

REGISTERED
SPEED POST



F.No.198/18/2012-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... 29/11/13

ORDER NO. 1336 /13-Cx DATED 25.10.2013 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. US/396/RGD/2011 dated 9.11.2011 passed by
Commissioner of Central Excise (Appeals-II), Mumbai

APPLICANT : Commissioner of Central Excise, Raigad

RESPONDENT : M/s Eastern Petroleum Pvt. Ltd, Raigad

ORDER

This revision application is filed by Dy. Commissioner of Central Excise, Panvel Division, Raigarh Commissionerate, on authorization from Commissioner of Central Excise, Raigarh against the order-in-appeal No. US/396/RGD/2011 dated 9.11.2011 passed by Commissioner of Central Excise (Appeals-II), Mumbai with respect to order-in-original No. RC-233/09-10 dated 03.02.2010 passed by Dy. Commissioner of Central Excise, Panvel Division. M/s Eastern Petroleum Pvt. Ltd. are the respondents in this case.

2. M/s Eastern Petroleum Pvt. Ltd. situated at 235-239, Jawahar Industrial Estate, Kamothe, Panvel, Distt. Raigad, a manufacturer exporter, had filed rebate claim on 08.12.2009 of Rs.1,06,815/- with the Assistant Commissioner, Central Excise, Panvel Division, Raigad, under Rule 18 of the Central Excise Rules, 2002 for goods cleared for export. The said rebate claim was sanctioned by the Assistant Commissioner, Central Excise, Panvel Division, Raigad Commissionerate, vide her order-in-original No. RC-233/09-10 dated 03.02.2010.

2.1 It was seen that the value of the goods shown in the ARE-1 was Rs.12,96,300/- whereas FOB value shown in the shipping bill was Rs.12,79,701/-. The FOB value in the shipping bill is arrived at after reducing the amount of freight and insurance charges from the commercial invoice value. The commercial value is the value at which goods are sold. As per Section 4 of Central Excise Act, 1944, the transaction value is the value at which goods are sold but does not include freight and insurance charges. Thus the value after deducting the freight and insurance from the commercial value (which is equal to FOB value) should be the transaction value for the purpose of value as per Section 4 of Central Excise Act, 1944. Thus as per the provisions of Central Excise Act & Rules, the CIF was not the correct transaction value and the duty paid on the said freight and insurance was not admissible for rebate under Rule 18 of the Central Excise Rules, 2002. Therefore the amount paid on such part of ARE-1 value, over and above

the FOB value is not the duty of Central Excise but is to be treated as excess payment. The rebate in terms of Rule 18 of Central Excise Rules, 2002 is the rebate of Central Excise duty paid on exported goods. In the instant case, ARE-1 value includes an amount of Rs.16,599/- [amounting to Rs.1368/- (16599 x 8.24%)] is in violation of Rule 18 of Central Excise Rules, 2002. Thus the rebate sanctioning authority should have restricted the sanction of rebate claim to the extent of Rs.1,05,447/- instead sanctioning the rebate claim of Rs.1,06,815/- thereby rejecting the rebate claim of Rs.1368/- (Rs.106815 less Rs.105447/-).

2.2 The Department preferred an appeal against the said order-in-original No. RC-233/09-10 dated 03.02.2010 passed by the Assistant Commissioner, Central Excise, Panvel Division, Raigad Commissionerate in respect of M/s Eastern Petroleum Pvt. Ltd. before the Commissioner (Appeals), on the grounds that the claimant paid duty on the price which was inclusive of freight and the duty paid on the freight was not admissible for rebate under rule 18 of the Central Excise Rules, 2002.

3. Commissioner (Appeals) set aside the entire impugned order and allowed appeal of department whereas department has not challenged the sanction of rebate claim to the extent of Rs.1,05,447/-.

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 The Commissioner (Appeals) by setting aside the impugned order-in-appeal, by following the above said orders of the Joint Secretary to the Government of India and relying upon Hon'ble Supreme Court judgment in the case of Superintendent (Tech-I) Central Excise vs. Pratap Rai reported in 1978 (2) ELT J613(SC) has de-facto remanded the case to the original authority.

4.2 However, the Commissioner (Appeals) has no powers to remand. Section 35A(3) of the Central Excise Act, 1944 as it existed before 11.05.2001 provided that

Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling decision or order appealed against or **may refer the case back to the adjudicating authority with such direction as he may think fit for a fresh adjudication or decision as the case may be, after taking additional evidence, if necessary.**

By an amendment vide Finance Act, 2001 w.e.f. 11.05.2001, the phrase as mentioned in bold above has been deleted with an intention to withdraw the powers to Commissioner (Appeals) to remand the cases for fresh adjudication to the original adjudication authorities and after the said amendment in 2001, the said Section 35A(3) read as follows :-

"The Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against."

Thus w.e.f. 11.05.2001, the Commissioner (Appeals) has no powers to remand back the case.

4.3 The Commissioner (Appeals) has thus failed to pass speaking order in the Department's appeal and failed to appreciate the fact that merely setting aside the order passed by the original authority and allowing the Department's appeal without confirming the excess amount of rebate sanctioned or by remanding the case to the original authority with suitable directions, is not proper disposal.

4.4 The Commissioner (Appeals) has passed an incomplete order by setting aside the order-in-original but did not ascertain or pinpoint any liabilities of the parties. The hon'ble CESTAT's decision in the case of Vikram Ispat vs. CCE, Raigad, reported in 2004 (168) ELT 61 (Tri.-Mumbai), wherein the Hon'ble Tribunal observed that :

" 3. The revenue filed an appeal against that order with the Commissioner (Appeals). The present applicant was the respondent who filed cross-objection before him. The Commissioner (Appeals) passed the impugned order stating we quote. In view of the above, I set aside the impugned orders and allow the appeals. The effect

of this order is that nothing except the show cause notice originally issued survived. The issue then is whether the applicant is required to deposit the amounts mentioned in the show cause notice before filing an appeal against the Commissioner (Appeal)'s order. A plain reading of section 35F of Central Excise Act indicates that the applicant is not required to do so as in the face of the Commissioner (Appeals)'s order no amount by way of duty/penalty is confirmed against the applicant.

4.5 The Commissioner (Appeals) has set aside the order-in-original No. RC-233/09-10 dated 03.02.2010 in entirety. The amount sanctioned vide this order-in-original was Rs.1,06,815/-. The department has reviewed the order of the Assistant Commissioner Central Excise, Panvel Division only for an excess and erroneous rebate amount of Rs.1368/- (involving differential value of Rs.16,599/-). The setting aside of the order-in-original in entirety, has created a situation where the properly sanctioned rebate amount (not disputed by the department also) also becomes recoverable, but the department has no mechanism to effect the recovery. Also, liability of the assessee / claimant has been ascertained by the order-in-appeal. Therefore, it is submitted that the impugned order-in-appeal dated 9.11.2011 is unworkable. Also the Commissioner (Appeals) has exceeded his jurisdiction.

4.6 Therefore, the order-in-appeal No. US/396/RGD/2011 dated 09.11.2011 appears to be not proper, legal and correct and is required to be set aside and it is prayed that the relief mentioned herein below shall be granted.

4.6.1 To decide as to whether, after taking into consideration the facts / grounds as stated above, the order-in-appeal No. US/396/RGD/2011 dated 09.11.2011, passed by the Commissioner (Appeals), Central Excise, Mumbai Zone-II is proper, legal and correct.

4.6.2 To set aside the order-in-appeal No. US/396/RGD/2011 dated 09.11.2011 passed by the Commissioner (Appeals) Central Excise, Mumbai Zone-II.

4.6.3 To set aside the order-in-original No. RC-233/09-10 dated 03.02.2010 and modify it by rejecting the rebate to the extent of Rs.1368/- and ordering its recovery from the claimant.

5. A show cause notice was issued to the respondent under Section 35 EE of Central Excise Act, 1944 to file their counter reply. But no reply is filed by respondent till date.

6. Personal hearing scheduled in this case on 25.09.2013 was not attended by anybody. No request is received for adjournment of case. As such, Government takes up the case for decision on the basis of available case records.

7. Government has carefully gone through the relevant case records , oral & written submissions and perused the impugned order-in-original and order-in-appeal.

8. On perusal of records, Government observes that in this case, department had filed appeal before Commissioner (Appeals) on the ground that original authority should have restricted the sanction of rebate claim to the extent of Rs.1,05,447/-, instead of sanctioning entire rebate claim of Rs.1,06,815/- since duty of Rs.1368/- was paid on the value representing ocean freight charges which does not form part of transaction value determined under section 4 of Central Excise Act 1944. Commissioner (Appeals) allowed the department appeal but set aside the impugned order-in-original. Now in this revision application department has contended that Commissioner (Appeals) has passed a faulty order by setting aside the entire impugned order-in-original. Department had not challenged the sanction of rebate claim upto the extent of Rs.1,05,447/-.

9. Government notes that respondent had paid duty on CIF value which was mentioned on ARE-1. Since the place of removal in this case is stated to be port of export, the ocean freight charges beyond port of export cannot form part of transaction value. As such, original authority has sanctioned excess rebate of Rs.1368/- as rightly held by Commissioner (Appeals) also. Respondents have neither attended the hearing

nor filed any written reply. It means that they have nothing to counter the contentions of department. Government therefore holds that the rebate claim of Rs.1,05,447/- is admissible to the respondent under rule 18 of Central Excise Rules, 2002 read with Notfn. No. 19/04-CE(NT) dated 6.9.2004 and excess paid amount of Rs.1368/- is liable recovered. The impugned order-in-appeal is modified to this extent.

10. The revision application is allowed in terms of above.

11. So ordered.



(D.P. Singh)

Joint Secretary(Revision Application)

Commissioner of Central Excise,
Raigad Commissionerate,
Plot No.3, 4th Floor, Trifed Tower,
Sector-17, Khandeshwar,
Navi Mumbai – 410 206.

Attested



(भागवत शर्मा/Bhagwat 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

Order No. 1336 /13-Cx dated 25.10.2013

Copy to:

1. Commissioner of Central Excise (Appeals-II), 3rd Floor, Utpad Shulk Bhavan, Plot No.C-24, Setor-E, Bandra Kurla Complex, Bandra (E) Mumbai-400 051
2. Deputy Commissioner of Central Excise, Panvel Division, Raigad Commissionerate, Kendriya Utpad Shulk Bhavan, Plot No.1, 1st Floor, Sector-17, Khandeshwar, Navi Mumbai – 410 206.
3. M/s Eastern Petroleum Pvt. Ltd., 235-239, Jawahar Industrial Estate, Kamothe, Panvel, Distt. Raigad.
4. PA to JS(RA)
5. Guard File.
6. Spare Copy



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