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F.No.198/40-42/2012-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: 8/2/16

ORDER NO. 29-31/2016-CX DATED 03.02.2016 OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject	:	Revision Application filed, under Section 35 EE of the Central Excise, 1944 against the Order-in-Appeal No. 245-247/ CE/ Appl/ CHD-II/ 2011 dated 13.12.2011 passed by Commissioner Central Excise (Appeals), Chandigarh-II.
Applicant	:	Commissioner of Central Excise & Customs, Chandigarh-II.
Respondent	:	M/s Ind-Swift Labs Limited.

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ORDER

This revision application is filed by the Commissioner of Central Excise, Chandigarh-II (hereinafter referred to as Department applicant) against the Order-in-Appeal No.245-247/CE/Appl/CHD-II/2011 dated 13.12.2011 passed by the Commissioner of Central Excise (Appeals), Chandigharh-II with regard to Order-in-Original No. R-602-606/DB/2011 dated 13.06.2011 passed by the Deputy/Assistant Commissioner, Central Excise Division Derabassi against M/s Ind-Swift Lab (hereinafter referred to as respondent).

2 The brief facts of the cases are as under:-

2.1. M/s Ind-Swift Laboratories Limited are engaged in the manufacture of excisable goods falling under Chapter heading no. 29, 30 and 33 of the first schedule to Central Excise Tariff Act, 1985 availing Cenvat Credit facility on the inputs, capital goods and input services which are used in or in relation to manufacture of final products under Cenvat Credit Rules, 2004.The respondent in addition to other excisable goods also manufactures Menthol, Menthol Flakes and Menthol Crystals. These products namely Menthol, Menthol Flakes and Menthol Crystals are exempted unconditionally vide Notification No. 4/2006 dated 01.03.2006 as amended vide Notification No. 4/2008 dated 01.03.2008.

2.2. The respondent manufactured (using duty paid inputs/packing material) and cleared consignment of Menthol Crystals[during the period from 27.10.2009 to 19.10.2010]; Menthol Flakes, Menthol Bold Crystals, Rectified Menthol Flakes (Menthol 100% pure) [during the period from 30.01.2010 to 25.09.2010] and Menthol (Mentha Oil Rectified), Menthol Bold Crystals [during the period from 27.04.2010 to 31.10.2010] for export, and filed rebate claims of duty paid on inputs mentioned thereto under the procedure as envisaged under Notification No. 21/2004-CE (NT) dated 06.09.2004 read with Parat V of Chapter 8 of CBEC Supplementary Instructions Manuals on the basis of declaration dated 12.03.2009 in Annexure 24 filed with the adjudicating authority for fixing input output norms.

2.3. The respondent had earlier filed declaration in Annexure 24 dated 12.03.2009 and also submitted letter no. ISLL/Menth/004/09-10 dated 10.08.2009 and sought permission to manufacture export goods in terms of said notification, which was subsequently granted by the Division office, Derabassi vide C.No. V(Misc) Rebate/ Not.21/04/DB/2/2009/2747 dated 19.08.2009 fixing therein input output norms as 1.250 kg DMO: 1.000 kg Menthol on the basis their declaration confirming thereunder mother liquor would not be processed/recycled for obtaining the menthol and would be cleared as De-Mentholized Oil Terpenelss.

2.4. The respondent mis-declared that the waste obtain would not be reprocessed/recycled further to obtain menthol which led to wrong fixation of the

input output norm 1.250 kg DMO: 1.000 kg Menthol by the Division office which in effect was required to be fixed as 1:1 as the respondent was recycling/reprocessing the mother liquor and other wastes to obtain further Menthol.

2.5. Subsequently input output norms fixed earlier as 1.250 kg of De-terpinate Mentha Oil to 1 kg of Menthol and 1.250 kg of De-terpinated Mentha Oil to 1 kg of Menthol Crystals vide letter C.No.V(Misc) Rebate/Not.21/04/DB/2/2009/2747 dated 19.08.2009 for Menthol and vide letter C.No. V(Misc) Rebate/Not.21/04/DB/ 2/2009/408 dated 31.01.2011 for Menthol Crystals, have been revised to 1.000 kg of De-terpinated Mentha Oil to 1 kg Menthol and 1.000 kg of De-terpinated Mentha Oil to 1 kg of Menthol Crystals.

2.6. The respondent thus violated the conditions and procedure laid down under the Notification ibid and cleared quantity of menthol bold crystals and for export without seeking or getting express permission of the Deputy Commissioner of Central Excise and also without fixation of input output ratio in relation thereto. Accordingly, a Show Cause Notice C.No.V(29)18/DB/R/350/11/1836-37 dated 10.05.2011 was issued to the respondent.

2.7. The adjudicating authority vide Order-in-Original No. R-602-606/DB/2011 dated 13.06.2011 rejected all the rebate claims of the respondent holding that they failed to get the input output ratio approved in respect of Menthol Crystals as required under Notification No. 21/2004-CE(NT) dated 06.09.2004 and rebate claim were not admissible to them as they had failed to fulfill the conditions of Notification ibid.

3. Being aggrieved by the said Order-in-Originals, the respondent filed appeal before the Commissioner (Appeals) who vide 245-247/CE/Appl/CHD-II/2011 dated 13.12.2011 allowed the appeal of the party and set aside the Order-in-Original with consequential relief.

4. Being aggrieved by the impugned Orders-In-Appeal, the department has filed this revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:-

4.1. That the Commissioner (Appeals) has grossly erred in ignoring the fact that the party had themselves voluntarily agreed to vide their letter dated 17.02.2011 that rebate be sanctioned as per norms 1kg DMO to 1kg menthol and accordingly the norms were re-fixed as 1.000 kg of de-terpinated menthe oil to 1 kg menthol and 1.000 kg of de-terpinated menthe oil to 1 kg of menthol crystals vide letter C.No. V(Misc)Rebate/Notfn.21/04/DB/2/2009/1121 dated 04.03.2011. That the respondent filed appeal no.138/AP/CE/Ch-I/2011 (against Order-in-Original No. R-1136-1139/DB/2010 dated 18.06.2010) on 24.03.2011, 215/AP/CE/Ch-II/2011 (against Order-in-Original R-2207-2215/DB/2011 dated 30.03.2011) on 02.06.2011

and 265/AP/CE/Ch-II/2011 (against Order-in-Original R-602-606/DB/2011 dated 13.06.2011) on 10.08.2011 with Commissioner (Appeals) much after the re-fixation of input output ratio correctly as 1:1 vide letter dated 04.03.2011. That the Commissioner (Appeals) has passed an order which is unjust and legally improper to the extent it grants rebate of duty paid on inputs ibid on the basis of input output norms as 1.250 : 1 fixed and permitted by the department under C.No. V(Misc)Rebate/Notfn. 21/04/DB/2/2009/2747 dated 19.08.2009.

4.2. That Commissioner (Appeals) in his order has not considered the fact and circumstances which led to re-fixation of input output norms subsequently as 1:1 and grossly erred in simply setting aside the impugned orders passed by the adjudicating authority who in his orders has specifically mentioned that the norms were revised and re-fixed as 1.000 kg of de-terpinated menthe oil to 1 kg menthol and 1.000 kg of de-terpinated menthe oil to 1 kg of menthol crystals vide letter C.No. V(Misc)Rebate/ Notfn.21/04/DB/2/2009/1121 dated 04.03.2011 and that the respondent had showed his malafide intention to claim more amounts of the rebates as in all the ARE -2s they have worked out the amounts of rebates by applying input output ratio as 1.250 kg of DMO for manufacture of 1.000 kg menthol crystal. That while filing the rebate claims they had claimed rebates by applying ratio of 1.000 kg DMO for manufacture of 1.000 kg of menthol crystal.

4.3. That the respondent suppressed the fact of recycling/reprocessing of the mother liquor and other wastes to obtain further menthol from the Department and mis-declared which led to wrong fixation of the input output norm 1.250 kg DMO:1.000 kg menthol by the Division Office which subsequently correctly re-fixed as 1:1 vide letter ibid. That the order of Commissioner (Appeals) is not proper as he ignored both on the record established fact of, in the first place, adopting fraudulent practices by the respondent to get excess monetary benefit to the extent of 20% which needs modification.

5. Personal hearing scheduled in this case on 10.08.2015. The department applicant made a reply dated 12.09.2012 reiterating the grounds of revision appeal. Shri K. Gurumurthy, Advocate attended the hearing on behalf of the respondent, who stated that the fact of export and duty payment is not disputed. That the Commissioner (Appeals) order is detailed and reasonable and may be upheld. Also the submissions dated 27.06.2012 may be considered wherein following had been submitted:

5.1. That the Revision Application have been filed by the department under a mistake of facts because the department itself has granted permission under Notification No. 21/2004-CE(NT) dated 06.09.2004 and has fixed input output norms for the final product namely Menthol as well as Menthol Crystals.

5.2. That the present case was constructed on the issue that the permission order dated 19.08.2009 did not cover menthol crystals for the input stage rebate. That neither in the Show Cause Notice nor in the Order-in-Original nor in Order-in-Appeal there was any dispute with regard to input output ratio fixed vide permission order dated 09.08.2009 thus the present revision application is not maintainable.

5.3. That the Revenue has taken a ground in its revision application that the Commissioner (Appeals) has grossly erred in ignoring the fact the party had themselves voluntarily agree to vide their letter dated 17.02.2011 that rebate be sanctioned as per the norms 1kg DMO to 1 kg of Menthol and 1 kg of DMO to 1 kg Menthol Crystals vide letter C.No. V(Misc)Rebate/Notfn.21/04/DB/2/2009/1121 dated 04.03.2011. That the party filed appeal with Commissioner (Appeals) much after the re-fixation of input output ratio correctly as 1:1 vide letter dated 04.03.2011. That the Commissioner (Appeals) has passed an order which is unjust and legally improper to the extend it grants rebate of duty pain on inputs ibid on the basis of input output norms as 1.250:1 fixed and permitted by the department under C.No.V (Misc)Rebate/Notfn.21/ 04/DB/2/2009/ dated 19.08.2009.

5.4. That the Revenue failed to understand the true nature and reason for the filing the same. That it was not the case that the party agreed to the ratio 1 kg menthol: 1 kg DMO. That the party in their letter dated 17.02.2011 has contended that as the revenue has already issued a Show Cause Notice on a different issue with regard to eligibility of rebate claim in respect of ARE-2 Nos 3/2009-10 dated 27.10.2009, 005/2009-10 dated 10.11.2009, 007/2009-10 dated 05.12.2009 and 10/2009-10 dated 19.01.2010 and the party to facilitate the speedy disposal of pending rebate claims due to delay in refund was also causing prejudice to their commercial interest, hence it was requested that the rebate claims may be immediately allowed as per input output ratio of 1 kg DMO : 1 kg menthol on a condition that the Show Cause Notice may be dropped.

5.5. That the respondent in the letter dated 17.02.2011 agreed to the input output norm as 1:1 only on the condition that the Show Cause Notices may be dropped and the rebate claims that are pending for the sanction may be allowed immediately as they were in need of refund money.

5.6. That the revenue department in its Revision Application has pleaded that the Commissioner (Appeals) in his order has not consider the fact and circumstances which led to re-fixation of input output norms subsequently as 1:1 and grossly erred in simply setting aside the impugned orders passed by the adjudicating authority in its Order-in-Original R-602-606/DB/2011 dated 13.06.2011 has specifically mentioned that the norms were revised and re-fixed as 1.000 kg of

de-terpinated menthe oil to 1 kg menthol/crystals vide letter V(Misc)Rebate/ Notfn.21/04/DB/2/2009/1121 dated 04.03.2011. That the consequential relief in effect should have been restricted to the extent to 1:1 ratio.

5.7. That it is only in relation to the Order-in-Original R-602-606/DB/2011 dated 13.06.2011 for period April 2010 to October 2010 for amount Rs. 36,68,624/- wherein such fact of fixation of 1:1 is mentioned. That the adjudicating authority had not mentioned any such fact in rest of the two Orders-in-Original.

5.8. That the plea of revenue is incorrect in law. That the Show Cause Notices in the present case did not object to the quantum of ration fixed for input stage rebate claims.

5.9. The party has relied on the following case laws:-

- M/s Ispat Industries Ltd Vs CCE 2012(280)ELT 236 (Tri)
- CCE Vs Carrier Aircon Ltd 2005 (184) ELT 113 (SC)

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

7. On perusal of records, Government observes that input stage rebate under Rule 18 filed by the respondent were rejected by the original authority on the grounds of failure to fulfil conditions of Notification No. 21/2004-CE(NT) dated 06.09.2004. The respondents appealed against the same before the Commissioner (Appeals) who allowed the appeal of the party and set aside the Orders-in-Original with consequential relief. Now the department has filed this Revision Application on grounds mentioned in para 4 above.

8. Government observes that the basic allegation levelled against the respondent was that they had failed to get approval of input output ratio as required under Notification No. 21/2004-CE(NT) dated 06.09.2004 and cleared the impugned goods viz Menthol Bold Crystals for export without seeking or getting permission of the Deputy Commissioner of Central Excise and also without fixation of input output ratio in relation thereto. Thus the rebate of duty paid on De-terpinated Mentha Oil (input) and fiber drums paper based (packing material) used in the manufacture of these exported Menthol Crystals is not admissible as the respondent has not fulfilled the condition of getting the input output ratio fixed for the export products before manufacture and export of finished goods as required under the said Notification. Applicant department has contested the impugned Order-in-Appeal mainly on the ground that respondent failed to follow the prescribed procedure under Notification No. 21/2004-C.E. (N.T.) dated 06-09-2004 and also as much as the respondent mis-declared input-output ratio.

9. Government further, observes that the respondent has claimed that the input output ratio was approved by the jurisdictional Deputy Commissioner on 19.08.2009 and 31.01.2011. It is a fact on record that the two sheets to Annexure-24 dated 12.03.2009 submitted by the respondent for approval of input output norms indicate "the material balance sheet for making menthol and other derivatives from peppermint oil" and "the material balance sheet for making menthol from De-terpinated Menthol Oil". Both the material balance sheets indicate menthol as final product only. This Annexure-24 also mentioned only the process for making Menthol and other derivatives from Peppermint Oil. Government thus holds that it is clear that the respondent was not given any permission for manufacture and export of menthol crystals under claim for import duty rebate as they has never applied for fixation of input output ratio in respect of Menthol Crystals. The input output ratio for menthol crystals was applied for vide declaration dated 28.06.2010 and thereafter approved vide letter dated 31.01.2011.

10. Government finds as untenable the presumption of Commissioner (Appeals) that as same ratio has been fixed first for menthol and then for menthol crystals, the norms for crystals can be said to have been fixed at the same time as that for menthol. Menthol and menthol crystals are two distinct products classifiable under distinct tariff headings viz 2906 and 3003 respectively as held in the impugned Order-in-Original. It is an uncontested fact that both items not only fall under different headings but the process of manufacture is also different as menthol is in liquid form and menthol crystals are in crystal form. The respondent was therefore, required to file different declaration and get separate approvals for the norms for each product sought to be exported for each product sought to be exported in terms of Notification No. 21/2004-CE(NT) dated 06.09.2004 read with para 2 of part V of Chapter 8 to CBEC Supplementary Instructions Manual.

11. Further, Government observes that as per the Notification No. 21/2004-CE(NT) dated 06.09.2004, the declaration is required to be filed before commencement of the exports of goods involved. Para 2 of the said Notification clearly states that the correctness of the ratio of the input output ratio shall be verified before the commencement of the export of the said goods but in the present case, the respondent exported the goods before the verification of input output ratio as well as fixation of the input output norms. Thus they had failed to satisfy the condition of the Notification ibid.

12 Government also observes that the respondent has contended that they voluntarily opted for re-fixation of input output ratio for the speedy disposal of pending rebate claims as delay in refund was also causing prejudice to their commercial interest, which is not acceptable as it shows their malafide intention to claim more amounts of the rebates as in all the ARE -2s they have worked out the

amounts of rebate by applying input output ratio as 1.250 kg of DMO for manufacture of 1.000 kg menthol crystal. But while filing the rebate claims they had claimed rebates by applying ratio of 1.000 kg DMO for manufacture of 1.000 kg of menthol crystal.

13. Government notes that nature of above requirement is both a statutory condition and mandatory in substance for removal of goods for exports under claim for rebate of duty either on the final goods exported or on the inputs contained therein.

13.1 It is in this spirit and this background that Hon'ble Supreme Court in case of Sharif-ud-Din, Abdul Gani – (AIR 1980 SC 3403) has observed that distinction between required forms and other declarations of compulsory nature and/or simple technical nature is to be judiciously done. When non-compliance of said requirement leads to any specific/odd consequences, then it would be difficult to hold that requirement as non-mandatory.

13.2 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 (S.C.); Union of India vs. Dharmendra Textile Processors 2008(231) ELT 3 (S.C.). Also it is settled that a Notification has to be treated as a part of the statute and it should be read along with the Act as held by in the case of Collector of Central Excise vs. Parle Exports (P) Ltd – 1988(38) ELT 741 (S.C.) and Orient Weaving Mills Pvt. Ltd. Vs. Union of India 1978 (2) ELT J 311 (S.C.) (Constitution Bench).

14. In view of above findings, Government sets aside the impugned Order-in-Appeal and upholds the Orders-in-Original passed by the original authority.

15. The revision application is allowed as above.

16. So, ordered.

(RIMJHIM PRASAD)
Joint Secretary to the Government of India

The Commissioner of Central Excise,
Central Excise, Chandigarh-II,
C.R. Building, Plot No. 19,
Sector -17-C,
Chandigarh-160017.

Attested
अवर सचिव (आ.)
Under Secretary (RA)

ORDER NO. 29-31/2016-CX DATED 03.02.2016

Copy to:-

1. The Commissioner of Central Excise, Chandigarh-II.
2. The Commissioner of Central Excise (Appeals), Chandigarh-II C.R. Building, Plot 19, Sector 17 C, Chandigarh.
3. The Deputy Commissioner of Central Excise, Division, Derabassi, Sadashiv Complex, Chandigarh, Ambala Road, District SAS Nagar, Mohalli.
4. M/s Ind-Swift Laboratories Ltd, Village Bhagwanpur, Derabassi.
5. PA to JS (Revision Application).
6. Guard File.
7. Spare Copy.

(Attested)

(Shaukat Ali)
Under Secretary (RA)