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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. 195/45/12-RA/644 Date of Issue: 27.12.2017.

ORDER NO. 24/2017-CX (WZ) /ASRA/Mumbai DATED 27.12. 2017 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. Thermax Limited.

Respondent : Commissioner of Central Excise (Appeals), Rajkot.

Subject : Revision Applications filed, under section 35EE of the Central Excise ACT, 1944 against the Orders-in-Appeal No.198/ 2011/ COMMR (A) RBT/ RAJ dtd. 22.11.2011 passed by the Commissioner of Central Excise (Appeals), Rajkot.

ORDER

This revision application has been filed by M/s. Thermax Limited, Rajkot (hereinafter referred to as "applicant") against the Order-in-Appeal No. 198/2011/Commr(A)/RBT/RAJ dated 22.11.2011 passed by the Commissioner of Central Excise (Appeals), Rajkot, upholding the Order-in-Original No.756/2011-12 dated 20.07.2011 passed by the Deputy Commissioner of Central Excise Gandidham.

2. The case briefly is that the applicant are engaged in manufacture of Boilers, Heaters, Heat pumps and Pollution control equipment for industrial use. All these equipments are capital goods falling under chapter 84 of CETA 1985. The appellant had applied in September 2007 to Development Commissioner Kandla for allocating SEZ status so as to carry out the business. The applicant approached Mundra port and Special Economic Zone Ltd for premises on lease rental. Accordingly a lease agreement was signed on 3rdNovember 2007 to licensor. By this agreement a part of survey No 169 of village Dhrub was given temporally to the applicant from November 2007 to April 2008.The premises were used for Boiler assembly The applicant applied for excise registration and resumed assembly process at Survey No 169.The appellant were granted registration no AAACT 3910 DXM 007. The appellant were filing the monthly return with the Range Office

3. The applicant availed Cenvat Credit on the duty paid input materials received and used in the assembly of Boilers and also paid Excise duty while exporting the Boilers. They filed a rebate claim of Rs.30,00,355/- on 18.06.2008, under rule 18 of the Central Excise Rules, 2002 in respect of Light Oil Fired Boiler manufactured and exported by them. The Deputy Commissioner rejected the Rebate claim on the grounds that after receipt of the letter of Approval from the SEZ Authority, the applicant applied for registration with the Central Excise Department and obtained a registration

under rule 9 of the Central Excise Rules, 2002, fraudulently, as they suppressed the fact of their approval under SEZ regulations with an intention to avail benefit of CENVAT credit on the inputs and finally refund of these credit in the form of rebate after paying the same as duty on the final product, which was otherwise not available under the SEZ Act, 2005 & the Rules made thereunder; that, the claimant had committed a fraud with the Govt. with mala fide intent for monetary benefit, knowingly and purposefully by willful mis-declaration and suppression of facts; that after careful consideration of the provisions of the SEZ Act, 2005, the SEZ Rules, 2006, the Central Excise Rules, 2002 and the Central Excise Act, 1944; that the claimant had obtained the Registration under Central Excise Rules, 2002 fraudulently by suppressing the fact of having already applied and obtained the Letter of Approval from the Specified Authority of the Special Economic Zone and therefore, no benefit of rebate under rule 18 of the Central Excise Rules, 2002 can be allowed to the claimant.

4. Aggrieved by the Order in Original passed by the Deputy Commissioner, the applicant filed appeal before Commissioner (Appeals) Rajkot who rejected the appeal with the following observations :-

> *9."I find that the provisions of section 3 of the Central Excise Act 1944 clearly excludes the goods produced or manufactured in special economic zones therefore the duty paid by the appellant was not required to be paid at all and consequently not eligible for rebate for the same. Thus the charging Section-3 of the Central Excise Act, 1944, clearly excludes the goods produced or manufactured in Special Economic Zones.*
>
> *10. I also find 'that benefit of rule 18 cannot be allowed to the appellant as they operate in notified SEZ which has its own provisions and they are eligible only for benefits available under the SEZ Regulations.*

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

5.1 Without prejudice to the grounds mentioned elsewhere in this appeal, the applicants submit that their unit cannot be treated as SEZ Unit.

5.2 The findings of the impugned Order in Appeal has held that the applicants have fraudulently taken central excise registration is incorrect and without any basis.

5.3 When the core fact of export is not disputed, the valuable right to rebate cannot be destroyed due to technical breach.

5.4 The applicants were not required to pay excise duty and when paid the same should be refunded to the applicants.

5.5 The Central Excise department in not losing anything by granting rebate. Hence, the objection in the impugned Order in Appeal is without any basis.

5.6 The impugned Order-in-Appeal held that the applicants have wilfully suppressed the crucial information with malafide intention for monetary benefit. The above finding is perverse and without any basis.

5.7 The findings of the impugned Order-in-Appeal that Notification No.30/2004-CE(NT) and Rule 18 does not apply to SEZ units is incorrect and without any basis.

5.8 The findings of the impugned Order-in-Appeal that Section 3 excludes goods produced or manufactured by SEZ from levy of excise duty. Therefore, rebate cannot be granted to the applicants since no duty was required to be paid. The above finding of findings of the impugned Order-in-Appeal is incorrect and without any basis.

In view of the foregoing, the applicant prayed to set aside the impugned order dated 22.11.2011 passed by the Commissioner of Central Excise (Appeals), Rajkot, and allow the appeal in full with consequential reliefs to the applicants.

6 A Personal hearing was held in this case on 30.11.2017 and Shri Rajesh Ostwal, Advocate, duly authorized by the Revision Applicant appeared for hearing and reiterated the submission filed with Revisionary Authority and also submitted a compodium of case laws. In view of the same

he pleaded that RA be allowed and the Order of the Commissioner (Appeals) be set aside.

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. On perusal of records, Government observes that the applicant's rebate claim 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 grounds that the applicant had obtained the Registration under Central Excise Rules, 2002 fraudulently by suppressing the fact of having already applied and obtained the Letter of Approval from the Specified Authority of the Special Economic Zone and therefore, no benefit of rebate under rule 18 of the Central Excise Rules, 2002 can be allowed to them. Commissioner (Appeals) while upholding the Order of the original adjudicating authority on the grounds that the provisions of section 3 of the Central Excise Act 1944 clearly excludes the goods produced or manufactured in special economic zones therefore the duty paid by the appellant was not required to be paid at all and consequently they are not eligible for rebate for the same.

8. It this regard Government observes that Notification 36/2001 CE(NT) dated 26.6.2001 exempted certain specified categories of assessees from obtaining registration under Rule 9 of the Central Excise Rules, 2001. The relevant para of the said Notification is extracted below.

1. *hereby declares that where a hundred per cent export oriented undertaking, or a unit in Free Trade Zone or Special Economic Zone, is licensed or appointed, as the case may be, under the provisions of the Customs Act, 1962, such hundred per cent export oriented undertaking or unit in Free Trade Zone or Special Economic Zone shall be deemed to be registered for the purposes of rule 9 of the Central Excise (No.2) Rules, 2001.*

Government further observes that Notification No. 31/2002-CE (NT) Dated 17-09-2002 amended Notification 36/2001 CE(NT) dated 26.6.2001 to insert the following provision which reads::

> *"Provided that such hundred percent export oriented undertaking or a unit in Export Processing Zone shall not be deemed to be registered for the said purpose if such undertaking or unit procures excisable goods from the domestic tariff area or removes excisable goods to the domestic tariff area".*

The aforesaid provision indicates that the exemption / deemed registration is not applicable if such units are either procuring excisable goods from the domestic tariff area or clearing the excisable goods in DTA. In such instances it requires a registration under Rule 9.

9. Government also draws attention to para 4 of Circular No 662/53/2002-CX, dated September 17, 2002 on "Central Excise Registration-new instructions" which is reproduced below:

> *4. Furthermore, Export Oriented Units (EOUs) and units in Export Processing Zones (EPZ units) were deemed to be registered under Central Excise vide* Notification No.36/2001-CE (NT), dated 26.6.2001. *At the same time such units which clear goods to domestic tariff area on payment of central excise duty are required to file a return with the Superintendent of Central Excise in terms of Rule 17 of Central Excise Rules, 2002. It is observed that the EOUs and EPZ units are increasingly getting linked to the domestic economy through procurement of excisable goods therefrom and sale of finished goods, scrap etc. in the domestic market. These transactions or inter-linkages have revenue implications for Central Excise administration. Hence, it is considered necessary by the Board to require such of the EOUs and EPZ units which have inter-linkage with domestic economy through procurement and/or sale of goods to get registered with the Department with 15 digit PAN-based Registration Numbers being allotted to them. Other EOUs and EPZ units would continue to be treated as deemed registered with the Central Excise authorities.*

10. From the Notifications and the Circular supra, Government observes that in certain conditions, the SEZ Unit or the Developer was also required to obtain Central Excise / Service Tax Registration. Moreover, procurement of

inputs locally by the applicant also required registration with the Central Excise Authorities. As such Government does not find any infirmity in obtaining Central Excise Registration by the applicant who was operating from a notified SEZ.

11. Government further observes that the applicant was admittedly situated in the Mundra Port & Special Economic Zone, at Village Dhrub, Tal-Mundra which is a notified area for undertaking authorized operations under the SEZ Act, 2005 and the SEZ Rules, 2006. It is also a fact that the approval of the Development Commissioner, Kandla Special Economic Zone, Ministry of Commerce & Industry, Gandhidham-Kutch was subject to terms and conditions mentioned in the approval letter. The condition number (i) was very specific about exports, which stated

> "(i) You shall export the goods manufactured, as per provisions of Special Economic Zones Act, 2005 and Rules made thereunder "
>
> and condition No. (xii) read as
>
> "(xii) You shall abide by the provisions of Special Economic Zones Act, 2005 and the rules and orders made thereunder."

12. Government observes that Commissioner (Appeals) while rejecting the appeal of the applicant observed that

> *"I find that the provisions of section 3 of the Central Excise Act 1944 clearly excludes the goods produced or manufactured in special economic zones therefore the duty paid by the appellant was not required to be paid at all and consequently not eligible for rebate for the same. Thus the charging Section-3 of the Central Excise Act, 1944, clearly excludes the goods produced or manufactured in Special Economic Zones.*
>
> *I also find 'that benefit of rule 18 cannot be allowed to the appellant as they operate in notified SEZ which has its own provisions and they are eligible only for benefits available under the SEZ Regulations.*

13. The relevant portion of Section 3(1) of the Central Excise Act, 1944 reads as under :

> "Section 3. Duties specified in First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied. –
>
> (1) There shall be levied and collected in such manner as may be prescribed, -
>
> (a) a duty of Excise to be called the Central Value Added Tax (CENVAT) on all excisable goods (excluding goods produced or manufactured in special economic zones) which are produced or manufactured in India as, and at the rates, set forth in the first Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);
>
> (b) a special duty of Excise, in addition to the duty of Excise specified in clause (a) above, on excisable goods (excluding goods produced or manufactured in special economic zones) specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule.
>
> Provided that the duties of Excise which shall be levied and collected on any excisable goods which are produced or manufactured, -
>
> (i) in a free trade zone and brought to any other place in India; or
>
> (ii) by a hundred per cent export-oriented undertaking and brought to any other place in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India, and where the said duties of Customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975)."11.

14. Government observes that with a separate SEZ Act coming into effect, Section 3 of the Central Excise Act, 1944 was amended in 2007 to omit SEZs from levy of duty under Section 3 thus exempting SEZ units from payment of central excise duty. As the applicant unit was operating from notified SEZ

which has its own provisions and they are eligible only for benefits available under the SEZ Regulations. As such the applicant were not required to pay the duty as the provisions of section 3 of the Central Excise Act 1944 clearly excludes the goods produced or manufactured in special economic zones. The duty paid without authority of law cannot be treated as duty paid on the exported goods. As such rebate claim is not admissible in terms of Rule 18 of Central Excise Rules, 2002, read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. Government finds support from the observations of Hon'ble Supreme Court in the cases of M/s. ITC Ltd. v. CCE reported as 2004 (171) E.L.T. 433 (S.C.), and M/s. Paper Products v. CCE reported as 1999 (112) E.L.T. 765 (S.C.) that the simple and plain meaning of the wordings of statute are to be strictly adhered to.

15. Government however, also observes that the applicants had procured the duty paid inputs and the goods manufactured were physically exported on payment of excise duty which was not required to be paid by them. The duty paid without authority of law cannot be treated as duty paid on the exported goods. As such rebate claim is not admissible in terms of Rule 18 of Central Excise Rules, 2002, read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. However, as held in many Government of India Revision Orders, Government is of opinion that the duty paid in this instant case is to be treated as voluntary deposit made by the applicants at their own volition which is required to be returned to them in the manner it was initially paid, because the Government cannot retain the same without any authority of law. The Government places its reliance on the following GOI Revisions Orders :

- 2012(281)ELT 0156 GOI-Johari Digital Health Care Limited.
- 2012(284)ELT 737 GOI-GTN Engineering (India)
- 2012 (278) E.L.T. 559 (G.O.I.)-Indira Gandhi Mahila Sahakari Soot Girni Ltd.
- 2012 (278) E.L.T. 421 (G.O.I.)- Praj Industries Ltd.

- 2012 (278) E.L.T. 401 (G.O.I.)- Honeywell Automation (India) Ltd.
- 2012 (283) ELT 0466 GOI - Flamingo Pharmaceuticals Ltd.
- 2014(313)ELT 0913 GOI- Ginni International Limited.
- 2014(313)ELT 0876 GOI- Watson Pharma
- 2014(312)ELT 0929 GOI-Monomer Chemical Industries Pvt. Ltd.

16. Since, Government cannot retain any amount which is not due to it, as has been held in aforesaid orders, the amount so collected is allowed to be re-credited in Cenvat Account. Government allows the applicant to take re-credit of said amount in their Cenvat Credit Account. The impugned order-in-appeal is modified to this extent.

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

18. So, ordered.

27.12.2017

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

ORDER No.24/2017-CX (WZ) /ASRA/Mumbai DATED 27.12.2017

To,
M/s. Thermax Ltd.
D-13, MIDC, R.D. Aga Road,
Chinchwad, Pune -411 019.

True Copy Attested

27/12

SUMAN MUNDA
Asstt. Commissioner of Custom & C. Ex.(RA)

Copy to:

1. The Commissioner of GST & CX,Rajkot Commissionerate.
2. The Commissioner (Appeals), Central Excise & Customs, 2nd floor, GST Bhavan Race Course Ring Rpad, Rajkot- 360 001.
3. The Deputy Commissioner GST & CX Gandhidham Division,
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.