

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

F.No. 371/59/B/2021-RA / 132

Date of Issue: ~~12.2023~~

02.01.2024

ORDER NO. 963 /2023-CUS (WZ)/ASRA/MUMBAI DATED 29.12.2023 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 : Ms. Enas Mohamed Sahil Abdulla

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-523/2020-21 dated 29.10.2020 [Date of issue: 02.11.2020] [S/49-587/2019] passed by Commissioner of Customs (Appeals), Mumbai Zone-III

ORDER

This Revision Application has been filed by Ms. Enas Mohamed Sahil Abdulla (herein after referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUS-PAX-APP-523/2020-21 dated 29.10.2020 [Date of issue: 02.11.2020] [S/49-587/2019] passed by Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 17.06.2018, the Applicant, holding a Sudanese passport was intercepted by officers of Customs Officers, on her arrival from Sharjah by Air Arabia Airlines Flight No. G9406 after she had opted the Customs Green Channel for her clearance. Her personal search resulted in the recovery of four yellow coloured metallic bars each having marking "Premier 10 Tolas Gold 999.0 OGR Melter Assayer" and assayed by the Valuer and were found to be collectively weighing 466 grams of 24KT was valued at Rs 13,18,475/-. The impugned gold bars were concealed in her private part and 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. The blue coloured carbon paper and black coloured adhesive tape which were used for concealment of the seized gold bars were also seized by the Customs officers under 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/473/2018-19 dated 26.02.2019 [Date of issue: 28.02.2019] ordered for the absolute confiscation of the seized gold bars collectively weighing 466 grams of 24KT and valued at Rs 13,18,475/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Penalty of Rs. 1,75,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the Applicants filed an appeal before the appellate authority viz Commissioner of Customs (Appeals), Mumbai Zone-III who vide Order-in-Appeal No. MUM-CUS-PAX-APP-523/2020-21 dated 29.10.2020 [Date of issue: 02.11.2020] [S/49-587/2019] rejected the appeal as not maintainable as filed beyond the period of limitation prescribed under the provisions of the Customs Act, 1962 and the Applicant had failed to pay the pre-deposit of 7.5% of the penalty amount.

5. Aggrieved with the aforesaid order dated 29.10.2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III, the Applicant filed this revision application inter alia on the grounds that;

5.01. That the impugned order was bad in law and unjust;

5.02 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;

5.03. 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 11.08.2023. Shri N. J. Heera, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant. He is a foreign national and brought some quantity of gold, 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. At the outset, the Government notes that the Applicant has filed for condonation of delay. The Revision Application was filed on 26.02.2021. The date of issue of the Order of the Appellate Authority is 02.11.2020 which was communicated to the applicant on 07.11.2020. Based on the date of communication of the said Order of the Appellate Authority, the Applicant was required to file the Revision Application by 07.02.2021 (i.e. taking the first 3 months into consideration) and by 07.05.2021 (i.e. taking into consideration a further extension period of 3 months). The Applicant has accepted that there was a delay in filing the Revision Application from the date of receipt of the order. Thus it is seen that the Revision Application has been filed within the date, after considering the extended period.

7.2. The Applicant in her application for condonation of delay has stated that the revision application could not be filed due to reasons beyond applicants control and requested that the delay be condoned.

7.3. For understanding the relevant legal provisions, the relevant section is reproduced below :

SECTION 129DD. Revision by Central Government.-

(1) The Central Government may, on the application of any person aggrieved by any order passed under section 128A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A, annul or modify such order.

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(2) An application under sub-section (1) shall be made within three months from the date of the communication to the Applicant of the order against which the application is being made :

Provided that the Central Government may, if it is satisfied that the Applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.

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7.4. From above, it is clear that the Applicant was required to file the Revision Application within 3 months from the communication of the Appellate Order. The delay thereafter, upto 3 months can be condoned. Since, the Revision Application is filed within the condonation period of three months, and the reason also being genuine, Government condones the delay on the part of the Applicant in filing the application and proceeds to examine the case on merits.

8. 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 penalty amount imposed by the OAA.

9.1. At para 2 of the OIA, the AA has observed as follows,

“2. I have carefully gone through the facts of the case and appeal filed by the applicant. 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 14.06.2019 was also issued to the appellant for submitting the proof of payment of mandatory deposit of 7.5% of the duty demanded/penalty imposed. However, the appellant failed to submit any reply to the said Defective Appeal Notice till date.”

9.2. Government notes that the A.A had issued the defective appeal notice (dtd 14.06.2019) to the Applicant, but 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 appeal was rejected without going into the merits of the appeal as the same was non maintainable on account of non payment of pre-deposit and dispensing off personal hearing.

10.1. 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.

10.2. 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.”

10.3. 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.”

10.4. 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.”


11. Government notes that the AA had issued the defective appeal notice which was within the statutory/condonable period. The Applicant had not rectified the defect/deficiency which needless to state was required to be done within the condonable period.

12. 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 OIA, the same has been passed after lapse of more than 90 days (i.e. 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.

13. Government notes that at the time of the personal hearing the Applicant has made averment of payment of the mandatory pre-deposit amount. However it is observed that the payment of the mandatory pre-deposit amount has not been made so far.

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

15. Accordingly, the Revision Application filed by the Applicant is dismissed.


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

ORDER No. 943/2023-CUS (WZ) /ASRA/ DATED 29.12.2023

To

1. Ms. Enas Mohamed Sahil Abdulla, C/o N.J. Heera, Advocate, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O, Fort, Mumbai 400 001
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), 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 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.

