

REGISTERED SPEED POST



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
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Mumbai- 400 005

195/232/13-RA

3363

Date of Issue:

28.07.2020

ORDER NO. 480 /2020-CX (WZ)/ASRA/MUMBAI DATED 29.05.2020 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.

Subject : Revision Applications filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No.380/2010(Ahd-I) CE/MM/Commr(A)/Ahd dated 27.12.2010 passed by the Commissioner (Appeals-V), Central Excise, Ahmedabad.

Applicant : M/s J Dyechem Industries, Ahmedabad.

Respondent : The Commissioner, Central Excise, Ahmedabad-I.



ORDER

This Revision application is filed by M/s. J DYECHEM INDUSTRIES, Ahmedabad (hereinafter referred to as 'applicant') against the Order in Appeal No. No. 380/2010(Ahd-I)/CE/MM/Commr(A)/Ahd dated 27.12.2010 passed by the Commissioner (Appeals-V), Central Excise, Ahmedabad.

2. The brief facts of the case is that the applicant had filed a refund claim of Rs. 2,41,544/- on 07-07-2010 under Section 11BB of the Central Excise Act, 1944, for claiming interest on the 8 rebate claims on a total amount Rs. 22,45,871/- granted to them vide Order in Original No. 604 to 611/AC/Reb/09 dated 09.11.2009 passed by the Assistant Commissioner, Central Excise, Division-II, Ahmedabad-I. The said rebate claims had been filed on 23.10.2007 and 30.07.2007 for the goods cleared for export under claim of rebate under section 11B of the Central Excise Act, 1944 and also availing the benefit of DFIA scheme, in terms of Notification no. 40/2006-Cus. dated 01.05.2006. The above said 8 rebate claims of Rs. 22,45,871/- were initially rejected by the Assistant Commissioner on the ground that the para (v) of the notification no. 40/2006-cus dated 1-5-2006, restricted the rebate under Rule 18 of Central Excise Rules, 2002.

3. Aggrieved by the rejection of these rebate claims, the applicant filed appeal before the Commissioner (Appeals), Ahmedabad. After due process of law, the Commissioner Appeals, Ahmedabad passed Order in Appeal No.184-191/ 2009 (Ahd-I)/CE/CMC/Commr (Appeals) Ahd dated 10.08.2009 and further issued corrigendum dated 26.08.2009 and set aside the said Orders in Original by way of remand. The Commissioner (Appeals) while remanding the case back to the adjudicating authority had directed to take appropriate action in terms of Board's Circular No. 11/2009-Cus dated 25.02.2009 and Notification No. 17/2009-Cus dated 19.02.2009 and also to check that the double benefits were not taken by the applicant. On the basis of these directions of the Commissioner (Appeals), Ahmedabad, the applicant was sanctioned the rebate claims of Rs. 22,45,871/- vide above said Order in Original No. 604 to 611/AC/Reb/09 dated 09.11.2009 and an A/c payee cheque bearing no. 809095 dated 09.11.2009 was issued to the applicant on 09.11.2009 for Rs. 22,45,871/-. Thereafter, the applicant filed a refund claim of interest of Rs. 2,41,544/- (Rupees Two Lakh Forty One Thousand Five Hundred Forty Four only) on the above said 8 rebate claims of Rs. 22,45,871/



alleging that the same were sanctioned to them after three months of filing the said rebate claims.

4. Show cause Notice vide F. No. IV/16-56/Ref/2010 dated 13.07.2010 was issued by the Assistant Commissioner, Central Excise, Division-II, Ahmedabad-I proposing to reject refund claim of Rs. 2,41,544/- under Section 11 BB of Central Excise Act, 1944. The said Show Cause Notice was adjudicated by the said Assistant Commissioner, vide Order in Original No. 53/AC/Ref/2010 dated 16.08.2010 rejecting the said claim for grant of interest on rebate amount .

5. Being aggrieved, the applicant filed appeal before Commissioner (Appeals-V), Central Excise, Ahmedabad, however, the said Commissioner (Appeals) vide Order in Appeal No. No. 380/2010 (Ahd-I) CE /MM/ Commr (A)/Ahd dated 27.12. 2010 upheld the Order in Original No. 53/AC/Ref/2010 dated 16.08.2010 and rejected the appeal filed by the applicant.

6. Being aggrieved with the above Order-in-Appeal, the applicant filed appeal before CESTAT, Ahmedabad and the Hon'ble Tribunal, Ahmedabad, vide Order No. A/10093/WZB/AHD/2013 dated 04.01.2013 transferred the case file to the Joint Secretary (RA), Government of India, New Delhi, since the Tribunal had no jurisdiction to pass any order on the issue. On receipt of Appeal filed by the applicant from CESTAT, Ahmedabad, the Section Officer (RA), New Delhi vide letter dated 28.01.2013 requested the applicant to submit Revision Application in prescribed format.

7. Accordingly, the applicant vide letter dated 09.02.2013 filed Revision Application under Section 35EE of Central Excise Act, 1944 before the Government in the prescribed format mainly on the following grounds:

- 7.1 Interest for delayed payment of rebate claims have been rejected by the adjudicating authority on the ground of show cause notice. The ground being vital to the issue is reproduced herein below:-

The relevant date for the payment of duty in the present case would not be 24.01.2008 or 01.11.2007 as claimed by the claimant. In view of the explanation 5B(jec) of Section 11B, the relevant date would be three months from the date of receipt of the Order in Appeal No. 184-191/2009 (Ahd-I)/CE/CMC/Commr (Appeals) Ahd dated 10-8-2009 passed by the Commissioner(Appeals), Ahmedabad which had been received in by the department on 11.08.2009 and the Corrigendum



dated 26.08.2009 which was received on 09.09.2009. (para 10 of SCN)

Section 11 B(5)-explanation (β), "relevant date means,- which reads as under;

(ec) "in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;"

Further, the date from which interest under Section 11 BB becomes payable is the issue of Revision Application, therefore it is necessary to produce the relevant dates, which are as under:-

Date of filing Rebate claim	23.10.2007	Para 8 of the Show cause Notice
Date of sanctioning Rebate claim	09.11.2009	Para 6 of the Show cause Notice
Date of Order in Appeal	10/26-08-2009	Para 5 of the Show cause Notice
Application of refund of Interest	07.07.2010	Para 2 of the Show cause Notice

In the aforementioned backdrop of the provisions and dates, it is submitted that interest needs to be paid after the completion of three months from the date of application i.e. 23-10-2007 for rebate filed with the rebate sanctioning authority. However, department has disputed the relevant date for payment of interest on the ground that rebate was sanctioned on 09-11-2009 within three months of the receipt of the order of Commissioner (Appeals) on 09-09-2009. Inasmuch as rebate claim was sanctioned on the basis of the direction of Commissioner (Appeals), the relevant date would be 09-09-2009 as per explanation 5(ec) of Section 11B of the CEA. In connection with the relevant date in respect of interest on delayed refunds, it is submitted that as per Section 11BB if any duty ordered to be refunded under Section 11B(2) to any applicant is not refunded within three months from the date of receipt of application, there should be paid to that applicant interest. As such interest liability under Section 11BB arises after expiry of three months of date of filing of rebate claim. The provision of interest under Section 11BB is attracted immediately on expiry of period of three months from the date of filing of rebate application. Therefore, order passed by the learned Commissioner (Appeals) is required to be quashed and set aside.

7.2 With respect to explanation (ec) to Section 11B(5) of CEA, rebate claim is payable as per the provisions of Rule 18 of CER and accordingly, Assistant Commissioner sanctioned the rebate claim under Section 11B(2).



They rely on concluding paragraph in para 4 of Hon'ble Bombay High Court's Judgment dated 10.07.2008 in case of CCE, Pune-III V/s. Ballarpur Industries Ltd. cited at 2008(229)ELT-498 (Bom.) wherein Hon'ble High Court discussed explanation to Section 11BB of the Central Excise Act and in light of the same the order passed by the Commissioner (Appeals) is required to be quashed and set aside.

- 7.3 They also rely on para 10 of GOI Order in Reliance Industries Ltd. cited at 2012(281)ELT-132(GOI), wherein identical issue came up before the Revisionary Authority wherein Revisionary Authority after having discussed the provisions of Section 11B and Section 11BB held in the case of refund/rebate filed under Section 11B of the Central Excise Act, 1944, the interest liability will arise in terms of Section 11BB *ibid* after the expiry of 3 months from the date of receipt of the application for refund/rebate of duty."

In light of the judgment of Honourable High Court in the case of CCE, Pune-III V/s. Ballarpur Industries Ltd. [2008(229)ELT-498(Bom.)] and the order of Revisionary Authority in the case of Reliance Industries Ltd., [2012(281)ELT-132(GOI)], cited above, the issue is no more *res-integra*.

- 7.4 As per the Explanation B (ec) of Sub-section (5) of Section 11B of Central Excise Act, 1944, if the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, and such refund is paid within three months, the interest is not admissible. The department's plea is that as in this case the refund of Rs. 22,45,871/- was allowed on the basis of the remand order of the Commissioner (Appeals), Ahmedabad's Order in Appeal No. 184-191/2009(Ahd-I)/CE/CMC/Commr(A)Ahd dated 10-8-2009 and therefore the date from which refund of interest became due was the date on which the order was received in the Divisional Office i.e. 09-09-2009. All the eight rebate claims have arisen consequent to the exports made by them. Therefore, show cause notices for rejecting the rebate claims, were issued and the claims were rejected on passing Orders in Original. The rebate claims were sanctioned by the Assistant Commissioner belatedly. The rebate claims submitted by them were very much in order and the stand taken by the department to reject them was not correct. Therefore, the rebate claims were sanctioned on the basis of the applications made on 23-1-2007 and 30-07-2007. It is set principle of law that the interest is relatable with the date of application for refund/rebate and not with an order granting rebate.

- 7.5 They also rely on Circulars No. 398/31/98-CX, dated 2-6-1998 [From F. No. 201/04/98-CX.6] and No. 670/61/2002-CX, dated 1-10-2002 [F. No. 268/51/2002-CX. 8]



7.6 Further, reliance is placed on the following decisions and judgments of Honourable Tribunals and Honourable High Courts:

1. Rama Vision Ltd. V/s. CCE, Meerut 2004(170)ELT-12(Tri.-LB).
2. J. K. Cement Works V/s. ACCE&C 2004(170)ELT-4(Raj.).
3. CCE, Pune-III V/s. Ballarpur Industries Ltd. 2008(229)ELT-498(Bom.)

8. The respondent department vide letter F.No. IV/16-313/OIO/Ref/2010-RA dated 05.03.2013 issued by Additional Commissioner (RRA) Central Excise, Ahmedabad, filed cross objections on the grounds of Revision Application. They have mainly submitted that :

8.1 Revision Application filed by the appellant may be dismissed on the ground of delay and advantage of filing a revision application at wrong forum should not be given to the appellant;

8.2 the appeal filed by the claimant before CESTAT Ahmedabad is not proper in so far as they filed the appeal in wrong forum and the CESTAT Order No. A/10093/WZB/AHD/2013 dated 04.01.2013 transferring the case to the Joint Secretary, (RA), New Delhi is not legal and proper and the appeal ought to have been rejected by the CESTAT itself. They rely on following case laws in this regard:-

- Ketan V. Rarekh vs. Special Director, Directorate of Enforcement reported at 2012 (275) ELT 3(SC)
- M/s. India Pistons Ltd Vs. AC CE, Madras and others 1987(27)ELT 651 (Mad),
- M/s. Niraj Kejariwal Vs. CCE-Thane-II, 2012 (279)ELT 550 (Tri. Mumbai) CESTAT

8.3 Instruction F.No.390/Misc/100/2010-JC dated 22.09.2011, the Director (Review), CBEC, New Delhi has stressed the need for filing appeal in the correct forum

8.4 CBEC Circular No.398/31/98-CX dated 02.06.1998 and 670/61/2002 -CX dated 01.10.2002 also did not discuss about the interest in such situation

8.5 the appeal filed by the claimant is time barred now. There is no provision in the Section 11B of the Central Excise Act, 1944 to pay interest on rebate if the sanction of rebate application itself is in doubt and eligibility is not certain. ,

9. Personal hearing in the matter was fixed on 04.12.2019. Nobody appeared for the personal hearing on behalf of the applicant. Shri J.S. Bhiwandkar, Assistant



Commissioner, Division-III, CGST & CX Ahmedabad South attended the hearing on behalf of the respondent department. He reiterated grounds made in cross objections filed on 05.03.2013 and pleaded that the Order in Appeal be upheld.

10. Government observes that the respondent department in its cross objections has contended that the time limit to file a Revision Application before Revision Authority is three months and as the appellant preferred an appeal before the CESTAT against the order of Commissioner (Appeals) i.e. wrong forum and the time limit for filing the revision application before the Revision Authority has elapsed. Therefore, the department has further contended that Revision Application filed by the appellant may be dismissed on the ground of delay and advantage of filing a revision application at wrong forum should not be given to the appellant;

11. In view of the above, Government first proceeds to discuss issue of delay in filing this revision application. The chronological history of events is as under:

a	Date of receipt of impugned Order-in-Appeal dated 11.04.2013 by the applicant	05.01.2011
b	Date of filing of appeal before Tribunal	18.03.2011
c	Time taken in filing appeal before Tribunal by the applicant	2 Months and 12 days
d	Date of receipt of Tribunal order dated 04.01.2013 by the applicant	18.01.2013
e	Date of filing of revision application by the applicant	21.02.2013
f	Time taken between date of receipt of Tribunal order to date of filing of revision application	1 Month 4 days
	Time Taken for filing Revision Application (c + f)	3 months 16 days

11.1 From the above position, it is clear that applicant has filed this revision application after 3 months and 16 days when the time period spent in proceedings before CESTAT is excluded. As per provisions of Section 35EE of Central Excise Act, 1944 the revision application can be filed within 3 months of the communication of Order-in-Appeal and the delay up to another 3 months can be condoned provided there are justified reasons for such delay.

11.2 The department has relied on case of Ketan V. Parekh v. Special Director, Directorate of Enforcement 2012 (275) E.L.T. 3 (S.C.)] In that case, the Hon'ble Supreme Court observed that appeal to High Court in terms of opportunity given by another High Court where appellant was wrongly prosecuting appeal and appeal beyond time-limit specified by the High Court and the appellant not even making a



case that they had filed appeal within period specified in the order granting them liberty to file appeal was not maintainable. In that case, Shri Ketan V. Parekh filed appeal before Hon'ble High Court of Bombay which was not jurisdictional Court and while adjudicating the appeal, the High Court of Bombay had directed the appellant to file appeal within 30 days before appropriate High Court which appellant failed to do so. In these circumstances, and also taking other aspects of the matter, Hon'ble Supreme Court came to the conclusion that the appeal is not maintainable. Therefore, this decision is also not help to the respondent department in this case. Further, the applicant in pursuance of CESTAT, Ahmedabad's Order dated 04.01.2013, also filed revision application on 09.02.2013 (received in RA Office, New Delhi on 21.02.2013). Hence, reliance placed by the respondent department on M/s. India Pistons Ltd Vs. AC CE, Madras and others 1987(27)ELT 651 (Mad), is also misplaced.

11.3 Government notes that Hon'ble High Court of Gujarat in W.P. No. 9585/11 in the case of M/s. Choice Laboratory vide order dated 15-9-2011, Hon'ble High Court of Delhi vide order dated 4-8-2011 in W.P. No. 5529/2011 in the case of M/s. High Polymers Ltd. and Hon'ble High Court of Bombay in the case of M/s. EPCOS India Pvt. Ltd. in W.P. No. 10102/2011 [2013 (290) E.L.T. 364 (Bom.)] vide order dated 25-4-2012, have held that period consumed for pursuing appeal bonafidely before wrong forum is to be excluded in terms of Section 14 of Limitation Act, 1963 for the purpose of reckoning time limit of filing revision application under Section 35EE of Central Excise Act, 1944. The ratio of above said judgments is squarely applicable to this case. Government therefore keeping in view the above cited judgment considers that revision application is filed after a delay of 16 days which is within condonable limit. Government, in exercise of power under Section 35EE of Central Excise Act, 1944 condones the said delay and takes up revision application for decision on merits.

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

13. Government observes that in the instant case the rebate claims totally amounting to Rs. 22,45,871/- filed by the applicant on 30.07.2007 and 23.10.2007 which were initially rejected, were sanctioned in remand proceedings vide Order in Original No. 604 to 611/AC/Reb/09 dated 09.11.2009 by the adjudicating



authority in pursuance of Order in Appeal No. 184-191/2009 (Ahd-I)/CE/CMC/Commr(Appeals) Ahd dated 10-8-2009 and corrigendum dated 26.08.2009 issued by the Commissioner Appeals, Ahmedabad. An A/c payee cheque bearing no. 809095 dated 09.11.2009 was issued to the applicant on 09.11.2009 for Rs. 22,45,871/- towards the above mentioned rebate claims. Thereafter, the applicant filed a refund claim of interest of Rs. 2,41,544/- (Rupees Two Lakh Forty One Thousand Five Hundred Forty Four only) on the above said 8 rebate claims of Rs. 22,45,871/- alleging that the same were sanctioned to them after three months of filing the said rebate claims. However, Assistant Commissioner, Central Excise, Division-II, Ahmedabad-I vide Order in Original No. 53/AC/Ref/2010 dated 16.08.2010 rejected the said refund claim of interest. The Commissioner (Appeals-V), Central Excise, Ahmedabad, vide Order in Appeal No. No. 380/2010 (Ahd-I)/CE/MM/Commr(A)/Ahd dated 27.12.2010 upheld the Order in Original No. 53/AC/Ref/2010 dated 16.08.2010 and rejected the appeal filed by the applicant.

14. In their Revision Application filed against aforesaid Commissioner (Appeals) Order dated 27.12.2010, the applicant contended that interest needs to be paid after the completion of three months from the date of application i.e. 23-10-2007 for rebate filed with the rebate sanctioning authority. However, department has disputed the relevant date for payment of interest on the ground that rebate was sanctioned on 09-11-2009 within three months of the receipt of the order of Commissioner (Appeals) on 09-09-2009 inasmuch as rebate claim was sanctioned on the basis of the direction of Commissioner (Appeals), the relevant date would be 09-09-2009 as per explanation 5(ec) of Section 11B of the CEA. In connection with the relevant date in respect of interest on delayed refunds, that as per Section 11BB if any duty ordered to be refunded under Section 11B(2) to any applicant is not refunded within three months from the date of receipt of application, there should be paid to that applicant interest; that interest liability under Section 11BB arises after expiry of three months of date of filing of rebate claim.

15. Government observes that the Commissioner (Appeals), Ahmedabad while rejecting the appeal filed by the applicant vide impugned Order observed as under:-

6.1 I agree with the findings of the AC as the explanation to Section 11BB clearly states that "Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or any court against an order of the Assistant Commissioner of Central Excise or Deputy



Commissioner of Central Excise, under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section". I would have agreed with the appellant that the interest under Section 11BB was payable to them with effect from three months from the filing of the rebate claims initially, that this, 23 October, 2007 and 30 July 2007, if the Commissioner (Appeals) had sanctioned the rebate claims of the appellant. In this case however the Commissioner (Appeals) remanded the matter for examination in terms of Circular No. 11/2009-Customs dated 25 February 2009. The Commissioner's Order is dated 10th August 2009 and subsequent to this the Assistant Commissioner sanctioned the rebate claims of the appellant on 9th November 2009. The interest under Section 11BB is not available to the appellant because the Commissioner (Appeals) did not sanction their rebate claim per se which is a requirement under the explanation to Section 11BB.

6.2 Secondly, there was also no question of the AC having sanctioned the rebate claims of the appellant at the time of the initial filing because the CBEC Circular number 11/2009-Customs dated 25 February 2009, under which the rebate claims were subsequently sanctioned was not available at the time of initial filing of the rebate claims in the year 2007.....

6.3 Thus on both counts I do not find that interest under Section 11BB is admissible to the appellant. Both legally and factually Section 11BB interest is not applicable to the Appellant.

16. Government observes that the rebate claims of Rs. 22,45,871/- were initially rejected by the Assistant Commissioner, Central Excise, Div-II, Ahmedabad - I. vide Orders in Original Nos. 781/07/AC/Rebate/07 dtd. **22.10.07** and 985 to 991/07/AC/Rebate/07 dtd. **16.01.08** on the ground that the applicant was availing the benefit of DFIA scheme, in terms of Notification no. 40/2006-Cus. dated 01.05.2006 and para (v) of the Notification No. 40/2006-cus dated 01.05.2006 restricted the rebate under Rule 18 of Central Excise Rules, 2002. The Commissioner (Appeals), vide OIA No. 184-191/2009 (Ahd-I)/CE/CMC/Commr (Appeals) Ahd dated 10-8-2009 and corrigendum dated 26.08.2009 set aside the said Orders in Original by way of remand and directed original authority to take appropriate action in terms of the Board's Circular No. 11/2009-Cus dated 25-2-2009 and Notification No. 17/2009-Cus dated 19-2-2009, and also to check that the double benefits is not taken by the claimant.



17. Government observes that Notification No. 17/2009-Cus dated 19-2-2009 amended Notification No. 40/2006, dated 1-5-06 by omitting the following phrase of Condition (v) :

'and in respect of which facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant products) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or CENVAT credit under CENVAT Credit Rules, 2004 in respect of materials imported/procured against the said authorization has not been availed.'

Therefore, w.e.f. 19-2-2009, availment of Cenvat credit in respect of materials imported/procured does not debar the assessee from claiming rebate of duty paid on export of finished goods under DFIA Scheme. However, in the meantime, Finance (No. 2) Act, 2009, in the Second Schedule (Section 93), amended Notification No. 40/2006-Customs, dated 1-5-2006 retrospectively from the date of issue so as to allow the facility of rebate in respect of locally procured materials used in the manufacture of goods exported under the Duty Free Import Authorization (DFIA) Scheme. In this regard, the relevant Para M. 9 under the Miscellaneous and Legislative Amendments of Explanatory Notes - Customs of Budget Bulletin 2009, is reproduced below :-

'Notification No. 40/2006-Customs, dated 1-5-2006 has been amended retrospectively from its date of issue so as to allow the facility of rebate in respect of locally procured materials used in the manufacture of goods exported under the Duty Free Import Authorisation Scheme and carry out other related change [Clause 92 of the Finance (No. 2) Bills refers].'

which had been enacted vide Section 93 of Finance (No. 2) Act, 2009 on 19-8-2009.

18. Government further observes that the operative portion of Circular No. 11/2009-Cus., dated 25-2-2009 reads as follows :-

'The Law Ministry clarified that from a perusal of the DFIA Scheme and the conditions laid therein, it appeared that the authorization holder cannot avail Cenvat credit on the inputs used in the manufacturer of the goods exported under the DFIA scheme as well as duty free imports under the DFIA simultaneously as it amounts to double benefit and against the spirit and object of the scheme.'

19. In the context of issuance of the Notification No. 17/2009-Cus dated 19-2-2009 and Circular No. 11/2009-Cus., dated 25-2-2009 above, the Commissioner (Appeals), Ahmedabad directed Adjudicating authority to examine the rebate claims



and also to check that the double benefit was not taken by the claimant while remanding the case back to him. On the basis of the directions of the Commissioner (Appeals), Ahmedabad, and in pursuance of Board's Circular No. 11/2009-Cus dated 25-2-2009 and Notification No. 17/2009-Cus dated 19-2-2009, the rebate claims of the applicant were sanctioned of Rs. 22,45,871/- vide Order in Original No. 604 to 611/AC/Reb/09 dated 09.11.2009 by the Assistant Commissioner, Central Excise, Division-II, Ahmedabad-I

20. Government notes that both the Circular No. 11/2009-Cus dated 25-2-2009 and Notification No. 17/2009-Cus dated 19-2-2009 discussed above did not exist at the time eight rebate claims were processed initially and therefore, these rebate claims were precisely rejected earlier vide Orders in Original Nos. 781/07/AC/Rebate/07 dtd. 22.10.2007 and 985 to 991/07/AC/Rebate/07 dtd. 16.01.2008 in terms of condition (v) of Notification No. 40/2006-Customs, dated 1-5-2006 which restricted the rebate under Rule 18 of Central Excise Rules, 2002. It is pertinent to note that Notification No. 17/2009-Cus., dated 19-2-2009 amended Notification No. 40/2006, dated 1-5-2006 by omitting Condition (v) which restricted the rebate under Rule 18 of Central Excise Rules, 2002. Further, "Notification No. 40/2006-Customs, dated 1-5-06 has been amended retrospectively from its date of issue so as to allow the facility of rebate in respect of locally procured materials used in the manufacture of goods exported under the Duty Free Import Authorization (DFIA) Scheme (Clause 92 of the Finance (No. 2) Bills refers)", which had been enacted vide Section 93 of Finance (No. 2) act, 2009 on 19-8-2009. In view of this retrospective amendment allowing rebate of duty paid on final products exported under DFIA Schemes the applicant became eligible for rebate claims in the present case. Thereafter, on the basis of directions of the Commissioner (Appeals), Ahmedabad issued in remand, and on examining the admissibility of benefit of the said Circular/Notification, the Assistant Commissioner, Central Excise, Division-II, Ahmedabad-I, vide Order in Original No. 604 to 611/AC/Reb/09 dated 09.11.2009 sanctioned the eight rebate claims amounting to Rs. 22,45,871/-.

Therefore, Government (in addition to the findings of Commissioner (Appeals) reproduced at para 15 supra) is also in full agreement with the following findings of the Commissioner (Appeals) in impugned Order :



"as admitted by the appellants themselves, the Commissioner Appeals did not sanction the rebate claims but rather remanded them to the lower adjudicating authority to take action as laid down in Circular No. 11/2009 and consider the rebate claims afresh. Thus in effect the Commissioner Appeals has only asked for a re-examination and on re-examination the AC has sanctioned the rebate claimed within three months. There is no finding as such by the Commissioner Appeals on the rebate claims and hence the appellant are not entitled to interest payment under Section 11 BB as claimed by them."

21. The applicant has relied upon the judgment of Honorable High Court in the case of CCE, Pune-III V/s, Ballarpur Industries Ltd. [2008(229)ELT-498(Bom.)] and the order of Revisionary Authority in the case of Reliance Industries Ltd., [2012(281)ELT-132(GOI)] in support of his claim of interest refund under Section 11BB of the Central Excise, Act, 1944.

- In case of Reliance Industries Ltd., the department called for clarification on the absence of proper customs seal etc. and also respective undertaking for submission of respective BRCs as an alternative which were complied by the applicant exporter. Department had not disputed the fact that the rebate claims were filed alongwith all the requisite documents. The enquiry made by department from the Customs at port of export regarding genuineness of Bill of Lading/Mate Receipt cannot be a reason of delaying the sanction of rebate claim. There is no specified document which was not submitted by applicant and therefore Government held that interest is admissible and payable to the applicant in terms of Section 11BB of Central Excise Act, 1944.
- In case of Ballarpur Industries Ltd. it was held that in terms of the explanation appearing below Section 11BB of the Act interest is payable even if refund is ordered not by the order made by the Assistant Commissioner or Deputy Commissioner, but if the refund is ordered either by the appellate authority or Tribunal or Court.

As the facts of the instant case are different from both the aforementioned case laws in as much as the rebate claims in the instant case were found admissible in pursuance of retrospective amendment of Notification No. 40/2006, dated 1-5-2006 vide Clause 92 of the Finance (No. 2) Bill, 2009 so also the Commissioner (Appeals) did not sanction the rebate claims in the instant case but only directed the Assistant Commissioner to re-examine the same with reference to CBEC Circular



and Notification issued subsequent to initial filing of these rebate claims. The facts of Rama Vision Ltd. V/s. CCE, Meerut 2004(170)ELT-12(Tri.-LB) and J. K. Cement Works V/s. ACCE&C 2004(170)ELT-4(Raj.) also relied upon by the applicant are different and hence these case laws are of no help to the applicant.

22. Government also notes that the Finance Act, 2001 which came into force on 11-5-2001 introduced Section 38A in the Central Excise Act, 1944 providing for protection, with retrospective effect, for actions taken by the department under Rules, Notifications, Orders etc. amended, superseded, rescinded, repealed etc. The provisions the said Section 38A of the Central Excise Act, 1944 have been duly discussed by Hon'ble Gujarat High Court in its Judgment dated 18.03.2010 in Sal Steel Ltd. Vs Union Of India [2010 (260) E.L.T. 185 (Guj.)] in the following manner:

24. Under Section 38A of the Act it is provided that where any Rule, Notification, etc. made or issued under this Act is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescission "then five clauses (a) to (e) are set out" to lay down that what is provided in each of the five clauses, which are alternative to each other, shall not take place. Clause (b) stipulates that an amendment, etc. shall not affect the previous operation of any Rule, Notification, etc. so amended, etc. or anything duly done or suffered thereunder. Therefore, an amendment of a notification shall not, not only not affect the previous operation of the notification, but shall also not affect anything duly done or suffered under the notification. Similarly, clause (c) provides for a situation where an amendment, etc. shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any Rule, Notification, etc. so amended, etc. which means that where under a notification any right or privilege has been acquired or has accrued, the same shall not be affected by the amendment, etc. of the notification, and correspondingly an obligation or liability incurred under the notification shall have to be discharged even after the amendment, etc. Clauses (d) and (e) similarly provide for permitting continuation of leviability of any penalty, etc. and continuation of any investigation, legal proceeding or remedy, etc.

25. Thus, the scheme which emerges on a plain reading of Section 38A of the Act is that even in a case where a Rule, Notification, etc. is amended, etc., unless the amending Rule, Notification, etc. specifically denotes a contrary intention, everything that has taken place under the Rule, Notification, etc. prior to amendment shall continue to its logical end. This provision is not only a saving provision, but is a provision which correspondingly obligates both the person who was a beneficiary under the existing Rule, Notification, etc. and the authority under the existing Rule, Notification, etc. to continue to comply with the requirements of the Rule, Notification, etc. as it existed even after amendment once the parties have duly done anything or suffered under the existing Rule, Notification, etc. An assessee, who is required to act in a particular manner as specified by the Rule, Notification, etc. as existing before the amendment, is obliged in law to act accordingly, and correspondingly the authority is equally obliged in law to act as if the amendment had not taken place, such act on part of the authority being not only in relation to collection of



revenue and other attendant provisions like penalty, etc., but also in relation to the entitlements of an assessee. This provision, namely, Section 38A of the Act incorporates in the statute the principle of a completed contract between the parties, whereunder the parties are obliged to fulfil their respective part of the concluded contract, and in case of failure, the Court may step in and direct the defaulting party to specifically perform his part of the promise. To put it differently, one may say that the principle of promissory estoppel, as normally understood, has been incorporated in the statute.

23. It is clear from the above that Section 38A is a saving clause which protects any action taken under the erstwhile law including the rules. This is in spite of a subsequent change in law. In terms of this section no fault can be found with the order of the rebate sanctioning authority to warrant the grant of interest in the instant case. It was only because of the retrospective amendment of the "Notification No. 40/2006-Customs, dated 1-5-2006, that the applicant became eligible for the rebate. Therefore, no interest liability can be fastened on the Department. What was done at that point of time is deemed to have been correctly done in terms of the provisions of Section 38A of the Central Excise Act, 1944 as in this case, the rebate was not admissible to the applicant at the time when the rebate claim was initially processed.

24. In view of above discussion, Government does not find any reason to interfere with the finding in the Order-in-Appeal No. 380/2010(Ahd-I) CE/MM/Commr (A)/Ahd dated 27.12. 2010 passed by the Commissioner (Appeals-V), Central Excise, Ahmedabad and therefore upholds the same.

25. The Revision Application is dismissed being devoid the merit.

26. So, ordered.

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

ORDER No. 480/2020-CX (WZ) /ASRA/Mumbai DATED, 29.05.2020.

ATTESTED

To,
M/s J. Dyechem Industries,
C-1-5516, Phase-III,
GIDC, Vatva,
Ahmedabad 382 445.

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



Copy to:

1. The Principal Commissioner of CGST, Ahmedabad South, 7th Floor, CGST Bhavan, Rajasva Marg, Ambawadi, Ahmedabad-380015.
2. The Commissioner of CGST, Ahmedabad Appeals, 5th Floor, CGST Bhavan, Rajasva Marg, Ambawadi, Ahmedabad-380015.
3. The Assistant Commissioner Division III, 2nd Floor, CGST Bhavan, Rajasva Marg, Ambawadi, Ahmedabad-380015
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.

