



REGISTERED
SPEED POST

F.No.195/28/2012-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..... 31/3/14

ORDER NO. 93/14-Cx DATED 25.03.2014 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 Act, 1944 against the orders-in-appeal
No. US/414-416/RGD/11 dated 17.11.2011 passed
by Commissioner of Central Excise (Appeals),
Mumbai-III, Mumbai Zone-II

APPLICANT : Commissioner of Central Excise, Raigad

RESPONDENT : M/s Manish Packaging Pvt. Ltd. situated at Plot
No.539, Road No.5, GIDC, Sachin-394230, Distt.
Surat

ORDER

This revision application is filed by Commissioner of Central Excise, Raigad against the order-in-appeal No. US/414-416/RGD/11 dated 17.11.2011 passed by Commissioner of Central Excise (Appeals), Mumbai-III, Mumbai Zone-II.

2. Brief facts of the case are that M/s Manish Packaging Pvt. Ltd. situated at Plot No.539, Road No.5, GIDC, Sachin-394230, Distt. Surat had filed 66-rebate claims of Rs.1,36,98,474/- with the Assistant Commissioner(Rebate), Central Excise, Raigad under rule 18 of the Central Excise Rules, 2002 for goods cleared for export. The Assistant Commissioner (Rebate), Central Excise, Raigad Commissionerate, vide his order-in-original No.1233/10-11/AC(Rebate)/Raigad dated 29.10.2010 sanctioned the rebate claim of Rs.1,36,33,013/-.

2.1 It was seen that the value of the goods shown in the ARE-1 in respect of below mentioned ARE-1s was higher than the FOB value shown in the shipping bill as detailed below :

R.C. No. & date	ARE-1 No. & date	ARE-1 Value	FOB value	Rate of duty	Amount due	Amount sanctioned	Excess Amount paid
1	2	3	4	5	6	7	8
012919 15.09.09	98 31.07.09	2124453	2075154	8%	170993	175055	4062
001096 16.04.10	341 25.02.10	1715792	1640051	8%	135140	141381	6241
Total Rs.		3840245	3715205			316436	10,303

The FOB value in the shipping bill is arrived at after reducing the amount of freight and insurance charges from the commercial invoice value. The commercial

value is the value at which goods are sold. As per section 4 of Central Excise Act, 1944, the transaction value is the value at which goods are sold but does not include freight and insurance charges. Thus the value after deducting the freight and insurance from the commercial value (which is equal to FOB value) should be the transaction value for the purpose of value as per Section 4 of the Central Excise Act, 1944. Thus as per the provisions of Central Excise Act & Rules, the CIF was not the correct transaction value and the duty paid on the said freight and insurance was not admissible for rebate under Rule 18 of the Central Excise Rules, 2002. Therefore the amount paid on such part of ARE-1 value, over and above the FOB value is not the duty of Central Excise but is to be treated as excess payment. The rebate in terms of Rule 18 of the Central Excise Rules, 2002 is the rebate of Central Excise duty paid on exported goods. In the instant case, ARE-1 value includes an amount of Rs.1,25,040/- towards freight and insurance charges over and above the FOB value at which the goods are sold. Hence sanction of the rebate on the amount of Rs.1,25,040/- [amounting to Rs.10,303/- (1,25,040 × 8.24%)] is in violation of Rule 18 of Central Excise Rules, 2002. Thus the rebate sanctioning authority should have restricted the sanction of rebate claim in respect of ARE-1s No. 98/31.07.2009 and 341/25.02.2010 to the extent of Rs.3,06,133/-, instead of sanctioning the rebate claim of Rs.3,16,436/- thereby rejecting the rebate claim of Rs.10,303/- (Rs.3,16,436 less Rs.3,06,133/-).

2.2 The department preferred an appeal against the said order-in-original No. 1233/10-11/AC(Rebate)/Raigad dated 29.10.2010 passed by the Assistant Commissioner (Rebate), Central Excise, Raigad Commissionerate in respect of M/s Manish Packaging Pvt. Ltd. before the Commissioner (Appeals), on the grounds that the claimant paid duty on the price which was inclusive of freight and the duty paid on the freight was not admissible for rebate under rule 18 of the Central Excise Rules, 2002.

2.3 Commissioner(Appeals) vide his order-in-appeal No. US/414 to 416/RGD/2011 dated 17.11.2011 interalia found that :

- (i) Under new Section 4 of the Act the assessable value is the transaction value at the time and place of clearance and where the place of removal is different from the place of manufacture, the freight (including freight insurance) incurred in transport of goods from the place of removal has to be excluded for determination of the assessable value;
- (ii) that the respondent had assessed the goods on the basis that the place of removal was the port;
- (iii) that the Explanation -2 of the Rule 5 of Central Excise Valuation Rules, 2000 clarifies that cost of transportation from the factory to the place of removal (which includes depot, place of consignment agent and any other place from where the goods are sold), where the factory is not the place of removal, shall not be excluded for the purpose of determining the value of excisable goods;
- (iv) that the place of removal has to be determined on the basis of agreement of sale / purchase order – i.e. the terms and condition of sale agreed between the buyer and the seller;
- (v) that the revenue has not adduced any evidence in the appeal to prove that the factory was the place of removal in the instant case and not indicated in the appeal as to where the 'place of removal' was located this particular case and it was for the revenue to collect and adduce evidence;
- (vi) that the Joint Secretary to the Government of India vide order No.926-991/11/-Cx dated 25.07.2011 passed in the case of M/s Chemagis India Pvt. Ltd. on an appeal filed by the department, has set aside the order and directed original authority to decide the case after conducting the requisite verification holding that factual details regarding place of removal are required to be verified to determine transaction value and that similar stand has been taken by the Joint Secretary to the Government of India in other cases cited in the said order-in-appeal;

(vii) that decisions of the higher authorities should be followed by the lower authorities;

(vii) That rebate in this case has already been sanctioned and if the revenue on the basis evidence, find that excess duty had been paid and excess rebate sanctioned, it should be given a chance to recover the differential amount of rebate in accordance with the principles of natural justice and this can be done only when the impugned order is set aside and relied upon Hon'ble Supreme Court judgment in the case of Superintendent (Tech-I) C.Ex. vs. Pratap Rai reported in 1978(2) ELT J613(SC).

2.4 The Commissioner (Appeals) accordingly vide his order-in-appeal No.US/414 to 416/RGD/2011 dated 17.11.2011 set aside the impugned order and allowed departmental appeal.

3. 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 :

3.1 The Commissioner (appeals) vide the impugned order-in-appeal relying on the decision of the Joint Secretary to the Government of India vide order No.926-991/11-Cx dated 25.07.2011 passed in the case of M/s Chemagis India Pvt. Ltd., on an appeal filed by the department and on the basis of other cases cited in the order-in-appeal, wherein the Joint Secretary to the Government of India has set aside the orders and directed original authority to decide the case afresh after conducting the requisite verification with regards to the place of removal and determination of the transaction value, has followed the decisions of the higher authorities.

3.2 The Commissioner (Appeals), by setting aside the impugned order-in-appeal, by following the above said orders of the Joint Secretary to the Government of India and relying upon Hon'ble Supreme Court judgment in the case of Superintendent (Tech-I) C.Ex. vs. Pratap Rai reported in 1978(2)ELT J613(SC) has de-facto remanded the case to the original authority.

3.3 However, the Commissioner (Appeals) has no powers to remand. Section 35A(3) of the Central Excise Act, 1944 as it existed before 11.05.2001 provided that Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling decision or order appealed against or **may refer the case back to the adjudicating authority with such direction as he may think fit for a fresh adjudication or decision as the case may be, after taking additional evidence, if necessary.** By an amendment vide Finance Act, 2001 w.e.f. 11.05.2001, the phrase as mentioned in bold above has been deleted with an intention to withdraw the powers to Commissioner (Appeals) to remand the cases for fresh adjudication to the original adjudication authorities and after the said amendment in 2001, the said Section 35A(3) reads as follows :-

"The Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against."

Thus w.e.f. 11.05.2001, the Commissioner (Appeals) has no powers to remand back the case.

3.4 The Commissioner (Appeals) has thus failed to pass speaking order in the department's appeal and failed to appreciate the fact that merely setting aside the order passed by the original authority and allowing the department's appeal without confirming the excess amount of rebate sanctioned or by remanding the case to the original authority with suitable directions, is not proper disposal.

3.5 The Commissioner (Appeals) has set aside the order-in-original No. 1233/10-11/AC(Rebate)Raigad/ dated 29.10.2010 in entirety. The department has reviewed the order of the AC (Rebate) Central Excise, Raigad only for an excess and erroneous rebate amount of Rs.10,303/- (involving differential value of Rs.1,25,040/-). The setting aside of the order-in-original in entirety, has created a situation where the properly sanctioned rebate amount (not disputed by the department also) also becomes recoverable, but the department has no mechanism to effect the recovery. Also,

liability of the assessee / claimant has been ascertained by the order-in-appeal. Therefore, it is submitted that the impugned order-in-appeal dated 17.11.2011 is unworkable. Also the Commissioner (Appeals) has exceeded his jurisdiction.

3.6 The order-in-appeal sets aside the order-in-original of the AC(Rebate C.Ex, Raigad, and allows department's appeal, but leaves no scope for the department to go ahead to recover excess rebate disbursed.

3.7 Therefore, the order-in-appeal No.US/414 to 416/RGD/2011 dated 17.11.2011 appears to be not proper, legal and correct and is required to be set aside.

4. A show cause notice was issued to the respondent under Section 35 EE of Central Excise Act, 1944 to file their counter reply. No reply is filed by respondent till date.

5. Personal hearing was scheduled in this case on 28.11.2013 and 11.03.2014. Nobody appeared for hearing on the above mentioned dates.

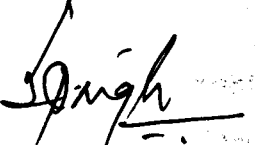
6. Government has carefully gone through the relevant case records, oral & written submissions and perused the impugned order-in-original and order-in-appeal.

7. On perusal of records, Government observes that in this case department had filed appeal before Commissioner (Appeals) to disallow the excess paid rebate claim of Rs.10,303/- and had not contested the sanction of rebate claim of Rs.3,06,133/- vide order-in-original dated 29.10.2010. Commissioner (Appeals) while allowing department's appeal relying on GOI Revision Order, had set aside the entire order-in-original dated 29.10.2010 and did not order for recovery of excess paid amount of Rs.10,303/-. Government notes that Commissioner (Appeals) has erred in setting aside the entire order-in-original. Department has not contested the sanction of rebate claim of Rs.3,06,133/-. In view of this position, the case is required to be remanded to original authority to the extent of deciding dispute about excess paid rebate claim of Rs.10,303/-.

8. Government restores impugned order-in-original as regards sanction of rebate claim of Rs.3,06,133/- and directs the original authority to decide the rebate claim of disputed amount of Rs.10,303/- afresh after taking into account the cited GOI revision order No.926-991/11-Cx dated 25.07.2011. A reasonable opportunity of hearing will be afforded to the parties. The impugned order-in-appeal is modified to this extent.

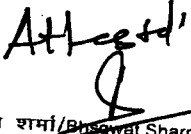
9. The revision application is disposed off in terms of above.

10. So ordered.


(D.P. Singh)

Joint Secretary(Revision Application)

Commissioner of Central Excise
Raigad Commissionerate,
Ground Floor, Kendriya Utpad Shulk Bhawan,
Sector-17, Plot No.1, Khandeshwar,
Navi Mumbai -410 206.



(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. 93/14-Cx dated 25.03.2014

Copy to:

1. Commissioner of Central Excise (Appeals-II), Mumbai, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E, Bandra-Kurla Complex, Bandra (East), Mumbai-400051.
2. The Deputy Commissioner of Central Excise (Rebate), Ground Floor, Kendriya Utpad Shulk Bhawan, Sector-17, Plot No.1, Khandeshwar, Navi Mumbai -410 206.
3. Manish Packaging Pvt. Ltd. situated at Plot No.539, Road No.5, GIDC, Sachin-394230, Distt. Surat
4. PA to JS(RA)
5. Guard File.
6. Spare Copy



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