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. 195/192/WZ/2018-RA /7753 Date of issue: 26.12.2022

ORDER NO. 1228/2022-CX (WZ)/ASRA/MUMBAI DATED 20.12.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Bilfinger Plant Equipment Pvt. Limited

Respondent: Commissioner of CGST & CX, Surat

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. CCESA-SRT(APPEALS)/PS-038/2018-19 dated 12.06.2018 passed by the Commissioner of CGST & CX Appeals Commissionerate, Surat.

ORDER

This Revision Application has been filed by M/s. Bilfinger Plant Equipment Pvt. Limited, now known as M/s. Neo Structo Construction Pvt. Limited, B-3/3-3/12, SUSML, Hoziwala Industrial Estate, Sachin, Surat - 394 230 (hereinafter referred to as "the Applicant") against the Order-in-Appeal (OIA) No. CCESA-SRT(APPEALS)/PS-038/2018-19 dated 12.06.2018 passed by the Commissioner of CGST & CX Appeals Commissionerate, Surat.

2. Brief facts of the case are that the applicant is engaged in manufacturing of excisable goods falling under Ch.84 of Central Excise Tariff Act,1985. They had filed a rebate claim amounting to Rs.31,86,371/- on 11.01.2017 under Section 11B of the Central Excise Act, 1944, in respect of goods exported by them. However, the rebate sanctioning authority vide Order-in-Original No. SRT-III/ADJ-48/17-18-R dated 10.04.2017, rejected the rebate claim on the ground that the rebate claim had been filed beyond the period of one year from the date of export. Aggrieved, the applicant filed an appeal which was rejected by the Commissioner (Appeals) vide impugned Order-in-Appeal on the ground of time bar as the appeal had been filed after 89 days of the receipt of said OIO.

3. Hence, the applicant has filed the impugned Revision Application mainly on the grounds that:

(a) The Applicant is reiterating the submissions made by them in the EA-I Appeal memorandum and defence reply dated 30.03.2017 to the SCN and requesting to consider the same in addition to the following grounds which may be prejudice to each other.

(b) The Applicant in their application for condonation for delay filed before the Commissioner (Appeals) respectfully requested & prayed to kindly condone the delay of 29 days {less than 30 days}, in filing the appeal. However, the Commissioner (Appeals), Surat in his OIA has dismissed the appeal on the count of time bar without going

into the merits of the case, which is not proper and therefore deserves to be set aside.

(c) Without prejudice to the above, it is on records that the Applicant filed the appeal in question before the Commissioner (Appeals) on 12.07.2017 which is a delay of 29 days and as per the proviso of Section 35(1) of Central Excise Act,1944, the Commissioner (Appeals) is empowered to allow filing of appeal within a further period of one month. As the revenue involved in this appeal is amounting to Rs.32.62 lakhs, the Applicant respectfully requests the Hon'ble Revisionary Authority to kindly condone this delay of 29 days and also requesting for setting aside of the impugned OIA.

(d) Without prejudice to the above, it is respectfully submitted that "sufficient cause" is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the delay of 29 days is due to that the person concerned has been busy in switching over from excise regime to GST and attending seminars in various cities to understand the GST. Also during the period of July 2017 the New GST system was implemented and the applicant was very much engaged in implementation of new GST.

(e) Further, during the period Applicant company was merged with another group company namely M/s. Bilfinger Neo Structo Pvt. Ltd. and their Surat office was shifted to Chennai. Also staff at Surat, dealing the matter related to Central Excise, Service tax transferred to Chennai or left the company. Also the person who was handling Central Excise at Sachin factory resigned the company and kept the papers without informing the management and without handing over pending papers with him, including subject Order-in-Original, against which filing of appeal was delayed. Therefore the Applicant

respectfully requested to condone the delay of 29 days to the Commissioner (Appeals).

(f) Applicant rely upon the following decisions in support of their contention to condone delay :-

- Hon'ble High Court of Allahabad in case of Sukhdeo Singh Vs CCE [2011 (23) S.T.R. 120 (All.)]
- Hon'ble CESTAT, Ahmedabad in case of Gujarat Guardian Ltd. Vs CCE, Bharuch [Final order No. A/10728/2018 dated 19.04.2018]

(g) Without prejudice to the above, it is settled position that exports are tax-free and by applying this logic to the present case, if your honour is not allowing the cash refund of Rs.32.62 lakhs then the Applicant humbly request your honour to kindly allow to Credit of Cenvat credit (now CGST ITC) of the same amount so that the Cenvat credit debited by the Applicant could be compensated by Cenvat/ITC credit.

On the above grounds the applicant prayed to set aside the impugned Order-in-Appeal and grant consequential relief.

4.1 Personal hearing in the case was fixed for 23.11.2022. Shri Naresh Satwani, Consultant attended the online hearing and submitted that the Commissioner (Appeals) has rejected their appeal on limitation though it was filed within condonation period. He submitted that Original authority had rejected their claim on the ground of time bar under Section 11B of the Central Excise Act,1944. He further submitted that time bar is not applicable on rebate claims. He requested one week's time for additional submissions.

4.2 Subsequently, the applicant filed additional submissions vide their letter dated 02.12.2022, wherein they have inter alia contended that:

a) On merit, we would like to submit that the learned adjudicating authority as well as lower appellate authority has failed to take a note of

the very object behind granting the rebate to exporter is to neutralize the Tax effect on export goods and encourage the exports. It is in accordance to principle followed in WTO agreement that the taxes cannot be exported in other country. Therefore, all that has to be seen while sanctioning the rebate, that whether duty was paid on exports and such goods on which duty has been paid are exported or not. In present case, the exportation of goods and payment of excise duty is not under challenge. However, the learned adjudicating authority, without considering these facts of the case and submission made by us, rejected the rebate claim only on sole ground that the claim was filed with a delay of 17 days, which too in fact, beyond the control of appellant. As we already submitted that the delay was intentionally made by our CHA due to some payment disputes. It is settled position of law that the legitimate benefits of Rebate on duty paid on exports, cannot be denied on a procedural and condonable lapse, especially when the exportation of goods and payment of duty is not under challenge. These crucial facts have not been considered by Ld. Lower appellate authority, therefore on this ground itself the impugned Order deserves to be set aside.

b) It is further to submit that it is a settled legal position that taxes cannot be exported, as per the norms prescribed by the World Trade Organization, which specifically permits the remission of duties and taxes on exported products and if in any case the exporter is unable to get back the tax or duty paid on exports goods at the time of clearance from factory or warehouse, as the case may be, either by way of rebate in cash or re-credit back in CENVAT Credit account, then exporter would be compel to write-off this amount and pass on the burden of such amount to its foreign customers, which would lead to a situation of export of taxes, which is against the settled principle that taxes cannot be exported. This may be the reason that it is general practice of department that in cases where export goods cleared on payment of excise duty under claim for rebate and while sanctioning the rebate in cash, if the rebate sanctioning authority finds, any excess duty payment on export goods, then in such cases, the rebate claim of such excess payment was being rejected and the

exporters were allowed to re-credit the amount of such excess duty payment in the manner it was initially paid.

c) Therefore, even otherwise, without admitting the liability, for sake of logic, if the refund is not sanctionable to appellant on ground of limitation, then also the exporter is eligible to re-credit such amount in their CENVAT Credit account, in the manner it was initially paid. However, after the introduction of GST w.e.f. from 01.07.2017, when the Cenvat Credit Rules, 2004 ceased to exist, the appellant is not in a position to re-credit such amount in CENVAT Credit Account. To deal with such kind of situation, section 142 of CGST Act, 2017, speaks about the Transitional provisions and sub-section (3), (6)(a), (8)(b) & 9(b) of Section 142 of CGST Act, 2017 states that every claim of CENVAT Credit shall be disposed of in accordance with the existing law and any amount eventually accruing to claimant shall be paid in cash.

d) From the submission made above, it is clear that even in case, where the rebate claims are not being sanctioned in cash to appellant on the ground of limitation, then also the appellant are eligible to re-credit such rebate amount in their CENVAT Credit account and since after introduction of GST, the Cenvat Credit Rules, 2004 ceased to exist, and appellant is not in a position to re-credit such amount in their CENVAT Credit account therefore in terms of transitional provisions of sub-section (3), (6)(a), (8)(b) & 9(b) of Section 142 of CGST Act, 2017, such amount refunded to appellant in cash. In support of our claim, we rely upon the following case laws –

   - Revisionary Authority to Government of India order No. 24/2017-CX(WZ)/ASRA/Mumbai, dated 27-12-2017
   - Hon'ble High Court of Gujarat Order in case of Thermax Ltd. Vs. UOI, 2019(31) G.S.T.L. 60 (Guj.)

e) In view of above case laws, it is clear that when in similar circumstances the rebate claim was rejected to appellant, however on appeal the revisionary authority has allowed the appellant to re-credit the rejected rebate claim amount in Cenvat Credit Account. But since after

introduction of GST, the appellant was not in a position to re-credit the same in his CENVAT Credit Account, therefore on Appeal before Hon'ble High Court of Gujarat, the court allowed the appeal and directed the sanctioning authority to refund such amount in Cash and while allowing the appeal the court observed that Respondent No. 2 (RA) ought to have directed the sanctioning Authority to refund the duty of the amount in cash instead of credit in the Cenvat account.

f) Our view is also upheld by Hon'ble CESTAT, Chandigarh in case of M/s Great India Steel Fabricators vs. CCE&ST Panchkula, 2019(3) TMI 103 - CESTAT CHANDIGARH

g) In view of above it is clear that the applicant is eligible for rebate claim in Cash and even if the rebate sanctioning authority rejects the rebate claim on limitation, then also the appellant is eligible to re-credit such rejected rebate claim amount in Cenvat Credit Account and as the Cenvat Credit Rules, 2004 ceased to exist, hence, the same is refunded to appellant in Cash in terms of transitional provisions of sub-section (3), (6)(a), (8)(b) & 9(b) of Section 142 of CGST Act, 2017.

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

6. Government observes that the main issue in the instant case is whether the rebate claim filed after one year is time barred, being hit by limitation in terms of section 11B of the Central Excise Act, 1944. Further whether the delay in the filing of appeal could have been condoned by the Commissioner (Appeals).

7.1 Government first takes up the condonation issue. Government observes that as regards filing of an appeal, the relevant Section of the Central Excise Act, 1944 reads as follows:

SECTION 35. Appeals to Commissioner (Appeals). — (1) Any person aggrieved by any decision or order passed under this Act by a Central

Excise Officer, lower in rank than a Principal Commissioner of Central Excise or Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals)hereafter in this Chapter referred to as the Commissioner (Appeals) <u>within sixty days</u> 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 <u>further period of thirty days</u>.]*

Government observes that the appeal with Commissioner(Appeals) was filed alongwith an application seeking condonation of delay of 29 days for the reason of negligence on part of their accounts staff. The Commissioner (Appeals) found the reason assigned by the Applicant for the delay in filing the appeal to be not valid and not justified to consider grant of condonation and rejected the appeal being hit by limitation of time bar.

7.2 Government finds that the Commissioner (Appeals) had rejected the appeal filed by the applicant, without going into the merits of the case, as there was a delay of 29 days in filing the said appeal. Government observes that it is not in dispute that there was a delay of 29 days in filing the appeal covered by the present Revision Application, which was beyond the period of sixty days but within a further thirty days, from the receipt of the order. Government notes that the issue has been clarified by the Hon'ble Supreme Court in the case of Collector, Land acquisition Anantnag and Another Versus Mst. Katiji and Others [1987 (28) E.L.T. 185 (S.C.)]. Relevant portion of the order is reproduced hereunder:

> *The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice - that being the life-purpose for the existence of the institution of Courts. It is common*

knowledge that this Court has been making a justifiable liberal approach in matters instituted in this Court. But the message does not - appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Therefore, Government allows the condonation of delay of 29 days incurred in filing of appeal.

8.1 Now, Government takes up the main issue of rejection of the rebate claim of the applicant on the ground of being time barred in terms of section 11B of the Central Excise Act,1944. Government observes that the applicant had filed the rebate claim for an amount of Rs.31,62,242/-, being duty paid on the goods exported, on 11.01.2017 with the rebate sanctioning authority. After verification of documents submitted, the rebate sanctioning authority rejected the rebate claim on the grounds of being time barred in terms of section 11B of the Central Excise Act, 1944 as it was filed after the

prescribed period of one year from the relevant date, viz. 25.12.2015 (the date of shipment).

8.2 The applicant has contended that *the legitimate benefits of Rebate on duty paid on exports, cannot be denied on a procedural and condonable lapse, especially when the exportation of goods and payment of duty is not under challenge.* In this regard, Government observes that filing of rebate claim within one year from the relevant date is a statutory requirement under Section 11B of Central Excise Act,1944. It is not a procedural requirement but a substantive requirement. Further, by issuance of Notification No. 18/2016- Central Excise (N.T.) dated 01.03.2016, the Notification No. 19/2004-Central Excise (N.T.), dated the 6th September, 2004, has been amended by inserting the words, "*figures, letter and brackets before the expiry of the period specified in section 11B of the Central Excise Act 1944 (1 of 1944)*". Thus, the condition of fulfilment of filing a rebate application before the expiry of one year from the relevant date has been categorically mandated under the Statute which is required to be mandatorily adhered to and is non-condonable.

8.3 The applicant has further contended that *if the refund is not sanctionable on the ground of limitation, then also the exporter is eligible for re-credit of such amount in their CENVAT Credit account, in the manner it was initially paid, as taxes cannot be exported.* In this regard, Government observes that the relevant Rule 18 of the Central Excise Rules, 2002 reads as under:

> ***RULE 18. Rebate of duty.*** *— Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification.*

> ***Explanation.*** *- For the purposes of this rule, "export", with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India and includes shipment of goods as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft.*

Thus, Government observes that an exporter is required to pay the applicable duty at the time of clearance of goods from the factory besides complying with other stipulated norms for claiming rebate. This duty, paid at the time of export, can be claimed as rebate under aforementioned Rule subject to compliance of specified conditions and limitations. In the instant case the applicant has not complied with the statutory requirement of filing the claim within one year of shipment of goods, resulting in rejection of their claim as time barred. Once a rebate claim is rejected as time barred, allowing re-credit of duty paid at the time of clearance will be legally untenable as it would tantamount to allowing rebate which has been already denied. Thus, Government does not agree with this contention of the applicant.

8.4 Government notes that in support their contention mentioned at aforementioned para 8.3, the applicant has relied upon the case law of M/s. Thermax Ltd. Government observes that in the said case, M/s. Thermax Ltd., a 100% EOU, had exported certain consignments on payment of duty and filed rebate claims which were rejected by lower authorities on the ground that being 100% EOU they were not required to pay duty as per provisions of Section 5A(1A) of Central Excise Act, 1944 read with applicable Notification. The Revisionary Authority, while agreeing with the decision taken by the lower authorities, had held that the amount so paid is to be treated as voluntary deposit with the Department and same is to be returned the way it was initially paid. However, in the instant case, as the applicant is not an EOU and as discussed as para 8.3, was required to pay duty at the time of clearance of goods for export, hence, the case law is found to be inapplicable in the instant matter.

8.5 Government places reliance on the judgment of Hon'ble Supreme Court of India, in Civil Appeal No. 8717 of 2022, decided on 29.11.2022, in the case of M/s. Sansera Engineering Pvt. Ltd. wherein while upholding the judgment dated 22.11.2019 of Hon'ble High Court of Karnataka [2020(371) ELT 29(Kar)], it is held that:

> *35. In view of the above and for the reasons stated above, it is observed and held that while making claim for rebate of duty under Rule 18 of the Central Excise Rules, 2002, the period of limitation prescribed under Section 11B of the Central Excise Act, 1944 shall have to be applied and applicable. In the present case, as the respective claims were beyond the period of limitation of one year from the relevant date, the same are rightly rejected by the appropriate authority and the same are rightly confirmed by the High Court. We see no reason to interfere with the impugned judgment and order passed by the High Court. Under the circumstances, the present appeal fails and deserves to be dismissed and is accordingly dismissed. However, there shall be no order as to costs.*

9. In view of the findings recorded above, Government rejects the impugned Revision Application on merits.

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 1228/2022-CX (WZ)/ASRA/Mumbai dated 20.12.2022

To,
M/s. Bilfinger Plant Equipment Private Limited,
Now known as M/s. Neo Structo Construction Pvt. Limited,
B-3/3-3/12, SUSML, Hoziwala Industrial Estate,
Sachin, Surat – 394 230.

Copy to:

1. Commissioner of CGST & CX,
   Surat, New Central Excise Building,
   Chowk Bazar, Surat – 395 001.

2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Notice Board.