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SPEED POST

F.No. 198/186-187/11-RA-CX
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
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NEW DELHI-110 066

Date of Issue 7/12/12

ORDER NO. 1651-1652/12-CX DATED 06.12.2012 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 THE ORDER-IN-APPEAL No. 379-380/BK/RTK/2010 dated 28.09.10 PASSED BY COMMISSIONER OF CENTRAL EXCISE (APPEALS), GURGAON.
APPLICANT	:	COMMISSIONER OF CENTRAL EXCISE, ROHTAK
RESPONDENT	:	M/S JINDAL STAINLESS LTD., HISSAR

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ORDER

These revision applications are filed by the applicants Commissioner of Central Excise, Rohtak against the order-in-appeal No.379 & 380/BK/RTK/3010 dated 28.09.10 passed by the Commissioner of Central Excise (Appeals), Delhi-III, Gurgaon with respect to order-in-original No. 153-154/CE/R/09-10 dated 29.10.2009 passed by Deputy Commissioner Central Excise Division, Hissar.

2. Brief facts of the case are that the respondents M/s Jindal Stainless Ltd., Hissar are engaged in the manufacturer of products such as Slabs, Ingots and Blooms falling under chapter sub heading No.721800, HR strips of Stainless Steel of width less than 600 mm, HR flats of Stainless steel of more than 600mm, HR Plates of Stainless of width more than 600mm falling under Chapter 7220.10 and 7219.10 and waste and scrap of stainless steel falling under Chapter 7204.20 of the Central Excise Tariff Act, 1985. They are availing of Cenvat Credit facility under Cenvat Credit Rules, 2002 and 2004 as amended. They are engaged in the clearance of their goods in the domestic market, as well as export under Bond and also export on payment of duty.

2.1 The respondents filed their Rebate claim of duty paid on exports to different countries from their factory premises, as well as from the premises of their job worker in terms of Rule 18 of the Central Excise Rules, 2002 and Notification No.19/2007-CE (NT) dated 06.09.2004. The respondents at the time of filing the rebate claims, submitted the copies of the export documents such as ARE-I, shipping bill, bill of lading and mate receipts. The respondents failed to produce the copies of the BRCs, alongwith the above said rebate claim. The rebate claims were sanctioned by the Asstt. Commissioner, Central Excise Division, Hissar.

2.2 When any rebate of duty paid on exported goods has been paid to an exporter; but the entire sale proceeds in respect of the said goods have not been realized by the exporter within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999) including any extension of such period; such rebate becomes to be recoverable under the provisions of Finance Act and the Rules made thereunder; as if it

is a recovery of rebate erroneously refunded. The party, therefore, is required to submit proof of realization of the sale proceeds in respect of the goods for which such the rebate is sanctioned, immediately after expiring of period allowed under the Foreign Exchange Management Act, 1999.

2.3 As per Board Circular No.354/70/97-CX dated 13.11.97 every exporter of the goods is required to submit the BRC within 160 days of the sanction of the rebate claim. The scrutiny of applicant's BRC has revealed that the amount of BRC as compared to the amount of ARE-I has been realized less to the tune of Rs.4,73,806/- & Rs.1,02,022/- respectively. In this way, the amount realized as per the BRCs did not fulfill the requirement of the Central Excise Law in force, hence two SCNs were issued on 22.10.2008. The case was adjudicated and demand was confirmed with interest and penalty under section 11A & 11AB of the Central Excise Act 1944 read with Rule 27 of Central Excise Rules 2002.

3. Being aggrieved by the said orders-in-original, respondent filed appeal before Commissioner (Appeals) who set aside the orders of adjudicating authority & allowed the appeal.

4. Being aggrieved by the impugned orders-in-appeal, the applicant department has filed these revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 Commissioner (Appeals) has erred in observing that the Board's instruction regarding submission of BRC within 160 days for the purpose of recovering of sanctioned rebate in 'full' but in fact the same is required for ascertaining the correct valuation of product under Section 4 of Central Excise Act, 1944 as the Cenvat has been paid on ad-valorem rate and value is required to find as per the correct duty payable. Rule 18 of Central Excise Rule 2002 read with Notification 19/2004-CE(NT) dated 06.09.2004 only allows rebate of correct duty paid.

4.2 Admittedly the manufacturer M/s JSL has not realized any value or lesser value against goods exported and hence, the duty payable has to be first assessed

correctly in terms of Section 4 of Central Excise Act, 1944 and then to be paid as rebate in terms of Rule 18 of Central Excise Rule 2002. Instructions issued by RBI as relied by Commissioner (Appeals) does not govern the provisions of assessments under Central Excise Act/Rules, but help in regularizing the short recovery of foreign exchange based on fair business principle.

4.3 Any excess duty paid or short duty paid by an assesse at the time of clearance, are required to be finally assessed as per value first and then only appropriate rebate is required to be sanctioned. If rebate already sanctioned is less than duty payable further duty will be recovered and rebate sanctioned thereafter, if claimed. In other situation where duty payable becomes lesser, the excess rebate already sanctioned will require recovery under Section 11A of central Excise Act, 1944 with interest and penalty in case misdeclaration of suppression is noticed.

In view of the foregoing, the Adjudicating Authority had rightly rejected the party's rebate claim amounting to Rs.1,02,022/- & Rs.4,73,806/- respectively in terms of Section 11-A of the Central Excise Act, 1944, imposed penalty of Rs.5,000/- in each case under Rule 27 of the Central Excise Rules, 2002, and ordered recovery of the interest under the provisions of Section 11AB of the said Act, and Commissioner (Appeals) has erroneously allowed appeal relying upon circular of RBI which is not applicable to Central Excise matters.

5. A show cause notice was issued to the respondent under Section 35 EE of Central Excise Act, 1944 to file their counter reply. They vide their written reply dated 2.6.11 submitted that:

5.1 There is no provision under Central Excise Law including Rule 18 of Central Excise Rules, Notification No.19/2004-CE(NT) issued under Rule 18 and CBEC's Excise Manual of Supplementary Instructions for submission of BRCs in order to claim rebate claim of Excise duty paid on export goods. In the present case it is an admitted position that the goods have been duly exported and duty has been paid on the goods exported by the respondent. Therefore, there is no reason for the Department to disallow rebate claim merely for short realization against certain export invoices.

Paragraph 8 of Chapter-8 of CBEC's Excise Manual does not provide the requirement of BRCs in order to sanction rebate claim.

5.2 The Central Excise Authorities are not permitted to invoke provisions of FEMA as the said authorities are appointed under the provisions of Customs Act. Therefore, the invocation and relying upon provisions of FEMA in order to disallow rebate claim, is without an authority of law. Reliance is placed on the decision of Hon'ble Tribunal in case of Bank of Nova Scotia Vs. Commissioner of Central Excise, Bangalore-2008 (228) ELT 474 (Tri-Bangalore) wherein it was held that customs authorities lack jurisdiction to take action on non-realization of sales proceeds of export as it was governed by FEMA and suitable action lay with Enforcement authorities and Reserve Bank of India.

5.3 The short realization by the respondent is within the permissible limits as prescribed by Reserve Bank of India in Master Circular. It is pertinent to note that international trade is also subject to certain business risks and keeping in view of such normal business risks, the Reserve Bank of India has prescribed the norms to the extent of which short realization is condonable as per General Permission granted under Master Circulars.

5.4 As regards Board Circular No.354/70/97-CX dated 13.11.1997 it is submitted that the said Circular is not applicable to the facts of the present case. This circular provides that in specific circumstances BRC can be used as a collateral evidence for export of goods only in case where T.R. (transference copy) was not received by the customs department within the stipulated period in case of export of goods through ICD/CFS. In the present case there being no dispute about export of goods and the evidence produced by the respondents in this respect, the said Circular cannot be used to disallow the rebate claim to the respondent.

5.5 It is a well settled law that Central Excise authorities are not permitted to raise demand merely on the basis of a Board Circular without any support of law. Such circulars issued by Board are merely an expression of their opinion and cannot be substituted with the provisions of law enacted by the Parliament. In this respect the

decision of Hon'ble Supreme Court in case of Orient Paper Mills Limited Vs. Union of India – 1978 (2) ELT J345 is relevant.

Other case laws relied upon by the respondent are:

- Sandur Micro Circuits Ltd. Vs. CCE – 2008 (229) ELT 641 (SC)
- M/s Welspun Gujarat Stahl Rohren Ltd. Vs. Union of India – 2010 (254) ELT 551 (Guj.)

5.6 In the facts and circumstances of the case, no penalty can be imposed under Rule 27. Further, the issue relates to interpretation of legal provisions and in such cases penalty cannot be imposed.

5.7 In respect of revision application No.198/186/11 with reference to O.I.A. No.379/BK/RTK/10 dated 28.9.10 respondent stated as under:

(i) The Asstt. Commissioner, after verifying the documents evidencing export of goods allowed rebate claim by following Adjudication Orders:

A.O.No.	Date	ARE-I No.	Date	Amount (Rs.)
183	26.10.2007	0045	09.04.2007	24,022,123
204	13.12.2007	0441 0442	28.05.2007 28.05.2007	2,62,94,276
221	19.12.2007	343	26.10.2007	2,09,93,178

(ii) A show cause notice dated 22.10.2008 was issued by the learned Asstt. Commissioner seeking to recover duty amounting to Rs.1,02,022/-, which was sanctioned and granted vide the aforesaid Adjudication Orders on the ground that the respondent had not furnished Bank Realization certificates (BRCs).

(iii) That against ARE-1 No.441 dated 28.05.2007 and 442 dated 28.5.2007 (A.O.No.204), the appellant had realized entire sales proceeds and they enclosed BRC issued by State Bank of India, Hisar, therefore, the demand of duty to this extent i.e. Rs.61,185/- [Rs.33,750/- + Rs.27,415/-] was liable to be set aside on this factual ground alone, since the allegation of non-submission of BRC does not remain.

(iv) As regards BRC pertaining to AO No.183 dated 26.10.2007 (involving duty amounting to Rs.21,264/-) and AO No.221 dated 21.1.2008 [involving duty amounting to Rs.19,573/-] total duty amounting to Rs.40,837/-, it is submitted that the goods supplied under cover of the said consignments were after export, converted into 'trade samples' for the customers for the purpose of promotion of our export trade. In this connection it is submitted that the realization of export proceeds of the goods exported is covered by the provisions of Foreign Exchange Management Act, 1999 and the Regulations issued in this behalf by the Reserve Bank of India, namely, "Foreign Exchange Management (Export of Goods and Services) Regulations, 2000".

5.8 In respect of revision application No.198/187/11 with reference to O.I.A. No.380/BK/RTK/10 dated 28.9.10 respondent stated as under:

(i) The Asstt. Commissioner, after verifying the documents evidencing export of goods allowed rebate claim by following Adjudication Orders:

A.O.No.	Date	ARE-I No.	Date	Amount (Rs.)
180	24.10.2007	666 505	24.06.2007 31.05.2007	2,12,53,881
208	19.12.2007	1323 1217 1394 1408	17.09.2007 02.09.2007 29.09.2007 29.09.2007	2,12,92,534
209	19.12.2007	1530	22.10.2007	2,06,38,318

(ii) A show cause notice dated 22.10.2008 was issued by the learned Asstt. Commissioner seeking to recover duty amounting to Rs.4,73,806/-, which was sanctioned and granted vide the aforesaid Adjudication Orders on the ground that the respondent had not furnished Bank Realization certificates (BRCs), for the entire (full) amount of value declared in the ARE-1s.

(iii) That against ARE-1 No.1530 dated 22.10.2007 (AO No.209) and 1394 dated 29.9.2007 (A.O.No.208), and ARE-1 No.1408 dated 29.9.2007 (A.O.No.208), the

appellant had realized entire sales proceeds. Therefore, the demand of duty to this extent i.e. Rs.1,85,952/- was liable to be set aside on this factual ground alone, since the allegation of non-submission of BRC does not remain.

6. Personal hearing was scheduled in this case on 7.8.12 and 9.10.12. Shri B.S.Bhandari, Assistant Commissioner, Central Excise, Rohtak appeared for hearing on 9.10.12 on behalf of the applicant department and reiterated the ground of revision application. Shri Sanjeev Mishra, DGM, Jindal Stainless Ltd. and Shri K.P.Gupta, Advocate appeared for hearing on 9.10.12 on behalf of the respondents and reiterated the submission made in their written counter reply dated 2.6.11.

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 Government observes that the respondents M/s Jindal Stainless Ltd. (JSL) are engaged in the clearance of impugned goods in domestic market; export under Bond as well as export on Payment of duty. They have filed their rebate claims which were sanctioned by the Jurisdictional Assistant Commissioner. Subsequently it was observed that the entire sale proceeds in respect of the some exported goods were not realized by the respondents within the period allowed under the FEMA 1999 including any extention of such period. It was also found in that in two BRCs dated 25.11.08 EP copy of S/B. No. and date mentioned have been over written and have not been authenticated by the bank. In some cases the export sale proceed realized as per BRC were less than the value declared in ARE-1 form and so excess duty was paid. Therefore show cause notices were issued and the adjudicating authority confirmed demand for the recovery of rebate erroneously refunded to the respondents with interest and penalty. Commissioner (Appeals) in his O.I.A. No.380/BK/RTK/2010 found that after export the respondent's goods reached at the buyer's place who refused to accept them due to market recession and the only course left was to sell them to another person at best available price, cannot be ignored. Similarly in O.I.A.

No. 379/BK/RTK/2010 dated 28.9.10 he holds that non-submission of BRC cannot be the basis to conclude that goods have not been exported. He also relied upon the RBI master circular No.9/2007-08 dated 2.7.07 which reveals that if the reduction in value involved does not exceeds 25% and the realization of export is not delayed beyond the period of six month prior approval is not required. He, accordingly set aside the orders of adjudicating authority and allowed the appeal in the favour of respondents. Now the applicants have filed the Revision Application on the grounds stated at para 4 above.

9. The respondents have stated in their counter reply that in respect of cases in R.A.No.198/186/11, they were sanctioned total rebate claims of Rs.7,13,09,577/- out of which show cause notice was issued for recovery of only Rs.102022/- and similarly in respect of cases in R.A.No.198/187/11, they were sanctioned total rebate claim of Rs.6,31,84,733/- out of which show cause notice was issued for recovery of Rs.473806/-. The ground for recovery of said amount was non-submission of relevant BRCs and short realization of export sale proceeds. Respondent has contended that for part amount of recovery, they had submitted BRCs which were not considered by original authority but accepted by Commissioner (Appeals). In this regards, Government observes that the said BRCs had over writings and therefore were slightly found as invalid documents by original authority. Government notes that as per condition at para 2 (g) of Notification No.19/04-CE (NT) dated 6.9.04, rebate of duty paid on those excisable goods export of which is prohibited under any law for the time being in force shall not be made. As per Section-8 of FEMA 1999, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realize and repatriate to India such foreign exchange within time period prescribed by RBI. Further Section-13 of FEMA stipulates the penalty provision for non-realisation of foreign exchange. The provisions of FEMA Act makes it clear that the export of goods without realization of export proceed, is not permitted and there is a prohibition on such exports. Since valid BRCs are not submitted, the goods are treated to be exported in violation of Section 7, 8 of FEMA 1999, attracting

penalty under Section-13. So, in such cases the rebate cannot be granted in terms of condition at para 2(g) of Notification No.19/04-CE(NT) dated 6.9.04.

10. The explanation given by respondents for short realization cannot be accepted since duty is required to be paid on transaction value of goods (exported) determined under Section-4 of Central Excise Act 1944. Since the transaction value as shown in the BRCs was less than the value declared in ARE-I form, the department has rightly held that respondent paid excess duty on such clearance.

10.1 Government notes that this issue has already been decided by GOI order No.271/05 dated 25.7.05 passed in the case of CCE Nagpur Vs. Shri Bhagirath Textiles Ltd. reported as 2006(2002)ELT 147 (GOI). The said order was passed in revision application filed by department against the order-in-appeal No.SVS/*/NCP-II/2004 dated 26.11.04 passed by Commissioner of Central Excise (Appeals), Nagpur. The operative portion of GOI order is reproduced below:-

> *"9.4 In the instant case it is not the case of Revenue that the seller and buyer of the goods are related person. Govt., therefore, would agree with the contention of the applicant Commissioner that the excise duty on the goods should have been paid on transaction value as defined under section 4(3) (d) of the Central Excise Act, 1944. CBEC vide their Circular No. 203/37/96-CX dated 26.4.96 have also clarified that AR4 value should be determined under section 4 of the Central Excise Act, which is required to be mentioned on the invoices issued under rule 52 A of the Central Excise Rules, 1944. In the instant case the respondents themselves have admitted in their letter of cross objection dated 26.5.2005, that they have paid Central Excise duty on CIF value of the impugned goods for purpose of claiming rebate under rule 18 of the Central Excise Rules, 2002. Govt. therefore, would agree with the contention of the Applicant Commissioner that as per provisions of section 4(1) (a) and 4(2) (d) of Central Excise Act, 1944 the value in terms of section 4 should be the amount that the buyer of the exported goods is liable to pay. In the instant case, the buyer*

of the exported goods had paid an amount as shown in the Bank realization certificate. In any case the respondents are not liable to pay Central Excise duty on the CIF value of the goods but the Central Excise duty is to be paid on transaction value of the goods as prescribed under section 4 of the Central Excise Act, 1944. However, it is also fact that the respondents have paid excess duty to the tune of Rs.2,35,192/- which is to be refunded to the respondents in the manner in which it was paid.

9.5 In view of facts and circumstances, Govt. is of the considered opinion that the impugned Order-in-Appeal is not maintainable and Govt. accordingly sets aside the impugned Order-in-Appeal. Govt. also permits the respondents to take back the Cenvat Credit of Rs.2,35,192/- which is related to Central Excise duty paid on CIF value of the impugned goods."

10.2 It has been stipulated in the notification No.19/04-CE(NT) dated 6.9.04 and the CBEC circular No.510/06/2000-Cx dated 3.2.2000 that rebate of whole of duty paid on all excisable goods will be granted. Here also the whole duty of excise would mean the duty payable under the provision of Central Excise Act. Any amount paid in excess of duty liability on one's own volition cannot be treated as duty. But it has to be treated simply a voluntary deposit with the Government which is required to be returned to the respondent 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 2009(235)ELT12(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."

Government notes that the ratio of above said GOI order dated 25.7.05 and Punjab and Haryana High Court order dated 11.9.08 is squarely applicable to this case.

11. In view of above discussion, Government set aside the impugned orders-in-appeal and restores the impugned orders-in-original. Government further observe that excess paid amount of duty in case of short realization of export sale proceeds may be returned to the respondent as recredit in their cenvat credit account.

12. The revision applications are allowed in terms of above.

13. So ordered.

(D.P.Singh)
Joint Secretary to the Government of India

The Commissioner of Central Excise
Rohtak, SCO No.6, Sector-1
Rohtak (Haryana)

Attested

प्र. क. रामेश्वरम/P K. RAMESHWARAM
विशेष कार्य अधि./OSD-II (RA)
वित्त मंत्रालय, (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

G.O.I. Order No. 1651-1652/12-Cx dated 06 -12-2012

Copy to:-

1. M/s Jindal Stainless Ltd., Delhi Road, Hisar (Haryana)
2. Commissioner of Central Excise (Appeals-I), Delhi-III, Udyog Minar, Vanijya Nikunj, Udyog Vihar Phase-V, Gurgaon (Haryana)
3. Deputy Commissioner of Central Excise Division, 135-E, Model Town, Hisar
4. Shri K.K.Gupta, Advocate, B-137, Second Floor, Ramprastha, Ghaziabad-201011 (U.P.)
5. PS to JS(Revision Application)
6. Guard File
7. Spare Copy.

ATTESTED

(P.K.Rameshwaram)
OSD (Revision Application)