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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
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Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 195/373-379/13-RA 235 Date of Issue 11/12/19

ORDER NO. 281-287 /2019-CX (SZ) / ASRA / MUMBAI/ DATED 03.12.2019 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. Carclo Technical Plastics Private Ltd.

Respondent : Commissioner of Central Excise, Bangalore II.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. 459, 460, 461, 462, 464 & 465/2012-CE dated 26.12.201 passed by the Commissioner (Appeals-I), Bangalore.

ORDER

The instant Revision Applications are filed by M/s. Carclo Technical Plastics Private Ltd., Karnataka (hereinafter referred to as "the applicant") against the Order-in-Appeal No. 459, 460, 461, 462, 464 & 465/2012-CE dated 26.12.201 passed by the Commissioner (Appeals-I), Bangalore.

2. The issue in brief is that the applicant, a 100% EOU is engaged in the manufacture of Parts & Accessories for ATM machines classified under Chapter 84 of Central-Excise Tariff Act, 1985. The applicant initially was registered as DTA unit and subsequently converted into 100% EOU with effect from 25.08.2010. The applicant had cleared significant quantity of goods during the period from November 2010 to May 2011 for export or deemed export to other EOU units on payment of duty through Cenvat Credit Account. The applicant had filed seven (7) rebate claims for payment of duty on export clearances under Notification No. 19/2004-CE dated 06.09.2004. Since the EOU unit are exempted from the payment of duties under Notification No. 24/2003-CE dated 31.03.2004 and are not liable to pay duty as per provisions of Section 5A(1A) of the Central Excise Act, 1944, the Department issued Show Cause Notices stating that the payment of duties on exports and claiming of rebate subsequently is contrary to said provisions.

3. The Adjudicating Authority rejected all seven claims filed by the applicant and imposed penalty in each case on following grounds :

3.1 The applicant converted their existing unit into 100% EOU on 25.08.2010 and to that effect a new registration was obtained. Being 100% EOU, the applicant is well aware that by virtue of Notification No. 24/2003-CE dated 31.03.2003 read with Section 5A(1A) of CEA, 1944 goods manufactured by them are exempted from payment of whole of duty of excise.

3.2 As for the irregular availment / utilization / transfer of Cenvat credit lying in balance of the assessee as 100% EOU as alleged in the SCN, no evidence is forthcoming on records to establish that the applicant has not utilized the balance of Cenvat credit in their Cenvat Credit Account for payment of duty on the goods exported for which they have claimed rebate.

3.3 The Additional Commissioner, Central Excise, Bangalore-II Commissionerate held that the assessee was ineligible to avail the Cenvat credit lying in balance in their erstwhile unit and confirmed the demand. It is thus evident that subject exports are made without payment of appropriate Central Excise Duty.

4. Being aggrieved, the applicant filed appeal before Commissioner (Appeals-I), Bangalore. The Appellate Authority while rejecting the appeal, observed that :

4.1 There is no condition in the Notification No. 24/2003 CE(NT) for availing exemption to goods manufactured by 100% EOU and cleared for export. Therefore, provisions of sub section (1A) of Section 5A of CEA, 1944 are applicable and no duty is required to be paid on such exported goods. Further, the Board vide Circular No.940/01/211-CX dated 14.01.2011 has clearly stated that the manufacturer cannot opt to pay the duty in respect of unconditionally fully exempted goods and he cannot avail the Cenvat credit of the duty paid on inputs.

4.2 The duty is paid on exports from the credit balance, which they carried forward as opening balance on obtaining registration as 100% EOU unit and not from the input credit earned on and after the DTA unit is converted into 100% EOU unit. When the transfer of credit from DTA unit to 100% EOU unit of the applicant itself is held as irregular, contention that the applicants have paid duty through Cenvat credit balance itself is not acceptable and hence refund of the duty amount said to have been paid does not arise at this juncture.

5. The applicant filed the instant Revision Application on the following grounds :

5.1 The exemption provided under Notification No. 24/2003-CE dated 31.03.2003 is not available in case the goods manufactured by the EOU units are brought to any other place in India. Therefore, the said Notification is not meant for / applicable in case of export of goods. The applicant relied on the following judicial pronouncements for the same.

i) Tab India Granites Private Limited Vs CCE, Chennai [2006(198)ELT 0432 (tri-Chennai)]

ii) Madhav Marbles and Granites Ltd. Vs. CCE, Salem [2009(239) ELT 0120 (Tri. Chennai)]

5.2 Assuming that the aforesaid exemption is applicable even to the export of goods out of India, the provisions of Section 5A(1A) is still not applicable as export of goods without payment of duty requires an assessee to comply with various conditions prescribed under Notification No. 42/2001-CE (NT) dated 26.06.2001 and this would mean that the Notification No. 24/2003-CE dated 31.03.2003 would essentially becomes a conditional Notification rather than exempting the goods absolutely so as to attract the provisions of Section 5A(1A).

5.3 The Notification No. 24/2003-CE exempts the EOU Unit and not the goods per se.

5.4 The assessee is not bound to avail the exemption.

5.5. The applicant relies on the judgement in the case of CCE Vs VIP Industries 1998 (193) ELT 95 (CEGAT) where it was held that conditional exemption is at the option of assessee.

5.6 The language in the Notification No. 24/2003-CE dated 31.03.2003 never indicates that the exemption is mandatory in nature.

5.7 The entire transaction is revenue neutral. The amount of duty paid by the applicant would be in the nature of deposits which is eligible for refund.

5.8 If a dispute is arising out of interpretation of the provisions of statute or exemption notification, no penalty can be imposed.

6. A personal hearing in the matter was fixed on 05.11.2019. Ms. Tripti Dhar, Advocate appeared for hearing on behalf of the applicant. No one from the department's side attended the personal hearing. Ms. Dhar contested the applicability of Notification No. 24/2003-CE dated 31.03.2003 and the penalty imposed by the adjudicating authority. She also mentioned that there is no unjust enrichment in the case.

7. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

8. From perusal of records, Government observes that the applicant has converted their DTA unit into a 100 % EOU with effect from 25.08.2010. It is also observed that the assessee had been issued the SCN cum Demand Notices for availing the ineligible Cenvat Credit lying in balance in their erstwhile unit (DTA). The said demand was confirmed by the adjudicating authority.

9. Government notes that this case matter involves a core issue that as to whether a 100% E.O.U. can pay the Central Excise Duty on the export goods and claim the rebate of duty paid on exported goods under Rule 18 of Central Excise Rules, 2002 keeping in view the provisions of Section 5A(1A) of Central Excise Act, 1944.

10. On perusal of case records, Government observes that applicant a 100% EOU, had exported goods on payment of duty under claim of rebate under Rule 18 of CER, 2002. The adjudicating authority rejected all the claims on the grounds that applicant being 100% EOU enjoyed unconditional exemption under Notification No. 24/03-C.E., dated 31-3-2003 and had no option to pay duty of goods (cleared for export) in terms of provisions of Section 5A(1A) of CEA, 1944. In appeal, Commissioner (Appeals) upheld the impugned order-in-original dated 13-8-2010. Now, applicant has filed this revision application on the grounds stated in para 5 above.

10. Government finds it proper to go through relevant legal provision which are extracted below :-

10.1 Notification No. 24/2003-C.E., dated 31-3-2003 states as follows –

> "In exercise of the power conferred by sub-section (1) of Section 5A of Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby;

(a) Exempts all excisable goods produced or manufactured in an export oriented undertaking from whole of duty of excise leviable thereon under Section 3 of Central Excise Act, 1944 (1 of 1944) and additional duty of excise leviable thereon under Section 3 of Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and additional duty of excise leviable thereon under Section 3 of Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

"Provided that the exemption contained in this Notification in respect of duty of excise leviable under Section 3 of said Central Excise Act shall not apply to such goods if brought to any other place in India ;"

10.2 The Government notes that the only proviso to this Notification is that the exemption is not applicable to such goods if brought to any other place in India. This means that this exemption is not available to the goods cleared for home consumption. The instant case is regarding export of goods and there is no condition specified in this notification with respect to exemption from whole of Central Excise duty on goods exported.

10.3 The Government, therefore, holds that the Notification No. 24/2003-C.E., dated 31-3-2003 is absolute, and unconditional and rightly covered under Section 5A(1A) of Central Excise Act, 1944 which reads as under :

"(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon :

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured (i) in a free trade zone or a special economic zone and brought to any other place in India (ii) by a hundred percent export oriented undertaking and brought to anyplace in India

Explanation :- (1A) for removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods."

10.4 As per explanation 1(A) to Section 5A of Central Excise Act, 1944, the manufacturer of such goods has no option to pay Central Excise Duty since Notification No. 24/2003-C.E., dated 31-3-2003 issued under Section 5(A)(1) of Central Excise Act, 1944 granting unconditional exemption from whole of duty in this case. C.B.E.C. has also clarified vide letter F. No. 209/26/2009-CX., dated 23-4-2010 that Notification No. 24/2003-C.E., dated 13-3-2003 provides absolute exemption to the goods manufactured by EOU and therefore in terms of Section 5A(1A) of Central Excise Act, 1944, EOUs do not have an option to pay duty and thereafter claim rebate of duty paid. As such rebate claim is not admissible in terms of Rule 18 of Central Excise Rule, 2002 read with Notification No. 19/2004-C.E.(N.T.), dated 6-9-2004. Government finds support from the observations of Hon'ble Supreme Court in the cases of *M/s. ITC Ltd.* v. *CCE* reported as 2004 (171) E.L.T. 433 (S.C.), and *M/s. Paper Products* v. *CCE* reported as 1999 (112) E.L.T. 765 (S.C.) that the simple and plain meaning of the wordings of statute are to be strictly adhered to. CBEC has also clarified vide letter F.No. 209/26/09-Cx-6, dated 23-4-2010 (Para 2) as under :-

> "The matter has been examined, Notification No. 24/2003-C.E., dated 13-3-2003 provides absolute exemption to the goods manufactured by EOU. Therefore, in terms of Section 5A(1A) of the Central Excise Act, 1944. EOUs do not have an option to pay duty and thereafter claim rebate of duty paid."

Similar view is taken by Government in its GOI Order Nos. 819-827/2011-CX., dated 24-6-2011 (F. No. 195/282-290/10) and 695/2011-CX., dated 3-6-2011 (F. No. 195/630/2009) [2012 (278) E.L.T. 401 (G.O.I.)].

11. The Government finds that the Rule 17 of Central Excise Rules, 2002 was amended vide Notification No. 18/04-C.E.(N.T.) dated 6-9-2004 to allow EOU/EHTP/STP Units to allow payment of duty on removal of goods in DTA from Cenvat Credit Account also. Since the duty is to be paid only on DTA sales, the Cenvat credit can be utilized only for DTA Sales.

12. Further, Government also observes that the duty paid without the authority of law cannot be treated as duty paid under the provision of Central Excise Act. As such the duty amount debited by the applicant has to

be treated as a voluntary deposit made by applicant with the Government. Government can retain any amount without any authority of law. So, any excess paid amount has to be returned in the manner in which it was paid. 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 as 2009 (235) E.L.T. 22 (P&H) has decided as under :

> " Rebate/Refund - Mode of payment - Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable - Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty - Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate."

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. Government directs that said amount paid by applicant may be allowed to be re-credited in their Cenvat Credit Account. The impugned Order-in-Appeal is modified to this extent. CBEC vide circular No. 940/1/2-11-CX., dated 14-1-2011 has clarified that manufacturer cannot opt to pay duty in respect of unconditionally fully exempted goods and he cannot avail the Cenvat credit of the duty paid on inputs. The instruction of Board are binding on the departmental authorities as held by Hon'ble Supreme Court in the case of *Dhiren Chemical Industries Ltd.* v. *CCE, Vadodara* - 2002 (139) E.L.T. 3 (S.C.).

13. In view of above circumstances, Government finds no infirmity in the impugned Order-in-Appeal and therefore upholds the same to the extent of denial of rebate claims. However the amount paid on duty without any

authority of law being a voluntary deposit may be allowed to be re-credited in their Cenvat credit account. The impugned Order-in-Appeal is modified to the extent.

14. The Revision Application is thus disposed off in terms of above.

15. So, ordered.

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

ORDER No. 281-287 /2019-CX (SSZ) /ASRA/ DATED 31.12.2019

To,

M/s Carlco Technical Plastics Pvt. Ltd.,
No. 27A(2), KIADB Industrial Area,
Doddabhallapur- 561 203.

Copy to:

1. The Principal Commissioner, CGST, Vadodara-I, South C.R. Building, Queen's Road, Bengaluru- 560 001.
2. The Commissioner, CGST (Appeals), No. 16/1, 5th Floor, Sp Complex, Lalbagh Road, Bangalore- 560 027.
3. Sr. P.S. to AS (RA), Mumbai.
4. Guard File.
5. Spare Copy.