REGISTERED
SPEED POST

F.No. 195/816, 1040-1041/11-RA-Cx
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...16/9/13

Order No.1251-1253/13-cx dated 13-09-2013 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 : ORDER IN REVISION APPLICATION FILED, UNDER SECTION 35 EE OF THE CENTRAL EXCISE, 1944 AGAINST THE ORDER-IN-APPEAL No. passed by Commissioner of Central Excise, (Appeals), Mumbai Zone-III as detailed in table of para 1 of this order.

APPLICANT : M/s Raj Chemicals
Plot No. W-43 MIDC,
Taloja Distt. Raigarh

RESPONDENT : Commissioner of Central Excise, Mumbai Zone-II

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ORDER

These 3 revision applications were filed by M/s Raj Chemicals, Plot No. W-43 MIDC, Taloja Distt. Raigarh against the Order-in-Appeal passed by Commissioner of Central Excise, (Appeals), Mumbai Zone-III as detailed below:-

S.No.	RA No. Name of the Applicant	OIA No. & Date	Order-in-Original No. & Date	Rebate Claimed (Rs.)
1	2	3	4	5
1	195-816-11-RA-Cx	PKS/4/BEL/2011 dt. 20-04-2011	R/2264/10-11 dt. 22-12-2010	202526/-
2	195-1040-11-RA-Cx	PKS/35/BEL/2011 dt. 30-05-2011	R/2285/10-11 dt. 30-12-2010	3646096/-
3	195-1041-11-RA-Cx	PKS/103/BEL/2011 dt. 26-09-2011	R/114/10-11 dt. 23-05-2011	996762/-

2. Brief facts of the cases are that M/s. Raj Chemicals a 100% EOU filed rebate claims in r/o goods exported under rebate claims vide various ARE-I/Shipping Bills. The impugned rebate claim were rejected by the adjudicating authority on the following grounds:

a) The applicants being a 100% Export Oriented Unit, their clearances are exempted from payment of duty vide Notification No. 24/2003-CE dt. 31-03-2003.

b) Section 5A (1A) of the central Excise Act, 1944, provides 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.

c) The said exemption notification is an absolute exemption. The applicants did not have any option to pay the duty on the goods cleared for exports and thereafter claim rebate of duty under rule 18 of Central Excise Rules, 2002.

d) The matter of rebate to 100% EOU has already been settled by the Commissioner (Appeals), Mumbai-II vide Order-in-Appeal No. YDB/236 to 244/BEL/2009 dt. 18-12-2009.

3. Being aggrieved by the said Orders-in-Original, applicant filed appeals before Commissioner (Appeals), who rejected the same and upheld the impugned Orders-in-Original.

4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed these revision applications under section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 After having lost in the revision applications, applicants submit that on the further refund applications filed by the applicants under said rule 18 on the exports made and refunds claimed in the same manner, the department for the first time alleged that under Notification No. 24/2003-CE dt. 31-03-2003 issued under section 5A (1) of the central Excise Act, 1944, all excisable goods produced or manufactured by 100% EOU are exempted from payment of excise duty. The department further contended that in view of sub-section (1A) to section 5A inserted with effect from 13-05-2005, applicants had no option but to avail the exemption granted and therefore according to the department applicants should have not paid excise duty on exported goods and therefore rebate/refund of duty so paid cannot be allowed.

4.2 By Order-in-Appeal No. 346 to 351/BEL/2007 dt. 10-09-2007, the Commissioner of Central Excise (Appeals) after considering the contention of the department that applicants could not pay duties in view of section 5A (1A) of Central Excise Act, has held that the bar under provisions of section 5A (1A) was not applicable and therefore the orders rejecting the rebate claims cannot be sustained.

4.3 Applicants submits that once again the same old issue already decided and adjudicated upon as aforesaid, was raised by the department, based on the Review order dated 27-08-2009 seeking recovery of nine rebate claims allowed to the

applicants amounting to Rs. 23,37,923/-. Respondent, by Order-in-Appeal No. YDB/236 to 244/Bel/2009 dt. 18-12-2009 allowed the appeals of the revenue and set aside the sanctioned rebate claims. From the said Order-in-Appeal dated 18-12-09, applicants filed revision application under section 35EE before the Central Government. The said revision application was rejected by the Joint Secretary to the Government of India by ex-parte order No. 819-827 dt. 24-06-2011. Applicants have filed Miscellaneous Applicants in the said revision application for recalling of the said order dated 24-06-2011 in so far as the applicants herein are concerned on the grounds more particularly set out in the said Miscellaneous application. Applicants state that the said Miscellaneous Application is pending. Applicants crave leave to refer to and rely upon the said Order-in-Appeal dated 18-12-2009 and papers and proceedings in the said revision application and the Miscellaneous application therein as and when produced.

4.4 Applicants submit that in the statement of facts, it is an admitted position that applicants as a 100% EOU have been claiming rebate of duties paid on the input components used in the finished goods cleared for exports under rule 18 of the Central Excise Rules, 2002. The goods are exported directly from the factory premises of the applicants as stipulated in proviso (1) of the Notification No. 19/2004-CE (NT) dated 06-09-2004. The goods are exported within six months from the date of clearances from the factory. All the documents are always co-related and found to be in order. All claims are filed within a year from the date of shipment in accordance with section 11B of the Central Excise Act, 1944. As the aspect of unjust enrichment has never been relevant in view of proviso to section 11B (2) of the Central Excise Act, the rebates were being sanctioned and allowed by the department either without contest or by the orders in statutory appeal/ revision applications. Respondent however once again, based on Notification No. 24/2003 dated 31-03-2003 and section 5 (1A) by impugned Order-in-Appeal has upheld the said Order-in-Original dated 23-05-2011 and has rejected the appeal of the applicants.

4.5 The Notification No. 24/2003 dated 31-03-2003 is being wrongly construed and applied by the respondent to the applicants case. THE said notification exempts all excisable goods produced or manufactured in 100% EOU interalia from whole of the duty of excise. The said notification does not exempt the inputs brought in the factory by the applicants. Section 5(1A) cannot be therefore applied to the duty paid on inputs brought in to the factory. Applicants pay duty on inputs and take cenvat credit. After use of such inputs and take cenvat credit. After use of such inputs in the final product, Applicants, on clearance for exports, debit the cenvat credit including credit taken on the inputs to the extent of the credit available and claim rebate which includes also duty paid on inputs. Notification No. 24/2003 dated 31-03-2003 cannot be therefore made applicable to applicants.

4.6 The Notification No. 24/2003 dated 31-03-2003 issued under section 5A (1), as stated above, does not exempt the 100% EOU from procuring inputs duty free. It only exempts the excisable goods produced or manufactured in EOU interalia from whole of the duty of excise. The department relies pon section 5A (1A) which provides that where an exemption under section 5A (1) in respect of any excisable goods from the whole of the duty of excise thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods. Thus, the exemption is available and restriction is applicable to the excisable goods produced and not to the inputs procured. So, we paid the duty on the inputs and as admittedly export product is exempted from whole of duty of excise, applicant are not required to pay any duty on the exported goods. However, neither the said Notification No. 24/2003 dated 31-03-2003 not said sub-section (1A) to Section 5A restricts claiming refund of the duty paid on inputs already which are used in the export product. The entire application of Notification No. 24/2003 dated 31-03-2003 read with section 5A (1A) is being misconstrued and misapplied by the respondent resulting into grave injustice to the applicants of being denied the refund of duty paid on exported goods which included duty paid on inputs and all by debit to the extent of the credit available to the applicants in RG 23, part-II.

4.7 Without prejudice to the above, having paid the duty, applicants are entitled to make a claim for refund/rebate of the duties so paid by debit to cenvat credit account either by following the procedure under rule 5 of cenvat credit rules, 2004 read with Notification no. 5/2006-CE (NT) dt. 14-03-2006 or under rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004 dt. 06-09-2004. Both the said procedures are independent of each other in as much as rebate/refund on the goods exported is permitted under both the procedures. However, refund under rule 5 read with Notification No. 5/2006 dt. 14-03-2006 is restricted only to duty paid on inputs and is more encumber some to be followed for small companies like applicants since extra manpower is required to follow the procedure under Notification No. 5/2006 which would add to the costs of final product and that is not economically viable in today's inflationary circumstances.

4.8 Following the footsteps of the deputy Commissioner of Central Excise, the respondent, without any independent application of mind, has similarly erred in concentrating on the unconditional exemption granted by Notification No. 24/2003 dt. 31-03-2003 issued under section 5 (1) of the act. Respondent has failed to appreciate that applicants have not disclaimed the benefit under Notification No. 24/2003 dt. 31-03-2003 but as duty was paid on inputs. Applicants therefore pay duty on exported goods by debit to cenvat credit as available, and then claim rebate/refund.

4.9 For restrictive application of section 5A (1A) reliance upon the judgment of the Tribunal in the case of Commissioner of Central Excise, Mumbai-III Vs. Vishruta Printing [2007 (218) ELT 605 Tri. Mumbai] that exemption is mandatorily to be availed of is unwarranted. Applicants are in fact entitled to exemption from payment of any duty on exported goods but having already paid duty on inputs, Applicants cannot be denied the refund to that extent by wrong application of the exemption notification issued under section 5(1) read with section 5A (!A). Where two options are available, Apex court has held that the assessee cannot be denied to choose the more beneficial option.

4.10 Without prejudice to the above, applicants submit that sub-section (1A) of section 5A refers to an exemption granted under sub-section (1) of sec. 5A. Sec.5A (1) applies to exemption from excise duty to goods manufactured in India and cannot be made applicable to 100% EOU.

4.11 Applicants submit that under the order No. 457/11-Cx dt. 03-05-2011 passed by the Government of India in the revision application of M/s. Praj Industries, Pune, the Government of India has observed that the amount paid by the applicant therein is to be treated as voluntary deposit with the department and the same is to be returned the way it was initially paid. The Government has therefore directed that the erroneously paid amount may be allowed to be re-credited to their cenvat credit account. Applicants submit that the Government passed the said order in favour of the applicant therein on the above lines as the applicant therein also had DTA sales and therefore the cenvat re-credited could very well be utilized by the applicant therein on DTA sales. In the instant case, however, applicants as 100% EOU have no DTA clearances. Applicants thereof are entitled to the refund of duties paid on inputs and being on admittedly voluntary deposit cannot be retained by the respondent on the ground that the applicants had no option but not to pay the duties. Having paid the duties on the inputs and not on the export product, applicants are entitled therefore to the refund thereof as the department cannot enrich itself with voluntary deposit.

4.12 As regards, the reliance of the respondent on the clarification issued by CBEC which is an internal correspondence, the clarification in the same cannot be contrary to the statutory provisions and cannot render other statutory provision redundant. Even otherwise, the applicability of the said Notification No. 24/2003 dt. 31-03-2003is misconstrued as the said notification exempts the payment of duty on export products and does not bind an EOU from procuring the inputs and does not bind an EOU from procuring the inputs duty frees. Applicants have paid the duty on inputs and therefore the said Notification No. 24/2003 dt. 31-03-2003 is inapplicable and the respondent cannot base his order on the clarification which is in respectful submission of the applicants thoroughly misread by the respondent.

4.13 Applicants therefore pray that the impugned Orders-in-Appeal be quashed and set aside.

5. Government has carefully gone through the relevant case records and perused the impugned orders-in-original and orders-in-appeal. Since the issue involved in all these application is same, all cases are taken up together for decision by this common order.

6. Personal hearing was scheduled in this case on 08-08-2013 at Mumbai. was attended by Shri K.K.Bulchandani and Shri R.K. Sharma, Sr. Counsels, on behalf of the applicant who reiterated the grounds of Revision Application. During the hearing, they further contended that alternatively re-credit in Cenvat account of said amount may be allowed with interest.

7. On perusal of records, Government notes that applicant an 100% EOU manufacturing unit has filed rebate claims under rule 18 of Central Excise Rules, 2002 r/w Notification No. 19/04-CE (NT) dt. 06-09-2004. Government notes that the said issue regarding admissibility of rebate claim under rule 18 of Central Excise Rules, 2002 to 100% EOU, is already decided in applicant's own case vide GOI Revision Order No. 1653-1661/12-Cx-Denovo dt. 06-12-2012. The said order was passed in respect of revision application No. 195/282-290/10 of the applicant M/s. Raj Chemical, filed against Orders-in-Appeal No. YDB/236-244/Bel/09 dt. 18-12-2009 passed by Commissioner of Central Excise (Appeals) Mumbai Zone-II.

7.1 The operative portion of above said GOI Revision order is as under:-

" 6.2 In this regard Government observes that for proper understanding of the issue, the relevant provisions of Notification No.24/03-CE dated 31.5.03 under Section 5A(1A) may be perused which are extracted as under:

6.3 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;"

6.4 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."

6.5 The Notification No. 24/03-CE dated 31-03-2003 was issued under section 5A(1) 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 not 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 (pära 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."

6.6 In view of above position Government is of the view that in view of absolute exemption from whole of duty under Notification No.24/03-CE dated 31.3.03 the manufacturer had no option to pay duty as stipulated in the provisions of Section 5A(1A) of Central Excise Act 1944. The duty paid in these cases in violation of provisions of Section 5A(1A) cannot be treated as duty paid under the provisions of Central Excise Act/Rules. As such the said paid amount does not become a duty paid for the purpose of granting rebate under Rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE(NT) dated 6.9.04. Similar view is taken in GOI Order No.457/11-Cx dated 3.5.11 cited by applicant before Hon'ble High Court. As such, the said rebate claims are not admissible to the applicants. Government is in agreement with the findings of Commissioner (Appeals) and finds no legal infirmity in the said orders-in-appeal to this extent.

6.7 The applicant has further relied upon the GOI Revision order No. 371-372/07 dated 28-06-2007 (File No. 198-271-272/06) and GOI Order No. 121/09 dated 12-05-2009 (File No. 198/3/9/06) (Both Orders are in their own case). Government observe that in these cases the goods were exported by the applicant during the period prior to 13-05-2005 when the section 5A(1) was not amended and the provision of subsection (1A) of section 5A(1) did not exist. As such the ratio of said orders cannot applied the instant cases which relate to the period subsequent to 13-05-2005 when the subsection (1A) of section 5A(1) was inserted vide section 75 of Finance Act 2005 (18 of 2005).

7. Government notes that once a view is taken in accordance with law that rebate claim is not admissible to the applicant under Rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE(NT) dated 6.9.04, there is no merit in the pleading of the applicant that they may be allowed rebate as they cannot use cenvat credit as they have to DTA sales. Government notes that Hon'ble High Court of Rajasthan in the case of CCE Vs. Suncity Alloys Pvt. Ltd. has held that if no duty is leviable and still assesse paid duty the department cannot retain it on any ground and has to be refunded. Applicant has sought the relief of allowing recredit of said amount in their Cenvat Credit in terms of GOI order No.457/11-Cx dated 3.5.11 in their WP No.6331/12 before the High Court of Bombay. In the said order Government had allowed recredit in cenvat account of duty paid which was not leviable.

7.1 Government notes that Hon'ble Punjab & Haryana High Court in case matter of M/s Nahar Industrial Enterprises [2009 (235) ELT-12(P&H) has order as under:

> *"Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty – Petitioner is entitled to cash refund by way of credit is appropriate – Board's Circular No.687/3/2003-CX, dated 3.1.2003 distinguished – Rule 18 of Central Excise Rules, 2002."*

In the said judgement Hon'ble High Court has held that allowing recredit of duty paid which was not leviable is appropriate.

7.2. In view of above, Government is not averse to allowing the present request of the applicant for taking re-credit of said amounts in their cenvat credit account taking into account their request made before Hon'ble High Court of Bombay. Government allows the benefit of re-credit of the said amounts into cenvat account of the applicant as the same cannot be retained by Government without any authority of law. The impugned orders-in-appeal are modified to this extent. "

8 Government notes that ratio of above said GOI order is squarely applicable to these cases and therefore rebate claim is rightly denied to the applicants under rule 18 of Central Excise Rules, 2002 r/w Not. No. 19/04-CE (NT) dt. 06-09-2004. Government notes that amount paid without authority of law cannot be treated as duty of excise paid on goods but it is to be treated as voluntarily deposit made by applicant with the Government. The amount is required to be returned to the applicant in the manner it was paid. In these cases the amount was paid from Cenvat credit and therefore the said amount is to be allowed as re-credit in the same Cenvat credit account as Government cannot retain it without any authority of law.

8.1 Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11.9.2008 in CWP Nos.2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. Vs. UOI reported as 2009 (235) ELT-22 (P&H) has decided as under:-

"Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty – Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate."

Hon'ble High Court of Punjab & Haryana has observed that refund in cash of higher duty paid on export product which was not payable, is not admissible and refund of said excess paid duty/amount in Cenvat Credit is appropriate. As such the excess paid amount/duty is required to be returned to the respondent in the manner in which it was paid by him initially.

8.2 Applicant has requested during hearing that said re-credit may be allowed with interest. In this regard, Government observes that it is not case of refund of duty but a case of allowing re-credit of Cenvat amount which was debited on his own volition and remained as voluntary deposit with Government. The provision of section 11BB of Central Excise Act, 1944 relate to interest on delayed refund of duty. So, there is no question of payment of interest while allowing re-credit of excess paid amount (Voluntary deposit) in their Cenvat Credit account.

9. In view of above position, Government find no infirmity in the impugned Orders-in-Appeal as regards rejection of rebate claims and therefore upholds the same to this extent. However, as discussed above, the applicant may be allowed to take re-credit of said excess paid amount in their Cenvat credit account. The impugned Orders-in-Appeal are modified to this extent.

9. The revision applications are disposed of in terms of above.

10. So, ordered.

(D.P.Singh)
Joint Secretary to the Government of India

M/s Raj Chemicals
Plot No. W-43 MIDC,
Taloza Distt. Raigarh

ATTESTED

(भागवत शर्मा/Bhagwat Sharma)

Copy to:-

1. Commissioner of Central Excise, Belapur, Ist Floor, CGO Complex, CBD Belapur Navi Mumbai-400604.
2. Commissioner of Central Excise (Appeals), Belapur, 5th Floor, CGO Complex, CBD Belapur Navi Mumbai-400604.
3. The Deputy Commissioner Central Excise, Taloja Division,Belapur.
4. Shri R.K.Sharma, Senior Counsel, R.K.Sharma & Associates Pvt. Ltd., 157, 1st Floor, DDA Office Complex, C.M., Jhandewalan Extn., New Delhi-55
5. PS to JS (Revision Application)
6. Guard File
7. Spare Copy.

ATTESTED

13/9

(BHAGWAT P. SHARMA)
OSD (REVISION APPLICATION)

(भागवत शर्मा/Bhsgwat Sharma)
सहायक आयुक्त/Assistant Commissioner
C B E C -O S D (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi