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GOVERNMENT OF INDIA
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DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No. 195/126/14-RA /8305 Date of Issue: 01.07.2021

ORDER NO. 233/2021-CX (WZ) /ASRA/MUMBAI DATED 29 .06.2021 OF THE 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 CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Okasa Pharma Pvt. Ltd.,
12, Gunbow Street,
Fort, Mumbai – 400 001

Respondent: Principal Commissioner, CGST, Mumbai (East).

Subject : Revision Applications filed, under Section 35EE of Central Excise Act, 1944 against the Order-in-Appeal No. PD/01/M-I/2014 dated 08.01.2014 passed by the Commissioner(Appeals), Central Excise, Mumbai Zone-I.

ORDER

This Revision Application has been filed by M/s. Okasa Pharma Pvt. Ltd., 12, Gunbow Street, Fort, Mumbai – 400 001 (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. PD/01/M-I/2014 dated 08.01.2014 passed by the Commissioner(Appeals), Central Excise, Mumbai Zone-I.

2. The case in brief is that the Applicant are engaged in the manufacture of P & P Medicaments falling under CH 30 of Central Excise Tariff and had exported their manufactured goods through Merchant Exporter i.e. M/s CIPLA Ltd. by debiting the duty @ 10.30% in their Cenvat account. The exporter filed rebate claims of Rs. 71,654/-(Rupees Seventy One Thousand Six Hundred Fifty Four Only) with the Maritime Commissioner(Rebate), Central Excise, Mumbai-I. The Rebate sanctioning authority found that the exporter had exported the products 'P & P Medicaments' paying duty @ 10.30% under Notification No. 2/2008-CE dt. 01.03.2008 as amended and claimed the rebate of duty to that extent. Whereas it was found that the Notification No. 2/2008-CE dt. 01.03.2008 as mended, is a Notification whereby the Tariff rate has been amended and it is not the Notification prescribing the effective rate. The effective rate for the CHS 30 is 5.15 % under Notification No. 4/2006-CE dated 01.03.2006 as mended w.e.f. 01.03.2011.

3. The Deputy Commissioner (Rebate), Mumbai-I vide Order-in-Original No. KII/179-R/2013(MTC) dated 02.04.2013 granted part amount of claim @ 5.15% amounting to Rs.35,827/- (Rupees Thirty Five Thousand Eight Hundred Twenty Seven Only) under Notification No. 19/2004-CE(NT) dated 06.09.2004 as amended, issued under Rule 18 of Central Excise Rules, 2002 read with Section 11B of Central Excise Act, 1944 and for the remaining amount of Rs.35,837/- the exporter was directed to approach the respective jurisdictional Central Excise authority for refund as a cenvat credit.

4. Aggrieved, the Applicant then filed appeal with the Commissioner (Appeals), Central Excise, Mumbai - I who vide Order-in-Appeal No.

PD/01/M-I/2014 dated 08.01.2014 rejected their appeal and upheld the Order-in-Original dated 02.04.2013. The appellate authority while passing the impugned order observed that :-

4.1 Both the notification do not prescribe about the effective rate of duty prevalent at the material time. The Notification No. 4/1006-CE dated 01.03.2006, as amended from time to time prescribed about the effective rate of duty, whereas , the Notification No. 2/2008-CE dated 01.03.2008 as amended prescribed about the Tariff rate i.e the general Cenvat rate or standard rate of duty.

4.2 It is not under dispute that the adjudicating authority while deciding the rebate claim did not say that the applicant were not entitled for the refund of entire duty paid on the goods exported. It was only held that the applicant were entitled for the refund of duty only to the extent it was payable at the effective rate of duty @4% or @5% ad valorem as the case may be as per Notification No. 4/2006-CE dated 01.03.206 as amended in 'cash' and for the balance amount they were asked to approach the jurisdictional authority for availing Cenvat Credit of the balance amount paid as he did not have the jurisdiction to do so.

4.3 The applicant adopted the present methodology to enrich themselves by encashing the Cenvat Credit beyond the provisions of law. The same is not permitted by any of the said law.

4.4 Since in the present case, the applicant claimed that they did not pass of the incidence of duty, the excess amount paid was intended to be refunded by was y of Cenvat Credit. The same is as per the law.

4.5 The following case laws are squarely applicable in the present case.

a) M/s Nahar Industrial Enterprises Ltd. Vs. UOI 2009(235)ELT 0022 (P&H)

b) M/s Reva Electric Car Company Pvt. Ltd. 2012 (275)ELT 0488 (GOI)

c) GOI orders in respect of M/s CIPLA Ltd. (the details of order mentioned in the findings.)

5. Aggrieved, the Applicant then filed the current Revision Application of the following grounds:

(i) Notification No. 4/2006 & 2/2008 co-exist in the books of law and are not mutually exclusive without any overriding effect. Sl. No. 62C of Notification No. 4/2006 does not have nay provision stating ath the said Notification has an overriding effect over Sl. No. 21 of Notification No. 2/208-CE dated 01.03.208.

(ii) Rebate sanctioning authority cannot question the assessment. As per Circular No. 510/06/2000-CX dated 03.02.2000, the Maritime Commissioner have no jurisdiction for the reassessment of duty payment in respect of sanctioning of rebate claim.

(iii) The issue is already settled by Revision Authority vide Order No. 1133-1137/2012-CX dated 07.09.2012.

6. A Personal hearing was granted in the matter on 25.02.2020, 03.03.2020, 11.02.2021. 25.02.2021, 17.03.2021 and 24.03.2021. None appeared on behalf of the applicant or Department.

7. Government has carefully gone through the case records, the written submissions made by the applicant, their submissions at the time of personal hearing, the revision application filed by them, the impugned order and the order passed by the adjudicating authority. Government finds that the core issue for decision in the instant revision application is whether the applicant is entitled to choose to avail the benefit of notification no. 02/2008-CE dated 01.03.2008 as per which the goods are chargeable to duty @ 10.3% adv. when the same goods are cleared to domestic consumption availing notification no. 04/2006-CE dated 01.03.2006 as amended by notification no. 04/2011-CE dated 01.03.2011 as per which the goods are chargeable to duty @ 5.15% adv.

7.1 The Notification No. 2/2008-CE dated 01.03.2008 issued under Section 5A(1) of the CEA, 1944 is a notification prescribing effective rate of duty for goods specified under first schedule to the CETA, 1985. The said notification was amended by Notification No. 58/2008-CE dated 7.12.2008

which reduced the effective rate of duty from 14% adv. to 10% adv. Thereafter, the effective rate of duty was further reduced from 10% adv. to 8% adv. by Notification No. 4/2009-CE dated 24.02.2009.

7.2 While presenting Budget 2010-11, the Finance Minister mentioned in his speech that "The improvement in our economic performance encourages a course of fiscal correction even as the global situation warrants caution. Therefore, I propose to partially roll back the rate reduction in Central Excise duties and enhance the standard rate on all non-petroleum products from 8 per cent to 10 per cent *ad valorem*." Accordingly, Notification No. 2/2008-CE dated 01.03.2008 was amended by Notification No. 6/2010-CE dated 27.02.2010 and the effective rate of duty for the goods specified under the first schedule to the CETA, 1985 was enhanced from 8% adv. to 10% adv. Although, the Central Excise Notification No. 2/2008-CE, 58/2008-CE. 4/2009-CE and 6/2010 are issued under the power of Section 5A(1) of the CEA, 1944 which empowers the Central Government to exempt excisable goods of any description from the whole or any part of the duty of excise leviable thereon. However, it can be seen that by Notification No. 6/2010-CE dated 27.02.2010, the effective rate of duty was enhanced from 8% adv. to 10% adv.

7.3 It simply means that the standard rates of excise duty or merit rate are changed by the Central Government by issuing notification under the powers of Section 5A(1) of the CEA, 1944. At the same time, concessional rates of duty on all excisable goods are also effected by the Central Government through the notifications which are also issued under the powers of Section 5A(1) of the CEA, 1944. These concessional rates may be linked to some conditions.

8. As per the provisions of Para 4.1 of Part I of Chapter 8 of the Supplementary Manual, the goods cleared for export shall be assessed to duty in the same manner as the goods cleared for home consumption. In the present case, the applicant had availed the benefit of two notifications simultaneously which was not permissible as per law. If two exemption notifications are in existence, it would be his prerogative to avail the one which

is beneficial to him. The applicant could not have availed the benefit of two notifications simultaneously for the same goods without maintaining separate accounts of inputs. The applicant was entitled to the benefit of only one notification out of the two which was beneficial to him and pay duty accordingly. The benefit of both notifications selectively without separate accounting of inputs cannot be availed simultaneously.

8.1 The availment of higher rate of CENVAT credit on the inputs utilised for the manufacture of medicaments entailed that only part of such CENVAT credit was being used to pay lower rate of duty on the final products cleared for home consumption by availing the benefit of exemption under Notification No. 4/2006-CE dated 01.03.2006 whereas the balance of the accumulated CENVAT credit on such inputs was used to pay duty on medicaments cleared for export at higher rate of duty in terms of Notification No. 2/2008-CE dated 01.03.2008 which specified the effective rate of duty. Such a practice would detract from the concept and purpose of the CENVAT scheme. When the applicant preferred to utilise two separate notifications for home consumption and export of the same goods, the CENVAT credit utilised for clearance of the exported goods was required to be restricted to the proportion of inputs utilised in their manufacture. Concept of tax on export to be zero rated cannot mean that tax not concerning with export is loaded on export goods somehow to encash the same. Alternatively, the applicant should have maintained separate account for the inputs utilised in the manufacture of exported goods and claimed rebate at higher rate utilising CENVAT credit on such inputs used in the manufacture of such goods.

8.2 Ratio laid down by the judgment of the Hon'ble Gujarat High Court in the case of Arvind Ltd. vs. UOI[2014(300)ELT 481(Guj.)] which has thereafter been affirmed by the Hon'ble Supreme Court[2017(352)ELT A21(SC)] is relevant here. In that case, inspite of there being an exemption notification which fully exempted their goods, Arvind Ltd. had availed the benefit of Notification No. 59/2008-CE dated 07.12.2008 and paid duty on the export goods. The relevant portion of the said judgment of the Hon'ble Gujarat High Court is reproduced below.

"9. On, thus, ...It is, thus, an undisputed fact that the petitioner on final products discharged the duty liability by availing the benefit of Notification No. 59/2008 and as has already been noted in the record, it has reversed the amount of Cenvat credit taken by it on the inputs used for manufacturing of such products. Thus, when the petitioner is not liable to pay duty in light of the absolute exemption granted under Notification No. 29/2004 as amended by Notification No. 59/2008-C.E. read with the provision of Section 5A(1A) of the Act and when it has not got any other benefit in this case, other than the export promotion benefits granted under the appropriate provision of the Customs Act and Rules (which even otherwise he was entitled to without having made such payment of duty), we are of the firm opinion that all the authorities have committed serious error in denying the rebate claims filed by the petitioner under Section 11B of the Act read with Rule 18 of the Rules. The treatment to the entire issue, according to us, is more technical rather than in substance and that too is based on no rationale at all.

10. We also cannot be oblivious of the fact that in various other cases, the other assessees have been given refund/rebate of the duty paid on inputs used in exported goods. ....."

8.3 In the above judgment, Hon'ble High Court has laid down that when there are two exemption notifications which co-exist, the assessee can avail one for domestic clearances and the other one which is beneficial to them for export so as to obtain refund/rebate of duty paid on inputs used in the exported goods (emphasis supplied). Thus, as long as, intent is to get refund/rebate of duty paid on inputs consumed in exported goods, exporter can choose to pay higher rate of duty on exported goods, even if it is an effective rate. Hon'ble High Court has not decided that an applicant while paying higher duty on exported goods can utilise the CENVAT credit not related to inputs consumed/used in exported goods but accumulated due to availment of another notification prescribing lower rate of duty for domestic

clearances. This would result in encashment of accumulated credit not related to inputs consumed/used in exported goods.

8.4 In the instant case, nothing on the record shows that the applicant have maintained separate accounts for utilising inputs while availing concessional rate for domestic clearances and paying duty at effective rate while exporting, the applicant was required to follow provisions of Supplementary Manual, and the goods cleared for export were required to be assessed to duty in the same manner as the goods cleared for home consumption.

9. In the light of the findings recorded above, Government does not find sufficient ground to modify the OIA No. PD/01/M-I/2014 dated 08.01.2014 passed by the Commissioner(Appeals), Central Excise, Mumbai Zone-I.

10. The revision application is disposed off in the above terms.

Shrawan 29-6-21

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

ORDER No 233 /2021-CX (WZ) /ASRA/Mumbai DATED 29.06.2021

To,
M/s. Okasa Pharma Pvt. Ltd.,
12, Gunbow Street,
Fort, Mumbai – 400 001.

Copy to:

1. The Principal Commissioner of CGST, Mumbai East Zone, 9th Floor, Lotus Infocentre, Parel (East), Mumbai – 400 012.
2. The office of the Commissioner of CGST(Appeals-II), 3rd floor, CGST Bhavan, Plot No. C-24, Sector-E, BKC, Bandar (East), Mumbai – 400 051,
3. The Deputy Commissioner, CGST, Division-III, Mumbai East CGST & C-Ex, 1st Floor, Polyshoor building, LBS Marg Vikhroli (West), Mumbai-400083.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Spare Copy.