REGISTERED SPEED POST

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.195/177/13- RA, /5461 Date of Issue:- 24.09.2021

ORDER NO. 322/2021-CX(WZ)/ASRA/MUMBAI DATED 17.09.2021 OF THE GOVERNMENT OF INDIA PASSED BY SMT SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SETION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Revision applications filed under section 35EE of the Central Excise Act, 1944 against the Order in Appeal No. BR/409 to 414/M-I/2012 dtd. 09.11.2012, passed by the Commissioner, Central Excise (Appeals), Mumbai Zone-I.

Applicant : M/s. Uniworld Pharma Pvt. Ltd., Mumbai.

Respondent : Commissioner, Central Excise, Mumbai-I.

**ORDER**

1. This Revision application is filed by M/s. Uniworld Pharma Pvt. Ltd., Mumbai a Merchant Exporter (hereinafter referred to as 'applicant') against the Order in Appeal No. BR/409 to 414/M-I/2012 dated 09.11.2012, passed by the Commissioner, Central Excise (Appeals), Mumbai Zone-I so far as it relates to Order in original No. KII/660-R/2012(MTC) dated 31.07.2012 passed by the Maritime Commissioner (Rebate) Central Excise, Mumbai-I .

2. Brief facts of the case are that the applicant had filed 2 Rebate claims totally amounting to Rs.56,452/- under Notification No.19/2004 C.Ex.(NT) dated 06.09.2004 issued under Rule 18 of the Central Excise Rules, 2002, read with Section11B of Central Excise Act, 1944 for the goods cleared from the factories situated at various places and exported through Air Cargo Complex, Sahar, Mumbai. The manufacturer was paying Central Excise duty continuously @ 4% (@ 5% w.e.f. 1-3-2011) *adv.* on its products falling under Chapter 3004.90 of the Central Excise Tariff Act, 1985 cleared for home consumption availing the benefit of Notification No. 4/2006-C.E., dated 1-3-2006 as amended and paying duty @ 10% *adv.* on the same goods, if cleared for export under claim for rebate by virtue of Notification No. 2/2008-C.E., dated 1-3-2008. The manufacturer had paid duty from the Cenvat credit account against their clearance for export. The applicant had claimed rebate in respect of the duty paid on export clearances. The adjudicating authority vide Order in Original No.: KII/660-R/2012(MTC) dated 31.07.2012 had sanctioned cash rebate @ 4% + cess on the FOB value i.e. Rs. 22,580/- and for the remaining amount of Rs.33,872/- the exporter was directed to approach the respective jurisdictional Central Excise Authorities.

3. Being aggrieved by the said order-in-original, applicant filed appeal before Commissioner (Appeals), who rejected the same vide Order in Appeal No. BR/409 to 414/M-I/2012 dated 09.11.2012 (impugned order).

4. Being aggrieved by the impugned order-in-appeal, the applicant has filed these revision applications under Section 35EE of Central Excise Act, 1944 before Central Government on the following grounds :

4.1 When two Notifications - which are not mutually exclusive - co-exist in the books of law, the assessee has option to choose any one of them.

(i) When pluralities of exemption are available, the assessee has the option to choose any of the exemptions, even if the exemption so chosen is generic and not

specific. The above legal proposition is well settled by the Supreme Court in *HCL Ltd.* v. *Collector of Customs, New Delhi* - 2001 (130) E.L.T. 405 (S.C.), wherein it was held that - *"The question in these appeals is covered in favour of the applicant by the order of this Court in Collector of Central Excise, Baroda v. Indian Petro Chemicals [1997 (92) E.L.T. 13]. Where there are two exemption notifications that cover the goods in question, the assessee is entitled to the benefit of that exemption notification which gives him greater relief, regardless of the fact that that notification is general in its terms and the other notifications are more specific to the goods."*

(ii) They also further referred and relied on following decisions of Supreme Court, High Court and CESTAT for this proposition - (a) 1997 (92) E.L.T. 13 (S.C.) - *CCE* v. *Indian Petro Chemicals*, (b) 1991 (53) E.L.T. 347 (T) - *Indian Oil Corporation Ltd.* v. *CCE* (c) 1990 (47) E.L.T. 7 (T) - *Coromandal Prints & Chemicals* v. *CCE* (d) 1989 (44) E.L.T. 500 (T) - *Dunbar Mills Ltd.* v. *CCE* (e) 1985 (22) E.L.T. 574 (T) - *Calico Mills* v. *CCE*, (f) 2009 (242) E.L.T. 168 = 2009 (15) S.T.R. 657 (Bom.) - *Coca-cola Ltd.* v. *CCE*, (g) 2007 (209) E.L.T. 321 (S.C.) - *Share Medical Care* v. *UOI* (h) 1998 (108) E.L.T. 213 - *CCE* v. *Cosmos Engineers* (i) 2003 (160) E.L.T. 1150 - *CCE* v. *Thermopack Industries* (j) 1996 (83) E.L.T. 123 (T) - *Gothi Plastic Industries* v. *CCE*.

4.2 Notification No. 4/2006 & Notification No. 2/2008 co-exist in the books of law and are not mutually exclusive.

(i) It is an undisputed fact that both the Notifications under consideration are in existence simultaneously. Both the aforesaid Notifications do not have any provisions excluding the other. In other words, Sr. No. 62C of Notification No. 4/2006 does not have any provision stating that the said Notification has an over-riding effect over Notification No. 2/2008-C.E., dated 1-3-2008 and similarly, vice-versa. Both the Notifications have been issued under Section 5A of the Central Excise Act, 1944.

(ii) In view of the settled legal position as explained supra, they had the option to avail any of the Notification. The department cannot force any particular Notification on an assessee. Further, the legal position cannot be distinguished on the ground that Notification No. 2/2008 provides for general amendment to the rates in Tariff. Even if it is admitted for the sake of argument, still, this does not detract from the fact that it is still a Notification issued under Section 5A only. The respondent has conveniently ignored the fact that if the rates in the Central Excise Tariff Act, 1985, are to be amended, it has to be done legally by way of a suitable Act of Parliament. Admittedly, there has been no Act of Parliament seeking to amend the rates prescribed in the Tariff.

(iii) The department has not pointed any provision under the Central Excise Act or Rules made thereunder which has the effect of requiring the assessee to mandatorily avail the exemption Notification No. 4/2006-C.E., dated 1-3-2006 (Sr. No. 62C) only.

4.3 They are entitled to entire refund of duty paid on goods exported.

(i) The Rule 18 of the Central Excise Rules, 2002, which grants rebate of the Excise Duty paid on goods exported and the conditions and procedures to claim rebate are prescribed under Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 and the essential condition prescribed under the said Notification is that the goods shall be exported after payment of duty. The fact that the goods which have been exported and have suffered Excise Duty is also not in dispute.

(iii) The CESTAT in the case of Gayatri Laboratories v. CCE - 2006 (194) E.L.T. 73 (T) held that rebate claim to the extent of duty paid is available and that the rebate claim cannot be restricted on ground that less duty should have been paid in terms of Notification.

4.4 Rebate sanctioning authority cannot question the assessment. The said issue has already been clarified by the circular of Government of India, Ministry of Finance (Circular No. 510/06/2000-CX dated 3 Feb, 2000) which is self-explanatory about such issues.

4.5 Assessment of goods being finalized, refund of duty cannot be denied.

(i) In terms of provisions of Rule 6 we have assessed goods to Central Excise duty applying Notification No. 2/2008-CE dated 01.03.2008 by paying 10% duty on such goods. Details of the assessment thus made, were duly informed to the Range Superintendent through the copies of ARE-1 submitted within 24 hrs of clearance of the goods as well as in the monthly ER1 returns. Assessment of goods made by us in aforesaid manner has not been challenged by the department in any manner.

(ii) In this matter Ministry of Finance have clarified vide their letter dated (DOF No. 334/1/2008-TRU) 29th February 2008, where at para 2.2 as since the reduction in the general rate has been carried out by notification, the possibility of same product / item being covered by more than one notification cannot be ruled out. In such situation the rate beneficial to the assessee would have to be extended if he fulfills the attendant condition of the exemption.

(iii) In any event of the matter and without prejudice to the above, unjust enrichment is not applicable to the present case since we have not collected the excess duty paid by us from our foreign buyer.

4.6 The matter is already decided by Government of India vide Order No. 1568-1595/2012-CX dt. 4.11.2012. Therefore we do not wish to be heard in person again. In view of this please decide the matter accordingly.

5. Personal hearing was scheduled in this case on 29.12.2017 & 27.08.2019 & 17.09.2019. Nobody attended the hearings. The applicants vide ground of appeal (para 4.6 supra) had waived the personal hearing and requested to decide the case as per Government of India vide Order No. 1568-1595/2012-CX dt. 4.11.2012 in case of M/s Cipla Ltd.

6. Government has carefully gone through the relevant case records and perused order-in-original and the impugned order-in-appeal.

7. Government observes issue of payment of duty by the applicant's manufacturers @ 10% i.e. General Tariff Rate of Duty ignoring the effective rate of duty @ 4% in terms of exemption Notification No. 4/2006-C.E., dated 1-3-2006 has been decided by G.O.I. Revision Order Nos. 41-54/2013-CX, dated 16-1-2013 in RE Cipla Ltd. [2014(313)E.L.T.954(G.O.I.) holding as under:-

> *"9. ..... there is no merit in the contentions of applicant that they are eligible to claim rebate of duty paid @ 10% i.e. General Tariff Rate of Duty ignoring the effective rate of duty @ 4% or 5% in terms of exemption Notification No. 4/2006-C.E., dated 1-3-2006 as amended. As such Government is of considered view that rebate is admissible only to the extent of duty paid at the effective rate of duty i.e. 4% or 5% in terms of Notification No. 4/2006-C.E., dated 1-3-2006 as amended.*
>
> *10. .....The amount of duty paid in excess of duty payable at effective rate of 4% or 5% as per Notification No. 4/2006-C.E. is to be treated as voluntary deposit with the Government. In such cases where duty is paid in excess of duty actually payable as held by Hon'ble Apex Court in the case discussed in Para 8.8.2 and also held by Hon'ble High Court of Punjab and Haryana as discussed in Para 8.8.3 above, the excess paid amount is to be returned/adjusted in Cenvat credit account of assessee. Moreover Government cannot retain the said amount paid without any authority of law. Therefore, Government allows the said amount to be re-credited in the Cenvat credit account of the concerned manufacturer".*

8.2 Being aggrieved by the decision of the aforementioned order of Revision Authority, the Commissioner of Central Excise, Mumbai-III filed Writ Petition No. 2693/2013 before Hon'ble Bombay High Court. Hon'ble Bombay High Court vide Order dated 17th November 2014 dismissed the Writ Petition No 2693/2103 filed by the Commissioner of Central Excise Mumbai-III [2015 (320) E.L.T. 419 (Bom.)] holding that

> *8.....The direction to allow the amount to be re-credited in the Cenvat credit account of the concerned manufacturer does not require any interference by us because even if the impugned order of the Appellate Authority and the Order-in-Original was modified by the Joint Secretary (Revisional Authority), what is the material to note is that relief has not been granted in its entirety to the first respondent. The first respondent may have come in the form of an applicant who has exported goods, either procured from other manufacturer or manufactured by it. Looked at from any angle, we do not find that any observation at all has made which can be construed as a positive direction or as a command as is now being understood. It was an observation made in the context of the amounts lying in excess. How they are to be dealt with and in what terms and under what provisions of law is a matter which can be looked into by the Government or even by the Commissioner who is before us. That on some apprehension and which does not have any basis in the present case, we cannot reverse the order or clarify anything in relation thereto*

*particularly when that it is in favour of the authority. For all these reasons, the Writ Petition is misconceived and disposed of.*

In view of the Revisionary Authority and Hon'ble Bombay High Court's Order/Judgement discussed in preceding paras, Government holds that the applicant is not entitled to rebate of duty paid in excess of duty payable at effective rate as per of Notification No. 4/2006-C.E., dated 1-3-2006 as amended. However, the excess duty paid by the applicant's manufacturer in this case, viz. duty paid in excess than payable at effective rate as per of Notification No. 4/2006-C.E., dated 1-3-2006 as amended has to be re credited in the Cenvat Credit account from where it was paid subject to compliance of the provisions of Section 12 B of Central Excise Act, 1944.

9. Order in Appeal No. BR/409 to 414/M-I/2012 dated 09.11.2012, passed by the Commissioner, Central Excise (Appeals), Mumbai Zone-I so far as it relates to Order in original No. KII/660-R/2012(MTC) dated 31.07.2012 passed by the Maritime Commissioner (Rebate) Central Excise, Mumbai-I is modified to the above extent.

17/9/21

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 322/2021-CX (WZ) /ASRA/Mumbai Dated 17.09.2021

To,

M/s Uni World Pharma,
12, Gunbow Street,
Fort, Mumbai-400 001

Copy to:

1. The Commissioner of CGST & CX, Mumbai East Commissionerate, 9th Floor, Lotus Info centre, Parel, Mumbai 400 012.
2. The Commissioner of CGST & CX, (Appeals-II), IIIrd floor, Central Excise Building, Bandra Kurla Complex, Bandra (East), Mumbai 400 051.
3. The Deputy / Assistant Commissioner, Division-III, GST & CX Division –III, Mumbai East Commissionerate, 9th Floor, Lotus Info centre, Parel, Mumbai 400 012
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Spare Copy.