

**(2008) 02 BOM CK 0171**

**Bombay High Court**

**Case No:** Writ Petition No. 1024 of 2008

Suresh Bafna, carrying on  
business of sole proprietorship  
under the name and style of  
Chirag Enterprises

APPELLANT

Vs

Commissioner of Customs and  
Central Excise (Appeals),  
Commissioner of Customs (E.P.),  
Dy. Commissioner of Customs  
and Union of India (UOI)

RESPONDENT

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**Date of Decision:** Feb. 28, 2008

**Acts Referred:**

- Customs Act, 1962 - Section 108, 120A, 128, 128(1), 131A

**Citation:** (2008) 5 BomCR 717 : (2008) 110 BOMLR 868 : (2008) 127 ECC 31 : (2008) 153 ECR 31 : (2009) 234 ELT 606

**Hon'ble Judges:** R.S. Mohite, J; F.I. Rebello, J

**Bench:** Division Bench

**Advocate:** A.D. Roy, for the Appellant; A.S.Rao, Ritu Singh and H.P.Chaturvedi, for the Respondent

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### **Judgement**

F.I. Rebello, J.

Rule. Heard forthwith.

2. The appeal preferred by the petitioner herein was dismissed by the Commissioner of Customs and Central Excise (Appeals) Goa on the ground that the appeal was barred by limitation. An appeal lies u/s 128 of the Customs Act. The limitation provided u/s 128(1) starts from the date of communication of the decision or order. u/s 153 of the Customs Act an order or decision passed has to be served either by tendering the order or decision or by sending it by registered post to the person for whom it is intended or to his agent. The order or decision if it cannot be served in

the manner as earlier set has to be done by affixing it on the notice board of the customs house.

3. Section 128(1) of the Customs Act, 1962 reads as under.

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;

[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.]

Section 153 of the Customs Act, 1962 reads as under.

Service of order, decision, etc. - Any order or decision passed summons or notice issued under this Act, shall be served,

(a) by tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended or to his agent; or

(b) if the order, decision, summons or notice cannot be served in the manner provided in Clause (a), by affixing it on the notice board of the customs house.

4. It is the petitioners case that by communication dated 12.2.2002 he had intimated to the Dy. Commissioner of Customs, Pune the change of address. Similarly by communication dated 3.3.2004 had intimated further change of address. These facts are not disputed. The show cause notice issued on 26.6.2002 was returned back undelivered. Another communication dated 13.11.2002 was also returned back as undelivered. It is the case of the petitioner that the communications were addressed at the address from which he had already shifted and inspite of the fact that he had communicated the new address. The order further shows that the original order was sent by registered post as per the address on the import documents dated 30.7.1999 and the same was returned undelivered. It is also set out that while recording the statement u/s 108 of the Customs Act, order in original was shown to the petitioner. There is no finding or statement that on that day, a copy of the said order was handed over to the petitioner.

5. In these circumstances, the question arises, whether it can be said that the petitioner was served as required under the Customs Act. When the act provides for the manner in which the notice is required to be served and further when the limitation to file the appeal will commence from the date of service, then the notice must be served in the manner prescribed by the Act. Time for filing an appeal against the order will start running from the date when the copy of the order or decision is served. u/s 131(A) of the Act, to which our attention was drawn by learned Counsel for the respondents in computing the period of limitation for an

appeal or application, the day on which the order was served and the party preferring the appeal or making the application was not furnished with a copy of the order when the notice of the order was served upon him, the time requisite for obtaining a copy of such order shall be excluded. This provision provides for exclusion of time. As a duty is cast upon revenue to serve the copy of the order and if it was not served and only intimation given of the order passed, then in that event, the time taken for obtaining copy of the order would be excluded for the purpose of computing the limitation u/s 128 of the Customs Act.

6. It is not the case of the Respondents that the order was served to the petitioner in the manner required by Section 153 of the Act or that notice of the order was served. The only contention is that when the statement was recorded u/s 108, the fact that the order was passed was made known to the petitioner. A perusal of Section 131(A) would show that it requires that the notice or the order be served. In other words, if not the order atleast a communication to be given to the petitioner that order has been passed. That also has not been complied with. A provision for service as it has an effect on the remedy of appeal which party is entitled to must be strictly construed more so in case when there is no provision for condonation of delay or a specific period of delay also can be condoned.

7. Considering the above, in our opinion, there was no service as required u/s 153. The question of excluding time u/s 131(A) would therefore not arise. At the highest it can be said that the petitioner received the copy of the order in the reply filed by the respondents before this Court. That could be considered for the commencement of the period of limitation as notice on the petitioner. The petitioner received the copy of the order of appeal on 7.6.2007. The appeal was preferred on 21.8.2007. It was therefore, open to the Commissioner (Appeals) to have condoned the delay considering the powers vested u/s 120(a) of the Act on the facts and circumstances sufficient cause has been made out to condone the delay.

8. Considering the facts and circumstances of the case, the impugned order is set aside. Delay if any in preferring the appeal is condoned, considering the first proviso to Section 120(a), the Commissioner (Appeals), is directed to hear the matter and dispose of the same according to law.

9. The counsel for the petitioner made a statement that for the purpose of disposing of the appeal and communicating the order, the address given in this petition will be the address for the purpose of appearance and service of all orders till the appeal is disposed of and the order is communicated. Statement accepted.

10. Rule is made absolute accordingly.