F.No.198/130 - 141/18-RA
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GOVERNMENT OF INDIA
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Mumbai- 400 005

F. No.198/130 - 141/18-RA /4685
F. No.198/142 -148/18-RA

Date of Issue: 11.10.2022

ORDER NO.959-977/2022-CX (WZ)/ASRA/MUMBAI DATED 10.10.2022 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 : Principal Commissioner of Central Excise, Customs and Service Tax, Daman Commissionerate, 2nd Floor, Honey's Landmark, Above HDFC Bank, Vapi Daman Road, Vapi, District –Valsad, Gujarat – 396 191.

Respondents : Essel Propack Ltd.,
Survey No. 121/P,
Village-Amli, Vapi Main Road, Silvassa

Subject : Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal Nos. CCESA-SRT(APP)-AT-026 to 037-2017-18 and CCESA-SRT(APP)-AT-038 to 044-2017-18 both dated 26.03.2018, passed by the Commissioner, Central Excise & Goods & Service Tax, Vadodara-II.

ORDER

The subject 19 Revision Applications have been filed by the Department (here-in-after referred to as 'the applicant') against the Orders-in-Appeal Nos CCESA –SRT(APP)-AT-026 to 037 – 2017-18 and CCESA – SRT(APP)-AT-038 to 044 – 2017-18 both dated 26-03-2018 passed by the Commissioner, Central Excise & Goods & Service Tax, Vadodara-II which decided appeals filed by the applicant against the Orders-in-Original Nos 1012 to 1023/AC/SLV-IV/Rebate dated 19-08-2016 and 1179 to 1185/AC/SLV-IV/Rebate dated 30.09.2016 passed by the Assistant Commissioner of Central Excise, Customs & Service Tax, Division – IV, Silvassa which sanctioned the Rebate claims filed by M/s Essel Propack Ltd, Survey No. 121/P, Village Amli, Vapi Main Road, Silvassa (here-in-after referred to as 'the respondents') for rebate of duty paid amounting to Rs.49,19,494/- and Rs.27,43,348/- on clearances to a unit in the KASEZ, Kutch.

2. Government notes that the issue involved, the findings and decision of the Commissioner (Appeals) in the both the aforesaid Orders-in-Appeal and the submissions of the applicant-Department in the subject Revision Applications in both the cases are identical and hence takes up the Revision Applications filed against the same for decision together.

3. Brief facts of the case are that the respondent claimed rebate of duty paid on goods cleared to a unit in the KASEZ, Kutch under Rule 18 of the Central Excise Rules, 2002 and the same was sanctioned by the original authority. Aggrieved, the Department filed appeals against the said Orders-in-Original before the Commissioner (Appeals) on the grounds that notification no.06/2015-CE (NT) dated 01.03.2015 and notification no.08/2015-CE (NT) dated 01.03.2015 amended Rule 5 of the Cenvat Credit Rules, 2004 and Rule 18 of the Central Excise Rules, 2002, respectively, to the effect that 'export' meant 'taking out of India to a place outside India' and 'export goods' meant 'any goods which are taken out of India to a place outside India' and hence the goods cleared to a KASEZ being 'deemed export' and such goods not having been physically exported out of India, the claims for rebate would be hit by the doctrine of unjust enrichment in terms of Section 11B of the Central Excise Act, 1944. The applicant placed reliance

on the judgment of the Hon'ble Supreme Court in the case of UOI vs Essar Steel Limited [2010 (255) ELT A115 (SC)] in support of their case.

4. The Commissioner (Appeals) vide OIA Nos CCESA –SRT(APP)-AT-026 to 037 – 2017-18 and CCESA –SRT(APP)-AT-038 to 044 – 2017-18 both dtd. 26-03-2018 held that Board has clarified vide Circular No.1001/8/2015-CX-8 dated 28-04-2015 that SEZ is deemed to be outside the Customs Territory of India and the clearance of goods from SEZ to DTA are to be considered as export and entitled for benefit under Rule 18 of CER, 2002. Hence the question of unjust enrichment does not arise at all in terms of proviso (a) to Section 11 B (2) of Central Excise Act, 1944. Therefore Commissioner (Appeals) rejected the appeals filed by the department and upheld the Orders-in Original passed by the original authority.

5. Aggrieved, the applicant Department has filed the present Revision Applications against the impugned Orders-in-Appeal on the following grounds:-

(a) The appeal filed by the Revenue before the Commissioner (Appeals) against the OIA was on the grounds that the "unjust enrichment" clause as mentioned in Section 11B of the CEA, 1944 is not applicable only to exports where the goods have been physically taken out of India and a place outside India. Deemed exports to SEZ, a territory outside the Customs territory of India is not a place outside India. Provision (a) of section 11B (2) of the CEA, 1944 reads as under:

"*Provided that the amount of duty of excise 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."

Deemed export to SEZ is not a place out of India.

(b) The appellate authority while allowing the appeal of the respondent has erred in arriving at a finding that the clause of unjust enrichment is not

required to be examined by treating SEZ export as physical export. The exemption of non-application of doctrine of unjust enrichment in terms of Section 11B of CEA, 1944 is only for the exports which are physically exported outside India but not to deemed exports made to SEZ in view of the Notification No. 06/2015-CE(NT) dated 01.03.2015, in Rule 5 (Cenvat Credit Rules 2004), in explanation 1, after clause (1) the following clause shall be inserted, namely:

'(1A) export goods means any goods which are to be taken out of India to a place outside India"

Further, vide notification no. 08/2015-CE (NT) dated 01.03.2015 the following explanation in the definition of export has been inserted in Rule 18 of CER, 2002:

"Explanation for the purpose of this rule, "export" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India and includes shipment of goods as provision or stores for use on board a ship proceeding to a foreign port or supplied to foreign going aircraft".

(c) Further, the holistic reading of the Apex Court judgment in Union of India vs. Essar Steel Ltd., reported in 2010 (255) ELT A115 (S.C.) categorically entails that the export/clearance made to SEZ unit is not a physical export in terms of the definition of export as defined in the Customs Act, 1962 & SEZ Act. Therefore refund/ rebate available in terms of Central Excise Rules cannot escape the scrutiny of unjust enrichment provisions under Section 11B of the Central Excise Act, 1944.

(d) For the purposes of Rule 5 of the CENVAT Credit Rules, 2004, the meaning of 'export' has to be derived from the Central Excise Act, 1944 and the Customs Act, 1962 and accordingly 'exports' would not be anything other than taking goods out of India'.

(e) The term 'export' used in Rule 5 of the CENVAT Credit Rules, 2004 is to be understood in its ordinary and natural sense i.e. taking goods physically out of India to a place outside India'. This legal position is clear

from the Explanation to Rule 18 of the Central Excise Rules, 2002, which reads:

'export includes goods shipped as provision or stores for use onboard a ship proceeding to a foreign port or supplied to a foreign-going aircraft.'

(f) The relevant provisions of the SEZ Act and the SEZ Rules are meant for the benefit of SEZ unit. The benefits available to a DTA unit supplying raw materials or capital goods to SEZ units are limited to the extent specified under para 7.9 of the Foreign Trade Policy;

(g) Neither SEZ Act nor the Rules make any express provision for refund of accumulated (unutilized) CENVAT Credit under Rule 5 of the CENVAT Credit Rules, 2004 and therefore, the benefit of Rule 5 will not be available to a DTA supplier supplying goods to a SEZ unit or developer:

(h) The Board's Circular No 29/06-Cus dated 27.12.2006 did not touch Rule 5 of the CENVAT Credit Rules, 2004;

(i) In the case of Essar Steels Ltd vs Union of India 2010 (249) ELT 3 (Guj), the Hon'ble High Court, after considering the various provisions of the SEZ Act and the SEZ Rules, held that export duty could not be levied under the Customs Act in respect of goods supplied by a DTA unit to SEZ unit. For purposes of levy of such duty, the export should be physical export out of the country. In the present case, the supply of goods by the respondent to SEZ units was only a 'deemed export within the meaning of this expression as expounded by the Hon'ble Madras High Court in the case of BAPL Industries Ltd vs Union of India 2007 (211) ELT 23 (Mad).

(j) The term 'export' used in Rule 5 of the CENVAT Credit Rules, 2004 stands for 'export, which is 'physical export' out of the country, envisaged under the Customs Act. Anybody other than SEZ unit cannot be allowed to claim any benefit under the SEZ Act/Rules.

(k) On a perusal of the provisions of the SEZ Act, it is clear that a special statute enacted by Parliament to benefit manufacturing units in Special

Economic Zones. It is a special legislation which is intended to benefit such units only. The various provisions of the SEZ Act are to be considered as vehicles which convey such benefits to SEZ units. The definition of the term export given under Section 2 (m) of the SEZ Act and the various related provisions of the Act have to be considered in this perspective. Undisputedly, the definition 'export given under Section 2 (m) (ii) of the SEZ Act is a deeming provision inasmuch as it purports to designate as 'export' a transaction which is not recognized as export under the Customs Act. Section 2 (18) of the Customs Act defines 'export' thus:

'export' with its grammatical variations and cognate expressions, means taking out of India to a place outside India;'

(l) Any export' as defined under Section 2 of the SEZ Act purports to be an export by that unit just as an 'import' as defined under the Act purports to be an import by the same unit. One should not be misled by the deeming provisions. It has to be borne in mind that, if the supply of goods by DTA unit to SEZ unit is considered to be an export by the DTA unit, then it should be an import by the SEZ unit. But the definition of import under Section 2(o) of the SEZ Act does not recognize the transaction to be an import for the SEZ unit. On the other hand, the transaction squarely falls within the definition of 'export' under Section 2 (m). It is an export for the SEZ unit. All the deeming provisions of the SEZ Act and the Rules framed there under cumulatively aim at granting benefits to SEZ units. None of these provisions can be construed as having been enacted to confer benefits on any DTA unit.

(m) In view of the above it was submitted that that the impugned Order-in-Appeal is not correct, legal and proper and need to be set aside holding that the issue of unjust enrichment is applicable on rebate granted on supply to SEZ in terms of Section 11B(2)(a) of Central Excise Act, 1944.

6. Personal hearing dates were given on 27-10-2021, 03-11-2021, 18-11-2021, 25-11-2021 and 16-12-2021. However, no one appeared before the

Revisionary Authority for personal hearing on any of the appointed dates. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

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

8. Government finds that the issue involved in the present case is whether the clearances by a unit in the DTA to a unit in the SEZ would fall in the category of exports and whether the claim for rebate of duty paid on such clearances would be hit by the doctrine of unjust enrichment. Government finds that the contention of the applicant Department before the Commissioner (Appeals) and in the subject Revision Application as well, is that clearances to SEZ is 'deemed export' and cannot be equated with clearances wherein goods are physically exported out of India and as a corollary the exclusion provided by Section 11(B)(2) of the Central Excise Act, 1944 would not be applicable to clearances to SEZ and hence the rebate of duty paid on such clearances would be subject to the doctrine of unjust enrichment.

9. Government finds that the facts and the legal position of the impugned case has been disposed by the Government of India in an identical case wherein department had filed appeal against M/s Hylite Cables Private Limited. The Revisionary Authority vide Order No.773/2022-CX (WZ)/ASRA/Mumbai dated 22.08.2022, rejected the department's appeal with the following findings/ observations:-

> *"Government finds that the Commissioner (Appeals) had relied on the decision of the Larger Bench of the Hon'ble Tribunal in the case of Sai Wardha Power Limited vs CCE, Nagpur [2015-TIOL-2823-CESTAT-MUM-LB] to reject the contention of the Department and hold that supplies from DTA to SEZ are to be treated as export outside the territory of India and would not be hit by the doctrine of unjust enrichment as provided for by Section 11(B)(2) of the Central Excise Act, 1944.*
>
> *9. Government finds that the Larger Bench of the Hon'ble Tribunal vide the decision cited supra, decided whether appeals*

against orders passed by the Commissioner (Appeals) relating to rebate on goods supplied to SEZ would lie before it or not. The relevant portion of the Central Excise Act, 1944 which was the bone of contention in the case before the Tribunal, viz. Clause (b) of the first proviso to Section 35B(1) of the Central Excise Act, 1944 is reproduced below:-

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

(a).....

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

A reading of the above proviso indicates that appeals in cases relating to rebate of duty of excise on goods exported to a territory outside India would not lie before the Tribunal. The dispute arose as the Department contended that clearances to an SEZ would not qualify as 'export to a territory outside India' and were hence not covered by the above proviso which in turn meant that the appeals in such cases would lie before the Tribunal. The Larger Bench of the Hon'ble Tribunal in the above cited decision has extensively discussed the issue, relevant portions of which have been reproduced by the Commissioner (A) in the impugned Order-in-Appeal, to find that clearances from DTA to SEZ fell in the category of 'export' mentioned at Clause (b) of the proviso to Section 35B(1) of the Central Excise Act, 1944 and thus arrived at the conclusion that in respect of rebate on goods supplied from DTA to SEZ within India, the appeals would not lie to the Appellate Tribunal under clause (b) of the proviso to Section 35B(1) of the Central Excise Act, 1944. Given the above decision of the Larger Bench of the Hon'ble Tribunal, Government does not find any fault with the decision of the Commissioner (A) to hold that supplies from DTA to SEZ are to be treated as export outside the territory of India.

10. Further, on analyzing the SEZ Act, 2005, 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. As discussed above, similar view has been expressed by the Larger Bench of the Hon'ble Tribunal in the decision relied upon by the Commissioner (Appeals).

11. Government notes that the applicant Department has sought to place reliance on several judgments wherein it was held that 'export duty' would not be leviable on the goods supplied from DTA to SEZ as there was no movement of goods from India to a place outside India. Government finds that Hon'ble Tribunal in the case of Sai Wardha Power Limited, cited above, had considered this issue and had found that the above conclusion arrived at by the High Court was for the reason that 'export duty' was sought to be levied by incorporating the taxable event under one statute to another statute, which was impermissible by law. The Hon'ble Tribunal having found so, held that the said judgment was made in a different context and hence would not apply to the case before them. As discussed earlier, in the present case the issue of whether the clearances from the DTA to the SEZ would amount to export to a territory beyond the Customs territory of India has been found to be in favor of the respondent as per the provisions of the SEZ Act, 2005 itself and is hence different from the facts of the cases on which the applicant has relied upon. Government finds that the situation in the instant case is similar to the case distinguished by the Hon'ble Tribunal and hence holds that the cases cited by the Department, being in a different context, will not be applicable to the instant case.

12. Government notes that, as indicated by the Departmental appeal before the Commissioner (Appeals), the issue stems from the amendments to Rule 5 of the Cenvat Credit Rules, 2004 and Rule 18 of the Central Excise Rules, 2002 made by notification no.06/2015-CE (NT) dated 01.03.2015 and notification no.08/2015-CE (NT) dated 01.03.2015, respectively, to the effect that 'export' meant 'taking out of India to a place outside India' and 'export goods' meant 'any goods which are taken out of India to a place outside India', respectively. The ambiguity caused by these amendments was put to rest by the Board vide its Circular No.1001/8/2015-CX dated 28.04.2015 wherein it was clarified that that the said amendments were only to make the definition more 'explicit' and conveyed that the position clarified by its earlier circulars dated 27.12.2006 and 19.03.2010 would not

change. Relevant portion of the said Circular is reproduced below:-

"Since SEZ is deemed to be outside the Customs territory of India, any licit clearances of goods to an SEZ from the DTA will continue to be export and therefore be entitled to the benefit of rebate under rule 18 of CER, 2002 and of refund of accumulated CENVAT credit under rule 5 of the CCR, 2004, as the case may be."

A reading of the above makes it abundantly clear that the Board has clarified that clearances from the DTA to SEZ will continue to be treated as export to a place outside the Customs territory of India and that the benefit of rebate under Rule 18 of the Central Excise Rules, 2002 will be available on such clearances. In this context, Government notes that any amendment must be construed with regard to the object and purpose it seeks to achieve. In this case the Board vide the above circular has clarified that the objective of the said amendment was to merely to make more explicit the existing position and that there was no change in the grant of rebate as explained vide its earlier Circulars. Given the above, Government finds the contention of the applicant Department that the position had changed subsequent to the above amendments to be ill founded, erroneous and hence rejects the same.

13. As regards the issue of 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 in the preceding paras that the clearances by the respondent to the SEZ will be treated as export to a place outside the territory of India. Given the above, Government finds that there is no doubt that the doctrine of unjust enrichment will not apply to the rebate claims filed by the respondent with respect to their clearances to a unit in the SEZ and accordingly holds so.

14. Government finds that the contentions raised by the applicant Department in the subject Revision Application to be incorrect, against the provisions of the laws governing the issue on hand and also to be against the basic maxim of the legislation governing clearances to a SEZ. It cannot be denied that the purpose for which the SEZs were created was to encourage exports and not to export the duties and taxes, a position unequivocally reinforced by the Board vide its Circular dated 28.04.2015 referred above.

15. In view of the above, Government does not find any infirmity in the impugned Order-in-Appeal dated 18.06.2016 and upholds the same. The subject Revision Application is rejected."

10. Government notes that the findings and decision arrived at in the above cited case is squarely applicable to the instant case too. Government also finds that submissions made by the applicant Department in the subject cases have been addressed by the findings reproduced above. Given the above, Government does not find any fault with the decision of the Commissioner (A), in the instant cases, to hold that supplies from DTA to SEZ are to be treated as export outside the territory of India and that the

doctrine of unjust enrichment will not apply to the rebate claims filed by the respondents with respect to their clearances to a unit in the SEZ and accordingly holds so.

11. In view of the above, Government does not find any infirmity in the impugned Orders-in-Appeal viz Nos CCESA –SRT(APP)-AT-026 to 037 – 2017-18 and CCESA –SRT(APP)-AT-038 to 044 – 2017-18 both dated 26-03-2018 and upholds the same. The subject Revision Applications are rejected.

10/10/22

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

ORDER No. 959-977/2022-CX (WZ) /ASRA/Mumbai dated 10.10.2022

To

The Commissioner of CGST,
2nd Floor, Hani's Landmark,
Vapi-Daman Road, Chala,
Vapi-396191

Copy to:

1. M/s Essel Propack Ltd., Survey No. 121/P, Village-Amli, Vapi Main Road, Silvassa-396230.
2. The Commissioner (Appeals), Vadodara-II, Central GST Building, Shubhanpura, Vadodara-390023.
3. Sr. P.S. to AS (RA), Mumbai.
4. Notice Board