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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.198/251/2012-RA  
F.No.198/56/2013-RA

Date of Issue: 11.12.19

ORDER NO. <sup>296-297</sup> /2019-CX (WZ)/ASRA/MUMBAI DATED 06.12.2019  
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.

Applicants : Commissioner, Central Excise, Raigad

Respondents : M/s Conros Steel Pvt. Ltd.

Subject : Revision Application filed, under Section 35EE of the Central  
Excise Act, 1944 against the Order-in-Appeal Nos.  
US/537/RGD/2012 dated 03.09.2012 and US/48/RGD/2013  
dated 31.01.2013 passed by the Commissioner (Appeals-II),  
Central Excise, Mumbai.

ORDER

This two Revision Applications have been filed by the Commissioner, Central Excise, Raigad (hereinafter referred to as "the Applicant") against the Order-in-Appeal Nos. US/537/RGD/2012 dated 03.09.2012 and US/48/RGD/2013 dated 31.01.2013 passed by the Commissioner (Appeals-II), Central Excise, Mumbai.

2. The issue in brief are that M/s. Conros Steels Pvt. Ltd., Survey No.26,28,29, At: Vanvate, P.O. Wavoshi, Pen-Khopoli Road, Raigad. (hereinafter referred to as the "Respondent") having C. Ex. Registration No.AACCC5103BXM001, are engaged in the manufacture of Excisable goods viz., Ingots / G.I.Pipes falling under Chapter Heading No. 72 & 73 of the schedule to the Central Excise Tariff Act, 1985. They manufactured and exported excisable goods under claim of rebate and had filed 268 rebate claims amounting to Rs. 2,53,20,775/- and 01 rebate claim of Rs. 97,003/- under Rule 18 of Central Excise Rules, 2002 (herein after as "CER) for the exports made, where duty was paid by using their Cenvat credit Account.

2.1 During investigation by DGCEI, it was revealed that the for the month Sept. 2008, the Respondent had defaulted in the payment of duty of Rs.4,18,97,700/ and for the succeeding period i.e. 06.11.2008 to 12.04.2011 (for which above rebate claims had been filed), they had discharged the Central excise duty on the clearances through Cenvat Credit Account although they were required to pay the same through PLA without using Cenvat Credit during the period through which the default wick continued beyond 30 Days under Rule 8 (3A) of CER 2002. Further, they failed to mention the default in their monthly ER-1 nor intimated the department that they had not cleared the default of Central Excise duty for the month of Sept. 2008, hence the DGCEI issued a Show Cause Notice under F.No. DGCEI/MZU/I&IS'B1/12(4)21/2011/1212 dated 9/13.02.2012. The Show Cause Notice was adjudicated by the

Commissioner, Central Excise, Raigad, vide Order-in-Original No. 55/SJW(55)COMMR/RGD/12-13 dated 17.01.2013 wherein the Commissioner confirmed the demand of Rs. 13,43,70,490/- under the provisions of Section 11A(4) of the Central Excise Act, 1944 (herein after as 'CEA) (erstwhile proviso to Section 11A(1) of the CEA).

2.2 In the light of the above facts, rebate claims of duty paid by Cenvat cannot be allowed for the above intervening period hence Show Cause Notices were issued to the Respondent. The subject rebate claims were rejected by the Deputy Commissioner, Khopoli vide his Order-in-Original Nos. Raigad/KPL/RC/217/2012-13 dated 10.04.2012 and Raigad/KPL/RC/1409/2012-13 dated 28.05.2012

2.3 In other parallel proceeding, in respect of payment made regarding default for the Month of September 2008, the Respondent applied to Settlement Commission, Additional Bench, Mumbai before issuance of any written Show Cause Notice by the DGCEI, the Commissioner of Central Excise, Raigad vide letter F.No. V/Settlement Commission/Conros/193/Rgd/11-12/2433 dated 01.03.2012 informed the Settlement Commission that Respondent had resorted to fraudulent submission of GAR 7 challan and token receipt with an ulterior motive and ~~intention~~ to evade payment of Central Excise duty leviable on the goods manufactured and cleared by them. The Hon'ble Settlement Commission, Additional Bench, Bombay vide Order No 31/Final order/C.Ex/JRG/2012 dated 16.3.2012 disposed off the Application No. SA(E)350-351/2011 dated 20.12.2011 by appropriating the payment towards duty and interest and imposed a penalty of Rs 12,00,000/- on the Respondent and Rs.3,00,000/- on Mr Shehzad Hemani, Managing Director of the Company. Against the said Settlement Commissioner's final

order No. 31/Final Order/C.Ex/JRG/2012 dated 16.03.2012, on the recommendation of DGCEI, a Writ Petition has been filed by DGCEI, inter alia on the ground that "The Settlement Commission cannot admit the application before issuance of SCN as it cannot be termed as a 'case' under Section 31(c) of the CEA, 1944 and the application does not satisfy the requirement of Section 32(E) of the Act as the SCN had not been issued."

Aggrieved by the Order-in-Original Nos. Raigad/KPL/RC/217/2012-13 dated 10.04.2012 and Raigad/KPL/RC/1409/2012-13 dated 28.05.2012, the Respondent preferred respective two appeals before Commissioner (Appeal), which have been allowed by the vide Order-in-Appeal Nos. US/537/RGD/2012 dated 03.09.2012 and US/48/RGD/2013 dated 31.01.2013 with consequential relief and setting aside the respective Order-in-Original dated 10.04.2012 and 28.05.2012.

3. Aggrieved, the Department then filed the two Revision Applications on the following grounds :

3.1 That two Orders-in-Appeal dated 03.09.2012 and 31.01.2013 passed by the Commissioner(Appeals) are not legal and proper since they have erred in relying on the below judgments

- (i) Solar Chemferts Pvt Ltd. V/s CCE [2012(276)ELT 273(Tri-Mumbai]
- (ii) Plasti Pac Flexibles Ltd. V/s. CCE [2009 (236)ELT672(Tri-Mumbai]
- (iii) CCE V/s.Moonlight Alloys Pvt.Ltd. [2007(208) ELT 395(Tri-Del)]
- (iv) Meenakshi Associates V/s. CCE [[2012-TIOL-CESTAT-Del]

which were not relevant for the particular facts of this case where there is clear case of intention to evade duty and willful

suppression of the facts and positive action to suppress and forge the duty payment documents. There was no intention on the part of the Respondent in this case to pay the defaulted Excise duty till it was detected by the DGCEI, Mumbai after two and half years.

3.2 That the Commissioner(Appeals) has also erred in not following the correct Rule and the law laid down in various other judgments. particularly after amendment in Rule 8(3A) of the Central Excise Rules, 2002 w.e.f. 31.03.2005, wherein it was clearly held that after amendment in Rule 8(3A) there is specific bar not to utilize the Cenvat credit for duty payment during defaulting period, till the date the assessee pays the outstanding amount including interest thereon and in event of any failure. it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow. This has to be done automatic & there is no need of any written order after 2006 This view is also supported by various other Judgments passed by the High Court & Tribunal.

3.3 Penalty depends upon the nature of offence and in the particular facts and circumstances of the case. In the case of M/s. Solar Chemferts, which has relied upon the judgment of ~~M/s. CCE Vs. Saurashtra Cement Ltd. (2010(260) ELT 71(Guj.H.C.)~~ — ingredients of section 11AC/Rule 25 was absent and there was no intention to evade duty. In light of those facts it was decided that penalty U/S 11AC / Rule 25 was not attracted. However, in the present case, there is clear case of wilful mis-statement and positive action to suppress and forge the duty payment documents, which certainly should attract penalty under Section 11AC or Rule 25(d) read with Rule 14 & 15(2) of CENVAT Rules, which should be equal to duty attempted to be evaded.

- 3.4 That while passing the said Orders-in-Appeal dated 3.9.2012 and dated 31.01.2013, the Commissioner (Appeals) had opportunity to go through the show cause notice dated 13.02.2012 issued by DGCEI, which was discussed by the Original Adjudicating Authority in his Orders-in-Original dated 10.04.2012 and 28.05.2012 and also mentioned by the Respondent in their submissions filed before Commissioner (Appeals), hence the Commissioner (Appeals) should not have decided the fate of payments which have been challenged by issuing a show cause notice and since then decided by the Commissioner of Central Excise, Raigad.
- 3.5. That the Responent had defaulted the payment of duty for the month of September 2008. The payment of the same was due on 05.11.2008 after granting the amnesty period. But the said payment was made on 11.04.2011, which was much beyond the 30 days as provided in the Rule. Hence the provisions of Rule 8 (3A) of CER, 2002 are squarely attracted for duty payments for the succeeding months. Therefore, all such goods cleared for home consumption as well as export under rebate are without payment of duty. In the present case all the goods cleared for export under rebate were prior to 10.04.2011 and duty was paid by using Cenvat account. Hence at the time of the clearances, goods for export under claim of rebate were exported without payment of duty. As the goods exported were non duty paid in terms of Rule 8 (3A) of CER, therefore the provisions of Rule 18 of CER read with notifications issued there under prohibits the payment of rebate in this case.
- 3.6 That the Commissioner(Appeals) has also erred in not distinguishing a case of fraud where there was mala-fide intention to evade duty. The amount was only paid and recovered when DGCEI Mumbai booked the case and recovered the amount. All judgements which have been relied by the

Commissioner (Appeals) were dealing with normal situation where intention to evade the duty was absent and delay was only two to three months, while in the present case there is clear case of positive suppression, willful misstatement and forgery of duty paid documents with intention to evade duty. So this is a case where all ingredients of Section 11 AC are present and equal penalty equivalent to duty and interest is chargeable and recoverable. Even if the duty is paid by Cenvat account during the defaulting period, interest is recoverable from the date of each clearance, which is still pending recovery.

3.7 They prayed that the two impugned Orders-in-Appeal be set aside and the respective Orders-in-Original be restored and upheld.

4. A personal hearing in the case was fixed on 16.01.2017, 06/07.07.2018, 20.12.2017, 02.02.2018 and 20.08.2019. However neither the Appellant nor the Respondent attended the said hearings. Hence the case is being decided exparte on merits.

5. 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.

6. Government observes that the said rebate claims were rejected by the jurisdictional Dy.Commissioner on the grounds that due to the default in payment of duty during the period from 06.11.2008 to 12.04.2011, all the clearance of excisable goods in any manner other than by consignment wise debit to their PLA would be deemed to be without payment of duty and hence the conditions laid down under Section 11B of Central Excise Act, 1944 and Rule 18 of the CER 2002 read with Notification No. 40/2002 Ce (NT) dated 26.06.2001 as amended by Notification No. 19/2004 CE (NT) dated 06.09.2004 are not fulfilled. The Respondent then filed appeal with

the Commissioner(Appeal) who set aside the Orders-in-Original and allowed the appeal with consequential relief. The details are as given below:

Sl. No	Total Rebate claims	Amount (Rs)	SCN dt	OIO No. & date	OIA No. & dt	Revision Application filed by Appellant
1	110	1,02,23,851/- Period 4.10.10 to 31.12.2010	5.7.2011	Raigad/KPL/RC /217/2012-13 dated 10.04.2012 - rejected	US/537/RGD/2012 dt. 03.09.2012 - OIO set-aside and appeal allowed with consequential relief	198/251/2012-RA
	95	88,83,365 /- Period 20.01.2011 to 11.3.2011	6.7.2011			
	63	62,13,559/- Period 23.2.11 and from 14.3.11 to 11.4.2011	3.10.11			
	Total 268 rebate claims	2,53,20,775	3 SCNs			
2	ARE-1 No. 12 dt 11.04.2011	97,003	01 SCN dt 05.12.2011	Raigad/KPL/RC /1409/2012-13 dated 28.05.2012 - rejected	US/48/RGD/2013 dt. 31.01.2013 - OIO set-aside and appeal allowed with consequential relief	198/56/2013-RA

7. The issue in the current two revision applications is whether the provisions of Rule 8(3A) of the CER is applicable in case of clearances for export made under rebate claims when the duty was not paid at the time of removal of goods for export and the rebate of duty was paid subsequently.

8. As per provisions of Rule 18 of CER read with Notification No 19/2004-C.E.(N.T.) dated 06.09.2004, the rebate of duty paid on excisable goods exported is granted subject to compliance of conditions and procedure prescribed in Notification No 19/2004-C.E.(N.T.) dated 06.09.2004. Condition 2(a) of the said Notification stipulates that goods shall be exported on the payment of duty directly from factory or warehouse. Government further notes that as per provisions contained in para 1.1(1)(i) of Part-I, Chapter 8 of CBEC's Excise Manual of Supplementary Instructions -



*"(f) It is essential that the excisable goods shall be exported after payment of duty, directly from a factory or warehouse. The condition of "payment of duty" is satisfied once the exporter records the details of removals in the Daily Stock Account maintained under rule 10 of the said Rules, whereas the duty may be discharged in the manner specified under rule 8 of the said Rules, i.e. monthly basis."*

Whereas as per Rule 4(1) of the CER

*"(1) Every person who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the manner provided in rule 8 or under any other law, and no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured, or from a warehouse, under otherwise provided:"*

Thus, this Rule provides that every person engaged in the manufacture of excisable goods, can remove the goods from his factory i.e. whether home clearance or export, only after payment of duty leviable on such goods. Further, with effect from 01.04.2003, Rule 8 of the CER requires that duty be paid for a particular month by the 5th of the next month and duty for the month of March had to be paid by the 31st March. Rule 10 of the said Rules required maintenance of Daily Stock Account by giving complete details of goods produced and manufactured including amount of duty actually paid.

9. Government notes that in the present cases, the Respondent had defaulted in payment of Central Excise duty amount of Rs. 4,18,97,700/- for the month of September, 2008. After default in Sept.'2008, during audit of the unit in January 2009, this issue was detected, whereupon the Respondent produced GAR-7 purporting to have paid an amount of duty of Rs. 4,18,97,700/-. Thereafter the matter remained dormant till DGCEI raided the unit in April 2011 and unearthed the fact that the said GAR 7 Challan claiming to be payment of Rs. 4,18,97,700/- was in fact a forged challan and not a correct one. No duty had actually been paid. Thereafter, a part of the said duty i.e. Rs. 2,38,97,700/- was paid on 11.04.2011 and the remaining duty of Rs. 1,80,00,000/- was paid on 18.04.2011. The interest

of Rs. 1,28,22,375/- was paid on 25.04.2011 and informed the fact of payment to the department vide letter dated 02.05.2011. Further, the Respondent in their application before the Settlement Commission admitted that their employee had manipulated the scanned copies of GAR-7 and Token Receipt and subsequently presented it to the Department to establish that the payment of defaulted Central Excise duty with interest was paid, though in fact, no such payment had been made. Government finds that it is undisputed fact that the Respondent has accepted the charges of defraud/ suppression/ misstatement before the Settlement Commission.

10. Government notes the Respondent had defaulted in payment of duty pertaining to the month of Sept. 2008. A part of the said duty i.e. Rs. 2,38,97,700/- was paid on 11.04.2011 and the remaining duty of Rs. 1,80,00,000/- was paid on 18.04.2011. The interest for the delayed payment amounting to Rs. 1,28,22,375/- was paid on 25.04.2011. Thus the default continued till 25.04.2011. Government finds that under Rule 8(3A) of CER, the Respondent were required to pay the Central Excise duty consignment-wise through PLA/cash at the time of export of goods. However, they paid at the end of the month that too not consignment-wise. Therefore, the rebate claims will be rejected as they failed to fulfil the above said conditions stipulated under Rules 18 of the CER and Notification No. 19/04-CE (NT) dated 06.09.2004 and above supplementary instructions.

11. Further, Government notes the facts of the case laws relied upon by the Commissioner(Appeals) are different from facts of this case which are as below:

- (i) In the case of M/s Solar Chemferts Pvt. Ltd, the default was not because of any fraud committed by the assessee, whereas in the current cases, the Respondent had intentionally committed fraud in showing the amount paid through GAR-7 dated 03.02.2009 which was actually not paid and the same was detected by the DGCEI.

- (ii) In the case of M/s Plasti Pac Flexibles Ltd, the defaulting period December 2000 to March 2001 was pre-2005, and Rule 8(3A) of CER was amended vide Notification 17/2005-CE(NT) dated 31.03.2015. The Hon'ble CESTAT observed that non-obstantive clause was introduced by insertion of sub-Rule 3A in Rule 8 of the CER 2002 only on w.e.f. 31.3.2005, while the period in dispute in the case of M/s Plasti Pac Flexibles Ltd was prior to that date. Whereas in current case, after amendment in Rule 8(3A), when specific bar was created for not using Cenvat during defaulting period, the Rule will prevail.
- (iii) In the case of M/s Moonlight Alloys Pvt Ltd. The defaulting period was 01.04.2006 to 02.6.2006 and defaulting amount was paid on 03.06.2006. The adjudicating order forfeiting the facility of monthly payment was dated 14.06.2006. The sub-rule 3A in Rule 8 of the CER 2002 was introduced vide Notification 17/2005-CE(NT) dated 31.03.2015, and amendment vide Notification 13/2006-CE(NT) dated 01.06.2006. Therefore, Commissioner(Appeals) held that *"As the payment has already been made on 3rd June 2006 and the order is also passed in June 2006, therefore, the amended provisions as contained in sub-rule (3A) would get attracted. In view of these amended provisions, once the outstanding amount has been paid, thereafter the payment of duty on daily basis need not paid. Since the payment was made on 03.06.2006, therefore the order of the lower authority in forfeiting the facility for two months is not governed by the amended provisions of sub-rule (3A)."* And Hon'ble Cestat held that the impugned order is correct. Whereas in the current cases of the Respondent the default period was 06.11.2008 to 13.04.2011 and hence is governed by the amended provisions of Rule 8(3A).
- (iv) In the case of M/s Meenaksi Associates, the issue was of short payment of interest for the duty which was defaulted and the

same was declared by the assessee and there was no fraud committed by the assessee -

*"12. We have considered the issue of short payment of interest for the duty which was defaulted. We do not consider that such an error in calculation which was never pointed out to the assessee can take the assessee into the mischief of Rule 8(3A). Default in payment of duty is different from short payment of duty or interest. Further the Commissioner himself has condoned this issue as recorded in para 5.7 of the order dated 31.10.2010. So we do not propose to dwell on this issue in great detail."*

Whereas in the current cases, the Respondent committed fraud by producing forged documents/ challans to prove the payment of Central Excise duties. And the same was admitted by the Respondent before the Settlement Commissioner.

In view of the above, the ratio of the above case laws cannot be made applicable to this case. Hence, Orders-in-Appeal Nos. US/537/RGD/2012 dated 03.09.2012 and US/48/RGD/2013 dated 31.01.2013 needs to be set aside.

12. The GOI Order No. 1227/2011-CX dated 20.09.2011 (2012 (281) E.L.T. 747 (G.O.I.)) in RE: Marim International, while rejecting the Revision Application and upholding Order in Appeal rejecting the rebate claim on account of late payment of Central Excise Duty in respect of goods cleared for export, observed as under :-

*10. Government further observes that sub rule 3 and 3(A) of Rule 8 provides for payment of duty along with applicable interest if the assessee failed to pay the amount of duty by due date. Government notes that provision for claim of Rebate is governed by Rule 18, which requires payment of duty at the time of export. Provision contained in Rule 8 does not absolve the assessee from substantial conditions of payment of duty for claim of rebate under Rule 18 of Central Excise Rules, 2002.*

13. The GOI has taken a similar view in its Order No. 501-503/13-CX dated 31-5-2013 in the case of M/s Sandhar Automotives.

14. In view of the foregoing discussion and relying on case laws discussed supra, Government holds that the Respondents are not eligible for rebate of duty paid in respect of claims Sr. No.1 & 2 ( Table at para 6.3 above) amounting to Rs. 2,53,20,775/-(Rupees Two Crores Fifty Three Lakhs, Twenty Thousand Seven Hundred and Seventy Five Only) and Rs. 97,003/- (Rupees Ninety Seven Thousand and Three only) for not depositing the duty at the time of export within the specified time stipulated under Rule 8 of the CER.

15. In view of the above discussions and findings, Government upholds the Order-in-Original Nos Raigad/KPL/RC/217/2012-13 dated 10.04.2012 and Raigad/KPL/RC/1409/2012-13 dated 28.05.2012. Government therefore sets aside the impugned Order-in-Appeal Nos. US/537/RGD/2012 dated 03.09.2012 and US/48/RGD/2013 dated 31.01.2013.

16. The two Revision Applications are allowed in terms of above.

17: So ordered.

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

296-297  
ORDER No. /2019-CX (WZ)/ASRA/Mumbai DATED 06/12/2019.

To,  
The Commissioner,  
Central Goods & Service Tax,  
Raigad Commissionerate,  
Plot No. 1, Sector-17,  
Khandeshwar,  
Navi Mumbai- 410 206

Copy to:

1. M/s. Conros Steels Pvt. Ltd., Survey No.26,28,29, At: Vanvate, P.O. Wavoshi, Pen-Khopoli Road, Raigad.
2. The Deputy / Assistant Commissioner, GST & CX , Khopoli Division, Raigad Commissionerate
3. S. P.S. to AS (RA), Mumbai
4. Guard files
5. Spare Copy.