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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
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Mumbai- 400 005

F. NO. 195/398 /13-RA/482 Date of Issue: 10.02.2022

ORDER NO.166 /2022-CX (WZ) /ASRA/Mumbai DATED 08.02.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Meditab Specialities Pvt. Ltd.

Respondent : Commissioner (Appeals) of Central Excise, Mumbai Zone-II.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. US/912/RGD/2012 dated 18.12.2012 passed by the Commissioner (Appeals) of Central Excise, Mumbai Zone-II.

ORDER

This revision application has been filed by the applicant M/s Meditab Specialities Pvt. Ltd., 12, Gunbow Street Mumbai-400001, (hereinafter referred to as 'the applicant') against Order-in-Appeal No: US/912/RGD/2012 dated 18.12.2012 passed by the Commissioner (Appeals) of Central Excise, Mumbai Zone-II.

2. Brief facts of the case are that the applicant, an exporter, filed 17 rebate claims for Rs.5,69,669/- of duty paid on exported goods viz. P & P Medicaments, under Rule 18 of the Central Excise Rules, 2002 read with Notification No 19/2004-CE(NT) dated 06.09.2004. In 12 claims it was found that the exporter had paid duty on said exported goods @ 10.3% under Notification No 2/2008-CE dated 01.03.2008 as amended. Whereas it was found that the Notification No 2/2008-CE dated 01.03.2008, as amended was a Notification whereby the tariff rate had been amended and it was not the Notification prescribing the effective rate. The effective rate for the said goods exported by the exporter during the relevant period was 4.12% under Notification No 4/2006-CE dated 01.03.2006 and 5.15% w.e.f. 01.04.2011. In 2 claims it was found that the FOB value was lesser than the ARE-1 value. Vide Order in Original No. 771(A)/11-12/DC(Reb)/Raigad dated 31.05.2012, it was held that duty was required to be paid on exported goods at the effective rate of duty in terms of the said Notifications as amended and in respect to the difference in FOB value and ARE1 value it was held that since the F.O.B. value is the transaction value, and the eligible rebate claim would be on the duty worked on the FOB. Accordingly vide the aforesaid Order, the adjudicating authority sanctioned rebate of duty amount of Rs.2,51,412/-.

3. Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioners of Central Excise (Appeals), who vide Order-in-Appeal No. US/912/RGD/2012 dated 18-12-2012 upheld the Order-in-Original with regards to the reduction of the rebate claims to the extent of duty payable under Notification No. 4/2006-CE dated 1.03.2006 and in respect of the difference in FOB value and ARE1 value, it was held that reduction of rebate claim to the extent of duty payable on the FOB value is upheld and also that the applicant can apply to the jurisdictional authorities for restoration of the excess Cenvat credit debited by them as duty.

4. Being aggrieved by the impugned Order-in-Appeal only with respect to the reduction of the rebate claims to the extent of duty payable under Notification No. 4/2006-CE dated 1.03.2006, the applicant has filed this revision applications under Section 35EE of the Central Excise Act, 1944 before Central Government mainly on the following grounds:

(a) The applicant submitted that it was settled law that when two notifications co-exist in the books of law and they are not mutually

exclusive, an assessee would have the option to choose any one of these exemptions even if the exemption so chosen is generic and not specific. In this regard, they placed reliance upon the judgment of the Hon'ble Supreme Court in HCL Ltd. vs. Collector of Customs, New Delhi[2001(130)ELT 405(SC)].

(b) The applicant also placed reliance upon the following judgments:

(i) CCE vs. Indian Petro Chemicals[1997(92)ELT 13(SC)];
(ii) IOCL vs. CCE[1991(53)ELT 347(Trb)];
(iii) Coromandal Prints & Chemicals vs. CCE[1990(47)ELT 7(Trb)];
(iv) Dunbar Mills Ltd. vs. CCE[1989(44)ELT 500(Trb)];
(v) Calico Mills vs. CCE[1985(22)ELT 574(Trb)];
(vi) Coca Cola Ltd. vs. CCE[2009(242)ELT 168];
(vii) Share Medical Care vs. UOI[2007(209)ELT 321(SC)];
(viii) CCE vs. Cosmos Engineers[1998(108)ELT 213];
(ix) CCE vs. Thermopack Industries[2003(160)ELT 1150];
(x) Gothi Plastic Industries vs. CCE[1996(83)ELT 123(Trb)].

(c) The applicant submitted that it was an undisputed fact that both Notification No. 4/2006-CE and Notification No. 2/2008-CE were in existence simultaneously. Both these notifications do not have any provisions excluding the other. In other words, Sr. No. 62C of Notification No. 4/2006-CE does not have any provision stating that the notification has overriding effect over Notification No. 2/2008-CE and similarly, vice-versa. They therefore averred that they had the option to avail either of the notifications and that the central excise Department cannot force any particular notification on the applicant.

(d) The applicant further contended that this legal position cannot be distinguished on the ground that Notification No. 2/2008-CE provides for general amendment to the rates in the tariff. They stated that even if it was admitted for the sake of argument that it was a general amendment, it cannot be ignored that it was still a notification issued under Section 5A of the CEA, 1944. They averred that the Deputy Commissioner had conveniently ignored the fact that if the rates in the CETA, 1985 are to be amended, it has to be done legally by way of a suitable Act of Parliament. However, there has been no Act of Parliament seeking to amend the rates prescribed in the tariff. It was further argued that the Deputy Commissioner had not pointed out any provision under the CEA or the rules made thereunder which had the effect of requiring the assessee to mandatorily avail the benefit of Notification No. 4/2006-CE dated 01.03.2006.

(e) It was further averred that they were eligible for the refund of entire duty paid on exported goods. Reference was made to Rule 18 of the CER, 2002 and Notification No. 19/2004-CE(NT) dated 06.09.2004 and pointed out that the essential condition prescribed under the said notification was that the goods should be exported on payment of duty. They further pointed out that it was not in dispute that the goods had suffered duty and had been exported. Reliance was placed upon the decision of the CESTAT in the case of Gayatri Laboratories vs. CCE[2006(194)ELT 73(Trb)] wherein it was held that rebate claim to the extent of duty paid was available and that rebate claim cannot be restricted on the ground that less duty should have been paid in terms of notification.

(f) It was contended that since the method of assessment of excise duty on finished goods opted by them had not been challenged in any Commissionerate, therefore reassessment of excise duty payment while sanctioning the rebate claim was beyond the scope of powers of the Office of Maritime Commissioner. It was opined that this issue had already been clarified by the Board in Circular No. 510/06/2000-CX. dated 03.02.2000 by the contents therein that "There is no question of re-quantifying the amount of rebate by the rebate sanctioning authority by reassessment, it is also clarified that the rebate sanctioning authority should not examine the correctness of assessment but should examine only the admissibility of rebate of the duty paid on the export goods covered by a claim.".

(g) The assessee stated that the goods had been assessed to central excise duty in terms of the provisions of Rule 6 by applying Notification No. 2/2008-CE dated 01.03.2008 and paying duty @ 10% on such goods. The details of assessment made in such manner were communicated to the Range Superintendent through copies of ARE-1 submitted within 24 hours of clearance of goods as well as in the monthly ER-1 returns. It was alleged that the assessment of goods made in the aforesaid manner was not challenged by the Department in any manner. Attention was also drawn to para 2.2 of letter DOF No. 334/1/2008-TRU dated 29.02.2008 which stated that since the reduction in general rate had been carried out by notification, the possibility of the same product/item being covered by more than one notification could not be ruled out and that in such situation, the rate beneficial to the assessee would have to be extended if he fulfilled the attendant conditions of exemption.

(h) The matter is already decided by Revisionary authority vide Order No. 1568-1595/2012-CX dtd. 04.11.2012 and matter may be decided

accordingly.

5. Personal hearing in this case was scheduled on 19.01.2018, 6.02.2018, 28.02.2018, 23.08.2019, 3.02.2021 or 17.02.2021, 18.03.2021 or 25.03.2021 and 8.07.2021 or 22.07.2021. However, no one appeared for the personal hearing so fixed on behalf of the department and the respondent. Since sufficient opportunity to represent the case has been given, the case is taken up for decision on the basis of available documents on record.

6. Government has carefully gone through the relevant case records and perused the Order-in-Original, the impugned Order-in-Appeal and the revision application filed by the applicant.

7. Upon perusal of records, Government observes that the applicant filed 17 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. In respect of 12 claims, the applicant had paid duty on said exported goods @ 10.30% under Notification No. 2/2008-CE dated 01.03.2008 as amended. The original authority held that duty was required to be paid on exported goods at the effective rate of duty payable @ 4.12/5.15% and rebate had been allowed to that extent only. The Commissioner (Appeals) upheld the Order-in-Original restricting rebate to payment of duty @4.12/ 5.15 %. Now, the applicants have filed this revision applications against the impugned Order-in-Appeal on the grounds stated above.

8.1 The Notification No. 2/2008-CE dated 01.03.2008 issued under Section 5A(1) of the CEA, 1944 is a notification prescribing effective rate of duty for goods specified under first schedule to the CETA, 1985. The said notification was amended by Notification No. 58/2008-CE dated 7.12.2008 which reduced the effective rate of duty from 14% adv. to 10% adv. Thereafter, the effective rate of duty was further reduced from 10% adv. to 8% adv. by Notification No. 4/2009-CE dated 24.02.2009.

8.2 Notification No. 2/2008-CE dated 01.03.2008 was again amended by Notification No. 6/2010-CE dated 27.02.2010 and the effective rate of duty for the goods specified under the first schedule to the CETA, 1985 was enhanced from 8% adv. to 10% adv. Although, the Central Excise Notification No. 2/2008-CE, 58/2008-CE. 4/2009-CE and 6/2010 are issued under the power of Section 5A(1) of the CEA, 1944 which empowers the Central Government to exempt excisable goods of any description from the whole or any part of the duty of excise leviable thereon. However, it can be seen that by Notification No. 6/2010-CE dated 27.02.2010, the effective rate of duty was enhanced from 8% adv. to 10% adv.

8.3 It simply means that the standard rates of excise duty or merit rate are changed by the Central Government by issuing notification under the powers of Section 5A(1) of the CEA, 1944. At the same time, concessional rates of duty on all excisable goods are also effected by the Central Government through the notifications which are also issued under the powers of Section 5A(1) of the CEA, 1944. These concessional rates may be linked to some conditions.

8.4 As per the provisions of Para 4.1 of Part I of Chapter 8 of the Supplementary Manual, the goods cleared for export shall be assessed to duty in the same manner as the goods cleared for home consumption. In the case laws relied upon by the applicant, the appellate authority had held that when two exemption notifications are available, it is up to the assessee to choose the one which is beneficial to him. In the present case, the applicant had availed the benefit of two notifications simultaneously which was not permissible as per law. If two exemption notifications are in existence, it would be his prerogative to avail the one which is beneficial to him. The applicant could not have availed the benefit of two notifications simultaneously for the same goods without maintaining separate accounts of inputs. The applicant was entitled to the benefit of only one notification out of the two which was beneficial to him and pay duty accordingly. The benefit of both notifications selectively without separate accounting of inputs cannot be availed simultaneously.

8.5 The availment of higher rate of CENVAT credit on the inputs utilised for the manufacture of medicaments entailed that only part of such CENVAT credit was being used to pay lower rate of duty on the final products cleared for home consumption by availing the benefit of exemption under Notification No. 4/2006-CE dated 01.03.2006 whereas the balance of the accumulated CENVAT credit on such inputs was used to pay duty on medicaments cleared for export at higher rate of duty in terms of Notification No. 2/2008-CE dated 01.03.2008 which specified the effective rate of duty. Such a practice would detract from the concept and purpose of the CENVAT scheme. When the applicant preferred to utilise two separate notifications for home consumption and export of the same goods, the CENVAT credit utilised for clearance of the exported goods was required to be restricted to the proportion of inputs utilised in their manufacture. Concept of tax on export to be zero rated cannot mean that tax not concerning with export is loaded on export goods somehow to encash the same. Alternatively, the applicant should have maintained separate account for the inputs utilised in the manufacture of exported goods and claimed rebate at higher rate utilising CENVAT credit on such inputs used in the manufacture of such goods.

8.6 Ratio laid down by the judgment of the Hon'ble Gujarat High Court in the case of Arvind Ltd. vs. UOI[2014(300)ELT 481(Guj.)] which has thereafter been affirmed by the Hon'ble Supreme Court[2017(352)ELT A21(SC)] is relevant here. In that case, inspite of there being an exemption notification which fully exempted their goods, Arvind Ltd. had availed the benefit of Notification No. 59/2008-CE dated 07.12.2008 and paid duty on the export goods. The relevant portion of the said judgment of the Hon'ble Gujarat High Court is reproduced below.

> *"9. On, thus, ...It is, thus, an undisputed fact that the petitioner on final products discharged the duty liability by availing the benefit of Notification No. 59/2008 and as has already been noted in the record, it has reversed the amount of Cenvat credit taken by it on the inputs used for manufacturing of such products. Thus, when the petitioner is not liable to pay duty in light of the absolute exemption granted under Notification No. 29/2004 as amended by Notification No. 59/2008-C.E. read with the provision of Section 5A(1A) of the Act and when it has not got any other benefit in this case, other than the export promotion benefits granted under the appropriate provision of the Customs Act and Rules (which even otherwise he was entitled to without having made such payment of duty), we are of the firm opinion that all the authorities have committed serious error in denying the rebate claims filed by the petitioner under Section 11B of the Act read with Rule 18 of the Rules. The treatment to the entire issue, according to us, is more technical rather than in substance and that too is based on no rationale at all.*
>
> *10. We also cannot be oblivious of the fact that in various other cases, the other assessees have been given refund/rebate of the duty paid on inputs used in exported goods. ....."*

8.7 In the above judgment, Hon'ble High Court has laid down that when there are two exemption notifications which co-exist, the assessee can avail one for domestic clearances and the other one which is beneficial to them for export so as to obtain refund/rebate of duty paid on inputs used in the exported goods (emphasis supplied). Thus, as long as, intent is to get refund/rebate of duty paid on inputs consumed in exported goods, exporter can choose to pay higher rate of duty on exported goods, even if it is an effective rate. Hon'ble High Court has not decided that an applicant while paying higher duty on exported goods can utilise the CENVAT credit not related to inputs consumed/used in exported goods but accumulated due to availment of another notification prescribing lower rate of duty for domestic clearances. This would result in encashment of accumulated credit not related to inputs consumed/used in exported goods. Therefore, the applicant would be eligible for rebate of central excise duty paid on the exported goods

only to the extent of rate of duty applicable in terms of Notification No. 04/2006-CE dated 01.03.2006.

9. Government holds that the applicant would be entitled to rebate on the quantity of exported goods at the rate of duty applicable under Notification No. 4/2006-CE dated 01.03.2006

10. In view of above discussion, Government finds no infirmities in the order passed by the appellate authority and therefore does not find any reason to interfere with or modify the Order in Appeal.

11. The revision application is rejected being devoid of merits.

8/2/22

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

ORDER No.166/2022-CX (WZ) /ASRA/Mumbai DATED08.02.2022

To,

M/s Meditab Specialities Pvt Ltd.
12 Gunbow Street, Fort,
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Copy to:

1. The Commissioner of CGST, Belapur Commissionerate, C.G.O. Complex, 10, C.B.D. Belapur, Navi Mumbai – 400 614.
2. The Commissioner of GST & CX, Appeals Raigad, C.G.O. Complex, 10, C.B.D. Belapur, Navi Mumbai – 400 614.
3. The Deputy Commissioner (Rebate), GST & CX Belapur Commissionerate, C.G.O. Complex, 10, C.B.D. Belapur, Navi Mumbai – 400 614.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Notice Board.