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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**  
8<sup>th</sup> Floor, World Trade Centre, Cuffe Parade,  
Mumbai- 400 005

F.No.195/26/16-RA/4439

Date of Issue: 04.09.2022

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ORDER NO. 914 /2022-CX (WZ) /ASRA/MUMBAI DATED 28 09.2022  
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** : M/s. Hallmark Engineers,  
J-3, Ansa Industrial Estate,  
Saki Vihar Road, Mumbai 400 072

**Respondent:** The Commissioner of Central Excise, Mumbai-II

**Subject** : Revision Applications filed under Section 35EE of Central  
Excise Act, 1944 against the Order-in-Appeal No. CD/889/M-  
II/2015 dated 01.12.2015 passed by the Commissioner  
(Appeals) Central Excise, Mumbai-II

**ORDER**

The Revision Application have been filed by M/s. Hallmark Engineers, J-3, Ansa Industrial Estate, Saki Vihar Road, Mumbai 400 072 (hereinafter referred to as the 'applicant') against the Order-in-Appeal No. CD/889/M-II/2015 dated 01.12.2015 passed by the Commissioner (Appeals) Central Excise, Mumbai-II

2. The facts of the case in brief are the applicant is a 100% EOU and holding Central Excise Registration No. AAAPH0882RXM002 for manufacture and export of Tungsten Carbide Tools for cold forging falling under CETSH 82073010 of the First schedule to the Central Excise Tariff Act, 1985. The applicant were availing exemption under Notification No. 52/2003-Cus & 22/2003-CE dated 31.03.2003.

3. During the course of EA 2000 Audit for the period 2009-13 on the records of the applicant, it was observed that:

i. The applicant has cleared 15 Nos. Of Tungsten Carbide Tools for cold forging valued at Rs.1,80,972/- involving duty of Rs. 18,640/- vide invoice No. 004E/11-12 did. 02.04.2011 for export to Germany under Shipping Bill No. 3345128 dated 22.04.2011. It was observed that the buyer received only 10 nos. of the same instead of 15 nos. of tools cleared vide the said invoice, out of which one of the tools was cracked. The applicant also received claim amount of Rs.57,990/- from M/s. Federal Express Corporation against the same.

ii. The applicant had also cleared 60 Nos. Tungsten Carbide tools valued at Rs.3,35,945.70 involving duty amounting to Rs. 53,751.31 vide invoice No.042E/09-10 dated 02.11.2009 for export vide Shipping Bill No. 7519299 dated 19.11.2009. As it appeared that the full consignment was lost by M/s. FEDEX, M/s. FEDEX had paid an amount of Rs. 48,000/- as settlement to the applicant.

3.1. It appeared that, in both the above cases, the applicant had not received the full export sale proceeds as shown in shipping bills and received a claim amount of Rs.57,990/- and Rs.48,000/- against the same.

3.2. The reply of the applicant was not accepted by Audit and as the applicant had not followed the procedure for export without payment of duty as prescribed under Rule 19 of the CER, 2002, show cause notice was issued for recovery of duty amounting to Rs. 60,964/- (Rs. 5,213/- plus Rs. 53,751/-) under proviso to Section 11A (1) of the Central Excise Act, 1944 alongwith interest and also for imposition of penalty under the Act.

4. The Adjudicating Authority vide Order-in-Original No MKM/Adj/61/Powai/Hallmark/14-15 dated 10.03.2015 ordered recovery of Rs. 60,964/- alongwith interest at the appropriate rate and also imposed penalty of Rs. 60,964/- on the applicant.

5. Aggrieved by the Order-in-Original, the applicant filed an appeal before the Commissioner (Appeals), Central Excise, Mumbai-II rejected the appeal, relying on the RA order No 1651/1652/2012-CS dated 06.01.2012 in the case of Jindal Steel Ltd and also Para 2.3.3 of Board Circular No 354/70/97-CX dated 13.11.1997.

5. Aggrieved by the impugned Order-in-Appeal; the applicant filed the Revision Application on the following grounds:

5.1 That the copy of the BRC in respect of Shipping Bill No. 3345128 dated 22.04.2011 and the settlement of the claim to the extent of Rs. 57,990/- was submitted to the adjudicating authority and the Appellate Authority but no cognisance was taken;

5.2. That the copy of the BRC in respect of Shipping Bill No. 7519299 dated 19.11.2009 which showed that the complete realization of the Export Invoice value had taken place, was submitted to the Adjudicating Authority;

5.3. That from the reading of the CBEC circular No. 500/66/99-CX, dated 15-12 1999 issued from F. No. 209/26/99-CX.6 & the CBEC circular No. 87/87/94-CX, dated 26-12-1994 issued from F. No. 209/18/93-CX.6 (Pt.) it

is clear that there is no condition of the realization of the export proceeds for the discharge of the bond and it is established beyond doubt that non realization cannot lead to the recovery of duty. However, the learned Commissioner (Appeals) has failed to honour the written word of the law though the circular is binding on the department;

5.4. That the Commissioner (Appeals) had wrongly placed reliance on CBEC circular No. 354/70/97-CX dated 13.11.97 as the said circular was put to test in case of Polyplex Corporation Ltd vs. Joint Secretary, Finance [2014 (306) E.L.T. 24 (All.)] wherein it was ruled that executive order laying down something otherwise than what is prescribed in the notification is not permissible in terms of the law therefore once again on this count itself, the order needs to be set aside.

6. Personal hearing in the case was scheduled for 14.06.2022 or 27.06.2022. Shri Rajiv Gupta, Consultant appeared online for the hearing on behalf of the applicant. He submitted that the applicant was an EOU and there is no consignment wise requirement of remittance and therefore rejection of the claim was incorrect. He also submitted that the Bank Realisation Certificates were available on record.

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

7.1 Government observes that the moot point in the case is whether the applicant which is an Export Oriented Unit is required to submit the Bank Realisation Certificates in respect of the export of goods for each consignment exported and if so whether the applicant is liable to pay central excise duty on the export proceeds not received due to the goods being lost in transit.

7.2. Government notes that the applicant being an Export Oriented Undertaking is governed by the Export-Import Policy for the relevant year and operate as per the procedures envisaged in the Handbook of Procedures.

Chapter 6 of the Handbook of Procedures amplifies the policy relating to EOU's. As per Chapter 6 of the Handbook of Procedures, the emphasis pertaining to fulfilment of obligations does not lie on the receipt of the receipt of export proceeds in respect of each export but on the EOU achieving the status of being 'net foreign exchange (NFE)' earner and further actions of recovery of duty are a result of the failure of the EOU failing to achieve NFE.

For a better understanding the relevant provisions of Handbook of Procedure and relevant Notifications are reproduced as under:

As per Para 6.9.1 of the Handbook of Procedures (Vol 1)

*"EOU / EHTP / STP / BTP unit shall be a positive net foreign Exchange (NFE) exchange earner. NFE earnings shall be calculated cumulatively Earnings in the block period as per para 6.5 of FTP, according to the formula given below. Items of manufacture for export specified in LoP / LoI alone shall be taken into account for calculation of NFE.*

$$\text{Positive NFE} = A - B > 0$$

*Where*

*'NFE' is Net Foreign Exchange;*

*'A' is FOB value of exports by EOU / EHTP / STP / BTP unit;*

*'B' is sum total of CIF value of all imported inputs and CIF value of all imported capital goods, and value of all payments made in foreign exchange by way of commission, royalty, fees, dividends, interest on external borrowings / high sea sales during first five year period or any other charges. It will also include payment made in Indian Rupees on high sea sales. "Inputs" mean raw materials, intermediates, components, consumables, parts and packing materials"*

7.3 Government observes that Para 7 (vii) of Circular No 29/2003-Cus dated 03.04.2003 stipulates that demand of duty from EOU's in case of failure to achieve NFEP/EP will be on proportionate basis in proportion to default.

Para 7 (vii) Para 7 (vii) of Circular No 29/2003-Cus dated 03.04.2003 is reproduced as under:

*“(vii) Demand of duty from EOUs in case of failure to achieve NFEP/EP on Proportionate basis in Proportion to default as in the case of SEZ units.*

*(a) Hitherto, the notifications governing EOU/STP/EHTP Schemes provided that in case of failure to achieve NFEP/EP, the entire duty foregone on the raw materials and consumables is recoverable from the unit along with interest. It was pointed out by the Trade and Industry that the existing practice of demanding duty on the entire quantity of goods procured or imported duty free, irrespective of the quantity of goods that have been used in export production or have been already exported, is very unfair. It was further argued that the provision does not take into consideration the quantity of goods utilised in production of finished product, which have been cleared in to DTA on payment of duty. (b) In view of above, it was suggested that in case of failure to achieve NFE (EP being deleted in the new Policy), the demand of duty alongwith interest should be in direct proportion to the default as already provided in case of SEZ Scheme. Since the concept is already in existence in case of SEZ Scheme, it has been decided to incorporate the same in EOU/STP/EHTP Scheme also. To implement this, a suitable provision has been incorporated in the notifications Nos. 22/2003-CE and 52/2003-Cus, both dated 31-3-2003, governing duty free procurement and import by EOUs and STP/EHTP.”*

7.4 Further Para 4 (b) of Notification No 22/2003 dated 31.03.2003 states as under

*“(4) the user industry executes a bond with the Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise or Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, (hereinafter referred to as the said officer) in the prescribed form and for such sum as may be specified by the said officer for the proper account of the receipt, storage and utilization of such goods, to achieve positive Net Foreign exchange Earning and comply with the conditions stipulated in this notification and the Export and Import Policy, and binding itself to pay on demand,-*

*(a) an amount equal to duty leviable on the goods and interest at the rate specified in the notification of the Government of India, Ministry of Finance, Department of Revenue issued under section 11 AB of Central Excise Act,*

1944 (1 of 1944) from the date of duty free procurement of the said goods till the date of payment of such duty, if -

(i) .....

(ii) .....

(iii) .....

(a) ....., and

(b) .....

within a period of one year from the date of procurement of such goods or within such extended period as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow,

(b) in case of failure to achieve the positive Net Foreign exchange Earning, the duty equal in amount to the portion of the duty leviable on the said goods but for the exemption contained in this notification and the duty so payable shall bear the same proportion as the unachieved portion of Net Foreign exchange Earning bears to the positive Net Foreign exchange Earning to be achieved along with interest at the rate of as specified in the notification of the Government of India, Ministry of Finance, Department of Revenue issued under section 11 AB of the Central Excise Act, 1944, from the date of procurement of the said goods till the payment of such duty.

7.6. In view of the provisions elucidated above, Government observes that all actions for recovery of duty follow the premise of the applicants failure to achieve NFE for the relevant period as per the EXIM policy in force at the relevant time.

8. Besides the above, Government also notes that endorsement of the customs authorities on the shipping bills in question bear testimony to the export of goods and the export of the goods has not been disputed by the adjudicating authority and the Appellate Authority. The applicant has also submitted copies of the Bank Realisation Certificates and the amount received from FEDEX for the loss in transit.

9. In view of the above, Government finds that issuance of the show cause notice for recovery of the duty in respect of the purported short receipt of export proceeds on account of the loss of goods in transit and the confirmation of the same in the impugned Order-in-Original and Order-in-Appeal is flawed and sets aside the Order-in-Appeal No. CD/889/M-II/2015 dated 01.12.2015 passed by the Commissioner (Appeals) Central Excise, Mumbai-II.

10. The revision application is allowed and disposed of in terms of above.

  
(SHRAWAN KUMAR)

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

ORDER NO. 914 /2022-CX (WZ) /ASRA/MUMBAI DATED 28.09.2022

To,

M/s. Hallmark Engineers,  
J-3, Ansa Industrial Estate,  
Saki Vihar Road, Mumbai 400 072

Copy to :

- 1) The Pr. Commissioner of CGST, Mumbai East, 9<sup>th</sup> Floor, Lotus Infocentre, Parel (East), Mumbai 400 012
- 2) The Commissioner (Appeals II, Mumbai, 3<sup>rd</sup> Floor, CGST Bhavan, Plot No. C-24, Sector -E, BKC, Bandra (East), Mumbai 400 051
- 3) Shri Rajiv Gupta, Consultant, C/o Professional Exim, A-1, Divyajyot CHS Ltd, R.K.Singh Marg, Off Old Nagardas Road, Andheri (East), Mumbai 400 069
- 4) Sr PS. to RA, Mumbai
- 5) Notice Board.
- 6) Spare copy.