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सत्यमेव जयते

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
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Mumbai- 400 005

F. NO. 195/119/WZ/2018-RA /~~2095~~ 2102
F. NO. 195/66/WZ/2019-RA

Date of Issue: 10.04.2023

ORDER NO. 214-215 /2023-CX (WZ) /ASRA/Mumbai DATED 31.03.23 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 Tuffware Industries
Gala No. 4, Rama Industrial Estate,
Golani Complex, Waliv,
Vasai (E), Dist. Palghar.

Shri Kishor Gangar,
Partner, M/s. Tuffware Industries
Gala No. 4, Rama Industrial Estate,
Golani Complex, Waliv,
Vasai (E), Dist. Palghar- 401208.

Respondent : Pr. Commissioner CGST, Palghar.

Subject : Applications filed, under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. SM/CGST & CX/Bhiwandi/APP-146/17-18 dated 19.3.2018 passed by Commissioner (Appeals), Bhiwandi Commissionerate & No. NA/GST A-III/354/18-19 dated 31.01.2019 passed by the Commissioner(Appeals-III), GST & CEx., Mumbai.

ORDER

This Revision Application has been filed by M/s. Tuffware Industries Gala No. 4, Rama Industrial Estate, Golani Complex, Waliv, Vasai (E), Dist. Palghar(hereinafter referred to as "the applicant/applicant No. 1") & Shri Kishor Gangar, Partner, M/s. Tuffware Industries (hereinafter referred to as "the applicant No. 2") against the Order-in-Appeal No. SM/CGST & CX/Bhiwandi/APP-146/17-18 dated 19.3.2018 passed by Commissioner (Appeals), Bhiwandi Commissionerate & Order-in-Appeal No. NA/GST A-III/354/18-19 dated 31.01.2019 passed by the Commissioner CGST & CEx., (Appeals-III), Mumbai respectively.

2. Brief facts of the case are that the applicant M/s. Tuffware Industries holders of Central Excise Registration bearing Number AAEPG9938M XM002 dated 05.03.2002 are engaged in the manufacture of stainless steel utensils and Cutlery falling under the chapter Sub Heading 7323.90 of Central Excise Tariff Act, 1985.

3. Information gathered by the officers of the Central Excise Preventive Section, Vasai-I Division, Thane-II indicated that M/s. Tuffware Industries had taken registration for manufacture of S.S. Utensils. However, they had not manufactured any S.S. utensils and Kitchenware but only posed as a manufacturing unit. They purchased readymade S.S. utensils and kitchenware from the market in ready condition and exported the same from the factory premises under claim for rebate. M/s. Tuffware Industries were availing Cenvat Credit based on documents for purchase of stainless steel flats (as Raw Material) received by them from their suppliers. From the above, it appeared that M/s. Tuftware Industries, Vasai were taking Cenvat credit fraudulently without receipt of raw material and exporting the ready finished goods, procured from market suppliers. After following the due

process the adjudicating authority vide Order-in-Original No. PKS/20/2016-17 dated 02.12.2016:-

A) Ordered the confiscation of 24959.660 Kgs. of finished goods valued Rs.1,24,948/- approx., found in excess on 21.09.2002. Imposed a fine in lieu of confiscation, of Rs.35,000/- under Rule 25 of Central Excise Rule, 2002.

B) Confirmed the demand of Rs.1,89,306/- in respect of goods found short, and ordered M/s. Tuffware Industries to pay the same under sub-section 10 of section 11 A of C. Ex. Act, 1944.

C) Ordered to pay the interest at the appropriate rate on the confirmed demand of Rs. 1,89,306/- under Section 11AB of C. Ex. Act, 1944.

D) Imposed a penalty of Rs. 1,89,306/- under sub-section 11AC of C.Ex Act, 1944 on M/s. Tuffware Industries.

E) Confirmed the demand of Rs.4,00,939/- on the clearances of 167058 Kgs. S. S. Scrap, under sub-section 10 of Section 11A of the C. Ex. Act, 1944.

F) Appropriated the amount of Rs. 1,27,000/- paid by M/s. Tuffware Industries, Vasai as against the confirmed demand of Rs. 4,00,939/-.

G) Ordered to pay the interest at the appropriate rate on the confirmed demand of Rs. 4,00,939/- under Section 11AB of C. Ex. Act, 1944.

H) Rejected the benefit of exports claimed by the Applicant and also rejected rebate claims totally amounting to Rs. 42,18,436/-, Ordered recovery of the amount of Rs. 42,18,436/- under Section 11A (10) of Central Excise Act, 1944. This amount included the amount of rebate claims of Rs.9,47,863/-, Rs 38,467/- and Rs. 2,40,422/- which were also rejected.

I) Ordered to pay interest at the appropriate rate on confirmed demand of Rs. 42,18,436/- under Section 11AB of C. Ex. Act, 1944.

J) Appropriated the amount of Rs.7,57,000/- paid by M/s. Tuffware Industries as against rejected rebate claims, the demand for which is confirmed above.

K) Disallowed the Cenvat Credit of Rs.43,036/- taken on inputs without receipt of goods in the factory premises and ordered to recover the same under the provisions of Rule 12 of Cenvat Credit Rules, 2002 read with Section 11A of the Central Excise Act, 1944.

L) Ordered to pay interest at the appropriate rate on confirmed demand of Rs. 43,036/- under Section 11AB of C. Ex. Act, 1944 read with Rule 14 of the Cenvat Credit Rule, 2004.

M) Imposed total penalty of Rs.46,62,411/- on M/s Tuffware Industries under the provisions of Rule 25 of Central Excise Rules 2002.

N) Imposed a personal penalty of Rs.46,62,411/- on Shri Kishor Gangar, Partner of M/s. Tuffware Industries under the provisions of Rule 26 of Central Excise Rules, 2002.

4.1 Being aggrieved by the aforesaid Order in Original dated 02.12.2016, the applicant No. 1 filed appeal before Commissioner (Appeals), Bhiwandi Commissionerate who vide Order-in-Appeal No. SM/CGST & CX/Bhiwandi/APP-146/17-18 dated 19.3.2018, partially allowed the appeal, holding that :

> *"16.2 On going through the records available on file, I find that the Commissioner (Appeals) had allowed the appeal filed in respect of 12 rebate claims which were rejected by the jurisdictional Assistant Commissioner which involved a total Central Excise duty of Rs.*

42,62,776/-. The Department had apparently preferred an appeal with the Revision Authority against the impugned OIA under Section 35EE of the Central Excise Act, 1944, which was disallowed vide his RA Order No. 206-213/2006 22.03.2006. On perusal of the present rebate claims under consideration in this Order, I find that 9 rebate claims involving Central Excise duty of Rs. 18,66,671/- have been covered by the impugned Order of the Revision Authority. As per the CBEC norms regarding the Revisionary Authority Unit, The Revisionary Authority becomes functus officio after passing the final GOI Revision Orders. The Honorable Delhi High Court in the case of Union of India Vs. M/s. Ind Metal Extrusions Pvt. Ltd. held that the order passed by the Central Government under section 35EE cannot be challenged or questioned by a functionary of the Central Government. The Act is a Central Act. The functionaries under the Act, such as the Assistant Commissioner, Deputy Commissioner, Joint Commissioner, Additional Commissioner, Commissioner of Central Excise, Commissioner (Appeals) or Chief Commissioner of Central Excise are all functionaries under the Central Government, executing the Act. It is the Central Government itself which acts under Section 35EE as revisionary authority, dealing with revision applications filed both by the assessee and the Commissioner of Central Excise. Since the Central Government also has to act only through human agency, the function is entrusted to an official of the Central Government who is of the rank of Joint Secretary in the Ministry of Finance. He does not pass the revision order in his individual capacity or as a functionary under the Act; his orders are those of the central government itself. The section repeatedly refers to the "Central Government" and not to any official or functionary thereof. The Joint Secretary acts for the Central Government in passing the order. There is finality attached to the order which cannot be questioned by functionaries under the Act since the order is passed by the Government Union of India itself; if the Department chooses to take the revisionary route and question the legality and propriety of the order of the Commissioner (Appeals) before the Central Government under

Section 35EE, it must, if the decision of the Central Government goes against it, accept it as final. The section does not recognize any grievance that the Commissioner may nurse against the decision of the Central Government. Under the circumstances, I do not think that the adjudicating authority had any power to decide the rebate claims allowed vide the aforesaid Order of the Revisionary Authority. So, the total rebate of Central excise duty amounting to Rs 18,66,671/- covered by the Revisionary, Authority's Order stands allowed."

4.2 Being aggrieved by the aforesaid Order-in-Original dated 02.12.2016, in respect of the penalty imposed under Rule 26 of the Central Excise Rules, 2002 the applicant No. 2 filed Writ Petition No. WP/5991/17 instead of appeal to the Commissioner (Appeals). Hon'ble Mumbai High Court by an order dated 31.08.2018 directed the applicant to file appeal before Commissioner(Appeals). Commissioner CGST & CEx., (Appeals-III), Mumbai vide Order-in-Appeal No. NA/GST A-III/354/18-19 dated 31.01.2019 upheld the penalty imposed in Order-in-Original but reduced the penalty to Rs. 20,00,000/- under Rule 26 of the central Excise Rules, 2002.

5.1 Being aggrieved with the impugned Order-in-Appeal dated 19.03.2018, the applicant has filed present revision application mainly on the following grounds :-

5.1.1 The Applicants submitted that the Commissioner (Appeals) was pleased to set aside the order for recovery of rebate claims to the extent of amount of Rs.18,66,671/- (Sr. no 11, 12, 13, 14, 17, 18, 19, 20 & 21) by holding in para 16.2 of the impugned order that the adjudicating authority had no power to decide the rebate claims allowed by the Revisionary Authority vide Order No. 206-213/2006 dated 22.03.2006. However, the Commissioner (Appeals) upheld the remaining rebate claims of amount of Rs.23,51,765/- (Sr. Nos. 1, 2, 3, 4, 15 & 16 - Rs. 11,43,982/- (Refund received-given by Vasai Range); Sr. Nos. 5, 6 & 7- Rs.4,41,179/- (Rebate

filed on 08.01.2003 department not rejected & not passed) and Sr. Nos. 8, 9 & 10 - Rs.7,67,004/- (Rebate claims filed and rejected, appeal file and pending – documents destroyed due to fire in factory) of the statement showing the details about the total rebate claim of Rs. 42,18,436/- filed by the Applicants and details about the adjudication on rebate claim applications).

5.1.2 The applicants submit that the Ld. Commissioner (Appeals) erred in confirming the demand for recovery of rebate sanctioned amounting to Rs.23,51,765/- while allowing rebate of Rs. 18,66,671/-. The Ld. Commissioner (Appeals) allowed the rebate of Rs. 18,66,671/- on the ground that the adjudicating authority does not have power to decide rebate claims allowed vide Order No. 206- 213/2006 dated 22.03.2006 by the Revisionary Authority passed in appeal filed by the department.

5.1.3 The applicant submitted that the ground taken by the department for recovery of rebate sanctioned or rejecting pending claims is that the finished goods were exported directly from job work unit at Bhayandar and not from their Vasai unit as claimed by applicant.

5.1.4 The applicants submit that in para no 16.2 of the impugned OIA, the Ld. Commissioner has observed in detail as to how the order passed by the Revision Authority is final and cannot be challenged the same by subordinate officials, it being passed by the Central Government. However, the Ld. Commissioner (Appeals) failed to appreciate that the Revisionary Authority allowed the rebate holding that direct delivery of raw material to job worker and export of final goods from job worker's premises is within the frame work of law and procedure and the ratio of the said order is applicable to the entire disputed amount. The Ld. Commissioner (Appeals) allowed the rebate only to the extent of amount covered by the Order passed by the Revisionary Authority and rejected the rebate of balance amount. The applicants submit that impugned OIA to the extent of denying the rebate of Rs.23,51,765/- is illegal on this ground alone.

5.1.5 It is submitted that two of the rebate claims for Rs.4,25,101/- and Rs.2,25,848/- filed by the applicant for subsequent period, after going through many rounds of appeals and counter appeals, are finally allowed by the Dy. Commissioner, Central Excise, Bhayandar Division, Thane-II vide OIO No. MKJ/01/2017-18 dated 26.05.2017. The Dy. Commissioner dropped the proceedings to recover the rebate sanctioned on the ground as observed in para 16 and 17 of the Order that the Revision Application of the department is rejected and the Revisionary Authority has allowed the rebates vide Order No 206-213/2006 dated 22.03.2006 [same Order relied by the Ld. Commissioner (Appeals) for allowing rebate of Rs. 18,66,671/- involved in the said Order] and 513/2006 dated 30.06.2006 and since there is no appeal pending against the above orders of Revisionary Authority before any High Court, the said decision is reached to finality.

5.1.6 The applicant submits that the Ld. Commissioner (Appeals) also ought to have accepted the ratio of the aforesaid judgements of Revisionary Authority and ought to have allowed the rebate of entire disputed amount of Rs.42,62,776/- and not only Rs.18,66,671/-. It is therefore submitted that the upholding confirmation of demand of Rs.23,51,765/- towards recovery of rebate allegedly sanctioned to the applicant is illegal and unsustainable.

5.1.7 Without prejudice to the above submissions, the applicants submit that the rebate to the extent of Rs.11,43,982/- sanctioned and received by applicants earlier under different sanction orders, cannot be sought to be recovered under this proceeding and department ought to have challenged the orders sanctioning the said rebate with proper judicial authority. Therefore, the impugned order upholding the demand to the extent of Rs.11,43,982/- is illegal and unsustainable.

5.1.8 Without further prejudice, the applicants submit that the Ld. Commissioner (Appeals) erred in upholding the confirmation of demand to the extent of Rs.4,41,179/- and Rs.7,67,004/- as the rebate of said amount

is yet to be sanctioned and received by the applicant and proceedings initiated to recover the allegedly sanctioned rebate is premature and the impugned order to the extent of seeking recovery of amount of Rs. 12,08,183/- (Rs.4,41,179/- plus Rs.7,67,004/-) is illegal and deserves to be set aside forthwith and order for sanctioning the rebate claims along with interest.

5.1.9 The applicants submit that in view of the aforesaid submissions, they are not liable to pay any amount and therefore the amount of Rs.7,57,000/- (Rs.5,00,000/- and Rs.2,57,000/- paid during the course of investigation and sought to be appropriated in the impugned OIA cannot be appropriated and the Applicants pray that the said amount may ordered to be refunded in cash to the applicant forthwith. The Applicants submit that the Ld. Commissioner (Appeals) failed to appreciate the submissions of the applicants that there is no dispute about the manufacture of finished goods out of recorded inputs and exportation thereof on payment of duty. It was merely alleged in the SCN that rebate claim of Rs.42,18,436/- is deniable as same were exported from the premises of the job worker i.e. applicant's own factory at Bhyander instead of brining back to Vasai unit. The is patently false as material was brought back to Vasai factory and attended finishing process which ever is necessary and finally exports from Vasai unit under the physical supervision of Excise Officer which is evident on the basis of certification on the back of ARE-1. Further the same issue was subject matter of proceeding before Commissioner Officer and Revisionary Authority who finally decided that export rebate was permissible. Further export rebate of Rs.9,47,863/- and Rs.38,467/- (out of Rs.42,18,436/-) it was alleged in SCN that the rebate was not permissible as goods purchased from open market were exported. The applicants say and submit that the goods purchased from the open market were in the form of laddle/turner/solid spoon and same were subjected to process of setting as per the required design of utensils/cutlery. It is submitted that accordingly both the adjudicating and appellate authority erred in adjudicating the rebate claims again and that too by going beyond allegation made in the SCN.

5.1.10 The Applicants further submit that the Ld. Commissioner (Appeals) failed to appreciate that export from the premises of the job worker is legally permissible as per Cenvat Rule 4(6), Therefore, even if the contention of the applicants is not accepted that exports was made from Vasai factory still benefit cannot be denied as there is no dispute about the exportation of goods which is admitted position in impugned order also. As regards exportation of material purchased from the open market also the claim of rebate cannot be rejected as in terms of CBE&C Circular No. 283/117/96-CX dated 31.12.1996 read with CBE&C Circular No. 345/2/2000-TRU dated 29.8.2000 (Para No.8), export of input as such is permissible. Alternatively rebate is also permissible on exportation of market purchased duty paid goods as per CBE&C Circular No. 18/92-CX.6 dated 18.12.1992 read with Circular No. 294/10/97-CX dated 30.1.1997.

5.1.11 It is submitted that the Ld. Commissioner (Appeals) illegally upheld the confirmation of demand of Rs.43,036/- on other inputs namely packing material without appreciating that packing material is used for exportation of finished goods. Entire proceeding is based on cohesive statement of Partner which is contrary to the factual records.

5.1.12 It is claimed by the department by relying upon the statement of the partner that neither raw material nor finished goods was received in Vasai factory. This is contrary to the factual position stated in SCN itself where-under the departmental officer carried out stock taking and demanded duty on the alleged shortage of stock and imposed redemption fine on alleged excess stock. Further based on the statement of the partner it was claimed that the finished goods were exported not from Vasai unit but from Bhayander unit. This is also contrary to the factual position appearing on ARE-1 evidencing the export from Vasai unit. The applicants submit that the Ld. Commissioner (Appeals) upheld the impugned OIO without proper appraisal of the stated factual position.

5.2 Being aggrieved with the impugned Order-in-Appeal dated 31.01.2019, the applicant has filed present revision application mainly on the following grounds :-

5.2.1 The applicant is a partner in a firm M/s. Tuffware Industries who is the main noticee of proceeding and has already filed Revision Application against. OIA No. SM/CGST&CX/Bhiwandi/App-146/17-18 dated 19.03.2018 passed by the Commissioner (Appeals), CGST & C. Ex. Bhiwandi Commissionerate and the applicant seek to refer and rely upon all the grounds thereof and pray that the same may be treated as part of this application for the purpose of defence.

5.2.2 The applicant say and submit that the reliance placed by the Commissioner (Appeals) in para no 9.3 on CESTAT judgement in the case of Paragaon Steels (P) Ltd., is totally irrelevant and not applicable in this case. In the said case, penalty on managing director was imposed on account of clandestine removal. In this case, there is no involvement of any clandestine removal.

5.2.3 Further the reliance placed by Commissioner (Appeals) in para no 9.4 on the CESTAT judgement in the case of Ekbote Brothers Furniture Works in support of the contention that the penalty on partners can be imposed is also out of context. It is submitted that on the contrary the applicant themselves in para 24 of the EA-1 and para 7 of the PH Synopsis dated 07.01.2019 made a plea that as per the judgement of larger bench of Mumbai High Court in case of Amrit Lakshmi Machine Works, 2016 (335) ELT 225 (Bom), the penalty on partner can be imposed in addition to penalty on the firm but only when the breach committed on the

part of the partner is independent of the breach committed by the firm. The applicant further contended that in this case, there is no involvement of any inadmissible credit or deliberate evasion and the issue is repeatedly settled by Revisionary Authority on eligibility of rebate claim. The applicants submit that the Commissioner (Appeals) has not given any finding and illegally followed the order of the Commissioner (Appeals) passed against firm and reduced personal penalty proportionately. The impugned Order passed by the Commissioner (Appeals) and needs to be set aside forthwith.

5.2.4. The Applicant say and submit that in view of the above grounds of appeal, the personal penalty imposed under Rule 26 on the applicant needs to be dropped forthwith.

6. A Personal hearing in this case was held online on 12.10.2022 which was attended by Shri Dinesh H. Mehta, Advocate on behalf the applicant. He submitted that on subsequent denovo proceedings where Revisionary Authority has allowed their application and they received rebate, still department issued SCN and re-opened all proceedings again. He submitted that earlier RA order was final therefore, present proceedings are extra judicial.

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

8. On going through the case records, it is observed that the case emanates out of the investigation and search carried out on the premises of the applicant at their Vasai and Bhayandar where the respondent

department has alleged certain infirmities and accordingly after following the due process has passed adjudication order as detailed in para 3 supra. The main issue to be decided here is whether they are entitled to rebate on exports purportedly carried out from job-worker premises and orders passed on the other allegations and personal penalty on Shri Kishor Gangar, Partner of M/s. Tuffware Industries are sustainable.

9. Before adverting to the merits of the opposing contentions, it is pertinent to refer to statutory provisions relevant to the case. The applicant has in the revision application submitted that the impugned order is non est in law and has averred that no review of the sanctioned orders were done and as no appeal was filed against the sanctioned order, they had attained finality.

10. Government observes that while the sanction of the rebate claims are on record, the instant case has relevance to the statutory provisions pertaining to the recovery of the such sanctioned rebate claims as subsequent events had brought to light the misdeclaration, suppression and misrepresentation of facts in the clearance of the goods which are as under:

i. M/s. Tuffware Industries did not have any machinery required for manufacture of S.S. Utensils and Kitchenware in their factory at Vasai.

ii. Shri Kishor Gangar, Partner of M/s. Tuffware Industries has in his statement recorded under Section 14 of CEA, 1944 had admitted that their machineries installed a Vasai could not be used for manufacturing of Stainless steel Utensils and Kitchenware.

iii. M/s. Tuffware Industries were taking Cenvat credit fraudulently without receipt of raw material and exporting the ready finished goods, procured from market/suppliers.

iv. The input documents on which Modvat/Cenvat credit was availed in their books of accounts were never received at their Vasai unit.

v. The Modvat/Cenvat credit availed in their Vasai unit had been claimed as rebate from the Assistant Commissioner, Vasai.

vi. On urgent request of M/s. Tuffware Industries made on 25.09.2002, the export of seized stock was allowed. M/s. Tuffware Industries had voluntarily paid Rs. 7.5 lakhs vide their letter dated 24.09.2002 in respect of the amount of rebate already received by them, accepting the irregularity in availment of Modvat/Cenvat Credit.

vii. There was no generation of stainless steels scrap at Vasai unit that the scarp generated at their Bhayandar unit was cleared clandestinely without payment of Central Excise duty on cash basis.

viii. They were also engaged in trading activity, that they had not taken any permission under Rule 16 of Central Excise Rules, for trading.

ix. They purchased S.S.Utensils and Cutleries in their Vasai Unit and directly exported the same by debiting Central Excise duty under RG 23A part-II account, that they had suppressed the said fact and mislead/misguided the Central Excise department.

11.1. Government notes for a better understanding of the statutory provisions and applicability in cases of erroneous recovery of refunds, the provisions of Section 11A of the Central Excise Act are reproduced as under:

Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-

(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty-

(a) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom

the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of,-

(i) his own ascertainment of such duty; or

(ii)the duty ascertained by the Central Excise Officer, the amount of duty along with

interest payable thereon under section 11AA.

(2) .....

(3) .....

(4) Where any duty of excise has not been levied or paid or has been short-levied or

short-paid or erroneously refunded, by the reason of-

(a) fraud; or

(b) collusion; or

(c) any wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.

Explanation 1. - For the purposes of this section and section 11AC,-

(a) "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;

(b) .....;

(i).....;

(ii).....;

(iii).....;

(iv).....;

(v) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund;

[(vi) .....

.....

Section 11AC. Penalty for short-levy or non-levy of duty in certain cases. -

(1) The amount of penalty for non-levy or short-levy or non-payment or short-payment or erroneous refund shall be as follows :-

(a) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason other than the reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty not exceeding ten per cent of the duty so determined or rupees five thousand, whichever is higher;

(b) where any duty as determined under sub-section (10) of section 11A and the interest payable thereon under section 11AA in respect of transactions referred to in clause (a) is paid within thirty days of the date of communication of the order of the Central Excise Officer who has determined such duty, the amount of penalty liable to be paid by such person shall be twenty-five per cent. of the penalty imposed, subject to the condition that such reduced penalty is also paid within the period so specified;

(c) where any duty of excise has not been levied or paid or has been short-levied or shortpaid or erroneously refunded, by reason of fraud or collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined: Provided that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with 8th April, 2011 up to the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty percent of the duty so determined.

11.2. Government notes that as stated above, the statute in the Central Excise Act, has provided a remedy in the event of a refund having been sanctioned erroneously and recovery of the same in the light of subsequent omission on the part of the noticees.

11.3 Government notes that the issue has been discussed at various judicial forums and the Courts have held that Section 11 A is an independent substantive provision and is a complete code in itself for realization of excise duty erroneously refunded ant there are no pre-conditions attached for issuance of notice under Section 11 of the Act for recovery of amount erroneously refunded. Government relies on the observations of the Hon'ble High Court of Judicature at Bombay in the case of Indian Dyestuff Industries Ltd vs. Union of India [2003(161) E.L.T. 12(Bom)] at Para 15 which is reproduced as under:

> *"15. The submissions of the Petitioners that when the refund was granted as a consequential relief by accepting the order-in-original dated 11-9-1984, it was not open to the Revenue to resort to Section 11A of the said Act and purport to recover the amount refunded on the ground that the amount was erroneously refunded and that if at all the revenue was aggrieved by the order-in-original, the proper course open to the revenue was to file an appeal u/s. 35 of the said Act and that*

having accepted the order-in-original dated 11-9-1984, it was not open for the revenue to invoke jurisdiction u/s. 11A of the said Act have no merit, because, before invoking the jurisdiction u/s. 11A of the said Act, it was not mandatory for the Revenue to challenge the order-in-original by filing appeal. The show cause notice u/s. 11A of the said Act can be issued, if there are grounds existing such as short levy or short recovery of erroneous refund etc. under the Scheme of the said Act. The only way by which an erroneously refunded duty could be recovered is by resorting to the powers conferred under Section 11A. The issuance of a notice under Section 11A is a primary and fundamental requirement for recovery of any money erroneously refunded. Section 11A is the fountain head of all the powers for recovery of any money erroneously refunded. There are no preconditions attached for issuance of notice under Section 11A for recovery of the amount erroneously refunded. There is no requirement of passing an adjudication order and if adjudication order is passed, there is no need to initiate appellate proceedings before issuing notice under Section 11A. Second proviso to Section 35A(3) which states that no order-in-appeal requiring the appellant to pay any duty erroneously refunded shall be passed unless the Appellant is given show cause notice within the time limit prescribed in Section 11A also shows that Section 11A is a independent substantive provision and it is a complete code in itself for realisation of excise duty erroneously refunded. Under the circumstances, the contention of the Petitioner that notice under Section 11A could not be issued without challenging the order-in-original is without any merit."

Government notes that the above order of the High Court of Judicature in Bombay has been maintained by the Hon'ble Supreme Court in the case of Navinon Ltd vs. UOI [2004(163)E.L.T A 56(SC)].

Further Government also relies on the following case laws which echo the decisions of the Courts as quoted supra:

(i) Bharat Box Factory vs. Commissioner of Central Excise, Ludhiana

[2005(183) E.L.T. 461(Tri-Del)]

(ii) GOI order in Re: Evershine Polyplast Pvt Ltd [2012(278) E.L.T 133(GOI)

11.4. Government observes that the impugned Orders-in-Original has clearly brought out the misdeclarations, suppression and misrepresentation on the part of the applicant and the objections on the part of the applicant on this count are flawed and thus rejects the same and moves on to merits of the case.

12. Confiscation and redemption fine on goods:

The applicant No.1 has claimed that the excess amount of goods confiscated had been manufactured using inputs eligible for Cenvat credit and were awaiting inclusion in the daily stock register. They argued that the goods had been accounted for in a separate record kept for export, indicating that they were not intended for illegal removal. However, this explanation cannot be accepted, as the applicant themselves admitted that the excess quantity was not recorded in the mandatory statutory records. Additionally, there is no provision in the relevant rule stating that goods intended for export are exempt from accounting for in statutory records. Despite the applicant's previous statements confirming the excess stock position, they requested the department to allow export of the goods after voluntarily paying a sum of Rs. 7.5 lakhs. Based on these circumstances, the excess finished goods were liable for confiscation under Rule 25 (b) of CER 2002, and the given explanation is not valid.

The Show Cause Notice (SCN) clearly stated in Para 10 that the excess stock was subject to seizure and subsequent confiscation. However, as per the request made in the letter dated 25.09.2002, the excess stock was allowed to be exported. Furthermore, in his findings, the Adjudicating Authority in Para (j) (a) clearly stated that the excess stock had been

accepted by the Applicant during the Panchnama proceedings and in various statements recorded, and that the Applicant had requested the Department to allow the export of the excess stock. Therefore, allowing the excess stock to be exported based on the request made by the Applicant can be compared to releasing the goods under bond. As a result, the order of confiscation of the excess goods and the imposition of a redemption fine in lieu of confiscation were both justified. Given the facts and circumstances of the present case, the case laws cited by the Applicant are not relevant to the proceedings. Therefore, the conclusions arrived at in the impugned Orders-in-Original and Orders-in-Appeal in this regard were just and proper.

13. Central Excise Duty demand amounting to Rs.1,89,306/- on goods found short in the factory premise:

The adjudicating authority has confirmed the Central Excise duty demand of Rs. 1,89,306/- on the 1757 curry pots found short during stock verification on 21.09.2002 at Vasai. The Applicant had asserted that the 1757 curry pots found short were the same as the 1757 flat tops found in excess, and that flat tops were synonymous with curry pots.

However, this explanation is not unacceptable because the stock taking of the goods was conducted in the presence of the Applicant's representative, and no such issue was raised at that time. Furthermore, the argument that the goods were subsequently exported does not hold any weight. If the stock had been present on the day of the stock taking, the representative could have identified it and brought it to the attention of the concerned Central Excise officer drawing the Panchanama and the Panchas. Additionally, there was no correlation between the goods exported later in November 2002 and those found to be short on the material day. Various persons accepted in their statements that the goods had been cleared without proper accounting and invoice issuance, and these statements have not been retracted. Therefore, the demand for Central Excise duty of Rs. 1,89,306/- on the shortages, along with interest and a penalty for the clearance of the goods without paying the Central Excise duty and issuing

invoices, is rightly confirmed. Moreover, the Applicant has not provided any documentation to support their assertion. Consequently, the claim that curry pots and flat tops are the same seems to be an afterthought. Therefore, the conclusions arrived at in the impugned Orders-in-Original and Orders-in-Appeal in this regard were just and proper.

14. Central Excise duty demand on clearance of cenvatable S.S.scrap without payment of duty:

The issue pertains to the recovery of Central Excise duty amounting to Rs. 4,00,030/- on the clearance of S.S. scrap weighing 167058 kgs, between April 2002 and 21.09.2002. The Applicant has contended that the duty demanded is incorrect as the benefit of cum-duty price was not granted. However, Applicant's explanation, is not acceptable as the scrap was cleared without accounting in the statutory records and without issuing any invoice. Moreover, the Applicant has failed to provide evidence to establish that the value was inclusive of the Central Excise duty element. The Supreme Court in the case of M/s. Amrit Agro Industries Ltd. Vis. CCE, Gaziabad (2007(210) ELT 183 (SC)) has observed that unless the manufacturer demonstrates that the price of goods includes the excise duty payable by him, the question of exclusion of duty element from price does not arise for the determination of value under Section 4(4)(d) (ii) of the Central Excise Act, 1944. Thus, the benefit of cum-duty price cannot be considered.

The exemption provided by Notification No.8/2002 to SSI units for payment of Central Excise duty clearly stipulates that the assessee must exercise the option to either avail full exemption from payment of duty without availing CENVAT credit or pay Central Excise duty at a reduced rate from the first clearance in the financial year and avail CENVAT credit on the inputs/input services. The option cannot be exercised at any other time during the financial year. The Applicant in this case has admitted that they did not exercise the option at all. Thus, they cannot unilaterally decide to avail the benefit of this exemption/notification as and when they deem fit.

The Honorable Supreme Court in CCE v. Ramesh Food Products [2004 (174) E.L.T. 310 (S.C.)] had observed that the exemption provided by the specified goods accrues to the manufacturer through the instrumentality of the manufacturer. The notification clearly distinguishes between two categories of manufacturers - those availing Modvat credit and those not opting for the Modvat Scheme. The manufacturers who opt to operate under the scheme are given input duty relief under the scheme by applying for it in the prescribed manner. Ultimately, the manufacturers have the option of choosing one of the concessions - either the Modvat Scheme or Notification 175/86. The ratio of this decision is applicable to this case. Additionally, the Applicant has not contested the occurrence of clandestine removal and has only argued for a reduction in the quantum of demand. There is no merit in the Applicant's arguments. Therefore, the conclusions arrived at in the impugned Orders-in-Original and Orders-in-Appeal in this regard were just and proper.

15. Rejection of rebate claims involving Central Excise duty of Rs. 42,18,436/-

The records show that the Commissioner (Appeals) allowed an appeal (para 4.1 supra) filed for 12 rebate claims which were earlier rejected by the Assistant Commissioner. The Department filed an appeal against this decision with the Revision Authority, which was disallowed. Upon reviewing the present rebate claims, it is found that 9 rebate claims are covered by the impugned Order of the Revision Authority. As per the CBEC norms, the Revisionary Authority becomes functus officio after passing the final GOI Revision Orders. The order passed by the Central Government under section 35EE was not challenged or questioned by the department. Therefore, the adjudicating authority does not have the power to decide the rebate claims allowed by the Revisionary Authority's order, and the total rebate of Central excise duty amounting to Rs. 18,66,671/- covered by the Revisionary Authority's Order was allowed.

Regarding the remaining amount of Rs. 23,51,765/- involved in the rebate claims decided by the adjudicating authority, the reviewing authority agrees with the adjudicating authority that these rebate claims should be rejected. The reviewing authority finds that the Applicant had the intention to fraudulently avail the benefits of rebates that were not admissible to them otherwise. This fraudulent intent stands clearly exposed. Based on this, the appellate authority has rightly upheld the Order-in-Original to the extent mentioned above on this issue, which means that the rebate claims involving this remaining amount should be rejected as the Applicant is not entitled to the rebate of Central Excise duty on this amount. Therefore, the conclusions arrived at in the impugned Orders-in-Appeal in this regard were just and proper.

Contention of the applicant that once earlier order of Revisionary Authority allowing rebate of Rs. 18,66,671/- was not challenged, ratio of the order becomes final and the same should have been applied to remaining rebate claim, does not have merit. Commissioner(Appeals) in his impugned Order-in-Appeal has appropriately discussed this issue and has allowed rebate to the extent already allowed by Revisionary Authority in earlier order. Remaining rebate amount has correctly been held inadmissible.

16. Wrong availment of CENVAT credit:

The adjudicating authority has refused to allow a CENVAT credit of Rs. 43,036/- on packing materials due to the Applicant's improper availment of credit. During the investigation, the Applicant acknowledged that they had taken credit which was not admissible. Although the OIO stated that the Applicant denied availing any credit on packing materials, in their appeal, they claim to have taken credit for packing materials used for exports. However, the Applicant could not provide any supporting documentation to substantiate their argument. Therefore, the adjudicating authority had rightly held that the Applicant wrongly availed of the CENVAT credit. Therefore, the conclusions arrived at in the impugned Orders-in-Original and Orders-in-Appeal in this regard were just and proper.

17. Regarding Imposition of interest and penalty:

Commissioner(Appeals) in his order dated 19.03.2018 at para 18 has held as under:

> *"18 Regarding Imposition of interest and penalty, I would like to refer to the case of PRATIBHA PROCESORS Vs UNION OF INDIA reported in [(1996) 11 SCC 1011, wherein it was held that interest is payable in such cases. The Honourable Supreme Court held that in fiscal statutes, the tax is the amount payable as a result of the charging provision and it is a compulsory extraction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of a particular statute. It was further pointed out by the Honourable Apex Court that interest is compensatory in character and is imposed on the assessee who has withheld payment of any tax as and when it is due and payable; that the levy of interest is levied on the delay in payment of tax due and payable on the due date. Further in the case of M/s Tulsi Intermediates Vs CCE, Vadodara[2010-TIOL-885- CESTAT-AHM] the Honourable CESTAT held that once the department recorded statement of the director admitting clandestine removal and did not retract hist statement the burden of proving contrary shifted to the appellants, which has not been discharged at any stage and hence interest recoverable and penalty imposable. Also in the case of M/s Maheswari Industries Vs CCE, Hyderabad [2010-TIOL-770- CESTAT-BANG] the Honourable CESTAT held that since intention to evade duty was proved, penalty under Section 11AC was justified. As such, there is no need to interfere with the adjudicating authority's decision to levy interest under Section 11AB of the Central Excise Act, 1944 and impose penalty under Section 11AC ibid. I however reduce the quantum of interest and penalty according to the quantum of central excise duty confirmed in this Order.*

The issue at hand pertains to the imposition of penalties on the Applicant under various provisions of the Central Excise Rules, 2002 including Rule 25, 26, and 27, and Rule 13 of the Cenvat Credit Rules, 2002. The Applicant has only provided a vague explanation that they did not intend to evade the payment of Central Excise duty, which is unconvincing. The Applicant has violated multiple provisions of the Central Excise Rules, 2002, and each contravention has been discussed in detail. It is evident that the Applicant has availed of irregular Cenvat credit, removed excisable goods

without proper accounting, and exported goods in contravention of the provisions of the Central Excise Rules. Therefore, the penalties, including penalties under Rule 25, 26, and 27 of the Central Excise Rules, 2002, and Rule 13 of the Cenvat Credit Rules, 2002 are rightly imposed. Therefore, the conclusions arrived at in the impugned Orders-in-Original and Orders-in-Appeal in this regard were just and proper.

18. **R.A. No. 195/66/WZ/2019-RA**

18.1 Commissioner(Appeals) in his order dated 31.01.2019 at para 9.1 and 9.2 has held that:

> *"9.1 As regards to imposition of penalty under Rule 26 of the Rules on the appellant, the allegations revealed by the investigations conducted by the departmental officers have been further corroborated by the statements recorded of the appellant on 18.09.2002, 19.09.2002, 21.09.2002, 22.11.2002, 16.07.2003, who was aware of the inconsistencies and violations of the firm. The appellant has admitted that although the Vasai unit of their firm manufactured Aluminium utensils and had Plant and machinery for manufacture of Aluminium utensils, Cenvat credit of on purchase of Stainless steel flats were availed at the Vasai Unit although no stainless steel flats had been received in the Vasai unit. He has further admitted that the Stainless steel flats were directly delivered to Jodhpur where they were converted to S.S. patties which were delivered to the Bhayander unit. At the Bhayander unit Stainless steel utensils were exported by way of container stuffing, whereas Cenval credit on Stainless steel inputs/raw materials, availed at the Vasai unit which did not at all manufacture any stainless steel products, which did not even have the plant and machinery to manufacture stainless steel products, was claimed as rebate. All purchases were made in the name of the Vasai unit to claim Cenvat and all exports took place from their Bhayander unit Further they have not availed any exemption based on valued based clearances. There was no accounting of scrap, no account or co-relation of cenvat/modvat credit availed and finished goods manufactured and that exported Further the appellant was also aware that the firm had engaged in trading activities. It is therefore apparent that the appellant was well aware of the irregularities was aware and involved in the removal of scrap without payment of duty. In his written submissions, the appellant contends that based on his statement, it has been claimed that the finished goods were exported not from Vasai unit but from Bhayandar unit, however, this was contrary to the factual position appearing on ARE-1 evidencing the export from Vasai unit. By this contention it appears that the appellant is at the appeal stage trying to retract his statement recorded during the search conducted in the*

assessee's premises, I consider that this contention further fortifies the fact that the appellant was involved in the committing of irregularities where manufacture, availment of credit, export and preparation of documents were done containing addresses of the manufacturing units as benefited by them.

9.2 The Commissioner (Appeals) has already considered the appeal of the firm and confirmed the demand. In view of my above discussions, I hold that the penalty under Rule 26 of the Rules are rightly imposable upon the partner of M/s Tuffware, Shri Kishore D Gangar. However, considering that Commissioner(Appeals), has held that interest and penalties on the firm be scaled down considering that the quantification of the demand has been reduced in view of the order of the Revisionary Authority, I find that the benefit should also be extended to the appellant. Accordingly, I hold that the penalty under Rule 26 of the Central Excise Rules, 2002 needs to be suitably scaled down. It is felt that ends of justice would be met if a penalty of Rs 20,00.000/- is imposed."

18.2 In so far as imposition of personal penalty on Shri Kishor Gangar, Partner of M/s. Tuffware Industries vide order dated 31.01.2019 under Rule 26 of Central Excise Rules, 2002, is concerned, the Government observes that he was overall in charge of all the export related work including participating in carrying out wrongful activities that involved creating and using documents for manufacturing, availment of credit, exporting goods, and preparing paperwork that included addresses of manufacturing units that were advantageous to them, at the relevant period. Government finds that this would undoubtedly be a conscious decision taken with the knowledge of the Shri Kishor Gangar, Partner of M/s. Tuffware Industries. In the circumstances, Government finds that the personal penalty for participating in carrying out wrongful activities for exporting goods imposed on Shri Kishor Gangar, Partner of M/s. Tuffware Industries (applicant No. 2), would suffice to meet the ends of justice. Accordingly, the reduced personal penalty imposed on Shri Kishor Gangar, Partner of M/s. Tuffware Industries vide order dated 31.01.2019 under Rule 26 of Central Excise Rules, 2002, is upheld.

19. In view of the above discussion and findings, Government,

(a) upholds Order-in-Appeal No. SM/CGST & CX/Bhiwandi/APP-146/17-18 dated 19.3.2018 passed by Commissioner (Appeals), Bhiwandi Commissionerate and rejects Revision Application No. 195/119/WZ/2018-RA filed by M/s. Tuffware Industries Gala No. 4, Rama Industrial Estate, Golani Complex, Waliv, Vasai (E), Dist. Palghar.

(b) upholds Order in Appeal No. NA/GST A-III/354/18-19 dated 31.01.2019 passed by the Commissioner(Appeals-III), GST & CEx., Mumbai and rejects Revision Application No. 195/66/WZ/2019-RA, filed by Shri Kishor Gangar, Partner, M/s. Tuffware Industries

31/3/23
(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 214-216/2023-CX (WZ) /ASRA/Mumbai DATED 31.03.23

To,

M/s. Tuffware Industries
Gala No. 4, Rama Industrial Estate,
Golani Complex, Waliv,
Vasai (E), Dist. Palghar- 401208.

Shri Kishor Gangar,
Partner, M/s. Tuffware Industries
Gala No. 4, Rama Industrial Estate,
Golani Complex, Waliv,
Vasai (E), Dist. Palghar- 401208.

Copy to:

1. Pr. Commissioner of CGST & CX, Palghar.
2. Commissioner (Appeals-III), CGST, Mumbai.
3. D.H.Mehta (Advocate), Vivek Enclave, Shop No. 4, Shivaji Nagar, Borivali(W), Mumbai – 400 103.
3. Sr. P.S. to AS (RA), Mumbai.
4. Guard file.

5. Spare Copy.