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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.198/235/12-RA/382 Date of Issue: 12/02/20

ORDER NO. 167/2020-CX (WZ)/ASRA/MUMBAI DATED 04.02.2020 OF THE GOVERNMENT OF INDIA PASSED BY SMT SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Commissioner, Central Excise, Raigad

Respondent :. M/s H.G. Entertainment Technology Ltd.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. BC/77/RGD/2012-13 dated 31.05.2012 passed by the Commissioner (Appeals), Central Excise Mumbai-III.

ORDER

This Revision Application is filed by the Commissioner, Central Excise, Raigad (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. BC/77/RGD/2012-13 dated 31.05.2012 passed by the Commissioner (Appeals), Central Excise Mumbai-III.

2. The issue in brief is that the M/s H.G. Entertainment Technology Ltd., Exporter, 101, Owners Industrial Estate, Gabriel Road, off. L. J. Road, Mahim, Mumbai-400016 (herein after as 'Respondent') filed Rebate claim Nos. 0477 & 0478/10-11 dated 12.04.2010 amounting to Rs. 3,61,506/- (Rupees Three Lakhs Sixty One Thousand Five Hundred and Six Only) under Rule 18 of Central Excise Rules,2002 read with Notification No. 19/2004 -CE (NT) dated 06.9.2004 as amended issued under Rule 18 of Central Excise Rules,2002 in respect of the goods exported. The Deputy Commissioner (Rebate), Central Excise, Raigad, vide Order-in-Original No. 1735/10-11/AC (Rebate)/Raigad dated 24.01.2011 sanctioned the said Rebate Claims. The Department then filed appeal with the Commissioner (Appeals), Central Excise Mumbai-II which was then transferred to the Commissioner (Appeals), Central Excise Mumbai-III. The appeal was filed on the following grounds :

(i) Blank audio cassettes falling under CH. 85232910 of Central Excise Tariff Act, 1985 (CETA) are exempt from duty as per Sr. No 22 of Notification 10/2006 - CE dated 01.03.2006. (herein after as 'Notfn 10/2006') However, the Respondent have still paid Central Excise duty and claimed rebate;

(ii) Since the goods exported attract Nil rate of duty, the payment made cannot be considered to be payment of Central Excise duty and consequently rebate of such amount paid, is not admissible.

The Commissioner (Appeals), Central Excise Mumbai-III vide Order-in-Appeal No. BC/77/RGD(R)/2012 dated 31.05.2012 upheld the Order-in-Original and rejected the appeal.

3. Being aggrieved, the Department then filed the current Revision Application on the grounds that the Blank Audio Cassettes were subjected to NIL rate of duty as per Sr. no. 22 of Notfn. 10/2006 and the said notification was amended by Notification No. 48/2006-CE dated 30.12.2006 by which the entry no. 8524 was substituted by entry no. 8523 2910 which is in force during the disputed period. It is important to note that "Audio Cassettes" classified under CH. 8523 2910 are exempted from payment of duty vide Notfn. 10/2006 which covers both recorded and blank audio cassettes. The above factual position clearly meant that the blank audio cassettes were exempted from payment of duty without any condition. The Notification No. 2/2008-CE dated 01.03.2008 is generic in nature as it gives at Sr. No. 63, exempts goods falling under chapter no. 85 (except tariff items 85238020, 85481010, 85481020 and 85481090), whereas the Notfn. 10/2006 is specific in nature as it exempts both by name of the excisable goods "Audio Cassettes" and the CH 85232910 which is chargeable to Nil rate of duty. Commissioner (Appeals) should have read specific Notfn. 10/2006 along with generic Notification No 2/2008-CE dated 01.03.2008. In terms of provisions of Section 5A (1A) of Central Excise Act, 1944 (herein after as 'CEA') the manufacturers are barred from payment of duty when exemption granted is unconditional / absolute. It was held by the Hon'ble CESTAT in Mahendra Chemicals v/s C.C.E. [2007 (208) E.L.T. 505 (Tri. - Ahmd.)] that where there is an unconditional exemption, the assessee cannot disclaim its benefit, pay duty and thereafter claim credit of duty or rebate. The notification granting such exemption has statutory force and payment of duty contrary to the notification would be without sanction of law and the introduction of sub-section 5A(1A) of CEA in 2005 was only clarificatory in nature. The above view has also been clarified vide CBEC Circular No.940/01/2011-CX dated 14.01.2011 and relevant portion is reproduced below -

"Attention is invited to Board's Circular No. 937/27/2010-CX., dated 26- 11-10 issued from F. No. 52/1/2009-CX1 (Pt) 12010 (260) E.L.T. T3j, wherein based on the opinion of the Law Ministry, it was clarified that in view of the specific bar provided under sub-section (IA) of Section 5A of the Central Excise Act, 1944, the manufacturer cannot opt to pay the duty in respect of unconditionally fully exempted goods and he cannot avail the CENVAT credit of the duty paid on inputs.

2. It is further clarified that in case the assessee pays any amount as Excise duty on such exempted goods, the same cannot be allowed as "CENVAT Credit" to the downstream units, as the amount paid by the assessee cannot be termed as "duty of excise" under Rule 3 of the CENVAT Credit Rules, 2004."

Further, the Hon'ble Tribunal in the case of Narayan Polyplast Vs. Commissioner of C. EX., Ahmedabad [2003 (153) E.L.T. 160 (Tri.-Mumbai)] has held that -

"An unconditional notification exempts specified goods from duty without there being any such requirement. Whether in the case of goods exempted by unconditional notification, it could be said that there is an option to an assessee to avail of the exemption notification or to choose to pay duty at the statutory rate is in my view is debatable. An exemption notification which is issued by the Central Govt., has to be ratified by Parliament. The Supreme Court has held in more than one decision that an exemption notification has to be read to be part of the statute [e.g. Collector v. Parle Exports - 1988 (38) E.L.T. 741 (SC) = AIR 1989 SC 644]. It can be argued that an assessee has an option to accept, or not to accept such an exemption would be to say that he has an option or by option not to go by the provisions of the statute."

In addition to the above legal provisions and Board's circular, another appellate authority viz., the Commissioner (Appeals-II), Central Excise, Mumbai vide his OIA No. US/366/RGD/2012 dated 30.05.2012 has rejected the appeal filed by the Respondent on the same issue. The Applicant prayed the impugned order be set aside.

4. The Applicant delayed filing the Revision Application, details of which are given below:

Sl. No.	OIA No. & dt	Revision Application	Date RA recd and No. of delay	Application for COD date
1	BC/77/RGD(R)/2012 dated 31.05.2012 (Recd on 20.06.2012)	198/235/12-RA	24.09.2012 04 days delay	Filed on 29.04.2016

Applicant filed the Revision Application along with the Miscellaneious Application for Condonation of Delay (herein after as 'COD').

5. A personal hearing in the case was held on 14.12.207, 09.02.2018, 06/07.02.2018 and 23.08.2019. However neither the Applicant nor the Respondent attended the said hearings. While condoning the delay of 04 days in filing the application, the Government takes up the case for decision exparte on merits.

6. Government has carefully gone through the relevant case records, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

7. The issue in dispute in the current Revision Applications is

(i) Whether Section 5A (1A) would arise in case when two notifications are operative i.e. exempted under Notification 10/2006 - CE dated 01.03.2006 and chargeable to duty under Notification No. 02/2008-CE dated 01.03.2008;

(ii) whether the rebate claimed by them was admissible or not.

8. Government notes that M/s H.G. Entertainment Technology Ltd., manufacturer of the impugned goods has been clearing 'Blank audio cassette" falling under C.H. 85232910 both for export as well as home clearance on payment of duty. The Applicant had exported the said goods vide ARE-1 No. 139 dated 15.02.2010 and ARE-1 No. 137 dated 03.02.2010 and had filed rebate claims. On verification of duty payments of the exported goods, the Superintendent, Central Excise, Range II, Division-II, Silvassa

vide his letter F.No. SLV-II/HG/Rebate/09-10/134 dated 03.05.2010 had confirmed the verification of duty payment.

9. Government observes that for the goods 'Blank audio cassette" falling under C.H. 85232910, during the period March 2010, there existed two notifications prevailing -

(i) Notification No. 6/2006-CE (Sr. No. 24)and Notification 10/2006 - CE (Sr.No.22) both dated 01.03.2006 providing Nil rate of duty. Further both the Notifications were amended vide Notification No. 48/2006-CE dated 30.12.2006 and the prescribed rate of duty under these two notification was 'NIL'.

	Notification No. & date	SrNo	Chapter or heading or sub-heading or tariff item	Description of goods	Rate under the first Schedule
48/2006-CE dt 30.12.2006 amendement to					
(19)	6/2006-CE dt 01.03.2006	19(v)	Substituted to 8523	Recorded Audio Cassettes	Nil
(20)	10/2006-CE dt. 01.03.2006	22	Substituted to 8523 29 10		

(ii) Notification No. 02/2008-CE dated 01.03.2008 providing 14% rate of duty under which was amended vide Notification No. 58/2008 dated 07.12.2008 (Sr.No. 10) reducing the rate of duty to 10% adv and which was further amended vide Notification No. 04/2009 dated 24.02.2009 (Sr.No. 5) reducing the rate to 8% adv.

10. At this point, it would be pertinent to understand the scope of the embargo under sub-section (1A) of Section 5A of the Central Excise Act, 1944. The text of the said sub-section (1A) of Section 5A of the Central Excise Act, 1944 is reproduced below.

"(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the

manufacturer of such excisable goods shall not pay the duty of excise on such goods."

There are two crucial phrases in the sub-section which require careful consideration; viz. "whole of the duty of excise leviable thereon" and "granted absolutely". The inference that can be drawn is that the phrase "whole of the duty of excise leviable thereon" would mean an exemption which exempts excisable goods entirely or extinguishes the entire duty leviable on those goods. Similarly, the words "granted absolutely" signify that the exemption granted is complete or unconditional. In other words there are no provisos or conditions to the exemption granted. Purely by virtue of being the manufacturer of the goods specified in the exemption notification, the manufacturer becomes eligible for the exemption granted. When the sub-section (1A) of Section 5A of the CEA, 1944 is read in its entirety, it would be inferable that in a situation where the manufacturer is eligible for an exemption from the entire duty leviable on the excisable goods manufactured without any conditions attached, the manufacturer would no longer have the option to pay duty of excise on such excisable goods.

11. It is observed that there are essentially three different types of exemption notifications. There are exemptions which exempt unconditionally from the whole of the duty of excise leviable on excisable goods. There is a second category of exemption notifications which exempt from the whole of the duty of excise leviable on excisable goods subject to fulfillment of certain conditions. Then there is a third category of exemption notifications which exempts excisable goods from so much of the duty of excise specified thereon as is in excess of the amount calculated at the rate specified in the notification. In other words, the third category of exemption notifications do not exempt excisable goods from the whole of the duty of excise but only from a part thereof which may or may not come with conditions attached. In view of Section 5A(1A) of the CEA, 1944, the manufacturers who manufacture excisable goods which are eligible for exemptions which exempt unconditionally from the whole of the duty of excise do not have the option of paying duty on the goods covered by such

exemption. However, if the manufacturer is eligible for the benefit of an unconditional exemption notification granting exemption from the whole of the duty of excise as well as another exemption notification which grants conditional exemption from the whole of the duty of excise or partial exemption, the manufacturer would be at liberty to choose between these two exemptions for the notification which is more beneficial to them. The provisions of Section 5A(1A) would not be applicable to such a situation. The legislature has in its wisdom issued different exemption notifications in the public interest. Therefore, an interpretation which compels a manufacturer who is eligible for the benefit of two different exemption notifications to avail of the benefit of the exemption notification which exempts excisable goods unconditionally from the whole of the duty of excise would render the other exemption notification which grants conditional exemption from the whole of the duty of excise or partial exemption to become redundant. The scheme of law is such that each of the exemptions issued have a specific intent and purpose. Any inference which negates such coherent interpretation would defeat these purposes.

12. The Notification No. 10/2006-CE dated 01.03.2006 is the notification which is *parimateria* to the rebate claims involved in the present case. As would be forthcoming from the exposition hereinbefore, the exemption granted by Notification No. 10/2006-CE dated 01.03.2006 is not such exemption that the manufacturer has to compulsorily avail of it and therefore the provisions of Section 5A(1A) would not be applicable to manufacturers who do not intend to avail it. In other words, the manufacturers who are eligible for the benefit of exemption under the said notification could choose to not avail of its benefit and pay duty at the tariff rate.

13. Government observes that in the case of Arvind Ltd Vs UOI [2014 (300) ELT 481 (Guj.], the Hon'ble Gujarat High Court in its order dated 19.06.2013 had held that-

Export rebate- Claim of –Denied, on ground that payment of duty was at the will of the assessee – Export rebate impermissible when assessee was exempt from payment of whole duty but when he paid duty at the time of export permissible – Final products manufactured by petitioner exempted from payment of duty by Notification No. 29/2004-C.E. as amended by Notification No. 58/2008-CE. – However petitioner wrongly availed benefit of concessional rate of duty under Notification No. 59/2008-C.E. which exempted cotton textile products in excess of 4% ad valorem –Thereafter, claims for rebate made – Revenue authorities rejected the claims on ground that payment of duty on final products exported was at will of the assessee – Such orders set aside, as petitioner was not liable to pay in light of absolute exemption granted under Notification No. 29/2004-C.E. as amended by Notification No. 58/2008-C.E. r/w Section 5A(1A) of Central Excise Act, 1944 – When the petitioner was given exemption from payment of whole of the duty, and if it paid duty at the time of exporting the goods, there was no reason why it should be denied the rebate claimed which the petitioner was otherwise entitled to – Export rebate claim allowed – Section 5A(1A) and 11B of Central Excise Act, 1944 – Rule 18 of Central Excise Rules, 2002. (paras 9, 10, 11)

Petitions allowed.

Government finds that the same has been upheld by the Hon'ble Supreme Court vide order dated 01.03.2016.

14. The manufacturer has been clearing 'Blank audio cassette" both for export as well as home clearance on payment of duty and had cleared the impugned export goods on payment of duty which was verified by the jurisdictional Superintendent. Further Government finds that it has been held in various judicial decisions that irrespective of facts i.e. whether duty is liable to be paid or otherwise, once duty has been paid, the same cannot be retained by the Government on the grounds that duty was not required to be paid. Therefore, Government holds that the Respondent exporter herein is eligible for rebate in the manner it was granted by the original rebate sanctioning authorities.

15. In view of the above, Government upholds the Order-in-Appeal No. BC/77/RGD(R)/2012 dated 31.05.2012 passed by the Commissioner (Appeals), Central Excise Mumbai-III and dismisses the instant Revision Applications filed by the Department as being devoid of merit.

16. So, ordered.

(SEEMA ARORA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 167/2020-CX (WZ)/ASRA/Mumbai DATED 04.02.2020.

To,
The Commissioner of GST& Central Excise,
Belapur Commissionerte.

Copy to:

1. M/s H.G. Entertainment Technology Ltd., 101, Owners Industrial Estate, Gabriel Road, off. L. J. Road, Mahim, Mumbai-400016.
2. The Deputy / Assistant Commissioner(Rebate), GST & CX , Belapur Commissionerte
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file.