

SPEED POST
REGISTERED POST



**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.371/182/DBK/2018-RA | 1524 Date of Issue: 16 .03.2023

ORDER NO. 359/2023-CUS (WZ) /ASRA/Mumbai DATED 14.03.2023 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 : M/s Ritex Overseas,
155, Mittal Industrial Estate,
Building No.6, 84/85, M.V. Road,
Andheri (East), Mumbai - 400 059.

Respondent : Commissioner of Customs (Export), ACC,
Mumbai.

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No.MUM-CUSTOM-AXP-APP-54/18-19 dated 27.04.2018 passed by the Commissioner of Customs (Appeals), Mumbai Customs, Zone - III.

ORDER

The subject Revision Application has been filed M/s Ritex Overseas, Mumbai (here-in-after referred to as 'the applicant') against the Order-in-Appeal No.MUM-CUSTM-AXP-APP-54/18-19 dated 27.04.2018 passed by the Commissioner of Customs (Appeals), Mumbai Customs, Zone - III. The said Order-in-Appeal decided an appeal filed by the applicant against Order-in-Original dated 21.03.2017 passed by the Assistant Commissioner, DBK (XOS), ACC, Mumbai.

2. Brief facts of the case are that the applicant was issued a Show Cause cum Demand Notice seeking to recover the Drawback amounting to Rs.46,79,269/- sanctioned to them, as it appeared that they had not realized the foreign exchange involved on the goods exported by them as required under Rule 16(A) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (DBK Rules, 1995). The same was issued as the applicant had failed to respond to Public Notice No.19/2015 dated 02.12.2015 and Facility Notice No.08/2016-17 dated 18.08.2016 vide which the applicant, along with several other exporters, were called upon to submit the BRC's/Negative statements in respect of the consignments on which Drawback was claimed. The applicant failed to respond to the Show Cause Notice and hence the original authority, vide Order-in-Original dated 21.03.2017, confirmed the demand raised. Aggrieved, the applicant filed an appeal before the Commissioner (Appeals). The said appeal was rejected by the Commissioner (Appeals) without going into the merits of the case as the appeal was found to be non-maintainable on account of non-payment of pre-deposit prescribed by Section 129E of the Customs Act, 1962.

3. Aggrieved, the applicant has filed the subject Revision Application against the impugned Order-in-Appeal on the following grounds: -

(a) That they had submitted Medical Certificate and a written request for adjournment of the case from 19.04.2018 to another date which was not considered at all and a remark was made in the Order-In-Appeal that no such request was received, which was contrary to facts;

(b) That the Commissioner (Appeals) and the original authority had ignored various Orders/judgements of the Honorable Supreme Court of India wherein it was held that no genuine claim should be denied on procedural lapses/technical grounds and cited the following cases: -

- Mangalore Chem. & Fert Ltd Vs. D.C. [1991 (51)ELT 437(SC)]
- Formica India Vs Collector of Central Excise [1995 (77) ELT 51 (SC)]
- Suksha International Vs. Union of India [1993 (39) ELT 503 (SC)]
- Union of India Vs. AV Narasimhalu [1983 (13) ELT 1534 (SC)];

(c) That rebate/drawback are export oriented schemes and unduly restricted and technical interpretation of procedure was to be avoided in order not to defeat the very purpose of such scheme which serve as export incentive to boost export and they sought to place reliance on several decision of the GOI and the Hon'ble Tribunal in support of their submissions;

(d) That their financial position was very bad and they were finding it difficult to meet the day today expenses; that their office premise was sealed by the judicial authorities consequent to the case filed against the applicant by the bank; that hence they were not in a position to make payment of the pre-deposit challan along with the appeal filed before the Commissioner of Customs (Appeals); that the Commissioner of Customs (Appeals) did neither consider the merits of the case nor their written request for adjournment and simply rejected their appeal due to non-payment of pre-deposit of 7.5% of the duty drawback and penalty demanded; that if they were allowed one more PH then they would have arranged the payment of pre-deposit and hence the impugned Order-in-Appeal was a blatant violation of the principles of natural justice and hence was required to be set aside;

(e) That the right to prefer an appeal is a statutory right touching the substantive right of the parties, while the provisions relating to pre-deposit is procedural in nature and that the procedural law is only a handmaid of justice and not the mistress of justice; that having regard to the huge amount of pre-deposit to be made and also having regard to their financial hardship the impugned Order-in-Appeal should be set aside; they relied on the case of Venus Electronics and Control Pvt. Ltd. vs. CC, Kandla (2006 (198) ELT 547 (Tri Mum) in support of their case;

(f) That the original authority had erred in arriving at the conclusion of non-realization of export proceeds, when the exports proceeds had already been realized; that the matter was not relating to non-realisation of export proceeds, but non-submission of Bank Realisation Certificate; that the dispute between the Bank and them on account of non- payment of loans taken from the Bank as due to unforeseen exigencies of business and various other factors they could not the repay the loans and therefore the bank had not adjusted the received advance payments against export bills from the foreign buyers and hence they could not submit the BRCs in time; that the issues with the bank have now been resolved, the Bank has started releasing the Bank Realization Certificates and that they had received some Bank Realization Certificates and the balance is to be released shortly; that the delay in release of the balance Bank Realization Certificates was entirely due to the difficulties in tracing out the old records by Bank; they submitted bank statement of payment remittance received from foreign buyers and copies of BRCs; that since there was no question of non-realisation of export proceeds, the imposition of 7.5% of pre-deposit of duty drawback and penalty was illegal and unconstitutional; that if they are still required to pay this amount, they were ready to do so;

(g) That the imposition of a penalty of Rs 1,00,000/- was totally baseless and unjust and they could not be penalized simply because of the dispute with bank; that the non-submission of the documents was not due to their fault but because of the deliberate non-co-operation of the bank.

In view of the above they requested that the impugned Order-in-Appeal be set aside and the Commissioner (Appeals) be directed to reconsider their case and decide it on merits as they were ready to pay the pre-deposit now. They also requested that suitable instructions be issued to the original authority to drop the proceedings initiated against them.

4. Personal hearing in the matter was granted to the applicant on 16.11.2022, 30.11.2022, 12.01.2023, 23.01.2023, 09.02.2023 and 16.02.2023. However, the applicant vide letter dated 15.02.2023 informed that they do not need any personal hearing and also made additional

submissions, vide which, apart from reiterating their earlier submissions, they also submitted that: -

(a) That various High Courts and Tribunals, in cases where the appeal was rejected on account of the applicants failing to make the pre-deposit, had ordered for the appeal to be reconsidered after the appellant paid the pre-deposit amount and cited the following decisions: -

- Hon'ble High Court of Madras in the case of M/s Jupiter Impex vs AC, Customs, Chennai in W.P. No.217 of 2015;
- Hon'ble High Court of Kerala in the case of M/s Thennala Service Co-operative Bank Limited vs Superintendent of Central Excise in W.P. No.18180 of 2020;
- Hon'ble Tribunal in the case of Sanjeev Kumar HUF vs CCE & ST in appeal no.60828 of 2019;
- Hon'ble Tribunal in the case of M/s Metro City Cable vs CCE & ST in appeal no.61045 of 2019;
- Hon'ble Tribunal in the case of M/s Mahavir Tools Corporation vs CC, Kolkotta in Appeal No.C/75772/17;

(b) They submitted copy No Due Certificate dated 16.02.2022 issued by the Bank which they claimed that was proof that no realization is pending in respect of their exports; that they had submitted the same to the concerned authority for being updated on the system; that since all the payments have been realized there was no question on non-realization of export proceeds.

In view of the above, they once again requested that their application may be allowed and the impugned Order-in-Appeal be quashed and the case be remanded back to the Commissioner (Appeals) for being decided on merits after payment of pre-deposit amount.

5. Government has carefully gone through the relevant case records and the written submissions and also perused the impugned Order-in-Original and the Order-in-Appeal.

6. Government notes that the Commissioner (Appeals) vide the impugned Order-in-Appeal has rejected the appeal filed by the applicant without going

into the merits of the case as the applicant failed to make the pre-deposit as required under Section 129E of the Customs Act, 1962. Government finds that it is an admitted fact that the applicant did not make the necessary pre-deposit either at the time of preferring the appeal or any time thereafter. Further, Government finds that the office of the Commissioner (Appeals) had issued a Defective Appeal Notice dated 22.05.2017 to the applicant requiring them to submit proof of the payment of the mandatory pre-deposit of 7.5% of the duty and penalty, which the applicant failed to respond to. The applicant also failed to appear for the personal hearing granted by the Commissioner (Appeals). The Commissioner (Appeals) has recorded that no request for adjournment was received in the matter, an observation which the applicant contests inasmuch they submit that they had sought an adjournment, however, no evidence to that effect was produced by them and hence the observation of the Commissioner (Appeals) on this count will hold good.

7. In this context, Government finds it pertinent to examine Section 129E of the Customs Act, 1962; the relevant portion of the same is reproduced below: -

“ Section 129E. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. -

- The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal, -

(i) under sub-section (1) of section 128, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of customs lower in rank than the Principal Commissioner of Customs or Commissioner of Customs;....”

A reading of the above, makes it is clear that the Commissioner (Appeals) shall not entertain any appeal unless the appellant has deposited seven and half per cent of the duty and penalty in dispute. In the instant case, it is not in dispute that the pre-deposit mandated by Section 129E of the Customs Act, 1962 was not paid by the applicant even after the expiry of the

condonable period for filing appeal before the Commissioner (Appeals). Government finds that a similar issue was decided by the Hon'ble High Court of Gujarat in the case of Ramesh Vasantbhai Bhojani vs UOI [2017-TIOL-990-HC-AHM-CUS], wherein, the Hon'ble Court while relying on the decision of the Apex Court in the case of Ranjit Impex vs Appellate Deputy Commissioner and Othrs [(2013) 10 SCC 655] had held as under: -

" 13. The learned advocate for the petitioners has drawn the attention of the court to a decision of the Supreme Court in the case of Ranjit Impex v. Appellate Deputy Commissioner and another, (2013) 10 SCC 655, wherein, an appeal before the Deputy Commissioner I, Commercial Taxes was preferred by the appellant therein and at the time of presentation, a sum of Rs.8,52,472/- was required to be deposited as per the calculation made under section 51 of the Tamil Nadu Value Added Tax Act, 2006, but as it was not done, the memorandum of appeal was returned to him. The learned Single Judge had disposed of the writ petition and directed the appellate authority to register the appeal and dispose of the same in accordance with law. In the writ appeal, it was contended that the appellate authority could not have returned the memorandum of appeal on the ground that section 51 used the term "entertain" and second, the amount that was due to the appellant from the Department was to be adjusted for the purpose of deposit as envisaged under section 51 of that Act. The Division Bench of the High Court held that the proof of deposit of tax had to be produced at the time when the appeal was taken for consideration, but not at the time of presentation of the appeal. The Supreme Court held that the above conclusion of the Division Bench was 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 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.

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. The condition contained in clause (6) of Form No.C.A.-1, has no statutory basis and hence, there cannot be any insistence on payment of pre-deposit prior to filing the appeal. In these circumstances, if such a practice is in fact prevailing, namely, that the memorandum of appeal is being returned if the same is not accompanied with the challan evidencing payment of pre-deposit, such conduct on the part of the respondent authorities has no legal basis. The respondent authorities are duty bound to accept the memorandum of appeal if the same is filed in the prescribed form, without insisting upon the challan evidencing payment of pre-deposit accompanying the same. If the appeal comes up for hearing and the pre-deposit is not paid, the Commissioner (Appeals) may refuse to entertain the same and dismiss it on that ground."

In light of the above decision of the Hon'ble High Court, the decision of the Hon'ble Supreme Court referred therein and the facts of the present case, wherein the applicant has not made the mandated pre-deposit at any point of time, Government finds the decision of the Commissioner (Appeals) to reject the appeal for non-payment of pre-deposit to be legal and proper. Government finds that it is settled law, that payment of pre-deposit as mandated in the statute, is mandatory and it is not within the powers of the Commissioner (Appeals) to waive such requirement. Given the fact that the primary requirement of making the pre-deposit was not complied with by the applicant, there was no cause for the Commissioner (Appeals) to go into the merits of the case.

8. Government has examined the cases cited by the applicant in support of their argument that the case needs to be heard on merits and has found that in all the cases cited the applicants had paid the pre-deposit before seeking relief from the Order rejecting their appeal. Government notes that

in the extant Revision Application, the applicant has not come forward with any evidence of having paid the mandatory pre-deposit. Thus, Government finds that these cases will not have any application in the instant case.

9. In view of the above, Government finds the impugned Order-in-Appeal to be legal and proper and upholds the same. The subject Revision Application is rejected.

Shrawan
14/3/23
(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. ³⁵⁹ /2023-CUS (WZ) /ASRA/Mumbai dated *14*.03.2023

To,

M/s Ritex Overseas,
155, Mittal Industrial Estate,
Building No.6, 84/85, M.V. Road,
Andheri (East), Mumbai - 400 059.

Copy to:

1. Commissioner of Customs (Export), Air Cargo Complex, Mumbai.
2. Commissioner of Customs (Appeals) Mumbai, Zone - III,
5th floor, Awas Corporate Point, Makwana Lane, Behind S.M. Centre,
Andheri - Kurla Road, Marol, Mumbai - 400 059.
3. Sr. P.S. to AS (RA), Mumbai.
4. Notice Board.