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SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 371/134/B/WZ/2022-RA

Date of Issue

08 .11.23

ORDER NO. 814/2023-CUS (WZ)/ASRA/MUMBAI DATED 06 .11.2023
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 : Shri. Saifudden Kulathil

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai

Subject : Revision Application filed, under Section 129DD of
the Customs Act, 1962 against the Order-in-Appeal
No. MUM-CUSTM-PAX-APP-830/2021-22 dated and
issued on 28-10-2021 through F.No. S/49- 762/2020
passed by the Commissioner of Customs (Appeals),
Mumbai – III.

ORDER

This Revision Application has been filed by the Shri. Saifuddeen Kulathil (herein referred to as Applicant) against the Order-In-Appeal No. MUM-CUSTOM-PAX-APP-830/2021-22 dated and issued on 28.10.2021 through F.No. S/49-762/2020 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 10-06-2018, on the basis of intelligence and profiling, AIU officers of Customs, CSMI Airport, Mumbai intercepted one passenger viz Shri Saifuddeen Kulathil, the applicant, after he had cleared immigration. He was holding Indian Passport No. N7806887 and was scheduled to depart to Dubai by Indigo Airlines Flight No.6E-63 dated 10.06.2018. On sustained interrogation, the applicant admitted that he was carrying some foreign currency in his checked-in baggage. Examination of his checked-in baggage resulted in recovery of assorted foreign currency, they were as follows: US Dollar 40,500, Saudi Riyal 2,14,780, Omani Riyal 2,775, UAE Dirhams 37,600, Bahrain Dinar 255, Kuwait Dinar 40 and Qatari Riyal 1,500. The total value of the recovered assorted foreign currency was found equivalent to Rs.75,85,266/- The AIU officers seized the assorted foreign currency under the reasonable belief that the same were attempted to be smuggled out of India and hence liable to confiscation under the provisions of the Customs Act, 1962 read with FEMA, 2000 and Regulations made thereunder. On conclusion of investigation, Show Cause Notice was issued to the applicant on 06-12-2018.

3. After due process of law and investigations, the Original Adjudicating Authority (OAA) viz, Additional Commissioner. of Customs, CSMIA, Mumbai vide Order-in-Original No. ADC/SKR/ADJN/20/2019-20 dated 22-01-2020 ordered for the absolute confiscation of the recovered assorted foreign currency equivalent to Rs.75,85,266/- under Section 113(d), (e) and (h) of the

Customs Act, 1962 read with relevant provisions of FEMA, 1999. Personal penalty of Rs.18,95,000/- was also imposed on the applicant.

4. Aggrieved by this order, the Applicant filed an appeal with the Appellate Authority (AA), Commissioner of Customs (Appeals), Mumbai – III who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-830/2021-22 dated and issued on 28.10.2021 through F.No. S/49-762/2020 rejected the appeal without going into the merits of the case. The appeal was rejected on the grounds of non-maintainability, as the applicant had failed to pay the pre-deposit of 7.5% of the duty demanded/penalty imposed vide impugned OIO at the time of filing the appeal, in terms of Section 129(E) of the Customs Act, 1962.

5. Aggrieved with the above order, the Applicant has filed this Revision application on the under mentioned grounds:

5.1 That the procedure made by the department to make mandatory pre-deposit is a cumbersome procedure and that it is not possible for the applicant to enter the International airport to make pre-deposit

5.2 That the OIO is illegal and unsustainable; that foreign currency is not prohibited goods to order absolute confiscation; that adjudication authority is bound to release the goods on payment of redemption fine and penalty;

5.3 The applicant requested to set-aside the Order in Original and the Order-in Appeal and to release the seized foreign currency.

6. Personal hearing was scheduled on 6-09-2023. Ms Linda Rajeeve, Advocate appeared through the online video conferencing. She submitted that applicant was carrying foreign currency. On the point of pre-deposit before Commissioner (Appeals), she submitted that the same was not required during the relevant time. She requested to allow redemption of currency on reasonable fine and penalty.

7. Government has gone through the facts of the case. At the outset, Government observes that the AA had rejected the appeal filed by the applicant on grounds of non-maintainability as they had not deposited 7.5% of the duty/fine/penalty amount imposed by the OAA. Government notes that the applicant has submitted that the procedure to make mandatory pre-deposit is cumbersome procedure and it was not possible for them to enter the International airport to make the pre-deposit.

8(a). At para 2 of the OIA, the AA has observed as follows,

“...2. I have gone through the facts of the case and appeal filed by the appellant. I find that the appellant has failed to deposit 7.5% of the amount demanded while filing the appeal against the impugned order-in-original which is mandatory in terms of the provisions of Section 129E of the Customs Act, 1962. A Defective Appeal Notice dated 19-07-2021 was issued to the applicant for submitting the proof of payment of mandatory deposit of 7.5% of the duty demanded/penalty imposed. However the applicant failed to submit any reply to the said Defective Appeal Notice till date. As per Speed Post Tracking record it is confirmed by the postal authority the same has been delivered to the appellant and his advocate, Mr. P.A. Augustian.....”

8(b). The A.A had issued the defective appeal notice dtd 19.07.2021 to the applicant during the statutory period available to him to make the pre-deposit payment. The applicant neither made the payment nor replied to the defective notice. Thereafter, after the expiry of the condonable period, the matter was taken up by the appellate authority, granted personal hearing to the applicant and having found out that the pre-deposit amount had not been paid till then, the appeal was rejected.

9(a). The relevant section is reproduced below:

*“SECTION 129E. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. The Tribunal or the **Commissioner (Appeals), as the case may be, shall not entertain any appeal, —***

- (i) *under sub-section (1) of section 128, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of customs lower in rank than the 32[Principal Commissioner of Customs or Commissioner of Customs];”*

The Section clearly states that the pre-deposit of 7.5% has to be made before filing appeal. Government relies on the Hon'ble Gujarat High Court in the case of Ramesh Bhojani vs. U.O.I reported in 2017 (357) E.L.T. 63 (Guj.) [17-03-2017]. Para 14 of the case law is as below;

“14. From the language employed in section 129E of the Act, it is evident that the same mandates that the appeal shall not be entertained unless the pre-deposit is made. Filing of an appeal and entertaining of an appeal are not synonymous. A party may file an appeal within the prescribed period of limitation though it may not be in a position to make the pre-deposit within such time. Considering the fact that the Commissioner (Appeals) has no power to condone the delay beyond a period of thirty days, an appeal, even when there is a delay, has to be filed within a period of ninety days from the date of receipt of the order-in-original, it may be that a party may not be in a position to arrange for the amount of pre-deposit within such period. However, that by itself, should not be a ground to totally non-suit such party, more so, when what the statute provides is that the appeal shall not be entertained unless such pre-deposit is made. As held by the Supreme Court in the above referred decision, a condition to entertain an appeal does not mean that the

*memorandum of appeal shall be returned because of such non-compliance pertaining to predeposit and that the only consequence is that the appeal shall not be entertained, which means the appeal shall not be considered on merits and eventually has to be dismissed on that ground. Therefore, while the Commissioner (Appeals) cannot entertain an appeal, namely, hear and decide it unless the pre-deposit is made, he cannot insist upon payment of predeposit as a condition precedent for filing an appeal. The condition contained in clause (6) of Form No.C.A.-1, has no statutory basis and hence, there cannot be any insistence on payment of pre-deposit prior to filing the appeal. In these circumstances, if such a practice is in fact prevailing, namely, that the memorandum of appeal is being returned if the same is not accompanied with the challan evidencing payment of pre-deposit, such conduct on the part of the respondent authorities has no legal basis. The respondent authorities are duty bound to accept the memorandum of appeal if the same is filed in the prescribed form, without insisting upon the challan evidencing payment of pre-deposit accompanying the same. **If the appeal comes up for hearing and the pre-deposit is not paid, the Commissioner (Appeals) may refuse to entertain the same and dismiss it on that ground.**"*

9(b). Government notes that in this case the AA had accepted the appeal memorandum and had not returned back the memorandum of appeal for non-compliance of payment of pre-deposit. In fact the AA had pointed out the deficiency and had sent a communication to the applicant during the mandatory/condonable period available to the applicant to file an appeal informing him that the pre-deposit @ 7.5% of the quantum of penalty imposed was required to be paid.

9(c). Government also relies on para 12 and 13 of the Order of the Apex Court in the case of M/s. S. E. Graphites Pvt. Ltd. Vs. State of Telangana & Ors. [Civil Appeal No.7574 of 2014] is reproduced below,

“12. In addition, the appellant-assessee has rightly placed reliance on the decision of this Court in Ranjit Impex (supra). In that case, the Court considered almost similar stipulation in Section 51 of the Tamil Nadu VAT Act, 2006. Indeed, the second proviso therein uses the expression no appeal shall be “entertained,” unlike the expression used in the provisions under consideration that the appeal so preferred “shall not be admitted”. We are conscious of the fact that the first proviso pertaining to maximum period of delay to be condoned by the Appellate Authority, also uses the expression “admit the appeal.” That expression “admit”, however, must be read to mean filing, institution or presentation of the appeal in the office of the Appellate Authority. Whereas, the expression “admitted” used in the second proviso will have to be construed as analogous to expression “entertained.” We are inclined to take this view as the setting in which the provisions under consideration appear leaves no manner of doubt that it is ascribable to the event of taking up the appeal for consideration, for the first time, to admit it on merits or otherwise and/or for condonation of delay in filing the appeal, as the case maybe. Before that event occurs, it is open to the appellant to deposit the tax dues in respect of which the appeal is preferred and produce proof of such deposit before the Appellate Authority.

13. This view is reinforced from the exposition of this Court in Ranjit Impex (supra), wherein the view taken by the Division Bench of the High Court of Madras that the proof of deposit of tax has to be produced at the time when the appeal is taken up for consideration, but not at the time of filing or presentation of the appeal, has been upheld.”

9(d). Further, at para 17 of the aforesaid case i.e. M/s. S.E Graphites Pvt. Ltd, the Apex Court, the following observation has been made,

“17. While parting, we may observe that taking advantage of the interpretation given by us, it is possible that some unscrupulous litigant (assessee) may file an appeal within the limitation period but keep it under defect so that the same does not proceed for consideration before the Appellate Authority. To obviate such a mischief, we hold and direct that the Appellate Authority shall be obliged to take up every singular appeal for consideration for admission on merits and/or for condonation of delay in filing the appeal for the first time, no later than thirty days from the date of its filing, institution or presentation in the office of the Appellate Authority. This direction shall be complied with by all concerned meticulously, without any exception. That is the only way to secure the interests of the Revenue and at the same time to effectuate the purpose underlying the proviso regarding the deposit of specified amount of tax dues.”

10. In terms of the guidance of the Apex Court at para 9(d) above, Government notes that the AA had issued the defective appeal notice. The applicant had not rectified the defect/ deficiency which needless to state was required to be done within the condonable period.

11. Government notes that it is settled law, that payment of pre-deposit as mandated in the statute, is mandatory and the AA cannot sidestep the same. The AA has no power to waive-of the payment of pre-deposit amount. In this case, from the facts it is clear i.e. considering the date of the OIA, the same has been passed after lapse of the appeal period. Therefore, Government finds that the OIA passed by the AA is legal and proper. Government finds no

reason to interfere in the same and is inclined to uphold the OIA passed by the AA.

12. Accordingly, the Revision Application filed by the applicant is dismissed.

(SHRAWAN KUMAR)

Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. S/H/2023-CUS (WZ) /ASRA/MUMBAI DATED 06.11.2023.

To,

1. Shri. Saifuddeen Kulathil, Kulathil Pattancheri House. Kashyapadi, Kozhikode, Kerala-673631.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal 2, Level - II. Sahar, Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to:

1. Shri P.A. Augustian, Advocate, Faizel Chambers, Pullepady Cross Road, Cochin, Kerala-682018.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Noticeboard.

