



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
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. 195/151-153, 29-32/14-15-RA/1138

Date of Issue: 13-02-2018

ORDER NO. 27-33/2018-CX (WZ)/ASRA/Mumbai Dated 13-02-2018
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. 87-96/2014
dated 28.02.2014, 98-135/2014-CE dated 28.02.2014, 143 -
153/2014-CE dated 04.03.2014, 01-07/2015-CE dated
09.01.2015, 827-834/2014-CE dated 31.12.2014, 12-27/2015-
CE dated 21.01.2015, 728-826/2015-CE dated 30.12.2014
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 issued by the Commissioner of Central Excise (Appeals-I) as detailed below

Sl. No.	Revision Application No.	Order of Commr. (Appeals) No.
1	195/151/2014-RA	87-96/2014-CE dt. 28.02.2014
2	195/152/2014-RA	98-135/2014-CE dt. 28.02.2014
3	195/153/2014-RA	143-153/2014-CE dt. 04.03.2014
4	195/29/2015-RA	01-07/2015-CE dt. 09.01.2015
5	195/30/2015-RA	827-834/2014-CE dt. 31.12.2014
6	195/31/2015-RA	12-27/2015-CE dt. 21.01.2015
7	195/32/2015-RA	728-826/2015-CE dt. 30.12.14

The above mentioned Revision Applications pertain to one Applicant Alufit (India) Pvt. Ltd., 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 thereof, they avail cenvat credit on inputs, capital goods and input services, used in or in relation to manufacture of these goods. M/s Alufit filed for rebate claims Central Excise duty paid in respect of exports effected to SEZ. The Assistant Commissioner of Central Excise allowed sanction of rebate.

3. Aggrieved by the sanction of rebate, the Deputy Commissioner of Central Excise filed appeals with the Commissioner of Central Excise (Appeals) for setting aside the above Orders on the grounds that;

3.1 the impugned orders are silent on the permission granted in respect of quantity to be procured from DTA by the Development Commissioner to the Co-developer and no verification was conducted by the Adjudicating Authority as to what items have been permitted to the Co-developers to be supplied from DTA by the Development Commissioner or Ministry of Commerce.

3.2 In the absence of permissions for procurement of materials from the DTA suppliers, the supplies to SEZ by the DTA units cannot be considered as export.

3.3 *the sanction of rebate on realisation in rupees is not legal and proper.*

4. The Commissioner Appeals vide his orders detailed above noted that the Applicants have filed all the requisite permissions with the sanctioning authority who had examined the same. Hence comments were called for from the sanctioning authority who has confirmed vide letter dated 17.02.2014 that the SEZ developers /co- developer have obtained necessary permissions to develop SEZ. 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.

4.2 The Applicants have not substantiated how the provisions of section 2(t) 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.

4.3 The credit accumulated due to exports of final product can be claimed as (cash) refund under rule 5 of Cenvat Credit Rules 2004, however the Applicant has not stated anything as to why this is not done. No verification of the authenticity and eligibility of the credit availed has been carried-out. Hence, the claims of rebate cannot be held to be beyond doubt as the availment of credit, which is used for payment of duty, is not subjected to verification.

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

5.1 That the sales made to SEZ developers qualify to be exports.

5.2 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.

5.3 The Applicant manufactured and supplied the goods to the approved SEZ developers / co-developers on the basis of prescribed documents.

- 5.4 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.
- 5.5 Section 51(1) of the 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."*
- 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 Rebate under Rule 18 of CE Rules has been rightly claimed despite there being other options to claim refund.
- 5.7 The rebate cannot be rejected on the ground that the Applicant should have claimed refund under Rule 5 of the Cenvat Credit Rules instead of claiming rebate as per Rule 18 of the Central Excise Rules. Rebate under Rule 18 of CE Rules has been rightly claimed despite there being other options to claim refund.
- 5.8 The Order in Appeal alleges that Applicant has claimed rebate of duty paid on exports merely to avoid verification of CENVAT credit. This allegation suggests that the Applicant is seeking to avail rebate of CENVAT credit on ineligible inputs, input services. This is an unfair allegation questioning the integrity of the Applicant. The Assistant Commissioner has granted the rebate after causing full verification of the said documents by the range authorities. The Jurisdictional Audit authorities also regularly conduct Audits of rebate applications and availment of credit.

The Applicants humbly prayed that the impugned Order-in-Appeal be set aside and the rebate claims allowed.

6. Personal hearing in the case was scheduled on 01.02.2018 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"."

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.

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 directed the lower formations to follow Circular No. 29/2006-Cus., dated 27-12-2006. The Circular 06/2010-Cus 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, Department of 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 only.

12. In the case of Essar Steel Ltd vs UOI 2010(249) ELT 3 (Guj) the Hon'ble High court of Gujarat 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 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 contrary to purpose of legal fiction created - No conflict in applying respective definitions of export in two enactments for purposes of both Acts 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 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 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 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, 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. 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. Therefore provisions of FEMA are not attracted to supplies 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."

In view of the above paras, provisions of FEMA cannot be applied to exports from DTA to SEZ and 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.

15. In the last three paras 10, 11 and 12 of the impugned orders above the Appellate Authority has proceeded thus;

" I find that the duty, in respect of the goods cleared to SEZ developers/ co-developers, has been paid by the Respondents by utilizing Cenvat credit. This means that there has been an accumulation of Cenvat credit which could only be due to earlier export clearances under Bond/ LUT."

The order in para 11 further states that

" When the provisions of clearance without payment of duty and claiming refund of unutilized credit are simple and fast, what is the incentive for the assesseees to resort to the rebate route rather than the refund route? The answer lies in the fact that when a refund is sought under rule 5, the same may be subjected to verification of the authenticity and eligibility of credit of duty/ tax paid on inputs and input services used in the manufacture of export goods. Such verification is not a prominent requirement in the case of rebate claims, whereby there is the likelihood that ineligible credit also gets encashed."

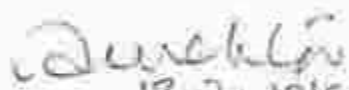
The above stated allegations suggest that the Applicant is seeking to avail rebate of cenvat credit of ineligible inputs /input services. However, no documentary evidences have been put forth in support of these allegations, and yet the Appellate Authority has arrived at conclusions on basis these assumptions. In the absence of evidence, such allegations cannot be the basis to arrive at a positive conclusions leading to the denial of the benefit of rebate claims. The ratio of the Apex court in 1978 (2) ELT (J-172) - Oudh Sugar Mills, is squarely applicable in this case. The Applicant is well within his rights to select and use the benefit/remedy that suits him better. The department cannot force the Applicant to avail an option when the law has provided for more than one benefit. In view of the above the impugned orders in Appeal need to be set aside.

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

19. So, ordered.


 13.2.2018
 (ASHOK KUMAR MEHTA)
 Principal Commissioner & ex-Officio
 Additional Secretary to Government of India

27-33
 ORDER No. /2017-CX (WZ) /ASRA/Mumbai

DATED 13.02.2018

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

Copy to:

1. The Commissioner of Central Excise, Bangalore -20.
2. Commissioner of Central Excise (Appeals-I), Bangalore, S. P. Complex, Lalbaug Road, Bangalore.
3. The Assistant Commissioner, Central Excise, E-1 Division, 1st Main Road, Sheshadripuram, Bangalore-20.
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