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F.No. 195/1090/11-RA (CX)
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

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

Date of Issue 23.9.2015

Order No. 82/2015-CX dated 17.09.2015 of the Government of India, passed by Ms 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 the Order-in-Appeal No. 24(CB) CE/JPR-II/10 dated 28-01-2011 passed by Commissioner of Customs & Central Excise (Appeals-II), Jaipur.

Applicant : M/s. Hindustan Zinc Ltd., Udaipur, Rajasthan.

Respondent : Commissioner of Central Excise, Jaipur-II.

ORDER

This Revision Application is filed by M/s. Hindustan Zinc Ltd., Rajasthan (hereinafter referred to as applicant) against the Order-in-Appeal No. 24(CB) CE/JPR-II/10 dated 28.01.2011 passed by Commissioner of Customs & Central Excise (Appeals-II), Jaipur with respect to Order-In Original passed by Assistant Commissioner of Central Excise, Division, Udaipur.

2. Brief facts of the case are that the applicant is a mining-cum-smelting unit of the large sector undertaking known as HINDUSTAN ZINC LIMITED and is engaged in the mining and manufacture of non-ferrous metal (mainly zinc and lead) concentrate at its concentration plant located at Rajpura-Dariba. The applicant has its smelters at various places where the concentrate mined from its captive mines is being subjected to smelting operations, generally transferring the concentrate manufactured at Rajpura-Dariba Mines to its captive smelters, after payment of duty. As such transfers were inter-unit transfers, the valuation thereof was being done under the provisions of Rule 8 of the Valuation Rules at "Cost of Production + 10%" profit basis. That apart from inter-unit consumption, the applicant was also exporting the concentrate, under Bond, under the provisions of Rule 19 of the Central Excise Rules, 2002 against LUT. The applicant filed rebate claim for Rs.1,98,03,243/- on 20.07.2009 for the goods exported during the period 11.02.2009 to 20-02-2009 in terms of Notification No. 19/2004-CE (NT) dated 06.09.2004, issued under Rule 18 of the Central Excise Rules, 2002 read with Section 11 B of the Central Excise Act, 1944. A Show Cause Notice dated 06.10.2009 was issued to the applicant for rejecting the rebate claims filed by them on the following grounds:

- (i) As per invoices issued under Rule 11 of the Central Excise Rules, 2002, the goods have been shown exported under LUT and not on payment of duty to claim the rebate.
- (ii) Prior to the month of February 2009, the applicant had been exporting lead concentrate @ Rs. 22,000/- per DMT under LUT. Even on 11.02.2009 the applicant had exported 579.550 DMT lead concentrate @ Rs. 22,000/- per DMT under claim of rebate of duty vide ARE-I No. 54 dated 11.02.2009 and invoice nos. 11553 to 11578. But the same goods were cleared for export during 12.02.2009 to 20.02.2009 under ARE-I nos. 55 to 63 and invoice nos. 11579 to 11581 and 11583 to 11683 @ Rs. 74,000/- per DMT under claim of rebate of duty. Thus the assessable value of the said goods for export under claim of rebate of duty appeared abnormally high with the sole objective to en-cash the accumulated CENVAT credit by way of overvaluation of export goods.

The Assistant Commissioner of Central Excise Division, Udaipur vide impugned Order-in-Original No.123/10/R-CE(Ref) dated 17.03.2010, sanctioned rebate of Rs. 77,27,060/- in cash and allowed re-credit of Rs. 1,20,76,183/- to the applicant by

taking into consideration the assessable value as Rs. 24200/- per DMT on quantity of 3100.00 DMT.

3. The Commissioner, Central Excise, Jaipur-II reviewed the order of Assistant Commissioner as the Order-in-Original was not proper and legal to the extent of sanction of rebate of Rs. 3,67,076/- [Rs. 1,31,326 + Rs. 2,35,750/-] in cash and filed appeal before the Commissioner (Appeals-II), Jaipur on the following grounds:-

3.1 That the adjudicating authority, while sanctioning the rebate appears to have not examined the factual position of the issue involved in the case. The claim does not appear to be legal and correct.

3.2 That on examination of ARE-1 No. 54 dated 11.02.2009, it was observed that 579.550 DMT lead concentrate was cleared for export on payment of duty of Rs.13,13,260/- @ Rs.22,000/- per DMT while the Assistant Commissioner sanctioned rebate of Rs. 14,44,586/- in cash on this quantity by taking into consideration the assessable value as Rs. 24,200/- per DMT instead of Rs.22,000/- per DMT, which has resulted in excess sanction of rebate of Rs. 1,31,326/- in cash.

3.3. That perusal of the ARE-1 Nos. 54 to 63 dated 11.02.2009 to 20.02.2009 and their corresponding invoices shows that a quantity of 3005.42 DMT of lead concentrate was cleared for export. However, while sanctioning the rebate claim the Assistant Commissioner had wrongly considered this quantity as 3100 DMT. This resulted in excess sanction of rebate of Rs. 2,35,750/- on assessable value of Rs. 22,88,836 for 94.58 DMT @ of Rs. 24,200/- per DMT.

3.4. That rebate of Rs. 3,67,076/- (Rs. 1,31,326/- + Rs. 2,35,750/-) had wrongly been sanctioned to the applicant by way of cash. Therefore the wrongly sanctioned rebate of Rs. 3,67,076/- in cash should be recovered from the applicant along with interest under Section 11 A and Section 11 AB respectively of Central Excise Act, 1944.

The Commissioner (Appeals-II), Jaipur vide Order-in-Appeal No.24(CB)CE/JPR-II/2011 dated 28.01.2011 allowed the appeal of the Revenue and ordered for recovery of excess refund sanctioned under Section 11A of the Central Excise Act, 1944 read with Section 11 AB of the Act.

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

4.1 That the Commissioner (Appeals II), Jaipur erred in deciding the matter, without giving any other opportunity to the applicant to argue the matter. That the appeal was heard when the appeal against the Order-in-Original No. 123/10/R-CE(Ref) dated 17.03.2010 was still pending with the Commissioner (Appeals-II), Jaipur and it was not known whether the same would be accepted or not. It was expected that the appeal would be decided in favour of them and that the whole

rebate claim would be sanctioned. That they prayed that this matter may be kept pending till the said appeal stands decided. That the applicant should have been given another chance of presenting this matter after the above appeal was decided against them. That proper opportunity has not been allowed to the applicant and therefore, the matter should be sent back to be re-heard and decided by Commissioner (Appeals) on merits of the case.

4.2 That this Revision Petition being related to the earlier Revision Petition registered under file reference no. 195/282/11-RA, this matter may be taken up simultaneously with the hearing of the said revision petition.

4.3 That the Commissioner (Appeals) has himself held in his Order-in-Appeal No. 25(CB)CE/JPR-II/2010 dated 27.01.2011/22.02.2011 at page 5 that

"In view of the above discrepancies, I hold that transaction value of Rs. 74,000/- adopted by the appellant is not correct and that transaction determined by the refund sanctioning authority as Rs. 24,200/- PMT in terms of Rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is correct,-----"

That in view of above observation, there is a specific determination of the assessable value at Rs. 24,200/- by the same appellate authority, if the department was aggrieved by such determination, the department could have filed a Review Appeal against the same. But the department has not filed any review appeal against the same. Therefore, the same has become final and binding as far as the department is concerned. That this finding should not have been departed from by the same Commissioner (Appeals) in the present proceedings.

4.4 That the alleged discrepancy in weight is concerned, it is stated that the actual exports undertaken by the applicant were to the tune of 3100 DMT [in place of 3005.42 DMT] and the applicant had paid duty on the same. Therefore, the claim of rebate on 3100 DMT was proper and consequently the quantity of material, adopted in the order sanctioning the rebate was correct and should not have been interfered with.

4.5. That the Commissioner (Appeals) erred in not considering the fact that in the case of this applicant itself, the same adjudicating authority has allowed the rebate claim in full for subsequent period under similar circumstances.

4.6 The applicant prayed that this Revision Application may be allowed and cash rebate may be allowed.

5. Personal hearing scheduled on 06.05.2015 was attended by Shri Vishy Vinod Nandawat, AGM (Finance) on behalf of the applicant who reiterated the grounds of Revision Application. Nobody attended hearing on behalf of respondent.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

7. On perusal of records, Government observes that in this case the applicant filed rebate claim of total amount of Rs.1,98,03,243/-. The original authority observed that the value of goods exported under claim of rebate was abnormally high as compared to same goods cleared under LUT/Bond and also to their sister concern. Accordingly, the original authority re-determined the transaction value @ Rs. 24200/- per DMT as against declared value of Rs. 74,000/- per DMT and allowed the cash rebate upto such value and remaining amount was allowed to be re-credited in CENVAT account of the applicants vide impugned Order-in-Original. The Department filed appeal with the Commissioner (Appeals) against the Order-in-Original on the grounds mentioned in para 3. Commissioner (Appeals) allowed the appeal of the Revenue and ordered for recovery of excess refund sanctioned under Section 11A of the Central Excise Act, 1944 read with Section 11 AB of the Act. Now, the applicant has filed this revision application on grounds mentioned in para 4 above.

8. Government observes that the applicant had exported lead concentrate vide ARE-1 54 to 63 and claimed rebate under Rule 18 of the Central Excise Rules, 2002 on the duty, paid thereof. The original authority vide impugned Order-in-Original No.123/10/R-CE (Ref) dated 17.03.2010, sanctioned the rebate claim on the assessable value of Rs. 24,200/- per DMT and on the total quantity of 3100 DMT for ARE-1 Nos 54 to 63 for the period 11.02.2009 to 20.02.2009 under invoice numbers 11553 to 11581 and 11583 to 11683. The Commissioner (Appeals) subsequently held that with respect to ARE-1 No. 54 the correct assessable value is Rs. 22,000/- per DMT and the total quantity of goods exported under ARE-1 Nos. 54 to 63 is 3005.42 DMT. Thus two issues need to be settled in the current Revision Application i.e. assessable value pertaining to ARE-1 No. 54 (whether Rs.24,200/- per DMT or Rs.22,000/- per DMT) and the total quantity of goods exported vide ARE-1s 54 to 63 (whether 3100 MT or 3005.42 MT).

9. Government finds that it is an undisputed fact that on 11.02.2009 the applicant had exported lead concentrate vide ARE-1 No. 54 @ Rs. 22,000/-per DMT and claimed rebate under Rule 18 at that rate for the impugned ARE-1 No. 54. However, subsequently the applicant has contended that though they were clearing export goods @ Rs. 22,000/- per DMT upto 11.02.2009, by mistake they were showing Rs.22,000/- per DMT as the inter-unit transfer price which was not the transaction value of the export goods. After the mistake was realised with effect from 12.02.2009 the programme on the computer was corrected and the rate was changed to Rs. 74,000/-DMT.

10. Government observes that Rule 18 of the Central Excise Rules, 2002 prescribes for rebate of duty paid in respect of excisable goods cleared for export subject to such conditions or limitations, if any, and fulfilment of such procedure as

may be specified in the notification. The most important aspect in this case is the value at which duty is required to be paid in respect of excisable goods cleared for export. Under Rule 18 the value should conform to 'Transaction Value' in terms of Section 4 of the Central Excise Act, 1944. Government further observes that Chapter 8 of CBEC's Excise Manual of Supplementary Instructions, prescribes that the goods (exported) should be assessed to duty in the same manner as the goods for home consumption and the value should be 'Transaction Value' in terms of Section 4 or Section 4A of the Central Excise Act, 1944, as the case may be. The transaction value may be less, equal to or more than the F.O.B. value indicated by the exporter on the shipping bills.

11. Government further observes that the applicant before the appellate authority has not produced any documentary evidence to controvert the grounds of appeal of the department. The department has alleged that on 11.02.2009 the applicant had paid duty by taking transaction value @ Rs. 22,000/- per DMT but the refund sanctioning authority has granted refund by taking it Rs. 24,200/-per DMT. Government also observes that the applicant has submitted before the refund sanctioning authority that on 11.02.2009 they have cleared the goods by taking transaction value @ Rs. 22,000/- per DMT and paid duty accordingly which has been claimed as rebate. Further Government finds no merit in the contention of the applicant that the Commissioner (Appeals) has finalised the assessment at Rs.24,200/- per DMT vide Order-in-Appeal No.25 (CB)CE/JPR-II/2011 dated 27.01.2011, as at that point the contention of the applicant before Commissioner (Appeals) was that the assessable value should be Rs.74000/- per DMT and not Rs.24,200/- per DMT as held by the original authority. The assessable value pertaining to impugned ARE-1 54 at 3005.42 MT has been specifically decided only vide the impugned Order-in-Appeal No.24(CB)CE/JPR-II/2011 dated 28.01.2011 wherein the point for determination was whether assessable value should be Rs.24,200/- per DMT or Rs.22,000/ per DMT. Therefore, the applicant's contention that by mistake they were showing Rs. 22,000/- per DMT as inter unit transfer price which was not the transaction value of the export goods is not correct and not acceptable being more of an afterthought. Thus the refund sanctioning authority has granted excess refund in cash amounting Rs. 1,31,326/- on 579.55 MT lead concentrate which is recoverable under Section 11 A of the Act read with Section 11 AB.

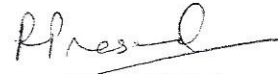
12. Government further observes that contract for export was for 3028.198 MT of concentrate against which the applicant exported 3005.42MT. But the refund sanctioning authority has granted refund by taking quantity as 3100MT which has resulted into excess refund in cash amounting to Rs. 2,35,750/- on 94.58 MT concentrate. The applicant has failed to produce any evidence to controvert this

ground. Thus it is rightly held by Commissioner that the refund sanctioning authority has granted excess refund in cash amounting to Rs. 2,35,750/-, which is recoverable under Section 11 A of the Central Excise Act, 1944 read with Section 11 AB ibid.

13. In view of above position, Government finds no infirmity in the impugned Order-in-Appeal and therefore upholds the same.

14. The revision application is therefore rejected being devoid of merit.

15. So, ordered.



(RIMJHIM PRASAD)

Joint Secretary to the Government of India

M/s. Hindustan Zinc Ltd.,
Unit Rajpura Dariba Mines,
P.O. Dariba,
Distt. Rajsamand (Rajasthan).

ATTESTED



(SHAUKAT ALI)
Under Secretary (RA)


शुकात अली
Shaukat Ali
अन्तर-सचिव (रा.स.)
Under Secretary (RA)

GOI Order No. 82/2015-CX dated 17.09.2015

Copy to:

1. The Commissioner of Central Excise, Jaipur-II, New Central Revenue Building, C-Scheme, Jaipur-302005.
2. The Commissioner (Appeal), Jaipur-II, New Central Revenue Building, Statue Circle, C-Scheme Jaipur-302005.
3. The Assistant Commissioner of Central Excise & Service Tax, Division, 142 B Sector-11, Hiran Mangri, Udaipur-313001.
4. Shri V.V. Nandawat, General Manager, Yashad Bhawan, Udaipur-313001.
5. Guard File.
- ✓ 6. PA to JS (Revision Application).
7. Spare Copy.

ATTESTED



(SHAUKAT ALI)

Under Secretary to the Government of India

शुकात अली
SHUKAT ALI
अ.स.स. (अ.स.)
उदाहरण (अ.स.)