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F.No. 195/214/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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Date of Issue 6/2/13

ORDER NO. 101 /13-Cx DATED 05.2.2013 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D. P. SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

SUBJECT	:	REVISION APPLICATION FILED UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944 AGAINST THE ORDER-IN-APPEAL No. M.I/AV/269/2010 dated 15.10.10 PASSED BY COMMISSIONER OF CENTRAL EXCISE (APPEALS), MUMBAI-I.
APPLICANT	:	M/S BLUE CIRCLE CORPORATION, MUMBAI
RESPONDENT	:	COMMISSIONER OF CENTRAL EXCISE, MUMBAI-I

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ORDER

This revision application is filed by the applicant M/s Blue Circle Corporation, Mumbai against the order-in-appeal M.I/AV/269/2010 dated 15.10.10 passed by the Commissioner of Central Excise (Appeals), Mumbai-I with respect to order-in-original No. K-II/272-R/2005 (MTC) dated 25.7.2006 passed by Assistant Commissioner (Rebate) Central Excise, Mumbai-I.

2. Brief facts of the case matter are that M/s Blue Circle Corporation, Mumbai are engaged in the export of goods. The applicants have filed rebate claims in respect of goods cleared for export against AREs-1 before the Maritime Commissioner, Central Excise, Mumbai-IV. The applicant filed the rebate claims after the stipulated period of one year. The applicant stated that the delay in filing rebate claim occurred due to the reason that the relevant Shipping Bills were not returned to the applicants after assessment but sent for chemical examination and the assessment was made provisional. The Shipping Bills were finally assessed by the Customs Department on 02.05.2006. After receiving the said assessed copy of the Shipping Bills, the applicant had filed their rebate claims on 16.5.2006. The applicant was thereafter issued with a show cause notice proposing that the goods in question were exported on 21.04.2005 and 28.04.2005 and the rebate claims were filed in the office of the Maritime Commissioner, Mumbai-IV on 16.05.2006 i.e. after the expiry of one year from the date of exportation and hence, are time barred in terms of sub-section (1) of Section 11B of Central Excise Act, 1944 and therefore are liable for rejection. After due process of adjudication, both the claims of the applicant were rejected by the original authority.

3. On being aggrieved, the applicant filed appeal before Commissioner (Appeals), who rejected the same.

4. On further being aggrieved the applicant preferred this revision application under Section 35EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 The relevant Shipping Bills were held up by the Custom Authorities directing provisional assessment of the same stating the reason that the samples of the goods exported requires testing, analysis by the Office of the Deputy Chief Chemist, in other words, there was a specific direction for the assessment of the exported goods be provisional.

4.2 The Rebate Claims are filed in seeking refund of the Excise Duty paid on the finished goods manufactured in India and the rebate/refund claims is filed under Rule 18 of the Central Excise Rules 2002, read with relevant Notification No.19/2004-Central Excise (N.T.), dated 6.9.2004. The rebate claims filed under Rule 18 of Central Excise Rules is governed by the procedure laid down under Section 11B of the Central Excise Act,1944. At sub section 5 of the said Section 11B, "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;" A plain reading of the definition of "refund" makes amply clear that the provisions relating to refund of excise duty mutatis mutandis applicable to rebate claims.

4.3 Manual which reads as under:

"8. Sanction of claim for rebate by Central Excise.

8.3 The following documents shall be required for filing claim of rebate:

(i) A request on the letterhead of the exporter containing claim of rebate, A.R.E.1 numbers an dates, corresponding invoice numbers and dates amount of rebate on each A.R.E.1 and its calculations

(ii) original copy of the A.R.E.1

(iii) invoice issued under Rule 11,

(iv) self attested copy of shipping Bill, and

(v) self attested copy of Bill of Lading,

(vi) Disclaimer Certificate {in case where claimant is other than exporter]"

In absence of above mentioned documents, the Department would not accept the rebate claim as complete and cannot proceed with sanctioning rebate claims, as laid down at para 2.4 of the CBEC manual irrespective of the fact, whether the goods are exported borne out from the other documents reflecting export and payment. Besides, when a specific endorsement by the Customs authority for keeping the assessment provisional for whatsoever reason, the common sense and logic demands that the rebate claims cannot be processed as at the time of finalization of assessment there could be a demand of duty resulting into variations in the excise duty already paid by the manufacturer correspondingly, a variation in the rebate claim.

4.4 The procedure of processing of the refund claims by the department has been laid down at para 2.4 of the CBEC manual which reads as:

> *"2.4 It may not be possible to scrutinize the claim without the accompanying documents and decide about its admissibility. If the claim is filed without requisite documents, it may lead to delay in sanction of the refund. Moreover, the claimant of refund is entitled for interest in case refund is not given within three months of the filing of claim.* ***Consequently, submission of refund claim without supporting documents will not be allowed.*** *Even if claim is filed by post or similar mode, the claim should be rejected or returned with Query Memo(depending upon the nature/importance of document not filed). The claim shall be taken as filed only when all relevant documents are available. In case any documents is not available for which the Central Excise or Customs Department is solely accountable, the claim may be received so that the claimant is not hit by limitation period. "*

In the present case, there is a serious delay on the part of Customs House in completion of the analysis of the sample of goods exported by the applicant and only after the insistence of the applicant they were finally assessed, hence delay, if any, in filing rebate claim for want of finally assessed shipping Bill squarely falls on the customs department and hence the principle of law

laid down by the Gujarat High Court M/s Cosmonaut Chemicals Vs. Union of India - 2009 (233) E.L.T. 46 (Guj) is applicable in this case.

4.5 Lower Authority has erred in recording his observation 'it is evident that the relevant date in respect of provisional assessment is only applicable to those cases where the payment of excise duty is assessed provisionally and same cannot be made applicable for assessment of the shipping bills where no excise duty has been paid. The provisions of provisional assessment in so far as it relates to shipping bills would be in terms of the provisions laid down in the Customs Act, 1962 and not the Central Excise Act, 1944. It is submitted that The rebate claims are filed under Rule 18 of Central Excise Rules,1944 is covered by the procedure laid down under Section 11B of the Central Excise Act. At sub section 5 (A) of Section 11B of the Central Excise Act, 1944, it is stipulated that "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;" A plain reading of the definition of "refund" makes amply clear that the provisions relating to refund of excise duty mutatis mutandis applicable for rebate claims, hence, there is no need for referring to provisions laid down under the Customs Act, 1962.

4.6 This is a general practice with the office of the Assistant Commissioner (Rebate); that when complete set of documents prescribed Under Rule 8.3 of the CBEC Manual, they do not entertain the rebate claims and enter into further correspondences on the said rebate claims; this procedure could be verified from the office of the Assistant Commissioner (Rebate),Mumbai. Without verifying the submission of the applicant on the procedure followed by the Assistant Commissioner (Rebate) Office, has wrongly held that merely submission of proof of export, which is based on the endorsement of the Customs Officers on the ARE-1, there is no need for filing the Shipping Bill, further it is immaterial, whether, Shipping Bill is provisionally assessed or finally assessed for sanction of the rebate claims.

4.7 The Commissioner of Central Excise (Appeals) has also erred in understanding the submissions of the appellant that Chemical analysis of the sample of the goods exported could have been asked by the customs authorities so as to ascertain the chemical composition, as well as, the real nature of the goods exported. There could be a reason for ascertaining, whether the goods mentioned in the Shipping Bill are same or different goods has been exported. In absence of any reason mentioned, it is incorrect on the part of the Commissioner of Central Excise (Appeals), to assume that the same was not relevant for the rebate claims. Such a finding of the Commissioner of Central Excise (Appeals) has not borne out of records but based on assumptions and presumptions. The Hon'ble Supreme Court has laid down in number of cases that a demand of duty cannot be raised and also no refund could be sanctioned when the assessment was provisional for whatsoever reason. Hence, once the shipping bill has been assessed provisionally it is incorrect to say that all the export documents are in order and complete making the exporter liable to claim rebate of duty on such exports on the basis of documents available.

5. Personal hearing in the case was scheduled on 9.8.2012, 17.10.2012, 20.12.2012. Hearing held on 9.8.2012 was attended by Shri R.K.Sharma, Advocate on behalf of applicant. During the course of hearing the applicant relied upon Hon'ble Madras High Court judgement in the case of Dorcas Market Makers Pvt. Ltd. reported in 2012 (TOIL)-108-H.C.-Madras-CX. The respondent department vide their reply vide letter F.No.V(Reb)Blue/258/2006 dated 10.10.2012 mainly stated as under:

a) The mention of time limit of filing a rebate claim within a specific period of one year, has been omitted from Notification No.19/2004, as the same was superfluous, because, even otherwise, all refunds, which includes rebate, are subject to the time limit of filing within a specific period of one year, as prescribed under Section 11B of the Central Excise Act, 1944. It may also be mentioned that the general provisions of Section 11B are not being made

applicable here. Section 11B of the Central Excise Act, 1944, contains specific stipulations with regards to computation of time limit in case of claims made for rebate of goods exported. As against this, the exemption notification does not contain any specific provisions that would override the aforesaid provisions of Section 11B. As such, in the absence of any provisions to the contrary in Notification No.19/2004, the specific provisions of Section 11B with regards to computation of time limit in case of export under claim for rebate, shall apply.

b) It appears that this aspect was not brought to the notice of the Hon'ble High Court in the case of M/s Dorcas Market Makers Pvt. Ltd. As such, it appears that the said judgment can be said to have been rendered per in curium since the same has not taken into account the specific provisions relating to export provided under Section 11B.

6. Government has carefully gone through the relevant case records and perused the impugned order-in-original and order-in-appeal.

7. Government observes that applicants exported the goods on 21.4.2005 and 28.4.2005. They filed rebate claims on 16.5.2006, which was held by the original authority as 'time barred' being filed after stipulated one year period from the date of export. The original authority vide impugned Order-in-Original rejected the claims as 'time barred'. Commissioner (Appeals) upheld impugned Order-in-Original. Now, applicant has filed this revision application on ground mentioned in para (4) above.

8. Government observes that the original authority rejected the rebate claim on the ground that rebate claim was filed after one year time limitations as stipulated under section 11B of Central Excise Act 1944. The applicant contested that their impugned Shipping Bills were initially assessed provisionally and finalized on 2.5.2006. After receiving finally assessed copies of Shipping Bills, they filed rebate claims on 16.5.2005. As such, the delay for the reasons of late receipt of finally assessed copies of Shipping Bills cannot be attributed to them. Government

observes that in order to decide the issue, it is proper to discuss relevant statutory provisions and various judgement of Tribunal/Court's in this regard.

9. As per explanation (a) to section 11B, refund includes rebate of duty of excise on excisable goods exported out of India or excisable materials used in the manufacture of goods which are exported. As such the rebate of duty on goods exported is allowed under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004 subject to the compliance of provisions of section 11B of Central Excise Act, 1944. The explanation A of section 11B has clearly stipulated that refund of duty includes rebate of duty on exported goods. Since the refunds claim is to be filed within one year from the relevant date, the rebate claim is also required to be filed within one year from the relevant date. As per explanation B(a)(i) of Section 11B, the relevant date for filing rebate claim means:-

"(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods-

(i) If the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are load, leaves India, or"

There is no ambiguity in provision of section 11B of Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002 regarding statutory time limit of one year for filing rebate claims.

10. Applicant has given provisional assessment by the department of impugned Shipping Bills as the reason for filing rebate claim after a stipulated period of one year. As discussed above, the rebate claim is required to be filed within one year from relevant date i.e. date of export. As such rebate claims are undisputedly filed after one year from the date of export. Government observes that filing of rebate claim within one year is a statutory requirement which is mandatory to be followed. The statutory requirement can be condoned only if there is such provisions under Section 11B. Since there is no provision for condonation of delay in terms of Section 11B, the rebate claim has to be treated as time barred.

11. Government find support from the below mentioned judgments for the proposition that rebate claim filed after one year time limit stipulated in section 11B of Central Excise Act, 1944 being time barred is liable to be rejected.

11.1 Hon'ble High Court of Gujrat in its order dated 15.12.2011 in the case of IOC Ltd. Vs. UOI (SCA No. 12074/2011) has held as under:-

"We are unable to uphold the contention that such period of limitation was only procedural *requirement and therefore could be extended upon showing sufficient cause for not filing the claim earlier. To begin with, the provisions of Section 11B itself are sufficiently clear. Sub-section (1) of Section 11E, as already noted, provides that any person claiming refund of any duty of excise may make an application for refund of such duty before the expiry of one year from the relevant date. Remedy to claim refund of duty which is otherwise in law refundable therefore, comes with a period of limitation of one year. There is no indication in the said provision that such period could be extended by the competent authority on sufficient cause being shown.*

Secondly, we find that the Apex Court in the case of Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 had the occasion to deal with the question of delayed claim of refund of Customs and Central Excise. Per majority view, it was held that where refund claim is on the ground of the provisions of the Central Excise and Customs Act whereunder duty is levied is held to be unconstitutional, only in such cases suit or writ petition would be maintainable. Other than such cases, all refund claims must be filed and adjudicated under the Central Excise and Customs Act, as the case may be. Combined with the said decision, if we also take into account the observations of the Apex Court in the case of Kirloskar Pneumatic Company (supra), it would become clear that the petitioner had to file refund claim as provided under Section 11B of the Act and even this Court would not be in a position to ignore the substantive provisions and the time limit prescribed therein.

The decision of the Bombay High Court in the case of Uttam Steel Ltd. (supra) was rendered in a different factual background. It was a case where the refund clam was filed beyond the period of six months which was the limit prescribed at the relevant time, but within the period of one year. When such refund claim was still pending, law was amended. Section 11B in the amended form provided for extended period of limitation of one year instead of six months which prevailed previously. It was in this background, the Bombay High Court opined that limitation does not extinguish the right to claim refund, but only the remedy thereof. The Bombay High Court, therefore, observed as under :

"32. In present case, when the exports were made in the year 1999 the limitation for claiming rebate of duty under Section 11B was six months. Thus, for exports made on 20th May 1999 and 10th June 1999, the due date for application of rebate of duty was 20th November 1999 and 10th December, 1999 respectively. However, both the applications were made belatedly on 28th December 1999, as a result, the claims made by the petitioners were clearly time-barred. Section 11B was amended by Finance Act, 2000 with effect from 12th May 2000, wherein the limitation for applying for refund of any duty was enlarged from 'six months' to 'one year'. Although the amendment came into force with effect from 12th May, 2000, the question is whether that amendment will cover the past

transactions so as to apply the extended period of limitation to the goods exported prior to 12th May 2000?"

11.2 The Hon'ble CESTAT, South Zonal Bench, Chennai in the case of Precision Controls vs. Commissioner of Central Excise, Chennai 2004 (176) ELT 147 (Tri.-Chennai) held as under:

"Tribunal, acting under provisions of Central Excise Act, 1944 has no equitable or discretionary jurisdiction to allow a rebate claim de hors the limitation provisions of Section 11B ibid – under law laid down by Apex Court that the authorities working under Central Excise Act, 1944 and Customs Act, 1962 have no power to relax period of limitation under Section 11B ibid and Section 27 ibid and hence powers of Tribunal too, being one of the authorities acting under aforesaid Acts, equally circumscribed in regard to belated claims – Section 11B of Central Excise Act, 1944 – Rule 12 of erstwhile Central excise Act, 1944 – Rule 18 of the Central Excise Rules, 2002. – Contextually, in the case of Uttam Steel Ltd. also, the Hon'ble Bombay High Court allowed a belated rebate claim in a writ petition filed by the assessee. This Tribunal, acting under the provisions of the Central Excise Act, has no equitable or discretionary jurisdiction to allow any such claim de hors the limitation provisions of Section 11B."

11.3 Further, it has been held by the Hon'ble Supreme Court in the case of Collector Land Acquisition Anantnag & Others vs. Ms. Katji & Others reported in 1987 (28) ELT 185 (SC) that when delay is within condonable limit laid down by the statute, the discretion vested in the authority to condone such delay is to be exercised following guidelines laid down in the said judgment. But when there is no such condonable limit and the claim is filed beyond time period prescribed by statute, then there is no discretion to any authority to extend the time limit.

11.4 Hon'ble Supreme Court has also held in the case of UOI vs. Kirloskar Pneumatics Company reported in 1996 (84) ELT 401 (SC) that High Court under Writ jurisdiction cannot direct the custom authorities to ignore time limit prescribed under Section 27 of Customs Act, 1962 even though High Court itself may not be bound by the time limit of the said Section. In particular, the Custom authorities, who are the creatures of the Customs Act, cannot be directed to ignore or cut contrary to Section 27 of Customs Act. The ratio of this Apex Court judgment is squarely applicable to this case, as Section 11B of the Central Excise Act, 1944 provides for the time limit and there is no provision under Section 11B to extend this time limit or to condone any delay.

11.5 In a very recent judgement, Hon'ble High Court of Bombay in the case of Everest Flavours Ltd. Vs. UOI reported as 2012 (282) ELT 481 (Bom) vide order dated 29.03.2012 dismissed a WP No. 3262/11 of the petitioner and upheld the rejection of rebate claim as time barred in terms of section 11B of Central Excise Act 1944. Hon'ble High Court has observed in para 11 & 12 of its judgement as under:

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*10. A judgment of the Madras High Court in **Dorcas Market Makers Private Limited, Chennai Vs. CIT (Appeals)2** was sought to be relied upon to submit that Section 11B of the Central Excise Act would not operate in respect of an application under Rule 18 of the Central Excise Rules, 2002. The learned Single Judge of the Madras High Court held that when a statutory Notification which was issued under Rule 18 does not prescribe any time limit, Section 11B would not be attracted. With respect, the learned Single Judge of the Madras High Court has not had due regard to the specific provision of Explanation (A) to Section 11B of the Act under which the expression "refund" is defined to include rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of such goods. The judgment of the Supreme Court in **Raghuvar** which has been relied upon by the learned Single Judge of the Madras High Court has already been considered hereinover.*

11. Finally it has been sought to be urged that the filing of an export promotion copy of the shipping bill is a requirement for obtaining a rebate of excise duty. This has been contraverted in the affidavit in reply that has been filed in these proceedings by the Deputy Commissioner (Rebate), Central Excise. Reliance has been placed in the reply upon Paragraph 8.3 of the C.B.E. & C. Manual to which a reference has been made above, and on a Trade Notice dated 1 June 2004 which is issued by the Commissioner of Central Excise and Customs Paragraph 8.3 of the Manual makes it abundantly clear that what is required to be filed for the sanctioning of a rebate claim is, inter alia, a self-attested copy of the shipping bill. The affidavit in reply also makes it clear that under the Central Excise rules, 2002 there are two types of rebates: (i) A rebate on duty paid on excisable goods and (ii) A rebate on duty paid on material used din the manufacture or processing of such goods. The first kind of rebate is governed by Notification No. 19/2004 dated 6 September 2004. In the case of the rebate on duty paid on excisable goods, one of the documents required is a self-attested copy of the shipping bill. For the second kind of rebate a self-attested copy of the

export promotion copy of the shipping bill is required. Counsel appearing on behalf of the petitioner sought to rely upon a Notification issued by the Central Board of Excise and Customs on 1 May 2000. However, it is abundantly clear that this Notification predates the Manual which has been issued by the Central Board of Excise and Customs. The requirement of the Manual is that it is only a self-attested copy of the shipping bill that is required to be filed together with the claim for rebate on duty paid on excisable goods exported.

12. For the aforesaid reasons, we hold that the authorities below were justified in coming to the conclusion that the petitioner had filed an application for rebate on 17 July 2007 which was beyond the period of one year from 12 February 2006 being the relevant date on which the goods were exported. Where the statute provides a period of limitation, in the present case in Section 11B for a claim for rebate, the provision has to be complied with as a mandatory requirement of law."

In the said order, the division Bench of Hon'ble Bombay High Court has not agreed with the order of Hon'ble Madras High Court which was cited by applicant.

12. In view of above position, the rebate claim filed after stipulated time limit of one year being time barred in terms of section 11B of Central Excise Act, 1944 is rightly rejected by the Commissioner (Appeals). Therefore, Government upholds the impugned Order-in-Appeal.

13. The revision application is rejected in terms of above.

14. So, ordered.

(D.P. Singh)
(Joint Secretary to the Government of India)

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Attested

(Bhagwat Sharma)
Assistant Commissioner
CBEC (Revision Application)

G.O.I. Order No. 101 /13-Cx dated 5/2/2013

Copy to:-

1. The Maritime Commissioner of Central Excise, Mumbai-I Commissionerate, 2nd Floor, MSEB Building, Labour Camp, Dharavi, Mumbai 400 019.

2. Commissioner of Central Excise (Appeals-II), Mumbai Zone-I, Meher Building, Bombay Garage, Dadi Seth Lane, Chowpatty, Mumbai- 400007.

3. The Assistant Commissioner, Central Excise(Rebate), Mumbai-IV Commissionerate, 2nd Floor, Estrella Batteries Compound, Dharavi, Mumbai 400 019.

4. Shri R.K.Sharma, Counsel, 157, 1st Floor, DDA Office Complex, CM-Jhandewalan Extension, New Delhi-110055.

5. PS to JS(Revision Application)

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ATTESTED

05/02

(B.P. SHARMA)
OSD (Revision Application)