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सत्यमेव जयते

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. 195/1001/13-RA/3452 Date of Issue: 07.07.2021

ORDER NO. 238/2021-CX (SZ) /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 Tanktech Asia Pvt. Ltd., III Avenue, V Cross, Industrial Estate, Guindy, Chennai 600032

Respondent : Commissioner of Central Excise, Chennai IV.

Subject : Revision Application filed under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. 218/2013(M-IV) dated 24.09.2013 passed by the Commissioner of Central Excise (Appeals), Chennai.

ORDER

This revision application has been filed by M/s. Tanktech Asia Pvt. Ltd., Chennai, (hereinafter referred to as "the applicant") against the Order-in-Appeal No. 218/2013(M-IV) dated 24.09.2013 passed by the Commissioner of Central Excise (Appeals), Chennai.

2. The brief facts of the case are that the applicant filed a rebate claim of Rs.89,626/- on 15.04.2010 in respect of duty paid on inputs used in goods exported by them under ARE-2 No. 02/2009-10 dtd.23.02.2010. Out of rebate claim of Rs.89,626/- the Original authority, i.e. Deputy Commissioner, Central Excise, Guindy Division, Central Excise Chennai-IV vide Order in Original No.17/2010 dated 31.05.2010 rejected rebate claim for Rs.16,491/- in respect of input wiper seal imported under Bill of entry as the Bill of Entry was not a document eligible for the refund of duty.

3. Being aggrieved by the aforesaid Order in Original the applicant filed appeal before Commissioner of Central Excise (Appeals), Chennai who vide Order-in-Appeal No. 218/2013(M-IV) dated 24.09.2013 dismissed the appeal filed by the applicant being time barred.

4. Being aggrieved with the impugned order in appeal, the applicant filed this Revision Application before the Government mainly on the following grounds : -

(i) Under Notification 12/2007 CE-NT, whereby an exporter is made eligible to the rebate of the duties levied under the provisions of section 3 of the Customs Tariff Act which are specifically notified therein, which is well supported of the numerous decisions of the Apex Court, High Courts and the Tribunal wherein the ratio of the department refusing to accord substantial benefits on the assessee in the face of procedural infirmities has been consistently struck down in favour of the assessee.

(ii) They have not filed the appeal beyond the statutory period, but the same has been filed well within the condonable period as provided u/s. 35(1) of the Central Excise Act and they have also given such convincing reasons for filing the appeal within the condonable period, which should have been properly appreciated by the Commissioner (Appeals) instead of passing the non-judicious and unreasonable order.

(iii) They have shown reasonable cause in their application to condone the delay in filing the appeal, wherein they have clearly stated that the person who had received the order had left the service of the applicant company abruptly, leaving the impugned order unnoticed and unattended by any other staffs, which ultimately got mixed up with other files. It was only thereafter they having come to know above fact and the consequences of such order, immediate steps were taken by them to trace out the impugned order, and the connected files and immediately on retracing the same, the applicant took diligent steps to file the present appeal, after consulting with their legal consultant/advocate, thereby there occasioned a delay of 21 days, which fact was not properly appreciated by the learned lower appellate authority

(iv) The learned appellate authority without adverting to the merits of their case gave the stamp of approval to the order passed by the lower adjudicating authority on the basis that the appeal was barred by time without considering the fact that the appeal was filed within the condonable period and the lower appellate authority had every right to condone the delay involved on sufficient cause being shown by the applicant of their handicappedness to file the appeal within the time limit, which was beyond their control and circumstances.

(v) The learned appellate authority had failed to appreciate that the language used in provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. There can be no dispute or scintilla of doubt that the appellate authority has sufficient powers to allow the appeal to be presented beyond the period of 30 days and after expiry of initial 60 days, which if properly appreciated would not have resulted in passing the incorrect impugned order

(vi) The explanation offered by them was reasonable and there is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides or dilatory tactics adopted by the applicant and not out of prudence and every assessee would be interested in getting their case disposed on merits and does not stand to benefit by resorting to delay, as he runs a serious risk and therefore interest of justice requires that the applicable be given a reasonable opportunity of hearing to defend his case on merits

(vii) The learned appellate authority failed to understand that refusing to condone delay had resulted in a meritorious matter being thrown out at the very

threshold and cause of justice being defeated and when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred when there is a non-deliberate delay.

(viii) The above view is much supported by the following judicial pronouncements, which is given hereunder, wherein the courts and tribunals had taken a view that if the appeal is filed within the condonable period, such appeal should be entertained on sufficient cause to be shown and the right of their appeal should not be defeated merely because there occasioned to be delay in filing the appeal and all the more every appeal has to be disposed on its merits.

(i) 1994 (72) ELT 711 (Tri) - In the matter of Incab Industries Vs CCE, Patna
(ii) 2009 (237) ELT 86 (Tri - Ahmd) - In the matter of Dushian Ltd., CCE, Ahmedabad
(iii) 2009 (235) ELT 852 (Tri - Che) — In the matter of Rajan Tex — CEX, Salem
(iv) 1996 (86) ELT 152 (G.O.I) &
(v) 1987 AIR 1353 (SC)-In the matter of Land acquisition- Vs Mst. Katiji & Ors.

5. A personal hearing in the matter was held on 26.02.2021 through video conferencing which was attended online by Shri N. Viswanathan, Advocate on behalf of the applicant. He submitted that CVD is also eligible for rebate. He submitted that Commissioner (Appeals) has rejected their appeal on limitation (21 days delay) without going into merits of the case.

6. Government has carefully gone through the relevant case records available in case files, oral submissions and perused Order-in-Original and the impugned Order-in-Appeal. Government observes that there was a delay of 21 days in filing of appeal before Commissioner (Appeals) by the applicant.

7. The applicant had shown reasonable cause in their application to condone the delay in filing the appeal, wherein they had stated that the person who had received the order had left the service of the applicant company abruptly, leaving the impugned order unnoticed and unattended by any other staffs, which ultimately got mixed up with other files. It was only thereafter they having come to know above fact and the consequences of such order, immediate steps were taken by them to trace out the impugned order, and the connected files and immediately on retracing the same, the applicant took steps to file the appeal, after consulting with their legal consultant/advocate, thereby there occasioned a delay of 21 days.

8. Government observes that as per Section 35(1) of the Central Excise Act, an appeal before Commissioner (Appeals) has to be filed within 60 days from the date

of communication of the order of the adjudicating authority. This period of 60 days can be extended by the Commissioner (Appeals) by 30 days. In the instant case, there was a delay of 21 days in filing appeal which is condonable in terms of the provisions of Section 35(1) of the Central Excise Act, 1944. However, the Commissioner (Appeals) dismissed the appeal on the ground that the appeal has been filed beyond 60 days of the adjudication order and the applicant failed to show any reason or reasonable cause for such delay before him.

9. Government in this case places reliance on Hon'ble Gujarat High Court Order Special Civil Application No. 14988 of 2005, decided on 30-9-2005 [2006(199) ELT 404(Guj.)]. In this case, although appeal was filed within stipulated period, application for condonation of delay was not filed along with it and accordingly, appeal was dismissed by Commissioner (Appeals). Hon'ble Gujarat High Court observed that Appeal not to be dismissed on technical ground when petitioner is pursuing statutory remedy and not inclined to give up his right of appeal and accordingly directed the petitioner to file application seeking condonation of delay before Commissioner (Appeals) and Commissioner (Appeals) was directed to condone the delay.

10. Applying the ratio of the above decision and also in view of the fact that the applicant had satisfactorily explained the delay, Government condones the delay of 21 days in filing appeal and proceeds to decide the case on merit.

11. Government observes that in the instant case the original authority rejected rebate claim filed under Notification No. 21/2004-CE(NT) dated 06.09.2004 for Rs.16,491/- in respect of input wiper seal imported under Bill of entry for the reason that the Bill of Entry was not a document eligible for the refund of duty. Thus, the issue involved in this case is whether the applicant is entitled for rebate of CVD paid on imported inputs used in the export goods, and whether it was mandatory to procure the goods under cover of an invoice raised under Rule 11 of CER, to become eligible for rebate of duty (CVD) paid on the imported inputs, in terms of the Notification No.21/2004 CE (NT) dated 06.09.2004.

12. Government in this regard relies on the GOI Order in Re: Vinati Organics Ltd. [2014 (311) E.L.T. 994 (G.O.I.)] wherein GOI while holding that "*as Per Notification No. 12/2007-C.E. (N.T.) CVD is allowed to be rebated so the bill of entry*

which is the duty paying document automatically accepted", vide Order Nos. 433-444/2013-CX, dated 30-5-2013, observed as under :-

"9. *Government observes that this authority vide GOI Revision Order No. 01-05/2011-C.E., dated 17-1-2011 in the case of Om Sons Cookware Pvt. Ltd. [2011 (268) E.L.T. 111 (GOI)] has held that rebate of CVD paid on imported raw materials which are used in manufacture of final export product is admissible under Notification No. 21/2004-C.E. (N.T.) r/w Rule 18 of Central Excise Rules, 2002. This order of GOI was upheld by the Hon'ble Delhi High Court vide its order dated 2-5-2012 in the case of CCE, Delhi-I v. JS (RA) reported as 2013 (287) E.L.T. 177 (Del.). As such, the payment of CVD at the time of import of goods is eligible of rebate benefit. Vide Notification No. 12/2007-C.E. (N.T.), dated 1-3-2007 additional duty (CVD) levied under Section 3 of Customs Tariff Act, 1975 was added in the Notification No. 19/2004-C.E. (N.T.) as well as Notification No. 21/2004-C.E. (N.T.), dated 6-9-2004. As such, by virtue of said amendment, the rebate of CVD paid on imported materials has been allowed as per the statute. Now, once the issue is settled that CVD is eligible for rebate benefit, the next issue to be decided is whether payment of CVD through DEPB scrip can be treated as payment of duty. From harmonious perusal of statutory provisions as discussion in paras 8.1, 8.2 and 8.3 above, the additional customs duty paid through debit in DEPB scrip is eligible for brand rate of drawback as well as Cenvat credit. So, there is no reason for not treating the payment of CVD through DEPB Scrip as payment of duty since it has been treated as payment of duty for Brand rate drawback as well as for Cenvat credit. Government further notes that there are no similar provision available for payment of education cess through DEPB scrip, so the said payment cannot be treated as payment of duty and hence rebate of education cess paid through DEPB scrip is not admissible.*

9.1 *It is further contended by department that bill of entry is not a specified duty paying document is condition No. 3 of Notification No. 21/2004-C.E. (N.T.). In this regard Commissioner (Appeals) in his findings in the impugned Order-in-Appeal has observed as under :-*

> *"It is contended by the Revenue that condition No. 3 of the notification required the materials to be brought under an invoice issued under Rule 11 of the Central Excise Rules, 2002 and the said condition has not been fulfilled as the imported material had been brought under Bills of Entry. The notification grants the rebate "subject to the condition and the procedure specified hereinafter". What is specified thereafter at Sr. No. 3 only lays down the procedure for procurement of material from registered factories. This cannot be applicable to material procured from other sources. The manufacturers wanting to use imported material cannot possibly procure such material from registered factories. The law does not require anybody to do the impossible. Since the use of imported materials used for the manufacture or processing of export goods is permitted and the rebate of the additional duty leviable under section 3 of the Customs Tariff Act, 1975 is also allowed, the only possible conclusion is that the notification does not prescribe any particular procedure or condition for procurement of imported material. Accordingly, the contention of the revenue has to be rejected. "*

Commissioner (Appeals) has given a logical reasoning, Government notes that vide Notification No. 12/2007-C.E. (N.T.), dated 1-3-2007, additional duty (CVD) was added on duties to be rebated under Notification No. 21/2004-C.E. (N.T.), dated 6-9-2004. So the position has undergone change w.e.f. 1-3-2007 and once CVD is allowed to be rebated, the bill of entry being the duty paying document has to be automatically accepted. So, Government agrees with findings of Commissioner (Appeals) as there is no merit in this plea of applicant department."

13. Respectfully following the GOI Order discussed supra, Government holds that input rebate of Rs.16,491/- in respect of input, wiper seal imported under Bill of entry is admissible to the applicant under Rule 18 of Central Excise Rules, 2002 r/w Notification No. 21/2004-C.E. (N.T.), dated 6-9-2004.

14. Accordingly, Government modifies and sets aside the Orders-in-Appeal No. Order-in-Appeal No. 218/2013 (M-IV) dated 24.09.2013 passed by the Commissioner of Central Excise (Appeals), Chennai.

15. The Revision Application is allowed with consequential relief.

Shrawan 30/06/21

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

ORDER No.238/2021-CX (SZ) /ASRA/Mumbai DATED 30.6.2021

To,

M/s Tanktech Asia Pvt. Ltd., III Avenue, V Cross,
Industrial Estate, Guindy, Chennai 600032

Copy to:

1. Commissioner of CGST & CX, Chennai South, 5th Floor, 692, M.H.U. Complex, Anna Salai Nandanam, Chennai-600 035.
2. The Commissioner CGST & CX (Appeals-II), Newey Towers, 12th Main Road, Annanagar (W), Chennai-600 040.
3. The Assistant Commissioner of CGST & CX, Guindy Division , 3rd Floor, EVR Periyar Building Anna Salai, Nandnam, Chennai-600 035.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.