act, 1962 as the date of communication of the Order-in-Original. Commissioner (Appeals) utterly failed to appreciate, consider and record any finding upon applicants's specific submission in the appeal that it had never received the copy of Order-in-Original when it was passed. That the Commissioner (Appeals) also utterly failed to require the Adjudicating Authority to prove the service of Order-in-Original as contemplated under Section 153 of the Customs Act, 1962. That the burden to prove the service of order upon the applicants was entirely upon the Adjudicating Authority as it was the fact especially within its knowledge. In this regard, the relevant provision under the law is reproduced herein under:

> "Section 106. Burden of proving fact especially within knowledge: When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

vi) The Hon'ble Madras High Court had in its recent judgment dated 11.12.2017, in the case titled 'M/s. Ruis Marketing And Creative Vs. The Commissioner of Service Tax', Civil Misc. Appeal No. 3141 of 2017 filed under Section 35-G of the Central Excise Act against the order dated 09.03.2017, passed by the Customs, Excise, and Service Tax Appellate Tribunal, held as under:

"11. It is trite law that limitation has to be reckoned only from the date when the actual service has been effected, subject to fulfilling the mandatory requirement of showing proof of delivery. In the case on hand, the service of notice was effected on the appellant only on 23.12.2011 and there is nothing on the record to show that it was served on 9.5.11. Further, the order has been dispatched through speed post on 9.5.11, as is evident from the letter of the Superintendent (Appeals). However, prior to 10.5.13, service through speed post having not been a recognised/approved mode of service, it cannot be treated as service for reckoning the period of limitation. For the sake argument, even if the order is said to have been delivered by RPAD on 9.5.11, which apparently has not happened in this case, no proof having been filed to support such delivery, which is the mandatory requirement as per Section 37C (1) (a) of the Act, it is clear that the service of notice in the manner as prescribed under Section 37C (1) (a) has not been effected. Therefore, in the absence of any consideration and finding upon the issue of date of communication of the order upon the applicants, the impugned Order-in-Appeal is based entirely upon surmises and conjectures and liable to be set aside on this count alone."

vii) The Adjudicating Authority, in the present case has failed to prove that the Order-in-Original was duly communicated to the applicants as provided under Section 153 of the Customs Act, 1962. Therefore, the period of limitation for filing the appeal before the Commissioner (Appeals) could not have started until the applicants obtained the copy of the Order-in-Original from the Tax Recovery Cell (Export) Section of the Customs Department.

viii) It was impossible for the applicants to file the appeal against the Order-in-Original until it obtained the copy of the same from the Tax Recovery Cell (Export) Section of the Customs Department. It is submitted that the impugned Order-in-Appeal is against the legal doctrine, expressed in the maxim i.e. Lex non cogit ad impossibilia, which means that the law does not compel a man to do that which is impossible.

ix) It is settled law that the provision relating to limitation should be construed liberally while adopting a justice oriented approach. That a hyper technical and pedantic approach should not be adopted. That no person stands to benefit by

deliberately filing an appeal beyond limitation. That effort should be made to decide the matter on merit, rather than of rejecting the same on technical grounds of limitation. In this regard, applicants relies upon the judgment of the Hon'ble Supreme Court in the case, Collector, Land Acquisition, Anantnag Vs. Mst. Katiji, JT 1987 (1) SC 537.

x) The Commissioner (Appeals) has been passing contradictory orders upon appeals with the identical facts. It was opined that the Commissioner (Appeals) had been allowing all the appeals wherein the appellant obtained the copy of the Order-in-Original from the Drawback (XOS) Section, Air Cargo Complex, while rejecting all appeals wherein the appellants obtained the copy of the Order-in-Original from the Tax Recovery Cell (Export) Section or RTI Section of the Customs Department.

xi) The applicants had annexed with its appeal the evidences of realization of foreign exchange (sale/export proceeds) in the form of BRCs/negative statement in respect of the goods exported within the period prescribed under the Foreign Exchange Management Act, 1999. Thus, the applicants did not commit any violation of any provision of the Customs Act, 1962 or of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

xii) It was pointed out that the 2nd proviso to Section 75(1) of the Customs Act, 1962 and Rule 18 of the Customs and Central Excise Duties Drawback Rules, 2017 provides for the recovery of sanctioned drawback from the exporter only when the foreign exchange (sale/export proceeds) in respect of the goods exported is not realized within the period prescribed under the Foreign Exchange Management Act, 1999. However, the applicants, in the present case, had annexed with its appeal the evidences of realization of foreign exchange (sale/export proceeds) in the form of BRCs/negative statement in respect of the goods exported within the period prescribed under the Foreign Exchange Management Act, 1999.

xiii) The applicants submitted that sub-rule 4 of Rule 18 of the Customs and Central Excise Duties Drawback Rules, 2017 and sub-rule 4 of Rule 16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 provide for the repayment of recovered drawback to the exporter, even in case where the foreign

exchange (sale/export proceeds) are realized after recovery of drawback from the exporter.

7. The Applicants have filed the present revision applications within three months from the date of communication of the impugned Order-in-Appeal as per Sub-Section (2) of Section 129DD of the Customs Act, 1962.

8. A personal hearing in this case was held on 14.01.2021 through video conferencing which was attended online by Shri Lovish Sharma Advocate, on behalf of all the applicants. He reiterated the submissions made in the written submissions. He submitted that the BRCs have been realized in the cases, therefore, grave injustice would be done, if they are fastened with the liability on above ground. He requested to remand back the cases to the Original Authority for decision on merits.

9. In their further submissions filed through email on 14.01.2021, the advocate for applicants placed reliance upon the decision of the Government of India in Order dated 28.09.2018 in Officer Craft Pvt. Ltd. vs. Commissioner of Customs(Exports) and submitted that the facts in their case and the cited case were exactly the same and that the revisionary authority had remanded the matter back to the adjudicating authority to verify the claim of the exporter that they were in possession of the proof of realisation of sale/export proceeds. They also placed reliance upon the judgment of the Hon'ble Bombay High Court in the case of Prince International and Ors. vs. Union of India and Ors. wherein the SCN and ex-parte OIO had been set aside on the ground that there was no proof of service. It was further submitted that the applicants had submitted all the proofs of realisation of sale/export proceeds and therefore the impugned OIA should be set aside and the matter should be remanded back to the adjudicating authority with directions to give an opportunity to adduce proof of realisation of sale/export proceeds and then pass fresh OIO.

10. Government has carefully gone through the relevant case records available in case files, perused the impugned Order-in-Original and Order-in-Appeal and considered oral & written submissions made by the applicant in Revision Applications as well as during the personal hearing.

11. Government observes that all the 15 revision applications involve similar circumstances. 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 alongwith interest. 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 alongwith interest at the applicable rate. All 15 applicants have claimed that they have not received the copies of the respective 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 proceedings were initiated for recovery of the drawback. These matters were carried in appeal before Commissioner(Appeals) who has rejected the appeals on the ground of 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.

12. Government observes that the Circular No. 5/2009-Customs dated 02.02.2009 had set out a mechanism to monitor the realisation of export proceeds. It is observed that exports involved in these cases pertain to exports in 2013-14 and in one case even before 2010. All except one of the SCN's have been issued during 2015-16. 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 grounds 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 appeals before Commissioner(Appeals) have been filed during the period between October 2018 to July 2019 alongwith evidence of realisation of foreign exchange for exports effected during the period between 2010 to 2014. Furthermore, it is seen that in many cases the applicants have not repaid the entire amount of drawback sanctioned to them but have merely made a pre-deposit to file appeal. 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.

13. 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 or by filing RTI application 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 OIO had actually been served on the applicants.

14.1 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 appellant

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 appellant, 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 – Appellant directed to appear before Commissioner(Appeals) on 3-8-2015 for hearing – Section 35 of Central Excise Act, 1944.*[paras 7,8,9,10]*"

14.2 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, Nagpur-II[2018(12)GSTL 288(Bom)]. The relevant portion of the headnote 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 appellant'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, 1944 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]*"

14.3 The judgment of the Hon'ble High Court of Rajasthan is also relevant to the facts of the case. Relevant headnote of the case is reproduced below.

"Appeal to Appellate Tribunal – Limitation – Condonation of delay – Service of order – No evidence adduced by Department to show that order served upon assessee as copy

sent by registered post not received by him – Said service not in terms of statutory provision which require service of order by registered post Acknowledgment Due (AD) – Accordingly, Tribunal not justified in not condoning delay, on ground that appellant was aware of order – Tribunal order set aside – Delay of 3214 days condoned and matter remanded to Tribunal for consideration of appeal on merits – Section 35B and 37 of Central Excise Act, 1944*[paras 8, 9, 10, 11]*"

14.4 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]*"

15. 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 Commissioner(Appeals) and the onus has not been discharged by him. 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.

16. The impugned orders passed by glossing over the grounds made out by the applicants regarding non-receipt of the orders passed by the original authority cannot be sustained. However, in view of the assertions made by the applicants regarding

receipt of export proceeds and the provisions of Rule 16A of the Drawback Rules, 1995/Rule 18 of the Drawback Rules, 2017, examination of this factual aspect would be vital to settle the issue once and for all. Government therefore modifies the impugned 15 Orders in Appeal passed by the Commissioner of Customs (Appeals)Mumbai Zone-III mentioned at column 5 of the Table at para 1 supra 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 applicant is required to provide all the documents evidencing receipt of foreign remittances to the concerned authorities. The original authority is directed to pass appropriate order in accordance with law after following the principles of natural justice, within 8 weeks from the receipt of this order.

17. Revision Applications are disposed off in the above terms.

Shrawan 4/2/21

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 23-37/2021-CUS (WZ) /ASRA/Mumbai Dated 04.02.2021

To,

1.	M/s. Bee Gee Handicrafts BG-1/22, Paschim Vihar, New Delhi – 110 063	2	M/s Lakhani Dyestuffs Pvt Ltd. 306, Flying Colours, Near Mulund Check Naka, D. U. Marg, Mulund(W), Mumbai 400 080
3.	M/s M. Tech Innovations Ltd. Plot No. P-1/2, Rajiv Gandhi Infotech Park, Phase-1, Hinjewadi, Pune – 411 057	4	M/s NTB International Pvt Ltd. 622/2, Kuruli near Chakan, Pune- Nashik Highway, Tal-Khed, Chakan, Pune – 410 501
5.	M/s Ginza Industries Ltd. A 501 & 502, Lotus Corporate Park, Jay Coach Lane, Off. Western Express Highway, Goregaon East, Mumbai 400 063	6	M/s Bonnevie Pharma Pvt Ltd. C/2, Ground Floor, Jal Kirti CHS, Mahisasur Mardani Temple Road, Jai Raj Nagar, Borivili(West), Mumbai 400 091

7.	M/s Cosmos Pharma A/102, Jay Shiv Samarpan, Bhayander East, Thane 401 105	8	M/s Surya Sea Food Exports 6/33, A 5, Annai Theresanagar, Tharuvaikulam, Tuticorin – 628 105
9.	M/s United Exports Consortium 942/43, Phaltan Galli, Solapur	10	M/s Omtex Healthware Pvt. Ltd. 45, Orient Industrial Estate, 2nd Floor, Jerbai Wadia Road, Parel- Bhoiwada, Mumbai 400 012
11	M/s Kalanee Impex Pvt Ltd. A/4, Rolex Building, Next to Shantinath Shopping Centre, S. V. Road, Malad West, Mumbai 400 064	12	M/s Prakash Eyewear Pvt Ltd. Gala No. 10, Sakina Industrial Estate, Block No. 5, Ambemata Road, Bhayander West, Thane 401101
13	M/s Khizer Exports Mahadev Shelar Room No. 1, Disa Compound, Off Link Road, Jogeshwari West, Mumbai	14	M/s Minda Corporation Ltd. A-15, Ashok Vihar, Phase-1, Delhi – 110001
15.	M/s Indoworth India Ltd. B-130, MIDC, Pune – 411 004	16	Shri Lovish Sharma 3, Abul Fazal Road, Basement, Bengali Market, New Delhi – 110 001

Copy to :-

1. The Commissioner of Customs, (Export), Air Cargo Complex, Sahar, Andheri(E),Mumbai – 400099
2. Commissioner of Customs (Appeals)Mumbai Zone-III
3. Assistant Commissioner of Customs DBK (XOS), Air Cargo Complex, Mumbai
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
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