F.No.195/87/2013-RA

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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, Cuffe Parade,
Mumbai- 400 005

F.No.195/87/2013-RA/5546 Date of Issue: 22.11.19

ORDER NO. 137 /2019-CX (WZ)/ASRA/MUMBAI DATED 31.10.2019 OF THE GOVERNMENT OF INDIA PASSED BY SMT SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Manish Packaging Pvt. Ltd.

Respondent : Commissioner (Appeals-II), Central Excise Mumbai.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. US/656/RGD/2012 dated 12.10.2012 passed by the Commissioner (Appeals-II), Central Excise Mumbai.

ORDER

This Revision Application is filed by the M/s Manish Packaging Pvt. Ltd,Block No. 689, 690,691, Maroli-Umbhrat Road, Village- Maroli, Dist. – Navasari, Gujarat (hereinafter referred to as "the Appellant") against the Order-in-Appeal No. US/656/RGD/2012 dated 12.10.2012 passed by the Commissioner (Appeals-II), Central Excise Mumbai.

2. The issue in brief is that the Appellant is a manufacturer exporter had filed 19 rebate claims total amounting to Rs. 46,70,083/-. On verification of the records, the Deputy Commissioner(Rebate), Central Excise, Raigad vide his Order-in-Original No. 1332/11-12/DC(Rebate)/Raigad dated 30.11.2011 sanctioned rebate claims of Rs. 46,70,083/-under the provisions of Section 11B of Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002(herein after as 'CER'). The Department then filed appeal with the Commissioner (Appeals-II), Central Excise Mumbai on the grounds that in respect the rebate claim to the tune of Rs. 2,28,125/- (Rupees Two Lakhs Twenty Eight Thousand, One Hundred and Twenty Five Only) of ARE-1 No. 22 dated 23.04.2011 was wrongly sanctioned as the value of the goods was higher than the FOB value as shown in the Shipping Bill. The amount paid on such part of ARE-1 value over and above FOB value is not the duty of Central Excise, but is to be treated as 'Excess payment". Hence the sanction of rebate of such 'Excess payment' is in violation of Rule 18 of the CER. Therefore the Order-in-Original No. 1332/11-12/DC(Rebate)/Raigad dated 30.11.2011 sanctioning the rebate claim of Rs. 2,28,125/- is not legal and proper to that extent. The Commissioner (Appeals-II), Central Excise Mumbai vide Order-in-Appeal No. US/656/RGD/2012 dated 12.10.2012 set aside the Order-in-Original dated 30.11.2011 and the Departmental appeal was allowed.

3. Being aggrieved, the Appellant then filed the current Revision Application on the following grounds :

3.1 that when the Revenue has filed appeal only to the extent of Rs. 3,692/- the Commissioner(Appeal) could not have invented a totally new and false ground for rejecting / disallowing the entire rebate claim of Rs. 2,28,125/-. The impugned order is required to be set aside on this ground alone. In this relied on the following case laws:

(i) Tata Iron & Steel Co. Ltd Vs Collector of C.Ex., Patna [2005 (181) ELT 311 (SC)

(ii) Baboobhai Patel & Company Vs Collector of Customs [1993 (68) ELT 734 (Bom.)].

3.2 that the Commissioner(Appeal)'s adverse finding relying on paragraph 6.1 of Chapter 8 of CBEC's Excise Manual of Supplementary instructions was never at issue in the Order-in-Original or the EA-2 filed by the Department.

3.3 that it is settled law by the Apex Court that the order of adjudication/ appellate authority cannot be beyond the show cause notice as held in the case of *Hindustan Polyers vs CCE [1999 (106) ELT 12 (SC)]* and *Saci Allied Products [2—5 (183) ELT 225 (SC)]*. Therefore, the order of Commissioner(Appeals) is liable to be quashed as set aside.

3.4 that they prayed that the Order-in-Appeal be set aside and to restore the Order-in-Original.

4. A personal hearing in the case was held on 22.08.2019 which was attended by Shri S Suriyanarayanan, Advocate on behalf of the Appellant. The Appellant stated that the Order-in-Appeal mentions Self-sealing and as Kirloskar case as issue, were as the Department appeal was on totally different grounds.

5. 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.

6. Government observes that the Department had filed Form No. E.A.2 dated 24.04.2012 before the Commissioner(Appeals) –

"GROUNDS OF APPEAL

M/s Manish Packaging Pvt Ltd..... filed 19 Rebate Claims with the Deputy Commissioner (Rebate), Maritime Commissionerate, Raigad under Rule 18 of the Central Excise Rules, 200) read with Notification No. 19/2004 - CE (NT) dated 6.9.2004 as amended issued under Rule 18 of the Central Excise Rules, 2002. These Rebate Claims amounting to Rs.46,70,083/- were sanctioned by Deputy Commissioner (Rebate), Central Excise, Maritime Commissionerate, Raigad vide Order-in-Original No.1332/2011-12 dated.30.11.2011 and communicated to Audit for review on 09.01.2012.

Upon examining the above Order-in-Original, I find that the order is not legal and proper because of the following:-

In the following Rebate claims the value of the goods shown in the ARE-1s is higher than the F.O.B. value as shown in the shipping bill which is evident from the following table :-

Sr. No.	R.C No. & date	ARE-1 No. & date	S/B No. & Date	Rate of duty	Value of ARE-1	FOB value (Rs)	Amount of rebate due (Rs.)	Amount of rebate sanctioned (Rs.)	Excess paid (Rs.)
1	7531 dt 19.7.11	22 dated 23.4.2011	3361590 dt 23.4.11	10%	22,14,804	21,78,962	2,24,433	2,28,125	3,692

The FOB value shown in the shipping Bill is arrived after reducing the Freight and Insurance charges (if any) from commercial invoice value. The commercial invoice value is the value at which goods are sold. The transaction value as per Section 4 of the Central Excise Act, 1944 is the value at which goods are sold but does not include freight and Insurance. Therefore, the value after deduction freight and insurance from commercial invoice value (which is equal to FOB value) should be the transaction value for the purpose of Section 4 of Central Excise Act, 1944.

In the present cases, the ARE-1 value being higher than FOB value includes an amount towards insurance & freight charges and other amount (if any) not part of the transaction value as per Section 4 of the Central Excise Act, 1944. Therefore, the amount paid on such part of ARE-1 value over and above FOB value is not the duty of Central Excise but it is to be treated as "Excess payment". The rebate in terms of Rule 18 of the Central Excise Rules, 2002 is the rebate of Central Excise duty paid on the exported goods. Hence, the sanction of rebate of such 'Excess payment' is in violation of Rule 18 of the Central Excise Rules, 2002. Therefore, the Order-in-Original No.1332/2011-12 dated.30.11.2011 is not legal and proper to that extent.

In view of the above, the Order-in-Original No.1332/2011-12 dated.30.11.2011 sanctioning the rebate claim of Rs. 2,28,125/- is not legal and proper.

RELIEF PRAYED

It is therefore prayed :

(a) To set aside the O-in-O No. 1332/2011-12 dated 30.11.2011 passed by the Deputy Commissioner (Rebate), C.Ex. Raigad, to the extent of Rs. 3,692/- in respect of Rebate Claims No. 7531, dated 19.07.2011.

(b) To pass any such order as may be deemed fit, on the basis of facts and circumstances of the case"

7. The Government observes that the Commissioner (Appeals-II), Central Excise Mumbai vide Order-in-Appeal No. US/656/RGD/2012 dated 12.10.2012 -

"The present appeal is filed by Revenue against the Order-in-Original No. 1332/11-12/DC(Rebate)/Raigad-dated 30.11.2011 passed by the Deputy Commissioner of Central Excise, Rebate, Raigad, on the ground that the rebate claim to the tune of Rs. 2,28,125/- was wrongly sanctioned as the respondent had not followed the procedure of self sealing as required vide Para 3(a)(xi) of Notification No. 19/2004-CE(NT) dated 06.09.2004. Reliance is placed on the decision of Hon'ble Tribunal in the case of M/s Kirloskar Brothers Ltd. reported in 1997 (94) ELT 176 (Tri.).

A personal hearing.....

I have gone through the case records and considered the averments made in the appeal and at the time of personal hearing. The short issue involved in the appeal that the respondents failed to comply with the basic conditions of 'self-sealing procedure' mentioned under Notification 19/2004-CE(NT) dated 06.09.2004. Para 6.1 of Chapter 8 of CBEC;s Excise Manual of Supplementary Instructions reads as follows –

"6.1. The facility.....

.....having number _____under my supervision."

From the above it is clear that the above mentioned provision is mandatory provision and the respondents has not followed the procedure as laid down in Para 3(a)(xi) of Notification No. 19/2004-CE(NT) dated 06.09.2004. Moreover, the respondents have also not submitted any documentary evidence to prove that the goods wer actually opened and examined by the Customs Department, therefore, identity of the gods exported was not established. Therefore, the rebate claim was wrongly sanctioned.

In view of the above, the impugned order is set aside and the appeal is allowed."

Here, Government finds that the Commissioner(Appeal) in his impugned order has deviated away from the grounds of appeal filed by the Department. Hence the Order-in-Appeal is not legal or proper.

8. Government observes that the Applicant's rebate claim in respect of ARE-1 No. 22 dated 23.04.2011, the value of the goods was higher than the FOB value. The CIF value cannot be transaction value and for that matter freight and insurance beyond the port of export cannot be the part of transaction value and moreover any expenditure incurred beyond the international borders of India cannot be a part of valuation under Central Excise Act, 1944 in view of the provisions of Section 1 of Central Excise Act, 1944 wherein the jurisdiction of the said Act extends to the whole of India and not beyond. Government finds that the rebate of duty is to be allowed

of the duty paid on the transaction value of the goods determined under Section4 of the Central Excise Act, 1944 i.e. in this case Rs. 2,24,433/-.

9. In this regard, Government observes that the identical issue has been decided by Government vide Revisionary Order No. 97/2014-Cx, dated 26-3-2014 in Re: Sumitomo Chemicals India Pvt. Ltd. reported in 2014 (308) E.L.T. 198 (G.O.I.). -

> *"it has been stipulated in the Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 and the CBEC Circular No. 510/06/2000-CX, dated 3-2-2000 that rebate of whole of duty paid on all excisable goods will be granted. Here also the whole duty of excise would mean the duty payable under the provisions of Central Excise Act. Any amount paid in excess of duty liability on one's own volition cannot be treated as duty. But it has to be treated simply a voluntary deposit with the Government which is required to be returned to the respondent in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11-9-2008 in CWP Nos. 2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. v. UOI reported in 2009 (235) E.L.T. 22 (P&H).*
>
> *Hon'ble High Court of Punjab & Haryana has observed that refund in cash of higher duty paid on export product which was not payable, is not admissible and refund of said excess paid duty/amount in Cenvat credit is appropriate. As such the excess paid amount/duty is required to be returned to the respondent in the manner in which it was paid by him initially.*

10. Government also places its reliance on the Hon'ble Gujarat High Court order dated 09.01.2016 in the Applicant's own case - In RE:Garden Silk Mills Ltd Vs UOI [2018 (2) TMI 15 Gujart High Court] where in it was held that

> *"9. Coming to the merits of the case, again undisputed facts are that the petitioner had paid excise duty on CIF value of goods exported. The petitioner*

does not dispute the stand of the Government of India that excise duty was payable on FOB value and not on CIF value. The Government of India also does not dispute the petitioner's stand that in such a case the additional amount paid by the petitioner would be in the nature of deposit with the Government which the Government cannot withhold without the authority of law. If these facts are established, a simple corollary thereof would be that the amount has to be returned to the petitioner. If therefore, the petitioner's request was for re-credit of such amount in Cenvat account, the same was perfectly legitimate. The Government of India should not have asked the petitioner to file separate application for such purpose.

10. In the result, the respondents are directed to recredit the excess amount paid by the petitioner categorizing as excise duty of CIF value of the goods to the Cenvat credit account.

11. Petition is disposed of."

11. Government finds that as the facts of the present Revision Application are similar to the above quoted cases, the ratio of the same is squarely applicable to this case.

12. In view of the foregoing discussion, Government holds that in the case of ARE-1 No. 22 dated 22.24.2011, the duty was paid on CIF value and therefore, rebate of excess duty paid on said portion of value which was in excess of transaction value is to be denied to the Appellant. Further, Government finds that any excess duty paid by the assesse has to be returned to them as the department is not authorised by law to retain the same with themselves and in view of this the re-credit of the balance duty should be allowed.

13. In view of above, Government finds that the excess paid amount of duty which is not held admissible for being rebated under Rule 18 of CER, 2002, is to be allowed as re-credit in their Cenvat credit account from where said duty was initially paid subject to compliance of provisions of Section 12B of Central Excise Act, 1944.

14. In view of above, Government holds that in ARE-1 No. 22 dated 23.04.2011, Rs. 2,24,433/- (Rupees Two Lakhs Twenty Four Thousand Four Hundred and Thirty Three Only) is admissible for rebate under Rule 18 of CER, 2002 and the excess paid amount of duty of Rs. 3,692/- (Rupees Three Thousand Six Hundred and Ninety Two only) which is held as not admissible for rebate under Rule 18 of CER, 2002, is to be allowed to the Appellant as re-credit in their Cenvat credit account. Under such circumstances, Government set-asides the Order-in-Appeal No. US/656/RGD/2012 dated 12.10.2012 passed by the Commissioner (Appeals-II), Central Excise Mumbai and the Order-in-Orignal No. 1332/11-12/DC(Rebate)/Raigad dated 30.11.2011 is modified and upheld to that extent.

15. Revision application is allowed in terms of above.

16. So, ordered.

(SEEMA ARORA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 137 /2019-CX (WZ)/ASRA/Mumbai DATED 31.10.2019

To,
M/s Manish Packaging Pvt Ltd,
Block No. 689, 690,691,
Maroli-Umbhrat Road,
Village- Maroli, Dist. – Navasari,
Gujarat.

Copy to:
1. The Commissioner (Appeals-II), Central Excise Mumbai.
2. The Commissioner, Central Excise, Raigad, 1st floor, CGO Complex, Sector 10, CBD Belapur, Navi Mumbai 4400 614.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy.