

REGISTERED SPEED POST



**GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE**

**Office of the Principal Commissioner RA and  
Ex-Officio Additional Secretary to the Government of India  
8<sup>th</sup> Floor, World Trade Centre, Cuff Parade,  
Mumbai- 400 005**

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F. NO. 198/195/12-RA /4484

Date of Issue: 16/10/19

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ORDER NO. 21/2019-CX (WZ) /ASRA/Mumbai, DATED 30.8.2019 OF THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

**Applicant** : Commissioner of Central Excise, Mumbai-II.

**Respondent** : M/s Metweld Industries, Mumbai.

**Subject** : Revision Applications filed under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. BC/25/M-II/2012-13 dated 30.04.2012 passed by the Commissioner (Appeals), Central Excise, Mumbai-III.

**ORDER**

This revision application is filed by the Commissioner of Central Excise, Mumbai-II (hereinafter referred to as "the applicant") against the Order-in-Appeal No. BC/25/M-II/2012-13 dated 30.04.2012 passed by the Commissioner (Appeals), Central Excise, Mumbai - III.

2. The brief facts of the case are that M/s. Metweld Industries, 244, Masrani Industrial Estate, F Building, Halav Bridge, Kurla (West), Mumbai-400070, (hereinafter referred to as "the respondent") had filed two rebate claims for Rs.2,38,157/- (Rupees Two Lakh Thirty Eight Thousand One Hundred and Fifty Seven only) and Rs.4,55,709/- (Rupees Four Lakh Fifty Five Thousand Seven Hundred and Nine only) under Rule 18 of Central Excise Rules, 2002, with the Assistant Commissioner, Central Excise, Chembur-II Division. The Assistant Commissioner sanctioned the rebate claims of the claimant by reducing the claims to Rs.2,29,029/- (Rupees Two Lakh Twenty Nine Thousand and Twenty Nine only) & Rs.4,40,217/- (Rupees Four Lakh Forty Thousand Two Hundred and Seventeen only) respectively vide Order in Original Nos. KPA/Refund/05/Ch-II/2006-07 dated 08.05.2006 and KPA/Refund/06/Ch-II/2006-07 dated 29.05.2006 respectively.

3. On examination of both the rebate claims it was seen that the applicant had included the weight of the spoons/ladle which were supplied to them by the merchant exporter. As such, the quantity of free spoon/ladle which were not processed/manufactured were not eligible for rebate as no duty paid material had gone into the same. The amount of such irregular Rebate Claim was of Rs.1662/- (Rupees One Thousand Six Hundred and Sixty Two only) on the quantity of 161.280 kgs and Rs.15635/- (Rupees Fifteen Thousand Six Hundred and Thirty Five only) on the quantity of 1437.319 kgs. respectively.

4. In view of the facts mentioned above, both the Order in Original Nos. KPA/Refund/05/Ch-II/2006-07 dated 08.05.2006 and KPA/Refund/ 06/ Ch-II/ 2006-07 dated 29.05.2006 were not found to be legal and proper and

therefore the applicant filed appeal against the same before the Commissioner of Central Excise (Appeals), Mumbai-II.

5. The Commissioner (Appeals) remanded the case back to the rebate sanctioning authority vide Order in Appeal No. SRK/452 & 453/M-II/2008 dated 15.07.2008 on the grounds that the relied upon documents were not given to the respondent as mentioned in Annexure 'A' to the grounds of appeal. The same documents were not available in the Commissioner Appeal's office. Therefore, it was felt necessary by the Commissioner (Appeals) to remand the case back to the rebate sanctioning authority who shall make the documents available to the applicant and thereafter pass fresh order after following the principles of Natural Justice.

6. This order of Commissioner (Appeals) was reviewed and a Revision Application was filed by the applicant on 29.08.2008 before the Government on the grounds that the power of remand back was done away by conscious interference vide amendment to Section 35A of Central Excise Act,1944 w.e.f. 11.05.2001. Joint Secretary (RA) vide its order no. 1552/10-CX dated 11.10.10, set aside the Order in Appeal No. SRK/452 & 453/M-II/2008 dated 15.07.2008 and directed the Commissioner (Appeals) to decide the case on merits. Thereafter, Commissioner (Appeals) Mumbai III has issued various letters to Assistant Commissioner, Central Excise Chembur-II Division to submit the original documents so as to decide the case on merits. However, the files pertaining to this case maintained at the Division and Tribunal Section, were not traceable and hence the documents could not be submitted to the Commissioner (Appeals). Thereafter, Commissioner (Appeals) vide Order in Appeal no. BC/25/M- 11/2012-13 dated 30.04.2012 dismissed the appeals and held that "since the natural justice has been denied to the respondent by the appellants, I do not go into the merits of the Appeals filed by the department. "

7. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant department has filed this Revision Application mainly on the following grounds :

- 7.1 The Order in Original passed by the Assistant Commissioner was scrutinized and it was observed that party had supplied free spoon/ladle, which was non-duty paid and hence not eligible for refund. Accordingly, a calculation sheet was prepared on the basis of ARE-2, Shipping Bills and Packing List submitted by the exporter at the time export of the said goods. ..The said calculation sheet was made the relied upon documents with the appeal filed before Commissioner (Appeal). Therefore, the contention of the Commissioner (Appeals) that the ARE-2 submitted by the assessee was not made available to the assessee/respondent at the time of hearing of the case and the benefit of 'denial of natural justice' was given to the respondent is not correct. However, it is obvious that the all the exporters are required to prepare at least four copies of ARE-2 before any export takes place along with all other relevant documents such as Invoices, Shipping Bills and Packing List etc. Out of these 4 copies, first 2 copies i.e. Original and duplicate copies of the said ARE-2 are meant for Customs and the triplicate copy is meant for Excise purposes. However, the fourth copy is always retained with the exporter along with other relevant documents. Therefore, it cannot be said that the assessee/exporter was not in possession of the relevant documents and asking for the record which was prepared/submitted by them is not proper and also not against the principal of natural justice. In fact the action of the assessee/exporter was to procrastinate until the decision was given in his favour. Moreover, the exporter did not bring this fact to the knowledge of the Commissioner (A) at the time of hearing that the copy (exporter's copy) of the ARE-2 is well within his possession and there is no need to ask for the same from the department and also the Appellate Authority did not mention about the facts that the copy of ARE-2 is with the exporter, in his order. From the above, it appears that the exporter has deliberately hidden this fact with the Commissioner (A) and took the benefit of the word "Natural Justice".
- 7.2. The case was remanded back to the Commissioner (Appeal), by the Government of India vide order No. 1552/10-CX dated 11.10.2010, stating there in that the case may be decided on merit by the Commissioner (Appeal). However, in his order, the Commissioner (Appeal) did not go into the merits

The Commissioner Appeal did not consider the factual aspects pertaining to appeals filed by the department and given the benefit of natural justice to the respondent. The Supreme Court and the Apex Court disposed of Civil Appeal No. 6704 of 2008 on 17-11-2008 remanding the case to this Tribunal for fresh decision on merits on the captioned ROM application vide Sunitadevi Singhania Hospital Trust v. UOI - 2009 (233) E.L.T. 295 (S.C.). **The Supreme Court in remand order held that prima facie, Tribunal has not considered factual aspects of present appellant - Case purported to have been considered on the question of law without taking into question whether the law laid down by Tribunal applicable to the facts of appellant's case or not - Supreme Court also held that Tribunal not considered appellant's case on merits - In view of these observations of Supreme Court, the impugned order is considered to be manifestly erroneous and recalled - Section 129A of Customs Act, 1962. paras 2, 3, 4].** Therefore, the order passed by the Commissioner (Appeal) is not proper & legal and requires to be set aside.

In view of the averments made above, the applicant prayed that the Order-in-Appeal No. BC/25/M-II/2012-13 dated 30.04.2012, passed by the Commissioner (Appeals) of Central Excise, Mumbai - III be set aside and the case may be remanded back to the Commissioner (Appeal) for deciding the case on merits.

8. A Personal hearing in the matter was held on 20.08.2019 and Shri D.J. Jyotirmoy, Assistant Commissioner, Division-II, Mumbai East, CGST Commissionerate appeared for hearing on behalf of the applicant. None appeared on behalf of the respondent. On examination of the Revision Application, Government has found at the outset that the Revision Application has been filed after delay of 7 days and an application for condonation of delay is filed mainly on the ground that copy of the impugned Order in Appeal dated 30.04.2012 was received in the office of the Commissioner, Central Excise, Mumbai-II on 16.05.2012; the authorization to file an Appeal under sub-section 1 of Section 35EE of the Central Excise Act, 1944 was received on 07.08.2012; on receipt of the authorization the application in form EA-8 was prepared and dispatched on 08.08.2012; however, the above process took some time thereby causing delay in filing

the above appeal. The applicant further contended that the delay in filing appeal was not deliberate or not due to any negligence and that the delay was caused for the above said reasons which are bonafide. From a perusal of records, Government observes that the Revision Application dated 08.08.2012 was received on 23.08.2012 whereas the impugned Order-in-Appeal was received by the Department on 16.05.2012. Therefore, keeping in view the reasons for delay, Government in exercise of powers vested in it under Section 35EE(2) of Central Excise Act, 1944 condones the delay of 7 days which falls within condonable limit of 3 months and proceeds to decide the cases on merit. Shri D.J. Jyotirmoy, Assistant Commissioner who appeared for personal hearing on behalf of the applicant, reiterated the written submission filed through Revision Application.

9. 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.

10. Government observes that the rebate claims sanctioned by the original authority vide Order in Original Nos. KPA/Refund/05/Ch-II/2006-07 dated 08.05.2006 and KPA/Refund/06/Ch-II/2006-07 dated 29.05.2006 were examined by Commissioner, Central Excise, Mumbai-II. On examination it was observed that the applicant had included the weight of the free spoons/ladle which were not processed/manufactured by them but were supplied to them by the merchant exporter and hence were not eligible for rebate as no duty paid material had gone into the same. Therefore, these Orders in Original were not found to be not legal and proper and the Commissioner, Central Excise, Mumbai-II filed appeal against the same before the Commissioner of Central Excise (Appeals), Mumbai-II. The Commissioner (Appeals) remanded the case back to the rebate sanctioning authority vide Order in Appeal No. SRK/452 & 453/M-II/2008 dated 15.07.2008 on the grounds that the relied upon documents were not given to the respondent as mentioned in Annexure 'A' to the grounds of appeal. The same documents were not available in the Commissioner (Appeals)' office. Commissioner Central Excise, Bombay-II thereafter, reviewed the

order of Commissioner (Appeals) and filed a revision application before the Government on the grounds that the power of remand back was done away by conscious interference vide amendment to Section 35A of Central Excise Act, 1944 w.e.f. 11.05.2001. Joint Secretary (RA) vide its order no. 1552/10-CX dated 11.10.10, set aside the Order in Appeal No. SRK/452 & 453/M-II/2008 dated 15.07.2008 and directed the Commissioner (Appeals) to decide the case on merits.

11. Government also observes from the impugned Order that during the remand proceedings, Commissioner (Appeals), Mumbai III had issued various letters to Assistant Commissioner, Central Excise Chembur-II Division to submit the necessary documents so as to decide the case on merits. As the applicant could not produce the relied upon documents, relying on case of CCE, Ludhiana Vs Gulab Industries (P) Ltd.[2010 (262)E.L.T. 780 (Tri-del)] Commissioner (Appeals) dismissed the appeals without going into the merits of the case.

12. It is pertinent to note that the applicant department in its statement of facts of the present Revision Application has stated that files pertaining to this case maintained at the Division and Tribunal Section, were not traceable and hence the documents could not be submitted to the Commissioner (Appeals). However, Government observes that the applicant, subsequent to filing of instant Revision Application, vide Letter F.No. V(Ch.73)18-05/Ch.II/06-07 Pt.I dated 12.09.2012 informed Government that the records (relied upon documents) are available in their office and enclosed these documents for providing the same to the respondent in case they were required by them during the course of hearing before Government. Government also finds it necessary to express its displeasure for failure on the part of the applicant department in submitting the documents which were repeatedly being called for by the Commissioner (Appeals) in appeal proceedings, which, surprisingly, have now been appended to the Revision Application filed by the Department. It is most unfortunate that the Department which itself had filed appeal against erroneously sanctioned rebate claims instead of showing promptness in dealing with the matter had

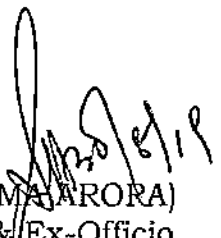
not rendered the necessary assistance to the Commissioner (Appeals) which has unnecessarily dragged on the proceedings for unduly long period. Government therefore directs that in future proper steps be taken by the Department to ensure adequate assistance to the appellate authorities in all such matters.

13. In view of the above Government is of the considered view that once the relied upon documents stated above, are now on record, it is the duty of the applicant department to provide the same to the Commissioner (Appeals) forthwith, within two weeks from the date of receipt of this order and Commissioner (Appeals) having co-extensive and co-terminus power shall examine the matter and shall pass the order without sending the matter back to the adjudicating authority.

14. Accordingly, Order-in-Appeal No. BC/25/M-II/2012-13 dated 30.04.2012 is set aside and the matter is remanded back to the Commissioner (Appeals) to decide the issue on merits after granting an opportunity of personal hearing to the respondent.

15. Revision Application is disposed off in terms of above.

16. So ordered.

  
(SEEMA ARORA)  
Principal Commissioner & Ex-Officio  
Additional Secretary to Government of India

ORDER No. 21 /2019-CX (WZ) /ASRA/Mumbai DATED 30.8.2019

To,  
The Commissioner of Central Goods & Service Tax,  
Mumbai (East), 9<sup>th</sup> Floor, Lotus Infocentre,  
Near Parel Station, Parel (East),  
Mumbai-400 012.



Copy to:

1. M/s. Metweld Industries, 244, Masrani Industrial Estate, F Building, Halav Bridge, Kurla (West), Mumbai- 400070
  2. The Commissioner of Central Goods & Service Tax, (Appeals-II) 3<sup>rd</sup> Floor, GST Bhavan, Plot No.C-24, Sector-E, Bandra-Kurla Complex, Bandra(E), Mumbai 400 051.
  3. The Assistant Commissioner (Division-II), Central Goods & Service Tax, Mumbai (East), 9<sup>th</sup> Floor, Lotus Infocentre, Near Parel Station, Parel (East), Mumbai-400 012.
  4. Sr. P.S. to AS (RA), Mumbai.
  - ✓ 5. Guard file.
  6. Spare Copy.
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