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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. 371/34-A/B/15-RA | 5721

Date of Issue 05/10/21

ORDER NO. ²⁵¹/2021-CUS (WZ)/ASRA/MUMBAI DATED 29.03.2021 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 : Shri Mohammed Ashif

Respondent: Pr. Commissioner of Customs, CSI Airport, Mumbai

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
Mum -CUSTM -PAX -APP -641 & 644/14-15 dated
22.01.2015 passed by the Commissioner of Customs
(Appeals), Mumbai-III.

ORDER

This revision application has been filed by the Shri Mohammed Ashif (herein referred to as Applicant) against the order No. Mum -CUSTM -PAX -APP - 641 & 644/14-15 dated 22.01.2015 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Briefly stated facts of the case are that the Officers of Customs, on the basis of specific information, intercepted Shri Mohammed Ashif, at the C.S. International Airport as he was to depart for Dubai after completing immigration formalities. The examination of his baggage resulted in the recovery of INR Rs. 38,93,000/- (Rupees Thirty eight lakhs Ninety three thousand). The Applicant had not declared the currency and did not possess any document /permit from RBI as required under FEMA for export of the foreign currency. Investigations conducted revealed that one Shri Mujeeb Keppa from Bhatkal was the mastermind behind the smuggling of Indian currency.

3. After due process of the law vide Order-In-Original No. ADC/AS/ADJN/49/2012-13 dated 28.12.2012 the Original Adjudicating Authority confiscated the currency absolutely and imposed a penalty of Rs. 10,00,000/- (Rupees Ten lakhs) on the Applicant under section 114(i) of the Customs Act, 1962. A penalty of Rs. 2,00,000/- (Rupees Two lakhs) was also imposed on the Applicant under section 114AA of the Customs Act, 1962. A penalty of Rs. 10,00,000/- (Rupees Ten lakhs) was imposed on Shri Mujeeb Keppa under section 114(i) of the Customs Act, 1962.

4. Aggrieved by this order the Applicant filed an appeal with the Commissioner of Customs (Appeals), The Commissioner (Appeals) vide his order Mum -CUSTM -PAX -APP -641 & 644/14-15 dated 22.01.2015 dismissed the Appeal as time barred as the Appeal was filed after 90 days from the date of communication of the order.

5. Aggrieved with the above order the Applicant has filed this revision Application after a delay of three weeks, seeking a condonation of the delay against the order of the Appellate authority interalia stating,

The Hon'ble Bombay High Court in the case of Balchandra V. Jadhav Vs UOI in Civil Writ Petition No. 9254 of 2010 has held as under;

" This petition is filed against the order of CESTAT dated 09/04/2010 whereby the Tribunal has declined to condone the delay of 13 months and 9 days in filing the Appeal. The grievance of the petitioner is that the order in original which was received by the family members of the petitioner was misplaced and therefore there was delay in filing the appeal. He submits that serious prejudice would be caused to the petitioner if the delay is not condoned. In our opinion, the explanation given by the petitioner is not convincing, however, looking into the totality of circumstances, the interest of justice would be met by condoning the delay and directing the CESTAT to dispose of the appeal on merits. Accordingly, the order of the CESTAT dated 09/04/2010 is set aside. The delay is condoned. CESTAT is directed to dispose of the appeal on merits in accordance with law."

2. That it would not be out of place to cite hereunder the ratio laid down by the Hon'ble Supreme Court on the issue of "Sufficient Cause", in Collector, Land Acquisition, Anantnag Ws. Mrs. Katiji, reported in (1987) 2 SCC 107. The Hon'ble Supreme Court held that a liberal approach shall be adopted in condoning the delay because:-

- Ordinarily a litigant does not stand to benefit by lodging an appeal late.
- Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
- The requirement that "every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's

delay gmatic m , every second's delay? The doctrine must be applied in a rational, commonsense and pragmatic manner.

- When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
- There is no presumption that delay is occasioned deliberately or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
- The judiciary is respected not on account of its power to legalize injustice on technical grounds, but because it is capable of removing injustice and is expected to do so."

3. The Ld. Commissioner of customs (Appeals) has not considered the above judgments. Therefore the Applicants prays that the delay in filing the appeal may kindly be condoned and the case may be remanded back to the Ld. Adjudicating authority with the direction to it to pass the order on merits after giving opportunity to be heard to the Applicants or to their authorized representatives.

6. Personal hearings in the case was scheduled on 02.03.2021, 09.03.2021 and on 06.04.2021, 09.07.2021 and 23.07.2021. Nobody attended the hearing on behalf of the Applicants or the Department. The case is therefore being decided on the facts on record on merits.

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

7. Government observes from impugned order dated 22.01.2015 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 sixty days and beyond the condonable period of 30 days after the expiry of 60 days of actual date of filing of appeal. 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 their written submissions is out of place.

11. In view of above discussions, Government upholds the impugned Order in Appeal No. No. Mum -CUSTM -PAX -APP -641 & 644/14-15 dated 22.01.2015 passed by the Commissioner of Customs (Appeals), Mumbai-III and dismisses the instant revision application as being devoid of merit.

Shrawan Kumar
29/9/21
(SHRAWAN KUMAR)

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

ORDER No. ²⁵¹/2021-CUS (WZ) /ASRA/MUMBAI DATED 29/09/2021

To,

1. Shri Mohammed Ashif, H. No. 132, Patel Compound, Kidwai Road, Bhatkal, Karwar, North Kanara, Karnataka 581 320.
2. The Pr. Commissioner of Customs, CSI Airport, Sahar, Mumbai.

Copy to:

1. Shri A. M. Sachwani, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O., Fort, Mumbai - 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. ✓ Spare Copy.