

REGISTERED
SPEED 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. 371/479/DBK/2019,
371/178/DBK/2019, 371/448/DBK/2019-RA

Date of issue:

27.03.2023

11741

ORDER NO. 379-351 /2023-CUS (WZ)/ASRA/MUMBAI DATED 23.03.2023
OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE
OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicants : M/s. Concept Clothing

M/s. Contemporary Classique

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

Subject : Revision Applications filed, under Section 129DD of the Customs Act,
1962, against the Orders-in-Appeal passed by Commissioner of Customs
(Appeals), Mumbai Zone-III.

ORDER

These Applications have been filed by applicants against the following Orders-in-Appeal passed by the Commissioner of Customs (Appeals), Mumbai Zone-III :

S. No.	Applicant	RA No.	OIO No. and Date	OIA No. and Date
1	M/s. Concept Clothing	371/178/DBK/2019	YK/6537/2016-17/ADJ/ACC dated 31.03.2017	Mum-Custm-Axp-App-1204/18-19 dated 28.02.2019
2	M/s. Concept Clothing	371/448/DBK/2019-RA	AC/JD/2331/2017-18/DBK(XOS) ACC dated 27.03.2018	Mum-Custm-Axp-App-375-19-20 dated 31.07.2019
3	M/s. Contemporary Classique	371/479/DBK/2019	AC/JD/2334/2017-18/DBK (XOS) ACC dated 27.03.2018	Mum-Custm-Axp-App-476-19-20 dated 29.08.2019

2. Briefly stated, facts of the case are that Demand-cum-Notice to show cause was issued to the exporter by speed post which was confirmed by the adjudicating authority vide aforesaid Orders-in-Original on the ground that the applicants had failed to produce evidence to show that sale proceeds (foreign exchange) in respect of goods exported were realized within the time limit prescribed under the Foreign Exchange Management Act, 1999 and therefore the applicants had to pay the duty drawback amount along with the interest applicable as per rule 16(A) sub rule (1) & (2) of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 read with Section 75 A(2) and Section 28 A of Customs Act, 1962. Under these circumstances, the adjudicating authority vide aforesaid OIOs confirmed the demand of drawback with applicable interest as per their respective Demand cum Notice issued to the said exporters. Aggrieved, the applicants filed appeal, however the Appellate authority rejected the appeals holding them time barred, being filed beyond the time limit prescribed under Section 128 of the Customs Act, 1962.

3. Hence, the Applicants have filed the impugned Revision Applications mainly on the following identical grounds:

- i. The Commissioner is in error in holding that the appeal was barred by limitation when the exact date of delivery of the order is not identified by the Commissioner(Appeals)
- ii. No grounds to reject the Applicant's Averment about the receipt of the order-in-original only after blocking of their IEC. They have received the OIO only on 21.06.2019 and filed the appeal within the time limitation period.
- iii. Export proceeds were realized within the period allowed under the FEMA Act,1999.
- iv. Adjudicating authorities passed the OIO in gross violation of principles of natural justice. SCN and OIO both were not served.
- v. SCN is hit by the limitation of time.
- vi. Applicant have placed reliance on certain case laws.
- vii. In light of the legal and factual position set out herein, since the demand is itself unsustainable, there can be no imposition of interest or penalty on the Applicant.
- viii. In view of above Applicants requested to
 - i. Set aside the impugned Orders-in-Appeal.
 - ii. Hold and declare that the drawback sanctioned and paid to the applicant was not liable to be re-paid and the demand for that may be set aside with consequential relief.
 - iii. Quash and set aside the penalty
 - iv. Pass any other order(s), which may be deemed fit in the facts and circumstances of the present case.

4. A Personal hearing was fixed in this case on 01.12.2022. Mr. Prashant Patankar, Consultant, appeared online for hearing and submitted that Commissioner(Appeals) has rejected their appeal on limitation. He submitted

that they came to know about OIO only when their consignment was stopped barred on alert on EDI. They filed appeal within time after they came to know the order. He further submitted foreign exchange remittances relevant in the case are available with them. He requested to allow the application.

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

6. Government observes that the applicant has all been sanctioned drawback in respect of exports made by them. However, the applicant had not produced evidence to show that the sale proceeds (foreign exchange) in respect of the exported goods had been realized within the time limit prescribed under FEMA, 1999. The applicant had therefore been issued show cause cum demand notice for recovery of the drawback sanctioned to them along with interest and penalty. The applicants did not respond to the intimations for personal hearing and therefore the adjudicating authority proceeded to confirm the demand for recovery of drawback sanctioned along with interest and penalty at the applicable rate. Applicant has claimed that they have not received the copies of the respective SCN & OIO passed by the adjudicating authority deciding the show cause notice for recovery of drawback sanctioned and that they became aware of the respective OIO only when his consignment was stopped based on the alert in the EDI system. This matter was carried in appeal before Commissioner (Appeals) who has rejected the appeal on the ground of being time bar.

7. Government observes that the Circular No. 5/2009-Customs dated 02.02.2009 had set out a mechanism to monitor the realization of export proceeds. The circular dated 02.02.2009 was in vogue and therefore the applicants were required to follow the instructions contained therein and were duty bound to produce evidence of receipt of export proceeds before the Assistant/ Deputy Commissioner of Customs in terms of Rule 16A of the Drawback Rules, 1995/ Rule 18 of the Drawback Rules, 2017 within the period

allowed under the FEMA, 1999. Government observes that no ground has been made out in the revision application to the effect that the applicant had already submitted evidence before the Assistant/Deputy Commissioner to substantiate receipt of export proceeds before issue of notice. The applicants ground regarding submission of evidence of realisation of foreign exchange is that they furnished such evidence before Commissioner (Appeals) and not at any time before that. Government observes that the impugned Order by the Appellate authority are passed during the year 2018-2019. Even if it is presumed that the applicants claim about receipt of foreign exchange is accurate, the record suggests that the applicants have not been diligent and did not intimate the Department about the receipt of foreign exchange. However, the proximate cause for the revision application is that the appeals filed by the applicant has been dismissed on grounds of time bar.

8. While passing the impugned orders, the Commissioner(Appeals) has observed that the applicant have obtained copies of the respective OIO's from TRC(Export) Section and not from Drawback(XOS) Section. It was averred by the Commissioner(Appeals) that the obtaining of orders in such manner was not in terms of Section 153 of the Customs Act, 1962 and held that the date of receipt of the orders in such manner could not be considered as the date of communication of order. The appeal before the Commissioner(Appeals) has been dismissed solely on the ground that the appeal has been filed beyond 60 days of the statutory time limit for filing appeal and the 30 days of condonable period. In this regard, Government observes that the Commissioner(Appeals) has not made any attempt to ascertain as to whether the OIO had actually been served on the applicant.

9.1 Government observes that there are several binding judgments which provide insights on how proper service of orders is to be determined. It would be apposite to make reference to these judgments. The relevant headnote of the judgment of the Hon'ble Supreme Court of India in the case of Saral Wire Craft

Pvt. Ltd. vs. Commissioner of Customs, Central Excise & Service Tax[2015(322)ELT 192(SC)] is reproduced below :

*"Appeal to Commissioner(Appeals) — Limitation --- Date of service of order -
- Commissioner(Appeals), Tribunal as well as High Court rejecting appeal of
Applicants only on question of power with Commissioner(Appeals) for delay
condonation without ascertaining factum of date of actual service of order—
Failure to take notice of Statutory provisions of service of order leading to
gross miscarriage of justice - Affected party requires to be served
meaningfully and realistically -- Adjudication order issued at back of
Applicants, having not been properly served, came to his knowledge only on
26-7-2012 — Appeal filed on 22-8-2012, being within time, no question of
condonation of delay Appeal allowed — Applicants directed to appear before
Commissioner(Appeals) on 3-8-2015 for hearing — Section 35 of Central
Excise Act, 1944.[paras 7,8,9,10]"*

9.2 A case involving facts similar to those in the instant case had received the attention of the Hon'ble High Court of Bombay in the case of Soham Realtors Pole Star vs. Commissioner of Central Excise, Customs & Service Tax, 288(Bom)]. The relevant portion of the head-note thereof is reproduced below.

*"Appeal to Commissioner(Appeals) — Limitation — Delay in filing —
Condonation - Scope of— Instant case COD application rejected merely on
ground that department took proper steps for effecting service of impugned
order — Question of condonation of delay is independent of date of service
of impugned order as said date relevant only for determining length of delay
— Reasons of delay in filing appeal have nothing to do with date of service
of order — Appellate authority not recording any finding on correctness of
Applicants's plea of having received certified copy of adjudication order
much later — Further findings on proper service of order also incorrect as
sequence of procedure prescribed in Section 37C of Central Excise Act, J 944
not followed — As substantial amount of demand already stood deposited,*

matter remanded to Commissioner(Appeals) for reconsideration of issue and take a decision within 6 months - Section 35 of Central Excise Act, 1944.[paras 5, 6, 7, 8, 9, 11]"

9.3 The relevant headnote of the citation where the Hon'ble High Court of Madras had occasion to deal with the issue of service of order in the case of Osa Shipping Pvt. Ltd. vs. CCE, Chennai [2015(325)ELT 486(Mad.)] is reproduced below.

"Order — Adjudication order — Service of— Said order reportedly sent by Department by registered post — No acknowledgment card produced by Department — Service of order not complete — Section 37C of Central Excise Act, 1944.[paras 5, 6]"

10. Government infers from the judgments cited that it is incumbent upon the appellate authority to confirm service of the order. The factum of service of order cannot be based upon presumption. In the present case, the Commissioner (Appeals) has not made any effort to ascertain actual date of service. The Commissioner (Appeals) was required to call for the records from the office of the adjudicating authority to corroborate the actual service of the order. He has not made any attempt to counter the submissions of the applicants stating that they had not received the OIO. Needless to say, the onus to establish service of the order to the applicant was upon the Department and Commissioner (Appeals) has not given any findings as to how the onus has been discharged. However, the Commissioner (Appeals) has based his findings exclusively on the contention that since the copies of the order have been obtained from sources other than the office of the adjudicating authority, such date cannot be considered as the date of communication for the purpose of filing appeal before the appellate authority in terms of Section 128 of the Customs Act, 1962. .

11. In view of the assertions made by the applicants regarding receipt of export proceeds, it would be travesty of justice if applicant realized sale proceeds still the recovery orders are sustained exactly on the same ground of

non realisation of sale proceeds. Therefore, appropriate verification would be vital to settle the issue once and for all. Government therefore sets aside the impugned Order- in-Appeal and directs the original authority to decide the cases after due verification of documents in terms of the extant drawback rules and specifically Rule 16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995/ Rule 18 of the Customs and Central Excise Duties Drawback Rules, 2017. The applicants are required to provide the documents evidencing receipt of foreign remittances to the concerned authorities. The original authority is directed to pass appropriate order in accordance with the law after following the principles of natural justice, within 8 weeks from the receipt of this order.

12. The Revision Application/s are disposed of on the above terms.

Shrawan
23/3/23
(SHRAWAN KUMAR)

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

ORDER No. *373381* /2023-CUS (WZ)/ASRA/Mumbai dated *23.03.23*

To,

1. M/s. Concept Clothing, W-7/3, Western Avenue, Sainik Farms, New Delhi- 110062.
2. M/s. Contemporary Classique, 22, Mother House(Basement), New Delhi- 110029.
3. The Pr. Commissioner of Customs(E), Air Cargo Complex, Sahar, Andheri(E), Mumbai – 400 099.

Copy to:-

1. The 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.

2. M/s. Patankar Legal Combine(Advocate), Office No. 1, Neel-Atharva, Opp. Durga Mata Temple, Telephone Exchange road, Panvel(Old), New Mumbai- 410206.
3. Sr. P.S. to AS(RA), Mumbai.
4. Guard file.