REGISTERED SPEED POST AD

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

8th Floor, World Trade Centre, Cuffe Parade,

Mumbai- 400 005

F. No. 195/282/13-RA
F. No. 195/511/13-RA | 3487 Date of Issue: 07.02.2021

ORDER NO. 234-235 /2021-CX (WZ) /ASRA/MUMBAI DATED 30.6.2021 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 Zest Pharma
274A/275A, Sector-F,
Sanwer Road, Indore

Respondent : Commissioner of CGST & CX, Indore
Manik Bagh Palace,
Post Box No. 10,
Indore 452 001

Subject: Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against OIA No. IND/CEX/000/APP/353 to 356/2012 dated 20.11.2012 & OIA No. IND/CEX/000/APP/20/2013 dated 20.01.2013 passed by Commissioner(Appeals), Central Excise, Indore

ORDER

These revision applications have been filed by M/s Zest Pharma, 274A/275A, Sector-F, Sanwer Road, Indore(hereinafter referred to as "the applicant") against OIA No. IND/CEX/000/APP/353 to 356/2012 dated 20.11.2012 & OIA No. IND/CEX/000/APP/20/2013 dated 20.01.2013 passed by Commissioner(Appeals), Central Excise, Indore passed by Commissioner(Appeals), Central Excise, Indore.

2. The applicant had filed four rebate claims with the Assistant Commissioner, Division-I, Indore. The rebate claims were sanctioned in part by way of refund in cash and the remnant was allowed as re-credit in the CENVAT account of the applicant. The order of re-credit was passed on the ground that the applicant was removing the said goods for home consumption on payment of duty @ 5.15% adv. i.e. at the effective rate of central excise duty whereas they have paid duty @ 10.30% adv. on goods exported under claim of rebate through CENVAT account which is not permissible as per central excise law. It was opined that there were two different exemption notifications viz. Notification No. 4/2006-CE dated 01.03.2006 as amended by Notification No. 4/2011-CE dated 01.03.2011 specifying effective rate of duty for the goods falling under various chapters and Notification No. 2/2008-CE dated 01.03.2008 as amended by Notification No. 4/2011-CE dated 01.03.2011 reducing excise duty rates are providing exemption to the goods falling under chapter heading 3004 of the schedule to the CETA, 1985. The Assistant Commissioner found that the claimant has the option to choose the benefit of one of the two exemption notifications which is more beneficial to them but cannot avail the benefit of both exemption notifications simultaneously. He therefore allowed re-credit of the excess duty paid by the applicant vide four different OIO's.

3.1 Being aggrieved by the orders passed by the Assistant Commissioner, Division-I, Indore, the applicant filed appeal before the Commissioner(Appeals). Commissioner(Appeals) did not agree with the contention of the applicant that they have the option to choose between

Notification No. 2/2008-CE dated 01.03.2008 and Notification No. 4/2006-CE dated 01.03.2006 according to their convenience. He pointed out that this aspect has been clarified way back by CBEC through its Circular No. 222/56/96-CX dated 21.06.1996 which was issued on the basis of findings of the Hon'ble Supreme Court in their judgments dated 07.05.1996 in C.A. No. 8762 of 1992 in the case of CCE & Others vs. Bata India and C.A. No. 1121 of 1992 in case of Modi Rubber Ltd. & Others vs. UOI(with C.A. NP's 1965/86, 1966/86, 2328/86, 1059/81, 2393-2409/80, 1052/81, 285/88, 2155/87, 1415-16/86, 8178/95, 8263/95 and C.A. No. 8748 & 7852 of 1996. Through these judgments, the Hon'ble Supreme Court had clarified that duty payable was the duty paid after giving effect to the existing exemption notifications. In the present case, the duty payable is the duty payable after giving effect to the Notification No. 4/2006-CE dated 01.03.2006 as amended which was the proper notification prescribing effective rate of duty on the products of the applicant and the applicant was also paying duty in terms of this notification for domestic clearances.

3.2 The Commissioner(Appeals) further held that duty paid for the purpose of Rule 18 of the rules or for any other rule means duty payable after giving full effect to the existing exemption notification and any amount paid in excess of such duty payable is not duty at all and is at best a deposit. Therefore, no benefit of such excess payment can be given to the applicant in the form of rebate or refund. With regard to the various case laws cited by the applicant, the Commissioner(Appeals) found that the facts and circumstances of those cases were not relevant to the facts of the present case and hence not applicable. The Commissioner(Appeals) therefore upheld the OIO's passed by the Assistant Commissioner, Division-I, Indore vide his OIA No. IND/CEX/000/APP/353 to 356/2012 dated 20.11.2012.

4. The applicant had filed another three rebate claims before the Assistant Commissioner, Central Excise, Division-I, Indore which were also decided in a similar manner by partly allowing the rebate claims in cash and allowing the balance amount by way of re-credit in CENVAT credit. The applicant had thereupon filed appeal before the Commissioner(Appeals) which were rejected

on similar grounds as in the OIA dated 20.11.2012 detailed hereinbefore at para 3.1 and 3.2 vide his OIA No. IND/CEX/000/APP/20/2013 dated 22.01.2013.

5. Aggrieved by the OIA No. IND/CEX/000/APP/353 to 356/2012 dated 20.11.2012 and OIA No. IND/CEX/000/APP/20/2013 dated 22.01.2013, the applicant has filed revision applications on the following grounds :

(i) The applicant submitted that rebate is always to be paid in cash and that there was no discretion with the sanctioning authority to give rebate through CENVAT account as per clarification issued by the CBEC vide Circular No. 687/03/2003-CX dated 03.01.2003.

(ii) The applicant averred that two exemption notifications were available to them. Notification No. 4/2006-CE dated 01.03.2006 prescribed an effective rate of duty of 5.15% adv. and the other Notification No. 2/2008-CE dated 01.03.2008 reduced the rate of duty to 10.30% adv. They stated that the clearance for export sales were carried out on the basis of negotiation with their foreign buyer and had no relation to the quantum of central excise duty paid by the applicant and that Notification No. 2/2008-CE was beneficial to them to facilitate refund of duty paid by them on export goods from the CENVAT account which had been availed by them of duty paid on inputs used in manufacturing the final products.

(iii) The applicant submitted that there were several judgments wherein it had been held that when two different exemption notifications are available to an assessee, it is the option of the assessee to choose the one which is more beneficial to them and it is the duty of the authorities to grant such benefits if the assessee is entitled to such benefit. In this regard, the applicant placed reliance upon the judgments in Modi Xerox Ltd. vs. CCE, Meerut[1997(94)ELT 139(Trb)], CCE, Baroda vs. Indian Petro Chemicals[1997(92)ELT 13(SC)], Share Medical Care vs. UOI[2007(209)ELT 321(SC)], Cipla Ltd. vs. CC, Chennai[2007(218)ELT 547(Tri-Chennai)] & Mangalam Alloys Ltd. vs. CC, Ahmedabad[2010(256)ELT 124(Tri-Ahmd)]. The applicant contended on the basis of these case laws that there is no restriction that when one

notification has been availed for domestic clearances, the other existing notification cannot be availed for clearances of export goods.

(iv) The applicant contended that it was absolutely wrong on the part of the Commissioner(Appeals) to agree with the lower authority and restrict the cash refund as per duty payable in terms of Notification No. 4/2006-CE @ 5.15% adv. which had been availed by them on their domestic clearances. In this context, the applicant relied upon the judgment in the case of CCE & C, Vadodara-II vs. Jayant Oil Mills[2009(235)ELT 223(Guj)] and submitted that it would be clear from the judgment that at the time of exports an assessee is not bound to any exemption and can pay duty at the normal rate. Similarly, in the present case, they had chosen to not avail any exemption and pay duty at the normal rates. Since the peak rate of duty had been reduced under Notification No. 2/2008-CE, the applicant was bound to pay duty at that rate. The applicant submitted that there were various judgments of the Tribunal wherein it had been held that assessees may simultaneously avail benefit under two exemption notifications and especially so when there is no bar in either of the notifications for availing the benefit under another notification. In this regard, they placed reliance upon the judgments in the case of Inspector of Central Excise, Sivakasi and Anr. vs. S. Sornam[1986(24)ELT 279(Mad)], CCE, Hyderabad-I vs. Premier Mushroom Farms[2005(190)ELT 511(Tri-Bang)], CCE, Guntur vs. Maddala Industries[2006(202)ELT 809(Tri-Bang)], Steel Shape India Ltd. vs. CCE, Ghaziabad[2004(170)ELT 87(Tri-Del)], Jay Dye Chem Industries vs. CCE, Rajkot[1996(87)ELT 290(Trb)], German Remedies Ltd., Bombay vs. CCE, Bombay[1987(28)ELT 144(Trb)], Indye Chemicals Ltd. & Ahmedabad vs. CCE, Ahmedabad[1986(25)ELT 318(Trb)].

(v) The applicant further submitted that neither was any show cause notice issued for the proposed action nor was any personal hearing granted and the order was passed ex-parte ignoring the principles of natural justice which is bad in law. In this regard, the applicant relied upon the judgments in the case of Metal Forgings vs. UOI[2002(146)ELT 241(SC)] & Gokak Patel Volkart Ltd. vs. CCE[1987(28)ELT 53(SC)].

(vi) The applicant referred Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 of the CER, 2002 and averred that rebate is to be granted of the whole of duty paid on all excisable goods falling under the First Schedule to the CETA, 1985 on goods exported. They further opined that it would be pertinent to note that as per the aforesaid notification actual amount of duty paid is to be refunded and not the amount of duty payable. Duty payment be erroneous or at a higher or lower rate. It was further stated that the rule for granting rebate makes no distinction based on the source or manner of payment of duty. In this regard, they placed reliance upon the decision in the case of Bharat Chemicals vs. CCE, Thane[2004(170)ELT 568(Tri-Mum)].

6.1 Thereafter, the Department submitted comments on the revision applications filed by the applicant vide its letters C. No. III(20)ARC/GOI/RA/73/2013/4382 dated 16.05.2013 and C. No. III(20)ARCICESTAT/123/2013/14986 dated 22.08.2013. It was averred that availing two notifications simultaneously was not permissible as per law. Notification No. 4/2006-CE dated 01.03.2006 as amended prescribed effective rate of duty @ 5.15% adv. on goods falling under chapter sub-heading no. 3004 and Notification No. 2/2008-CE dated 01.03.2008 as amended provided exemption to goods across the board thereby reducing the rate of duty to 10.30% adv. The applicant has availed Notification No. 4/2006-CE for domestic clearances by paying duty @ 4.12% adv. They have simultaneously exported goods by availing Notification No. 2/2008-CE as they intended to encash the accumulated credit by way of rebate and claiming it in cash as rebate. It was submitted that the applicant could not simultaneously avail the benefit of two notifications. As per the provisions of para 4.1 of Part-I of Chapter 8 of the Supplementary Manual, the goods cleared for export are to be assessed to duty in the same manner as the goods cleared for home consumption. Therefore, since the applicant was paying duty @ 5.15% adv. on the good cleared for home consumption, they were required to pay duty at a similar rate on the export goods. If two exemption notifications were in existence, the applicant was at liberty to avail any one of the two which was

beneficial to him but the applicant could not avail benefit of both notifications simultaneously and separately for export of goods and clearance of goods to DTA.

6.2 It was submitted that the normal excise duty on all dutiable goods in the CETA was 16% in the year 2006. In the budget 2007-08, the Government decided to reduce excise duty to 14% which was done by issuing Notification No. 2/2008-CE dated 01.03.2008 under Section 5A for all dutiable goods. The products which had lower rates of duty continued to enjoy earlier rate under various notifications. Thereafter, in December 2008 the general rate of duty was reduced from 14% to 8% by amending Notification No. 2/2008-CE and not by amending the Central Excise Tariff. In the Budget for 2010, the general rate was increased to 10% and in the Budget for 2012 the general rate was again increased to 12%. Notification No. 4/2006-CE dated 01.03.2006 was one of the notifications under which a number of items attracted a lower rate of duty. Therefore, in reality only items which earlier attracted 16% duty were chargeable to 14% duty w.e.f. 01.03.2008 by virtue of Notification No. 2/2008-CE which could also have been achieved by amending the Central Excise Tariff Act.

6.3 P. P. medicaments which were chargeable to duty @ 4% continued to attract 4% duty. In December 2008, the general rate of duty was reduced to 8% however even then continued to be chargeable to 4% duty. The general rate of duty was increased to 10% in the 2010 Budget. However, P. P. medicaments still continued to be chargeable to 4% duty. Thus, P. P. medicaments continued to be chargeable to 4% duty. The Notification No. 2/2008-CE only provided general rate of duty. Thereafter, in the Budget for 2012, the general rate of duty was increased to 12% whereas the duty on P. P. medicaments was 5% by Notification No. 4/2006-CE dated 01.03.2006 as amended. Therefore, since the general rate was higher the correct rate for P. P. medicaments was 5% and manufacturers were supposed to pay that duty only and Notification No. 2/2008-CE was not relevant for determining the rate of duty for P. P. medicament. As such, 5% duty rate under Notification No.

4/2006-CE dated 01.03.2006 was more beneficial for the manufacturer and the relevant notification as far as P. P. medicament was concerned.

6.4 The Department submitted that in all the cases relied upon by the applicant, the appellate authority had held that when two exemption notifications were available it was upto the assessee to choose the one which was beneficial to him whereas in the present case, the applicant availed the benefit of two notifications simultaneously which was not permissible as per law. If there are two exemptions in existence, the assessee was at liberty to avail any one of them which is beneficial to them but it did not mean that they can avail the benefit of these two notifications separately for export of goods and clearance of goods to DTA. The applicant was legally entitled to the benefit of only one notification out of the two which was beneficial to him and to pay duty accordingly. In this case, there was no dispute regarding entitlement of the applicant for refund and it was only the mode of refund which was in dispute. While the applicant had asserted that they were entitled to claim the entire refund in cash which was not correct as per the reasons elaborated hereinbefore and therefore the refund was correctly granted by way of re-credit into CENVAT account. Hence the question of ignoring the principles of natural justice does not arise.

6.5 Reference was made to Rule 18 of the CER, 2002 and it was observed that rebate of duty paid on excisable goods exported was admissible subject to the conditions, limitations and fulfilment of procedure laid down under the notification issued under this rule. The relevant notification for claiming rebate of duty paid on excisable goods exported is Notification No. 19/2004-CE(NT) dated 06.09.2004 as amended.

6.6 The meaning of the words "duty paid on excisable goods" was explained. It was pointed out that as per Rule 4(1) of the CER, 2002 every person who produces or manufactures any excisable goods shall pay the duty leviable on such goods in the manner provided in Rule 8 of under any other law. Further as per Rule 2(e) of the CER, 2002 duty means the duty payable under Section 3 of the CEA, 1944. So also Section 3(1)(a) of the CEA, 1944 provides that

there shall be levied and collected in such manner as may be prescribed a duty of excise on all excisable goods which are produced or manufactured in India, as and at the rates set forth in the First Schedule to the CETA, 1985. It was also alluded to that payment of duty is not effected at the tariff rates but that duty is paid at the effective rates prescribed by the notifications for this purpose. The rates of duty set forth in the first schedule to the CETA, 1985 as well as the effective rates of duty undergo frequent changes and these changes are also effected by issuing notifications under proper authority of law.

6.7 It was submitted that while presenting the Budget for 2010-11, the Finance Minister had 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% to 10% 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 rate of duty set forth in the first schedule to the CETA, 1985 was enhanced from 8% to 10% ad valorem. Though the Central Excise Notifications No. 2/2008-CE, 58/2008-CE, 4/2009-CE and 6/2010-CE 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 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 rate of duty set forth in the first schedule to the CETA, 1985 was enhanced from 8% adv. to 10% adv.

6.8 The Department submitted that these simply meant that the standard rates of duty or tariff rate are changed by the Central Government by issuing notification under the powers of Section 5A(1) of the CEA, 1944 while at the same time effective 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. It was therefore contended that

there was a clear distinction between the notifications which are issued to set forth the rate of duty in the first schedule to the CETA, 1985 and the notifications which are issued for prescribing effective rates of duty on excisable goods although both of these are issued under the powers of Section 5A(1) of the CEA, 1944.

6.9 The contention of the applicant that they have the option to choose any rate for payment of duty on their products according to convenience was clarified way back by the Board by issuing Circular No. 222/56/96-CX dated 21.06.96 which was issued on the basis of the findings of the Hon'ble Supreme Court in their judgments dated 07.05.96 in C.A. No. 8762 of 1992 in the case of CCE & Ors. vs. Bata India and C.A. No. 1121 of 1992 in the case of Modi Rubber Ltd. & Ors. vs. UOI(with Civil Appeals MPs/ 1965/86, 1966/86, 2328/86, 1059/81, 2393-2409/80, 1052/81, 285/88, 2155/87, 1415-16/86, 8178/95, 8263/95 and Civil Appeal No. 8748 & 7852 of 1996. By these judgments the Hon'ble Supreme Court had clarified that the term "duty payable" used in Section 4(4)(d)(ii) of the CEA, 1944 envisages that the taxes and the central excise duty payable should be deducted from the wholesale price for arriving at the assessable value which is the normal price charged by the manufacturer from the wholesale dealers at the first point of sale. The Hon'ble Court had categorically upheld the Departments view that it is only the central excise duty actually payable after giving full effect to the exemption notification which is to be deducted from the wholesale price for arriving at the assessable value.

6.10 In these judgments, the Hon'ble Supreme Court had clarified that "duty payable" is the duty paid after taking full effect to the existing exemption notifications. The Department contended that in the present case, the "duty payable" was the duty payable after giving effect to the Notification No. 4/2006-CE dated 01.03.2006 as amended which was the proper notification prescribing effective rate of duty to the products of the applicant and the applicant was also paying duty under this notification for domestic clearance. The applicants intention was only to encash the balance of CENVAT credit lying with them by way of making excess payment of duty at the tariff rate for

the goods cleared by them for export under claim of rebate which was not legally permissible.

7. The applicant was granted a personal hearing on 03.12.2019. Shri B. B. Mohite, Advocate appeared on behalf of the applicant and reiterated the grounds of revision and stated that it was a settled issue. They also submitted a synopsis of these cases. In addition to reiterating the grounds of revision, the applicant submitted that CBEC had vide letter D.O. F. No. 334/5/2015-TRU dated 30.04.2015 clarified that importers can avail of the benefit of Notification No. 12/2012-Customs dated 17.03.2012 for the purposes of BCD(i.e. Sr. No. 197 of 2003 as amended by Notification No. 46/2012-Customs dated 17.08.2012) and simultaneously avail the benefit of Sr. No. 127 of Notification No. 12/2012-CE dated 17.03.2012 for the purpose of CVD where such imports are for use in the manufacture of other fertilisers. Subsequent to the change in the revisionary authority, the applicant was granted fresh hearing on 08.01.2021. Shri B. B. Mohite, Advocate appeared online for personal hearing and requested for allowing the benefit of both notifications. He submitted that there was no bar on using two different notifications; one for domestic clearances and another for export.

8. 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 issue for decision in these revision applications is whether the applicant is entitled to choose to avail the benefit of Notification no. 02/2008-CE dated 01.03.2008 in terms of which the export goods are chargeable to duty @ 10.3% adv. when the same goods are cleared for domestic consumption availing Notification no. 04/2006-CE dated 01.03.2006 as amended by Notification no. 04/2011-CE dated 01.03.2011 and chargeable to duty @ 5.15% adv. The applicant has contended that they are eligible for rebate in cash of the entire amount of duty paid by them at the rate of duty specified under Notification No. 2/2008-CE dated 01.03.2008. The revision application has been filed to secure in cash the amount allowed as re-credit in their CENVAT account. On the other hand,

the Department has through the comments submitted reaffirmed the view that rebate in cash is to be restricted to the rate of duty payable in terms of Notification No. 4/2006-CE dated 01.03.2006 and the amount paid in excess of such duty can only be allowed as re-credit in the CENVAT account of the applicant.

9.1 Government observes that 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.

9.2 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.

9.3 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.

10.1 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 case laws relied upon by the applicant, the appellate authority had held that when two exemption notifications are available, it is up to the assessee to choose the one which is beneficial to him. 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.

10.2 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.

10.3 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. ……."

10.4 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.

10.5 In the instant case, since applicant did not maintain 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. Therefore, the Commissioner(Appeals) has correctly upheld the order of the rebate sanctioning authority restricting the rebate sanctioned in cash to the duty payable in terms of Notification No. 4/2006-CE as amended and allowed the amount paid in excess of such duty as re-credit in their CENVAT account.

11. In the light of the findings recorded above, Government does not find sufficient ground to modify the OIA No. IND/CEX/000/APP/353 to 356/2012 dated 20.11.2012 & OIA No. IND/CEX/000/APP/20/2013 dated 20.01.2013

passed by Commissioner(Appeals), Central Excise, Indore and therefore rejects the revision applications filed by the applicant.

Shrawan 30/06/21

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

ORDER No. 234-235 /2021-CX (WZ) /ASRA/Mumbai DATED 30.6.2021.

To,
M/s Zest Pharma
274A/275A, Sector-F,
Sanwer Road, Indore

Copy to:

1. The Commissioner of CGST & CX, Indore Commissionerate
2. The Commissioner of CGST & CX, (Appeals), Indore
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy