REGISTERED SPEED POST AD

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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. 195/1639/12-RA /5043 Date of Issue: 01.09.2020

ORDER NO. 451/2020-CX (WZ) /ASRA/MUMBAI DATED 19.08.2020 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. ICI Ltd.
(Presently known as M/s Akzo Nobel India Ltd.)
Plot No. 1/1,
TTC Industrial Area,
Thane-Belapur Road,
Koparkhairane,
Navi Mumbai 400 709

Respondent : Commissioner, Central Excise, Thane-I

Subject : Revision Applications filed under section 35EE of the Central Excise Act, 1944 against the OIA No. BR/78/Th-I/2012 dated 17.07.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-I.

Pr. Commr. (RA) & ex-Officio Additional Secretary to the Govt of India * Mumbai * मुंबई

ORDER

The revision application has been filed by M/s. ICI Ltd.(Presently known as M/s Akzo Nobel India Ltd.), Plot No. 1/1, TTC Industrial Area, Thane-Belapur Road, Koparkhairane, Navi Mumbai 400 709 (hereinafter referred to as "the applicant") against OIA No. BR/78/Th-I/2012 dated 17.07.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-I.

2.1 The applicant is engaged in the activity of repacking/re-labeling of excisable goods falling under Chapter 28, 29 and 35 of the CETA, 1985. The applicants specialize in products such as adhesives, specialized starches and specialized polymer. The activity of re-labeling is deemed manufacture in terms of Section 2(f)(ii) of the CEA, 1944 read with the relevant chapter notes of chapter 28, 29 & 35 of the CETA, 1985. These products are imported by the applicants duly packed in consumer packages. The applicants merely affix the label on the packages. The labels affixed bear the MRP, product name & brand name of the applicants. Prior to the activity of affixing the labels, the imported goods are treated as raw materials. After the packages of the said goods are affixed with labels mentioning the details of the product, they are treated as finished goods. Amongst other places, the applicant had been carrying out such activities at their premises in B/4, Shed No. 188, Chamunda Complex, Kasheli Village, Thane Bhiwandi Road – 421302 & Gala No. 6 & 7, Building No. 14, Arihant Compound, Purna, Bhiwandi.

2.2 During the course of audit in June 2009, it was noticed that the applicant had received an amount of Rs. 28,69,186/- from an insurance company towards insurance in respect of certain goods which were destroyed in the flood caused by the unprecedented rains which occurred during July 2005. The Department construed the goods destroyed in the flood to be finished goods. On enquiry with the applicant after audit objection was raised, the applicant informed the Range Superintendent vide his letter dated 30.06.2006 that they had filed claim with an insurance company for an amount of Rs. 35,89,148/07 but had received only Rs. 28,69,186/- from the insurance company. It was observed from the Insurance Company's Surveyors Report dated 21.11.2005 that there was mention of an amount of Rs. 61,85,274/- being the value of stock held at Arihant Corporations Warehousing Complex, Gala No. 6 and 7, Building No. 14, Village Kopar, Bhiwandi and Rs. 1,63,03,334/- being the value of stock held at Chamunda Godown Complex, 188, Chamunda Complex, 188, Kasheli, Bhiwandi. The

total value of goods destroyed in floods thus comes to Rs. 2,24,88,607/42 and the amount of central excise duty @ 16% adv. amounts to Rs. 35,98,177/- and education cess @ 2% of central excise duty amounts to Rs. 71,964/- totally amounting to Rs. 36,70,141/- which appeared to be recoverable from the applicant under the proviso to Section 11A(1) of the CEA, 1944.

2.3 The applicant was alleged to not have assessed and determined central excise duty on the manufactured goods destroyed in the floods resulting in contravention of Rule 6 of the CER, 2002 and had not paid the central excise duty in the manner prescribed under Rule 8 of the CER, 2002 thereby contravening the provisions of Section 3 of the CEA, 1944 read with Rule 4 of the CER, 2002 without applying for remission of such duties in contravention of Rule 21 of the CER, 2002. On the basis of these charges, the applicant was issued SCN dated 05.07.2010 calling upon them to show cause why central excise duty amounting to Rs. 36,70,141/- on the goods manufactured and stored in the store/finishing room which had apparently been destroyed should not be demanded and recovered from them under the proviso to Section 11A(1) of the CEA, 1944, interest at the appropriate rate should not be demanded and recovered from them under Section 11AB of the CEA, 1944 and penalty should not be imposed upon them under Rule 25 of the CER, 2002 read with Section 11AC of the CEA, 1944.

3. In adjudication, the Additional Commissioner, Central Excise, Thane-I vide his OIO No. 37/PP-10/TH-I/2011 dated 30.11.2011 confirmed the demand for central excise duty totally amounting to Rs. 36,70,141/-, ordered recovery of interest under Section 11AB of the CEA, 1944 and imposed equal penalty of Rs. 36,70,141/- under Rule 25 of the CER, 2002 read with Section 11AC of the CEA, 1944. Being aggrieved, the applicant filed appeal before the Commissioner(Appeals). On taking up the appeal, the Commissioner(Appeals) did not find any infirmity in the OIO and therefore upheld the same vide his OIA No. BR/78/Th-I/2012 dated 17.07.2012.

4. The applicant has now filed revision application against the OIA No. BR/78/Th-I/2012 dated 17.07.2012 on the following grounds :

(a) The impugned OIA has been passed without application of mind as it proceeds on the basis of incorrect facts and assumptions and presumptions; principally that the goods destroyed by the floods are finished goods and not raw materials.

(b) The applicant contended that the burden of proof to prove that the goods destroyed in the floods were finished goods was on the Department. This burden of proof had not been discharged by the Department. The OIO as well as the OIA proceed on the assumption that the goods destroyed in the floods are finished goods.

(c) The goods destroyed in the floods were imported raw materials, that credit had not been availed on such raw materials destroyed in the floods, that the Departments contention that the applicant had taken CENVAT credit as soon as the raw materials were received and not at the time of clearance of finished goods was incorrect.

(d) The applicant averred that the insurance claim was for duty on raw materials imported. Since the goods destroyed were imported raw materials on which they had not availed CENVAT credit, the objection of the applicants that they should have filed for remission of duty on finished goods under Rule 21 of the CER, 2002 was not sustainable.

(e) The applicant submitted that the entire demand was barred by limitation as there was no suppression of facts. The applicant stated that after the flood took place on 26.07.2005, they had informed the Department vide letter dated 18.08.2005 regarding loss of goods on account of the flood in both the godowns. However, the SCN has been issued only on 15.07.2010, much after the normal period of limitation of one year.

(f) The applicant contended that no penalty was imposable and that penalty cannot be imposed under Section 11AC of the CEA, 1944 as well as Rule 25 of the CER, 2002. The applicant also submitted that no interest was recoverable.

5. The applicant was granted opportunity for personal hearing on 12.12.2017, 08.02.2018, 12.12.2018, 13.12.2018 and 21.11.2019. However, none appeared on their behalf. The Department also did not avail of the opportunity to be heard.

6. Government has carefully gone through the impugned order-in-appeal, the order-in-original, the show cause cum demand notice, the case records and the submissions made by the applicant. Government observes that the case ensues out of the loss of goods due to the floods on 26.07.2005. While the applicant has contended that the goods lost in the floods were imported raw materials, the Department alleged that the goods lost in the floods were finished goods. After it was noticed during the audit on the

records of the applicant that they had filed insurance claim for the goods destroyed in the floods, the Department issued the applicant an SCN on the ground that since they had not claimed remission of duty on the finished goods destroyed by the floods, the applicant would be liable to pay central excise duty on the finished goods. The demand issued has been confirmed and upheld by the lower authority with penalty and interest. The applicant has now applied for revision on various grounds.

7. The devastation caused by the massive floods on 26.07.2005 and its aftermath are common knowledge. Like many others, the floods had caused loss of goods to the applicant. The applicant has been consistently claiming that they have lost only imported raw materials whereas the Department insists that the finished goods manufactured by the applicant have been destroyed in the floods. It is observed from the revision application filed by the applicant that they have enclosed copies of their RG1 – Daily Stock Account for the month of July 2005. As per this Account, the closing balance of every single product manufactured by them is zero/nil. However, the Department has adopted the stock of goods and their value as shown in the Insurance Company's Surveyor's Report dated 21.11.2005 in the two premises of the applicant as the stock of finished goods lost in the flood on 26.07.2005. The Department has relied upon these figures to issue the demand for central excise duty.

8. In this regard, the Government observes that the contentions of the Department about the stock of goods stored in the godowns/premises being finished goods is not based on any independent assessment. The record does not reveal any attempt having been made to analyse the surveyors report and examine its contents. The observations of the Audit have been accepted as it is and the contention that the applicant would be liable to pay duty on the finished goods since they have not claimed remission has been persisted with. In this regard, Government observes that the provisions of Rule 21 of the CER, 2002 provide that where the assessee is able to show to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer to be unfit for consumption or for marketing at any time before their removal, the Commissioner may remit the duty payable on such goods. Unlike the provisions of Rule 4, Rule 6, Rule 7 etc. of the CER, 2002 where the rule casts an obligation upon the assessee/manufacturer, Rule 21 does not make it mandatory for every manufacturer who has incurred loss due to natural causes to seek remission. It would be apparent from the text of the rule that the assessee

is at liberty to choose if he wants to apply for remission. Where the legislature intended to cast a responsibility upon the assessee as in Rule 4, Rule 6, Rule 7 etc., the language used is directory and the rule itself instructs the assessee/manufacturer to act in a particular manner. If the assessee does make the choice of applying for remission, only then can the Commissioner remit the duty on the goods which have been lost or destroyed. The practice followed in the field also goes along these lines. The assessee/manufacturer comes forward and files remission application whereupon the competent authority decides whether remission application is to be allowed. Therefore, an assessee cannot be compelled to seek remission.

9. The argument of remission being forced upon the assessee who has lost manufactured goods must also be seen through the prism of Rule 4 of the CER, 2002. As per Rule 4 of the CER, 2002, the duty on excisable goods is payable at the time when the goods are removed from the place where they are produced or manufactured or from a warehouse. According to the language used in the SCN, the demand for recovery of central excise duty is for the goods *"manufactured and stored in store/finishing room, now apparently destroyed."* It is clear from the language used in this portion of the SCN that there is no charge that the goods have been removed from the store/finishing room to any place outside the factory. Therefore, as per the provisions of Rule 4 of the CER, 2002 duty was not payable on the goods at that point in time. It is also not the case of the Department that the applicant had applied for remission on finished goods and such application had been rejected resulting in the duty on the goods becoming payable. The demand for central excise duty is therefore premature on the count that the goods have not been cleared and therefore cannot be sustained.

10. Notwithstanding the observations recorded hereinbefore, the basis for the demand of duty on finished goods itself is suspect. The confirmation of the demand and the impugned order are both based on surmises and not based on any evidence adduced by the Department. Government observes that the Department has gone by the records related to the insurance claim to assert assiduously that the claim is in respect of finished goods. The quantification of demand is based upon the data provided by the applicant to their insurer. The total quantity of goods lost and the duty payable thereon has then been accepted by the surveyors of their insurer. Thereafter, the claim has been curtailed as per the norms of the insurance company and settled accordingly. It is observed that these annexures detail the quantity as on 26.07.2005, rates of the goods,

their value, duty involved. The duty involved per kg. on the goods has been calculated basis the duty suffered on the import of the goods under the respective bills of entry which has been apportioned to the quantity of the inputs which was in stock as on 26.07.2005. The inference that can be drawn from this fact is that the duty claimed by the applicant from their insurer was the duty suffered at the time of import of goods. By implication, if the applicants intention was to claim insurance on their finished goods; viz. the goods which had been relabeled, the value of the goods and the duty component would have been based on the sale price(MRP) of the goods. In the absence of any evidence to the contrary, since the calculation of the duty component was based upon the import(input) cost of the goods, the veracity of the applicants submissions that the loss suffered by them in the floods was entirely of the stock of imported raw materials cannot be doubted.

11. In view of the foregoing observations, Government concludes that the proceedings initiated against the applicant demanding recovery of central excise duty were misdirected. By extrapolating from the fact of the applicant having claimed insurance of the component of duty suffered on the inputs, it becomes apparent that the CENVAT credit availed of duty paid on the stock of these inputs or any part thereof would not be available to the applicant as these goods cannot be used for manufacture of duty paid final products. The issue of the SCN demanding recovery of central excise duty on the finished goods has been fatal for the plausible action of ensuring that the applicant reverses CENVAT credit availed of duty paid on inputs which can never be put to use for manufacture and which has also been recovered from their insurer.

12. Government therefore sets aside the impugned OIA and allows the revision application filed by the applicant.

13. So ordered.

ATTESTED

B. LOKANATHA REDDY
Deputy Commissioner (R.A.)

19/3/20

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

ORDER No. 45/2020-CX (WZ) /ASRA/Mumbai DATED 19.03.2020

To,
M/s. ICI Ltd.
(Presently known as M/s Akzo Nobel India Ltd.)
Plot No. 1/1,
TTC Industrial Area,
Thane-Belapur Road,
Koparkhairane,
Navi Mumbai 400 709

Copy to:

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