

**REGISTERED
SPEED POST**



F.NO. 195/593/12-RA
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. 1.2.5.16....

ORDER NO. 59 /2016-CX DATED 09.05.2016 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 Act, 1944 against the No.JM/28/2012 dated 05.03.2012 passed by the Central Excise, Large Tax Payer Unit, Bangalore.

Applicant : M/s Biocon Limited, Bangalore.

Respondent : Commissioner of Central Excise, Large Tax Payer Unit, Bangalore.

ORDER

This Revision Application is filed by the applicant M/s Biocon Limited, Bangalore against the No. JM/28/2012 dated 05.03.2012 passed by the Central Excise, Large Tax Payer Unit, Bangalore with respect to Order-in-Original passed by The Assistant Commissioner (GLT-I), Large Tax Payer Unit, Bangalore.

2. Brief facts of the case are that the applicant has filed the rebate claims for claiming rebate of duty paid on capital goods cleared to M/s Biocon, SEZ. The rebate claim pertains to the capital goods which were imported by the applicant under exemption Notification No.21/2002-Customs dated 01.03.2002, 24/2005 Customs dated 01.03.2002 and 25/2005-Customs dated 01.03.2002, as amended and installed/put to use in the factory at the above mentioned address, have been removed to M/s Biocon, SEZ Unit situated at Biocon Special Economic Zone, Jigani Link Road, Bommasandra, Bangalore. In respect of imports made under exemption Notifications No.24/2005 Customs dated 01.03.2002 and 25/2005-Customs dated 1.3.2002, as amended, there are no import conditions consequent upon installation/put to use in the factory. However, in respect of capital goods imported availing benefit under Sl.No. 248(1)(a) and (b) of exemption Notification No.21/2002 Customs dated 01.03.2002, as amended certain conditions under Sl.No 53(i) of the said Notification have to be fulfilled. In the instant case, the applicant have cleared the capital goods imported under Notification No.21/2002 Customs dated 01.03.2002 as amended, failed to fulfill the conditions prescribed, under Sl.No 53(i) of the said Notification, in as much as the said goods have been transferred within period of seven years, from date of installation. Hence Show Cause Notice (SCN) were issued rejecting the rebate claim based on the fact that the goods have been cleared without fulfilling the conditions of the above said Notification.

3. Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioner (Appeal), Bangalore, who rejected the same.

4. Being aggrieved by the impugned, the applicant party has filed this Revision Application under Section 35EE of Central Excise Act, 1944 before Central Government on the following grounds:-

4.1 The applicant submits that both the lower authorities have not appreciated that the Applicant has claimed rebate of actual duty paid i.e. Cenvat credit amount paid on removal of imported capital goods to SEZ. It is submitted that condition No.53 of customs Notification No.21/2002-Cus was irrelevant, immaterial and unconnected with the claim of rebate. It is submitted that when initially the goods were imported, the applicant had paid additional duty of customs and availed Cenvat credit of the same and when the capital goods were removed to SEZ the credit so availed was paid and hence whatever duty which was "actually" paid was claimed as rebate. Therefore the

both the lower authorities have proceeded to reject the rebate claim on an extraneous ground.

4.2 The applicant submits that the impugned order is improper in law in as much as the authorities below have not appreciated that there was no exemption from payment of duty or the applicant had not claimed any exemption benefit in respect of other customs duties such as CVD, education cess and SHE cess and Special CVD. Hence, the question of fulfilling or otherwise of conditions envisaged in Notification No.21/2002-Cus would have no relevance.

4.3 The applicant submits that the Adjudicating Authority has sanctioned rebate in respect of goods imported under Notification No.24/2005-Cus dated 01.03.2005 and No.25/2005-Cus dated 01.03.2005 but has rejected the rebate in respect of goods imported under Notification No.21/2002-Cus dated 01.03.2002. It is submitted that there is no difference between above Notifications when it comes to payment other duties of customs. In other words, goods imported under the above Notifications are exempted only from payment of Basic Customs Duty (BCD) and no other duties of customs. The rebate claims made by the applicant were in respect of other duties of customs which were actually paid by them on the goods imported and claimed as rebate on clearance to SEZ. Hence, both the lower authorities have erred in law in rejecting rebate claim on the ground that goods imported vide Notification No.21/2002-Cus were cleared in violation of the conditions attached to the said Notification.

4.4 The applicant submits that assuming without admitting only for argument sake that by clearing goods imported under Notification No. 21/2002-Cus dated 01.03.2002 which was subject to condition No.53 to its own SEZ unit has violated the condition No.53, then the Department could have demanded the duty which was foregone in terms of the above Notification i.e. BCD only. As regards, other duties of customs are concerned on the goods imported, neither there was any exemption from payment nor the applicant claimed exemption from payment of said duties. Under these circumstances, the purported non-fulfillment of condition vide Sl.No.53 of Notification No.21/2002-Cus would have no bearing on entitlement to rebate of duty which was only in respect of CVD, education cess and SHE cess and Special CVD.

4.5 The applicant submits that the Original Authority in his adjudication order had made a categorically finding as to types of duties which are 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. The rebate which was claimed by the applicant in respect of all the goods were the very same type of duties specified in the above Notification. Further, even in respect of goods imported vide Sl.No.248 of Notification No.21/2002-Cus, the rebate claimed was of the specified duties and not anything else. It is reiterated that non-fulfillment or otherwise of condition No.53 of Notification No.21/2002-Cus would

Have no Application for claiming rebate of specified duties which were not exempted but actually been paid by the applicant.

4.6 The applicant submits that it is well settled that the additional duty of customs leviable under Section 3(1) of the Customs Tariff Act, 1962 is separate and independent of Section 12 of the Customs Act, 1962. In this regard, the applicant places reliance on the decision of the Supreme Court in Hyderabad Industries Ltd vs UOI, 1999 (108) ELT 321 (SC) - para-10 of the decision. Further, the Supreme Court in UOI vs Modi Rubber Limited, 1986 (25) ELT 849 (SC) held that when an exemption Notification exempts duty of excise it does not mean that there is an exemption from special excise duty, auxiliary duty or additional duty of excise. Reliance is also placed on the decision of the Bombay High Court in Shree Rajasthan Texchem Ltd vs UOI, 2010 (252) ELT 8 (Bom.). Therefore, in the applicant's case, it is submitted that the payment of other duties of customs leviable under Section 3 of the Customs Tariff Act, 1975 is not exempted by Sl.No.248 of Notification No.21/2002-Cus. When there is no exemption granted in respect of other duties of customs, the conditions in Sl.No.53 of Notification in question cannot be read into in respect of said other duties.

4.7 The applicant submits that assuming without admitting that condition No.53 of Notification No.21/2002-Cus has been violated then the proper remedy available to department is to demand customs duty which has been exempted in terms of the above Notification. The department has in fact issued a show cause notice proposing demand of customs duty foregone on the imported goods which is still pending adjudication. Instead the Department has incorrectly rejected the rebate.

4.8 The applicant submits that the impugned order is contrary to Section 26 of the Special Economic Zones Act, 2005 read with SEZ Rules, 2006 and also CBEC Circular No.6/2010-Cus dated 19.03.2010 and No.29/06-Cus dated 27.12.2006 in as much as if any person in DTA clears goods to SEZ on payment of duty under rule 18 of the CER, 2002, then whatever duty actually paid on goods cleared to SEZ is eligible as rebate/refund. In the applicant's case, it is an undisputed fact that the applicant had paid duty on clearance of goods to SEZ.

4.9 The applicant submits that the Department does not dispute the legal position at supply of goods to SEZ would amount to "export". This is evident from the definition of "export" in Section 2(m)(ii) of the SEZ, 2005. Any 'export' of goods is not liable for payment of duty. Further CBEC vide its Circular No.6/2010-Cus dated 19.03.2010 has clarified that rebate under rule 18 is admissible when the supplies were made from DTA to SEZ.

4.10 It is submitted that the applicant had imported R&D equipments under Sl.No.248 of Notification No.21/2002-Cus which is subjected to condition No.53, the applicant has complied with all the conditions.

5. The applicant also filed Application for condonation of delay for filing appeal beyond stipulated 90 days period as under:

5.1 The applicant submits that they are in receipt of the impugned order passed by the Commissioner (Appeals) on 07.03.2012. The revision application against the above impugned order should have been filed within a period of three months which expired on 07.06.2012. The above revision application was sent by Registered Post on 06.06.2012 itself which is evident from the postal acknowledgment slip enclosed to this application. However, it appears that the above revision application is received by the office after a delay of 8 days and hence we are filing the present condonation of delay application praying for condonation of delay of 8 days.

5.2 The applicant submits that they have duly sent the revision application on 06.06.2012 itself and going by this date there is no delay. However, in terms of rule 10(2) of the Central Excise (Appeals) Rules, 2011 read with section 35EE(2) of the Act the delay caused in receiving the revision application may kindly be condoned as the delay is caused due to transit on the part of the Postal authorities and the delay so caused is "condonable" as per law. In this regard, the applicant places reliance on the decisions in Viresh Kumar & Bros vs CC, 1987 (27) ELT 699 (Tri.); Jhabboo Lal Kesara Rolling Mills vs UOI, 1985 (19) ELT 367 (All.) and in Vanivilas Cooperative Sugar Factory Ltd vs UOI, 1983 (12) ELT 290 (Kar.).

5.3 The applicant submits that they place reliance on the decision of the Honorable Supreme Court in the case of Collector vs Mst Katiji, 1987 (25) ELT 185 (SC) in support of this application and implore to condone the delay in filing the present appeal and hear the stay application and the main appeal in the interest of justice.

6. Personal hearing scheduled in this case on 10.11.2015 and 08.12.2015. It was attended by Shri K.S. Ravi Shankar, Advocate on behalf of the applicant. At the outset he requested that delay of 8 days may be condoned as it was dispatched by speed post from Bangalore within due date. The grounds of Revision Application were reiterated. Nobody attended hearing on behalf of the Department but they have furnished the written submission vide letter dated 27.03.2014 wherein they mainly reiterated contents of impugned orders.

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

8. Upon perusal of records, Government observes that the applicant imported goods under Notification No.21/2002-Cus dated 01.03.2002. They subsequently supplied the said goods to M/s Biocon, SEZ Unit located at SEZ, Bangalore on payment of duty and filed rebate claims of such duty paid. The original authority

rejected the rebate claim on the ground that the applicant failed to comply with condition stipulated in the Notification No. 21/2002-Cus dated 01.03.2002. Commissioner (Appeals) upheld the impugned Order-in-Original. Now, the applicant has filed this Revision Application on grounds mentioned in para (4) above.

9 At the outset, Government observes that the Revision Application has been filed beyond stipulated period of three months. The applicant has filed Application for condonation of delay wherein they mainly stated that the delay has occurred due to postal delay and may be condoned. The applicant has submitted that as the impugned was received them on 07.03.2012, the revision application against the said order should have been filed within a period of three months which expired on 07.06.2012. They further contended that they have duly sent the application on 06.06.2012 itself and going by this date there is no delay. It is requested that in terms of Rules 10(2) of Central Excise (Appeal) Rules 2011 read with Section 35EE of the Act the delay may be condoned as it is due to delay caused in transit.

10. Government observes the time limit of filing Revision Application has been specified in Section 35EE(2) *ibid* which reads as under:

"Section 35EE Revision by Central Government:

(1)
(1A)

(2) An Application under sub-Section (1) shall be made within three months from the date of the communication to the applicant of the order against which the Application is being made:

Provided that the Central Government may; If it is satisfied that the applicant was prevented by sufficient cause from presenting the Application within the aforesaid period of three months, allow it to be presented within a further period of three months."

Further Rule 10(2) of Central Excise (Appeals) Rules, 2001 provides as under:-

"The Revision Application sent by registered post under sub-rule (1) shall be deemed to have been submitted to the said Under Secretary on the date on which it is received in the office of such officer."

From perusal of above provisions, it is clear that stipulated period of filing Revision Application is three months from date of receipt of and is deemed to have been submitted only upon receipt of Revision Application in the office of Revision Application Unit. The present Revision Application has been filed beyond three months period. This period may be extended by further three months provided sufficient cause has been shown which prevented the applicant from filing Revision Applications in time.

11. Government finds that the applicant in their Application for condonation of delay has in a general manner mentioned that they had posted the application on the last day of the stipulated 3 months period and that the delay is caused due to postal delay. The applicant has failed to give any documentary evidences to justify that there were sufficient cause, which prevented them from filing Revision Application in stipulated time in support of their claim for the delay in filing of appeal. Under such circumstances, Government is of the considered opinion that onus to show cause for not filing Application is on the applicant who has failed to show sufficient cause that prevented him from filing Revision Application within stipulated period of three months. The Revision Application has been made contrary to the provisions of Section 35EE (2) and is, therefore, liable for rejection.

12. Further in terms of Rule 10(2) of the Central Excise (Appeal) Rules, 2001 the date of receipt of the application by registered post in the Revision Application Unit is deemed to be the date of submission of the application. Therefore, the claim of the applicant that the postal delay is condonable is contrary to the provisions of Section 35(EE) of the Central Excise Act 1944 read with Rule 10(2) of the Central Excise (Appeal) Rules 2011.

13. In view of the above, Government rejects the Revision Application as time barred without going into the merits of the case.

14. So, ordered.



(RIMJHIM PRASAD)

Joint Secretary to the Government of India

M/s Biocon Limited
20th K.M., Hosur Road, Electronics City,
Bangalore-560 100.

ATTESTED.



BHAGWAT P. SHARMA
OSD (R.A. WING)

ORDER NO. 59 /2016-CX DATED 09.05.2016

Copy to:-

1. The Commissioner of Central Excise, LTU, Large Tax Payer Unit, JSS, Towers, 100 Ft. Ring Road, Banashankari, 3rd Stage, Bangalore-560085.
2. The Commissioner of Central Excise (Appeals), LTU, Large Tax Payer Unit, JSS, Towers, 100 Ft. Ring Road, Banashankari, 3rd Stage, Bangalore-560085.
3. The Assistant Commissioner (GLT-I), Large Tax Payer Unit, JSS, Towers, 100 Ft. Ring Road, Banashankari, 3rd Stage, Bangalore-560085.
4. PA to JS (R. A.)
5. ✓ Guard File
6. Spare Copy.

ATTESTED



(B.P.Sharma)
OSD (Revision Application)
BHAGWAT P. SHARMA
OSD (R.A. WING)