

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

Customs Appeal No. 85090 of 2020

(Arising out of Order-in-Appeal No. MUM-CUSTOM-AXP-APP-751/2019-20 dated 29.11.2019 passed by the Commissioner of Customs (Appeals), Mumbai III)

Metro Fashions

.....Appellant

**Gala No. J-225, 2nd floor,
Ansa Indl. Estate, Saki Vihar Road,
Saki Naka, Andheri (East), Mumbai**

VERSUS

**Commissioner of Customs, Mumbai (Air
Cargo Export)**

.....Respondent

**Air Cargo Complex, Andheri (East)
Mumbai**

APPEARANCE:

Shri Sanjay Singhal, Advocate for the appellant
Shri Ram Kumar, (AR) for the respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/85925/2023

DATE OF HEARING : 13.12.2022
DATE OF DECISION : 06.06.2023

Per: AJAY SHARMA

This appeal has been filed assailing the impugned order dated 29.11.2019 passed by Commissioner of Customs (Appeals), Mumbai III rejecting the appeal filed by the appellant on the ground of limitation.

2. The issue involved herein is whether the learned Commissioner is justified in dismissing the appeal as time barred u/s. 128, Customs Act, 1962?

3. A demand cum show cause notice dated 31.8.2017 was issued to the appellant demanding Rs.1,58,101/- being the drawback amount obtained by the appellant for the exports made under the shipping bills since according to the department, the exporter has not realized the foreign exchange involved on the goods exported under the said Shipping bills as per Rule 16(A) (1) and (2) of Customs, Central Excise and Duties and Service Tax Drawback Rules, 1995. The same was confirmed by the adjudicating authority vide Order-in-Original dated 20.3.2018 alongwith penalty of Rs.10,000/- on the exporter. On 24.10.2019, the appellant had filed the appeal before the learned Commissioner (Appeals) but since it has been filed beyond prescribed period of 90 days as provided by section 128 *ibid* therefore the same was rejected on the ground of limitation without going into the merits of the appeal.

4. I have heard learned counsel for the appellant and learned Authorised Representative for the Revenue and perused the case records including the written submissions placed on record by the respective sides. Learned counsel submits that the appellant received the copy of order-in-original only on 13.09.2019 that too when they personally visited the authority's office and the appeal was filed by them on 24.10.2019 which is well within the period of limitation. He further submits that the department failed to produce any evidence to establish that the Order-in-Original was served/communicated by them at any earlier point of time. Section 128 of the Customs Act, 1962 provides for filing of appeals before Commissioner (Appeals). According to the said section any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days *from the date of the communication to him of such decision or*

order. [emphasis supplied] This section bars the Commissioner (Appeals) from condoning the delay beyond the period of 30 days. So what is relevant is the date of communication of the order of the adjudicating authority. I have to see when the adjudicating order was communicated to the appellant. According to the learned counsel although the date of the adjudicating order is 28.3.2018 but the same was not received by the appellant and the certified copy of the same was received by them on 13.9.2019 that too when they approached the authorities concerned and therefore the period of limitation has to be calculated from 13.9.2019 and not from 28.3.2018. Per contra learned Authorised Representative submits that the adjudication order was sent to the appellant by speed post and deemed to have been served on them.

5. Section 128 *ibid* which has been relied upon by the learned Commissioner (A) for dismissing the appeals on the ground of limitation, uses the words *date of communication of order*, which in my view is 13.9.2019 as the department failed to produce on record any evidence including the tracking record in support of their submission that the adjudication order was sent to the appellant immediately after the passing of the Order-in-Original. Merely by sending a copy of the Order-in-Original by speed post, the department cannot be said to have discharged their liability as they have to communicate the same to the appellant which means it has to be served on the assessee as the wording used in Section 128 *ibid* is '*date of communication of order*'. In *R. Sundararaj v. CC, Tuticorin* - 2018 (363) E.L.T. 426 (Tri. - Chennai) and *OSA Shipping Pvt. Ltd. v. CCE, Chennai* - 2015 (325) E.L.T. 486 (Mad.) it has been held that merely by sending the Order-in-Original/show cause notice by registered post would not amount to communication/service of the Order-in-Original. In the instant case the appellant received copy of the Order-in-Original on 13.9.2019 the appeal before the learned Commissioner (A) was filed on 24.10.2019 which is well within a

period of three months from the date of receipt/communication of the Order-in-Original. Therefore, the Commissioner (Appeals) has erred in rejecting the appeal on the ground of time bar.

6. Accordingly the impugned order is set aside and the matter is remanded back to the Commissioner (Appeals) to decide the same on merits after following the principle of natural justice within a period of three months from the date of receipt of this order. The appeal is allowed by way of remand.

(Pronounced in open Court on 06.06.2023)

(Ajay Sharma)
Member (Judicial)

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