F.No. 198/185/16-RA
F.No. 198/186/16-RA
F.No. 198/179/16-RA

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GOVERNMENT OF INDIA
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DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F.No. 198/185/16-RA
F.No. 198/186/16-RA /3451
F.No. 198/179/16-RA

Date of Issue: 11.08.2022

ORDER No. 753-755/2022-CX (WZ) /ASRA/Mumbai DATED 08.8.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Commissioner of Central Excise, Customs & Service Tax, Valsad 3rd Floor, Adarshdham Building, Vapi Daman Road, Vapi Distt. – Valsad (Guj.) – 396191.

Respondent : M/s. S Kant Healthcare Ltd., Plot No. 1802-1805, 3rd Phase GJDC-Vapi, Distt. – Valsad (Gujarat).

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. VAD-EXCUS-003-APP-75/2015-16 dated 02.03.2016, No. VAD-EXCUS-003-APP-77/2015-16 dated 02.03.2016 & No. VAD-EXCUS-003-APP-66/2015-16 dated 01.03.2016 passed by the Commissioner (Appeals) Central Excise, Customs & Service Tax, Vadodara -III, Vapi.

ORDER

This revision applications has been filed by the Commissioner of Central Excise, Customs & Service Tax, Valsad (hereinafter referred to as "applicant" against the Orders-in-Appeal No. VAD-EXCUS-003-APP-75/2015-16 dated 02.03.2016, No. VAD-EXCUS-003-APP-77/2015-16 dated 02.03.2016 & No. VAD-EXCUS-003-APP-66/2015-16 dated 01.03.2016 passed by the Commissioner (Appeals) Central Excise, Customs & Service Tax, Vadodara -III, Vapi upholding Orders-in-Original No. VAPI-II/REBATE/125/2015-16 dated 03.08.2015, No. VAPI-II/REBATE/144/2015-16 dated 18.08.2015 & No. VAPI-II/REBATE/91/2015-16 dated 30.06.2015 passed by the Assistant Commissioner of Central Excise, Customs & Service Tax Division- II, Vapi Commissionerate as detailed in Table below:

TABLE

Sl. No.	Revision Application No.	Order-in-appeal No. & Date	Order-in-original No. & Date	Amount of rebate (Rs.)
1	2	3	4	5
1	198/185/16-RA	VAD-EXCUS-003-APP-75/2015-16 dated 02.03.2016	VAPI-II/REBATE/125/2015-16 dated 03.08.2015	Rs. 29,62,876/-
2	198/186/16-RA	VAD-EXCUS-003-APP-77/2015-16 dated 02.03.2016	VAPI-II/REBATE/144/2015-16 dated 18.08.2015	Rs.26,02,444/-
3	198/179/16-RA	VAD-EXCUS-003-APP-66/2015-16 dated 01.03.2016	VAPI-II/REBATE/91/2015-16 dated 30.06.2015	Rs. 17,36,394/-

2. The facts, in brief, of the case are that the respondents had exported their finished goods to SEZ Units and filed rebate claims under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE dated 06.09.2004. They filed twenty two rebate claims totally amounting to Rs. 30,86,094/-; three rebate claims totally amounting to Rs.26,02,444/- & nine rebate claims totally amounting to Rs. 17,36,394/- with the Assistant Commissioner of Central Excise, Customs & Service Tax Division- II, Vapi office for refund/rebate of the Central Excise duty paid on the excisable goods cleared to Special Economic Zones (S.E.Z.).

3. Assistant Commissioner of Central Excise, Customs & Service Tax Division- II, Vapi vide his Orders-in-Original No. VAPI-II/REBATE/125/2015-16 dated 03.08.2015, No. VAPI-II/REBATE/144/2015-16 dated 18.08.2015 & No. VAPI-II/REBATE/91/2015-16 dated 30.06.2015 sanctioned the rebate claims of the Central Excise duty paid on the excisable goods from their manufacturing units in Domestic Tariff Area(DTA) to Special Economic Zones (S.E.Z.).

4. Being aggrieved by the orders, the applicant filed appeal Commissioner (Appeals-III) Central Excise, Customs & Service Tax, Vadodara-III, Vapi. Commissioner (Appeals) relying on his earlier decision of M/s. Hylite Cables Pvt. td. Vide Order-in-Appeal No. VAD-EXCUS-003-APP-460/2015-16 dated 18.01.2016, considering various case laws including the decision of the Hon'ble Supreme Court's judgment in the case of Union of India Vs Essar Steel Limited [2010(255)ELT A115(SC)] in SLP against Gujarat High Court Judgment [2010(249)ELT 3(Guj.) upheld the impugned Orders-in-Original and rejected the appeals filed by the applicant.

5. 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 main grounds :-

The Orders-in-Appeal No. VAD-EXCUS-003-APP-75/2015-16 dated 02.03.2016, No. VAD-EXCUS-003-APP-77/2015-16 dated 02.03.2016 & No. VAD-EXCUS-003-APP-66/2015-16 dated 01.03.2016 passed by the Commissioner (Appeals) Central Excise, Customs & Service Tax, Vadodara - III, Vapi is not proper, legal and is against the law on the following grounds:

A. The Commissioner (A) has erred in relying upon CESTAT Larger Bench decision dtd 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.

B. The Commissioner (A) has 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 (A) has 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.

C. The Commissioner (A) relied upon Order of J.S. (R.A) in case of M/s Essel Propack reported as [2014 (134)946

(GOI)] 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 (A) was that that adjudicating authority has 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 order of J.S. (R.A) in case of M/s Essel Propack is erroneous.

D. In the Order-in-Appeal dated 18.01.2016 in 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."

E. Commissioner (A) has 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 since M/s. MAS-GMR Aerospace Engineering Co. Ltd has 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.

F. Thus, after considering the case laws of M/s. MAS GMR, M/s. Essar Steel Limited, M/s. Advait Steel Rolling Mill, M/s. Biocon Limited, M/s. Shyamaraju & Co., 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 (A) needs to be set aside.

In view of the foregoing, the applicant prayed to set aside the impugned orders-in-Appeal passed by the Commissioner (Appeals) Central Excise, Customs & Service Tax, Vadodara -III, Vapi, being neither legal nor proper.

6.1 A Personal hearing was held in this case on 30.06.2022 and Mr. Shivchand Lal Meena, Assistant Commissioner appeared online and reiterated the submissions. He requested to reject claim of the respondent on the ground that supply to SEZ is not export and it attracts unjust enrichment.

6.2 Another Personal hearing was held in this case on 07.07.2022 and Mr. Uday Kadu, Advocate duly authorized by the respondent, appeared online for

hearing and submitted that they have not collected tax amount from SEZ buyers. He also informed that a C.A. certificate to this has been submitted. He pleaded that there is no unjust enrichment and requested to maintain Commissioner (Appeals) Order.

6.3 Respondent made submissions dated 07.07.2022 wherein they stated that the case law cited by them in their cross objection i.e. GOI order No. 875-876/2012-CX dated 30.07.2012 in RE: Tulsyan Nec Ltd. [2014(313) ELT.977 (GOI)] squarely covers the present issue, whereas the case law referred by the department is not relevant to the present case, since the single judgment no where says that the unjust enrichment clause is applicable in respect of goods cleared to SEZ. They further stated that assuming but not accepting that unjust enrichment clause is to be verified in respect of goods cleared to SEZ then also in Respondent case they have already submitted CA certificate certifying that they have not recovered the duty amount from the customers. They requested that the appeal filed by the department may be rejected and the subject Orders-In-Appeals may be upheld.

7. Government takes up the Revision Application against the Orders-in-Appeal No. VAD-EXCUS-003-APP-75/2015-16 dated 02.03.2016, No. VAD-EXCUS-003-APP-77/2015-16 dated 02.03.2016 & No. VAD-EXCUS-003-APP-66/2015-16 dated 01.03.2016 which decided an appeal against the Orders-in-Original No. VAPI-II/REBATE/125/2015-16 dated 03.08.2015, No. VAPI-II/REBATE/144/2015-16 dated 18.08.2015 & No. VAPI-II/REBATE/91/2015-16 dated 30.06.2015 passed by the Assistant Commissioner of Central Excise, Customs & Service Tax Division- II, Vapi The facts of the case have been detailed above.

8. Government has carefully gone through the relevant case records available in case files, the written submissions and also perused the impugned Order-in-Original, the Order-in-Appeal and the RA. From the facts

on record, the issues to be decided in the present case is whether the goods exported by the respondent manufacturer in Domestic Tariff Area (DTA) to Special Economic Zone (SEZ) is export within the territory on India or otherwise and whether the clause of unjust enrichment applies in the instant case or not.

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 friction 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 19-3-2010 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.

12. 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.*

13. Government in this regard also relies on GOI order No. 875-876/2012-CX dated 30.07.2012 in RE: Tulsyan Nec Ltd. [2014(313) ELT.977 (GOI)] which also involves an identical issue.

14. Besides other similar issues as in the present revision application, the applicant in Re: 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.*

15. Government in its Order No. 875-876/2012-CX dated 30.07.2012 referred to in para 13 above, while deciding the issue of unjust enrichment 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.*

16. Government also observes that while deciding identical issue, similar view has been taken by this authority vide GOI Order No. 26-27/2017-CX (WZ) /ASRA/ Mumbai dated 29.12.2017 in Re: M/s Neela Systems Limited, Thane.

17. In view of above position, Government finds no infirmity with the impugned Order-in-Appeal and therefore upholds the same.

18. Accordingly, the revision application is thus dismissed.

Shrawan 8/8/22

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

ORDER No. 753-755/2022-CX (WZ) /ASRA/Mumbai 08.8.2022

Dated: 08.2022

To,
Commissioner of Central Excise,
Customs & Service Tax,
Valsad.

Copy to:

1. M/s. S Kant Healthcare Ltd., Plot No. 1802-1805, 3rd Phase GJDC-Vapi, Distt. – Valsad (Gujarat).
2. Commissioner (Appeals) Central Excise, Customs & Service Tax, Vadodara-III, Vapi.
3. Assistant Commissioner of Central Excise, Customs & Service Tax Division- II, Vapi Commissionerate.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Spare Copy.