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F.No. 195/1080-1081/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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NEW DELHI-110 066

Date of Issue 28.5.13

ORDER NO. 405 – 406 /13-CX DATED 27-05-2013 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D.P.SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Order in revision application filed, under Section 35 EE of the Central Excise Act, 1944 against the order-in-appeal No.IND/CEX/000/318-319/11 dated 29.07.2011 passed by the Commissioner of Customs & Central Excise (Appeals) Indore.

Applicant : M/s Gangotri Wire Ropes Pvt., Ltd., Indore

Respondent : The Commissioner, Central Excise, Indore.

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ORDER

These revision applications are filed by M/s Gangotri Wire Ropes Pvt., Ltd., Indore against the orders-in-appeal No.IND/CEX/000/318-319/11 dated 29.07.2011 passed by the Commissioner of Customs & Central Excise (Appeals) Indore with respect to order-in-original No. 295 to 303/2010-11/AC/R dated 30.9.10 as passed by the Assistant Commissioner of Customs & Central Excise Division Indore.

2. Brief facts of the cases are that the applicants are engaged in the manufacturing of PE Ropes falling under chapter heading No.39269099 of the Central Excise Tariff. The applicants are also engaged in the export of finished goods directly as well as through merchant exporter claiming the benefit of input stage rebate. They have exported various consignments through merchant exporter and have filed rebate claims in respect of duty paid on goods used in the manufacture of final products PE Ropes exported, under Rule 18 of Central Excise Rules, 2002. In all the ARE-2 forms, applicants have declared that exports are made under duty drawback and claim for duty drawback will be for customs portion only. Accordingly, merchant exporter have claimed drawback in respect of customs portion only and the applicants have filed above rebate claims in respect of excise duty paid on inputs under Notification No.21/2004-CE (NT) dated 6.9.2004. Adjudicating authority initially sanctioned the said four rebate claims as detail below :-

S.No.	Rebate Claim Amount (Rs.)	Sanctioned vide O-I-O No./Date
1.	99614	198/07-08/AC/R dated 27.09.07
2.	103786	280/07-08/AC/R dated 27.09.07
3.	35364	334/07-08/AC/R dated 07.02.08
4.	103646	04/07-08/AC/R dated 04.04.08

2.1 However, Commissioner of Central Excise, Indore reviewed the two order-in-original No. 334/07-08/AC/R dated 07.02.08 04/07-08/AC/R dated 04.04.08. The other two orders were not reviewed. The Commissioner of Central Excise (Appeals) vide order-in-appeal No. IND-I/166 & 167/2008 dated 24.09.08 have allowed the appeals of the department and held the two claims as not admissible. Against the said order-in-appeal dated 24.09.08, applicant filed revision application No. 195/521/08-RA-Cx before JS(RA) who vide GOI Revision Order No.271/11-Cx dated 28.03.11 rejected the said revision application. Applicant filed writ petition No. 4338/11 before Hon'ble High Court of Madhya Pradesh who vide order dated 20.05.11 granted stay against the aforesaid GOI revision order dated 28.03.11.

2.2 Meanwhile the ACCE Indore issued protective demand show cause notices dated 8.9.08 proposing recovery of erroneous refund of Rs.99614, 103786, 35364 and 103646 already sanctioned. However, case was re-adjudicated by ACCE vide order-in-original No. 03/09-10 dated 9.10.09 and demands were confirmed. Applicant filed appeal in second round which was rejected by Commissioner (Appeals) vide impugned order-in-appeal dated 29.07.11.

3. Being aggrieved by the impugned order-in-appeal, the applicant has filed these revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:-

3.1 That department has reviewed only two order in original dated 7.2.08 & 4.2.08 and remaining order in original No.198/07-08/AC/R dated 27.9.07 for Rs.99614/- and 280/07-08/AC/R dt 31.12.07 for Rs.103786/- have not been reviewed. It is also undisputed fact that department has filed appeal only against order in original no. 334/07-08/AC/R dt 07.02.08 & 04/08-09/AC/R dt 04.04.08 and no appeal was filed against remaining order in original no. 198/07-08/AC/R dt

27.09.07 for Rs.99614/- and 280/07-08/AC/R dt 31.12.07 for Rs.103786/-. Applicant therefore submit that once no appeal was filed against first two order in Original, it cannot be held later on vide show cause notice that rebate sanctioned vide said orders are erroneously refund. Hence demand in respect of rebate claim of Rs.99614/- + Rs.103786/- (Total Rs.203400/-) is liable to be dropped on this count alone.

3.2 The show cause notice dt 08.09.08 was first time issued to the applicant in Jan, 2009. Hence the show cause notice for recovery of rebate claim was issued after more than one year from the OIO dt 27.09.2007 and 31.12.2007. Applicant therefore submit that on one side against these two show cause notices no/any appeal was filed by the department and on other side show cause notice for recovery is issued after more than 1 year. Hence demand in respect of first two OIO dated 27.9.2007 and 31.12.2007 is clearly time barred.

3.3 They have exported finished goods through merchant exporter and filed the rebate claim of excise duty paid on inputs used in or in relation to manufacture of export products. That merchant exporter have claim duty draw back only in respect of customs portion.

3.4 That the Notification No.81/06-Cus (NT) dated 13.7.06 the condition No.5 is the relevant condition. The said condition clearly stipulates that the figures appearing under the Column "Drawback when Cenvat facility has been availed" refer to the drawback allowable under the customs component. That reliance is also placed on the circular No.22/2005-Cus, dated May 2, 2005 F.No.609/38/2005-DBK wherein it is clarified in para 6 that in the existing Drawback Schedule the drawback rates have been shown separately for a product, that is to say, a higher amount when CENVAT facility has not been availed (which is inclusive of Customs and Central Excise allocation) and a lower amount when CENVAT facility has been availed, representing the Customs

portion of drawback. As a measure of simplification and to avoid repetition of entries, in the new Schedule the format of the Table has been changed to show the drawback rates separately, i.e. when CENVAT facility has not been availed and when CENVAT facility has been availed. The latter entry denotes the Customs portion of drawback only whereas, the former entry denotes the Central Excise and Customs portion put together. The difference between the two is Central Excise portion of drawback.

3.5 Further the board vide circular No.8/2003-Cus, dated : February 17, 2003 F.No.609/162/2002-DBK clarified that as per the existing instructions, the exporters who avail the Central Excise portion of duty drawback in case the drawback involves both Customs & Central Excise portions, or the full duty drawback when the rate has only Central Excise allocation, have to produce a certification from the jurisdictional Deputy Commissioner/Assistant Commissioner of Central Excise certifying that they have not availed Cenvat facility in respect of the goods exported. The rationale behind this condition is that no double benefits should accrue to the exporters because through the Cenvat facility as well as duty drawback, exporters are rebated the duties of Central Excise suffered on the inputs used in the manufacture of the export products. In view of above it is clear that the drawback claimed by the merchant exporter is only related to customs portion. Because in the ARE-2 and shipping bill it is mentioned that only customs portion of drawback is claimed.

Case laws relied upon by the applicants:

- Meghdoot Piston Pvt. Ltd. Vs CCE, Kanpur 2011 (263) ELT 610 (T)
- In Re-Benny Impex Pvt. Ltd., 2003 (154)ELT 300(GOI)
- Associated Dye-Stuff Industries Vs CCE, Ahmedabad 2000(117) ELT732 (Tribunal)
- In Re-Munot Textiles (207)ELT 298(GOI)

3.6 The earlier notification No.103/2008-Cus (NT) dated 29.08.08 as amended provided that the rates of drawback in the Drawback Schedule would not be applicable to products manufactured or exported by availing the rebate of Central Excise duty paid on material used in the manufacture of export goods in terms of Rule 18 of the Central Excise Rules, 2002, or if such raw materials were procured without payment f Central Excise duty under Rule 19(2) of the Central Excise Rules, 2002. References have been received that exporters are being denied 1% of drawback, which is the customs component of the AIR drawback, on the basis of the above condition although the manufacturers had taken only the rebate of Central Excise duties in respect of their inputs/ procured the inputs without payment of Central Excise duties, and the Customs duties which remained un-rebated should be provided through the AIR drawback route.

The issue has been examined. The present notification No. 84/2010-Cus.(NT) dated 17.09.2010 provides that customs component of AIR drawback shall be available even if the rebate of Central Excise duty paid on raw material used in the manufacture of export goods has been taken in terms of Rule 18 of the Central Excise Rules, 2002, or if such raw materials were procured without payment of Central Excise duty under Rule 19(2) of the Central Excise Rules, 2002.

Though above clarification is in respect of recent notification but since the provisions of customs and excise portion of drawback was also included in earlier notifications and the same are entirely similar with the new notification 84/2010-Cus dated 17.09.10 the aforesaid clarification can also be applied for past cases specially looking to the fact that similar type of clarification was also given earlier vide circular No. 209/43/96-Cx dated 9.5.1996 and other circulars mentioned herein above.

3.7 Applicant further relied upon GOI Revision Order in the case of M/s Aarti Industries Ltd. 2012 (285) ELT 461 (GOI).

4. Personal hearing was scheduled in this case on 21.2.13 and 20.3.13. However, the hearing fixed on 20.3.13 was attended by Shri R.K.Sharma, Sr. Counsel and Shri R.K. Dash Consultant on behalf of the applicant who reiterated the grounds of revision applications.

5. Government has carefully gone through the relevant case records, and perused the impugned orders-in-original and orders-in-appeal.

6. On perusal of records, Government observes that in the earlier round of revisionary proceedings in respect of revision application No. 195/521/08 which was filed against order-in-appeal No. IND-I/166-167/08 dated 16.10.08, the revision application of applicant was rejected holding that rebate of duty paid on input /materials used in the manufacture of exported goods was not admissible when drawback of custom portion was availed on the exported goods. The said GOI Revision order No.271/11-Cx dated 28.03.11 was challenged by applicant before Hon'ble High Court of Madhya Pradesh in W.P. No.4338/11. Hon'ble High Court vide order dated 20.05.11 granted stay against said GOI order dated 28.3.11. Since the said stay order is still in force as no final order is received in this office or produced by applicant, the issue is subjudice and no further decision can be taken in the matter.

7. Applicant has further pleaded that department had reviewed only two orders-in-original dated 7.2.08 and 4.4.08 involving rebate amount of Rs.35364 and Rs.103646 and the other two orders-in-original dated 27.09.07 & 31.12.07 were not reviewed and have attained finality. It is not legally permissible for the department to initiate proceedings under section 11A of Central Excise Act, 1944 without reviewing the Order-in-Original under section 35 E of Central Excise Act, 1944. In this regard it is relevant to rely on the judgment of Hon'ble High Court of Bombay in the case of M/s. Indian Dye Stuff Industries Ltd. Vs. UOI 2003 (161) ELT 12 (Bom.). In the said judgment it is held that section 11A if Central

Excise Act 1944 being an independent substantive provision, the appellate proceedings are not required to be initiated before issuing Show Cause Notice under section 11A if there are grounds existing such as short levy, short recovery or erroneous refund etc. Section 11A is an independent substantive provision and it is a complete code in itself for realisation of excise duty erroneously refunded. There are no pre conditions attached for issuance of notice under section 11A for recovery of amount erroneously refunded. This decision of Bombay High Court has been upheld by Hon'ble Supreme Court reported as 2004 (163) ELT A 56 (SC) where Supreme Court has held that recovery of duty erroneously refunded is valid in law under section 11A of Central Excise Act and there is no need of first filing the appeal against the order by which refund was erroneously sanctioned. Following case law also laid down the same principles.

7.1 In the case of Union of India Vs. Jain Shudh Vanaspati Ltd. [1996 (86) ELT 460 (SC), the apex court has held in paras 5,6 & 7 as under:

" 5. *It is patent that a Show Cause Notice under the provisions of section 28 for payment of Customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance under section 47 of the concerned goods. Further, section 28 provides time limits for the issuance of the Show Cause Notice there under commencing from the "relevant date"; "relevant date" is defined by sub-section (3) of section 28 for the purpose of section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; which is to say that the date upon which the permissible period begins to run is the date of the order under section 47. The High Court was, therefore, in error in coming to the conclusion that no Show Cause Notice under section 28 could have been issued until and unless the order under section 47 had been first revised under section 130.* "

7.2 While referring to the above mentioned case law in the case of Collector of Central Excise, Bhubaneshwar vs. Re-Rolling Mills [1997 (94) ELT 8 (SC)], the Hon'ble Supreme Court has held as under:

" *The learned counsel for the parties do not dispute that this appeal is covered by the decision of this court in Union of India & Ors. V. Jain Shudh Vanaspati Ltd. & Anr.- 1996 (86) ELT 460 (SC)= (1996) 10 SCC 520. In that case the court was dealing with section 28 of the Customs Act which is in pari materia with section 11A of the Central Excise Act. The said decision is thus applicable to the present case also. For the reasons given in the said judgment, the appeal is dismissed with no order as to coasts.* "

7.3 In I T I Ltd. Vs. Commissioner of Customs, ACC, Mumbai [2008 (228) ELT. 78 (Tri. Mumbai)] it has been held:

" *11. We hold that the issue of Show Cause Notice under section 28 of the Customs Act, 1962 for recovery of the erroneously granted refund is sufficient to meet the requirement of law. Following the ratio of the Hon'ble Supreme Court judgments in the case of Re-Rolling Mills and Jain Shudh Vanaspati cited supra and the Tribunal's order in the case of Roofit Industries Ltd., we hold that the proceedings initiated under section 28 of the Customs Act, 1962, are not vitiated on the ground of non-filing of appeals by the Revenue against the orders No. 72 dated 01-03-1994 and 99 dated 11-03-1994 passed by the Assistant Commissioner. Therefore, the demand of erroneous refunds under section 28 of the Customs Act, 1962 is sustainable.* "

7.4 In Roofit Industries Ltd. Vs. Commissioner of Central Excise, Chennai-2005 (191) ELT. 635 (tri. Chennai) it has been held as follows:

" *4..... We follow this precedent and apply the ratio of the Supreme Court's decision in Jain Shudh Vanaspati (Supra) to the facts of the instant case and, accordingly, reject the appellants' contention that a Show Cause Notice demanding*

erroneously refunded duty could not be issued under section 11A without revision/review of the refund order. No other issue has arisen from the submissions made in this case. "

7.5 In Ogilvy & Mather Pvt. Ltd., Vs. Commissioner of Service Tax, Bangalore [2010 (18) S.T.R. 502 (Tri. Bang.), the Hon'ble CESTAT has interalia held in para 9.2 as under:

" *From the above judicial authorities, it is amply clear that the erroneous refund sanctioned under an order can be recovered by invoking provision of section 11A of the Central Excise Act without taking recourse to provision of section 35 E of the Act and filing appeal against the order pursuant to which the refund was initially sanctioned.* "

7.6 In view of the principles laid down in above said judgments, Government holds that the erroneous refund/ rebate sanctioned under an order can be recovered by invoking provisions of section 11A of Central Excise Act 1944, without taking recourse to provisions of section 35 E ibid and fling appeal against the order under which refund was initially sanctioned.

8 Applicant has also contended that the show cause notice dated 8.9.08 is issued in January 2009 and hence it is time barred. In this regard, Government notes that applicant had filed reply to said show cause notice vide letter dated 9.3.08 and no such plea of show cause notice being time barred was taken. The show cause notice issued on 8.9.08 was well within one year of the date of issuance of order-in-original and therefore it cannot be called time barred.

9. Government observes that the CBEC circular 35/10-Cus dated 17.09.10 and Not. No. 84/10-Cus (NT) both dated 17.09.10 are effective from date of issue and their provisions cannot be made applicable to cases of period prior to 17.9.10. However, the issue cannot be decided on merit since W.P. No. 4338/11

filed against earlier GOI revision order No. 271/11-Cx dated 28.3.11 is pending final decision. Hon'ble High Court's stay order dated 20.5.11 is also still in force. Therefore, case can be finally decided only after the final decision of Hon'ble High Court of Madhya Pradesh in the said writ petition. Therefore, case is required to be remitted back to denovo consideration.

10 In view of above position, Government sets aside the impugned order-in-appeal and remands the matter back to the original authority for deciding the case afresh in the light of final decision of Hon'ble High Court in the pending W.P. No.4338/11. A reasonable opportunity of hearing will be afforded to be parties.

11. The revision applications are disposed off in terms of above.

12. So, ordered.

(D.P.Singh)
Joint Secretary (Revision Application)

M/s Gangotri Wire Ropes Pvt. Ltd.,
32/33, Industrial Area
Pithampur Rau Bypass,
Indore

Attested
27/12

(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
CBEC-OSD (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

GOI Order No. 405-406 /13-Cx dated 27.05.2013

Copy to:-

1. The Commissioner of Central Excise & Customs, Keshar Bagh Road, Indore (MP)

2. The Commissioner (Appeals) Customs & Central Excise, 4, Indralok Colony, Keshar Bag Road, Indore, (MP).

3. The Assistant Commissioner of Central Excise & Customs Division - Indore (MP)

4. Shri R.K.Sharma, Sr. Counsel, 157, 1st Floor, DDA Office Complex, C.M., Jhandewalan Extn., New Delhi-55

5. PS to JS (Revision Application)

6. Guard File

7. Spare Copy.

ATTESTED

27/5

(Bhagwat P. Sharma)
OSD (Revision Application)