REGISTERED SPEED POST AD

GOVERNMENT OF INDIA

MINISTRY OF FINANCE

DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and

Ex-Officio Additional Secretary to the Government of India

8th Floor, World Trade Centre, Cuffe Parade,

Mumbai- 400 005

F. No. 195/200/2013-RA/427 Date of Issue: 03.02.2022

ORDER NO. 134/2022-CX (WZ)/ASRA/MUMBAI DATED 02.02.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Meditab Specialities Pvt. Ltd.
12, Gunbow Street,
Mumbai 400 001

Respondent : The Commissioner of CGST & Central Tax, Raigad

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. BC/328/RGD/2012-13 dated 22.10.2012 passed by the Commissioner(Appeals), Central Excise, Mumbai-III.

ORDER

The revision application has been filed by M/s Meditab Specialities Pvt. Ltd., 12, Gunbow Street, Mumbai 400 001(hereinafter referred to as "the applicant") against the Order-in-Appeal No. BC/328/RGD/2012-13 dated 22.10.2012 passed by the Commissioner(Appeals), Central Excise, Mumbai-III.

2. The applicant is a merchant exporter engaged in the export of pharmaceutical products. They procure goods from various manufacturers located across the country. In this particular case, the applicant had procured goods from the factory of M/s Wintac Ltd. on payment of duty. Duty was paid @ 10% adv. in respect of goods cleared on central excise invoice no. 15 & 16 dated 119.05.2010 whereas duty was paid @ 4% adv. in respect of goods cleared on central excise invoice no. 77 dated 26.09.2009. The applicant had claimed rebate of central excise duty paid from the Maritime Commissioner, Raigad. However, the Deputy Commissioner(Rebate), Raigad had partly rejected their rebate claim vide his OIO No. 915/11-12/DC(Reb)/RGD dated 13.06.2012.

3. Being aggrieved by the OIO No. 915/11-12/DC(Reb)/RGD dated 13.06.2012, the applicant filed appeal before the Commissioner(Appeals), Mumbai-III. The Commissioner(Appeals), Mumbai-III rejected their appeal vide OIA No. BC/328/RGD/2012-13 dated 22.10.2012.

4. The applicant has now filed revision application on the following grounds :

(a) The applicant submitted that it was settled law that when two notifications co-exist in the books of law and they are not mutually exclusive, an assessee would have the option to choose any one of these exemptions even if the exemption so chosen is generic and not specific. In this regard, they placed reliance upon the judgment of the Hon'ble Supreme Court in HCL Ltd. vs. Collector of Customs, New Delhi[2001(130)ELT 405(SC)].

(b) The applicant also placed reliance upon the following judgments:

(i) CCE vs. Indian Petro Chemicals[1997(92)ELT 13(SC)];

(ii) IOCL vs. CCE[1991(53)ELT 347(Trb)];

(iii) Coromandal Prints & Chemicals vs. CCE[1990(47)ELT 7(Trb)];

(iv) Dunbar Mills Ltd. vs. CCE[1989(44)ELT 500(Trb)];

(v) Calico Mills vs. CCE[1985(22)ELT 574(Trb)];

(vi) Coca Cola Ltd. vs. CCE[2009(242)ELT 168];

(vii) Share Medical Care vs. UOI[2007(209)ELT 321(SC)];

(viii) CCE vs. Cosmos Engineers[1998(108)ELT 213];

(ix) CCE vs. Thermopack Industries[2003(160)ELT 1150];

(x) Gothi Plastic Industries vs. CCE[1996(83)ELT 123(Trb)].

(c) The applicant submitted that it was an undisputed fact that both Notification No. 4/2006-CE and Notification No. 2/2008-CE were in existence simultaneously. Both these notifications do not have any provisions excluding the other. In other words, Sr. No. 62C of Notification No. 4/2006-CE does not have any provision stating that the notification has overriding effect over Notification No. 2/2008-CE and similarly, vice-versa. They therefore averred that they had the option to avail either of the notifications and that the central excise Department cannot force any particular notification on the applicant.

(d) The applicant further contended that this legal position cannot be distinguished on the ground that Notification No. 2/2008-CE provides for general amendment to the rates in the tariff. They stated that even if it was admitted for the sake of argument that it was a general amendment, it cannot be ignored that it was still a notification issued under Section 5A of the CEA, 1944. They averred that the Deputy Commissioner had conveniently ignored the fact that if the rates in the CETA, 1985 are to be amended, it has to be done legally by way of a suitable Act of Parliament. However, there has been no Act of Parliament seeking to amend the rates prescribed in the tariff. It was further argued that the Deputy Commissioner had not pointed out any provision under the CEA or the rules made thereunder which had the effect of requiring the assessee to mandatorily avail the benefit of Notification No. 4/2006-CE dated 01.03.2006.

(e) It was further averred that they were eligible for the refund of entire duty paid on exported goods. Reference was made to Rule 18 of the CER, 2002 and Notification No. 19/2004-CE(NT) dated 06.09.2004 and pointed out that the essential condition prescribed under the said notification was that the goods should be exported on payment of duty. They further pointed out that it was not in dispute that the goods had suffered duty and had been exported. Reliance was placed upon the decision of the CESTAT in the case of Gayatri Laboratories vs. CCE[2006(194)ELT 73(Trb)] wherein it was held that rebate claim to the extent of duty paid was available and that rebate claim cannot be restricted on the ground that less duty should have been paid in terms of notification.

(f) It was contended that since the method of assessment of excise duty on finished goods opted by them had not been challenged in any Commissionerate, therefore reassessment of excise duty payment while sanctioning the rebate claim was beyond the scope of powers of the Office of Maritime Commissioner. It was opined that this issue had already been clarified by the Board in Circular No. 510/06/2000-CX. dated 03.02.2000 by the contents therein that "There is no question of re-quantifying the amount of rebate by the rebate sanctioning authority by reassessment, it is also clarified that the rebate sanctioning authority should not examine the correctness of assessment but should examine only the admissibility of rebate of the duty paid on the export goods covered by a claim.".

(g) The assessee stated that the goods had been assessed to central excise duty in terms of the provisions of Rule 6 by applying Notification No. 2/2008-CE dated 01.03.2008 and paying duty @ 10% on such goods. The details of assessment made in such manner were communicated to the Range Superintendent through copies of ARE-1 submitted within 24 hours of clearance of goods as well as in the monthly ER-1 returns. It was alleged that the assessment of goods made in the aforesaid manner was not challenged by the Department in any manner. Attention was also drawn to para 2.2 of letter DOF No.

334/1/2008-TRU dated 29.02.2008 which stated that since the reduction in general rate had been carried out by notification, the possibility of the same product/item being covered by more than one notification could not be ruled out and that in such situation, the rate beneficial to the assessee would have to be extended if he fulfilled the attendant conditions of exemption.

(h) The applicant invited attention to Finance Bill, 2012 presented in Parliament where the ambiguity between two notifications had been removed. Instead of giving retrospective effect, Parliament had rescinded Notification No. 2/2008-CE dated 01.03.2008 by Notification No. 17/2012-CE dated 17.03.2012 and superseded Notification No. 04/2006-CE by the issue of Notification No. 12/2012-CE dated 17.03.2012. It was further contended that Section 5A clearly states that when there are two partial exemptions available, an assessee can opt for whichever is beneficial to them. In their case, they had opted for the beneficial notification and therefore they were eligible for rebate @ 10% duty paid by them. They therefore requested for directions to the rebate sanctioning authority to sanction the remaining 6% rebate alongwith applicable interest.

(i) Insofar as the issue of restriction of rebate claim to the extent of FOB value is concerned, the applicant stated that for administrative control, the export goods are consolidated at Bhiwandi and Pune depot for onward clearance to the port of shipment. Therefore, the freight element was not decided on the day of dispatch from the factory. They stated that the freight element would get confirmed only on availability of vessel and space on the vessel and that they were reducing the rate @ 20% amount of CIF rate as given in export order for payment of excise duty. With regard to insurance, they stated that they work out insurance @ 0.55% of CIF value which was very negligible and does not play any important role in valuation. They claimed that they had tried their best to overcome the problem of FOB value and that there was no intention to pay excise duty at higher side to claim rebate. They therefore averred that the rebate claim had been

rejected without understanding the facts of the case or difficulties faced by industries.

(j) The applicant further stated that many a times, to promote export business they offer discount to overseas buyers and thus discounted CIF values get considered for calculation of FOB value in shipping bill and because of that FOB value becomes less than ARE-1 value. Sometimes the commission given to the foreign agent exceeds 12.5% and whenever the commission exceeds 12.5% it gets deducted from shipping value to calculate FOB value in shipping bill in terms of Circular No. 64/2003-Cus dated 21.07.2003. The applicant again drew attention to Board Circular No. 510/06/2000-CX. dated 03.02.2000 to point out that the amount of rebate cannot be requantified by the rebate sanctioning authority and that he cannot examine the correctness of assessment.

(k) In respect of RC No. 5463, the applicant stated that they were selling goods in overseas markets and that they sometimes have to give samples to overseas buyers. However, these goods had been cleared on payment of duty for export. Since, the payment of duty and export of these goods was not in doubt, therefore they requested that the duty paid on samples should be sanctioned by way of CENVAT credit. In this regard, they placed reliance upon the decision In Re : Bhagirath Textiles Ltd.[2006(202)ELT 147(GOI)].

(l) In connection with the non-sanction of rebate claim due to non-submission of triplicate copy of ARE-1, the applicant stated that they had submitted the triplicate copy of ARE-1 to the jurisdictional Central Excise Range and also complied with the procedural part as mentioned in Notification No. 19/2004-CE(NT) dated 06.09.2004. The applicant claimed that the jurisdictional Central Excise Office had not handed over the triplicate copy of ARE-1 to them and therefore they were not in a position to submit the same. They placed reliance upon the decision In Re : Sanket Industries Ltd.[2011(268)ELT 125(GOI)].

5. The applicant submitted a letter dated 18.02.2014 stating that the issue issue of rebate being claimed @ 10% duty as per Notification No. 02/2008-CE dated 01.03.2008 instead of @ 4%/5% as per Notification No. 04/2006-CE dated 01.03.2006 had already been decided by the Revisionary Authority vide Order No. 1133-1137/2012-Cx. dated 07.09.2012, 1568-1595/2012-Cx. dated 14.11.2012 and 41-54/2013-Cx. dated 16.01.2013. For the issue of FOB value being higher than the assessable value, the applicant placed reliance upon the decision In Re : Bhagirath Textiles Ltd.[2006(202)ELT 147(GOI)] and also requested them to take CENVAT credit at the end of their manufacturer subject to compliance of the provisions of Section 12B of the CEA, 1944. With regard to the issue of non-submission of triplicate copy of ARE-1, the applicant claimed that they could not be held responsible for this lapse. They stated that the triplicate copies of the ARE-1's were still pending with the concerned Range Office and the documentary evidence regarding submission of triplicate copy to jurisdictional authority had already been provided in the Revision Application. They also requested for grant of personal hearing in the matter.

6. The applicant was granted opportunity of personal hearing on 28.02.2018, 17.09.2019, 03.12.2019, 10.02.2021, 24.02.2021, 18.03.2021 and 25.03.2021. However, the applicant failed to attend personal hearing on any of the appointed dates.

7. Government has carefully gone through the relevant case records, perused the impugned Order-in-Appeal, the Order-in-Original and the revision application filed by the applicant. It is observed that the Commissioner(Appeals) has rejected the rebate claim filed by the applicant on the grounds that the applicant had paid duty at higher rate instead of the lower rate of duty applicable to their goods in terms of exemption available, that the FOB value of the goods was less than the value declared in their invoices, that the applicant had failed to submit triplicate copies of ARE-1 and that rebate is not admissible on export of samples.

8.1 The Notification No. 2/2008-CE dated 01.03.2008 issued under Section 5A(1) of the CEA, 1944 is a notification prescribing effective rate of duty for goods specified under first schedule to the CETA, 1985. The said notification was amended by Notification No. 58/2008-CE dated 7.12.2008 which reduced the effective rate of duty from 14% adv. to 10% adv. Thereafter, the effective rate of duty was further reduced from 10% adv. to 8% adv. by Notification No. 4/2009-CE dated 24.02.2009.

8.2 While presenting Budget 2010-11, the Finance Minister mentioned in his speech that "The improvement in our economic performance encourages a course of fiscal correction even as the global situation warrants caution. Therefore, I propose to partially roll back the rate reduction in Central Excise duties and enhance the standard rate on all non-petroleum products from 8 per cent to 10 per cent *ad valorem.*" Accordingly, Notification No. 2/2008-CE dated 01.03.2008 was amended by Notification No. 6/2010-CE dated 27.02.2010 and the effective rate of duty for the goods specified under the first schedule to the CETA, 1985 was enhanced from 8% adv. to 10% adv. Although, the Central Excise Notification No. 2/2008-CE, 58/2008-CE. 4/2009-CE and 6/2010 are issued under the power of Section 5A(1) of the CEA, 1944 which empowers the Central Government to exempt excisable goods of any description from the whole or any part of the duty of excise leviable thereon. However, it can be seen that by Notification No. 6/2010-CE dated 27.02.2010, the effective rate of duty was enhanced from 8% adv. to 10% adv.

8.3 It simply means that the standard rates of excise duty or merit rate are changed by the Central Government by issuing notification under the powers of Section 5A(1) of the CEA, 1944. At the same time, concessional rates of duty on all excisable goods are also effected by the Central Government through the notifications which are also issued under the powers of Section 5A(1) of the CEA, 1944. These concessional rates may be linked to some conditions.

9.1 As per the provisions of Para 4.1 of Part I of Chapter 8 of the Supplementary Manual, the goods cleared for export shall be assessed to duty in the same manner as the goods cleared for home consumption. In the case laws relied upon by the applicant, the appellate authority had held that when two exemption notifications are available, it is up to the assessee to choose the one which is beneficial to him. In the present case, the applicant had availed the benefit of two notifications simultaneously which was not permissible as per law. If two exemption notifications are in existence, it would be his prerogative to avail the one which is beneficial to him. The applicant could not have availed the benefit of two notifications simultaneously for the same goods without maintaining separate accounts of inputs. The applicant was entitled to the benefit of only one notification out of the two which was beneficial to him and pay duty accordingly. The benefit of both notifications selectively without separate accounting of inputs cannot be availed simultaneously.

9.2 The availment of higher rate of CENVAT credit on the inputs utilised for the manufacture of medicaments entailed that only part of such CENVAT credit was being used to pay lower rate of duty on the final products cleared for home consumption by availing the benefit of exemption under Notification No. 4/2006-CE dated 01.03.2006 whereas the balance of the accumulated CENVAT credit on such inputs was used to pay duty on medicaments cleared for export at higher rate of duty in terms of Notification No. 2/2008-CE dated 01.03.2008 which specified the effective rate of duty. Such a practice would detract from the concept and purpose of the CENVAT scheme. When the applicant preferred to utilise two separate notifications for home consumption and export of the same goods, the CENVAT credit utilised for clearance of the exported goods was required to be restricted to the proportion of inputs utilised in their manufacture. Concept of tax on export to be zero rated cannot mean that tax not concerning with export is loaded on export goods somehow to encash the same. Alternatively, the applicant should have maintained separate account for the inputs utilised in the manufacture of exported goods and claimed rebate at higher rate

utilising CENVAT credit on such inputs used in the manufacture of such goods.

9.3 Ratio laid down by the judgment of the Hon'ble Gujarat High Court in the case of Arvind Ltd. vs. UOI[2014(300)ELT 481(Guj.)] which has thereafter been affirmed by the Hon'ble Supreme Court[2017(352)ELT A21(SC)] is relevant here. In that case, inspite of there being an exemption notification which fully exempted their goods, Arvind Ltd. had availed the benefit of Notification No. 59/2008-CE dated 07.12.2008 and paid duty on the export goods. The relevant portion of the said judgment of the Hon'ble Gujarat High Court is reproduced below.

> *"9. On, thus, ...It is, thus, an undisputed fact that the petitioner on final products discharged the duty liability by availing the benefit of Notification No. 59/2008 and as has already been noted in the record, it has reversed the amount of Cenvat credit taken by it on the inputs used for manufacturing of such products. Thus, when the petitioner is not liable to pay duty in light of the absolute exemption granted under Notification No. 29/2004 as amended by Notification No. 59/2008-C.E. read with the provision of Section 5A(1A) of the Act and when it has not got any other benefit in this case, other than the export promotion benefits granted under the appropriate provision of the Customs Act and Rules (which even otherwise he was entitled to without having made such payment of duty), we are of the firm opinion that all the authorities have committed serious error in denying the rebate claims filed by the petitioner under Section 11B of the Act read with Rule 18 of the Rules. The treatment to the entire issue, according to us, is more technical rather than in substance and that too is based on no rationale at all.*
>
> *10. We also cannot be oblivious of the fact that in various other cases, the other assessees have been given refund/rebate of the duty paid on inputs used in exported goods. ...."*

9.4 In the above judgment, Hon'ble High Court has laid down that when there are two exemption notifications which co-exist, the assessee can avail one for domestic clearances and the other one which is beneficial to them for export <u>so as to obtain refund/rebate of duty paid on inputs used in the</u>

exported goods(emphasis supplied). Thus, as long as, intent is to get refund/rebate of duty paid on inputs consumed in exported goods, exporter can choose to pay higher rate of duty on exported goods, even if it is an effective rate. Hon'ble High Court has not decided that an applicant while paying higher duty on exported goods can utilise the CENVAT credit not related to inputs consumed/used in exported goods but accumulated due to availment of another notification prescribing lower rate of duty for domestic clearances. This would result in encashment of accumulated credit not related to inputs consumed/used in exported goods. Therefore, the applicant would be eligible for rebate of central excise duty paid on the exported goods only to the extent of rate of duty applicable in terms of Notification No. 04/2006-CE dated 01.03.2006.

10.1 With regard to the finding of the Commissioner(Appeals) to restrict the claims to the FOB value, Government observes that the assessable value being more than FOB value was not a ground for rejection/restricting the rebate claims by the original authority. The finding rejecting/restricting the claims was in respect of samples sent by the applicant to their buyer and not a general finding about export consignments. The text of the relevant paragraph 3(iv) in the OIO is reproduced below:

> "iv. Market price as declared in the ARE-1/Invoice is seen to be more than the rebate claimed. However, in respect of Rebate Claim No. 5463 dated 24.06.11, it is seen that out of the total quantity of goods exported, 571 Nos. of the product 'D-Flox 50 ml' which area actually free samples are also exported. Similarly, in respect of Rebate Claim No. 16173 dated 28.10.10, out of the total export goods, 95 Nos. of 'D-Flox 100 ml are actually free samples. The free samples have no commercial value and thus the market price in respect of the same is less than the rebate claimed on account of the same. When the market price of any export goods is less than the rebate claimed thereon, the rebate is not admissible as per the condition laid down under Notification No. 19/2004-CE(NT) dated 06/09/2004. Therefore, the rebate amount proportionate to the free samples exported(Rs. 3433/- In respect of Rebate Claim No. 5463 dated 24.06.11 and Rs. 428/- in respect of Rebate Claim No. 16173 dated 28.10.10) merits rejection."

10.2 It would be apparent from the text reproduced above that the adjudicating authority has rejected part of these claims on the ground that some of the goods were free samples bereft of any commercial value and therefore the market price of the samples was less than the rebate claimed. The issue of rejecting the rebate claims to FOB value was not part of the original proceedings. It appears that the appellate authority has digressed from the actual ground on which the rebate claims were held to be inadmissible. The issue of rejection of rebate claims for assessable value being in excess of the FOB value of the goods cannot be introduced by appellate authority while deciding the appeal filed by the applicant exporter. In a case where the rebate claims have been rejected at the original stage, the Commissioner(Appeals) cannot reject the same rebate claims on a new ground or for a different reason when no such ground has been made out by the Department by filing appeal. The Commissioner(Appeals) cannot put the applicant to greater disadvantage while deciding their own appeal.

10.3 The contention of the original authority for rejection of certain part of the rebate claims was that the goods involved thereunder were free samples being sent to the foreign buyer and that they did not have any commercial value. The original authority therefore concluded that the market price of the export goods was less than the rebate claimed and therefore these claims were hit by the condition laid down under Notification No. 19/2004-CE(NT) dated 06.09.2004. Although the condition has not been specifically mentioned in the OIO, it is presumable that the condition being referred to is condition 2(e) of Notification No. 19/2004-CE(NT) dated 06.09.2004. The interpretation of the term "market price" lies at the root of the matter. The adjudicating authority has interpreted the term to mean the value/price of the goods for the overseas buyer. Government is of the firm view that the term "market price" in the condition must be inferred to be the market price of the goods in the Indian market and not in the hands of the overseas buyers/importers country. The purpose behind exporters being granted export benefits such as rebate is to incentivise export to achieve the objective of maximising the inflow of foreign exchange into the country. Exports which are essentially a form of sale of goods can fructify only if the

buyer in the foreign country can examine the product for its suitability and quality. In the case of pharmaceutical products, there would be an added layer of approval by the Drug Authorities of the country of the overseas buyer. These processes would require physical availability of the product for which samples must be procured. Needless to say, the overseas buyer will not be willing to buy the product without being given samples to check its suitability in terms of the parameters set in his country. In other words, if the exporter does not send samples, he will not be able to obtain export orders.

10.4 If the notification is interpreted in such a regressive manner, it would be very difficult for Indian exporters to export to foreign markets and the purpose of granting rebate would be defeated. It would also be pertinent to note that the cost of the samples which are being exported free of cost to the overseas buyer will subsequently be recovered from the cost of exports. Remarkably, the words "market price" appearing in the notification have since been substituted with the words "the Indian market price" vide Notification No. 18/2016-CE(NT) dated 01.03.2016. Therefore, the price of the samples in the Indian market and not the commercial value thereof in the overseas market is to be considered for grant of rebate. The fact of duty payment on the samples cleared by the applicant is not in dispute. In this view, Government concludes that the rebate of central excise duty paid on the samples exported by the applicant is admissible.

11. Insofar as the issue of non-submission of triplicate copy of ARE-1 is concerned, it is observed that both the applicant as well as the revenue have made counter claims. The applicant has stated that they have submitted the triplicate copies of ARE-1's to the rebate sanctioning authority and the Department claims that the applicant has failed to submit triplicate copies of ARE-1's. Government observes that the main purpose of the triplicate copy of ARE-1 is to corroborate duty payment on the export clearances. The question of whether duty has been paid on the goods cleared under the particular invoices can very well be ascertained from the jurisdictional Range Superintendent. As such, there is no clarity about the factual position of submission/non-submission of triplicate copies of ARE-1. Be

that as it may, the non-submission of triplicate copy of ARE-1 cannot be fatal to the admissibility of rebate claims.

12. It is observed that the original authority has pointed out some instances of short shipment in para 3. II. of the OIO to hold that rebate in respect of such quantities would be inadmissible. These findings are apposite and hence do not require any interference.

13. Government holds that the applicant would be entitled to rebate on the quantity of exported goods at the rate of duty applicable under Notification No. 4/2006-CE dated 01.03.2006. The original authority is therefore required to re-examine the rebate claims on merits in the light of the findings recorded hereinbefore after verifying duty payment particulars of the goods cleared for export under the respective ARE-1's. This exercise may be completed within eight weeks of receipt of this order.

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

ORDER No. 134 /2022-CX (WZ) /ASRA/Mumbai DATED 02.02.2022

To,
M/s Meditab Specialities Pvt. Ltd.
12, Gunbow Street,
Mumbai 400 001
Copy to:

1) The Commissioner of CGST & CX, Belapur
2) The Commissioner (Appeals), CGST & CX, Raigad
3) Sr. P.S. to AS (RA), Mumbai
4) Guard file