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.371/228/DBK/2022-RA | 7674 Date of issue: 27/10/23

ORDER NO. 796 /2023-CUS (WZ)/ASRA/MUMBAI DATED 27.10. 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. Yaseer International

Respondent : Commissioner of Customs (Export), Mumbai

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-AXP-APP-1155/2019-20 dated 20.01.2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application is filed by M/s. Yaseer International, (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. MUM-CUSTM-AXP-APP-1155/2019-20 dated 20.01.2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that the Applicant had obtained drawback but had failed to produce evidence of realization of export proceeds in respect of the export of goods during the period Jan-2010 to Dec-2010, hence, a show cause cum demand notice for recovery of total drawback amounting to Rs.1,40,402/- was issued to them on 26.08.2017. After due process of law, the adjudicating authority vide Order-in-Original No. AC/PTS/99/2018-19/DBK(XOS)/ACC dated 03.04.2018, passed following Order:

(i) Confirmed demand of Rs.1,40,402/- alongwith applicable interest under Sub-Rule (1) & (2) of Rule 16(A) of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 (hereinafter referred to as the Drawback Rules) read with Customs Circular No. 05/2009 dated 02.02.2009.

(ii) Imposed penalty of Rs.7,500/- on the applicant under Section 117 of the Customs Act,1962.

Aggrieved, the Applicant filed an appeal which was rejected by the Commissioner (Appeals) vide impugned Order-in-Appeal, on the grounds of being time barred.

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

i. that the Hon'ble Commissioner of Customs (Appeals) ought to have appreciated the facts that office of the adjudicating authority while issuing the certified copy dated 30.10.2019 of the impugned order verified the fact that the applicant had not received the order-in-

original issued at his address and same has been returned to the adjudicating authority unserved.

ii. that the Appellate authority did not appreciate the fact that the adjudicating authority issued Certified Copy of the impugned Order-in-Original on 30.10.2019 and the applicant received the same on 11.11.2019. On the support of the Certified Copy of impugned Order-in-Original, the Applicant filed appeal before Hon'ble Commissioner of Customs (Appeals), Mumbai-III. Thereafter, the applicant filed the appeal with the Commissioner of Customs (Appeals) on 5.12.2019 i.e. within 25 days of communication of the order. Therefore, the applicant has complied with the provisions of Section 128 of Customs Act, 1962 and filed appeal before 60 days period.

iii. that no export realization whatsoever is pending for realization for the exports done prior to 01.04.2013. Further, it is pertinent to mention that the applicant has realized the export proceeds through their AD-CODE BANK for the export done through impugned S/Bills during 2010 and 2011. Hence the applicant submits that in view of receipt of remittance through their Bank, the demand of Drawback amount of Rs.1,40,402/- along with penalty and interest (which arrived at Rs.3,57,150/-) to be recovered from the applicant ought not have been confirmed and recovered.

iv. that in terms of sub-rule 4 of Rule 16, even where the Drawback is recovered the same is refundable if the exporter produces evidence within one year. In the instant case the export proceeds were realized well within the stipulated period. Therefore, even if the applicant deposits the Drawback amount with the applicable interest, the applicant is eligible for the refund of such drawback amount returned by the Applicant. Therefore, the demand of drawback amount with applicable interest, even after realization of exports proceeds against the all the subject shipping is bad in law. The Applicant submits that the sale proceeds of the goods exported under impugned S/Bills have been realized by them and remittance has been received through their banker.

v. that the appellate authority should have appreciated the fact and set aside the impugned order-in-original passed by the adjudicating authority because in this case the sale proceeds of the goods exported under impugned S/Bills have been realized by the Applicant and remittances in respect of impugned S/Bills (whose Leo date were prior to 01.04.2013) have been received by the Applicant and nothing is pending to be realized. The copy of Realization certificate dated 12.09.2019 was submitted as also the Chartered Accountant Certificates issued by CA Rahiman And Rahim certifying that export proceeds for export shipments made during the period 01.01.2010 to 30.06.2010, and 01.07.2010 to 31.12.2010 have been received and there is nothing pending for realization. Those certificates clarified that the export proceeds of export shipments made by the Applicant prior to 01.04.2013 have been received and nothing is pending for realization.

vi. that in view of the receipt of remittance by the Applicant's Banker, the recovery of Drawback+ interest+ penalty amounting to Rs.3,57,150/- from the Applicant is illegal. The appellate authority ought to have appreciated this fact and ought to have gone into the merits of the case. Further, the Hon'ble Appellate Authority ought to have appreciated that there was no violation on the part of the Applicant and accordingly, ought to have considered the fact that receipt of drawback on the part of the applicant was legitimate. The Applicant relies on the judgements of the Hon'ble Calcutta High Court in the matter of Commissioner of Customs, Mumbai vs Terai Overseas Ltd. reported in 2003(156)ELT 841 (Cal.). In the said judgment, the Hon'ble Court has ruled that liberal approach is to be adopted and drawback cannot be denied on mere technicality or by adopting a narrow and pedantic approach, especially since drawback is an incentive scheme for augmenting exports.

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

4. Personal hearing in the matter was held on 28.08.2023. Ms. Reema S. Deshnehare, Advocate appeared on behalf of the applicant and submitted that OIO was not received and applicant came to know about it only when export consignment of applicant was stopped due to an alert in EDI. She further submitted that the appeal was filed well in time once applicant came to know about it. She also pointed out that remittances have been received on time in the export under dispute. She 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. On perusal of records, Government observes that the applicant had obtained drawback with regard to exports done by them during the period Jan-10 and Dec-10. However, the applicant had not produced evidence to show that the sale proceeds (in 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 totally amounting to Rs.1,40,402/- alongwith applicable interest and penalty of Rs.7,500/-. The applicant has claimed that they had not received the OIO passed by the adjudicating authority. They came to know about OIO in Sep-2019, from their Banker, M/s. Indian Bank, who had received a letter dated 19.09.2019 from AC, TRC(Export), ACC, Sahar, Mumbai, informing about the default by the applicant and consequent recovery thereof. Thereafter, the applicant visited the Customs Authorities and were handed over the impugned OIO. On the basis of which they paid an amount of Rs.3,57,150/- towards the dues including interest and penalty and got the alert against them lifted. These facts were brought to the notice of Commissioner (Appeals). But their appeal was rejected on the grounds of being time barred. 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.

7.1 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 the list of exporters mentioned in the Annexure to impugned Facility Notice. As the applicant failed to respond, a SCN was issued to them on 26.08.2017. The applicant has contended that they are in possession of relevant BRCs/Negative certificates which they had furnished before the appellate authority. However, the appeal filed by the applicant was dismissed on the grounds of time bar by the Appellate authority.

7.2 Government observes that 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. The Commissioner (Appeals) has also emphasized that the Drawback (XOS) Section, Air Cargo Complex is the proper authority for serving impugned OIO in terms of Section 153 of the Customs Act, 1962. In this regard, Government observes from the copy of impugned OIO that it bears a handwritten remark signed on 30.10.2019 of Supdt./DBK(XOS) and AC/DBK(XOS) – *'F.No.S/3-Misc/DBK(XOS)-AS(6440)17-18ACC – This certified copy of OIO is issued with approval of the Joint Commissioner of Customs (DBK/XOS),ACC, Mumbai sated 29/10/2019 as per Standing Instruction No.01/2018 dt. 14.03.2018'*. The remark confirms the claim of the applicant that *he had not received the order-in-original issued at his address and same had been returned to the*

adjudicating authority unserved. Therefore, Government holds that taking the date of communication of impugned OIO as 11.11.2019, as claimed by the applicant, the appeal was filed within the prescribed limits of Section 128 ibid.

7.3 In this context, 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]".*

7.4 In the case of Soham Realtors Pole Star vs. Commissioner of Central Excise, Customs & Service Tax, [2018 (12) G.S.T.L. 288 (Bom.)] adjudged by Hon'ble Bombay High Court, the relevant head-note reads as under:

> *"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 Applicant'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]"

Government infers from the judgments cited that it is incumbent upon the appellate authority to confirm service of the order, which was not done in the instant matter.

8. Further, Government observes that Rule 16A(4) of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 (hereinafter referred to as the Drawback Rules) reads as under:

(4) Where the sale proceeds are realised by the exporter after the amount of drawback has been recovered from him under sub-rule (2) or sub-rule (3) and the exporter produces evidence about such realisation within one year from the date of such recovery of the amount of drawback, the amount of drawback so recovered shall be repaid by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to the claimant.

From the above provision, Government notes that even if amount of drawback has been recovered, the same is to be repaid on submission of evidence of realization of export proceeds by the exporter. Thus, the intention of the legislature is very clear that if export proceedings have been realized, the eligible drawback needs to be released to the exporter. In the instant case, the applicant has claimed full realization of export proceeds

and possession of evidence in the form of e-BRC/negative statement from authorized dealer Bank/Chartered Accountant. It is undisputed that rebate/drawback and other such export promotion schemes are incentive-oriented beneficial schemes intended to boost export and to earn more foreign exchange for the country and in case the substantive fact of export having been made is not in doubt, liberal interpretation is to be accorded in case of technical lapses if any, in order not to defeat the very purpose of such scheme. Therefore, it is in the interest of justice that these claims of the applicant are taken up for verification and the matter is re-decided on merits.

9. In this regard, in a recent judgment passed by Hon'ble Madras High Court in the case of M/s. Sabare International Limited vs. Revision Authority [2022 (5) TMI 395], with reference to said Rule 16A(4) ibid it was held as under:

> *9. A reading of the above provision seems to indicate that where the sale proceeds are realized by the exporter after the amount of drawback has been recovered from him under sub-rule(2) or sub-rule (3) and the exporter produces evidence about such realization within one year from the date of such recovery of the amount of drawback, the amount of drawback so recovered shall be repaid by the Assistant Commissioner of Customs of Deputy Commissioner of Customs to the claimant.*
>
> *10. In this case, the recovery has been made long after the export realization. Considering the same and considering the fact that there is indeed an export realization, the case of the petitioner deserves a favorable disposal by the respondents.*
>
> *11. Under these circumstances, I am inclined to dispose of this writ petition by remitting the case back to the 3rd respondent/the Assistant Commissioner of Customs, to take note of Rule 16A(4) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and to dispose of the same on merits and in accordance with law, in the light of the Bank Realization Certificate produced by the petitioner on 22.09.2009.*

10. In view of the above discussion and findings, the Government sets aside Order-in-Appeal No. MUM-CUSTM-AXP-APP-1155/2019-20 dated 20.01.2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and remands the matter back to original authority with the direction to decide it afresh after carrying out appropriate verification of the evidence of realization of export proceeds. The applicant should be provided a reasonable opportunity for submission of required documents.

11. The Revision Application is disposed of with the above directions.

Shrawan 27/10/23

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

ORDER No. 796 /2023-CUS (WZ)/ASRA/Mumbai dated 27.10.23

To,

M/s. Yaseer International,
No. 118/10, Ground Floor,
Vepery High Road,
Periamet, Chennai – 600 003.

Copy to:

1. Commissioner of Customs (Export),
   Air Cargo Complex, Sahar,
   Andheri(E), Mumbai – 400 099.
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file.