

**REGISTERED
SPEED POST**



F.NO. 195/1135 to 1261/12-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.....

21/9/13

ORDER NO. 1099-1225/2013-CX DATED 29.08.2013 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 35EE of the Central Excise Act, 1944, against the Orders-in-Appeal No. 447 to 706/2012/COMMR(A)/RBT/RAJ dated 24.07.2012 passed by Commissioner (appeals), Central Excise, Rajkot.

APPLICANT : M/s Welspun India, Ltd., Welspun City, Anjar Bhachau Road, PB No. 21, Anjar, Kutch, Gujarat-370110.

RESPONDENT : Commissioner of Central Excise & Customs, Rajkot.

ORDER

These revision applications have been filed by the applicants M/s Welspun India Ltd., Welspun City, Anjar Bhachau Road, PB No. 21, Anjar, Kutch, Gujarat against the orders-in-appeal 447 to 706/2012/Commr(A)/RBT/RAJ dt. 24.07.2012 passed by the Commissioner of Customs & Central Excise (Appeals), Rajkot.

2. Brief facts of the cases are that the Applicants are a Company incorporated and registered under the Companies Act, 1956 and are, inter-alia, engaged in the manufacture of Bed Sheet/Terry Towels ("said goods" for short), falling under Chapter Heading 63 of Central Excise Tariff Act, 1985. For this purpose, the Applicants have obtained a Central Excise Registration No. AAACW1259NXM004. Applicants filed 127 rebate claims of duty paid on exported goods, under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004.

2.1 The Applicants were availing benefit of area based exemption under Notification 39/2001-CE dated 31.07.2001, as amended, and has opted for re-credit of Central Excise duty paid, through PLA, in the next month. The amount of refund by way of re-credit in terms of Notification 39/2001-CE dated 31.07.2001 also included the portion of duty which was paid on goods cleared for export under claim of rebate under rule 18 of the Central Excise Rules, 2002. Subsequently, the Applicants filed rebate claims before the jurisdictional Assistant Commissioner, for such exports. However, department observed that since the amount of duty paid through PLA on such exports was refunded in terms of Notification 39/2001-CE dated 31.07.2001, the rebate claims filed by the applicants were apparently not admissible. Therefore, show cause notices were issued for rejection of the said rebate claims on the ground that the duty paid on same goods cannot be refunded twice under different sections, that is,

section 5A and section 11 B of Central Excise Act, 1944 and as refund was already granted by way of self re-credit, the goods became exempted and no rebate can be allowed on such exempted goods. The jurisdictional Assistant Commissioner of Central Excise rejected the rebate claims vide Orders-in-Original No. 14 to 20/AC/06-07 dated 08.03.2007, 01/AC/06 dated 08.03.2006. Applicant did not file any appeal against the said Orders-in-Appeal before Commissioner (appeals) as recorded in the Orders-in-Appeal No. 02 to 259/2009/Commr(A)/Raj dated 09.01.2009.

2.2 The retrospective amendment made in rule 18 of the Central Excise Rules, 2002, by virtue of section 88 and sixth schedule of the Finance Act, 2008 allowed rebate on exportation of the goods cleared from factory for Export between 01.03.2002 to 07.12.2006, from the units availing the area based exemption Notification 39/2001-CE dated 31.07.2001, for that portion of duty paid for which the refund was granted in terms of Notification 39/2001 - CE dated 31.07.2001. In pursuance to said retrospective amendment, the jurisdictional Assistant Commissioner of Central Excise sanctioned the rebate claim of the Applicant in these cases vide 127 Order-in-Original passed in 2008, Orders-in-Original Nos. 07 to 76/08 dated 23.05.2008, 89 to 121/08 dated 28.05.2008, 134 to 167/08 dated 29.05.2008, 174 to 205/08 dated 04.06.2008, 348 to 351/08 dated 13.06.2008, 353 to 353 to 358/08 dated 13.06.08, 388 to 389/08 dated 24.06.2008, 393/08 dated 25.06.2008, 399/08 dated 26.06.2008, 411/08 dated 03.07.08, 413/08 dated 03.07.08, 418-419/08 dated 03.07.08.

3. Being aggrieved by the said Orders-in-Original, respondent department filed appeals before Commissioner (appeals) who by an order No. 02 to 259/2009/COMMR(A)/RAJ, dated 9th January, 2009 allowed appeals filed by the Department by setting aside the order passed by Assistant Commissioner sanctioning rebate claims. The Commissioner (appeals) allowed appeals on the premise that the Assistant Commissioner erred in re-opening his own order suo

motto under which the rebate claims were rejected. Aggrieved by Orders-in-Appeal dated 09.01.2009 the Applicants filed the Revision Application dated 16.04.2009. Government vide Order No. 520-777/1-CX dated 01.04.10 disposed of the said Revision Applications on the ground that the same became infructuous as the Hon'ble High Court vide Order dated 23.09.2009 quashed and set aside the Order-in-Appeal No. 2 to 259/2009 dated 09.01.2009. Now, Commissioner (appeals) vide Order-in-Appeal No. 447 to 706/2012/Commr(A)/RBT/RAJ dt. 24.07.2012 allowed the appeals filed by department against Orders-in-Original passed in 2008 stated in para 2.2 above and set aside the said rebate sanctioning orders. Commissioner (appeals) has also decided the department appeals in respect of M/s Welspun Corp. Ltd. & M/s Welspun Trading Ltd. vide said Orders-in-Appeal No. 447 to 706/12 dated 24.07.2012. The revision applications filed by these other two parties were decided vide G.O.I. revision order No. 599-858/13-Cx dated 28.06.2013.

4. Being aggrieved by the impugned Orders-in-Appeal dated 24.07.2012 the applicant has filed these revision applications under section 35 EE of Central Excise Act, 1944 before Central Government on the following common grounds:

4.1 The Commissioner (Appeals) erred in allowing the appeals of the Department and setting aside the Orders-in-Original passed by the Adjudicating Authority. The impugned order is mis-conceived both on facts and in law and therefore, the same cannot be sustained in the eyes of law.

4.2 In view of the Order-in-Appeal No. 2 to 259/2009/Commr.(A)/RAJ dated 09.01.2009 passed by the Commissioner (appeals), the Joint Commissioner of Customs & Central Excise issued the Protective show cause notice dated 12.02.2009 for recovery of alleged erroneous rebate claims of Rs. 1.15 Crore and alleged that various rebate orders sanctioned in favor of the Applicants have been quashed and set aside by the Commissioner (appeals) vide Orders dated

09.01.2009. They filed reply dated 20.04.2009 to the Joint Commissioner of Central Excise to the above referred show cause notice dated 12.02.2009. The above referred show cause notice is still pending for adjudication.

4.3 The Commissioner (Appeals) erred in passing the impugned order without granting proper opportunity of personal hearing. The notice for personal hearing was not issued to the Applicants before deciding the Appeals filed by the Department challenging rebate orders sanctioned in favor of the Applicants. In the absence of giving proper opportunity of the personal hearing, action of the Commissioner (Appeals) deciding the appeals of the Department ex-parte is contrary to the provisions of principles of natural justice and on this ground itself, the impugned order cannot be sustained.

4.4 The Commissioner (Appeals) erred in holding in the impugned order that since the Applicants withdrew the Revision Application from the Revisionary Authority, no any proceedings was pending while sanctioning the rebate claims by the Adjudicating Authority. They had never withdrawn revision application from the Revisionary Authority and therefore, the question for withdrawal of Revision Application cannot arise in the present case.

4.5 Their rebate claim was sanctioned in their favor in terms of the amendment which came into force by way of Section 88 of the Finance Act, 2008 while Show Cause Notices were pending for adjudication. The Applicants submit that no any other application before the Hon'ble Revisionary Authority was pending except for challenging Order-In-Appeal Nos. 2 to 259/2009/Commr(A)/Raj dated 09.01.2009.

4.6 The Commissioner (Appeals) failed to appreciate the fact that the

Department challenged the appeal against Orders-in-Original passed by the Adjudicating Authority for sanctioning rebate claim on the premise that refund cannot be sanctioned suo moto without challenging the withdrawal order. The Commissioner (Appeals) ought to have appreciated the fact that there was no withdrawal order in the Applicants' case and therefore, the impugned order is erroneous and contrary to the facts of the case.

4.7 The Commissioner (Appeals) erred in giving the finding that the Original Authority sanctioned rebate claim even though no any proceeding was pending to give effect of retrospective amendment brought under the Finance Act, 2008. The Commissioner (Appeals) ought to have appreciated the fact that show cause notice alleging for denial of rebate claim was pending when amendment was introduced through the Finance Act, 2008 and therefore, the Adjudicating authority correctly sanctioned rebate claims.

4.8 Without prejudice to the aforesaid, it is submitted that on the date of introduction of Section 88, Show Cause Notice of the Applicants was pending. The Finance Act, 2008 came into force on 10.05.2008. As the proceedings were not completed, the question of non-applicability of provision of Section 88 of Finance Act, 2008 does not arise at all. As such both on the dates of introduction of Section 88 and date of sanction of rebate claim, the rebate application was pending for consideration, the question of their being completed the proceedings does not arise at all. Section 88 on a plain reading thereof is applicable that retrospective effect. The fact that Section 88 has been given over-writing effect over all orders and decisions of Courts, Tribunals and other Authorities means that the same shall nullify such orders whether or not pending and whether or not the same attained finality so long as the goods manufactured and arrived

under the said notification were exported between the period covered therein. The Commissioner (A) failed to appreciate that in the present case the rebate was granted by the Assistant Commissioner within the four corners of the law and this is also supported by the provisions of the Finance Act, 2008. In view of the above the granting of the rebate cannot be termed to be erroneous at all. Inasmuch as the grant of rebate was not erroneous there is no question of recovery thereof by means of filing appeal against the Orders sanctioning the same. The impugned Order failed to consider the above submission and, therefore, the same needs to be set aside.

4.9 The order of the Respondent is even otherwise bad, erroneous, without any authority in law and jurisdiction and therefore, it deserves to be set aside.

5. Personal hearing was scheduled in these cases on 25.06.2013 and 26.08.2013. Applicant failed to attend hearing on 25.06.2013. However Shri Rahul Raghuwanshi, Advocate Economic Law Practice, attended hearing on 26.08.2013 who reiterated the grounds of revision application and relied upon G.O.I. revision order No. 599 to 858/13-Cx dated 28.06.2013 passed in case of their sister concerns M/s Welspun Corp. Ltd. & M/s Welspun Trading Ltd. No body attended hearing on behalf of the respondent department on any of these dates.

6. Government has carefully gone through the relevant case records available in case file, oral & written submissions and perused the impugned Orders-in-Original and Orders-in-Appeal.

7. On perusal of records, Government observes that the applicants engaged in the manufacturer of Bed Sheets/Terry Towels, has availed the benefit of area based exemption notification No. 39/01-CE(NT) dated 31.07.2001 and opted for

recredit of Central Excise duty paid through PLA in the next month. The amount of refund by way of recredit in terms of Notification No. 39/01-CE(NT) dated 31.07.2001 also included the portion of duty which was paid on goods cleared for export under claim of rebate under Rule 18 of Central Excise Rules, 2002. Subsequently, the applicants filed rebate claims before jurisdictional Assistant Commissioner of Central Excise. Show cause notices were issued proposing rejection of rebate claims on the ground that amount of duty paid through PLA on such exported goods was already refunded to them by way of self recredit in terms of Notification No. 39/01-CE(NT) dated 31.07.2001. The adjudicating authority rejected the said rebate claims vide Orders-in-Original No. 14 to 20/AC /06-07 dated 08.03.2007, 01/AC//06 dated 08.03.2006 and applicant did not file any appeal against said orders as mentioned by Commissioner (appeals) in his Orders-in-Appeal No. 02 to 259/2009 dated 09.01.2009. Subsequently, original authority sanctioned the said 127 rebate claims vide 127 Orders-in-Original of 2008 as mentioned in para 2.2 above. The department reviewed the said rebate sanction orders and filed appeals before Commissioner (Appeals) on the ground the original authority has no power to reopen the case suo moto once it has been adjudicated & rejected by him by issuing an appealable order. Commissioner (Appeals) vide orders-in-appeal No.2 to 259/2009/Comm(R)/ RAJ dated 09.01.2009 allowed the department's appeals by setting aside impugned rebate sanction orders of the original authority. The show cause notices dated 12.02.2009 were issued for recovery of sanctioned rebate claims, pursuant to said orders-in-appeal dated 09.01.2009. Being aggrieved by the said orders-in-appeal dated 12.9.2009 the applicants filed writ petition before the Hon'ble Gujarat High Court who vide order dated 23.9.2009 restored the revision applications No.195/3,4,100/08-RA-Cx and directed this authority to decide the same within 3 months time. The Hon'ble High Court also set aside the said orders-in-appeal No.2 to 259/2009/Comm(R)/RA dated 9.1.2009 and directed that it will be open for the Commissioner (Appeals) to decide the appeals contained in said orders-in-appeal dated 9.1.2009 after the decision in Revision

Applications. This authority decided the said revision applications No. 195/3,4 & 100/08-RA-Cx of M/s Welspun Corp. Ltd. formerly known as M/s Welspun Gujrat Sthal Rohens Ltd. and M/s Welspun Trading Ltd. vide G.O.I. Revision Order No.212-214/10-Cx dated 16.2.2010. Now Commissioner (Appeals) vide impugned common orders-in-appeal No. 447 to 706/2012/Commr(A)/ RBT/RAJ dated 24.7.2012, decided the department appeals, relating to three parties including the instant cases of applicant. Commissioner (Appeals) decided the appeal in favour of department and set aside all these Orders-in-Original sanctioning rebate claims. Applicants have now filed these revision applications on grounds mentioned in para (4) above. Meanwhile, the department initiated action for recovery of sanctioned rebate claims pursuant to impugned orders-in-appeal dated 29.7.2012. The applicants filed Special Civil Application No.14733 of 2012 and 14735 of 2012 against the said action of recovery of sanctioned rebate. The Hon'ble High Court vide order dated 12.12.2012 restrained the department from taking further action of recovery of sanctioned claims till the final disposal of these impugned revision applications. The revision applications filed by other two parties M/s Welspun Corp. Ltd. and M/s Welspun Trading Ltd. against the same common Orders-in-Appeal No. 447 to 706/12 dated 24.07.2012 were decided vide G.O.I. Revision Order No. 599 to 858/13-Cx dated 28.06.2013. The instant revision applications filed by applicant against the same common Orders-in-Appeal No. 447 to 706 dated 24.07.2012 are being decided by this order.

8. Government observes that the Commissioner (Appeals) decided the cases vide impugned orders-in-appeal dated 24.07.2012 in favour of the department by holding that the jurisdictional adjudicating authority having rejected the rebate claims initially, cannot reopen his own orders suo moto and sanction the rebate to the applicants and set aside the impugned 127 Orders-in-Original rebate sanction orders of 2008 mentioned in para 2.2 above (which were also earlier set aside vide Orders-in-Appeal No. 2-259 dated 09.01.2009).

9. Applicant has contended that the initial show cause notices issued proposing rejection of these rebate claims were pending and in the meantime the retrospective amendment in Rule 18 of Central Excise Rules, 2002 came into existence by virtue of section 88 and sixth schedule of the Finance Act 2008 allowing such rebate claims for the period 01.03.2002 to 07.12.2006, that in pursuance to said amendment Assistant Commissioner Central Excise has rightly sanctioned their rebate claims. In this regard, Government notes that Commissioner (appeals) has categorically recorded in his Orders-in-Appeal 02 to 259/09 that said rebate claims were initially rejected by Assistant Commissioner Central Excise vide Orders-in-Original No. 1, 14 to 20/AC/06-07 dated 08.03.2006 and no appeal was filed against said orders and therefore said orders have attained finality. This factual position is contrary to the claim of applicant. This position was stated in Order-in-Appeal dated 09.01.2009 and still applicant has shown ignorance about these Orders-in-Original dated 08.03.2006 rejecting rebate claims initially. As such this contention is contrary to facts and can not be accepted. Applicant has not submitted any evidence that appeal was ever filed against Order-in-Original dated 08.03.2006 and therefore, Government has no alternative but to accept that no appeal was filed against Orders-in-Original dated 08.03.2006 and same has attained finality. Moreover the impugned Order-in-Appeal dated 24.07.2012 is not w.r.t. Orders-in-Original No. 01, 14 to 20/AC/06-07 dated 08.03.2006. So the said orders dated 08.03.2006 are not under challenge in this revision application.

10. Applicant has further contended that in view of G.O.I. order No. 559-858/13-Cx dated 28.06.2013, their revision application may be allowed. Government has held in para 8.4 of said order dated 28.06.2013 as under :-

"8.4 Government observes that the said issue was not involved in the revision applications in question i.e. Revision Application No. 195/3,4 & 100/08-RA, and therefore the said issue was not considered This issue is raised in the present revision applications and as such it is to be

considered as per law. In this regard, Government notes that it is a well settled legal position on this issue that after passing an appealable order, the authority become functus officio and can not re open the case suo moto to re-decide the same. The original authority had no option to reopen the rebate claim which were already rejected and rejection order was upheld by Commissioner (appeals). The provision of section 88(2) of Finance Act, 2002 do not permit the authority reopen the decided cases suo moto. The observation of Commissioner (appeals) as contained in para 12.2 of the Order-in-Appeal are reproduced below:-

"12.2 On careful reading of the amended provisions in rule 18 supra, it is quite palpable that said provisions of retrospective amendment introduced in Rule 18 of Central Excise Rules only validates and legitimize or protects the action already taken, in consonance with the amendment, as if the law existed on the relevant date. The Retrospective amendment does not confer any power to the original authority to undo or alter any action already taken or completed by him. The words and phrases employed in sub-section (2) of section 88 of the Finance Act, 2002 categorically emphasize that any action taken or done or purported to have been done at any time during the period commencing on and from the 1st day of March, 2002 and ending with the 7th day of December, 2006 under the rule as amended by sub-section (1) shall be deemed to be and always to have been, for all the purposes, as validly and effectively taken or done, as if the amendment made by sub-section (1) had been in force at all material times. The amendment, thus, emphasized that if any benefit had been extended or allowed before this retrospective amendment, it protects the action already taken during the said period, as if validly and effectively taken during the aforesaid material period between 01.03.2002 to 07.12.2006. At the cost of reiterating, it has to be observed that it is not intended to undo an action taken by the lower authority, let alone re-opening of cases. Any retrospective amendment enacted by the legislature is intended to validate and to decide the case pending at various levels whether it is before adjudicating authority or before appellate level. Had the intention of the amendment in Rule 18 of Central Excise Rules, been to start the proceedings of rebate/refund claims afresh from scratch from the level of the lower authority/Assistant-Deputy Commissioner, it would have expressly stated therein. However, there is no such provisions in the amendment in the said rule."

Government is in agreement with these findings of Commissioner (appeals) and holds that the provisions of section 88(2) of Finance Act, 2008 do not mandate the reopening of already decided cases suo moto as is done in this case by original authority. Therefore, Government do not find any legal infirmity in the impugned Orders-in-Appeal w.r.t. said issue and upholds the impugned Orders-in-Appeal dated 24.07.2012 to this extent."

10.1 In the instant case, the initial rebate rejection orders dated 08.03.2007 were not challenged in appeal. Otherwise facts of the cases are same. As stated above, Government has concurred with the finding of Commissioner (appeals) that after passing an appealable order the authority becomes functus officio and can not reopen the case suo moto to redecide the same. In this case also same finding of Government holds good. Government therefore agrees with the said order of Commissioner (appeals), that original authority had rejected the rebate claims initially and he had no authority to reopen the said case, and sanction the claim, on his own. Government holds that original authority has erred in sanctioning the said claim when his earlier orders rejecting the claims were in force. As such Commissioner (appeals) has rightly set aside the said Orders-in-Original of 2008.

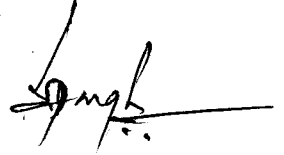
10.2 Government notes that benefit of retrospective amendment in Rule 18 of Central Excise Rules, 2002 can be extended by following the due process of law. In this case the initial Orders-in-Original No. 01, 14 to 20/AC/06-07 dated 08.03.2006 rejecting the rebate claims were not challenged before Commissioner (appeals), and therefore have attained finality. In these revision applications the Order-in-Appeal dated 24.07.2012 w.r.t. 127 Order-in-Original of 2008 is under challenge and no legal infirmity is found in said Order-in-Appeal as held in para 10.1 above. The initial Orders-in-Original dated 08.03.2006 rejecting rebate claims have already attained finality. In case of other two parties M/s Welspun Corp. Ltd. and M/s Welspun Trading India Ltd., the initial Orders-in-Original rejecting rebate claims were challenged before Commissioner (appeals) who upheld the same. Thereafter said Orders-in-Appeal were challenged in revision applications before Central Government. So facts of instant case are altogether different. Therefore in view of above position the ratio of G.O.I. Revision order dated 28.06.2013 can not be made applicable to this case for the reason stated above.

11. In view of above discussions Government finds no infirmity in the impugned Orders-in-Appeal dated 24.07.2012 as regards said rebate claims of applicant party and therefore upholds the same to this extent.

12. These revision applications are thus rejected in terms of above.

11. So, ordered.

M/s Welspun India, Ltd.,
Welspun City, Anjar Bhachau Road,
PB No. 21, Anjar, Kutch,
Gujarat-370110.



(D P Singh)

Joint Secretary(Revision Application)

(Attested)

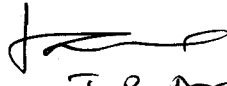


(टी. आर. आर्य / T.R. ARYA
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Order No. 1099-1225 /2013-Cx dated 29/08/2013

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2. Commissioner of Central Excise (Appeals), 2nd Floor, Central Excise Bhavan, Race Court Ring Road, Rajkot-360 001.
3. Assistant Commissioner of Central Excise, Opposite IFFCO Colony Main Gate, Gnadhidham, Gujarat.
4. Economic Laws Practice, 801, Abhijeet – III, Nr. Mithakhali Cross Road, Opp, Mayors Bungalow, Ellisbridge, Ahmedabad – 380 006.
5. PS to JS(RA)
6. Guard File.
7. Spare Copy


T. R. Arora
(Assistant Commissioner)
Rajkot (RA)