



**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, Cuff Parade,
Mumbai- 400 005**

F. NO. 198/106/13-RA/449

Date of Issue: ~~01-2022~~
07.02.2022

ORDER NO. 135/2022-CX (WZ) /ASRA/Mumbai DATED 07.02.2022 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 : Commissioner of CGST, Belapur.

Respondent : M/s Cadila Healthcare Ltd.,
Survey No. 417,419 & 420,
Sarkhej-Bavala Highway,
N.H.8A, Taluka Sanand,
Ahmedabad- 382210.

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. SDK/163/M-III(R)/2013-14 dated 05-09-2013 passed by the Commissioner of Central Excise (Appeals), Mumbai-III, Mumbai Zone-II.

ORDER

This revision application is filed by the Commissioner of Central Excise, Mumbai-III (herein after referred to as the department) against the Order-in-Appeal No: SDK/163/M-III(R)/2013-14 dated 05-09-2013 passed by the Commissioner (Appeals) of Central Excise, Mumbai-III, Mumbai Zone-II in respect of M/s Cadila Healthcare Ltd., Survey No. 417,419 & 420, Sarkhej-Bavala Highway, N.H.8A, Taluka Sanand, Ahmedabad- 382210 (hereinafter referred to as "the respondent")

2. Brief facts of the case are that the respondent, a merchant exporter, have filed 5 Rebate Claims under the provisions of Rule 18 of CER, 2002, read with Notification No. 19/2004-CE(NT) dated 06.09.04 amounting to Rs. 14,14,460/- in respect of goods exported by them. The rebate sanctioning authority vide the OIO No. 60 R/SKM/DC(RC)/MIII/11-12 dated 17.06.2013 sanctioned the rebate claim for Rs. 14,04,322/- on the ground that the value of the ARE-1 was found to be more than the corresponding F.O.B value duty and hence the F.O.B. value is the transaction value and the respondent is eligible only for rebate on the duty worked on the FOB value.

3. Being aggrieved by the Order in Original, the respondent filed an appeal before the Commissioner (Appeals) of Central Excise, Mumbai-III. The Appellate Authority vide Order in Appeal No. SDK/163/M-III (R)/2013-14 dated 05-09-2013 observed that the rebate sanctioning authority has rightly restricted the rebate to the duty paid on the transactional value and the excess amount paid of Rs. 10,138/- by the respondent is allowed as credit in the Cenvat credit account of the concerned manufacturer. Further with regard to the appeal for payment of interest by the respondent, the appellate authority observed that in the era of self-assessment, it is the assessee who are paying duty on their own and if excess payment is made it is the assessee who is to be blamed and hence the question of interest on excess payment does not arise.

4. Being aggrieved and dissatisfied with the impugned order in appeal, the department has filed this Revision Application on the following grounds that:

4.01 The respondent are not the Manufacturer but are Merchant Exporter and have procured goods from M/s Ocean Pharmacoat Pvt Ltd, on the value mentioned on the ARE-1 and invoice of the manufacturer. The ARE-1/invoice shows that the said goods have been sold by the manufacturer to the claimant charging duty of Rs 14,14,460/- (BED Rs 1373262/- + Ed Cess Rs 27466/- + S&H Cess Rs 13732/-). As per Section 12 B of CEA, 1944, it can be presumed that the duty shown on invoice paid by the manufacturer to the Government and the same has been passed on to the buyer i.e. claimant, M/s Cadila Healthcare Ltd, Ahmedabad. Therefore, the Manufacturer M/s Ocean Pharmacoat Pvt. Ltd. has recovered entire cost of the goods sold alongwith the duty paid Rs 10138/- by him from the claimant, M/s Cadila Healthcare Ltd, Ahmedabad.

4.02 In the OIA SDK/163/M-III(R) /2013-14 dtd 05.09.2013, the Commissioner (Appeals) has allowed the excess duty paid as credit in the Cenvat accounts of the manufacturer which appears to be incorrect as it will lead to giving additional benefits to the manufacture and will amount to "Unjust Enrichment" as the manufacturer viz M/s Ocean Pharmacoat Pvt Ltd, has already recovered the said excess duty from its buyer i.e. claimant, M/s Cadila Healthcare Ltd, Ahmedabad. The allowance of duty of Rs 10138/- as credit in Cenvat account of the concerned manufacturer is also incorrect as the cenvat credit re-credited to manufacturer is not rebate but refund under section 11B of the Central Excise Act, 1944. And Board vide Circular No 53/90 dated 26.09.1990 clarified that refund claims even if otherwise admissible should not be sanctioned where the competent officer is satisfied that the manufacturers importers have passed on the duty burden to their customers.

4.03 The Commissioner's (Appeals) reliance on the decision of Hon'ble Punjab Haryana High Court given in the case of M/s Nahar Industrial Enterprises Ltd and reported in 2009(235) ELT-22(P&H) is also not correct as the claimant in that case viz M/s Nahar Industrial Enterprises Ltd was himself a manufacturer and not the merchant exporter as in the instant case. M/s Nahar Industrial Enterprises Ltd. being a manufacturer & exporter

himself has not passed on the duty incidence to any other person. However, the same cannot be said in the instant case as here the manufacturer and exporter are different entities and the manufacturer M/s Ocean Pharmacat Pvt Ltd, has recovered the entire duty amount from the exporter. Therefore the case law Hon'ble Punjab & Haryana High Court given in the case of M/s Nahar Industria Enterprises Ltd cannot be applied to the instant case and it's reliance by Commissioner (Appeals) is improper. It appears that the proper order could be credit the excess duty paid by the manufacturer in the Consumer Welfare fund under Section 12C (2) (a) of CEA, 1944.

4.04 The department requested that the impugned OIA may be set aside and to credit the excess duty paid by the manufacturer in the Consumer Welfare fund under Section 12C (2) (a) of CEA, 1944.

5. A Personal hearing in the matter was granted on 15.01.2018 & 2.02.2018, 3.12.2019, 29.01.2021, 23.06.2021 and 23.07.2021. However, no one appeared for the personal hearing so fixed on behalf of the department and the respondent. Since sufficient opportunity to represent the case has been given, the case is taken up for decision on the basis of available documents on record.

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

7. Government observes that the adjudicating authority had rejected a part of the rebate claims filed by the respondents on the ground that the assessable value on the ARE-1 was found to be more than the corresponding FOB value. On the other hand the Commissioner (Appeals) relying on the Government of India Order No. 1568-1595/2012-CX dated 14.11.2012 in the case of M/s Cipla Ltd, Hon'ble Apex Court judgement in the case of M/s Belapur Sugar and Allied Industries Ltd – 1999 (108) ELT 9 (SC), Hon'ble High Court judgement in the case of M/s Nahar Industrial Enterprises Ltd reported in 2009 (235) ELT 22 (P&H) and Government of India Order No. 81-104/12-CX dated 03.02.2012 in the case of Aarti Industries, allowed credit of the

amount paid in excess of duty on FOB value in the Cenvat credit accounts of the concerned manufacturers.

8. Government observes that in the revision application the applicant department has contended that the Commissioner (Appeals) has allowed the excess duty paid as credit in the Cenvat accounts of the manufacturer which appears to be incorrect as it will lead to giving additional benefit to the manufacturer and will amount to unjust enrichment as in all this case the manufacturer has already recovered the said excess duty from its buyer. It is also pleaded that the case law of Hon'ble Punjab and Haryana High Court given in the case of M/s Nahar Industrial Enterprises Ltd.[2009(235)ELT-22(P&H)].is also not correct as in that case M/s Nahar Industrial Enterprises Ltd. was himself a manufacturer and not the merchant exporter who had not passed on the duty incidence to any other person, whereas in this case, the manufacturer ie M/s Ocean Pharmacoat Pvt Ltd and the exporter M/s Cadila Healthcare Ltd. (the respondent) are different and the manufacturer has recovered the entire duty amount from the exporter. In view of the above the department has opined that the proper order could be to credit the excess duty paid by the manufacturer in the Customer Welfare fund under Section 12 C(2) (a) of Central Excise Act, 1944.

9. Government observes that while deciding a similar issue Revisionary Authority vide Order Nos. 160-225/2014-CX, dated 28-4-2014 In Re : Cipla Ltd.[reported in 2015 (328) E.L.T. 742 (G.O.I.)] observed as under :-

“The applicant department has challenged the impugned Orders-in-Appeal and contended that manufacturers have already recovered excess duty from its buyer M/s. Cipla Ltd., Mumbai and allowing re-credit of excess paid amount in the Cenvat credit account of manufacturer will lead to additional benefit to the manufacturer which will amount to unjust enrichment. As such department has argued that excess paid amount should be credited in the consumer welfare fund under Section 12 C (2)(a) of Central Excise Act, 1944, M/s. Cipla Ltd. has filed counter written reply and contended that M/s. Cipla Ltd. is a manufacturer as well as merchant exporter, that they procured goods on loan licence basis

from various manufacturers and they are principal manufacturers as raw material and packing material is supplied by them. M/s. Cipla Ltd. has claimed that there is no question of passing the duty incident as duty is paid by them only. The factual position is to be verified by the original authority from records. Government notes that in these cases claimant is a merchant exporter and duty on exported goods is paid by manufacturer. So, the re-credit of excess paid amount is to be allowed as ordered by Commissioner (Appeals), only if the provisions of Section 12B of Central Excise Act, 1944 are complied with. The impugned Orders-in-Appeal are modified to the extent.

10. Following the ratio of the aforementioned case law, in order to find out passing of duty incidence by the manufacturer in the present cases to the Merchant exporter i.e the respondent, Government remands the cases back to the original authority for verification of records and the credit of excess duty paid by the respondent, as ordered by the Commissioner (Appeals), will be allowed only if the provisions of Section 12 B of Central Excise Act, 1944 are complied with, failing which the said excess paid amount should be credited in the consumer welfare fund under Section 12C(2)(a) of Central Excise Act, 1944.

11. The impugned Order-in-Appeal is modified to the above extent.

12. These revision application is thus disposed of in terms of above.


(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 135/2022-CX (WZ) /ASRA/Mumbai DATED 04.02.2022

To,

The Commissioner of CGST,
Belapur Commissionerate, C.G.O. Complex,
10, C.B.D. Belapur,
Navi Mumbai – 400 614.

Copy to:

1. M/s Cadila Healthcare Ltd., Survey No. 417,419 & 420, Sarkhej-Bavala Highway, N.H.8A, Taluka Sanand, Ahmedabad- 382210
2. The Commissioner of GST & CX, Appeals Raigad, C.G.O. Complex, 10, C.B.D. Belapur, Navi Mumbai – 400 614.
3. The Deputy Commissioner (Rebate), GST & CX Belapur Commissionerate, C.G.O. Complex, 10, C.B.D. Belapur, Navi Mumbai – 400 614.
4. Sr. P.S. to AS (RA), Mumbai
- ~~5. Guard file~~
6. Notice Board.