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F.No. 195/02/11-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..13/2/13

ORDER NO. 119 /2013/CX DATED 13.2.2013 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 35 EE OF THE CENTRAL EXCISE ACT, 1944 AGAINST THE ORDER-IN-APPEAL No. 73/2010 (M-IV) DATED 20.10.10 PASSED BY COMMISSIONER OF CENTRAL EXCISE (APPEALS), CHENNAI

APPLICANT : M/S INPAC DELTA INDIA PVT. LTD., SRIPERUMBUDUR

RESPONDENT : COMMISSIONER OF CENTRAL EXCISE, CHENNAI-IV

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ORDER

This revision application is filed by the applicant M/s Inpac Delta India Pvt. Ltd., Sriperumbudur against the order-in-appeal No. 73/2010 (M-IV) dated 20.10.10 passed by the Commissioner of Central Excise (Appeals), Chennai with respect to order-in-original No. 08/2009 (RF) dated 29.1.09 passed by Deputy Commissioner of Central Excise-I Poonamallee Division, Chennai-IV Commissionerate.

2. Brief facts of the case are that the applicant preferred a rebate claim under Rule 18 of Central Excise Rules 2002 read with Section 11B of Central Excise Act 1944 for an amount of Rs.2,87,501/- with the Divisional Office on 13.6.2008 for the payments made as Central Excise duties for the clearances effected to M/s. NOKIA Telecom SEZ under five ARE-1s. The applicant being a 100% EOU unit has claimed that they paid duty at the time of export in terms of the provisions of Section 3 of Central Excise Act 1944 and have subsequently claimed rebate in terms of Rule 18 of Central Excise Rules 2002 read with Section 11B of Central Excise Act 1944. The applicant is a 100% EOU and have exported excisable goods manufactured in India that are exempted from payment of excise duty absolutely vide exemption Notification No: 24/2003-CE, dated 31-03-2008, to a place outside India. Hence, the applicant ought to have, exported the excisable goods without payment of duties of excise based on the exemption Notification, contrarily, they have paid the duties of excise voluntarily and claimed the same as Rebate of duty in contravention of the provisions of the sub-section (1A) of Section 5A of Central Excise Act 1944. Thus, when any duty is paid on their own volition without availing the absolute exemption, such payments could not be considered as duties of excise. Further, Rule 18 of Central Excise Rules 2002 provides that where any goods are exported, rebate of duties paid on such excisable goods may be granted. However, as explained above, the amount paid by the applicant does not amount to duties of excise, they appear not to be rebatable. Therefore, a Show Cause Notice was issued to the applicant for the

above said reason and after due process of law the Adjudicating Authority rejected the rebate claim.

3. Being aggrieved by the said order-in-original, applicant filed appeal before Commissioner (Appeals) who upheld the impugned order-in-original and rejected the appeal.

4. Being aggrieved by the impugned order-in-appeal, the applicant has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 The lower authority had held that the clearances from appellant unit is exempt from payment of duty in terms of Notfn.No.24/2003-CE dated 31-3-2003, and therefore they ought to have availed the exemption and not paid duty. The appellant submit that in terms of the proviso to Section 3 when the goods manufactured in the EOU are cleared into DTA the excise duty payable is to be calculated based on the value and rate of duty under the Customs Law provisions. By a fiction, the proviso to Section 3 provides that the duties of excise on excisable goods manufactured in an EOU shall be an amount equal to the aggregate duties of Customs which would be leviable under the Customs Act or under any other law for the time being in force. Thus, the EOU being a manufacturer of excisable goods are faced with two types of duties, (a) the duty of excise to be called Central Value Added Tax under Section 3 as well as (b) duties of excise being an amount equal to the aggregate of duties of Customs leviable thereon as per the proviso to Section 3(1) of the Central Excise Act, 1944. To get over this situation, Notification 24/2003-CE was issued on 31.3.2003 (and its predecessor Notification 125/84-CE dated 26.5.1984) exempting all goods Manufactured in an EOU from the whole of duties of excise leviable thereon under Section 3 of the Central Excise Act. However, to avoid an EOU from claiming the exemption even for the goods cleared in DTA, the proviso was inserted that the full exemption from duty under Notification 24/2003 will not apply if the goods are cleared in DTA.

4.2 Thus, reading Notifications 24/2003 and 23/2003 together, the amount of duty leviable on the excisable goods manufactured by EOU and brought to any place into India shall be the rate of duty as specified under Notification 23/2003. However, on exports of excisable goods, the duty payable shall continue to be as per the proviso clause, namely, the aggregate of the duties of Customs payable on like goods imported to India. The payment of duty on the goods exported under the proviso to Section 3 (1) of the Central Excise Act is therefore in order. It is submitted that the object and purpose of the notification no: 24/2003-CE dated 31.03.2003 (previously notification no: 125/84 CE date 26:5.1984) is not to charge excise duty under Section 3 on goods produced in EOU but only levy the proviso duty. Hence the payment of the duty under the proviso clause is correct and the legitimate claim of rebate of the duty paid cannot be rejected by interpretations that do not serve the purpose. In the circumstances, the payment of duty and claim of rebate is also in order and the lower authority ought not to have rejected the rebate claim in question.

4.3 Availment of Exemption is Optional and impugned order is bad in Law. The lower authority held that the applicant ought to have compulsorily availed the exemption in terms of Notfn.No.24/2003-CE dated 31-3-2003 in terms of 'provisions contained in Section 5A (1A) of Central Excise Act 1944. The applicant submits that such a proposition is not tenable in terms of the proposition laid down in various decisions.

4.4 Without prejudice to the earlier submissions the applicant submits before the lower adjudicating authority as well as appellate authority that they are alternatively eligible for refund under Section 11B of Central Excise Act 1944. Section 11B also provides for refund of duty paid erroneously, and the duty paid on export clearances are well within the ambit of the above section, and the lower authority ought to have sanctioned the refund. Further the applicant is also alternatively eligible for refund in terms of provisions of Rule 5 of Cenvat Credit Rules 2004 (CCR'2004) the plea of which was placed before the lower authority. The lower authority ought to have sanctioned

the refund under Rule 5 of CCR'2004, the plea of the appellant is ignored by lower authority as well as the appellate authority as the impugned order is silent on this aspect. The lower authority held that as the appellant have paid duty on their own volition the same cannot be considered as excise duty as there is no charge caste on them by Section 3 of the Central Excise Act 1944. In terms of Para 1.2 Chapter 8 of CBEC Supplementary instructions, the definition of term 'refund' under Sec.11B includes 'rebate'. The lower authority held that the applicant ought not to have paid duty when there is an exemption, he should have sanctioned the amount paid erroneously by applicant, by treating the rebate as refund claim. When the duty is not at all payable as held by the lower authority, the collection and retention of the same is also without authority of law, and the proper course of action is to refund the amount paid by mistake.

Case laws relied upon by the applicants are:

- Himalaya International Ltd. Vs. CCE, Chandigarh I 2003(154) ELT 580(Tri-LB)
- Hindustan Aluminium Corporation Ltd. Vs CCE 1981(8) ELT 642 (Del)
- Punjab Stainless Steel Vs CCE 2008 (226) ELT 587 (Tri-Delhi)
- Bala Handloom Exports Vs CCE 2008 (223) ELT 100 Tri
- In Re: Sacheta Metals Ltd 2006 (200) ELT 184 (Commr. Appl.)
- Commissioner Vs Suncity Alloys Pvt Ltd 2007 (218) ELT 174 (Raj.)
- Hindustan Unilever Vs CCE 2010 (250) ELT 92 (Tri-Ahmd.)

5. Personal hearing in this case scheduled on 13/14.12.12 was attended by Shri M.S.Krishna Kumar, Advocate on behalf of the applicant who reiterated the grounds of revision application. He submitted that in a similar case Hon'ble Chennai High Court has allowed the rebate in the W.P.No.5667/12 in the case of Orchid Healthcare vs UOI. Shri Arokiaraj, Deputy Commissioner, Poonamallee Division appeared on behalf of the respondent department and submitted that the order-in-appeal being legal & proper may be upheld.

6. Government has carefully gone through the relevant case records and perused the impugned order-in-original and order-in-appeal.

7. On perusal of records Government observes that the adjudicating authority rejected the rebate claim on the ground that in terms of Section 5A(1A) of Central Excise Act, 1944 absolute exemption is available to the applicant being a 100% EOU hence they had no option to pay duty and claim rebate under Rule 18 of Central Excise Rules 2002. Commissioner (Appeals) has upheld the impugned order-in-original and rejected the appeal of applicant. Now the applicant has filed this Revision Application on the grounds stated at para 4 above.

8. In this regard, Government notes that issue regarding admissibility of rebate claim under rule 18 of Central Excise Rules 2002 to 100% EOU was decided vide GOI Revision Order No.219-245/12-CX dated 9.3.12 in the case M/s Vijay Chemical Industries, Mumbai. In the said case revision application was filed by party against order-in-appeal No.PKS/103-129/BEL/2010 dated 1.6.10 passed by Commissioner of Central Excise (Appeals), Mumbai-III. The operative portion of said order is as under:

> "7. On perusal of records, Government observes that applicant a 100% EOU cleared the finished goods for export on payment of duty by debiting Cenvat Credit account and filed rebate claims of duty paid on such exported goods which were sanctioned by Assistant Commissioner Central Excise. However Commissioner Central Excise reviewed the Orders-in-Original passed by Assistant Commissioner Central Excise & filed appeals before Commissioner (Appeals), who allowed the department appeals holding that rebate claim were not admissible in these cases since the said goods were unconditionally exempted from whole of duty under Notification 24/03-CE and applicant had no option to pay duty in view of provision of section 5A(1A) of Central Excise Act 1944. Now, the applicant has filed these revision application on the grounds stated in para (4) above.

8. Applicant has mainly contented that Commissioner (Appeals) did not follow the decision of Hon'ble High Court of Rajasthan in the case of Central CCE Vs. Suncity Alloys Pvt. Ltd which it was held that if no duty was liable and still assessee paid duty the department cannot retain it on any ground and must refund it. Applicant has also concluded that it has been consistent policies of Government to ensure that exporter does not have to bear the taxes and duties and taxes/duties do not became a cost.

8.1 In order to understand the issue, it is necessary to go through the provision of Notification No. 24/03-CE dated 31.03.03 and section 5A(1A) of Central Excise Act, 1944 which are extracted below:

8.2 Notification No. 24/2003-CE dated 31-03-2003 states as follows-

" In exercise of the power conferred by sub-section (1) of section 5A of Central Excise Act, 1944, (1 of 1944), read with sub-section (3) of section 3of the Additional Duties of Excise (Goods of special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby;

(a) Exempts all excisable goods produced or manufactured in an export oriented undertaking from whole of duty of excise leviable thereon under section 3 of Central Excise Act, 1944 (1 of 1944) and additional duty of excise leviable thereon under section 3 of additional Duty of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and addition duty of excise leviable thereon under section 3 of additional Duty of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

Provided that the exemption contained in this Notification in respect of duty of excise leviable under section 3 of said Central Excise Act shall not apply to such goods if brought to any other place in India;"

8.3 Sub-Section (1A) of Section 5A of the Central Excise Act, 1944 stipulates as follows;-

> "(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely the manufacturer of such excisable goods shall not pay the duty of excise on such goods."

8.4 The Notification No. 24/03-CE dated 31-03-2003 was issued under section 5A(i) of Central Excise Act 1944. The goods manufactured by 100% EOU and cleared for export are exempted from whole of duty unconditionally. Therefore in view of provisions of subsection (1A) of section 5A, the applicant manufacturer has no option to pay duty. Government notes that there is no condition for availing exemption from payment of duty on goods cleared for exports. Normally the 100% EOU has to clear goods for exports as per the EOU scheme. Since there is no condition in the notification for availing exemption to goods manufactured by 100% EOU and cleared for export, the provisions of sub-section (1A) of section 5A(1) are applicable and no duty was required to be paid on such export goods. As such rebate claims were rightly held by Commissioner (Appeals) to be in admissible in terms of rule 18 of Central Excise Rule 2002. Government finds support from the observations of Hon'ble Supreme Court in the case of M/s ITC Ltd. Vs CCE reported as 2004 (171) ELT-433 (SC), and M/s Paper Products Vs CCE reported as 1999 (112) ELT -765 (SC) that the simple and plain meaning of the wordings of statute are to be strictly adhered to. CBEC has also clarified vide letter F.No. 2009/26/09-Cx dated 23.04.2010 (para 2) as under:-

> *"The matter has been examined, Notification No. 24/2003-CE dated 13.03.2003 provides absolute exemption to the goods manufactured by EOU. Therefore, in terms of Section 5A(1A) of the Central Excise Act, 1944. EOUs do not have an option to pay duty and thereafter claim rebate of duty paid."*

8.5 As regards, applicant's contention that duties/taxes are not to be exported, Government notes that these are various scheme in operation which neutralize the effect of duty incident on the exported goods. Each scheme is governed by the conditions/limitations and procedures laid down in the notification. In this case the provisions of section 5A(1A) of Central Excise Act 1944 put embargo on payment of duty since goods were exempted from payment of whole of duty un conditionally. However, the unutilized Cenvat Credit is permitted to refunded under rule 5 of Cenvat Credit Rules, 2004 and the said facility is not availed by applicant.

8.6 Applicant has relied upon the decision of Hon'ble High Court of Rajasthan in the case of CCE Vs. Suncity Alloys Pvt. Ltd. In this said case Hon'ble High Court has held that if no duty is as leviable and still assessee paid duty, the department cannot retain it on any ground and must refund it. Government observes that the duty paid without the authority of law cannot be treated as duty paid under the provision of Central Excise Act. As such the said paid amount has to be treated as a voluntary deposit made by applicant with the Government. Government cannot retain any amount without any authority of law. So, any excess paid amount has to be returned in the manner in which it was paid.

8.7 In view of above position, Government do not find any infirmity in the impugned Orders-in-Appeal on merit and holds that said rebate claims are rightly held inadmissible under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE/(NT) dated 06.09.2004. The rebate claims already sanctioned are laible to be recovered. The applicant has to repay the already sanctioned amount in Cash. After the recovery is affected, the applicant may be allowed to take recredit of said amount in the Cenvat Credit account from which it was initially paid. The impugned Order-in-Appeal is modified to this extent."

In the said order and several other orders Government had consistently taken a view that in view of provisions of Section 5A(1A) of Central Excise Act, 1944 the 100% EOU who enjoy unconditional exemption from payment of whole of basic excise duty under

Notification No.24/03-CE dated 31.3.03, has no option to pay duty and thereafter claim rebate of duty paid on exported goods.

9. Government further observes that similar findings were given in GOI Revision Order No.1624/11-CX in the case of Orchid Health Care, Tamilnadu. Party challenged the said order in W.P.No.5667/12 before Hon'ble High Court of Madras who vide order dated 30.11.12 decided the matter against the department. The observation of Hon'ble High Court in para 17 & 18 of said order are as reproduced below:

> "17 At this stage of the hearing of the writ petition the learned counsel appearing on behalf of the petitioner had submitted that it would not be of any use to the petitioner if the respondents are keeping the rebate amount in credit, as the petitioner does not make any local sales and therefore, no excise duty would be payable by the petitioner. Therefore, the second respondent is bound to pay the rebate amount to the petitioner, in cash, if necessary, subject to certain safe guards and conditions, as may be specified by the Central Government, by notification. Therefore, it has been prayed that, this Court may be pleased to quash the impugned order of the first respondent, dated 28.1.2011 and to consequently, direct the second respondent to grant the rebate claim made by the petitioner, in respect of the exports made by it, as per Rule 5 of the CENVAT Credit Rules, 2004."
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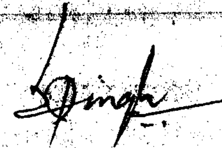
> "18 In view of the averments made on behalf of the petitioner, as well as the respondents, and on a perusal of the records available and in view of the decisions cited supra, this Court finds it appropriate to conclude, without going into the other issues relating to the matter, that the second respondent, is bound to refund the rebate payable to the petitioner, in cash, subject to certain conditions to safeguard the interests of the respondent department. In view of the fact that the petitioner had paid the excise duty on the goods exported by it, and as it may not be of use to the petitioner if the respondent department keeps the amount of rebate claim in credit, as the petitioner does not have local sales, the respondent department is directed to refund the duty paid by the petitioner, on the goods exported by it, as expeditiously as possible, subject to certain conditions, which may be necessary to safeguard the interests of the respondent

Department. The writ petition is ordered accordingly. No costs. Consequently, connected miscellaneous petition is closed."

10. Government notes that the issue is required to be decided in the light of abovesaid judgement of Hon'ble High Court of Madras. Therefore Government sets aside the impugned orders and remands the case back to the original authority for deciding the issue afresh in the light of above said order of Hon'ble High Court of Madras. A reasonable opportunity of personal hearing may be afforded to both the parties.

11. The revision application is disposed of in terms of above.

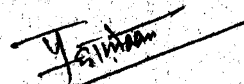
12. So ordered.



(D.P.Singh)
Joint Secretary (Revision Application)

M/s Inpac Delta India Pvt. Ltd.
C-6, SIPCOT Industrial Part
Sriperumbudur-602105
Tamil Nadu

Attested



K. RAMESHWARAM
(RA)
Ministry of Financ... of Rev.)
India
New Delhi

G.O.I. Order No. 119 /2013-Cx. dated 13-02-2013

Copy to:-

1. The Commissioner of Central Excise, Chennai-IV, Commissionerate, 692, Anna Salai, MHU Complex, Nandanam, Chennai-600035, Tamil Nadu
2. The Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai-600034, Tamil Nadu.
3. Deputy Commissioner of Central Excise, Poonamallee Division, C-48, TNHB Building, Anna Nagar, Chennai-600040, Tamil Nadu
4. Guard File.
5. PS to JS (RA)
6. Spare Copy

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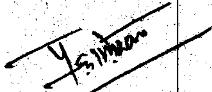

(P.K.Rameshwaram)
OSD (Revision Application)