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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, Cuffe Parade,
Mumbai- 400 005

F.No.195/782/2012-RA / 1980 Date of Issue: 22.11.2018

ORDER NO. 347 /2018-CX (WZ)/ASRA/MUMBAI DATED 23/10/2018 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 THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Balaji Fibres,4C Dover Place, 9 Hall Road, Richards Town, Bangalore-560 005.

Respondent : Commissioner, Central Excise, Raigad.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. US/412/RGD/2012 dated 19.06.2012 passed by the Commissioner(Appeals-II), Central Excise, Mumbai.

ORDER

This revision application is filed by the M/s Balaji Fibres (hereinafter referred to as "the applicant") against the Order-in-Appeal No. US/412/RGD/2012 dated 19.06.2012 passed by the Commissioner(Appeals-II), Central Excise, Mumbai upholding the appeal filed by the Revenue and setting aside the Order-in-Original No. 983/11-12/DC / Rebate)/ Raigarh dated 12.10.2011 passed by Dy. Commissioner of Central Excise (Rebate) Raigarh whereby the Adjudicating Authority had sanctioned rebate claims amounting to Rs. 2,39,100/-(Rupees Two Lakhs Thirty Nine Thousand and One Hundred Only)

2. The issue in brief is that the applicant, a merchant exporter, had filed Rebate claims amounting to Rs. 2,39,100/- under the provisions of Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004. The Dy. Commissioner of Central Excise (Rebate) Raigarh, vide Order-in-Original No. 983/11-12/DC / Rebate)/ Raigarh dated 12.10.2011 sanctioned rebate claim of Rs. 2,39,100/- under Section 11B of the Central Excise Act, 1944 read with Rule 18 of the Central Excise Riles, 2002. The department then filed an appeal with the Commissioner(Appeals) on the ground that the goods were exported by availing benefit under Notification No.21/2004- CE(NT) dated 6.9.2004 as certified by them at Sr.No.3(b) of the ARE-1. Under the said Notification it is mandatory to clear the goods for export in form ARE-2 and file the rebate claims with the jurisdictional Assistant/Deputy Commissioner. The Commissioner(Appeals-II), Central Excise, Mumbai vide Order-in-Appeal No. US/412/RGD/2012 dated 19.06.2012 set aside the Order-in-Original dated 12.10.2011 and the appeal filed by the Revenue was allowed.

3. Being aggrieved, the applicant filed Revision Application on the following grounds:

3.1 that the impugned order passed by Commissioner(Appeals-II) is illegal, erroneous and unsustainable.

3.2 that regarding Appeal being not maintainable:

(a) Appeal, if any, against the said Order-in-Original was required to be filed within three months of the date of communication of order. The Office of the Dy. Commissioner (Rebate) as well as Commissioner (Appeals-II) are located in the same building, one being on the first floor and other being on the 9th floor. Being in the same building, the date of communication of order has to be presumed as the date on which the order was signed or at best the date on which the order was dispatched. In the present case, the order was dated 12.10.2011 and had been dispatched on 14.10.2011 as per the dispatch date appearing on the Order- in-Original. Directions if any for filing an appeal in exercise of powers conferred on the Commissioner vide Section 35 (E) of the Central Excise Act, 1994 should have been issued within 3 months of the date of communication i.e. latest by 14/15 of January 2011. However, directions in the present case have been issued on 2.3.2012 which is much beyond the period of 3 months. Strangely, to overcome the period of limitation, the Commissioner, while issuing directions to file an appeal, has given entirely different dates by employing words 'communicated for review". Once the order is received by the Office of the Commissioner Central Excise, the date on which the order is received is to be considered as date of communication and there is no separate date prescribed as date of communication for the purpose of review. Since the two offices are located in the same building, the date of signing the order/ date of dispatch

has to be taken as date of communication of the order as has also been held by the Hon'ble Supreme Court in the case of Collector of Central Excise Vs. M.M. Rubber Company reported in 1991 (55) E.L.T. 289 (S.C) wherein it was held that the limitation of one year in case of suo motu review by the department runs from the date of signing of the order. In view of this, the appeal filed by the department is not maintainable and should have been straightaway dismissed without going into the merits. The impugned order is, therefore, liable to be struck down on this ground alone.

(b) Further, a plea of appeal being not maintainable; being a question of law, can be raised at any stage as has been held by the Hon'ble Supreme Court in case of

(i) Paul Industries Vs. Union of India reported in 2004 (71) E.L.T. 299 (S.C),

(ii) Ajay Singh Vs. State of Punjab 2000 (118) E.L.T. 4 (S.C),

(iii) Commissioner Vs. Macnaive Escorts 2003 (152) E.L.T. A 87 (S.C).

In view of this, even though this plea was not taken before the Commissioner (Appeals-II), the same can be taken at the revision application stage and accordingly the impugned order is liable to be set aside without going into the merits.

3.3 ARE-1 is not an Assessment Document as :

(a) the only grounds on which the Commissioner (Appeals-II) has set aside the order of the Adjudicating Authority is that once the applicant has certified on the copy of ARE-1

that it was availing the facility under Notification No. 21/2004-CE(NT) dated 06.09.2004, it was not open for him to reassess it as ARE-1, is an assessment document which is assessed by an assessee. In support of his contention, Commissioner (Appeals-II) had placed his reliance on the Board's circular No. 1510/06/ 2000-CS dated 3.2.2000 clarifying that any scrutiny of the correctness of the assessment can be done by Jurisdictional Assistant/ Dy. Commissioner only. Applicant submits that ARE-1 is not an assessment document and is simply an application for removal of goods for the purpose of export both under Bond as well as under claim of Rebate of duty. In case of export under claim of rebate of duty, it simply indicates the amount of duty already paid on the goods, which amount is also certified by the Jurisdiction Officer on the back of ARE-1 form as having been paid by mentioning the PLA / RG-23A Part II Entry No. under which the duty amount has been debited. Duty is assessed on an invoice or on RT-12 return and not on ARE-1 form, as has been erroneously held by the Commissioner (Appeals-II). Jurisdiction Officer only certifies the duty paid on the goods but does not assess it.

(b) The Commissioner (Appeals-II) had grossly erred in holding that declaration given on ARE-1 form cannot be changed. The declarations are always subject to scrutiny to be carried out by the sanctioning authority and the rebate sanctioning authority has the power to reject the claim if the declarations are found to be incorrect. In fact, all necessary verification regarding payment of duty and factum of export have been carried out by the Assistant

Commissioner before sanctioning the rebate. The Commissioner (Appeals-II) had failed to note that rebate in respect of the inputs used in the manufacture of export goods can be sanctioned only to those exporters/ manufacturers who do not avail Cenvat credit of duty paid on the inputs. In the present case, they had declared at Sr. No.3 (a) of ARE-1 form that they was availing credit of duty paid on inputs and had also submitted a certificate from the Jurisdictional Superintendent that they had never claimed any rebate of input duty. Once they are availing Cenvat credit of input duty, they could not have claimed rebate of input duty, and accordingly could not have filed his claim in ARE-2 form. In fact the declarations under Sr.No. 3 (a) and Sr.No. 3 (c) are contradictory to each other as once the input duty credit is availed, the benefit of Notification 21/ 2004 cannot be availed. In view of the same, Commissioner (Appeals)'s finding that claim should have been filed in ARE-2 form with Jurisdictional Assistant / Dy. Commissioner instead in ARE-1 form, is clearly erroneous, unsustainable and, therefore, is liable to be set aside on this ground alone.

3.4 Regarding Notification 21/2004 CE-NT being enabling provision:

(a) Notification 21/ 2004 CE-NT dated 6.9.2004 is only an enabling provisions which enables an assessee to claim rebate of duty paid on input used in the manufacture of finished goods exported as well as duty paid on the finished goods for which purpose an application has to be filed in ARE-2 form with the Jurisdictional Assistant / Dy. Commissioner. It nowhere lays down that even where the applicant does not intend to claim rebate of input duty as he has availed credit of duty paid on inputs, it cannot file

a rebate claim in ARE-1 form for the purpose of claiming rebate of duty paid on finished goods exported by him. In fact, ARE-1 form is the only correct form for all those cases where rebate is being claimed in respect of duty paid on finished goods exported by an exporter. Since, in this case, the Jurisdictional Superintendent has also certified that they was not availing rebate of input duty and when the applicant in his claim application has not claimed rebate of input duty, there was no ground for the department and the Commissioner (Appeals-II) to hold that the claim should have been filed with Jurisdictional Assistant / Dy. Commissioner in the ARE-2 form. Such a finding is clearly liable to be set aside.

3.5 Regarding claim being filed in an incorrect office :

(a) Applicant submits that presuming but not admitting that the claim was filed in incorrect office, it is his submission that a claim if bona fide filed in an incorrect office and the same is accepted without demur and not returned as defective, the Revenue is no longer entitled to reject the claim merely on account of such a defect in the filing of a claim. In this they relied on the decision of the Tribunal in the case of Steel Authority of India Ltd. 1990 (50) E.L.T. 83 (Tri.) and Sun Pharmaceuticals Ltd. 2003 (158) E.L.T. 94 (Tri.) wherein it was clearly held that if a claim which is filed in an incorrect office, is accepted without demur and also entertained by the said officer without directing the claimant to file the claim with the correct office, such a claim cannot be subsequently rejected only on account of such an irregularity. The Tribunal has gone to the extent of holding that it was the duty of the officer who

received the claim to have guided the assessee to file the claim with the proper authority.

(b) Further, they relied on the decision of the Hon'ble Tribunal in an identical case before Hon'ble Chennai Tribunal in the case of TAFE Ltd. Vs. Commissioner 2008 (227) E.L.T 80 (TH.) wherein the Tribunal held as under :-

> *"The rebate claim filed by the applicant was entertained by the original authority and the rebate sanctioned. In review order of the original authority was not found to be defective except for the lack of jurisdiction As the rebate claim was found to be in order in review except for the jurisdictional aspect, I find that it is necessary for the applicants to approach the jurisdictional Assistant Commissioner TAL to undertake the same exercise which is of no material consequence. As was urged by the Counsel for the applicants, a different Assistant Commissioner sanctioning the refund involves only an administrative adjustment of funds disbursed as rebate for statistical purposes. Moreover, a similar sanction order No. 1/96, dated 31.5.06 passed by the Assistant Commissioner, Chennai-I Division, Chennai-II Commissionerate in a claim of similar facts has been accepted by the department and no appeal filed against the same. In the circumstances, the appeal filed by TAFE is allowed restoring the order-in-original No. 4/06 RB dated 21.4.06."*

In view of the above Hon'ble Tribunal decision applies on all fours to its case under consideration and the Commissioner (Appeals-II) order, is therefore, liable to be set aside.

3.6 That very recently, the Government of India in a Revision Application in the case of Reliance Industries reported in 2012

(275) E.L.T. 277 (G.O.I) held that once there is no dispute with respect to payment of duty on export goods and actual export of goods, the fundamental requirement of export of duty paid goods gets satisfied and the applicant cannot be penalized for the lapses on the part of the departmental authority in entertaining and sanctioning the claim without jurisdiction and the legitimate export benefits cannot be denied on technical lapses. Further, the Hon'ble Supreme Court's decision in the case of Priyanka Overseas Ltd. reported in 1991 (51) E.L.T. 185 (S.C.) wherein it was held that the Revenue cannot take advantage of its own wrong. In view of this, once the claim has been entertained and sanctioned by the Dy. Commissioner presuming but not admitting that the said Dy. Commissioner was not competent to sanction the claim, the claim could not have been denied on the grounds of lack of jurisdiction ,once the factum of export and payment of duty on exported goods is established.

3.7 That Rebate / drawback and other export promotion schemes of the Government are incentive oriented financial schemes in India to boost exports in order to promote exports by exporters to earn foreign exchange for the country. In case the substantive fact of export having been made is not in doubt, a liberal interpretation has to be accorded in case of technical lapses, if any, in order not to defeat the very purpose of such scheme. This view finds support from Madras High Court decision in the case of Ford India Pvt. Ltd. Vs. Assistant Commissioner reported in 2011 (272) E.L.T. 353 (Madras) and Supreme Court decision in the case of Union of India Vs. A.V. Narasimhalu reported in 1983 (13) E.L.T. 1534 (S.C) wherein it was observed that the administrative authorities should instead of relying on technicalities, act in a manner consistent with the broader

concept of justice. Procedural infractions of Notifications / circulars are to be condoned if exports have taken place actually and substantive benefit should not be denied. A rebate being a financial scheme, it should be interpreted liberally. Rebate cannot be denied on technicality. There are catena of judgments of tribunal and Government of India holding the view that once the factum of exports is not denied the rebate should not be withheld on account of procedural deficiency.

3.8 That in their case, there is no deviation in the procedure as all requirements laid down under Notification 19/2004-CE (NT) dated 6.9.2004 have been complied with and also verified by the sanctioning authority. However, if for some reasons, it is still held that the claim was to be filed in ARE-2 form with Jurisdictional Assistant / Dy. Commissioner, the rebate claim cannot be denied once the fact of duty having been paid and the goods being exported is not being disputed by the department.

3.9 that the order in appeal may kindly be set aside and Dy. Commissioner's order sanctioning the rebate claim be restored.

4. A personal hearing in the case was held which was attended by Shri Karan Sarawagi, Advocate on behalf of the applicant. The applicant reiterated the submission filed in Revision Application and pleaded that the Order-in-Appeal be set aside and Revision Application be allowed in view of case law 2014(314) ELT 949 (GOI) and 2014(313) ELT 921 (GOI).

5. 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.

6. On perusal of records, Government observes that the applicant, a Merchant Exporter had filed rebate claims of duty totally amounting to Rs.

2,39,100/- in respect of goods exported by them under provisions of Rule 18 of the Central Excise Rules, 2002 read with Notification 19/2004 - Central Excise (NT) dated 06.09.2004 along with relevant documents. The claims were sanctioned by Deputy Commissioner after he was fully satisfied that the goods mentioned in the various ARE-1's filed by applicant have been actually exported and duty as indicated on the relevant ARE-1's has actually been paid duly certified by the Jurisdictional Officer. While sanctioning the claim, Dy. Commissioner in his findings stated that the goods had been exported within the period as stipulated under Notification No. 19/2004 - CE(NT) dated 03.09.2004 and the claims for rebate had been lodged within the period as stipulated under Section 11(B) read with Rule 18 of the Central Excise Rules 2002. The goods were excisable and the description and quantity of goods as mentioned in ARE-1 vis-a-vis in Shipping Bill and Bill of Lading tallies and were in order and that the triplicate copy of ARE-1 carried an endorsement of Excise Officer in Part A, that the export clearance was recorded in daily stock register. The duty payment had been ascertained from the invoice and from the endorsement on ARE-1 Part A by Superintendent-in-charge of the manufacturing unit and that the exported goods covered by ARE-1 had been certified as exported by the Customs Officer in Part B of original and duplicate ARE-1 which aspect was also supported by Bills of Lading and Shipping Bills. The Superintendent, Range-IV, Dn-III, Silvassa, Vapi Commissionerate vide his letter dated 27.5.2011 also confirmed the verification of duty payment. Further, the applicant has copies of BRC in respect of all claims.

7. Government observes that the applicant in the said ARE-1s at Sr. No.3 (b) certified that applicant had cleared the goods for exports by availing benefit under Notification No. 21/2004-CE (NT) dated 26.09.2004 and the applicant in their submissions have stated that due to oversight the words "without availing" was struck. Government notes that as per provisions of Notification No. 21/2004-CE (NT) dated 26.09.2004, the manufacturer can claim rebate of duty paid on excisable goods used in the manufacture of

exported goods, subject to the conditions that it does not avail of Cenvat Credit of input duty. Here it is an admitted position that the manufacturer had availed credit on inputs which fact was also certified at Sr. No.3 (a) of the ARE-1s and also in Part-A (1) wherein the jurisdictional Superintendent and Inspector had certified that the duty has been paid by debit entry in Cenvat Account Entry. As such, the exported goods are duty paid goods. Once, it has been certified that exported goods have suffered duty at the time of removal, it can be logically implied that provisions of Notification No. 21/2004-C.E. (N.T.), dated 6-9-2004 and Notification 43/2001-C.E. (N.T.), dated 26-6-2001 cannot be applied in such cases. There is no independent evidences on record to show that the applicant have exported the goods without payment of duty under ARE-2 or under Bond. Under such circumstances, Government finds force in contention of applicant that they have by mistake ticked in ARE-1 form declaration that they have availed benefit of Notification 21/2004-C.E. (N.T.), dated 6-9-2004 and Notification 43/2001-C.E. (N.T.), dated 26-6-2001. In this case, there is no dispute regarding export of duty paid goods. Simply ticking a wrong declaration in ARE-1 form cannot be a basis for rejecting the substantial benefit of rebate claim. Under such circumstances, the rebate claims cannot be rejected for procedural lapses of wrong ticking. In catena of judgments, the Government of India has held that benefit of rebate claim cannot be denied for minor procedural infraction when substantial compliance of provisions of notification and rules is made by claimant. Applying the ratio of such decisions, Government finds that rebate claims in impugned cases cannot be held inadmissible.

8. In this connection Government relies on the GOI Order Nos. 154-157/2014-CX, dated 21-4-2014 [2014 (314) E.L.T. 949 (G.O.I.)] in case of Socomed Pharma Pvt. Ltd. wherein it was held that wrong declaration ticked by mistake in ARE-1 does not make the provisions of Notification Nos. 21/2004-C.E. (N.T.) and 43/2001-C.E (N.T.) not applicable and merely ticking a wrong declaration in ARE-1 form cannot be a basis for rejecting

substantial benefit of rebate claim. Government notes that non ticking/filling of Sr. No. 3 (b) of ARE-1 Forms cannot be a basis for rejecting the substantial benefit of rebate claim when there is no dispute regarding export of duty paid goods.

9. Governement notes that it has time and again been emphasized by the GOI and Higher Courts that the substantial benefit of rebate is not to be denied on technical and procedural grounds when duty paid and export of the goods is established. Such technical and procedural lapses are liable to be condoned. Here the Governement relies upon the following case laws in support of the above findings

(1) Government of India in the case of M/s. Sanket Industries Ltd (2011 (268) E.L.T. 125 (G.O.I)

(2) Deesan Agro Tech Ltd (2011 (273) E.L.T. 457 (G.O.I)

10. Government observes that the Commissioner(Appeal-II) has placed his reliance on the Board's Circular No. 510/06/2000-CS dated 3.2.2000 clarifying that any scrutiny of the correctness of the assessment can be done by the Jurisdicitional Assistant/Dy. Commissioner only. Government notes that ARE-I is not an assessment document and is simply an application for removal of goods for the purpose of export i.e. under bond or under claim of rebate of duty. And in case of export under claim of rebate of duty, it simply indicates the amount of duty already paid on the goods, which amount is certified by the jurisdictional officer in Part –A of ARE-I form as having paid by mentioning the PLA/RG-23A Part-II Entry No. under which the duty amount has been debited and the duty is assessed on an invoice. In this case, the Dy.Commissioner (Rebate) in his findings in the Order-in-Original dated 14.10.2011 has covered all the aspects in respect of the rebate claimed by the applicant

FINDINGS

"The above claims filed by the claimant have been processed and it is observed that :

1. *The goods have been shipped within period as stipulated under Notfn. No, 19/2004-CE(NT) dated 06-09-2004 and the claims for rebate have been lodged with period as stipulated under Section 11B read with Rule 18 of Central Excise Rules, 2002.*
2. .....
3. ....
4. *The triplicate copy of ARE-1 carries the endorsement of Excise Officer in Part A that the export clearance is recorded in Daily Stock Register.*
5. *The duty payments has been ascertained from the invoice and from the endorsement on ARE-1 Part A by Supdt. in-charge of manufacturing unit.*
6. ...
7. *The market price as declared in the ARE-1/Invoice is seen to be more that the rebate claimed.*
8. ....
9. ....

10 ..... The Shipping bill verification is done on the basis of software data received from the MCD, JNCH, which reveals that the goods have been exported and the particulars tallies with other export documents. The Supdt. C.Ex. Range-IV, Dn III Silvassa, Commissionerate-Vapi vide LETTER F.NO. SLV-IV/DIV-III/VERIFICVATION/11-12 dated 27.05.2011, has confirmed the verification of duty payment. The same also has been confirmed over telephone.

10....."

Government notes that here is no dispute with respect to payment of duty on export goods and actual export of goods, the fundamental requirement of export of duty paid goods gets satisfied and the Dy. Commissioner after due verification of all the documents has correctly sanctioned the rebate claims.

11. Hon'ble Bombay High Court in UM Cables Limited Vs UOI [2013 (293) E.L.T. 641 (Bom.)] while holding that Notification No. 19/2004-C.E. (N.T.) and C.B.E. & C. Manual of Supplementary Instructions of 2005 only facilitate processing of rebate application and enables authority to be

satisfied that requirement of goods having been exported and being of duty paid character and it cannot be raised to level of mandatory requirement has observed as under :-

> *"12. The procedure which has been laid down in the notification dated 6 September, 2004 and in CBEC's Manual of Supplementary Instructions of 2005 is to facilitate the processing of an application for rebate and to enable the authority to be duly satisfied that the two fold requirement of the goods having been exported and of the goods bearing a duty paid character is fulfilled. The procedure cannot be raised to the level of a mandatory requirement. Rule 18 itself makes a distinction between conditions and limitations on the one hand subject to which a rebate can be granted and the procedure governing the grant of a rebate on the other hand. While the conditions and limitations for the grant of rebate are mandatory, matters of procedure are directory.*
>
> *13. 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 [at paragraph 11]. 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."s***

12. In view of the above, the Government hold that since the export of duty paid goods is not in dispute, the rebate claim in question cannot be denied. As such, Government holds that in the instant case the rebate claim is admissible to the applicant under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. Government. Accordingly, holds the impugned Order-in-Appeal No. US/412/RGD/2012 dated 19.06.2012 be set aside and Order-in-Original No. 983/11-12/DC / Rebate)/ Raigarh dated 12.10.2011 sanctioning the rebate claim is restored.

13. The revision application, thus, succeeds in above terms.

14. So ordered.

22/X/18

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

ORDER No. 347 /2018-CX (WZ)/ASRA/Mumbai DATED 23.10.2018.

To,
M/s Balaji Fibres,
4C Dover Place,
9 Hall Road,
Richards Town,
Bangalore-560 005.

ATTESTED

22/11/18
S.R. HIRULKAR
Assistant Commissioner (R.A.)

Copy to:

1. The Commissioner, Central Excise, (Appeals) Raigad.
2. The Deputy / Assistant Commissioner(Rebate), GST & CX Mumbai Belapur.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy.