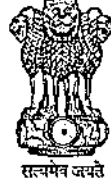


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**GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE**

**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. 195/324/2014-RA

F. No. 195/325/2014-RA /40

Date of Issue: 09.01.2022

ORDER NO. ⁹⁰⁴⁻⁹⁰⁵ /2021-CX (SZ)/ASRA/MUMBAI DATED 31.12.2021
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 : Weir Minerals India Pvt. Ltd.
333A-2, 2nd Phase,
Peenya Industrial Area,
Bangalore - 560 058

Respondent : Commissioner of Central Excise, Bangalore

Subject : Revision Application filed under Section 35EE of the Central Excise
Act, 1944 against Order-in-Appeal No. 367-371/2014-CE dated
26.06.2014 and Order-in-Appeal No. 377/2014-CE dated
30.06.2014 passed by the Commissioner of Central
Excise(Appeals-I), Bangalore.

ORDER

These revision applications have been filed by Weir Minerals India Pvt. Ltd., 333A-2, 2nd Phase, Peenya Industrial Area, Bangalore – 560 058 (hereinafter referred to as “the applicant”) against Order-in-Appeal No. 367-371/2014-CE dated 26.06.2014 and Order-in-Appeal No. 377/2014-CE dated 30.06.2014 passed by the Commissioner of Central Excise(Appeals-I), Bangalore.

2. The applicant had filed several rebate claims before the Deputy Commissioner of Central Excise, E-1 Division, Bangalore. The original authority sanctioned rebate claims in respect of some ARE-1's and rejected claims in respect of some ARE-1's on the ground that the claims were hit by limitation of time under Section 11B of the CEA, 1944. Aggrieved by the rejection of their rebate claims on the ground of time bar, the applicant filed appeals before the Commissioner(Appeals). The Commissioner(Appeals-I), Bangalore rejected the appeals of the applicant and upheld the OIO's passed by the Deputy Commissioner of Central Excise, E-1 Division, Bangalore.

3. Aggrieved by the OIA's the applicant filed revision applications on the following grounds :

- (i) They had filed rebate claim within the time period provided in Section 11B of the CEA, 1944. Since the goods had been transported by ship, the relevant date is the date when the ship leaves India. The Explanation (B) to Section 11B of the CEA, 1944 clearly states that the relevant date in this case would be the date when “the ship or the aircraft in which the goods are loaded, leaves India.”
- (ii) Section 2(27) of the Customs Act, 1962 clearly provides that India includes the territorial waters of India. As per Section 3(2) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, the territorial waters of India extend upto twelve nautical miles from the nearest point of the appropriate baseline and Section 3(1) of the said Act clearly

provides that the sovereignty of India extends till its territorial waters.

- (iii) It was averred that when the Act provides that the relevant date is the date on which the ship leaves India, then the Department cannot come to the conclusion that as per Circular No. 354/70/97-CX. dated 13.11.1997 the date of "Let Export Order" is to be taken as the relevant date.
- (iv) It was further submitted that there is a time difference between the "Let Export Order" date and the date on which the ship carrying the goods actually leaves India. The "Let Export Order" is allotted once the goods are deposited in the ICD in Bangalore. After that the goods are transported to Chennai and kept in the dock and subsequently loaded in the ship for export. All of these operations take time.
- (v) The applicant argued that in their case where the date of shipment is 29.11.11, the period of one year would lapse on 30.11.12. Therefore, they had filed the claim for refund within a period of one year as stipulated in Section 11B of the CEA, 1944.
- (vi) It was submitted that the date on which the goods are actually exported is to be taken into consideration and not the date of "Let Export Order". In this regard, reliance was placed upon para 2 of the judgment in the case of Everest Flavours Ltd. vs. UOI[2012-TIOL-285-HC-MUM-CX] which stated that the relevant date has been defined to be the date on which the ship or aircraft leaves India. Reliance was also placed upon the judgment in the case of Bajaj Electricals Ltd.[2012(281)ELT 146(GOI)] wherein it was held that relevant date would be the date on which the ship carrying exported goods left India.
- (vii) As an alternate submission, it was argued that a circular cannot alter, expand or circumscribe the provisions of law. When there was an express and clear provision in this regard, then a contradictory interpretation cannot be drawn from the circular and that a circular cannot expand or circumscribe the ambit of the statute and is only clarificatory in nature.

(viii) It was submitted that when substantive conditions have been complied with, then procedural lapses should not be made ground for denial of benefit of the notification. Reliance was placed upon the judgment in the case of Bajaj Electricals Ltd.[2012(281)ELT 146(GOI)] in this regard. It was further contended that when the legislative intent is not to charge excise duty on exported goods then technical lapses should not deny the benefit of such provision when the applicant has admittedly complied with the substantive conditions.

4. The applicant was granted a personal hearing on 25.02.2020. Shri Shama Rao, Sr. Manager appeared on behalf of the applicant. He handed over a written submission and also requested that recredit may be allowed of the duty paid on exported goods.

5.1 In the written submissions submitted by the applicant, they stated that the rebate claims had been rejected for claims beyond the period of one year from the date of Let Export Order(LEO). The applicant placed reliance upon the judgment of the Hon'ble High Court of Madras in Dorcas Market Makers Private Ltd. vs. CCE[2012(281)ELT 227(Mad.)] wherein it had been held that limitation specified in Section 11B of the CEA, 1944 is not applicable to rebate claim under Rule 18 of the CER, 2002. The applicant contended that rebate should therefore be granted to them. Reliance was also placed upon the order In Re : Balkrishna Industries Ltd.[2011(271)ELT 148(GOI)] wherein it has been held that any excess duty paid cannot be retained by the Government and should be recredited to the exporter. It was also held that the exporter was not required to wait for the order of the Department to recredit the amount. Reliance was placed upon Order No. 229/13-CX. dated 07.03.2013 in the case of Radiall India Pvt. Ltd. wherein it was held that such amounts are to be treated as voluntary deposit with the Government and directed the original authority to allow the respondent to take recredit of the amount in their CENVAT account as the same cannot be retained by the Government without any authority of law. The judgment of the Hon'ble High Court of Punjab and Haryana in the case of JSL Lifestyle

Ltd. vs. UOI in Civil Writ Petition No. 16018 of 2014(O & M) dated 04.08.2015[2015(326)ELT 265(P & H)] was referred to wherein it was held that *"Since notification issued under rule 18 of the Central Excise Rules, 2002 does not provide any period of limitation for a claim for rebate, rebate claim cannot be dismissed as time-barred applying provisions of section 11B of Central Excise Act, 1944."*

5.2 In the light of these submissions, the applicant contended that the time limitation under Section 11B of the CEA, 1944 was not applicable to rebate claims. The applicant then referred Explanation (B) to Section 11B(5) of the CEA, 1944 to point out that in case of goods exported out of India, the relevant date would be the date on which the ship leaves India. Since as per Section 2(27) of the Customs Act, 1962, India includes the territorial waters of India, the date when the ship leaves the territorial waters of India would be the date when the goods are exported. It was stated that after completion of necessary customs formalities, a Let Export Order(LEO) is obtained on the shipping bill. The shipping carrier can move the goods only after obtaining such LEO as proof of completion of customs procedures under the said shipment. Therefore, while computing the claim, the relevant date should be that date when actual shipment takes place by leaving Indian frontier.

6. On change in the revisionary authority, the applicant was granted fresh dates for personal hearing on 01.12.2020, 04.12.2020, 09.12.2020, 19.02.2021, 19.03.2021 & 26.03.2021. However, none appeared on behalf of the applicant.

7. Government has carefully gone through the impugned orders, the orders passed by the adjudicating authority, the written submissions filed by the applicant, the submissions of the applicant at the time of personal hearing, the revision applications and the case records. The revision applications have been filed because the original authority and the first appellate authority have rejected rebate claims filed by the applicant on the ground that the rebate claims are time barred as they have been filed after one year of issue of LEO(Let Export Order) for those exports. While doing so,

the lower authorities have relied upon the provisions of the Customs Act, 1962 and CBEC Circular No. 354/70/97-CX. dated 13.11.1997.

8. Since the basic issue concerns the relevant date for filing rebate claim, resort must be had to Section 11B of the CEA, 1944. The relevant portion of Section 11B of the CEA, 1944 is reproduced hereinafter.

“(B) “relevant date” means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

- (i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or*
- (ii) if the goods are exported by land, the date on which such goods pass the frontier, or*
- (iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;”*

The text of the Explanation appended to Section 11B(5) of the CEA, 1944 states that the relevant date when limitation commences is the date on which the ship or aircraft in which such goods are loaded leaves India. Going further, it can be seen that for export by land, the date on which the goods pass the frontier is the relevant date. The bill of lading and mates receipt issued at the point in time when the goods are loaded on the vessel records the time when the goods have passed into the possession of the master of the vessel and are out of customs control. Likewise, in the case of exports by air the point in time when the goods are loaded on an aircraft and the airway bill is issued would be the point where the goods are out of customs control. After this point when the bill of lading/airway bill is issued, the goods leave the port/airport and transit to the country of the buyer of the exported goods.

9.1 With regard to the reliance placed upon Circular No. 354/70/97-CX, dated 13.11.1997, Government observes that this circular had been issued to institute a procedure to overcome the delays in acceptance of proof of export where goods are exported through ICD's/CFS' which in turn delays rebate claims or fulfilment of conditions of bond executed for exports by the trade. The circular had been issued when the time limit for filing rebate claims was six months. It does not at any place specify that the date of LEO would be the relevant date when limitation would commence for filing rebate claim. Therefore, the reliance placed on the circular dated 13.11.1997 to hold that date of LEO would be the relevant date is insupportable. As such the documentation required for export by sea begins with the filing of shipping bill and ends with the issue of bill of lading/mate receipt. Post filing of the shipping bill, when the goods are received in the docks, the customs officer examines the goods and makes an order permitting clearance and loading of the goods for exportation in terms of the provisions of Section 51 of the Customs Act, 1962. Thereafter, the goods are loaded on the vessel and the possession of the goods passes into the hands of the master of the vessel. The bill of lading records the vessel name and date on which the goods have been loaded. The master of the vessel issues a Mate Receipt to acknowledge receipt of the goods on board the vessel. Thereafter, the vessel sails out to its destination.

9.2 In the case of export through ICD, the LEO is issued after the goods are deposited in the ICD. After that the goods are transported to the nearest port and kept in the docks and subsequently loaded on the ship for export. It is only after these processes that the goods actually leave the country on board the vessel. There is a substantial time gap between the time when the LEO is issued at the ICD and the actual date when the goods are loaded on the vessel and the goods leave India. Adopting the date of LEO as the relevant date puts the exporter at a distinct disadvantage and reduces the period of limitation for filing rebate claim. In this view, the date of LEO cannot be considered as the date when the ship loaded with the goods leaves India.

9.3 In plain terms, the contention of the Department is that a circular which is a delegated legislation can curtail the time limit allowed for claiming rebate under Section 11B of the CEA, 1944. In the face of the repeated references to rebate in Section 11B and the period of limitation specified under Section 11B of the CEA, 1944, such an averment would be unreasonable. The statute is sacrosanct and is the bedrock on which the rules and other delegated legislations like notifications, circulars, instructions are based. An argument which suggests that a circular can reduce the time limit for refund of rebate stipulated by Section 11B of the CEA, 1944 cannot be endured. In a recent judgment in a matter relating to GST, the Hon'ble Gujarat High Court had occasion to deal with the powers that can be given effect through a delegated legislation in its judgment dated 23.01.2020 in the case of Mohit Minerals Pvt. Ltd. vs. UOI[2020(33)GSTL 321(Guj.)]. Para 151 of the said judgment is reproduced below.

"151. It is a settled principle of law that if a delegated legislation goes beyond the power conferred by the statute, such delegated legislation has to be declared ultra vires. The delegated legislation derives power from the parent statute and not without it. The delegated legislation is to supplant the statute and not to supplement it."

Any delegated legislation which derives its existence from the statute cannot stand by itself, much less override the statute. Therefore, the contention of the Department that the LEO should be considered as the relevant date cannot be countenanced.

10. The applicant has made out some arguments to contend that the goods leave India only after the vessel is outside the territorial waters. To buttress this argument, the applicant has drawn attention to Section 2(27) of the Customs Act, 1962 and Section 3(2) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976. Government observes that this argument borrows from the provisions of other Acts. The provisions of the Customs Act, 1962 has its own objects and reasons for the definitions contained therein. Insofar as the provisions for grant of rebate are concerned, the provisions of Section 11B of the CEA,

1944 are clear. They stipulate that limitation for filing rebate claim would be one year from relevant date which would be the date when the ship in which the goods are loaded leaves India. The point when the export goods are handed over to the master of the vessel and allowed to sail would suffice its purposes. Invoking the definition of territorial waters only creates more ambiguity and can lead to more confusion. These submissions made out by the applicant are therefore in the nature of hair splitting and open up endless possibilities. If the same kind of argument is accepted for export of goods by air, it would mean that the time spent over Indian airspace by an aircraft flying over the country from east to west or west to east would also have to be factored in. Government therefore holds that the date recorded in the bill of lading/mate receipt for loading of goods on the vessel should be treated as the relevant date.

11.1 The applicant has relied upon a few judgments to contend that limitation specified under Section 11B of the CEA, 1944 would not be applicable to Rule 18 of the CER, 2002. The applicant has placed reliance upon the judgment of the Hon'ble Madras High Court in Dorcas Market Makers Pvt. Ltd. vs. CCE[2012(281)ELT 227(Mad.)] although the same High Court has reaffirmed the applicability of Section 11B to rebate claims in its later judgment in Hyundai Motors India Ltd. vs. Dept. of Revenue, Ministry of Finance[2017(355)ELT 342(Mad.)] by relying upon the judgment of the Hon'ble Supreme Court in UOI vs. Uttam Steel Ltd.[2015(319)ELT 598(SC)]. Incidentally, the special leave to appeal against the judgment of the Hon'ble High Court of Madras in Dorcas Market Makers Pvt. Ltd. has been dismissed *in limine* by the Apex Court whereas the judgment in the case of Uttam Steel Ltd. is exhaustive and contains a detailed discussion explaining the reasons for arriving at the conclusions therein.

11.2 Be that as it may, the observations of the Hon'ble High Court of Karnataka in Sansera Engineering Pvt. Ltd. vs. Dy. Commissioner, Bengaluru[2020(371)ELT 29(Kar)] at para 13 of the judgment dated 22.11.2019 made after distinguishing the judgments in the case of Dorcas

Market Makers Pvt. Ltd. and by following the judgment in the case of Hyundai Motors India Ltd. reiterate this position.

“13. The reference made by the Learned Counsel for the petitioners to the circular instructions issued by the Central Board of Excise and Customs, New Delhi, is of little assistance to the petitioners since there is no estoppel against a statute. It is well settled principle that the claim for rebate can be made only under section 11B and it is not open to the subordinate legislation to dispense with the requirements of Section 11B. Hence, the notification dated 1-3-2016 bringing amendment to the Notification No. 19/2004 inasmuch as the applicability of Section 11B is only clarificatory.”

11.3 Similarly, in their judgment dated 27.11.2019 in the case of Orient Micro Abrasives Ltd. vs. UOI[2020(371)ELT 380(Del.)], their Lordships have made categorical observations regarding the applicability of the provisions of Section 11B to rebate claims. Para 14 and 15 of the judgment is reproduced below.

“14. Section 11B of the Act is clear and categorical. The Explanation thereto states, in unambiguous terms, that Section 11B would also apply to rebate claims. Necessarily, therefore, rebate claim of the petitioner was required to be filed within one year of the export of the goods.

15. In Everest Flavours Ltd. v. Union of India [2012(282)ELT 481(Bom.)], the High Court of Bombay, speaking through Dr. D. Y. Chandrachud, J (as he then was) clearly held that the period of one year, stipulated in Section 11B of the Act, for preferring a claim of rebate, has necessarily to be complied with, as a mandatory requirement. We respectfully agree.”

In such manner, the Hon'ble High Courts of Karnataka and Delhi have reiterated that limitation specified in Section 11B would be applicable to rebate claims. Government is persuaded by the principle of contemporaneous exposition of law in the later judgments of Sansera Engineering Pvt. Ltd. vs. Dy. Commissioner, Bengaluru[2020(371)ELT 29(Kar.)] and Orient Micro Abrasives Ltd. vs. UOI[2020(371)ELT 380(Del.)]

which very unequivocally hold that the time limit specified in Section 11B of the CEA, 1944 would be applicable to rebate claims.

12.1 The applicant has made some submissions to contend that even if their rebate claims are hit by limitation, the duties paid by them on the exported goods must be recredited as such amounts are to be treated as deposits and that the Government cannot retain such amounts. In this regard, Government observes that all excisable goods are leviable to central excise duty when they are cleared from the factory. Although the Government policy is to zero rate exports, the exporter is required to follow the procedures prescribed under Section 11B of the CEA, 1944 and notifications issued to be eligible for rebate of such duties paid. The rebate admissible in terms of the notifications issued are subject to the specified conditions and limitations. Upon following the conditions and limitations for grant of rebate, the applicant is entitled to refund of the duties paid. As such, the levy of central excise duties remains attached to the manufactured goods.

12.2 The duty suffered on the goods can be refunded only when the procedures for grant of rebate and the conditions and limitations in the relevant notification are followed. In other words, save and except for a situation where the applicant chooses to follow the procedures for grant of rebate, the charge of central excise duty remains attached to the goods cleared from the factory and subsequently exported. It is not clear from the revision applications filed by the applicant as to whether the rebate claims have been filed within time in terms of Explanation (B) to Section 11B(5) of the CEA, 1944. However, if the original authority finds that the rebate claims have not been filed within the time limit for filing rebate claims as per Explanation (B) to Section 11B(5) of the CEA, 1944, the rebate claims will not be admissible. Needless to say, where the rebate claims are time barred the duties cannot be allowed as recredit as the levy thereof is not in doubt. As such, there is no exemption available for export of goods and therefore the duties paid by the applicant are leviable and cannot be treated as

deposit. Allowing recredit of duties paid on the export goods inspite of the rebate claims being timebarred would render redundant the provisions of Section 11B of the CEA, 1944 and the notifications issued under Rule 18 of the CER, 2002 for grant of rebate. Therefore, the contentions of the applicant for allowing the duties paid by them as recredit cannot be sustained.

13. Government therefore directs the original authority to re-examine the rebate claims rejected on grounds of time bar by identifying the date when the ship in which the goods are loaded has left India. The applicant is directed to cooperate by furnishing the relevant bills of lading/mate receipts of the exports before the original authority. If the rebate claims have been filed within one year from the relevant date, the rebate claims may be considered for sanction. This exercise may be completed within a period of eight weeks from the date of receipt of this order.

14. The revision applications filed by the applicant are disposed off in the above terms.


(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

904-905
ORDER No. /2021-CX (SZ) /ASRA/Mumbai DATED 31.12.2021

To,
Weir Minerals India Pvt. Ltd.
333A-2, 2nd Phase,
Peenya Industrial Area,
Bangalore – 560 058

Copy to:

- 1) The Commissioner of CGST & CX, Bengaluru North West
- 2) The Commissioner of CGST & CX, Bengaluru(Appeals-II)
- 3) Sr. P.S. to AS (RA), Mumbai
- 4) ~~Guard file~~