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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
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Date of Issue 7/3/14

ORDER NO. 71/14 CX DATED 4.3.2014 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D. P. SINGH, 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 orders-in-appeal No. 66-69/Kol-III/2012 dated 24.5.12 passed by Commissioner of Central Excise (Appeals-I), Kolkata
Applicant	:	Commissioner of Central Excise, Kolkata-III
Respondent	:	M/s ESS DEE Aluminium Ltd., Kolkata

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ORDER

These revision applications are filed by the Commissioner of Central Excise, Kokata-III against the orders-in-appeal No.66-69/Kol-III/2012 dated 24.5.12 passed by the Commissioner of Central Excise (Appeals), Kolkata-I with respect to orders-in-original passed by the Assistant/Deputy Commissioner of Central Excise, Khardah-II Division.

2. Briefly stated that M/s ESS DEE Aluminium Ltd., Kolkata having Central Excise Registration No.AABCE3113GEM004 submitted/filed 33 (thirty three) rebate claims of duty paid on excisable goods exported before the Deputy/Asstt. Commissioner, Central Excise, Khardah-II Division. Except in some cases, exportation in all cases was originally executed by M/s India Foils Ltd., having Central Excise Registration No.AAACI6251QXM004 (hereinafter will be referred as M/s IFL). Invoices issued under Rule 11 of Central Excise Rules, 2002 were raised by M/s IFL as well as by the said claimant in some cases. Central Excise duty was discharged by M/s IFL as well as by the said claimant in some cases. Other export related documents viz. Bill of Lading, Bill of Export, Delivery Chalan, Packing List etc. were raised by M/s IFL only. Copies of Bank Realisation certificate issued by the authorized banks was also in the name of M/s IFL. Deputy/Assistant Commissioner, Central Excise, Khardah-II Division vide impugned orders-in-original rejected all the rebate claims on the ground that M/s Ess Dee Aluminium Ltd., Kolkata is not the proper claimant to file rebate claims. Being aggrieved by the said order-in-originals the said claimant filed appeal before the Commissioner (Appeal-I) Central Excise, Kolkata. The Appellate Authority in his order-in-appeal No.66-69/Kol-III/201224.5.12 has held that M/s IFL & M/s Ess Dee Aluminium Ltd (Claimant) are not two different companies but the same legal entity and the matter was remanded back to the lower authority with a direction to issue SCN and also hear and decide the rebate claims by passing a speaking order.

3. Being aggrieved by the impugned orders-in-appeal, the applicant department has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

3.1 The Appellate Authority failed to appreciate that since M/s IFL was actual exporter himself except in some occasions, and no disclaimer certificate was issued by the exporter in favour of the claimant, the claimer is not entitled to get the rebate on Central Excise Duty paid on such export consignments. The Commissioner (Appeal) failed to appreciate that Section 11 B of Central Excise Act, 1944 does not envisage that a rebate/refund application can be filed on someone else's behalf.

3.2 The Appellate Authority erred in not finding that though it was claimed that M/s IFL was merged with the claimant as per BIFR scheme, yet M/s IFL's status as manufacturer as well as exporter are not denied and disputed in as much as all export formalities were observed by M/s IFL as per requirement of Central Excise procedure. The Appellate Authority erred in holding the claimant and M/s IFL as same legal entity in spite of the other grounds that M/s IFL exported the goods under DEPB scheme which was approved by DGFT in the name of M/s IFL. When DGFT is allowing special incentive scheme to M/s IFL, the said claimant is not entitled to enjoy the benefit of such scheme and in effect the former remains a separate legal entity.

3.3 The Commissioner (Appeal) failed to appreciate that it was sheer misstatement on the part of the claimant, who sought transfer of credit under Rule 10 of CENVAT Credit Rules, 2004 despite the fact that M/s IFL was still functioning as a registered manufacturer/assessee with observance of Central Excise formalities.

3.4 The Appellate Authority failed to appreciate that refund/rebate claim should be processed and sanctioned as per the guidelines laid down in Central Excise Law and corporate difficulties should not prevail over the execution and implementation of Central Excise Rules and procedure.

4. A show cause notice was issued to the respondent under Section 35 EE of Central Excise Act 1944 to file their counter reply. The respondent vide their written submission dated 30.10.2012, submitted their counter reply where they interalia mainly stated as under:

4.1 It is respectfully submitted that the Department is absolutely wrong to suggest that despite the merger as per BIFR Order, IFL still continued to be the manufacturer and exporter. It appears that it has not appreciated the mandatory provisions of the 'Scheme of Merger', sanctioned by the BIFR Order dated 30-09-2010, whereby IFL got merged with EDAL with effect from 30-09-2010. IFL, being the transferor company got dissolved without requiring it to be wound up as provided under sub-Para 8.6 [Part III-TRANSFER AND VESTING] of the Scheme of Merger. Therefore, on and from 30-09-2010 IFL ceased to exist anymore both physically and legally and all the assets and liabilities of IFL passed on to EDAL. Attention is drawn to clause (a) of sub-Para 2.14 [Part 1- GENERAL;DEFINITIONS] of the Scheme of Merger, wherein it has been specifically defined that the 'Undertaking' of IFL, being transferred to EDAL, shall mean all assets and properties, whether movable or immovable, tangible or intangible, real or personal, present or contingent, in possession or reversion, corporeal or incorporeal of whatever nature and the clause (b) of sub-Para 2.14 further, inter alia, included "all permits, quotas, rights, entitlement, export/import incentives and benefits including Duty Exemption Pass Book Scheme (DEPB), advance licences, industrial and other licences.....". Upon coming into effect of the Scheme of Merger as per sub-Para 8.1,"all suits, actions, proceedings by or against Transferor Company pending and/or arising on or before the Effective Date shall be continued and/or enforced by or against the Transferee Company .....". It is, therefore, clear that as a consequence of the BIFR Order all the assets, quotas, rights, licenses, permit etc. on the one hand and all the liabilities on the other of IFL that existed on the date of merger got vested in EDAL. The revenue has committed a grievous error by not following the mandatory provisions laid down under the aforesaid clauses.

4.2 It is an uncontroverted fact that after the merger took place there could not be any legal or physical existence of IFL. The jurisdictional Divisional authority also granted Central Excise Registration Certificate No. AABCE3113GEM004 on 01-12-2010 in respect of the same factory premises that was earlier registered in the name of IFL vide Central Excise Registration No.AAAC16251QXM004. The Department has not found any fault with the grant as well as the continuance of the said Central Excise Registration in favour of EDAL for the same factory that was also earlier registered in the name of IFL. It is, therefore, clear that the adjudicating authorities were fully aware of the fact of disappearance of IFL pursuant to the merger as per the BIFR Order dated 30-09-2010.

4.3 As per the terms of the BIFR Order all the assets and liabilities lying in the name of IFL on the date of merger passed on to EDAL. Thus the rebate claims arising out of the exports made by IFL before the merger as well as the rebate claims that arose out of the export orders issued in favour of IFL, but executed by EDAL (even though the export related papers were made showing the name of IFL) accrued to EDAL. EDAL having taken over the liabilities of the erstwhile company cannot be deprived of the benefits due to the erstwhile company arising out of exports. The Department cannot refuse to follow the clauses mentioned under 'TRANSFER AND VESTING' under Part-III of the 'SCHEME OF MERGER' between IFL and EDAL in the BIFR Order dated 30-09-2010, whereby all the assets, quotas, rights, licenses, permit etc. on the one hand and all the liabilities on the other of IFL that existed on the date of merger got vested in EDAL. It is absolutely wrong to contend that EDAL is not eligible to claim rebate in respect of the exports purportedly made by IFL, as the ARE-I ,Central Excise Invoice, shipping bill, commercial invoice, etc. were issued by IFL in some cases and in respect of other cases, even though the ARE-1s and Central Excise Invoices were prepared in the name of EDAL, but the shipping bills, commercial invoices, etc. were found to be in the name of IFL. One cannot lose sight of the fact that EDAL inherited all the assets and liabilities of IFL in view of the merger and in such situation, being the successor-in-interest they are entitled to all the rebate claims irrespective of the fact that the exports were made by IFL.

4.4 It must be appreciated that in view of the merger, when IFL did not exist anymore, no question of IFL's submitting disclaimer in favour of the EDAL for getting rebates should arise. The Department should have appreciated and accepted the explanation given by EDAL that it was not practically possible for them to give effect of the change of name from IFL to EDAL in the export orders that were formalized through lot of procedures and formalities in the importing countries, because that would have seriously jeopardized the prospect of meeting date lines and also getting payments on time. In such circumstances EDAL had to execute the exports orders, maintaining the reference of IFL in the documents viz. Commercial Invoices, Shipping Bills, Bills of Lading, Packing list etc. that accompanied the goods to the overseas buyers. EDAL, however, immediately thereafter initiated the formalities of intimating the overseas buyers about the change of name upon merger at the buyers' end.

4.5 EDAL, in the facts and circumstances, continued to maintain the erstwhile Bank accounts in the name and style of IFL, so that the cheques issued by the overseas buyers could be cleared, by making necessary arrangements with the Banks for this purpose officially and legally, so that the Cheques received against export in the name of IFL after merger, could be deposited in those Banks, obviously after being endorsed by the Authorised Signatories of EDAL. In such a situation, it must have been understood that there is nothing unusual that the Bank Realization Certificates were issued in the name of IFL.

4.6 It is also the fact that EDAL after having made the position clear already surrendered Central Excise Registration Certificate that was issued in the name of IFL under the cover of their letter No. Nil, dated 29-06-2011. But surprisingly, the adjudicating authorities have refused to accept the contention of EDAL that IFL was no more in existence and according to them the operational existence of IFL was still there at the time of filing the rebate claims. They have banked on the plea that even though EDAL surrendered the IFL's Central Excise Registration Certificate on 30-06-2011, but the same was not still accepted. But fact is that the Department has not given any

reason as to why it has not accepted the said surrender even after the lapse of more than a year by now. Does it mean that till the time EDAL surrendered the IFL's Central Excise Registration Certificate or the Department accepted the said surrender, in spite of it's legal death IFL should be treated to be in existence? It is clearly wrong on the part of the revenue authorities to hold that IFL was still in existence as the Central Excise Registration Certificate was subsisting and monthly returns were filed. It is not expected of the Department to shy away from the reality just to deny the EDALs' lawful rebate claims. It is stated that had the basic fact of merger that had taken place between IFL and EDAL gone home, the issues that are being dragged on propelling to deny the benefit of rebate claims would not have arisen at all.

4.7 It is unfortunate that the revenue authorities in the Revision Application have once again allowed themselves to be carried away by the trivialities, which are absolutely inconsequential, as far as the eligibility of EDAL to the rebate claims is concerned. In the grounds for setting aside the impugned Order in Appeal it has been stated that M/s. IFL was granted the benefit of DEPB Scheme by DGFT and therefore EDAL being the successor upon merger cannot enjoy the benefit of special incentive, sanctioned by DGFT. It is absolutely strange to hear such argument, when all the benefits, rights, incentives etc. of IFL accrued to EDAL along with all the liabilities by virtue of the said merger. It is clear that EDAL inherited not only the benefits of DEPB Scheme granted to IFL before merger, but also the liability to discharge the obligation of the said DEPB Scheme. It is all the more strange, so far as the Central Excise authorities are concerned, not to appreciate that the DGFT is competent enough to ensure that any incentive or benefit granted by it are availed by those for whom they are intended and also the obligations attached thereto are also properly discharged. It is unfortunate that the Central Excise department has unnecessarily and illegally raised this issue to deny the benefit of the Rebate Claims.

5. Personal hearing was scheduled in this case on 25.7.13 and 6.2.2014. Hearing held on 25.7.13 was attended by Shri Raj Kumar, Commissioner on behalf of the

applicant department who reiterated the grounds of revision application. Hearing held on 6.2.14 was attended by Ms Gargi Banerjee, Head (HR) of respondent company, Shri S.P.Majumdar, Advocate and Shri Joy Deep Dutt Gupta, Advocate appeared on behalf of the respondents and reiterated submissions made in their written reply dated 30.10.12.

6 Government has carefully gone through the relevant case records and perused the impugned order-in-original and order-in-appeal.

7. Government observes that M/s IFL got merged with M/s Ess Dee Aluminium Pvt. Ltd (EDAL), Kolkata by virtue of BIFR Order dated 30.9.2010. M/s EDAL filed various rebate claims with respect to exports executed by M/s IFL. The original authority vide impugned orders-in-original rejected all the rebate claims on the ground that M/s Ess Dee Aluminium Ltd., Kolkata is not the proper claimant to file rebate claims. Being aggrieved by the said orders-in-original the said claimant filed appeal before the Commissioner (Appeal-I) Central Excise, Kolkata who in impugned order-in-appeal has held that M/s IFL & M/s Ess Dee Aluminium Ltd (Claimant) are not two different companies but the same legal entity and the matter was remanded back to the lower authority with a direction to issue SCN and also hear and decide the rebate claims by passing a speaking order. Now, the applicant has filed this revision application on grounds mentioned in para (4) above.

8. Government notes that the rebate claims filed by M/s EDAL where goods were also exported by M/s EDAL there cannot be any dispute about proper claimant. Such claims are to be allowed provided the claims are otherwise in order. As regards the rebate claims filed by M/s EDAL where goods were exported by M/s IFL the matter is required to be adjudicated in the light of provisions of Rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE (NT) dated 6.9.04 and Section 11B of Central Excise Act 1944. Respondent has contended that IFL got merged with EDAL w.e.f. 30.9.10 as per BFIR order, that IFL being the transferor company got dissolved without requiring it to be would up as provided under Sub-para 8.6 (Part-III-Transfer and

Vesting) of the scheme of merger, that on and from 30.9.10, IFL ceased to exist anymore both physically and legally and all assets and liabilities of IFL passed on to EDAL. In this regards Government notes that respondent has taken a contradictory stand. On the one hand they are contending that IFL ceased to exist legally and physically after 30.9.10, whereas on the other hand the said IFL continued to a central excise registered assesse and continued to export the goods even after 30.9.10. They should have surrendered the Central Excise registration immediately after 30.9.10 but they did not do so for reasons known to them. The respondent had also argued during hearing held on 6.2.13 that IFL had obtained DEPB licences before exports and the impugned exports are against DEPB export obligation. In contrast to said claim, it is noted that the said DEPB shipping bills are on post export basis and against said exports, respondent must have obtained DEPB licences subsequently as stated in the impugned order-in-original. So, the contentions of the respondent are contradictory. The issue with reference to proper claimant of these rebate claims has to be examined & decided by taking into BFIR order as well as other relevant statutory provisions governing rebate claims and all the submissions made by applicant.

9. Government however notes that as pointed out by Commissioner (Appeals) the original authority has not issued show cause notice in the matter and therefore decided the case without following the principles of natural justice. The violation of principles of natural justice vitiates the whole proceedings. In these circumstances the case is required to be remanded back for fresh considerations in the light of above observations.

10. In view of above discussion, Government modifies the impugned order-in-appeal to above extent and remands the case back to original authority to decide the same afresh in view of observation above. A reasonable opportunity of hearing is to be provided to both the parties before deciding the case.

11. Revision application is disposed off in above terms.

12. So, ordered.

(D.P.Singh)
Joint Secretary (Revision Application)

Commissioner of Central Excise
Kolkata-III Commissionerate
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(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
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वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Revn)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

ORDER NO. 71 /14 Cx dated 4.3.2014

Copy to:

1. M/s ESS DEE Aluminium Ltd., 1, Sagar Dutta Ghat Road, Kamarhati, Kolkata-700058.
2. The Commissioner of Central Excise (Appeal-I), 169, AJC Bose Road, Bamboo Villa (4th Floor), Kolkata-700014.
3. The Assistant/Deputy Commissioner of Central Excise, Khardah-II Division, 4 Brabourne Road, Kolkata-700101
4. PS to JS(RA)
5. Guard File
6. Spare Copy

ATTESTED

(B.P.Sharma)
OSD (Revision Application)