REGISTERED 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. 195/478/2016-RA / 3714 Date of issue: 13.09.2022

ORDER NO. 845 /2022-CX (WZ)/ASRA/MUMBAI DATED 05.09.2022 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. Tabrez Exports

Respondent : Commissioner of Central Excise & Customs Surat-I

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. VP/255 to 257/SRT-I/2005 dated 21.06.2005 passed by Commissioner (Appeals), Central Excise & Customs, Surat-I

ORDER

This Revision Application along with application for condonation of delay has been filed by M/s. Tabrez Exports, 11/223, Tabrez Complex, Opp. Bata Shoes, Bhagatalao, Surat – 395 003 (hereinafter referred to as "the Applicant") against the Order-in-Appeal (OIA) No. VP/255 to 257/SRT-I/2005 dated 21.06.2005 passed by Commissioner (Appeals), Central Excise & Customs, Surat-I.

2. In the application for condonation of delay, the applicant has submitted that the present revision application has been filed pursuant to permission granted by the Hon'ble Tribunal vide their order dated 14.06.2016; that there was some delay on account of filing the appeal; that it is requested to condone the delay and register the appeal. The Government is condoning the delay of 4 days in filing the appeal and is taking up the matter for deciding on merits.

3.1 Brief facts of the case are that the applicant had filed rebate claims totally amounting to Rs.30,29,100/- for the duty paid on excisable goods supplied to units in Special Economic Zone (SEZ) under 9 ARE-1s. The said rebate claims were sanctioned and the amount was paid to the applicant vide a cheque dated 14.10.2003.

3.2 Subsequently, the department realized that the special provisions relating to the Special Economic Zone legislatively inserted in the Customs Act,1962 in the form of a new chapter vide Section 126 of the Finance Act, 2002 were not notified during the time material to the disputed consignments. Therefore a SEZ could not be treated as a place outside the Customs territory of India. In view of this, rebate of central excise duty paid on excisable goods by a DTA unit and supplied to a SEZ unit was not permissible under Rule 18 and accordingly, a Show Cause Notice was issued to the applicant for recovery of erroneous rebate sanctioned to them. The Adjudicating Authority, vide Order-in-Original (OIO) No. SRT-I/AD/46/R/2004 dated 22.09.2004 ordered recovery of the erroneously

sanctioned refund under Section 11A(1) of the Central Excise Act, 1944 along with interest payable under Section 11AB ibid.

3.3 Aggrieved, the applicant filed an appeal before the Commissioner (Appeals) who in turn upheld the order of the adjudicating authority and rejected the appeal vide the impugned OIA. The applicant preferred an appeal to the Tribunal, but subsequently realising that the Tribunal was not the proper forum, requested for withdrawal of appeal. Consequent to the Hon'ble CESTAT Ahmedabad, permitting to withdraw the appeal vide Order No. A/10510-10512/2016 dated 14.06.2016, the applicant has filed the impugned Revision Application mainly on the grounds that:

(a) The order of the lower authorities demanding amount towards erroneous refund is not maintainable in law as the respondent was required to proceed by two means one by filing appeal under Section 35E(2) against rebate order passed and also issuing notice under Section 11 A for recovery of erroneous refund as held by the Tribunal in the following cases:-

(i) Sree Digvijay Cement Co. Ltd. — Reported in 1991 (52) ELT 631(Tribunal). The relevant paras 8 & 9 reads as —

8. However, the order passed under Section 35E(2) does not automatically result in recovering the erroneous refund. This order should be followed by a show cause notice under Section 11A, according to which the show cause notice should be issued within six months from the date of actual refund. Since the time limit, for filing an appeal under Section 35E(2), is longer than the time limit prescribed under Section 11A, the show cause notice should precede the proceedings under Section 35E(2), otherwise, the order under Section 35E(2) becomes an empty formality and is not enforceable. Similarly, even if the show cause notice is issued for recovering the erroneous refund within the time limit prescribed under Section 11A without setting aside the order granting erroneous refund under Section 35E(2), no erroneous refund can be recovered. Therefore, the department should initiate proceedings simultaneously under Section

11 A within the time limit prescribed therein and also under Section 35E(2) within the time limit prescribed therein.

9. In the instant case, the refund cheque was issued on 19-5-1987 and the show cause notice ought to have been issued under Section 11A within six months from 19-5-1987. Since it was not issued, though the appeal under Section 35E(2) for setting aside the order of refund is maintainable, before the Collector, the order cannot be enforced as no notice was issued under Section 11 A for the recovery of erroneous refund.

(ii) Doothat Tea Estate Kanoi Plantation (P) Ltd. — Reported in 2001 (135) ELT 386 (Tri-Kolkata)

The relevant para 5 reads as under —

5. A reading of the above para shows that Department is required to initiate action for recovery of the erroneous refund simultaneously under provisions of Section 11A as well as Section 35E(2). As in the instant case no appeal has been filed under the provisions of Section 35E(2) by the Department against the earlier order of the Asstt. Commr., issuance of show cause notice under provisions of Section 11A without seeking setting aside of the earlier order of refund by the Asstt. Commr., cannot be held to be valid proceedings. Accordingly by following the ratio of the earlier order we allow the appeal itself.

The applicant submits that the department has not filed review application under Section 35E(2) against the order of rebate claims sanctioned. In absence of the same the recovery cannot be enforced. The applicant therefore submits that the order passed by the Commissioner (Appeals) is not correct and legal and required to set aside in the interest of justice.

(b) The Commissioner (Appeals) has failed to appreciate the facts on record that after taking approval from the Ministry of Commerce through Development Commissioner, Kandla, the

goods exported through SEZ unit, Kandla were treated as export in accordance with law and the rebate, claims were sanctioned thereafter and therefore no contrary view can be taken by the adjudicating authority after sanctioning in the rebate claims that too without following the mandatory provisions of law under Section 35E(2) of the Central Excise Act, 1944 by reviewing the rebate claims sanctioned order and therefore the order passed by the lower authority are totally against the provisions of law and required to set aside in the interest of justice.

(c) The Commissioner (Appeals) has failed to appreciate that the Ministry of Commerce has directly reimbursed the amount of rebate claims to the Deputy Commissioner, Central Excise, Division-I, Surat-I. This clearly shows that there was confusion between two ministries internal correspondence before sanctioning rebate claims for the goods exported through SEZ, Kandla and therefore also the order passed by the Commissioner (Appeals) confirming demand is totally incorrect, improper and against the spirit of fundamental policy of Government of India for boosting of exports and therefore the order of the lower authorities confirming demand for the rebate sanctioned on the goods exported is in violation of the Government policy and therefore also the order passed by the lower authorities confirming demand is required to set aside in the interest of justice.

(d) The Commissioner (Appeals) has failed to appreciate the point of law that the interest can be collected only if the duty has been determined under sub-section (2) of Section 11A of the Central Excise Act, 1944. In the present case the adjudicating authority has confirmed the demand order under Section 11A(1) of the Central Excise Act, 1944 and therefore applying the ratio of the Tribunal judgment in the case of Dhillon Kool Drinks Beverages -- Reported in 2000 (120) ELT 81 (Tribunal) - "7. In the light of the above discussions, we have to hold that the impugned order imposing

penalty under Section 11AC cannot be sustained in law. As a consequence, the demand for interest under Section 11 AB also becomes untenable.", the order passed by the lower authorities demanding interest under Section 11AB is not maintainable in law and therefore also the said order is required to set aside in the interest of justice.

(e) The applicant submits that the Commissioner (Appeals) has failed to appreciate the vital point that there was confusion between two ministries as regards to the payment of rebate claims for which the applicant was ultimately entitled and therefore in the matter of interpretation of law due to confusion between two ministries, the demand cannot be confirmed and interest cannot be ordered to recover and therefore the order passed by the Commissioner (Appeals) is legally not sustainable and required to set aside in the interest of justice.

On the above grounds the applicant prayed to set aside the orders passed by the lower authorities in the interest of justice.

4.1 Personal hearing in the case was held on 26.07.2022. Shri R.D. Jadav, Consultant appeared on behalf of the Applicant and submitted that the limited issue in the matter is relating to interest payment. He pleaded that erroneous refund was confirmed against them on 22.09.2004, therefore any interest liability should start only after three months from this date. He submitted that since refund amount was paid back during this time, no interest is payable. He submitted additional written submissions.

4.2 In the additional submissions, the applicant has inter alia contended that:

a. The claims were relating to Deemed Export made to the Special Economic Zone where rebate/refund of Terminal Excise duty is entitled in terms of Para No. 8.3(c) of FTP 2002-2007_ (Foreign Trade Policy 2002-2007). No matter, whether the goods for export

may physically leave the Country or not. The relevant provision of the policy-2002-07 is reproduced below for easy facilitation:

CHAPTER-7 SPECIAL ECONOMIC ZONES –Eligibility

"7.1 (a) Special Economic Zone (SEZ) is a specifically delineated duty free enclave and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs.

(b) Goods going into the SEZ area from DTA shall be treated as deemed exports and goods coming from the SEZ area into DTA shall be treated as if the goods are being imported".

CHAPTER-8 DEEMED EXPORTS

8.1 "Deemed Exports' refers to those transactions in which the goods supplied do no leave the country.

Benefits for Deemed Exports

"8.3 Deemed exports shall be eligible for any/all of the following benefits in respect of manufacture and supply of goods qualifying as deemed exports subject to the terms and conditions as given in Handbook (Vol.I):-

(a) Advance Licence for intermediate supply/ deemed export.
(b) Deemed Exports Drawback.
(c) Refund of Terminal

b. Therefore it is submitted that the Rebate/Refund Claims under the FTP Policy-2002-2007 is the matter to be dealt with the Development Commissioner, Special Economic Zone, Kandla. There is no role of Central Excise Authority at all to play.

c. It is submitted that there is an apparent error on part of the Ld, Original authority as well on part of the Ld. Appellate authority in as much as they encroached and utilized the Powers as vested in the Foreign Trade Policy and the Act thereof. First of all, they sanctioned and paid the refund immediately to the 'Applicant' and immediately after the payment, they prompted to issue demand Show Cause Notice for recovery of the rebate on account of the Terminal Excise duty for Deemed export. There is no mala fide intention on part of the 'Applicant' to claim erroneous refund/rebate.

d. Since it was an error on part of the original authority as well on part of the 'Appellate authority' they could have taken lenient view for recovery of the interest. These views are fortified by the CEGAT, Northern Bench, New Delhi reported at 2000 (121) E.L,T. 783 (Tribunal) in case Margra Industries Ltd. Versus Commr. of Cus., ICD, Tughlakabad, New Delhi, Final order No. A/615/2000-NB, dated 18-7-2000 Appeal No. C/149, wherein the Hon'ble CESTAT had reduced redemption fine and penalty The relevant para No. 3, 4 and 5 are reproduced below for easy facilitation

"3. Arguing the case, Shri R. Swaminathan, Id. Consultant submits that there is a provision in the Exim policy in para 4.15 that the marble blocks on importation at the Indian port can be warehoused after executing the warehousing Bills of Entry. He submits that the importer had accordingly submitted in-bond Bills of Entry which was permitted under the above paragraph of the Exim policy but it was the mistake of the authority not to permit warehousing of the marble blocks by presentation of in-bond Bills of Entry. He submits that since these goods were likely to incur heavy demurrage, they had perforce to clear the goods on payment of duty, redemption fine and penalty. He submits that huge fine and penalty have been imposed which are out of all proportion and need to be set aside"

"4. Shri S.K, Das, "ld. JDR submits that import of marble blocks required a licence. He submits that when the goods were cleared, no licence was produced by the importer, therefore confiscation of the goods and imposition of penalty was justified. He submits that the Italian marble blocks fetch very high price and the margin of profit is also very high. He submits that 100% redemption fine, in the instant case, having regard to the fact that the marble blocks are Italian marble blocks, was not on the higher side. Looking to the value of the goods, penalty of Rs. 7 lakhs does not appear to be on the higher side. He, therefore, prays that the impugned order may be upheld and the appeal may be rejected'.

"5. Heard the rival submissions. We note that there is a provision in Exim policy for warehousing the imported marble blocks. We note that the applicants filed in-bond Bill of Entry which was not accepted by the customs authorities. We note that the applicants have not been able even today to produce the licence which was required for Import of marble blocks. In the absence of licence, we hold that confiscation of the imported goods and imposition of penalty is justified. The only question that needs our evaluation is whether redemption fine and penalty are very much on the higher side. We find that the Exim policy permitted warehousing of the marble

blocks. Thus, at the time of importation, production of import licence was not at all necessary, 'it was necessary only at the time of clearance from warehouse. In the instant case, the authority did not permit warehousing of the marble blocks imported from Italy. Looking to the fact that it was only Italian marble blocks, we are of the view that 100% redemption fine is not warranted. We are also of the view that looking to the value of the goods, the penalty of 7 lakhs is also on the higher side in view of the special circumstances of the case, in the circumstances, we reduce redemption fine to Rs. 7 lakhs and penalty to Rs.3.50 lakhs. The impugned order is modified to the extent stated above and the appeal is disposed of accordingly'.

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

6. Government observes that the main issue in the instant case is whether the interest under Section 11AB of the Central Excise Act,1944 (CEA), which was applicable during the period the impugned exports were carried out, can be waived on recovery of erroneous rebate?.

7.1 Government observes that the matter in hand can be summarized as under:

a) The rebate claims of the applicant in respect all the 9 ARE1s were initially sanctioned and the amount was disbursed to them vide cheque dated 14.10.2003.

b) Subsequently, seven Show Cause Notices (SCN) all dated 22.03.2004 demanding recovery of erroneous rebate were issued to applicant on the grounds detailed at para 3.2.

c) Realising its mistake, the applicant, filed claim with Development Commissioner, Kandla Special Economic Zone (Kandla SEZ), for refund of Terminal Excise Duty(TED) involved in the Deemed Exports in terms of Foreign Trade Policy 2002-2007.

d) The SCNs were adjudicated vide impugned OIO dated 22.09.2004 confirming the demand alongwith interest.

e) On enquiry by the Department, the Kandla SEZ authorities, vide letter dated 12.10.2004 informed them regarding sanction of TED claims of the applicant and forwarded the cheque thereof.

f) Thus, in this manner, the demand amount was recovered by the Department. However, the interest amount remained unpaid.

7.2 Government observes that the said Section 11AB of CEA reads as under:

> *SECTION 11AB - Interest on delayed payment of duty. - (1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under sub-section (2), or has paid the duty under sub-section (2B), of Section 11A, shall, in addition to the duty, be liable to pay interest at such rate not below ten per cent and not exceeding thirty-six per cent, per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section (2B), of Section 11A till the date of payment of such duty.*

On a simple reading of above provisions, Government notes that interest becomes payable if there is an erroneous refund, irrespective of the fact whether the demand amount is determined by the Central Excise Officer under sub-section (2) of Section 11A of the Central Excise Act, or it is paid by the assessee on his own volition under sub-section 2B of Section 11A ibid before issue of show cause notice.

7.3 Government observes that the applicant received the rebate amount in Oct'03. Afterwards they filed TED claims for the same transactions with the Kandla SEZ. Thus, at this point they were aware of having filed an ineligible claim under Rule 18 of the Central Excise Rules,2002, and accordingly having received an erroneous refund. However, they did not return the

amount involved, which was ultimately received by the Department from the Kandla SEZ in Oct'04. Therefore, Government concurs with the decision taken by Original & Appellate authorities that in terms of Section 11AB of CEA, the applicant is required to pay interest from the date of receipt of erroneous refund till the date of its payment to the Department.

7.4 Government observes that the case law of M/s. Dhillon Kool Drinks Beverages, relied upon by the applicant is not applicable in the instant matter. In that case, no demand under Section 11A of CEA had been raised, hence the penalty under Section 11AC and interest under Section 11AB were held as non maintainable by the Hon'ble Tribunal. However, in the instant case demand under Section 11A for recovery of erroneous refund has been raised in the SCN and subsequently confirmed by the adjudicating authority.

7.5 As regards contention of the applicant that the Appellate authority could have taken lenient view for recovery of the interest by citing case law of M/s. Margra Industries Ltd., Government observes that in the said case, considering the circumstances, Hon'ble CESTAT had reduced the redemption fine and penalty imposed by the lower authority. However, Government finds that interest being a mandatory provision, the ratio of this case law cannot be applied in the instant matter.

7.6 Government finds that on similar issue in the case of M/s. Victor CNG Engg (2009 (248) E.L.T. 438 (Tri. - Mumbai)), while deciding on appeal filed by the Department as regards waiver of interest & penalty, the Hon'ble CESTAT has observed as under:

> *2. After examining the records, I note that the short question to be considered in this case is whether the respondent is liable to pay interest under Section 11AB of the Central Excise Act on the amount of duty paid by them for the period February 2003 to October 2004. In the impugned order, the learned Commissioner (Appeals) held, on the facts of the case, that the assessee was entitled to the benefit of sub-Section*

(2B) of Section 11A of the Central Excise Act. He further held that the assessee was not liable to pay interest under Section 11AB or penalty under Section 11AC. In the present appeal, the limited challenge is directed against the waiver of interest. In support of the grounds of this appeal, the learned SDR refers to the provisions of Section 11A(2B) and Section 11AB of the Act. He particularly refers to Explanation to sub-section (2B) of Section 11A and submits that the waiver of penalty ordered by the learned Commissioner (Appeals) is contrary to these provisions.

3. After reading the above provisions of law, I have found a valid point in the submission of the learned SDR. On the facts of this case, the learned Commissioner (Appeals) granted the benefit of sub-section (2B) of Section 11A of the Act to the assessee inasmuch as the latter quantified the correct amount of duty payable on the goods in question for the period February 2003 to October 2004 and paid the same before issuance of the show-cause notice. This payment of duty was treated as one made under sub-section (2B) ibid. The appellant has no grievance against this part of the order of the Commissioner (Appeals). Their grievance is against the waiver of interest under Section 11AB and the same is genuine. Explanation to sub-section (2B) ibid declares that interest under Section 11AB shall be payable on the amount paid by the assessee under sub-section (2B). This liability of the assessee is also explicit from the text of sub Section (1) of Section 11AB of the Act.

4. Obviously, the learned Commissioner (Appeals) has chosen to waive interest on the duty paid by the assessee, regardless or oblivious of the provisions cited by the SDR. Such waiver of interest is illegal and the same is set aside. The impugned order shall stand modified to this effect. The original authority shall work out the interest in accordance with law and the assessee shall pay the same.

5. The appeal is allowed in the aforesaid terms.

Thus, it is affirmed that interest is a mandatory provision and hence cannot be waived.

8. As regards the other contention of the applicant that the order of the lower authorities demanding amount towards erroneous refund is not maintainable in law as no appeal under Section 35E(2) had been filed by the Department, by relying on case laws as mentioned in foregoing paras, Government finds that it has already discussed on this issue in the case of M/s. Fresenius Kabi Oncology Ltd. (2016 (344) E.L.T. 671 (G.O.I.)). Relevant paras from said case are reproduced hereunder:

> *15. Government now proceeds to examine the issue as to whether any show cause notice is to be issued before appeal is filed under Section 35E as contended by the applicant.*
>
> *15.1 Government observes that against the contention of the applicant that no show cause notice was issued before filing the appeal, Commissioner (Appeals) while disagreeing with said contention relied upon Hon'ble Supreme Court's judgment in the case of M/s. Asian Paints v. CCE, Bombay [2002 (142) E.L.T. 522 (S.C.) 3 Member Bench], has held that recovery of duty can be made pursuant to an appeal filed under Section 35E or by raising demand under Section 11A of Central Excise Act, 1944 as both operate under different fields and are invoked for different purposes with different time limits. The basic principle laid in the said decision of the Apex Court that recovery can be made pursuant to an appeal filed under Section 35E is clearly applicable to the present case. Government does not, therefore, find as tenable the applicant's plea that the said judgment is not applicable to the present case.*
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> *15.2 The Tribunal in the case of CCE, Ahmedabad v. Kashiram Textile Mills (P) Ltd., 1995 (86) E.L.T. 581 (Tri.), held that appeal filed by Department before Collector being continuation of main proceedings, fresh demand is not required to be raised. In the present case, the*

proceedings of admissibility of rebate have already been initiated by the impugned Order-in-Original and thereafter carried forward under Section 35E.

15.3 Government also finds support in the decision of the Tribunal in the case of CCE, Bangalore v. Raman Boards Ltd. - 1985 (22) E.L.T. 892 (Tribunal), as under :

"We therefore, hold that Section 11A and Section 35E operate entirely in different fields with different objectives and purposes. Therefore, Section 11A cannot be telescoped or super-imposed over Section 35E with an overriding effect. Thus, the Collector of Central Excise can exercise the powers of correctional jurisdiction by way of suo motu revision in terms of Section 35E(2) against an order passed by an adjudicating authority subordinate to him either in respect of an order passed after the issuance of a show cause notice within a period of six months or an order passed without the issuance of any show cause notice. The issuance or otherwise of a show cause notice is not determinative and deciding criterion of the powers of the Collector of Central Excise under Section 35E of the Act."

15.4 Government also observes that C.B.E. & C. Circular No. 423/56/98-CX, dated 22-9-1998 relied upon by the applicant was issued in 1998 and subsequently the Hon'ble High Court of Bombay had delivered above said judgment referred in Para 15.1 which was also upheld by the Apex Hon'ble Supreme Court. Therefore, there is no pre-condition of reviewing the order under Section 35E before issuing show cause notice under Section 11A for recovery of erroneous refund or for issuing show cause notice under Section 11A for recovery of erroneous refund before reviewing the order under Section 35E.

Thus, Government observes that reviewing of an OIO under Section 35E of CEA and issuing a SCN cum Demand notice under Section 11A ibid are two different aspects under law and should not be interlinked.

9. In view of the findings recorded above, Government upholds the Order-in-Appeal No. VP/255 to 257/SRT-I/2005 dated 21.06.2005 passed by the Commissioner (Appeals), Central Excise & Customs, Surat-I and rejects the impugned Revision Application.

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

ORDER No. 845 /2022-CX (WZ)/ASRA/Mumbai dated 05.9.22

To,
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Copy to:

1. Commissioner of CGST,
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   Gandhi Baugh, Chowk Bazar,
   Surat – 395 001.

2. M/s. Rajeev Agarwal & Associates,
   M-7, Athwa Arcade, Athwa gate,
   Surat – 395 001.

3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Notice Board.