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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. 195/260/13-RA/6118 Date of Issue: 20.09.2021

ORDER NO. 345 /2021-CX (SZ) /ASRA/Mumbai DATED 30.09.2021 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 Modern Machine Manufacturers.

Respondent : The Commissioner of CGST & CX, Bengaluru North

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. 365/2012-C.E dated 08.11.2012 passed by the Commissioner of Central Excise (Appeals-I), Bangalore.

## ORDER

This revision application is filed by the M/s Modern Machine Manufacturers, 37 & 38B Industrial Estate, Ollur, Thrussur-680306, (hereinafter referred to as "applicant") against the Order-in-Appeal 365/2012-C.E dated 08.11.2012 passed by the Commissioner of Central Excise (Appeals -I), Bangalore.

2. The applicant is a merchant exporter and had procured three LPG storage tanks from M/s Senrco Engineering Co Private Ltd, Bangalore, who are holders of Central Excise Registration No AACCS6571RXM001 and had exported the same vide shipping bill No 2256143 dated 05.11.2009 to Afghanistan through Karachi Port. The applicant had filed rebate claim for rebate of central excise duties for an amount of Rs. 1,27,720/- paid by the manufacturer under Rule 18 of the Central Excise Rules, 2002 and Notification No 19/2004 CE (NT) dated 06.09.2004 read with Section 11B of the Central Excise Act, 1994.

3. It appeared that the merchant exporter had not followed the procedures prescribed in Notification No 19/2004-CE (NT dated 06.09.2004 as amended in as much as

(i) the manufacturer and the merchant exporter had not furnished the ARE 1 containing signature and seal of both

(ii) the goods have not been sealed at the place of dispatch i.e at the factory of the manufacture by the Central Excise Officer

(iii) the applicant had not furnished any evidence to show that the goods cleared from the factory of the manufacturer is the same goods exported by the merchant exporter.

4. In view of the above, show cause notice was issued to the applicant by Assistant Commissioner of Central Excise, Bangalore –III Division, Bangalore proposing to reject the rebate claim.

5. The claimant filed their reply vide letter dated 14.12.2010 and stated that they got an inquiry for LPG storage tank for US army stationed at Kabul, and it has to supplied within 45 days from receipt of advance payment. Since production of LPG storage tanks cameunder various act and regulation (of the explosive acts), producing in their factory was ruled out. Hence, they placed the order with M/s Senrco Engineering Co Pvt, Ltd, Bangalore. Since this was their first export, they applied for import export licence and got the same on 26.10.2009. Since their supplier also new to export and due to shortage of time, they could not get the proper advice on the rules and regulation for exporting and hence could not follow the procedure to be followed while exporting goods. On 06.11.2009, the tanks were loaded in tanks were the trailer lorry and after the mandatory custom clearance from ICD, Bangalore, the goods were transported to Mumbai port by road. Due to heavy rain and cyclonic storm their consignment could not reach in time and they were forced to store the tanks in the shipyard with extra cost for one week. They have enclosed the RC issued by commercial taxes, Government of Kerala and Vat list to show that they only export storage tank not manufactures.

6. The explanation of the applicant was accepted and the rebate claim of Rs. 1,27,720/- was sanctioned by the Assistant Commissioner, Bangalore III Division vide order in original No 37/11 (R)) dated 09.02.2011.

7. Being not satisfied with the legality and propriety of the Orders in Original, the Department filed an appeal before Commissioner of Central Excise (Appeals-I), Bangalore on the following grounds :-

(i) When the ARE1 is the export document as per para 2.1 of Chapter 8 pertaining to export under claim of rebate, of CBEC's Central Excise Manual, decision of the rebate sanctioning authority to waive the non-issue of the basic/ mandatory document for export, as a procedural condition and not a substantive one is erroneous and not legal.

(ii) Para 4.2 of Chapter 8 (Export Under Claim of Rebate) of CBEC's Central Excise Manual states that the duty payable shall be determined on the

ARE1 and invoice and recorded in the Daily Stock account. The procedure prescribed under para 6.2 and 6.3 is not followed and the sanction of rebate is bereft of law and in gross violation of the procedure prescribed for export under rebate.

(iii) In terms of paras 2.3 of the Board's Circular No.510/06/2000- CX dated 30.02.2000, it is mandatory for the Range officers to scrutinize the triplicate copy of the AR4 and then send them to the rebate sanctioning authority with suitable endorsement and the duty element shown on the AR-4 is to be rebated. The impugned order in original is silent on the Range Officer's report which shows that the rebate sanctioning authority sanctioned the claim without acceptance of proof of export which is mandatory.

(iv) The case laws cited by the rebate sanctioning authority in the impugned order in original has no relation to the issue at hand.

(v) In the absence of ARE1, the identity of the goods can be done only on the basis of the examination report appearing on the Shipping Bill which has not been discussed in the impugned order in original to establish the identity of the goods and hence the relevance of the BRC in the identification of goods in not known.

(vi) The details of the Bond and CT1 as prescribed under Circular No 711/27/2003-CX dated 30.04.2003 and 613/04/2002-CX dated 31.01.2002 for the Merchant Exporter to undertake is not forthcoming from /discussed in the impugned order in original. The procedural relaxation cannot be extended to the merchant exporter i.e M/s Modern Machine Manufacturers, Thrissur as it was not known whether the merchant exporter was registered under any Export Promotion Council.

(vii) The invoice Nos 31 & 32 issued by M/s. Senrco Engineering Co. Pvt Ltd, Bangalore are dated 06.11.2009 but the Shipping Bill No.2256143/05.11.2009 filed by the merchant exporter is earlier than the invoice since the goods have gone directly from the manufacturers premises and thus the export is irregular and does not merit sanction of rebate.

(viii) Date of disclaimer certificate is not mentioned in the impugned order in original.

(ix) In Para 9, it is clearly stated that the claimant has accepted that "The fault lies with the manufacturer in not following the procedure prescribed for goods meant for export." When the procedures have not been followed and the JAC has himself issued a notice to the claimant earlier it is not understood as to how the irregularities could be overlooked for sanction of rebate.

(x) There is a difference noticed between the invoice value which is Rs.15,50,000/- and the FOB value declared in the Shipping Bill which is Rs. 29,69,846/-

8. The Appellate Authority vide Orders in Appeal No. 365/2012-CE dated 08.11.2012 set aside the order in original and allowed the appeal filed by the Department. The Appellate Authority while upholding the appeal made following observations

a) There is no dispute with regard to the aspect that basic/mandatory documents stipulated for export of goods were not made available by the respondents and thereby the set procedures were not followed.

b) There is no strength in the contention that the department has traversed beyond the scope of the show cause notice.

c) Any set of procedures are framed with a specific purpose and the essential points to be taken care of is that the goods are ultimately exported should be duty paid (which naturally should be evidenced through documentation). The preparations of ARE-Is squarely serves the purpose wherein the goods which are manufactured and cleared on payment of duty can be correlated with the goods that are exported. Here the vital link is missing. Further even in the impugned order no efforts have been made by the original authority in that direction.

d) On perusal of the shipping bill, there is no clinching link to prove that the goods which were cleared on payment of duty by the manufacturer are the same which were ultimately exported by the merchant exporter.

9. Being aggrieved by the impugned Order in Appeal, the applicant filed the instant Revision Application on following grounds:-

a) The Assistant Commissioner has travelled beyond the scope of the original SCN and made out altogether new case in the Review which is against the principles of law.

b) The jurisdictional range officer vide letter dated 13.05.2010 has certified that Central Excise duties amounting to Rs. 59,328/- and Rs. 68,392/- has been paid by the manufacturer vide invoice no 31 and 32 both dated 06.11.2009 and the address shown on the respective invoices are 'US Army Corp of Engineers, Afghanistan Engineer District, South Kabul Area Office, Kabul, Afghanistan, which is clear evidence that the goods manufactured by the manufacturer have actually been exported. Thus, the findings of the Commissioner (Appeals) that the identity of goods not proved is incorrect and is liable to be rejected

c) That the non issuance of ARE 1 is a procedural irregularity which has been condoned by the Assistant Commissioner of Central Excise Bangalore III.

d) The department has not given evidence whether the goods have been diverted to DTA, if not exported.

e) Omission to file LUT or ARE-1 treated as procedural lapse by the original authority has not been faulted by Commissioner (Appeals).

10. A Personal hearing in the matter was granted on 22.03.2018, 26.08.2019, 08.01.2021, 15.01.2021, 25.02.2021, 19.03.2021, 26.03,2021, 20.04.2021, 27.04.2021,06.07.2021 and 20.07.2021. However, no one appeared for the personal hearing so fixed on behalf of applicant / department. Since sufficient opportunity to represent the case has been given, the case is taken up for decision on the basis of available documents on record.

11. 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.

12. In the instant case, Government observes that :-

a) As per the order in original, the applicant had submitted the original copy of the invoice, shipping bills, bill of lading, copy of the export invoice, attested copy of the mate receipt and bank realization certificate, NOC from the manufacturer and copy of the ER1 for November 2009, declaration from the applicant regarding purchase of the exported goods from the manufacturer.

b) The applicant has submitted the shipping bill No. 2256143 dated 05.11.2009 duly endorsed by the customs authorities.

c) The applicant has submitted the relevant BRCs to the authorities and copy of the ER1 for November 2009 evidencing discharge of duty on the goods.

12.1. The Government notes that the Manual of Instructions that have been issued by the CBEC specifies the documents which are required for filing a claim for rebate. Among them is the original / duplicate / triplicate copy of the ARE-1, the Excise Invoice and self-attested copy of shipping bill and bill of lading etc. Further paragraph 8.4 of the said Manual specifies that the rebate sanctioning authority has to satisfy himself in respect of essentially two requirements. The first requirement is that the goods cleared for export under the relevant ARE-1 applications were actually exported as evident from the original and duplicate copies of the ARE-1 form duly certified by customs. The second is that the goods are of a duty paid character as certified on the triplicate copy of the ARE-1 form received from the jurisdictional Superintendent of Central Excise. The object and purpose underlying the procedure which has been specified is to enable the authority to duly satisfy itself that the rebate of central excise duty is sought to be claimed in respect of goods which were exported and that the goods which were exported were of a duty paid character.

12.2. The Government holds that in order to qualify for the grant of a rebate under Rule 18, the mandatory conditions required to be fulfilled are that the goods have been exported and duty had been paid on the goods.

12.3. The Government notes that the ARE 1 have not been furnished by the manufacturer and the applicant. However, there is no doubt that the goods in question has been exported by the applicant as is evident from the endorsement of the customs authorities on the shipping bill. As regards the duty paid on the goods exported, the same has been certified by the rebate sanctioning authority as having been discharged through the Cenvat account of the manufacturer.

12.4. In view of above, the government holds that the deficiencies pointed out by the Appellate authority while setting aside the order in original sanctioning the rebate claims for the amount of Rs. 1,27,720/- are merely procedural infractions and the same should not result in the deprival of the statutory right to claim a rebate particularly when the substantial compliance has been done by the applicant with respect to conditions and procedure laid down under relevant notifications / instructions issued under Rule 18 of the Central Excise Rules, 2002.

12.5. The Government finds that in several decisions of the Union Government in the revisional jurisdiction as well as in the decisions of the CESTAT, the production of the relevant forms has been held to be a procedural requirement and hence directory as a result of which, the mere non- production of such a forms would not result in an invalidation of a claim for rebate where the exporter is able to satisfy through the production of cogent documentary evidence that the relevant requirements for the grant of rebate have been fulfilled. In the present case, no doubt has been expressed that the goods were not exported.

12.6. The Government further observes that a distinction between those regulatory provisions which are of a substantive character and those which are merely procedural or technical has been made in a judgment of the Supreme Court in **"Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner-1991 (55) E.L.T. 437 (S.C.)"**. The Supreme Court held that

the mere fact that a provision is contained in a statutory instruction "does not matter one way or the other". The Supreme Court held that non-compliance of a condition which is substantive and fundamental to the policy underlying the grant of an exemption would result in an invalidation of the claim. On the other hand, other requirements may merely belong to the area of procedure and it would be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes which they were intended to serve. The Supreme Court held as follows:

*"The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some other may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve."*

12.7. In this regard Government observes that while deciding the identical issue, Hon'ble High Court of Bombay in its judgment dated 24-4-2013 in the case of M/s. U.M. Cables v. UOI (WP No. 3102/2013 & 3103/2013) reported as TIOL 386 HC MUM CX. = 2013 (293) E.L.T. 641 (Bom.), at para 16 and 17 of its Order observed as under :-

*16. However, it is evident from the record that the second claim dated 20 March, 2009 in the amount of Rs. 2.45 lacs which forms the subject matter of the first writ petition and the three claims dated 20 March, 2009 in the total amount of Rs. 42.97 lacs which form the subject matter of the second writ petition were rejected only on the ground that the Petitioner had not produced the original and the duplicate copy of the ARE-1 form. For the reasons that we have indicated earlier, we hold that the mere non-production of the ARE-1 form would not ipso facto result in the invalidation of the rebate claim. In such a case, it is open to the exporter to demonstrate by the production of cogent evidence to the satisfaction of the rebate sanctioning authority that the requirements of Rule 18 of the Central Excise Rules, 2002 read together with the*

*notification dated 6 September, 2004 have been fulfilled. As we have noted, the primary requirements which have to be established by the exporter are that the claim for rebate relates to goods which were exported and that the goods which were exported were of a duty paid character. We may also note at this stage that the attention of the Court has been drawn to an order dated 23 December, 2010 passed by the revisional authority in the case of the Petitioner itself by which the non-production of the ARE-1 form was not regarded as invalidating the rebate claim and the proceedings were remitted back to the adjudicating authority to decide the case afresh after allowing to the Petitioner an opportunity to produce documents to prove the export of duty paid goods in accordance with the provisions of Rule 18 read with notification dated 6 September, 2004 [Order No. 1754/2010-CX, dated 20 December, 2010 of D.P. Singh, Joint Secretary, Government of India under Section 35EE of the Central Excise Act, 1944]. Counsel appearing on behalf of the Petitioner has also placed on the record other orders passed by the revisional authority of the Government of India taking a similar view [Garg Tex-O-Fab Pvt. Ltd. - 2011 (271) E.L.T. 449] and Hebenkraft - 2001 (136) E.L.T. 979. The CESTAT has also taken the same view in its decisions in Shreeji Colour Chem Industries v. Commissioner of Central Excise - 2009 (233) E.L.T. 367, Model Buckets & Attachments (P) Ltd. v. Commissioner of Central Excise - 2007 (217) E.L.T. 264 and Commissioner of Central Excise v. TISCO - 2003 (156) E.L.T. 777.*

17. *We may only note that in the present case the Petitioner has inter alia relied upon the bills of lading, banker's certificate in regard to the inward remittance of export proceeds and the certification by the customs authorities on the triplicate copy of the ARE-1 form. We direct that the rebate sanctioning authority shall reconsider the claim for rebate on the basis of the documents which have been submitted by the Petitioner. We clarify that we have not dealt with the authenticity or the sufficiency of the documents on the basis of which the claim for rebate has been filed and the adjudicating authority shall reconsider the claim on the basis of*

*those documents after satisfying itself in regard to the authenticity of those documents. However, the rebate sanctioning authority shall not upon remand reject the claim on the ground of the non-production of the original and the duplicate copies of the ARE-1 forms, if it is otherwise satisfied that the conditions for the grant of rebate have been fulfilled. For the aforesaid reasons, we allow the Petitions by quashing and setting aside the impugned order of the revisional authority dated 22 May, 2012 and remand the proceedings back to the adjudicating authority for a fresh consideration. The rejection of the rebate claim dated 8 April, 2009 in the first writ petition is, however, for the reasons indicated earlier confirmed. Rule is made absolute in the aforesaid terms.*

12.8. Government also observes that Hon'ble High Court, Gujarat in Raj Petro Specialities Vs Union of India [2017(345) ELT 496(Guj)] also while deciding the identical issue, relying on aforestated order of Hon'ble High Court of Bombay, vide its order dated 12.06.2013 observed as under:

7. *"Considering the aforesaid facts and circumstances, more particularly, the finding given by the Commissioner (Appeals), it is not in dispute that all other conditions and limitations mentioned in Clause (2) of the notifications are satisfied and the rebate claim have been rejected solely on the ground of non-submission of the original and duplicate ARE1s, the impugned order passed by the Revisional Authority rejecting the rebate claim of the respective petitioners are hereby quashed and set aside and it is held that the respective petitioners shall be entitled to the rebate of duty claimed for the excisable goods which are in fact exported on payment of excise duty from their respective factories. Rule is made absolute accordingly in both the petitions".*

13. Government finds that ratios of aforesaid Hon'ble High Court orders are squarely applicable to the instant case in so far as the matter of sanction of rebate claim of Rs. 1,27,720/- is concerned.

14. In view of discussions and findings elaborated above, Government holds that impugned rebate claims for Rs.1,27,720/- are admissible in terms of

Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/04-CE (N.T.) dated 06.09.2004.

15. In view of the above, Government holds that ends of justice will be met if the impugned Order in Appeal is set aside. Accordingly, Government sets aside the Order in Appeal No 365/2012-CE dated 08.11.2012 passed by Commissioner of Central Excise (Appeals-I), Bangalore

16. The Revision applications are allowed on above terms.

Shrawan 30/9/21

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

ORDER No.345/2021-CX (SZ) /ASRA/Mumbai DATED 30.09.2021

To,

M/ s. Modern Machine Manufacturers,
37 & 38B Industrial Estate, Ollur,
Thrussur-680306

Copy to:

1. The Commissioner of CGST & CX, Bengaluru North, No. 59, HMT Bhavan, Bellary Road, Bengaluru 560 032
2. The Commissioner of CGST & CX (Appeals I), Traffic and Transit Management Centre, BMTC Bus Stand, HAL Airport Road, Dommaluru, Bengaluru-560 071
3. Sr. P.S. to AS (RA), Mumbai
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5. Spare Copy.