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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. 195/1576/2012-RA | 958 Date of Issue: 06.07.2018

ORDER NO. 180 /2018-CX (WZ)/ASRA/MUMBAI DATED 07.06.2018 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 : M/s Reshmika Minerals & Chemicals (P) Limited.

Respondent : Commissioner of Central Excise and Customs Surat-II.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. SSP/67/SURAT-II/2012 dated 28.09.2012 passed by the Commissioner (Appeals) Central Excise, Customs & Service Tax, Surat-II.

ORDER

This revision application is filed by the M/s Reshmika Minerals & Chemicals (P) Limited, Bharuch (hereinafter referred to as "the applicant") against the Order-in-Appeal No. SSP/67/SURAT-II/2012 dated 28.09.2012 passed by the Commissioner (Appeals) Central Excise, Customs & Service Tax, Surat-II

2. The brief facts of the case are that the applicant cleared the excisable goods to Special Economic Zone (SEZ) without payment of duty under Rule 30 of SEZ Rules, 2006. The said goods were cleared without payment of duty on the strength of letter of undertaking. The applicant failed to submit the proof of export within the period of the 45 days to the jurisdictional Range Officer as per Rule (4) of Rule 30 of SEZ Rules, 2006 in respect of ARE-1s mentioned in in 88 SCNs (as detailed in Annexure appended to the SCNs). Therefore, the applicant was issued with a show cause notices directing to show cause as to why duty involved in various ARE-1s should not be recovered under Rule 30(4) of SEZ Rules read with Section 11A (1) of Central Excise Act, 1944 (hereinafter referred as the Act), interest not be charged and recovered under Section 11AB of the Act and penalty should not be imposed under Rule 25(1) and Rule 27 of the Central Excise Rules, 2002 read with section 26 (1) of 51 SEZ Act, 2005. The said Show Cause Notices were adjudicated and on adjudication Superintendent had dropped the demand of duty involed in these ARE-1s, since the applicant had produced proof of export but imposed penalty of Rs. 500/- under Rule 27 of Central Excise Rules, 2002, in each ARE-1 for late submission of proof of export (total penalty of Rs. 1,80,500/- was imposed).

3. Being aggrieved by the Order-in -Original, the applicant filed appeal before Commissioner (Appeals) who vide his Order in Appeal No. SSP/67/Surat-II/2012 dated 28.09.2012 upheld the Order in Original No. R-II/Dn-III/PP/01/2011-12 dated 25.07.2011.

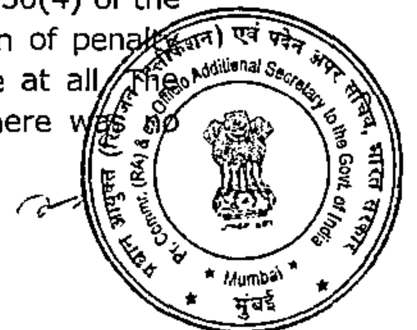
4. Aggrieved by the aforesaid order the applicant filed present revision application against the impugned Order-in-Appeal dated 28.09.2012 on the following grounds:

4.1 that the learned Commissioner (A) has neither considered the factual position nor considered the legal position in respect of the export of the goods and payment of duty. He has also not dealt with all the significant points properly and also not considered the vital and legal grounds of the case as put forth by the applicant in their replies and discussed irrelevant points. He has conveniently overlooked all the legal grounds put forth by the applicant. Thus, the Order dated 28-09-2011 is not only improper, invalid and unjustified but is also not based on any of the legal grounds of the law. He has rejected the appeal on grounds which are quite baseless. This would be found from the actual facts discussed below.

4.2 that in the present case, the lower authority has imposed penalty under the provisions of Rule 27 of the Central Excise Rules, 2002 for contravention of Rule 30(4) of the SEZ Rules, 2006. The applicant reproduce Rule 27 of the CER, 2002 as under.

RULE 27. General penalty. — A breach of these rules shall, where no other penalty is provided herein or in the Act, be punishable with a penalty which may extend to five thousand rupees and with confiscation of the goods in respect of which the offence is committed.

that on perusal of Rule 27 of the CER, 2002, it would please be found that under the said Rule, penalty can be imposed only if the assessee has contravened any of the provisions of Central Excise Rules, 2002 or Central Excise Act, 1944. In the present case, the case of the department is only that the applicant has contravened Rule 30(4) of SEZ Rules, 2002. It is not the case of the department that the applicant has contravened the provisions of central Excise Act, 1944 or Rules made thereunder. It is therefore submitted that if the applicant has contravened the provisions of Rule 30(4) of the SEZ Rules, 2006 then the question of imposition of penalty under Rule 27 of the CER, 2002 does not arise at all. The applicant submit that as stated above since there was no



contravention any of the provisions of Central Excise Rules, 2002 or the Central Excise Act, 1944, the order for imposition of penalty under the provisions of Rule 27 of the CER, 2002 is not legal and proper.

4.3 that in such a case, penalty can never be imposed under the provisions of Rule 27 of the CER, 2002 in as much as under the said Rule, penalty can be imposed only if no other penalty is provided in the CER, 2002 or in the CEA, 1944.

4.4 that it was the views of the department that in such a case, penalty can be imposed under Rule 25 of the CER, 2002 as it is evident from the proposal made, in the SCN, to impose penalty. If the penalty can be imposed under Rule 25 of the CER, 2002, the question of imposition of penalty under Rule 27 does not arise at all. In other words, if as per the views of the department provisions of Rule 25 are applicable then the proposal to impose penalty under Rule 27 was not required to be imposed.

4.5 <u>THE COMMISSIONER (A) HAS TRAVELLED BEYOND THE SCOPE OF THE SCN AND DISCUSSED IRRELEVANT POINTS IN THE OIA</u>:

that in instant case, the lower authority has imposed penalty under the provisions of Rule 27 of the Central Excise Rules, 2002 only for contravention of Rule 30(4) of the SEZ Rules, 2006 whereas as the Commissioner (A) has mentioned in his order at para 7(iv) that '*Therefore, Adjudicating authority has correctly concluded that there is violation of Rule 19 of the CER, 2002 read with Rule 30(4) of SEZ Rules, 2006 and hence correctly imposed the penalty under Rule 27 of the CER, 2002 of Rs. 500/- for each ARE-1*'. In this context, the applicant submit that nowhere the lower adjudicating authority in his OIO, has mentioned the conclusion as mentioned by the learned Commissioner (A). Further, he has also mentioned at para 7(iii) that there is clear violation of Rule 19 of the CER, 2002 but it is submitted that the lower adjudication authority has imposed penalty only for contravention of Rule 30(4) of the SEZ Rules, 2004 for non submission of documents as proof of export within 45 days.

4.6 that further, it is submitted that if there was contravention of Rule 19 of the CER, 2002 then it was required for both the

lower authorities to specifically mention under which Rule of CER, 2002, it has been prescribed that the exporter is required to submit the documents as proof of exports within 45 days. THE APPLICANT SUBMIT THAT NO TIME LIMIT IS PRESCRIBED FOR SUBMISSION OF DOCUMENTS AS PROOF OF EXPORTS IN THE CENTRAL EXCISE RULES, 2002. IT CAN BE SAID THAT THE PROVISIONS OF RULE 19 OF THE CER, 2002 HAVE BEEN CONTRAVENED ONLY IF THE APPLICANT HAS NOT AT ALL PRODUCED THE DOCUMENTS AS PROOF OF EXPORT. THIS IS NOT THE PRESENT CASE. It is thus submitted that the Commissioner (A) has erred in upholding the OIO passed by the Superintendent of Central Excise.

4.7 that the applicant further submit that the findings given at para 7(ii) are not relevant to the instant case and not inconformity with the rules and regulations of the Central Excise Act, 1944 and Rules made thereunder as it was not required for the applicant to produce any proof about acceptance of proof of exports. Further, once the demand of duty has been dropped by the lower authority, this implies that the documents as proof of export have been accepted. Further, no procedure is prescribed to apply for condonation of delay in submission of proof of exports. In the instant case, it was required for the Commissioner (A) to discuss the legal points as put forth by the applicant but he has failed in it and hence the order, under appeal, is not legal and correct.

THE SCNs HAVE BEEN ISSUED WITHOUT JURISDICTION:

4.8 that the SCNs have been issued without jurisdiction as the consignments of the finished goods were removed for export purpose, without payment of duty, under Letter of Undertaking (LUT) executed/furnished before the Deputy Commissioner of Central Excise & Customs, Division-III, Ankleshwar and the same has been accepted by him. Thus, as per the settled legal position, in such a case, the SCNs proposing to demand Central Excise duty; to recover interest; and to impose penalty were required to be issued by the Deputy Commissioner who had accepted the (LUT). In other words, in such a case, the powers to demand duty and to impose penalty rests with the authority with whom the LUT/bond has been executed and the officer in charge of factory is not appropriate authority to take action if bond has

been executed with the Deputy Commissioner. In this context, the applicant place reliance on the following judgements.

IN RE: Supreme Industries Limited - 2002 (144) ELT 729 (GOI)

Bombay Dyeing and Mfg. Co. Ltd. - 2001 (134) ELT 591 (GOI)

Both the lower authorities have failed in giving findings on this submission made by the applicant.

4.9 In any case, even if it is assumed that the applicant has contravened any of the provisions of Central Excise Rules, 2002 or the Notifications issued under the said Rules, in the circumstances also penalty under Rule 27 cannot be imposed because there was no intention to evade payment of duty. It is not the case of the department that the contravention has taken place with intent to evade payment of duty. Even, no such allegation is made, in the SCNs. It is submitted that in such a case, there cannot be intention to evade payment of duty because in the instant case, the goods were removed to SEZ and it is deemed as export of the finished goods and the same have been delivered to SEZ as the same is evident from the endorsement of the Customs authority on the relevant ARE-1s. In other words, the goods were removed from export and the same have been exported under proper documents. Since there was no intention to evade payment of duty, penalty under the provisions of Rule 27 cannot be imposed.

4.10 In similar circumstances, the Commissioner (A), Pune-II, in case of M/s Kirloskar Brothers Ltd., reported in 2010 (261) ELT 788 [Commissioner (A)] has held that in such a case penalty cannot be imposed.

4.11 that delay in filing of documents as proof of export is nothing but the procedural lapse/violations particularly when the finished goods have been exported. Such lapses are condonable. In this context, we would like to refer and rely on the judgement in case of CCE V/s Ambadi Enterprises Limited reported in 2007 (219) ELT917 (T).

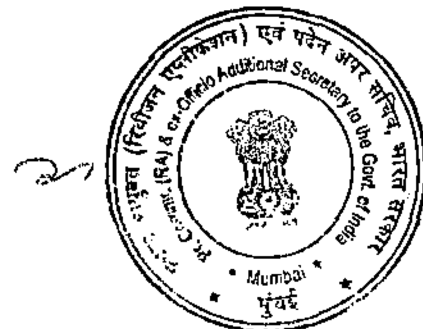
4.12 the applicant also rely on the judgement in case of M/s Clipsal Industries India Pvt. Ltd. V/s CCE reported in 2004 (174) ELT 188 (T).

4.13 the applicant further submit that they do not dispute about the fact that the documents as proof of exports have been submitted delayed by some days (i.e., beyond 45 days) but at the same time it is submitted that the goods have been exported/delivered to SEZ in time.

4.14 It is also submitted that the applicant's unit was new unit at the relevant time and this was the first occasion to remove the goods to SEZ and therefore the applicant was not aware about the provisions of Rule 30 of the SEZ Rules 2006 which prescribes to submit the documents as proof of export within forty five days to the Central Excise officer. It was the bonafide impression of the applicant that the documents as proof of exports are required to be filed within six months. At initial stage when the applicant had set up their unit, they did not have proper excise staff and therefore only in some cases, the proof of exports has been submitted delayed.

4.15 In view of the above, it is submitted that in the instant case, the order for imposition of penalty under Rule 27 of the CER, 2002 is not legal and proper.

4.16 In view of the facts stated above and the ratios of the judgements, referred to above, the applicant contend that the learned Commissioner (A) has not properly taken into accounts the facts of the case and the legal grounds discussed by the applicant in this matter and has rejected the grounds without properly appreciating the facts and also the legalities involved in this case. From the above facts, it will please be found that the order for rejection of appeal, is not legally sustainable in law. Therefore the applicant submit that the order, under appeal, passed by the Commissioner (A) deserves to be set aside.



5. A personal hearing in the case was held on 22.02.2018. Shri Vikas Khare, Company Secretary, and Shri Raghunath Natu, GM appeared on behalf of the applicant. None was present for the respondent. The applicant reiterated the submissions filed in Revision Application and pleaded that the OIA be set aside and instant Revision Application be allowed.

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. The issue to be decided in this revision application is whether the penalty imposed on the applicant under Rule 27 of Central Excise Rules, 2002, for contravention of Rule 30(4) of the SEZ Rules, 2006 is proper or otherwise.

7. Government, on perusal of records observes that the Adjudicating Authority, vide Order in Original No. R-II/Dn-III/PP/01/2011-12 dated 25.07.2011 imposed of penalty of Rs. 500/- under Rule 27 of Central Excise Rules, 2002 in respect of each of the ARE-1 for late submission of proof of export by the applicant which are covered under 88 SCNs. Commissioner (Appeals) while upholding the said Order in Original observed that the fact of late submission of proof of export in respect of all those ARE-1 referred in Order in original was neither disputed nor denied by the applicants; that there was no proof or submissions that, all these respective and relevant proof of exports relating to the corresponding ARE-1, were accepted by the competent Authority at relevant time, or there was delay condonation in such matter by any Authority, or any time extension was granted by the any authority to submit the relevant proof of exports; therefore, there was clear violations of Rule 19 of Central Excise Rules, 2002 read with Rule 30(4) of SEZ Rules, 2006 in respect of goods removed for export under respective ARE-1s. Accordingly, Commissioner (Appeals) concluded that the Adjudicating Authority has correctly concluded that, there is violation of Rule 19 of Central Excise Rules, 2002 read with Rule 30(4) of SEZ Rules, 2006 (being SEZ angle involved in the subject matter) and hence correctly

imposed the penalty under Rules 27 of Central Excise Rules, 2002 of Rs. 500/- for each ARE-1.

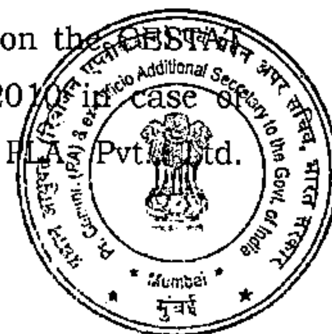
8. The applicant, in their grounds for appeal in the instant revision application has contended that that on perusal of Rule 27 of the Central Excise Rules, 2002, it would be found that under the said Rule, penalty can be imposed only if the assessee has contravened any of the provisions of Central Excise Rules, 2002 or Central Excise Act, 1944. In the present case, the case of the department is only that the applicant has contravened Rule 30(4) of SEZ Rules, 2002. It is not the case of the department that the applicant has contravened the provisions of Central Excise Act, 1944 or Rules made thereunder. It is therefore submitted that if the applicant has contravened the provisions of Rule 30(4) of the SEZ Rules, 2006 then the question of imposition of penalty under Rule 27 of the CER, 2002 does not arise at all. The applicant submit that as stated above since there was no contravention any of the provisions of Central Excise Rules, 2002 or the Central Excise Act, 1944, the order for imposition of penalty under the provisions of Rule 27 of the CER, 2002 is not legal and proper. It is also contended that the lower authority has imposed penalty under the provisions of Rule 27 of the Central Excise Rules, 2002 only for contravention of Rule 30(4) of the SEZ Rules, 2006 whereas as the Commissioner (A) has mentioned in his order at para 7(iv) that 'Therefore, Adjudicating authority has correctly concluded that there is violation of Rule 19 of the CER, 2002 read with Rule 30(4) of SEZ Rules, 2006 and hence correctly imposed the penalty under Rule 27 of the CER, 2002 of Rs. 500/- for each ARE-1'. In this context, the applicant submit that nowhere the lower adjudicating authority in his OIO, has mentioned the conclusion as mentioned by the learned Commissioner (A). Further, he has also mentioned at para 7(iii) that there is clear violation of Rule 19 of the CER, 2002 but it is submitted that the lower adjudication authority has imposed penalty only for contravention of Rule 30(4) of the SEZ Rules, 2004 for non submission of documents as proof of export within 45 days.

9. Government observes that the Adjudicating Authority in his discussion and findings and before imposing the penalty on the applicant under Rule 27 of the Central Excise Rules, 2002, has observed as under

> *'Accordingly, the assessee have contravened the provisions of Rule 19 of Central Excise Rules, 2002 read with Rule 30 (4) of SEZ Rules, 2006 in as much as they failed to submit the proof of export of goods in question and/ or also failed to submit the original/duplicate copies of ARE-1s with due certification of Customs authority/specified officer of Special Economic Zone, evidencing the entry of goods in SEZ within 45 days from the date of removal of the goods for export purpose, thereby rendering themselves liable for payment of Central Excise duty involved in the said clearance along with interest and penal action under respective provisions. Since the assessee has furnished the proof of export after issuance of SCN the question of recovery of Central Excise Duty does not arise and they are liable for penal action only'.*

10. In view of the foregoing, Government observes that there is no force in the contention of the applicant (at para 4.5 above) that nowhere the lower adjudicating authority in his OIO, has mentioned the conclusion as mentioned by the learned Commissioner (A). Moreover, Government observes that para 7 of Show Cause Notice dated 18.04.2011 has clearly spelt out the contravention of provisions of Rule 19 of Central Excise Rules, 2002 read with Rule 30 (4) of SEZ Rules 2006 in the instance case.

11. As regards applicant's contention that there was no contravention any of the provisions of Central Excise Rules, 2002 or the Central Excise Act, 1944, the order for imposition of penalty under the provisions of Rule 27 of the CER, 2002 is not legal and proper, Government relies on the CESTAT, South Zonal Bench, Banglore's Final Order dated 09.03.2010 in case of Commissioner of Central Excise, Banglore Vs Shree PLA Pvt. Ltd.



[2013(296) E.L.T. 282(Tri.Bang)]. In this case the lower authorities proceeded against the assessee on the ground that the assessee had not furnished LUT as required under Notification No. 42/2001-C.E. (N.T.), dated 26-6-2001 read with Rule 19 of Central Excise Rules, 2002, wherein procedure and condition are stipulated for clearance without payment of duty and had cleared goods for export under ARE-1 to units of SEZ. The said ARE-1s were cleared by the authorities below. The adjudicating authority in both the cases imposed penalties under Rule 27 of the Central Excise Rules, 2002. On an appeal, the appellate authority upheld the imposition of penalty under Rule 27. However, department sought for imposition of penalty under Rule 25 and enhancement in both these appeals. While dismissing the appeal filed by the department seeking imposition of penalty under Rule 25 of the Central Excise Rules, 2002 and also dismissing cross objections filed by the respondents for setting aside the penalty imposed under Rule 27 under the Central Excise Rules, 2002 CESTAT South Zonal Bench, Banglore in its Final Order dated 09.03.2010 observed as under:

> **5.** I have considered the submissions made at length by both sides and perused the records. I find that the ld. Commissioner (Appeals) has recorded the following findings for non-imposition of penalty under Rule 25 and for upholding the penalty under Rule 27 :-
>
> *"....... .... The appellant has followed procedure prescribed under Rule 30 of SEZ Rules, 2006 and the goods cleared to SEZ units under ARE-1s have been rewarehoused as evidenced from the endorsements on ARE-1s by jurisdictional Customs officer. Thus I find from the records except for non-furnishing of letter of undertaking all other procedures prescribed for clearance of goods to SEZ units have been complied with by the appellant. The adjudicating authority has not made out any case that the endorsement on the ARE-1s by the Customs authorities having admitted the goods in full in SEZ unit is wrong and erred in confirming duty and interest. There is violation of Rule 19 of Central Excise Rules, 2002 by not furnishing letter of undertaking and delay is submitting re-warehousing certificate which are only procedural lapses. Nevertheless, violation of procedures prescribed should not be treated as [illegible] automatically condoned. The statutory procedures are prescribed to ensure proper functioning of substantive provisions and therefore*

contravention invites suitable penalty, though clearly, the penalty should be commensurate with the offence. In this case the substantial requirement of export proof is not controverted by the department; suitable penalty for procedural infringement will suffice. Thus imposition of penalty under Rule 27 of Central Excise Rules 2002 sustains. ...."

6. As against the above reproduced portion of the order, it can be seen that the Revenue's contention, in the grounds of appeal is only to the extent that there is no proper procedures have been followed. It is also on record that the goods have been cleared by the respondent / assessee , in this case under ARE-1 with the permission of the lower Revenue authorities. It is also undisputed that the ARE-1s were warehoused as per the endorsement of the recipient of the ARE-1. It would indicate that the goods cleared from the factory premises of the respondent/assessee reached the SEZ which is considered as an export. I find that the imposition of penalty of Rs. 5,000/- under Rule 27 for not following the procedure is correct and does not require any interference. I find that the order of the ld. Commissioner (Appeals) is correct and legal and does not suffer from any infirmity. Appeals filed by the Revenue are dismissed.

7. As regards the cross-objections filed by the respondent that there are no show cause notice for the proposition of imposition of penalty under Rule 27 of Central Excise Rules, 2002. On this point, the arguments for setting aside the penalty imposed under Rule 27 under the Central Excise Rules, by the Counsel are not convincing and as also their arguments that the provisions of said rule is not invocable. Accordingly, cross-objections filed by the respondent are also dismissed.

12. Applying the ratio of the aforesaid decision to the facts of the case before it, Government observes that there is violation of Rule 19 of Central Excise Rules, 2002 by delay in submitting re-warehousing certificate / proof of export which are only procedural lapses and therefore, holds that penalty under Rule 27 of Central Excise Rules, 2002 is correctly imposed on the applicant and thus concurs with the view taken by original Adjudicating Authority. Government further observes that the reliance placed by the applicant on the order passed by Commissioner (A), Pune-II, in case of M/s Kirloskar Brothers Ltd., reported in 2010 (261) ELT 788 [Commissioner (A)] is misplaced in as much as while setting aside the penalty imposed on the applicant under Rule 27 ibid, the Commissioner (Appeals) observed that the

delay in getting the re-warehousing certificate within the stipulated period had been occurred at the destination point and for which the appellant cannot be faulted and hence, the imposition of penalty on the appellant is not sustainable. As against this, as recorded in his findings by the original Adjudicating Authority in his Order in Original dated 25.07.2011, the failure in submission of proof of export in stipulated time in the instant Revision Application, by the applicant was due to (i) lack of knowledge (ii) Casual approach towards fulfilment of statutory requirement.

13. However, Government also observes that during the course of personal hearing before the original Adjudicating Authority Shri A. S. Godbole, who appeared on behalf of the applicant had made a sincere request that merely due to lack of knowledge and newness of issue such delay had occurred and that after issuance of SCNs they had submitted the proof of export for subsequent period within stipulated time period, the facts which are taken in to consideration by the Adjudicating Authority. The Adjudicating Authority has also mentioned in his Order in Original dated 25.07.2011 that the applicant's bonafide is not in question.

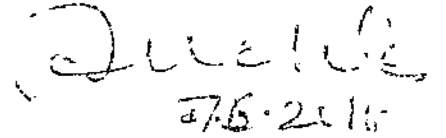
14. In view of the foregoing discussion, Government holds that imposition of penalty under Rule 27 of Central Excise Rules, 2002 on the applicant was justified. However, in view of the fact that the applicant has furnished the proof of export and the Original Adjudicating Authority has dropped the demand, and also giving credence to the submissions made by the applicant for late submissions of proof of export Government is of the view that the penalty of Rs.500/- in each ARE-1 for late submission of proof of export is excessive and not commensurate with the gravity of offence and in the circumstances penalty amount deserves to be reduced. Accordingly, Government reduces the penalty from Rs.500/- in each ARE-1 to Rs.250/- in each ARE-1.

15. Government, therefore, orders modification of the order of the Commissioner (A) to the extent that penalty imposed under Rule 27 of Central Excise Rules, 2002 be reduced from Rs.500/- to Rs.250/-in each ARE-1 which will meet the ends of justice.

16. The Revision Application stands disposed of accordingly.

17. So ordered.

Attested



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

एस. आर. हिरुलकर
S. R. HIRULKAR
(A-C)

ORDER No. 180/2018-CX (WZ)/ASRA/Mumbai DATED 07-06-2018.

To,
M/s Reshmika Minerals & Chemicals Pvt. Ltd.,
Plot No. 23, GIDC Panoli, Tal. Ankleshwar.

Copy to:
1. The Commissioner of Central Goods and Service Tax, Vadodara-II, GST Bhavan, Subhanpura, Vadodara-390 023
2. The Commissioner of Central Goods and Service Tax, (Appeals), Central Excise Building, 1st Floor Annex, Race Course Circle, Vadodara 390007.
3. The Deputy / Assistant Commissioner, Central Goods & Service Tax, Division-XI [Panoli], 2nd Floor, R. K. Casta Building, Near-Taluka Panchayat, Station Road, Bharuch- 392001.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.