F.No.198/107/13-RA

REGISTERED
SPEED POST

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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.198/107/13-RA 1595 Date of Issue: 07/06/2018

ORDER NO. 170 /2018-CX (WZ)/ASRA/MUMBAI DATED 17.05.2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Commissioner of Central Excise, Customs & Service Tax, Vapi.

Respondent : M/s Sabero Organics Gujarat Ltd..

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. SRP/226/VAPI/2013-14 dated 06.08.2013 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vapi.

ORDER

This revision application is filed by the Commissioner of Central Excise, Customs & Service Tax, Vapi, (hereinafter referred to as "the applicant") against the Orders-in-Appeal No. SRP/226/VAPI/2013-14 dated 06.08.2013 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vapi.

2. The issue in brief is that the respondent, viz. M/s. Sabero Organics Gujarat Ltd., Plot No.2102, GIDC, Sarigam, Dist: Valsad, Gujarat (now amalgamated with M/s Coromandel International Limited, having registered office at 1-2-10, Sardar Patel Toad, Secunderabad-500003, vide Hon'ble High Court of Andhra Pradesh at Hyderabad's Order dated 22.09.2014) and are manufacturer of Excisable goods falling No. 38. The respondent had filed a rebate claim for Rs.1,76,097/-(Rupees One Lakh Seventy Six Thousand and Ninty Seven only) for the duty paid on goods cleared for export under ARE-No. 1076 dated 31.07.2009, under the provisions of Rule 18 of CER, 2002 read with Notification No.19/2004-CE(NT) dated 06.09.2004. On scrutiny of the documents filed alongwith the rebate claim, it was noticed that the ARE-1 Number in the shipping bill No. 7564642 dated 03.08.2009 was mentioned as 076 dated 31.07.2009 whereas, original, duplicate and triplicate copies of the ARE-1 submitted along with the claim bore the number as 1076 dated 31.07.2009. Further, it was also noticed that no payment of duty has been made against the clearance of goods under ARE-1 No.1076 dated 31.07.2009. The department vide letter dated 02.02.2010 requested the respondent to submit the clarification in the matter of such discrepancies. The respondent vide their letter dated 23.08.2010 submitted the corrected copy of the relevant shipping bill No.7564642 dated 03.08.2009. Later on the respondent vide their letter dated 24.12.2010 submitted that the correct ARE-1 No. is 1076 dated 31.07.2009 but through oversight, it was mentioned as 076 in the shipping bill No.7564642 dated 03.08.2009 and withdrew the corrected copy of the said shipping bill. Regarding the duty payment, the respondent stated that in the

statement showing duty payment, the ARE-1 No. is shown as 1073 instead of 1076 due to typographical error.

3. Thereafter, considering the replies made by the respondent in response to the department's letter dated 02.02.2010, the adjudicating authority passed the Order in Original No. 1037/AC/REB/Div.-Vapi/2012-13 dated 26.11.2012 and rejected the said rebate claim holding that no duty has been paid in respect of goods cleared under said ARE-1 and as such rebate is not admissible to the appellant.

4. Being aggrieved with the Order in Original No. 1037/AC/REB/Div.-Vapi/2012-13 dated 26.11.2012 the respondent filed an appeal before the Commissioner (Appeals), Central Excise, Customs and Service Tax, Vapi, who decided the case vide Order in Appeal NO. SRP/226/VAPI/2013-14 Dated 06.08.2013, wherein he set aside the Order in Original No. 1037/AC/REB/Div.-Vapi/2012-13 dated 26.11.2012 and allowed the appeal with consequential relief to the respondent subject to verification regarding payment of duty on the export goods during the month of clearance from the return and other collateral evidences.

5. Being aggrieved, the Department filed aforementioned revision application against the impugned Order in Appeal on the following grounds that :-

5.1. (a) In Para 10 of OIA, the Commissioner(Appeal) has held that "Since, non-mentioning of the ARE-1 No. in the duty statement as explained above is the only ground and also other documents mentioned above proves the export and duty payment during the month, I find no reason to deny the rebate in this case."

(b) The Commissioner(Appeal) has erred in arriving at the above conclusion as it is clearly mentioned in the OIO that during scrutiny of records filled with Rebate claim in respect of ARE-1 No. 1076 dated 31.07.2009, it was noticed that the payment details regarding the ARE-1 No. 1076 was not shown in the duty payment

statement. Thus the Adjudicating Authority did not have clear cut information and it was difficult to co-relate the duty payment. So the Adjudicating Authority has rightly held in OIO that no duty payment had been done regarding above mentioned ARE-1 No. 1076. In this condition the rebate claim could not be held admissible.

5.2. The respondent filed the rebate claim under the provisions of Rule 18 of Central Excise Rules , 2002 which clearly stipulates that the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedures, as may be specified in the notification. Accordingly, in this case the rebate claim is rightly rejected as due to non-mentioning of ARE-1 number in duty paying document, it could not be possible for Adjudicating Authority to co-relate and conclude that duty payment with regards to respective ARE-1 has been done or not, which is the basic requirement/condition for sanctioning a rebate claim.

5.3. The Commissioner (Appeals) had erred in applying a ratio of judgement in the case of Nilkamal Ltd 2011 (271) ELT 476 (GOI) , Sanket Industries 2011 (268) E.L.T. 125 (G.O.I.), as these citation are related to non-following of prescribed procedures. Whereas the instant case is related to non-payment of duty in respect of a claim for rebate of duty under Rule 18 of Central Excise Rules, 2002.

5.4. The Commissioner (Appeals) had erred in applying a ratio of GOI Order No. 612-666/2011-CX dated 31.05.2011 in case of Vinergy International Ltd [2012 (278) ELT 407 (GOI)], wherein at Para 10 of Page 11, it has been held that:-

as regards rebate specifically, procedural infraction of Notification, Circular, etc. are to be condoned if exports have really taken place, and that the core aspect for rebate is its manufacture and subsequent export. As long as this requirement is met other procedural deviations can be condoned.

When the said judgement itself held duty payment as a core aspect then, the Adjudicating Authority has rightly rejected the claim of rebate in absence of enough evidences regarding payment of duty.

5.5 The Commissioner (Appeals) in para 11 of the OIA. remanded for denovo adjudication. The Adjudicating Authority in impugned Order has mentioned that he set aside the impugned order and allowed the appeal of the appellant (respondent in this case) subject to verification regarding payment of duty on the export goods during the month of clearance from the return and other collateral evidences.

5.6 The Commissioner (A) has not finalized the case, though legally he is bound for it, but he has remanded the matter for denovo consideration to lower Adjudicating authority by directing to cause verification regarding payment of duty on the export goods during the month of clearance from the return and other collateral evidences.

5.7 In the above context, kind attention is invited towards CBEC instructions issued under F.No. 275/34/2006-CX.8A dated 18.02.10, wherein the Commissioner (Appeals) has no powers to remand the case and he shall after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against. Therefore, the decision of Commissioner (Appeals) is not correct in law.

5.8 The Commissioner (A) is not vested with the power remand back cases to the adjudicating authority consequent to specific amendment in this regard carried out by the Finance Act, 2001 w.e.f. 11.5.2001.

5.9 (a) In the case of Commissioner of Central Excise,Vapi Vs M/s. Patel Stationers Pvt. Ltd., the Hon'ble CESTAT vide order No. A/10804 & 10805/WZB/AHD/2013 dated 01.05.13, has held that:-

" the provision of section 35(B) of the Central Excise ACT, 1944 has been amended, in terms, that the power of remanding the mater back by the Appellate Authority no more exists. In our considered view, if there is no power to remand matter back to the Adjudicating Authority, the First Appellate Authority has to decide the issue based on the records available with him. This is the view of the Hon'ble Apex Court in the case of Mil India Ltd. Vs CCE, Noida 2007 (210) ELT.188 (SC).

(b) Hon'ble Supreme Court of India in Civil Appeal No. 6988 of 2005, in the case of MIL India Ltd, Vs Commissioner of Central Excise, Noida has observed as under:

'In fact, the power of remand by the Commissioner (A) has been taken away by amending Section 35A with effect from 11-5-2001 under the Finance Bill, 2001. Under the Notes to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35A so as to withdraw the powers of the Commissioner (A) to remand matters back to the adjudicating authority for fresh consideration'.

6. A personal hearing in the matter was held on 15.01.2018. None was present on behalf of the applicant. Shri Rajesh M Patel Dy. Manager, GST & Accounts and Shri Jagdish Babu, Assistant Manager (Accounts) duly authorized, appeared on behalf of the respondent. They also produced the copy of Hon'ble High Court of Andhra Pradesh at Hyderabad's Order dated 22.09.2014 in Company Petition No.156/2014 sanctioning the scheme of amalgamation between the Sabero Organics Gujarat Limited (Transferor Company) and Coromandel International Limited (Transferee Company) w.e.f. the appointed date i.e. 01.04.2014. They on behalf of the respondent reiterated the Order of Commissioner (A) and pleaded that revision application be dismissed and Order in Appeal be upheld.

7. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal. Government notes that the respondent filed a rebate claim for Rs.1,76,097/- for the duty paid on goods cleared for exports under ARE-1 No.1076 dated 31.7.2009 under the provisions of Rule 18 of CER,2002 read with Notification No. 19/2004 – CE (NT) dated 06.09.2004. Government notes that the lower authority has rejected the said rebate claim only on the ground that no duty has been paid in respect of goods cleared under said ARE1 and as such rebate is not admissible to the respondent. The respondent has contended before Commissioner (Appeals) that the mention of ARE-1 No.1073 instead of 1076 in the duty Statement is only a typing error which is in the nature of technical lapse and there is no dispute about the export of goods and realization of export proceeds. Government further notes that the Adjudicating authority as well as Commissioner (Appeals) has also observed that all other details like description of goods, quantity of goods etc. Invoice number, container number, Mate Receipt, etc. cross tallies with all the documents and therefore, Commissioner (Appeals) rightly observed that the adjudicating authority should have verified the payment particulars from returns and other collateral evidences and has allowed the appeal of the respondent subject to verification as stated above.

8. Government further notes that the department in the present revision application has contended that after amendment in Section 35A(3) of Central Excise Act, 1944 w.e.f. 11-5-2001 under Finance Act, 2001 the remand power of Commissioner (Appeals) stands withdrawn. In this regard, Government notes that issue is now well settled that remand powers of Commissioner (Appeals) were withdrawn w.e.f. 11-5-2001 as per above said amendment in Section 35A(3) ibid. So, this pleading of the department is acceptable. Commissioner (Appeals) should have decided the case finally at his level.

9. Under such circumstances, Government remands the case back to the Commissioner (Appeals) for conducting the requisite verification and correlation of duty payment vis a vis ARE-1 No. 1076 /2009-10 dated

31.07.2009. A reasonable opportunity of hearing is to be provided to the respondent before deciding the same. Commissioner (Appeals) shall decide the case within six weeks from the date of receipt of this order.

10. The impugned order -in-appeal is partially modified to above extent and revision application also succeed partially to above extent.

11. The revision application is disposed of in terms of above.

12. So, ordered

17.5.2018

(ASHOK KUMAR MEHTA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 170/2018-CX (WZ)/ASRA/Mumbai DATED 17.5.2018.

To,
Commissioner of Central Goods and Service Tax,
Surat, New Central Excise Building,
GST Bhavan, 41/A Sasoon Road,
Chowk Bazaar, Surat 395001.

Copy to:

1. Commissioner of Central Goods and Service Tax, (Appeals) Surat, 3rd Floor, Magnus Building Althan Canal Road, Near Atlanta Shopping Centre, Althan, Surat-395007.

2. M/s. Sabero Organics Gujarat Ltd., (now M/s Coromandel International Limited) Crop protection Division, Plot No.2102, GIDC, Sarigam 396 155.

3. Assistant/Deputy Commissioner, Central GST & Excise Division XII, Umergaon, Magnus Building Althan Canal Road, Near Atlanta Shopping Centre, Althan, Surat-395007

4. Sr. P.S. to AS (RA), Mumbai.

5. Guard File.

6. Spare Copy.