

**REGISTERED
SPEED POST**



F.No.198/59-60/2012-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION)

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

Date of Issue. 30/5/16.....

ORDER NO. 69-70/2016-CX DATED 24.05.2016 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 Order-in-Appeal No. No. US/ 503&504/RGD/2011 dated 30.12.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-I.

Applicant : Commissioner of Central Excise, Raigad.

Respondent : M/s Vividh Industries.

ORDER

This Revision Application is filed by the Commissioner of Central Excise, Raigad (hereinafter referred to as the Department) against the Order-in-Appeal No. US/503&504/RGD/2010 dated 30.12.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-II, with respect to Order-in-Original No. 45/10-11/DC (Rebate) dated 12.04.2011 passed by the Deputy Commissioner of Central Excise (Rebate), Raigad. M/s Vividh Industries are the respondent in this case.

2. Brief facts of the case are that the respondent exported the goods on payment of duty under Rule 18 read with Notification No.19/2004-CE(NT) dated 06.09.2004 and filed two rebate claims amounting to Rs.79,401/- and Rs. 64,314/-. The original authority held that out of total claimed amount of Rs.1,43,715/- (Rs.79,401+ Rs.64,314), duty payable on FOB value i.e. Rs.1,10,322/- is admissible for rebate while holding the rebate claim amount to Rs.1,10,322/- admissible in "FINDINGS" portion of impugned Order-in-Original, the original authority in "ORDER" portion rejected the rebate claims of said amount of Rs.1,10,322/-. The rebate claim on traded items was also not considered.

3. Being aggrieved by the said Orders-in-Original both the respondent the Department filed appeal before Commissioner (Appeals) who vide Order-in-Appeal No. US/503-504/RGD/2011 dated 30.12.2011 rejected Department's appeal.

4. Being aggrieved by the impugned Orders-in-Appeal, the Department has filed these Revision Applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 The rebate in terms of rule-18 of Central Excise Rules, 2002, is rebate of Central Excise duty paid. Central Excise duty payable is governed by Section 3 of Central Excise Act, 1944 for which the value is to be determined in terms of Section 4 of Central Excise Act 1944 and the Valuation Rules, 2000. The transaction value under Central Excise provisions does not include freight and insurance. The duty is required to be paid on FOB value and not on CIF Value. The amount paid on account of freight & insurance is not duty and therefore cannot be sanctioned as rebate under Central Excise Rules, 2002.

4.2 The Government of India (Revisionary Authority) in Sri Bhagirath Textiles Ltd - 2006 (202) ELT 147 (GOI) has held that Excise duty should be paid on the transaction value of the goods under Section 4 of the Central Excise Act 1944 and not on its CIF Value.

4.3 Thus the Commissioner (Appeals) has not appreciated the fact that the amount paid on account of freight & insurance is not duty and therefore, cannot be sanctioned as rebate.

4.4 The Commissioner (Appeals) also failed to appreciate that the bought out items cleared for exports as such, have not been manufactured by the claimant and thus the said goods have, not been manufactured by the claimant but by some other manufacturer. Hence the conditions of Notification No. 19/2004(NT) dated 06.09.2004 are not fulfilled and therefore, rebate on such bought out goods is not entitled.

4.5 The observation of the Commissioner (Appeals) that the rebate sanctioning authority have been rejected rebate on "cryptic" ground is unfounded and arrived at judgment without discussing the merit of the case.

4.6 The Order-in-Appeal is contradictory in as much as, on one hand it relies on the Supreme Court judgment in the case of Superintendent vs. Pratap Rai (Supra), to hold that "when an order is struck down as invalid being in violation of principle of natural justice, there is no final decision of the cause and fresh proceedings are left open" and on the other hand it relies on the CBEC Circular No. 275/34/2006-CX.84 dated 18.02.2010, to hold that "the Commissioner (Appeals) does not have power to remand".

4.7 The Commissioner (Appeals), by setting aside the Order-in-Original and by relying upon Hon'ble Supreme Court judgment in the case of Superintendent vs. Pratap Rai (supra) has de-facto, remanded the case to the original authority, which he himself admits as "having no power to remand".

4.8 Section 35A(3) of the Central Excise Act, 1944 as it existed before 11.05.2001 provided that Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling decision or order appealed against or may refer the case back to the adjudicating authority with such direction as he may think fit for a fresh adjudication or decision as the case may be, after taking additional evidence, if necessary. By an amendment vide Finance Act, 2001 w.e.f. 11.05.2001, the phrase as mentioned in bold above has been deleted with an intention to withdraw the powers to Commissioner (Appeals) to remand the cases for fresh adjudication to the original adjudication authorities and after the said amendment in 2001, the said Section 35A(3) read as follows :-

"The Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against."

Thus w.e.f 11.05.2001, the Commissioner(Appeals) has no powers to remand back the case.

4.9 The Hon'ble Punjab & Haryana High Court in the case of CC, Amritsar vs. M/s Enkay (India) Rubber Co. Pvt. Ltd. reported in 2008 (224) E.L.T. 393 (P&H) and in the case of CCE, Jalandhar vs. B.C. Kataria reported in 2008 (221) E.L.T.

508 P&H has held that the Commissioner (Appeals) have been divested of the powers to remand the cases back to adjudicating authority after deletion of that power from Section 35A(3) of Central Excise Act vide amendment made in 2001 and set aside the order of Commissioner (Appeals) as well as the order of Tribunal and sent back the matter to the Commissioner (Appeals) for decision in accordance with law.

4.10 The Hon'ble Supreme Court in its judgment dated 01.03.2007 in Civil Appeal No. 6988/2005 in the case of MIL India Ltd. reported in 2007 (210) E.L.T. 188 (S.C.) has observed that:

"in fact, the power of remand by the Commissioner (Appeals) has been taken away by amending Section 35A with effect from 11.05.2001 under the Finance Bill, 2001. Under the Notes to clause 122 of the said Bill it is stated that Clause 122 seeks to amend Section 35A so as to withdraw the power of the Commissioner (Appeal) to remand matters back to the adjudicating authority for fresh consideration"

The Hon'ble Supreme Court in the case of MIL India Ltd., while noting that the powers of remand had been taken away, has also categorically stated that the Commissioner (Appeals) continues to exercise the power of adjudicating authority in the matter of assessment and the Commissioner (Appeals) can add or subtract certain items from the order of assessment made by the adjudicating authority and the order of Commissioner (Appeals) could also be treated as an order of assessment.

4.11 The Hon'ble Supreme Court's judgment in the case of Superintendent vs. Pratap Rai (supra) relied upon by the Commissioner (Appeals) is not applicable to the present case, in view of the amended Section 35A(3).

4.12 The Commissioner (Appeals) has failed to pass the Speaking Order. He also failed to appreciate the fact that merely setting aside the order passed by the original authority and allowing the party's appeal without going into the merits of the case, is not proper disposal.

4.13 The Commissioner (Appeals) has also erred in by not considering the decision of the Hon'ble CESTAT's decision in the case of CC(EP), Mumbai vs. Ahmednagar Forgings Ltd., reported in 2005 (188) E.L.T. 403 (Tri. - Mumbai) wherein the Hon'ble Tribunal held that the Commissioner is bound to give a decision on the appeal filed before him and remanded back the matter to the Commissioner (Appeals).

4.14 The learned Commissioner (Appeals) has set aside the Order-in-Original No. RC-233/09-10 dated 03.02.2010 in entirety. The amount sanctioned vide this Order-in-Original was Rs.1,10,322/-. The department has reviewed the order of the A.C., Central Excise, Rebate, Raigad for being illogical and contradictory as, in "order" part, it rejects the rebate claim of Rs.1,10,322/-. The setting aside of the

Order-in-Original in entirety, has created a situation where the undisputed amount of rebate also becomes recoverable, but the department has no mechanism to effect the recovery. Therefore it is submitted that the impugned Order-in-Appeal dated 30.12.2011 is unworkable. Also the Commissioner (Appeals) has exceeded his jurisdiction.

5. A Show Cause Notice was issued to the respondent under Section 35EE of the Central Excise Act 1944 to file their counter reply. The respondent in their counter reply dated 11.09.2012 mainly reiterated observations of Commissioner (Appeals) as regard to their appeal filed before Commissioner (Appeals).

6. Personal Hearing was scheduled in this case on 12.10.2015, 04.11.2015 and 20.11.2015. Nobody attended the hearing. Government proceeds to decide the case on merits on the basis of available records.

6.1 The Department was conveyed that the Revision Applications were filed 5 days beyond stipulated 90 days period and hence, aspect of time bar may be explained. In response, the Department vide letter dated 22.06.2015, filed application for condonation of delay.

6.1.1 In their application for condonation of delay, they stated that impugned Order-in-Appeal dated 30.12.2011 was received by them on 18.01.2012; that the Revision Application against the said order was prepared and sent under this office letter dated 04.04.2012. That nonetheless as date of filing is beyond three months as stated in letter dated 04.06.2015 received from Section Officer (RA), this application is being preferred.

6.1.2 That the applicant has a strong case on merits, the delay caused is inadvertent and not deliberate.

7. 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.

8. At the outset, Government takes up the application for condonation of delay in filing the Revision Application after a delay of five days by the Department. In their application for condonation of delay, they stated that delay, may be condoned, as the Department has very strong case in their favour, the delay caused is inadvertent and not deliberate. As such the Department filed this Revision Application five days after the initial 90 days period which falls within the condonable limit of 90 days under Section 35EE (2) of the Act. Hence Government condones the delay and proceeds to decide the case on merits.

9. On perusal of records, Government observes that the respondent filed rebate claim under Rule 18 of the Central Excise Rules, 2002 for Excise duty paid on exported goods. The original authority held that only duty payable on FOB

value i.e. Rs.1,10,322/- is admissible for rebate and while holding the rebate claim to the tune of Rs.1,10,322/- admissible in "FINDINGS" portion of impugned Order-in-Original, the original authority in "ORDER" portion rejected the rebate claims of said amount of Rs.1,10,322/-. The rebate claimed on traded items was also not considered. Being aggrieved by the said Orders-in-Original, both the Department and the claimant filed appeal before Commissioner (Appeals) who vide Order-in-Appeal No. US/503-504/RGD/2011 dated 30.12.2011 rejected Department's appeal on the plea that Commissioner (Appeals) did not have the authority to remand but allowed the exporters appeal as the order was passed without hearing the party. The Department has filed these Revision Applications on grounds mentioned in para (4) above.

10. Government observes that as regards Commissioner (Appeals) ground for rejection of departmental appeal that he lacks power of remand, Department has contended relying on a plethora of case laws that while powers of remand have been taken away the Commissioner (Appeals) continues to exercise power of adjudicating authority. Government notes that the department had reviewed the Order-in-Original on the ground that it was contradictory in nature as while in the findings portion rebate to the tune of Rs.1,10,322/- was sanctioned, in the order part the said amount was rejected. In order that the anomaly could be rectified, the department appealed to Commissioner (Appeals) to set aside the original order with direction to original authority to pass fresh order.

11. Government finds that the impugned Order-in-Original is indeed contradictory as while it sanctions the rebate in the findings portion, it rejects the same amount in the order portion for reasons best known to the original authority. Therefore, in the interest of justice, Government holds it fit to remand the case back to the original authority to re-examine the claim of Rs. 1,10,322/- based on records and merits of the case and pass orders afresh.

12. Government further observes that the Commissioner (Appeals) has set aside the portion of the impugned Order-in-Original disallowing rebate of duty paid on traded items, on the ground that no opportunity was given by the original authority to claimant to explain their case. This fact has not been refuted by the Department. Government finds that as there has been violation of principle of natural justice, the claimant may be given an opportunity to defend his case first before the original authority.

13. Therefore, in view of the above facts and circumstances, in the interest of justice, Government holds it fit remand the case back to the original authority to decide the case afresh as per law and based on records and merits of the case. Due opportunity of hearing will be given to the claimant of rebate by the original authority.

14. The Revision Applications are disposed off in above terms.
15. So, ordered.



(RIMJHIM PRASAD)

Joint Secretary to the Government of India

The Commissioner of Central Excise
Raigad Commissionerate, Ground Floor
Kendriya Utpad Shulk Bhavan
Sector-17, Plot No. 1, Khandeshwar
Navi Mumbai-410206.

ATTESTED



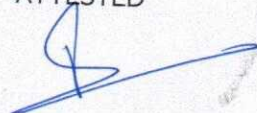
(शग्वत शर्मा/Shagwat Sharma)
असिस्टन्ट कमिश्नर/Assistant Commissioner
C.B.E.C.-O.S.D (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली/New Delhi

ORDER NO. 69-70/2016-CX DATED 24.05.2016

Copy to:

1. M/s. Vividh Industries, 338, Paragati Industries Estate, N.M.Joshi Marg, Lower Parel, Mumbai-400011.
2. The Commissioner of Central Excise (Appeals) Mumbai Zone-II, 3rd Floor, Utpad Shulk Bhavan, Plot No.C-24 Sector-E, Bhandra Kurla Complex, Bhandra (E), Mumbai-400051.
3. The Deputy Commissioner (Rebate) Central Excise, Ground Floor, Kendriya Utpad Shulk Bhavan, Sector-17, Plot No. 1, Khandeshwar, Navi Mumbai-410206.
4. PA to JS(RA).
5. ✓ Guard File.
6. Spare copy.

ATTESTED



(B.P.Sharma)

OSD (Revision Application)

(अभिषेक शर्मा / Abhishek Sharma)
असिस्टेंट कमिश्नर / Assistant Commissioner
C.B.E.C-OSD (Revision Application)
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