

REGISTERED
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. 371/176/B/WZ/2021-RA / 7903 Date of Issue 20.11.2023

ORDER NO. 827 /2023-CUS (WZ)/ASRA/MUMBAI DATED 16/11/23 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 : Mr. Aatish Machindra Kamble,

Respondent : Pr. Commissioner of Customs,
Telangkhedi Road,
Civil Lines, Nagpur -440001

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MKR/99/CUS/NGP/2021 21 DATED 13/01/2021 issued on 29-03.2019 through F.No. V(2)191-CUS/NGP/APPL/2019 passed by the Commissioner (Appeals) Customs, Central Excise & GST, Nagpur.

ORDER

This revision application has been filed by the Mr. Aatish Machindra Kamble (herein referred to as Applicant) against the Order-in-Appeal No. MKR/99/CUS/NGP/2021-21 DATED 13/01/2021 issued on 29.03.2019 through F.No. V(2)191-CUS/NGP/APPL/2019 passed by the Commissioner (Appeals) Customs, Central Excise & GST, Nagpur.

2. Briefly stated facts of the case are that Whereas, an intelligence was received by the officers of Directorate of Revenue Intelligence (DRI), Nagpur Regional Unit (NRU), Nagpur that one passenger named as Shr Aatish Machindra Kamble holding the Indian Passport No 23903866, arriving at Dr. Babasaheb Ambedkar International Airport, Nagpur from Sharjah by Air Arabia Airways Flight No G90415 on 07.09.2018, would be carrying some contraband goods. The DRI officers, carried out a personal search of Aatish Machindra Kamble. He was found in possession of Boarding Pass dated 06.09.2018 for journey from Shariah to Nagpur by Air Arabia Flight No, G90415 & Seat No 13D. During the search of the check-in baggage and hand bag found in possession of Aatish, nothing suspicious was found. Upon interrogation, the applicant admitted to DRI officers that he had concealed multiple gold bars in his rectum and was willing to excrete them. Subsequently, in the office's lavatory, three packets wrapped in black adhesive tape were excreted by the applicant. The tape on two of these packets was removed to reveal blue carbon paper, and beneath that were two yellowish heavy metal bars in each of the two packets. The third packet, also covered with black tape and blue carbon paper, contained one yellowish heavy metal bar. In total, five yellowish heavy metal bars were recovered from the three packets. It appeared that these bars had been cut from a larger piece of gold bar and markings on them had been erased.

3. After due process of law and investigations, the Original Adjudicating Authority (OAA) vide Order-in-Original No 01/HCV/JC/CUS/2019 dtd. 06/09/2019 passed by the Joint Commissioner of Customs, Customs Commissionerate, Nagpur (here in after referred to as the Adjudicating/Lower Authority), wherein the Joint Commissioner has ordered absolute confiscation of gold weighing 716.500 gms. valued at Rs 20,01,310/- under Section 111(d), 111(i), 111(j), 111(l) & 111(m) of the Customs Act, 1962 & Black adhesive paper and carbon paper which were used for concealing smuggled goods, under Section 119 of the Customs Act, 1962, imposed penalty, on Shri Aatish Machindranath Kamble, of Rs. 5,75,000/- under Section 112(a) & 112(b) of the Customs Act, 1962 & imposed penalty of Rs. 85,000/- under Section 114AA of the Customs Act, 1962.

4. Aggrieved by this order, the Applicant filed an appeal with the Commissioner (Appeals) Customs, Central Excise & GST, Nagpur (here in after referred to as the Appellate Authority / AA) who vide Order-in-Appeal No. MKR/99/CUS/NGP/2021-21 DATED 13/01/2021 issued on 29.03.2019 through F.No. V(2)191-CUS/NGP/APPL/2019 passed by the Commissioner (Appeals) Customs, Central Excise & GST, Nagpur, rejected the appeal without going into the merits of the case on the grounds of non-maintainability, as the applicant had failed to pay the pre-deposit 7.5% of the amount demanded on account of penalty imposed vide impugned OIO at the time of filing the appeal.

5. Aggrieved with the above order, the Applicant has filed this revision application on the following grounds:-

5.01. that the impugned order passed by the AA was bad in law and unjust;

5.02. that the AA had passed the OIA without granting personal hearing, even once and the principles of natural justice had not been applied.

5.03. that due to Covid-19 epidemic, he was not able to arrange necessary funds for payment of 7.5% of Pre-Deposit of Personal Penalty.

5.04 that in the case of Ramesh Vasantbhai Bhojani reported in 2017 (357) E.L.T 63 (Guj.), the Hon'ble High Court of Gujarat had held that Commissioner (Appeals) has no power or authority to permit the appeal to be presented beyond ninety days and on the plea that the Commissioner (Appeals) does not accept memorandum of appeal unless accompanied by challan evidencing payment of pre- deposit and that the appeal could not be filed within prescribed period of limitation as it took some time to arrange pre- deposit, which was made within condonable period of thirty days - HELD: Filing of appeal and entertaining of appeal are not synonymous. Party may file an appeal within prescribed period of limitation though it may not be in a position to make the pre-deposit within such time. While Commissioner (Appeals) cannot entertain an appeal unless pre-deposit is made, he cannot insist upon payment of pre-deposit as a condition precedent for filing an appeal. 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 - Authorities duty bound to accept memorandum of appeal, if filed in prescribed form, without insisting upon challan evidencing payment of pre-deposit accompanying it. If the appeal comes up for hearing and pre-deposit not paid, Commissioner (Appeals) may refuse to entertain it and dismiss it on that ground. Assessee had proceeded on assumption that appeal papers would not be accepted without such challan and had let statutory period lapse, thereby non-suiting himself as Commissioner (Appeals) had no power or authority to condone the delay beyond period of thirty days, even if sufficient cause is shown - No infirmity in order of Commissioner (Appeals) Sections 128 and 129E of Customs Act, 1962. [paras 12, 13, 14]

5.05 that the Applicant submitted that in the case of NYATI HOTELS & RESORTS PVT. LTD, the Hon'ble CESTAT, WEST ZONAL BENCH, MUMBAI reported in 2018 (364) E.L.T 1081 (Tri-Mumbai.), Limitation - Pre-deposit, Dismissal of appeal on ground that mandatory pre-deposit under Section 35F of Central Excise Act, 1944 was made after three months of passing of adjudication order: HELD: That assessee made pre-deposit as required under Section 35F ibid although after filing of appeal, cannot be a ground to dismiss appeal - Once appeal was filed within time limit it could not be dismissed on ground of late payment of pre-deposit amount. Commissioner (Appeals) to hear appeal on merits. Section 35 of Central Excise Act, 1944.- Sections 35 and 35F ibid are independent and have got no overriding effect on the other. Section 35(1) is in respect of type of appeal which can be filed before the Commissioner (Appeals) and it does not deal with entertaining appeal by Commissioner (Appeals), Section 35F in turn deals only with entertaining the appeal subject to condition of pre-deposit of seven and half per cent. It nowhere prescribes the time limit for making pre-deposit and the provisions of Section 35F cannot be read in context of Section 35(1) as it has got no application. The non-payment of pre-deposit is a curable defect. Any appeal can be entertained only when it is filed. Obviously, the question of entertaining the appeal comes at the time of filing of appeal which has to be filed within stipulated period.

Under the circumstances, the applicant has prayed that the OIA may be set aside and to pass any other order as deemed fit.

6. Personal hearing was held on 11.08.2023. Shri. N.J Heera, Advocate appeared for personal hearing and submitted that applicant brought some quantity of gold. He further submitted that manner of concealment should not influence decision to confiscate. He requested to allow redemption of gold on

reasonable fine and penalty. He requested to set aside penalty under section 114AA of the Customs Act.

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 the applicant had not paid the pre-deposit i.e. 7.5% of the penalty amount imposed by the OAA. Also, since the pre-deposit amount i.e. 7.5% of the imposed penalty had not been paid which was mandatory in terms of the provisions of Section 129E of the Customs Act, 1962, the AA disposed of the case without going into its merits.

8(a). In its defence, the applicant has relied on the case law of M/s. Nyati Hotels & Resorts Pvt. Ltd passed by the CESTAT, WZB, Mumbai [2018 (364) ELT 1081 (Tri-Mumbai)] wherein it was stated that

'On perusal of above both sections we find that both sections are independent and have got no overriding effect on the other. Section 35(1) is in respect of type of appeal which can be filed before the Commissioner (Appeals) and it does not deal with entertaining appeal by Commissioner (Appeals). Section 35F in turns deal only with the entertaining the appeal subject to condition of pre-deposit of seven and half per cent. It nowhere prescribes the time limit for making pre-deposit and the provisions of Section 35F cannot be read in context of Section 35(1) as it has got no application. The non-payment of pre-deposit is curable defect. Any appeal can be entertained only when it is filed. Obviously, the question of entertaining the appeal comes at the time of filing of appeal which has to be filed within stipulated period. Once the appeal has been filed within the time limit the same cannot be dismissed on the ground of late payment of pre-deposit amount. Further in the present case the appellant has made the pre-deposit as required under Section 35F although after filing of appeal. However, this cannot be a ground to dismiss the appeal. We are thus of the view that the reasoning adopted by the Commissioner (Appeals) is not correct. We thus set aside the impugned order and remand the case back to Commissioner (Appeals) to hear the case on merits and decide the appeal.'

8(b) The appellate authority and having found out that the pre-deposit amount had not been paid even after 90 days. the appeal was rejected and after the applicant failed to attend the personal hearing on 10.12.2020 the AA did not find it necessary to grant another personal hearing.

9(a). Government notes that the aforesaid order in respect of M/s. Nyati Hotels and Resorts Pvt. Ltd., was passed by CESTAT on 13.04.2018.

9(b). Government has gone through the facts of the case and the aforesaid case laws relied upon in the OIA and the averments made by the applicant.

9(c). On the issue of 'when the payment of the pre-deposit is required to be made', 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] passed on 10.07.2019, 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. Government notes that the Apex Court's Order dated 10.07.2019 has settled the issue that payment of pre-deposit as mandated in the statute, is mandatory and the A.A cannot sidestep the same. The AA has no power to waive- of the payment of pre-deposit amount. Therefore, considering the above. Government finds that the OIA passed by the AA is legal and proper. Government finds that the averment made by the applicant citing the Tribunal's Order in

respect of M/s. Nyati Hotels and Resorts Pvt. Ltd does not come to his rescue, more so, this case is antedated i.e precedes the Apex Court's Order dated 10.07.2019 cited above i.e. in respect of M/s. S.E Graphites Pvt. Ltd. Also, in the said case referred by the applicant, M/s. Nyati Hotels and Resorts Pvt. Ltd had paid up the pre-deposit whereas, in the extant case, the same had not been done. Infact, even in this revision application filed by the applicant, no evidence has been forthcoming that the pre-deposit amount had been paid. Therefore, Government finds no reason to interfere in the OIA passed by the AA and is inclined to uphold the OIA passed by the AA.

11. Coming to the contention that principles of natural justice had not been followed, Government finds that this averment is specious, especially as held by Hon'ble Apex Court, and cited by the AA at para 6 of the OIA [i.e. para 14 of case law of Ramesh Vasantbhai Bhojani vs. UOI, passed by the Hon'ble Gujarat High Court [2017 (357) ELT 63 (Guj.)], i.e. '*.....while the Commissioner (Appeals) cannot entertain an appeal, namely, hear and decide it unless the pre-deposit is made* ', it is clear that the appeal is to be rejected without going into the merits and wasting the court's time. The applicant was aware that the statutory pre-deposit had not been paid by him during the statutory / condonable period and his act of filing an appeal a deliberate deficient appeal, is contumacious.

12. The Government finds no reason to interfere in the order passed by the AA and upholds the OIA.

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


(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. **827** /2023-CUS (WZ) /ASRA/MUMBAI DATED **16.11.2023**.

To,

1. Mr. Aatish Machindra Kamble, Bahiyasaheb Ambedkar Society, Vithalwadi Hiraghat, Station Road, ULHASNAGAR-421 003.
2. Pr. Commissioner of Customs, Telangkhedi Road, Civil Lines, Nagpur - 440001.

Copy to:

1. A.M Sachwani / V.M Advani / N.J Heera / R.R Shah, Advocates, Nulwala Bldg. Ground Floor, 41 Mint Road, Opp. G.P.O, Fort, Mumbai – 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Noticeboard.