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F.No.198/641/2011-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
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NEW DELHI-110 066

Date of Issue: 4/10/13

ORDER NO. 1287 /2013-Cx DATED 01.10.2013 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D.P.SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944

Subject	:	Revision application filed under Section 35 EE of the Central Excise Act, 1944 against the order-in-appeal No.YDB/174/Th-I/2011 dated 18.7.2011 passed by the Commissioner of Central Excise (Appeals) Mumbai-I
Applicant	:	Commissioner of Central Excise, Thane-I
RESPONDENT	:	M/s Bhuwalika Steel Industries Ltd., Thane

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ORDER

This revision application is filed by Commissioner of Central Excise, Thane-I against the order-in-appeal No.YDB/174/Th-I/2011 dated 18.7.2011 passed by the Commissioner of Central Excise (Appeals) Mumbai-I with respect of order-in-original passed by the Assistant Commissioner of Central Excise, Kalyan-I Division.

2. Brief facts of the case are that the respondent filed a rebate claim of Rs.51,274/- under Rule 18 of the Central Excise Rules,2002 in respect of the goods cleared by them to M/s. ATC Tires Pvt. Ltd, SIPCOT, SEI, Tirunelveli. A Show Cause Notice was issued to the assessee on the grounds that clearance to the SEZ could not be equated with that of export and that such clearances would not be eligible for grant of rebate under Rule 18 of the Central Excise Rules, 2002. The case was decided by the Assistant Commissioner, Central Excise, Kalyan-I Division, vide impugned order-in-original who rejected the rebate claim.

3. Being aggrieved by the said order-in-original, the respondent filed appeal before Commissioner (Appeals), who decided the same in favour of respondent party.

4. Being aggrieved by the impugned order-in-appeal, the applicant department has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 The term 'export' has not been defined under the Central Excise Act, 1944 or any Rules framed thereunder. The definition of 'export' given under the Customs Act, 1962 has been traditionally adopted for the purposes of the Central Excise Act, 1944 and the Rules thereunder. Therefore, in the absence of a definition of 'export' under the Central Excise Act, 1944, the Central Excise Rules,2002 or the Cenvat Credit Rules, 2004 one has to look for its definition given under the Customs Act,1962.

4.2 Section 2(18) of the Customs Act, 1962 defines 'export' as:- " 'export' with its grammatical variations and cognate expressions, means taking out of India to a place outside India". The aforesaid definition of the term 'export' under the

Customs Act,1962, therefore, implies that the term 'export' stands for the physical export out of the country. As such, the fictionalized definition of 'export' under section 2(m)(ii) of the SEZ Act,2005 cannot be looked for as it purports only to make the SEZ unit an exporter.

4.3 The Hon'ble CESTAT in its Order No.A/246 to 248/2010-EB/CII dated 04.08.2010, in the case of Commissioner of Central Excise, Thane-I Vs. M/s. Tiger Steel Engineering (I) Pvt. Ltd, also held that 'export' has the same meaning as defined under Section 2 (18) of the Customs Act,1962 and not as defined under Section 2(m)(ii) of the SEZ Act,2005 and that the fictional definition of 'export' referred to under Section 2(m)(ii) of the SEZ Act, 2005 cannot be considered as it purports only to make the SEZ unit as exporter and not the DTA supplier. While deciding the said matter, the Hon'ble Tribunal also examined the clarification issued by the Director General (Export Promotion) vide Circular No.6 of 2010 dated 19.03.2010 issued in F.No.DGEP/SEZ/ 13/2009, that rebate under Rule 18 of the Central Excise Rules,2002 is admissible for the supplies made from DTA to SEZ. However the final decision rendered by the Hon'ble Tribunal in the said case has held that such supplies made from DTA could not be considered as export for the purpose of Rule 18 of the Central Excise Rules, 2002. However, the Commissioner (Appeals) has, while passing the aforesaid order in appeal, ignored the said conclusion of the Hon'ble Tribunal.

4.4 In the case of M/s. Essar Steel Ltd. and others Vs. Union of India & Others, reported in 2009 TIOL-674-HC-AHM-CUS, the Hon'ble High Court of Gujarat held that for the levy of export duty on any goods, the goods should be shown to have been physically exported out of the country as envisaged under the provisions of the Customs Act, 1962. The Hon'ble High Court further held that "the movement of the goods from the Domestic Tariff Area to the Special Economic Zone has been treated as export by a legal fiction created under the SEZ Act, 2005. A legal fiction is to be restricted to the statute which creates it". The Hon'ble High Court's aforesaid judgement supports the position that 'export' has the same meaning as defined under Section 2(18) of the Customs Act, 1962 and not as defined under Section 2(m) (ii) of the SEZ Act, 2005.

4.5 In the case of Commissioner Central Excise V/s M/s. Quality Screens, reported in 2008(226) ELT 608 (Tri) Mumbai, it is held that in case of refund when claimed under Central Excise Act, there has to be physical export. Further, it is also viewed that the term "deemed export" is a creation of Exim Policy and is nowhere defined under the Central Excise Law. Since the rebate has been claimed under the Central Excise Law, the meaning of the export is to be derived from the Central Excise Act 1944 and the Customs Act 1962 where export has been defined as taking goods out of India.

5. A show cause notice was issued to the respondent under Section 35EE of Central Excise Act 1944 to file their counter reply. However, no reply received from the respondent.

6. Personal hearing scheduled in this case on 7.8.2013 at Mumbai was attended by Shri A.S.Monappa, advocate & Shri Dilip N. Patil on behalf of the respondent who stated the order-in-appeal being legal and proper may be upheld. Nobody attended hearing on behalf of applicant department.

7. Government has carefully gone through the relevant case records and perused the impugned order-in-original and order-in-appeal.

8. Government observes that the respondents rebate claim was rejected by the original authority on the ground that the clearance to SEZ could not be equated with that of export and that such clearances would not be eligible for grant of rebate under Rule 18 of the Central Excise Rules 2002. Commissioner (Appeals) set aside the impugned order-in-original and decided the case in favour of respondent. Now, the applicant department has filed this revision application on grounds mentioned in para (4) above.

9. Government notes that department has contended that definition of 'export' given under the Customs Act 1962 has been traditionally adopted for the purposes of the Central Excise Act and rules made thereunder. The term 'export' is a physical export out of the country as envisaged in the Customs Act. Department has relied upon judgement of Hon'ble Tribunal in the case of M/s Tiger Steel Engineering Pvt. Ltd. 2010(259) ELT 375 (T-Mumbai) wherein it was held that 'export' has same

meaning as defined in Section 2(18) of Customs Act and not defined under Section 2(m)(ii) of SEZ Act 2005.

9.1 Government notes that as per para 5 of CBEC Circular No.29/06-Cus dated 27.12.06 (F.No.DGEP/SEZ/331/2006), the supplies from DTA to SEZ on payment of duty shall be eligible for claim of rebate under Rule 18 of Central Excise Rules 2002 subject to fulfillment of conditions laid therein. Further Rule 30(1) of SEZ Rules, DTA Unit may supply goods to SEZ, as in the case of exports either under bond or as duty paid goods under claim of rebate on cover of ARE-1.

9.2 Government also notes that CBEC in its Circular No.06/10-Cus dated 19.3.10 (F.No.DGEP/SEZ/13/09) regarding rebate under Rule 18 on clearances made to SEZs has clarified as under:

> "***Sub: Rebate under Rule 18 on clearances made to SEZs. reg.***
>
> *A few representations have been received from various field formations as well as from various units on the issue of admissibility of rebate on supply of goods by DTA units to SEZ.*
>
> *2. A view has been put forth that rebate under Rule 18 of the central Excise Rules, 2002 read with Notification 19/2004- CE (NT) dated 06.09.2004 is admissible only when the goods are exported out of India and not when supplies are made to SEZ.*
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> *3. The matter has been examined. The circular No. 29/2006- Cus dated 27.12.2006 was issued after considering all the relevant points and it was clarified that rebate under Rule 18 is admissible when the supplies are made from DTA to SEZ. The Circular also lays down the procedure and the documentation for effecting supply of goods from DTA to SEZ, by modifying the procedure for normal export. Clearance of duty free material for authorised operation in the SEZ is admissible under Section 26 of the SEZ Act, 2005 and procedure under Rule 18 or Rule 19 of the Central Excise Rules is followed to give effect to this provision of the SEZ Act, as envisaged under Rule 30 of the SEZ Rules, 2006.*

4. Therefore, it is viewed that the settled position that rebate under Rule 18 of the Central Excise Rules, 2002 is admissible for supplies made from DTA to SEZ does not warrant any change even if Rule 18 does not mention such supplies in clear terms. The field formations are required to follow the circular no. 29/2006 accordingly."

9.3 Government notes that the judgement of Hon'ble CESTAT in the case of M/s Tiger Steel Engineering Pvt. Ltd. cited by department relates to the issue of refund of accumulated cenvat credit under Rule 5 of Cenvat Credit Rules 2004. Hon'ble Tribunal in para 12 of said judgement has observed as under:

".... The Board's clarification is in the context of applicability of Rules 18 and 19 of the Central Excise Rules, 2002 to a DTA supplier who might claim duty-free clearance of goods under Bond/Letter of Undertaking or rebate of duty paid on such goods or on raw materials used therein. Such limited clarification offered by the Board cannot be applied to the instant case where the issue under consideration is altogether different."

From above it is quite clear that CESTAT has not given any finding on the admissibility of rebate claim of duty paid on goods cleared to SEZ/SEZ Units.

9.4 Government further notes that Hon'ble Gujarat High Court has held in the case of CCE Vs NBM Industries vide order dated 8.9.11 reported on 2012(276)ELT9(Guj) as under:

"Revenue is in appeal against the judgment of the Tribunal dated 6th March 2009 [2009 (246) ELT 252 (Tribunal) raising following questions for our consideration:

"(i) Whether the Tribunal was right in allowing refund of the Cenvat credit availed on inputs used in the manufacture of goods cleared by DTA unit to a 100% Export Oriented Unit, following CT-3/ARE-3 procedure, where the provisions of Rule 5 of the Cenvat Credit Rules, 2004 are not applicable, such clearance being 'deemed export'?

(ii) Whether the Tribunal was right in allowing refund of the Cenvat credit availed on inputs used in the manufacture of goods cleared by DTA unit to a

100% Export Oriented Unit, even in absence of enabling provision that consider deemed export as physical export as in case of supply to SEZ, having been defined as export in terms of section 2(m), of SEZ Act, 2005 read with Rule 30 of the SEZ Rules, 2006?"

2. *From the questions it can be seen that though two questions are framed, issue is common, viz. entitlement of the manufacturer to refund of Cenvat credit on inputs used in manufacture of goods cleared by DTA units to 100% export oriented unit. Case of the Revenue is that such refund is not available since Rule 5 of the Cenvat Credit Rules does not cover such a situation granting benefit of deemed export. It is Revenue's case that only physical export would qualify for refund. We need not record the submissions at length since we find that similar issue was considered by a Division Bench of this Court in Tax Appeal No.968 of 2008 [2011(269) ELT 17(Guj.)]. One of the questions posed before the Court was as follows:*

"(i) Whether in the facts and circumstances of the case, the Tribunal is justified and has committed a substantial error of law in dismissing the appeal of the Revenue and confirming the order of the learned Commissioner (Appeals) holding that the clearances made by one 100% EOU to another 100% EOU which are "deemed exports" are to be treated as physical exports for the purpose of entitling refund of unutilized Cenvat credit contemplated under the provisions of Rule 5 of the Cenvat Credit Rule, 2004?"

3. *The Division Bench after taking into account the detail submissions of the counsel appearing for the parties held and observed as under:*

"14. We have heard the learned Counsel appearing for the parties and after considering their submissions, we are of the view that the issue raised by the Revenue in the present Tax Appeal is squarely covered by the decision of Amitex Silk Mills Pvt. Ltd.(supra), Commissioner of Central Excise vs. Ginni International Ltd. and Sanghi Textiles Ltd. vs. Commissioner of Customs & Central Excise 2006 (206) E.L.T. 854 (Tri.-Bang.). So far as the decision of the Tribunal in the case of Amitex Silk Mills Pvt. Ltd. (supra) is concerned, it is true that the appeal is admitted by the Apex Court, however, no stay was granted by the Apex Court. It is, however, more important to note that the decision of the Tribunal in the case of Ginni International Ltd. (supra) was

also challenged before the Apex Court and the Apex Court vide decision reported in 2007(215) ELT A102(S.C.) held while dismissing the Revenue's appeal against the Tribunal's order, that once Development Commissioner giving permission to the appellant, a 100% EOU, to sell goods in DTA up to a specified value, Revenue cannot go beyond the permission and dispute it holding that for fixing the limit only physical exports and not deemed exports should have been taken into account. It is also important to note that the decision of the Tribunal in the case of Sanghi Textiles Ltd. vs. Commissioner of Customs & Central Excise (supra) was also challenged by the Revenue before the Apex Court and the Apex Court vide order dated 16.08.2007 dismissed the Revenue's appeal. While dismissing the said appeal, Apex Court has referred to its decision in the case of Ginni International Ltd.(supra) and reiterated that the Tribunal in its impugned order had held that once Development Commissioner giving permission to the appellant, a 100% EOU, to sell goods in DTA up to a specified value, Revenue cannot go beyond the permission and dispute it holding that for fixing the limit only physical exports and not deemed exports should have been taken into account.

15. In view of the above settled legal position and considering the fact that the issue is settled by the Apex Court by those very judgments on which the Tribunal has placed reliance while deciding the case of the present respondent, we are of the view that no purpose will be served in keeping this matter pending, awaiting the outcome of the Apex Court's decision in the case of Amitex Silk Mills Pvt. Ltd. (supra), especially when in two other matters, the Apex Court has already dismissed the appeals filed by the Revenue.

16. In the above fact situation, we are of the view that no question of law much less any substantial question of law, arises out of the order of the Tribunal and even if it arises, the answer is very obvious and we, therefore, hold that the Tribunal is justified and has not committed any substantial error of law in dismissing the appeal of the Revenue and confirming the order of the learned Commissioner (Appeals) holding that the clearances made by one 100% EOU to another 100% EOU which are "deemed exports" are to be treated as physical exports for the purpose of entitling refund of unutilized

Cenvat credit contemplated under the provisions of Rule 5 of the Cenvat Credit Rule, 2004."

4. Counsel for the Revenue, however, submitted that a Division Bench of the Madras High Court in the case reported in 2007 (211) ELT 23 (Mad) has taken a different view. We find that the decision of this Court being directly on the issue, we are bound by the said decision. Further we find that the Apex Court in the case of Virlon Textile Mills Ltd. v. Commissioner of C.Ex. Mumbai, 2007 (211) ELT 353 (SC), though not in identical situation while examining the nature of DTA sales to 100% export oriented units observed that DTA sales against foreign exchange or other supplies in India can be equated with physical exports.

5. In the result, the situation being similar, this Tax Appeal is dismissed."

The ratio of above said judgement of Hon'ble High Court of Gujarat is applicable to this case since the deemed export to 100% EOU is considered as physical export and therefore clearances to SEZ are also be treated as physical exports for the purpose to grant rebate under Rule 18 of Central Excise Rules 2002.

10. In view of above position, Government holds that rebate claim of duty paid on goods cleared to SEZ is rightly held admissible by Commissioner (Appeals) under 18 of Central Excise Rules 2002 read with Notification No.19/04-CE(NT) dated 6.9.04. Government finds no infirmity with said order-in-appeal and therefore upholds the same.

11. The revision application is thus rejected in terms of above.

12. So, ordered.

(D.P. Singh)
Joint Secretary (Revision Application)

Commissioner of Central Excise
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(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
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Ministry of Finance (Deptt of Revn)
भारत सरकार/Govt. of India
नई दिल्ली/New Delhi

Order No. 1287 /2013-Cx dated 01.10.2013

Copy to:

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3. Assistant Commissioner of Central Excise, Kalyan Division-I, 3rd Floor, Chandrama Building, Valipeer Road, Kalyan (W)-421301.
4. PS to JS(RA)
5. Guard File.

ATTESTED

(B.P.Sharma)
OSD (Revision Application)