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SPEED POST

F.No.195/16/2012-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. 87/14-Cx DATED 19.03.2014 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/352/RGD/2011 dated 18.10.2011 passed by Commissioner of Central Excise (Appeals-II), Mumbai
APPLICANT	:	Commissioner of Central Excise, Raigad
RESPONDENT	:	M/s Aggarwal Fasterners Pvt. Ltd. a manufacturer exporter situated at 110, Narayan Dhuru Street, Mumbai

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ORDER

This revision application is filed by Commissioner of Central Excise, Raigad against the order-in-appeal No.US/352/RGD/2011 dated 18.10.2011 passed by Commissioner of Central Excise (Appeals-II), Mumbai.

2. Brief facts of the case are that M/s Aggarwal Fasterners Pvt. Ltd. a manufacturer exporter situated at 110, Narayan Dhuru Street, Mumbai having Central Excise Registration No. AAACG1355EXM001 of address 12 to 18, Kaveri, Tungareshwar Industrial Complex, Village Sativali, Vasai €, Distt. Thane had filed rebate claims amounting to Rs.15,30,050/-. Assistant Commissioner (Rebate) Central Excise, Raigad, sanctioned the said rebate vide order-in-original No. 1203/10-11/AC(Rebate)/Raigad dated 27.10.2010.

2.1 The department filed appeal against the order-in-original before Commissioner (Appeals) on the grounds that as per the Notification No.4/2009-CE dated 24.01.2009, the effective rate of Central Excise duty was reduced from 10% to 8%. It has been observed that the manufacturer had cleared the exported goods vide ARE-1 No. 86 dated 24.02.2009 by paying the central excise duty @ 10% instead of 8% and rebate had been claimed and sanctioned of duty @ 10%. However, they were liable to pay central excise duty @ 8% only. Assistant Commissioner (Rebate) has sanctioned the rebate of duty as claimed which is not proper. The excess duty paid and rebate is Rs.60,061/-. However, Commissioner (Appeals) rejected the appeal of department.

3. 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 grounds:

4.1 The Commissioner (Appeals) has agreed that "the law is settled that a Notification changing effective rate of duty takes effect from the date of publication in the official gazette as held in Hon'ble Supreme Court decision in Union of India vs.

Ganesh Das Bhajraj – [2000 (116) ELT 431 (SC)]." But Commissioner (Appeals) held that "it is an equally settled principle that the duty assessed and paid at the time of clearance of goods for export and certified by the jurisdictional Central Excise officer to be the correct duty, has to be sanctioned as rebate as mentioned in CBEC Circular No. 510/06/2000-Cx dated 3.3.2000. The effective rate of duty in the instant case was reduced vide Notification No.4/2009-CE dated 24.02.2009 to 8%. But at the time of clearance of goods on 24.02.2009 it was not known either to the assesse or to the jurisdictional Range Officer regarding the change of rate of duty. The assesse paid the duty at the earlier rate of 10%". 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 assesse bring not the correct duty as per the rate prevailing at the time, the amount paid in excess of 10% adv. cannot be considered as duty for grant of rebate.

4.2 Commissioner (Appeals) order is per incuriam as it does not consider the provisions of Section 5A(1A) of the Central Excise Act which stipulates that in case of unconditional exemption, no excise duty is payable.

4.3 The ignorance of law is not an excuse to pay the duty of higher rates. The goods are self-assessed by the assesse and the assesse who are in excise for so many years; it is frivolous to give such an excuse. The assesse should be aware of the changes / modifications made in law and rate of duty etc. and implement them immediately as per the requirement.

4.4 However, the cited case laws are not applicable in as much as the goods are self-assessed by the manufacturer. In the instant case the assessment is not done by the Central Excise officer, but by the assesse himself. On the day of clearance of goods for export, the jurisdictional central excise officer, only certifies the payment of duty debited or paid by the exporter / manufacturer and not doing the assessment. The assessment by the jurisdictional Central Excise officer was done prior to introduction of

Central Excise Rules, 2002, under erstwhile Central Excise Rules, 1944, which has now been entrusted with the assesse himself; vide Rule 6 of Central Excise Rules, 2002.

4.5 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. v. 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 assesse 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".

4.6 Similarly, in the case of Premier Agencies vs. CC, Nagpur reported in 2010 (18) STR 668 (Tri.-Mumbai), relying on the judgment in the case of Nagpur Transwell Power Pvt. Ltd. vs. Commissioner of Central Excise Nagpur – reported in 2009 (243) ELT 459 (Tri.-Mum), wherein while disposing of the stay application, the Hon'ble Tribunal has clearly held that proposition that "assessment" includes "self-assessment" is not correct for purpose of appeal under Section 35F of the Central Excise Act, 1944; that the appeal under Section 35 ibid is preferable to Commissioner (Appeals) against order/decision by subordinate Central Excise officer; that it is difficult to envisage that the said provision of law provides for an appeal against self-assessment, it has been held that the assesse cannot file any appeal against their own assessment.

4.7 The provisions of para 3(b) of the Notification No. 19/2004(NT) dated 06.09.2004, issued under Rule 18 of the Central Excise Rules, 2002, clearly spelled out that if the proper officer (i.e. AC/DC of Central Excise having jurisdiction over the factory or Maritime Commissioner) is satisfied himself that the claim is in order then he shall sanction the rebate either in whole or part. This means that he is empowered to look into the correctness of the rebate claim.

4.8 Further paragraph 8.4 of chapter 8 of CBEC Central Excise Manual reads as followed –

"8.4 – After satisfying himself that the goods cleared for export under the relevant ARE-1 applications mentioned in the claim were actually exported, as evident from the original & duplicate copy of ARE-1 duly certified by Customs, and that the goods are of 'duty-paid' character as certified on the triplicate copy of ARE-1 received from the jurisdictional superintendent of Central Excise (Range office), the rebate sanctioning authority will sanction the rebate, in part or full. In case of any reduction or rejection of the claim, an opportunity shall be provided to the exporter to explain the case and the reasoned order shall be passed."

4.9 It is therefore clear that the rebate sanctioning authority can himself ascertain correctness of the duty payment and adjudicate the matter which Dy. Commissioner (Rebate) failed to do.

4.10 In view of the above, applicant department requested to allow their revision application.

5. A show cause notice was issued to the respondent under Section 35 EE of Central Excise Act, 1944 to file their counter reply. Respondent vide letter dated 25.02.2012 has contested the departmental revision application and pleaded to uphold the impugned order-in-appeal.

6. Personal hearing was scheduled in this case on 25.09.2013 and 12.03.2014. Nobody attended hearing on behalf of applicant. However, applicant vide letter dated 08.03.2014 stated that their reply dated 25.02.2012 may be admitted in lieu of present hearing.

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. 86 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.60,061/- 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.60,061/- 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 Sharma)
सहायक आयुक्त/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. 87 /14-Cx dated 19.03.2014

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 Aggarwal Fasterners Pvt. Ltd. a manufacturer exporter situated at 110, Narayan Dhuru Street, Mumbai.

4. ~~PA~~ to JS(RA)

5. Guard File.

6. Spare Copy

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