REGISTERED SPEED POST AD

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. 195/697/13-RA/202 Date of Issue: 07.01.2020

ORDER NO.104/2020-CX (WZ) /ASRA/MUMBAI DATED03.01.2020 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 : M/s. Gea Pharma Systems (I) Pvt. Ltd.
Block No. 8, Phase-B,
Village Dumad,
Savli Road,
Dist. Vadodara 391 740

Respondent : Commissioner, Central Excise & Customs, Vadodara-II

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the OIA No. PJ/583/VDR-II/2012-13 dated 18.03.2013 passed by the Commissioner of Central Excise & Customs(Appeals), Vadodara.

ORDER

The revision application has been filed by M/s Gea Pharma Systems (I) Pvt. Ltd., Block No. 8, Phase-B, Village Dumad, Savli Road, Dist. Vadodara 391 740 (hereinafter referred to as "the applicant") against OIA No. PJ/583/VDR-II/2012-13 dated 18.03.2013 passed by the Commissioner of Central Excise & Customs(Appeals), Vadodara.

2.1 The applicant is a 100% EOU and their unit is registered with the proper central excise authority. The applicant is engaged in the production and clearance of finished excisable goods falling under chapter 84 of the first schedule to the CETA, 1985. They had opted to avail CENVAT credit on the inputs/capital goods and service tax paid on taxable goods and services for utilization of such CENVAT credit towards payment of duties on the finished excisable goods.

2.2 The applicant had exported their finished excisable goods under three different ARE-1's under claim of rebate. After export of the goods, they filed rebate claims with the Divisional Central Excise Office for rebate of central excise duty paid on the export goods. Thereafter, a show cause notice was issued to the applicant calling upon them to show cause why the rebate claim of Rs. 2,75,331/- should not be rejected as the applicant was claiming benefit of having attained positive NFE under the 100% EOU scheme and simultaneously claiming rebate of duty and hence the rebate of duty would amount to unintended double benefit to the applicant.

3. The rebate sanctioning authority vide his OIO No. City-Dn/12/Reb/11-12 dated 27.06.2011 rejected the rebate claim for Rs. 2,75,331/- on the ground that the applicant was a 100% EOU and had executed Bond in Form B-17 with the jurisdictional Assistant Commissioner for duty-free import as well as export from their registered premises. However, the applicant had cleared the goods from their registered premises as a 100% EOU for export on payment of central excise duty under claim of rebate on such export. As per the B-17 Bond executed by the applicant, there was no need for the applicant to pay central excise duty but instead was required to utilise UT-1 which was prescribed for free import as well as export. It was observed that the applicant had filed shipping bill for clearance of goods for export under EOU scheme. He further observed that the exemption to goods produced or manufactured by a 100% EOU was provided by virtue of Notification No. 24/2003-CE dated 31.03.2003 and that the exemption under Section

5A(1) had been granted absolutely. The applicant did not have the option to pay duty of excise on manufactured goods and therefore are not eligible for rebate under Rule 18 of the CER, 2002 read with Section 11B of the CEA, 1944.

4. Being aggrieved by the OIO No. City-Dn/12/Reb/11-12 dated 27.06.2011, the applicant filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) observed that the applicant being a 100% EOU, their final product was exempt under Notification No. 24/2003-CE dated 31.03.2003 issued under Section 5(1) of the CEA, 1944 unconditonally and absolutely. Therefore, the applicant cannot clear excisable goods on payment of central excise duty for claiming rebate and must clear finished excisable goods under exemption for export. He placed reliance upon Order No. 1413/2011-CX dated 18.10.2011 of the Government of India in the case of Vanasthali Textile Industries Ltd.[2012(281)ELT 727(GOI)] wherein it was held that the 100% EOU does not have the option to pay central excise duty and to claim rebate of the duty as they have been fully exempted from payment of central excise duty by Notification No. 24/2003-CE dated 31.03.2003. In the light of these observations, the Commissioner(Appeals) rejected the appeal of the applicant vide OIA No. PJ/583/VDR-II/2012-13 dated 18.03.2013.

5. Aggrieved by the order of the Commissioner(Appeals), the applicant has filed revision application on the following grounds:

(i) They have followed the complete procedure prescribed under Rule 18 of the CER, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004 and the procedure of ARE-1 and excise invoices which has not been challenged by the Excise Authorities. Moreover, the Customs Authorities have certified that duty paid excisable goods have been exported.

(ii) Duty payment on the excisable goods is also not in challenge.

(iii) Rule 18 does not stipulate that rebate of duty paid on finished excisable goods duly exported to a foreign country is not admissible to a 100% EOU. Similarly, Notification No. 19/2004-CE(NT) dated 06.09.2004 does not stipulate that the provisions contained in the said notification are not applicable to 100% EOU.

(iv) The FTP 2009-2014 does not stipulate that a 100% EOU cannot export excisable goods on payment of central excise duty, under claim of rebate.

(v) As per the judgment of the Hon'ble Madras High Court in the case of Tablets India Ltd. vs. Joint Secretary, Ministry of Finance[2010-TIOL-652-HC-MAD-CX], duty paid on export goods is required to be refunded.

(vi) They averred that export means no duty and therefore any duty paid on export goods must be refunded to the exporter. They placed reliance on the decisions in the case of CCE, Calicut vs. Ambadi Enterprises Ltd.[2007(219)ELT 917(Tri-Bang)], Eves Fashions vs. CCE, Delhi-II[2006(205)ELT 619(Tri-Del)], CCE, Kolkata-I vs. Krishna Traders[2007(216)ELT 379(Tri-Kol)], Krishna Traders vs. CCE, Kolkata-III[2008(226)ELT 734(Tri-Kol)] & CCE, Kolkata-I vs. Rahul Computex Pvt. Ltd.[2007(208)ELT 296(Tri-Kol)].

(vii) The SCN is solely based on the ground that the applicant is claiming benefit of attaining positive NFE under the EOU scheme and simultaneously claiming rebate of duty and hence the rebate claim would amount to unintended double benefit to the applicant which is totally erroneous. The applicant averred that rebate claim cannot be rejected on this ground. The applicant stated that every 100% EOU is required to make positive NFE failing which it is liable to penal action. It was submitted achieving positive NFE was not a benefit flowing out of Central Excise or Customs law or Foreign Trade Policy. Positive NFE was required for healthy existence of 100% EOU and had nothing to do with rebate of central excise duty.

(viii) The argument of the original authority that the applicant being a 100% EOU cannot claim rebate is contrary to the provisions of Rule 18 of the CER, 2002, Notification No. 19/2004-CE(NT) dated 06.09.2004, Notification No. 22/2003-CE dated 31.03.2003 and Notification No. 23/2003-CE dated 31.03.2003 as none of these stipulated that a 100% EOU cannot export finished goods on payment of central excise duty under claim of rebate.

(ix) The applicant contended that the argument that since they had executed B-17 Bond(General Surety/Security) for export of their finished goods, they cannot pay central excise duty on the export goods and claim rebate was erroneous. They claimed that they could either export without payment of central excise duty under UT-1 or B-1 Bond or B-7 Bond under Rule 9 of the CER, 2002 read with Notification No. 42/2001-CE(NT) dated 26.06.2001 or export goods on payment of central excise duty under claim of rebate under

Rule 18 of the CER, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004. They averred that it was for them to choose Rule 18 or Rule 19 of the CER, 2002 for export of goods.

(x) The applicant averred that when input stage benefit has been claimed by the manufacturer under Rule 18 or Rule 19, the excisable goods must necessarily be exported without payment of central excise duty. In the present case, they had not claimed any such benefit and therefore they can export finished excisable goods on payment of central excise duty under claim of rebate under Rule 18 of the CER, 2002.

(xi) With regard to the finding of the lower authorities that the applicant did not have the option of paying duty on the finished goods as they were fully exempted by Notification No. 24/2003-CE dated 31.03.2003, the applicant claimed that the said notification had been issued by the Central Government to grant exemption to intermediate goods produced in an 100% EOU and cleared within a 100% EOU for further production of excisable goods. The applicant contended that the notification is not applicable to export of finished excisable goods on payment of central excise duty under claim of rebate. It was averred that if the contention of the lower authorities was taken to be correct, then there would be no need for 100% EOU's to execute B-17 Bond for export of finished excisable goods to a foreign country without payment of duty and there was also no need to enact Notification No. 23/2003-CE for DTA sale.

(xii) The applicant further contended that the provisions of Rule 19 and Rule 18 of the CER, 2002 correspond to each other and are counterparts. If Rule 19 is applicable to them, the applicant contended that they also had the option to go by Rule 18 as there is no restriction in Central Excise law for a 100% EOU to opt for Rule 18 of the CER, 2002.

(xiii) The applicant pointed out that the decision of the Government of India in the case of Vanasthali Textile Industries Ltd.[2012(281)ELT 727(GOI)] had been overruled by the judgment of the Hon'ble Madras High Court in the case of Orchid Health Care vs. UOI & Ors.[2013-TIOL-416-HC-MAD-CX].

6. The applicant was granted personal hearing on 28.08.2019. Shri Arvind N. Patel, Consultant appeared on behalf of the applicant. He submitted that there was a change

in the name and constitution of the company and submitted High Court Order. He reiterated the grounds of revision application. The Consultant for the applicant contested para 5 of the OIA and stated that during the transit period, even though they were an EOU, 3 consignments were cleared on payment of duty. He further submitted that no double benefit had been taken by them.

7.1 Government has carefully gone through the impugned order, the order-in-original, the revision application filed by the applicant, the written submissions filed by them and their submissions at the time of personal hearing. The issue involved in the present case is that the applicant who is a 100% EOU had cleared excisable goods on payment of central excise duty and claimed rebate of the duty paid under Rule 18 of the CER, 2002. The lower authorities have rejected the rebate claim on the ground that the rebate claim is inadmissible as the applicant was required to export the excisable goods without payment of central excise duty in terms of the B-17 Bond executed by them. The lower authorities also took cognizance of the fact that the goods manufactured by the applicant were absolutely exempt from central excise duty by Notification No. 24/2003-CE dated 31.03.2003 which has been issued under Section 5A(1) of the CEA, 1944 and therefore the applicant did not have the option to pay central excise duty in terms of sub-section (1A) of the Section 5A of the CEA, 1944.

7.2 The applicant has raised various contentions in support of their stand that they as 100% EOU are eligible for rebate of central excise duty paid on the export goods. They have also placed reliance upon the case law of Tablets India Ltd. vs. Joint Secretary, Ministry of Finance[2010-TIOL-652-HC-MAD-CX] which held that duty paid on export goods is required to be refunded. In this regard, it is observed that the facts of that case are different. The appellant in that case before the Hon'ble High Court of Madras was not an EOU. In that case, the party had not followed the procedure of clearance applicable to Rule 12(1)(b) of the CER, 1944 and therefore the rebate on inputs used for the manufacture of exempted final products which were exported had been rejected by the lower authorities. In the other cases cited by the applicant has claimed that the Tribunal has held that export means no duty and therefore any duty paid by the exporter on the export goods must be refunded. However, these cases involve facts where there have been procedural lapses and hence the export benefit has been allowed.

8. The argument that the exemption under Notification No. 24/2003-CE dated 31.03.2003 is applicable only to intermediate goods is without any basis in fact. The notification itself does not bear out such an inference and is clearly applicable to clearances of final products. The exemption Notification No. 24/2003-CE dated 31.03.2003 in very explicit words states that it exempts all excisable goods produced or manufactured in an export oriented undertaking from the whole of duty of excise leviable thereon. Therefore, Government finds that the observations of the lower authorities that the exemption is absolute are cogent. In terms of the provisions of Section 5A(1A) of the CEA, 1944, the applicant who is eligible for the benefit of the exemption under Notification No. 24/2003-CE dated 31.03.2003 did not have the option to pay duty on the excisable goods while clearing them for export.

9. Post the judgment of the Hon'ble Madras High Court in the case of Orchid Health Care vs. UOI & Ors.[2013-TIOL-416-HC-MAD-CX] which has been cited by the applicant, Government observes that the Hon'ble High Court of Rajasthan had occasion to examine the same issue in the case of Vanasthali Textile Industries Ltd.[2015(321)ELT 89(Raj)]. Their Lordships held that Section 5A(1A) of the CEA, 1944 is applicable due to unconditional exemption under Notification No. 24/2003-CE dated 31.03.2003 available to EOU and therefore no duty was required to be paid on exported goods. Therefore, rebate claim filed on the basis of central excise duty paid in such circumstances will not be admissible under Rule 18 of the CER, 2002 and Notification No. 19/2004-CE(NT) dated 06.09.2004. The judgment dated 11.08.2014 of the Hon'ble Rajasthan High Court being a more recent judgment than the judgment of the Hon'ble Madras High Court is a more contemporary interpretation of the law and hence must be followed. The inference that ensues is that the rebate claims filed by the applicant cannot be sanctioned. Therefore, the orders passed by the lower authorities rejecting the rebate claims are found to be in order.

10. However, as has been consistently held by the Government in preceding decisions, duty paid erroneously cannot attain the character of duty of excise and therefore becomes a deposit with the Government. Since the Government cannot retain any amount which is not due to it, the amount so collected is allowed to be re-credited to the CENVAT account. The Government allows the applicant to take re-credit of the

said amount in their CENVAT credit account. The impugned Order-in-Appeal is modified to such extent.

11. The Revision Application is disposed off in the above terms.

12. So ordered.

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

ORDER No.104/2020-CX (WZ) /ASRA/Mumbai DATED 03.01.2020.

To,

M/s. Gea Pharma Systems (I) Pvt. Ltd.
Block No. 8, Phase-B,
Village Dumad,
Savli Road,
Dist. Vadodara 391 740

Copy to:

1. The Commissioner of CGST & CX, Vadodara-II Commissionerate
2. The Commissioner of CGST & CX, (Appeals), Vadodara
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy