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. 195/267/WZ/2019-R.A. /2255 Date of Issue: 26.04.2023

ORDER NO. 235 /2023-CX(WZ)/ASRA/MUMBAI DATED 26.4.23 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. Sumitomo Chemical India Pvt. Ltd.,
Moti- Mahal, 7th Floor,
195, J. Tata Road,
Churchgate, Mumbai-400020.

M/s. Sumitomo Chemical India Pvt. Ltd.,
13/14, Aradhana Indl. Development Corpn.,
Near Virwani Indl. Estate,
Goregaon (E), Mumbai – 400 063.

Respondent : Commissioner CGST & Central Excise, Nashik.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. NSK/EXCUS/000/APPL/044/18-19 dated 31.05.2018 passed by the Commissioner (Appeals), GST & C. EX., Nashik.

ORDER

The subject Revision Application has been filed by M/s. Sumitomo Chemical India Pvt. Ltd., Moti-Mahal, 7th Floor, 195, J. Tata Road, Churchgate, Mumbai-400020 (hereinafter referred as the applicant) against the impugned Order-in-Appeal No. NSK/EXCUS/000/APPL/044/18-19 dated 31.05.2018 passed by the Commissioner (Appeals), GST & C. EX., Nashik against the Order-in-Original No. 101/R/2015 dated 20.10.2015 passed by the Assistant Commissioner, Central Excise & Customs, Jalgaon Division, Nashik-I.

2. Brief facts of the case are that M/s. Sumitomo Chemical India Pvt. Ltd., a Merchant Exporter filed Rebate Claim in terms of Rule 18 of Central Excise Rules 2002 in Form-C for Rs 9,33,405/- along with self attested copies of shipping bill, Bill of Lading, Mate Receipt, original & duplicate copies of ARE-1, duly signed by the custom authorities, Commercial Invoice, Tax Invoice and Disclaimer Certificate of manufacturer M/s. MDB Chemicals (I) Pvt Ltd, 100% EOU, Gat No. 177, Mhasavad Road, Erandol Distt. Jalgaon. Adjudicating Authority following the process of Law sanctioned the rebate claim vide Order-in-Original No. 101/R/2015 dated 20.10.2015.

3. Aggrieved by the Order dated 20.10.2015 department filed an appeal with Commissioner (Appeals), GST & C. EX., Nashik. Commissioner (Appeals), vide Order-in-Appeal No. NSK/EXCUS/000/APPL/044/18-19 dated 31.05.2018 at Para 24 held that:

> *"24. Having decided as above, It is observed that M/s MDB Chemicals had debited the purported duty amount involved in the exported consignment as below;*

Payment mode	*Amount debited (Rs.)*	*E: No. & date*
PLA	*301000/-*	*334 / 02.10.2013*

CENVAT A/C (input)	*232106/-*	*1013 / 02.10.2013*
CENVAT A/c (Capital Goods)	*93158/-*	*524 / 02.10.2013*
CENVAT A/c (Service Tax credit)	*309147/-*	*02 / 02.10.2013*
TOTAL	*935411/-* *PLA Rs. 301000/- + CENVAT Rs. 634411/-*	

Thus, even though the respondent is not entitled for the rebate of duty involved in the exported goods sought by them for the reasons discussed herein above, the manufacturer M/s. MDB Chemicals, Jalgaon, from whose premises the goods were exported by the respondent merchant exporter, is otherwise entitled for restoration of credit of amount of Rs.9,35,405/- as it is they who had debited the amount of Rs.9,35,411/- This view was upheld in the case of Johari Digital Health Care Ltd, reported at 2012 (281) ELT -156 (GOI). Under this backdrop, and as can be seen from the above table, an amount of Rs. 3,01,000/- was paid through PLA. Therefore, the amount sanctioned albeit wrongly by the lower authority to the tune of Rs.3,01,000/- to the respondent cannot be faulted arithmetically as anyways the said amount would have called for restoration in PLA. So far as the remaining amount of Rs.6,34,405/- paid through Cenvat account, the same also ideally calls for restoration in the Cenvat account of M/s MDB Chemicals.

However, in the present case, the claim for rebate was filed by the respondent on the basis of disclaimer certificate issued by M/s. MDB Chemicals India Pvt. Ltd., (100% EOU), Jalgaon. I therefore, refrain from passing any order granting refund (by way of restoration) of Rs.6,34,405/- to them as a disclaimer certificate was already issued by them to the respondent M/s. Sumitomo Chemicals India Pvt. Ltd., Mumbai coupled with the fact that M/s. MDB Chemicals is not a party to the appeal."

Accordingly, he partially allowed the appeal filed by the appellant department to the extent of Rs. 6,34,405/- granted wrongly by the adjudicating authority.

4. Being aggrieved with the Orders-in-Appeal dated 31.05.2018 the applicant has preferred an appeal with CESTAT, Mumbai. CESTAT vide Final Order No. A/86667/2019 dated 17.09.2019 allowed the appeal to be withdrawn, as requested by the appellant, to file appeal before the Revisionary Authority.

5. Thereafter, the applicant has filed the present Revision Application mainly on the following grounds:-

5.1 The restriction under Section 5A(IA) is only to prohibit availment of credit of duty on inputs:

Applicant submitted that Notification No.24/2003-C.E. dated 31.3.2003 provide exemption to all excisable goods produced or manufactured in an Export Oriented Unit (EOU) and cleared to any unit other than in Domestic Tariff Area (DTA). Assuming that this notification provides absolute exemption from levy of duty on clearance of goods from EOU to export. it is submitted that even then refund of duty paid amount on export is available to the applicant. The Central Board of Excise & Customs has clarified vide Circular No.940/1/2011-CX.. dated 14-1-2011 that restriction is only for the purpose of availment of credit on the input. The relevant para is reproduced below:

"2. It is further clarified that in case the assessee pays any amount as Excise duty on such exempted goods, the same cannot be allowed as "CENVAT Credit" to the downstream units, as the amount paid by the assessee cannot be termed as "duty of excise" under Rule 3 of the CENVAT Credit Rules, 2004.

In the instant case, the duty has been paid at the time of removal of goods from the factory of EOU. The merchant exporter (applicant) has sought rebate of the said duty which has been deposited on clearance of goods. If no duty is payable as contended, the refund would be available under section 11B of Central Excise Act. It is submitted that in case the exemption is allowed to the company, the amount paid at the time of clearance of goods is in excess of the duty which is required to be paid and therefore refund of the excess duty paid shall be allowed under section 11B of Central Excise Act.

5.2 The applicant is a merchant exporter is entitled to rebate of duty paid on export of goods. The Notification No. 24/2003 is conditional as the duty is payable on DTA clearances which have been exported by merchant exporter. The exports effected through third party i.e. merchant exporter who is the applicant, has exported the goods from EOU on payment of duty. Later on, rebate was claimed for the duty paid on the goods exported by the exporter i.e. by merchant exporter, hence, rebate allowed to applicant is correct and proper.

Applicant submitted that Section 5A of the Central Excise Act, 1944, provides for granting of exemption to goods generally, either absolutely or subject to certain conditions. The impugned Notification No.24/2003-C.E. does not grant any absolute exemption. In fact, it is only exempting excisable goods produced or manufactured in an Export Oriented Unit. Being a conditional exemption, the provisions of Section 5A(1-A) is not applicable to the impugned notification. It has also been submitted that Section 5A(1-A) of the Act is to be applied only when the exemption granted is absolute in nature. When an exemption is granted to the goods manufactured by a particular manufacturer the same cannot be considered as generally exempt from excise duty, as held by the Apex Court in Commissioner of Sales Tax v. Pine Chemicals Ltd, and Ors.. (1995) 1 SCC 58.

5.3 Rebate claim under Rule 18 of Central Excise Rules, 2002 - No prohibition under said Rules for merchant exporter to claim rebate on export of goods - The applicant has complied with all the substantial conditions:

The applicant had applied for rebate of duty paid on exports under Notification No.19/2004-C.E.(N.T.) dated 06-9-2004. It will be evident from the said notification that the conditions and limitations for granting of refund is specified in para 2 of the notification and the procedure to be followed is specified in para 3 of the notification. The show-cause- notice

does not dispute about compliance with the conditions and limitations specified in para 2 of the notification. It is submitted that the merchant exporter has complied with all the conditions of the notification provided in para 2.

5.4 There is no power to demand duty under Section 3 of Central Excise Act, 1944:

The manufacturer is approved as an EOU and the necessary permission has been granted by the Assistant Commissioner. There is no dispute on the fact that goods have been manufactured in EOU and cleared for export by third party i.e. applicant. The Assistant Commissioner in the show-cause-notice has accepted the facts that goods have been exported. It is submitted that the Section 3 of the Central Excise Act, 1944, provides for levy of duty for goods manufactured or produced in India.

5.5 Without prejudice to the above, seeking to deny and demand back the already sanctioned rebate duty of 9,35.405/- is not correct & proper and order-in-appeal passed by the Commissioner (Appeals) should be set aside:

An order of sanctioning the rebate claim is correct & proper and seeking to deny and demand back the already sanctioned rebate duty is not correct and proper.

5.6 Without prejudice to the above, the procedural infraction of Notification/circulars ear to be condoned if exports have really taken place, and the law is settled that substantial benefit cannot be denied for procedural lapses and hence rebate should be granted:

It has been consistently held in the several judgments of Government of India / Tribunal that claiming rebate is substantive right given to an

exporter and it should not be denied merely on the ground of technical mistake/lapse.

5.7 Without prejudice to the above submission it is submitted that the assuming but not admitting that the rebate claim sanction to the applicant is incorrect, in such case the payment of duty on export of goods cannot be retained by the department as the same is paid without any authority of law. It is submitted that in such case it is consistently held in various judgement that such duty paid in excess shall be allowed as recredit in the Cenvat Credit account. The applicant relied upon following judgements:

i. Watson Pharma Pvt. Ltd. 2014 (313) ELT 876 (GOI)
ii. Manomer Chemical Industries Pvt. Ltd. 2014 (312) ELT (929) (GOI).

It is submitted that the Central Excise Act, 1944 and the rules therein including the Cenvat Credit Rules, 2004 are repelled on account of introduction of the CGST Act, 2017. Therefore, it is submitted that the excess duty paid cannot be claimed as recredit.

It will be evident from the above provision that every claim of refund filed before the appointed date of any amount of duty paid under the existing law shall be disposed in accordance with the provisions of the existing law and any amount eventually accruing shall be paid in cash notwithstanding any provisions contained under the existing laws, except the provisions of sub-section (2) of Section 11B of the Central Excise Act, 1944.
It is submitted that the present claim relates to the duty paid on export of goods Further, the second proviso is also not applicable to the present case, as till date the applicants have not availed the recredit. Therefore, the question of carry forward of such credit under GST does not arise. Thus, it will evident that in case the refund is to be denied in the present case, the same will be revenue neutral as the such payment will have to refunded in cash.

6. Personal hearing in the matter was held on 24.11.2022, Shri Archit Agarwal, C.A. appeared online on behalf of the applicant and submitted that delay should be condoned which occurred due to filing appeal with wrong forum. He further submitted that amount paid through Cenvat be returned to them if not eligible for rebate.

7. Government has carefully gone through the relevant records, the written and oral submissions and also perused the impugned Order-in-Original and the impugned Order-in-Appeal. It is observed that the issues involved in the present revision application are whether the applicant, a Merchant Exporter is entitled for rebate on export goods cleared from 100% EOU, on payment of duty under the provisions of Rule 18 of the Central Excise Rules, 2002.

8. Government observes that the applicant initially filed appeal against the impugned Order before Tribunal, Mumbai. Tribunal refrained from passing any order as Tribunal does not have any jurisdiction to pass any order in respect of rebate claims filed by the applicant on export of goods. On receipt of the said CESTAT order, applicant filed the instant Revision Application and pleaded for condonation of delay.

9. Government first proceeds to discuss issue of delay in filing Revision Application. The CESTAT vide Final Order No. A/86667/2019 dated 17.09.2019 allowed the appeal to be withdrawn, as requested by the appellant, to file appeal before the Revisionary Authority. Applicant has accordingly filed a Revision Application in respect of Order-in-Appeal No. NSK/EXCUS/000/APPL/044/18-19 dated 31.05.2018. The chronological history of events is as under:-

Sl. No.	Particulars	Order-in-Appeal No. NSK/EXCUS/000/APPL/044/18-19 dated 31.05.2018

1.	Date of Receipt of Order in Appeal by the Respondent	18.06.2018
2.	Date of filing of appeal before Tribunal	17.09.2018
3.	Time taken in filing appeal before Tribunal	2 months 30 days
4.	Date of receipt of Tribunal order Final Order No. A/86667/2019 dated 17.09.2019	24.09.2019
5.	Date of filing of Revision application	03.10.2019
6.	Time taken between date of receipt of Tribunal order to date of filing of Revision application	9 days

As per provisions of Section 35EE of Central Excise Act, 1944 the revision application can be filed within 3 months of the communication of Order-in-Appeal and the delay up to another 3 months can be condoned provided there are good reasons to explain such delay.

10. Government notes that Hon'ble High Court of Gujarat in the case of M/s. Choice Laboratory [2015 (315) E.L.T. 197 (Guj.)] , Hon'ble High Court of Delhi in the case of M/s. High Polymers Ltd. [2016 (344) E.L.T. 127 (Del.)] and Hon'ble High Court of Bombay in the case of M/s. EPCOS India Pvt. Ltd. in [2013 (290) E.L.T. 364 (Bom.)] have held that period consumed for pursuing appeal bonafidely before wrong forum is to be excluded in terms of Section 14 of Limitation Act, 1963 for the purpose of reckoning time limit of filing revision application under Section 35EE of Central Excise Act, 1944. The ratio of above said judgements is squarely applicable to these cases. Government therefore keeping in view the above cited judgments holds that revision application No. 195/267/WZ/2019-R.A. is condonable. Government, in exercise of power under Section 35EE of Central Excise Act, 1944 condones the said delay and takes up these Revision Application for decision on merit.

11. Whether the applicant, a Merchant Exporter is entitled for rebate on export goods, cleared from 100% EOU, who is unconditionally exempted under Notification No. 24/2003-CE, dated 31st March, 2003, on payment of duty under the provisions of Rule 18 of the Central Excise Rules, 2002.

The applicant M/s. Sumitomo Chemical India Ltd, Mumbai is merchant exporter who had exported excisable goods manufactured by M/s. MDB Chemicals (I) Ltd., a 100% EOU, the said excisable goods were cleared from the manufacturers premises under claim of rebate vide ARE-1 No. 13-14/E-010 dated 02.10.2013 on payment of Central Excise duty.

11.1 Notification No. 24/2003-CE dated 31.03.2003 reads as under:

31st March, 2003

Notification No. 24/2003 Central Excise

In exercise of the power conferred by sub-section (1) of section 5A of Central Excise Act, 1944, (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978) the Central Government, being satisfied that it is necessary in the public interest so to do, hereby,-

(a) exempts all excisable goods produced or manufactured in an export oriented undertaking from whole of duty of excise leviable thereon under section 3 of Central Excise Act, 1944 (1 of 1944) and additional duty of excise leviable thereon under section 3 of Additional Duty of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and additional duty of excise leviable thereon under the section 3 of Additional duty of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978)
Provided that the exemption contained in this notification in respect of duty of Excise leviable under section 3 of said Central Excise Act shall not apply to such goods if brought to any other place in India;

(b) rescinds the notification Nos. 125/84- Central Excise, dated the 26th May 1984 (G.S.R. 403(E), dated the 26th May, 1984), 127/84 Central Excise dated the 26th May 1984 (0.S.R. 405(E), dated the 26th May, 1984) and 55/91-Central Excise, dated the 25th July, 91 (G.S.R. 389 (E), dated the 25th July, 1991).

2. This notification shall come into force on the 1st day of April, 2003.
The principal notification No. 55/91 Central Excise dated the 25th July 1991 was issued vide GSR 389, dated the 25th July, 1991.

D. S. Garbyal

11.2 The Notification No. 24/2003-CE dated 31.03.2003 states that the goods manufactured in an export oriented undertaking are fully exempted from whole of duty of Excise, Additional Duty (GSI) and Additional duty (TTA).

11.3 The exemption Notification No. 24/2003-CE dated 31.03.2003 has been issued under sub-section (1) of Section 5A of the Central Excise Act, 1944. Sub-section (1A) of Section 5A states that:

> "[(1A) for the removal of doubts, it is hereby declared that where on exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturers of such excisable goods shall not pay the duty of excise on such goods."]

11.4 There is no option or discretion provided to the manufacturer to refrain from availing the exemptions granted by the Notification issued under sub-section (1) of Section 5A of Central Excise Act, 1944. Where an exemption has been granted absolutely, the manufacturer shall not pay the duty of excise on such goods.

11.5 The Hon'ble Tribunal in case of Mahendra Chemicals Vs CCE. Ahmedabad [2007 (203) ELT 505 (Tri-Ahmd)] has referred to Supreme Court decision in case of CCE Vs. Parle Exports 1988(38)ELT 741(SC) and observed that:

> *"The SC has clearly held that the notification is a part of statute and has force of law. The law is not optional. If the legislature has decided to exempt certain goods by notification, the exemption cannot be negated by an assessee by opting to pay duty on exempted goods..... Any such payment of duty on such goods will be without sanction of law."*

11.6 It is mandatory for all 100% EOU to avail the exemption Notification No. 24/2003-CE dated 31.03.2003 issued under sub-section (1) of Section 5A of Central Excise Act, 1944 and the manufacturer has no exception. The Notification No. 24/2003-CE dated 31.03.2003 is unambiguous which states that the goods manufactured in an export oriented undertaking are fully exempted from whole of duty of Excise, Additional Duty (GSI) and Additional duty (TTA), i.e. export clearances are unconditionally exempted.

12. CBEC has clarified vide circular under F.No. 262/117/2010-CX8 dated 14.01.2011 that manufacturer cannot opt to pay the duty in respect of unconditionally fully exempted goods and that in case the assessee pays any amount as Excise Duty on such exempted goods, the amount paid by the assessee cannot be termed as "duty of excise" under Rule 3 of the CCR, 2004. Therefore, when amount paid itself is not "duty of excise", refund thereof cannot be claimed under Section 11B of CEA, 1944 as said section starts *"any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application..."*. Hence, when amount paid is not duty of excise, refund thereof cannot be even claimed under said Section 11B of CEA, 1944. Further, the Board in their circular issued under F.No.209/26/09-CX.06 dated 23.04.2010 made clear that EOU's do not have an option to pay duty and thereafter claim rebate of duty paid.

13. The Hon'ble Supreme Court has in its judgment in the case of Sandoz Pvt Ltd. V/s. U.O.I. [2022 (379) E.L.T. 279 (S.C.)] has held that :

> ***28.*** *If the refund claim is by the EOU, the same needs to be processed by the authorities under the FTP by reckoning the entitlement of DTA supplier specified in Chapter 8 of the FTP concerning the goods supplied to it, being a case of deemed exports. The EOU on its own, however, is not entitled for*

refund of TED, as the mandate to EOU is to procure or import goods from DTA supplier, without payment of duty in view of the express ab initio exemption provided in terms of para 6.2(b) read with para 6.11(c)(ii). However, despite such express obligation on the EOU, if the EOU has had imported goods from DTA supplier by paying TED, it can only claim the benefit of refund provided to DTA supplier under para 8.4.2 read with paras 8.3(c) and 8.5 subject to obtaining disclaimer from DTA supplier in that regard and complying with other formalities and requirements.

29. *We thus agree with the conclusion reached by the Bombay High Court that the EOU is not entitled to claim refund of TED on its own. However, we add a caveat that EOU may avail of the entitlements of DTA supplier specified in Chapter 8 of FTP on condition that it will not pass on that benefit back to DTA supplier later on. In any case, the refund claim needs to be processed by keeping in mind the procedure underlying the refund of Cenvat credit/rebate of excise duty obligations. If Cenvat credit utilised by DTA supplier or EOU, as the case may be, cannot be encashed, there is no question of refunding the amount in cash. In that case, the commensurate amount must be reversed to the Cenvat credit account of the concerned entity instead of paying cash.*

.....

42. *In conclusion, we hold that the EOU entities, who had procured and imported specified goods from DTA supplier, are entitled to do so without payment of duty [as in para 6.2(b)] having been ab initio exempted from such liability under para 6.11(c)(ii) of the FTP, being deemed exports. Besides this, there is no other entitlement of EOU under the applicable FTP. Indeed, under para 6.11(a) of the FTP, EOU is additionally eligible merely to avail of entitlements of DTA supplier as specified in Chapter 8 of the FTP upon production of a suitable disclaimer from the DTA supplier and subject to compliance of necessary formalities and stipulations. It would not be a case of entitlement of EOU, but only a benefit passed on to EOU for having paid such amount to the DTA supplier, which was otherwise ab initio exempted in terms of para 6.11(c)(ii) of the FTP coupled with the obligation to import the same without payment of duty under para 6.2(b).*

14. In view of the above, Government finds no reason to interfere with the impugned order-in-appeal. The revision application filed by the applicant are rejected as being devoid of merits.

Shrawan 26/4/23

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

ORDER No. 235 /2023-CX (WZ) /ASRA/Mumbai dated 26.4.23

To,
M/s. Sumitomo Chemical India Pvt. Ltd.,
Moti- Mahal, 7th Floor,

195, J. Tata Road,
Churchgate, Mumbai-400020.

M/s. Sumitomo Chemical India Pvt. Ltd.,
13/14, Aradhana Indl. Development Corpn.,.
Near Virwani Indl. Estate,
Goregaon (E), Mumbai – 400 063.

Copy to:

1. Commissioner CGST & Central Excise, Nasik.
2. Commissioner (Appeals), GST & C. EX., Nasik.
3. Mr. Archit Agarwal, 1009-1015, 10th Flr., Topiwala Centre, Topiwala Theatre Compound, Near Railway Station, Goregaon (West), Mumbai 400 104.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.