



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/57&58/B/2021-RA / 8555 : Date of Issue: 19.12.2023

ORDER NO. 938-939/2023-CUS (WZ)/ASRA/MUMBAI DATED 18.12.2023 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 : 1 Mr. Young Yeo Yoon (A1)
2 Mr. Juhyung Ahn (A2)

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

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUS-PAX-APP-667&668/2020-21 dated 14.01.2021 [Date of issue: 20.01.2021] [S/49-529 & 530/2019/AP] passed by Commissioner of Customs (Appeals), Mumbai Zone-III

ORDER

This Revision Applications has been filed by Mr. Young Yeo Yoon and Mr. Juhyung Ahn (herein after referred to as the 'A1' and 'A2' respectively) against the Orders-in-Appeal No. MUM-CUS-PAX-APP-667&668/2020-21 dated 14.01.2021 [Date of issue: 20.01.2021] [S/49-529 & 530//2019/AP] passed by Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 27.07.2017, both the Applicant, holding Korean passport was intercepted by officers of Customs Officers, on his arrival from Hong Kong by Flight No. CX663 after they had opted the Customs Green Channel for their clearance.

2.2 Personal search of Mr Young Yeo Youn (A1) resulted in the recovery one yellow metallic chain which was cleverly concealed by wearing around his neck under the cloth worn by him, one black coloured belt buckle which was attached to the belt worn by him around his waist and two yellow coloured metallic cut pieces concealed inside the power bank from the right side back pocket of the trouser worn by him all purported to be gold.

2.3 Personal search of the Mr Juhyung Ahn (A2) resulted in the recovery of one yellow metallic chain which was cleverly concealed by wearing around his neck under the cloth worn by him, one black coloured belt buckle which was attached to the belt worn by him around his waist both purported to be gold.

2.4 Thus the gold recovered from both the applicants totally weighing 1999 grams concealed in a white coloured cloth belt with attached zipped pouch having three pockets within it, which was worn by him around his waist hidden under his trousers. The assorted gold totally weighing 1999 grams valued at Rs. 53,47,045/- were seized under the reasonable belief that the same were attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962.

3. The Original Adjudicating Authority i.e Additional Commissioner of Customs, C.S.I Airport, Mumbai vide Order-In-Original No ADC/AK/ADJN/517/2018-19 dated 27.03.2019 [Date of issue: 20.11.2018] [S/14-5-56/2018-19/Adjm SD/INT/AIU/314/2017 AP 'A'] ordered for the absolute confiscation of the seized gold totally weighing 1999 grams and valued at Rs. 53,47,045/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Penalty of Rs 4,05,000/- was imposed on the A1 and Rs1,85,000/- was imposed on the A2 under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said orders, the Applicants filed appeals before the appellate authority viz Commissioner of Customs (Appeals), Mumbai Zone-III who vide Order-in-Appeal No. MUM-CUS-PAX-APP-667&668/2020-21 dated 14.01.2021 [Date of issue: 20.01.2021] [S/49-529 & 530/2019/AP] rejected the appeals on the grounds of that the Applicant had failed to pay the deposit of 7.5% of the penalty amount.

5. Aggrieved with the aforesaid orders dated 14.01.2021 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III, the Applicants filed this revision application inter alia on the grounds that;

5.01. That the impugned orders were bad in law and unjust;

5.02 That the AA has passed the order without granting personal hearing even once and therefore the order had been passed without applying the principles of natural justice;

5.03. That, as held in the case of Ramesh Vasantbhai Bhojani [2017(357) E.L.T. 63 (Guj)], filing of appeal and entertaining of appeal are not synonymous and the party may file an appeal within the prescribed period of limitation though it may not be in a position to make pre-deposit within such time and that while Commissioner (Appeals) cannot entertain an appeal unless a pre-deposit is made, payment of pre-deposit as a condition precedent for filing an appeal cannot be insisted upon;

5.04. That as held in the case of Nyati Hotels & Resorts Pvt Ltd in Hon'ble CESTAT, WZB, Mumbai [2018(364) E.L.T. 1081 (Tri-Mumbai)], once appeal was filed within

time limit it could not be dismissed on ground of late payment of pre-deposit amount and Commissioner (Appeals) to hear appeal on merits;

Under the circumstances, the Applicant have prayed to set aside the order passed by the Appellate Authority.

6. Personal hearing in the case was scheduled for 04.08.2023. Shri N. J. Heera, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant. Both the applicants are foreign nationals. On mandatory deposit, he submitted that the same will be made in due course. He requested to release the goods on redemption fine and penalty.

7. Government has gone through the facts of the case. At the outset, Government observes that the AA had rejected the appeals filed by both the Applicants on grounds of non-maintainability as they had not deposited 7.5% of the penalty amount imposed by the OAA.

8.1. At para 3 of the OsIA, the AA has observed as follows,

"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 Principal Commissioner of Customs or Commissioner of Customs;"

8.2. Government notes that the A.A had issued the defective appeal notices (dtd 04.01.2019) to both the Applicant, but both the Applicant had not paid the requisite amount of pre-deposit. Thereafter, after the expiry of the condonable period, the matter was taken up by the appellate authority and having found out that the pre-deposit amount had not been paid so far, the appeals were rejected without going into the merits of the appeals as the same was non maintainable on account of non-payment of pre-deposit and dispensing off personal hearing.

9.1. Government notes that the A.A has relied on the judgement of the Hon'ble Gujarat High Court in the case of Ramesh Bhojani vs. U.O.I reported in 2017-TIOL-990-HC-AHM-CUS. Para 14 of the case law which has been reproduced by the AA in the OsIA, which 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."

9.2. Government notes that the AA had not returned back the memorandum of appeal for non-compliance but in fact had pointed out the deficiency and had sent a communication to the Applicant during the mandatory / condonable period available to the Applicant, that the pre-deposit @ 7.5% of the quantum of penalty imposed was required to be paid.

9.3. In this regard, para 5 of the judgement of the Hon'ble Apex Court dated 03.09.2013 in the Civil Appeal No 7809 of 2013 (Arising out of SLP (C)No. 27073/2011) in Ranjit Impex vs. Appellate Dy. Commissioner and Anr pertaining is reproduced below:

"5. As far as the first issue is concerned, it is needless to say that the conclusion arrived at by the Division Bench is absolutely justified, for a condition to entertain an appeal does not mean that the Memorandum of Appeal shall be returned because of such non-compliance pertaining to pre-deposit. The only consequences 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."

9.4. 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] 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."

9.5. 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 AA had issued the defective appeal notice which was within the statutory/condonable period. The both the Applicants had not rectified the defect/deficiency which needless to state was required to be done within the condonable period.
11. Government notes that while rejecting the appeals filed by both the Applicants, the AA has squarely applied the ratio of the aforesaid judgements of the Apex Court. Government notes that it is settled law, 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 off the payment of pre-deposit amount. Further, the AA has no power to condone delay exceeding 90 days. In this case, from the facts it is clear i.e. considering the date of the OsIA, the same has been passed after lapse of more than 90 days (i.e. the appeal period). Therefore, Government finds that the OsIA passed by the AA is legal and proper. Government finds no reason to interfere in the same and is inclined to uphold the OsIA passed by the AA.
12. Moreover, Government notes that in the extant Revision Application and at the time of the personal hearing both the Applicant has not made averment of the payment of the mandatory pre-deposit amount.
13. The Government finds no reason to interfere in the orders passed by the AA and upholds the OsIA.
15. Accordingly, the Revision Application filed by both the Applicants is dismissed.

Shrawan Kumar
18/12/23
(SHRAWAN KUMAR)

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

ORDER No. 938-/2023-CUS (WZ) /ASRA/

DATED 18.12.2023

To, 939

- 1 Mr. Young Yeo Yoon (A1) c/o N.J. Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai 400 001
- 2 Mr. Juhyung Ahn (A2) c/o N.J. Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai 400 001
- 3 The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
- 4 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 N.J. Heera, Advocate, Nulwala Building, 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. Notice Board.