SPEED POST

F.No. 195/60/2019-R.A.
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..04/6/21.

Order No. 119/2021-CX dated 04-06-2021 of the Government of India, passed by **Sh. Sandeep Prakash,** Additional 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. NOI-EXCUS-001-APP-917-19-20 dated 30.08.2019 passed by the Commissioner (Appeals), CGST, Noida.

Applicants : M/s EMD Locomotive Technologies Pvt. Ltd., Noida.

Respondent : Commissioner of CGST, Noida.

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ORDER

A revision application no. 195/60/2019-R.A. dated 13.12.2019 has been filed by M/s EMD Locomotive Technologies Pvt. Ltd., Noida (hereinafter referred to as the Applicant) against the Order-in-Appeal no. NOI-EXCUS-001-APP-917-19-20 dated 30.08.2019, passed by the Commissioner (Appeals), CGST, Noida whereby the appeal filed by the Applicant against the Order-in-Original No. 155/DC/Div-V/Noida-I/17-18 dated 23.06.2017 passed by the Deputy Commissioner of erstwhile Central Excise Division-V, Noida-I Commissionerate has been rejected.

2. Brief facts of the case are that the Applicant was registered with the Central Excise and engaged in manufacturing of Electromotive Diesel Engines and parts thereof, falling under Chapter 87 of Central Excise Tariff Act, 1985. The Applicant filed Shipping Bill No. 137 dated 10.02.2016 under claim for drawback in respect of re-export of imported goods, under Section 74 of the Customs Act, 1962, for which the Applicant reversed the CVD and SAD, totally amounting to Rs. 1,92,88,854/-, availed earlier as CENVAT credit. However, upon examination by the Customs Officers, the export under Section 74 ibid was not allowed as the identity of the goods could not be established in absence of the part no. of the export goods to be co-related with the goods imported. Consequently, the Shipping Bill was converted to free Shipping Bill and the Applicant exported the same goods under ARE-1 No. 001/15-16 dated 14.02.2016, which was permitted by the Customs by endorsing Shipping Bill and ARE-1. The Applicant filed a rebate claim of Rs. 1,73,01,181/-, on 28.04.2016, under Rule 18 of the Central Excise Rules, 2002. The original authority issued a Show Cause Notice and rejected the rebate claim, vide aforesaid Order-in-Original dated 23.06.2017, broadly, on the grounds that the Applicant had failed to follow the provisions of para 3 of the Notification No. 19/2004-CE (NT) dated 06.09.2004. While rejecting the rebate claim, however, the original authority held that since the Applicant had reversed the CENVAT credit at the time of removal of goods, the "allegation that the party had not paid duty at the time of clearance has no legal sanction and unsustainable." In appeal, the Commissioner (Appeals)

held that rebate under Rule 18 could be granted only in respect of excisable goods; that on a combined reading of Section 2(d) and Section 3 of the Central Excise Act, it is evident that the excisable goods are those goods which are manufactured in India and specified in the First and Second Schedule of the Central Excise Tariff Act as being subject to a duty of excise. The Commissioner (Appeals) also held that reversal of CENVAT credit taken cannot be treated as payment of duty for the purposes of rebate under Rule 18 and, hence, rebate cannot be allowed.

3. The revision application has been filed, mainly, on the grounds that the question of excitability of the imported goods was not the subject matter of dispute before the original authority and, hence, the impugned Order-in-Appeal has traversed beyond the Show Cause Notice; that the original authority has held that the reversal of credit amounts to payment of duty, which has not been challenged by the department before the Commissioner (Appeals), and, therefore, the Commissioner (Appeals) could not have held against them in the matter; that on a plain reading of Section 2A and Section 3 of the Central Excise Act and Rule 2(e) it is clear that the duty of excise includes CENVAT under its ambit; that all the legal requirements relating to the rebate claim have been fulfilled and the substantial benefit of rebate cannot be denied on any procedural irregularity; and that there is no requirement to submit Bank Realisation Certificate towards realisation of export proceeds for sanction of rebate claim.

4. Personal hearing in the matter was held, on 31.05.2021, in virtual mode. Ms. Shagun Arora, Advocate made submissions on behalf of the Applicant and reiterated the contents of RA and the written submissions filed by email on 31.05.2021. She requested a day's time to file written submissions limited to the issue whether having failed in obtaining drawback under Section 74, the Applicant can in the alternate claim rebate of duty. Thereafter, a written submission has been filed on 01.06.2021. The written submission dated 01.06.2021 brings out that under Section 74, the Applicant would have been

eligible for drawback of all duties paid at the time of import, i.e., BCD, CVD and the SAD, whereas rebate is claimed only in respect of CVD. It is has been further submitted that the Applicant had filed a total of 05 rebate claims under Rule 18, on similar facts, during the period February 2016, March 2016, June 2016, July 2016, November 2016, and March 2017. Out of the total 05 claims, the original authority had granted rebate in respect of 03 of these claims vide Order-in-Original No. R-185/DC/N-V/N-I/2017-18 dated 30.06.2017 and Order-in-Original No. R-80/DC/N-V/N-I/2017-18 dated 29.05.2017 and; that the department has not challenged these orders. No one appeared for the Respondent department in personal hearing nor any request for adjournment has been received. Therefore, the matter is taken up for decision based on records.

5.1 The Government has carefully examined the matter.

5.2 The first issue that arises for consideration is whether the imported goods that have been exported 'as such' can be considered to be 'excisable goods' for the purposes of rebate of duty under Rule 18 of the Central Excise Rules, 2002. Rule 18 reads as under:

"Rule18. Rebate of Duty. – Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on material used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification."

The Government observes that the rebate is admissible on 'any goods' with the condition that the goods must be 'excisable goods'. As per Section 2(d) of the Central Excise Act, 'excisable goods' are the goods specified in the First Schedule or the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to the duty of excise. Thus, for 'any goods' to be described as 'excisable goods' requirement is that they must be specified in the First Schedule of the Central Excise Tariff Act as being subject to a duty of excise. There is no finding by the lower authorities that the subject goods are not specified in the First

Schedule to the Central Excise Tariff Act as being subject to a duty of excise. The Commissioner (Appeals) has not accepted this position by holding that no activity amounting to manufacture was employed on the goods imported and the imported goods were exported as such, hence, goods exported were not excisable. The Government observes that the Hon'ble Allahabad High Court has, in the case of ***Samsung India Electronics Pvt. Ltd. vs. Union of India {2019 (368) ELT 917 (All.)}***, which relates to re-export of imported goods, held that:

"14. The objection raised by the revenue-respondent that the export must have been made after manufacture, is not substantiated by the statutory provisions. The words a 'factory' used in clause 2(a) of the rebate notification only refers to the fact that the goods must be exported from a premises that is a 'factory'. Again, the term 'factory' has not been defined under Rules under Section 2(e) of the Act. It reads:-

"(e) "factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on;"

15. Thus, it being undisputed that petitioner was carrying out, manufacturing activities at it's 'factory' premises and that the goods had been exported from such premises, the removal of the goods (LCD panels and parts of coloured televisions etc.) was made in compliance of the rebate notification i.e. from it's 'factory'.

16. Thus, there found to exist no stipulation under the Rule or a condition under the rebate notification that the eligible goods must have been actually manufactured inside the country. The consequence that arises is that goods that may even be deemed to have been manufactured upon payment of excise duty would remain eligible to rebate on their export....."

Therefore, the view taken by the Commissioner (Appeals) cannot be sustained. In any case, as correctly brought out by the Applicant, the

excitability of goods was not a ground to deny rebate in the proceedings before the original authority.

5.3 The second issue based on which Commissioner (Appeals) has rejected the appeal is by holding that reversal of credit cannot be treated as payment of duty for the purposes of Rule 18. The Applicant has pointed out that as per Board Circular No. 283/117/96-CX dated 31.12.1996, it has been clarified that the import on 'inputs as such' in a bond or by debiting RG-23A Part II account will be treated as export of final goods by virtue of 'deemed manufactured clause' as if such inputs have been manufactured in the same factory. It has also been observed by the Board that, in case, such inputs are cleared by debiting of RG-23A Part II account, the manufacturer will be entitled to rebate under Rule 12(1)(a) of the Central Excise Rules, 1944. The Government observes that though this clarification has been issued with reference to the rebate under earlier Rules of 1944, the Hon'ble Bombay High Court in the case of ***Union of India vs. Sterlite Industries (I) Ltd. {2017 (354) ELT 87 (Bom.)}*** has held that the aforesaid Board's Circular dated 31.12.1996 is also applicable in respect of Rule 18 of the Central Excise Rules, 2002 as Rule 12(1)(a) of the 1944 Rules is pari materia to Rule 18 of the Central Excise Rules, 2002. Accordingly, the Hon'ble High Court has held that "where the duty is paid by debiting the credit entry, rebate claim is allowable". Therefore, the order of Commissioner (Appeals) holding that reversal of CENVAT credit cannot be treated as payment of duty for the purposes of Rule 18 can also not be sustained.

5.4.1 The original authority has rejected the claim on the grounds that the procedural requirements prescribed in para 3 of the Notification No. 19/2004-CE (NT) dated 06.09.2004 have not been complied. It has been specifically observed by the original authority that the Applicant had no intention to follow the provisions of the said notification as goods were removed to claim drawback under Section 74 of the Customs Act, 1962. The Applicant on the other hand has contended that they have fulfilled all mandatory requirements and there is no dispute with respect to their fulfilment in the proceedings

before the lower authorities. Further, non-fulfilment of any procedural requirement cannot be used to deny substantial benefit of rebate.

5.4.2 The Government observes that the Hon'ble Bombay High Court, in the case of ***UM Cables Ltd. Vs Union of India {2013(293) ELT 641 (Bom)}***, has considered this issue in detail. The Hon'ble Court has observed that:

> *"10. Rule 18 of the Central Excise Rules, 2002 empowers the Central Government by a notification to grant a rebate of duty on excisable goods or on materials used in the manufacture or processing of such goods, where the goods are exported. The rebate under Rule 18 shall be subject to such conditions or limitations, if any, and the fulfillment of such procedure as may be specified in the notification. Rule 18, it must be noted at the outset, makes a clear distinction between matters which govern the conditions or limitations subject to which a rebate can be granted on the one hand and the fulfillment of such procedure as may be prescribed on the other hand. The notification dated 6 September, 2004 that has been issued by the Central Government under Rule 18 prescribes the conditions and limitations for the grant of a rebate and matters of procedure separately. Some of the conditions and limitations are that the excisable goods shall be exported after the payment of duty directly from a factory or warehouse, except as otherwise permitted by the CBEC; that the excisable goods shall be exported within six months from the date on which they were cleared for export from the factory of manufacture or warehouse or within such extended period as may be allowed by the Commissioner; that the market price of the excisable goods at the time of export is not less than the amount of rebate of duty claimed and that no rebate on duty paid on excisable goods shall be granted where the export of the goods is prohibited under any law from the time being in force. The procedure governing the grant of rebate of central excise duty is specified in the same notification dated 6 September, 2004 separately. Broadly speaking, the procedure envisages that the exporter has to present four copies of an application in form ARE-1 to the*

Superintendent of Central Excise. The Superintendent has to verify the identity of the duplicate copies of the application to the exporter. The triplicate copy is to be sent to the officer with whom a rebate claim is to be filed either by post or by handing it over to the exporter in a tamper proof sealed cover. After the goods arrive at the place of export they are presented together with the original and duplicate copies of the application to the Commissioner of Customs. The Commissioner of Customs after examining the consignment with the particulars cited in the application is to allow the export if he finds that the particulars are correct and to certify on the copies of the application that the goods have been duty exported. The claim for rebate of duty is presented to the Assistant or Deputy Commissioner of Central Excise who has to compare the duplicate copy of the application received from the officer of customs with the original copy received from the exporter and the triplicate received from the Central Excise officer.

11. *The Manual of Instructions that has been issued by the CBEC specifies the documents which are required for filing a claim for rebate. Among them is the original copy of the ARE-1, the invoice and self attested copies of the shipping bill and the bill of lading. Paragraph 8.4 specifies that the rebate sanctioning authority has to satisfy himself in respect of essentially two requirements. The first requirement is that the goods cleared for export under the relevant ARE-1 applications were actually exported as evident from the original and duplicate copies of the ARE-1 form duly certified by customs. The second is that the goods are of a duty paid character as certified on the triplicate copy of the ARE-1 form received from the jurisdictional Superintendent of Central Excise. The object and purpose underlying the procedure which has been specified is to enable the authority to duly satisfy itself that the rebate of Central Excise duty is sought to be claimed in respect of goods which were exported and that the goods which were exported were of a duty paid character.*

12. *The procedure which has been laid down in the notification dated 6 September, 2004 are in CBEC's Manual of*

Supplementary Instructions of 2005 is to facilitate the processing of an application for rebate and to enable the authority to be duly satisfied that the two fold requirement of the goods having been exported and of the goods bearing a duty paid character is fulfilled. The procedure cannot be raised to the level of a mandatory requirement. Rule 18 itself makes a distinction between conditions and limitations on the one hand subject to which a rebate can be granted and the procedure governing the grant of a rebate on the other hand. ***While the conditions and limitations for the grant of rebate are mandatory, matters of procedure are directory*** *(emphasis supplied)."*

5.4.3 In the case of ***Zandu Chemicals Ltd. vs Union of India, {2015(315) ELT 520 (Bom)}***, the Hon'ble Bombay High Court has followed the judgment in the case of UM Cables Ltd (Supra) and held that *"The procedural provisions are capable of substantial compliance. There is no requirement of insisting on strict compliance therewith."* Thus, the original authority while considering a claim of rebate has to ensure that the condition and limitations laid down in Para 2 of the Notification No. 19/2004 Central Excise (NT) dated 6/9/2004 are mandatorily complied. However, in respect of the procedures specified in Para 3 thereof, substantial compliance has to be ensured without insisting upon strict compliance.

5.4.4 In the instant case, there is no contention that the 'conditions and limitations' contained in para 2 of the Notification No. 19/2004 have not been followed by the Applicant. However, the Government is in agreement with the original authority that in the facts and circumstances of the case, where the export goods were originally cleared for claim of drawback under Section 74, the procedure under para 3 of the said notification could not have been strictly complied with. Therefore, in the interest of justice, it would be appropriate that the Applicant is afforded an opportunity to establish substantial compliance with the matters of procedure specified in para 3 of the Notification No. 19/2004-CE (NT) dated 06.09.2004.

5.5 Another issue that is required to be decided is whether the rebate claim could have been rejected for non production of BRC as evidence towards realisation of export proceeds. The Government observes that there is no provision in the Rule 18 or the Notification No. 19/2004-CE (NT) to make the sanction of rebate conditional upon realisation of export proceeds. Therefore, the subject rebate claim could not have been rejected on the grounds of non-production of BRC. This view is supported by the judgment of Hon'ble Allahabad High Court in the case of ***Jubilant Life Sciences Ltd. vs. Union of India {2016 (341) ELT 44 (All.)}***. The Government has also taken an identical view in the earlier cases of ***Salasar Techno Engineering Ltd. {2018 (364) ELT 1143 (GOI)}, M/s Taurus Agile Technology Corporation Pvt. Ltd. {Order No. 66/2021-CX dated 31.03.2021}, and M/s Jindal (I) Ltd. {Order No. 96/2021-CX dated 10.05.2021}.***

6. In view of the above, the Orders of the lower authorities are set aside and the revision application is allowed by way of remand to the original authority with directions to examine the rebate claim afresh, with a limited purpose of verifying substantial compliance with the matters of procedure, as per findings and observations above. While deciding the matter afresh, the original authority shall be free to satisfy itself as regards to the sufficiency and authenticity of documents produced in order to ensure substantial compliance with the procedure specified in para 3 of the Notification No. 19/2004-CE (NT) dated 06.09.2004.

(Sandeep Prakash)
Additional Secretary to the Government of India

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G.O.I. Order No. 119/21-CX dated 04-6-2021

Copy to: -

1. The Commissioner of CGST, Noida, C-56/42, Sector-62, Noida- 201 301.
2. Commissioner (Appeals), CGST, Noida.
3. M/s. Lashmikumaran & Sridharan Attorneys, No. 5, Link Road, Jangpura Extension, New Delhi- 110 014.
4. P.S. to A.S. (Revision Application).
5. Guard File.
6. Spare Copy.

ATTESTED

आशीष तिवारी / ASHISH TIWARI
सहायक आयुक्त/ Assistant Commissioner
केन्द्रीय वस्तु एवम् सेवा कर, केन्द्रीय उत्पाद एवम् सीमा शुल्क
CGST, Central Excise & Customs
राजस्व विभाग / Department of Revenue
वित्त मंत्रालय / Ministry of Finance
भारत सरकार / Government of India
नई दिल्ली / New Delhi