REGISTERED
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सत्यमेव जयते

F.No.195/447, 449-455, 464-467, 472-479, 480-482, 486, 644,645-652/13-Cx &
198/19-37, 44-47, 55, 57-65/13-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6 FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 30.4.14

Order No. 160-225/2014-CX dated 28.04.14 of the Government of India, passed By Shri D. P. Singh, Joint Secretary to the Government of India, under Section 35 EE of the Central Excise Act, 1944.

Subject	:	Revision Application filed under Section 35 EE of the Central Excise Act, 1944 against orders-in-appeal No. (as reflected in the table of this order) passed by Commissioner of Central Excise (Appeals), Raigad, Mumbai-III & Mumbai-I.
Applicant	:	(1) M/s Cipla Ltd., Mumbai (2) Commissioner of Central Excise, Raigad/Mumbai-III
Respondent	:	(1) Commissioner of Central Excise, Raigad/Mumbai-III (2) Cipla Ltd., Mumbai.

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ORDER

These revision applications are filed by M/s Cipla Ltd., Mumbai as well as Commissioner Central Excise Raigarh/Mumbai-III against the orders-in-appeal passed by Commissioner of Central Excise (Appeals), Mumbai-III, CBD, Belapur, Navi Mumbai, as detailed in the following table:-

Sr. No.	Revision Application No.	Applicant	Revision Application filed against order-in-appeal No. & Date	Order-in-Appeal passed by Commissioner of Central Excise (Appeals)
1.	195/447/13	M/s Cipla Ltd., Mumbai	BC/442/MUM-III/12-13 dt. 6.12.12	Mumbai-III
2-8	195/449-455/13	-do-	BC/444-450/MUM-III/12-13 dt. 6.12.12	-do-
9-16	198/30-37/13	CCE Mumbai-III	BC/442 & 444-450/MUM-III/12-13 dt. 6.12.12	-do-
17-24	195/472-479/13	M/s Cipla Ltd., Mumbai	BC/559-566/MUM-III/12-13 dt. 30.1.13	-do-
25-28	198/23-26/13	CCE Mumbai-III	BC/559-562/MUM-III/12-13 dt. 30.1.13	-do-
29	198/55/13	-do-	BC/563/MUM-III/12-13 dt. 30.1.13	-do-
30-32	198/27-29/13	-do-	BC/564-566/MUM-III/12-13 dt. 30.1.13	-do-
33-35	195/480-482/13	M/s Cipla Ltd., Mumbai	BC/547-549/MUM-III(R)/12-13 dt. 28.1.13	-do-
36-38	198/19-21/13	CCE Mumbai-III	BC/547-549/MUM-III(R)/12-13 dt. 28.1.13	-do-
39	195/486/13	M/s Cipla Ltd., Mumbai	BC/554/MUM-III(R)/12-13 dt. 29.1.13	-do-
40	198/22/13	CCE	-do-	-do-

		Mumbai-III		
41	195/644/13	M/s Cipla Ltd., Mumbai	BC/658//M-III(R)/12-13 dated 25.3.13	-do-
42	198/57/13	CCE Mumbai-III	-do-	-do-
43-50	195/645-652/13	M/s Cipla Ltd., Mumbai	BC/659-666//M III/12-13 dated 25.3.13	-do-
51-58	198/58-65/13	CCE Mumbai-III	BC/659-666//M III/12-13 dated 25.3.13	-do-
59-62	198/44-47/13	-do-	BC/505 to 508/M-III/12-13 dated 17.01.13	-do-
63-66	195/464-467/13	M/s Cipla Ltd., Mumbai	-do-	-do-

2. Common brief facts of these cases, are that the applicant M/s Cipla Ltd, a merchant exporter filed rebate claims of duty paid on exported goods under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004. The manufacturers had paid duty on said exported goods @ 10% under Notification No. 2/08-CE dated 01.03.2008 as amended. Similarly the manufacturers had cleared said goods for home consumption on payment effective rate of duty @ 4% upto 28.02.11 and @ 5% w.e.f. 01.03.11 under Notification No. 4/2006-CE dated 01.03.2006 as amended. The original authority after following due process of law, held that duty was required to be paid on exported goods at the effective rate of duty @ 4%/5% in terms of Notification No. 4/2006-CE dated 01.03.2006 as amended and sanctioned the rebate claims to the extent of duty payable @ 4%/5%.

3. Being aggrieved by the said Orders-in-Original applicants filed appeals before Commissioner (Appeals) who modified the impugned Orders-in-Original to the extent

that, he allowed re-credit of amount rejected by the original authority, in the cenvat credit account from where duty was initially paid.

4. Now, being aggrieved with these Orders-in-Appeal, M/s Cipla Ltd. as well as CCE Mumbai-III have filed these revision applications before Central Government under section 35 EE of Central Excise Act, 1944 mainly on the following grounds:-

4.1 Grounds in Revision Application Nos. 195/447, 449-455, 464-467, 472-479, 480-482, 486, 644,645-652/13-Cx filed by M/s Cipla Ltd. :-

4.1.1 Both the Notifications under consideration do not have any provision excluding the other.

4.1.2 When both the notifications co-exist simultaneously and do not mutually exclude each other, an assessee has an option to choose whichever is beneficial. When pluralities of exemption are available, the assessee has the option to choose any of the exemption, even if the exemption so chosen is generic and not specific.

4.1.3 The tariff has not been amended by any Act of Parliament. When two Notifications – which are not mutually exclusive – co-exist in the books of law, the assessee has option to choose any one of them.

(i) In other words, when both the Notifications co-exist simultaneously and do not mutually exclude the other, they had option to choose between the aforesaid notifications. When pluralities of exemption are available, the assessee has the option to choose any of the exemptions, even if the exemption so chosen is generic and not specific. The above legal proposition is well settled by the Supreme Court in HCL Ltd. vs. Collector of Customs, New Delhi – 2001 (130) ELT 405 (SC), wherein it was held that – *"The question in these appeals is covered in favour of the applicant by the order of this Court in Collector of Central Excise, Baroda V Indian Petro Chemicals [1997 (92) ELT 13]. Where there are two exemption*

notifications that cover the goods in question, the assessee is entitled to the benefit of that exemption notification which gives him greater relief, regardless of the fact that that notification is general in its terms and the other notifications is more specific to the goods."

(ii) They also further referred and relied on following decision of Supreme Court, High Court and CESTAT for this proposition – (a) 1997 (92) ELT 13 (SC) – CCE vs. Indian Petro Chemicals, (b) 1991 (53) ELT 347(T) – Indian Oil Corporation Ltd. vs. CCE (c) 1990 (47) ELT 7 (T) – Coromandal Prints & Chemicals vs. CCE (d) 1989 (44) ELT 500 (T) – Dunbar Mills Ltd. vs. CCE (e) 1985 (22) ELT 574 (T) – Calico Mills vs. CCE, (f) 2009 (242) ELT 168 – Coca-cola Ltd. vs. CCE, (g) 2007 (209) ELT 321 (SC) – Share Medical Care vs. UOI (h) 1998 (108) ELT 213 – CCE vs. Cosmos Engineers (i) 2003 (160) ELT 1150 – CCE vs. Thermopack Industries (j) 1996 (83) ELT 123 (T) – Gothi Plastic Industries vs. CCE.

4.1.4 Notification No. 4/2006 & Notification No. 2/2008 co-exist in the books of law and are not mutually exclusive.

(i) It is an undisputed fact that both the Notifications under consideration are in existence simultaneously. Both the aforesaid Notifications do not have any provisions excluding the other. In other words, Sr. No. 62C of Notification No. 4/2006 does not have any provision stating that the said Notification has an over-riding effect over Notification No. 2/2008-CE dated 1.3.2008 and similarly, vice-versa. Both the Notifications have been issued under Section 5A of the Central excise act, 1944.

(ii) In view of the settled legal position as explained supra, they had the option to avail any of the Notification. The department cannot force any particular Notification on an assessee. Further, the legal position cannot be distinguished on the ground that Notification No. 2/2008 provides for general amendment to the rates in Tariff. Even if it is admitted for the sake of argument, still, this does not detract from the fact that it is still a Notification issued under

Section 5A only. The respondent has conveniently ignored the fact that if the rates in the Central Excise Tariff Act, 1985, are to be amended, it has to be done legally by way of a suitable Act of Parliament. Admittedly, there as been no Act of Parliament seeking to amend the rates prescribed in the Tariff.

(iii) The department has not pointed any provision under the Central Excise Act or rules made there under which has the effect of requiring the assessee to mandatorily avail the exemption Notification No. 4/2006-CE dated 1.03.06 (Sr. No. 62C) only.

4.1.5 They are entitled to entire refund of duty paid on goods exported.

(i) The Rule 18 of the Central Excise Rules, 2002, which grants rebate of the excise duty paid on goods exported , reads as under :

> *"Rule 18 where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification."*

(ii) The conditions and procedures to claim rebate are prescribed under Notification No. 19-2004-CE(NT) dated 6.09.04 and the essential condition prescribed under the said Notification is that the goods shall be exported after payment of duty. The fact that the goods which have been exported and have suffered excise duty is also not in dispute.

(iii) The CESTAT in the case of Gayatri Laboratories vs. CCE – 2006 (194) ELT 73 (T) held that rebate claim to the extent of duty paid is available and that the rebate claim cannot be restricted on ground that less duty should have been paid in terms of Notification.

4.1.6 Rebate sanctioning authority cannot question the assessment. It is well settled that rebate sanctioning authority cannot question the assessment of export consignment. As to how much duty ought to be paid is beyond the jurisdiction and realm of a rebate sanctioning authority. Hence, the impugned portion of the order-in-original is liable to be set aside. It is well settled that there is no estoppel in taxation. Hence, the fact that the applicants were availing Notification No. 4/2006-CE dated 1.03.06 in past is irrelevant for the present dispute.

4.2 Grounds in Revision Application of F.Nos. 198/19-37, 44-47, 55, 57-65/13-RA filed by department i.e. CCE Mumbai-III:-

4.2.1 In the impugned Orders-in-Appeal the Commissioner (Appeals) has allowed the excess duty paid as credit in the Cenvat accounts of the manufacturer which appears to be incorrect as it will lead to giving additional benefits to the manufacturer and will amount to "Unjust enrichment" as the manufacturer has already recovered the said excess duty from its buyer i.e. claimant, M/s Cipla Ltd, Mumbai. The Commissioner (Appeals) reliance on the decision of Hon'ble Punjab & Haryana High Court given in case of M/s Nahar Industrial Enterprises Ltd. and reported in 2009(235) ELT-22)P&H) is also not correct as the claimant in that case viz M/s Nahar Industrial Enterprises Ltd. was himself a manufacturer and not the merchant exporter as in the instant case. M/s Nahar Industrial Enterprises Ltd., being a manufacturer & exporter himself has not passed on the duty incidence to any other person. However, the same cannot be said in the instant case as here the manufacturer and exporter are different entities and the manufacturer has recovered the entire duty amount from the exporter. Therefore the case law of Hon'ble Punjab & Haryana High Court given in case of M/s Nahar Industrial Enterprises Ltd. cannot be applied to the instant case and its reliance by Commissioner (Appeals) is improper. It appears that the proper order could be to credit the excess duty paid by the manufacturer in the Consumer Welfare fund under Section 12C (2)(a) of Central Excise Act, 1944.

4.3 In Revision Applications No. 198/19-37, 44-47, 55, 57-65/13/13 filed by department, the respondent M/s Cipla Ltd. has filed following counter submissions:-

4.3.1 In caption subject matter, We M/s Cipla Ltd. is manufacturer as well as merchant exporter. We procured goods on loan license basis from various manufacturer situated across the country (hereinafter called as "Supporting manufacturer"). Further, as we are principal manufacturer, the raw material and packing material are supplied by us to the supporting manufacturer.

4.3.2 Also, these supporting manufacturers is availing CENVAT Credit on raw and packing material received and consumed in manufacturing of finished goods on our account. Also, they are paying the central excise duty on our behalf on finished goods from our CENVAT account. Therefore, we are only paying the job work charges to them. Hence, there is no question of passing the duty incidence by supporting manufacturer to us as the burden of duty has itself been born by us. We are submitting herewith some copies of Job work bill and declaration obtained from our supporting manufacturer.

4.3.3 Where we have dispatched goods for export from our own manufacturing unit we are having status of 'manufacturing exporter', and in such cases there is no question of passing the duty incident as duty is paid by us only. Also, the applicant in his application has not considered this fact where we have status of manufacturer exporter. The said matter is already been decided by your office vide order No. 1318-1329/2013-CX dated 15.10.2013. Vide said order your office has held that "The amount of duty paid in excess of duty payable at effective rat eof 4% or 5% is to be treated as voluntary deposit made by manufacturer with Government. The excess paid amount may be allowed to be re-credited in the cenvat credit account of the manufacturer subject to the compliance of the provision of section 12B of Central Excise Act, 1944". Though, we have not taken the cenvat credit against the said order but the direction of

Revisionary Authority of allowing the cenvat credit under provision of Section 12B is acceptable to us only in respect where we have status of "Merchant exporter".

4.3.4 We have clarified in above, which is self explanatory as per the order No. 1318-1329/2013 dated 15.10.2013 passed by your office, the provision of section 12B of Central Excise Act, 1944 in respect of unjust enrichment is subject to establishment of facts is applicable. Inn the present case also we have established the facts before you by compliance of provision under section 12B of Central Excise Act, 1944. Therefore, there is no unjust enrichment applicable and direction given by Commissioner (Appeals) of Central Excise and Customs, Commissionerate –Mumbai-III is correct. Also, the said issue has already been decided by your office and as concern to the said direction we do not have any dispute though we want entire rebate claim to be sanction by way of cash, thus we have already preferred writ petition no. WP/4488/2013 dated 07.05.2013 before Hon'ble Bombay High Court. Therefore you may please be decide the said matter in accordance to the order dated 15th October 2013 without granting the personal hearing, we request you to take this submission at your records before deciding the matter. Therefore ewe are not attending the personal hearing.

5. Personal hearing was scheduled in these cases on 04.03.2014, No body attended the hearing. The applicant vide letter dated 18.02.2014, had stated that Government has already decided the said issue in their own case vide G.O.I. Revision order No. 1133-1137/12-Cx dated 07.09.2012, and some other orders and therefore requested to decide these cases also without fixing any personal hearing.

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

7. Government notes that applicant M/s Cipla Ltd, a merchant exporter filed rebate claims of duty paid on exported goods under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004. The manufacturers

had paid duty on said exported goods @ 10% under Notification No. 2/08-CE dated 01.03.2008 as amended. Similarly the manufacturers had cleared said goods for home consumption on payment effective rate of duty @ 4% upto 28.02.11 and @ 5% w.e.f. 01.03.11 under Notification No. 4/2006-CE dated 01.03.2006 as amended. The original authority after following due process of law, held that duty was required to be paid on exported goods at the effective rate of duty @ 4%/5% in terms of Notification No. 4/2006-CE dated 01.03.2006 as amended and sanctioned the rebate claims to the extent of duty payable @ 4%/5%. In appeal Commissioner (Appeals), modified the impugned Orders-in-Original and allowed the recredit in cenvat credit account of the amount rejected as rebate. Now, both M/s Cipla Ltd. as well as department have filed revision applications against the same Orders-in-Appeal on the grounds stated above.

8. M/s Cipla Ltd. had has contended that both the said notifications has approval of Parliament and therefore they are at liberty to avail any notification which ever they find beneficial to them. Therefore they have claimed themselves to be eligible to rebate of duty paid on export goods @10% in terms of Notification No. 2/08-CE dated 1.03.08 as amended.

8.1 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 242.09, said Notification 2/08-CE was further amended to reduce the general rate of duty from 10% to 8%. Finally the Notification No. 2/08-CE was 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%. Even in Joint Secretary (TRU) DO Letter No. 334/1/2008-TRU dated 29.02.08, it was clearly 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) has been reduced from 16% to 8% and thus general effective rate for all goods of Chapter 30 is 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%. The Notification No. 4/06-CE was further amended vide Notification No. 4/11-CE dated 01.03.2011 and effective rate of duty was enhanced to 5% which was prevalent during the period when said exports were made.

8.2 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.

8.3 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 prescribed 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. Further Notification No. 4/06-CE was amended vide Notification No. 4/11-CE dated 01.03.2011 and the effective rate of duty was enhanced to 5%. 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.

8.4 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 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%, 8% to 4% and finally to 5% 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.

8.5 Further, it is also noticed that applicant are clearing goods for home consumption on payment of duty @4% or 5% 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% or 5%. 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% or 5% vide Notification No. 4/06-CE as amended. Even the Joint Secretary (TRU) CBEC D.O. Letter dated 29.02.08 stipulated 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.

8.6 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. In view of said principles laid by Hon'ble Supreme Court, Government upholds the applicability of above said CBEC Instructions in this case.

8.7 M/s Cipla Ltd. 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 and HCL Ltd. vs. CC New Delhi, 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 judgement 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.

8.8 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.

8.8.1 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.

8.8.2 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.

8.8.3 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.

8.9 M/s Cipla Ltd. have relied upon CBEC Circular No. 795/28/2004-CX dated 28.07.04 and 937/27/2010-CX dated 26.11.10 in support of their claim that they can avail both the notifications.

In this regard, Government observes that subsequent to Budget, 2004 number of changes were made in the excise duty structure on Textiles and Textiles Articles. Regarding issue No. 1, CBEC clarified in Circular No. 795/28/2004-CX dated 28.07.04 as under :

"Issue No. 1:

Can a manufacture of Textiles or Textiles articles avail full exemption under No. 30/04-CE dated 9.07.04 as well as clear similar or dissimilar goods on payment of duty under Notification No. 29/04-CE dated 9.07.04 simultaneously?

Clarification:

Notification No. 29/04-CE (prescribing optional duty at the rates of 4% for pure cotton goods and 8% for other goods) and Notification No. 30/04-CE(prescribing full exemption) are independent notifications and there is no restriction on availing both simultaneously. However, the manufacturer should maintain separate books of account for goods availing Notification No. 29/04-CE and for goods availing Notification No. 30/04-CE"

In this case, both the Notifications prescribed effective rates of duty. Notification No. 30/04-CE prescribed nil rate of duty provided manufacturer does not avail cenvat credit on inputs. This clarification does not say that duty can be paid at tariff rate when the exemption notification is existing. Simultaneously availment of these notifications is allowed in the said circular as they pertain to different situation like whether he is availing cenvat credit or not. This circular is of no help to the applicant as in their case there are no two conditional notifications prescribing two effective rates. Moreover, there is no such circular issued in case of pharmaceutical products pertaining to Notification in question allowing their simultaneous availment. The other Circular No. 937/27/2010-CX dated 26.11.10 is not applicable as in the

instant case there is no applicability of provisions of Section 5A(1A) of Central Excise Act, 1944.

8.10 Government observes that the M/s Cipla Ltd. has relied upon CBEC circular No.510/06/2000-Cx dated 3.2.2000.In this regard, the Government observes that w.e.f. 1.7.2000, the concept of transaction value was introduced for valuation of goods under Central Excise Act and therefore said Circular issued prior to the introduction of transaction value concept, cannot be strictly applied after 1.07.2000. As per para 3(b)(ii) of Notification No. 19/04-CE(NT) dated 6.09.04, the rebate sanctioning authority has to satisfy himself that rebate claim is in order before sanctioning the same. If the claim is in order he shall sanction the rebate either in whole or in part. The said para 3(b)(ii) is reproduced below :

"3(b) Presentation of claim for rebate to Central Excise :-

(i) .....

(ii) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacture or warehouse or, as the case may be, Maritime Commissioner of Central Excise shall compare the duplicate copy of application received from the officer of customs with the original copy received from the exporter and with the triplicate copy received from the Central Excise Officer and if satisfied that the claim is in order, he shall sanction the rebate either in whole or in part."

The said provisions of this notification clearly stipulate that after examining the rebate claim, the rebate sanctioning authority will sanction the claim in whole or part as the case may be depending on facts of the case. Government notes that said notification issued under Rule 18 of Central Excise Rules, 2002, prescribes the conditions, limitations and procedure to be following for claiming as well as sanctioning rebate claims of duty paid on exported goods. The satisfaction of rebate sanctioning authority requires that rebate claim as per the relevant statutory provisions is in order. He does not have the mandate to sanction claim of obviously excess paid duty and then initiate proceeding for recovery of the erroneously paid rebate claim. Therefore, the circular of 2000 as relied upon cannot supersede the provisions of Notification No. 19/04-CE(NT).

8.11 Government notes that said issued is already decided vide Government of India Revision Order No. 1318 – 1329/13-CX dated 15.10.2013 in the case of M/s Cipla Ltd., the same applicant party In the said order, it was held that rebate claim was admissible to the extent of duty payable at effective rate of duty @ 4% or 5% as the case may be and not of duty paid at the tariff rate of duty. The ratio of said decision is squarely applicable to these cases.

9. In view of position explained in foregoing para, Government finds that there is no merit in the contentions of applicant that they are eligible to claim rebate of duty paid @10% i.e. General Tariff Rate of Duty ignoring the effective rate of duty @ 4% or 5% 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% or 5% in terms of Notification No. 4/06-CE dated 1.03.06 as amended, as applicable on the relevant date on the transaction value of exported goods determined under section 4 of Central Excise Act, 1944.

10. The applicant department has challenged the impugned Orders-in-Appeal and contended that manufacturers have already recovered excess duty from its buyer M/s Cipla Ltd., Mumbai and allowing re-credit of excess paid amount in the cenvat credit account of manufacturer will lead to additional benefit to the manufacturer which will amount to unjustenrichment. As such department has argued that excess paid amount should be credit in the consumer welfare fund under section 12C(2)(a) of Central Excise Act, 1944, M/s Cipla Ltd has filed counter written reply and contended that M/s Cipla Ltd. is a manufacturer as well as merchant exporter, that they procured goods on loan license basis from various manufacturers and they are principle manufacturers as raw material and packing material is supplied by them. M/s Cipla Ltd. has claimed that there is no question of passing the duty incident as duty is paid by them only. The factual position is to be verified by the original authority from records. Government notes that in these cases claimant is a merchant exporter and duty on exported goods is paid by manufacturer. So, the re-credit of excess paid amount is to be allowed as ordered by

Commissioner (Appeals), only if the provisions of section 12B of Central Excise Act 1944 are complied with. The impugned Orders-in-Appeal are modified to the extent.

11. These revision applications are thus disposed of in terms of above.

12. So, ordered.

(D P Singh)
Joint Secretary(Revision Application)

M/s Cipla Ltd.,
Mumbai Central,
Mumbai-400 008.

Attested

(भागवत [illegible]/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
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Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

GOI Order No. 160-225 /14-CX dated 28 .04.2014

Copy to:

1. The Commissioner of Central Excise, Mumbai-III, 3rd & 4th Floor, 115, Vardaan Trade Centre, MIDC, Wagle Industrial Estate, Thane(W)-400 604.
2. The Commissioner of Central Excise (Appeals), Mumbai-III, 5th Floor, CGO Complex, CBD Belapur, Navi Mumbai – 400614.
3. Commissioner of Customs & Central Excise (Appeals) Mumbai Zone-I, Mumbai.
4. The Assistant Commissioner of Central Excise, 3rd Floor, 115, Vardaan Trade Centre, MIDC, Wagle Industrial Estate, Thane(W)-400 604.
5. Guard File.
6. PS to JS (RA)
7. Spare Copy

(भागवत शर्मा/Bhagwat Sharma)
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