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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. 195/471/16-RA / 4617 Date of Issue: 07.10.2022

ORDER NO. 933 /2022-CX(WZ) /ASRA/MUMBAI DATED 03 .10.2022 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 ABG Shipyard Limited, Near Magdall Port, Dumas Road, Surat – 395 007.
Respondent	:	Commissioner of Central Excise, Customs & Service Tax, Surat – II Commissionerate.
Subject	:	Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. CCESA-VAD(APP-II)/MM-07/2016-17 dated 26.04.2016 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vadodara, Appeals – II.

ORDER

The subject Revision Application has been filed by M/s ABG Shipyard Limited, Surat (here-in-after referred to as 'the applicant') against the impugned Order-in-Appeal dated 26.04.2016 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vadodara, Appeals – II. The said Order-in-Appeal disposed of an appeal by the Department against the Order-in-Original No. SRT-II/DIV-II/05/R/2014-15 dated 17.12.2014 passed by the Assistant Commissioner, Central Excise, Customs & Service Tax, Division–II, Surat – II, which in turn had decided the rebate claim filed by the applicant.

2. Brief facts of the case are that the applicant who are engaged in the manufacture of 'Ocean Going Vessels' and held Central Excise registration, filed a rebate claim for Rs.1,76,48,269/- in respect of the duty paid on inputs used by them in the manufacture of exported goods under Rule 18 of the Central Excise Rules, 2002 read with notification no.21/2004-CE(NT) dated 06.09.2004. The original rebate sanctioning authority sanctioned Rs.1,76,39,655/-; the balance amount of Rs.8,974/- was rejected as the jurisdiction Range officer had reported that the duty payment particulars could not be verified as the concerned unit, which had supplied the inputs, had closed down and no returns were filed by them. The respondent Department filed an appeal against the said Order of the original authority before the Commissioner (Appeals), who vide the impugned Order-in-Appeal dated 26.04.2016 set aside the order of the original authority and held that applicant was ineligible for the rebate claimed by them as they could not avail the benefit of notification no.21/2004-CE(NT) dated 06.09.2004 and notification no.43/2001-CE(NT) dated 26.06.2001 simultaneously.

3. Aggrieved, the applicant has filed the subject Revision Applicant against the impugned Order-in-Appeal dated 26.04.2016 on the following grounds:-

(a) The impugned order is a non-speaking order as it had overlooked the contentions of the applicants and had mechanically allowed the appeal of the Department while setting aside the Order-in-Original sanctioning the rebate claim; they cited the decisions of the Apex Court in the case of Cyril Lasardo (dead) vs Juliana Maria Lasardo [2004 (7) SCC 431] and Asst. Commissioner, Commercial Tax Department vs Shukla & Brothers [2010 (254) ELT 6 (SC)] in support of their argument;

(b) That in similar cases the Commissioner (Appeals) had upheld the sanctioning of rebate claims to the applicant and that since there was no stay on the same granted by the Revisionary Authority, the Commissioner (Appeals) ought to have upheld the order of the original authority sanctioning the rebate claims; they cited the decision of the High Court in the case of Zenith Computers Ltd., vs CCE [2014 (303) ELT 336 (Bom.)] in support of their contentions;

(c) The Commissioner (Appeals) had erred in holding that they were ineligible to the rebate claims for the reason that they could not avail the benefit of notification no.21/2004-CE(NT) dated 06.09.2004 and notification no.43/2001-CE(NT) dated 26.06.2001 simultaneously; the finding of the Commissioner (Appeals) that both the notifications operate under different schemes and therefore the applicant did not have an option to avail the benefit of both the notifications at the same time, was without any basis;

(d) Notification No.21/2004-CE(NT) was issued under Rule 18 of the Central Excise Rules, 2002 and it provides that rebate of whole of the duty paid on excisable goods used in the manufacture or processing of export goods shall, on their exportation out of India, to any country except Nepal and Bhutan, be paid subject to the conditions and the procedure specified therein; thus, the said notification granted benefit of rebate of duty paid on goods used in the manufacture of export goods; that however, in their case they had procured certain raw materials which were used in the manufacture of export goods on payment of duty and have claimed rebate of the same under the said notification;

(e) Notification No.43/2001-CE(NT) was issued under sub-rule (3) read with sub-rule (2) of rule 19 of the Central Excise (No 2) Rules, 2001 and had specified the conditions safeguards and procedures for procurement of the excisable without payment of duty for the purpose of use in the manufacture or processing of export goods and their exportation out of India, and that as per the said notification a manufacturer could procure duty free raw materials for use in the manufacture of goods export and that goods have to be exported under Form A RE-2 ; and that in the present case the fact that the goods have been exported under ARE 2 is not in dispute;

(f) That the contention of the department and the finding of the Commissioner (Appeals) that the benefit of both the notifications cannot be availed simultaneously is incorrect as nowhere does Notification No 21/2004-CE(NT) or Notification No. 43/2001-CE(NT) state that the exporter are precluded from availing the benefit of another notification if they are eligible for the same; that Notification No.43/2001-CE(NT) dated 26.06.2001 allows and lays down the procedure for procurement of inputs without payment of duty for use manufacturing/processing of export goods, whereas Notification No.21/2004-CE(NT) granted rebate of duty paid on goods used in the manufacturer of export goods; that their rebate claim could not be rejected on the ground that they had violated any condition of Notification No.43/2001-CE(NT); that they had in any case not violated any of the conditions of Notification No 43/2001-CE(NT) and hence the denial of rebate in the present case was erroneous and liable to be set aside;

(g) That denial of rebate of duty paid on inputs used in the manufacture of exported goods is against the intent of the legislature to relieve exported goods from the burden of excise duty; that as a result of denial of rebate of duty pad on raw materials on goods which are undeniably exported, the same have suffered excise duty; that it was settled law that the intention of the legislature is to ensure that goods exported out of India are not subjected to excise duty and that the entire purpose behind both Rule 18 and Rule 19 of the Central Excise Rules 2002 was to rid all exported goods from the burden of excise duty;

(h) The placed reliance on the decision of the Hon'ble High Court of Gujarat in the case of Zenith Spinners v. Union of India [2015 (326) ELT 97 (Guj. HC)] wherein the petitioners had challenged the validity of Notification No 10/2004 CE(NT) dated 03.06.2004 which amended Notification No. 43/2001 CE(NT) by inserting a condition into Notification No.43/2001 CE(NT) which provided that when inputs were procured without payment of duty under benefit of Notification No 43/2001-CE(NT), the finished goods could only be exported without payment of duly under bond in terms of Rule 19 and not under claim for rebate under Rule 18 of the Central Excise Rules, 2002; that the said notification dated 03.06 2004 was challenged on the ground that by virtue of the amendment notification, the option available with an exporter to either export goods on payment of duty under claim of rebate under Rule 18 or to export goods without payment of duty under bond in terms of Rule 19 was taken away and the exporter who opts to procure the inputs without payment of duty was forced to export the final products also without payment of duty, even though the exporter was entitled to claim rebate under Rule 18 in relation to the duty paid on such final products; that the Hon'ble High Court of Gujarat allowed the petition and struck down the conditions imposed by the amendment notification dated 03.06 2004 as bad in law and had held that where the final product itself was liable to duty and the exporter on clearance of such goods for export makes a claim for rebate on payment of duty at the time of clearance, cannot be prevented from doing so on the specious plea that the inputs used in manufacture of such final products were procured without payment of duty; that the above judgment of the Hon'ble High Court of Gujarat was affirmed by the Hon'ble Supreme Court vide its order dated 28 08 2015 reported at 2015 (326) ELT 23(SC); in view of the above judgments the impugned order was liable to be set aside;

(i) That the finding of the Commissioner (Appeals) that rebate was granted without proper duty payment verification was incorrect on facts as the range officers and rebate sanctioning authority had taken all the necessary steps to conduct duty payment verification and that duty payment verification at the end of suppliers was not required under law for the goods exported by them

and that the rebate sanctioning authority in the Order-in-Original dated 17.12.2014 had correctly observed that the Instruction No 08/2005 dated 03.02.2005 of Surat-1 Commissionerate only mandated such verification for sensitive goods like textile and textile articles and that in any case the rebate sanctioning authority had sent Annexure-D to all the concerned Range Officers belonging to ranges from where inputs were supplied to the them to verify the duty payment particulars and only in one case the JRO had reported that the amount of duty paid could not be verified as the unit was closed and accordingly an amount of Rs 8.974/ was reduced from the rebate sanctioned to them and in the remaining cases since inordinate delay was caused by the Range Officers in sending their verification reports, the rebate sanctioning authority had sanctioned the rebate after observing that no negative reports were received in the past;

(j) That the fact of receipt of the inputs used in exported goods and duty payment on such inputs by them stood verified by the Range Officers as observed in Para 12 of the Order in Original dated 17.12.2014 and hence adequate verification was done by the rebate sanctioning authority prior to sanctioning of rebate and the finding of the Commissioner (Appeals) stating the opposite, was without any basis and hence was liable to be set aside.

In light of the above, the applicant prayed that the impugned Order-in-Appeal be set aside with consequential relief.

4. Personal hearing in the matter was held on 20.09.2022 and Shri Punit Shah of the Liquidator team of ABG Shipyard Limited, appeared online on behalf of the applicant. He submitted that the company is in liquidation. He reiterated their earlier submissions in the matter and added that the rebate claims of the applicant be allowed.

5. Government has carefully gone through the relevant records, the written and oral submissions and also perused the impugned Order-in-Original and the impugned Order-in-Appeal.

6. Government finds that the primary issue involved in the present case is whether the applicant, an exporter, could avail the benefit of notification no.21/2004-CE (NT) dated 06.09.2004 issued under Rule 18 of the Central Excise Rules, 2002 and notification no.43/2001-CE (NT) dated 26.06.2001 issued under Rule 19 of the Central Excise Rules, 2002, simultaneously. Government notes that the applicant had procured certain raw material used in the exported goods without payment of duty under notification no.43/2001-CE (NT); further, the applicant also procured duty paid indigenous raw material used in the final exported product and claimed the rebate of the duty paid on such the indigenous raw material under notification no.21/2004-CE (NT).

7. Government notes that the original authority has recorded that the rebate claim was calculated on the basis of duty paid on the indigenous inputs and was based on the input output ratio approved by the jurisdictional Deputy Commissioner vide letter dated 06.03.2014 as required by notification no.21/2004-CE(NT). The original authority has also recorded that the jurisdictional Superintendent has certified that the material consumption indicated in the ARE-2 under which the finished goods were exported was in accordance with the declaration filed by the applicant and accepted vide the Deputy Commissioner vide the above-mentioned letter. Government further notes that the applicant has paid duty on the waste and scrap that arose during the course of manufacture of the exported final product. It is also on record that the applicant has not availed Cenvat credit of the raw material procured by them.

8. Government has examined notification no.21/2004-CE (NT) dated 06.09.2004 and notification no.43/2001-CE (NT) dated 26.06.2001, which have been reproduced by the original authority in its entirety in the Order-in-Original itself. Government finds no condition in either of the said notifications which explicitly or implicitly conveys that an exporter would be eligible to claim the benefit of only one of the said notifications at a time. Government finds that there is no clause or condition in either of the said

notifications which states that availment of one of these notifications would automatically preclude an exporter from availing the benefit of the other notification. Government finds that while notification no.43/2001-CE (NT) dated 26.06.2001 provided the conditions, safeguards and procedures for procurement of excisable goods without payment of duty for use in the manufacture of export goods, notification no.21/2004-CE (NT) dated 06.09.2004 provided for rebate of the duty paid on the inputs used in the manufacture of exported products. Government finds that the benefits provided by both the above exemptions do not overlap and is aimed at ensuring that inputs used to manufacture goods for export are not subjected to Central Excise duty and in case such duty is paid, rebate of the same would be available to the exporter, thus effectively ensuring that tax component of the inputs are not exported. Government has also examined both, Rule 18 and Rule 19 of the Central Excise Rules, 2002, which again has been reproduced by the original authority in the impugned Order-in-Original, and finds that neither of them imposes any condition or restriction to the effect that an exporter could operate under only of them. Given the above, Government finds the decision of the Commissioner (Appeals) that the applicant could not avail the benefit of both the above mentioned notifications simultaneously, and had to necessarily opt for only one of them, to be incorrect and without any legal basis. Further, Government finds that the Commissioner (Appeals) while arriving at the above decision, has failed to record or mention the legal provisions which supports such view. Given the above, Government is inclined to agree with the observation of the original authority that beneficiary provisions should be read beneficially unless there are provisions specifically providing for restraint, which as discussed earlier, is absent in the present case. In view of the above, Government finds that the rebate claims filed by the applicant cannot be denied for the reason that they availed the benefit of both the above said notifications simultaneously and accordingly holds so. Government finds support in the decision of the Hon'ble High Court of Gujarat in the case of Zenith Spinners vs UOI [2015 (326) ELT 97 (Guj)] wherein the notification no.10/2004-CE (NT), which prescribed that the goods must be necessarily exported under bond if manufactured from goods procured duty free under notification no.43/2001-CE (NT), was held to

be bad in law. The Hon'ble Court had held that both Rules 18 and 19 of the Central Excise Rules, 2002 operated in separate fields; Rule 18 of Central Excise Rules, 2002 prescribing the admissibility of rebate of duty on export goods, being a complete code in itself, was not applicable where no duty was paid on finished goods and hence the insistence on export under bond only was not a rational course of action. This decision was affirmed by the Hon'ble Supreme Court [2015 (326) ELT 23 (SC)].

9. Government finds that another reason on the basis which the Commissioner (Appeals) has set aside the Order-in-Original which allowed the rebate claims of the applicant was that the original authority had failed to carry out proper verification of duty payment by the suppliers of the raw material. Government finds that this is not a correct position as the jurisdictional Range Superintendent had sent the input invoices to the concerned officers having jurisdiction over the input suppliers for being verified and had also specifically stated that duty payment in respect of one of the suppliers could not be verified as the unit had closed down and no returns were filed by them. Government finds that the original authority has recorded that the rebate claim of the applicant could not be held back indefinitely in the absence of receipt of verification report from all the jurisdictional officers of all their suppliers, and, had on the basis that that there were no adverse reports in respect of such suppliers, proceeded to sanction the rebate claim of the applicant, after deducting the amount pertaining to the supplier flagged by the Range Superintendent. Government finds that verification of duty payment of all the suppliers has not been mandated by the rules or other legal provisions governing the sanction of rebate. Further, Government also notes that in the event of an adverse report being received in respect of any of the suppliers, it was not beyond the Department to raise a notice at a later stage to recover such rebate sanctioned. Thus, Government finds that the decision of the original authority to sanction the rebate on the basis of the report of the range Superintendent is correct and cannot be faulted for the reason of non-verification of the duty payment by the suppliers. In view of the above, Government does not find any merit in the finding of the Commissioner (Appeals) on this count and rejects the same.

Thus, Government finds that both the grounds on which the Commissioner (Appeals) had set aside the Order-in-Original will not hold good and accordingly holds so.

10. In view of the above, Government sets aside the impugned Order-in-Appeal dated 26.04.2016 and holds that the applicant is eligible to the rebate sanctioned to them by the original authority.

11. The subject Revision Application is allowed.

Shrawan 3/10/22

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

ORDER No. 933/2022-CX (WZ) /ASRA/Mumbai dated 3.10.2022

To,

1. M/s ABG Shipyard Limited,
   Near Magdall Port,
   Dumas Road, Surat – 395 007.

2. Shri Sundaresh Bhat,
   Liquidator of ABG Shipyard Limited,
   BDO Restructuring Advisory LLP, Level 9,
   The Ruby, North West Wing, Senapati Bapat Marg,
   Dadar (W), Mumbai – 400 028.

3. V. Lakshmikumaran, Consultant,
   334-B, (3rd floor), SAKAR-VII,
   Nehru Bridge Corner, Ashram Road,
   Ahmedabad – 380 009.

Copy to:

1. Commissioner of Central Excise & CGST, Surat Commissionerate, New Central Excise Building, Chowk Bazaar, Surat 395001.
2. The Commissioner (Appeals), Central Excise, Customs & Service Tax (Appeals-I), Vadodara, Appeals –II.
3. Sr. P.S. to AS (RA), Mumbai.
4. Notice Board.