

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

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F.No.195/917/13-RA | 2929

Date of Issue: 02/06/21

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ORDER NO. 203 /2021-CX (SZ)/ASRA/MUMBAI DATED 28.5.2021 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.

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Subject :- Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. 10/2013(H-II)CE dated 02.07.2013 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals-II),Hyderabad.

Applicant :- M/s Bharat Petroleum Corporation Ltd., Aviation Fuelling Station, Hyderabad.

Respondent :- Maritime Commissioner, Hyderabad-II Commissionerate, Hyderabad.

**ORDER**

This revision Application has been filed by M/s Bharat Petroleum Corporation Ltd., Aviation Fuelling Station, Hyderabad (hereinafter referred as the applicant) against the Order in Appeal 10/2013(H-II)CE dated 02.07.2013 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Hyderabad.

2. Brief facts of the case are that the applicant, having Aviation Fuelling Station (ATF) at all major Airports in India including Hyderabad Air Port. They are supplying excise duty paid Aviation Turbine Fuel (ATF) to foreign going Aircrafts. Consequent on the issuance of Notification No 17/2004 dated 06.09.2004, withdrawing the warehousing facility, thus they received duty paid ATF from refineries and exported the same from Hyderabad Airport to Foreign going Aircraft. The applicant filed four rebate claims for Rs.8,14,606/-, Rs. 27,91,443/-, 14,82,607/- and Rs.32,08,040/- pertaining to above exports for the period from September 2005 to December 2005.

3. The Maritime Commissioner, Hyderabad-II Commissionerate, Hyderabad, vide letter C No IV/16/18/2005-RC dated 26.10 2007 informed the applicant that

*“ On perusal of your refund claims filed by you it is observed that, the aviation turbine fuel has been cleared during the period from September, 2005 to December, 2005. It is evident that, the claims filed by you are beyond the ambit of Section 11B of the Central Excise Act, 1944 in as much as the claims were preferred by you are hit by time limit. Hence the claims are returned herewith”.*

4. Being aggrieved by the aforesaid letter, the applicant filed appeal before Commissioner (Appeals) on 21.06.2013. Commissioner (Appeals), vide Order in Appeal 10/2013(H-II)CE dated 02.07.2013 (impugned Order) dismissed the appeal filed by the applicant as barred by limitation of time prescribed under Section 35(1) of the Central Excise Act, 1944.

5. Being aggrieved by the impugned Order, the applicant has filed the present revision application on the various grounds mentioned therein.

6. Personal hearing in this case was fixed on 04.02.2021 which was attended by Shri Jitendra Kumar, Chief Manager Finance-(Taxation) and Shri Ritesh Mehta, Assistant Manager (Taxation) on behalf of the applicant. They reiterated their additional written submissions filed on the date of hearing. They claimed that Hon'ble Gujarat High Court in the case of CCE vs. AIA Engineering Ltd. [2011 (21) S.T.R. 367 (Guj.)] has held that if the original claim was filed within time with

wrong authority, then subsequent refiling beyond limitation should not be held against the assessee.

7. In their additional written submissions filed on 04.02.2021 the applicant mainly reiterated the grounds of Revision Application and contended as under :-

7.1 Refund claims were correctly submitted with jurisdictional authorities within 1 year as per the provisions of Notification 19/2004-CE.

At the outset, they would like to highlight that as per Notification 19/2004-CE, a rebate claim can be presented to Assistant Commissioner or the Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacture or warehouse or, as the Maritime Commissioner. The relevant extract of "Presentation of claim for rebate to Central Excise" is reproduced by the applicant.

In their case, the ATF is manufactured at Numaligarh Refinery Limited, Assam which fall under the jurisdiction of Nagaon and also the Excise duty collected by Nagaon Commissionerate. It is also to be noted that the Refund Notification nowhere restricts an applicant who is not a manufacture from filing refund claim with central excise department having jurisdiction over the factory of manufacture. In view of this, they had correctly filed the refund claims before the Deputy Commissioner, Nagaon having jurisdiction over the factory of manufacturer.

7.2 The original refund filing date, though filed before wrong authority, should be considered for computing the period of limitation. In view of this, it is clear that refund claim filed for the period of September 2005, October 2005, November 2005 & December 2005 is well within the period of limitation as per section 11 B of Central Excise Act,1944 and therefore, they humbly request your Honour to sanction refund and set aside the Impugned OIA.

7.3 The Maritime Commissioner, Hyderabad had rejected the refund claim thrice vide letter dated 26.10.2007, 13.02.2008 & 27.06.2008 on the ground that they failed to file the refund claims within stipulated time period of one year under section 11 B of Central Excise Act. In this regard, they would like to draw the attention towards the fact that they had filed the refund claim duly within the time-limit of 1 year before Deputy Commissioner of Central Excise, Nagaon, which is having the jurisdiction over the factory. The dates for filing refund claim before authorities is as under:

Period	Date of filing Refund claim	Authority	Remarks
Sept. 2005	08.09.06	Deputy Commissioner Nagaon having jurisdiction over factory.	These are filed well within the time-limit of 1 year.
Oct. 2005	03.10.06		
Nov.2005	03.11.06		
Dec 2005	03.11.06		

However, the Deputy Commissioner, Nagaon vide letter dated 20.03.2007 advised them to re-submit the claim before Maritime Commissioner, Hyderabad having jurisdiction over the port of export. It is important to note here that till the time Deputy Commissioner, Nagaon had informed the same, the time-limit of 1 year from relevant date had already been lapsed. Therefore, in any possibility, the refund claims could not be re-submitted within 1 year from relevant date. Even then, they had bonafidely acted on the instructions of the Deputy Commissioner, Nagaon and tried to re-submit the refund claims thrice with Maritime Commissioner, Hyderabad. In any case, the period of limitations should be considered from the date of first filing of refund claim. There are plethora of judgments which supports their above view. that period of limitations should be computed from date on which refund claim was initially filed.

a. Indian Oil Corporation Limited [2007 (220) E.L.T .. 609 (G.O.I.)]. The applicant reproduced para No. 8.4. of GOI Order No. 774/2006, dated 5-9-2006.

b. Hon'ble CESTAT, Kolkata in the case of Balmer Lawrie & Co. Ltd. Vs.CCE, Kolkata-VI [2015 (315) E.L.T. 100 (Tri. - Kolkata)] The applicant reproduced para No. 5.1 of CESTAT Final Order No. A-75588/KOL/2014, dated 12-8-2014.

In view of the above, they wish to submit that the Original Refund claim was submitted within the stipulated period of 1 year from relevant date as per section 11 B of the Central Excise Act, 1944 and that date should be considered for the purpose of computing the period of limitations. Accordingly, the refund is not barred by period of limitation and thus, should be granted to them.

7.4 Hon'ble Commissioner (Appeals), Hyderabad had outrightly rejected the appeal only on the ground of being time-barred as the appeal was filed on 26.06.2013 against the letter issued by Maritime Commissioner, Hyderabad on 26.10.2007. The Hon'ble Commissioner (Appeals), Hyderabad alleged that since the appeal is filed after the time-limit prescribed in Section 35 of Central Excise Act, 1944, therefore it is liable to be dismissed without even going into merits. In this regard, they would like to submit that Hon'ble Commissioner (Appeals) had erred in passing the Impugned OIA without appreciating the merits of the case. In this regard, they would like to bring to kind notice that after the interference of Central Board of Excise & Customs, New Delhi, the Maritime Commissioner, Hyderabad instructed them vide letter C. No. IV /16 /16/2013- RC dated 30.04.2013 to file the appeals, in which they covered their letter C. No. IV /16/18/2005-RC dated 26.10.2007 as an order or decision. But the letter C. No. IV/16/18/2005-RC dated 26.10.2007 by Maritime Commissioner, Hyderabad did not instruct them to file the appeal against the returned claims. Further, it is to be noted that it was their frequent exchange of communication with Central Board of Excise & Customs, New Delhi, which resulted in the issuance of letter C. No. IV/16/16/2013-RC dated 30.04.2013 by Maritime Commissioner Hyderabad and they got the opportunity to file the appeal. They filed the appeals before the Commissioner of Central Excise, Appeals as per the instructions of Maritime

Commissioner, Hyderabad on 21.06.2013. While preparation of the appeals, they followed instructions of the Maritime Commissioner Hyderabad to mention the order date as 26.10.2007 whereas the last date of communication between both the parties is 30.04.2013. However, the Commissioner (Appeals), vide Order - in - Appeal No.10/2013 (H-II) CE on 02.07.13, stated that *"As the subject appeal is liable to be dismissed on account of time bar under Section 35 of Central Excise Act, 1944, as such no personal hearing was accorded to the appellants as it does not have any bearing on the appeal in as much as the appeal has been filed after expiry of even condonable period under Section 35 Central Excise Act, 1994 and also I am not considering various submission of the Appellants with regard to merits of the issue involved."*

It is to be noted that the Commissioner (Appeals), Hyderabad considered the order date as 26.10.2007 & expected them to file appeals within the period 60 days from such date in a situation where the communication to consider such letter as appealable order was communicated to them only on 30.04.2013. Therefore, they submit that period of computation of time-limit for filing appeal should be considered from last date of communication from Maritime Commissioner, Hyderabad, i.e., time-limit of 60 days should be considered from 30.04.2013. Further, the case law referred in impugned OIA of Singh Enterprises Vs CCE - 2008 (221) E.L.T. 163 (SC) & Bhusan Ltd. Vs CCE, Kolkata -IV ... 2008 (232) E.L.T 828, by Commissioner (Appeals) Hyderabad is based on the period of condonation which is totally irrelevant to their case as they have continuously followed the Maritime Commissioner, Hyderabad and Central Board of Excise New Delhi (CBEC) even after the rejection of the claim i.e 26.10.2007. The date of limitation should be counted from the last date of communication. Therefore, on the basis of the all above mentioned ground the last date of communication in the their case is the letter dated 30.04.2013 issued by the Maritime Commissioner, Hyderabad. Accordingly, they have filed the appeals on 21.06.2013, which is well within the time limit of 60 days. Therefore, matter of condonation of delay does not arise at all.

7.5 Bar of limitation would not apply in case of rebate claimed under Rule 18 of Central Excise Rules, 2002 read with Notification 19/2004-CE (NT).

The period of limitation is not at all specified in the Refund Notification 19/2004; however, the same was mentioned in the earlier notification 40/2001. This shows the conscious decision of the Government to remove the time limitation condition while keeping all other conditions and limitations intact. Further, the period of limitations was brought as condition for eligibility of refund conditions only in the year 2016 by way of amendment notification no. 18/2016-CE (NT) dated 01.03.2006. Since the refund claims pertain to the period of September 2005, October 2005, November 2005 & December 2005, therefore the Refund Notification as stood before amendment (i.e. without any period of limitation) should apply in their case and in view of this alone, the Refund should be granted to them and the impugned OIA is liable to be set aside.

They would like to place reliance on the following judgments :-

- a) Deputy Commissioner V. Dorcas market Makers Pvt. Ltd. [2015(325)ELT A104 (S.C.)] has upheld the decision of Hon'ble High Court Madras [2015(321)ELT 45(Mad)]. The applicant reproduced para Nos. 16,17, 30 & 31 of Hon'ble Madras High Court;
- b) Hon'ble Punjab and Haryana High Court in the case of JSL Life style Limited Vs Union of India [2015(326)E.L.T.265(P&H)] . The applicant reproduced para Nos. 10,12,15 & 19 of of Hon'ble Punjab and Haryana High Court.

7.6 Substantive benefit, like refund cannot be denied merely on account of procedural lapse of being time barred, that too, in a case where such delay is account of Department and CBEC.

7.7 Export cannot bear the burden of taxes. It is cardinal principal of Government that exports should not bear the burden of taxes. The EXIM policy of the Government aims to promote export of goods, not taxes. Further, the intention of the Government is to make Indian goods competitive in the foreign markets. If the exported goods bear the burden of the taxes, it will increase the ultimate cost of the exported goods and render our goods uncompetitive in the foreign market. This will lead to decrease in exports and obstruct the ultimate objective of the Government.

They place reliance on the following:

Bannari Amman Spinning Mills Ltd, Vs Commr. of C. Ex. & ST., Madurai [2016 (46) S.T.R. 871 (Tri. - Chennai)] (the applicant reproduced para No 5 of the CESTAT Order).

8. The Commissioner, Hyderabad-II Commissionerate in cross objections filed vide F.No. IV/16/16/13-(RC)(BPCL) dated 18.03.2014 contended as under:-

8.1 Exporter vide their four different letters all dated 5.9.2007 have filed the rebate claims before the Maritime Commissioner, Hyderabad - II Commissioner, Hyderabad, claiming it to be resubmission. The claims filed by the exporter cannot be considered as resubmission, since this was the first time the exporter has submitted application for rebate.

8.2 The Maritime Commissioner, Hyderabad - II Commissioner, Hyderabad, returned the claims to the exporter vide letter C. No. IV/ 18/ 18/2005-RC dt. 26.10.2007, stating reasons that the claims filed are beyond the ambit of Section 11B of the CEA, 1944 since they were time barred.

8.3 Contention of the exporter that the claims were submitted within time before Assistant Commissioner, Central Excise, Nagaon, and based upon the direction of the Superintendent, CE, Nagaon Division, vide his letter C.No. V(18)1/REB/BPCL/NAG/06/978 dt. 20.3.2007, the claims were filed before Maritime Commissioner, Hyderabad - II Commissioner, is misplaced.

8.4 Letter issued by the Superintendent, CE, Nagaon Division, in spirit is primarily a letter of rejection of the said claims. In the said letter, as a measure of facilitation to the exporter, additional information is provided, wherein it is stated that the said claims is required to be filed before the jurisdictional Maritime

Commissioner, since the claimant happens to be Merchant Exporter and not the Manufacturer.

8.5 Letter issued by the Superintendent, CE, Nagaon Division, cannot be treated as if the Rebate Claims are under process, since the claims were not forwarded to this office, instead the same were returned to the applicant.

8.6 On subsequent representation/resubmission of claims by the exporter, the Maritime Commissioner, Hyderabad - II Commissionerate, Hyderabad, vide letters dt. 13.2.2008 and 27.6.2008 had returned the claims explaining the legal provision for returning the same.

8.7 Exporter claims that consequent to their further representation with CBEC, New Delhi, the Maritime Commissioner, Hyderabad - II Commissionerate, Hyderabad vide his letter C.No.IV/ 16/ 16/ 2013- RC dt. 30.4.2013 instructed to file appeal since the earlier letter of Maritime Commissioner dt. 26.10.2007 is an order or decision. Interpretation of the exporter appears to be improper. Letter dt.30.4.2013 issued by the Maritime Commissioner stated that earlier letter dt.26.10.2007 falls under the category of decision/ order against which appeal can be filed under Section 35 of the CEA, 1944.

8.8 Provision of Section 35 of the CEA, 1944 is applicable to all parties and the parties are free to interpret the same on merits and take action accordingly without any clarification from the department. Thus, exporters contention that Maritime Commissioner's letter dt. 26.10.2007 does not instruct to file appeal and they got the opportunity to file appeal only due to letter dt. 30.4.2013 appears to be improper.

8.9. Opportunity to file appeal against the Maritime Commissioner's letter dt.26.10.2007 in terms of Section 35 of the CEA, 1994 was always available to the exporter since the date of its issue. Exporter being a Government agency themselves ought to have been well aware of the statutory rules and provisions. They have filed the claims outside the jurisdiction of their central excise authority resulting in rejection of the same and at the same time they have not adopted the required procedure so as to enable themselves to get rebate from Central Excise, Nagaon, at the hands of their manufacturer, who are their sister concern, i.e., M/s BPCL, Numaligarh Refinery Ltd., Assam. Further, they have delayed in filing claim before the Maritime Commissioner, Hyderabad - II Commissionerate, resulting in rejection of the same.

In view of the above, Revision Application made by the exporter in the instant case may be dismissed.

9. Government has carefully gone through the relevant case records oral and written submissions and perused the impugned letters and order-in-appeal.

10. The Maritime Commissioner, Hyderabad-II Commissionerate, Hyderabad, vide letter C No IV/16/18/2005-RC dated 26.10 2007 informed the applicant as under :-

*"Please refer to your letters all dated 05.09.2007 forwarding rebate claims for 1) Rs.27,91,443/-, 2) Rs. 14,82,607/- 3) 32,08,040/-and 4) Rs. 8,14,606/- towards aviation fuel supplied to foreign going aircrafts.*

*In terms of Section 11B of the Central Excise Act, 1944 any person claiming refund of any duty excise may make an application for refund of such duty to the Asst./Dy. Commissioner of Central Excise before the expiry of one year period from the relevant date in such form and manner as may be prescribed. On perusal of your refund claims filed by you it is observed that, the aviation turbine fuel has been cleared during the period from September, 2005 to December, 2005. It is evident that, the claims filed by you are beyond the ambit of Section 11B of the Central Excise Act, 1944 in as much as the claims were preferred by you are hit by time limit. Hence the claims are returned herewith".*

11. It is thus clear from the wordings of the aforesaid letter that all the four refund claims filed by the applicant were rejected being hit by time limit and hence returned to the applicant.

12. Before proceeding further, it would be apposite to quote Section 35 of the Central Excise Act, 1944 which runs as follows :-

***"SECTION 35. Appeals to Commissioner (Appeals). - (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) hereafter in this Chapter referred to as the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order :***

*Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days."*

13. Thus Sub-section (1) thereof clearly provides that any person aggrieved by the decision or the order passed by the Central Excise Officer may appeal to the Commissioner of Central Excise (Appeals) within 60 days from the date of the communication of the said order. The proviso inserted thereto gives discretion to the said appellate authority to condone the delay beyond the normal period of limitation up to further period of 30 days. The maximum period, which could be ascertained from the aforesaid provision, is 90 days from the date of communication of the decision or the order.

14. In the instant case the Maritime Commissioner, Hyderabad vide letter dated 26.10.2007 had clearly made a decision that the rebate claims filed by the applicant were hit by time limit prescribed under Section 11B of the Central Excise Act, 1944. In *Ace Manufacturing Systems Ltd. Versus Commr. Of Cus., Bangalore, Tribunal Bangalore*[2010 (259) E.L.T. 117 (Tri. - Bang.) ] while holding that the



appeal has been filed within time against letter before the learned Commissioner (Appeals), observed as under:-

*"It can be seen from the above reproduced letter, that this letter is informing the assessee rejection of their request for correction, which in turn causes a fiscal liability/burden on the appellant and the question involved in this case is whether EODC was obtained for the 12th licence or not. We also find that the assessee has produced his copy of the EODC for our perusal, as seen in appeal memoranda. Since the letter dated 16-6-2009 is shutting away the appellant's claim of EODC and casts a liability, it would be correct in law to hold that the letter dated 16-6-2009 can be considered as an Order".*

15. Therefore, being aggrieved with the decision of the Maritime Commissioner, Hyderabad communicated vide letter dated 26.10.2007, the applicant ought to have filed appeal against the said decision within the time limit stipulated under Section 35(1) *ibid*.

16. The applicant further contended that the Commissioner (Appeals), Hyderabad considered the order date as 26.10.2007 & expected them to file appeals within the period 60 days from such date in a situation where the communication to consider such letter as appealable order was communicated to them only on 30.04.2013. Therefore, they submit that period of computation of time-limit for filing appeal should be considered from last date of communication from Maritime Commissioner, Hyderabad, i.e., time-limit of 60 days should be considered from 30.04.2013. Perusal of Maritime Commissioner, Hyderabad-II's letter dated 30.04.2013 reveals that it only informed the applicant that the letter dated 26.10.2007 should be covered in the category of decision /order against which appeal can be filed under Section 35 of the Central Excise Act, 1944. It did not say that the applicant thereafter (after 30.04.2013) can also file appeal before Commissioner (Appeals) against the Letter dated 26.10.2007. Therefore, the argument of the applicant that time-limit of 60 days should be considered from 30.04.2013 is simply unacceptable.

17. The Commissioner (Appeals) has rightly observed that *"As the impugned order of the Maritime Commissioner was received by the Appellants on 27.10.2007 and as the subject appeal was filed on 21.06.2013 i.e. after more than five years, which was after expiry of the maximum appealable period of ninety days available (including condonable period), the subject appeal is clearly hit by limitation of time. Therefore, I hold that the subject appeal is liable to be dismissed due to time bar. In fact an appeal filed after the condonable period cannot be considered, since the statute do not provide any authority to admit such appeals filed after the said*

condonable period. Hence I am not empowered to consider the subject appeal". In terms of Section 35 ibid appeal can be filed only within 60 days from the communication of the order and the Commissioner (Appeals) has the power to extend the said period by another 30 days. Thus, the appeal was filed even beyond the period during which the Commissioner (Appeals) could have allowed the filing thereof. Accordingly, the Commissioner (Appeals) rightly held that the appeal was filed beyond the prescribed period and therefore was time-barred. The case laws relied upon by the Commissioner (Appeals) viz. Singh Enterprises Vs CCE - 2008 (221) E.L.T. 163 (SC) & Bhusan Ltd. Vs CCE, Kolkata -IV. 2008 (232) E.L.T 828 (Tri. Kolkata) are very much applicable to facts of the case in hand. As the impugned order is sustained on limitation the same is required to be upheld without going into the merits of the case.

18. Government therefore does not find any reason to interfere with or modify the Order in Appeal No. 10/2013(H-II)CE dated 02.07.2013 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Hyderabad and upholds the same.

19. The revision application is rejected being devoid of merits.

  
28/05/21  
(SHRAWAN KUMAR)

Principal Commissioner (RA) & Ex-Officio  
Additional Secretary to the Government of India

To,

M/s Bharat Petroleum Corporation Ltd.  
Aviation Fuelling Station,  
Hyderabad - 500 051.

ORDER NO. 203/2021-CX (SZ)/ASRA/MUMBAI DATED 28.05.2021

Copy to:

1. Commissioner of Goods & Service Tax, L.B. Stadium Road Basheer Bagh, Hyderabad -500 004.
2. Commissioner of Central Goods & Services Tax, Hyderabad Appeals I, Gst Bhavan, L.B. Stadium Road, Basheerbagh, Hyderabad-
3. Sr.P.S. to AS (RA), Mumbai.
4. Guard file.
- ✓ 5. Spare Copy.