F NO. 195/763/13-RA

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GOVERNMENT OF INDIA
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F NO. 195/763/13-RA/4694 Date of Issue: 02.09.2021

ORDER NO. 276 /2021-CX (WZ) /ASRA/MUMBAI DATED 25.08.2021 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 Agriguard Manufacturing Pvt. Ltd.

Respondent : Commissioner of Central Excise, Vadodara-I

Subject : Revision Application filed, under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. PJ/130 to 131/VAD-I/2013-14 dated 07.08.2012 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vadodara.

ORDER

This Revision Application is filed by M/s Agriguard Manufacturing Pvt. Ltd., 42/4 & 5, GIDC, Nandesari, District-Vadodara, Gujarat 391 340 (herein after as 'the Applicant') against the Order-in-Appeal No. PJ/130 to 131/VAD-I/2013-14 dated 07.08.2012 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vadodara.

2. In brief, the Applicant holding Central Excise Registration No.AAACKI747RXM001 had filed two rebate claims of Rs 3,50,180/- each both dated 7.5.2012, in respect of duty paid by 100% Export Oriented Underaking (EOU) M/s. Swag Fine Chemicals Pvt. Ltd., Nandesari, District-Vadodaraon on 5400 Litres each of 288GPL Pyridynyloxy Octyl Acetate in Solvesso 100 being their DTA sales, under Rule 18 of the Central Excise Rules, 2002 read with Notification No.21/2004-CE (NT) dated 06.09.2004 as amended. On scrunity of the two claims it was observed that

(a) M/s Sujag Fine Chemicals Pvt. Ltd., had debited

(i) the duty Rs.3,50,180/- (Rs.2,31.316/-(CVD) + Rs.91,800/- (Customs duty) + Rs.18,030/-(Education Cess including Education Cess of Rs 4,627/- on CVD) + Rs.9,014/- (Sec. & Hr Education Cess including Sec & Hr Education Ccss of Rs 2,114/- on CVD) under Debit Entry No 4 dated 19.03.2012 of RG-23A Part-II in respect of Invoice No. 2018 dated 19.03.2012 and cleared excisable goods to the Applicant.

(ii) the duty Rs.3,50,180/- (Rs.2,31.316/-(CVD) + Rs.91,800/- (Customs duty) + Rs.18,030/-(Education Cess including Education Cess of Rs 4,627/- on CVD) + Rs.9,014/- (Sec. & Hr Education Cess including Sec & Hr Education Ccss of Rs 2,114/- on CVD) under Debit Entry No 3 dated 18.03.2012 of RG-23A Part-II in

respect of Invoice No. 2017 dated 18.03.2012 and cleared excisable goods to the Applicant.

(b) It was also appeared that the Applicant had exported

(i) 5400 Litres each of 288GPL Pyridynyloxy Octyl Acetate (288GPL Pyridynyloxy Octyl Acetate in Solvesso 100) involving duty amounting to Rs.2,59,568/-under LUT Invoice No. 508 dated 19.03.2012, ARE-2 No. AGMPL/EX/508 dated 19.03.2012, Shipping Bill No. 8077794 dated19.03.2012, Mate Receipt No. 68684 dated 04.04.2012.

(ii) 5400 Litres each of 288GPL Pyridynyloxy Octyl Acetate (288GPL Pyridynyloxy Octyl Acetate in Solvesso 100) involving duty amounting to Rs.2,59,568/-under LUT Invoice No. 507 dated 19.03.2012, ARE-2 No. AGMPL/EX/507 dated 19.03.2012, Shipping Bill No. 8077782 dated 19.03.2012, Mate Receipt No. 68682 dated 04.04.2012.

(c) It also appeared that there was no difference between the material procured by the Applicant from M/s Sujag Fine Chemicals Pvt. Ltd and material exported by the Applicant. In other words, it appeared that no manufacturing or processing activity had been undertaken by the Applicant and as such conditions of Rule 18 of Central Excise Rules, 2002 read with Notification No. 21/2004-CE (NT) dated 06.09.2004 for grant of rebate claim did not appear to have been complied with by the Applicant. It also appeared that Cenvat Credit under Cenvat Credit Rules, 2004 was also not admissible when no manufacturing or processing is undertaken by the manufacturer/processor.

(d) It also appeared that M/s Sujag Fine Chemicals Pvt. Ltd., and the Applicant had adopted the above modus operandi for claiming the rebate claim under Rule 18 of Central Excise Rules, 2002 read with Notification

No. 21/2004-CE (N.T) dated 06.09.2004 which is otherwise not admissible.

(e) It also appeared that the two rebate claims of Rs.3,50,180/- each includes Rs. 1,11,903/-relating to Basic Customs duty and Education Cess and Secondary and Higher Education Cess leviable thereon, which did not appear debit able from RG-23A Part-II in terms of Rule 3(4) of the Cenvat Credit Rules. 2004 and as such it appeared that the said amount of Rs. 1,11,903/- each had not been paid properly.

(f) Thus, the Applicant's two rebate claims of Rs.3,50,180/- each did not appear to be admissible for rebate on duties except CVD, Ed.Cess and H.Sc.Cess on CVD under Rule 18 of the Central Excise Rules, 2002 read with Notification No.21/2004-CE (NT) dated 06.09.2004 as amended. As other duties Viz Customs duty and Ed. Cess and Secondary and Higher Education Cess leviable other than CVD paid by M/s Sujag Fine Chemicals Pvt. Ltd.. are not specified as duty under Notification No.21/2004-CE (NT) dated 06.09.2004. Moveover restriction imposed under proviso 2 to Rule 3(7)(a) of the Cenvat Credit Rules, 2004 with regard to admissibility of credit to the extend of CVD, Ed.Cess and H.Sc.Cess on CVD, credit of CVD, Ed.Cess and H.Sc.Cess on CVD in respect of Inputs and Capital Goods cleared from EOU supports the view that rebate of duty under Notification No.21/2004-CE(NT) is admissible in respect of CVD, Ed.Cess and H.Sc.Cess on CVD only and no rebate of other duties is admissible.

Hence, the Applicant was issued two Show Cause Notice both dated 17.7.2012. The Assistant Commissioner, Central Excise, Division-IV, Vadodara-I vide Orders-in-Original Nos. Reb/194/AC.DIV-IV/ML/2012-13 and Reb/195/AC.DIV-IV/ML/2012-13 both dated 07.08.2012 sanctioned the rebate of Rs. 2,28,277/- respectively and rejected the remaining rebate of Rs. 1,11903/- respectively under Rule 18 of the Central Excise Rules, 2002 read

with Notification No.21/2004-CE (NT) dated 06.09.2004 and Section 11B of the Central Excise Act, 1944. Aggrieved, with that part of the Orders-in-Original where the rebate claim to the tune of Rs. 1,11,903/- respectively was rejected, the Applicant filed appeal with the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vadodara. The Commissioner(Appeals) vide Order-in-Appeal No. PJ/130 to 131/VAD-I/2013-14 dated 07.08.2012 rejected their appeal and upheld the Orders-in-Original.

3. Aggrieved the Applicant filed the current Revision Application on the following grounds:

(i) The inputs procured by the Applicant from M/s Sujag Fine Chemicals Pvt Ltd. (100% EOU) on payment of DTA rate of duty as applicable under Section 3(1) of Central Excise Act, 1944, were subject to blending and re-packing and re-labeling before being exported. The description of goods remains same but the process of re-packing and re-labeling /blending amounts to manufacturing as per the Chapter Note of Chapter 29 of CETA, 1985.

(ii) The procured goods were further processed in Applicant's factory by blending and repacking in the presence of Superintendent (Technical) from Division-IV Office in 5 Litre PET Bottles, 4 bottles were packed in a box; boxes were loaded into pallets, strapped down and shrink wrapped. So the allegation that there was no manufacturing process is totally un-acceptable in this case. There is value addition due to the processes which further substantiates the Applicant's claim. The description of goods remains same but the process of re-packing and re-labeling /blending amounts to manufacturing as per Section 2(f)(iii) of Central Excise Act, 1944 brings into the ambit of manufacturing the activity of packing in third schedule to make goods marketable to the consumer. The Applicant placed reliance on the case law of in the case of A. V. Industries [2011 (269) ELT 122 (GOI)] in which it is clearly ruled that any

processing including packing and repacking and labeling amounts to manufacturing and is eligible for rebate.

(iii) The Applicant proceeded on this export with procurement and blending and repacking only after getting the approval. The repacking operation was done in the presence of Superintendent (Technical) from Division-IV office. The Actual export had taken place and the rebate claimed on inputs used was not in disputed. This is not the first time the Applicant had claimed input stage rebate. They had already claimed the rebate amount on six occasions with approval of Department. The details of the Order-in-Original are as give below:

(a) OIO No. REB/436/AC.DIV.IV/BP/2011-2012 dated 11.08.2011;
(b) OIO No. REB/437/AC.DIV.IV/BP/2011-2012 dated 11.08.2011;
(c) OIO No. REB/489/AC.DIV.IV/BP/2011-2012 dated 07.09.2011;
(d) OIO No.REB/490/AC.DIV.IV/BP/2011-2012 dated 07.09.2011;
(e) OIO No. REB/539/AC.DIV.IV/BP/2011-2012 dated 27.09.2011;
(f) OIO No. REB/540/AC.DIV.IV/BP/2011-2012 dated 27.09.2011.

(iv) In the current case, the input stage rebate had been claimed only after the department fixed the quantum of rebate in their case. The facts of all of the Orders-in-Originals referred above are the same and full refund in case had been granted on Cenvat credit available to a person procuring such goods from EOU description in Rule 3(7)(a) of Cenvat Credit Rules, 2004. The Applicant had procured semi finished goods from M/s Sujag Fine Chemicals Pvt. Ltd. (100% EOU). On the inputs purchased from them, they charged the Applicant duties as applicable to EOU on their DTA Sales.

(v) The term duty involves any Central Excise Duty leviable under Central Excise Act. 1944. The duty of Central Excise as referred to in Notification No. 21/2004-CE(NT) and Section 11B includes all forms of Central Excise Duties including CVD on imports. Rule 18 says *"the duty paid on goods exported and duty paid on materials used in the manufacture or*

processing of such goods is to be rebated." It refers to duty paid without qualifying the type of duty paid and hence covers whole of the duties Excise and Custom duties. CBEC Board Circular No. 83/2000-Cus, dated 16.10.2000 pertaining to cash refund of unutilized Cenvat credit clearly states *"In terms of Customs and Central Excise Duties Drawback is allowed to the exporter for the duties of Customs and Central Excise suffered on the imported or indigenous inputs used in the manufacture of the export product for which no relief is otherwise available."* Duty Drawback and the Duty Rebate are nothing more than two alternate schemes available to the exporters.

(vi) The amount of credit that can be taken by the buyer from 100% EOU credit issue was settled by the Notification No. 22/2009-CE(NT) dated 07.09.2009. This is the latest amendment in the Rule 3(7)(a) of the Cenvat Credit Rules, 2004. This Notification adds proviso to this rule which prescribed a clear and unambiguous language which says that that the amendment is meant for the EOUs/EHTP/STP units paying excise duty leviable under Section 3 of the Excise of the Excise Act read with serial number 2 of the Notification No. 23/2003-CE dated 31.03.2003. The amendment seeks to provide credit of CVD, SAD and final EC and SHEC. This it is clear that the total of all duties charged by EOU on their DTA clearances can be treated as Central Excise duties and EOU are allowed to pay by debit to Cenvat Credit Account. In support of Applicant's claim, they relied on the case laws:

(a) in case of Simplex Pharma (P) Ltd. vs. C.C.EX, Delhi III [2006 (205) E.L.T. 296 (Tri-Delhi) wherein the Hon'ble Tribunal has been observed *"It can be seen the sub-section 2(A) of section 11B categorically states that the rebate of duty of excise on good exported or on excisable materials used in the manufacture of goods, which were exported, are eligible for refund. Further the explanation also very categorically states that 'refund' includes rebate of duty as well as the duty of excise on excisable materials."* This order was

challenged by Revenue in Punjab and Haryana High Court and again was ruled in favour of the assessee -2008 (229) ELT 504 (P & H High Court).

(b) Hyundai Motor India Ltd. Vs. Commissioner of C. Ex., Chennai [2007 (220) ELT 162 (Tri.Chennai). The Hon'ble Tribunal has taken a view that the duty paid by a 100% EOU on DTA clearances is simply a duty of Excise under Section 3 of Central Excise Act, 1944. Only quantum of duty is prescribed as aggregate of duties of customs. Going by this analogy, the Chennai Tribunal has allowed the credit of entire duty paid by EOU.

(c) India Japan Lighting Ltd. vs. CCE, Chennai [2004 (064) RLT 0166 (Cestat-Chennai)]

(d) PepsiCo India Holdings Ltd. Vs. Commissioner of C. Ex., Mumbai-II [2001 (130) ELT 951 (Tri. Mumbai)].

(vii) Excise Duty to be paid by EOU for DTA sale would be applicable Customs duty payable on similar goods if the said goods were to be imported as per Section of Central Excise Act,1944. It should be clear that what their 100% EOU supplier has done is correct under the existing Central Excise Rules. They are entitled to debit entire amount of duty in their Cenvat Credit Account and the whole of the duty can be treated as Central Excise duty even the part in place of BCD. However, this pertains to supplier it cannot be discussed in this application.

(viii) The fact remains that the Applicant had properly claimed the rebate of duty paid on inputs and they are entitled to the rebate of the total of all duties paid on the inputs used in the manufacture/processing of export product as in the past, as the duty paid by EOU is a duty under the Section 3 of Central Excise Act,1944.

(ix) The Applicant had initiated the rebate claim procedure at input stage only after the Department approved the procedure, and allowed rebate in their six previous cases. They are sure that they all have been audited as well and approved. It seems that the Department wants to revisit settled issues by their own office of eligibility of rebate of whole of duty which is illogical and against natural justice.

(x) The Applicant is confident that this is the correct and valid procedure as prescribed by the Department and followed by them scrupulously and that they are entitled to rebate of whole of duties paid at input stage under Section 3 of Central Excise Act, 1944, against the export consignment cleared under ARE-2 Nos. AGMPL/EX/507 and AGMPL/EX/508 both dated 19.03.2012.

(xi) The Respondent had not applied his mind while deciding the appeal as can be seen from Para 5 of the impugned Order-in-Appeal- *"....I find that the issue to be decided in the present case is whether C. Ex. Duty could be debited from RG23A Pt II out of Cenvat Credit taken on Basic Customs Duty and Education Cess and Secondary and Higher Secondary Education Cess leviable thereon in terms of Rule 3(4) of Cenvat Credit Rules,12004 and notification no. 21/2004-CE (NT) dated 06.09.2004 or otherwise."* This is absolutely wrong as here the issue is related to input stage duty rebate which has no correlation to Cenvat credit. Hence this application is being made to rectify the fault stand taken by the Respondent just to make an issue out of nothing.

(xii) Further in PARA 5.5 of the impugned Order-in-Appeal, the Respondent has again tried to create a different interpretation of the case law to the favour of revenue without even understanding the intent of the Hon'ble High Court. As the Applicant was not claiming Drawback, the rebate incentive would be eligible for the total dutv_paid by the supplier under Rule 18 of Central Excise Rules, 2002.

(xiii) The Applicant places reliance on the Hon'ble Madras High Court judgment dated 30.11.2012 in W.P.No.5667 of 2012 - M.P.No.1 of 2012- M/s Orchid Health Care Vs UOI where EOU is held to be eligible for rebate of duty paid on final product.

> *"Central Excise — 100% EOU — Finished goods exported under claim of rebate under Rule 18 of the Central Excise Rules, 2002 — Denial of rebate — Revenue is bound to refund the rebate payable to the petitioner, in cash, subject to certain conditions to safeguard the interests of the respondent department - In view of the fact that the petitioner had paid the excise duty on the goods exported by it, and as it may not be of use to the petitioner if the respondent department keeps the amount of rebate claim in credit, as the petitioner does not have local sales, the respondent department is directed to refund the duty paid by the petitioner, on the goods exported by it, as expeditiously as possible, subject to certain conditions, which may be necessary to safeguard the interests of the respondent Department."*

Similarly, in the Applicant's case, when the EOU had paid duty on DTA clearance, the DTA unit should be eligible for rebate of input stage duty.

(xvi) The Applicant prayed that the impugned Order-in-Appeal be set aside and quashed to the extent of amount rejected by the Respondent.

4. Personal hearing in this case was fixed on 22.05.2018, 26.08.2019 and 17.09.2019, no one appeared for the hearing. In view of change in Revisionary Authority, hearing in the matter was fixed on 02.02.2021, 16.02.2021, 18.03.2021 and 25.03.2021, however no one attended the hearing. Hence the case is taken up on merits.

5. Government has carefully gone through the relevant case records available in case files, oral & written submissions/counter objections and perused the impugned Order-in-Original and Order-in-Appeal.

6. On perusal of the records, Government observes that the Applicant had filed two rebate claims of Rs.3,50,180/- each which includes Rs. 1,11,903/- each relating to Basic Customs duty and Education Cess and Secondary and Higher Education Cess leviable. The Assistant Commissioner, Central Excise,

Division-IV, Vadodara-I vide Orders-in-Original Nos. Reb/194/AC.DIV-IV/ML/2012-13 and Reb/195/AC.DIV-IV/ML/2012-13 both dated 07.08.2012 sanctioned the rebate of Rs. 2,28,277/- each and rejected the remaining rebate of Rs. 1,11903/- each under Rule 18 of the Central Excise Rules, 2002 read with Notification No.21/2004-CE (NT) dated 06.09.2004 and Section 11B of the Central Excise Act, 1944 on the grounds that additional duty leviable under Sub-section (5) of Section 3 of the Customs Tariff Act, and the Education Cess and Secondary and Higher Education Cess leviable thereon and Cenvat credit of Basic Customs Duty and Education and Secondary and Higher Education Cess leviable thereon are not admissible. Aggrieved with that part of rejection of rebate claims of Rs. 1,11903/- each, the Applicant filed appeal before the Commissioner(Appeal). The Commissioner(Appeals) rejected their appeal.

7. Government has examined the matter and it is found that the rebate of duty of Rs. 1,11903/- each has been rejected on the ground that the said duty comprised of Basic Customs duty and Education and Secondary and Higher Education Cess and there is no provision of granting rebate of duty in respect of Basic Customs duty. The Applicant has vehemently contested the above line of view taken by the lower authorities and they have claimed that the total duty paid in respect of inputs procured from 100% EOU is duty of Central Excise and consequently rebate in respect of full excise duty is admissible to them under Rule of Central Excise Rule, 2002 and Notification No. 21/2004-CE(NT) dated 06.09.2004.

8. The Government finds that the lower authorities have confused the Central Excise duty paid by the Applicant in respect of inputs as Customs duty for the reason that measure of levy of Central Excise duty on the goods manufactured by the 100% EOU is equivalent to the aggregate of the Customs duty under Section 3 of the Central Excise Act. But for this reason alone the Excise duty leviable on such goods cannot be misconstrued as duty of Customs and the legal reality is that the duty levied on the goods manufactured by 100% EOU to the DTA is a duty of Excise not a duty of Customs on account of a

measure being Customs duty provide in proviso to Section 3(1) of the Central Excise Act.

9. In this regard it is noticed that while deciding an identical issue, the Hon'ble Cestat, South Zonal Bench, Bangalore in the case of Molex (India) Pvt. Ltd Vs Commr. of C.Ex. Bangalore-1 [2016 (341) ELT 463 (Tri. Bang.)] has held that:

> *"4.1 On perusal of the bare provisions as cited supra and the interpretation given to these provisions by the decisions cited supra, we find that the duty charged by an EOU is a duty of excise charged by 100% EOU and the amount of duty charged is one single amount and does not contain any bifurcation as to basic custom duty, additional duty of customs, etc. We also find that the invoices issued by the 100% EOU indicate excise duty as per the proviso to Section 3(1) of the Central Excise Act where only Central Excise duty has been prescribed to be calculated in a particular manner. We also find that Revenue was wrong in further bifurcating the Central Excise duty paid into basic custom duty and education cess. Though the method used for calculating the measure of such excise duty was also to include element of customs duties but the entire duty paid on the invoices will have to be considered as Central Excise duty paid under Section 3(1) of Central Excise Act. Therefore keeping in view the material on record and judgments cited supra which squarely covers the case of the appellant in his favour, we set aside the impugned order by allowing the appeal with consequential relief, if any."*

Accordingly, the Government is fully convinced that entire duty paid by the Applicant in respect of the inputs is duty of Excise duty only and the rebate of the same is allowed are Rule 18 of the Central Excise Rules, 2002 and Notification No. 21/2004-CE(NT) dated 06.09.2004 as the compliance of these two governing provision are not doubted by the lower authorities also in this case. The splitting of the Central Excise duty into Basic Customs duty and Education and Secondary and Higher Education Cess and to confuse the entire matter was wholly unwarranted. Further the Government's policy enshrined in the Rule 18 and Notification No. 21/2004-CE(NT) is that no tax should be exported along with goods. Therefore, the Government is convinced that Commissioner(Appeals) has passed an erroneous order by disallowing the

rebate of duty of Rs. 1,11903/- and Rs. 1,11903/- respectively to the Applicant for the aforesaid untenable reason.

10. In view of the above position, Government sets aside the Order-in-Appeal No. PJ/130 to 131/VAD-I/2013-14 dated 07.08.2012 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vadodara and remands the matter to original authority who shall pass the order within eight weeks from the receipt of this order.

11. The Revision Applications filed by the Applicant is allowed.

25/8/21

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

ORDER No.276/2021-CX (WZ) /ASRA/Mumbai Dated 25.08.2021

To,
M/s Agriguard Manufacturing Pvt. Ltd.,
42/4 & 5, GIDC,
Nandesari, District-Vadodara,
Gujarat 391 340.

Copy to:

1. The Commissioner of CGST, Vadodar-I, GST Bhavan, Race Course, Vadodara, Gujarat 390 007
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Spare Copy.