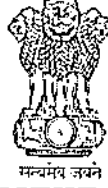


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

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. 195/178/WZ/2019

7637

Date of Issue: 14.12.2022

ORDER NO. \202/2022-CX (WZ) /ASRA/MUMBAI DATED 14.12.2022 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 Leben Laboratories Pvt. Limited,
Plot No.L-4, Phase - III,
MIDC, Akola - 444 104.

Respondent : The Pr. Commissioner of GST & Central Excise,
Nagpur - II Commissionerate,
2nd floor, Room No.221,
Telanghedi Road Civil Lane,
Nagpur - 440 001.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. NGP-EXCUS-000-APPL-543/18-19 dated 18.03.2019 passed by the Commissioner (Appeals), Central Excise & GST, Nagpur.

ORDER

The subject Revision Application has been filed by M/s Leben Laboratories, Akola (here-in-after referred to as 'the applicant') against the impugned Order-in-Appeal dated 18.03.2019 passed by the Commissioner (Appeals), Central Excise & GST, Nagpur. The said Order-in-Appeal disposed of an appeal against Order-in-Original dated 20.11.2018 passed by the Assistant Commissioner, GST & Central Excise, Akola Divn., Nagpur - II, which in turn decided a refund claim dated 29.05.2018 filed by the applicant.

2. Brief facts of the case are that during the scrutiny of the accounts of the applicant it was found that they had failed to pay service tax amounting to Rs.21,61,366/- under reverse charge mechanism on services received from firms situated abroad. Show Cause Notice seeking to recover the same, invoking suppression of facts, was issued to the applicant and the demand so raised was confirmed by the original authority. On the same being challenged, the Commissioner (Appeals) reduced the demand to Rs.7,25,108/-. The applicant paid Rs.2,03,412/- prior to 30.06.2017 and Rs.5,21,696/- subsequently. The applicant availed Cenvat credit of Rs.2,03,412/-, however, with the onset of GST regime they could not avail Cenvat credit of Rs.5,21,696/- as the same was paid in the GST regime leading to the applicant filing the subject refund claim for the same in terms of Section 142 of the CGST Act, 2017. The same was rejected by the original authority vide Order-in-Original dated 20.11.2018 on the grounds that the said service tax was paid by the applicant only after a Show Cause Notice invoking suppression of facts was issued to them and as per Rule 9(b) and Rule 9(e) of the Cenvat Credit Rules, 2004, Cenvat credit of such amount was not permissible. Aggrieved, the applicant preferred an appeal against the Order-in-Original dated 20.11.2018 with the Commissioner (Appeals). The Commissioner (Appeals) vide the impugned Order-in-Appeal dated 18.03.2019 upheld the Order of the original authority and rejected the appeal of the applicant. Aggrieved, the applicant has filed the subject Revision Application against the impugned Order-in-Appeal. They also made further submissions vide their letter dated 05.12.2022. The grounds for revision and the points made in the said submission are as under:-

(a) Service Tax payments under Reverse Charge are covered by Rule 9(1)(e) of the Cenvat Credit Rules, 2004 and not Rule 9(1)(b) of the Cenvat Credit Rules, 2004;

(b) They were eligible to cash refund of the amount claimed in terms of Section 142 of the CGST Act, 2017;

(c) They sought to place reliance on the decision of the Hon'ble CESTAT in the case of Cadbury India Limited bearing no.ST/324/12 dated 11.01.2017 in support of their case.

In light of the above, the applicant submitted that the refund claimed by them should be allowed to them by way of cash refund.

3. Personal hearing in the matter was granted to the applicant on 06.12.2022. Shri Shrenik Shah, C.A., appeared on behalf of the applicant and submitted that refund of service tax paid on reverse charge basis is admissible to them under Rule 5 of Cenvat Credit Rules, 2004. He also made the additional submission referred above.

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

5. Government observes that that the issue involved is whether the applicant is eligible for the refund of service tax paid by them on reverse charge basis after a Show Cause Notice was issued to them invoking suppression of facts and if so whether the same has to be refunded in cash as per Section 142 of the CGST Act, 2017. The lower authorities have ruled against the applicant, which they don't agree with, hence this application. Government notes that at this juncture it is pertinent to examine Section 35EE and Section 35B of the Central Excise Act, 1944, which provide for Revision by the Central Government and specifies the nature of cases that would lie before the Central Government, respectively. Relevant portions of the same are reproduced below:-

(i) Section 35EE - Revision by Central Government -

(1) The Central Government may, on the application of any person aggrieved by any order passed under section 35A, where the order is of the nature referred to in the **first proviso to sub-section (1) of section 35B**, annul or modify such order :

[Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.]..”

(ii) Section 35B - Appeals to the Appellate Tribunal

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) a decision or order passed by the ¹[Principal Commissioner of Central Excise or Commissioner of Central Excise] as an adjudicating authority;

(b) an order passed by the ²[Commissioner (Appeals)] under section 35A;

....

... [Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;

(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998:

[emphasis supplied]

On examining the first proviso to Section 35B of the Central Excise Act, 1944, Government notes that it does not include disputes relating to the eligibility of Cenvat credit or the refund of such disputed amount under the CGST Act, 2017, which is the issue involved in the present case. Given the above, Government notes that the issue for decision in the instant case is not covered under the clauses (a) to (d) of the first proviso to Section 35B of the Central Excise Act, 1944. Thus, Government finds that in terms of Section 35B and Section 35EE of the Central Excise Act, 1944, it does not have jurisdiction over the dispute involved in the present *lis*.

6. In view of the above, Government dismisses the subject Revision Application as the same is non-maintainable due to lack of jurisdiction.



(SHRAWAN KUMAR)

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

ORDER No.\202/2022-CX (WZ) /ASRA/Mumbai dated 14.12.2022

To

M/s Leben Laboratories Pvt. Limited,
Plot No.L-4, Phase - III,
MIDC, Akola - 444 104.

Copy to:

1. The Pr. Commissioner of GST & Central Excise, Nagpur - II
Commissionerate, 2nd floor, Room No.221, Telangkhedi Road, Civil
Lane, Nagpur - 440 001.
2. Commissioner (Appeals), CGST & Central Excise, Nagpur,
2nd floor, Room No.221, Telangkhedi Road, Civil Lane,
Nagpur - 440 001.
3. M/s Ashwin K. Shah & Co LLP,
2A(1), Maker Bhavan II, 18, Sir Vithaldas Thackersey Marg,
Lines, Behind Aaykar Bhavan, Mumbai - 400 020.
4. Sr. P.S. to AS (RA), Mumbai.
5. Notice Board.