Government of India
Ministry of Commerce & Industry
Directorate General of Foreign Trade
Udyog Bhawan, New Delhi -110011
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F.No. 01/92/171/32/AM 17/ PC-VI/183-184 Date of Order: 07.09.2018

Date of Dispatch: 12.09.2018

Name of the Appellant:	M/s Hubergroup India Private Limited, Plot No. 808/E, Phase –II, GIDC, Vapi- 396195.
Order appealed against:	Order-in-Original No.5/16-17 [issued from F.No. KASEZ/ACCTS/CRA/01/13-14(Vol. III)/0265] dated 27.10.2016 passed by the Development Commissioner, Kandla, Special Economic Zone
Order-in-Appeal passed by:	Shri Alok Vardhan Chaturvedi, DGFT Shri J.V. Patil, Addl. DGFT

Order-in-Appeal

M/s Hubergroup India Private Limited, Vapi (Earlier known as M/s Micro Inks Ltd. hereinafter referred to as 'the appellant'), an EOU unit, has filed an appeal on 19.12.2016 against Order-in-Original No.5/16-17 [issued from F.No. KASEZ/ACCTS/CRA/01/13-14(Vol. III)/0265] dated 27.10.2016 passed by the Development Commissioner, Kandla, Special Economic Zone.

2. Vide Notification No. 101 (RE-2013)/2009-2014, dated the 5th December 2014, the Central Government has authorized the Director General of Foreign Trade aided by one Addl. DGFT in the Directorate General of Foreign Trade to function as Appellate Authority against the orders passed by the Development Commissioner, Special Economic Zones as Adjudicating Authorities. Hence, the present the appeal is before us.

3.0 Brief facts of the case are that:

3.1 The appellant unit was granted Letter of Permission (LoP) under EOU Scheme 2002-2007 by the Development Commissioner, Kandla for manufacturing of Printing Inks, Pigments. The under had commenced production on 12.10.2001.

3.2 During the review of Deemed Export benefits like CST/DBK/TED given to 100% EOU, for the period 2007-08 to 2010-11 the Audit pointed out that CST granted on DTA clearances of finished goods and supplies from EOU to EOU were inadmissible during the period under Audit. It was observed that an amount of Rs. 83,91,196/- against the claims for the period OD-06, AJ-07, AM-08 has been erroneously paid to the unit.

3.3 Pursuance to the above audit observations, demand notice dated 30.10.2013 followed by reminder dated 21.11.2014 was issued to the appellant unit with the direction to deposit the amount which was incorrectly taken by them as refund of CST. The appellant firm submitted its comments vide letter dated 18.12.2014 which were not found acceptable to the O/o DC, KASEZ.

3.4 As the appellant firm did not deposit the said amount, a show cause notice dated 7.7.2015 was issued to the appellant by the Jt. DC, KASEZ for recovery of Rs. 83,91,196/- against the inadmissible CST granted to the unit with the following observations:

(i) Grant of CST on goods supplied by EOUs to EOUs was inadmissible.

(ii) Grant of CST refund on DTA clearances was inadmissible.

3.5 The unit made detailed reply to the Show Cause Notice vide letter dated 19.08.2015 and 28.4.2016. Personal hearing was also granted to the appellant unit on 7.7.2015, 4.9.2015 and 05.05.2016. The appellant unit's representative appeared finally on 16.05.2016. The appellant unit interalia made the following submissions:

i. The Headnote says 'Entitlement for supplies from DTA', paragraph 6.11(c)(i) specifically states that EOU units will be entitled for 'reimbursement of Central sales tax on goods manufactured in India'.

ii. Goods manufactured in India includes goods produced by EOU units. Reliance is placed, inter alia, on proviso to Section 3(1) of the Central Excise Act, 1944 which levies excise duty on goods manufactured by EOUs. All goods manufactured in India suffer excise duty. In the case of EOUs, excise duty only is levied through the measure of excise duty is the aggregate of customs duties. This is because EOU uses duty free raw materials while non-EOU units use duty paid inputs.

iii. The provisions in paragraph 6.11(c)(i) use the phrase 'goods manufactured in India' and therefore goods sourced from other EOUs by their EOU and suffering CST makes us eligible for refund of CST under said paragraph 6.11(c)(i).

iv. The proposal to deny CST refund in respect of inputs consumed in final products cleared into the DTA is illegal on facts, law as well as due to the scheme of EOUs. In addition to what has been submitted in their reply to audit as well as in the reply to the show cause notice, submit that the scheme of EOU envisages non-exportation of taxes on the exported goods, That is why exemption from excise/customs duties on inputs and refund of CST on inputs have been provided for by the legislature to EOUs. For the same reason aggregate of customs duties is levied as excise duty on finished goods cleared by EOU into the DTA. In other words, to set off the tax concessions availed while sourcing raw materials, clearance into DTA is levied with aggregate of customs duties. These customs duties include the 4 percent SAD levied in lieu of VAT/CST. Therefore denying CST

refund on inputs used for production of final product cleared into DTA will amount to double taxation as the said CST refund benefit is already off set by levy of SAD.

3.6 On examination of the reply to the Show Cause Notice submitted by the unit, the following observations were made by the Development Commissioner, Kandla SEZ:

i. Provisions in Foreign Trade Policy and Handbook of Procedures are to be read in harmony and CST to be reimbursed as per provisions mentioned in the Appendix 14-I-I of HBP. At the relevant time, the provision was clear that reimbursement of CST was applicable only on goods meant for exports. Public Notice No. 81/RE-2008 dated 16.09.08 which made reimbursement of CST applicable on goods cleared into DTA had only prospective effect.

ii. Para 6.11(c)(i) clearly states that reimbursement of CST on goods manufactured in India and supplied from DTA and therefore, reimbursement of CST on supplies from EOU was inadmissible.

iii. Supplies from EOU are counted towards fulfilment of positive NFE only.

iv. As per para 6.11(a) of FTP, supplies from DTA are termed as Deemed exports and EOU unit/DTA unit is eligible for Deemed export drawback and in addition to this EOU unit is eligible for refund of CST. Thus it is clear that CST refund is admissible only from the supplies received from DTA.

v. Supplies from one EOU to another EOU is treated as imported goods for second unit for payment of duty.

vi. On the issue of delay in issue of Show Cause Notice, it is noticed that CAG review for the period 2007-08 to 2010-11 was done during the period May-June 2012 and demand notices were issued on 28.10.13 & 31.10.13 and the unit gave reply vide letters dated and the unit gave reply vide letters dated 18.11.13 and we have also sent reminders vide our letters dated 21.11.2013 and the unit again replied in their defense vide their letters dated 18.12.2014. The DC's office has been in the process of recovery proceedings since November 2013 and the noticee's reply was under process finally SCN was issued on 07.07.15.

vii. Even though provision contained in Para 6.11(c)(i) of the Policy permits for DTA sale of goods but it does not ipso facto implies that reimbursement of CST shall also be available on such goods supplied into DTA. Public Notice No. 81 (RE-2008) dated 16.09.08 had only prospective effect.

viii. Para 2 of Appendix 14-I-I of Handbook of Procedures for 2004-09 clearly states that EOU is entitled to reimbursement of CST paid on only those purchases made from DTA which are used for production of goods actually exported.

ix. As per FTP/HBP, EOU has to pay applicable customs, Special Additional Duty etc., as excise duty if goods are to be cleared in to DTA since the goods were procured Duty free. Reimbursement of CST cannot be considered as to offset these duties since central Sales tax falls under separate Government revenue account. Further, the unit was not made to

pay CST and SAD on some goods. CST was levied on goods procured, viz; raw material and SAD is levied on finished goods cleared into DTA.

x. It is also noted that notice firm has given undertaking and declaration in all the claims, as mentioned in the Appendix 14-I-I, that in case excess CST amount is paid, the same will be refunded after receipt of demand notice from the Development Commissioner.

xi. The case law quoted by the notice will be relevant in the cases where some existing provisions of Policy & Procedure are clarified. Director General of Foreign Trade was making such clarification through a policy circular. In this case vide Public Notice no.81 dated 16.09.2008, an amendment to an existing provision was made and thus it has effect from the date of its issue only. It cannot be given retrospective effect.

3.7 On examination of the reply to the Show Cause Notice submitted by the unit along with full facts of the case, the Development Commissioner, Kandla SEZ passed an Order dated 27.10.16 to deposit an amount of Rs.83,91,196/-(Rupees Eighty Three Lakh Ninety One Thousand One Hundred and Ninety Six only)in the Government account under Section 13 of the Foreign Trade(Development & Regulation) Act, 1992 as amended, read with Section 11 of the Foreign Trade(Development & Regulation) Act, 1992, as amended. Further, DC, KASEZ had also imposed a penalty of Rs.25,00,000/-(Rupees Twenty Five Lakh only) for delaying the refund of amount.

4. Aggrieved by the adjudication order dated 27.10.16x, the Unit has filed the present appeal. An opportunity of personal hearing was granted to the unit on 30.01.2018 in which Mr. S. Suriyanarayanan, Advocate appeared and represented the Unit before us. The appeal has been filed on the following grounds:

(i) The provisions in paragraph 6.11 (c) (i) use the phrase 'goods manufactured in India' and therefore goods sourced from other EOUs by our EOU and suffering CST makes us eligible for refund of CST under said paragraph 6.11 (c) (i).

(ii) The heading of paragraph 6.11, namely, 'Entitlement for supplies from DTA,' cannot limit or circumscribe the applicability of the phrase 'goods manufactured in India ' occurring in paragraph 6.11 (c) (i) to EOUs.

(iii) The scheme of EOU envisages non-exportation of taxes on the exported goods. That is why exemption from excise/customs duties on inputs and refund of CST on inputs have been provided for by the legislature to EOUs. For the same reason aggregate of customs duties is levied as excise duty on finished goods cleared by EOU into the DTA. In other words, to set off the tax concessions availed while sourcing raw materials, clearance into DTA is levied with aggregate of customs duties. These customs duties include the 4 percent SAD levied in lieu of VAT/CST. Therefore denying CST refund on inputs used for production of final product cleared into DTA will amount to double taxation as the said CST refund benefit is already off set by levy of SAD.

(iv) Commissioner of Customs (Preventive) Mumbai v. M. Ambalal and Company, (2011) 2 SCC 74 = 2010 (260) ELT 0487 (S.C), the Apex Court has observed that the beneficial

notification providing the levy of duty at a concessional rate should be given a liberal interpretation:

(v) The amendments through public notice no. 81(RE-2008)/2004-09 dated 16.09.2008 has retrospective effect and the show cause notice deserves to be dropped. Reliance is placed on the case law reported in 1997 (92) ELT 23 (S.C) Johnson and Johnson v. Commissioner of C.Ex., Aurangabad.

(vi) The Respondent could not have refused to consider as to whether the amendments of 16.09.2008 are clarificatory and therefore retrospective or not and could not have tersely concluded policy of 2015-16 is different from policy of 2004-09, more particularly when Respondent's office also interpreted 2004-09 policy as interpreted by appellant only until AG raised the audit objections in 2013.

(vii) The Respondent could not have tersely concluded that Public Notice dated 16.09.2008 is only prospective without discussing the case laws relied upon by the appellant.

(viii) That without rebutting the appellant's contention that goods produced by EOU are goods produced in India only, CST on supplies from EOU are not reimbursable. Respondent has failed to consider the relevant facts and law.

(ix) That Respondent's finding that supplies from EOU are counted towards positive NFE only is contradictory in as much as once the goods supplied from EOU are counted towards positive NFE, non reimbursement of CST will result in denial of eligible EOU benefits. When CST under section 3(5) of the Customs Tariff Act is granted as CENVAT credit to Importer manufacturers, non reimbursement of CST will make EOUs supplies to other EOUs unviable.

5. Comments from the office of the Development Commissioner, KASEZ have also been obtained on the appeal filed by the appellant Unit which have been received vide their letter dated 21/29.08.2017. The DC has interalia stated that :

(i) The main heading of para 6.11 states that "Entitlement for Supplies from DTA". As per Para 9.21 of FTP Domestic Tariff Area means area within India which is outside SEZs and EOU/EHTP/STP/BTP. Therefore, CST reimbursement was admissible on goods manufactured in India which are supplied by DTA units. Therefore CST reimbursement on supplies from EOU was inadmissible.

(ii) Provision for reimbursement of CST on goods supplied from EOU to EOU has been made only in FTP 2015-2020. PAra 6.11(c)(i) clearly states that reimbursement of CST on goods manufactured in India and supplied from DTA and therefore, reimbursement of CST on supplies from EOU was inadmissible. The para 6.11(c) (i) is to be read in harmony with head note.

(iii) As per FTP/HBP, an EOU had to pay applicable customs, Special Additional Duty etc., as excise duty if goods are to be cleared in to DTA. Reimbursement of CST cannot be considered as to offset these duties since Central Sales tax falls under separate Government revenue account. Further, the unit was not made to pay CST and SAD on same goods. CST was levied on goods procured, viz; raw material and SAD is levied on finished goods cleared into DTA.

(iv) As per the relevant provisions during the period 2004-09, supplies from EOU to EOU are counted towards fulfillment of positive NFE only. The main heading of para 6.11 states that "Entitlement for Supplies from DTA". As per Para 9.21 of FTP Domestic Tariff Area means area within India which is outside SEZs and EOU/EHTP/STP/BTP. Therefore, CST reimbursement is admissible on manufactured in India which are supplied by DTA units only. Government is supposed to provide benefits to EOUs as per the existing provisions of FTP/HBP only. Section 3(5) of the Customs Tariff Act will not be relevant to this para since CST was to be reimbursed only on supplies from DTA units to EOU units. CST is not covered under Customs Tariff Act.

(v) It is mentioned in para 3(xiii) of Appendix 14-I-I of HBP that in case some glaring error or irregularity is detected against any unit in claiming CST reimbursement, action to recover the amount paid and levy penalty would be taken under FT(D&R) Act, 1992 against such unit.' Therefore Development Commissioner is fully competent to recover the dues under FT(D&R) Act, 1992. The penalty has been imposed under the relevant provisions of Foreign Trade Development & Regulation Act, 1992. The Objections raised by C&AS are correct and as per the provisions of relevant FTP/HBP.

6. We have considered the adjudication order dated 27.10.2016 passed by DC, KASEZ, appeal preferred by the Unit and oral as well as written submissions made by its representatives, report/comments of office of the DC, NSEZ and all other aspects relevant to the case. On examination of the present case the following is noted:

(i) They placed reliance on the some recent judgements pertaining to CST refund in respect of goods received by an EOU from the DTA. The CAG objection is in respect of CST refund in the respect of the supplies made before the amendment carried out by Public Notice No. 81 (RE-2008) dated 16.09.08 and also such reimbursement in respect of procurements made by an EOU from another EOU.

(ii) The CAG during the audit pointed out that at the relevant time of supply of goods by the firm, EOUs were eligible to get CST refund on raw material, components etc., utilised for their production meant for exportation and, out on the whole value of goods cleared (i.e. Export + DTA sale). The EOUs should have claimed the CST refund on proportionate basis on the exported goods and not on the goods cleared in DTA.

(iii) Appendix 14-I-I of HBP Vol.I contains the procedure to be followed for reimbursement of the CST on supplies made to EOU. Para-2 of the said appendix before Public Notice No. 81 (RE-2008) dated 16.09.08 clearly states that an EOU is entitled to reimbursement to CST paid on only those purchases made from DTA which are used for production on goods meant for export and/or utilised for exports/services. The supplies in the present case pertains to the period before issuance of the said public notice.

(iv) Vide Public Notice No. 81 dated 16.9.2008, the word 'meant for export' was deleted from para 2 of Appendix 14-I-I of HBP Vol.I which was applicable from the date of issuance of the said public notice. Hence, with the issuance of the said public notice, the reimbursement of CST on supply of goods by EOU into DTA/EOU made available w.e.f. 16.9.2008.

(v) It is true that even though provision contained in Para 6.11(c)(i) of the Policy permits for DTA sale of goods but it does not ipso facto implies that reimbursement of CST shall also be available on such goods supplied into DTA. Public Notice No. 81 (RE-2008) dated 16.09.08 had only prospective effect.

(vi) It is correct to note that the provisions of FTP and HBP are to be read in harmony and CST to be reimbursed as per provisions mentioned in the Appendix 14-I-I of HBP applicable at the time of supply.

(vii) As per the scheme of EOUs, the units which are undertaking to export their entire production of goods and services (except permissible sales in DTA) are considered as EOU. As per Para 6.8(a) the unit is allowed to sell goods upto 50% of FOB value of exports subject to fulfilment of NFE on payment of concession of duties. Hence, supplies from EOU are counted for fulfilment of positive NFE only.

(viii) Further Para 6.15(a) (ii) of extent FTP clearly states that in case an EOU unit is unable to utilise goods and services, imported or procured from DTA, it may be disposed off in DTA with the approval of customs authority on payment of applicable duties and submissions of import of authorizations. Hence, the clearance of goods into DTA/EOU were subject to payment of applicable CST.

(ix) As such, the contention of the Audit that "EOUs should claim the CST refund on proportionate bases on the exported goods and not on the goods cleared in DTA" is correct. Also, during the relevant period, CST reimbursement was available for procurement of goods from DTA only. The para 9.21 of FTP 2004-09 clearly stated that "Domestic Tariff Area(DTA)" means area within India which is outside SEZs and EOU/EHTP/STP/BTP.'

7. In view of the above, in exercise of the powers vested in us under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014, dated the 5th December 2014, we pass the following order:

Order

F.No. 01/92/171/32/AM 17/ PC-VI/ Dated: 07 .09. 2018

Order-in-Original No.5/16-17 [issued from F.No. KASEZ/ACCTS/CRA/01/13-14(Vol. III)/0265] dated 27.10.2016 passed by the Development Commissioner, KASEZ, Gandhidham, Gujrat is upheld and the appeal is rejected.

(J.V. Patil)
Addl. Director General of Foreign Trade

(Alok Vardhan Chaturvedi)
Director General of Foreign Trade

Copy To:

(1) M/s Hubergroup India Private Limited, Plot No. 808/E, Phase –II, GIDC, Vapi-396195.

(2) Development Commissioner, SEZ, Kandla.

(Shobhit Gupta)
Dy. Director General Foreign Trade