

REGISTERED
SPEED POST



F.No. 198/126-178/12-RA-Cx
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue... 7/12/12

**ORDER NO 1662-1714/12-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 129 DD OF CUSTOMS ACT, 1962.**

**SUBJECT : ORDER IN REVISION APPLICATION FILED, UNDER SECTION
129 DD OF CUSTOMS ACT, 1962 AGAINST THE ORDERS-IN-
APPEAL No. 101-153/CE/LKO/2012 dated 29.02.2012 passed
by the Commissioner of Central Excise and Service Tax
(Appeals) Lucknow.**

APPLICANT : The Commissioner, Central Excise & Service Tax, Lucknow

RESPONDENT : M/s P.R. Chemicals, Kannauj, UP.

ORDER

These Revision Applications have been filed by the Commissioner, Central Excise & Service Tax, Lucknow against the Orders-in-Appeal No. 101-153/CE/LKO/2012 dated 29.02.2012 passed by the Commissioner of Central Excise and Service Tax (Appeals) Lucknow w.r.t. Orders-in-Original passed by the jurisdictional Assistant Commissioner, Central Excise Division, Farrukhabad. M/s P.R. Chemicals, Kannauj, U.P. is the respondent in this case.

2. Brief facts of the cases are that respondent filed 53 rebate claims of the amount of duty on account of goods exported through various ARE-1's under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 32/2008-CE(NT) dated 28.08.2008 and Rule 14 of the Pan Masala Packing Machine (Capacity Determination and collection of duty) Rules 2008. Assistant Commissioner, Central Excise Division Farrukhabad sanctioned the said rebate claims vide various Orders-in-Original. Being aggrieved with the orders, the department filed appeals before the Commissioner (Appeals). The Commissioner (Appeals), Central Excise, Lucknow, vide impugned Orders-in-Appeal upheld all the Orders-in-Original against which the appeals have been filed by the department and dismissed all the appeals filed by the department.

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

3.1 It has been found that monthly duty deposited by the party is on pro-rata basis by counting number of days vis-à-vis total pouch packing machines installed during the months. In view of provisions 3 of Section 3A of Central Excise Act, 1944 and Rule 8 of Pan Masala Packing Machines (Capacity determination and collection of duty) Rules 2008, the option of payment of duty on pro-rata basis by the party suo-moto is not available. Further, as per Pan Masala Packing Machines (Capacity determination and

collection of duty) Rules 2008, the number of operating packing machines for the months shall be taken as the maximum number of machines installed on any day during the month. In this way, party has short paid the Central Excise duty and thus the ratio calculated for sanctioning the rebate claim as per formula under Notification No. 32/2008-(NT) dated 28.08.2008 is also not correct. Therefore, the amount of rebate claims calculated on the basis of this ratio is also arrived at wrongly.

3.2 The Commissioner (Appeals) has erred in his findings that the party was a new manufacturer and therefore they have correctly discharged the duty against which rebate was sanctioned. The party was manufacturing 'Gutkha' regularly during the relevant months. He has also erred in his findings that Section 3(A) of the Central Excise Act overrides the provision of Rule 8 of Pan Masala Packing Machines (Capacity determination and collection of duty) Rules 2008. The view taken by the Commissioner (Appeals) that allegation of short payment of duty cannot be raised in the appeal after the rebate claim has already been sanctioned is not correct. The issue was detected in post audit which is prescribed in terms of Circular No. 809/6/2005-CX dated 01.03.2005 [2005(1810) ELT T4]. The Board vide CBEC Circular No. 857/15/2007-CX dated 02.11.2007 [2007(217) ELT (T29)] has clarified that "Pre audit of refund and rebate claims serves the twin purpose of ensuring uniformity in procedure and enables effective monitoring of sanction of refund/rebate claims. Therefore, this procedure cannot be dispensed with". The short payment of duty was detected during post audit and therefore, the issue was rightly raised by post audit which was contained in the review order also.

3.3 The party has claimed the rebate of duty under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004 but the conditions (g) of this Notification read as under:-

"That the rebate of duty paid on the excisable goods, export of which is prohibited under any law for the time being in force, shall not be made".

Since, in the instant case, Gutkha manufactured by the party is exported in plastic sachets/material hence rebate allowed on the same is in contravention of Notification No. 19/2004-CE(NT) dated 06.09.2004.

The Commissioner (Appeals) while dealing with the above issue has erred in his findings while taking the plea that instruction dated 04.03.2011 by the Chief Commissioner, Central Excise, Lucknow Zone in the form of letter C.No. V(30) CCO/LKO/Tech/26/2011 dated 04.03.2011 may be one of the factors which may be considered while deciding the instant case. However, this letter cannot override the Rules and Sections pertaining to the issue. The Commissioner (Appeals) himself held in the concluding para of his Order-in-Appeal that "Section 3A of the Central Excise Act over-rides the provisions of Rule 8 of Pan Masala Packing Machines (Capacity determination and collection of duty) Rules 2008." Therefore, a letter dealing with some issue in a general form cannot be made precedence to decide a case where the case can be decided on merit only.

3.4 Further it cannot be accepted that since CEBC circular No. 528/69/2011-STO(ITU) was issued on 30.08.2011, therefore, the cases covering by this clarification prior to 30.08.2011 are not covered by the same since it cannot have retrospective effect. This finding is not correct as the law i.e. Plastic Waste (Management & Handling) Rules, 2011 dated 04.02.2011 were in existence when the export took place and therefore any clarification issued subsequently would have no bearing and the party would not be able to escape from the statutory provisions of Plastic Waste (Management & Handling) Rules, 2011 dated 04.02.2011. Any circular and subsequently issuance of a trade notice on the basis of the same only facilitates interpretational aspects but it does not mean that the provisions of the relevant Act were not in force as on that date.

4. Show Cause Notices were issued to the respondent under Section 35EE of Central Excise Act, 1944 to file their counter reply. The respondent vide their written submission dated 21.07.2012 mainly stated as follows:-

4.1 The said Gutkha was manufactured and cleared for export to Afghanistan after permission of the Department and in pursuance of the minutes of the meeting held on 22.03.2011 in the chamber of Chief Commissioner, Central Excise and Service Tax, Delhi Zone issued under C.No. CCU(DZ)CX/TECH/135/2011 dated 22.03.2011 and letter No. C.No. V(30) CCO/LKO/Tech/26/2011 dated 04.03.2011 of the Chief Commissioner, Central Excise & Service Tax, Lucknow Zone, addressed to the Commissioner, Central Excise, Kanpur.

4.2 The said Gutkha was exported strictly in accordance with provisions of Notification No. 32/2008-CE(NT) dated 28.08.2008 and by complying the procedures contained in para 3 of the Notification No. 19/2004-CE(NT) dated 06.09.2004 as made applicable to the provisions of 32/2008-CE(NT) dated 28.08.2008 vide conditions and limitations at Sl. No. (ix) therein. The duty was paid strictly in accordance with the provisions of Rule 6(3) read with its proviso of Pan Masala Packing Machines (Capacity determination and collection of duty) Rules 2008 and the findings and the decision held during post audit with regard to payment of duties of excise by the respondent on prorata basis was factually incorrect and was the outcome of misconceiving and misrepresenting the facts on record.

4.3 The Trade Notice No. 20/2011 of the Central Excise Commissionerate, Lucknow and the CBEC letter F.No. 528/69/2011-STO(TI) dated 30.08.2011 issued consequent to amendment of the Plastic Waste (Management and Handling) Rules, 2011, on 02.07.2011, cannot have a retrospective effect in respect of the manufacture and export of gutkha by the respondent under proper permissions and departmental clarifications on the subject matter.

4.4 The authority conducting the post audit of said rebate claims misconstrued the provisions of Notification No. 32/2008-CE(NT) dated 28.08.2008 by applying the terms and conditions stipulated under Notification No. 19/2004-CE(NT) dated 06.09.2004 relevant to the rebate of duty paid on excisable goods exported and sort in terms of the

said Notification No. 19/2004-CE(NT) dated 06.09.2004 only. It has been totally ignored the terms and conditions stipulated at Sl.No. (ix) of the Notification No. 32/2008-CE(NT), dated 28.08.2008, under which the respondents had exported the said gutkha and which condition very clearly states that "the procedure as laid down in Notification No. 19/2004-CE(NT) dated 06.09.2004 shall be followed mutatis mutandis". It nowhere borrows the terms & conditions contained in para 2 of the said Notification as conditions & limitations are specified at Sl.No. (i) to (x).

4.5 Proviso to Rule 6(3) of the Pan Masala Packing Machines (Capacity determination and collection of duty) Rules 2008, states that incase a new manufacturer commences production of notified goods, his annual capacity of production shall be calculated on the basis of the total no. of days in that year and the no. of days remaining in that year starting from the date of commencement of product of such notified goods. The respondent was issued registration certificate on 15.03.2011 and commenced his production on 22.04.2011 and paid appropriate duty of excise in conformity of the said provisions. Thereafter the respondent paid appropriate duty of excise at the prescribed rate per packing machine per month i.e. Rs. 12.50 lakhs and paid aggregate duty of Rs. 1.50 crores on the 12 packing machines unsealed by the department and allowed to be installed.

4.6 The respondent vide his letter dated 11.04.2011 addressed the Deputy Commissioner, Central Excise Divisions, Farrukhabad, for unsealing the said 12 numbers of packing machines for manufacturer of gutkha to be exported only to Afghanistan in view of the minutes of the meeting held on 22.03.2011 in the chamber of Chief Commissioner, Central Excise and Service Tax, Delhi Zone, issued under C.No. CCU(DZ)CX/TECH/135/2011 dated 22.03.2011 and Letter C.No. V(30)CCO/LKO/TECH/26/2011 dated 04.03.2011 of the Chief Commissioner, Central Excise & Service Tax, Lucknow Zone, addressed to the Commissioner, Central Excise, Kanpur.

4.7 It is a fact on record and it is legal requirement that the goods in question were subject to duty as per Notification No. 42/2008-CE dated 01.07.2008. The goods were manufactured and exported directly from his factory by the respondent. Notification No. 32/2008-CE(NT) dated 28.8.2008 is issued under Rule 18 of the Central Excise Rules, 2002 read with Rule 14 of Pan Masala Packing Machines (Capacity determination and collection of duty) Rules 2008 wherein certain conditions, limitations & procedures numbering (i) to (x) were prescribed. In the instant matter the condition No. (iii) & (ix) are of more relevance. As per condition No. (iii) of the said Notification, the excisable goods are required to be exported directly from the factory or warehouse and as per condition No. (ix) the procedure as laid down in Notification No. 19/2004-CE(NT) dated 06.09.2004 would be followed mutadis-mutandis. Since the respondent had fulfilled all the conditions required to be followed, they have become eligible for enjoying the benefit of Notification No. 32/2008-CE(NT) by way of rebate of duty paid on exported gutkha.

4.8 The respondent submits and state that the department is repeatedly using the restrictions carved out in condition (g) of Rule 18 read with the Notification *ibid*, it is a trite that the words "prohibited under any law for the time being in force", the whole term has been elaborately dealt correctly in the order of Commissioner (Appeals) and moreover as per the settled position of law and in light of the submissions made in the above paras, export of pan masala/gutkha in plastic sachets was not carved out as prohibited goods. Moreover as already inculcated above, the clause 'mutatis mutandis', the said grounds of appeal has no legal sanction & the whole grounds for Revision Application filed by the department is without application of mind & using a rhetoric language.

4.9 In the case of M/s Suksha International Vs. UOI, 1989 (39) ELT 503(SC), the Hon'ble Supreme Court has observed that an interpretation unduly restricting the scope of beneficial provision is to be avoided so that it may not take away with one hand what the policy gives with the other. In the Union of India Vs. A.V. Narasimhalu, 1983 (13) ELT 1534(SC), the Apex Court also observed that the administrative authorities should

instead of relying on technicalities, act in a manner consistent with the broader concept of justice.

5. Personal hearing scheduled in this case on 09.10.2012 was attended by Shri Aman Garg, Assistant Commissioner, on behalf of the applicant who reiterated the grounds of revision application. Ms. Harsimran Kaur, advocate attended hearing on behalf of respondent and reiterated submission made in their reply dated 21.07.2012
6. The applicant department vide their fax letter F.No. IV-853/R/O/2011 dated 23.11.2012 stated that another exporter M/s Pan Parag India Ltd., Kanpur had exported Pan Masala/Gutkha sachets of Plastic upto August, 2011 and rebate claims of export upto that period were sanctioned to them. They also confirmed the fact of realization of BRCs in these impugned cases.
7. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.
8. Government observes that the respondent exported the goods namely Gutkha and filed rebate claims of duty paid on such export product under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 32/2008-CE(NT) dated 28.08.2008 and Rule 14 of the Pan Masala Packing Machines (Capacity determination and collection of duty) Rules 2008. Original authority vide impugned Orders-in-Original sanctioned rebate claims of the respondent. Applicant department preferred appeal against impugned Orders-in-Original before Commissioner (Appeals) who rejected appeals filed by the department. Now, department has filed these revision applications on grounds mentioned in para (3) above.
9. Government observes that the department has contested that as per Rule 8 of Pan Masala Rules, 2008, the number of operating packing machine for the month shall be taken as the maximum number of machines installed at any day during the month.

The pro rata basis payment of monthly duty is in contravention of provision 3 of section 3(4) of the Central Excise Act, 1944 and Rule 8 of Pan Masala Rules, 2008. The respondent has contested they were issued registration certificate on 15.03.2011 and commences production from 22.04.2011 and as such, he was the new manufacture within the meaning of proviso to sub-rule 3 of Rule 6 of the said Pan Masala Packing Machines rules, 2008 and for this reason duty of April, 2011 was calculated on prorata basis. Such payment is as per proviso to rule 6(3) of the said Pan Masala Packing Machines Rules, 2008.

9.1 Government first proceeds to examine relevant provisions of statutes:-

Rule (8) of said Pan Masala Rules, 2008 reads as under:-

"Rule 8: Alteration in number of operating packing machines.- In case of addition or installation or removal or uninstallation of a packing machine in the factory during the month, the number of operating packing machine for the month shall be taken as the maximum number of packing machines installed on any day during the month:

Provided that in case a manufacturer commences manufacturing of goods of a new retail sale price during the month on an existing machine, it shall be deemed to be an addition in the number of operating packing machine for the month:

Provided further that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be operating packing machine for the month."

Rules 6(3) of said Pan Masala Rules, 2008:-

"(3) The annual capacity of production shall be calculated by application of the appropriate quantity that is deemed to be produced by use of one operating packing machine as specified in rule 5 to the number of operating packing machines in the factory during the month beginning which the capacity is being determined:

Provided that in case a new manufacturer commences production of notified goods, his annual capacity of production shall be calculated pro-rata on the basis of the total number of days in that year and the number of days remaining in that year starting from the date of commencement of the production of such notified goods."

From perusal of above said rules, it is ample clear that rule (8) of the said Pan Masala Packing Rules, 2008 is applicable to cases where there is alteration in number of operating packing machines. In this case respondent were issued registration on 15.03.2011 and hence, are to be treated as a new manufacturer and hence, their production of "Gutkha" shall be specifically governed by the proviso to sub rule (3) of Rule (6) of the said Pan Masala Packing Rules, 2008. The proviso of sub rule (3) of rule (6) allows payment of duty on pro-rata basis. As such, the applicant who commenced production w.e.f. 22.04.2011 rightly paid duty on pro-rata basis. Under such circumstances, Government concurs with observation of Commissioner (Appeals) that allegation of short payment by the respondent is not tenable.

10. Applicant department has contended that in view of condition 3(g) of Notification No. 19/2004-CE(NT) dated 06.09.2004, the rebate of duty paid on excisable goods, export of which is prohibited under any law for the time being in force can not be granted since Gutkha manufactured by respondent was exported in plastic sachets/material. In this regard Government notes that the said goods were exported by the respondent after issuance of clarification by Chief Commissioner of Central Excise Lucknow Zone vide letter C.No.V(30) CCO/LKO/Tech/26/2011 dated 04.03.2011 in the case of other manufacturer exporter M/s Pan Parag India Ltd. Kanpur.

10.1. In the said letter, issue was clarified as under:-

"I would like to make it clear that in the matter of export, the goods which are likely to be consumed by subjects and citizens of other countries, the ban ordered by Hon'ble Supreme Court or even by Ministry of Environment and Forests, vide its standing order of 4th February 2011 would not be applicable to cases and consignments for export. Even otherwise, there are instructions of the government, issued from time to time, that in matter of exports no unwarranted and unjustified restrictions should be imposed. Therefore, flow of consignments meant for exports should not be got interrupted."

It was clearly stated in the said letter that ban ordered by Hon'ble Supreme Court or even by Ministry of Environment & Forests vide standing order dated 04.02.2011 would not be applicable to cases and consignments for export. In pursuance to said clarification, clearance of said goods was allowed for export by Central Excise authorities. The Customs authorities at the port of export has also allowed export without any objection.

10.2 Respondent in his counter reply had stated that in case M/s Pan Parag India Ltd. Kanpur, rebate of duty paid on similar goods, was allowed and no such objection has ever been raised and department is discriminating against him by proposing recovery of already sanctioned claims. Matter was checked up from the applicant department who vide letter F.No. IV-853/R/O/2011 dated 23.11.2012 stated that another exporter M/s Pan Parag India Ltd., Kanpur had exported Pan Masala/Gukha in sachets of Plastic upto August 2011 and rebate claims of duty paid on exported goods was allowed upto that period.

10.3 Government notes that Trade Notice No. 20/2011 dated 20.09.2011 issued on the basis of CBEC Circular F.No.528/69/2011-STO(TI) dated 30.08.2011 clarifying distinction between sachets and carry bags, cannot have retrospective effect. The clarification issued by Chief Commissioner Lucknow was binding on the Central Excise officers and as such the rebate allowed for duty paid on exported goods at the relevant time cannot now attract the provisions of condition 3(g) of Notification No. 19/2004-CE(NT) dated 06.09.2004.

10.4 Government also notes that departmental authorities are bound by Circular/Instruction and they have to comply with the same. Hon'ble Supreme Court has held in the case of Paper Products Ltd. Vs. CCE 1999(112) ELT 765(SC) that Circular/Instructions issued by CBEC are binding on departmental authorities. They cannot take contrary stand and department cannot repudiate a Circular on the basis that it was inconsistent with the statutory provision. Apex court has further held that

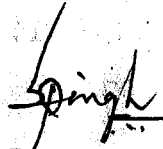
department's actions have to be consistent with circulars, consistency and discipline are of far greater importance than winning or losing court proceedings. In view of said principles laid down by Hon'ble Supreme Court, the instructions issued by Chief Commissioner Lucknow were rightly followed by departmental Central Excise officers.

10.5 The original authority had sanctioned the claims subject to submission of realization of export sale proceeds. Applicant department has now confirmed that respondent have submitted the Bank realization certificates in all the cases confirming the receipt of foreign remittances for export sale proceeds.

11. In the above circumstances, Government donot find any infirmity in impugned Orders-in-Appeal and hence, upholds the same.

12. Revision Applications are thus rejected being devoid of merit.

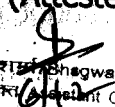
13. So, ordered.


(D. P. Singh)

Joint Secretary to the Government of India

The Commissioner , Central Excise & Service Tax,
7-A, Ashok Marg,
Lucknow (UP)

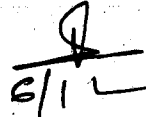
(Attested)


(भगवत शर्मा Bhagwat Sharma)
सहायक आयुक्त Assistant Commissioner
C.B.E.C.-O.S.D. (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt of India
नई दिल्ली / New Delhi

Order / No. 1662-17/14/2012-Cx dated 06-12-2012

Copy to:-

1. The Commissioner (Appeals), Customs, Central Excise & Service Tax, Hall No. 2, 8th Floor, Kendriya Bhawan, Aliganj, Lucknow – 226024.
2. Assistant Commissioner, Central Excise Division Farrukhabad, Lucknow (UP).
3. M/s. P.R. Chemicals, G.R. Road, Jasoda, Kannauj (UP)
4. Ms. Harsimran Kaur, Advocate, C/o M/s. P.R. Chemicals, G.R. Road, Jasoda, Kannauj (UP)
5. PS to JS(Revision Application)
6. Guard File
7. Spare Copy.



(Bhagwat P. Sharma)
OSD-I (Revision Application)

THE UNITED STATES OF AMERICA

IN SENATE

COMMITTEE ON THE JUDICIARY

HEARINGS

ON

THE NOMINATION OF

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