



REGISTERED
SPEED POST

F.No.195/844/2012-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

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

Date of Issue. 29/1/16

ORDER NO. 20/2016-CX Dated 28.01.2016 OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, 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 the Order-in-Appeal No. 02/2012(V-II) CE dated 28.06.2012 passed by Commissioner of Customs, Central Excise and Service Tax(Appeals), Vishakhapatnam-II.

APPLICANT : M/s RHI CLASSIL LIMITED, Visakhapatnam.

RESPONDENT : Commissioner of Central Excise, Visakhapatnam.

ORDER

This Revision Application is filed by M/s RHI Classil Limited, Visakhapatnam against the Order-in-Appeal No. 02/2012 (V-II) CE dated 28.06.2012 passed by the Commissioner of Customs, Central Excise and Service Tax (Appeals), Visakhapatnam, with respect to Order-in-Original No. 14/2009(R)/BP/VSP-5/CEX dated 23.04.2009 passed by the Assistant Commissioner of Central Excise, Division-V, Vishakhapatnam-II Commissionerate.

2. Brief facts of the case are that the applicant are manufactures of "Refractory Bricks" initially they operated as a DTA Unit and with effect from 31.01.2008 converted in to a 100% EOU. The applicant exported goods manufactured by them to M/s. RHI AG Vienna and to their other affiliated group companies during the period from 21.03.2007 to 30.01.2008 under claim of rebate under Rule 18 of Central Excise Rules, 2002. The applicant filed rebate claims and the same were sanctioned during the period from 15.11.2007 to 18.07.2008. Subsequently, because of contractual obligation the applicant received additional amounts due to cost variance from their importers i.e. M/s. RHI AG Vienna and their other affiliated group companies, on which the applicant paid the differential duty with interest. Subsequent to payment of differential duty, the applicant filed two rebate claims before Jurisdictional Assistant Commissioner for Rs.4,36,053/- and for Rs.24,04,012/-

2.1 Rebate claim for Rs.4, 36,053/ was sanctioned by Order-in-Original No. 14/2009 (R)/BP/VSP-5/CEX dated 23.04.2009. On review of the above Order-in-Original by the competent authority, the Department being aggrieved by the impugned order filed an appeal before Commissioner (Appeals) and the same was dismissed vide Order-in-Appeal No. 11/2009 (V-II) D CE dated 30.10.2009 basing on the decision in the case of M/s. Sterlite Industries (I) Ltd. Vs. CCE, Tirunelveli [(2009 (236) EL.T 143 (Tri. Chennai)], was where in rebate based on the supplementary invoices raised on foreign buyers was allowed. A Revision Application was filed before the Joint Secretary (RA) against the said Order-in-Appeal No.11/2009 (V-II) D CE dated 30.10.2009.

2.2 On verification of the rebate claim for Rs. 24, 04,012/- a Show Cause Notice was issued to the applicant proposing to reject the supplementary rebate claim to the tune of Rs.5,33,932/- on the ground that the same was hit time bar under section 11B (5) (B) (a) (i) of the Central Excise Act,1944. However while sanctioning the claim the original authority sanctioned the claim in full i.e. Rs.24,04,012/- Vide Order-in-Original No. 15/2009 (R)/BP/VSP-S/CEX dated 27.04.2009. On review of the above Order-in-Original by the competent authority, the Department being aggrieved by the impugned order filed an appeal before

Commissioner (Appeals) and the same was dismissed vide Order-in-Appeal No. 12/2009 (V-II) D CE dated 30.10.2009 basing on the decision in the case of M/s. Sterlite Industries (I) Ltd. Vs. CCE, Tirunelveli (2009 (236) ELT 143 (Tri.Chennai), where in rebate based on the supplementary invoices raised on foreign buyers was allowed. A Revision Application was filed before the Hon'ble Joint Secretary (RA) against the Order-in-Appeal No.12/2009 (V-II) D CE dated 30.10.2009.

2.3 The Joint Secretary (Revision Application) vide Government of India Order No. 455- 456/2011-CX dated 30.05.2011, decided both the above said Order-in-Appeal No. 11/2009 (V-II) D CE dated 30.10.2004 and 12/2009 (V-II) D CE dated 30.10.2004. The Revisionary authority held that the rebate claim of Rs.5,33,932/- is time barred in terms of provision of Section 11B and liable to be rejected. The JS (RA) disposed off the revision applications filed against Order-in-Appeal No.11/2009 (V--II) D CE dated 30.10.2009 and Order-in-Appeal No.12/2009 (V-II) D CE dated 30.10.2009 by setting aside the impugned orders and remanding the case to original authority to decide the case afresh taking into account GOVERNMENT OF INDIA Revision Order No. 418/2011-CX dated 27.04.2011 (F. No. 198/159/09-RA-CX) in the case of CCE Hyderabad vs. M/s. Piramal Health Care Ltd.

2.4 The adjudicating authority in de novo proceedings vide the impugned Order-in-Original held that during the material period of export of subject excisable goods that is from 21.03.2007 to 30.01.2008 on which the impugned rebate was claimed, the appellants were only a manufacturing unit in DTA and not a 100% EOU. As such, the GOVERNMENT OF INDIA Revision Order No. 418/2011-CX dated 27.04.2011 (F. No198/159/09- RA-CX) in the case of CCE Hyderabad Vs. M/s. Piramal Health Care Ltd is not applicable in the present case. The adjudicating authority further held that the decision of the Joint Secretary (RA) under section 35EE Central Excise Act, 1944 cannot be appealed against and is final, therefore the contention of the appellants that their issue is covered under explanation B (2) (f) under section 11B and that their claim is within the time does not hold water and is liable for rejection. The adjudicating authority following the observations of the Hon'ble Joint Secretary decided the issue by holding that the sanction of rebate of Rs. 4,36,053/ is in order, in respect of the other claim for Rs.24,04,012/- only the rebate of Rs.18,70,080/- is in order and rejected the amount of Rs.5,33,932/- as the supplementary rebate claim in respect of this amount are not filed within one year from the relevant date that is one year from the date of export: under explanation (B) (a) (i) of section 11B of the Central Excise Act, 1944 and also demanded the same amount under section 11A of Central Excise Act, 1944 along with interest under section 11B ibid.

3 Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioner (Appeals) who rejected the same.

4 Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 The impugned Order-in-Original is ultra vires on the ground that Adjudication has gone beyond what has been ordered in the G.O.I. order No. 455-56/2011 to decide the case afresh on issue of M/s Piramal case only. After deciding that the order of the Joint Secretary (RA) is not applicable to the case, as the unit is not EOU but DTA unit, only option open was to request the Revisionary authority to revisit his order and rectify the mistake which occurred due to miscommunication. But still he proceeded on his own and finalized the case disregarding the JS(RA) orders.

4.2 It is clarified that the period of 1 year from the date of Export figuring in Para 11B (1) pertains to the normal single consignment Export. In this case, export is covered by a contract pertaining to a longer period. The Contract Price is covered by a Price Variation Clause. Against the Export of different consignments under claim of rebate, the unit had received its refund. Subsequently, when additional amount was received from buyer after finalization of contract, as per the agreement, additional duty was deposited and refund was claimed against the said additional payment. It is not stipulated anywhere that only duty paid at the time of export only can be rebated. In this case, the normal refund claim was filed in time and refund was sanctioned. Only when the party deposited additional duty, fresh refund claim was filed. Hence the provision of 11 B (1) is not applicable and provision of 11B (B) (f) is applicable. Thus there is no need for provisional assessment to claim the refund. In addition, as we are explaining below, these assessments would be deemed provisional till finalization of the contract, this would also be governed under explanation (8) (eb) to rule 12 B (4). In that case also the relevant date would be date of finalization of contract. It is also pertinent to note that Notification 19/2004 CE (NT) issued under Rule 18 of the Central Excise Rules does not prescribe any time limit for filing of rebate claim unlike the Notification 41/1994 CE (NT) dated 12.9.1994 where time frame was prescribed as under the section 11 B. Hence no time limit is prescribed for claiming rebate under the Rule 18 of Central Excise Rules in the case of export after the issuance of the Notification 19/2004. This view is confirmed by the Hon'ble High Court at Madras in the case of Dorcas Market Makers Pvt. Ltd. Vs. CCE [2012 (281) ELT 227 (Mad)] who have detailly analyzed and compared two notifications.

4.3 The G.O.I. Order No. 455-56/2011 encompasses on two issues: First one is being which of the clauses viz. (a) (i) or clause (f) or clause (eb) and (f) both, to

explanation to section 11B (5) is applicable and the second one is whether in case of 100% EOU export rebate is allowable. For the first one in the G.O.I order dated 5.5.2011, it has been held that the decision of the Sterlite Industries case is not applicable as the case dealt with an issue when supplementary rebate claim was made before the sanction of original claim. It was held that clause (a) (i) is applicable without Government of India into the fact that assessments were provisional. But nowhere in Sterlite order there is any mention that the supplementary rebate is claimed prior to the sanction of original claim. This inference is not based on facts. Hence the clauses (f) and clause (eb) is more appropriate. Hence the decision in the case of Sterile is not redundant but is the decision on which the case is centered around.

4.4 The main discussion in the order dated 5.5.2011 was whether 100% EOU should export on payment of duty with claim of rebate and on this issue of 100% EOU the direction has been issued to the original authority to decide the case afresh. In the G.O.I order of 5.5.2011 the main thrust is on whether rebate can be sanctioned for 100% EOU and duty paid must be considered to be a deposit and the amount is to be re-credited to Cenvat Account. As our unit was not an 100% EOU during the period, that discussion is no more relevant. In the following cases the supplementary payments beyond time limit of one year were discussed and they got benefit. As the AC has now confirmed that during the material period our unit was not an EOU, the above discussion has no further relevance.

4.5 In this case, whether an express provisional, assessment was made or not, the assessment made would be deemed to be provisional. We seek the assistance of CESTAT order in the cases of -

- Commissioner of Central Excise, Chennai Vs Sri Balaji Cylinders- 2009 (235) ELT 101 (Tri-Bang), page - 15
- Ideal Industrial Explosives Ltd Vs CCE Hyderabad-2008 (231) ELT 485 (Tri-Bang), Page - 17, Para - 7
- Telephone Cables Ltd Vs CCE Chandigarh-2003(154) ELT-234(Tri- Delhi) Page - 21, and finally Supreme Court's Orders in the case of
- Commissioner Vs Telephone Cables Ltd 2004 (163) ELT 117 (SC)

In all these orders it has been held by the tribunals, and confirmed by the Supreme Court, that where there is a Price Variation clause in the agreement, the assessment should be, deemed to be, provisional. It has been even held that even where the assessable value is reduced in accordance with price variation clause, the department has to refund the differential duty collected.

4.6 We still hold our stand that the rebate/refund should be paid on whole of the duty of excise paid for the export goods as mentioned in the notification No. 19/2004 C.E(N.T.) dated 04.09.2004, whether paid provisionally or in supplementary invoice so that valuation under Section 4 is properly complied with. In the case of Balkrishna Industries Ltd.[2011 (271) ELT) 148 (G.O.I), same view was asserted by the J.S (RA), that for extra amount paid by the assessee subsequently to arrive at FOB value should be refunded or credited to the Cenvat credit.

4.7 The fact of 100% EOU or DTA unit exporting the goods on payment of duty is immaterial and so also section 5A (1A) of the Act. The issue has not been disputed by the Assistant Commissioner in his Order in Original and the assessment has been done by department for the payment of duty including realization of supplementary duty. If the amount is paid by the exporter is to be paid as voluntary deposit with the department , the same is to be returned to the exporter by way of re-credit in Cenvat credit account. We rely in the case of Praj Industries Ltd [2012 (278) ELT 421 (G.O.I)] , P.R.S. Pharmacel Pvt. Ltd (GOVERNMENT OF INDIA) [2006 (202) ELT 153 (G.O.I.)] and Indira Gandhi Mahila Sahakari Soot Girni Ltd. [2012 (278) ELT (G.O.I.) pronounced by the J.S.(R.A).

5. Personal hearing was held in this case on 06.07.2015. Shri S.C. Choudhary attended hearing on behalf of applicant who reiterated grounds of Revision Application. Shri Narendra Kumar Yadav, Deputy Commissioner appeal for hearing on behalf of the respondent department.

6. Government has carefully gone through the relevant case records available in case files, oral & written submission and perused the impugned Order-in-Original and Order-in-Appeal.

7. Government observes that applicants filed rebate claim on duty paid by them on exported goods, which were sanctioned to them. Subsequently, the applicant received additional amount due to cost variance from buyer of the goods and they paid differential duty along with applicable interest and filed two rebate claims amounting to Rs. 4,36,053/- and Rs. 24,04,012/-. The first rebate claim of Rs. 4,36,053 was allowed by the original authority and upheld by the appellate authority in the first round of revisionary proceedings. In respect of second rebate claim of Rs. 24,04,012/-, a show cause notice was issued for rejection of part rebate claim to the tune of Rs. 5,33,932/- on ground of being the same time barred. However, the original authority sanctioned the whole rebate claim of Rs. 24,04,012/-. Being aggrieved by both rebate sanctioning orders, the department preferred appeals before Commissioner (Appeals), who rejected department's appeals. Subsequently, the Department filed Revision Application before JS (RA).

JS(RA) vide Government of India order No. 455-456/2011-CX dated 03.05.2011 modified Commissioner (Appeals) order in as such as the rebate claim of Rs. 5,34,932/- held time barred and that amount of Rs. 4,36,053/- and Rs. 24,04,012/- rightly held admissible. However, Government remanded the whole case to decided the same afresh in limit of Government Revision Order No. 418/2011-CX dated 27.04.2011 in case of CCE Hyderabad Vs. M/s. Piramal Health, on the ground that the department informed that the applicants are 100% EOU. In remand proceedings, original authority held that the applicant is claiming rebate of duty of period when they were not 100%EOU. Commissioner (Appeals) upheld impugned Order-in-Original. Now, the applicant has filed this Revision Application on grounds mentioned in Para (4) above.

8. Government observes that in first round of Revision proceedings, Government vide Revision Order No. 455-456/2011-CX dated 03.05.2011 held that:

(i) Original authority and appellate authority rightly held rebate claim of amount Rs. 4,36,053/- with regards to first rebate claim admissible. As regard to second rebate claim of Rs. 24,04,012/- part amount of Rs. 5,33,932/- is not admissible as the rebate claim is time barred. As such rebate claim of Rs. 18,70,080/- (24,04,012-4,36,052) is rightly held admissible.

(ii) It was reported by department vide letter dated 29.04.2011 that the applicant is 100% EOU. In view of this fact, the JS(RA) remanded the case to decide the same afresh in terms of GOVERNMENT OF INDIA order No. 418/2011-CX dated 27.04.2011 in the case of CCE, Hyderabad Vs. M/s. Piramal Health.

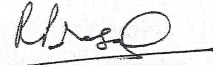
8.1 In remand proceedings, the original authority has held that during the material period of export of subject excisable goods that is from 21.03.2002 to 31.01.2008 on which impugned rebate was claimed, the applicant were only a manufacturing unit in DTA and not 100% EOU and as such, ratio of Government of India order No. 418/2011-CX dated 27.04.2011 is not applicable to this case and the rebate of Rs. 4,36,053/- is in order. In respect of the claim for Rs. 24,04,012/- only the rebate of Rs. 18,70,080/- was sanctioned and Rs. 5,33,92/- was rejected as time barred.

8.2 Government further notes that the applicant is challenging only rejection of Rs. 5,33,932/- in this Revision Application. This issue has already been settled in first round of Revisionary Proceedings vide Government of India Revision Order No. 455-456/11-CX dated 03.05.2011. The said Revision Order dated 03.05.2011 has not been reported by the applicant to have challenged before any higher judicial forum. As such, the said Revision Order dated 03.05.2011 has attained its finality. As such, rebate claim of Rs. 5,33,932/- which was held inadmissible as time barred, also attained finality. This issue, which has already attained finality, cannot

be raised in this second round of Revisionary Proceedings as the issue is no longer res-integra. The whole case, therefore, becomes infructuous and as such, Revision Application cannot be entertained at this stage.

9. Revision Application is therefore rejected in above terms.

10. So, ordered.

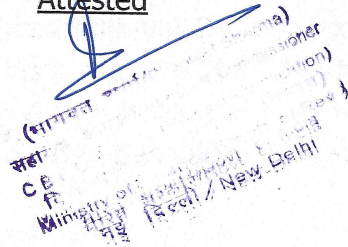


(RIMJHIM PRASAD)

Joint Secretary to the Government of India

M/s.RHI Classil Ltd.,
Venkatpuram (Village)
Thane (Post), Munagapaka (Mandal),
Visakhapatna, District-531021.

Attested




(Signature)
(Name)
C B
Ministry of
New Delhi

ORDER NO. 20/2016-CX Dated 28.01.2016

Copy to:

1. Commissioner of Central Excise, Visakhapatnam-II, Commissionerate, Central Excise Building, Port Area, Visakhapatnam-530035.
2. Commissioner of Central Excise Customs & Service Tax (Appeals), Customs House, Visakhapatnam-530035
3. The Assistant Commissioner of Central Excise, Customs and Service Tax, Division-V, Visakhapatnam-II, S.V.C. Complex, 3rd Floor, Dwaraka Nagar, First Lane, Visakhapatnam-530016
4. PA to JS(RA)
5. Guard File.
6. Spare Copy

Attested


(B.P.Sharma)
OSD (RA)
Mintally of New Delhi / New Delhi
नई दिल्ली / New Delhi

