

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. 371/196/DBK/2019-RA / 104 Date of issue: 29.03.2023

ORDER NO. 389 /2023-CUS (WZ)/ASRA/MUMBAI DATED 29.03.2023
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. Ankit Impex

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

Subject : Revision Applications filed, under Section 129DD of the Customs Act,
1962, against the Order-in-Appeal No. Mum-CUSTM-AXP-APP-964/18-19 dated
09.01.2019 passed by Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application has been filed by M/s. Ankit Impex (hereinafter referred as 'applicant') against the Order-in-Appeal No. Mum-CUSTOM-AXP-APP-964/18-19 dated 09.01.2019 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2.1 Briefly stated, facts of the case are that Demand-cum-Notices to show cause were issued to the exporters by speed post. As per the OSD (DBK)'s instructions, a Public Notice No. 19/2015 dated 02.12.2015 was issued wherein it was stipulated that the exporters will submit a certificate from the authorized dealer (s) or Chartered Accountant providing details of shipment which remain outstanding beyond the prescribed time-limit including the extended time, if any, allowed by the authorized dealer/ RBI on a 6 monthly basis. Such certificate shall be furnished by the exporter, authorized dealer wise for each port. However, none of the exporter submitted the proof of their export realization in the prescribed format, wherein they were required to submit BRC/Negative Statement till the time as mentioned in the said Demand-cum-Notices. Further the said demand-cum notices were returned back by the postal authorities with the remarks unclaimed incorrect address. To conclude the matter, a Facility Notice No.08/2016-17 dated 18.08.2016 was issued to sensitize all the exporters/ their CHAs and in case their name was reflecting in the list of defaulters, they should immediately contact the Dy. Commissioner of Customs, Drawback (XOS) Section between 22.08.2016 to 29.08.2016 for personal hearing on all working days and within working hours with all the required documents. Also an IEC alert was also fed in the EDI systems against the Exporters. Even then the said Exporters have not submitted the proof of their export realization as prescribed. Further two more opportunities were granted to the applicant exporter for personal hearing. Under these circumstances, the adjudicating authority vide impugned order confirmed the demand of drawback with applicable interest as per their respective Demand cum Notice issued to the said

exporters and also imposed penalty under section 117 of the Customs Act, 1962. Aggrieved, the applicant filed appeal, however the Appellate authority vide Order-in-Appeal No. Mum-CUSTOMS-APP-964/18-19 dated 09.01.2019 rejected the appeal 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 applicant states that if one turns to section 129A which provides for appeals to the Appellate Tribunal, power to condone delay is provided in sub section (5)) this results in condonation limit of 45 days to file cross objections permissible in the proceedings commenced under section 129D, there is absolutely no justifiable reason why in the case of an appeal under section 1290 a narrow interpretation should be adhered. Therefore it would be highly discriminatory to deny such condonation benefit only to the party which files an application in the nature of an appeal. It is embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself. Considered from this angle, though sub section (5) of section 129A is embedded in the section as an independent substantive provision, but in our considered view, sub section (5) is a proviso to sub section (4) of section 129A. It is, therefore, logical to hold that any application in the nature of appeal or cross objections arising from the provision of sub section (4) of section 129D would be governed by sub section (5) of section 129A of the Act. This approach may also lead to violation of the provisions of Article 14 of the Constitution of India. Therefore, the Revision Application filed after three months may be considered and condoned as procuring uploaded BRC details was beyond the control of the applicant.

- ii. The applicant was denied principles of Natural justice and without receiving any notices of personal hearing from the Assistant Commissioner of Customs DBK (XOS), Mumbai and from the Commissioner of Customs (Appeal) Mumbai-III, an ex parte order has been issued which is bad in law and requires to be set aside.
- iii. In view of above Applicant requested to
 - i. accept the Revision Application enclosed with the uploaded BRC details on 29-05-2019 from the Kotak Mahindra Bank Limited, Mumbai and therefore, set aside the demand of Rs.79804/- under the Rule 16(A) sub-Rule (1) & (2) of the Customs, Central Excise Duties and Service Tax Drawback Rules 1995 read with section 75A(2) of the Customs Act, 1962.
 - ii. The applicant prays to set aside the penalty of Rs.5000/- imposed on the exporter under section 117 of the Customs Act, 1962.
 - iii. Any other relief as this Appellate deems fit be granted.

4. A Personal hearing was fixed in this case on 01.12.2022. Mr. Pankaj Bhupatkar, Proprietor, appeared for hearing and submitted that OIO shown to have been issued on 31.03.2017 was actually received on 27.05.2017. He further submitted that Appeal was filed within time from the date of receipt of the order. HE further submitted that all relevant remittances have been realized. He showed original envelope containing postal stamp of 23.05.2017 in which OIO was sent from DC/AC customs, Drawback sections, Andheri(E), Mumbai. He requested to allow the application.

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

6. Government observes that the applicant has all been sanctioned drawback in respect of exports made by them. However, the applicants 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 on a later date on 27.05.2017. This matter was carried in appeal before Commissioner (Appeals) who has rejected the appeal on the ground of being time bar.

7. The Government notes that the impugned order in appeal was received by the applicant on 09.01.2019 and the instant Revision Application was filed 28.06.2019. The Government observes that the applicant has given sufficient cause for not filing the instant Revision Application within a period of three months from the date of receipt of the impugned Order in Appeal. Government first proceeds to discuss issue of delay in filing this revision application. The chronological history of events is as under:

(a)	Date of receipt of impugned Order-in-Appeal dated 28.12.2018 by the applicant	09.01.2019
(b)	Date of filing of revision application by the applicant	28.06.2019

From the above position, it is clear that applicant has filed this revision application after 5 months and 19 days after the receipt of impugned OIA. As per provisions of Section 129DD of Customs Act, 1962 the revision application can

be filed within 3 months of the communication of Order-in-Appeal and the delay up to another 3 months can be condoned provided there are justified reasons for such delay. Government, in exercise of power under Section 129DD of Customs Act, 1962 condones the said delay and takes up revision application for decision on merit.

8. On perusal of records, Government observes that the applicant was granted the duty drawback with regard to exports made by them and demand of drawback already sanctioned was confirmed on the ground that they failed to submit Bank Realization Certificate as evidence of remittance within stipulated period. The appeal filed by the applicant against the Order in Original was dismissed by the appellate on being time barred.

9. Government notes that while dismissing the appeal filed by the applicant Appellate Authority had drawn following observations: -

“ 4. I have gone through the facts and submissions of the case. On perusal of the Form C.A.-1, I find that the date of communication of the impugned order is mentioned as 21.07.2017 and the appeal has been filed on 24.12.2018. I find that the appellant has also admitted vide their letter dated 24.12.2018 that they received the impugned order 27.05.2017. Considering these facts, I opine that the appellant has failed to file the present appeal within the prescribed time limit of 90 days as prescribed under the provisions of Section 128 of the Customs Act, 1962. I find that Section 128 provides that the appeal should be filed within 60 days from the date of communication of the order. Section 128 further states 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. The Allahabad High Court in the matter of M/s. Doaba Rolling Mills (P) Ltd -2004 (169) E.L.T. 258 (All.) has held that if the statute provides for a period of limitation, and further maximum period for which the delay can be condoned, the authority cannot extend the same. If the Legislature in its wisdom has fixed a maximum period for doing a particular thing, the authority is not competent to prescribe the period beyond it. The power of the Appellate Authority has been restricted to

condone the delay up to 30 days and any appeal preferred after this period, the delay is rightly not condonable. From the above it is clear that Commissioner (Appeals) has power to condone delay of only 30 days and appeals filed beyond the expiry of 30 days of condonable period, Commissioner (Appeals) is not empowered to condone delay in filing appeal. I find that the appeal has been filed even beyond the condonable period of 30 days i.e. beyond 90 days from the date of communication of order and hence not condonable under Section 128 of the Customs Act, 1962. As the impugned appeal is not maintainable on the time period prescribed for appeal, I have not gone into the merits of the appeals.”

10. Government notes that it is an admitted fact that Order in Original which was issued on 31.03.2017 was received on 27.05.2017 by the Applicant. The OIO was not challenged by them within the stipulated period of 60 days as per the provisions of Section 128(1) of the Customs Act, 1962 before the Appellate Authority. The legislative intent is abundantly clear in empowering quasi-judicial authorities to provide for an appellate mechanism in the Central Excise Act, 1944/Customs Act, 1962. When the Legislature has specifically provided an appellate structure, the intent not to avail of the normal appellate remedy by the assessee or by revenue when aggrieved, cannot be attempted to be reopened after lapse of appealable period including condonable period provided in the statute. The law does not come to the aid of the indolent, tardy litigant. Therefore, allowing appeal against Order in Original dated 31.03.2017 would be without authority of law as it would be contrary to the statutory period of limitation prescribed for filing an appeal under Section 128 of the Customs Act, 1962 against such Orders in Original, which is 60 days. If such a practice is allowed, then it would amount to a back-door entry, to circumvent the provisions of Section 128 of the Customs Act, 1962 which is against the settled law. As such, the Government holds that the Appellate Authority has rightly dismissed the appeal filed by the applicant as the same was hit by limitation of time as stipulated under the law.

11. In view of the above discussion and findings, the Government does not find any reason to interfere with or modify the Order-in-Appeal No. Mum-

CUSTM-AXP-APP-964/18-19 dated 09.01.2019 passed by Commissioner of Customs (Appeals), Mumbai Zone-III and upholds the same.

12. The Revision Application is disposed of on the above terms.


24/3/23
(SHRAWAN KUMAR)

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

ORDER No. 389 /2023-CUS (WZ)/ASRA/Mumbai dated 24-03-23

To,

1. M/s. Ankit Impex, Room No. 8, Gr. Floor, Maharaj Bldg., 247, Charni Road, Mumbai-400004.
2. The Pr. Commissioner of Customs (Exports), 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. Sr. P.S. to AS(RA), Mumbai.
3. Guard file.