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. 195/815-837/12-RA/5163 Date of Issue: 02.09.2020

ORDER NO. 315-337/2020-CX (WZ) /ASRA/MUMBAI DATED 01.09.2020 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 : Cadila Healthcare Ltd.
Plot No. 417-419-420, NH 8A,
Sarkhej-Bavla Highway,
Village Moraiya, Taluka Sanand,
Ahmedabad – 382 210

Respondent : Commissioner, Central Excise & Customs, Ahmedabad-II

Subject : Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against OIA No. 146 to 168/2012(Ahd-II)CE/AK/Commr(A)/Ahd dated 27/28.06.2012 passed by the Commissioner(Appeals-I), Central Excise, Ahmedabad.

ORDER

These revision applications have been filed by M/s Cadila Healthcare Ltd.(hereinafter referred to as "the applicant") against OIA No. 146 to 168/2012(Ahd-II)CE/AK/Commr(A)/Ahd dated 27/28.06.2012 passed by the Commissioner(Appeals-I), Central Excise, Ahmedabad.

2.1 The applicant was engaged in the manufacture of medicaments falling under chapter 30 of the First Schedule to the Central Excise Tariff Act, 1985(hereinafter referred to as "the CETA, 1985"). The applicant was availing the benefit of CENVAT credit on inputs, capital goods and input services received by them. The finished goods produced by the applicant; namely medicaments are covered at Sr. No. 62-C of the Table to Notification No. 4/2006-CE dated 01.03.2006 and are chargeable to central excise duty at the rate of 4% adv.(5% w.e.f. 01.03.2011) with 2% primary education cess and 1% secondary and higher education cess. The applicant was clearing their manufactured goods for home consumption in such manner.

2.2 For the export of their products, the applicant was availing the benefit of Notification No. 2/2008-CE dated 01.03.2008 under Sr. No. 21 of the Table thereof and clearing goods on payment of central excise duty at the rate of 10% adv. with 2% primary education cess and 1% secondary and higher education cess. The total central excise duty on the export goods in terms of Notification No. 2/2008-CE dated 01.03.2008 works out to 10.30% adv. and had been paid by the applicant from their CENVAT credit account. The applicant filed rebate claims for duty paid in such manner under the provisions of Rule 18 of the CER, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004.

2.3 The rebate sanctioning authority vide 23 different OIO's sanctioned the rebate claims for duty paid by the applicants on the export goods by taking into consideration central excise duty paid at the rate of 4% or 5% on the FOB value of the export goods and the remaining amount was restored by way of credit in their CENVAT account under Rule 18 of the CER, 2002 read with Section 11B of the CEA, 1944.

3. Aggrieved by the OIO's, the applicant filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) vide his OIA No. 146 to 168/2012(Ahd-II)CE/AK/Commr(A)/Ahd dated 27/28.06.2012 upheld the OIO's and rejected the appeals filed by the applicant.

4. The applicant has now filed for revision on the following grounds:

(a) It was pointed out that Notification No. 2/2008-CE dated 01.03.2008 had been issued under Section 5A(1) of the CEA, 1944 and is applicable to medicaments falling under chapter heading 3004 of the First Schedule to the CETA, 1985 which are thereby chargeable to duty at the rate of 10.30% adv.

(b) The applicant contended that the medicaments manufactured by them were eligible for the benefit of both Notification No. 4/2006-CE dated 01.03.2006 and Notification No. 2/2008-CE dated 01.03.2008. When the legislature has enacted two different notifications for the same excisable goods it is the option of the assessee to choose which is more beneficial for them.

(c) They placed reliance upon the case laws of Mangalam Alloys Ltd. vs. CCE, Ahmedabad[2010(255)ELT 124(Tri-Ahmd)], CCE, Baroda vs. Indian Petrochemicals Corporation Ltd.[1997(92)ELT 13(SC)], HCL Ltd. vs. CCE, New Delhi[2001(130)ELT 405(SC)] & Share Medical Care vs. UOI[2007(209)ELT 321(SC)].

(d) The applicant referred Chapter 9 of the Supplementary Instructions wherein it has been stated that the expression "Refund" under Section 11B of the CEA would also mean rebate of duty paid on export goods.

(e) They also referred para 7.2 of Chapter 9 of the Supplementary Instructions stating that refund or rebate was to always be given by cheque and averred that the adjudicating authority did not have any jurisdiction to allow rebate by way of CENVAT credit in the CENVAT credit account of the applicants. Therefore, the OIO granting rebate under Rule 18 of the CER, 2002 by way of CENVAT credit was bad in law.

(f) The applicant invited attention to Circular No. 795/28/2004-CX dated 28.07.2004 and the Circular No. 937/27/2010-CX. dated 26.11.2010 which stood overruled by the decision of the CESTAT in the case of Hyva (India) Pvt. Ltd. vs. CCE, Belapur – 2010- TIOL – 1410 – CESTAT – MUM.

(g) The applicant sought to draw parity for their case with Notification No. 30/2004-CE dated 09.07.2004 whereby all the textile goods which are specified in Notification No. 29/2004-CE dated 09.07.2004 have been granted exemption from payment of central excise duty subject to the condition that no CENVAT credit of duty paid on inputs has been availed. They contended that if the interpretation of the Department was accepted, then textile industries would not have any scope to clear their finished goods at the rate of 4% adv prior to 01.03.2011 and at the rate of 5% adv thereafter. They averred that when two notifications are existing simultaneously for textile industry, it was upto the textile industry to select the one which was more suitable to the manufacturer and there was no option for the Department to direct the textile industries to clear the specified textile goods only at Nil rate of duty on account of Notification No. 30/2004-CE dated 09.07.2004.

5. The applicant was granted personal hearing on 29.11.2017, 09.10.2019, 21.11.2019 and 27.11.2019. However, they failed to appear for personal hearing.

6. Government has carefully gone through the relevant case records and perused the impugned orders-in-original and orders-in-appeal. The issue involved is that the applicant had paid central excise duty @ 4%/5% adv. for clearance of their goods for home consumption as per Sr. No. 62C of Notification No. 4/2006-CE dated 01.03.2006. However, they had voluntarily paid basic excise duty at higher rate of 10% adv. while exporting the same goods without availing the benefit of Notification No. 4/2006-CE dated 01.03.2006. Although the applicant was entitled for benefit of the said notification which gave them greater relief, they paid duty at

the rate specified under Notification No. 2/2008-CE dated 01.03.2008 on the products which were cleared for export with intention to claim enhanced/more rebate. According to the Department, the apparent motive of clearing export goods at higher rate of duty @10% and goods for home consumption at 4% was to encash the accumulated CENVAT credit. The Department is of the view that the applicant would be entitled to excess duty paid by way of refund under the provisions of Section 11B of the CEA, 1944 in the manner in which it was paid; viz. by way of credit in their CENVAT credit account. On the other hand, the applicant contends that both notifications; i.e. Notification No. 2/2008-CE dated 01.03.2008 for their export consignments and Notification No. 4/2006-CE dated 01.03.2006 for their domestic clearances were in existence on the relevant date and they were both mutually exclusive. The applicant claimed that they were therefore eligible for the benefit of both exemption notifications simultaneously. Government observes that in the original rebate claims wherever the FOB value of the export goods is lower than ARE-1 value, the rebate sanctioning authority has restricted the rebate claims to FOB value. However, the applicant has not contested on this ground. It is therefore clear that the applicant has accepted the Departments stand on this issue.

7.1 The applicant in the present case is availing the benefit of two notifications. The benefit of Notification No. 4/2006-CE dated 01.03.2006 is availed by the respondent for payment of duty @ 4%/5% on home clearances whereas they pay duty @ 10% on the export goods in terms of Notification No. 2/2008-CE dated 28.02.2008. It is observed that while Notification No. 4/2006-CE dated 01.03.2006 provides for an effective rate of 5%, the Notification No. 2/2008-CE dated 28.02.2008 specifies duty @ 10%. Both these notifications do not grant full exemption. Therefore, the embargo of Section 5A(1A) of the CEA, 1944 cannot be said to apply to the facts of the present case.

7.2 Government finds it pertinent to note that Circular No. 795/28/2004-CX., dated 28.07.2004 discusses Notification No. 30/2004-CE dated 09.07.2004 which exempts from the whole of the duty of excise and clarifies that it can simultaneously be availed alongwith Notification No. 29/2004-CE dated 09.07.2004. By that analogy nothing would prevent the applicant in the present case from simultaneously availing the benefit of Notification No. 4/2006-CE dated 01.03.2006 and Notification No. 2/2008-CE dated 28.02.2008 which are both unconditionally granting partial exemption to the applicant from the applicable tariff rate of duty. Government further notes that the judgment in the case of Nahar Industrial Enterprises Ltd. vs. UOI[2009(235)ELT 22(P&H)] involved circumstances where that assessee had simultaneously availed the benefit of Notification No. 29/2004-CE dated 09.07.2004 & Notification No. 30/2004-CE dated 09.07.2004 for domestic clearances whereas they had paid duty at the tariff rate on export goods. The rebate sanctioning authority had thereupon sanctioned rebate in cash for the amount of duty paid through cash and the remnant was recredited into their CENVAT account. The contention of Nahar Industrial Enterprises Ltd. that they were eligible for the rebate of the entire amount of duty paid in cash was rejected by the Hon'ble High Court of Punjab and Haryana. Therefore, the facts of the case in Nahar Industrial Enterprises Ltd. and the present case are different and hence the ratio of that judgment would not apply to the present case.

8.1 The ratio of the orders passed by the Government in the case of Cadila Health Care Ltd.[2013(288)ELT 133(GOI)], Bhagirath Textiles Ltd.[1996(202)ELT 147(GOI)] cannot be followed as the ratio of these decisions has been superseded by the judgment of the Hon'ble Gujarat High Court in the case of Arvind Ltd. vs. UOI[2014(300)ELT 481(Guj.)] which has thereafter been affirmed by the Hon'ble Supreme Court[2017(352)ELT A21(SC)]. In that case, inspite of there being an exemption notification which fully exempted their goods, Arvind Ltd. had availed the benefit of Notification No. 59/2008-CE dated 07.12.2008 and paid duty on the export goods.

The relevant portion of the said judgment of the Hon'ble Gujarat High Court is reproduced below.

> *"9. On, thus, having heard both the sides and on examination of the material on record, the question that involves in these petitions is the wrong availment of the benefit of concessional rate of duty vide Notification No. 59/2008, dated December 7, 2008. Admittedly, the final products were exempted from payment of duty by original Notification No. 29/2004-C.E., dated July 9, 2004 as further amended vide Notification No. 59/2008-C.E., dated December 7, 2008. The fact is not being disputed by the respondents that the petitioner availed Notification No. 59/2008 for clearance made to export and thereafter filed various rebate claims. It is, thus, an undisputed fact that the petitioner on final products discharged the duty liability by availing the benefit of Notification No. 59/2008 and as has already been noted in the record, it has reversed the amount of Cenvat credit taken by it on the inputs used for manufacturing of such products. Thus, when the petitioner is not liable to pay duty in light of the absolute exemption granted under Notification No. 29/2004 as amended by Notification No. 59/2008-C.E. read with the provision of Section 5A(1A) of the Act and when it has not got any other benefit in this case, other than the export promotion benefits granted under the appropriate provision of the Customs Act and Rules (which even otherwise he was entitled to without having made such payment of duty), we are of the firm opinion that all the authorities have committed serious error in denying the rebate claims filed by the petitioner under Section 11B of the Act read with Rule 18 of the Rules. The treatment to the entire issue, according to us, is more technical rather than in substance and that too is based on no rationale at all.*
>
> *10. We also cannot be oblivious of the fact that in various other cases, the other assessees have been given refund/rebate of the duty paid on inputs used in exported goods. The stand of the Revenue is also not sustainable that the payment of duty on final products exported at the will of the assessee cannot be compared with other type of cases of refund/rebate of duty. Admittedly, when the petitioner was given exemption from payment of whole of the duty and the petitioner if had paid duty at the time of exporting the goods, there is no reason why it should be denied the rebate claimed which otherwise the petitioner is found entitled to. We are not going into the larger issues initially argued before us as subsequently the Revenue has substantially*

admitted the claim of rebate of excise duty and has not resisted in substance such claim of rebate.

11. Resultantly, both the petitions are allowed quashing and setting aside the orders impugned in both the petitions by further directing the respondents to grant the petitioner of Special Civil Application No. 10887 of 2012 rebate of Rs. 3,15,63,741/- (Rupees Three Crore Fifteen Lac Sixty Three Thousand Seven Hundred Forty One only) and Rs. 39,59,750/- (Rupees Thirty Nine Lac Fifty Nine Thousand Seven Hundred Fifty only) to the petitioner of Special Civil Application No. 10891 of 2012, by calculating interest thereon under Section 11BB of the Central Excise Act, 1944, within a period of eight weeks from the date of receipt of a copy of this judgment."

8.2 It can be drawn from the judgment of the High Court that when there are two unconditional exemption notifications which co-exist, there cannot be any compulsion on the assessee even to avail the one which fully exempts excisable goods because such an interpretation would render the exemption with the higher rate of duty to be redundant. Needless to say, all exemptions issued under Section 5A of the CEA, 1944 are issued in public interest with some specific legislative intent and cannot be rendered inconsequential. Applying the ratio of the judgment of the Hon'ble Gujarat High Court which has been affirmed by the Hon'ble Apex Court, it would follow that the applicant cannot be faulted for availing the benefit of Notification No. 2/2008-CE dated 01.03.2008. The applicant is therefore eligible for the benefit of rebate of duty paid on the exported goods.

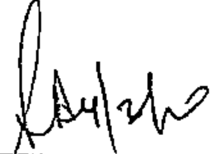
9. The Department has also contended that the applicant has chosen this method of availing the benefit of Notification No. 2/2008-CE inspite of being eligible for the benefit of Notification No. 4/2006-CE with the intent to encash the CENVAT credit available in their balance. The applicant is very well entitled to the benefit of CENVAT credit. Therefore, there can be no challenge to the availment of CENVAT credit. Needless to say, payment of duty from the CENVAT account is equitable with duty paid through account current and hence would be admissible as rebate. The contention in the impugned order

about the motive of encashment of accumulated CENVAT credit is not prohibited by any provision in the notifications or by the statute.

10. Government hereby sets aside the impugned OIA by holding that the applicant is eligible for rebate of duty paid by availing the benefit of Notification No. 2/2008-CE dated 01.03.2008.

11. Revision applications filed by the applicant are allowed.

12. So ordered.



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

ORDER No. 315-337/2020-CX (WZ) /ASRA/Mumbai DATED 04.03.2020

To,

Cadila Healthcare Ltd.
Plot No. 417-419-420, NH 8A,
Sarkhej-Bavla Highway,
Village Moraiya, Taluka Sanand,
Ahmedabad – 382 210

Copy to:

1. The Commissioner of CGST & CX, Ahmedabad South
2. The Commissioner of CGST & CX(Appeals), Ahmedabad
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy