

REGISTERED
SPEED POST



F.No.195/736-737/10-Denovo-RA-CX
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue...11/12/12

Order No. 1742-1743/12 -Cx-denovo dated 10-12.12.2012 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 order-in-appeal No. SB/84-85/Th-II/09 dated 5.11.09 passed by Commissioner of Central Excise (Appeals), Mumbai-I.

Applicant : M/s Zandu Pharmaceuticals Works Ltd., 200/1, Sanjan, Amgaon Road, Village – Dongari, Talasari, Thane-401 606

Respondent : Commissioner of Central Excise, 3rd Floor, Navprabhat Chambers, Ranade Road, Dadar(W), Mumbai-400 028

ORDER

These revision applications are filed by the applicant M/s Zandu Pharmaceuticals Works Ltd., Thane against orders-in-appeal No. SB/84-85/TH-II/09 dated 05.11.09 as passed by Commissioner of Central Excise (Appeals), Mumbai Zone-I in respect to two individual Orders-in –Original No.14&17 both dated 30.6.06 by the Assistant Commissioner of Central Excise, Boisar-II, Thane-II.

2. Brief facts of the cases are that the applicants are manufacturing and clearing their goods for local consumption as well as for export under Bond/LUT following the self-removal procedure in terms of Rule 19 of the Central excise Rules, 2002. Demands of Rs.99,601/- & Rs.3,70,313/- under Section 11A (1) of the Central Excise Act, 1944 with due interest and equal penalties under Rule 26 of the Central Excise Rules, 2002 were confirmed against the applicant due to failure to produce proof of exports in respect of some export clearances made without payment of duties through their respective merchant exporters on the strengths of relevant Bond/CT-Is.

2.1. On being aggrieved by orders of original of Adjudicating Authorities, the applicant preferred an appeal before the Jurisdictional Commissioner (Appeals) who rejected the same thereby upholding the impugned orders. The applicant has stated to have received the above order-in-appeal on 18.12.09. Further, the applicant preferred to file an appeal under Section 35(B) of the Central Excise Act, 1944 in Form EA-3 before the CESTAT, Mumbai. The respondent department objected to the jurisdiction of the CESTAT in this matter and the Hon'ble Tribunal after hearing both sides held that the above appeals before Tribunal were not maintainable because the matter pertains to the goods exported outside India without payment of duty. Finally, on 22.7.10, the Hon'ble Tribunal passed orders for transfer of the impugned appeals before this authority. Thereafter the applicant filed proper revision applications before this authority on 9.8.11. This authority after considering the same as having been filed after the prescribed time limit stipulated in Section 35 EE of Central Excise Act 1944, rejected the same as "Time-barred" vide GOI orders No.1385-86/2011-Cx dated

11.10.2011. On being aggrieved by these orders, the applicant preferred a C.W.P. No.3485/12 before Hon'ble High Court of Judicature at Bombay, who vide final Orders dated 26.6.12 directed this authority to consider the matter on merits. Accordingly both the revision applications are hereby taken up for decision on merits.

3. Being aggrieved by the impugned order-in-appeal, the applicant had filed these Revision Applications under Section 35EE of the Central Excise Act, 1944 before Central Government on the following grounds:

3.1 That as per records, the goods were cleared for export on the strength of B-I Bond/CT-I of the merchant exporters only where we (the applicants) had acted as a supporting manufacturer. It has been clearly laid down in the procedure prescribed under law (Notification No.42/2001) that in case of exports without payment of duty by merchant exporters, the responsibility to realize foreign exchange and otherwise the obligation to pay the duty lies with the merchant exporters and not upon the manufacturers of the goods in question. The applicants therefore submit that, in the present cases it is not their obligation to pay the duty on the exports undertaken by the said merchant exporters without payment of duty who should have filed the proof of exports with the bond authority who has issued CT-I who is Maritime Commissioner.

3.2 That recovery jurisdiction rests with the Maritime Commissioner where the bond is executed by the merchant exporter which is evident from Board's circular No.87/87/94-CX dated 26.12.94 and below detailed relied upon case laws and for these clearances having made with full information to jurisdiction and Central Excise Authorities no penalty under Rule 26 of Central Excise 2002 can be imposed.

4. Personal hearing was scheduled in this case on 4.10.12. Shri R.K.Sharma, Advocate appeared for personal hearing on behalf of applicant who reiterated grounds of revision application. Shri H.W.Chandiramani, Superintendent attended personal hearing from respondent side. Further vide written submissions dated 4.10.12, the applicant and vide 11.10.12 the respondents further elaborated the above reiterated facts/merits of their respective contentions.

5. Government has carefully gone through the relevant case records and perused the impugned orders-in-original and orders-in-appeal.
6. Government notes that in these cases the goods manufactured by applicant manufacturer were cleared for export without payment of duty under bond through merchant exporters on the strength of CT-I and Bond executed by them before Maritime Commissioner. The original authority confirmed the demand of duty against applicant manufacturer for non-submission of valid proof of export. Commissioner (Appeals) upheld the said orders-in-original. The revision applications filed before Central Government were rejected as time barred vide GOI order No.1385-86/11-Cx dated 11.10.2011. Applicant filed WP No.3485/12 against these orders dated 11.10.2011 before Hon'ble High Court of Bombay who vide order dated 26.6.12 set aside the GOI order dated 11.10.11 and directed to decide the case on merit as the time bar issue was already decided in their judgement dated 25.4.12 in WP No.10102/11 in the case of UOI Vs EPCOS India Pvt. Ltd. Hon'ble High Court has directed in the said case of UOI Vs EPCOS India Pvt. Ltd. that the period spent bonafidely in pursuing appeal before CESTAT is to be excluded under Section 14 of Limitation Act 1963 for computing time limitation for filing revision application under Section 35 EE of Central Excise Act 1944. Accordingly, Government respectfully following the directions of Hon'ble High Court taken up these cases for decision on merit.
7. On perusal of records, Government observes that in these cases of export clearances of excisable goods i.e. Ayurvedic Medicines, of Ch.30 of Central Excise Tariff Act, 1985 by the applicant herein, the basic issue as disputed by the applicant is that because all these exports were made by merchant exporter who after filing the requisite B-I bond, obtained the relevant CT-Is on the strength of which said clearances were made, therefore he is to account for the proper proofs of exports. The applicant relied upon the provisions of Notification NO.42/2001-CE (NT) dated 26.6.2001 read

with Rule 19 of the Central Excise Rules 2002 and CBEC Circular No.87/87/94-CX dated 26.12.94 along with cited judgements and claimed that not only the impugned show-cause Notices are time barred but all the penal provisions invoked therein are illegal.

8. On perusal of records, Government notes that goods in question manufactured by applicant manufacturer were exported through merchant exporters without payment of duty under bond in terms of provisions of rule 19 of Central Excise Rules 2002. The merchant exporters had exported the goods on the strength of Bond executed by them with the Maritime Commissioner at the port of export and the manufacturer also effected clearances of goods without payment of duty on the strength on relevant CT-I & Bond debit entries. The relevant ARE-I is signed by both parties i.e. applicant manufacturer and merchant exporters. The bond details are given on the ARE-I forms. This factual position is not disputed by the department and applicant. The original authority Assistant Commissioner of Central Excise Boisar-II, Thane-II vide a respective order-in-original both dated 30.06.2006 confirmed the impugned demands in respect of said exports for which valid proof of export was not submitted. The applicant has mainly pleaded that as per procedure laid down in the Not. No. 42/2001-CE(NT) dated 26.6.2001 and instructions contained in CBEC Central Excise Manual of Supplementary Instructions and as held in various case laws, in case of default in exporting goods the responsibility to pay duty lies with the merchant exporters and not upon the manufacturers of goods in question, and that the show cause notice was also time barred.

9. Government notes that main issue involved in this case is whether the applicant manufacturer or the merchant exporters are liable to pay duty involved on goods exported under bond when valid proof of export is not submitted. In this regard, it would be proper to go through the para 6, 13 of Part-II of Chapter 7 of instructions contained in CBEC Central Excise Manual of Supplementary Instructions which are extracted as under :-

9.1 "6. Procedure of clearance from the factory or warehouse

6.1 A manufacturer exporter who has furnished a letter of undertaking will prepare the export documents (ARE-1 and invoice under rule 11) for clearance from his factory of production.

6.2 A Merchant-exporter who has furnished a bond shall be provided sufficient number of certificates (CT-1), duly signed /certified in multiples of 25 copies normally covering a period of one to three months, depending upon track record of compliance by the exporter. The bond accepting authority shall be responsible for verifying and accepting the proof of export and in case of any default by the exporter to recover the sum and enforcing the bond. The certificate should be provided according to the volume of exports projected by the exporter (which should also reflect in the amount of bond). The compliance of the exporter is submitting the requisite documents towards proof of export shall be another criterion.

13. Procedure relating to proof of export and re-credit against such proof

13.1 The procedure relating to acceptance of proof of export or the 'validation' of actual export has been simplified. The original and duplicate copies of ARE-1 are presented to the Customs authorities at the place of export [with option for exporter to also present quintuplicate copy]. The Customs authority certifies the actual export on these documents and distributes the copies as specified.

13.2 The exporter shall submit a statement at least in a month, in form specified in Annexure-19 (See Part 7) along with the original copies of ARE-1 with due certification of export (Pass for Shipment Order) by Customs authorities at the place of export to the divisional office (through Range) or in the office of bond-accepting authority. Other supporting documents shall also be furnished, namely, self-attested photocopy of Bill of Lading and self-attested photocopy of shipping bill (Export Promotion copy). The range office or the office of the bond accepting authority on receipt shall immediately acknowledge the statement.

13.3 The exporter is permitted to take credit in his running bond account on the basis of copy of the statement referred to above, duly acknowledged by Range office or the office of the bond-accepting authority.

13.4 It shall be the responsibility of the Range Office and Division Office or the other bond-accepting authority to verify the correctness of statement and ARE-1 will be tallied by the Range Officers with the triplicate copies of ARE-1 already with them and the ARE-1 or its summary received directly from the place of export (hard copies or electronic summary or (e-mail) within 15 days of the receipt. The Divisional Officer shall accept the proof of export or initiate necessary action in case of any discrepancy.

13.5 In case of other bond accepting authority, their office will do this work. The bond accepting authority shall accept the proof of export or initiate necessary action in case of any discrepancy. He will also intimate about the acceptance of proof of export or any other action to the Deputy / Assistant Commissioner of Central Excise from whose jurisdiction goods were cleared for export.

13.6 In case of non export within six months from the date of clearance for export (or such extended period, if any, as may be permitted by the Deputy/Assistant Commissioner of Central Excise or the bond accepting authority or any discrepancy, the exporter shall himself deposit the excise duties alongwith interest on his own immediately on completion of the statutory time period or within ten days of the Memorandum given to him by the Range / Division office or the office of the bond accepting authority. Otherwise necessary action can be initiated to recover the excise duties along with interest and fine/penalty. Failing this, the amount shall be recovered from the manufacturer exporter alongwith interest in terms of the Letter of Undertaking furnished by the manufacturer. In case where the exporter has furnished bond the said bond shall be enforced and proceedings to recover duty and interest shall be initiated against the exporter.

13.7 In case of any loss of document, the Divisional Officer or the bond accepting authority may get the matter verified from the Customs authorities at the place of export or may call for collateral evidences such as remittance certificate, Mate's receipt etc. to satisfy himself that the goods have actually been exported."

9.2 The perusal of above said provision makes it clear that in case of clearance of goods for exports without payment of duty under rule 19 through merchant exporter on the strength of bond executed by merchant exporter with Maritime Commissioner, the necessary action for recovery of duties alongwith interest and fine/penalty will be initiated by the bond accepting authority Maritime Commissioner. This position is stated in most of sub paras of both the paras 6 & 13. Para 6.2 specifically states that "the bond accepting authority shall be responsible for verifying and accepting the proof of export and in case of any defaults by exporter to recover the sum and enforcing the bond". Similarly para 13.5 stipulates as "in case of other bond accepting authority, their office will do this work. The bond accepting authority shall accept the proof of export or initiate necessary action in case of any discrepancy. He will also intimate about the acceptance of proof of export or any other action to the DCCE/ACCE from whose jurisdiction goods were cleared for export".

9.3 Commissioner (Appeals) in his order did not consider the provisions contained in para 6 as well as para 13.3 to 13.7 which stipulate that in case of default in exports made under bond, the action to recover duty will be taken by bond accepting authority. Government observes that no doubt as per statutory provision of Central Excise law the primary responsibility to pay duty lies on manufacturer as duty is required to be paid at the time of removal of goods from factory. In case of clearance of goods for export under bond, payment of duty is deferred till the goods are actually exported. When goods are exported through merchant exporter who has executed bond, the responsibility to export goods lies with the merchant exporter. As such for the sake of clarity and simplification of the procedures, CBEC has instructions stipulating that bond accepting authority will take action to recover the duty/dues in case of default in exports. CBEC Central Excise Manual of Supplementary Instructions, and the instructions as contained are binding on the departmental office as held by Apex Court in the case of M/s Paper Products Ltd. Vs. CC Vadodara 1999 (120) ELT 765 (SC). Therefore, the CBEC instructions to recover duty from merchant exporter by bond accepting authority are required to be followed. Department has erred in confirming demand against manufacturer as this action is contrary to CBEC instructions.

9.4 Government has earlier the same issue vide GOI Revision Order No. 117/2001 dated 31.12.2001 in the case of M/s Supreme Industries Ltd. Vs. CCE Trichy reported as 2002 (144) ELT 729 (GOI). In the said case Government has held as under :-

"Export clearance effected under the authority of the Bonds executed before the Assistant Collector (Refunds), Bombay otherwise called as Maritime Commissioner - Action for recovery of duty and imposition of penalty under erstwhile Rule 13 read with erstwhile Rule 14A of the Central Excise Rules, 1944 rests with the authority with whom the bond has been executed and the officer incharge of factory is not competent to take action - Section 35 EE of Central Excise Act, 1944."

Similar view is taken by Government of India in the case of M/s Unicare Remedies (P) Ltd. 2001 (133) ELT 509 (GOI), and by Hon'ble CESTA Tribunal in the

case of CCE Nagpur Vs. Simplex Mill Co. Ltd. 2007 (215) ELT 107 (T-Mum) and CCE Surat-I Vs. Shagun Processors Pvt. Ltd. 2009 (236) ELT 52 (T-Ahd).

10. Government notes that in these cases merchant exporters had executed bond with the Maritime Commissioners and there is nothing on record whether proof of export is accepted by bond accepting authority or any action was initiated for recovery of sums. The jurisdictional authorities should have checked up the factual position from the bond accepting authority rather than straightaway confirming demand against the manufacturers. Their action is contrary to the CBEC instructions and therefore is not legally sustainable. In case demand is not recoverable from the merchant exporter, then as per provisions of Central Excise Law, the liability of manufacturer to pay the said sums should be examined in accordance with law. In view of above position the whole case matter is required to be remanded back to original authority for denovo consideration in the light of above said CBEC instructions.

11. Government therefore, sets aside the impugned orders and remands the case back to original authority for denovo consideration in the light above discussed CBEC instructions and observation made in foregoing paras. A reasonable opportunity of hearing will be afforded to the parties concerned.

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

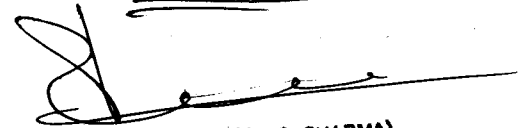


(D P Singh)

Joint Secretary (Revision Application)

M/s Zandu Pharmaceuticals Works Ltd.,
(Now Emami Ltd.,)
200/1, Sanjan, Amgaon Road,
Village – Dongari, Talasari,
Thane-401 606

Attested.



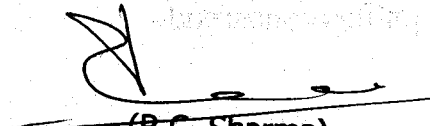
(आर सी शर्मा/R. C SHARMA)
उपायुक्त/Dy Commissioner
C.B.E.C.-GSD to Jt. Secy (R.A.)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt of India
नई दिल्ली / New Delhi

GOI Order No. 1742 - 1743/12-Cx-denovo dated 10.12.2012

Copy to:

1. Commissioner of Central Excise, 3rd Floor, Navprabhat Chambers, Ranade Road, Dadar(W), Mumbai-400 028
2. Commissioner (Appeals) of Central Excise, Mumbai-Zone-I, Meher Building, Dadyseth Lane, Chowpatty Mumbai - 400007.
3. The Assistant Commissioner of Central Excise, Biosar-II Division, Thane-II Commissionerate, Hrishikesh Apartment, Palghar-Biosar Road, Boisar, Distt.- Thane.
4. Shri R.K. Sharma, Sr. Counsel, 157, Ist Floor, DDA Office Complex, CM, Jhandewalan Extn. New Delhi.
5. Guard File.
- ✓ 6. PS to JS (RA)
7. Spare Copy

ATTESTED


(R.C. Sharma)
OSD (Revision Application)