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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.373/301/DBK/2019-RA / 2220

Date of Issue: 19.04.2023

ORDER NO. **44** /2023-CUS (WZ) /ASRA/Mumbai DATED **17.4.23**
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 Boston Leather Exports,
No. 14/16, M.V.Badran Street,
Periamet,
Chennai – 600 003.

Respondent : Pr. 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-120/2019-20 dated 24.05.2019
passed by the Commissioner of Customs (Appeals),
Mumbai, Zone – III.

ORDER

The subject Revision Application has been filed by M/s Boston Leather Exports, No. 14/16, M.V.Badran Street, Periamet, Chennai – 600 003 (here-in-after referred to as ‘the applicant’) against the Order-in-Appeal No. MUM-CUSTOM-AXP-APP-120/2019-20 dated 24.05.2019 passed by the Commissioner of Customs (Appeals), Mumbai, Zone – III which decided an appeal filed by the applicant against the Order-in-Original dated 31.03.2017 passed by the Assistant Commissioner of Customs, DBK (XOS), ACC, 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 seeking to recover the Drawback amounting to Rs. 4,29,089/- sanctioned to them, 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). The same was issued as the applicant had failed to respond to the Facility Notice No. 08/2016-17 dated 18.08.2016 and Public Notice No. 19/2015 dated 02.12.2015 vide which the applicant, along with several other exporters, were called upon to submit the BRC's/Negative statements 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 31.03.2017, confirmed the demand raised and imposed a penalty of Rs. 21,000/- on the applicant. 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:-

3.1 Applicant submitted that the impugned Order-in-Appeal dated 24.05.2019 is liable to be set aside, as there was no personal hearing was given to the Applicant, which is in violation of principles of natural justice. Applicant had specifically claimed "Yes" to Serial No. 6A of the Appeal Performa against the column "Whether the appellant wishes to be heard in person". Accordingly, the Commissioner (Appeals) ought to have granted an opportunity to the applicant in terms of Section 128A(1) of the Customs Act, 1962. On this ground also the impugned order is liable to be set aside. The applicant relied on the decision of the Honorable Supreme Court in the case of Automotive Tyre Manufacturers Association reported in 2011 (263) ELT 481 (SC).

3.2 Applicant submitted that in terms of Section 128A (3) of the Customs Act, 1962, the Commissioner (Appeals) ought to have conducted inquiry with the Assistant Commissioner of Customs (DBK) (XOS), being the Proper Officer, by calling for the proof of delivery of the Order-in-Original dated 31.03.2017, personal hearing notices respectively for the hearing fixed on 19.12.2016 and 28.12.2016 and the Show Cause Notice dated 18.06.2016. It is further submitted that the appeal is filed within the stipulated time, from the date of receipt of copy of the Order-in-Original dated 31.03.2017 through the RTI Reply letter dated 16.04.2019, which was received by the applicant's Counsel on 26.04.2019.

3.3 On merits, it is further submitted that the applicant had realized the export proceeds on 05.04.2014 in respect of the shipping bill No. 5128734 dated 25.04.2013 and 5128742 dated 25.04.2013 itself. Copy of the E-BRC for the same is enclosed for ready reference.

3.4 It is further submitted that the Assistant Commissioner has erred in recovering the drawback and penalty totaling to Rs. 4,50,089/- from the

applicant, without following the Board Circular No. 05/2009 dated 02.02.2009 and Public Notice No. 05/2009 dated 07.03.2009. It is submitted that the Assistant Commissioner ought to have verified the fact of non-realisation of export proceeds, before issuance of show cause notice. However, in the present case, the Assistant Commissioner has failed to verify the same, despite having the particulars in their Customs EDI System.

3.5 It is pertinent to note that in the Demand Cum Show Cause Notice dated 18.06.2016 issued by the Assistant Commissioner, there was no proposal to impose penalty on the applicant. However, while passing the impugned order dated 31.03.2017, the Assistant Commissioner has imposed penalty of Rs. 21,000/- on the applicant, which is beyond the scope of the show cause notice. Accordingly, the penalty imposed on the applicant is also liable to be set aside.

3.6 It is submitted that from the copy of the Order-in-Original dated 31.03.2017, it appears that the order was sent by Speed post, vide consignment no. EM740768520IN. It is submitted that the Assistant Commissioner has again erred in sending the impugned order by speed post, which is against Section 153 of the Customs Act, 1962. The Assistant Commissioner ought to have sent it by Registered Post in term of the Section 153 of Customs Act, 1962. On this count also, the impugned order is liable to be set aside. It is also to be noted that the impugned Order-in-Appeal dated 24.05.2019 was also sent by speed post only, which is against Section 153 of Customs Act, 1962. Further, the Assistant Commissioner has failed to follow the Board Circular No. 05/2009 dated 02.02.2009 by not verifying the realisation of export proceeds relating pertaining to the shipping bills dated 25.04.2013 before issuing the Show Cause Notice/the Order-in-Original.

4. Personal hearing in the matter was granted to the applicant on 01.12.2022 and Shri Gokulraj L., Advocate appeared online for the same.

He submitted that exporter came to know when amount confirmed in Order-in-Original was recovered from their bank. He submitted that appeal was filed withing time from the date when Order-in-Original was received. He submitted that all foreign exchange remittances have been received. He requested to allow the application.

5. Government has carefully gone through the relevant case records available in case files, 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 31.03.2017 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 recovery proceeding were initiated by the Tax Recovery Cell (Export). They have also submitted that they pursued the issue with the Department, by filing an application under the Right to Information Act, 2005 and thereafter received a copy of the said Order-in-Original on 26.04.2019, subsequent to which they filed the appeal before the Commissioner (Appeals) in the month of May, 2019. Government finds that a certified copy of the said Order-in-Original was given to the applicant on 26.04.2019, in reply to their RTI application dated 21.03.2019, by the Assistant Commissioner of Customs CPIO, RTI Cell(Export), Air Cargo Complex, Mumbai. 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 31.03.2017 was served on the applicant prior to the date on which they were given a copy of the same on 26.04.2019. Given these facts, Government finds that the applicant received a copy of the impugned Order-in-Original on 26.04.2019 and have filed an appeal against it in the month of May, 2019, 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 24.05.2019.

7. Further, Government finds that the applicant has submitted that the BRCs required by the Department and also that they have received the payments in foreign exchange with respect to all the export consignments in question. Government finds that the issue needs to be re-examined by the Original authority by taking into account the submissions of the applicant and hence remands the case back to the original authority for being decided afresh. The applicant should be provided sufficient opportunity to place on record their submission in the matter.

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


(SHRAWAN KUMAR)

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

ORDER No. 241/2023-CUS (WZ) /ASRA/Mumbai dated 17.4.23

To,
M/s Boston Leather Exports,
No. 14/16, M.V.Badran Street,

Periamet,
Chennai – 600 003.

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. Mr. Gokulraj L., Advocete, AGOL Associates, No. 17, 1st Cross Street,
Customs Colony, 4th Avenue, Besent Nagar, Chennai – 600 090.
4. Sr. P.S. to AS (RA), Mumbai.
5. Notice Board.