F. NO. 195/58/14-RA

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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
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Mumbai- 400 005

F. NO. 195/58/14-RA/3615 Date of Issue: 12.07.2021

ORDER NO.242/2021-CX (WZ) /ASRA/Mumbai, DATED 09.07.2021 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.

Subject : Revision Application filed under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. DMN-EXCUS-000-APP-230-13-14 dated 28.11.2013 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Daman.

Applicant : M/s Jolly Containers, 739/740, Kalaria, Dabhel, Nani-Daman, Daman (UT)396210.

Respondent : Commissioner of Central Excise, Customs & S. Tax, Daman.

ORDER

This revision application has been filed by M/s Jolly Containers, Daman (hereinafter referred to as "the applicant") against the Order-in-Appeal No. DMN-EXCUS-000-APP-230-13-14 dated 28.11.2013 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Daman.

2. The brief facts of the case are that during scrutiny of ER-1 s for 2011-12 and ARE-3, it appeared that the applicant had cleared plastic "Cutlery" (CETH 39241090) without payment of duty under Notification No. 17/2004-CE (NT) dated 04.09.2004 under ARE-3 to M/s Air India during the period April 2011 to October 2011. The said goods were not found specified in the said notification and also that they did not receive or submit CT-2 or CT-3 certificate for availing the benefit. Accordingly, a Show Cause Notice dated 19.03.2012 was issued to the applicant proposing to demand duty of Rs. 6,25,190/- along with interest and imposition of penalty. After due process of law the original authority confirmed entire demand of duty of Rs. 6,25,190/- along with interest and imposed equal penalty under Section 11AC of Central Excise Act, 1944 vide Order in Original No. C.Ex./01/DEM/ADJ/KVKS-ADC/SDMN/2013-14 dated 30.04.2013.

3. Being aggrieved by the aforesaid Order in Original the applicant filed appeal before Commissioner (Appeals), Central Excise, Customs & Service Tax, Daman who vide Order-in-Appeal No. DMN-EXCUS-000-APP-230-13-14 dated 28.11.2013 (impugned Order) upheld the said Order in Original with only modification in penalty imposed from Rs.6,25,190/- under Section 11 AC to Rs. 1,00,000/- under Rule 25(1) of Central Excise Rules, 2002.

4. Being aggrieved and dissatisfied with the impugned Order, the applicant filed this Revision Application before the Government mainly on the following grounds:

4.1 The goods were cleared to Air India for use in their foreign going aircrafts. These facts are evident from the documentary evidences e.g. re-warehousing certificate, warehousing license obtained by them from Customs etc. The warehouse license obtained by Air India specifically included the disputed item i.e. Plastic Tumblers. That supply of ship stores to foreign going aircrafts/ vessels are considered as exports as per Para (1) (c) of Notification No. 40/2001-CE (NT) dated 26.06.2001, Para (1) (iv) of Notification No. 42/2001- CE (NT) dated 26.06.2001, Para (2) (c) of Notification No. 19/2004-CE (NT) dated 06.09.2004 and Para 2 of Chapter 8 of CBEC Manual of supplementary instructions. These statutory provisions clearly establish that the goods supplied as ships store to foreign going vessel are considered as exports and therefore, the goods supplied by them to Air

India as stores to their foreign going aircrafts are exports and the question of demanding duty on such goods did not arise

4.2 Such clearances are exports are also held by Hon'ble Tribunal in case of Hindustan Petroleum Corpn. Ltd. Vs. CCE- 2002 (146) ELT 124 (Tri. Mum.). From the said Order (Para 3) it is established that the goods supplied by them are considered as exports for the purpose of Central Excise and therefore question of demanding duty on the same did not arise, merely on the ground that the appellants had followed procedure of ARE-3 instead of ARE-1, as per the requirement of Air India, since the goods were supplied to their Customs Bonded warehouse.

4.3 That the goods were supplied to warehouse of Air India for further use in their foreign going Aircrafts. As a matter of fact similar procedure is followed by them uniformly in respect of all the suppliers, including those located in Daman. That otherwise also the goods are covered by clause 2(a) of the Notification No. 17/2004-CE (NT). That the list of goods covered by (i) to (vii) are related to clause (b) i.e. when the goods are supplied to a meal uplift station outside India and not to clause (a) i.e. as stores to a foreign going vessel of aircraft. This is evident from the fact that Air India has been specifically licensed to receive various goods, including Polystyrene articles of cutlery and Tumblers without payment of duty. Air India is procuring verieties of goods, other than those mentioned at (i) to (vii) of clause (b) of Notification No. 17/2004-CE (NT) from various manufacturers, including those located in Daman without payment of duty under cover of ARE-3 following warehousing procedure.

4.4 The provisions of Rule 25(1) were not invoked in the show cause notice, therefore, it was not open to the Commissioner (Appeals) to impose penalty of Rs.1,00,000/- afresh under the said rule and is legally unsustainable.

5. A personal hearing in the matter was held through video conferencing on 25.02.2021 which was attended online by Shri Nitin Mehta, Consultant. He reiterated the submissions and informed that tonly point for decision is whether rebate is admissible on plastic cutlery supplied to Air India through Customs Bonded warehouse. He also filed additional written submissions subsequently.

6. In their further submissions dated 25.02.2021 the applicant submitted as under:-

6.1 The issue involved in the present case is whether clearance of Plastic Cutlery and Tumblers to Air India's Customs Bonded warehouse for use in foreign-going aircrafts is covered within the expression 'stores' and considered as export. They had supplied Plastic Cutlery & Tumblers to Air India for use as stores in their foreign-going vessel. For obvious reasons, the goods cannot be supplied directly to the foreign-going aircraft as and when the aircraft is leaving, hence, Air India had obtained a Custom Bonded warehouse permission Ref. No. S/15-01/08 ACC dated 2 3.0 2.2012, issued by the Deputy Commissioner of Customs, CSI Airport, Mumbai. [copy at page 72 of EA-8 Paperbook]. S.No.2 of the Annexure-I of the said permission, inter alia, covered

the goods supplied by them to Air-India, viz. Plastic Cups, Glasses, Cutlery, etc. [copy at page 74 of EA-8 Paperbook].

6.2 As the goods were being supplied through Custom Bonded warehouse, as per the normal practice followed by Air India with all the suppliers, they had instructed them to supply the goods under cover of ARE-3, instead of ARE-4 used for Exports. Therefore, they had supplied the goods to Air-India under cover of ARE-3. They had received copies of ARE-3 duly certified by Customs Bond Officer, Air Bonds (ACC) and Superintendent of Customs, in-charge of the respective Custom Bonded warehouse. [Copies of some of ARE-3 are annexed at page 76-79 of EA-8 paperbook.]

6.3 The learned Commissioner (Appeals) has grossly erred in holding that supply of Plastic Cutlery, falling under CETH 39241090, cannot be considered as Ship's stores. It is submitted that Plastic Cutlery for use on board foreign-going vessels, for which Air-India were specifically granted a Custom Bonded warehouse licence to obtain the goods without payment of Central Excise duty, is covered within the expression Ship's Stores.

6.4 In view of the clarification issued vide Board's Circular No.89/88-CX.6 dated 30.12.1988 [F.No.208/60/88-CX.6], with reference to ship stores, supply of Plastic Cutlery to Air India for use on foreign going aircrafts is covered within the expression ship stores and consequently were eligible for clearance to Customs Bonded warehouse of Air-India, in terms of clause (a) of notification No.17/2004-CE (NT).

Otherwise also the supply of goods for use on foreign going air-crafts is considered as exports, covered under Rule 19 of the Central Excise Rules, 2004, read with notification No.42/2001-CE (NT) dated 26.06.2001, as clarified by the Board, vide Circular No.605/42/2001- CX dated 29.11.2001. In view of the said clarification, the goods were eligible to be considered as export under Rule 19 of the Central Excise Rules, 2004, read with notification No.42/2001-CE (NT) dated 26.06.2001, and consequently there is no question of recovering Central Excise duty on such clearances.

6.5 At para 8 of the impugned order, the Commissioner (Appeals) has observed that clearance to a warehouse under ARE-3 can only be done on the basis of CT-3 certificate issued by the JRO of procuring warehouse, and in the present case, no CT-3 certificate was presented by them. The procedure of production of CT-3 was required to be followed only when the goods are cleared to a 100% EOU/STP/EHTP, etc and not when the goods are cleared without payment of duty to a Custom Bond warehouse. In this regard, they refer to the Board's following circulars, on the issue, on a perusal of which it is clear that CT-3 procedure is only for clearance to 100% EOU/STP/EHTP, etc.

1. F.No.305/121/2001, dated 25.07.2001; and
2. No.859/17/2007-CX dated 13.11.2007

In view of this the procedure of CT-3 was not required to be followed. In any case, it is not in dispute that the goods have been received in the Custom Bonded warehouse of Air-India. This is clearly evident from the ARE-3 duly certified by the Customs Officers In-Charge of the Custom Bonded warehouse. When the fact of

supply of goods to Custom Bonded warehouse of Air-India and receipt of the same in the Custom Bonded warehouse is established, then the substantial benefit of considering the goods as supplied for export and/or warehouse supply cannot be denied merely on procedural ground that CT-3 certificate was not issued by the Custom Bonded warehouse in-charge.

6.6 In view of the submissions made above, and those put forth in the Revision Application, the applicant prayed that the Revision Application filed by them may kindly be allowed with consequential reliefs, extending export benefit, and the impugned order may kindly be set aside and quashed.

7. Government has carefully gone through the relevant case records available in case files, oral and written submissions and perused Order-in-Original and the impugned Order-in-Appeal. The question in this Revision Application is whether the goods cleared to Air India by the applicant for use in their foreign going aircrafts as supply of stores to foreign going aircrafts/ vessels is to be considered as exports for all legal purposes or otherwise.

8. Government observes that the original cause of action in the present case is an SCN alleging contravention of the conditions of Notification No. 17/2004-CE(NT) dated 04.09.2004 and a consequential demand for central excise duty on the goods cleared under the auspices of the said notification. The said notification has been issued in exercise of the powers vested in the Central Government under sub-rule (1) of Rule 20 of the CER, 2002 to extend the facility of removal of specified excisable goods from the factory of production to a warehouse, or from one warehouse to another warehouse without payment of duty. The said notification does not provide for removal of excisable goods from the factory to a warehouse and for export therefrom. The applicable notification for removal of excisable goods to a warehouse for export therefrom is Notification No. 46/2001-CE(NT) dated 26.06.2001. Needless to say, Notification No. 46/2001-CE(NT) dated 26.06.2001 has appositely been issued in pursuance of sub-rule (1) of Rule 20 of the Central Excise(No. 2) Rules, 2001 for export of goods under Rule 19 of the said rules.

9. The powers vested in the Central Government for revision emanate out of Section 35EE of the CEA, 1944. These powers are exercisable for exports made under claim of rebate of duty and for goods exported without payment of duty. The power to grant rebate of duty paid on excisable goods or duty paid on materials used in the manufacture of exported goods under Rule 18 of the Central Excise Rules, 2002 and the power to allow export without payment of duty under Rule 19 of the Central Excise Rules, 2002 are subject to the notifications issued under the respective rules. In the present case, the applicant has effected clearances under Notification No. 17/2004-

CE(NT) dated 04.09.2004 which has been issued under Rule 20 of the Central Excise Rules, 2002 and not Rule 19 of the Central Excise Rules, 2002. The CBEC Circular No. 605/42/2001-CX dated 29.11.2001 relied upon by the applicant to contend that the clearances of cutlery by them to Air India's private bonded warehouse licenced under Section 58 of the Customs Act, 1962 is an export clearance has been issued to clarify the position in terms of Notification No. 42/2001-CE(NT) dated 26.06.2001 issued under Rule 19 of the CER, 2002 for export of goods without payment of duty. Therefore, this clarification cannot be applied to Notification No. 17/2004-CE(NT) dated 04.09.2004. It would be pertinent to note that the procedure for "Export Warehousing" has elaborately been set out in Part-II of Chapter 10 titled "Warehousing" of the CBEC Excise Manual of Supplementary Instructions and specifically adverts to Notification No. 46/2001-CE(NT) dated 26.06.2001.

10. In the light of the above facts, Government finds that the revision application is purely a demand for recovery of central excise duty for failure to adhere to the conditions of Notification No. 17/2004-CE(NT) dated 04.09.2004 issued for warehousing of goods. The remedy for the confirmed demand would not be revisionary proceedings under Section 35EE of the CEA, 1944. The revision application is therefore not maintainable. Needless to say, the applicant is at liberty to approach the Tribunal for appropriate relief in the matter. The revision application is therefore dismissed as not maintainable.

9/7/21

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

ORDER No.242/2021-CX (WZ) /ASRA/Mumbai DATED 09.07.2021

To,

M/s Jolly Containers,
739/740, Klaria, Dabhel,
Nani-Daman, Daman 396 210.

Copy to:

1. The Commissioner of GST & CX, Daman, 2nd Floor, Hani's landmark, Vapi Daman Road, Chala, Vapi 396 191.
2. The Commissioner of GST & CX, (Appeals), 3rd Floor, Mgnus Building, Althan Canal Road, Near Atlanta Shopping Centre, Althan, Surat
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy