F.No.371/57-A/16-RA
F.No.371/54(A to G)/DBK/17-RA
F.No.371/21(A to D)/DBK/17-RA
F.No.371/153/DBK/2018-RA

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GOVERNMENT OF INDIA
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Mumbai- 400 005

F. No.371/57-A/16-RA 1491 Date of Issue: 10 .02.2022
F.No.371/54 (A to G)/DBK/17-RA
F.No.371/21 (A to D)/DBK/17-RA
F.No.371/153/DBK/2018-RA

ORDER NO. 26-38 2022-CUS (WZ) /ASRA/Mumbai DATED 09 .02.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicant : M/s IFGL Exports Limited
Plot no.638-644, Kandla Special Economic Zone,
P.O. Gandhidham – 370230,
Dist: Kutch, Gujarat.

Respondent : Commissioner of Customs,
Kandla Special Economic Zone,
Customs House, Near Balaji Temple,
Kandla – 370210.

Subject : Revision Applications filed under Section 129 DD of the Customs Act, 1962 against the following Orders-in-Appeal, all passed by the Commissioner of Customs (Appeals), Ahmedabad :-

Sl. No.	Order-in-Appeal No.	Date
1	KDL-CUSTM-000-APP-023/16-17	17.06.2016
2	KDL-CUSTM-000-APP-021 to 27/17-18	01.06.2017
3	KDL-CUSTM-000-APP-001 to 004/17-18	03.04.2017
4	KDL-CUSTM-000-APP-047-17-18	08.03.2018

ORDER

These Revision Applications have been filed by M/s IFGL Exports Limited (here-in-after referred to as 'the Applicant') against the subject Orders-in-Appeal passed by the Commissioner of Customs (Appeals), Ahmedabad which decided the appeals filed by the applicant against letters of the Deputy Commissioner of Customs, Kandla Special Economic Zone (KASEZ), Gandhidham, rejecting their claims for Drawback.

2. Brief facts of the case are that the applicant is a unit operating in the Kandla Special Economic Zone (KASEZ) and manufactured refractories. They had procured imported inputs from various suppliers in the Domestic Tariff Area which were used to manufacture the said refractories. They filed duty drawback claims under Section 74 of the Customs Act, 1962 in terms of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 claiming drawback of the duties paid in terms of Section 26(1)(d) of the Special Economic Zone Act, 2005 (SEZ Act). The applicant filed claims before the Deputy Commissioner of Customs, KASEZ, for sanction of drawback of Customs duties on the purported import of goods by the DTA dealer under Section 74 of the Customs Act, 1962; they filed the dealer's invoices from the Central Excise dealer-supplier of LPG along with the said claims. These claims were returned/rejected by the Department on the grounds that the applicant did not fulfill the conditions of Rule 30(2), 30(3) and 30(5) of the Special Economic Zone Rules, 2006 (SEZ Rules, 2006) read with Rule 4(a) of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 and also that procurement of the said goods by a unit in the SEZ from a DTA dealer does not qualify the SEZ unit to claim drawback on the said goods under Section 74 of the Customs Act, 1962 read with the provision of Rule 2(b) of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995.

3. Aggrieved, the respondent preferred appeals against the letters returning/rejecting the drawback claims filed by them before the Commissioner of Customs (Appeals), Ahmedabad resulting in the subject Orders-in-Appeal. The Commissioner (Appeals) vide the Orders-in-Appeal dated 17.06.2016, 01.06.2017 and 08.03.2018 rejected the appeals filed by the applicant on the grounds that – there was no deeming provision in Rule 2(b) of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995; that the applicant had failed to follow the procedure of Rule 4(a) & 5 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 and also the provisions of Rule 24, 30, of the SEZ Rules, 2006. As regards the Order-in-Appeal dated 03.04.2017, the Commissioner (Appeals) rejected the appeals filed by the applicant as they were filed beyond the limitation period of ninety days.

4. Aggrieved, the applicant has filed the present Revision Applications against the said Orders-in-Appeal on the following grounds:-

a) Non-filing of Bill of Export / ARE-1 is a mere procedural lapse; and that substantive benefit of drawback of the duties of paid on goods procured cannot be denied;
b) Section 26(1)(d) of the SEZ Act, 2005 specifically allows drawback of duties paid on goods brought from DTA into a unit in the SEZ for the purpose of carrying on authorized operations;
c) There was no disagreement on the fact that goods had actually been received in their premises for use in authorized operations under the cover of invoices; they placed reliance on the case of Essel Propack Ltd. [2014 (312) ELT 946 (GOI)] wherein it was held that - when the receipt of duty paid goods was not disputed, non-submission of Bill of Export was a mere procedural lapse which could be condoned and that such lapse could not take away the substantial benefit of export entitlement. They also relied upon the following case laws wherein similar views were expressed, in support of their case:-

- Nov Sara India (P) Ltd. [2014 (313) ELT 898 (GOI)]
- KEI Industries [2014 (313) 895 (GOI)]
- Indo Alusys Industries Ltd [2013 (297) ELT 305 (GOI)]
- Shree Parvati Metal P. Ltd. [2013 (290) ELT 638 (GOI)]

(d) The Order-in-Appeal had erroneously held that the condition of Rule 30(7) had not been satisfied as the notice issued to them had not alleged that non-filing of the Bill of Export had resulted in the non-examination of the goods by the SEZ authorities and in the event had such a request been made the goods in question would been identified to the satisfaction of the concerned authorities;

(e) Since they were themselves claiming the drawback benefit and there was no reason for a disclaimer certificate under Rule 30(5) of the SEZ Rules as the same was required only when the domestic supplier wished to claim the drawback;

(f) The Commissioner (Appeals) had travelled beyond the initial rejection Order of the Deputy Commissioner inasmuch as the Order-in-Appeal has alleged that the applicant had not followed the conditions, procedures laid down under Rule 30(4), 30(7) and 30(8) of the SEZ Rules and was liable to be set aside on this grounds alone;

(g) The condition under Rule 30(8) of the SEZ Rules was satisfied by them inasmuch as the payment for the goods in question were made through their PCFC account in which the payments received in Foreign Currency were credited and subsequently converted to INR; that the Annual Performance Report indicating the details of inflow of Foreign Currency and its subsequent use to buy inputs in relation to which drawback had been claimed has not been questioned;

(h) The supplies made by the unit in the DTA to them were exports in terms of Section 2(ii) of the SEZ Act, 2005 and Section 2 (18) of the Customs Act, 1962 as Section 53 of the SEZ Act, 2005 provides that Special Economic Zones shall be deemed to be a territory outside the Customs territory of India for the purpose of undertaking the operations they were authorized; and hence the Commissioner (Appeals) had erred in holding that supplies from the DTA were not exports; they placed reliance on the decision of the High Court of Chattisgarh in the case of UOI vs Steel Authority of India Ltd. [2013 (297)ELT 166] in support of their case; they further submitted that the DTA supplier is not engaged in manufacturing activity, they had merely imported and supplied goods to them and hence Rule 18 of the Central Excise Rules, 2002 would not be applicable in the instant case;

(i) They relied on CBEC Circulars no.29/2006-Customs dated 27.12.2006, No.06/2010 dated 19.03.2010 and No.1001/8/2015-CX dated 28.04.2015 to submit that supplies by a DTA unit to the an unit in the SEZ has to be treated as 'export';

In light of the above, the applicant submitted that the subject Orders-in-Appeal be set aside and the drawback claimed by them may be sanctioned to them. It may be stated here that the grounds of appeal in all the Revision Applications is similar, including the appeal against the Order-in-Appeal dated 03.04.2017 wherein their appeals were rejected by the Commissioner (Appeal) on the grounds of limitation. The applicant has not provided any explanation/reasons as to why the said Order-in-Appeal was not proper in rejecting their appeals on the grounds of limitation.

5. Personal hearing in the matter was granted to the applicant on 12.11.2021. Ms Priyanka, and Ms Heena, both Advocates appeared online on behalf of the applicant. They reiterated their earlier submissions and

submitted that export to SEZ is eligible for drawback. They further submitted that ARE-1 is not required to be submitted for SEZ supply. They contended that there being no dispute on duty paid goods being exported to SEZ, minor procedural lapses, even otherwise, should not deprive them of the admissible drawback. They requested that their application may be allowed.

6. Government has carefully gone through the relevant case records available in case files, the written submissions and also perused the impugned Orders-in-Original and Orders-in-Appeal.

7. Government notes that out of the four impugned Orders-in-Appeal against which the subject Revision Applications have been filed, the finding and decision of the Commissioner (Appeals) in three Orders-in-Appeal, viz. Orders-in-Appeal dated 17.06.2016, 01.06.2017 and 08.03.2018, is identical and hence takes up the Revision Applications filed against the same for decision together. Government notes that drawback of the duties paid on the inputs received from suppliers situated in the DTA sought by the applicant has been denied by the Department. The Commissioner (Appeals) vide the above mentioned three Orders-in-Appeal dated 17.06.2016, 01.06.2017 and 08.03.2018 has rejected the appeals filed by the applicant on the grounds that sale of goods by a unit in the DTA to a SEZ unit cannot be treated as 'export' in terms of Rule 2(b) of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 and also for the reason that the applicant did not follow the procedure laid down under various sub-sections of Rule 30 of the SEZ Rules, 2005 and Rule 4(a) and Rule 5 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995.

8. Government finds that Section 2(m)(ii) of the SEZ Act, 2005 clearly states that supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer in the SEZ would be treated as export. Further,

Section 53 of the SEZ Act, 2005 lays down that a SEZ shall be deemed to be a territory outside the Customs territory of India for the purposes of undertaking the operations for which they have been authorized. A combined reading of Section 2(m)(ii) and Section 53 of the SEZ Act, 2005, as discussed above, clearly indicate that as per the SEZ Act, 2005 the applicant, a unit in a SEZ, is outside the Customs territories of India and supplies made by a DTA unit to them would fall under the definition of 'export'. Government notes that once the relevant Sections of an Act provides that such supplies would be export, it is incorrect to rely on a narrow interpretation of the Rules subservient to it, to hold the opposite. Government finds support in the judgment of the Hon'ble High Court of Chattisgarh in the case of UOI vs Steel Authority of India [2013(297)ELT 166 (Chattisgarh)] wherein it was held that supplies from DTA to a developer in the SEZ are to be treated as exports in terms of Section 2(m) of the SEZ Act, 2005. Thus, Government holds that supplies made by the units in the DTA to the applicant in the SEZ would fall under the category of exports. In view of the above, Government sets aside this portion of the Orders-in-Appeal dated 17.06.2016, 01.06.2017 and 08.03.2018 and holds that the supplies made by the DTA units to the applicant will be treated as 'exports'.

9. Government finds that 'drawback' in relation to any goods exported out of India, as defined under the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 means refund of duty paid on importation of such goods in terms of Section 74 of the Customs Act, 1962. In the present case, Government finds that the Order-in-Appeal has clearly recorded that the goods were procured from a Dealer in the DTA who was registered with the Central Excise Department. The applicant has sought drawback of the duties indicated as paid in the invoice raised by the DTA unit against supply of inputs to them in the SEZ. Government finds that neither the original Order of the Deputy Commissioner nor the Orders-in-Appeal have cast any doubt on the claim of the applicant with respect to the nature of goods supplied by the unit in the DTA, its receipt in the SEZ and the duty paid on

it of which drawback has been claimed. Government notes that the drawback claimed has sought to be denied on the grounds that procedures prescribed for claiming drawback have not been followed by the applicant. Government finds that in present case, though the applicant has admittedly failed to follow certain procedures, the same cannot be held against them to deny the substantive benefit of drawback for which they are legally eligible. Government finds that there are plethora of judgments of various Courts on this issue wherein it has been held that substantive benefit cannot be denied on grounds of procedural irregularities. In view of the above, Government holds that drawback claimed by the applicant cannot be denied to them on the grounds of certain procedure not being followed and sets aside the Orders-in-Appeal dated 17.06.2016, 01.06.2017 and 08.03.2018 wherein non-following of procedure was one of the grounds on which drawback was denied to the applicant. In view of the findings recorded above, Government holds that the supplies made by the units in the DTA to the applicant would qualify as export and the applicant would be eligible to the drawback of duties paid on such supplies received from the DTA. The Revision Applications against the Orders-in-Appeal dated 17.06.2016, 01.06.2017 and 08.03.2018 are disposed of in the above terms.

10. As regards the Revision Application against the Order-in-Appeal dated 03.04.2017, Government finds that the Commissioner (Appeals) had rejected the appeals of the applicant on the grounds of limitation. Government finds that in all the four cases covered by the said Order-in-Appeal, the Orders passed by the original authority were communicated to the applicant on 26.02.2016/29.02.2016 and that the appeals against the same were filed before the Commissioner (Appeals) on 29.08.2016. These facts have been recorded in the said Order-in-Appeal and have not been disputed by the applicant in the instant Revision Application filed by them.

11. Government observes that it is not in dispute that there was a delay in filing the appeals before Commissioner (Appeals) covered by the Order-in-

Appeal dated 03.04.2017 and that such delay was beyond the period of sixty days and a further thirty days time limit prescribed by Section 35 of the Central Excise Act, 1944. The crux of the issue here is whether Commissioner (Appeals) is empowered to condone the above delay. Government notes that the issue is no more *res-integra* and has been set to rest by the Hon'ble Supreme Court in the case of Singh Enterprises vs Commissioner of Central Excise, Jamshedpur [2008 (221)ELT 163 (S.C.)]. Relevant portion of the order is reproduced below :-

> *"The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the 'Limitation Act') can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period."*

The above judgment of the Apex Court leaves no doubt that in the present case, the Commissioner (Appeal) did not have the power to condone the quantum of delay on the part of the applicant in filing the appeals.

Government finds that the decision of the Commissioner (Appeals) vide the Order-in-Appeal dated 03.04.2017 to reject the appeals on the grounds of them being time barred is proper and legal. Government refrains from going into the merits of the case, as the appeals by the applicant before the Commissioner (Appeals) have been found to be time barred. In view of the findings recorded above, Government finds no reason to annul or modify the Order-in-Appeal dated 03.04.2017.

12. To summarize, Government sets aside the Orders-in-Appeal dated 17.06.2016, 01.06.2017 and 08.03.2018, and holds that the applicant is eligible to the drawback claimed by them which are covered by the these three Orders-in-Appeal. Further, the Government upholds the Order-in-Appeal dated 03.04.2017 and rejects the Revision Application filed against the same.

13. The subject Revision Applications are disposed of in the above terms.

Shrawan 1/2/22

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

26-38

ORDER No. /2022-CUS (WZ) /ASRA/Mumbai dated 01 .02.2022

To

M/s IFGL Exports Limited
Plot no.638-644, Kandla Special Economic Zone,
P.O. Gandhidham – 370230,
Dist: Kutch, Gujarat.

Copy to:

1. Commissioner of Customs, Kandla Special Economic Zone, Customs House, Near Balaji Temple, Kandla – 370210.
2. The Commissioner (Appeals), Customs, Ahmedabad, 7th floor, Mridul Tower, Behind Times of India, Ashram Road, Ahmedabad – 380009.
3. Sr. P.S. to AS (RA), Mumbai.
4. Guard file.
5. Notice Board