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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, Cuff Parade,
Mumbai- 400 005

F. NO. 195/772/13-RA/3194

Date of Issue: 28.06.2021

ORDER NO. 212/2021-CX (WZ) /ASRA/Mumbai DATED 0.06.2021 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 : M/s Sabero Organics Gujrat Ltd.,
Plot No. 2102, GIDC, Sarigam,
Dist. Valsad, Gujrat.

Respondent : Commissioner of CGST, Surat.

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. SRP/47/Vapi//2013-14 dated 30.04.2013 dated 23.11.2011 passed by the Commissioner (Appeals), Central Excise, Vapi, Gujrat.

ORDER

This revision application is filed by M/s Sabero Organics Gujrat Ltd., Plot No. 2102, GIDC, Sarigam, Dist. Valsad, Gujrat (hereinafter referred to as "the applicant") against the Order-in-Appeal No. SRP/47/Vapi//2013-14 dated 30.04.2013 passed by the Commissioner (Appeals), Central Excise, Vapi, Gujrat.

2. Brief facts of the case are that the applicant are the manufacturer and exporter of TRI ETHYL PHOSPHATE (98% Minimum) falling under Ch.S.H. No. 29310090 of Central Excise Tariff Act, 1985. The applicant had filed the rebate claims for Rs. 3,28,686/- and Rs. 2,52,708/- on 07.01.2008 under the provisions of Rule 18 of Central Excise Rules, 2002 read with Section 11B of Central Excise Act, 1944. The rebate sanctioning authority at the time of scrutiny of the impugned rebate claims observed that the applicant had not submitted Original & Duplicate copies of ARE-1s along with the rebate claims which is basic document for granting the rebate thereby contravened the provisions of Section 11B of the Central Excise Act, 1944. The Rebate sanctioning authority issued two separate show cause notices to the applicant to show cause as to why the impugned rebate claims should not be rejected under Section 11B of the Central Excise Act, 1944. The adjudicating authority vide Order in Original No. 2539 to 2540/AC/REB/Div-Vapi/2011-12 dated 15.02.2012 rejected the rebate claim of Rs. 5,81,394/-.

3. Being aggrieved by the Order in Original, the applicant filed an appeal before the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vapi. The appellate authority vide Order in Appeal No. SRP/47/VAPI/2013-14 dated 30.04.2013 rejected the appeal filed by the applicant and upheld the Order in Original passed by the adjudicating authority. The appellate authority while passing the impugned Order in Appeal observed that :-

3.1 The applicant had admitted that they had filed only one appeal though there were two show cause notices, which were adjudicated vide two OIOs bearing numbers 2539 and 2540 issued in the instant cases.

3.2 In terms of Section 35 of Central Excise Act, 1944, the person aggrieved of any order passed by the adjudicating authority may file appeal against each such order for redressal before Commissioner (Appeals). The applicant had filed only one appeal against two OIOS bearing numbers 2539 and 2540. Therefore, one of the OIOs remained uncontested by the applicant.

3.3 The present appeal relates to the SCN dated 09.10.2009 pertaining to ARE1 dated 03.03.2008 and the OIO relating to the other ARE-1 dated 12.05.2008 (rebate amount Rs. 2,52,708/- remains uncontested. Therefore, there is no option but to decide the case relating to amount of Rs.3,28,686/- only after admitting only one appeal.

3.4 The Revision Authority in the following cases rejected the rebate claims in the absence of Original and Duplicate copy of the ARE-1

a) Varinda Overseas Ltd. 2012(281) ELT 129 (GOI)

b) Bajaj Electricals Ltd. 2012(281) ELT 146 (GOI)

Following the ratio of above decisions, there is no merit in the appeal filed by the applicant.

3.5 It is observed that the applicant had not filed the attested copies of the ARE-1 before the lower authority and they have filed these documents only at the appellate stage. The applicant should have explained as to what prevented them from filing the Attested copies of ARE-1s before the lower authority. As per provisions of Rule 5 of the Central Excise (Appeals) Rules, 2001 the applicant is not entitled to produce before the Commissioner (Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority.

3.6 On going through the copies of ARE-1 dated 03.03.2008, it was observed that the reverse of the said ARE-1 ostensibly indicates that it had been endorsed by the Superintendent of Customs JNCH and bears the Round office Seal which reads 'Dy Commissioner of Customs & Central Excise, Jawaharlal Nehru Customs House, Nhavasheva'. The genuineness of the

official seal is not free from doubt since Nhavasheva Customs do not have office of Commissioner of Customs & Central Excise. Therefore, the authenticity of the document also remains unestablished.

4. Being aggrieved with the impugned order in appeal, the applicant has filed this Revision Application on the following grounds that :

- 4.1 The impugned Order in Original was a composite order under which the adjudicating authority had decided the two show cause notices. The preamble of the said order in original was silent about the number of appeals to be filed before the Appellate Authority.
- 4.2 There is no provision under law for splitting / dissection and part deciding of an appeal particularly when the impugned Order in Original was passed as a result of same facts, same submissions, same finding and same evidence. The applicant have relied upon following case laws in support of their argument.
 - 4.2.1 Eicher Motors – 2000(116) ELT 306 (T)
 - 4.2.2 Amar Amit Talana Alloys (P) Ltd.- 2009(243) ELT 210(T)
 - 4.2.3 Hindustan Lever Ltd.- 2004(178) ELT 585 (T)
 - 4.2.4 Alliance Mills (Lessees) Ltd- 1996(81) ELT 615 (T).
- 4.3 The decision in the case of Varinda Overseas Ltd. and Bajaj Electricals Ltd. are not applicable in the present case. In those cases the goods were exported by the merchant exporters.
- 4.4 Their employee residing at Ballard Estate, Mumbai had lost the supporting Original and Duplicate copy of ARE-1 while travelling in Mumbai Local Train. Immediately police complaint had been lodged with CST Railway Police Station under complaint No. 28/2008.
- 4.5 The Chapter 7 para 13.7 of the CBEC Manual states that in case of loss of document, the rebate sanctioning authority can satisfy himself about the export on the basis of collateral evidences such as remittance certificate, Mate Receipt etc.

- 4.6 They had submitted an additional ground before the appellate authority as regards original attested ARE-1. The appellate had brushed aside the same considering it as an additional evidence under Rule 5 of Central Excise (Appeals) Rules, 2001. The Rules cannot shut out to entertain a new ground as envisaged under Section 35A(2) of the Central Excise Act, 1944.
- 4.7 The appellate authority had doubted the genuineness of the official seal on the ARE-1s. While sanctioning the rebates in respect of the Applicant's previous exports, the Customs Officers similar seal was accepted as proof of export.

5. A Personal hearing in the matter held on 12.03.2018 was attended by Shri R.K. Sharma, Advocate on behalf of the applicant. In view of change in the Revision Authority, the fresh personal hearings were granted on 07.01.2021, 14.01.2021, 21.01.2021 and 25.01.2021. However, no one appeared for the personal hearing so fixed on behalf of applicant / department. Since sufficient opportunity to represent the case has been given, the case is taken up for decision on the basis of available documents on record.

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

7. In the instant case, Government notes that two separate show cause notices issued to the applicant, proposing denial of the rebate claims filed by them on similar grounds, were decided by the adjudicating authority vide combined Order in Original No. 2539 to 2540/AC/REB/Div-Vapi/2011-12 dated 15.02.2012. The applicant filed a single appeal against the impugned order in original. The appellate authority passed an order in appeal in respect of one out of two Order in Original passed by the adjudicating authority.

7.1 Before proceeding further in the matter, it would be appropriate to refer to the relevant provisions of the Central Excise Act and Rules. The

relevant provisions of the Central Excise Act, 1944 reads 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 [Principal Commissioner of Central Excise or 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.]

[(1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner.”

7.2 From the above, the Government observes that Section 35 gives an aggrieved person a right to appeal to the Commissioner (Appeals) against orders passed by the authorities mentioned therein. The Section is basically intended to provide for a right of appeal to an aggrieved party before the Commissioner (Appeals), as the right of appeal is a statutorily conferred right. Section 35 thus spells out the said right and identifies the authorities whose orders are appealable and the types of orders passed by them. The Government opines that the right of appeal is by way of a remedy provided by the statute and should not ordinarily be denied to the assessee unless the law prohibits it. The Government notes that there is no provision in the Central Excise Act or the rules made thereunder existing at the relevant period making the filing of more than one appeal before the Commissioner (Appeals) mandatory where more than one SCN are disposed by issuing combined order in original. It is also observed that in many instances the Hon'ble Courts have observed that the right of appeal conferred by the statute has to be liberally construed and when the appeal lies to the same authority, it would be too technical an approach to adopt and to reject an appeal on the ground that separate appeals ought to have been filed instead of a composite one.

7.3 The Government also observes that the Supreme Court decision

in *Narhari and Others v. Shanker and Others* reported in AIR 1953 SC 419 to which a reference has been made in the case of **Alliance Mills (Lessees) Ltd- 1996(81) ELT 615 (T)** considered the question of applicability of *res judicata* to a case where two appeals were filed from the same order but in relation to one of which the bar of limitation applied. The appeals were from a single order passed as a result of one trial, one finding and one decision. Only two decrees were drawn up. The question considered was whether failure of the plaintiff to file appeal against one of the decrees within the period of limitation would result in the other appeal also becoming non-maintainable. The observations made in the said Judgment about the maintainability of one appeal even if there were two decrees were made in that context. The observations of the Apex Court in *Narahari & Others* case appears to lend support (though indirectly) to the contention of the applicant in the instant case that once a judicial or quasi-judicial authority passes a compendious / combined order disposing of a number of SCNs, for purposes of filing appeal to a higher authority, there is no need to prefer as many appeals as there were SCNs. The fact that the common order was passed at the stage of Order-in-Original or the Order-in-Appeal does not really make any difference in principle. This principle would apply both in the case of Section 35 and 35B. The distinctions sought to be made on the basis of the number of orders passed at the stage of Order-in-Original or Order-in-Appeal would not make any difference. Thus, so long as the Act or the Rules do not bar filing of a single appeal before the higher Appellate Authority from a compendious order of the lower authority, there should be no objection to an applicant filing a single appeal before the Appellate Authority from the order of the Lower Authority from a single order disposing of more than one SCN. The Government is of the opinion that since there is no bar in the Act or in the Rules to the passing of consolidated orders by the adjudicating authority or the first appellate authority, a single appeal filed against such an order cannot be held to be irregular only for the reason that the impugned order had dealt with more than one SCN. As such, Government holds that unless there is express provision in the Act or in the Rules for the mandatory filing of two appeals, or a clear implication to that effect, two appeals are not required and a composite appeal could be filed.

7.4 In view of above discussion, the Government holds that this ground of rejecting the appeal filed by the applicant is not maintainable and thus not just and proper.

8. The Government now takes up the matter pertaining to rejection of an appeal contested by the applicant was rejected on merit by the appellate authority vide impugned order in appeal. The impugned rebate claims were rejected by the rebate sanctioning authority for the reason that the applicant has not submitted the original & duplicate copies of relevant ARE-1s.

8.1 In this regard, the Government finds that the Manual of Instructions that have been issued by the CBEC specifies the documents which are required for filing a claim for rebate. Among them is the original copy of the ARE-1, the invoice and self-attested copy of shipping bill and bill of lading. Further paragraph 8.4 of the said Manual specifies that the rebate sanctioning authority has to satisfy himself in respect of essentially two requirements. The first requirement is that the goods cleared for export under the relevant ARE-1 applications were actually exported as evident from the original and duplicate copies of the ARE-1 form duly certified by customs. The second is that the goods are of a duty paid character as certified on the triplicate copy of the ARE-1 form received from the jurisdictional Superintendent of Central Excise. The object and purpose underlying the procedure which has been specified is to enable the authority to duly satisfy itself that the rebate of central excise duty is sought to be claimed in respect of goods which were exported and that the goods which were exported were of a duty paid character.

8.2. In the instant case, the Government notes the applicant had submitted the photocopies of impugned ARE-1 dully attested by the Customs Authority before the appellate authority. However, it is found that, the appellate authority did not admit the additional evidence, so produced by the applicant, in terms of Rule 5 the Central Excise (Appeals) Rules, 2001.

8.3 It is pertinent to refer the provisions under Section 35A(2) of the Central Excise Act, 1944 which reads as under :-

“ SECTION 35A. Procedure in appeal. —

(1) The [Commissioner (Appeals)] shall give an opportunity to the appellant to be heard, if he so desires.

(2) The [Commissioner (Appeals)] may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the [Commissioner (Appeals)] is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.”

8.4 From plain reading of provisions under Section 35A(2) of the Central Excise Act 1944, it will be at once clear that the Commissioner (Appeals) may, upon the hearing of an appeal, allow the appellant to raise any ground not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not wilful and unreasonable.

8.5 The Government observes that the applicant, being claimant of rebate of export duties, had no reason to submit incomplete claim which would result in denial of the export incentive to them. As such, Government holds that non submission of the attested copies of ARE-1 before adjudicating authority cannot be interpreted as wilful omission on the part of applicant by stretch of imagination also.

8.6 It is also seen that the applicant had submitted the documents viz. shipping bill, bill of lading, mate receipts, Bank Realisation Certificates and Central Excise Invoices in respect of the said consignment exported by them. These collateral documents are sufficient to check whether the goods cleared under said ARE-1 had been exported or otherwise. Further, in case of any doubt arising with the Maritime Commissioner the genuineness of the document could have been referred to the Customs Authorities and Central Excise Authorities and could have been verified.

8.7 The Government observes that the appellate authority has raised doubts regarding the authenticity of the office seal on the attested copies of ARE-1 produced by the applicant as collateral documents. However, it is found that the observations drawn by the appellate authority are based on presumption rather than facts verified from the concerned authorities and

thus the same cannot be considered as legal ground for denying statutory rights of the applicant.

8.8 The Government, therefore, holds that the production of the ARE-1 form in the original and duplicate is a matter of procedure and non-submission of Original & Duplicate copies of ARE-1 form by the applicant should not result in the deprivation of the statutory right to claim a rebate subject to the satisfaction of the authority on the production of sufficient documentary material that would establish the identity of the goods exported and the duty paid character of the goods.

8.9 Further, as a matter of fact, in several decisions of the Union Government in the revisional jurisdiction as well as in the decisions of the CESTAT, the production of the relevant forms has been held to be a procedural requirement and hence directory as a result of which, the mere non-production of such a form would not result in an invalidation of a claim for rebate where the exporter is able to satisfy through the production of cogent documentary evidence that the relevant requirements for the grant of rebate have been fulfilled. It is also observed that, in the present case, no doubt has been expressed whatsoever that the goods were exported goods.

8.10 Also, it is observed that a distinction between those regulatory provisions which are of a substantive character and those which are merely procedural or technical has been made in a judgment of the Supreme Court in *Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner*. The Supreme Court held that the mere fact that a provision is contained in a statutory instruction "does not matter one way or the other". The Supreme Court held that non-compliance of a condition which is substantive and fundamental to the policy underlying the grant of an exemption would result in an invalidation of the claim. On the other hand, other requirements may merely belong to the area of procedure and it would be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes which they were intended to serve. The Supreme Court held as follows :

"The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some other may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve."

8.11 In view of the discussion in foregoing paras, Government holds that the rejection /returning the rebate claim solely on the ground of non-submission of Original / Duplicate copies of ARE-1, when sufficient collateral documents are available on records, is not just and proper.

9. In view of above discussion, Government remands the matter back to the original authority for verification of the claim with directions that he shall reconsider the claim for rebate on the basis of the documents submitted by the applicant after satisfying itself in regard to the authenticity of those documents. However, the rebate sanctioning authority shall not reject the claim only on the ground of the non-production of the original/ duplicate copy of the ARE-1 form, if it is otherwise satisfied that the conditions for the grant of rebate have been fulfilled. The original adjudicating authority shall pass the order within eight weeks from the receipt of this order.

10. In view of above circumstances, Government sets aside the impugned Order-in-Appeal No. SRP/47/Vapi//2013-14 dated 30.04.2013 dated 23.11.2011 passed by the Commissioner (Appeals), Central Excise, Vapi, Gujrat and remands the case to the original adjudicating authority as ordered supra.

11. The revision application is disposed off in terms of above.


10/06/21

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

ORDER No.212-/2021-CX (WZ) /ASRA/Mumbai DATED 10.06.2021

To,

M/s Sabero Organics Gujrat Ltd.,
Plot No. 2102, GIDC, Sarigam,
Dist. Valsad, Gujrat.

Copy to:

1. The Commissioner of CGST & CX, Surat Commissionerate, New Central Excise Building, Chowk Bazar, Surat- 395001.
2. The Commissioner of GST & CX, Surat Appeals, 3rd floor, Magnus Building, Althan Canal Road, Near Atlanta Shopping Centre, Althan, Surat- 395 017.
3. M/s R.K. Sharma & Associates Pvt. Ltd., Advocates, C-23, Tower-A, Someswar Apparts., Opp. Star Bazar Satellite Road, Ahmedabad- 380 015.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.