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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

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F.No. 371/37/DBK/2020-RA /4973 Date of issue: 03.08.23

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ORDER NO. 558 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.7.2023  
OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,  
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE  
OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

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Applicants : M/s. Kay Kay Art P. Ltd.

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

Subject : Revision Applications filed, under Section 129DD of the Customs Act,  
1962, against the Order-in-Appeal No. Mum-CUSTOM-AXP-APP-791/19-20 dated  
27.12.2019 passed by Commissioner of Customs (Appeals), Mumbai Zone-III.

## ORDER

This Revision Application has been filed by M/s. Kay Kay Art P. Ltd.(hereinafter referred as 'applicant') against the Order-in-Appeal No. Mum-CUSTOM-AXP-APP-791/19-20 dated 27.12.2019 passed by Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Briefly stated, facts of the case are that a show cause notice was issued to the applicant, demanding Rs. 9,42,753/- as the drawback amount obtained for exports made under the Shipping Bills, which is required to be returned to the Customs Department with applicable interest as the exporter has not realized the foreign exchange involved in the exported goods, as per Rule 16(A) Sub Rule [1] and [2] of Customs, Central Excise and Duties and Service Tax Drawback Rules, 1995. Earlier a Facility Notice No. 05/2017 dated 07.06.2017 was issued and all the exporter whose name was appeared in the said list were requested to submit BRC's/Negative statement for subject period before 15.07.2017. Applicant did not submit any reply against the said Facility Notice. Further, a public Notice No. 24/2017 dated 17.07.2017 has been issued extending the time limit for submission of documents not later than 31.07.2017, exporter has not submitted any documents regarding this. Thereafter, the Notice dated 28.08.2017 with the list of Shipping Bills pending for realization of export proceeds was issued to the applicant for submission of documents within 30 days of the receipt of the instant notice. The applicant has neither submitted the proof of their realization of export proceeds nor appeared for personal hearing on the given dates even after been given so many opportunities. Since the exporter failed to produce evidence to show that the sale proceeds in respect of the goods exported have been realised, the adjudicating authority confirmed the demand. Aggrieved, the applicant filed appeal, however, the Appellate authority vide OIA NO. Mum-CUSTOM-AXP-APP-791/19-20 dated 27.12.2019 rejected the appeal holding them time barred, being filed beyond the time limit prescribed under Section 128 of the Customs Act, 1962.

3. Hence, the Applicant has filed the impugned Revision Applications mainly on the following identical grounds:

- i. The impugned Order-in-Appeal is passed in gross violation of principles of natural justice, as the Ld. Commissioner (Appeals) ought to have given hearing before dismissing the Appeal as time barred, when the Applicants had clearly indicated that the impugned Order-in- Original was received only on 22.10.2019 under Application made under RTI and was not served on them.
- ii. The Applicants' Director had made Application under RTI and though the reply received states that it was sent through Speed-Post, but no details of speed post i.e. acknowledgement of receipt was provided and the attested copy of demand cum Show Cause Notice and Order- in-Original was enclosed with the RTI Application. The Ld. Commissioner (Appeals) nowhere states that the impugned Order-in- Original was served on the Applicants.
- iii. The Applicants had relied upon Interim Order No.1/44/2018 dtd.6.12.2018 in the case of Adeeshwar Enterprises India Vs. CC, Mumbai (Air Cargo Export). The Hon'ble Tribunal in this order held that the revenue could not place even the EMS number under which the speed post was claimed to have been dispatched by the Deptt., except the extract of the dispatch register. Therefore, in the absence of clear evidence of communication of the Order-in-Appeal by the Revenue, the date on which the order was received by the Applicant under the RTI, was considered as the date of communication of the order and hence the Appeal is filed within time. In the present case also, no evidence is cited by the Ld. Commissioner (Appeals) that the impugned Order-in-Original was served on the Applicants.

- iv. As per the provisions of Section 153 of the Customs Act, 1962, order has to be served by registered post or speed post with acknowledgement due delivered to the person for whom it is issued at the last known of business or residential address. Therefore, in the absence of acknowledgement, there was no service of the impugned Order-in-Original on the Applicants and therefore, as the impugned Order-in-Original was received on 22.10.2019 and the Appeal was filed on 7.11.2019 within 15 days of receipt of the order. The Appeal filed is within time and the Ld. Commissioner (Appeals) has grossly erred in disposing off the Appeal by holding that it is time barred. The Applicants further submit that this was not a case of delay, as the time limit started only after receipt of the impugned Order-in-Original on 22.10.2019.
- v. Even on merit they had produced realization certificates which were enclosed in the Appeal Paper regarding realization of export proceeds in respect of exports made during the period 2007 to December 2011. Further, various Hon'ble High Courts have held that if the Show Cause Notice is issued beyond a period of 3 years demanding drawback, the demand is not sustainable. In the Applicants' case, the Demand cum Show Cause Notice is issued on 28.8.2017 beyond the period of 6 years from the last shipment and 10 years after the first shipment.
- vi. In view of above Applicant requested to :
  - i. Set aside the impugned Order-in-Appeal.
  - ii. Set aside the penalty imposed.

4. A Personal hearing was fixed in this case on 17.05.2023. Ms. Kiran Doiphode, Advocate, appeared for hearing and reiterated earlier submissions. She further submitted that Comm(A) has decided against them on limitation. She stated that they came to know about OIO only when their consignment was held due to alert in EDI. She further submitted that they filed appeal within time

once they received OIO. She further submitted that Comm(A) has passed order in gross violation of material justice. She also stated that remittances in all cases have been received. She requested to allow the Application.

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

6. Government observes that the applicant has all 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 along with interest and penalty. 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 and penalty at the applicable rate. Applicant has claimed that they have not received the copies of the SCN & OIO passed by the adjudicating authority deciding the show cause notice for recovery of drawback sanctioned and that they became aware of the OIO only when his consignment was stopped based on the alert in the EDI system. This matter was carried in appeal before Commissioner (Appeals) who has rejected the appeal on the ground of being time bar.

7. Government observes that the Circular No. 5/2009-Customs dated 02.02.2009 had set out a mechanism to monitor the realization of export proceeds. The circular dated 02.02.2009 was in vogue and therefore the applicants were required to follow the instructions contained therein and were duty bound 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. Government observes that no ground has been made out in the revision application to the effect that the applicant had already

submitted evidence before the Assistant/Deputy Commissioner to substantiate receipt of export proceeds before issue of notice. The applicants ground regarding submission of evidence of realisation of foreign exchange is that they furnished such evidence before Commissioner (Appeals) and not at any time before that. Government observes that the impugned Order by the Appellate authority are passed during the year 2019. Even if it is presumed that the applicants claim about receipt of foreign exchange is accurate, the record suggests that the applicants have not been diligent and did not intimate the Department about the receipt of foreign exchange. However, the proximate cause for the revision application is that the appeals filed by the applicant has been dismissed on grounds of time bar.

8. While passing the impugned orders, the Commissioner(Appeals) has observed that the applicant have obtained copies of the OIO from CPIO TRC(Export) Section in response to their 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 OIO had actually been served on the applicant.

9.1 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]"*.

9.2 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.[paras5, 6, 7, 8, 9, 11]"*

9.3 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]”*

10. 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. Needless to say, the onus to establish service of the order to the applicant was upon the Department and Commissioner (Appeals) has not given any findings as to how the onus has been discharged. However, the 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 in terms of Section 128 of the Customs Act, 1962.

11. In view of the assertions made by the applicants regarding receipt of export proceeds, it would be travesty of justice if applicant realized sale proceeds still the recovery orders are sustained exactly on the same ground of non realisation of sale proceeds. Therefore, appropriate verification would be vital to settle the issue once and for all. Government therefore sets aside the impugned Order- in-Appeal 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 applicant is 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.

*Shrawan Kumar*  
28/7/23

(SHRAWAN KUMAR)  
Principal Commissioner & Ex-Officio  
Additional Secretary to Government of India.

ORDER No. 358/2023-CUS (WZ)/ASRA/Mumbai dated 28.7.23

To,

1. M/s. Kay Kay Art P. Ltd., Shah & Nahar Ind. Estate(A-2), Dhanraj Mill Compound, S.J. Marg, Lower Parel(W), Mumbai-400013.
2. The Pr. Commissioner of Customs(E), Air Cargo Complex, Sahar, Andheri(E), Mumbai - 400 099.

Copy to:-

1. The 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.
2. Shri V.M. Doiphode & Co (Advocate), 285, Shahid Bhagat Singh Road, Chamber No. 44 & 45, 5<sup>th</sup> Floor, Sucheta Niwas, Fort, Mumbai-400001.
3. Sr. P.S. to AS(RA), Mumbai.
4. Guard file.

