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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. 195/681/13-RA

F. No. 195/682/13-RA

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Date of Issue: 06/10/2021

335-336

ORDER NO. /2021-CX (SZ) /ASRA/MUMBAI DATED 30.09.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant ; M/s Sterlite Industries India Ltd.
SIPCOT Industrial Complex,
Madurai Bypass Road,
T. V. Puram, P.O.,
Tuticorin - 682 002

Respondent: Commissioner of Central Excise,
Tirunelveli

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against OIA No. TNL-CEX-000-APP-093-13 dated 28.02.2013 and OIA No. TNL-CEX-000-APP-094-13 dated 28.02.2013 passed by the Commissioner of Central Excise(Appeals), Madurai.

ORDER

These revision applications have been filed by M/s Sterlite Industries India Ltd., SIPCOT Industrial Complex, Madurai Bypass Road, T. V. Puram, P.O., Tuticorin - 682 002(hereinafter referred to as "the applicant") against OIA No. TNL-CEX-000-APP-093-13 dated 28.02.2013 and OIA No. TNL-CEX-000-APP-094-13 dated 28.02.2013 passed by the Commissioner of Central Excise(Appeals), Madurai.

2.1 The applicant had submitted a claim for rebate of Rs. 36,30,70,941/- and Rs. 65,55,85,689/- being the duties of excise paid on copper cathode, anode slime & selenium powder falling under ch.sh. 74031100, 71129990 & 28049000 respectively and cleared for export. The Deputy Commissioner of Central Excise, Tuticorin Division had sanctioned the rebate of Rs. 36,30,70,941/- & Rs. 65,55,85,689/- vide OIO No. 32/2012(Rebate) dated 24.05.2012 & OIO No. 33/2012(Rebate) dated 24.05.2012.

2.2 During the review proceedings concerning the OIO's, the Commissioner of Central Excise, Tirunelveli found that the orders were not legal and proper. He found that anode slime was a residue of metallurgical, electrolytic process containing precious metals, merits classification under chapter heading 7112.90. Entries in the shipping bills of the applicant also indicated the same classification of the product. As per the entry in Sr. No. 195 of Notification No. 12/2012-CE dated 17.03.2012 anode slime falling under chapter heading no. 7112 attracts Nil rate of duty. No tax can be paid without authority of law. As opined by the Law Ministry, if any one pays tax without authority of law, it would be in contravention of Article 265 of the Constitution of India.

3.1 On appeal by the Department, the Commissioner(Appeals) observed that during the process of conversion of copper anode into copper cathode, anode slime emerges as a by-product which contains various metals like tellurium, selenium and precious metals apart from copper.

The anode slime generated in Silvassa is brought to Tuticorin for the purpose of extraction of selenium after extraction of copper and tellurium contained therein as the unit at Silvassa does not have the facility for extraction of selenium. The anode slime emerging at all their units is exported for recovery of gold and silver from the anode slime at the importers end. The applicant classified the anode slime under chapter heading 7112.9900, paid duty and claimed rebate. The chapter heading 7112.9900 covers waste and scrap of precious metal or of metal clad with precious metal. While contesting the order passed by the original authority, the applicant had filed cross objection stating that the anode slime is not covered under Sr. No. 195 of Notification No. 12/2012-CE dated 17.03.2013 as it arises during the conversion of copper anode to copper cathode.

3.2 The Commissioner(Appeals) found that there was no dispute that the applicant was receiving anode slime falling under chapter 71 and was further purifying the anode slime by extracting selenium and then exporting the goods for extracting precious metals falling in chapter 71. He inferred that the words "course of manufacturing" is not with reference to the applicants factory and that the goods are being exported for extracting precious metals at the recipients end. On further processing of anode slime, for the purpose of extraction of copper, tellurium and selenium what emerges is anode slime containing precious metals which is classified under chapter 71. Therefore, the exported anode slime squarely falls within the meaning of the expression "arising in the course of manufacture of goods falling in Chapter 71" appearing in Sr. No. 195 of the table annexed to the Notification No. 12/2012-CE dated 17.03.2012. In the light of these findings, the Commissioner(Appeals) had vide OIA No. TNL/CEZ/000/APP/093-13 dated 28.02.2013 & OIA No. TNL-CEX-000-APP-094-13 dated 28.02.2013 held that the applicant was not entitled to cash rebate of the duty paid without authority of law and directed the applicant to immediately pay back the refunded amounts in respect of anode slime in cash.

4. Aggrieved by the OIA's, the applicant has filed revision applications alongwith stay applications on the following grounds:

(a) The applicant contended that the Commissioner(Appeals) had failed to consider the applicants submission that the anode slime exported from their factory did not fulfill any of the conditions and that the exemption was not available to them. The presumption of the Commissioner(Appeals) on which the entire order is based is factually incorrect as the applicant had classified the anode slime under chapter heading 7112.90 which covers "other waste and scrap containing precious metals of a kind used in recovery of precious metals" whereas the exemption was available only to waste and scrap of precious metals or metals clad with precious metals. The applicant averred that the exemption was not available to the category of other waste and scrap containing precious metals under which anode slime falls.

(c) The applicant opined that the Commissioner(Appeals) had failed to appreciate that the expression "precious metal" has been defined in Note 4A of Chapter 71 of the CETA which silver, gold and platinum. Therefore, it is only waste and scrap of silver, gold and platinum or of metal clad with silver, gold or platinum arising in the course of manufacture of goods falling under chapter 71 which would be eligible for exemption. The applicant asserted that anode slime is not waste/scrap of silver, gold or platinum. On the contrary, in para 5 of the impugned order the Commissioner(Appeals) had accepted that anode slime was a by-product arising in the manufacture of copper cathode/copper anode.

(d) The notification covers only waste and scrap but not by-products. Moreover, anode slime does not arise in the manufacture of goods falling under chapter 71(precious metals) but arises as a by-product in the course of manufacture of goods falling under chapter 74. Anode slime is neither gold, silver or platinum but contains metals such as copper, copper telluride, selenium, bismuth, nickel sludge and cannot be said to be waste and scrap of precious metals or metals clad with precious metals

arising in the course of manufacture of goods falling under chapter 71 to which the exemption applies.

(e) The applicant contended that the Commissioner(Appeals) had failed to appreciate that even if anode slime is classifiable under chapter heading 7112, it could not be said that anode slime was waste and scrap of precious metals(gold, silver, platinum).

(e) The applicant further submitted that the exemption in terms of Sr. No. 195 of Notification No. 12/2012-CE dated 17.03.2012 not only requires that the waste and scrap should be of gold, silver and platinum or metal clad with precious metals but also that the same should arise in the course of manufacture of goods falling under chapter 71. The anode slime does not arise during the manufacture of goods falling under chapter 71 but arises during the course of manufacture of copper cathodes from copper anodes falling under chapter 74.

(f) It was submitted that the surmise in the impugned order that the availability of exemption is to be examined and extended with respect to the use to which the goods would be put after their clearance/export from the appellants factory was untenable, baseless and absurd. The applicant stated that such an interpretation was neither advanced in the Departments appeal nor did it emanate from the reading of the terms of the exemption notification.

(g) The applicant referred the para no. 2 of letter F. No. CC/per/1/2012-SrPS CCO dated 21.05.2012 addressed to Commissioner, Tirunelveli wherein it was stated that anode slime would have to be treated as other waste and scrap containing precious metals or precious metal compounds principally used for recovery of precious metals. It was pointed out that such a categorization had been confirmed even in para 6.4 of the letter F. No. IV/16-72/T/12/4404 dated 11.10.2012 addressed to the CBEC, New Delhi by the Chief Commissioner, Vadodara. Without prejudice to these submissions, the applicant submitted that the Chief Commissioner, Coimbatore who had raised this issue in his letter dated 21.05.2012 had agreed that anode slime was to be categorized as other waste and scrap containing precious metal. Therefore, the Commissioner(Appeals) ought to

have held that exemption in terms of Sr. No. 195 of Notification No. 12/2012-CE dated 17.03.2012 was clearly not available to clearance/export of anode slime.

(h) As an alternative argument, the applicant averred that even if anode slime was considered as waste and scrap of precious metal, it would lead to a situation where duty had been paid when it was not required to be paid. The applicant relied upon case laws wherein it had been held that even in such situations, as a settled principle refund of duty is required to be granted as only goods are to be exported and not taxes thereon. It was contended that the impugned order had the effect of the Union collecting and retaining taxes without authority of law which it cannot collect in terms of Article 265 of the Constitution of India. Therefore, irrespective of whether or not duty was payable, once such payment of duty was accepted by the Department, rebate must be granted. In this regard, the applicant placed reliance upon judgments in Commissioner vs. Suncity Alloys Pvt. Ltd.[2007(218)ELT 174(Raj)] and CCE & C, Vadodara-II vs. Jayant Oil Mills[2009(235)ELT 223(Guj)].

(i) The applicant submitted that the Department could not approbate and reprobate. On the one hand, the jurisdictional Dy. Commissioner of C. Ex., Silvassa had directed to classify the anode slime which arose in the process of manufacture of copper cathodes under chapter heading 7112 of the CETA, 1985 and pay duty thereon. This letter informed the applicant that exemption in terms of Sr. No. 195 of Notification No. 12/2012-CE would not be available for the anode slime. On the other hand, the respondent at Tuticorin who was part of the same revenue formation had filed appeal challenging the grant of rebate of duty paid at the time of export of anode slime on the premise that the anode slime was exempt from payment of duty. The applicant averred that such a course of action was clearly not permissible on the part of the Department.

(j) Without prejudice to their other submissions, the applicant stated that the Commissioner(Appeals) had failed to appreciate that heading 7112 of the CET covers two categories; viz. waste and scrap of precious metals or metal clad with precious metal & other waste and scrap containing

precious metals or precious metal compound of a kind used principally for recovery of precious metal. It was averred that anode slime which arises in the course of manufacture of copper cathode contains metals such as copper, tellurium, selenium and trace elements of precious metals and is not classifiable under chapter heading 7112 but is correctly classifiable under chapter heading 2620 which covers slag, ash and residue containing arsenic metal and their compounds. The anode slime generated at Silvassa and Tuticorin primarily contained 30% to 40% copper and was classifiable under chapter heading 263030 of the CET. It was further stated that even after extraction of copper, tellurium and selenium, the anode slime still contained other metals such as nickel sludge, selenium and bismuth and was therefore classifiable under chapter heading 26209900 under "other/others". However, since the Department was of the view that the anode slime cleared from Silvassa to Tuticorin which was also exported from Tuticorin was classifiable under chapter heading 7112, the applicant had adopted the said classification. However, such classification cannot ipso facto result in the goods being eligible for exemption in terms of Sr. No. 195 of Notification No. 12/2012-CE dated 17.03.2012.

(k) The applicant contended that the impugned order had been passed without granting effective opportunity of personal hearing as the applicant had during the course of personal hearing on 20.12.2012 specifically requested for another opportunity for personal hearing to be granted as the issue of availability of exemption on anode slime in terms of Sr. No. 195 of Notification No. 12/2012-CE dated 17.03.2012 had been referred to the CBEC. It had been averred that since the matter had been referred to the Board, a decision in the matter should be taken only after receipt of clarification from the Board to avoid multiplicity of proceedings. It was submitted that the Commissioner(Appeals) did not disagree with this view of the applicant and had in fact verbally assured that no decision would be taken prior to receipt of clarification from the Board. Therefore, the impugned order, deciding the issue on the matter without putting the

applicant to notice stating that he would not wait for the clarification from the Board was clearly violative of the principles of natural justice.

(1) The applicant made alternate submissions to contend that the rebate had rightly been sanctioned whereas the impugned order was non-speaking and therefore deserved to be quashed and set aside. In this regard, the applicant placed reliance upon the judgments in the case of *Kranti Associates Pvt. Ltd. vs. Mansood Ahmed Khan*[2010(9)SCC 496], *Oryx Fisheries Pvt. Ltd. vs. UOI*[2011(266)ELT 422(SC)] and *Assistant Commissioner of Sales Tax vs. Shukla Bros.*[2010(254)ELT 6(SC)].

5. The Department filed cross objection vide letter dated 20.08.2013 to the revision applications filed by the applicant reiterating that the anode slime manufactured by the applicant was fully exempt from payment of duty.

6. The applicant appeared for personal hearing on 08.05.2018, 09.12.2019 and on 20.04.2021. They reiterated their submissions in the revision applications filed by them and drew attention to CBEC Circular No. 71/4/2012-CX.1 dated 14.07.2015 and the judgment dated 18.02.2016 of the Madurai Bench of Hon'ble Madras High Court in the case of the same applicant in Writ Appeal (MD) No. 82 of 2015[2016(337)ELT 366(Mad)]. In the written submissions filed by the applicant, the applicant referred the OIO No. 42/COMMR/CE/2016 dated 28.03.2016 allowing the sanction of rebate claims in view of the clarification issued by CBEC vide Circular No. 71/4/2012-CX.1 dated 14.07.2015.

7. Government has carefully gone through the relevant case records and perused the impugned orders-in-appeal and orders-in-original. Government observes that the short issue involved in these revision applications is the classification of the anode slime exported by the applicant and whether anode slime is exempt as per the entry at Sr. No. 195 of Notification No. 12/2012-CE dated 17.03.2012. The answer to

these questions would determine whether the duty paid by the applicant while exporting the anode slime would be rebatable under Rule 18 of the CER, 2002.

8.1 Government observes that the case made out by the Commissioner of Central Excise, Tirunelveli is entirely based on the reference made by the Chief Commissioner, Coimbatore Zone to the CBEC vide his letter C. No. IV/16/140/2010-AE(CCO)Pf.I dated 25.07.2012 involving the facts concerning the applicant in the instant case. The said reference has been answered by the CBEC vide Circular No. 71/4/2012-CX.1 dated 14.07.2015. The inferences drawn by the Board after discussing the issues threadbare are reproduced below.

“15. It may be noted that the heading 7112 of Central Excise Tariff Act, 1975 covers the following products :

(a) Waste and scrap of precious metals or of metal clad with precious metal;

(b) Other waste and scrap containing precious metal or precious metal compounds, of a kind used principally for the recovery of precious metal.

16. The Note 4(A) to Chapter 71 of the Central Excise Tariff defines the expression “precious metal” means, silver, gold and platinum.

17. It may be noted that exemption notification covers goods of description “waste and scrap of precious metals or metals clad with precious metals” which is similar in language to part (a) of heading 7112 as mentioned above. The question to be examined is whether part (b) of heading 7112 is covered by exemption notification or not. For this to be covered by exemption notification, two conditions should be satisfied viz. (i) item should be waste and scrap of precious metals and (ii) such waste and scrap should arise in the course of manufacture of goods of chapter 71.

18. Regarding the first condition i.e. whether Anode Slime is a waste and scrap of precious metal, it is observed that anything can

be called as waste and scrap of precious metals only if it is generated out of manufacturing of precious metals. The Anode Slime contains only traces of precious metals or precious metal compounds and hence it is not covered under the term 'waste and scrap of precious metal'. Therefore, Anode Slime does not fall under part (a) of heading 7112 but falls in part (b) of the said heading which covers 'other waste and scrap containing precious metal or precious compound'. Since, the exemption is available to only part (a) of the heading 7112, the first condition of the notification is not satisfied.

19. *Even though Anode Slime is not covered under that part of the tariff head which is included in the exemption, for analysis, the second condition of the notification is further examined hereafter. The second condition to be satisfied for the exemption is whether this waste and scrap has arisen in course of manufacture of goods falling in Chapter 71. Anode Slime is generated either during the extraction of copper which is not a precious metal or during the further processing of raw Anode Slime when more copper and selenium, tellurium etc. are extracted. None of these materials is considered to be a precious metal of Chapter 71. Hence, the Anode Slime does not arise during the course of manufacture of goods falling under Chapter 71.*

Conclusion & Order :

21. (a) *Anode slime, a byproduct of copper refining industry is not entitled to exemption under S. No. 195 of the Notification No. 12/2012-C.E., dated 17-3-2012.*

(b) *The issue under consideration is a mixed question of law and fact and has been considered and decided by the Commissioner, who is the adjudicating authority under Section 33 of Central Excise Act, 1944. As per Section 35B of Central Excise Act, 1944, against the adjudication Order, a statutory remedy of filing the Appeal is available to the party before the CESTAT. Further, against the Order passed by the Tribunal, an*

appellate remedy is available before the Division bench of the High Court on questions of Law. The present order does not substitute the due process prescribed in the Act. The view expressed on merits are in compliance of the Orders dated 15-4-2015 of the Hon'ble High Court. The adjudicating and appellate authorities may pass suitable orders in accordance with law."

8.2 On going through the circular, it is observed that the Board has concluded that anode slime is classifiable under chapter 7112 of the CET and not entitled for exemption in terms of Sr. No. 195 of Notification No. 12/2012-CE dated 17.03.2012. The Board has clarified that the views expressed on merits are in compliance of the Orders dated 15.04.2015 issued by the Madurai Bench of the Hon'ble High Court of Madras in W.P.(MD) No. 5643 of 2015 filed by M/s Sesa Sterlite Ltd. However, since the issue involved is a mixed question of law and fact, the Board has clarified that the circular would not substitute due process of law and therefore the adjudicating and appellate authorities may pass suitable orders in accordance with law.

9. It is observed that the Board has analyzed the issue in detail and arrived at the conclusion. On examining the issue on merits, Government discerns that the anode slime is waste and scrap containing precious metals/precious compounds of a kind used principally for recovery of precious metal. It is on record that the anode slime contains precious metals. Therefore, the anode slime merits classification under chapter heading 7112 of the CETA, 1985. Likewise, the exemption available for such goods under Notification No. 12/2012-CE dated 17.03.2012 is only in respect of goods arising in the course of manufacture of goods falling under chapter 71 whereas in the present case the anode slime is a byproduct arising during the course of manufacture of copper products falling under chapter 74 of the CETA, 1985. Government, therefore,

concurs with the views expressed in the circular dated 14.07.2015 and holds that the anode slime is correctly classifiable under chapter heading 7112 of the CET and that anode slime is not exempt under Notification No. 12/2012-CE dated 17.03.2012.

10. Be that as it may, the Madurai Bench of the Hon'ble High Court of Madras again had occasion to examine the same issue in the case of Sesa Sterlite Ltd. vs. UOI[2016(337)ELT 366(Mad)]. In that case, it had been alleged that the duty paid on anode slime was not duty as the said product was exempt and therefore CENVAT credit of duty paid was not admissible. While deciding the said case, the Division Bench of the Hon'ble High Court relied upon the Circular issued vide F. No. 71/4/2012/CX.1 dated 14.07.2015 to set aside the OIO confirming the demand for recovery of such CENVAT credit. Moreover, the demands for recovery of the rebate claims sanctioned for the period from August 2011 to January 2012 to the applicant in these proceedings has been dropped by the Commissioner of Central Excise, Tirunelveli vide OIO No. 42/COMMR/CE/2016 dated 28.03.2016. It is observed that while passing the adjudication order, the Commissioner has solely relied upon the CBEC Circular No. 71/4/2012-CX.1 dated 14.07.2015.

11. The order dated 28.03.2016 passed by the Commissioner, Tirunelveli reveals that the jurisdictional authorities have conceded that the anode slime is dutiable. As a corollary thereto, the duty payment on the goods and the sanction of rebate by the original authority cannot be found fault with. The judgment of the Division Bench of the jurisdictional Hon'ble High Court of Madras in Sesa Sterlite Ltd. vs. UOI[2016(337)ELT 366(Mad)] is a binding precedent. The impugned orders cannot be sustained and the revision applications filed by the applicant must be allowed.

12. Respectfully following the judgment of the Hon'ble High Court of Madras in Sesa Sterlite Ltd. vs. UOI[2016(337)ELT 366(Mad)],

Government modifies the impugned OIA No. TNL-CEX-000-APP-093-13 dated 28.02.2013 and OIA No. TNL-CEX-000-APP-094-13 dated 28.02.2013 passed by the Commissioner of Central Excise(Appeals), Madurai and upholds the sanction of the rebate claims vide OIO No. 32/2012(Rebate) dated 24.05.2012 & OIO No. 33/2012(Rebate) dated 24.05.2012 by the Deputy Commissioner of Central Excise, Tuticorin Division.

Shrawan
30/9/21

(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

335-336

ORDER No. /2021-CX (SZ) /ASRA/Mumbai DATED 30.09.2021

To,
M/s Sterlite Industries India Ltd.
SIPCOT Industrial Complex,
Madurai Bypass Road,
T. V. Puram, P.O.,
Tuticorin - 682 002

Copy to:

1. The Commissioner of CGST & Central Tax, Madurai
2. The Commissioner of Central Excise(Appeals), Coimbatore
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy