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

F. No.198/338-352/WZ/2018-RA / 659
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Date of Issue: 18.02.2022

ORDER NO. 180-195 /2022-CX (WZ) /ASRA/Mumbai DATED 16.02.2022 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	:	Commissioner of CGST & Central Excise, Mumbai East. 9th Floor, Lotus Info Centre, Station Road, Parel East, Mumbai-400012
Respondent	:	M/s Ajanta Pharma Ltd., B-4/5/6, MIDC Industrial Area, Paithan, Aurangabad-431138
Subject	:	Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal no.PK/794-808/ME/2018 dated 29-08-2018 and PK/757/ME/2018 dated 24-08-2018 passed by the Commissioner (Appeals -II), CGST & C. Excise, Mumbai.

ORDER

The subject Revision Applications have been filed by the Commissioner of CGST & Central Excise, Mumbai East (here-in-after referred to as 'the department') against the Order-in-Appeal No.PK/794-808/ME/2018 dated 29-08-2018 and PK/757/ME/2018 dated 24-08-2018 passed by the Commissioner (Appeals-II), CGST & C. Excise, Mumbai in respect of M/s Ajanta Pharma Ltd. situated at B-4/5/6, MIDC Industrial Area, Paithan, Aurangabad-431138. The details of the relevant Orders-in-Original, the amount sanctioned and the disputed rebate amount are as per the table below:-

Sl. No.	Order-in-Original No. & Date	No. of Rebate claims	Amount sanctioned (Rs)	Amount in dispute (Rs)
A	**B**	**C**	**D**	**E**
1	R-002/MTC/ME/2017-18 dt. 18-09-2017	17	2415506	215201
2	R-003/MTC/ME/2017-18 dt. 18-09-2017	18	4673052	138719
3	R-004/MTC/ME/2017-18 dt. 18-09-2017	22	3322661	142421
4	R-005/MTC/ME/2017-18 dt. 18-09-2017	17	3441721	52509
5	R-006/MTC/ME/2017-18 dt. 18-09-2017	18	1238889	152994
6	R-130/MTC/ME/2017-18 dt. 23-10-2017	10	1252878	156988
7	R-131/MTC/ME/2017-18 dt. 23-10-2017	8	2728727	52628
8	R-132/MTC/ME/2017-18 dt. 23-10-2017	13	2458738	51171
9	R-133/MTC/ME/2017-18 dt. 23-10-2017	19	18457904	64459
10	R-183/MTC/ME/2017-18 dt. 30-10-2017	17	4457201	66307
11	R-184/MTC/ME/2017-18 dt. 30-10-2017	18	4371808	92518
12	R-227/MTC/ME/2017-18 dt. 06-11-2017	7	14109692	62875

13	R-228/MTC/ME/2017-18 dt. 03-11-2017	17	4155444	12321
14	R-337/MTC/ME/2017-18 dt. 21-11-2017	14	1308648	367513
15	R-427/MTC/ME/2017-18 dt. 18-12-2017	10	593666	63475
16	R-074/MTC/ME/2017-18 dt. 3-10-2017	9	8994922	302522
		TOTAL	77981457	1994621

2. Brief facts of the case are that the respondent filed applications under notification no.19/2004-CE (NT) dated 19.06.2004 as amended under Rule 18 of the Central Excise Rules 2002 read with Section 11B of CEA, 1944, claiming rebate of the Central Excise duty paid on the goods exported by them. The rebate sanctioning authority found that though excess amount of duty was paid on account of FOB value of exported goods being less than the Invoice value of exported goods, the respondent was eligible for refund in cash of the entire amount in view of Section 142(3) of CGST Act, 2017. Hence the adjudicating authority vide aforesaid Orders-in-Original sanctioned the entire rebate claimed on the duty paid even on the value over and above the FOB value on the goods exported in view of the Provisions of Section 142(3) of CGST Act, 2017. Aggrieved by the said Orders in Original, the department filed appeal with Commissioner Appeals on the grounds that as per Section 142(3) of the CGST Act, 2017, the original sanctioning authority should have restricted the rebate sanctioned in cash to the extent of the duty payable on FOB values and the differential excess duty paid should have been treated as lapsed and that the original authority had erred in interpreting Section 142(3) of the CGST Act, 2017 resulting in the excess duty paid being refunded in cash to the respondent.

3. The Commissioner (Appeals) vide Orders-in-Appeal PK/794-808/ME/2018 dated 29-08-2018 and PK/757/ME/2018 dated 24-08-2018 held that Section 142(3) applies only in the cases where the claim is refund of Cenvat credit and where the claim is fully or partially rejected. He held that the claims

in this case are pertaining to claims of duty on export of goods and there is no order of rejection either fully or partially and hence he rejected the department's appeal and upheld the Maritime Commissioner's Order. Commissioner Appeal also held that 14 appeals mentioned in respect of the OIOs, at Sr.No.1to 13 and Sr No.15 in the above table stands withdrawn in view of the department's letter No. CGST/Mum(E)/Rev/withdrawal/1022/2018/2800 dated 02.08.2018, requesting for withdrawal of the instant appeals filed against the impugned fourteen orders-in-original, as those are below the threshold monetary limits fixed by the Board's Instruction No. 390/Misc/116/2017-JC dated 25.05.2018.

4. Aggrieved, the department has filed the present Revision Applications against the impugned Orders-in-Appeal on the following grounds:-

4.1 The respondent was not entitled for an excess amount sanctioned as rebate over and above the duty on FOB value declared by them and the same was liable to be rejected and lapsed in terms of proviso to the Section 142(3) of CGST Act, 2017. As per Section 142(3) of the Central Goods and Services Tax Act, 2017, *every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of Section 11B of the Central Excise Act 1944 (1 of 1944):* and as per 1st proviso to Section 142(3) of the Central Goods and Services Tax Act, 2017 where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse'.

4.2 In view of the above, the excess amount claimed/rejected shall lapse. Accordingly, the amount of refund claimed over and above the FOB Value is liable to be rejected, and the same has to be lapsed in terms of the proviso to

Section 142(3) ibid. What is available in cash under Section 142(3) is eligible refund amount and not the amount which is not eligible. Since, the subject excess amount of refund pertains to a value which is over and above the FOB value, the same does not pertain to exports and hence, not eligible for refund. Once the amount is not legally eligible for refund, there is no other option but the same has to lapse in terms of Section 142(3). The appellate authority has erred in holding that the exporter was eligible for the entire rebate of Central Excise duty paid even on a value over and above FOB value on the goods exported under Notification No.19/2004 C.E.(N.T.) dated 06/09/04 as amended issued under Rule 18 of C.E.R., 2002 read with Section 11B of the CEA 1944 and provisions of Section 142(3) of the Central Goods and Services Tax Act, 2017 when the exporter was not eligible for the excess rebate claimed over and above the FOB value declared by them. For this matter, the Transitional Provision of Section 142(3) of the Central Goods and Services Tax Act, 2017 has been wrongly interpreted. When an Act is implemented in the Legislature, proviso if any, incorporated should also be read with and examined with the Act itself and the eligibility should be determined on the basis of the said main Act as well as the proviso and the Section cannot be implemented independently.

4.3 In the instant rebate claim the exporter was eligible for the rebate of duty paid on FOB value and the same had to be restricted to that extent rather than sanctioning the excess amount claimed by the exporter.

4.4 In view of the above, the department filed the revision application requesting to pass an order to reject the rebate of excess amount sanctioned in cash, over and above the duty on FOB value.

5. The respondent filed reply to the Revision application vide their letter dated 2nd November, 2021, wherein they have submitted as under:

5.1. Provision of lapse of credit under section 142 (3) only apply in cases where the refund claim is pertaining to refund of cenvat credit-However in the present case the refund is in respect of rebate of duty paid on clearance of final goods. In terms of Section 142(3) of the Goods and Services Tax Act, 2017 rebate claims for amounts paid under erstwhile law shall always be sanctioned in cash.

5.2. There is no dispute with respect to the facts that the goods have been exported outside India on various dates prior to 30/06/2017 and Central excise duty has been paid on the goods exported and rebate claim for the same has been filed. The order allowing rebate to the Appellant has been passed after the date of implementation of GST.

5.3. It has been held by the orders of the GOI and the orders of the lower authorities that Respondent has paid excess duty over and above assessable and hence the same is refundable to the Respondent. The Department has contended that the refund should have been lapsed in terms of section 142 (3). As per Section 142(3) of the GST Act, every claim of refund of duty paid under erstwhile law filed by the Appellant before 01/07/2017 shall be disposed off in accordance with the provisions of erstwhile law and any amount eventually accruing to the Appellant shall be paid to him in cash. The said section reads as follows:

(3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944:

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse:

Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act.

5.4. The Department has primarily relied on the proviso to section 142 (3) to contend that the refund of excess duty should have been lapsed. It is submitted that the said contention is not tenable on the following grounds:

a. The proviso to section 142 (3) applies only in cases where any claim for refund of CENVAT credit is fully or partially rejected". Thus it is imperative that the claim should be made for refund of cenvat credit by the claimant. However in the instant case the claim is made for rebate of duty paid on goods exported in terms of Rule 18 of the Central Excise Rules, 2004. The Respondent has paid the duty on the clearance of the export of goods and has claimed refund of such duty. The respondent had claimed the refund of duty. The manner in which duty was discharge does not change the nature of rebate claim filed. Thus the proviso itself does not apply. Therefore the question of non-sanction of the refund in cash does not arise.

b. It is submitted that there is no rejection of any refund claim and hence the provisions of section 142 (3) does not apply. The Lower authorities have held that refund is admissible to the respondent and hence there is no order with respect to any rejection of the refund claim. The department in its appeal memorandum has not cited any grounds to contend that the refund sanctioned for excess duty paid should be rejected. Hence there is no refund amount which is either rejected or liable to rejected. Therefore the reliance on section 142 (3) is totally misplaced and without any merit.

5.5. Respondent relied on the following judgements wherein it has been held that in terms of Section 142(3) of Central Goods and Services Tax Act, 2017, with effect from 1-7-2017 any refund arising on account of Cenvat credit was to be paid in cash:

(i) Gujarat High Court Order in case of THERMAX LIMITED Vs Union of India-2019 (31)G.S.T.L. 60-(GUJ);

(ii) CESTAT Chandigarh Order in case of Oswal Castings Pvt. Ltd. Vs Commissioner of C.Ex. & S.T. Faridabad-1-2019(24) G.S.T.L. 649 (Tri-Chan.);
(iii) CESTAT Chandigarh Order in case of SMG International Vs Commissioner of C.Ex. Panchkula-2019(21) G.S.T.L. 446 (Tri-Chan.);
(iv) CESTAT Chandigarh Order in case of Rawalwasia Ispat Udyog Pvt. Ltd. Vs Commissioner of C.Ex. Panchkula -2019(26) G.S.T.L.196 (Tri-Chan.);
(v) CESTAT Chennai Order in case of TOSHIBA MACHINE (CHENNAI) P. LTD. 2019 (27) G.S.T.L 216 (Tri - Chennai)

5.6. The respondent referred to CBEC Circular No. 37/11/2018-GST dated 15.03.2018 wherein it has been clarified as under:
10.1 Furthermore, it has been brought to the notice of the Board that the field formations are rejecting, withholding or re-crediting CENVAT credit, while processing claims of refund filed under the existing laws. In this regard, attention is invited to sub-section (3) of section 142 of the CGST Act which provides that the amount of refund arising out of such claims shall be refunded in cash. Further, the first proviso to the said sub-section provides that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse and therefore, will not be transitioned into GST. Furthermore, it should be ensured that no refund of the amount of CENVAT credit is granted in case the said amount has been transitioned under GST. The field formations are advised to process such refund applications accordingly

5.7. The respondent has contended that Lapsing / Rejection of refund will amount to retention of excess amount and the tax cannot be withheld without the authority of law in violation of Article 265 of the Constitution of India. The lower authorities has allowed refund in cash. However the department has contended that refund amount should lapse. There is no dispute that amount paid by the respondent is excess amount of tax. It is also not disputed that such excess amount is required to be given back to the claimant. The refund of such excess amount is governed by the Article 265 of the Constitution of India which states that "No tax shall be levied or collected except by authority

of law." It is submitted that in the GST regime, an assessee is eligible for availment of credit of input tax credit only of CGST, SGST and IGST paid on all inward supplies. Further, the transitional provisions have been enacted which allow credit of duty paid under erstwhile law only for certain specified situations. It is submitted that the present situation has nowhere been provided for in the transitional provisions except in section 142(3) which very specifically covers the situation. Also, the due dates for filing the transitional forms is over. Thus, if the re-credit is allowed to the applicant, the re-credit will accrue to the applicant but will not be allowed to be taken under GST as there is no provision which allows such re-credit. Therefore, this will cause financial loss to the applicant to this extent. Therefore, entire purpose of Section 142(3) for granting the refund by way of cash shall be defeated. The Government cannot unjustly retain an amount which is otherwise not due to them. Hence the refund has been rightly allowed to the respondent and the appeal filed by the department needs to be set aside.

5.8. The respondent submitted that it is evident from the above that any refund of tax paid under erstwhile regime shall be refunded in cash only in GST era. In view of the above, it was submitted that both the appeals filed by the department is required to be set aside.

6. Personal hearing in the matter was granted to the applicant on 10.11.2021. Shri Vinod Awtani, Advocate appeared online on behalf of the applicant. He reiterated their submissions and stated that excess amount above FOB value has been rightly credited under Section 142(3) of CGST Act. He requested to maintain Commissioner Appeals Order.

7. Government has carefully gone through the relevant case records available in case files, the written submissions and also perused the impugned Orders-in-Original, Orders-in-Appeal and the Revision Applications.

8. Government notes that the short issue involved in the instant case is whether the amount of Central Excise duty which was paid in excess on the exaggerated assessable values of the goods representing the difference between CIF and FOB value which were exported, is required to be refunded to the applicant in cash.

9. Government notes that in the impugned cases the original authority had held that exporter had paid excess duty on such value representing the difference between CIF & FOB value, however he also held that even the duty paid in excess was required to be refunded in cash in terms of Section 142(3) of the CGST Act, 2017.

10. The department has contended that exporter was eligible for the rebate of duty paid on FOB value and the same had to be restricted to that extent rather than sanctioning the excess amount claimed by the exporter and requested to pass an order to reject the rebate of excess amount sanctioned in cash, over and above the duty on FOB value. Government finds that it is not in dispute even with the respondent that they are eligible to claim rebate of such quantum of Central Excise duty that was paid as per the FOB value.

11. The department has also made some arguments about the fact that the amount of refund claimed over and above the FOB value should be rejected and the same has to be lapsed in terms of Section 142(3) ibid. The respondent has submitted that with the implementation of GST, allowing re-credit of the excess duty paid would accrue to the respondent but they will not be allowed to be taken as GST as there is no provision which allows such credit. They have also drawn attention to GST Circular No. 37/11/2018-GST dated 15.03.2018 wherein it has been clarified that post 1st July 2017, any amount allowable as re-credit of CENVAT credit has to be granted as cash refund in terms of Section 142(3) of the CGST Act, 2017.

12. In the instant case, Government seeks to emphasise that the present proceedings are in exercise of the powers vested in terms of Section 35EE of the CEA, 1944 and must be exercised within the framework of the Central Excise Act, 1944. The provisions of the CGST Act, 2017 are not exercisable in revision proceedings and also does not fall under the purview of the Revisionary authority. Therefore, the department's appeal in this regard cannot be entertained at this stage.

11. In view of the above Government holds that the department's appeal is allowed only to the extent of restrictions of eligibility of rebate of duty paid on FOB value and the department can seek relief in respect of the appeal made under the provisions of CGST Act, 2017, with the appropriate authorities.

12. The Revision application is disposed off on the above terms.

16/2/22

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

ORDER No.180-195/2022-CX (WZ) /ASRA/Mumbai dated 16.02.2022

To,
The Commissioner GST & Central Excise, Mumbai East,
9th Floor, Lotus Info Centre, Station Road,
Parel East, Mumbai-400012

Copy to:
1. M/s Ajanta Pharma Ltd. B-4/5/6, MIDC Industrial Area, Paithan, Aurangabad-431138.
2. The Commissioner of CGST & Central Excise (Appeals-II), Mumbai, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Bandra Kurla Complex, Bandra (East), Mumbai-400051.
3. The Maritime Commissioner GST & Central Excise, Mumbai East, 9th Floor, Lotus Info Centre, Station Road, Parel East, Mumbai-400012.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Notice Board.