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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
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. 198/65/12-RA/614 Date of Issue: 22nd December 2017

ORDER NO. 21/2017-CX (WZ) /ASRA/MUMBAI DATED 22.12.2017 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, RINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Deputy Commissioner of Central Excise & Customs, Raigad

Respondent : M/s Positive Packaging Inds Ltd.

Subject : Revision Applications filed, under section 35EE of the Central ExciseAct,1944 against the Orders-in-Appeal No.US/ 60/ RGD 2012 dated 24.01.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai.

ORDER

This revision application is filed by Deputy Commissioner of Central Excise & Customs Raigad(hereinafter referred to as "the applicant") against the Order-in-Appeal No. US/60/RGD/2012 dated 24.01.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – II setting aside the Order-in-Original No.KPL/RC/2501/2011-12 dtd.09.05.2011 passed by the Deputy Commissioner of Central Excise, Khopoli Division

2. The issue in brief is that the Deputy Commissioner, Central Excise, Khopoli Division, Raigad vide Order-in-Original No.Raigad/KPL/RC/2501/ 2011-12 dated 9.5.2011 rejected a rebate claim of Rs.3,38,594/- filed by M/s Positive Packaging Inds Ltd. (the respondents) on the ground that the amount paid at the time of export was not duty but "amount" paid under Rule 16(2) of Central Excise Rules, 2002 .

3. Being aggrieved by the impugned Order-in-Original, M/s Positive Packaging Inds Ltd. (the respondents) filed an appeal before Commissioner (Appeals-II), Mumbai.

4. After going through the case records and considering the averments made in the appeal, Commissioner (Appeals) observed that in the instant case, the appellants had cleared the goods for export on 4.12.2008. The container met with an accident en-route the port and was brought back to the factory. The appellants took Cenvat Credit of the duty paid by them under Rule 16 of Central Excise Rules, 2002 and again cleared the consignment after reversal of the Cenvat Credit. The adjudicating authority held that this reversal was not a duty for which rebate could be granted. On carefully reading the provisions of Rule 16 of Central Excise Rules, 2002, and also relying on the judgements of Hon'ble CESTAT in Grasim Industries Ltd. v/s CCE - 2003 (155) E.L.T. 200 (Tri.– Del.) and Hon'ble Bombay High Court in CCE v/s Micro Inks Ltd. -2011

(270) E.L.T. 360 (Bom.),Commissioner (Appeals), set aside Order-in-Original No.Raigad/ KPL/ RC/ 2501/ 2011-12 dated 9.5.2011 rejecting a rebate claim of Rs.3,38,594/-.

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

5.1 the Commissioner (A) has not appreciated the fact that the rate of duty prevalent on the date of clearance of the goods exported was 10% adv. whereas, the assessee has claimed the rebate of duty @ 14% adv. The Board's Circular No.510/06/2000 CX dated 03.02.2000 clarifies that rebate has to be allowed equivalent to the correct duty. Thus, what is important in this case is correct amount of duty as applicable at the prevalent time. The duty paid by the assessee being not the correct duty, as the prevailing rate at that time was 10% adv., therefore, amount demanded @ 14% adv., cannot be considered as duty for grant of rebate.

5.2 the Commissioner(A) has erred in considering the fact that in instant case, the rebate claimed pertains to amount paid under Rule 16(2) of Central Excise Rules, 2002, which cannot be held as Central Excise duty as envisaged under Rule 18 of Central Excise Rules, 2002 for grant of rebate. Hon'ble Supreme Court in case of M/s. Hindustan Zinc Ltd. Vs CCE, 2005 (181) ELT 170 (SC), held that the two basic conditions must be satisfied - first article should be good and second it should have come into existence as result of "manufacture". It is clear that the assessee has only reversed amount of Cenvat Credit for complying with provision of Rule 16(2) of Central Excise Rules, 2002.

5.3 since, no process of manufacture has been under taken on duty paid goods received back in the factory of the assessee, the payment

made at the time of subsequent clearance of such goods is not Central Excise duty but is payment of "amount" equal to Cenvat Credit availed in terms of Rule 16(1) of Central Excise Rules. This "amount" does not qualify for claiming rebate as it does not represent the Central Excise duty as it is not paid in terms of provisions of Section 3 of Central Excise Act. Therefore this payment does not get covered in definition of term 'duty' as defined insaid Rule 18 of Central Excise Rules. Thus the rebate claimed in instant case of "amount" paid under Rule 16(2) is not admissible to the assessee.

5.4 the Commissioner(A) has erred in not considering the true and real meaning of the term 'Duties of Excise' which are collected under the following laws –

i) The Central Excise Act, 1944;

ii) The Additional Duties of Excise (Goods Special Importance) Act 1957. (58 of 1957);

iii) The Additional Duties of Excise (Textile & Textile Articles) Act, 1978 (40 of 1978;

iv) Special Excise Duty Collected under a Finance Act.

The word 'duty' has been defined under Rule 2(e) of the Central Excise Rules 2002, as "duty payable under Section 3 of the Central Excise Act, 1944. Section 3 of the Central Excise Act, 1944, defines 'duty' as duty specified in the First and Second Schedules to the Central Excise Tariff Act, 1985. Since the amount paid by the assessee does not fall in any of the above definition, it cannot be construed to be a 'duty of excise'.

5.5 the Commissioner(A) has failed to appreciate that the reversal of Cenvat Credit was 'an amount' and not 'a duty' and hence rebate was not admissible as it is beyond the scope of Rule 18 of the Central Excise Rules, 2002 ("Rules") and hence the rebate was not admissible for

clearance of capital goods as such.

5.6 the Commissioner(A) has failed to appreciate that an amount is paid at the time of clearance of goods as such for export cannot qualify for rebate by treating the same akin to 'duty' since as per Sub-rule (5) of Rule 3 of Cenvat Credit Rules, 2004, an 'amount' is required to be paid for the clearance of input / capital goods, "as such". However, the term 'amount' is not 'duty of excise'.

5.7 the Commissioner(A) has failed to appreciate the decision of the tribunal in the case of Aarti Drugs Vs CCE 2001 (133) ELT 201 (CEGAT) wherein relying on Board's Circular No. B-42/1/196 dated 27.09.1996, it was held that 'amount' paid under Rule 16 (that time Rule 57CC) has nothing to do with duty. It is in fact not duty at all. The Commissioner(A) has not considered the settled case law and thus apparently erred in its interpretation towards the applicant.

5.8 the Commissioner (A) has failed to appreciate that as per Sub Rule 2 of Rule 16 'amount' has been equated to be 'duty' paid only for the purpose of eligibility of Cenvat Credit. The Commissioner in its impugned order has gone beyond the scope of the statute and applied this rational for granting rebate of such 'amount' paid which does not qualify as 'duty' on the said export goods,

5.9 the Commissioner (A) has failed to appreciate that 'an amount' has not been made eligible for availing rebate on exports, under the provisions of Rule 18 of Central Excise Rules, 2002. In fact there exists no provision in the Central Excise Rules permitting the rebate of 'amount' paid at the time of export of input / capital goods cleared as such,

5.10 the Commissioner(A) failed to consider the question "Whether, the rebate is admissible to the case where the conditions and limitations (a)

and (b) mentioned in Notification no. 19/04- (CE-NT) dated 06.09.2003, prescribed for grant of rebate are adhered to by the applicant, as the excisable goods should have been exported after payment of duty directly from the factory of manufacturer. In the instant case, duty has been reversed in proportionate to the CENVAT credit availed on the receipt of the goods at their factory premises. Hence, it can be said that the conditions and procedure for grant of rebate prescribed under Notification no.19/04-CE (NT) dated 06.09.2003 issued under Rule 18 of the Central Excise Rules, 2002 have not been fulfilled by the assessee.

5.11 the Commissioner(A) has further relied upon Order of The Bombay high court in the case of CCE Vs Micro Inks Ltd. filed by the department. It is pertinent to note that the Department has not acquiesced of the said order and further appeal is pending with the Hon'ble Supreme Court.

5.12 the Commissioner (Appeals) has also failed to appreciate the fact that the money extra paid, on account of reduction of rate of duty, cannot be treated as duty but an "amount" and it is required to be transferred to Consumer Welfare Fund under Section 11D of the Central Excise Act, 1944.

5.13 the O-I-A No.US/60/RGD/2012 dated 24.01.2012 therefore does not appear to be proper, legal and correct and is required to be set aside and it is prayed that the relief mentioned herein below shall be granted.

6. A Personal hearing in the matter was fixed on 27.11.2017. No one was present from the applicant's side (Revenue). ShriP.Gopalan, General Manager (Indirect Taxation) and ShriP.K.Shetty, Advocate for the respondents appeared for the personal hearing and reiterated the reply filed through letter dated 21.08.2012. They also filed synopsis dated 27.11.2017 alongwith 5 case laws and a CBEC Circular. They pleaded that RA filed by the Revenue be dismissed

and Order-in Appeal passed by the Commissioner (Appeals) be upheld.

7. 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.On perusal of records, Government observes that the issue to be decided in the present application is whether the applicant is entitled for rebate claim of amount paid in terms of Rule 16 (2) of the Central Excise Rules, 2002 against goods exported.

8. Government observes that the respondents had initially cleared the goods on payment of duty vide invoice No.687 dated 4.12.2008. Later they brought back the goods and took Cenvat Credit of the duty paid by them @ 14% duty plus Cess under Rule 16 of Central Excise Rules, 2002 and again cleared the goods for export on 11.12.2008 on reversal of an amount equal to 10% as the duty rates were changed effective 07.12.2008.In order to comply with the provisions Rule 16(2) of Central Excise Rules, 2002, the respondents reversed the remaining Cenvat Credit of 4% (differential duty) and Cess on 8.1.2009 vide supplementary invoice No.814 and claimed rebate of entire amount of duty @ 14% and Cessi.e Rs.3,38,594/-.

9. Government observes that the Revision Applicant has contended that the Commissioner (Appeals) has failed to appreciate that the reversal of Cenvat Credit was 'an amount' and not 'a duty' and hence rebate was not admissible as it is beyond the scope of Rule 18 of the Central Excise Rules, 2002 ("Rules") and hence the rebate was not admissible for clearance of capital goods as such.

10. Rule 16 of Central Excise Rules, 2002 states as follows.

"RULE 16. Credit of duty on goods brought to the factory. —

(1) *Where any goods on which duty had been paid at the time of removal thereof are brought to any factory for being re-made, refined, re-conditioned or for any other reason, the assessee shall state the particulars of such receipt in his records and shall be entitled to take*

CENVAT credit of the duty paid as if such goods are received as inputs under the CENVAT Credit Rules, 2002 and utilise this credit according to the said rules.

(2) If the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount equal to the CENVAT credit taken under sub-rule (I) and in any other case the manufacturer shall pay duty on goods received under sub-rule (1) at the rate applicable on the date of removal and on the value determined under sub-section (2) of section 3 or section 4 or section 4A of the Act, as the case may be.

(Explanation. - The amount paid under this sub-rule shall be allowed as CENVAT credit as if it was a duty paid by the manufacturer who removes the goods.)"

11. From the perusal of aforesaid rule, Government notes that if the process to which the goods are subjected before being removed does not amount to manufacture, the manufacture shall pay an amount equal to CENVAT Credit taken under sub rule (1) and in other case the manufacturer shall pay duty on goods received under sub-rule (1) at the applicable rate. If the processing of goods does not amount to manufacture, the cenvat credit taken under sub-rule (1) shall be considered as "amount" and in such cases the cenvat credit taken under sub-rule (2) shall be considered as duty. However,vide explanationin the said Rule 16(2), it is provided that the amount paid under this sub-section shall be allowed as CENVAT Credit as if it was a duty paid by the manufacturer, who removes the goods. So explanation to sub rule 16(2) makes it clear that the amount actually paid is nothing but duty and as such payment by the Respondents should be treated as payment of duty.

12. Government also observes that as pointed out by the Commissioner (Appeals) in his impugned Order, the Explanation appended to Rule 16 is analogous to the provisions of sub – rule 3(6) of Cenvat Credit Rules, 2004 which states as follows :-

"(6) The amount paid under [sub-rule (5) and sub-rule (5A) shall be eligible as CENVAT credit as if it was a duty paid by the person who removed such goods under sub-rule (5) and sub-rule (5A)."

13. Government also notes that the Commissioner (Appeals) while setting aside the Order in Original has placed reliance on CESTAT Order in Grasim Industries Ltd. v/s CCE - 2003 (155) E.L.T. 200 (Tri. - Del.) and Hon'ble Bombay High Court's Order in CCE v/s Micro Inks Ltd. -2011 (270) E.L.T. 360 (Bom.), both of which squarely cover the issue on hand, viz. *"amount paid by a manufacturer at the time of removal of goods or capital goods as such is duty and if duty is paid by reversing the credit, it does not loose the character of duty and therefore, if the rebate is otherwise allowable, the same cannot be denied on the ground that the duty is paid by reversing the credit".*

14. Government also notes that the lower adjudicating authority as well as the Revision Applicant contended that the department had filed appeal against the Bombay High Court's Order in CCE V/s Micro Inks Ltd. [2011 (270) E.L.T. 360 (Bom.)], and the same is pending with the Hon'ble Supreme Court and hence cannot be relied on.

15. In view of the aforesaid contentions, the enquiries were caused with the office of the Principal Commissioner of Central Goods and Service Tax, and Central Excise, Raigad Commissionerate, as regards the outcome of the appeal filed against Hon'ble Supreme Court against Hon'ble Bombay High Court's Order in CCE Raigad v/s Micro Inks Ltd. The Deputy Commissioner (Review), Raigad Commissionerate vide letter F No. V/Spl Cell/CESTAT (F)/80/RGD/14-15 dated 18.12.2017 has informed that Special Leave Petition (SLP) seeking interim relief filed by the department before Hon'ble Supreme Court [*SLP(C) 5159/2012 Commr. of Central Excise, Raigad Vs Micro Inks Ltd. &Anr.*] has been dismissed vide Order dated 25.11.2013 on the ground that there was no reason to entertain this Special Leave Petition. The Hon'ble Supreme Court Order

dated 25.11.2013 was accepted by the Commissioner, Central Excise Raigad Commissionerate on 07.01.2014.

16. In view of the aforesaid, Government observes that Bombay High Court's Order in CCE Raigad v/s Micro Inks Ltd.2011 (270) E.L.T. 360 (Bom.), has attained finality. As such Government is of opinion that the Respondents are eligible for rebate on payment of duty paid against export product by way of reversing the Cenvat Credit. Government's views are in conformity with views of Commissioner (Appeals).

17. However, Government has noted that the respondents cleared the goods for export on 11.12.2008 on reversal of an amount equal to 10% as the duty rates were changed effective 07.12.2008 and in order to comply with the provisions Rule 16(2) of Central Excise Rules, 2002, they reversed the remaining Cenvat Credit of 4% (differential duty) and Cess on 8.1.2009 vide supplementary invoice No.814 and claimed rebate of entire amount of duty @ 14% and Cess i.e Rs.3,38,594/-. In this regard, Government observes that, as the respondents cleared the goods for export on 11.12.2008 on reversal of an amount equal to 10% duty and cess i.e. Rs 2,41,852/- against Central Excise Invoice No. 736 dtd.11.12.2008, they are entitled to rebate claim to the extent of duty paid i.e. Rs.2,41,852/- only under Rule 18 of Central Excise Rules, 2002."

18. As regards the reversal of the remaining amount of Cenvat Credit of 4% duty and Cess amounting to Rs.96,742/-vide supplementary invoice no. 814, in compliance with the provisions Rule 16(2) of Central Excise Rules, 2002, Government notes that the amount paid in excess of duty on one's own volition cannot be retained by Government and it has to be returned to manufacturer in the manner in which it was paid. Accordingly, such excess paid/reversed amount/duty is required to be returned to the respondents in the manner of

allowing re-credit in Cenvat Credit account from where it was debited. In this regard Government relies on Hon'ble High Court of Punjab & Haryana's order dated 11-9-2008 in CWP Nos. 2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. v. UOI reported as 2009 (235) E.L.T. 22 (P&H).

19. In view of above, Government modifies the order of Commissioner (Appeals) to the extent discussed above and rejects Revision Application being devoid of merit.

20. So, ordered.

22.12.17

(ASHOK KUMAR MEHTA)
Principal Commissioner (RA) & Ex-Offico
Additional Secretary to Government of India, Mumbai

ORDER No. 21/2017-CX (WZ) /ASRA/Mumbai DATED 22.12.2017

To,

True Copy Attested

The Principal Commissioner of CGST &CX,Raigad
4th Floor, GST Bhavan, Plot No.1, Sector 17,
Khandeshwar, New Panvel-410206

SANKARSAN MUNDA
Asstt. Commissioner of Custom & C. Ex(RA)

Copy to:

1. M/s Positive Packaging Industries Limited, 3rd Floor, A wing, Great Eastern Summit, Plot No. 56, Sector 15, CBD Belapur (East), Navi Mumbai 400 614.
2. The Commissioner, Central Excise, (Appeals) –II, 3rd Floor, GST Bhavan, BKC, Bandra (E), Mumbai-400051.
3. The Deputy Commissioner CGST & CX ,Raigad, Khploli Division, GSTBhavan Plot no. 1, Sector-17, Khandeshwar, Navi-Mumbai -410206.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.