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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
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8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.198/34/2015-RA \ 184 Date of Issue: \6 02.2022

ORDER NO. 177 /2022-CX (WZ) /ASRA/MUMBAI DATED 14.02.2022 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 : The Commissioner of Central Excise, Customs and Service Tax, Gandhidham

Respondent: M/s Space Exim Pvt Ltd
Plot No 442, Sector 1A, Ground Floor,
Gandhidham, Kutch 370 021

Subject : Revision Applications filed under Section 35EE of Central Excise Act, 1944 against the Order-in-Appeal No. KCH-EXCUS-000-APP-022-14-15 dated 31.03.2015 passed by the Commissioner, (Appeals –III), Central Excise, Rajkot

ORDER

The Revision Application has been filed by the Commissioner of Central Excise, Customs and Service Tax, Gandhidham (hereinafter referred to as the 'applicant') against the Order-in-Appeal No. KCH-EXCUS-000-APP-022-14-15 dated 31.03.2015 passed by the Commissioner, (Appeals –III), Central Excise, Rajkot

2. Briefly stated the facts of the case are that the respondent is a merchant exporter and had filed three separate rebate claims dated 13.12.2013 and 18.02.2011, for Rs. 2.50,639/-, Rs.86.261/- and Rs.2,37,432/- alongwith the relevant export documents. The said rebate claims were returned by the sanctioning authority vide letter dated 26.02.2014, on the ground that the ARE-1s were submitted without manufacturer's certification; that the triplicate copy of the subject ARE-1 was submitted without the signature of concerned Range Superintendent & Inspector, that the particulars of payment of duty on the said goods had not been submitted; that manufacturer's disclaimer certificate was not submitted. The appellant, vide letter dated 10.04.2014, resubmitted the claims before the sanctioning authority and also submitted their compliance explaining the discrepancies vide their letter dated 19.05.2014 to the sanctioning authority who, vide the impugned order, rejected and returned the rebate claim filed by them making the observations that the rebate claims were filed by them in the capacity of a merchant exporter, without support of disclaimer certificate(s) and the same were required to be filed with the concerned Maritime Commissioner in accordance with the provisions of para 3(b)) of the Notification No.19/2004-CE (N.T.): that as per Circular No. 508/04/2000-CX dated 14.01.2000, the Board has clarified that a merchant exporter could file the claim of rebate with the Assistant / Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacturer of export goods provided the manufacturer gives the disclaimer certificate; that it is not forthcoming as to whether the requirement of presenting the triplicate and quadruplicate copies ARE-1s within 24 hours of removal of export goods were duly complied with the

manner prescribed in para 3(a)(xi) of the Notification No. 19/2004-CE (N.T.), or otherwise.

3. Being aggrieved with the impugned order the respondent filed an appeal before the Commissioner of Service Tax (Appeals), Pune. The Appellate Authority vide Order-in-Appeal No. KCH-EXCUS-000-APP-022-14-15 dated 06.04.2015 disposed off the appeal by way of remand to the original authority. The Appellate authority observed that as no show cause notice was issued to the applicant and no chance to defend the case was accorded to the applicant, the principles of natural justice had not been observed and so declined to decide the case on merits. In the said order-in-appeal, the Appellate Authority, quoting Para 10 and 11 of the case of Singh Alloys (P) Ltd. - 2012(284) ELT 97 (Tri-Del), and relying on the decision of the Hon'ble Tribunal in case of Honda Sell Power Products Ltd. reported in 2013 (287) ELT 353 (Tri-Del) wherein the similar views have been paraphrased as regard inherent power of the appellate office to remit the case back under the provisions of section 35A(3) of the Central Excise Act, 1944. Further, the Hon'ble High Court of Gujarat, in the case of Tax Appeal No. 276 of 2014 in respect of Associated Hotels Ltd, observed that even after the amendment in Section 35A(3) of the Central Excise Act, 1944 after 11.05.2011, the Commissioner of Central Excise would retain the powers of remand.

4. Being aggrieved by the Order-in-Appeal, the department has filed the revision applications on the following grounds:

4.1 Since all the decisions relied upon by the Appellate authority were orders of Commissioner (Appeals) or the Tribunal, it is clear that the law is not settled and matter can be contested.

4.2 The judgement of the Hon'ble High Court of Gujarat in the case of Tax Appeal No. 276 of 2014 in respect of Associated Hotels Ltd relied upon by the Appellate Authority is not applicable in the present case.

4.3 In the instant case, the Appellate Authority has committed gross error of law by remanding back the matter on the above grounds. Pursuant to the amendment to Section 35(A) of the Central Excise Act, 1944/ Section 128A (3) of the Customs Act, 1962 with effect from 11.05.2001, Appellate Authority has been given powers to issue orders after ascertaining the facts at his end and the remand power of Commissioner (Appeals) stands withdrawn. Thus the Appellate Authority had failed to adhere to the judicial discipline by directing the Original Adjudicating Authority to decide the matter afresh.

4.4 The appellate authority, has overlooked the Board's Instruction No. 275/34/2006-CX.8A dated 18.02.2010, which prohibited the appellate authority to remand the case back to the original Adjudicating Authority.

4.5 The department has relied upon the following judgements

i) The Hon'ble Supreme Court of India in its judgment in Civil Appeal No.6988/2005 in the case of M/s MIL India Ltd [2007 (210) ELT 188 (S.C.)]

ii) M/s. Nov Sara India (Pvt) Ltd vs GOI [2014(ELT)898 G.O.I]

iii) M/s Enkay (India) Rubber Co. Pvt. Ltd. [2008 (224) ELT 393 (P & H) HC]

iv) M/s C. Kataria 2008 (221) ELT 508 (P&H)) and

v) Punjab and Haryana HC order in the case of M/s. Hawkins Cookers Ltd

5. Personal hearing was scheduled in this case on 03.03.2021, 10.03.2021, 06.04.2021,13.04.2021,12.10.2021 and 20.10.2021. Shri Deva, Assistant Commissioner, appeared for the hearing online on 20.10.2021 and stated that the Commissioner (Appeals) did not have the power to remand back the matter.

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

7. Government notes that the contention of the department in the revision application is that in view of the amendment to Section 35A with effect from

11.05.2001, the decision of the Appellate Authority to remand the proceedings to the original authority is not legal and proper.

i) Section 35(A) of the Central Excise Act, 1944/ Section 128A (3) of the Customs Act, 1962 as it stood before 11.05.2001 read as

"Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling decision or order appealed against or may refer the case back to the adjudicating authority with such direction as he may think fit for a fresh adjudication or decision as the case may be, after taking additional evidence, if necessary."

ii) The Section pursuant to amendment with effect from 11.05.2001 reads as

"Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against".

7.1 Government further notes that the department in the present revision application has contended that after amendment in Section 35A(3) of Central Excise Act, 1944 w.e.f. 11-5-2001 under Finance Act, 2001 the remand power of Commissioner (Appeals) stands withdrawn. In this regard, Government notes that issue is now well settled that remand powers of Commissioner (Appeals) were withdrawn w.e.f. 11-5-2001 as per above said amendment in Section 35A(3) ibid. So, this pleading of the department is acceptable. Commissioner (Appeals) should have decided the case finally at his level.

8. Be that as it may, Government observes that rebate claim was prima facie rejected / returned by the Rebate Sanctioning Authority for the following reasons:

i) Triplicate copy of the ARE 1's was submitted to the office of the sanctioning authority without the signature of the concerned Range Superintendent and Inspector.

ii) ARE1's submitted without manufacturers certification

iii) Non submission of duty payment particulars

iv) Non submission of the manufacturers disclaimer certificate.

v) The rebate claim was required to be filed before the Maritime Commissioner

8.1 The Government notes that the Manual of Instructions that have been issued by the CBEC specifies the documents which are required for filing a claim for rebate. Among them is the original / duplicate / triplicate copy of the ARE-1, the Excise Invoice and self-attested copy of shipping bill and bill of lading etc. Further paragraph 8.4 of the said Manual specifies that the rebate sanctioning authority has to satisfy himself in respect of essentially two requirements. The first requirement is that the goods cleared for export under the relevant ARE-1 applications were actually exported as evident from the original and duplicate copies of the ARE-1 form duly certified by customs. The second is that the goods are of a duty paid character as certified on the triplicate copy of the ARE-1 form received from the jurisdictional Superintendent of Central Excise. The object and purpose underlying the procedure which has been specified is to enable the authority to duly satisfy itself that the rebate of central excise duty is sought to be claimed in respect of goods which were exported and that the goods which were exported were of a duty paid character.

8.2 The Government holds that in order to qualify for the grant of a rebate under Rule 18, the mandatory conditions required to be fulfilled are that the goods have been exported and duty had been paid on the goods.

8.3 In the instant case, it is observed that :-

a) the applicant had submitted the copies of the relevant ARE-1s duly endorsed by the Customs Authorities.

b) copies of the invoices raised on the applicant by M/s Welspun Steel Ltd for the sale of the goods which shows the payment of duty on the goods.

8.4 In view of above, the government holds that the deficiencies pointed out by the sanctioning authority while rejecting the rebate claims are merely procedural infractions and the same should not result in the deprival of the

statutory right to claim a rebate particularly when the substantial compliance has been done by the applicant with respect to conditions and procedure laid down under relevant notifications / instructions issued under Rule 18 of the Central Excise Rules, 2002.

8.5 Government also notes that there is nothing on record to show that the principles of natural justice were accorded to the applicant by the sanctioning authority by way of issue of show cause notice and grant of personal hearing, before rejecting the claims.

9 The Government finds that in several decisions of the Government in the revisional jurisdiction as well as in the decisions of the CESTAT, the production of the relevant forms has been held to be a procedural requirement and hence directory as a result of which, the mere non- production of such a forms would not result in an invalidation of a claim for rebate where the exporter is able to satisfy through the production of cogent documentary evidence that the relevant requirements for the grant of rebate have been fulfilled. In the present case, no doubt has been expressed that the goods were not exported.

9.1 The Government further observes that a distinction between those regulatory provisions which are of a substantive character and those which are merely procedural or technical has been made in a judgment of the Supreme Court in **"Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner-1991 (55) E.L.T. 437 (S.C.)"**. The Supreme Court held that the mere fact that a provision is contained in a statutory instruction "does not matter one way or the other". The Supreme Court held that non-compliance of a condition which is substantive and fundamental to the policy underlying the grant of an exemption would result in an invalidation of the claim. On the other hand, other requirements may merely belong to the area of procedure and it would be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes which they were intended to serve. The Supreme Court held as follows:

"The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some other may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve."

9.2 In this regard Government observes that while deciding the identical issue, Hon'ble High Court of Bombay in its judgment dated 24-4-2013 in the case of M/s. U.M. Cables v. UOI (WP No. 3102/2013 & 3103/2013) reported as TIOL 386 HC MUM CX. = 2013 (293) E.L.T. 641 (Bom.), at para 16 and 17 of its Order observed as under :-

"16. However, it is evident from the record that the second claim dated 20 March, 2009 in the amount of Rs. 2.45 lacs which forms the subject matter of the first writ petition and the three claims dated 20 March, 2009 in the total amount of Rs. 42.97 lacs which form the subject matter of the second writ petition were rejected only on the ground that the Petitioner had not produced the original and the duplicate copy of the ARE-1 form. For the reasons that we have indicated earlier, we hold that the mere non-production of the ARE-1 form would not ipso facto result in the invalidation of the rebate claim. In such a case, it is open to the exporter to demonstrate by the production of cogent evidence to the satisfaction of the rebate sanctioning authority that the requirements of Rule 18 of the Central Excise Rules, 2002 read together with the notification dated 6 September, 2004 have been fulfilled. As we have noted, the primary requirements which have to be established by the exporter are that the claim for rebate relates to goods which were exported and that the goods which were exported were of a duty paid character. We may also note at this stage that the attention of the Court has been drawn to an order dated 23 December, 2010 passed by the revisional authority in the case of the Petitioner itself by which the non-production of the ARE-1 form was not regarded as invalidating the rebate claim and the proceedings were remitted back to the adjudicating authority to decide the case afresh after allowing to the Petitioner an opportunity to

produce documents to prove the export of duty paid goods in accordance with the provisions of Rule 18 read with notification dated 6 September, 2004 [Order No. 1754/2010-CX, dated 20 December, 2010 of D.P. Singh, Joint Secretary, Government of India under Section 35EE of the Central Excise Act, 1944]. Counsel appearing on behalf of the Petitioner has also placed on the record other orders passed by the revisional authority of the Government of India taking a similar view [Garg Tex-O-Fab Pvt. Ltd. - 2011 (271) E.L.T. 449] and Hebenkraft - 2001 (136) E.L.T. 979. The CESTAT has also taken the same view in its decisions in Shreeji Colour Chem Industries v. Commissioner of Central Excise - 2009 (233) E.L.T. 367, Model Buckets & Attachments (P) Ltd. v. Commissioner of Central Excise - 2007 (217) E.L.T. 264 and Commissioner of Central Excise v. TISCO - 2003 (156) E.L.T. 777.

17. We may only note that in the present case the Petitioner has inter alia relied upon the bills of lading, banker's certificate in regard to the inward remittance of export proceeds and the certification by the customs authorities on the triplicate copy of the ARE-1 form. We direct that the rebate sanctioning authority shall reconsider the claim for rebate on the basis of the documents which have been submitted by the Petitioner. We clarify that we have not dealt with the authenticity or the sufficiency of the documents on the basis of which the claim for rebate has been filed and the adjudicating authority shall reconsider the claim on the basis of those documents after satisfying itself in regard to the authenticity of those documents. However, the rebate sanctioning authority shall not upon remand reject the claim on the ground of the non-production of the original and the duplicate copies of the ARE-1 forms, if it is otherwise satisfied that the conditions for the grant of rebate have been fulfilled. For the aforesaid reasons, we allow the Petitions by quashing and setting aside the impugned order of the revisional authority dated 22 May, 2012 and remand the proceedings back to the adjudicating authority for a fresh consideration. The rejection of the rebate claim dated 8 April, 2009 in the first writ petition is, however, for the reasons indicated earlier confirmed. Rule is made absolute in the aforesaid terms."

9.3 Government also observes that Hon'ble High Court, Gujarat in Raj Petro Specialities Vs Union of India [2017(345) ELT 496(Guj)] also while deciding the identical issue, relying on aforestated order of Hon'ble High Court of Bombay, vide its order dated 12.06.2013 observed as under:

> *7. "Considering the aforesaid facts and circumstances, more particularly, the finding given by the Commissioner (Appeals), it is not in dispute that all other conditions and limitations mentioned in Clause (2) of the notifications are satisfied and the rebate claim have been rejected solely on the ground of non-submission of the original and duplicate ARE1s, the impugned order passed by the Revisional Authority rejecting the rebate claim of the respective petitioners are hereby quashed and set aside and it is held that the respective petitioners shall be entitled to the rebate of duty claimed for the excisable goods which are in fact exported on payment of excise duty from their respective factories. Rule is made absolute accordingly in both the petitions".*

9.4 Government finds that ratios of aforesaid Hon'ble High Court orders are squarely applicable to the instant case in so far as the matter of sanction of rebate claim is concerned.

10. In view of discussions and findings elaborated above, Government holds that the impugned rebate claims in the instant case are admissible in terms of Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/04-CE (N.T.) dated 06.09.04 subject to verification by rebate sanctioning authority of the relevant documents pertaining to impugned exports and verification of duty payment particulars.

11. In view of the above, Government holds that ends of justice will be met if the impugned Order in Appeal is set aside and the case remanded back to the original sanctioning authority for the limited purpose of verification of the claims with directions that he shall reconsider the claim for rebate on the basis of the collateral documents submitted by the applicant after satisfying itself with regard to the authenticity of those documents and duty paid nature of goods.

12. Accordingly, Government sets aside Order in Appeal No. KCH-EXCUS-000-APP-022-14-15 dated 31.03.2015 passed by the Commissioner, (Appeals –III), Central Excise, Rajkot and directs the Original authority for verification of impugned rebate claims filed by the applicant in the light of above discussion after giving reasonable opportunity of hearing to the applicant. The rebate sanctioning authority shall pass the order within eight weeks from the receipt of this order.

13. The Revision applications are allowed on the above terms.

Shrawan 14/2/22

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

ORDER NO. 177 /2022-CX (WZ) /ASRA/MUMBAI DATED 14 .02.2022

To,

The Commissioner of CGST, Kutch (Gandhidham),
GST Bhavan, Plot No, 82, Sector 8, Kutch (Gandhidham),
Gujarat-370201

Copy to :

1) M/s. Space Exim Pvt. Ltd., Plot No 442, Sector 1A, Ground Floor, Gandhidham, Kutch 370 021
2) The Commissioner of CGST, Rajkot Appeals, 2nd Floor, GST Bhavan, Race Course, Ring Road, Rajkot 360001
3) Guard File.
4) Spare copy.