



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 380/17-A/B/WZ/2017-RA / 6079

Date of Issue 20/10/2021

ORDER NO. 240/2021-CUS (WZ)/ASRA/MUMBAI DATED 30.09.2021 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.

Applicant : Commissioner of Customs, Pune.

Respondent : Shri Mohammed Mohsin Mobin Shaikh

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. PUN-EXCUS-001-APP-467-16-17 dated 02.03.2017 passed by the Commissioner of Central Excise (Appeals-I), Pune-I.

ORDER

This revision application has been filed by Commissioner of Customs, Pune (herein after referred to as the Applicant) against the Order in appeal No. PUN-EXCUS-001-APP-467-16-17 dated 02.03.2017 passed by the Commissioner of Central Excise (Appeals-I), Pune-I.

2. Briefly stated the facts of the case are that the Respondent, viz Shri Mohammed Mohsin Mobin Shaikh arrived at Pune International Airport from Dubai on 23/10/2014 by Air India Express Flight No. IX 212. He was intercepted by the officers of Customs, Pune near the Gents toilet in immigration area when he exchanged one black color rectangle packet with one Shri Bashir Mohammed Shaikh who was found to be working as Senior Attendant (House Keeping) with Airport Authority of India (AAI). During the personal search of Shri Bashir Mohammed Shaikh, a rectangular package wrapped with black plastic tape containing 03 biscuits/bars of gold with foreign markings of total weight of 2116.64 grams and total value of Rs. 58,71,559/- was recovered from him. Shri Bashir Mohammed Shaikh on being asked identified the Respondent (i.e. Mohammed Mohsin Mobin Shaikh) the person who handed over the said packet of gold bars and biscuits to him. The Respondent produced the Customs declaration slip duly filled as nil. The 3 gold biscuit / bars totally valued at Rs. 58,71,559/- were seized under the provisions of the Customs Act, 1962 under reasonable belief that the same were smuggled into India with an intention to evade Customs duty. During the course of the proceedings, Shri. Bashir Mohammed Shaikh expired.

3. The Original Adjudicating Authority vide Order-In-Original No. PUN-CUSTM-000-ADC-01/16-17 dated 13/04/2016 ordered for the absolute confiscation of the 03 gold bar /biscuits weighing total 2116.64 grams, collectively valued at Rs. 58,71,559/- under Section 111 (d), Section 111(1) and Section 111(m) of the Customs Act, 1962 and imposed penalty of Rs. 10,00,000/- under Section 112 (a) and (b) of the Customs Act, 1962 and also imposed penalty of Rs. 2,50,000/- under Section 114AA of the Custom Act, 1962.

4. Aggrieved by the said order, the Respondent filed an appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. PUN-EXCUS-001-APP-467-16-17 dated 02.03.2017, set aside the absolute confiscation and allowed the gold to be redeemed on payment of a redemption fine of Rs. 14,70,000/-. The penalty of Rs. 10,00,000/- imposed under Section 112 (a) & (b) of the Customs Act, 1962 and Rs. 2,50,000/- imposed on the Respondent by the Original Adjudicating Authority was upheld.

5. Aggrieved with the above order, the Applicant (i.e. department) has filed this revision application inter alia on the grounds that;

5.1. The order passed by the Commissioner (Appeal-I), Pune-I is not legal and proper to the extent of reversing the order of Adjudicating Authority and giving an option to the Respondent to redeem the smuggled gold (two gold bars and one gold biscuit) totally weighing 2116.64g valued at Rs.58,71,559/- in lieu of confiscation. The Commissioner (Appeal-I) had erred in not appreciating the fact that the O.I.O. No. PUN-CUSTOM-000-ADC-01/16-17 dated 13/04/2016 was dispatched by Speed Post and received by the accused Respondent on 18.04.2016, ignoring the fact that the evidence of delivery is borne by postal evidence bearing bar code No. EM389845636IN dtd 15.04.2016. This fact is confirmed by the Dy. Manager, Business Development Group, Department of Posts, Pune, vide letter no. CR/COMP/OW/ 1/Corr/2017 dtd 06.06.2017 that the same was delivered at the address on 18.04.2016. Thus the appeal filed by the accused Respondent is statutorily time barred. The statute does not provide any adjudicating or appellate authority to use his discretion beyond the stipulated provisions of the Act. The Commissioner (Appeal-I) has further erred in not referring to the representative of the department during the course of personal hearing. It is alleged by the Applicant that undue favour & consideration was granted to the Respondent while admitting his appeal; that the Commissioner (Appeal-I) had exceeded in his discretion by allowing the appeal filed after a delay of 217 days which is prescribed under Section 128 of the Customs Act, 1962 which states that the appeal is required to be filed within 60 days from the date of communication of the order / decision and thereafter, on being presented with sufficient cause allow a further period of 30 days.

5.2. The case laws mentioned and relied upon by the appellate authority do not apply to this case.

5.3. The applicant have submitted a catena of judgements passed by various Tribunals, Revision Authorities, High Courts and Apex Court on the issue of 'prohibited goods', 'onus on burden of proof', 'discretion under Section 125 of the Customs Act, 1962", to buttress their case against the Respondent.

Applicant has prayed that (a). the O.I.A No. PUN-EXCUS-001-APP-467-16-17 dated 02.03.2017 passed by the Commissioner of Central Excise (Appeals-I), Pune-I, may be set aside being barred by limitation as well as merits, (b). The O.I.O no. PUN-CUSTOM-000-AC-16/17 dated 13.04.2017 may be restored, (c). Revision authority may pass any other order as deemed fit.

6. Personal hearings in the case was scheduled on 07.11.2019 / 21.11.2021. Thereafter, in view of the change in the Revisionary authority, another opportunity of personal hearing was extended on 16.09.2021 / 23.09.2021. Shri M.K Murthy, Assistant Commissioner, appeared online and reiterated the submissions of the department. It was submitted that the order of the Original Authority reflects the correct position of law and that Commissioner (Appeals) had erred in allowing redemption of gold and requested to absolutely confiscate the gold.

7. The Government has gone through facts of the case. The prayer of the applicant is that there has been a delay of nearly 217 days for filing appeal before the Appellate Authority from the date of issue of the Order.

7.1. The appellate authority at para 11.1 & 11.2 has observed as under;

11.1. Before proceeding with the present appeal, I have to consider the submission of the Appellants in the matter of delay in filing the appeal. As per Section 128 of the Customs Act, 1962, *"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"*. Therefore, as per the above provisions, an Appellant should file an appeal within 60 days from the date of communication of the order".

11.2. I have seen the letters of the Appellant which were written to Customs, Pune wherein it was mentioned that they had not received the OIO and they requested to provide the same. It is also on the record that Customs, Pune had provided the copy of the appeal under letter no. VIII/Cus/TRC/Recovery/15-16 dated 04/11/2016 on 04/11/16. There is nothing on record which proves contrary to the Appellant claim. In the case of R.P. Castings Pvt Ltd Vs CESTAT, New Delhi reported in 2016 (344) E.L.T. 168 (Raj-), it was held that *"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 - Sections 35B and 37 off Central Excise Act, 1944"*. In view of the statutory provision and also in view of the fact that there is nothing on record that the impugned order was served to the Appellant prior to 04/11/16, I find that the instant appeal has been filed within

stipulated time limit of 60 days from the date of communication. Therefore, I proceed to decide the present appeal on merit.

7.2. From the recording, it is apparent that the documentary evidence that the OIO was dispatched on 15.04.2016 and had been received by the respondent on 18.04.2016 was not placed before the Appellate Authority. However, the applicant had stressed before the appellate authority that the OIO was sent to the Respondent on time. However, the appellate authority proceeded with the order on merits without giving time to the applicant to obtain evidence to buttress their case strongly on the issue of delay in filing appeal.

7.3. In their revision application, the applicant has now produced evidence to authenticate their claim that the OIO was dispatched to the Respondent on 15.04.2016 and was received at the receiver's address (Respondent's) on 18.04.2016. They have placed letter no. CR/Comp/OW/1/Corr/2017 dated 06.06.2017 issued by the Department of Post, Office of the Superintendent of RMS, 'B' Division, Pune 411 001. The said letter is signed by the Dy. Manager, Business Development Group, D.O.P, Pune 411 001 which corroborates that the letter sent by the applicant was received at the Respondent's address on 18.04.2016.

7.4. The Government finds that the appellate authority should have given an opportunity to the applicant to substantiate their claim that the OIO was communicated prior to 04.11.2016. The letter F.No. VIII/Cus/TRC/Recovery/15-16 dated 04.11.2016 pointed out by the appellate authority clearly indicates that this letter was sent by the Recovery Cell of Customs, Pune and not the Adjudication Section of Customs, Pune. Upon visual examination, this fact is clearly noticeable.

7.5. The Government finds that the Respondent have mis-represented and used the ploy of non-receipt of the OIO to somehow extract a favourable order from the appellate authority. Now, that the facts have been disclosed at the revision stage, the Government cannot turn a Nelson's eye to the facts and is required to analyse the facts placed before it and restore justice.

7.6. The OIO was dispatched on 15.04.2016 through speedpost of the Department of Post and delivered at the given address of the Respondent on 18.04.2016. The delivery of speedpost is well documented and has a electronic trail which can be accessed through the net. The tracking of the email is available online. However, this electronic trail can be accessed for a limited period of time of about 3 months. Thereafter, the same is not available online and is required to be obtained from the concerned department of the Postal Authority. Government finds that it was only in November, 2016 that the Respondent contested the copy of the OIO was not received by him and thereafter, the department made it available to him. However, the records now accessed from the Department of Post confirms that the delivery of the OIO was made on 18.04.2016 itself. The Respondent in order to file an appeal before the appellate authority took the recourse of subterfuge to lodge their appeal before the Appellate Authority. Government finds that it was incumbent on part of the appellate authority to ascertain from the applicant that the copy was delivered either in April, 2016 or on 04.11.2006. An opportunity should have been extended to the applicant to substantiate their case with documentary evidence. The same was denied to them.

8. The detail of the dates are given in the table below;

Date of the O.I.O	Date of issue of O.I.O	Date of booking Speedpost	Date of Delivery as per records of Postal Dept	Date of filing Appeal before Commissioner (Appeals)
13-04-2016	13-04-2016	15-04-2016	18-04-2016	16-11-2016

9. The Government relies on the case law passed by the Apex Court in respect of M/s. Singh Enterprises v/s Commissioner of Central Excise, Jamshedpur & otrs [APPEAL (Civil) No. 5949. The relevant paras 8 to is reproduced below;

8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the \021Limitation Act\022) 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 upto 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.

9. Learned counsel for the appellant has emphasized on certain decisions, more particularly, I.T.C.\022s case (supra) to contend that the High Court and this Court in appropriate cases condoned the delay on sufficient cause being shown.

10. Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal. If that is so, the plea that because of lack of experience in business there was delay does not stand to be reason. I.T.C.\022s case (supra) was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed which we direct. There will be no order as to costs.

10. Thus, the Government finds that the statute itself proscribes that the appellate authority has no power to condone the delay beyond a period of 90 days i.e. 60 days and on sufficient cause having been furnished can extend it by another 30 days. There is so scope for extension beyond this period.

11. In view of the aforesaid paras, Government finds that the revision application succeeds at the first instance itself. It was imperative in the interest and cause of justice that a further opportunity was required to be given by the appellate authority to the applicant to put forth their claim and the machinations resorted to by the Respondents would have stood exposed.

12. Having held that the revision application succeeds at the first instance itself i.e. on the issue of appeal having been filed by the Respondent before the Commissioner of Central Excise (Appeals-I) beyond the stipulated period of 90 days, the Government still finds it that the applicant department has a strong case on merits as well. Respondent was caught in the act of smuggling of gold which was subsequently absolutely confiscated by the original adjudicating authority. It is well settled that gold brought into India without fulfilling the required conditions becomes prohibited goods. Facts of the case does not leave any scope for use of discretion under Section 125 of the Customs Act in favour of the Respondent. Smuggled gold of 2116.64 gms deserve to be absolutely confiscated. The order of the Appellate Authority is therefore liable to be set aside and the order passed by the Original Adjudicating Authority is restored.

13. In view of the above the Government sets aside the Order of the Appellate Authority and restores the Order passed by the Original Adjudicating Authority.

14. The revision application is disposed of on above terms.

Shrawan
30/9/21
(SHRAWAN KUMAR)

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

ORDER No. 240/2021-CUS (WZ) /ASRA/

DATED 30.09.2021

To,

1. The Commissioner of Customs, Pune, E-Wing, 4th Floor, 41-A, ICE-House, Sassoon Road, Opp. Wadia College, Pune – 411001..
2. Shri Mohammed Mohsin Mobin Shaikh, resident of 44/19, Samuel Street, R No. 19, 4th Floor, Hamidiya Bldg., Dongri, Mumbai-400009.

Copy to:

3. Sr. P.S. to AS (RA), Mumbai.
4. Guard File. ,
5. Spare Copy.