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. 195/67/WZ/2018-RA/1083 Date of Issue: 17.02.2023

ORDER NO. 64 /2023-CX(WZ)/ASRA/MUMBAI DATED 15.2.2023 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 : M/s. Madhav Copper P. Ltd.
Plot No. 5/B/B, Survey No. 346-47,
Near Kobdi, Ukharla,
Bhavnagar- 364 050
State-Gujarat.

Respondent : Pr. Commissioner of CGST & Central Excise, Bhavnagar.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. BHV-EXCUS-000-APP-083-2017-18 Dated 03-01-2018 passed by the Commissioner of Central Excise(Appeals), Bhavnagar.

ORDER

The revision application has been filed by M/s. Madhav Copper P. Ltd. Plot No. 5/B/B, Survey No. 346-47, Near Kobdi, Ukharla, Talaja Road, Bhavnagar- 364 050 State-Gujarat (herein after to be referred as "Applicant"), against Order-in-Appeal No. BHV-EXCUS-000-APP-083-2017-18 Dated 03-01-2018 passed by the Commissioner of Central Excise(Appeals), Bhavnagar.

2. The applicant had filed rebate claims amounting to Rs. 1,20,006/- under Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 of the CER, 2002 read with Section 11B of the Central Excise Act, 1944 for the goods cleared from the factory for export under ARE-1's. The concerned Assistant Commissioner, Central Excise after following the due process of Law rejected the said rebate claim vide his Order-In-Original No. R-278 Refund/16-17 dated 30.12.2016 being inadmissible under Section 11B of the CEA, 1944 as the rebate claim had been filed beyond the stipulated time limit of one year from the relevant date.

3. Aggrieved by the OIO dated 30.12.2016, the applicant filed appeal before the Commissioner(Appeals). The appellate authority after following due process of law rejected the appeal and upheld the OIO vide his Order-in-Appeal No. BHV-EXCUS-000-APP-083-2017-18 Dated 03-01-2018.

4. Aggrieved by the OIA dated 03-01-2018, the applicant filed revision application on the following grounds:

i. They contended that the Impugned Order is absolutely bad in law, unjust, illegal and is not maintainable in the eyes of law. The case laws cited by the Adjudicating Authority are not squarely applicable. The case laws viz; 2012 (281) ELT 209 (Guj) has been Distinguished in 2016 (334) ELT 321 (Rajasthan High Court). Therefore, the

Appellate Authority has wrongly taken the help of the said case law. But, the case laws viz; 2015 (321) ELT 45 (Mad) cited by your Applicant was squarely applicable in the present case as this case law has been relied upon in the following case laws which are reported in 2014 (314) ELT 833 (Government of India), 2015 (316) ELT 618 (Bombay High Court), 2015 (328) ELT 177 (Tribunal Ahmedabad), and Distinguished in 2016 (334) ELT 321 (Rajasthan High Court).

ii. The issue is to decide whether the Adjudicating Authority as well as Appellate Authority has correctly and legally rejected the claim amounting to Rs. 1,20,006/- on account of hit by time limitation under Section 11B of the Central Excise Act, 1944 or otherwise.

iii. The Adjudicating Authority has not denied that the rebate claim has not been filed in accordance with the procedures prescribed under the Notification No. 19/2004-CE (N.T.) dated 06.09.2004 issued under the provisions of Rule 18 of the erstwhile Central Excise Rules, 2002.

iv. Your Applicant had categorically submitted that there was no time limit had been prescribed under the provisions of the Notification No. 19 /2004-CE (NT) dated 06.09.2004 issued under the statutory provisions of Rule 18 of the Central Excise Rules, 2002. Only, the condition has been prescribed that the export should be made within six months from the date of clearance from the factory gate for export. In the present case, the Adjudicating Authority has not denied that the export has not been made within

six months.

v. The Applicant relied upon the following case laws:

(I) 2008 (232) E.L.T. 413 (Guj.), COMMISSIONER OF C.EX & CUSTOMS, SURAT-I Versus SWAGAT SYNTHETICS;

(II) 2000 (118) E.L.T. 311 (SC)- Collector of Central Excise, Jaipur v / s. Raghuvar (India) Ltd.;

(III) 2012 (281) ELT 227 (Mad) - M/s. Dorcas Market Makers Pvt. Ltd. v/s Commissioner of Central Excise - wherein it has been held that;

"Rebate- Limitation- Time limit under Section 11B of Central Excise Act, 1944-Priscribed by Notification No. 41/94-CE, but omitted by subsequent Notification No. 19 / 2004-CE, prescribing procedure for obtaining rebate- HELD: Omission was conscious as all other conditions for obtaining rebate were retained in the subsequent Notification - Rebate could not be rejected on ground of limitation-It was more so as even Rule 18 of Central Excise Rules, 2002 did not prescribe it.

Rebate-Claim of -Limitation- Rule 18 of Central Excise Rules, 2002 is not subject to Section 11 A and 11B of Central Excise Act, 1944-In that view, rebate cannot be rejected on ground of limitation.

Writ jurisdiction- Alternative remedy- Its availability is not an absolute bar for High Court to exercise its writ jurisdiction - It is more so where facts are before the Court and only question to decide is whether Rules or Notification were to be applied-Article 226 of Constitution of India 195".

The above case law is squarely applicable in the present case.

Accordingly, the subject order passed by the said Authority is without authority of law.

(IV) 2013 (291) ELT 189 (Mad)- M/s. Shasun Pharmaceuticals Ltd. v/s Joint Secretary, MF (D.R.), New Delhi where in it has been held that:

"Rebate-Nature of- It is a beneficial scheme to encourage exports. Hence, it has to be construed liberally- Rule 18 of Central Excise Rules, 2002".

(V) The Hon'ble Supreme Court has dismissed the petition for Special Leave to Appeal (Civil) CC No. 17561 of 2015 filed by the Commissioner of Central Excise, Chennai against the Judgment and Order dated 26.03.2015 of Madras High Court in Writ Appeal No. 821 of 2012, as reported in 2015 (321) ELT 45 (Mad). While dismissing the petition by the Hon'ble Supreme Court, the Supreme Court passed an order as;

"Delay condoned

Dismissed"

"The Madras High Court in its impugned order held that question of rebate of duty is governed separately by Section 12 of Central Excise Act, 1944 and the entitlement to rebate would arise only out of a notification under section 12 (1) ibid. Rule 18 of Central Excise Rules, 2002 is to be construed independently. Notification No. 19/2004-CE dated 06.09.2004 does not contain the prescription regarding limitation. Assessee actually having exported the goods and in absence of any prescription in the scheme, the rejection of application for refund as time bared is unjustified"- (Deputy Commissioner v. Dorcas Market Makers Pvt. Ltd. -2015 (325) ELT 0104 (S.C.)".

vi. Accordingly, your Applicant had categorically submitted that your Applicant was entitled for the said rebate claim

under the provisions of Rule 18 of the Central Excise Rules, 2002 and the Notification No.19 /2004-CE(N.T.) dated 06.09.2004 wherein no such time limit for filling of a Rebate claim was specifically been provided therein. On going through the above mentioned settled case laws, the Honorable Supreme Court, Honorable High Court of Gujarat has also discussed the provisions of Section 11B of the Central Excise Act under which the adjudicating authority has wrongly and without authority of law has rejected the rebate claim on account of hit by time limitation under Section 11B of the Central Excise Act, 1944. Therefore, it appears that the Impugned Order has been passed by grossly violating the Norms of "Judicial Discipline". Therefore, the Impugned Order is not proper and legal.

vii. The Appellate Authority as well as Adjudicating Authority have failed to take on record the Notification No. 18/2016-CE (NT) dated 01.03.2016 (herein after referred to as Annexure-1). This Notification is pertaining to the amendment of Principle Notification No. 19 /2004-CE (NT) dated 05.09.2004. Vide this Notification dated 01.03.2016, the Government has fixed the time limit of filing of Rebate Claim under Rule 18 of the Central Excise Rules, 2002 as;
"(2) under heading '(3) Procedures', in paragraph (b), in sub paragraph (i), after the words 'shall be lodged', the words, figures, letter and brackets 'before the expiry of the period specified in section 11B of Central Excise Act, 1944 (1 of 1944)" shall be inserted.

viii. As per the settled laws, the above Notification dated 01.03.2016 is effective from 01.03.2016 as no such provisions as "retrospective effect" have been made in the

said Notification. The present Rebate Claim is pertaining to the export made under claim of rebate on 04.08.2015 vide ARE-1 No. 001 dated 04.08.2015 read with Central Excise Invoice No. 001 dated 04.08.2015. These duty paid goods under reference had been cleared on 04.08.2015 for export from the factor premises. At the time of export the goods (i.e. the date of export from the factory gate was 04.08.2015), there was no such provisions as inserted vide the said amended Notification dated 01.03.2016. Therefore, it is clearly established that the Appellate Authority has clearly violated the statutory provisions of Notification dated 06.09.2004 prevailing at the material time of export. As well as, the impugned order has been passed by violating the principle of judicial discipline with regard to the above cited case laws.

ix. For the above contention, your Applicant would like to draw kind attention to Notification No. 102/2007-Cus dated 14.09.2007 (herein after referred to as Annexure-J) pertaining to the granting of Refund Claim of 4% SAD. In this Notification, there was no time limit had been prescribed in filing such Refund Claim. The Government had also clarified that the provisions of Section 27 of the Customs Act, 1962 were not applicable at the time of issuing the said Notification dated 14.09.2007. For this contention, your Applicant is producing herewith a copy of Circular No. 6/2008-Cus dated 28.04.2008 wherein it was specifically provided that;

"4 Time - Limit :

4.1 In the Notification No. 102/2007-Customs, dated 14-9-2007, no specific time limit has been prescribed for filing a refund application. Under the circumstances, a doubt

has been expressed that whether the normal time-limit of six months prescribed in Section 27 of the Customs Act, would apply. In the absence of specific provision of Section 27 being made applicable in the said notification, the time limit prescribed in this section would not be automatically applicable to refunds under the notification ..... ".

In the present case, the Notification No. 19 / 2004-CE (NT) dated 06.09.2007 is similar to the Notification No. 102/2007-Cus dated 14.09.2007 and amendment Notification No. 18/2016-CE (NT) dated 01.03.2016 is also similar to the Notification No. 83/2008- Cus dated 01.08.2008 (amended to Notification No. 102/2007-Cus dated 14.09.2007 under which the time limit of filing of Refund of 4% SAD has been prescribed).

x. In view of the above submissions, it is clearly established by your Applicant that the Adjudicating Authority as well as Appellate Authority have erred in holding that the Rebate Claim was time barred. Actually, *there* was no time limit in filing the Rebate Claim till the issuance of Notification No. 18/2016-CE (NT) dated 01.03.2016, effective from 01.03.2016 as no such clause as "retrospective effect" has been provided therein. Further, the Appellate Authority has also failed to consider the above mentioned case laws which shows that they have contravened the provisions of maintaining the judicial discipline.

5. The applicant was thereafter granted opportunity of personal hearing on 12.10.2022 Shri N.K.Maru, Consultant appeared online and submitted that for rebate no time limit of Section 11B of the Central Excise

Act is applicable. He requested to allow the rebate. He stated that he would be submitting written submission in 15 days. The applicant filed their written submissions dated 06.10.2022 were in the reiterated their earlier submissions.

6. Government has carefully gone through the relevant case records available in case files, the written submissions and also perused the impugned Order-in-Original, the Order-in-Appeal and the RA. The issue for decision in the present case is the admissibility of rebate claim filed by the applicant beyond one year of the date of export of goods.

7.1 Before delving into the issue, it would be apposite to examine the statutory provisions regulating the grant of rebate. Rule 18 of the CER, 2002 has been instituted by the Central Government in exercise of the powers vested in it under Section 37 of the CEA, 1944 to carry into effect the purposes of the Central Excise Act, 1944 including Section 11B of the CEA, 1944. Moreover, the Explanation (A) to Section 11B explicitly sets out that for the purposes of the section "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India. The duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India covers the entire Rule 18 within its encompass. Likewise, the third proviso to Section 11A(1) of the CEA, 1944 identifies "rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India" as the first category of refunds which is payable to the applicant instead of being credited to the Fund. Finally, yet importantly, the Explanation (B) of "relevant date" in clause (a) specifies the date from which limitation would commence for filing refund claim for excise duty paid on the excisable goods and the excisable goods used in the manufacture of such goods. The relevant text is reproduced below.

"(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;"

7.2 It would be apparent from the definition of relevant date in Section 11B of the CEA, 1944, that for cases of refund of excise duty paid on exported goods or on excisable materials used in exported goods, the date of export is the relevant date for commencement of time limit for filing rebate claim.

8.1 The applicant has placed reliance upon the judgment of the Hon'ble Madras High Court in Dorcas Market Makers Pvt. Ltd. vs. CCE[2012(281)ELT 227(Mad.)] although the same High Court has reaffirmed the applicability of Section 11B to rebate claims in its later judgment in Hyundai Motors India Ltd. vs. Dept. of Revenue, Ministry of Finance[2017(355)ELT 342(Mad.)] by relying upon the judgment of the Hon'ble Supreme Court in UOI vs. Uttam Steel Ltd.[2015(319)ELT 598(SC)]. Incidentally, the special leave to appeal against the judgment of the Hon'ble High Court of Madras in Dorcas Market Makers Pvt. Ltd. has been dismissed *in limine* by the Apex Court whereas the judgment in the case of Uttam Steel Ltd. is exhaustive and contains a detailed discussion explaining the reasons for arriving at the conclusions therein.

8.2 The observations of the Hon'ble High Court of Karnataka in Sansera Engineering Pvt. Ltd. vs. Dy. Commissioner, Bengaluru[2020(371)ELT 29(Kar)] at para 13 of the judgment dated 22.11.2019 made after distinguishing the judgments in the case of Dorcas

Market Makers Pvt. Ltd. and by following the judgment in the case of Hyundai Motors India Ltd. reiterate this position.

> *"13. The reference made by the Learned Counsel for the petitioners to the circular instructions issued by the Central Board of Excise and Customs, New Delhi, is of little assistance to the petitioners since there is no estoppel against a statute. It is well settled principle that the claim for rebate can be made only under section 11B and it is not open to the subordinate legislation to dispense with the requirements of Section 11B. Hence, the notification dated 1-3-2016 bringing amendment to the Notification No. 19/2004 inasmuch as the applicability of Section 11B is only clarificatory."*

8.3 Be that as it may, the Hon'ble Delhi High Court has in its judgment in the case of Orient Micro Abrasives Ltd. vs. UOI[2020(371)ELT 380(Del.)] dealt with the issue involved in the present revision application. The text of the relevant judgment is reproduced below.

> *"16. We also record our respectful disagreement with the views expressed by the High Court of Gujarat in Cosmonaut Chemicals[2009(233)ELT 46(Guj.)] and the High Court of Rajasthan in Gravita India Ltd.[2016(334)ELT 321(Raj.)], to the effect that, where there was a delay in obtaining the EP copy of the Shipping Bill, the period of one year, stipulated in Section 11B of the Act should be reckoned from the date when the EP copy of the Shipping Bill became available. This, in our view, amounts to rewriting of Explanation (B) to Section 11B of the Act, which, in our view, is not permissible."*

8.4 The judgment of the Hon'ble Delhi High Court has very unambiguously held that the period of one year must be reckoned from the date of export and not from the date when the copy of shipping bills is received.

8.5 the Hon'ble Supreme Court has in its judgment in the case of Sansera Engineering Limited V/s. Deputy Commissioner, Large Tax Payer Unit, Bengaluru [(2022) 1 Centax 6 (S.C.)] held that:

"9. On a fair reading of Section 11B of the Act, it can safely be said that Section 11B of the Act shall be applicable with respect to claim for rebate of duty also. As per Explanation (A) to Section 11B, "refund" includes "rebate of duty" of excise. As per Section 11B(1) of the Act, any person claiming refund of any duty of excise (including the rebate of duty as defined in Explanation (A) to Section 11B of the Act) has to make an application for refund of such duty to the appropriate authority before the expiry of one year from the relevant date and only in the form and manner as may be prescribed. The "relevant date" is defined under Explanation (B) to Section 11B of the Act, which means in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of goods..... Thus, the "relevant date" is relatable to the goods exported. Therefore, the application for rebate of duty shall be governed by Section 11B of the Act and therefore shall have to be made before the expiry of one year from the "relevant date" and in such form and manner as may be prescribed. The form and manner are prescribed in the notification dated 6.9.2004. Merely because in Rule 18 of the 2002 Rules, which is an enabling provision for grant of rebate of duty, there is no reference to Section 11B of the Act and/or in the notification dated 6.9.2004 issued in exercise of powers conferred by Rule 18, there is no reference to the applicability of Section 11B of the Act, it cannot be said that the provision contained in the parent statute, namely, Section 11B of the Act shall not be applicable, which otherwise as observed hereinabove shall be applicable in respect of the claim of rebate of duty.

10. At this stage, it is to be noted that Section 11B of the Act is a substantive provision in the parent statute and Rule 18 of the 2002 Rules and notification dated 6.9.2004 can be said to be a subordinate legislation. The subordinate legislation cannot override the parent statute. Subordinate legislation can always be in aid of the parent statute. At the cost of repetition, it is observed that subordinate legislation cannot override the parent statute. Subordinate legislation which is in aid of the parent statute has to be read in harmony with the parent statute. Subordinate legislation cannot be interpreted in such a manner that parent statute may become otiose or nugatory. If the submission on behalf of the appellant that as there is no mention/reference to Section 11B of the Act either in Rule 18 or in the notification dated 6.9.2004 and therefore

the period of limitation prescribed under Section 11B of the Act shall not be applicable with respect to claim for rebate of duty is accepted, in that case, the substantive provision – Section 11B of the Act would become otiose, redundant and/or nugatory. If the submission on behalf of the appellant is accepted, in that case, there shall not be any period of limitation for making an application for rebate of duty. Even the submission on behalf of the appellant that in such a case the claim has to be made within a reasonable time cannot be accepted. When the statute specifically prescribes the period of limitation, it has to be adhered to.

11. It is required to be noted that Rule 18 of the 2002 Rules has been enacted in exercise of rule making powers under Section 37(xvi) of the Act. Section 37(xxiii) of the Act also provides that the Central Government may make the rules specifying the form and manner in which application for refund shall be made under section 11B of the Act. In exercise of the aforesaid powers, Rule 18 has been made and notification dated 6.9.2004 has been issued. At this stage, it is required to be noted that as per Section 11B of the Act, an application has to be made in such form and manner as may be prescribed. Therefore, the application for rebate of duty has to be made in such form and manner as prescribed in notification dated 6.9.2004. However, that does not mean that period of limitation prescribed under Section 11B of the Act shall not be applicable at all as contended on behalf of the appellant. Merely because there is no reference of Section 11B of the Act either in Rule 18 or in the notification dated 6.9.2004 on the applicability of Section 11B of the Act, it cannot be said that the parent statute – Section 11B of the Act shall not be applicable at all, which otherwise as observed hereinabove shall be applicable with respect to rebate of duty claim.

.....

15. In view of the above and for the reasons stated above, it is observed and held that while making claim for rebate of duty under Rule 18 of the Central Excise Rules, 2002, the period of limitation prescribed under Section 11B of the Central Excise Act, 1944 shall have to be applied and applicable. In the present case, as the respective claims were beyond the period of limitation of one year from the relevant date, the same are rightly rejected by the appropriate authority and the same are rightly confirmed by the High Court. We see no reason to interfere with the impugned judgment and order passed

by the High Court. Under the circumstances, the present appeal fails and deserves to be dismissed and is accordingly dismissed."

9. In the light of the foregoing facts and in keeping with the judicial principle of *contemporanea exposito est optima et fortissinia in lege*(contemporaneous exposition is the best and strongest in law), Government respectfully follows the ratio of the above judgment of the Hon'ble Supreme Court. The criteria for the commencement of time limit for filing rebate claim under the Central Excise law has been specified as the date of export of goods and applicability of Section 11B for rebate has been settled conclusively and cannot be varied by any exercise of discretion. Therefore, the rebate claims filed by the applicant have correctly been held to be hit by bar of limitation by the Commissioner(Appeals) in the impugned order.

10. The Order-in-Appeal No. BHV-EXCUS-000-APP-083-2017-18 Dated 03-01-2018 passed by the Commissioner(Appeals) is upheld. The revision application filed by the applicant is rejected as devoid of merits.

Shrawan 15/2/23

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

ORDER No. 64/2023-CX(WZ) /ASRA/Mumbai DATED 15.02.2023

To,
M/s. Madhav Copper P. Ltd.
Plot No. 5/B/B, Survey No. 346-47,
Near Kobdi, Ukharla,
Bhavnagar- 364 050
State-Gujarat.

Copy to:

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