

REGISTERED
SPEED POST



F.No. 195/998/13-RA-CX
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

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

Date of Issue.....21/5/2016

ORDER NO. 58/2016-CX DATED 29.04.2016 OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, 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, 1944 against the Order-in-Appeal No.11-12/Kol-VII/2013 dated 09.09.2013 passed by Commissioner of Central Excise, (Appeals-I), Kolkata

Applicant : M/s Cheviot Co. Ltd

Respondent : Commissioner of Central Excise, Kolkata -V

ORDER

This Revision Application is filed by M/s Cheviot Co. Ltd. (hereinafter referred to as Applicant) against the Order-in-Appeal No.11-12/Kol-VII/2013 dated 09.09.2013 passed by Commissioner of Central Excise, (Appeals-I), Kolkata with respect to Order-in-Original No. 2-R/BB-I/Kol-VII/10-11 dated 12.07.2010 passed by the Assistant Commissioner of Central Excise Division, Budge, Budge Division-I, Kolkata-VII Commissionerate.

2. Brief facts of the case are that the applicant, a manufacturer of articles of Jute falling under classification no. 53071010 of Central Excise Tariff Act, 1985 have submitted a refund claim for Rs. 13,47,341/- to the Assistant Commissioner of Central Excise Budge, Budge-I Division under Section 11 B of the Central Excise Act, 1944 as they have delivered their excisable goods (Jute Yarn) from their factory premises to a unit at Special Economic Zone, Falta on payment of Jute Cess as well as Education Cess and Higher Education Cess for the period from 01.07.2008 to 18.06.2009, when the payment of any such duty, cess is exempted vide Section 7 of the SEZ Act, 2005 subject to such terms and conditions and limitations as may be prescribed by the concerned authorities. However, in supersession of the said claim, subsequently the applicant submitted revised claim of Rs. 13,36,029/-. The contention of the department in this regard was that as the applicant has submitted their initial refund claim on 04.08.2009 hence their refund claim for the period from 01.07.2008 to 04.08.2008 has become time barred and hence non grantable. Moreover, as detailed in the Notification No. 19/2004-CE(NT) dated 06.09.2004 [equivalent to Notification No. 42/2001-CE(NT) dated 26.06.2001] duties and cesses allowable for rebate under Rule 18 of the Central Excise Rules, 2002 are under:-

- a. Central Excise Act, 1944
- b. Additional duty of Excise (goods of Special Importance) Act 1957
- c. Additional Duty of Excise (Textiles and Textiles Articles) Act 1978
- d. Nations Calamity contingent duty leviable under Section 136 of the Finance Act, 2001
- e. Special Excise duty collected under a Finance Act
- f. Additional duty of excise as levied under 157 of the Finance Act, 2003
- g. Education Cess on excisable goods as levied under Section 91 read with Section 93 of Finance Act, 2001
- h. Additional duty of Excise leviable under clause 85 of the Finance Bill 2005
- i. Secondary and Higher Education Cess leviable under Clause 126 read with Clause 138 of the Finance Bill 2007.

Jute Cess paid under the Jute Manufacturers Cess Act, 1983 read with the Jute Manufacturers Cess Rules, 1984 do not come within the purview of Duty for the

purpose of Refund claim. Further contention of department was that the Jute Cess also cannot be refunded due to the restriction as enshrined in Rule 4 of the Jute Manufacturers Cess Rules, 1984 which states that "No refund of Cess allowed on the jute manufacturers exported...".

2.1 Therefore, a Show Cause Notice dated 07.05.2010 was issued to the applicant asking them as to why:

(a) the claim of refund of Jute Cess amounting to Rs. 13,08,097 will not be rejected for the reasons mentioned above under Section 11 B (2) of the Central Excise Act, 1944,

(b) the claim of refund of Education Cess and Higher Education Cess amounting to Rs. 4282 and 2140 respectively for the period from 01.07.2008 to 04.08.2008 will not be rejected for being time barred.

2.2 The Assistant Commissioner, Central Excise, Budge, Budge-I Division, Kolkata-VII Commissionerate vide Order-in-Original No.2-R/BB-I/Kol-VII/10-11 dated 12.07.2010 rejected the refund of Jute Cess amounting to Rs. 13,08,097/- and claim of Refund of Education Cess amounting to Rs. 4282 and Higher Education Cess amounting to Rs. 2140 for the period 01.07.2008 to 04.08.2008 but refund of Education Cess amounting to Rs. 21886 and Higher Education Cess amounting to Rs. 10936 for the period from 05.08.2008 to 18.06.2009 was allowed.

3. Aggrieved by the said order, the applicant as well as the Department filed appeal before the Commissioner (Appeals-I) Kolkata, who vide Order-in-Appeal No. 11-12/Kol-VII/2013 dated 09.09.2013 rejected the order of the original authority by disallowing the refund claim of Jute Cess and ordered to deposit the sanctioned amount of Rs. 32,822/- along with appropriate interest into Government Account.

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

4.1. That the instant Order-in-Appeal travels beyond the notice dated 07.05.2010 and the Order-in-Original dated 12.07.2010 passed thereunder in as much as the instant refund claim arising out of inadvertent payment of jute cess, education cess and higher education cess thereon, in respect of supplies from the applicant's DTA unit to its SEZ unit was never sought to be denied on the ground of unjust enrichment in the original proceedings. That the proposal to deny the refund claim on the ground of unjust enrichment was raised by the department for the first time only in the departmental appeal against the said Order-in-Original. That at no stage of original proceedings the applicant was required to furnish any documents to satisfy the test of unjust enrichment as the same was

not at all applicable to the instant refund claim. That it is a settled law that a case which the revenue never canvassed and which the applicant was never required to meet in the original proceedings cannot be made out in favour of the revenue at the appellate stage. That the Order-in-Appeal in so far as it rejected the refund claim on the ground of unjust enrichment clearly travels beyond the original proceedings and thereby deserves to be set aside on the short ground alone.

4.2. That the Appellate Commissioner failed to appreciate that the jute goods in the instant case were supplied by the applicant's unit in the DTA to the applicant's unit in the SEZ which qualifies as an export transaction under Rule 2 (c) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 issued inter alia in exercise of powers conferred under Section 37 of the Central Excise Act. That the supplies of jute goods from the DTA unit to the SEZ unit qualifies as an export and the provisions of unjust enrichment had no application in view of the express provision contained in clause (a) to the proviso to Section 11 B (2) of the Central Excise Act, 1944. That the provisions of unjust enrichment are not applicable to an export transaction also stands settled by the decision of the CESTAT in the following case:

1. CST Vs S. Mohanlal reported in 2010(18)STR173
2. Convergys India Services Pvt. Ltd Vs CST, reported in 2012(25)STR251

That the rejection of refund claim of jute cess inadvertently paid on an export transaction by the appellate Commissioner is *ex facie* bad in law.

4.3. That the DTA unit and the SEZ unit of the applicant in the instant case are owned by the same corporate entity. That the two units are separate profit centres these don't have any separate legal existence and/or identity. That the supplies from DTA unit to the SEZ does not attract any sales tax in as much as there are no two separate persons buying and selling the goods. That the findings in the Order-in-Appeal that the DTA unit and the SEZ unit are to be reckoned as separate persons for all legal purposes suffers from serious infirmities.

4.4. That jute cess in the instant case was paid under a mistake of law, in as much as Section 7 of the SEZ Act specifically exempts payment of jute cess in respect of goods supplied from DTA to a unit in the SEZ. That in the present case, it is undisputed that the jute yarn supplied by the DTA unit during the relevant period was received by the SEZ Unit and such supplies were made under the cover of ARE-1, Bill of Export and Central Excise Cum Tax Invoice as also accepted in the impugned order. That the cess was not payable at all in respect of supplies to the SEZ unit, that the department has no authority to retain the cess so collected without any mandate of law in view of the provisions of Article 265 of the Constitution of India, 1950.

4.5. That no separate terms, conditions and limitation have been prescribed for the purpose of claiming exemption under Section 7 of the SEZ Act. That Rule 30 of the SEZ Rules only lays down the procedure, in general, for procurement of goods from the DTA in terms of the said Rule, the DTA supplier supplying goods to a unit in the SEZ is required to clear the goods, as in the case of exports either under bond or as duty paid goods under claim of rebate on the cover of ARE1 referred to in Notification No. 42/2001-CE(NT). That Rule 30(1) of the SEZ Rules could only confer an option to the DTA unit to either claim the exemption upfront by supplying goods to the SEZ Unit without payment of jute cess under bond or pay the same and claim the exemption by way of rebate. That the said rule could not be interpreted in a way so as to deny the benefit of exemption conferred by Section 7 of the SEZ Act as attempted in the order, in as much as rules cannot over-ride the Act. That the jute goods were supplied to the SEZ unit on payment of jute cess, the refund claim arose because of the provisions of Section 7 of the SEZ Act and the said claim had to be given effect notwithstanding anything inconsistent in any other act or rules, in view of the over-riding effect of the provisions of SEZ Act, by virtue of Section 51 of the SEZ Act.

4.6. That the Jute Cess Act vide Section 3 incorporates by reference the provisions of the Central Excise Act relating to refunds, the applicant preferred a refund application under Section 3 of the Jute Cess Act read with Section 11B of the Central Excise Act. That it would be fallacious to assume that the instant refund claim has been filed under Rule 18 of the Central Excise Rules and the Notification issued thereunder as was erred by the adjudicating authority while adjudicating the notice.

4.7. That under Rule 30(1) of the SEZ Rules the goods should move under the cover of ARE-1 referred under Notification No. 42/2001 dated 26.06.2001 and the same remains undisputed in the facts of the present case. That the said Rule does not prescribe that the rebate claim shall have to be filed under Rule 18 read with Notification No. 19/2004-CE(NT) as was erred by the adjudicating authority while passing the Order-in-Original.

4.8. That SEZ Act is a special enactment and by virtue of Section 51 thereof has an over-riding effect over any other law to the extent the provisions of such other law are inconsistent. That the Order-in-Original in so far as it sought to deny the refund on the ground that Rule 4 of the Jute Cess Rules, did not provide for any dispensation from payment of jute cess in respect of jute goods exported out of India is completely unjustified and stems from a clear mis-interpretation of law. That the Hon'ble Supreme Court in the case of Talchar Municipality vs Talcher Regulated Market Committee reported in 2004 (6) SC178 wherein the Hon'ble Court has categorically held that in case of a conflict between two special enactments, the one with overriding provisions will prevail. That the SEZ Act is

not only later in time in comparison to the Jute Cess Act, but also contains over-riding provisions. That the specific exemption conferred by Section 7 of the SEZ Act has to prevail over anything repugnant contained in the Jute Cess Rules. That Rule 4 of the Jute Cess Rules cannot be made the basis to deny the refund claim as attempted in the Order-in-Original.

5. Personal hearing scheduled in this case on 05.08.2015 was attended by Shri Arvind Baheti, Senior Associate, Khaitan & Co. on behalf of the applicant who reiterated the grounds of revision application and submitted that this is a refund claim under Section 3 (4) of the Jute Cess Act for duty paid by mistake on goods cleared from DTA to SEZ, that such cess was clearly exempted under Section 7 of the SEZ Act read with 1st schedule, that the Commissioner (Appeals) has rejected the Order-in-Original mainly on the ground of unjust enrichment which is not applicable in cases of exports and secondly was never a point of dispute in the original order. Personal hearing was also held on 21.04.2016, which was attended by Shri Arvind Baheti, Senior Associate, Khaitan & Co on behalf of the applicant who reiterated the earlier submission and also stated that the show cause notice proceeds on assumption that claim is under Rule 18 and not Section 11 of the Act; that it is duty paid under mistake of law; that in terms of Section 7 of SEZ Act Jute Cess is exempt; that in terms of Section 51 of the SEZ Act, the Act has over riding effect if any provisions of any other law for the time being in force is inconsistent; that the question of unjust enrichment does not arise as the goods are being cleared from DTA to SEZ which is an export as also observed by GOI order in case of Tulsyan Nec Ltd 2014 (313) ELT; that this issue of unjust enrichment was not raised in the show cause notice but only before the Commissioner (Appeals) for the first in the appeal filed by the department. Nobody attended the hearing on behalf of the department.

6. Government has carefully gone through the relevant case records available in case file, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

7. Government observes that the applicant had submitted a refund claim for Rs. 13,47,341/- to the jurisdictional Assistant Commissioner under Section 11B of the Central Excise Act, 1944 as they have delivered their excisable goods (Jute Yarn) from their factory premises to a unit at Special Economic Zone, Falta on payment of Jute Cess as well as Education Cess and Higher Education Cess for the period from 01.07.2008 to 18.06.2009, when the payment of any such duty, cess is exempted vide Section 7 of the SEZ Act, 2005 subject to such terms and conditions and limitations as may be prescribed by the concerned authorities. Show Cause Notice was issued to the applicant alleging therein that their initial refund claim for the period from 01.07.2008 to 04.08.2008 has become time barred and hence not grantable; that as per Notification No. 19/2004- CE(NT) dated 06.09.2004 [equivalent to Notification No. 42/2001-

CE(NT) dated 26.06.2001] duties and cesses allowable for rebate under Rule 18 of the Central Excise Rules, 2002, do not come within the purview of duty for the purpose of Refund claim; that the Jute Cess also cannot be refunded due to the restriction as enshrined in Rule 4 of the Jute Manufacturers Cess Rules, 1984. The adjudicating authority rejected the refund of Jute Cess amounting to Rs. 13,08,097/- and claim of Refund of Education Cess amounting to Rs. 4282 and Higher Education Cess amounting to Rs. 2140 for the period 01.07.2008 to 04.08.2008 but refund of Education Cess amounting to Rs. 21886 and Higher Education Cess amounting to Rs. 10936 for the period from 05.08.2008 to 18.06.2009 was allowed. Against the order of the original authority the applicant as well as the Department filed appeal before the Commissioner (Appeals-I) Kolkata, who vide Order-in-Appeal No. 11-12/Kol-VII/2013 dated 09.09.2013 disallowed the refund claim of Jute Cess and ordered to deposit the sanctioned amount of Rs. 32,822/- along with appropriate interest into Government account. Now the applicant has filed this revision application on the grounds stated in para 4 above.

8. From a perusal of the impugned Order-in-Appeal, Government observes that aggrieved by the impugned Order-in-Original both the applicant and the department had filed appeal under Section 35 of the Act before the Commissioner (Appeals). The applicant had appealed mainly on the grounds that refund claim was filed under Section 11 B of the Central Excise Act as per exemption provisions of Section 7 of the SEZ Act, 2005 which exempts jute cess read with Section 3 of the Jute Cess Act; that the adjudicating authority on its own and without any basis has assumed that such refund has been claimed under Rule 18 of the Central Excise Rules and Notifications thereunder; that in terms of Rule 30(1) of the SEZ Rules what is required is that the goods should move under the cover of ARE 1 referred under Notification No. 42/2001 dated 26.06.2001 and the same remains undisputed; that the said rule does not prescribe that the rebate claim shall have to be filed under Rule 18 read with Notification No. 19/2004-CE(NT). The Assistant Commissioner of Central Excise mainly filed appeal before Commissioner (Appeals) on the grounds that the adjudicating authority failed to appreciate the fact that the assessee have categorically demanded that their subject supplies do not fall within the scope of 'export' within the meaning of Rule 18 or 19 of the Central Excise Rules, 2002 or the Notifications issued thereunder; that the adjudicating authority failed to appreciate the fact that the assessee has not adduced any evidence, documentary or otherwise along with the claim to prove that no unjust enrichment was involved in the case as was lawfully required under the provisions of Section 11B(1) of the Central Excise Act, 1944. The Commissioner (Appeals) has given his findings on the issue on unjust enrichment and held that since the refund claim did not satisfy the provision of Section 11 B of the Central Excise Act, 1944 in regard to unjust enrichment he did not find any necessity to discuss the points raised by the party in their appeal against the same impugned order and disallowed the refund claim.

9. Government further observes that under Section 35 EE of the Central Excise Act, 1944, a Revision Application against the Order of Commissioner (Appeals) passed under Section 35 A ibid lies with Government only if such orders relate to cases as mentioned in provision to sub-section (1) of Section 35(B) of the Act. Sub-section (1) of Section 35 B of Central Excise Act, 1944 reads as under:-

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

- (a) *a decision or order passed by the Commissioner of Central Excise as an adjudicating authority;*
- (b) *an order passed by the Commissioner (Appeals) under Section 35A;*
- (c) *an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate Commissioner of Central Excise under Section 35, as it stood immediately before the appointed day;*
- (d) *an order passed by the Board or the Commissioner of Central Excise either before or after the appointed day, under Section 35A, as it stood immediately before that day:*

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to -


- (a) *a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;*
- (b) *a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;*
- (c) *goods exported outside India (except to Nepal or Bhutan) without payment of duty ;*
- (d) *credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998.*

10. Government finds that the main issue in the impugned Order-in-Appeal is the admissibility of refund under Section 11 B of the Central Excise Act read with Section 3 of the Jute Cess Act in respect of supplies made thereof.

Hence the instant case does not fall with the purview of ambit and scope of provisions contained for Section 35EE read with proviso to Section 35(B) (1) of the Central Excise Act, 1944 under which the instant revision application has been made.

11. In view of above discussions, Government therefore finds that the Revision Application filed before Central Government in terms of Section 35 EE of Central Excise Act 1944 is beyond jurisdiction. As such, this Revision Application is dismissed for being non-maintainable. The applicant is at liberty to file an appeal before the appropriate authority under Section 35 B of Central Excise Act, 1944.

12. So, ordered.



(RIMJHIM PRASAD)

Joint Secretary to the Government of India

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M/s Cheviot Company Ltd.,
19, Mehta Road, Budge-Budge,
24, Parganas (South),
Kolkata-700137



Attested.


शौकत अली
Shaukat Ali
अवर सचिव (पु. अ.)
Under Secretary (RA)

ORDER NO. 58/2016-CX DATED 29.04.2016

Copy to:-

1. The Commissioner of Central Excise Kolkata-VII Commissionerate, 169, A.J.C. Bose Road, Central Revenue Building, Bamboo Villa (4th Floor), Kolkata-700014.
2. The Commissioner of Central Excise (Appeals-I), 169, A.J.C. Bose Road, Bamboo Villa (4th Floor), Kolkata-700014.
3. Shri Arvind Baheti, Executive Director, Khaitan & Co, Emerald House, 18, Old Post Office Street, Kolkata-700001
4. The Assistant Commissioner of Central Excise, Budge-Budge-I Division, Kolkata-VII Commissionerate, 169, A.J.C. Bose Road, 5th Floor, Central Revenue Building, Bamboo Villa (4th Floor), Kolkata-700014.
5. PA to JS (RA)
- ✓ 6. Guard File
7. Spare Copy.

(Attested)


(Shaukat Afri)
Under Secretary (RA)
Under Secretary (RA)