

REGISTERED
SPEED POST



F.No. 195/1217-1218/11-RA
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..19-3-14..

ORDER NO. 84-85/14-Cx DATED 18.03.2014 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 Applications filed under Section 35 EE of the Central Excise Act, 1944 against the Orders-in-Appeal No.YDB/401-404/RGD/2010 dated 20.07.10 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-II
- Applicant : M/s Positive Packaging Industries Ltd., Khopoli-410203
- Respondent : Commissioner of Central Excise , Raigarh, Plot No. 1, Kendriya Utpad Shulk Bhavan, Sector No. 17, Khandeshwar New Panvel(W) Maharashtra - 400614.

ORDER

These revision applications are filed by M/s Positive Packing Industries Ltd. Khopoli against the orders-in-appeal No.YDB/401-404/RGD/2010 dated 20.07.10 passed by the Commissioner (Appeals) Central Excise, Mumbai Zone-II with respect to order-in-original No.KPL/RC/15/08-09 dated 16.3.09 and KPL/RA/15/08-09 dated 16.3.09 passed by the Assistant Commissioner of Central Excise, Khapoli Division, Raigad.

2. Brief facts of the case are that

2.1 M/s Positive Packaging Industries Ltd. (flexible Division) Distt. Raigad registered with Central Excise vide Registration No. AAACA 1012.BXM001 (here-in-after referred to as the assessee) vide their letter dated 28.08.08 received in this office on 29.08.08, have filed a refund claim for Rs.11,62,951/- and Rs.1238169/- for the refund of Custom duties paid by their 100% EOU (PPI-EOU), on finished goods during the period of de-bonding, as the said finished goods (duty paid) were exported as per the following details.

- (i) During the process of de-bonding, stocks of finished goods were ascertained as at the close of 13.02.08.
- (ii) Valuation of the aforesaid ascertained goods was done on 15.02.08.
- (iii) Duty for the aforesaid goods was paid on 15.02.08.
- (iv) After de-bonding, the goods covered by this Refund claim were exported under Bond and the original documents, in respect of the said goods, were submitted along with the proof of exports.
- (v) PPIL-EOU, vide letter dt. 19.02.08 have informed the Range Superintendent that they would be exporting finished goods lying in stock as on 13.02.08 and also would be claiming refund of duty paid on such goods exported subsequently .

2.2 The claimants have submitted the following documents:

- (i) Worksheet showing product-wise details of quantity and Refund of duty claimed vis-a-vis product-wise details of quantity and details of duty ascertained as on 13.02.08. This statement quantifies the amount of refund claimed as Rs.11.62,951/-, Rs.1238169/-.
- (ii) Photo-copy of the statement showing product-wise valuation and duty involved on the total stock ascertained as on 13.02.2008 duly signed by the Range Superintendent. This statement has been submitted to verify as to whether the product wise quantity and duty involved on the goods exported are included/covered in the respective product wise quantity and duty described in this statement.
- (iii) TR.6 Challan for depositing duties (a) Basic Custom Duty (b) Basic Excise Duty (c) Education Cess (d) S.H.E.Cess (e) Total Ed. Cess (f) Total S.H.E Cess and (g) ACVD with reference to letter No.SEEPZ/SEZ/PER/EOU/25/03-04/Vol.II/336 dated 17.01.08 by Asstt. Development Commissioner in respect of De-bonding of EOU Unit.
- (iv) Copy of 'No Dues Certificate' dated 21.02.08 issued by the Assistant Commissioner, C.Excise, Khopoli Division, Raigad from file No.VIII/Cus/36/Enpac/KPL/03/P-III.
- (v) Copy of Final De-bonding Order dated 11th March, 2008 issued by Development Commissioner vide his office File No.SEEPZ-SEZ/EOU/25/03-04/Vol-II.
- (vi) Copy or letter dated 19.02.2008 submitted by PPIL-EOU to the Range Superintendent informing therein the intention of exporting the finished goods whose stock was ascertained as at 13.02.08 and in respect of which duty was paid vide TR6 Challans and claiming refund of duty so paid.

(vii) Copies of the following documents in respect of the ARE 1 Nos. mentioned in the worksheet described at (i) above:

- (a) ARE-1 duly endorsed by Custom Officer confirming the exportation of goods mentioned therein.
- (b) Central Excise Invoice issued by M/s. PPIL-EOU at the time of clearance of goods from the factory,
- (c) EP Copy of Shipping Bill.
- (d) Mate Receipt
- (e) Bill of Lading.
- (f) Customs Invoice
- (g) Packing list

The adjudicating authority sanctioned both the rebate claims of Rs.11,50796/- and Rs.1238169/-.

3. Being aggrieved by the said order-in-original, applicant department filed appeal before Commissioner (Appeals). It is contended in the appeals filed by the Revenue that no duty was paid at the time of export as is clear from the ARE-1s. Further the duty shown to be payable in the ARE-1s is @16% and not at the rate of duties of customs at which the assessee had paid the duty at the time of de-bonding vide challans. It is further contended that the duty paid by the assessee related to de-bonding and the refund of the same could not be granted on the basis of export. Commissioner (Appeals) after considering all the submissions, allowed the departmental (appeals) and set aside impugned order-in-original

4. Being aggrieved by the impugned order-in-appeal, the applicant has filed these two revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:-

4.1 Since issue involved in the Revenue appeal was of refund under Section 11B of Central Excise Act, 1944, the applicant filed appeal and stay petition & appeal before the Honorable CESTAT, Mumbai on 17/09/2010. The Honorable Tribunal listed the said appeal for hearing on 12/10/2011 in respect of maintainability as the order passed by the Commissioner (Appeals) is rebate claim case. On 12/10/2011 the matter was heard and the Honorable CESTAT dismissed the appeal on the ground that there is a finding by the Commissioner (Appeals) in the impugned order that the claims are rebate claims and as per the provisions of Section 35B of the Central Excise Act, the Tribunal has no jurisdiction to hear the appeal filed against the order passed by Commissioner (Appeals) in respect of rebate claim. However the Honorable Tribunal granted leave to appellant saying that the appellant is at liberty to approach the appropriate forum in accordance with law.

4.2 The Commissioner (Appeals) erred in issuing the common order on the 4 appeals out of which two relating to rebate claims filed by the Applicant & the other two relates to appeal filed by the Revenue. In respect of two refund claims against which the Revenue had filed the appeal before Commissioner (Appeals), the Applicant submits that they have claimed the refund of excise duty paid under proviso (ii) of Section 3 of Central Excise Act, 1944. The Commissioner (Appeals) has passed a common order for both the refund claims mainly on the ground that the customs duty paid on the de-bonding of EOU is not refundable on subsequent export of the said goods. There is no finding as regards the excise duties paid under "Head of Account and Major Head 038-Union Excise Duties" which is evident from the TR 6 Challans under which duties were paid. Therefore the order of Commissioner (Appeals) is a non-speaking order casually passed without appreciating the facts and legal position on record and non-application of mind too. It is settled law by the Hon'ble Bombay High Court in the case of Shivsagar Veg. Restaurant v/s Asstt. Commissioner, Income Tax-2008 (232) ELT 780 (HC-Bom) that delay & unreasoned judgments violate the basic rules or natural justice. Similar view was held by Hon'ble High Court in the case of CCE v/s Mahindra & Mahindsa Ltd-

2010 (252) ELT 330 (HC-Bom) & therefore order of Commissioner (Appeals) is liable to be quashed & set aside.

4.3 The Honorable Commissioner (Appeals) in his order (second last para of the order) held that "once duty of Customs including CVD has been paid on the imported goods and the goods had been de-bonded, the refund of the said duties could not be claimed by subsequently exporting the goods". At the outset the Commissioner (Appeals) erred on the basic facts that the Customs duty paid on the imported goods is sought to be refunded. The Applicant submit that the goods which were exported were not imported goods but manufactured by the Applicant in their EOU unit. Applicant submits that the duty was paid on the finished products manufactured & were lying in stock as on 13.2.2008 at the time of de-bonding of 100% EOU. As per the guidelines given under Appendix 14-1-L under Foreign Trade Policy, excise duty is required to be paid on the goods manufactured and lying in stock on the date of de-bonding. This basic fact has been misunderstood by the Commissioner (Appeals) when he passed the order presuming that the duty which was refunded was in relation to imported goods on which customs duty has been paid at the time of de-bonding. This misconception of basic fact by Commissioner (Appeals) in passing the order clearly shows the non-application of mind. The Applicant further submits that in the instant case the issue of payment of duty on imported goods was neither before the original authority nor the Revenue had taken that plea in their appeal. Therefore arriving at the conclusion of "payment of duty on imported goods" and that too "duty of customs" is exceeding both i.e. order in original and the ground pleaded by the Revenue in their appeal and hence the impugned Order in Appeal is liable to be set aside on this ground alone.

4.4 The Honorable Commissioner (Appeals) in his order (second last para of the order) held that "the respondents, as exporter of customs duty paid goods, may have been eligible for drawback under Section 75 of Customs Act, 1962". The Applicant

submits that whatever duty was paid on finished goods at the time of de-bonding is the 'duty of excise'. Though the duty is calculated equivalent to Customs duty, it is only for the purpose of calculation, but in effect the said duties are 'duties or excise' only.

4.5 The Commissioner (Appeals) has also erred in traversing beyond the grounds of appeal filed by the Revenue. The main ground in the revenue's appeal was that there is no nexus between the duty paid at the time of de-bonding & the goods exported. However Commissioner (Appeals) allowed the Revenue's appeal & the Commissioner (Appeals) has taken a totally new ground in his findings that the Assistant Commissioner does not have the authority to sanction the refund of Customs duty. Applicant submits that it is the order-in-original at Para 5 clearly recorded the basic facts co-relating the export of duty paid goods along with the export documents.

4.6 The Commissioner (Appeals) erred in his findings (second last para of the order) in holding that "as exporter of 'Customs duty paid goods', the duty paid by the EOU may have been eligible for drawback under Section 75 of Customs Act 1962 read with Customs & Central Excise Duties Drawback Rules 1995". Applicant submit that the duty drawback under Section 75 of Customs Act covers only the refund of duty paid on inputs used for production of goods which are exported or the refund of Customs duty paid on the imported goods subject to certain conditions. However, in the instant case the refund was pertaining to duty paid on finished goods (not on inputs) manufactured in India by the Applicant in their EOU unit.

4.7 The Commissioner (Appeals) erred in his finding (second last para of the order) in holding that the duty paid on the goods manufactured in the 100% EOU could be sanctioned as rebate under Notification No. 19/2004-CE (N.T.) dated 6.9.2004 issued under Rule 18 of Central Excise Rules, 2002. The Applicant submits that goods manufactured in an 100% EOU are exempted from whole of duty of excise leviable thereon under section 3 of Central Excise Act, 1944 vide Notification No. 24/2003-CE dated 31/03/2003. The said Notification further provides that the exemption is not

applicable to such goods if brought to any other place in India i.e. DTA sale. In respect of exports the goods are cleared under B-17 Bond only. In view of this factual position the finding of the Commissioner (Appeals) about applicability of rebate is entirely unfounded & unsustainable and hence on this ground too the impugned order is liable to be set aside. The Applicant further submits that in fact the Revenue in their grounds of appeal at para 1 (iv) had claimed that on export of goods, rebate is allowed of duty of excise paid thereon. Applicant submits that it is a general statement and not applicable to EOU as stated in above para. However with this rebate clause the conclusion drawn by the Revenue i.e. there is no nexus between the amount claimed as refund and export of goods is absolutely irrelevant. On this ground the Commissioner (Appeals) in his findings has adversely held that the duty paid on the goods manufactured in the 100% EOU could be sanctioned as rebate under Notification No. 19/2004-CE (N.T.) dated 6.9.2004 issued under Rule 18 of Central Excise Rules, 2002. The order of Commissioner (Appeals) is therefore traversing beyond the order in original and the Revenue's appeal and therefore on this ground too the impugned order is liable to be set aside.

In view of above the impugned orders-in-appeal may be set aside and orders-in-original be restored.

5. Personal hearing scheduled in this case on 8.8.2013 at Mumbai was attended by Shri S.K.Gupta, Inspector Central Excise on behalf of respondent department who stated that revision application No.195/789-792/11 filed by party against OIA No.YDB/401-404/RGD/10 is already decided vide GOI Revision Order No.632-637/12-Cx dated 11.6.11. Shri Prabhakar Shetty, Advocate attended hearing on behalf of the applicant who sought time for clarifying the contentions of department. The applicant vide letter dated 12.8.13 clarified as under:

5.1 During the course of the hearing the representative of department showed the order passed by your Honour, order No.632-637/12/-CX dated 11.6.2011 covering the two order in appeals as follows:

SI No.	RA Application No.	Against OIA No/date	OIO No./date
1.	195/1217-1218/11-RA-CX	YDB/401-404/RGD/10 dt. 20.7.2010	Raigad/KPL/RC/15/2008-09 16.3.2009-Rs.11.50 Lacs
2	195/1217-1218/11-RA-CX	YDB/401-404/RGD/10 dt. 20.7.2010	Raigad/KPL/RC/16/2008-09 16.3.2009-Rs.12.38 Lacs
3	195/789-792/10-RA-CX	YDB/401-404/RGD/10 dt. 20.7.2010	Raigad/KPL/RC/1000/2008- dt 23.4.2009-Rs.8626/-
4	195/789-792/10-RA-CX	YDB/401-404/RGD/10 dt. 20.7.2010	Raigad/KPL/RC/1001/2008- dt 16.4.2009- Rs.2250/-
5	195/111-112/11-RA-CX	YDB/825- dt. 19.11.2010	KPL/RGD/RC/8092/09-10 dated 31.3.2010-Rs.26821/-
6	195/111-112/11-RA-CX	YDB/825- dt. 19.11.2010	KPL/RGD/RC/8093/09-10 dated 31.3.2010-Rs.2006/-

Against Order-in-appeal No.401-404/RGD/2010, we have filed only two Revision application for rebate of Rs.8626/ - & 2250/- as referred in SI No.3 & 4 in table above. This revision application has been numbered as 195/789-792/10-RA-CX for four revision applications, may be by mistake, by oversight. However we confirm that we have filed only two revision applications against the said order on 20.10.2010.

5.2 We have not filed Revision application on 20.10.2010 against order-in-original No.Raigad/KPL/RC/15/2008-09 dated 16.3.2009-Rs.11.50 Lacs & Raigad/KPL/RC/16/2008-09 dt 16.3.2009-Rs.12.38 Lacs arising out of order-in-appeal No.YDB/401-404/RGD/10 dated 20.7.2010. However we have filed an appeal before CESTAT under

the bonafide belief that the same is a refund and hence the jurisdiction is before CESTAT.

5.3 The Honorable CESTAT heard the matter on 12.10.2011 wherein the said appeals were dismissed as not maintainable as tribunal has no jurisdiction to hear the appeal because it relates to rebate of duty paid on goods exported. Tribunal however granted liberty to appellants to approach appropriate forum. Therefore we have filed two Revisions applications on 7.12.2011, consequent to the order of CESTAT No. A/921-924/11/EB/C-II dated 12.10.2011. These revision applications were allotted RA application No.195/1217-1218/11-RA-CX.

5.4 Hearing on 8th August 2013 was granted for this Revision applications No.195/1217-1218/11-RA-CX which is also covered under order-in-appeal No. YDB/401-404/RGD/10 dated 20.7.2010. Application against the said orders were not filed before Revisionary Authorities earlier. Therefore the contention of the revenue that the order No.632-637/12-Cx dated 13.6.2012 (wrongly shown as 13.6.2011) already covered in the said order passed on 13.6.2012 is factually incorrect as is evident from the above position.

5.5 During the personal hearing, on submission of the said order copy by the departmental representative, the hearing was concluded without hearing us on merit. We have therefore request to grant us time to another date to prove that there were no duplication of application against the same order-in-appeal. Accordingly we have now checked up all the records and re-confirm that the said two applications (No.195/1217-1218/11-RA-CX) were not heard any time earlier as the applications were filed only subsequent order of CESTAT.

6. Government has carefully gone through the relevant case records/oral & written submissions and perused the impugned order-in-original and order-in-appeal. In view of position explained in para (5) above Government notes that no revision application was filed earlier with reference to OIO No.15&16/08-09 both dated 16.3.09/OIA

No.401-404/10 dated 20.7.10 and GOI Revision Order No.632-637/12-Cx dated 11.6.11 does not relate to the instant revision application No.195/1217-1218/11.

7. On perusal of records, Government observes that applicant has filed an application for condonation of delay which is taken up first for decision. Applicant had filed appeal against OIA No.401-404/10 dated 20.7.10 received on 28.7.10 relating to OIO No.15&16/08-09 dated 16.3.09, before CESTAT on 17.9.10. Hon'ble CESTAT dismissed the said appeal as non-maintainable vide order No.A/921-924/11/E13/C-II dated 12.10.11. The total time taken in filing revision applications after excluding time spent in pursuing appeal before CESTAT is 19.7.10 to 17.9.10 (51 days) and 13.10.11 to 7.12.11 (56 days) i.e. total 107 days = 3 months and 17 days.

7.1 Government notes that Hon'ble High Court of Gujarat in W.P. No. 9585/11 in the case of M/s Choice Laboratory vide order dated 15.9.11, Hon'ble High Court of Delhi vide order dated 4.8.11 in W.P. No.5529/11 in the case of M/s High Polymers Ltd. and Hon'ble High Court of Bombay in the case of M/s EPCOS India Pvt. Ltd. in W.P. No. 10102/11 vide order dated 25.4.2012, have held that period consumed for perusing appeal bonafidely before wrong forum is to be excluded in terms of section 14 of Limitation Act 1963 for the purpose of reckoning time limit of filing revision application under Section 35 EE of Central Excise Act, 1944. The ratio of above said judgments is squarely applicable to this case. Government finds that keeping in view the above judgments, the delay is of only 17 days which has occurred due to valid reasons and same is within condonable limit. Hence, Government condones the said delay and takes up revision application for decision on merit.

8. Government notes that in this case the applicant, a 100% EOU, has exported the goods under bond without payment of duty in terms of Rule 19 of Central Excise Rules 2002. Applicant has himself admitted that being 100% EOU they were not entitled to rebate claim under Rule 18 of Central Excise Rules 2002.

8.1 In order to understand the issue, it is necessary to go through the provision of Notification No. 24/03-CE dated 31.03.03 and section 5A(1A) of Central Excise Act, 1944 which are extracted below:

8.2 Notification No. 24/2003-CE dated 31-03-2003 states as follows:

" In exercise of the power conferred by sub-section (1) of section 5A of Central Excise Act, 1944, (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby;

(a) Exempts all excisable goods produced or manufactured in an export oriented undertaking from whole of duty of excise leviable thereon under section 3 of Central Excise Act, 1944 (1 of 1944) and additional duty of excise leviable thereon under section 3 of additional Duty of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and addition duty of excise leviable thereon under section 3 of additional Duty of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

Provided that the exemption contained in this Notification in respect of duty of excise leviable under section 3 of said Central Excise Act shall not apply to such goods if brought to any other place in India;"

8.3 Sub-Section (1A) of Section 5A of the Central Excise Act, 1944 stipulates as follows:-

"(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely the

manufacturer of such excisable goods shall not pay the duty of excise on such goods."

8.4 The Notification No. 24/03-CE dated 31-03-2003 was issued under section 5A(i) of Central Excise Act 1944. The goods manufactured by 100% EOU and cleared for export are exempted from whole of duty unconditionally. CBEC has also clarified vide letter F.No. 2009/26/09-Cx dated 23.04.2010 (para 2) as under:-

"The matter has been examined, Notification No. 24/2003-CE dated 13.03.2003 provides absolute exemption to the goods manufactured by EOU. Therefore, in terms of Section 5A(1A) of the Central Excise Act, 1944. EOUs do not have an option to pay duty and thereafter claim rebate of duty paid."


Therefore in view of provisions of subsection (1A) of section 5A, the applicant rightly contended that 100% EOU is not entitled for rebate claim under Rule 18 of Central Excise Rules 2002.

9. Government notes that in this case applicant has exported goods under bond without payment of duty. The duty paid during de-bonding of goods was for DTA clearance of goods and not for export of goods. Since goods were exported under bond under Rule 19, the applicant has become disentitled for the benefit under Rule 18 as no duty was paid on clearance of goods for export. The refund of custom duties paid at the time of debonding the goods by 100% EOU is not covered under the provisions of Rule 18 of Central Excise Rules 2002. As such the contention of applicant for grant of rebate claim of such duty is not acceptable. Government finds support from the observations of Hon'ble Supreme Court in the case of M/s ITC Ltd. Vs CCE reported as 2004 (171) ELT-433 (SC), and M/s Paper Products Vs CCE reported as 1999 (112) ELT - 765 (SC) that the simple and plain meaning of the wordings of statute are to be strictly adhered to.

10. In view of above position the rebate claims have been rightly held inadmissible to the applicant by the Commissioner (Appeals). Government do not find any infirmity in the impugned orders-in-appeal and therefore upholds the same.

11. The revision applications are thus rejected being devoid of merits.


12. So, ordered.



(D.P.SINGH)

Joint Secretary (Revision Application)

M/s Positive Packaging Industries Limited,
Village – Ransai, KM 16, Khopoli Pen Road,
Khopoli – 410 203.



(भागवत शर्मा/Bhiswat Sharma)
सहायक आयुक्त/Assistant Commissioner
C B E C - O S D (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Finance)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

GOI Order No. 84-85/2014-CX dated 18.03.2014

Copy to:

1. Commissioner of Central Excise, Customs & Service Tax, Raigarh, 4th Floor, Kendriya Utpad Shulk Bhavan, Plot No. 1, Sector 17, Khandeshwar New Panvel (W) Maharashtra-410 206.
2. Commissioner, Central Excise (Appeals), 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E, Bandra Kurla Complex, Bandra (E), Mumbai-400 051.
3. Asstt. Commissioner of Central Excise, Khopoli Division, Raigad Commissionerate, 4th Floor, Trifed Tower, Khandeshwar, Navi Mumbai-410206.
4. Shri Prabhakar Shetty, Advocate, F-160, Dreams Mall, LBS Marg, Bhandup (West), Mumbai-400078
- ✓ 5. PS to JS(RA)
6. Guard File.
7. Spare copy

Attested



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