REGISTERED SPEED POST

सत्यमेव जयते

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

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

F.No.195/81/16-RA, 195/82/16-RA, 195/84/16-RA, 195/85/16-RA, 195/86/16-RA, 195/87/16-RA, 195/88/16-RA, 195/447/16-RA | 1993

Date of Issue:- 20/11/18

ORDER NO.352-359 / 2018-CX(WZ)/ASRA/MUMBAI DATED 30.10.2018 OF THE 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.

Sl.No.	Revision Application No.	Applicant	Respondent
1.	195/81/16-RA	M/s Sai Wardha Power Ltd. Nagpur	Commissioner, Central Excise, Nagpur.
2.	195/82/16-RA		
3.	195/84/16-RA		
4.	195/85/16-RA		
5.	195/86/16-RA		
6.	195/87/16-RA		
7.	195/88/16-RA		
8.	195/447/16-RA		

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the Orders in Appeal No.
C.CUS No.NGP/EXCUS/000/869/13-14 dtd. 27.09.2013,
C.CUS No.NGP/EXCUS/000/088/14-15 dtd. 27.08.2014,
C.CUS No.NGP/EXCUS/000/097/14-15 dtd. 02.09.2014,
C.CUS No.NGP/EXCUS/000/098/14-15 dtd. 03.09.2014,
C.CUS No.NGP/EXCUS/000/099/14-15 dtd. 03.09.2014,
C.CUS No.NGP/EXCUS/000/100/14-15 dtd. 03.09.2014,
C.CUS No.NGP/EXCUS/000/101/14-15 dtd. 03.09.2014,
C.CUS No.NGP/EXCUS/000/094/14-15 dtd. 02.09.2014,

passed by Commissioner (Appeals), Central Excise & Customs, Nagpur.

ORDER

These Revision applications have been filed by M/s Sai Wardha Power Ltd. Nagpur, (now known as Sai Wardha Power Generation Limited (SWPGL) and hereinafter referred to as 'applicant') against the Orders-in-Appeal as detailed in Table below passed by Commissioner (Appeals) of Central Excise & Custom Nagpur.

TABLE

Sl.No.	Revision Application No.	Order In Appeal No.	Amount of Refund Claimed
1	**2.**	**3.**	**4.**
1.	195/81/16-RA	C.CUS No.NGP/EXCUS/000/869/13-14 dtd. 27.09.2013,	Rs.6,40,24,812/-
2.	195/82/16-RA	C.CUS No.NGP/EXCUS/000/088/14-15 dtd. 27.08.2014	Rs.9,60,82,308/-
3.	195/84/16-RA	C.CUS No.NGP/EXCUS/000/097/14-15 dtd. 02.09.2014	Rs.6,70,22,041/-
4.	195/85/16-RA	C.CUS No.NGP/EXCUS/000/098/14-15 dtd. 03.09.2014	Rs.1,44,30,944/-
5.	195/86/16-RA	C.CUS No.NGP/EXCUS/000/099/14-15 dtd. 03.09.2014	Rs.5,15,27,643/-
6.	195/87/16-RA	C.CUS No.NGP/EXCUS/000/100/14-15 dtd. 03.09.2014	Rs.9,49,24,560/-
7.	195/88/16-RA	C.CUS No.NGP/EXCUS/000/101/14-15 dtd. 03.09.2014	Rs.1,15,35,319/-
8.	195/447/16-RA	C.CUS No.NGP/EXCUS/000/094/14-15 dtd. 02.09.2014	Rs.2,62,45,918/-

2. The brief facts of the case are that the applicant is engaged in generation of electricity in SEZ. M/s. SWPGL obtained the permission for setting up a NEW-sector specific Special Economic Zone (SEZ Unit) vide Letter of Approval (LOA) No. SEEPZ/ SEZ/ WARDHA-CHANDRAPUR/01/LOA-01/08-09/7700 dated 01.10.2008. The applicant had filed refund claims of amounts mentioned at column 4 of the table above, on the ground that they had procured the coal from M/s. Western Coal Field Ltd. & they are entitled for refund of duty paid by the WCL on such Coal in terms of Rule 30(1) of Special Economic Zones Rules, 2006.

3. The Original adjudicating authority rejected the refund claim on the grounds as given below:-

(a) Procedural lapses and insufficiency of documents as required under Rule 30 of SEZ Rules 2006, Circular No.

29/2006-CUS dated 27.12.2006, Circular No.6/2010-CUS dated 19.03.2010 and Notfn No.19/2014-CE(NT) dated 06.09.2004.

(b) Mixing of issue of Rebate & Refund and non-applicability of Section 11B 2(e) of Central Excise Act, 1944.

(c) Unjust enrichment and passing of duty burden to the ultimate customer.

In subsequent Orders the Original adjudicating authority also rejected the refund claims on the following grounds:-

(a) The applicant, as per Rule 30(1) of the SEZ Rules 2006, ought to have received goods without payment of duty or the procedure prescribed under Notification No. 42/2001-CE(NT) dated 26.06.2001 should have been followed, which the applicant has not done.

(b) There is substantial lapse on the part of the applicant due to not giving the department the prerogative to verify the actual receipt of materials and to verify whether its consumption is for approved authorized operations only by following the procedures as prescribed under Rule 30(6) and 30 (7) of the SEZ Rules, 2006 and the various notifications and circulars applicable in the matter.

(c) The claim was clearly hit by time under Section 11 B of the Central Excise Act, 1944 as it has been filed beyond one year period.

4. Being aggrieved by the aforesaid Orders-in-Orignal, the applicant filed an appeal before Commissioner (Appeals) while upholding the rejection of refund claims by the Original adjudicating authority observed that

".....In this case the moot question is who is the exporter of goods when these goods are supplied to SEZ unit. What is the locus standi of SEZ unit in claiming such rebate. SEZ unitis only an importer of goods. Goods to an SEZ unit can be cleared without payment of duty as if they are the physical exports. In the event the manufacturer choses to pay duty then the manufacturer exporter is entitled to such rebate in terms of Rule 18 of the Central Excise Rules, 2002 and not the

importer of goods. The said Notification No. 19/2004-CE (NT) dated 06.09.2004 not any of the circulars they have relied upon enables the buyer of the goods for rebate of duty paid to any person other than who has paid, the argument of M/s WPCL has no merit and they have no locus standi to claim such rebate of the duty paid by the manufacturer exporter.

Additionally, Commissioner (Appeals) also upheld the orders of the Original adjudicating authority by observing as under:-

"7.4 It is to once again emphasize at the cost of repetition that supplies from DTA to SEZ is equivalent to exports for which all the rules and provisions pertaining to monitoring of export clearances are clearly applicable. Therefore, the only prerogative the department has to verify the validity and authenticity of such clearances made from DTA to SEZ (which is equivalent to exports) is verifying whether the procedures laid down in Notification No. 19/2004-CENT) dated 06.09.2004 read with Board Circular No.29/2006 -CUS dated 27.12.2006 have been followed by the concerned persons. And it is seen that such procedures as prescribed in the said notification have been prescribed for the exporters and can be followed only by the exporters. So, at this stage there is no question of verifying the procedures prescribed in the said notification which are to be followed at the time of clearance of excisable goods from the exporters' premises in the DTA. And as rightly held by the lower authority in her impugned order, the department has been deprived of this prerogative to verify the validity and authenticity of the said transactions/ supplies/ clearances/ receipts. And therefore, as there is no way to rectify the error already done and as there is no provision or procedure prescribed for SEZs who is a buyer/importer to follow such procedures and thereby claim any such refund/rebate, the argument of M/s WPCL has no merits and they have no locus standi to claim such rebate of the duty paid by the manufacturer exporter. Last but not the least, it is not just a case of simple procedural or technical lapse, it is a case of substantial lapse as none of the procedures prescribed under law have been followed which includes non production of proof of exports which is a mandatory procedure for claiming any of the benefits under the relevant Notifications".

7. Being aggrieved by the aforementioned Orders in Appeal (mentioned at column 3 of the Table at para 1 above), the applicant have filed 8 Revision Applications (mentioned at column 2 of the Table at para 1 above) under

Section 35EE of Central Excise Act, 1944 before Central Government on the grounds mentioned therein.

8. The issue involved in all these Revision Applications being common, they are taken up together and are disposed off vide this common order.

9. A Personal hearing was held in this case on 18.04.2018 and 18.05.2018 which was attended by Shri Saurabh Dixit, Shri D.H. Nadkarni, Shri A. Jankiraman, all Advocates and Shri V. Parekh and Shri M.K. Sharma Sr. Manager (Taxation). They reiterated the submissions filed in the Revision Applications, written submissions and case laws alongwith compendium filed on the dates of hearing. It was pleaded that in view of the submissions made the Orders of the Commissioner (Appeals) be set aside and Revision Applications be allowed.

10. In their submissions filed on the date of personal hearing the applicant contended that :

10.1 it is an undisputed fact that the applicant is a SEZ unit located in SEZ area and engaged in the activity of generation of electricity Being an SEZ unit, and in order to promote export activity and also to ensure that no taxes are exported out of India, by virtue of provisions Section 26 of the SEZ Act, 2005 read with appropriate rules made under SEZ rules, 2006 more particularly Rule 30 thereof, the legislature as also Central Government, in order to neutralize the taxes involved on any goods and/or services supplied to the SEZ area, has given the option of either non-payment of duties/taxes thereof or in the alternative, grant cash refund of whatever taxes that are levied/charged on the supplies being made to the SEZ unit/developer.

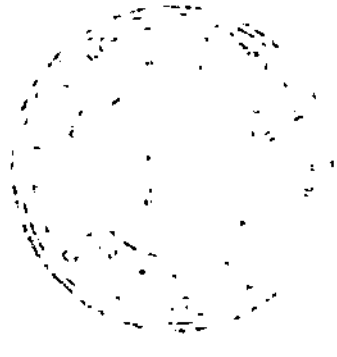
10.2 during the material period, the applicant had received substantial quantities of coal from Western Coal Fields Limited (subsidiary of Coal India Limited) which is a government owned entity.. That despite repeated request, since the said Western Coal Fields Limited refused to concede our request and did not feel comfortable undergoing the procedural requirements of preparing ARE-1/obtaining LUT or bond etc., they had simplicitur supplied the coal on payment of appropriate Central Excise Duty to the applicant under the cover of CEX invoices. This was done despite the

fact that otherwise the SEZ Act/Rules made thereunder, provide for either non-payment of duty of Central Excise on goods cleared to SEZ unit or in the alternative provide the mechanism to seek refund (popularly known as rebate) of the duties so involved on the supplies made to the SEZ unit, so that the duty impact is suitably neutralized.

10.3 in terms of the definition of the term "refund" as containing Section 11B of the Central Excise Act, 1944, the term refund includes rebate of duty paid on goods exported. It is for this reason that the procedure of claiming refund prescribed under Section 11B is also made applicable to rebate claims. It is trite law that in terms of Section 51 to 53 of the SEZ Act, 2005, SEZ territory is deemed to be a territory outside the Customs territory of India for the purpose of undertaking the authorized operations with an objective of neutralizing taxes involved on goods which are imported into SEZ area and/or supplied from domestic Tariff area into the SEZ area for use in its authorized operations. For the records, it is an undisputed fact that coal is required by the applicant for the purpose of its authorized operations within SEZ area to produce electricity.

10.4 there are series of Board Circulars dt.28.4.15, dt.19.3.10 and dt.19.3.10 some of which are referred to in the grounds of revision application as well, which categorically state that SEZ being a territory outside the customs territory of India in terms of the scheme of Section 51 to 53 of the SEZ Act, 2005 read with Section 26 thereof, the duties involved on good supply to SEZ area has to be allowed as refund in the form of "Rebate" in terms of Rule 18 of the Central Excise Rules 2002. That in any case, neither of the Lower Authorities has disputed this general proposition in law at all and hence this aspect is taken as undisputed.

10.5 when the applicant filed various rebate claims, the same were originally rejected by the original authority, and the findings of the Original authority are submitted hereunder :



a) Procedural lapses and insufficiency of documents — the only ground to deny rebate as per the conclusion drawn in OIO (running page 168).

b) That the original authority specifically found that the rebate is admissible to the applicant in the capacity of a buyer in terms of Section 11B of the Central Excise Act, 1944 since the buyer himself cannot be considered to be an importer. The specific findings of the original authority (running page 138 of the revision application) are reproduced hereinbelow:

"From the hare reading of above section it is clear that the procurement by SEZ unit from DTA does not fall in the category of import and to that extent the assesse is not an importer rather he is a buyer. Hence, they are eligible for refund under Section 11B. Although what are basic requirements for a buyer to claim a refund- to produce a disclaimer certificate wherein manufacturer would not claim any refund of duty which is present in the particular case. Further, duty has been borne by the buyer hence the point raised in this behalf in SCN are satisfied".

10.6 as regards unjust enrichment also, the original authority gave specific findings that the bar of unjust enrichment does not apply to the facts and circumstances of the present case. However the rebate claim was rejected/denied by the original authority solely on account of the fact that certain so-called procedural requirements and insufficiency of documents.

10.7 on further appeal against such order, the First Appellate Authority clearly travelled beyond the scope of the proceedings, with utmost respect, inasmuch as while on the issue of locus standi to claim the rebate, the original authority has clearly given a favorable order and which was never challenged by the Revenue Authorities, and on the ground of unjust enrichment also, the order was favorable to the applicant which was never challenged by the Revenue Authorities, the First Appellate Authority, recorded the findings as Para 9 and 10 of the impugned order 0. With utmost respect, the only finding of the original authority which was against the applicant namely procedural infractions, has in fact been held in their favor by the First

Appellate Authority stating that substantial benefit of refund/rebate cannot be rejected on the ground of procedural infractions. Despite the Order of Original Authority (010) giving clear findings in favour of the applicant and which were unchallenged, the impugned order of the First Appellate Authority , rejects refund/rebate solely on the grounds that the present applicant does not have locus standi being an SEZ unit, to claim such rebate since the applicant is actually only an importer of goods.

10.8 the impugned order categorically finds that even the manufacturer chooses to pay duty then the manufacturer exporter is entitled to such rebate in terms of Rule 18 of the Central Excise Rules 2002 and not the importer of such goods (presumably the applicant being an SEZ unit). The impugned order further states that neither in terms of Notification 19/2004-CE (NT) dated. 06.09.2004, nor any of the circulars which are relied upon by the applicant enable the buyer of the goods to claim rebate entitlement on the goods procured by them in the SEZ area. As such, the sole ground of rejecting the rebate/refund vide the impugned order is that as there is no provision to sanction rebate claim of duty paid to any person other than the person who has paid the duty and the argument of the applicant has no merits and they have no locus standi to claim refund/rebate of the duty paid by the manufacturer exporter.

10.9 with upmost respect, the first Appellate Authority (FAA) could not have recorded such findings inasmuch as the original authority had already concluded on the issue, rightly or wrongly and such favourable findings in favour of the applicant were never challenged by the Revenue Authorities in further appeal. As such insofar as the issue of, whether the applicant has locus standi to claim such rebate/refund or not, have already been concluded in favour of the applicant since this aspect of the 010 was never challenged by the revenue, the impugned order in Appeal could not have actually upturned such findings in favour of the applicant, while deciding the question as to whether mere procedural infraction is sufficient to reject the refund/ rebate claim or

not . The only issue before the First Appellate Authority in the appeal was whether mere procedural infraction is sufficient to reject the refund/rebate claim and that he has decided in favour of the applicant in the impugned Order. In view of this, the appeal ought to have been allowed by the FAA.

10.10 it is trite law that the issues which are already decided by virtue of Res judicata, cannot be disturbed in the Appellate proceedings especially when the revenue never challenges the same and this issue was to be treated as settled. That the impugned order deserves to be quashed and set aside on this single ground inasmuch as it has reopened an issue which was never in contention at the Appellate proceedings at all having already been concluded in favour of the applicant.

10.11 even otherwise, Rule 18 as also the relevant Notification No. 19/2004-CE(NT) dated. 06.09.2004 merely talks about to be granted of the duty paid on exports goods. Nowhere in the rule or the notification has there been any discussion whatsoever as to who should be the person claiming the refund. Even the Board Circulars dt.27.12.06, dt.19.3.10 and dt.28.4.15 do not contain anything to the effect that SEZ unit being a buyer of goods cannot claim rebate/refund. As such the entire scheme of refund/rebate of duty paid on goods exported is qua duty and export and not qua who claims the same. It is equally true since it is trite law that in case of rebate, when export is through third party i.e. Merchant Export transaction, both manufacturer as well as merchant exporter both are allowed to claim rebate subject to the other party not claiming and Riving necessary NOC declaration in this regards.

10.12 the law in the procedure made thereunder is aimed that neutralizing the duties paid on export activity by giving refund and since as per Section 11B which governs both refund as well as rebate, refund includes rebate of duty, the general legal principles governing refund are- equally applicable to rebate. Explanation under Section 11 B of CEA makes it clear that refund includes rebate of duty of excise on excisable goods exported out of India and as per Section

2(m) (ii) of SEZ Act, export means supply of goods or providing services from DTA to SEZ unit or developer. The present claim for rebate of CE Duty is therefore is covered by Section 11B of CEA. It could be seen from Section 11B of CEA that any person who paid the duty or borne the incidence of duty is entitled to claim the refund of such duty. In the present case, the incidence of duty is borne by the applicant as the same having been passed by Western Coal Fields Limited and therefore the applicant has the locus standi to claim the refund/rebate of CE Duty.

10.13 the Hon'ble Apex Court in the case of Addison and Co. Ltd. 2016(339) ELT 177(SC) (which is also later affirmed by another decision of SC (2017 (353) EL.T. A64 (S. C.)j) has quite recently held that a buyer who bears the duty incidence is also equally in a position to claim refund under 11B of the Central Excise Act, 1944. This being the case, there is no reason why any different view should be taken for rebate which is merely specie of refund which is a genus in the general sense of the term. As such, especially since there is no prohibition otherwise under Rule 18 of the Central Excise Rules 2002 or the relevant Notification No. 19/2004-CE (NT) dated 06.09.2004 issued in this regard, even a buyer being an SEZ unit can equally claim rebate of duty which was admittedly paid on goods which were admittedly exported and physically received in the SEZ area in the present case. - None of the Circulars also suggest that in SEZ unit is otherwise disentitled to claim such refund. Once the duty was not required to be paid and was paid and once the goods are admittedly brought into the SEZ area which is also not in dispute and well documented by collateral evidence in the form of Certificate by the Authorized Officer of the SEZ, the Central Government cannot retain the duty paid on such goods. In that sense, the concept of unjust enrichment equally applies to the government also since they cannot illegally retain any duty which is not due and otherwise the law provides for refunding or returning the same. We crave leave to refer to and rely upon the judgment of the Hon'ble Gujarat High Court in the case of Indo-Nippon Chemic4ls Co. Ltd. 2005(185) ELT 19(Guj) which also upheld by the Hon'ble

Apex Court as reported in 2005(186) ELT A117(SC). That the relevant portion thereof is reproduced herein below:
"Refund - Unjust enrichment - Concept operates against department also - If Modvat credit is reversed erroneously on insistence of department, they cannot be allowed to take its advantage - Section 11B of Central Excise Act, 1944. [Para 36]

10.14 since there is otherwise no prohibition in this regard and since admittedly the applicant was the buyer of the goods which were duty paid and received in SEZ area and used the coal for their authorized operation of generating power/electrical energy and since the manufacturer himself has neither claimed nor interested in claiming any refund/rebate, as per the disclaimer certificate given by the manufacturer , (attached to the Revision Application) , there is absolutely no legal embargo in the present applicant claiming refund/rebate of duty so paid by the manufacturer or suppliers of the coal.

10.15 as regards the presumptim drawn in the impugned order that when goods are brought from DTA into SEZ area, the same are to be treated as "imported" and hence SEZ unit being an importer , rebate/refund is not admissible, which appears to be the underlying reasoning while rejecting the rebate/refund to the applicant. The FAA failed to notice that section 2 (o) of SEZ Act, read with Section 2 (zd) where receipt of goods in SEZ from DTA does not amount to import as per the definition of import in the SEZ Act and hence the applicant SEZ unit cannot be construed as importer. Further, the issue on hand is no more res Integra. That the Hon'ble Andhra High Court in the case of Tirupati Udyog Ltd 2011 (272) E.L.T. 209 (AP) while dealing with the issue of levy of custom duty on supplied made by DTA unit to an SEZ unit, was pleased to hold that the friction created in the Section 53 of the SEZ Act, 2005 is to be limited to the purpose for which it is created and the goods supplied from domestic area into SEZ unit cannot be treated to the imported by the SEZ unit. That such view was also upheld by the Hon'ble Apex Court as reported in 2017 (354) E.L.T. A105 (Supreme Court). As such this view has become the law

of the land and this proposition on basis of which the impugned order is passed is ex-facie bad in law inasmuch as supplies made by domestic units to SEZ unit are per se not import and since the entire reasoning is legally unsustainable, even the conclusion drawn for rejecting rebate/refund to the applicant on the grounds that they do not have any locus standi since these are to be treated as imported goods is also ex-facie bad in law and therefore the same deserves to be quashed and set aside and the refund/rebate deserves to be granted with consequential relief to the present applicant.

10.16 while the applicant has otherwise made elaborate submissions on why procedural lapses require to be condoned while granting refund/rebate and why unjust enrichment cannot apply to the facts and circumstances of the present case, inasmuch as the impugned order has otherwise not disputed this aspect at all, such averments are merely reiterated and not further elaborated at this stage. Suffice it to say, that the only finding given by the original authority to reject the refund being on account of procedural lapses which has already been held as not justified at paragraph 9 of OIA and since the Revenue Authorities have not challenged the same, at least this ground cannot be once again taken for denying refund/rebate to the applicant. 21. As regards the aspect of locus standi to claim refund/rebate by the applicant, while the original authority had otherwise given a favorable finding that the applicant is otherwise allowed to claim such refund/rebate, and which finding was never challenged by the Revenue Authorities, however as stated above, the impugned has actually rejected refund on this ground alone, which on the fact of it, cannot be sustained. Be that as it may, even for legal reasons including the analysis of the legal position as also Board Circulars, it would clearly suggest that since there is no prohibition otherwise for the SEZ unit being a buyer to claim rebate/refund of duty paid on supplies being made by the domestic suppliers and since Section 11B otherwise permits a buyer who has borne the incidence of duty to claim refund and since refund includes rebate of duty, there is nothing

amiss in the applicant having claimed such duty by way of refund/rebate, especially in light of the fact that the goods were admittedly duty paid and brought into the SEZ area. Further SEZ unit is not an importer as receipt of goods and services from DTA to SEZ does not amount to import under Section 2(o) of SEZ Act. It is being made clear that the procedural infractions are no more an issue in the present revision proceedings since the same are already condoned by the first Appellate Authority.

10.17 as regards the "procedural infractions" of the supplier having not prepared ARE1 or the revenue authorities having been deprived of the verification of quantity, value, description of goods etc., with utmost respect, it is the authorities at the end of SEZ unit which verify these and the rebate/refund sanctioning authorities cannot be deprived of certain verification they don't carry out anyway. It is submitted that SEZ is a specified area under the supervision and control of the Development Commissioner and every transaction is supervised and checked by his officers. Authorized Officer has issued a certificate confirming the receipt of coal in SEZ as well as its use in the authorized operations of the SEZ unit of the applicant. This establishes the receipt of coal in SEZ and can be accepted as the proof of export by way of supply from DTA to SEZ.

10.18 the provisions of Section 30(6) and (7) of SEZ Rules, 2006 as relied upon by Original authority and as upheld by first Appellate authority are also wholly misplaced. The same deal with claiming of export entitlement - which is not given by Central Excise authorities anyway, and which is given by the authorities at the end of SEZ unit itself. On the contrary, when it comes to refund/rebate of duty paid goods cleared to SEZ area, the Central Excise authorities are only required to verify if goods are duty paid and entered into SEZ area or not.

10.19 these requirements are similar to physical export of goods on duty payment. The very same Notification No.42/01-CENT) is followed for this purpose. When otherwise, for physical export under same Notification, vide catena of decisions and

some of which are discussed below, it has been held that non-preparation of or non-following of ARE-1 procedure is not fatal to refund/rebate claim, there is absolutely no question of taking a different view when supplies are made to SEZ unit, which is otherwise deemed to be foreign territory for such purposes.

10.20 on further appeal against such order, the First Appellate Authority clearly travelled beyond the scope of the proceedings, with utmost respect, inasmuch as while on the issue of local standi to claim the rebate, the original authority has clearly given a favorable order and which was never challenged by the Revenue Authorities.

10.21 the impugned order categorically finds that even the manufacturer chooses to pay duty then the manufacturer exporter is entitled to such rebate in terms of Rule 18 of the Central Excise Rules 2002 and not the importer of such goods (presumably the applicant being an SEZ unit). The impugned Order further states that neither in terms of Notification 19/2004-CE (NT) dated. 06.09.2004, nor any of the circulars which are relied upon by the applicant enable the buyer of the goods to claim rebate entitlement on the goods procured by them in the SEZ area. As such, the sole ground of rejecting the rebate/refund vide the impugned order is that as there is no provision to sanction rebate claim of duty paid to any person other than the person who has paid the same and that the applicant has no locus standi to claim refund/rebate of the duty paid by the manufacturer exporter.

10.22 with upmost respect, the first Appellate Authority could not have recorded such findings inasmuch as the original authority had already concluded on the issue, rightly or wrongly and such favourable findings in favour of the applicant were never challenged by the Revenue Authorities in further appeal.

10.23 it is trite law that the issues which are already decided by virtue of Res judicata, cannot be disturbed with the Appellate proceedings especially when the revenue never challenges

the same and this issue was to be treated as settled. That the impugned order deserves to be quashed and set aside on this single ground inasmuch as it has reopened an issue which was never in contention at the Appellate proceedings at all having already been concluded in favour of the applicant.

10.24 even otherwise, Rule 18 as also the relevant Notification No. 1912004-CE(NT) dated. 06.09.2004 merely talks about refund/rebate to be granted of the duty paid on exports goods. Nowhere in the rule the notification has there been any discussion whatsoever as to who should be the person claiming the refund. Even the Board Circulars dt.27.12.06, dt.19.3.10 and dt.28.4.15 do not contain anything to the effect that SEZ unit being a buyer of goods cannot claim rebate/refund. As such the entire scheme of refund/rebate of duty paid on goods exported is qua duty and export and not qua who claims the same. It is equally true since it is trite law that in case of rebate, when export is through party i.e. Merchant Export transaction, both manufacturer as well as merchant exporter both are allowed to claim rebate subject to the other party not claiming and giving necessary NOC declaration in this regards.

10.25 as such, the law in the procedure made thereunder is aimed that neutralizing the duties paid on export activity by giving refund and since as per Section 11B which governs both refund as well as rebate, refund includes rebate of duty, the general legal principles governing refund are equally applicable to rebate. Explanation under Section 11 B of CEA makes it clear that refund includes rebate of duty of excise on excisable goods exported out of India and as per Section 2(m) (ii) of SEZ Act, export means supply of goods or providing services from DTA to SEZ unit or developer. The present claim for rebate of CE Duty is therefore is covered by Section 11B of CEA. It could be seen from Section 11B of CEA that any person who paid the duty or borne the incidence of duty is entitled to claim the refund of such duty.. In the present case, the incidence of duty is borne by the applicant as the same having been passed by Western

Coal Fields Limited and therefore the applicant has the locus standi to claim the refund/rebate of CE Duty.

10.26 It should be equally appreciated that the applicant is a buyer of duty paid goods, and situated in SEZ area. They have no control over actions of supplier in not preparing ARE 1, especially when such supplier is Govt. owned entities itself. As such, the applicant could not have personally ensured that ARE1 procedure is followed. At the same time, while there is plausible explanation for not following procedures in the present case, as per consistent judicial pronouncements, it has been held that the same is not fatal to the substantive claim of refund/rebate:

a. Aarti Industries Ltd. 2014(305) ELT 196(Bom)
b. UOI V/s. Farheen Texturizers 2015(23) E.L.T.A23 (S.C.)
c. Commissioner of CEX, Bhopal 2006(205)ELT 1093(GOI)
d. UM Cables Ltd. 2013(293)ELT 641(Bom)
e Raj Petro Speialities 2017(345)ELT 496(Guj)
f Shri Parvati Metal P Ltd. 2013(290) ELT 638 (GOI)
g Zandu Chemicals Ltd. Vs Union of India 2015(315) ELT 520(Bom.)
h Manglore Chemicals & Fertilizers 1991(55)ELT 437(SC)

10.27 as regards the aspect of locus standi to claim refund/rebate by the applicant, while the original authority in another 010 No V(18)13/Ref CND/12-13 dtc1.24.06.2013had otherwise given a favorable finding that the applicant is otherwise allowed to claim such 'refund/rebate, and which finding was never challenged by the Revenue Authorities, however as stated above, the impugned has actually rejected refund on this ground also , which on the fact of it, cannot be sustained. Be that as it may, even for legal reasons including the analysis of the legal position as also Board Circulars, it would clearly suggest that since there is no prohibition otherwise for the SEZ unit being a buyer to claim rebate/refund of duty paid on supplies being made by the domestic suppliers and since Section 11B otherwise permits a buyer who has borne the incidence of duty to claim refund and since refund includes rebate of duty, there is nothing amiss in the applicant having claimed such duty by way of refund/rebate, especially in light of the fact that the goods

were admittedly duty paid and brought into the SEZ area. Further SEZ unit is not an importer as receipt of goods and services from DTA to SEZ does not amount to import under Section 2(o) of SEZ act. It is being made clear that the procedural infractions are no more an issue in the present revision proceedings since the same are already condoned by the first Appellate Authority.

10.28 as regards rejection of the claim on ground of not following ARE 1 procedure/procedural infractions, that in an identical case decided by another Commissioner (in their own case for a different period) exercising the powers as First Appellate Authority, has held that the ground of rejection of refund claim on this ground is not justified. The relevant portion of the said order at paragraph 9 of the said order (OIA No NGNEXCUS/000/APPL/869/13-14 dated 27/9/2013 is reproduced herein below for your kind reference and perusal.

"Para 9: I find that there is no dispute that the unit of appellant is situated in SEZ notified by the Government. It is also not in dispute that the supplier of coal Mks. Western Coalfield Ltd. supplied the coal to appellant M/s. Wardha Power Company Ltd. it is fact that appellant has received the coal from 111/s. WCL on which WCL has paid the Central Excise Duty which was certified by the departmental officers as well as Chartered Accountant. Lower authority has rejected the refund claim mainly on the ground of non-observance of procedural requirements on the part of the appellant. The appellant contended that it is a settle law that substantial benefit cannot be denied on the procedural infractions. Hence ground of rejection of refund claim not justified in present case. The applicant submits that above is the correct position in law and ought to have been followed.

10.29 They wish to rely upon the provisions of Section 26 of the SEZ Act, 2005 at this stage, which suggests that duty on goods supplied to SEZ area has to be exempted. If paid, it has to be refunded/ given as rebate. Such substantive provisions of the statute cannot be set at naught merely on procedural grounds, especially in light of above submissions.

We crave leave to refer to and rely upon following decisions in support of the contention that even where procedures are not followed, any goods/services supplied to SEZ area should not suffer any duty/Service Tax: a. Reliance Industries Ltd. 2016(41) STR 465(Tri-Mum) b. DHL Lemuir Logistics P. Ltd. 2016-CESTAT-1455-CESTAT-MUM.

10.30 as regards the finding in certain OIOs that claim is hit by bar of unjust enrichment, the issue on hand is no more Res Integra. The Hon'ble RA - GOI, in the case of Tulsyan NEC Ltd. 2014(313) ELT 977(G01) has held that unjust enrichment concept does not apply to rebate on account of goods supplied to SEZ area:

"Export rebate - Goods supplied to SEZ - They are exports within meaning of Sections 2(i) and 2(m)(ii) of Special Economic Zones Act, 2005 - For consequential rebate claims, it cannot said that they are not 'exports out of India', and such removals SEZ are only 'treated' as exports - There are no two separate terms: 'treated as exports' and 'exports out of India' -Factually and legally, there is only one term i.e. exports - It is more so as 2005 Act and Special Economic Zone Rules, 2006 have overriding effect - Also, C.B.E. & C. Circular No. 29/2006-Cus., 27-12-2006 stipulates that Rules 18 and 19 of Central Excise Rules, 2002 and all relevant provisions of Central Excise Act, 1944 are applicable mutatis mutandis. [paras 8.1, 9.3]

Refund - Unjust enrichment -Goods supplied to SEZ - They are exports within meaning of Sections 2(i) and 2(m)(ii) of Special Economic Zones Act, 2005 - In that view, as unjust enrichment is not applicable to exflorts as per first proviso to Section 11B(2) of Central Excise Act, 1944, rebate cannot be rejected on that _ground - It is more so as 2005 Act and Special Economic Zone Rules, 2006 have overriding effect, and C.B.E. & C. Circular No. 29/2006-Cus., dated 27-12-2006 stipulates that Rules 18 and 19 of Central Excise Rules, 2002 and all relevant provisions of Central Excise Act, 1944 are applicable mutatis mutandis. [paras 83, 9.2, 9.3]".

10.31 the applicant had also provided CA certificate as well as Copy of Balance Sheet which clearly shows that the duty incidence is not passed on to any other person but shown as receivable meaning thereby that the applicant has itself borne the incidence. Even if in some claims, formal ledger entry was made later on, this is not fatal to claim of refund / rebate. The issue on hand is squarely covered vide CESTAT decision in the case of Savita Oil Technologies Ltd. 2016-TIOL-1444-CESTAT-MUM.

10.32 the issue stands on similar footing as issuing Credit Note later on to regularize the issue which amounts to not passing on of duty incidence. This issue is also otherwise covered vide the judgment of the Hon'ble Allahabad High Court in the case of Bhushan Steel Ltd. 2016(340) ELT 107(A11) as also in the case of A.K. Spintex Ltd. 2009(234) ELT 41(Raj) as upheld by Hon'ble Apex Court reported at 2016(339) ELT 177(SC).

10.33 the impugned order has not rejected a single rebate/refund claim on the grounds of being time-barred. As such, at this stage, no elaborate submissions are being made in this regard. Suffice it to say, none of the claims are legally time-barred.

In their further submissions dated 18.05.2018, the applicant further contended that :-

10.34 as submitted during the course of the previous hearings fixed and attended on 3rd April, 2018 and 18th April, 2018, the applicant made earnest attempts through M/s. Western Coalfield Limited, to approach the Jurisdictional Central Excise Authorities of M/s. Western Coalfields Limited, in order to certify that the supplies made by M/s. Western Coalfields Limited to the applicant on appropriate duty payment, were such wherein the duties of central excise was admittedly paid by them to the Government Exchequer.

10.35 in connection with the same, they have been issued Certificate C.No IV (16)30-201/Ref/City/NGP-II/2018-19/ 883 dated 02.05.2018 by the office of The Assistant Commissioner, CGST & Central Excise, Division- city,

Nagpur - II certifying that during the period from March 2011 to May 2013, M/s. Western Coalfields Limited had supplied excisable goods to the applicant on appropriate payment of duties of central excise. The said certificate is annexed hereto and marked as Annexure -A.

10.36 as also the fact that the Jurisdictional Central Excise Authorities found it difficult to certify the exact invoice-wise details for supplies made to the applicant by M/s. Western Coalfields Limited, as the ER-1 returns does not reflect party wise details of supplies made by M/s Western Coalfields Limited. Further, the applicant separately obtained certificates from one of the mine area of M/s. Western Coalfields Limited (Wani North Area, Yeotmal Division) to the effect that the various invoices (forming part of refund claim) were in fact raised by them upon the applicant wherein appropriate Central Excise Duty was physically paid by M/s. Western Coalfields Limited and that all such supplies were made to SEZ area of the applicant. The applicant encloses copy of the said Certificate obtained from Wani North Mine area of M/s. Western Coalfields Limited (Annexure -B).

10.37 the applicant has already submitted copies of CA certificate incorporating all the above details, correlating the period of supply as also the details of various invoices under which different mines of M/s. Western Coalfield Limited had cleared Central Excise Duty paid coal to the applicant and which was physically received by the applicant in their premises. As also the fact that WCL are public sector undertaking, and as upheld by Hon'ble CESTAT in case of CCE, Indore v Nepa Ltd - 2013 (298) E.L.T.225 (Tri-Del) that in case of public sector undertaking it would be absurd to accuse that there was any intention to evade tax. Thus, there is no point in questioning the veracity of the duty paid nature of transaction effected by Public Sector Undertakings as specifically confirmed by them in writing which is already on record.

10.38 as such, the aspect as to the duty paid nature of the goods and its receipt and usage in the factory premises of the applicant stands properly established vide the above

evidences. This is however without prejudice to the fact that the duty paid nature and its receipt was anyway never in dispute in the present proceedings before any of the Lower Authorities. Nonetheless, in light of such factual backdrop, it is reiterated that the procedural infractions that too at the end of M/s. Western Coalfields Limited in having not prepared ARE-1 etc. is not fatal to the substantive benefit of rebate under Rule 18 of the Central Excise Rules 2002 read with appropriate Notification issue thereunder and hence the rebate is otherwise due in the facts and circumstances of the case.

10.39 Further, it is reiterated that admittedly they are the buyer of the duty paid coal which was received and used by them for their SEZ operations. As already submitted earlier, a buyer of the goods is eligible to claim refund and since rebate is specie of refund, the buyer ipso facto is eligible to claim even rebate of duty paid by M/s. Western Coalfields Limited on coal supplied to the SEZ area. Nonetheless, it is also submitted that insofar as the manner in which rebate claim has been lodged by them, there is nothing to the contrary suggested either in Rule 18 of the Central Excise Rules 2002 and the relevant Notifications issued thereunder, which prohibits a buyer from claiming such rebate. That no such condition can be artificially read into the said Rule or the procedural laid out thereunder and the substantive benefit of rebate cannot be denied to the person who has born the duty incidence, being the applicant in the present case.

10.40 as already submitted in the earlier submissions, the goods brought into SEZ area are not be treated as imported goods at all since the deeming friction created to render SEZ area as a territory outside India is limited for the purpose of authorized operations of SEZ unit insofar as procurement of goods are concerned and does not affect the independent working of Rule 18/Rule 19 of the Central Excise Rules 2002 at all. The Hon'ble Andhra Pradesh High Court in the case of Tirupati Udyog Ltd. 2011(272) ELT 209(AP) as upheld by Hon'ble Apex Court and reported at 2017(354) ELT A105 (SC), as also the Hon'ble Gujarat High Court in the case of

Essar Steel Ltd. 2010(249) ELT 3(Guj) as upheld as reported at 2010(255) ELT A155 (SC) have already concluded on this issue. It is interesting to note that the Hon'ble Gujarat High Court in the said case of Essar Steel Ltd.(supra) in fact held as follows:

"41.3.4 Similarly, reliance on Section 53 of the SEZ Act 2005 to contend that a Special Economic Zone is a territory outside India, is misconceived. Section 53 provides that the Zone would be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations. The term "customs territory" cannot be equated to the territory of India and in fact, such term has been defined in the General Agreement of Tariffs & Trade, to which India is a signatory, to mean an area subject to common tariff and regulations of commerce and that there could be more than one customs territory in a country. Moreover such an interpretation would lead to a situation where a Special Economic Zone would not be subject to any laws whatsoever. The entire SEZ Act 2005 would be rendered redundant since it is stated to extend the whole of India. In any case, various provisions of the SEZ Act would be rendered redundant and unworkable if the Special Economic Zone was to be considered an area outside India. This is apart from the fact that such a declaration would be constitutionally impermissible.

10.41 As such, the deeming fiction cannot be stretched beyond the purpose for which it is created and would otherwise lead to rather strange consequences which was never intended by the legislature. Suffice it to say, the applicant otherwise has to be treated as an Indian assesse and having purchased goods on duty payment from M/s. Western Coalfield Ltd, the applicant having borne the incidence of the duty, is otherwise eligible to claim refund thereof in the form of Rebate in terms of Rule 18 of the Central Excise Rules 2002 read with Circular No.29/2006- CUS dated 27.12.2006 as amended. The goods so procured also did not become imported goods for the purpose of Rule 18 of Central Excise Rules, 2002. In the facts and circumstances of the case, the

impugned order is in grave error inasmuch it wrongly rejects the refund otherwise legitimately due to the applicant.

10.42 As some of the rebate applications are concerned as involved in the present case, the applicant had already lodged the claim however before wrong authority and upon the claims being returned to them, the applicant had forthwith filed the claim with the appropriate Jurisdictional Authority. It is trite law that in terms of The General Clauses Act, as held in the following cases, when refund/rebate application is first filed before a wrong authority and later on filed before the correct authority, the time spend before the wrong authority has to be excluded while competing the period of limitation. We crave leave to refer to and rely upon the judgment of the Hon'ble Gujarat High Court in the case of AlA Engineering Ltd. 2011(21) STR 367(Guj) in this regard.

10.43 The aspect of limitation though discussed in some of the claims by the original authority, nonetheless, the first Appellant Authority does not deny any of the rebate claims on the ground of limitation, which must be for the above reasons itself which were also explained before the first Appellant Authority as well. As such the issue of limitation is merely and academic one in the present review revision applications. Similarly, insofar as the issue of unjust enrichment is concerned, the applicant has already relied upon the decision in the case of Tulsyn NRC Ltd. 2014(313) ELT 977(GOI) wherein it has been held that in case of supplies made to SEZ area, since rebate is otherwise due on such supplies, the concept of unjust enrichment does not apply. While the First Appellant Authority does not deny rebate on the grounds of unjust enrichment, nonetheless, this issue is being made clear so that the Revenue Authorities would not seek to deny rebate on extraneous grounds.

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

12. Government observes that the issue for decision in these Revision Applications is whether the applicant who is SEZ unit is entitled for refund of duty paid by its supplier of coal, i.e. M/s Western Coalfield Ltd. (WCL) in terms of Rule 30 (1) of Special Economic Zones Rules 2006. Government further observes that while submitting the grounds of filing such refund claim the applicant stated that such procurements of coal from WCL by the company are considered as exports as in terms of Section 26(1)(c) of the SEZ Act, 2005, being an SEZ unit, they are entitled to exemptions, from payment of Central Excise duty on all procurements from the Domestic Tariff Area (DTA) in relation to the Authorized Operations (i.e. generation of electricity) subject to such terms conditions and limitations, as may be prescribed by the Central Government; that such procurements are considered as exports as per the definition of exports under section 2(m) of the Special Economic Zones Act, 2005; and therefore, rebate of duty paid on such supplies is admissible in terms of Rule 18 of Central Excise Act, 1944 read with Notification No. 19/2004-C.E. (N.T.), dt. 06/1212004 read with the Central Board of Excise and Customs Circular No. 29/2006 dated 27th December 2006 and Section 26 of SEZ Act. The applicant further stated that however, for availing the benefit of duty free procurement and passing the benefit of excise duty exemption to SEZ units, the DTA seller (WCL) and SEZ ought to have followed the procedure of filing the ARE-1 as specified under Notification No. 19/2004-C.E. (NT) dated 5th September 2004 read with Circular No. 29/2006-Customs dated 27th December 2006 and Circular No. 6/2010-Customs dated 19th March 2010 for the said transaction. However, WCL, did not follow the procedure of ARE-1 and paid duties which was subsequently charged to them and as a consequence they had to purchase the coal from WCL, on payment of total duties (Including Central Excise duty and Clean Energy Cess) and hence the instant refund claim claiming refund of such duties which had been borne by them as buyer of coal from WCL.

13. Government observes that the relevant provisions of the SEZ Act, 2005 and SEZ Rules, 2006 read as under :-

Section 2 (m). -
"export" means
(i) ----------
(ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer.

Section 51. Act to have overriding effect. *- (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.*

Section 53. Special Economic Zones to be ports, airports, inland container depots, land stations, etc. in certain cases. *- (1) A Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations.*

SEZ Rules, 2006 - Rule 23 : *Supplies from the Domestic Tariff Area to a unit or developer for their authorized operations shall be eligible for export benefits as admissible under the Foreign Trade Policy.*

From the above statuary provisions under the SEZ Act, 2005 and SEZ Rules, 2006, it is clear that supplies made to SEZ are considered as exports. Therefore, all the benefits provided for exports under Foreign Trade Policy, Central Excise Act and Customs Act & Rules, made thereunder shall be applicable to supplies made to SEZ unit also.

Further, the Board Circular No. 29/2006-Cus., dated 27-12-2006 thereunder it is clarified as under :

"3. The important provisions of the Act and the Rules having a bearing on procurement of goods from DTA by SEZ units and SEZ developers for their authorized operations are listed below -

(a) Under Section 2(m) of the Act, supplying goods or providing services, from DTA to a SEZ unit or a SEZ developer, has been defined to constitute 'export'.

(b) Section 51 of the Act provides that the said Act shall have effect in case of any inconsistency with the provisions contained in any other law for the time being in force, etc.

5. The existing SEZs, i.e., the ones notified under Section 76(A) of Chapter XA of the Customs Act, 1962 shall be deemed to have been notified under Section 4 of the Act. Supplies from DTA to SEZ shall be exempt from payment of any Central Excise Duty under Rule 19 of Central Excise Rules, 2002. Similarly, such supplies shall be eligible for claim of rebate under Rule 18 of Central Excise Rules, 2002 subject to the fulfillment of conditions laid thereunder. The provisions relating to exports under Central Excise Act, 1944 and rules made thereunder may

be applied, mutatis mutandis, in case of procurement by SEZ units and SEZ developers from DTA for their authorized operations."

From the above clarification, it is clear that in respect of supplies made to SEZ unit; it shall be eligible for all the benefits available under the Central Excise Act, 1944 and rules thereunder.

14. 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

Praveen Mahajan
Director General"

15. 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.

16. A combined reading of aforesaid circulars makes the position clear that rebate under Rule 18 of the Central Excise Rules, 2002 is admissible for **supplies made** from DTA to SEZ by **DTA supplier** supplying goods to the SEZ, as duty paid goods under claim of rebate **on the cover of ARE-1**. It is thus amply clear that the rebate of duty under Rule 18 of the Central Excise Rules, 2002 is admissible only to the DTA supplier on following the procedure and the documentation for effecting supply of goods from DTA to SEZ as laid down in Circular No. 29/2006-Cus., dated 27-12-2006. Further there is no provision or procedure prescribed either in SEZ Act, 2005 , SEZ Rules, 2006 or the afore stated circulars for SEZ unit, who is buyer receiving supplies from the DTA, for claiming any such refund / rebate of duty paid by the suppliers/ DTA.

17. Government observes that as per Section 2(m) of SEZ Act, 2005, supply of goods and service from DTA to SEZ shall constitute exports. When the supply of goods is treated as exports, the receipts of the same are obviously treated as Imports. Rule 30(1) of SEZ Rules, 2006 stipulates that DTA supplier shall clear the goods to SEZ Unit or Developer as in the case of exports either under bond or as duty paid goods under claim of rebate on the cover of ARE-1 referred to in Notification No. 42/2001-C.E. (N.T.), dated 26-6-2001. The said notification is now replaced by new Notification No. 19/2004-C.E. (N.T.),dated 6-9-2004. Therefore, under Rule 18 of Central Excise Rules 2002, rebate claim can be filed by DTA supplier / the exporter only by following procedure prescribed under the Notification No. 19/2004-CE (NT) dated 6.9.2004 issued under Rule 18 ibid. From this it is evident that the Refund Claim can be filed by the exporter only i.e. in this case M/s WCL. In any case, since M/s WCL is the exporter of the goods to SEZ in this case the rebate claim can only be filed by the exporter under Rule 18 of the Central Excise Rules, 2002. The said Rule is not applicable to receiver or Buyer of the goods. Rule 18 clearly stipulates that where any goods are exported the Central Government may by notification grant rebate of duty paid on such excisable goods and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedures as may be specified in the notification. From this it is evident that the rebate can be claimed by the exporter only that too on following the procedure prescribed Notification No. 19/2004-CE (NT) dated 6.9.2004. In this case the applicant is not an exporter and has also not followed any of the procedures

prescribed in the said Notification. Therefore they are not eligible for rebate in this case. The ARE-1 application duly certifying the receipt of goods in SEZ has to be filed by the exporter for claiming the rebate. The Buyer/Purchaser of the goods cannot claim the benefit available to an exporter prescribed under Rule 18 and the notification issued under the said notification. Even if the ARE-1 procedure or Bill of Export was filed by the Exporter, the applicant cannot claim the rebate under Rule 18 as they are the buyer of goods. The rebate claim can be filed by the Exporter only as Rule 18 read with Notification is for claiming rebate by Exporter only. The argument of the applicant that the issue is a procedural lapse is unacceptable as the rebate claim under Rule 18 read with the Notification ibid is available for Exporters only and in this case the applicant is not an exporter. When the statute itself prescribes the benefit for exporters, in no way the said benefit can be claimed by the receiver of the goods. In view of the above, the case laws cited by the applicant also do not appear to be applicable in their case.

18. Government further observes that the applicant has relied upon judgement of the Hon'ble Apex Court in the case of Addison and Co. Ltd. 2016(339) ELT 177(SC) (which is also later affirmed by another decision of SC (2017 (353) EL.T. A64 (S. C.)) in which it has been held that a buyer who bears the duty incidence is also equally in a position to claim refund under 11B of the Central Excise Act, 1944. On going through the contents of the said case Government observes that The Supreme Court in its impugned order had held that since duty component on turnover discount was initially passed onto buyer who further passed it onto ultimate consumer who could not be identified, refund of such duty claimed by assessee on the plea that such duty returned back by issuing credit notes subsequent to clearance of goods was not admissible being hit by bar of unjust enrichment under Section 12B of the Central Excise Act, 1944. It was further held that the downstream buyers/ultimate consumers can also make claim for refund of duty paid in excess. Plea that the ultimate buyers/consumers do not figure in the Scheme of Sections 11B, 12A, 12B and 12C of the Central Excise Act, 1944 was not acceptable.

19. Government observes from the above that the issue involved in the case of Addison and Co. Ltd. 2016(339) ELT 177(SC) relates to duty paid in excess which was claimed to be returned back by issuing of credit notes subsequent to clearance of goods. It is in the context of excess payment of duty that the Hon'ble Supreme Court held that the downstream

buyers/ultimate consumers can also make claim for refund of duty paid in excess and hence plea that the ultimate buyers/consumers do not figure in the Scheme of Sections 11B, 12A, 12B and 12C of the Central Excise Act, 1944 was not acceptable. On the other hand in the instant Revision Applications there was no excess payment of duty but the duty was paid correctly by WCL and therefore, there was no payment of excess duty so as to entitle the applicants as ultimate buyers to claim any refund. Their suppliers WCL has chosen to pay duty and clear goods without claiming exemption / rebate. Hence the reliance placed by the applicant on case of Addison and Co. Ltd. 2016(339) ELT 177(SC) is misplaced.

20. Government observes that Ministry of Commerce and Industry has amended Rule 47 of SEZ Rules, 2006 by issuing Notification to insert sub-rule 5 (G.S.R. 772(E) dated 5 August 2016), to empower Customs and Central Excise Authorities to deal with refund, demand, adjudication, review and appeal matters relating to authorized operations under SEZ Act and the transactions involving goods and services related thereto. The text of the Notification No. GSR 772(E) dated 5.08.2016 issued by the Ministry of Commerce and Industry inserting sub-rule (5) in Rule 47 of the Special Economic Zone Rules, 2006 is indicative of the intent of the law makers. The provision is specifically in respect of clearances made by the **SEZ to the DTA**. Since its inception, this sub-rule is the only provision in the SEZ Rules which brings the Central Excise authorities into the picture for matters concerning refund, demand, adjudication, review and appeal with regard to the matters relating to authorized operations under SEZ Act, 2005. There are no other provisions in the Act or the Rules where the SEZ is required to approach the Central Excise authorities for obtaining refund. Needless to say, this avenue would be available only prospectively after the insertion in Rule 47. Prior to this insertion the SEZ Act and the Rules were bereft of any provision/procedure to approach the Central Excise authorities for refund in any matter.

21. It would be pertinent to mention here that neither in its Revision Applications nor in their subsequent submissions has the applicant been able to produce a single case law / instance where the SEZ unit has been granted rebate / refund of duties paid by the DTA unit under Rule 18 of Central Excise Rules, 2002. On the other hand, there are plethora of cases where the DTA units supplying the goods to the SEZ have been allowed the benefit of rebate under rule 18 of CER, 2002 and of refund of accumulated CENVAT credit under rule 5 of CCR, 2004. The Board has for the guidance

of the trade issued circulars to enable the DTA units to claim rebate on such clearances without any encumbrance. The procedures are well publicized and being followed by similarly placed units in the SEZ without any difficulty. Therefore, the applicant's pleadings to be allowed a special deviation from an established practice on the ground that they were eligible for refund of duty paid on the goods procured from the DTA would be discriminatory and unfair to the other units in the DTA and the units in the SEZ who are diligently following the laid down procedures without demur.

22. As such, Government wants to impress upon the basic principle which is to be followed for the purpose of deliberation and decision of the required interpretation and thus applicability of all the above statutory provisions for the purpose of decision in this case matter. This principle is as per the guidelines settled by the Apex Court in the case of ITC Ltd. v. CCE, 2004 (171) E.L.T. 433 (S.C.) and Paper Products Ltd. v. CCE, 1999 (112) E.L.T. 765 (S.C.) which are :

(i) Strict & Plain wordings of the Statute are to be strictly adhered

(ii) Statute as clarified/elaborated vide Circulars are to be followed religiously in proper perspective.

When the whole case matter is examined as above then Government finds itself in conformity with the views that there is no provision or procedure prescribed either in SEZ Act, 2005, SEZ Rules, 2006 or the Circulars issued by the Board for SEZ unit, who is buyer receiving supplies from the DTA, for claiming any refund / rebate of duty paid by the suppliers/ DTA units.

Further, Government is also bound by the principles laid down in the above applicable Statute. The applicant in his grounds is citing examples/cases which are not directly/mandatorily applicable for the case matter and proceedings herein.

23. In view of the aforesaid discussion, Government holds that the applicant is neither eligible for rebate/refund of duty paid by WCL either under Rule 30(1) of SEZ Rules, 2006 or Rule 18 of the Central Excise Rules, 2002 and the refund claims are rightly held inadmissible by lower authorities.

24. In view of this position, Government does not find any legal infirmity in the impugned Orders-in-Appeal (at column 3 of Table and therefore upholds the same.

25. All the 8 Revision Applications viz. bearing Nos.195/81/16-RA, 195/82/16–RA, 195/84/16-RA, 195/85/16-RA, 195/86/13-RA, 195/87/16 - RA, 195/88/16-RA, and 195/447/16-RA are dismissed being devoid of merits.

26. So ordered

30.10.18

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

ORDER No.358-359/2018-CX (WZ) /ASRA/Mumbai Dated 30.10.2018

To,

M/s Sai Wardha Power Generation Limited,
(Formerly known as Sai Wardha Power Limited)
B-2 Warora Growth Centre,MIDC Warora,
Chandrapur District,
Maharashtra 442 907.

ATTESTED

30.10.18

S.R. HIRULKAR
Assistant Commissioner (R.A.)

Copy to:

1. The Commissioner of CGST, Nagpur-I Commissionerate, Telangkhedi Road, Civil lines, Nagpur-440 001
2. The Commissioner of CGST (Appeals) Telangkhedi Road, Civil lines, Nagpur-440 001
3. Deputy / Assistant Commissioner CGST Division Chandrapur, Nagpur-I Commissionerate, Jagannath Baba Nagar, Datala Road, Chandrapur-442402.
4. Shri Saurabh Dixit, Advocate, B-216/217 Monalisa Business Centre, Beside Old More Megastore Campus Manjalpur, Vadodara-390 011.
5. Sr. P.S. to AS(RA), Mumbai,
6. Guard File,
7. Spare Copy.