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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
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Mumbai-400 005

F. No. 198/222/16-RA (CX) 3644 Date of Issue 05.09.2022

ORDER NO. 829 /2022-CX(WZ)/ASRA/MUMBAI DATED 30 .08.2022 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 Commissioner of Central Excise, Mumbai-I.

Respondent : M/s Rashtriya Metal Industries Ltd.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. SK/61/Mum-I/2016 dated 30.06.2016 passed by the Commissioner of Central Excise (Appeals), Mumbai-I

ORDER

The Revision Application is filed by the Commissioner of Central Excise, Mumbai-I (hereinafter referred to as the applicant department) against the Order in Appeal No. SK/61/Mum-I/2016 dated 30.06.2016 passed by the Commissioner of Central Excise (Appeals), Mumbai-I, in respect of D.C. Dn K-I Mumbai-I's Order in Original No. K-I/13/2014-15 dated 14-08-2014 pertaining to M/s Rashtriya Metal Industries Ltd. situated at Sir M. V. Road, J.B. Nagar, Andheri East, Mumbai-59 (hereinafter referred to as the respondent).

2. Brief facts of the case are that the respondent are engaged in manufacture and clearance of excisable goods falling under Ch. No. 74 of the Central Excise Tariff Act, 1985. The applicant cleared 1044 kgs of Brass Strips for Export under ARE-1 No. 1/2012-13 dated 13-07-2012 involving duty amount of Rs.63,487/- without following the procedure as required under Rule '19 of the Central Excise Rules, 2002 and Notification No. 42/2001-CE(NT) dated 26-06-2001, as per which an exporter is required to furnish a bond in Form B-1 and obtain a Certificate in Form CT-1 or furnish an annual Letter of Undertaking subject to the conditions that the goods shall be exported within six months from the date on which the goods were cleared for export from the factory of production or manufacture or warehouse or other approved premises or within such extended period as the DC/AC or Maritime Commissioner may in a particular case allow. In this case the respondent cleared the goods for export without having valid Letter of Undertaking thereby rendering themselves liable to pay the Central excise duty amounting to Rs.63, 487/- on the goods cleared without payment of duty. Hence, a Show Cause Notice was issued to the respondent demanding the duty along with interest and applicable penalty. The adjudicating authority vide Order in Original No. K-I/13/2014-15 dated 14-08-2014 confirmed the duty demand under Section 11A of CEA, 1944 along with interest at applicable rate under

Section 11AA of CEA, 1944 read with Rule 25 of CER, 2002 and also imposed penalty under Section 11AC of CEA, 1944 read with Rule 25 of CER, 2002. Being aggrieved by the said Order the respondent filed appeal with the Commissioner Appeal.

3. The Appellate Authority vide impugned Order in Appeal set aside the order in original and allowed the Respondent's appeal.

4. Being aggrieved by the impugned Order in Appeal, the applicant department filed the instant Revision Application on following grounds:-

4.1 The Commissioner (Appeals). Central Excise, Mumbai-1, vide Order-in-Appeal No. SK/61/MUM-1/2016, dated 30.06.2016 passed in respect of M/s. Rashtriya Metal Industries, has erred in setting aside the Order-in-Original No. K-1/13/2014-15 dated 18.08.2014 and the subject O-i-A is unjust, not legal or proper.

4.2 As per Notification No.42/2001-CE (NT) dated 26.06.2001, issued under Rule 19 of the Central Excise Rules, 2002, the manufacturer exporter has to follow the procedures and conditions as laid down therein. The applicant referred and produced the Conditions as per para 1.1 of the notification, Chapter 7 of CBEC's Excise Manual

4.3 The applicant department submitted that the instructions are clearly binding on both the Department and the Respondent. In Chapter 1 Part-1 of the said CBEC Manual, the scope of the Manual has been explained. Paragraph No. 1.1 indicates that the instructions are supplemental to, and must be read in conjunction with the Act and the Rules. These instructions are applicable throughout India and should not be departed from, without the previous approval of the Commissioner, who will, where necessary, obtain Board's sanction for the deviations. Paragraph No. 2 makes it clear that the Manual is a public document and is made available to all interested persons. On a conjoint reading of paragraph Nos. 1.1 and 1.2 of the said Manual it is also apparent that instructions therein are applicable throughout India and officers of Central Excise Department are not entitled to depart

therefrom, without previous approval of the Commissioner, who in turn is required to obtain sanction from CBEC for such deviations.

4.4 Hon'ble Supreme Court in the case of Union of India vs Kirloskar Pneumatic Company 1996 (084) ELT 0401 S.C. had specifically held that:

"*the question is whether Items permissible for the High Court to direct the authorities under the Act to get contrary to the aforesaid statutory provision We do not think it is, even while acting under Article 226 of The Constitution. The power conferred by Article 226/227 is designed to effectuate the law, to enforce the Rule of law and to ensure that the several authorities and organs of the State act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law. In particular, the Customs authorities, who are the creatures of the Customs Act, cannot be directed to ignore or act contrary to Section 27 whether before or after amendment. May be the High Court or a Civil Court is not bound by the said provisions but the authorities under the Act are. Nor can there be any question of the High Court clothing the authorities with its power under Article 226 or the power of a civil court No such delegation or conferment can ever be conceived. We are therefore, of the opinion that the direction-contained in clause (3) of the impugned order is unsustainable in law*"

4.5 In view of the above, the finding of Commissioner (Appeals) at para 7 of O-I-A that "*neither Notification 42/2001-CE (NT) dated 26.06.2001 nor Rule 19 of CER 20 prescribe any statutory period for validity of Letter of Undertaking, therefore, it is or a procedural violation and same can be condoned*" appears to be incorrect and hence the said order of Commissioner (Appeal) is bad in law.

4.6 Secondly, the citation of Jain Irrigation Systems Ltd., vs C.C.E. Nasik [201(40)STR752(Tri-Mum)] is in respect of applicability of Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture

of Excisable Goods) Rules, 2001, and the ratio the judgment is not squarely applicable in the instant case.

4.7 In the instant case the applicant submitted that the assessee had cleared the goods without having a valid letter undertaking. Therefore, the goods had been rendered cleared without payment of duty with intention to evade payment of duty in absence of any valid provisions. Further, the goods were not exported but returned back. Hence, the duty involved is recoverable under the provisions section I1A of Central Excise Act, 1944 and penalty under section 11AC of Central Excise Act, 1944, is also imposable. In view of the above, the Order-in-Appeal No.SK/61/MUM-1/20 dated 30.06.2016, is not legal or proper and therefore be set aside.

5. The Respondent vide their letter dated 27th March, 2017 submitted their cross submissions against the department's grounds of revision application which are as follows:

5.1. Rule 19 of Central Excise Rules 2002 provides that any excisable goods can be exported without payment of duty from factory of producer or manufacturer. Further, sub-rule (3) provides that such export shall be subject to such conditions, safeguards and procedure as may be prescribed. Notification No.42/2001-CE (NT) has been issued in exercise of the powers under sub-rule (3) laying down the conditions, procedure for export of goods. It provides that the manufacturer exporter shall furnish letter of undertaking in the form prescribed in Annexure-II in lieu of a bond. This notification issued under the said rule does not specify the period of expiry of the undertaking. It is submitted that in absence of any period laid down under rule 19 or in the notification 42/2001-CE (NT), the said period cannot be imposed for providing expiry of letter of undertaking.

5.2. The respondent submitted that the instructions contained in CBEC's Excise Manual of Supplementary Instructions shall not override the provisions contained in Rule 19 or Notification No.42/2001 CE (NT).

The said supplementary instruction is divided into various chapters and chapter 7 deals with export without payment of duty. Para 3.4 of Part-II reproduced below, provides that the LUT shall be valid for 12 months.

"3.4 The letter of undertaking is to be furnished in the form UT-1..... The letter of undertaking shall be valid for twelve calendar months provided the exporter complies with the conditions of the letter of undertaking, especially the procedure for 'acceptance of proof of export' under this notification...."

It is submitted that it is only a supplementary instruction and not a statutory provision. The instruction is also not issued in exercise of powers contained in any of the provisions of Central Excise Act or the Rules made there-under. Therefore, this cannot be basis for demand of excise duty on goods cleared under UT-1. The supplementary instructions has no statutory force and therefore cannot be the basis for the purpose of demanding duty. Hence, the appeal allowed to the manufacturer exporter is proper and correct.

5.3. It is submitted that the manufacturer exporter after executing an UT-1 No.22/2011-12 had been accepted by the Assistant Commissioner vide his letter dated 30-06-2011 with the jurisdictional AC/DC which was valid upto 29-06-2012. Again the company executed the 'letter of undertaking' bearing no.41/2012-13 on 14-08-2012 which was valid upto 14-08-2013 and same was accepted by jurisdictional AC vide his letter dated 16-08-2012. There was a gap of 45 days for executing the letter of undertaking and during this period, the company has exported one consignment as detailed above. The show-cause-notice does not dispute about the facts of export consignment. It only alleges that during the period of export the 'letter of undertaking was not valid which is merely a procedural lapse and same can be condoned. The Hon'ble Tribunal in case of STERICAT GUSTRINGS VS. CCE 2003 (158) ELT 779

(CESTAT) has held that even if required procedure is not followed, as long as export is proved by way of Shipping Bill, substantive benefit could not be denied on grounds of non conformance with technicalities. The CBEC has clarified that exports under 'claim of rebate' and 'export under bond' are at parity. Since, intention of both the procedures is to make duty incidence 'NIL. The export consignment was rejected by party due to damage and same was returned to the company. If the duty was payable on the exported consignment, the same would have available as credit to the company. It was a revenue neutral situation. The Hon'ble Supreme Court, in case of Coco Cola 2007 (213) ELT 490 (SC) had held that demand of excise duty shall not be raised when it results in revenue neutral situation. It was also held that unnecessary paper work of raising the demand and recovery of amount which was available as credit should be avoided. The manufacturer exporter also relies on the following judgments:

a. Indeos Abs Ltd. 2010 (254) ELT 0628 (Guj.)
b. SRF Ltd. 2007 (220) ELT 201 (Tri.)
c. United Phosphorous Ltd. 2007 (210) ELT 45 (Tri.)
d. Indian Oil Corporation Ltd. 2010 (262) ELT 751 (SC)

5.4. The respondent further submitted that prior to 2002, the statutory provisions relating to clearance of goods without payment of duty was contained in rule 13 of Central Excise Rules, 1944. The bond was required to be executed under rule 13 for clearance of goods without payment of duty. In one case, the bond period is expired and the goods were cleared by M/s. Indian Aluminium Co. Ltd. after the expiry of Bond period. The department demanded duty and the matter was finally decided by the Hon'ble High Court of Kolkata in the case Indian Aluminium Co. Ltd., 1988 (36) ELT 435 (Cal), the following principles are evolved in the judgment:

(a) Since the goods were exported in terms of Rule 13 which permits such exportation free from excise levy, the demand for such duty is sustainable.
(b) The Bond that is required to be executed under Rule 13 is not by way of security for payment of the unpaid duty on the exportation being completed, but it stands as security only for proper exportation of goods.
(c) Rule 13 applies only to non-duty paid goods which are removed from a licensed factory for exportation without their getting mixed up in the local market. The object of removal being exportation and exportation alone, special consideration is shown in respect of encourage exportation.
(d) A statutory rule made in exercise of rule-making powers by the subordinate legislative authority cannot be explained or interpreted contrary to its normal connotation by an Executive Order and that being so the Show Cause Notice based on an executive interpretation of Rule 13 contrary to its real intent and purpose is without any legal basis and accordingly bad in law.
(e) Since the goods were exported in terms of Rule 13 of Central Excise Rules which permits such exportation free from levy of any excise duty the claim for such duty in terms thereof is not sustainable.

Therefore, even after the expiry of UT-1 period, the respondent submitted that the goods can be cleared without payment of duty. This is without prejudice to their submission that UT-1 has no expiry period. The respondent relied on the following judgments:

a. Eves Fashions vs. Commissioner of C.Ex., Delhi-1 2006 (205) ELT 619 (Tri. Del.)

b. In Re: Drish Shoes Ltd. 2006 (197) ELT 437 (Commr. Appl.)

5.5. The respondent submitted that Commissioner (A) has correctly allowed the appeal and departmental appeal is to set aside and that the company has complied the all the procedures as specified in the Rule 19 under Central Excise Rules, 2002 and exported the excisable goods. Hence, technical/procedural lapses should be condoned and

departmental revision should be set aside. The respondent relied on the case of Stericat Gustrings v. CCE 2003 (158) ELT 779 (CESTAT), wherein it was held that even if required procedure is not followed, as long as export is proved by way of Shipping Bill, substantive benefit could not be denied on grounds of non-compliance with technicalities. CBEC has clarified that exports under 'claim of rebate' and 'export under bond' are at parity, since intention of both the procedures is to make duty incidence 'Nil'. Therefore, show cause notice issued to the manufacturer exporter should be dropped and benefit should be granted and subsequently departmental appeal should be set aside.

5.6. The respondent further submitted that Section 11A & 11AC is not sustainable as demand for duty did not arise on account of fraud, suppression, misstatement etc., as respondent had followed the provisions of Rule 19 and Notification issued thereunder for export of goods. Further, for the imposition of penalty mensrea is mandatory requirement and in absence of which imposition of penalty is not justifiable and sustainable.

5.7. The respondent concluded that the company has followed the rule 19 of Central Excise Rules, 2002 and the notification issued hereunder for export of goods and in fact there is no allegation that the goods have not been exported. The only allegation in departmental appeal is that the company has failed to renew the UT-1 is only a procedural lapse which can be condoned. The Hon'ble Commissioner (A), Mumbai-I, has rightly allowed to respondent. Therefore, it is submitted that no penalty shall be levied under Section 11A & Section 11AC

6. Personal Hearing was held on 30.06.2022. Shri Vinod Awtani, CA attended the same on behalf of the applicant and submitted that the matter relates to section 11 demand, therefore jurisdiction of matter does not pertain to Revisionary Authority.

7. Government has carefully gone through the relevant case records, the impugned Order-in-Original, Order-in-Appeal, Revision Applications, oral and written submissions of the Respondent.

8. The Government notes that at the time of Personal Hearing, the CA had submitted that the matter relates to section 11 demand and therefore the jurisdiction of matter does not pertain to Revisionary Authority. In this regard, the relevant proviso to Section 35B (1) of the Central Excise Act, 1944 reads as under:-

"Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) ***goods exported outside India (except to Nepal or Bhutan) without payment of duty;***

(d) credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under Section 109 of the Finance (No. 2) Act, 1998."

On a plain reading of the above said proviso to Section 35B (1), it is very clear in case of the goods exported outside India without payment

of duty lies with the jurisdiction of Revisionary Authority and hence this office takes up this case for decision on the basis of merits.

9. The Government observes that the issue involved in the dispute is non-compliance of the conditions of Notification No. 42/2001-CE (NT) dated 26.06.2001 issued under Rule 19 of the Central Excise Rules, 2001 which govern export of goods without payment of duty. The issue in this case is that for a period from 30.06.2012 to 13.08.2012 there was no valid letter of Undertaking since the validity of the previous letter of Undertaking was till 29.06.2012 and the subsequent Letter of Undertaking was valid from 14.08.2012. The respondent had cleared 1044 kgs of Brass Strips for Export under ARE1 No. 1/2012-13 dated 13-07-2012. The issue to be decided is whether the duty involved in the said goods cleared without a valid letter of undertaking are recoverable.

10. The main grounds of appeal by the department are as follows:

a) that the respondent had cleared the goods without having a valid letter of undertaking;

b) The goods had been rendered cleared without payment of duty with intention to evade payment of duty in absence of any valid provisions.

c) The goods were not exported but returned back and the re-entry of the said goods was not informed to the department.

Commissioner Appeal allowed the appeal on the following points;

a) the documents submitted by the respondent such as Goods received note for sales return challan, letter from transporter and gate Entry Note proves that the goods have been cleared for export;

b) the Notification 42/2001-CE(NT) dated 26-06-2001 does not prescribe any statutory period for validity of Letter of Undertaking;

c) As per the provisions of Rule 16 of CER, 2002 even if the respondent would have paid excise duty on removal of the said goods, the same would have been available to them as Cenvat credit, Hence duty should not have been demanded as the same is revenue neutral.

11. Government notes that the provision contained in Condition No. (i) of the Notification No. 42/2001-C.E. (N.T.) and Part-II, Para 2.1 of Chapter 7 of CBEC's manual, **allows the manufacturer-exporter to furnish letter of undertaking (LUT) for their export without payment of duty.** In this case the applicant is manufacturer exporter of the goods and under such circumstances, provision contained in Para 3.3 of Part-II of Chapter 7 of the C.B.E. & C. Manual of Supplementary Instructions, 2005 is attracted. The provision of said Para **3.3** unambiguously states that *"the Letter of Undertaking is to be furnished in the Form UT-1 specified in Annexure-15 to Notification No. 42/2001-Central Excise (N.T.), supra. Any manufacturer, who is an assessee for the purposes of the Central Excise (No.2) Rules, 2001, shall furnish a Letter of Undertaking only to the Deputy/Assistant Commissioner of Central Excise having jurisdiction over his factory from which he intends to export. The Letter of Undertaking should not be furnished to the Maritime Commissioner or any other officer authorised by the Board. A 'Letter of Undertaking' shall be valid for twelve calendar months provided the exporter complies with the conditions of the Letter of Undertaking, especially the procedure for 'acceptance of proof of export' under this instruction. In case of persistent defaults or non-compliance causing threat to revenue, the manufacturer-exporter may be asked to furnish bond with security/surety. For the sake of clarification, it is mentioned that this Letter of Undertaking should not be taken for each consignment of export".*

12. In this case, the goods were cleared for export on 13-07-2012 and the letter of Undertaking was validated on 30-06-2011 for the period from 30-06-2011 to 29-06-2012 and on 14-08-2012 for the period 14-08-2012 to 13-08-2013, thus the goods which were exported on 13-07-

2012 was without payment of duty. Due to damage of the goods in transit, they were returned to the factory. Since at the time of export there was no Letter of Undertaking only, the respondent violated this substantial condition of Notification No. 42/2001-C.E. (N.T.). Government does not agree with the Commissioner Appeal's point that Notification 42/2001-CE(NT) dated 26-6-2001 does not prescribes any statutory period for validity. The furnishing of Letter of Undertaking was substantial requirement and not a mere procedural requirement. As such, there is no force in the plea of the respondent that this lapse should be considered on a procedural lapse of technical nature which is condonable in term of case laws cited by them.

13. Further the Letter of Undertaking prescribed under Notification No. 42/2001-CE (NT) dated 26-06-2001 stipulates at (d) of the Format that **".....d)** ***pay the excise duty payable on such excisable goods in the event of failure to export them, along with an amount equal to twenty four percent interest per annum on the amount of duty not paid, from the date of removal for export till the date of payment".*** Government finds that in the impugned case the goods were not exported and were returned back which was also not informed to the department at that instant. Hence the respondent are required to pay the applicable excise duty.

14. Further, Commissioner Appeal has also held that under the provisions of Rule 16 of CER, 2002, even if the respondent would have paid excise duty on removal of the said goods, the same would have been available to them as Cenvat credit when the goods were returned and hence the same would be revenue neutral and set aside the duty confirmed by the department. The concept of revenue neutrality cannot be considered when the duty was supposed to be paid by the respondent. The argument that the respondent need not pay duty as the same is available for credit is incorrect. The availability of credit itself is subject to various conditions in terms of Cenvat Credit Rules, 2004. The

availability of such credit cannot be presumed in order to contest the duty liability of the respondent, which is in terms of applicable provisions of the Act and the Notification thereunder.

15. The case laws cited by the respondent are not applicable to the present case since in these cases there was no doubt in respect of the goods having been exported. In the instant case the goods were not exported.

15. In view of above, the Government finds that the Order in Appeal No. SK/61/Mum-I/2016 dated 30.06.2016 passed by the Commissioner of Central Excise (Appeals), Mumbai-I is not proper and liable to be set aside. The Revision Applications filed by the department is allowed by holding that ~~they~~ the respondent had cleared goods for export without payment of duty and without having valid Letter of Undertaking.

16. . The Revision Application is disposed of in the above terms.

Shrawan 30/8/22

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

ORDER No 829/2022-CX (WZ)/ASRA/ DATED 30.08.2022

To,
Principal Commissioner of CGST, Mumbai East
9th Floor, Lotus Info Centre,
Station Road, Parel East,
Mumbai-400012

Copy to:

1. M/s Rashtriya Metal Industries Ltd. Sir M.V.Road, J.B. Nagar, Andheri East, Mumbai-59.
2. The Assistant/Deputy Commissioner of CGST, Mumbai East, 9th Floor, Lotus Info Centre, Station Road, Parel East, Mumbai-12
3. Sr. P.S. to AS (RA), Mumbai
4. Guard File.
5. Spare Copy.