

SPEED POST



F.No. 195/161/2018-R.A.
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue. 12.04.21...

Order No. 77/2021-CX dated 09-04-2021 of the Government of India, passed by Sh. Sandeep Prakash, Additional 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 Order-in-Appeal No. LUD-EXCUS-001-APP-623-2018 dated 12.03.2018 passed by the Commissioner (Appeals), CGST, Ludhiana.

Applicants : M/s Devi Powers Limited, Ludhiana.

Respondent : Commissioner of Central Excise & CGST, Ludhiana.

ORDER

A revision application no. 195/161/2018-R.A. dated 15.06.2018 has been filed by M/s Devi Powers Pvt. Ltd., Ludhiana (hereinafter referred to as the applicant) against the Order-in-Appeal no. LUD-EXCUS-001-APP-623-2018 dated 12.03.2018, passed by the Commissioner (Appeals), CGST, Ludhiana, vide which the Commissioner (Appeals) has upheld the Order-in-Original no. 134/CE/ADC/LDH/2013 dated 16.12.2013 of the Additional Commissioner, Ludhiana, confirming the demand of Rs. 2,54,378/- as erroneous refund, under Section 11A of the Central Excise Act, 1944.

2. Briefly stated, the applicant are engaged in re-packing and export of goods. They filed four rebate claims totally amounting to Rs. 6,30,734/- under Notification No. 21/2004-CE (NT) dated 06.09.2004 read with Rule 18 of the Central Excise Rules, 2002. The said rebate claims were sanctioned by the Assistant Commissioner of Central Excise, Ludhiana, vide Orders-in-Original Nos. 1215-18/Rebate/AC/Ldh-II/2011-12 all dated 14.11.2011. During the post audit of the rebate claims, it was observed that the sanction was not proper as the applicant had claimed drawback against the Shipping Bills. Hence, the department filed an appeal against the aforesaid Orders dated 14.11.2011 before the Commissioner (Appeals), who vide Order-in-Appeal no. LUD-EXCUS-000-APP-418-422-13-14 dated 08.07.2013 dismissed the appeals filed by the department. A show cause notice C.NO.V(85)CE/ADC/LDH/72/2012/20897 dated 07.11.2012 was also issued which was adjudicated by the Additional Commissioner, Ludhiana vide an aforesaid Order-in-Original No. 134/CE/ADC/LDH/2013 dated 13.12.2013, wherein the demand of claim of rebate amounting to Rs. 2,54,378/- erroneously sanctioned and disbursed was confirmed alongwith interest and penalty by holding that the applicant had exported the goods vide Shipping Bill No.1359313 dated 30.07.2010 and that during the material period the Notification No.103/2008-Cus(NT) dated 29.08.2008 was applicable which barred the simultaneous availment of drawback and rebate of

the duty paid on the inputs used in the manufacture of export goods. Being aggrieved, the applicant filed an appeal before the Commissioner (Appeals) which was rejected.

3. The revision application has been filed mainly on the ground that the department had originally sought to reject the rebate claim, vide show cause notice 23.06.2011 on certain grounds which were not accepted in the original proceedings and the rebate was sanctioned. The ground of simultaneous availment of duty drawback and rebate of the duty paid on the inputs was not raised in the show cause notice 23.06.2011 and the Commissioner (Appeals), had on this same ground of department traversing beyond the scope of original show cause notice, had rejected the appeal of the department and confirmed the order sanctioning rebate. Therefore, the same matter cannot be reopened through another proceedings under Section 11A.

4. Personal hearing was held on 05.04.2021, in virtual mode. Sh. Kamaljeet Singh, Advocate, made the submissions for the applicant and reiterated the contents of the RA. He highlighted that:

- (i) The orders sanctioning rebate were challenged by the department before the Commissioner (Appeals). The Commissioner (Appeals) has vide OIA dated 08.07.2013 rejected the appeal. The department has not challenged the OIA dated 08.07.2013. Hence, it has become final.
- (ii) The orders sanctioning the rebate having become final, it is not open to the department to reopen the issue by issuing show cause notice for erroneous refund. Hon'ble Supreme Court's decision in the case of ITC Ltd. {2019 (368) ELT 216 (SC)} and Hon'ble Tripura High Court's decision in the case of Tripura Ispat {WP(C) No.465/2020} are relied upon.

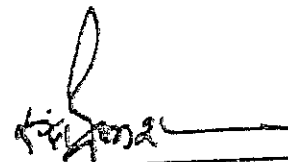
No one appeared from the respondent department nor any request for adjournment has been received. Therefore the matter is taken up for disposal based on records.

5. The Government has examined the matter. The short point for consideration is whether the order sanctioning the rebate having attained finality as the Commissioner (Appeals) has rejected the appeal of the department, can be reopened in the proceedings under Section 11A as a case of erroneous refund.

6. The Government finds that the Hon'ble Supreme Court in the case of ITC Ltd. (supra) while considering the question whether in the absence of any challenge to the order of assessment in appeal, any refund application against the assessed duty can be entertained has held that *"the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act."* While arriving at this conclusion, the Apex Court also noticed the provisions of Section 28 of the Customs Act, 1962, dealing with the recovery of duty not levied or not paid or short levied or short paid or erroneously refunded. The applicant has also cited the judgment dated 12.01.2021 of the Hon'ble High Court of Tripura in the case of Tripura Ispat vs. Union of India & Others (WP(C) No.465/2020). In the case of Tripura Ispat, the petitioner was issued a show cause notice by the department for recovery of amount of Rs. 53,06,055/- refunded to them as erroneous refund under Section 11A of the Central Excise Act, 1944 alongwith interest. The Hon'ble High Court following several decisions of the Hon'ble Supreme Court held that *"[15] Section 11A of the Central Excise Act does not authorize the Assistant Commissioner to revise or review his own order. In the show cause notice effectively what he proposes to do is revise and recall his own order on the ground that the law that he applied when he passed order of refund, has since been changed. This in our opinion is wholly impermissible"*. The show cause notice issued by the department was, therefore, quashed by the Hon'ble High Court.

7. In the present case, the department challenged the order sanctioning the rebate under Section 35 of the Central Excise Act, 1944, which did not succeed. The order sanctioning the rebate having thus become final, following the ratio of ITC Ltd. (supra) and Tripura Ispat (supra), the reopening of the same issue on the same grounds by way of demand of erroneous refund under Section 11A is not permissible in this case. Therefore, the Government finds that the impugned Order-in-Appeal cannot be sustained.

8. The revision application is allowed.



(Sandeep Prakash)

Additional Secretary to the Government of India

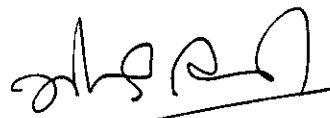
M/s Devi Powers Limited,
228-B, Industrial Area-A,
Ludhiana.

G.O.I. Order No. 77/21-CX dated 9-4-2021

Copy to: -

1. The Commissioner of CGST, GST Bhawan, F-Block, Rishi Nagar, Ludhiana (Punjab)-141 001
2. Commissioner (Appeals), CGST, Ludhiana.
3. Sh. Kamaljeet Singh, Advocate, J-144, Patel Nagar-I, Opp. Roadways Bus Stand, Ghaziabad (U.P.)
4. P.S. to A.S. (Revision Application).
5. Guard File.
6. *Spare Copy.*

ATTESTED



(Ashish Tiwari)

ASSISTANT COMMISSIONER (R.A.)