REGISTERED
SPEED POST

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.198/103-104/2013-RA Date of Issue:

ORDER NO. 349-350/2021-CX (WZ)/ASRA/MUMBAI DATED 30.09.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Commissioner, Central Excise, Thane-I

Respondent: M/s Guddi Plastcon Pvt. Ltd.

Subject : Revision Application filed by the Commissioner, Central Excise, Thane-I, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No SB/91-92/Th-I/2010 dated 15-07-2010 passed by the Commissioner (Appeals), Central Excise, Mumbai Zone-I.

ORDER

This Revision Application is filed by Commissioner of Central Excise, Thane-I (hereinafter referred to as "the Applicant") against Order-in-Appeal No SB/91-92/Th-I/2010 dated 15-07-20210 passed by the Commissioner (Appeals), Central Excise, Mumbai Zone-I.

2. The brief facts of the case are that M/s Guddi Plastcon Pvt. Ltd. (hereinafter referred to as "the respondent"), situated at Gala No. 6 &7 Nirmal Ashish Indl. Estate, Taluka Shahapur, Asangaon, had filed six rebate claims in respect of the ARE-1s Nos. 84 to 86, 93 to 95, 96 to 98, 99, 100, 103,104, 105, 107,108 & 111 of 2008-09 (total rebate claim amounting to Rs.4,83,067/-) on 20-01-2009 and five rebate claims in respect of the ARE-1 Nos. 117 to 119,120 to 122, 128 to 130, 131, 133, 134, 136 and 140 of 2008-09 (total rebate claim amounting to Rs.4,13,074/-) on 13.03.2009. The clearances in all these ARE-ls were to SEZ, Jamnagar. The respondent had not furnished the "bill of export" in respect of the above said ARE-ls. In terms of Rule 30(3) of SEZ Rules 2006, 'Bill of Export' is an essential document which is required to be duly assessed in terms of Rule 30(6) ibid. The goods procured by a Unit or Developer under claim of export entitlements are allowed admission into the SEZ on the basis of a Bill of Export, which is assessed by the Authorized Officer before arrival of the goods. This fact was brought to the Respondent's notice. The respondent, vide their letter filed on 20-03-09, stated that they are neither taking any duty drawback, nor getting DEPB benefits and therefore they cannot make application for bill of export. Further, vide their letter dated 30.03.2009 and 10.04.09, they informed that the Rule 30(3) of SEZ Rules 2006 applies to Unit or Developer who wants to claim export entitlements benefit and not to DTA supplier like them, and as per Rule 30(1) and 30(2) ibid, a unit or developer in SEZ can procure the goods from the DTA suppliers and the goods so procured are allowed admission into the SEZ on the basis of ARE1, if they do not avail of export entitlement, in such a situation the bill of export is not required.

3. Two SCNs were issued to applicant asking them to show cause as to why the above said rebate claims should not be denied in view of non-fulfillment of conditions under Rule 30(3) of the SEZ Rules 2006 for all the subject ARE-I's. The adjudicating authority vide O1O No. R -84/2008-09 Dt. 17-04-09 rejected the rebate claims amounting to Rs 4,83,067/- and vide OIO No. R-219/2009-2010 dated 01-06-2009 rejected the rebate claim amounting to Rs.4,13,074/-. Being aggrieved with the said Orders-in-Original the appellant preferred appeal before Commissioner (Appeals).

4. Commissioner (Appeals) held that 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 the supplies are made from DTA to SEZ. The Circular also lays down the procedure and the documentation for effecting supply of 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 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. Commissioner (Appeals) vide OIA No SB/91-92/Th-I/2010 dated 15-07-2010 set aside both the Orders in Original No. R-219/2009-2010 dated 01-06-2009 and No. R-84/08-09 dt. 17-04-09 passed by the Deputy Commissioner, Central Excise, Kalyan-II Dn. Thane I, and held that the rebate claims of M/s Guddi Plastcon Pvt. Ltd is proper and genuine, relying upon the following case laws:

1. 2004(178)ELT 834 (Tri Kolkatta) 1OC Ltd. Vs Commr. C.Ex. Kolkatta 1
2. 2010(249)ELT3 (Gu) Essar Steel Ltd. Vs Union of India
3. 2009(246)ELT 252(Tri, Ahmedabad) NBM Industries Vs CCE Ahmedabad.
4. Letter dt. 27-04-09 of Dy. Commr. of Customs, Reliance, Jamnagar SEZ confirming receipt of the goods in SEZ area. Commissioner (Appeal).

5. The department had filed an appeal before CESTAT, Mumbai under Rule 6 of the Central Excise (Appeal) Rules, 2001 read with explanation no.1 to Rule 6 of the CESTAT (Procedure) Rules 1982 on 26-12-2010 on the grounds that Commissioner Appeals has not considered the point of law as to whether the supplies made to SEZ are treated as export and are admissible for rebate. CESTAT vide Order No. A/301-302/13/SMB/CIV dated 25-06-2013 had dismissed the Appeal as non-maintainable as per the provisions of Section 35B of the CEA, 1944 which stipulate that the Tribunal has no jurisdiction to entertain appeals in respect of Rebate claims. The department then filed two Revision Applications along with prayer for condonation of delay on the following grounds:

a) The requirement of fulfillment of all condition specified under the Notification issued thereunder have not fulfilled and no evidence to prove its fulfillment has been put forth by the assessee. Thus, this cannot be said to be covered under the provision made vide Board's circular No. 06/2010 Cus dated 09-03-2010 read with circular F No. DGEP/SEZ/13/2009 dated 19-03-10. The assessee's contention accepted by Commissioner (Appeal) is not proper.

(b) The Commissioner (Appeal) erred in considering "SEZ Clearance as "'export clearance" in terms of Rule 18 of the Central Excise Rules 2002. Rebate under Rule 18 of C Ex. Rules 2002 and Notification issued there

under is given only in case of actual export out of India. Rule 18 of the Central Excise Rules 2002 reads as follows:

"*Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification*"

.It is evident from the wording that rebate of duty on such excisable goods or duty paid on material used in the manufacture or processing of such goods, rebate shall be subjected to such conditions or limitation, if any, and fulfilment of such procedure as may be specified in the notification. Nowhere the words, "SEZ clearance", are mentioned and as such SEZ Clearance effected by DTA will not be entitled for any rebate benefit under Rule 18 of Central Excise Rules 2002.

(c) Commissioner (Appeal) has overlooked the condition of Rule 30 (6) which states that "The Bill of Export shall be assessed in accordance with the instructions and procedures, including examination norms, laid down by the Department of Revenue as applicable to export goods. Provided that at the time of assessment, it shall be specifically examined whether the goods are required for the authorized operations by the Unit or Developer, with reference to the Letter of Approval or the list of goods approved by the Approval Committee for the Developer". In the instant case, bill of export is not submitted by the appellant with the rebate claim.

(d) Commissioner (Appeal), while deciding the issue has not gone in depth of the case and has not taken into consideration the definition of the term "export", as defined in Section 2(18) & 12 ibid, in the Custom Act 1962 and that of Section 2(m) of the Special Economic Zone Act 2005, and simply relied upon letter dt. 27.04.09 of Development Commissioner of Customs, Reliance, Jamnagar SEZ, He has also not taken into consideration the citation of 2010(249)ELT 3 (Guj) in the case of M/s. Essar Steel Ltd. Vs Union of India, which is in favor of the Department.

(e) The Hon'ble CESTAT Mumbai vide order No. A/246-248/2010/EB/KII dt 08-07-10 in the matter of Commissioner of Central Excise Thane I Vs. M/s. Tiger Steel Engineering () Pvt. Ltd. (Appeal No. E/344,345& 346/09) wherein, similar issue has been decided in the favor of revenue.

(f) The Hon'ble Gujarat High Court in the case of M/s Essar Steel V/s Union of India reported at 2010(249)ELT 3 (Guj.) was dealing with the question whether the goods supplied by the DTA unit to SEZ units were chargeable to export duty under the Customs Act has considered. The contention of the Revenue that clearance of goods was covered by the definition of 'export' given under the SEZ Act, export duty leviable thereon was negative by the

High Court which held that, for the levy of export duty on any goods, the goods should be shown to have been physically exported out of the country as envisaged under the provisions of the Customs Act. Their Lordships did not permit the provisions of the SEZ Act to be applied to chargeability of export duty under the Customs Act. This decision of the Hon'ble High Court is working in favor of Revenue in the present case, wherein unlike in the case of M/s Essar Steel, the Revenue has chosen to exclude the provisions of the SEZ Act/ Rules from the purview of the Central Excise provision viz Rule 18 of the Central Excise Rules, 2002 Thus the view which was taken against the Revenue in Essar Steel's case works in their favour in the instant case.

6. In view of the foregoing the department prayed to condone the delay and to set aside the OIA No. SB/91&92/ThI/2010 dated 15-7-2010.

7. The Respondent filed the reply to the Revision Application vide their letter dated 12.11.2013 wherein they have submitted the following:

1) Delay in filing the Revision Application cannot be condoned legally since the department did not plead any legal points before Tribunal;
2) In respect of the merits of the case the respondent submitted that Commissioner (appeals) Order is legally sustainable in as much as there were no dispute about the export of goods from their Unit to the SEZ on payment of duty under claim for rebate and physical receipt of the same inside SEZ. In support of the same they relied on the following judgements:
   a) GOI order in case of P. K. Tubes and Fittings Ltd. reported in 2012(276)ELT113(GOI);
   b) GOI order in case of Ace Hygeine Products P. Ltd reported in 2012(276)ELT131(GOI);
   c) GOI order in case of Indo Amines Ltd. reported in 2012 (284)ELT147(GOI);
   d) GOI order in case of Rohit Poly Products P. Ltd. reported in 2012(284)ELT137(GOI);

8. Personal hearing in the case was granted to the department and the respondent on 15-01-2018 or 2-02-2018, 3-12-2019 or 10-12-2019. In view of change in the Revisionary Authority Personal hearing was granted on 6-01-2021, 13-01-2021, 20-01-2021 and 12-02-2021. No one appeared for the hearing on behalf of the department and also on behalf of the respondent.

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

10. In respect of the applicant's request for condonation of delay, Government observes on perusal of the records, that the applicant department stated in the application that they had wrongly filed appeal before CESTAT Mumbai on 22-11-2010 against said order-in-appeal received on 29-7-2010, which was rejected by Hon'ble Tribunal vide order No A/301-302/13/SMB/CIV dated 25-06-2013 as non-maintainable as per provision of Section 35B(1) first proviso of Central Excise Act, 1944. Therefore, department has contended that they were pursuing appeal before CESTAT upto 29th July, 2013 and time spent upto said date may be excluded in terms of Section 14(2) of Limitation Act, 1963 for the purposes of Section 35EE(2). The revision applications are filed on 09-10-2013. Government notes that Hon'ble High Court of Gujarat in W.P. No. 9585 of 2011 in the case of *M/s. Choice Laboratory* vide order dated 15-9-2011, Hon'ble High Court of Delhi vide order dated 4-8-2011 in W.P. No. 5529 of 2011 in the case of *M/s. High Polymers Ltd.* and many other judgements have held that period consumed for pursuing appeal *bona fidely* before wrong forum is to be excluded in terms of Section 14 of Limitation Act, 1963 for the purpose of reckoning time limit of filing revision application under Section 35EE of Central Excise Act, 1944. The ratio of above said judgments is squarely applicable to this case. Government considering the genuine reasons for said delay not exceeding 3 months, condone the delay under Section 35EE(2) and proceeds to decide these applications on merits.

11. In the instant case Government find that the department has filed these two Revision Application on the grounds that the clearance to the SEZ by the Respondent is not export and also that the assessee had not furnished the Bill of Export. He relied on Hon'ble Gujarat High Court decision in the case of Essar Steel Limited v. Union of India - 2010 (249) E.L.T. 3 (Guj.) and CESTAT, Mumbai's Order No. A/246-248/2010/EB/KII dated 8-07-2010 in the matter of Commissioner of Central Excise, Thane-I Vs M/s Tiger Steel Engineering (I) Pvt. Ltd. Commissioner Appeal set aside the OIOs and allowed both the appeal filed by the party.

12. Government finds that in terms of Para 5, 6 and 7 of Board's Circular No. 29/2006-Cus., dated 27-12-2006, the supply from DTA to SEZ shall be eligible for claim of rebate under Rule 18 of Central Excise Rules, 2002 subject to fulfillment of conditions laid thereon. 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.C.B.E. & C. has further clarified vide Circular No. 6/2010-Cus., dated 19-3-2010 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 said clarification is with respect to C.B.E. & C. Circular No. 29/2006-Cus, dated 27.12.2006, as well as to Rule 18 of Central Excise Rules, 2002. So this clarification applies to all the rebate claims filed under Rule 18 of Central Excise Rules, 2002.

13. Government also notes that vide circular No.1001/8/2015-CX.8 dated 28.05.2015 issued under F.No.267/18/2015-CX.8 on *"Clarification on rebate of duty on goods cleared from DTA to SEZ "*, CBEC has clarified that since Special Economic Zone (**"SEZ"**) is deemed to be outside the Customs territory of India in terms of the provisions under the SEZ Act, 2005, any licit clearances of goods to SEZ from Domestic Tariff Area (**"DTA"**) will continue to be Export and therefore are entitled to the benefit of rebate under Rule 18 of the Excise Rules and of refund of accumulated Cenvat credit under Rule 5 of the Credit Rules, as the case may be.

Para No. 3 & 4 of the Circular are reproduced herein below:

> *3. It can thus be seen that according to the SEZ Act, supply of goods from DTA to the SEZ constitutes export. Further, as per section 51 of the SEZ Act, the provisions of the SEZ Act shall have over riding effect over provisions of any other law in case of any inconsistency. Section 53 of the SEZ Act makes an SEZ a territory outside the customs territory of India. It is in line of these provisions that rule 30 (1) of the SEZ rules, 2006 provides that 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.*
>
> *4. It was in view of these provisions that the DGEP vide circulars No. 29/2006-customs dated 27/12/2006 and No. 6/2010 dated 19/03/ 2010 clarified that rebate under rule 18 of the Central Excise Rules, 2002 is admissible for supply of goods made from DTA to SEZ. The position as explained in these circulars does not change after amendments made vide Notification No. 6/2015-CE (NT) and 8/2015-CE (NT) both dated 01.03.2015, since the definition of export, already given in rule 18 of Central Excise Rules, 2002 has only been made more explicit by incorporating the definition of export as given in the Customs Act, 1962. Since SEZ is deemed to be outside the Customs territory of India, any licit clearances of goods to an SEZ from the DTA will continue to be export and therefore be entitled to the benefit of rebate under rule 18 of CER, 2002 and of refund of accumulated CENVAT credit under rule 5 of CCR, 2004, as the case may be."*

14. Government notes that department has contended that definition of 'export' given under the Customs Act, 1962 has been traditionally adopted for the purposes of the Central Excise Act and rules made thereunder. The term 'export' is

a physical export out of the country as envisaged in the Customs Act. Department has relied upon judgment of Hon'ble Tribunal in the case of *M/s. Tiger Steel Engineering Pvt. Ltd.* - 2010 (259) E.L.T. 375 (T-Mumbai) wherein it was held that 'export' has same meaning as defined in Section 2(18) of Customs Act and not defined under Section 2(m)(ii) of SEZ Act, 2005.

14.1 In respect of the case law of *Essar Steel Ltd.* v. *UOI* - 2010 (249) E.L.T. 3 (Guj.) relied by the department, it is observed that Hon'ble High Court of Gujarat has held that export duty is leviable under Section 12 of Customs Act and definition of export as given in Section 2(18) is relevant for charging export duty. Hon'ble High Court has further held that for charging duty under Section 12 definition of export as given in SEZ Act cannot be incorporated. In the instant case the issue export benefit like rebate/drawback cannot be equated with the issue of charging export duty.

14.2. The aforesaid case law relied upon by the applicant essentially deals with the definition of term 'Export'. In this connection, the said judgment has been discussed by the Larger Bench of CESTAT, West Zonal Bench Mumbai in its Order dated 17.12.2015 in the case of Sai Wardha Power Limited Vs CCE, Nagpur [2016 (332) E.L.T. 529 (Tri. - LB)] in the context of the eligibility of rebate for supplies made to SEZ. The relevant portion of the said order is reproduced below:

> *"8. A striking contention of the ld. AR which appeals to us is that the only statutory provision for grant of rebate lies in Section 11B read with Rule 18 of Central Excise Rules which is for goods exported out of the country. If the supplies to SEZ is not treated as such export, there being no other statutory provisions for grant of rebate under Rule 18, the undisputable consequence and conclusion would be that rebate cannot be sanctioned at all in case of supplies to SEZ from DTA units. Certainly such conclusion would result in a chaotic situation and render all circulars and Rules under SEZ Act ineffective and without jurisdiction as far as grant of rebate on goods supplied to SEZ is concerned. The contra argument is that Section 51 of the SEZ Act would have overriding effect and the rebate can be sanctioned in terms of the provisions of Section 26 of the SEZ Act. We note that Section 26 only provides for exemption of excise duties of goods brought from DTA to SEZ. It does not provide for rebate of duty on goods exported out of the country. Therefore there is no conflict or inconsistency between the provisions of the SEZ Act and Central Excise Act so as to invoke the provisions of Section 51 of the SEZ Act. Our view is strengthened by the Hon'ble High Court judgment in the case of Essar Steel Ltd. which 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. On the other hand, export duty is levied under the Customs Act, 1962 on export of goods from India to a place outside India and the said Act does not contemplate levy of duty on movement of goods from the Domestic Tariff Area to the Special Economic Zone. Therefore, there is no conflict in applying the respective definitions of export in the two enactments for the purposes of both the Acts and therefore, the non obstante clause cannot be applied or invoked at all."

15. Government observes that the original authority has rejected rebate claims also on the ground that the Applicant failed to produce Bill of Export in term of sub-rule (3) of Rule 30 of SEZ Rules, 2006. Government observes that in terms of Rule 30(5) of the SEZ Rules, Bill of Export should be filed under the claim of drawback or DEPB. Since rebate claim is also export entitlement benefit, the applicant was required to file Bill of export. Though Bill of Export is required to be filed for making clearances to SEZ, still the substantial benefit of rebate claim cannot be denied only for this lapse Government further notes that Commissioner (Appeals) has categorically recorded in his findings that all the ARE-1s were duly certified by the authorized signature of M/s Reliance Petroleum Ltd. and the Preventive Officer posted at the SEZ unit's with a remark "CONSIGNMENT RECEIVED in FULL/GOODS RECEIVED In RSEZ. A/C RPL" which clearly indicates that the said goods were received in the SEZ Unit and therefore receipt of duty paid goods in SEZ Unit is not in dispute. The non-preparation of bill of export is a procedural lapse for which substantial benefit of rebate cannot be denied as held in catena of judgments cited by Commissioner (Appeals).

16. In view of above position, Government holds that rebate claim of duty paid on goods cleared to SEZ is rightly held admissible by Commissioner (Appeals) under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. Government finds no infirmity with the impugned Orders-in-Appeal No OIA No SB/91-92/Th-I/2010 dated 15-07-2010 passed by the Commissioner (Appeals), Central Excise, Mumbai Zone-I and therefore upholds the same.

17. The revision application is thus rejected in terms of above.

Shrawan
30/9/21
(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 349-350 /2021-CX (WZ)/ASRA/Mumbai DATED 30.09. 2021.

To,
M/s Guddi Plastcon Pvt. Ltd.,
Gala No. 6 &7 Nirmal Ashish Indl. Estate,
Taluka Shahapur,
Asangaon-421603

Copy to:

1. Commissioner of GST & Central Excise, Thane Commissionerate.
2. Commissioner of GST & Central Excise (Appeals), Thane, 12th Floor, Lotus Info Centre, Near Parel Station (East), Mumbai-400012.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare copy