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SPEED POST**



F.No. 195/1577/12-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue... 01/02/16

ORDER NO. 27/2016-CX DATED 29.01.2016 OF THE GOVERNMENT OF INDIA,
PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF
INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No.239/2012-CE dated 24.08.12 passed by the Commissioner of Central Excise (Appeal-I), Bangalore.

Applicant : M/s Radiall India Pvt. Ltd., Bangalore.

Respondent : Commissioner of Central Excise, Bangalore-II Commissionerate.

ORDER

This revision application is filed by M/s Radiall India Pvt. Ltd., Bangalore against the Order-in-Appeal No.239/2012-CE dated 24.08.12 passed by the Commissioner of Central Excise (Appeals-I), Bangalore with respect to Order-in-Original passed by the Assistant Commissioner of Central Excise, E-1 Division, Bangalore.

2. Brief facts of the cases are that the applicants are registered with Central Excise and engaged in the manufacture of excisable goods and are availing the facility of CENVAT Credit under the CENVAT Credit Rules, 2004. Applicants had filed five rebate claims during the period from 29.6.2010 to 19.8.2010 totaling to Rs.16,60,234/- in respect of clearances made to SEZ unit during the period July 2009 to October 2009. The applicants were found to have cleared excisable goods without payment of duty under UT-1 Bond to the SEZ Unit under Notification No.42/2001-CE (N.T.) dated 26.06.2001 issued under rule 19 of Central Excise Rules, 2002. However, it was found that the applicants have subsequently paid the duty on the said clearances through CENVAT account by making consolidated debit entry at the end of the respective months of clearances and claimed rebate of duty paid on such clearances. In other words in the five rebate claims claimed, the excisable goods have been cleared under UT-1 without payment of duty to SEZ Unit under Rule 19 of Central Excise Rules, 2002 read with Notification No. 42/2001-CE (N.T) elated 26.06.2001 as amended and subsequently duty was paid on such clearances at the end of respective months through Cenvat Credit. It appeared that removal of goods for export without payment of duty under bond is allowed under Notification No.42/2001-C E (NT) dated 26.06.01 issued under rule 19 of the Central Excise Rules, 2002. Whereas the removal of goods for export under claim of rebate is allowed under Notification No. 19/2004-CE (N.T.) dated 06.09.2004 issued under rule 18 of the rules ibid. Therefore it appeared that the applicants cleared the excisable goods to SEZ unit under UT-1 Bond without payment of duty under the Notification No.42/2001 CE(N.T.) dated 26.06.2001 and not under the Notification No.19/2004-CE(N.T) dated 06.09.2004 under claim of rebate. As such, it appeared that the applicants have not fulfilled the conditions and limitations prescribed under Notification No.19/2004-C.E (N.T) dated 06.09.2004 issued under Rule 18 in respect of clearances to SEZ under the said ARE -1s as the excisable goods were originally cleared without payment of duty under Bond. Accordingly, the applicants were issued with 5 Show Cause Notices proposing to reject the rebate claims. The adjudicating authority after following the principles of natural justice in the impugned order, rejected the 5 rebate claims under the provisions of section 11B of the Central Excise Act, 1944 read with Rule 18 of Central Excise Rules, 2002 and Notification No. 19/2004-CE (N.T.) dated 06.09.04 issued under Rule 18.

3. Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioner (Appeals), who rejected the same.

4. Being aggrieved by the impugned Order-In-Appeal, the applicant has filed this Revision Application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 The Commissioner (Appeals) has failed to appreciate that once the factum of payment of duty on the goods "exported" to SEZ Units has been unequivocally accepted, it is not possible to say that the goods were cleared under 'Bond'. The payment of duty changes the character of exported goods from clearance under 'bond' to 'duty paid'. This is purely a question of fact.

4.2 The Commissioner (Appeals) has failed to appreciate that Rule 30 of the SEZ Rules, 2006 states that the DTA supplier supplying goods to a Unit or Developer shall clear the goods, as in the case of exports, either under Bond or as duty paid goods under claim of rebate under the cover of ARE 1 referred to in Notification No 42/2001 CE (NT) dated 26.06.2001.

4.3 The Applicants have followed the procedure as prescribed under Rule 30 of the SEZ Rules, 2006 for export of goods to SEZ Units. Notification No. 42/2001 CE (NT) issued under Rule 19; as prescribed in Rule 30 of the SEZ Rules, was followed. There is no reference to Notification No. 19/2004 CE (NT) dated 06.09.2004 in Rule 30 of the SEZ Rules, 2006. Since the Applicants intended to claim rebate of the duty paid on the goods, they paid the duty on the goods supplied to SEZ Units at the end of the month. The Applicants cannot be faulted or denied the substantive export benefit for following the provisions of Rule 30 of the SEZ Rules, 2006.

4.4 The Commissioner (Appeals) in Para 6 has referred to Rule 18 and Notification No 19/2004 CE (NT) dated 06.09.2004, but has failed to show any provision in the said Rule 18 or Notification 19/2004 CE (NT) with respect to supply of goods to SEZ Units. In fact, The Commissioner (Appeals) cannot show any statutory provisions in Rule 18 and Rule 19 of the Central Excise Rules, 2002 or the Notifications issued there under with respect to supply of goods to SEZ Unit or Developer under claim of rebate or any procedure prescribed for the purpose. The same authorities have denied Rebate of the duty paid on the goods supplied to SEZ on the ground that the same did not constitute physical export of goods out of India. Therefore, the authorities could not have offered better clarification. In fact, denial of Rebate of the duty paid on the goods supplied to SEZ on the ground that the goods were not exported out of India is the subject matter of SCN C No V/RP/18/186/09 E1 dated 05.10.2009 and Order-in-Appeal No 241/2012 CE dated 27.08.2012 in respect of the same Applicants which is also being challenged before the Revisionary Authority in a separate Application.

4.5 The issue of supply of goods to SEZ Units under claim for rebate was clouded and confused and was causing serious difficulties to the DTA manufacturers is evident from the CBEC Circular No.6/2010-Cus dated 19.03.2010. The Board has clarified that the clearance of duty free materials for authorized operation in the SEZ is admissible

under Section 26 of the SEZ Act, 2005 and it is only the procedure under Rule 18 or Rule 19 of the Central Excise Rules, 2002 adopted to give effect to the statutory provisions of the SEZ Act, as envisaged under Rule 30 of the SEZ Rules, 2006. Therefore, the rebate under Rule 18 of the Central Excise Rules, 2002 is admissible for supplies made to SEZ. The Board also clarified that since rebate under Rule 18 of the Central Excise Rules, 2002 is admissible for supplies made from DTA to SEZ there is no warrant to change even if Rule 18 does not mention such supplies in clear terms.

4.6 The eligibility for rebate of duty paid is in terms of Rule 30 of the SEZ Rules, 2006 and Rule 18 of the Central Excise Rules, 2002 is admittedly only procedural. The substantive conditions are (i) manufacture and export of goods, and (ii) payment of duty on the goods exported. So long as these substantive conditions are fulfilled, the export incentives cannot be denied even if there are procedural lapses.

4.7 The Hon High Court of Rajasthan in the case of Commissioner Vs. Sun City Alloys Pvt Ltd - 2007 (218) ELT 174 (Raj.) has held that if no duty was leviable and the assessee was not required to pay the duty, but still if the assessee has paid the duty, the Department cannot retain the same on any ground and must refund the amount received from the assessee on their own showing. If on the other hand the assessee is held entitled to remove the goods on payment of duty in the ordinary course and then he is entitled to claim rebate thereon because the goods were exported. In either case the result is the same. Accordingly, the petitions filed by the Commissioner were dismissed.

4.8 The Applicants have been denied the use and enjoyment of the amount of Rs.16,60,234/- from the time of payment of duty and submission of the claims for rebate. The claims for rebate have been rejected in an arbitrary and unjust manner. The Applicants are therefore, entitled to interest under Section 11BB of the Central Excise Act, 1944 for the delay in payment of the rebate amount from the date of expiry of 3 months from the date of submission of application till the date of payment of the rebate amount.

4.9 The applicant has relied upon various case laws in favour of their contention.

5. Personal hearing was scheduled in this case on 15.06.2015, 30.06.2015 & 10.8.2015. Hearing held on 10.8.2015 was attended by Shri Ashish Chaudhary, C.A. on behalf of the applicant who reiterated the grounds of revision application. Nobody attended hearing on behalf of department. However, a written submission by way of comments/counter reply was made vide letter dated 12.6.2015 by the Department reiterating the Order-in-Appeal. It was submitted that for claiming rebate the export of goods should be under Rule 18 ibid and the procedure laid down therein shall be followed. Only then the exporter becomes entitled to rebate. Rule 18 & 19 are not interchangeable nor can be applied at the same. The Commissioner (Appeals)

has rightly observe that every procedure has its own checks and balances which cannot be exercised other than at the relevant point of time. In the instant case, the assessee has chosen to clear the goods under bond by executing the UT-1 bond and clearly certifying in the ARE-1s that the clearances are under Rule 19. The appellants cannot at a later date claim they are entitled to benefit of rebate.

6. 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.

7. On perusal of records, Government observes that the applicants made supply to SEZ under Rule 19 of Central Excise Rules, 2002 under UT-1 Bond. Subsequently, the applicant found to have paid duty on the said clearances through cenvat account by making consolidated debit entry at the end of the respective months of the clearances and claimed rebate of duty paid on such exported goods. Original authority held that whole export has been done under said Rule 19 *ibid*, however, the claim was filed under Rule 18 *ibid*; and as such conditions of the Notification No.19/2004-CE (NT) dated 06.09.2004 issued under Rule 18 *ibid* have not complied with. Accordingly, original authority held rebate claims non-admissible. Commissioner (Appeals) upheld impugned Order-in-Original. Now, the applicant has filed this Revision Application on grounds mentioned in para (4) above.

8 Government observes that exports were made under Rule 19 of the Central Excise Rules 2002. The said Rule 19 reads as under:

"Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification.

Explanation. - "Export" includes goods shipped as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft."

The detailed conditions and procedure relating to export without payment of duty has been provided under Notification No.42/2001-CE(NT) dated 26.06.2001. As such, the export of goods without payment of duty is covered by different set of rule and Notification on compliance of conditions and procedures prescribed therein.

8.1 However, in this case the applicant has claimed rebate of duty under Rule 18 of Central Excise Rules 2002. The said Rule 18 reads as under:

"(1) Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Commissioner.

- (2) Any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Commissioner.
- (3) The export under sub-rule (1) or sub-rule (2) shall be subject to such conditions, safeguards and procedure as may be specified by notification by the Board."

Further, the detailed condition and procedure relating to export of goods under claims of rebate has been provided under Notification No.19/2004-CE(NT) dated 06.09.2004. As such, the export of goods under claim of rebate is subjected to compliance of certain sets of conditions and procedures as envisaged in the said rule/notification.

8.2 Government observes that for the purpose of export of excisable goods Central Excise Rules 2002 provide for the facility of export under claim for rebate under Rule 18 or for export under bond under Rule 19. These two provisions are two different sets of Rules which provide export benefits to the exporters and applies in different circumstances. The exporter is free to opt for any one of these and once anyone of the options is exercised it attains finality and cannot be reverted back subsequently. In this case it is an undisputed fact that the applicant clears the goods under bond and hence exercised the option to export goods under Rule 19 and in a way can now claim benefit of Rule 18.

8.3 As the applicant opted to export the goods under Rule 19 without payment of duty and not under Rule 18 on payment of duty, they failed to comply/follow conditions/procedure prescribed under Notification No.19/2004-CE(NT) dated 06.09.2004. Compliance of these conditions/procedure are substantial in nature and non-adherence to same may lead to denial of rebate claim. In this case mere payment of duty at the end of month on consolidated basis, does not entitle the applicant the rebate claim as the substantial condition of statutory requirements are not met with. It has been rightly held by Commissioner (Appeals) that every system has its checks and balances which cannot be exercised other than at the relevant point of time.

9. Government notes that it is a settled issue that benefit under a conditional notification cannot be extended in case of non-fulfillment of conditions and/or non-compliance of procedure prescribed therein as held by the Apex Court in the case of *Government of India vs Indian Tobacco Association* 2005(187) ELT 162 (SC); *Union of India Vs Dharmendra Textile Processors* 2008(231) ELT (SC). Also it is settle that a notification has to be treated as a part of the statute and it should be read along with the Act as held in case of *CCE Vs Parle Exports (P) Ltd.* 1998(38) ELT 741(SC) and *Orient Weaving Mills Pvt. Ltd. Vs UOI* 1978(2) ELT 311(SC) (Confiscation Branch). Government also finds support from the observations of Hon'ble Supreme Court in the case of *M/s ITC Ltd. Vs CCE* reported as 2004 (171) ELT-433 (SC), and *M/s Paper*

Products Vs CCE reported as 1999 (112) ELT -765 (SC) that the simple and plain meaning of the wordings of statute are to be strictly adhered to. As such there is no force in the plea of the applicant that the lapse should be considered as a procedural one which is condonable in nature. As such, as the applicant did not follow the requirements of the Notification No.19/2004-CE(NT), the rebate claims are rightly held inadmissible.

9.1 The applicant has also alternatively requested for recredit of cenvat credit. In this regard, Government notes that recredit is allowed in the cases where the exporter was not required to pay duty at the time of export, however, he pays the same. Such amount paid by the exporter in his own volition cannot be retained by the Government and it is required to be paid back in the form it has been paid. In this case, the applicant was not required to pay duty and hence, the duty was rightly not paid. The duty was paid subsequently at the end of the month on consolidated basis and such duty cannot be treated at par with duty not payable at the time of export and as such, does not qualify for availing of recredit. As such, applicant's request for allowing recredit is not tenable.

10. In view of above, Government finds no infirmity in order of Commissioner (Appeals) and hence, upholds the same.

11. Revision Application is thus rejected.


12. So, ordered.


(RIMJHIM PRASAD)

Joint Secretary to the Government of India

M/s Radiall India Pvt. Ltd.,
No25-D, II Phase,
Peenya Industrial Area,
Bangalore-38

Attested.


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ORDER NO. 27/2016-CX DATED 29.01.2016

Copy to :

1. Commissioner of Central Excise, Bangalore-II Commissionerate, C.R.Building, P B No. 5400 Queen's Road, Bangalore – 560 001.
2. Commissioner of Central Excise (Appeals-I), Central Excise, 16/1, 5th Floor, S P Complex, Lalbaug Road, Bangalore-560 027.
3. Assistant Commissioner of Central Excise, E-1 Division, No.162/1, 1st Main Road, Seshadripuram, Bangalore-560020
4. M/s T.Rajeswara Sastry & Associates, Advocate, No.48, 11th Main Road, Banashankari II Stage, Bangalore-560070
5. PA to JS (RA)
6. Guard File
7. Spare copy

ATTESTED



(B.P.Sharma)

OSD (Revision Application)

(सहायक निदेशक)
सहायक निदेशक
C.E. (Appeals-I)
दि. 29.01.2016
Ministry of Revenue
भारत सरकार/CC
नई दिल्ली/New Delhi