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/ 165-167 /2011-RA/4907 Date of Issue : 08/11/19
195/241/2011-RA

ORDER NO.132-135/2019-CX (WZ)/ASRA/MUMBAI DATED 11.10.2019 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

Applicant : M/s. Indian Oil Corporation Limited, WR, Mumbai

Respondent : The Commissioner of Central Excise, Mumbai

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order In Appeal No. YDB/55/M-II/2011 dated 25.01.2011 and Order In Appeal No. YDB/847 to 849/M-II/2011 dated 16.12.2010, passed by the Commissioner (Appeals-II) Central Excise, Mumbai.

ORDER

These Revision Applications have been filed by M/s. Indian Oil Corporation Limited, Marketing Division, Western Region, Mumbai 400 051 (hereinafter referred to as "the applicant") against the Order in Appeal No. YDB/847 to 849/M-II/2011 dated 16.12.2010 & the Order in Appeal No. YDB/55/M-II/2011 dated 25.01.2011, passed by the Commissioner (Appeals-II) Central Excise, Mumbai.

2. The brief facts of the case are that the applicant, M/s. INDIAN OIL CORPORATION LTD. (A Govt. of India Undertaking) are engaged in the manufacture, sale and distribution of inter-alia Motor Spirit, Aviation Turbine Fuel etc. falling under Heading 27.10 of the First Schedule to Central Excise Tariff Act, 1985 and are holding registration with the Central Excise authorities. The applicant also receive Low Sulphur High Flash High Speed Diesel (LSHF HSD) from M/s Bharat Petroleum Corporation Ltd. (M/s BPCL) on duty payment by M/s BPCL which is used for supply to the vessels other than foreign going vessels and also without excise duty payment under export warehousing procedure and the same is used for supply to the foreign going vessels.

3. In these cases, the applicant had supplied LSHF HSD to foreign going vessels during the period May 2006 to July 2006 and May 2007 to July 2007 and July 2006 to October 2006, respectively, and after due process the applicant claimed to notice that whatever supplies were made to foreign going vessels, were out of duty paid stocks received from M/s BPCL for which they filed refund claims subsequently. However, supplies to foreign going vessels (export) were made by the applicant under letter of undertaking (LUT) following the procedure under Rule 19 of Central Excise Rules, 2002 and the claims for acceptance of proof export were also filed with the Assistant Commissioner Division F-II, Central Excise, Mumbai-I. Later on the applicant filed refund claim with the Assistant Commissioner,

Central Excise, Chembur-I division on the grounds that LSHF HSD supplied to foreign going vessels during the aforementioned period, were duty paid and had been supplied to them by M/s BPCL. However, the jurisdictional Assistant Commissioner of Central Excise, Chembur-I Division observed that before filing their refund claim, the applicant had applied for acceptance of Proof of Export of the product exported under Rule 19 of the Central Excise Rules 2002 against letter of undertaking. Since the proof of export was obtained from the jurisdictional Central Excise Authority and entries in respect of the amount of duty foregone remained in the running bond account, the question of considering the application for refund did not arise. Accordingly, Assistant Commissioner of Central Excise, Chembur-I Division vide following Orders-in-original rejected the refund claims filed by the applicant.

(i) Order-in-Original No. ASB/Refund/32-R/CH-I/2009-2010 dtd. 15.12.2009 - the rebate claims of Rs.1,00,54,446/-.
(ii) Order-In-Original No. ASB/Refund/34-R/CH-I/2009-2010 dtd. 04.01.2010, - the rebate claim of Rs.88,66,121/- and
(iii) Order-in-Original No. ASB/Refund/33-R/CH-I/2009-2010 dtd. 16.12.2009 – rejecting the rebate claim of Rs.48,95,743/- resp.

4. The applicant filed appeals against the said Orders before the Commissioner (Appeals). The Commissioner (Appeals) vide common Order-in-Appeal No. YDB/847 to 849/M-II/2010 dated 16.12.2010 and Order in Appeal No. No. YDB/55/M-II/2011 dated 25.01.2011 upheld the afore-stated Orders-in-Original dated 15.12.2009, 4.1.2010 and 16.12.2009 and rejected the Appeals filed by the applicant.

5. Being aggrieved by the Orders-in-Appeals dated 16.12.2010 and 25.01.2011, the applicant filed Revision applications Nos. 195/165-167/11-RA and 195/241/11-RA under Section 35EE of the Central Excise Act, 1944, before Government of India on the various grounds as stated therein.

6. The Revisionary Authority, vide GOI Orders No.1385-1387/12-CX dtd.4.10.2012 and 92/2013-CX dated 30.01.2013 upheld the Orders-in-Appeal and rejected the aforementioned Revision Applications.

7. Aggrieved by the aforementioned GOI orders, the applicant filed writ petition No. 2078 of 2013 and 2079 of 2013 before the Hon'ble High Court Bombay against the said Revision orders. Hon'ble High Court vide Order dated 04.08.2014 set aside the Order No.1385-1387/12-CX dtd.4.10.2012 and Order No.92/2013-CX dtd.30.01. 2013 respectively, of this authority and remanded the case back to Revisionary authority with direction that the Revision Applications shall now be decided by taking into consideration all the relevant materials and a fresh order shall be passed after hearing the petitioner.

8. A personal hearing in this case was held on 22.08.2019 and it was attended by the Advocate, Ms. Padmavati Patil along with the representatives of the applicant Shri V.G.Gawade, DGM (F) and Shri Rahul Maloo, Accounts Officer. They reiterated the facts and documents and pleaded that indent was for bonded non duty paid supply and therefore ARE-1 prepared as non duty paid. They submitted CA Certification of the entire claim for all the cases.

9. Government has carefully gone through the relevant case records available in the case files, Hon'ble Bombay High Court Order dated 04.08.2014, the Revision Applications, GOI Orders as well as the impugned Orders in Appeal. Since the issue involved in all the Revision Applications being same, they are disposed off vide this common order.

10. The Hon'ble Bombay High Court while deciding Writ Petitions bearing Nos. 2078 of 2013 and 2079 of 2013 filed by the applicant, vide combined Order dt. 04.08.2014 remanded the matter to the Revisionary Authority with the following observations :-

8. *In that regard, Mr. Patil has rightly placed reliance on page 103 of the paper book in the Writ Petition No. 2079 of 2013 and page 50 of the paper book where the application for refund of duty is made in Form-R. That according to Shri Patil, establishes that the goods were duty paid and Rule 18 was invoked. At page 103 of the paper book we find a letter which has been addressed on 21st January, 2013 by the petitioners to the Joint Secretary of the Government of India confirming their presence at two hearings. During the personal hearing, the petitioners relied upon the co-relation statement supported by documentary evidence. According to them, these statements have been prepared so as to establish the co-relation with the goods which are covered by the invoices raised by BPCL. We find that this communication was received on 23rd January, 2013 together with the co-relation statement/enclosures. However, we do not find any reference made to this aspect of the matter in the impugned orders. We have not been shown anything which would enable the Revisional Authority and others particularly when such documents were placed on file and it was emphasized that the application for refund of duty is traceable to Rule 18 of the Central Excise Rules, 2002 that they can omit the same from consideration totally. Having found that a clear statement was made in the application as also before us that the Indian Oil Corporation Ltd. which is also answerable to the public and Parliament having produced such document that they can be left out of consideration. If Rule 18 was invoked and that is how the impugned orders proceed, then, this material should have been referred to by the Revisional Authority.*

9. *As result of the above discussion, we quash and set aside both the orders impugned in these Writ Petitions and passed by the Revisional Authority namely Joint Secretary, Government of India, Ministry of Finance (Department of Revenue) and direct that the Revision Applications filed by the petitioners shall be decided afresh on merits and in accordance with law after taking into account all the material supplied including the details of the co-relation statement, the documents referred therein and which according to the petitioners evidence payment of duty. Needless to clarify that we are not holding that the applications which have been made for refund are traceable to a particular Rule and it was the applicable provision. We have only found from the admitted facts and the observations and conclusions in the impugned orders that the Authorities themselves referred to Rule 18 and the petitioners not being able to establish the correlation with the goods supplied by BPCL to them and on which duty has been paid. In such circumstances and in the larger interest of justice,*

we give this opportunity to the petitioners. Therefore, the impugned orders are quashed and set aside. The Revision Applications shall now be decided by taking into consideration all the relevant materials. A fresh order shall be passed after hearing the petitioners. All contentions of both sides are kept open.

11. In their written submissions dated 03.09.2019, the applicant contended that :

i) the findings that invoices of M/s. BPCL are not signed is factually incorrect, as there is proper signature of the Executives of M/s.BPCL on the top right portion of the invoices;

ii) that although ARE-1s did not show the duty paid amount, the goods received from M/s. BPCL and supplied to International Bunkers are duty paid, which gets evidenced from the invoices of M/s. BPCL as well as the disclaimer certificate given by them;

iii) that the entire co-relation of documents to evidence the fact of duty payment like the invoices of BPCL under which the goods were received by the applicants, accountal thereof by them, clearance of the said goods to International Bunkers by them under their invoices, ARE-1 and Shipping Bills were also submitted during the course of personal hearing and explained in detail;

iv) that based on the aforesaid co-relation of documents, it is clearly evident that duty paid goods were supplied to International Bunkers, which is treated as export under Rule 18 and hence, rebate of duty paid is admissible;

v) that the documents evidencing the duty paid character of LSHF HSD in as much as Invoices of BPCL under which the duty paid LSHF HSD were cleared to them, corresponding Invoices for clearance of LSHF HSD to International Bunkers, Corresponding ARE-1s and Shipping Bills were already submitted on 23.1.2013 before the Joint Secretary (G.O.I) aftermath personal hearing, by letter dated 21.1.2013 by them;

vi) that the RA during the earlier round of litigation passed Order without considering the said co-relation and the corresponding documents evidencing the fact that, duty paid goods were supplied

to foreign going vessels (exported), hence, the Hon'ble Bombay has remanded back the matter for consideration of all the documentary evidences supporting the receipt of duty paid goods and cleared to foreign vessels;

vii) that in support of the fact that during the disputed period i.e. from May 2006 to October 2006 and May 2007 to July 2007 duty paid goods were received from BPCL and were cleared to foreign vessels, co-relation statements certified by a Chartered Accountant [Certificates each rebate-wise] were produced, relied upon and copies thereof submitted during the course of hearing; [Certificate No. 19152087AAAABE2622 dated 14.8.2019 pertaining to rebate of Rs. 88,66,122/-, Certificate No. 19152087AAAABH6082 dated 17.8.2019 pertaining to rebate of Rs. 48,95,743/-, Certificate No. 19152087AAAABF 8548 dated 14.8.2019 in respect of rebate of Rs. 1,00,54,446/-];

viii) that there was no dispute of fact of export and fact of receipt of duty paid goods gets evidenced from the documents in as much as Invoices of BPCL, Corresponding Invoices of the Petitioners for clearance of LSHF HSD to foreign going vessels, Corresponding ARE-1s and Shipping Bills, co-relation statement as certified by a Chartered Accountant Certificate relied upon and copies submitted;

ix) that under the said circumstances, denial of substantive benefit of Rebate on technical grounds, is incorrect and is not sustainable based on settled legal position as held in various judgments of higher foras.

12. Government observes that in these cases, initially the LSHF HSD was supplied by the applicant to foreign going vessels during the period May 2006 to July 2006, July 2006 to October 2006, and May 2007 to July 2007 under bond in terms of Rule 19 of the Central Excise Rules, 2002. This rule enables export of goods without payment of duty from the factory of a manufacturer.

13. Subsequently, during product reconciliation with M/s. BPCL, the applicant realized that, the said LSHF HSD supplied to foreign going vessels

during the period from May 2006 to July 2006, July 2006 to October 2006, and May 2007 to July 2007, were actually duty paid. Consequently, applicant filed the excise duty refund claims of Rs.48,95,743/-on 13.07. 2007, Rs.1,00,54,446/- on 01.06.2007 and of Rs. 88,66,121/-on 02.04. 2008, before the jurisdictional Assistant Commissioner of Central Excise, Chembur-I Division. The refund claims were filed along with requisite supporting documents. However, both the lower authorities as well as Government of India was of the opinion that since the goods have been exported in terms of Rule 19 of Central Excise Rules, 2002, the appellant will not be entitled to the rebate of duty paid. Accordingly, the claims were rejected.

14. Government observes that it is an admitted fact that the applicant had exported the goods in terms of Rule 19 of Central Excise Rules, 2002. Government observes that Rule 18 of the Central Excise Rules, 2002 pertains to rebate of duty and provides for rebate claims by following the procedure prescribed by the Government of India under a notification. Rule 19 of the Rules pertains to export without payment of duty. Thus, both these Rules operate in vastly different fields. It is in terms of Rule 18 that the Government of India under Notification No. 19/2004 laid down detailed procedure for making rebate claims. On the other hand, Annexure-19 is prescribed for declaration necessary for export without duty in terms of Rule 19 of the said Rules.

15. It is pertinent to mention here that the provisions of Rule 18 and Rule 19 of Central excise Rules, 2002 are mutually exclusive, If an exporter avails of the facility of rebate under Rule 18 on export goods they cannot follow the procedure under Rule 19 and vice versa. In the instant cases, the applicant has not adhered to the basic requirement of export under claim of rebate, viz. payment of duty on the final product. The Shipping Bill and ARE-1 explicitly mention that the goods have been cleared under bond /LUT. The prescribed procedure for export without payment of duty had been followed

in its entirety. It is also observed from the applicant's submissions in Writ Petitions filed before Hon'ble Bombay High Court that during the period of dispute, they received LSHF HSD **from M/s BPCL on duty payment** by M/s. BPCL Refinery at Mumbai, **which was used for supply to the vessels other than foreign going vessels**; that the applicant also received **LSHF HSD without excise duty payment,** under export Warehousing Procedure and the same was **used for supply to the foreign going vessels as well as for supply to Navy**; that the supply of duty paid or non duty paid LSHF HSD from M/s. BPCL was based on the requirement of the applicant. It is further observed from the applicant's submissions in the said Writ petitions that during the period from July 2006 to October 2006, May 2006 to July 2006 and May 2007 to July 2007, **since the requirement was that of non-duty paid LSHF HSD**, the applicant under the impression that, what had been received from M/s. BPCL was non duty paid LSHF HSD, supplied the same to foreign going vessels and followed export procedure under bond under Rule 19 of the Central Excise Rules, 2002; adhering to filing of ARE-1, shipping bill, submission of proof of export etc. complying with the procedure laid down; that the applicant, during product reconciliation with M/s. BPCL, realized that, the said LSHF HSD supplied to foreign going vessels during the period from July 2006 to October 2006, May 2006 to July 2006 and May'2007 to July'2007, were actually duty paid and consequently, they filed the excise duty rebate claims of Rs.48,95,743/- on 13.07.2007, Rs.1,00,54,446/- on 01.06.2007 and of Rs. Rs.88,66,121/-on 02.04.2008, both before the jurisdictional Assistant Commissioner of Central Excise, by complying with the procedure under Rule 18 of Central Excise Rules, 2002 along with requisite supporting documents.

16. From the aforesaid discussion as well as from the orders passed by the authorities below, Government observes that in effect, the basis of the applicant's claim for rebate after completion of export by fully complying with the procedure prescribed under Rule 19 of the Central Excise, Rules,

2002, is an oversight on their part. Surely, failure on the part of the applicant to exercise due diligence cannot be a valid ground to switch over from one scheme to another. Moreover, before filing their refund claim, the applicant had applied to the Central Excise Authority of F-II Division, Mumbai-I Commissionerate for acceptance of Proof of Export of the product exported under Rule 19 of the Central Excise Rules 2002 against letter of undertaking and the proof of export was obtained from the jurisdictional Central Excise Authority and entries in respect of the amount of duty foregone remained in the running bond account. Thus, making of the declarations by the applicant after exports in format of Annexure-19 before the jurisdictional Central Excise Officer for acceptance of proof of export and also receiving the same was a usual practice followed by the applicant in respect of non-duty paid LSHF HSD supplied to foreign going vessels. Further, as observed from impugned Orders in Original, there is nothing on record to show that the applicant had ever applied for cancellation of their Letter of Undertaking either before or even immediately after filing their Application in Form R claiming refund of duty on the same product. An oversight on the part of the applicant does not qualify them to conveniently switch over from "Under bond Export" under Rule 19 of Central Excise Rules, 2002 to "Export under claim of Rebate" under Rule 18 of Central Excise Rules, 2002 and the same does not appear to be legitimately permissible. Once the applicant had opted for exports without payment of duty under UT-I in terms of Rule 19 of Central Excise Rules, 2002, the exports will have to be governed by the provision of the said rule. Therefore Government holds that the applicant is not eligible for rebate of the duty paid by M/s BPCL under Rule 18 of Central excise Rules, 2002.

17. Government further observes that in the instant cases the requirement for supply to International Bunkers / foreign going vessels was that of non-duty paid LSHF HSD, but what was supplied to International Bunkers / foreign going vessels during the period from July 2006 to October

2006, May 2006 to July 2006 and May 2007 to July 2007, was duty paid LSHF HSD received from M/s BPCL (which was noticed during the product reconciliation with M/s BPCL). Usually, the applicant received LSHF HSD from M/s BPCL without excise duty payment, under export Warehousing Procedure and the same was used for supply to the foreign going vessels. Therefore, the applicant being under the impression that, what had been received from M/s. BPCL during the aforesaid period was non duty paid LSHF HSD, supplied the same to foreign going vessels and followed usual procedure of export under bond as prescribed under Rule 19 of Central Excise Rules, 2002. Under these circumstances Government is of the considered view that the proper recourse available to the applicant would have been to file refund claim for the duty paid on LSHF HSD supplied to foreign going vessels, as what was supposed to be supplied to the foreign going vessels was non duty paid LSHF HSD for which they correctly followed the procedure of export under bond as prescribed under Rule 19 of Central Excise Rules, 2002.

18. In terms of Section 11B of Central Excise Act, 1944, any person who suffers Central Excise duty, which is not payable as per law, can apply for refund of the same. In the instant cases the statutory remedy of refund is very much available to the applicant within the parameters of Section 11B. Under Section 11B of the Central Excise Act, 1944, it is well settled that the refund claim can as well be made by the ultimate consumer who may have borne the burden of tax. The Supreme Court in the case of Oswal Chemicals & Fertilizers Limited v. Commissioner of Central Excise, Bolpur, reported in (2015) 14 SCC 431 = 2015 (318) E.L.T. 617 referring to the Constitution Bench's decision in the case of Mafatlal Industries Limited v. Union of India, (1997) 5 SCC 536 = 1997 (89) E.L.T. 247, in context of Section 11B of the Central Excise Act, held and observed as under :

> *6. "The said provision is made for obvious reasons. Though the duty under Section 11B of the Act is payable by the manufacturer, a manufacturer*

would generally pass on the burden of the excise duty to the buyer or it may be some other person. It is for this reason, a person who is ultimately aggrieved with the payment of the said duty and challenges the order successfully can seek the refund. This becomes apparent from the reading of clause (e) to Explanation (B) appended to the aforesaid provision which is as under :

"Explanation - For the purpose of this section –
.....
.....
(B) 'relevant date' means –
.....
.....
(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person".
.....

7. Explanation (B) defines "relevant date". Though this date has reference to the calculation of limitation period for the purposes of seeking refund of the duty under the aforesaid provision. However, clause (e) while stating the "relevant date" clarifies that in case of a person, other than the manufacturer, the date of purchase of goods by other person would be the relevant date. This itself indicates that the person can be other than the manufacturer and Explanation (B) caters to such other person. It is not even necessary to embark on detailed discussion on this aspect inasmuch as we note that the Constitution Bench of this Court in 'Mafatlal Industries Ltd. and others v. Union of India and others' [1997 (5) SCC 536 = 1997 (89) E.L.T. 247 (S.C.)] has already settled this aspect in the following words :-

> *"(xii) Section 11-B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that Section 11-B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962."*

19. In view of the above, Government holds that the applicants can apply for refund claims in the terms as discussed above. The applicant had supplied LSHF HSD purchased by them from BPCL for supply to foreign going vessel. On realising that the supply was made from duty paid stock the applicant filed refund claims under form 'R' for Rs.48,95,743/- on 13.07.2007, Rs.1,00,54,446/- on 01.06.2007 and of Rs. 88,66,121/-on 02.04.2008, along with requisite supporting documents before the then

jurisdictional Assistant Commissioner of Central Excise. During the personal hearing, the applicant has also submitted co-relation statements certified by a Chartered Accountant pertaining to refund of Rs. 48,95,743/-, Rs. 1,00,54,446/- and Rs. 88,66,122/-, to establish that LSHF HSD which had been received by them from M/s BPCL and subsequently supplied to foreign going vessels was duty paid.

20. In view of the foregoing discussion Government remands the matter back to the Original authority regarding the refund claims for causing verification / correlation of duty paid goods received from M/s. BPCL supplied to foreign going vessels with the invoices of the applicant. The applicant will submit adequate documents with necessary details along with aforestated Chartered Accountant's Certificates, before the original authority. The original authority is at liberty to verify whether duty has been paid on the goods which have been received by the applicant and supplied to the foreign going vessel and the relevant date as per Section 11B.

21. In view of the above, Government sets aside impugned Orders in Appeal and direct the original authority to examine the refund claims afresh on merit along with the connected documents and pass a fresh order within a period of six weeks from the date of receipt of this order.

22. Revision Applications are disposed off in the above terms.

23. So, ordered.

17.10.19

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

ORDER No.132-139/2019-CX (WZ)/ASRA/Mumbai DATED 17.10.2019

To,

M/s. Indian Oil Corporation Limited,
Marketing Division, Western Region,
Indian Oil Bhawan, Plot No. C-33,
G Block, Bandra-Kurla Complex, Mumbai 400 051.

Copy to:

1. The Commissioner of CGST & C.Ex., Mumbai Central, 4th Floor, GST Bhavan, 115 M.K. Road, Marine Lines, Mumbai 400 020.
2. The Commissioner of CGST & C.Ex. (Appeals-II), 3rd Floor, GST Bhavan, Plot No. C-24, Sector –E, Bandra Kurla Complex (Bandra(East), Mumbai 400 051.
3. The Assistant Commissioner,(Refund) CGST & C.Ex. Mumbai Central, 4th Floor, GST Bhavan, 115 M.K. Road, Marine Lines, Mumbai 400020.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Spare Copy.