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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.195/272/17-RA/7092 Date of issue: 30.11.2022

ORDER NO. 1154 /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 SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Echjay Forgings Pvt. Ltd.

Respondent: Commissioner of CGST & CX, Raigad .

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. PK/162/RGD/2017 dated 31.05.2017 passed by the Commissioner of Central Excise (Appeals-II), Mumbai-II.

ORDER

This Revision Application is filed by M/s. Echjay Forgings Pvt. Ltd., Honad Village, Khalapur, Khopoli, Raigad - 410 202 (hereinafter referred to as "the Applicant") against the Order-in-Appeal(OIA) No. PK/162/RGD/2017 dated 31.05.2017 passed by the Commissioner of Central Excise (Appeals-II), Mumbai-II.

2. Brief facts of the case are that the Applicant is engaged in the manufacture of 'M.S.Flanges', 'S.S.Flanges', 'Metal tyres for Railway', etc. falling under chapter heading 73 and 86 of the Central Excise Tariff Act, 1985. The Applicant had carried out export of goods manufactured by them during the F.Y. 2008-09 to 2010-11 and claimed rebate of duty paid under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-CE (NT) dated 06.09.2004. Subsequently, some of the goods exported were received back by them on account of rejection by their overseas buyers. As the export proceeds had not been realized on the said 'export rejects', a Show Cause Notice dated 07.03.2014 proposing recovery of wrongly paid rebate amounting to Rs.34,58,070/- alongwith interest and penalty was issued to the Applicant. The adjudicating authority confirmed part demand for Rs.29,93,622/- under section 11A alongwith interest under section 11AA and imposed penalty equivalent to demand under section 11AC of the Central Excise Act, 1944 vide Order-in-Original No. Raigad/JC/11(PKA)/16-17 dated 01.07.2016. Aggrieved, the applicant filed an appeal. However, the Commissioner (Appeals) rejected the appeal vide impugned OIA and upheld the order-in-original.

3. Hence, the Applicant has filed the impugned Revision Application mainly on the following grounds:

i. Both the lower authorities failed to appreciate that the Applicant had submitted the copies of the Bills of Entry along with duty payment challans to show that the goods were returned on account of rejection by the overseas buyers and on which appropriate duty was

paid by the Applicant which was equal to the amount of rebate originally sanctioned. In fact, it is the case of the Applicant that they had paid more than what was required to be paid under Notification 94/96-Cus dated 16.12.1996.

ii. Both the lower authorities committed a grave error in holding that the said re-imported goods cannot be equated with the exported goods and the benefits availed by the Applicants while exporting the said goods had to be withdrawn/surrendered by the Applicants.

iii. Assuming without admitting that the lower authorities are right in holding that goods covered by the bills of entry produced by the Applicants are not the goods originally exported by the Applicants, there is no provision for seeking return of the rebate on the goods exported by the Applicants.

iv. The Commissioner (Appeals-II), failed to appreciate that the Joint Commissioner had dropped the demand to the extent of Rs.4,64,448/- accepting the submissions of the Applicants that demand raised on the figures reported in Annual Report which included customs duties, freight, insurance etc., is erroneous. Accordingly, the Joint Commissioner re-calculated the demand based only on the assessable value of imported goods, which clearly shows that he has accepted that the goods covered by the said bills of entry were originally exported. It is submitted that the Joint Commissioner could not have demanded any duty on the goods imported by the Applicants unless the goods were the same which were originally exported by the Applicants.

v. The goods are originally exported under notification No. 19/2004-CE (NT) dated 06.09.2004 issued under Rule 18 of the Central Excise Rules, 2004 and neither the said notification nor the provisions of Rule 18 provide that the export under claim for rebate is subject to realization of export proceeds. In fact, there is no provision under the Central Excise Act that the goods cleared for export either without

payment of duty under bond or LUT or on payment of duty with a claim for rebate are subject to realization of export proceeds.

vi. It is submitted that the Commissioner (Appeals-II), failed to appreciate that the Joint Commissioner had erroneously placed reliance on CBEC Circular No 354/70/97-CX dated 13.11.1997 for confirmation of demand on the ground of non-submission of bank realization certificates. The said circular did not make the submission of the bank realization certificate mandatory. It allowed production of the BRC if the exporter is unable to produce the transference copy of the shipping bill within stipulated period and not otherwise. In the Applicants' case, submission of shipping bill for export of goods in respect of which rebate is sanctioned is not disputed and hence there is no question of submission of bank realization certificate even in terms of the above CBEC Circular relied upon by the Joint Commissioner. The Hon'ble High Court of Allahabad in the case of Polyplex Corporation Ltd., Versus Joint Secretary, Finance, 2014 (306) ELT 24 (All.) struck down the above CBEC Circular No. 354/70/97-CX, dated 13.11.1997 holding that the restriction regarding proof of export imposed by an executive order laying down something otherwise than what is prescribed in the notification is not permissible in law and directed the concerned authorities to reconsider rebate claim in light of Notification No. 19/2004-CE (NT) by ignoring the above-referred circular.

vii. It is submitted that the Show Cause Notice dated 07.03.2014 sought to recover the rebate sanctioned to the Applicants during 2008/2011. The Applicants were not obliged in law to disclose non receipt of sale proceeds in free foreign exchange in view of rejection of the goods by the overseas buyers. Without prejudice to the aforesaid, it is submitted that there is no suppression of facts. There is no contravention of any provisions. There is no provision under the Rules to file D-3 intimation of re-imported rejected goods even than the Applicants had intimated the receipts of re-imported rejected

goods vide their letters dated 17.06.2008/08.12.2008/09.03.2009. The CERA audit team had raised the audit observation based on the available records of the Applicants. The demand is clearly barred under Section 11(1).

viii. It is submitted that the assessable value of goods exported in 2008-09 is Rs.1,72,32,477/- involving rebate of Rs. 24,84,923/- at the then prevailing rate of 14.42% including education cess of 3%. The demand confirmed for the period 2008-09 to 2010-11 is Rs.29,93,622/- and in view of the above submissions the demand to the extent of Rs.24,84,923/- is otherwise barred under section 11A(4) of the Act. In any event, it is submitted that relevant date for issuance of show cause notice cannot be the date of information sought for but it is the date as defined in clause (b) of Explanation 1 to Section 11A and in case of refund, the relevant date is the date on which duty is erroneously refunded.

ix. It is submitted that the Commissioner (Appeals-II), erred in upholding the imposition of penalty. It is submitted that under the facts and circumstances of the case, the question of imposition of penalty does not arise. There is no involvement of any suppression or contraventions of provisions. The Applicants submit that when the demand for recovery of rebate originally sanctioned itself does not survive, the question of penalty or recovery of interest also does not survive

In the light of the above submissions, the applicant prayed to set aside the impugned order.

4.1 Personal hearing in the case was fixed for 19.10.2022. Shri Prakash Shah, Advocate attended the online and submitted that as per Section 20 of the Customs Act, rebate/export incentive is not required to be given back when export goods come back to India. He further submitted that SCN was time barred as it covered period part of which was beyond five years. He also submitted that there was no suppression of facts.

4.2 The applicant filed additional submissions dated 18.10.2022 which were reiterations of their earlier submission. However as regards issue of suppression of facts, they had placed reliance on following case laws:

i. Hindalco Industries Ltd. vs Commissioner of C. Ex., Allahabad, 2003 E.L.T. 346 (Tri - Del)

ii. Indian Hotels Co. Ltd. vs Commissioner of Service Tax, Mumbai-I, 2016 (41) S.T.R. 913 (Tri. -Mumbai)

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

6. Government observes that the issues involved in the instant case are - whether due to non-receipt of foreign exchange against export proceeds, the rebate sanctioned is liable to be recovered and whether the Show Cause Notice issued was time barred?

7. Government observes that a CERA team had raised an objection that as the applicant had failed to produce Bank Realisation Certificates in respect of export returns/rejections hence the amount towards rebate allowed on such exports was required to be recovered. Accordingly, a Show Cause cum Demand Notice (SCN) dated 07.03.2014 was issued to the applicant demanding an amount of Rs.34,58,070/- covering the period 2008-09 to 2010-11. The demand was confirmed vide impugned OIO and the appeal filed against it was rejected vide impugned OIA.

8. Government observes that rebate claims are submitted along with relevant documents as mentioned in Paras 8.1 to 8.5 of Chapter 8 of the C.B.E. & C. Manual of Supplementary Instructions. This list of documents does not prescribe submission of BRCs as one of the pre-conditions for claiming rebate. As such, a rebate claim under Rule 18 which is required to be filed within one year from the date of export is not required to be filed along with BRCs as the period for receipt of remittance is one year or as extended. Further as per Reserve Bank of India's Circular AP (DIR Series)

No. 50, dated 3-6-2008 the period of realization and repatriation to India of the amount representing the full export value of goods has been laid down as twelve months from the date of export. Therefore, for any export done, exchange proceeds are to be received within one year or extended period as permitted by the RBI.

9. Government notes that as per condition at Para 2(g) of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004, rebate of duty paid on those excisable goods export of which is prohibited under any law for the time being in force, shall not be made. Regulation 3 of Foreign Exchange Management Act (Goods & Services) Regulations, 2000 requires that a declaration in form GR/SDF is to be submitted to the Customs, *inter alia*, affirming that the full export value of the goods or software has been or will be realized within the specified period (under Regulation 9, ibid) be paid in specified manner. As per Section 8 of Foreign Exchange Management Act, 1999, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all steps to realize and repatriate to India, such foreign exchange within time period prescribed by the RBI. Further, Section 13 of Foreign Exchange Management Act stipulates penalty provision for non-realization of foreign exchange. The provisions of Foreign Exchange Management Act make it clear that the export of goods without realization of export proceeds is not permitted. Therefore, in such cases, condition of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 cannot be said to be complied with and rebate can therefore, not be allowed under Rule 18 ibid.

10. Government observes that in the instant case the stipulated period of one year for the realization of export proceeds had exceeded much before issue of the show cause notice. It is also a fact on record that till date the applicant has failed to submit the BRCs to the department. Even in their submissions in the instant revision application, the applicant has not mentioned anything regarding receipt of remittance leave alone producing any evidence to that effect.

11. It cannot be denied that one of the main reasons for allowing any export incentive including rebate is to encourage export-generated foreign exchange earnings for the country. From a harmonious reading of Rule 18 of Central Excise Rules, Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004, relevant provisions of Foreign Exchange Management Act, Foreign Trade Policy and RBI guidelines as applicable, Government concludes that exports are entitled for rebate benefit only if export proceeds are received, which has not happened in the present case.

12. Government further notes that the applicant has placed reliance upon Hon'ble Allahabad High Court's Order dated 28-4-2014 with respect to Writ Tax No. 1165 of 2012 in case of *M/s. Polyplex Corporation Ltd.* v. *Joint Secretary, Finance,* against Government of India Order No. 1184/2011-CX, dated 7-9-2011 in F.No. 198/134/2009-R.A. Government observes that in the said Revision Order, the main issue was whether settlement in rupees by ECGC in place of export proceeds in foreign exchange would qualify for rebate benefit. As such, the facts of the case are different from the facts of present case.

13. As regards the other issue, Government observes that the applicant has contended that the SCN issued to them was time barred considering the relevant date defined under clause (b) of Explanation 1 to Section 11A, as per which the period of five years is to be counted from the date of refund/rebate. Government observes that for this purpose the applicant should have provided the date of sanction of rebate in respect of each of re-imported consignment. Further, as apparent from the case records, the applicant even failed to identify the re-imported goods vis-à-vis original duty paying documents and original export documents. Therefore, the department was forced to compute the five years period from April'09, considering that the Balance Sheet of the applicant for the FY 2008-09 had been finalized after March'09. Government, therefore, does not find any substance in this contention of the applicant.

14. Government observes that the applicant has also contended that there was no suppression of facts in the instant matter as inspite of there being no provision under the Act or Rules ibid to file an intimation of re-imported rejected goods, they had intimated their jurisdictional Range office about the receipt of re-imported rejected goods vide letters dated 17.06.2008, 08.12.2008 and 09.03.2009. The applicant has submitted copy of letters dated17.06.2008 and 08.12.2008. From the content of these two letters, Government observes that the applicant has informed the department about re-import of steel forgings vide Bills of Entry (BoE) No. 840727 dated 23.05.2008 and 657476 dated 23.10.2008 respectively. Government observes from the impugned OIO that an amount of Rs.4,98,187/- has been confirmed against BoE No.840727 dated 23.05.2008 and an amount of Rs.71,001/- has been confirmed against BoE No. 657476 dated 23.10.2008. Government concludes from the evidence placed on record that extended period of time under Section 11A ibid cannot be invoked against these two consignments. The claim of the applicant in respect of their third letter also needs to be verified.

15. In view of the above findings, Government upholds the impugned Order-in-Appeal as far as requirement of realization of export proceeds for sanction of rebate claims is concerned and remands the case back to Original Authority for carrying out verification as detailed at aforementioned para no.14 and pass an appropriate order. The applicant should be given reasonable opportunity before deciding the matter.

16. The Revision Application is disposed of on the above terms.

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

ORDER No. 1154 /2022-CX(WZ)/ASRA/Mumbai dated 25.11.2022

To,
M/s. Echjay Forgings Pvt. Ltd.,
Honad Village, Khalapur,
Khopoli, Raigad - 410 202.

Copy to:

1. Pr. Commissioner of CGST & CX,
   Raigad, Plot No.1, Sector-17,
   Khandeshwar, Navi Mumbai – 410 206.

2. Shri Prakash Shah,
   c/o, M/s. PDS Legal,
   14, Mittal Chambers,
   1st Floor, Nariman Point,
   Mumbai – 400 021.

3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Notice Board.