F. No. 195/750-751/13-RA

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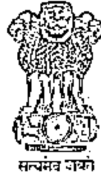

**GOVERNMENT OF INDIA**
**MINISTRY OF FINANCE**
**DEPARTMENT OF REVENUE**

**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. 195/750-751/13-RA/4442 | Date of Issue: 16/10/19 |
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ORDER NO. 26-27/2019-CX (WZ) /ASRA/MUMBAI DATED 13.09.2019 OF THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Apar Industries Ltd.
A-201/202, 2nd Floor, Bezzola Complex,
Sion-Trombay Road, Chembur, Mumbai 400 071

Respondent : Commissioner, Central Excise, Customs & Service Tax, Vapi Commissionerate, Vapi, Gujarat – 396 191

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the OIA No. SRP/144 & 145/VAPI/2013-14 dated 12.06.2013 passed by the Commissioner(Appeals), Central Excise, Customs & Service Tax, Vapi.

**ORDER**

These revision application has been filed by M/s. M/s. Apar Industries Ltd., A-201/202, 2nd Floor, Bezzola Complex, Sion-Trombay Road, Chembur, Mumbai 400 071 (hereinafter referred to as "the applicant") against OIA No. SRP/144 & 145/VAPI/2013-14 dated 12.06.2013 passed by the Commissioner(Appeals), Central Excise, Customs & Service Tax, Vapi.

2.1 The applicant(then known as M/s Uniflex Cables Ltd.) is a registered manufacturer-exporter of excisable goods falling under Chapter 85. They had exported their final products under the cover of 68 ARE-1's during the period February 2011 to January 2012 on payment of duty totally amounting to Rs. 2,18,34,987/-. They filed rebate claims in these cases before the Office of the Maritime Commissioner, Raigad. While granting rebate through various Orders-in-Original on different dates, the rebate sanctioning authority granted rebate in part but rejected rebate claimed to the extent of Rs. 4,94,037/- attributable to the duty paid on the value in excess of the FOB value. Similarly, in respect of 23 different ARE-1's filed by the applicant for goods exported during the period from March 2011 to December 2011, the Office of the Maritime Commissioner, Raigad partly rejected rebate claims to the extent of Rs. 4,70,490/-.

2.2 The applicant then filed two applications, both dated 04.09.2012 before the Assistant Commissioner of Central Excise and Customs, Vapi Division, Vapi(hereinafter referred to as the "JAC") wherein the applicant stated that "when rebate claim is sanctioned in short or in part, the balance amount of duty debited/paid needs to be refunded in cash or should be allowed by "restoration of credit" in Cenvat credit account, which the rebate sanctioning authority/Maritime Commissioner office has failed to do so". On this ground, the appellant requested the JAC, Vapi to either grant refund of the said rejected amounts or to allow them "restoration of credit" in their CENVAT account.

2.3 The JAC, Vapi vide two identical letters F. No. V/18-691/2012-13/R dated 07.11.2012 and F. No. V/18-692/2012-13/R dated 07.11.2012 returned the papers to the applicant holding that "the appellants were

unable to file/did not file appeal against the Orders(of the Rebate granting authority) within the time limit fixed in Central Excise Act, 1944, and further holding that filing of claims for rejected portion at her office is not remedial measure."

3.1 Aggrieved by the letters of the JAC, Vapi dated 07.11.2012, the applicant filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) observed that it was an undisputed fact that the applicant had not challenged the orders of the Maritime Commissioner, Raigad and thus the said orders of the Maritime Commissioner had attained finalty as far as sanction of rebate is concerned. He averred that if the applicant was aggrieved by the part rejection of the rebate claims, then they should have filed appeal against the order of the rebate sanctioning authority before the next appellate authority, as the power of granting any relief in the matter would definitely and solely lie with the appellate authority holding jurisdiction over the Maritime Commissioner, Raigad; i.e. Commissioner(Appeals-II), Mumbai. Since the applicant had failed to file appeal and had allowed the matter to attain finalty, the applicant could not seek remedy at the hands of the authority holding jurisdiction over the manufacturer. Approaching the JAC would tantamount to deciding the same issues again, for which the JAC, Vapi would not be competent.

3.2 The Commissioner(Appeals) further observed that the applicant had themselves referred to and relied upon OIA No. 777-779/RGD/2012 dated 14.11.2012 passed by Commissioner(Appeals-II), Mumbai. He took note of the fact that the appellate order was in respect of similar rejection of rebate claims on account of FOB value vide Orders-in-Original passed in May 2012 and June 2012 by the Deputy Commissioner, Central Excise, Rebate, Raigad where the same applicant had filed appeals before the Commissioner(Appeals-II), Mumbai and obtained relief. The Commissioner(Appeals) inferred from these facts that the applicant was aware that the power to grant relief against orders passed by the authorities at Raigad vested only in the Commissioner(Appeals-II), Mumbai. He therefore found no infirmity in the decision of the JAC, Vapi in rejecting the

request of the applicant and returning to them the papers relating to the present claims.

3.3 With regard to the reliance placed on the case law of UM Cables Ltd. 2013-TIOL-386-HC-MUM-CX, the Commissioner(Appeals) observed that the Hon'ble High Court had directed the rebate sanctioning authority to process the claim without rejecting the claim on the ground of non-production of ARE-1's whereas in the present case the papers were returned to the applicant on the ground that filing claims for the rejected portion at the Central Excise Office at Vapi was not the proper remedy. He observed that the claims were rejected basically on the ground that the central excise authority at Vapi had no jurisdiction over the orders passed by the Maritime Commissioner, Raigad and therefore the case law relied upon by the applicant is distinguishable and not applicable to their case. Similarly, the case law of Dorcos Market Makers Private Ltd. 2012-TIOL-108-HC-MAD-CX and Asian Paints (I) Ltd. Ltd.[2002(142)ELT 522] relate to limitation whereas the sole reason for rejection of the claim in this case was jurisdiction. Therefore, the case laws relied upon by the applicant were held to be inadmissible. In so far as the contentions regarding limitation are concerned, the papers of the applicant were returned mainly on the ground that the applicants filing of claim for the rejected portion pertained to the order passed by the authorities at Mumbai and therefore the present claims are not proper on the ground of jurisdiction. The Commissioner(Appeals) therefore rejected these contentions as they were irrelevant to the issue at hand and therefore there was no merit in these appeals. In such manner, the Commissioner(Appeals) vide his Order-in-Appeal No. SRP/144 & 145/VAPI/2013-14 dated 12.06.2013 rejected the appeals and upheld the letters issued by the lower authority.

4.1 Aggrieved by the Order-in-Appeal No. SRP/144 & 145/VAPI/2013-14 dated 12.06.2013 passed by the Commissioner(Appeals), Central Excise, Customs & Service Tax, Vapi, the applicant has filed these Revision Applications. The applicant contended that the rebate sanctioning authority had erred in rejecting the rebate claims although the fact of export and duty paid nature of the goods was not disputed & that the Maritime

Commissioner should have allowed re-credit of the part of duty amount which was rejected while sanctioning the rebate claims. They requested that the orders passed by the authorities below were required to be set aside with consequential relief. It was further stated that as per the directions of the Office of the Maritime Commissioner they had approached the JAC, Vapi to allow re-credit of the excess duty paid. The applicant further asserted that if excise duty is based on duty calculated on FOB value, the excess duty should be treated as pre-deposit and is required to be refunded; that there is no time-limit for refund of pre-deposit & that they had filed application for restoring credit well in time. However, the JAC had rejected the claim for re-credit without personal hearing and denied them natural justice. They stated that all the documents were available on record and had been verified and certified by the Range Officer.

4.2 The applicant explained that the variation in FOB value could be due to dollar exchange rate and detailed the various reasons. The applicant stated that the excise duty was payable at factory gate on FOB value declared in ARE-1/excise invoice and therefore the rebate claim ought to have been sanctioned on the basis of actual duty paid; that when the rebate claim is sanctioned in part, the balance amount ought to be refunded in cash or in the CENVAT account which the "respondent authority" had failed to do. They had referred and relied upon Order-in-Appeal No. US/777 to 779/RGD/2012 dated 14.11.2012 passed by the Commissioner(Appeals), Mumbai Zone-II in the applicants own case where the excess amount was treated as pre-deposit and ordered to be paid as re-credit in CENVAT credit account. The applicant therefore averred that the JAC and Commissioner(Appeals) had erred in rejecting the refund claim of the applicant for restoration of credit on the ground of jurisdiction. They further contended that whereas the Commissioner(Appeals) had in the impugned order held that recourse against the rebate sanction order was before the Commissioner(Appeals), Mumbai Zone-II, the Commissioner(Appeals), Mumbai Zone-II had in his order dated 14.11.2012 directed the applicant to take up the matter with the JAC.

4.3 The applicant asserted that there was no dispute on limitation and that the rejection of re-credit was on the ground of jurisdiction was not proper as the power to allow re-credit was with the rebate sanctioning authority/JAC. There were two remedies for the applicant and the applicant could avail either of the two options. They claimed that they had fulfilled all the conditions of Notification No. 19/2004-CE(NT) dated 6.09.2004 issued under Rule 18 of the CER, 2002. It was further stated that there was no requirement in the notification that the FOB value in the ARE-1 based on which duty was paid/debited should exactly match the FOB value declared in the shipping bill. The only requirement is that duty payment on export goods should be established or the duty claimed as rebate should have been debited/paid in the books of account. They claimed that they had fulfilled this condition and hence their request for grant of the full amount of rebate claim for duty paid in excess should be allowed to be restored in the CENVAT account. They argued that it was settled law that grant of rebate is inured by only two substantive conditions; viz. evidence that duty paid goods have been exported and evidence that goods have been physically exported with proof of export.

4.4 The applicant further pointed out that there were a number of decisions of the Revisionary Authority holding that when the two substantive conditions are fulfilled, rebate was to be allowed; that the purpose of granting rebate was to encourage exports and that rejection of rebate claims on technical grounds defeats the object of Rule 18 of the CER, 2002. Attention was drawn to the fact that the JAC had made reference to the preamble of the orders passed by Assistant Commisisoner(Rebate), Maritime Commissioners Office in her letters dated 7.11.2012 to indicate that appeal against his orders were to be made before the Commissioner(Appeals), Mumbai Zone-II. They argued that although non-filing of appeals had not been taken as a ground for rejecting the application for restoration of excise duty paid in excess, yet it was observed that "alternatively" filing application before the JAC was not a remedial measure. They averred that this was totally incorrect in law and objecting to the filing of application for re-credit before the JAC was akin to ignoring the entire

scheme and procedures. They also asserted that the CBEC Manual recognizes both, the Office of the Maritime Commissioner and JAC as equal and parallel authorities and it was the applicants prerogative to decide where to file for refund or re-credit. The applicant also alleged that the JAC had not allowed them natural justice before rejecting the refund & the Commissioner(Appeals) had erred in rejecting the appeal on grounds of jurisdiction as it was contrary to the Order-in-Appeal passed by Commissioner(Appeals), Mumbai Zone-II holding that the JAC is empowered to allow re-credit to the applicant. On these grounds, the applicant pleaded that the Revision Application filed by them be allowed.

5. The applicant was granted a personal hearing on 19.08.2019. Shri Inder Chand Thakur, General Manager, Indirect Tax attended on behalf of the applicant and handed over written submissions. They placed reliance upon the Order-in-Appeal No. 777-779/RGD/2012 dated 14.11.2012 passed by Commissioner(Appeals-II), Mumbai in their own case. In their written submissions, the applicant reiterated their grounds in the revision application filed by them.

6.1 Shri Anil C. Chauhan, Superintendent appeared on behalf of the Department for personal hearing and filed para wise comments on the revision application under the signature of the Joint Commissioner, GST & Central Excise, Surat. In the written submission dated 21.08.2019, the Joint Commissioner stated that once the rebate claim is filed with a particular authority, it cannot again be filed before another authority. Therefore, once the applicant had preferred to file rebate claim with the Maritime Commissioner, they could not have filed the same claim before another authority; viz. Central Excise & Customs, Vapi Division, Vapi Commissionerate. However, the applicant had again filed rebate claim with the Vapi Division and the Assistant Commissioner, Vapi Division had vide letter F. No. V/18-691/2012-13/R dated 07.11.2012 and letter F. No. V/18-692/2012-13/R dated 07.11.2012 returned the rebate claim with the comments as reproduced below.

> "Since you were unable to file/did not file an appeal(s) against said orders within the time limit fixed by the Central Excise Act, 1944, you have filed these claims before

this office. However, filing claims for rejected portion by Maritime Commissioner at this office is not a remedial measure.".

Because the applicant was aggrieved by the above said letters, the applicant preferred appeal before the Commissioner(Appeals), Vapi which were in turn rejected by the Commissioner(Appeals), Vapi vide his OIA No. SRP/144 & 145/Vapi/2013-14 dated 12.06.2013.

6.2 The Joint Commissioner further stated that the jurisdiction for sanction of rebate claim and passing of quasi judicial order are both different and the adjudication order passed by an authority has to be contested/appealed against before the concerned jurisdictional appellate authority. He averred that there was no concurrent jurisdiction in appeal matters. As per the provisions for filing rebate claim, the applicant can file rebate claim before the jurisdictional central excise authority or before the Maritime Commissioner where the goods have been exported from. In the instant case, the applicant had preferred to file rebate claim before the Maritime Commissioner. If the applicant had any grievance against the order passed by the Maritime Commissioner, then the applicant should then have approached the Commissioner(Appeals) having jurisdiction over the Maritime Commissioner. However, they instead approached the Central Excise & Customs, Vapi Division falling under the jurisdiction of the then Vapi Commissionerate(presently CGST & CE, Division-XII(Umbergaon Division), Surat Commissionerate. The Joint Commissioner averred that the contention of the applicant was incorrect.

6.3 It was further stated that the adjudicating authority would be able to sanction the balance amount only after the appeal is allowed by the appellate authority. Therefore, an order to separately restore the short sanctioned rebate claim by directly approaching the JAC for restoration of excess duty paid would not be proper and legal. It was opined by the Department that such a plea should have been filed before the Maritime Commissioner who was the rebate sanctioning authority in the present case. It was further submitted that since rebate was a conditional refundable tax subject to submission of proof of exports/realization of foreign currency and other procedural guidelines, the payment of tax on export goods was not

considered as a pre-deposit. It was pointed out that as per the OIA passed by the Commissioner(Appeals), Vapi, the filing of the claim before the Excise Office at Vapi was not a remedial measure. It signified that the claims were rejected on the ground that the central excise authority at Vapi had no jurisdiction over the order passed by the Maritime Commissioner, Raigad. Therefore, the case law relied upon by the applicant was distinguishable and not applicable to their case. Similarly, the case laws of Dorcos Market Makers Pvt. Ltd. 2012-TIOL-108-HC-MAD-CX and Asian Paints (India) Ltd. 2002(142)ELT 522 relied upon by the applicants relate to limitation and were therefore stated to be inapplicable.

6.4 It was pointed out that the basic reason for rejecting the claim in the instant case was jurisdiction alone and therefore these case laws were distinguishable and inapplicable to the facts of the case on hand. With regard to the applicants contention that there was no time limit for refund of pre-deposit, it was submitted that there is a time limit fixed for granting refund of tax which is set out under Section 11B of the Central Excise Act, 1944 and it is one year from the date of export. The Department on the basis of these submissions prayed that the Revision Application No. 195/750-751/2013-RA filed by the applicant be rejected and that the order passed by the Commissioner(Appeals), Vapi upholding the letters dated 7.11.2012 issued by the Assistant Commissioner of Central Excise, Division Vapi, Vapi Commissionerate be upheld.

7.1 Government has carefully gone through the Revision Applications filed, relevant case records, oral and written submissions and perused the impugned Order-in-Appeal and the letters issued by the Assistant Commissioner, Vapi.

7.2 The issue for decision is whether the impugned OIA upholding the letters issued by the JAC, Vapi rejecting the request of the applicant for re-credit of amount of duty not sanctioned as rebate reckoning it as beyond jurisdiction was apposite.

7.3 The sequence of events in the present case leading up to these revision applications is that the applicant had originally filed rebate claims before the Maritime Commissioner; i.e. the Deputy Commissioner(Rebate), Raigad. The Deputy Commissioner(Rebate) partly sanctioned the claims. Aggrieved by the non-sanction of part of the rebate claims filed by them, the applicant filed refund claims for the "short received" rebate claims before the JAC - Assistant Commissioner, Vapi. The JAC had returned the claims to the applicant stating that filing these claims before her for the portion of rebate claims rejected by Maritime Commissioner was not the remedial measure. She also alluded to the fact that the applicant had filed these refund claims before her because the applicant had not filed appeals against the order of the Maritime Commissioner within the time limit fixed under the Central Excise Act, 1944. This decision of the Assistant Commissioner, Vapi has been upheld by the jurisdictional Commissioner(Appeals) and the applicant has subsequently filed for revision before the Government against such order.

8.1 Before delving into the facts of the case, it would be pertinent to understand the statutory remedy available to an aggrieved person when aggrieved by any decision or order. In the present case the original authority; viz. the Deputy Commissioner(Rebate), Raigad has passed a refund sanction order rejecting some part of the rebate claimed by the applicant. It is a matter of record that the applicant was aggrieved by that part of the order. Section 35 of the Central Excise Act, 1944 is the relevant provision governing the rights of an aggrieved person and is reproduced below for reference.

> "**SECTION 35. Appeals to Commissioner(Appeals).** – (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Principal Commissioner of Central Excise or Commissioner of Central Excise, may appeal to the Commissioner of Central Excise(Appeals)[hereinafter referred to as the Commissioner(Appeals)] within sixty days from the date of the communication to him of such decision or order :
>
> **Provided** that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the

aforesaid period of sixty days, allow it to be presented within a further period of thirty days."

In the present case, the applicant was aggrieved by the order of the Deputy Commissioner(Rebate), Raigad who is lower in rank than the Principal Commissioner and Commissioner. Therefore, the applicant was required to file an appeal before the Commissioner(Appeals) against the said order within sixty days from the date of its communication or in certain circumstances within a further period of thirty days after such date. In other words, assuming that the Commissioner(Appeals) was satisfied that the applicant was prevented by sufficient cause from presenting the appeal, he could have admitted the appeal within a maximum period of ninety days from the date of communication of the order.

8.2 Government observes that the applicant had originally filed rebate claims which were sanctioned on the basis of FOB value declared in the shipping bills and not on the basis of the FOB value declared in the ARE-1's filed by the applicant. On going through the grounds for revision, it is observed that virtually all the grounds are disputing the order of the rebate sanctioning authority; viz. Deputy Commissioner(Rebate), Raigad - the Maritime Commissioner. Any challenge against the order of the Maritime Commissioner could be only before the Commissioner(Appeals) under whose jurisdiction the Maritime Commissioner falls. Needless to say, Commissioner(Appeals), Vapi cannot usurp the jurisdiction of Commissioner(Appeals-II), Mumbai. A situation where the applicant can again seek redressal against an order or correction of an order of an officer before another officer of equal rank would lead to chaos. Regardless of the fact that the applicant can file rebate claim either before the Maritime Commissioner or the JAC, once the applicant has exercised their option of filing before one authority, any deficiency therein will be addressed by the Commissioner(Appeals) under whose jurisdiction that authority falls.

8.3 The applicant was aggrieved by the order of the rebate sanctioning authority which only sanctioned them the amount of rebate of FOB value of exports. However, they failed to file appeal against this order before the Commissioner(Appeals). Interestingly, the details of the refund sanction

orders under which the applicant claims to have short received refunds amounting to Rs. 4,70,490/- are Order No. 1978 dated 31.01.2012, Order No. 192 dated 26.04.2012 and Order No. 424 dated 15.05.2012. Similarly, the details of the refund sanction orders under which the applicant claims to have short received refunds amounting to Rs. 4,94,037/- are Order No. 1428 dated 13.12.2011, Order No. 1430 dated 14.12.2011, Order No. 1544 dated 22.12.2011, Order No. 1775 dated 12.01.2012, Order No. 102 dated 18.04.2012 & Order No. 338 dated 04.05.2012. Against these refund orders passed by the Maritime Commissioner, Raigad, the applicant has filed refund claims before the Assistant Commissioner, Vapi on 04.09.2012. Government observes that both the "refund claims" have been filed beyond the statutory period of sixty days and the possible extension of a further period of thirty days allowable at the discretion of the Commissioner(Appeals) under Section 35 of the Central Excise Act, 1944. Assuming without admitting that the applicant has pursued their remedy before the wrong forum, it would still be beyond the maximum time limits specified under Section 35 of the Central Excise Act, 1944 and would therefore be hit by limitation. These facts bear out the observations of the JAC in her letters dated 7.11.2012. In this light, the various decisions in the judicial forum which hold that the time taken in pursuing appeal before a wrong forum would be condonable will not apply as the applicant had filed the refund claims before the JAC after the statutory time limit of ninety days for filing appeal before the Commissioner(Appeals). By that analogy, even if the applicant had correctly filed appeals on 04.09.2012 before the Commissioner(Appeals-II), Mumbai, the appeals would not have survived in view of the judgment of the apex court in the case of Singh Enterprises[2008(221)ELT 163(SC)]. The filing of the refund claims before the JAC will not come to the rescue of the applicant.

8.4 In addition to the observations recorded above, it is relevant to note that the applicant had filed appeals against similar orders of the Maritime Commissioner – Deputy Commissioner(Rebate), Raigad which were decided vide OIA No. US/777 to 779/RGD/2012 dated 14.11.2012. In virtually identical circumstances where the rebate sanctioning authority had partly sanctioned rebate claims to the extent of duty payable on FOB value, the

applicant had filed appeal before the Commissioner(Appeals) with a specific request to allow the rejected amount as re-credit in CENVAT account and the Commissioner(Appeals) had thereupon allowed their plea. The said OIA also records the applicants submission that the Assistant Commissioner, Central Excise, Belapur-III Division vide Order No. Belapur/Div-BelIV/R-III/R-1298/VN/AC/2011 dated 12.12.2011 passed in case of Apar Industries had allowed restoration of the amount not sanctioned as rebate. These facts bear two facts; viz. that the applicant had in the past received re-credit of the amount not sanctioned as rebate in their CENVAT account from the original authority and they were also aware of the fact that the remedy for them against an order of the Maritime Commissioner in a case where refund of rebate of full amount is not sanctioned was before the Commissioner(Appeals-II), Mumbai.

9. In view of the above discussions, Government upholds the OIA No. SRP/144 & 145/VAPI/2013-14 dated 12.06.2013 and rejects the revision applications filed by the applicant.

10. So ordered.

( SEEMA ARORA )
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No.26-27/2019-CX (WZ) /ASRA/Mumbai DATED 13.09.2019

To,

M/s. Apar Industries Ltd.
A-201/202, 2nd Floor, Bezzola Complex,
Sion-Trombay Road,
Chembur, Mumbai 400 071

Copy to:

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