F.No. 195/1460/12-RA

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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
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Mumbai- 400 005

F NO. 195/1460/12-RA/1163 Date of Issue: 15.02.2018

ORDER NO. 35/2018-CX (WZ) /ASRA/MUMBAI DATED 15.02.2018 OF THE OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF CENTRAL EXCISE ACT,1944.

Applicant : M/s Ampacet Speciality Products Pvt. Ltd.

Respondent: Commissioner, Central Excise, Pune-III

Subject : Revision Applications filed, under Section 35EE of Central Excise Act, 1944 against the Order-in-Appeal No. P III/MMD/ 195/2012 dated 27.07.2012 passed by the Commissioner (Appeals-III), Central Excise, Pune.

:ORDER:

This revision application has been filed by M/s Ampacet Speciality Products Pvt. Ltd. Pune (hereinafter referred to as "the applicant") against the Order-in-Appeal No. P III/MMD/ 195/2012 dated 27.07.2012 passed by the Commissioner (Appeals-III), Central Excise, Pune.

2. The case in brief is that the applicant M/s. Ampacet Speciality Products Pvt.Ltd. filed rebate claim for Rs.3,87,201/- on 06.01.2012 . The said claim was in respect of duty paid and subsequently reversed on the inputs viz."Litho phone" falling under Tariff Heading No.32064200 which were imported and exported as such under Rule 18 of the Central Excise Rules,2002 (Rules) read with Notification No.19/2004-NT dated 06.09.2004 read with Section 11 B of the Central Excise Act, 1944. On scrutiny of the said rebate claim it was noticed that the ARE 1 value was higher than the FOB value declared in the Shipping Bill. Therefore the duty paid erroneously on the higher side was to be sanctioned by way of credit in Cenvat to the extent of Rs. 7,295/- and the credit availed and subsequently reversed on account of Special Additional Duty (SAD) to the extent of Rs.1,16,500/- was not covered under Section 11B ibid. Accordingly, Deputy Commissioner, Central Excise, Pune VIII Division, Pune-III vide Order-In-Original No.03/Refund/ P.VIII/ CEX/11-12, dated 02.04.2012 sanctioned rebate of Rs.2,63,406/- in cash under the provisions of Section 11B (2-a) of the Central Excise Act,1944 and sanctioned refund of Rs.7,295/- through credit in Cenvat Account under Section 11B of the said Act and rejected the amount of Rs.1,16,500/- paid by the assessee towards Special Additional Duty

3. Being aggrieved by the aforesaid Order in Original, the applicant filed appeal before Commissioner (Appeals-III), Central Excise, Pune. Vide impugned Order-in-Appeal, the Commissioner (Appeals), while upholding Order-In-Original No.03/Refund/P.VIII/CEX/11-12, dated 02.04.2012 observed that definition of "duty" as enumerated in Explanation to

Notification No.19/2004-C.E. dated 06.09.2004 does not include Special Additional Duties (SAD) leviable under Section 3A of the Customs Tariff Act, 1975. Therefore, duties which are not specified in the relevant Notification cannot be rebated. He also observed that Section 11B and the provisions thereto speak only about sanctioning rebate of duty of excise and SAD does not find any premise in Section 11 B of the Central Excise Act, 1944.

4. Being aggrieved with the above Order-in-Appeal, the applicant has filed this Revision Application under Section 35EE of Central Excise Act, 1944 before the Government on the various grounds as enumerated in their application. Main grounds of appeal are follows;

4.1 When it is an undisputed fact that the impugned goods have been exported, the learned Respondent ought to have sanctioned refund even the said amount equivalent to Rs. 1,16,501/- which is to the extent of 4 % SAD paid, which is also regarded as CENVAT - "duties of excise" as specified in Rule 3 of CCR 2004.

4.2 The learned Respondent has failed to appreciate the aspect that when he is relying on Chief Commissioner's Trade facility that rebate should be allowed even in respect of cenvat inputs / capital goods cleared as such under section 18 of CER, 2002 for export, since as per instructions contained in supplementary instruction to Excise Manual allows such Export of cenvat inputs / capital goods as such under bond, the said principle should be carried to logical end which will only meet the ends of justice.

4.3 When the Chief Commissioner has provided such a clarification, it cannot be implemented partially to suit the convenience and to deny the part of refund which is unjustifiable in law due to the simple reason that when such imported inputs / capital goods on which cenvat has been claimed are exported under Bond u/r 19 of CER 2002 without payment of duty under ARE 1, which procedure cannot be denied to applicants if they wish to follow, in such situations, legally, the department cannot issue show cause notice to demand 4 % SAD nor an assessee can be asked to remit the said 4 % SAD separately, while allowing such export of impugned goods under bond and if it is not so done it also does not constitute contravention or violation of any of the provisions of either CCR 2004 or CER 2002.

4.4 Thus, it is the humble submission of the applicants that when the very same procedure has been followed u/r 18 of CER 2002 which also stands specifically allowed by the said Trade Facility referred and so is allowed even by department's instructions, the said amount paid equivalent to 4 % SAD cannot be denied.

4.5 The learned Respondent is wrong in interpreting the said trade facility in as much as the aspect of applying the principle of sanctioning refund to duty at the rate of duty payable on transaction value under Section 4 is limited to the manufactured goods which are exported and not to the cenvat inputs / capital goods cleared as such under Rule 3 (5) of CCR, 2004 as it is not manufactured goods, where whatever cenvat credit availed based or whatever collected / paid by assessee while procuring or importing the goods, needs to be refunded, since the said cenvat inputs stands exported and the legal provisions are that on such export of goods, Government is not authorized to retain any duty collected, as it has not been put to use in India.

4.6. Hence, the learned Respondent is wholly wrong in not having refunded the said amount of Rs. 1,16,500/- which is to the extent of 4 % SAD paid, which stands remitted to the Government though the same is legitimately ought to have been allowed by issuing cheque to that extent.

4.7 Notwithstanding the facts stated above and without prejudice, even assuming without admitting, it is submitted that by the learned Respondent's own admission of the fact, as referred in impugned Order in Original - "Whatever amount of duty has been paid as duty on higher value, the said extra duty amount would constitute an amount, which has been erroneously paid and is liable to be refunded in terms of Section 11- B of the Central Excise Act, 1944, by allowing Credit in their Cenvat Account", if the said amount of equivalent to 4% SAD is an amount not to be allowed in cash, in as,

much the said amount of Rs. 1,16,500/- stands paid and wrongly retained by the department, in view of the admitted fact that impugned imported goods have been physically re-exported, the question of any part of said amount of Rs. 1,16,500/ - cannot be retained by the department and thus it indeed becomes an " extra duty amount paid" and the same ought to have been allowed as re-credit in Cenvat credit account, instead of denying the said refund of Rs. 1,16,500.00 for no rhyme or reasons and without any authority of law.

4.7 The applicant rely on the following decision :

IN RE : HONEYWELL AUTOMATION (INDIA) LTD.- 2012 (278) E.L.T. 401 (G.O.I). and

IN RE : MARAL OVERSEAS LTD- 2012 (277) E.L.T. 412 (G.O.I)

In the circumstances, the Applicants prayed that the Order in appeal No. P III/MMD/195/2012 DTD. 27.7.2012 denying the part rebate claim of Rs. 1,16,500/- claimed under rule 18 of Cenvat Excise Rules, 2002 may be set aside and the same amount debited on export of the said goods may be allowed as refund by cheque or by way of allowing re-credit of the said amount in Cenvat Credit account.

5. A personal hearing was held in this case on 27.12.2017. Shri S Narayanan, and Shri Ashok Prabhune, both Advocates, duly authorized by the applicant appeared for hearing and reiterated the submission filed through Revision Application. They also filed written submission and case laws on the date of the personal hearing. In view of the same it was pleaded that the Order-in-Appeal be set aside and Revision Application may be allowed.

6. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal. On perusal of records, Government observes that the issue for decision before it is whether the applicant is eligible for rebate/refund of 4% SAD paid by them at the time

of importing of the inputs and which was subsequently reversed at the time of export of the inputs as such, under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 – C.E.(NT) dated 06.09.2004.

7. Government observes that the applicant had imported the raw material namely "Lithophone' against Bill of Entry No. 3328659 dated 27.04.2011 and availed the credit under Rule 3 of Cenvat Credit Rules, 2004, in their Cenvat Credit account of CVD Rs.2,62,816/-, alongwith Ed. Cess and S& H Ed.Cess and Additional Duty (Imports) i.e. SAD of Rs. 1,16,500/- vide entry no. 53 dated 28.05.2011 . The said inputs imported from M/s Sachtleben Chemie, GMBH Germany were re-exported to their main unit M/s Ampacet (Thailand) Co. Ltd., as such under Rule 3(5) of the Cenvat Credit Rules, 2004 by reversing / debiting both the aforementioned duties vide entry no. 81 dt.19.08.2011. Thus the impugned goods were cleared on payment of duty under Rule 3(5) of CCR 2004 r/w Rule 18 of Central Excise Rules for export under Rebate by paying total duty of Rs.3,87,201/-. The applicant then filed refund claim for the amount of Rs. 3,87,201/- (Rupees Three Lakhs Eighty Seven Thousand Two hundred and one) in respect of such duty paid /reversed inputs which were exported as such under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-No. dated 06.09.2004 and Section 11 B of Central Excise Act, 1944.

8. Government observes that rebate claim to the extent of Additional Duty (Imports) i.e. SAD of Rs. 1,16,500/- paid was rejected on the ground that the definition of "duty" as enumerated in Explanation to Notification No.19/2004-C.E. dated 06.09.2004 does not include Special Additional Duties (SAD) leviable under Section 3A of the Customs Tariff Act, 1975 and therefore, duties which are not specified in the relevant Notification cannot be rebated. It was also held that Section 11B and the provisions thereto speak only about sanctioning rebate of duty of excise and SAD does not find any premise in Section 11 B of the Central Excise Act, 1944.

9. Government observes that the applicant is claiming rebate of SAD levied under Section 3(5) of the Customs Tariff Act, 1975. The said provision of Section 3(5) reads as under :

"(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent. of the value of the imported article as specified in that notification."

10. *Rule 3 of the CENVAT Credit Rules, 2004 reads :-*

"Rule 3. CENVAT Credit - (1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of-

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(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) (vi) and (via);

(viia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act,

Provided that a provider of taxable service shall not be eligible to take credit of such additional duty;

It is, therefore, clear that under Rule 3 of CENVAT Credit Rules, 2004, SAD is treated and allowed as a duty credit.

11. Government notes that Hon'ble High Court Bombay in Union of India Vs Sterlite Industries (I) Ltd.2017 (354) E.L.T. 87 (Bom.) at para 5 has observed as under :-

> *"Reversal of input credit is one of the recognized method for paying duty on the final product. In fact, the Central Government by its Circular No. 283, dated 31-12-1996 construing similar provisions contained in Rule 57F of the Central Excise Rules, 1944 held that where the inputs are cleared on payment of duty by debiting RG-23A Part II as provided under erstwhile Rule 57F(4) of the Central Excise Rules, 1944, the manufacturer would be entitled to rebate under Rule 12(1)(a) of the Central Excise Rules, 1944. Rule 57F in the 1944 Rules is pari materia to Rule 3(5) of Cenvat Credit Rules, 2004. Similarly, Rule 12(1)(a) of the 1944 Rules is pari materia to Rule 18 of the Central Excise Rules, 2002. Therefore, when the Central Government has held that where the duty is paid by debiting the credit entry, rebate claim is allowable, it is not open to the departmental authorities to argue to the contrary".*

12. High Court of Bombay in the case of CCE, Raigad v. Micro Inks Ltd., reported in 2011 (270) E.L.T. 360 (Bom.) has inter alia held that if duty is paid by reversing the credit, it does not lose the character of duty and therefore, if rebate is otherwise allowable, the same cannot be denied on the ground that duty is paid by reversing the credit.

13. Government observes that it is also on record that the applicant at the time of re-exporting the goods as such, under Rule 3(5) of the Cenvat Credit Rules, 2004 had reversed duty amount of Rs.1,16,501/- which is to the extent of 4% SAD vide entry no. 81 dt.19.08.2011. However it is also a fact that SAD is levied on imported goods to counter balance the sales tax, value added tax, local tax, etc., which cannot be considered as duties of excise for being eligible for rebate benefit. Further, SAD collected under Section 3(5) of the Customs Tariff Act, 1975 is also not classified as a duty in list of duties provided in Explantation-1 of the Notification No. 19/2004-C.E. (N.T.) dated

6-9-2004. Hence, such payment of SAD is not eligible for rebate claim under Rule 18 of CER, 2002.

14. Hon'ble High Court of Punjab and Haryana vide judgement dated 14-1-2008 in Central Excise Appeal No. 10/07, in the case of CCE, Gurgaon v. Simplex Pharma Pvt. Ltd., [2008 (229) E.L.T. 504 (P & H)] held that once eligibility of appellant for benefit of Cenvat/Modvat credit on CVD paid by him is not disputed by Revenue then appellant is entitled to payment/refund of said amount under Section 11B(2) of Central Excise Act, 1944. In this case, the merchant exporter exported the goods under Notification No. 21/2004-C.E. (N.T.), dated 6-9-04 read with Rule 18 of the Central Excise Rules, 2002 and filed refund claims on the duty (CVD) paid on the imported inputs used in the processing/manufacturing of the exported goods which was rejected by the Assistant Commissioner and Commissioner (Appeals). The merchant exporter filed an appeal with the CESTAT who set aside the orders of the Commissioner (Appeals) and allowed the exporter's appeal. The department filed an appeal to the Hon'ble High Court of Punjab and Haryana who while dismissing the said appeal observed at para 11 as under :-

> *Para 11 : From the facts on the record, it is not disputed that the Countervailing Duty amounting to Rs. 9,69,250/- paid by the applicant at the time of import of raw material was in fact a duty of excise equivalent to the excise duty payable on such raw material if manufactured in India and admittedly, the said raw material was consumed in the manufacturing of excisable goods exported out of India by the applicant on which excise duty equivalent to the amount paid by the applicant at the time of import of raw material was leviable. Further, the applicant is admittedly eligible for the benefit of Modvat/Cenvat Credit on the CVD/additional duty paid by him at the time of import of raw material and if he had availed the Modvat/Cenvat Credit, then he would have got the refund of the same under the provisions of Section 11B (2). Once the eligibility of the applicant for the benefit of*

Modvat/Cenvat Credit on the CVD paid by him is not disputed by the Revenue then in that case the applicant is entitled to payment/refund of the said amount under Section 11B(2) of the Act."

15. Similarly, in the instant case Government observes that the manufacturer is allowed to take the Cenvat credit of the SAD in terms of Rule 3(viia) of Cenvat Credit Rules, 2004. From the facts on record, the applicant has taken credit of CVD/SAD paid on the imported raw material namely "Lithophone' against Bill of Entry No. 3328659 dated 27.04.2011 vide entry no. 53 dated 28.05.2011. While re-exporting the said inputs as such under Rule 3(5) of the Cenvat Credit Rules, 2004 again the applicant had reversed the credit taken on CVD and SAD vide entry no. 81 dt.19.08.2011. Thus reading in harmony with Hon'ble High Court of Punjab and Haryana's judgement dated 14-1-2008 Government observes that the applicant is admittedly eligible for the benefit of Cenvat Credit on the SAD paid by him at the time of import of raw material and once the eligibility of the applicant for the benefit of Cenvat Credit on the SED paid by him is not disputed by the Revenue then in that case the applicant is entitled to payment/refund of the said amount under Section 11B(2) of the Act. Moreover, the SAD is paid back by the applicant by way of reversal by the applicant at the time of re-export as required under Rule 3(5) of the Cenvat Credit Rules, 2004. In terms of Hon'ble Bombay High Court's judgements referred to in paras 11 & 12 supra, reversal of credit while clearing the goods as such for exports tantamounts to payment of duty. However, Government observes that vide Notification No. 12/2007-C.E. (N.T.), dated 1-3-2007 additional duty (CVD) levied under Section 3 of Customs Tariff Act, 1975 was added on duties to be rebated in the Notification No. 19/2004-C.E. (N.T.) as well as Notification No. 21/2004-C.E. (N.T.), dated 6-9-2004. As such, by virtue of said amendment, the rebate of CVD paid on imported materials has been allowed as per the statute. However, SAD is still out of the purview of the definition of "duty" as enumerated in Explanation I to Notification No.19/2004-C.E. dated 06.09.2004.

16. It has been stipulated in the Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 and the C.B.E. & C. Circular No. 510/06/2000-CX, dated 3-2-2000 that rebate of whole of duty paid on all excisable goods will be granted. Here also the whole duty of excise would mean the duty payable under the provision of Central Excise Act. In the instant case SAD paid/reversed by the applicant has not been treated as one of the duties specified in Explanation I to the Notification No.19/2004 CE dated 06.09.2004, hence the SAD does not find any premise in Section 11 B of the Central Excise Act, 1944 and therefore not rebated. Therefore, Government is of the view that SAD paid by the applicant has to be treated simply as a voluntary deposit made by the applicant with the Government which is required to be returned to the applicant in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law.

17. In view of the foregoing discussion, Government holds that the amount of Rs.1,16,501/- (Rupees One Lakh Sixteen Thousand Five Hundred and One) which is to the extent of 4% SAD and which is not held admissible for being rebated, is to be allowed as re-credit in the Cenvat credit account from where it was initially paid.

18. The impugned Order in Appeal stands modified to this extent.

19. Revision application is disposed off in above terms.

20. So, ordered.

15.2.2018

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

True Copy Attested

21.2.18

एस. आर. हिरुलकर
S. R. HIRULKAR

ORDER No 35/2018-CX (WZ) /ASRA/Mumbai DATED 15.02.2018

To,
M/s. Ampacet Speciality Products P. Ltd.,
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Village Karegaon, Shirur,
Pune 412 220.

Copy to:

1. The Commissioner of GST & CX, Belapur Commissionerate.
2. The Commissioner, Central Excise, (Appeals) Raigad.
3. The Deputy / Assistant Commissioner, GST & CX Mumbai Belapur.
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