F.No. 195/84/13-RA

SPEED POST

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GOVERNMENT OF INDIA
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Mumbai- 400 005

F.No.195/84/13-RA /1066 Date of Issue: 06.02.2018

ORDER NO. 19/2018-CX (WZ) /ASRA/MUMBAI DATED 31.01.2018 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. Britacel Silicones Ltd., F-18, MIDC, Marol, Andheri (East), Mumbai 400 093.

Respondent : Commissioner of Central Excise, Customs, & Service Tax, Raigad

Subject : Revision Application filed, under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal US/657/ RGD/ 2012 dated 12.10.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai.

ORDER

This revision application is filed by M/s. Britacel Silicones Ltd., F-18, MIDC, Marol, Andheri (East), Mumbai 400 093 (hereinafter referred to as "the applicant") against the Order-in-Appeal No. US/657/RGD/2012 dated 12.10.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – II with respect to the Order-in-Original No. 1311/11-12/DC (Rebate)/Raigad dated 29.11.2011 passed by the Deputy Commissioner of Central Excise (Rebate), Raigad.

2. Brief facts of the case are that the applicant had filed 11 rebate claims under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004 – C.E. (NT) dated 06.09.2004 amounting to Rs.13,78,491/-. The original authority viz. Deputy Commissioner, Central Excise (Rebate), Raigad sanctioned the said rebate claims vide Order in Original No. 1311/11-12/DC (Rebate)/Raigad dated 29.11.2011.

3. Being aggrieved by the Order-in-Original, Department filed appeal before the Commissioner (Appeals) on the ground that the rebate claims were wrongly sanctioned as the applicant had not followed the procedure of self-sealing as required vide para 3(a) (xi) of Notification No.19/2004-CE(NT) dated 06.9.2004. It was further mentioned in the grounds of appeal that the applicant had cleared the goods by availing benefit under Notification no. 21/2004-CE (NT) dated 06.09.2004 under which it was mandatory on their part to clear the goods in form ARE-2 and file the rebate claims with the Assistant/Deputy Commissioner of Central Excise having jurisdiction of the place approved for manufacture or processing of such export goods. The Commissioner (Appeals) vide Order in Appeal No. US/657/RGD/2012 dated 12.10.2012 set aside Order in Original No. 1311/11-12/DC (Rebate)/Raigad dated 29.11.2011 and allowed the Revenue's Appeal.

4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds :-

4.1 that order to review the Order in original has not been made within the time limit of three months stipulated under Section 35 E(2) of the Central Excise Act,1944 and hence the appeal filed on the basis of the directions issued under a time barred review Order was legally unsustainable and deserved to be rejected in toto;

4.2. that the ground on which the Commissioner (Appeals) rejected the claim i.e *"Applicants have not submitted any documentary evidence to prove that the goods were actually opened and examined by Customs department, therefore the identity of goods exported was not established"*, was not the subject matter of the appeal filed before him and therefore rejection of the claim is on extraneous ground;

4.3 that the impugned order is bad in law and deserves to be set aside on the ground that the fact of the goods cleared under the respective ARE-1 is duly established from the various documentary evidences submitted by them as proof of export;

4.4 that it is a well settled legal position that substantial benefit of rebate admissible under the law, cannot be denied only on the ground of certain technical and clerical error by the manufacturer while filling up ARE-1 form;

4.5 that in view of the legal and factual position explained above, the rebate was rightly sanctioned and paid to them and therefore the order passed by the Dy Commissioner deserved to be sustained as legal proper and correct and the impugned order deserves to be rejected and set aside.

5. A Personal hearing was held in this case on 29.12.2017 and Shri Nitin Mehta, Consultant, duly authorized by the consultant appeared appeared for hearing on behalf of the Applicant and reiterated the submission filed through Revisionary Application and also placed reliance on the following case laws :-

1. 2013 (293) ELT 641(Bom) and
2. 2014 (314)ELT 949 (GOI)

In view of the above he pleaded that instant he pleaded that Order-in-Appeal be set aside and 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.

7. Government further notes that apart from point of dispute on merit of the case, the applicant submitted about the status of review/appeal of the impugned order-in-original by the jurisdictional Commissioner of Central Excise under Section 35E(2) and 35E(3) of the Central Excise Act, 1944 being time-barred. Though this issue was also raised before the Commissioner (Appeals), the Commissioner (Appeals) has not given any finding on that review order passed in this case under Section 35E(3) of the Central Excise Act, 1944 was barred by limitation or otherwise. On the point of limitation, the applicant submitted that the review and filing of appeal has been done in this case after the stipulated period of three months and hence appeal was clearly time barred.

8. In this regard, Government observes that the statute of Section 35 E(2) & 35E(3) of the Central Excise Act, 1944 provides that every order under sub-Section (1) or sub-Section (2), as the case may be, shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority and the relevant review order has to be necessarily made within the stipulated period of three months from the date of communication of relevant order-in-original.

9. The "Order to File Appeal" issued by the then Commissioner of Central Excise, Customs and Service Tax, Raigad Commissionerate vide F.No. III/18/Gr.IV/PA/240/2011-12 dated 2nd April 2012 (Annexure D to Revision Application), states that

> *"The rebate claims totally amounting to Rs.13,78,491/- were sanctioned by the Deputy Commissioner (Rebate), Central Excise, Raigad, vide Order in Original No.1311/11-12 dated 29.11.2011 and communicated to Audit for Review on 09.01.2012".*

The impugned Order in Original was reviewed by the Commissioner, Central Excise, Customs and Service Tax, Raigad Commissionerate on 2.4.1998 in terms of Section 35E(2) of the Central Excise Act, 1944. In the instant case, Government observes that the said order has been reviewed by the Commissioner within the stipulated period of three months from the date of communication of relevant order-in-original. Thus, Government holds that the order of review is not hit by limitation and hence Government proceeds to examine the case on merits.

10. Government observes that the Department filed appeal before the Commissioner (Appeals) on the ground that the rebate claims were wrongly sanctioned as the applicant had not followed the procedure of self-sealing as required vide para 3(a) (xi) of Notification No.19/2004-CE(NT) dated 06.9.2004. It was further mentioned that the applicant had cleared the goods by availing benefit under Notification no. 21/2004-CE (NT) dated 06.09.2004 under which it was mandatory on their part to clear the goods in form ARE-2 and file the rebate claims with the Assistant/Deputy Commissioner of Central Excise having jurisdiction of the place approved for manufacture or processing of such export goods.

11. The Commissioner (Appeals) vide Order in Appeal No. US/657/RGD/2012 dated 12.10.2012 and while setting aside Order in Original No. 1311/11-12/DC (Rebate)/Raigad dated 29.11.2011 observed as under :-

> *The dispute involved in the appeal that the respondents failed to comply with the basic conditions of 'self-sealing procedure' mentioned under Notification 19/2004-CE (NT) dated 06.9.2004. Para 6.1 of Chapter 8 of CBEC's Excise Manual of Supplementary Instructions reads as follows —*
>
> *6.1 The facility of self-sealing and self-certification is extended to all categories of manufacturer-exporters subject to compliance with the existing procedure. For this purpose the owner, the working partner, the Managing Director or the Company Secretary, of the manufacturing unit exporter or a person (who should be permanent employee of the said manufacturer-exporter holding reasonably high position) duly authorized by such owner, working*

partner or the Board of Directors of such Company, as the case may be, shall certify on all the copies of the application (ARE-1) that the description and value of the goods covered by this invoice/ARE-1/ARE-2 have been checked by me and the goods have been packed and sealed with lead seal/one time lock seal having number under my supervision.

From the above it is clear that the above mentioned provision is mandatory provision and the respondents 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. Moreover, the respondents have also not submitted any documentary evidence to prove that the goods were actually opened and examined by the Customs Department, therefore, identity of the goods exported was not established. Therefore, the rebate claim was wrongly sanctioned. However, I agree with their submission that they had exported the goods under claim of rebate under Notification No. 19/2004-CE (NT) and not under Notification No. 21/2004-CE (NT) as they had exported the goods in form ARE-1 duly signed by Jurisdictional Range Officer.

12. The applicant in his Revision Application has stated that the ground on which the Commissioner (Appeals) rejected the claim i.e "*Applicants have not submitted any documentary evidence to prove that the goods were actually opened and examined by Customs department, therefore the identity of goods exported was not established*", was not the subject matter of the appeal filed before him and therefore rejection of the claim is on extraneous ground.

13. In this connection Government observes that in case of M/s Universal Impex involving identical issue Government of India vide Order No. 10/2016-CX dated 15.01.2016 while upholding the order of the Commissioner (Appeals) and rejecting the Revision Application filed by the assessee observed that

- *as per Notification No.19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 ibid, the manufacturer exporter registered under Central Excise Rules, 2002 and merchant exporter who procure and export goods directly from the factory or warehouse can exercise an option of exporting the goods sealed at the place of despatch by a Central Excise Officerr or under self sealing.*

- *where the exporter desires self sealing and self certification for removal of goods from the factory the owner, working partner or Managing Director among others of the manufacturing unit shall certify on all copies of ARE-1 that the goods have been sealed in his presence and shall distribute the various copies as prescribed including to the jurisdictional Superintendent or Inspector of Central Excise within 24 hours of removal of goods.*

- *from a plain reading of the above provisions it is clear that if goods are cleared from a factory for export under claim for rebate it has to be under the cover of an ARE-1 duly certified for purpose of identity of goods either by the Superintendent/Inspector or the person from the factory as the case may be. This duly verified/certified ARE-1 is then certified by the Customs after due verification/examination that goods have been exported and the verification on ARE-1 prior to clearance from factory and thereafter by the Customs at the time of export helps to establish that the goods which were cleared from the factory are the same which are exported and without having followed the procedure as described in the Notification it cannot be established that goods which were cleared from factory were the ones actually exported or goods exported cannot be correlated with goods cleared from factory.*

- *that the nature of above requirement is both a statutory condition and mandatory in substance which also finds support in various judgments of the Apex Court and also noted that Hon'ble Supreme Court in case of Sharif-ud-Din, Abdul Gani-(AIR 1980 SC 3403) has observed that distinction between required forms and other declarations of compulsory nature and/or simple technical nature is to be judiciously done. When non-compliance of said requirement leads to any specific/odd consequences, then it would be difficult to hold that requirement as non-mandatory. It is a settled issue that benefit under a conditional notification cannot be extended in case of non-fulfillment of conditions and/or non-compliance of procedure prescribed therein as held by the Apex Court in the case of Government of India Vs. Indian Tobacco Association 2005 (187) ELT 162 (S.C.); Union of India Vs. Dharmendra Textile Processors 2008(231) ELT 3 (S.C.). Also it is settled that a Notification has to be treated as a part of the statute and it should be read along with the Act as held by in the case of Collector of Central Excise Vs. Parle Exports (P) Ltd - 1988(38) ELT 741 (S.C.) and Orient Weaving Mills Pvt. Ltd. Vs. Union of India 1978 (2) ELT J 311 (S.C.) (Constitution Bench).*

14. While refuting the reliance placed by the applicants on the various judgments regarding procedural relaxation on technical grounds, Government in its Order No. 10/2016-CX dated 15.01.2016 observed that

- *the point which needs to be emphasized is that when the applicant seeks rebate under Notification No.19/2004-CE (NT) dated 06.09.2004, which prescribes compliance of certain conditions, the same cannot be ignored. While claiming the rebate under Rule 18 ibid, the applicant should have ensured strict compliance of the conditions attached to the said Notification. Government places reliance on the judgment in the case of Mihir Textiles Ltd. Versus Collector of Customs, Bombay, 1997 (92) ELT 9 (S.C.) wherein it is held that:*

> *"concessional relief of duty which is made dependent on the satisfaction of certain conditions cannot be granted without compliance of such conditions. No matter even if the conditions are only directory."*

15. Government in its Order No. 10/2016-CX dated 15.01.2016 further observed as under:

- *Government notes that it is an undisputed fact on record that in the present case the goods have been cleared by the applicant from the factory of Manufacturer on invoices only between 19.04.2007 to 23.04.2007 and dispatched to JNPT Container Terminal for stuffing. They had prepared the ARE-1 only on 24.04.2007 subsequent to clearance from the factory after the complete consignment was received at JNPT. It was only signed by Customs officials and the triplicate copy was submitted to the jurisdictional Superintendent of Central Excise on I8.02.2008. The impugned goods were thus cleared from the factory without an ARE-1 bearing certification about the goods cleared from the factory either under excise supervision or under serf-sealing and self-certification procedure. The conditions and procedure as laid down under Notification No. I9/2004-CE(NT) dated 06.09.2004 for sealing of goods at the place of dispatch were not followed. Correlation can*

therefore not be said to have been established as to whether the goods that were cleared from the factory, were the same as those exported.

16. In the context of the aforesaid judgment, the ratio of which is squarely applicable to the present Revision Application, Government notes that the the Commissioner (Appeals)' observation in the impugned order that "*Applicants have not submitted any documentary evidence to prove that the goods were actually opened and examined by Customs department, therefore the identity of goods exported was not established*", is entirely reasonable and therefore rejection of the claim cannot be construed as on extraneous ground. Moreover, one of the grounds mentioned in the Appeal memorandum was that the goods in respect of all ARE-1s to the corresponding rebate claims were not opened by the Customs for examination and since the self sealing certificate is not given, the identity of the exported goods was not established and in the absence of self sealing certificate, there is no certainty that the goods which are mentioned on the ARE-1 and on which duty was paid, were cleared from the factory and exported.

17. In view of the foregoing, Government observes that the impugned goods were cleared from the factory without an ARE-1 bearing certification about the goods cleared from the factory either under excise supervision or under self-sealing and self-certification procedure and therefore the conditions and procedure of sealing of goods at the place of dispatch were not followed and therefore the correlation between the goods cleared from the factory and those exported cannot be said to have been established.

18. Government, therefore, holds that non observations of the conditions and procedure of self-sealing as provided in the Notification No.19/2004 – CE(NT) dated 06.09.2004 cannot be treated as minor procedural lapse for the purpose of availing benefit of rebate of duty on impugned export goods. Therefore, the various judgments relied on by the applicant regarding procedural relaxation on technical grounds as well as applicant's plea about treating this lapse as procedural one cannot be accepted. Government,

therefore, finds no infirmity in the Order of the Commissioner (Appeals) and hence upholds the same.

19. The revision application is thus dismissed being devoid of merits.

20. So, ordered.

31.1.18

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

ORDER No.19/2018-CX (WZ) /ASRA/Mumbai DATED 31.01.2018

To,
M/s. Britacel Silicones Ltd.,
F-18, Street No. 23,
MIDC, Marol, Andheri (East),
Mumbai 400 093

True Copy Attested

11.1.18
एस. आर. हिरूलकर
S. R. HIRULKAR
(A.C)

Copy to:
1. The Commissioner of GST & CX, Belapur Commissionerate.
2. The Commissioner of GST & CX, (Appeals) Raigad, 5th Floor,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.