F.No. 198/123/13-RA

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GOVERNMENT OF INDIA
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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. 198/123/13-RA/816 Date of Issue: 18.01.2018

ORDER NO.34/2017-CX (WZ) /ASRA/Mumbai DATED 29.12.2017 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 : Commissioner of Central Excise, Thane-I Commissionerate, 4th Floor, Navprabhat Chambers, Ranade Road, Dadar (W), Mumbai 400 028

Respondent : M/s. Gansons Limited, Patra Shed Industrial Area,Plot No. B-18, Osia Mata Compound, Kalher, Bhiwandi -421302.

Subject : Revision Applications filed, under section 35EE of the Central Excise ACT, 1944 against the Order-in-Appeal No.BPS/206/Th-I/2013 dated 08.10.2013 passed by the Commissioner of Central Excise (Appeals-I), Central Excise Zone, Mumbai-I.

ORDER

This revision application has been filed by the Commissioner, Central Excise, and Thane-I Commissionerate (hereinafter referred to as "applicant" against the Order-in-Appeal No. BPS/206/TH-I/2013 dated 08.10.2013 passed by the Commissioner of Central Excise (Appeals-I), Central Excise Zone, Mumbai-I setting aside the Order-in-Original No. R-101/2013-14 dated 18.04.2013 passed by the Deputy Commissioner of Central Excise, Division- Kalyan-I, Thane-I Commissionerate.

2. The facts, in brief, of the case are that the respondents had filed two rebate claims totally amounting to Rs.5,18,615/- with the Deputy Commissioner of Central Excise, Division- Kalyan-I, Thane-I's office on 18.01.2013 for refund/rebate of the Central Excise duty paid on the excisable goods cleared to Special Economic Zones (S.E.Z.) against ARE-I No. 10/06.10.2012 and 11/13.10.2012, under Rule 18 of the Central Excise Rules, 2002. The respondent was issued a Show Cause Notice dated 21.03.2013 proposing to reject the said rebate claims on the grounds that-

(i) Bill of Export has not been submitted;

(ii) The rebate claims are against clearances of excisable goods to Special Economic Zone and the clearances to Special Economic Zone are not export for the purpose of Rule 18 of the Central Excise Rules, 2002;

(iii) The doctrine of Unjust Enrichment is applicable in the said matter;

(iv) Notification No.19/2004-CE(NT) dated 06.09.2004 provides for grant of rebate on goods exported to any country other than Nepal and Bhutan subject to the conditions, limitations, procedures specified therein. However, the clearances to SEZ do not qualify to be an export to any country;

(v) The legal fiction created under the SEZ Act defining supply of goods from DTA to SEZ as 'export' would be restricted to that Act and for the purpose of rebate under Central Excise law, the definition under Customs Act would apply.

3. Vide impugned Order-In-Original dated 18.04.2013 Adjudicating authority held that the goods were cleared to S.E.Z. and although the EXIM Policy treats the clearances to S.E.Z. at par with exports and treating it as export, the Central Excise Act or the rules made there under do not make any such specific provision for giving rebate. This stand is also taken in the case of Commissioner of Central Excise vs. Quality Screens reported in 2008 (226) ELT 608 (Tri) Mumbai in as much as that it is held that refund, when claimed under the Central Excise Act, there has to be physical export; that the term "deemed export" is a creation of the EXIM Policy and is nowhere defined under the Central Excise Law; that since the rebate has been claimed under the Central Excise Law, the meaning of export is to be derived from the Central Excise Act,1944 and the Customs Act where export has been defined as taking of goods out of India. Therefore, such clearances will not be eligible for grant of rebate under Rule 18 ibid. Adjudicating authority also relied on Hon'ble High Court of Gujarat in case of Essar Steel Ltd. and others VS. Union of India and others, reported in 2009 TIOL-674-HC-AHM-CUS, which observed that '"The, term 'export' having been defined in the Customs Act, 1962, for the purpose of that Act, there is no question of adopting or applying the meaning of the said term under another,' enactment for any purpose for levying duty under the Customs Act, 1962. It is also held that the Hon'ble CESTAT's Order No. A/246 to 248/2010/EB/CII dated 04.08.2010 in the case of Commissioner of Central Excise, Thane- I Vs Tiger Steel Engg.(I) Pvt. Ltd., Murbad, passed by the Tribunal Mumbai Bench is in favour of the department and is applicable to the instant case wherein it is held that "Export" has the same meaning as defined under Section 2(18) of

Customs Act,1962 and not as definition of "Export" given under Section 2(m)(ii) of the SEZ Act,2005. It is further held that the Notification No.19/2004- CE(NT) dated 06.09.2004 issued under Rule 18 of the Central Excise Rules,2002, stipulates that there shall be granted rebate of whole of the duty paid on all excisable goods exported to any country other than Nepal and Bhutan, subject to conditions, limitations and procedures specified therein. The clearances to SEZ cannot be considered as export for grant of rebate under Rule 18 of the Central Excise Rules,2002 as the SEZ do not qualify to be a country other than Nepal or Bhutan; that even the SEZ Act,2005 does not recognize the receipt in SEZ from DTA as imports which are not the case when goods are exported to other countries where receipt of the goods is always treated as import and subject to customs duty, if any and therefore, the provisions of Section 51 of the SEZ Act,2005 will have no effect with respect to rebate under Rule 18 of the Central Excise Rules,2002. It is further held that the aforesaid discrepancies have not been clarified by the CBEC's Circular No.29/2006-Cus dated 27.12.2006 and 06/2010-Cus dated 19.03.2010 and hence the stand taken by the assessee is not acceptable. As regards unjust enrichment, Adjudicating authority held that the provisions of the Section 11B (1) lay down that the claimant of refund (which includes rebate) must establish that the amount of duty in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty has not been passed on to any other person; that in the instance case the assessee has failed to fulfill this requirement of law. In view of the above the Adjudicating authority rejected the two rebate claims totally amounting to Rs.5,18,615/- filed by the Appellants

4. Being aggrieved by the impugned order, the respondent filed appeal before Commissioner (Appeals) on 05.07.2013. Commissioner (Appeals) who relying on C.B.E.C. Circular No.29/2006-Cus dated 27.12.2006 issued under F. No. DGEP/SEZJ331/2006 which has been updated vide CBEC's

Circular No.06/2010-Cus, dated 19.03.2010, Hon'ble Supreme Court's judgement in the case of Dhiren Chemical Industries.-2002 (139) ELT 3 (S.C.), Tribunal's order in the case of COMMISSIONER OF CENTRAL EXCISE, RAIPUR vs. SHRI BAJRANG ALLOYS LTD.- 2013 (292) E.L.T. 426 (Tri. - Del.) and also on Government of India (R.A.)'s Order No. 737/2012-CX, dated 29-6-2012 in F. No. 198/417/2010-RA as reported in 2013 (290) E.L.T. 638 (G.O.I.), observed that the impugned order does not stand on its merit and therefore it deserves to be set aside and accordingly, set aside the Order-in-Original No. R-101/2013-14 dated 18.04.2013 passed by the Deputy Commissioner of Central Excise, Division- Kalyan-I, Thane-I Commissionerate.

5. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following main grounds :-

The Order in Appeal No. No.BPS/206/Th-I/13 dt. 08.10.2013 passed by the Commissioner (Appeals) is not proper, legal and is against the law on the following grounds:

i) Supply made to a SEZ Unit is not covered under the definition of export under the Customs Act, 1962. This proposition has been examined by the Hon'ble High Court of Gujarat in M/s. Essar Steel Ltd Vs. U01 2010 (249) ELT 3 (Guj), wherein it has been held that "the term 'export' having been defined in the Customs Act, 1962, for the purposes of that Act, there is no question of adopting or applying the meaning of the said term under another enactment for any purpose of levying duty under the Customs Act, 1962. In other words, a definition given under an Act cannot be displaced by a definition of the same term given in another enactment, more so, when the provisions of the first Act are being invoked. Even in the absence of a definition of the term in the subject statute, a definition contained in another statute cannot be adopted since a word may mean different things depending on the setting and context. Reference is invited to the decisions of the Apex Court in

the case of Commissioner of Wealth Tax Gujarat-III, Ahmedabad v. Ellis Bridge Gymkhana, (1998) 1 SCC 384, Commissioner of Income Tax, Bangalore v. Venkateswara Hatcheries (P) Limited, (1999) 3 SCC 632 and M/s Qazi Noorul H. H. H. Petrol Pump & Another v. Dy. Director, E.S.I. Corporation, reported in 2009 (240) ELT 481 (S.C.)= 2009 AIR SCW 5490. In fact, the interpretation canvassed by the department is not merely the adoption of a definition of another Statute, but the incorporation of a taxable event itself, which is impermissible under the law".

ii) Further while examining the similar issue, it has been held by the Hon'ble CESTAT, Mumbai in CCE, Thane-I Vs.Tiger Steel Engineering (I). Pvt. Ltd. 2010(259) ELT 375 (Tri-Mumbai) :- "However, the question arises as to whether such supply of goods to SEZ units was an 'export.' At no time was the term 'export' defined under the Central Excise Act or any Rules framed thereunder. The definition of 'export' given under the Customs Act has been traditionally adopted for purposes of the Central Excise Act and the Rules thereunder. Therefore, in the absence of a definition of 'export' under the Central Excise Act, the Central Excise Rules or the CENVAT Credit Rules, 2004, we hold that, for purposes of the CENVAT Credit Rules, 2004, one should look for its definition given under the Customs Act. The fictionalized definition of "export" under Section 2 (m) (ii) of the SEZ Act cannot be looked for as it purports only to make the SEZ unit an exporter. In other words, the term 'export' used in Rule 5 of the CENVAT Credit Rules, 2004 stands for 'export', which is 'physical export' out of the country, envisaged under the Customs Act. We take this view because, as we have already indicated, anybody other than SEZ unit can not be allowed to claim any benefit under the SEZ Act/Rules".

iii) The clarification issued vide Circular No.6/2010-Cus dt. 19.03.2010 has not the binding effect, being contrary to the law. This proposition has been upheld by the constitutional Bench of Hon'ble Supreme Court in CCE, Bolpur Vs. Ratan Melting & Wire Industries 2008 (231)ELT22 (SC).

iv) A copy of assessed "Bill of Export" is a fundamental document along with the copy of the relevant ARE1 bearing endorsement of

the Customs Officer/specified officer in charge of the SEZ, in order to consider the clearance as a genuine one effected to the SEZ in accordance with sub-rule 3 of Rule 30 of the SEZ Rules ,2006 and further to consider the rebate eligibility under Rule 18 of the Central Excise Rules, 2002.As the said Bill of Export was not submitted by M/s. Gansons Limited, their rebate claim cannot be considered as complete and proper and therefore the same is not admissible.

In view of the foregoing, the applicant prayed to set aside the impugned order dated 8.10.2013 passed by the Commissioner (Appeals), being neither legal nor proper.

6 A Personal hearing was held in this case on 21.12.2017 and Smt. Priya Jadhav, Assistant Commissioner, Division-IV, Bhiwandi GST & CX Commissionerate duly authorized by the Revision Applicant appeared for hearing and reiterated the submission filed through Revision Application. None was present from the side of the respondents. The applicant pleaded that the instant RA be allowed and Order in Appeal be set aside.

7. Government observes that the applicant has 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.) which observed that movement of goods from Domestic Tariff Area to Special Economic Zone has been treated as export by legal friction created under SEZ Act, 2005 and such legal fiction should be confined to the purpose for which it has been created.

8 In this regard Government observes that while deciding the issue whether in terms of Clause (b) of proviso to Section 35B(1) of the Central Excise Act, appeals against orders relating to rebate on goods supplied to SEZ, will lie to the Appellate Tribunal, Larger Bench of the Tribunal constituted for the purpose, 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)] at para 7.2 observed as under :-

*7.2 In the case of Essar Steel Ltd. (supra) the issue was whether export duty can be imposed under the Customs Act, 1962 by incorporating the definition of the term "export" under the SEZ Act into the Customs Act. The facts in this case were that export duty was sought to be levied under the Customs Act on goods supplied from DTA to the SEZ. The Hon'ble Court observed that a definition given under an Act cannot be substituted by the definition of the same term given in another enactment, more so, when the provisions of the first Act are being invoked. The Court went on to observe that even in the absence of a definition of the term in the subject statute, a definition contained in another statute cannot be adopted since a word may mean different things depending on the setting and the context. In this case what was sought to be done was to incorporate the taxable event under one statute into the other statute. The Court held this to be impermissible under the law. It was in this context that the court held that the legal fiction created under the SEZ Act, 2005, by treating movement of goods from DTA to the SEZ as export, should be confined to the purposes for which it has been created. Although at first glance the judgment appears attractive to apply to the facts of the present case, on a deeper analysis, we find that the said judgment is made in a different context.*

Hon'ble Larger Bench also observed at para 8 of its order as under :

*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."*

9. Government further notes that the judgment of Hon'ble CESTAT in the case of M/s. Tiger Steel Engineering Pvt. Ltd. cited by department relates to the issue of refund of accumulated Cenvat credit under Rule 5 of Cenvat Credit Rules, 2004. Hon'ble Tribunal in para 12 of said judgment has observed as under :

*"....The Board's clarification is in the context of applicability of Rules 18 and 19 of the Central Excise Rules, 2002 to a DTA supplier who might claim duty-free clearance of goods under Bond/Letter of Undertaking or rebate of duty paid on such goods or on raw materials used therein.*

*Such limited clarification offered by the Board cannot be applied to the instant case where the issue under consideration is altogether different."*

From above it is quite clear that CESTAT has not given any finding on the admissibility of rebate claim of duty paid on goods cleared to SEZ/SEZ Units.

10. Government further observes that in terms of Para 5 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 Circular dated 19-3-2010 is reproduced below :-

***"Circular No. 6/2010-Cus., dated March 19, 2010***

*Sub : Rebate under Rule 18 on clearances made to SEZs reg.*

*A few representations have been received from various filed formations as well as from various units on the issue of admissibility of rebate on supply of goods by DTA units to SEZ.*

*2. A view has been put forth that rebate under Rule 18 of the Central Excise Rules, 2002 read with Notification 19/2004-C.E. (N.T.), dated 6-9-2004 is admissible only when the goods are exported out of India and not when supplies are made to SEZ.*

*3. The matter has been examined. The Circular No. 29/2006-Cus., dated 27-12-2006 was issued after considering all the relevant points and it was clarified that rebate under Rule 18 is admissible when 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.*

*4. Therefore, it is viewed that the settled position that rebate under Rule 18 of the Central Excise Rules, 2002 is admissible for supplies made from DTA to SEZ does not warrant any change even if Rule 18 does not mention such supplies in clear terms. The field formations are required to follow the circular No. 29/2006 accordingly.*

*F.No.DGEP/SEZ/13/2009*

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.

11. Government also notes that vide circular No.1001/8/2015-CX.8 dtd.28th April, 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.*

12. Government also observes that the original authority has rejected rebate claims also on the ground that the respondent 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 respondent 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 procedural lapse. Government observes that Authorised Officer of SEZ Unit has endorsed on ARE-1 form that the goods have been duly received in SEZ. As the duty paid nature of goods and supply the same to SEZ is not under dispute, the rebate on duty paid as goods supplied to SEZ is admissible

under Rule 18 of Central Excise Rules, 2002. There are catena of judgments that substantial benefit of rebate should not be denied for procedural lapses.

13. In view of above position, Government finds no infirmity with the impugned Order-in-Appeal and therefore upholds the same.

14. Accordingly, the revision application is thus dismissed.

15. So, ordered.

True Copy Attested

29.12.17

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

11.1.18
एस. आर. हिरूलकर
S. R. HIRULKAR
(A.C)

ORDER No. 34/2017-CX (WZ) /ASRA/Mumbai DATED 29.12.2017

To,
The Commissioner of GST & CX, Bhiwandi Commissionerate,
12th Floor, Lotus Infocentre,
Parel (East), Mumbai-400 012

Copy to:

1. M/s. Gansons Limited, Patra Shed Industrial Area,Plot No. B-18, Osia Mata Compound, Kalher, Bhiwandi -421302,
2. The Commissioner (Appeals), Thane, 12th Floor, Lotus Infocentre, Parel (East), Mumbai-400 012
3. The Assistant Commissioner, Division IV, GST & CX Bhiwandi Commissionerate.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
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