

SPEED POST



F. Nos. 199/03/ST/2019—R.A.
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..06/09/2021

Order No. 31/21-ST dated 06/09/21 of the Government of India, passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under Section 35 EE of the Central Excise Act, 1944 read with Section 83 of Finance Act, 1994.

Subject: Revision Application filed under Section 35 EE of the Central Excise Act, 1944 read with Section 83 of Finance Act, 1994 against the Order-in-Appeal No. 47/HAL/ST/2019-20 dated 14.06.2019 passed by the Commissioner of CGST & Central Excise (Appeals), Kolkata-II.

Applicant: The Commissioner of CGST & Central Excise, Haldia.

Respondent: M/s Orissa Metaliks Pvt. Ltd. (Unit-II), Kolkata.

107

ORDER

A Revision Application No. 199/03/ST/2019-R.A. dated 30.09.2019 has been filed by the Commissioner of CGST & Central Excise, Haldia (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 47/HAL/ST/2019-20 dated 14.06.2019, passed by the Commissioner of CGST & Central Excise (Appeals), Kolkata-II.

2. The facts leading up to the present revision application are that M/s Orissa Metaliks Pvt. Ltd., Unit-II, Kolkata (hereinafter referred to as the Respondent) submitted a refund claim of Service Tax for an amount of Rs. 27,94,392/-, on 06.10.2017, under Notification No. 41/2012-ST dated 29.06.2012, for the goods cleared for export having Let Export Orders dated from 07.10.2016 to 25.10.2016, towards the Service Tax paid on specified services used in the export of excisable goods, namely, Iron Ore Pellets. The refund sanctioning authority issued a Deficiency Memo on 16.10.2017 and in response the Respondent submitted the revised claim amounting to Rs. 34,97,349/-, on 05.01.2018, by including 05 additional invoices which were not included in the original claim. The original authority, thereafter, issued a Show Cause Notice dated 02.02.2018. In the personal hearing held pursuant thereto, on 25.09.2018, the Respondent further revised the refund claim by including Swach Bharat Cess amounting to Rs. 1,24,992/-. Accordingly, the revised claim of Rs. 34,97,349/-, was submitted on 25.09.2018. The original authority, vide Order-in-Original No. R/178/ST/Refund/KGP/2018-19 dated 11.12.2018, sanctioned the refund of Rs. 22,46,954/-, out of the total claim of Rs. 34,97,349/-, and rejected the balance amount on the following grounds:

- (i) Amount of Rs. 7,02,956/- in respect of five invoices sought to be included in the revised claim in response to the Deficiency Memo and amount of Rs. 1,24,992/- in respect of Swach Bharat Cess sought to be included in the revised claim filed at the time of the personal hearing on 25.09.2018, was rejected on the ground of limitation.
- (ii) Rs. 54,678/- was rejected on the ground of short-shipment of 2882 M.T of goods.

- (iii) Rs. 9,051/- in respect of service tax paid on port services as the refund was claimed on a weightment of 31125.48 MT whereas the quantity actually exported was 19242 MT under SB No. 1822624 dated 24.10.2016.
- (iv) Rs. 3,348/- in respect of service tax paid on Handling & Vessel Loading services under SB No. 1425062 dated 03.10.2016 and Rs. 637/- on testing services under SB No. 1822624 dated 24.10.2016 as the amount was claimed on excess quantity of goods than that actually exported.
- (v) Rs. 19,775/- was rejected on the ground that the services had been provided beyond the port of export.
- (vi) Rs. 4,59,950/- in respect of Service Tax paid on GTA services was rejected for want of necessary documents to correlate with the exports and also the due to absence of proof regarding non-availment of Cenvat Credit.

Being aggrieved, the Respondent herein had filed an appeal before the Commissioner (Appeals), who vide impugned Order-in-Appeal, allowed refund of Rs. 7,02,956+ Rs. 1,24,992 = Rs. 8,27,948/-, which was rejected as time barred by the original authority, by holding it to be a continuous claim. The amount of Rs. 67,714/-, rejected by the original authority on the ground of short-shipment, was also allowed by the Commissioner (Appeals) on the ground that the Iron Ore Pellets have to be aggregated at the port of export in a continuous manner and no evidence had been adduced by the department that the 2882 M.T. of goods short-shipped, were not exported subsequently or diverted elsewhere. The items at sl. (iii), (iv) & (vi) were not pursued in appeal.

3. The revision application has been filed on the grounds that the inclusion of additional invoices involving Service Tax and the Swach Bharat Cess, amounting to Rs. 8,27,948/- (as above), cannot be construed as a continuous attempt with reference to the original claim and is to be treated as a fresh claim submitted after the stipulated time period. Hence, the amount is clearly time barred. In respect of the goods short-shipped, the short-shipment is evident from the relevant Shipping Bills wherein the actual quantity exported is 33632 M.T. and there is no evidence that the balance quantity short-shipped i.e. 2882 M.T. was actually exported with reference to subject refund claims. Further the claim of Rs. 19,775/- pertained to



testing services at the Tie Shan Port, China and hence this claim pertained to services provided beyond port of export. A written reply dated 10.01.2020 and detailed written submissions have been filed on 31.08.2021 by the Respondent. It is the contention of the Respondent that the amount of Service Tax in respect of five additional invoices and Swach Bharat Cess i.e. Rs. 8,27,948/- was inadvertently missed out in the original refund claim filed on 06.10.2017 and, therefore, the revised claim was subsequently filed in response to the Deficiency Memo on 25.09.2018 during the course of personal hearing; that there is no dispute that the service was provided in relation to the exported goods; that CESTAT in the case of *Hindustan Fertilisers Corporation Limited, Durgapur {1987 (31) ELT 525 (Tribunal)}* has held that the enhanced refund claim is to be treated in time as original refund claims was filed within time limit and it amounts to an amendment of the original claim only. In respect of the Service Tax refund relating to the short-shipment, it is submitted that the short-shipped quantity has been shipped by the Respondent under the cover of another Shipping Bill and that since the service was with respect to the exported goods, the refund allowed by the Commissioner (Appeals) is in order. Further, the testing services were availed in respect of exported goods. Hence, the refund of service tax paid thereon is also admissible.

4. Personal hearings in the matter were fixed on 22.07.2021, 13.08.2021 & 01.09.2021. Sh. Chiraag Patodia, Authorised Representative, appeared for the Respondent in the PH held on 01.09.2021. No one appeared for the Applicant department nor any request for adjournment has been received. Sh. Chiraag Patodia reiterated the contents of the written submission filed on 31.08.2021. Since sufficient opportunities have been provided to the Applicant department, the case is taken up for disposal based on records.

5.1 The Government has carefully examined the matter.

5.2 As regards the claim of Rs. 8,27,948/- in respect of five additional invoices and Swach Bharat Cess, which was added to the claim, in response to the Deficiency Memo and at the time of personal hearing held on 25.09.2018 pursuant to the Show

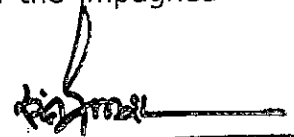
Cause Notice dated 02.02.2018, respectively, it is the contention of the Respondent that this amounts to merely an amendment to the original claim and therefore enhanced refund claim is to be treated as a continuous claim. It is also pointed out that the original authority has, in fact, accepted the additional amount of Rs. 2,996/- in response to the Deficiency Memo beyond the original limitation period of one year in their own case covered by the RA No. 199/02/ST/2019-RA and, therefore, the department should accept this additional claim of Rs. 8,27,948/- as well. The department, on the other hand, has pointed out that the amount of Rs. 8,27,948/- was in respect of new invoices and Swach Bharat Cess which was never a part of the original claim. Further, the Government observes from the records of RA No. 199/02/ST/2019 that the amount of Rs. 2,996/- was by way of correction or rectification in the original claim whereas amount of Rs. 8,27,948/- involved herein represents the amount which was never part of the original claim. The decision of the Tribunal in the case of Hindustan Fertilisers Corporation Limited, Durgapur (supra), relied upon by the Respondent, is with reference to an amendment made on account of wrong calculation of the duty amount sought to be refunded. In other words, the Tribunal has held that the amendment necessitated due to a calculation error, cannot be rejected as time barred. In the earlier case, the amount of Rs. 2,996/- is added due to the rectification of a mistake in the original claim whereas amount of Rs. 8,27,948/-, in the present case, is on account of a entirely new invoices and SBC which was never a part of the original claim. Therefore, there can be no parity between the two. The Commissioner (Appeals) has relied upon the judgment of the Hon'ble Delhi High Court in the case of *Commissioner of Central Excise, Delhi-I vs. Arya Exports and Industries {2005 (192) ELT 89 (Del.)}* in support of his findings. However, Government observes that in the aforesaid case, the issue was regarding the procedural irregularity committed by the assessee at the time of filing the refund application which was sought to be corrected whereas, in the present case, the refund claim is sought to be enhanced by adding entirely new invoices as well as SBC which was never a part of the original claim. The contention that the Respondent herein had failed to claim these amounts due to oversight cannot also be accepted as they themselves had calculated the amount of refund and are entirely responsible for the same. The Tribunal has taken a similar view in

the case of *Ravi Paints and Chemicals vs. Commissioner of Central Excise, Chennai* {2004 (177) ELT 1074 (Tri. - Chennai)}. Therefore, the Government finds that the decision of Commissioner (Appeals), on this count, cannot be sustained.

5.3 As regards refund of Service Tax pertaining to the short-shipped quantity of 2882 M.T., the Government observes that it is an admitted position of the Respondent herein that this quantity was not exported, vide the relevant Shipping Bills but is claimed to have been exported by a subsequent Shipping Bill. No details of the Shipping Bill, vide which this quantity has been shipped, are forthcoming. It is trite to say that it is for the claimant to substantiate that the claim pertains to the goods which have been actually exported and are covered by those export shipments which are the subject matter of specific claim. Therefore, by observing that the department has failed to produce evidence that short-shipped quantity is not exported subsequently or diverted elsewhere, the Commissioner (Appeals) has sought to shift this burden from the claimant to the department which is not acceptable in law. As such, the findings of Commissioner (Appeals), on this count, also cannot be sustained.

5.4 In respect of the refund of service tax of Rs. 19,775/- paid on testing services, it is not disputed that these testing services were availed at Tie Shan Port, China, i.e., the port of discharge of exported goods. Thus, it is evident that the services have been provided after the export of goods had been completed. As such, the notification no. 41/2012-ST is not applicable to subject services.

6. In view of the above, the revision application is allowed and the impugned Order-in-Appeal is set aside.



(Sandeep Prakash)

Additional Secretary to the Government of India

The Commissioner of CGST & CE, Haldia,
15/1, Strand Road, MS Building,
Kolkata – 700 001.

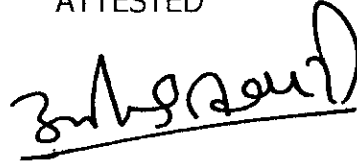
dfc 06.09.2021

G.O.I. Order No. 31/21-ST dated 06/09/2021

Copy to:-

1. M/s Orissa Metaliks Pvt. Ltd. (Unit-II), 1, Garstin Place, Orbit House, Room No. 3B, 3rd Floor, Kolkata – 700 001.
2. The Commissioner of CGST (Appeals), Kolkata-II, 3rd Floor, Bamboo Villa, 169, A.J.C. Bose Road, Kolkata – 700 014.
3. PA to AS(Revision Application).
4. ✓ Spare Copy.
5. Guard File.

ATTESTED



आशीष तिवारी / ASHISH TIWARI
सहायक आयुक्त/Assistant Commissioner
केन्द्रीय वस्तु एवं सेवा कर, केन्द्रीय उत्पाद एवं सीमा शुल्क
CGST, Central Excise & Customs
राजस्व विभाग / Department of Revenue
वित्त मंत्रालय / Ministry of Finance
भारत सरकार / Government of India
नई दिल्ली / New Delhi

