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F.No. 198/443/11-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 06/6/13.

ORDER NO. 558 /13-Cx DATED 06.06.2013 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 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. 195/2011 dated 11.03.11 passed by the Commissioner of Central Excise (Appeal), Bangalore-II.
Applicant	:	Commissioner of Central Excise, Bangalore-II Commissionerate
Respondent	:	M/s Mysore Mercantile Co. Ltd., Bangalore

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ORDER

This revision application is filed by the applicant Commissioner of Central Excise, Bangalore against the order-in-appeal No.195/2011 dated 11.03.11 passed by the Commissioner of Central Excise (Appeals), Bangalore-II with respect to order-in-original passed by the Assistant Commissioner of Central Excise, Kanakpura Division.

2. Brief facts of the cases are that the respondent have purchased 197700.527 MTs of cane molasses from various sugar factories under CT1 and stored them at Karwar. The respondent obtained CT-1 for total quantity of 201559.62 MTs. The molasses so procured were exported through Karwar Port by following ARE1 procedure. The respondent submitted that due to some technical reasons like the difference in density of water a High Seas, and at the shore and the mean density applied by the surveyors for arriving at the estimated quantities by draft survey, there was some differences between the actual quantity loaded and the quantity assessed by the surveyors. The claimant further submits that the quantity accumulated at their storage place due to such differences was around 4000 MTs. The original authority observed that it was not known how the 4000 MTs of molasses was in excess receipt against the CT-1 certificates, when the quantity certified by M/s Posidon Technical Services Private Limited (Surveyor) at the time of loading the cargo for export, that therefore it appeared that there is no documentary evidence to prove the claim of excess molasses which resulted in export of 4000 MTs. The Asst. Commissioner vide his Order-in-Original rejected the rebate claim on the grounds that the rebate was claimed on a quantity whose existence and origin is not even proved let along be accurate, as the excess quantity could neither be co-related to particular CT-1/ ARE-1 nor explained properly as to their Origin.

3. Being aggrieved by impugned order-in-original, the respondent filed appeal before Commissioner (Appeals), who decided the case in favour of respondent.

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

4.1 The claimants have stated that the various factors governing the weighment like draft problem, density, temperature etc., give them lot of advantage in their draft survey quantity. Thus they have taken advantage of the inaccuracies in the procedures and based on empirical calculation have managed to show excess quantity than the quantity received under various CT-1 Certificates. The Board has clearly laid down the requirements of the following documents for the purpose of filing claim of rebate/sanction of rebate. After satisfying that the goods cleared for export under the relevant ARE-1 applications mentioned in the claim were actually exported, as evident by the original and duplicate copies of ARE-1 duly certified by Customs, and that the goods are of 'duty-paid' character as certified on the triplicate copy of ARE-1 received from the Jurisdictional Superintendent of Central Excise (Range Officer), the rebate sanctioning authority will sanction the rebate, in part or full. In case of any reduction/rejection of the claim, an opportunity shall be provided to the exporter to explain the case and a reasoned order shall be issued". In view of the above said instruction issued by the Board, it is evident that unless the exporter submits the requisite documents, the rebate claim cannot be processed nor sanctioned by the AC/DC.

4.2 In the present case admittedly the exporter has not furnished the following important documents, in the absence of which the application for rebate is liable to rejection:

I. ARE-1 No. and Date, corresponding Invoice no. and dates, amount of rebate on each ARE-1 No. and its calculation.
II. Original copy of the ARE-1
III. Invoices issued under Rule 11
IV. Original and duplicate copies of ARE-1 duly certified by Customs Triplicate copy of ARE-1 received from the jurisdictional Superintendent of Central Excise.

The Commissioner (Appeals) decided the case only on the basis of payment of duty by the assessee, however since all the relevant documents connected with the rebate claim were not verified before passing the order, the order passed by the Commissioner suffers from legal infirmity.

5. A Show Cause Notice was issued to the respondent under Section 35EE of Central Excise Act, 1944 to file their counter reply. The respondent vide their written reply dated 10.11.11 mainly stated as under:

5.1 The entire issue has been made to look a complicated issue by the department. We submit that we have procured 1,97,700.527 Mts of Molasses during the period 2006-07 to 2008-09. It is a known fact that the quantity of liquid cargo cannot be exactly measured before loading and the method of determining the actual quantity exported involves some estimation. In the instant case we have explained to the department the reasons for such kind of difference between the actual quantity of goods exported and the quantity shown in the draft survey report. We had exported Molasses as per the quantities indicated in the ARE 1 and CT 1 certificates and we had some stock of Molasses left in the shore tank which was around 4,000 tons. This represents 2% of the total Molasses handled by us during the period. Since we had not paid duty on Molasses at the time of procurement we could not have diverted this quantity to local market. The said quantity cannot be linked to any specific ARE 1 since the said quantity has accumulated over 2 to 3 years. When we explained this problem to the department they advised us to pay duty and to export the same. Accordingly we paid duty of Rs.30,90,900/- on the said goods and we filed

the shipping Bill, we exported the same. The fact remains that since we are not the manufacturers we could not issue any ARE 1. The goods were properly exported, the proof of shipment has been obtained on the shipping bill and corresponding export document, the exports proceeds have been realized and the foreign inward remittance certificate has been enclosed to the claim. But for the ARE 1 all the documents required were submitted along with a rebate claim.

5.2 We submit that primarily it is not the case of the department that any quantity of Molasses procured has been diverted by M/s MMCL. It is an admitted fact that the procedures etc., for draft survey involves some estimation. The quantity of 4,000 tons remaining in the shore tank is certainly due to such differences between the quantity as per the draft survey report and the quantity actually exported. We have paid duty on this quantity and it has been exported. It is a well settled principle to not to tax the exports. We wish to rely on the decision of the Government of India in the case of Barot Exports reported in 2006 (203) ELT 321 (G.O.I) wherein it has been held that that the core aspect in determination of rebate claim is the fact of manufacture and payment of duty thereon and its subsequent export. If this fundamental requirement is met other attendant procedural requirements can be condoned. The G.O.I observed in the said case that the fact of payment of duty and its export is not doubted. Hence the matter was remanded to the original authority to decide the case afresh.

5.3 The decision of G.O.I referred to above has been passed based on various decisions including the decision of Bombay High court reported in 2003 (156) ELT 168 (BOM) distinguishing between the mandatory or directive provisions. We submit that in the case of M/s MMCL the goods had suffered duty and they were exported and all documents relating to exports have been furnished along with a claim. The ARE-1 could not be produced because M/s MMCL is not a manufacturer, and the quantity was the surplus quantity remaining in the shore tank.

5.4 We also wish to rely on the decision of Hon'ble CESTAT Mumbai in the case of Upkar International reported in 2004 (169) ELT 240. In that case the Hon'ble CESTAT granted the rebate though there were procedural violations.

Similarly in the case of Birla VXL Ltd., reported in 1998 (99) ELT 387 the CESTAT held that the rebate of duty is admissible to the appellants. It was observed that the duty was paid on the goods and there was no dispute regarding the fact that the goods were exported. These contentions were based on the documents produced by the appellants and the Commissioner should have relaxed the provisions of sub Rule (1) of Rule 12.

6. Personal hearing was scheduled in this case on 14.12.12, 20.2.13 and 4.3.13. Hearing scheduled on 4.3.13 attended by Shri R.K.Sharma, Sr. Counsel and Shri R.K.Dash, Consultant on behalf of the respondent who stated that order-in-appeal being legal and proper, may be upheld. Shri Y.C.S.Swami, Deputy Commissioner attended the hearing on behalf of applicant department on 14.12.12 and reiterated grounds of revision application.

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

8. Government observes that respondents obtained CT-1 for 201559.62 MTs of molasses. They purchased 197700.527 MTs of molasses from various sugar factories and exported the said goods in terms of provisions contained in the Notification No.42/2001-CE(NT) dated 26.6.2001. The respondent subsequently claimed that there was 4000MTs of molasses left in their shore tank terminal, which was exported on payment of duty as directed by authorities. Later on, they filed rebate claim for duty paid on 4000 MTs of molasses, which was rejected by the original authority on the grounds that the applicant failed to give any documentary evidence for proper correlation of said 4000 MTs with reference to ARE-1/CT-1. Commissioner (Appeals) decided the case in favour of respondent.

9. Government observes that the appellate authority in impugned order-in-appeal has observed as under:

"6. ..... This view taken and findings given by the Original Adjudicating authority, is not acceptable for the following reasons: Draft survey method of ascertaining the quantity of bulk goods loaded or discharged by a vessel is an internationally accepted method and the same is carried out by approved surveyors and a certificate to that effect would be given by such surveyors. Mate's receipt issued by the master of the vessel acknowledging the receipt of the cargo is another document indicating the quantity of cargo loaded into the vessel, copies of these documents furnished by the Appellants indicates that the quantity of cane molasses loaded in to the vessel was 4000 M.Ts. Over and above this the Customs' Officer who had supervised the loading of the said cargo has also endorsed this quantity in the Shipping Bill filed for the export of the said cargo. Such being the overwhelming evidence that is available on record, the Original Adjudicating authority's findings on this aspect cannot be held as factual and merited, deserving any consideration. Arriving at such whimsical findings, without being supported by even an iota of evidence and without any basis brings out the prejudiced mind of the Original Adjudicating authority. Further such a finding casts aspersion not only on the Customs authorities of the Karwar port but also on the other authorized agencies providing port services associated with export/import of cargo and also on the master of vessel, doubting their very functioning in the port. If these findings were to true, the Original Adjudicating authority should have taken up the matter with the Customs Authorities at the Karwar Sea Port for ascertaining the facts before coming into such conclusion and also could have ascertained, as to, whether export of cargo under question was in fact effected and if so the real/actual quantity of the cane molasses loaded into the ship/exported and after the facts the issue could have been decided. Nothing on this aspect is forth-coming either in the facts of the case or the documents brought on record. Further, going by the findings of the Original Adjudicating authority, expert proceeds received by the Appellants as evidenced by the Bank Certificate of Export and Realisation, and Bank's Certificate, would not be attributable to the export activity of the Appellants. On the other hand it would suggest to something else that was indulged by the Appellants. Such far reaching implications, without supporting evidences, will have no legal validity and therefore the same cannot be accepted in Law.

7. As could be seen from facts of case, Appellants are engaged in the activity of

procuring cane molasses from various sugar factories and store them in shore Tank Terminal at Karwar and export the same from the Karwar sea port, procuring storing and export of the cane molasses was a continuous process, Going by the nature of the excisable commodity, being in liquid form, method of assessing the quantity shipped into the vessel i.e., draft survey cannot be accurate this fact has been appreciated by the Original Adjudicating authority in para 13 of his findings also, thus the surplus quantity of 4000 M.Ts of cane molasses, representing about 2% of the cane molasses procured from various sugar factories, having varying densities that was available in the shore Tank Terminal is natural. As to the origin of the commodity, for the reasons that the cargo being stored in a common shore Tank Terminal, cannot be pinpointed to particular sugar factory from where the commodity was procured, but can be safely concluded that the commodity was indeed procured from one of the sugar factories during the period of issue. The ratio of the decision in the following case law is squarely applicable to the subject issue. In M/s. Plastichemix Industries case reported in 2002 (146) ELT. 385 (Tri-Mumbai), the Hon'ble Tribunal has held that there was no quantitve or value restrictions under CT-2 certificate issued, hence charge of supply of goods in addition to value covered under CT-2 certificate, is without any basis; that goods being exempted from duty under Notification No.47/94-C.E., allegation of short-levy or evasion of duty on account of excess supply is not maintainable....."

10. Government observes that Commissioner (Appeals) has dealt in detail all the aspects of this case. The goods were cleared from factory and stored in shore tank terminal. The custom authorities endorsed that these 4000 MTs of molasses were actually exported and export documents and realization of proceeds further establishes that 4000MTs of goods were exported. The applicant has paid duty before export of the goods. As such, substantial condition for admissibility of rebate claim viz. duty paid nature of the goods and export of such duty paid goods stands established. Government finds that since these two conditions are fulfilled, the rebate claim cannot be denied for procedural infraction on the part of exporter, keeping in view the peculiar nature of case. There are catena of judgements wherein it has been held that benefit

of export related schemes like rebate cannot be denied for procedural infraction, when substantial condition of that scheme has been complied with.

11. In view of above discussions, Government does not find any infirmity in order of Commissioner (Appeals) and hence, upholds the same.

12. Revision application is thus rejected being devoid of merit.

13. So, ordered.

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

Commissioner of Central Excise,
Bangalore-I Commissionerate,
C.R.Building, P B No. 5400
Queen's Road,
Bangaloe – 560 001.

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

Order No. 558 /2013-Cx dated 06.06.2013

Copy to:

1. M/s Mysore Mercantile Co.Ltd., No.201&202, 2nd Floor, Shreshta Bhumi, No.87, K.R.Road, Bangalore-560004
2. Commissioner of Central Excise (Appeals-I), Central Excise, 16/1, 5th Floor, S.P.Complex, Lalbaug Road, Bangalore-560 027.
3. Deputy Commissioner of Central Excise, Kanakapura Division, #110/10, Uma Complex, Lalbaug Road, Bangalore-560 027.
4. Shri R.K.Sharma, , Sr. Counsel, 157, 1st Floor, DDA Office Complex, C.M. Jhandewalan Extention, New Delhi-55
5. PA to JS (RA)
6. Guard File
7. Spare copy

ATTESTED

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