

REGISTERED
SPEED POST



F.No. 198/643 & 644/11-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.....24/3/14

Order No. 89-90/14-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,
1944 against the Order-in-Appeal No.
AGS (142) 30/11 dated 04-08-2011 &
AGS (143) 86/11 dated 04-08-2011
passed by Commissioner of Customs and Central
Excise, (Appeals), Aurangabad.

Applicant : Commissioner of Central Excise,
Aurangabad.

Respondent : M/s. Sanket Food Products P. Ltd.,
Unit-II, Gut No. 186, Dawalwadi,
TQ, Badanapur, Distt.- Jalna.

ORDER

These revision applications are filed by Commissioner of Central Excise, Aurangabad against the Orders-in-Appeal No. AGS (142) 30/11 dated 04-08-2011 & AGS (143) 86/11 dated 04-08-2011 passed by the Commissioner of Central Excise (Appeals), Aurangabad.

2. Brief facts of the cases as under:-

2.1 Revision Application No 198/643/11-RA:-

2.1.1 M/s. Sanket Food Products P. Ltd. are holding Central Excise Registration No. AA ECS 0131 PX M002 for the manufacture of excisable goods V. Pan Masala/Gutkha falling under chapter 24 of the First Schedule of the Central Excise Tariff Act, 1985. The unit is working under compounded Levy Scheme. The assessee filed 10 rebate claims for refund of Central Excise duty of Rs. 6,62,22,485/- paid by them on exports undertaken in the month of Nov. 2009 and Jan 2010. The Deputy Commissioner, Customs, Central Excise and Service Tax, Nanded Division vide his Order-in-Original No. 50/R/2009 dated 12-03-2010 rejected all the 10 rebate claims filed by the assessee.

2.1.2 Being aggrieved by the said Order-in-Original No. 50/R/2009 dated 12-03-2010 the assessee filed an appeal before the Commissioner (Appeals), Aurangabad. The Commissioner (Appeals) vide his Order-in-Appeal No. AGS (137) 64/2010 dtd. 12-07-2010 rejected the appeal filed by the assessee.

2.1.3 Being aggrieved by the said Order-in-Appeal No. AGS (137) 64/2010 dtd. 12-07-2010 the assessee filed a revision application before the Joint Secretary (Revision Application) New Delhi. The Joint Secretary (Revision Application) has decided the revision application of the assessee vide Order No. 198/2011-Cx dtd. 24-02-2011 and the revision application of the assess is allowed.

2.1.4 Following the revision Order No. 198/2011-Cx dated 24-02-2011 passed by the Joint Secretary to the Government of India, New Delhi the Deputy Commissioner, Central Excise, Nanded decided the said 10 rebate claims of the assessee vide Order-in-Original NO. 20/RBT/DC/2010-11 dt. 07-03-2011 wherein

claims sanctioned has been restricted to Rs. 6,46,70,545/- and claim of Rs. 15,51,940/- has been rejected. The total sanctioned amount of Rs. 6,46,70,545/- has been adjusted against the default duty amount due from the assessee for the month of Feb. 2010 and March 2010.

2.1.5 Against the Order-in-Original dtd. 07-03-2011 the Deputy Commissioner, Central Excise & Customs, Nanded Division filed appeal with the Commissioner (Appeals), Central Excise & Customs, Aurangabad who vide his Order-in-Appeal No. AGS (142) 30/11 dated 04-08-2011 held that the order passed by the Joint Secretary (Revision Application) is operative. It is also observed that the applicant has raised same grounds in this appeal which were raised by them in Writ Petition before Hon'ble High Court while filing the appeal against the order dtd. 24-02-2011. Since the said grounds are sub-judice before the Hon'ble High Court, he refrained from giving any findings on them. However, he find that the order dtd. 24-02-2011 passed by the Joint Secretary, New Delhi is neither stayed nor set aside by any for and therefore it is still operational. Therefore, he upheld the Order-in-Original dtd. 07-03-2010 and the appeal filed by the Department against Order No. 20/RBT/DC/2010-11 dtd. 07-03-2011 is rejected.

2.2 Revision Application No. 198/644/11-RA:-

2.2.1 The assessee submitted a letter dtd. 05-04-2011 to the Deputy Commissioner, Central Excise and Customs, Nanded Division requesting him to pay the interest on delayed payment of rebate of Rs. 6,46,70,545/- arising out of GOI Order No. 198/2011-Cx dtd. 24-02-2011. The rebate was sanctioned on 07-03-2011 and rebate claims were filed on 22-12-2009, 29-12-2009 and 25-01-2010 and claimed interest amounting to Rs. 38,05,820/-. The Deputy Commissioner, Central Excise and Customs, Nanded Division vide letter F.No. V (18) 22/REF/Sanket/Int/2010-11 dtd. 5/13-04-2011 rejected the claim of interest in view of explanation to section 11BB of Central Excise Act, 1944 as rebate/refund was sanctioned

to the assessee within three months from the date of receipt of GOI order No. 198/2011-Cx dtd. 24-02-2011.

2.2.2 Being aggrieved by the letter dtd. 5/13-04-2011 the assessee preferred the appeal before the Commissioner (Appeals) Aurangabad who vide Order-in-Appeal No. AGS (143) 86/2011 dtd. 04-08-2011 set aside the impugned letter F.No. V (18) 22/REF/Sanket/INT/2010-11 dtd. 05/13-04-2011 issued by the Deputy Commissioner, Central Excise & Customs, Nanded Division with consequential relief and allowed the appeal filed by the assessee.

3. Being aggrieved by the impugned Orders-in-Appeal, the applicant department has filed these two revision application under section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

3.1 Grounds of Revision Application No 198/643/11-RA (OIA No. 142/11 dt. 04.08.2011):-

3.1.1 The Commissioner (Appeals), Aurangabad rejected departmental appeal filed against Order-in-Original No. 20/RBT/DC/2011 dtd. 07-03-2011 passed by the Deputy Commissioner, Central Excise and Customs, Nanded relying upon Revision Order No. 198/2011-Cx dtd. 24-02-2011 which appears to be not proper and legal as revision order appears to be not proper and legal on the following grounds:-

- i) In the impugned Order No. 198/2011-Cx dtd. 24-02-2011 the Joint Secretary has erred in holding that non following of the procedure for self removal and the conditions of Notification No. 19/2004 CE (NT) dtd. 06-09-2004 and circulars on the issue was procedural requirement and that such procedural deviations can be condoned. The conditions laid down in the Notifications No. 19/2004-CE (NT) dtd. 06-09-2004 and circulars on the issue are substantive conditions to ensure the nexus between the goods which are

cleared from the factory/warehouse and the goods actually exported. Hence allowing the rebate by considering the violations to be procedural in nature will render the said substantial requirements redundant.

- ii) In this case the fact that the goods are not directly exported from the factory of manufacturer is not in dispute. This being one of the conditions of Notification No. 32/2008-CE (NT) ensures the identity of the goods exported, the violation cannot be considered as procedural as held by the Joint Secretary in the impugned revision order.
- iii) The Joint Secretary has observed in para 4.10 of the order that the good are actually examined and sealed by the officers of the customs. This is factually incorrect. The endorsement of Customs officers at the port of export on the ARE-1 cannot ipso-facto be considered as the examination of the goods. On contrary, the EDI shipping bill No. 7857137 dtd. 18-11-2009 has clear endorsement by the system that the goods of the shipping bill are not opened for examination. Thus the export goods have not actually been examined by the officers.
- iv) In this case while opting for self sealing of the goods the assessee ought to have followed the procedure prescribed in the CBEC circular on the issue which only can ensure the nexus between the goods manufactured and the goods actually exported. The assessee has failed to follow the procedure for self sealing of export goods, therefore it appears that the nexus between the goods manufactured and the goods actually exported cannot be established and consequently the assessee are not eligible to get the rebate.

3.2 Grounds of Revision Application No. 198/644/11-RA (OIA No. 143/11 dt. 04.08.2011):-

3.2.1 The Commissioner (Appeals) Aurangabad while allowing the appeal filed by the assessee has relied upon the decision of Hon'ble High Court of Bombay in Writ Petition No. 3454 of 2011 in the case of Shroff United Chemicals Ltd., Vs. UOI and others reported in 2011-TIOL-411-HC-MUM-ST which is not relevant and applicable to this case as the issue is totally different. Issue involved in the said Writ Petition is "Service Tax-Refund-Interest for delayed refund-Refund claim rejected by the original authority and subsequently sanctioned consequent to the remand order of Commissioner (Appeals) allowing the claim-Petitioner entitled for interest from three months from the date of filing the original claim-contention that the interest will be applicable only after the resubmission of the documents in remand proceedings is not valid-section 11BB of the Central Excise Act, 1944-order of the Deputy Commissioner declining the interest is set aside and the petition allowed."

In this case there is no remand order of any authority and refund is arised out of GOI revision order No. 198/2011-Cx dt. 24-02-2011 and refund has been sanctioned by the Deputy Commissioner of Central Excise and Customs, Nanded Division on 07-03-2011 well within 3 months from the date of Revision order dtd. 24-02-2011.

3.2.2 Hon'ble CESTAT's decision in the case of Samarth Engineering Co. P. Ltd. reported in 2008 (226) ELT 122 (Tri. Kolkata) is squarely applicable in this case wherein it is held that:

" Interest on delayed refund on pre-deposit-Even if refund of pre-deposit can be considered as refund of duty, since the refund cheque dated 27-05-2000 has been issued within three months of appellants applying for refund pursuant to Tribunal's order dated 12-01-2000 entitling them to such refund, interest cannot be allowed on such refund made within three months from date of application-section 11BB of Central Excise Act, 1944. "

- 3.2.3 Assessee has also not filed the refund claim in prescribed format i.e. R form as prescribed under the provisions of section 11B of Central Excise Act, 1944 for claiming of refund of interest which is a statutory requirement for claimant refund.
- 3.2.4 As per explanation to section 11BB of Central Excise Act, 1944, it is imperative that where any order of refund made by the Commissioner (Appeals), Appellate Tribunal, national Tax Tribunal or any court against an order of Assistant/Deputy Commissioner, Central Excise and Customs under sub section (2) of section 11B, the order assed by the Commissioner (Appeals), Appellate Tribunal or as the case may be by the court shall be deemed to be an order passed under said sub section (2) of or the purpose. As he case is covered under the said explanation and accordingly rebate/refund of duty has been originally sanctioned/granted to the assess by the competent authority i.e. Deputy Commissioner Central Excise and Customs, Nanded Division within 3 months from the date of receipt of GOI order and as such there is no delay in sanction or grant of rebate by the competent authority. Hence there is no question of interest on the refund/rebate sanctioned and paid to the assessee.
- 3.2.5 In view of the above, the Order-in-Appeal No. AGS (143) 86/2011 dt. 04-08-2011 passed by the Commissioner (Appeals), central Excise and Customs, Aurangabad is not legal, proper, correct and merits review and needs to be set aside.
4. The Show cause notices were issued to the respondents under section 129DD of Central Excise Act, 1944 to file their counter reply. The respondent has not filed any counter reply till date.
5. Personal hearing was scheduled in these cases on 08-08-2013 and 12-03-2014. Personal hearing held on 08-08-2013 was attended by Shri Chuna Ram ACCE, Nanded on behalf of department who reiterated the goods of revision applications. Personal hearing held on 12-03-2014 was attended by Shri V.D.Kulkarni, Superintendent (Review) Aurangabad who again reiterated the grounds of revision

application. The respondent neither attended hearing on these dates nor sought adjournment of case to any other date.

6. Government has carefully gone through the relevant case records and perused the impugned Orders-in-Original and Orders-in-Appeal.

7. On perusal of records, Government observes that in this case the Deputy Commissioner Central Excise, Nanded has sanctioned the rebate claim vide order dated 07-03-2011 in pursuance to GOI revision order No. 198/2011-Cx dt. 24-02-2011. However department filed appeal against the said sanction order on the ground that the GOI Revision order No. 198/11-CX dt. 24-02-2011 was not accepted by department and writ petition against said order was filed in the Hon'ble High Court of Bombay. Commissioner (Appeals) held that the GOI Revision order is neither stayed nor set aside by High Court for and therefore rejected the appeal of department. The respondent party was not granted interest for delayed payment of rebate claim and therefore they also filed appeal against order-in-original before Commissioner (Appeals) who allowed the appeal. Now department has challenged both the impugned Orders-in-Appeal before this authority on the grounds stated above.

8. Government notes that regarding sanction of rebate claims applicant department has raised the same objection which were decided in the revision order No. 198/11-Cx dt. 24-02-2011. Department has challenged the said order dt. 24-02-2011 before High Court. As per available record said order is neither stayed or set aside by Hon'ble High Court. In such a situation there is no infirmity in the sanction of rebate claims as upheld by Commissioner (Appeals). The revision application filed in second round is thus not maintainable in the eyes of law. Moreover this authority has become functus officio after passing the order and no pleadings against said order can be entertained. As such Commissioner (Appeals) has rightly rejected the appeal of department. Government do not find any infirmity in the said order-in-appeal No. 142/11 dated 4.8.2011 and therefore upholds the same.

9. Government observes that in the second case, the issue involved is whether interest liability under Section 11BB of Central Excise Act arise after three months of the order passed by Commissioner of Central Excise or after 3 months of the date of filing refund application. In this regard, Government observes that once the rebate claim is held admissible under Section 11B of the Central Excise Act, 1944, interest liability starts after the expiry of three months of the date of receipt of application for rebate in the Divisional Office in terms of Section 11BB *ibid*. The relevant Section is reproduced below for ready reference:

" Section 11BB : Interest on delayed refunds - If any duty ordered to be refunded under sub-section 2 of Section IIB to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section there shall be paid to that applicant interest at such rate [not below five percent and not exceeding thirty per cent per annum as is for the time being in fixed [by the Central Government by Notification in the Official Gazette}], on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty.

Provided

Explanation: Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal or any court against an order of the Assistant Commissioner of Central Excise or Dy. Commissioner of Central Excise under sub-section (2) of Section 118, the order passed by the Commissioner Appeals, Appellate Tribunal as the case may be, the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section. "

Government observes that as per Explanation to Section 11BB, where the refund/rebate claim is allowed consequent to the order of appellate authority or any court against the order of the Asstt. / Dy. Commissioner, Central Excise, the order of the appellate authority/Court shall be deemed as an order passed under sub-section (2) for the purposes of this Section.

10. Government notes that Hon'ble Supreme Court in the case of *Mis Ranbaxy Laboratories Ltd. vs. UOI* reported on 2011-TIOL-10S-SC-CS has categorically held as under :

" 9. It is manifest from the afore-extracted provisions that Section 1188 of the Act comes into play only after an order for refund has been made under Section 118 of the Act.

Section 1188 of the Act lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 118 of the Act then the applicant shall be paid interest at such rate, as may be fixed by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below proviso to Section 1188 introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this Section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under sub-section (2) of Section 118 of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 1188 of the Act. Manifestly, interest under Section 1188 of the Act becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 1188 that can be arrived at is that interest under the said Section becomes payable on the expiry of a period of three months from the date of receipt of the application under Sub-section (1) of Section 118 of the Act and that the said Explanation does not have any bearing or connection with the date from which interest under Section 1188 of the Act becomes payable.

10. It is a well settled proposition of law that a fiscal legislation has to be construed strictly and one has to look merely at what is said in the "relevant provision, there is nothing to be read in/ nothing to be implied and there is no room for any intendment. (See: Cape Brandy Syndicate Vs. Inland Revenue Commissioners [1921] 1 K.B. 64 and Ajmera Housing Corporation & Anr. Vs. Commissioner of Income Tax (2010) 8 see 739 =(2010-TJOL-66-SC-JT).

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12.

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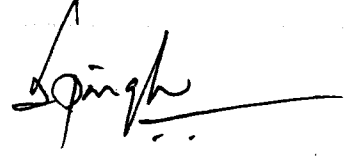
14.

15. In view of the above analysis, our answer the question formulated in para (1) supra is that the liability of the revenue to pay interest under Section 1188 of the Act commences from the date of expiry of three months from the date of receipt of application for refund under Section 118(1) of the Act and not on the expiry of the said period from the date on which order of refund is made. "

11. Government observes that Hon'ble Supreme Court in the above said judgement has held in unambiguous terms that liability of the revenue to pay interest under Section 1188 of Central Excise Act commences from the date of expiry of these months from the date of receipt of application for refund under Section 118(1) ibid and not from the expiry of said period from the date on which order of refund is made. In view of the principles laid down in above said judgment of Apex Court, Government finds no infirmity in the order-in-appeal No.143/11 dated 04.08.2011 and therefore upholds the same.

12. In view of above position, the revision applications are thus rejected being devoid of merits.

13. So, ordered.




(D.P. Singh)

Joint Secretary to the Govt. of India

The Commissioner of Central Excise & Customs,
Town Centre, N-5, CIDCO,
Aurangabad.

ATTESTED



(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.89-90/14-Cx dated 19-3-2014

Copy to:

1. The Commissioner of Central Excise & Customs,(Appeals) Town Centre, N-5,CIDCO, Aurangabad.
2. The Deputy Commissioner of Central Excise & Customs, Nanded Division, Aswan Bldg., Airport, Nanded.
3. M/s. Sanket Food Products P. Ltd., Unit-II, Gut No. 186, Dawalwadi, TQ, Badanapur, Distt.- Jalna.
4. Guard File.
5. PS to JS (RA)
6. Spare Copy

ATTESTED


(BHAGWAT P. SHARMA)
OSD (REVISION APPLICATION)