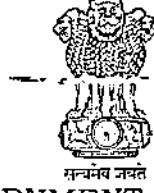


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai-400 005

F.No.195/399/2013-RA / 3656

Date of Issue: 15.07.2021

ORDER NO. 214/2021-CX (WZ)/ASRA/MUMBAI DATED 12.07.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Maroof Exim

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

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. 20 & 21/Mumbai-III/2013 dated 08.01.2013 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by the M/s Maroof Exim C/o M/s C. Subba Reddy & Co., Advocate & Consultants, B-201, Kailash Industrial Complex, Veer Savarkar Marg, Off L.B.S. Marg, Vikhroli (West), Mumbai 400 079 (hereinafter referred to as "the Applicant") against the Order-in-Appeal 20 & 21/Mumbai-III/2013 dated 08.01.2013 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. The issue in brief is that the Applicant, exporter, having IEC No. 0304031704 had obtained a drawback amount of Rs. 1,51,16,335/- (Rupees One Crore Fifty One Lakhs Sixteen Thousand Three Hundred and Thirty Five Only) for the exports made under the Shipping Bills dated from 11.01.2005 to 29.05.2007. The Applicant had not furnished the proof of realization of foreign exchange for the goods exported under the said Shipping Bills as per Rule 16(A) Sub Rule (1) & (2) of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995(herein after as 'Drawback Rules'). Hence, the Applicant was issued Demand Cum Notice to Show Cause F.No. S/3-Misc/DBK (XOS)-05/ACC/2010 dated 05.02.2010 under Rule 16(A) of Drawback Rules for recovery of drawback amount Rs. 1,51,16,335/- paid to them under the Shipping Bills enlisted in the Annexure to the said notice. The Deputy Commissioner of Customs, Air Cargo Complex, Sahar, Mumbai vide Order-in-Original CAO No. DC/RBP/395/2009-10/ADJ/ACC dated 22.03.2010 confirmed the demand of Drawback amount of Rs. 1,51,16,335/- to be recovered from the Applicant along with interest applicable under Rule 16(A) Sub Rule (1) & (2) of Drawback Rules, read with Section 75A(2) & Section 28A of Customs Act, 1962. Aggrieved, the Applicant then filed appeal with the Commissioner of Customs (Appeals), Mumbai-III who vide his Order-in-Appeal No. 20 & 21/Mumbai-III/2013 dated 08.01.2013 rejected their appeal.

3. Being aggrieved, the Applicant then filed the current Revision Application on the following grounds :

- (i) The Commissioner (Appeals) dismissed their appeal without taking into consideration the submissions made therein with reference to service of the notice dated 05.02.2010 and also failed to appreciate the various factors which are available on the records.
- (ii) In terms of provisions of Rule 16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, in case the exporter does not submit proof of written receipt of remittances, a notice is required to be issued to the exporter calling upon him to show cause within a period of 30 days from the date of receipt of the said notice. In their present case, the show cause notice issued on 05.02.2010 required of the Applicant to submit such evidences within 15 days from the date of receipt of the notice between 18.03.2010 and 20.03.2010. Therefore, this is a clear case where the notice itself does not indicate sufficient time for the purpose of filing any reply. This is inspite of the fact that while the statutory provisions provide for a period of 30 days, the notice mentions only 15 days' time for filing a reply.
- (iii) In their present case, there are 2 addresses available on the records of the Department. While the address of the office of the Applicant was a rented premises, the residential premises was a ownership and the Applicant continued to have the said premises as the residential address more specifically at the time when the notice and the order was passed. This is because, the IEC under which the Applicants exported their consignments contains both the addresses. However, while admittedly the notice was sent to the office address of the Applicant, which had to be vacated in the circumstances mentioned herein above, no effort of any kind whatsoever has been made to send the notice on the residential address, which is available on the records of the Department. Therefore, this is a clear case where no notice has been served on the Applicant before passing the impugned Order.
- (iv) While on the one hand it is the contention of the Department that the notice sent to the Applicants has been returned with postal remarks "left" and, therefore, the impugned Order was passed, on the other hand it is a fact that the recovery notices were sent by the Department to the residential address of the Applicants for the purpose of effecting recovery of

the amount of drawback confirmed in the impugned Order. Therefore, the impugned Order was passed without properly serving the notice on the Applicant and without giving them proper opportunity to submit the various evidences available with them with reference to the receipt of sale proceeds.

- (v) The residential address of the Applicant at the material time was available with the Department and therefore the Applicant were not aware of any such proceedings and were not in a position to make any representation against the alleged proceedings initiated against them by the said notice. Therefore, it is a clear case where the Applicants have been prevented from showing cause and from producing evidence before the Adjudicating Authority. While this is the position, in the impugned Order, the Commissioner (Appeals) has held that the evidence produced by the Applicant is fresh evidence and, therefore, in terms of provisions of Rule 5(1) of Customs (Appeals) Rules, 1982, such fresh evidence submitted by the Applicant cannot be considered. The Applicant submit that this is absolutely illegal and erroneous conclusion drawn by the Commissioner (Appeals) as this erroneous conclusion arrived at, is the result of incorrect appreciation of the facts relating to service of notice and lack of opportunity given to the Applicant as stated herein before. The Applicant, therefore, the impugned Order is liable to be set aside.
- (vi) It is the contention of the Commissioner (Appeals) that the Applicant did not bring to the notice of the Department regarding change of address nor any fresh/new communication of this was intimated to the Department. In this connection, the Applicants submit that the Learned Commissioner (Appeals) grossly erred inasmuch as that, while on the one hand the residential address of the Applicants was available on the records of the Department and the office premises was only a leased premises, the fact also remains that, thereafter the Applicant were not carrying out any business and therefore, in the absence of any notice prior to the vacation of the said premises, there was no need or requirement for the Applicants to submit any fresh/new communication address to the Department. Even otherwise as of date the notice was issued and/or the order was passed by the Adjudicating Authority, the residential address of the Applicants

remained the same. It is also an admitted position that while no effort of any kind whatsoever has been made to send the notice by registered post to the residential address of the Applicant, the recovery notices were sent to the said residential address. Therefore the impugned Order is required to be set aside as an order which is absolutely illegal.

(vii) The impugned Order-in-Appeal is absolutely illegal on the ground also that, while on the one hand, the Commissioner (Appeals) held that, the Applicant did not produce evidence before the original authority and therefore the said evidence cannot be considered, which basically was for the reason that the Applicants did not receive any such notice, the Commissioner (Appeals) has considered the submissions made by the Applicant regarding the date of receipt of the impugned Order-in-Original. It is a matter of record and is an admitted position that the impugned Order passed on 22.03.2010 was received by the Applicant on 30.08.2012. The manner in which the Applicant came into possession of the impugned Order was by way of an application made under the Right to Information Act, 2005 has been clearly explained. In respect of the said order also, it is the case of the Department that initially the said order was sent to the office address and apparently has been returned by the postal authorities. While in respect of the date of receipt of the impugned Order, the Commissioner (Appeals) does not have any objection and, therefore, the appeal filed by the Applicant on 30.10.2012 had been accepted, the dispute was raised only with reference to the service of notice and to the non-submission of evidence before the original authority. Therefore, the impugned Order-in-Appeal is liable to be set aside independently on this ground alone.

(viii) In terms of the provisions of the Customs (Appeals) Rules, 1982, even in a case where any evidence has not been produced before the Adjudicating Authority, yet, it is not a case-where the Appellate Authority is bound under the law not to take any fresh evidence/additional evidence into consideration. On the other hand, the said rules specifically provide that the Appellate Authority can take such fresh evidence into consideration in the specific circumstances as are specifically mentioned in Rule 5 of the Customs [Appeals] Rules, 1982. The said provision specifically provides

that where the appellant was prevented by sufficient cause from producing the evidence, which he was called upon to produce by Adjudicating Authority, any fresh evidence/additional evidence can be taken into consideration by the Appellate Authority. In the instant case, by non-service of the notice in an effective manner. the Applicant had been prevented from producing such evidence before the original authority. It is not the case of the Department that the Applicant did not have such evidence in their hands and that the same has been procured/obtained after the adjudication proceedings have been completed. On the other hand the evidences submitted by the Applicant will clearly show that the remittances in respect of the goods exported by the Applicant had been received at the material time. Therefore the impugned Order-in-Appeal is absolutely illegal and, therefore, needs to be set-aside.

- (ix) The said provision also provides that the Commissioner (Appeals) can take fresh evidence on record if sufficient cause is shown that the appellant has been prevented from producing such evidence before the authority if the said evidence is relevant to the grounds of appeal. In the instant case, it is the case of the Department that the Applicants were required to produce evidence of receipt of remittances in respect of the exports in which drawback has been availed by the Applicant. The evidence submitted by the Applicant relates to the very same cause of action that has been initiated against them. It was the ground of appeal that the Applicant had exported the goods which have been examined and thereafter permitted clearance and in respect of each such consignment, remittances have been received by the Applicant and, therefore, there is no ground under which the duty drawback can be demanded and recovered from them. The evidence produced by the Applicant goes to the root cause of the entire case and the impugned notice and the consequent order cannot survive. Since the evidence produced by the Applicant is absolutely relevant and is the material which will decide the matter one way or the other, there is no reason why the Commissioner (Appeals) could not have taken the same into consideration for the purpose of arriving at a proper decision on merits.

- (x) The said Rule also provides that such fresh evidence/additional evidence which is relevant to any of the grounds can be taken into consideration in which the Adjudicating Authority has made the order without giving sufficient opportunity to the appellant. In the present case, the Applicant had not been given sufficient opportunity for making a representation before the Adjudicating Authority and to produce the very same evidence which was already in possession and custody of theirs further from the evidences submitted before the Commissioner(Appeals) that all the certificates issued by the banks were much prior to the date of the notice. The impugned Order by which the Commissioner(Appeals) refused to take into consideration the evidence submitted by them was absolutely illegal and therefore is required to be set aside.
- (xi) The Applicant prayed that the Order-in-Appeal be set aside with consequential relief.

4. Personal hearing in this case was fixed on 19.01.2018, 06.02.2018 and 23.08.2019, none appeared for the hearing. Since there was change in the Revisionary Authority, personal hearing was fixed on 06.01.2021, 13.01.2021 20.01.2021, 26.02.2021 and 25.02.2021, but no one appeared for the hearing. Hence the case is being decided on merits.

5. 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.

6. In the instant case, Government observes that the Applicant was paid Drawback amount of Rs. 1,51,16,335/- for the export made under the Shipping Bills dated from 11.01.2005 to 29.05.2007. However, the Applicant did not produce necessary certificate showing realization of foreign exchange against the exported goods and hence was issued Show Cause Notice. The Applicant has submitted that they had not received the SCN nor the Order-in-Original and they only came to know when a resident residing in the area where the Applicant was earlier residing mentioned that some notice was issued by the Air Cargo Custom Department and that since the Applicant were not staying at the said premises, the letter was taken back by the Postman. On enquiry with the Department, the

officers of the Department were not willing to provide copies of all the documents relating to the said issue, hence the Applicant through an Advocate made an application under the Right to Information Act, 2005 for providing copies of all such documents. The department then vide letter F.No. S/RTI/33/EXP/2012/ACC dated 00.08.2012 provided the copies of the following documents:

- (i) Demand-Cum-Notice of Show Cause F.No. S/3-Misc/DBK (XOS)-079405/ACC/2010 dated 05.02.2010 with annexure.
- (ii) Order-in-Original CAO No. DC/RBP/395/09-10/ADJ/ACC dated 22.03.2010 passed by the Deputy Commissioner of Customs, in adjudication.
- (iii) Letter F.No. S/3-Misc-01/DBK-ACC-XOS/2009(VIDE) dated 28.08.2009.
- (iv) Copy of Speed Post Envelope F No S/3-Misc/ACC-DBK (XOS)/2009
- (v) Letter F.No. S/3-Misc/DBK (XOS)-5/2010 ACC/
CAO No. DC/RBP/395/09-10/ADJ/ACC dated 22.03.2010
- (vi) Detention Notice dated 29.03.2011.

Thus on RTI Application, the Applicant received the Order-in-Original No. CAO No. AC/NKM/995/2012 ADJ./ACC dated 22.02.2012 on 30.08.2012.


7. Government observes that the Applicant had filed a Civil Suit No. 1786 of 2009 before the Bombay High Court. The Hon'ble High Court vide Order dated 14.08.2009 gave relief to the Applicant and were given authority to collect all the documents/property belong to the Applicant from the bank. The Applicants have been able to retrieve/recover Bank Certificates for Export Realization and/or Bank Advice which remittance in respect 366 out of the 402 Shipping Bills in respect of the current case. And since evidence of receipts of the remittances in respect of the said remaining Shipping Bills would be available with the bank, the Applicant vide their letter dated 11.10.2012 addressed to the AGM, UCO Bank, Nariman Point, Mumbai had requested for issuance of the BRC's and had also file RTI Application dated 12.10.2012 with the UCO Bank for the BRC certificates.

8. Government notices that the Applicant had not received the Show Cause Notice and the impugned Order-in-Original dated 22.03.2010 was passed without giving an opportunity of hearing to the Applicant. Therefore, it amounts to violation of principle of natural justice. Further, the Applicants have received the Order-in-Original dated 22.03.2010 on 30.08.2012.

9. Prima facie, it appears that the Applicant have realized the remittances within the stipulated time and non-submission of the same cannot negate the fact of realization. Therefore, the Government is of the view that the Applicant's claim of realization of proceeds within due time requires verification from the original authority.

10. In view of the above, Government sets aside the impugned Order-in-Appeal 20 & 21/Mumbai-III/2013 dated 08.01.2013 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and remands back the instance case to the original authority for fresh verification, who shall consider and pass appropriate orders on the drawback claim and in accordance with law after giving proper opportunity within eight weeks from receipt of this order.

11. The Revision Application is disposed in terms of above.


12/07/21
(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 244/2021-CX (WZ)/ASRA/Mumbai DATED 12.07.2021.

To,
M/s Maroof Exim,
C/o M/s C. Subba Reddy & Co.,
Advocate & Consultants,
B-201, Kailash Industrial Complex,
Veer Savarkar Marg
Off L.B.S. Marg, Vikhroli (West),
Mumbai 400 079.

Copy to:

- 1) The Commissioner of Customs(Export), Air Cargo Complex, Sahar, Andheri(East), Mumbai 400 099.
- 2) Sr. P.S. to AS (RA), Mumbai
- 3) Guard file
- 4) Spare Copy.