F.NO. 195/1458/12-RA

SPEED POST
REGISTERED POST

सत्यमेव जयते

GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

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

F NO. 195/1458/12-RA/467 Date of Issue: 28/12/17

ORDER NO.25/2017-C.EX (WZ) /ASRA/Mumbai DATED 28TH DECEMEBER 2017 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Macleods Pharmaceutical Limited, Atlanta Arcade, Church Road, Near Leela Hotel, Andheri-Kurla road, Andheri Mumbai -400059.

Respondent : Commissioner of Central Excise (Appeals), Mumbai-III-400614.

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 944 against the Orders-in-Appeal No. BC/247/RGD/2012-13 dated 30.08.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-III.

ORDER

The instant revision application has been filed by M/s. Macleods Pharmaceutical Limited, Atlanta Arcade, Church Road, Near Leela Hotel, Andheri-Kurla road, Andheri-400059 (hereinafter referred to as "applicant") against the Order-in-Appeal No. BC/247/RGD/2012-13 dated 30.08.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-III.

2. Brief facts of the case are that the applicant, a merchant exporter had filed 9 rebate claims under Rule 18 of the Central Excise Rules, 2002 amounting to Rs.8,16,449/-. The adjudicating authority sanctioned the rebate claims amounting to Rs.7,56,045/- and rejected the amount of Rs. 60,404/- on the ground that transaction value shown in the invoice / ARE-1 is higher that the corresponding FOB value. The Commissioner (Appeals) relying on the Judgement of Hon'ble Punjab and Haryana High Court in Nahar Industrial Enterprises Ltd. v. Union of India [2009 (235) E.L.T. 22 (P & H)] (*wherein the exporter, instead of paying effective rate of duty of 4% chose to pay duty at tariff rate of 16%, hence was allowed cash rebate @ 4% while differential amount of 12% was credited in the Cenvat account*) rejected the appeal and held that the applicant would be entitled to 4% of the duty as rebate only and the applicant being merchant manufacture are not having Cenvat credit account would not be entitled for the remaining duty.

3. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this Revision Application under Section 35 EE of Central Excise Act, 1944 on the following grounds that,

- the Learned Commissioner (Appeals), has erred in passing the impugned order without considering and appreciating the submissions made before him; rebate of duty paid on CIF value of goods exported is permissible and cannot be restricted to duty paid on FOB Value;

- rebate is payable equal to entire excise duty paid; the actual amount of duty paid on the exported goods has been claimed and hence there was no loss to Government Exchequer; and the Credit of actual duty paid is admissible as cenvat credit, even though such duty was paid wrongly / erroneously.

To substantiate the above, the Revision applicant relied upon various case laws and board's circular viz. (i) Sterlite Industries -2009 (236) ELT 143 (T), (ii) M.F.Rings -2000 (119) ELT 239 (T), (iii) Maini Precision-2010 (252) ELT 409 (T), (iv) Board's circular no. 510/06/2000-CX dated 3.02.2000 etc.

4. A Personal hearing was held in this case on 12.12.2017 and Shri Mayur Shah, Manager Accounts, Authorized representative of the applicant appeared for hearing and reiterated the submission made in the instant application and pleaded to allow re-credit on the differential duty on CIF & FOB on the basis of case laws and orders of the department and submitted the copies. None appeared on behalf of Department.

5. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal. On perusal of records, Government observes that the applicant, a merchant-exporter filed rebate claims of Rs.8,16,449/- in respect of duty paid on exported goods. Since the duty was paid on ARE-1 value which was CIF value, the original authority determined the FOB value as transaction value in terms of Section 4 of Central Excise Act, 1944 and allowed the rebate of duty payable amounting to Rs.7,56,045/- on the said transaction value. The part claim of Rs. 60,404/- in respect of excess duty paid on value portion in excess of transaction value was rejected. Commissioner (Appeals) rejected the applicant's appeal and held that the applicant would be entitled to 4% of the duty as rebate only [illegible] the applicant being merchant manufacture are not having Cenvat credit.

account would not be entitled for the remaining duty. Now the applicant has filed this revision application on the grounds stated above.

6. Government also notes that the contention of the Department for rejecting the part rebate claim was that the place of removal in this case was the factory and therefore freight Insurance incurred for the transport of the goods from the factory to the port of export and other charges incurred for export are not required to be included in the transaction value

7. In this regard, Government observes that the identical issue has been decided by Government vide Revisionary Order No. 97/2014-Cx, dated 26-3-2014 in F. No. 195/126/2012-RA reported in 2014 (308) E.L.T. 198 (G.O.I.). While deciding the issue Government, in its aforesaid Order discussed the provisions of Section 4(1)(a) of Central Excise Act, 1944, Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 as well as the definitions of 'Sale' and 'Place of Removal' as per Section 2(h) and Section 4(3)(c)(i), (ii), (iii) of Central Excise Act, 1944 respectively, and observed as under :-

> ***8.5*** *Government observes that from the perusal of above provisions it is clear that the place of removal may be factory/warehouse, a depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at place of removal. The meaning of word "any other place" read with definition of "Sale", cannot be construed to have meaning of any place outside geographical limits of India. The reason of such conclusion is that as per Section 1 of Central Excise Act, 1944, the Act is applicable within the territorial jurisdiction of whole of India and the said transaction value deals with value of excisable goods produced/manufactured within this country. Government observes that once the place of removal is decided within the geographical limit of the country, it cannot be beyond the port of loading of the export goods. Under such circumstances, the place of removal is the port of export where sale takes place. The GOI Order No.*

*271/2005, dated 25-7-2005 in the case of CCE, Nagpur v. M/s. Bhagirth Textiles Ltd. reported in 2006 (202) E.L.T. 147 (GOI) has also held as under :-*

*"the exporter is not liable to pay Central Excise duty on the CIF value of the goods but the Central Excise duty is to be paid on the transaction value of the goods as prescribed under Section 4 of the Central Excise Act, 1944". It is clear from the order that in any case duty is not to be paid on the CIF value.*

**8.6** *Supreme Court in its order in Civil Appeal No. 7230/1999 and CA No. 1163 of 2000 in the case of M/s. Escorts JCB Ltd. v. CCE, Delhi reported in 2002 (146) E.L.T. 31 (S.C.) observed (in para 13 of the said judgment) that*

*"in view of the discussions held above in our view the Commissioner of Central Excise and CEGAT erred in drawing an inference that the ownership in the property continued to be retained by the assessee till it was delivered to the buyer for the reason that the assessee had arranged for the transport and transit insurance. Such a conclusion is not sustainable".*

*Further, CBEC vide it (Section) 37B Order 59/1/2003-CX, dated 3-3-2003 has clarified as under :-*

> *"7. Assessable value' is to be determined at the "place of removal". Prior to 1-7-2000, "Place of removal" [Section 4(4)(b), sub-clauses (i), (ii) and (iii)], was the factory gate, warehouse or the depot or any other premises from where the goods were to be sold. Though the definition of "place of removal" was amended with effect from 1-7-2000, the point of determination of the assessable value under Section 4 remained substantially the same. Section 4(3)(c)(i) [as on 1-7-2000] was identical to the earlier provision contained in Section 4(4)(b)(i), Section 4(3)(c)(ii) was identical to the earlier provision in Section 4(4)(b)(ii) and Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, took care of the situation covered by the earlier Section 4(4)(b)(iii). In the Finance Bill, 2003 (clause 128), the definition "place of removal" is proposed to be restored, through amendment of section 4 to the position as it existed just prior to 1-7-2000.*

*8. Thus, it would be essential in each case of removal of excisable goods to determine the point of "sale". As per the above two Apex Court decisions this will depend on the terms (or conditions of contract) of the sale. The 'insurance' of the goods during transit will, however, not be the sole consideration to decide the ownership or the point of sale of the goods."*

The Government also observed in its aforesaid Revision Order that

*"it has been stipulated in the Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 and the CBEC Circular No. 510/06/2000-CX, dated 3-2-2000 that rebate of whole of duty paid on all excisable goods will be granted. Here also the whole duty of excise would mean the duty payable under the provisions of Central Excise Act. Any amount paid in excess of duty liability on one's own volition cannot be treated as duty. But it has to be treated simply a voluntary deposit with the Government which is required to be returned to the respondent in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. 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. v. UOI reported in 2009 (235)* E.L.T. *22 (P&H).*

*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.*

8. As the facts of the present Revision Application are similar to the above quoted case, the ratio of the same is squarely applicable to this case.

9. In view of the foregoing, Government notes that in this case the duty was paid on CIF value and therefore, rebate of excess duty paid on said portion of value which was in excess of transaction value was rightly denied to the applicant. The applicant who is a Merchant-exporter has contended that in the present case medicaments manufactured by Loan Licensee have been exported by him and the duty payable was debited in the Cenvat Credit Account of the Loan Licensee, therefore, that much portion of the rebate needs to be credited in the Cenvat Account of Loan Licensee. Therefore, Government allows re-credit of excess paid duty of Rs. 60,404/-(Rupees Sixty Thousand Four Hundred and Four) in Cenvat credit account from where it was paid subject to compliance of provisions of Section 12B of Central Excise Act, 1944.

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

11. So ordered.

28.12.17

(ASHOK KUMAR MEHTA)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No.25/2017-CX (WZ) /ASRA/Mumbai DATED 28.12.2017

To,
M/s. Macleods Pharmaceutical Limited,
Atlanta Arcade, Church Road,
Near Leela Hotel, Andheri-Kurla road,
Andheri-400059

**True Copy Attested**

28/12

SANKARSAN MUNDA
Asstt. Commissioner of Custom & C. Ex.(RA)

Copy to:

1. The Commissioner of GST & CX, Raigad Commissionerate.
2. The Commissioner, Central Excise, (Appeals) –Raigad, 5th floor C.G.O. Complex, CBD Belapur, Navi Mumbai-400614.
3. The Deputy / Assistant Commissioner (Rebate), C.G.O. Complex, CBD Belapur, Navi Mumbai-400614.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.