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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.195/06/WZ/2018-RA | 1235
F. No.195/68/WZ/2018-RA

Date of Issue: 01.03.2023

ORDER NO. 93-99 /2023-CX (WZ) /ASRA/Mumbai DATED 28.02.2023 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 Sai Wardha Power Generation Limited,
(formerly known as M/s Sai Wardha Power Limited)
B-2, MIDC, Warora Growth Centre,
Warora, District Chandrapur,
Maharashtra – 442907.

Respondent : Commissioner of CGST & Central Excise, Nagpur- I.

Subject : Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against the following Orders-in-Appeal :-

Sl. No.	Order-in-Appeal No.	Date	Passed by
1	NGP/EXCUS/000/ APPL/250/14-15	09.01.2015	Commissioner (Appeals), C.Ex. & Customs, Nagpur
2	NGP/EXCUS/000/ APPL/853/17-18	27.03.2018	Commissioner (Appeals), C.Ex. & Customs, Nagpur

ORDER

The subject Revision Applications have been filed by M/s Sai Wardha Power Generation Limited, (*formerly known as M/s Sai Wardha Power Limited*), Chandrapur (here-in-after referred to as 'the applicant') against the subject Orders-in-Appeal dated 09.01.2015 and 27.03.2018. The Order-in-Appeal dated 09.01.2015 decided an appeal by the applicant against Order-in-Original dated 17.04.2014 passed by the Deputy Commissioner, C.Ex., Division-II, Nagpur and the Order-in-Appeal dated 27.03.2018 decided an appeal by the applicant against Order-in-Original dated 21.11.2016 passed by the Assistant Commissioner, Central Excise & Service Tax, Division – City – I, Nagpur. The original authority in both cases had rejected the refund/rebate applications filed by the applicant.

2. Brief facts of the case are that the applicant is a SEZ unit and have set up a Power plant for generation of electricity at Chandrapur in terms of the Letter of Approval of the Development Commissioner, SEEPZ, SEZ for the same. The applicant procured coal from M/s Western Coalfields Limited (WCL) situated in the DTA for generation of electricity. M/s WCL cleared coal to the applicant on payment of Central Excise duty. The applicant claimed refund of the such excise duty paid by WCL. The details of the refund claimed is as under: -

Sl. No.	PERIOD	Date of filing of claim	AMOUNT (Rs.)
1	April 2012 to September 2012	23.03.2013	14,17,236/-
2	October 2012 to March 2013	27.09.2013	3,93,850/-
3	March 2011 to March 2012	27.08.2013	90,35,850/-

The claim at serial no.1 was rejected by the original authority vide Order-in-Original dated 17.04.2014 and the claims at serial no. 2 and 3 were rejected vide Order-in-Original dated 21.11.2016. Aggrieved, the applicant preferred appeals against the said Orders-in-Original resulting in the impugned Orders-in-Appeal.

3. The Commissioner (Appeals) vide Order-in-Appeal dated 09.01.2015 which decided the appeal against Order-in-Original dated 17.04.2014

upheld the Order-in-Original and rejected the appeal filed by the applicant on the following grounds: -

- In terms of Rule 18 of the Central Excise Rules, 2002, the unit in the DTA which cleared the goods to the SEZ was eligible to claim the rebate/refund of the duty paid on such clearances and not the applicant in the SEZ;
- Procedures laid down in notification no.19/2004-CE(NT) dated 06.09.2004 for clearances from the DTA unit to the SEZ was not followed; and
- The rebate/refund was hit by unjust enrichment as the applicant had failed to prove that the element of duty has not been passed on to their customer.

As regards the Order-in-Appeal dated 27.03.2018 which decided the appeal against Order-in-Original dated 21.11.2016, the Commissioner (Appeals) upheld the Order-in-Original and rejected the appeal filed by the applicant on the following grounds: -

- Non-following of procedures laid down by notification no.19/2004-CE(NT) dated 06.09.2004;
- The claim was time barred in terms of Section 11B of the Central Excise Act, 1944, and;
- The claim was hit by the clause of unjust enrichment as, in the absence of other evidence, the certificate of the Chartered Accountant produced by the applicant was not acceptable to prove that they had passed on the duty element to their customers;

Aggrieved, by the above Orders-in-Appeal, the applicant has preferred the subject Revision Applications.

4.1 The Revision Application against the Order-in-Appeal dated 09.01.2015 has been filed on the following grounds: -

(a) The Commissioner (Appeals) erred in holding that the applicant was importer of the goods and thus they are not entitled for rebate claim under Rule 18 of the Central Excise Rules 2002 and that the rebate claim, if any, can only be filed by the Manufacturer Exporter under the said Rule 18 and applicable notification as there was no such finding by the lower authority

and that the lower authority had accepted that the applicant would be entitled to claim rebate/refund under Section 11B of CEA, 1944; that it has also been clearly stated in the Order-in-Original that in terms of section 2(o) of SEZ Act, the procurement by SEZ unit from DTA does not fall in the category of import and to that extent they were not an importer but a buyer; that this decision is on an issue which was outside the Order-In-Original itself and therefore was not legally sustainable;

(b) That they claimed rebate of duties of excise paid on coal received in SEZ unit from DTA as they had borne the incidence of duty; that Board's circular No 29/2006 CUS and 6/2010 CUS read with notification No 19/2004 CE (NT) make the provisions for rebate of CE duty (under Rule 18 of CER) on export of goods, applicable to supply of goods from DTA to SEZ in view of the provisions in the SEZ Act to the effect that supply of goods and services from DTA to SEZ shall constitute exports (Section 2(m) of SEZ Act); that the Commissioner (Appeals) failed to appreciate that in the case of physical export of goods to a place outside India, the goods leave the country and the buyer is outside the country, whereas in the case of supply of goods from DTA to SEZ, goods do not leave the country and such supplies are treated as deemed exports only for the purpose of export benefits; that receipt of goods in SEZ from DTA does not amount to import of goods and hence the SEZ unit does not become importer as wrongly held by the Commissioner (Appeals); that under Section 2(o) of SEZ Act, import "means- (i) bringing goods or receiving services, in a Special Economic Zone, by a Unit or Developer from a place outside India by land, sea or air or by any other mode, whether physical or otherwise; or (ii) receiving goods, or services by, Unit or Developer from another Unit or Developer of the same Special Economic Zone or a different Special Economic Zone; that it was clear from the definition of import in the SEZ Act that receipt or procurement of goods by SEZ unit from DTA did not fall under the definition of import and therefore SEZ unit cannot be considered as importer; that the Commissioner (Appeals) should have appreciated that SEZ unit is only a purchaser of goods in India and not an importer and that the explanation under Section 11B of the Central Excise Act, 1944 clearly provides that for purposes of Section 11B refund includes rebate of duty of excise on excisable goods exported out of India and thus the claim for rebate for rebate of duty on exports including deemed exports was therefore governed by the provisions of Section 11B of the Central Excise Act, 1944; that it could be seen from the provisions of this section that not only the person who paid the duty

(supplier or manufacturer exporter) but also the person from whom the duty was collected by the manufacturer /supplier of goods was also entitled to claim the rebate/refund; that hence they were entitled to claim the rebate/refund in terms of the provisions of Rule 18 of Central Excise Rules read with section 11B of Central Excise Act, 1944; they further submitted that the fact that any person other than the exporter is also eligible to file the refund claim was provided in the Central Excise Manual of CBEC Instructions Chapter 8 under the heading "Export under claim for rebate" Clause 8.3(vi), wherein it has been provided that among other documents necessary for filing the rebate claim, a Disclaimer certificate from the exporter has to be filed by the claimant where the claimant is any person other than the exporter; that this further substantiates the fact that person other than the exporter was also entitled to file claim of rebate of duties of excise on the basis of the Disclaimer Certificate from the Exporter, if such claimant has borne the incidence of duty; that in the present case they had produced the said disclaimer certificate from the exporter/manufacturer and also proof of payment of excise duties to WCL (Exporter/manufacturer) along with the claim; hence they submitted that they were the legitimate claimant as per Section 11B (1) of CEA read with Rule 18 of Central Excise Rules, 2002 for refund which includes rebate; hence the finding of the Commissioner (Appeals) on this count is legally untenable and factually incorrect;

(c) As regards the Commissioner (Appeals) finding of non-following of procedure it was submitted that ARE-1 procedure was not followed by the manufacturer-exporter (WCL) and also bill of export was not filed, because of reluctance on the part of WCL; that in the circumstances the applicant was forced to pay the CE duty and clean energy cess on the coal supplied by WCL; that in the absence of endorsement of Authorized officer on ARE 1 they had submitted a certificate from the Authorized Officer (A.O) of SEZ that the coal in question was received in the SEZ unit and utilized for authorized operations in SEZ unit and that this was sufficient proof of export as far as the supply to SEZ unit was concerned; that they had also submitted CA certificate from their statutory auditor in regard to procurement and receipt of coal in question and its use in the authorized operations in SEZ unit; thus they submitted that there exists sufficient documentary evidence to substantiate the clearance of duty paid coal to SEZ unit and receipt of the same in SEZ unit and therefore the only lapse of Non-filing of ARE-1/bill of export was only a procedural lapse, which could not

be ground for denying a substantial benefit of rebate /refund under Rule 18 of Central Excise Rules, 2002; that it was a well settled law that procedural lapse cannot vitiate claim for rebate so long as duty paid nature of goods and receipt of the same in SEZ from DTA has been substantiated; that they had also submitted a disclaimer certificate from their supplier, thus it was submitted that in the given circumstances, they had produced sufficient documents to establish their right to claim the rebate of duties of excise under Rule 18 of Central Excise Rules, 2002;

(d) That there was a procedural lapse on the part of Western Coal Fields of not clearing the coal supplied to them under ARE 1; but it was a well settled position that for procedural or technical lapses, substantial benefits could not be denied when the proof of receipt of coal in SEZ and used for authorized operations was otherwise available; they cited several decisions including the case of Indo Amines Ltd as reported in 2012 (284) ELT 147 (GOI) in support of their argument;

(e) In view of the above, it was submitted that the finding of the Commissioner (Appeals) that "there is no merit in the argument of the Appellant and that there is no locus standi of the Appellant to file a rebate claim is not proper and legal" and the impugned order is therefore contrary to the provisions of SEZ Act and Rules and Central Excise Act, 1944 and rules thereof and also contrary to settled decisions of courts and was therefore liable to be set aside.

4.2 They made further submissions vide their letter dated 02.12.2022, wherein in addition to the submissions made earlier they also submitted that:-

(a) That supply to SEZ is 'Export' in terms of Section 2(m) of the SEZ Act, and that Section 26 of the SEZ Act provides exemption from duty of excise on goods procured from DTA by SEZ unit; that Rule 30 of SEZ Rules also prescribed procedure similar to exports for procurement of goods; that hence for all practical purposes the SEZ unit is deemed to be a territory outside India and thereby all benefits are available to supplies from DTA to SEZ;

(b) That the fact of receipt of duty paid coal and utilization thereof by them in the SEZ was not in dispute as the fact of receipt of coal from WCL by them in their SEZ unit was certified by the authorized officer of the SEZ, Wardha, Chadrapur vide Certificate dated 15.05.2013;

(c) That they had also submitted a disclaimer certificate given by WCL the supplier; that once the fact of receipt of coal from WCL into SEZ and utilization thereof for authorized operation within the SEZ is not in dispute, the activity of sale of coal by WCL would be treated as export;

(d) That they had borne the incidence of duty and were hence entitled to claim refund of the same and relied upon the decision of the Hon'ble Supreme Court in the case of M/s Mafatlal Industries Limited –[1997 (89) ELT 247 (SC)] and Oswal Chemicals [2015 (318) ELT 617 (SC)] in support of their case; Apart from these they also cited several decisions in support of the above arguments;

(e) That it was the avowed policy objective of the Government of India that exports should not bear the burden of taxes; that the legislative intention of the Government to not to export taxes would get vitiated if rebate in the present case was not granted to them.

In view of the above they requested that the Order-in-Appeal dated 09.01.2015 be set aside and it may be held that they are entitled to claim the rebate/refund of duties of excise and clean energy cess as claimed by them.

4.3 The Revision Application against the Order-in-Appeal dated 27.03.2018 has been filed on the following grounds: -

(a) As regards the issue of non-following of procedure under the relevant notification they made submissions similar to that made against this observation in the Order-in-Appeal dated 09.01.2015 which has been mentioned above; in light of these submissions they submitted that it is now trite law that the procedural infractions of notifications/circulars should be condoned if exports have really taken place and that the law was settled that substantive benefit cannot be denied for procedural lapses; that when there is no ambiguity in the export of the duty paid goods, the rebate of duty paid

under Rule 18 of the Central Excise Rules, 2002 cannot be denied to them merely on procedural grounds;

(b) As regards the finding of the Commissioner (Appeals) that the refund claim filed in respect of Clean Energy Cess as Excise Duty was beyond the time limit of one year as prescribed under Section 11B of Central Excise Act, 1944 it was submitted that being an SEZ unit they were under the impression that excise duty paid on coal was to be claimed as drawback from S.O. under provisions of SEZ Act and Rules and that accordingly they had filed the said refund claim with Specified officer of the SEZ unit on 28.02.2012, within the time limit of one year period, in terms Rule 30 (5) of the SEZ Rules, 2005; that the Commissioner (Appeals) had failed to take cognizance of the fact that they had filed the refund claim before the S.O.; that it was a fact that rebate claims were filed, and that too within the prescribed time limit of one year, therefore the Commissioner (Appeals) ought to have treated the claims to have been filed within the time period though to the wrong authority, and was not hit by limitation; they cited the following decisions in support of their argument:-

- CCE vs AIA ENGINEERING LTD 2011 (21) S.T.R. 367 (Guj.)
- REDINGTON INDIA LTD. Vs CC, AIR, Chennai [2014 (304) E.LT. 154 (Tri. - Chennai)]
- Rathi Steel & Power Limited vs CCE, Ghaziabad [2014 (308) E.LT. 163 (Tri.-Del.)]

(c) As regards the issue of unjust enrichment they submitted that the subject of Unjust Enrichment had not been raised by the lower authority, but the Commissioner (Appeals) had Suo moto taken up the issue of unjust enrichment and made finding that CA Certificate cannot be acceptable evidence in the question of unjust enrichment; they submitted that the finding of the Commissioner Appeals in this respect was erroneous and unjustified; that they had clearly shown the duty amount as receivable in the books of accounts and balance sheet also; that in addition to the same they had also submitted certificate from the statutory auditors wherein it has been clearly mentioned that the amount of duty claimed as refund is shown as RECEIVABLES in the books of accounts; that in addition to this, 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 be attracted

in the case of goods exported and in this case it is not in dispute that supply of goods from DTA to SEZ unit is an export in terms of the applicable provisions of SEZ Act and Rules;

4.4 They made further submissions vide their letter dated 02.12.2022 with respect to the Order-in-Appeal dated 27.03.2018, wherein in addition to the submissions made earlier and similar to that made with respect to the Order-in-Appeal dated 09.01.2015 they also submitted that: -

(a) That refund claims filed within prescribed time; although before wrong authority could not be denied as time barred; they reiterated their earlier submissions on this issue;

(b) Non-filing of ARE-1/Refund claims filed before wrong authority but within time – Procedural lapses needed to be condoned;

(c) That the fact of export was not in dispute – hence substantial benefit of rebate could not be denied;

(d) That rebate of Clean Energy Cess was admissible; that Clean Energy Cess was introduced by Ministry of Finance vide Section 83 of the Finance Act, 2010 and that the same stipulates that Clean Energy Cess has been introduced in addition to any cess or duty leviable on goods specified in the Tenth Schedule under any law for the time being in force and from the same it was clear that Clean Energy Cess was one of the duties of excise leviable on coal and they sought to place reliance on Order-in-Appeal No.46-49/CEX/RKL-GST/2020 dated 30.11.2020 in the case of Adani Power Limited, Ahmedabad, wherein it was held that refund of Clean Energy Cess was admissible.

In view of the above they requested that the Order-in-Appeal dated 27.03.2018 be set aside and it may be held that they are entitled to claim the rebate/refund of duties of clean energy cess as claimed by them;

5. Personal hearing in the matter was granted to the applicant on 24.11.2022 and Shri A. Janakiraman, Ms Padmavati, Shri Vishal Parekh, and Shri Viraj appeared on behalf of the applicant and submitted that they are a SEZ unit which received duty paid on coal for electricity. They

submitted copies of Order dated 21/20-CX dated 28.12.2020 of R.A., Delhi and consequent Order of original authority R-01-02/CE Refund/SBP-1/2022 dated 28.09.2022. They further submitted a copy of the judgment dated 22.09.2010 of Gujarat High Court on the issue of filing the claim with the wrong forum. They request to allow their claim. They further requested ten days time to file additional submissions, which they did and the same has been recorded above.

6. Government has carefully gone through the relevant case records available in the case files, the written and oral submissions and also perused the said Orders-in-Original and the impugned Orders-in-Appeal.

7. Government finds that the issue involved in the present case is whether the applicant, as a generator of electricity in an SEZ, would be eligible to claim the refund of the Central Excise duty paid by the unit in the DTA which supplied coal to them. Government finds that the applicant has made three such claims pertaining to different periods as detailed above. Government finds that the lower authorities have rejected these claims for the following reasons:-

(i) In terms of Rule 18 of the Central Excise Rules, 2002, the unit in the DTA who cleared the goods to the SEZ, was eligible to claim the rebate/refund of the duty paid on such clearances and not the unit in the SEZ;

(ii) Procedures laid down in notification no.19/2004-CE(NT) dated 06.09.2004 for clearances from the DTA unit to the SEZ was not followed;

(iii) The rebate/refund was hit by unjust enrichment as the applicant had failed to prove that the element of duty has not been passed on to their customer; and

(iv) The claim was time barred in terms of Section 11B of the Central Excise Act, 1944.

Government notes that the Order-in-Appeal dated 09.01.2015, which covered one such claim, had rejected the appeal filed by the applicant on the grounds mentioned at Sl. Nos. (i) to (iii) above and the Order-in-Appeal dated 27.03.2018, which covered two refund claims, had rejected the appeal filed by the applicant on the grounds mentioned at Sl. Nos. (ii) to (iv) above.

8. Government now proceeds to examine each of the above-mentioned grounds on which the applications for refund/rebate were rejected. As regards the first ground that in terms of Rule 18 of the Central Excise Rules, 2002, it was the unit in the DTA who cleared the goods to the SEZ who was eligible to claim the rebate/refund of the duty paid on such clearances and not the applicant in the SEZ, Government finds it pertinent to examine Rule 18 of the Central Excise Rules, 2002 and the same is reproduced below:-

> *" Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification....."*

A reading of the above rule does indicate that it provides for rebate of duty paid on goods that have been exported and no such restriction is placed that such rebate would be granted only to the supplier of such goods. Government also finds that it a well settled principle that such rebate/refund claims will be governed by the provisions of Section 11B of the Central Excise Act, 1944. Government finds that this issue has been dealt with by the Hon'ble Supreme Court in the case of Mafatlal Industries Limited vs UOI [1997 (89) ELT 247 (SC)] wherein at para 89 of the Order, it was held as under: -

> *" ..... Clause (e) of the proviso to sub-section (2) of Section 11B does provide for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden."*

In view of the above, Government finds that the relevant legal provisions do not bar the applicant from claiming the refund/rebate of the duty paid on goods received from a supplier in the DTA. As such Government finds this portion of the Order-in-Appeal dated 09.01.2015 to be incorrect and holds that the applicant will be eligible to claim the refund of such duty paid by their supplier in the DTA.

9. Government now proceeds to examine the second issue, viz., whether refund could be denied to the applicant, as procedures laid down in the

notification no.19/2004-CE(NT) dated 06.09.2004 for clearances from the DTA unit to the SEZ, was not followed. In this context, Government notes that the applicant by virtue of being situated in the SEZ, all goods received by them were subjected to verification by the officers of the Department. The fact of receipt of goods in the SEZ by the applicant is recorded and an endorsement to this effect is required to be made by the competent officer in the SEZ. Government finds that the claim of the applicant with respect to the receipt of the goods in question from their supplier, along with its details, can be verified by the authority sanctioning the refund/rebate with the contemporaneous evidence available and hence, in such event, denying the refund/rebate of the duty paid on such goods for non-following of procedures, would be unjust and incorrect. Government finds support in the decision of the Hon'ble High Court of Bombay in the case of UM Cables Limited vs UOI [2013 (293) ELT 641 (Bom.)] wherein it had, while deciding a similar issue, held as follows: -

> *" **12.** The procedure which has been laid down in the notification dated 6 September, 2004 and in CBEC's Manual of Supplementary Instructions of 2005 is to facilitate the processing of an application for rebate and to enable the authority to be duly satisfied that the two fold requirement of the goods having been exported and of the goods bearing a duty paid character is fulfilled. The procedure cannot be raised to the level of a mandatory requirement. Rule 18 itself makes a distinction between conditions and limitations on the one hand subject to which a rebate can be granted and the procedure governing the grant of a rebate on the other hand. While the conditions and limitations for the grant of rebate are mandatory, matters of procedure are directory."*

Government finds that in this case, the original authority has to ensure that the conditions and limitations laid down at para 2 of the notification no.19/2004-CE(NT) dated 06.09.2004 are mandatorily complied with, however, in respect of procedures specified at para 3 of the said notification, substantial compliance has to be ensured without insisting on strict compliance. In light of the above, Government sets aside this portion of both the impugned Orders-in-Appeal wherein the refund/rebate sought by the applicant was rejected on the grounds of non-following of procedure prescribed by the said notification. Government holds that in the present case the refund/rebate cannot be denied to the applicant on the ground that the procedure laid down by the said notification was not followed.

10. Further, Government notes that the refund/rebate claimed by the applicant was also rejected for the reason that the same was hit by the clause of unjust enrichment as the applicant had failed to prove that the element of duty has not been passed on to their customer. Government notes that in this case it is not in dispute that the clearances were from a DTA unit to the applicant in the SEZ. In this context, Government finds that Section 2(m)(ii) of the SEZ Act, 2005 clearly states that supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer in the SEZ would be treated as export. Further, Section 53 of the SEZ Act, 2005 lays down that a SEZ shall be deemed to be a territory outside the Customs territory of India for the purposes of undertaking the operations for which they have been authorized. A combined reading of Section 2(m)(ii) and Section 53 of the SEZ Act, 2005, as discussed above, clearly indicate that as per the SEZ Act, 2005 a unit in a SEZ, is outside the Customs territories of India and supplies made by a DTA unit to them would fall under the definition of 'export'. Government finds support in the judgment of the Hon'ble High Court of Chattisgarh in the case of UOI vs Steel Authority of India [2013(297)ELT 166 (Chattisgarh)] wherein it was held that supplies from DTA to a developer in the SEZ are to be treated as exports in terms of Section 2(m) of the SEZ Act, 2005. Thus, in the present case the supplies made by the unit in the DTA to the applicant will fall under the definition of 'export'. Having found so, it needs to be examined whether such rebate claims in respect of clearances from DTA to SEZ would attract the doctrine of unjust enrichment. Government finds that the said issue is governed by provisions Section 11B of the Central Excise Act, 1944. Relevant portion of the same is reproduced below:-

> ***"Section 11B. Claim for refund of duty and interest, if any, paid on such duty -***
>
> *(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person .....*

.. (2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

***Provided** that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -*

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
(b) ....."

A reading of the above Section clearly indicates that the concept of unjust enrichment is not applicable in the matter of goods exported out of India as stands specified in the first proviso to sub-section (2) of Section 11(B) of Central Excise Act, 1944. It has been found above, that the supplies by the unit in the DTA to the applicant in the SEZ will be treated as export to a place outside the territory of India. Given the above, Government finds that the doctrine of unjust enrichment will not apply to the rebate claims in question filed by the applicant, and accordingly holds so. The portion of the impugned Orders-in-Appeal holding a contra view is set aside.

11. Government now comes to the last issue as to whether the rebate claim filed by the applicant on 27.08.2013 for the period March 2011 to March 2012 would be hit by the time limit prescribed by Section 11B of the Central Excise Act, 1944. Government finds that it is not in dispute that the said refund/rebate claim was filed before the original authority after a period of one year from the date on which the goods in question were received by the applicant in the SEZ. The applicant has submitted that they had filed the said claim before the Specified Officer in the SEZ within the one-year period, however, Government notes that no evidence in support of such claim has been furnished either before lower authorities or during the course of these proceedings. Further, given the fact that the quantum of delay is more than a year, the plea of the applicant that such delay was due to them being unaware of the proper officer before whom the claim should be filed, rings hollow and deserves to be rejected because they themselves had already filed a claim before the very same proper officer on 23.03.2013. Government finds that the applicant has relied, amongst a few earlier

decisions, on the decision of the Hon'ble High Court of Madras in the case of Dy. Commissioner vs Dorcas Market Makers Pvt. Ltd. [2015 (321) ELT (45) Mad.] in support of their case which they have submitted has been maintained by the Hon'ble Supreme Court. On examining the said decision of the Hon'ble Supreme Court, Government finds that in this case, the Apex Court did not go into the merits of the case while giving its decision. Government finds that the issue of whether the time limit prescribed by Section 11B of the Central Excise Act, 1944 is applicable to claims for rebate is no more *res integra* and has been laid to rest by a number of decisions of the higher Courts. Government observes that the Hon'ble High Court of Madras, in a judgment subsequent to its decision in the case of Dy. CCE vs Dorcas Market Makers relied upon by the applicant, while dismissing a Writ Petition filed by Hyundai Motors India Limited [2017 (355) E.L.T. 342 (Mad.)] had upheld the rejection of rebate claims which were filed after one year from the date of export and held that the limitations provided by a Section will prevail over the Rules. Further, Government also notes that the Hon'ble High Court of Karnataka while deciding the case of Sansera Engineering Pvt. Ltd. Vs Dy. Commissioner, Bengaluru [2020 (371) ELT 29 (Kar.)], an identical case, had distinguished the decision of the Apex Court referred to by the applicant and had held as under:-

> *" It is well settled principle that the claim for rebate can be made only under section 11-B and it is not open to the subordinate legislation to dispense with the requirements of Section 11-B. Hence, the notification dated 1-3-2016 bringing amendment to the Notification No. 19/2004 inasmuch as the applicability of Section 11-B is only clarificatory.*
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> ***14.*** *It is not in dispute that the claims for rebate in the present cases were made beyond the period of one year prescribed under Section 11-B of the Act. Any Notification issued under Rule 18 has to be in conformity with Section 11-B of the Act.*
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> ***15.*** *The decision of Original Authority rejecting the claim of rebate made by the petitioners as time-barred applying Section 11-B of the Act to the Notification No. 19 of 2004 cannot be faulted with."*

A Writ petition filed against the above decision was decided by a Larger Bench of the Hon'ble High Court of Karnataka in Sansera Engineering Limited vs Deputy Commissioner, LTU, Bengaluru [2021 (372) ELT 747 (Kar.)] wherein the Hon'ble High Court upheld the decision by the Single Judge in the above cited case with the following remarks :-

> *" A reading of Section 11B of the Act makes it explicitly clear that claim*

for refund of duty of excise shall be made before the expiry of one year from the relevant date. The time prescribed under Section 11B of the Act was earlier six months which was later on amended on 12-5-2000 by Section 101 of the Finance Act, 2000. Rule 18 of the Central Excise Rules and the Notification dated 6-9-2004 did not prescribe any time for making any claim for refund as Section 11B of the Act already mandated that such application shall be filed within one year. Section 11B of the Act being the substantive provision, the same cannot yield to Rule 18 of the Rules or the Notification dated 6-9-2004. As rightly held by the Learned Single Judge, the Notification dated 1-3-2016 was mere reiteration of what was contained in Section 11B of the Act, and therefore, the Law as declared by the Hon'ble Supreme Court in Uttam Steel (supra) is applicable to the facts of this case. In that view of the matter, the judgment of the Madras High Court in the case of Dorcas Market Makers Pvt. Ltd., (supra) is not applicable to the facts of this case. As a matter of fact, the Madras High Court in the case of Hyundai Motors India Ltd. v. Department of Revenue, Ministry of Finance reported in 2017 (355) E.L.T. 342 (Mad.) did not subscribe to the law declared in Dorcas Market Makers Pvt. Ltd., (supra) and held that the time prescribed under Section 11B of the Act is applicable.

13. *In view of the aforesaid, the Learned Single Judge had extensively considered the questions of law and the applicability of Section 11B of the Act and has rightly held that the claim of the appellant for refund was time-barred as it was filed beyond the period of one year. We do not find any justification to interfere with the findings of the Learned Single Judge. Hence, W.A. No. 249/2020 lacks merit and is dismissed."*

Government finds the above decision is squarely applicable to the issue on hand and finds that it relies on the decision of the Hon'ble Supreme Court in the case of UOI & Others vs. Uttam Steel Limited [2015 (319) E.L.T. 598 (S.C.)] to hold that the limitation of one year prescribed by Section 11B of the Central Excise Act, 1944 is applicable to claims for rebate. In light of the above, Government rejects the contention of the applicant that there is no time limit for filing a rebate/refund claim and holds that the time limit prescribed by Section 11B of the Central Excise Act, 1944 will be applicable to the instant case too. Thus, Government finds that the rebate/refund claim filed 27.08.2013 for the period March 2011 to March 2012 is time barred in terms of the limitation of one year prescribed by Section 11B of the Central Excise Act, 1944 and accordingly holds so.

12. Government finds support in the decision of the Hon'ble Supreme Court in the case of Sansera Engineering Limited V/s. Deputy

Commissioner, Large Tax Payer Unit, Bengaluru [(2022) 1 Centax 6 (S.C.)] wherein it was held that: -

> *"9. On a fair reading of Section 11B of the Act, it can safely be said that Section 11B of the Act shall be applicable with respect to claim for rebate of duty also. As per Explanation (A) to Section 11B, "refund" includes "rebate of duty" of excise. As per Section 11B(1) of the Act, any person claiming refund of any duty of excise (including the rebate of duty as defined in Explanation (A) to Section 11B of the Act) has to make an application for refund of such duty to the appropriate authority before the expiry of one year from the relevant date and only in the form and manner as may be prescribed. The "relevant date" is defined under Explanation (B) to Section 11B of the Act, which means in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of goods..... Thus, the "relevant date" is relatable to the goods exported. Therefore, the application for rebate of duty shall be governed by Section 11B of the Act and therefore shall have to be made before the expiry of one year from the "relevant date" and in such form and manner as may be prescribed. The form and manner are prescribed in the notification dated 6.9.2004. Merely because in Rule 18 of the 2002 Rules, which is an enabling provision for grant of rebate of duty, there is no reference to Section 11B of the Act and/or in the notification dated 6.9.2004 issued in exercise of powers conferred by Rule 18, there is no reference to the applicability of Section 11B of the Act, it cannot be said that the provision contained in the parent statute, namely, Section 11B of the Act shall not be applicable, which otherwise as observed hereinabove shall be applicable in respect of the claim of rebate of duty.*
>
> *10. At this stage, it is to be noted that Section 11B of the Act is a substantive provision in the parent statute and Rule 18 of the 2002 Rules and notification dated 6.9.2004 can be said to be a subordinate legislation. The subordinate legislation cannot override the parent statute. Subordinate legislation can always be in aid of the parent statute. At the cost of repetition, it is observed that subordinate legislation cannot override the parent statute. Subordinate legislation which is in aid of the parent statute has to be read in harmony with the parent statute. Subordinate legislation cannot be interpreted in such a manner that parent statute may become otiose or nugatory. If the submission on behalf of the appellant that as there is no mention/reference to Section 11B of the Act either in Rule 18 or in the notification dated 6.9.2004 and therefore the period of limitation prescribed under Section 11B of the Act shall not be applicable with respect to claim for rebate of duty is accepted, in that case, the substantive provision – Section 11B of the Act would become otiose, redundant and/or nugatory. If the submission on behalf of the appellant is accepted, in that case, there shall not be any period of limitation for making an application for rebate of duty. Even the submission on behalf of the appellant that in such a case the claim has to be made within a reasonable time cannot be accepted. When the*

statute specifically prescribes the period of limitation, it has to be adhered to.

11. It is required to be noted that Rule 18 of the 2002 Rules has been enacted in exercise of rule making powers under Section 37(xvi) of the Act. Section 37(xxiii) of the Act also provides that the Central Government may make the rules specifying the form and manner in which application for refund shall be made under section 11B of the Act. In exercise of the aforesaid powers, Rule 18 has been made and notification dated 6.9.2004 has been issued. At this stage, it is required to be noted that as per Section 11B of the Act, an application has to be made in such form and manner as may be prescribed. Therefore, the application for rebate of duty has to be made in such form and manner as prescribed in notification dated 6.9.2004. However, that does not mean that period of limitation prescribed under Section 11B of the Act shall not be applicable at all as contended on behalf of the appellant. Merely because there is no reference of Section 11B of the Act either in Rule 18 or in the notification dated 6.9.2004 on the applicability of Section 11B of the Act, it cannot be said that the parent statute – Section 11B of the Act shall not be applicable at all, which otherwise as observed hereinabove shall be applicable with respect to rebate of duty claim.

.....

15. In view of the above and for the reasons stated above, it is observed and held that while making claim for rebate of duty under Rule 18 of the Central Excise Rules, 2002, the period of limitation prescribed under Section 11B of the Central Excise Act, 1944 shall have to be applied and applicable. In the present case, as the respective claims were beyond the period of limitation of one year from the relevant date, the same are rightly rejected by the appropriate authority and the same are rightly confirmed by the High Court. We see no reason to interfere with the impugned judgment and order passed by the High Court. Under the circumstances, the present appeal fails and deserves to be dismissed and is accordingly dismissed."

In view of the above, Government finds that the Commissioner (Appeals) in the Order-in-Appeal dated 27.03.2018 has correctly held the claim for the period March 2011 to March 2012 to be time barred.

13. Further, Government notes that the applicant in their submissions at certain places have mentioned that the rebate/refund claim is that of 'Clean Energy Cess'. They have also claimed that they are eligible to claim the rebate/refund of the Clean Energy Cess paid by their supplier and placed reliance on an Order-in-Appeal in support of their case. Government finds that the issue had been decided by the Revisionary Authority in the case of the applicant themselves vide Order no.21/20-CX dated 28.12.2020, wherein, while relying on the decision of the Hon'ble Tribunal in the case of

ACC Limited vs Commissioner, CGST & CEx. [2019 (31) GSTL 103 (Tri-Del)], the Revisionary Authority had held that 'Clean Energy Cess' is in the nature of a fee and not in form of excise duty and hence rebate of 'Clean Energy Cess' was not admissible. Government finds that the applicant has not placed any decision passed by any higher authority which holds a contrary view to that expressed by the Revisionary Authority on this issue. In light of the same, Government rejects the contention of the applicant on this count and holds that the applicant will not be eligible to the rebate/refund of Clean Energy Cess' paid by their supplier in the DTA.

14. Having held as above, Government remands the refund claims filed by the applicant for the period April 2012 to September 2012 and October 2012 to March 2013 filed on 23.03.2013 and 27.09.2013, respectively, back to the original authority for being decided in terms of the findings above. The applicant is directed to furnish all documents in support of the above said two claims before the original authority. The original authority will provide the applicant sufficient opportunity within eight weeks from the date of receipt of this order to submit the documents in support of the said two claims. The third claim pertaining to the period March 2011 to March 2012 for Rs.90,35,850/- is rejected.

15. The subject Revision Applications are disposed of in the above terms.

Shrawan 20/2/23
(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No.93-99/2023-CX (WZ) /ASRA/Mumbai dated 21.02.2023

To,

M/s Sai Wardha Power Generation Limited,
(*formerly known as M/s Sai Wardha Power Limited*)
B-2, MIDC, Warora Growth Centre,
Warora, District Chandrapur,
Maharashtra – 442907.

Copy to:
1. Commissioner of CGST & Central Excise, Nagpur – I, GST Bhavan, Telegkhedi Road, Civil Line, Nagpur – 440001.

2. Commissioner (Appeals), Central Excise & Customs, GST Bhavan, 2nd floor, Room No.221, Telegkhedi Road, Civil Line, Nagpur – 440001.
3. Sr. P.S. to AS (RA), Mumbai.
4. Notice Board.