



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.198/223/12-RA | 169

Date of Issue: 01.05.2018

ORDER NO. 135 /2018-CX (WZ)/ASRA/MUMBAI DATED 27.04.2018
OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO
THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL
EXCISE ACT, 1944.

Applicant : Commissioner of Customs & Central Excise, Rajkot.

Respondent : M/s Maha Shakti Coke(A Unit of Saurashtra Fuels Pvt. Ltd.),
Dist: Kutch.

Subject : Revision Application filed, under Section 35EE of the Central
Excise Act, 1944 against the Order-in-Appeal No. 372/2012
/COMMR(A)/RBT/RAJ dated 21.06.2012 passed by the
Commissioner (Appeals), Rajkot :-

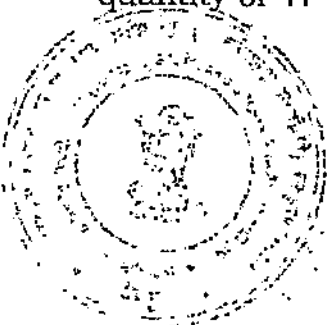


ORDER

This revision application is filed by the Commissioner of Customs & Central Excise, Rajkot (hereinafter referred to as "the applicant") against the No. 372/2012 /COMMR(A)/RBT/RAJ dated 21.06.2012 passed by the Commissioner (Appeals), Rajkot.

2. The issue in brief is that the respondent, M/s Maha Shakti Coke, Mundra as manufacturer exporter, had filed rebate claim of Central Excise duty paid on excisable goods viz. " Metallurgical Coke" (herein after referred to as "excisable goods") manufactured by them as well as by M/s. Kutch Coal Carbonisation Pvt. Ltd. who sold the goods to M/s. Mahashakti Coke (registered as dealer also) who further removed the goods for export under self-supervision procedure instead of following the procedure as laid down under para 8 of the CBEC Circular No. 294/10/94-CX dated 30.01.1997. They had filed rebate claim for Rs. 5,45,35,465/- in connection with export of 50108.700 MT of excisable goods. During scrutiny of the rebate claim, it was noticed that out of total quantity of 50108.700 MT of the excisable goods; only 49499.446 MT were actually exported and therefore rebate claim of Rs. 6,67,495/- was rejected on the short shipped quantity. Further, rebate claim to the tune of Rs. 18,29,693/-was rejected on the ground that the goods were cleared from the dealer's premises without following the procedure laid down in the CBEC Circular No. 294/10/94-CX dated 30.01.1997 and rebate claim to the tune of Rs. 5,20,38,277/- was sanctioned in favour of the respondent, vide Order-in-Original No. 1470/2011-12 dated 06.01.2012.

3. Being aggrieved with the above, the respondent preferred an appeal with the appellate authority, who, vide impugned appellate order, held that the respondent is eligible for the rebate on quantity of 49499.446 MT and not on quantity of 47497.596 MT thereby allowing the rebate on the quantity of goods



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exported from dealer's premises and restricting the rebate on the short shipped goods.

4. Being aggrieved, the Department filed aforementioned Revision Application against the impugned Order in Appeal stating that :

4.1 The Appellate Order setting aside the Order-in-Original and thereby allowing the appeals filed by the assessee, does not appear to be correct, legal and proper on the following grounds:-

the Appellate Authority while passing the Appellate Order has not considered the finding of the Adjudicating Authority. The excisable goods cleared from the factory of manufacturer were not directly cleared for export but were first stored at the premises of the dealer. Subsequently the exporter prepared ARE-1 and exported the goods in contravention of the provisions of Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE (NT) dated 06.09.2004 and the assessee has not followed the procedures prescribed under the Circular No. 294/10/94-CX dated 30.01.1997. Rule 18 of the Central Excise Rules, 2002 reads as under;

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 fulfillment of such procedure, as may be specified in the notification.

Explanation.-"Export" includes goods shipped as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft.

4.2 The conditions, limitations and procedure in respect of export under Rule 18 of the Central Excise Rules, 2002 are laid down under Notification No.19/2004-CE (NT) dated 6.09.2004. The relevant paragraph of the said Notification reads as under;



2. Conditions and limitations : -

(a) that the excisable goods shall be exported after payment of duty, directly from a factory or warehouse, except as otherwise permitted by the Central Board of Excise and Customs by a general or special order

3 Procedures:-

(a) Sealing of Goods and examination at the place of dispatch and export:-

(i) The manufacturer exporters registered under the Central Excise Rules, 2002 and merchant-exporters who procure and export the goods directly from the factory or warehouse can exercise the option of exporting the goods sealed at the place of dispatch by a Central Excise Officer or under self-sealing;

(ii) Where the exporter desires self-sealing and self-certification, the manufacturer of the export goods or owner of the warehouse shall take the responsibility of sealing and certification;

(iii) The merchant-exporters other than those procuring the goods directly from the factory or warehouse shall export the goods sealed at the place of dispatch by a Central Excise Officer;

Further in para (ii) of Part-1 of Chapter 8 of the Supplementary Instructions of Central Excise Manual it is mentioned that "In certain cases, the Board may issue instructions/procedures for exporting the duty paid goods from a place other than the factory or the warehouse. In this regard, a general permission has been granted in respect of goods where it is possible to correlate the goods and their duty paid character."

4.3 The dealer, in the instant case, at the time and place of removal of goods did not follow the procedure as prescribed under CBEC Circular No. 294/10/94-CX dated 30.01.1997. The relevant portion reads as under;

"6. It has, therefore, been decided that the cases where exporters submit the proof that goods have actually been exported to the satisfaction of the rebate sanctioning authority, and that where goods are clearly identifiable and

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co-relatable with the goods cleared from factory on payment of duty, the condition of exports being made directly from the factory/warehouse should be deemed to have been waived. Other technical deviations not having revenue implications, may also be condoned.

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8. However, in case of future exports (including the export as ship stores), to avail the aforesaid waiver from the condition of direct exports from the factory/ warehouse, the exporters will be required to follow the procedure prescribed in Circular No. 2/75, dated 22-1-1975 (reiterated in Circular No. 18/92, dated 18-12- 1992), which is reiterated below with certain modifications :-

8.1 An exporter, (including a manufacturer-exporter) desiring to export duty paid excisable goods (capable of being clearly identified) which are in original factory packed condition/not processed in any manner after being cleared from the factory stored outside the place of manufacturer should make an application in writing to the Superintendent of Central Excise in-charge of the Range under whose jurisdiction such goods are stored. This application should be accompanied with form AR 4 (now ARE-1) duly completed in sixuplicate, the invoice on which they have purchased the goods from the manufacturer or his dealer and furnish the following information :-

(a) Name of the exporter.

(b) Full description of excisable goods along with marks and/or numbers.

(c) Name of the manufacturer of excisable goods.

(d) Number and date of the duty paying document prescribed under Rule 52A under which the excisable goods are cleared from the factory and the quantity cleared. (Photo copy of invoice/duty paying documents can be submitted).



(e) The rate of duty and the amount of duty paid on excisable goods,

8.2 The AR 4 form should have a progressive number commencing with Sl. No. 1 for each financial year in respect of each exporter with a distinguishing mark. Separate form should be made use of for export of packages/consignments cleared from the same factory/warehouse under different invoices or from the different factories/warehouses. On each such form it should be indicated prominently that the goods are for export under claim of rebate of duty.

8.3 On receipt of the above application and particulars, the particulars of the packages/goods lying stored should be verified with the particulars given in the application and the AR 4 form, in such manner and according to such procedure as may be prescribed by the Commissioner.

8.4 If the Central Excise Officer deputed for verification of the goods for export is satisfied about the identity of the goods, its duty paid character and all other particulars given by the exporter in his application and AR 4, he will endorse such forms and permit the export.

8.5 The exporter will have to pay the supervision charges at the prescribed rates for the services of the Central Excise Officer deputed for the purpose.

8.6

4.4 The exporter / dealer, thus grossly violated the statutory conditions and provisions as laid down under Rule 18 of the Central Excise Rules, 2002 and Board's circulars referred para supra. Therefore, the exporter is not entitled for rebate of Central Excise duty as claimed to have paid in respect of goods exported from dealer's premises.

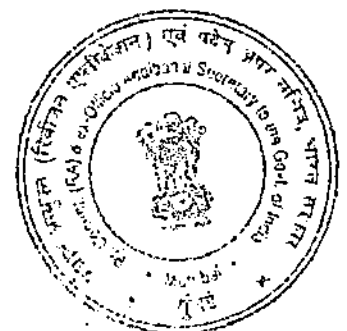
4.5 Reliance is placed on the Order NO.388/2010-CS dated 25.03.2010 in the case of M/s. Philip Electronics India Ltd. [2011(273)ELT 0461 (G.O.I.)] wherein it is held that the goods exported were not having any marking / identification no. etc. by which it could be established that the same goods which had

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suffered duty at the time of clearance from the factory were actually exported and thereby the applicant failed to meet out the basic mandatory requirement for claiming rebate of duty.

- 4.6. Reliance is also placed on the Joint Secretary (Revision Authority)'s order No.204-205/09/CX dated 30.07.2009 in the case of M/s. BPCL wherein it is held that the identity of the goods in the said case could not be established since the goods were not cleared directly from factory and it cannot be co-related.
- 4.7. In the instant case also, the dealer cleared the goods for the purpose of export under self sealing which is not permitted in case of exports from places other than factory of manufacturer or warehouse. Thus, the exporter / dealer has grossly violated the provisions as laid down in Circular No. 294/10/94-CX dated 30.01.1997.
- 4.8 Moreover, the appellate authority, while allowing the appeal filed by the exporter, relied upon the Govt. Of India decision in the case of M/s. Vinergy International Pvt. Ltd. [2012(278) ELT 407 (GOI)] for treating registered dealer as a 'warehouse' in terms of rule 2(h) of the Central Excise Rules, 2002. However, it is to submit that the said decision has not been accepted by the department and an appeal against the same has been filed with the Hon'ble High Court of Bombay and as such the issue has not yet attained finality.
- 4.9. In light of the above, it is clear that the appellate authority has erred in allowing rebate on the quantity of goods exported from the dealer's premises without following the proper procedure as stipulated under Circular No. 294/10/94-CX dated 30.01.1997 as well as Notification No. 19/2004-CE (NT) dated 06.09.2004.
5. A personal hearing in the case was held on 29.01.2018. Shri Rakesh Bihari, Assistant Commissioner, Gandhidham Division appeared on behalf of the applicant and reiterated the submissions filed through Revision Application and prayed that instant revision application be allowed and Order in Appeal be set aside.



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

8. On perusal of records, Government observes that the lower authority has rejected the rebate claim on the grounds that the respondent had not followed the procedure prescribed under Board's Circular No. 294/10/97-CX dated 30.01.1997 and that there was no co-relation between the exported goods to the goods cleared from manufacturer. The lower authority held that the goods cleared from factory of manufacturer under ARE-1 were not sent to the port of export directly from the premises of the registered dealer which is in contravention of the provisions of Rule 18 of the Central Excise Rules, 2002 read with notification no.19/2004- CE (NT) dated 06.09.2004 as amended. The lower authority while rejecting the claims also found that the respondent had not fulfilled the condition as per para 2(a) of notification no.19/2004-CE (NT) dated 06.09.2004.

9. Whereas, the Commissioner (Appeals) observed that in the instant case the goods were cleared from the premises of the registered dealer. Under Rule 2(h) of the Central Excise Rules, 2002 "warehouse" means any place or premises registered under Rule 9 of Central Excise Rules. Under Rule 9 of the Central Excise Rules, every person carrying on trade etc. has to apply for and obtain registration with the Central Excise Department. As per Notification No. 35/2001-C.E. (N.T.) dated 26.06.2001 [para (1)] every person specified under Rule 9(1) is required to apply for registration in the prescribed form and obtain registration, unless exempted from registration by C.B.E & C. under Rule 9 of Central Excise Rules. As per para 1 (iv) of Notification No. 36/2001-C.E. (N.T.), dated 26.06.2001, the person who carried out wholesale trade or deals in excisable goods, except first stage dealer or second stage dealer, as defined in Cenvat Credit Rules, is exempted from registration. With this, first stage dealer and second stage dealer are required to hold registration. In view of above, the



registered dealer of the appellant is holding registration under Rule 9(1) of Central Excise Rules, 2002. The condition No. 2(a) of Notification No. 19/2004-C.E. (N.T.) ibid requires export of goods directly either from factory or warehouse. Since the goods have been supplied directly from the premises of the registered dealer, as explained above, condition No. 2(a) of the Notification No. 19/2004-C.E. (N.T.) is fulfilled and hence the findings of the lower authority that the goods in question were not supplied directly from factory or warehouse is incorrect.

10. Commissioner (Appeals) in his impugned order further observed that the payment of duty has not been doubted in the 'impugned order and the subject goods were exported under statutory documentation with Customs Authorities who also scrutinized the documents and supervised the export of the cargo. Hence, he found that there had been enough compliance to establish the duty paid character and correlation of the goods in question. He further found that the Customs Authorities also supervised the loading of the cargo in the vessel and have also passed the subject goods without raising any objection regarding the reasonable quantity of the goods in question as envisaged in the condition as per para 2(a) of notification no.19/2004-CE (NT) dated 06.09.2004 as amended. Government also observes that the case laws relied upon by the Commissioner (Appeals) in his impugned order viz. (i) 2012(278) ELT 407 (GOI) RE: Vinergy International Pvt. Ltd. (ii) Cotfab Exports 2006 (205) ELT 1027 (G.O.I.) and (iii) Modern Process Printers 2006 (204) E.L.T. 632 (G.O.I.) are squarely applicable to the issue in hand.

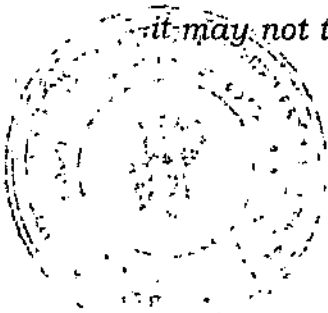
11. Government finds that there are many cases where Government of India has conclusively held that the failure to comply with requirement of examination by jurisdictional Central Excise Officer in terms of Board Circular No.294/10/97-Cx dated 30.01.1997 may be condoned if the exported goods could be co-related with the goods cleared from the factory of manufacture or warehouse. Government places its reliance on para 11 of GOI Order No. 341-



343/2014-CX dated 17.10.2014 [reported in 2015 (321) E.L.T. 160(G.O.I)] In RE: Neptunus Power Plant Services Pvt. Ltd. In this case, in order to examine the issue of corelatibility, Government made sample analysis of the exports covered vide some of the shipping bills. Further, description, weight and quantities has to tally with regard to description mentioned in mentioned in ARE-1 and other export documents including Shipping Bill and export invoices. In the instant case Government notes that Commissioner (Appeals) has already observed that the subject goods were exported under statutory documentation with Customs Authorities who also scrutinized the documents and supervised the export of the cargo and there had been enough compliance to establish the duty paid character and correlation of the goods in question. He further found that the Customs Authorities also supervised the loading of the cargo in the vessel and have also passed the subject goods without raising any objection regarding the reasonable quantity of the goods in question as envisaged in the condition as per para 2(a) of notification no.19/2004-CE (NT) dated 06.09.2004 as amended.

12. As such, Government observes that there are sufficient corroboratory evidences to establish that the goods covered under excise documents had actually been exported vide impugned export documents. Government also notes that, while allowing the Revision application in favour of the applicant, Government at para 12 of its aforementioned Order [2015 (321) E.L.T. 160(G.O.I)] observed as under:-

"In this regard Govt. further observes that rebate/drawback etc. are export-oriented schemes, A merely technical interpretation of procedures etc. is to be best avoided if the substantive fact of export having been made is not in doubt, a liberal interpretation is to be given in case of any technical lapse. In Suksha International v. UOI - 1989 (39) E.L.T. 503 (S.C.), the Hon'ble Supreme Court has observed that, an interpretation unduly restricting the scope of beneficial provision is to be avoided so that it may not take away with one hand what the policy gives with the other"



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In the Union of India v. A.V. Narasimhalu - 1983 (13) E.L.T. 1534 (S.C.), the Apex Court also observed that the administrative authorities should instead of relying on technicalities, act in a manner consistent with the broader concept of justice. Similar observation was made by the Apex Court in the Formica India v. Collector of Central Excise - 1995 (77) E.L.T. 511 (S.C.) in observing that once a view is taken that the party would have been entitled to the benefit of the notification had they met with the requirement of the concerned rule, the proper course was to permit them to do so rather than denying to them the benefit on the technical grounds that the time when they could have done so, had elapsed. While drawing a distinction between a procedural condition of a technical nature and a substantive condition in interpreting statute similar view was also propounded by the Apex Court in Mangalore Chemicals and Fertilizers Ltd. v. Dy. Commissioner - 1991 (55) E.L.T. 437 (S.C.). In fact, as regards rebate specifically, it is now a title law that the procedural infraction of Notifications, circulars, etc., are to be condoned if exports have really taken place, and the law is settled now that substantive benefit cannot be denied for procedural lapses. Procedure has been prescribed to facilitate verification of substantive requirement. The core aspect or fundamental requirement for rebate is its manufacture and subsequent export. As long as this requirement is met other procedural deviations can be condoned.- This view-of condoning procedural-infractions in favour of actual export having been established has been taken by Tribunal/Govt. of India in a catena of orders, including Birla VXL Ltd. - 1998 (99) E.L.T. 387 (Tri.), Alpha Garments - 1996 (86) E.L.T. 600 (Tri.), T.I. Cycles - 1993 (66) E.L.T. 497 (Tri.), Atma Tube Products - 1998 (103) E.L.T. 270 (Tri.), Creative Mobus - 2003 (58) R.L.T. 111 (G.O.I), Ikea Trading India Ltd. - 2003 (157) E.L.T. 359 (G.O.I) and a host of other decisions on this issue”.

13. Accordingly, Government holds that the findings reached by the learned Commissioner (Appeals) are legal and proper and hence the impugned order




Commissioner (Appeals) is liable to be upheld and impugned revision application is liable to be dismissed.

14. Accordingly, the revision application is dismissed and the impugned order of Commissioner (Appeals) is upheld as legal and proper.

15. So ordered.

(Signature)
27.4.2018

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

ORDER No. 135/2018-CX (WZ)/ASRA/Mumbai DATED 27.4.2018.

To,
Commissioner of Goods and Service Tax,
Kutch (Gandhidham),
Sector 8, Opposite Ram Leela Maidan,
Gandhidham -370201.

True Copy Attested

(Signature)
15/11/18

एस. आर. हिरुलकर
S. R. HIRULKAR

Copy to:

1. Commissioner (Appeals), GST & Central Excise, 2nd Floor, GST Bhavan, Race Course Ring Road, Rajkot, 360 001.
2. M/s Mahashakti Coke, (A unit of Saurashtra Fuels Pvt. Ltd.), Plot No. 166/1, Baraya-Patri Road, Village : Lakhapar, Taluka: Mundra, Dist: Kutch
3. Assistant Commissioner, GST & Central Excise, Division- Mundra, Kutch (Gandhidham), Sector 8, Opposite Ram Leela Maidan, Gandhidham - 370201
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File.
6. Spare Copy.

