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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F. NO. 195/642/13-RA /2906 Date of Issue: 02.06.2021

ORDER NO. 200/2021-CX (WZ) /ASRA/Mumbai DATED 11 .05.2021 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 Addon Export House Limited,
205/207, Nirman Industrial Estate,
Chincholi Link Road, Malad (West),
Mumbai – 400 064.

Respondent : Commissioner of CGST, Belapur.

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. BC/612/RGD(R)/2012-13 dated 27.02.2013 dated 23.11.2011 passed by the Commissioner (Appeals-II), Central Excise, Mumbai.

ORDER

This revision application is filed by M/s Addon Export House Limited, 205/207, Nirman Industrial Estate, Chincholi Link Road, Malad (West), Mumbai – 400 064(hereinafter referred to as "the applicant") against the Order-in-Appeal No. BC/612/RGD(R)/2012-13 dated 27.02.2013 dated 23.11.2011 passed by the Commissioner (Appeals-II), Central Excise, Mumbai.

2. Brief facts of the case are that the applicant, a merchant exporter, had filed rebate claims under the provisions of Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-CE (NT) dated 06.09.2004 in respect of the goods exported by them. The total amount of rebate claimed was Rs. 14,12,315/- (Rupees Fourteen Lakh Twelve Thousand Three Hundred Fifteen Only) being central excise duty paid on exported goods. The Rebate Sanctioning Authority while scrutinizing the impugned rebate claim noticed following discrepancies -

a) The applicant's supporting manufacturers have manufactured the impugned good falling under chapter 5402 by opting full exemption under Notification No: 30/2004-CE dated 09.07.2004. They were also availing Notification No. 29/2004-CE dated 09.07.2004 and paying duty on the similar goods after availing cenvat credit on inputs used in the manufacture of such dutiable goods. When any goods or class of goods are fully exempt from payment of duty under one Notification and are chargeable to a given rate of duty under another Notification, then in view of sub-section (1A) of Section 5A of the Central Excise Act, 1944, he manufacturer does not have any option but to avail the exemption as clarified by the CBEC vide its Circular No. 937/27/2010-CX dated 26.11.2010. Therefore, when there is an exemption, the assessee /manufacturer cannot disclaim its benefit, pay duty and thereafter claim rebate of duty.

b) In R.C. Nos. 2370, 2371 & 2372, the applicant had declared in the ARE-1s that the goods have been cleared under Bond against CT-1. when the goods had been cleared under CT-1 without payment of duty, the question of claiming rebate does not arise as the condition 2(a) of Notification No. 19/2004-CE(NT) dated 06.09.2004 remains unfulfilled.

c) The claimant had declared in Para 3(b) of ARE-11 of availing Notification No. 21/2004-CE(NT) dated 06.09.2004. IF so, in terms of Para 6 of the said Notification, the claims should have been lodged with the Assistant/Deputy Commissioner of Central Excise having jurisdiction of the place approved for manufacture or processing of such export goods and not with the Maritime Commissioner.

d) The applicant had declared in para 3(c) of ARE-1s of availing of Notification No. 43/2004-CE(NT) dated 26.06.2001. If so, the goods should have been exported under ARE-2 by following the procedure prescribed under the said Notification.

e) Assessable value shown in the ARE-1 / Central Excise Invoice is more than FOB value shown in the Shipping Bill.

f) No objection from the manufacturer to claim rebate in the applicant's favour not produced in respect of R.C. Nos. 2370, 2371 & 2372.

f) The Bank Realization Certificate had not been submitted in respect of R.C. Nos. 2370, 2372, 2374, 21260 & 21261.

The Rebate Sanctioning Authority vide Order in Original No. 1209/11-12/Dy. Commr. (Rebate)/Raigad dated 31.07.2012 rejected the impugned rebate claim.

3. Being aggrieved by the Order in Original, the applicant filed an appeal before the Commissioner (Appeals-II), Central Excise, Mumbai-II. The Appellate Authority vide Order in Appeal No. BC/612/RGD(R)/2012-13 dated 27.02.2013 dated 23.11.2011 rejected the appeal and upheld the

Order in Original. The appellate authority while passing the impugned order in appeal observed that :-

a) The Notification No. 30/2004-CE(NT) dated 06.09.2004 is a conditional notification and hence, manufacturer is at liberty to avail or not avail the said notification, Rejection of rebate on this ground is not valid and legal.

b) In case of Rebate claim Nos. 2370, 2371 and 2372, the goods had been cleared under Bond and the bond No. was mentioned on ARE-1. As regards certification of payment of duty, the said payment can only be certified by the concerned Range Officer which is not available on records. Hence, rebate is not admissible on these rebate claims.

c) In respect of remaining rebate claims, the applicant had submitted that the said defect has arisen on account of non striking of the word availing in ARE-1 at Para 3(b) and Para 3(c). The applicant had also produced declaration from the concerned manufacturers to the effect of non availment of the said notifications during the relevant year i.e. 2010-11. However, these declarations had not been verified by the jurisdictional Excise officials. Hence no weightage can be given to them. Further, Rule 5 of the Central Excise (Appeals) Rules, 2001 forbids submission of new documents frat the appellate authority unless they have been prevented from filing with the lower Adjudicating Authority. Hence, the documents cannot be taken on records.

d) As regards non submission of No Objection Certificate, the applicant had produced the required NOC from the manufacturer. Further, Rule 5 of the Central Excise (Appeals) Rules, 2001 forbids submission of new documents frat the appellate authority unless they have been prevented from filing with the lower Adjudicating Authority. Hence, the documents cannot be taken on records.

e) On going through the Notification No. 19/2004-CE(NT) dated 06.09.2004 and Chapter 8 of the CBEC's Excise Manual of Supplementary Instructions, 2005, the requirement of submission of BRCS is not mandatory for the claimants to submit the rebate claim.

f) As regards, rejection of rebate claim for assessable value shown in ARE-1 / Invoice is greater than the FOB value shown in the shipping bill, the said issue is only in respect of R.C. No. 2370. Denial of said rebate claim had already upheld.

4. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant has filed this Revision Application on the following grounds that :

4.1 They had not received the deficiency memo dated 18.06.2012 issued by the department and because of which they could not clarify the defects and appear for the Personal Hearing.

4.2 As regards the R.C. No. 2370, 2371 & 2372, the goods covered under the captioned ARE-1 were cleared under 'rebate' only and it was evident from duty liability discharged against each ARE-1. Further, submission of NOC from manufacturer at the appellate authority was no a submission of any new documents within the meaning of Rule 5 of the Central Excise (Appeals) Rules, 2001. This was one of the documents required to be submitted while making the application for rebate of duty by the merchant exporter.

4.3 The defect was due to non striking of the word availing in the ARE-1 at Para 3(b) & Para 3(c) and they had produced the declaration from the concerned manufacturers to the effect of non availment of the said notifications during the relevant year i.e. 2010-11.

4.4 AS regards, R.C. No. 2370, the appellate authority had not dealt with the issue regarding the value in ARE-1/ invoice was greater than the FOB value in the shipping bill on the ground that the rebate claim in respect of the said ARE-1 was already rejected on other grounds. The appellate authority erred in not giving specific reasoning on the said ground of rejection as, if the applicant's contention on the other grounds was accepted, the proceeding might suffer on this ground alone.

5. A Personal hearing in the matter was fixed on 17.03.2021. The same was attended on line by Shri Naresh Thakur, Export Manager. He reiterated his submissions. He submitted that they are merchant exporters and have exported goods after paying excise duty to suppliers. Therefore, he requested for sanction of rebate.

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. At the outset, Government notes that the applicant have contended that they had not received the deficiency memo dated 18.06.2012 issued by the rebate sanctioning authority listing the deficiencies noticed while scrutiny of the impugned rebate claims. It is also noted that the department also has not contended this ground put forth by the applicant.

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

9. In the instant case, the Government notes that the photocopies of ARE-1 available on record shows the duty payment particulars. However, the same are not certified by the competent authority. It is also observed that the ARE-1 copies bear the endorsement to the effect that the goods

were cleared under Bond i.e. without payment of duty. The applicant have claimed that the duty in respect of exported goods had been paid by the manufacturer. In the interest of justice, Government opines that since the export of goods had not been suspected by the rebate sanctioning authority, the facts i.e. whether the goods were exported under bond or otherwise on payment of duty could have been verified by the rebate sanctioning authority by obtaining the report from the jurisdictional range office before rejection of the impugned rebate claims. However, it is seen that no such exercise was done by the rebate sanctioning officer before rejection of the impugned rebate claims. The Government, therefore, holds that mere non certification of the duty payment particulars on the overleaf of ARE-1s, in case the exported goods had been cleared on payment of duty as claimed by the applicant, should not result in the deprival of the statutory right to claim a rebate subject to the satisfaction of the authority on the production of sufficient documentary material that would establish the duty paid character of the goods. Therefore, Government holds that the impugned rebate claims cannot be rejected on this ground without carrying out exercise discussed above.

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

10. Further, it is observed that some of the rebate claims have been rejected on account of non striking of the word availing in ARE-1 at Para 3(b) and Para 3(c) and also for non submission of the NOC from the manufacturer. The Government finds that the applicant had produced the requisite documents to the appellate authority. However, the appellate authority did not take cognizance of the same as Rule 5 of the Central Excise (Appeals) Rules, 2001 forbids submission of new documents before

the appellate authority unless they have been prevented from filing with the lower Adjudicating Authority. The Government finds that the applicant had not received the deficiency memo dated 18.06.2012 issued by the department. The department has not produced any evidence, in this regard, showing delivery details of said deficiency memo to the applicant. Thus there is reason to believe that the applicant might not have received the deficiency memo and hence could not comply with the deficiencies / defects pointed out therein. The Government, therefore, holds that the rejection of rebate claims on these grounds without giving a fair chance to produce the relevant documents would be not just and proper.

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

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

10. As regards, rejection of rebate claim for assessable value shown in ARE-1 / Invoice is greater than the FOB value shown in the shipping bill, the applicant have contended that the difference in the value shown in the ARE-1 / Invoice and the value shown in Shipping Bill is mainly on account

of difference in US$ conversion rate and the same is not within their control. The Government finds that the INR of the FC i.e. US$ in the instant case vary based on the CBR published every fortnightly between invoicing date and shipping bill generation date. Thus the fluctuation, as claimed by the applicant, could be beyond control of the applicant. However, the contention of the applicant is acceptable subject to verification of this aspect.

11. In view of the discussion in foregoing paras, Government remands the matter back to the original authority for the limited purpose of verification of the claim with directions that he shall reconsider the claim for rebate on the basis of the discussion in the forgoing paras and verifying documents submitted by the applicant after satisfying itself in regard to the authenticity of those documents particularly regarding payment of duty. The original adjudicating authority shall pass the order within eight weeks from the receipt of this order.

12. In view of above, Government sets aside the impugned Order-in-Appeal No. BC/612/RGD(R)/2012-13 dated 27.02.2013 dated 23.11.2011 passed by the Commissioner (Appeals-II), Central Excise, Mumbai and remands the case to the original adjudicating authority as ordered supra.

13. The revision application is disposed off in terms of above.

Shrawan 11/05/21

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

ORDER No.200/2021-CX (WZ) /ASRA/Mumbai DATED\\ .05.2021

To,

M/s Addon Export House Limited,
205/207, Nirman Industrial Estate,
Chincholi Link Road, Malad (West),
Mumbai – 400 064.

Copy to:

1. The Commissioner of CGST, Belapur Commissionerate, C.G.O. Complex, 10, C.B.D. Belapur, Navi Mumbai – 400 614.
2. The Commissioner of GST & CX, Appeals Raigad, C.G.O. Complex, 10, C.B.D. Belapur, Navi Mumbai – 400 614.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy.