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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. 195/20/16-RA /4051 Date of Issue: 22.09.2022

ORDER NO. 875/2022-CX (WZ) /ASRA/MUMBAI DATED 21.09.2022 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 Rachna Industries, 11, Shanti Industrial Estate, Sarojini Naidu Road, Mulund (West), Mumbai – 400 080.
Respondent	:	Commissioner of CGST & Central Excise, Navi Mumbai Commissionerate. (erstwhile Mumbai – III Commissionerate)
Subject	:	Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. CD/787/M-III/2015 dated 26.10.2015 passed by the Commissioner (Appeals), Mumbai Zone – II.

ORDER

The subject Revision Application has been filed by M/s Rachna Industries, Mumbai (here-in-after referred to as 'the applicant') against the impugned Order-in-Appeal dated 26.10.2015 passed by the Commissioner (Appeals), Mumbai Zone - II. The said Order-in-Appeal disposed of an appeal against Order-in-Original dated 31.12.2014 passed by the Assistant Commissioner, Central Excise, Mulund Division, Mumbai – III, which in turn decided a Show Cause Notice dated 14.10.2014 issued to the applicant.

2. Brief facts of the case are that the applicant who were engaged in the manufacture of non-stick coating aluminium cookware surrendered their Central Excise registration in the month of July 2012, but continued to manufacture the said goods till February 2013 by availing the exemption under notification no.08/2003 dated 01.03.2003. They cleared their goods to another unit viz. M/s Viral Non-stick Coatings P. Limited (VNCL), a manufacturer themselves, without payment of duty under invoices having the endorsement "No tax against form H – For Export only". The applicant had not followed the procedure laid down in CBEC Circular No.648/39/2002-CX dated 25.07.2002 which provided the procedure to be followed in the case of exports by an exempted unit through a merchant exporter; and it was also found that VNCL was neither the applicant's merchant exporter nor their authorized agent for executing export. Further, the applicant failed to file the prescribed quarterly returns and also failed to submit any proof of export. Hence, it was felt that all such clearances made by the applicant to the domestic market exceeding the exemption limit of Rs.1.5 crores were liable to be charged to Central Excise duty leading to a Show Cause Notice dated 14.10.2014 being issued to the applicant alleging incorrect availment of the notification no.08/2003 dated 01.03.2003 and demanding Central Excise duty amounting to Rs.2,03,580/- on clearances exceeding Rs.1.5 crores for the FYs 2011-12 and 2012-13. The same was decided by the original adjudicating authority vide Order-in-Original dated 31.12.2004 wherein the demand raised was confirmed and penalty

equivalent to the duty confirmed was imposed under Section 11AC of the Central Excise Act, 1944.

3. Aggrieved, the applicant preferred an appeal against the Order-in-Original dated 31.12.2004 with the Commissioner (Appeals). The Commissioner (Appeals) vide the impugned Order-in-Appeal dated 26.10.2015 upheld the Order of the original authority and rejected the appeal of the applicant. Aggrieved, the applicant has filed the subject Revision Application against the impugned Order-in-Appeal on the following grounds:-

(a) The Commissioner (Appeals) had failed to appreciate that the entire production of the applicant as well as that of the merchant exporter was exported; the exports were reflected in their ER-3 returns which were duly acknowledged by the range officers and hence the Show Cause Notice was time barred;

(b) That the Commissioner (Appeals) had passed the order without commenting on the Chartered Accountant's certificate and other supporting documents and had upheld the demand as they merely did not follow procedure; that non observance of procedure has always been a technical lapse and is condonable as export is proved and cited several judgments in support of their case; the authenticity of Form H was never doubted and hence exported cannot be disputed;

(c) The merchant exporter did not sell goods for home consumption and hence there was no possibility of diversion of the applicant's goods into the domestic market; that the product code numbers appearing on the invoices of the applicant and the export invoices could be co-related with the stock statement of the merchant exporter and their invoices; that there was no allegation that the goods cleared without payment of duty were not exported, etc.

In light of the above, the applicant submitted that the impugned Order-in-Appeal be set aside; the demand for duty and penalty imposed also be set aside and it may be held that Form H is sufficient as proof of export.

4. The respondent Department too filed their response vide letter dated 24.06.2022 of the Assistant Commissioner, Division IV, CGST & C.Ex., Navi Mumbai Commissionerate. The respondent submitted that as per the procedure mentioned in Chapter 7, Part III of the Central Excise Manual, the applicant should have followed the ARE – 1 procedure till 02.07.2012, as they were holding Central Excise registration, which they failed to do and that for the subsequent period, the applicant had not applied for declarant code nor filed any quarterly returns. It was further submitted that export through merchant exporters was available only to exempted units where the exports were from the unit itself. In light of these submission it was pleaded that the impugned Order-in-Appeal upholding the Order-in-Original may be upheld and the Revision Application rejected.

5. Personal hearing in the matter was granted to the applicant on 06.07.2022. Shri Sanjay Dwivedi, Advocate, appeared online on behalf of the applicant. He submitted that in their case the domestic buyer had no option but to export as invoice clearly mentioned that the same was for export. He further submitted that co-relation established before the lower authorities clearly brings out that the goods were exported. He pleaded that export of duty paid goods not being in dispute, they should not be subject to duty.

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

7. Government observes that that the Show Cause Notice in the present case demands duty on the domestic clearances by the applicant which were in excess of the threshold limit of Rs.1.5 Crores prescribed by notification

no.08/2003-CE dated 01.03.2003. The applicant has claimed that the clearances were to a firm in the domestic market who were supposed to have exported the same. The Show Cause Notice came to be issued as the applicant neither followed the procedure laid by the Board for such cases nor did they adduce any evidence to support their claim that the goods cleared by them in the domestic market were actually exported. Government finds that the issue for decision in this case is whether such domestic clearances by the applicant in excess of the threshold limit prescribed by notification no.08/2003-CE dated 01.03.2003 would be liable to Central Excise duty or otherwise. Government notes that the applicant has not exported the goods in question, as their clearances were to the domestic market. Government finds that the dispute here does not pertain to goods exported outside India, but pertains to clearances to the domestic tariff area. Government further notes that the issue does not involve the rebate of duty paid on such goods either. Government notes that at this juncture it is pertinent to examine Section 35EE and Section 35B of the Central Excise Act, 1944, which provide for Revision by the Central Government and specifies the nature of cases that would lie before the Central Government, respectively. Relevant portions of the same are reproduced below:-

(i) Section 35EE - Revision by Central Government -

(1) The Central Government may, on the application of any person aggrieved by any order passed under section 35A, where the order is of the nature referred to in the ***first proviso to sub-section (1) of section 35B****, annul or modify such order :*

[Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.]..."

(ii) Section 35B - Appeals to the Appellate Tribunal

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) a decision or order passed by the [1][Principal Commissioner of Central Excise or Commissioner of Central Excise] as an adjudicating authority;

(b) an order passed by the [2][Commissioner (Appeals)] under section 35A; .....

....

... [Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;

(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998:

[*emphasis supplied*]

On examining the first proviso to Section 35B of the Central Excise Act, 1944, Government notes that it does not include cases relating to demand of Central Excise duty in respect of goods cleared to the domestic tariff area, which is the issue in the instant case. As stated above, Government also notes that the issue involved does not pertain to rebate of the duty paid on goods exported either. Further, Government finds that the issue does not pertain to loss of goods nor does it involve the credit of duty utilized for payment of duty on final products. Given the above, Government notes that the issue for decision is not covered under the clauses (a) to (d) of the first proviso to Section 35B of the Central Excise Act, 1944. Thus, Government

finds that in terms of Section 35B and Section 35EE of the Central Excise Act, 1944, it does not have jurisdiction over the dispute involved in the present *lis*.

8. In view of the above, Government dismisses the subject Revision Application as the same is non-maintainable due to lack of jurisdiction.

Shrawan 21/9/22

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

ORDER No. 825/2022-CX (WZ) /ASRA/Mumbai dated 21.09.2022

To

1. M/s Rachna Industries,
   11, Shanti Industrial Estate,
   Sarojini Naidu Road, Mulund (West),
   Mumbai – 400 080.

2. M/s SRD Legal, Advocate & Consultants,
   512, Business Park, City of Joy,
   JSD Road, Mulund (W),
   Mumbai – 400 080.

Copy to:

1. The Commissioner of CGST & Central Excise, Navi Mumbai, 16th floor Satra Plaza, Palm Beach Road, Sector 19D, Vashi, Navi Mumbai – 400 705.
2. Commissioner (Appeals)-II, CGST & Central Tax, 3rd floor, Utpad Shulk Bhavan, Plot No.C-24, Sector – E, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051.
3. Sr. P.S. to AS (RA), Mumbai.
4. Guard File
5. Notice Board.