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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, Centre-I, World Trade Centre, Cuff Parade, Mumbai- 400 005.

F NO. 195/32-67/SZ/17-RA/327 Date of Issue: 27/08/2018

ORDER NO. 251-286 /2018-CX (SZ)/ASRA/Mumbai Dated 21.08.2018
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 CENTRAL EXCISE ACT,1944

Applicant :M/s. Alufit (India) Pvt. Ltd. Embassy Diamante, # 34 Vittal Mallya Road, Bangalore 560 001.

Respondent :The Commissioner Central Excise, (Appeals-I),Bangalore.

Subject Revision Applications filed, / under Section 35EE of Central Excise Act, 1944 against the Orders-in-Appeal No. 173 – 208/2017 CE AU-I dated 08.05.2017, passed by the Commissioner of Central Excise (Appeals-I), Bangalore.

ORDER

These Revision Applications have been filed by M/s Alufit (India) Pvt. Ltd., against the Orders in Appeal No. 173 – 208/2017 CE AU-I dated 08.05.2017, passed by the Commissioner of Central Excise (Appeals-I), Bangalore. All these Revision Applications pertain to one Applicant Alufit (India) Pvt. Ltd., and have been decided vide a common order by the Appellate authority, a common issue is involved in all these Revision Applications and as they are being represented by the same advocates, these Revision Applications are being disposed by a common order.

2. The Applicants, M/s Alufit (India) Pvt. Ltd., are interalia engaged in the manufacture of Aluminium Structures and parts therof, they avail cenvat credit on inputs, capital goods and input services, used in or in relation to manufacture of these above mentioned goods. M/s Alufit filed 36 rebate during the relevant period and claimed rebate of Central Excise duty paid in respect of exports effected to SEZ under rule 18 of Central Excise Rules, 2002.

3. The Deputy Commissioner of Central Excise rejected the rebate claims mainly on the grounds that the Applicants had not produced the permissions granted by the Development Commissioners of the respective SEZs for procurement of such materials. The rebates pertains to duty paid on goods cleared to various Developers/Co-developers of SEZ and the sales proceeds were received in Indian rupees and not in convertible foreign exchange in contravention of FEMA, Act, the supplies therefore cannot be treated as export.

4. Aggrieved by the orders in Original, the Applicants filed appeals before the Commissioner (Appeals). The Commissioner Appeals vide his order noted that the Forms ARE-1s were duly endorsed by the jurisdictional SEZ authorities certifying receipt of goods covered under the ARE-1s, which shows that the goods were duly received in SEZs. Therefore the rebate cannot be rejected on the basis of non furnishing of documents or for non procurement of permissions from the Development Commissioner. The

Commissioner (Appeals) however, rejected the appeal interalia on the following grounds;

4.1 The Applicants have not brought forth any rule or regulation or provision which stipulates that the DTA suppliers to developers, co-developers of SEZ can receive the sale proceeds in Indian Rupees, and therefore held that the receipt of sales proceeds in Indian rupees is not proper and correct and is liable for rejection.

4.2 The Applicants have not substantiated how the provisions of FEMA are not attracted to supplies to SEZ. The provisions of Foreign Exchange Management Act, 1999 ("FEMA") and the RBI regulations/ guidelines are automatically attracted and cannot be ignored for such clearances. The SEZ Act does not refer to FEMA and is not intended to override its provisions.

5. Aggrieved with the order of Commissioner (Appeals) the Applicants have filed this Revision Application interalia on the following grounds;

5.1 The sales made to SEZ developers qualify to be exports., section 2(m) of the SEZ Act, supplying goods or providing services from DTA to a SEZ unit or a SEZ developer has been defined to constitute "export". Section 53 of the SEZ Act, makes a SEZ a territory outside the Customs Territory of India.

5.2 The Applicant manufactured and supplied the goods to the approved SEZ developers / co-developers on the basis of prescribed documents. Such as Purchase orders, Letter of procurement, List of Capital goods duly approved by SEZ authorities, Form ARE-1 duly endorsed by the jurisdictional SEZ authorities certifying receipt of goods etc. The conditions prescribed by the rebate notification and the procedure laid down by Rule 30 of the SEZ rules have been scrupulously followed.

5.3 That the claim of rebate on supplies made to SEZs is permissible even when sale proceeds are received in Indian rupees as there is no requirement for receipt of consideration in foreign exchange, neither

does the law provide for receipt for consideration in Foreign Exchange and the said restriction cannot be artificially imposed. The Applicant is well within his rights to claim rebate under Rule 18 of the CCR despite there being other alternatives to monetize input credit. Further the SEZ developers cannot make payment for goods in foreign exchange as they do not have foreign exchange dealings. Therefore, the claim of rebate on supplies made to SEZs is permissible even when sale proceeds are received in Indian Rupees as there is no requirement for receipt of consideration in foreign exchange.

5.4 Section 52(1) of the SEZ Act provides that that with effect from March 14, 2006 the provisions contained in chapter XA of the Customs Act,1962 the SEZ rules 2003 and SEZ (Customs procedure) Regulations, 2003 made thereunder, shall not apply to Special Economic zones.

5.5 Section 51(1) of the SEZ Act, provides that " *The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."* Thus the SEZ Act shall have overriding effect over provisions of any other law in case of any inconsistency. Hence, the allegation in the Order in Appeal that exports to SEZs will be governed by FEMA that since the SEZ Act nowhere mentions FEMA is unsustainable.

5.6 The Applicant has been treated differently as the similar rebate has been granted to other assesses on a similar fact pattern.

The Applicants cited case laws in defence of thier case and prayed that the impugned Order-in-Appeal be set aside and the rebate claims allowed.

6. Personal hearing in the case was scheduled on 08.08.2018 which was attended by Shri C. Solomon Raj and Chandran Chiramel both advocates, on behalf of the applicant and reiterated submissions made in the revision application and filed written additional submissions. They pleaded that the impugned orders of the Commissioner (Appeals) be set aside and the impugned Revision Applications be allowed.

7. Government has carefully gone through the relevant case records and perused the impugned Order-in-Appeal. It is observed that Para 5 of the Board's Circular No. 29/2006-Cus. dated 27.12.2006 clarifies as below;

" 2. Following the enactment of Act and the Rules, certain representations have been received from the trade regarding implementation of Rule 30 relating to procurement of goods by Special Economic Zones (SEZs) from the Domestic Tariff Area (DTA). It has been felt necessary to issue instructions, as detailed under, for proper implementation of the said Rule. Department of Commerce has also issued Instruction No. 6 dated 3rd August, 2006 on the said issue.

3. The important provisions of the Act & the Rules having a bearing on procurement of goods from DTA by SEZ units and SEZ developers for their authorized operations are listed below: –

(a) Under section 2 (m) of the Act, supplying goods or providing services, from DTA to a SEZ unit or a SEZ developer, has been defined to constitute "export".

Hence the supply of goods and services, from DTA to a SEZ unit or a SEZ developer, constitutes "export".

8. Government further observes that Rule 30 of SEZ Rules, 2006 prescribes for the procedure for procurements from the Domestic Tariff Area. As per sub-rule (1) of the said Rule 30 of SEZ Rules, 2006, DTA may supply the goods to SEZ, as in the case of exports, either under Bond or as duty paid goods under claim of rebate under the cover of ARE-1 form. This clearly underlines the fact that rebate of duty for goods supplied to SEZ units or developer is eligible for rebate.

9. CBEC has further clarified vide Circular No. 06/2010-Cus., dated 19-03-2010 that rebate under Central Excise Rules, 2002 is admissible to supplies made from DTA to SEZ and has directed the lower formations to follow Circular No. 29/2006-Cus., dated 27-12-2006. In this regard, the Circular 06/2010-Cus dated 19-3-2010 is reproduced below :-

"Circular No. 6/2010-Cus., dated March 19, 2010

Sub Rebate under Rule 18 on clearances made to SEZs reg.

A few representations have been received from various filed formations as well as from various units on the issue of admissibility of rebate on supply of goods by DTA units to SEZ.

2. A view has been put forth that rebate under Rule 18 of the Central Excise Rules, 2002 read with Notification 19/2004-C.E. (N.T.), dated 6-9-2004 is admissible only when the goods are exported out of India and not when supplies are made to SEZ.

3. The matter has been examined. The Circular No. 29/2006-Cus., dated 27.12.2006 was issued after considering all the relevant points and it was clarified that rebate under Rule 18 is admissible when supplies are made from DTA to SEZ. The Circular also lays down the procedure and the documentation for effecting supply of the goods from DTA to SEZ, by modifying the procedure for normal export. Clearance of duty free material for authorized operation in the SEZ is admissible under Section 26 of the SEZ Act, 2005 and procedure under to Rule 18 or Rule 19 of the Central Excise Rules is followed to give effect to this provision of the SEZ Act, as envisaged under Rule 30 of the SEZ Rules, 2006.

4. Therefore it is viewed that the settled position that rebate under Rule 18 of the Central Excise Rules, 2002 is admissible for supplies made from DTA to SEZ does not warrant any change even if Rule 18 does not mention such supplies in clear terms. The field formations are required follow the circular No. 29/2006 accordingly.

10. The Export Promotion Council For EOUs & SEZs ('EPCES') vide the, Circular no. 109 dated April 5, 2010 further clarifies as follows:

" (ii) DGEP, DOR, Ministry of Finance issues circular No 06/2010 dated 19-3-2010 clarifying that rebate under rule 18 of CE Rules is admissible for supplies made from DTA to SEZ. We had received various representations from SEZ Units that field formations are not permitting rebate under Rule 18 of the Central Excise Rule for supply of goods from DTA to SEZ as Rule 18 mentions physical exports and supply of goods from DTA to SEZ is specifically not mentioned in Rule 18. We have taken up this issue with Director General of Export Promotion, Depa[illegible]

Revenue, Ministry of Finance, pointing out that supply of goods from DTA to SEZ is treated as physical exports under SEZ Act and Circular No. 29/2006-Customs dated 27.12.2006 has recognized this position.

Accordingly, now DG(EP) has issued Circular No 6/2010 dated 19.03.2010 wherein it has again reiterated the contents of circular No. 29/2006-Cus dated 27-12-2006 and has stated categorically that it is viewed that this is the settled position that rebate under Rule 18 of the Central Excise rule, 2002 is admissible for supplies made from DTA to SEZ and it does not warrant any change in Rule 18."

It appears that the Commissioner (Appeals) has not taken the above into account while passing the order.

11. To remove any doubts on the issue CBEC vide Circular No. 1001/8/2015-CX, Dated: April 28, 2015 has clarified that benefit of rebate of duty under Rule 18 of Central Excise Rules, 2002 and Refund of accumulated CENVAT credit under Rule 5 of CENVAT Credit Rules, 2004 will continue to be available on goods cleared from Domestic Tariff Area (DTA) to Special Economic Zone (SEZ). As per the provisions of SEZ Act, supply of goods from DTA to the SEZ is treated as export; as a SEZ is treated as a territory outside the customs territory of India. The DTA supplier supplying goods to the SEZ shall clear the goods either under bond or as duty paid goods under claim of rebate on the cover of ARE-1. Thus, any licit clearances of goods to an SEZ from the DTA will continue to be treated as export and there is no restriction imposed by CBEC that the amount should be realised in foreign exchange. Government therefore notes that there is no dispute and clearances of goods to an SEZ from the DTA is Export.

12. In the case of Essar Steel Ltd vs UOI 2010(249) ELT 3 (Guj) the Hon'ble High court of Gujarat, maintained by the Supreme Court, has held that " *Export duty whether can be imposed under Customs Act, 1962 by incorporating definition of term 'export' under Special Economic Zones Act, 2005 into Customs Act.....- Term 'export' defined in Customs Act and meaning thereof is not adoptable or applicable under another enactment for any purpose of levying duty under Customs Act - Movement of goods from DTA to SEZ treated export by legal fiction under SEZ Act for making available*

duty drawback, DEPB benefits, etc. ---..... .....Construction of such movement as entailing liability to duty is contrary to purpose of legal fiction created - No conflict in applying respective definitions of export in two enactments for purposes of both Acts. ..... -Term 'export' defined in Customs Act and meaning thereof is not adoptable or applicable under another enactment for any purpose of levying duty under Customs Act - Movement of goods from DTA to SEZ treated export by legal fiction under SEZ Act for making available duty drawback, DEPB benefits, etc. - Construction of such movement as entailing liability to duty is contrary to purpose of legal fiction created - No conflict in applying respective definitions of export in two enactments for purposes of both Acts" The case was maintained/upheld by the Apex Court.

In view of the above, the Government therefore holds the rebate claims of duty paid on goods cleared from DTA to SEZ are admissible.

13. The Government also observes that the term "export" defined under Section 2 (l) in The Foreign Exchange Management Act(FEMA), 1999, reads thus,

> *"export", with its grammatical variations and cognate expressions, means,—*
> *(i) the taking out of India to a place outside India any goods,*
> *(ii) provision of services from India to any person outside India;*

The Section 53 (1) of the SEZ Act mentions that

> *"A Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations".*

Thus it alludes that the Special Economic Zone is actually located within the territory of India and therefore it follows that the provisions of FEMA cannot be made applicable to exports to SEZ, and its provisions cannot be thrust on the exports/clearances made from DTA to SEZ units as these do not constitute an intra national transaction. The provisions of FEMA Act comes to effect only when exports are made out of the country. The DTA supply to SEZ though construed as "export" as per section 2(m) of the SEZ Act,2005 cannot be termed as "export" within the meaning of section 2(l) of FEMA. Further, when the clearances form DTA to SEZ do not conform to the

definition of export in FEMA, the provisions of FEMA therefore are not attracted to supplies made to SEZ.

14. Government also observes that CBEC Circular No. 29/2006-Cus., dated 27.12.2006 and Circular No. 06/2010-Cus., dated 19-03-2010 also do not impose any restrictions regarding receipt of consideration in foreign exchange. Further, Section 51(1)of the SEZ Act provides as follows

> *"The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."*

Referring to the above section the Hon'ble High Court of Gujarat in the case of Essar Steel Ltd vs UOI 2010(249) ELT 3 (Guj) has held that

> *" Section 51 of the SEZ Act, 2005 providing that the Act would have overriding effect does not justify adoption of a different definition in the Act for the purposes of another statute. A non-obstante clause only enables the provisions of the Act containing it to prevail over the provisions of another enactment in case of any conflict in the operation of the Act containing the non-obstante clause. In other words, if the provision/s of both the enactments apply in a given case and there is a conflict, the provisions of the Act containing the non-obstante clause would ordinarily prevail. In the present case, the movement of goods from the Domestic Tariff Area into the Special Economic Zone is treated as an export under the SEZ Act, 2005, which does not contain any provision for levy of export duty on the same."*

15. In view of the above paras, the Government observes that the law does not permit borrowing definitions of other Acts when there is a definition already given relevant Act under which the transactions have taken place. Provisions of FEMA therefore cannot be applied to exports from DTA to SEZ. The SEZ law also do not stipulate payment in foreign currency for the supplies of goods from DTA to SEZ. Therefore, Government agrees with the opinion that the provisions of FEMA are not attracted to supplies to SEZ, and therefore remuneration in foreign currency cannot be demanded in such cases. In conclusion therefore, rebate claims cannot be denied on the

grounds that remuneration in foreign exchange has not been received for exports from DTA to SEZ.

16. From the above it is clear that, Clearances from DTA to SEZ shall constitute export. The rebate has therefore been denied on presumptions, without adducing any positive evidence and are contrary to the ratios of the following judgements wherein the facts are similar to the facts of the present case,- 2013 (292) ELT 426 (Tri.Del) Commr. Of C.Ex. vs Shri Bajrang Alloys Limited.

17. Finally, in the light of observations and discussions made in foregoing paras and material available on record. The Government holds that the impugned Orders-in-Appeal are required to be set aside.

18. The Government of India accordingly sets aside the impugned Orders in Appeal issued by the Commissioner of Central Excise (Appeals-I) setting aside the rebate claims and allows the impugned Revision Applications with consequential relief.

18. So, ordered.

21.8.18

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

ORDER No. 251-286 /2018-CX (WZ) /ASRA/Mumbai DATED 21.08.2018

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5. Guard File
6. Spare Copy.

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ATTESTED

23/8/18

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