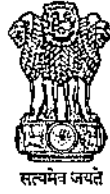


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/202/B/2019-RA / 1306 : Date of Issue: 02.02.2023

ORDER NO. 370 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.02.2023 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 : Mr. Aboobacker Eramu Nellukunnu

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-CUS-PAX-APP-1235/2018-19 dated 25.03.2019 [Date of issue: 29.03.2019] [S/49-768/2018] passed by Commissioner of Customs (Appeals), Mumbai Zone-III

ORDER

This Revision Application has been filed by Mr. Aboobacker Eramu Nellukunnu (herein after referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUS-PAX-APP-1235/2018-19 dated 25.03.2019 [Date of issue: 29.03.2019] [S/49-768/2018] passed by Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 06.11.2017, the Applicant, holding an Indian passport was intercepted by officers of Customs Officers, after he had cleared himself through Immigration and was proceeding to board Air India Express Flight No IX 251 to Sharjah. Detailed examination of his baggage resulted in the recovery of 26,500 USD and 4000 Euros concealed in 04 sewing thread spools. The said foreign currencies, equivalent to Rs. 19,84,100/- were seized under the reasonable belief that the same were attempted to be smuggled out of India and hence were liable for confiscation under the provisions of the Customs Act, 1962 read with the provisions of the Foreign Exchange Management Act, 1999 and regulations framed thereunder.

3. The Original Adjudicating Authority i.e Additional Commissioner of Customs, C.S.I Airport, Mumbai vide Order-In-Original No ADC/AK/ADJN/330/2018-19 dated 26.10.2018 [Date of issue: 26.10.2018] [S/14-6-02/2018-19/Adjn SD/INT/AIU/307/2017 AP 'C'] ordered for the absolute confiscation of the seized foreign currency i.e 26,500 USD and 4000 Euros equivalent to Rs. 19,84,100/- under Section 111(d), (e) and (f) of the Customs Act, 1962 read with Section 6(3) (g) of the FEMA, 1999 and regulations framed thereunder. Penalty of Rs. 2,25,000/- was imposed on the Applicant under Section 114(i) and (iii) of the Customs Act, 1962. The sewing thread spools and the black coloured sewing thread which were used to conceal the seized foreign currency was absolutely confiscated under Section 119 of the Customs Act, 1962

4. Aggrieved by the said order, the Applicants filed an appeal before the appellate authority viz Commissioner of Customs (Appeals), Mumbai Zone-III who vide Order-in-Appeal No. MUM-CUS-PAX-APP-1235/2018-19 dated 25.03.2019 [Date of issue: 29.03.2019] [S/49-768/2018] rejected the appeal on the grounds of that the Applicant had failed to pay the deposit of 7.5% of the penalty amount.

5. Aggrieved with the aforesaid order dated 25.03.2019 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III, the Applicant filed this revision application inter alia on the grounds that;

5.01. That the impugned order was bad in law and unjust;

5.02 That the AA has passed the order without granting personal hearing even once and therefore the order had been passed without applying the principles of natural justice;

5.03. That, as held in the case of Ramesh Vasantbhai Bhojani [2017(357) E.L.T. 63 (Guj)], filing of appeal and entertaining of appeal are not synonymous and the party may file an appeal within the prescribed period of limitation though it may not be in a position to make pre-deposit within such time and that while Commissioner (Appeals) cannot entertain an appeal unless a pre-deposit is made, payment of pre-deposit as a condition precedent for filing an appeal cannot be insisted upon;

5.04. That as held in the case of Nyati Hotels & Resorts Pvt Ltd in Hon'ble CESTAT, WZB, Mumbai [2018(364) E.L.T. 1081 (Tri-Mumbai)], once appeal was filed within time limit it could not be dismissed on ground of late payment of pre-deposit amount and Commissioner (Appeals) to hear appeal on merits;

Under the circumstances, the Applicant have prayed to set aside the order passed by the Appellate Authority.

6. Personal hearing in the case was scheduled for 25.11.2022. Shri N.J.Heera, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant. He reiterated his earlier submissions and requested that the foreign currency may be released on redemption fine and penalty.

7. Government has gone through the facts of the case. At the outset, Government observes that the AA had rejected the appeal filed by the Applicant on grounds of non-maintainability as they had not deposited 7.5% of the penalty amount imposed by the OAA.

8.1. At para 4 of the OIA, the AA has observed as follows,

"4. I have gone through the facts and submissions of the case. On perusal of the Form CA-1, I find that the appellant has mentioned that the pre-deposit i.e. 7.5% of the imposed penalty has been paid. However, on scrutiny of the documents, I find that the appellant has failed to produce credible evidence showing payment of pre-deposit 7.5% of the imposed penalty while filing the appeal against the impugned order-in-original, which is mandatory in terms of the provisions of Section 129E of the Customs Act, 1962. The defective appeal notice dated 04.01.2019 was also issued to the appellant but the appellant has not paid the requisite amount of pre-deposit so far."

8.2. Government notes that the A.A had issued the defective appeal notice (dated 04.01.2019) to the Applicant, but the Applicant had not paid the requisite amount of pre-deposit. Thereafter, after the expiry of the condonable period, the matter was taken up by the Appellate Authority and having found out that the pre-deposit amount had not been paid so far, the appeal was rejected without going into the merits of the appeal as the same was non maintainable on account of non payment of pre-deposit and dispensing off personal hearing.

9.1. Government notes that the A.A has relied on the judgement of the Hon'ble Gujarat High Court in the case of Ramesh Bhojani vs. U.O.I reported in

2017-TIOL-990-HC-AHM-CUS. Para 14 of the case law which has been reproduced by the AA in the OIA, which is as below:

"14. From the language employed in section 129E of the Act, it is evident that the same mandates that the appeal shall not be entertained unless the pre-deposit is made. Filing of an appeal and entertaining of an appeal are not synonymous. A party may file an appeal within the prescribed period of limitation though it may not be in a position to make the pre-deposit within such time. Considering the fact that the Commissioner (Appeals) has no power to condone the delay beyond a period of thirty days, an appeal, even when there is a delay, has to be filed within a period of ninety days from the date of receipt of the order-in-original, it may be that a party may not be in a position to arrange for the amount of pre-deposit within such period. However, that by itself, should not be a ground to totally non-suit such party, more so, when what the statute provides is that the appeal shall not be entertained unless such pre-deposit is made. As held by the Supreme Court in the above referred decision, a condition to entertain an appeal does not mean that the memorandum of appeal shall be returned because of such non-compliance pertaining to predeposit and that the only consequence is that the appeal shall not be entertained, which means the appeal shall not be considered on merits and eventually has to be dismissed on that ground. Therefore, while the Commissioner (Appeals) cannot entertain an appeal, namely, hear and decide it unless the pre-deposit is made, he cannot insist upon payment of predeposit as a condition precedent for filing an appeal."

9.2. Government notes that the AA had not returned back the memorandum of appeal for non-compliance but in fact had pointed out the deficiency and had sent a communication to the Applicant during the mandatory / condonable period available to the Applicant, that the pre-deposit @ 7.5% of the quantum of penalty imposed was required to be paid.

9.3. In this regard, para 5 of the judgement of the Hon'ble Apex Court dated 03.09.2013 in the Civil Appeal No 7809 of 2013 (Arising out of SLP (C)No. 27073/2011) in Ranjit Impex vs. Appellate Dy. Commissioner and Anr pertaining is reproduced below:

"5. As far as the first issue is concerned, it is needless to say that the conclusion arrived at by the Division Bench is absolutely justified, for a condition to entertain an appeal does not mean that the Memorandum of Appeal shall be returned because of such non-compliance pertaining to pre-

deposit. The only consequences that the appeal shall not be entertained which means the appeal shall not be considered on merits and eventually has to be dismissed on that ground."

9.4. On the issue of 'when the payment of the pre-deposit is required to be made', para 12 and 13 of the Order of the Apex Court in the case of M/s. S.E. Graphites Pvt. Ltd. Vs. State of Telangana & Ors. [Civil Appeal No.7574 of 2014] is reproduced below:

"12. In addition, the appellant-assessee has rightly placed reliance on the decision of this Court in Ranjit Impex (supra). In that case, the Court considered almost similar stipulation in Section 51 of the Tamil Nadu VAT Act, 2006. Indeed, the second proviso therein uses the expression no appeal shall be "entertained," unlike the expression used in the provisions under consideration that the appeal so preferred "shall not be admitted". We are conscious of the fact that the first proviso pertaining to maximum period of delay to be condoned by the Appellate Authority, also uses the expression "admit the appeal." That expression "admit", however, must be read to mean filing, institution or presentation of the appeal in the office of the Appellate Authority. Whereas, the expression "admitted" used in the second proviso will have to be construed as analogous to expression "entertained." We are inclined to take this view as the setting in which the provisions under consideration appear leaves no manner of doubt that it is ascribable to the event of taking up the appeal for consideration, for the first time, to admit it on merits or otherwise and/or for condonation of delay in filing the appeal, as the case maybe. Before that event occurs, it is open to the appellant to deposit the tax dues in respect of which the appeal is preferred and produce proof of such deposit before the Appellate Authority.

13. This view is reinforced from the exposition of this Court in Ranjit Impex (supra), wherein the view taken by the Division Bench of the High Court of Madras that the proof of deposit of tax has to be produced at the time when the appeal is taken up for consideration, but not at the time of filing or presentation of the appeal, has been upheld."

9.5. Further, at para 17 of the aforesaid case i.e. M/s. S.E Graphites Pvt. Ltd, the Apex Court, the following observation has been made:

"17. While parting, we may observe that taking advantage of the interpretation given by us, it is possible that some unscrupulous litigant (assessee) may file an appeal within the limitation period but keep it under defect so that the same does not proceed for consideration before the Appellate Authority. To obviate such a mischief, we hold and direct that the Appellate Authority shall be

obliged to take up every singular appeal for consideration for admission on merits and/or for condonation of delay in filing the appeal for the first time, no later than thirty days from the date of its filing, institution or presentation in the office of the Appellate Authority. This direction shall be complied with by all concerned meticulously, without any exception. That is the only way to secure the interests of the Revenue and at the same time to effectuate the purpose underlying the proviso regarding the deposit of specified amount of tax dues."

10. Government notes that while filing the appeal before the AA, the Applicant had mis-represented by stating that the pre-deposit had been paid and had not produced credible evidence showing payment of the pre-deposit. In terms of the guidance of the Apex Court at para 9.5 above, Government notes that the AA had issued the defective appeal notice which was within the statutory/condonable period. The Applicant had not rectified the defect/deficiency which needless to state was required to be done within the condonable period.

11. Government notes that while rejecting the appeal filed by the Applicant, the AA has squarely applied the ratio of the aforesaid judgements of the Apex Court. Government notes that it is settled law, that payment of pre-deposit as mandated in the statute, is mandatory and the A.A cannot sidestep the same. The AA has no power to waive off the payment of pre-deposit amount. Further, the AA has no power to condone delay exceeding 90 days. In this case, from the facts it is clear i.e. considering the date of the OIA, the same has been passed after lapse of more than 90 days (i.e. the appeal period). Therefore, Government finds that the OIA passed by the AA is legal and proper. Government finds no reason to interfere in the same and is inclined to uphold the OIA passed by the AA.

12. Moreover, Government notes that in the extant Revision Application and at the time of the personal hearing the Applicant has not made averment of the payment of the mandatory pre-deposit amount.

13. Coming to the contention that principles of natural justice had not been followed, Government finds that this averment is specious, especially as held by Hon'ble Apex Court, mentioned at para 9.1 above, i.e. '*.....while the Commissioner (Appeals) cannot entertain an appeal, namely, hear and decide it unless the pre-deposit is made* ', it is clear that the appeal is to be rejected without going into the merits and wasting the court's time. The Applicant was aware that the statutory pre-deposit had not been paid by him during the statutory / condonable period and his act of filing a deliberate deficient appeal, is contumacious.

14. The Government finds no reason to interfere in the order passed by the AA and upholds the Order-in-Appeal No. MUM-CUS-PAX-APP-1235/2018-19 dated 25.03.2019 [Date of issue: 29.03.2019] [S/49-768/2018] passed by the Appellate Authority.

15. Accordingly, the Revision Application filed by the Applicant is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. 270/2023-CUS (WZ) /ASRA/

DATED 28.02.2023

To,

1. Mr. Aboobacker Eramu Nellikunnu, Near Podipallam Masjid, Indira Nagar, Podipallam, Chengala P.O., kasargod, Kerala 671541
Address No. 2: Mr. Aboobacker Eramu Nellikunnu, C/o N.J. Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai 400 001
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to:

1. Shri N.J. Heera, 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. File Copy.
4. Notice Board.