

REGISTERED SPEED POST



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

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F.No. 195/27/16/-RA, 195/28/16-RA/6618 Date of Issue: 23/11/2022

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ORDER NO. 1104-1105 /2022-CX (WZ)/ASRA/MUMBAI DATED 22.11.2022 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.

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Subject : - Revision Application filed under Section 35EE of the Central  
Excise Act, 1944 against Orders-in-Appeal No.  
CD/788/RGD/2015 dated 19.10.2015 and  
CD/785/RGD/2015 dated 06.11.2015 passed by the  
Commissioner of Central Excise (Appeals) - Mumbai-II.

Applicant : - M/s Bliss GVS Pharma Ltd.

Respondent: - Commissioner of CGST & CX , Mumbai East.

**ORDER**

This Revision application is filed by M/s. Bliss GVS Pharma Ltd. (hereinafter referred to as 'applicant') situated at 102, Hyde Park, Saki Vihar Road, Andheri (E), Mumbai- 400072 against the Orders-in-Appeal No. CD/788/RGD/2015 dated 19.10.2015 and CD/785/RGD/2015 dated 06.11.2015 passed by the Commissioner of Central Excise (Appeals) - Mumbai-II.

2. Brief facts of the case are that the applicant, a Merchant Exporter had filed rebate claims under the provisions of Rule 18 of Central Excise Rules, 2002 read with notification No. 19/2004(N.T.) dated 06.09.2004, as amended, as tabulated under:

Sr. No.	OIA No. And Date	ARE-1 No. and Date	Rebate Amount Claimed
1	CD/788/RGD/2015 dated 19.10.2015	15 dated 22.09.13	115134/-
2	CD/785/RGD/2015 dated 06.11.2015	23 dated 11.08.14	119744/-
3	CD/785/RGD/2015 dated 06.11.2015	12 dated 17.06.14	208750/-

The Adjudicating Authority vide Orders-in-Original No. 2939/14-15/Dy. Commr.(Rebate)/Raigad dated 09.01.2015 and 3066/14-15/Dy. Commr.(Rebate)/Raigad dated 20.02.2015 rejected the rebate claim on the grounds that the duty paid by the manufacturer on the exported goods is out of unlawful Cenvat Credit availed by the manufacturer. Being aggrieved by the aforesaid Orders in Original, the Applicant filed appeal before the Commissioner of Central Excise (Appeals) - Mumbai-II, who vide Orders-in-Appeal No. CD/788/RGD/2015 dated 19.10.2015 and CD/785/RGD/2015 dated 06.11.2015 rejected the appeal and upheld the OIO.

3. Being aggrieved by the impugned Order, the applicant has filed the present revision application mainly on the following common grounds:

- i. In the present issue no SCN is issued by the Daman Commissionerate, hence the presumption to treat the accumulated credit (as unlawful) by M/s Bliss Indasi Life Sciences Pvt. Ltd. (Manufacturer) is absolutely wrong.
- ii. Infact the appropriate authority to decide as to whether the CENVAT credit availed by the manufacturer is lawful or unlawful, is the jurisdictional

Central Excise incharge of manufacturer; however, the jurisdictional Central Excise authority has never objected for availment of CENVAT credit by the manufacturer M/s Bliss Indasi Life Sciences Pvt. Ltd. Daman L.e. In other words the CENVAT credit availed by the manufacturer is lawful & the payment made by using this credit is lawful as per the provisions of Cenvat Credit Rules 2004 and therefore the rebate claim of such duties is also lawful under Notification 19/2004 (NT) dated 6.9.2004, as amended, issued under the provision of Rule 18 of Central Excise Rules 2002. Thus there is no reason to reject the same. There is no allegation or dispute of non fulfilment of conditions of Notification 19/2004 (NT) dated 6.9.2004 as amended, issued under the provision of Rule 18 of Central Excise Rules 2002. Thus it merits for sanction.

- iii. Kind attention is drawn the provisions contained in the CBEC Circular No. 766/82/2003 dated 15.12.2003, para 5 of which says:: "on the issue of availment of credit by the user manufacturer, it is clarified that action against consignee to reverse/recover the CENVAT Credit availed of in such case need not to be resorted to as long as the bonafide nature of the consignee's transaction is not in dispute."
- iv. In the instant issue consignee is merchant exporter and the nature of transaction is bonafide & we, the consignee are entitled for CENVAT Credits of duties (if we would have been manufacturer, the credit of such duties would have been entitled to us & would have been availed by us for payment of duties either for home consumption or for export under claim for rebate) however, since we being merchant exporter we are otherwise entitled for the rebate of duties (as we fulfil the conditions stipulated under Noti. 19/2004 dated 6.9.2004 issued under Rule 18 of Central Excise Rules 2002) and in view of the contents of the CBEC Circular No. 766/82/2003 dated 15.12.2003, the action against the consignee for denial of rebate claim would tantamount to deny the constitutional right & need not to be resorted as the bonafide nature of the consignee's transactions are not in dispute.
- v. For cementing this contention we submit the judgement dated 31-3-2011 delivered by the Hon'ble. Gujarat High Court cited at 2011 (270) E.L.T. 321 (Guj.) in which it is held that when exporter purchases the goods from the manufacturer on payment of duties, they are entitled for CENVAT credit of the duties passed on to them and rebate of such duties not deniable.

- vi. Sir, in this judgement it is analysed and held that Input supplier passing on Cenvat credit to exporter under documents/invoices showing that inputs had suffered duty. However, agencies from whom input supplier purchased the inputs, found to be non-existent-Though exporter did not deny that input supplier had not paid duty at time of clearance of goods, no allegations made in show cause notice that exporter was party to fraud in non-payment of excise duty or had any knowledge about it- Although adjudicating authority had found that exporter did not take necessary care to ensure that inputs were duty paid, no allegation was made in that regard in show cause notice, and Commissioner (Appeals) as well as Government revisional authority, held that they had taken such care- HELD: Exporter had purchased inputs after payment of duty to manufacturer, and were entitled to claim Cenvat credit passed to them by the seller. It could not be said that exporter had not paid duty Rebate not deniable. It was more so as Department had issued notice for recovery of duty and penalty to agencies from whom Input supplier had bought them. However, plea of exporter that without cancellation of Cenvat credit granted to input supplier, their rebate claim cannot be declined, rejected Rule 9(3) of Cenvat Credit Rules, 2004 Rule 18 of Central Excise Rules, 2002. [paras 5, 6, 7, 10, 11, 14.1, 14.2]
- vii. Consequently, the Department through the Commissioner of Central Excise and Customs, Surat-I has filed Special Leave to Appeal (Civil) against the Judgment/Order dated 31-3-2011 of the Hon'ble. Gujarat High Court with the Hon'ble Supreme Court who has dismissed the petition on 2.12.2011 i.e. the Order dated 31-3-2011 of the Hon'ble. Gujarat High Court holds good as it is confirmed by the Hon'ble Supreme Court.
- viii. In view of the of this hon'ble Supreme Court's judgement having its precedential value, being the law of the land & binding on the subordinate authorities, the instant rebate claim of Rs.1.15.134 merits for sanction to us.
- ix. Notwithstanding anything contained above, we further submit that the name of the drug at Sr. No. 22 (in list 1) attached to Notification No. 12/2012 dt 17.3.2012 as amended is Arteether whereas the instant product viz. Gvither Forte Injection is contained/manufactured from ARTEMETHER drug. As such the exemption at Sr. No. 120 of No. 12/2012 dt 17.3.2012 as amended meant for formulations manufactured from the bulk drugs specified in list 1 is not available, thus the CENVAT credit availed on the inputs for the manufacture of Gvither Forte Injection is not disputable i.e. It is genuine and

the payments made on the goods exported out of it is also genuine, therefore the rebate claim of such duties is genuine and merits for sanction.

- x. In view of the above, the applicant requested to
- a) Quash and set aside the impugned OIAs and pass an order granting consequential relief by way of granting the rebate claim as claimed.
  - b) Pass such Order or further Order or further Order as is deemed just and proper under the facts and the circumstances of the case.
4. Personal hearing was fixed for 05.07.2022, Shri Nazir K. Shaikh, Advocate on behalf of the Applicant appeared for hearing and submitted that cenvat availed by them was not disputed, therefore their claim should be allowed. Shri Adeb Pathan, Deputy Commissioner on behalf of the respondent appeared online and submitted that main raw material of exporter was exempted, therefore, no duty was required to be paid on the same by their supplier. Thus, he contended cenvat credit on the same becomes irregular.
5. Government has carefully gone through the relevant case records, written submissions and perused the impugned letters, Orders in Original and Orders-in-appeal.
6. Government observes that the issue to be decided in the present case is whether the applicant exporter is entitled for the rebate of duty paid on the goods exported in terms of Notification No.19/2004-CE (NT) when the duty was not required to be paid on exempted goods by their manufacturer.
7. Government finds that Appellate authority cited section 5A(1A) of the Central Excise Act, 1944 to support the fact that manufacturer was not required to pay the duty when the goods were exempted. Government finds that Commissioner (Appeals)'s observation in the impugned order at para 6 is valid, precise and correct, he has observed that:
- "6. I find from discussion that Sr. No. 22 of the list to Notification No. 12/2012 dated 17.03.2012 as amended which allows NIL duty exemption without any condition i.e. the exemption is absolute. The provisions under Sub-Section (1A) of section 5A ibid when the exemption is granted absolutely the manufacturer of the goods shall not pay duty of excise on all such product. Therefore, the payment made by the manufacture is illegal and the claim of rebate of such duty is also unlawful."*
8. Government in their earlier order in case of M/s JVS Exports 2014 (312) ELT 877 (GOI), has discussed this issue at length before coming to the conclusion that the duty paid against the exempted goods cannot be treated as duty paid

under the provision of Central Excise Law and allowed the recredit of excess duty paid on exempted goods. Government further observed in the aforesaid order that this amount paid as duty is to be treated voluntary deposit with the Government and same cannot be retained without any authority of law, therefore the same is to be refunded in the manner it was initially paid. The relevant portion of the same is reproduced as:

*" 7. On perusal of records Government observes that applicants paid duty on the exported goods under Notification No. 59/2008-C.E., dated 7-12-2008 @4% and claimed rebate of duty paid on exported goods. In fact, the said goods were exempted unconditionally from payment of duty of excise under Notification No. 29/2004-C.E., dated 9-7-2004 as amended vide Notification No. 58/2008-C.E., dated 7-12-2008. So, applicant has no option to pay duty in terms of provisions of Section 5A(1A) of Central Excise Act, 1944. Commissioner (Appeals) has upheld order-in-original relying on the Section 5A(1A) of the Central Excise Act, 1944 and C.B.E. & C. Circular No. 937/27/2010-CX., dated 26-11-2010 and held that the applicants are not eligible for any rebate for the duty paid on the exempted goods during the said period 14-2-2009 to 19-2-2009.*

*8. Government notes that C.B.E. & C. Circular No. 937/27/2010-CX., dated 26-11-2010 has clarified the issue as under:*

*"References had been received from the field formations as well as trade to clarify the ambiguity arising out of simultaneous prevalence of two exemption notifications namely 29/2004-C.E., dated 9-7-2004 as amended by notification No. 58/2008-C.E., dated 7-12-2008 and another notification 59/2008-C.E., dated 7-12-2008. The period of dispute is from 7-12-2008 to 6-7-2009. During this period while one notification No. 29/2004-C.E. as amended granted full exemption to certain items of Textile Sector without any condition, the second notification 59/2008-C.E. prescribed a concessional rate of duty of 4% on these items, with the benefit of Cenvat credit.*

*2. The dispute was with regard to whether an assessee can avail the benefit of either of the above said two notifications whichever is beneficial to him or he is bound to avail the unconditional exemption under Notification No. 20/2004-C.E., as amended, during the period under dispute in terms of the provisions of Section 5A(1A) of the Central Excise Act, 1944.*

*3. The matter was examined in the Board. As a substantial question of law was involved, the matter was referred to the Law Ministry for its opinion. The Ministry of Law has opined that the language used in said Section 5A(1A) is unambiguous and principles of harmonious construction cannot be applied in the instant case in view of specific provision under sub-section (1A) of Section 5A of the Central Excise Act. The Law Ministry has accordingly concluded that in view of the specific bar provided under sub-section (1A) of Section 5A of the Central Excise Act. The manufacturer cannot opt to pay the duty under Notification 59/2008-C.E., dated 7-12-2008 and he cannot avail the Cenvat credit of the duty paid on inputs.*

*4. The aforesaid opinion of Law Ministry has been accepted by the Board, pending issues, if any, may be decided accordingly."*

*The C.B.E. & C. Circular has clearly stipulated that in view of specific bar provided under Section 5A(1A) of Central Excise Act, 1944, manufacturer cannot opt to pay duty under Notification No. 59/2008-C.E., dated 7-12-2008 and rebate of duty.*

*9. Government observes that as per explanation 1(A) to Section 5(A) of Central*

*Excise Act, 1944 the manufacturer of such goods has no option to pay Central Excise duty since Notification No. 29/2004-C.E., dated 9-7-2004 as amended, issued under Section 5A(1A) of Central Excise Act, 1944 grants unconditional exemption from whole of duty. The duty paid cannot be treated as duty paid under the provision of Central Excise Law. As such, the rebate of said amount is not admissible to the applicant under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 since exported goods cannot be treated as duty paid goods. Government, therefore, uphold the impugned order-in-appeal to this extent. Applicants have pleaded that they are entitled for refund of the Cenvat credit availed either by cash or by re-credit in Cenvat account as no duty is payable on export goods. Government notes that this amount paid as duty is to be treated voluntary deposit with the Government and same cannot be retained without any authority of law. The said amount is required to be refunded in the manner it was paid as held by Hon'ble High Court of Rajasthan in the case of C.C.E. v. Suncity Alloys reported at 2007 (218) E.L.T. 174 (Raj. H.C.). Hon'ble High Court of Punjab & Haryana vide order, dated 11-9-2008 in the case of M/s. Nahar Industrial Enterprises Ltd. v. UOI reported as 2009 (235) E.L.T. 22 (P & H) has held that refund in case of higher duty paid on export product which was not payable, is not admissible and refund of excess paid duty/amount in Cenvat credit is appropriate. Government observes that the amount so paid by the applicant is to be treated as voluntary deposit with Government and same is to be refunded in the manner it was initially paid. In the instant case the same was paid from Cenvat credit account and hence government directs that the said amount may be allowed to be re-credited in their Cenvat credit account. The impugned O-I-A is modified to this extent."*

Government holds that excess duty should be allowed as the re-credit in the Cenvat credit account from which duty was paid. In the instant case, Government finds that the goods were cleared for export on payment of duty through Cenvat Credit of the Manufacturer. Therefore, applicant being the merchant exporter, the same cannot be allowed to them.

9. In view of above discussions, Government upholds the Orders-in-Appeal No. CD/788/RGD/2015 dated 19.10.2015 and CD/785/RGD/2015 dated 06.11.2015 passed by the Commissioner of Central Excise (Appeals) – Mumbai-II.

10. Revision application is disposed off on the above terms.

  
(SHRAWAN KUMAR)

Principal Commissioner & ex-Officio  
Additional Secretary to Government of India

ORDER No. 1104-1105 /2022-CX (WZ) /ASRA/Mumbai Dated 22.11.2022

To,

1. M/s. Bliss GVS Pharma Ltd., 102, Hyde Park, Saki Vihar Road, Andheri (E), Mumbai- 400072.
2. The Commissioner of CGST, Mumbai East Commissionerate, 9<sup>th</sup> Floor, Lotus Infocentre, Parel, Mumbai - 400012.

Copy to:

1. The Commissioner(Appeals) Central Excise, Mumbai Zone-II, 3<sup>rd</sup> Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E,BKC, Bandra (E), Mumbai – 400051.
2. Sr. P.S. to AS (RA), Mumbai.
3. ~~Guard file.~~