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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
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.198/783/12-RA / 5136 Date of Issue: 02.09.2020

ORDER NO. 313 /2020-CX (WZ)/ASRA/MUMBAI DATED 04.03.2020 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 H.G. Entertainment Technology Ltd

Respondent : Commissioner, Central Excise, Raigad

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. US/366/RGD/2012 dated 31.05.2012 passed by the Commissioner (Appeals-II), Central Excise Mumbai.

ORDER

This Revision Application is filed by M/s I.G. Entertainment Technology Ltd., Exporter, 101, Owners Industrial Estate, Gabriel Road, off. L. J. Road, Mahim, Mumbai-400016 (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. US/366/RGD/2012 dated 31.05.2012 passed by the Commissioner (Appeals-II), Central Excise Mumbai.

2. The issue in brief is that the Applicant had filed Rebate claim dated 29.06.2010 amounting to Rs. 2,25,982/- (Rupees Two Lakhs Twenty Five Thousand Nine Hundred and Eighty Two Only) under Rule 18 of Central Excise Rules,2002 read with Notification No. 19/2004 -CE (NT) dated 06.9.2004 as amended issued under Rule 18 of Central Excise Rules,2002 in respect of the goods 'Blank Audio Cassettes' which was exported. The Applicant was then issued a Deficiency Memo-cum-SCN-Call dated 23.05.201. The Deputy Commissioner (Rebate), Central Excise, Raigad, vide Order-In-Original No. 1021/11-12/DC (Rebate)/Raigad dated 19.10.2011 rejected the said Rebate Claims on the ground that the exported goods were exempted and the amount paid by the Applicant on their own volition was not duty but deposit which could not be sanctioned as rebate. The exported goods viz 'blank audio cassettes' were chargeable to 'NIL' rate of duty vide Notification No. 6/2006-CE dated 1.3.2006 as amended by Notification No. 10/2006-CE dated 01.03.2006 and Notification No.48/2006-CE dated 30.12.2006 and hence the payment made by the Applicant cannot be considered as 'duty'. The Applicant then filed appeal with the Commissioner (Appeals-II), Central Excise, Mumbai. The Commissioner(Appeals-II) vide Order-in-Appeal No. US/366/RGD/2012 dated 31.05.2012 upheld the Order-in-Original dated 19.10.2011 and rejected their appeal.

3. Being aggrieved, the Applicant then filed the current Revision Application on the following grounds that the 'Blank Audio Cassettes' were never exempted from payment of duty in terms of Notification Nos 10/2003-CE, 10/2006-CE or 6/2006-CE. Further, in view of Notification No. 2/2008-CE, the 'Audio Cassettees" falling under CH 8524 are not exempted, but are made to Central Excise Duty @14% adv which was later reduced to 10% vide Notification No. 58/2008.

Therefore, reference to Section 5A of CEA is absolutely illegal. The exemption in terms of two Notifications were only for 'Audio Cassettes' falling under CH 8524. The two Notifications were amended by Notification No. 48/2006-CE whereby the figures 8524 against Sl.No. 24 is superseded to read as 8523 while description also is changed from 'Audio Cassettes" to 'Recorded Audio Cassettes'. Prior to this amendment, Sl.No. 24 of Notification No. 6/2006-CE showed the description of the goods as 'Audio Cassettes' and CH 8524. Therefore by way of this amendment while Chapter Heading changed from 8524 to 8523, the description of the goods also changed from 'Audio Cassettes' to 'Recorded Audio Cassettes'. Thus the exemption, even after the amendment was only for 'Recorded Audio Cassettes'. The amendment to Notification No. 48/2006-CE is with reference to change of Tariff Heading No which is changed to 8523 2910. This was necessitated only because the two chapter headings, namely CH 8523 relating to 'Blank Unrecorded media' and CH 8524 relating to 'Recorded media' have been merged and the new CH is 8523 2910 'Audio Cassettes'. The Applicant further submitted that in terms of instructions contained in Circular No. 510/06/2000 dated 03.02.2000, the Rebate Sanctioning Authority cannot look into the fact as to whether duty has been correctly paid or otherwise. In case of any doubts regarding the same, Rebate Sanctioning Authority was under an obligation to refer the matter to the jurisdictional Central Excise Officers who have assessed the duty payment. The Applicant prayed that the impugned order be set aside with consequential relief.

4. A personal hearing in the case was held on 04.10.2019 and Shri Vinit P Dubey, Advocate appeared on behalf of the Applicant. The Applicant reiterated the submission made in Revision Application and submitted additional written submission.

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. The issue in dispute in the current Revision Applications is

(i) Whether Section 5A (1A) would arise in case when two notifications are operative i.e. exempted under Notification 10/2006 - CE dated

01.03.2006 and chargeable to duty under Notification No. 02/2008-CE dated 01.03.2008;

(ii) whether the rebate claimed by them was admissible or not.

7. Government finds that M/s H.G. Entertainment Technology Ltd., manufacturer of the impugned goods had been clearing 'Blank audio cassette" falling under C.H. 85232910 both for export as well as home clearance on payment of duty. The Applicant had exported the said goods vide ARE-1 No. 199 dated 29.03.2010 and the Deputy Commissioner had rejected the rebate claim for Rs. 2,25,941/- on the grounds that the exported goods viz 'blank audio cassettes' were chargeable to 'NIL' rate of duty vide Notification No. 6/2006-CE dated 1.3.2006 as amended by Notification No. 10/2006-CE dated 01.03.2006 and Notification No.48/2006-CE dated 30.12.2006 and hence the payment made by the Applicant cannot be considered as 'duty' as the exported goods were exempted and the amount paid by the Applicant on their own volition was not duty but deposit which could not be sanctioned as rebate.

8. Government finds that all the grounds on which the original adjudicating authority vide Order-in-Original dated 19.10.2011 had rejected the Applicant's rebate claim, the same has already been decided by this authority in the Department's case against the current Applicant vide GOI Revision Order No. 167/2020-CX(WZ) ASRA/Mumbai dated 04.02.2020 and the same is reproduced below:

"9. Government observes that for the goods 'Blank audio cassette" falling under C.H. 85232910, during the period March 2010, there existed two notifications prevailing -

(i) Notification No. 6/2006-CE (Sr. No. 24)and Notification 10/2006 - CE (Sr.No.22) both dated 01.03.2006 providing Nil rate of duty. Further both the Notifications were amended vide Notification No. 48/2006 CE dated 30.12.2006 and the prescribed rate of duty under these two notification was 'NIL'.

	Notification No. & date	SrNo	Chapter or heading or sub heading or tariff item	Description of goods	Rate under the first Schedule
48/2006-CE dt 30.12.2006 amendement to					
(19)	6/2006-CE dt 01.03.2006	19(v)	Substituted to 8523	Recorded Audio Cassettes	Nil
(20)	10/2006-CE dt. 01.03.2006	22	Substituted to 8523 29 10		

(ii) Notification No. 02/2008-CE dated 01.03.2008 providing 14% rate of duty under which was amended vide Notification No. 58/2008 dated 07.12.2008 (Sr.No. 10) reducing the rate of duty to 10% adv and which was further amended vide Notification No. 04/2009 dated 24.02.2009 (Sr.No. 5) reducing the rate to 8% adv.

10. At this point, it would be pertinent to understand the scope of the embargo under sub-section (1A) of Section 5A of the Central Excise Act, 1944. The text of the said sub-section (1A) of Section 5A of the Central Excise Act, 1944 is reproduced below.

> "(1A) For the 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."

There are two crucial phrases in the sub section which require careful consideration; viz. "whole of the duty of excise leviable thereon" and "granted absolutely". The inference that can be drawn is that the phrase "whole of the duty of excise leviable thereon" would mean an exemption which exempts excisable goods entirely or extinguishes the entire duty leviable on those goods. Similarly, the words "granted absolutely" signify that the exemption granted is complete or unconditional. In other words there are no provisos or conditions to the exemption granted. Purely by virtue of being the manufacturer of the goods specified in the exemption notification, the manufacturer becomes eligible for the exemption granted. When the sub-section (1A) of Section 5A of the CEA, 1944 is read in its entirety, it would be inferable that in a situation where the manufacturer is eligible for an exemption from the entire duty leviable on the excisable goods manufactured

without any conditions attached, the manufacturer would no longer have the option to pay duty of excise on such excisable goods.

11. *It is observed that there are essentially three different types of exemption notifications. There are exemptions which exempt unconditionally from the whole of the duty of excise leviable on excisable goods. There is a second category of exemption notifications which exempt from the whole of the duty of excise leviable on excisable goods subject to fulfillment of certain conditions. Then there is a third category of exemption notifications which exempts excisable goods from so much of the duty of excise specified thereon as is in excess of the amount calculated at the rate specified in the notification. In other words, the third category of exemption notifications do not exempt excisable goods from the whole of the duty of excise but only from a part thereof which may or may not come with conditions attached. In view of Section 5A(1A) of the CEA, 1944, the manufacturers who manufacture excisable goods which are eligible for exemptions which exempt unconditionally from the whole of the duty of excise do not have the option of paying duty on the goods covered by such exemption. However, if the manufacturer is eligible for the benefit of an unconditional exemption notification granting exemption from the whole of the duty of excise as well as another exemption notification which grants conditional exemption from the whole of the duty of excise or partial exemption, the manufacturer would be at liberty to choose between these two exemptions for the notification which is more beneficial to them. The provisions of Section 5A(1A) would not be applicable to such a situation. The legislature has in its wisdom issued different exemption notifications in the public interest. Therefore, an interpretation which compels a manufacturer who is eligible for the benefit of two different exemption notifications to avail of the benefit of the exemption notification which exempts excisable goods unconditionally from the whole of the duty of excise would render the other exemption notification which grants conditional exemption from the whole of the duty of excise or partial exemption to become redundant. The scheme of law is such that each of the exemptions issued have a specific intent and purpose. Any inference which negates such coherent interpretation would defeat these purposes.*

12. *The Notification No. 10/2006-CE dated 01.03.2006 is the notification which is parimateria to the rebate claim involved in the present case. As would be forthcoming from the exposition hereinbefore, the exemption granted by Notification No. 10/2006-CE dated 01.03.2006 is not such exemption that the manufacturer has to compulsorily avail of it and therefore the provisions of Section 5A(1A) would not be applicable to manufacturers who do not intend to avail it. In other words, the manufacturers who are eligible for the benefit of exemption under the said notification could choose to not avail of its benefit and pay duty at the tariff rate.*

13. *Government observes that in the case of Arvind Ltd Vs UOI [2014 (300) ELT 481 (Guj.), the Hon'ble Gujarat High Court in its order dated 19.06.2013 had held that-*

> *Export rebate- Claim of -Denied, on ground that payment of duty was at the will of the assessee – Export rebate impermissible when assessee was exempt from payment of whole duty but when he paid duty at the time of export permissible – Final products manufactured by petitioner exempted from payment of duty by Notification No. 29/2004-C.E. as amended by Notification No. 58/2008-CE. – However petitioner wrongly availed benefit of concessional rate of duty under Notification No. 59/2008-C.E. which exempted cotton textile products in excess of 4% ad valorem –Thereafter, claims for rebate made Revenue authorities rejected the claims on ground that payment of duty on final products exported was at will of the assessee Such orders set aside, as petitioner was not liable to pay in light of absolute exemption granted under Notification No. 29/2004-C.E. as amended by Notification No. 58/2008-C.E. r/w Section 5A(1A) of Central Excise Act, 1944 – When the petitioner was given exemption from payment of whole of the duty, and if it paid duty at the time of exporting the goods, there was no reason why it should be denied the rebate claimed which the petitioner was otherwise entitled to Export rebate claim allowed – Section 5A(1A) and 11B of Central Excise Act, 1944 - Rule 18 of Central Excise Rules, 2002. (paras 9, 10, 11)*
>
> *Petitions allowed.*

Government finds that the same has been upheld by the Hon'ble Supreme Court vide order dated 01.03.2016.

14. *The manufacturer has been clearing 'Blank audio cassette" both for export as well as home clearance on payment of duty and had cleared the impugned export goods on payment of duty which was verified by the jurisdictional Superintendent. Further Government finds that it has been held in various judicial decisions that irrespective of facts i.e. whether duty is liable to be paid or otherwise, once duty has been paid, the same cannot be retained by the*

Government on the grounds that duty was not required to be paid. Therefore, Government holds that the Respondent exporter herein is eligible for rebate in the manner it was granted by the original rebate sanctioning authorities. "

Hence the case/ issue is Res-Judicata.

9. In view of the above, Government holds that the Applicant's rebate claim is admissible. Further, Government set asides the impugned Order-in-Appeal No. US/366/RGD/2012 dated 31.05.2012 passed by the Commissioner (Appeals-II), Central Excise, Mumbai.

10. The Revision Application is allowed in terms of above.

11. So, ordered.

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

ORDER No.313/2020-CX (WZ)/ASRA/Mumbai DATED 04.03.2020.

To,
M/s H.G. Entertainment Technology Ltd.,
101, Owners Industrial Estate,
Gabriel Road, off. L. J. Road,
Mahim,
Mumbai-400016.

Copy to:
1. The Commissioner (Appeals-II), Central Excise Mumbai
2. The Commissioner of GST& Central Excise, Belapur Commissionerate
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy.