

REGISTERED
SPEED POST



F.No. 198/346, 447/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue... 5/6/13

ORDER NO. 554-555/13-Cx DATED 05.06.2013 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 the order-in-appeal No. YDB/60/RGD/2011 dated 31.1.11 passed by Commissioner of Central Excise (Appeals), Mumbai-II

Applicant : Commissioner of Central Excise, Raigad

Respondent : (i) M/s Gharda Chemical Ltd., Bandra, Mumbai
(ii) M/s Nephtunus Power Plants Services Pvt. Ltd., Navi Mumbai

ORDER

These revision applications are filed by the applicant Commissioner of Central Excise, Raigad, against the orders-in-appeal passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-II, Mumbai with respect to orders-in-original passed by Assistant Commissioner of Central Excise Raigad as detailed below:.

Sl. No.	R.A.No.	Name of Respondent	Order-in-Appeal No. & date	O-I-O No. & date
1	F.No.198/346/11-RA	M/s Gharda Chemical Ltd., Bhadra, Mumbai	YDB/60/RGD/2011 dt. 31.1.11	125/09-10/AC (Reb) Raigad dt. 16.4.10
2	F.No.198/447/11-RA	M/s Neptunus Power Plants Services Pvt. Ltd., Navi Mumbai	YDB/148/RGD/2011 dt. 21.2.11	79/10-11/AC(R), Raigad, dt.13.4.10

2. In these cases, Assistant Commissioner (Rebate), Central Excise, Raigad, sanctioned the said claim vide order-in-original. The Department preferred appeals against the said orders-in-original on the grounds that as per the Notification No.4/2009-CE dated 24.2.2009, the effective rate of Central Excise duty was reduced from 10% to 8%. It has been observed that the manufacturer had cleared the exported goods by paying the central excise duty @10% instead of 8% and rebate had been sanctioned as claimed. However, they were liable to pay central excise duty @8% only. Commissioner (Appeals) rejected the appeals filed by the department.

3. Being aggrieved by the impugned order-in-appeal, the applicant Commissioner filed these revision applications under Section 35EE of Central Excise Act, 1944 before Central Government on the following grounds:

3.1 The Commissioner (Appeals) has erred in its findings inasmuch as:

(i) The Commissioner (Appeal) accepted the ignorance on part of the assessee and jurisdictional excise officer.

(ii) The money extra paid on account of reduction of rate of duty does not to be treated as duty but the "amount" and it is required to be transferred to Consumer Welfare Fund under Section 11D of the Central Excise Act, 1944.

(iii) The Commissioner (Appeal) overlooked the Apex Court judgement which was cited by Commissioner (Appeal) himself.

(iv) Commissioner (Appeals) order is per incuriam as it does not consider the provisions of Section 5A (1A) of the Central Excise Act which stipulates that in case of unconditional exemption, no excess duty is payable.

3.2 The ignorance of law is not an excuse to pay the duty at higher rate. The goods are self-assessed by the assessee and the assessee who are in Excise for so many years; it is frivolous to give such an excuse. The assessee should be aware of the changes / modifications made in law & rate of duty etc. and implement them immediately as per the requirement.

3.3 In the case of Rakesh Kanungo Vs Commissioner C Ex. Mumbai - {2004 (178) ELT 1061 (Tri. Mum)} wherein inter alia it was held that "Appeal to Appellate Tribunal - Restoration of appeal - Ignorance of law is no excuse - Appeal withdrawn for filing application before Settlement Commission -....."

3.4 In the case of Worldwide Diamond Mfgs vs. CCE Vishakhapatnam – {2010 (249) ELT 402(Tri. Bang)} it was held that "Demand - DTA clearances of EOU - Nonpayment of 50% of Additional duty of Customs leviable under Section 12 of Customs Act, 1962 in terms of Notification No.2/95-C.E. - Assessee's plea that they were not aware of their liability rejected as ignorance of law was no excuse - It was more so as they had not contested their liability to duty - Section 11 A of Central Excise Act, 1944 -"

3.5 The provisions of para - 3(b) of the Notification No- 19/2004 (NT) dated 06/09/2004, issued under Rule 18 of the Central Excise Rules 2002, clearly spelled out that if the proper officer (i.e. AC/DC of Central Excise having jurisdiction over the factory or Maritime Commissioner) is satisfied himself that the claim is in order then he shall sanction the rebate either in whole or part. This means that he is empowered to look into the correctness of the rebate claim.

4. Show cause notice under Section 35EE of the Central Excise Act, 1944 were issued to the respondents. However, no counter reply have been received till date.

5. Personal hearing in the case was fixed on 5.3.2013. Shri Subash Chandra Das, Officer (Marketing) appeared for hearing on behalf of the respondent No.1 and Shri Neerav Mainkar, Advocate appeared for hearing for respondent No.2. Respondents stated that orders-in-appeal being legal and proper, may be upheld. Nobody appeared on behalf of the applicant department.

6. Government has carefully gone through the relevant case records and perused the impugned orders-in-original and orders-in-appeal.

7. Government observes that the respondents rebate claims were initially sanctioned by the original authority. The applicant department filed appeals before Commissioner (Appeals) on the ground that the applicant cleared the exported goods by payment of 10% duty instead of 8% duty payable and received rebate claim of duty paid @10%. As such, excess rebate claims were sanctioned by the original authority to the extent of excess paid duty. Commissioner (Appeals) rejected department's appeals. Now, the applicant department has filed these revision applications on grounds mentioned in para (3) above.

8. The appellate authority has held that department has not reviewed the assessment done by excise authority at the time of clearance of goods on the basis of which rebate claims were sanctioned. It is not legally permissible for the department to

initiate proceedings under section 11A of Central Excise Act, 1944 without reviewing the original assessment. In this regard it is relevant to rely on the judgment of Hon'ble High Court of Bombay in the case of M/s. Indian Dye Stuff Industries Ltd. Vs. UOI 2003 (161) ELT 12 (Bom.). In the said judgment it is held that section 11A of Central Excise Act 1944 being an independent substantive provision, the appellate proceedings are not required to be initiated before issuing Show Cause Notice under section 11A if there are grounds existing such as short levy, short recovery or erroneous refund etc. Section 11A is an independent substantive provision and it is a complete code in itself for realisation of excise duty erroneously refunded. There are no pre conditions attached for issuance of notice under section 11A for recovery of amount erroneously refunded. This decision of Bombay High Court has been upheld by Hon'ble Supreme Court reported as 2004 (163) ELT A 56 (SC) where Supreme Court has held that recovery of duty erroneously refunded is valid in law under section 11A of Central Excise Act and there is no need of first filing the appeal against the assessment on the basis of which refund was erroneously sanctioned. Following case law also laid down the same principles.

8.1 In the case of Union of India Vs. Jain Shudh Vanaspati Ltd. [1996 (86) ELT 460 (SC), the apex court has held in paras 5, 6 & 7 as under:

"5. It is patent that a Show Cause Notice under the provisions of section 28 for payment of Customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance under section 47 of the concerned goods. Further, section 28 provides time limits for the issuance of the Show Cause Notice there under commencing from the "relevant date"; "relevant date" is defined by sub-section (3) of section 28 for the purpose of section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; which is to say that the date upon which the permissible period begins to run is the date of the order under section 47. The High Court was, therefore, in error in coming to the conclusion that no Show Cause Notice under section 28 could have been issued until and unless the order under section 47 had been first revised under section 130. "

8.2 While referring to the above mentioned case law in the case of Collector of Central Excise, Bhubaneshwar vs. Re-Rolling Mills [1997 (94) ELT 8 (SC)], the Hon'ble Supreme Court has held as under:

"The learned counsel for the parties do not dispute that this appeal is covered by the decision of this court in Union of India & Ors. V. Jain Shudh Vanaspati Ltd. & Anr.- 1996 (86) ELT 460 (SC)= (1996) 10 SCC 520. In that case the court was dealing with section 28 of the Customs Act which is in pari materia with section 11A of the Central Excise Act. The said decision is thus applicable to the present case also. For the reasons given in the said judgment, the appeal is dismissed with no order as to costs."

8.3 In I T I Ltd. Vs. Commissioner of Customs, ACC, Mumbai [2008 (228) ELT. 78 (Tri. Mumbai)] it has been held:

"11. We hold that the issue of Show Cause Notice under section 28 of the Customs Act, 1962 for recovery of the erroneously granted refund is sufficient to meet the requirement of law. Following the ratio of the Hon'ble Supreme Court judgments in the case of Re-Rolling Mills and Jain Shudh Vanaspati cited supra and the Tribunal's order in the case of Roofit Industries Ltd., we hold that the proceedings initiated under section 28 of the Customs Act, 1962, are not vitiated on the ground of non-filing of appeals by the Revenue against the orders No. 72 dated 01-03-1994 and 99 dated 11-03-1994 passed by the Assistant Commissioner. Therefore, the demand of erroneous refunds under section 28 of the Customs Act, 1962 is sustainable."

8.4 In Roofit Industries Ltd. Vs. Commissioner of Central Excise, Chennai- 2005 (191) ELT. 635 (tri. Chennai) it has been held as follows:

"4..... We follow this precedent and apply the ratio of the Supreme Court's decision in Jain Shudh Vanaspati (Supra) to the facts of the instant case and, accordingly, reject the appellants' contention that a Show Cause Notice demanding erroneously refunded duty could not be issued under section 11A without revision/review of the refund order. No other issue has arisen from the submissions made in this case. "

8.5 In view of the principles laid down in above said judgments, Government holds that the erroneous refund/ rebate sanctioned under an order can be recovered by invoking provisions of section 11A of Central Excise Act 1944, without taking recourse to provisions of section 35 E ibid and filing appeal against the assessment on the basis of which refund was initially sanctioned. Hence, Government finds that appellate authority erred in holding that since the assessment at the time of export was not challenged, the rebate claim cannot be reduced with reference to the time of assessment.

9. Government further notes that it is undisputed position that notification changing effective rate of duty takes effect from the date of publication of notification in official Gazette as held in Hon'ble Supreme Court decision in the case of UOI Vs. Ganesh Das Bhajraj 2000 (116) ELT 431 (SC). So, it is a settled legal position that on 24.02.2009, duty was payable on impugned goods @ 8% in terms of Not. No. 4/09-CE dated 24.02.2009.

9.1 Government also finds it proper to discuss provisions contained in para 4.1 of Part-I of Chapter 8 of CBEC Excise Manual on Supplementary Instructions which is extracted as under :-

"4. Sealing of goods and examination at place of dispatch

4.1 The exporter is required to prepare five copies of application in the Form ARE-1, as per format specified in the Annexure-14 to Notification No. 19/2004-Central Excise (NT) dated 6.9.2004(See Part 7). The goods shall be assessed to duty in the same manner as the goods for home consumption. The classification and rate of duty should be in terms of Central Excise Tariff Act, 1985 read with any exemption notification and / or Central Excise Rules, 2002. The value shall be the "transaction value" and should conform to Section 4 or section 4A, as the case may be, of the Central Excise Act, 1944. It is clarified

that this value may be less than, equal to or more than the FOB value indicated by the exporter on the Shipping Bill."

The plain reading of said para, reveals that the export goods shall be assessed to duty in the same manner as the good cleared for home consumption are assessed. Further the classification and rate of duty should be as stated in schedule of Central Excise Tariff Act, 1985 read with any exemption notification and / or Central Excise Rules, 2002. These CBEC Instructions clearly stipulate that applicable effective rate of duty will be as per the exemption notification. The said instruction is issued specifically with respect to sanctioning rebate claim of duty paid on exported goods and therefore assessee has to pay the effective rate of duty and claim rebate accordingly.

9.2 In view of above position, Government holds that duty was required to be paid @ 8% on said goods on 24.02.2009, and rebate is admissible of duty paid @ 8% only under rule 18 of Central Excise Rules 2002 read with Not. No. 19/04-CE(NT) dated 6.9.2004. Any plea of ignorance of law cannot be admitted as legal and proper.

9.3 Govt. however observes herein that any amount paid in excess of duty liability on one's own volition cannot be treated as duty and it has to be treated as a voluntary deposit with the Government which is required to be returned to the assesses / respondents in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11.9.2008 in CWP Nos.2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. Vs. UOI reported as 2009 (235) ELT-22 (P&H) has decided as under:-

"Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said

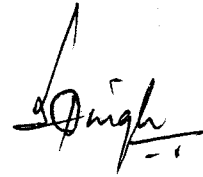
higher excise duty – Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate.”

Hon'ble High Court of Punjab & Haryana has observed that refund in cash of higher duty paid on export product which was not payable, is not admissible and refund of said excess paid duty/amount in Cenvat Credit is appropriate. As such the excess paid amount/duty is required to be returned to the respondent in the manner in which it was paid by him initially.

10. In view of above discussions, Government sets aside the impugned orders-in-appeal and allows the revision application. Government further directs that said excess paid amount may be allowed as re-credit in the Cenvat credit account from which duty was paid.

11. The revision applications thus succeed in terms of above.

12. So, ordered.



(D.P.Singh)

Joint Secretary (Revision Application)

Commissioner of Central Excise & Customs,
Raigad Commissionerate, 4th Floor,
Kendriya Utpad Shulk Bhawan,
Sector 17, Plot No.1, Khandeshwar,
Navi Mumbai – 410 206

Attended



(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
C B E C - O S D (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev)
भारत सरकार/Govt. of India
नई दिल्ली/New Delhi

Order No. 554-555 /2013-Cx dated 05.06.2013

Copy to:

1. M/s Gharda Chemicals Ltd., Gharda House, 48 Hill Road, Bandra (W), Mumbai-400050
2. M/s Neptunus Power Plants Services Pvt. Ltd., Plot No.A-554, TTC Industrial Area, MIDC Mahape, Navi Mumbai-400710
3. Commissioner of Central Excise (Appeals), Central Excise, Mumbai Zone-II, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E, Bandra Kurla Complex, Bandra(East), Mumbai-400 051.
4. The Deputy Commissioner of Central Excise (Rebate), Raigad Commissionerate, Ground Floor, Kendriya Utpad Shulk Bhawan, Sector-17, Plot No. 1, Khandeshwar, New Panvel – 410 206.
- ✓ 5. PA to JS (RA)
6. Guard File
7. Spare copy

ATTESTED



(B.P.Sharma)
OSD (Revision Application)