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**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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005**

F.No.195/195/2015-RA *MA*

Date of Issue: *15*.12.2021

ORDER NO. *868* /2021-CX (WZ) /ASRA/MUMBAI DATED *14*.12.2021
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 CENTRAL
EXCISE ACT,1944.

Applicant : M/s United Phosphorus Ltd.(Unit-II),
Plot No.3405/06, GIDC, Ankleshwar,
Dist-Bharuch

Respondent: The Commissioner, CGST, Surat.

Subject : Revision Applications filed, under Section 35EE of Central
Excise Act, 1944 against the Order-in-Appeal No.
BC/136/SURAT-II/2011 dated 22.06.2011 passed by the
Commissioner (Appeals), Central Excise & Customs, Surat II.

ORDER

This Revision Application has been filed by M/s United Phosphorus Ltd.(Unit-II), Plot No.3405/06, GIDC, Ankleshwar, Dist-Bharuch (hereinafter referred to as the 'applicant') against the Order-in-Appeal No. No. BC/136/SURAT-II/2011 dated 22.06.2011 passed by the Commissioner (Appeals), Central Excise & Customs, Surat-II.

2. The applicant is engaged in manufacture of excisable goods falling under Chapters 29,22,28 & 38, of the schedule to the Central Excise Tariff Act, 1985 and were holding Central Excise Registration Certificate No AABCS1698GXM004 for the same and also exporting their manufacturing product from the factory premises under Letter of Undertaking in Form UT-1.

3. M/s. United Phosphorus Ltd (Unit-II) Plot No. 3405/06, GIDC, Ankleshwar, had removed excisable goods for export under UT-1 without payment of Central Excise duty under cover ARE 1 No. 296/24.03.2007, ARE 1 No. 23/25.05.2007 and ARE 1 No. 100/01.08.2007, under Rule 19 of Central Excise Rules, 2004. As the applicant had neither submitted the proof of export in respect of the said ARE1's within 6 months from the date of removal of goods nor paid Central excise duty with interest, in contravention of Rule 19 of the Central Excise Rules, 2004 read with Para 13.6 of Chapter 7 of the Excise Manual of Supplementary Instructions issued by CBEC, show cause notice was issued to the applicant for recovery of Central Excise duty amounting to Rs.19,71,435/- (BED 19,14,015/-+ Education Cess 38,281/- + Education Cess 19,139/-) alongwith applicable interest and also proposing to impose penalty on the applicant.

4. The adjudicating authority vide order No. 03/ADC-AGS/Dem/2009 dated 05.02.2009 confirmed the demand of central excise duty amounting to Rs. 10,80,859/- in respect of ARE 1 No. 23/25.05.2007 alongwith applicable interest and penalty of Rs. 10,80,859/- was imposed on the applicant under Section 11AC of the Central Excise Act, 1944

5. Aggrieved by the said Order in Original, the applicant filed an appeal before the Commissioner (Appeals), Central Excise & Customs, Surat-II.

5.1 The Appellate Authority vide Order in Appeal No. BC/136/SURAT-II/2011 dated 22.06.2011 rejected the appeals of the applicant on the grounds that the applicant had filed self certified copies of the ARE 1 No 23/25.05.2007 and enough opportunity was given to the applicant to produce the certified copies from the competent authority but they had failed to produce the same.

6. Being aggrieved by the impugned Order-in-Appeal, the applicant filed an appeal No. E/1118/2011 with the Hon'ble Custom, Excise and Service Tax Appellate Tribunal, Ahmedabad. The said appeal was filed within the prescribed time limit under Section 35B of the Central Excise Act, 1944.

6.1 The Hon'ble Tribunal vide its final order No. A/890/WZB/AHD/2012 dated 19.06.2012 held that the appeal was not maintainable before it and transferred the same to Joint Secretary (Revisionary Authority) of Government of India. However, inadvertently the name of the authority to whom the application was to be transferred was mentioned as Joint Secretary (Review) instead of Joint Secretary (Revisionary Authority). Accordingly, the applicant filed an application on 29.09.2014 seeking rectification in the name of the authority to which the appeal was transferred which was dismissed as time barred as the said application was filed beyond the stipulated period.

7. Aggrieved by the impugned Order-in-Appeal BC/136/SURAT-II/2011 dated 22.06.2011, the applicant filed the instant Revision Applications on the following grounds:-

7.1 That the impugned Order in Appeal is ex-facie, erroneous and deserves to be set aside.

7.2 It is not disputed by the authorities below that the goods covered by ARE-1 No. 23/2007 dated 25.05.2007, were exported by the applicant and a copy of the shipping bill duly certified by the Superintendent of Customs was produced before the Appellate Authority for which no dispute is raised by the department.

7.3 That the sole ground on which impugned order has been passed by the Appellate Authority is that the applicant did not produce the original or certified copy of the ARE I No. 23/2007 dated 25.05.2007.

7.4 That mere non-production of certified copy of ARE1 by itself would not be sufficient to hold that the goods were not exported by the applicant and to sustain the demand for duty, interest and penalty.

7.5 That the procedure relating to proof of export is set out in Chapter 7 of the Excise Manual of Supplementary Instructions issued by CBEC particularly paragraph 13 of Chapter 7 is relevant and had to be followed by the department

7.6 The applicants had assured the Commissioner of Central Excise (Appeals) to produce the shipping bill duly certified by the Customs Authorities and accordingly vide letter dated 06.06.2011, certified copy of the shipping bill was produced. The Applicant had produced other collateral evidence vide letter dated 13.06.2011 which included photo copy of ARE1 and it was incumbent upon the Appellate Authority to call for the verification report from the Divisional Officer before rejecting the same.

7.7 No allegation of fraud or suppression of misstatement was alleged in the show cause notice and therefore penalty under Section 11AC of CEA, 1944 is clearly impermissible in law.

8. Personal hearing was scheduled in this case on 13.08.2021 and 20.08.2021. Shri Mihir Mehta and Shri Mohit Rawal, consultants appeared before the Revision Authority for personal hearing on 20.08.2021 and reiterated their earlier submissions. Shri Mehta stated that original ARE 1 was lost they could not submit the same. The submitted a xerox copy of the ARE 1.

9. Pursuant to the personal hearing, the applicant filed additional written submissions dated 20.08.2021, wherein they submitted that the goods covered under ARE1 No 23/2007 dated 25.05.2007 were exported and the copy of the shipping bill duly certified by the customs authorities was produced before the appellate authority and cross reference of ARE 1, mate receipt and invoices could be found in the shipping bill and other details like goods exported, vessel name etc are also correlated and hence export was substantiated.

The applicant has relied upon the following case laws

- 1) UM cables Limited vs UOI 2013(293)ELT 64 -Bom
- 2) Aarti Industries Ltd vs UOI 2014(305) ELT 196 (Bom)
- 3) Raj Petro Specialities vs UOI 2017(345) ELT 496 (Guj)

10. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

10.1 The facts stated briefly is that the applicant is engaged in the manufacture of goods falling under Chapter Nos 29,22,28 & 38, of the schedule to the Central Excise Tariff Act, 1985 and also exporting their manufacturing product from the factory premises under letter of undertaking in Form UT-1. Show cause notice was issued to the applicant as they had neither submitted the proof of export in respect of 3 ARE 1's within 6 months from the date of removal of goods nor paid Central excise duty with interest, in contravention of Rule 19 of the Central Excise Rules 2004 read with Para 13.6 of Chapter 7 of the Excise Manual of Supplementary Instructions issued by CBEC. Government notes that vide

the impugned Order in Original recovery of an amount of Rs 10,80,859/- was confirmed in respect of ARE 1 No.23/2007 dated 25.05.2007 alongwith applicable and penalty of Rs 10,80,859/- was imposed on the applicant.

11. On perusal of the records it is observed that the applicant had filed copies of following documents before the Appellate Authority.

- [a] Central Excise Invoice No. 1400065023 dated 25.05.2007;
- [b] ARE-I No. 23/2007 dated 25.05.2007;
- [c] Packing List dated 25.05.2007;
- [d] Commercial Invoice No. 1400836423
- [e] LR receipt No. 7000 dated 23.05.2007 of M/s Sahyadri Transport Co
- [f] Mate Receipt No. 516825 dated 31.05.2007 and
- [g] Shipping Bill No. 5283081 dated 26.05.2007 certified by the Superintendent Customs (P).

11.1 It is also observed that the applicant could not file the Original and Duplicate copies of ARE-1 duly endorsed by the Customs Authorities as the same were lost in transit. It is also observed that the applicant has filed a complaint with the police above the loss of the entire set of documents pertaining to ARE 1 No. 23/2007 dated 25.05.2007.

11.2 The Government notes that the Excise Manual of Supplementary Instructions issued by the CBEC, under Chapter 7, has specified the procedure related to exports without payment of duty. The procedure relating to proof of export and recredit against submission of proof of export is set out in paragraph 13 of Chapter 7 of the said Manual. Para 13.1 and 13.2 of the said Manual prescribes the procedure to be followed by the customs authority regarding validation of export and submission of statement and documents by the exporter. Government notes that in the instant case the original documents have been lost and a police complaint has been filed by the applicant regarding the loss of documents. Para 13.7 deals specifically with the action in the case of loss of document. The said paragraph states that *'In case of any loss of document, the Divisional Officer*

or the bond accepting authority may get the matter verified from the customs authorities at the place of export or may call for collateral evidences such as remittance certificate, mates receipt etc to satisfy himself that the goods have actually been exported.' The object and purpose underlying the procedure which has been specified is to enable the authority to duly satisfy itself that the goods have been exported. Government notes that there is nothing on record that the said procedure has been followed by the department.

11.3. Government notes that the applicant has stated that the documents have been lost in transit but have submitted the self attested copies of the requisite documents including collateral documents. The documents submitted established beyond doubt that the goods in question have been exported and neither has the department raised any objections regarding non export of goods.

11.4. Hence, the deficiencies pointed out in the impugned order in original and the appellate authority for rejection are merely procedural infractions and the same should not result in the deprivation of the statutory right to prove the genuineness of the export particularly when the substantial compliance has been done by the applicant with respect to conditions and procedure laid down under relevant notifications / instructions issued under Rule 18 of the Central Excise Rules, 2002. The Government opines that, in the absence of original copies of the ARE 1 and shipping bill, the genuineness of the export could have been verified by the department by resorting to the instructions contained in Para 13.7 of Chapter 7 of the manual of instructions. However, no such efforts appear to have been made by the divisional officer or the bond accepting authority before initiating the recovery of duty on account of non submission of proof of export.

11.5. In several decisions of the Union Government in the revisional jurisdiction as well as in the decisions of the CESTAT, the production of the relevant forms has been held to be a procedural requirement and as a result of which, the mere non- production of such a forms would not result in an

invalidation of proof of the goods having been exported where the exporter is able to satisfy the same through the production of cogent documentary evidence. In the present case, no doubt has been expressed whatsoever that the goods were not exported goods.

11.6 The Government further observes that a distinction between those regulatory provisions which are of a substantive character and those which are merely procedural or technical has been made in a judgment of the Supreme Court in "Mangalore Chemicals & Fertilizers Ltd. vs. Deputy Commissioner-1991 (55) E.L.T. 437 (S.C.)". The Supreme Court held that the mere fact that a provision is contained in a statutory instruction "does not matter one way or the other". The Supreme Court held that non-compliance of a condition which is substantive and fundamental to the policy underlying the grant of an exemption would result in an invalidation of the claim. On the other hand, other requirements may merely belong to the area of procedure and it would be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes which they were intended to serve. The Supreme Court held as follows:

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

12. In view of the discussion in foregoing paras, Government holds that the rejection of the proof of export solely on the ground of non-submission of Original / Duplicate copies of documents, when sufficient collateral documents are available on records, is not just and proper.

12.1 In view of the above, Government remands the matter back to the original authority with directions that the issue be reconsidered on the basis of the documents submitted by the applicant after satisfying itself in regard to the authenticity of those documents. However, the original authority shall

not decide the issue on the ground of the non-production of the original/ duplicate copy of the ARE-1 form, if it is otherwise satisfied that the conditions for the submission of proof of export have been fulfilled. The original adjudicating authority shall pass the order within eight weeks from the receipt of this order.

13 In view of above circumstances, Government sets aside the impugned Order-in-Appeal No. BC/136/SURAT-II/2011 dated 22.06.2011 passed by the Commissioner (Appeals), Central Excise & Customs, Surat-II. and remands the case to the original adjudicating authority as ordered supra.

14. The revision application is disposed off on the above terms.

Shrawan
14/12/21
(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER NO. 868/2021-CX (WZ) /ASRA/MUMBAI DATED 14.12.2021

To,

M/s United Phosphorus Ltd.(Unit-II),
Plot No.3405/06, GIDC, Ankleshwar,
Dist-Bharuch

Copy to :

1. The Principal Commissioner of CGST & Central Excise, Vadodara II, GST Bhavan, Subhanpura, Vadodara 390 023
2. The Commissioner (Appeals), Vadodara, Central Excise Building, 6th Floor, Race Course Circle, Vadodara 390 007
3. Sr P.S. to AS (RA), Mumbai.
4. Guard File.
5. Spare copy.