F NO. 195/262/14-RA

SPEED POST
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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F NO. 195/262/14-RA/1983 Date of Issue: 12.03.2021

ORDER NO. 129 /2021-CX (SZ) /ASRA/MUMBAI DATED 09.03.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINICIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s EID Parry (India) Ltd.

Respondent : Commissioner of Central Excise & Service Tax, LTU, Chennai.

Subject : Revision Application filed under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. 72,73,74 & 75/2014 dated 08.05.3014 passed by the Commissioner(Appeals), Central Excise & Service Tax, Large Taxpayer Unit, Chennai.

ORDER

This Revision Application is filed by M/s EID Parry (India) Ltd., Parry Nutraceuticals Division, Parry House, 5th floor, 43 Moore Street, Chennai 600 001 (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. No. 72,73,74 & 75/2014 dated 08.05.3014 passed by the Commissioner(Appeals), Central Excise & Service Tax, Large Taxpayer Unit, Chennai.

2. The brief facts of the case are that the Applicant, manufacturer/merchant exporter had filed four rebate claims under Section11B of the Central Excise Act, 1944 read with Rule 18 of Central Excise Rules, 2002. The adjudicating authority vide Originals-in-Order sanctioned the rebate claim and out of the sanctioned claim appropriated the amount of arrears payable by the Applicant. Aggrieved the Applicant filed appeals with the Commissioner(Appeals), Central Excise & Service Tax, Large Taxpayer Unit, Chennai. The Commissioner(Appeals), LTU rejected their appeals. The details are given below:

Sr. No.	Rebate claimed	Total amount claimed (Rs)	Order-in-Original No. & dt	Pending arrears r/o OIO / and OIA No. & dt which was appropriated	Sanctioned and appropriate amount (Rs)	Order-in-Appeal & No.
1	05/2012-13 dt 17.9.12	1,34,823	LTUC/91/2013 AC (RF) dt 2.4.13	LTUC/99/2011 ADC dt 20.3.11 / and 64/2012 dt 30.10.12	1,34,823	72,73,74 & 75/2014 dt 8.5.14
2	05 ARE-1s	13,00,767	LTUC/107/2013 AC (RF) dt 2.4.13	99/2011 ADC dt 29.3.11/ and 64/2012 dt 30.10.12	5,52,404	
				403 & 404/2011 ADC dt 22.12.11	7,48,363	
3	10/2012-13 dt 28.1.13	2,96,640	LTUC/71/2013 AC (RF) dt 27.3.13	403 & 404/2011 ADC dt 22.12.11	2,96,640	
4	06 ARE-1s	9,17,483	LTUC/108/2013 AC (RF) dt 2.4.13	99/2011 ADC dt 20.3.11 and 64/2012 dt 30.10.12	9,17,483	
		26,49,713	Total		26,49,713	

3. Aggrieved, the Applicant has filed the current Revision Application on the following grounds:

(i) The appropriation of the amount against the dues can be done only if there is a confirmed demand which had attained finality. The Applicant placed reliance on the Judgment of Hon'ble High Court of Karnataka [2012(275) E.L.T 404(Kar)]. In the instant case, the government has sanctioned the rebate claim on the one hand and have adjusted the said rebate amount on the other hand by taking recourse to Section 11 of the Central Excise Act 1944. The procedure adopted is illegal and a perusal of Section 11 of the Central Excise Act, 1944 shows that the said provision does not contemplate the adjustment of the amount due to the assessee towards the amount due to the revenue. The conduct of the authorities in adjusting the rebate claims is without the authority of law. In these circumstances the adjustment of the rebate claims is bad in law.

(ii) In the present case, the stay had been granted by the Tribunal and hence there cannot be any adjustment of the amounts which has been done so by the lower authorities. They placed reliance on the judgment of the 2013(288) ELT 244 (Tri-Ahmd.) wherein it is held that when the amount due has been unconditional stayed by the Tribunal, the same cannot be adjusted from the rebate claim sanctioned. The said order was in challenge and the Order in stay Petition No. 228623/2013 dated 09.04.2013 was in force during the time Commissioner (Appeals) passed the impugned orders.

(iii) The recourse to Section 11 can be taken only when the dues to the revenue has attained finality. In their present case, it is not even the case of the revenue that these dues are consequent to matters that have attained finality. In these circumstances the appropriation of rebate claims is illegal and unjustified.

(iv) It is the undisputed policy of the Government not to burden the export goods with domestic taxes as has been noted in various decisions of the Tribunal. The reasons are obvious. The country does not want to make domestically produced goods, when exported to the foreign market, to become uncompetitive. Secondly, no country wants to export the domestic taxes meant to be levied on domestic consumption of goods and services. Each country either exempts such taxes in respect of export goods, including taxes relating to inputs used in the export goods, or there are alternative schemes for providing rebate, drawback of duties suffered by export goods. There are also schemes making available duty-free goods and services for export production. At the first stage the appropriation itself was illegal as the matters for which the said appropriation had been done had not attained finality. There is more so with the case of adjustment of a rebate claim as this is a export benefit scheme.

(v) The Applicant prayed that the impugned Order-in-Appeal be set aside with consequential relief.

4. A Personal hearing in this case was held 14.01.2020. Shri V Satya Murthy, Manager-Taxation appeared on behalf of the Applicant. The Applicant submitted written submissions and reiterated the grounds of revision application. Refund amount was appropriated as per Circular No. 967/01/2013 CX dated 01.01.2013 as there was no stay order. As on date, on the entire issue of demand decided by the Tribunal Order is in their favour (not appealed). Hence refund amount appropriated should be given back. However, there was a change in the Revisionary Authority, hence a final hearing was granted on 28.01.2021. Shri Satya Murthy, Manager-Taxation and Shri Jayaprakash, Sr.Manager-Taxation appeared online on behalf of the Applicant. They submitted that in all four cases, rebate sanctioned was appropriated against demands which have subsequently been set aside. They submitted that

written submission have been mailed. They requested to allow their applications.

5. The Applicant submitted their written submissions on the following grounds:

(i) The appropriation of Rs. 26,49,773/- had happened on 27.03.2013 and 02.04.2013 in view of the department's Circular No. 967/01/2013 CX dated 01.01.2013. The said Circular was rescinded vide Circular No. 1035/23/2016-CX dated 04.07.2016. Therefore, the issue of appropriation as on today has become infructuous due to passage of time and need not be heard upon merit.

(ii) The Hon'ble CESTAT, Chennai vide :

(a) Final Misc Order No. 40483-40492/2018 dated 29.05.2018 to be read in conjuction with Final Order No. 42067-42073/2017 dated 15.09.2017 has dropped the demand on "ABDA";

(b) Final Order on 40768-40769/2017 dated 29.03.2017 has dropped the demand on the issue of Chapter 72 and 73 items used in fabrication of plant and machinery.

Therefore, it can be inferred that the appropriation made by the Department which was confirmed by the Commissioner(Appeals) vide Orders-in-Appeal dated 08.05.2014 is null and inoperative as on today.

(iii) The Applicant prayed that the refund of Rs. 26,49,773/- be granted which was appropriated.

(iv) They have not filed a refund application for the pre-deposit filed in pursuance to the direction of Commissioner(Appeals) Order in Stay Petition No. 22 & 23/2013 dated 09.04.2013 for Rs. 12,65,246/- and Rs.

12,56,531/-. The same may also be granted refund in view of favourable order of CESTAT Chennai vide Order mentioned in Para 5(ii) above.

6. Government has carefully gone through the relevant case records available in case files, oral & written submissions/counter objections and perused the impugned Order-in-Original and Order-in-Appeal.

7. On perusal of the records, Government observes that the Applicant had been granted rebate claims vide four Order-in-Original dated 27.03.2013 and 02.04.2013 and totaling to amount of Rs. 26,49,713/- (details Para 2 above) under Section 11B of the Central Excise Act, 1944 read with Rule 18 of Central Excise Rules, 2002. Based on the Board's Circular No. 967/1/2013-CX dated 01.01.2013 that recovery proceedings be initiated against a confirmed demand in terms orders wherein appeal has been filed against a confirmed Order-in-Original if no stay is granted said rebate claims, the adjudicating authority appropriated against respective pending arrears as no stay had been granted on the date of appropriation.

8.1 Government observe that in respect of first confirmed demand of duty on Chapter 72 & 73 items used for fabrication of Plant & Machinery which was appropriated, the Applicant was issued two Show Cause Notices both dated 25.11.2008 as it appeared that Cenvat credit was not available on the as the goods were not covered in the definition of capital goods under Rule 2(a) of Cenvat Credit Rules, 2004 and that they were not used in the manufacturing process or to bring about any change in the final products.

8.2 The adjudicating authority, Additional Commissioner, LTU, Chennai vide Order-in-Original No. LTUC/403&404/2011-ADC dated 22.12.2011 confirmed an amount of Rs. 25,30,492/- and Rs. 25,13,061/- and ordered recovery of the same along with interest from the Applicant under Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 11A(1) and Section 11AB of the Central Excise Act, 1944. Further a penalty of Rs. 25,30,492/- and Rs.

25,13,061/- was imposed on the Applicant under Rule 15 of the Cenvat Credit Rules, 2004.

8.3 Aggrieved the Applicant filed appeals with the Commissioner(Appeals), LTU, Chennai. The Commissioner(Appeals) vide Order-in-Stay Petition No. 22 & 23/2013 dated 09.04.2013 ordered pre-deposit of 50% of Cenvat Credit (50% of Rs. 25,30,492/- and 50% of Rs. 25,13,061/-) which should be paid by 08.08.2015. As directed, the Applicant paid the pre-deposit of Rs. 12,65,846/- and Rs. 1256531/- both dated 03.05.2013. The Commissioner(Appeals) vide Order-in-Appeal No. 10 & 11 /13 dated 11.06.2013 rejected the Applicant's appeal.

8.4 Aggrieved the Applicant filed appeal before the CESTAT Chennai. The Hon'ble Tribunal vide Final Order No. 40768-40769/2017 dated 29.03.2017 allowed the appeal in favour of the Applicant. The relevant para is reproduced below:

> *"8. In view of the discussions hereinabove and also following the ratio laid down by the judgments/decisions cited supra in paras-5.3 to 5.6, I have no hesitation in allowing both the appeal in favour of the appellants, with consequential benefits, if any, as per law."*

Hence the case is Res-Judicata. The particular details of the confirmed demand case is given below:

Sr. No	SCN No	Amount (Rs.)	OIO No. & dt	Stay order of Commr(A)	Commr(A) final order & date	CESTAT Chennai Order No. & date
1	V/CH.17/15/81/ 2008-C.Ex.Adj dt 25.11.08	25,13,061	403 & 404/2011 ADC dt 22.12.11	O-in-Stay Petition No. 22 & 23/2013 dated 09.04.2013 As directed, the Applicant paid the pre-deposit of Rs. 12,65,846/- and Rs. 1256531/- both dated 03.05.2013	Final OIA No. 10&11 /13 dt 11.6.2013 rejected the appeal	Final Order No. 40768-40769/2017 dt 29.03.2017 Allowed the appeal in favour of the Applicant with consequential relief
2	V/CH.17/15/63/ 2008-C.Ex.Adj dt 25.11.08	25,30,491				

9.1 Government observes that in respect of first confirmed demand of duty on 'ABDA' which was appropriated, the Applicant was issued Show Cause Notice dated 04.08.2010 as it appeared that the Applicant had been wrongly claiming the benefit of the exemption Notification No. 23/2003 and are therefore liable to discharge duties on all clearances of ABDA into DTA in terms of proviso to Section 3(1) of the Central Excise Act, 1944 as if the goods have been imported into India.

9.2 The adjudicating authority Additional Commissioner, Central Excise & Service Tax, LTU, Chennai vide Order-in-Original No. LTUC/99/2011 ADC dated 20.03.2011 confirmed the demand of Rs. 16,59,292/- being the differential duty payable on the clearances of ABDA into DTA by the Applicant for the period from 21.07.2009 to 07.10.2009 and ordered recovery of the same with interest under Section11A and Section 11AB of the Central Excise Act, 1944. Further a penalty of Rs.1,00,000/- was imposed under Rule 25 of the Central Excise Rules, 2002.

9.3 Aggrieved the Applicant filed appeal with the Commissioner(Appeals), LTU, Chennai. The Commissioner(Appeals) vide Order-in-Appeals) 64/2012 dated 30.10.2012 did not find any infirmity in the Order-in-Original dated 20.03.2011 and that the Applicant is not eligible for the exemption under Notification No. 23/2003. Further it was held that once Ed. Cess is added to the Customs duties to arrive at aggregate of Customs duties, the question of charging Ed. Cess again does not arise.

9.4 Aggrieved the Applicant filed appeal before the CESTAT Chennai. The Hon'ble Tribunal vide Final Order No 42061-42073/2017 dated 15.09.2017 in the findings stated

> *"17. In view of the above discussions and analysis, we hold that "ABDA" manufactured and cleared by the appellant-assessee is correctly classifiable under Heading 31010099. The claim for exemption under Notification No. 23/2003-CE, wherever duty is payable is not sustainable in view of violation No.*

3(i) of the notification as discussed. Demand for differential duty, if any, will be applicable only for normal period. The appeals by the appellant-assessee as well as Revenue are disposed in the above terms."

9.5 The Applicant filed an application for Rectification of Mistake (ROM) before the Hon'ble CESTAT and the Hon'ble CESTAT vide Misc. Order No. 40483-40492/2018 dated 13.06.2018 allowed the Applicant's application. The Order is re-produced below:

"The present application for rectification of mistake apparent on record have been filed in relation to the Final Order Nos. 42061-42073/2017 dated 15.09.2017. In this connection we heard the Ld. Cunsel, Shri Muthu Venkataram on behalf of the applicants and the Ld.AR Shri K.P. Muralidharan, AC, on behalf of the Revenue.

2. The Ld. Counsel submitted that the Tribunal vide the impugned order has ordered classification of the product manufactured by the appellants under CETH 3101 0099. In para 17 of the above final order, the Tribunal has recorded that the appellant will not be eligible for the benefit of exemption Notification No. 23/2003-CE dated 31.03.2003 and that differential duty was payable for normal period. He pointed out that the tariff rate for the above CETH was 'nil' during the entire period of dispute and hence the appellant will not be liable to pay any duty irrespective of the benefit of the Notification No. 23/2003-CE. Accordingly, he submitted that the findings of the Tribunal upholding the demand for differential duty for the period under dispute may be modified.

3. The Ld. DR has no objection.

4.1 After hearing both the side and on perusal of records, we note that in the final order referred above, the Tribunal after careful consideration of the two alternate classification for the products under Chapter 38 and Chapter 31 has ordered classification of the product under CETH 3101 0099. Since the above CETH carries 'nil' rate of duty during the disputed period irrespective of the benefit of Notification No. 23/2003-CE.

4.2 In the result, the final order is modified as follows:-

In the para-17 of the impugned order; after the first sentence the following portion may be deleted:-

"The claim for exemption under Notification No. 23/2003-CE, wherever duty is payable is not sustainable in view of violation No. 3(i) of the notification as discussed. Demand for differential duty, if any, will be applicable only for normal period."

In the result ROM applications are allowed as above.

5. The miscellaneous applications for change of cause title have been filed by the Revenue due to change in the jurisdiction of the appellant and change in address of the respondent. The present jurisdiction and address of the respondent is as follows:-

The Commisisoner of GST & Central Excise,

No. 1, Williams Road, Trichy.

Accordingly, the miscellaneous application are allowed and the jurisdiction and address of the respondent is changed from CCE, LTU, Chennai to The Commisisoner of GST & Central Excise, No. 1, Williams Road, Trichy.

7 All the miscellaneous applications filed by the Revenue for change of cause title and all the miscellaneous application filled by the application for rectification of mistake are allowed in above terms."

Hence the case is Res-Judicata. The particular details for the demand of duty on 'ABDA' is given below:

Sr. No	SCN No	Amount (Rs.)	OIO No. & dt	Commr(A) OIA No. & dt	CESTAT Chennai Stay Order No. & date	CESTAT Chennai final Order No. & date
1	LTU/243/2010-ADC dt 4.8.2010	16,39,292	LTUC/99/2011 ADC dt 20.3.11	64/2012 dt 30.10.12	Misc. Order No. 41092 & 41093/2013 dt 01.05.13 and extension vide Misc Order No. 40271-40272/14 dt 27.1.2014	42067-42073/2017 dt 15.9.17 and Misc. Order No. 40483-40492/2018 dt 29.5.18 No liability is cast upon the Applicant for the disputed period irrespective of the benefit of Notfn 23/2003-CE

10. In respect of the two confirmed demand of duty on which the four sanctioned rebate claims amount totaling to Rs. 26,49,713/- was appropriated Government finds that the both the cases are Res-Judicata and are in favour of the Applicant. Hence the appropriation made by the adjudicating authority and confirmed by the Commissioner(Appeals) becomes null and inoperative.

11. Government observes that based on the Board's Circular No. 967/1/2013-CX dated 01.01.2013, the Adjudicating Authority had appropriated in the sanctioned rebate amount. Government finds that the appropriation of the

amount against the Government dues can be done only if there is a confirmed demand which had attained finality. Here in the two confirmed demands of duty (Para 8 and 9 above) which were appropriated, the Applicant had filed Stay Applications before the Commissioner(Appeals) and Tribunal respectively. The details are is given below:

Sr. No	OIO No. & dt	Stay Application No. & dt	Stay order
1	403 & 404/2011 ADC dt 22.12.11	A-9/2012(P) dt 14.2.2012 and A-11/2012(P) Dt 14.12.2012 filed before the Commr(A)	Commr(A) O-in-Stay Petition No. 22 & 23/2013 dated 09.04.2013 As directed, the Applicant paid the pre-deposit of Rs. 12,65,846/- and Rs. 1256531/- both dated 03.05.2013. Stay allowed
2	LTUC/99/2011 ADC dt 20.3.11 64/2012 dt 30.10.12	Appeal before CESTAT E/S/40270 dt 31.03.2013	CESTAT Misc. Order No. 41092 & 41093/2013 dt 01.05.13 Stay application allowed and extension vide Misc Order No. 40271-40272/14 dt 27.1.2014

Government finds that initiating recovery proceedings because a stay application has not been disposed of within thirty days of the filing of an appeal would be to penalize an assessee for the inability of the judicial or, as the case may be, quasi-judicial authority to conclude the disposal of the stay application within that period.

12. Here Government places reliance on the judgment dated 1.02.2013 of the Hon'ble Bombay High Court in the case of Larsen & Toubro Ltd. Vs UOI [2013 (29) STR 449 (Bom)]. The relevant paras are reproduced below:

> *"13. The decision of the Supreme Court and the situation which led to the decisions of the Delhi High Court and of this Court take due notice of the fact that the delay in the disposal of an appeal by an assessee or for that matter the delay in the disposal of a stay application may take place for reasons which lie outside the control of the assessee. Where the failure of the Appellate Authority to dispose of the appeal or the application for stay arises without any default on the part of the assessee, and without the assessee having resorted to any dilatory tactics, there would, in our view, be no reason or justification to penalize the assessee by*

recovering the demand in the meantime. Undoubtedly, where the assessee has been responsible for the delay in the disposal of the stay application, such an assessee cannot be heard to complain if the Revenue were to initiate steps for recovery. But the vice of the circular of the Board dated 1 January 2013 is that it mandates that steps for recovery must be initiated thirty days after the filing of the appeal if no stay is granted. Counsel appearing on behalf of the Revenue submits that the Board has directed that a period of thirty days should be allowed to lapse after the filing of the appeal, allowing the assessee time to move the Appellate Authority for the disposal of the stay application. The reason why the submission cannot be accepted is because, in a situation where the Commissioner (Appeals) or, as the case may be, the CESTAT are unable to decide the application for stay within a period of thirty days of the filing of the appeal, it would be completely arbitrary to take recourse to coercive proceedings for the recovery of the demand until the application for stay is disposed of. Administrative reasons including the lack of adequate infrastructure, the unavailability of the officer concerned before whom the stay application has been filed, the absence of a Bench before the CESTAT for the decision of an application for stay or the sheer volume of work are some of the causes due to which applications for stay remain pending. In such a situation, where an assessee has done everything within his control by moving an application for stay and which remains pending because of the inability of the Commissioner (Appeals) or the CESTAT to dispose of the application within thirty days, it would, to our mind, be a travesty of justice if recovery proceedings are allowed to be initiated in the meantime. The protection of the revenue has to be necessarily balanced with fairness to the assessee. That was why, even though a specific statutory provision came to be introduced by Parliament in Section 35C(2A) to the effect that an order of stay would stand vacated where the appeal before the Tribunal was not disposed of within 180 days, the Supreme Court held that this would not apply to a situation where the appeal had remained pending for reasons not attributable to the assessee.

14. Sr. No. 10 of the circular of the Board deals with an appeal to the CESTAT where the Commissioner (Appeals) has confirmed a demand in an order in original of the adjudicating authority. The circular stipulates that recovery has to be initiated immediately on the issue of the order in appeal. In a situation where the Commissioner (Appeals) has confirmed the demand made in the order of adjudication, the assessee is permitted by the provisions of Section 35F to move the Tribunal for a dispensation of the requirement of deposit. But the circular mandates that recovery shall be made immediately on the issue of an order in appeal implying thereby that recovery would be initiated without allowing the assessee, the time which is allowed by the statute for filing an appeal and for applying for a waiver of pre-deposit. Similarly, Sr. No.11 stipulates that where the Tribunal has confirmed the demand, a recovery would be initiated immediately on the issuance of the order of the Tribunal. The assessee is therefore deprived of

even a reasonable period of time to move the High Court against the order of the Tribunal. In our view, the circular which is issued by the Board is in terrorem and its plain effect and consequence is to deprive the assessee of the remedy which is provided under the law of moving, as the case may be, the CESTAT, the High Court or the Supreme Court against an order of adjudication of the competent appellate forum. Initiating recovery proceedings because a stay application has not been disposed of within thirty days of the filing of an appeal would be to penalize an assessee for the inability of the judicial or, as the case may be, quasi-judicial authority to conclude the disposal of the stay application within that period. If the assessee is not responsible for the delay in the disposal of the stay application and the application remains pending for reasons not attributable to the conduct of the assessee, initiation of recovery proceedings would be arbitrary and unfair. However, if the failure to dispose of an application for stay is because of the conduct of the assessee, such as by a resort to dilatory tactics, the revenue would in such a situation be justified in commencing recovery action. Moreover, there is no justification to commence recovery immediately following an order in appeal where a period of limitation is laid down by the relevant provision of law for challenging the decision of the Appellate Authority.

15. In the affidavit in reply, it has been stated that the recovery of an outstanding demand during the pendency of an appeal has been a matter of considerable litigation leading to the circular dated 2 March 1990 and had been the subject matter of judicial decisions in several cases. The affidavit notes that in several decisions the High Courts had directed that no recovery could be made during the pendency of a stay application before an Appellate Authority. But these decisions, it has been stated, were based on the facts of the individual cases and on the instructions and circulars of the Department stating that no recovery should be made during the pendency of the appeal before the Commissioner (Appeals) (circular dated 2 March 1990) and for a period of six months in the case of an appeal before the Tribunal (circular dated 25 May 2004). The legal position according to the Department is that there is no prohibition on proceeding with the recovery of a confirmed demand even immediately after an order has been issued, when no stay is in operation. Section 87 of the Finance Act 1994, it is submitted, does not provide for suspension of the original order when a stay application is pending before an Appellate Authority. Hence, according to the Revenue it is a matter of policy for the government to decide as to how long it should wait before a recovery of a confirmed demand should be initiated (it has now been decided by the circular dated 1 January 2013 that all past circulars should be rescinded). The Revenue has urged that under Section 35F a pre-deposit is mandatory with the filing of an appeal and an order of dispensation is by way of an exception. By the impugned circular, the field officers have been directed to proceed with recovery when there is no order of stay. This, it has been submitted, does not impinge upon the power of the Appellate Authority to grant a stay. The difficulty in accepting the defence which is submitted in the reply is that

the Appellate Authorities, whether it be the Commissioner (Appeals) or the CESTAT are empowered to waive the requirement of a pre-deposit. An assessee who moves an application for waiver and is diligent in pursuing the application cannot be blamed for the inability of the appellate forum to dispose of the stay application. The reasons such as the absence of adequate infrastructure which lead to an accumulation of a backlog or the unavailability of the appellate officer or a duly constituted Bench of the PNP 15/17 WP878-1.2 Tribunal are matters which lie beyond the volition of an assessee. If at all, these are matters over which the executive arm of the State has control. Hence, to blame an assessee who is not in default and to initiate recoveries against an assessee who has filed an appeal together with an application for stay merely because the application has remained pending on the file of the decision making authority would be to penalize the assessee for a situation over which the assessee has no control. This would be patently arbitrary and violative of Article 14 of the Constitution.

16. Counsel appearing on behalf of the Revenue submitted during the course of the hearing that the field officers of the Revenue who initiate recovery action are independent of the adjudicating or appellate forum and hence have no means of verifying the status of the applications for stay and it is hence for the assessee, when recovery action is initiated to inform the jurisdictional Commissioner of the pendency of the stay application. We do not find that this can be treated as a valid justification for penalizing an assessee whose conduct is otherwise free from blame. Modern technology has made rapid strides and in our view, it is time that the Union Ministry of Finance takes steps to ensure that proceedings before the adjudicating authorities as well as the Appellate Authorities including the Commissioner (Appeals) and the CESTAT are recorded in the electronic form. Once an appeal is filed before the Commissioner (Appeals), the filing of the appeal must be recorded through an entry made in the electronic form. Every appellant, including the assessee must indicate, when an appeal is filed, an email ID for service of summons and intimation of dates of hearing. The Commissioner (Appeals) must schedule the hearing of stay applications and provide dates for the hearing of those applications which must be published in the electronic form on the website. The order sheets or roznamas of every case must be duly uploaded on the website to enable both the officers of the Revenue and assessees to have access to the orders that have been passed and to the scheduled dates of hearing. We would also commend to the Union Ministry of Finance the urgent need to introduce electronic software that would ensure that the orders and proceedings of the CESTAT are duly compiled, collated and published in the electronic form. A case information software has been adopted for the District judiciary including in the State of Maharashtra under the auspices of the National Informatics Center. Matters involving Revenue have large financial implications for the Union Government. The incorporation of electronic technology in the functioning of judicial and quasi-judicial authorities constituted under the Central Excise Act, 1944, the Customs Act, 1962 and cognate legislation would provide a

measure of transparency and accountability in the functioning of the adjudicating officers, the appellate Commissioners as well as the Tribunal. But equally significant is the need to protect the interest of the Revenue which the adoption of electronic technology would also achieve. We are not unmindful of the fact that an application for stay may be kept pending for an indefinitely long period of time at the behest of an unscrupulous assessee and a willing administrative or quasi-judicial authority. This would be obviated by incorporating the requirement of disseminating and uploading the proceedings of judicial and quasi-judicial authorities under the Central Excise Act 1944 as well as the Customs Act 1962 in an electronic form. This would ensure that a measure of administrative control can be retained with a view to safeguarding the position of the Revenue as well as in ensuring fairness to the assessees. We hope and trust that this suggestion of the Court will receive serious and urgent consideration by the Union Ministry of Finance.

17. For these reasons, we have come to the conclusion that the provisions contained in the impugned circular dated 1 January 2013 mandating the initiation of recovery proceedings thirty days after the filing of an appeal, if no stay is granted, cannot be applied to an assessee who has filed an application for stay, which has remained pending for reasons beyond the control of the assessee. Where however, an application for stay has remained pending for more than a reasonable period, for reasons having a bearing on the default or the improper conduct of an assessee, recovery proceedings can well be initiated as explained in the earlier part of the judgment."

13. Government notes that Board vide Circular No. 1035/23/2016-CX dated 04.07.2016 had rescinded the Circular No. 967/1/2013-CX dated 01.01.2013. The relevant para is reproduced below:

"Sub: Recover of confirmed demands during the pendency of stay application-reg.

Kind attention is invited to Board Circular No. 967/ 1/2013-CX dated 01.01.2013 on the issue of recovery of confirmed demands during the pendency of stay application filed by the assessee, Since then important changes in law have been made and important judgments have come on the subject. Accordingly, it has been decided to review the Circular.

Part I: When stay application is pending before Commissioner (Appeals) or CESTAT:

2.0 .....

3.1.....

3.2.....

4.1 In light of the above judgment, the Circular No. 967/1/2013-CX dated 1-1-2013 is hereby rescinded and following fresh instruction are given on the subject. It is also clarified that seven circulars which had been rescinded vide Circular No. 967/1/2013-CX shall continue to remain rescinded.

4.2 In cases where stay application is pending before Commissioner(Appeals) or CESTAT for period prior to 6.8.2014, no recovery shall be made during the pendency of the stay application.

..."

14. Government observes that the arrears have been appropriated by the adjudicating authority on the basis of the CBEC Circular No. 967/1/2013-CX dated 01.01.2013. These amounts have been appropriated during the pendency of the stay applications before the appellate authorities against the correspondent orders. Government finds that it is a matter of record that the CBEC Circular No. 967/1/2013-CX dated 01.01.2013 was challenged in various High Courts by assessees. Some of the judgments were passed by the High Courts within days/months of the issue of the Circular viz Larsen & Toubro ltd Vs UOI [2012 (288) ELT 481 (Bom)], Tata Motors Ltd Vs UOI [2013 (293) ELT 321 (Jhar)] and R.S.W.M. Ltd Vs UOI [2013 (288) ELT 511 (Raj)]. All these judgments have very clearly held that recovery proceedings during the pendency of stay applications could not be permitted. It is observed that the adjudicating authority has failed to take note of the judgments of the Hon'ble High Courts.

15. In addition to the judgments, disapproving of recovery proceedings instituted in terms of the Circular No. 967/1/2013-CX dated 01.01.2013, by hindsight the appropriation of the refund of rebate by the adjudicating authority is no longer valid as the cases involving the so call "arears" have subsequently been decided in favour of the Applicant. In the circumstance, notwithstanding the inappropriateness of the appropriation in terms of the Board's Circular, the amount adjusted against the refunds are no longer arrears. Government therefore hold that the adjustment made by the adjudicating authority out of the refund of rebate due to the Application is

untenable. The Applicant is eligible for the refund of the entire amount of rebate sanctioned to them.

16. In view of the above, Government therefore proceeds to modify the Order-in-Appeal No. 72,73,74 & 75/2014 dated 08.05.3014 passed by the Commissioner(Appeals), Central Excise & Service Tax, Large Taxpayer Unit, Chennai and holds that the rebate sanctioning authority shall refund the rebate sanctioned, the details of which are given below:

Sr. No.	Rebate claimed	Total amount claimed (Rs)	Order-in-Original No. & dt	Sanctioned amount (Rs)
1	05/2012-13 dt 17.9.12	1,34,823	LTUC/91/2013 AC (RF) dt 2.4.13	1,34,823
2	05 ARE-1s	13,00,767	LTUC/107/2013 AC (RF) dt 2.4.13	13,00,767
3	10/2012-13 dt 28.1.13	2,96,640	LTUC/71/2013 AC (RF) dt 27.3.13	2,96,640
4	06 ARE-1s	9,17,483	LTUC/108/2013 AC (RF) dt 2.4.13	9,17,483
		26,49,713	Total	26,49,713

9/3/21

(SHRAWAN KUMAR)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No.129/2021-CX (SZ) /ASRA/Mumbai Dated 09.03.2021

To,
M/s EID Parry (India) Ltd.,
Parry Nutraceuticals Division,
Parry House, 5th floor,
43 Moore Street,
Chennai 600 001.

Copy to:

1. The Commissioner of CGST & CX, Chennai Outer, No. 2054-1, II Avenue, 12th main Road, Newry Towers, Anna Nagar, Chennai – 600 040.
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Spare Copy.