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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. 195/165-166/WZ/2017-RA /1952 Date of Issue: 31.08.2023

ORDER NO.192-193/2023-CX(WZ)/ASRA/MUMBAI DATED 29.08.23 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	:	M/s. Mahashakti Coke (A Unit of Saurashtra Fuels Pvt. Ltd.)
Respondent	:	Commissioner of CGST & CX, Kutch
Subject	:	Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. KCH-EXCUS-000-APP-060-61-16-17 dated 13.01.2017 passed by the Commissioner (Appeals-III), Central Excise, Rajkot.

ORDER

These two revision applications are filed by M/s. Mahashakti Coke (A Unit of Saurashtra Fuels Pvt. Ltd.), Dist. Kutch, (hereinafter referred to as "the applicant") against the Order-in-Appeal (OIA) No. KCH-EXCUS-000-APP-060-61-16-17 dated 13.01.2017 passed by the Commissioner (Appeals-III), Central Excise, Rajkot.

2. The issue in brief is that the applicant is engaged in manufacturing of excisable goods viz. LAM Coke, Metcoke, Coking Coal falling under Chapter Sub-Heading No. 27040090/27040030/27011910 of the First Schedule to the Central Excise Tariff Act, 1985. The applicant had cleared the excisable goods for export under Letter of Undertaking (LUT) as per Rule 19 of the Central Excise Rules, 2001. However, during the scrutiny of the papers submitted by the applicant for acceptance of 'Proof of Export', a short shipment was noticed and therefore a demand for duty involved was raised and the same was confirmed alongwith interest and penalty vide following Orders-in-Original (OIO):

Sl. No.	Order in Original No. & date	Export period	Quantity short shipped (in Mts)	Central Excise Duty confirmed (in Rs.)
1.	18/AC/2015 dated 30.12.2015	Apr-Jul 2013	82	94,809/-
2.	19/AC/2015 dated 30.12.2015	Oct-12 to Mar-13	138.335	1,97,299/-

Being aggrieved, the applicant filed appeals against the OIOs, however, the Appellate authority rejected the same vide impugned OIA.

3. Hence, the applicant has filed the instant Revision Application mainly on the following grounds:

a) The demand is time barred. It is to submit that the demand of the Show Cause Notice is hit by limitation. The Show Cause Notice is issued for the period April-13 to July-13 and the same had been issued on 11.04.14. It is to submit that the time of issue of the Show

Cause Notice is one year from the relevant date. Since the demand is issued after the period of one year therefore the said demand is hit by limitation and accordingly the same is liable to be quashed immediately and grant the consequential relief to the applicant.

b) It is to submit that the product "Metallurgical Coke" is hygroscopic in nature and it had definitely some moisture content otherwise whole lot may burn on its own and get converted into ash. Therefore, the product "Metallurgical Coke" had definitely some portion as moisture content which may be 15% - 20% of total weight depending on the atmospheric environment. Even the sales contracts are prepared by considering general moisture content of 5% of total weight. Therefore, the shortages of appx. 5% do occur in shifting of a lot of bulk coke due to losses occurred for evaporation of moisture content and transportation handling losses. Therefore, a general tolerance rate of 5% is allowed in respect of Moisture contained. In the lot of Metallurgical Coke 0.5%-1.0% losses are tolerated in respect of the handling losses depending on the terms and conditions mutually agreed between the parties. In the present case of export cargo, the allowable moisture content is 5% which is verified from the contract with the foreign buyers. There are penalty clauses for the excess moisture content and amount will be deducted accordingly. Further the Mundra Port had also allowed for 0.5% handling loss for transfer of lot bulk Coke from factory to port area and further from port to vessel.

c) The whole export cargo is removed from the factory under the supervision of Survey Agency of international repute who certified the moisture content in each such big lot of Coke. The Agency had issued the day wise certificate which are removed from factory and reached at the port of Export at Mundra Port. Further the Agency had also certified about the Moisture content in the lot which were again shifted from Port area to the foreign going Vessel. On the basis of these certificates, Draft Survey report are prepared on the basis of

which export quantity are finalized and mentioned in the EP copy of the Shipping bill and accordingly Short Shipment notices are also issued by the Shipping line which had been even signed by the Master of vessel. Therefore, the various certificates are definitely like statutory certificate viz. Daily Truck Receiving Report, Certificate of analysis and Draft Survey Report as issued by Survey agency namely IGI, which has an international repute in this field. Therefore, the certificate as issued by the Agency must be considered as necessary document by which actual quantity is ascertained.

d) Therefore, the contention of the adjudicating Authority that the ARE-1 does not have any endorsement with regards to the actual quantity exported is clearly wrong and worthless. The ARE-1s are duly endorsed by the Customs Authorities which means that the goods cleared from the factory had been received Ion the port and the same lot had been exported and accordingly the ARE-1 containing the full details of the lot had been signed and verified by the Customs Authorities. The ARE-I become very crucial in the present case since the ARE-I is only proof that the goods containing in the said ARE-I had been exported. The same had been endorsed in the present case therefore It is proved that the goods sent from factory had been exported.

e) The applicant also wishes to submit that the cargo had been moved to the CFS area of the Mundra Port. The CFS had also certified that they have received whole quantity contained in the ARE-Is and also such goods were not moved out. Therefore, it is also again proved that the goods had been received in the CFS area and the said goods had been further exported and no goods had been moved out in DTA area and all the goods were exported. Further the Show Cause Notice as well as the Order-in-Original also does not alleged for the diversion of the export cargo to the home consumption. Therefore sir, the allegation is clearly wrong on account of facts of the case accordingly the Order-in-

Original so passed is liable to be set aside and grant the consequential relief to the applicant.

f) The Applicant herewith again relied upon the following case laws in support of their contention that the rebate should not be deducted on account of moisture loss and handling losses. These cases are:

- BPL Display Devices Ltd. Reported at 2004 (174) ELT 5 (SC)
- Indian Metals & Ferro Alloys Ltd Vs CCE. C. & ST, Bhubaneswar-I reported at 2010 (249) ELT 548 (Tri - Kolkata)
- CCE, Chennai Vs Bhuwalka Steel Industries Limited reported at 2010 (249) E.L.T. 218 (Tri. - LB)
- Roshanlal Lalit Mohan vs. CCE Delhi III reported at 2009 (238) E.L.T. 661 (Tri. - Del.)

The essence of the each case is that when there is loss on account of moisture, then the Exemption which is otherwise eligible to a unit, will be available; CENVAT Credit on the duty paid on those quantity evaporated due to moisture content will be available and Even the remission of duty is also not available when the loss is on account of moisture content therefore the rebate must be granted to the applicant, As the Adjudicating Authority had failed to rely upon the same without stating any cogent reason therefore the order passed by the Adjudicating Authority is become Illegal and not sustainable in law therefore the above said impugned OIO must be set aside and grant the consequential relief to the applicant.

g) The essence of the each case is that when there is loss on account of moisture, then the Exemption which is otherwise eligible to a unit, will be available; CENVAT Credit on the duty paid on those quantity evaporated due to moisture content will be available and even the remission of duty is also not available when the loss is on account of moisture content therefore the rebate must be granted to the applicant. As the Adjudicating Authority had failed to rely upon the same without stating any cogent reason therefore the order passed by the Adjudicating Authority is become illegal and not sustainable in

law therefore the above said impugned OIO must be set aside and grant the consequential relief to the applicant.

h) Since the demand of the present case is not maintainable in terms of the above submission therefore the Interest is also not payable on the impugned demand under section 11AA/11AB of the Central Excise Act, 1944.

i) It is settled legal position that the penalty under rule 25 is subjected to the section 11 AC of the Central Excise Act 1944. The Penalty under section 11 AC had to impose when the demand is confirmed on account of misstatement, wilful suppression, fraud, collusion etc with intent to evade the Central Excise Duties. In this regards, it is to submit that the applicant had submitted Annexure 19 Proof of exports regularly with the range office along with the original ARE-Is duly endorsed by the Customs officer. Even the Show Cause Notice as well as the Order-in-Original also not contended how the intentional breach had been done by the applicant. Therefore the mala fide intention is missing in the present case. Therefore the penalty under section 11 AC is not imposable and consequently penalty is also not imposable under rule 25 in the present case. Therefore your kind honour is requested to kindly drop the penalty by setting aside the impugned Order-in-Original being invalid, illegal and without base.

4. Several personal hearing opportunities were given to the applicant and the respondent viz. on 04.10.2022, 18.10.2022, 07.12.2022 and 21.12.2022. However, both of them did not attend on any date nor have they sent any written communication. Since sufficient opportunities have been given, the matter is therefore taken up for decision based on the available records.

5. 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.

6. On perusal of records, Government observes that excisable goods were cleared for export by the applicant under Letter of Undertaking (LUT). However, during the scrutiny of the papers submitted by the applicant for acceptance of 'Proof of Export', a short shipment of quantity was noticed and accordingly show cause notices were issued to the applicant demanding the duty on short shipment and the same was confirmed by the adjudicating authority alongwith interest and penalty from the applicant. The Commissioner (Appeals) upheld the impugned Orders-in-Original as detailed at para 2 above except imposition of penalty which was quashed. Now the applicant has filed these revision applications under Section 35EE of the Central Excise Act, 1944 on the grounds mentioned at Para 3.

7. Government observes that on an identical issue of the applicant, involved in Revision Applications No. 195/585 and 681/2012-RA (CX), GOI has already passed Order No. 61-62/2016-CX, dated 12.5.2016. Government further observes that the applicant has filed a Special Civil Application No. 15459/2016 against this GOI order dated 12.05.2016 before Hon'ble High Court of Gujarat which is pending disposal. However, GOI order dated 12.05.2016 has not been stayed by the Hon'ble High Court of Gujarat.

8. The Revisionary Authority vide Order No. 61-62/2016-CX, dated 12.5.2016 while rejecting the revision applications as devoid of merit observed as under :-

> ***8.*** *Government observes that the issue to be decided in which the impugned goods can be said to have been "exported" for the applicant to be entitled to rebate in terms of Rule 18 of the Central Excise Rules, 2002 The lower authorities have held the part rebate claims inadmissible on the ground that the full quantity cleared from factory was actually not exported. The applicant on the other hand has claimed that moisture loss has occurred between clearance from factory and loading in ship and as such there is no short shipment. In view of the rival contentions, Government first proceeds to examine the issue on the basis of prevalent statutory provisions.*

8.1 *Rule 18 of Central Excise Rules, 2002 deals with rebate of duty which reads as under:*

Rebate of duty - Where any gods 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 fulfilment of such procedure, as may be specified in the notification.

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

8.2 *Further the word export is defined in Section 2 of the Customs Act, 1962 as under:*

'(18) "Export" with its grammatical variations and cognate expressions means taking goods out of India'.

9. *The harmonious reading of the above provisions reveal that the rebate is admissible only on duty paid/payable on goods exported outside India In this case it is an admitted fact that total quantity of the goods cleared from the factory as reflected in ARE-1 and Central Excise Invoices was not exported as reflected in Shipping Bill. By virtue of interpretation of above said provisions, only duty paid on actual quantity of goods becomes eligible for rebate. As such, Government finds no illegality in order of original authority restricting rebate to actual quantity of goods exported.*

10. *The applicant has further claimed that the difference in quantity cleared from the factory and that exported was due to loss of goods occurred on account of moisture content and transportation handling losses subsequent to clearance from factory. In this regard, Government notes that the applicant could not cite any applicable provisions, where such loss subsequent to clearance from the factory for the impugned goods is allowed under the relevant provisions of the Central Act and Rules thereof. In absence of any such provision for loss of goods on account of moisture loss and fixing of any percentage loss for the purpose, Government finds no ground to interfere with the order to hold as inadmissible the rebate of duty paid over and above actual quantity exported.*

11. *Notwithstanding the above, Government notes that applicant has placed heavy reliance upon Survey Report in support of its claim for moisture content and loss thereof. In this regard, the original authority has observed that there are many factual discrepancies in data given in the said Survey Report viz-a-viz quantity mentioned in Excise/export*

documents which has not been refuted by the applicant. As such, reliance placed by the applicant on such Survey Report does not hold much ground for the reasons of said discrepancies and also the moisture content loss is claimed to be of a relatively high percentage considering the fact that the goods have travelled within the same district. Further, Government notes that the applicant has failed to declare the moisture content in the goods at the point of taxation viz. the clearance from the factory of export. Hence the lower authorities have rightly observed that any such exercise to determine moisture loss or to argue that the difference in quantity is due to moisture loss is futile. In any case it is a fact on record that the goods have been short shipped for whatever reason and as per provision of law rebate of duty cannot be allowed on the quantity of goods which have not been exported.

12. *Government notes that applicant has relied upon various case laws. These case laws were also relied upon by the applicant before Commissioner (Appeals). Commissioner (Appeals) has discussed each case laws in details and concluded that facts of this case are different from facts of cases relied upon by the applicant. Government concurs with such detailed findings of appellate authority regarding non-applicability of case laws.*

13. *In view of above discussion, Government finds no infirmity in order of Commissioner (Appeals) and hence upholds the same as just and legal.*

Being the identical issue in all respects, following the ratio of the above said order of the revisionary authority, Government observes that lower authorities have rightly confirmed the demand for the quantity held to be short shipped.

9. As regards applicant's contention that the show cause notice is hit by limitation and is liable to be quashed, Government observes that in terms of para 13.6 of Excise Manual (CBEC - Supplementary Instructions):

"in case of non-export within the six month from the date of clearance for export (or such extended period, if any, as may be permitted by the Deputy/Assistant Commissioner of Central Excise or the bond-accepting authority) or discrepancy, the exporter shall himself deposit the excise duties along with interest on his own immediately on completion of the statutory time period or within ten days of the Memorandum given to him by the Range/Division office or the Office of the bond-accepting authority. Otherwise necessary action can be initiated to recover the excise duties along with interest and

fine/penalty. Failing this, the amount shall be recovered from the manufacturer-exporter along with interest in terms of the Letter of Undertaking furnished by the manufacturer. In case where the exporter has furnished bond, the said bond shall be enforced and proceedings to recover duty and interest shall be initiated against the exporter".

From the above provisions it is very much clear that the applicant is required to pay duty on its own in case of non-exportation of goods. Government observes that in the instant case the applicant failed to do so even after considerable time. Hence, Government completely agrees with the finding of the Commissioner (Appeals) in this regard that *"the applicant has not taken this plea before the lower authority during the course of adjudication proceedings and hence there is no reason to interfere on the issue at this juncture".*

10. The applicant has mentioned several judgments in support of their contention. It is seen that same judgments were relied upon before the Commissioner (Appeals) as well. The Commissioner (Appeals) in his order vide para 13 has discussed all these judgments. The said para 13 is reproduced hereunder:

13. The applicant has also relied upon certain decisions of the higher appellate forums.

- *BPL Display Devices Ltd, reported at 2004 (174) ELT 5 (SC): This case relates to shortage of goods and denial of exemption at the time of importation. I find that the facts mentioned in the above decision are quite different than the fact of the present case. Therefore, the same cannot be made applicable to present case.*
- *Indian Metals & Ferro Alloys Ltd. Vs. CCE. C. & ST, Bhubaneshwar-I reported at 2010 (249) ELT 548 (Tri.-Kolkata): This case relates to demand of duty for shortage of goods. The demand was set aside on the premises that there was no allegation regarding diversion of goods for other purpose. I find that this decision in not squarely applicable as there is no demand but the same is relating to rebate of duty on export.*
- *CCE Chennai Vs. Bhuwalka Steel Industries Ltd, reported at 2010 (249) ELT 218 (Tri.-LB): This case was for allowance of cenvat credit*

as per Rule 3 of Cenvat Credit 'Rules, 2004. This case is not squarely applicable looking to the facts of the case on hand.

- *Roshanlal Lalit Mohan Vs. CCE Delhi-III reported at 2009 (238) ELT 661 (Tri.-Del.): In this case the remission of duty was denied for losses in respect of imported goods adulterated not permitting to be cleared. Therefore the ratio of this case is not applicable with the present case.*

Government finds that the applicant has not put forth any cross objection as regards above findings of Appellate authority.

11. In view of the above discussion, Government finds no reason to annul or modify the impugned Order-in-Appeal No. KCH-EXCUS-000-APP-060-61-16-17 dated 13.01.2017 passed by the Commissioner (Appeals-III), Central Excise, Rajkot and rejects the Revision Application filed by the Applicant.

27/3/23

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

ORDER No. 192-193 /2023-CX(WZ)/ASRA/Mumbai dated 27.03.23

To,
M/s Mahashakti Coke,(A unit of Saurashtra Fuels Pvt. Ltd.),
Plot No. 166/1, Baraya-Patri Road,
Village : Lakhapar, Taluka: Mundra, Dist: Kutch – 370 140.

Copy to:

1. Commissioner of CGST & CX, Kutch,
   GST Bhavan, Plot No.82, Sector 8,
   Gandhidham – 370 201.
2. M/s. Lahoti & Lahoti,
   Plot No.220, Akshat House, Sector 1A,
   Near Mamlatdar office, Gandhidham – 370 201.
3. Sr. P.S. to AS (RA), Mumbai.
4. Guard File.
5. Notice Board.