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8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F. NO. 198/18/13-RA/905 Date of Issue: 12/07/2018

ORDER NO. 197 /2018-CX(WZ)/ASRA/Mumbai DATED 12.06.2018 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 : Commissioner of Central Excise, Raigad.

Respondent : M/s. KMS Exports Pvt. Ltd., Mumbai.

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. BC/489/RGD (R) /2012-13 dated 31.12.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-III.

ORDER

This revision application is filed by Commissioner of Central Excise, Raigad against the Order-in-Appeal No. BC/489/RGD (R) /2012-13 dated 31.12.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-III.

2. Brief facts of the case are that the respondent, viz. M/s KMS Export Pvt. Ltd. Mumbai are merchant exporters and had filed two rebate claim under Rule 18 of the said Rules read with Notification No.19/2004 CE (NT) dated 6.09.2004 for the duty paid on goods exported. In respect of the said rebate claims, it was observed among others that in respect of Rebate claim No. 3131 dated 21.05.2012 for Rs.3,28,275/- (Rupees Three Lakhs Twenty Eight Thousand Two Hundred and Seventy Five only) the respondent had not furnished the certification / declaration in Para 3(a), (b) & (c) and Para 4 of ARE-1 which is mandatory. Also in respect of Rebate claim No. 3132 dated 21.05.2012 for Rs.1,14,091/- (Rupees One Lakh Fourteen Thousand and Ninty One only), the goods were exported after six months of the clearance from the factory and no permission has been granted for export of goods beyond six months. Accordingly the rebate claims of Rs.3,28,275/- and Rs.1,14,091/- were rejected by the Original Adjudicating Authority vide Order in Original No.1391/12-13/ DC(Rebate) Raigad dated 14.08.2012.

3. Being aggrieved, the respondent filed appeal before Commissioner (Appeals) who vide impugned Order in Appeal dated 31.12.2012 partially allowed the appeal filed by the respondent by granting the rebate claim No. 3131 dated 21.05.2012 for Rs. 3,28,275/- and rejecting the Rebate claim No. 3132 dated 21.05.2012 for Rs.1,14,091/-

4. Being aggrieved by the Order-in-Appeal dated 31.12.2012 to the extent it allowed the rebate claim No. 3131 dated 21.05.2012 for Rs. 3,28,275/- of the respondent, the applicant Department filed the present Revision Application on the following grounds:

4.1 The Commissioner, Central Excise, (Appeals), Mumbai-III erred by allowing the appeal on the ground Sr. No. 3(a) of the ARE-1, it was observed that the manufacturer was required to certify whether he is availing CENVAT Credit facility or not. The claimant is eligible for Rebate of duty irrespective of whether manufacturer of the goods exported avails Cenvat facility or not. The exporter is merchant exporter and he has no role in availing Cenvat credit or otherwise. Sr. No.3(b) talks about availment of Notification No. 21/2004(NT). The said notification provides for rebate of duty on excisable goods used in manufacture/ processing of export goods and the procedure involved. Whereas, in the instant case rebate is claimed on the finished exported goods. As regards Sr. No. 3(c) of the said ARE-1, it talks about availment or otherwise of Notification No. 43/2001(NT). The said notification provides for procurement of inputs without payment of duty for manufacture of export goods. Whereas, in the instant case rebate is claimed on the finished exported goods. Non filling up these columns by the merchant exporter will not have any bearing on the admissibility of the rebate claim.

4.2 The procedure as laid down in para 3(a) (xi) of the Notification No.19/2004-CE (NT) dated 06.9.2004 is mandatory in nature as the information provided in ARE-1 is nothing but a self assessment. However, the claimant has not followed the same. In respect of the incomplete declaration at Sr. No. 3(a), 3(b) and 3(c). The ARE-1 is a statutory form prescribed under Notification No.19/2004-CE (NT) dated 6.9.2004 issued under Rule 18 of Central Excise Rules, 2002. The declarations given in the ARE-1's are required to be filled in so as to ascertain whether benefits under specified Notification's have been availed by the exporter or not. This is a statutory requirement which have not been complied with by the respondents. ARE-1

document is giving all details including self assessment. After self assessing the said document, the claimant presented the same to the proper officer. Once the said document is assessed by the claimant, it is not open for them to re-assess it. Board has also clarified vide Circular No.510/06/2000-CX dated 3.2.2000 that any scrutiny of the correctness of the assessment shall be done by the jurisdictional Assistant/Deputy Commissioner only. Declaration under 3 (a) is for availment/non availment of cenvat credit on inputs, declaration under 3(b) is for availment/non availment of benefits under Notification No. 21/2004(NT) which provides for rebate on inputs including packing material used in manufacture/processing of goods for export and declaration under 3(c) is for availment of Notification No. 43/2001(NT) which provides procurement of inputs including packing materials without payment of duty for manufacture/processing of goods for export. The declaration under 3(a), 3(b) and 3(c) are vital, as in absence of the same the adjudicating authority will not have knowledge whether the claimant is availing undue double benefits such as (A) Rebate on finished goods as well as rebate on inputs or (B) Rebate on finished goods as well as procurement of duty free inputs. To nullify such possibilities it is provided in Form ARE-1 regarding a declaration under 3(a), 3(b) and 3(c) which is being mandatory in nature. Therefore, in absence of complete declaration, the adjudicating authority can not ascertain the admissibility of rebate.

4.3 Further Para 2 of Chapter 8 of CBEC's Excise Manual of Supplementary Instructions provides as under —

2. Forms to be used

2.1 ARE-I is the export document (see Annexure-14 in Part 7), which shall be prepared in quintuplicate (5 copies). This is similar to the erstwhile AR4. This document shall bear running serial number beginning from the first day of the financial year. On ARE-I. certain declarations are required to be given by the exporter. They should be read carefully and signed by the exporter or his authorized agent. The different copies of ARE-I forms should be of different colours as indicated below. (emphasis added).

4.4 Whereas a contrary view was taken by other Commissioner, Central Excise (Appeals-II) Mumbai:- in a case of M/s Maind Investments Pvt. Ltd. the Commissioner (Appeals-II), Central Excise Mumbai rejected an appeal in identical issues vide 01A No. US/719/RGD/2012 dated 29-10-2012 on the ground that:-

"From the above it is clear that the above mentioned provision is mandatory provision and the appellant has not followed the procedure as laid down in para 3(a) (xi) of the Notification No.19/2004-CE (NT) dated 06.9.2004.

In respect of the incomplete declaration at Sr. No. 3(a)(b) and (c), I hold the finding of the rebate sanctioning authority that ARE-1 is an assessment document and once the said document is assessed it is not open for them to re-assess it. Board has also clarified under Circular No.510/06/2000-CX dated 3.2.2000 that any scrutiny of the correctness of the assessment shall be done by the jurisdictional Assistant/Deputy Commissioner only. Therefore, the rebate claim was rightly rejected by the adjudicating authority and accordingly, the impugned order is upheld."

4.5 Further, on the same ground i.e. incomplete declaration under 3(a), 3(b) and 3(c) the Commissioner , Central Excise (Appeals-II) Mumbai has rejected the appeals and upheld orders rejecting rebate claims on this ground.

4.6. Furthermore, two Commissioners, Central Excise (Appeals) differs on this issues. Therefore for judicial consistency the appeal is required to be filed in this case.

4.7 The 0-in-A No. BC/489/RGD (R)/2012-13 dated 31-12-2012 therefore does not appear to be legal and proper in respect of allowing rebate claim No.3131 dated 21-05-2013 for Rs.3,28,275/- and is required to be appealed against and it is prayed that the relief mentioned herein below shall be granted.

5. In response to the show cause notice dated 17.07.2013, the respondent filed following submissions against the instant Revision Application.

- THE IDENTITY OF GOODS EXPORTED IS NOT IN DISPUTE : The description of goods covered under the aforesaid ARE 1, Excise S/Bill, Bill of Lading, Invoice and Packing List, starting from the point of antes till to the point of actual export would establish the identity of goods e identification of Engine No. and Chassis no. and not in dispute . They say it is a settled legal position not to deny rebate for such procedural lapse.

- DUTY PAYMENT CHARACTER NOT IN DISPUTE : the duty has been paid by the them when the consignment taken out of the factory and then the total amount of the C. Excise Invoice paid by the exporter and the triplicate copy of ARE 1 has been endorsed by ventral Excise Range Officer wherein the debit entry has been mentioned in opriate place. Hence the revenue has also rightly not disputed in the duty Rent character.

- EXPORT IS NOT IN DISPUTE : the duty paid goods of the specified quantities were cleared factory for exports under the ARE1 and subsequently cleared by the ores department and the export documents were endorsed by them. Hence, considering the export documents like Shipping Bill, Export Invoices, ARE 1, se Invoice, Bill of Lading, neither identification of the goods exported is in ute nor the factual export has been questioned by any of the Revenue. The export documents has carried out the specified quantities, description of goods, nos. of case, weights and are co-related in all the documents which were endorsed by the C. Excise & Customs department. Regarding this, the department has not raised any questions or doubts.

- It cannot be gainsaid that rebate/drawback and other such export promotion scheme of the govt. are incentive-oriented beneficial schemes intended to boost export in order to promote effforts by exporters to earn more foreign exchange for the country and in case the substantive fact of export having been made, is in doubt, liberal interpretation is to be accorded in case of technical latches in order not to defeat the very purpose of such scheme.

- Without prejudice to the submissions made hereinabove we further say that under proviso to Rule 12(1) of CER, the hon'ble J.S.R.A. or for that matter your Honour is empowered to allow rebate after condoning all or any of the conditions laid down in any of the notification issued under Rule 12 not fulfilled by us if His Honour /Your Honour is satisfied that the goods in fact have been exported by us.

- It is a settled legal position not to deny the incentives that is provided by the Govt. for export, for procedural deficiencies as long as the goods have in fact been exported, in support of which their place reliance on the ratio of the following binding judgments :

- The Govt. of India, Ministry of Finance, Department of Revenue, vide their Order No.185/2004 dated, 31.10.2003 has catergorically noted that basically, the settlement of the dispute requires understanding of mandatory and directory provisions of law.

- The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case, of the latter, substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of

courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory as summarized In the matter of SHARIF UD-DIN VS ABDUL GANI LONE, AIR 1980 SC(303) & 203(156)ELT(168)Bom. : -

- Govt. also noted that in para 13.7 of CBEC'S Manual, 2001 in para II of Chapter 7, it is mentioned that in case of loss of documents, the divisional office or bond accepting authority may get the matter verified from customs authorities at the place of export or may call for collateral evidences such as remittance certificate, Mate's Receipt to satisfy himself that the goods have actually been exported.

- Govt. observes that export under bond and export under payment of duty are comparable as objective of both the schemes are same. In case of former, export goods are exempted from payment of duty subject to the condition of production of proof of export, failing which duty is to be recovered. In the case of latter, export goods are cleared on payment of duty which is rebated subject to production of proof of export.

- Under these circumstances, even if it is assumed for argument's sake, but not admitting the same, that there has been some procedural lapse on our part, for that matter your Honour is empowered to condone the same and allow us the rabate since the goods in fact have been exported.

It is a settled legal position not to deny the rebate of duty paid for procedural deficiencies as long as the goods have in fact been exported, in support of which their place reliance on the ratio of the aforesaid binding judgments

1. In Suksha International Vs. Union of India — 1998(39) ELT 503(SC).

2. Kansal Knitwears vs. CCE 2001-136-ELT-467-TRI —

3. Indo Euro Textiles Pvt Ltd., - {1998-97-ELT-550-G01} -

4. 1994 (71) E.L.T. 1081 (G.O.I.)

6. Personal Hearing was held on 16.01.2018. None appeared for the department. Shri Laxmidhar Behera, Consultant appeared for hearing on behalf of the respondent and pleaded that due to small oversight they could not properly tick / cut the declaration in ARE-1 Form and pleaded that instant Revision Application be dismissed and Order-in-Appeal be upheld.

7. 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 applicant's rebate claim No. 3131 dated 21.05.2012 for Rs.3,28,275/- made under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 – C.E.(NT) dated 06.09.2004 was rejected by the original Adjudicating Authority on the ground that there was no certification / declaration in Para 3 (a) (b) & (c), 4 of ARE-1 which was mandatory. On appeal being filed against this by the respondent, Commissioner (Appeals) while allowing the appeal of the respondent on this count observed as under :

> *In the instant case, the exporter is merchant exporter and he has no role in availing Cenvat credit or otherwise. Sr. No.3(b) talks about availment of Notification No. 21/2004(NT). The said notification provides for rebate of duty on excisable goods used in manufacture/ processing of export goods and the procedure involved. Whereas, in the instant case rebate is claimed on the finished exported goods. As regards Sr. No. 3(c) of the said ARE1, it talks about availment or otherwise of Notification No. 43/2001(NT). The said notification provides for procurement of inputs without payment of duty for manufacture of export goods. Whereas, in the instant case rebate is claimed on the finished exported goods. Non filling up these columns by the manufacturers has no way effect the claim of the merchant exporter. The rebate claim can be decided without going into these details. Hence rebate*

claim cannot be denied on this count. Moreover it is observed from the endorsements on the reverse of the ARE-1's that the goods have been verified as per Board's Circular No.294/16/97-Cx dated 30.01.97 by the departmental officers. Also the duty paid character of the exported goods have been verified. It has time and again been emphasized by the Appellate Authority, Tribunal, Apex Court that the substantial benefit of rebate is not to be denied on technical and procedural ground when duty is paid and export of the goods is established. Such technical and procedural lapses are liable to be condoned. In support of my above contention, I rely upon the following cases: (i) Government of India in the case of M/s. Sanket Industries Ltd (2011 (268) E.L.T. 125 (G.O.I.)) held that "Rebate - Procedural infractions condonable - Fundamental requirement for rebate is manufacture and subsequent export - Procedure prescribed to facilitate verification of substantive requirement - Procedural infraction of Notifications, Circulars be condoned if exports really taken place - Rule 18 of Central Excise Rules, 2002".

(ii) Government of India in the case of Deesan Agro Tech Ltd (2011 (273) E.L.T. 457 (G.O.I.)) held that "Rebate - Non-observance of procedures as laid down in Notification No. 21/2004-C.E. (N.T.) - Fixation of input output ratio - Input output norms amended by DGFT Vide Public Notice No. 32 (RE-2006) 2004-09, dated 13-7-2006 prescribing Hexane as 6.9 Ltr per MT of Soyabean De-oiled cake - Use of hexane essential for the production of De-oiled Cake (DOC) - Fact of export not disputed - Procedural lapses are condonable as the substantive requirement of law has been complied with -Rebate claims admissible by following the input-output ratio as per SION Norms fixed in Exim Policy.

9. Aggrieved by the above Order passed by the Commissioner (Appeals) the applicant department has filed the present Revision Application on the grounds mentioned in para 3 supra.

10. Government observes that the applicant exported the goods and filed rebate claim under Rule 18 of the Central Excise Rules, 2002 read with the Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. The applicant has contended that due to oversight they could not properly tick/cut the declaration in the printed ARE-1 form.

11. In this regard Government places its reliance on GOI in Revision Order No. 32/2016 – CX Dated 04.02.2016 in the case of M/s Mahavir Synthesis Pvt. Ltd. Vs Commissioner of Central Excise, Raigad, wherein while allowing application of the applicant the Revisionary authority observed that *the rebate claims cannot be rejected for procedural lapses of wrong ticking* of declaration in Para 3 (a) (b) & (c), 4 of ARE-1. In catena of judgments, the Government of India has held that benefit of rebate claim cannot be denied for minor procedural infraction when substantial compliance of provisions of notification and rules is made by claimant.

12. Government notes that identical issue of ticking wrong declaration in case of M/s. Socomed Pharma Ltd. decided by GOI in Revision Order No. 154-157/2014-CX dated 21.04.2014 (reported in 2014 (314) ELT 949 (GOI) wherein it has been observed that mere ticking of wrong declaration may not be a reason for rejection of rebate claim especially when substantial condition of export of duty paid goods established.

13. In this connection Government observes that the Notification No.19/2004. CE(NT) dated 6.9.2004 which grants rebate of duty paid on the goods, has laid down the conditions and limitations in paragraph (2) and the procedure to be complied with in paragraph (3). The fact that the Notification has placed the requirement of "presentation of claim for rebate to Central Excise" in para 3(b) under the heading "procedures" itself shows that these are procedural requirements. Such procedural infractions can be condoned. Further, it is now a settled law while sanctioning the rebate claim, that the procedural infraction of Notification/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 requirements. The core aspect or fundamental requirement for rebate is its manufacturer, payment of duty and subsequent export. As long as this requirement is met, other procedural deviations can be condoned. It is further observed that rebate/drawback etc. are export-oriented schemes and unduly restricted

and technical interpretation of procedure etc. is to be avoided in order not to defeat the very purpose of such schemes which serve as export incentive to boost export and earn foreign exchange and in case the substantive fact of export having been made is not in doubt, a liberal interpretation is to be given in case of any technical breaches. Such a view has been taken in *Birla VXL* - 1998 (99) E.L.T. 387 (Tri.), *Alfa Garments* - 1996 (86) E.L.T. 600 (Tri), *Alma Tube* - 1998 (103) E.L.T. 270, *Creative Mobous* - 2003 (58) RLT 111 (GOI), *Ikea Trading India Ltd.* - 2003 (157) E.L.T. 359 (GOI), and a host of other decisions on this issue. 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. 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.).

14. In view of discussions and findings elaborated above, Government holds that said rebate claims are admissible in terms of Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/04-CE(NT) dated 06.09.04 subject to verification by original adjudicating authority of the details given in the photocopies of the said documents pertaining to impugned exports

with the original case records and verification of duty payment particulars on triplicate copies of relevant ARE-1 forms by the jurisdictional Central Excise Range officer.

15. In view of the above, Government upholds impugned Order-in-appeal and directs the original authority to decide the rebate claim No. 3131 dated 21.05.2012 for Rs. 3,28,275/- (Rupees Three lakh Twenty Eight Thousand Two Hundred Seventy Five only) afresh in view of above observations, after due verifications of documents submitted by the applicant after affording reasonable opportunity and to pass well-reasoned order within eight weeks from the receipt of this order.

16. Revision application is disposed off accordingly on above terms.

17. So ordered.

ATTESTED

12/7/18

S.R. HIRULKAR
Assistant Commissioner (R.A.)

12.6.2018

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

ORDER No. 197 /2018-CX (WZ) /ASRA/Mumbai DATED 12.06.2018.

To,
The Commissioner of GST & CX, Belapur Commissionerate,
1st Floor, CGO Complex, CBD Beelapur, Navi Mumbai 400614.

Copy to:

1. M/s KMS Exports Pvt. Ltd, Kohinoor Industrial Estate, Gala No. 225, 2nd Floor, Western Express Highway, Virwani, Goregaon (East) Mumbai 400 063.
2. The Commissioner of GST & CX, (Appeals) Raigad, 5thFloor,CGO Complex, Belapur, Navi Mumbai, Thane.
3. The Deputy / Assistant Commissioner (Rebate), GST & CX Belapur Commissionerate.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.