

SPEED POST



F. No. 199/04/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..06/09/21

Order No. 32/21-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. 50/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.

ORDER

A Revision Application No. 199/04/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. 50/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. 28,03,956/-, on 17.11.2017, under Notification No. 41/2012-ST dated 29.06.2012, for the goods cleared for export under two Shipping Bills dated 24.10.2016 & 11.11.2016, 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 08.12.2017. In response, the Respondent withdrew the refund claim in respect of the Shipping Bill dated 24.10.2016 and revised the claim to Rs. 12,07,578/-, on 05.01.2018, by including 01 invoice of Kolkata Port Trust for port services related to the Shipping Bill dated 17.11.2016. The original authority, thereafter, issued a Show Cause Notice dated 02.02.2018. In the personal hearing held, on 10.10.2018, the Respondent further revised the refund claim by including Swach Bharat Cess, amounting to Rs. 37,248/-. Accordingly, the revised claim of Rs. 12,50,713/-, was submitted on 10.10.2018. The original authority, vide Order-in-Original No. R/183/Refund/ST/KGP/2018-19 dated 20.12.2018, rejected the entire refund claim observing the following:

- (i) Amount of Rs. 4,28,593/- was rejected as time barred, as the LEO was issued on 17.11.2016 and the claim was filed on 17.11.2017.
- (ii) Amount of Rs. 6,12,072/- in respect of one invoice bearing no. CJS 163601 dated 11.01.2017 of M/s Kolkata Port Trust for port services, sought to be included in the revised claim filed at the time of filing reply to the Deficiency Memo and Rs. 37,248/- in respect of Swach Bharat Cess which

was included at the time of personal hearing, was rejected on the ground of limitation.

- (iii) Rs. 1,999/- was rejected on the ground of short-shipment of 3646.46 M.T of goods also.
- (iv) Rs. 3,711/- in respect of service tax for port services not related to the SB's of the instant claim.
- (v) Rs. 1,64,808/- 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. 4,28,593/- which was rejected as time barred as well as that of Rs. 6,49,320/- (Rs. 6,12,072/- + 37,248/-), which was also rejected as time barred by the original authority, by holding it to be a continuous claim. The amount of Rs. 1,999/-, 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 has been adduced by the department that the 3646.46 M.T. of goods short-shipped, were not exported subsequently or diverted elsewhere.

3. The revision application has been filed on the grounds that the amount of Rs. 4,28,593/- has been allowed on the grounds that the date of filing on 17.11.2017 is within time limit of 01 year whereas total quantum of service tax paid in this respect is Rs. 4,24,989/- only, Further, the inclusion of a additional invoice involving Service Tax, amounting to Rs. 6,49,320/-, cannot be construed as a continuous attempt with reference to their original claim and is to be treated as a fresh claim submitted after the stipulated time period, which was submitted after issuance of the Show Cause Notice proposing rejection of original claim. 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 23,266.46 M.T. and there is no evidence that the balance quantity short-shipped i.e. 3646.46 M.T. was

actually exported with reference to subject refund claims. 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 one additional invoice and Swach Bharat Cess (as above) i.e. Rs. 6,49,320/- was inadvertently missed out in the original refund claim filed on 17.11.2017 and, therefore, the revised claim was filed; that there is no dispute that this is in respect of service 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 claims 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.

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. It is observed that out of the total amount rejected by the original authority, the refund claim of Rs. 1,64,808/- and that of Rs. 3,711/- has not been pursued in appeal by the Respondents herein before the Commissioner (Appeals). Therefore, the matter stands settled to this extent.

5.2 As regards the total revised claim of Rs. 6,49,320/- in respect of a additional invoice of M/s Kolkata Port Trust and Swach Bharat Cess which was added to the

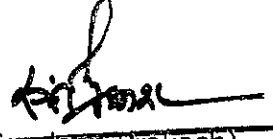
claim, at the time of filing reply to Deficiency Memo and during personal hearing respectively, it is the contention of the Respondent that this amounts to an amendment to the original claim and therefore enhanced refund claim is to be treated as a continuous claim. It is also pointed out that the original authority has, in fact, accepted the additional amount of Rs. 2,996/- in response to the Deficiency Memo issued, in a matter covered by RA No. 199/02/ST/2019-RA, beyond the original limitation period of one year and, therefore, the department should accept this additional claim of Rs. 6,49,320/- as well. The Government observes from the records of RA No. 199/02/ST/2019-RA that the differential amount of Rs. 2,996/- was accepted as it was merely rectification of amount in respect of a particular railway receipt which was claimed less earlier whereas the amount of Rs. 6,49,320/-, in the present case, is in respect of an invoice and SBC which was never a part of the original claim. Thus, the amount of Rs. 2,996/- is by way of correction or rectification in the original claim whereas amount of Rs. 6,49,320/- 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/- was added due to the rectification of a mistake in the original claim whereas in the present case amount of Rs. 6,49,320/- is on account of a entirely new invoice 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 an entirely new invoice and SBC which was never a part of the original claim. The contention that the Respondent herein had failed to claim this amount 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 amounting to Rs. 18,840/- and Rs. 1,999/- pertaining to the short-shipped quantity of 3646.46 M.T., the Government observes that it is an admitted position of the Respondent herein that this quantity was not exported, vide the Shipping Bill dated 11.11.2016, 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 subject matter of a 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. Therefore, the findings of Commissioner (Appeals), on this count, also cannot be sustained.

5.4 In respect of the refund claim amounting Rs. 4,28,593/-, the Commissioner (Appeals) has held that the same is not time barred as the LEO was issued on 17.11.2016 whereas the claim is filed on 17.11.2017. The Government observes that, as per Section 9(1) of the General Clauses Act, 1897, the limitation has to be computed after excluding the first in a series of days, i.e. 17.11.2016, in this case. Hence, the findings of Commissioner (Appeals) in this regard are correct. However, the department has pointed out that the correct amount involved is only Rs. 4,24,989/-. Therefore, the impugned OIA is upheld on this count but by modifying the amount involved as Rs. 4,24,989/-.

6. In view of the above, the revision application is partly allowed to the extent indicated above.



(Sandeep Prakash)

Additional Secretary to the Government of India

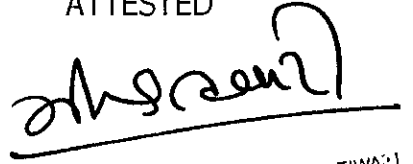
The Commissioner of CGST & CE, Haldia,
15/1, Strand Road, MS Building,
Kolkata – 700 001.

G.O.I. Order No. 32/21-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