SPEED-POST

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.195/395 (I) to (VII)/13-RA/3460 Date of Issue:- 11 -08-2022

ORDER NO.756-762 /2022-CX (WZ) /ASRA/Mumbai DATED 08.08.2022 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 : M/s One World Pharma Pvt. Ltd.

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

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. US/883 to 889/RGD/2012 dated 12.12.2012 passed by the Commissioner (Appeals) of Central Excise, Mumbai Zone-II.

ORDER

These Revision applications are filed by M/s One World Pharma Pvt. Ltd. Mumbai (hereinafter referred to as 'applicant') situated at 201-202, Ark Inds Estate, Makwana Road, Marol, Andheri (East), Mumbai-400059, against the Orders-In-Appeal No.US/883 to 889/RGD/2012 dated 12.12.2012 passed by Commissioner of Central Excise (Appeals) Mumbai Zone-II.

2. The Brief facts of the case are that the applicant M/s One World pharma Pvt. Ltd., a merchant exporter procure goods from various manufacturers on payment of duty under claim for rebate as per Notification No. 19/2004-CE read with Rule 18 of Central Excise Rules, 2002.

3. In the instant cases, the rebate claims filed by applicant were rejected by the Original authority vide OIO No.533,565,567,568,569/11-12/DC(Rebate) Raigad dated 24-05-2012 and OIO No. 679,743/11-12/Dc(Rebate) Raigad dated 31-05-2012 on the ground that:

i) The rate of duty on medicaments was @ 4% / 5% Ad-valorem. The duty paid by the appellants @ 10% Ad-valorem instead of the correct 4% / 5% Ad-valorem could not be considered as Cenvat duty. Therefore, the rebate of duty paid on the export goods was admissible only to that extent.

ii) The FOB value was less than the assessable value shown in the ARE-1s and therefore, rebate amount was restricted only to the extent of duty payable on the FOB value.

iii) In one case the goods were exported from the Pune Depot of M/s Cipla Ltd. Under ARE-1 and invoice issued by M/s Cipla Ltd. Pune Depot and there was no duty payment certificate.

iv) In one case, the rebate claim has been rejected on the ground that the goods were cleared on account of M/s Medioral Laboratories and the exporter was mentioned in the invoice as M/s Cipla but they were actually exported by the applicants M/s One World Pharma Pvt. Ltd.

4. Being aggrieved by the said Orders-in-Original applicant filed appeals before Commissioner (Appeals) who after consideration of all the submissions, upheld impugned Orders-in-Original vide OIA No.US/883 to 889/RGD/2012 dated 12-12-2012.

5. Being aggrieved with these Orders-in-Appeal, applicants have filed these revision applications before Central Government under Section 35EE of Central Excise Act, 1944 on the following grounds:

1. Excise duty paid and rebate claimed @10% as per Notification No. 2/2008-CE dt. 1.3.2008.

a) The applicant submitted that when two Notifications, which are not mutually exclusive co-exist in the books of law, the assessee has option to choose any one of them. In other words, when both the aforesaid Notifications co-exist simultaneously and do not mutually exclude the other, an assessee has an option to choose between the aforesaid two Notifications. The applicant relied on Supreme Court judgement in case of HCL Ltd. Vs. Collector of Customs, New Delhi-2001 (130) ELT 405 (SC) and various other case laws.

b) It is an undisputed fact that both the Notifications no. 4/2006 & Notification no. 2/2008 under consideration are in existence simultaneously and have been issued under Section 5A of the Central Excise 1944. Both the aforesaid Notifications do not have any provisions excluding the other. In other words, Sl. No. 62C of Notification No. 4/2006 does not have any provision stating that the said Notification has an overriding effect over Notification No.2/2008-CE dated 1.3.2008 and similarly, vice versa. The central excise department cannot force any particular Notification on an assessee. The Deputy Commissioner has not pointed any provision under the Central Excise Act or rules made there-under which has the effect of requiring the applicant to

mandatorily avail the exemption Notification No.4/2006 CE dated 1.3.2006 (Sl. No.62C) only.

c) Rule 18 the Central Excise Rules, 2002 grants rebate of the excise duty paid on goods exported. Conditions and procedures to claim rebate are prescribed under Notification No. .19/2004-CE (NT) dated 6.9.2004. The essential condition prescribed under the said Notification is that the goods shall be exported after payment of duty. The fact that the applicant has made the export is not at all in dispute. The fact that the goods which have been exported have suffered excise duty is also not in dispute. Therefore, they are eligible for the entire claim of rebate. The CESTAT in the case of Gayatri Laboratories Vs. CCE-2006 (194) ELT 73 (T) held that rebate claim to the extent of duty paid is available and that the rebate claim cannot be restricted on the ground that less duty should have been paid in terms of Notification. In view of the above, the impugned Order-in-Original holding to the contrary is liable to be set aside.

d) Further, the applicant submitted that the method of assessment of excise duty payment on finished goods opted by them have not yet been challenged at any Commissionerate and therefore reassessment of excise duty payment while sanctioning rebate claim by the office of Maritime Commissioner is beyond the scope. The said issue have been already clarified by the circular of Government of India, Ministry of Finance (Circular No. 510/06/200-CX dated 3 Feb, 2000), which is self-explanatory about such issues vide this circular board has resolve that - "There is no question of re-quantifying the amount of rebate by the rebate sanctioning authority by reassessment, it is also clarifies that the rebate sanctioning authority should not examine the correctness of assessment but should examine only the admissibility of rebate of the duty paid on the export goods covered by a claim."

e) In terms of provisions of Rule 6 they have assessed goods to Central Excise duty applying Notification No. 2/2008-CE dated 01.03.2008 by paying 10% duty on such goods. Details of the assessment thus made, were duly informed to the Range Superintendent through the copies of ARE-1 submitted within 24 hrs of clearance of the goods as well as in the monthly ER1 returns. In this matter Ministry of Finance have clarified vide their letter dated (DOF No. 334/1/2008-TRU) 29th February 2008, where at para 2.2 as since the reduction in the general rate has been carried out by notification, the possibility of same product/ item being covered by more than one notification cannot be ruled out. In such situation the rate beneficial to the assessee would have to be extended if he fulfills the attendant condition of the exemption.

2. The assessable value is more than FOB value

a) In this matter, the applicant submitted that for administrative control their export goods consolidated at Bhiwandi and Pune depot for onward clearance to port of shipment. Therefore the freight element was not decided on the day of dispatch from factory. Freight will get confirm on availability of vessel and space on vessel. They reduce the rate @20% amount of CIF rate as given in export order for the payment of excise duty. They have tried to overcome the problem of FOB value and there is no intention to pay excise duty at higher side to claim rebate, therefore the rejecting the rebate claim is without understanding the fact of the case or difficulties of industries. Many time, to promote the export business discounts are offered to overseas buyer and thus discounted CIF values get considered for the calculation of FOB value in shipping bill and because of that also FOB value becomes less then ARE. 1 value. Due to these issues many time FOB values in shipping bill get lesser than ARE.1 value. Further, to support our contention they relied on the circular of Government of India, Ministry of Finance (Circular No. 510/06/2000-CX dated 3 Feb, 2000) which is self-explanatory.

b) The Commissioner (Appeals) has upheld the Order In Original rejecting our rebate claim, with instruction that the "appellant are at liberty to apply to jurisdictional authorities for restoration of the excess Cenvat credit debited by them as duty". Though the Commissioner (Appeals) has given instruction, it is not specific direction. They requested to give specific direction to approach Jurisdictional Central Excise Authority having jurisdiction over factory premises. Further, in this matter they relied on the case law iro BHAGIRATH TEXTILES LTD as reported in 2006 (202) E.L.T. 147 (G.O.I)

3. Goods procured for export from Pune depot of M/s. Cipla Ltd

a) In this case, the Deputy Commissioner of Central Excise (Rebate), Raigad has rejected the rebate claim on the ground that, the excise invoice belongs to Cipla ltd, Pune depot and the relevant excise invoice under which the goods cleared from the factory of manufacturer is not available. Also, the certificate at Sr. No. 3(a), (b) & (c) of the ARE-1 is not complete. The applicant submitted that M/s. Cipla Ltd, Pune depot is registered with Central Excise authority as an assessee under Central Excise Act, 1944 and having registration number AAACC1450BXM018. After clearance of goods, M/s. Cipla has submitted triplicate ARE-1 with Jurisdictional Central Excise Authority. The Range Superintendent has certified the duty payment after verification. As concern to certificate under Sr. No. 3 (a), (b) & (c) of the ARE-1, the applicant clarified that, the said declaration deals with excise duty paid/not paid on input material used in manufacturer of finished product. They are always under facility of availing CENVAT credit and never taken any relevant benefit for procurement of input material for use of manufacturing finished goods. The non-striking of certificate under Sr. No. 3 (a), (b) & (c) of the ARE-1 is procedural lapse at their part and requested to condone.

4. In respect of name of exporter mentioned as M/s. Cipla Ltd

a) M/s. One World Pharma Pvt Ltd has raised export order for "Nistatina Oral Suspension" for export as a merchant exporter. The said goods has been manufactured by M/s. Mediorals Laboratories Pvt Ltd. At the time of clearance

of goods the manufacturer has wrongly mentioned name of M/s Cipla as merchant exporter on Central Excise Invoice and also given NOC to M/s Cipla at column 12 of ARE-1. This was technical mistake made by the manufacturer at the time of preparation of excise documents. The manufacturer has clarified the matter vide their letter dated 30.03.2010 that, they are in loan licensee business with M/s Cipla Ltd and huge quantity of goods cleared from their factory for export for M/s. Cipla. Therefore, they are habitual of preparing excise documents in the name of M/s Cipla. In this case also, they have cleared goods for export by merchant exporter M/s. One World Pharma Pvt Ltd, but they have wrongly mentioned name of M/s Cipla as merchant exporter on Central Excise Invoice. All the other relevant documents viz. shipping bill, Bill of lading, export invoice, mate receipt etc are in the name of M/s. One World Pharma Pvt Ltd. The copy of proof of export and the copy of icegate shows the goods has been exported by M/s. One World Pharma Pvt Ltd.

b) The applicant requested to set aside that part of Order In Appeal passed Commissioner (Appeals) of Central Excise, Mumbai Zone II and Order In Original passed by Deputy Commissioner of Central Excise, Raigad and give direction to sanction the rebate claims and pass such other order or orders as may be deemed fit and proper in the facts and circumstances of the case.

6. Personal Hearing was granted to the applicant on19-01-2018, 15-02-2018, 03-12-2019, 3-12-2020 or 08-12-2020 and 27-01-2021. However, neither the applicant nor respondent appeared for the personal hearing on the appointed dates, or made any correspondence seeking adjournment of hearings despite having been afforded the opportunity on more than three different occasions and therefore, Government proceeds to decide these cases on merits on the basis of available records.

7. Government has carefully gone through the relevant case records available in case files, written submissions and perused the impugned Orders-

in-Original, Orders-in-Appeal and the Revision Application. Government addresses the issue involved in the impugned Revision application, point-wise as indicated herein above:

1. Excise duty paid and rebate claimed @10% as per Notification No. 2/2008-CE dt. 1.3.2008.

a) Government observes that the applicant has contended that there were two rates of duty prescribed for medicaments and it was open to them to pay duty @4%/5% under Notification No.4/2006 for home consumption and pay duty @8%/10% under Notification No. 2/2008 for exports.

b) Government observes issue of payment of duty by the applicant @ 10% i.e. General Tariff Rate of Duty ignoring the effective rate of duty @ 4% or 5% in terms of exemption Notification No. 4/2006-C.E., dated 1-3-2006 has been decided by Government of India vide Order No 41-54/2013-CX dated 16.01.2013 in the case of M/s Cipla Ltd., holding as under :

> *" there is no merit in the contentions of applicant that they are eligible to claim rebate of duty paid @ 10% i.e. General Tariff Rate of Duty ignoring the effective rate of duty @ 4% or 5% in terms of exemption Notification No. 4/2006-C.E., dated 1-3-2006 as amended. As such Government is of considered view that rebate is admissible only to the extent of duty paid at the effective rate of duty i.e. 4% or 5% in terms of Notification No. 4/2006-C.E., dated 1-3-2006 as amended. The amount of duty paid in excess of duty payable at effective rate of 4% or 5% as per Notification No. 4/2006-C.E. is to be treated as voluntary deposit with the Government. In such cases where duty is paid in excess of duty actually payable as held by Hon'ble Apex Court in the case discussed in Para 8.8.2 and also held by Hon'ble High Court of Punjab and Haryana as discussed in Para 8.8.3 above, the excess paid amount is to be returned/adjusted in Cenvat credit account of assessee. Moreover Government cannot retain the said amount paid without any authority of law. Therefore, Government allows the said*

amount to be re-credited in the Cenvat credit account of the concerned manufacturer".

c) Being aggrieved by the decision of the order of Revision Authority, the Commissioner of Central Excise, Mumbai-III had filed Writ Petition No. 2693/2013.

d) Hon'ble Bombay High Court vide Order dated 17th November 2014 had dismissed the Writ Petition No 2693/2103 filed by the Commissioner of Central Excise Mumbai-III holding that

"The direction to allow the amount to be re-credited in the Cenvat Credit account of the concerned manufacturer does not require any interference by us because even if the impugned order of the Appellate Authority and the order in original was modified by the Joint Secretary (Revisional Authority), what is the material to note is that relief has not been granted in its entirety to the first respondent. The first respondent may have come in the form of an applicant who has exported goods, either procured from other manufacturer or manufactured by it. Looked at from any angle, we do not find that any observation at all has made which can be construed as a positive direction or as a command as is now being understood. It was an observation made in the context of the amounts lying in excess. How they are to be dealt with and in what terms and under what provisions of law is a matter which can be looked into by the Government or eve by the Commissioner who is before us. That on some apprehension and which does not have any basis in the present case, we cannot reverse the order or clarify anything in relation thereto particularly when that it is in favour of the authority. For all these reasons, the Writ Petition is misconceived and disposed of.

e) In view of the Revisionary Authority and Hon'ble Bombay High Court's Order discussed in preceding paras, Government holds that the applicant is not entitled to rebate of duty paid in excess of duty payable at effective rate as

per Notification No. 4/2006-C.E., dated 1-3-2006 as amended and the excess paid duty has to be allowed as recredit in the Cenvat credit account from which it was paid/debited subject to compliance of the provisions of Section 12 B of Central Excise Act. The applicant can approach the jurisdictional authorities for the needful.

2. The assessable value is more than FOB value

a) Government observes that in this case the applicants have contended their price was C.I.F but since the exact amount of freight and insurance could not be decided on the day of dispatch from the factory, they could not deduct the correct amount of freight and insurance etc. at the time of clearance of goods. The FOB value was less than the assessable value shown in the ARE-1's because of addition of Freight and Insurance in the assessable value which is not allowed under Section 4 of the Central Excise Act, 1944. Under Section 4, the assessable value is the transaction value at the time and place of removal. The factory gate was the place of removal in the instant case and the agreed price was CIF. The FOB value shown on shipping bill is the correct transaction/assessable value. The assessable value worked out on approximate basis was more than the correct FOB value which led to excess payment of duty. The rebate amount has to be restricted to the duty payable on FOB value as the amount paid over and above the assessable value is not duty.

b) Government relies on GOI Order dated 26.03.2014 in Re: Sumitomo Chemicals India Pvt. Ltd. [2014(308) E.L.T.198(G.O.I.)], in respect of the rebate amount being restricted proportionately to FOB value of the rebate claims treating it as a transaction value. The GOI Order held that:

> *"9. Government notes that in this case the duty was paid on CIF value as admitted by applicant. The ocean freight and insurance incurred beyond the port, being place of removal in the case cannot be part of transaction value in terms of statutory provisions discussed above.*

Therefore, rebate of excess duty paid on said portion of value which was in excess of transaction value was rightly denied. Applicant has contended that if rebate is not allowed then the said amount may be allowed to be re-credited in the Cenvat credit account. Applicant is merchant-exporter and then re-credit of excess paid duty may be allowed in Cenvat credit account from where it was paid subject to compliance of provisions of Section 12B of Central Excise Act, 1944".

c) Government therefore, holds that the excess duty paid by the applicant over and above the FOB value be allowed as recredit in the Cenvat credit account from which it was paid/debited subject to compliance of the provisions of Section 12 B of Central Excise Act, 1944. The applicant can approach the jurisdictional authorities for the needful.

3. Goods procured for export from Pune depot of M/s. Cipla Ltd

a) Government observes that the applicant's rebate claims were rejected on the ground that the Excise invoice belonged to Cipla Ltd. Pune depot and the relevant excise invoice under which the goods were cleared from the factory of manufacturer is not available and hence the goods were not exported directly from factory and as such violated the condition of the Notification No. 19/2004-C.E. (N.T.). The said condition 2(a) reads as under :

"(2)(a) that the excisable goods shall be exported after payment of duty, directly from a factory or a warehouse, except as otherwise permitted by the Central Board of Excise and Customs by a general or special order."

b) The above said condition requires that the goods should be exported directly from factory to avail rebate benefit. The relaxation from said condition of direct export from factory has been provided in Board's Circular No. 294/10/97-CX, dated 30-1-1997. However, the applicant has neither exported the goods directly from factory in terms of condition 2(a) of the Notification No.

19/2004-C.E. (N.T.) nor he followed the procedure mentioned in Circular No. 294/10/97-CX, dated 30-1-1997.

c) Since the applicant neither exported the goods directly from factory or warehouse in terms of condition 2(a) of the Notification No. 19/2004-C.E. (N.T.) nor followed the relaxed procedure as prescribed Board's Circular dated 30-1-1997, the rebate claims in respect of the goods which were not exported directly from factory/warehouse, were rightly held inadmissible by the Commissioner Appeal, under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004.

d) The Applicant has contended that M/s Cipla is registered with C.Ex and had submitted triplicate ARE-1 and the Range Supdt had certified the duty payment after verification. In this regard, Government observes that condition 2(a) clearly stipulate that excisable goods shall be exported after payment of duty directly from a factory or a warehouse. In this case, applicant had not exported the goods directly from factory. The C.B.E. & C. vide Circular No. 294/10/97-CX, dated 30-1-1997, prescribed the procedure for exporting the goods under rebate claim from a place other than factory or warehouse. Since the goods were not exported directly from factory or warehouse, the procedure laid down in said Circular was required to be followed for becoming eligible to claim rebate duty under Rule 18 of Central Excise Rules, 2002. Hence Government upholds the Commissioner Appeal's impugned Order on this issue.

4. <u>In respect of name of exporter mentioned as M/s. Cipla Ltd</u>

a) In this case the rebate claim has been rejected on the ground that the goods were cleared on account of M/s Medioral Laboratories (the manufacturer) and the exporter mentioned in the invoice was M/s Cipla but they were actually exported by the applicant M/s One World Pharma Pvt. Ltd. At the time of clearance of goods the manufacturer has wrongly mentioned

name of M/s Cipla as merchant exporter on Central Excise Invoice and also given NOC to M/s Cipla at column 12 of ARE-1. This was technical mistake made by the manufacturer at the time of preparation of excise documents. The manufacturer has clarified the matter vide their letter dated 30.03.2010 that, they have cleared goods for export by merchant exporter M/s. One World Pharma Pvt Ltd, but they have wrongly mentioned name of M/s Cipla as merchant exporter on Central Excise Invoice. All the other relevant documents viz. shipping bill, Bill of lading, export invoice, mate receipt etc are in the name of M/s. One World Pharma Pvt Ltd. They have enclosed the Copy of proof of export copy of icegate, which shows the goods has been exported by the applicant. Commissioner Appeal held that the deficiency cannot be brushed aside as technical lapse. The law is established that procedural deficiencies can be overlooked or ignored only when export of duty paid excisable goods is established from the records. The export and duty payment cannot be presumed on some a priori reasoning.

b) On going through the relevant documents viz. shipping bill, Bill of lading, export invoice, mate receipt etc which has been produced as part of the Revision Application, Government finds that name of M/s One World has been mentioned in all these documents except on the Central Excise Invoice and also at column 12 of ARE-1 wherein the name of M/s Cipla Ltd. has been mentioned. Government, therefore is of the considered view that the applicant is eligible for rebate provided that the original authority satisfies himself with collateral evidences such as shipping bill, Bill of lading, export invoice, mate receipt etc submitted by the applicant evidencing the actual export of duty paid goods by them.

c) In view of the above, Government holds that rebate is admissible to the applicant on this issue, provided that the collateral evidences produced by the applicant can prove that they have exported the duty paid goods. Accordingly, Government modifies the impugned Order-in-Appeal in this point and directs

the original authority to decide the case afresh taking into account the above observations. The applicant is directed to submit necessary documents before original authority for verification.

9. The Revision Application is partially allowed in terms of above.

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

ORDER No.756-762/2022-CX (WZ) /ASRA/Mumbai DATED 08.08.2022

To,

M/s One World Pharma Pvt. Ltd.,
201-202, Ark Inds Estate,
Makwana Road, Marol,
Andheri (East), Mumbai-400059

Copy to:

1. The Commissioner of CGST, Belapur, C.G.O. Complex, 10, C.B.D. Belapur, Navi Mumbai – 400 614.
2. The Commissioner of GST & CX, Appeals, 5th Floor, C.G.O. Complex, 10, C.B.D. Belapur, Navi Mumbai – 400 614.
3. The Deputy Commissioner (Rebate), GST & CX Belapur, 1st Floor, C.G.O. Complex, 10, C.B.D. Belapur, Navi Mumbai – 400 614.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Notice Board.