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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. 195/129(1 & 2)/17-RA /6667 Date of Issue: 12.09.2023

ORDER NO. 355-356 /2023-CX(WZ)/ASRA/MUMBAI DATED 12.9.2023 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. Starlite Lighting Ltd.,
Plot No. 6, MIDC,
Satpur, Nashik 422 007.

Respondent : Commissioner of Central Excise, Nasik

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. NGP/EXCUS/000/APPL/405-406/16-17 dated 24.11.2016 passed by the Commissioner (Appeals), Central Excise & Customs, Nagpur.

ORDER

The subject Revision Application has been filed by M/s. Starlite Lighting Ltd., Plot No. 6, MIDC, Satpur, Nashik 422 007 (hereinafter referred as the applicant) against the impugned Order-in-Appeal No. NGP/EXCUS/000/APPL/405-406/16-17 dated 24.11.2016 passed by the Commissioner (Appeals), Central Excise & Customs, Nagpur against the Order-in-Original No. 14/Rebate/2016-16 dated 21.05.2015 and No. 27/Rebate/2015-16 dated 24.07.2015 passed by the Assistant Commissioner, Central Excise & Customs, Satpur-ll Division sanctioning the rebate claim amounting to Rs. 4,51,445/- & Rs 4,91,853/- respectively on account of export of excisable goods, by way of restoration of Cenvat credit in their Cenvat Account.

2. Brief facts of the case is that M/s. Starlite Lighting Ltd., a manufacturer-exporter is a 100% EOU Export Oriented Unit having Customs License bearing No. NSK-I/CUS/9/99 dated 15/10/1999 valid upto 24/11/2015 under Section 58 & 65 of the Customs Act, 1962. Further, they also have Central Excise Registration bearing No. AACC54988EXM001 for the manufacture & clearance of the goods viz. Compact Fluorescent Lamps falling under chapter 85 of Central Excise Tariff Act, 1985. They have filed rebate claims on 25/02/2015 and 25/05/2015 amounting to Rs. 4,51,445/- & Rs. 4,91,853/- respectively under the provisions of Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 CE (NT) dated 06/09/2004.

3. The Assistant Commissioner, Central Excise, Satpur-II Division vide OIO No. 14/Rebate/2015-16 dated 21-5-2015 and OIO No.27/Rebate/2015-16 dated 24.07.2015, sanctioned the rebate claim amounting to 4,51,445/- & Rs. 4,91,853/- respectively on account of export of excisable goods, by way of restoration of Cenvat credit in their Cenvat Account.

4. Aggrieved, the respondent department filed an appeal before the Commissioner (Appeals) who vide impugned Order-in-Appeal dated 24.11.2016 set aside the Order-in-Original and allowed the appeal.

5. Thereafter, the applicant has filed the present Revision Application mainly on the following grounds:-

5.1 They contended that the exemption under section 5A read with Notification No. 24/2003-CE dated 31.03.2003, the goods cleared by Applicant are exempted conditionally and hence the restriction specified under sub-section 1A of section 5A is not applicable in the instant case. Section 5A of the Central Excise Act, 1944, provides for granting of exemption to goods generally, either absolutely or subject to certain conditions. The impugned Notification No. 24/2003-CE does not grant any absolute exemption. In fact it is only exempting excisable goods produced or manufactured in an Export Oriented Unit. Being a conditional exemption, the provisions of Section 5A(1-A) is not applicable to the impugned notification. Applicant also submitted that Section 5A (1-A) of the Act is to be applied only when the exemption granted is absolute in nature. When an exemption is granted to the goods manufactured by a particular manufacturer and in particular situation, the same cannot be considered as generally exempt from excise duty, as held by the Apex Court in Commissioner of Sales Tax Vs. Pine Chemicals Ltd. And Ors., (1995) 1 SCC 58.

5.2 The proviso to Notification No.24/2003-CE clearly stipulates that the exemption is not applicable for the goods when they are brought to any other place in India. Thus, the notification grants more exemption for the goods cleared by an Export Oriented Unit for export. It is pertinent to mention here that the exemption notification is to be read as a whole to understand its correct meaning and objective, ie whether the exemption is absolute or not. The department has clearly ignored said proviso to the notification in reaching its conclusion that the exemption is absolute. As per the proviso excise duty

exemption is not applicable when the goods are cleared for consumption in India. As such when excise duty is payable on same/such goods on its clearances in DTA, it cannot be said that the said goods are absolutely exempted. Therefore, the contention of the Department that 'such finished goods exempt from duty' is baseless.

5.3 Board Circular No. 940/1/2011-CX dated 14.01.2011 clarified the view of the specific bar provided under sub-section (1A) of section 5A of the Central Excise Act, 1944. In this connection as explained above, since the Notification No. 24/2003-CE does not grant any absolute exemption, being a conditional exemption, the provisions of Section 5A(1-A) is not applicable to the impugned notification No. 24/2003 and as such the applicability of the provisions of above Board Circular No. 940/1/2011-CX dated 14.01.2011 doesn't arise in absence of absolute exemption to subject goods in this case.

5.4 Further, considering the above legal position it is clearly established that Hon'ble Under secretary, Ministry of Finance has issued Instruction letter F.No. 209/26/09-CX.6 dated 23.04.2010, which is relied upon in this case by the department, is issued by mis-considering the absolute exemption to the goods manufactured by EOU as per Notification No 24/2003-CE, hence misplaced.

5.5. The Government of India has announced exemptions from the payment of Excise and Customs Duty payable on the raw materials and consumables procured and used in the manufacture of export products by a 100% Export Oriented Unit. Whereas, the levy of Service Tax on taxable services has been announced under Chapter 5 of the Finance Act, 1994, but no exemption from charging of service tax, on the services provided to a 100% Export Oriented Unit, has been granted. Consequent to this the Applicant is paying Service Tax to the service providers on the received by them and used in the manufacture of the goods exported as well cleared in the Domestic Tariff Area.

5.6 The Government has imposed concessional rate of duty on the sale of the finished products in the Domestic Tariff Area as well, and allowed 100% EOU to pay such duty by utilizing CENVAT credit earned on Input service or on Input or on capital goods procured. (100% EOU is permitted to procure input without payment of excise duty against Form-CT-3, however they can also procure on payment of excise duty and avail CENVAT credit) Since the goods manufactured by 100% EOU are not exempted absolutely, they can remove such goods for export on payment of excise duty by utilizing said CENVAT credit also.

5.7 Vide Rule 18 of the Central Excise Rules, 2002 the exporters are enabled to export goods on payment of excise duty and claim rebate of duty so paid upon submission of proof of export and Rule 19 of the said rules enables the export of goods without payment of duty under LUT. In the instant case since the goods manufactured by 100% EOU are excisable goods but exempted, if exported out of India, therefore it depends on the choice of the Applicant /manufacturer/exporter to exercise their option, between the above stated two modes. There is no bar, under Rule 18, that 100% Export Oriented Unit cannot export on payment of excise duty. Therefore, the rebate claim of the Applicant. under Rule 18 of the Central Excise Rules, 2002, is legal and valid.

5.8 Further without prejudice to above it is submitted that Rule 18 of the Central Excise Rules, 2002, provides for the grant of rebate of duty paid on excisable goods removed for export as well the duty paid on inputs used in the manufacture or processing of such goods, by way of a notification issued by the Central Government. Thus, a manufacturer including 100% EOU, as an exporter, can either claim rebate /refund of the duties or Service Tax paid on the inputs or input services used in the manufacture of the export goods. under Rule 5 of the CENVAT Credit Rules, 2004, or use such credit for

payment of excise duty on goods cleared for export and claim rebate of such duty.

5.9 Rule 5 of the CENVAT Credit Rules, 2004, mandates, that before the claim of refund of credit, the finished product is to be cleared for export, on payment of duty. Only, when such adjustment is not feasible the manufacturer has to claim refund. It is submitted that the Applicant had followed the procedures stipulated by Rule 5 of the Central Excise Rules, 2002, and had cleared the final product for export, on payment of duty. As such, the payment of the excise duty on export of goods is legal and therefore, the Applicant is eligible to claim rebate.

5.10 Applicant relied upon the following case Laws –

- 2013 (290) E.L.T. 504 (Mad.) ORCHID HEALTH CARE Versus UNION OF INDIA W.P. No. 5667 of 2012.
- 2012 (282) E.L.T. 156 (G.O.I.) IN RE: KEI INDUSTRIES LTD. Order No. 866/2011-CX, dated 1-7-2011 in F. No. 195/285/2008-RA

5.11 The Board Circular No. 828/5/2006-CX dated 20.04.2006 (Para 4f) has been issued in terms of Rule 5A of CCR, 2004, which specify about the procedure for refund of accumulated cenvat credit on account of export of goods as well in respect of rebate of duty paid on exported goods u/r 18 of CER, 2002. The very first subject of the said circular clearly specify as "simplified procedures for sanction of refund of unutilized credit / rebate claims in cases of export" further in the opening para 1 the circular clarify about the refund of unutilized credit of input under Rule 5, however at Para 3 it also clarifies the procedure about the sanction of rebate claim of duty paid on export goods under Rule 18 of CER, 2002 by 100% EOU. It is to be appreciated that the said circular is not issued solely in context of Rule 5 of CCR, 2004 but also in the context of rebate claims under Rule 18 of CER, 2002. At para 4(f) of the circular also clarify that the rebate / refund is

applicable to 100% EOU unit. Therefore, Applicant submitted that the said circular is also misread by the Ld. Commissioner (Appeals) as well by the Ld. Assistant Commissioner and misinterpreted.

5.12. Without prejudice to above, Applicant submit the fact which are undisputed that the Applicant had followed all the procedures specified for export of the goods manufactured by them, on payment of duty, and had submitted the various forms and the documents, including the shipping bills, at the time of the export. The export proceeds were also realized in foreign exchange and had filed the claim for rebate of Rs. 4,51,445/- & Rs. 4,91,853/- under Rule 18 of the Central Excise Rules, 2002. Therefore, even if it is considered that the Circular No. 940/1/2011 is applicable the provisions of para 3 of the circular are not at all applicable for recovery of said rebate under section 11D of CE Act, 1944. As such the grounds for denial / recovery of rebate sanctioned are wrong and baseless. The Applicant is clearly eligible for rebate, which has been granted by the adjudication authority.

5.13 Further the Applicant draw the kind attention to Circular No. 510/06/2000-CX dated 3.2.2000 vide which it has been clarified that once duty has been paid on export goods, no matter excess, short or undue, the rebate should be sanctioned.

5.14 Since Applicant was not holding renewed license to store, manufacture and export goods under section 58 and 62 of the Act during the relevant period of 25.11.2014 to 17.05.2015, the Department was not allowing them to clear goods without payment of excise duty for export. Therefore, the Applicant had paid duty in cash and claimed Rebate. Since the Department himself put restrictions to clear goods without duty for export, denying Rebate of the same upon submission of proof of export contending that 'the said goods are not excisable or exempted, Applicant cannot option for payment of duty and ask for rebate' is very unsustainable act on the part of Department in the eyes of Law.

5.15. Applicant submitted that in case the rebate for any reason is not granted, the same may please allow to be credited in the CENVAT account as said amount has not been recovered from any person. If the amount paid is not considered as duty of excise, the same shall be refunded to Applicant.

6. A Personal hearing was fixed on 04.10.2022, 18.10.2022, 07.12.2022, 21.12.2022, 13.01.2023, 24.01.2023 & 14.02.2023. Neither the applicant nor the respondent appeared for personal hearing or made any correspondence seeking adjournment of hearings despite having been afforded the opportunity on more than three different occasions and therefore, Government proceeds to decide the case on merits on the basis of available records.

7. Government has carefully gone through the relevant records, the written and oral submissions and also perused the impugned Order-in-Original and the impugned Order-in-Appeal. It is observed that the issues involved in the present revision application are whether the applicant had an option to export goods on payment of duty and claim rebate of the same under the provisions of Rule 18 of the Central Excise Rules, 2002.

8. whether the applicant had an option to export goods on payment of duty and claim rebate of the same under the provisions of Rule 18 of the Central Excise Rules, 2002.

8.1 The Notification No. 24/2003-CE dated 31.03.2003 states that the goods manufactured in an export oriented undertaking are fully exempted from whole of duty of Excise, Additional Duty (GSI) and Additional duty (TTA).

8.2 The exemption Notification No. 24/2003-CE dated 31.03.2003 has been issued under sub-section (1) of Section 5A of the Central Excise Act, 1944. Sub-section (1A) of Section 5A states that:

> "[(1A) for the removal of doubts, it is hereby declared that where on 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 manufacturers of such excisable goods shall not pay the duty of excise on such goods."]

8.3 There is no option or discretion provided to the applicant to refrain from availing the exemptions granted by the Notification issued under sub-section (1) of Section 5A of Central Excise Act, 1944. Where an exemption has been granted absolutely, the manufacturer shall not pay the duty of excise on such goods.

8.4 The Hon'ble Tribunal in case of Mahendra Chemicals Vs CCE. Ahmedabad [2007 (203) ELT 505 (Tri-Ahmd)] has referred to Supreme Court decision in case of CCE Vs. Parle Exports 1988(38)ELT 741(SC) and observed that:

> *"The SC has clearly held that the notification is a part of statute and has force of law. The law is not optional. If the legislature has decided to exempt certain goods by notification, the exemption cannot be negated by an assessee by opting to pay duty on exempted goods..... Any such payment of duty on such goods will be without sanction of law."*

8.5 It is mandatory for all 100% EOU to avail the exemption Notification No. 24/2003-CE dated 31.03.2003 issued under sub-section (1) of Section 5A of Central Excise Act, 1944 and the noticee have no exception. The Notification No. 24/2003-CE dated 31.03.2003 is unambiguous which states that the goods manufactured in an export oriented undertaking are fully exempted

from whole of duty of Excise, Additional Duty (GSI) and Additional duty (TTA), i.e. export clearances are unconditionally exempted.

9. The Hon'ble Supreme Court has in its judgment in the case of Sandoz Pvt Ltd. V/s. U.O.I. [2022 (379) E.L.T. 279 (S.C.)] has held that :

> ***28.*** *If the refund claim is by the EOU, the same needs to be processed by the authorities under the FTP by reckoning the entitlement of DTA supplier specified in Chapter 8 of the FTP concerning the goods supplied to it, being a case of deemed exports. The EOU on its own, however, is not entitled for refund of TED, as the mandate to EOU is to procure or import goods from DTA supplier, without payment of duty in view of the express ab initio exemption provided in terms of para 6.2(b) read with para 6.11(c)(ii). However, despite such express obligation on the EOU, if the EOU has had imported goods from DTA supplier by paying TED, it can only claim the benefit of refund provided to DTA supplier under para 8.4.2 read with paras 8.3(c) and 8.5 subject to obtaining disclaimer from DTA supplier in that regard and complying with other formalities and requirements.*
>
> ***29.*** *We thus agree with the conclusion reached by the Bombay High Court that the EOU is not entitled to claim refund of TED on its own. However, we add a caveat that EOU may avail of the entitlements of DTA supplier specified in Chapter 8 of FTP on condition that it will not pass on that benefit back to DTA supplier later on. In any case, the refund claim needs to be processed by keeping in mind the procedure underlying the refund of Cenvat credit/rebate of excise duty obligations. If Cenvat credit utilised by DTA supplier or EOU, as the case may be, cannot be encashed, there is no question of refunding the amount in cash. In that case, the commensurate amount must be reversed to the Cenvat credit account of the concerned entity instead of paying cash.*
>
> .....
>
> ***42.*** *In conclusion, we hold that the EOU entities, who had procured and imported specified goods from DTA supplier, are entitled to do so without payment of duty [as in para 6.2(b)] having been ab initio exempted from such liability under para 6.11(c)(ii) of the FTP, being deemed exports. Besides this, there is no other entitlement of EOU under the applicable FTP. Indeed, under para 6.11(a) of the FTP, EOU is additionally eligible merely to avail of entitlements of DTA supplier as specified in Chapter 8 of the FTP upon production of a suitable disclaimer from the DTA supplier and subject to compliance of necessary formalities and stipulations. It would not be a case of entitlement of EOU, but only a benefit passed on to EOU for having paid such amount to the DTA supplier, which was otherwise ab initio exempted in terms of para 6.11(c)(ii) of the FTP coupled with the obligation to import the same without payment of duty under para 6.2(b).*

10. In view of the above, Government finds no reason to interfere with the impugned order-in-appeal. The revision application filed by the applicant are rejected as being devoid of merits.

Shrawan 12/9/23

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

ORDER No. 355-356 /2023-CX (WZ) /ASRA/Mumbai dated 12.9.23

To,
M/s. Starlite Lighting Ltd.,
Plot No. 6, MIDC,
Satpur, Nashik 422 007.

Copy to:

1. Commissioner of Central Excise& Customs, Nasik
2. Commissioner (Appeals), Central Excise& Customs, Nagpur.
3. Sr. P.S. to AS (RA), Mumbai.
4. Spare Copy.