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**GOVERNMENT OF INDIA**
**MINISTRY OF FINANACE**
**DEPARTMENT OF REVENUE**

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

F NO. 195/57-59/13-RA,
195/60-61/13-RA &198/04/13-RA/1271 Date of Issue: 09.03.2018

ORDER NO.38-43/2018/ASRA/MUMBAI DATED 28.02.2018
OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF CENTRAL EXCISE ACT,1944.

Applicant / Respondent :

| Sr. No. | File Number | Revision Application (R.A) filed against OIA No.* | OIO & dated | Applicant | Respondent |
|---|---|---|---|---|---|
| 1 | 195/57-59/ 13 -RA | BR (221-223)/M-V/2012 dt. 3.10.12 | 175/11-12 dt. 20.5.11<br>176/11-12 dt. 20.5.11<br>R-512/10-11 dt 25.2.11 | M/s Essel Propack Ltd. | Commissioner of Central Excise Thane-I |
| 2 | 195/60-61/ 13-RA | BR(254-255)/Th-1/2012 dt 19.10.12 | 258 dt 31.05.12<br>1262 dt 1.02.2012 | M/s Essel Propack Ltd. | Commissioner of Central Excise Thane-I |
| 3 | 198/04/13-RA | SB/265/Th-I/10 dated 8.12.10 | 1326/09-10 dt 30.10.09 | Commissioner of Central Excise Thane-I | M/s Essel Propack Ltd. |

*OIA passed by Commissioner (Appeal), C.Ex. Mumbai Zone-I, Meher Building, Dadi Seth lane, Chowpatty, Mumabi-400 007

:ORDER:

These five revision applications have been filed by the M/s Essel Propack Ltd., Village-Vasind, Taluka-Shahpur, District- Thane, Maharashtra-421 604 against the two Orders-in-Appeal viz. 1. Order-in-appeal No. BR (221 to 223)M-V/2012 dated 3.10.2012 and 2. Order-in-appeal No. BR(254-255) Th-1/2012 dated 19.10.2012 both passed by the Commissioner of Central Excise (Appeals)-Zone-I, Mumbai, Meher Building, Dadi Seth Lane, Chowpatty, Mumbai .

2. In a similar issue, another revision application has also been filed by the Commissioner of Central Excise, Thane-I, Navprabhat Chambers, Ranade Road, Dadar (W), Mumbai against the Orders-in-Appeal No.SB/265/Th-I/10 dated 8.12.2010 passed by the Commissioner of Central Excise (Appeals) Zone-I, Mumbai, Meher Building, Dadi Seth Lane, Chowpatty, Mumbai with respect to Order-in-original, No.1326/09-10 dt 30.10.2009 passed by the Assistant Commissioner of Central Excise Kalyan-II Division Thane-I. M/s Essel Propack Ltd., Thane is the respondent in this case. Since the issue involved in all the six applications is identical, these six applications are being taken up for adjudication together in this order.

3. Brief facts of these cases are as follows;

3.1 Brief facts in case of Revision Application no. 195/57-59/13-RA & 195/60-61/13-RA

3.1.1 M/s Essel Propack Ltd., Thane are engaged in the manufacture of excisable goods falling under Chapter 39239090 of the Schedule to the Central Excise Tariff Act, 1985, holders of Central Excise Registration No. AAACE1568LXM001. M/s Essel Propack Ltd., Thane had filed rebate claim on account of goods cleared by them to SEZ, under Rule 18 of the Central Excise Rules, 2002. All the rebate claims filed by M/s Essel Propack Ltd., Thane, were rejected by the original rebate sanctioning authority mainly on the ground that goods cleared to SEZ Units cannot be equated with that of exports and such clearances would not be eligible for grant of rebate under rule 18 of Central Excise Rule, 2002.

3.1.2 Being aggrieved by the said orders-in-original, the respondents filed appeals before Commissioner (Appeals), who disallowed the said appeals and upheld the Orders-in-Original issued by the Original rebate sanctioning authority.

3.1.3 Being aggrieved by the impugned orders-in-appeal, the applicant, M/s Essel Propack Ltd., Thane has filed these revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds that:

(i) The Ld. Commissioner Appeals has upheld the OIOs vide its impugned orders and dismissed the appeal filed by the applicant against rejection of the rebate claim amounting to Rs. 1,47,066/- and 4,61,032.00 on the ground that supplies made from DTA to SEZ do not amount to 'export' and it is only a deeming fiction.

(ii) The Ld. Commissioner Appeals has stated that the definition of 'export' under Customs Act, 1962 (hereinafter referred to as "Customs Act") has to be referred for determining rebate claim of the applicant. The said definition provides that 'export' with its grammatical variations and cognate expressions, means taking out of India to a place outside India. As the SEZ unit is located in India, such supplies do not amount to export under Customs Act,

(iii) The Ld. Commissioner (Appeals) has taken a contradictory stand as far as treating the supplies from DTA to SEZ as 'export' is concerned. In para 6(iii) on page 2 of the impugned order, the Ld. Commissioner (Appeals) has held that "though supplying of goods or providing service by DTA to a unit or Developer is treated as Export, it however does not treat the supplies made by DTA unit to the SEZ units as imports". Whereas on the other hand, the Ld. Commissioner (Appeals) in its impugned order has rejected the rebate claim on the grounds that supplies from DTA to SEZ cannot be treated as export. Moreover the Ld. Commissioner (Appeals) vide Para 6(iii) has categorically stated that rebate claim cannot be governed by the circulars issued under Customs Act. However, the Ld. Commissioner (Appeals) has conveniently relied on the definition of 'export' under the Customs Act to deny the claim of rebate to the applicant. Thus the applicant submits that the order passed by the Ld. Commissioner (Appeals) is self-contradictory and is therefore, liable to be set aside on this ground itself. Reliance is placed on Convergys India Service Pvt Ltd vs. Commissioner of Service Tax reported in 2012(25)S.T.R.251(Tri.-Del.) to show that self-contradictory orders are liable to be set aside.

(iv) The observation by the Ld. Commissioner (Appeals) is incorrect and bad in law. A reference may be made to Section 2(m) of the Special Economic Zone Act, 2005 (hereinafter referred to as "SEZ Act") which

provides the definition of the term 'export'. For the sake of convenience, the said section has been reproduced below:

(m) "export" means —

(i) taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise; or

(ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or

(iii) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone;

(v) Sub-section (ii) categorically provides that supply of goods or services from DTA to SEZ Unit or developer shall be termed as 'export.

(vi) Further the said position was clarified vide Circular No. 29/2006 dated 27.12.2006 issued by the Central Board of Excise and Customs (hereinafter referred to as "CBEC") wherein it was provided that supplies made from DTA to SEZ shall be treated as export under section 2 (m) of the SEZ Act and for supplies from DTA to SEZ, procedure provided under Rule 30 of the SEZ Rules has to be followed. A copy of the circular is enclosed as Annexure-5.

(vii) To further substantiate the claim of the applicant, reliance is placed on the various judgments passed by Government of India, Tribunal, High courts on the issue of supply of goods from DTA to SEZ and availability of rebate of Central Excise duty on such supplies:

3.2 Brief facts in case of Revision Application No. 198/04/13-RA filed by the Department.

3.2.1 The abovementioned, M/s Essel Propack Ltd., Thane had filed rebate claims on account of goods cleared by them to SEZ, under Rule 18 of the Central Excise Rules, 2002. The rebate claims filed by M/s Essel Propack Ltd., Thane were rejected by the original rebate sanctioning authority on the ground that goods cleared to SEZ Units cannot be equated with that of exports and such clearances would not be eligible for grant of rebate under rule 18 of Central Excise Rule, 2002.

3.2.2 Being aggrieved by the said Order-in-Original, M/s Essel Propack Ltd., Thane filed appeal before Commissioner (Appeals), who allowed the said appeals with consequential relief. Commissioner (Appeals) held that

rebate of duty paid on goods supplied to SEZ is admissible under Rule 18 of Central Excise Rules 2002 read with Notification -No 19/04-CE (NT) dated 6.9.04.

3.2.3 Being aggrieved by the impugned orders-in-appeal, the applicant department has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government 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. UOI 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 Vs. Ellis Bridge Gymkhana, (1998) 1 SCC 384, Commissioner of Income Tax, Bangalore Vs.. Venkateswara Hatcheries (P) Limited, (1999) 3 SCC 632 and M/s. QaziNoorul H. H. H. Petrol Pump & Another Vs. 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 even 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 cannot be allowed to claim any benefit under the SEZ Act/Rules".*

*(iii) The clarification issued vide Circular No.6/2010-Cus dated 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 Custom officer specified officer in charge of the SEZ, in order toconsiderthe 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. EPL, their rebate claim cannot be considered as complete and proper and therefore the same is not admissible.*

4. A Personal hearing in respect of Revision application no. 198/04/13-RA filed against order-in-appeal No. SB/265/Th-I/10 dated 8.12.2010 was held on 15.01.2018 and the same was attended by Shri Sachchidanand Singh, Head-Indirect taxes, on behalf M/s Essel Propack Ltd., Thane. However, no one was present from applicant department. As there was a delay of 20 days in filing of instant revision application by the department, the application for condonation of delay was taken up for decision. Shri Sachchidanand Singh, Head-Indirect taxes, on behalf M/s Essel Propack Ltd., Thane objected to the condonation of Delay in filing of the instant revision petition by the department. In this regard Government observes that the order of the Commissioner (Appeals) has been stated to be received in the office of the Commissioner of Central Excise, Thane-I on 13.12.2010 and the instant Revision Application should have been filed on or before 12.03.2011 in terms of Section 35EE under sub-section (2) of

the Central Excise Act, 1944. It has been stated that the applicant had filed the appeal before CESTAT, Mumbai under Rule 6 of the Central Excise (Appeals) Rules, 2001 read with explanation No.1 to Rule 6 of the CESTAT (Procedure) Rules 1982 on 14.02.2011 (within the period of 3 months) on the grounds that the Commissioner (Appeals) had not considered the point of law as to whether the supplies made to SEZ are treated as export, consequently admissible for rebate. The Hon'ble CESTAT, Mumbai vide order No. A/ 172/ 12/ SMB/CIV dated 04.07.2012 had dismissed the said appeal as non-maintainable in view of the provisions of Section 35B of the Central Excise Act, 1944 and this order of the Tribunal was received reportedly by them on 04.12.2012. The instant Revision Application has been filed on 29.01.2013. Government further observes that the applicant department after having received the main order of the Commissioner (Appeals) had by mistake filed the appeal before the Hon'ble CESTAT well before the stipulated period of 3 months in the point of law. However, the Tribunal was pleased to dismiss their appeal as non-maintainable because under the provision of section 35B of the Central Excise Act, the Tribunal has no jurisdiction of the rebate claims where the order is passed by Commissioner (Appeals). The applicant department has received this order of Tribunal on 4.12.2012 and they have filed the instant Revision Application within 50 days from the receipt of this order of the Tribunal. Therefore, it is seen from the records that the applicant have been persistently pursuing the legal recourse against the order about which they felt aggrieved. There doesn't appear to be any lethargy or inaction on the part of the department whatsoever. It is merely the case of filing the appeal before the wrong fora and then correct the legal recourse. Therefore, Government hold that the time during which the department was pursuing their appeal with CESTAT up to 4.12.2012 is liable to be excluded from computing time under Section 14 of sub-section 2 of the Limitation Act, 1963. Therefore, Government holds that the application for condonation of delay of 20 days is liable to be allowed and the Government accordingly allows the application for condonation of delay. The case was then taken up for regular Personal Hearing.

4.1 Nobody appeared from the side of the department. On behalf of the applicant, Shri Sachchidanand Singh, Authorised Representative of the respondent have filed the additional submissions. He reiterated the submissions filed in response to the Revision Application along with the submission and pleaded that the issue regarding the admissibility of rebate claims on the supply of goods to the SEZ has been settled by the Revisionary Authority in their own case. The Revisionary Authority in Order No. 1314-1315/2013-CX dated 14.10.2013 had in the Application no. 198/3-4/2012-RA dated 15.10.2013 had allowed the rebate on supplies made by them to the

SEZ. It was therefore prayed that the instant Revision Application filed by the applicant department may please be dismissed and the order of Commissioner (Appeals) may be upheld.

5. A Personal hearing in respect of Revision Application no. 195/57-59/13-RA & 195/60-61/13-RA filed against Order-in-appeal No. BR (221 to 223) M-V/2012 dated 3.10.2012 & Order-in-appeal No. BR(254-255)Th-1/2012 dated 19.10.2012 was held on 12.02.2018 and the same was attended by Shri Sachchidanand Singh, Head-Indirect taxes, on behalf M/s Essel Propack Ltd., Thane, who prayed that impugned order-in-appeal be set aside and the Revision Applications be allowed.

6. Government has carefully gone through the relevant case records, oral & written submissions and perused the impugned orders-in-original' and orders in-appeal. Government observes that the issue for decision in all these applications is, whether clearances to SEZ can be equated with that of exports and whether such clearances would be eligible for grant of rebate under Rule 18 of Central Excise Rule, 2002.

7. Government notes that department has contended that definition of 'export' given under the Customs Act 1962 has been traditionally adopted for the purposes of the Central Excise Act and rules made thereunder. The term 'export' is a physical export out of the country as envisaged in the Customs Act. Department has relied upon judgement of Hon'ble Tribunal in the case of M/s Tiger Steel Engineering Pvt. Ltd. 2010(259) ELT 375 (T-Mumbai) wherein it was held that 'export' has same meaning as defined in Section 2(18) of Customs Ac and not defined under Section 2(m)(11) of SEZ Act, 2005.

8. Government observes that Commissioner (Appeals) has rejected the rebate claims relying 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.

9. 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."*

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 therein. 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 notes that the applicant department has also relied on the judgement of Hon'ble CESTAT in the case of M/s Tiger Steel Engineering Pvt. Ltd. [2010(259) ELT 375] in their revision application. Government observes that Revisionary Authority vide GOI Order No. 1287/2013-CX, dated 1-10-2013[(311) E.L.T. 971 (G.O.I.)] while deciding the identical issue and allowing the Revision application filed by M/s Bhuwalika Steel Industries Ltd. has distinguished the judgement of Hon'ble CESTAT in the case of M/s Tiger Steel Engineering Pvt. Ltd. The relevant paras of the said Order are reproduced below :

> *9.3 Government 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.*

*9.4 Government further notes that Hon'ble Gujarat High Court has held in the case of CCE v. NBM* Industries [2013 (29) S.T.R. 208 (Guj.)] vide order dated 8-9-2011 reported on 2012 (276) E.L.T. 9 (Guj.) as under :

"Revenue is in appeal against the judgment of the Tribunal dated 6th March, 2009 [2009 (246) E.L.T. 252 (Tribunal)] raising following questions for our consideration :

*"(i) Whether the Tribunal was right in allowing refund of the Cenvat credit availed on inputs used in the manufacture of goods cleared by DTA unit to a 100% Export Oriented Unit, following CT-3/ARE-3 procedure, where the provisions of Rule 5 of the Cenvat Credit Rules, 2004 are not applicable, such clearance being 'deemed export'?*

*(ii) Whether the Tribunal was right in allowing refund of the Cenvat credit availed on inputs used in the manufacture of goods cleared by DTA unit to a 100% Export Oriented Unit, even in absence of enabling provision that consider deemed export as physical export as in case of supply to SEZ, having been defined as export in terms of Section 2(m) of SEZ Act, 2005 read with Rule 30 of the SEZ Rules, 2006?"*

*2. From the questions it can be seen that though two questions are framed, issue is common, viz. entitlement of the manufacturer to refund of Cenvat credit on inputs used in manufacture of goods cleared by DTA units to 100% export oriented unit. Case of the Revenue is that such refund is not available since Rule 5 of the Cenvat Credit Rules does not cover such a situation granting benefit of deemed export. It is Revenue's case that only physical export would qualify for refund. We need not record the submissions at length since we find that similar issue was considered by*

*a Division Bench of this Court in Tax Appeal No. 968 of 2008 [2011 (269) E.L.T. 17 (Guj.)]. One of the questions posed before the Court was as follows :*

*"(i) Whether in the facts and circumstances of the case, the Tribunal is justified and has committed a substantial error of law in dismissing the appeal of the Revenue and confirming the order of the learned Commissioner (Appeals) holding that the clearances made by one 100% EOU to another 100% EOU which are "deemed exports are to be treated as physical exports for the purpose of entitling refund of unutilized Cenvat credit contemplated under the provisions of Rule 5 of the Cenvat Credit Rules, 2004?"*

*3. The Division Bench after taking into account the detail submissions of the counsel appearing for the parties held and observed as under :*

*"14. We have heard the learned Counsel appearing for the parties and after considering their submissions, we are of the view that the issue raised by the Revenue in the present Tax Appeal is squarely covered by the decision of Amitex Silk Mills Pvt. Ltd. (supra), Commissioner of Central Excise v. Ginni International Ltd. and Sanghi Textiles Ltd. v. Commissioner of Customs & Central Excise* - 2006 (206) E.L.T. 854 *(Tri.-Bang.). So far as the decision of the Tribunal in the case of Amitex Silk Mills Pvt. Ltd. (supra) is concerned, it is true that the appeal is admitted by the Apex Court, however, no stay was granted by the Apex Court. It is, however, more important to note that the decision of the Tribunal in the case of Ginni International Ltd. (supra) was also challenged before the Apex Court and the Apex Court vide decision reported in* 2007 (215) E.L.T. A102 *(S.C.), held while dismissing the Revenue's appeal against the Tribunal's order, that once Development Commissioner giving permission to the appellant, a 100% EOU, to sell goods in DTA up to a specified value, Revenue cannot go beyond the permission and dispute it holding that for fixing the limit only physical exports and not deemed exports should have been taken into account. It is also important to note that the decision of the Tribunal in the case of Sanghi Textiles Ltd. v. Commissioner of Customs & Central Excise (supra) was also challenged by the Revenue before the Apex Court and the Apex Court vide order dated 16-8-2007 dismissed the Revenue's appeal. While dismissing the said appeal, Apex Court has referred to its decision in the case of Ginni International Ltd. (supra) and reiterated that the Tribunal in its impugned order had held that once Development Commissioner giving permission to the appellant, a 100% EOU, to sell*

*goods in DTA up to a specified value, Revenue cannot go beyond the permission and dispute it holding that for fixing the limit only physical exports and not deemed exports should have been taken into account.*

*15. In view of the above settled legal position and considering the fact that the issue is settled by the Apex Court by those very judgments on which the Tribunal has placed reliance while deciding the case of the present respondent, we are of the view that no purpose will be served in keeping this matter pending, awaiting the outcome of the Apex Court's decision in the case of Amitex Silk Mills Pvt. Ltd. (supra), especially when in two other matters, the Apex Court has already dismissed the appeals filed by the Revenue.*

*16. In the above fact situation, we are of the view that no question of law much less any substantial question of law, arises out of the order of the Tribunal and even if it arises, the answer is very obvious and we, therefore, hold that the Tribunal is justified and has not committed any substantial error of law in dismissing the appeal of the Revenue and confirming the order of the learned Commissioner (Appeals) holding that the clearances made by one 100% EOU to another 100% EOU which are "deemed exports" are to be treated as physical exports for the purpose of entitling refund of unutilized Cenvat credit contemplated under the provisions of Rule 5 of the Cenvat Credit Rules, 2004."*

*4. Counsel for the Revenue, however, submitted that a Division Bench of the Madras High Court in the case reported in* 2007 (211) E.L.T. 23 *(Mad.) has taken a different view. We find that the decision of this Court being directly on the issue, we are bound by the said decision. Further we find that the Apex Court in the case of Virlon Textile Mills Ltd. v. Commissioner of C. Ex., Mumbai,* 2007 (211) E.L.T. 353 *(S.C.), though not in identical situation while examining the nature of DTA sales to 100% export oriented units observed that DTA sales against foreign exchange or other supplies in India can be equated with physical exports.*

*5. In the result, the situation being similar, this Tax Appeal is dismissed."*

*The ratio of above said judgment of Hon'ble High Court of Gujarat is applicable to this case since the deemed export to 100% EOU is considered as physical export and therefore clearances to SEZ are also be treated as physical exports for the purpose to grant rebate under Rule 18 of Central Excise Rules, 2002.*

*10. In view of above position, Government holds that rebate claim of duty paid on goods cleared to SEZ is rightly held admissible by Commissioner (Appeals) under 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. Government finds no infirmity with said Order-in-Appeal and therefore upholds the same.*

13. From a consideration of the above mentioned decisions and on considering the facts of the present case, Government is of the view that the ratio of aforesaid case is applicable to the facts of the present case.

14. Government further notes that as per Section 5 of SEZ Act 2005, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being inforce. Rule 30(1) of SEZ Rule 2006 stipulates that DTA supplier shall clear the goods to SEZ Uni 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-CE(NT) dated 26.6.2001. The said notification is now replaced by new Notification No.19/04-CE (NT) dated 6.9.04. Similarly, drawback benefit and other export entitlements are also made admissible to SEZ suppliers. So the CBEC Circular discussed above issued in the light provisions of SEZ Act/Rules cannot be called illegal as contended by department.

15. Government further notes that Commissioner (Appeals) has categorically recorded in his findings that said goods were received by SEZ Unit and therefore receipt of duty paid goods in SEZ Unit is not in dispute. However, he has held that as Bill of Export was not submitted by M/s Essel Propack Ltd., their rebate claim cannot be considered as complete and proper and therefore, the same is not admissible. 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, M/s Essel Propack Ltd., was required to file Bill of export. Though Bill of Export is required to be filed for making clearances to SEZ, still the substantial benefit of rebate claim cannot be denied only for this lapse. Government further notes that 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 the substantial benefit of rebate should not be denied for minor procedural lapses.

16. In view of above position, Government holds that rebate claim of duty paid on goods cleared to SEZ are held to be admissible under Rule 18 of

Central Excise Rules 2002 read with Notification No.19/04-CE (NT) dated 6.9.04.

17. Accordingly, Government finds no infirmity with Order-in-Appeal no. SB/265/Th-I/10 dated 8.12.2010 and therefore upholds the same. The revision application No.198/04/13-RA filed by the Department is thus rejected in terms of above.

18. Government also set aside Orders-in-Appeal no. BR (221-223)/M-V/2012 dt. 3.10.2012 & BR (254-255) Th-1/2012 dated 19.10.2012 and five revision applications (No. 195/57-59/13 –RA and 195/60-61/13-RA) are allowed, with consequential relief.

19. So, ordered.

True Copy Attested

28.2.2018

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

एस. आर. हिरुलकर
S. R. HIRULKAR
(AC - RA)

ORDER No. 38-43/2018-CX (WZ) /ASRA/Mumbai DATED 28.02.2018.

To,

1. M/s Essel Propack Ltd., Village-Vasind, Taluka-Shahpur, District-Thane, Maharashtra-421 604

2. The Principal Commissioner of GST & CX Thane Rural,

Copy to;

1. The Commissioner (Appeals-I), GST & CX Thane
2. The Assistant Commissioner of GST & CX Thane Rural
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy.