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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. 195/47/WZ/18-RA, 198/107/WZ/2018-RA 1234 Date of Issue: 06.02.2023

ORDER NO. 37 – 38 /2023-CEX (WZ)/ASRA/MUMBAI DATED 31.01.2023 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.

Applicants : 1. M/s. Tasty Bite Eatable Ltd.
2. . Principal Commissioner of CGST& Cx Pune II

Respondents : 1. Principal Commissioner of CGST& Cx Pune II
2. M/s. Tasty Bite Eatable Ltd.

Subject : Revision Application filed, under section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. – PUN-CT-APPII-000-018-18-19 dated 19.04.2018 passed by the Commissioner(Appeals-II),Central Tax ,Pune.

ORDER

These Revision Application have been filed by M/s. Tasty Bite Eatable Ltd. (hereinafter referred to as "Applicant-Exporter") and the Principal Commissioner of CGST& Cx Pune II (hereinafter referred to as "Applicant-Department") against the Order-in-Appeal No. – PUN-CT-APPII-000-018-18-19 dated 19.04.2018 passed by the Commissioner(Appeals-II),Central Tax ,Pune.

2. The issue involved in brief is that the Applicant-Exporter, having Central Excise Registration No. AAACT2317AXM001, had filed three rebate claims amounting to Rs.40,82,531/-, Rs.62,83,987/- and Rs.66,02,938/- for export clearances made on payment of duty. The Applicant-Exporter are availing benefit of two notifications viz. 1/2011-CE dtd. 1.3.2011 as amended by Notfn. No. 16/2012- CE dtd. 17.03.2012 and 2/2011-CE dtd. 1.3.2011 as amended by Notfn. No. 19/2012-CE dtd. 17.03.2012. They are availing benefit of Notfn. No.1/2011-CE dtd. 1.3.2011 as amended, for their clearances in Domestic Tariff Area (DTA) which allows the specified goods to be cleared on payment of 2% duty with a bar on availment of Cenvat credit on inputs and input services. With effect from October 14, 2016 the they undertook to export the goods on payment of duty under the provisions of Rule 18 of the Central Excise Rules, 2002 and simultaneously they availed Notfn. No. 2/2011-CE dated 01-03-2011 (unconditional), as amended for their export clearances and discharged duty@6%. During the scrutiny of the said claims, it was observed that the Applicant had utilized the capital goods credit for payment of duty on export of goods. The Applicant availed Capital Goods credit for the goods which are manufactured and cleared under Not. No. 1/2011-C.E, dated 01-03-2011. However, they allegedly were not entitled to take the credit of capital goods as the said notification read with Cenvat Credit Rules, 2004 states that the manufacturer is not entitled to take capital goods credit for the manufacture of exempted goods. This position is also clarified by Board's circular No. 943/4/2011-CX., dated 29-04-2011.Accordingly, three Show Cause Notices were issued to the Applicant-Exporter for rejection of the rebate claims, which culminated in

the issuance of the OIO bearing OIO No. R-157 to 159/CEX/2017-18 dated 22.12.2017, rejecting all the three claims. Aggrieved, the Applicant-Exporter filed appeal with the Commissioner (Appeals-II),Central Tax ,Pune-II, who vide Order-in-Appeal No. – PUN-CT-APPII-000-018-18-19 dated 19.04.2018 allowed their appeal partially and modified the OIO to allow rebate to the tune of Rs. 56,56,485/-.

3. Being aggrieved and dissatisfied with the impugned order in appeal, the Applicant-Exporter had filed this revision Application on the following grounds:

i. Applicant-Exporter has fulfilled all the procedure as prescribed under Rule 18 and submitted all the relevant documents. This fact is not disputed. In such a case, the Applicant has indeed complied with the necessary procedure and the duty suffered by the Applicant for export of excisable goods ought to be allowed as rebate in its entirety.

ii. Accordingly, where the Applicant-Exporter is engaged in the activity of exporting the manufactured finished goods on payment of duty and complies with the procedural requirement for claim of rebate, the same ought to be allowed in its entirety by the departmental authorities.

iii. Notification No. 2/2011 is an unconditional notification and Applicant is eligible for its benefit ipso facto that description of goods cleared by it are covered by this notification, whereas Notification No. 1/2011 is a conditional Notification and prescribes bar on availment of CENVAT credit on input and input service for availment of its beneficial rate. The goods cleared by Applicant are also covered by Notification No. 1/2011. It may therefore be noted that, once the Applicant has adhered to the condition of non-availment of CENVAT credit as prescribed under Notification No. 1/2011, it makes itself eligible for both the Notification, and it becomes the Applicant's prerogative to opt for either of the Notification.

iv. The fact of non-availment of CENVAT credit of duties/taxes paid by the Applicant on inputs and input services in the present case is

evidenced by a Certificate issued by Chartered Accountant and Applicant's eligibility to avail benefit of both the Notification simultaneously is also duly acknowledged by the OIA.

v. in order to restrict the assessment of rebate claim to the rate of duty prescribed under Notification No. 01/2011, the Ld. Commissioner (Appeals) has only partly referred to the supplementary instructions. The impugned findings have failed to refer the supplementary instructions holistically. For ease of reference the entire text of para 4.1 of Central Excise Manual of Supplementary Instructions is reproduced below:

Sealing of goods and examination at place of dispatch: The exporter is required to prepare five copies of application in the Form ARE-1, as per format specified in the Annexure-14 to Notification No. 19/2004-Central Excise (NT) dated 6.9.2004(See Part 7). The goods shall be assessed to duty in the same manner as the goods for home consumption. The classification and rate of duty should be in terms of Central Excise Tariff Act, 1985 read with any exemption notification and/or Central Excise Rules, 2002 The value shall be the "transaction value" and should conform to Section 4 or section 4A, as the case may be, of the Central Excise Act, 1944. It is clarified that this value may be less than, equal to or more than the FOB value indicated by the exporter on Shipping Bill."

On a bare perusal of the above reproduced text Applicant submits that the supplementary instructions refer only to the manner i.e. procedure to be followed to determine classification and duty rate and does not make it mandatory to adopt identical notification for domestic clearances as well as exports to assess dutiability of export goods.

vi. the Applicant-Exporter had an option to choose the benefit amongst Notification No. 1/2011-CE and Notification No. 2/2011- CE for DTA clearances and in view of the text of Central Excise Manual the same option of choosing the relevant benefit ought to be available to Applicant while assessing the export goods. It is submitted that the

assesse's option to choose the Notification is also evident from the use of the words 'The classification and rate of duty should be in terms of Central Excise Tariff Act, 1985 read with any exemption notification. However, the same has been ignored to the prejudice of the Applicants entitlement of rebate as claimed by it.

vii. The present revisionary proceedings culminate out of the Show Notice's issued to Applicant challenging the validity of rebate claim wherein the nature of export itself was disputed to be exempted clearance vis-à-vis dutiable clearance. The Show Cause Notices at no point raised the issue of rate of duty at which the claim of rebate was to be assessed. The scope of the allegation in the Show Cause Notices was thus restricted to determine only if goods exported are to be treated as exempt goods at par with the goods cleared in DTA and this fact is also evident from the findings recorded in the OIO at its paragraph 22.

viii. It is further submitted that the findings of the adjudication proceedings recorded in the OIO nowhere attempts to determine the rate of duty at which the claim of rebate is required to be assessed. The supplementary instruction referred thereunder too are referred for a limited point of determination of nature of goods exported quo exempted goods vis-à-vis dutiable goods.

ix. Applicant-Exporter submits that determination of nature of goods cleared as to exempted goods or dutiable goods is in itself a point of law which independent from determination of rate of duty at which the claim of rebate is to be assessed. It is submitted that Show Cause Notices were issued were limited only to allege that the goods exported are exempted goods and have not raised the issue of rate of duty at which the claim of rebate is to be assessed.

x. Without prejudice to the submission made above, the Applicant submits that it has utilized CENVAT credit to the tune of Rs. 1,69,69,456/- towards the discharging Excised duty on goods exported under Rule 18 of CER. Such utilization of CENVAT Credit is evident from the documents furnished in support of the claim of

rebate and is also not disputed. In such a case if the assessment of rebate claim with reference to Notification No. 01/2011 is upheld, the CENVAT Credit utilized in excess of the rebate so assessed partakes the character of a payment other than for Excise duty liability. This position is also conceded by the Ld. Commissioner (Appeals) in its OIA. It is therefore submitted that in absence of any duty liability itself, the Applicant ought to be granted refund of the CENVAT Credit utilized in excess of the claim of rebate as assessed with reference to Notification No. 01/2011.

xi. Applicant-Exporter have placed reliance on various case laws

xii. In view of above Applicant prayed to

(i) set aside the Impugned OIA to the extent of rebate claim rejected

(ii) allow the rebate of Rs. 1,13,12,971/- in cash to the Applicant

4. Being aggrieved and dissatisfied with the impugned order in appeal, the Applicant-Department had filed this revision Application on the following grounds:

i. In the instant case, the basis of issue of Show Cause Notices was that the assessee filed rebate claims in respect of duty paid on exported goods where it was observed that they simultaneously availed benefit of two notifications viz. 1/2011-CE dated 1.03.2011 as amended by Notification No.16/2012-CE 17.03.2012 for clearances in DTA @ 2% duty and Notification No.2/2011-CE dated 1.03.2011 as amended by: Notification No. 19/2012-CE dated 17.03.2012 for export clearances @ 6% duty. For payment of excise duty on export clearances, they availed and utilized Capital goods credit which was not admissible to them in terms of provisions of Rule 2 (d) and Rule 6 (4) of Cenvat Credit Rules, 2004 which stipulates that: Rule 2 (d): "exempted goods" means excisable goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "NIL" rate of duty and goods in respect of which the benefit of an exemption under Notification No. 1/2011. CE, dated the 1 March, 2011 or under entries at serial number 67 and 128 of Notification No.

12/2012-CE, dated 17th March, 2102 is availed. Rule 6 (4): no Cenvat Credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based on the value or quantity of clearances made in financial year.

ii. The rebate sanctioning authority after scrutiny of the export and other relevant documents correctly rejected all the three rebate claims and held as under:

"24. Whereas in the instant case the capital goods were received by the assessee and was put to use when they were availing exemption only under Notification No: 01/2011-CE dated 01.03.2011 and the assessee availed the credit only at a later stage and as per the decision of the Tribunal in the case of CCE, Indore vs. Surya Roshni Ltd referred above, the question of availing credit on the capital goods doesnt arise.

27. From the above it is evident that rebate is admissible only if duty is paid on exported goods. In the instant case the assessee paid duty allegedly from the balance of Cervat credit which is not admissible to them as discussed above. When the availment of Cenvar Credit is ab-initio not admissible to the assessee, the so called payment of Central Excise Dury in respect of the present rebate claims cannot be construed as payment of Central Excise duty under Rule 8 of Central Excise Rules, 2002. Moreover other than the said Cenvat Credit of Capital goods the assessee did not have any balance available in their Cervat credit account during the relevant period. Thus, the rebate of duty amount actually debited from such credit account is not admissible to the assessee."

iii. The Ld. Commissioner (Appeals) while partially modifying the OIO No. R-157 to R-159/CEX/2017-18 dated 22.12.2017, allowed rebate claim of Rs. 13,60,844/-, Rs.20,94,662/- and Rs.22,00,979/-[Total: Rs.56,56,485/-] to the assessee which is not correct as the payment of

duty for export clearances through Cenvat account itself is not acceptable to the department in view of the findings of the rebate sanctioning authority regarding Inadmissibility of Cenvavt credit recorded in the order.

iv. The rebate sanctioning authority at Para-16 and 17 of the Order dated 22.12.2017 has clearly recorded the reasons as to why the Cenvat Credit on Capital goods was not admissible to the assessee. Para-16 and 17 of said Order are reproduced as under

"16 On going through the submissions made by the assessee it is noticed that the capital goods on which the Cenvat credit was availed by the assessee was received in the factory during the period December 2012 to January 2016 but the assessee has taken the credit only in the month of June 2016 On combined reading of the above referred Rules it specifically means that till June 2016, the Capital goods received in the factory was solely used for manufacture of the goods in respect of which benefit of exemption under Notification No:1/2011-CE dated 01.03.2011 was being availed by the assessee. In other words Capital goods were used exclusively for the manufacture of exempted goods and the credit on the same is not allowed. The issue is also clarified by the Boards Circular No: Circular No.943/04/2011-CX dated 29.04.2011 which states that:

As per Rule 6(4) no credit can be availed on capital goods used exclusively in manufacture of exempted goods or in providing exempted service. Goods in respect of which the benefit of an exemption under notification No. 1/2011-CE, dated the 1st March, 2011 is availed are exempted goods [Rule 2(d)]. Taxable services whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken, are exempted services [Rule 2(e)]. Hence credit of capital goods used exclusively in manufacture of such goods or in providing such service is not allowed.

17. As regards the usage of capital goods after June 2016, I would like to place reliance on the decision in the case of CCE, Indore vs. Surya

Roshni Ltd reported in 2003 (155) ELT 481 (Tri. Del). wherein it is held that:

"the availability of moduat credit is to be looked into at the time of receipt of the capital goods. If the capital goods are exclusively used in the manufacture of exempted products, modvat credit will not be available to the manufacturer. Subsequently, the exempted product becomes dutiable on account of withdrawal of exemption or the manufacturer puts the capital goods to other use would not revive the question of modvat credit which stands determined at the time the capital goods were received."

v. The Ld. Commissioner (Appeals) at Para No.7.1 of the findings of the O-1-A has recorded as under:

7.1 Further as discussed above the appellant were required to assess their clearances for export in terms of CBEC's Excise Manual of Supplementary instructions 2005 and resultantly they were also required to avail the benefit of Notification No.01/2011-CE of their export clearances made on payment of duty. Therefore, there would be a situation that all the goods manufactured and cleared (DTA/export) by the Appellant would fall under the category of exempted goods in terms of Rule-2(d) of Cenvat Credit Rules, 2004 as under exempted goods" means excisable goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "NIL" rate of duty and goods in respect of which the benefit of an exemption under Notification No. 1/2011- CE, dated the 1st March, 2011 or under entries at serial number 67 and 128 of Notification No. 12/2012-CE, dated 17th March, 2102 is availed."

vi. In such a situation if any fresh purchases of Capital Goods are made by the Appellant, when all the clearances fall under the exempt category, agree that no credit will be allowed in terms of Rule 6(4) of the CCR,2004. However, the Cenvat Credit related to those capital goods which were purchased earlier before arising of such situation cannot be denied at this stage as it does not satisfy the criteria of Rule 6(4) of CCR,2004," Principally, the Ld. Commissioner (Appeals)

appears to have accepted the findings of the adjudicating authority that no credit will be allowed in terms of Rule 6(4) of the CCR,2004. However, the findings that Cenvat Credit related to those capital goods which were purchased earlier before arising of such situation cannot be denied at this stage are not correct. If inadmissibility of Cenvat credit is legally sustainable, same can be recovered/denied at subsequent stage.

vii. The Ld. Commissioner (Appeals) has erred to interpret the provisions of Rule 6(4) of CCR, 2004 in proper perspective. It has been recorded that the Cenvat Credit related to those capital goods which were purchased earlier before arising of such situation cannot be denied at this stage as it does not satisfy the criteria of Rule 6(4) of CCR, 2004.

viii. In the case of Spenta International Ltd. Vs. Commissioner of Central Excise, Thane reported in 2007 (216) E.L.T.133 (Tri.LB) Hon'ble CESTAT, Mumbai [Larger Bench] has held that Cenvat Credit is to be determined with reference to the dutiability of the final product on the date of receipt of Capital goods.

ix. In view of the above mentioned statutory provisions the sanctioning of rebate of Rs.56,56,485/- was incorrect, since the assessee availed inadmissible Cenvat Credit in respect of Capital goods which were received in the factory during the period December, 2012 to January,2016 and final products during this period were fully exempted. Subsequently, such Cenvat Credit was utilized for payment of excise duty on goods export by them and claimed as rebate.

x. In view of above, Applicant-Department requested to set aside the impugned OIA.

5. Personal hearing in the matter was fixed on 12.10.2022, Mr. Ketan Tadsare, Advocate appeared online on behalf of the Applicant-1 for the hearing and reiterated their earlier submission. He submitted that applicant started operating under two separate notifications one in 2016 for domestic and one for export. He requested to allow rebate. Alternatively, he requested to allow credit back to them.

6. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original, Order-in-Appeal and the Revision Application.

7. Government notes that the issue to be decided in the instant case are:

a) Whether the credit on capital goods is admissible in the facts and circumstances of the present case.

b) Whether benefit of two exemption notification (Notification 02/2011 CE and 01/2011 CE dated 01.03.2011) can be availed simultaneously for different consignments.

c) Whether rebate claim is sanctionable.

8. With regards to the question of admissibility of the cenvat credit on capital goods, Government finds that contention on this issue arises from the fact that rule 6(4) of CCR,2004 disallows credit on capital goods used exclusively in the manufacture of exempted goods. Rule 6(4) is reproduced as under:

"(4) No CENVAT credit shall be allowed on capital goods used exclusively in the manufacture of exempted goods or in providing exempted services for a period of two years from the date of commencement of the commercial production or provision of services, as the case may be, other than the final products or output services which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made or services provided in a financial year:

Provided that where capital goods are received after the date of commencement of commercial production or provision of services, as the case may be, the period of two years shall be computed from the date of installation of such capital goods."

It is clear from the above that cenvat credit on capital goods used exclusively in the manufacture of exempted goods shall not be allowed. Government finds that admissibility of cenvat credit on capital goods in present case depends on the fact that whether these goods were used exclusively in the

manufacture of exempted goods..Government finds that when the capital goods were put to use during the period from December 2012 to January 2016, Applicant-Exporter were clearing the goods in two ways as under:

a) Clearance to DTA in terms of Not. No. 01/2011-CE

b) Clearance in case export of goods under rule 19 of Central Excise rules, 2002 without payment of duty under bond.

Government observes that it is specified in the Rule 6(6)(v) of the cenvat credit rules 2004 that Rule 6(4) shall not be applicable in case of goods cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002. Rule 6(6)(v) of the cenvat credit rules 2004 is reproduced as under :

" (6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either-

.....

(v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or"

From the above, it is clear that Rule 6(4) will not be applicable in the present case as the Applicants cleared goods for exports without payment of duty under bond. Besides, Government observes that this issue has been dealt with by the Appellate Authority in detail in para 7 to Para 7.2 of the impugned OIA before coming to the conclusion that the cenvat credit on capital goods are admissible to the Applicant. Therefore, Government finds that this issue needs no further interference.

9. With regard to the issue of the availment of benefit of notifications simultaneously, Government notes that Applicant Exporter by availing these two notifications has treated the exported goods differently from the goods cleared for home consumption in as much as the assessment of duty, which is not permissible as per the provisions of para 4.1 of Chapter 8 of CBEC's Excise Manual of Supplementary instructions 2005. The Para 4.1 of the supplementary instructions is reproduced as :

"4. Scaling of goods and examination at place of dispatch

4.1 The exporter is required to prepare five copies of application in the Form ARE-1, as per format specified in the Annexure-14 to Notification No. 19/2004-Central Excise (NT), dated 6-9-2004 (See Part 7). ***The goods shall be assessed to duty in the same manner as the goods for home consumption.*** *The classification and fate of duty should be in terms of Central Excise Tariff Act, 1985 read with any exemption notification section Central Excise Rules, 2002. The value shall be the "transaction value" and should conform to section to or 44, as the case may be, of the Central Excise Act, 1944. It is clarified that this value may be less than, equal to or more than the F.O.B. value indicated by the exporter on the Shipping".*

It is an admitted fact that, Applicant-Exporter has assessed the duty at the rate of 2% by availing the benefit of Notification 01/2011-CE dated 01.03.2011 for goods cleared to DTA while in case of Exports they have assessed the duty at the rate of 6% by taking benefit of Notification 02/2011-CE dated 01.03.2011. Therefore, as per the aforesaid instructions they had to pay the duty at the rate of 2% on the goods exported at par with the goods cleared under DTA. More so, Government notes that it has been discussed elaborately in the impugned OIA in paras 6.4 to 6.7 before coming to the conclusion that duty for export under rebate was required to be assessed in terms of Notification 01/2011-CE by paying duty @2%.

10. No evidence for separate accounting and availment of cenvat for domestic clearances & for export has been produced. When the applicant preferred to utilise two separate notifications for home consumption and export of the same goods, the CENVAT credit utilised for clearance of the exported goods was required to be restricted to the proportion of inputs utilised in their manufacture. Concept of tax on export to be zero rated cannot mean that tax not concerning with export is loaded on export goods somehow to encash the same. Alternatively, the applicant should have maintained separate account for the inputs utilised in the manufacture of exported goods and claimed rebate at higher rate utilising CENVAT credit on such inputs used in the manufacture of such goods.

11. In view of the above, Government does not find any infirmity in the Order-in-Appeal No. – PUN-CT-APPII-000-018-18-19 dated 19.04.2018 passed by the Commissioner(Appeals-II),Central Tax ,Pune and therefore, upholds the impugned order in appeal.

12. Revision applications is/are disposed off in above terms.

31/1/23

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

ORDER No. 37-38/2023-CEX (WZ) /ASRA/Mumbai Dated 31.1.2023

To,

1. M/s. Tasty Bite Eatable Ltd., Gat No. 490, At post Bhadgaon, Tal. Daund, Pune -412214.
2. The Principal Commissioner CGST & CX, Pune-II, GST Bhavan, 41/A, Ice House, Opp Wadia College, Sasoon Road,Pune-411001.

Copy to:

1. The Commissioner(Appeals-II),Central Tax ,Pune-II, 2nd Floor, F wing, GST Bhawan, 41/A, Sasoon Road, Pune-411001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.