

REGISTERED SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.195/581-593/13- RA/S704

Date of Issue: -

~~08.2020~~

20.09.2020

ORDER NO.601-613 /2020-CX(WZ)/ASRA/MUMBAI DATED 01.09.2020
OF THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO
THE GOVERNMENT OF INDIA, UNDER SETION 35EE OF THE CENTRAL
EXCISE ACT,1944.

SL.No.	Revision Application No.	Applicant	Respondent
1	195/581-593/13-RA	M/s Micro Labs. Ltd., Goa.	Commissioner, Central Excise, LTU, Bangalore

Subject: Revision applications filed under section 35EE of the Central Excise Act, 1944 against the Order in Appeal No. 24 to 29/2013 dated 14.02.2013 and 38 to 44/2013 dated 26. 02. 2013 passed by the Commissioner (Appeals), LTU, Bangalore.

ORDER

These Revision applications are filed by M/s Micro Labs Limited, Plot No. S-155to S-159, Phase-III, Verna Industrial Estate, Goa- 403 722 (Hereinafter referred to as 'applicant') against the Orders-In-Appeal as detailed in Table below passed by Commissioner of Central Excise (Appeals), LTU , Bangalore.

TABLE

Sr. No.	RA File No.	Order-In-Appeal No./ Date	Order-In-Original No./ Date	Remark
1	195/581-586/13-RA dt. 20.05.2013	24 to 29/2013 dated 14.02.2013	1) 138R/2012 R LTU Dt. 12.06.2012 2) 196R/2012 R LTU Dt. 08.08.2012 3) 202R/2012 R LTU Dt. 22.08.2012 4) 277R/2012 R LTU Dt. 03.10.2012 5) 310R/2012 R LTU Dt. 10.10.2012 6) 311R/2012 R LTU Dt. 12.10.2012	1) Rebate Claim Restricted to the Extent FOB value appeared in Shipping bill 2) Rebate claims rejected for non eligibility of rebate on goods exported to various organisation like UNICEF in foreign countries.
2	195/587-593/13-RA dt.20.05.2013	38 to 44/2013 dated 26.02.2013	1) 14R/2012 R LTU Dt. 02.02.2012 2) 24R/2012 R LTU Dt. 22.02.2012 3) 33R/2012 R LTU Dt. 28.02.2012 4) 80R/2012 R LTU Dt. 17.04.2012 5) 101R/2012 R LTU Dt. 27.04.2012 6) 129R/2012 R LTU Dt. 09.05.2012 7) 202R/2012 R LTU Dt. 22.08.2012	1) Rebate Claim Restricted to the Extent FOB value appeared in Shipping bill 2) Rebate claims rejected for non eligibility of rebate on goods exported to various organisations like UNICEF in foreign countries. 3) In one case, apart from FOB & ARE-1 value difference, the rebate claim rejected on the ground that Shipping Bill is not submitted.

2. The Brief facts of the case are that the applicant M/s Micro Labs Limited, are engaged in the business of manufacturing of pharmaceutical goods falling under chapter 30 of CETH of Central Excise Tariff Act, 1985. The applicant is also having factories in and around 11 locations in various parts of the Country. The applicants are clearing the goods for home consumption as well as export. The applicant export the goods on payment of duty and thereafter claim rebate of the duty paid in terms of Rule 18 of the Central Excise Rules, 2002. The applicant are regularly filing rebate claims which were sanctioned and paid in cash calculated on FOB value of exports & the difference of the value between ARE-1 and FOB value is sanctioned as credit in Cenvat Credit Account.

3. In the instant revision application rebate claims were rejected/restricted by the original authority vide Orders in original mentioned at Table at para 1 above, on the following issues,

- 3.1 Rebate Claim restricted to the extent of FOB Value
- 3.2 Rebate claims rejected for non eligibility of rebate on goods exported to various organizations like UNICEF in foreign countries.
- 3.3 In one case, apart from FOB & ARE-1 value difference, the rebate claim rejected on the ground that Shipping Bill is not submitted.

4. Being aggrieved by the said Orders-in-Original applicants filed appeals before Commissioner (Appeals), LTU, Bangalore who after consideration of all the submissions, rejected their appeals and upheld impugned Orders-in-Original in respect of 3.1 & 3.2 above.

5. Being aggrieved with these Orders-in-Appeal, applicants have filed the instant revision applications before Central Government under Section 35EE of Central Excise Act, 1944 on the grounds mentioned in each application. As the issue involved in all the Revision Applications are more or less

similar, the grounds of these Revision Applications are summarised as below :-

5.1 The CBEC vide its circular No. 33/33/94-CX.8 dated 04.05.1994 (F. No. 267/19/94-CX.8) had clarified that cash rebate was to be given when goods are exported even when the duty is to be paid through MODVAT account. Thus the intention of the Board has always been to refund the rebate claim in cash only.

5.2 Circulars issued by the Board. The Larger Bench of the Hon'ble Supreme Court in the case of CCE Vs. Dhiren Chemicals Ltd. as reported in 2002(143)ELT 19(SC) has held that irrespective of decisions of the various courts the department is bound by the Circular issued by the Board.

5.3 Applicant has the option either to avail a conditional exemption Notification or not to avail it. The original authority has granted a part of the rebate credit on the grounds that the appellants cleared their final products to various organizations of UNICEF in foreign countries on payment of duty and on domestic clearances to such organisations such as WHO , the applicant have availed benefit of exemption notification. Therefore the applicant have paid duty on exports only for the purpose of encashing cenvat credit. In this regard, the applicant submitted that they are manufacturer of Pharmaceutical Products. Various organisations such as UNICEF, WHO etc. purchase the final products cleared by them for their projects and official work. The Central Government vide Notification No. 108/1995-CE dated 28.08.1995 has provided exemption from payment Central Excise Duty, when the goods are cleared to United Nations or specified international organisations.

6. A Personal Hearing was held in this case on 04.12.2019 and Shri Cherian Punnoose, Advocate duly authorized by the applicant appeared for hearing. No one appeared on behalf of the Revenue. The applicant reiterated the submission filed through Revision applications. The applicant also filed submissions at the time of personal hearing.

7. Government notes that the adjudicating authority has rejected the Rebate Claims filed by the applicant on two common grounds. On being appeal filed by the applicant the Commissioner (Appeals) upheld the Orders in Original and rejected the appeal filed by the applicant. In view of the aforesaid background and as the issues involved in all these Revision Applications being similar, Government now takes up these Revision Applications for decision vide common order.

8. The First issue is based on based on the differential duty based on the ARE-1 Value and FOB Value of goods and the sanction of rebate thereof by the original authority. The Government finds that the Original Authority had rejected/restricted the rebate amount on the ground that in some cases the FOB value was less than the assessable value on which duty had been paid and rebate of duty paid on value over and above the assessable value was not admissible as rebate.

8.1 As regards restricting of rebate amount proportionate to FOB value in respect of the rebate claims treating it as a transaction value Government relies on GOI Order dated 26.03.2014 in Re: Sumitomo Chemicals India Pvt. Ltd. [2014(308) E.L.T.198(G.O.I.)] wherein GOI held that:

"9. Government notes that in this case the duty was paid on CIF value as admitted by applicant. The ocean freight and insurance incurred beyond the port, being place of removal in the case cannot be part of transaction value in terms of statutory provisions discussed above. Therefore, rebate of excess duty paid on said portion of value which was in excess of transaction value was rightly denied. Applicant has contended that if rebate is not allowed then the said amount may be allowed to be re-credited in the Cenvat credit account. Applicant is merchant-exporter and then re-credit of excess paid duty may be allowed in Cenvat credit account from where it was paid subject to compliance of provisions of Section 12B of Central Excise Act, 1944".

8.2 Government therefore, holds that the excess duty paid by the applicant over and above the FOB value be allowed as re credit in the Cenvat credit account from which it was paid/debited subject to compliance of the provisions of Section 12 B of Central Excise Act, 1944.

9. As regards Second issue, it is found that the Original Authority, while scrutinising the rebate claim, has observed that the applicant had made clearances to various organisations of UNICEF in foreign countries as well as had made domestic clearances to organisations of UNICEF. It is observed that the applicant are availing the benefit of exemption as per Notification No. 108/1995-CE dated 28.08.1995 and were clearing goods without payment of duty for domestic clearances. However, while exporting the goods to UNICEF, the applicant clear the goods on payment of duty. The Original Authority did not allow rebate claim on the ground that the applicant had paid duty in this case for encashing Cenvat Credit. However, since this is export the duties paid on such clearances are returned by the way of credit into their Cenvat Credit Account.

9.1 In this case it is pertinent to understand the provisions of Notification No. 108/1995-CE dated 28.08.1995. The same read as under :-

Notification No. 108/95-C.E., dated 28-8-1995

“Exemption to goods supplied to UN or an International Organisation

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excises and Salt Act, 1944, (1 of 1944) read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts all goods falling under the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said goods) when supplied to the United Nations or an international organisation for their official use or supplied to the projects financed by the said United Nations or an international organisation and approved by the Government of India, from the whole of -

- (i) *the duty of excise leviable thereon under section 3 of the Central Excises and Salt Act, 1944 (1 of 1944); and*

- (ii) *the additional duty of excise leviable thereon under sub-section (1) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) :*

Provided that before clearance of the said goods, the manufacturer produces before the Assistant Commissioner of Central Excise having jurisdiction over his factory, a certificate from the United Nations or an international organisation that the said goods are intended for official use by the said United Nations or the said international organisation or are to be supplied to a project financed by the said United Nations or the said international organisation and the said project has duly been approved by the Government of India.

Explanation. - For the purpose of this notification, "international organisation" means an international organisation to which the Central Government has declared, in pursuance of section 3 of the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), that the provisions of the Schedule to the said Act shall apply."

From the perusal of records, Government observes that the impugned Notification is conditional one. The subject notification is issued under sub Section (1) of Section 5A of Central Excise Act, 1944. The Government finds that the issue pertaining to the ambit of the provisions of sub-section (1) of Section 5A of the CEA, 1944 is also relevant to the facts of the case. In the instant case, the Department has put more emphasis to the contention that the respondent ought not to have paid duty while they were eligible to the benefit of exemption under Notification No. 108/1995-CE dated 28.08.1995. The Government finds that Sub-section (1) of Section 5A of the Central Excise Act, 1944 which is pertinent to the instant issue stipulates as under:-

"Section 5A :- Power to grant exemption from duty of excise :-

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of duty of excise leviable thereon :

Provided that, unless specifically provided in such notification no exemption therein shall apply to excisable goods which are produced or manufactured -

- (i) *In a free trade zone or special economic zone and brought to any other place in India; or*
- (ii) *By a hundred percent export oriented undertaking and brought to any place in India,*

Explanation :- In this proviso "free trade zone", "special economic zone" and "hundred percent export oriented undertaking" shall have the same meanings as in Explanation 2 to sub section (1) of Section 3.

(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely the manufacturer of such excisable goods shall not pay the duty of excise on such goods."

The above provision insists that the exemption granted absolutely from whole of duty of excise has to be availed and in that case there is no option to pay duty. However, in the instant case, goods are exempted under Notification No. 108/1995-CE dated 28.08.1995 subject to condition that the manufacturer produces before the Assistant Commissioner of Central Excise having jurisdiction over his factory, a certificate from the United Nations or an international organisation that the said goods are intended for official use by the said United Nations or the said international organisation or are to be supplied to a project financed by the said United Nations or the said international organisation and the said project has duly been approved by the Government of India. Consequently, the Notification No. 108/1995-CE dated 28.08.1995 does not pass muster as an unconditional notification. Now given that the Notification No. 108/1995-CE dated 28.08.1995 is a conditional one, the respondent was not under any statutory compulsion to avail it. Conversely, even if it is assumed for a moment that Notification No. 108/1995-CE dated 28.08.1995 is an absolute exemption, the contention that the respondent would be obligated to avail it has been rejected by the Hon'ble Gujarat High Court in the case of Arvind Ltd. Also, as per C.B.E. & C. Circular No. 845/03/06-CX dated 1-2-2007 and 795/28/2004-CX, dated 28-7-2004, both the Notifications can be availed simultaneously.

9.2 The Government notes that the applicant have option to either opt for the exemption notification or clear the goods on payment of duty. The applicants are fulfilling the conditions under the said Notification while clearing goods to domestic organisations of UNICEF and they opt not to avail the exemption under notification for their export to UNICEF.

9.3 The Government observes that the Hon'ble Gujarat High Court had in the case of Arvind Ltd. vs. UOI [2014(300)ELT 481(Guj.)] dealt with the issue of simultaneous availment of two different notifications and observes as under :

9. On, thus, having heard both the sides and on examination of the material on record, the question that involves in these petitions is the wrong availment of the benefit of concessional rate of duty vide Notification No. 59/2008, dated December 7, 2008. Admittedly, the final products were exempted from payment of duty by original Notification No. 29/2004-C.E., dated July 9, 2004 as further amended *vide* Notification No. 59/2008-C.E., dated December 7, 2008. The fact is not being disputed by the respondents that the petitioner availed Notification No. 59/2008 for clearance made to export and thereafter filed various rebate claims. It is, thus, an undisputed fact that the petitioner on final products discharged the duty liability by availing the benefit of Notification No. 59/2008 and as has already been noted in the record, it has reversed the amount of Cenvat credit taken by it on the inputs used for manufacturing of such products. Thus, when the petitioner is not liable to pay duty in light of the absolute exemption granted under Notification No. 29/2004 as amended by Notification No. 59/2008-C.E. read with the provision of Section 5A(1A) of the Act and when it has not got any other benefit in this case, other than the export promotion benefits granted under the appropriate provision of the Customs Act and Rules (which even otherwise he was entitled to without having made such payment of duty), we are of the firm opinion that all the authorities have committed serious error in denying the rebate claims filed by the petitioner under Section 11B of the Act read with Rule 18 of the Rules. The treatment to the entire issue, according to us, is more technical rather than in substance and that too is based on no rationale at all.

10. We also cannot be oblivious of the fact that in various other cases, the other assesseees have been given refund/rebate of the duty paid on inputs used in exported goods. The stand of the Revenue is also not sustainable that the payment of duty on final products exported at the will of the assessee cannot be compared with other type of cases of refund/rebate of duty. Admittedly, when the petitioner was given exemption from payment of whole of the duty and the petitioner if had paid duty at the time of exporting the goods, there is no reason why it should be denied the rebate claimed which otherwise the petitioner is found entitled to. We are not going into the larger issues initially argued before us as subsequently the Revenue has substantially admitted the claim of rebate of excise duty and has not resisted in substance such claim of rebate.

11. Resultantly, both the petitions are allowed quashing and setting aside the orders impugned in both the petitions by further directing the respondents to grant the petitioner of Special Civil Application No. 10887 of 2012 rebate of Rs. 3,15,63,741/- (Rupees Three Crore Fifteen Lac Sixty Three Thousand Seven Hundred Forty One only) and Rs. 39,59,750/- (Rupees Thirty Nine Lac Fifty Nine Thousand Seven Hundred Fifty only) to the petitioner of Special Civil Application No. 10891 of 2012, by calculating interest thereon under Section 11BB of the Central Excise Act, 1944, within a period of eight weeks from the date of receipt of a copy of this judgment.

12. Rule is made absolute in each petition to the aforesaid extent. There shall be, however, no order as to costs.

9.4 It would be relevant to note that the Hon'ble Apex Court [2017(352)ELT A21(SC)] has dismissed the Special Leave Petitions filed by the Union of India against the above judgment of the Hon'ble Gujarat High Court and therefore the matter has attained finality. The Hon'ble Gujarat High Court after careful consideration of the facts, came to the conclusion that the Admittedly, when the assessee was given exemption from payment of whole of the duty and the assessee if had paid duty at the time of exporting the goods, there is no reason why it should be denied the rebate claimed which otherwise the assessee is found entitled to. The inference that can be drawn from this judgment is that when the notification grants exemption conditionally the assessee would have the option to pay duty and claim rebate of such duty paid. In the light of the above referred judgment of the Hon'ble High Court, it would follow that the respondent cannot be compelled to avail the benefit of the exemption notification which exempts the goods cleared for export from the whole of the duty of excise. The Government further finds that the Circular No. 687/3/2003-CX dated 03.01.2003 (F. No. 267/57/2002-CX-8) clarifies that the duty paid through actual credit or deemed credit account on the goods exported must be refunded in cash.

9.5 The Government also notes that the same appellate authority vide Oder In Appeal No. 152-156/2013 dated 27.06.2013 held that the Notification No. 108/1995-CE dated 28.08.1995 granting exemption to supplies made to organisations like UNICEF, is a conditional notification and the Applicant had the option either to fulfil the condition of the

Notification or not to claim the benefit of the said Notification. The Appellate Authority had also held that the rebate has to be granted in cash and held that the applicant are eligible for the rebate on the goods exported to UNICEF in cash. It is leant that the department had not filed any appeal against the above referred Order in Appeal and thus has attained finality.

9.6 In view of above discussions, Government holds the applicant are eligible for the rebate of excise duty paid on the goods exported to UNICEF.

10. In view of above discussion, Government sets aside the impugned Order in Appeal No. 24 to 29/2013 dated 14.02.2013 and 38 to 44/2013 dated 26. 02. 2013 passed by the Appellate Authority.

11. The revision application is allowed as above.

12. So ordered.

(SEEMA ARORA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

601-613
ORDER No. /2020-CX (WZ)/ASRA/Mumbai DATED 01.09.2018

To

M/s Micro Labs Limited,
Plot No. S-155to S-159,
Phase-III, Verna Industrial Estate,
Goa- 403 722.

Copy to :

1. The Commissioner of CGST, South, C.R. Building, Queen's Road, Bengaluru - 560 001.
2. The Commissioner of CGST, Goa, GST Bhavan, EDC Complex, Plot No. 6, Patto Panaji, Goa- 403 001.
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