REGISTERED SPEED POST AD

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. 195/422/13-RA/395 Date of Issue: 12/02/20

ORDER NO. 143/2020-CX (WZ) /ASRA/MUMBAI DATED 03.02.2020 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. Aquatech Systems (Asia) Pvt. Ltd.
Plot No. 92, Ambi Talegaon MIDC Road,
At Ambi Village, Taluka Maval,
Dist. Pune 410 501

Respondent : Commissioner, Central Excise, Pune-I

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the OIA No. P-I/MMD/223/2012 dated 23.11.2012 passed by the Commissioner (Appeals), Central Excise, Pune-I.

ORDER

The revision application has been filed by M/s. Aquatech Systems (Asia) Pvt. Ltd., Plot No. 92, Ambi Talegaon MIDC Road, At Ambi Village, Taluka Maval, Dist. Pune 410 501(hereinafter referred to as "the applicant") against OIA No. P-I/MMD/223/2012 dated 23.11.2012 passed by the Commissioner (Appeals), Central Excise, Pune-I.

2.1 The applicant had cleared the goods; viz. "Sea Water RO Plant, Self Clearing Filter and Activating Carbon Filter" for export on payment of duty under claim of rebate in terms of Rule 18 of the CER, 2002. They had cleared the goods under ARE1 No. 007/11-12 dated 15.02.2012 and ARE1 No. 008/11-12 dated 24.02.2012 under excise invoice no. 016 dated 15.02.2012 and 017 dated 24.02.2012 directly from their factory under self-examination and supervision. They filed a rebate claim for Rs. 14,31,692/- on 14.05.2012 under their letter dated 20.04.2012 in terms of Section 11B of the CEA, 1944 read with Rule 18 of CER, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004 on the ground that duties of excise had been paid by them on the said finished goods cleared for export under drawback shipping bill as per schedule "B" of the drawback scheme for rebate. They had cleared the excisable goods for export on payment of central excise duty in their CENVAT account.

2.2 The adjudicating authority sanctioned rebate of duties of excise amounting to Rs. 4,01,904/- and disallowed an amount of Rs. 10,29,788/-. The adjudicating authority held that the goods exported under ARE1 No. 007/11-12 dated 15.02.2012; i.e. New Sea Water RO Plant rightly falls under Sr. No. 8(c) of the Notification No. 06/2006-CE dated 01.03.2006 and therefore attracts Nil rate of duty. However, the applicants had paid duty @ 10.3% and claimed rebate of duty so paid. Further, they had availed CENVAT credit on inputs. The adjudicating authority averred that as per Section 5A(1A) of the CEA, 1944 read with Board Circular No. 940/01/2011-CX dated 14.01.2011 the applicant did not have the option to pay duty in respect of unconditionally exempt goods and could not have availed CENVAT credit of duty paid on inputs and thereafter claimed rebate under Rule 18 of the CER, 2002. Therefore, claiming rebate of duty paid on exempted goods was not correct and in the light of the circular, the applicant was not entitled to rebate of duty of Rs. 6,27,757/-. He further held that the goods viz. Self-cleaning Filter Skid-UF activated Carbon Filter Skid with accessories exported under the cover of ARE1 No. 008/11-12 dated 24.02.2012 are classifiable under Sr. No. 8 D

of the Notification No. 06/2006-CE dated 01.03.2006 and would attract duty @ 5%. However, the applicant had paid total duty of Rs. 8,03,935/- @ 10.3% of the assessable value against the duty payable @ 5.15%. The adjudicating authority therefore vide his OIO No. PI/Div-I/Reb/131/2012 dated 13.08.2012 held that the rebate should be considered on FOB value vide letter F. No. 209/21/85-CX 6 dated 10.04.1986 is to be restricted to 5.15% of FOB value of Rs. 78,03,965/- which would be Rs. 4,01,904/- and disallowed the remaining amount of Rs. 4,02,031/- in view of the circular dated 14.01.2011.

3. Aggrieved by the OIO dated 13.08.2012, the applicant preferred appeal before the Commissioner(Appeals). With regard to the denial of rebate claim on New Sea Water RO Plant, the Commissioner(Appeals) held that the goods rightly fall under Sr. No. 8(c) of Notification No. 06/2006-CE dated 01.03.2006 and therefore attracts Nil rate of duty and therefore the adjudicating authority had rightly denied the rebate claim in view of the provisions of Section 5A(1A) of the CEA, 1944 read with Board Circular No. 940/01/2011-CX dated 14.01.2011. He held that the applicant had no option to pay duty on unconditionally exempt goods and could not have availed CENVAT credit of duty paid on inputs. In so far as the Self Clearing Filter Skid-UF and Activated Carbon Filter Skid with accessories which fall under chapter heading 84212190 on which the effective rate of duty as per Sr. No. 8D of Notification No. 06/2006-CE dated 01.03.2006 is 5%, the Commissioner(Appeals) held that the adjudicating authority had rightly restricted the rebate claim to 5.15% paid in cash of FOB value of Rs. 78,03,965/-. However, the Commissioner(Appeals) held that the adjudicating authority had erred in not allowing the remaining amount paid by the applicant in their CENVAT account. In this regard, he placed reliance on the decision In Re : Evershine Polyplast Pvt. Ltd.[2012(278)ELT 133(GOI)]. The Commissioner(Appeals) held that the amount paid in excess; i.e. Rs. 4,02,031/- should be credited to the CENVAT account. The Commissioner(Appeals) vide the impugned order upheld the OIO dated 13.08.2012 in so far as it relates to disallowance of rebate claim in respect of fully exempted goods and ordered that the amount of Rs. 4,02,031/- paid in excess of the duty liability should be credited to their CENVAT account.

4. The applicant has now filed the subject revision application on the following grounds:

(i) They submitted that Sea Water RO Plant and Self Clearing Filter and Activated Carbon Filter fall under chapter heading no. 84212190 and that the Assistant Commissioner had erred in classifying Sea Water RO Plant under Sr. No. 8(C) of Notification No. 6/2006-CE dated 01.03.2006 and contended that effective rate of duty is Nil and that the exemption is unconditional.

(ii) They submitted that both the goods cleared by them; viz. "Sea Water RO Plant" and "Self Clearing Filter and Activated Carbon Filter" fall under Sr. No. 8D of Notification No. 6/2006-CE dated 01.03.2006 with effective rate of duty of 5%/6%.

(iii) The applicant further submitted that the Assistant Commissioner had wrongly held that Sea Water RO Plant falls under Sr. No. 8C of Notification No. 6/2006-CE dated 01.03.2006 and is fully exempt from excise duty. They submitted that the goods cleared by them were not replacable kits but were water purification or filtration equipments.

(iv) The applicant submitted that the finding of the Assistant Commissioner relying upon Circular No. 940/01/2011-CX dated 14.01.2011 with regard to ARE1 No. 07/11-12 dated 15.02.2012 wherein it had been clarified that the assessee would have no option to pay duty in respect of unconditionally fully exempt goods and cannot avail CENVAT credit of duty paid on inputs was also not proper as the goods were not fully exempt but attract 5% duty.

(v) The applicant averred that they were eligible for rebate of 5% of excise duty paid on New Sea Water RO Plant exported under ARE1 No. 007/15.02.2012 under Excise Invoice No. 16 dated 15.02.2012 since as per Sr. No. 8D of Notification No. 6/2006-CE dated 01.03.2006, the goods were chargeable to 5% excise duty. They therefore claimed that they were eligible for rebate claim of remaining amount of Rs. 6,27,757/- in respect of export effected under ARE1 No. 007/15.02.2012.

(vi) The applicant placed reliance on the decisions in the case of CCE, Bangalore vs. Maini Precision Products Pvt. Ltd.[2010(252)ELT 409(Tri-Bang.)], CCE, Delhi-I vs. M. F. Rings and Bearing Races Ltd.[2000(119)ELT 239(Tri)], Bharat Chemicals vs. CCE, Thane[2004(170)ELT 568(Tri-Mum)].

(vii) The applicant also relied upon CBEC Circular No. 510/06/2000-CX wherein it had been clarified that rebate of the full amount of duty paid on goods exported should be allowed. Therefore, since excise duty amounting to Rs. 14,31,692/- had been paid by the applicant, they submitted that they were eligible for full amount of duty paid.

(viii) The applicant submitted that even if it is assumed that the applicant had paid excess duty, as per Article 265 of the Constitution stipulates that tax can be collected only by authority of law and Article 300A of the Constitution states that no person shall be deprived of its property except by authority of law. Therefore, the duty/amount illegally collected cannot be retained by the Central Government.

(ix) The applicant placed reliance upon the case law of Anupam Products Ltd. vs. CC, ICD, TKD, New Delhi[2012(282)ELT 451] and Aman Medical Products vs. CCE[2010(250)ELT 30(Del HC DB] to aver that excess duty paid inadvertently without taking benefit of exemption is to be refunded.

5. The applicant was granted personal hearings in the matter on 15.01.2018, 02.02.2018 & 23.08.2019. However, none appeared on behalf of the applicant. The applicant has also not sought adjournment or filed any written submissions. The case is therefore taken up for decision.

6.1 The issue involved in the present case is that the applicant had cleared "New Sea Water RO Plant" and "Self-Clearing Filter Skid – UF activated carbon filter skid with accessories" for export under claim of rebate. The lower authorities were of the view that "New Sea Water RO Plant" was eligible for exemption under Sr. No. 8C of Notification No. 6/2006-CE dated 01.03.2006 and chargeable to Nil rate of duty whereas the applicant had paid duty at the rate of 10.30%. Therefore, the rebate claim in respect of the said product was rejected in its entirety. In the case of "Self-Clearing Filter Skid – UF activated carbon filter skid with accessories", the applicant had cleared the goods paying duty at the rate of 10.30% on the invoice value whereas the Department was of the view that these goods were eligible for exemption at Sr. No. 8D of Notification No. 6/2006-CE dated 01.03.2006 and liable to duty at the rate of 5.15%. Moreover, it was noted that as per the instructions issued by the CBEC vide letter F. No. 209/21/85-CX.6 dated 10.04.1986 rebate is to be sanctioned on the basis of FOB value of the goods

and therefore the rebate claim was restricted to the duty payable @ 5.15% on the FOB value of the goods. The amount of duty paid in excess of 5.15% of FOB value of the export goods was rejected.

6.2 Government observes that the product "New Sea Water RO Plant" cannot be said to conform to the description of excisable goods at Sr. No. 8C of Notification No. 6/2006-CE dated 01.03.2006 - "Replacable kits of all water filters except those operating on reverse osmosis technology". It appears from the description of the goods "New Sea Water RO Plant" that it would fall in the exception category for Sr. No. 8C of Notification No. 6/2006-CE dated 01.03.2006 as the letters "RO" are the acronym commonly used for "reverse osmosis" in relation to water purifiers. Moreover, the applicant has also submitted that the "New Sea Water RO Plant" cleared by them was not a replaceable kit but was a water purification or filtration equipment. In the circumstances, both the products exported by the applicant would be eligible for exemption under Sr. No. 8D of Notification No. 6/2006-CE dated 01.03.2006. Even assuming that the "New Sea Water RO Plant" was eligible for exemption at Sr. No. 8C of Notification No. 6/2006-CE dated 01.03.2006, it was chargeable to duty at the rate of 5% and not fully exempt.

7.1 The entire rebate in respect of the product "New Sea Water RO Plant" was rejected by the lower authorities on the premise that the applicant was hit by the embargo of Section 5A(1A) of the Central Excise Act, 1944. Similarly, after allowing rebate at the rate of 5.15% of FOB value, the central excise duty in excess of 5.15% of FOB value paid by the applicant on the "Self-Clearing Filter Skid – UF activated carbon filter skid with accessories" was allowed as CENVAT credit by the Commissioner(Appeals). However, the applicant has paid duty at the rate of 10.30% on both the products exported by them. As per the analogy adopted by the Department in these proceedings, the applicant would be eligible for rebate at the effective rate of 5.15% duty paid as they were eligible for exemption under Notification No. 6/2006-CE dated 01.03.2006 and the duty paid in excess of such amount would be allowed as re-credit in their CENVAT account. The basis for this action apparently is the fact that the applicant is eligible for unconditional exemption under Notification No. 6/2006-CE dated 01.03.2006 and therefore in terms of the provisions of Section 5A(1A), the applicant cannot pay duty in excess of the duty rate specified in the exemption notification.

7.2 At this point, it would be pertinent to understand the scope of the embargo under sub-section (1A) of Section 5A of the Central Excise Act, 1944. The text of the said sub-section (1A) of Section 5A of the Central Excise Act, 1944 is reproduced below.

> "(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods."

There are two crucial phrases in the sub-section which require careful consideration; viz. "whole of the duty of excise leviable thereon" and "granted absolutely". The inference that can be drawn is that the phrase "whole of the duty of excise leviable thereon" would mean an exemption which exempts excisable goods entirely or extinguishes the entire duty leviable on those goods. Similarly, the words "granted absolutely" signify that the exemption granted is complete or unconditional. In other words there are no provisos or conditions to the exemption granted. Purely by virtue of being the manufacturer of the goods specified in the exemption notification, the manufacturer becomes eligible for the exemption granted. When the sub-section (1A) of Section 5A of the CEA, 1944 is read in its entirety, it would be inferable that in a situation where the manufacturer is eligible for an exemption from the entire duty leviable on the excisable goods manufactured without any conditions attached, the manufacturer would no longer have the option to pay duty of excise on such excisable goods.

8. It is observed that there are essentially three different types of exemption notifications. There are exemptions which exempt unconditionally from the whole of the duty of excise leviable on excisable goods. There is a second category of exemption notifications which exempt from the whole of the duty of excise leviable on excisable goods subject to fulfillment of certain conditions. Then there is a third category of exemption notifications which exempts excisable goods from so much of the duty of excise specified thereon as is in excess of the amount calculated at the rate specified in the notification. In other words, the third category of exemption notifications do not exempt excisable goods from the whole of the duty of excise but only from a part thereof which may or may not come with conditions attached. In view of Section 5A(1A) of the CEA, 1944, the manufacturers who manufacture excisable goods which are eligible for

exemptions which exempt unconditionally from the whole of the duty of excise do not have the option of paying duty on the goods covered by such exemption. However, if the manufacturer is eligible for the benefit of an unconditional exemption notification granting exemption from the whole of the duty of excise as well as another exemption notification which grants conditional exemption from the whole of the duty of excise or partial exemption, the manufacturer would be at liberty to choose between these two exemptions for the notification which is more beneficial to them. The provisions of Section 5A(1A) would not be applicable to such a situation. The legislature has in its wisdom issued different exemption notifications in the public interest. Therefore, an interpretation which compels a manufacturer who is eligible for the benefit of two different exemption notifications to avail of the benefit of the exemption notification which exempts excisable goods unconditionally from the whole of the duty of excise would render the other exemption notification which grants conditional exemption from the whole of the duty of excise or partial exemption to become redundant. The scheme of law is such that each of the exemptions issued have a specific intent and purpose. Any inference which negates such coherent interpretation would defeat these purposes.

9. The Notification No. 6/2006-CE dated 01.03.2006 is the notification which is *pari materia* to the rebate claims involved in the present case. As would be forthcoming from the exposition hereinbefore, the exemption granted by Notification No. 6/2006-CE dated 01.03.2006 is not such exemption that the manufacturer has to compulsorily avail of it and therefore the provisions of Section 5A(1A) would not be applicable to manufacturers who do not intend to avail it. In other words, the manufacturers who are eligible for the benefit of exemption under the said notification could choose to not avail of its benefit and pay duty at the tariff rate.

10. Government observes that the tariff rate prescribed under the Central Excise Tariff Act, 1985 does not require any validation to be made applicable. The tariff rate is the basic mechanism through which the levy of central excise duty under Section 3 of the CEA, 1944 is given effect. In this case, it is observed that the tariff rate during the year 2011-12 for the entire chapter heading 8421 is 10% ad valorem. The applicant has chosen to pay duty at the tariff rate instead of availing the benefit of exemption under Notification No. 6/2006-CE dated 01.03.2006. The act of withholding and rejecting any part of the duty paid by the applicant would be in the nature of penalizing the applicant

who has exported excisable goods and depriving them of rebate legitimately due to them. There is also no case for allowing part of the duty paid in the CENVAT account as re-credit. Perhaps the action of allowing re-credit could have been justified if the applicant had paid duty at a rate which was more than the tariff rate or in the face of an unconditional exemption notification granting exemption from the whole of the duty of excise leviable and hit by the embargo of Section 5A(1A) of the CEA, 1944. Government is therefore of the firm view that the applicant cannot be faulted for paying excise duty at the rate of 10.3% ad valorem on the export goods and claiming rebate thereof.

11. In the light of these facts, the rebate claims filed by the applicant are held to be admissible. However, the rebate claims would be restricted to 10.3% of the FOB value of the goods which have been exported. The case is remanded back to the rebate sanctioning authority with a direction to sanction the rebate claims within a period of six weeks from the receipt of this order.

12. The revision application filed by the applicant is disposed of in the above terms.

13. So ordered.

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

ORDER No.143/2020-CX (WZ) /ASRA/Mumbai DATED 03.02.2020

To,

M/s. Aquatech Systems (Asia) Pvt. Ltd.
Plot No. 92, Ambi Talegaon MIDC Road,
At Ambi Village, Taluka Maval,
Dist. Pune 410 501

Copy to:

1. The Commissioner of CGST & CX, Pune-I Commissionerate.
2. The Commissioner of CGST & CX, (Appeals-I), Pune.
3. Sr. P.S. to AS (RA), Mumbai
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