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F.No.198/441/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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NEW DELHI-110 066

Date of Issue...5/12/12

Order No. 1646 / 2012-CX dated 04.12.12 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 order-in-appeal No. YDB/191/RGD/2010 dated 07.03.10 passed by Commissioner of Central Excise (Appeals), Mumbai Zone-II
Applicant	:	Commissioner of Central Excise, Customs & Service Tax, Raigad
Respondent	:	M/s Ipca Laboratories Ltd., Mumbai

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ORDER

This revision application is filed by the applicant Commissioner of Central Excise, Customs & Service Tax, Raigad against order-in-appeal No. YDB/191/RGD/2010 dated 07.03.11 passed by Commissioner of Central Excise (Appeals), Mumbai Zone-II. M/s Ipca Laboratories Ltd., Mumbai are the respondents herein.

2. Briefly stated facts of the case are that the respondent M/s Ipca Laboratories Ltd., Mumbai are manufacturer exporter holding Central Excise Registration No. AAAC1122MXM002 had filed rebate claims amounting to Rs.66,93,709/-. Assistant Commissioner (Rebate) Central Excise Raigad sanctioned Rs. 66,44,346/- out of the said claim vide order-in-original No. 405/10-11/AC (Reb.)/ Raigad dated 22.06.10. The department preferred the appeal against the said order-in-original dated 22.06.10 under section 35 E (2) of the C.Ex Act, 1944 on the grounds that as per the Notification No. 4/2006-CE dated 01.03.06 as amended by Notification 4/2008 dated 01.03.08 and 58/2008-CE dated 07.12.08, the effective rate of Central Excise Duty on the product falling under Chapter 30 have been reduced from 8% to 4% with effect from 07.12.08. It has been observed that the claimant had cleared their goods for export vide export invoice No. 892 dated 07.12.08 (ARE-1 No. 771/08-09 dated 07.12.08) on payment of Central Excise Duty @8.24% instead of @4.12% vide ARE-1 No. 771/08-09 dated 07.12.08. However, they were liable to pay Central Excise Duty @4.12% only. Assistant Commissioner (Rebate) has sanctioned the rebate of duty as claimed which is not proper.

3. the said order in original was reviewed by Commissioner of Central Excise, Raigad & department filed appeal before the Commissioner (Appeals), who after due consideration of facts, submissions & merits of the case rejected the same.

4. Being aggrieved by the impugned order-in-appeal, the applicant Commissioner has filed this revision application under Section 35EE of the Central Excise Act, 1944 before Central Government on the following grounds :

4.1 The Commissioner (Appeals) has erred in its findings inasmuch as:-

(i) The Commissioner (Appeals) accepted the ignorance on part of the assesse and jurisdictional excise officer.

(ii) The money extra paid on account of reduction of rate of duty does not to be treated as duty but the "amount" and it is required to be transferred to Consumer Welfare Fund under Section 11D of the Central Excise Act, 1944.

(iii) The Commissioner (Appeals) overlooked the Apex Court judgement which was cited by Commissioner (Appeals)himself.

(iv) Commissioner (Appeals) order is per in curium as it does not consider the provisions of Section 5A (1A) of the Central Excise Act, 1944 which stipulates that in case of unconditional exemption, no excess duty is payable.

4.2 The ignorance of law is not an excuse to pay the duty at higher rate. The goods are self assessed by the assesse and the assesse who are in excise for so many years; it is frivolous to give such an excuse. The assesse should be aware of the changes / modifications made in law & rate of duty etc. and implement them immediately as per the requirement.

4.3 In the case of Rakesh Kanungo vs. CCE Mumbai-2004 (178) ELT 1061 (Tri. Mum)] wherein inter alia it was held that "Appeal to Appellate Tribunal – Restoration of appeal – Ignorance of law is no excuse – Appeal withdrawn for filing application before Settlement commission -....."

4.4 In the case of Worldwide Diamand Mfgrs vs. CCE Vishakhapatnam – [2010 (249) ELT 402 (Tri. Bang.)] it was held that "Demand – DTA clearances of EOU – Non payment of 50% of Additional Duty of Customs leviable under Section 12 of Customs Act, 1962 in terms of Notification No. 2/95-CE – Assessee's plea that they were not aware of their liability rejected as ignorance of law was no excuse – it was more so as they had not contested their liability to duty – Section 11A of Central Excise Act,1944-"

4.5 By referring the following case laws, the Commissioner (Apepals0 rejected the departmental appeal vide impugned order-in-appeal No. YDB/49/RGD/2011 dated 21.01.11 and upheld the order-in-original dated 16.04.10 sanctioning rebate at higher rate of duty –

(i) Samrat International (Pvt.) Ltd. Vs. CCE – 1992 ELT 561 (SC) wherein it was held that self assessment of duty is only provisional assessment subject to the final approval by the proper officer.

(ii) Karan Associates vs. CC(Import) – 2009 (236) ELT – 23 (Bom) wherein it was held that even non-speaking assessment order is appealable.

(iii) Collector vs. Flock (I) Pvt. Ltd. – 2000 (120) ELT 285 (SC) wherein it was held that the every order passed by the Adjudicating Authority, which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently.

(iv) Priya Blue Inds. Ltd. Vs. CC(Prev.) – 2004 (172) ELT 145 (SC) wherein it was held that the officer considering the refund can neither sit in appeal or the assessment order nor can he review the assessment order. As long as order of assessment stands, the duty will be payable as per that order of assessment. The appeal filed by the revenue does not show that assessment of the duty on the export consignment was ever successfully challenged. As such the correctness of the assessment can also be not challenged in the proceedings related to rebate claim based on the said payment of the duty.

(v) CC (Imports) vs. Eurotex Industries and Export Ltd. – 2007 (216) ELT 137 (Tri. LB) – wherein, the Tribunal after discussing all the relevant case laws and the departmental instructions, reiterated that a refund is not maintainable unless & until the assessment order in pursuance of which the duty was paid has not been challenged.

4.6(a) In present system, determination of duty liability is done by the assesse himself under self-assessment. In the impugned refund case the jurisdictional Central Excise Officer has neither passed any decision nor any order. Hence, challenging of the same does not arise at all.

4.6(b) In the matter of the impugned rebate it is observed that the assesse has not filed the claim with the jurisdictional Assistant Commissioner but the claim is filed with the Maritime Commissioner, Raigad and the Assistant Commissioner, Rebate has passed the rebate order. The subject order-in-original is rightly challenged by the department before Commissioner (Appeals) under the provisions of Section 35(1) of Central Excise Act, 1944.

4.6(c) Hon'ble CESTAT in case of M/s Gimatex Industries Ltd. Vs. CCE Nagpur (2010 (261) ELT 1026 (Tri.Mum)] has held that in case of self assessment by the assesse, when neither any decision of Central Excise Officers nor any order of Central Excise Officers is available then challenging of the same does not arise. The Tribunal also relied in the case of Tribunal Order in Nagpur Transwell Power Pt. Ltd. Vs. CCE Nagpur – 2009 (243) ELT 459 (T), which disposing of the stay application, held that proposition that 'assessment' includes "self assessment" is not correct for the purpose of appeal under Section 35F of the Central Excise Act. The Tribunal held that it is difficult to envisage that the said provision of law provides for an appeal against self-assessment and held that withoukt any decision or order passed by the Central Excise Officer lower to the rank of Commissioner (Appeal) no appeal can be filed. The Tribunal in Gimatex Ind. Ltd. (supra) has distinguished the decision of Hon'ble Supreme Court in Priya Blue Ind. Flock (India) Ltd. And larger bench decision in Eurotex Ind.

4.7 However, the cited case laws are not applicable in as much as the goods are self assessed by the manufacturer and also the relevfant provisions of the rebate notification specifically stipulates that the rebate sanctioning authority shall satisfy himself as to the correctness of the rebate claim and that the duty has been correctly paid.

4.8 The provisions of para – 3(b) of the Notification No. 19/2004 (NT) dated 6.09.04 issued under Rule 18 of the Central Excise Rules, 2002. Clearly spelled out that if the proper officer (i.e. AC/DC of Central Excise having

jurisdiction over the factory or Maritime Commissioner is satisfied himself that the claim is in order then he shall sanction the rebate either in whole or part. This means that he is empowered to look into the correctness of the rebate claim.

4.9 From the above, it seems that the rebate sanctioning authority should examine and satisfy himself that the rebate claim is in order in all respect and if it is not in order, he can restrict the claim amount.

4.10 Further, paragraph 8.4 of Chapter 8 of CBEC Centrla Excise Manual reads as followed –

"8.4 - After satisfying himself that the goods cleared for export under the relevant ARE-1 applications mentioned in the claim were actually exported, as evident from the original and duplicate copy of ARE-1 duly certified by Customs, and that the goods are of 'duty-paid' character as certified on the triplicate copy of ARE-1 received from the jurisdictional Superintendent of Central Excise (Range Office) the rebate sanctioning authority will sanction the rebate, in part or full. In case of any reduction or rejection of the claim, an opportunity shall be provided to the exporter to explain the case and the reasoned order shall be passed."

4.11 It is therefore clear that the rebate sanction authority can himself ascertain correctness of the duty payment and adjudicate the matter which Dy. Commissioner Rebate failed to do.

5. A show cause notice was issued to the respondent under Section 35EE of Central Excise Act, 1944 to file their counter reply. They vide their letter dated 31.10.11 submitted counter reply mainly on the following grounds :

5.1 There is no valid ground in the appeal filed by the department. Hence, the appeal filed by the department is liable to be set aside on this ground alone because the sole contention of the department is that the notices have paid excess duty at the time of clearance of the goods for export on 7.12.08 (Invoice No. 892 dated 7.12.08 / ARE-I No. 771/08-09 dated 7.12.08). On 7.12.08, the rate of duty on the said goods was reduced from 8% to 4%. However, the notices cleared the said goods for export on 7.12.08 on payment of duty at the rate of 8% instead of 4%. The contention of the department is

that since the notices had paid excess duty excess rebate had been sanctioned to the notice, which is incorrect.

5.2 The notice are entitled to rebate of entire duty paid on goods exported because conditions and procedures to claim rebate are prescribed under Notification No. 19/2004-CE(NT) dated 6.09.04 to be read with Rule 18 of Central Excise Rules, 2002. The essential condition prescribed under the said Notification is that the goods shall be exported after payment of duty. The fact that the notices have made the export is not at all in dispute. The fact that the goods which have been exported have suffered excise duty is also not in dispute. Therefore, the notice are eligible for the. entire claim of rebate. The notice submit that where the goods are exported on payment of duty rebate shall be g4ranted of the amount of duty paid and not amount of duty payable. The noticees submit that whatever amount of duty is paid on clearance of the goods for export the said amount has to be sanctioned as rebate. In support, the notices place reliance on Circular No. 510/06/2000-CX dated 3.02.2000 issued by the CBEC and case laws (i) & (ii) –

(i) Gayatri Laboratories vs. CCE – 2006 (194) ELT 73(T)

(ii) Bharat Chemicals vs. CCE – 2004 (170) ELT 568 (T)

5.3 At this stage, the rebate sanctioning authority cannot examine the correctness of the assessment. This is beyond the scope of the rebate sanctioning authority. In support, the notices rely upon the decision in the case of Priya Blue Industries Ltd. Vs. CC (Prev.) – 2004 (172) ELT 145 (SC). Further relied upon cases are (i) CCE vs. standard Drum and Barrel Mfg. Co. 2006 (199) ELT 590 (Bom). Department's reliance on the case of (i)Nagpur Transwell Power Pvt. Ltd. Vs. CCE – 2009 (243) ELT 459 (T) (ii) M/s Gimatex Industries Ltd. Vs. CCE – 2010 (261) ELT 1026 (T).

5.4 The CBEC Circular is binding on the authorities of the Central Excise Department. The aforesaid Circular No. 510/06/2000-CX dated 3.02.2000support the case of the notices, as discussed supra which is as per cases :

(a) CCE vs. Cadbury India Ltd. – 2006 (200) ELT 353 (SC)

(b) CCE vs. Jayant Dalal Ltd. – 1996 (88) ELT 638 (SC)
(c) Paper Product vs. CCE – 1999 (112) ELT 765 (SC)

5.5 Without prejudice, even if the contention of the revenue is accepted it will have no revenue implication and without prejudice, even if the contention of the revenue is accepted, the notices are entitled to refund of excess excise duty paid as per Rule 11B (2) of Central Excise Act, 1944 as notice was not aware of this new notification w.e.f. 0.00 hrs. of 07.12.2008.

6. Personal hearing was scheduled in this case on 12.09.12. Shri Ganesh Bapu TR, Advocate appeared for personal hearing on behalf of respondent who after explaining factual details reiterated the submissions made in the written reply dated 31.10.11 discussed in para 5 above. Nobody attended personal hearing from applicant side.

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

8. On perusal of records, it is observed that there is no dispute on the factual details of the completion of impugned exports of pharmaceuticals products of Chapter 30 of Central Excise Tariff after clearance of the same on 07.12.08 by paying Central Excise duty @ 8% whereas on or after 07.12.08 reduced rate of duty @4% was applicable in terms of Notification No. 58/2008-CE dated 07.12.08. It is also noted that the department is agitating only one Export Invoice No. 892 dated 07.12.2008 (ARE-I. No.-771/08-09 dt. 07.12.2008) for which one excess payment of Rs. 2,80,780/- is being alleged. Thus as submitted by the respondent herein that sole and main ground of this revision application is that by virtue of Notification No. 04/2006-CE dt. 01.03.2006 as amended by Notification No. 04/2008 dt. 01.03.2008 and Notification No. 58/2008-CE dt. 07.12.2008, the rate of duty on the product falling under Ch.30 have been reduced from 8%to 4% w.e.f. 07.12.2008 for which the respondent,

in addition to their not being aware as to the revised rate have also put forth their legal / technical cross-objection as detailed in pare 5 above.

9. Government notes that applicant department has relied upon para 4.1 of Part-I of Chapter 8 of CBEC Excise Manual on Supplementary Instructions which is 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 rebate claim of duty paid on exported goods and therefore the whole issue will have to be examined in the light of these instructions.

10. 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 Court 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.

11. Government also observes that the CBEC Circular No.510/06/2000-Cx dated 3.2.2000 has also been discussed and relied upon by Commissioner (Appeals) as well as respondents. In this regard, the Government observes that 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. Any other plea of scope of limits of rebate sanctioning authority without review /challenge of such self-assessments it is emphasized that when cited case of M/s. Priya Blue Industries Limited (2004 (172) ELT-145 (SC))is read alongwith

M/s. Jain Shudh Vanaspati Ltd. Case (1996 (86) ELT 460 (SC)), in proper perspective then it transpired that when there are inbuilt provisions in separate self-sufficient rebate sanctioning provisions than the rebate sanctioning authority should neither wait nor depend upon any other action of review process by any jurisdictional authority.

12. Further, the 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 to be in order. He does not have the mandate to sanction claim of obviously excess paid duty. Therefore, the circular of 2000 as relied upon by respondents cannot supersede the provisions of Notification No. 19/04-CE (NT). Govt. however agrees with the respondents herein that any such amount paid in excess of duty liability on one's own volition cannot be treated as duty and it has to be treated as a voluntary deposit with the Government which is required to be returned to the assesses / respondents in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11.9.2008 in CWP Nos.2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. Vs. UOI reported as 2009 (235) ELT-22 (P&H) has decided as under:-

"Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty – Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate."

Hon'ble High Court of Punjab & Haryana has observed that refund in cash of higher duty paid on export product which was not payable, is not admissible and refund of said excess paid duty/amount in Cenvat Credit is appropriate. As

such the excess paid amount/duty is required to be returned to the respondent in the manner in which it was paid by him initially.

13. Finally, Govt. is of considered opinion that what the settled principal of law are that in the interest of natural justice for equity of law, whatever the implications may be i.e. either of benefits /refunds or of liability / recoveries, the applicable date of effect would be same and that can only be the date of coming into effect the applicable legislations as issued for the purpose. Therefore, in this case any plea of ignorance of law cannot be admitted as legal and proper, as such the respondent was required to pay duty @ 4% on 07.12.2008 in terms of Notification 58/2008-CE dt.07.12.2008. The rebate of duty paid@4.12% in terms of Notification No. 58/08-CE dt. 07.12.2008 is admissible to the respondent under rule 18 of Central Excise Rule-2002 read with Notification No. 19/04-CE (NT) dt.06.09.2004.

14. Therefore, Government sets aside the impugned orderfor being not legal and proper and allows the revision application. Government further directs that said excess paid amount may be allowed as recredit in the Cenvat credit account from which duty was paid.

15. The revision application thus succeeds of in terms of above.

16. So, ordered.

(D P Singh)
Joint Secretary (Revision Application)

The Commissioner of Central Excise & Customs,
Raigad Commissionerate,
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Navi Mumbai-410 206

Attested

(आर सी शर्मा/R.C SHARMA)
उपायुक्त/Dy. Commissioner
C.B.E.C.-O.S.D. to Jt. Secy. (R.A.)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

GOI Order No. 1646/12-CX dated 04 .12.2012

Copy to:

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2. The Commissioner of Central Excise (Appeals), Mubmai Zone-II, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E, Bandra-Kurla Complex, Bandra - Mumbai – 400 051.
3. The Deputy / Assistant Commissioner of Central Excise, (Rebatel), Central Excise, Raigad, Ground Floor, Kendriya Utpad Shulk Bhavan, Plot No. 1 Sector-17, Khandeshwar, New Panwal (W) – 410 206
4. Guard File.
5. PS to JS (RA)
6. Spare Copy

ATTESTED

(R C Sharma)
OSD(Revision Application)