

REGISTERED SPEED POST AD



**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. 195/210/2013-RA / 5865

Date of Issue: 12/12/19

ORDER NO. 279/2019-CX (WZ) /ASRA/MUMBAI DATED 03.12.2019 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, Bezzola Complex,
2nd Floor, Sion-Trombay Road,
Chembur, Mumbai - 400 071

Respondent : Commissioner of Central Excise, Raigad

Subject : Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against OIA No. US/750/RGD/2012 dated 31.10.2012 passed by the Commissioner (Appeals-II), Central Excise, Mumbai.

ORDER

This revision application has been filed by M/s Apar Industries Ltd., A-201/202, Bezzola Complex, 2nd Floor, Sion-Trombay Road, Chembur, Mumbai 400 071(hereinafter referred to as "the applicant") against OIA No. US/750/RGD/2012 dated 31.10.2012 passed by the Commissioner(Appeals-II), Central Excise, Mumbai passed by the Commissioner(Appeals-II), Central Excise, Mumbai.

2.1 M/s Uniflex Cables Ltd. having their factory at 158-163, GIDC, Umbergaon, District Valsad, Gujarat 396 171 was a company registered under Companies Act, 1956 registered with Central Excise and were engaged in the manufacture and export of "Power Cables & Aluminium Conductors" falling under chapter sub-heading no. 8544 1990 & 7614 1000 of the First Schedule to the Central Excise Tariff Act, 1985. The said factory had removed goods for export during the period from 23rd August 2010 to 26th November 2010 in respect of actual export made during the period between 4th September to 1st December 2010.

2.2 The said company M/s Uniflex Cables Ltd. were declared a sick unit by the order of BIFR dated 13.09.2012 and were amalgamated and merged with M/s Apar Industries Ltd. followed by the transfer of all its assets and liabilities with immediate effect therefrom. Although the period of dispute in the present case relates to the period prior to amalgamation order passed by the BIFR, the present Revision Application has been filed after amalgamation and merger by M/s Apar Industries Ltd.(hereinafter referred to as "the applicant").

3.1 The applicant had cleared the excisable goods for export from their factory at Umbergaon, Gujarat during the period between 23rd August 2010 to 26th November 2010 under various ARE-1 forms on payment of applicable central excise duty totaling to Rs. 79,24,729/- under claim of rebate in terms of Rule 18 of the CER, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004.

The said goods were physically exported/shipped immediately thereafter by 01.12.2010 under various shipping bills generated in EDI system.

3.2 The applicant claimed that while clearing the goods for export from the factory at Umbergaon, the EDI shipping bills which were supposed to be made in DEPB scheme as DEPB shipping bills were inadvertently filed in DBK scheme as Drawback shipping bills. They submitted that they became aware of this mistake only when the drawback amount was credited in their bank account as per the procedure and provisions of the Customs and Central Excise law. The applicant stated that they had immediately after receipt of the original documents such as original shipping bills, original ARE-1, Mate Receipt etc. submitted a request under their letter dated 18.01.2011 to the Customs Authorities for conversion of the shipping bills from Drawback to DEPB shipping bills in terms of CBEC Circular No. 36/2010-Cus dated 23.09.2010.

3.3 It was submitted that in terms of the provisions of the then existing rules read with Section 11B of the CEA, 1944, the exporter was required to file rebate claim either to the jurisdictional central excise authority or the Office of the Maritime Commissioner in the prescribed Form-R together with the relevant documents including original ARE-1 within a period of one year from the date of shipment. In the present case, since the last shipment was made on 01.12.2010, the rebate claim was required to be submitted latest by 01.12.2011. Since correction/amendment/conversion was required to be done in the shipping bills, it was necessary for the applicants to submit all the original documents including original ARE-1 back to the customs. The said documents were submitted to customs on 18.01.2011 and even thereafter there were nearly 10-11 months available for Customs to do the needful to enable the applicants to file rebate claim before the rebate sanctioning authority.

3.4 The applicant submitted that the Customs Authorities had returned the original ARE-1 to them only in the first week of March 2012, after more than one

year but retained the original shipping bills pending for conversion/amendment. The applicants had immediately tried to file rebate claims before the jurisdictional AC which were rejected. They later on filed the rebate claim before the Maritime Commissioner. Both the authorities had rejected the claim on the ground of limitation, totally ignoring the fact that there was delay in providing the original shipping documents to the applicants by the Customs, an aspect which the applicant had no control over. The applicant submitted that it was wholly on account of this delay on the part of customs that the claims could not be submitted on time.

4. Based on the rejection order cum letter F. No. V/15- /Reb/Uniflex Cables/Rgd/2011-12 dated 23.05.2012 issued by the Superintendent of Central Excise(Rebate), Maritime Commissionerate Office, the applicants preferred appeal before the Commissioner of Central Excise(Appeals), Mumbai Zone-II. The Commissioner(Appeals) also rejected and dismissed the appeal vide Order-in-Appeal No. US/750/RGD/2012 dated 31.10.2012.

5. Aggrieved by the order of the Commissioner(Appeals), the applicant filed revision application on the following grounds:

- (i) The original documents had been submitted to Customs for amendment/correction/conversion on 18.01.2011. The ARE-1 was returned to the applicants only in the first week of March 2012 after more than a year. They therefore contended that limitation should be counted from the date of receipt of the original documents from Customs.
- (ii) They submitted that immediately on receipt of the documents from Customs, they had filed the rebate claim. When the rebate claim was not accepted by the Department, they submitted the rebate claim by courier on 03.05.2012 which was acknowledged by the Department on 07.05.2012 which was within the period of limitation as contended by them.

- (iii) They submitted that there was no dispute about export or the duty paid nature of the goods. All the required documents were submitted to the rebate sanctioning authority. There was substantive compliance of the requirements for filing rebate claim and therefore the rebate claim could not have been rejected on limitation as it was the Customs Authorities who had not provided original documents to the applicant in time.
- (iv) Rule 18 and Notification No. 19/2004-CE(NT) do not prescribe any time limit for filing rebate claim. They submitted that the interpretation of the Madras High Court and the Supreme Court was that the period of limitation is purely a legislative function and that the contrary view of the Bombay High Court was not in consonance with law.
- (v) The applicant further submitted that Notification No. 19/2004-CE(NT) and Rule 18 had consciously omitted time limit. It was further opined that the courts must interpret law as it exists and cannot supply deliberate omission.
- (vi) The applicant observed that Section 11B provides time limit for filing rebate claim. Section 11B, the rules and the circulars stipulated the documents to be filed. In the absence of such documents, the rebate claim could not have been filed.
- (vii) The applicant submitted that they were diligent in submitting the claim as soon as the original documents were received from the Customs Department.
- ~~(viii)~~ The applicant submitted that there are a plethora of judgments holding that submission of required documents & filing claim within time were procedural requirements and cannot take away substantive right of rebate.
- (ix) Section 11B provides time limit of one year. But Rule 18 read with Notification No. 19/2004-CE(NT) does not provide any time limit & therefore Section 11B does not have application in the present case.
- (x) They submitted that the scheme of rebate on export of goods independent & self-contained scheme embodied in Rule 18.

- (xi) Notification No. 41/94-CE(NT) dated 12.09.1994 issued under Rule 12(a) of the CER, 1944 in clause (iv) embodies the time limit. But proviso to Rule 12(1) provides for waiver of conditions including time limit by Commissioner or Maritime Commissioner when proof of export is filed with rebate claim.
- (xii) Notification No. 40/2001-CE(NT) dated 26.06.2001 did not contain time limit and hence waiver was not debarred.
- (xiii) As per para 8 of judgment in the case of Dorcas[2012(281)ELT 227(Mad)], there is a conscious omission of time limit in Notification No. 19/2004-CE(NT).
- (xiv) They placed reliance upon the judgment in the case of Uttam Steel Ltd. vs. UOI[2003(158)ELT 274(Bom)] wherein it was held that law of limitation was only procedural and not substantive law. Therefore, a rebate claim filed beyond time limit would not lapse. It was pointed out that the said judgment pertained to the period when Notification No. 41/94-CE(NT) dated 12.09.1994 was prevailing whereas Notification No. 19/2004-CE(NT) dated 06.09.2004 does not prescribe time limit.
- (xv) The judgement in the case of Dorcas Market Makers Pvt. Ltd.[2012-TIOL-108-HC-MAD-CX] was relied upon to lend strength to the argument that limitation under Section 11B will not apply to rebate claim under Notification No. 19/2004-CE(NT) dated 06.09.2004.
- (xvi) It was submitted that the judgments of the Supreme Court in the case of Miles India Ltd., Doaba Co-op. Sugar Mills, Kirloskar Pneumatic Co. and Kashyap Engg. & Metallurgical Pvt. Ltd. relied upon by the lower authority was not relevant as the in the said judgments, the documents were received well within the period of limitation from the customs from customs but the claimant could not submit their claim in time or within the period of limitation to the Department and hence the court had held that the provisions of the Act were required to be strictly followed whereas in the case of the present applicant, the customs authority had failed to return the original shipment documents(including original ARE-1 etc.) to

the applicants within time and hence the applicant could not file their claims within the period of limitation.

(xvii) They placed reliance upon the judgment of the Gujarat High Court in the case of Cosmonaut Chemicals vs. UOI[2009(233)ELT 45(Guj)] wherein it was held that limitation is to be considered in the light of availability of requisite documents and that the claim cannot be rejected on limitation when there was a delay on the part of the customs in providing copy of documents.

(xviii) The applicant submitted that the Customs Authority had returned the original documents to the applicants only in the first week of March 2012 and hence the period of limitation is to be counted from the date of receipt of the said document from the customs. They therefore contended that they had filed the claim well within the period of limitation.

(xix) The applicant submitted that the Superintendent(Rebate), Central Excise & Customs, Raigad had no power of adjudication delegated to him by the Board. Since the Superintendent(Rebate) had no powers of adjudication, the letter issued by him was without jurisdiction and therefore a nullity; that it should correctly have been vacated by the learned lower appellate authority.

6. During the personal hearing granted to the applicant on 26.08.2019, Shri I. C. Thakur, GM, Indirect Taxation appeared on behalf of the applicant and handed over written submissions. He stated that documents had still not been received from the Department. The relevant documents were received by them on 08.03.2012 & they had filed revised claim on 12.03.2012. He submitted that the Department was wrongly calculating limitation from the date of shipment & not the date of receipt of the documents. In the written submissions, the applicant reiterated their grounds of revision.

7. Government has carefully gone through the relevant case records and perused the impugned order-in-original and order-in-appeal. The

facts of the case are that the applicant had exported goods under shipping bills which were inadvertently filed in DBK scheme instead of DEPB scheme. The applicant immediately paid back the drawback amount received by them alongwith interest and then filed request with the Customs Authorities for conversion of the shipping bills from Drawback to DEPB shipping bills on 18.01.2011. For correction/amendment/conversion of the shipping bills, the applicant was required to submit all the original documents including original ARE-1 back to Customs. Subsequently, when the original ARE-1 was returned to the applicant by the Customs Authorities in the first week of March 2012, the applicant immediately filed rebate claims on 03.05.2012; which was acknowledged by the Department on 07.05.2012. The rebate claim filed by the applicant was rejected by the lower authorities as being time barred as it had been filed after one year of the date of shipment of these goods.

8.1 Rule 18 of the CER, 2002 has been made by the Central Government in exercise of the powers vested in it under Section 37 of the CEA, 1944 to carry into effect the purposes of the Central Excise Act, 1944 including Section 11B of the CEA, 1944. Moreover, the Explanation (A) to Section 11B explicitly sets out that for the purposes of the section "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India. The duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India covers the entire Rule 18 within its encompass. Likewise, the third proviso to Section 11A(1) of the CEA, 1944 identifies "rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India" as the first category of refunds which is payable to the applicant instead of being credited to the Fund. Finally yet importantly, the Explanation (B) of "relevant date" in clause (a) specifies the date from which limitation would

commence for filing refund claim for excise duty paid on the excisable goods and the excisable goods used in the manufacture of such goods. It would be apparent from these facts that Section 11B of the CEA, 1944 is purposed to cover refund of rebate within its ambit. If the contention of the applicant that Section 11B is not relevant for processing rebate claims is accepted, it would render these references to rebate in Section 11B superfluous.

8.2 Moreover, Section 37 of the CEA, 1944 by virtue of sub-section (2)(xvi) through the CER, 2002 specifically institutes Rule 18 thereof to grant rebate of duty paid on goods exported out of India. Notification No. 19/2004-CE(NT) dated 06.09.2004, Notification No. 21/2004-CE(NT) dated 06.09.2004 have been ~~issued under Rule 18 of the CER, 2002 to set out the procedure to be followed~~ for grant of rebate of duty on export of goods.

9. Since it is unambiguously clear that the limitation under Section 11B applies to export of goods under claim of rebate, the next issue that arises is whether the non-availability of documents would have the effect of postponing such "relevant date". Government infers that in the normal course any diligent applicant would try and ensure that their rebate claim would be lodged within time. Therefore, the applicant should have filed the rebate claim within one year of date of shipment of the goods with the available documents and photocopies of documents which had been submitted ~~by them to the~~ Customs Authorities. Such timely action on their part would have ensured that the rebate claim was not time barred. Even if the claim was returned by the rebate sanctioning authority for deficiency in the documents submitted, the applicant could have established their entitlement to the rebate claimed as and when the proper documents were received. In such a case, their rebate claim would be deemed to have been filed in time. Para 2.4 of Chapter 9 of the CBEC's Excise Manual of Supplementary Instructions, 2005 in

very explicit terms provides for such exigencies. The text thereof is reproduced below.

“2.4Even if claim is filed by post or similar mode, the claim should be rejected or returned with Query Memo(depending upon the nature/importance of document not filed). The claim shall be taken as filed only when all relevant documents are available. In case any document is not available for which the Central Excise or Customs Department is solely accountable, the claim may be received so that the claimant is not hit by limitation period.”

10. The applicant in the present case has failed to file rebate claim within time. Government had In Re: Dagger Forst Tools Ltd.[2011(271)ELT 471(GOI)] where the applicant had filed incomplete documents held that initial date of filing would be the relevant date under Section 11B of CEA, 1944. However, in the present case the applicant has failed to file any rebate claim within the prescribed time limit.

11.1 The applicant has placed reliance upon the judgments in the case of Gravita India Ltd.[2016(334)ELT 321(Raj)], Cosmonaut Chemicals[2009(233)ELT 46(Guj)], Dorcas Market Makers Pvt. Ltd.[2012(281)ELT 227(Mad)], [2015(321)ELT 45(Mad)] and Uttam Steel Ltd.[2003(158)ELT 274(Bom)]. Incidentally, the Special Leave to Appeal(Civil) CC No. 17561 of 2015 filed by the Deputy Commissioner of Central Excise, Chennai against the Judgment and Order dated 26.03.2015 of the Madras High Court in Writ Appeal No. 821 of 2012[2015(321)ELT 45(Mad)] has been dismissed *in limine* by the Supreme Court. With due respect to these judgments of the Hon'ble High Courts relied upon by the applicant, it is observed that these judgments have been delivered in exercise of the powers vested in these courts in terms of Article 226/Article 227 of the Constitution of India. Needless to say, no statute passed by Parliament

or State Legislative Assembly or any existing law can abridge the powers vested in the High Courts which is known as writ jurisdiction of the High Court under Article 226 of the Constitution of India. However, the irrefutable fact in the present case is that the Central Excise Act, 1944 provides for a period of limitation in Section 11B of the CEA, 1944. The powers of revision vested in the Central Government under Section 35EE of the CEA, 1944 are required to be exercised within the scope of the CEA, 1944 which includes Section 11B of the CEA, 1944. In other words, notwithstanding the mitigating circumstances or compelling facts, there can be no exercise of powers in revision outside the scope of the Central Excise Act, 1944. Thus, there is a great difference in the degree of powers exercisable by the High Courts and creatures of statute.

11.2 Be that as it may, the judgment of the Hon'ble Bombay High Court in Uttam Steel Ltd.[2003(158)ELT 274(Bom)] has been reversed by the Hon'ble Supreme Court in Civil Appeal No. 7449 of 2004 decided on 05.05.2015 reported at [2015(319)ELT 598(SC)]. Similarly, the Hon'ble Madras High Court has in its judgment dated 18.04.2017 in the case of Hyundai Motors India Ltd. vs. Dept. of Revenue, Ministry of Finance[2017(355)ELT 342(Mad)] held that the contention that no specific relevant date was prescribed in Notification No. 19/2004-CE(NT) was not acceptable in view of proviso (a) to sub-section (2) of Section 11B of the CEA, 1944.


12.--~~The applicant has made out a feeble ground that Superintendent~~(Rebate), Raigad had no powers of adjudication & hence the letter dated 23.05.2012 was a nullity. It is observed that the Superintendent has returned the rebate claims since they were time barred. Government observes that the Superintendent has merely followed the mandate of para 2.4 of Chapter 9 of the CBEC's Excise Manual of Supplementary Instructions, 2005. On finding that the rebate claims are time barred, he has returned the claim back to the applicant. Since the rebate claims were already time barred, no useful purpose would have been served by retaining the rebate claims as

they could not have been processed for sanction even after receipt of the required documents. Limitation under Section 11B of the CEA, 1944 was not a discrepancy/deficiency condonable by the rebate sanctioning authority and therefore no fault can be found with the letter dated 23.05.2012 returning the claims. Therefore, this ground raised by the applicant in the revision application does not sustain.

13. In the light of the detailed discussions hereinbefore, the Government has come to the conclusion that the applicant has failed to act diligently in as much as they have failed to file rebate claim with the available documents within the statutory time limit of one year from the date of shipment of the export goods. Therefore, the rebate claims filed by the applicant have correctly been held to be hit by bar of limitation by the Commissioner(Appeals) in the impugned order.

14. The Order-in-Appeal No. US/750/RGD/2012 dated 31.10.2012 passed by the Commissioner(Appeals) is upheld. The revision application filed by the applicant is dismissed as being devoid of merits.

15. So ordered.


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

ORDER No. 270/2019-CX (WZ) /ASRA/Mumbai DATED 03.12.2019

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

Copy to:

1. The Commissioner of CGST & CX, Belapur Commissionerate.
2. The Commissioner of CGST & CX(Appeals), Raigad.
3. Sr. P.S. to AS (RA), Mumbai
- ~~4. Guard file~~
5. Spare Copy