



**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, Cuff Parade,
Mumbai- 400 005

F. NO. 198/04/14-RA | 2842 Date of Issue: 28/5/21

ORDER NO. 188/2021-CX (WZ) /ASRA/Mumbai, DATED 29.4.2021 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 Central Excise, Thane-I.

Respondent : M/s Ashu Organics (I) Pvt. Ltd., Thane-Reg.

Subject : Revision Application filed under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. BPS/213/Th-I/2013 dated 18.10.2013 passed by the Commissioner(Appeals) Central Excise, Mumbai Zone-I.

ORDER

This revision application has been filed by the Commissioner of Central Excise, Thane-I, (hereinafter referred to as "the applicant") against the Order-in-Appeal No. BPS/213/Th-I/2013 dated 18.10.2013 passed by the Commissioner (Appeals) Central Excise, Mumbai Zone-I.

2. The brief facts of the case are that M/s Ashu Organics (I) Pvt. Ltd. (respondent) are a 100% EOU holding Letter of Permission (LOP) from the Development Commissioner and license for Private Bonded Warehouse was issued under Section, 58 & 65 of the Customs Act, 1962. They are also registered with Central Excise Department holding registration for manufacture of Red K D Base; Natro Anisic Acid, Para Amino Benzamide, Opla Amine etc. The respondent also has a DTA unit situated at W-118, 119, MIDC, Badlapur which manufactures and supplies raw materials for use in the EOU. An audit conducted of the respondent's records revealed that their DTA unit had received duty drawback on the goods received by them for manufacture of raw materials supplied to the EOU. Since availment of duty drawback by the DTA unit made its clearances to the EOU ineligible for the exemption for Basic Customs duty, a Show Cause Notice F.No. V/Adj/DSCN/15-03/Ashu/AK-IV/Th-1/2012 dated 07.05.2012 was issued to the respondent for recovery of Customs duty of Rs. 29,21,380/- not paid on the clearances made by the DTA unit to the EOU unit, imposition of penalty and appropriation of Customs duty and interest already paid. The Additional Commissioner of Central Excise, Thane-I vide Order in Original No.03/KP-03/TH-1/2013-14 dated 14.05.2013 confirmed the demand of Rs. 29,21,380/- towards the Customs duty along with interest and imposed equal penalty on the respondent company. The said Order-in-Original also appropriated Rs. 18,33,111/- paid by the respondent towards the demand of Customs duty confirmed and Rs. 7,69,663/- towards interest.

3. Being aggrieved by the said Order in original, the respondent filed appeal before Commissioner (Appeals) Central Excise, Mumbai Zone-I. The said Commissioner (Appeals) vide impugned Order allowed the appeal filed by the respondent by setting aside Order in Original No.03/KP-03/TH-1/2013-14 dated 14.05.2013.

4. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant department has filed this Revision Application before the Government on the following grounds:-

4.1 M/s Ashu Organics (I) Pvt. Ltd. (respondent), have cleared the goods in DTA manufactured out of imported /deemed imported raw material on which duty track benefit is availed, on payment of CVD during the period from April, to March, 2010 without discharging the Customs duty at appropriate and thereby, they have contravened the provisions of Section 3 of the 1944 read with Rule 17 read with Rule 8, Rule 11 of the Central Excise Rules, 2002 and Section 4 of the Central Excise Act, 1944, by:-

(i) not paying Customs duty at appropriate rate on the clearance of finished goods made in DTA; manufactured out of raw materials imported with drawback benefit,'

(ii) not adopting correct value for payment of such duty, by deducting from the 'transaction value' of such goods in terms of Section 4 ibid, such amounts as they claim to be 'discounts' which were not made known to the Department in advance prior to such transactions and passing on the duty paid on such full transaction value as Cenvat credit to the recipient DTA unit,

(iii) not issuing invoice showing proper value and duty payment thereon, by not reflecting proper duty payment in the returns filed by them from time to time.

4.2 The Appellate authority's views are different than the views of Additional Commissioner. The basic issue involved in the above show cause notice is that, whether the Noticee was required to pay Customs duty at appropriate rate on the clearances of finished goods made in DTA, manufactured out of raw materials imported with Drawback benefit, in terms Notification No. 23/2003-Central Excise dated 31.03.2003, as amended.

4.3 As per the Order in Original the penalty is preventive as well a deterrent measure to defeat the recurrence of breach of law and also to discourage non-compliance of law specially when there has been deliberate avoidance of payment of tax. In the instant case, if the Audit had not been conducted by the CERA officers, such escapement of duty would not have come to light. Thus, suppression of facts with intent to evade payment of duty stands established, thereby attracting penalty under Section 11AC of e Central Excise Act, 1944. In the case of CCE M/s. Machino Montell (I) Ltd. as reported in 2006 (202) ELT 398, the Hon'ble Punjab and Haryana High Court has held that the imposition of penalty was justified when duty liability was not discharged. The ratio flowing from this judgment is squarely applicable to the issue of imposing penalty in this case under Section 11AC of the Act. The Appellate authority has not considered this issue.

5. A personal hearing in the matter was fixed on 28.01.2021, through video conferencing which was attended online by Shri Deepak Naik, Authorized Representative and Shri Ashutosh Dewal, Director on behalf of the respondent company. They submitted that

- Revision Application filed by the applicant department is not maintainable on the ground of jurisdiction as issue is demand of duty,

- Even on merits, Commissioner (Appeals) has correctly passed the OIA considering all facts. The same is required to be maintained, and
- Ground of application are only conjectures and surmises.

6. The Government has examined the matter and it is found that the issue involved in the instant Revision application is undisputedly regarding whether the respondent company was required to pay Customs duty at appropriate rate on the clearances of finished goods made in DTA, manufactured out of raw materials imported with Drawback benefit, in terms of Notification No. 23/2003-Central Excise dated 31.03.2003, as amended. Whereas, as per first proviso to Section 35B read with Section 35EE of the Central Excise Act, 1944, the Revision application can be filed with the Government against the Order in Appeal only if the order relates to a case of loss of goods, a rebate of duty of Excise on exported goods and goods exported outside India without payment of duty. Therefore, the issue involved in the present Revision Application cannot be covered in any of the categories as envisaged in clause (a), (b) and (c) of the first proviso to Section 35B of the Central Excise Act, 1944. Therefore, the Government does not have jurisdiction to deal with the above stated Commissioner (Appeals)'s order.

7. For the foregoing reasons, Government holds that the Revision Application is not maintainable and accordingly, the same is dismissed giving liberty to the applicant department to pursue the matter before the appropriate forum.


29/4/21
(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 188/2021-CX (WZ) /ASRA/Mumbai DATED 29.04.2021

To,

The Commissioner of Central Goods & Services Tax,
Thane Rural, 4th Floor, Central GST Bhawan, Plot No 24-C,
Sector-E, Bandra Kurla Complex, Bandra (E), Mumbai-400051.

Copy to:

1. M/s Ashu Organics (I) Pvt. Ltd., W-48 & 49, MIDC Morivali, Ambernath (West), Dist. Thane-421 501.
2. Commissioner Of Central Goods & Services Tax, Thane Appeals, 12th Floor, Lotus Info Centre, Near Parel Station (East), Mumbai-400012
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file,
5. ~~Spare Copy.~~