

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.371/515/DBK/2019-RA/239

Date of Issue: 19.01.2023

ORDER NO. H0/2023-CUS (WZ) /ASRA/Mumbai DATED 17.01.2023 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 Global Apparels Pvt. Limited,
102/5, Anmol, Sir M.V. Road,
Marol, Mumbai - 400 059.

Respondent : Commissioner of Customs (Export),
Air Cargo Complex, Sahar, Mumbai 400099.

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal no. MUM-CUSTM-AXP-APP-491/2019-20 dated 29.08.2019 passed by the Commissioner of Customs (Appeals), Mumbai, Zone -III.

ORDER

The subject Revision Application has been filed by M/s Global Apparels Pvt. Limited, Mumbai (here-in-after referred to as 'the applicant') against the Order-in-Appeal dated 29.08.2019 passed by the Commissioner of Customs (Appeals), Mumbai, Zone - III, which decided an appeal filed by the applicant against the Order-in-Original dated 26.12.2012 passed by the Assistant Commissioner of Customs, DBK (XOS), ACC, Sahar, Mumbai, which in turn had confirmed the demand seeking to recover Drawback sanctioned to the applicant.

2. Brief facts of the case are that the applicant was issued a Show Cause cum Demand Notice dated 26.07.2010 seeking to recover the Drawback amounting to Rs.8,72,133/- sanctioned to them, as it appeared that they had not realized the foreign exchange involved on the goods exported by them, during the period 01.4.2004 to 31.12.2008, 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 the letter issued to them in terms of Public Notice No.5/2009 dated 07.03.2009 vide which the applicant was called upon to submit the proof of receipt of export proceeds 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 26.12.2012, confirmed the demand raised. Aggrieved, the applicant filed an appeal before the Commissioner (Appeals). The said appeal was dismissed by the Commissioner (Appeals) 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. Aggrieved, the applicant has filed the subject Revision Application against the impugned Order-in-Appeal on the following grounds:-

- (a) They came to know about the Demand cum Show Cause Notice and Order-in-Original from the recovery notice vide letter dated 18.04.2018; that they wrote letter dated 24.04.2018 stating that the said copy of the order was not received by them and that all the remittance has been received in respect of the exports made by them during the said period;
- (b) They collected the relevant documents i.e. demand-cum-notice as per the letter dated 27.04.2018 from the department; and that they had filed appeal before the Commissioner (Appeals) on 20.08.2019;
- (c) That they had submitted C.A. certificate for the said period showing no pending foreign exchange realization; that it was not possible to obtain BRC in respect of the exports made during the period 2004-2007;
- (d) That Board's Circular No,05/2009-Cus dated 02.02.2009 was not applicable to the exports made prior to 2009; that evidence of export is the Shipping Bill; and that the same was processed under the EDI system; thus evidence was submitted to the Customs authorities;
- (e) That no recovery of duty drawback under Rule 16 of Customs, Central Excise duties could be made when the goods were exported;
- (f) That the rejection of appeal by the appellate authority without going into the merits of the case is denial of the statutory rights of the appellant as the appellate authority had inherent right to condone the delay by recording the reasons in the interest of justice;

In view of the above the applicant requested that the Order-in-Original dated 26.12.2012 demanding duty drawback may be set aside.

4. Personal hearing in the matter was granted to the applicant on 16.11.2022 and Shri H.K. Hirani, Consultant, appeared for the same. He submitted that foreign exchange was realized and drawback has been correctly availed. He submitted that neither Show Cause Notice nor Order-

in-Original was received by them and they came to know about Order-in-Original only when recovery proceedings started. He further submitted that appeal before Commissioner (Appeals) was within time from the date the applicant came to know about the Order-in-Original. He requested to allow the application.

5. Government has gone through the case records available, 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 by taking into account the date on which the Order-in-Original dated 26.12.2012 was passed. The applicant on the other hand has submitted that they never received the Show Cause Notice or the Order-in-Original and became aware of the same only when recovery proceedings were initiated against them vide letter dated 18.04.2018. Government notes that the applicant in their appeal before the Commissioner (Appeals) had submitted that they received the copy of the Order-in-Original dated 26.12.2012 on 27.04.2018. Further, Government finds that the applicant filed appeal before the Commissioner (Appeals) on 20.08.2019 as recorded in the impugned Order-in-Appeal. Government finds that the applicant in the subject application has not disputed the above dates and has in fact submitted that they received the relevant documents from the Department on 27.04.2018.

7. Given the above facts, Government notes that even if the benefit of doubt is given to the applicant with respect to their claim of not having received the Show Cause Notice and Order-in-Original when they were issued, it is an admitted fact that they did receive a copy of the impugned Order-in-Original on 27.04.2018 as confirmed by them in their application before the

Commissioner (Appeals). It is also a fact that they filed appeal against the said Order-in-Original before the Commissioner (Appeals) on 20.08.2019. Thus, even assuming that the applicant received the Order-in-Original as late as 27.04.2018, it is clear that the appeal before Commissioner (Appeals) was made after almost 15 months, which is beyond the period of sixty days and a further thirty days time limit prescribed by Section 128 of the Customs Act, 1962. The crux of the issue is whether Commissioner (Appeals) is empowered to condone the above delay. Government notes that the issue is no more *res-integra* and has been set to rest by the Hon'ble Supreme Court in the case of Singh Enterprises vs Commissioner of Central Excise, Jamshedpur [2008 (221)ELT 163 (S.C.)]. Relevant portion of the order is reproduced below :-

The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the 'Limitation Act') can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period.

The above decision of the Apex Court leaves no doubt that in the present case, the Commissioner (Appeal) did not have the power to condone the quantum of delay on the part of the applicant in filing the rebate claim. Thus Government finds the decision of the Commissioner (Appeals) to reject the appeal on the grounds of it being time barred to be proper and legal.

Government refrains from going into the merits of the case, as the appeal by the applicant before the Commissioner (Appeals) has been found to be time barred.

8. In view of the findings recorded above, Government finds no reason to annul or modify the impugned Order-in-Appeal. The Revision Application is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. ~~NO~~ /2023-CUS (WZ) /ASRA/Mumbai dated 17.01.2023

To,

M/s Global Apparels Pvt. Limited,
102/5, Anmol, Sir M.V. Road,
Marol, Mumbai - 400 059.

Copy to: ..

1. Commissioner of Customs (Export), Air Cargo Complex, Sahar, 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.