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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.198/57/16-RA 1737 Date of issue: 13.10.22

ORDER NO. 979/2022-CX (WZ)/ASRA/MUMBAI DATED 12.10.2022 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, Vadodara-II.

Respondent : M/s. Roy Enterprise

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. VAD-EXCUS-002-APP-468/2015-16, dated 20.01.2016, passed by the Commissioner (Appeals – I), Central Excise, Customs & Service Tax, Vadodara.

ORDER

The subject Revision Application has been filed by the Department (here-in-after referred to as 'the applicant Department') against the Order-in-Appeal No. VAD-EXCUS-002-APP-468/2015-16, dated 20.01.2016, passed by the Commissioner (Appeals – I), Central Excise, Customs & Service Tax, Vadodara.

2. Brief facts of the case are that M/s. Roy Enterprise, C-1B/150, GIDC, POR-Ramangamdi, Dist. Vadodara – 391 243 (hereinafter referred to as 'the respondent') claimed rebate of duty paid on goods cleared to a unit in the SEZ under Rule 18 of the Central Excise Rules, 2002 and the same was sanctioned by the original authority vide Order-in-Original No. Reb/Roy/373-374/15-16 dated 24.09.2015. Aggrieved, the applicant Department filed appeal 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 SEZ 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. However, the Commissioner (Appeals) rejected the appeal and upheld the Order-in-Original passed by the original authority.

3. Aggrieved, the applicant Department has filed the present Revision Application against the impugned Order-in-Appeal mainly on the following grounds:-

a) The Commissioner (Appeals) has erred in distinguishing the Hon'ble Apex Court and the High Court judgment in the case of UOI vs Essar Steel Limited [2010 (255) ELT A-115 (SC)] by relying upon decision of the Hon'ble CESTAT in the case of M/s Sai Wardha Power Limited vs

CCE, Nagpur [2015 TIOL-2823-CESTAT-MUM-LB]; that from the above cited judgments it could be inferred that SEZ is not to be treated outside India for the purpose of examining rebate/refund claims from the unjust enrichment point of view in terms of Section 11B(2) of the Central Excise Act, 1944;

b) The Commissioner (A) had erroneously relied upon Circular 1001/8/2015/CX-8 dated 28.04.2015 issued by CBEC, which stated that since SEZ was deemed to be outside Customs territory of India, any licit clearance of goods from DTA to SEZ would continue to be treated as export and would be entitled for rebate; that the Commissioner (A) had held that supply from DTA to SEZ are export outside territory of India without commenting on whether unjust enrichment would be applicable to such cases or otherwise; that Commissioner (A) had failed to recognize that the eligibility of rebate and applicability of unjust enrichment doctrine to an issue are different things and mere grant of rebate did not exempt rebate from doctrine of unjust enrichment; that there was no CBEC circular which says that proviso to Section 11(B)(2)(a) will not be applicable to clearance from DTA to SEZ;

c) The Commissioner (A) erred in relying upon CESTAT Larger Bench decision in case of M/s Sai Wardha Power Ltd. Vs. CCE Nagpur [2015 TIOL-2823-CESTAT-MUM-LB] as the issue before the Larger Bench was whether appeal in case of rebate of goods supplied to SEZ will lie before CESTAT or not; that the issue before the Larger Bench was not whether unjust enrichment issue will be applicable or otherwise for supply of goods from DTA to SEZ; that the Commissioner (A) had erroneously concluded that doctrine of unjust enrichment would be exempted in the subject case; that the Commissioner (A) failed to recognize the fact that entitlement for rebate of goods supplied from DTA to SEZ (to be treated outside customs territory of India), ipso facto did not translate into exemption of unjust enrichment when proviso to Section 11B(2)(a) of the Central Excise Act, 1944;

d) The Commissioner (A) relied upon Order of J.S. (RA) in case of M/s Essel Propack reported as [2014 (134) 946 (GOI)] wherein it was held that rebate was admissible when goods are supplied to SEZ and that the Department has not challenged the admissibility of rebate to the goods supplied from DTA to SEZ. The challenge of the Department in the present case before Commissioner (A) was that that adjudicating authority had not examined the issue of unjust enrichment; that the

export to SEZ was required to be examined from unjust enrichment point of view due to Section 12B of the Act and if not hit, required to be granted to the claimant and if hit to be credited to the consumer welfare fund and hence, reference to order of J.S. (R.A) in case of M/s Essel Propack was erroneous;

e) The Commissioner (A) has erred in concluding that since rebate was allowable for supply from DTA to SEZ, the issue of unjust enrichment did not arise and held that words physical export and deemed export are of colloquial usage and not sanctified by legal approval; Commissioner (A) has incorrectly concluded that "physical export" and "deemed export" are terms of colloquial usage and have no legal approval; that these words have been defined as follows:
"Deemed export" is defined in Foreign Trade Policy (PTP) 2015-20 of Govt. of India at Para 7.01 as those transactions in which goods supplied do not leave country and payment for supplies is received in India's rupees or in free foreign exchange";

"Physical export: the term physical export is same as export as defined in Explanation to Rule 18 of Central Excise Rules, 2002, which reads "export and its grammatical variations & cognate expression means taking goods out of India to a place outside India....."

That it was clear from the above that the Commissioner (A) had erred in coming to conclusion that "physical export" and "deemed export" are of colloquial usage terms and there is no distinction between them and there is no legal sanction for these terms; and hence the conclusion drawn by Commissioner (Appeals) that unjust enrichment did not apply in the instant case is erroneous; that unjust enrichment is exempted when the excisable goods are 'exported' out of India and not merely 'treated' or 'deemed' to be exported out of India;

f) Commissioner (A) had concluded that SEZ is outside India on the basis of decision of Larger Bench of Tribunal in case of M/s Sai Wardha Power and M/s Essel Steel Propack Ltd and such conclusion was invalid, fallacious and untrue for the following reasons:-

(i) The AAR in the case of MAS-GMR Aerospace Engineering Company Limited, while deciding whether maintenance & repair services carried out in SEZ will be exempted from service Tax as SEZ is to be regarded as a territory outside Customs Territory India for the authorized operations, held that if SEZ were really deemed to be

territory outside India there was apparently no need for such expansive list of exemptions and concessions and there would be not need to exempt the goods from Customs & Excise duties; that under Indian Laws when such goods were intended to be supplied to foreign lands, consequently all enactments whether relating to fiscal levies, labour laws, banking laws or any other law which apply to territory of India apply in equal measure to the notified areas of special economic zone as well; that if a particular law is applied to SEZs with modification (the Income Tax Act, 1961 applied to SEZ under Section 27 of the SEZ Act) it cannot lead to an inference that other laws have no application to SEZ; that all central laws apply to SEZ with modification or exceptions, if any, as provided in the SEZ Act itself or in Rules made there under. In view of the above, the AAR concluded that maintenance & repair services would therefore be treated as performed within the territory of India; that that since SEZ was not outside India the maintenance & repair services provided by the applicant could not be considered as export of taxable services under Export of Services Rules, 2005;

(ii) The Hon'ble High Court of Madras in case of Advait Steel Rolling Mills Pvt. Ltd. [2012(286) ELT 535 (Mad)] had referred to definition of export under SEZ Act, 2005 wherein it states "export" inter alia means supplying goods, or providing services from DTA to a unit or developer" and that definition of export under Section 2(16) of Customs Act, 1962 could not be made applicable for levies of duty of customs on goods supplied from DTA to SEZ as there is no movement of goods from India to place outside India, export duty cannot be levied; and that movement of goods from DTA to SEZ, there was no movement of goods from India to a place outside India;

(iii) The Hon'ble Karnataka High Court in case of M/s. Shyamaraju & Co (India) Pvt. Ltds [2010 (256) ELT 193 (Kar)] on the issue whether export duty would be leviable on Iron & Steel products made liable for export duty for goods supplied to SEZ held that if SEZ were to be treated as being outside India there was no necessity to exempt imports & exports from SEZ under Section 26 of SEZ Act, 2005; that movement to SEZ is treated as exports under SEZ Act 2005 only by legal fiction for making available benefits as in case of actual exports and that no export duty was payable for supply by DTA to SEZ; that SEZ further laid down that DTA procurement should be tax free and

that in view the above, it can be inferred that SEZ be treated outside India only by legal fiction; that similar decision was given by the Hon'ble High Court in the case of Biocon Limited [2011(267) ELT 28 (Kar)]. It was further submitted that Hon'ble High Court of Gujarat in the case of M/s Essar Steel Limited reported as [2010 (249) ELT 3 (Guj)] in a similar case had held that Section 53(1) of the SEZ Act, 2005 deeming SEZ as outside customs territory for undertaking authorized operation and Custom territory could not equated with territory India and that this decision was maintained by the Hon'ble Supreme Court [2010 (255) 115(SC)].

In view of the above it was submitted that the above decisions it could be inferred that SEZ was not to be treated outside India for the purpose of examining rebate/refund claims from an unjust enrichment point of view as stated in Section 12B read with Section 11B(2)(a) of the Central Excise Act, 1944; that the proviso to Section 11B(2)(a) of the Central Excise Act, 1944 does not recognize legal fiction and hence in the subject case though rebate is admissible and has been granted, the unjust enrichment angle was also to be examined as there was a distinct and manifest possibility that DTA supplier will recover duty from the customers as well as rebate leading to open abuse of law by way of dual enrichment if rebate/refund claims are not examined from unjust enrichment angle;

(g) Reference was made to the judgment by the Hon'ble Supreme Court in the case of M/s Mafatlal Industries Ltd Vs U.O.I [1997 (89) ELT 247 (SC)] wherein it was held that all claims of refund, except where levy is held to be unconstitutional, was to be preferred and adjudicated upon under Section 11B of Central Excise Act, 1944 and that refund of duty either under Central Excise Act, in a civil suit, or a writ petition should be granted only when it is established that burden of duty has not been passed to others and that the person ultimately bearing the burden of duty could legitimately claim its refund otherwise the amount to be retained by the state.

(h) 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.

4. Several personal hearing opportunities were given to the applicant viz. 17.06.2022, 01.07.2022, 20.07.2022, and 27.07.2022. However, the applicant-Department/respondent did not attend on any date nor have they sent any written communication.

4.1 Since sufficient opportunities have already been given in the matter, the same is therefore taken up for decision based on available records.

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

6. 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 the 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. 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.

7. 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.

8. 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).

9. 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.

10. 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.

11. 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 absolutely no doubt that the doctrine of unjust enrichment will not apply to the rebate claims filed by the applicant with respect to their clearances to a unit in the SEZ and accordingly holds so.

12. 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.

13. In view of the discussions and findings recorded above, Government does not find any infirmity in the impugned Order-in-Appeal No. VAD-EXCUS-002-APP-468/2015-16, dated 20.01.2016, passed by the Commissioner (Appeals – I), Central Excise, Customs & Service Tax, Vadodara and upholds the same. The subject Revision Application is rejected.

12/10/22

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

ORDER No. 979/2022-CX (WZ) /ASRA/Mumbai dated 12.10.2022

To

The Principal Commissioner of CGST & Central Excise,
1st Floor, New Central Excise Building, Subhanpura, Vadodara – 390 023.

Copy to:

1. M/s. Roy Enterprise,
   C-1B/150, GIDC,
   POR-Ramangamdi,
   Dist. Vadodara – 391 243.

2. Sr. P.S. to AS (RA), Mumbai.
3. Notice Board