F NO. 195/155/WZ/2018-RA

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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. 195/155/WZ/2018-RA 1008 Date of Issue: 13.02.2023

ORDER NO. 63/2023-CEX (WZ)/ASRA/MUMBAI
DATED 10-02-2023 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. H.K. Industries

Respondent : Principal Commissioner of CGST, Mumbai East.

Subject : Revision Application filed, under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No.– PVNS/102/Appeals/M-E/2018-19 dated 13.06.2018 passed by the Commissioner (Appeals Thane).

ORDER

This Revision Application has been filed by M/s. H.K. Industries (hereinafter referred to as "Applicant") against the Order-in-Appeal No.- PVNS/102/Appeals/M-E/2018-19 dated 13.06.2018 passed by the Commissioner (Appeals Thane).

2. The facts of the case are that the Applicant has cleared goods to SEZ unit M/s. Indofil Industries Ltd., under Central Excise Invoice and paid the appropriate duty on the clearance value of the said goods through PLA as well as RG 23 Part-II. However, they did not follow the procedure as laid down under SEZ Rules, 2006 for supplying excisable goods to Unit falling under SEZ Act and Rules in as much as that they have also not cleared the said duty paid goods under claim of Rebate / Refund on the cover of ARE-1 procedure as laid down under the said SEZ Rules, 2006. Further, CBEC vide its Circular No. 06/2010 dated 19.03.2010 has drawn attention to the provisions of the Rule 30(1) of the SEZ Rules, 2006 and the DTA supplier supplying the 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. It has also been observed that the Applicant had recovered the amount of the duty paid on the goods from the consignee i.e. M/s. Indofil Industries Ltd. which is admitted and undisputed fact and therefore applicant are not eligible to claim the refund of the Central Excise Duty element already recovered by them under provisions of Section 11B of the Central Excise Act, 1944. Therefore, Show cause notice was issued to applicant on the grounds under the provisions of Rule 18 of the Central Excise Rules, 2002 read with the provisions of Sub-rule (1), (2), (3), (4), (7). (9) and Rule 30 (1) of SEZ Rules, 2006. Vide OIO No V/GH/5-9/R/TKN/2016-17 dated 23.02.2017, Show cause notice was adjudicated and all the refund claims were rejected. Aggrieved by the OIO, the Applicant filed appeal with the Commissioner (Appeals)Thane, who vide Order-in-Appeal No.- PVNS/102/Appeals/M-E/2018-19 dated 13.06.2018 rejected their appeal and upheld the OIO.

3. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant had filed this revision Application on the following grounds:

i. the Learned Commissioner has passed the impugned order in gross violation of natural justice without considering and appreciating the vital submissions made by the Applicants.

ii. the Learned Commissioner has passed the impugned order in a desultory and cavalier manner without considering and appreciating the facts and circumstances of the case in their proper perspective and without assigning fair reasons for upholding the Order in original and rejecting the appeal. The learned Respondent has not given cogent findings on the various contentions of the applicant: The order of the learned Respondent is violative of the established principles of the natural justice. It has been held by several judicial for that an order not discussing all the pleas made by the party and either admitting or rejecting them, is invalid.

iii. the Learned Commissioner has merely repeated the findings given by the original adjudicating authority and merely stated that the provisions of various circulars issued by CBEC make it mandatory for clearance of goods for export under cover of ARE 1. Applicants submit while this is the position mandated by the circulars, the cases relied upon by the Applicants have carved out exceptions whereby it has been held that rebate is to be allowed even in the absence of ARE1. By merely repeating the provisions of circular and ignoring the case laws, violates the norms of natural justice. The impugned is therefore rendered obtuse, bad in law and therefore on this ground alone the impugned order needs to be set aside and the claim allowed to the Applicants.

iv. the learned Commissioner ought to have appreciated that the absence of AREI is a mere procedural infraction and once the core requirements i.e. the payment of duty on export goods and the actual exports of goods are met, then mere procedural infractions could not be a ground to reject the rebate claim as it is a beneficial scheme for

encouraging exports. Reliance in this regard is placed on the following cases:

v. the Learned Commissioner erred in rejecting the appeal on the grounds that the receipt of goods into SEZ was not validated by an authorised officer of SEZ, as per sub-rule (1) of clause (e) of rule 2 of the SEZ Rules, 2006. Applicants submit that in this case also, the learned Commissioner has relied on mere procedural requirements, without appreciating that the purpose of the requirement for endorsement was to confirm the physical receipt of goods into the SEZ area. In the instant case, endorsement by the specified officer of SEZ provided the necessary proof of receipt of goods in SEZ and hence, could not be dismissed merely on procedural grounds that it was endorsed by a different officer. It was more relevant to prove the receipt of goods in the SEZ area and once that was proved the rebate should have been allowed and procedural shortcomings should have to be overlooked.

vi. the learned Commissioner erred in casting doubts on the authenticity of the certificate merely for the reason that it has been issued nearly one year after supply of goods. Applicants submit that the certificate has been signed by an authorized Officer of the SEZ, and mere passage of one year cannot be a reason to doubt its authenticity. Applicants also submit that in terms of law the provisions of SEZ prevail over other laws, including Central excise law, hence there is no tenable reason not to accept the certification given by the authorized SEZ officer. The Learned Commissioner has failed to give a single valid reason for casting doubts on the validity of the certificate. Further his adverse findings that the certificate only certifies about the receipt of goods but not about the recovery of duty amount are not relevant as the certificate from the SEZ officer was primarily meant for certifying the receipt of the goods into SEZ, which the certificate had unequivocally confirmed.

vii. the learned Commissioner erred in observing that the certificate only certifies about the receipt of goods in SEZ but not about the recovery

of duty amount. Applicants submit that the non recovery of duty amount is substantiated in the sales ledger of M/s Indophil Industries Ltd, submitted under cover of the written submissions made at the time of personal hearing, whereby the excise duty sought as refund is clearly mentioned as refund receivable from excise. This position is further substantiated by the certificate given by M/s Indophil Industries Ltd. certifying that only basic amount, net of the excise duty, was paid to the Applicants and also that no CENVAT credit was availed by them. Hence the adverse findings are baseless, void and therefore liable to be set aside on this ground itself.

viii. Applicant have placed reliance on various case laws.

ix. without prejudice to above, the Applicants say and submit that Applicants had filed rebate claim on 11-11-2016. As per provision of Section 11BB of Central Excise Act 1944 which is reproduced on ease of reference, If any duty ordered to be refunded (includes rebate) to an applicant is not refunded within three months from the date of application there shall be paid to the applicant interest at such rate fixed by the government'. As such the Applicants are eligible for interest on the delayed rebate beyond three months from the date of filling of rebate Claim.

x. In view of above, Applicant requested to allow the refund amount and set aside the impugned OIA.

4. Personal hearing in this case was fixed for 14.10.2022, Shri Rajan Mashelkar, Advocate appeared online on behalf of the applicant and submitted that except ARE-1 all other documents evidencing export of duty paid goods to SEZ was produced. He submitted that no unjust enrichment is applicable as duty component is not paid by the recipient.

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

6. Government observes that the refund claims were denied by the Department mainly on following issues:

i. non production of ARE-1 by the Applicant .

ii. Applicant had recovered the amount of the duty paid on the goods from the consignee.

iii. the receipt of goods into SEZ was not validated by an authorised officer of SEZ, as per sub-rule (1) of clause (c) of rule 2 of the SEZ Rules, 2006.

Therefore, the issue to be decided in the instant case is whether:

i. the non-preparation of Form ARE-1 in case of export of goods in SEZ can be a reason for denying rebate under Rule 18 of Central Excise Rules,2002.

ii. Whether unjust enrichment have any bearing on the refund sought.

iii. the certificate dated 17.02.2017 furnished from the specified officer, SEZ is valid even if not signed by the Authorized officer.

7. With regards to the claim of rebate, the Government notes paragraph 8.4 of the Manual of Instructions issued by the CBEC specifies that the rebate sanctioning authority has to satisfy himself in respect of essentially two requirements. The first requirement is that the goods cleared for export under the relevant ARE-1 applications were actually exported. The second is that the goods are of a duty paid character. The object and purpose underlying the procedure which has been specified is to enable the authority to satisfy itself that the rebate of central excise duty is sought to be claimed in respect of goods which were exported and that the goods which were exported were duty paid.

8. The Government holds that in order to qualify for the grant of a rebate under Rule 18, the mandatory conditions required to be fulfilled are that the goods have been exported and duty had been paid on the goods. Government notes that the duty payment character as well as the export of the goods are not in dispute. In the present case there is no dispute in respect of the duty payment against the exports of goods.

9. With regard to the argument that Applicant have not submitted the copies of the ARE-1 duly endorsed by the custom authorities, Government, holds that non-submission of duly endorsed copy of ARE-1 form by the Applicant should not result in the deprival of the statutory right to claim a rebate subject to the satisfaction of the authority on the production of sufficient documentary material that would establish the identity of the goods exported and the duty paid character of the goods. Government notes that goods have been cleared to SEZ in present case and both these aspects can be corroborated from the contemporaneous evidences even if ARE-1 has not been prepared at all.

10. In the present case, the fact that goods have been cleared to SEZ for export has never been challenged by the Department. Furthermore, Department has not raised any doubt on the duty paid character of the goods. The contention of the Department that the Applicant has recovered the amount of duty paid on the goods from their consignee for denying refund, will not hold good, as the clearances have been affected to SEZ, and such clearances are to be treated at par with the export outside India and there is no unjust enrichment in cases of export. Thus, this issue will not be having a bearing on the refund sought.

11. Further, as a matter of fact, in several decisions of the Union Government in the revisional jurisdiction as well as in the decisions of the CESTAT, the production of the relevant forms has been held to be a procedural requirement and hence directory as a result of which, the mere non- production of such a form would not result in an invalidation of a claim for rebate where the exporter is able to satisfy through the production of cogent documentary evidence that the relevant requirements for the grant of rebate have been fulfilled.

12. Also, it is observed that a distinction between those regulatory provisions which are of a substantive character and those which are merely procedural or technical has been made in a judgment of the Supreme Court in Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner. The Supreme Court held that the mere fact that a provision is contained in a statutory instruction "does not matter one way or the other". The Supreme

Court held that non-compliance of a condition which is substantive and fundamental to the policy underlying the grant of an exemption would result in an invalidation of the claim. On the other hand, other requirements may merely belong to the area of procedure and it would be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes which they were intended to serve. The Supreme Court held as follows :

"The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some other may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance"

13. In their judgment of Bombay High Court in case of UM Cables Ltd v/s Union of India-2013 (290) ELT 641 (HC-Bom) as relied upon by the applicant held that:

'non production of original and duplicate ARE-I ipso facto cannot invalidate the rebate claim. In such a case the exporter can demonstrate by cogent evidence that goods were exported and duty paid, satisfying the requirement of Notification No. 19/2004 CE (NT). On facts claim directed be considered on the basis of bill of lading, bankers certificate and inward remittance of export proceeds and certification from Customs authorities on ARE-I'

In the above said case, the exporter had failed to submit original and duplicate copy of ARE-1 while other export documents evidencing the "facts of exports" were submitted under rebate under Notification No. 19/2004 CE (NT). However, the lower authorities rejected the rebate claim for non-submission of Original and Duplicate copy of ARE-1 duly signed by the Central Excise officers for verification of goods exported. The ratio of the said judgment is squarely applicable in the instant case.

14. With regard to the Department's contention on the validity of the certificate dated 17.02.2017, Government finds that considering facts of the case, certificate can be seen only to verify whether the goods have been received in the SEZ or not. This purpose gets served from the certificate

which clearly mentions that the goods have been received in the SEZ. Therefore, the allegation of the Department that this certificate is not issued by the authorized officer, is immaterial to the facts of the case.

15. In view of above, the Government holds that since the export of duty paid goods is not in dispute, the rebate claim in question cannot be denied merely on technical/procedural lapses. Government therefore set asides the impugned Order-in-Appeal No.– PVNS/102/Appeals/M-E/2018-19 dated 13.06.2018 passed by the Commissioner (Appeals), Thane. Adjudicating Authority is directed to disburse the same within 8 weeks of the receipt of this order.

Shrawan 10/2/23

(SHRAWAN KUMAR)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No. 63/2023-CEX (WZ) /ASRA/Mumbai Dated 10.2.2023

To,

1. M/s. H.K. Industries, 14,15,16, Swastik Industrial Estate, 178,Vidyanagari Marg, Kalina, Mumbai- 400098.
2. The Commissioner of CGST, Mumbai East Commissionerate, 9th Floor, Lotus Infocentre, Parel, Mumbai - 400012.

Copy to:

1. The Commissioner(Appeals) Central Excise, Mumbai Zone-II, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E,BKC, Bandra (E), Mumbai – 400051.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.