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F.NO.195/799/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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NEW DELHI-110 066

Date of Issue: 25/9/13

ORDER NO. 1281 /2013-Cx DATED 24.09.13 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D.P.SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 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.TKG/04/LTU/MUM/2011 dated 30.6.11 passed by the Commissioner of Central Excise & Service Tax (Appeals), LTU Mumbai

APPLICANT : M/s. Lupin Ltd., Mumbai

RESPONDENT : Commissioner of Central Excise & Service Tax, (LTU), Mumbai

ORDER

This revision application is filed by M/s. Lupin Ltd., Mumbai against the order-in-appeal No.TKG/04/LTU/MUM/2011 dated 30.6.11 passed by the Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai with respect to order-in-original No.LTU/MUM/CX/GLT4/R43/2010 dated 28.5.10 passed by the Assistant Commissioner, Central Excise & Service Tax, LTU, Mumbai.

2. Brief facts of the case are that the applicant M/s Lupin Ltd. had submitted rebate applications on 20.11.08 with the Assistant Commissioner, LTU, Mumbai against ARE-1 Nos.310,340 & 445 dated 3.9.07, 14.9.07 & 13.11.07 respectively for a total amount of Rs.4386005/- along with all required documents, enclosing exchange control copy of the shipping bill, mentioning that the Export Promotion (EP) copy of the shipping bill, had still not been released by Customs as the same was not finally assessed. The rebate sanctioning authority observed that the goods under consideration were exported on 6.9.07, 18.9.07 and 16.11.07, as shown in the ARE-1s, but the applicants had filed the rebate application only on 20.11.08, i.e. after one year from the date of export. Hence, vide a show cause notice dated 31.12.2008, the applicants were required to show cause as to why the said rebate of Rs.4386005/- should not be rejected as time barred, having been filed after the expiry of one year from the relevant date contrary to the provisions of Section 11B of Central Excise Act, 1944. After grant of persona hearing, the rebate claims were rejected vide the impugned order-in-original dated 28.5.10 holding that the claim for rebate had been filed after the lapse of statutory limit of one year from the relevant date.

3. Being aggrieved by the said order-in-original dated 28.5.10, applicant filed appeal before Commissioner (Appeals) who upheld the 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 In the subject matter, the applicants would like to state that they had manufactured the said goods, cleared them on payment of duty and the said goods were exported within the specified time-limit. These basic facts are undisputed. However, the final assessment of the Shipping Bill No.6564416 dtd.14.11.07 against the said export was pending with the customs. Therefore all the original export documents also were pending with the customs. As such the applicants were not able to submit their rebate claims within time. A copy of the letter dated 19.05.2008 submitted to Customs in this regard. Noticing that the finalization is yet getting abnormally delayed, the applicants approached the customs and requested for finalization of assessment and the original documents. However the assessment could not be finalized as samples were sent for testing. As such Customs were kind enough to give the original documents except the EP copy of the Shipping Bill. Even though the EP copy of the Shipping Bill is a mandatory requirement for filing rebate claim, the applicants submitted their rebate claim on 20.11.08 with the available documents, stating that the EP copy would be submitted as and when received. So even if the claim were submitted within the stipulated time also, it would not be possible for the officer to assess the claim in the absence of the EP copy of the SB and the same would have been rejected for want of EP copy of SB. The said EP copy of the SB was released by customs only on 27 & 28.08.09, i.e. much later to the submission of the rebate claim. And thereafter copy of the same was given to the rebate office on 16.09.09 as confirmed in the order-in-original. So it is humbly submitted that the said delay is due to the non-receipt of the required documents from the said department for which the applicants should not be put responsible. The core aspect or fundamental requirement for rebate is manufacture, duty payment and subsequent export. As long as these are met rest are only procedural deviations. Procedure infractions may be condoned if the above fundamental requirements are fulfilled.

4.2 The applicants rely upon GOI decision in case of M/s Cotfab Exports (2006-205-ELT-1027-GOI) wherein it is very well stated that procedural infractions cannot

take away the substantial benefit if there is substantial compliance of mandatory/fundamental requirements. It is mentioned in this order at para No.6:

" In fact, it is now a trite law that the procedural infraction of notifications/circulars etc. are to be condoned if exports have really taken place, and law is settled now that substantive benefit cannot be denied for procedural apses. Procedures have been prescribed to facilitate verification of substantive requirements. The core aspect or fundamental requirement for rebate is its manufacture and subsequent export. As long as this requirement is met, other procedural deviations can be condoned."

The same stand is taken by the Apex Court in the following cases:

- M/s Suksha International & Nutal Germs (1989-39-ELT-503-SC)
- M/s A.B.Narasimhalu (1983-13-ELT-1534-SC)
- M/s Formika India (1995-77-ELT-511-SC)
- M/s Krishna Filaments Ltd (2001-131-ELT-726-GOI)
- M/s Ikea Trading (India) Ltd (2003-157-ELT-359-GOI)
- M/s Modern Process Printers (2006-204-ELT-632-GOI)
- M/s Sidhartha Soya Products Ltd (2006-205-ELT-1093-GOI)

4.3 In the present case, there is no dispute of manufacture, duty payment and export of the goods. So delay in submitting the claims due to the non-availability of the required documents from the customs, which is purely not within the control of the applicants, is only a procedural infraction, which cannot take away the substantial benefit, as otherwise the rebate could be allowed.

4.4 Further Gujarat High Court, in case of M/s Cosmonaut Chemicals, very categorically stated that delay due to non-availability of requisite documents, i.e. EP copy of SB, from the Customs cannot be considered as a lapse from the part of the exporter. Under Section 11B, the claimant is expected to submit the claim along with all the requisite documents. When customs endorsed shipping bill is not received from the customs, submitting the claim without such document doesn't serve the

purpose as the rebate officer cannot assess the claim without the said document. Chapter 8 of CBEC circular clearly states at para 8.4 that the assessing officer has to satisfy himself from the documents the evidence of export and duty payment. But without the requisite documents, how the officer is to assess the evidence or export and duty payment. When one reads the requirement of shipping bill being endorsed by the customs authorities evidencing the physical export of goods which are duty paid, it becomes clear that the entire scheme is an integrated scheme to promote exports. In fact the endorsement requirement itself stipulates endorsement of a copy of shipping bill by use of the phrase 'export promotion'. Thus an interpretation which advances the object of the scheme has to be preferred as against a construction which militates against the scheme. Provisions of Section 11A of the Act stipulates that the claim has to be submitted along with requisite documents. If the customs authorities delay in parting with the said document, how can an assessee be put to disadvantage?

4.5 The position in law is well settled that any procedure prescribed by a subsidiary legislation has to be in aid of justice and procedural requirements cannot be read so as to defeat the cause of justice. In the manual of supplementary instructions in Chapter-1, para 1.1 it is stated that the instructions are supplemental to, and must be read in conjunction with the Act and the Rules. On a conjoint reading of para 1.1 and 1.2 of the Manual it is also apparent that instruction therein are applicable throughout India and officers are not entitled to depart therefrom, without previous approval of the Commissioner, who in turn is required to obtain sanction from CBEC for such deviation. Every aspect of the requirement, obligation and spirit of the scheme is explained in details in the decision in case of M/s Cosmonaut Chemicals. Since department's appeal on this is rejected by Apex Court, the decision of the High Court remains valid and the other N number of decisions of Apex Court also stands in favour of the applicants. Accordingly, the delay in submitting claim due to the non-availability of the document, which is purely not within the control of the exporter, cannot be construed as a reason to deny the substantial benefit of the scheme.

4.6 The Apex Court in case of M/s Sambhaji has clearly stated that

"Procedural law- A procedural law should not ordinarily be construed as mandatory- procedural law is always subservient to and is in aid to justice- interpretation which eludes or frustrates recipient of justice not to be followed." "Procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. A procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice"

4.7 Accordingly, it is prayed that the impugned order-in-appeal dated 30.06.2011 passed by the Commissioner (Appeals) and order-in-original dated 28.05.2010 deserve to be set aside.

5. Personal hearing scheduled in this case on 7.8.2013 at Mumbai was attended by Shri R.K.Sharma, Sr. Counsel and Shri T.Homas, General Manager, Lupin Ltd. on behalf of the applicant who reiterated the grounds of revision application.

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, it is observed that excisable goods cleared for export vide ARE-1 No.310, 340, 445 dated 3.9.07, 14.9.07 and 13.11.07 were exported on 6.9.07, 18.9.07 and 16.11.07 respectively. The rebate claims were filed under Rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE(NT) dated 6.9.04, on 20.11.08 after a time limit of one year as stipulated under Section 11B of Central Excise Act 1944. As such rebate claims were rejected as time barred. Commissioner (Appeals) upheld the impugned order-in-original. Now application has filed this revision application on the grounds stated above.

8. Government notes that as per explanation (a) to section 11B, refund includes rebate of duty of excise on excisable goods exported out of India or excisable materials used in the manufacture of goods which are exported. As such the rebate of duty on goods exported is allowed under Rule 18 of the Central Excise Rules, 2002 read with Notification No.19/2004-CE(NT) dated 06.09.2004 subject to the

compliance of provisions of section 11B of Central Excise Act, 1944. The explanation A of section 11B has clearly stipulated that refund of duty includes rebate of duty on exported goods. Since the refunds claim is to be filed within one year from the relevant date, the rebate claim is also required to be filed within one year from the relevant date. As per explanation B(a)(i) of Section 11B, the relevant date for filing rebate claim means:-

"(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods.-

(i) If the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are load, leaves India, or"

There is no ambiguity in provision of section 11B of Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002 regarding statutory time limit of one year for filing rebate claims.

9. Applicant has given various reasons for filing rebate claim after a stipulated period of one year. In addition, he contended that delay in filing rebate claim is a procedural lapse and same may be condoned as the substantial benefit cannot be denied to them due to procedural infractions. In this regard, Government observes that filing of rebate claim within one year is a statutory requirement which is mandatory to be followed. The statutory requirement can be condoned only if there is such provisions under Section 11B. Since there is no provision for condonation of delay in terms of Section 11B, the rebate claim has to be treated as time barred.

10. Government notes that rebate claims filed after one year being time barred cannot be sanctioned as categorically held in the case laws/judgments cited below :-

10.1 Hon'ble High Court of Gujrat in its order dated 15.12.2011 in the case of IOC Ltd. Vs. UOI (SCA No. 12074/2011) has held as under:-

"We are unable to uphold the contention that such period of limitation was only procedural requirement and therefore could be extended upon showing sufficient cause for

not filing the claim earlier. To begin with, the provisions of Section 11B itself are sufficiently clear. Sub-section (1) of Section 11E, as already noted, provides that any person claiming refund of any duty of excise may make an application for refund of such duty before the expiry of one year from the relevant date. Remedy to claim refund of duty which is otherwise in law refundable therefore, comes with a period of limitation of one year. There is no indication in the said provision that such period could be extended by the competent authority on sufficient cause being shown.

Secondly, we find that the Apex Court in the case of Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 had the occasion to deal with the question of delayed claim of refund of Customs and Central Excise. Per majority view, it was held that where refund claim is on the ground of the provisions of the Central Excise and Customs Act whereunder duty is levied is held to be unconstitutional, only in such cases suit or writ petition would be maintainable. Other than such cases, all refund claims must be filed and adjudicated under the Central Excise and Customs Act, as the case may be. Combined with the said decision, if we also take into account the observations of the Apex Court in the case of Kirloskar Pneumatic Company (supra), it would become clear that the petitioner had to file refund claim as provided under Section 11B of the Act and even this Court would not be in a position to ignore the substantive provisions and the time limit prescribed therein.

The decision of the Bombay High Court in the case of Uttam Steel Ltd. (supra) was rendered in a different factual background. It was a case where the refund claim was filed beyond the period of six months which was the limit prescribed at the relevant time, but within the period of one year. When such refund claim was still pending, law was amended. Section 11B in the amended form provided for extended period of limitation of one year instead of six months which prevailed previously. It was in this background, the Bombay High Court opined that limitation does not extinguish the right to claim refund, but only the remedy thereof. The Bombay High Court, therefore, observed as under:

"32. In present case, when the exports were made in the year 1999 the limitation for claiming rebate of duty under Section 11B was six months. Thus, for exports made on 20th May 1999 and 10th June 1999, the due date for application of rebate of duty was 20th November 1999 and 10th December, 1999 respectively. However, both the applications were made belatedly on 28th December 1999, as a result, the

claims made by the petitioners were clearly time-barred. Section 11B was amended by Finance Act, 2000 with effect from 12th May 2000, wherein the limitation for applying for refund of any duty was enlarged from 'six months' to 'one year'. Although the amendment came into force with effect from 12th May, 2000, the question is whether that amendment will cover the past transactions so as to apply the extended period of limitation to the goods exported prior to 12th May 2000 ?"

10.2 The Hon'ble CESTAT, South Zonal Bench, Chennai in the case of Precision Controls vs. Commissioner of Central Excise, Chennai 2004 (176) ELT 147 (Tri.-Chennai) held as under:

"Tribunal, acting under provisions of Central Excise Act, 1944 has no equitable or discretionary jurisdiction to allow a rebate claim de hors the limitation provisions of Section 11B ibid – under law laid down by Apex Court that the authorities working under Central Excise Act, 1944 and Customs Act, 1962 have no power to relax period of limitation under Section 11B ibid and Section 27 ibid and hence powers of Tribunal too, being one of the authorities acting under aforesaid Acts, equally circumscribed in regard to belated claims – Section 11B of Central Excise Act, 1944 – Rule 12 of erstwhile Central excise Act, 1944 – Rule 18 of the Central Excise Rules, 2002. – Contextually, in the case of Uttam Steel Ltd. also, the Hon'ble Bombay High Court allowed a belated rebate claim in a writ petition filed by the assessee. This Tribunal, acting under the provisions of the Central Excise Act, has no equitable or discretionary jurisdiction to allow any such claim de hors the limitation provisions of Section 11B."

10.3 Further, it has been held by the Hon'ble Supreme Court in the case of Collector Land Acquisition Anantnag & Others vs. Ms. Katji & Others reported in 1987 (28) ELT 185 (SC) that when delay is within condonable limit laid down by the statute, the discretion vested in the authority to condone such delay is to be exercised following guidelines laid down in the said judgment. But when there is no such condonable limit and the claim is filed beyond time period prescribed by statute, then there is no discretion to any authority to extend the time limit.

10.4 Hon'ble Supreme Court has also held in the case of UOI vs. Kirloskar Pneumatics Company reported in 1996 (84) ELT 401 (SC) that High Court under Writ jurisdiction cannot direct the custom authorities to ignore time limit prescribed under Section 27 of Customs Act, 1962 even though High Court itself may not be bound by the time limit of the said Section. In particular, the Custom authorities, who are the creatures of the Customs Act, cannot be directed to ignore or cut contrary to Section 27 of Customs Act. The ratio of this Apex Court judgment is squarely applicable to this case, as Section 11B of the Central Excise Act, 1944 provides for the time limit and there is no provision under Section 11B to extend this time limit or to condone any delay.

10.5 In a very recent judgement, Hon'ble High Court of Bombay in the case of Everest Flavours Ltd. Vs. UOI reported as 2012 (282) ELT 481 (Bom) vide order dated 29.03.2012 dismissed a WP No. 3262/11 of the petitioner and upheld the rejection of rebate claim as time barred in terms of section 11B of Central Excise Act 1944. Hon'ble High Court has observed in para 11 & 12 of its judgement as under:-

"11. Finally it has been sought to be urged that the filing of an export promotion copy of the shipping bill is a requirement for obtaining a rebate of excise duty. This has been contraverted in the affidavit in reply that has been filed in these proceedings by the Deputy Commissioner (Rebate), Central Excise. Reliance has been placed in the reply upon Paragraph 8.3 of the C.B.E. & C. Manual to which a reference has been made above, and on a Trade Notice dated 1 June 2004 which is issued by the Commissioner of Central Excise and Customs Paragraph 8.3 of the Manual makes it abundantly clear that what is required to be filed for the sanctioning of a rebate claim is, inter alia, a self-attested copy of the shipping bill. The affidavit in reply also makes it clear that under the Central Excise rules, 2002 there are two types of rebates: (i) A rebate on duty paid on excisable goods and (ii) A rebate on duty paid on material used in the manufacture or processing of such goods. The first kind of rebate is governed by Notification No. 19/2004 dated 6 September 2004. In the case of the rebate on duty paid on excisable goods, one of the documents required is a self-attested copy of the shipping bill. For the second kind of rebate a self-attested copy of the export promotion copy of the shipping bill is required.

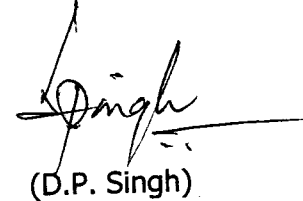
Counsel appearing on behalf of the petitioner sought to rely upon a Notification issued by the Central Board of Excise and Customs on 1 May 2000. However, it is abundantly clear that this Notification predates the Manual which has been issued by the Central Board of Excise and Customs. The requirement of the Manual is that it is only a self-attested copy of the shipping bill that is required to be filed together with the claim for rebate on duty paid on excisable goods exported.

12. *For the aforesaid reasons, we hold that the authorities below were justified in coming to the conclusion that the petitioner had filed an application for rebate on 17 July 2007 which was beyond the period of one year from 12 February 2006 being the relevant date on which the goods were exported. Where the statute provides a period of limitation, in the present case in Section 11B for a claim for rebate, the provision has to be complied with as a mandatory requirement of law."*

11. In view of above position, the rebate claim filed after stipulated time limit of one year being time barred in terms of section 11B of Central Excise Act, 1944 is rightly rejected by the Commissioner (Appeals). Therefore, Government upholds the impugned Order-in-Appeal.

12. The revision applications are thus rejected in terms of above.

13. So ordered.



(D.P. Singh)

Joint Secretary to the Govt. of India

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

Order No. /2013-Cx dated 2013

Copy to:

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2. Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai, 29th Floor, Centre-1, Cuffe Parade, Mumbai – 400 005.
3. Deputy Commissioner, Central Excise, LTU, Mumbai, 28th Floor, WTC-1, Cuffe Parade, Mumbai – 400 005
4. ~~PS to JS(RA)~~
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6. Spare Copy

ATESTED



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