

REGISTERED SPEED POST AD



**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. 195/32/WZ/2022-RA / 2012 Date of Issue: 26.07.2023

ORDER NO. 360 /2023-CX(WZ)/ASRA/MUMBAI DATED 26.07.23 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. Jay Chemical Industries Ltd.,
Plot No.44, GIDC Estate,
Odhav, Ahmedabad-382415.

Respondent : Pr. Commissioner of CGST Ahmedabad South.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. AHM-EXCUS- 001-APP-040/2022-23 dated 29-07-2022 passed by the Commissioner (Appeals) CGST, Ahmedabad.

ORDER

The revision application has been filed by M/s. Jay Chemical Industries Ltd., Plot No.44, GIDC Estate, Odhav, Ahmedabad-382415 (herein after to be referred as "Applicant"), against Order-in-Appeal No. AHM-EXCUS- 001-APP-040/2022-23 dated 29-07-2022 passed by the Commissioner (Appeals) CGST, Ahmedabad.

2. The applicant had filed rebate claim of Rs.2,59,566/- on 14.07.08 for goods exported under ARE.1 No.1523, 1524, 1525, 1526, 1527 & 1528/06-07 dated 30.03.2007 (Date of export of goods 13.4.2007), Rs.2,49,757/- on 14.7. 2008 for goods exported under ARE.1 No.1521 & 1522 dated 30.03. 2007 (Date of export of goods 13.4.2007) and Rs.1,43,737/- on 1.8. 2008 for goods exported under ARE.1 No.1471/06-07 dated 24.03. 2007 (Date of export of goods 19.4.2007), totalling Rs.6,53,060/- under Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 of the CER, 2002 read with Section 11B of the Central Excise Act, 1944 for the goods cleared from the factory for export under ARE-1's. The concerned Assistant Commissioner, Central Excise after following the due process of Law rejected the said rebate claim vide his Order-In-Original No. MP/619 TO 621/REB/08-09 dated 21.11.2008 being inadmissible under Section 11B of the CEA, 1944 as the rebate claim had been filed beyond the stipulated time limit of one year from the relevant date.

3. Aggrieved by the OIO dated 21.11.2008, the applicant filed appeal before the Commissioner(Appeals). The appellate authority after following due process of law rejected the appeal and upheld the OIO vide his Order-in-Appeal No. AHM-EXCUS- 001-APP-040/2022-23 dated 29-07-2022.

4. Aggrieved by the OIA dated 29-07-2022, the applicant filed revision application on the following grounds:

4.1. That the learned Commissioner (Appeals) has rejected the appeal filed by the applicant merely on the ground that Joint Secretary (Revision Application) passed the order in the case of the applicant in the similar sets of facts and therefore binding upon him under judicial discipline. However, learned Commissioner (Appeals) has in fact passed the order in disregard to principle of judicial discipline. Inasmuch as Honourable High Court of Gujarat in the case of Cosmonaut Chemicals V/s. UOI cited at 2009(233)ELT-46(Guj.) has specifically held that if the Customs authorities delay in parting with a copy of Shipping bill bearing necessary endorsement, an assessee cannot be put to disadvantage on the ground of limitation when the assessee is not in a position to make a claim without accompanying documents. Further, Honourable High Court of Rajasthan in the case of Gravita India Ltd. V/s. UOI cited at 2016(334)ELT-321(Raj.) following the judgment of Honourable High Court of Gujarat in the case of Cosmonaut Chemicals has held that limitation is to be considered in light of availability of requisite documents and should be taken to begin when documents necessary for substantiating the claim of refund are furnished by the department. In light of the law laid down by Honourable High Court of Gujarat and followed by Honourable High Court of Rajasthan, the learned Commissioner (Appeals) has erred in rejecting the appeal. Therefore, order passed by learned Commissioner (Appeals) may please be quashed and set aside.

4.2. That the reply to the show cause notice specifically pointed out the cause of delay in filing rebate claim within the stipulated period of one year from the date of export of goods. It would be seen that applicant could not furnish ARE-1 and Shipping bill duly endorsed by Customs authorities within stipulated period of one year as the specified documents were not provided by Customs authorities to the applicant. In fact there was no fault of Customs authority in parting with endorsed copies of ARE-1s and Shipping bills. Inasmuch as original copies of Shipping bills, ARE-1s and other export documents were lost in fire. Due to fire in the Customs record room original documents were lost and reconstructed copies of the export documents were provided by the Customs authority. In such unprecedented situation

limitation should not come in the way of the object and purpose of rebate claim as held by Honourable High Court of Gujarat in the case of Cosmonaut Chemicals. However, learned Commissioner (Appeals) has rejected the rebate claim without considering the unprecedented situation and the law laid down by the Honourable High Court of Gujarat. Therefore, impugned order may please be quashed and set aside.

4.3. That the Commissioner (Appeals) has rejected the appeal filed by the applicant merely because in earlier case Joint Secretary (Revision Application) decided the matter against the applicant. It is submitted that Revision Authority while allowing the Revision Application of the department did not consider the facts and the law laid down by Honourable High Court of Gujarat in the case of Cosmonaut Chemicals. It is submitted that Honourable Joint Secretary (Revision Application) under his Order No.61/2011-CX dated 24-01-2011 decided the matter against the applicant on the ground that the judgment of Honourable High Court in the case of Cosmonaut Chemicals V/s. UOI cited at 2009(233)ELT- 46(Guj.) was appealed against by the department and that ratio of Cosmonaut's judgment of Honourable Gujarat High Court cannot apply in the applicants case.

4.4. With respect to another ground taken by Honourable Joint Secretary that in the case of Cosmonaut Chemicals copy of Shipping bill given to the exporter after statutory time limit, while in the case of the applicant this is not so, it is submitted that department in their Revision Application in earlier case had stated that Shipping bill was given by customs authorities on 08-01-2008, however, the submission of the department was factually not correct. In as much as copy of shipping bill and duplicate copy of ARE-1 were given to the respondent in September-2008. The department has not brought on record that copy of ARE-1 and shipping bill duly endorsed by customs authorities were provided to the respondent on 8-1-2008. In view of the fact that respondent immediately on receipt of the requisite documents filed the rebate claim, the ground taken by the department was not sustainable. Therefore, the Revision Authority erred in passing the order against the

applicant. In the present case also applicant had submitted rebate claim immediately after receipt of copy of ARE-1 and Shipping bill duly endorsed by Customs authorities. Here it is submitted that goods were exported on 23-03-2007 and 04-04-2007 and fire broke out in the room adjacent to CMC service centre in the export shed of ICD, Sabarmati on 05-05-2007. Accordingly, Deputy Commissioner, Customs issued circular No. 02/2007 dated 21-07-2007. Thereafter, copies of shipping bills were printed on various dates from 27-12-2007 to 28-06-2008. However, copies of Shipping bills and ARE-1 duly endorsed by Customs authorities were provided on different dates. The applicant on receipt of endorsed Shipping bills and ARE-1 furnished rebate claim on 14-07-2008 and in case of ARE-1 No. 1471 dated 24-03-2007 the rebate claim was submitted on 01-08-2008. Here it may be pointed out that print date of Shipping bill cannot be considered as parting of copies of Shipping bill on the same date. In fact copies of Shipping bill and copies of ARE-1 duly endorsed by Customs authorities were given to the exporters including the applicant on different dates. Therefore, presumption made by Revision Authority to the effect that copy of Shipping bill was given by Customs authority on printing date was factually incorrect. Since Revision Authority under their order No. 61/2011-CX dated 24-01-2011 decided the matter against the applicant on the presumption that copy of Shipping bill was given to the applicant on printing date of Shipping bill, the reliance placed by learned Commissioner (Appeals) while rejecting the appeal is not proper and just. Inasmuch as applicant obtained copy of Shipping bill on various dates after same were printed from 27-12-2007 to 28-06-2008, moreover copies of ARE-1 were also provided to the applicant on various dates after Deputy Commissioner, Customs issued Circular on 21-07-2007 in connection with fire broke out in the export shed of ICD. Therefore, order passed by learned Commissioner (Appeals) may please be quashed and set aside.

4.5. That the judgment of Honourable High Court of Gujarat in the case of Cosmonaut Chemicals V/s. UOI cited at 2009(233)ELT- 46(Guj.) squarely applies in the present case. Inasmuch as Honourable High Court has specifically held that an assessee cannot be put to disadvantage on the ground

of limitation when the assessee is not in a position to make claim without accompanying document.

4.6 That the Honourable High Court of Rajasthan in the case of Gravita India Ltd. V/s. UOI cited at 2016(334)ELT-321(Raj.) following the judgment of Honourable High Court of Gujarat in the case of Cosmonaut Chemicals has held that limitation is to be considered in light of availability of requisite documents and should be taken to begin when documents necessary for substantiating the claim of refund are furnished by the department.

4.7 That the statutory limit of one year under Section 11B of CEA provided with the view that an assessee / exporter may require time to gather various documents to establish payment of duty and proof of export. This view has been substantiated in the judgment of Honourable High Court of Gujarat in the case of Cosmonaut Chemicals V/s. UOI cited at 2009(233)ELT-46(Guj.) and Honourable High Court of Rajasthan in the case of Gravita India Ltd. V/s. UOI cited at 2016(334)ELT-321(Raj.). As such limitation is to begin when requisite documents provided by customs authority and the department.

5. The applicant was thereafter granted opportunity of personal hearing on 22.06.2023. Shri P.G.Mehta, Advocate, appeared online on behalf of the applicant and submitted that the rebate claim was rejected on the ground of delay in filing the claim beyond one year. He further submitted that delay occurred due to fire in Customs Area. He requested in these peculiar circumstances, their claim be allowed.

6. They submitted an additional written submission dated 30.06.2023 wherein they reiterated their earlier submissions and stated that when they approached the Customs Authorities for obtaining copies of ARE-1 and shipping bill duly endorsed by Customs Authorities they were informed that since a fire broke out in the export shed of ICD, Customs, Sabarmati, Ahmedabad, all the records pertaining to exports were reported

destroyed/gutted. In this regard Deputy Commissioner, ICD Customs, Sabarmati, Ahmedabad issued Circular No. 02/2007 dated 21.07.2001.

7. Government has carefully gone through the relevant case records available in case files, the written submissions and also perused the impugned Order-in-Original, the Order-in-Appeal and the RA. The issue for decision in the present case is the admissibility of rebate claim filed by the applicant beyond one year of the date of export of goods.

8.1 Before delving into the issue, it would be apposite to examine the statutory provisions regulating the grant of rebate. Rule 18 of the CER, 2002 has been instituted by the Central Government in exercise of the powers vested in it under Section 37 of the CEA, 1944 to carry into effect the purposes of the Central Excise Act, 1944 including Section 11B of the CEA, 1944. Moreover, the Explanation (A) to Section 11B explicitly sets out that for the purposes of the section "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India. The duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India covers the entire Rule 18 within its encompass. Likewise, the third proviso to Section 11A(1) of the CEA, 1944 identifies "rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India" as the first category of refunds which is payable to the applicant instead of being credited to the Fund. Finally, yet importantly, the Explanation (B) of "relevant date" in clause (a) specifies the date from which limitation would commence for filing refund claim for excise duty paid on the excisable goods and the excisable goods used in the manufacture of such goods. The relevant text is reproduced below.

"(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;”

8.2 It would be apparent from the definition of relevant date in Section 11B of the CEA, 1944, that for cases of refund of excise duty paid on exported goods or on excisable materials used in exported goods, the date of export is the relevant date for commencement of time limit for filing rebate claim.

9.1 The next issue that arises is whether the non-availability of documents would have the effect of postponing such “relevant date”. Government infers that in the normal course any diligent applicant would try and ensure that their rebate claim would be lodged within time. Therefore, the applicant should have filed the rebate claim within one year of date of shipment of the goods with the available documents and photocopies of documents which had been submitted by them to the Customs Authorities. Such timely action on their part would have ensured that the rebate claim was not time barred. Even if the claim was returned by the rebate sanctioning authority for deficiency in the documents submitted, the applicant could have established their entitlement to the rebate claimed as and when the proper documents were received. In such a case, their rebate claim would be deemed to have been filed in time. Para 2.4 of Chapter 9 of the CBEC’s Excise Manual of Supplementary Instructions, 2005 in very explicit terms provides for such exigencies. The text thereof is reproduced below.

“2.4Even if claim is filed by post or similar mode, the claim should be rejected or returned with Query

Memo(depending upon the nature/importance of document not filed). The claim shall be taken as filed only when all relevant documents are available. In case any document is not available for which the Central Excise or Customs Department is solely accountable, the claim may be received so that the claimant is not hit by limitation period.

9.2 The applicant has not offered any evidence to substantiate their claim of having previously submitted the rebate claim within the designated timeframe, and it was rejected by the department. Consequently, the accusation of not adhering to the prescribed one-year period for submitting the rebate claim is deemed valid and reasonable.

10.1 The Hon'ble Delhi High Court has in its judgment in the case of Orient Micro Abrasives Ltd. vs. UOI[2020(371)ELT 380(Del.)] dealt with the issue involved in the present revision application. The text of the relevant judgment is reproduced below.

“16. We also record our respectful disagreement with the views expressed by the High Court of Gujarat in Cosmonaut Chemicals[2009(233)ELT 46(Guj.)] and the High Court of Rajasthan in Gravita India Ltd.[2016(334)ELT 321(Raj.)], to the effect that, where there was a delay in obtaining the EP copy of the Shipping Bill, the period of one year, stipulated in Section 11B of the Act should be reckoned from the date when the EP copy of the Shipping Bill became available. This, in our view, amounts to rewriting of Explanation (B) to Section 11B of the Act, which, in our view, is not permissible.”

10.2 The judgment of the Hon'ble Delhi High Court has very unambiguously held that the period of one year must be reckoned from the date of export and not from the date when the copy of shipping bills is received.

10.3 The Hon'ble Supreme Court has in its judgment in the case of Sansera Engineering Limited V/s. Deputy Commissioner, Large Tax Payer Unit, Bengaluru [(2022) 1 Centax 6 (S.C.)] held that:

“9. On a fair reading of Section 11B of the Act, it can safely be said that Section 11B of the Act shall be applicable with respect to claim for rebate of duty also. As per Explanation (A) to Section 11B, “refund” includes “rebate of duty” of excise. As per Section 11B(1) of the Act, any person claiming refund of any duty of excise (including the rebate of duty as defined in Explanation (A) to Section 11B of the Act) has to make an application for refund of such duty to the appropriate authority before the expiry of one year from the relevant date and only in the form and manner as may be prescribed. The “relevant date” is defined under Explanation (B) to Section 11B of the Act, which means in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of goods..... Thus, the “relevant date” is relatable to the goods exported. Therefore, the application for rebate of duty shall be governed by Section 11B of the Act and therefore shall have to be made before the expiry of one year from the “relevant date” and in such form and manner as may be prescribed. The form and manner are prescribed in the notification dated 6.9.2004. Merely because in Rule 18 of the 2002 Rules, which is an enabling provision for grant of rebate of duty, there is no reference to Section 11B of the Act and/or in the notification dated 6.9.2004 issued in exercise of powers conferred by Rule 18, there is no reference to the applicability of Section 11B of the Act, it cannot be said that the provision contained in the parent statute, namely, Section 11B of the Act shall not be applicable, which otherwise as observed hereinabove shall be applicable in respect of the claim of rebate of duty.

10. At this stage, it is to be noted that Section 11B of the Act is a substantive provision in the parent statute and Rule 18 of the 2002 Rules and notification dated 6.9.2004 can be said to be a subordinate legislation. The subordinate legislation cannot override the parent statute. Subordinate legislation can always be in aid of the parent statute. At the cost of repetition, it is observed that subordinate legislation cannot override the parent statute. Subordinate legislation which is in aid of the parent statute has to be read in harmony with the parent statute. Subordinate legislation cannot be interpreted in such a manner that parent statute may become otiose or nugatory. If the submission on behalf of the appellant that as there is no mention/reference to Section 11B of the Act either in Rule 18 or in the notification dated 6.9.2004 and therefore the period of limitation prescribed under Section 11B of the Act shall not be applicable with respect to claim for rebate of duty is accepted, in that case, the substantive provision – Section 11B of the Act would become otiose, redundant and/or nugatory. If the submission on behalf of the appellant is accepted, in that case, there shall not be any period of limitation for making an application for rebate of duty. Even the submission on behalf of the appellant that in such a case the claim has to be made within a reasonable time cannot be accepted. When the statute specifically prescribes the period of limitation, it has to be adhered to.

11. It is required to be noted that Rule 18 of the 2002 Rules has been enacted in exercise of rule making powers under Section 37(xvi) of the Act. Section 37(xxiii) of the Act also provides that the Central Government may make the rules specifying the form and manner in which application for refund shall be made under section 11B of the Act. In exercise of the aforesaid powers, Rule 18 has been made and notification dated 6.9.2004 has been issued. At this stage, it is required to be noted that as per Section 11B of the Act, an application has to be made in such form and manner as may be prescribed. Therefore, the application for rebate of duty has to be made in such form and manner as prescribed in

notification dated 6.9.2004. However, that does not mean that period of limitation prescribed under Section 11B of the Act shall not be applicable at all as contended on behalf of the appellant. Merely because there is no reference of Section 11B of the Act either in Rule 18 or in the notification dated 6.9.2004 on the applicability of Section 11B of the Act, it cannot be said that the parent statute – Section 11B of the Act shall not be applicable at all, which otherwise as observed hereinabove shall be applicable with respect to rebate of duty claim.

.....

15. In view of the above and for the reasons stated above, it is observed and held that while making claim for rebate of duty under Rule 18 of the Central Excise Rules, 2002, the period of limitation prescribed under Section 11B of the Central Excise Act, 1944 shall have to be applied and applicable. In the present case, as the respective claims were beyond the period of limitation of one year from the relevant date, the same are rightly rejected by the appropriate authority and the same are rightly confirmed by the High Court. We see no reason to interfere with the impugned judgment and order passed by the High Court. Under the circumstances, the present appeal fails and deserves to be dismissed and is accordingly dismissed.”

11. In the light of the foregoing facts and in keeping with the judicial principle of *contemporanea exposito est optima et fortissinia in lege* (contemporaneous exposition is the best and strongest in law), Government respectfully follows the ratio of the above judgment of the Hon'ble Supreme Court. The criteria for the commencement of time limit for filing rebate claim under the Central Excise law has been specified as the date of export of goods and applicability of Section 11B for rebate has been settled conclusively and cannot be varied by any exercise of discretion. Therefore, the rebate claims filed by the applicant have correctly been held to be hit by bar of limitation by the Commissioner(Appeals) in the impugned order.

12. The Order-in-Appeal No. AHM-EXCUS- 001-APP-040/2022-23 dated 29-07-2022 passed by the Commissioner(Appeals) is upheld. The revision application filed by the applicant is rejected as devoid of merits.


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

ORDER No. 360 /2023-CX(WZ) /ASRA/Mumbai DATED 26.9.23

To,
M/s. Jay Chemical Industries Ltd.,
Plot No.44, GIDC Estate,
Odhav, Ahmedabad-382415.

Copy to:

- 1) The Commissioner of CGST Ahmedabad South.
- 2) The Commissioner (Appeals) CGST, Ahmedabad.
- 3) Shri P.G.Mehta, Advocate, 4, Padma Chambers, 1st Floor, Opp Gandhigram Rly. Stn., Ellisbridge, Ahmedabad.
- 4) Sr. P.S. to AS (RA), Mumbai.
- 5) Spare Copy.

