SPEED POST

F. No. 195/64/SZ/2018-RA
F. No. 195/133/SZ/2019-RA
F. No. 195/272/SZ/2019-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 25/04/23

Order No. 82-84/2023-CX dated 25-04-2023 of the Government of India, passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 35 EE of the Central Excise Act, 1944.

Subject	:	Revision Applications, filed under section 35 EE of the Central Excise Act, 1944, against the Orders-in-Appeal No. 20/2017-18(Audit-I) dated 08.02.2018, No. 677/2018(CXA-II) dated 28.12.2018 & No. 216/2019(CTA-II) dated 29.06.2019, passed by the Commissioner of GST & Central Excise (Appeals-II), Chennai.
Applicant	:	M/s IGP Engineers Pvt. Ltd., Kanchipuram.
Respondent	:	The Commissioner of CGST, Chennai South.

ORDER

Revision Applications, bearing Nos. 195/64/SZ/2018-RA dated 15.05.2018, 195/133/SZ/2019-RA dated 25.04.2019 & 195/272/SZ/2019-RA dated 24.10.2019, have been filed by M/s IGP Engineers Pvt. Ltd., Kanchipuram (hereinafter referred to as the Applicant) against the Orders-in-Appeal No. 20/2017-18(Audit-I) dated 08.02.2018, No. 677/2018(CXA-II) dated 28.12.2018 & No. 216/2019(CTA-II) dated 29.06.2019 , passed by the Commissioner of GST & Central Excise (Appeals-II), Chennai. The Commissioner (Appeals) has, vide impugned Order-in-Appeal dated 15.05.2018, upheld the Order-in-Original No. 85/2016 dated 30.12.2016 passed by the Assistant Commissioner of Central Excise, Tambaram Division of the then Central Excise Commissionerate-Chennai IV. The Commissioner (Appeals) has, vide impugned Order-in-Appeal dated 28.12.2018, rejected the appeal filed by the Applicants herein against the Order-in-Original No. 09/2018 dated 18.06.2018 passed by the Assistant Commissioner of Central Excise, Perungudi Division of the CGST Commissionerate, Chennai (South). Whereas, vide impugned Order-in-Appeal No. 216/2019(CTA-II) dated 29.06.2019, the Commissioner (Appeals) has allowed the departmental appeal filed against the aforesaid Order-in-Original No. 09/2018 dated 18.06.2018.

2. Briefly stated, the Applicants herein are manufacturers of industrial gaskets falling under CETH 84849000 of the Central Excise Tariff Act, 1985. Case wise details are as under:

(i). **RA No. 195/64/SZ/2018-RA**: During the scrutiny of accounts of the Applicants by the Audit Group of the department, it was found that the Applicants had written off export sales to the tune of Rs.35,94,874/-, in their financial records, for the period from April, 2015 to September, 2015 as the exported goods were rejected by their foreign buyers. During this period, the Applicants wrote off an amount of Rs. 3,42,184/- on which they had claimed a rebate of Rs. 42,294/- while they wrote off an amount of Rs. 32,52,690/- in respect of goods exported without payment of duty under LUT. Duty

involved in exports under LUT was Rs. 4,03,108/-. It, therefore, appeared that the Applicants herein had contravened the provisions of Rule 18 of the Central Excise Rules, 2002 read with notification no. 19/2004-CE(NT) dated 06.09.2004, Rule 19 of the Central Excise Rules, 2002 read with notification no. 42/2001-CE(NT) dated 26.10.2001 and Para 2.25.4 of Handbook of Procedure- Vol. I of Foreign Trade Policy. Accordingly, the Applicants were issued a SCN dated 21.04.2016 for recovery of Rs. 42,294/- (being erroneous rebate) and Rs. 4,03,108/- (being the Central Excise duty involved on goods cleared without payment of duty). After due process of law, the original authority confirmed both demands alongwith the applicable interest. An equal amount of penalty was also imposed. Aggrieved, the Applicants herein preferred an appeal with the Appellate authority who held that if the exporter fails to submit the BRC within the stipulated time period, the benefits availed by them should be recovered and, accordingly, upheld the Order passed by the original authority.

(ii). **RA No. 195/133/SZ/2019-RA**: During the scrutiny of accounts of the Applicants by the Audit Group of the department, it was found that the Applicants had written off export sales to the tune of Rs.2,39,47,930/- in their financial records, for the period from October, 2012 to March, 2017 on the ground that the exported goods were rejected by their foreign buyers. During this period, the Applicants wrote off an amount of Rs. 35,58,671/- on which they had claimed a rebate of Rs. 4,08,343/- while they wrote off an amount of Rs. 2,03,89,259/- in respect of goods exported without payment of duty under LUT. Duty involved in exports under LUT was Rs. 22,22,912/-. Accordingly, the Applicants were issued a SCN dated 03.11.2017 for recovery of Rs. 4,08,343/- (being erroneous rebate) and Rs. 22,22,912/- (being the Central Excise duty involved on goods cleared without payment of duty). After due process of law, the original authority vide Order-in-Original No. 09/2018 dated 18.06.2018, confirmed both demands alongwith the applicable interest. However, the original authority refrained from imposing any penalty. Aggrieved, the Applicant herein preferred an appeal before the Appellate authority, which was rejected.

(iii) **RA No. 195/272/SZ/2019-RA**: As the original authority had not imposed any penalty, vide the Order-in-Original No. 09/2018 dated 18.06.2018, the Respondent department too preferred an appeal against the said OIO before the Commissioner (Appeals). The Commissioner (Appeals) while allowing the departmental appeal recorded that the Respondent (Applicant herein) had not disclosed the fact of rejection of the export export by their overseas customers in their statutory documents and, thus, invoking of suppression under Section 11A(4) of the Central Excise Act,1944 is in order. Accordingly, imposition of equal penalty is sustainable

3. The Revision Applications have been filed by the Applicants herein, mainly, on the grounds that in terms of the RBI Master Circular, they are entitled to self-write off upto 10% of the total exports; that in terms of Rule 19 of the Central Excise Rules, 2002 or the notifications issued thereunder, there is no requirement of any realization of export proceed; that in terms of the said rule, the only requirement is to establish that the goods cleared from the factory have been physically exported out of India and nothing else; that under Rule 18 of the Central Excise Rules, 2002 or the notification issued thereunder, the Applicant was required to establish that they had paid duty on such clearances for export which has been established by them alongwith the fact that such goods have been exported physically out of India; that surrender of export incentive referred to in the Master Circular No. 14/2013-14 dated 01.07.2013 of RBI is applicable only to the export incentive provided under the FTP where realization of export proceeds has been mandated as a condition and prescribed explicitly and that there was no malafide intention on Applicant's part nor the applicant had suppressed any information from the department with intent to evade payment of duty and, as such, invocation of extended period is not sustainable at all. Revision application dated 24.10.2019 has been filed by the Applicants herein, mainly, on the grounds that the appeal filed by the department is beyond the time limit; that there was no suppression of facts involved as they were not required to disclose overseas buyer's rejection in the returns filed by them and that penalty proposed by the

department is under incorrect provision and Appellate Authority's view of imposing penalty is not sustainable.

4. Personal hearing, in virtual mode, was held on 24.04.2023. Ms. Pallavi Ganesh, Advocate appeared for the Applicants and submitted that an identical matter for previous period has been decided by the Government in their favour vide G.O.I Order No. 30/2023-CX dated 18.01.2023. She further stated that in respect of RA No. 195/133/SZ/19 there is no delay in filing. No one appeared for the department nor any request for adjournment has been received. Therefore, it is presumed that the department has nothing to add in the matter.

5.1 The Government has carefully examined the matter. In this case, the Commissioner (Appeals) has held that rebate already sanctioned and paid has been erroneously paid/refunded to the extent the export proceeds were not realized. Similarly the demand of duty foregone on the goods exported, by following the procedure under Rule 19 ibid, has been confirmed, wherever the export proceeds have not been realised. Admittedly, in both cases, export proceeds could not be realized as the exported goods were rejected by the foreign buyer of the Applicant. However, it is also not in dispute that the goods in both the cases were exported physically out of India. Therefore, the question that arises for consideration is whether a rebate claim sanctioned in terms of Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) can be held to have been erroneously paid/refunded and the duty foregone on exports under LUT in terms of Rule 19 of the Central Excise Rules, 2002 read with Notification No. 42/2001-CE(NT) can be demanded, if export proceeds are not realized. It has been correctly pointed out that identical issues have been decided in the Applicant's own case, for earlier period vide GOI Order No. 30/2023-CX dated 18.01.2023. In the said Order dated 18.01.2023, the matter has been decided in favour of the Applicants on the basis of the reasons which are recapitulated hereinafter.

5.2.1 As per Rule 18 ibid, where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification. Notification No. 19/2004-CE(NT) dated 06.09.2004 has been, accordingly, issued prescribing the 'conditions and limitations' as well as the 'procedure' for grant of rebate. The said notification dated 06.09.2004 does not prescribe realisation of export proceeds and submission of BRC to evidence the same as a condition for sanction of rebate claim. In the present case, the appellate authority has proceeded on a premise that the Applicant herein have availed the benefit of rebate claim and the amount was sanctioned and paid to them on a bonafide belief that they will submit the BRC within the stipulated time , but after availing the benefits , they have not submitted the BRC, hence, the rebate amount availed by the Applicants herein are rightly recoverable. However, the Government observes that there is nothing in either Rule 18 or the notification dated 06.09.2004 to read the realisation of export proceeds and submission of BRC as a condition for grant of rebate, including a post-facto condition. The Government observes that the judgment of Hon'ble Allahabad High Court, in the case of Jubilant Life Sciences Ltd. vs. UOI. {2016 (341) ELT 44 (All)}, supports this view. Further, the Government has also taken similar view earlier in several cases, including in the case of Salasar Techno Engineering Pvt. Ltd.{2018 (364) ELT 1164 (GOI), Order No. 66/2021-CX dated 31.03.2021 in the case of M/s Taurus Agile Technology Pvt. Ltd., New Delhi and Order No. 15-21/2023-CX dated 05.01.2023 in the case of M/s Unilever India Exports Ltd., Bengaluru etc.

5.2.2 In respect of demand of duty issued to the Applicants in respect of goods exported under LUT, in terms of Rule 19 of the Central Excise Rules, 2002 read with notification no. 42/2001 –CE(NT) dated 26.06.2011, the appellate authority has similarly recorded that that the Applicants herein have failed to submit the BRC and, hence, the duty not paid on exported goods is correctly recoverable. However, it is observed that neither Rule 19 nor the notification dated 26.06.2021 prescribe the realization of export proceeds as a

condition (prior or post- export) for duty free export of goods under LUT. Therefore, even in this case, order passed by the Commissioner (Appeals) is without any legal basis.

5.2.3 The appellate authority while rejecting the appeal filed by the Applicant herein, has found merit in Respondent department's contention that before self- writing off the export sales in their financial records, the Applicants herein should have surrendered the duty exemption benefit availed by them and also should have surrendered the rebate claim sanctioned and paid to them, when they could not realize the foreign exchange, as per RBI Master Circular No. 14/2013-14 dated 01.07.2013. However, Government finds that in absence of any condition to this effect in Rule 18/Rule 19 and the relevant notifications, the rebate sanctioned/ duty foregone cannot be sought to be recovered only on the basis of executive instructions [Ref. Polyplex Corporation Ltd.{2014 (306) ELT 24 (All.)}]. Further, para C.20 of the said Master Circular requires the AD Bank to ensure compliance in this regard. There is no role assigned to the Central Excise authorities in enforcing the requirement of the Master Circular. The department, therefore, if aggrieved could have approached the AD Bank/RBI instead of taking action sou-motu in the matter.

5.3 In Order-in-Appeal No. 677/2018(CXA-II) dated 28.12.2018, the Commissioner (Appeals) has relied upon the decision of Hon'ble Madras High Court in the case of UOI vs. Maars Software International {2017 (354) ELT 593 (Mad)} in support of his findings. The Government observes that the said case relates to action to be taken under the Foreign Exchange Management Act, in the eventuality of non-realisation of export proceeds. Further, the said decision of Hon'ble Madras High Court has been set aside by the Hon'ble Apex Court vide its judgment reported in 2019 (366) ELT 598 (SC). It would also be relevant to highlight here that in the case of Drawback of duties, specific provisions have been made in Section 75 of the Customs Act and the Rules framed thereunder for recovery of drawback paid, if the export proceeds are not realized. Such provisions are conspicuous by their absence under Rule 18/Rule 19 of the Central Excise Rules, 2002 or the notifications dated 06.09.2004 issued thereunder.

5.4 Since the case for recovery of rebate sanctioned/duty foregone itself cannot be sustained, the penalty also cannot be imposed.

5.5 In view of the above, the Government holds that the Orders-in-Appeal impugned herein cannot be sustained.

6. The Revision Applications are, accordingly, allowed.

(Sandeep Prakash)
Additional Secretary to the Government of India

M/s IGP Engineers Pvt. Ltd.,
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G.O.I. Order No. 82-84/23-CX dated 25-4-2023

Copy to:

1. The Commissioner of Central Goods & Services Tax (South), Chennai, 692, M.H.U. Complex, Anna Salai, Nandanam, Chennai-600035.
2. The Commissioner of Central Goods & Services Tax (Appeals-II), Chennai, Plot no-2054, Block-I, Newry Towers (2nd floor), 12th Main road, 2nd Avenue, Anna Nagar, Chennai-600040.
3. M/s Swamy Associates, Rams flats, New No.18, Ashoka Avenue, Directors Colony, Kodambakkam, Chennai-600024.
4. PPS to AS(RA)
5. Guard file.
6. Spare Copy.
7. Notice Board.

ATTESTED

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