



REGISTERED
SPEED POST

F.No. 198/39/2012-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.....24/2/15

ORDER NO. 21 /2015-Cx DATED 20.07.2015 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.78-CE/MRT-I/2011 dated 30.11.2011, passed by the Commissioner (Appeals), Central Excise, Meerut-I

Applicant : Commissioner of Central Excise & Customs, Meerut-I

Respondent : M/s Kanohar Electricals Ltd., Meerut

ORDER

This Revision Application has been filed by the Commissioner of Central Excise & Customs, Meerut-I (hereinafter referred to as Applicant) against the Order-in-Appeal No.78-CE/MRT-I/2011 dated 30.11.2011, passed by the Commissioner (Appeals), Central Excise, Meerut-I with respect to Order-in-Original No.R-45/2010 dated 16.8.2011 passed by the Assistant Commissioner of Central Excise, Division Meerut. M/s Kanohar Electricals Ltd., Meerut is the respondent in this case.

2. The brief facts of the case are that M/s Kanohar Electricals Ltd., Meerut (hereinafter referred to as Respondent) are engaged in the manufacture of Transformers. On 16.03.2010, the party filed a refund claim for Rs. 11,98,563/- with the jurisdictional Deputy Commissioner on the ground that they had supplied their said goods (Transformers) to their buyers M/s Maharashtra State Electricity Transmission Company Ltd and M/s West Bengal Electricity Transmission Company Ltd and at the time of clearance, they had paid Central Excise duty on the higher value, but subsequently the prices were revised on the lower side in terms of a price variation clause of the relevant purchase order/agreement entered into between the party and their buyers. The Adjudicating Authority has rejected the refund claim vide Order-In-Original No. R-45/2010 dated 16.08.2010.

3. Being aggrieved by the Order-In-Original, the respondent filed appeal with the Commissioner (Appeals) who allowed the refund to the party vide Order-In-Appeal No. 78-CE/MRT-I/2011 dated 30.11.2011.

4. Aggrieved by the Commissioner (Appeals)'s order, the applicant has filed Revision Application under Section 35EE of Central Excise Act, 1944 on the following grounds:-

4.1 That the Commissioner (Appeals) failed to appreciate that the price variation clause has come in the existence due to Indian Electrical & Electronics Manufacturers' Association i.e. IEEMA, i.e. there are some materials which are used in the transformers whose prices are not final at the time of clearance but they are finalized at later stage and the difference in prices of the said material causes

difference in the price of transformers depending upon the quantity of material used in the transformers.

4.2. That IEEMA is a national representative organization of manufactures of electrical industrial electronics and allied equipment in India. That as a representative of the electrical industry, IEEMA maintains dialogue with the Government of India, its departments, electric utilities, users, standardization bodies, educational institutions, research, development and testing agencies.

4.3 That IEEMA's major activities are disseminating information about government policy changes and statistics, representing views of the industry to the government, evolving price indices for the same and formulating industry standards. That as the representative organization of the electrical and industrial electronics industries in India, IEEMA is a part of councils and committees constituted by the Government of India.

4.4. That IEEMA has been operating Price Variation clauses for various electrical equipment including transformer. That it regulates the prices of Copper and Aluminum and is vastly accepted in Government and Private buyers and supplies including State Electricity Boards.

4.5 That there are various factors which control the prices of Transformers viz Price of base metal i.e. copper and Aluminum, Steel, CRGO electrical steel and various insulating materials.

4.6. That the goods were cleared from the factory on the documents of the Manufacturer i.e. the respondent on the payment of Central Excise Duty. The price variation clause between the buyer and the party is because of IEEMA Circular which publishes monthly rate of base metal i.e copper and Aluminum, Steel, CRGO electrical steel and various insulating materials etc. prevailing in the market. That the appellate authority has erred in accepting the reason for changes in the prices of transformers due to price variation clause as per IEEMA regulates the prices of base metals used in the transformers i.e. Copper and Aluminum which are mainly used in the form of coil or otherwise. That the quantity of these metals used in transformers is to be determined and variation in the prices will contribute to the difference in the price of transformer

and the duty attributed to the value shall be refunded to the party. That the quantum of base metals used in each transformer is to be determined and difference in the prices as per IEEMA circular are neither nowhere declared by the party nor discussed in the order passed by the Adjudicating Authority.

4.7. The applicant placed reliance on the following in the case laws:

- Traco Cables Ltd CE, Cochin 2004 (172) ELT 33 (Tri-Bangalore)
- Mauria Udyog Vs. CCE 2007 (207) ELT 31 {P & H HC – DB}
- Keihin Fie Pvt. Ltd Vs CCE 2010 (259) ELT 742 (CESTAT- Mumbai)

4.8 That the Order-In-Appeal on claim of refund does not appear to be legal and proper.

4.9 Hence the Central Government may be pleased to modify the Order-in-Appeal No.78-CE/MRT-I/2011 dated 30.11.2011 to the extent that the quantification of actual quantity of Copper, Aluminum or otherwise being used in the manufacture of each transformers be determined and variation in prices as fixed by the IEEMA, should form the difference in the Assessable Value and the duty involved shall be the Refund amount subject to the fulfillment of other conditions as laid down under section 11 B of CEA, 1944 or may pass such order as deemed fit.

5. In the cross objections, the respondent, M/s Kanohar Electricals Ltd. has the following submissions:

5.1 That the Refund claim filed by the Respondent was rejected by the Assistant Commissioner on the grounds that the Respondents failed to establish that the reduced prices of the Transformers were paid by the buyer. However, he accepted that the prices of the Transformers were reduced due to Price Variation Clause for which Negative Price Variation Bills were issued.

5.2 That in appeal the Commissioner (Appeals) accepted the submission of the Respondents and the burden of excess duty paid was not passed on to the Customer. He further held that in case there is price variation clause in the contract, the prices have to be treated as provisional and the benefit of reduction in price has to be given to the manufacturer. He, therefore, allowed the refund claim to the Respondents.

5.3 The present revision application has been filed by the Department in terms of Section 35 EE of the Central Excise Act, 1944. The scope of jurisdiction of the Central Government has been given in on the Sub-Section (1) of Section 35 EE. The order in the present case does not relates to the four categories given in first proviso to Section 35B. Therefore, the matter in question as it relates to refund of excess Excise duty paid on clearances of the Transformers, the final product, to the buyer on account of reduction in prices due price variation Clause in the contract for supply of such Transformer, the jurisdictional Appellate Authority is Appellate Tribunal and not Government of India under Section 35 EE. Therefore, if the Commissioner of Central Excise was of the opinion that the order of the Commissioner (Appeals) was not proper or legal, he should have filed the appeal before the Appellate Tribunal under Section 35B of the Central Excise Act, 1944.

5.4 That on merits also there is no case for interference with the Commissioner (Appeals) order in as much as the refund has been allowed to the extent of Central Excise duty paid in excess on account of reduction in prices as per the formula contained in the contract itself with defined variables. Therefore, the refund allowed was to be extent of duty attributable to actual reduction in price of the Transformer. It is also not in dispute in the grounds of revision application that the excise duty paid was not passed on to the buyer and was retained by the Respondents. The case law cited by the Commissioner (Appeals) is applicable in the present case. In such cases, it is a settled law that the price has to be treated as provisional and if there was excess payment of duty, it has to be refunded back as in the present case the excess duty paid was borne by the Respondents.

5.5 That the case law referred in support by the Department relates to the period when wholesale price was approved by the Department and in all the cases cited, the prices in question were fixed and form and there was no price Variation Clause in the contract, if any. The facts in the present case are totally different as the contract itself provided that the price was variable subject to price variation clause and formula was given in the contract itself. Therefore, the Commissioner (Appeals) has rightly allowed refund of the Respondent as per the settled law by the Tribunal and the various Courts including the Supreme Court.

6. Personal hearing in the case was held on 10.06.2015 wherein Shri B.V. Singh, Assistant Commissioner, Central Excise, Division-II, Meerut-I appeared on behalf of the Department who reiterated the grounds of appeal. Shri Praveen Sharma, Advocate appeared on behalf of the party who reiterated the reply to the show cause notice and stated that the appeal filed before the Revisionary Authority is beyond jurisdiction.
7. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.
8. On perusal of records, Government observes that in the instant case the issue relates to refund of duty claimed on the ground that the Respondent had supplied transformers to the buyers i.e. M/s Maharashtra State Electricity Transmission Company Ltd and M/s West Bengal Electricity Transmission Company Ltd and at the time of clearance they paid excise duty on higher value but due to price variation, the prices were subsequently decreased by the buyer in terms of price variation clause of purchase order/agreement between the supplier and buyer. The original authority rejected the refund claim on the ground that the respondent have failed to show that they received less amount than what was paid by them at the time of clearance. Subsequently, the Commissioner (Appeals) held the refund claim of duty on account of price variation as justified. Now, the applicant has filed this Revision Application on grounds mentioned in para 4 above.
9. Government further observes that under Section 35 EE of the Central Excise Act, 1944, a Revision Application against the Order of Commissioner (Appeals) passed under Section 35 A ibid lies with Government only if such orders relate to cases as mentioned in provision to sub-section (1) of Section 35(B) of the Act. Sub-section (1) of Section 35 B of Central Excise Act, 1944 reads as under:-
- (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -
- (a) a decision or order passed by the Commissioner of Central Excise as an adjudicating authority;
 - (b) an order passed by the Commissioner (Appeals) under Section 35A;
 - (c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter

referred to as the Board) or the Appellate Commissioner of Central Excise under Section 35, as it stood immediately before the appointed day;

- (d) an order passed by the Board or the Commissioner of Central Excise either before or after the appointed day, under Section 35A, as it stood immediately before that day:

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to -

- (a) *a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;*
- (b) *a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;*
- (c) *goods exported outside India (except to Nepal or Bhutan) without payment of duty ;*
- (d) *credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998.*

Further, Section 35 EE of Central Excise Act, 1944 states that "(1) The Central Government may, on the application of any person aggrieved by any order passed under Section 35A, where the order is of the nature referred to in the first proviso to sub-section (1) of Section 35 B, annul or modify such order:

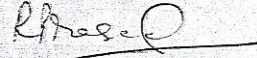
[Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees]"

10. Government finds that the issue covered in this Revision Application relates to refund of duty under section 11B of the Central Excise Act, 1944, claimed to have been paid in excess on higher value at the time of removal of goods for home consumption to M/s Maharashtra State Electricity Transmission Company Ltd and M/s West Bengal Electricity Transmission Company Ltd. This subject matter is not covered in the first proviso to sub-section (1) of Section 35 B of the Central Excise Act 1944 and, therefore,

Revision Application on this issue does not lie before Central Government under Section 35 EE of the Central Excise Act, 1944.

11. Thus the Revision Application filed before Central Government in terms of Section 35 EE of Central Excise Act 1944 is beyond jurisdiction. As such, this Revision Application is dismissed for being non-maintainable. The applicant is at liberty to file an appeal before the appropriate authority under Section 35 B of Central Excise Act, 1944.

12. So, ordered.



(RIMJHIM PRASAD)

Joint Secretary to the Government of India

Commissioner of Central Excise & Customs
Meerut-I, Opp. Chaudhary Charan Singh University
Mangal Pandey Nagar
Meerut-250005

Attested



(Shaukat Ali)
Under Secretary (RA)

GOI ORDER NO. 21 /2015-Cx DATED 20.07.2015

Copy to:-

1. M/s Kanohar Electricals Ltd., Gangol Road, Meerut (U.P.).
2. The Commissioner (Appeals-II), Central Excise, Meerut-I, Meerut.
3. The Assistant Commissioner, Central Excise Division-Meerut, Meerut.
4. PA to JS (Revision Application).
5. Guard File.
6. Spare Copy.

ATTESTED



(Shaukat Ali)

Under Secretary to the Government of India

