

REGISTERED
SPEED POST

सत्यमेव जयते

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.195/532/2013-RA / 1967

Date of Issue: 20/11/18

ORDER NO. 360/2018-CX (WZ)/ASRA/MUMBAI DATED 31.10.2018 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 THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Balaji Fibres, 4C Dover Place, 9 Hall Road, Richards Town,
Bangalore-560 005.

Respondent : Commissioner, Central Excise, Raigad.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. US/53/RGD/2013 dated 15.02.2013 passed by the Commissioner(Appeals-II), Central Excise, Mumbai.



ORDER

This revision application is filed by the M/s Balaji Fibres (hereinafter referred to as "the applicant") against the Order-in-Appeal No. US/53/RGD/2013 dated 15.02.2013 passed by the Commissioner (Appeals-II), Central Excise, Mumbai rejecting the appeal filed by the applicant for non-compliance of pre-deposit of 50% of the refund amount demanded

2. The issue in brief is that the applicant, a merchant exporter, had filed Rebate claims amounting to Rs. 2,39,100/- under the provisions of Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004.

2.1 The Dy. Commissioner of Central Excise (Rebate) Raigarh, vide Order-in-Original No. 983/11-12/DC / Rebate)/, Raigarh dated 12.10.2011 sanctioned rebate claim of Rs. 2,39,100/- under Section 11B of the Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002.

2.2 The department then filed an appeal with the Commissioner(Appeals) on the ground that the goods were exported by availing benefit under Notification No.21/2004- CE(NT) dated 6.9.2004 as certified by them at Sr.No.3(b) of the ARE-1. Under the said Notification it is mandatory to clear the goods for export in form ARE-2 and file the rebate claims with the jurisdictional Assistant/Deputy Commissioner.

2.3 Simultaneously, a protective Demand-cum-SCN was issued on 10.04.2012, asking the applicant as to why the rebate claim erroneously sanctioned should not be recovered back along with interest and why a penalty should not be imposed under Rule 27 of the Central Excise Rules, 2002.



- 2.4 The Commissioner(Appeals-II), Central Excise, Mumbai vide Order-in-Appeal No. US/412/RGD/2012 dated 19.06.2012 set aside the Order-in-Original dated 12.10.2011 and the appeal filed by the Revenue was allowed.
- 2.5 Aggrieved, the applicant filed Revision Application dated 22.8.2012 which is still pending for decision.
- 2.6 In view of the Commissioner(Appeals) Order-in-Appeal dated 19.06.2012, the protective Demand-cum-SCN dated 10.04.2012 was adjudicated by the Additional Commissioner vide Order-in-Original No. Raigad/ADC/74/12-13 dated 15.11.2012 confirming and demanded the amount of Rs. 2,39,100/- which was erroneously sanctioned under Section 11A of the Central Excise Act, 1944, confirmed Interest under Section 11AB/11AA of the Central Excise Act and imposed a penalty of Rs. 5,000/- under Rule 27 of the Central Excise Rules, 2002.
- 2.7 Aggrieved, the Applicant filed an Appeal with the Commissioner(Appeals) along with stay application wherein it was pleaded the pre-deposit be waived as an appeal was file in Revision Application against Commissioner(Appeals) order dated 19.06.2012
- 2.8 The Stay application was heard and Commissioner(Appeals) vide his pre-deposit Order No. US/Stay/05/RGD/2013 dated 22.01.2013, wherein the applicant was directed to pre-deposit 50% of the refund amount demanded within 15 days of the receipt of order failing which the appeal shall be rejected.
- 2.9 The Applicant filed an application for modification of pre-deposit order on 4.2.2013. Applicant appeared for personal hearing on 05.02.2013, but was informed that since pre-deposit order was not complied with Personal Hearing would not be held. It was prayed that the modification application be heard and decided before any further order is passed in the Appeal.



2.10 The Commissioner(Appeal) vide Order-in-Appeal No. US/53/RGD/2013 dated 15.02.2013 dismissed the appeal for non-compliance with the pre-deposit order.

3. Being aggrieved, the applicant filed Revision Application on the following grounds:

3.1 The impugned order passed by Commissioner(Appeals-II) is illegal, erroneous and unsustainable.

3.2 Both the Order-in-Original and Order-in-Appeal are-mature as the earlier Order-in-Appeal on the basis of which the present demand has been confirmed is still subjudice and the Revision Application filed by them is still pending. This matter was brought to the notice of the Original Authority and the Commissioner(Appeals) and had requested them to keep the matter in abeyance till their Revision Application is decided but no comments have been offered by either authority on the same.

3.3 It is a settled law that when an appeal against the order is filed, the order is in jeopardy and the same could not be implemented still the application is decided and at least a reasonable time should be given to the applicant to get his stay application decided by the Appellate Authority. It is a settled law that multiplicity of proceeding is to be avoided. The present proceedings will be of no consequence if its Revision Application succeeds before the Joint Secretary (Revision). Such parallel proceedings on the same issue only results in harassment and undue hardships to the applicant and are liable to be set aside.

3.4 The order has been passed in utter disregard to the principles of nature justice and fairness where the same Commissioner(Appeals) who had earlier allowed the Revenue's appeal and held against the



applicant, has sat in judgment over his own order in as much as he has passed the Order-in-Appeal against Order-in-Original No. Raigad/ADC/74/12-13 dated 15.11.2012 which was passed with a view to implement the Order-in-Appeal No. US/412/RGD/2012 dated 19.06.2012 earlier passed by the same Commissioner (Appeal). It was on account of this that the modification application was moved with a request to transfer the appeal proceedings to some Commissioner(Appeals) other than the one who passed the earlier Order-in-Appeal. However instead of considering the request, dismissed the appeal for non-deposit without even giving the opportunity to the applicant to present their case. The order is, therefore, liable to be set aside on this ground.

3.5 Since the present order has been passed only to implement the earlier Order-in-Appeal against which the Revision Applicant was filed, they reiterates the grounds taken in its Revision Application earlier filed and requested that the two revision applications may be decided together being on the same issue for the same period in order to prevent multiplicity of proceedings.

4. A personal hearing in the case was held which was attended by Shri Karan Sarawagi, Advocate on behalf of the applicant. The applicant reiterated the submission filed in Revision Application and pleaded that the Order-in-Appeal be set aside and Revision Application be allowed.

5. 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.

6. On perusal of records, Government observes that the applicant, a Merchant Exporter had filed rebate claims of duty totally amounting



2,39,100/- in respect of goods exported by them under provisions of Rule 18 of the Central Excise Rules, 2002 read with Notification 19/2004 - Central Excise (NT) dated 06.09.2004 along with relevant documents. The claims were sanctioned by the Dy. Commissioner of Central Excise (Rebate) Raigarh, vide Order-in-Original No. 983/11-12/DC / Rebate)/ Raigarh dated 12.10.2011 sanctioned rebate claim of Rs. 2,39,100/- under Section 11B of the Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002 after he was fully satisfied that the goods mentioned in the various ARE-1's filed by applicant have been actually exported and duty as indicated on the relevant ARE-1's has actually been paid duly certified by the Jurisdictional Officer. The Department then filed an appeal with the Commissioner(Appeals) on the ground that the goods were exported by availing benefit under Notification No.21/2004- CE(NT) dated 6.9.2004 as certified by them at Sr.No.3(b) of the ARE-1. Under the said Notification it is mandatory to clear the goods for export in form ARE-2 and file the rebate claims with the jurisdictional Assistant/Deputy Commissioner. The Commissioner(Appeals-II), Central Excise, Mumbai vide Order-in-Appeal No. US/412/RGD/2012 dated 19.06.2012 set aside the Order-in-Original dated 12.10.2011 and the appeal filed by the Revenue was allowed. Aggrieved, the applicant filed Revision Application dated 22.8.2012.

7. Government places its reliance on GOI Order No. 347/2018-CX (WZ)/ASRA/MUMBAI dated 23.10.2018 in the Applicant's own case Revision Application dated 22.8.2012 where in it was held that

"8. In this connection Government relies on the GOI Order Nos. 154-157/2014-CX, dated 21-4-2014 [2014 (314) E.L.T. 949 (G.O.I)] in case of Socomed Pharma Pvt. Ltd. wherein it was held that wrong declaration ticked by mistake in ARE-1 does not make the provisions of Notification Nos. 21/2004-C.E. (N.T.) and 43/2001-C.E (N.T.) not applicable and merely ticking a wrong declaration in ARE-1 form cannot be a basis for rejecting substantial benefit of rebate claim. Government notes that non ticking/filling of Sr. No. 3 (b) of ARE-1 Forms cannot



be a basis for rejecting the substantial benefit of rebate claim when there is no dispute regarding export of duty paid goods.

9. Government notes that it has time and again been emphasized by the GOI and Higher Courts that the substantial benefit of rebate is not to be denied on technical and procedural grounds when duty paid and export of the goods is established. Such technical and procedural lapses are liable to be condoned. Here the Government relies upon the following case laws in support of the above findings

(1) Government of India in the case of M/s. Sanket Industries Ltd (2011 (268) E.L.T. 125 (G.O.1)

(2) Deesan Agro Tech Ltd (2011 (273) E.L.T. 457 (G.O.I)

10. Government observes that the Commissioner(Appeal-II) has placed his reliance on the Board's Circular No. 510/06/2000-CS dated 3.2.2000 clarifying that any scrutiny of the correctness of the assessment can be done by the Jurisdictional Assistant/Dy. Commissioner only. Government notes that ARE-I is not an assessment document and is simply an application for removal of goods for the purpose of export i.e. under bond or under claim of rebate of duty. And in case of export under claim of rebate of duty, it simply indicates the amount of duty already paid on the goods, which amount is certified by the jurisdictional officer in Part -A of ARE-I form as having paid by mentioning the PLA/RG-23A Part-II Entry No. under which the duty amount has been debited and the duty is assessed on an invoice. In this case, the Dy.Commissioner (Rebate) in his findings in the Order-in-Original dated 14.10.2011 has covered all the aspects in respect of the rebate claimed by the applicant

FINDINGS

"The above claims filed by the claimant have been processed and it is observed that :

1. The goods have been shipped within period as stipulated under Notfn. No, 19/2004-CE(NT) dated 06-09-2004 and the claims for rebate have been lodged with period as stipulated under Section 11B read with Rule 18 of Central Excise Rules, 2002.
2.

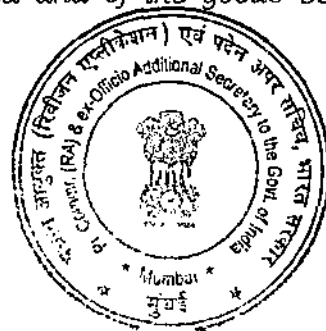


3.
4. *The triplicate copy of ARE-1 carries the endorsement of Excise Officer in Part A that the export clearance is recorded in Daily Stock Register.*
5. *The duty payments has been ascertained from the invoice and from the endorsement on ARE-1 Part A by Supdt. in-charge of manufacturing unit.*
6. ...
7. *The market price as declared in the ARE-1/Invoice is seen to be more than the rebate claimed.*
8.
9.
- 10 *The Shipping bill verification is done on the basis of software data received from the MCD, JNCH, which reveals that the goods have been exported and the particulars tallies with other export documents. The Supdt. C.Ex. Range-IV, Dn III Silvassa, Commissionerate-Vapi vide LETTER F.NO. SLV-IV/DIV-III/VERIFICVATION/11-12 dated 27.05.2011, has confirmed the verification of duty payment. The same also has been confirmed over telephone.*
- 10.....”

Government notes that here is no dispute with respect to payment of duty on export goods and actual export of goods, the fundamental requirement of export of duty paid goods gets satisfied and the Dy. Commissioner after due verification of all the documents has correctly sanctioned the rebate claims.

11. *Hon'ble Bombay High Court in UM Cables Limited Vs UOI [2013 (293) E.L.T. 641 (Bom.)] while holding that Notification No. 19/2004-C.E. (N.T.) and C.B.E. & C. Manual of Supplementary Instructions of 2005 only facilitate processing of rebate application and enables authority to be satisfied that requirement of goods having been exported and being of duty paid character and it cannot be raised to level of mandatory requirement has observed as under :-*

“12. The procedure which has been laid down in the notification dated 6 September, 2004 and in CBEC's Manual of Supplementary Instructions of 2005 is to facilitate the processing of an application for rebate and to enable the authority to be duly satisfied that the two fold requirement of the goods having been exported and of the goods bearing a duty paid



character is fulfilled. The procedure cannot be raised to the level of a mandatory requirement. Rule 18 itself makes a distinction between conditions and limitations on the one hand subject to which a rebate can be granted and the procedure governing the grant of a rebate on the other hand. While the conditions and limitations for the grant of rebate are mandatory, matters of procedure are directory.

13. A distinction between those regulatory provisions which are of a substantive character and those which are merely procedural or technical has been made in a judgment of the Supreme Court in *Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner - 1991 (55) E.L.T. 437 (S.C.)*. The Supreme Court held that the mere fact that a provision is contained in a statutory instruction "does not matter one way or the other". The Supreme Court held that non-compliance of a condition which is substantive and fundamental to the policy underlying the grant of an exemption would result in an invalidation of the claim. On the other hand, other requirements may merely belong to the area of procedure and it would be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes which they were intended to serve [at paragraph 11]. The Supreme Court held as follows."

"The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some other may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve."

12. In view of the above, the Government hold that since the export of duty paid goods is not in dispute, the rebate claim in question cannot be denied. As such, Government holds that in the instant case the rebate claim is admissible to the applicant under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. Government. Accordingly, holds the impugned Order-in-Appeal No. US/412/RGD/2012 dated 19.06.2012 be set aside and Order-in-Original No. 983/11-12/DC / Rebate/ Raigarh dated 12.10.2011 sanctioning the rebate claim is restored.

13. The revision application, thus, succeeds in above terms.




14. So ordered."

8. In view of the above, the Government holds that in the instant case the rebate claim is admissible to the applicant under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. The Government accordingly, holds Order-in-Appeal No. US/53/RGD/2013 dated 15.02.2013 is set aside and Order-in-Original No. 983/11-12/DC / Rebate)/ Raigarh dated 12.10.2011 sanctioning the rebate claim is liable to be restored.

9. The Revision Application, thus, succeeds in above terms.

10. So ordered.


DIXIV

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

ORDER No. 360/2018-CX (WZ)/ASRA/Mumbai DATED 31.10.2018.

To,
M/s Balaji Fibres,
4C Dover Place,
9 Hall Road,
Richards Town,
Bangalore-560 005.

ATTESTED


20.10.18
S.R. HIRULKAR
Assistant Commissioner (R.A.)

Copy to:

1. The Commissioner, Central Excise, (Appeals) Raigad.
2. The Deputy / Assistant Commissioner (Rebate), GST & CX Mumbai Belapur.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy.

