REGISTERED
SPEED POST

F.No. 198/651/11-RA & 195/12/12-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.....04.3.14

Order No. 91-92 /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/170/34/11 dated 10-10-2011 passed by Commissioner of Customs and Central Excise, (Appeals), Aurangabad.

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

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

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# ORDER

These revision applications are filed by Commissioner of Central Excise, Aurangabad and M/s. Sanket Food Products P. Ltd., Unit-II, Gut No. 186, Dawalwadi, TQ, Badanapur, Distt.- Jalna against the same Orders-in-Appeal No. AGS/170/34/11 dated 10-10-2011 passed by the Commissioner of Central Excise (Appeals), Aurangabad. with respect to Order-in Original No. 01/Reb/DC/11 (Reg.), Raigad dated 20-04-2011 passed by the Deputy Commissioner of Central Excise, Nanded.

2. Brief facts of the cases as under:-

2.1 M/s. Sanket Food Products P. Ltd. are holding Central Excise Registration No. AAECS 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. 91,34,616/- paid by them on exports undertaken in the month of March 2010. The Deputy Commissioner, Customs, Central Excise and Service Tax, Nanded Division vide his Order-in-Original No. 01/Reb/DC/11 (Reg.), Raigad dated 20-04-2011 sanctioned rebate claim amounting to Rs. 91,34,616/- under Notification No. 32/2008-CE (NT) dt. 28-08-2008 and Notification No. 19/2004-CE (NT) dt. 06-09-2004 issued under Rule 18 of Central Excise Rule, 2002 read with section 11B of Central Excise Act, 1944 and ordered to appropriate and adjust the above sanctioned amount against the interest liability of Rs. 17,77,292/- pending for the month of March-2011 and duty default of Rs. 69,00,000/- for the month of November 2010 and interest liability of Rs. 3,73,750/- for the month of November 2010 and the remaining amount of Rs. 83,574/- against duty default for the month of December-2010 as a part amount. The Order-in-Original No. 01/RBT/DC/11 dt. 20-04-2011 passed by the Deputy Commissioner, Central Excise and Customs, Nanded Division sanctioning the rebate claims based on the revision order No. 198/2011-Cx dt. 24-02-2011.

2.2 Being aggrieved by the Order-in-Original No. 01/RBT/DC/11 dt. 20-04-2011 the department filed an appeal with the Commissioner (Appeals), Aurangabad. The

Commissioner (Appeals), Aurangabad vide Order-in-Appeal No. AGS (170)/34/2011 dt. 10-10-2011 partially allowed departmental appeal. In his order he has observed that during March 2010 the assessee had defaulted payment of Central Excise duty totally amounting to Rs. 5,97,50,000/-. From the copies of Order-in-Original No. 20/RBT/DC/2010-11 dt. 07-03-2011 and Order-in-Original No. 21/RBT/DC/2010-11 dt. 30-03-2011, it is noticed that the amounts of Rs. 3,52,13,795/- and Rs. 2,45,36,205/- respectively totally amounting to Rs. 5,97,50,000/- were appropriated towards defaulted amount due for the month of March 2010. Even the part amount of interest amounting to Rs. 62,42,404/- for the same month was appropriated vide Order-in-Original dt. 30-03-2011. Out of total rebate of Rs. 91,34,616/- an amount of Rs. 45,67,308/- was pertaining to ARE-1 No. 30/09-10 dt. 17-03-2010 against which rebate claim was filed on 31-01-2011. Since, the date of appropriation of duty against ARE-1 No. 30/09-10 dt. 17-03-2010 is 07-03-2011; therefore, the claim is premature filed before payment of duty. Rebate is refund of duty paid due to export of goods. The date on which application for rebate was filed, duty was not paid. Therefore, such application became premature. The rebate cannot be allowed on such premature application. Therefore the impugned order needs to be set aside as far as amount involved in such premature claim. However in respect of rebate claim against ARE-1 No. 29/09-10 dt. 17-03-2010 which was filed on 09-03-2011 it is also observed that the rebate calm was filed after payment of duty through appropriation hence cannot be set aside for reason stated earlier. Accordingly he modified the Order-in-Original allowing rebate to the extent of Rs. 45,67,308/- in respect of ARE-1 No. 29/09-10 dt. 17-03-2010 and set aside the rebate sanctioned for amount of R. 45,67,308/- in respect of ARE-1 No. 30/09-10 dt. 17-03-2010. The Order-in-Appeal dt. 10-10-2011 allowing rebate to the extent of Rs. 45,67,308/- in respect of ARE-1 No. 29/09-10 dt. 17-03-2010 appears not correct, proper and legal.

3. Being aggrieved by the impugned Orders-in-Appeal w.r.t. allowing part rebate claim of Rs.45,67,308/-, the applicant department has filed this revision application under section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

3.1 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. Therefore the impugned order passed by the Joint Secretary does not appear to be correct and legal and needs to be set aside.

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 respondent 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 respondent are not eligible to get the rebate.

3.2 In view of the above factual and legal position it appears that the Order-in-Appeal No. AGS (170)/34/2011 dt. 10-10-2011 passed by the Commissioner (Appeals), Central Excise and Customs, Aurangabad relying upon Order No. 198/2011-Cx dt. 24-02-2011 passed by the Joint Secretary is not proper and legal to the extent allowing rebate of Rs. 45,67,308/- in respect of ARE-1 No. 29/09-10 dt. 17-03-2010 and needs to be set aside.

3.3 It is also observed that the department has preferred to file a writ petition on dt. 01-06-2011 in the Hon'ble High Court against the Order No. 198/2011-Cx dt. 24-02-2011 passed by the Joint Secretary.

4. M/s. Sanket Food Products Ltd. have challenged the said Order-in-Appeal dt. 10-10-2011 w.r.t. rejection of part rebate claim Rs.45,67,308/- in RA No. 195/12/12 on the following grounds:-

4.1 The impugned order is bad in law and contrary to the facts of the case.

4.2 The impugned order is based on an erroneous interpretation of facts. The date wise sequence of events is as under:-

17-03-2010 ARE-1 nos. 29 & 30 filed.
27-03-2010 actual date of shipment of goods.
31-01-2011 rebate claim filed for ARE-1 30/09-10
07-03-2011 duty for March 2010 appropriated vide Order-in-Original No. 20/RBT/DC/2010-11 dt. 07-03-2011
09-03-2011 rebate claim filed for ARE-1 29/09-10
30-03-2011 interest on delayed payment for March 10 appropriated vide Order-in-Original No. 21/RBT/DC/2010-11 d. 30-03-2011
20-04-2011 Order-in-Original No. 01/REB/AC/2011 dt. 20-04-2011 passed allowing both the refund claims.

The Commissioner (Appeals) has allowed the rebate claim filed on 09-03-2011 but has disallowed the rebate claim filed on 31-01-2011 on the ground that it was filed before the date of appropriation/payment of duty and was thus pre-mature. However, the Commissioner (Appeals) failed to appreciate that on the date when the rebate claims were decided by the Deputy Commissioner the duty had already been appropriated and the goods on which rebate was claimed became duty paid goods. Hence the rebate claim in respect of ARE-1 30/09-10 ought to have been allowed.

4.3 The Commissioner (Appeals) failed to appreciate that Notification No. 32/2008-CE (NT) dated 28-08-2008 postulates that the duty should have been paid on the excisable goods under section 3 A of the Central Excise Act, 1944. In the present case, the duty liability has been discharged under section 3A only. Hence all the conditions of Notification No. 32/2008-CE (NT) dated 28-08-2008 are met and there is no justification for disallowing the refund claim of the applicant.

4.4 The said Notification No. 32/2008-CE (NT) dated 28-08-2008 has been issue under Rule 18 of the Central Excise Rules, 2002 read with Rule 14 of the Pan Masala Rules. There is no such condition in the said rules or the notification that duty should be paid before filing the rebate clam. Moreover for filing the rebate claim an assessee is bound by the time limit imposed by section 11B of the Central Excise Act, 1944. However for payment of duty, the Central Excise Act, 1944 and the Pan Masala Rules specifically provide for levying of interest on the delayed payment of duty. A harmonious construction of the provisions of Rule 18 of Central Excise Rule 2002 Rule 14 of Pan Masala Rules the provisions for levy of interest under section 11A of the Central Excise Act, 1944 and the 2nd proviso to rule 9 of the Pan Masala Rules shows that even if there is delay in payment of duty, then also, if the duty has been paid before the rebate claim is decided, then such claim is admissible as the goods are duty paid goods on the date on which the rebate application is decided.

4.5 On one hand the applicant's rebate claim for earlier period has been appropriated by the department towards the duty for the month of March 2010 and

on the other hand, the department is denying the rebate claim of the exported goods on the allegation that on the date of filing rebate claim, duty was not discharged. This amounts to retaining duty even in respect of such goods which have undisputedly been exported.

4.6 It is also pertinent to note that the duty payable for March 2010 was appropriated vide Order-in-Original No. 20/RBT/DC/2010-11 dt. 07-03-2011 and the interest was appropriated vide Order-in-Original No. 21/RBT/DC/2010-11 dt. 30-03-2011 however, the rebate claims decided by these two orders pertain to the period prior to the date on which these orders were passed. The rebate claim allowed by these two orders were also excess duty collected by the department against export of goods export of good which was already lying with the department. The date of appropriation of these rebate claims towards duty payable for subsequent months is a mere technicality. Had these two orders been passed a little earlier, the present rebate claims of the applicant could not have been denied. However rebate being a substantive benefit, is not deniable on technicalities.

5. 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.

6. Personal hearing scheduled in this case on 19-09-2013 and 12-03-2014 was attended by Shri S.G.Pradhan, Superintended (Tech.) Nanded and Shri V.D.Kulkarni, Superintendent (Review) Aurangabad respectively who reiterated the grounds of revision application. The respondent party has neither attended hearing on any of these dates nor sought any adjournment of personal hearing.

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

8. On perusal of records, Government observes that the original authority sanctioned the impugned rebate claims. In appeal filed by department,

Commissioner (Appeals) allowed the appeal partly to the extent of disallowing rebate claim of Rs. 4567308/- in r/o ARE-1 No. 30/09-10 dt. 17-03-2010. However Commissioner (Appeals) upheld the sanction of rebate claim of Rs. 4567308/- in r/o ARE-1 No. 29/09-10 dt. 17-03-2010 on the ground that duty was paid by way appropriation before filing of rebate claim. Now, the department (called applicant) as well as M/s. Sanket Food Products Pvt. Ltd. (called Respondent) have filed said revision application against said Order-in-Appeal on the grounds stated above.

9. Government notes that in the instant case the duty was not paid the time of clearance of goods from factory for export. This facts is on record that respondent had not paid Central Excise duty amounting to Rs. 59750000 for the clearance effected during March 2010. So the said goods pertaining to ARE-1 No. 29/09-10 and 30/09-10 both dated 17-03-2010 were undisputedly cleared for export without payment of duty. In the case decided vide GOI revision order No. 198/11-Cx dt. 24-02-2011 there was no default of payment and goods were exported on payment of duty as verified the jurisdictional Central Excise range superintendent. So the ratio of said GOI revision order dt. 24-02-2011 cannot be applied to this case as regards payment of duty. Applicant department has erred in mixing up the issue of payment of duty with the issue of procedural lapses n the grounds of revision application.

10. Government notes that as per provisions of rule 18 of Central Excise Rules 2002 and Notification No. 19/04-CE (NT) dt. 06-07-2004 where any goods exported, the rebate of duty paid on excisable goods shall be granted subject to such conditions or limitation specified on the notification. In terms of condition (a) of said Notification dt. 06-09-2004 excisable goods shall be exported after payment of duty directly from a factory or warehouse except as otherwise permitted by CBEC. The Central Board of Excise and customs vide Circular No. 294/10/97-Cx dt. 30-01-1997 relaxed the condition of direct export of goods from factory subject to compliance of procedure prescribed therein. The harmonious reading of these statutory provisions makes it clear that rebate shall be granted when excisable goods are exported after payment of duty. In this case it is on records that goods were exported without payment of duty. The fundamental condition for granting rebate claim is that duty

paid goods are exported. In this case, this condition is not satisfied and therefore rebate claim cannot be held admissible Commissioner (Appeals) has erred in considering the adjustment of duty before filing of rebate claim as compliance of condition No. 2 (a) of Notification No. 19/04-CE (NT) dt. 06-09-2004 r/w provision of Rule 18 of Central Excise Rules, 2002. In view of above said statutory position the said rebate claims of Rs. 91,34,616/- pertaining to ARE-1 Nos. 29/09-10 and 30/09-10 both dated 17-03-2010 are not admissible to the respondents. The impugned Order-in-Appeal is modified to this extent.

11. The revision application No. 198/651/11 filed by applicant department is therefore allowed and revision application No. 195/12/12 filed by respondent party is rejected in terms of above.

12. So, Ordered.

(D.P. Singh)
Joint Secretary to the Govt. of India

The Commissioner of Central Excise& Customs,
Town Centre, N-5,CIDCO,
Aurangabad.
&
M/s. Sanket Food Products P. Ltd.,
Unit-II, Gut No. 186, Dawalwadi,
TQ, Badanapur, Distt.- Jalna.

ATTESTED

(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
CBEC-OSD (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

Order No.91-92/14-Cx dated 19-03-2014

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 Diision, Aswan Bldg., Airport, Nanded.
3. Guard File.
4. PS to JS (RA)
5. Spare Copy

ATTESTED

(BHAGWAT P. SHARMA)
OSD (REVISION APPLICATION)