

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.371/79/DBK/2020-RA/6213

Date of issue: 18.08.2023

---

ORDER NO. 588 /2023-CUS (WZ)/ASRA/MUMBAI DATED 16.8.2023  
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. Chemiesynth (Vapi) Ltd.

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-755/19-20 dated 29.11.2019 passed by the  
Commissioner of Customs (Appeals), Mumbai -III.

## ORDER

This Revision Application is filed by M/s. Chemiesynth (Vapi) Ltd., (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. MUM-CUSTOM-AXP-APP-755/19-20 dated 29.11.2019 passed by the Commissioner of Customs (Appeals), Mumbai -III.

2. Brief facts of the case are that the Applicant had obtained drawback totally amounting to Rs.58,752/- in respect of the exports done by them through 7 Shipping Bills during the period June 2010 to December 2010. 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 01.09.2017 and after due process of law, the adjudicating authority ordered recovery of demand amount of Rs.58,752/- alongwith interest and penalty of Rs. 5,000/- vide Order-in-Original No. AC/JD/2278/2017-18/DBK(XOS)/ACC dated 27.03.2018. 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 Commissioner (Appeals) is in error in holding that the appeal was barred by limitation when the exact date of the delivery (service) of the order is not identified by the Commissioner (Appeals). The Commissioner (Appeals) has failed to appreciate that there was no malafide intention on the part of the Applicant. The Commissioner is in error in ignoring the averment of the Applicant about the date of receipt following the blockage of their IEC. The Commissioner (Appeals) should have decided the appeal on merit considering that the Applicant received the impugned Order-in-Original on 07/09/2019 and filed the appeal within sixty days of receipt of the said order (well before the last date for filing the appeal on 22/10/2019).

- ii. the Commissioner (Appeals) has not shared the earlier details, if any, related to the supply of the OIO by Drawback (XOS) Section, the Postal Consignment Code for supplying the OIO with the Applicant. There is no mention about the date of booking of the postal consignment or the delivery to the Applicant. It is also doubtful if the said order of the Assistant Commissioner of Customs was dispatched to the Applicant. The impugned order has been passed without sharing these details with the Applicant and without giving any opportunity to the Applicant to explain their point of view. Therefore, the impugned order passed ex-parte in gross violation of principles of natural justice is liable to be set aside for this reason alone.
- iii. The Applicant has till date not received even the photocopy of the SCN F. No. S/3-Misc/DBK (XOS)-ss (1024)/17-18 ACC dated 01/09/2017 in spite of consistent follow-up for the same, albeit after their export clearance was kept on hold pending NOC from Dy. Commissioner, TRC(X), Sahar, Mumbai. The Applicant was granted NOC for the clearance of export consignments on 24/06/2019 in response to the Applicant's letter dated 24/06/2019 only on making the deposit of drawback Rs. 58,752 and Penalty of Rs. 5,000 but the related SCN has not be received till date.
- iv. The Assistant Commissioner had not appreciated that Applicant was entitled to three adjournments during the course of adjudication in terms of the proviso to section 128(1A) of the Customs Act, 1962. It implies that the Applicant was entitled to a minimum of four opportunities of hearing. However, only two opportunities were extended to the Applicant in the instant case, even presuming that the respective communications were received by the Applicant exporter. In the circumstances, the Assistant Commissioner should have refrained from passing an ex-parte order and the Order-in-Original dated 27/03/2018 deserved to be set aside on that ground alone.
- v. In the present case, the export proceeds (sale proceeds) in respect of all seven shipping bills were realized within the period allowed under the Foreign Exchange Management Act, 1999. In this context, please

refer to the Bank Realization Certificates (BRC's) by Bank of Baroda, Vapi retrieved from Finacle (Electronic Bank Realization Certificate Module). The Bank of Baroda, Vapi, has also issued 'Periodic Half Yearly Certificates' to the effect that no export proceeds are pending realization in respect of the exports during the respective 'Half Years'. Similar, certificates (negative certificates) are also issued by the Applicant's Chartered Accountant M/s. Manoj Shah & Company. The certificates from the Bank and the Chartered Accountant clearly indicate that the Applicant has realized the entire export proceeds for the shipping bills listed in Para 2 above. The said certificates from the Bank of Baroda and the Chartered accountant have been collectively marked as Annexure 141 and enclosed herewith. Therefore, Rule 16A has no application in the present case and drawback paid to the Applicant exporter is not liable to be recovered. The Applicant, having realized the export proceeds within the time stipulated under FEMA, was under a bonafide belief that they had complied with the relevant regulatory requirements. It is a settled position of law that the substantive benefit (drawback amount) should not be denied to the Applicant for the procedural infraction, if any (say, non-submission of Negative Statements), when the Applicant has fulfilled the substantive requirement of realization of Sale Proceeds within time stipulated under FEMA.

- vi. The SCN dated 01/09/2017 was issued for recovery of drawback for the export shipments during June 2010 - December 2010. Thus, the SCN is issued after a period which extends between (6 years 9 months) to (7 years 3 months). Though, Rule 16 of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 does not prescribe any period, a reasonable period has to be read into it. In this context we refer to and rely upon the following decisions:
- Pratibha syntex Ltd vs Union of India [2013(287) ELT 290 (Guj.)]
  - Padmini Exports vs Union of India [2013 (284) ELT 490 (Guj.)]

Therefore, the SCN issued after unreasonable period of time is hit by limitation and is liable to be set aside on this ground.

- vii. The Assistant Commissioner had erred in imposing penalty of Rs.5,000 under section 117 of the Customs Act, 1962 for the reason that-
- The export proceeds are received in time;
  - Drawback sanctioned and paid to the Applicant is not liable to be recovered;
  - Non-submission of the negative statements emanates from the fact that the realization details are electronically communicated by the Authorized Dealer;
  - The Applicant, having realized the export proceeds within the time stipulated under FEMA, was under a bonafide belief that they had complied with the relevant regulatory requirements;
  - Penalty is not liable to be imposed only because it might be lawful so to do. In this context we refer to the decision of the Hon'ble Supreme Court in the case Hindustan Steel Vs State of Orissa reported in 1978 (2) ELT J159 (S.C.).
- viii. Interest is corollary with the principal and when demand for sanctioned drawback is not sustainable, the demand for interest would not survive.

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 17.05.2023. Shri Prashant Patankar, Consultant appeared online and submitted that OIA has rejected the appeal only on limitation without going into merits. He further submitted that the applicant came to know about OIO only when their export consignment was held up due to an alert in EDI. He further informed that appeal was filed in time from the date OIO was received. He further stated that all BRCs have been received and submitted with the application. He requested to allow the 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 duty drawback amounting to Rs. 58,752/- in respect of exports done 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 and penalty. 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 SCN, PH Notices and OIO passed by the adjudicating authority deciding the show cause notice for recovery of drawback sanctioned as the same were sent on their old address and that they became aware of the OIO when their export consignment was put on hold for NOC from TRC(X). Thereafter, they received the OIO on 07.09.2019 after approaching the Customs Authorities and these facts were brought to the notice before Commissioner (Appeals) who has rejected the appeal on the ground of time bar. 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 Facility Notice No. 5/2017 dated 07.06.2017 had set out a mechanism to monitor the realisation of export proceeds in respect of EDI shipping bills with LEO date prior to 01.04.2013. As per this notice all exporters mentioned in the Annexure enclosed therein were required to submit details of export realization received/certificate from authorized dealers/chartered accountants before 15.07.2017 which was subsequently extended till 31.07.2017. The applicant's name appeared in list of exporters mentioned in the Annexure to impugned Facility Notice. As the applicant failed to respond, a SCN was issued to them on 01.09.2017. The applicant has contended that they had furnished evidence regarding realization of export proceeds before Commissioner (Appeals). However, the appeal filed by the applicant was dismissed on the grounds of time bar by the Appellate authority.

8. Government notes that since the rejection by Appellate Authority is on the grounds of limitation and the applicant has contended that the impugned OIO and other related correspondence was not received by them and also their averment that they are in possession of proof of realisation of export proceeds in the form of Bank Realization Certificates (BRC's) issued by Bank of Baroda, Vapi, 'Periodic Half Yearly Certificates' to the effect that no export proceeds are pending realization in respect of the exports during the respective 'Half Years' issued by the Bank of Baroda, Vapi, and similar negative certificates issued by their Chartered Accountant M/s. Manoj Shah & Company, it is in the interest of justice that these claims of the applicant be taken up for verification.

9. In view of the above discussion and findings, the Government sets aside Order-in-Appeal No. MUM-CUSTOM-AXP-APP-755/19-20 dated 29.11.2019 passed by the Commissioner of Customs (Appeals), Mumbai -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. 588/2023-CUS (WZ)/ASRA/Mumbai dated 16.8.23

To,

M/s. Chemiesynth (Vapi) Ltd.,  
B-401/402, 4<sup>th</sup> Floor,  
Neelkanth Business Park,  
Vidyavihar (W), Mumbai - 400 058.

Copy to:

1. Pr. Commissioner of Customs (Export),  
Drawback (XOS) Section, Air Cargo Complex,  
Sahar, Andheri (East), Mumbai - 400 099.
2. M/s. Patankar Legal Combine,  
Office No.1, Neel Atharva,  
Opp. Durga Mata Temple,  
Telephone Exchange Road,  
Panvel (Old), Navi Mumbai - 410 206.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file.