

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. 195/787/2013-RA/960

Date of Issue: 06/07/2018

ORDER NO. 177/2018-CX(WZ)/ASRA/MUMBAI DATED 05.06.2018
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 : M/s Rupa Organics Pvt. Ltd., Thane.

Respondent : Commissioner of Central Excise and Customs
Belapur.

Subject : Revision Application filed, under Section 35EE of the
Central Excise Act, 1944 against the Order-in-Appeal
No. BC/18/BEL/2013-14 dated 22.04.2013 passed by
the Commissioner (Appeals) of Central Excise, Mumbai-
III.



ORDER

These Revision applications are filed by M/s Rupa Organics Pvt. Ltd. Thane, (hereinafter referred to as 'applicant') against the Order-in-Appeal as BC/18/BEL/2013-14 dated 22.04.2013 passed by the Commissioner (Appeals) of Central Excise, Mumbai-III.

2. Brief facts of the case are that the applicant had exported goods involving duty of Rs. 97,130/- to Germany, rebate was claimed and sanctioned by the then Adjudicating Authority. Later, the applicants found that the consignee at the Germany end turned bankrupt and would not take delivery of the consignment. Hence the subject goods were re-imported. When the goods-remained in the custody of the Customs at CONWARE CFS, the same were destroyed due to accident. The applicant later claimed insurance for the total value of the goods and the same was received. Therefore, Show Cause cum demand Notice dated 23.11.2011 was issued to the applicant for the recovery of the erroneously granted rebate on the ground that the goods cannot be considered as exported as the customer did not take delivery of goods and export remittance was not received. Later the said demand was adjudicated vide Order in Original No. Belapur /003/VN/AC/12-13 dated 30.11.2012 by the Assistant Commissioner, Central Excise, Taloja Division, confirming the demand of Rs.97,130/- alongwith appropriate interest and also imposed equal penalty on the applicant.

3. Being aggrieved, the applicant filed appeal before Commissioner (Appeals) who vide impugned Order in Appeal No. BC/18/BEL/2013-14 dated 22.04.2013 rejected the applicant's appeal.

4. Being aggrieved by the impugned Order in Appeal, the applicant filed a present Revision Application mainly on the following grounds:

- 4.1 In respect of extended period, Applicant submit that proviso to Section 11A of Central Excise Act, 1944, the time of issue of SCN of one year can be extended upto 5 years, if there is wilful



misstatement or suppression of facts, or contravention of any provision of the act, or the rules, with intent to evade payment of duty. In this case the Applicants submit, that the Department was in complete knowledge that goods have exported after following the proper procedure, as required under Central Excise Act and rules made thereunder, and there is no denying the fact that the rebate claim of Rs. 97,130/- was sanctioned by the proper officer, only after submission of proper and required documents, and after fulfillment of stipulated conditions. Further, the issue is raised on the basis of audit query. In the case of audit query, no suppression can be charged. The Show Cause Notice is issued on 23.11.2011, pertaining to the rebate claim sanctioned vide Order No. R2965/09- 10 dtd.18.01.2010, which is beyond the statutory period of issue of SCN, hence SCN is barred by limitation. Further no appeal has been filed against the Rebate sanction order which attained finality.

- 4.2 Applicants state and submit that, the rebate amount of Rs.97,130/- can not be considered ineligible, since, the goods had left the boundaries of Indian Territorial waters, and export activity has occurred, based on which, the Excise refund was granted by authorities. The Applicants wanted to re-export the same had it not been burnt on fire when it was with the custody of Customs.
- 4.3 The Applicant did not claim any duty from the insurance company as the duty was not shown on the S.B. and B.E. The act of retaining rebate amount, cannot be considered fraudulent, since, the goods had landed on Indian Port, and Applicant had not initiated activity of taking delivery, purely based on the fact, that their intention was to re-export the goods to Original Buyer's sister concern, in Indonesia, who were already buying the products from the Applicant, for last few years. In this connection Applicant submit the copy of P.O. received from Original Buyer, 'Dystar's Germany plant, as well as Dystar's, Indonesia plant. In reference case, on realizing the fact, that M/s Dystar's Germany unit, is not in a position to take delivery of goods, they were communicating with Dystar, Indonesia, to take delivery of the goods. It was further justified by the copy of letter sent, to the Deputy Commissioner of Customs, dtd.05.01.2010, wherein the intention is clearly



communicated. Copy of the Purchase orders and letter dated 05.01.2010 are enclosed .

- 4.4 The question of informing appropriate authority, arises only after taking the delivery of goods out of Customs, and into their factory premises, which has not happened, since the Goods were lying in custody of Customs only. It is the fact on re-import of exported goods, the customs shall charge Customs Duty and CVD, which has not happened, due to the fact that, goods under reference, were totally and completely destroyed, due to fire, and duty waiver, is issued by the Customs Authority. Hence the allegation, of suppressing the fact and ma-la-fide intention is inappropriate and void.
- 4.5 In respect of Interest and Penalty, Applicants submit that none of the acts are backed by motive of ma-la-fide intention to claim the rebate of Rs.97,130/-, under Rule 18 of Central Excise Rules, 2002, further no appeal has been filed against the rebate sanction order and therefore the imposition of penalty under Section 11AC of Cenvat Credit Rules, 2004 read with Section 11 AC, is not sustainable and interest is also not recoverable. It is pertinent to note that the Commissioner has, in his/her findings of the Order IN Appeal, has only done hypothesis without giving any legal background or supporting law citing, despite of the fact that Applicant have replied to the similar questions raised with sufficient records and documents as evidence /support to their arguments. The order referred in the Order in Appeal is not applicable to this case.
- 4.6 It is worth noting here that the Duty Drawback, is an Incentive granted by Government on Export of Goods, and on realization of the Export Proceeds, within a stipulated period of time. In the instant case, as can be seen from the correspondence with Customs Authorities, the intention of the Applicants, was to re-export the goods from the Port itself, which did not happen, due to accidental fire, causing complete destruction of the goods, while in custody of Customs, subsequent to which the Applicants, have returned back the Duty Drawback amount, with interest. While Duty Drawback is an incentive, Excise Rebate is a refund of Duty of Excise on Excisable goods exported out of India or on Excisable materials used in the manufacture of goods which are exported out of India. There is



no denying the fact that Export did happen, based on which the Excise Rebate was granted by proper Officer, hence relating Export incentive, with Excise Rebate, is misleading, especially without providing any legal basis, provisions or rules of the same.

- 4.7 The Applicants state and submit that the Assistant Commissioner while sanctioning the rebate claim has properly gone through the records, hence impugned Order-in-Original and order in appeal without filing the appeal against the impugned Order in original sanctioning the rebate claim, confirming the demand, imposing penalty and interest on vague reasons, is not proper and correct.
- 4.8 Without prejudice to what is stated above, the Applicants state and submit, that the whole Refund sanctioned and paid to the Applicants, is not wrong, hence the Order-in-Original and order in appeal confirming the demand is not proper order and needs to be set aside.
- 4.9 The Penalty imposed needs to be set aside as there is no suppression or mis-statement in this case. In the above genuine circumstance and bonafide facts, it may kindly be appreciated that, the said Order-in-Appeal is, improper, in correct, against the law, and thus is required to be set aside in limine.
5. A Personal hearing was held in this case on 16.01.2018 and Shri R. V. Shetty, Advocate duly authorized by the applicant appeared for hearing. None appeared on behalf of the respondent department. The Advocate reiterated the submission filed through Revision Application. In view of the same it was pleaded that Revisions Application be allowed Orders in Appeal be set aside. The applicant vide letter dated 12.02.2018 also filed further submissions in the matter which were also taken on record.
6. 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.



7. Government observes that the exported goods in respect of which the applicant had claimed the rebate were re-imported as it was found that the consignee at the Germany turned bankrupt and would not take delivery of the consignment. Government further observes that while the goods remained in the custody of the Customs at CONWARE CFS, the same were destroyed due to accident. In the instant case, upon re-import of the goods, drawback was paid back to the Customs and even insurance was claimed from the insurance company. However, the applicant failed to pay back the rebate claimed.

8. Government in this regard relies on Government of India Order No. 17-19/2016-CX dated 28.01.2016 in RE: Globe Technologies [2016 (344) E.L.T. 677 (G.O.I.)]. In this case the adjudicating authority held that the exporter had not submitted (BRCs) in respect of export clearances for the period 21-12-2009, 28-6-2010 to 23-7-2011 & 28-4-2010 on the date of the Order-in-Original viz. 1.4.2011, 30-6-2011 and 21-7-2011 when in terms of RBI guidelines the foreign proceeds are to be realized within a period of one year from date of export. He therefore, rejected the rebate of duty for non-production of BRCs. Commissioner (Appeals) however, allowed the appeal filed by the assessee holding that the rebate sanctioning authority can very well verify the BRC subsequently also and take necessary action to recover the duty within the time limit if the BRC is not produced within the prescribed time and that the submission of BRCs have not been envisaged as precondition for grant of rebate under Notification No. 19/2004-C.E. (N.T.). However, Government, while setting aside the Order in Appeal in its above referred Order observed as under :

15. *It is a universally known principle that one of the main reasons any export incentive including rebate is allowed is to encourage export-generated foreign exchange earnings for the country. From a harmonious reading of Rule 18 of Central Excise Rules, Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004, relevant provisions of Foreign Exchange Management Act, Foreign Trade Policy and RBI guidelines*

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applicable, it can be concluded that exports are entitled for rebate benefit only if export realization is received, which has not happened in the present case.

9. Applying the rationale of the aforesaid cases, Government is of the considered opinion that the applicant is not entitled to rebate in the instant case as export realization /remittances of the same has also not been received.

10. Government further observes that by issuing of the show cause notice the department sought to recover the rebate amount of Rs.97,130/- which appeared erroneous as the exported goods were re-imported due to the fact German buyer neither accepted the delivery of the said goods nor paid the remittances. This issue of non-acceptance of exported goods by the foreign buyer and re-import of the said goods came to the notice of the Department only when the records were audited. Had there been no such Audit, the claiming of insurance and paying back drawback to the Customs by the applicant but not the rebate amount claimed from the Department would not have been unearthed. This clearly shows suppression on the part of the applicant. The omission and commission on the part of the applicant in not bringing to the notice of the department their acts is nothing but wilful suppression of facts with intent to evade payment of Central Excise duty and therefore, Government holds that extended period for recovery of erroneously sanctioned rebate was correctly invoked, in the instant case. Once, it is held that the erroneously sanctioned rebate is recoverable from the applicant under proviso to Section 11 A of the Central Excise Act, 1944, the statutory interest and appropriate penalty under Section 11 AC of the Central Excise Act, 1944. Hence, Government holds that the penalty was rightly imposed on the applicant under Section 11 AC of the Central Excise Act, 1944.

11. In view of the above, Government is of the considered opinion that given the circumstances of the case, the rebate claim has rightly been held



as inadmissible and recovered along with the interest and penalty. Government, therefore, finds no infirmity in the Order of the Commissioner (Appeals) and hence upholds the same.

12. The revision application is thus rejected being devoid of merits.

13. So, ordered.

(Handwritten Signature)
05.06.2018

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

ORDER No. 177 /2018-CX (WZ) /ASRA/Mumbai Dated 05/06/2018.

To,

M/s Rupa Organics Pvt. Ltd,
Shop No. 1, Gurukrupa Co-op Hsg. Society,
Near Three petrol Pump,
Veer Savarkar Path, Thane-400 602.

Attested

(Handwritten Signature)
6/7/18

एस. आर. हिरुलकर
S. R. HIRULKAR
(A.C.)

Copy to:

1. The Commissioner of GST & CX, Belapur Commissionerate.
2. The Commissioner of GST & CX, (Appeals) Raigad, 5th Floor, CGO Complex, Belapur, Navi Mumbai, Thane.
3. The Deputy / Assistant Commissioner ,GST & CX Belapur
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file
6. Spare Copy.

