- CBX - Rajkot -

Govt. of India
Office of the Commissioner of Central Excise
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F. No. V/15-04/Dem/HQ/2011-12

Date of Order: 30/01/2012
Date of Issue: 10/02/2012

Passed by

IMAMUDDIN AHMED
Joint Commissioner
Central Excise
Bhavnagar

Order-in-Original No: 12/BVR/Jt. Commr/2012

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Any person(s) deeming himself aggrieved by this Order may appeal against this order to the Commissioner Central Excise (Appeals), Rajkot, Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 within 60 days from the date of its communication. The appeal should bear a court fee stamp of Rs 2.50/- paise only.

The appeal should be filed in form EA 1 in duplicate, as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeal) Rules, 2002.

- It should be accompanied with the following:
- Copy of appeal in duplicate

Copies of the order, one of which shall be certified copy **OR** the other must bear a court fee stamp of Rs 2.50/- paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

BY R.P.A.D.

To,
M/s. Raghuvanshi Refractories,
Plot No. 330, G.I.D.C. Ind. Estate,
Porbandar – 360 577

Subject: - Show Cause Notice Number F. No. V/15-91/Dem/HQ/2008 dated 29.11.2011 demanding Central Excise duty totally amounting to Rs. 13,74,249/-.

BRIEF FACTS OF THIS CASE

1. M/s. Raghuvanshi Refractories, G.I.D.C. Porbandar (hereinafter referred to as the Noticee No.1) are manufacturer of excisable goods viz., Cartable Refractory falling under CETH 38160000 of the first schedule to the Central Excise Tariff Act, 1985 and holder of C.Ex. Registration No.AACFR4923RXM001. They also avail Cenvat credit on inputs and capital goods under Cenvat Credit Rules, 2004 and clearing their finished product for home consumption on payment of Central Excise duty as well as for export under Bond/LUT without payment of duty.

1.1 The Noticee No.1 had cleared the goods namely Refractory Castable WHYTHEAT-K from their factory without payment of duty under cover of different ARE-1s duly signed by them only for direct export under LUT F. No. V/30-34/MP/UT-1/06 dated 29.12.2006 accepted by the Assistant Commissioner, Central Excise, Junagadh in terms of Rule 19 of Central Excise Rules 2002 read with Notification No. 42/2001-CE(NT) dated 26.06.2001 as amended. The details of such clearances were shown in Annexure-A attached to the show cause notice.

1.2 During the course of scrutiny of proof of export documents in respect of ARE-1s mentioned in Annexure-A attached to the show cause notice with the monthly statement in form Annexure-19 for the month of April 2007 & May 2007 filed by the Noticee No.1, it was revealed from the copy of the S/Bills that the name of exporter was M/s. Lindsay International Pvt. Ltd. Kolkata (W.B.). Thus it was revealed from the proof of export produced by the Noticee No.1 that they were not the actual exporter of the goods though cleared by them for direct export under LUT without payment of duty under cover of ARE-1s. Hence a letter dated 23.07.2007 was issued by the Superintendent of Central Excise, AR-II, Porbandar asking the Noticee No.1 to pay up Central Excise duty determined by them in each of the above ARE-1s considering all such removal of goods from the factory as clearances for Home Consumption and not for export. The Assistant Commissioner C.Ex., Junagadh also took up the matter with the Noticee No.1 vide their letter dated 23.07.2007 asking the assessee to clarify the matter or to pay up appropriate Central Excise duty leviable on the goods exported vide aforesaid ARE-1s.

1.3 It was further observed that the Noticee No.1 filed an explanation vide letter dated 20.09.2007 in which they admitted that according to the instructions of their Franchisee M/s. ACE Refractory (hereinafter referred to as Noticee No.2), they had cleared the goods from their factory without payment of duty under LUT and under cover of ARE-1s for the purpose of Export to M/s. Mittal Steel, Anabas, Algeria through merchant exporter M/s Lindsay International (hereinafter referred to as Noticee No. 3). Thus, they admitted procedural lapse but contested payment of duty for the clearance of export goods on the basis of decisions of the Appellate authority. On further verification of the relevant invoices as mentioned by the Noticee No.1 in each of the ARE-1s, it was found

that all the relevant retail invoices were issued to the Noticee No.2 as buyer and the name of consignee was shown as M/s. Mital Steel, Anabas, Algeria. Thus it appeared that the Noticee No. 1 sold the goods in a Domestic Market without payment of duty to Noticee No. 2 who exported these goods through their Merchant Exporter (Noticee No.3). Certain other documents which were called for from the Noticee No. 1 by the jurisdictional Superintendent vide letter dated 09.03.2009 were provided by the Noticee No.1 vide their letter dated 16.03.2009. On scrutiny of the said documents, it was revealed that (1) all the transport receipts issued by M/s. Balkrishna Transport Company Porbandar for removal of goods from Porbandar to Mundra were showing the name of the consignor as M/s. ACE Ref. Ltd., (Noticee No.2) and the name of consignee as M/s. Mital Steel, Annaba C/o. Bright Shiptrans Pvt. Ltd., Mundra port, Mundra; (2) the Noticee No.1 had received total payment of Rs. 83,63,928/- on different dates through cheques from Noticee No.2 towards all invoices relevant to the ARE-1s. and they could not supply the Bank Realization Certificate which proved that clearance of these goods were nothing but sale in domestic market; (3) All the Shipping Bills and Bills of Lading showed the Exporter's name as M/s. Lindsay International Pvt. Ltd., Kolkata (W.B.).

1.4 Thus, it was clearly revealed from the documents submitted by Noticee No. 1 as proof of export that the goods were cleared in the guise of export against Letter of Undertaking furnished by Noticee No. 1 and accepted by the Assistant Commissioner of Central Excise, Junagadh. Further, it appeared that the Noticee No.1 had cleared the said goods to domestic buyer without payment of duty under cover of ARE-1s on the strength of LUT furnished by them whereas the goods were actually exported by Noticee No.3. Thus the Noticee No.1 had suppressed the facts from the department and as such, Central Excise duty & Cess on goods cleared without payment of duty was liable to be recovered by invoking extended period as contemplated under proviso to Section 11A of the Central Excise Act 1944. It further appeared that the Noticee No. 1 had cleared the goods in violation of Notification No. 42/2001-CE(NT) dated 26.06.2001 read with Rule 19 of Central Excise Rules 2002 and thereby committed an offence as described in clauses (a) & (d) of Rule 25(1) of the said Rules with intent to evade the payment of Central Excise duty. Therefore, Noticee No. 1 were liable to penalty under rule 25(1) of the Central Excise Rules 2002 read with Section 11AC of the Act for suppression of facts and contravention of various provisions of the Act and the Rules with intend to evade payment of duty.

1.5 Noticee No.2 and Noticee No.3 acquired the possession of excisable goods described in ARE-1s as per Annexure-A attached to the show cause notice, which were removed without payment of Central Excise duty in the guise of export in contravention of the provisions of rule 19 of Central Excise Rules 2002 read with Notification No. 42/2001-CE(N.T.) dated 26.06.2001 as amended and they had reasons to believe that these goods were liable to confiscation under sub-rule (a) & (d) of rule 25(1) of Central

Excise Rules 2002 and thereby rendered themselves liable for penalty under rule 26 of Central Excise Rules 2002.

1.6 In view of the aforesaid facts, the Show Cause Notice F. No. V/15-91/Dem/HQ/2008 dated 29.11.2011 was issued by the Jt. Commissioner, Central Excise, Bhavnagar asking the Noticees to show cause within 30 days from the receipt of notice as to why Central Excise duty totally amounting to Rs. 13,74,249/- (Cenvat Rs. 13,38,240/- + Ed. Cess Rs.39,355/- + S. & H. Ed. Cess Rs. 6654/-) should not be levied and recovered from Noticee No.1 as per the provisions of rule 4, 5, & 8 of Central Excise Rules, 2002 along with interest recoverable from them under Section 11AB of the Central Excise Act, 1944 and also proposing penalty under Rule 25 of Central Excise Rules, 2002 to be imposed on Noticee No. 1 and under Rule 26 of the Central Excise Rules, 2002 to be imposed on M/s. ACE Refractories (Noticee No. 2) and M/s. Lindsay International (Noticee No. 3).

DEFENCE AND PERSONAL HEARING

2. The Personal hearing was fixed on 12/13.01.2012 but the Noticee requested for adjournment. Accordingly, the date of personal hearing was re-fixed for 23.01.2012. Meanwhile, the Noticee No.1 filed their defense reply vide letter F. No. SCN/ Export/RR/PBR/2011 dated 05.01.2012 stating that the allegations made in the show cause notice are not agreeable / acceptable for the following reasons :-

(i) It is an open fact and they does not deny that the goods were exported by them under cover of ARE-1s and on the strength of Letter of Undertaking which is accepted by the Assistant Commissioner of C.Ex, Junagadh under the export procedure as prescribed under rule 19 of C.Ex, Rules,2002. They also stated that according to the instructions of their Franchisee M/s. ACE Refractory, They had cleared the goods from their factory without payment of duty under LUT and under cover of ARE-1s for the purpose of Export to M/s. Mittal Steel, Anabas, Algeria through merchant exporter M/s Lindsay International.

(ii) In view of the above facts, it was very clear that the excisable goods were exported under cover of LUT (duly accepted by the department) and ARE-1 and invoices from the factory and from port to Algeria under cover of S/bill.. The goods were exported to foreign buyers and necessary proof of export had also been furnished. It further appeared that there is only a procedural lapse of executing Bonds. The procedural lapse can be considered as technical lapse and it cannot come within the eligibility of benefit of export scheme. In support of their contention, they relied upon following judgements :

(1) The Judgment pronounced by Honorable Commissioner Appeal, Chandigrah reproduced in ELT 2006(197)ELT0437 (Commr. Appeal) in case of M/s. Drish Shoes Ltd. wherein it has been held that Bond/LUT is a collateral security to ensure not only payment of duty on case of non export of goods cleared without payment of duty but also

of other statutory provisions/rules and has significance till the goods are within the territory of India. Once the goods are exported out of the country and proof of exports in the nature of ARE-1, Shipping Bill / Bill of lading etc. are on records then the role of Bond/LUT is complete and has no further significance. Hence once the export established, the filing or non-filing of Bond/LUT has no significance.

(2) The Govt. of India in case of M/s. Modern Process Printers , Bangalore have decided Revision application filed against Order-in-Appeal No. 130/2004-C.E. dated 21.10.2004 and No. 135/04 dt.25.10.2004 passed by the Commissioner Appeal Bangalore. (reproduced in 2005(11)LCX0303 Equivalent 2006(204)ELT-0632(G.O.I.)

(3) The Hon. Tribunal-Kolkata in the case of M/s. Ajay Industdries-2007(217)ELT.244.(Tri.- Kolkata) have dismissed the Revenue's appeal and held that Demand and penalty – Export - goods consigned through merchant exporter – law prescribing procedure for compliance in respect of export in it's initial stage – procedural lapse on the part of assesses – Matter does not call for looking into the aspect as to whether goods in question were same or different and whether there was any differential duty chargeable – Order of Commissioner (Appeals) only on the point of procedural lapse on the part of the assesses which is found to be exonerated – Revenue's appeal dismissed – Section 11A and 11AC of Central Excise Act, 1944.

(iii) As regards allegations for suppression of facts from the department that the Noticee have cleared the goods to domestic buyer without payment of duty under cover of ARE-1s and LUT furnished against goods exported by M/s. Lindsay International Pvt; Ltd; Kolkatta- a merchant-exporter, they stated that the exporter's name is clearly mentioned in Shipping bills presented by them for export of goods which were also produced along with proof of export furnished from time to time and hence the department had knowledge of the aforesaid facts and therefore there is no question of suppression of facts as alleged in SCN. Since there remains no suppression, no penalty can be imposed under Section 11AC of the Act. In the present case, investigation was started in July 2007 and completed in Sept. 2007 even though the department took time for issue of SCN for more than two years. Since there is no suppression of the facts, the duty demanded for extended period will not stand as the demand is time barred under the limitation of law. The duty demanded was for the period from December 2006 to April 2007 whereas the show cause notice was issued on 29.11.2011 which was received by them on 09.12.2011 therefore it is issued beyond one year time. In support of this, they quoted following judgments and stated that SCN is not maintainable and deserves to be dropped and they would like to avail the opportunity of personal hearing:

(1) Hon'ble CESTAT Bangalore in the case of Lovely food Indu. V/s. Commissioner Cochin reported in 2006(195)ELT-0090 held that the department took 3 years time to issue the SCN, the appeals are allowed by grant of benefit of time bare U/s. 11.

(2) Hon'ble CESTET Chennai in the case of M/s, Ratan Steel works & Anr. V/s. Commissioner C. Ex. Chennai reported in 2009(236)ELT-0152 held that the

investigations for the clandestine removal completed in April 1997 whereas SCN issued in August-2008 and as such the demand barred by limitations. In respect of demand and penalty set aside.

3. Shri A. M. Nakum Consultant and Shri M. J. Mankodi Excise Officer and Authorised Representative of Noticee No.1 appeared for Personal Hearing fixed on 23.01.2012 and produced a further written submission dated 23.01.2012 and reiterated the same with request to decide the case accordingly. The Noticee in their further submissions vide letter dated 23.01.2012 produced during the course of personal hearing, reiterated their written submissions made vide letter dated 05.01.2012 with relied upon judgments and further relied upon and quoted para 62 in Chapter 9 of EXIM policy 2004-2009 relating to third party export which reads as under :

"Third-party exports" means exports made by an exporter or manufacturer on behalf of another exporter(s). In such cases, export documents such as shipping bills etc shall indicate the name of both the manufacturing exporter/manufacturer and third party exporter(s). The BRC, GR declaration, export order and the invoice should be in the name of the third party exporter". In support of their contention, they relied upon the following judgments and produced copy of the same:-

(1) The Judgment pronounced by Honourable Commissioner Appeal , Chandigrah reproduced in ELT 2006(197)ELT0437 (Commr. Appl) in case of M/s.Drish Shoes Ltd. (discussed in para 2(ii) above)

(2) The Gov.of India in case of M/s. Modern Process Printers , Bangalore have decided Revision application filed against Order-in- Appeal No.130/2004-C.E. dated 21.10.2004 and No.135/04 dt.25.10.2004 passed by the Commr.Appeal Bangalore. (reproduced in 2005(11)LCX0303 Equivalent 2006(204)ELT-0632(G.O.I.). (discussed in para 2(ii) above)

(3) Hon. Tribunal-Kolkatta in the case of M/s. Ajay Industdries-2007 (217) ELT.244.(Tri.- Kolkatta). (discussed in para 2(ii) above)

(4) In the case of SALZER CONTROLS LTD. Versus COMMISSIONER OF C. EX., CHENNAI, 2003 (160) E.L.T. 1169 (Tri. - Chennai), it has been held that job worker taking Modvat credit on the goods manufactured and removed by them to the merchant exporter without executing a bond in terms of Rule 57F(4)(iii) of the erstwhile Central Excise Rules, 1944 – Non-execution of bond is only a procedural lapse and such violation will not disentitle the appellant from taking Modvat credit (para 11).

(5) The Govt. of India in Revision application in the case filed by M/s. Nilkamal Ltd., reported in ELT 2011(271)ELT-0476(G.O.I.) have held that Goods exported under the supervision of the Central excise officer after stuffing them in the Container & loading the Containers as per the condition of the permission letter dated 17-7-2002 of the jurisdictional Assistant Commissioner. Applicant has not followed the procedure as prescribed in the Notification No. 43/2001-C.E. (N.T.), dated 26-6-2001. No ambiguity

regarding the identity and export of the said goods to the satisfaction of the Central Excise and Customs officers. These are Catena of judgment of various judicial forums including reversionary authority wherein it has consistently been held that the substantial benefit to exporter should not be denied due to procedural/technical lapses especially when there is no dispute regarding the actual export of the duty paid goods. Appeal of assessee allowed. (Paras. 6, 7, 8).

(6) Hon'ble CESTAT Bangalore in the case in the case of Commissioner Bangalore V/s. Shree Pla Pvt. Ltd. reported in 2010(03)LCX0263 have held that Goods have been cleared by Assessee in said case under ARE-1 with the permission of lower Revenue authorities. ARE-1s were warehoused as per endorsement of recipient of ARE-1. Indicate that goods cleared from factory premises of Assessee reached the SEZ which considered as an export. Imposition of penalty under Rule 27 for not following the procedure correct and does not require any interference. Order of Commissioner (Appeals) correct and legal and does not suffer from any infirmity. Appeal of the Revenue rejected. (Para 6).

(7) In the case of WELL KNOWN POLYESTERS LTD. Versus COMMISSIONER OF C. EX., VAPI 2011 (267) E.L.T. 221 (Tri.-Ahmd.), it was held that Refund of Cenvat credit - Exempted goods exported without bond or LUT by unit not having Central Excise Registration - HELD : Execution of bond/LUT was only procedural lapse for which refund of Cenvat credit could not be denied - It was more so as there was no dispute about export, availability of relevant documents and use of inputs - Records indicated that Central Excise Officers had verified availment of Cenvat credit, intention to avail credit and registration not obtained due to clerical error - Also, it was assessee who suffered loss by delaying registration and not exporting under bond - Rule 5 of Cenvat Credit Rules, 2004. [paras 6, 7]

(8) Hon, CESTAT Bangalore in the case of Lovely food Ind; V/s. Commr. Cochin reported in 2006(195)ELT 0090 (Tri.Bang.)have held that the department took 3 years time to issue the SCN, the appeals are allowed by grant of benefit of time bare U/S.11, Appeal allowed.

4. Shri P. G. Verghese, General Manager (Finance & Accounts) and authorized signatory of Noticee No. 2 appeared for Personal Hearing fixed on 12.01.2012 and produced a written reply to the SCN vide letter dated 10.01.2012 and requested to produce additional submissions and accordingly next date of P.H. was fixed for 23.01.2012. In the said written reply, they interlia stated that the allegations made in the SCN are not sustainable for the following reasons :

(1) They got the goods manufactured from Noticee No.1 for the purpose of exports through merchant exporter Noticee No. 3. The Noticee No. 1 after manufacture of goods prepared relevant invoices, ARE-1s and other export documents and cleared the goods on the strength of LUT under impression that even for the purpose of export

through merchant exporter, the goods can be exported on the basis of LUT. Therefore the goods were consigned to merchant exporter Noticee No. 3.

(2) The alleged violation of Central Excise Rules and law has come to the knowledge of the officers only when Noticee No. 1 present proof of export to their jurisdictional authorities. In the normal course of business a manufacturer can execute a bond in case where the goods are exported through merchant exporter and thus undertakes duty liability in case the goods are not exported within the stipulated time. In the present case it was only minor procedural lapse that Noticee No. 1 instead of executing bond cleared the goods on the basis of LUT. However, it is an undisputed fact that this lapse came to the notice of the department only when Noticee No. 1 present proof of export to their jurisdictional authorities.

(3) The execution of Bond or LUT or clearance of goods against CT 1 Certificate is only procedural in nature and to safe guard the duty in case the goods are not exported. However in the instant case, it is an undisputed fact that the goods cleared on the basis of LUT were ultimately exported and there is no dispute about the same. Thus once the goods has been ultimately exported, there cannot be any duty demand from Noticee No.1 and imposition of penalty upon both of them.

(4) There are catena of judgments on the issues wherein it has been held that where the goods were exported without execution of bond and there are other procedural lapses but ultimately the goods were exported, there cannot be any duty demand and penalty. Some of the judgments are as under :

(i) In the case of W ELL KNOWN POLYESTERS LTD. Versus COMMISSIONER OF C. EX., VAPI 2011 (267) E.L.T. 221 (Tri.-Ahmd.), it was held that Refund of Cenvat credit - Exempted goods exported without bond or LUT by unit not having Central Excise Registration - HELD : Execution of bond/LUT was only procedural lapse for which refund of Cenvat credit could not be denied - It was more so as there was no dispute about export, availability of relevant documents and use of inputs - Records indicated that Central Excise Officers had verified availment of Cenvat credit, intention to avail credit and registration not obtained due to clerical error - Also, it was assessee who suffered loss by delaying registration and not exporting under bond - Rule 5 of Cenvat Credit Rules, 2004. [paras 6, 7]

(ii) In the case of SALZER CONTROLS LTD. Versus COMMISSIONER OF C. EX., CHENNAI, 2003 (160) E.L.T. 1169 (Tri. - Chennai), it has been held that job worker taking Modvat credit on the goods manufactured and removed by them to the merchant exporter without executing a bond in terms of Rule 57F(4)(iii) of the erstwhile Central Excise Rules, 1944 – Non-execution of bond is only a procedural lapse and such violation will not disentitle the appellant from taking Modvat credit (para 11).

(iii) The Judgment pronounced by Honourable Commissioner Appeal, Chandigrah reproduced in ELT 2006(197)ELT0437 (Commr. Appeal) in case of M/s.Drish Shoes Ltd. wherein it has been held that Bond/LUT is a collateral security to ensure not only payment of duty on case of non export of goods cleared without payment of duty but also of other statutory provisions/rules and has significance till the goods are

within the territory of India. Once the goods are exported out of the country and proof of exports in the nature of ARE-1, Shipping Bill / Bill of lading etc. are on records then the role of Bond/LUT is complete and has no further significance. Hence once the export established, the filing or non-filing of Bond/LUT has no significance.

(iv) The Govt. of India in case of M/s. Modern Process Printers, Bangalore have decided Revision application filed against Order-in-Appeal No. 130/2004-C.E. dated 21.10.2004 and No. 135/04 dt.25.10.2004 passed by the Commissioner Appeal Bangalore. (reproduced in 2005(11)LCX0303 Equivalent 2006(204)ELT-632(G.O.I.) holding that admittedly the applicant have not filed declaration as per para 1 of Notification No. 42/2001-CE(NT) issued under rule 18 of the Central Excise Rules 2001 but have filed declaration in terms of para 1 of Notification No. 42/94-CE(NT) issued under erstwhile rule 12(i)(b) of the Central Excise Rules 1944 and the Assistant Commissioner of Central Excise, Bangalore-I Division, has granted permission under the said rules. The core aspect of fundamental requirement for rebate is its manufacturer and subsequent export. As long as this requirement is met, other procedural deviations can be condoned.

(v) The Hon. Tribunal-Kolkatta in the case of M/s. Ajay Industdries-2007(217)ELT.244.(Tri.- Kolkatta) have dismissed the Revenue's appeal and held that Demand and penalty – Export - goods consigned through merchant exporter – law prescribing procedure for compliance in respect of export in it's initial stage – procedural lapse on the part of assesses – Matter does not call for looking into the aspect as to whether goods in question were same or different and whether there was any differential duty chargeable – Order of Commissioner (Appeals) only on the point of procedural lapse on the part of the assesses which is found to be exonerated – Revenue's appeal dismissed – Section 11A and 11AC of Central Excise Act, 1944.

(5) They are themselves registered exporter and in case of export of goods they are permitted to export the goods without payment of duty by executing bond without furnishing any security. Thus it cannot be said that they had any involvement in clearance of goods by Noticee No. 1 on the basis of LUT. They had no malafide intention and had no role to clear the goods on the basis of LUT. The SCN had not discussed their any role in the alleged violation. Merely for the reason that they had order for export goods, penalty cannot be imposed upon them. When they had no malafide intention to evade payment of duty and even the alleged lapses are only procedural lapses and the goods has been exported which is apparent from the proof of export i.e. shipping bills, ARE-1 and other documents which are undisputed, in that case no penalty should be imposed upon them. When they had no mens rea or malafide intention, then the imposition of penalty is against the principles of natural justice.

(6) From the reading of rule 26, it becomes abundantly clear that knowledge on the part of the person against whom the provisions of rule 26 are invoked is one of the essential ingredients. In the instant case as may be seen from the facts of the case, there are no reasons to allege the deliberate or conscious act on their part in the alleged evasion of duty. For imposition of penalty upon them under rule 26, it is necessary to

establish that there is mens rea on their part. No such onus in the instant case has been discharged by the department. Therefore no penalty can be imposed upon them and they relied upon following judgments in support of their contention:

(a) Kavia Carbons Versus Commissioner of Customs, Tuticorin- 2009 (243) ELT (547) (Tri. Chennai) : Held – Penalty – Imposition of – No allegation in SCN regarding involvement of appellant company in removing the declared goods enroute by stuffing red sanders by way of concealment – Penalty not imposable on appellant company – Section 114(i) of Customs Act, 1962. (para 2).

(b) Vivek Joshi Versis Commr. of Cus.(Imports), Nhava Sheva, Mumbai-2004(178)ELT(526)(Tri. Mumbai) : Held – Penalty – Imposition of – Order not giving reasons or indicating acts/omissions of import manager which made goods liable to confiscation – Penalty set aside – Section 112(a) of Customs Act, 1962 [Para 3(c)].

In view of the above judgments it is absolutely clear that since they has merely acted as buyer of goods and has not involved themselves in any deliberate act or knowingly involved themselves in alleged violation of law, therefore no penalty can be imposed upon them and the impugned SCN deserve to be dropped..

4.1. Shri P. G. Verghese, General Manager (Finance & Accounts) and authorized signatory of Noticee No. 2 again appeared for Personal Hearing fixed on 23.01.2012 and produced further written submission vide letter dated 23.01.2012 and reiterated the same. He further requested that since there was only a procedural mistake on the part of the main Noticee, penalty proposed under rule 26 of Central Excise Rules, 2002 may please be dropped.

4.2. In further written submission, they submitted that from the facts narrated in the SCN, it can be seen that their role was limited to purchase of goods from Noticee No. 1 and to export the said goods which were ultimately exported. Since the goods were to be exported, there is no duty liability. In the whole SCN there is no ground or reason to allege that they had any malafide intention to evade payment of duty or had any reason to so nor there is any allegation that they had any knowledge of clearance of goods by Noticee No. 1 under LUT. Even they could not have been benefited in any way by alleged violation. The extended period of limitation is invokable only in case where a person has tried to suppress the facts which he was legally bound to disclose or he has not shown/misstated any facts with the intention of fraud or collusion in order to evade any duty. They got the goods manufactured from Noticee No.1 for the purpose of export through Noticee No. 3 . The Noticee No. 1 after manufacture of goods prepared relevant invoices, ARE-1s and other export documents and cleared the goods on the strength of LUT and presented proof of export to their jurisdictional authorities. Thus there is nothing in the present case which can show that they had any intention to hide any fact from the department or any intention to evade payment of duty. Hence no charge of suppression of facts, willful misstatement, fraud, collusion is established. In absence of any of the said ingredients on their part, the demand by invoking extended period of limitation under Section 11A cannot be made. Therefore the demands were

wrongly made by invoking the extended period. The demands are patently time barred and liable to be dropped. They relied upon following judgments in support of their submission and stated that the proposals made in the SCN by invoking extended period of limitation is not legal and not sustainable and deserves to be set aside on the grounds of time bar.

(i) In the case of Collector of Central Excise Vs. Chemphar Drugs & Liniments 1989(40)ELT(276)(SC) it was held – In order to make a demand under Section 11A of Central Excise & Salt Act for beyond a period of six months and up to a period of 5 years some thing positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required to be established. Where department had full knowledge about the facts and the manufacturer's action or inaction is based on their belief that they were required or not required to carry out such action or inaction, the period beyond six months cannot be made applicable.

(ii) Created Industries Versus Commissioner of Customs(Prev.), Mumbai 2003 (160) ELT (826) (Tri. Mumbai): Held – EXIM Policy – DEPB Scheme – Demand – Customs – Limitation – Suppression of facts alleged without bringing out as to what facts were suppressed - Goods were cleared under Section 47 of the Customs Act, 1962 and the Commissioner not dealt with the defence – Neither the notice nor the order gives any detail as to when the department came to know about the sale of consignment to non-existing firms – Demand time barred – Section 28 ibid - In this case, sale of consignment imported under passbook scheme, to non-existing firms alleged. Appellant contended that extended period not invokable since the consignments were cleared under Section 47 ibid and they were entitled to benefit of Notification No. 117/88-Cus. (para 5).

(iii) Padmini Products Versus Collector of C. Ex. 1989 (43)ELT 195 (SC) : Held – Demand – Limitation – Extended period of 5 years inapplicable for mere failure or negligence of the manufacturer to take out licence or pay duty when there was scope for doubt that goods were not dutiable – Dutiability of goods in doubt because of Trade notices – Scope of fraud, collusion, willful mis-statement or suppression of facts or contravention of rules with intent to evade duty – Rule 9(2) of Central Excise Rules, 1944 and Section 11A of the Central Excise and Salt Act, 1944.

5. Shri S. K. Dey, Sr. Managar Logistic & authorized signatory of Noticee No, 3 appeared for personal hearing fixed on 23.01.2012 and produced written reply to the SCN along with documentary evidences to show that goods have been exported. He reiterated the written submission and requested to drop proposed penalty under rule 26 of Central Excise Rules, 2002 upon them.

5.1. In the written submission, Noticee No. 3 submitted that it is clear from the reading of SCN that the penalty sought to be imposed upon them on the sole and whole ground of alleged offence committed by Noticee No. 1 while removing their goods to Noticee

No. 2 contravening provisions of Rule 19 of CER 2002 read with condition laid down under Notification No. 42/2001-CE(NT) dated 26.06.2001. But the fallacy of the proposal for imposition of penalty upon them in the SCN and the casual manner is exposed from the fact that in relation of export goods under question, the transaction with Noticee No. 2 are only be considered which have got no bearing or nexus with transactions made in between Noticee No. 1 and Noticee No. 2. It is distressing to point out that the proposal of imposition of penalty upon them under Rule 26 of the said rules has been made in the SCN, little or not appreciating the fact that they were not in anyway concerned with Noticee No. 1. It is astonishing that the Ld. Framer of the SCN has chosen to saddle them with penalty as a person who has encouraged/assisted the alleged offence committed by Noticee No. 1 whose activities were not at all known and concerned with them nor the chronological case history vis-à-vis the allegation speak itself. Since the goods were admittedly exported out of India and consideration there against has also been duly received by them in freely convertible foreign currency and also since the entire transactions in effecting the export of goods were in between them and Noticee No. 2, there would be no question of any penalty on them for alleged lapse on the part of Noticee No. 1, if there be any at all. It is significant to note that the name & address of Noticee No. 2 from whom the goods were procured for export, have duly been recorded in their export invoice and packing list as supporting manufacturer. In the present case, their activities if held to be encouraging a manufacturer-assessee in indulging Statutory Provisions, then apart from the fact that such assessee has no relation with them would amount to discouraging of all efforts being made by merchant exporters resulted earning foreign exchange. The impugned goods were not "prohibited goods" within the meaning of Section 2(33) of the Customs Act, 1962.

5.2. The Noticee No. 3 further submitted that without entering any controversy in relation to non fulfillment of condition of Rule 19 of said rules read with Notification No. 42/2001-CE(NT) dated 26.06.2001 on the part of Noticee No. 1, exports are vital for our country and any stoppage in export consignement means loss of export orders to the exporter as well as loss of foreign exchange to our country. Thus, the movement of export cargo, except prohibitory and contravened goods will not be interrupted. It has been constitently held by various legal authorities as also Government of India in catena of reported decisions interalia, that the benefit of export of goods extended with an aim to boost export in order to promote exports by Exporter to earn more foreign exchange for the country and in case the substantive fact of export is not in doubt, liberal interpretation is to be accorded in case of technical lapse, if any; in order not to defeat the very purpose of any export benefit. It is now a trite law that the procedural infraction of notification/Rule etc. is to be condoned if export has really taken placer and the law is settled by now that the substantive benefit of export can not be denied for procedural lapses. The core aspects or fundamental requirement for export benefit is on the goods manufactured for export and subsequent actual exportation thereof. In other words, if the substantive fact of actual export is not disputed, Government feels that denial of export

relief of sole ground of technical infractions is not justified in as much as the entire Indirect Taxing system is framed with an objective of not exporting the duties/and or taxes levied in India to outside India. They relied upon the following decisions among others in support of their contention:

(i) IN RE; RELIANCE INDUSTRIES LTD. [2012(275)ELT 277(GOI)]

(ii) **WELL KNOWN POLYESTERS LTD. Versus COMMISSIONER OF C. EX., VAPI 2011 (267) E.L.T. 221 (Tri. - Ahmd.)**

(iii) **SALZER CONTROLS LTD. Versus COMMISSIONER OF C. EX., CHENNAI, 2003 (160) E.L.T. 1169 (Tri. - Chennai)**

(iv) IN RE: DROSH SHOES LTD. [2006(197) ELT 437 (Commr. Appeal)]

(v) IN RE; MODERN PROCESS PRINTERS [2006(204) ELT 632 (GOI)]

(vi) CCE vs. AJAY INDUSTRIES [2007(217) ELT 244 (Tri. Kolkata)]

(vii) Eves Fashions vs. CCE [2006(205) ELT 619 (Tri. Del.)]

(viii) IN RE: Cotfab Exports [2006(205) ELT 1027 (GOI)]

(ix) CCE vs. Krishna Traders [2007(216) ELT 379 (Tri. Kolkata)]

(x) Lakshmi Automatic Loom Works Ltd. vs. CCE [2011(268) ELT 508 (Tri. Chennai)]

Ratio of the above discussions when applied with the allegation made in the SCN for imposing penalty on them, the following are crystallized:

(a) The SCN, on the face of it, is not sustainable having been proceeded on the basis of extraneous and irrelevant considerations, clearly in contrary to the facts and in law.

(b) The discrepancy on the part of Noticee No. 1 can not necessarily lead to any such adverse inferences as contained in the SCN as to enable the department to impose penalty upon them under Rule 26 of the said Rules.

(c) The sole ground of the alleged contravention by Noticee No. 1 can not be made any legal basis for taking serious action against them. This threatening having been made against a genuine law binding merchant exporter, earning substantial amount of foreign currency by effecting export of goods to various countries, may adversely affect export clearances. Such proposed action is not only against legislative intent to encourage export of goods for earning of foreign exchange, very much needed by our country for import of goods specially crude petroleum oil but also may disturb in getting Orders raised by their Group Companies situated abroad for export of goods from India.

5.3. The Noticee No.3 further stated that in order to impose penalty, pre-requisite condition that they had physically dealt with the said goods in any manner specified or contemplated under Rule 26 of the said Rules has to be proved beyond doubt, onus of which lies on the Revenue. The sine qua non for a penalty on any person under Rule 26 of the said Rules is that either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the said Act or the said Rules or he has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief. Acquisition of possession of goods is, indisputably, a physical act, and so in each of the various ways of dealing with goods,

specifically mentioned therein. The expression 'in any other manner" should be understood in accordance with the principle of ejusdem generis and would, then, mean 'any other mode of physical dealing with the goods'. Therefore, any person to be penalized under Rule 26 of the Rules ibid, should also be shown to have been concerned in physically dealing with excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act / Rules ibid. He should have done the act with mens rea. In other words, a penalty under Rule 26 of the Rules ibid, could be validly imposed on any person only if it was found, on the basis of reliable evidence, that he had physically dealt with any excisable goods, knowing or believing that the goods were liable to confiscation under the Act ibid or Rules ibid. This issue is well settled by Hon'ble Tribunal in a catena of decisions thereby no longer res-integra, some of which are cited below :

(i) STANDARD PENCILS PVT. LTD. VS. CCE [1996(86) ELT 245 (Tri.)]

(ii) S.R. FOILS LTD. VS. CCE [2001(138) ELT 719 (Tri.-Del.)]

(iii) GODREJ BOYCE & MFG. CO. LTD. VS. CCE [2002 (148) ELT 161 (Tri. Mumbai)]

(iv) RAM NATH SINGH VS. CCE [2004(165) ELT 451 (Tri.-Del.)]

(v) Kamdeep Marketing(P) Ltd., vs. CCE [2004 (165) ELT 206 (Tri. Del.)]

(vi) Mukund Ltd., vs. CCE [2007 (7) STR 159 (Tri. – Mum.)]

(vii) Indo Green textile Pvt. Ltd. vs. CCE [2007(212) ELT 343 (Tri. Mumbai)]

In the instant case none of the essential ingredients of offence under Rule 26 of the Rules ibid has been shown to exist. In absence of any evidence on record to show that any act of commission or omission on their part rendered the goods liable to confiscation under Rule 25 or Rule 26 of the Rules ibid, the proposal of imposition of penalty in SCN fails to stand having no legal footing. The impugned notice does not contain any material to conclude that they either knew that the instant export goods were liable to confiscation or did something or omitted to do something which commission or omission rendered the goods liable for confiscation. They as a merchant exporter had acted well within the legal framework and their activities to comply to law surfaces, in making exports of the goods under question out side the country. There is even no whisper in the SCN as to indicate that the role played by them was in malafide manner having elements of mens-rea, being non-exist and therefore, the SCN in so far as it related to imposition of penalty upon them is liable to be dropped in limine. The SCN itself repeatedly admits by referring various export documents that the goods were exported through them. Except for the verbatim reproduction of the language employed in Rule 26 of the Rules ibid in the SCN, there is no material or substances in support of the contention that they had, in any way, abetted the offence in attempting the export the goods without payment of duty. Ratio of law laid down in case of KAVIA CARBONS VS. CC [2009 (243) ELT 547 (Tri. – Chennai)] is relied upon in this behalf and it is humbly prayed that no penalty may please be imposed upon them keeping in view the facts and circumstances of the present case.

Discussion and Findings-

6. I have examined the entire case records, written submissions of the Noticees and their submissions during personal hearings. I find that M/s. Raghuvanshi Refreactaory, Porbandar is manufacturer of excisable goods and filed LUT meant for direct export but exported the goods through merchant exporter M/s. Lindsay International, Kolkata without payment of duty to foreign buyers M/s. Mittal Steel of Algeria, as per instructions from their franchisee M/s. ACE Refractory, Ahmedabad. I also find that M/s. Raghuvanshi Refractory, Porbandar have filed ARE-1s and retail Invoices for the goods (covered in Shipping bills filed by merchant exporter i.e. Noticee No. 3) while removing the goods from their factory. Noticee No. 2 have prepared and issued export invoices and packing list for the said goods. The goods have been examined by the Customs Authority of GAPL, Mundra Port. The Noticee No. 3 produced copy of Bank realization certificate of foreign exchange favoring them. In short M/s. Raghuvanshi Refractory have produced copies of proof of export to the department and the export have been established hence no duty can be demanded on export goods. It is also found that third party export is allowed under Exim policy vide Policy Circular No. 16/200-2007 dated 24.12.2002 issued by the Ministry of Commerce and the 'Third Party Exports" have been defined in para 2.34 read with para 9.62 of Foreign Trade Policy 2004-2009 as mentioned in para 10.1 of Circular No. 30/2005-Cus. Dated 12.07.2005 issued vide F. No. 605/50/ 2005-DBK by the Under Secretary (DBK), Ministry of Finance, Department of Revenue.

6.1. In view of the above facts, I hold that the decision of Hon'ble Tri. Chennai in the case of SALZER CONTROLS LTD. Versus COMMISSIONER OF C. EX., CHENNAI reported at 2003 (160) E.L.T. 1169 (Tri. - Chennai), is squarely applicable to the present case. It was held that Job worker taking Modvat credit on the goods manufactured and removed by them to the merchant exporter without executing a bond in terms of Rule 57F(4)(iii) of the erstwhile Central Excise Rules, 1944 and Non-execution of bond is only a procedural lapse and such violation will not disentitle the appellant from taking Modvat credit.[para11]. In the present case, there is purely a procedural lapse and there is no question remains for payment of duty for the clearances of export goods in light of the Hon'ble Appellate authority's decision cited above. The Tribunal Chennai have held that adjudicating Authority has failed to see the other side of the coin. e.g. in case a manufacturer of dutiable goods exports certain goods without filing any Bond/LUT but the Exports is established from the relevant documents like ARE1, Shipping Bill/Bill of lading then the question is as to whether the party is liable to pay duty of excise on the basis that they have not furnished Bond/LUT. Certainly not, the reason being the Exports have been established. Similarly, following the same analogy, I hold that once the Export are established, the filing or non-filing of Bond/LUT has no significance.

6.2. The Judgment pronounced by Hon'ble Commissioner Appeal , Chandigrah reproduced as ELT 2006(197)ELT0437 (Commr. Appl) in case of M/s. Drish Shoes Ltd.

wherein it is held that- "Execution of Bond/LUT is a collateral security to ensure not only payment of duty in case of non-export of goods cleared without payment of duty but also of other statutory provisions/rules and has significance till the goods are within the territory of India. Once the goods are exported out of country and proof of exports in the nature of ARE-1, shipping Bill/Bill of lading etc. are on the records, then the role of Bond/LUT is complete and has no further significance. Hence once the export is established, the filing or non-filing of Bond/LUT has no significance". As held by the Hon'ble Commissioner (Appeal) in his above cited judgment (Para-11 P.4) that- The Adjudicating Authority has failed to see the other side of the coin. e.g. in case a manufacturer of dutiable goods exports certain goods without filing any Bond/LUT but the Exports is established from the relevant documents like ARE1, Shipping Bill/Bill of lading then the question is as to whether the party is liable to pay duty of excise on the basis that they have not furnished Bond/LUT. Certainly not, the reason being the Exports have been established. Similarly, following the same analogy, I hold that once the Export are established, the filing or non-filing of Bond/LUT has no significance.

6.3. The Govt. of India in case of M/s. Modern Process Printers , Bangalore have decided Revision application filed against Order-in- Appeal No.130/2004-C.E. dated 21.10.2004 and No.135/04 dt.25.10.2004 passed by the Commissioner (Appeal) Bangalore. (reproduced at 2006(204) ELT-0632(G.O.I.) in which it has been decided that Procedural lapse- Admittedly the applicant have not filed declaration as per Para 1 of Notification No. 41/2001 –C.E.(N.T.) dated 26.06.2001 issued under rule 18 of the Central Excise Rules,. 2001 but the applicant have filed declaration in terms of Para 1 of the Notification No. 42/94-C.E. (N.T.) issued under erstwhile rule 12 (i) (b) of the Central Excise Rules, 1944 and the Assistant Commissioner C. Ex, Bangalore–I Division has granted permission under rule 12(1) (b) of C. E., Rules, 1944. The core aspect of fundamental requirement for rebate is its manufacturer and subsequent export. As long as this requirement is met, other procedural deviations can be condoned. Hon'ble Tribunal Kolkata in the case of M/s. Ajay Industries reported at 2007 (217) ELT 244 (Tri.- Kolkata) involving the matter of Demand and penalty - Export – Goods consigned through the merchant exporter – procedural lapse on the part of assesses, have dismissed the Revenue's appeal and held that lenient consideration made by the learned Appellate Authority considering the infancy stage of the law introduced prescribing a procedure for compliance in respect of export, the matter does not call for looking into the aspect as to whether goods in question were same or different and whether there was any differential duty chargeable and the order of the learned Commissioner (Appeals) was only on the point of procedural lapse on the part of assesses which is found to be exonerated.

6.4. As regards allegations for suppression of facts from the department that the Noticee have cleared the goods to domestic buyer without payment of duty under cover of ARE-1s and LUT furnished against goods exported by M/s. Lindsay International Pvt;

Ltd; Kolkatta- a merchant-exporter, I find that the Noticee No. 1 has failed to declare merchant exporter's name in their statutory documents relating to removal of goods from their factory and since they had executed LUT with the department, it was well understandable that they intends to be the exporter. They disclosed the name of Noticee No. 3 as the merchant exporter to the department only in reply to the objection raised by the department after receipt of the documents with Annexure-19 submitted by them which includes copy of shipping bills in which the name of Noticee No. 3 is clearly mentioned and thus the department had no knowledge of the aforesaid facts. Therefore there is clear cut suppression of facts at the time of removal of goods from the factory of Noticee No. 1 and rightly alleged in SCN. Therefore extended period can be applied irrespective of the fact that recovery of duty under Sec.11A of the Act, will be applicable or not. Since there remains no question of demanding duty on export goods as discussed in the foregoing paras, question of demanding interest does not arise. However, penalty can be imposed on Noticee No. 1 under rule 25 of the Central Excise Rules, 2002 read with Sec.11AC of the Act, as proposed in SCN though no malafide intention on their part is noticed except procedural lapse. However, penalty can not be imposed on Noticee No. 2 M/s. ACE Refractories, Ahmedabad and Noticee No. 3 M/s. Lindsay International, Kolkata under Rule 26 of C. Ex. Rules, 2002. In the aforesaid circumstances, I find that no penalty is required to be imposed on Noticee No. 2 and 3.

7. In view of the above findings, I pass the following order.

- : O R D E R : -

(1) I drop the proceeding initiated vide show cause notice F. No. V/15-91/Demand/HQ/2008 dated 29.11.2011 so far as it relates to demand of duty totally amounting to Rs. 13,74,249/- as per the provisions of Rule 4, 5 and 8 of Central Excise Rules 2002 and charging interest in terms of Section 11AB of the Central Excise Act, 1944.

(2) I impose penalty of Rs. 25,000/- (Rupees twenty five thousand only) upon Noticee No. 1 M/s. Raghuvanshi Refractory, Porbandar under Rule 25 of Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944. However, I do not impose penalty on Noticee No. 2 M/s. ACE Refractory, Ahmedabad (now M/s. ACE Calderys Ltd.) and Noticee No. 3 M/s. Lindsay International, Kalkotta under rule 26 of the Rules ibid.

10/2/12

(Imamudin Ahmed)
Joint Commissioner,
Central Excise, Bhavnagar

By Regd.Post.A.D.
To,
(1) M/s. Raghuvanshi Refractories,
Plot No.330,GIDC, Porbander-360 577

(2) M/s. ACE Refractories Ltd (now ACE Calderys Ltd.,);
CMd, Karaka Bulding No.1
P.B.No.4103, Ashram Road,
Ahmedabad.

(3) M/s.Lindsay International Pvt; Ltd;
Lindsay Tower, 9th floor, 13 Nellie Sengupta Sarani,
Kolkatta-700087 (W.B.)

Copy to:-

1. The Commissioner, Central Ezxcise, Bhavnagar (RRA Section)
2. The Asstt. Commissioner, .C. Ex Division,, Junagadh
3. The Supdt. C. Ex, AR-II -Porbander
4. The Supdt. (Recovery Cell), Cen. Excise H.Q. Bhavnagar
5. Guard File.