

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

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F.No. 371/461/DBK/2019-RA / 1841 Date of issue: 29.03.2023

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ORDER NO. 392 /2023-CUS (WZ)/ASRA/MUMBAI DATED 24.03.2023  
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.

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Applicants : M/s. Johnson & Johnson Pvt. Ltd.

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-374/2019-20  
dated 31.07.2019 passed by Commissioner of Customs (Appeals), Mumbai Zone-  
III.

## ORDER

This Revision Application has been filed by M/s. Johnson & Johnson Pvt. Ltd. (hereinafter referred as 'applicant') against the Order-in-Appeal No. Mum-CUSTM-AXP-APP-374/2019-20 dated 31.07.2019 passed by Commissioner of Customs (Appeals), Mumbai Zone-III.

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 Order-in-Original No. AC/JD/2850/2017-18/DBK(XOS)/ACC dated 27.03.2018 on the ground that the applicant 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 applicant 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 OIO confirmed the demand of drawback with applicable interest as per their respective Demand cum Notice issued to the said exporters. Aggrieved, the applicant filed appeal, however the Appellate authority vide Order-in-Appeal No. Mum-CUSTM-AXP-APP-374/2019-20 dated 31.07.2019 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 Hon'ble Commissioner (Appeals) ought to have appreciated that the issue with regard to whether the Order-in-Original was appropriately served on the Applicant was germane to deciding the appeal filed before

- him and it was incumbent upon him to have specifically examined the said issue.
- ii. The Hon'ble Commissioner (Appeals) ought to have appreciated that till date, the Applicant has not been served a copy of the Order-in-Original as per the modes set out in Section 153 of the Act. In terms of Section 128 of the Act, an appeal is to be filed within sixty days from the date of communication of the order. Since in the present case, the Order-in-Original has not been served on the Applicant as per the prescribed modes, the time period for filing the appeal under Section 128 of the Act has not commenced even now. Therefore, the appeal before the Hon'ble Commissioner (Appeals) was filed within the limitation period and the Impugned Order disposing off the appeal merely on grounds of limitation is completely erroneous.
  - iii. Without prejudice, the Hon'ble Commissioner (Appeals) ought to have appreciated that since the copy of Order-in-Original was sent to the old address of the Applicant, and, the Applicant was made aware of the Order-in-Original only when its IEC was blocked, the time period for filing the appeal under Section 128 of the Act would, at the best, commence only from the date on which the Applicant gained knowledge of the Order-in- Original, viz. 14th June 2019, in the present case. Accordingly, the appeal before Hon'ble Commissioner (Appeals) was filed within the limitation period.
  - iv. The Hon'ble Commissioner (Appeals) has passed the Impugned Order without any application of mind since at paragraph 4 of the said Order, the Hon'ble Commissioner (Appeals) after considering Section 153 of the Act, has acknowledged that the copy of Order-in-Original provided by the TRC Section cannot be considered as the date of communication for purpose of filing of appeal since the Respondent's office is the proper authority for serving the Order-in-Original. Further, at paragraph 5 of the Impugned Order, the Hon'ble Commissioner (Appeals) has considered judicial decisions stating that if the law requires something

to be done in a particular manner and time-line, such requirement of law cannot be condoned. To this extent, the Hon'ble Commissioner (Appeals) has himself rendered a finding that the service has not been carried out in an appropriate manner. However, vide paragraph 6 of the Impugned Order, the Hon'ble Commissioner (Appeals) has held that the delay in filing of appeal cannot be condoned, without providing any reason for the same. Therefore, it is evident that the Impugned Order is based on contrary findings and has been passed without any application of mind and is liable to be set aside.

- v. Recovery of amount of drawback under Rule 16A of the Drawback Rules is unwarranted, as the Applicant has fulfilled the conditions for claiming the drawback amount, in terms of Section 75 of the Act.
- vi. Rule 16A (1) and (2) of the Drawback Rules provides for recovery of drawback amount where the sales proceeds in respect of exported goods has not been realized by or on behalf of the exporter within the time period allowed under Foreign Exchange Management Act, 1999 ('FEMA Act'). In terms of Reserve Bank of India's Notification No RBI/2007-08/354 dated 3rd June 2008, time period prescribed for realization of export proceeds during the relevant period was twelve months from the date of export. This is further substantiated vide paragraph B.3 (iv) of the RBI Master Circular No. 14/2012-13 dated 2nd July 2012.
- vii. Accordingly, where the sales proceeds towards exports made vide the subject shipping bills has been received within one year from the date of export, it is evident that the conditions under Section 75 of the Act have been satisfied. Therefore, recovery under Rule 16A (1) and (2) of the Drawback Rules is completely unwarranted, in this regard, a tabulation setting out the details of the subject shipping bills and the corresponding date of realization of export proceeds as per the relevant Bank Realization Certificate (BRC) clearly demonstrates that the sales proceeds have been received within one year from the date of export,

and, accordingly, the Applicant was eligible to claim the drawback amount.

viii. Applicant have placed reliance on certain case laws.

ix. 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.

x. In view of above Applicants requested to

- i. Set aside the impugned Order-in-Appeal.
- ii. 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. Parth Parikh, Advocate and Mr. Farhad Dalal, Senior Counsel, appeared for hearing and submitted that they came to know about instant OIO when their consign,ent was stopped in 2019 barred on alert in EDI. They further submitted that Commissioner(A) has rejected their appeal Ex-parte without appreciating facts of the case. They submitted a written submission on the matter and requests to allow their claim.

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 realised 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 SCN & OIO passed by the adjudicating authority deciding the show cause

notice for recovery of drawback sanctioned and that they became aware of the 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 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.[paras5, 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*  
*24/3/23*  
(SHRAWAN KUMAR)

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

ORDER No. *332* /2023-CUS (WZ)/ASRA/Mumbai dated *24-03-23*

To,

1. M/s. Johnson & Johnson Pvt. Ltd., Arena Space, Behind Majas Bus Depot, Jogeshwari Vikroli Link road, Jogeshwari East, Mumbai- 400060.
2. 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. Advocate(Applicant)
3. Sr. P.S. to AS(RA), Mumbai.
4. Guard file.