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F.No. 198/364-375/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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NEW DELHI-110 066

Date of Issue... 31/5/13

Order No. 433-444/13-cx dated 30-5-2013 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	:	Revision Application filed, under section 35 EE of the Central Excise, 1944 against the Order-in-Appeal No. YDB/209-220/RGD/2010 dated 31-08-2010 passed by Commissioner of Central Excise, (Appeals), Raigad.
Applicant	:	Commissioner of Central Excise, Raigad.
Respondent	:	M/s. Vinati Organics Ltd., Raigad.

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ORDER

These revision applications are filed by Commissioner of Central Excise, Raigad against the Orders-in-Appeal No. YDB/209-220/RGD/2010 dated 31-08-2010 passed by the Commissioner of Customs (Appeals), Raigad with respect to Orders-in Original passed by the Assistant Commissioner of Central Excise, Raigad. M/s. Vinati Organics Ltd., Raigad is the respondent in this case.

2. Brief facts of the case are that Assistant Commissioner, Central Excise, Mahad Raigad vide impugned Orders-in-Original had sanctioned rebate of duty paid on inputs used in the manufacture of Isobutyl Benzene, which was exported under bond under Notification No. 21/2004-CE (NT) dt. 06-09-2004. Department filed appeals before Commissioner (Appeals) against the said Orders-in-Original on the grounds that the inputs used were imported and were procured under various bills of entries, such bills of entry are not covered under condition No. 3 of the Notification No. 21/2004-CE (NT) dt. 06-09-2004and therefore, the said condition was not fulfilled; that the duty was not paid at the time of import in cash and the same was debited in DEPB scrip; that the rebate has been allowed in respect of additional duty leviable under sub-section (5) of section 3 of Customs Tariff Act, which is not specified in the above notification for the purpose of rebate and therefore, the sanction of rebate claims was not legal and proper. Commissioner (Appeals) rejected the appeals filed by the applicant department.

3. Being aggrieved by the impugned Orders-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 It is seen that the input materials on which rebate has been sanctioned is obtained by M/s Vinati Organics Ltd. by way of import. Further, it is also seen that at the time of import, duty has not been paid in cash but the same was debited in DEPB scrip. The rebate has been allowed in respect of Additional duty leviable under sub-section (5) of Section 3 of Customs Tariff Act. As per

Notification no. 21/2004-CE(NT) dated 06.09.2004 the 'duty' specified for sanction of rebate does not cover those cases if the same is debited in DEPB scrip. Reliance placed by Commissioner (Appeals) in respect the case laws is misplaced as these decisions are not applicable to this case. DEPB scrip towards discharged of duty at the time of import cannot be equated with payment of duty in cash.

3.2. Hon'ble Supreme Court in ITC Ltd. Vs CCE has held that if two constructions are possible and a strict compliance would lead to an absurd result then the construction which is in keeping with the object of statutory provisions should be accepted. However, in the instant case no two constructions are applicable and therefore the rebate notification has to be construed accordingly.

3.3 Hon'ble Supreme Court in HMM Ltd. Vs CCE (supra) has held that the exemption notification has to be constructed reasonably having due regard to the language employed. However, in the instant case, nowhere the condition of the Rebate Notification 19/2004-CE(NT), implicitly or explicitly indicate that duty debited through DEPP scrip can be rebated. The Supreme Court in case of Eagle flask Vs CCE 2004(171)ELT 296(SC) has held that for exemption notification conditions thereto are to be strictly applied with for availing its benefit.

3.4 Commissioner (A) relied on CCP Vs Malwa Industries Ltd. -2009 (235)ELT 214 (SC) which held that the exemption notification should be construed literally, supports the departmental stand.

3.5 Commissioner (A) reliance on CCE Vs Simplex Pharma Pvt. Ltd-2008 (229) ELT 504 (P&H) is also not applicable in as much as Hon'ble High Court had decided the applicability of refund when the duty is paid through Cenvat credit. However, it does not deal with the present situation as to whether the rebate of duty discharged through DEPB scrip is admissible or not.

4. Show Cause Notices were issued to the respondent under section 35EE of Central Excise Act, 1944 to file their counter reply. The respondent vide their written submission dt. 26-08-2011 mainly stated as follows:

4.1 Plain reading of Rule 18 would show that it seeks to neutralize the tax effect by granting rebate/refund of (i) duty paid on export goods or (ii) duty paid on inputs used in the manufacture or processing of export goods. Respondents have met with these essential conditions of Rule 18 above.

4.2 Basic condition of Notification No. 21/2004 CE (NT) is that the inputs should have been used in the manufacture or process or exported goods to be eligible for claiming rebate/refund. The fact that the inputs for which rebate is claimed have been used in the manufacture/process of exported goods is not in dispute. There is no dispute regarding quantification of the amount of rebate/refund claimed. Under these circumstances, when goods exported is not in dispute, use of inputs is not in dispute and amount of claim is not in dispute, there is no case for filing review petition and the same needs to be set aside.

4.3 When fact of export is not disputed, the valuable right to claim rebate cannot be destroyed or denied due to technical or procedural breach if any. The applicant has cited some case laws in favour of their contention.

4.4 only point taken up in the revision application is that the rebate of amount of cenvat credit paid through DEPB is not allowable as the same is not specified in the referred notification for the purpose of rebate; hence the rebate passed is not legal and proper. There is no restriction for availment of cenvat credit when the amounts have been paid by debit in DEPB issued under Foreign Trade Policy (F.T.P.) 2004-2009. Para 4.3.5 of Foreign Trade Policy 2004- 2009 is reproduced below:

"4.3.5 Applicability of Drawback Additional customs duty/ Excise duty and Special Additional duty paid in cash or through debit under DEPB may also be adjusted as CENVAT Credit or Duly Drawback as per DOR rules."

4.5 Even Notification No. 89/2005-Cus. dated 04.10.2005 exempting imports made under DEPB scheme clearly echoes what is stated in para 4.3.5 of F.T.P. is reproduced herein below:

"(vi) that the importer shall be entitled to avail the drawback or CENVAT credit of additional duty leviable under Section 3 of the said Customs Tariff Act against the amount debited in the said Duty Entitlement Pass Book; "

Central Board of Customs & Excise (CBEC) has also issued Circular dated 21.10.2004 which states that CVD paid though debit under DEPB is allowed as credit

4.6 Respondents also relied on the following case laws in support of their claim that rebate is allowed once the credit has been allowed on duty paid through DEPB pass book.

a) Sesasayee Paper & Boards Ltd., 2007 (217) ELT 562 (T).

b) Sesasayee Paper & Boards Ltd., 2008 (223) ELT 616 (T).

c) Tecumseh Products India Pvt. Ltd., 2010 (256) ELT 276 (T).

d) Tanfac Industries Ltd., 2009 (236) ELT 109 (T) affirmed by Hon'ble Madras High Court, 2009 (240) ELT 241 (Mad. HC) and Hon'ble Supreme Apex court vide 2009 (244) ELT A121 (SC).

5. Personal hearing scheduled in this case on 05-03-2013 was attended by Shri T.R.Rustagi, advocate and Shri N.K. Goyal, C.F.O on behalf of the respondent who reiterated submission made in their written reply dt. 26-08-2011. Nobody appeared for hearing on behalf of applicant department.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

7. Government observes that the applicant exported the goods and filed input rebate claims of duty paid on inputs used in manufacture of exported goods, under Notification No. 21/2004-C.E. (N.T.) dt. 06-09-2004. The rebate claims were initially

sanctioned by the original authority. Department filed appeals before Commissioner (Appeals) against the impugned Orders-in-Original on the grounds that the inputs used were imported and procured under various bills of entries. Such bills of entry are not covered under condition No. 3 of the Notification No. 21/2004-CE (NT) dt. 06-09-2004and therefore, the said condition was not fulfilled; that the duty was not paid at the time of import in cash and the same was debited in DEPB scrip; that the rebate has been allowed in respect of additional duty leviable under sub-section (5) of section 3 of Customs Tariff Act, which is not specified in the above notification for the purpose of rebate and therefore, the sanction of rebate claims was not legal and proper. Commissioner (Appeals) rejected the appeals filed by the applicant department.

8. Government observes that the department is mainly contesting that payment of duty by way of debit in DEPB Script will not be treated as payment of duty and hence, such payment are not eligible for rebate benefit. The respondent have cited various statutory provisions viz. para 4.3.5. of F.T.P, Circular No. 57/04-Cus. Dt. 21-10-2004, Circular No. 41/2005-Cus dt. 28-10-2005 and various case laws.

8.1 Now, Government finds it proper to examine different statutory provisions in this regard.

Para 3,4,5 of the circular No. 57/04-Cus dt. 21-10-2004 reads as under:

" 3. The matter has been examined by the Ministry. It is noted that the DEPB Scheme is a post export duty remission scheme, which allows neutralization of deemed import duty charges on inputs used in the export product. Under the Scheme, the exporter first uses duty paid inputs in the manufacture of the export product and after exports he gets the duty credit at the notified rates. Thus, instead of refund of duty in cash after exports, a scrip in the form of DEPB is issued against the export product as duty remission. The exporter is at liberty to utilize the scrip for import of raw materials, components etc. within the credit allowed in the DEPB or he may sell it to any other exporter.

4. In a case where the exporter sells the DEPB to another exporter, he gets cash of equivalent amount to pay customs duty on the import of raw materials and components. In this situation, he would be entitled to DEPB on his subsequent exports. Further, the exporter can sell the inputs imported against DEPB to another exporter for being used in export production. In this situation also, the latter exporter will be entitled to DEPB on his exports. Therefore, to deny the DEPB benefit to an exporter who has utilised the DEPB scrip for sourcing his own inputs is not appropriate. As such, the point raised that the benefit of

DEPB should not be allowed in a situation where the customs duty has been paid on the inputs by way of debit in DEPB is devoid of merits.

5. It is, therefore, clarified that the benefit of DEPB Scheme should be allowed on exports even though the inputs used in the manufacture of the export product were cleared through DEPB route. The letter F.No.605/11/2004-DBK dated 12.4.2004 of OSD (Drawback) addressed to CC&CE, Indore stands withdrawn. "

From above circular it is made ample clear that benefit of DEPB is available in those exports also when the exported goods were manufacture from the inputs which were imported under debit of DEPB script.

8.2 Further para (2) of the Board's circular No. 41/2005-Cus 28-10-2005 reads as under:

" 2. The matter has been examined by the Board. Hitherto, the additional customs duty paid in cash only was adjusted as CENVAT credit or duty drawback while the same paid through debit under DEPB was not allowed as duty drawback. In the Foreign Trade Policy 2004-2009, which came into force w.e.f. 1.9.2004, it has been provided under paragraph 4.3.5 that the additional customs duty/excise duty paid in cash or through debit under DEPB shall be adjusted as CENVAT credit or Duty Drawback as per the rules framed by the Department of Revenue. Taking note of this change, it has been decided that the additional customs duty paid through debit under DEPB shall also be allowed as brand rate of duty drawback. "

The above said provision provides that additioned customs duty paid through debit under DEPB script shall be allowed as brand rate of duty drawback.

8.3 Para 4.3.5 of the Foreign Trade Policy 2004-09 reads as under:-

" Additional customs duty/excise duty and special additional duty paid in cash or through debit under DEPB may also be adjusted as Cenvat Credit or duty Drawback as per DOR Rules.

The para 4.3.5 of F.T.P. 2004-09 also provides for adjustment of Additional Customs duty debited under DEPB Scheme as Cenvat Credit or duty drawback.

9. Government observes that this authority vide GOI Revision order No. 01-05/11-CE dtd. 17-01-2011 in the case of Om Sons Cookware Pvt. Ld. has held that rebate of CVD paid on imported raw materials which are used in manufacture of final

export product is admissible under Notification No. 21/04-CE (NT) r/w Rule 18 of Central Excise Rules, 2002. This order of GOI was upheld by the Hon'ble Delhi High Court vide its order dtd. 02-05-2012 in the case of CCE Delhi-I Vs. JS (RA) reported as 2013 (287) ELT 117 (Del.). As such, the payment of CVD at the time of import of goods is eligible of rebate benefit. Vide Notification No. 12/07-CE (NT) dt. 01-03-2007 additional duty (CVD) levied under section 3 of Customs Tariff Act, 1975 was added in the Notification No. 19/04-CE (NT) as well as Notification No. 21/04-CE (NT) dt. 06-09-2004. As such, by virtue of said amendment, the rebate of CVD paid on imported materials has been allowed as per the statute. Now, once the issue is settled that CVD is eligible for rebate benefit, the next issue to be decided is whether payment of CVD through DEPB script can be treated as payment of duty. From harmonious perusal of statutory provisions as discussion in para 8.1 , 8.2 and 8.3 above, the additional customs duty paid through debit in DEPB script is eligible for brand rate of drawback as well as cenvat credit. So, there is no reason for not treating the payment of CVD through DEPB Scrip as payment of duty since it has been treated as payment of duty for Brand rate drawback as well as for cenvat credit. Government further notes that there are no similar provision available for payment of education cess through DEPB scrip, so the said payment cannot be treated as payment of duty and hence rebate of education paid through DEPB scrip is not admissible.

9.1 It is further contended by department that bill of entry is not a specified duty paying document is condition No. 3 of Notification No. 21/04-CE (NT). In this regard Commissioner (Appeals) his findings in the impugned Order-in-Appeal has observed as under:-

" It is contended by the revenue that condition No. 3 of the notification required the materials to be brought under an invoice issued under Rule 11 of the Central Excise Rules, 2002 and the said condition has not been fulfilled as the imported material had been brought under Bills of Entry. The notification grants the rebate " subject to the condition and the procedure specified hereinafter". What is specified thereafter at Sr. No. 3 only lays down the procedure for procurement of material from registered factories. This cannot be applicable to material procured from other sources. The manufactures wanting to use

imported material cannot possibly procure such material from registered factories. The law does not require anybody to do the impossible. Since the use of imported materials used for the manufacture or processing of export goods is permitted and the rebate of the additional duty leviable under section 3 of the Customs Tariff Act, 1975 is also allowed, the only possible conclusion is that the notification does not prescribe any particular procedure or condition for procurement of imported material. Accordingly, the contention of the revenue has to be rejected. "

Commissioner (Appeals) has given a logical reasoning, Government notes that vide Notification No. 12/07-CE (NT) dt. 01-03-2007, additional duty (CVD) was added on duties to be rebated under Notification No. 21/04-CE (NT) dt. 06-09-2004. So the position has undergone charge w.e.f. 01-03-2007 and once CVD is allowed to be rebated, the bill of entry being the duty paying document has to be automatically accepted. So, Government agrees with findings of Commissioner (Appeals) as there is no merit in this plea of applicant department.

10. Government also notes that the applicant is claiming rebate of SAD levied under section 3 (5) of the Customs Teriff Act, 1975. The said provision of section 3 (5) reads as under:

" (5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under subsection (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent. of the value of the imported article as specified in that notification. "

From perusal of above position, it is clear that SAD is levied on imported goods to counter balance the sales tax, value added tax, local tax etc, which cannot be considered as duties of excise for being eligible for rebate benefit. Further, SAD collected under such 3 (5) is also not classified as a duty in list of duties provided in explantation-1 of the Notification No. 21/2004-CE (NT) dtd. 06-09-2004. Hence, such payment of SAD is not eligible for rebate claim.

11. In view of above discussion, Government holds that input rebate of Additional Customs Duty (CVD) paid through DEPB scrip is admissible under rule 18 of Central Excise Rules,, 2002 r/w Notification No. 21/04-CE (NT) dt. 06-09-2004. The impugned Order-in-Appeal is partially upheld and modified to above extent.

12. Revision Applications are disposed off in above terms.

13. So, Ordered.

(D.P. Singh)
Joint Secretary to the Govt. of India

The Commissioner (Appeals), Central Excise,
Raigad, Ground Floor,
Kendriya Utpad Shulk Bhawan,
Sector-17, Plot NO. 1, Khandeshwar,
Navi Mumbai-410 206.

ATTESTED

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

Order No.433-444/13-Cx dated 30-5-2013

Copy to:

1. The Commissioner (Appeals), Central Excise, Raigad, Ground Floor, Kendriya Utpad Shulk Bhawan, Sector-17, Plot NO. 1, Khandeshwar, Navi Mumbai-410 206.

2. The Assistant Commissioner, Central Excise, Raigad, Mahad Div., Commissionerate, 1st Floor, CGO Complex, CBD Belapur, Navi Mumbai-400614.

3. M/s. Vinati Organics Ltd., B-12/13, MIDC, Mahad, Distt-Raigad-402301, State-Maharashtra.

4. Shri T.R.Rustagi, advocate, SD-84, Tower Apartments, Pitampura, Delhi-110034.

5. Guard File.

6. PS to JS (RA)

7. Spare Copy

ATTESTED

(BHAGWAT P. SHARMA)
OSD (REVISION APPLICATION)