

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

F.No.371/121/DBK/2019-RA

4250

Date of issue: 28.06.2023

ORDER NO. 190/2023-CUS (WZ)/ASRA/MUMBAI DATED 23.6.2023
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. Forever Exports.

Respondent : Commissioner of Customs (Export), ACC, Mumbai

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-AXP-APP-1186-18-19 dated 28.02.2019 passed by
the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by M/s. Forever Exports, (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. MUM-CUSTOM-AXP-APP-1186-18-19 dated 28.02.2019 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that the Applicant had obtained a drawback amounting to Rs.23,32,327/- in respect of the exports done by them. As the applicant failed to produce evidence for realization of export proceeds in respect of the concerned exports, a show cause notice was issued on 02.07.2010 and after due process of law, the adjudicating authority ordered recovery of demand amount of Rs.23,32,327/- alongwith interest vide Order-in-Original No. AC/MM/3628/2012-13/ADJ/ACC dated 12.12.2012. Aggrieved, the Applicant filed an appeal which was rejected by the Commissioner (Appeals) vide impugned Order-in-Appeal being time barred under Section 128 of the Customs Act, 1962.

3. Hence the Applicant has filed the impugned Revision Application mainly on the following grounds:

- i. The Applicant states that, the Commissioner has gone beyond what has been laid down in the said Section 153 of the Customs Act, 1962. Section 153 only states that, the mode through which order, decision, summons or notice is required to send or tendered, ought to approved by the Commissioner of Customs.
- ii. The Applicant further states that as per Section 128 of the Customs Act, 1962, the person aggrieved by any decision or order passed by an officer of customs may file an appeal to the Commissioner (Appeals) within 60 days from the date of the communication to the person of such decision or order. The said Sections do not specifically require the Drawback (XOS) Section, Air Cargo Complex, being the purported proper authority to serve a copy of the

- Impugned Order-in-Original to the Applicant for the purpose of filing an Appeal. Therefore, the Commissioner drawing a conclusion that the date of receipt of the copy of the Order-in-Original provided by the TRC Section cannot be considered as the date of communication for the purpose of filing the Appeal is bad in law.
- iii. The Applicant states that Section 128 of the Customs Act, 1962 requires an aggrieved person to file an Appeal within 60 days from the date of Communication of the Order. It is submitted that the limitation of filing an Appeal commences from the date of receipt of the Impugned Order-In-Original dated 12th December, 2012. The Applicant has received the aforesaid Impugned Order-in-Original dated 12th December, 2012 only when the Applicant visited the office of the Tax Recovery Cell on 13th March, 2018. In view of the aforesaid, the said Appeal has been filed well within the period of limitation and hence the same is not time barred. Therefore, the question of the Commissioner having the power to condone delay does not arise as the Applicant had rightly filed the Appeal within a period of 60 days as has been laid down under Section 128 of the Customs Act, 1962.
- iv. Applicant further submit that as per Rule 17 of Drawback Rules 1995, powers are vested to relax the Provisions of recovery of drawback from the Exporter, if failed to comply with any of the provisions of the said rules, and has thus been entitled to drawback after considering the representation, if any, made by such exporter, for reasons to be recorded in writing, exempt such exporter from the provisions of such rule and allow drawback in respect of such goods. Applicant submit that they were deprived of any such opportunity to make their representation. In fact, there is no contravention of provisions of Drawback Rules as the sale proceeds have been received within the stipulated time. Therefore, allegations in the show cause notice that "Exporter have not realized the foreign exchanges involved on the goods exported under the shipping bills (attached to the notice) as per Rule 16[A], Sub-rule (1) & (2) are not

correct and are baseless. Therefore, order of Respondent is required to be quashed and set aside.

- v. In the case of Handicrafts & Handlooms Exports Corp. of India Ltd. 2018 (359) ELT 170 (Mad) the Petitioner therein was issued a show cause notice calling upon them to show cause why drawback granted should not be recovered in the absence of receipt of sales proceeds of the goods exported. It was the case of the Petitioner that since their premises had been shifted, they did not receive a notice for personal hearing and therefore an Order was passed confirming the said demand. In the said case, the Hon'ble Madras High Court recorded that the proceedings were ex-parte. In view of the aforesaid, the Hon'ble Madras High Court recorded that since the Petitioner were in possession of the bank certificate, the realization should not be nonsuited on technical grounds and hence allowed the Petition by way of remand for fresh consideration. The Commissioner while passing the Impugned Order failed to consider the aforesaid judgment which is similar on facts to the Applicant's ease, and is binding on the Department. Without prejudice to what has been stated herein above, the Commissioner failed to consider that various judgments of the Hon'ble Supreme Court as well as the Hon'ble High Courts and the Appellate Tribunals which has held that Departmental Authorities cannot pass ex-parte Orders and are bound to give the Assessee a Personal Hearing on merits before passing any Orders.
- vi. The Commissioner failed to appreciate that the copy of the Show Cause Notice dated 2nd July 2010 was never received by the applicant from the office of the Commissioner of Customs (Exporter) in order to enable them to file an appropriate Reply and deal with the allegations laid down in the said Show Cause Notice dated 2nd July, 2010. The Applicant submits that, the Applicant is in possession of the Chartered Accountant Certificate which evidences the realization of exports. As the Applicant's business was wound up and its office premises were shifted, the Applicant did not receive the said Show Cause Notice dated 2nd July, 2010 nor did they receive a copy of the

Personal Hearing Notices to place on record the said Certificates before the Adjudicating Authority.

- vii. The Applicant states that the Applicant was unaware of the Circular No. 5/2009-CUS dated 2nd February, 2009 as the Applicant had closed its operations and wound up its business in the month of March, 2007. The said Circular was issued nearly 2 years after the winding up of the Applicant's business. The Applicant got to know about the said Circular for the first time, only on the 13th March, 2018 when the Show Cause Notice dated 10th July, 2010 was handed over to the Applicant by the Customs Authorities. It is submitted that the Commissioner failed to take into consideration that, the provision for submitting the Bank Realisation Certificate/ Chartered Accountant for the exports realized for the period from 1st January, 2004 to 31st December, 2007 Certificate came into effect only on 2nd February, 2009 when the said Circular was issued by which time the Applicant was no longer carrying on the aforesaid business. The Applicant further submits that non submission of the Bank Realisation Certificate/ Chartered Accountant Certificate for the exports, pursuant to the said Circular was merely a procedural lapse on part of the Applicant due the fact that the Applicant was under a bonafide belief that it was not required to submit the Bank Realization Certificate/ Chartered Accountant's Certificate and also the fact that the Applicant's had wound up its business in 2007.
- viii. It is stated that, it was only when the Applicant visited the office of Tax Recovery Cell on 13th March, 2018 that, the Applicant was for the first time served with a copy of the Show Cause Notice dated 2nd July, 2010 along with a copy of the Impugned Order-in-Original dated 12th December, 2012. When the Applicant were made aware of the said demand raised in the Impugned Order-in-Original dated 12th December, 2012, the Applicant immediately paid the principal amount of Rs. 23,32,327/- on 13th March, 2018. In view of the aforesaid no interest and penalty can be demanded from the Applicant, as the Applicant has already paid the principal amount of Rs. 23,23,327/-.

- ix. It is submitted that the Applicant company was incorporated in the year 1999 and have been regularly carrying on the business of exporting the said goods to various countries. The Applicants have always followed due procedure of filing the Bank Realization Certificate with the Customs Authorities for all its earlier exports.
- x. The Applicant states that there has been no effective service of the Impugned Order-In-Original dated 12th December, 2012 on the Applicant either by way of Courier or Post. It was only when the Applicant visited the office of the Tax Recovery Cell on 13th March, 2018 that they were handed over a copy of the Impugned Order. It is submitted that the Hon'ble Supreme Court in Raja Harish Chandra Raj Singh Vs Deputy Land Acquisition Officer reported in 1962 (1) SCR 676 has held that, ".....where the rights of a person are affected by an order and limitation is prescribed for the enforcement of a remedy by the person aggrieved against the order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the order to the party concerned".
- xi. The Hon'ble Supreme Court in Collector of Central Excise Vs. M.M.Rubber Company reported in 1991 55 ELT 289 has held that: "So far as the party who is affected by the order or decision for seeking his remedies against the same, he should be made aware of passing of such order the parties affected by it have a reasonable opportunity of knowing of passing of the order and what it contains. The knowledge affected by such a decision either actual or constructive is thus an essential element which must be satisfied before the decision can be said to have been concluded and binding on him otherwise the party affected by it will have no means of obeying the order or acting in conformity with it or of appealing against it or otherwise having it set.....".
- xii. The Applicant submits that it is apparent from the aforesaid judgments that for an Adjudication to be complete, the Assessee has to receive a copy of the Order which has to be communicated to him

or he has to have a reasonable opportunity of knowing of the passing of the Order and what it contains.

In the light of the above submissions, the applicant prayed to set aside the impugned order with consequential relief.

4. Personal hearing in the matter was held on 16.02.2023. Shri Anupam Dighe, Advocate, appeared before me online and submitted that the Commissioner (A) has rejected their appeal on limitation. He submitted that they came to know about OIO when their account was frozen. They filed appeal within time limit of receipt of order. He further submitted that foreign remittance has been received. He requested to allow their application.

5. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

6. Government observes that the applicant had 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 alongwith interest. The applicant 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 had not received the impugned OIO passed by the adjudicating authority deciding the show cause notice dated 02.07.2010 for recovery of drawback sanctioned as they had wound up their business in March'07 and that they became aware of the impugned OIO only when their Bank account was frozen by the Customs Authorities. They then received the OIO only after approaching the Customs Authorities and these facts were brought to the notice of Commissioner (Appeals) who has rejected the appeal on the ground of time

bar. In the revision application, the applicant has made similar grounds and contended that the appeal was filed within the statutory appeal period after the receipt of the OIO. In the given facts and circumstances and also in the larger interest of justice, Government would be looking into the merits of the case.

7. Government observes that the Circular No. 5/2009-Customs dated 02.02.2009 had set out a mechanism to monitor the realisation of export proceeds. It is observed that exports involved in the instant case pertained to the period prior to 2010-11. The SCN was issued on 02.07.2010. The circular dated 02.02.2009 was in vogue and therefore the applicant was required 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. The applicant has contended that they had submitted about availability of such evidence before Commissioner (Appeals). However, the appeal filed by the applicant was dismissed on the grounds of time bar by the Appellate authority.

8. Government observes that the applicant has submitted copies of 'Exports reconciliation statements', duly certified by Chartered Accountants – M/s. B.N. Dudani & Co., for the quarterly period starting from Jan'04 – Mar'04 to Jan'07 – Mar'07 depicting date-wise receipt of foreign currency in their bank account held at Centurion Bank of Punjab (subsequently acquired by HDFC Bank Ltd.) against the date-wise drawback amount mentioned in the impugned SCN dated 02.07.2010. The reconciliation statements are supported by bank statements for the relevant period issued by HDFC Bank Ltd., Bandra (West) branch. Documents for realisation of foreign exchange relating to the total drawback amount of Rs. 23,32,327/- during the said period starting from January 2004 to March 2007 are required to be verified by the proper officer.

9. In view of the above discussion and findings, the Government sets aside Order-in-Appeal No. MUM-CUSTM-AXP-APP-1186-18-19 dated

28.02.2019 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the instant Revision Application by remanding the matter to original authority for appropriate verification. The applicant should be provided reasonable opportunity for submission of required documents.


(SHRAWAN KUMAR)

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

ORDER No. 490 /2023-CUS (WZ)/ASRA/Mumbai dated 23.6.23

To,

M/s. Forever Exports,
601, Palatial Apartment,
21st Road, Next to Executive Enclave Hotel,
Bandra West – 400 050.

Copy to:

1. Commissioner of Customs,
Air Cargo Complex, Sahar,
Andheri (East), Mumbai – 400 099.
2. Advocate Anupam Dighe,
M/s. India Law Alliance,
Surya Mahal, 1st Floor,
5, Burjorji Bharucha Marg,
Fort, Mumbai – 400 023.
3. Sr. P.S. to AS (RA), Mumbai
4. ~~Guard file.~~