

REGISTERED
SPEED POST



F.No.195/625/2011-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.....25/9/13

ORDER NO. 1277/13-Cx DATED 23-09-2013 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 : Revision Application filed under Section 35 EE of the
Central Excise Act, 1944 against the orders-in-appeal
No. M-I/AV/262/11 dated 6.5.2011 passed by
Commissioner of Central Excise (Appeals) Mumbai
Zone-I, Mumbai

APPLICANT : Commissioner of Central Excise, Thane-II

RESPONDENT : M/s Petrox Containers., Thane

ORDER

This revision application is filed by Commissioner of Central Excise, Thane-II, Mumbai against the order-in-appeal No. M-I/AV/262/11 dated 6.5.2011 passed by Commissioner of Central Excise (Appeals) Mumbai Zone-I, Mumbai with respect to order-in-original No. 8/07-08 dated 23.07.2007 passed by Assistant Commissioner of Central Excise, Bhyander Central Excise Division, Thane-II.

2. Brief facts of the case are that M/s Petrox Containers are holding Central Excise Registration and are engaged in the manufacture of excisable goods viz. metal cans falling under Chapter Sub Heading No. 73102110 of the Central Excise Tariff Act, 1985. During the course of audit on the records of the applicants it was noticed that they had received insurance claim of Rs. 10,03,710/- for the finished goods, inputs etc. damaged due to floods in July 2005.

2.1 Accordingly, a show cause notice dated 27.04.2007 was issued to the party for demand of duty Rs.1,27,655/- on the finished goods under the proviso to Section 11A(1) of Central Excise Act, 1944, (ii) Cenvat Credit of Rs. 36,151/- involved in the inputs under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 11A(1) of the Central Excise Act, 1944, (iii) interest under the provisions of Section 11AB of the Central Excise Act, 1944, (iv) penalties under the provisions of Rule 25/27 of the Central Excise Rules, 2002; Rule 15 of the Cenvat Credit Rules, 2004 and Section 11Ac of the Central Excise Act, 1944.

2.2 The matter was adjudicated vide order-in-original No. 8/2007-08 dated 23.07.2007 by the Assistant Commissioner, Bhyander Division wherein the demand of Rs.1,27,665/- was confirmed under the proviso to Section 11A(1) of the Central Excise Act, 1944 and Rs. 36,151/- under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 11A(1) of the Act, *ibid* and ordered to pay interest on the confirmed demand amounts, under Section 11 AB of the Act, *ibid*. Further, penalties were imposed of Rs. 1,27,655/- under the provisions of Rule 25 of the Central

Excise Rules, 2002 and Section 11 AC of the Central Excise Act, 1944, Rs.36,151/- under the provisions of Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944 and Rs.5000/- under the provisions of Rule 27 of the Central Excise Rules, 2002.

3. Being aggrieved by the said order-in-original, respondent filed appeal before Commissioner (Appeals) who passed following order :-

3.1 The demand of Rs. 1,27,655/- has been set aside on the ground that there is no dispute regarding the fact that the finished goods had not been cleared and that they were destroyed before their removal from the factory of manufacture and considering the fact that the duty of central excise is leviable in terms of Rule 8 only on removal of goods from the factory. While section 3 is charging section for levying central excise duty, whereas the manner in which the same is required to be collected has been given under rule 8. No duty therefore can be recovered unless the goods are removed from the place of manufacture.

3.2 The party do not dispute that the raw materials and packing materials had not been issued for manufacture and they were destroyed without they being put their intended use i.e. for manufacture of finished products. Once it is established that the inputs have not been put to intended use, the credit availed on them has to be reversed whether the goods have been destroyed or otherwise. Therefore, the demand of Rs.36,151/- on the raw materials is upheld along with interest thereon under Section 11AB. However, no penalty is required to be imposed under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944, as there has been no intentional mis-utilization of Cenvat credit. Penalty of Rs.5000/- under Rule 27 of Central Excise Rules, 2002 without indicating which Rule has been contravened for invoking such penalty, is also set aside. The party is advised to apply for remission for regularizing the loss of finished products.

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

4.1 In this case the assessee has not applied for remission of duty hence Adjudicating Authority has no option but to confirm the duty. The Commissioner (Appeals) has not properly appreciated the spirit of the judgment in the case of Grasim Ltd. Vs CCE, Indore [2007(208) EL T 336(Tri- LB)].

4.2 It is unhealthy practice to require the unit to submit Remission Application subsequently particularly after having exhausted all the procedural formalities before adjudication and appeal forums. Remission Application needs to be filed by the unit immediately after having suffered the damages to the excisable goods.

4.3 Commissioner (Appeal) should have appreciated the fact that in absence of proper Remission Application filed by the unit, Remission of duty cannot be granted. Further, in absence of duty being remitted by the proper Officer, the adjudicating authority is left with no option but to confirm the demand of duty involved on excisable goods under reference.

4.4 In view of these facts, it appears that the Commissioner (Appeals) has erred in setting aside the Orders-in-Original No.08/07-08 dated 23.7.2007 and therefore the decision of setting aside the Orders-in-Original is not legal and proper.

5. A show cause notice was issued to the respondent under Section 35 EE of Central Excise Act, 1944 to file their counter reply. The respondent vide written reply dated 14.11.2011 made following submissions :-

5.1 The department in para 6.2 of their revision application have cryptically stated that the Commissioner (Appeals) has not properly appreciated the spirit of the judgment in the case of Grasim Ltd. vs. CCE Indore, 2007 (208) ELT 336 (Tri.-LB). In the absence of the exact grounds as to how the Commissioner (Appeals) has not properly appreciate the spirit of the said judgment, we are at a loss to understand the grounds made by the department. However, we also beg to draw your kind attention that in para 6 of her impugned Order, the Commissioner (Appeals) has discussed the decision of Hon'ble Larger Bench Tribunal in the

case of *Grasim Industries v CCE Indore (supra)*, that this judgment "does not Department has not contested this observation. Therefore, the contention of the department in the impugned appeal may kindly be rejected as not sustainable. state the duty is required to be paid on the finished goods" and the Department 'has not contested this observation. Therefore, the contention of the department in the impugned appeal may kindly be rejected as not sustainable.

5.2 The department in Para 6.3 of their Revision Application have stated that it is unhealthy practice to require the unit to submit remission application subsequently particularly after having exhausted all the procedural formalities before adjudicating and appeal forums. Remission Application needs to be filed by the unit immediately after having suffered the damages to the excisable goods. In this connection, we also beg to draw your kind attention to the provisions of Rule 21 of Central Excise Rules, 2002, which states as follows:

"Rule 21. Remission of duty.- Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be Imposed by him by order in writing:"

A perusal of the aforesaid Rule 21 indicates that there is no stipulation of immediately filing the remission application by the assessee after having suffered the damages to the excisable goods, and also there is no concept of unhealthy practice in the Central Excise law, as contended by the Department. Therefore, the contention of the department is not required to be accepted and the appeal may kindly be rejected as not sustainable.

5.3 The assessee further beg to submit that the Commissioner (Appeals) has set aside the impugned order -in-Original No. 08/07-08 dated 23.07.2007 of Assistant Commissioner on merits and has not considered the other submissions made by the assessee as brought out in Paras 4.4, 4.5, 4.6 and 5 in the

impugned Order-in-Appeal that the demand is barred by limitation, as extended period is not invocable in the absence of any suppression, mis-statement etc. as assessee had informed the department about the loss of finished goods, inputs and packing materials vide their letter' dated 08.08.2006, provided the details vide their letter dated 15.07.2006 in compliance of EA-2000 audit objections and submitted the periodical returns regularly and the same were being accepted without any adverse remarks.

6. Personal hearing scheduled in this case on 7.8.2013 at Mumbai was attended by Shri S.K. Babaladi, Consultant on behalf of the respondent party who reiterated the submissions made in their written reply dated 14.11.2011.

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

8. On perusal of records, Government observes that in the instant case, the damaged finished goods and inputs are still lying in the factory. This fact is not disputed at all. However, original authority confirmed the duty demand in finished goods as well as inputs alongwith interest and penalty. Commissioner (Appeals) has set aside the demand of Rs.1,27,655/- on finished goods since the same are removed from factory and directed the party to file remission application under rule 21 of Central Excise Rules 2002. The department has contested said order-in-appeal on the ground that original authority has no option but to confirm the demand in the absence of application for remission of duty and also contested the direction of Commissioner (Appeals) to party to file remission application at stage. In this regard, Government observes that duty is chargeable under Section 3 of Central Excise Act, 1944 but the payment of duty is deferred till removal of goods from the factory under Rule 8 of Central Excise Rules, 2002. This fact is not disputed by department also. Finished goods are still lying in the factory. The loss of goods due to floods is established with available documentary evidences of insurance report and intimation given

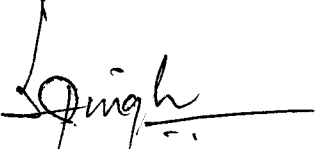
by party. Respondent has again offered that said goods can still be inspected by department in their factory.

9. The loss of goods due to floods is by natural causes or by unavoidable accident and the damage of goods are claimed to be unfit for marketing and their remission of duty involved on such goods is to be considered under rule 21 of Central Excise Rules, 2002. Hon'ble Tribunal in the case of Mira Chemicals vs. CCE Surat-II 2009 (234) ELT 328 (T-Ahd) has held that filing of remission application is only a procedure required to be adopted by assessee and in the absence of any clearance of good from factory confirmation of demand of duty is not justified. Similar view is taken by Tribunal in the case of Voltamp Transformers Ltd. vs. CCE Vadodara 2010 (262) ELT 909 (T-Ahd). The Principal Bench (Large Bench) of CESTAT in the case of Grasim Industries vs. CCE Indore 2007 (208) ELT 336 (T-LB) has held the reversal of input credit when remission granted on final product destroyed in fire/accident is not required. The ratio of said judgments is squarely application to this case. As such, the view taken by Commissioner (Appeals) cannot be faulted with.

10. In view of above position, Government do not find any infirmity in the impugned order-in-appeal and therefore upholds the same.

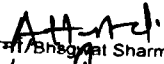
11. The revision application is thus rejected being devoid of merits.

12. So ordered.


(D.P. Singh)

Joint Secretary(Revision Application)

Commissioner of Central Excise,
Thane-II Commissioneate,
4th Floor, Navprabhat Chambers,
Ranade Road, Dadar (West),
Mumbai – 400 028


(भागवत शर्मा/Bhagat Sharma)
सहायक आयुक्त/Assistant Commissioner
C.B.E.C.-OSD (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Dept. of Rev.)
भारत सरकार/Govt. of India
सं. क्र. 198/625/11-RA

Order No. 12-77/13-Cx dated 23.01.2013

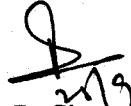
Copy to:

1. Commissioner of Central Excise (Appeals), Mumbai Zone-I, Mehar Building, Dady Seth Lane, Chowpatty, Mumbai – 400 007.
2. The Assisant Commissioner of Central Excise, Bhayander Division, Thane-II, 1st Floor, Divine Sheraton Plaza, Jesal Park, Bhayander (E).
3. M/s Petrox Containers, Raj Bucket Complex, Ghodbunder Road, Ghobunder Village, P.O. Mira Road, Thane – 401 104

4. PA to JS(RA)

5. Guard File.

6. Spare Copy


(B.P. Sharma)
OSD(Revision Application)