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**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.371/400/DBK/2022 / 1933

Date of Issue: 31.03.2023

ORDER NO. ⁴⁰² /2023-CUS (WZ) /ASRA/Mumbai DATED 30.03.2023 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 Sumita Exports,
(Proprietor Shri Rajendra Tantia)
18, Abdul Hamid Street, 1st floor,
Suit No.111, Kolkata, West Bengal – 700 069.

Respondent : Commissioner of Customs (Export),
Air Cargo Complex, Mumbai.

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal no.
MUM-CUSTOMS-APP-375/2022-23 dated 31.05.2022
passed by the Commissioner of Customs (Appeals),
Mumbai, Zone – III.

ORDER

The subject Revision Application has been filed by M/s Sumita Exports, Kolkata, through its proprietor Shri Rajendra Tantia (here-in-after referred to as 'the applicant') against the Order-in-Appeal dated 31.05.2022 passed by the Commissioner of Customs (Appeals), Mumbai, Zone - III, which decided an appeal filed by the applicant against the Order-in-Original dated 17.05.2018 passed by the Assistant Commissioner of Customs, DBK (XOS), ACC, Mumbai, which in turn had confirmed a demand seeking to recover Drawback sanctioned to the applicant. The Show Cause cum Demand Notice and the Order-in-Original was issued to Shri Rajendra Kumar Tantia, proprietor of the applicant firm, but since then, the applicant have amended their IEC No.0293003831 to change its name to M/s Sumita Exports having Shri Rajendra Kumar Tantia as its proprietor. Government finds that the Commissioner (Appeals) has established that both, M/s Sumita Exports and Shri Rajendra Kumar Tantia, its proprietor, are the same entity and hence entertained the appeal filed by the applicant. This fact has not been disputed by both the parties concerned.

2. Brief facts of the case are that the applicant was issued a Show Cause cum Demand Notice dated 19.08.2017 seeking to recover Drawback amounting to Rs.17,87,923/- sanctioned to them during the period 2008 to 2011, 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) and also in terms of CBEC Circular no.5/2009-Cus dated 02.02.2009 and Public Notice No.5/2009 dated 07.03.2009. The applicant failed to respond to the Show Cause Notice and hence the original authority, vide Order-in-Original dated 17.05.2018, confirmed the demand raised and imposed penalty of Rs.30,000/- on the applicant under Section 117 of the Customs Act, 1962. Aggrieved, the applicant filed an appeal before the Commissioner (Appeals). The said appeal was dismissed by the Commissioner (Appeals), vide the impugned Order-in-Appeal, without going

into the merits of the case, as it was found that the appeal was time barred and filed even beyond the condonable period of ninety days.

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

(a) That the Commissioner (Appeals) had rejected their appeal solely on the grounds that the same was barred by limitation and had failed to appreciate that they had never received the Show Cause Notice, the PH intimation letter and the Order-in-Original as the entire proceedings were conducted ex-parte;

(b) That the Commissioner (Appeals) had failed to appreciate the fact that they became aware of the said Order-in-Original only when their shipment was withheld upon instructions from the Tax Recovery Cell of the Customs Department;

(c) That the Commissioner (Appeals) had treated the purported date of service of order as provided under Section 153 of the Customs Act, 1962 as the date of communication of the Order-in-Original; that the Commissioner (Appeals) had failed in requiring the lower authority to prove that the Show Cause Notice, PH and Order-in-Original had been served on them and had erred in holding that the burden of proving non-delivery of Show Cause Notice etc. was on them instead of the Department as provided for by Section 106 of the Indian Evidence Act, 1872;

(d) That they had furnished the evidence of realization of foreign exchange in respect of goods exported submitted by them within the prescribed period, along with the appeal filed by them; that they had not committed any violation of any provision of the DBK Rules, 1995; that the Commissioner (Appeals) had overlooked the provisions of Section 75(1) of the Customs Act, 1962 and Rule 18 of the DBK Rules, 2017 which provided for recovery of drawback only when foreign exchange in respect of the goods exported is not realized within the prescribed period;

(e) They relied upon the decision of the Hon'ble High Court of Madras in the case of M/s Ruis Marketing and Creative vs CST [Civil Appeal No.3121 of

2017] wherein it was held that limitation has to be reckoned only from the date when the actual service has been effected and hence the Department only relying on dispatch of documents by speed post was not proper; they also placed reliance on the decision of the Apex Court in the case of M/s Anantnag vs Mst.Kariji, JT [1987 (1) SC 537] and the decision of the Revisionary Authority in Order No.23-37/2021-CUS(WZ)/ASRA/Mumbai dated 04.02.2021 in support of their case.

3.2 Further submissions were made by the applicant during the course of personal hearing on 27.03.2023 wherein they submitted that:-

(a) That the name of the firm and its office address was clearly mentioned in the IEC as 'Sumitra Exports' having office address at 18, Abdul Hameed Street (formerly known as British India street), Kolkata – 700 069;

(b) That the Commissioner (Appeals) had erred in observing that correspondence by the Department during the period 2013 to 2015 at 'Rabindra Sarani, Kolkata, West Bengal – 700 003 was duly received by them was not true and misleading; that all correspondence since 2008 till date had been addressed to their office address and the same was evidence by the annexures to their application;

(c) That the Show Cause Notice/Order-in-Original was defective as it also included 13 Shipping Bills in respect of which they had already received notice in March 2013 at their office address and in response to which they had submitted BRCs on 23.05.2013, a copy which they had submitted along with this application;

(d) That the Department had sent all notices through Speed Post and had treated the date of dispatches as date of serving; and that the Department failed to provide proof of service which was requested by them and that in response to an RTI application they were only provided the date of dispatch;

(e) They finally submitted that they have all the original BRCs and Negative Certificates since 2008 till 2014 and requested that the matter be dropped.

In view of the above the applicant requested for the impugned Order-in-Appeal dated 31.05.2022 to be set aside.

4. Personal hearing in the matter was held on 27.03.2023 and Shri Rajendra Kumar Tantia, Proprietor of the applicant firm appeared for the same. He submitted that they came to know about the Order-in-Original only when their export shipment was stopped based on alert in the ICES. He further submitted that appeal was filed before Commissioner (Appeals) within time from the receipt of the Order-in-Original. He further mentioned that no correspondence was sent to their office; that residential address where communication appears to have been sent was not in use since 2009. He further submitted that all remittances have been received and proof thereof was submitted to the Department. He further submitted that copies of all BRCs are attached with the Revision Application. He showed original copies of the BRCs. He also submitted negative statement from the Bank for the period 2007 to 2014, confirming that no amount is pending realization. He requested to allow their application. He submitted additional written submissions which has been detailed above.

5. Government has carefully gone through the relevant case records, the written and oral 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 found the appeal of the applicant to be time barred and has dismissed the same without going into the merits of the case. Government also notes that Commissioner (Appeals) has computed the time limit for filing appeal by taking into account the date i.e. 29.05.2018 on which the Order-in-Original dated 17.05.2018 was issued. The applicant on the other hand has submitted that they never received a copy of the said Order-in-Original and became aware of the same only when their export consignments were held up in the year 2021. They have also submitted that they pursued the issue with the Department and thereafter received a copy of the said Order-in-Original on 13.12.2021, subsequent to which they filed the appeal before the Commissioner (Appeals) on 05.01.2022. Government finds that a copy of the said Order-in-Original, along with the Show Cause Notice

was given to the applicant on 13.12.2021. Government notes that Section 128(1) of the Customs Act, 1962 provides that the sixty day period for filing of appeal before the Commissioner (Appeals) has to be computed from the date of communication of the Order-in-Original to the parties concerned. On examining the impugned Order-in-Appeal, Government finds that no evidence has been recorded by the Commissioner (Appeals) to indicate that the impugned Order-in-Original was served/communicated to the applicant. Government finds that no evidence has been adduced by the Department before the Commissioner (Appeals) or during the course of these proceedings to indicate that the said Order-in-Original dated 17.05.2018 was served on the applicant prior to the date on which they were given a copy of the same on 13.12.2021. Government notes that the Department, in response to an application under the RTI by the applicant, could only provide the date on which the Order-in-Original was dispatched and not when it was served. Given these facts, Government finds that the applicant received a copy of the impugned Order-in-Original on 13.12.2021 and have filed an appeal against it on 05.01.2022 before the Commissioner (Appeals), which is well within the prescribed time limit of sixty days. Thus, Government finds that the Commissioner (Appeals) has erred in computing the time limit by taking the date of the issue of the Order-in-Original in account rather than the date of communication of the same to the applicant, as required by the law. In view of the above, Government finds the decision of the Commissioner (Appeals) to hold the appeal of the applicant to be time barred to be incorrect and hence sets aside the impugned Order-in-Appeal dated 31.05.2022. Government finds support in the decision 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)] wherein in a similar case it was held that the date of actual service of the order has to be taken into account for determining the time period for filing of appeal.

7. Further, Government finds that the applicant has submitted that they have received the proceeds in respect of all the 39 consignments in question and are in possession of BRCs in respect of all them, copies of which have been submitted by them during these proceedings. Government also takes note of the fact that the applicant has submitted statements from the Bank concerned, confirming that there is no amount pending realization for the period 2007 to 2014 with respect to their export shipments. In view of the

above, taking into account the submissions of the applicant and considering the fact of submission of all relevant BRCs and negative statements from the Bank, the allegation of non-realization of export remittances does not survive. Government therefore sets aside the demand of Rs.17,87,923/- confirmed vide Order-in-Original No.AC/PTS/183/2018-19/Dbk(XOS)/ACC dated 17.05.2018 and upheld by the impugned Order-in-Appeal No. MUM-CUSTOMS-APP-375/2022-23 dated 31.05.2022. Penalty of Rs.30,000/- imposed on the applicant by the said Order-in-Original is also set aside.

8. The Revision Application is allowed in the above terms.

Shrawan
30/03/2023
(SHRAWAN KUMAR)

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

ORDER No. ⁴⁰² /2023-CUS (WZ) /ASRA/Mumbai dated 30.03.2023

To,

M/s Sumita Exports,
(Proprietor Shri Rajendra Tantia)
18, Abdul Hamid Street, 1st floor,
Suit No.111, Kolkata, West Bengal – 700 069.

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. Shri Rajendra V. Shahsane, Advocate, c/o Thorat Chambers, Office
No.3, 2nd floor. 35, Kirti Chambers, Opp. Hamam House, Ambalal Doshi
Marg, Fort, Mumbai – 400 023.
4. Sr. P.S. to AS (RA), Mumbai.
5. Notice Board.