REGISTERED
SPEED POST

F.No.198/3-4/2012-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE
NEW DELHI-110 066

Date of Issue: 15/10/13

ORDER NO.1314-1315/2013-Cx DATED 14.10.2013 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/128 & 129/Th-I/2010 dated 20.8.2011 passed by the Commissioner of Central Excise (Appeals) Zone-I, Mumbai
Applicant	:	Commissioner of Central Excise, Thane-I
RESPONDENT	:	M/s Essel Propack Ltd., Thane

******

ORDER

These revision applications are filed by the Commissioner of Central Excise, Thane-I, Navprabhat Chambers, Ranade Road, Dadar (W), Mumbai against the orders-in-appeal No.YDB/128 & 129/Th-I/2010 dated 20.8.2011 passed by the Commissioner of Central Excise (Appeals) Zone-I, Mumbai with respect to orders-in-original No.R-13/09-10 dated 18.4.09 & R-276/09-10 dated 1.10.09 passed by the Assistant Commissioner of Central Excise, Kalyan-I Division Thane-I. M/s Essel Propack Ltd., Thane are the respondents in these cases.

2. Brief facts of the case are that the respondents are engaged in the manufacture of excisable goods falling under Chapter 39239090 of the Schedule to the Central Excise Tariff Act, 1985 and are holders of Central Excise Registration No. AAACE1568LXM001. The respondents had filed rebate claim on account of goods cleared by them to M/s. Hindustan Unilever Ltd; Kandla SEZ, under Rule 18 of the Central Excise Rules, 2002. However, it is seen that the respondents have not furnished the Bill of Exports against all the copies of the said ARE-1s, which appeared to be necessary in fulfillment of the condition for claiming the export entitlement i.e., rebate under Rule 18 of the Central Excise Rules, 2002, read with sub rule (3) of Rule 30 of SEZ Rules, 2006. Against this background show cause notices were issued and accordingly the rebate claims were rejected.

3. Being aggrieved by the said orders-in-original, the respondents filed appeals before Commissioner (Appeals), who allowed the said appeals with consequential relief. Commissioner (Appeals) held that rebate of duty paid on goods supplied to SEZ is admissible under Rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE (NT) dated 6.9.04.

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

4.1 Supply made to a SEZ Unit is not covered under the definition of export under the Customs Act, 1962. This proposition has been examined by the Hon'ble High Court of Gujarat in M/s. Essar Steel Ltd Vs. UOI 2010 (249) ELT 3 (Guj), wherein it has been held that "the term 'export' having been defined in the Customs Act, 1962, for the purposes of that Act, there is no question of adopting or applying the meaning of the said term under another enactment for any purpose of levying duty under the Customs Act, 1962. In other words, a definition given under an Act cannot be displaced by a definition of the same term given in another enactment, more so, when the provisions of the first Act are being invoked. Even in the absence of a definition of the term in the subject statute, a definition contained in another statute cannot be adopted since a word may mean different things depending on the setting and context. Reference is invited to the decisions of the Apex Court in the case of Commissioner of Wealth Tax Gujarat-III, Ahmedabad Vs. Ellis Bridge Gymkhana, (1998) 1 SCC 384, Commissioner of Income Tax, Bangalore Vs.. Venkateswara Hatcheries (P) Limited, (1999) 3 SCC 632 and M/s. Qazi Noorul H. H. H. Petrol Pump & Another Vs. Dy. Director, E.S.I. Corporation, reported in 2009 (240) ELT 481 (S.C.) = 2009 AIR SCW 5490. In fact, the interpretation canvassed by the department is not merely the adoption of a definition of another Statute, but the incorporation of a taxable event itself, which is impermissible under the law".

Further while examining the similar issue, it has been held by the Hon'ble CESTAT, Mumbai in CCE, Thane-I Vs. Tiger Steel Engineering (I). Pvt. Ltd. 2010(259) ELT 375 (Tri-Mumbai) :- "However, the question arises as to whether such supply of goods to SEZ units was an 'export.' At no time was the term 'export' defined under the Central Excise Act or any Rules framed thereunder. The definition of 'export' given under the Customs Act has been traditionally adopted for purposes of the Central Excise Act and the Rules thereunder. Therefore, in the absence of a definition of 'export' under the Central Excise Act, the Central Excise Rules or the CENVAT Credit Rules, 2004, we hold that, for purposes of the CENVAT Credit Rules, 2004, one should look for its definition given under the Customs Act. The fictionalized definition of "export" under Section 2 (m) (ii) of the SEZ Act cannot be looked for as it purports only to make the SEZ unit an exporter. In other words, the term 'export' used in Rule 5 of the CENVAT

Credit Rules, 2004 stands for 'export'; which is 'physical export' out of the country, envisaged under the Customs Act. We take this view because, as we have already indicated, anybody other than SEZ unit cannot be allowed to claim any benefit under the SEZ Act/Rules".

The clarification issued vide Circular No.6/2010-Cus dated 19.03.2010 has not the binding effect, being contrary to the law. This proposition has been upheld by the constitutional Bench of Hon'ble Supreme Court in CCE, Bolpur Vs. Ratan Melting & Wire Industries 2008 (231) ELT22 (SC).

A copy of assessed "Bill of Export" is a fundamental document along with the copy of the relevant ARE1 bearing endorsement of the Customs Officer/specified officer in charge of the SEZ, in order to consider the clearance as a genuine one effected to the SEZ in accordance with sub-rule 3 of Rule 30 of the SEZ Rules, 2006 and further to consider the rebate eligibility under Rule 18 of the Central Excise Rules, 2002. As the said Bill of Export was not submitted by M/s. EPL, their rebate claim cannot be considered as complete and proper and therefore the same is not admissible.

5. A show cause notice was issued to the respondent under Section 35EE of Central Excise Act 1944 to file their counter reply. They did not file any written counter reply.

6. Personal hearing scheduled in this case on 26.9.2013 was attended by Shri Rachit Jain & Joyoti Pal, Advocates on behalf of the respondents who stated that impugned orders-in-appeal being legal and proper may be upheld. They further contended that said revision application is time barred and liable to be rejected on this count also.

7. Government has carefully gone through the relevant case records, oral & written submissions and perused the impugned orders-in-original and orders-in-appeal.

8. On perusal of records, Government observes that applicant department stated in the application that they had wrongly filed appeal before CESTAT Mumbai on

22.11.10 against said order-in-appeal received on 27.8.10, which was rejected by Hon'ble Tribunal vide order dated 29.8.11 as non-maintainable as per provision of Section 35B(1) first proviso of Central Excise Act 1944. Therefore, department has contended that they were pursuing appeal before CESTAT upto 2.11.11 and time spent upto said date may be excluded in terms of Section 14(2) of Limitation Act 1963 for the purposes of Section 35EE(2). The revision applications are filed on 12.1.12. As such the applications filed on 12.1.12 is with 6 months of the receipt of impugned order-in-appeal. Government notes that Hon'ble High Court of Gujarat in W.P. No. 9585/11 in the case of M/s Choice Laboratory vide order dated 15.9.11, Hon'ble High Court of Delhi vide order dated 4.8.11 in W.P. No.5529/11 in the case of M/s High Polymers Ltd. and Hon'ble High Court of Bombay in the case of M/s EPCOS India Pvt. Ltd. in W.P. No. 10102/11 vide order dated 25.4.2012, have held that period consumed for perusing appeal bonafidely before wrong forum is to be excluded in terms of section 14 of Limitation Act 1963 for the purpose of reckoning time limit of filing revision application under Section 35 EE of Central Excise Act, 1944. The ratio of above said judgments is squarely applicable to this case. Government considering the genuine reasons for said delay not exceeding 3 months, condone the delay under Section 35EE(2) and proceeds to decide these applications on merits.

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.*
>
> *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."

10. As regards case law of Essar Steel Ltd. Vs UOI 2010(249)ELT 3(Guj) it is observed that Hon'ble High Court of Gujarat has held that export duty is leviable under Section 12 of Customs Act and definition of export as given in Section 2(18) is relevant for charging export duty. Hon'ble High Court has further held that for charging duty under Section 12 definition of export as given in SEZ Act cannot be incorporated. In the instant case the issue export benefit like rebate/drawback cannot be equated with the issue of charging export duty.

11. Government further notes that as per Section 5 of SEZ Act 2005, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Rule 30(1) of SEZ Rule 2006 stipulates that DTA supplier shall clear the goods to SEZ Unit or Developer as in the case of exports either under bond or as duty paid goods under claim of rebate on the cover of ARE-1 referred to in Notification No.42/2001-CE(NT) dated 26.6.2001. The said notification is now replaced by new Notification No.19/04-CE (NT) dated 6.9.04. Similarly, drawback benefit and other export entitlements are also made admissible to SEZ suppliers. So the CBEC Circular discussed above issued in the light provisions of SEZ Act/Rules cannot be called illegal as contended by department.

12. Government further notes that Commissioner (Appeals) has categorically recorded in his findings that said goods were received in the SEZ Unit and therefore receipt of duty paid goods in SEZ Unit is not in dispute. The non-preparation of bill of export is a procedural lapse for which substantial benefit of rebate cannot be denied as held in catena of judgment cited by Commissioner (Appeals).

13. 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 Rule 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.

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

15. So, ordered.

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

Commissioner of Central Excise
Thane-I Comissionerate
Navprabhat Chambers, 3rd Floor
Ranade Road, Dadar (West)
Mumbai-400028

(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
CBEC-OSD (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Revenue)
भारत सरकार/Govt of India
दिल्ली/New Delhi

Order No.1314-1315 /2013-Cx dated 14.10.2013

Copy to:

1. M/s Essel Propack Ltd., P.O.Uchat, Village Vadavali, Taluka-WADA, Distt. Thane
2. Commissioner of Central Excise (Appeals), Mumbai Zone-I, Mehar Building Dadi Seth Lane, Chowpatty, Mumbai-4000 007.
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

15/10

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