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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.195/31/2018-RA / 1578 Date of issue: 17.03.2023

ORDER NO. 134/2023-CX (WZ)/ASRA/MUMBAI DATED 15.03.2023 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Prashi Pharma Pvt. Ltd.

Respondent: Commissioner of CGST, Palghar.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. NA-GST AIII-MUM-297-17-18 dated 16.01.2018 passed by the Commissioner, GST & CX. (Appeals-III), Mumbai

ORDER

This Revision Application is filed by the M/s. Prashi Pharma Pvt. Ltd. having their office at Gut No. 982/6 & 983/6, Village Shirgaon, Juna Satpati Road, Palghar, Dist. Thane – 401 404 (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. NA-GST AIII-MUM-297-17-18 dated 16.01.2018 passed by the Commissioner, GST & CX. (Appeals-III), Mumbai.

2. Brief facts of the case are that the Applicant manufacture P & P medicaments and had cleared a consignment of Quinine Sulphate tablets and Tetracycline tablets for export on payment of duty claiming rebate under Rule 18 of the Central Excise, Rules, 2002, which was sanctioned to them. However, said products attract Nil rate of duty by virtue of Notification No. 04/2006-CE dated 01.03.2006 as amended, hence, a demand notice had been issued to the applicant. The adjudicating authority, vide Order-in-Original No. 31/15-16 dated 21.01.2016, confirmed the demand notice for erroneous rebate sanctioned and disbursed to the applicant amounting to Rs.28,43,373/-, under Section 11A(1) along with interest under Section 11AA and imposed equal penalty of Rs.28,43,373/- under Section 11AC of the Central Excise Act, 1944. Aggrieved, the applicant filed an appeal which was rejected by the Commissioner (Appeals) vide the impugned Order-in-Appeal.

3. Hence, the Applicant has filed the instant Revision Application mainly on the following grounds:

a) It is respectfully submitted that entire production including Quinine Sulphate Tablets and Tetracycline Tables are exported and not at all sold locally by the Applicant. It is pertinent to mention that at the time of Export there was no any obligation to mention in any of the export related documents viz. ARE-1, Excise Invoice, Customs Invoice etc., that "the Goods being exported are exempted". Therefore the Applicants did not feel necessary to declare the same. Also, the fact that entire production are exported and no goods are sold locally, there was no

need to declare that their goods are exempted from excise duty, since filing classification list and/or price lists are abolished long back. As enumerated and evidenced in Para No.5 above, it is on record that we have indeed exported the goods under reference diligently following the procedure setout in the relevant notification and have even submitted Bank Realization Certificate (BRC) as proof of receipt of remittance of Foreign Exchange. It is therefore respectfully submitted that the Rebate of Rs.28,43,373/- sanctioned and disbursed after following due process of law should not be recovered from the Applicants.

b) It is pertinent to point out here that the duty paid by the Applicants has been considered as duty payment and also has been collected and accounted for in the Central Excise kitty by the government. However, in the impugned order a contrary view has been taken and the Duty paid on the said Exported goods has been treated as Deposit. As is well settled now that the Govt. cannot hold on to any money collected without the authority of law and therefore deserves to be returned to the Applicants. Precisely, the Learned Assistant Commissioner has complied with the above provision, by sanctioning and disbursing the refund of Rs.28,43,373/- to the Applicants. The Applicants wish to quote and rely on the ratio propounded by the Hon'ble Rajasthan High Court in the case law of Commissioner Versus Suncity Alloys Pvt. Ltd. - 2007 (218) E.L.T. 174.

c) Original Adjudicating authority in the present case is not reviewing his order / alter his OIO, but has to correct clerical mistake of equating the figure of Rebate Claim filed which he has correctly stated in OIO, with the amount of Rebate Claim sanctioned in Cash and by way of re-credit.

d) Without prejudice to what has been contended in aforesaid paragraphs, the Applicant wish to state and submit that as per the provisions of Rule 6(6)(v) of Cenvat Credit Rules, 2004 - the provision of Sub-Rule (1) of Rule 6 of Cenvat Credit Rules, 2004 shall not be applicable in case the excisable goods are removed without payment of duty for export under bond in terms of the provisions of Central Excise Rules, 2002. It is further submitted that as per Rule 5 of Cenvat Credit Rules. where any input or input service is used in the manufacture of

final product which is cleared for export under bond or letter of undertaking,....., the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final product cleared for home consumption or for export on payment of duty. Consequently, the Cenvat credit on inputs used by the Applicants for export of exempted final products was utilized for export on payment of duty and such duty was refunded to us since the goods were exported. It is submitted that the Applicants have exported the excisable goods without payment of duty under bond and therefore Rule 6(1) of CCR. 2004 is not applicable and the Learned Commissioner (Appeals-III) has erred in his finding vide para 8(b) of the impugned order that Cenvat Credit on inputs is not eligible on Exempted goods under Rule 6(1) of CCR, 2004. Therefore, the Applicants are legitimately eligible for the Cenvat credit of duty paid on the inputs and are consequently eligible for the Rebate of duty paid on the manufactured goods exported utilizing such credit. We wish to quote and rely on the following case law which squarely covers the above situation.

Nav Bharat Impex Versus Commissioner Of Central Excise, Delhi-I - 2015 (330) E.L.T. 674 (Tri, - Del.)

In the above case, the Hon'ble Tribunal has allowed refund of the Cenvat credit claimed on the inputs used in the Exempted goods which are exported under bond under Rule 5 of Cenvat Credit Rules, 2004. On the same analogy, Rebate of the duty paid on the exempted goods exported on payment of duty under Rule 18 of Central Excise Rules 2002 r/w Notification No. 19/2004-CE(NT) should be eligible to the Applicants.

e) We wish to further quote and rely on the ratio propounded by the Hon'ble Gujarat High Court in the case law of - Arvind Ltd. v/s. Union Of India - 2014 (300) E.L.T. 481 (Guj.)

The learned Commissioner erred in his findings vide para 9, last para of page No.6, that in the above case law the Court has allowed rebate claim since the appellants have not availed any other benefit i.e. Cenvat Credit. In the present case, the Applicants have not availed any other benefit than the CENVAT Credit on the inputs going into the

manufacture of exported goods, which is eligible to them. Therefore, the Rebate claim of the duty paid on the exported exempted goods, using the Cenvat Credit availed should not be denied to the Applicants.

f) We wish to quote and further rely on the following case law which was brought to the kind attention of the Commissioner (Appeals), who conveniently ignored the same and passed the impugned order - Union of India Versus Sharp Menthol India Ltd. 2011 (270) E.L.T. 212 (Bom. HC).

g) The Applicants have acted bona-fidely and there was no intention whatsoever to evade payment of duty at all on the part of the Applicant. The Applicants exported the entire goods manufactured by him. The Applicants exported majority of the consignments under bond. The inputs going into the manufacture of these goods exported have suffered Excise Duty. Therefore, the Applicants under a bona fide belief and understanding availed the CENVAT Credit of the same and cleared certain consignments for export paying excise duty and claiming Rebate of the duty paid on the exported goods. It is pertinent to mention here that at the time of Export there was no any obligation to mention in any of the export related documents viz. ARE-I, Excise Invoice, Customs Invoice, Shipping Bill, etc., that "the Goods being exported are exempted". Therefore the need to declare the same does not arise. Therefore, not declaring the above, under any stretch of imagination, cannot be construed to be suppression of facts and penalty cannot be imposed on the Applicants under Sec.11AC. The Appellants wish to quote and rely on the following case laws in support.

- 1978 (2) ELT J 159 SC Hindustan Steel Ltd. Vs State of Orissa
- 1994 (74) ELT9 SC- Tamil Nadu Housing Board V CCE
- 1990 (47) ELT 152T- EID Parry V CCE
- Hero Cycles Ltd. - 2005 (191) ELT 938
- Siddharth Tubes Ltd. - 2004 (178) ELT 659

h) It is further submitted that there was no willful misdeclaration on our part, in as much as, we have followed due process under excise law following ARE1 procedure, payment of Excise Duty, filing of Refund Claim and refund claim also sanctioned after due process of scrutiny

and verification by the Proper Officer. Therefore, extended period cannot be invoked under Section 11A of the Central Excise Act 1944. The Appellants further submit that they have filed monthly ERI Returns in time along with extracts of RG23A Part II & accounts. It is pertinent to point out here that the Triplicate (Pink) copy of the relevant ARE1s have been duly countersigned by the proper officers who have signed the documents only after verifying the facts given therein and got themselves satisfied. In view of this, extended period cannot be invoked and the show-cause-notice fails on this count alone and the demand for recovery of the Rebate granted already should be dropped forthwith.

i) Without prejudice to the above contention, in view of extended period not applicable to the present case majority of the demand is barred by limitation since show cause has been issued after lapse of ONE year. The department was fully aware of the matter and the show-cause-notice issued after a lapse of more than one year is null and void and not sustainable on the score of limitation alone. We draw support on the following case laws:

- 1990 (30) ECR 297T - SCN time-barred not enforceable
- 1987 (12) ECR 1135 1991 (33) ECR 249 T- suppression of facts not established extended period not applicable.
- 1992 (42) ECR 432 T - dept. in the knowledge of the matter extended period inapplicable

In the light of the above submissions, the applicant prayed to set aside the impugned order-in-appeal and allow the application with consequential relief.

4. Personal hearing in the case was fixed for 21.12.2022. Shri Anshul Jain, Advocate, attended hearing and submitted that the goods were cleared on payment of duty. He reiterated earlier submissions. He requested to set aside the order of Commissioner (Appeals).

5. Government has carefully gone through the relevant case records available in the case file, written and oral submissions and perused the impugned Order-in-Original and Order-in-Appeal.

6. Government observes that the main issue involved in the instant case is whether rebate of duty paid on export of exempted goods is allowed and whether Show Cause Notice was time barred?

7. Government observes that in the instant case the demand notice issued under Section 11A to the applicant for recovery of erroneously sanctioned rebate claim amounting to Rs.28,43,373/-, being duty paid on export medicaments which were exempted under Notification No. 4/2006-CE dated 01.03.2006 was confirmed alongwith interest and penalty.

8. Government observes that the relevant portion of said Notification No. 4/2006-CE dated 01.03.2006 reads as under:

> *In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading or sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act), as are given in the corresponding entry in column (2) of the said Table, from so much of the duty of excise specified thereon under the First Schedule to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table and subject to the relevant conditions specified in the Annexure to this notification, and the Condition number of which is referred to in the corresponding entry in column (5) of the Table aforesaid. Explanation.- For the purposes of this notification, the rates specified in column (4) of the said Table are ad valorem rates, unless otherwise specified.*

S. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
(1)	(2)	(3)	(4)	(5)
59.	30	Formulations manufactured from the bulk drugs specified in List 1. Explanation.-For the purposes of this notification, the expression "formulation" means medicaments processed out of or containing one or more bulk drugs, with or without the use of any pharmaceuticals aids (such as diluent, disintegrating agents, moistening agent, lubricant, buffering agent, stabiliser or preserver) which are therapeutically inert and do not interfere with therapeutical or prophylactic activity of the drugs, for internal or external use, or in the diagnosis, treatment, mitigation or prevention of disease in human beings or animals, but shall not include any substance to which the provisions of the Drugs and Cosmetics Act, 1940 (23 of 1940) do not apply	Nil	-

LIST 1 (See S. Nos.43, 44 and 59 of the Table)

(1) Streptomycin
(2) .....
(9) Tetracycline Hydrochloride
18) Quinine

Thus, the two medicaments exported by the applicant attracted Nil rate of duty with no conditions. Therefore, the applicant had no option to pay duty as per sub-section (1A) of Section 5A of Central Excise Act, 1944, under which said Notification was issued, which is reproduced hereunder:

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

Further, as per Rule 6(1) of the Cenvat Credit Rules, 2004:

> *(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule (2).*

Thus, no Cenvat Credit of input/input services used in the manufacture of the impugned exempted goods was allowed. Government observes that the applicant has not denied having availed Cenvat Credit on the inputs/input services used in the manufacture of the impugned exempted goods.

9. Government notes that as the applicant was not required to pay duty at the time of export, therefore, the amount debited by the applicant cannot be treated as duty paid in terms of provision of Section 3 of the Central Excise Act,1944. The rebate of duty paid on excisable exported goods is admissible when duty leviable as per Section 3 of Central Excise Act is paid. Thus, the impugned amount paid cannot be termed as a duty and therefore

rebate is not admissible under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 06.09.2004.

10. Government notes that there are specific provisions for granting refund/rebate of duty of excise paid on the exported goods as well as the inputs used in the manufacture of export goods under the Central Excise Act, 1944, read with the relevant Notifications issued thereunder. Rule 18 of Central Excise Rules, 2002 provides for rebate of excise duty paid on the export goods as well as the duty paid on materials used in the manufacture of export goods subject to compliance of the procedure, limitation and conditions specified in the Notification No. 19/2004-C.E.(N.T.) dated 06.09.2004 and 21/2004-C.E. (N.T.), dated 06.09.2004, as applicable. The Notification No. 21/2004-C.E.(N.T.) dated 06.09.2004 has been issued for grant of rebate on the inputs/excisable material used in the manufacture of dutiable/exempted export goods.

11.1 Government does not find the case laws relied upon by the applicant applicable in the instant case:

a. Commissioner v/s. Suncity Alloys Pvt. Ltd. - 2007 (218) E.L.T. 174
Government observes that as per this judgment, the Union of India is not entitled to retain any amount paid by an assessee on exempted goods and should refund it. Government notes that in the instant case the applicant had utilised ineligible Cenvat credit to pay duty at the time of export and therefore the question of returning the amount paid by them did not arise as concluded by the Original authority – *'I further find that noticee has also not claimed that the duty on such fully exempted goods has not been paid from such inadmissible Cenvat credit and therefore, I find that no re-credit is permissible in this case.'*

b. Arvind Ltd. v/s. Union of India - 2014 (300) E.L.T. 481 (Guj.)
Government observes that the Appellate authority has already discussed as to why this judgment is not applicable in the instant matter and Government concurs with it. The relevant extract from the impugned OIA is reproduced hereunder:

The Hon'ble High Court has mentioned that the appellants have reversed the Cenvat credit on the input credit used for manufacture of the said product, which are exported and have not availed any other benefit or in other words the Hon'ble Court's order has implied meaning that the Hon'ble Court has sanctioned the rebate only because the appellants have not availed any other benefit i.e. Cenvat benefit. However, in the present case, the appellants have availed the Cenvat credit in spite of fact that final product is absolutely exempted and have not reversed the same. I find that the judgment cited by not applicable in this case.

In fact, Government observes that the applicant has confirmed this fact by contending that – *'In the present case, the Applicants have not availed any other benefit than the CENVAT Credit on the inputs going into the manufacture of exported goods, which is eligible to them.'*

c. Union of India Versus Sharp Menthol India Ltd. 2011 (270) E.L.T. 212 (Bom. HC) and
d. Nav Bharat Impex Versus Commissioner of Central Excise, Delhi-I - 2015 (330) E.L.T. 674 (Tri, - Del.)

In both the above cases, exempted goods were exported under Bond and therefore by virtue of Rule 6(6)(5) of Cenvat Credit Rules, 2004, provisions of sub-rules (1), (2), (3) of Rule 6 ibid were not applicable. In other words, the assessee was eligible to avail and utilize Cenvat credit of inputs/input services used in manufacture of exempted goods which were exported under Bond. This is not the scenario in the instant case where ineligible cenvat credit availed on inputs/input services used in manufacture of exempted goods was utilzed to pay duty at the time of export of said exempted goods and subsequently claim rebate of same.

11.2 However, Government notes that the case law relied upon by the Appellate authority viz. Fresenius Kabi Oncology Ltd. [2016 (336) E.L.T. 289 (Cal.)[12-04-2016] is in pari materia with the instant case. The said case

also involves identical issue of rebate claimed on export of medicaments which were exempted under Notification No. 4/2006-CE dated 01.03.2006.

12. As regards time barring issue, Government concurs with the stand taken by lower authorities. The relevant Paragraph 13 of the impugned OIA is reproduced hereunder:

13. I find that, the Adjudicating Authority in para 31 of the Order-in-Original observed as under:

"I also find that since noticee never in any monthly returns filed by them with the department disclosed description of product and fact that they were clearing exempted medicaments on the payment of Central Excise duty, therefore I find that they have suppressed the true fact from the department and hence the demand for extended period is rightly invoked to this case?"

I find that, the Hon'ble High Court's observation implied that there may be possibility of mischief in paying the duty on exempted product after availment of Cenvat. The Adjudicating Authority has mentioned that the appellants have suppressed the fact. The combined effect of observation of Hon'b1e High Court and Adjudicating Authority's finding conclusively suggests that there is suppression and mischief. The Adjudicating Authority has correctly invoked the extended period and as the appellants have wilfully availed benefit not due, contravening the law, I find that the Adjudicating Authority has correctly imposed penalty of Rs. 2843373/- on the appellants under section 11AC of the Central Excise Act, 1944.

13. In view of the findings recorded above, Government upholds the Order-in-Appeal No. NA-GST AIII-MUM-297-17-18 dated 16.01.2018 passed by the Commissioner, GST & CX. (Appeals-III), Mumbai and rejects the impugned Revision Application.

Shrawan 15/3/23

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 134 /2023-CX (WZ)/ASRA/Mumbai dated 15.3.2023

To,
M/s. Prashi Pharma Pvt. Ltd.
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Copy to:

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   Dadabhai Road, Vile Parle (W), Mumbai – 400 056.

3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Notice Board.