

REGISTERED SPEED POST AD



**GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE**

**Office of the Principal Commissioner RA and  
Ex-Officio Additional Secretary to the Government of India**  
8<sup>th</sup> Floor, World Trade Centre, Cuffe Parade,  
Mumbai- 400 005

F. No. 195/814/12-RA /3236

Date of Issue: 31.03.2020

ORDER NO. <sup>505</sup> /2020-CX (WZ) /ASRA/MUMBAI DATED 09.06.2020 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 : Macleods Pharmaceuticals Ltd.  
(Unit-II), Plot No. 24 to 28, 30,  
Survey No. 366, Premier Industrial Estate,  
Kachigam, Daman

Respondent: Commissioner, Central Excise & Service Tax, Daman

Subject : Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against OIA No. SRP/89/DMN/SDMN/2012-13 dated 21.08.2012 passed by the Commissioner(Appeals), Central Excise, Daman.

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**ORDER**

This revision application has been filed by M/s Macleods Pharmaceuticals Ltd., (Unit-II), Plot No. 24 to 28, 30, Survey No. 366, Premier Industrial Estate, Kachigam, Daman (hereinafter referred to as "the applicant") against OIA No. SRP/89/DMN/SDMN/2012-13 dated 21.08.2012 passed by the Commissioner (Appeals), Central Excise, Daman.

2. The applicant was engaged in the manufacture of medicaments falling under Tariff Item No. 3004 90 57 in their factory which are exempt in terms of Sr. No. 54 & 59 of Notification No. 04/2006-CE. The applicant had cleared the said medicaments at Nil rate of duty by availing the exemption for home clearances. However, when the said medicaments were cleared for export, the same were exported either under Bond/LUT under Notification No. 42/2001-CE(NT) dated 26.06.2001 issued under Rule 19 of the CER, 2002 or under claim of rebate under Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 of the CER, 2002. 47 rebate claims filed in such manner for refund of rebate amounting to Rs. 72,01,961/- filed during the period from 29.06.2009 to 22.11.2010 were sanctioned to the applicant through various OIO's passed during the period between 06.10.2009 to 19.04.2011. An amount of Rs. 71,01,440/- was sanctioned in cash whereas an amount of Rs. 1,00,521/- was sanctioned by re-credit in their CENVAT account. However, it was observed that the applicant was not required to pay duty on exempted goods as per Section 5A(1A) of the CEA, 1944 and hence they were requested to return the amount of cash rebate sanctioned to them alongwith interest. Accordingly, the applicant deposited the amount of Rs. 71,01,440/- received by them in cash alongwith interest amounting to Rs. 7,14,845/- on 16.06.2011. Thereafter, the applicant filed refund claim on 14.07.2011 for the amount of Rs. 71,01,440/- deposited by them on 16.06.2011 with a request to re-credit the same in their RG23A pt. II account. The adjudicating authority vide OIO No. SD/AC/347/11-12/R dated 29.02.2011 rejected the refund claim of Rs. 71,01,440/- on the ground that the goods being exempted, the applicant was not required to pay duty in terms of Section 5A(1A) and Rule 2(e) of the CER, 2002 stating that payment of duty made by the applicant



would not be treated as duty payable under Section 3 of the CEA, 1944. It was further held that in terms of Board's Circular No. 940/01/2011-CX dated 14.01.2011, the manufacturer cannot opt to pay duty in respect of exempted goods and the duty paid, if any, would not be treated as duty but would be treated as a deposit.

3. Being aggrieved by the OIO, the applicant filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) did not find force in the appeal of the applicant and therefore rejected the appeal and upheld the OIO.

4. The applicant has now filed revision application on the following grounds:

- (a) The applicant submitted that the rebate claims have been filed within the prescribed time limit of one year and hence the allegation that part of the refund claim for an amount of Rs. 46,41,360/- was filed beyond one year period was incorrect.
- (b) The applicant asserted that the ARE-1's had been signed by central excise officers at the time of clearance from the factory and hence no facts had been suppressed when clearances were made.
- (c) The applicant stated that none of the rebate sanction orders had been reviewed or challenged before the appellate authorities and hence rebate was rightly sanctioned and was not required to be paid back. They placed reliance on the decisions in the case of La Opala[2002(149)ELT 164(Trb)], Gokak Mills[2006(206)ELT 562(Trb)], Overseas Engineers[2007(215)ELT 513(Trb)].
- (d) The applicant submitted that since the SCN had not been issued within the normal period of one year from the date of sanction, they were not required to reverse/pay back the sanctioned rebate amount. In this regard, reliance was placed upon Re-rolling Mills[1997(94)ELT 8(SC)], Rosemount (India) Ltd.[1998(99)ELT 502(Trb)], CBEC Circular No. 423/56/98-CX, dated 22.09.1998, Morarjee Gokuldas[2008(222)ELT 114(Trb)].



- (e) They submitted that the very fact that Section 5A(1A) of the CEA, 1944 had come into the statute on 13.05.2005 and the circular no. 940/01/2011-CX dated 14.01.2011 and 937/27/2010-CX dated 26.11.2010 had been issued later would indicate that the issue involved was relating to interpretation of the provisions and that legal interpretations are likely to have more than one interpretation.
- (f) They made reference to the text of Notification No. 4/2006-CE and Sr. No. 54 & 59 thereof to contend that the exemption therein was conditional in nature.
- (g) The applicant contended that the provisions of Section 5A(1A) of the CEA, 1944 are not applicable to the facts of their case and that the exemption available to them was not absolute.
- (h) The applicant further submitted that the exemption notification was applicable only to clearances for home consumption and not for exports. The applicant relied upon case laws of Omkar Textile Mills[2000(122)ELT 115(Trb)], SRF Ltd.[2002(149)ELT 469(Trb)], Steelco Gujarat[2000(121)ELT 557(Trb)], JCT Ltd.[1999(114)ELT 618(Trb)], Alpha Drug India Ltd.[2000(118)ELT 783(Trb)] and Hunsur Plywood Works[1996(82)ELT 256(Trb)] in support of their submission that export clearances are not exempt.
- (i) It was averred that when the assessee is eligible for the benefit of two or more exemptions, the assessee can opt for the exemption which is most beneficial to them. In this regard, they placed reliance upon the decisions in the case of HCL Ltd.[2001(130)ELT 405(SC)], Indian Petro Chemicals[1997(92)ELT 13(SC)], Asian Paints[1999(114)ELT 972(Trb)], Haffkine Bio Pharmaceutical[1999(109)ELT 393(Trb)].
- (j) The applicant submitted that condition no. 1(iv) of Notification No. 42/2001-CE(NT) would not apply to export under claim of rebate.
- (k) The applicant further submitted that the provisions of Section 11B of the CEA, 1944 were applicable to refunds, that ER-1s' had been filed indicating payment of duty of excise, duty payment was reflected in records like daily stock account etc., that the Department had accepted the payment of the amount of duty of excise, sanctioned and paid the



said amount as duty of excise and therefore the Department cannot now claim that such amounts were deposits on the basis of Circular No. 940/01/2011-CX dated 14.01.2011 & 937/27/2010-CX dated 26.11.2010. They placed reliance upon the decisions in the case of Bombay Dyeing and Manufacturing Co. Ltd.[2001(135)ELT 1392(Trb)] which was upheld by the Hon'ble Supreme Court.

- (l) The applicant further submitted that even if the duty had been paid on exempt goods, rebate would still be admissible. In this regard, they placed reliance on the decisions in the case of CCE, Vadodara vs. Jayant Oil Mills[2009(235)ELT 223(Guj)], Suncity Alloys Pvt. Ltd.[2007(218)ELT 174(Raj)], Norris Medicines Ltd.[2003(56)RLT 353(Trb)] and Medispan Ltd.[2004(178)ELT 848(Trb)].
- (m) The applicant submitted that rebate was admissible even if export products were not excisable.
- (n) The applicant placed reliance upon para 1.2 & 1.3 of Part-V of Chapter 8 of CBEC's Excise Manual of Supplementary Instructions to contend that rebate of duty is admissible even if the resultant products are excisable or otherwise.
- (o) The applicants submitted that they are eligible for either of the three benefits of refund of CENVAT credit of duty paid on inputs attributed to goods exported under Rule 5 of the CCR, 2004 or rebate of duty paid under Rule 18 of the CER, 2002 or drawback of duty paid on inputs attributable to goods exported.
- (p) The applicants submitted that assessment or self-assessment or provisional assessment would not have any relevance when their ER-1 returns had been accepted by the Department.
- (q) They averred that their refund claims had been filed within one year from the date of export effected during the period from 29.06.2008 to 22.11.2010 under various ARE-1's and were filed within time.
- (r) It was submitted that mention or non-mention of exempt status of goods in their documents like ARE-1's, ER-1's, invoices etc. would not change the status or merits of the case.



- (s) They further submitted that payment through both cash and CENVAT account were both permissible and refundable. They placed reliance upon the decisions in the case of Rajashree Cements[2001(132)ELT 724(Trb)], Kothari General Foods Corpn. Ltd.[1992(59)ELT 196(Trb)].
- (t) The applicant submitted that rebate was admissible even if rate of duty on inputs was 10% and rate of duty on final products is only 5%.
- (u) *The applicant stated that the 47 OIO's sanctioning rebate were not reviewed by the Department. They therefore contended that when the refund sanction orders had not been reviewed or challenged before the appellate authorities, refund of such rebate cannot be recovered. They placed reliance upon the decisions in the case of La Opala[2002(149)ELT 164(Trb)], Gokak Mills[2006(206)ELT 562(Trb)] and Overseas Engineers[2007(215)ELT 513(Trb)].*
- (v) The applicant submitted that the decisions of Bharat Box Factory Ltd.[2005(183)ELT 461(Trb)] and Ogilvy & Mather Pvt. Ltd.[2010(18)STR 502(Trb)] relied upon by the Department were not applicable because these decision had been passed by Single Member Bench whereas the decisions relied upon by the applicants were given by Division Bench.
- (w) They further stated that the decision of the Tribunal in the case of Ogilvy & Mather Pvt. Ltd.[2010(18)STR 502(Trb)] which followed its earlier judgment in Bharat Box Factory Ltd.[2005(183)ELT 461(Trb)] had since been reversed by the Hon'ble Karnataka High Court in the judgment reported at [2011(274)ELT 182(Kar)].
- (x) The applicant submitted that the impugned order had been passed without giving any findings on the detailed submissions/binding judgments cited by the applicant. They further stated that a non-speaking order had been passed. They averred that it was not sustainable in view of the decisions in the case of D. Balkrishna & Co.[2000(122)ELT 631(Trb)], Baldev Krishan[1997(95)ELT 121(Trb)], Agarwal Metal Works (P) Ltd.[1981(8)ELT 602(CBE&C)], Ram Prakash[1987(31)ELT 930(Trb)] & Kesoram Cement[1989(40)ELT 413(Trb)].



5. The applicant was granted personal hearing on 29.11.2017, 27.12.2017 and 09.10.2019. However, none appeared on behalf of the applicant. The Department also failed to appear for hearing on the appointed dates.

6. Government has carefully gone through the relevant case records and perused the impugned orders-in-original and orders-in-appeal. The issue involved is that during the period from 29.06.2009 to 22.11.2010 the applicant had cleared pharmaceutical products manufactured by them for home consumption under full exemption in terms of Sr. No. 54 & 59 of the Notification No. 4/2006-CE dated 01.03.2006 whereas they had cleared the same goods for export on payment of central excise duty under claim of rebate. After sanction of the rebate claims totally amounting to Rs. 71,01,440/- in cash and an amount of Rs. 1,00,521/- by way of re-credit in their CENVAT account, the applicant has submitted that they have deposited an amount of Rs. 71,01,440/- at the behest of the Department on 16.06.2011. Thereafter, the applicant filed a refund claim for the same amount of Rs. 71,01,440/- requesting that it be allowed by way of CENVAT credit in their RG 23A pt.II. This refund claim was rejected by both the lower authorities. The applicant has now filed revision application against the rejection of this refund claim.

7. Government observes that the O/O No. SD/AC/347/11-12/R dated 29.02.2012 on page 4 thereof at para 4 records that a separate inquiry for wrong payment of duty/CENVAT under Section 11A(1), invoking penal provisions was under progress as the applicant had wrongly paid the duty amount taken as rebate. It is therefore clear that the amount of rebate which was initially sanctioned to the applicant was subject of a detailed investigation. The outcome of the adjudication, appellate proceedings in respect of the SCN ensuing out of the investigation would have a direct bearing on the present proceedings. In spite of being granted opportunities of personal hearing on three different dates, the applicant has failed to attend



personal hearing. Likewise, the Department has also failed to attend personal hearings. As such there is no clarity about the updated status in the proceedings concerning the SCN issued after investigation.

8. Government therefore remands the proceedings back to the original authority for decision after taking into account the decision taken in respect of the impugned SCN No. V/18-421/2011-12/R dated 27.12.2011 issued to the applicant after investigation and the facts of the case.

9. The revision application filed by the applicant is disposed of in the above terms.

10. So ordered.

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

ORDER No. <sup>505</sup> /2020-CX (WZ) /ASRA/Mumbai DATED 09-06-2020.

To,  
Macleods Pharmaceuticals Ltd.  
(Unit-II), Plot No. 24 to 28, 30,  
Survey No. 366, Premier Industrial Estate,  
Kachigam, Daman

Copy to:

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

**ATTESTED**

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

