REGISTERED
SPEED POST

F.NO. 195/867-871/11-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 21.11.13

ORDER NO. 1373-1377 /2013-CX DATED 18.11.2013 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 35EE of the Central Excise Act, 1944 against the orders-in-appeal No. 283-286-CE/MRT-II/2011 dated 30.6.2011 passed by the Commissioner of Central Excise (Appeals), Meerut-II

Applicant : M/s Shree Baba Exports,
Roshan Bagh, Distt-Rampur
Uttar Pradesh

Respondent : Commissioner of Central Excise, Meerut-II

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ORDER

These revision applications are filed by M/s Shree Baba Exports, Roshan Bagh, Distt-Rampur Uttar Pradesh against the orders-in-appeal No. 283-286-CE/MRT-II/2011 dated 30.6.2011 passed by the Commissioner of Central Excise (Appeals), Meerut-II with respect to order-in-original passed by the Assistant Commissioner of Customs & Central Excise.

2. Brief facts of the case are that the applicant M/s Shree Baba Exports, Roshan Bagh, Distt-Rampur had exported Mentha Products under claim of rebate. The applicant availed cenvat credit on the inputs and paid duty on exported goods from cenvat credit account which was subsequently claimed as rebate under rule 18 of the Central Excise Rules, 2002. All rebate claims filed by the applicant were sanctioned by the Assistant Commissioner, Central Excise Division, Rampur. However, the Commissioner of Central Excise Meerut-II reviewed sanction orders of the Assistant Commissioner and ordered for filing appeals against such sanction orders before the Commissioner (Appeals) Central Excise, Meerut-II. The Commissioner (Appeals) allowed the appeals by way of remand. Consequently, the applicant filed revision applications against the remand order of the Commissioner (Appeals).

3. Revision applications of the applicant was disposed of by JS (RA) vide order Nos. 379-390/11-Cx dt. 19-04-2011 directing the Commissioner (Appeals) to decide the case on merit. Now Commissioner (Appeals) has allowed the appeals of the department vide Orders-in-Appeal Nos. 283-286-CE/MRT-II/2011 dt. 30-06-2011 and set aside the impugned Orders-in-Original.

4. Being aggrieved by the impugned orders-in-appeal, the applicants have filed these revision applications under Section 35EE of Central Excise Act, 1944 before Central Government on the following common grounds:

4.1 The applicants submit that the statutory provision contained in Rule 18 provides for sanction of rebate of the duty paid on excisable goods in case

any goods are exported after payment of duty. The sanction of rebate claim is subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification. The applicants submits that after scrutiny of the rebate claim the jurisdictional authority was satisfied that conditions, limitations including the procedure have been followed by the applicants, therefore after being satisfied the claims were sanctioned. Thus in the subject rebate claims the dispute is not in relation to conditions, limitations and procedure followed by the applicants. The revenue appeals was filed by the department on the ground that Cenvat credit availed by the applicants was under investigation and while the rebate was sanctioned. This was the position when the revenue appeal was taken up for decision by the Commissioner (Appeals) initially. Subsequently on issuance of order of remand by the Joint Secretary (Revision), further proceedings in the matter of investigation has resulted in issuance of notice to the applicants.

4.2 In the present case the matter relates to proprietary of rebate claim sanctioned by the jurisdictional Assistant Commissioner as per provisions of rule 18 of Central Excise Rules, 2002 read with CBEC circulars and supplementary instructions. There is no dispute regarding infringement of any provisions contained in rule 18 or the relevant CBEC circulars or the supplementary instructions. The dispute is regarding fraudulent availment of Cenvat credit which is governed by provisions of Cenvat Credit Rules, 2004. The export has been undertaken after payment of duty. Proper procedure of export has been followed and is not being disputed. In the circumstances question arises in the matter is whether fraudulent availment of Cenvat can be considered as a reason to deny rebate which is governed by separate provisions of rule 18 of Central Excise Rules, 2002 and whether the provisions of fraudulent Cenvat can override the provisions of rule 18 in the matter governed exclusively by provisions of rule 18. In Para 6 of the order, the Commissioner (Appeals) has rightly pointed out that the issue before him is whether the sanction of the rebate claim was premature. This question has not been answered in the order though taken up initially. Therefore the

Commissioner (Appeals) has erred by proceeding to decide the case without deciding whether the sanction of rebate claim was premature.

4.3 The revenue had protected not only the Cenvat allegedly by fraud but had also included the amount of rebate sanctioned to the Applicants as demand. Thus since revenue had already protected the alleged fraudulent Cenvat and had also sanctioned the rebate therefore the Commissioner (Appeals) should have not taken the notice in to consideration. Thus before deciding upon the revenue appeal it was imperative on the part of the Commissioner (Appeals) to decide whether the sanction of rebate claim at the original stage of investigation was premature keeping in mind also the fact that revenue including sanctioned rebate has been protected. The Commissioner (Appeals) has failed to do so and has decided the issue otherwise before deciding the maturity of the issue though his office himself took up maturity of the sanction of rebate in the very initial stage of deciding the case. Therefore the order is bad in law.

4.4 The applicants also placed reliance on other CBEC circulars cited below which specifically asked and directs the proper officer to sanction rebate claims without resorting to delay. Sanction of rebate has also 'been allowed in cash in case duty is paid out of Cenvat. CBEC has not distinguished between Cenvat and fraudulent Cenvat. Had the intent of the circular been to deny rebate in case of fraud the circular would have clarified the situation. In the absence of such clarification rebate allowed by the Assistant Commissioner was fair and justified. The CBEC circular also directs the proper officer to sanction rebate at the earliest without delay. Had the intent been to deny rebate in case of wrong or fraudulent availment of Cenvat the circular would have definitely put restriction or and directed to deny rebate for such cases where Cenvat is in dispute. The said circulars which are binding on the department and being relied upon by the applicants are as under:

(i) Circular No.687/3/2003-CX dated 3.1.2003
(ii) Circular No. 670/61/2002-CX dated 1-10-2002
(iii) Circular No. 24/87 dated 6-5-1987

(iv) Instruction dated 03.04.2007 issued under F.No.209/11/2005-CX.6 (CBEC)

4.5 The applicants submits that it is crystal clear from the Board's clarification that the documents listed only should have been considered for sanction of rebate claims and not the Cenvat documents which are not part and parcel of rebate. Moreover CBEC circular dated 03.01.2003 and 01.10.2002 are crystal clear which hold that rebate claim is to be paid in cash and within three months. In both these circulars there is no reference that in case of dispute of fraudulent Cenvat rebate should be held up or be denied. There is clear cut directive to pay interest on rebate if the sanction is made after three months. CBEC has also clarified that rebate be sanctioned even in case of duty paid on inputs in area based exemptions units like in J&K. In the circumstances there was no reason to deny the rebate. Thus the order of Assistant Commissioner granting rebate was fit, proper and justified.

4.6 Applicants submit that the issuance of the notice upholds their contentions that issue of fraudulent Cenvat is a separate issue governed by provisions of Cenvat Credit Rules, 2004. There are separate provisions under Central Excise law which deals with cases related to fraudulent availment of Cenvat and there also exists separate mechanism to recover such fraudulent availment of Cenvat. If it is alleged that Cenvat credit has been availed fraudulent the mechanism allows the department to deny Cenvat recover interest and impose penalty but there is no mechanism to deny rebate. Therefore the setting aside the orders-in-original is absolutely wrong, not legal and without authority of law

4.7 The applicants further assert their submission by example of normal business transactions. In normal business transactions between a manufacturer and the buyer if Cenvat is considered fraudulent by the department a notice to show cause is issued to the manufacturer for disallowance and recovery of Cenvat credit of duty but the manufacturer is not forced to either not to recover the duty from the buyers nor the amount recovered from the buyer representing the duty portion is asked to pay to the

department before decision of the notice and further decisions through appellate proceedings. Contrary to the above in the present case the duty paid by the applicants as per provisions of rule 18 is rebated by the department as the same cannot be recovered from the foreign based buyer. The purpose of granting of rebate is to compensate the manufacturer of the duty paid but not recovered from the foreign buyer. By denying the same the Commissioner (Appeals) has deprived the applicants what was due to them as transaction value of the export goods (cost paid by the buyer (+) duty to be rebated by the department. It would be noticed that besides demanding fraudulent Cenvat alleged to have been availed by the Applicants, notice has also been issued demanding rebate of Rs.12,75,197/-. The said amount of rebate demanded from the applicants includes the amount of Rs.12,81,153/- sanctioned by the jurisdictional Assistant Commissioner, Central Excise, Moradabad vide various orders in original and now set aside by the Commissioner (Appeal).

4.8 Order of Commissioner (Appeals) has added to multiple demands created on same issue. It would be noticed that in the notice in the show cause notice issued by CCE, Meerut-II entire amount of Rs. 1,95,11,969/- taken as Cenvat credit of duty by the applicants during the period Sep. 2005 to 31.3.2009 has been demanded from the applicant. Thus the amount availed as Cenvat for payment of duty claimed as rebate has already been covered in the notice. Therefore denial of rebate amounts to creating two demands against the same credit taken by the applicant. Applicant further adds that besides demanding alleged fraudulent Cenvat the Commissioner, Central Excise, Meerut-II has also demanded a sum of Rs. 12,81,153/- as an amount sanctioned to the applicant as rebate. Applicant in this regard submits that the alleged Cenvat credit taken by them is related inputs purchased from J&K based manufacturer suppliers and is related to the period September 2005 to 31.3.2009. The rebate claim of the applicant also relate to duty paid by the applicant out of Cenvat taken of the inputs supplied by J&K based manufacturer supplier for the period Oct, 2007 to Nov, 2007. The

amount of duty paid and claimed as rebate relates to impugned AREs-1. Thus the amounts as inadmissible Cenvat credit, sanctioned rebate of Rs. 12,75,197/- and present amount of Rs. 12,81,153/- so far are one and same and out of same amount of Cenvat credit taken by the applicant. Thus Commissioner (Appeals) has added to gross injustice meted out to the applicant.

4.9 Notwithstanding the above submissions, the applicant further submits that in case the Hon'ble Joint Secretary (Revision Application) also take a view that rebate claim of duty paid from the fraudulent Cenvat credit is not permissible the present Revision Application be kept on record pending decision on the issue of admissibility of Cenvat credit by competent authority so as to avoid multiplicity of demands against the applicant and parallel proceedings against the applicant before two different forum for the same issue i.e. admissibility of Cenvat credit and acceptability of duty paid from such Cenvat credit for sanctioning rebate claim. The Joint Secretary (Review) may take up the revision application for decision only after the main issue of admissibility of Cenvat credit is finally decided. However it is added that till the present application of the applicant is decided stay be granted from recovery of rebate.

4.10 Case relied upon:

- CCE Vadodara Vs Dhiren Chemical Industries 2002 (143) ELT 19(SC)
- UOI Vs Arviva Industries (I) Ltd. 2007 (209)ELT 0005 (SC)

5. Personal hearing was scheduled in this case on 21.2.13 and 15.10.2013. Hearing held on 15.10.2013 was attended by Shri S.C.Dabral, Consultant and Shri Kapil Kumar, Advocate on behalf of applicants and reiterated the grounds of revision application. Nobody attended hearing on behalf of department.

6. Government has carefully gone through the relevant case records and perused the orders-in-original and orders-in-appeal.

7. On perusal of records Government observes that the original authority initially sanctioned rebate claim. The department preferred appeal against impugned orders-in-original on the ground that duty was paid on exported goods from fraudulently availed cenvat credit in respect of inputs shown to have been procured from various units including the units situated in Jammu & Kashmir who were availing area based exemptions. Commissioner (Appeals) decided the cases by way of remand vide order-in-appeal No.329-358-CE/MRT-II/2008 dated 30.12.2008. Against the said order-in-appeal dated 30.12.2008, the applicant filed revision applications before Joint Secretary (Revision Application), who decided the same vide GOI Order No.379-390/11-Cx dated 19.4.2011 and directed the Commissioner (Appeals) to decide the case on merit. Commissioner (Appeals) has now vide impugned Orders-in-Appeal set aside the impugned orders-in-original and allowed department's appeals. Now the applicants have filed these revision applications on the grounds stated at para (4) above.

8. Government notes that applicant is mainly contending that original authority had sanctioned the rebate claims initially after verifying all the documents, as duty paid goods were exported by following the laid down procedure, that the dispute regarding fraudulent availment of cenvat credit is to be decided in terms of Cenvat Credit Rules 2004, and said proceedings for recovery of wrongly availed cenvat credit cannot be reason to deny rebate claims which are governed by rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE(NT) dated 6.9.04, that revenue interest is already protected by show cause notice issued by CCE Meerut-II for entire amount of Cenvat Credit involved/taken during the period in question, that enquiry in the matter conducted by Noida and J&K Commissioner did not reveal any such discrepancy.

9. Government notes that in these cases the duty was paid on exported goods from the cenvat credit and department after conducting investigations in the matter issued a show cause notice No. IV-CE (a) CP/SBA/06/Pt-

15/21195 dt. 31-12-2009 for recovery of wrongly availed cenvat credit of Rs. 1,95,11,969/-. The applicant has stated that said show cause notice is pending adjudication before, CCE (Adj.) Delhi, a common adjudication authority.

10. Government notes that the department has been disputing the payment of duty on the export goods as the duty was paid from wrongly availed cenvat credit, by the manufacturer exporters who are the applicants in these cases. Government observes that in these cases duty on exported goods was paid from cenvat credit and department after conducting investigations, has issued show cause notice for recovery of wrongly availed cenvat credit which are yet to be decided in the adjudication proceedings initiated vide show cause notice and outcome of said adjudication proceeding will have a direct bearing in determining the admissibility of said rebate claims. At this stage, Government cannot interfere with the ongoing quasi judicially proceedings before Commissioner of Central Excise (Adj.) in this case by giving any finding on merit of the contentions of applicant claiming correct availment of cenvat credit and proper payment of duty on exported goods.

11. The governing statutory provisions of grant of rebate are contained Rule 18 of Central Excise Rules, 2002 which reads as under:

> "Rule 18: Rebate of Duty: Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, any fulfillment of such procedure, as may be specified in the notification."

The provision of said rule stipulate that rebate of duty paid on excisable goods exported is admissible. The notification No.19/04-CE(NT) dated 6.9.04 issued under rule 18, stipulates the condition and procedure to be followed for availing rebate claim. In these cases, payment of duty is in dispute and

case matter for recovery of wrongly availed Cenvat credit are pending adjudication. Applicant is a manufacturer exporter and duty is paid from cenvat credit which is under dispute. So said duty paid cannot be treated as duty paid validly unless the cenvat credit availed is held a valid cenvat credit. The contention of applicant that proceedings initiated for recovery of wrongly cenvat credit are independent of sanctioning rebate claim cannot be accepted since duty paid on exported goods can only be rebated under rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE (NT) dated 6.9.04. In view of this, it would be premature to decide the admissibility of rebate claims till the decision is taken by adjudicating authority in the various show cause notice issued to the applicants. Therefore, in the interest of justice, the case is required to be remanded back for fresh consideration.

12. In view of above position, Government sets aside the impugned orders and remands the case back to the original authority for denovo consideration of rebate claim on the basis of outcome of the above said show cause notices in the ongoing adjudicating proceedings. A reasonable opportunity of hearing will be afforded to the parties.

13. Revision applications disposed off in above terms.

14. So ordered.

(D.P.SINGH)
Joint Secretary (Revision Application)

M/s Shree Baba Exports,
Roshan Bagh, Distt-Rampur
Uttar Pradesh

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 Revy)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

Order No. 1373 – 1377 /2013-Cx dated 18.11.2013

Copy to:

1. Commissioner of Customs & Central Excise, Meerut-II, Opp. Shaheed Park, Delhi Road, Meerut
2. Commissioner (Appeals), Customs & Central Excise, Meerut-II, Opp. Shaheed Park, Delhi Road, Meerut
3. Assistant Commissioner, Customs & Central Excise, Rampur.
4. PA to JS(RA)
5. Guard File
6. Spare Copy.

ATTESTED

2014

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