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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F. NO. 198/205/12-RA Date of Issue:

ORDER NO. 06 /2019-CX (WZ) /ASRA/Mumbai, DATED 23.08.2019 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.

Applicant : Commissioner of Central Excise, Raigad.

Respondent : M/s Uttam Galva Steel Ltd.,Raigad.

Subject : Revision Applications filed under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. BC/61/RGD/2012-13 dated 24.05.2012 passed by the Commissioner of Central Excise (Appeals) Mumbai-III.

ORDER

This revision application is filed by the Commissioner of Central Excise Raigad (hereinafter referred to as "the applicant") against the Order-in-Appeal No. BC/61/RGD/2012-13 dated 24.05.2012 passed by the Commissioner (Appeals) of Central Excise, Mumbai - III.

2. The brief facts of the case are that M/s Uttam Galva Steels Ltd. situated at Pali Road Complex, Survey No. 39- 49, Village- Dahivali, Taluka-Khalapur, Dist- Raigad (hereinafter referred to as "the respondent") had filed a rebate claim in respect of export clearance made against ARE-1 No. 9P-0055 dated 29.05.2009, Central Excise Invoice No. 200 dated 29.05.2009 for Rs. 92,605/- (Rupees Ninety Two Thousand Six Hundred and Five only).

3. Deputy Commissioner, Central Excise, Khopoli Division, Raigad Commissionerate vide Order-in-Original No. Raigad/KPL/R.C/1920/2011-12 dated 17/05/2011 rejected the rebate amount of Rs.92,605/- on the grounds that:

- initially, these goods were cleared by the respondent on payment of Central Excise duty which were received back in their factory and that the same goods were exported by the respondent without carrying out any process amounting to manufacture for which the respondent preferred the instant rebate claim;
- the rebate claimed in instant case pertained to amount paid under Rule 16(2) of Central Excise Rules, 2002, which can not be held on Central Excise duty as envisaged under Rule 18 of Central Excise Rules, 2002 for grant of rebate;
- since no process of manufacture had been under taken on duty paid goods received back to the factory of the respondent, the payment made at the time of subsequent clearance of such goods is not Central Excise duty but was payment of amount equal to Cenvat Credit availed in terms of Rule 16(1) of Central Excise Rules and this amount did not qualify for claiming rebate as it did not represent the Central Excise duty as the same is not paid in terms of provisions of Section 3

of Central Excise Act and therefore this payment did not get covered under definition of term 'duty' as defined in Explanation-I below Notification No. 19/2004-CE (NT) dt. 06.03.2004, issued under said Rule 18 of Central Excise Rules. Thus, the rebate claimed in instant case of "amount" paid under Rule 16(2) was not admissible to the respondent as rebate

4. Being aggrieved, the respondent filed the appeal against the said Order in Original challenging the rejection of rebate claim of Rs. 92,605/- on the ground that the matter has been settled by Mumbai High Court in the case of CCE, Raigad V/s Micro Inks Ltd. reported in 2011(270)ELT360(Bom).

5. Commissioner of Central Excise (Appeals), Mumbai-III, vide Order in Appeal No. BC/61/RGD/ 2012 -13 dated 24.05.2012, allowed the appeal filed by the respondent on the grounds that:

- the intention of the legislature behind issuing such an explanation to Rule 16 is to let the trade enjoy the benefits of Cenvat even in case where the amount equivalent to duty is reversed making it amply clear that what is being reversed is duty. When an amount is reversed, it does not change or loose the character of duty. It would still remain the duty only.
- the refund claim in the instant case was rejected for the reasons that the reversal was an amount and not a duty. Had they cleared the same for local market, the said reversal would be eligible for availment of Cenvat Credit. The Government of India at several times, made it clear that various benefits are being extended to the trade to not to let export the duty. Denying benefit of rebate under the pretext of reversal was an amount and not duty is just not lawful. Revenue cannot take divergent views on the same issue i.e when reversed and cleared to local, what is reversed is duty and for export what is reversed is not duty.
- By relying on the judgement of of the Hon'ble Bombay High Court in the case of Micro Inks Ltd. held that (2011 (270) E.L.T. 360 (Bom.) , it

was observed that the amount reversed on clearance of inputs as such under Rule 16(2) of the said rules, is duty. Accordingly, rebate is allowable under rule 18 of the said rules.

6. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant department has filed this Revision Application mainly on the following grounds :

6.1 The rebate claimed in instant case pertains to amount paid under Rule 16(2) of Central Excise Rules, 2002, which can not be held as Central Excise duty as envisaged under Rule 18 of Central Excise Rules, 2002 for grant of rebate. Now coming to levy of Central Excise duty, as held by Hon'ble Supreme Court in case of M/s. Hindustan Zinc Ltd. Vs CCE, 2005 (181) ELT 170 (SC) two basic conditions must be satisfied — first article should be goods and second it should have come into existence as result of "manufacture". It is clear that the respondent has only reversed amount of Cenvat Credit far comply with provision of Rule 16(2) of Central Excise Rules, 2002.

6.2 Since no process of manufacture has been undertaken on duty paid goods received back to the factory of the respondent, the payment made at the time of subsequent clearance of such goods is not Central Excise duty but is payment of amount equal to Cenvat Credit availed in terms of Rule 16(1) of Central Excise Rules. This amount does not qualify for claiming rebate as it does not represent the Central Excise duty as the same is not paid in terms of provisions of Section 3 of Central Excise Act. Therefore this payment does not get covered under definition of term 'duty' as defined in Explanation-I below Notification No. 19/2004-CE (NT) dated 06.03.2004, issued under said Rule 18 of Central Excise Rules. Thus, the rebate claimed in instant case of "amount" paid under Rule 16(2) is not admissible to the respondent as rebate.

6.3 The Commissioner (Appeals), has relied upon the order of the Hon'ble Bombay High Court in the case CCE, Raigad V/s Micro Inks Ltd. and decided the issue in the favour of respondent but the Revenue has not accepted the said order of the Hon'ble Bombay High Court in the case of Commissioner, Central Excise, Raigad Vs. Micro Inks Ltd. and at present the Special Leave Petition (Civil) filed by the department is pending with Hon'ble Supreme Court for final decision.

In view of the averments made above, the applicant prayed that the Order-in-Appeal No. BC/61/RGD/2012 dated 24.05.2012 passed by the Commissioner (Appeals) of Central Excise, Mumbai - III be set aside and Order-in-Original No. Raigad/KPL/R.C/1920/2011-12 dated 17/05/2011 passed by Deputy Commissioner, Central Excise, Khopoli Division, Raigad Commissionerate be restored.

7. A Personal hearing in this case was held on 20.08.2019. No one appeared from the applicant's side. Shri D.C. Fernandes, Sr. Vice President appeared on behalf of the respondent company who stressed that what was taken was rebate; that the Order in Appeal relies on Micro Ink's case is correct and duty payment by reversal does not make it non duty.

8. 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.

9. Government observes that the issue involved in the instant Revision Application is whether rebate of an amount equal to Cenvat Credit reversed under rule 16(2) of Central Excise Rules,2002 on export of inputs / capital goods as such, will be admissible under Rule 18 of Central Excise Rules, 2002 or not.

10. In order to understand the issue, the Rule 16 of Central Excise Rules, 2002 is reproduced below :-

"Rule 16. Credit of duty on goods brought to the factory. –

(1) Where any goods on which duty had been paid at the time of removal thereof are brought to any factory for being re-made, refined, re-conditioned or for any other reason, the assessee shall state the particulars of such receipt in his records and shall be entitled to take CENVAT credit of the duty paid as if such goods are received as inputs under the CENVAT Credit Rules, 2002 and utilize this credit according to the said rules.

(2) If the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount equal to the CENVAT credit taken under sub-rule (1) and in any other case the manufacturer shall pay duty on goods received under sub-rule (1) at the rate applicable on the date of removal and on the value determined under sub-section (2) of section 3 or section 4 or section 4A of the Act, as the case may be.

[Explanation. - The amount paid under this sub-rule shall be allowed as CENVAT credit as if it was a duty paid by the manufacturer who removes the goods.]

(3) If there is any difficulty in following the provisions of sub-rule (1) and sub-rule (2), the assessee may receive the goods for being re-made, refined, re-conditioned or for any other reason and may remove the goods subsequently subject to such conditions as may be specified by the Commissioner."

11. In the instant case the respondent received back inputs under Rule 16(1) for repairs and subsequently the said inputs after reversing an amount of equivalent to the Cenvat Credit availed on such inputs under Rule 16(2) of the Central Excise Rules, 2002. The disagreement between the Commissioner (Appeals) and the applicant department is in treatment of such reversal of amount of Cenvat credit which according to Commissioner (Appeals) is to be treated as duty whereas it is the contention of the department that this amount does not qualify for claiming rebate as it does not represent the Central Excise duty as the same is not paid in terms of provisions of Section 3 of Central Excise Act.

12. Government further observes that to arrive at a conclusion that the amount reversed on clearance of inputs as such under Rule 16(2) of Central Excise Rules, by the respondent, is duty and the rebate is allowed to the them under Rule 18 of the said Rules, Commissioner (Appeals) has relied on explanation to Rule 16 of Central Excise Rules, 2002 as well as judgment of

Honorable Bombay High Court in CCE, Raigarh v. Micro Ink Ltd. in W.P. No. 2195/2010, reported as 2011 (270) E.L.T. 360 (Bom.).

13. Hon'ble Bombay High Court at para 12, 16 & 17 of its order dated 23.03.2011 observed as under :

> ***12.*** *Rule 3(4) & Rule 3(5) of the 2002 Rules to the extent relevant read thus :-*
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> *Rule 3(4). When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the duty of excise which is leviable on such goods at the rate applicable to such goods on the date of such removal and on the value determined for such goods under sub-section (2) of section 3 or section 4 or section 4A of the Act, as the case may be, and such removal shall be made under the cover of an invoice referred to in rule 7.*
>
> ***Rule 3(5). The amount paid under sub-rule (4) shall be eligible as CENVAT credit as if it was a duty paid by the person who removed such goods under sub-rule (4).***
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> ;
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> ***"16.*** *Since rule 3(4) of the 2002 Rules is pari materia with Rule 57(1)(ii) of the Central Excise Rules, 1944 it is evident that inputs/capital goods when exported on payment of duty under Rule 3(4) of 2002 Rules, rebate of that duty would be allowable as it would amount to clearing the inputs/capital goods directly from the factory of the deemed manufacturer. In these circumstances, the decision of the Joint Secretary to the Government of India that the assessee who has exported inputs/capital goods on payment of duty under Rule 3(4) & 3(5) of 2002 Rules (similar to Rule 3(5) & 3(6) of 2004 Rules) therefore entitled to rebate of that duty cannot be faulted.*
>
> ***17.*** *The contention of the revenue that the payment of duty by reversing the credit does not amount to payment of duty for allowing rebate is also without any merit because, firstly there is nothing on record to suggest that the amount paid on clearance of inputs/capital goods for export as duty under Rule 3(4) & 3(5) of 2002 Rules cannot be considered as payment of duty for granting rebate under the Cenvat Credit Rules. If duty is paid by reversing the credit it does loose the character of duty and therefore if rebate is otherwise allowable, the same cannot be denied on the ground that the duty is paid by reversing the credit. Secondly, the Central Government by its circular No. 283/1996, dated 31st December, 1996 has held that amount paid under Rule*

57F(1)(ii) of Central Excise Rules, 1944 (which is analogous to the Cenvat Credit Rules, 2002/Cenvat Credit Rules, 2004) on export of inputs/capital goods by debiting RG 23A Part II would be eligible for rebate. In these circumstances denial of rebate on the ground that the duty has been paid by reversing the credit cannot be sustained.

14. Government further observes that Hon'ble Bombay High Court in its order dated 24-3-2011 in W.P. No. 2094/2010 filed by the Department and while upholding the Government of India Order No. 18/09 dated 20.1.2009 in the case of M/s Sterlite Industries (I) Ltd. [2017(354ELT 87(Bom)] at para 5 & 8 observed as under:

5. *We see no merit in the above contention. Reversal of input credit is one of the recognized method for paying duty on the final product. In fact, the Central Government by its Circular No. 283, dated 31-12-1996 construing similar provisions contained in Rule 57F of the Central Excise Rules, 1944 held that where the inputs are cleared on payment of duty by debiting RG-23A Part II as provided under erstwhile Rule 57F(4) of the Central Excise Rules, 1944, the manufacturer would be entitled to rebate under Rule 12(1)(a) of the Central Excise Rules, 1944. Rule 57F in the 1944 Rules is pari materia to Rule 3(5) of Cenvat Credit Rules, 2004. Similarly, Rule 12(1)(a) of the 1944 Rules is pari materia to Rule 18 of the Central Excise Rules, 2002. Therefore, when the Central Government has held that where the duty is paid by debiting the credit entry, rebate claim is allowable, it is not open to the departmental authorities to argue to the contrary.*

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8. *The expression "removed as such" in Rule 3(5) of the Cenvat Credit Rules, 2004 simply means that when inputs or capital goods are removed as inputs or capital goods as such, the assessee shall pay an amount equal to the credit availed in respect of such inputs or capital goods. In other words, inputs/capital goods on the date of removal must be in the same form as they were on the date on which they were brought into the factory. Normal wear and tear of the inputs/capital goods does not make them different from the original inputs/capital goods. Moreover, it is not the case of the Revenue that on account of the user, the character of the capital goods has changed. Therefore, where duty paid inputs/capital goods brought into the factory are subsequently cleared for export, then Rule 3(5) of 2004 Rules would apply. Hence, the Joint Secretary to the Government of India was justified in holding that user of the capital goods before export does not in any way affect the*

duty liability on export of such capital goods and consequently does not affect the right of the assessee to claim rebate of duty paid on export of such capital goods.

The SLP No. 6120/12 filed in Supreme Court by Department against Hon'ble Bombay High Court order was dismissed vide order dated 14.09.2012. [2017(354)E.L.T. A26 (SC)] .

15. Government notes that the principle deliberated upon and approved by the Hon'ble Bombay High Court in both of its aforesaid judgments is that reversal of the Cenvat credit at the time of exports tantamounts to payment of duty and is therefore, admissible as rebate under Rule 18 of Central Excise Rules, 2002. It would be pertinent to note that the Explanation in Rule 16 of the Central Excise Rules, 2002 (at para 10 supra) and the text of Rule 3(5) of the Cenvat Credit Rules, 2004 (at para 13 supra) are worded almost identically. Both the rules treat the Cenvat credit allowed under the respective rules as if they are duty paid by the manufacturer. It would therefore follow that the inference drawn by the Hon'ble Bombay High Court with regard to Rule 3(5) of the Cenvat Credit Rules, 2004 would be equally applicable to Rule 16 of the Central Excise Rules, 2002. Needless to say, two similarly worded provisions in the rules cannot be interpreted differently.

16. Moreover, Government also notes that one of the grounds for filing the present Revision Application by the applicant department is that Commissioner (Appeals), relied upon the order of the Hon'ble Bombay High Court in the case CCE, Raigad V/s Micro Inks Ltd. and decided the issue in the favour of respondent but the Revenue had not accepted the said order of the Hon'ble Bombay High Court in the case of Commissioner, Central Excise, Raigad Vs. Micro Inks Ltd. and the Special Leave Petition (Civil) filed by the department was pending with Hon'ble Supreme Court for final decision. However, it is observed that the Special Leave to Appeal (C) No. 5159 of 2012 filed by Department against Hon'ble Bombay High Court order in W.P. No. 2195 of 2010 had been dismissed by Hon'ble Supreme Court vide order dated 25.11.2013 [2017(351)E.L.T. A 180 (S.C)]. It is also reported that the Hon'ble Supreme Court Order dated 25.11.2013 had also

been accepted by the Commissioner, Central Excise, Raigad Commissionerate on 07.01.2014 , and as such, the Hon'ble Bombay High Court's Order in CCE Raigad v/s Micro Inks Ltd.2011 (270) E.L.T. 360 (Bom.), has attained finality.

17. In view of the above discussion, the Government does not find any fault in the order of the Commissioner (Appeals) and, therefore, the Revision Application is dismissed.

18. So ordered.

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

ORDER No. 06/2019-CX (WZ) /ASRA/Mumbai DATED 23.8.2019

To,
The Commissioner of Central Goods & Service Tax, Belapur,
CGO Complex, Sector 10,
C.B.D. Belapur,
Navi Mumbai -400 614.

Copy to:

1. M/s Uttam Galva Steels Ltd. Pali Road Complex, Survey No. 39- 49, Village- Dahivali, Taluka-Khalapur, Dist- Raigad
2. The Commissioner (Appeals) of Central Goods & Service Tax, Raigad, 5th Floor, CGO Complex, Belapur, Navi Mumbai -400 614.
3. The Deputy / Assistant Commissioner (Rebate), Belapur, CGO Complex, Sector 10, C.B.D. Belapur, Navi Mumbai -400 614
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file,
6. *Spare Copy.*