REGISTERED
SPEED POST

F.No. 198/214-219/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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NEW DELHI-110 066

Date of Issue 17/1/13

Order No. 55-60/2013-CX dated 17-01-01.2013 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 Act, 1944 against orders-in-appeal No. 67-72/2010 (V-I) CE dated 19.11.2010 passed by Commissioner of Central Excise, Customs & Service Tax (Appeals), Visakhapatnam.
Applicant	:	Commissioner of Central Excise & Customs, Visakhapatnam-I
Respondent	:	M/s Essar Steel Ltd., Visakhapatnam.

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ORDER

These revision applications are filed by the Commissioner of Central Excise Customs & Service Tax Visakhapatnam-I against the orders-in-appeal 67-72/2010 (V-I) CE dated 19.11.2010 passed by Commissioner of Central Excise, Customs & Service Tax (Appeals), Visakhapatnam, with respect to orders-in-original passed by the Assistant Commissioner of Central Excise, Division-III Visakhapatnam-I Commissionerate.

2. Brief facts of the cases are that the respondent M/s Essar Steels Ltd. Visakhapatnam had filed various rebate claims of Central Excise duty in respect of "Iron Ore Pellets (IOP)" cleared by them to their SEZ unit at Hazira, Gujarat, under claim for rebate of duty in terms of Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 of the Central Excise Rules, 2002. A verification reports was sought from the jurisdictional Range officer with regard to the claim filed. It was reported that the particulars mentioned in the claim were correct, however the respondents had filed a writ petition in Hon'ble High Court of Gujarat questioning the levy of export duty on the supplier made by them to their SEZ unit at Hazira. It was opined that the issue regarding levy of export duty on the goods supplied to their Hazira unit had a direct nexus with the payment of Central Excise duty on the goods under claim for rebate in terms of Rule 18 of the Central Excise Rules, 2002. It was noticed that the respondents had filed a special Civil Application (SCA) No. 9656 of 2008 with SCA No. 9713 of 2008 before the Hon'ble High Court of Gujarat challenging the levy of export duty on the goods cleared by them to their SEZ Unit and hence they were not entitled for the rebate of Central Excise duty paid by them on these goods. On these findings, a Show Cause Notice dated 23.12.2008 was issued to the respondents proposing to reject the rebate claim filed by them. The respondents in their reply strongly contended that the Show Cause Notice was issued on a blatantly incorrect and erroneous reading of interim order of Hon'ble High Court and the allegations in the notice have no real legs to stand on. The reason for approaching the Hon'ble High Court was that the SEZ Act, 2005 does not contain any charging provision for DTA to SEZ Unit could not be construed to be export of goods from India to a place outside India. It was further contended that they

had never said in of their pleadings that such supplies will not be construed to be exports for the purpose of Central Excise Rules 2002, that their submissions made before Hon'ble High Court were incorrectly extracted in the Notices, that once it is accepted that there was no contradiction between their stand in the High Court and their for rebate, their entitlement for rebate becomes indefeasible for the reason that the Notices does not dispute their entitlement for rebate, that if any view even if the Hon'ble Gujarat High Court is to finally decide the writ petition either in their favour still the same will not have any bearing on the issue covered by the noticies and that being so, the interim order of the Hon'ble Gujarat High Court has nothing to do with rebate claim which is the subject matter of the Show Cause Notices, that it is clearly stated position of the Government that supplies from DTA to SEZ are entitled for export benefits, including rebate of excise duty, that what is of particular significance in the context of their pleadings before the High Court is that the Government has not conceded or accepted these pleading and has in fact opposed it tooth and nail by contending that the movement of goods from DTA to SEZ does amount to export and this position is clearly spelt out in the letter dated 23.10.2008 of the Assistant Commissioner, that since the department has taken a clear stand before the Court that supplies from DTA to SEZ are exports, it cannot take a diametrically opposite stand in the present proceedings solely for the purpose of rejecting their claim for rebate. They further relied on Departmental instruction No. 6/2006 dated 03.08.2006 and Circular No. 29/2006-Cus. dated 27.12.2006 in their support along with certain case laws. They also produced copies of order dated 04.11.2009 passed by High Court of Gujarat and Order-in-Original dated 26.02.2009 passed by Deputy Commissioner of Central Excise, Division-IV, Surat-I Commissionerate and clarified that since the goods were cleared to their own SEZ Unit at Hazira, doctrine of unjust enrichment is not applicable in this instant case. However, the rebate claim was subsequently sanctioned by the adjudicating authority vide various Orders-in-Original. The sanction of refund claim was delayed. The respondents filed a representation claiming interest on the said rebate sanctioned belatedly. Upon this the adjudicating authority mainly rebutted the claim of interest made by respondents on the grounds that since the SCA filed by the

respondents was pending before the Hon'ble High Court of Gujarat, the matter concerning the levy of export duty on the goods cleared by the respondents to their SEZ Unit at Hazira as well as the eligibility of the respondents to claim rebate of the Central Excise duty paid by them on such clearances were both sub-judice and hence no order could be passed on he rebate claim till the disposal of SCA, that though the SCA was decided in their favour, on a request made by the Senior Standing Counsel to Government of India, the Hon'ble High Court has suspended the operation of the said order for a period of four weeks from the date of pronouncement i.e. upto 04.12.2009, that on receipt of the copy of the order dated 04.12.2009 from the applicant on 12.11.2009, the rebate was sanctioned to the respondents, that the issue is still sub-judice as Department had contested the decision of High Court in the Hon'ble Supreme Court and hence as the issue is still pending, the claim for interest is still premature, that in the instant case, the SCA filed by the respondents was pending before the Hon'ble High Court of Gujarat till its final disposal in favour of the applicant w.e.f. 04.12.2009 and in view of this position, the rebate claim was required to be sanctioned on or before expiry of three months there from i.e. from 04.03.2010 and the same was sanctioned much earlier, on 22.12.2009 and hence the rebate amount is deemed to have been sanctioned and paid to the applicant well within the time limit of three months stipulated under Section 11B of the Central Excise Rules 1944, that in view of the above position, the purported delay in the sanction of the rebate amount is not attributable to the department and question of payment of interest on the rebate amount sanctioned does not arise and is without any basis. On these grounds, the impugned order was passed rejecting the application filed by the applicant claiming interest.

3. Being aggrieved, the said Orders-in-Original respondent filed appeal before Commissioner (Appeals) who set aside the impugned Orders-in-Original and allowed the appeal of the respondents with consequential relief.

4. Being aggrieved by the impugned orders-in-appeal, the applicant department has filed these revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government mainly on the following common grounds:-

4.1 The Commissioner (Appeals) does not appear to have considered the facts and circumstances of the instant case in their right perspective even though the same were clearly brought out by the Adjudicating Authority in the Order-in-Original. The Commissioner (Appeals) appears to have erred in concluding that there was no connection between the outcome of the decision of the Hon'ble High Court of Gujarat and the refund claim filed by the assesses. If this had actually been true, the Department had no other bottle-necks for keeping the rebate claim filed by the assesses pending indefinitely and would have certainly disposed of the rebate claim within the stipulated period of three months from the date of receipt of the same.

4.2 As seen from the facts of the case, it is evident that the claim for interest filed by the assesses under the provisions of section 11BB of the Central Excise Act, 1944 was sought to be rejected mainly on the ground that the sanction of the rebate amount to the assesses was delayed due to a case of non-payment of Customs Duty on the clearance of goods to SEZ pending disposal at the Hon'ble High Court of Gujarat which originated due to the contradictory stands adopted by the assesses regarding the definition of "export", i.e. on one hand challenging the levy of export duty on the goods cleared to their SEZ unit in Hazira under Section 12 of the Customs Act, 1962 by filing a special Civil Application in the Gujarat High Court, and on the other hand, claiming rebate of the Central Excise duty paid on the same goods cleared to SEZ by deeming the same as "export". Since the case pending in the Hon'ble High Court of Gujarat had a direct nexus with the rebate claim filed by the assesses, the rebate claim could not be disposed of till the Special Civil Application filed by the assesses was decided by the Hon'ble High Court of Gujarat. As soon as the judgment of the Hon'ble Court was received, the Adjudcating Authority immediately took up the adjudication of the Show Cause Notice issued to the assesses in respect of the said rebate claim filed by them.

4.3 The Commissioner (Appeals) appears to have missed the vital point in the instant case that the Show Cause Notice was issued to the assesses questioning only the legality of the rebate claim in the wake of the Special Civil Application filed by them before the Hon'ble High Court of Gajarat. At that juncture, the entitlement of the assesses to the rebate claimed by them was not examined since the legality of the rebate claim itself was in doubt. As already mentioned above, the assesses themselves had disputed the levy of Customs duty on the clearances to their SEZ unit at Hazira claiming that the same did not constitute "export" while simultaneously claiming rebate of the Central Excise duty paid by them on the same clearances claiming that the same constituted "export", and had thus adopted two mutually contradictory stands with regard to the definition of "export" in relation to the clearances to their SEZ unit at Hazira. It was only after the settlement of the said dispute in favour of the assesses by the Hon'ble High Court of Gujarat that the Adjudicating Authority examined the rebate claim on merits, found that the assesses were entitled to the rebate claimed by them and accordingly sanctioned the rebate claim filed by the assesses. Since a Show Cause Notice had already been issued to the assesses questioning the legality of the rebate claim filed by them and the matter relating to levy of Customs duty on the goods cleared by the assesses to their SEZ unit at Hazira had been stayed by the Hon'ble High Court of Gujarat, there was no way of which the Adjudicating Authority could have disposed of the rebate claim filed by the assesses while the Special Civil Application filed by them was still pending before the Hon'ble High Court of Gujarat. Thus, the time-lag between the date of issuance of the Show Cause Notice and the date of the passing of the adjudication order was attributable solely to the Special Civil Application filed by the assesses before the Hon'ble High Court of Gujarat and not to any administrative reasons for delay on the part of the Department, as had been clearly brought out by the Adjudicating Authority in the Order-in-Original rejecting the claim for interest on rebate filed by the assesses. In the said Order-in-Appeal, the Commissioner (Appeals) has not given specific justifiable reasons for not accepting the findings of the Adjudicating Authority in this regard.

4.4 Thus from the above, it is an indisputable fact that the processing of the rebate claim was not delayed by the department due to any administrative reasons and in reality the rebate claim could not be disposed of by the Department in the normal course within the stipulated time-limit of three months only because of the Special Civil Application filed by the assesses in the Hon'ble High Court of Gujarat. Had it not been so, nothing would have prevented the Adjudicating Authority in sanctioning the rebate claim filed by the assesses much earlier, within the stipulated period of three months from the date of filing of the rebate claim. Such being the case, the Commissioner (Appeals) has clearly erred in concluding that there was a delay on the part of the Department in disposing the rebate claim filed by the assesses as discussed above. In the said Order-in-Appeal, the Commissioner (Appeals) has not made any categorical observation that the Department had camouflaged the delay in processing the rebate claim filed by the assesses only for the purpose of avoiding payment of interest. The observation made by the Commissioner (Appeals) in this regard that the before the Hon'ble High Court of Gujarat had no nexus with the rebate claim filed by the assesses, is factually incorrect as the same had been clearly brought out by the Adjudicating Authority in his Order-in-Original as discussed above. It is all along the department's view that clearances to SEZ qualify as exports and are therefore eligible for rebate so also they are liable for payment of export duty. These two are inter-related issues. One cannot be viewed in isolation with that of the other. It is on this ground only the department has contested the issue before the Hon'ble High Court, and Visakhapatnam-I Commissionerate has also impleaded itself in the case pending with the Hon'ble Court of Gujarat between the Commissioner, Surat Vs. Essar Steels Ltd. It was only this ground that the issue was Further contested even before the Supreme Court. Had the Hon'ble High Court of Gujarat ruled against the assesses, the Department would have sanctioned the eligible rebate amount to the assesses in cash and appropriated the same towards the payment of Customs duty as applicable on the final products. This was the clear nexus between the impugned rebate claim filed by the assesses with the Central Excise Department and the Special Civil Application filed by them before the Hon'ble High Court of Gujarat and this put the restraint on the Adjudicating Authority

not to dispose of the rebate claim till the receipt of the order from the Hon'ble High Court of Gujarat. In the said Orders-in-Appeal, the Commissioner (Appeals) has not looked into this aspect at all and merely held that there was no connection between the rebate claim and the Special Civil Application filed by the assesses before the Hon'ble High Court of Gujarat, which in the light of the above does not appear to be proper. When the decision came in favour of the assesses, personal hearing was immediately held by the Assistant Commissioner and the impugned Orders-in-Original were passed by the Assistant Commissioner sanctioning the said rebate to the assesses. In the light of the above, the rebate claim filed by the assesses is deemed to have been sanctioned to them within the stipulated time –limit of three months from the date of receipt of the order from the Hon'ble High Court of Gujarat. Thus, it is to be construed that there was no delay on the part of the department in processing and sanctioning the rebate claim filed by the assesses. In view thereof, the question of payment of interest on the purported delay in sanction of the rebate claim to the assesses did not appear to be warranted and accordingly the claim filed by the assesses for payment of interest on the rebate was rightly rejected by the Adjudicating Authority vide the said Order-in-Original. Therefore, the impugned Orders-in-Appeal passed by the Commissioner (Appeals) ordering the payment of interest on the purported delay in sanction of the rebate claimed by the assesses by allowing the appeal filed by them against the said Orders-in-Original does not appear to be legal and proper and merits to be appealed against.

5. Show Cause Notices were issued to the Respondent under section 35EE of Central Excise Act, 1944 to file their counter reply. No such counter replies are received from the respondent.

6. Personal hearing scheduled in this case on 13.12.2012 was attended by S/Sh Vishal Agrawal advocate and S. Gurumurthy, GMIDT on behalf of Respondents who submitted that the Orders-in-Appeal being legal and proper may be upheld. The

applicant Commissioner vide his letter dated 09.10.2012 submitted that the application filed by them department are self explanatory hence no further comments are offend from their side.

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

8. On perusal of records Government observes that in the instant case, rebate claims were sanctioned to the respondents belatedly but no finding on interest aspect was given by the adjudicating authority in the impugned Orders-in-Original. Subsequently the respondents through representation claimed interest on delayed rebate. The adjudicating authority observed that a Special Civil Appeal was filed by the respondents on the issue of levy export duty on the goods cleared by the respondents to their SEZ Unit and the issue regarding levy of export duty on such clearances and eligibility of the respondents to claim rebate of the Central Excise duty paid by them on such clearances were sub-judice and pending before Hon'ble Gujarat High Court. He further held that the claim for interest was pre-mature till its disposal in favour of the respondents w.e.f. 04.12.2009 hence rebate claim was required to be sanctioned on or before expiry of three months there from and the same was sanctioned much earlier on 22.12.2009 i.e. within the time limit of three months form the date of receipt of the order of Hon'ble Court in terms of Section 11BB of Central Excise Act, 1944. He held that the purported delay in the sanction of the said rebate amount was not attributable to department and question of payment of interest on the rebate amount sanctioned did not arise. He accordingly rejected their interest claim. In appeal, Commissioner (Appeals) allowed their interest claim in terms of section 11BB by observing that the interest under Section 11B of the Central Excise Act is payable after expiry of three months from the date of filing of the original refund/rebate claim; Now the applicant department has filed revision application on the grounds stated at para (4) above.

9. Government notes that on delayed payment of refund/rebate claim interest is payable after the expiry of three months of the date of receipt of application for rebate in the Divisional offices in terms of Section 11BB of Central Excise Act, 1944. This very issue is already decided by Hon'ble Supreme Court in the case of M/s Ranbaxy Laboratories Ltd. vs. UOI reported as 2011-TIOL-105-SC-EX. Ho'ble Supreme Court has categorically held as under :

"9. It is manifest from the afore-extracted provisions that Section 11BB of the Act comes into play only after an order for refund has been made under Section 11B of the Act. Section 11BB of the Act lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11B of the Act, then the applicant shall be paid interest at such rate, as may be fixed by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below proviso to Section 11BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central excise or Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this Section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under sub-section (2) of Section 11B of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11BB of the Act. Manifestly, interest under Section 11BB of the Act becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11BB that can be arrived at is that interest under the said Section becomes payable on the expiry of a period of three months from the date of receipt of the application under Sub-section (1)of Section 11B of the Act and that the said Explanation does not have any bearing or connection with the date from which interest under Section 11BB of the Act becomes payable.

10. It is a well settled proposition of law that a fiscal legislation has to be construed strictly and one has to look merely at what is said in the relevant provision, there is nothing to be read in; nothing to be implied and there is no room for any intendment. (See: Cape Brandy Syndicate Vs. Inland Revenue Commissioners [1921] 1 K.B. 64 and Ajmera Housing Corporation & Anr. Vs. Commissioner of Income Tax (2010) 8 SCC 739 = (2010-TIOL-66-SC-IT).

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15. In view of the above analysis, our answer to the question formulated in para (1) supra is that the liability of the revenue to pay interest under Section 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund under Section 11B(1) of the Act and not on the expiry of the said period from the date on which order of refund is made."

9.1 In another case of M/s Jindal Drugs, Government vide its GOI Order No. 247/2011-CX dated 17.03.11 passed in revision application No. 198/184/08-RA-CX filed by Commissioner Central Excise, Raigad against order-in-appeal No. SRK/455-460/RGD-

08 dated 24.07.08 passed by Commissioner of Central Excise (Appeals) Mumbai Zone-II, had upheld the impugned orders-in-appeal and held that in terms of Section 11BB interest is payable after expiry of three months from the date of receipt of refund / rebate application. Department contested the said GOI Order dated 17.03.11 by filing WP No. 9100/2011 in Bombay High Court who in it's judgment dated 30.01.2012 has upheld the GOI Order No. 247/2011-CX dated 17.03.11. The observations of Hon'ble High Court in para 2,3 of said judgment are reproduced below:

"2. Counsel appearing on behalf of the Petitioner submitted that the entitlement of the Respondent to a rebate was crystallized only on 6 December 2007 when the notice to show cause was dropped by the Commissioner of Central Excise. The rebate claims were sanctioned within a period of three months thereafter by the Assistant Commissioner (Rebate) and hence, no interest was payable. On the other hand, it has been urged on behalf of the respondent that the law has been settled by the judgment of the Supreme Court in Ranbaxy Laboratories Ltd. vs. Union of India and consequently no interference in the exercise of the jurisdiction under Article 226 of the Constitution is warranted.

3. The Supreme Court in its decision, in Ranbaxy (supra) considered the provisions of Section 11B and 11BB of the Central Excise Act, 1944 and held that Section 11BB lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11B, then the applicant shall be entitled to interest at such rate as may be fixed by the Central Government. The Supreme Court observed that the explanation to Section 11BB introduces a deeming fiction to the effect that where the order for refund is not made by the Assistant Commissioner but by an appellate authority or the Court, then for the purposes of the Section the order passed by the appellate authority or the Court shall be deemed to be an order under sub-Section (2) of Section 11B. Having observed as aforesaid the Supreme Court also held that the explanation does not effect a postponement of the date from which interest becomes payable under Section 11BB and interest under the provision would become payable if on expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Hence, it is now a

settled position in law that the liability of the Revenue to pay interest under Section 11BB commences from the expiry of three months from the date of receipt of the application for refund under Section 11B(1) and not on the expiry of the said period from the date on which an order for refund is made. The submission which has been urged on behalf of the revenue is directly in the teeth of the law as laid down by the Supreme Court. The order passed by the Commissioner (Appeals) granting interest and as confirmed by the revisional authority does not hence fall for interference under Article 226 of the Constitution. The Petition is accordingly dismissed."

10. In view of above judgement, the contentions raised by department are not legally tenable as the ratio of said judgements is squarely applicable to this case. Moreover Commissioner (Appeals) has held in his order that the party had contested before Hon'ble High Court, the only issue of levy of Customs duty under the Customs Act 1962 on the clearances made from DTA Unit to SEZ Unit and therefore department had wrongly concluded that matter with regard to claim of rebate under Rule 18 of the Central Excise Rules, 1944 had alongwith the main issue of levy of Customs duty were both subjudice and hence no order could be passed till the disposal of SCA by Hon'ble High Court. As such Government observes that Commissioner (Appeals) has rightly held that rebate claims were sanctioned belatedly and interest is payable under section 11BB from the date of expiry of three months from the date of filing said claims. Government finds no infirmity in the orders of Commissioner (Appeals) and therefore upholds the same.

11. Revision Applications are thus rejected being devoid of merit.

12. So, ordered.

(D.P.Singh)
Joint Secretary (Revision Application)

The Commissioner of Central Excise & Customs,
Visakhapatnam-I Commissionerate,
C.R. Building, Port Area,
Visakhapatnam – 5300 035.

M.J.

Attested

K. RAMESHWARAM
विशेष कार्य अधि./OSD-II (RA)
वित्त मंत्रालय, वित्तीय विभाग
Ministry of Finance, Department of Revenue

G.O.I. Order No. 55-60 /2013-Cx dated 17/01/2013

Copy to:

1. M/s Essar Steel Ltd., Near Flyover, Scindia Road, Visakhapattanam – 530004.

2. Commissioner of Customs, Central Excise & ServiceTax, (Appeals) , 4th Floor, Customs House, Port Area, Vishaka patnam-35.

3. The Assistant Commissioner of Central Excise, Division –III, Visakhapattnama-I, 4th Floor, Srinivassa Plaza, HIG-244, Sector IV, MVP Colony, Visakhapatnam- 531173.

4. Shri Vishal Agrawal Advocate, M/s TLC Legal, Advocates, 19th Floor, Nirmal, Nariman Point, Mumbai 400 021.

5. Guard File.

6. PS to JS (RA)

7. Spare Copy