



REGISTERED
SPEED POST

F.No.198/461/2011-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: 16/7/13

ORDER NO. 929/2013-Cx DATED 15-7-2013 OF THE GOVERNMENT OF INDIA,
PASSED BY SHRI D.P.SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA,
UNDER SECTION 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 order-in-appeal
No.PKS/560/BEL/2011 dated 31.3.2011 passed by the
Commissioner of Central Excise (Appeals) Mumbai-III

Applicant : Commissioner of Central Excise, Mumbai-III

RESPONDENT : M/s Ansar Chemicals, Lodhi Sarai, Sambhal,
Moradabad, (UP)

ORDER

This revision application is filed by Commissioner of Central Excise, Mumbai-III against the order-in-appeal No.PKS/560/BEL/2011 dated 31.3.2011 passed by the Commissioner of Central Excise (Appeals) Mumbai-III with respect of order-in-original passed by the Deputy Commissioner (Rebate) Central Excise Mumbai-III. M/s Ansar Chemicals, Sambhal, Moradabad is the respondent.

2. Brief facts of the case are that the respondent had filed a rebate claim for Rs.2,77,681/- before the Deputy Commissioner of Central Excise (Refund), Raigad. Commissioner of Central Excise, Meerut-II, vide letter dt 7.7.2006 informed that a case against M/s Ansar Chemicals, Sambhal, is under investigation for suspected fraudulent avilment of Cenvat Credit in respect of goods received from units located in Jammu and Kashmir, who were availing area based exemption under Notification No. 56/2002 as amended; that a Show Cause Notice dt 12.9.2008 was issued to the said respondent by the Meerut-II Commissicnerate for the period November 2005 to March, 2006 alleging that the appellant had accumulated the Cenvat credit on the strength of invoices issued fraudulently. Accordingly, Show Cause Notice dated 09.02.2010 was served by Maritime Commissionerate, which culminated into issuance of the impugned order-in-original rejecting rebate on the grounds that the appellant has utilized cenvat credit for payment of duty on goods cleared under impugned ARE-1 out of the cenvat credit which were allegedly fraudulently availed by them from November 2005 to March 2006, Therefore, duty was not paid in terms of Rule 18 of the Central Excise Rules, 2002 and that in spite of extending several opportunities, neither written submission was made nor was personal hearing attended.

3. Being aggrieved by the said order-in-original, the respondent filed appeal before Commissioner (Appeals), who decided the same in favour of respondent.

4. 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 In view of judgement of Hon'ble Supreme Court in the case of MIL India Ltd. Vs Commissioner of Central Excise, Noida-2007(210) ELT188(SC), Commissioner (Appeals) should have assumed the powers of the adjudicating authority and decided the case on merit instead of reminding/directing the original adjudicating authority. Further, Government of India in its Order No.1551/10-CX dt. 11-10-10 in respect of M/s Rollex Synthetics, Mumbai in the Revision Application filed by Commissioner of Central Excise, Mumbai- III against Commissioner (Appeals)'s Order-In-Appeal No. SRK479 &481/M-III/2008 dt. 07-08-08 has also observed that "Commissioner (Appeals) has no power to remand back the case to the adjudicating authority for de-novo proceedings/fresh consideration. Accordingly, Government sets aside the impugned Orders-in-Original and directs the Commissioner (Appeals) to decide the cases on merit".

4.2 Commissioner (Appeals)'s findings in para 8 that impugned order suffers from lack of evidence and has been passed on the basis of assumption and presumption are not plausible on the grounds that rebate of duty paid on goods cleared for export are governed by the provisions of Section 11 B of the Central Excise Act, 1944 read with Rule 18 of Central Excise Rules, 2002 and Notification 19/2004-CE dt. 06-09-2004, issued under the said Rule 18 and provisions contained in Chapter 8.4 of CBEC's Excise Manual of Supplementary Instructions. As per these provisions, any person claiming rebate of duty of excise is required to establish by documentary or other evidence that the amount of duty paid in relation to which rebate is claimed, was paid by him. Sub-Section (2) of the said Act further provides that the rebate sanctioning authority would sanction the rebate only, if he is satisfied that the whole or any part of the duty of excise paid is refundable. In the instant case, from the perusal of para 6 of the show cause notice, it is seen that the claimant have utilized cenvat credit for payment of duty on goods cleared under impugned ARE-1 which were fraudulently availed during the period November, 2005 to March, 2006. Therefore, the payment of duty on goods

cleared for export under the impugned ARE-1 by utilizing the said fraudulently availed credit cannot be treated as "duty paid" as required under Section 11B as the credit so utilized is fraudulent. Fraud vitiates everything consequently. Hence, M/s Ansar Chemicals is not entitled for rebate claim, as the fact remains that rebate has to be allowed on the payment of real duty so that the revenue should reach Government's Treasury. In the instant case, show cause notice has been issued by the Meerut-II Commissionerate for fraudulent avilment of cenvat credit. The exporter being the beneficiary of the rebate, the onus lies on them to prove that duty had been paid on the exported goods and they had to deal with bona fide manufactures.

4.3 Further, the amount paid by the claimant as duty against the above mentioned invoices cannot be considered as duty in terms of the explanation-1 given under Notification No. 19/2004(NT) dt. 06.09.04 amended by Notification No. 37/2009 dt. 19.09.09 as the said amount has not been collected/paid by the claimant in accordance with the provisions of any enactments specified in the said explanation to the Notification.

5. A show cause notice was issued to the respondent under Section 35EE of Central Excise Act 1944 to file their counter reply. The respondent vide their cross objection, received in this office on 26.3.2013 mainly stated as under:

5.1 The respondent submits that since duty on the export goods was paid in terms of Rule 8(1) of the Excise Rules, the same in terms of Rule 8(2), *ibid*, would be deemed to have been paid for the purpose of the Excise Rules. Accordingly, the said duty would be deemed to have been paid for the purpose of Rule 18 of the said Excise Rules. Therefore, the contention of department to the effect that payment of duty on goods cleared for export under the impugned ARE-1 by utilizing the said fraudulently availed credit cannot be treated as duty paid is not correct in view of aforesaid Rule 8(2).

5.2 The Notice issued to the respondent in the instant matter primarily involves allegations for taking irregular/fraudulent Cenvat credit for which

However, in the instant case the learned Commissioner (Appeals) has held the rebate admissible and allowed the appeal of the respondent with direction to the rebate sanctioning authority to quantify the amount of rebate after verifying the same from documents. Therefore, it is not correct to say that the Commissioner(Appeals) has remanded the case to original authority for de-novo adjudication. The Commissioner (Appeals) has held the rebate admissible and thereafter, directed the original authority to quantify the amount of rebate after verification of duty paid from documents.

6. Personal hearing was scheduled in this case on 5.3.2013 and 27.6.2013. Nobody attended the hearing. Hence, Government proceeds to decide the case on the basis of available records.

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. Government observes that in the instant case rebate claim was rejected by the original authority on the ground that a show cause notice bearing F.No.IV-CE(9) CP/ Ansar/M-II/09/06/Pt.I dated 12.9.2008 was issued to the respondent by the Meerut-II Commissionerate for the period November 2005 to March 2006 alleging that the respondent had accumulated the cenvat on the strength of invoices issued fraudulently and duty paid from such fraudulently availed cenvat credit cannot be treated as 'duty' for the purpose of granting rebate. Commissioner (Appeals) set aside the impugned order-in-original and allowed the appeal filed by the respondent. Now, the applicant department has filed this revision application on grounds stated in para 4 above.

9. The department has contended that the Commissioner (Appeals) has remanded the case without having any authority of remand back of the case. The respondent has stated that Commissioner (Appeals) has not remanded the case back to original authority but the Commissioner (Appeals) has held the rebate admissible and thereafter directed the original authority to quantify the amount of rebate after verification of duty

mechanism for recovery of irregular credit taken/utilised along with interest and penalty are provided under Rule 14 & 15 of the Cenvat Credit Rules, 2004. Provisions under Rule 18 read with Rule 8 of the Excise Rules for granting rebate of duty on export goods are independent of the provisions of Rule 14 & 15 of the Credit Rules. The above contention of the Respondent further gets support from the fact that central excise law provides different channels for hearing second stage appeals in the matters of rebate of duty and recovery of irregular Cenvat credit as under:

- Second stage appeals in relation to rebate claims are to be heard by the Government of India through the designated authority viz. the Joint Secretary (RA) in the Department of Revenue as revision matters, and
- Second appeal regarding admissibility of Cenvat credit on inputs, capital goods and input services and recovery thereof are to be heard by the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") and Hon'ble Supreme Court in case of further appeals.

5.3 Interest of the respondent would be jeopardised if the claim of rebate is rejected finally on the ground that relevant duty has been paid from fraudulently availed Cenvat credit but the matter of admissibility of Cenvat credit subsequently is decided in favour of the respondent after lapse of period available for filing appeal against the order of rejection of rebate. In such eventuality, the respondent would not be able to file any appeal even though the Cenvat credit availed is held admissible and the duty paid on the export goods from Cenvat credit account becomes legitimately paid duty. The respondent would not be able to claim & get lawful rebate in that situation. Therefore, contention of department putting legitimate/lawful interest of the respondent in jeopardy is not sustainable.

5.4 Contention of department that the Commissioner (Appeals) does not have powers to remand the matter to original adjudicating authority is correct.

paid from documents. To examine this specific aspect, Government finds it proper to peruse the concluding para of impugned order-in-appeal, which reads as under:

"Further perusal of the impugned order will indicate that the appellant has submitted requisite documents to the sanctioning authority, but the same were not examined on merit as per the procedure laid down in the central excise law. The Centre Excise Supplementary Instructions-2005 in paragraph 8 of Chapter 8 has provided the procedure for processing of the rebate claim. The rebate of duty of excise is given under Rule 18 of the Central Excise Rules, 2002, read with the conditions and limitations, laid down in the Notification No 19/2004-CE(NT) dated 6.9.2004. The perusal of the impugned order would indicate that compliance or non-compliance of the said notification has not been discussed therein by the sanctioning authority. The appellant has not given requisite documents of rebate claim along with appeal memorandum. Under these circumstances, the appeal is required to be allowed with the direction to the rebate sanctioning authority to quantify and verify the amount in the claim with reference to documents and sanction the same immediately.

Accordingly, the impugned order is set aside and appeal is allowed."

From perusal of above para of impugned order-in-appeal, Government is of opinion that the Commissioner (Appeals) has not remanded the case back for denovo adjudication to original authority. The Commissioner (Appeals) has allowed the appeal of respondent and set aside the impugned order-in-original and directed the original authority to sanction the same after verification of duty paying documents. Such order cannot be treated as remand order for denovo adjudication. Hence, department's contention in this regard is not tenable.

10. Government further observes that a show cause notice bearing F.No.IV-CE(9) CP/ Ansar/M-II/09/06/Pt.I has been issued to the respondent by the Meerut-II Commissionerate for the period November 2005 to March 2006 alleging that the respondent had accumulated on the strength of invoices issued fraudulently. Government finds that under such circumstances, the genuineness of payment of duty is in dispute.

10.1 The governing statutory provisions of grant of rebate are contained Rule 18 of Central Excise Rules, 2002 which reads as under:

"Rule 18 : Rebate of Duty : Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, any fulfillment of such procedure, as may be specified in the notification."

The provisions of said rule stipulate that rebate of duty paid on excisable goods exported goods is admissible. The fundamental requirement for claiming rebate is that the proper duty paid goods are exported out of India. In this case, payment of duty on exported goods is in dispute and case for recovery of Cenvat credit is pending adjudication. In view of above, it would be premature to decide the admissibility of rebate claim till the finalization of pending adjudicating proceedings.

11. Government finds the coverage/applicability of Hon'ble Apex Court's observations in above cited case of CC Vs. Candid Enterprises [2001 (1300 ELT 404 (SC)] that "Fraud nullifies everything" and all further decisions based on the same can never be held as final/judiciously correct specifically in a situation when there is provision of law to make further investigations and adjudications as per available procedure for a natural and proper justice for both the parties i.e. the applicants and the respondents. Government notes that there indeed are some investigations which were caused and proper show cause notices stands issued (in this case also) and the same were put to process of adjudication. In fact, the outcome of adjudication will prevail whether the relevant cenvat credit taken was legally correct or not. The equity of law demands that the applicant department should be afforded a proper opportunity to reach at conclusive adjudication state herein.

12. However, Government fully agrees with the cross objection/submission of the respondent herein that "fraud" cannot be termed by mere writing or on presumption/assumption but the same is needed to be established by proper evidence after following a proper course of law keeping in view the principles of natural justice.

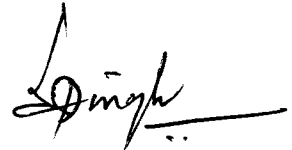
Here, Government would like to quote the below mentioned observations/findings of the Hon'ble Supreme Court of India. Hon'ble Supreme Court in para 10 of the judgment in the case of Escorts Ltd. Vs. CCE Delhi-II [2004 (173) ELT 113 (SC)] observed, inter-alia that one additional or different fact may make a word of difference between conclusion of two cases; and in para 11 further inferred as following:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a singleDetail may after the entire aspect"

13. In view of above circumstances, Government sets aside the impugned order-in-appeal and remands the case back to the original adjudicating authority for denovo adjudication taking into account the observations in the preceeding paras and the decision of adjudicating authority in the said show cause notice dated 12.9.08 issued by Meerut-II Commissionerate. A reasonable opportunity of hearing will be afforded to the parties before deciding the case.

14. Revision application is disposed off in above terms.

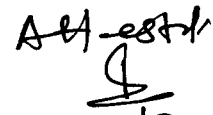
15. So, ordered.



(D.P. Singh)

Joint Secretary (Revision Application)

Commissioner of Central Excise Mumbai-III,
4th Floor, Vardaan Trade Centra, MIDC,
Wagle Industrial Estate, Thane (W) – 400 604



16/11
(भगवत 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. 929/2013-Cx dated 15-7-2013

Copy to:

1. M/s Ansar Chemicals, Lodhi Sarai, Sambhal, Moradabad, (UP)
2. Commissioner of Central Excise (Appeals), Mumbai-III, 5th Floor, CGO Complex, CBD Belapur, Navi Mumbai – 400 604.
3. Deputy Commissioner of Central Excise(Rebate), Mumbai-III,
- ✓ 4. PA to JS(RA)
5. Guard File.
6. Spare Copy

ATTESTED



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