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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
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Mumbai- 400 005

F. No. 371/66/DBK/2021-RA/6922 Date of issue: 21.09.2023

ORDER NO. 674/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.9.2023 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. D.G.M. Textiles

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-624/2020-21 dated 24.12.2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by M/s. D.G.M. Textiles against the Order-in-Appeal No. MUM-CUSTM-AXP-APP-624/2020-21 dated 24.12.2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2.1 Brief facts of the case are that the applicant is an exporter 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)(1) & (2) of the Customs, Central Excise and Service Tax Drawback Rules, 1995, an 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. In this regard, a Facility Notice no. 05/2017 dated 07.06.2017 had been issued for submission of Negative Statement/Bank Certificates for export proceeds realized against shipping bills with LEO date prior to 01.04.2013. All the exporters whose name appeared in the list enclosed with the said Facility Notice were required to submit BRCs/Negative statement for subject period before 15.07.2017. Subsequently, vide Public Notice No. 24/2017 dated 17.07.2017, the period for submission of documents was extended till 31.07.2017.

2.2 As the applicant 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, a show cause cum demand notice dated 15.05.2010 was issued to them proposing to recover the amount of drawback already paid amounting to Rs.17,58,772/- alongwith interest and penalty. The adjudicating authority passed the Order-in-Original No. AC//2012/ACC dated 03.01.2013 confirming the demand of drawback amount alongwith applicable interest 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) of the Customs Act, 1962. Aggrieved, the applicant filed an appeal, however the Appellate authority vide the impugned Order-in-Appeal rejected the appeal holding them time barred, being filed beyond the time limit prescribed under Section 128 ibid.

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

i. The Commissioner (Appeals) has rejected applicant's appeal solely on the ground of the same being barred by limitation. Section 128 of the Customs Act, 1962 prescribes three months as the period of limitation for filing of the appeal and the said period of three months is to be reckoned from the date of communication of the Order-in-Original. That the applicant had never received the Demand-cum-Notice, any intimation regarding personal hearing and Order-in-Original as the entire proceedings were conducted ex parte against them. That the applicant had come to know about the said Order-in-Original only when its shipments were withheld and/or bank accounts were frozen upon instructions from the Tax Recovery Cell (Export) Section of the Customs Department. It is then that the applicant immediately applied for the copy of the said Order-in-Original and filed the appeal well within three months from the date of receiving the copy of the said Order-in-Original from the Tax Recovery Cell (Export) Section or the RTI Section of the Customs Department. In this regard, the Hon'ble Madras High Court in O.A.O.A.M. Muthia Chettiar v. CIT [ILR 1951 Mad 815] has observed: "*If a person is given a right to resort to a remedy to get rid of an adverse order within a prescribed time", limitation should not be computed from a date earlier than that on which the party aggrieved actually knew of the order or had an opportunity of knowing the order and therefore must be presumed to have the knowledge of the order*". The Hon'ble Madras High Court took the view that even the omission to use the words "from the date of communication" in Section

33-A(2) of the Indian Income Tax Act does not mean that limitation can start to run against a party even before the party either knew or should have known about the said order. A similar question arose before the Madras High Court in Annamalai Chetti v. Col. J.C. Closte [(1883) ILR 6 Mad 189], wherein Section 25 of the Madras Boundary Act 28 of 1860 limited the time within which a suit may be brought to set aside the decision of the settlement officer to two months from the date of the award, and so the question arose as to when the time would begin to run. The High Court held that the time can begin to run only from the date on which the decision is communicated to the parties. *"If there was any decision at all in the sense of the Act"*, says the judgment, *"it could not date earlier than the date of the communication of it to the parties; otherwise they might be barred of their right of appeal without any knowledge of the decision having been passed"*. Adopting the same principle, a similar construction which has been placed by the Hon'ble Madras High Court in K.V.E. Swaminathan alias Chidambaram Pillai v. Letchmanan Chettiar [(1930) ILR 53 Mad 491] on the limitation provisions contained in Sections 73(1) and 77(1) of the Indian Registration Act 16 of 1908. It was held that in a case where an order was not passed in the presence of the parties or after notice to them of the date when the order would be passed the expression *'within thirty days after the of the order"* used in the said sections means within thirty days after the date on which the communication of the order reached the parties affected by it. These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. Thus, in the present case, the date of communication of the Order-in-Original to the applicant was

the date when the copy of the said Order-in-Original was supplied to the applicant by the Tax Recovery Cell (Export) Section of the Customs Department, not when the said Order-in-Original was passed.

ii. The Commissioner (Appeals) in para 4 of the appeal order wrongly assumed that since RTI reply was received by the exporter on the same address, the exporter would have received the order-in-original on the same address without requiring the department to prove the service of the impugned order.

iii. The Commissioner (Appeals) has wrongly treated the purported date of service of order as provided under Section 153 of the Customs Act, 1962 as the date of communication of the Order-in-Original. Commissioner (Appeals) utterly failed to appreciate, consider and record any finding upon applicant's specific submission in the appeal that it had never received the copy of Order-in-Original when it was passed. That the Commissioner (Appeals) also utterly failed to require the Adjudicating Authority to prove the service of Order-in-Original as contemplated under Section 153 of the Customs Act, 1962. That the burden to prove the service of order upon the applicant was entirely upon the Adjudicating Authority as it was the fact especially within its knowledge. In this regard, the relevant provision under the law is reproduced herein under:

> "Section 106. *Burden of proving fact especially within knowledge: When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".*

The Hon'ble Madras High Court had in its recent judgment dated 11.12.2017, in the case titled 'M/s. Ru's Marketing and Creative Vs. The Commissioner of Service Tax,' Civil Misc. Appeal No. 3141 of 2017 filed under Section 35-G of the Central Excise Act against the order dated 09.03.2017, passed by the Customs, Excise, and Service Tax Appellate Tribunal, held as under:

"11. It is trite law that limitation has to be reckoned only from the date when the actual service has been effected, subject to fulfilling the

mandatory requirement of showing proof of delivery. In the case on hand, the service of notice was effected on the appellant only on 23.12.2011 and there is nothing on the record to show that it was served on 9.5.11. Further, the order has been dispatched through speed post on 9.5.11, as is evident from the letter of the Superintendent(Appeals). However, prior to 10.5.13, service through speed post having not been a recognised/approved mode of service, it cannot be treated as service for reckoning the period of limitation. For the sake argument, even if the order is said to have been delivered by RPAD on 9.5.11, which apparently has not happened in this case, no proof having been filed to support such delivery, which is the mandatory requirement as per Section 37C (1) (a) of the Act, it is clear that the service of notice in the manner as prescribed under Section 37C (1) (a) has not been effected. Therefore, in the absence of any consideration and finding upon the issue of date of communication of the order upon the applicant, the impugned Order-in-Appeal is based entirely upon surmises and conjectures and liable to be set aside on this count alone."

The Adjudicating Authority, in the present case has failed to prove that the Order-in-Original was duly communicated to the applicant as provided under Section 153 of the Customs Act, 1962. Therefore, the period of limitation for filing the appeal before the Commissioner (Appeals) could not have started until the applicant obtained the copy of the Order-in-Original from the Tax Recovery Cell (Export) Section of the Customs Department.

iv. It was impossible for the applicant to file the appeal against the Order-in-Original until it obtained the copy of the same from the Tax Recovery Cell (Export) Section of the Customs Department. It is submitted that the impugned Order-in-Appeal is against the legal doctrine, expressed in the maxim i.e. *Lex non cogit ad impossibilia*, which means that the law does not compel a man to do that which is impossible.

v. It is settled law that the provision relating to limitation should be construed liberally while adopting a justice oriented approach. That a hyper technical and pedantic approach should not be adopted. That no person stands to benefit by deliberately filing an appeal beyond limitation, that effort should be made to decide the matter on merit, rather than of rejecting the same on technical grounds of limitation. In

this regard, applicant rely upon the judgment of the Hon'ble Supreme Court in the case, Collector, Land Acquisition, Anantnag Vs. Mst. Katiji, JT 1987 (1) SC 537.

vi. The Commissioner (Appeals) has been passing contradictory orders upon appeals with the identical facts. It was opined that the Commissioner (Appeals) had been allowing all the appeals wherein the appellant obtained the copy of the Order-in-Original from the Drawback (XOS) Section, Air Cargo Complex, while rejecting all appeals wherein the appellants obtained the copy of the Order-in-Original from the Tax Recovery Cell (Export) Section or RTI Section of the Customs Department.

vii. The applicant had annexed with its appeal the evidences of realization of foreign exchange (sale/export proceeds) in the form of BRCs/negative statement in respect of the goods exported within the period prescribed under the Foreign Exchange Management Act, 1999. Thus, the applicant did not commit any violation of any provision of the Customs Act, 1962 or of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

viii. It was pointed out that the 2nd proviso to Section 75(1) of the Customs Act, 1962 and Rule 18 of the Customs and Central Excise Duties Drawback Rules, 2017 provides for the recovery of sanctioned drawback from the exporter only when the foreign exchange (sale/export proceeds) in respect of the goods exported is not realized within the period prescribed under the Foreign Exchange Management Act, 1999. However, the applicant, in the present case, had annexed with its appeal the evidences of realization of foreign exchange (sale/export proceeds) in the form of BRCs/negative statement in respect of the goods exported within the period prescribed under the Foreign Exchange Management Act, 1999.

ix. The applicant submitted that sub-rule 4 of Rule 18 of the Customs and Central Excise Duties Drawback Rules, 2017 and sub-rule 4 of Rule

16A of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 provide for the repayment of recovered drawback to the exporter, even in case where the foreign exchange (sale/export proceeds) are realized after recovery of drawback from the exporter.

4. Several personal hearing opportunities were given to the applicant and the respondent-department viz. on 07.06.2023, 21.06.2023, 18.07.2023, and 25.07.2023. However, they did not attend on any date nor have they sent any written communication. Since sufficient opportunities have been given, the matter is therefore taken up for decision based on available records.

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 issue involved in the instant case is 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 alongwith interest at the applicable rate. The applicant has claimed that they have not received the copies of the impugned SCN & OIO and that they became aware of the OIO only when proceedings were initiated for recovery of the drawback. These matters were carried in appeal before Commissioner (Appeals) who has rejected the appeal on the ground of being time barred. In the revision application, the applicant has made similar grounds to contend that the appeal was within time as they had filed the appeal within the statutory appeal period after the OIO had been communicated to them.

7. Government observes that the appellate authority has come to the conclusion that the appeal of the applicant was filed beyond the period stipulated under Section 128 of the Customs Act, 1962 on the basis of following findings:

'4. On perusal of the copy of impugned Order submitted by the appellant, I find that said order had been issued on 05.01.2013 and thus in any case, it should have been served within 10 days i.e. by 15.01.2013. Here, it is pertinent to mention section 153 (3) of the Customs Act, 1962:

"(3) When such order, decision, summons, notice or any communication is sent by registered post or speed post, it shall be deemed to have been received by the addressee at the expiry of the period normally taken by such post in transit unless the contrary is proved."

Hence the impugned Order is deemed to have been received by the appellant by 15.01.2013 which is normally taken by speed post/ registered post as per section 153(3) ibid and in this regard, complete onus is on the appellant under section 153(3) ibid, to prove that said Order was not served to them or received by them till 01.05.2019 (even after almost 9 years from issuance of Order). Here I find that appellant has given no reason of receiving the Order. The appellant has also not produced any credible evidence or reasons for non-receipt of the order.

Here it is pertinent to mention that I find, from the copy of impugned Order, that appellant was called upon on many occasions by the respondent by way of sending Demand Notice dated 15.05.2010, by issuance of PH on 17.09.2010, 08.11.2012, 15.12.2012 and 29.12.2012 but it was appellant who neither responded to the SCN nor attended any PH. However, it is not that they were not receiving said communication of the department as appellant, once, vide their letter dated 19.10.2012 intimated that they would submit the relevant documents within a month's time but this time too they failed to do so. Here, I find it pertinent to mention the interesting fact that in Statement of Facts submitted by them along with present appeal, at para 4, they have explicitly submitted that "The appellant has NEVER received the above SCN

nor received any intimation regarding PH". In this regard, their letter dated 19.10.2012 to the department proves that their submissions in the appeal is nothing but a white lie. Interestingly they have also enclosed the copy of SCN as EXB-V to their said appeal while filing the appeal, one gives declaration to veracity of his submission. By doing so, he has attracted penal provisions under Customs Act, 1962. However, I refrain from imposing any such penalty and warn them to refrain from submitting any false information in future.

Hence it is amply clear that they were receiving the communications of the department but they opted to remain quiet. I find on the basis of enclosures that even after 6 years, they received the reply of RTI filed by them, Defective Appeal Notice dated 01.05.2019 on the very same address and they also responded to same. It is only when the appellant was informed that their bank accounts had been freezed and export consignment had been put on hold; the former got activated and obtained all the copies of all relevant documents (SCN, Order) from the department for filing appeal. I find that they were well aware of the SCN and further proceedings but they preferred to turn blind eye.

On the basis of above, I find that appellant was responding either to the favourable communication from the department or when they were badly hit by way of recovery of the duty demanded vide impugned order otherwise he never bothered to respond to any of the communication made by the respondent and he never even gave any reason for not receiving all these communications as required under section 153(3) ibid.

The legal maxim "Vigilantibus Non Dormientibus Jura Subveniunt" is very appropriate here which means that the law assists only those who are vigilant and not those who sleep over their rights. This maxim expands upon through the Limitation Act of 1963, which entails that if the suffered party does not file a suit for relief within the stipulated period, for the breach of his rights, then it cannot be claimed at a later stage. So even if appellant take plea that they were sleeping for such a long time (6 years) or rather acting to sleep, then also I cannot provide any relief as the said appeal is filed after such a long time

which actually should have been filed within 60 days in terms of sec 128 ibid. Thus, I find that there is a delay of more than 06 years in filing said appeal. In this regard, I find that as said appeal has been filed after 90 days {60 days appealable,+30 days further period which can be condoned by the Commissioner (Appeals)} to Commissioner (Appeals) as required to be done under section. 128 ibid and as I have no power/authority to condone delay beyond 90 days under section 128 ibid, I cannot entertain the said appeal filed by the appellant.'

8. Government finds that as regards aforementioned findings of the appellate authority, the applicant has contended that the Commissioner (Appeals) has wrongly assumed that since RTI reply was received by them, hence they would have received the order-in-original also, being sent on the same address, without requiring the department to prove the service of the impugned order. However, Government observes that the applicant has not denied having replied to the original authority vide their letter dated 19.11.2012, intimating that they would be submitting the relevant documents within a month's time. They have also not put forth any reason as to why they had not complied/communicated with the department thereafter. Their reply dated 19.11.2012 confirms that they were aware regarding the ongoing departmental adjudication. Subsequently, the applicant was provided two more Personal Hearing opportunities on 15.12.2012 and 29.12.2012 by the adjudicating authority, which they failed to utilize.

9. Government observes that Section 122A of the Customs Act, 1962 provides for grant of not more than three opportunities to hear a party during adjudication proceedings. The law does not come to the aid of a tardy litigant. It is the bounden duty of the one seeking relief to avail the opportunities provided under the law and put forth their defense. The applicant has himself to blame. Sufficient opportunities to defend their case had been extended by the lower authorities in the form of personal hearings. However, in utter

disregard, the applicant did not attend any of the personal hearing either personally or through their representative, nor did they file any written submission enclosing the relevant documents. Once, the personal hearing notice sent on the address available with the adjudication authority was received by the applicant, it defies the logic as to how the OIO sent to very same address was not received by the applicant. Thus, the findings of the Appellate Authority are reasonable and there is no ground to disagree with the same.

10. In view of above findings, Government rejects the impugned Revision Application.

18/9/23

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

ORDER No. 674 /2023- CUS(WZ)/ASRA/Mumbai dated 18.9.23

To,

M/s. D.G.M. Textiles,
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Copy to:-

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2. Shri Lovish Sharma (Advocate),
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3. Sr. P.S. to AS(RA), Mumbai
4. Guard file