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F.No. 198/358/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
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NEW DELHI-110 066

Date of Issue 8/3/13.

ORDER NO. 229 /13-Cx DATED 07.03.2013 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D. P. SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. 69/2011-CE dated 24.03.11 passed by Commissioner of Central Excise (Appeal-I), Bangalore.

Applicant : Commissioner of Central Excise, Bangalore-II Commissionerate

Respondent : M/s Radiall India Pvt. Ltd., Bangalore

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ORDER

This revision application is filed by the applicant Commissioner of Central Excise, Bangalore-II Commissionerate against the order-in-appeal No. 69/2011-CE dated 24.03.11 passed by the Commissioner of Central Excise (Appeals-I), Bangalore with respect to order-in-original No. 177/09(R) dated 24.11.09 and passed by Deputy Commissioner of Central Excise, E-1 Division, Bangalore-II Commissionerate.

2. Brief facts of the cases are that the respondents M/s Radiall Protectron Pvt. Ltd. (now M/s Radiall India Pvt. Ltd.), Bangalore have filed a rebate claim against the goods cleared to SEZ. On scrutiny of the ARE-1 it was noticed that the goods have been cleared to SEZ under UT -1 Bond and also under duty Draw back scheme. The goods were cleared without payment of duty under Notification No 42/2001-Central Excise dated 26.6.01 and not under notification 19/2004-Central Excise dated 6.9.04 under claim of rebate. The respondents subsequently paid the duty by making consolidated debit entry in the CENV AT Credit account on 31.3.2009 to discharge duty liability in respect of said goods cleared without payment of duty under bond and claimed rebate. It was also noticed that clearances under the above said ARE-1s have been "made under draw back scheme as found out by the endorsements on the reverse side of the relevant Bills of Export thus contravening the conditions in Notification No 19/2004-CE dated 06.9.2004 issued under Rule 18 of Central Excise Rules, 2002, hence refund claim was rejected by the original authority under the provisions of Rule 18 of Central Excise Rules, 2002 read with Section 11B of Central Excise Act, 1944.

3. Being aggrieved by impugned order-in-original, the respondents filed appeals before Commissioner (Appeals), who allowed the appeal holding the

rebate admissible subject to condition that the respondents fulfill all the other criteria.

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

4.1 The order-in-appeal No. 69/2011-CE dated 24.03.2011 passed by Commissioner (Appeals) is not proper and legal. The Commissioner (Appeals) has discussed eligibility of the rebate claim only on the issue as to whether the assessee is eligible for rebate claim in respect of the goods supplied to SEZ Units / Developers relying on circular No.29/2006-Cus. dated 27.12.2006 and also circular No.6/2010 Cus. dated 19.03.2010 issued from file F.No.DGEP/SEZ/13/2009. The Commissioner (Appeals) has erred in not considering the following issues involved in the case:

(i) the supply of the goods without payment of duty after executing Letter of Undertaking (Form UT -1) during the month of March 2009 and paying duty subsequently on 31.03.2009 and filing rebate claim is improper as once the goods have been cleared under Letter of Undertaking (Form UT -1) on which no duty is required to be paid, paying duty at a later date and claiming rebate of duty paid is only an after-thought to convert accumulated Cenvat credit into cash, and

(ii) regarding the clearances made under 'Drawback Scheme' and the amount of drawback eligible endorsed on the reverse side of the relevant Bills of Export. In this regard rule 12 of Customs, Central Excise Duties and Service Tax Drawback Rules 1955 (as it stood at the relevant point of time) is re-produced below:

"Rule 12 . Statement /Declaraiion to be made on exports other than by post. - (1) In the case of exports other than by post, the exporters shall at the time of export of the goods –

(a) state on the shipping bill or bill of export, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback, and if so, at what rate or rates and make a declaration on the relevant shipping bill or bill of export that-

(i) a claim for drawback under these rules is being made

(ii) in respect of duties of Customs and Central Excise paid on the containers, packing materials and materials and the service tax paid on the input services used in the manufacture of the export goods on which drawback is being claimed, no separate claim for rebate of duh) or service tax under the Central Excise Rules, 2002 or any other law has been or will be made to the Central Excise authorities".

4.2 From a plain reading of above rule, it is clear that drawback and the rebate of duty cannot be claimed on the same goods simultaneously. In the instant case, it is evident from the bills of export and the endorsements on their back side indicating the amount of eligible drawback, that the assessee has claimed both drawback and rebate simultaneously on the same goods, which is not permissible as per rule 12 of Customs, Central Excise Duties and Service Tax Drawback Rules 1955 (as it stood at the relevant point of time).

4.3 Further, it is also seen that the assessee vice their letter dated 25.08.2009 have furnished a disclaimer certificate stating that they are not claiming any Duty Drawback on the duty suffered by the export goods for which they are claiming the rebate. However, it is seen from the concerned ARE-Is and other related export documents that the assessee has clearly indicated that the exports are under 'Duty Drawback Scheme' and the amount of drawback eligible has also been endorsed on the concerned bills of export. Thus, furnishing of disclaimer certificate by the

assessee at a later date i.e., on 25.08.2009 that the export of goods (06.3.2009 to 25.3.2009) is nothing but only an after-thought to mislead the department and claim the undue benefit i.e., rebate of duty as well as the duty drawback simultaneously on the same goods fraudulently. Order-in-appeal is totally silent on this aspect, which is a valid ground for rejection of claim and order-in-appeal having not discussed about the same deserves to be set aside.

5. A Show Cause Notice was issued to the respondent under Section 35EE of Central Excise Act, 1944 to file their counter reply. They vide their letter dated 19.10.11 given the following submission:

5.1 The Grounds of Appeal accepts that the goods were initially cleared under LUT in March 2009 and duty was paid on 31.3.2009. Therefore, the payment of duty on the goods cleared to SEZ Units is not in dispute.

5.2 The Grounds of Appeal refers to claim for Duty Drawback. The Department has completely ignored that the Respondent assessee has submitted Disclaimer Certificate dated 25.8.2009 certifying that the assessee is not claiming Duty Drawback along with the Claim for Rebate submitted to the ACCE, E 1 Division. This is duly acknowledged. The ACCE in Para 6 of Order-in-Original No.177/09 (R) dated 24.11.2009 has confirmed submission of Duty Drawback Disclaimer Certificate for not claiming drawback in respect of the goods for which Rebate is being claimed. Therefore, the question of claiming Duty Drawback does not arise.

5.3 The Respondents submit that there was a great deal of confusion on eligibility for Rebate of the duty paid on the goods cleared to SEZ Units/Developers. The Department was contending that Rebate was not permissible in case of supplies to SEZ Units since the same did not amount to physical export of goods out of India. The Ld. adjudicating authority has also taken the same stand in Order-in-Original No.177/09 (R) dated 24.11.2009. The

respondent assessee therefore, had initially cleared the goods in March 2009 under ARE 1 without payment of duty and under LUT/Bond. On receiving counsel with regard to eligibility for Rebate, the Respondent assessee paid duty on the goods cleared to SEZ Units on 31.3.2009, which is not disputed, and submitted claim for rebate of the duty so paid. The respondent assessee reiterates and confirms that they have not claimed duty drawback on the said goods exported and which is the subject matter of the present proceedings.

5.4 The respondents submit that the appellants ought to have appreciated that Rule 18 and Rule 19 of the Central Excise Rules, 2002 are complementary to each other and cover the same subject of payment of duty on the goods exported. While Rule 18 of the Central Excise Rules, 2002 provides for clearance of goods for export on payment of duty and claim of rebate of the duty paid on the goods exported, Rule 19 permits the manufacturer to export the goods without payment of duty. If the assessee has paid the duty on the goods exported, the question of option under Rule 19 does not arise and the only option is to claim rebate of the duty paid under Rule 18 of the Central Excise Rules, 2002.

5.5 The CBEC Circular No. 6/2010 dated 19.3.2010 clarifies that the clearance of duty free materials for authorized operation in the SEZ is admissible under Section 26 of the SEZ Act, 2005 and it is only the procedure under Rule 18 or Rule 19 of the Central Excise Rules, 2002 adopted to give effect to the statutory provisions of the SEZ Act, as envisaged under Rule 30 of the SEZ Rules, 2006. Therefore, the rebate under Rule 18 of the Central Excise Rules, 2002 is admissible for supplies made to SEZ.

5.6 The Respondents submit that Rule 18 of the Central Excise Rules, 2002 is only procedural. The substantive conditions are (i) manufacture and payment of excise duty on the goods exported or supplied to SEZ Units, and (ii) proof of supply of goods to the SEZ Units. So long as these substantive conditions are

fulfilled, the claim for rebate of duty paid on the goods cannot be denied. In the instant case there is no doubt or dispute with regard to these substantive conditions.

5.7 It is well settled position in law that the rebate and other export promotion schemes are incentive oriented beneficial legislation intended to boost exports and earn foreign exchange for the country. If the substantive fact of export of goods is not in doubt or dispute and the duty has been paid on the said goods and is accepted by the Department, the exporter is entitled to the rebate of the duty paid on the goods exported. The technical or procedural deviations cannot come in the way of rebate of duty and defeat the purpose of export promotion schemes.

5.8 The CBEC Circular No. 418/51/98-CX, dated 2-9-1998 [From F.No.209/05/98-CX.6] was examining grant of rebate of duty paid on the goods exported. The CBEC clarified that that the notifications provide for rebate of duty only where duty on such clearances have been fully discharged. No rebate, fully or partially, should be sanctioned where duty has not been paid or only partially paid for the period in which the goods have been removed from the factory of production. It is, however, clarified that rebate will be allowed even in the cases where a manufacturer makes delayed payment of duty under the provisions of Central Excise Rules, 1944, in respect of period where export goods were cleared.

Case laws relied upon by respondents:

- Tablets India Vs UOI 2010(259)ELT 191 (MAD)
- Re-modern Process Printers – 2006 (204) ELT 632 (GOI)
- Re-Cotfab Exports – 2006 (205) ELT 1027 (GOI)
- Re-CCE Bhopal – 2006 (205) ELT 1093 (GOI)
- CCE Vs Sun City Alloys Pvt. Ltd. – 2007(218) ELT 174(Raj.)
- HPCL Vs CCE – 1995 (77) ELT 256 (SC)

6. Personal hearing was scheduled in the case on 14.12.12. Dr.M. Pariyasamy, Deputy Commissioner of Central Excise, E-1 Division appeared on behalf of the applicant department who reiterated the grounds of revision application. In their further submission Department is relying on various circulars contended that where the exporter had filed shipping bill under a particular export promotion scheme but benefit of that scheme was denied to him by DGFT or Customs, then conversion of shipping bill may be allowed/permitted on merits by the Commissioner on case to case basis subject to certain conditions. The assessee has not obtained necessary permission from the competent authority in this regard and clearances effected under the drawback scheme remains unchanged and also cannot be changed for whatsoever reason. Further, conversion from one export promotion scheme to another is concerned, such conversion has to be allowed where the benefit of an export promotion scheme claimed by the exporter has been denied by DGFT/ MOC or Customs due to any dispute. Hence, the assessee ought to have claimed the benefit of duty drawback and in the event of denial could seek conversion to some other scheme. In the instant case, though the assessee confirms that they have not claimed the benefit of duty drawback, yet they are not eligible for any other alternative export incentive. For the said reasons, the clearances effected by them remain under the provisions of Rule 19 of Central Excise Rules, 2002. He also contended that in the instant case the clearance of goods is not under Rule 18 of Central Excise Rules 2002 but under Rule 19 of Central Excise Rules 2002, hence the assesse has no right or liberty to choose the benefit of such export incentive which is beneficial without following the procedure prescribed in that regard. Shri M.S.Nagaraja, Advocate appeared on behalf of respondents who reiterated the memorandum of cross objection stated at para 5 above and submitted that order-in-appeal being legal and proper may be upheld. In his written submission he further relied upon several other case laws and requested that if rebate claim is not admissible then recredit of duty paid may be allowed in their cenvat credit account.

7. Government has carefully gone through the relevant case records and perused the impugned order-in-original and order-in-appeal.

8. On perusal of records, Government notes that respondents have made clearance of the impugned goods to the SEZ Unit under specific UT-1 Bond No.28/2008 dated 3.4.08 under Drawback scheme without payment of duty under Notification No.42/2001-CE (NT) dated 26.6.01 issued under Rule 19 of the Central excise Rules 2002. The respondents contended that they have subsequently paid the applicable duty of Rs.487439/- vide debit entry No.598 dated 31.3.09 in Cenvat account with disclaimer certificate that they are not claiming Duty Drawback on the said export. Government observes that there are two export benefit schemes which are stipulated in Rule 18 and Rule 19 of the Central Excise Rules and Notification issued thereunder. According to the Rule 18 when any excisable goods are exported on payment of duty or duty is paid on materials used in manufactured goods which are exported, rebate is granted subject to condition or limitation if any fulfillment of procedure specified in concerned Notification i.e. in Notification 19/2004-CE(NT) dated 6.9.04. Whereas as per Rule 19 excisable goods/materials can be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises subject to conditions, safeguard and procedures as specified by Notification by the Board and for this very purpose Notification 42/2001-CE(NT) dated 26.6.01 is applicable. Government observes that these two provisions are two different sets of Rule which provide export benefits to the manufacturers/exporters and applies on different circumstances as stated above. The manufacturer/exporter is free to opt one of the Rules which is more beneficial/suitable to him. Once anyone of the two options is exercised it attains finality and cannot be reverted back subsequently. It is very much clear that the respondents have made clearance of goods under UT-I Bond No.28/2008 dated 3.4.08 hence they have exercised the option to export goods under Rule 19 and in no way it was further open for him to pay duty and claim

rebate thereupon. In such a situation payment of duty cannot be treated as duty. But it has to be treated simply a voluntary deposit with the Government.

Government observes that Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11.9.2008 in CWP Nos.2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. Vs. UOI reported as 2009 (235) ELT-22 (P&H) has decided as under:-

> *"Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty – Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate."*

Hon'ble High Court of Punjab & Haryana has observed that refund in cash of higher duty paid on export product which was not payable, is not admissible and refund of said excess paid duty/amount in Cenvat Credit is appropriate. As such the excess paid amount/duty is required to be returned to the respondent in the manner in which it was paid by him initially.

9. In view of above, Government directs the original authority to allow respondent to take recredit of said amount in their cenvat credit account as the same cannot be retained by Government without any authority of law. The impugned order-in-appeal is set aside and order-in-original is restored with above modification.

10. The Revision application is disposed of in terms of above.

11. So ordered.

(D P Singh)
Joint Secretary (Revision Application)

Commissioner of Central Excise,
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Attested

ई. ज. रामेश्वरन/P K. RAMESHWARAN
निदेशक कार्य अधि./OSD-II (RA)
वित्त मंत्रालय, (वित्तीय विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

Order No. 229 /2013-Cx dated 07.03.2013

Copy to :

1. M/s Radiall India Pvt. Ltd., No25-D, II Phase, Peenya Industrial Area, Bangalore-38
2. Commissioner of Central Excise (Appeals-I), Central Excise, 16/1, 5th Floor, S P Complex, Lalbaug Road, Bangalore-560 027.
3. Deputy Commissioner of Central Excise, E-1 Division, No.161/1, 1st Main Road, Seshadripuram, Bangalore-560020
4. Shri M.S.Nagaraja, Advocate,
5. PA to JS (RA)
6. Guard File
7. Spare copy

ATTESTED

(P.K. Rameshwaram)
OSD (Revision Application)