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. 195/1475-1476/12-RA /4883 Date of Issue: 04.11.19

ORDER NO.४८४/2019-CX (WZ) /ASRA/MUMBAI DATED२०.९. 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. Zest Pharma
274A/275A, Sector-F,
Sanwer Road, Indore,
Madhya Pradesh

Respondent : Commissioner, Central Excise, Indore

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the OIA No. IND/CEX/000/APP/193 & 194/2012 dated 26.07.2012 passed by the Commissioner (Appeals), Customs & Central Excise, Indore.

ORDER

These revision applications have been filed by M/s. Zest Pharma, 274A/275A, Sector-F, Sanwer Road, Indore, Madhya Pradesh (hereinafter referred to as "the applicant") against OIA No. IND/CEX/000/APP/193 & 194/2012 dated 26.07.2012 passed by the Commissioner (Appeals), Customs & Central Excise, Indore.

2.1 The applicant had filed rebate claims before the Assistant Commissioner, Central Excise, Indore which were sanctioned/re-credited to CENVAT account by the adjudicating authority as per the details given in the table below.

Sr. No.	Total No. of claims	Rebate claim amount(Rs.)	Rebate claim sanctioned in cash(Rs.)	Rebate amount re-credit in CENVAT account(Rs.)	Order-in-Original No. & date
1	12	45,35,029/-	22,67,514/-	22,67,515/-	01 to 12/12-13/AC/R dated 02.04.2012
2	2	6,38,736/-	3,19,367/-	3,19,369/-	166-167/12-13/AC/R dated 01.05.2012

2.2 The Assistant Commissioner passed the order for re-credit of Rs. 22,67,515/- and Rs. 3,19,369/- on the ground that the applicant was removing the same goods in domestic tariff area for home consumption on payment of duty @ 5.15% adv. i.e. at the effective rate of central excise duty whereas they have paid duty @ 10.30% adv. on the same goods when exported under claim of rebate paid through CENVAT account which is not permissible as per central excise law. It was contended by the applicant that there were two different exemption notifications available; viz. 4/2006-CE dated 01.03.2006 as amended by notification no. 4/2011-CE dated

01.03.2011 specifying effective rate of duty for the goods falling under various chapters and notification no. 2/2008-CE dated 01.03.2008 as amended by notification no. 4/2011-CE dated 01.03.2011 reducing excise duty rates and providing exemption to the goods falling under chapter heading 3004 of the schedule to the Central Excise Tariff Act, 1985. The Assistant Commissioner formed the view that perusal of the two exemption notifications reveals that the claimant has the option to choose benefit of either one of the exemption notifications which is more beneficial to them but cannot avail the benefit of both exemption notifications simultaneously.

2.3 The Assistant Commissioner relied upon the judgments in the cases of Collector of Central Excise, Baroda vs. Indian Petrochemicals[1997(92)ELT 13(SC)], Modi Xerox Ltd. vs. CCE[1997(94)ELT 139(CEGAT)] & Parashuram Cement Ltd. vs. Commissioner of Central Excise, Lucknow[2009(238)ELT 196(Tri-Del)]. He also referred the Ministry of Finance DOF No. 334/1/2008-TRU dated 29.02.2008 wherein it has been stated that since the reduction in the general rate has been carried out by Notification No. 2/2008-CE dated 01.03.2008, the possibility of the same product/item being covered by more than one notification cannot be ruled out and therefore in such a situation the rate beneficial to the assessee would have to be extended if he fulfills the attendant conditions of the exemption.

3.1 Being aggrieved by the Orders-in-Original dated 02.04.2012 & 01.05.2012, the applicant filed two appeals before the Commissioner(Appeals), Central Excise, Indore. The Commissioner(Appeals) found that Rule 18 of the CER, 2002 provides that rebate of duty paid on excisable goods is admissible subject to conditions, limitations and fulfillment of procedure laid down under notification no. 19/2004-CE(NT) dated 06.09.2004 issued under this rule. After referring rule 4 & rule 2(e) of the CER, 2002 and Section 2(e) of the CEA, 1944, he inferred that the rates of duty set forth in the first schedule to the CETA, 1985 is termed as tariff rate of duty and that payment of duty is not effected at the tariff rates but that duty is paid at the effective rates set forth by notifications. He observed that notification no. 2/2008-CE dated 01.03.2008 sets the rate of duty at

14% whereas the notification no. 58/2008-CE dated 07.12.2008 reduces duty to 10% and notification no. 4/2009-CE dated 24.02.2009 sets the duty at 8%. However, in the budget for 2010-11, the rate of duty was enhanced from 8% to 10% by notification no. 6/2010-CE dated 27.02.2010. He inferred that although all these notifications have been issued under the provisions of Section 5A(1) of the CEA, 1944, there is a clear distinction between the notifications issued to set the rate of duty and those issued for prescribing the effective rates of duty on excisable goods.

3.2 With regard to the applicants argument that as per notification no. 2/2008-CE dated 01.03.2008 as amended the rate of duty set forth for their product falling under chapter heading 30.04 of the CETA was 10% adv. and as per notification no. 4/2006-CE dated 01.03.2006 as amended the rate of duty for their product was 4% adv. and they had the option to choose any rate for payment of duty on their products according to their convenience, the Commissioner(Appeals) observed that this aspect of law had been clarified by the CBEC through its Circular No. 222/56/96-CX dated 21.06.96 which had been issued on the basis of the findings of the Hon'ble Supreme Court in their judgments dated 07.05.96 in C.A. No. 8762 of 1992 in the case of CCE & Ors. vs. Bata India and C.A. No. 1121 of 1992 in the case of Modi Rubber Ltd. & Ors. vs. UOI. By these judgments, the Hon'ble Apex Court had clarified the meaning of the term "duty payable" used in Section 4(4)(d)(ii) of the CEA, 1944. These judgments had clarified that "duty payable" was the duty paid after giving full effect to the existing exemption notifications. He therefore inferred that in the present case, duty payable is the duty payable after giving effect to notification no. 4/2006-CE dated 01.03.2006 which was the proper notification prescribing effective rate of duty to the products of the applicant and which the applicant was applying for payment of duty on domestic clearances.

3.3 In the light of these findings, the Commissioner(Appeals) held that for all purposes, whether it is for duty paid for the purpose of rule 18 of the rules or for any other rule, duty means duty payable after giving full effect to the existing exemption notifications and any amount paid in excess of such

duty payable is not duty at all. Such amounts would at best be "deposit" and accordingly no benefit of such excess payment can be given to the applicant in the form of rebate or refund. He held that the applicant did not have the option to pay duty of excise at dual rates under two different notifications and that they must choose the proper notification which governs effective rates for their products and only the duty paid after giving full effect to such exemption notifications in existence will be treated as duty payable. With regard to the case laws cited by the applicant, the Commissioner(Appeals) held that the facts and circumstances of the cases are not relevant to those of the present case and therefore these case laws are not applicable to the instant case. In the light of these findings, the Commissioner(Appeals) concurred with the findings of the adjudicating authority and upheld the orders and rejected both the appeals filed by the applicant vide Order-in-Appeal No. IND/CEX/000/APP/193 & 194/2012 dated 26.07.2012.

4.1 Aggrieved by the order of the Commissioner(Appeals), Indore, the applicant has filed for revision. The applicant submitted that as per the CBEC Circular No. 687/03/2003-CX., dated 03.01.2003 rebate has to always be paid in cash and that is no discretion with the sanctioning authority to grant rebate through CENVAT account. They further submitted that two exemption notifications were available to them; viz. notification no. 4/2006-CE dated 01.03.2006 as amended prescribing effective rate of duty @ 5.15% adv. on the goods falling under chapter heading 30.04 and notification no. 2/2008-CE dated 01.03.2008 as amended providing for exemption to goods across the board(except goods falling under chapter 24 and 27) reducing the rate of duty to 10.30% adv. They stated that they had availed notification no. 4/2006-CE dated 01.03.2006 for their domestic clearances and paid duty @ 5.15% adv. which was beneficial to them in the competitive market and also to satisfy their domestic buyers. However, they had chosen to avail the benefit of exemption notification no. 2/2008-CE dated 01.03.2008 for their export clearances.

4.2 They maintained that the clearances for export sales were carried out on the basis of negotiation with the foreign buyer and has no relation with the quantum of central excise duty paid on it by the applicant. It was submitted that the notification no. 2/2008-CE dated 01.03.2008 was beneficial to them as it enabled them to get refund of the duty paid on export goods through their CENVAT account. They referred various judgments to aver that when two different exemption notifications are available to the assessee, it was the option of the assessee to choose which was more beneficial to them and it was the duty of the assessing authorities to grant the benefits to the assessee who is entitled to such benefit. They placed reliance on the judgments in the case of Modi Xerox Ltd. vs. Collector of Central Excise, Meerut[1997(94)ELT 139(Tri)], Collector of Central Excise, Baroda vs. Indian Petro Chemicals[1997(92)ELT 13(SC)], Share Medical Care vs. UOI[2007(209)ELT 321(SC)], Cipla Ltd. vs. Commissioner of Customs, Chennai[2007(218)ELT 547(Tri-Chennai)] & Mangalam Alloys Ltd. vs. Commissioner of Customs, Ahmedabad[2010(256)ELT 124(Tri-Ahmd)]. The applicant reasoned that it would be apparent from these judgments that when there are two notifications covering the goods in question, it was for the assessee to choose the notification which would be beneficial to them and that there was no restriction when one notification is availed for domestic clearances to prevent them from availing another notification for export goods. The applicant had therefore availed the benefit of notification no. 4/2006-CE for domestic clearances on payment of duty @ 5.15% adv. being beneficial to them and availed notification no. 2/2008-CE for export clearances @ 10.30% adv. as it was beneficial for them to get cash refund under claim of rebate. They again referred the case law of Share Medical Care where it was held that if the assessee is entitled to benefit under two heads, they can claim the benefit under the notification which gives them more benefit.

4.3 The applicant placed reliance on the judgments in the case of CCE & C, Vadodara-II vs. Jayant Oil Mills[2009(235)ELT 223(Guj)], Inspector of Central Excise, Sivakasi & Anr. vs. S. Sornam[1986(24)ELT 279(Mad)], CCE, Hyderabad-I vs. Premier Mushroom Farms[2005(190)ELT 511(Tri-Bang)],

CCE, Guntur vs. Maddala Industries[2006(202)ELT 809(Tri-Bang)], Steel Shape India Ltd. vs. CCE, Ghaziabad[2004(170)ELT 87(Tri-Del)], Jay Dye Chem Industries vs. CCE, Rajkot[1996(87)ELT 290(Trb)], German Remedies Ltd. vs. CCE, Bombay[1987(28)ELT 144(Trb)], Indye Chemicals vs. CCE, Ahmedabad[1986(25)ELT 318(Trb)], Metal Forgings vs. UOI[2002(146)ELT 241(SC)] & Gokak Patel Volkart Ltd. vs. CCE[1987(28)ELT 53(SC)]. The applicant submitted that impugned order was erroneous as it only caused accumulation of credit and was in violation of CBEC Circular No. 687/3/2003-CX dated 03.01.2003. The applicant further submitted that as per notification no. 19/2004-CE(NT) dated 06.09.2004 as amended issued under Rule 18 of the CER, 2002, rebate is to be granted of the whole of the duty paid on all excisable goods falling under the first schedule to the CETA, 1985 exported to any country other than Nepal or Bhutan. They averred that the notification directs that the actual amount of duty paid be returned as rebate and not the amount of duty payable. They placed reliance on the judgments in the case of Bharat Chemicals vs. CCE, Thane[2004(170)ELT 568(Tri-Mum)] to further the argument that duty @ 10.30% paid by the applicant on the export goods had to be rebated in full even if it is at a higher rate and it must be refunded in cash in terms of CBEC Circular No. 687/3/2003-CX dated 03.01.2003 irrespective of whether duty was paid from the PLA or through CENVAT account. On these grounds, the applicant prayed that the rebate of the amount allowed to be credited to their CENVAT account be sanctioned in cash to them.

5. The applicant was granted a personal hearing on 20.08.2019. Shri B. B. Mohite, Advocate appeared on behalf of the applicant. He contended that there is no provision which prevents them from availing the benefit of two notifications where the benefit of two notifications are available to an assessee. He also placed reliance on the circulars and case laws relied upon in the revision application.

6.1 Government has carefully gone through the relevant case records and perused the impugned orders-in-original and orders-in-appeal. The issue involved is that the applicant has availed the benefit of notification no.

4/2006-CE dated 01.03.2006 as amended prescribing effective rate of duty @ 5.15% adv. for domestic clearances of goods falling under chapter heading 30.04 and availed notification no. 2/2008-CE dated 01.03.2008 as amended providing for exemption to goods across the board(except goods falling under chapter 24 and 27) prescribing rate of duty of 10.30% adv. for export goods. The applicant claimed rebate of duty paid at the rate of 10.30% adv. The original authority sanctioned the rebate claims to the extent of duty paid @ 5.15% adv. and allowed the remnant by way of re-credit in their CENVAT account. On appeal by the applicant, the Commissioner(Appeals) upheld the orders-in-original passed by the original authority and rejected the appeals of the applicant. The applicants has now filed revision applications praying for refund of these amounts in cash.

6.2 The defence of the applicants is mainly based on the premise that when the benefit of two exemptions are available, the assessee is entitled to opt for the exemption which is more beneficial to them. The applicant has also relied upon various case laws to fortify this claim. The applicant is within his rights to opt for the benefit of the exemption notification which is more beneficial to them. However, in reality the fact of the present case is that the applicant has opted for two "exemptions" simultaneously for clearances of the same goods. In plain words, the applicant has opted for two different rates of duty for the same product; viz. one rate of duty which they discharge on domestic clearances and another rate of duty for clearances for exports. The case of the Department in a nutshell is that the applicant should discharge duty at any one of the two rates; whichever they consider beneficial.

7.1 Government observes that the Departments stand is in consonance with the ratio of the judgment of the Hon'ble Supreme Court in the case of Share Medical Care. In that case, the assessee had been denied the benefit under a particular category in an exemption notification but had claimed eligibility under another category. The Supreme Court held that if the assessee was found to be ineligible for the benefit under a particular category, it would not prevent them from availing of the benefit of exemption

under another category in the same notification. Per se, the argument about being eligible for the benefit of the exemption which is more beneficial to the assessee is being applied very ingeniously to the facts of the present case. The ratio of these judgments which have been relied upon by the applicant to buttress their case hold that the benefit of exemption = the benefit of reduced rate of duty would be available to them as against a higher rate of duty.

7.2 The word "benefit" mentioned in these judgments is strictly to be interpreted in terms of the exemption granted under the notification which was being denied by the Department. The applicant in the present case, is stretching the amplitude of the word "benefit" in these judgments to include exemption under a notification which actually levies duty at the higher rate(not lesser) but enables the applicant to encash CENVAT credit lying unutilized in their credit account as beneficial by resort to this artifice. The word "benefit" and in turn the word "beneficial" must be construed in terms of the notifications and the relief offered thereunder by the Central Government in the public interest to the applicant and similarly placed assessees from payment of duty at the tariff rate.

7.3 In addition to these facts, Government observes that the rebate sanctioning authority is bound by the instructions contained in para 4.1 of Part-I of Chapter 8 of the CBE & C Excise Manual of Supplementary Instructions.

> *"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 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 the Shipping Bill."*

The instructions very unequivocally direct that the export goods are to be assessed to duty in the same manner as the goods cleared for home consumption. In the light of these instructions, the rebate sanctioning authority has correctly sanctioned the rebate in cash only upto the extent to which the applicant has paid duty on goods cleared for home consumption.

8.1 The other plank on which the applicant has hinged their defence is that the Department is duty bound to refund the full duty paid on export goods in cash. Reliance has been placed on the clarification issued by the Board in Circular No. 687/03/2003-CX dated 3.01.2003. The applicant has also opined that the impugned order is improper as it causes accumulation of credit. These arguments are based on the hollow assertion that the duty payment @ 10.30% adv. by claiming the benefit of notification no. 2/2008-CE is legitimately duty payable on the export goods. However, the facts of the case reveal that the applicant has chosen to avail the benefit of notification no. 4/2006-CE for clearances of goods in the domestic market on payment of duty @ 5.15% adv. In the circumstances notification no. 4/2006-CE being the more beneficial exemption vis-à-vis the tariff rate, it would follow that they were liable to pay duty at the same rate of duty for all goods. Any amount paid in excess of the duty payable at the rate of 5.15% adv. would not attain the character of duty payable. Therefore, the Department has adhered to the prescription under CBEC Circular No. 687/03/2003-CX dated 3.01.2003 by sanctioning rebate of the amount of duty paid @ 5.15% adv. in cash; ignoring the fact that the said duty may have been paid through their CENVAT account. The sanctionable rebate for the export has been disbursed in cash. It is only the amount paid in excess of the duty rate of 5.15% adv. which has correctly been credited into the CENVAT account.

8.2 Government observes that the argument of the applicant that the re-credit of the amount paid in excess of the duty payable @ 5.15% adv. serves no purpose for the applicant and the re-credit has only caused accumulation of credit is facetious. Far from any conviction in their arguments made out by them and the hypothesis that notification no.

2/2008-CE dated 1.03.2008 was more "beneficial" to them vis-à-vis notification no. 4/2006-CE dated 1.03.2006, their actions appear to be driven by the CENVAT accumulation in their account. It is observed from the decision of the Government of India reported at [2014(314)ELT 906(GOI)] that the revision applications filed by the applicant in the present case were also decided thereunder. The then Revisionary Authority has in Para 7 & para 9 recorded an observation that the applicant appeared to have deliberately adopted this modus to encash accumulated CENVAT credit. The relevant text is reproduced below.

> *"7. .....Prior to the Budget, 2010, applicants were also clearing the export goods on payment of duty @ 4% in terms of Notification No. 4/2006-CE, dated 1-3-2006 as amended, but after budget 2010, they started paying duty on export clearances at 10% under Notification No. 2/2008-CE, dated 1-3-2008 as amended and filed rebate claims under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT), dated 6-9-2004....."*
>
> *"9. Government notes that applicants were availing Notification No. 4/2006-CE as amended till Feb. 2010 in respect of all clearances made on both for home consumption as well as for exports by paying duty @ 4% only. All the rebate claims were being sanctioned accordingly. From March/April, 2010 onwards applicants started paying duty @ 10% in terms of Notification No. 2/2008-CE as amended on export goods and claimed rebates of duty paid at higher rate. Applicants apparently opted to pay duty on export clearances at higher rate so as to encash the accumulated Cenvat credit through the said rebate claims."*

9. Government observes that the then Revisionary Authority has delved into the issues raised by the applicant and the case laws relied upon by them in the revision applications decided in the order reported In re : Plethico Pharma Ltd.[2014(314)ELT 906(GOI)]. The ratio of the said decision is applicable to the revision applications in the present case. Government does not find any infirmity in the OIA No. IND/CEX/000/APP/193 & 194/2012 dated 26.07.2012 and upholds the same.

10. Revision applications filed by the applicant are rejected.

11. So ordered.

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

ORDER No. 40-41/2019-CX (WZ) /ASRA/Mumbai DATED 20.9.2019

To,

M/s. Zest Pharma
274A/275A, Sector-F,
Sanwer Road, Indore,
Madhya Pradesh

Copy to:

1. The Commissioner of CGST & CX, Indore Commissionerate.
2. The Commissioner of CGST & CX, (Appeals), Indore.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy