REGISTERED
SPEED POST

सत्यमेव जयते
GOVERNMENT OF INDIA
MINISTRY OF FINANACE
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.195/518/2013-RA /1344 Date of Issue: 24.02.2024

ORDER NO. 71/2021-CX (WZ)/ASRA/MUMBAI DATED 29.01.2021 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 Seimens Ltd.

Respondent : Commissioner of Central Excise(Appeals), Mumbai-III.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. BC/477/RGD(R)/2012-13 dated 21.12.2012 passed by the Commissioner of Central Excise(Appeals), Mumbai-III.

Pr. Commr. (Revision Application) & ex-Officio Additional Secretary to the Govt. of India
Mumbai
मुंबई

ORDER

This Revision Application is filed by M/s Seimens Ltd., 130, Pandurang Budhkar Marg, Worli, Mumbai 400 030 (hereinafter referred to as "the Applicant") against the Order-in-Appeal No BC/477/RGD(R)/2012-13 dated 21.12.2012 passed by the Commissioner of Central Excise(Appeals), Mumbai-III.

2. The issue in brief is that the Applicant, a Merchant Exporter had filed rebate claim dated 07.05.2012 for Rs. 1,54,418/- (Rupees One Lakh Fifty Four Thousand Four Hundred and Eighteen Only) in respect of ARE-1 No. 27/11-12 dated 18.10.2011. On scrutiny of the claim the Applicant was issued a Deficiency Memo Cum Show Cause Notice Cum Call dated 10.08.2012. The Deputy Commissioner(Rebate), Central Excise, Raigad vide Order-in-Original No. 1474/12-13/DC(R)/Raigad dated 05.09.2012 reject the rebate claim on the ground that market value of the excisable goods at the time of exportation was less than the amount of rebate of duty claimed. Aggrieved, the Applicant filed an appeal along with an application for condonation of delay with the Commissioner of Central Excise(Appeals), Mumbai-III. The Commissioner(Appeals) vide Order-in-Appeal No. BC/477/RGD(R)/2012-13 dated 21.12.2012 rejected their appeal on the issue of time bar and did not discuss the issue of whether the Applicant was entitled for the rejected claim.

3. Being aggrieved, the Applicant filed the current Revision Application on the following grounds :

(i) The impugned order was a non-speaking order. The Commissioner(Appeals) had not given any finding as to why duty paid on the goods exported was inadmissible for rebate.

(ii) The delay in filing the appeal was due to the unavailability of the person concerned with filing the appeal as he was busy with internal audit. Further there was a delay in preparing the draft by the advocates too while filing the appeal. Thus there was a sufficient cause for delay in filing the appeal and the delay was within the limit prescribed under proviso to Section 35 of the Central Excise Act, 1944.

(iii) Liberal approach should be followed for condonation of delay in filing the appeal. Non-condonation of delay in filing the appeal results in to defeat of cause of justice and therefore the impugned order is liable to be set aside. In this they relied on the decision of Collector of Land Acquisition Anantnag and Another Vs MST Katiji and Others [1987 (28) ELT 185 (SC)] and few other case laws.

(iv) The contention of the Commissioner(Appeals) that the Applicant had not given any reason which prevented from filing appeal within aforesaid period and that they had been negligent in pursuing the relief are without any basis. The Applicant submitted that they did not gain by deliberately delaying filing of an appeal. They had also filed the appeals for earlier period on the same issue which shows that there was no deliberation for non filing of appear in the matter.

(v) The manufacturer had cleared the goods on payment of goods and had issued Excise Invoice to the Applicant. The Applicant had paid the invoice value along with the excise duty element charged by the manufacturer. Thus the Applicant had borne the excise duty levied on the goods exported by them. Moreover, there had been no procedural lapse on the part of the Applicant and no finding in respect of the same had been given by the Commissioner(Appeals). Hence the rebate claims should not be rejected and are eligible for the entire claim of rebate.

(vi) The FOB value or the CIF value declared for the purpose of customs cannot be a ground to reject the rebate claim under Rule 18 of the Central Excise Rules. The amount declared as FOB/CIF value for the purpose of Customs Act, is determined under the said Act and hence shall have no bearing on the rebate claimed under the Excise Act, unless provided for. Thus the market price of the goods exported is more that the rebate amount claim by the Applicant.

(vii) The Board's Circular No. 203/37/96-CX dated 26.04.2004 clarified that FOB value and the value declared under the Excise can be different and for the purpose of Rule 12 and Rule 13 of the Central Excise Rules, 1944, the assessable value declared on ARE-4 and corresponding invoices shall be relevant. The Applicant submitted that excise duty had been paid on assessable value declared in the ARE-1 and excise invoice. There was no evidence on record to show that the rebate was paid on the FOB value of the goods. Hence the rebate cannot be rejected on the aforesaid ground by the department.

(viii) The various other charges are includible in the transaction value i.e. the ARE-1 value in terms of Section 4(3)(d) of the Central Excise Act, 1944. The Applicant had paid excise duty on transaction value. Hence they are entitled to obtain rebate of whole of the duty of excise paid in respect of goods exported. They relied in the case of Sterlite Industries Ltd Vs CCE [2009 (236) ELT 143 (T)].

(ix) The Applicant prayed that the impugned order dated 21.12.2012 be set aside and they revision application be allowed in full.

4. A personal hearing in the case was held on 20.01.2021. Shri Mahesh Parnekar, Chief Manager Indirect Taxes and Ms Kajal Bhadra, Manager Indirect Taxes appeared online on behalf of the Applicant. They reiterated the submissions and requested for sanction of rebate

5. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

6. Government observes that as per Section 35(1) of the Central Excise Act, an appeal before Commissioner (Appeals) has to be filed within 60 days from the date of communication of the order of the adjudicating authority. This period of 60 days can be extended by the Commissioner (Appeals) by 30 days. In the instant case, there was a delay of 29 days in filing appeal which is condonable in terms of the provisions of Section 35(1) of the Central Excise Act, 1944 and the Applicant filed an appeal along with an application for condonation of delay with the Commissioner of Central Excise(Appeals), Mumbai-III. However, the Commissioner (Appeals) has dismissed the appeal on the ground that the appeal has been filed beyond 60 days of the adjudication order and that Applicant failed to show any cause for such delay before him. Government finds that appeal cannot be dismissed on technical ground when the Applicant is pursuing statutory remedy and not inclined to give up his right of appeal and accordingly condones the delay of 29 days and takes up revision application for decision on merit.

7. On perusal of the records. Government observes the Applicant, had filed rebate claim dated 07.05.2012 for an amount of Rs. 1,54,418/- in respect of ARE-1 No. 27/11-12 dated 18.10.2011 wherein the assessable value of the goods was Rs. 14,99,206/- and in Shipping Bill No. 5884280 dated 18.10.2011 the FOB value was Rs. 1,07,848/- . The Deputy Commissioner(Rebate), Central Excise, Raigad vide Order-in-Original No. 1474/12-13/DC(R)/Raigad dated 05.09.2012 rejected the rebate claim on the ground that "the market value of the excisable goods at the time of exportation was less than the amount of rebate of duty claimed". The Applicant in their revision application submitted that the FOB value or the CIF value declared for the purpose of customs cannot be considered as a ground to reject the rebate claim under Rule 18 of the Central Excise Rules. The amount declared as FOB/CIF value for the purpose of Customs Act, is

determined under the said Act and hence shall have no bearing on the rebate claimed under the Excise Act, unless provided for. Further, they submitted that under Section 4(3)(d) of the Central Excise Act, 1944, "transaction value" included any amount that the buyer is liable to pay to the seller by reason of, or in connection with the sale. They had paid excise duty on 'transaction value". Hence they are entitled to obtain rebate of whole of the duty of excise paid in respect of goods exported.

7. In this regard, Government observes that the identical issue has been decided by Government vide Revisionary Order No. 97/2014-Cx, dated 26-3-2014 in Re: Sumitomo Chemicals India Pvt. Ltd. reported in 2014 (308) E.L.T. 198 (G.O.I.). While deciding the issue Government, in its aforesaid Order discussed the provisions of Section 4(1)(a) of Central Excise Act, 1944, Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 as well as the definitions of 'Sale' and 'Place of Removal' as per Section 2(h) and Section 4(3)(c)(i), (ii), (iii) of Central Excise Act, 1944 respectively, and observed as under :-

> *8.5 Government observes that from the perusal of above provisions it is clear that the place of removal may be factory/warehouse, a depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at place of removal. The meaning of word "any other place" read with definition of "Sale", cannot be construed to have meaning of any place outside geographical limits of India. The reason of such conclusion is that as per Section 1 of Central Excise Act, 1944, the Act is applicable within the territorial jurisdiction of whole of India and the said transaction value deals with value of excisable goods produced/manufactured within this country. Government observes that once the place of removal is decided within the geographical limit of the country, it cannot be beyond the port of loading of the export goods. Under such circumstances, the place of removal is the port of export where sale takes place. The GOI Order No. 271/2005, dated 25-7-2005 in the case of CCE, Nagpur v. M/s. Bhagirth Textiles Ltd. reported in 2006 (202) E.L.T. 147 (GOI) has also held as under*

"the exporter is not liable to pay Central Excise duty on the CIF value of the goods but the Central Excise duty is to be paid on the transaction value of the goods as prescribed under Section 4 of the Central Excise Act, 1944". It is clear from the order that in any case duty is not to be paid on the CIF value.

8.6 Supreme Court in its order in Civil Appeal No. 7230/1999 and CA No. 1163 of 2000 in the case of M/s. Escorts JCB Ltd. v. CCE, Delhi reported in 2002 (146) E.L.T. 31 (S.C.) observed (in para 13 of the said judgment) that

"in view of the discussions held above in our view the Commissioner of Central Excise and CEGAT erred in drawing an inference that the ownership in the property continued to be retained by the assessee till it was delivered to the buyer for the reason that the assessee had arranged for the transport and transit insurance. Such a conclusion is not sustainable".

Further, CBEC vide it (Section) 37B Order 59/1/2003-CX, dated 3-3-2003 has clarified as under :-

"7. Assessable value' is to be determined at the "place of removal". Prior to 1-7-2000, "Place of removal" [Section 4(4)(b), sub-clauses (i), (ii) and (iii)], was the factory gate, warehouse or the depot or any other premises from where the goods were to be sold. Though the definition of "place of removal" was amended with effect from 1-7-2000, the point of determination of the assessable value under Section 4 remained substantially the same. Section 4(3)(c)(i) [as on 1-7-2000] was identical to the earlier provision contained in Section 4(4)(b)(i), Section 4(3)(c)(ii) was identical to the earlier provision in Section 4(4)(b)(ii) and Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, took care of the situation covered by the earlier Section 4(4)(b)(iii). In the Finance Bill, 2003 (clause 128), the definition "place of removal" is proposed to be restored, through amendment of section 4 to the position as it existed just prior to 1-7-2000.

8. Thus, it would be essential in each case of removal of excisable goods to determine the point of "sale". As per the above two Apex Court decisions this will depend on the terms (or conditions of contract) of the sale. The 'insurance' of the goods during transit will, however, not be the sole consideration to decide the ownership or the point of sale of the goods."

The Government also observed in its aforesaid Revision Order No. 97/2014-Cx, dated 26-3-2014 in Re: Sumitomo Chemicals India Pvt. Ltd. that

"it has been stipulated in the Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 and the CBEC Circular No. 510/06/2000-CX, dated 3-2-2000 that rebate of whole of duty paid on all excisable goods will be granted. Here also the whole duty of excise would mean the duty payable under the provisions of Central Excise Act. Any amount paid in excess of duty liability on one's own volition cannot be treated as duty. But it has to be treated simply a voluntary deposit with the Government which is required to be returned to the respondent in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11-9-2008 in CWP Nos. 2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. v. UOI reported in 2009 (235) E.L.T. 22 (P&H).

Hon'ble High Court of Punjab & Haryana has observed that refund in cash of higher duty paid on export product which was not payable, is not admissible and refund of said excess paid duty/amount in Cenvat credit is appropriate. As such the excess paid amount/duty is required to be returned to the respondent in the manner in which it was paid by him initially.

8. Government also places its reliance on the Hon'ble Gujarat High Court order dated 09.01.2016 in the RE:Garden Silk Mills Ltd Vs UOI [2018 (2) TMI 15 Gujart High Court] where in it was held that

"9. Coming to the merits of the case, again undisputed facts are that the petitioner had paid excise duty on CIF value of goods exported. The petitioner does not dispute the stand of the Government of India that excise duty was payable on FOB value and not on CIF value. The Government of India also does not dispute the petitioner's stand that in such a case the additional amount paid by the petitioner would be in the nature of deposit with the Government which the Government cannot withhold without the authority of law. If these facts are established, a simple corollary thereof would be that the amount has to be returned to the petitioner. If therefore, the petitioner's request was for re-credit of such amount in Cenvat account, the same was perfectly legitimate. The Government of India should not have asked the petitioner to file separate application for such purpose. The Government of

India itself in case of Balkrishna Industries Ltd. (supra), had substantially similar circumstance provided as under :

> *"8. In this regards, Government observed that the revisionary authority has passed a number of orders wherein it has been held that the rebate of duty is to be allowed of the duty paid the transaction value of the goods determined under Section4 of the Central Excise Act, 1944 and the rebate on the amount of duty paid in respect of post clearances expenses like freight and insurances may be allowed as recredit entry in their cenvat account. Since the Government cannot retain the amount collected without any authority of law and the same has to be returned to the applicant in the manner it was paid. Hence, Government observes that the applicant is entitled for the take (sic) credit in their cenvat account in respect of the amount paid as duty on freight & insurance charge. The applicant was not even required to make a request with the department for allowing this recredit in their cenvat account. The adjudicating officer/ Commissione(Appeals) could have themselves allowed this instead of rejecting the same as timebarred."*

10. In the result, the respondents are directed to recredit the excess amount paid by the petitioner categorizing as excise duty of CIF value of the goods to the Cenvat credit account.

11. Petition is disposed of."

9. Government finds that as the facts of the present Revision Application are similar to the above quoted cases, the ratio of the same is squarely applicable to this case. Hence the rebate of duty is to be allowed of the duty paid on the transaction value of the goods determined under Section 4 of the Central Excise Act, 1944.

10. Condition 2(e) of the Notification No. 19/2004-CE(NT) dated 06.09.2004, as amended issued under Rule 18 of the Central Excise Rules stipulate *"the market price of the excisable goods at the time of exportation is not less than the amount of amount of rebate of duty claimed"*. It is undisputed that Assessable value of goods declared in ARE-1/Invoice is Rs. 14,99,206/- and amount of duty paid and amount of rebate claimed is Rs. 1,54,418/-. Whereas the market price and FOB Value mentioned in Shipping Bill is Rs. 1,18,632/- & Rs. 1,07,848/- respectively. It is observed

that the market price of the excisable goods at the time of exportation is less than the amount of amount of rebate of rebate claim. Hence above condition specified under Notification No. 19/2004-CE(NT) date 06.09.2004 for sanction of rebate claim is not fulfilled. In view of above, rebate claim of Applicant does not have merit.

11. In view of above, Government finds no legal infirmity in the impugned Order-in-Appeal No BC/477/RGD(R)/2012-13 dated 21.12.2012 passed by the Commissioner of Central Excise(Appeals), Mumbai-III and hence upholds the same.

12. Revision Application is rejected in above terms.

29/01/21

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

ORDER No. 71/2021-CX (WZ)/ASRA/Mumbai Dated 29.01.2021

To,
M/s Seimens Ltd.,
130, Pandurang Budhkar Marg,
Worli,
Mumbai 400 030

Copy to:

1. The Commissioner, Central Goods & ST, Belapur, 1st floor, CGO Complex, Sector 10, CBD Belapur, Navi Mumbai 4400 614.
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Spare Copy

ATTESTED

अधीक्षक
Superintendent
रिवीजन एप्लीकेशन
Revision Application
मुंबई इकाई, मुंबई
Mumbai Unit, Mumbai