

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. 371/130/DBK/20-RA/2802

Date of Issue:- 06.05.2021

ORDER NO. 89/2021-CUS(WZ)/ASRA/MUMBAI DATED 30.03.2021
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 Flaunt Exports,
B/42, Oshiwara Ind. Centre,
Opp. Oshiwara Bus Depot,
New Link Road, Goregaon (West),
Mumbai – 400 062.

Respondents : Commissioner of Customs, Mumbai.

Subject : Revision applications filed under Section 129DD of the
Customs Act, 1962, against the Order in Appeal No. MUM-
CUSTM-AXP-APP-1154/2019-20 dated 20.01.2020
passed by the Commissioner of Customs (Appeals),
Mumbai Zone-III.



ORDER

This Revision application is filed by M/s Flaunt Exports, B/42, Oshiwara Ind. Centre, Opp. Oshiwara Bus Depot, New Link Road, Goregaon (West), Mumbai – 400 062 (hereinafter referred to as the 'applicant') against the Orders-In-Appeal MUM-CUSTM-AXP-APP-1154/2019-20 dated 20.01.2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. The Brief facts of the case are that a duty drawback amounting to Rs. 5,30,067/- (Rupees Five Lakh Thirty Thousand Sixty Seven Only) was sanctioned to the applicant under Section 75 of the Customs Act, for the export made under various shipping bills having LEO date prior to 01.04.2013. The applicant had not furnished the proof of realisation of foreign exchange for the goods exported under the said Shipping Bills in terms of CBEC Circular No. 5/2009-Cus dated 02.02.2009 & Public Notice No. 5/2009 dated 07.03.2009. Since the applicant had failed to realise the foreign exchange, the Asstt. Commissioner (Drawback), Customs, ACC, Mumbai issued Demand-cum-SCN dated 05.09.2017 proposing recovery of drawback amount already disbursed to the applicant alongwith the interest as per Rule 16(A) Sub-Rule (1) & (2) of Customs, Central Excise Duties and Service Tax Drawback Rules 1995.

3. The adjudicating authority vide Order in Original No. AC/JD/2611/2017-18/DBK(XOS) ACC dated 31.03.2018 confirmed the demand and imposed the penalty of Rs. 25,000/- on the applicant under Section 117 of the Customs Act, 1962.

4. Aggrieved by the Order in Original, the applicant filed an appeal before the Commissioner of Customs (Appeals), Mumbai Zone- III. The appellate authority, vide Order in Appeal No. MUM-CUSTM-AXP-APP-1154/2019-20 dated 20.01.2020, dismissed the appeal filed by the applicant as the same was not filed within the time period prescribed for filing an appeal under Section 128 of the Customs Act, 1962.

5. Being aggrieved by the impugned Order in Appeal, the applicant has filed instant Revision Application on the following grounds.

5.1 The Commissioner of Customs did not take cognizance of the fact that certified copy of Order in Original No. AC/JD/2611/2017-18/DBK(XOS) ACC dated 31.03.2018 was issued with the approval of the Asstt. Commissioner of Customs (XOS), ACC, Mumbai dated 10.12.2019 issued from File No. S/3-Misc./DBK(XOS)-SS/1500



17-18 ACC as per standing instructions No. 01/2018 dated 14.03.2018, the same being endorsed on the certified copy of Order in Original.

5.2 The appellate authority disposed off the order without issuing any notice for personal hearing & without providing an opportunity of being heard for giving clarifications.

5.3 they have been denied of natural justice which is an important part of the Administrative Law.

5.4 The appellate authority has not taken into consideration the case law cited by them which is applicable in the instant case.

6. A Personal Hearing was held in matter on 24.02.2021. Shri A.R. Budhani, Proprietor and Shri Zaid Budhani, representative of applicant appeared for personal hearing so fixed on 24.02.2021. They submitted that they were not given opportunity by lower authorities to submit their evidence of receipt of BRCs etc. As regards, delay in filing appeal before Commissioner (Appeals), they submitted that copy of OIO was received on 10.12.2019 and appeal was filed on 31.12.2019.

7. Government has carefully gone through the relevant case records available in case file, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

8. On perusal of records, Government observes that the applicant was granted the duty drawback with regard to exports made by them and demand of drawback already sanctioned was confirmed on the ground that they failed to submit Bank Realisation Certificate as evidence of remittance within stipulated period. The appeal filed by the applicant against the Order in Original was dismissed by the appellate authority on the ground that the same was time barred.

9. The Government finds that the copy of the Order in Original attached by the applicant with instant Revision Application bears certificate by the Superintendent (P) / XOS which has been further endorsed by the AC/XOS. The certificate reads as under:

"S/3-Misc/DBK(XOS)-SS(1700) 17-18-ACC

This copy of O-in-O is provided as per S/O No. 1/2018 dt. 14.03.2018"



9.1 It is therefore pertinent to peruse the contents of the Standing Order No. 1/2018 dated 14.03.2018 issued in this regard by the Office of the Commissioner of Customs (Export), Drawback (XOS), ACC, Mumbai.

9.2 On perusal of the impugned Standing Order, the Government observes that the issuing authority has noticed that while initiating recovery action under Section 142(11)(c)(ii) of the Customs Act, 1962 by Tax Recovery Cell (Export), many exporters had approached the department with a plea that they had not received the Order in Original and that they were also not aware of any recovery due from them especially in Drawback (XOS) related cases. The exporters had insisted that since there is no infringement from their side, a certified copy of the order in original be provided to them so that they can approach next Appellate Authority and file an appeal against the said order. In view of the said plea from exporters, the department decided that the Deputy / Assistant Commissioner of Customs, DBK(XOS) Section will issue the certified copy of O-I-O in eligible cases after verifying all the facts from available records as per the procedure laid down thereunder. The procedure laid down as per the impugned Standing Order No. 01/2018 dated 14.03.2018 is as under :-

a) The Exporters are expected to submit their request to provide certified copy of O-I-O to Dy/Asstt. Commissioner of Customs, DBK(XOS) Section. In case, the request is received in TRC(X) Section, they will forward such request to the DBK(XOS) Section.

b) The DBK(XOS) Section will first verify from the original file whether the O-I-O has been dispatched to the Exporter by Post or delivered to the Exporter / Authorised Representative of the Exporter by Hand. If the Original file is forwarded by DBK(XOS) Section to TRC(S) for recovery action, DC/AC, DBK(XOS) Section will call back the original file from TRC(X) for the time being for scrutiny and analysis of the facts of the case vis-à-vis records available in the section.

c) The DBK Section will verify the dispatch registers available in the DBK(XOS) section to get the details of the dispatch of the said O-I-O to the Exporter, DBK(XOS) will also verify from Review Cell the details of Order being accepted or not.



d) The DBK(XOS) Section will also verify the genuineness of the submission of the Exporter regarding realisation of export proceeds against the subject Shipping Bills after verifying the proof of the realisation of export proceeds submitted by the exporter through valid documents.

e) After verifying all the above facts, the file will be put up to AC/DC Drawback (XOS) underlining the facts of the case, investigation into verification of the records conducted and the same shall be put up in noting side as a chronological factual report. AC/DC may recommend on the basis of the facts and records available whether or not to provide the certified copy of the O-I-O to the exporter for the approval of the JC/ADC(Drawback) to issue the certified copy of the O-I-O”.

9.3 In the instant case, the Order in Original has been certified by the competent authority on 10.12.2019. The certification is said to have been done as per the Standing Order No. 1/2018 dated 14.03.2018. Thus, the respective sections ought to have followed the instructions (a) to (e) mentioned and verified the genuineness of the request made by the applicant before providing certified copy. It is, therefore, inferred that the applicant had not received the O-I-O either by Post or by Hand Delivery and were provided with the certified copy of the same on 10.12.2019. A such, it is held that the date of communication of order in original in the instant case is 10.12.2019.

10. The Government finds that the appellate authority has dismissed the appeal being time barred as per the provisions of Section 128 of the Customs Act, 1962. The provisions under Section 128 are, therefore, produced below.

“Section 128 in the Customs Act, 1962

(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the date of the communication to him of such decision or order:²⁸³ [Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]

(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties



or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing: Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf.]”

10.1 From the perusal of Section 128, it is clear that the appeal against the order in original is to be filed within the period of sixty days from the communication of order. In the instant case, the date of communication of order is 10.12.2019 as deduced in para 10 supra. The appeal was filed by the applicant on 31.12.2019 which is well within the time period prescribed under Section 128 of the Customs Act, 1962.

10.2 In view of above, the Government holds that the impugned order in appeal is not just and proper.

11. The Government notes that it is a statutory requirement under Section 75 (1) of Customs Act, 1962 & Rule 16A(1) of Customs, Central Excise & Service Tax Drawback Rules, 1995, read with Section 8 of FEMA 199 read with regulations 9 of Foreign Exchange Management (Export of goods & services Regulations 2000 & para 2.41 of EXIM Policy 2005-2009 that export proceeds need to be realised within the time limit provided thereunder viz within six months in this case subject to any extension allowed by RBI. If the applicants failed to comply with their statutory obligations, the drawback claim becomes recoverable along with interest under the statutory provisions stipulated under the Rule 16 of Customs, Central Excise & Service Tax Duty Drawback Rules, 1995 and the Section 75A (2) of the Customs Act, 1962.

11.1 The Government, further, notes that the above provisions are prescribed for recovery of drawback where the export proceeds are not realised within the period allowed under Foreign Exchange Management Act, 1999 including any extension of such period granted by the Reserve Bank of India. In the instant case, Government finds that the applicant have submitted the copies of BRCs along with the Revision Application stating that they have realised the export proceeds within prescribed time. It is opined that the BRCs are required to be verified to determine



its authenticity, validity and as to whether the export proceeds were received within stipulated period including any extensions granted by RBI to the applicant. Being beneficiary of the export incentive scheme i.e. drawback, it was the responsibility of the applicant to submit the evidence of receipt of sale proceeds immediately upon receipt which they admittedly failed to do. However, in the interest of justice, the applicant will now submit the relevant BRCs in original to enable verification of the same to the original authority for consideration in accordance with provisions of law and passing orders. As such, the case needs to be remanded for fresh consideration.

11.2 Further, the penalty in terms of Section 117 of Customs Act, 1962 will also be re-determined accordingly by the original authority, subject to outcome of the verification.

12. In view of above circumstances, Government sets aside impugned order and remands the case back to the original authority for fresh consideration in the light of above observation after giving reasonable opportunity of hearing being offered to the applicant. The applicant is also directed to furnish the relevant documents for verification.

13. Revision Application is disposed off in above terms.

Shrawan
30/3/21
(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ATTESTED
M. J. Joshi
CPR JOSHI
अधीक्षक

ORDER NO. 89/2021-CUS(WZ)/ASRA/MUMBAI DATED 30.03.2021

To,
M/s Flaunt Exports,
B/42, Oshiwara Ind. Centre,
Opp. Oshiwara Bus Depot,
New Link Road, Goregaon (West),
Mumbai - 400 062.

Superintendent
रिजिजन एप्लीकेशन
Revision Application
मुंबई इकाई, मुंबई
Mumbai Unit, Mumbai



Copy to :

1. The Commissioner of Customs (Export), Air Cargo Complex, Sahar, Andheri (East), Mumbai - 400 099.
2. The Commissioner of Customs (Appeals), Mumbai Zone - III, Awas Corporate Point, 5th floor, Makwana Lane, Behind S.M. Centre, Andheri- Kurla Road, Marol, Mumbai- 400 059.
3. The Assistant Commissioner of Customs, DBK (XOS) Section, Air Cargo Complex Sahar, Andheri (East), Mumbai - 400 099.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File.
6. Spare copy.

