F.No.195/10/14-RA

REGISTERED SPEED POST

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

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F. NO. 195/10/14-RA /1987 Date of Issue: 22.11.2018

ORDER NO. 381/2018-CX (WZ) /ASRA/Mumbai DATED 31.10. 2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Aarti Industries Ltd, Plot No. 801, 801/23, 3rd Phase, GIDC, Vapi.

Respondent : Additional Commissioner of Central Excise & Customs, Daman Commissionerate.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. SRP/127/DMN/2013-14 dated 15.07.2013 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Daman.

ORDER

This revision application has been filed by M/s Aarti Industries Ltd, Plot No. 801, 801/23, 3rd Phase, GIDC, Vapi against (hereinafter referred to as "the applicant") against the Order-in-Appeal No. SRP/127/DMN/2013-14 dated 15.07.2013 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Daman.

2. The issue in brief is that the applicant had manufactured and exported excisable goods valuing at Rs. 6.53 Crores during the year 2008-09 and 2009-10 without payment of Central Excise duty against Letter of Undertaking. The applicant exported the said goods under various export promotion scheme viz. DEPB, Target Plus, DFIA. Etc. but failed to realize the payment for aforesaid exports. During EA-2000 Audit and scrutiny of accounts it was observed that the applicant had written off the export proceeds of Rs.6.53 Crores in the Balance Sheet for the period 2008-09 and 2009-10. Based on the above audit observation the Department issued a Show Cause Notice dated 09.01.2012 demanding Central Excise duty of Rs.11,88,504/- (Rupees Eleven Lakh Eighty Eight Thousand Five Hundred and Four only) on the goods exported under Letter of Undertaking alleging that the applicant had wrongly availed the benefit of export incentives without payment of Central Excise Duty . The Show Cause Notice also demanded Cenvat Credit of Rs.11,84,708/-(Rupees Eleven Lakh Eighty Four Thousand Seven Hundred and Eight only) involved on the raw material used in the manufacture of the said export goods and also proposed demand of interest and penal action under Section 11 AC of the Central Excise Act, 1944 and Rule 15 of Cenvat Credit Rules, 2004 and Rule 25 of Central Excise Rules, 2002. The original adjudicating authority vide Order in Original No. CEX/103/DEM/ADJ/PD-ADC/VAPI/2012-13 dated 20.12.2012 confirmed the duty demand as well as Cenvat Credit availed on inputs used in manufacture of export goods along with interest and also imposed penalty of Rs.11,88,504/- (Rupees Eleven Lakh Eighty Eight

Thousand Five Hundred and Four only) under Rule 25 of the Central Excise Rules, 2002 read with Section 11 AC of Central Excise Act 1944 and further penalty of Rs.11,84,708/- (Rupees Eleven Lakh Eighty Four Thousand Seven Hundred and Eight only) under Rule 15 (2) of the Cenvat Credit Rules, 2004 read with Section 11 AC of Central Excise Act, 1944.

3. Being aggrieved by the above mentioned Order-in-Original the applicant filed an Appeal before the Commissioner of Central Excise (Appeals), Daman. The Commissioner (Appeals) vide Order-in-Appeal No. SRP/127/DMN/2013-14 dated 15.07.2013 rejected the appeal of the applicant on the following grounds:

a. That export is a key area of the economy and an important means of earning foreign exchange and therefore the department attaches considerable importance to exports.
b. There are different benefits in respect of duties on inputs used in manufacture of goods meant to be exported as well as in respect of duty on finished goods exported under central excise law. It is pertinent to mention that all the benefits attached to the exports are inherently connected with earning of the foreign exchange. Therefore the realization of the export proceed is not just a formality but an essential ingredient to export. The CBEC has also issued Circular No.354/70/97-CX dated 13.11.1997 wherein the Board emphasized about Bank Realization Certificate.
c. The essential requirement for availing export benefits like Drawback/Rebate is the repatriation of foreign exchange. On the similar lines, there is a case of demand of duty under LUT, the export proceeds of which was not realized or brought into the country.

3.1 Accordingly, Commissioner (Appeals) upheld the demand of Central Excise duty on the goods exported under LUT along with interest payable thereon. Commissioner (Appeals) further observed that the invocation of extended period was legally sustainable as the facts of the non-receipt of export

proceeds and write off of the same was not intimated to the department by the applicant and came to the knowledge of the department only during the course of audit of the financial records of the applicant and accordingly upheld penalty limited to amount of duty confirmed on the goods cleared for export without payment of duty under LUT impose under Section 11 AC of the Central Excise Act, 1944.

3.2 However, Commissioner (Appeals) observed that there is no merit in confirmation of demand and interest thereon towards credit availed on the raw material used in the manufacture of the said export goods hence set aside the same along with equal penalty imposed on the applicant under Rule 15(2) of the Cenvat Credit Rules, 2004 on this count.

4. Being aggrieved by the afore mentioned Order in Appeal the applicant has filed the instant revision application on the following grounds that :

4.1 the goods were exported without payment of duty under the Notification No. 42/2001-CE (NT) dated 26.06.2001 issued under rule 19 of the Central Excise Rules, 2002. They have correctly followed the conditions in the Notification and hence the benefits cannot be denied.

4.2 the Circular No.354/70/97-CX dated 13.11.1997 relied upon by the Commissioner (Appeals) was issued by the Board in respect of delay in receipt / non-receipt of transference copies from the Customs formation at the port of exit. The said circular states that in case the TR copy is not received within 120 days, then the exporter may submit BRC. As per this circular the BRC is required where TR copy is not available as no evidence is available to show the actual export of goods. Hence the said circular is not applicable to the present case as there is no dispute as regard export of goods.

4.3 the Rule 16A of the Drawback Rules provides for recovery of drawback where export proceeds are not realized but this provision cannot invoked for recovery of Central Excise duty payable on goods which are exported but in respect of which export proceeds are not received.

4.4 the correspondence made with foreign buyer as well as with bank of the foreign buyer indicates that the foreign buyer have become bankrupt and therefore the export proceeds were not realized

4.5 Proof of export submitted to the department. Remittance Certificate is not a relevant document for proof of export. Therefore no duty should be demanded for non-submission of remittance certificate.

4.6 the remittance certificate requirement is made compulsory only in case of loss of original documents as stated in para 13.7 of the CBEC manual. In the present case there is no dispute as to the fact of export of goods.

4.7 no dispute that the goods cleared from the factory was actually exported. Therefore no demand of duty should be made.

4.8 the Order in Appeal travels beyond upon the scope of Show Cause Notice since there is no allegation that duty is required to paid as per Rule 16 A of the Drawback Rules.

4.9 The demand of duty confirmed in the Order in Appeal is hit by bar of limitation in as much as the demand has been raised for the period January 2007 to June 2007 and the show cause notice was issued in January 2012 alleging suppression of facts from the knowledge of the department; that even after submission of proof of export application the department had never raised the query demanding Bank realization Certificate. They had bonafide belief that the goods were exported out of India and submitted proof of export. Therefore, no duty is payable. They rely upon the following judgements to substantiate that when there is bona fide belief, the extended period of 5 years cannot be invoked.

- Cosmic Dye Chemical Vs CCE Bombay 1995(75) ELT 721(SC)
- CCE Vs Chemphar Drug and Liniments 1989 (40) ELT 276 (SC)
- Pushpam Pharma. Co. Vs CCE Bombay 1995 (78) ELT 401 (SC)
- Tamil Nadu Housing Board 2004 (74) ELT 9 (SC)

4.10 Penalty could not have been imposed as no intention can be attributed to the applicant as regards non-receipt of payment from foreign party and write off of the same in their books of accounts. The penalty under Section 11AC can be levied only when the demand for the excise duty arises on account of fraud, suppression, mis-statement etc.

5. A personal hearing held in this case was attended by Shri Prasannan Namboodiri, Advocate and Shri D.B. Bhalerao, Consultant on behalf of the applicant. Government observed that there was a delay of 87 days in filing the present Revision Application by the applicant for condonation of which they have filed Misc. Application.

Upon hearing the Misc. Application for Condonation of delay Government noted that the Order in Appeal No. SRP/127/DMN/13-14 dated 15.07.2013 was received by the applicant on 19.07.2013. The applicant by mistake filed appeal against the impugned order before Tribunal West Zonal Bench, Ahmedabad vide Appeal No. E/13388/2013-SM which was disposed of as withdrawn on 07.03.2014. However, in the meantime the applicant had filed the application against the impugned order before wrong forum i.e. CESTAT, Ahmedabad on 09.10.2013. i.e. well within the period of Appeal, therefore, the delay in filing the instant Revision Application of 87 days is condoned in the interest of natural justice. Government now proceeds to examine the case on merits.

The applicant reiterated the submission filed in Revision Application and case laws. It was pleaded that the Order-in-Appeal be set aside and Revision Application be allowed. The respondent department reiterated the Order in Appeal and pleaded that Oder in Appeal be upheld and Revision Application be dismissed.

6. Government has carefully gone through the relevant case records available in the case files, the Revision Application, oral submission made during the personal hearing and have even perused the impugned Order-in-Original and Order-in-Appeal. The Government observes that the applicant had exported excisable goods to their customers situated abroad during the year 2006-07 and 2007-08. It is observed from the records that an amount of Rs.6.53 crores was written off during the years 2008-09 and 2009-10. During the course of audit this fact of writing off of export proceeds came to the knowledge of department. Based on the audit objection the department of revenue had issued Show Cause Notice dated 09.01.2012 demanding Central Excise duty of Rs. 11,88,504/- on PNCB to the value of Rs. 72,45,000/-. Hence the case of department is restricted to writing off of export proceed to the extent of Rs.72.45 lakhs only and duty demand thereof.

7. The Government finds that the applicant has submitted some correspondence in support of their contention that the foreign buyers to whom the goods were exported have become bankrupt and hence the export proceeds could not be realized. Government finds that Rule 19 of the Central Excise Rules, 2002 allows excisable goods to be exported without payment of duty from the factory of the manufacturer subject to such conditions, safeguards and procedures as may be specified by notification by the Board. Government also finds that Notification No. 42/2001-CE (NT) dated 26.06.2001 prescribes the condition, safeguards and procedures for export of excisable goods without payment of duty. Government observes on account of bankruptcy of the foreign buyers that the export proceeds could not be received by the applicant.

8. It is contended by the applicant that neither receipt of export proceeds nor submissions of BRC is a requisite or condition for availing benefit of export of goods without payment of duty; that the Circular No.354/70/97-CX dated 13.11.1997 relied upon by the Commissioner (Appeals) was issued by the Board in respect of delay in receipt / non-receipt of transference copies from the Customs formation at the port of exit; that the said circular states that in case the TR copy is not received within 120 days, then the exporter may submit BRC; that as per this circular the BRC is required where TR copy is not available as no evidence is available to show the actual export of goods. Hence the said circular is not applicable to the present case as there is no dispute as regard export of goods; that the Rule 16A of the Drawback Rules provides for recovery of drawback where export proceeds are not realized but this provision cannot invoked for recovery of Central Excise duty payable on goods which are exported but in respect of which export proceeds are not received.

9. Government observes that while deciding a similar issue involving non submissions of Bank Realization Certificates (BRCs) and short realisation of

export proceeds GOI in its Order Nos. 1651-1652/2012-CX dated 06.12.2012 in Re: Jindal Stainless Ltd. [2014 (314) E.L.T. 961 (G.O.I.)] observed as under :

> *"Government notes that as per condition at Para 2(g) of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004, rebate of duty paid on those excisable goods export of which is prohibited under any law for the time being in force, shall not be made. As per Section 8 of FEMA, 1999, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realize and repatriate to India such foreign exchange within time period prescribed by RBI. Further Section 13 of FEMA stipulates the penalty provision for non-realisation of foreign exchange. The provisions of FEMA makes it clear that the export of goods without realization of export proceed, is not permitted and there is a prohibition on such exports. Since valid BRCs are not submitted, the goods are treated to be exported in violation of Sections 7, 8 of FEMA, 1999, attracting penalty under Section 13. So, in such cases the rebate cannot be granted in terms of condition at Para 2(g) of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004".*

A similar view has also been taken by GOI in its Order No. 919/12-CX dated 22.08.2012 in Re: Oswal Vinyl Industries Ltd. [2014(314) ELT 843 (GOI) while holding that no rebate is admissible in respect of exported goods against which foreign exchange for foreign remittance of sales proceeds has not been received.

10. Government also relies on GOI Order Nos. 17-19/2016-CX, dated 28-1-2016 in Re: Globe Technologies [2016 (344) E.L.T. 677 (G.O.I.)] wherein while upholding the rejection of the rebate claim by the original authority GOI held that exports are entitled to rebate benefit only if export realization is received. GOI in its aforesaid order also discussed C.B.E. & C.'s Circular No. 354/70/97-CX, dated 13-11-1997 at length and observed that :

> *"Government notes that this circular deals with speedy acceptance of proof of exports in respect of goods exported though Inland Container Depots/Customs Freight Stations. It merely prescribes for furnishing of BRC in lieu of transference copy of Shipping Bill for purpose of proof of export in case of clearance for export from ICDs and if the TR copy or BRC is not received within 160 days from the date of sanction of rebate claim*

action for recovery is to be initiated. In this case rebate was not sanctioned in the first instance while the provision of said Circular would be applicable to cases where rebate had already been sanctioned and subsequently recovery for non-submission of BRC or TR copy is to be made".

Further at para 14 & 15 of its above referred Order GOI also observed as under :-

14. *It is a fact on record that the stipulated period of one year for the realization of export proceeds had been exceeded much before issue of the show cause notices. The question of submission of BRC would not arise when rebate is filed and sanctioned within one year of the date of export. However, in a scenario as in the present case were pending the sanction of rebate, the Bank Remittance Certificate had become due, it cannot be held that rebate ought to be sanctioned as it is not a prescribed document at the time of filing of rebate. It is also a fact on record that till date the respondent has failed to submit the BRCs to the department. Though it is claimed by them before the revisionary authority that remittance has been received by them partially, no evidence has been produced to that effect.*

15. *It is a universally known principle that one of the main reasons any export incentive including rebate is allowed is to encourage export-generated foreign exchange earnings for the country. From a harmonious reading of Rule 18 of Central Excise Rules, Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004, relevant provisions of Foreign Exchange Management Act, Foreign Trade Policy and RBI guidelines as applicable, it can be concluded that exports are entitled for rebate benefit only if export realization is received, which has not happened in the present case.*

11. From the aforesaid discussion it is clear that C.B.E. & C.'s Circular No. 354/70/97-CX, dated 13-11-1997 clearly mandates initiation of recovery of duty in case of non-submission of Bank Realisation Certificate within stipulated period. Therefore, the reliance placed by the first Appellate Authority on Circular No.354/70/97-CX dated 13.11.1997 is correct. The very ethos of the policy for exports is to incentivise exporters for selling their goods in the international market. Towards that end, Government has framed policies to ensure that duties and taxes are not exported. However, in a case where this objective of earning foreign exchange is not achieved, the event of export would

be said to have not been effected and consequently the clearance of goods would be on a similar footing as domestic clearances. It would therefore follow that such a person would be liable to discharge duty liabilities on the goods.

12. As regards the contention of the applicant that the demand of duty confirmed in the Order in Appeal is hit by bar of limitation, Government observes that the goods have been allowed to be cleared on the basis of letter of undertaking (LUT). The LUT is but a solemn guarantee given by the applicant to the President of India undertaking to pay the excise duty on excisable goods in the event of failure to export the excisable goods. In this regard, Government refers the judgment of the Hon'ble CESTAT in the case of Hindustan Lever Ltd. vs. Commissioner of Customs (EP), Mumbai where the Tribunal had occasion to consider the implication of limitation in a case where the demand has been raised in terms of bond and letter of undertaking. The relevant text of para 7.3 is reproduced hereinafter.

> *"7.3 The appellant has also raised a contention that duty demand is time-barred as the show cause notice has been issued only on 29-10-2004, whereas the import of Crude Palm Stearine has taken place in March and June 1999, that is, after a period of five years from the date of import. The question of time bar in this case will not arise for the reason that the duty demand is raised in terms of the bond and letter of undertaking executed by the importer appellant with the customs authorities. In terms of the said bond/LUT, there is a obligation on the part of the appellant to fulfil the terms and conditions of import which we have already held that the appellant has not fulfilled. The bond/LUT executed with the customs has not been discharged and therefore, duty demand can be raised at any time before the bond is discharged....."*

The applicant in the present case is also similarly placed. They have executed the LUT and hence the demand raised in this case would not be hit by bar of limitation.

12. The applicant has also stated that they were in the bona fide belief that they have filed proof of export application from time to time for goods exported without payment of duty and therefore no duty is payable. As stated hereinbefore in the preceding paragraphs, the CBEC had vide its circular clearly set out in public domain that in the event of failure to produce bank realization certificate, action would be initiated to recover duty payable. The purpose of issuing circulars is to clarify to the trade. In the face of such a categorical and unambiguous clarification issued by the Board, the applicant cannot profess to have had bonafide belief that the bank realization certificate is not a requirement for export under LUT. The amplitude of the term "bona fide belief" has been discussed on various occasions. The para 5.1 of the judgment of the Hon'ble CESTAT in the case of Hanuman Sahakari Dudh Vyvasaik Krushi Purak Seva Sanstha vs. CCE, Pune-II [2014(309)ELT 273(Tri-Mum)] wherein "bona fide belief" has been discussed is reproduced below:

> *"**5.1** As regards the plea of bona fide belief taken by the counsel for the appellant, it is settled law that bona fide belief is not a blind belief and bona fide belief has to be formed after consulting experts in the field or after seeking clarification from the department. In the present case, the department has clearly directed the appellant that the appellant's products are excisable and excise duty liability requires to be discharged. In spite of this direction, the appellant chose to dispute this and contended that they are not liable to pay duty as biscuits and other bakery products cannot be treated as excisable products. Thus, despite receipt of the directions from the department, the appellant failed to discharge excise duty liability. Further, the appellant did not submit details sought by the department and continued to drag the issue by prolonged correspondence. In view of the above, suppression of information on the part of the appellant is clearly established."*

It can be seen from the text above that bona fide belief cannot be a blind belief and has to be based on confirmation of the a particular point of view by experts in the field or the department. As in the said case, the applicant also had access to the clarification of the Board clearly setting out that bank

realization certificate was a pre-requisite to establish export of goods. Therefore, taking a stand contrary to a clarification available in the public domain cannot be said to be an act borne out of "bona fide belief".

14. The applicant in the present case had manufactured and exported excisable goods valued at Rs. 6.53 Crores during the year 2008-09 and 2009-10 without payment of Central Excise duty against Letter of Undertaking. Although in matters of taxation, it has been held time and again that ignorance of law cannot be an excuse, given the scale of their operations, it can safely be presumed that the applicant would be well conversant with the rules and procedures governing exports and also the clarifications issued by the CBEC from time to time. The applicant had exported the said goods under various export promotion scheme viz. DEPB, Target Plus, DFIA. Etc. but failed to realize the payment for aforesaid exports. During EA-2000 Audit and scrutiny of accounts it was observed that the applicant had written off the export proceeds of Rs.6.53 Crores in the Balance Sheet for the period 2008-09 and 2009-10. Based on the above audit observation the Department issued a Show Cause Notice dated 09.01.2012 demanding Central Excise duty of Rs.11,88,504/- (Rupees Eleven Lakh Eighty Eight Thousand Five Hundred and Four only) on the goods exported under Letter of Undertaking alleging that the applicant had wrongly availed the benefit of export incentives without payment of Central Excise Duty. If not for the Audit, the fact that the export proceeds had not been realized would have gone unnoticed. The very fact that the circular issued by the CBEC was in existence while the applicant has chosen not to divulge the writing off of the export proceeds shatters their claims of "bona fide belief". Perhaps their arguments would have been credible if they had come forward and informed the Department about the writing off of the export proceeds. In the facts and circumstances of the case and also the fact that the exports have been effected under LUT's whereby the applicant has bound themselves to discharge duty liability in cases where export is not completed, the demand for extended period is sustainable.

13. In view of position explained above, Government do not find any infirmity in the impugned Order-in-Appeal and therefore upholds the same.

14. The revision application is dismissed being devoid of merit.

15. So, ordered.

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

ORDER No. 381 /2018-CX (WZ)/ASRA/Mumbai DATED 31.10.2018.

To,
M/s Aarti Industries Ltd,
Plot No. 801, 801/23,
3rd Phase, GIDC, Vapi

Copy to:

1. The Commissioner of CGST, Daman, 2nd Floor, Hani's Land Mark, Vapi Daman Road, Chala, Vapi.
2. The Commissioner of CGST (Appeals), 3rd Floor, Magnus Building, Althan Camal Road, Near Atlanta Shopping Centre, Althan, Surat-395007.
3. The Deputy / Assistant Commissioner, CGST, Daman, 2nd Floor, Hani's Land Mark, Vapi Daman Road, Chala, Vapi.
4. Shri Prasannan S Namboodiri, Advocate, 2003-2004, 20th Floor, Marathon Monte-Vista, M.M. Malviya Road, P&T Colony Mulund (West), Mumbai 400 080.
5. Sr.P.S. to AS(RA),Mumbai.
6. Guard file
7. Spare Copy.

ATTESTED

29/11/18

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

22/11/18