

REGISTERED SPEED POST



सत्यमेव जयते

**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**  
8<sup>th</sup> Floor, World Trade Centre, Cuffe Parade,  
Mumbai- 400 005

F.No. 371/194/DBK/2019-RA  
F.No. 371/195/DBK/2019-RA

2214

Date of Issue :-

19.04.2023

ORDER NO. HH2-HH3/2023-CUS (WZ) /ASRA/MUMBAI DATED 19-04-2023  
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 Adel International.

Respondent : Commissioner of Customs (Appeal), Mumbai Zone-III.

Subject:- Revision Applications filed, under Section 129DD of the Customs Act,  
1962 against the Orders-in-Appeal Nos MUM-CUSTM-AXP-APP-  
125/19-20 dated 12-06-2019 and MUM-CUSTM-AXP-APP-126/19-20  
dated 12-06-2019 passed by the Commissioner of Customs (Appeals)  
Mumbai Zone-III.

**ORDER**

These two Revision Applications have been filed by M/s Adel International (hereinafter referred to as the applicants) against the Orders-in-Appeal No. MUM-CUSTOM-AXP-APP-125/19-20 dated 12-06-2019 and MUM-CUSTOM-AXP-APP-126 /19-20 dated 12-06-2019 passed by the Commissioner of Customs (Appeals) Mumbai Zone-III.

2. The brief facts of the case are that the applicant in these cases are exporters who had exported the goods under Drawback Scheme as provided under Section 75 of the Customs Act, 1962 and had obtained drawback towards the said exports. In terms of Rule 16(A) Sub-Rule (1) & (2) of Customs, Central Excise and Service Tax Drawback Rules, 1995, the exporter is under obligation to produce evidence to show that the sale proceeds [foreign exchange] in respect of goods exported have been realized within the time limit prescribed under the Foreign Exchange Management Act (FEMA), 1999. Further a Public Notice No. 19/2015 dated 02.12.2015 was issued by Commissioner of Customs (Export), ACC, Sahar wherein, it was stipulated that the exporters will submit a certificate from the authorized dealer (s) or Chartered Accountant providing details of shipment beyond the prescribed time limit including the extended time limit, 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. Also, a Facility Notice no. 08/2016-17 dated 18.08.2016 was issued to sensitize all the exporter/their CHA s that in case their name is 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.

3. As the exporter in these two cases 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 (FEMA), 1999, show cause notices were issued to these exporters proposing to recover the amount of drawback already paid alongwith interest.

4. The Adjudicating authority viz Assistant Commissioner vide his Orders in Original No.AC/YK/6257/16-17/ADJ/ACC dated 31-03-2017 and AC/YK/6258/16-17/ADJ/ACC dated 31-03-2017 confirmed the demand of drawback amount of Rs. 37,825/- and Rs.81038/- respectively, alongwith the applicable interest and penalty of Rs.5000/- each was imposed, as per Rule 16(A), Sub Rule (1) & (2) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 read with Section 75A(2) and Section 28A of the Customs Act,1962.

5. Being aggrieved, the applicant filed appeal before Commissioner of Customs (Appeals)Mumbai Zone-III who vide Orders in Appeal MUM-CUSTOM-AXP-APP-125/19-20 dated 12-06-2019 and MUM-CUSTOM-AXP-APP-126 /19-20 dated 12-06-2019 rejected the appeals being time barred holding them filed beyond time limit prescribed under Section 128 of the Customs Act, 1962.

6. Aggrieved by the aforesaid OIA's the applicant filed the Revision Applications before this authority on the following identical grounds.

6.1 The Commissioner (Appeals) has passed the impugned order issued on 12/6/2019 solely on the basis of the Appeal being allegedly barred by limitation and the merits have not been considered. The Commissioner (Appeals) has relied on Section 153 of the Customs Act for the same. It ought to be seen that the modes of service as prescribed in the said Section have not been adhered to by the office of the Assistant Commissioner of Customs, DBK (XOS), ACC Mumbai and no evidence to prove compliance of the said Section has been stated in the impugned order. Thus, the Applicant cannot be faulted for having to obtain the copy of the order through RTI.

6.2. The applicant was not given opportunity to be heard personally and the same is in violation of the principles of natural justice.

6.3. That obtaining of information through RTI from the concerned department is also a legitimate mode of obtaining a genuine copy of the order. Thus, Applicant could not have been faulted with for not being served as a consequence of adjudication proceedings. The applicant relied on Honourable High Court of Bombay at Goa case in respect of Shri Khurram Khazi v. The Regional Transport Authority & ors wherein it is held that receipt through RTI is appropriate when certified copy is not served upon the Applicant.

6.4. That no evidence has been looked into by the Commissioner (Appeals) to infer that the Applicant was indeed served as per Section 153 on a different date; that the Applicant had shown his bonafides by preferring the Appeal within limitation as provided in Section 128 of the Customs Act from the date of receipt of the copy of the order; that Section 128 of the Customs Act only prescribes calculation of period of limitation to start from 'date of communication'. In the present case, since the order had not been served upon/communicated to the Applicant by the concerned authority as per Section 153, the date of communication has to be held to be date of receipt of order through RTI.

6.5. The Commissioner (Appeals) has relied upon: i) State of Jharkhand & Ors vs Ambay Cements & Anr. which does not apply to the facts of the present case - where the issue pertains to limitation of the present case - where the issue pertains to limitation; ii) Eagle Flask Industries Ltd vs Commissioner of Central Excise. It ought to be seen that the said Judgment pertains to exemption sought and compliances to be made by the party seeking the said exemption. In the present case, the Commissioner (Appeals) has stated that since service is not as per Section 153, the date on which order was obtained

by RTI cannot be considered. It ought to be seen that compliance of Section 153 in respect of service or order has to be done by the concerned Authority and not by the Applicant. Thus, it is the concerned Authority that has apparently breached the said provision and the Applicant cannot be penalized for the same by ex-parte rejection of Appeal on the said ground; and iii) Doaba Rolling Mills (P) Ltd. vs Cegat which does not apply to the facts and circumstances of the present case.

6.6. In light of the above, the appeal was preferred within the period of limitation as the same was received by the Applicant only through RTI as a last resort, since the Customs Authorities did not give copy of the order levying payment of duty, interest and penalty in spite of several persistent requests and order was not served upon the Applicant as per Section 153 of the Customs Act. Hence, the order issued on 12/6/2019 in Appeal no.MUM-CUSTOM-APP-125/19-20 deserves to be quashed and set aside.

6.7. That no copy of the impugned order dated 31/3/2017 was served upon the Applicant by the concerned Authority On the Applicant's appeal in respect of the drawback amount of Rs. 37,825/-, the Customs Authorities placed a Lien of Rs. 37,825/- each in their 5 Bank Accounts i.e. 5 Times on 5 Different Bank Accounts, when only one single Amount of Rs. 37,825 was alleged to have been due. Applicant was in knowledge of the same only through his following 5 Bankers. Thus the lien was placed for the Total Amount of Rs. 1,89,125/-, when only Rs. 37,825/- was alleged to have been due from the Applicant. Applicant thereafter had to obtain the copy of the order through the Right to Information Act. Thus, there has been breach of natural justice in the act of auto-lien by the concerned Authority as well and in light thereof, the impugned order deserves to be quashed and set aside.

6.8. That the Duty Drawback, Penalty & the Interest amount that accrued on the amount allegedly owed by the Applicant was paid by the Applicant on 27/02/2019 as soon as the Applicant was orally informed that the impugned order had been passed and interest was due, through Bank Demand Draft No. 003889 dtd. 27-02-2019 drawn on HDFC Bank Ltd., Borivali West Branch, Mumbai in favour of Commissioner of Customs, A/C Mumbai, A/C.

6.9. That as on date, the Applicant is in possession of Bank Realisation Certificates which have been submitted & acknowledged by the Customs Authorities (Drawback) on 27/02/2019 for the entire amount of Rs. 37,825/-. Thus, there has been no malafides on part of the Applicant and in light thereof, the Applicant is entitled to refund of the entire amount illegally recovered by the concerned Authority plus the penalty plus the interest thereon.

6.10. That the Applicant has neither contravened any provisions or abetted any such contravention or failed to comply with any provisions of the Customs Act, 1962, as prescribed U/S 117, and therefore Penalty wrongly levied of Rs. 5,000/- be quashed and refunded.

In view of the above the applicant requested to set aside the impugned Order in Appeal.

7. Personal hearings were scheduled on 17-11-2022, 01-12-2022, 05-01-2023 and 19-01-2023. However, no one appeared before the Revisionary Authority for personal hearing on any of the appointed dates for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records..

8. Government has carefully gone through the relevant case records available in case files, perused the impugned Order-in-Original and Order-in-

Appeal and considered the written submissions made by the applicant in Revision Applications.

9. Government observes that the applicants had 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 realised within the time limit prescribed under FEMA, 1999. The applicants had therefore been issued show cause cum demand notices for recovery of the drawback sanctioned to them along with interest. 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 at the applicable rate. The applicant has claimed that they have not received the copies of the respective OIO's passed by the adjudicating authority deciding the show cause notices for recovery of drawback sanctioned and that they became aware of the respective OIO's only when their Banks intimated them about the lien placed by the Customs Authorities. They then received the OIOs only after filing a RTI application and these matters were brought to the notice before Commissioner (Appeals) who has rejected the appeals on the ground of time bar. In these revision applications, the applicants have made out similar grounds to contend that the appeals were within time as they had filed the appeals within the statutory appeal period after the receipt of the OIOs in compliance to the RTI filed.

10. Government observes that while passing the impugned orders, the Commissioner (Appeals) has held that the applicants have obtained copies of the respective OIOs after filing RTI application 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 OIOs had actually been served on the applicants.

11.1 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]"*

11.2 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.[paras 5, 6, 7, 8, 9, 11]"*

11.3 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]"*

12. 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's. 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. However, going through the documents submitted along with the Revision Application, Government finds that in reply to the RTI filed by the applicant, A.C. (Customs) have informed that the Order in Original was forwarded to the applicant's address vide speed post but the same was undelivered citing insufficient address. This clearly indicates that the applicant had not received the OIO then and had received the same in compliance to the RTI filed by the applicant.

11. Further, Government finds that the applicant has submitted 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. Government therefore sets aside the impugned Orders-in-Appeal viz MUM-CUSTOMS-APP-125/19-20 dated 12-06-2019 and MUM-CUSTOMS-APP-126 /19-20 dated 12-06-2019 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.

  
19/4/23  
(SHRAWAN KUMAR)

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

ORDER No. <sup>HH2-HH3</sup> /2023-CUS (WZ) /ASRA/Mumbai Dated 19-04-2023

To,

1. M/s Adel International, 701, Vivek Building, New Link Road, Kanderpada, Dahisar (West), Mumbai-400068
2. The Commissioner of Customs, (Export), Air Cargo Complex, Sahar, Andheri(E), Mumbai - 400099

Copy to :-

1. Commissioner of Customs (Appeals)Mumbai Zone-III, Awas Corporte Point (5<sup>th</sup> Floor), Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Muumbai-400059
2. Assistant Commissioner of Customs DBK (XOS), Air Cargo Complex, Sahar, Andheri(E), Mumbai - 400099
3. Sr. P.S. to AS (RA), Mumbai
4. Notice Board.