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, Cuff Parade,
Mumbai- 400 005

F NO. 195/77-78/13-RA/5492 Date of Issue: 22/11/19

ORDER NO.149-150/2019-CX (WZ) /ASRA/Mumbai DATED 14.11.2019 OF THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Guddi Plastcon P.Ltd., Dist. Thane

Respondent : Commissioner of Central Excise, Thane-I Commissionerate,

Subject : Revision Applications filed, under section 35EE of the Central Excise ACT, 1944 against the Order-in-Appeal No.BR/241/Th-I/2012 dated 08.10.2012 passed by the Commissioner (Appeals), Central Excise, Mumbai Zone-I.

ORDER

These revision applications have been filed by Guddi Plastcon P.Ltd., Dist. Thane (hereinafter referred to as "applicant") against the Order-in-Appeal No. BPS/241/TH-I/2012 dated 08.10.2012 passed by the Commissioner (Appeals), Central Excise, Mumbai Zone-I setting aside the Orders-in-Original No. R-986/2010-11 and R-987/2010-11 both dated 22.10.2010 passed by the Deputy Commissioner of Central Excise, Division-Kalyan-I, Thane-I Commissionerate.

2. Brief facts of the case is that the applicant during the period 2008-2009 cleared six separate consignments to SEZ unit under claim of rebate and filed rebate claims aggregating to Rs.4,83,067/-(Rupees Four Lakh Eighty Three Thousand Sixty Seven only). The said rebate claims were rejected by the Deputy Commissioner, Central Excise, Kalyan-II Division (Original authority) vide Order in Original No. R-84/2008-09 dated 17.04.2009. Subsequently, the applicant filed rebate claims relating to five different consignments for goods cleared to SEZ aggregating to Rs. 4,13,074/- (Rupees Four Lakh Thirteen Thousand Seventy Four only) and the same were also rejected by the same Original authority vide Order in Original No. R-219/2009-10 dated 01.06.2009.

3. On appeal being filed by the applicant against the aforesaid Orders in Original, the Commissioner (Appeals), Central Excise, Mumbai Zone-I, vide Order in Appeal No. SB/91-92/Th-I/10 dated 15.07.2010 allowed the appeal filed by the applicant by setting aside both the Orders in Original, viz. R-84/2008-09 dated 17.04.2009 and R-219/2009-10 dated 01.06.2009.

4. Thereafter, the Assistant Commissioner, Central Excise, Kalyan-II Division vide Orders in Original No. R-986/2010-11 and R-987/2010-11 both dated 22.10.2010 sanctioned the rebate claims filed by the applicants amounting to Rs. 4,83,067/- & Rs. 4,13,074/- respectively, on the ground that there was no stay on the operation of Order in Appeal No. SB/91-

92/Th-I/10 dated 15.07.2010 passed by the Commissioner (Appeals), Central Excise, Mumbai Zone-I.

5. Being aggrieved by the aforesaid Orders in Original, the department (Central Excise, Thane-I) filed an appeal before Commissioner (Appeals), Central Excise, Mumbai Zone-I.

6. The Commissioner (Appeals), Central Excise, Mumbai Zone-I vide Order-in-Appeal No. BPS/241/TH-I/2012 dated 08.10.2012 allowed the appeal filed by the department by setting aside Orders in Original No. R-986/2010-11 and R-987/2010-11 both dated 22.10.2010 passed by the Assistant Commissioner, Central Excise, Kalyan-II Division.

7. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed Revision Applications No. 195/77/13-RA and 195/78/13-RA under Section 35 EE of Central Excise Act, 1944 before Central Government on the following main grounds that :-

7.1 the Commissioner (Appeals) has not taken into consideration their submissions set out in the written submissions filed during the course of PH;

7.2 the Commissioner (Appeals) has travelled beyond the basis for initial denial of rebate claim in the matter which was subsequently allowed by Order-in-Appeal No.SB/91-92/Th-I/10 dated 15.07.2010 by which it was held that Bill of Export is not required to be filed in the matter. This basic issue is neither highlighted while filing the Department Appeal in EA2 nor dealt with while passing the Order-in-Appeal which is under challenge by way of present Revision Application. On this ground alone, the Commissioner (Appeals) Order needs to be set aside with consequential reliefs to them;

7.3 decision of the Government of India in the case of IN RE: P.K.Tubes and Fittings P.Ltd. [reported in 0012 (276) ELT 113 (GOI),Treating clearances by DTA Unit to SEZ Unit as Export is binding on the Commissioner (Appeals) and contrary Order passed needs to be set aside;

7.4 they rely on GOI Order passed in the case of IN RE: ACE hygiene Products P. Ltd.[2012(276)ELT 131] wherein it has been held as under –

> Rebate - Procedural/technical lapse - Movement of goods from DTA to SEZ availing export entitlement - Stipulation of producing Bill of Export under CBEC Circular No. 29/2006-Cus., dated 27-12-2006, non-compliance of - Goods cleared to SEZ under ARE-1 which was duly endorsed by concerned Range Officer and duly countersigned by Customs Officer at SEZ No ambiguity in export of duly paid goods - Claim for rebate can't be denied merely on procedural/technical lapse - Rule 18 of Central Excise Rules, 2002. - It is now trite law that the procedural infractions of notifications/circulars should be condoned if exports have really taken place and the law is settled that substantive benefit cannot be denied for procedural lapses. [para 8] .

7.5 in the Review order of Hon'ble Commissioner dtd. 25.01 2011 no findings are recorded as to how Bill of Export is an essential documents required to be filed along with the rebate claim for goods supplied to SEZ Unit on payment of duty, when no export entitlements like DEPB, Drawback etc. are claimed. This is the crux of the issue. The said Order deals with the issues which were not the subject matter of proceedings before the lower authorities too, hence legally not sustainable;

7.6 the Commissioner (Appeals) has erred in relying upon case laws which relate to levy of export of duty on goods supplied from DTA to SEZ unit and therefore same are not applicable to facts of the present case.

8. A Personal hearing was held in this case on 27.08.2019 and 13.09.2019. Shri Amit Samdariya, Assistant Commissioner, Thane Rural GST & CX Commissionerate appeared for hearing and submitted that Bill of Export was not supplied by the applicant which is an important document, hence the clearance made by the applicant be treated as DTA sale, as Bill of Export was never generated. He also contended that for the purpose of export, the definition should be as per the Customs Act and not SEZ Act. Shri Paresh P. Shah, Consultant, and Shri Ramnathan, Executive, duly

authorized by the applicant appeared for hearing on 13.09.2019 and reiterated the submissions filed through Revision Application. They also filed additional written submissions during the course of personal hearing.

9. In their additional submissions filed on 13.09.2019, the applicant submitted that the issues based on which the Order in Appeal was passed against them were no longer valid in view of the decisions of Revisionary Authority as well as CBEC Circulars on issue :

- IN RE : Essel Propack Ltd. [2014(312) E.L.T. 946 (GOI)]
- IN RE : Gujarat Organics Ltd.[2014(314)E.L.T.981(GOI)]
- IN RE : Nov Sara India (P) Ltd.[2014(313)E.L.T.898(GOI)]
- IN RE : Bhuwalika Steel Ind. Ltd.[2014(311)E.L.T.971(GOI)]
- IN RE : Ganesh Tiles and Marbles[2014(312)E.L.T.881(GOI)]
- IN RE : Unimix Equipments P. Ltd.[2014(312)E.L.T.957(GOI)]
- IN RE : KEI Inds. Ltd. [2014(313)E.L.T.895(GOI)]
- IN RE : Indo Alusys Inds. Ltd.[2013(297)E.L.T.305(GOI)]
- IN RE : Shree Parvati Metal P Ltd.[2013(290)E.L.T.638(GOI)]

They collectively relied on following CBEC Circulars:

- Circular No. 29/2006-Cus dated 27.12.2006
- Circular No.6/2010-Cus dated 19.03.2010
- Circular No.1001/8/2015-CX.8 dated 28.04.2015

10. Government has carefully gone through the submissions made by the applicant in the instant Revision Applications, Order in Appeal, Orders in Original, applicant's submissions made during the personal hearing and the circulars / relevant judgements cited for and against in this case. Both the Revision Applications are being disposed of by a common order as the issue involved is identical.

11. Government observes that vide Order in Appeal No. BPS/241/TH-I/2012 dated 08.10.2012 Commissioner (Appeals) has rejected the rebate claims of Central Excise duty paid on clearance of goods by the applicant to SEZ unit, holding that the supplies made to SEZ cannot qualify for export

benefits under Central Excise Act, 1944 and Rules made there under. Commissioner (Appeals) has relied on case of CCE, Thane-I Vs Tiger Steel Engineering (India) Pvt. Ltd. [2010 (259) E.L.T. 375 (Tri. - Mumbai)] wherein it was held that the definition of the term 'export given under Section 2(m) (ii) of SEZ Act is a deeming provision in as much as it purports to designate as 'export' a transaction which is not recognized as export under Section 2(18) of the Customs Act, 1962. Government further observes that Commissioner (Appeals) also relied on Hon'ble Gujarat High Court decision in the case of Essar Steel Limited v. Union of India - 2010 (249) E.L.T. 003 (Guj.) which observed that movement of goods from Domestic Tariff Area to Special Economic Zone has been treated as export by legal friction created under SEZ Act, 2005 and such legal fiction should be confined to the purpose for which it has been created.

12. As regards reliance of the Commissioner (Appeals) in the case of Tiger Steel Engineering (I) Pvt. Ltd. (supra), Government observes that since the Hon'ble High Court of Bombay has stayed this order [Tiger Steel Engg. (I) Pvt. Ltd. v. Commissioner - 2011 (263) E.L.T. A104 (Bom.)], it does not have binding effect. Therefore, the same cannot be considered. Government further observes that GOI vide its Order No. 1287/2013-CX, dated 1-10-2013 IN RE : Bhuwalika Steel Ind. Ltd.[2014(311)E.L.T.971(GOI)], while holding that Deemed export to 100% EOU is considered as physical export, hence, clearances to SEZ are also be treated as physical export and Rebate is admissible under Rule 18 of Central Excise Rules, 2002, distinguished the case of Tiger Steel Engineering (I) Pvt. Ltd. (supra) in the following manner:

> ***9.3*** *Government notes that the judgment 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 judgment 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.

13. Regarding reliance placed by Commissioner (Appeals) on Hon'ble Gujarat High Court decision in the case of Essar Steel Limited v. Union of India (supra), Government observes that GOI vide its Order Nos. 1314-1315/2013-CX, dated 14-10-2013 in IN RE : Essel Propack Ltd. [2014(312) E.L.T. 946 (GOI)] while holding 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,observed as under:-

10. As regards case law of Essar Steel Ltd. v. UOI - 2010 (249) E.L.T. 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.

Larger Bench of the Tribunal, Mumbai constituted for the purpose, in its Order dated 17.12.2015 in the case of Sai Wardha Power Limited Vs CCE, Nagpur [2016 (332) E.L.T. 529 (Tri. - LB)] at para 7.2 observed as under :-

7.2 In the case of Essar Steel Ltd. (supra) the issue was whether export duty can be imposed under the Customs Act, 1962 by incorporating the definition of the term "export" under the SEZ Act into the Customs Act. The facts in this case were that export duty

was sought to be levied under the Customs Act on goods supplied from DTA to the SEZ. The Hon'ble Court observed that a definition given under an Act cannot be substituted by the definition of the same term given in another enactment, more so, when the provisions of the first Act are being invoked. The Court went on to observe that 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 the context. In this case what was sought to be done was to incorporate the taxable event under one statute into the other statute. The Court held this to be impermissible under the law. It was in this context that the court held that the legal fiction created under the SEZ Act, 2005, by treating movement of goods from DTA to the SEZ as export, should be confined to the purposes for which it has been created. Although at first glance the judgment appears attractive to apply to the facts of the present case, on a deeper analysis, we find that the said judgment is made in a different context.

Hon'ble Larger Bench also observed at para 8 of its order as under :

8. *A striking contention of the ld. AR which appeals to us is that the only statutory provision for grant of rebate lies in Section 11B read with Rule 18 of Central Excise Rules which is for goods exported out of the country. If the supplies to SEZ is not treated as such export, there being no other statutory provisions for grant of rebate under Rule 18, the undisputable consequence and conclusion would be that rebate cannot be sanctioned at all in case of supplies to SEZ from DTA units. Certainly such conclusion would result in a chaotic situation and render all circulars and Rules under SEZ Act ineffective and without jurisdiction as far as grant of rebate on goods supplied to SEZ is concerned. The contra argument is that Section 51 of the SEZ Act would have overriding effect and the rebate can be sanctioned in terms of the provisions of Section 26 of the SEZ Act. We note that Section 26 only provides for exemption of excise duties of goods brought from DTA to SEZ. It does not provide for rebate of duty on goods exported out of the country. Therefore there is no conflict or inconsistency between the provisions of the SEZ Act and Central Excise Act so as to invoke the provisions of Section 51 of the SEZ Act. Our view is strengthened by the Hon'ble High Court judgment in the case of Essar Steel Ltd. which held that "Section 51 of the SEZ Act, 2005*

providing that the Act would have overriding effect does not justify adoption of a different definition in the Act for the purposes of another statute. A non obstante clause only enables the provisions of the Act containing it to prevail over the provisions of another enactment in case of any conflict in the operation of the Act containing the non obstante clause. In other words, if the provision/s of both the enactments apply in a given case and there is a conflict, the provisions of the Act containing the non obstante clause would ordinarily prevail. In the present case, the movement of goods from the Domestic Tariff Area into the Special Economic Zone is treated as an export under the SEZ Act, 2005, which does not contain any provision for levy of export duty on the same. On the other hand, export duty is levied under the Customs Act, 1962 on export of goods from India to a place outside India and the said Act does not contemplate levy of duty on movement of goods from the Domestic Tariff Area to the Special Economic Zone. Therefore, there is no conflict in applying the respective definitions of export in the two enactments for the purposes of both the Acts and therefore, the non obstante clause cannot be applied or invoked at all."

14. Government further observes that in terms of Para 5 of Board's Circular No. 29/2006-Cus., dated 27-12-2006, the supply from DTA to SEZ shall be eligible for claim of rebate under Rule 18 of Central Excise Rules, 2002 subject to fulfillment of conditions laid thereon. Rule 30 of SEZ Rules, 2006 prescribes for the procedure for procurements from the Domestic Tariff Area. As per sub-rule (1) of the said Rule 30 of SEZ Rules, 2006, DTA may supply the goods to SEZ, as in the case of exports, either under Bond or as duty paid goods under claim of rebate under the cover of ARE-1 form.C.B.E. & C. has further clarified vide Circular No. 6/2010-Cus., dated 19-3-2010 that rebate under Central Excise Rules, 2002 is admissible to supplies made from DTA to SEZ and directed the lower formations to follow Circular No. 29/2006-Cus., dated 27-12-2006.

15. Government also notes that vide circular No.1001/8/2015-CX.8 dtd.28th April, 2015 issued under F.No.267/18/2015-CX.8 on

"Clarification on rebate of duty on goods cleared from DTA to SEZ", CBEC has clarified that since Special Economic Zone (**"SEZ"**) is deemed to be outside the Customs territory of India in terms of the provisions under the SEZ Act, 2005, any licit clearances of goods to SEZ from Domestic Tariff Area (**"DTA"**) will continue to be Export and therefore are entitled to the benefit of rebate under Rule 18 of the Excise Rules and of refund of accumulated Cenvat credit under Rule 5 of the Credit Rules, as the case may be.

16. The rebate claims of the applicant were also rejected on the ground that the applicant failed to produce Bill of Export in term of sub-rule (3) of Rule 30 of SEZ Rules, 2006. Government observes that in terms of Rule 30(5) of the SEZ Rules, Bill of Export should be filed under the claim of drawback or DEPB. Since rebate claim is also export entitlement benefit, the applicant was required to file Bill of export. However, GOI in many of its Orders viz. Essel Propack Ltd. [2014(312) E.L.T. 946 (GOI)], Nov Sara India (P) Ltd.[2014(313)E.L.T.898(GOI)], KEI Inds. Ltd. [2014(313)E.L.T.895(GOI)] has held that the substantial benefit of rebate claims cannot be denied for not filing Bill of Export which is a procedural lapse of technical nature.

17. Government further observes from the Order in Appeal No. SB/91-92/Th-I/10 dated 15.07.2010 that Customs Officer of SEZ Unit has endorsed on ARE-1 that the goods have been duly received by them. As the duty paid nature of goods and supply the same to SEZ is also not under dispute, the rebate on export of duty paid goods under Rule 18 of Central Excise Rules, 2008 cannot be denied. As such Government holds that the rebate claims are admissible to the applicant in the instant cases under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (NT)., dated 6-9-2004.

18. In view of above discussion and findings, Government sets aside Order-in-Appeal No. BPS/241/TH-I/2012 dated 08.10.2012 passed by the Commissioner (Appeals), Central Excise, Mumbai Zone-I and restores Orders

in Original No. R-986/2010-11 and R-987/2010-11 both dated 22.10.2010 passed by the Assistant Commissioner, Central Excise, Kalyan-II Division.

19. The revision applications thus succeed in above terms.

20. So, ordered.

14/11/19

(SEEMA ARORA)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No.149-150/2019-CX (WZ) /ASRA/Mumbai DATED 14.11.2019

To,
M/s Guddi Plastcon Private Limited,
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Copy to:

1. The Commissioner of GST & CX, Thane Rural Commissionerate, 4th Floor, Utpad Shulk Bhawan, Plot No 24-C: Sector-E, Bandra Kurla Complex, Bandra (East), Mumbai-400 051.
2. The Commissioner of GST & CX, (Appeals) Raigad, 5thFloor, CGO Complex, Belapur, Navi Mumbai, Thane.
3. The Deputy / Assistant Commissioner, Division- III, GST & CX, Thane Rural Commissionerate , Vardan Trade Centre, MIDC, Wagle Industrial Estate, Thane.
4. Sr. P.S. to AS (RA), Mumbai
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