REGISTERED
SPEED POST

F.No. 195/735/11-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 26/11/13

ORDER NO. 1387 /13-CX DATED 26-11-2013 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 : Order in revision application filed, under Section 35 EE of the Central Excise Act, 1944 against the order-in-appeal No.IND/CEX/000/App/213/11 dated 31.05.2011 passed by the Commissioner of Central Excise (Appeals) Indore.

Applicant : M/s Alpha Laboratory Ltd., Indore

Respondent : The Commissioner, Central Excise, Indore.

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ORDER

This revision application is filed by Alpha Laboratory Ltd., Indore against the order-in-appeal No.IND/CEX/000/App/213/11 dated 31.05.2011 passed by the Commissioner of Central Excise (Appeals) Indore with respect to order-in-original passed by the Assistant Commissioner of Central Excise Division Indore.

2. Brief facts of the cases are as under:

2.1 The applicant vide ARE-1 No.183 dated 7.9.2010 have cleared the goods for export of payment of duty, under rebate claim in terms of Rule 18 of Central Excise Rules 2002. On getting proof of export, the applicant filed rebate claim of duty paid on finished goods amounting to Rs.322330/- along with the necessary documents. The original authority observed that the applicant was clearing the goods for domestic clearance by paying duty @4% under Notification No.4/2006-CE dated 1.3.2006, which prescribes effective rate of duty as 4% (in the case of P.P.Medicaments); whereas they were clearing the goods for export by paying higher rate of duty under Notification No.2/2008-CE dated 1.3.2008, at rate of duty of 10% advaloram only to avail higher amount of rebate. Accordingly, the adjudicating authority vide impugned order has sanctioned claim amounting to Rs.128932/- to the applicant in cash and balance amount of Rs.193398/- was allowed to be refunded by way of re-credit in their Cenvat Credit Account.

3. Being aggrieved by the orders-in-original applicant filed appeal before Commissioner (Appeals) who rejected the appeal.

4. Being aggrieved by the impugned order-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 It was argued before the Commissioner (Appeals) that the Assistant Commissioner has violated the principles of Natural Justice by not issuing the show cause notice. The primary purpose of the show cause notice in law is to put the aggrieved party on notice of facts and necessary ingredients of a charge so as to enable him to effectively meet it and this is one of the cardinal" PRINCIPLES OF NATURAL JUSTICE." Issuing of a show cause notice is a pre-requisite for initiation any legal proceeding. In this regard the applicant relied on Hon'ble Supreme Court judgment given in the case of Ramana Dasaram Sheety Vs. The International Airport Authority of India and others reported in AIR 1974 S.C. page 1628.

4.2 The applicant further argued before the Commissioner (Appeals) that the applicant had removed their final product in domestic tariff area for home consumption on payment of 4 % duty by taking benefit of exemption notification No. 4/2006 dated 1.3.2006, whereas at the same time they have paid duty at the rate of 10.30 % by claiming benefit of exemption notification No.2/2008-CE dated 1.3.2008 on the goods exported under the claim of rebate of duty paid through Cenvat account which is not permissible as per Central Excise Law. The Assistant Commissioner further held that if the applicant felt that the exemption under notification No.2/2008 dated 1.3.2008 is more beneficial to them they should have followed the same even for the payment of Central Excise Duty on DTA clearance. This finding of the Assistant Commissioner is totally wrong. This is because, at Serial No. 21 of exemption notification No. 2/2008-CE dated 1.3.2008 Chapter 3004 is specified mentioning applicable rate of duty as 14% . This notification was further amended vide Notification No. 58/2008 dated 7.12.2008 mentioning applicable rate of duty 10%. This Notification No. 4/2009-CE dated 24.02.2009 prescribing rate of duty 8%. Again this basis Notification No. 2/2008-CE dated 01.03.2008 was amended vide Notification No. 6/2010-CE dated 27.02.2010 prescribing rate of duty @ 10%. This being so as per Notification No.2/2008-CE dated 01.03.2008 as amended effective rate of duty

during September 2010 was 10 % adv. and as such the applicant have correctly paid duty @ 10% and have claimed rebate of duty paid on goods exported.

4.3 It was further argued that the adjudicating order refers to another Notification No. 4/2006-CE dated 01.03.2006 as amended prescribing effective rate of duty @ 4% which also covers the goods manufactured by the applicant and it is desired by the Department that the duty ought to have been paid at this reduced rate on goods exported and not @10% as prescribed vide Notification No.2/2008-CE dated 01.03.2008 as amended. This contention of the Department is not correct as per law. This is because exemption Notification No. 2/2008-CE dated 01.03.2008 as amended was issued under delegated legislature power and have full statutory force. This being so excise department is stopped from contending that the applicant cannot pay duty @ 10% by using this Notification and pay less duty @ 4% as per Notification which is beneficial to them. Excise Department/Authorities have no jurisdiction to direct or force assessee to follow a particular Notification which is beneficial to revenue. The order itself is without jurisdiction as no such power has been conferred on the authorities to raise such issue at the level when rebate claim is filed under Rule 18 of Central Excise Rules. The entire claim of the rebate has to be paid in cash.

4.4 The Applicant further argued before the Commissioner (Appeals) that the finding of the Assistant Commissioner that the applicant cannot avail the benefit of both the exempted notification simultaneously; is totally wrong. In support the Assistant Commissioner had relied on Apex Court's Judgment given in the case of Indian Petro Chemicals case reported in 1997(92) ELT 13 (S.C.). He further relied on Modi Xeros' case reported in 1997 (94) E.L.T. 139 and Parashuram Cements case reported in 2009(238) ELT 196 (Tri. Del). The fact of the above mentioned judgments are totally different and, therefore, cannot be relied in the applicant's case. It was further argued before the Commissioner (Appeals) that the same Assistant Commissioner Mr. Vishwanath in M/s Plethico

Pharamacuticals case, a company manufacturing the same products as that of the applicant, has allowed the rebate claim of the said company, when they had exported the goods by paying 10% of duty under Notification No.2/2008 dated 1.3.2008.

4.5 As per rule 18 of the 'rules' itself rebate of duty paid on excisable goods exported may be granted by the Central Govt. Now what is the meaning of, 'duty paid on excisable goods'. As per rule 4(1) of the 'rules' says, "every person who produces or manufactures any excisable goods shall pay the duty leviable on such goods in the manner provided in rule 8 or under any other law" This rule provides that every person engaged in the manufacture of excisable goods, can remove the goods from his factory only after payment of duty leviable on such goods.

As per rule 2(e) of the 'rules', 'duty' means the duty payable under Section 3 of the Central Excise Act, 1944. Further, as per Section 3(1)(a) of the Central Excise Act, 1944;

"There shall be levied and collected in such manner as may be prescribed a duty of excise on all excisable goods which are produced or manufactured in India, as,. And at rates set forth in the first schedule to the Central excise Tariff Act, 1985."

The rate of duty set forth in the first schedule to the Central Excise Tariff Act, 1985 is termed as Tariff Rate of duty and practically it may be seen that payment of duty is not effected as the tariff rates but duty is paid at the effective rates set forth by the Notifications issued for this purpose.

4.6 Though the Central Excise Notification Nos. 2/2008, 58/2008, 4/2009 and 6/2010 are issued under the powers of Section 5(A)(1) of the Central Excise Act, 1944, which empowers the Central Govt. to exempt excisable goods of any

description from the whole or any party of the duty of Excise leviable thereon. However, it can be seen that by Notification No. 6/2010-CE dated 27.02.2010, the rate of duty set forth in the first schedule of Central Excise Tariff Act, 1985 was enhanced from 8% to 10% Advaloram. It simply means that the standard rates of excise duty of tariff rates are changed by the Central Govt. by issuing Notification under the powers of Section5A(1) of the Central Excise Act, 1944. At the same time effective rates of duty on all excisable goods are also effected by the Central Govt. through the Notification which are also issued under the powers of Section 5A(1) of the Central Excise Act, 1944. In view of this there is a clear distinction between the Notifications which are issued to set forth the rate of duty in the first schedule of Central Excise Tariff Act, 1985 and the notifications which are issued for prescribing effective rates or duty on excisable goods, even though these notifications are issued under the powers of Section 5A(1)of the Central Excise Act, 1944.

4.7 Hon'ble Supreme Court in their judgments dated 07.05.96 in C.A.No.8762 of 1992 in case of CCE & Others V/s. Union of India (with Civil Appeals Mps/1965/86, 1966/86, 2328/86, 1059/81, 2393-2409/80, 1052/81, 285/88, 2155/87, 1415-16/86, 2178/95, 8263/95 and Civil Appeal Nos. 8748 & 7852 of 1996) has clarified that 'duty payable' is the duty paid after taking full effect to the existing exemption notifications. Thus in the present case duty payable is the duty payable after giving effect to the Notification No. 4/2006-CE dated 01.03.2006 as amended, which is the proper Notification for prescribing effective rate of duty to the products of the applicant and the applicant are also paying duty under this Notification for domestic clearances.

5. Personal hearing was scheduled in this case on 7.11.12, 20.2.13 and 15.10.13. Nobody appeared for hearing. Hence, Government proceeds to decide the case on the basis of available records.

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

7. Government observes that original authority restricted rebate claim to the extent of duty payable @4% and allowed recredit of balance amount in their cenvat credit account on the ground that duty was required to be paid on export clearance also @4% under Notification No.4/2006-CE dated 1.3.2006 and not at the higher rate of duty @10% under Notification No.2/2008-CE dated 1.3.2008. Commissioner (Appeals) upheld impugned order-in-original. Now, the applicant has filed these revision applications on grounds mentioned para (4) above.

8. It is observed that Central Government issued Notification No.2/08-CE dated 1.03.08 which has an effect of reduction in general rate of Central Excise Duty on various products from 16% to 14%. Thereafter, this notification was amended by Notification No. 58/08-CE dated 7.12.08 reducing the said general rate from 14% to 10%. Vide Notification No. 4/09-CE dated 24.02.09, said Notification 2/08-CE was further amended to reduce the general rate of duty from 10% to 8%which was further amended by Notification No. 6/10-CE dated 27.02.10 to enhance the said general rate of duty from 8% to 10%. Pharmaceutical drugs and medicines falling under Chapter 30 of First Schedule to Central Excise Tariff Act, 1985 covered under serial entry No. 21 of table to Notification No. 2/08-CE dated 1.03.08 as amended, attracted general tariff rate of duty @10%. At the same time the Notification No. 4/06-CE dated 1.03.06 providing for effective Nil rate of duty was amended vide Notification No. 4/08-CE dated 1.03.08 by inserting Sr. No. 62A, 62B, 62C, 62D & 62E for CETH 3001, 3003, 3004,3005 & 3006(except 3006.60 & 3006.92) prescribing effective rate of duty @8%. The Joint Secretary (TRU) vide his DO Letter No. 334/1/2008-TRU dated 29.02.08 had stated that the excise duty on drugs and pharmaceutical products falling under Central Excise Tariff Headings (CETH) No. 3001, 3003, 3004, 3005 & 3006 (except 3006.60 and 3006.92) was reduced from 16% to 8%

and thus general effective rate for all goods of Chapter 30 was now 8%. Thereafter, said Notification No. 4/06-CE was amended vide Notification No. 58/08-CE dated 7.12.08 where under effective rate of duty was reduced to 4% which was prevalent during the period when said exports were made.

8.1 The Joint Secretary (TRU) CBEC in his D.O. Letter DOF No. 334/1/2008-TRU dated 29.02.08 explained the changes made in excise and customs duties through Finance Bill, 2008 introduced in Lok Sabha on 29.02.08. In para 1, 2 & 3, he informed as under:-

"1. Central Excise

2. General Cenvat Rate: (Notification No. 2/2008-CE)

2.1 The general rate of excise duty (CENVAT) has been reduced from 16% to 14%. This reduction applies to all goods that hitherto attracted this general rate of 16%. In some cases, a deeper reduction has been made, the details of which are indicated in the subsequent paragraphs. These changes have been carried out by notification. The other ad volorem rates of 24%, 12% and 8% have bee retained.

2.2 Since the reduction in the general rate has been carried out by notification, the possibility of the same product / item being covered by more than one notification cannot be ruled. In such a situation, the rate beneficial to the assessee would have to be extended if he fulfils the attendant conditions of the exemption.

3. Drugs and Pharmaceuticals

3.1 Excise duty on drugs and pharmaceuticals falling under Heading Nos. 3001, 3003 (export Menthol crystals), 3004, 3005 and 3006 (except 3006 60 and 3006 92 00) has been reduced from 16% to 8%. Thus, the general effective rate for all goods of Chapter 30 is now 8%. However, certain specified items such as life saving drugs continue to be fully exempt. Excise duty has been fully exempted on Anti-AIDS drug ATAZANAVIR, and bulk drugs for its manufacture."

The Joint Secretary (TRU) CBEC has made it amply clear that reduction in General Tariff Rate has been carried out by Notification and therefore there could be a possibility of same item being covered by two notifications and directed that the rate beneficial to assessee may be extended. In the instant case, the applicant has availed both the rates of duty, which is not allowed in TRU letter. Here basically the issue involved is whether rebates of duty paid at tariff rate or effective rate is to be allowed and not exactly regarding applicability of two notifications for payment of duty.

8.2 It is felt that it is necessary to go into background to find out the reason behind the issue of these two notifications. Notification No. 4/2006-CE dated 1.03.06 when issued, originally did not prescribe any concessional rate of duty to medicaments of Chapter Heading 3004 and a concessional rate of duty @8% was prescribed by amending the said notification vide notification no. 4/2008-CE dated 1.03.08 and the same was further reduced to 4% vide amending the said notification vide notification no. 58/2008-CE dated 7.12.08. On the other hand, the tariff rate of duty for the Chapter heading 3004 was 16% adv. However subsequently reduction in general tariff rate of duty was effected as under:

The Hon'ble Finance Minister in his speech while presenting the Union Budget for 2008-09 in the Parliament stated that:-

"PART-B
VIII. PROPOSALS TAX

"Para 144. The manufacturing sector is the backbone of any economy. It is consumption that drives production and it is production that drives investment. Having carefully studied current trends of production and consumption, I believe there is a need to give a stimulus to the manufacturing sector. Hence, I propose to reduce the general CENVAT rate on all goods from 16 per cent to 14 per cent."

This proposed reduction in general tariff rate cenvat duty was carried out vide notification no. 2/2008-CE dated 1.03.08.

Further, the Hon'ble Finance Minister in his speech while presenting the Union Budget for 2009-10 in the Parliament stated that:

> *"PART B*
> *PROPOSALS TAX*
>
> *116. Hon'ble Members are aware that the Government announced a series of fiscal stimulus packages, one of the key elements of which was the sharp reduction in the ad valorem rates of Central Excise Duty for non-petroleum products by 4 percentage points across the board on 7th of December, 2008 and by another 2 percentage points in the mean Cenvat rate on the 24th February, 2009.*
>
> *117. .....*
> *118. .....*
> *119. .....*
>
> *120. With --- --- further convergence of central excise duty rates to a mean rate – currently 8 per cent. I have reviewed the list of items currently attracting the rate of 4 per cent, the only rate below the mean rate. There is a case for enhancing the rate on many items appearing in this list to 8 per cent, which I propose to do, with the following major exceptions: food items; and drugs, pharmaceuticals and medical equipment. Some of the other items on which I propose to retain the rate of 4 per cent are : paper, paperboard & their articles; items of mass consumption such as pressure cookers, cheaper electric bulbs, low priced footwear, water filers / purifiers, CFL etc.: power driven pumps for handling water and paraxylene."*

Further, the Hon'ble Finance Minister in his speech while presenting the Union Budget for 2010-11 in the Parliament stated that:

> *"PART – B*
> *INDIRECT TAXES*

142. Unlike the time I presented the last Budget, symptoms of economic recovery are more widespread and clear-cut now. The three fiscal stimulus packages that the Government introduced in quick succession have helped the process of recovery significantly. 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. –"

From above, it is noted that intention of legislature behind said two notifications is best revealed in the above said budget speeches of Hon'ble Finance Minister. It is quite clear that Notification No. 2/08-CE dated 1.3.08(14%) and subsequent amending Notification No. 58/08-CE dated 7.12.08 (10%), 4/09-CE dated 24.02.09(8%) and 6/10-CE dated 27.02.10(10%), were issued to reduce / alter the general tariff rate of duty.

8.3 Government observes that the instructions issued by CBEC regarding assessment of export goods are quite relevant to decide the issue involved in these cases. The instructions contained in para 4.1 of Part-I of Chapter 8 of CBEC Excise Manual on Supplementary Instructions relating to rebate of duty paid on excisable goods exported may be perused which are extracted as under:

"4. Sealing of goods and examination at place of dispatch

4.1 The exporter is required to prepare five copies of application in the Form ARE-1, as per format specified in the Annexure-14 to Notification No. 19/2004-Central Excise (NT) dated 6.9.2004(See Part 7). ***The goods shall be assessed to duty in the same manner as the goods for home consumption. The classification and rate of duty should be in terms of Central Excise Tariff Act, 1985 read with any exemption notification and/or Central Excise Rules, 2002.*** *The value shall be the "transaction value" and should conform to Section 4 or section 4A, as the case may be, of the Central Excise*

Act, 1944. It is clarified that this value may be less than, equal to or more than the FOB value indicated by the exporter on the Shipping Bill."

The plain reading of said para, reveals that the export goods shall be assessed to duty in the same manner as the good cleared for home consumption are assessed. Further the classification and rate of duty should be as stated in schedule of Central Excise Tariff Act, 1985 read with any exemption notification and/or Central Excise Rules, 2002. These CBEC Instructions clearly stipulate that applicable effective rate of duty will be as per the exemption notification. The said instruction is issued specifically with respect to sanctioning of rebate claim of duty paid on exported goods and therefore the whole issue will have to be examined in the light of these instructions. As explained above, Notification No. 2/08-CE dated 1.03.08 as amended prescribed General Tariff rate of duty @10% which was in fact brought down from 16% to 14% and then to 8% and finally to 10% by different amending notifications. The notification No. 4/06-CE dated 1.03.06 as amended prescribed effective rate of duty from initial rate of 0% to 8% and finally to 4% by different amending notifications. As such it is not correct to say that it is a case of applicability of two notifications only and assessee is at liberty to choose any one notification which is beneficial to him. In this case, notification No. 2/08-CE as amended provided for General tariff rate of duty and Notification No. 4/06-CE as amended provided for effective rate of duty and they have to be strictly construed as such. Therefore they have to be read together as stipulated in para 4.1 of Part-I of Chapter 8 of CBEC Excise Manual. In fact, this confusion has arisen since in this case the General tariff rate was reduced through Notification when special economic stimulus package was announced in 2008 by Government to deal with ongoing economic recession. Normally changes in General tariff rate are carried out through Finance Bill / Act. Government, therefore is of the view that duty was payable @4% on the export goods also and rebate cannot be granted on the duty paid in excess of effective

rate prescribed in the Notification No. 4/06-CE dated 1.03.06 as amended, as stipulated in the above said CBEC Instructions.

8.4 Further, it is also noticed that applicant are clearing goods for home consumption on payment of duty @4% in terms of Notification No. 4/06-CE as amended. The above said CBEC Instructions state that export goods are to be assessed in the same manner as the goods for home consumption. So, applicant has to assess all goods whether cleared for export or home consumption in a same manner. He cannot assess export goods as higher rate of duty @10% and good cleared for home consumption at lower rate of duty @4%. He has to choose any one notification and assess all clearance of goods in the same manner even if there are two effective rates of duty as per two notifications. In this case, the situation is different since Notification No. 2/08-CE as amended prescribed duty at General Tariff rate of 10% whereas effective rate of duty is 4% vide Notification No. 4/06-CE as amended. Even the Joint Secretary (TRU) CBEC in his D.O. Letter dated 29.02.08 clarified that rate of duty beneficial to assessee have to be extended. The said letter has not allowed payment of duty under both notifications. Assessee could have opted for one notification for all clearance even if it is considered as case of applicability of two notifications.

8.5 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.

8.6 Applicant has relied upon number of case laws to the proposition that it was upto the assessee to choose a notification which is most beneficial to him. Government notes that in the cases cited namely CCE Baroda vs. India Petro Chemicals, Hon'ble Supreme Court has held that when two notifications co-exit simultaneously, then assessee has the option to choose any one of the notifications beneficial to him. Hon'ble Apex Court has categorically held that in such a situation assessee has option to choose any one notification. Apex court has not stated that assessee can avail both the notifications simultaneously. Whereas in the instant case applicant has not chosen one notification for all the clearance but decided to avail benefit of both the notification. The apparent motive of clearing export goods at higher rate of duty @10% and goods for home consumption at 4% is to encash the accumulated cenvat credit. In terms of above said judgements also, the applicant is required to choose one notification whereas he has acted otherwise. Moreover, the said judgements are not in the context of sanctioning of rebate claims in terms of Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/04-CE(NT) dated 6.09.04 of the duty paid either at general tariff rate or at the effective rate. The cited case laws mainly relate to admissibility of exemption notification benefit in case of dispute of classification / eligibility of claimant. None of the said judgements are on the issue of sanctioning rebate of duty paid on exported goods. For applicability of the cited precedents "Government is of the opinion which is guided by the observations of Hon'ble Supreme Court in para 10 of the judgement in case of Escorts Ltd. vs. CCE Delhi-II 2004 (173) ELT 113 (SC) observed, which inter alia stipulates precedent –circumstantial flexibility - One additional or different fact

may make a world of difference between conclusion of two cases – Disposal of two cases by blindly placing reliance on a decision, not proper - In para 11 of said judgment following observations are made :-

"11. The following words of Lord Denning in the matter of applying precedents have become locus classicus:-

"... *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect in deciding such cases. One should avoid temptation to decide cases by matching the colour of one case against the colour of another .....".*

Therefore, there cannot be any strict statutory relied upon citation which can be taken as guiding precedents because each one of above citation have different background of factual merits pertaining to manufacturers manufacturing goods of different sub-headings following different set of Notifications, choosing different beneficial schemes and changing thereof in between a given financial year thereby leading to arise of different question of law.

8.7 Government further notes that following case laws lend support to the view that rebate is to be allowed of the duty paid on exported goods at effective rate prescribed in the notification and the excess paid amount as duty from the cenvat credit is to be refunded in the cenvat credit account.

8.7.1 Hon'ble Supreme Court has held in the case of CCE vs. Parle Exports 1988 (38) ELT 741 (SC) that when a notification is issued in accordance with power conferred by statute, it has statutory force and validity and therefore exemption under notification is, as if it were contained in the Act itself. Apex Court has clearly observed that any exemption notification specifying effective rate has to be complied with. In this regard, Hon'ble CESTAT Ahmedabad Bench in its judgement in the case of Mahindra Chemicals vs. CCE Ahmedabad 2007 (208) ELT 505 (T. Ahd.) while relying on above said Apex Court judgement has held

that exemption notification has to be construed as if this rate was prescribed by statute and when the legislature has decided to exempt certain goods by notification, the exemption cannot be negated by an assessee by opting for payment of duty.

8.7.2 Hon'ble Supreme Court has also held in the case of M/s Belapur Sugar and Allied Industries Ltd. vs. CCE 1999 (108) ELT 9 (SC) that even if duty paid under ignorance of law or otherwise, the rebate cannot be refused since party has paid the duty. Further, Hon'ble Apex Court has held that if the duty paid shown to be not leviable or entitled for rebate, the revenue has to refund, adjust, credit such amount to the assessee as the case may be.

8.7.3 Government also notes that Hon'ble High Court of Punjab & Haryana has examined the identical issue in the case of M/s Nahar Industrial Enterprises Ltd. vs. UOI 2009 (235) ELT 22 (P & H) where in assessee had paid duty on export goods at tariff rate of 16% ignoring the exemption notification No. 29/04-CE and 30/04-CE both dated 9.07.04 prescribing duty @4% and nil respectively. Hon'ble High Court has upheld the Government of India Revision Order upholding the order of original authority. In this case, original authority had allowed rebate of duty paid at effective rate of 4% and allowed re-credit of balance amount in the cenvat credit account of assessee. A specific submission regarding non-applicability of this judgement are on the ground that this decision in Nahar Industrial Enterprises case is per in curium and hence not applicable. It has been argued that the Apex Court judgement cited here for the proposition that assesse is at liberty to avail benefit of notification which is more beneficial to him, were not considered by Hon'ble High Court of Punjab & Haryana. In this regard, Government observes that applicability of said judgements of Hon'ble Supreme Court are already discussed in foregoing paras and therefore there is no merit in the pleading that said decision is per in curium. So as discussed above, this judgement of Hon'ble High Court is squarely applicable to the instant cases.

9. In view of position explained in foregoing para, Government finds that the applicants are not eligible to claim of rebate of duty paid @10% i.e. General Tariff Rate of Duty ignoring the effective rate of duty @ 4% in terms of exemption notification No. 4/06-CE dated 1.03.06 as amended. As such Government is of considered view that rebate is admissible only to the extent of duty paid at the effective rate of duty i.e. 4% in terms of Notification No. 4/06-CE dated 1.03.06 as amended, on the transaction value of exported goods determined under section 4 of Central Excise Act, 1944. The amount of duty paid in excess of duty payable at effective rate of 4% is to be treated as voluntary deposit made by manufacturer with the Government. The excess paid amount may be allowed to be re-credited in the Cenvat Credit account of the manufacturer subject to compliance of the provisions of section 12 B of Central Excise Act 1944.

10. In view of above position Government finds no infirmity in the impugned order-in-appeal and therefore upholds the same.

11. The revision application is rejected being devoid of any merit..

12. So, ordered.

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

M/s Alpha Laboratories Ltd.
33/2 A.B.Road, Pigdamber Distt. Indore
M.P.-453446

(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 Rev.)
Govt. of India
New Delhi

Order No. 1387/13-CX dated 26.11.2013

Copy to:-

1. The Commissioner of Central Excise & Customs, Keshar Bagh Road, Indore (MP)

2. The Commissioner (Appeals), Customs & Central Excise, 4, Indralok Colony, Keshar Bag Road, Indore, (MP).

3. The Assistant Commissioner of Central Excise, CGO Complex, Division – Indore, Indore

4. PS to JS (Revision Application)

5. Guard File

6. Spare Copy.

ATTESTED

27/11

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