

REGISTERED
SPEED POST



F.No.195/02/2012-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. 86/14-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 Application filed under Section 35 EE of the
Central Excise Act, 1944 against the orders-in-appeal
No.US/291/RGD/2011 dated 26.09.2011 passed by
Commissioner of Central Excise (Appeals-II), Mumbai

APPLICANT : Commissioner of Central Excise, Raigad

RESPONDENT : M/s United Phosphorus Ltd., Ready Money Terrace,
167, Dr. A.B. Road, Worli, Mumbai-400 018

ORDER

This revision application is filed by Commissioner of Central Excise, Raigad against the order-in-appeal No.US/291/RGD/2011 dated 26.09.2011 passed by Commissioner of Central Excise (Appeals-II), Mumbai with respect to order-in-original No.962/10-11/AC(Rebate)/Raigad dated 2.10.2010 passed by Assistant Commissioner of Central Excise (Rebate), Raigad.

2. Brief facts of the case are that the assessee M/s United Phosphorus Ltd., Ready Money Terrace, 167, Dr. A.B. Road, Worli, Mumbai-400 018 had filed rebate claim totally amounting to Rs.67,12,115/-. The rebate sanctioning authority viz. Assistant Commissioner (Rebate) vide his order-in-original No.962/10-11/AC(Rebate)/Raigad dated 21.09.2010 found that in respect of ARE-1 No.1147 dated 24.02.2009 (invoice No.1400046171) dated 24.02.2009, the assessee, had paid duty @ 10% adv. instead of 8% adv. and claimed the rebate of Rs.3,73,893/-. As, as per Notification No.04/2009-CE dated 24.02.2009, effective rate was reduced from 10% adv. to 8% adv., the assessee was required to pay duty @ 8% adv. instead of 10% adv. The rebate sanctioning authority accordingly in the findings, restricted the said claim of Rs.3,73,893/- to Rs.2,99,112/-. However, it inadvertently, sanctioned the claim in full, which resulted in excess payment of Rs.74,781/-.

3. Being aggrieved by the said order-in-original, department filed appeal before Commissioner (Appeals) who rejected the same and upheld the sanction of full rebate claim of Rs.3,73,893/-.

4. Being aggrieved by the impugned order-in-appeal, the applicant department has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central government on the following ground s:

4.1 The ARE-1 certificate certifies payment of duty on the export goods or otherwise. The said certificate cannot be called in any manner as an "assessment order" by the jurisdictional officer.

4.2 Thus the assessment of duty (except in respect of cigarettes) is done by the assessee himself. The Commissioner (Appeals) thus has erred in finding that the goods had been assessed by the jurisdictional officer.

4.3 The citation quoted by the Commissioner (Appeals) viz. Supreme Court judgment in the case of Priya Blue Industries Vs. CC (Preventive) reported in 2004 (172) ELT 145 (SC), the issue involved was refund of duty paid under protest on imported ship for breaking purposes for which they had filed a Bill of Entry against which the amount of duty payable was assessed. The refund was filed on the ground that duty had been wrongly levied which was dismissed on the ground that as no appeal had been filed against the Assessment Order, the refund claim was not maintainable. It was held that so long as the order of assessment stands, the duty would be payable as per that order of assessment and that the refund claim is not an appeal proceeding and officer considering refund claim cannot sit in appeal over an assessment made by a competent officer who cannot review an assessment order. In that case, the duty assessment was done under provisions of Customs Act, 1962 where there was provision for assessment by the officers of the department.

4.4 Further in the case of CCE, Hyderabad vs. Vijay Leasing Co. reported in 2011 (22) STR 553 (Tri-Bang.), relying on the decision of Hon'ble High Court of Rajasthan in the case of Central Office Mewar Palaces Org. vs. UOI [2008 (12) STR 545 (Raj.)] wherein it was clearly held that the self-assessment would not amount to assessment done by an officer and hence there is no restriction for claim of the refund of the duty so self-assessed, it has been held that "the assessee was justified in filing the refund claim as the self-assessment cannot be considered as an assessment made by an officer under Section 73 against which an appeal or challenge lies".

4.5 Hon'ble CESTAT in case of M/s Gimatex Industries Ltd. vs. CCE Nagpur [2010 (261) ELT 1026 (Tri-Mumbai)] has held that in case of self-assessment by the assessee, when neither any decision of central excise officers nor any order of central excise officers is available then challenging of the same does not arise and distinguished the Hon'ble Supreme Court decisions in Priya Blue Industries and Flock (India) and Larger bench Tribunal decision in Eurotex Ind.

4.6 The Commissioner (Appeals) has not appreciated the fact that the Board's Circular No.510/06/2000-CX dated 03.02.2000 clarifies that rebate has to be allowed equivalent to the correct duty. Thus what is important in the case is correct amount of duty as applicable at the prevailing time. The duty paid by the assessee being not the correct duty as per the rate prevailing at the time, the amount paid in excess of 8% adv. cannot be considered as duty for grant of rebate.

4.7 The Commissioner (Appeals) has also failed to appreciate the fact that the money extra paid, on account of reduction of rate of duty, cannot be treated as duty but an "amount" and it is required to be transferred to Consumer Welfare Fund under Section 11D of the Central Excise Act, 1944.

4.8 The order-in-appeal No.US/291/RGD/2011 dated 26.09.2011 therefore does not appear to be proper, legal and correct and is required to be set aside and it is prayed that the relief mentioned herein below shall be granted.

5. A show cause notice was issued to the respondent under Section 35 EE of Central Excise Act, 1944 to file their counter reply. No counter reply is filed till date.

6. Personal hearing was scheduled in this case on 25.09.2013 and 11.03.2014. Hearing held on 11.03.2014 was attended by Shri Ajit Pitale, Dy. General Manager of the company from respondent side who requested to uphold the impugned order-in-appeal.

7. Government has carefully gone through the relevant case records, oral & written submissions and perused the impugned order-in-original and order-in-appeal.

8. On perusal of records, Government observes that in the instant case respondent exporter paid duty @ 10% in respect of excisable goods cleared for export vide ARE-1 No. 1147 dated 24.02.2009, whereas the effective rate duty on said goods on the said date was 8% vide Notification No. 04/2009-CE dated 24.02.2009. Department has contended that respondent was required to pay duty @ 8% on 24.02.2009 and excess paid duty can not be rebated under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004.

9. In this regard, Government notes that Hon'ble Supreme Court has held in the case of U.O.I. Vs. Ganesh Das Bhajraj 2000 (110) ELT 431 (SC) that Notification changing effective rate of duty takes effect from the date of its publication in the official gazette. Commissioner (appeals) has noted this settled legal position. So, it can not be disputed that on 24.02.2009, duty on the said goods was payable @8% and not @ 10%.

9.1 Government notes that Commissioner (appeals) has relied upon CBEC circular No. 510/06/2000 dated 3.2.2000 and held that jurisdictional range office has certified that duty paid to be correct and rebate sanctioning authority can not change it. In this regard, it is observed that rebate sanctioning authority has to satisfy himself that rebate claim is in order before sanctioning the same. The said provision is contained in para 3(b)(ii) of Notification No. 19/2004-CE(NT) dated 06.09.2004 which is extracted below:-

"3(b) *Presentation of claim for rebate to Central Excise :-*

(i)

(ii) *The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacture or warehouse or, as the case may be, Maritime Commissioner of Central Excise shall compare the duplicate copy of application received from the officer of customs with the original copy received from the exporter and with the triplicate copy received from the Central Excise Officer and if satisfied that the claim is in order, he shall sanction the rebate either in whole or in part."*

The said provisions of this notification clearly stipulate that after examining the rebate claim, the rebate sanctioning authority will sanction the claim in whole or part as the case may be depending on facts of the case.

9.2 Government notes that said notification issued under Rule 18 of Central Excise Rules, 2002, prescribes the conditions, limitations and procedure to be following for claiming as well as sanctioning rebate claims of duty paid on exported goods. The satisfaction of rebate sanctioning authority requires that rebate claim as per the relevant statutory provisions is to be in order. He does not have the mandate to sanction claim of obviously excess paid duty and then initiate proceeding for recovery of the erroneously paid rebate claim. Therefore, the circular of 2000 as relied upon by applicant cannot supersede the provisions of Notification No. 19/04-CE(NT). Adjudicating authority has rightly held in his findings that rebate of duty paid @ 8% in terms Not. No.04/2009-CE dated 24.02.2009 is rebatable under rule 18 but erred in sanctioning the total amount. Government holds that rebate is admissible of duty paid at effective rate of duty on 24.02.2009 i.e. @ 8% in terms of Not. No.04/2009-CE dated 24.02.2009 and part rebate claim of Rs.74,781/- erroneously sanctioned is recoverable along with applicable interest.

9.3 It is observed that amount paid in excess of duty liability on one's own volition cannot be treated as duty and it has to be treated a voluntary deposit with the Government which is required to be returned to the assesses / respondents in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11.9.2008 in CWP Nos.2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. Vs. UOI reported as 2009 (235) ELT-22 (P&H) has decided as under:-

"Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty – Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate."

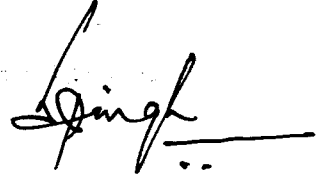
Hon'ble High Court of Punjab & Haryana has observed that refund in cash of higher duty paid on export product which was not payable, is not admissible and refund

of said excess paid duty/amount in Cenvat Credit is appropriate. As such the excess paid amount/duty is required to be returned to the respondent in the manner in which it was paid by him initially.

10. In view of above position, Government directs the respondent party to repay in cash the erroneously sanctioned amount of Rs.74,781/- along with applicable interest to the department and thereafter department may allow the re-credit of said amount in their cenvat credit account in the light of above said judgment of Hon'ble High Court of Punjab & Haryana. Government sets aside the impugned order-in-appeal and modifies the impugned order-in-original to this extent.

11. The revision application succeeds in terms of above.

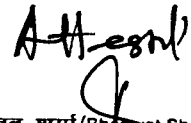
12. So, ordered.



(D.P. Singh)

Joint Secretary to the Govt. of India

Commissioner of Central Excise, Raigad
Plot No:1, Sector 17, Khandeshwar,
Navi Mumbai – 410 206



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

Order No. 86/14-Cx dated 18.03.2014

Copy to:

1. Commissioner of Central Excise (Appeals-II), Mumbai, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E, Bandra-Kurla Complex, Bandra (East), Mumbai-400051.
2. The Deputy Commissioner of Central Excise (Rebate), Ground Floor, Kendriya Utpad Shulk Bhawan, Sector-17, Plot No.1, Khandeshwar, Navi Mumbai -410 206.
3. M/s United Phosphorus Ltd., Ready Money Terrace, 167, Dr. A.B. Road, Worli, Mumbai-400 018
4. PA to JS(RA)
5. Guard File.
6. Spare Copy



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