REGISTERD SPEED POST

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. 195/136/17-RA /1279 Date of Issue: 01.03.23

ORDER NO. 96 /2023-CEX (WZ)/ASRA/MUMBAI DATED 27.02.23 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 : M/s. Transpek Industry Limited,
Coastal Highway, Village Ekalbara,
Taluka - Padra,
District – Vadodara- 391 440.

Respondent : The Commissioner, CGST & Central Excise, Vadodara-I.

Subject : Revision Applications filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. VAD-EXCUS- 001-APP-401/2016-17 dated 26.10.2016 passed by the Commissioner (Appeals-I), Central Excise, Customs & Service Tax, Vadodara.

ORDER

This revision application has been filed by M/s. Transpek Industry Limited, Coastal Highway, Village Ekalbara, Taluka - Padra, District – Vadodara- 391 440 (herein after referred as 'Applicant') against the Order-in-Appeal No. VAD-EXCUS-001-APP-401/2016-17 dated 26.10.2016 passed by the Commissioner (Appeals-I), Central Excise, Customs & Service Tax, Vadodara.

2. The brief facts of the case is that the Applicant M/s. Transpek Industry Limited, holding Central Excise Registration No. AAACT8639BXM002 manufacturing the excisable goods falling under chapter heading 29 of the Central Excise Tariff Act, 1985. They had filed refund claim on 04.03.2016 seeking refund/Re-credit for the amount debited erroneously in the month of June 2015 at Sr. No. 851 dated 09.06.2015 amounting to Rs. 6,11,073.84 under Section 11B of Central Excise Act, 1944. The claimant is filing ER-3 for the excisable goods manufactured and cleared on monthly basis. During the month of June 2015 they cleared the N-VALARIC ACID which was as such imported vide bill of entry No. 8926775 dated 16.04.2015 and the said consignment was rejected and re-exported as such due to technical issues vide ARE-1 No. 72/2015-16 dated 09.06.2015 under UT-1 and proof of export had been submitted on 28.09.2015.

3. The Assistant Commissioner, Central Excise & Customs, Division-II, Vadodara-I found that the assessee has rightly reversed the Cenvat Credit taken on said goods under the provisions of Rule 16(2) of Central Excise Rules, 2002 as no process amounting to manufacture was involved. Further, as no manufacturing activity is carried out on subject goods, question of duty payment or refund thereof doesn't arise. Further, as regards incidence of duty suffered on importation of said goods. He observed that assessee has

already claimed duty drawback and assessed the goods on export under Section 74 of Customs Act, 1962. These facts are mentioned in the applicant export application for export of goods under claim for duty drawback. Thus, finding no merit in the applicant's communication regarding re-credit / refund of Cenvat credit reversed and accordingly rejected the applicant request for refund / re-credit of amount debited as per Entry No. 857 dated 09.06.15 vide Order-in-Original No. Rebate/166/774/2016-17 dated 25.07.2016.

4. Being aggrieved with the above Order-in-Original dated 25.07.2016, the applicant filed appeal before Commissioner (Appeals) who vide Order-in-Appeal No. VAD-EXCUS-001-APP-401/2016-17 dated 26.10.2016 upheld the Order in Original and rejected the appeal filed by the applicant.

5. Being aggrieved by the aforesaid Order in Appeal the applicant has filed the instant revision application under Section 35EE of Central Excise Act, 1944 before Central Government mainly on the following grounds:

5.1 The applicant submitted the following discussion, will clearly reveal that any Input or Capital Goods, imported on payment of Countervailing Duty of Customs and Additional Duty of Customs, can be re-exported without payment of Central Excise Duty or CENVAT Credit, in terms of the provisions of Rule 19(1) of the Central Excise Rules, 2002, read with, Notification, 42/2001-C.E. (N.T.), dated 26.6.2001 or on payment of CENVAT Credit or Central Excise Duty, corresponding to CENVAT Credit originally availed of, with a Claim for Rebate, under Rule 18 of the Central Excise Rules, 2002, read with Notification, 19/2004-C.E, (N.T.), dated 6.9.2004.

5.1.1 The Applicants, rely upon the Circular F. No. 345/2/2006- TRU, dated 29.8.2000 issued by the Ministry of Finance, Department of Revenue, Central Board of Excise & Customs, New Delhi, wherein, at Point No. 8, it has been clarified that Inputs or Capital Goods, imported on payment of Central Excise Duty, can be re-exported, without payment of Central Excise Duty, under B-1 Bond, etc.

5.1.2 The Honorable Bombay High Court, in case of C.C.E.. RAIGAD, VERSUS, MICRO INKS LTD. [2011 (270) E.L.T. 360 (Bom.)] confirmed that Inputs or Capital Goods, can be exported on payment of Central Excise Duty or CENVAT Credit and Rebate thereof, can be claimed under the Central Excise Law.

5.1.3 The Honorable Tribunal, in case of FINOLEX CABLES LTD., VERSUS C.C.E., GOA (2007 (210) E.L.T. 76 (Tri-Mumbai)], maintained that any imported Inputs, in respect whereof, CENVAT Credit has been claimed, can be exported, either under Bond or under Claim for Rebate, of Central Excise Duty, paid thereon and availed of as CENVAT Credit.

5.1.4 However, the Honorable Bombay High Court, in the case, titled as, C.C.E., VERSUS FINOLEX CABLES [2015 (320) E.L.T. 256 (Bom.)], 256 (Bom.)], maintained that Inputs, in respect whereof, CENVAT Credit has been claimed, can be exported, either under Rule 18 or Rule 19 of the Central Excise Rules, 2002,

5.1.5 Exactly similar views have been taken by the Honorable Tribunal, in the following Decisions:

- 2008-TIOL-2781-CESTAT-AHM VIDEOCON INTERNATIONAL LTD. VERSUS C.C.E., VADODARA-II.
- 2012-TIOL-741-CESTAT-MUM VISTA FILM & PACKAGING PVT. LTD. VERSUS C.C.E., THANE-I.
- 2009-TIOL-2083-CESTAT-MAD SUPER SPINNING MILLS LTD. VERSUS C.C.E., COIMBATORE.
- 2012 (285) E.L.T. 469 (G.O.I.) IN RE: DIVI'S LABORATORIES LTD.
- 2010 (258) E.L.T. 574 (Tri.-Chennai) GUJARAT HEAVY CHEMICALS LTD. VERSUS C.C.E., MADURAI.

5.1.6 In the premises, the Respondent, is mistaken in disallowing Refund of CENVAT Credit inadvertently debited by the Applicants, on re-export of imported Inputs, in respect of which, CENVAT Credit was claimed and re-

exported under U.T.-1, without payment of Central Excise Duty but duty was debited inadvertently by the Excise Clerk, on the due date, for payment of duty, for the clearances of excisable goods, made in the previous month. All the above mentioned decisions are applicable to the facts and circumstances of the current case and accordingly. Your Honour, is most humbly and respectfully, requested to direct the Respondent, to refund the said amount, with Interest, at appropriate rate.

5.2 One of the grounds, on which, the Respondent, has rejected the Refund Claim of the Applicants, is to the effect that the Applicants, have claimed Duty Drawback, under Section 74 of the Customs Act, 1962 and as they have claimed the said Duty Drawback, question of granting any Refund of Customs Duty, does not arise.

It was clarified to the Respondent that though Duty Drawback has been claimed under Section 74 of the Customs Act, 1962 but it is only with respect to Basic Customs Duty and not for Countervailing Duty of Customs and Additional Duty of Customs. The corresponding Order of the Customs Authorities. bearing No. 129/2016-17/AC/NSII/JNCH, dated 9.6.2016, granting Duty Drawback only of Basic Customs Duty, under Section 74 of the Customs Act, 1962. These facts should have been verified by the Original Authority but in any way, he was pre-determined to reject the Refund Claim of the Applicants, which Revenue did not belong to the Central Government.

6. A personal hearing was held in this case on 20.10.2022. Shri Saurabh Dixit, Advocate appeared online on behalf of the applicant and submitted that Rule 16 has no role in the matter. He further submitted that reversal of credit on export of inputs is eligible for rebate. He requested to allow their application. He informed that he has submitted written submission in the matter.

7. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

8. Government observes that applicant had filed refund claim on 04.03.2016 seeking refund/Re-credit for the amount debited erroneously in the month of June, 2015 amounting to Rs. 6,11,073.84 under Section 11B of Central Excise Act, 1944. The claimant is filing ER-3 for the excisable goods manufactured and cleared on monthly basis. During the month of June, 2015 they cleared the N-VALARIC ACID which was as such imported and the said consignment was rejected and re-exported as such, due to technical issues under UT-1 and proof of export was submitted. The Assistant Commissioner, Central Excise & Customs, Division-II, Vadodara-I found that the assessee has rightly reversed the Cenvat Credit taken on said goods under the provisions of Rule 16(2) of Central Excise Rules, 2002 as no process amounting to manufacture was involved. Further, as no manufacturing activity is carried out on subject goods, question of duty payment or refund thereof doesn't arise. Further, as regards incidence of duty suffered on importation of said goods. He observed that assessee has already claimed duty drawback and assessed the goods on export under Section 74 of Customs Act, 1962. These facts are mentioned in the applicant export application for export of goods under claim for duty drawback. Thus, finding no merit in the applicant's communication regarding re-credit / refund of Cenvat credit reversed and accordingly rejected the applicant request for refund / re-credit of amount debited.

9. Before taking up the case for decision on merits, Government finds it proper to first examine the issue of jurisdiction maintainability of this revision application before Central Government under the provisions of Section 35EE of the Central Excise Act, 1944, Hence, Government proceeds to discuss relevant statutory provisions.

*9.1 "**Section 35EE. Revision by Central Government.** - (1) The Central Government may, on the application of any person*

aggrieved by any order passed under Section 35A, where the order is of the nature referred to in the first proviso to sub-section (1) of Section 35B, annul or modify such order :"

9.2 Section 35B(1) of Central Excise Act, 1944.

"35B. Appeals to the Appellate Tribunal. - (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) a decision or order passed by the [Commissioner of Central Excise] as an adjudicating authority;

(b) an order passed by the [Commissioner (Appeals)] under section 35A;

(c) .....

(d) .....

[Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods, exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;

[(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998:]

Provided further that the appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where -

(i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty

of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(ii) the amount of fine or penalty determined by such order."

10. From the above, it is clear that Government's power of revision is restricted to cases which are of the nature referred to in the first proviso to Section 35B(1) referred to in para 9 supra. It is only when duty is leviable at the time of export (in case goods are cleared for export under bond) and/or duty is actually paid before actual export that question of rebate of duty on goods exported can be raised. In other words, rebate on exports presupposes duty leviability on clearance of goods.

11. Government further observes that for claiming the Rebate of duty of goods exported, rebate application is required to be filed under Rule 18 of Central Excise Rules, 2002 and Notification No. 21/2004 CE (NT) dated 6.9.2004, which should contain a claim of rebate, ARE-2 numbers and dates, corresponding invoice numbers and dates, amount of rebate on each ARE-2 and its calculations, Original copy of ARE-2, self-attested copy of Shipping Bill (EP copy) and Bill of Lading/ Airway Bill, and duplicate copy of Central Excise input Invoice under which Central Excise duty was paid/ accounted as payable for goods used in the export product, details of sanction given by AC/DC for input-output ratio, calculation/ details of use of material in the export good etc.

12. Government in the instant case observes that the claim dated 04.03.2016 filed by the applicant, is for seeking refund/Re-credit for the amount debited erroneously in the month of June 2015 amounting to Rs. 6,11,073.84 in respect of which the applicant has filed a refund claim, was not paid by the applicant during the time of exports but at a much later stage, for payment of duty for the clearances of excisable goods, made in the previous month. Further, the said claim is neither filed under Rule 18 of Central Excise Rules, 2002 and Notification No. 21/2004 CE (NT) dated 6.9.2004 nor accompanied by the documents mentioned thereunder (refer para 11 above).

13. Thus, Government notes that the claim filed by the applicant is not of rebate of duty paid but of refund /Re-credit of duty debited inadvertently by the Excise Clerk, on the due date, for payment of duty, for the clearances of excisable goods, made in the previous month and therefore the issue arising out of impugned Order in Appeal is required to be agitated before proper legal forum, i.e. Tribunal.

14. In view of the above discussions Government holds that the instant Revision Application is not maintainable under Section 35EE ibid and the revision application is liable to be dismissed.

15. The revision application thus stands dismissed being non-maintainable for lack of jurisdiction. The appellant is at liberty to agitate the matter before appropriate forum.

27/2/23

(SHRAWAN KUMAR)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No. 96/2023-CX (WZ) /ASRA/Mumbai DATED 27.02.23

To,
M/s. Transpek Industry Limited,
Coastal Highway, Village Ekalbara,
Taluka - Padra,
District – Vadodara- 391440.

Copy to:

1. The Principal Commissioner of CGST, Vadodara-I, GST Bhawan, Race Course Circle, Vadodara- 390 007.
2. Commissioner (Appeals-I), CGST, Vadodara.
3. Saurabh Dixit, Advocate. B-216/217, Monalisa Business Centre, Beside Samanvay Saptarishi Manjalpur, Vadodara – 390011.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.