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F.No. 195/1651/12-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 28/8/2015

ORDER NO. 52/2015-CX DATED 25.08.2015 OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF INDIA UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Revision application filed under Section 35 EE of the Central Excise Act, 1944 against the Order-in-Appeal No.188/CE/LDH/2011 dated 21.08.2012 passed by the Commissioner (Appeals) Central Excise, Chandigarh-I.

Applicant : M/s N.V.R.Forgings, Jalandhar

Respondent : Commissioner, Central Excise Commissionerate, Central Excise House, F Block, Rishi Nagar, Ludhiana.

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ORDER

This revision application is filed by M/s N.V.R.Forgings, Jalandhar (hereinafter referred to as applicant) against the Order-in-Appeal No.188/CE/LDH/2011 dated 21.08.2012 passed by the Commissioner (Appeals), Chandigarh-I with respect to Order-in-Original No.12/JAL/DC/2011 dated 17.03.2011 passed by the Deputy Commissioner, Central Excise, Jalandhar.

2. Brief facts of the case are that applicant holding Central Excise registration were engaged in the manufacture of hand tools falling under chapter 82 of Central Excise Tariff. On scrutiny of ER-3 returns of the applicant for the quarters ending June, 2009 and September, 2009 it was observed that during this period the applicant had cleared excisable goods i.e. hand tools valued at Rs.38,30,216/- for export and in these returns, the applicant had mentioned "Export against H-Form" or "Export Sale". However, on further scrutiny, it was observed that the applicant had not followed export procedure as detailed in Rule 19 of Central Excise Rules, 2002 and Notification No. 42/2001-CE (NT) dated 26.06.2001 as amended and had violated the provisions of Rule 19 of the Central Excise Rules, 2002 and Notification No. 42/2001-CE(NT) dated 26.06.2001 as amended. Though the applicant had executed bond but neither any ARE-1 nor proof of export in respect of above clearances was filed with the proper officer, which was the statutory requirement as provided under Rule 19 of the Central Excise Rules, 2002. Therefore, it was held vide Order-in-Original passed by the Deputy Commissioner, Central Excise, Jalandhar, that the clearances without following the proper procedure, appeared to be clearances without payment of Central Excise duty amounting to Rs.3,15,610/- (Duty Rs.3,06,417/- + Edu. Cess Rs.6,129/- + Rs.3,064/-) in violation of Rule 19 of the of Central Excise Rules, 2002 and the same was recoverable under Section 11A of Central Excise Act, 1944.

3. Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioner (Appeals), who rejected the same.

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

4.1 That the Commissioner (Appeals) has failed to appreciate that the applicant, though registered, was not liable to pay excise duty as they were availing the facility of Small Scale Exemption under Notification No.8/2003-CE

dated 01.03.2003 during the material period. Therefore, Form H is to be considered as proof of export.

4.2 That there is no dispute with regard to the factum of export of goods. The copies of "H Forms" Shipping Bills, Bill of Lading submitted to the Central Excise Range Officer, Central Excise Division Office and also at the time of personal hearing before the Commisioner (Appeals) prove beyond doubt that the goods have been exported.

4.3 That there is no finding with regard to the clearance of export goods for home consumption and in the absence it cannot be presumed that the goods are not cleared for export.

4.4 That the delay in submitting the documents to prove that the goods have been exported is relaxable as held by the Hon'ble Tribunal in the case of Benara Bearings Pvt. Ltd. vs. Collector of Central Excise reported in 1999 (105) ELT 398.

4.5 That the appellant could not furnish the proof of export for want of opportunity. The decision of Hon'ble CESTAT in the case of Allwin Forgings vs. CCE reported in 2003 (158) ELT 248 (Tri.-Del.) referred.

4.6 That the Central Board of Excise & Customs vide Circular No.648/39/2002-CE dated 25.07.2002 has clarified simplified export procedure. The CBEC's Excise Manual of Supplementary Instructions in Chapter 7, Part-III, has prescribed the simplified export procedure for exempted units wherein at serial No.4 certain documents shall be accepted as proof of export. The Circular as well as Supplementary Instructions are binding upon the department. Reliance is placed upon judgments in the cases of State of Kerala vs. Kurian Abraham Pvt. Ltd 2008 (224) ELT 354 (SC), Union of India vs. Arviva Industries (I) Limited 2007 (209) ELT 5 (SC), Paper Products Ltd. vs. Commissioner of Central Excise 1999 (112) ELT 765 (SC) and Cosmonaut Chemicals vs. Union of India 2009 (23) ELT 46 (Guj.).

4.7 That there is no loss of revenue and it is not a case where the appellant has cleared the goods for home consumption.

4.8 That the appellant was new in the field and was not aware that copies of Form-'H' duly attested are to be submitted with the department within the stipulated time. Reliance is placed upon the Hon'ble Supreme Court of India decision in the case of Motilal Padampat Sugar Mills Co Ltd. vs. State of U.P. (1979) 44 STC 42.

4.9 That it is well settled by now that any procedural defect cannot take away the substantive right of the appellant. At best it can be said to be a case of procedural lapse in not furnishing the proof of export within time. The appellant is ready to produce the 'H' forms to prove that the goods in question had been exported by the merchant exporter. Reliance is placed upon the Hon'ble Supreme Court of India decision in the case of Sambhaji vs. Gangabai 2009 (240) ELT 161.

4.10 That the penalty of Rs.30,000/ - levied under Rule 25 of Central Excise Rules 2002 is untenable in as much as there is no malafide involved and sub-rule which has been attracted is neither mentioned in the show cause notice nor in the impugned order.

4.11 The charge having not been brought home clearly, penalty could not be levied. Reliance is placed upon the Hon'ble Supreme Court of India ruling in the case of Amrit Foods vs. Commissioner of Central Excise 2005 (190) ELT 433 (SC).

4.12 That penalty cannot be levied in the absence of *mens rea* under Rule 25 of Central Excise Rules 2002. At any rate penalty levied is excessive.

4.13 That there being no duty liability, interest could not be levied.

5. Personal hearing scheduled in this case on 25.3.2015 was attended by Shri Harvinder Singh, Advocate on behalf of the applicant, who stated that the goods have been exported through merchant exporter and under bonafide belief goods were cleared only under excise invoice without following ARE-1 procedure. There is no doubt that goods have been exported and procedural lapse may be condoned in the interest of justice. Nobody attended hearing on behalf of the respondent Department.

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

7. On perusal of the records, Government observes that the applicant, a registered manufacturing unit, has cleared the impugned goods for export as was noticed from the ER3 returns. However, on scrutiny, it was found that applicant had not followed the export procedure as required under Rule 19 of the Central Excise Act, 1944 read with Notification No.42/2001-CE (NT) dated 26.06.2001 as amended. Though the applicant had executed bond but neither ARE-1 nor proof of export was filed as stipulated under the Rules. As the clearances were made without following the statutory conditions, they were held

to be without payment of duty and duty was held to be recoverable under Section 11A of the Central Excise Act, 1944 along with interest by the original authority. Penalty was also imposed under Rule 25 of the Central Excise Rules, 2002. The impugned Order-in-Original was upheld by the Commissioner(Appeals). Now the applicant has filed the Revision Application on grounds stated in para 4 above.

8. Government notes that in the present case, it is an undisputed fact that the applicant, a unit registered with Central Excise, availed benefit of duty free clearances for the purpose of export but failed to fulfill the conditions and did not follow the prescribed procedure thereof. In the quarterly ER-3 returns, the impugned excisable goods were shown as cleared for export with remarks against the said sales as "Export against H Form" or "Export Sale". They neither paid duty on these goods nor did they comply with the provisions of Notification No.42/2001- CE(NT) dated 26.06.2001 under Rule 19 ibid. Though they executed a bond, they failed to file ARE-1 with proper officer and also failed to submit proof of export of goods in question.

9. In reference to the above, Government first proceeds to examine the statutory position and the requirement of Form ARE-1.

9.1 Government notes that export of goods without payment of duty is governed by Rule 19 of Central Excise Rules, 2002 and Notification No.42/2001-CE(NT) dated 26.06.2001 read with Chapter 7 of CBEC's Central Excise Manual and finds that ARE-1 is the basic and essential document for exports as an application for removal of excisable goods for exports.

9.1.1 As per procedure prescribed in the said Notification for sealing of goods at place of dispatch, the exporter shall present the goods along with four copies of application in Form ARE-1 to the Superintendent or Inspector of Central Excise who will verify the identity of goods mentioned in the application and the particulars of the duty paid or payable, and if found in order, he shall seal each package or container in the specified manner and endorse each copy of the ARE-1 in token of having such examination done. The original and duplicate copies of ARE-1 shall be returned to the exporter, he shall retain the quadruplicate copy and send the triplicate copy to officer with whom bond is executed.

9.1.2 Where the exporter desires self-sealing, the authorized person shall certify on all copies of ARE-1 that goods have been sealed in his presence and shall send the original and duplicate copies along with the goods to place of

export and the triplicate and quadruplicate copies to the jurisdictional Superintendent or Inspector of Central Excise within 24 hours of the removal of the goods.

9.1.3 At the place of export, the goods shall be presented along with the original and duplicate copies of ARE-1. Then Customs authorities upon examination of the goods shall allow export thereof and certify on the original and duplicate copies of ARE-1 that the goods have been duly exported citing the Shipping Bill number and date and return the original copy to the exporter and forward the duplicate copy to the officer with whom bond is executed by the exporter.

9.1.4 For the purpose of proof of export, the exporter shall submit a monthly statement along with original copies of ARE-1 to the jurisdictional Central Excise Officer, who in turn will *inter alia* match it with the duplicate copy received from Customs and triplicate copy available with him already. The Divisional Officer shall accept proof of export or initiate necessary action in case of any discrepancy.

9.1.5 In case of non-export within six months from the date of clearance for export or any discrepancy, the exporter shall himself deposit the duty along with interest. Otherwise, necessary action can be initiated to recover excise duties along with interest and penalty.

9.1.6 A separate procedure has been laid down for declarant units i.e. those units who are within exemption limit based on value of clearance and are not registered with Central Excise. The requirements include obtaining of declarant code no. in terms of Notification No.36/2005 CE (NT) dated 26.06.2001, use of pre-authenticated invoices bearing printed serial number, declarant code no., progressive total of clearances, EXIM code etc.; filling prescribed quarterly statement; submitting proof of export to Range Officer within six months from date of clearance from factory; proof of clearance in case of exports through merchant exporters including Form H in case of goods exported directly from the unit.

9.2 In light of the above stated statutory provision, Government observes that any export clearance, intended to be made without payment of duty, will be subject to Rule 19 ibid read with Notification No.42/2001-CE (NT) dated 26.06.2001 in case of registered units and CBEC's Circular 648/39/2002 dated 25.07.2007 in case of declarant units. ARE-1 is the principle document under Notification No.42/2001-CE (NT) dated 26.06.2001 that establishes that the

applicant has either followed the procedure for sealing of goods and examination of goods at place of dispatch either by Central Excise Officer or by self-sealing. In the absence of the ARE-1 and without following the procedure described above, it cannot be established that goods which were cleared from factory were the ones actually exported or that goods exported cannot be correlated with goods cleared from the factory. If the ARE-1 is not produced, it cannot also be established that the goods are the same on which duty is debited in the bond account i.e. the duty paid character of the goods also cannot be established. The submission of application for removal of export goods in ARE-1 form is must because such leniencies lead to possible fraud of claiming an alternatively available benefit which may lead to additional/double benefits.

9.3. Therefore, Government notes that nature of above requirement is both a statutory condition and mandatory in substance as an application for removal of excisable goods for exports.

9.3.1 It is in this spirit of this background that Hon'ble Supreme Court in case of Sharif-ud-Din, Abdul Gani – (AIR 1980 SC 3403) has observed that distinction between required forms and other declarations of compulsory nature and/or simple technical nature is to be judiciously done. When non-compliance of said requirement leads to any specific/odd consequences, then it would be difficult to hold that requirement as non-mandatory.

9.3.2 The Hon'ble High Court of Allahabad in the case of M/s Vee Excel Drugs and Pharmaceuticals Pvt. Ltd. Vs. Union of India 2014 (305) ELT 100 (All.) has dealt with the issue of permissibility of availment of export benefit when ARE -1 not filed. It has held that ARE-1 application is the basic essential document for export. Filing of ARE-1 having been specifically contemplated under Notification issued under Rule 18 ibid, same was mandatory and not directory. Therefore, lapse in filing of ARE-1 was held as non-condonable. The ratio of this decision is squarely applicable to clearances made for export without payment of duty under Rule 19 ibid.

9.3.3 It is a settled issue that benefit under a conditional notification cannot be extended in case of non-fulfillment of conditions and/or non-compliance of procedure prescribed therein as held by the Apex Court in the case of Government of India Vs. Indian Tobacco Association 2005 (187) ELT 162 (S.C.); Union of India Vs. Dharmendra Textile Processors 2008(231) ELT 3 (S.C.). Also it is settled that a Notification has to be treated as a part of the statute and it should be read along with the Act as held by in the case of Collector of Central

Excise Vs. Parle Exports (P) Ltd – 1988(38) ELT 741 (S.C.) and Orient Weaving Mills Pvt. Ltd. Vs. Union of India 1978 (2) ELT J 311 (S.C.) (Constitution Bench).

9.3.4 Government notes that the applicant relied on the various judgments regarding procedural relaxation on technical grounds. The point which needs to be emphasized is that when the Applicant seeks rebate under Notification No.42/2001-CE (NT) dated 26.06.2001, which prescribes compliance of certain conditions, the same cannot be ignored. While claiming the rebate under Rule 19 ibid, the Applicant should have ensured strict compliance of the conditions attached to the Notification No. 42/2001-CE (NT) dated 26.06.2001. Government place reliance on the Judgment in the case of MIHIR TEXTILES LTD. Versus COLLECTOR OF CUSTOMS, BOMBAY, 1997 (92) ELT 9 (S.C.) wherein it is held that:

> "concessional relief of duty which is made dependent on the satisfaction of certain conditions cannot be granted without compliance of such conditions. No matter even if the conditions are only directory."

9.3.5 Further, Government in its earlier Orders 774/2011-CX dated 14.06.2011 in the case of Amira Tanna Industries Pvt. Ltd. and 871/2011-CX dated 04.07.2011 in the case of Synergy Technologies has held that preparation of statutory requirement of ARE-1 cannot be treated as a minor or technical procedural lapse for the purpose of accepting proof of export of goods as such leniencies could lead to possible fraud of claiming an alternately available benefit.

9.3.6 Government, therefore, holds that non- preparation of statutory document of ARE-1 and not following the basic procedure of export as discussed above, cannot be treated as just a minor or technical procedural lapse for the purpose of availing the benefit of duty free clearances of the impugned export goods. As such there is no force in the plea of the applicant that this lapse should be considered as a procedural lapse of technical nature which is condonable in terms of case laws cited by applicant.

9.4. Government finds that the applicant has further pleaded that the CBEC vide Circular No.648/39/2002-CE dated 25.07.2002 and CBEC's Excise Manual of Supplementary Instructions in Chapter 7, Part-III, has prescribed the simplified export procedure for exempted units wherein at serial No. 4 certain documents shall be accepted as proof of export and that Circular as well Supplementary Instructions are binding upon the department. It is observed that above referred Circular dated 25.7.2002 has been issued with reference to Part-III of Chapter 7 of CBEC's Excise Manual of Supplementary Instructions, which relates to units

which are not registered with the Central Excise whereas the applicant was at the relevant time registered with the department and they were required to observe the provisions of Rule 19 of Central Excise Rules 2002 read with Notification No. 42/2001-CE (NT) dated 26.6.2001 and follow the procedure prescribed therein. As such it was always the intention of the applicant to be a registered unit otherwise they would have followed the declarant unit procedure as stated in para 9.1.6 above. There is nothing on record to show that due procedure for declarant units has been followed by them. As such, H-Form is not a valid document as proof of export in the case of the applicant and their contention in this regard is not tenable.

10. In view of above discussion, Government finds that the demand of duty of along with interest will sustain. Also once contravention of relevant statutory provisions stands established, imposition of penalty will also sustain. The applicant have contested the imposition of penalty on the ground of non-mentioning of sub-clause of Rule 25 of Central Excise Rules 2002 relying on the Hon'ble Supreme Court of India ruling in the case of Amrit Foods vs. Commissioner of Central Excise 2005 (190) ELT 433 (SC) in which it was observed that before imposing the penalty, it was necessary for the assessee to be put on notice as to the exact nature of contravention for which the assessee was liable under the provisions of Rule 173-Q. In the present case, the exact nature of contravention has clearly been set out in the show cause notice and upheld in the impugned order. Government observes that the acts of commission by the applicant cannot be ignored on mere technical ground that the relevant sub-section of Rule 25 is not specifically mentioned, especially when no prejudice is shown to have been suffered by the applicant. Also, it is not the case that the applicant was not put on notice regarding the charges against him. This also finds support in Hon'ble Punjab & Haryana High Court in the case of CC, Amritsar Vs. ATM International 2008(222) ELT 194 (P&H) wherein the Apex Court's ruling in the above referred case relied upon by the applicant is discussed at length and it is observed that the Hon'ble High Court is unable to read anything into the judgement of the Hon'ble Supreme Court that lays down as a Rule of Law that in case where specific clauses of the Section in the Act have not been specified then in all such cases Show Cause Notice is liable to be quashed. As such, the ratio of above decision of Hon'ble Supreme Court is not applicable to the facts of the present case. Considering the totality of facts and circumstances of the case, the quantum of penalty imposed by the adjudicating authority is reasonable and no interference in the same is warranted.

11. Moreover, the explanation given by the applicant that due to ignorance of law the proper procedure was not followed by them, also does not appear to be genuine and creditworthy. In any case ignorance of law is no excuse not to

follow something which is required to be done by the law in a particular manner. This principle has been recognized and followed by the Apex Court in a catena of its judgements.

12. In view of above, Government finds no infirmity in order of Commissioner (Appeal) and hence, upholds the same.

13. The revision application is therefore rejected being devoid of merit.

14. So, ordered.

(RIMJHIM PRASAD)
Joint Secretary to the Government of India

M/s N.V.R.Forgings
10 Wariana Industrial Complex
Leather Complex Road, Kapurthala Road
Jalandhar.

ATTESTED

(Shaukat Ali)
Under Secretary (RA)

GOI ORDER NO. 52/2015-CX DATED 25.08.2015

Copy to:-

1. Commissioner, Central Excise, Ludhiana Commissionerate, (Jalandhar Division), Central Excise House, 'F' Block, Rishi Nagar, Ludhiana-141001.

2. Commissioner (Appeals-), Central Excise, Chandigarh –II, C.R. Building, Plot No. 19, Sector-17-C, Chandigarh.

3. The Deputy Commissioner, Central Excise Division, Jalandhar, Model Town Road, Opp. Hotel Skylark, Jalandhar

4. PA to JS(RA)

5. Guard File

6. Spare Copy.

ATTESTED

(Shaukat Ali)
Under Secretary (RA)