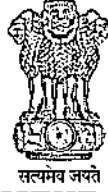


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**GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE**

**Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India**
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No. 196/14-16/SZ/2018-RA
F. No. 196/16-19/SZ/2019

Date of Issue: 21.04.2022

ORDER No. ³³⁻³⁹ /2022-ST(SZ) /ASRA/MUMBAI DATED 19.04.2022 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.

Applicant : M/s Indian Ocean Garnet Sands Company P. Ltd.,
No.146, Palayamkottai Road,
Tuticorin - 628 003.

Respondent : Commissioner of GST & Central Excise,
Madurai.

Subject : Revision Applications filed under Section 35EE of the
Central Excise Act, 1944 against the following Orders-in-
Appeal:-

1	MAD-CEX-000-APP-063 to 065 - 2018 dated 27.02.2018	Passed by Commissioner of Central Excise (Appeals -I), Madurai.
2	309 & 310/2019 dated 14.10.2019	Passed by Commissioner of GST & Central Excise (Appeals), Coimbatore
3	311 & 312/2019 dated 14.10.2019	Passed by Commissioner of GST & Central Excise (Appeals), Coimbatore

ORDER

The subject Revision Applications have been filed by M/s Indian Ocean Garnet Sands Company Pvt. Limited (here-in-after referred to as 'the applicant') against the three impugned Orders-in-Appeal detailed above. The said Orders-in-Appeal disposed of appeals against seven Orders-in-Original all passed by the Assistant Commissioner of Central Excise, Tuticorin Division, Madurai. Two of the said Orders-in-Original decided the demands raised for recovering rebate erroneously sanctioned and the rest disposed of rebate claims filed by the applicant.

2. Brief facts of the case are the applicants exported 'Garnet' processed out of mined beach sand. They filed rebate/refund claims under notification no.41/2012-ST dated 29.06.2012 seeking refund of the service tax paid on the input services, viz. Clearing & Forwarding agent services, Material Handling at Port Terminal services and GTA services, used for the export of goods exported during the period 2014-15 to 2016-17. The Department learnt from the District Level Committee (DLC) of Tirunelveli District, formed to verify the allegation of illicit mining of Beach Sand, that the applicant had illegally transported a total quantum of 7,17,768 MT of minerals extracted from the Raw Sands during the period from 1999-2000 to 2016-17 and that the applicant had admitted that they had illegally transported 1,05,707 MT of minerals during the period from 2014-15 to 2016-17 for which they had no transport permit. As the claims filed by the applicant involved such illicit transportation, Show Cause Notices were issued to not only reject the pending rebate claims but also recover the rebate already sanctioned to them during the said period. The original adjudicating authority held that it is a settled principle of law that no right can accrue from an illicit act and hence confirmed the demands raised and also rejected the pending rebate claims of the applicant.

3. Aggrieved, the applicant preferred appeals before the Commissioner (Appeals) against the said Orders-in-Original resulting in the impugned Orders-in-Appeal dated 27.02.2018, 14.10.2019 and 14.10.2019. The Commissioner (Appeals) vide the Orders-in-Appeal bearing no. MAD-CEX-

000-APP- 063 to 065 - 2018 and No.311 & 312/2019 dated 27.02.2018 and 14.10.2019, respectively, upheld the Orders-in-Original rejecting the rebate claims filed by the applicant. Further, the Commissioner (Appeals) vide Order-in-Appeal No.309 & 310/2019 dated 14.10.2019, dismissed the appeal filed by the applicant against the Order-in-Original which confirmed the demand raised to recover the rebate erroneously sanctioned to them, as they had failed to pay the pre-deposit of 7.5% of the demand raised while filing the said appeal.

4. Aggrieved, the applicant has filed the subject Revision Applications against the impugned Orders-in-Appeal.

(I) The application against the Order-in-Appeal dated 27.02.2018 is on the following grounds:-

(a) Commissioner (Appeals) incorrectly premised the conclusion on the term "illegal exports" as defined in Section 11H(a) of the Customs Act 1962 inasmuch as their exports did not contravene the provisions of Customs law; and that the term "any other law" in Sec 11H(a) ibid takes this issue to the definition of illegal mining envisaged in Rule 2(ii)a of the Mineral Concession Rules, 1960 and Rule 2(c) of the Minerals (other than Atomic and Hydro Carbons Energy Minerals) Concession Rules, 2016 which reads "illegal mining" will come only when any person or a company has undertaken any reconnaissance or prospecting of mining operation in an area without holding lease of license or a mineral concession" as required under 1 of Section 4 of the Mineral (Development and Regulation) Act, 1957;

(b) Their mining operations commenced in the year 1990 with Lease Hold License in their own land vide G.O. (MS) No.96 Industries (MMD.II) Department dated 22.01.1990 which was started by Shri T. Manickam and later inherited by his son Shri M. Ramesh the 1997; and that Shri K. Thyagaraj too had a mining lease for mining Garnet, Illeminite, etc. for a period of 30 years; and that while granting lease the authorities had certified that the above lands were not reserved for state exploitation and were not included in the list of Hill Area Conservation Authority, etc. They further submitted that the Assistant Director, Geology Mining, Tirunelveli had stated in his report dated 08.12.2014 stated that there was no mining operation carried by them and that all the export made through

Thoothukudi Port are royalty paid minerals and no mining operation was going on in the District'; that this report clearly established the licit nature of Mining, Transport, Storage and Export of Garnet Sands by them and negates the contents of District Level Committee Report upon which the Commissioner (Appeals) and the original Adjudicating Authority had placed reliance; they also placed reliance on the letter dated 24.11.2014 of the Assistant Director of Geology & Mines, Tirunelveli in support of their case;

(c) The reports of the jurisdictional Superintendent of the applicant had certified on the basis of Chartered Engineer's certificate, had stated that they had sufficient stock of 'Garnet' for export in the future;

(d) The above mentioned letters and reports established that they held stock of 8,13,828/- M. Tons of royalty suffered Garnet in their processing units which were transported from the mines under valid transport permit issued by mines department and hence the exports effected by them during the impugned period was not illegal either under Customs Act, 1962 or under the MMDR Act, 1957 and Rules made thereunder; and hence it was incorrect on the part of the Commissioner (Appeals) to invoke the dictum "*Ex turpt causa non oritur action*" to uphold the original order rejecting their rebate claims;

(e) That both the lower authorities were misguided by the DLC minutes communicated by the District Collector which was totally biased, factually incorrect, methodically unscientific, legally against principles of natural justice and against the findings of the professional field Geologists who had given an unbiased report; that the DLC had overruled the report of the TLC by simple administrative overpowering, disregarding the facts countenanced by the Assistant Directors of Geology & Mining of the two jurisdictional Districts and Central Excise Range officers who oversaw the export activity of the Applicant on day to day basis;

(f) The contents of G.O.(MS) No.156 dated 08.08.2013 and G.O.(MS) No.173 dated 17.09.2013 had not banned the activity of mining and transportation of minerals but had only stopped the mining and issuance of transport permit pending completion of inspection by the special team and hence the Commissioner (Appeals) had misconstrued the same as a ban and had gone a step further to hold that the garnet sands already processed, transported, stored prior to 08.08.2013 under valid mining lease and

transport permits, and exported during October 2015 to June 2016 as illegal which was a miscarriage of justice;

(g) The vires of the findings of the DLC had been challenged by them before the Hon'ble High Court in WP No.6301/2017.

In view of the above they prayed that Order-in-Appeal dated 27.02.2018 may be set aside and the rebate claimed by them be granted to them.

(II) The grounds of appeal against the Order-in-Appeal No. 311 & 312/2019 dated 14.10.2019 is the same as that in the case of Order-in-Appeal dated 27.08.2018, detailed above. As regards the Order-in-Appeal No. 309 & 310/2019 dated 14.10.2019, the applicant submitted the following in addition to the above :-

(a) The Commissioner (Appeals) had relied on their omission to deposit 7.50% of the rebate amount; that the same occurred due to their misreading of instructions and that had they been notified of the same they would have rectified their omission and quasi-judicial proceedings was resorted to by rejecting their appeal as against the administrative cures available. They further informed that they regret the same and have made amends by paying Rs.7932/- and Rs.10,8,015/- towards pre-deposit under GAR-7 challans.

In view of the above they prayed that the Orders-in-Appeal both dated 14.10.2019 may be set aside and the rebate claimed by them be granted to them.

5. Personal hearing in the matter was granted to the applicant on 14.12.2021. Shri R. Subramanian, Advocate, appeared online on behalf of the applicant. He submitted that seven claims pertained to DTA unit and five pertained to EOU. He further submitted that based on the District Collector's Order, export benefits could not be denied when export has taken place. He also informed that the District Collector's Order had been challenged before the High Court and promised to submit further written submissions.

6. They made further written submissions, received in this office on 28.12.2021, wherein they reiterated their earlier submissions. They additionally submitted that:-

(a) Various reports of the District Level officials like the Assistant Director, Geology and the jurisdictional Superintendent establish that the exports were licit, lawfully carried out and genuine;

(b) The district committee had erroneously concluded that the stock of 813828 MT of garnet sand available as "waste and trash"; that out of 14.5 lac MT, 6.36 lac MT was exported between 2000-01 to November 2014 and that the basis on which the District Level Committee had held the entire 8.13 lac MT as waste and trash was not known and also that they had not even drawn a sample to test the mineral content; that the entire quantity of 14.5 lac MT was mined and moved to their processing facilities prior to September 2013, whence the State Government ordered to stop issuing transport permit; that there was no mining or movement of BMS after the date; that the whole quantity mined and moved prior to September 2013 was royalty paid and moved under valid transport permits issued by the District Authorities;

(c) The Taluk Level Committee (TLC) gave a report establishing the licit nature of mining and export of BMS; that however, the District Level Committee (DLC) headed by District Collector on its own assumed an appellate role over the TLC and dismissed its report and went on to hold that the entire mining and exports are illegal; that the DLC's report was challenged before the Hon'ble High Court as ultra vires as it has no jurisdiction nor was it constituted in terms of Hon'ble High Court's direction; that the Central Government Mines And Minerals Department had now canalized the export of BMS through the Indian Rare Earths Ltd. which goes to establish that the export of BMS was neither banned nor illegal.

(d) The Original/ Appellate Authorities premised their order on the findings of the District Collector which was factually incorrect, administratively improper and legally untenable.

In view of the above they once again requested for the Orders of the lower authorities to be set aside; to hold that they were eligible for the refunds already sanctioned; and the pending rebate claims be sanctioned to them.

7. The applicant vide their letters dated 16.12.2021, received on 28.12.2021, submitted that they had filed a Writ Petition No.1592/2015 before the Hon'ble High Court of Madras challenging the merits and vires of the DLC report, which was pending decision; they requested that the present cases may be kept in abeyance till the case was disposed of by the Hon'ble High Court.

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

9. Government observes that that the dispute in the present case is regarding the admissibility of rebate of service tax paid on input services purportedly used by the applicant towards the product 'garnet' exported by them. It is the case of the Department that the applicant is not eligible for the same as the minerals exported by them were transported by illicit means as evidenced by Orders G.O. (MS) No.156 dated 08.08.2013 and G.O. (MS) No.173 dated 17.09.2013 of the District Level Committee of Tirunelveli District (DLC), wherein it was recorded that the applicant and their group companies had unlawfully transported 1,06,707 MT of minerals during the period 2014-15 to 2016-17, as mining operations were stopped and no transport permits were issued during the said period. The original adjudicating authority held that no right can accrue from an illicit act and rejected the claims for rebate made by the applicant pertaining to the above period and also confirmed the demands raised to recover the claims that were sanctioned initially.

10. Government finds that of the three subject Orders-in-Appeal, two Orders-in-Appeal dated 27.02.2018 and 14.10.2019 uphold the Orders-in-Original that had rejected the rebate claims, on the grounds that the same arose from an illegal act. The third Order-in-Appeal dated 14.10.2019

rejected the appeal against the Order-in-Original which confirmed the demand raised to recover the rebate already sanctioned, as the applicant had failed to make the pre-deposit while filing the appeals as mandated under Section 35F of the Central Excise Act, 1944 and made applicable to service tax matters by Section 83 of the Finance Act, 1994.

11. Government first takes up the Orders-in-Appeal No.MAD-CEX-000-APP- 063 to 065 - 2018 dated 27.02.2018 and No.311 & 312/2019 dated 14.10.2019 for discussion. In this context, Government has examined both the Orders passed by the Chief Secretary to the Government, Tamilnadu bearing G.O.(MS) No.156 dated 08.08.2013 and G.O.(MS) No.173 dated 17.09.2013. The said Orders clearly mention that large scale illicit beach sand mining involving minerals including 'Garnet' had been noticed and gave directions to stop the mining operations and also to stop the issuance of transport permits in respect of such minerals. Government finds that the act of the applicant in transporting the offending goods after the Government stopped issuing transport permits is clearly illegal. Government observes that the Commissioner (Appeals) in both the said Orders-in-Appeal have passed proper and detailed speaking orders. On going through the Order-in-Appeal dated 27.02.2018, Government finds that the Commissioner (Appeals) has discussed the issue at length. The relevant portion of the same is reproduced below:-

"The activity of mining of Beach Sand itself has been banned by the Government of Tamilnadu vide G.O.(MS) No.156, dated 08.08.2013 and as per said Order no transport permit should be issued for transporting the same. But the exports made by the appellant includes both the illegal activities ie., illegal mining and illegal transporting thereby rendering the export itself as an illegal export. As per Sec.11H(a) of the Customs Act, 1962, "illegal export" means the export of any goods in contravention of the provisions of this Act or any other law for the time being in force. As such the export made by the appellant in violation of the above Ban Order issued by Government of Tamilnadu under Mines and Minerals (Development and Regulation) Act, 1957 is an illegal export. No illegal export can be said to have public interest and it would not be necessary to extend the benefit of exemption Notification. The Notification is set out only for legal exporters. Hence the appellant who is involved in illegal exports cannot be made eligible for the exemption provided in the

Notification. Further as rightly construed by the adjudicating authority no right can accrue from an illegal act. However the appellants are arguing that they are only traders and not involved in mining activity. They are only procuring 90% of mined Garnet abrasives from M/s.Manickam Minerals and M/s. Indian Rare Earths Ltd., Tuticorin and exporting by packing in Jumbo Bags. Even though they had not directly involved in mining, dealing with such goods itself is an illegal activity. Moreover, it is to be noted that M/s.Manickam Minerals who are mining Beach Sand and extracting Garnet mineral out of it is a Proprietorship concern and Mr.M.Ramesh is the Proprietor of the said concern and he is the Managing Director of M/s.Indian Ocean Garnet Sands Company Pvt. Ltd.(the appellant) also: The main charge of the Government of Tamilnadu is that Mr.M.Ramesh has transported an excess quantum of 2,66,000 MT of raw sand against the quantity permitted in the approved mining plan. Hence, Mr M.Ramesh, who is the MD of the appellant company cannot take shelter under the argument that M/s.Indian Ocean Garnet Sands Company Pvt. Ltd and M/s.Manickam Minerals are separate entities and the appellant cannot be held responsible for the offence committed by M/s.Manickam Minerals. As the appellant had knowingly procured the Garnet abrasives from M/s.Manickam Minerals, the appellant unit is not ignorant of illegal mining and its export. Since the entire transaction is illegal, this forum cannot blindly extend the benefit of exemption Notification which is issued in Public Interest. The dictum *Ex turpi causa non oritur actio* is applicable in the instant case, i.e., from a dishonorable cause, an action does not arise which states that a person will be unable to pursue legal remedy if it arises in connection with his own illegal act. With respect to their contentions that as per Board's Circular in F.No.450/66/2009-CUS-IV, dated 08.07.2010, the Department can only share details of minerals exported with the state Government and the Circular does not authorize stopping of exports/rejecting export incentives, it is held that at the time of export, the Customs/Excise authorities are not aware whether the goods have been legally procured or not. However in the instant case the District Collector in District level Committee meeting minutes RC No.M3/40365/2015, dated 09.11.2016 has recorded that the appellant unlawfully transported beach sand minerals extracted from the raw sands which is against the Ban imposed by the Government of Tamilnadu vide order G.O.(MS) No.156, dated 08.08.2013 and G.O.(MS) No.173, dated 17.09.2013 which were not either stayed or set aside. Therefore the appellant's reliance on the above Board's Circular is of no avail."

The findings of the Commissioner (Appeals) in the Order-in-Appeal dated 14.10.2019 are similar to that in the Order-in-Appeal dated 27.02.2018 reproduced above. Government finds that the Commissioner (Appeals) in both the said Orders-in-Appeal have already addressed the grounds on which the applicant has preferred the present application and rejected the same. Government finds that the reports of the Chief Secretary to the Government, Tamilnadu, referred to above, clearly establishes that the applicant and their group of companies are suspected to have indulged in illicit mining and illicit transport of such minerals resulting in the stoppage of issuance of transport permits for the goods exported by the applicant. Given the circumstances, Government finds no fault in the decision of the Commissioner (Appeals) in the Orders-in-Appeal dated 27.02.2018 and 14.10.2019 wherein it was held that the export carried out by the applicant was not legal as it arose from an illegal act of mining which had been banned by the Government of Tamil Nadu and hence they would not be eligible to claim the benefit of the notification no.41/2012-ST dated 29.06.2012 which provided for rebate of duty paid on input services used to export goods legally. In view of the above, Government finds no reason to interfere with the impugned Orders-in-Appeal Nos.MAD-CEX-000-APP- 063 to 065 - 2018 dated 27.02.2018 and No.311 & 312/2019 dated 14.10.2019 and upholds the same.

12. As regards the Order-in-Appeal No.309 & 310/2019 dated 14.10.2019 wherein the appeal of the applicant was rejected by the Commissioner (Appeals) for failing to make the mandatory pre-deposit, Government finds that the said decision to be proper as the appeals in question could not be entertained by the Commissioner (Appeals) unless the applicant had made mandatory deposit stipulated by Section 35F of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. However, Government finds that the applicant during the course of these proceedings have submitted that they had earlier failed to make the said pre-deposit as a result of some misunderstanding and have now made the same. They have submitted screenshots of 'Details of Taxpayer Summary View' with respect to their firm, which indicates they have made payment of Rs.7,932/- and Rs.1,08,015/- on 05.12.2019 under the head 'Other Taxable Heads', which, they have submitted was towards pre-deposit in respect of the appeals before Commissioner (Appeals). Government finds that in such cases, wherein the applicants have subsequently paid the pre-deposit, the Hon'ble

High Courts have restored the appeals for being decided on merits. Government finds support in the decision of the Hon'ble High Court of Bombay in the case of Sportina Payce Infrastructure P. Limited vs UOI [2019 (365) E.L.T. 439 (Bom.)]. Relevant portion of the judgment is reproduced below:-

"We are of the view that there is no bar under Section 84 of the Act in filing an appeal without the pre-deposit being made. This if seen in the context of Section 107(6) of the Central Goods and Services Tax Act, 2017 which prohibits filing of appeal in the absence of statutory deposit. Even Section 35F of the Excise Act only prohibits appellate authority from entertaining the appeal. Section 84 of the Act r/w Section 35F of the Excise Act does not prohibit filing of the appeal without necessary deposit. It only prohibits the appellate authority from entertaining the appeal on merits. Therefore, where an appeal is dismissed for non-deposit and such deposit is made within a reasonable time of dismissal then, the appellate authority should exercise its inherent power to recall the order of dismissal and hear the petitioner's application on merits. This is a procedural review and not a review on merits of the case. Therefore, even in the absence of such power of recall being provided in the statute, every quasi judicial authority has inherent powers to exercise this power of recall in its inherent jurisdiction in the interest of justice. This has been so held by the Supreme Court in Grindlays Bank v. Central Govt. Industrial Tribunal, 1980 (supp.) SCC 420. Therefore, in the facts of this case, the Respondent No. 2 should have recalled his order dated 17th May, 2018 by allowing the petitioner's application dated 28th August, 2018.

6. In above view, the impugned order dated 17th September, 2018 and the order dated 17th May, 2018 are both quashed and set aside. The appeal of the petitioner is restored to the file of Respondent No. 2 - Commissioner (Appeals). This to enable disposal of the petitioner's appeal on merits, in accordance with law."

Thus, in view of the above, Government remands the cases decided vide Order-in-Appeal No. 309 & 310/2019 dated 14.10.2019 to the Commissioner (Appeals) for being decided afresh on merits.

13. As regards the prayer of the applicant that the subject Revision Applications may be kept in abeyance as they had challenged the said DLC reports before the Hon'ble High Court of Madras, Government finds that the applicant has not produced any evidence to indicate that the operation of the said DLC reports has been stayed by a higher Authority/Court. Thus, Government finds that the said DLC reports are still in force and the actions taken as a consequence of the same would also hold good. In the absence of

any stay granted by a higher Court, Government does not find any merit in the request of the applicant to keep the present applications in abeyance and hence rejects the same.

14. In summary, Government holds the impugned Orders-in-Appeal bearing Nos. Orders-in-Appeal Nos.MAD-CEX-000-APP- 063 to 065 - 2018 dated 27.02.2018 and No.311 & 312/2019 dated 14.10.2019 to be legal and proper and remands the Order-in-Appeal No. 309 & 310/2019 dated 14.10.2019 back to the Commissioner (Appeals) for being decided afresh on merits.

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

Shrawan
19/11/22
(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

33-39
ORDER No. /2022-57 (SZ) /ASRA/Mumbai dated 19.04.2022

To,

M/s Indian Ocean Garnet Sands Company P. Ltd.,
No.146, Palayamkottai Road,
Tuticorin - 628 003.

Copy to:

1. Commissioner of CGST & Central Excise, Madurai.
2. Commissioner of Central Excise (Appeals), Madurai, Circuit Office, 4, LBS Marg, C.R. Building, Madurai - 625002.
3. Commissioner of GST & Central Excise (Appeals), Coimbatore, Circuit Office - Madurai, 4, LBS Marg, C.R. Building, Madurai - 625002.
4. Sp. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Notice Board.