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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
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

F.No.198/74/SZ/2018-RA/8937 Date of Issue: 10.11.2020

ORDER NO.530/2020-CX (WZ)/ASRA/MUMBAI DATED 06/07/ 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 : Principal Commissioner of Central Tax, Visakhapatnam

Respondent : M/s Beekay Structural Steels (TMT Bar Division)

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. VIZ-EXCUS-002-APP-08-18-19 dated 13.04.2018 passed by the Commissioner of Central Tax & Customs (Appeals), Guntur.

ORDER

This Revision Application is filed by the Principal Commissioner of Central Tax, Visakhapatnam Central GST Commissionerate, GST Bhawan, Port Area, Visakhapatnam 530 035 (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. VIZ-EXCUS-002-APP-08-18-19 dated 13.04.2018 passed by the Commissioner of Central Tax & Customs (Appeals), Guntur.

2. The issue involved in the current Revision Application is that M/s. Beekay Structural Steels (TMT Bar Division), Visakhapatnam (herein after referred as " the Respondent") is a manufacturer and having Central Excise Registration No. AACB3205AEM012. The Respondent had imported raw material and the import duty payments such as CVD and SAD were credited to their Cenvat Credit Account. On export of these raw materials, the Respondent have filed two rebate claims under Rule 18 of Central Excise Rules, 2002, read with Notification No. 19/2004-CE(NT) dated 06.09.2004. Treating the claim as inadmissible in terms of Rule 18 of Central Excise Rules, 2002, read with Notification No. 19/2004-CE(NT) dated 06.09.2004 in as much as no excisable goods were manufactured and cleared as export on payment of duties of excise as defined in Notification No.19/2004-CEt NT) dated 06.09.2004, a Show Cause Notice dated 18.03.2016 was issued to the Respondent as to why the rebate claims should not be rejected. The Assistant Commissioner of Central Excise & Service Tax, Division-IV, Visakhapatnam vide Order-in-Original No. 491/2016(R) dated 19.10.2016 rejected the rebate claims on the inference that the goods exported were not manufactured in India and not subject to duty of Excise and Additional duty and Special Additional Duty levied under Section 3 of the Customs Tariff Act, 1975, are not duties specified in the Notification No.19/2004-CEt NT) dated 06.09.2004, hence the claim of rebate is ineligible. Aggrieved, the Respondent then filed appeal with the Commissioner of Central Tax & Customs (Appeals), Guntur. The Commissioner(Appeals) held that the Respondent is eligible for claim of rebate of CVD and set aside the Order-in-Original dated 19.10.2016

3. Being aggrieved, the Department then filed the current Revision Application on the following grounds:

(i) The Appellate Commissioner vide para 7 of the Order-in-Appeal has held that

"... there is no contradictory facts recorded by the adjudicating authority, holding that appellant availed irregular Cenvat Credit on ineligible documents, or that the availment of Cenvat is erroneous, which cannot be utilized for paying of duties...."

The issue in the instant case is whether CVD & SAD paid by the Respondent under Customs Tariff Act, 1975 is eligible for rebate in terms of Rule 18 of the Central Excise Rules 2002 read with Notification No. 19/2004-CE (NT) dated 06.09.2004 but not on the eligibility or otherwise of the Cenvat credit. The export of goods or the nature of the goods exported is not questionable. The duty element that is claimed as rebate is a matter of dispute. Hence, contradicting the other facts like the ones mentioned by the Commissioner(Appeals) does not arise.

(ii) The Adjudicating Authority had correctly held that, the goods in respect of which impugned rebate claims were filed were not produced or manufactured in India and instead they were imported from abroad. Therefore, the goods have not suffered any duty of excise as the same were not manufactured in India but imported into India. Further, the additional duty (CVD) and the special additional duty (SAD) leviable under Section 3 of the Customs Tariff Act, 1975 are not covered under Explanation-1 of the notification, as duties for the purpose of rebate.

(iii) In Para 7.1 of the Order-in-Appeal, the Commissioner (Appeals) has quoted 3 cases law and held that the issue of CVD paid while goods imported was held eligible for rebate under Notification No. 19/2004-CE (NT). These case laws are distinguishable and cannot be made applicable to the issue on hand for the following reasons:

(a) The first case i.e CCE Raigad vs Micro Inks Ltd[2011 (270) E.L.T. 360 (Bom)] is a case where an assessee engaged in manufacturing of printing ink purchased various inputs/capital goods from domestic suppliers and

manufacturers and subsequently exported the same on payment of duty by reversing the credit of duty availed on those inputs/capital goods. Whereas, the facts of the present case are different. In the instant case, the goods have been imported by paying the relevant customs duties and later exported a part of the same by reversing the CVD & SAD taken as credit; Equally more important is that the Rule 18 and the Notification No. 19/2004-CE (NT) speak in clear terms that rebate under the Notification No. 19/2004-CE (NT) is only of duty of excise paid on excisable goods manufactured and exported. The CVD and SAD levied under the Customs Tariff Act, 1975 are not duties specified in the Notification No. 19/2004-CE (NT). Hence, ignoring these fundamental aspects in the notification, rebate claimed, as in the subject case, cannot be granted giving a total go bye to all the conditions laid down in the governing notification.

(b) The second case i.e CCE, Delhi-I Vs Joint Secretary (Revisionary Authority) [2013 (287) E.L.T. 177 (Del)] - This case also cannot be made applicable to the case on hand as the said case law is on whether CVD paid included in the term "duty" in the Notification No. 21/2004-CE (NT) whereas our case is whether CVD paid included in the term "duty" in Notification No. 19/2004-CE. Though both the notifications govern rebate, the procedure and their applicability are different. Notification No. 19/2004-CE (NT) prescribes the procedure for rebate of duty for exports to countries other than Nepal and Bhutan. Whereas Notification. No. 21/2004-CE (NT) mandates rebate of duty on excisable goods used in manufacture/processing of export goods and its procedure.

(c) The third case law is IN RE Vinati Organics Ltd [2014 (311) E.L.T. 994(GOI)] – This case law is about input rebate of Additional Customs Duty (CVD) paid through DEPB scrip which has been held as inadmissible under Rule 18 of Central Excise Rules, 2002 read with Notification No. 21/2004-CE (NT) dated 06.09.2004. As the amount is

not paid through DEPB scrip in the case on hand, it cannot be made applicable to the instant case.

(iv) Moreover, the third case law supports the department's stand that, SAD is not eligible for_rebate claim. In the said case, the Revisionary Authority has held 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 held that SAD collected under Section 3(5) of the Customs Tariff Act is also not classified as a duty in list of duties provided in Explanation-1 of the Notification No. 21/2004-CE (NT) dated 06.09.2004. Hence such payment of SAD is not eligible for rebate claim. This being the position, SAD is also not classified as a duty in the list of duties provided in Explanation-1 of Notification No. 19/2004-CE (NT) and hence not eligible for rebate, as has rightly been held by the Adjudicating Authority.

(v) The Commissioner(Appeals) in para 7.2 of the Order-in-Appeals has interalia held under:

> *"...The intention of the Legislature in issuing the Notfn. No. 19/2004 CE (NT) dated 06.09.2004, was for the purpose of encouraging exports..... As there is no contradictory findings in this regard, I opine that the rebate as claimed by appellant by submitting substantial evidence as proof establishing they had exported the goods, and paid applicable duty, rebate provided under Notification No. 19/2004-CE (NT) cannot be denied. Therefore by respectfully following the above judicial pronouncements of various courts, I hold that the appellant is eligible for the benefit of rebate to the extent of CVD involved in the rebate.... "*

The intention of Legislature in issuing the Notification No. 19/2004-CE (NT) dated 06.09.2004 no doubt was for the purpose of encouraging exports but at the same time, it imposed certain restrictions/conditions which are to be mandatorily fulfilled by any assessee claiming the benefits of the said notification. In the instant case, the notification prescribed what is "duty" under different enactments that are made eligible to be claimed as rebate. Whereas, CVD & SAD which have been claimed as rebate in the case on

hand do not fit into the criteria of the term "duty" as per enactments listed under the Explanation 1 of the Notfn. No. 19/2004-CE (NT), dated 06.09.2004. Until and unless this condition is fulfilled rebate cannot be sanctioned which has rightly been denied by the Adjudicating Authority. Without taking into consideration this important aspect, the Commissioner(Appeals) has erred in extending the benefit to the Respondent.

(vi) The Commissioner (Appeals) vide para 8 of the Order-in-Appeals has held that *"... no discussion was made to construe whether the applicable duty was paid by reversing the credit of CVD or the credit of SAD amounts. When such distinction cannot be made and no findings were made to state the appellant utilized SAD credit Per paying duty, and since the CVD credit availed ..... substantial benefit of rebate cannot be denied...."*

The facts states that the Respondent had not only availed CVD credit of Rs. 3,58,40,617/- but has also availed the credit of SAD of Rs.1,34,40,572/-. In the instant case when the entitlement of CVD & SAD as "duty' itself is an issue for the purpose of rebate, the question of whether applicable duty was paid by reversing the credit of CVD or the credit of SAD amounts does not arise, as both these duties are not eligible as duties for claiming rebate in view of the reasons mentioned above. Hence under Notification No. 19/2004-CE (NT) issued under Rule 18, rebate of duty paid is allowed only on such export of excisable goods which are subject to duty of excise under Section 3 of the Central Excise Act, 1944. This is the reason the "duty" specified under the Notification No. 19/2004-CE (NT) means interalia only duty of excise collected under the Central Excise Act, 1944, but does not include the Additional duty leviable under Customs Tariff Act, 1975. Hence the impugned goods re-exported viz. Mild steel Billets originally imported and subject to the CVD and SAD under the Customs Tariff Act, 1975 cannot be considered as excisable goods within the meaning of the Notification No. 19/2004-CE (NT) for grant of rebate.

(vii) In this Connection it is pertinent to mention that, the case cited by the Adjudicating Authority viz. Intas Pharma Ltd vs. Union of India [2016 (332)

ELT. 680 (Guj)] is very much relevant to the issue at hand inasmuch as, it has dealt with export of rebate claimed under Notification No. 19/2004-CE (NT) dated 06.09.2004 and the Hon'ble Gujarat High Court has categorically held that, CVD at the time of import of goods was not excise duty and that the benefit of Notification No. 19/2004-CE (NT) is available only to manufacturers/exporters registered under Central Excise Rules and Merchant Exporters who procure excisable goods directly from the factory or warehouse. In the light of the above, it appears that the order passed by the Commissioner (Appeals) is not legal and proper.

(viii) Commissioner (Appeals) is a creature of the statute and has to function within the legal boundaries mandated on him under the Central Excise & Customs Acts, as held in the case of Assistant Commissioner of Customs & Central Excise Vs Acalmar Oils & Fats Ltd [2017 (357) E.L.T. 1084 (Tri. Hyd)]. In view of the above, Commissioner (Appeals) could not have gone against the statutory provisions.

(ix) The Applicant prayed to stay and set aside the Order-in-Appeal dated 13.04.2018

4. A personal hearing in the case was held on, 20.08.2018 which was attended by N Srujan Kumar, Deputy Commissioner, Visakhapatnam south Division on behalf of the Applicant. No one from the Respondent side attended the hearing. The Applicant submitted written submission and reiterated the submission made in the revision application and pleaded that the Order-in-Appeals be set aside and Revision Application may be allowed. However, there was a change in the Revisionary Authority, hence a final hearing was granted on 09.12.2019. However no one attended the hearing.

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

6. On perusal of records, Government observes that the issue in the instant case is whether CVD & SAD paid by the Respondent under Customs Tariff Act,

1975 is eligible for rebate in terms of Rule 18 of the Central Excise Rules 2002 read with Notification No. 19/2004-CE (NT) dated 06.09.2004

7. Government notes that the issue raised by the Department in the current Revision Application has already been decided by this authority in the case of Micro Inks vide GOI Revision Order No. 873/10-CX dated 04.06.2010. Against this order, the department had then filed Writ petition No. 2195 of 2010 before the Hon'ble Bombay High Court, who decided the matter vide Order dated 23.03.2011 [2011 (270) ELT 360 (Bom)] while rejecting the petition filed by the Department on the similar issue, at paras 17 & 18 observed as under :

> ***"17.*** *The contention of the revenue that the payment of duty by reversing the credit does not amount to payment of duty for allowing rebate is also without any merit because, firstly there is nothing on record to suggest that the amount paid on clearance of inputs/capital goods for export as duty under Rule 3(4) & 3(5) of 2002 Rules cannot be considered as payment of duty for granting rebate under the Cenvat Credit Rules. If duty is paid by reversing the credit it does [not] (sic) loose the character of duty and therefore if rebate is otherwise allowable, the same cannot be denied on the ground that the duty is paid by reversing the credit. Secondly, the Central Government by its Circular No. 283/1996, dated 31st December, 1996 has held that amount paid under Rule 57F(1)(ii) of Central Excise Rules, 1944 (which is analogous to the Cenvat Credit Rules, 2002/Cenvat Credit Rules, 2004) on export of inputs/capital goods by debiting RG 23A part II would be eligible for rebate. In these circumstances denial of rebate on the ground that the duty has been paid by reversing the credit cannot be sustained.*
>
> ***18.*** *The argument of the Revenue that identity of the exported inputs/capital goods could not be correlated with the inputs/capital goods brought in to the factory is also without any merit because, in the present case the goods were exported under ARE 1 form and the same were duly certified by the Customs Authorities. The certificate under the ARE 1 form is issued with a view to facilitate grant of rebate by establishing identity of the duty paid inputs/capital goods with the inputs/capital goods which are exported."*

8. Government further notes that Department had filed Special Leave Petition with the Supreme Court against the above judgment dated 23.03.2011 of the Hon'ble High Court vide Writ petition 2195 of 2010 in the case of CCE Vs Micro Inks Ltd. The Hon'ble Supreme Court has dismissed the Special Leave to Appeal (Civil) No. 5159/2012 filed by the Department vide order dated 25.11.2013 on the ground that there was no reason to entertain this Special Leave Petition. The Hon'ble Supreme Court Order dated 25.11.2013 was accepted by the

Commissioner, Central Excise Raigad Commissionerate on 07.01.2014 and hence the issue had attained finality and thus the case/ issue is Res-Judicata.

9. In view of the above, Government finds no legal infirmity in the impugned Order-in-Appeal No. VIZ-EXCUS-002-APP-08-18-19 dated 13.04.2018 passed by the Commissioner of Central Tax & Customs (Appeals), Guntur and hence upholds the same.

10. The Revision Application is therefore rejected being devoid of merits.

11. So ordered.

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

ORDER No. 530/2020-CX (WZ)/ASRA/Mumbai DATED 06/07/2020.

To,
The Principal Commissioner of Central Tax,
Visakhapatnam Central GST Commissionerate,
GST Bhawan,
Port Area,
Visakhapatnam 530 035.

Copy to:

1. M/s. Beekay Structural Steels (TMT Bar Division), Plot No. 68B & 69B, Industrial Park, APIIC, Bonangi, Parawada, Visakhapatnam-531 021
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Spare Copy.

ATTESTED

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