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F.No.198/70/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue..8.2.13

ORDER NO. 107 /2013-Cx DATED 7.2.2013 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. 51/2010 (V-I)CE dated 2.9.10 PASSED BY THE COMMISSIONER OF CENTRAL EXCISE & CUSTOMS (APPEALS), VISAKHAPATNAM

APPLICANT : COMMISSIONER OF CENTRAL EXCISE, CUSTOMS & SERVICE TAX, VISHAKHAPATNAM-I COMMISSIONERATE

RESPONDENT : M/s MATRIX LABORATORIES LTD., VIZIANAGARAM

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ORDER

This revision application is filed by Commissioner, Central Excise, Customs & Service Tax, Visakhapatnam-I Commissionerate against order-in-appeal 51/2010 (V-I) CE dated 2.9.2010 passed by the Commissioner of Central Excise & Customs (Appeals), Visakhapatnam with respect to order-in-original No.611/2009-10-R dated 1.2.10 passed by Deputy Commissioner of Central Excise, Vizianagaram Division.

2. Brief facts of the cases are that respondents M/s Matrix Laboratories Ltd, Poosapatirega Mandal Vizianagaram are 100% EOU and have exported 2000 Kgs of NAPROXEN vide ARE-1 No.37/2008-09 dt. 26/5/2008 on payment of Central excise duty to Denmark under claim for rebate under Rule 18 of Central Excise Rules, 2002. Respondents have filed rebate claim on 4/7/2008 for an amount of Rs.626682/- paid as duty at the time of export. Department observed that the benefit of cenvat was extended to EOUs vide Notification No.18/2004-CE (NT) dated 6/9/2004 for the purpose of duty payment in respect of clearances to DTA only and in the instant case the, Respondents have paid excise duty on the goods exported without authority of law and hence issued show cause notice. Respondents submitted reply stating, inter-alia, that there is no prohibition on the EOU to export the goods on payment of duty under claim for rebate under Rule 18 of Central Excise Rules; that there is no restriction either in Central Excise Act, 1944 or in the Central Excise Rules, 2002 or in the Foreign Trade Policy to the effect that the Rule 18 will not apply to goods exported by an EOU; that rebate is allowable subject to conditions or limitations and fulfillment of procedures stipulated in Notification No.19/2004-CE(NT) and that duty is defined in explanation 1 of this notification to include excise duty collected under the Central Excise Act, 1944 and that duty in the impugned case is the aggregate of customs & central excise; that they have an option not to avail the exemption under Notification No.24/2003-CE dated 31.3.2003 available to 100% EOU and relied upon the decisions in various case laws in support of their defense and requested to grant the rebate. Deputy Commissioner, by finding that the

exemption under Notification No.24/2003-CE is not an optional one and as there is no provision to collect duty on goods manufactured in 100% EOU, if they are exported, and the exporter should not have paid duty on the goods, passed the impugned order rejecting the rebate claim.

3. Being aggrieved by the said order-in-original, respondent filed appeal before Commissioner (Appeals) who set aside the impugned order-in-original and allowed the appeal.

4. Being aggrieved by the impugned order-in-appeal, the applicant department has filed this revision application under Section 35 EE of Central excise Act, 1944 before Central Government on the following grounds:

4.1 The order of Commissioner (Appeals) is not proper and legal as per following reasons:

(i) As seen from the findings of the Order-in-Appeal No. 112/2009(V-I) C.E. dated 31.08.2009, it is clearly evident that the Commissioner (Appeals) has accepted the fact that the assesses ought not to have paid the duty in terms of Notfn. No.24/2003 C.E. dt. 31.03.2003. In the above order, Commissioner (Appeals) failed to differentiate between rebate and refund and the order allowing rebate of duty paid by the assessee on their exported goods is against the provisions of Central Excise Law. Rebate is allowed only of the duty payable and paid on the goods exported. When the duty itself is not payable, the question of claiming rebate does not arise.

ii) Moreover the said Order-in-Appeal has not been accepted by the department and a revision application has been filed with the Revision Authority. Since no stay had been granted against the said Order-in-Appeal No. 112/2009, the duty which ought not to have been paid, but paid by a debit in their Cenvat account, had been refunded as credit in their Cenvat Account, in the form and manner in which it was paid.

4.2 As per the provisions of Notification No. 24/2003-CE dated 31.03.2003, all excisable goods manufactured in an export oriented unit are exempted from the whole of duty of excise leviable thereon under Section 3 of the Central Excise Act, 1944. The above exemption shall not apply to such goods if brought to any other place India i.e. DTA clearances. As per the provisions of Section 5A (1A) of the Central Excise Act, 1944, inserted w.e.f. 13.05.2005, "where an 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 manufacturer of such excisable goods shall not pay the duty of excise on such goods". So far as the issue relates to clearance of goods for export, the provisions of the above Notfn. No. 24/2003 C.E. are absolute. The provision, that the exemption is not available, is only in relation to the goods cleared in the DTA. Provisions of Sec.11B of the Central Excise Act, 1944 allows refund of Central Excise Duty paid. In the instant case, what is paid by the assesses is not excise duty since the impugned goods are not excisable and therefore the provisions of Sec.11B of the Central Excise Act, 1944 are not applicable to the instant case and therefore the assesses are not eligible for the rebate claim. However, they are eligible for refund of the duty paid by them, which was ought not to have been paid. The adjudicating authority has refunded the same as credit in their cenvat account, which is perfectly in order. However by allowing the rebate claim to the assessees, the Commissioner (Appeals) has failed to answer the question whether the duty in the first instance can be paid when the exemption is available, for the goods exported by 100% EOU. Thus, it appears that Commissioner (Appeals) has erred in allowing the appeal filed by the assessees.

5. A Show Cause Notice was issued to the respondent under Section 35EE of the Central Excise Act, 1944 to file their counter reply. No reply is submitted till date.

6. Personal hearing scheduled in this case on 8.12.2012 & 13.12.2012. Shri G. Venkat Rao, AVP appeared on behalf of the respondent who submitted that the order-in-appeal being legal and proper may be upheld. Applicant Department vide their letter dated December 2012 submitted that ground of appeal file by the department are self-explanatory and no further comments/personal hearing is required.

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

8. On perusal of records Government observes that the original adjudicating authority rejected the claim of rebate of the respondents vide order-in-original No.53/08-09 dated 31.3.09 on the ground that the Notification No.24/2003-CE dated 31.3.03 issued under Sub-section 1 of Section 5A of Central Excise Act 1944 exempting all excisable goods produced or manufactured in an 100% EOU is an absolute exemption Notification and there is no option to pay duty in this case. In appeal Commissioner (Appeals) vide his order dated 2.9.10 set aside the order of original authority dated 1.2.10 and directed to sanction the rebate to the applicants in cash. Now the applicant department has filed this revision application on the grounds stated at para (4) above.

9. Government notes that the said issue was decided by this authority vide GOI Revision Order No.219-245/12-Cx dated o.3.12 in the case of M/s Vijay Chemical Industries, Mumbai Vs CCE, Belapur where revision application was filed against the order-in-appeal No.PKS/103-129/BEL/2010 dated 1.6.10 passed by CCE (Appeals), Mumbai-III. In the said order, Government had 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 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.

8. Applicant has mainly contented that Commissioner (Appeals) did no follow the decision of Hon'ble High Court of Rajasthan in the case of Central CCE Vs. Suncity Alloys Pvt. Ltd which it was held that if no duty was liable and still assessee paid duty the department cannot retain it an any ground and must refund it. Applicant has also concluded that it has been consistent policies of Government to ensure that exporter does not have to bear the taxes and duties and taxes/duties do not became a cost.

8.1 In order to understand the issue, it is necessary to go through the provision of Notification No. 24/03-CE dated 31.03.03 and section 5A(1A) of Central Excise Act, 1944 which are extracted below:

8.2 Notification No. 24/2003-CE dated 31-03-2003 states as follows-

" In exercise of the power conferred by sub-section (1) of section 5A of Central Excise Act, 1944, (1 of 1944), read with sub-section (3) of section 3of the Additional Duties of Excise (Goods of special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby;

(a) Exempts all excisable goods produced or manufactured in an export oriented undertaking from whole of duty of excise leviable thereon under section 3 of Central Excise Act, 1944 (1 of 1944) and additional duty of excise leviable thereon under section 3 of additional Duty of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and addition duty of excise leviable thereon under section 3 of additional Duty of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

Provided that the exemption contained in this Notification in respect of duty of excise leviable under section 3 of said Central Excise Act shall not apply to such goods if brought to any other place in India;"

8.3 Sub-Section (1A) of Section 5A of the Central Excise Act, 1944 stipulates as follows;-

"(1A) For the removal of doubts, it is hereby declared that where an 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 manufacturer of such excisable goods shall not pay the duty of excise on such goods."

8.4 The Notification No. 24/03-CE dated 31-03-2003 was issued under section 5A(i) of Central Excise Act 1944. The goods manufactured by 100% EOU and cleared for export are exempted from whole of duty unconditionally. Therefore in view of provisions of subsection (1A) of section 5A, the applicant manufacturer has no option to pay duty. Government notes that there is no condition for availing exemption from payment of duty on goods cleared for exports. Normally the 100% EOU has to clear goods for exports as per the EOU scheme. Since there is no condition in the notification for availing exemption to goods manufactured by 100% EOU and cleared for export, the provisions of sub-section (1A) of section 5A(1) are applicable and no duty was required to be paid on such export goods. As such rebate claims were rightly held by Commissioner (Appeals) to be in admissible in terms of rule 18 of Central Excise Rule 2002. Government finds support from the observations

of Hon'ble Supreme Court in the case of M/s ITC Ltd. Vs CCE reported as 2004 (171) ELT-433 (SC), and M/s Paper Products Vs CCE reported as 1999 (112) ELT -765 (SC) that the simple and plain meaning of the wordings of statute are to be strictly adhered to. CBEC has also clarified vide letter F.No. 2009/26/09-Cx dated 23.04.2010 (para 2) as under:-

> *"The matter has been examined, Notification No. 24/2003-CE dated 13.03.2003 provides absolute exemption to the goods manufactured by EOU. Therefore, in terms of Section 5A(1A) of the Central Excise Act, 1944. EOUs do not have an option to pay duty and thereafter claim rebate of duty paid."*

8.5 As regards, applicant's contention that duties/taxes are not to be exported, Government notes that these are various scheme in operation which neutralize the effect of duty incident on the exported goods. Each scheme is governed by the conditions/limitations and procedures laid down in the notification. In this case the provisions of section 5A(1A) of Central Excise Act 1944 put embargo on payment of duty since goods were exempted from payment of whole of duty un conditionally. However, the unutilized Cenvat Credit is permitted to refunded under rule 5 of Cenvat Credit Rules, 2004 and the said facility is not availed by applicant.

8.6 Applicant has relied upon the decision of Hon'ble High Court of Rajasthan in the case of CCE Vs. Suncity Alloys Pvt. Ltd. In this said case Hon'ble High Court has held that if no duty is as leviable and still assessee paid duty, the department cannot retain it on any ground and must refund it. Government observes that the duty paid without the authority of law can not be treated as duty paid under the provision of Central Excise Act. As such the said paid amount has to be treated as a voluntary deposit made by applicant with the Government. Government can retain any amount without any authority of law. So, any excess paid amount has to be returned in the manner in which it was paid.

8.7 In view of above position, Government do not find any infirmity in the impugned Orders-in-Appeal on merit and holds that said rebate claims are rightly held inadmissible under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE/(NT) dated 06.09.2004. The rebate claims

already sanctioned are laible to be recovered. The applicant has to repay the already sanctioned amount in Cash. After the recovery is affected, the applicant may be allowed to take recredit of said amount in the Cenvat Credit account from which it was initially paid. The impugned Order-in-Appeal is modified to this extent."

10. The ratio of above said GOI Revision Order dated 9.3.12 is squarely applicable to this case. Therefore, Government holds that in view of provisions of Section 5A(1A) of Central Excise Act 1944, 100% EOU has to avail unconditional exemption Notification No.24/03-CE dated 31.3.03 and has no option to pay duty on the exported goods and claim rebate under Rule 18 of Central Excise Rules 2002. Commissioner (Appeals) has erred in ignoring said provisions of law. The impugned order in appeal is therefore not legally sustainable.

11. Government however notes that duty paid unauthorized in this case, is to be treated as voluntary deposit made by the party with the Government who can also not retain it without any authority of law. So, the said excess paid amount is to be returned to the claimant in the manner in which it was paid. In this case claimant has debited his cenvat credit account, and therefore, the said amount may be allowed to be re-credited in his cenvat credit account. Government sets aside the impugned order-in-appeal and partially allows the revision application in terms of above.

12. The revision application is disposed off in terms of above.

13. So, ordered.

(D.P.SINGH)
Joint Secretary (Revision Application)

Commissioner of Central Excise, Customs & Service Tax
Visakhapatnam-I Commissionerate
Central Excise Building, Port Area,
Visakhapatnam-530 035

Attested

के. ज. रामेश्वरम्/P K. RAMESHWARAM
विशेष कार्य अधि./OSD-II (RA)
वित्त मंत्रालय, (राजस्व विभाग)
Ministry of Finance (Deptt. of Revs.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

Order No. 107/2013-Cx dt. 7.2.13

F.No.198/70/11-RA

Copy to:

1. M/s Matrix Laboratories Ltd., G.Chodavaram, Poosapatirega Mandal, Vizianagaram, Visakhapatnam District-535204
2. Commissioner of Central Excise & Customs (Appeals), Visakhapatnam 4th Floor, Custom House, Port Area, Visakhapatnam-530 035.
3. Assistant Commissioner of Customs & Central Excise, Vizianagaram Division, near Domdumaramma Temple, Vizianagram-535 003.
4. PS to JS(RA)
5. Guard File.
6. Spare copy

ATTESTED

(P.K.Rameshwaram)
OSD (RA)