REGISTERED SPEED POST AD

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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. 195/211/WZ/2018-RA /1990 Date of Issue: 03.04.2023

ORDER NO. 137 /2023-CX(WZ)/ASRA/MUMBAI DATED 30.03.2023 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 : M/s. S Kant Healthcare Ltd.,
Plot No. 1802-1805,
3rd Phase GIDC-Vapi.

Respondent : Commissioner of CGST & Central Excise, Surat.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. CCESA-SRT(APPEAL)/PS-086/2018-19 dated 22.06.2018 passed by the Commissioner (Appeals), CGST & Central Excise, Surat.

ORDER

The revision application has been filed by M/s. S Kant Healthcare Ltd., Plot No.1802-1805, 3rd Phase GIDC-Vapi. (herein after to be referred as "Applicant"), against Order-in-Appeal No. CCESA-SRT(APPEAL)/PS-086/2018-19 dated 22.06.2018 passed by the Commissioner (Appeals), CGST & Central Excise, Surat.

2. The applicant had filed rebate claims amounting to Rs. 4,75,679/- under Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 of the CER, 2002 read with Section 11B of the Central Excise Act, 1944 for the goods cleared from the factory for export under ARE-1's. The concerned Assistant Commissioner, Central Excise after following the due process of Law rejected the said rebate claim vide his Order-In-Original No. VAPI-II/REBATE/179/2017-18 dated 21.12.2017 being inadmissible under Section 11B of the CEA, 1944 as the rebate claim had been filed beyond the stipulated time limit of one year from the relevant date.

3. Aggrieved by the OIO dated 21.12.2017, the applicant filed appeal before the Commissioner(Appeals). The appellate authority after following due process of law rejected the appeal and upheld the OIO vide his Order-in-Appeal No. CCESA-SRT(APPEAL)/PS-086/2018-19 dated 22.06.2018.

4. Aggrieved by the OIA dated 22.06.2018, the applicant filed revision application on the following grounds:

4.1 The Applicant is regularly exporting the goods, filling the proof of export and regularly getting refund also, in this three rebate claims file also they have submitted the rebate filed within one year only, however, the rebate sanctioning officer verbally demanded certain papers regarding unjust enrichment as such the Applicant could not submit the refund claim within one year to the department, as such the Applicant request to condone

the delay and grant them refund since there is not dispute regarding the export of the goods.

4.2 Instead of condoning. the delay the adjudicating authority & asking Applicant to produce the proof of submission of rebate claim within one year, in respect of this finding the Applicant wants to submit that the departmental officer verbally stated them to bring certain irrelevant papers and therefore the delay of 6 days have occurred as such they do not have any proper evidence on records of submission of rebate, claim within one years.

4.3 Without prejudice to what has been submitted above Applicant would like to further submit that the time period as specified under section 11B is not applicable in respect of rebate claim filled under Rule 15 of Central Excise Rules 2002 as per below mentioned case laws :-

2012 (281) ELT. 227 (Mad.) IN THE HIGH COURT OF JUDICATURE AT MADRAS N. Kirubakaran, J. DORCAS MARKET MAKERS PVT. LTD. Versus COMMISSIONER OF CENTRAL EXCISE Writ Petition No. 26236 of 2010, decided on 23-12-2011-

> *Rebate Limitation Time limit under Section 11B of Central Excise Act, 1944 -Prescribed by Notification No. 41/94-C.E., but omitted by subsequent Notification No. 19/2004-C.E., prescribing procedure for obtaining rebate - HELD: Omission was conscious as all other conditions for obtaining rebate were retained in the subsequent Notification - Rebate could not be rejected on ground of limitation It was more so as even Rule 18 of Central Excise Rules, 2002 did not prescribe it. [para 8]*
>
> *Rebate Claim of Limitation Rule 18 of Central Excise Rules, 2002 is not subject to Sections 11A and 11B of Central Excise Act, 1944 In that view, rebate cannot be rejected on ground of limitation. [para 8]*
>
> *Writ jurisdiction - Alternative remedy Its availability is not an absolute bar for High Court to exercise its writ jurisdiction It is more so where facts are before the Court and only question to decide is whether Rules or Notification were to be applied - Article 226 of Constitution of India 195. [para 9]*

4.4 The above case was followed in high court which is as under :-

2015 (321) E.L.T. 45 (Mad.) IN THE HIGH COURT OF JUDICATURE AT MADRAS DY. COMMISSIONER OF C. EX., CHENNAI Versus DORCAS MARKET MAKERS PVT. LTD. Writ Appeal No. 821 of 2012 and M.P. No. 1 of 2012, decided on 26-3-2015-

Export - Rebate/Refund - Limitation - Relevant date- Question of rebate of duty is governed separately by Section 12 of Central Excise Act, 1944 and the entitlement to rebate would arise only out of a notification under Section 12(1) bid - Rule 18 of Central Excise Rules, 2002 is to be construed independently - Rebate of duty under Rule 18 ibid should be as per the notification issued by Central Government - Notification No. 19/2004-CE, dated 6-9-2004 which supersede the previous Notification No. 41/94-C.E did not contain the prescription regarding limitation, a conscious decision taken by Central Government - Assessee actually exported the goods - Their entitlement to refund is not at all in doubt - In absence of any prescription in the scheme, the rejection of application for refund as time-barred is unjustified - Section 118 ibid. [paras 13, 14, 15, 31]

And the said above case law was maintained in supreme court and reported in 2015 (325) ELT. A104 (S.C.).

4.5 However as per the findings given by the First Appellate authority in Para 8 of the OIA dated 22.06.2018 that *"I find that neither adjudicating authority nor the Applicant had observed that an amendment was made in the said Notification No 19/2004- CE (NT) dated 06.09.2004 vide Notification No 18/2016 CE(NT) dated 01.03.2016 as per which it had specifically been provided that rebate claim should be lodged within one year as per provisions of Section 11B of Central Excise Act 1944,"*

4.6 Thus it can be observed that the First Appellate Authority had rectified the Order-In-Original dated 21.12.2017 which he cannot as per below mentioned cases Law :-

(1) 2011 (266) E.L.T. 422 (S.C.) IN THE SUPREME COURT OF INDIA, ORYX FISHERIES PRIVATE LIMITED Versus UNION OF INDIA, Civil Appeal No. 9489 of 2010, decided on 29-10-2010

Order Non-speaking order - Absence of reason in original order cannot be compensated by disclosure of reason in appellate order. [para 42]

4.7 The Applicant want to further submit that if they are not allowed the refund in cash then also they are eligible for refund by way of re-credit since there is no dispute that the goods are not exported but now with implementation of GST w.e.f. 01.07.2017 they cannot avail re-credit therefore the central government had made provision in sub-section (3) of Section 142 of CGST Act 2017 i.e. whatever refund arises to assesee it should be given in cash only as such the Applicant should be given refund in cash only.

4.8 That the Applicant would like to draw your honour kind attention to Provision of sub-section (3) of Section 142 of CGST Act 2017 which read as under :-

> *"(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 provision of existing law other than provisions of sub-section (2) of section 11B of the Central Excise Act, 1944(1 of 1944)."*

5. The applicant was thereafter granted opportunity of personal hearing on 10.01.2023. Shri Uday B Kadu, Advocate appeared online and submitted that time limit of Section 11B of the Central Excise Act does not apply to rebate. He referred to case law of Dorcas Metals Ltd. He requested to allow the claim as delay was only few days.

6. Government has carefully gone through the relevant case records available in case files, the written submissions and also perused the impugned Order-in-Original, the Order-in-Appeal and the RA. The issue for

decision in the present case is the admissibility of rebate claim filed by the applicant beyond one year of the date of export of goods.

7.1 Before delving into the issue, it would be apposite to examine the statutory provisions regulating the grant of rebate. Rule 18 of the CER, 2002 has been instituted by the Central Government in exercise of the powers vested in it under Section 37 of the CEA, 1944 to carry into effect the purposes of the Central Excise Act, 1944 including Section 11B of the CEA, 1944. Moreover, the Explanation (A) to Section 11B explicitly sets out that for the purposes of the section "refund" includes rebate 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. The 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 covers the entire Rule 18 within its encompass. Likewise, the third proviso to Section 11A(1) of the CEA, 1944 identifies "rebate 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" as the first category of refunds which is payable to the applicant instead of being credited to the Fund. Finally, yet importantly, the Explanation (B) of "relevant date" in clause (a) specifies the date from which limitation would commence for filing refund claim for excise duty paid on the excisable goods and the excisable goods used in the manufacture of such goods. The relevant text is reproduced below.

"(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;"

7.2 It would be apparent from the definition of relevant date in Section 11B of the CEA, 1944, that for cases of refund of excise duty paid on exported goods or on excisable materials used in exported goods, the date of export is the relevant date for commencement of time limit for filing rebate claim.

8.1 The applicant has placed reliance upon the judgment of the Hon'ble Madras High Court in Dorcas Market Makers Pvt. Ltd. vs. CCE[2012(281)ELT 227(Mad.)] although the same High Court has reaffirmed the applicability of Section 11B to rebate claims in its later judgment in Hyundai Motors India Ltd. vs. Dept. of Revenue, Ministry of Finance[2017(355)ELT 342(Mad.)] by relying upon the judgment of the Hon'ble Supreme Court in UOI vs. Uttam Steel Ltd.[2015(319)ELT 598(SC)]. Incidentally, the special leave to appeal against the judgment of the Hon'ble High Court of Madras in Dorcas Market Makers Pvt. Ltd. has been dismissed *in limine* by the Apex Court whereas the judgment in the case of Uttam Steel Ltd. is exhaustive and contains a detailed discussion explaining the reasons for arriving at the conclusions therein.

8.2 The observations of the Hon'ble High Court of Karnataka in Sansera Engineering Pvt. Ltd. vs. Dy. Commissioner, Bengaluru[2020(371)ELT 29(Kar)] at para 13 of the judgment dated 22.11.2019 made after distinguishing the judgments in the case of Dorcas Market Makers Pvt. Ltd. and by following the judgment in the case of Hyundai Motors India Ltd. reiterate this position.

"13. The reference made by the Learned Counsel for the petitioners to the circular instructions issued by the Central Board of Excise and Customs, New Delhi, is of little assistance to the petitioners since there is no estoppel against a statute. It is well settled principle that the claim for rebate can be made only under section 11B and it is not open to the subordinate legislation to dispense with the

requirements of Section 11B. Hence, the notification dated 1-3-2016 bringing amendment to the Notification No. 19/2004 inasmuch as the applicability of Section 11B is only clarificatory."

8.3 Be that as it may, the Hon'ble Delhi High Court has in its judgment in the case of Orient Micro Abrasives Ltd. vs. UOI[2020(371)ELT 380(Del.)] dealt with the issue involved in the present revision application. The text of the relevant judgment is reproduced below.

"16. We also record our respectful disagreement with the views expressed by the High Court of Gujarat in Cosmonaut Chemicals[2009(233)ELT 46(Guj.)] and the High Court of Rajasthan in Gravita India Ltd.[2016(334)ELT 321(Raj.)], to the effect that, where there was a delay in obtaining the EP copy of the Shipping Bill, the period of one year, stipulated in Section 11B of the Act should be reckoned from the date when the EP copy of the Shipping Bill became available. This, in our view, amounts to rewriting of Explanation (B) to Section 11B of the Act, which, in our view, is not permissible."

8.4 The judgment of the Hon'ble Delhi High Court has very unambiguously held that the period of one year must be reckoned from the date of export and not from the date when the copy of shipping bills is received.

8.5 the Hon'ble Supreme Court has in its judgment in the case of Sansera Engineering Limited V/s. Deputy Commissioner, Large Tax Payer Unit, Bengaluru [(2022) 1 Centax 6 (S.C.)] held that:

"9. On a fair reading of Section 11B of the Act, it can safely be said that Section 11B of the Act shall be applicable with respect to claim for rebate of duty also. As per Explanation (A) to Section 11B, "refund" includes "rebate of duty" of excise. As per Section 11B(1) of the Act, any person claiming refund of any duty of excise (including the rebate of duty as defined in Explanation (A) to Section 11B of the Act) has to make an application for refund of such duty to the appropriate authority before the expiry of one year from the relevant date and only in the form and manner as may be prescribed. The "relevant date" is

defined under Explanation (B) to Section 11B of the Act, which means in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of goods..... Thus, the "relevant date" is relatable to the goods exported. Therefore, the application for rebate of duty shall be governed by Section 11B of the Act and therefore shall have to be made before the expiry of one year from the "relevant date" and in such form and manner as may be prescribed. The form and manner are prescribed in the notification dated 6.9.2004. Merely because in Rule 18 of the 2002 Rules, which is an enabling provision for grant of rebate of duty, there is no reference to Section 11B of the Act and/or in the notification dated 6.9.2004 issued in exercise of powers conferred by Rule 18, there is no reference to the applicability of Section 11B of the Act, it cannot be said that the provision contained in the parent statute, namely, Section 11B of the Act shall not be applicable, which otherwise as observed hereinabove shall be applicable in respect of the claim of rebate of duty.

10. At this stage, it is to be noted that Section 11B of the Act is a substantive provision in the parent statute and Rule 18 of the 2002 Rules and notification dated 6.9.2004 can be said to be a subordinate legislation. The subordinate legislation cannot override the parent statute. Subordinate legislation can always be in aid of the parent statute. At the cost of repetition, it is observed that subordinate legislation cannot override the parent statute. Subordinate legislation which is in aid of the parent statute has to be read in harmony with the parent statute. Subordinate legislation cannot be interpreted in such a manner that parent statute may become otiose or nugatory. If the submission on behalf of the appellant that as there is no mention/reference to Section 11B of the Act either in Rule 18 or in the notification dated 6.9.2004 and therefore the period of limitation prescribed under Section 11B of the Act shall not be applicable with respect to claim for rebate of duty is accepted, in that case, the substantive provision – Section 11B of the Act would become otiose, redundant and/or nugatory. If the submission on behalf of the appellant is accepted, in that case, there shall not be any period of limitation for making an application for rebate of duty. Even the submission on behalf of the appellant that in such a case the claim has to be made within a reasonable time cannot be accepted.

When the statute specifically prescribes the period of limitation, it has to be adhered to.

11. It is required to be noted that Rule 18 of the 2002 Rules has been enacted in exercise of rule making powers under Section 37(xvi) of the Act. Section 37(xxiii) of the Act also provides that the Central Government may make the rules specifying the form and manner in which application for refund shall be made under section 11B of the Act. In exercise of the aforesaid powers, Rule 18 has been made and notification dated 6.9.2004 has been issued. At this stage, it is required to be noted that as per Section 11B of the Act, an application has to be made in such form and manner as may be prescribed. Therefore, the application for rebate of duty has to be made in such form and manner as prescribed in notification dated 6.9.2004. However, that does not mean that period of limitation prescribed under Section 11B of the Act shall not be applicable at all as contended on behalf of the appellant. Merely because there is no reference of Section 11B of the Act either in Rule 18 or in the notification dated 6.9.2004 on the applicability of Section 11B of the Act, it cannot be said that the parent statute – Section 11B of the Act shall not be applicable at all, which otherwise as observed hereinabove shall be applicable with respect to rebate of duty claim.

.....

15. In view of the above and for the reasons stated above, it is observed and held that while making claim for rebate of duty under Rule 18 of the Central Excise Rules, 2002, the period of limitation prescribed under Section 11B of the Central Excise Act, 1944 shall have to be applied and applicable. In the present case, as the respective claims were beyond the period of limitation of one year from the relevant date, the same are rightly rejected by the appropriate authority and the same are rightly confirmed by the High Court. We see no reason to interfere with the impugned judgment and order passed by the High Court. Under the circumstances, the present appeal fails and deserves to be dismissed and is accordingly dismissed."

9. In the light of the foregoing facts and in keeping with the judicial principle of *contemporanea exposito est optima et fortissinia in lege*(contemporaneous exposition is the best and strongest in law),

Government respectfully follows the ratio of the above judgment of the Hon'ble Supreme Court. The criteria for the commencement of time limit for filing rebate claim under the Central Excise law has been specified as the date of export of goods and applicability of Section 11B for rebate has been settled conclusively and cannot be varied by any exercise of discretion. Therefore, the rebate claims filed by the applicant have correctly been held to be hit by bar of limitation by the Commissioner(Appeals) in the impugned order.

10. The Order-in-Appeal No. CCESA-SRT(APPEAL)/PS-086/2018-19 dated 22.06.2018 passed by the Commissioner(Appeals) is upheld. The revision application filed by the applicant is rejected as devoid of merits.

Shrawan 30/5/23

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

ORDER No. 197 /2023-CX(WZ) /ASRA/Mumbai DATED 30.05.23

To,

M/s. S Kant Healthcare Ltd.,
Plot No. 1802-1805,
3rd Phase GIDC-Vapi.

Copy to:

1) The Commissioner of CGST & Central Excise, Surat.
2) The Commissioner (Appeals), CGST & Central Excise, Surat.
3) Mr. Uday B Kadu, Advocate, Office No. 607, Fortune Square 11, Above TBZ, Vapi Daman Road, Chala, Vapi 396191 (Gujarat).
4) Sr. P.S. to AS (RA), Mumbai.
5) Guard file.
6) Spare Copy.