REGISTERED SPEED POST AD

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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. 195/445/16-RA/6047 Date of Issue: 28/11/2022

ORDER NO.1152/2022-CX(WZ)/ASRA/MUMBAI DATED 25.11.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SETION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. M. J. Biopharm Pvt. Ltd.
Plot NO. L-7 MIDC, Taloja,
Raigad District, Maharashtra - 410208.

Respondent : Commissioner, CGST & Central Excise, Thane.

Subject: Revision Application filed, under Section 35EE of Central Excise Act, 1944 against the Order-in-Appeal No. CD/361/Bel/2016 dt. 12.4.2016 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone -II.

ORDER

This revision application has been filed by M/s. M. J. Biopharm Pvt. Ltd. located at Plot No. L-7 MIDC, Taloja, Taluka Panvel, Raigad District, Maharashtra - 410208 (herein after referred as 'Applicant') against the Order-in-Appeal No. CD/361/Bel/2016 dt. 12.4.16, passed by the Commissioner of Central Excise (Appeals), Mumbai Zone -II,

2. M/s. M. J. Biopharm Pvt. Ltd. holder of Registration Certificate No. AADCS9530PXM 001 are engaged in the manufacture of Pharmaceutical Products falling under Chapter 30 of the Central Excise Tariff Act, 1905 (CETA 1905). They are also engaged in export of their finished goods under claim of rebate of Central Excise duty paid at the time of clearance under Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 of the Central Excise Rules 2002. They are also availing the facility of CENVAT Credit, under the CENVAT Credit Rules 2004.

3. During the course of verification of the export documents by the Department it is observed that the applicant has exported free samples along with the regular consignment of their products. It was observed that the quantity so cleared as free samples were not considered while arriving at the FOB Value. However, they mentioned the value of their free samples in their ARE-1 and paid duty on the value of the free samples. Subsequently they claimed rebate of the duty paid on the clearance of free samples. In their corresponding Export Invoices and Shipping Bills, the applicant has shown the goods, in question, as 'Free Samples.

4. It was observed that transaction value of the free samples was 'Nil' hence no Central Excise duty was liable to be paid. It was alleged that applicant had deliberately paid Central Excise duty on free samples cleared for export with

an intention to claim rebate of the said duty paid by them. Accordingly, show cause notice was issued to them on 17.07.2015 demanding the erroneous rebate claims sanctioned to the appellants during the period from 07.07.2010 to 31.03.2015 totally amounting to Rs. 10,15,551/- with interest and penalty. Additional Commissioner, Central Excise, Belapur vide Order-in-Original No. Belapur/Taloja/R-III/44/ADC/TKS/2015-16 dated 21.12.2015 confirmed the demand with interest & penalty and consequent to recovery in cash, allowed the amount to be re-credited to their Cenvat account.

5. Being aggrieved by the said Order-in-Original, respondents filed appeal before Commissioner (Appeals) who after consideration of all the submissions, rejected the appeal and upheld the Order-in-Original.

6. Being aggrieved with the Order-in-Appeal, applicants have filed these revision application before Central Government under Section 35EE of Central Excise Act, 1944 mainly on the following grounds:-

On the facts & circumstances of the case, the learned Commissioner (Appeals) erred in -

6.1. Holding that since the market price of the samples was nil as declared in the Shipping Bill, the rebate of duty paid on the samples having no commercial value was not admissible to the Applicant in terms of provision of Notification No.19/2004-CE (NT) dt.6.9.2004.

6.2. Not appreciating that in terms of the purchase order, free samples were supplied to the Applicant's customers & they were within their rights to sell them off if so desired by them. In a way, supplying of 10% free samples was more in the form of the discount given to their customers. Instead of mentioning free samples, the Applicant could have mentioned total quantity at 100000 packs & value of the same would have been shown at a price for 91000 packs only. This would have been the transaction value of the exports which is the same as has been received by them.

6.3. Not appreciating that the allegation in the SCN that the transaction value of the free samples was nil as the Applicant had not received any remittances for free samples exported by them and hence, no Central Excise duty was liable to be paid by them at the time of clearance of the said free samples for export was misconceived.

6.4. Not appreciating that the Applicant was not exporting the free samples separately but it was invariably exported along with the dutiable goods ordered for by the customers and the same was the mandatory requirement as per the purchase order as mentioned in para 1 above. The condition of the order itself was that 10% of the goods will be given as free samples which was nothing but the quantity discount. Just because the term used in the purchase order was "free samples" instead of mentioning them as "quantity discount", it will not alter the nature of transaction. The substance of the transaction had to be seen rather than the nomenclature used.

6.5. Not appreciating that quantity discount was allowed as deduction and duty had to be paid on the transaction value after deducting the said discount. Hence, it cannot be alleged that transaction value of free samples was nil or the Applicant had not received foreign remittance on the said samples. The Applicant received the consideration in full for of the entire consignment as per the purchase order which was the transaction value.

6.6. Not appreciating that in the case of Indian Drugs Manufacturer's Association v/s UOI - 2008] 222 ELT 22 [BOM] it was held that the valuation of physician free sample had to be determined U/R. 4 by applying the valuation of such goods sold in the open market. (ie. comparable price).

6.7. Not appreciating that from the above judgment it could be seen that value of the free sample was not nil as alleged in the present SCN but its value had to be determined by applying the valuation of such goods sold in the open market. The Applicant had also valued the free samples as per Rule 4 of Valuation Rules, 2000 and paid the duty on the same.

6.8. Not appreciating that the above case of Applicant can be compared with the offers made by consumer goods manufacturers e.g. bladė manufacturer wherein one blade is supplied free with the pack of 4 blades. The MRP is printed and in such a scenario it cannot be said that one blade was supplied free of charge. Total 5 blades are supplied at a particular MRP i.e. transaction value and mentioning of 4 blades and 1 blade free is nothing but the sales gimmick.

6.9. Not appreciating that even otherwise, the position was revenue neutral. Duty was not payable on the free samples as they were for exports, but the duty was paid on the same. If so, then duty paid wrongly by the Applicant has to be refunded to them. So what department has granted to the Applicant in

the form of rebate is nothing but the duty wrongly paid by them on exports. There was no loss of revenue in this situation.

6.10. Not giving any finding on plea of the Applicant that the demand is barred by limitation as there was no suppression of facts.

6.11. Not appreciating that on all the documents including ARE-1, invoices etc. the quantity of free samples was clearly mentioned and in fact after verifying all the documents, rebate was granted to the Applicant. Hence, it cannot be said that there was any suppression on the Applicant's part.

6.12. Not appreciating that the show cause notice was issued for the period from 7.7.2010 to 31.3.2015 and during this period 5 rebate claims were granted to the Applicant by the department. The rebate was granted after duly verifying all the documents thoroughly. The very fact that the authority of the level of Assistant Commissioner granted the rebate claim which underwent pre-audit and post check audit check clearly showed that all the authorities who examined the rebate claim were fully satisfied with the claim and the same was granted only thereafter a scenario, it cannot be said that the Applicant had suppressed any facts from department and hence, extended period cannot be invoked at all in the present case.

6.13. Not appreciating that even otherwise extended period can be invoked only when there is duty evasion but as mentioned earlier, the position was revenue neutral since what has been granted to the Applicant by way off rebate claim was nothing but the excise duty wrongly paid by them on exports So there was no duty evasion at all on their part. And as such extended period could not have been invoked.

6.14. Not appreciating that penalty under Section11AC could not have he imposed since the rebate claims were legally granted to the Applicant and they were not fraudulent. And hence it could not be said that there was suppression on the part of the Applicant.

And hence, OIA dated 12.4.2016 should be set aside to the extent of recovery of rebate claim with interest and imposition of penalty.

7. A personal hearing was held in this case on 14.06.2022 Shri Rajeev Waglay, Advocate appeared for hearing on behalf of the Applicant and reiterated the submissions filed with Revisionary Authority. He submitted that special order for Tender & ARE-1 mentioned the free sample value. He further

submitted that there was no suppression of facts, therefore, 5 years period should not have been invoked.

8. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

9. Government notes that the points to be decided here is:-

9.1 Whether free samples of no commercial value and in absence of realization of foreign exchange, the applicant is entitled for rebate claim or otherwise &

9.2 Whether rebate sanctioned earlier in cash on the free samples by issuing Order-in-Original by Assistant/Deputy Commissioner, which were not challenged, is barred by limitation or are recoverable alongwith interest and penalty by issuing Show Cause Notice.

10. Government notes that the point in dispute, whether in absence of realization of foreign exchange the applicant is entitled for rebate claim or otherwise. Government notes that there is no dispute that free samples were not sold / exported. So also, Central Excise duty was paid on such clearances.

10.1. Government in this case relies on GOI Order Nos. 933-1124/2012-CX., dated 31-8-2012 reported in 2013 (288) E.L.T. 133 (G.O.I.) in the case of M/s. Cadila Healthcare Ltd. wherein Government at para 11 of its order held as under:-

> **11.** *Applicant has contended that rebate of duty paid cannot be denied on the goods supplied free as samples. The free sample has no commercial value as they are supplied free to the buyer and no foreign remittance is received. As per Condition 2(e) of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 if the market price of the excisable goods at the time of exportation is less than amount of rebate claimed, the rebate will not be admissible since the goods are*

supplied free and therefore rebate on such goods is rightly denied under Rule 18 of Central Excise Rules, read with Notification 19/2004-C.E. (N.T.), dated 6-9-2004. However, the amount paid as duty has to allowed in re-credited to the Cenvat credit account as the said amount cannot be retained by Government without any authority of law.

10.2. Government also places its reliance on GOI Order No. 332/2014-CX, dated 25-9-2014 in M/s. Umedica Laboratories Pvt. Ltd. reported in 2015 (320) E.L.T. 657 (G.O.I.) in which on the identical issue Government observed as under-

9.1 *Government finds that the original authority also rejected the rebate claim of duty paid on free samples. Government observes that these samples were not meant for sale, so, they did not have any commercial value and no foreign remittances were to be received by the applicant. Government observes that the rebate/drawback etc. are export oriented schemes to neutralize the effect of the domestic duties on the exported goods to make them competitive in international market to earn more foreign exchange for the country.*

9.2 *As in the instant case, no foreign remittances was to be received by the applicant, they were not eligible for rebate of duty on (free trade samples). As per foreign trade policy, the exporter is allowed to send the free trade samples, but the admissibility of the rebate claim is to be decided as per relevant provisions of Central Excise Act. No commercial value is mentioned on the export documents and the market value as per records become nil. Since the market price of export goods at the time of exportation is nil, the rebate claim becomes inadmissible in terms of Condition No. 2(e) of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004.*

10.3. Government also observes that Hon'ble Supreme Court has also held in the case of M/s. Belapur Sugar and Allied Industries Ltd. v. CCE - 1999 (108) E.L.T. 9 (S.C.) that even if duty paid under ignorance of law or otherwise, the rebate cannot be refused since party has paid the duty. Further, Hon'ble Apex Court has held that if the duty paid shown to be not leviable or entitled for rebate, the Revenue has to refund, adjust, credit such amount to the assessee as the case may be.

10.4. Government by applying the ratio of aforesaid judgements to the instant applications holds that as in the instant case, no foreign remittances was to be received by the applicant, they were not eligible for rebate of duty on (free trade samples). As per foreign trade policy, the exporter is allowed to send the free trade samples, but the admissibility of the rebate claim is to be decided as per relevant provisions of Central Excise Act. No commercial value is mentioned on the export documents and the market value as per records becomes nil. Since the market price of export goods at the time of exportation is nil, the rebate claim becomes inadmissible in terms of condition No. 2(e) of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004.

10.5. Government further holds that the amount of duty paid on free samples cannot be retained by Government and it has to be returned to applicant in the manner in which it was paid. Accordingly, such duty is required to be returned to the applicants. As such the amount of duty paid on free samples may be recredited in the applicant's Cenvat credit account.

11. Government notes that the other point in dispute is whether rebate sanctioned earlier in cash on the free samples by issuing Order-in-Original by Assistant/Deputy Commissioner, which were not challenged, is barred by limitation or are recoverable alongwith interest and penalty by issuing Show Cause Notices.

11.1. Before adverting to the merits of the opposing contentions, it is pertinent to refer to statutory provisions relevant to the case. The applicant has in the revision application submitted that the impugned order is non est in law and the demand is barred by limitation as there was no suppression of fact and therefore, extended period cannot be invoked for issuing show cause notice.

11.2. Government observes that while the sanction of the rebate claims are on record, the instant case has relevance to the statutory provisions

pertaining to the recovery of such sanctioned rebate claims. In this regard the case of Wellspring Universal (2004(313) ELT 881(GOI) has discussed in detail this issue and categorically taken a stand as follows:

"Refund in cash - Refund in cash of higher duty paid on export product which was not payable is not admissible - Excess duty paid by applicant allowed to be re-credited in Cenvat Credit Account. [para 9]

*Recovery - Recovery of erroneous refund/rebate - Recovery of erroneous refund/rebate sanctioned under an order can be recovered by invoking provisions of Section 11A of Central Excise Act, 1944, without taking recourse to provisions of Section 35E ibid and filing appeal against the order under which refund was initially sanctioned - Section 11A ibid - Section 35E ibid. [**2003 (161) E.L.T. 12** (Bom.), upheld by Supreme Court in **2004 (163) E.L.T. A56** (S.C.) followed] [para 11]"*

11.3. Government notes that the issue has been discussed at various judicial forums and the Courts have held that Section 11 A is an independent substantive provision and is a complete code in itself for realization of excise duty erroneously refunded and there are no pre-conditions attached for issuance of notice under Section 11 of the Act for recovery of amount erroneously refunded. Government relies on the observations of the Hon'ble High Court of Judicature at Bombay in the case of Indian Dyestuff Industries Ltd vs. Union of India [2003(161) E.L.T. 12(Bom)] at Para 15 which is reproduced as under

> ***"15.** The submissions of the Petitioners that when the refund was granted as a consequential relief by accepting the order-in-original dated 11-9-1984, it was not open to the Revenue to resort to Section 11A of the said Act and purport to recover the amount refunded on the ground that the amount was erroneously refunded and that if at all the revenue was aggrieved by the order-in-original, the proper course open to the revenue was to file an appeal u/s. 35 of the said Act and that having accepted the order-in-original dated 11-9-1984, it was not open for the revenue to invoke jurisdiction u/s. 11A of the said Act have no merit, because,*

before invoking the jurisdiction u/s. 11A of the said Act, it was not mandatory for the Revenue to challenge the order-in-original by filing appeal. The show cause notice u/s. 11A of the said Act can be issued, if there are grounds existing such as short levy or short recovery of erroneous refund etc. under the Scheme of the said Act. The only way by which an erroneously refunded duty could be recovered is by resorting to the powers conferred under Section 11A. The issuance of a notice under Section 11A is a primary and fundamental requirement for recovery of any money erroneously refunded. Section 11A is the fountain head of all the powers for recovery of any money erroneously refunded. There are no preconditions attached for issuance of notice under Section 11A for recovery of the amount erroneously refunded. There is no requirement of passing an adjudication order and if adjudication order is passed, there is no need to initiate appellate proceedings before issuing notice under Section 11A. Second proviso to Section 35A(3) which states that no order-in-appeal requiring the appellant to pay any duty erroneously refunded shall be passed unless the Appellant is given show cause notice within the time limit prescribed in Section 11A also shows that Section 11A is a independent substantive provision and it is a complete code in itself for realisation of excise duty erroneously refunded. Under the circumstances, the contention of the Petitioner that notice under Section 11A could not be issued without challenging the order-in-original is without any merit."

Government notes that the above order of the High Court of Judicature in Bombay has been maintained by the Hon'ble Supreme Court in the case of Navinon Ltd vs. UOI [2004(163)E.L.T A 56(SC)].

11.4. Further Government also relies on the following case laws which echo the decisions of the Courts as quoted supra:

(i) Bharat Box Factory vs. Commissioner of Central Excise, Ludhiana [2005(183) E.L.T. 461(Tri-Del)]

(ii) GOI order in Re: Evershine Polyplast Pvt Ltd [2012(278) E.L.T 133(GOI)

11.5. Government notes for a better understanding of the statutory provisions and applicability in cases of erroneous recovery of refunds, the provisions of Section 11A of the Central Excise Act are reproduced as under :-

"Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-

(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,-

(a) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of,-

(i) his own ascertainment of such duty; or

(ii)the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA.

(2) .....

(3) .....

(4) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of-

(a) fraud; or

(b) collusion; or

(c) any wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.

Explanation 1. *- For the purposes of this section and section 11AC,-*

(a) "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;

(b) .....;

(i).....;

(ii).....;

(iii).....;

(iv).....;

(v) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund;

[(vi) .....

....."

11.6. Government notes that as stated above, the statute in the Central Excise Act, has provided a remedy in the event of a refund having been having been sanctioned erroneously and recovery of the same in the light of subsequent omission on the part of the applicants.

11.7. The applicant contention that the show cause notice issued to them is time barred. Adjudication authority had observed that:-

"----

However, I find that the assessee knowingly paid Central Excise duty on the goods cleared for export as free samples when the transaction value of the said free samples was NIL with an intention to claim ineligible rebate claims of the duty paid by them on the goods cleared as free Samples for export, Therefore, the extended period is invokable in the present case and by the above act of commission and omission, the assessee have made themselves liable for penalty under Section 11AC of the Central Excise Act, 1944."

Applicants have made counter arguments like the free samples were given more in the form of discount or the applicant could have carried out the transaction differently so that the transaction value of the exports would be the same as the export proceeds received by them etc. These arguments are not maintainable. Therefore, the applicants' contentions remain unsustainable.

12. In view of the above discussion, Government holds that the Appellate Authority has rightly rejected the appeal filed by the applicant. Thus, Government does not find any infirmity in the Order-in-Appeal No. CD/361/Bel/2016 dt. 12.4.2016 passed by the Commissioner of Central Excise (Appeals) and therefore, upholds the impugned order in appeal.

13. The Revision Application are dismissed being devoid of merit.

Shrawan 25/11/22

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No.1152/2022-CX(WZ)/ASRA/MUMBAI DATED25.11.2022.

To,

M/s. M. J. Biopharm Pvt. Ltd.
Plot NO. L-7 MIDC, Taloja,
Raigad Dist District,
Maharashtra - 410208.

Copy to:

1. The Commissioner of GST & CX, Raigad Commissionerate.
2. The Commissioner of GST & CX, (Appeals) Raigad, 5th Floor,CGO Complex, Belapur, Navi Mumbai.
3. The Deputy / Assistant Commissioner (Rebate), GST & CX Raigad Commissionerate.
4. Rajeev Waglay(Advocate), 403, Emca House, 289, Shahid Bhagat Singh Road, Fort, Mumbai - 400 001.
5. Sr. P.S. to AS (RA), Mumbai
6. Guard file
7. Spare Copy.