REGISTERED SPEED POST

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, Cuffe Parade,
Mumbai- 400 005

F. NO. 195/629/13-RA/5533 Date of Issue: 28.11.19

ORDER NO. 140/2019-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. Swastik Techno Park Ltd., Mumbai.

Respondent : Commissioner of Central Excise, Mumbai-II

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No.58/M-II/2013 dated 21.02.2013 passed by the Commissioner of Central Excise (Appeals-II) Mumbai.

ORDER

This revision application is filed by M/s Swastik Technopack Pvt. Ltd. Mumbai (hereinafter referred to as "the applicants") against the Order-in-Appeal No. 58/M-II/2013 dated 21.02.2013 passed by the Commissioner Central Excise(Appeals-II), Mumbai.

2. Brief facts of the case are that the applicant is engaged in the manufacture of excisable goods falling under Chapter Sub Heading 84798200 of the First Schedule to the Central Excise Tariff Act, 1985. They are also engaged in export of their finished product. The export were being on payment of appropriate Central Excise Duty under claim of rebate as per the provisions of Rule 18 of the Central Excise Rules, 2002 as well as without payment of duty under Rule 19 ibid.

3. The applicant had cleared one consignment of finished goods on payment of duty under claim of rebate under Rule 18 of the Central Excise Rules, 2002. This consignment was cleared from the factory of the applicant under Central Excise Invoice No. 19 & 20 dated 25.06.2012 and ARE-1 No. 05/11-12 dated 25.06.2011. The goods were physically exported on 11,08,2011 vide Shipping Bill No. 4336460 dated 29.06.2011. Thereafter, the applicant filed a rebate claim of Rs.3,51,545/- (Rupees Three Lakh Fifty One Thousand Five Hundred Forty Five only) on 04.09.2012. As it appeared that the rebate claim had not been filed within stipulated period of one year from the relevant date (i.e. date of Shipment) a Show Cause Notice was issued to the applicant by the original authority proposing to reject the said rebate claim for contravention of Section 11(B) of Central Excise Act, 1944.

4. In its reply dated 08.11.2012 to the original authority, the applicant also submitted that one of its employees dealing with the Central Excise Work related to export formalities left the job without informing about the status of pendency with him and as a result, the rebate claim under Rule 18 of the Central Excise Rules, 2002, for the said goods actually exported on 11.08.2011 vide Shipping Bill No. 4336460 dated 29.06.2011 could not be filed in time and the same came to be filed only on 04.09.2012 with an

alleged delay of 24 days beyond the prescribed time limit of one year prescribed under Section 11 B of the Central Excise Act, 1944.

5. Vide Order in Original No. HKT/Rebate/15/Powai/Swastik/1 dated 03.12.2012 the Assistant Commissioner, Central Excise, Powai Division, Mumbai-II (Original authority) rejected said rebate claim filed by the applicant.

6. Being aggrieved by the said Order in Original dated 03.12.2012, the applicant filed the appeal before Commissioner (Appeals) who vide Order in Appeal No. 58/M-II/2013 dated 21.02.2013 observed that rebate claim was filed by the applicant after a period of one year of the relevant date for filing rebate claim i.e. after one year from the date on which the goods meant for export left India and therefore the rebate claim was rightly rejected by the adjudicating authority. Accordingly, Commissioner (Appeals) upheld the Order in Original dated 03.12.2012 and rejected the appeal of the applicant.

7. Being aggrieved with the above Order-in-Appeal, the applicant has filed this Revision Application under Section 35EE of Central Excise Act, 1944 before the Government mainly on the following grounds that :

7.1 the impugned order is a non speaking order, in as much as, the Commissioner (Appeals) has not answered the contention of the applicants that the lower authority had passed the Order in Original without specifying how the judgment of the Honorable High Court of Mumbai in the case of M/s Uttam Steels Limited reported in 2003 (158) ELT 0274 (Bom) would not be applicable to the facts of the present case, wherein, the Honorable Bombay High Court held that rebate claim should not be rejected only on the ground of limitation if all the other conditions are satisfied.

7.2 the Assistant Commissioner had observed in the order that as per the judgment of the Honorable Supreme Court in the case of M/s East India Commercial Company reported in 1983 (13) ELT 0342 (SC), the judgment of the High Court of Bombay would be applicable to him and relied on the judgment in the case of M/s Everest Flavours Ltd reported in 2012 (282) ELT 0481 (Bom). At the same time, the judgment of the same High Court delivered in the case of M/s Uttam Steels Limited which was also equally

applicable to the adjudicating authority in view of the ratio laid down by the Apex Court in the case of East India Commercial Company (supra), was neither considered nor any reasons cited for not considering this judgment. It would attract the attention of the appellate authority that the ruling of High Court of Bombay in the case of M/s Uttam Steels Limited was also a division bench judgment and this judgment was neither cited nor considered by the High Court of Bombay while rendering the decision in the case of M/s Everest Flavours Ltd. It is the submission of the applicants that since the judgment in the case of M/s Uttam Steels Limited was not considered by the High Court in M/s Everest Flavours Ltd, the ruling in M/s Uttam Steels Limited cannot be considered inferior in any manner and the ratio therein has to be appreciated as valid and subsisting. Having failed to do so, the impugned order which is a non speaking order, is required to be quashed and set aside on this very ground itself.

7.3 the Commissioner (Appeals) has merely referred to Para 1.2 of Chapter 8 of CBEC Manual. If the Notification does not state that the rebate is governed by Section 11 B, even though it is mentioned in the Section 11 B that the refund includes rebate of excise duty, the provisions of Section 11 B cannot be read into notification. It is a well settled legal position that nothing can be added or subtracted from the notification. The earlier notification in this regard i.e. Notification No. 41/94 dated 12.09.1994, made the provisions of Section 11B of the Central Excise Act, 1944 applicable to such rebate claims. Whereas, Notification No. 40/2001-CE (NT) dated 26.06.2001 which superseded the Notification No. 41/94 dated 12.09.1994 and which was in turn superseded by the current Notfn. No 19/2004-CE (NT) dated 06.09,2004, does not state that the rebate claims would be subject to the provisions of Section 11 B of the Central Excise Act, 1944. It would be interesting to note that both the subsequent Notifications which laid down the procedure for claim of rebate, do not refer to or state that the limitation prescribed under Section 11 B of the Central Excise Act, 1944 would apply to the rebate claims.

7.4 this omission in the subsequent two notifications was a conscious decision of the law makers with a view of ensure that no rebate claims are rejected on the ground of limitation alone. It is submitted that the applicants are entitled to rebate as per

the Notfn.No.19/2004-CE (NT) dated 06.09.2004, wherein, no limitation has been prescribed for claiming rebate.

7.5 this point was neither made nor considered by the Hon'ble High Court of Bombay in the case of M/s Everest Flavours Limited (supra), hence the said ruling would stand distinguished from the case before the learned adjudicating authority and therefore could not have been relied by the learned Assistant Commissioner. They submit that this issue was considered by the Hon'ble High Court of Madras in the case of M/s Dorcas Market Makers Pvt. Ltd reported in 2012 (281) ELT 227 (Mad) and it was held that rebate under Rule 18 of the Central Excise Rules, 2002 is not subject to Section 11 B of the Central Excise Act, 1944. Since this case was relied upon by them in their defence reply while contesting the matter at the lower authority and before the Commissioner (Appeals), both authorities were required to follow this ruling and allow the rebate claim. They once again reiterate its reliance on the judgment of the Honorable Madras High Court in the case of M/s Dorcas Market Makers Pvt. Ltd reported in 2012 (281) ELT 227 (Mad).

7.6 the Commissioner (Appeals) has erred in placing reliance on all those judgments and also erred in neither appreciating nor discussing anything about the judgment of Honorable Madras High Court in the case of M/s Dorcas Market Makers (supra) relied upon by the applicants.

7.7 its reliance on the judgment of the Apex Court in the case Collector of Central Excise. Jaipur v. M/s Raghuvar (India) Ltd. reported in 2000 (118) E.L.T. 311 (S.C), wherein, the Apex Court dealt with the question as to whether the limitation prescribed under Section 11A of the Central Excise and Salt Act 1944 would be applicable to any action taken under Rule 57(i) of the Central Excise Rules, 1944. The Hon'ble Supreme Court categorically held that the time limit prescribed under Rule 57-I of the Central Excise Rules alone is applicable and the said rule is not subject to Section 11A of the Act. As per the ratio of the Apex Court, Section 11 B of the Central Excise Act, 1944 would not be applicable to the rebate claims filed under Rule 18 of the Central Excise Rules, 2002.

7.8 neither the Assistant Commissioner nor the Commissioner (Appeals) have considered or refuted yet another contention of the applicants that the Notfn.No.5/2006-CE (NT) dt.14.03.2006 issued under the provisions of Rule 5 of the Cenvat Credit

Rules, 2004, which prescribes the procedure for refund on Cenvat Credit on inputs or input services used in manufacture of export goods or provision of export services, states that the application for refund of Cenvat credit should be made before the expiry of the period specified in Section 11 B of the Central Excise Act, 1944. However, there is no such condition prescribed in Notfn.No.19/2004-CE (NT) dated 06.09.2004 which evidently display the intent of the law maker that the limitation under Section 11 B ibid would not be applicable to rebate claims, more so when such a condition in the preceding notification i.e. Notification No. 41/94 dated 12.09.1994 dealing with rebate claims was omitted from the subsequent notifications.

7.9 it is a well settled legal position that a Notification has to be read as it is and nothing can be added or deleted from it. They would place reliance on the ruling of the Hon'ble Supreme Court in Union of India v. M/s Wood Papers Ltd. reported in 1990 (047) ELT 0500 (S.C.) wherein it was held that a notification should be construed strictly at the stage of considering availability of the benefit of the Notification to an assessee. However, once the availability of notification was held in favour of the assessee, then a liberal interpretation is required while extending the benefit under this notification to an assessee. The Apex Court in M/s Mangalore Chemicals and Fertilisers Ltd. v. Deputy Commissioner,reported in 1991 (055) ELT 0437 (S.C.) has also held that a distinction should be made between the substantive part of a statutory provision and the part which deals with only procedural matters.

7.10 they place reliance on the decision of Tribunal in the case of M/s Algappa Cements (P) Ltd reported in 2002 (148) ELT 1220 (T) wherein it is held that it is settled proposition of law that a Notification has to be interpreted in terms of the words used therein and nothing can be added or deleted.

7.11 without prejudice to the submission that the limitation prescribed under Section 11 B of the Central Excise Act, 1944 would not be applicable to rebate claims under Rule 18 of the Central Excise Rules, 2002, without admitting but assuming, the applicants submit that if the application for rebate of duty is not made within the period of limitation prescribed under Section 11 B, only the remedy is barred and not the substantive right to claim rebate of duty accrued under Rule 18 of the rules.

To put it differently, the limitation prescribed under Section 11 B ibid only deals with the procedural law and not the substantive law. They say and submit that the scheme of providing rebate of Central Excise duty paid on the materials used in the manufacture of finished goods or the duty paid on the finished goods exported to any country (except Nepal or Bhutan), is a reward to the exporters by the Government of India for the foreign currency which these exporters bring into the Country. Besides, the incentive scheme is extended to the exporters with a view to ensure that taxes/duties are not exported along with the goods. Such incentives also help the exporters in selling their goods at competitive prices and thus withstand the competition in the international market. If the exporters are denied such benefits on procedural grounds it will lead to a situation where the Central Excise duty paid by the manufacturer/exporter are retained by the Government with consequential export of goods along with taxes. There are no provisions under Section 11B of the Central Excise Act, 1944 which empowers or permits the Central Government to retain the amount of refund(refund also includes rebate of duty paid on exported goods" as per Explanation (A) to the said provisions) Even the provisions of unjust enrichment do not find applicability to exports under claim of rebate.

7.12 as per inbuilt provisions of Section 11B of the Act, and allegation made in the impugned show cause notice and upheld in the Order in Original and Order in Appeal, the delay in filing of rebate claim can only be classified as a contravention in relation to period of limitation attracting penal provisions, but denial of the rebate claim on the ground of limitation is certainly out of scope and jurisdiction of the said statute. In this regard the applicants reiterate their reliance on the judgment of the Honorable Madras High Court in the case of M/s Ford India Pvt. Ltd reported in 2011 (272) ELT 353 (Mad) (para 30 and 38).

7.13 in the written submission filed by them before the Commissioner (Appeals) they had drawn the attention to the provisions of Section 5 and 29 of the Limitation Act,1963, As per the above provisions of Section 29 of the Limitation Act, 1963, the limitation of one year laid down in Section 11B of the Central Excise Act, 1944 for refund claims would be subject to Section 3 of the Limitation Act, 1963 as if such period of limitation were the periods specified by the schedule to the limitation Act, 1963.

7.14 they without prejudice to the submissions made in the appeal memorandum and those contained in this submission, without admitting but assuming, had submitted that the case laws of M/s Dorcas Market Makers Pvt. Ltd. reported in 2012 (281) ELT 227 (Mad) (decided on 23.12.2011), Collector of Central Excise, Jaipur v. M/s Raghuvar (India) Ltd. reported in (2000 (118) ELT 311 (S.C.) and M/s Uttam Steels Limited reported in 2003 (158) ELT 0274 (Bom), are contrary to the provisions of Section 11B of the Central Excise Act, 1944 with regard to period of limitation stipulated therein. That it would not be a contentious issue that the applicant was entertaining the belief that in view of the ratio laid down in the above case laws the limitation of one year specified in Section 11B of the Central Excise Act, 1944 would not find application to rebate claims made under Rule 18 of the Central Excise Rules, 2002. Hence, as per the provisions of Section 5 of the Limitation Act, 1963, reproduced herein above, the existence of such rulings and belief placed by the applicant thereon, would be sufficient cause for not filing the rebate claim in time and hence needs to be condoned.

7.15 even the provisions of sub section (3) to Section 11 B ibid which reads as under, supports their above contention:-

Notwithstanding anything to the contrary contained in any judgement, decree, order or direction of the appellate tribunal or any court or in any other provision of this Act, or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub section (2).

Therefore, considering provisions under sub section (3) of Section 11 B of the Act, the prevailing court judgements and the spirit of Section 5 of the Limitation Act, 1963, as regards applicability of period of limitation to rebate claims, the substantive benefits of export cannot be denied to the applicant for a delay of 24 days in filing the rebate application.

7.16 in this regard they once again place reliance on the case of Union of India vs. M/s Straw Products Ltd reported in 1990 (45) ELT 562 (Ori) wherein it was held as under.-

'As regards the period of limitation, Section 5 of the Limitation Act may be applicable to such cases since the same does not appear to have been specifically excluded. Section 17 of the Limitation Act is also applicable to an application for refund'.

8. A Personal hearing in this case was held on 27.08.2019 and Shri Babula Nayak, GST and Excise Executive, duly authorized by the applicant, appeared for hearing and reiterated the submission filed through Revision Application and sought condonation of delay in filing the rebate claim.

9. 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. Government observes from the applicant's submission that one of its employees dealing with the Central Excise work relating to export formalities had left the job without informing about the status of pendency with him and as a result, the rebate claim under Rule 18 of the Central Excise Rules, 2002, came to be filed only on 04.09.2012 i.e. beyond the time limit of one year prescribed under Section 11 B of the Central Excise Act, 1944.The original authority rejected the rebate claim on these grounds and on appeal being filed by the applicant, Commissioner (Appeals) upheld the Order in Original. Now the applicant has filed this revision application on the grounds mentioned at Para 7 above.

10. The argument of the applicant is that the limitation period of one year is not specified under Rule 18 of the Central Excise Rules, 2002 and Section 11B of the Central Excise Act is not relevant for the rebate of duty. In support of their aforesaid claim, the applicant has relied upon various case laws mentioned in the Grounds of appeal at para 7 supra. Government observes that the decision of M/s Uttam Steels Limited reported in 2003 (158) ELT 0274 (Bom) which is heavily relied on by the applicant in this Revision Application has since been reversed by Hon'ble Supreme Court in Union of India (UOI) and Ors. v. Uttam Steel Ltd. [2015 (319) E.L.T. 598 (S.C.)] by categorically holding that the claim under Section 11B of the Act could be made only in cases where the claim is allowed, that is the claims made within limitation. Government further observes that issue regarding application of time limitation of one year is dealt by Hon'ble High Court of Bombay in detail in the case of M/s. Everest Flavour V. Union of India, (2012 (282) E.L.T. 48 wherein it is held that since the statutory provision

for refund in Section 11B specifically covers within its purview a rebate of Excise duty on goods exported, Rule 18 cannot be independent of requirement of limitation prescribed in Section 11B. In the said decision the Hon'ble High Court has differed from the Madras High Court's decision in the case of M/s. Dorcas Market Makers Pvt. Ltd. and even distinguished Supreme Court's decision in the case of M/s. Raghuvar (India) Ltd. which are relied upon by the applicant. Hence, the applicant's reliance on the decision in the cases of M/s. Raghuvar (India) Ltd and M/s. Dorcas Market Makers Pvt. Ltd. are not of much value.

11. Government further observes that for refunds and rebate of duty Section 11B of the Central Excise Act, 1944 is directly dealing statutory provision and it is clearly mandated therein that the application for refund of duty is to be filed with the Assistant/Deputy Commissioner of Central Excise before expiry of one year from the relevant date. Further in explanation in this Section, it is clarified that refund includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India. In addition to time limitation, other substantive and permanent provisions like the authority who has to deal with the refund or rebate claim, the application of principle of undue enrichment and the method of payment of the rebate of duty, etc. are prescribed in Section 11B only. Whereas Rule 18 is a piece of subordinate legislation made by Central Government in exercise of the power given under Central Excise Act whereby the Central Government has been empowered to further prescribe conditions, limitations and procedure for granting the rebate of duty by issuing a notification. Being a subordinate legislation, the basic features and conditions already stipulated in Section 11B in relation of rebate duty need not be repeated in Rule 18 and the areas over and above already covered in Section 11B have been left to the Central Government for regulation from time to time. But by combined reading of both Section 11B and Rule 18 of Central Excise Rules, 2002 it cannot be contemplated that Rule 18 is independent from Section 11B of the Act. Since the time limitation of 1 year is expressly specified in

Section 11B and as per this section refund includes rebate of duty, the condition of filing rebate claim within 1 year is squarely applicable to the rebate of duty when dealt by Assistant/Deputy Commissioner of a Division under Rule 18. Thus Section 11B and Rule 18 are interlinked and Rule 18 is not independent from Section 11B.

12. Government in this regard observes that the Hon'ble High Court Madras while dismissing writ petition filed by Hyundai Motors India Ltd. and upholding the rejection of rebate claim filed beyond one year of export [reported in 2017 (355) E.L.T. 342 (Mad.)] in its order dated 18.04.2017 by referring to Hon'ble Supreme Court decision in Union of India v. Uttam Steel Ltd., reported in 2015 (319) E.L.T. 598 (S.C.), observed as under:-

> *24. Therefore, the aforesaid decision of the Hon'ble Supreme Court, following the decision in the case of M/s. Mafatlal Industries Limited & Others. v. Union of India & Others reported in 1997 (89) E.L.T. 247 (S.C.) = (1997) 5 SCC 536 that such claims for rebate can be made only under Section 11B within the period of limitation as prescribed under the Act.*
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> *25. Therefore, the contention of the appellant that no time-limit is prescribed in the notification could not be accepted in view of proviso (a) to sub-section (2) of Section 11B of the Central Excise Act. Therefore, reading of Rule 18, there is no specific relevant date prescribed in the Notification to the effect that the relevant date on which final products or goods was cleared for export.*

13. Government applying the ratio of the aforesaid judgment observes that in the instant case, explanation B(a)(i) of Section 11B, stipulates the relevant date for computing the one year period for filing rebate claims. Once the statutory enactment prescribes something of this nature, the rules being a subordinate legislation cannot prescribe anything different from what is prescribed in the Act.

14. In view of the aforesaid discussion Government holds that the time bar under Section 11B precisely applies to the rebate claims filed under Rule 18 and Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004.

15. As such, Government finds no legal infirmity in the impugned Order-in-Appeal and hence, upholds the same.

16. The Revision Application is thus rejected being devoid of merit.

17. So, ordered.

31/10/19

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

ORDER No.140/2019-CX (WZ) /ASRA/Mumbai DATED 31.10.2019

To,

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Copy to:

1. The Commissioner of GST & CX, Mumbai East, Lotus.Info Center, Near Parel Station, Mumbai – 400012.
2. The Commissioner of CGST & C.Ex. (Appeals-II), 3rd Floor, GST Bhavan, Plot No. C-24, Sector –E, Bandra Kurla Complex, Bandra(East), Mumbai 400 051.
3. The Assistant/Deputy Commissioner , Division-VIII, GST & CX, Mumbai East, Lotus Info Center, Near Parel Station, Mumbai – 400012.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.