

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. 371/292/DBK/2021-RA

Date of issue:

04.09.2023

ORDER NO. 618/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.8.2023  
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.

Applicants : M/s. Aabh Creations

Respondent: Pr. Commissioner of Customs (General), Mumbai

Subject : Revision Applications filed, under Section 129DD of the Customs Act,  
1962, against the Order-in-Appeal No. Mum-CUS-PK-GEN-28/2021-22 dated  
13.07.2021 passed by Commissioner of Customs (Appeals), Mumbai Zone-I.

## ORDER

This Revision Application has been filed by M/s. Aabh Creations (hereinafter referred as 'applicant') against the Order-in-Appeal No. Mum-CUS-PK-GEN-28/2021-22 dated 13.07.2021 passed by Commissioner of Customs (Appeals), Mumbai Zone-I.

2. Briefly stated, facts of the case are that Applicant, having IEC No. 0311012523 exported goods under drawback scheme and had availed drawback amounting to Rs. 17,99,118/-. CBEC vide Circular No.05/2009-Cus dated 02.02.2009 and the Commissioner of Customs (General), New Custom House, Mumbai vide Public Notice No 20/2009 dated 30.03.2009 issued guidelines for compliance by trade in respect of requirements of submissions of evidence of realization of export proceeds to the Customs at the port of export. It was ascertained from the EDI System that the exporter did not realize the export proceeds for the good covered under the said shipping bills. Therefore a notice dated 26.04.2016 was issued to the exporter under Sub Rule 16A(2) of the Customs, Central Excise and Service Tax Drawback Rules, 1995 requesting him to show cause as to why the drawback amount paid for the said shipping bills should not be recovered with interest under Sub Rule 16A(1) of the Customs, Central Excise and Service Tax Drawback Rules, 1995 and /or why penalty should not be imposed under the provisions of the Customs Act, 1962 for non-submission or late submission of the proof of realization of export proceeds. 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 realized, the adjudicating authority confirmed the demand. Aggrieved, the applicant filed appeal, however, the Appellate authority vide impugned OIA 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 grounds:

- i. The Commissioner Appeals order is not sustainable and is bad in law as he failed to check the facts that the Applicant had vide mail dated 10.01.2018 intimated to the officer in charge ICD, Mulund, that he has already submitted the CA certificates on 17.04.2017 for Export period from 01.01.2012 - 31.12.2015. He should have considered that.
- ii. the mention of order in original came to them as a surprise as they never received it, and it is settled law that the time limit for filing an appeal begins from the date of communication of order to the applicant and the date of communication of the aforementioned order is 06.03.2018 and the appeal was filed by the applicant on 27.04.2018 within 60 days of the communication of the order, adhering to the due diligence
- iii. there is a complete violation of principle of natural justice as they were never given an opportunity of being heard before passing of the order in original. It is stated fact that they were not aware of the Order in Original as it was never received by them and they requested in writing for the copy of the same to Asst. Commissioner of Customs, ICD, Mulund vide letter dated 28.02.2018 the applicant don't gain anything by deliberately delaying their own matter before the Hon'ble Commissioner appeal and had they been aware they would have replied.
- iv. the applicant in the year 2017-2018 was going through very difficult times due to illness of her mother-in-law, who was suffering from diabetes and had gone through by-pass surgery, as has been stated in her mail dated 10.01.2018 and she also were required to be taken to hospital for dialysis three time a week during the said period as due to high sugar levels in her body there was a kidney failure. She succumbed to illness and passed away in the year 2018, this resulted in delay in submitting the documents of export realization, though it was completed long back.

- v. the applicant submitted 8 CA certificates and intimated the same to the authorities vide their letter dated 13.04.2017 which was received on 17.04.2017 in the office of the Assistant Commissioner of Customs ICD Mulund. However, on 04.10.2017, again a letter was issued to them from the office of the Asst. Commissioner for demand of drawback. This should not have been ignored by the authorities.
- vi. the applicant submitted the bank statement for proof of realization of export proceeds, that clarifies beyond doubt that all the realization was completed as per the prescribed time limit by FEMA 1999/ RBI regulations in this regard.
- vii. Further, that the delay in submission of negative statements/ proof of export realization in prescribed format is just a procedural Slip and for this the applicant should not be made to bear the substantial loss of Rs. 17,99,118/- as their Drawback claim as it is ignorance of the facts due to mis communication between the department and the applicant.
- viii. Further, that the applicant already submitted the CA certificate for the period 01.01.2012-31.12.2015.
- ix. The Commissioner Appeals Order for demand for drawback claim with interest is not sustainable as the decision is not proper and just, considering the miscommunication.
- x. In view of above Applicant requested to set aside the impugned Order-in-Appeal.

4. A Personal hearing was fixed in this case on 07.06.2023. Ms. Arti Sehgal, Consultant and Mr. Ketan Bhinde, consultant, appeared for hearing and submitted that applicant came to know about OIO on 28.02.2018 when their consignment was put on hold in the EDI. They filed the Appeal in time. They further submitted that bank remittances have been realized. They 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 realized 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 is passed during the year 2021. 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. 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.

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*  
*30/8/23*  
(SHRAWAN KUMAR)

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

ORDER No. *6\8*/2023-CUS (WZ)/ASRA/Mumbai dated *30.8.2023*

To,

1. M/s. Aabh Creations, C-3, Om Gajanan Apt, JN road Mulund(W), Mumbai-400080.
2. The Pr. Commissioner of Customs (General), New Customs House Ballard Estate, Mumbai-400001.

Copy to:-

1. The Commissioner of Customs (Appeals) Mumbai, Zone – I, 2<sup>nd</sup> Floor, New Custom House Ballard Estate, Mumbai-400001.
2. Ms. Arti Sehgal, 3, Damji Kheraj Bldg, 3<sup>rd</sup> Floor R.R.T. road, Mulund(w), Mumbai-400080.
3. Sr. P.S. to AS(RA), Mumbai.
4. Guard file.

