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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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.195/526/2013-RA /4595 Date of Issue: 18/10/19

ORDER NO. 36/2019-CX (WZ)/ASRA/MUMBAI DATED 20.09.2019 OF THE GOVERNMENT OF INDIA PASSED BY SMT SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Piramal Glass Ltd.,

Respondent : Commissioner of Central Excise (Appeals), Mumbai-III-

Subject : Revision Application filed, under section 35EE of the Central Excise Act, 944 against the Orders-in-Appeal No. US/928/RGD/2012 dated 26.12.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-II.

ORDER

The Revision Application has been filed by M/s. Piramal Glass Ltd., (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. US/928/RGD/2012 dated 26.12.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai

Sl. No.	Rebate Claim No & Date	Amount claimed (Rs)	Order-in-Original & dt	Amount (Rs)	Order-in-Appeal No. & dt	
1	63 claims dt 10.05.2012	73,86,508	557/11-12/DC(Rebate) /Raigad dt 23.05.2012	Sanctioned 68,44,512	Appeal rejected	OIA No. US/928 /RGD/ 2012 dated 26.12.2012

2. The issue in brief is that the Applicant manufactured and exported various types of Empty Glass Bottles and then filed rebate claim for the duty paid on the same in terms of Rule18 of the Central Excise Rules, 2002 (herein after 'CER') :

2.1 The Applicant had filed 63 rebate claims dated 22.11.2011 totally to Rs. 73,86,508/-. The Deputy Commissioner(Rebate), Central Excise, Raigad vide Order-in-Original No. 557/11-12/DC(Rebate)/Raigad dated 23.05.2012 sanctioned Rs. 68,44,512/-, as rebate are restricted proportionate to FOB value.

2.2 Aggrieved, the Applicant filed appeal with the Commissioner of Central Excise (Appeal-II), Mumbai who vide Order-in-Appeal No. US/928/RGD/2012 dated 26.12.2012 held that in view of the GOI Order Re: Balkrishna Industries Ltd. [2011(271) ELT 148 (GOI)] the applicants are at a liberty to claim the refund of the said excess payment and the same can be allowed by way of credit in Cenvat Credit account

and upheld the Orders in Original and rejected the appeal filed by the applicant.

2.3 Upon receipt of the impugned order in Appeal No. US/928/RGD/2012 dated 26.12.2012, the Applicant observed that in the second Para of the order Commissioner (Appeals) stated that the applicants are entitled to claim the re-credit in their Cenvat Credit account whereas in the last para of the order, Commissioner (Appeals) rejected the appeal of the Applicant in entirety.

2.4 Aggrieved, the applicant then filed a Miscellaneous Application before Commissioner (Appeals-II), Mumbai for modification of Order-in-Appeal as the operative part and the second last para were contradictory to each other. However, in an identical case issue in the Applicant's own case i.e. in Order-in-Appeal Nos US/866 to 870/RGD/2012 dated 11.12.2012, the Commissioner (Appeals-II), Mumbai vide letter F.No. V2(A) 607-611/RGD/2012 dated 31.01.2013 informed the applicants as under :

> *"2. In this connection it is to inform you that once the order has been passed by the Commissioner (Appeals), ther is no provision under Section 35 A of the Central Excise Act, 1944 for modification of order already passed by the Commissioner (Appeals).*
>
> *3. Accordingly, your request cannot be entertained by this office. You may approach the appropriate authority in the matter for redressal of your grievances."*

3. Being aggrieved, the Applicant has filed the instant Revision Application on the following grounds :

3.1 The applicant, in their own case, wherein identical issue was involved, was allowed to take the re-credit of the amount in dispute, by the Hon'ble Commissioner (Appeals), Mumbai-III;

3.2 Hon'ble Revisionary Authority vide their Order Nos. 1617-1634/2012-Cx dtd. 21.11.2012 & 1274-1369/11 CX dtd. 30.09.2011 has remanded the identical case to the Original Authority and also allowed re-credit ;

3.3 The claim shall be allowed even if the value shown in the RE-1 is more than FOB value, if the same represents transaction value;

3.4 In case of M/s Garnet Speciality Papers Pvt. Ltd having the same issue, Commissioner (Appeals), Mumbai-I has allowed the appeal and said order has been accepted by the department;

3.5. Without prejudice to anything mentioned above, it is submitted that the power to scrutinize or change the assessment is with the Jurisdictional Assistant / Deputy Commissioner and not with Rebate Sanctioning Authority. Actual amount of 'duty paid' shall be returned as rebate and not the amount of duty payable;

3.6 there are plethora of cases, where the GOI has allowed the applicants to take the re-credit in cases where the rebate is denied;

3.7 GOI has held that any excess duty paid by the assesse has to be returned to them as the department is not authorised by law to retain the same with themselves. The logic behind the decision is that what is not due to the department should not be retained by them and should be returned to the assesse in the manner it was paid. In view of this the re-credit of the balance duty should be allowed.

4 A personal hearing in this was held on 22.08.2019 which was attended by Shri Arindam Chatterjee, Chartered Accountants on behalf of the Applicants. The Applicants reiterated the written submissions dated 20.03.2018 and their application grounds. In their earlier Revision Application Orders, allowed their rebate to be recredited. The Appellant requested that the amount should be sanctioned in cash in terms of Section 142(3) of CGST Act, 2017.

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, the Applicants had filed 63 rebate claims dated 10.05.2012 totally to Rs. 73,86,508/-under Rule 18 of the CER read with Notification No. 19/2004-CE(NT) dated 06.09.2004 for claiming rebate on their finished goods which was exported after payment of duty. The Original Adjudicating Authority then sanctioned the rebate claims on FOB value totaling to Rs. 68,44,512/- on the ground that CIF value cannot be transaction value and for that matter freight and insurance beyond the port of export cannot be the part of transaction value and moreover any expenditure incurred beyond the international borders of India cannot be a part of valuation under Central Excise Act, 1944 in view of the provisions of Section 1 of Central Excise Act, 1944 wherein the jurisdiction of the said Act extends to the whole of India and not beyond. The Appellant then filed appeals for the balance amounting to Rs. 5,41,991/- in their rebate claims which was rejected by the Commissioner(Appeal). Hence the Applicant then filed the current Revision Application.

7. In this regard, Government observes that the identical issue has been decided by Government vide Revisionary Order No. 97/2014-Cx, dated 26-3-2014 in Re: Sumitomo Chemicals India Pvt. Ltd. reported in 2014 (308) E.L.T. 198 (G.O.I.). While deciding the issue Government, in its aforesaid Order discussed the provisions of Section 4(1)(a) of Central Excise Act, 1944, Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 as well as the definitions of 'Sale' and 'Place of Removal' as per Section 2(h) and Section 4(3)(c)(i), (ii), (iii) of Central Excise Act, 1944 respectively, and observed as under :-

> *8.5 Government observes that from the perusal of above provisions it is clear that the place of removal may be factory/warehouse, a depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at*

place of removal. The meaning of word "any other place" read with definition of "Sale", cannot be construed to have meaning of any place outside geographical limits of India. The reason of such conclusion is that as per Section 1 of Central Excise Act, 1944, the Act is applicable within the territorial jurisdiction of whole of India and the said transaction value deals with value of excisable goods produced/manufactured within this country. Government observes that once the place of removal is decided within the geographical limit of the country, it cannot be beyond the port of loading of the export goods. Under such circumstances, the place of removal is the port of export where sale takes place. The GOI Order No. 271/2005, dated 25-7-2005 in the case of CCE, Nagpur v. M/s. Bhagirth Textiles Ltd. reported in 2006 (202) E.L.T. 147 (GOI) has also held as under :-

> *"the exporter is not liable to pay Central Excise duty on the CIF value of the goods but the Central Excise duty is to be paid on the transaction value of the goods as prescribed under Section 4 of the Central Excise Act, 1944". It is clear from the order that in any case duty is not to be paid on the CIF value.*

8.6 Supreme Court in its order in Civil Appeal No. 7230/1999 and CA No. 1163 of 2000 in the case of M/s. Escorts JCB Ltd. v. CCE, Delhi reported in 2002 (146) E.L.T. 31 (S.C.) observed (in para 13 of the said judgment) that

"in view of the discussions held above in our view the Commissioner of Central Excise and CEGAT erred in drawing an inference that the ownership in the property continued to be retained by the assessee till it was delivered to the buyer for the reason that the assessee had arranged for the transport and transit insurance. Such a conclusion is not sustainable".

Further, CBEC vide it (Section) 37B Order 59/1/2003-CX, dated 3-3-2003 has clarified as under :-

> *"7. Assessable value' is to be determined at the "place of removal". Prior to 1-7-2000, "Place of removal" [Section 4(4)(b), sub-clauses (i), (ii) and (iii)], was the factory gate, warehouse or the depot or any other premises from where the goods were to be sold. Though the definition of "place of removal" was amended with effect from 1-7-2000, the point of determination of the assessable value under Section 4 remained substantially the same. Section 4(3)(c)(i) [as on 1-7-2000] was identical to the earlier provision contained in Section 4(4)(b)(i), Section 4(3)(c)(ii) was identical to the earlier provision in Section 4(4)(b)(ii) and Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, took care of the situation covered by the earlier Section 4(4)(b)(iii). In the Finance Bill,*

2003 (clause 128), the definition "place of removal" is proposed to be restored, through amendment of section 4 to the position as it existed just prior to 1-7-2000.

8. Thus, it would be essential in each case of removal of excisable goods to determine the point of "sale". As per the above two Apex Court decisions this will depend on the terms (or conditions of contract) of the sale. The 'insurance' of the goods during transit will, however, not be the sole consideration to decide the ownership or the point of sale of the goods."

The Government also observed in its aforesaid Revision Order No. 97/2014-Cx, dated 26-3-2014 in Re: Sumitomo Chemicals India Pvt. Ltd. that

"it has been stipulated in the Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 and the CBEC 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 provisions of Central Excise Act. Any amount paid in excess of duty liability on one's own volition cannot be treated as duty. But it has to be treated simply a voluntary deposit with the Government which is required to be returned to the respondent in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11-9-2008 in CWP Nos. 2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. v. UOI reported in 2009 (235) E.L.T. 22 (P&H).

Hon'ble High Court of Punjab & Haryana has observed that refund in cash of higher duty paid on export product which was not payable, is not admissible and refund of said excess paid duty/amount in Cenvat credit is appropriate. As such the excess paid amount/duty is required to be returned to the respondent in the manner in which it was paid by him initially.

8. Government also places its reliance on the Hon'ble Gujarat High Court order dated 09.01.2016 in the Applicant's own case - In RE:Garden Silk Mills Ltd Vs UOI [2018 (2) TMI 15 Gujart High Court] where in it was held that

"9. Coming to the merits of the case, again undisputed facts are that the petitioner had paid excise duty on CIF value of goods exported. The petitioner does not dispute the

stand of the Government of India that excise duty was payable on FOB value and not on CIF value. The Government of India also does not dispute the petitioner's stand that in such a case the additional amount paid by the petitioner would be in the nature of deposit with the Government which the Government cannot withhold without the authority of law. If these facts are established, a simple corollary thereof would be that the amount has to be returned to the petitioner. If therefore, the petitioner's request was for re-credit of such amount in Cenvat account, the same was perfectly legitimate. The Government of India should not have asked the petitioner to file separate application for such purpose. The Government of India itself in case of Balkrishna Industries Ltd. (supra), had substantially similar circumstance provided as under :

> *"8. In this regards, Government observed that the revisionary authority has passed a number of orders wherein it has been held that the rebate of duty is to be allowed of the duty paid the transaction value of the goods determined under Section4 of the Central Excise Act, 1944 and the rebate on the amount of duty paid in respect of post clearances expenses like freight and insurances may be allowed as recredit entry in their cenvat account. Since the Government cannot retain the amount collected without any authority of law and the same has to be returned to the applicant in the manner it was paid. Hence, Government observes that the applicant is entitled for the take (sic) credit in their cenvat account in respect of the amount paid as duty on freight & insurance charge. The applicant was not even required to make a request with the department for allowing this recredit in their cenvat account. The adjudicating officer/ Commissione(Appeals) could have themselves allowed this instead of rejecting the same as timebarred."*

10. In the result, the respondents are directed to recredit the excess amount paid by the petitioner categorizing as excise duty of CIF value of the goods to the Cenvat credit account.

11. Petition is disposed of."

9. Government finds that as the facts of the present Revision Application are similar to the above quoted cases, the ratio of the same is squarely applicable to this case.

10. In view of the foregoing discussion, Government holds that in this case the duty was paid on CIF value and therefore, rebate of excess duty paid on said portion of value which was in excess of transaction value was rightly denied to the applicant.

Applicant has contended any excess duty paid by the assesse has to be returned to them as the department is not authorised by law to retain the same with themselves and in view of this the re-credit of the balance duty should be allowed.

11. In view of above, Government finds that the excess paid amount of duty which is not held admissible for being rebated under Rule 18 of CER, 2002, is to be allowed as re-credit in their Cenvat credit account from where said duty was initially paid subject to compliance of provisions of Section 12B of Central Excise Act, 1944.

12. As regards contention of the applicant that the operative part and the second last para of the impugned Order in Appeal are contradictory to each other, Government observes from copy of Form EA-1 [Form of Appeal to the Commissioner Appeals) under Section 35 of the Central Excise Act, 1944] filed before Commissioner (Appeals)] that the relief sought by the applicant before Commissioner (Appeals) was *"rebate claim shall be sanctioned in full without re-determining the assessable value and duty payable"* and in the impugned Order at Para 3 - *".... appeared for the hearing and reiterated the grounds of appeal and requested that the re-credit of the differential amount should be allowed."* Since the excess paid amount of duty was held not admissible for being rebated under Rule 18 of CER, 2002, the Commissioner (Appeals) rightly rejected the appeals to the extent which sought the sanction of rebate claims fully. However, Commissioner (Appeals) stated that -

> *".....in view of GOI Order Re: Balkrishna Industries Ltd. [2011(271) ELT 148 (GOI)] held that the appellants are at a liberty to claim the refund of the said excess payment and the same can be allowed by way of credit in Cenvat Credit account.*
>
> *In view of the above, the impugned order is upheld and the appeal is rejected."*

Government finds that on one hand Commissione (Appeal) had allowed the Appellant to claim the refund of the excess payment and also allowed the same by way of credit in Cenvat credit account and on the other hand he upheld the original authority's

Order-in-Original – *" Accordingly, rebate is restricted proportionate to FOB value."* and rejected the appeal. Hence there is anomaly in the impunged Order-in-Appeal.

13. In view of above, Government holds that the excess paid amount of duty of Rs. 5,41,991/- (Rupees Five Lakhs Forty One Thousand Nine Hundred and Ninety One only) which is held as not admissible for rebate under Rule 18 of CER, 2002, is to be allowed to the Applicant as re-credit in their Cenvat credit account. Under such circumstances, Government modifies the Order-in-Appeal No. US/928/RGD/2012 dated 26.12.2012 to that extent.

14. Revision application is allowed in terms of above.

15. So, ordered.

(SEEMA ARORA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 36/2019-CX (WZ)/ASRA/Mumbai DATED 20.09.2019.

To,
M/s Pirmal Glass Ltd.,
Pirmal Tower, Annex 6th floor,
Peninsula Corporate Park,
Lower Parel,
Mumbai 400 013.

Copy to:

1. The Commissioner, Central Excise, Raigad, 1st floor, CGO Complex, Sector 10, CBD Belapur, Navi Mumbai 4400 614.
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Spare Copy.