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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. 195/433/16-RA/6138

Date of Issue: 01/11/2022

ORDER NO. 988/2022-CEX (WZ)/ASRA/MUMBAI
DATED 20.10.2022 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. Macleods Pharmaceuticals Ltd.

Respondent : Principal Commissioner of CGST Palghar.

Subject : Revision Application filed, under section 35EE of the Central
Excise Act, 1944 against the Order-in-Appeal No. -
Sk/125/TH-II/2016 dated 14.03.2016 passed by the
Commissioner(Appeals), Central Excise, Mumbai.

ORDER

This Revision Application has been filed by M/s. Macleods Pharmaceuticals Ltd. situated at Plot NO 1 & 2, Mahim Road, Palghar-401 404 (hereinafter referred to as "Applicant") against the Order-in-Appeal No. – Sk/125/TH-II/2016 dated 14.03.2016 passed by the Commissioner(Appeals), Central Excise , Mumbai.

2. Brief facts of the case are that the Applicant is holding Central Excise registration and is engaged in the manufacture of excisable goods namely P & P medicaments falling under Chapter 30 of the Central Excise Tariff Act, 1985. The applicant had exported medicaments under claim of duty paid on exempted as well as dutiable products and had claimed rebate of duty paid on both of the products. The respondent sanctioned the rebate claim of duty paid on dutiable products and reduced their claim of duty paid on exempted goods. The applicant vide their letter dated 17.02.2012 requested for granting re-credit of excess duty paid on exempt goods. The applicants were denied re-credit of duty paid in respect of exempted goods vide letter dated 16.03.2012. Aggrieved, the Applicant filed appeal with the Commissioner(Appeals),Central Excise ,Mumbai., who vide Order-in-Appeal No. – Sk/125/TH-II/2016 dated 14.03.2016 rejected their appeal.

3. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant had filed this revision Application on the following grounds:

- i. Once the rebate is reduced to the extent of duty paid on exempt goods exported, then such amount has to be allowed re-credit which is the settled position of law.
- ii. That in any case, exemption under Section 5A are applicable to the goods cleared for home exemption and does not apply to exports, as, goods exported are not exempted goods, but are chargeable to duty at par with dutiable goods. Therefore, the exemption claimed by the applicant is not in violation of Section 5A(1A) of CEA.
- iii. that as far as recredit of duty paid on exempt exported goods is concerned, there has been inaction on the part of Department as in

sanctioning order it was only mentioned that investigation is spending, but no investigation was pending.

- iv. their letter dated 19.04.2011 was specific and clear wherein it was requested to grant rebate of duty paid on non-exempt goods exported and to reduce the claim to the extent of duty paid on exempt goods exported, subject to giving re-credit of duty paid on exempt goods in their cenvat account.
- v. in any case, it was submitted that even if rebate is not admissible, re-credit in cenvat credit account is permissible, as same is to be treated as deposit paid without authority of law, in the light of the following judgments:
 - (a) CCE v/s. Jayant Oil Mills - 2009 (235) ELT 223 (Guj)
 - (b) CCE vis. Suncity Alloys - 2007 (218) ELT 174 (Raj)
 - (c) Saurav Chemicals v/s. CCE - 2013 (289) ELT 351 (T)
 - (d) JVS Exports 2014 (312) ELT 877 (GOI)
- vi. In view of above, applicant requested to set aside the order in appeal and to grant re-credit of excess duty paid on exempted goods.

4. Personal hearing in the matter was fixed on 21.06.2022, Ms. Manasi Patel , Advocate appeared online on behalf of the Applicant for the hearing and reiterated their earlier submission. She contended that duty not payable on the exported exempted goods needs to be re-credited to their cenvat account. She further submitted that in view of Section 142(3) of CGST Act, amount may be paid in cash.

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

6. Government notes that the applicant vide their letter dated 19.04.2011 had requested the Adjudicating Authority before passing the OIOs to sanction the rebate claim pertaining to excise duty paid on dutiable goods and asked to recredit the excise duty paid on exempted export goods.

Adjudicating authority sanctioned the rebate claim after excluding the amount of duty paid on exempted goods by stating that this issue of paying duty on exempted goods for export is being investigated separately by the Superintendent Palghar Division.

7. Government finds that Appellate authority cited section 5A(1A) of the Central Excise Act, 1944 to support the fact that applicant was not required to pay the duty when the goods were exempted. In the present case, applicant neither argued the fact that the goods were not exempted nor that they had paid the duty. The issue to be decided in the instant case is that whether re-credit of duty paid on exempted goods is allowed or not.

8. Government in their earlier order in case of M/s JVS Exports 2014 (312) ELT 877 (GOI) as relied by the applicant also, has discussed this issue at length before coming to the conclusion that the duty paid against the exempted goods cannot be treated as duty paid under the provision of Central Excise Law and allowed the recredit of excess duty paid on exempted goods. Government further observed in the aforesaid order that this amount paid as duty is to be treated voluntary deposit with the Government and same cannot be retained without any authority of law, therefore the same is to be refunded in the manner it was initially paid. The relevant portion of the same is produced as:

" 7. On perusal of records Government observes that applicants paid duty on the exported goods under Notification No. 59/2008-C.E., dated 7-12-2008 @ 4% and claimed rebate of duty paid on exported goods. In fact, the said goods were exempted unconditionally from payment of duty of excise under Notification No. 29/2004-C.E., dated 9-7-2004 as amended vide Notification No. 58/2008-C.E., dated 7-12-2008. So, applicant has no option to pay duty in terms of provisions of Section 5A(1A) of Central Excise Act, 1944. Commissioner (Appeals) has upheld order-in-original relying on the Section 5A(1A) of the Central Excise Act, 1944 and C.B.E. & C. Circular No. 937/27/2010-CX., dated 26-11-2010 and held that the applicants are not eligible for any rebate for the duty paid on the exempted goods during the said period 14-2-2009 to 19-2-2009.

8. Government notes that C.B.E. & C. Circular No. 937/27/2010-CX., dated 26-11-2010 has clarified the issue as under :

"References had been received from the field formations as well as trade to clarify the ambiguity arising out of simultaneous prevalence of two exemption notifications namely 29/2004-C.E., dated 9-7-2004 as amended by notification No. 58/2008-C.E., dated 7-12-2008 and another notification 59/2008-C.E., dated 7-12-2008. The period of dispute is from 7-12-2008 to 6-7-2009. During this period while one notification No. 29/2004-C.E. as amended granted full exemption to certain items of Textile Sector without any condition, the second notification 59/2008-C.E. prescribed a concessional rate of duty of 4% on these items, with the benefit of Cenvat credit.

2. The dispute was with regard to whether an assessee can avail the benefit of either of the above said two notifications whichever is beneficial to him or he is bound to

avail the unconditional exemption under Notification No. 20/2004-C.E., as amended, during the period under dispute in terms of the provisions of Section 5A(1A) of the Central Excise Act, 1944.

3. The matter was examined in the Board. As a substantial question of law was involved, the matter was referred to the Law Ministry for its opinion. The Ministry of Law has opined that the language used in said Section 5A(1A) is unambiguous and principles of harmonious construction cannot be applied in the instant case in view of specific provision under sub-section (1A) of Section 5A of the Central Excise Act. The Law Ministry has accordingly concluded that in view of the specific bar provided under sub-section (1A) of Section 5A of the Central Excise Act. The manufacturer cannot opt to pay the duty under Notification 59/2008-C.E., dated 7-12-2008 and he cannot avail the Cenvat credit of the duty paid on inputs.

4. The aforesaid opinion of Law Ministry has been accepted by the Board, pending issues, if any, may be decided accordingly."

The C.B.E. & C. Circular has clearly stipulated that in view of specific bar provided under Section 5A(1A) of Central Excise Act, 1944, manufacturer cannot opt to pay duty under Notification No. 59/2008-C.E., dated 7-12-2008 and rebate of duty.

9. Government observes that as per explanation 1(A) to Section 5(A) of Central Excise Act, 1944 the manufacturer of such goods has no option to pay Central Excise duty since Notification No. 29/2004-C.E., dated 9-7-2004 as amended, issued under Section 5A(1A) of Central Excise Act, 1944 grants unconditional exemption from whole of duty. The duty paid cannot be treated as duty paid under the provision of Central Excise Law. As such, the rebate of said amount is not admissible to the applicant under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 since exported goods cannot be treated as duty paid goods. Government, therefore, uphold the impugned order-in-appeal to this extent. Applicants have pleaded that they are entitled for refund of the Cenvat credit availed either by cash or by re-credit in Cenvat account as no duty is payable on export goods. Government notes that this amount paid as duty is to be treated voluntary deposit with the Government and same cannot be retained without any authority of law. The said amount is required to be refunded in the manner it was paid as held by Hon'ble High Court of Rajasthan in the case of C.C.E. v. Suncity Alloys reported at 2007 (218) E.L.T. 174 (Raj. H.C.). Hon'ble High Court of Punjab & Haryana vide order, dated 11-9-2008 in the case of M/s. Nahar Industrial Enterprises Ltd. v. UOI reported as 2009 (235) E.L.T. 22 (P & H) has held that refund in case of higher duty paid on export product which was not payable, is not admissible and refund of excess paid duty/amount in Cenvat credit is appropriate. Government observes that the amount so paid by the applicant is to be treated as voluntary deposit with Government and same is to be refunded in the manner it was initially paid. In the instant case the same was paid from Cenvat credit account and hence government directs that the said amount may be allowed to be re-credited in their Cenvat credit account. The impugned O-I-A is modified to this extent."

Government finds that as the facts of the present Revision Application are similar to the above quoted case, the ratio of the same is squarely applicable to this case.

9. The applicant has also requested that in view of Section 142(3) of CGST Act, amount may be paid in cash. Government seeks to emphasize that the present proceedings are in exercise of the powers vested in terms of Section 35EE of the CEA, 1944 and must be exercised within the framework of the Central Excise Act, 1944. The provisions of the CGST Act, 2017 are not exercisable in revision proceedings. Therefore, the relief in this regard cannot be entertained at this stage.

10. The ratio of the case law as discussed above confirms that the duty payment on the exempted exported goods is to be treated as voluntary deposit made by the applicant with the Government. The duty paid amount may be allowed to be re-credited in the CENVAT credit account of the manufacturer subject to compliance of the provisions of Section 12B of Central Excise Act, 1944. Government therefore sets aside the impugned Order-in-Appeal No. – Sk/125/TH-II/2016 dated 14.03.2016.

11. Revision application is disposed off in above terms.


(SHRAWAN KUMAR)

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

ORDER No. 988/2022-CEX (WZ) /ASRA/Mumbai Dated 20.10.2022

To,

1. M/s. Macleods Pharmaceuticals Ltd. situated at Plot NO 1 & 2, Mahim Road, Palghar-401404 .
2. The Principal Commissioner CGST & CX, Palghar Commissionerate.

Copy to:

1. The Commissioner(Appeals), Central Excise , Mumbai-I, Mehar Bldg., Dadi Seth Lane, Chowpatty, Mumbai- 400007.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.