REGISTERED SPEED POST AD

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. 198/18/2015-RA/2610 Date of Issue: 24.06.2022

ORDER NO. 639/2022-CX(WZ)/ASRA/MUMBAI DATED 21-6-2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Commissioner of CGST & Central Excise, Goa

Respondent : M/s Essel Propack Ltd.
113/114, Kundaim Industrial Estate,
Kundaim, Goa – 403 115

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. PUN-EXCUS-002-APP-029-14-15 dated 09.12.2014 passed by the Commissioner of Central Excise(Appeals-II), Pune.

ORDER

The revision application has been filed by the Commissioner of Central Excise & Service Tax, Goa(hereinafter referred to as "the applicant" or "the Department") against Order-in-Appeal No. PUN-EXCUS-002-APP-029-14-15 dated 09.12.2014 passed by the Commissioner of Central Excise(Appeals-II), Pune in respect of M/s Essel Propack Ltd., 113/114, Kundaim Industrial Estate, Kundaim, Goa – 403 115.

2. The respondent had filed rebate claim under Rule 18 of the Central Excise Rules, 2002, to claim rebate in respect of the capital goods exported by them for an amount of Rs. 1,81,38,333/- being the excise duty paid on the export of Capital goods cleared as such after use under ARE-I No. 25 dt.11.01.2013. The said capital goods were originally imported and then re-exported by reversing CENVAT credit under Rule 3 (5) of the CENVAT Credit Rules, 2004. SCN was issued to the assessee seeking to deny the refund claimed on the grounds that, the assessee had not reversed the CENVAT credit availed on the Capital goods reduced by percentage points calculated by straight line method @ 2.5% for each quarter in terms of Rule 3 (5A)(b) of CCR,2004 and that Rule 18 of CER,2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004. Notification No. 19/2004-CE(NT) dated 06.09.2004 grants rebate of whole of duty paid on all excisable goods falling under First schedule to the CETA, 1985 exported to other than Nepal and Bhutan. It was averred that the respondent had re-exported used Capital goods, which did not qualify as manufactured excisable goods falling under the schedule to the CETA, 1985, a necessary condition for granting rebate. Therefore, the Assistant Commissioner of Central Excise, Division-I, vide his OIO No.R/566/13-14-CX-DIV-I dated 21.10.2013 rejected the rebate claim of Rs. 1,81,38,333/-.

3.1 Aggrieved by the OIO dated 21.10.2013, the respondent preferred appeal before the Commissioner(Appeals). The Commissioner(Appeals) vide his OIA No. PUN-EXCUS-002-APP-029-14-15 dated 09.12.2014 noted that; export in such cases should have been allowed under bond/under Rule 19 of CER,2002 which takes care of any terminal duty payable for any export goods cleared from the factory for export, the adjudicating authority should examine the cases cited by the appellant and is bound by the decision of any higher authority which has reached finality and that the rules provide for reversal of credit equal to the amount of

credit taken a day before or on the day export was made. He observed that the capital goods were not used after credit was taken. The provisions of Rule 3 (5) of CCR, 2004 provides for reduction of 2.5 % per quarter calculated by straight line method for each quarter of a year or part thereof from the date of taking the CENVAT Credit. In the present case, since the goods were removed within 24 hours of reversals, application of Rule 3(5A) 0f CCR, 2004 is ruled out.

3.2 With regard to the issue of whether the export of capital goods removed as such be treated as removal of excisable goods considering such goods were imported but not manufactured in the factory which has been denied by the adjudicating authority, he has examined the expression *"Rebate of duty"* under Rule 18 of CER,2002 and expression *"excisable goods"* as defined in Section 2(d) of CEA, 1944. The Commissioner(Appeals) found that subjecting any goods to duty of excise is incumbent upon it falling within the encompass of Section 3 of the Act, which provides for levy of *"a duty of excise to be called CENVAT on all excisable goods (excluding goods produced or manufactured in SEZ) which are produced or manufactured in India as, and at the rates set forth in the First schedule to the CETA,1985 (50f 1986)"*. It was observed that the Department had contended that the goods imported are not manufactured. However, the Commissioner(Appeals) averred that this matter has been settled by various decisions and the answer lies in the earlier concept of *'deemed manufacture'* incorporated in the provisions concerning Modvat in the erstwhile Central Excise Rules, 1944. Later, in the CENVAT Credit Rules this expression was omitted, but provision for reversal of credit continued in such cases. The reversal of credit was precisely incorporated in the Rules because such items bought from outside, which include the inputs or capital goods per se, are not manufactured within that factory but any other person who receives such goods is entitled to avail CENVAT credit of such credit reversed, as if these are duty paid. Rule 3(5) of CCR, 2004 provides for reversal of goods removed as such and its status is laid down in Rule 3(6). The Commissioner(Appeals) held that once a fiction is created by Rule to make recipient eligible for CENVAT credit of the amount paid under sub-rule (5) as if it was duty paid by the person who removed such goods under sub rule (5) and sub rule (5A), the clearance for export on payment of duty and claim for rebate thereof cannot be faulted. In line with the above and placing reliance on the decision in the case of Divi's Laboratory Ltd. Vs Joint Secretary (Revisionary Authority)[2010 (285) ELT 469 (GOI)] , Ashok Leyland Ltd. Vs Joint Secretary (Revisionary Authority)[2012

(284) ELT 150 (GOI)] and some other cases Commissioner(Appeals) set aside the impugned order and allowed the appeal vide his OIA No. PUN-EXCUS-002-APP-029-14-15 dated 09.12.2014.

4. The Committee of Commissioners comprising of Commissioner of Central Excise, Goa and Commissioner of Central Excise, Kolhapur found that the OIA dated 09.12.2014 was not legal, proper and correct and hence directed the filing of revision application on the following grounds :

(i) Commissioner (Appeals) has erred in allowing the appeal as he had failed to take note of the fact that SAD (Special Additional Duty) part is also included in the amount claimed as rebate and they are not eligible for rebate on the SAD amount. SAD being the duty levied on imported goods @4 % in lieu of the sales tax, value added tax, local taxes and other charges leviable on similar goods on their sale/purchase/transportation in India and cannot be equated to customs duty/CVD. Moreover, this SAD is not included within the ambit of types of duties specified for the purpose of granting rebate in the Notification No.19/2004-(N.T) dated 06.09.2004. The Commissioner (A) has therefore erred in holding that the rebate is admissible.

(ii) The Commissioner(A) has failed to take note that the rebate of amount of Rs.1,81,38,333/- allowed by him includes SAD of Rs.54,57,397.20. The details showing the bifurcation of the amount of Rs.1,81,38,333/- are indicated in the Certificate dated 09.01.2013 issued by the Asstt. Commissioner, Customs, Nhava Sheva, Taluka Uran.

(iii) It needs to be mentioned that this Additional Duty is paid under Notification 19/2006- Cus dated 01.03.2006 which is in lieu of sales tax, value added tax, local tax and other taxes. Notification No. 19/2004-CE (N.T.) dated 06.09.2004 governing the claims for rebate specifies rebate of duty only in respect of the duties listed therein. SAD is not included among the duties listed in the Notification. When the exporter paid duties at the time of export and claimed rebate, the rebate can be allowed only of the duties specified in Notification 19/2004-CE(N.T.) dt. 06.09.2004.

(iv) Reliance has been placed on the decision reported in [2014(311) E.L.T. 854 (GOI)] in respect of M/s Alpa Laboratories Ltd., wherein the Revisionary

Authority, Department of Revenue, has held that Special Additional Duty(SAD) is levied on imported goods to counter balance the sales tax, value added tax, local tax etc. which cannot be considered as duty of excise for being eligible for rebate benefit. SAD is not classified as a duty in list of duties provided in Explanation 1 of the Notification No.21/2004-C.E.(N.T.). Hence, payment of SAD is not eligible for rebate claim. In the present case also, SAD is not mentioned under the expression of "duty of excise" collected under various enactments mentioned under Notification 19/2004- CE(N.T.) dated 06.09.2004. The Commissioner(Appeals) had therefore totally erred in allowing the appeal by permitting sanction of rebate of SAD portion of duty paid on imported goods.

5.1 Consequent to the filing of revision application by the Department, the respondent was issued SCN dated 26.08.2015 under Section 35EE of the CEA, 1944 calling upon them to show cause why the impugned OIA should not be annulled and other orders passed on the grounds of revision application. The respondent filed reply to the SCN vide their letter dated 25.09.2015. The respondent drew reference to Rule 18 and Rule 19 of the CER, 2002 and opined that it would be clear that the intention of these rules is to relieve the exports from all duties leviable on raw materials used in the manufacture of finished goods exported and duties levied on finished goods themselves. The intention of the Government was to export goods and not the taxes thereon because if refund of duty paid on final products is not allowed, Indian manufacturers will not be able to compete internationally. In this regard, the respondent placed reliance upon para 8 of the judgment of the Hon'ble Bombay High Court in the case of Repro India Ltd. vs. UOI[2009(235)ELT 614(Bom.)]. It was further stated that they had not passed on the incidence of SAD to any other person. Therefore, they were entitled to rebate of SAD paid on imported capital goods which had subsequently been exported by the respondents from their Goa Unit. In such manner, the revision application suffered from the vice of being contrary to stated policy and therefore was liable to be quashed.

5.2 The scope of the word "duty" in the Notification No. 19/2004-CE(NT) dated

06.09.2004 cannot be construed to exclude SAD. It was contended that duty levied under Section 3 of the CEA on all excisable goods is called CENVAT duty. In terms of Rule 3(1) of the CCR, 2004, the duties which are available as credit are referred to as CENVAT credit and CENVAT credit includes SAD as well. It was averred that the word "duty" has been used in the "Explanation" portion of the Notification and that it was well settled that the scope of the Explanation is explanatory, that it does not exclude what would normally come within the scope of that word and that the definition should be understood in the context of the phrase defined and the purpose of a definition is not to contradict or supplant it altogether. In this view, the contention that SAD would be outside the scope of the Notification No. 19/2004-CE(NT) dated 06.09.2004 was contrary to law and against the basic intention, purpose and spirit of the law. Therefore, the revision application filed by the revenue to reject the rebate of SAD on export of capital goods is totally incorrect.

5.3 The applicant stated that their submission that SAD on export of capital goods under Rule 3(5A) of the CCR, 2004 is "duty" is fully supported by the decision of the CESTAT in the case of Grasim Industries Ltd. vs. CCE[2003(155)ELT 200(Trb.)]. Likewise, Circular issued vide F. No. 283/188/96-CX. dated 31.12.1996 and Circular No. 345/2/2000 dated 29.08.2000 issued by the CBEC also support the proposition that the amount paid on the input or capital goods as such is "duty". They further averred that the narrow construction of the word "duty" in Notification No. 19/2004-CE(NT) dated 06.09.2004 as done in the revision application was discriminatory. It was stated that the manufacturer availing CENVAT credit of SAD would be eligible to claim refund under Rule 5 of the CCR, 2004 and thereby neutralize the tax burden on exports. It was further averred that the scope of the word "duty" in Notification No. 19/2004-CE(NT) dated 06.09.2004 was the same as that of the word "CENVAT credit" in Rule 3(1) of the CCR, 2004 and that this was apparent from the fact that whenever the duty element was allowed as "CENVAT credit", it was also allowed to be rebated by making suitable amendment in the word "duty" in the said notification. For illustration, they referred Notification No. 15/2005-CE(NT) dated 01.03.2005 inserting clause (h) & Notification No. 17/2007-CE(NT) dated 08.03.2007 inserting

clause (i) to the word "duty" in Notification No. 19/2004-CE(NT) dated 06.09.2004. It was pointed out that these insertions coincide with the insertions made to "CENVAT credit". The respondent opined that the intention of the legislature was to provide rebate of duty paid on the goods meant for export, which was also available as CENVAT credit as an alternative mechanism.

5.4 It was pointed out that the when the Notification No. 19/2004-CE(NT) dated 06.09.2004 was introduced, there was no SAD liability on imported goods since it was unconditionally exempted. SAD was reintroduced w.e.f. 01.03.2005 by issue of Notification No. 19/2005-Cus dated 01.03.2005 and on this day clause (viia) was inserted in Rule 3(1) of the CCR, 2004. The respondent contended that it was a lapse that Notification No. 19/2004-CE(NT) dated 06.09.2004 had not been amended but that lapse could not be exploited against exporters like them. It was further stated that the interpretation of Notification No. 19/2004-CE(NT) dated 06.09.2004 as adopted by the Department results in discrimination between a person who has exported the resultant product under bond under Rule 19 and persons who have exported under the rebate scheme in terms of Rule 18. The contention of the Department that export of capital goods as such on payment of amount equal to the credit of SAD availed by the exporter under the rebate scheme in Rule 18 of the CER, 2002 would be in violation of Notification No. 19/2004-CE(NT) dated 06.09.2004 is discriminatory in nature and hence should be avoided as held by the Hon'ble Supreme Court in the case of Hindustan Petroleum Corporation Ltd.[1995(77)ELT 256(SC)]. The respondent averred that for exports, both the duty on the exported finished goods as well as the duty on the inputs should not be levied, that it was the policy of the Government that no duty is levied at any stage. The interpretation of the Notification No. 19/2004-CE(NT) dated 06.09.2004 adopted by the Department was contrary to the aforesaid policy of the Government and therefore this classification violates Article 14 of the Constitution.

5.5 The respondent submitted that the reliance placed upon the decision of GOI in the case of Alpa Laboratories[2014(311)ELT 854(GOI)] was not correct because in that case the final products were exempted from payment of central excise duty and hence the question of taking credit of CVD and SAD did not arise. In the

present case, the respondents had taken credit of SAD paid on imported capital goods which were subsequently exported outside India. Therefore, the facts in the case of Alpa Laboratories and the facts in the present case are completely different. They averred that once the credit of SAD is taken, SAD becomes a part of CENVAT credit and loses its character of customs duty and partakes the character of duty of excise. The respondent further submitted that in this case there is no dispute about the fact that capital goods had been exported, they had already submitted proof of export, it was clear that the capital goods are duty paid and the amount of duty paid is also not in dispute. Therefore, the denial of rebate equal to the SAD paid on such capital goods was contrary to the provisions of Rule 18 of the CER, 2002 and notifications issued thereunder.

6. Personal hearing was granted in the matter on 14.10.2021. Shri P. Y. Dharmik, Assistant Commissioner appeared on behalf of the Department and reiterated the points already made in their earlier submissions and stated that SAD was not rebatable. Shri Sachidanand Singh, Head(Indirect Taxes) appeared on behalf of the respondent and submitted that CENVAT includes SAD. Therefore, since they had paid CENVAT which included SAD, rebate was admissible. He also filed a written submission. He also informed that based on Commissioner(Appeals) order, they had been allowed rebate of CVD and SAD portion was recredited to their CENVAT account.

7.1 In the written submissions filed by the respondent on the date of personal hearing, they submitted that in 2010 they had imported capital goods under EPCG licence without payment of applicable customs duties. They had installed these capital goods on 28.08.2010 and put them to use in the manufacture of finished goods to be cleared from the Goa Unit on payment of excise duty. They subsequently found that they were not in a position to fulfill the export obligation which was a condition under the EPCG licence. At that point, the respondents vide letter dated 12.12.2012 had requested the Central Excise Department to permit them to export these capital goods under bond(UT-1) without payment of duty from their Goa Unit. As there was no response from the Department to their request, the respondent on 09.01.2013 voluntarily paid customs duties applicable on such

imported goods. They thereafter availed the CENVAT credit of the amount equal to CVD and SAD paid on the imported capital goods in their CENVAT account. The imported capital goods were then cleared for export from their Goa Unit vide ARE-1 No. 25 dated 11.01.2013. At the time of removal of the said imported capital goods, the respondent debited their RG23C Pt.II with amount equal to CENVAT credit taken on imported capital goods. Since the imported capital goods had been removed for export on the same day of availing CENVAT credit, the respondent had reversed the entire amount of CENVAT credit taken on such imported capital goods. Thereafter, the respondent filed rebate claim under Rule 18 of the CER, 2002 vide letter dated 15.03.2013 before the Assistant Commissioner, Central Excise, Division-I, Panaji, Goa. Thereafter, their claim was rejected and they filed appeal before Commissioner(Appeals) who decided the matter in their favour.

7.2 The respondent thereafter reiterated the entire submissions filed by them vide letter dated 25.09.2015 in response to SCN issued after revision application was filed by the Department in the matter.. They also placed reliance upon the following case laws :

(i) Positive Packaging Industries Ltd.[2012(282)ELT 137(GOI)]

(ii) CCE vs. Micro Link Ltd.[2011(270)ELT 360(Bom.)]

(iii) Grasim Industries Ltd. vs. CCE[2003(155)ELT 200(Trb)]

(iv) Divi's Laboratories Ltd.[2012(285)ELT 469(GOI)]

(v) Ispat Industries Ltd. in W.P. No. 88 of 2011

(vi) Packaging Industries Ltd.[2012(282)ELT 137(GOI)]

(vii) Sterlite Industries (I) Ltd. in W.P. No. 2094 of 2010

(viii) Ashok Leyland Ltd.[2012(284)ELT 150(GOI)].

8. Government has carefully gone through the impugned OIA, the OIO, the revision application filed by the Department, the written submissions filed by the respondent and the submissions made by the Department as well as the respondent at the time of personal hearing. The issue for decision in the present case is whether the respondent is eligible for the rebate of SAD component paid by them on the imported capital goods which were subsequently exported by them. The Department is of the view that the respondent would not be eligible for the

rebate of the SAD component involved under the rebate claim.

9.1 Government proceeds to decide the issue of admissibility of rebate claims taking into account the harmonious and combined reading of statutory provisions relating to rebate as well as the additional Customs duty leviable under Section 3(5) of the Customs Tariff Act, 1975 (SAD).

9.2 Government notes that the said Section 3(5) ibid reads as under:

> ***Section 3. Levy of additional duty equal to excise duty, sales tax, local taxes and other charges. –***
>
> *(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four percent of the value of the imported article as specified in that notification.*
>
> ***Explanation.*** *- In this sub-section, the expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs, and where such taxes, or, as the case may be, such charges are leviable at different rates, the highest such tax or, as the case may be, such charge.*

Thus, Government observes that this levy is imposed at the time import of goods.

9.3 Government notes that the Rule 3(1)(viia) of the Cenvat Credit Rules, 2004 allows an assessee to take credit of SAD:

> ***Rule 3. CENVAT credit. -***

(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

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(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) (vi) and (via);

(viia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act;

Thus, the cenvat credit taken by the respondent of SAD paid at the time of import of goods was valid and proper.

9.4 Rule 18 of the Central Excise Rules, 2002 reads as under:

Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification

Thus, from a plain reading of Rule 18, it is clear that rebate of duty paid at the time of clearance of excisable goods for export can be claimed.

9.5 The relevant extracts of Notification No. 19/2004-Central Excise (N.T.) dated 06.09.2004 read as under:

In exercise of the powers conferred by rule 18 of the Central Excise Rules, 2002 and in supersession of the Ministry of Finance, Department of Revenue, notification No. 40/2001-Central Excise (NT), dated the 26th June 2001, [G.S.R.469(E), dated the 26th June, 2001] in so far as it relates to export to the countries other than Nepal and Bhutan, the Central Government hereby directs that there shall be granted rebate of the whole of the duty paid on all excisable goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), exported to any country other than Nepal and Bhutan, subject to the conditions, limitations and procedures specified hereinafter

Explanation I - "duty" for the purpose of this notification means duties of excise collected under the following enactments, namely:

(a) the Central Excise Act, 1944 (1 of 1944);

(b) the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(c) the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

(d) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), as amended by section 169 of the Finance Act, 2003 (32 of 2003) and further amended by section 3 of the Finance Act, 2004 (13 of 2004);

(e) special excise duty collected under a Finance Act;

(f) additional duty of excise as levied under section 157 of the Finance Act, 2003 (32 of 2003);

(g) Education Cess on excisable goods as levied under clause 81 read with clause 83 of the Finance (No.2) Bill, 2004.

Government observes that the Notification No. 19/2004-Central Excise (N.T.) dated 06.09.2004 relates to export of excisable goods on payment of duty and allows rebate of certain duties paid at the time of export. This notification does not mention SAD as a duty to be rebated.

10. Government observes that the rebate claims filed by the respondent were in respect of CVD and 4% AED (SAD) paid under cover of ARE-1 at the time of export. Government observes that the Applicant has rightly pointed out that 4% SAD leviable under sub-section (5) of section 3 of the Customs Tariff Act did not find a mention in the Explanation I of the said Notification No. 19/2004-Central Excise (N.T.) dated 06.09.2004 and thus cannot be termed as a duty of excise and that SAD is not required to be paid at the time of export. However, in plethora of judgments, it has been held that any amount paid in excess of duty liability is to be treated as voluntary deposit with the Government which is to be returned in the manner in which it was paid. In this regard, the Applicant has rightly prayed to re-credit the SAD paid at the time of export, to the Cenvat credit account of the respondent.

11. The Revision Application is disposed of in the above terms.

Shrawan 21.06.22

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 639 /2022-CX(WZ) /ASRA/Mumbai DATED 21.6.2022

To,
M/s Essel Propack Ltd.
113/114, Kundaim Industrial Estate,
Kundaim, Goa – 403 115

Copy to:

1) The Commissioner of CGST & Central Excise, Goa
2) The Commissioner of Central Excise(Appeals), Goa
3) Sr. P.S. to AS (RA), Mumbai
4) Guard file