

REGISTERED  
SPEED POST



F.No. 195/147/12-RA-CX  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue... 26/11/13

ORDER NO. 1385 13-Cx DATED 25.11.2013 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 Order-in-Appeal No. 538  
/BK/RTK/2011 dated 29.12.2011 passed by Commissioner of  
Central Excise (Appeals), Delhi-III.

APPLICANT : M/s JSL Stainless Ltd., Hisar.

RESPONDENT : Commissioner of Central Excise, Rohtak.

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**ORDER**

These revision applications are filed by the applicant M/s JSL Stainless Ltd., Hisar against the order-in-appeal No. 538 /BK/RTK/2011 dated 29.12.2011 passed by Commissioner of Central Excise (Appeals), Delhi-III, with respect to orders-in-original passed by Deputy Commissioner Central Excise Division, Hisar.

2. Brief facts of the case are that applicant exported the goods on payment of duty and filed rebate claims of Rs. 29,51,182/-, which was initially sanctioned by the Deputy Commissioner of Central Excise, Hisar. It was observed subsequently that the export proceeds in respect of said goods have not been realized within the period allowed and FEMA, 1999; that as per Board's Circular No. 354/70/97-Cx dated 13.11.1997, the exporter is required to submit the Bank Realization Certificates (BRCs) of export within 160 days time, which the applicant failed to submit and accordingly, Show Cause Notice was issued proposing recovery of sanctioned rebate of Rs. 29,51,182/-. The original authority dropped the recovery proceedings w.r.t. rebate claims of Rs. 24,29,988/-, wherein the BRCs were submitted. However, the original authority confirmed the demand of recovery of Rs. 5,21,214/- on the ground that BRCs in rebate claims involved in said amount of Rs. 5,21,214/- could not be submitted. The original authority also imposed penalty of Rs. 5,21,214/- under section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002 and also imposed penalty of Rs. 5,000/- upon applicant under rule 27 of the Central Excise Rules, 2002.

3. Aggrieved by the said order-in-original, the applicant filed appeals before the Commissioner (Appeals) who rejected the same

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

4.1 Additional Commissioner has failed to appreciate that the goods have in fact been exported and the Board Circular No. 354/70/97-Cx dated 13.11.1997 provided that BRC could be taken as a collateral evidence in support of export of goods in case where T.R. copy (Transference copy) was not received by Customs Department within stipulated period in case of export of goods from ICD/CFS. In the present case there is no dispute about export of goods, therefore, the applicants have not violated the said Circular.

4.2 Additional Commission has failed to appreciate that neither Rule 18, nor Notification No. 19/2004-CE/(NT) dated 06.09.2004 provide that the realization of the export proceeds has to be produced. This is for the reason that realization of export proceeds is not the jurisdiction of Central Excise Department. However, the same is insisted upon by the Department only as collateral evidence of proof of export of the goods. Therefore, when the non-realization of foreign exchange is within the condonable limits as per RBI Circular No. 33 dated 28.02.2007, the recovery of rebate granted to the applicant should not be made.

4.3 As regards Circular No. 354/70/97-Cx dated 13.11.1997 which provides submission of Bank Realization Certificates, Additional Commissioner has failed to appreciate law laid down by Hon'ble Supreme Court in case of Orient Pater Mills Ltd. Vs. U.O.I. 1978 (2) ELT J345, wherein it is held that quasi-judicial authority should treat the directions issued in the Board Circular as an expression of opinion and should apply their own mind to the issued under adjudication. Therefore, in the facts and circumstances of the case where the Rule 18 and Notification No. 19/2004-CE/(NT) dated 06.09.2004 do not provide for Bank Realization Certificate and the non-realization is within condonable limits as per the provision of RBI Circular, Additional Commissioner should not have passed the impugned order merely on the basis of Board Circular, ignoring all the said provisions.

4.4 The realization of export proceeds is governed by Reserve Bank of India and the Banks, who are the authorized dealers of foreign exchange. That it is well known that there is always volatility in the international market and sometimes there is bound to be some short realization on account of such volatility. To overcome this situation RBI has issued AP (Dir. Series) Circular No. 33 dated 28.02.2007 wherein it is provided that Status Holder Exporters are permitted write off outstanding bills upto an annual limit of 5% of their average annual realization during the preceding 3 calendar years or 10% of export proceeds during the financial year, whichever is higher. In case of the applicant the average of preceding 3 years export realization is Rs. 1444.47 crores approx. Therefore, even if there is non-realization of Rs. 72.22 crores (5% of Rs. 1444.47 crores), it is condonable. However, the amount of non-realization in the present case is only a minor fraction of the said amount i.e. Rs. 5,21,214/-. Thus, it is well within the limits of the said Circular.

4.5 The Additional Commissioner has not appreciated that he is not an authority under Foreign Exchange Management Act to allege violation of the said Act in realization of the amount. That the whole case of the Department is based on the allegation that the applicant had not realized foreign exchange as per FEMA. However, as per the foregoing paragraphs it is established that the applicant has duly realized foreign exchange as per the FEMA/RBI Guidelines. Therefore, the said allegation on the part of the Adjudicating Authority is not permissible.

4.6 The Additional Commissioner has also failed to appreciate the decision of Hon'ble Tribunal in case of Bank of Nova Scotia Vs. Commissioner of Central Excise, Bangalore – 2008 (228) ELT 474 wherein it is held that non-realization of export proceeds is covered by FEMA and Customs Authorities did not have any jurisdiction to adjudicate upon this point. Though, in the present case non-realization of amount has resulted on account of bonafide commercial transaction i.e. replacement given against earlier claim by the customers. Additional Commissioner has failed to appreciate that no duty liability can be fastened on an assessee merely by Board Circular in absence of any provisions

contained in Central Excise Act, Central Excise Rules or Notification issued thereunder. Though Rule 31 of Central Excise Rules, 2002 provides power to the Board to issue Supplementary Instructions, however, the said instructions have to be consistent with the provisions of the Act and the Rules. Circular No. 354/70/97-CX dated 13.11.1997 has neither been issued under Rule 31 of Central Excise Rule 2002, nor consistent with the provisions of the said Rule. Therefore, it cannot be used to create liability on the applicant. In this connection kind attention is invited to the decision of Hon'ble Supreme Court in M/s Sandur Micro Circuits Ltd. Vs. Commissioner of Central Excise- 2008(229) ELT 641 (SC) and Hon'ble Gujarat High Court in Welspun Gujarat Stahl Rohren Ltd. Vs. U.O.I. - 2010 (254) ELT 551 (GUJ.) wherein it is held that Circulars of Board which are contrary to/inconsistent with the Act and the Rules cannot be used to deny the benefit of rebate under Rule 18 of the Central Excise Rules, 2002. In case of WELSPUN, Hon'ble Gujarat High Court has specifically held that CBEC Circular cannot be permitted to nullify the effect of Notification No. 19/2004-CE(NT) dated 06.09.2004, which allows rebate of Excise duty paid on export of goods under Rule 18 of the Central Excise Rules, 2002.

5. Personal hearing scheduled in this case on 18.10.2013 was attended by Shri K.K.Gupta, Advocate, Shri Sanjeev Mishra, DGM (Excise) of applicant company and Shri Rajesh Yadav, Manager (Excise) on behalf of the applicant who reiterated the grounds of revision application. The applicant admitted in personal hearing that the BRCs are not received in impugned cases.

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

7. Government observes that order of recovery of sanctioned rebate claim of Rs. 5,21,214/- was ordered on the ground that the applicant failed to submit Bank Realization Certificate (BRCs) of export in terms of Board's Circular No. 594/70/97-CX dated 13.11.1997. The original authority also imposed penalty of Rs.

5,21,214/- under section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002 and also imposed penalty of Rs. 5,000/- upon applicant under rule 27 of the Central Excise Rules, 2002. Commissioner (Appeals) upheld impugned Order-in-Appeal. Now, the applicant has filed this revision application on grounds mentioned in para (4) above.

8. Government observes that the fact of non-submission of BRCs in respect of realization of foreign exchange has been admitted by the applicant. As per provisions of CBEC's circular No. 354/70/97-CX dated 13.11.1997, the recovery of sanctioned rebate claim is to be initiated if the exporter fails to submit BRC within 160 days from sanctioned of rebate claim. Further, the basis intentions behind export promotion schemes like rebate is to provide incentives to exporter so that foreign exchange could be earned, which in fact did not happen in this case. As the applicant admittedly failed to submit BRCs in this case, the recovery proceedings in terms of above said CBEC's circular dated 13.11.1997 can not be questioned.

Government notes that departmental authorities are bound by CBEC Circulars / Instructions and they have to comply with the same. Hon'ble Supreme Court has held in the case Paper Products Ltd. vs. CCE 1999 (112) ELT 765 (SC) that circulars issued by CBEC are binding on departmental authorities, they cannot take a contrary stand and department cannot repudiate a circular issued by Board on the basis that it was inconsistent with the statutory provision. Hon'ble Apex has further held that department's actions have to be consistent with the circulars, consistency and discipline are of far greater importance than winning or losing court proceedings. Government finds that as per rule 18 of Central Excise Rule-2002 rebate of duty paid on excisable goods exported is to be granted subject to compliance of procedure/conditions prescribed in the Notification. Here the duty paid would mean duty paid under the provisions of Central Excise law. Since the duty was to be paid as per effective rate, excess duty paid cannot be rebated under rule 18. In view of above position,

Government upholds the applicability of above said CBEC Instructions in this case. As such rebate claim is rightly denied by lower authorities.

8.1 Government observes that penalty under section 11AC of the Central Excise Act, 1944 can be imposed in case where allegation of mis-declaration, suppression of fact, fraud, collusion etc. with an intention of evade payment of duty, has been made. Government finds that no such grounds/allegation has been discussed by the original authority while invoking provision of section 11AC for imposition of penalty of Rs.5,21,214/-. As such, the imposition of penalty of Rs. 5,21,214/- is not sustainable and hence, is set aside. However, Government notes that penalty of Rs. 5,000/- has been rightly imposed under rule 27 of the Central Excise rules, 2002 for non-compliance of requirement of submission of BRCs within stipulated time in terms of above said circular dt. 13.11.1997. Hence, Government upholds order of penalty under rule 27 of the Central Excise Rules, 2002.

9. In view of above, Government modifies impugned Order-in-Appeal to the extent discussed above.

10. The revision application is disposed off in terms of above.

11. So ordered.

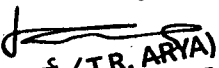


(D.P.Singh)

Joint Secretary to the Government of India

M/s Jindal Stainless Ltd.,  
O.P. Jindal Marg,  
Hisar (Haryana)

(Attested)



(टी. आर. आर्य / T.R. ARYA)  
अधीक्षक, आर.ए./ Superintendent RA  
वित्त मंत्रालय, (राजस्व विभाग)  
Ministry of Finance, (Deptt. of Re.)  
भारत सरकार / Govt. of India  
नई दिल्ली / New Delhi

G.O.I. Order No. 1385 dated 25-11-2013

Copy to:-

1. The Commissioner of Central Excise Rohtak, SCO No.6, Sector-1, Rohtak (Haryana)
2. Commissioner of Central Excise (Appeals), Delhi-III, Vanijya Nikunj, Udyog Vihar Phase-V, Gurgaon (Haryana)
3. Deputy Commissioner of Central Excise Division, 135-E, Model Town, Hisar
4. Shri K.K.Gupta, Advocate, B-137, Second Floor, Ramprastha, Ghaziabad-201011 (U.P.)
5. PS to JS(Revision Application)
6. Guard File
7. Spare Copy.

Supt. ( T. R. Arya )  
(Revision Application)