F.No. 198/174/16-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
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F.No. 198/174/16-RA/2668 Date of Issue: 27.06.2022

ORDER NO. 644/2022-CX(WZ)/ASRA/MUMBAI DATED 21.6.2022 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 : The Principal Commissioner of Central Excise, Customs & Service Tax, Vadodara-II Commissionerate

Respondent : M/s Tufropes Pvt. Ltd.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. VAD-EXCUS-002-APP-556/2015-16 dated 25.02.2016 passed by the Commissioner(Appeals-I) Central Excise, Customs & Service Tax, Vadodara-II Commissionerate

ORDER

The Revision Application has been filed by the Principal Commissioner of Central Excise, Customs & Service Tax, Vadodara-II Commissionerate (hereinafter referred to as "Applicant") against the Orders-in-Appeal No. VAD-EXCUS-002-APP-556/2015-16 dated 25.02.2016, passed by the Commissioner(Appeals-I) Central Excise, Customs & Service Tax, Vadodara-II Commissionerate.

2. In brief, M/s. Tufropes Pvt. Ltd., Survey Block No.488, Vadodara Halol Highway, Nr. Decent Hotel, Vill Asoj, Tal. Waghodai, Vadodara – 391510 is a manufacturer exporter (hereinafter referred to as the "Respondent") who is engaged in manufacture of excisable goods falling under Chapter Heading No. 60059000 of Central Excise Tariff Act, 1985 and is holding a valid Central Excise Registration No. AAACT8968MEM003. The Respondent had filed rebate claim amounting to Rs.4,05,987/ seeking Rebate of duty paid on excisable goods exported by them to M/s. India Nets through Pithampura SEZ (MP), India under Rule 18 of the Central Excise Rules, 2002 read with Notification No.19/2004 CE dtd.06.09.2004 with the Assistant Commissioner, Central Excise & Customs, Division-Halol-I, Vadodara-II Commissionerate. The Assistant Commissioner vide NO. Div.HLL1/689-696/Reb/15-16 dtd.28.09.2015 sanctioned the rebate claim of Rs. 4,05,474/ - through A/C payee cheque and Rs.513/- re-credited to Cenvat Credit account of the Respondent under Section 11B of CEA, 1944 read with Rule 18 of CER, 2002 and Notification No. 19/2004-CE dtd.06.09.2004. The department held a view that goods have been supplied to SEZ which is not outside India. Hence, the issue of unjust enrichment did exist in such a case. Being aggrieved with the Order in Original No. Div. HLL 1/689-696/Reb/15-16 dtd.28.09.2015 , the Department filled appeal before the Commissioner (Appeals), Central Excise, Customs and Service Tax, Vadodara-II, who decided the case vide OIA No. VAD-EXCUS 002-APP-

556/2015-16 dated 25.02.2016, wherein he has upheld the order passed by the Assistant Commissioner, Central Excise, Customs & Service Tax, Division-Halol-1, Vadodara-II and rejected the appeal filed by the Department.

3. Aggrieved the Applicant filed the current revision application on the following grounds:

(i) The Orders-in-Appeals have been examined on the basis of the facts and circumstances of the case and also on the basis of numerous decisions of Supreme Court, High Court and Authority of Advance Rulings where it has been held that SEZ to be treated within India and not outside India. Hence, the doctrine of unjust enrichment is applicable in the subject cases. Hence Orders-in-Appeal are not correct, legal and proper.

(ii) The Commissioner(Appeals) had erred in relying upon CESTAT Larger Bench decision dated 17.12.2015 in case of M/s Sai Wardha Power Ltd. Vs. CCE Nagpur [2015 TIOL-2823-CESTAT-MUM-LB] as the issue before the Larger Bench was whether appeal in case of rebate of goods supplied to SEZ will lie before CESTAT or not. The issue before the Larger Bench was not whether unjust enrichment issue will be applicable or not for supply of goods from DTA to SEZ. The Larger Bench decided that appeal in case of supply of goods from DTA to SEZ within India would not lie with CESTAT. However, Commissioner(Appeals) had erroneously concluded that doctrine of unjust enrichment will be exempted in the subject case and also failed to recognize the fact that entitlement for rebate of goods supplied from DTA to SEZ (to be treated outside customs territory of India), ipso facto does not translate into exemption of unjust enrichment - when proviso to Section 11B(2)(a) of Central excise Act, 1944 which states:-

"(a) Rebate of duty of excise on excisable goods exported out of India"

Which means the unjust enrichment is exempted when the excisable goods are "exported" out of India and not merely "treated" or "deemed" to be exported out of India. The Commissioner(Appeals)

failed to recognize - the grant of rebate of supply of goods from DTA to SEZ and examination of such rebate from point of view of unjust enrichment are two different issues.

(iii) The Commissioner(Appeals) had erroneously relied upon Circular 1001/8/2015/CX-8 dated 28.04.2015 issued by CBEC, which states that since SEZ is deemed to be outside Customs territory of India, any licit clearance of goods from DTA to SEZ will continue to be treated as export and will be entitled for rebate. Here, Commissioner(Appeals) had held that supply from DTA to SEZ are export outside territory of India without commenting on whether unjust enrichment will be applicable to such cases or otherwise. Commissioner(Appeals) had also failed to recognize the eligibility of rebate and applicability of unjust enrichment doctrine to an issue are different things and mere grant of rebate does not exempt rebate from doctrine of unjust enrichment. There is no CBEC circular which says that proviso to Section 11B(2)(a) will not be applicable to clearance from DTA to SEZ.

(iv) The Commissioner(Appeals) relied upon GOI Order(RA) in case of M/s Essel Propack [2014 (134) 946 (G01)] wherein it is held that rebate is admissible when goods supplied to SEZ and Department has not challenged the admissibility of rebate to the goods supplied from DTA to SEZ. The challenge of Department in present case before Commissioner(Appeals) was that the adjudicating authority had not examined from unjust enrichment point of view. The export to SEZ is required to be examined from unjust enrichment point of view due to Section 12B of the Act and if not hit, required to be granted to the claimant and if hit to be credited to the Consumer Welfare Fund. Hence, reference to GOI Order(RA) in case of M/s Essel Propack was erroneous.

(v) The Commissioner(Appeals) in the Order-in-Appeal No. VAD-EXCUS-CUS-000-460/2015-16 dated 18.01.2016 in the case of M/s. Hylite Cables Pvt. Ltd, Anand, at para 7, inter-alia stated:-

> *"...since the answer to first issue holds the export from DTA to SEZ as export outside the territory of India, the clause of unjust enrichment does not apply in the instant case. I am of the view that*

concept of unjust enrichment on export to SEZ, needs to be self contained on legal inapplicability because distinction between physical and deemed export is based on colloquial usage and not sanctified by legal approval."

Here again the Commissioner(Appeals) had erred in concluding that since rebate is allowable for supply from DTA to SEZ, he had concluded that issue of unjust enrichment does not arise and held that words physical export and deemed export are of colloquial usage and not sanctified by legal approval. The Commissioner(Appeals) had incorrectly concluded that *"physical export"* and *"deemed export"* are terms of colloquial usage and have no legal approval. However, in reality these words have been defined as follows: -

(a) "Deemed export" is defined in Foreign Trade Policy (FTP) 2015-20 of Govt. of India at Para 7.01 as those transactions in which goods supplied do not leave country and payment for supplies is received in India's rupees or in free foreign exchange.

(b) "Physical export", the term physical export is same as export as defined in Explanation to Rule 18 of Central Excise Rules, 2002, which reads "export" and its grammatical variations & cognate expression means taking goods out of India to a place outside India"

This proves that the Commissioner(Appeals) had erred in coming to conclusion that *"physical export"* and *"deemed export"* are of colloquial usage terms and there is no distinction between them and there is no legal sanction for these terms. Thus, conclusion drawn by the Commissioner(Appeals) that unjust enrichment does not apply in the instant cases are erroneous, invalid and wrong.

(vi) Commissioner(Appeals) had come to conclusion on the basis of decision of Larger Bench of Tribunal in case of M/s Sai Wardha Power, M/s Essel Steel Propack Ltd. (cited Supra) that SEZ is outside India. This conclusion is invalid, fallacious and untrue on the basis of the following:-

(a) M/s. MAS-GMR Aerospace Engineering Co. Ltd had approached Authority of Advance Ruling (AAR), to decide whether

maintenance & repair services carried out in SEZ will be exempted from Service Tax as SEZ is to be regarded as a territory outside Customs Territory India for the authorized operations, hence Finance Act, 1994 will not be applicable for the activities carried out within territory of SEZ. The AAR as reported in [2011-TIOL-06-ARA-ST] & [2012(26)STR 468 (A.A.R)] has held that if SEZ were really deemed to be territory outside India as the applicant would like us believe there was apparently no need for such expansive list of exemptions and concessions. In fact, there was no need to exempt the goods from Customs & Excise duties. Under Indian Laws when such goods are intended to be supplied to foreign lands, consequently all enactments whether relating to fiscal levies, labour laws, banking laws or any other law which apply to territory of India apply in equal measure to the notified areas of special economic zone as well. If a particular law is applied to SEZs with modification (the Income Tax Act, 1961 applied to SEZ under Section 27 of the SEZ Act) it cannot lead to an inference that other laws which may not have specifically in the SEZ Act have no application to SEZ. All central laws apply to SEZ with modification or exceptions, if any, as provided in the SEZ Act itself or in Rules made there under.

(b) The AAR has therefore come to conclusion that maintenance & repair services would therefore performed within territory of India and Section 66A of Finance Act, 1994 will have no application in context of these activities & services provided by the applicant would be taxable under section 66 of the said Finance Act, 1994. It also is concluded that since SEZ is not outside India the maintenance & repair services provided by the applicant cannot considered as export of taxable services under export of Services Rules, 2005. The AAR further concludes that SEZ being part of India, performance of such services in the SEZ does not entitle them to categorize as export of taxable services.

The Commissioner(Appeals) had stated that export to SEZ to be export out of India and hence unjust enrichment principle not

applicable but AAR has held that SEZ being part of India services rendered will not even be called as export of services. The significant point to be noted was AAR has held that maintenance and repair operations done in SEZ would, therefore, be performed within territory of India, concluding that SEZ is within India and not outside India.

(vii) The Hon'ble High Court of Madras in case of M/s Advait Steel Rolling Mills Pvt. Ltd. [2012(286) ELT 535 (Mad)] has referred to definition of export under SEZ Act, 2005 wherein it states "export" inter alia means "Supplying goods, or providing services from DTA to a unit or developer" and definition of export under Section 2(16) of Customs Act, 1962 cannot he made applicable for levies of duty of Customs on goods supplied from DTA to SEZ as there is no movements of goods from India to place outside India, export duty cannot be levied. It has been held Customs duty on exports is applicable only when goods are taken out of India to a place outside India. In movements of goods from DTA to SEZ there is no movement of goods from India to a place outside India. Hence, it was derided that supply from DTA to SEZ is not supply of goods to a place outside India.

(viii) The Hon'ble Karnataka High Court in case of M/s. Shyamaraju & Co (India) Pvt. Ltd. [2010 (256) ELT 193 (Kar)] on the issue "whether export duty would be leviable on Iron & Steel products made liable for export duty for goods supplied to SEZ", has held that if SEZ were to be treated as being outside India no necessity to exempt imports & exports from SEZ under Section 26 of SEZ Act, 2005. Movement to SEZ treated as exports under SEZ Act 2005 only by legal fiction for making available benefits as in case of actual exports. No export duty payable for supply by DTA to SEZ. SEZ Rules further lay down that DTA procurement should be tax free. In view of the above, it can be inferred that SEZ to be treated outside India only by legal fiction. This makes it evident that SEZ is not to be treated outside India as far as examining rebate/refund claims from unjust enrichment point of view.

(ix) The Hon'ble Karnataka High Court in case of M/s. Biocon Limited [2011(267) ELT 28 (Kar)] on the issue 'whether export duty leviable on SEZ clearance from "DTA" has held that Levy of export duty neither expressly nor impliedly contemplated under SEZ Act, 2005 and that such movement treated as export by a legal fiction for making available export benefits for DTA units & levy would be counter to purpose of such legal fiction. In view of the above it can be inferred that SEZ to be treated outside India only as legal fiction. This makes it more than evident that SEZ is not to be treated outside India as far as examining rebate/refund claims from unjust enrichment point of view is concerned.

(x) The Hon'ble Gujarat High Court (upheld by the Hon'ble Supreme Court) in the case of M/s. Essar Steel Limited [2012 (249) ELT 3 (Guj)] on the issue whether export duty is leviable under Customs Act, 1962 on goods supplied from DTA to SEZ has held that the term export is defined in Customs Act and meaning thereof not adoptable or applicable under another enactment for any purpose of levying duty under Customs Act. The movement of goods from DTA to SEZ treated export by legal fiction under SEZ Act for making available duty drawback, DEPB benefits etc. The construction of such movement as entailing liability to duty contrary to purpose of legal fiction created. The High Court has held that Section 53(1) of SEZ Act 2005 deeming SEZ as outside customs territory for undertaking authorized operation and custom territory cannot be equated with territory of India. The High Court has further held that such an interpretation will lead to a situation where SEZ would not be subject to any laws whosoever. The High Court has significantly noted that if the SEZ was to be considered as an area outside India, then various provisions of SEZ Act would be rendered redundant and unworkable and such declaration would be constitutionally impermissible [para 39, 41.3.1, 41.3.2, 41.3.3, 41.3.4 of cited judgment]. This decision was maintained by the Hon'ble Supreme Court [2010 (255) ELT 115(SC)]. In view of the above it can be inferred that SEZ is not to be treated outside India, for purpose

examining rebate/refund claims from unjust enrichment point of view as stated in Section 12B read with Section 11B (2)(a) of the Central Excise Act, 1944.

(xi) Thus, after considering the case laws cited supra in the cases of M/s MAS GMR, M/s Essar Steel Limited, M/s Advait Steel Rolling Mill , M/s Biocon Limited, M/s Shyamaraju 86 Co, the it is evident that as far as examining rebate claims from unjust enrichment point of view is concerned for supply from DTA to SEZ the claims are required to be examined from unjust enrichment point of view and hence conclusion drawn by the Commissioner(Appeals) needs to be set aside. The proviso to Section 11B(2)(a) of the Central Excise Act, 1944 does not recognize legal fiction and hence in the subject case though rebate is admissible and has been granted, the unjust enrichment angle is also necessarily to be examined as there is distinct and manifest possibility that DTA supplier will recover duty from the customers as well as rebate leading to open abuse of law by way of dual enrichment if rebate/refund claims are not examined from unjust enrichment angle.

(xii) Reference is also invited to the judgment by seven member Bench of the Hon'ble Supreme Court in the case of M/s Mafatlal Industries Ltd Vs U.O.I [1997 (89) ELT 247 (SC)] which unambiguously stated as follows:

> *"All claims of refund except where levy is held to be unconstitutional, to be preferred and adjudicated upon under Section 11B of Central Excise Act, 1944".....*
>
> *"refund of duty either under Central Excise Act, in a civil suit, or a writ petition granted only when it is established that burden of duty has not been passed to others. The person ultimately bearing the burden of duty can legitimately claim its refund otherwise amount to be retained by the state."*

(xiii) In view of the above grounds of Appeal the Order-in-Appeal dated 25.02.2016 passed by the Commissioner (Appeals-I), Central Excise and Service Tax, Vadodara-II is not correct, not legally tenable and need to be set aside holding that the issue of unjust enrichment on rebate granted on supply to SEZ in terms of Section 11 B 2 (a) of Central Excise Act, 1944 is applicable. The Order-in-Appeal

No.VAD-EXCUS-002-APP-556/2015-16 dated 25.02.2016, passed by the Commissioner (Appeals-I), may be set aside in accordance with the law.

4. Personal hearing was fixed for 12.10.2021, Shri Mukesh Soni,Consultant on behalf of the Respondent appeared for hearing online and reiterated his earlier submissions. He submitted that supply to SEZ is export and is well settled by now. He further stated that there can not be unjust enrichment in export. He requested to maintain Commissioner(A)'s order. None appeared on behalf of applicant.

5. The Respondent in their defense reply submitted the following additional submissions:

i) The Sanctioning authority has legally and properly sanctioned the rebate claims of Rs.4,05,987/- of the respondents in respect of duty paid on goods exported goods to SEZ unit. As per the definition of export under Section 2 (m) of the SEZ Act 2005 which provide that supplying goods, or providing services, from Domestic Tariff Area to a Unit or Developer of SEZ is treated as export. Further for the purpose of tariff and duty, a Special Economic Zone is considered a foreign territory. The Section 22 (m) of SEZ Act, 2005 is reproduced below:

"Section 2 (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:"

Further, Section 51 (1) of the SEZ Act, 2005 provide that the provisions of SEZ Act will have overriding effect on any law time being in force reproduced below:

" This section is 51 (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any

other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

ii) Ld. Commissioner (Appeals) rightly relied on the CBEC Circular No.1001/8/2015-CX.8 dated 28.04.2015 which 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 CBEC circular no. 29/2006 Customs dated 27.12.2006 and 62010 dated 19.03.2010 and amendment in the Rule 18 made vide Notification no. 6/2015 CE (NT) and 8/2015 CE (NT) both dated 01.03.2015 has made the definition of export more explicit by incorporating definition of export as given in the Customs Act. 1962. CBEC Circular No.1001/8/2015-CX8 dated 28.04.2015 (Appendix-A) clarify as under.

"4. It was in view of these provisions that the DGEP vide circular no 29/2006 Customs dated 27.12.2006 and 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 is explained in these circular does not change after amendments made vide no. 6/2013 CE (NT) and 8/2015 CE (NT) both dated 01.03.2015, since the definition of export already given in rude 18 of Central Excise Rules, 2002 has only made more explicit by incorporating definition of export as given in the Customs Act, 1962 Since SEZ is deemed to be outside the Ciatoms territory of India, any licit clearance of goods to an SEZ from DTA will continue to be export and therefore he entitled to the benefit of rebate under rule 18 of CER. 2002 und of refund of accumulated CENVAT credit under rule 5 of CCR 2004. As the case may be."

In view of above, SEZ are outside Customs territory of India and goods supplied by DTA unit to SEZ unit is treated as physical export and eligible for rebate.

iii) Ld. Commissioner (Appeals) rightly relied the RA order in RE: Essel Propack Ltd. (2014 (312) ELT 945 (G.O.L.) which distinguished the case of Essar Steel Ltd..

iv) Export to SEZ is not deemed export as per FTP 2015-20 since as per para 7.2 of said policy category of "Deemed Export" is defined as under wherein supplies to SEZ are not covered:

7.02 Categories of Supply

Supply of goods under following categories (a) to (d) by a manufacturer and under categories (e) to (h) by main/sub-contractors shall be regarded as "Deemed Exports": A. Supply by manufacturer:

(a) Supply of goods against Advance Authorisation / Advance Authorisation for annual requirement/DFIA:

(b) Supply of goods to EOU/STP/EHTP/BTP: (c) Supply of capital goods against EPCG Authorisation; (d) Supply of marine freight containers by 100% EOU (Domestic freight containers manufacturers) provided said containers are exported out of India within 6 months or such further period as permitted by customs;

From the above, it is clear that under Deemed export category, supply of goods from DTA to SEZ are not covered and it is physical export as per FTP. Hence, the respondents argument is incorrect and Ld. Commissioner (Appeals) rightly treated the supply to SEZ as export eligible for rebate.

v) Case of MAS-GMR Aero Space Engineering Co. Limited, Advait Steel Rolling Mills Pvt. Ltd. M/s Shyamraju & Co. (India) Pvt. Ltd. M/s Biocon Ltd. relied upon by the applicant is not applicable to the present case as the subject matter of these case are different.

vi) The Ld. Commissioner (Appeals) rightly relied on the decision of M/s Sai Wardha Power Ltd. Vs Commissioner of Central Excise. Nagpur (2015 TIOL-2823-CESTAT MUM-LB) and rightly held the decision of the Hon'ble High Court in case of Essar Steel Ltd. is not applicable to the case of unjust enrichment by treating export to SEZ different from physical export out of India.

vii) Hon'ble Commissioner (Appeals) in the subject Order-In-Appeal rightly held that judgment of the Hon'ble High Court of Gujarat in the case of Essar Steel Ltd. V/s Commissioner (2010 (249) ELT 3 (Guj.), which was upheld by Hon'ble Apex Court (2010 (255) ELT

A115 (SC)), was discussed and clearly distinguished by Larger Bench of CESTAT and also by the Revisionary Authority of Department of Revenue, as per para 8 of the decision in the case M/s Sai Wardha Power Ltd. Vs Commissioner of Central Excise, Nagpur (2015 TIOL-2823-CESTAT-MUM-LB) Larger Bench of CESTAT has held that (i) the movement of goods from DTA into SEZ is treated as an export under SEZ Act, 2005 which does not contain any provision for levy of export duty on the same (ii) 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 complete levy of duty on movement of goods from DTA to the SEZ (iii) there is no conflict in applying the respective definitions of export in the two enactments for the purpose of both the Acts and therefore, the non-obstante clause cannot be applied or invoked at all. Hence, the Ld. Commissioner (appeals) rightly held that decision of the Hon'ble High Court in case of Essar Steel Ltd. is not applicable to the case of unjust enrichment by treating export to SEZ different from physical export out of India, said decision is only decided the applicability of export duty on export our of India and departments loose said case who proposed the export duty on goods supplied from DTA to SEZ unit as export duty is applicable only to the export of goods out of India.

viii) The Ld. Commissioner (Appeals) rightly relied the decision of M/s Sal Wardha Power Ltd. Vs Commissioner of Central Excise, Nagpur (2015 TIOL-2823 CESTAT-MUM-LB) wherein Larger Bench of CESTAT has held that (i) the movement of goods from DTA into SEZ is treated as an export under SEZ Act, 2005 which does not contain any provision for levy of export duty on the same (ii) 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 complete levy of duty on movement of goods from DTA to the SEZ (iii) there is no conflict in applying the respective definitions of export in the two enactments for the purpose of both the Acts and therefore, the non-obstante clause cannot be applied or invoked at all. This decision

rightly discussed and clearly distinguished the case of Hon'ble Commissioner (Appeals) in the subject Order-In-Appeal rightly held that judgment of the Hon'ble High Court of Gujarat in the case of Essar Steel Ltd. Vis Commissioner (2010 (249) ELT 3 (Guj.), which was upheld by Hon'ble Apex Court: (2010 (255) ELT A115 (SC)). Further, the ratio of the judgment of the Hon'ble Apex Court in the case Mafatlal Industries Ltd. Vs U.O.I (1997 (89) ELT 247 (SC) is not applicable to the present case as the exporter (respondents) has not passed on the burden of the duty (rebate) to other person or buyer of the goods i.e. SEZ unit.

ix) Moreover, the principle of unjust enrichment is not applicable to the present case as the respondents have not charged any duty or collected duty (i.e. the amount of duty paid on export on which rebate is claimed) from the SEZ unit and as such burden of the duty was borne by the exporter, M/s HLE engineers (respondents). Hence, Section IIB (2) (a) of the Central Excise Act, 1944 is not applicable in the present case and rebate is properly sanctioned to the respondents.

x) Rule 23 of SEZ Rules, 2006 provide that supplies from the Domestic Tariff Area to a Unit or Developer for their authorized operations shall be eligible for export benefits as admissible under the Foreign Trade Policy and Rule 27 ibid provide the procedure for the supply duty free goods to SEZ unit or developer as export.

xi) The Revision Application filed by the Commissioner, Central Excise & Customs, Silvasa against the Order-In-Appeal No. No. VAD-EXCUS-002 APP-556/2015-16 dated 25.02.2016 may please be rejected.

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

8. On perusal of the records, Government observes that the Respondent manufacturer had exported their finished goods to SEZ units and filed rebate claimed under Rule 18 of Central Excise, 2002 read with

Notification No. 19/2004-CE dated 06.09.2004. The jurisdictional rebate authority sanctioned their rebate claims. Aggrieved, the Department then filed appeal with the Commissioner(Appeal) on the ground that rebate claims were sanctioned without examining the unjust enrichment aspect in terms of Section 12B of the Central Excise. The Commissioner(Appeals) rejected the Department's appeal and upheld the Orders-in-Original.

9. Government observes that the Applicant has relied 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 fiction created under SEZ Act, 2005 and such legal fiction should be confined to the purpose for which it has been created.

10. In this regard 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."*

11. 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 thereon. 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 19.03.2010 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 19.03.2010 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."

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.

12. Government also notes that vide Circular No.1001/8/2015-CX.8 dated 28.04.2015 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.*

13. Government in this regard also rely on GOI order No. 875-876/2012-CX dated 30.07.2012 in RE: Tulsyan Nec Ltd. [2014(313) ELT.977 (GOI) which also involve an identical issue. The Applicant M/s Tulsyan Nec Ltd. whose rebate claims were also rejected on the grounds of unjust enrichment had contended before the Government that

4.1 That the first proviso to sub-section (2) of Section 11B of the Central Excise Act clearly states that the concept of unjust enrichment would not attract in the case of goods exported. The Commissioner (Appeals) states that export to the SEZ was not an export out of India and accordingly the concept of unjust enrichment shall be attracted. It is submitted that export to SEZ is in fact an export out of India in terms of Section 2(i) of the SEZ Act, 2005. As per this sub-section domestic tariff area means the whole of India including the territorial waters and continental shelf but not include areas of SEZ. It is crystal clear from this section that SEZ is not a domestic tariff area which means that any supply of goods to the SEZ is an 'export'. In terms of Section 2(m) of the SEZ Act, 2005 supplying goods to a unit or developer from domestic tariff area is 'export'. The procedure to be followed is the same as for import from abroad and export out of the country. The Commissioner has therefore erred in holding that principles of unjust enrichment will apply to goods exported from domestic tariff area to SEZ. Further, Rule 18 of the Central Excise Rules, 2002 relating to export of goods permits payment of excise duty and claiming the same as rebate after the export was completed. The applicants followed the procedure as laid down in Rule 18. It is however to be noted that the unit which imported the goods from the applicants have issued the purchase order wherein it was clearly stated that the SEZ Unit ordering for the goods would not be liable to pay excise duty. Accordingly, the SEZ Unit paid only the value of the goods excluding the excise duty - vide ledger account. In order to make book adjustments, the applicants also issued a credit note. Further, no objection certificate from the buyers stating that they had no objection to refund the excise duty to the applicants was also produced.

14. Government in its Order No. 875-876/2012-CX dated 30.07.2012 referred to in Para 11 above, while deciding the issue of unjust enrichement observed that

> ***"8.3** It is an established fact that the concept of unjust enrichment is not applicable in the matters of exports, as stands specified in the first proviso to sub-section (2) of Section 11(b) of Central Excise Act, 1944. Government therefore finds that the said ground as stated in para 4.1 above is legal and proper and same is acceptable."*

15. In view of the foregoing, Government finds no infirmity with the impugned Order-in-Appeal No. VAD-EXCUS-002-APP-556/2015-16 dated 25.02.2016 passed by the Commissioner(Appeals-I) Central Excise, Customs & Service Tax, Vadodara-II Commissionerate and therefore upholds the same as legal and proper.

16. The Revision Application filed by the Applicant is thus dismissed in terms of above.

Shrawan 21/06/22

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

ORDER No.814/2022 CX (WZ) /ASRA/Mumbai DATED 21.6.2022

To,
The Principal Commissioner of Central Excise, Customs & Service Tax, Vadodara-II Commissionerate ,Ist floor, New Central Excise Building, Subhanpura,Vadodara-390023.

Copy to:

1. M/s. Tufropes Pvt. Ltd., Survey Block No.488, Vadodara Halol Highway, Nr. Decent Hotel, Vill Asoj, Tal. Waghodai, Vadodara – 3915102.
2. The Commissioner(Appeals-I) Central Excise, Customs & Service Tax, Vadodara-II Commissionerate, Central Excise Building,Ist Floor,Annexe,Race Course,Vadodara-390007.
3. Sr. P.S. to AS (RA), Mumbai
3. Guard file