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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. 195/1648/12-RA Date of Issue: 04.11.19
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ORDER NO. 64/2019-CX (WZ) /ASRA/MUMBAI DATED 9.10.2019 OF THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant: M/s Bhavika Chemical Corporation, Shed No. 17, M.I.D.C. Chemical Zone, Behind ESIC Office, Ambernath – 421 501.

Respondent: Commissioner of Central Goods & Service Tax, Thane (Rural), Mumbai.

Subject: Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. BR/ 153/Th-1/2012 dated 11.09.2012passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-I.

ORDER

The instant revision applications have been filed by M/s Bhavika Chemical Corporation (hereinafter referred to as "the applicant") against Orders-in-Appeal No. BR/153/Th-1/2012 dated 11.09.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-I.

2. The above Order-in-Appeal dated 11.09.2012 was passed in respect of the Order-in-Original No. R-1665/2011-12 dated 17.01.2012 passed by the Deputy Commissioner of Central Excise, Kalyan-I, vide, which, the rebate claims filed by the applicant were rejected on the grounds that clearances to Special Economic Zones (SEZ) cannot be considered as Exports for grant of rebate under Rule 18 of the Central Excise Rules, 2002 and also on the grounds of non-submission documents viz. 'Bills of Exports', duplicate and triplicate copies of ARE-1 etc.

3. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed the instant revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the various groundsas enumerated in the applications. The applicant also relied on various Judgments and Board circulars.

4. A Personal hearing was held in this case on 18.09.2019 and Shri S.B. Parekh, Partner appeared for hearing. He sought condonation of delay and reiterated the grounds of appeals submitted by them. In view of the submissionsthey requested for setting aside the impugned orders and allowing the rebate claims of duty paid on the goods exported to SEZ unit.

5. Government first proceeds to discuss issue of time bar in filing this revision application. The chronological history of events is as under.

a) Date of receipt of impugned order in Appeal dated 11.09.2012 : 17.09.2012

b) Date of filing of Revision Application	:	26.12.2012
f) Time taken between date of receipt of Tribunal to date of filing of revision application.	:	100 days

From the above, it is clear that applicant has filed this revision application after 100 days i.e. 3 months and 10 days. As per provisions of Section 35EE of Central Excise Act, 1944, the revision application can be filed within 3 months of the communication of Order-in-Appeal and the delay upto another 3 months can be condoned provided there are justified reasons for such delay. The Government considers that revision application is filed after a delay of 10 days which is within condonable limit. Government, in exercise of powers under Section 35EE of the Central Excise Act, 1944 condones the said delay and takes up the revision application for decision on merit.

5. Government observes that Commissioner (Appeals) has rejected the rebate claims relying 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 friction created under SEZ Act, 2005 and such legal fiction should be confined to the purpose for which it has been created.

6. 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 para7.2 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."

7. 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 19-3-2010 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 19-3-2010 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.

F.No.DGEP/SEZ/13/2009

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.

8. Government also notes that vide circular No.1001/8/2015-CX.8 dtd.28th April, 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.*

9. Government also observes that the original authority has rejected rebate claims also on the ground that the applicant failed to produce documents such as Bill of Export, duplicate and triplicate copies of ARE-1 in term of sub-rule (3) of Rule 30 of SEZ Rules, 2006. Government observes

that in terms of Rule 30(5) of the SEZ Rules, Bill of Export should be filed under the claim of drawback or DEPB. Since rebate claim is also export entitlement benefit, the applicant was required to file Bill of export. Though Bill of Export is required to be filed for making clearances to SEZ, still the substantial benefit of rebate claim cannot be denied only for this lapse. Government observes that the applicant had mentioned in their submission to rebate sanctioning authority to have submitted the attested copies of ARE-1 but the same were not received by the authority. As the duty paid nature of goods and supply the same to SEZ is not under dispute, the rebate on duty paid as goods supplied to SEZ is admissible under Rule 18 of Central Excise Rules, 2002. There are catena of judgments that substantial benefit of rebate should not be denied for procedural lapses.

10. In view of above discussions, the Government holds that rebate claims of duty paid on goods cleared to SEZ are admissible to the applicant under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004.

11. As regards rejection of rebate claims on account of non submission of duplicate / triplicate copies of ARE-1s by the applicant, Government observes that the applicant has contended that they have submitted the attested copies to the department but the same have not been received by rebate sanctioning authority for further process. Government in this regard relies on GOI Order Nos. 612-666/2011-CX., dated 31-5-2011 in In Re : Vinergy International Pvt. Ltd., wherein GOI observed as under:

> *9.9 Regarding certification of duty payment on the goods, Government notes the furnace oil cleared on payment of duty on Central Excise Invoices by M/s. BPCL Refinery Mahul and stored in their own installation BPCL Sewree Terminal whose Central Excise Invoice contain the reference of corresponding Central Excise Invoice issued by BPCL Refinery. The Asstt. Commissioner Central Excise has mentioned that the applicant had received said goods from M/s. BPCL Sewree Terminal and duty of said goods was originally paid by M/s. BPCL (Refinery) Mahul. This factual position as stated in the order-in-original is not denied by the department. Further, M/s. BPCL*

Mahul has given Disclaimer Certificate in each case to the applicant certifying the duty payment on the said goods and stating that they have no objection to M/s. Vinergy International Pvt. Ltd. claiming Excise refund/rebate of duty paid on furnace oil supplied to foreign going vessels. The triplicate copy of ARE-I was required to be certified by Range Superintendent regarding duty payment and forwarded to Asstt. Commissioner Central Excise. The factual position has not been brought on record regarding certification by Central Excise Range Superintendent.

10. *In this regard, Govt. further observes that rebate/drawback etc. are export-oriented schemes and unduly restricted and technical interpretation of procedure etc. is to be avoided in order not to defeat the very purpose of such schemes which serve as export incentive to boost export and earn foreign exchange and in case the substantive fact of export having been made is not in doubt, a liberal interpretation is to be given in case of any technical breaches. In Suksha International v. UOI - 1989 (39) E.L.T. 503 (S.C.), the Hon'ble Supreme Court has observed that an interpretation unduly restricting the scope of beneficial provision is to be avoided so that it may not take away with one hand what the policy gives with the other. In the Union of India v. A.V. Narasimhalu - 1983 (13) E.L.T. 1534 (S.C.), the Apex Court also observed that the administrative authorities should instead of relying on technicalities, act in a manner consistent with the broader concept of justice. Similar observation was made by the Apex Court in the Formica India v. Collector of Central Excise - 1995 (77) E.L.T. 511 (S.C.) in observing that once a view is taken that the party would have been entitled to the benefit of the notification had they met with the requirement of the concerned rule, the proper course was to permit them to do so rather than denying to them the benefit on the technical grounds that the time when they could have done so, had elapsed. While drawing a distinction between a procedural condition of a technical nature and a substantive condition in interpreting statute similar view was also propounded by the Apex Court in Mangalore Chemicals and Fertilizers Ltd. v. Dy. Commissioner - 1991 (55) E.L.T. 437 (S.C.). In fact, as regards rebate specifically, it is now a title law that the procedural infraction of Notification, circular, etc. are to be condoned if exports have really taken place, and the law is settled now that substantive benefit cannot be denied for procedural lapses. Procedure has been prescribed to facilitate verification of substantive requirement. The core aspect or fundamental requirement for rebate is its manufacture and subsequent export. As long as this requirement is met other procedural deviations can be condoned. This view of condoning procedural infractions in favour of actual export having been established has been taken by Tribunal/Govt. of India in a catena of orders, including Birla VXL Ltd., 1998 (99) E.L.T. 387 (Tri), Alfa Garments - 1996 (86) E.L.T. 600 (Tri.), T.I. Cycles - 1993 (66) E.L.T. 497 (Tri), Atma Tube Products - 1998 (103) E.L.T. 207 (Tri.), Creative Mobus - 2003 (58) RLT 111 (GOI), Ikea Trading India Ltd., 2003 (157) E.L.T. 359 (GOI) and a host of other decisions on this issue.*

11. In view of above circumstances and keeping in view the existence of enough adduced evidence here in above, Government is of the considered opinion that what is compulsorily required here in the interest of justice is that the department should make positive efforts so as to confirm the basic ingredient of co-relatibility specifically when there is nothing on record to out rightly negate the claim of applicant that duty paid goods cleared from M/s. BPCL Sewree Terminal were exported. Government, thus holds that duty paid goods have been exported in this case and rebate claim is admissible to the applicant. Thus, the impugned orders-in-appeal are hereby set aside and case is remanded back to the original authority to sanction the rebate claim after verifying the duty deposit particulars as stated in ARE-I forms. A reasonable opportunity of hearing will be afforded to the applicants.

12. Relying on the aforesaid case as well as on the aforesaid discussions and findings, Government modifies the Order in Appeal No. BR/153/Th-1/2012 dated 11.09.2012 to the above extent and remands this case back to the original authority for verification of the duty payment particulars as stated in ARE-I forms/Invoices and the applicant is also directed to submit all requisite documents evidencing duty paid nature of the exported goods. The Revision Application is disposed of in the above terms.

13. Hence, the Government sets aside the impugned orders of Commissioner (Appeals) and allows the instant Revision application.

14. Revision Applications succeeds in terms of above.

15. So, Ordered.

(SEEMA ARORA)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No. 64/2019-CX (WZ) /ASRA/ Mumbai DATED 9 .10.2019

To,
M/s Bhavika Chemical Corporation,
W-17, MIDC, Chemical Zone,
Ambernath, Thane- 400 501.

Copy to:

1. The Commissioner of GST &CX, Thane Rural, Commissionerate. 4th floor, Bandra-Kurla Complex, Bandra.
2. The Commissioner of GST &CX, (Appeals) Thane, Commissionerate. 4th floor, Bandra-Kurla Complex, Bandra
3. The Deputy / Assistant Commissioner), CGST &C.Ex, Division-II, Thane-Rural Commissionerate, Bhagwandas Mansion, ShivajiChowk, 1st& 2nd floor, Kalyan, (West).
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
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