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SPEED POST



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.198/654/11-RA / 3719

Date of Issue: /26/09/2019

ORDER NO. 01 /2019-CX (WZ)/ASRA/MUMBAI DATED 27.08.2019 OF THE GOVERNMENT OF INDIA PASSED BY SMT SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicants : Commissioner of Central Excise & Customs, Nashik

Respondent : M/s Epcos India Pvt Ltd.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. AKP/176/NSK/2011 dated 16.09.2011 passed by the Commissioner of Central Excise & Customs (Appeals), Nashik.

## ORDER

The Revision Application has been filed by Commissioner of Central Excise & Customs, Nashik (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. AKP/176/NSK/2011 dated 16.09.2011 passed by the Commissioner of Central Excise & Customs (Appeals), Nashik wherein he rejected the appeal filed by Applicant.

2. The issue in brief is that M/s Epcos India Pvt Ltd (hereinafter as 'Respondent'), are engaged in the manufacture of Plastic Film Capacitors falling under Chapter No. 85 of the Central Excise Tariff Act, 1985. They are manufacturing the goods and clearing the same to domestic market as well as for export when claim of rebate as well as under bond. While exporting their goods, they are claiming the rebate of duty paid on excisable goods under the provisions of the Central Excise Act and Rules made there under read with Notification No. 21/2004-CE(NT) dated 06.09.2004.

2.1 During April 2007 to July 2007, they had filed various rebate claims under their Serial nos 263 to 358 (except serial No. 272, 282, 283, 285, 299, 301, 307, 312, 314, 315, 327 & 332). The total amount involved in the claims was 4,00,12,12,840/- (i.e. BED - Rs, 3,88,47,417/- + Ed. Cess - Rs. 7,76,941/- + S.H.Ed.Cess. - 3,88,482/-).

2.2 The jurisdictional Asstt. Commissioner observed that while making payments of duty on export goods, they had contravened the provisions of Rule 3, Rule 9 and Rule 14 of Cenvat Credit Rules, 2004 (herein after as 'CCR') in as much as in some cases they had utilized cenvat credit of BED for payment of Ed. Cess (EC) and S.H.Ed.Cess (SHEC). As per Rule 3(7)(b) of CCR - credit of education cess and secondary & higher education cess can be utilized only for payment of education cess and secondary & higher education cess respectively. However, they had utilized the credit of BED for payment of EC. & SHEC. Such payments were in contravention of Rule 3 of CCR and therefore it appeared

that refund of such duty (EC & SHEC) could not be granted to them as initial payment itself was not proper.

- 2.3 Various Show Cause Notices were issued to the Respondent and the same were adjudicated vide a common Order-in-Original No. Rebate/30/08 dated 29.01.2008. The adjudicating authority held that the law does not provide for utilization of Cenvat credit availed of BED for payment of EC & SHEC payable on finished goods. Accordingly, he sanctioned the rebate claim only to the extent corresponding to BED and part of EC & SHEC which was paid through EC & SHEC account and rejected the claim of rebate of EC & SHEC which was paid through BED amounting to Rs. 10,70,460/-.
- 2.4 The Respondent then challenged the rejected amount of Rs. 10,70,460/- before Commissioner(Appeals), who vide Order-in-Appeals No. CES/AKD/55/APL/NSK/2008 dated 07.03.2008 relying on Tribunal's judgment in the case of Sun Pharma Industry Vs CCE [2007(207) ELT 673 (Tri-Del)] decided the case in respondents favour holding that there is no restrictions to utilize the BED for payment of EC & SHEC.
- 2.5 The Applicant then filed an appeal with the CESTAT who vide Order No. A/745/08/C-II/EV dated 12.08.2008 decided the case holding that since the Commissioner(A)'s order is relating to rebate of duty of excise on goods exported, it is out of the Tribunal's jurisdiction by virtue of Clause (b) of the First Provisio to Section 35B of the Central Excise Act, 1944. Thus the department's appeal was dismissed as non maintainable. It was opined that appeal in case cases should have filed before the Joint Secretary (Revision Application) to the Govt. of India.
- 2.6 The Applicant then filed a Revision Application on 22.10.2008 along with a Misc. Application to condone delay in filing appeal. The Govt. of India vide Order No. 1703/10-CX dated 23.11.2010 dismissed the departmental appeal on the ground of time bar, as it was filed beyond maximum condonable time period stipulated in Section 35EE(2) of Central Excise Act, 1944.

- 2.7 With a view of the above, to implement Commissioner(A)'s Order-in-Appeals No. CES/AKD/55/APL/NSK/2008 dated 07.03.2008, the jurisdictional Dy. Commissioner vide his Order-in-Original No. 674/Rebate/2011 dated 29.04.2011 granted the rebate of Rs. 10,70,460/-.
  - 2.8 The Applicant again being aggrieved by the O-in-O dated 29.04.2011 then filed appeal with the Commissioner(Appeals), who vide Order-in-Appeal No. AKP/176/NSK/2011 dated 16.09.2011 held that the department's appeal being superfluous in nature and devoid of any merit.
3. Being aggrieved, the Applicant filed this Revision Application on the following grounds:
- 3.1 The basic issue involved in the case is as to whether the Cenvat credit of BED on input can be utilized for payment of EC & SHEC payable on the final product, in contravention of Rule 3 of ibid Rules. As per Rule 3(7)(b) of the CCR credit of EC & SHEC can be utilized only for payment of EC & SHEC respectively.
  - 3.2 The issue is yet to be finalized on merit as the GOI Order No.1703/10-CX dated 23.11.2010 rejecting the department's appeal is being challenged by filing Writ Petition before the Hon'ble High Court, Mumbai.
  - 3.3 The Commissioner(A) at first place, should have waited for the decision from higher forum and could have kept the case in call book before deciding the issue in haste. The Order-in-Appeal itself is pre-nature and not legal and proper.
  - 3.4 The Commissioner(A)'s observation that the rebate sanctioning authority did not have any other option but to sanction the impugned refund claim in vide of Hon'ble Supreme Court judgment in case of UOI Vs Kamalashmi Finance [1991 (55) ELT 433 (SC)] is totally misplaced only to divert the whole issue from the main point as mentioned in Sr. No. 3.2 & 3.3 above.

In view of the facts herein above, the O-in-A No. AKP/NSK/176/2011 dated 26.09.2011 appears not legal, correct, proper and deserves to set aside.

4. A personal hearing in the case was held on 19.08.2019 which was attended by Shri Chetan Pawar, Asstt. Commissioner, CGST-CX, Nashik-I Dn, Nashik Commissionerate on behalf of the Applicant. The Respondent did not attend the hearing. The Applicant reiterated the written submission and stated that the status of the Writ Petition not know to them.

5. The Applicant vide letter F.No. R-SAT/CGST/P.H./R.A./Epcos/2018-19 dated 16.08.2019 submitted that Department had filed Writ Petition against the Revisionary Authority Order No. 1703/10/CX dated 23.11.2010. The Writ Petition No. 10102 of 2011 was decided vide Order dated 25.04.2012 by setting aside the order dated 23.11.2010 and restoring the appeal at Revisionary Authority. The status of the said appeal is not know at present and the case of M/s Sun Pharmaceutical is pending at Supreme Court as admitted fact in impugned Commissioner(A) order. AT present they has nothing more to add than what has already had been stated in grounds of appeal accept the outcome of Writ Petition No. 10102 of 2011.

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

7. In the present case the Deputy Commissioner had sanctioned rebate claim of Rs. 10,70,460/- to the Respondent in compliance of the order passed by the Commissioner(A) vide Order-in-Appeal No. CES/AKD/55/APL/NSK/2008 dated 07.03.2008 which was upheld by the GOI Order No. 1703/10-CX dated 23.11.2010. Meanwhile the Applicant had filed Writ Petition No. 10102/2011 with the Bombay High Court against the GOI Order No. 1703/10-CX dated 23.11.2010. The Hon'ble High Court vide Order dated 25.04.2012 -

"4. For the aforesaid reasons, we allow the petition by setting aside the impugned order of the Revision Authority dated 23 November 2010. In consequence, we restore Revision F.No. 198/185/08-RA-CX to the file of the Revisional Authority in the Government of India, Ministry of Finance (Department of Revenue) for disposal on merits in accordance with law. The Revisional Authority shall dispose of the Appeal preferably within a period of three months from the date on which a certified copy of this order is placed on its record."

8. Government notes that that the same issue involved in the current Revision Application has already been dealt by the Joint Secretary GOI Order Nos. 1144/2012-Cx-Remand dated 18.09.2012 in the Applicant's same Revision F.No. 198/185/08-RA-CX and had rejected the application for being devoid of merits.

"6.5 These observation of the Government finds support from Hon'ble Supreme Court decision in *M/s Paper Products Ltd. Vs CC-1994 (112) ELT 765 (SC)* and *Commissioner of Central Excise Vadodara Vs Dhiren Chemicals Industries Ltd. -2002 (143) ELT 19 (SSC)* that the plain reading of statute as clarified and elaborated vide the CBEC Manual and circulars are mandatorily binding on the departmental authorities. Thus in the event of there being no specific bar anywhere to the utilization of accumulated Cenvat Credit of BED towards payment of Education Cess and SHE Cess, the objection and ground of revision application of the department are not legally sustainable.

7. In view of above circumstances, Government does not find any infirmity in the impugned order-in-appeal and therefore uphold the same for being legal and proper.


8. Revision application thus stands rejected for being devoid of merits.

9. So ordered."

Hence the issue had attained finality and thus the case/ issue is Res-Judicata.

9. In view of above, Government dismisses the instant Revision Application as being devoid of merit.

10. So, ordered.

  
(SEEMA ARORA)  
Principal Commissioner & Ex-Officio  
Additional Secretary to Government of India.

ORDER No. 01 /2019-CX (WZ)/ASRA/Mumbai dated 27.08.2019.

To,  
The Commissioner of Central Goods & Service Tax,  
Nashik  
Plot No. 155, Sector P-34,  
NH, Jaistha & Vaishak, CIDCO,  
Nashik 422 008.

Copy to:

1. M/s EPCOS India Pvt Ltd., Plot No. E 22-25, MIDC, Satpur, Nashik 422 007.
2. The Dy / Asstt Commissioner, CGST & CX, Nashik-I Dn, Room No. 206/5, 2<sup>nd</sup> floor, Plot No. 155, Sector P-34, NH, Jaistha & Vaishak, CIDCO, Nashik 422 008.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy.