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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, Cuffe Parade,  
Mumbai- 400 005

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F.No.199/07/ST/2014-RA

2670

Date of Issue: 03.04.2021

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ORDER NO. 02/2021-CX (WZ)/ASRA/MUMBAI DATED 30.03.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicants : Commissioner, Central Excise, & Service Tax, Indore

Respondents : M/s Flexituff International Ltd.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. IND-CEX-000-APP-24-2014 dated 24.01.2014 passed by the Commissioner (Appeals), Customs, Central Excise, & Service Tax, Indore.

## ORDER

The Revision Applications is filed by the Commissioner, Central Excise, & Service Tax, Indore Commissionerate (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. IND-CEX-000-APP-24-2014 dated 24.01.2014 passed by the Commissioner (Appeals), Customs, Central Excise, & Service Tax, Indore.

2. The issue in brief is M/s Flexituff International Ltd., Indore Special Economic Zone, C-41-50, SEZ, Sector-3, Pithampur, District – Dhar (M.P.) – 454 775 (herein after as "the Respondent"), holding Service Tax Registration No. AAACN5986HST003 are engaged in the manufacture of Flexible Intermediate Bulk Containers (FIBC) i.e. the Authorized Operation vide LOP No. 12-2/2003-SEZ/321 dated 03.09.2009 issued by the Office of Development Commissioner, Indore Special Economic Zone, Indore and which was valid for next five years from 24.08.2009. In terms of Notification No.17/2011-ST dated 01.03.2011, as amended, the Respondent vide letter dated 17.05.2012 and 26.06.2012 had filed applications in Form A-2 for claim of refund of Service Tax amounting to Rs. 7,27,806/- and Rs. 16,26,167/- respectively incurred on various charges covered under specified services used for authorized operation of the Respondent and payment of Service Tax had been made to the service provider during January 2012 to March 2012 in Special Economic Zone. On scrutiny of the claims, the Respondent was issued query memo dated 13.07.2012 and 19.07.2012 respectively. The original adjudicating authority Deputy Commissioner, Customs, Central Excise & Service Tax, Division – Pithampur vide Order-in-Original No. 25/DC/Refund/ST/Pith/2012-13 dated 16.10.2012 sanctioned the refund amounting to Rs. 7,12,710/- under Section 11B of Central Excise Act, 1994 read with Section 83 of Finance Act, 1994 and rejected the balance amount of claim of refund of Rs. 15,096/- and vide Order-in-Original No. 26/DC/Refund/ST/Pith/2012-13 dated 16.10.2012 sanctioned the refund amounting to Rs. 16,12,572/- under

Section 11B of Central Excise Act, 1994 read with Section 83 of Finance Act, 1994 and rejected the balance amount of claim of refund of Rs. 13,595/-,

3. Being aggrieved with the two impugned Orders-in-Original both dated 16.10.2012 , the Department filed appeal with the Commissioner (Appeals), Customs, Central Excise, & Service Tax, Indore on the following grounds:

- (i) One of the essential condition specified in Notification No. 17/2011-ST dated 01.03.2011 for claiming refund of service tax by the SEZ units is the approval of list of services (utilized by the SEZ unit in relation to its authorized operation) by the Approval Committee. In this case, the committee itself had observed that *"It is noted that many services had been included by the unit without discriminating as to which Service would actually be utilized in its authorized operation"*. Thus, the list of services were approved on self-certification basis.
- (ii) There are many services in the list (submitted to the Committee by the Respondent) which could not have been utilized by the Respondent. These services are Credit Rating Agencies, Stock Exchange Service, Event Management Service, Club and Association Service, Management and Business Consultation Service, Advertisement Agency etc. On the other hand, the Respondent had wrongly certified in its submission of list of services for approval that *"it is certified that all services mentioned in column 3 above are to be received by SEZ unit relation to authorized operation"*. Therefore, it appeared that the approval so granted on the basis of a wrong declaration is invalid for all practical purpose.
- (ii) When the approval is granted on the basis of a wrong declaration it renders the resultant approval as improper and invalid since the refund in this case can be granted only on the basis of a valid approval, the absence of which would disqualify the applicant from getting the same. As such, the impugned Orders had wrongly lot awarded the refund amounts to the Respondent on said ineligible services.

4. The Commissioner(Appeals) vide Order-in-Appeal No. IND-CEX-000-APP-24-2014 dated 24.01.2014 held that the review order is not sustainable on the following grounds:

- (i) On the issue of time limitation and whether Section 84 of Finance Act, 1994 can be involved instead of Section 35E(2) of Central Excise Act, 1944, the review order had been signed on 24.01.2013 against Order-in-Original No. 25/DC/Refund/ST/Pith/2012-13 dated 16.10.2012 and Order-in-Original No. 26/DC/Refund/ST/Pith/2012-13 dated 16.10.2012. The review in such cases should have been completed within three months and order issued by 16.01.2013. However, it is seen that the order although was dated 15.01.2013, but had been signed by the Commissioner on 21.01.2013;
- (ii) Further, as pointed by the Respondents, the review order was required to be issued under the provisions of Section 84 of the Finance Act, 1994 whereas it had been issued under Section 35E(2) of the Central Excise Act, 1944 which was not correct.

5. Being aggrieved, the Applicant Department filed the current Revision Application on the following grounds:

- (i) On examination of the impugned Order-in-Appeal, the Commissioner is of the view that the impugned OIA is not proper, legal and correct.
- (ii) The Appellate Authority had found that the review order had been signed on 24.01.2013 against Order-in-Original No. 25/DC/Refund/ST/Pith/2012-13 dated 16.10.2012 & 26/DC/Refund/ST/Pith/2012-13 dated 16.10.2012. The review in such case should have been completed within three month and order issued by 16.01.2013, however it was seen that the order although was dated 15.01.2013 but had been signed by the Commissioner on 24.01.2013. Thus Appellate authority has rejected on limitation. The Appellate authority has erred in observing this. As per Section 84(2) of the Finance Act, 1994 (or Section 35E (3) of the Central Excise Act,

1944) every order under sub-section (1) of the Finance Act, 1994 (or sub-section (1) of the Finance Act, 1994), as the case may be, shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority. The Appellate authority has failed here to observe that the Orders-in-Original both dated 16.10.2012 were received in the Headquarters on 25.10.2012, therefore was to be reviewed upto 24.01.2013 which has rightly been done in the instant case. Therefore, the finding of Commissioner (Appeal) is not correct.

- (iii) The Appellate Authority had also held that the review order was required to be issued under the provisions of Section 84 of the Finance Act 1994 whereas it has been issued under section 35E(2) of the Central Excise Act, 1944, and observing this Commissioner(Appeal) has rejected the departmental appeal This finding of Commissioner (Appeal) was also not legal and proper. As it is a settled legal position that merely citation of wrong Rules does not make demand etc. void. In the instant case, Commissioner is duly empowered to review such cases as per provisions of subsection of Section 84 of the Finance Act, 1994. However, inadvertently review order has been passed under Section 35E (2) of Central Excise Act, 1944. Since in both the Acts, Commissioner has been empowered to file appeal, merely filling of appeal or passing of review order under wrong section does not make the Review order and appeal void. In this regard it was submitted that Hon'ble Tribunal in case of Collector of Central Excise Vs M/s Mihir Textiles Ltd.,[1991 (52) E.L.T. 89 (Tri.)], has held the same view. The appeal filed against the said order has been dismissed by the Hon'ble Apex Court [1991 (55) E.L.T. (A143)]. Thus, it is clear that the said order of Hon'ble Tribunal has attained finality and is law of the land.
- (iv) Furthermore, Hon'ble Tribunal Mumbai in the matter of Perfect Embroidery V/s Commissioner of Central Excise, Mumbai-VII [2000

(122) E.L.T. 752 (Tribunal)] has held that mere citation of wrong rule does not adversely affect the powers of Commissioners to impose penalties. Hon'ble Tribunal Delhi has also relied the same in the matter of S.R. Industries Ltd. V/s Commissioner of Central Excise, Chandigarh [2004 (170) E.L.T. 232 (Tri. - Del.)].

- (v) Hon'ble Tribunal Delhi in the matter of M/s Chandrapal Singh Govind Singh Khandsari Factory V/s Collector of Central Excise, Meerut [1987 (32) ELT 179 (Tribunal)] has also held that "*Citation of wrong rule does not affect validity of demand*".
- (vi) The Commissioner (Appeal) has erred in rejecting departmental appeal because, the said decisions of the Hon'ble Tribunal are having binding effect on the Commissioner (Appeal) as per judicial discipline. However, the Commissioner (Appeal) has failed to follow the same.
- (vii) In view of the above factual & legal position, Order-in-Appeal No. IND/CEX/000/APP/24/2014 dated 24.01.2014 passed by the Commissioner (Appeals), Central Excise, Indore does not appear to be legal and proper and the same is liable to be set aside.

6. The Respondent submitted their cross-objections on the revision application on the following grounds:

- (i) In terms of the provisions contained in Section 35E (1A) of the Central Excise Act, 1944 the Commissioner of Central Excise may, if he is of the opinion that an order passed by the Commissioner(Appeals) under Section 35A is not legal or proper, direct proper officer to make an application on his behalf to Central Government for revision of such order. In the instant case, the copy of the direction/ order passed by the Commissioner of Central Excise, Indore had not been provided to the Respondent for examining legality of such direction/ order. Even the number and date of such direction/order issued by Commissioner, Central Excise has not been mentioned in the entire revision application. In this connection, in para 3.1 (Grounds of

Appeal) of the revision application, there is a mention of Commissioner's view as under.-

*"3.1 On examination of the impugned Order-in-Appeal, the Commissioner is of the view that the impugned OIA is not proper, legal and correct insofar as:"*

It appears as if the Deputy Commissioner (Review) has intentionally avoided supplying copy of the order passed by the Commissioner.

- (ii) As regards limitation, in para 3.2 of the Revision Application, the Respondent submitted that no proof has been adduced so as to prove that both the said Orders-in-Original were received in the Headquarters on 25.10.2012 only. Both the Orders-in-Original were dispatched from Division: Pithampur by 'SPEED POST' on 16.10.2012. The distance from Pithampur to Indore is only 35 Kms. Normally the Speed Post takes maximum 2 days to deliver dak from Pithampur to Indore. In the instant case both the Orders-in-Original have been stated to have received in the Headquarters on 25.10.2012 i.e. after 10<sup>th</sup> day of dispatch which appears to be abnormal and not at all convincing.
- (iii) Therefore, in order to ascertain the truth the Revisionary Authority may kindly like to call for the original records relating to:-
  - (a) Dispatch Register of Pithampur;
  - (b) Inward Register of Headquarters, Indore;
  - (c) Acknowledgement from the Postal Authority relating to delivery of Orders-in-Original in the Headquarters Office at Indore.
- (iv) The Review Order No. 33/2012-13, issued under F.No. III(20) ARC/OIO/DC/Pith/1620/2012-13 bears the dispatch date as "15.01.2013", whereas the same has been signed by the Commissioner on "24.01.2013". How it is possible that an "order" signed on

10. Further, the relevant portion of the Section 35B of the Central Excise Act, 1944 is reproduced below:

***“Appeals to the Appellate Tribunal. SECTION 35B.*** Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order — — (1)

(a) .....

(b) .....

(c) .....

(d) ..... :

***Provided*** that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, —

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;

(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998.”

11. Under Section 86 of the Finance Act, 1994, the Government has been vested with the revisionary power for the order of the Commissioner (Appeals) involving the issue regarding the rebate of service tax against the exported services only. Accordingly, this office does not have any legal authority to deal with the Commissioner(Appeals)’s above referred Orders which is clearly relating to refund of Service Tax and not the rebate of Service Tax on input services or rebate of duty paid on inputs as is envisaged in aforementioned Section 86(2) of the Finance Act. Thus, the above stated Revision Application has been filed wrongly before the Government.



12. In view of the above discussions, the Government rejects the Revision Application filed by the Applicant Department as non-maintainable due to lack of jurisdiction.

*Shrawan*  
*30/3/21*  
(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio  
Additional Secretary to Government of India.

ORDER No. 02/2021-CX (WZ)/ASRA/Mumbai Dated 30.03.2021

To,  
The Commissioner,  
Central Goods & Service Tax,  
Indore Commissionerate,  
Manik Bagh Palace,  
Post Box No. 10,  
Indore (MP) – 454 001

Copy to:

1. M/s Flexituff International Ltd., Indore Sepcial Economic Zone, C-41-50, SEZ, Sector-3, Pithampur, District – Dhar (M.P.) – 454 775.
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Spare copy