REGISTERED SPEED POST AD

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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

F.No. 195/464/16-RA / 1324 Date of Issue: 09.03.2023

ORDER NO. 100 /2023-CX(WZ)/ASRA/MUMBAI DATED 31.03.23 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.

Applicant : M/s. Vijay Chemicals Industries,
R-422, MIDC Indl. Area, Rabale,
Thane- Belapur Road,
Navi Mumbai-400 701.

Respondent : Commissioner of Central Excise, Belapur

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. CD/301/Bel/2016 dated 01.04.2016 passed by the Commissioner (Appeals), Central Excise, Mumbai-II.

ORDER

The subject Revision Application has been filed by M/s. Vijay Chemicals Industries, R-422, MIDC Indl. Area, Rabale, Thane- Belapur Road, Navi Mumbai-400 701 (hereinafter referred as the applicant) against the impugned Order-in-Appeal No. CD/301/Bel/2016 dated 01.04.2016 passed by the Commissioner (Appeals), Central Excise, Mumbai-II against the Order-in-Original No. Belapur/Bel-IV/R-IV/03/Vijay Chem/AC/HP/15-16 dated 06.08.2015 passed by the Assistant Commissioner(Rebate), Belapur-IV, which had confirmed an amount of Rs.1,19,46,266 /-.

2. Brief facts of the case are that M/s. Vijay Chemicals Industries, a 100% Export Oriented Unit had filed rebate claims totally amounting to Rs.1,19,46,266/- during the year 2007-08, 2008-09, in respect of goods exported under claim of rebate, under Rule 18 of the Central Excise Rules, 2002 for the duty paid goods exported. The said claims were sanctioned by the Deputy/Assistant Commissioner, Central excise, Belapur IV. The department found that per Notification No. 24/2003-CE dated 31.03.2003 the goods manufactured by the 100% EOU are exempted from payment of duty, in such case the appellant has no option to pay the duty of his own volition. Therefore, sanction of the rebate claims by the Assistant/Deputy Commissioners is erroneous. Hence, to recover the amount sanctioned to the appellant a Show Case Cum demand notice dated 14.10.2014 was issued. Later on the demand was confirmed vide Order-in-Original No. Belapur/Bel-IV/R-IV/03/Vijay Chem/AC/HP/15-16 dated 06.08.2015.

3. Aggrieved, the applicant filed an appeal before the Commissioner (Appeals) who vide impugned Order-in-Appeal dated 01.04.2016 upheld the Order-in-Original and rejected the appeal.

4. Thereafter, the applicant has filed the present Revision Application mainly on the following grounds:-

(a) Order-In-Appeal is a "Non Speaking Order"

The applicant's submissions before Commissioner (Appeals) were not discussed and not even given any findings as to why said submissions cannot be accepted.

It is a well settled law that while rejecting their appeal; the first appellate authority is required to mention his findings with respect to the submissions made by the appellant. If these basic principles are not followed, it would amount to violation of natural justice.

(b) Jurisdiction of the Adjudicating Officer

The applicant submitted that the Adjudicating Officer being an Assistant Commissioner of Central Excise has no jurisdiction to adjudicate the case where the show cause cum demand is above Rs. 5 lakhs. Para No. 2.1.3 (B) of Part-II to CBEC's Central Excise Manual is specifically mentioned the monetary limitation for various adjudicating officers. As per the directions given in above said Para, if the demand is more than Rs. 50 lakhs, the case shall be adjudicated by the Jurisdictional Commissioner of Central Excise. In the present case since the notice cum demand is adjudicated by the Jurisdictional Assistant Commissioner. The applicant in their appeal before the Commissioner (A) had submitted this issue as one of the grounds of appeal that the matter is beyond the jurisdiction of Assistant Commissioner. However, the Commissioner (A) had not given any findings on this submission while upholding the Order in Original therefore the impugned order is null & void and liable to be set aside on this ground itself.

(c) Demand Bared by Limitation

i. The applicant submitted that the demand for recovery is barred by limitation. During the relevant period if any refund is made erroneously, the revenue has to follow the provisions laid down under Section 11A of the Central Excise Act, 1944 for recovery of the same. There is no any other provision to recover said "so called erroneous refund".

ii. It is an un-disputed fact that there was No fraud, collusion or any willful mis-statement or suppression of facts. All required documents were provided with the refund claim. It was within the knowledge of the revenue that the appellant are registered as an Export Oriented Unit. Said fact is mentioned in the refund order itself. The refund was sanctioned after consideration and verification of all required documents and records. Even there is no allegation of fraud, collusion or any willful mis-statement or suppression of facts in the show cause notice.

iii. The demand was initiated by the show cause notice for recovery of the refund sanctioned to the applicant during the period 2007-08 to 2008-09. The show cause notice was issued and received by the applicant on 16.10.2014. In other words the show cause notice has been issued after 6 years of sanction of refund claim. Since the show cause notice is issued after one year from the relevant date, the entire demand is barred by Imitation in terms of Section 11A of the Act.

iv. Secondly the show cause notice is issued after the maximum recovery period of "five years" as provided in the first proviso of the Section 11A.

v. The impugned Order confirming the demand proposed in the show cause notice served nearly after six years from the date of sanction of "so called erroneous refund" is bad in law and therefore liable to be set aside.

vi. It is further submitted that the refund claim is sanctioned under various Order-in-Originals. In the preamble of the Order-in- Originals, it is clearly mentioned that any person deeming himself aggrieved by said orders should appeal to the Commissioner [Appeals) Mumbai having office at 3rd Floor, Utpad shulk Bhavan, Bandra-Kunta complex. Bandra (E), Mumbai-40051 in Form EA-1 within a period of two months of the date of which the orders are communicated to him if the revenue was not agreeing with the order, they should have filed an appeal with the Commissioner [Appeals) within two months of the receipt of order. Since the legal remedy that was available to the revenue was not used in the right time, recovery proceeding after years from the date of sanction of refund is not justified.

vii. They relied on the following case laws:

a. KIRLOSKAR CUMMINS v/s. COLLECTOR [1998 (102) ELT A223)],

b. NATIONAL PLYWOOD INDUSTRIES v/s. COLECTOR [2002 (145) ELT A254)],

c. MUKUND LTD v/s CCE (2007(220) ELT 226 (T- Mumbai)],

viii. Further the C.B.E.C., under its No. Circular No. 423/56,98-CX dated 22/9/1998, categorically clarified that where ever there is an erroneous refund is being made, the revenue has to issue show cause notice under Section 11A of the Act within six months normal period (presently the normal period is increased to one year).

ix. The Commissioner (A) has not giving his any finding about the applicant's submission on the grounds of "limitation".

x. In view of above said decisions of superior courts and specific department circular in the subject matter, upholding the Order Original confirming the demand based on show cause notice served nearly after six

years from the date of sanction of refund bad in law and therefore liable to be set a side.

5. Personal hearing in the matter was held on 28.06.2022, Shri Vasant K. Bhat, C.A. appeared on behalf of the applicant and reiterated his earlier submissions. He submitted that for erroneous rebate / refund extended period is not applicable. Further, he submitted that Show Cause Notice has been issued after 5 years. He further submitted that amount involved is over Rs. 1 Crore therefore, adjudication by Assistant Commissioner is improper.

6. Government has carefully gone through the relevant records, the written and oral submissions and also perused the impugned Order-in-Original and the impugned Order-in-Appeal. It is observed that the issues involved in the present revision application are whether the applicant had an option to export goods on payment of duty and claim rebate of the same under the provisions of Rule 18 of the Central Excise Rules, 2002; whether the demand is barred by limitation & whether adjudicating authority being Assistant Commissioner of Central Excise has jurisdiction to adjudicate the case.

7. whether the applicant had an option to export goods on payment of duty and claim rebate of the same under the provisions of Rule 18 of the Central Excise Rules, 2002.

7.1 The Notification No. 24/2003-CE dated 31.03.2003 states that the goods manufactured in an export oriented undertaking are fully exempted from whole of duty of Excise, Additional Duty (GSI) and Additional duty (TTA).

7.2 The exemption Notification No. 24/2003-CE dated 31.03.2003 has been issued under sub-section (1) of Section 5A of the Central Excise Act, 1944. Sub-section (1A) of Section 5A states that:

"[(1A) for the removal of doubts, it is hereby declared that where on exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturers of such excisable goods shall not pay the duty of excise on such goods."]

7.3 There is no option or discretion provided to the applicant to refrain from availing the exemptions granted by the Notification issued under sub-section (1) of Section 5A of Central Excise Act, 1944. Where an exemption has been granted absolutely, the manufacturer shall not pay the duty of excise on such goods.

7.4 The Hon'ble Tribunal in case of Mahendra Chemicals Vs CCE. Ahmedabad [2007 (203) ELT 505 (Tri-Ahmd)] has referred to Supreme Court decision in case of CCE Vs. Parle Exports 1988(38)ELT 741(SC) and observed that:

"The SC has clearly held that the notification is a part of statute and has force of law. The law is not optional. If the legislature has decided to exempt certain goods by notification, the exemption cannot be negated by an assessee by opting to pay duty on exempted goods..... Any such payment of duty on such goods will be without sanction of law."

7.5 It is mandatory for all 100% EOU to avail the exemption Notification No. 24/2003-CE dated 31.03.2003 issued under sub-section (1) of Section 5A of Central Excise Act, 1944 and the noticee have no exception. The Notification No. 24/2003-CE dated 31.03.2003 is unambiguous which states that the goods manufactured in an export oriented undertaking are fully exempted from whole of duty of Excise, Additional Duty (GSI) and Additional duty (TTA), i.e. export clearances are unconditionally exempted.

8. Whether the demand is barred by limitation.

8.1 In the instant case, the applicant is an 100% EOU operating under special scheme. An 100% EOU operates under highly liberalized environment and receives domestic as well as imported goods without payment of duty. Such units are required to execute a Bond called the B-17 Bond. The relevant conditions of the said B-17 bond are as under:

> *1. We, the obligator shall observe all the provisions of the Customs Act 1962, Central Excise Act, 1944 and the rules and regulations made there under in respect of the said goods.*
>
> *2. We, the obligators shall pay or before a date specified in a notice of demand all duties, and rent and charges claimable on account of the said goods under the Customs Act, 1962, Central Excise Act, 1944 and rules/regulations made there under together with interest on the same from the date so specified at the rate applicable.*

8.2 B-17 Bond can be enforced without any limitation. Therefore, in the present case the provisions of section11A of the Central Excise Act, 1944 invoked for demand of duty and interest are not applicable and the demand of duty alongwith interest are decided in terms of B-17 Bond executed by the applicant. In case of EOU, Bond executed can be enforced to demand duty and interest, without any limitation.

8.3 In view of the Bond executed by the applicant, wherein it is undertaken that they will observe all the provisions of the Customs Act, 1962, the Central Excise Act, 1944 and to pay on demand all duties and rent and charges, claimable on account of the said goods alongwith interest at the appropriate rate, but failed to observe the conditions in case of the goods exported under the provisions of the aforesaid Acts and rules made thereunder.

8.4 Hon'ble CESTAT, Mumbai in the case of Endress + Hauser Flowtec (I) Pvt. Ltd. V/s. C.C.E., Aurangabad [2009 (237) E.L.T. 598 (Tri.-Bom)] observed:

"Even otherwise, since the PC are a 100% EOU, demands can be raised as per the provisions of the B-17 bond executed by them. As per this bond, there is no time limit for demanding duty in the case of short payment by an EOU. Though this bond has not been invoked by the Commissioner, while confirming the demand, there are a plethora of judgments to the effect that so long as the proper officer has the power under a particular provision of law, invoking the wrong provision of law for confirming the duty, will not vitiate the demand. [J.K. Steel reported in ***1978 (2) E.L.T. J355 (S.C.),*** *Industrial Coating Corporation v. CCE, Mumbai-III reported in (Tri-Mum), Sharda Synthetics Bombay Pvt. Ltd. v Union of India reported in (Bom) etc.]"*

9. whether adjudicating authority being Assistant Commissioner of Central Excise has jurisdiction to adjudicate the case.

9.1 It is observed that the applicant had not raised this ground during the proceedings before the adjudicating authority viz. the Assistant Commissioner at the time of passing of impugned Order-in-Original Dated 06.08.2015. The fact that the applicant had not raised this ground before the Assistant Commissioner would mean that they had acquiesced to the order of the original authority adjudicating the case. Government places reliance upon the judgment of the Hon'ble Supreme Court in the case of Commissioner of Cus. & C. Ex., Goa vs. Dempo Engineering Works Ltd.[2015(319)ELT 359(SC)] to hold that when the applicant had not raised this ground before the original authority, the applicant cannot raise this new ground in the revision proceedings.

9.2 Further, the demand is in terms of B-17 Bond executed with Assistant Commissioner. B-17 Bond signed by the applicant and the concerned Assistant Commissioner stipulates that subject to conditions specified applicant shall pay on demand any duty, interest, rent, etc. under Customs

Act, 1962 and Central Excise Act, 1944. Therefore, Assistant Commissioner can enforce the bond for recovery, which has rightly been done.

10. In the applicant's own case the Government vide Order No. 219-245/12- CX dated 9.3.2012 after elaborately discussing the issue held that in view of the provisions of Section 5A(1A) of Central Excise Act, 1944, the 100% EOU has no option to pay duty on goods exported and therefore, rebate claim was not admissible under Rule 18 of Central Excise Rules, 2002. The operative portion of the said order is reproduced below:

> *"7. On perusal of records, Government observes that applicant a 100% EOU cleared the finished goods from export on payment of duty by debiting Cenvat Credit account and filed rebate claims of duty paid on such exported goods which were sanctioned by Assistant Commissioner Central Excise. However, Commissioner Central Excise reviewed the Orders-in-Original passed by Assistant Commissioner Central Excise & filed appeals before Commissioner (Appeals), who allowed the department appeals holding that rebate claim were not admissible in these cases since the said goods were unconditionally exempted from whole of duty under Notification 24/03-CE and applicant had no option to pay duty in view of provision of section 5A(1A) of Central Excise Act 1944. Now, the applicant has filed these revision application on the grounds stated in para (4) above."*

This order of the Revisionary authority has not been challenged by the applicant. Therefore, it can be concluded that the issue has reached finality.

11. The Hon'ble Supreme Court has in its judgment in the case of Sandoz Pvt Ltd. V/s. U.O.I. [2022 (379) E.L.T. 279 (S.C.)] has held that :

> ***28.*** *If the refund claim is by the EOU, the same needs to be processed by the authorities under the FTP by reckoning the entitlement of DTA supplier specified in Chapter 8 of the FTP concerning the goods supplied to it, being a case of deemed exports. The EOU on its own, however, is not entitled for refund of TED, as the mandate to EOU is to procure or import goods from DTA supplier, without payment of duty in view of the express ab initio exemption provided in terms of para 6.2(b) read with para 6.11(c)(ii). However, despite such express obligation on the EOU, if the EOU has had imported goods from DTA supplier by paying TED, it can only claim the benefit of refund provided to DTA supplier under para 8.4.2 read with paras 8.3(c) and 8.5 subject to obtaining disclaimer from DTA supplier in that regard and complying with other formalities and requirements.*

> ***29.*** *We thus agree with the conclusion reached by the Bombay High Court that the EOU is not entitled to claim refund of TED on its own. However, we add a caveat that EOU may avail of the entitlements of DTA supplier specified in Chapter 8 of FTP on condition that it will not pass on that benefit back to DTA supplier later on. In any case, the refund claim needs to be processed by keeping in mind the procedure underlying the refund of Cenvat credit/rebate of excise duty obligations. If Cenvat credit utilised by DTA supplier or EOU, as the case may be, cannot be encashed, there is no question of refunding the amount in cash. In that case, the commensurate amount must be reversed to the Cenvat credit account of the concerned entity instead of paying cash.*
>
> .....
>
> ***42.*** *In conclusion, we hold that the EOU entities, who had procured and imported specified goods from DTA supplier, are entitled to do so without payment of duty [as in para 6.2(b)] having been ab initio exempted from such liability under para 6.11(c)(ii) of the FTP, being deemed exports. Besides this, there is no other entitlement of EOU under the applicable FTP. Indeed, under para 6.11(a) of the FTP, EOU is additionally eligible merely to avail of entitlements of DTA supplier as specified in Chapter 8 of the FTP upon production of a suitable disclaimer from the DTA supplier and subject to compliance of necessary formalities and stipulations. It would not be a case of entitlement of EOU, but only a benefit passed on to EOU for having paid such amount to the DTA supplier, which was otherwise ab initio exempted in terms of para 6.11(c)(ii) of the FTP coupled with the obligation to import the same without payment of duty under para 6.2(b).*

12. In view of the above, Government finds no reason to interfere with the impugned order-in-appeal. The revision application filed by the applicant are rejected as being devoid of merits.

Shrawan 28/2/23

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 100 /2023-CX (WZ) /ASRA/Mumbai dated 28.02.23

To,
M/s. Vijay Chemicals Industries,
R-422, MIDC Indl. Area, Rabale,
Thane- Belapur Road,
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Copy to:

1. Commissioner CGST & Central Excise, Belapur.
2. Commissioner (Appeals), CGST & Central Excise, Mumbai -II.
3. Vasant K. Bhat. Hiregange & Associates, 409, Filix, Opp. Asian Paints, LBS Marg, Bhandup (West), Mumbai – 400 078.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Spare Copy.