F.No. 195/756/13-RA

REGISTERED SPEED POST

**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, Cuff Parade,
Mumbai- 400 005

F.No. 195/756/13-RA/2334 Date of Issue: 10/12/2018

ORDER NO. 408/2018-CEX (WZ) /ASRA/Mumbai DATED 30.11.2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Glasstech Industries India Pvt. Ltd.

Respondent : Commissioner of Central Excise, Belapur

Subject : Revision Applications filed under section 35EE of the Central Excise Act, 1944, against the Order-in-Appeal No. BC/19/Bel/2013-14 dated 01.05.2013 passed by the Commissioner of Central Excise (Appeals) Mumbai-III.

ORDER

This revision application has been filed by M/s Glasstech Industries India Pvt. Ltd. (hereinafter referred to as "the applicant") against the Order-in-Appeal No. BC/19/Bel/2013-14 dated 01.05.2013 passed by the Commissioner of Central Excise (Appeals) Mumbai-III.

2. Brief facts of the case are that the applicant had filed refund claim of Rs. 8,91,182/- (Rupees Eight Lakh Ninty One Thousand One Hundred and Eighty Two only) as the had reversed/paid the same under protest as per the directions of the Range Supdt. The said amount was paid by the applicant for clearances of their goods namely "Double Glazed Units Glass" and "Toughened Glass" to M/s Arun Excello Infrastructures Pvt. Ltd (SEZ Developers) for the period from Nov.2008 to December 2009. The Deputy Commissioner, Central Excise, Taloja Division, Belapur Commissionerate, vide Order in Original No. R-2326/2010-11 dated 08.03.2011 rejected the said refund claim of Rs. 8,91,182/- (Rupees Eight Lakh Ninty One Thousand One Hundred and Eighty Two only).

3. Being aggrieved, the applicant filed appeal before Commissioner Central Excise (Appeals), Mumbai-III. Commissioner (Appeals) vide Order in Appeal No. No. BC/19/Bel/2013-14 dated 01.05.2013 rejected the appeal of the applicant as time barred by observing as under :

> *In the instant case, the appellants have submitted that they have received a copy of the impugned order on 20.03.2011. In terms of the statutory provisions as discussed above, the appellants should have preferred to file an appeal within sixty days from the date of the communication of the said order i.e by 19.05.2011. Whereas the appellants filed the appeal on 08.04.2013. During the personal hearing, it was submitted by the representatives that the officer concerned left the company and the said order remained to be attended. Hence, the delay in filing appeal. The delay in filing appeal is more than one and half years. Here I observe that during this intervening period, the appellants unit was functioning and hence, they should have taken precaution to file appeal within time limit. The reason advocated by the appellants cannot be accepted. Hence the delay in filing appeal cannot be condoned as it is hit by provisions of time bar".*

4. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant has filed this Revision Application on the following grounds that :

4.1 the impugned order is a non-speaking order, in as much as the Commissioner (Appeals) has refused to condone the delay in filing of appeal without considering the grounds justifying the delay and the case laws relied upon by them in their application for condonation of delay. The Cornmissioner (Appeals) being a fact-finding authority, it was his duty to consider all the grounds raised in the memorandum of appeal and the condonation of delay application and give findings on each of them.

4.2 having failed to consider their contentions and case laws, the learned Commissioner (Appeals) have rendered the impugned order unsustainable under law for being non-speaking in nature. It is settled legal position that a non-speaking or non-reasoned order cannot be sustained under any circumstances

4.3 the learned Commissioner (Appeals) ought not to have rejected the appeal only on the ground of delay in filing the appeal in view of the express provision of Section 5 and 29 of the Limitation Act 1963, which read as under-

*5. Extension of prescribed period in certain cases - Any appeal or any application. other than an application under any of the provisions of Order XXI of the Code of Civil Procedure. 1908 (5 of 1908) may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*

*Explanation - The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.*

*29. Saving : (1) Nothing in this Act shall affect section 25 of the Mdian Contract Act, 1872 (9 of 1872).*

*2) Where any special or (oca) law prescribes for any suit. appeal or application a period of limitation different from the period prescribed by the Schedule. the provisions of s. 3 shall apply as if such periods were the periods prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local la, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which they are not expressly excluded by such special or local law.*

4.4 as per the above reproduced provisions of Section 29 of the Limitation Act, 1963, the limitation of six months laid down in Section 35 of the Central Excise Act, 1944 for filing of appeals would be subject to Section 3 of the Limitation Act, 1963 as if such period of limitation were the periods specified by the schedule to the Limitation Act, 1963. Hence, having shown sufficient cause explaining the delay in filing of appeal, the learned Commissioner (Appeals) ought to have waived the delay heard the appeal on merits in view of the express provision of Section 5 of the Limitation Act, 1963.

4.5 the Commissioner (Appeals), has not only failed to consider the reasons put forth by the applicant for the delay in filing of the appeal in the application for condonation of dealy but also have failed to acknowledge such a contention. Having failed to do so, the impugned order has become unsustainable under the law. In this regard the applicant would once again place reliance on the following judgement, which were relied in the application for condonation of delay before the Commissioner (Appeals),in support of their contention:-

a. The judgement of the Hon'ble Supreme Court in the case of State of U P Harish Chandra as reported in 1996 (85) ELT 209 (SC).

b. Collector, Land Acquisition Anantnag and another V/s Mst Katji and others reported in 1987 (028) ELT 0185 (SC)

c. M/s Sharma Chemicals vs. Commissioner of Central Excise, Calcutta-II reported in 2000 (122) ELT 0140 (Tri)

d. State of Nagaland vs. Lipok AO reported in 2005 (183) ELT 0337 (SC)

e. M/s Cosmos Casting India Ltd reported in 2012 (286) E LT 721 (TRI - Del.).

f. Naresh Kumar reported in 2012 (280) E.L.T 368 (Del),

4.6 the Commissioner (Appeals) have neither considered nor refuted the contention of the applicants that the lower authority had passed the Order in Original without specifying how the judgment of the M/s Sujata Metal Products Ltd. reported in 2009 (243) ELT 542 (Tri.Bang) would not be applicable to the facts of the present case wherein, the Honorable Tribunal held that the amendment to Rule 6 (6) of the Cenvat Credit Rules, 2004 has retrospective effect. Even the reliance piaced by them on the ruling in the case of M/s Nuchem reported in AIT-201-62-CESTAT in the appeal memorandum was neither considered nor refuted by the Commissioner (Appeals) in the impugned order.

In this regard they again place reliance on the following case laws which were also relied upon by them In the appeal memorandum filed before the Commissioner (Appeals) :-

a. the ruling of the Hon'ble High Court of Bombay in the case of Ws Stanlek Engineering Pvt.Ltd reported In 2008 (229) E.L.T. 61 (Bom.)

b. the ruling of the Hontle High Court of Delhi in the case of Nitesh Kumar Kedia reported in 2012 (284) ELT 321 (Del).

c. the Hon'ble High Court of Gujarat order in the case of M/s Anil Products Ltd reported in 2010 (257) ELT 523 (Guj)

d the ruling of the Hon'ble Tribunal in the case of M/s Parnikka Harvest Floratech Ltd reported in 2010 (256) ELT 417 (Tri.Bang)

e. M/s Ramnord Research Laboratories Pvt. Ltd reported in 2009 (239)ELT 83 (Tri-Mumbai).

f. CCE vs. M/s Seasons Polymers reported in 2008 (229) ELT 664 (BOM)

4.7 without prejudice to the submissions in this appeal memorandum, the applicants submit that the Commissioner (Appeals) also committed gross error by not going into the merits of the case and summarily rejecting the refund claim on the grounds of limitation. The applicants submit that they have a very strong case of merits and hence the delay in filing of appeal needs to be condoned and their appeal decided on merits. Even at the sake of repetition the applicant would reiterate the contentions raised in their appeal memorandum before the Commissioner (Appeals) which is as under.-

a. The provisions of Special Economic Zone Act, 2005 and the rules made thereunder. As per Section 2 (i) of the SEZ Act, 2005, the Domestic Tariff Area (DTA) is defined to mean the whole of India (including its territorial waters and continental shelf) but not including the areas of the SEZs. Section 53 of the SEZ Act. 2005 provides that a SEZ shall be deemed to be a territory outside the Customs territory of India. The legal implication is that the SEZs are treated as a foreign territory for the purposes of trade operations, duties and tariffs and any goods which are supplied to SEZ would be considered as export of goods.

b. As per this definition of the term "export" in clause (m) (ii) of Section 2 of the SEZ Act, 2005, supply of goods from DTA to SEZ would amount to export for the DTA unit. In the present case the goods were cleared by the applicant, a unit operating in

DTA, under Letter of Undertaking to the developer of an SEZ after following all the procedures like preparation of ARE-1 etc required for export of goods and the same were received in the SEZ, as can be seen from the endorsement of the specified officer appearing on the backside of ARE-1 submitted along with the refund claim.

c. The term "export" is neither defined in the Cenvat Credit provisions nor in the Central Excise Act or Rules. As per Section 2 (18) of Customs Act. 1962, "export" with its grammatical variations and cognate expressions, means taking out of India to a place outside India. Even as per this definition clearances made to SEZ from DTA would be export of goods, as SEZ's are considered to be a foreign territory situated outside India.

d. Even if the amendment introduced in Rule 6 (6) of the Cenvat Credit Rules, 2004 is allegedly having prospective effect i.e. from 31.12.2008, the case of the applicant would be covered under clause (v) of the Rule 6 (6) of the Cenvat Credit Rules, 2004, since being export of goods as per the provisions of clause (m) (ii) of Section 2 of the SEZ Act, 2005. Since the goods supplied by them to the developer of SEZ amounts to export of goods, the provisions of sub-rule (1) to (4) of the Rule 6 of the Cenvat Credit Rules, 2004 would not find application. That the under protest/provisional reversal of Cenvat credit at the behest of the Central Excise officers, on inputs availed by them for manufacture of goods supplied fo the developer of SEZ and payment of interest thereon (also under protest) was without any authority of law and hence they are eligible for refund of the same

e. As per Section 51 of the SEZ Act. 2005. which states that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, the provisions of clause (i) of the Cenvat Credit Rules, 2004 would not have over riding effect. Even if it is assumed that there is an inconsistency between the Cenvat Credit Rules. 2004 or any other provisions and the SEZ Act, it is a settled issued that the provisions of SEZ Act would have overriding effect.

f. the provisions of sub-rule (1) to (4) of the Rule 6 of the Cenvat Credit Rules. 2004 would apply only if a manufacturer is engaged in manufacture of dutiable as well as exempted goods The term "exempted goods" was defined at the relevant time as any excisable goods which are exempt from the whole of duty of excise leviable thereon, and includes goods which are chargeable to 'NC rate of duty.

g. As per the provisions of clause (m) (ii) of Section 2 of the SEZ Act 2005 supplies to SEZ Developers are exports and hen. the same cannot be treated as "exempted goods". Even otherwise, since there is no exemption notification issued under Section 5A(1) of the Central Excise Act 1944 exempting supplies to SEZ Developers from duty Since the goods cleared by them to the developer of SEZ are neither exempted from duty by virtue of any exemption notification nor are chargeable to 'Nil' rate of duty and hence the provisions of sub-rule (1) to (4) of the Rule 6 of the Cenvat Credit Rules. 2004 would not have found application to such clearances the developers of SEZ. As these provisions are not applicable to their clearance to developers of SEZ, the reversal of Cenvat credit and payment of interest at the behest of the Central Excise officers, were without the authority of law and hence needs to be refunded back to them.

h. That the Circular No. 29/2006-Cus, dated 27-12-2006 issued from F. No. DGEP/SEZ/33112006 by the Central Board of Excise and Customs equated the clearances made to SEZ Units and Developers with exports and hence all the provisions under the Central Excise Act, 1944, rules and notifications made thereunder would also find application to such clearances.

5. A Personal hearing held in this was attended by Shri P.S. Namboodiri. He reiterated the submissions made through Revision Application and relied on case laws 2014(314)ELT 849(GOI) and 1987(28)ELT 185(SC). In view of the same it was pleaded that Order in Appeal be set aside and Revision Application be allowed.

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

7. Government observes that the applicant in their Revision Application have submitted that the Order in Original No. R-2326/2010-11 dated 08.03.2011 was served on them on 20.03.2011 and was received by Shri Indrasen Singh [Finance Controller] on their behalf; however, Shri Indrasen Singh, without intimating the receipt of this Order in Original, resigned from the service of the applicant and as a result, the receipt of the Order in Original came to their notice only in the month of February, 2013 from the Central Excise department. The applicant preferred an appeal against the Order-in-Original No. R/2326/2010-11 dt. 08.03.2011 passed by the

learned Deputy Commissioner of Central Excise, Taloja Division, Belapur Commissionerate along with application for condonation of delay. The Commissioner of Central Excise (Appeals), Mumbai -III vide Order-in-Appeal No. BC/19/Bel/2013-14 dated 01.05.2013 refused to condone the delay in filing of appeal and rejected the appeal of the applicant without going into merits of the case.

8. Government finds it pertinent to discuss the provisions of Section 35 of the Central Excise Act, 1944 which provides for appeal to Commissioner (Appeals) read as under :

*Appeals to Commissioner (Appeals). –*

*(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order:*

*Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.*

*(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:*

*Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.*

*(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."*

9. From the plain reading of the provisions of Section 35 ibid, it is clear that an appeal should be filed within sixty days from the date of communication of the decision or order that is sought to be challenged. However, in view of the proviso thereto, the Commissioner (Appeals) is empowered to allow the appeal to be presented within a further period of thirty days if he is satisfied that the appellant was prevented by sufficient

cause from presenting the appeal within the period of sixty days. Thus, the Commissioner (Appeals) is empowered to extend the period for filing an appeal for a further period of thirty days and no more. Therefore, once there is a delay of more than ninety days in filing the appeal the Commissioner (Appeals) has no power or authority to permit the appeal to be presented beyond such period. This issue has been decided by the Supreme Court in the case of Singh Enterprises v. Commissioner of Central Excise, Jamshedpur, *(2008) 3 SCC 70 = 2008 (221) E.L.T. 163 (S.C.)*, wherein the Court in the context of Section 35 of the Central Excise Act, has held thus :

> *"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are not vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short "the Limitation Act") can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the Legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period."*

10. The above view is reiterated by the Supreme Court in Amchong Tea Estate v. Union of India, (2010) 15 SCC 139 = 2010 (257) E.L.T. 3 (S.C.) and Commissioner of Customs and Central Excise v. Hongo India Private Limited, (2009) 5 SCC 791 = 2009 (236) E.L.T. 417 (S.C.). In the light of the

above settled legal position, the reference to and reliance placed by the applicant on various case laws in the Revision Application and also during the course of personal hearing is misplaced and out of context.

11. As in the instant case the appeal has been filed by the applicant after more than 90 days, the Government holds that the Commissioner (Appeals) has rightly rejected the appeal on the ground of limitation and there is no reason to interfere with the said order.

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

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

14. So, ordered.

30.11.18

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

ORDER No.408/2018-CX (WZ) /ASRA/Mumbai DATED 30.11.2018.

To,

**ATTESTED**

M/s. Glasstech Industries India Pvt Ltd.
Plot No.L-112 to 115, MIDC Taloja,
Dist. Raigad – 410 208.

B. LOKANATHA REDDY
Deputy Commissioner (R.A.)

Copy to:

1. The Commissioner of GST & CX, Belapur Commissionerate, 1st Floor, CGO Complex, Belapur, Navi Mumbai, 400 614.
2. The Commssioner of GST & CX, (Appeals) Raigad, 5thFloor, CGO Complex, Belapur, Navi Mumbai, 400 614.
3. The Deputy / Assistant Commissioner, GST & CX, Belapur Commissionerate, CGO Complex, Belapur, Navi Mumbai, 400 614.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Spare Copy.