

SPEED POST



F.No. 195/60/2016-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. 13/12/21.

Order No. 258/2021-CE dated 13-12-2021 of the Government of India, passed by **Sh. Sandeep Prakash**, Additional 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 Order-in-Appeal No. 67 to 87(AK)CE/JPR/2013 dated 06.04.2016 passed by the Commissioner (Appeals), Customs & Central Excise, Jaipur.

Applicants : M/s Blue Whale Enterprises India Pvt. Ltd., Jaipur.

Respondent : Commissioner, CGST, Jaipur.

ORDER

A revision application no. 195/60/2016-R.A. dated 03.05.2016 has been filed by M/s Blue Whale Enterprises India Pvt. Ltd., Jaipur (hereinafter referred to as the Applicants) against the Order-in-Appeal No. 67 to 87(AK)CE/JPR/2013 dated 06.04.2016 passed by the Commissioner (Appeals), Customs & Central Excise, Jaipur wherein the Commissioner (Appeals) has rejected the Applicants' appeal against the Order-in-Original No. 93 to 113/Reb./2012 dated 04.07.2012 passed by the Deputy Commissioner, Central Excise, Jaipur.

2. Brief facts of the case are that the Applicants were engaged in the manufacture and export of "Rainbow" brand Pan Masala falling under CETH 21069020 of the Central Excise Tariff Act, 1985. They filed 08 rebate claims totally amounting to Rs. 25,80,520/-, on 05.08 2011, and 13 rebate claims totally amounting to Rs. 41,93,345/-, on 02.09.2011, in respect of the goods exported through merchant exporter, under self-sealing procedure. The original authority rejected the said rebate claims, vide the aforesaid Order dated 04.07.2012, on the grounds of:

- (i) Not following the proper procedure for self sealing under claim for rebate;
- (ii) Identity of export goods not established;
- (iii) Not admissible in view of condition no. 2(e) of Notification No. 19/2004-CE (NT) dated 06.09.2004 as amended; and
- (iv) Not admissible in view of condition no. 2(h) of Notification No. 19/2004-CE (NT) dated 06.09.2004 as amended.

The allegations against the Applicants also found support in an investigation by DGCEI, Ahmedabad Unit. Aggrieved, the Applicants filed appeals before the Commissioner (Appeals), who, vide the impugned OIA dated 06.04.2016, rejected the same. The Applicants thereafter filed the instant revision application. However, the Government, vide GOI Order No. 633/2018-CX dated 05.12.2018, rejected the same on the ground that the revision application was not accompanied by the requisite fee. The Applicants approached Hon'ble Delhi

High Court in W.P.(C) 11490/2019, challenging the GOI Order dated 05.12.2018. The Hon'ble High Court, vide judgment dated 15.11.2019, quashed the GOI's Order dated 05.12.2018 and remanded the matter for fresh decision on merits in accordance with law, rule and regulations and evidence on record, as expeditiously as possible and practicable.

3. The instant revision application has been filed, mainly, on the grounds that the actual export of goods has not been disputed; that the observations and evidence about self sealing procedure are irrelevant; that there is no dispute that the duty, in respect of which rebate is claimed, was actually paid; that the observation of Commissioner (Appeals) that identity of exported goods was not established is erroneous as there is no doubt about the actual export of goods; and that the rebate claims have been rejected on irrelevant and unsubstantiated grounds. Cross objections were filed by the department vide email dated 22.12.2020.

4. Personal hearing was fixed on 24.12.2020. However, the Applicant, vide email dated 23.12.2020, requested for adjournment. The personal hearing fixed on 30.06.2021 also had to be adjourned due to non-appearance of the Applicant. Thereafter, the hearing was held, in virtual mode, on 28.07.2021. Sh. Venkat R Chari made the submissions on behalf of the Applicant and reiterated the contents of the RA. He requested for 10 days time to file a Synopsis updating the facts and to make additional legal submissions. The Synopsis was to be simultaneously shared with the department, which was required to furnish its comments if any within 10 days thereafter. The Applicant filed further written submissions, in pursuance of the personal hearing held on 28.07.2021, on 25.08.2021. The personal hearing was once again held on 26.11.2021, in virtual mode. Sh. Venkat Chari for the Applicant submitted that the submissions made vide email dated 28.08.2021 are final submissions and they had nothing further to add. Sh. Ripu Daman Singh, Superintendent regretted that comments on the

submissions dated 25.08.2021 had not yet been submitted by the department. Upon being asked, he submitted the following:

- (i) The value of the goods sold by M/s Unicorn Industries, Sikkim to the Applicants has not been redetermined by the jurisdictional authorities.
- (ii) The OIO No. JOD-EXCUS-000-COM-0008-17-18 dated 31.05.2017 has not been accepted by the department and an appeal has been filed before CESTAT. He is not aware of any stay granted by the CESTAT in respect thereof.

The comments of the department on the written submissions made by the Applicant, on 25.08.2021, were received on 26.11.2021 after the personal hearing.

5. In the written submissions filed on 25.08.2021, the Applicant has, inter-alia, stated that a similar controversy involving the period of March, 2012, May, 2012, July, 2012 & August, 2012 had been decided in their favour by the jurisdictional Commissioner by passing an adjudication order on 31.05.2017/07.06.2017; that similar controversy involving two other similarly situated exporters located at Gandhinagar in the state of Gujarat, namely, M/s Kamakshi Tradexim India Pvt. Ltd. and M/s. Grace Nutrients India Pvt. Ltd., has been decided by the Hon'ble Gujarat High Court in the favour of those entities, vide judgments reported at 2016 (338) ELT 528 (Guj.) and 2017 (351) ELT 102 (Guj.); that the Hon'ble Gujarat High Court had directed grant of rebate alongwith interest to the said entities which has been paid by the department and the matter has not been challenged further; that, therefore, it is impermissible for the revenue to raise the same issues and the same controversy against them; that the value of the goods manufactured by M/s Unicorn Industries, Sikkim had not been declared as a case of overvaluation by any competent authority; and that the issue of compliance with the self sealing procedure within export was a minor technical issue which cannot be held against them, though the department had issued another show cause notice to

them for these contraventions and the penalty had been levied which they had complied with. The department, vide comments received on 26.11.2021, has not admitted the contentions of the Applicant.

6.1 The Government has carefully examined the matter. The subject rebate claims were denied on the following grounds:

- (i) Not following the proper procedure for self sealing under claim for rebate;
- (ii) Identity of export goods not established;
- (iii) Not admissible in view of condition no. 2(e) of Notification No. 19/2004-CE (NT) dated 06.09.2004 as amended; and
- (iv) Not admissible in view of condition no. 2(h) of Notification No. 19/2004-CE (NT) dated 06.09.2004 as amended.

6.2 The Government observes that issues at (i) & (ii) above are interrelated in as much as it appears to be the department's contention that as the procedure for self sealing was not properly followed by the Applicant and the export goods were not examined at any stage, the identity of export goods could not be established to be the same as the goods which were cleared from the factory of the Applicant. To examine these interrelated issues, it is, at the outset, necessary to advert to certain admitted/uncontroverted facts, i.e.,:

- (a) The goods were cleared by the Applicant for export through a merchant exporter.
- (b) The Applicant followed the self sealing procedure, as stipulated under Board's Circular No. 426/59/98-CX dated 12.10.1998 read with the Board's Circular No. 736/52/2003-CX dated 11.08.2003.
- (c) The Applicant did not intimate the Superintendent of Central Excise, Range with a copy to Deputy Commissioner of Central Excise having jurisdiction over the factory atleast 24 hours in advance

from the time scheduled for sealing of the packages for stuffing and sealing of a container.

6.3 Before proceeding further in the matter it would be appropriate to examine the statutory position in respect of sealing and examination of export goods. The Rules 187, 187A & 187B of the Central Excise Rules, 1944 are relevant in this regard and are reproduced as under:

"187. Sealing of goods and examination at place of despatch.-

(1) Where the exporter desires the sealing of goods intended for export at the place of despatch, he shall present the goods along with application prepared in the proper form in sextuplicate duly signed by him for removal, to the proper officer for examination at least twenty-four hours before the intended removal or within such shorter period as the Commissioner of Central Excise may allow. The application in the proper form shall contain the amount of duty and value of goods in figures as well as in words.

(2) When the goods are presented before the proper officer under sub-rule (1), the proper officer, after verifying that the goods are identifiable with those cited in the application including the particulars of the duty paid or payable, shall seal each package in the manner and method as specified by the Commissioner of Central Excise and endorse each copy of the application in token of having such examination done.

(3) The proper officer shall return the original, duplicate and sextuplicate copies to the exporter. The triplicate copy shall be sent by the proper officer to the Commissioner of Central Excise having jurisdiction over the factory or warehouse or as the case may be Maritime Commissioner of Central Excise either by post or by handing over to the exporter in a tamper proof sealed cover. The proper officer shall send the quadruplicate copy to his Chief Accounts Officer and retain the quintuplicate for his record. The exporters shall use the sextuplicate copy for the purposes of claiming drawback:

Provided where goods are not exported directly from the factory of manufacture, the triplicate and quadruplicate copies shall be sent by the proper officer to the Superintendent having jurisdiction over the factory of manufacture, who shall after verification, forward the triplicate copy to the Maritime Commissioner either by post or by handing over to the exporter in a tamper-proof sealed cover or, as the case may be, to the Commissioner of Central Excise having jurisdiction over the factory and the quadruplicate copy to his Chief Account Officer.

(4) In case of export by parcel post after the goods intended for export has been sealed, the exporter shall affix to the duplicate application sufficient postage stamps to cover postal charges and shall present the documents, together with the package or packages to which it refers, to the postmaster at the Office of booking.

(5) A separate application shall be submitted in respect of each consignment.

187A. Despatch of goods without examination.-

Where the exporter desires examination of goods at the place of export, he shall send the original, duplicate and sextuplicate copies of the application along with the goods at the place of export, and shall send the triplicate, quadruplicate and quintuplicate copies of the application to the proper officer within twenty four hours of removal of the consignment. The proper officer shall after verifying the particulars of the duty paid or duty payable, send the triplicate copy of application to the Commissioner of Central Excise having jurisdiction over the factory of manufacture or warehouse or as the case may be the Maritime Commissioner of Central Excise either by post or by handing over to the exporter in a tamper-proof sealed cover, quadruplicate copy to his Chief Accounts Officer and retain the quintuplicate copy for his records. The application shall contain the amount of duty and value of goods in figures as well as in words:

Provided that where goods are not exported directly from the factory of manufacture, the triplicate and quadruplicate copies shall be sent by the proper officer to the Superintendent having jurisdiction over the factory of manufacture, who shall after verification forward the triplicate copy to the Maritime Commissioner of Central Excise either by post or by handing over to the exporter in a tamper proof sealed cover or, as the case may be, to the Commissioner of Central Excise having jurisdiction over the factory and the quadruplicate copy to his Chief Accounts Officer:

Provided further that a manufacturer-exporter who paid duty exceeding rupees ten crores in cash or through account current in the preceding financial year or a manufacturer-exporter who had been accorded status of Super Star Trading House, Star Trading House, Trading House or Export House under the provisions of the Export and Import Policy, notified by the Central Government under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), containing the goods may seal the packages or containers himself at the place of despatch and remove them for export subject to the conditions that-

(i) an intimation to proper officer shall be given by the manufacturer-exporter at least twenty four hours before the intended removal or within such shorter period as the Commissioner of Central Excise having jurisdiction over the factory of manufacture of the goods may allow, and

(ii) the owner, the working partner, the Managing Director or the Company Secretary, of the manufacturing unit of the goods or . a person duly authorised by the Board of Directors of such Company, as the case may be, shall certify on the application that the goods have been sealed in his presence.

187B. Examination of goods at the place of export.-

(1) On arrival at the place of export, the goods shall be presented together with original, duplicate and sextuplicate copies of the application to the Commissioner of Customs or other duly appointed Officer.

(2) The Commissioner of Customs or other duly appointed officer shall carefully examine the consignments with the particulars as cited in the application and if he finds that the same are correct and exportable in accordance with the laws for the time being in force, shall allow export thereof and certify on copies of the

application that the goods have been duly exported citing the shipping bill number and date and other particulars of export:

Provided that if packages containing the consignments were sealed at the place of despatch by the Officer in the manner provided in rule 187, such Commissioner of Customs or other duly appointed officer shall examine and check weighed the consignment with reference to exportability of such consignments and if they correspond with description given in application and seals are found intact, shall allow export thereof.

(3) The Commissioner of Customs or other duly appointed officer shall return the original and sixtuplicate copies of application to the exporter and forward the duplicate copy of application either by post or by handing over to the exporter in a tamper proof sealed cover to the officer specified in the application for removal, from whom exporter wants to claim rebate. The exporter shall use the sixtuplicate copy for the purposes of claiming drawback."

On a plain reading of aforesaid Rules, it is apparent that the export goods can be despatched either after examination and sealing of goods at place of despatch or for examination at the place of export. The Rule 187 that prescribes the procedure for sealing of goods and examination at the place of despatch unambiguously states that the goods shall be examined and sealed by the proper officer before their despatch. The Rule 187A prescribes a procedure for despatch of goods without examination. Rule 187B prescribes the procedure to be followed in the case of examination at the place of export.

6.4 The second proviso to the said Rule 187A was inserted, vide notification no. 38/1998-CE (NT) dated 02.09.1998, so as to extend a special facility to following two categories of manufacturer-exporters:

(i) The manufacturer-exporters who have paid Central Excise duty exceeding Rs. 10 crores in the preceding financial year in cash or by debit in current account.

(ii) The manufacturer-exporters who have been accorded the status of Super Star Trading House, Star Trading House, Trading House or Export 3 House under the provisions of the Export-Import Policy announced by the Government from time to time under section 5 of the Foreign Trade (Development and Regulation) Act, 1992.

It is in pursuance of this second proviso to Rule 187A that the Circular dated 12.10.1998 came to be issued.

6.5 Thus, the scheme of Rules 187, 187A & 187B is such that the export goods have to be either examined and sealed at the place of despatch by the Central Excise officers or these have to be examined at the place of export by the Customs officers. By virtue of second proviso to Rule 187A, a special dispensation of self sealing was provided to the large manufacturer-exporters, which dispensed with the requirement of examination at either end.

6.6 At this stage, it is important to notice that one of the conditions based on which self sealing procedure was extended by virtue of second proviso to Rule 187A, as brought out in clause (i) of the said second proviso, is advance intimation of 24 hours to the department. This is also a condition which has been specifically stated in para 4 of the Circular dated 20.10.1998. Therefore, it is incorrect for the Applicant to state that there was no requirement of advance intimation in case of their adopting the self sealing procedure. Though the Circular dated 12.10.1998 came to be modified, vide the Circular dated 11.08.2003, by virtue whereof the facility of self sealing was extended to all categories of manufacturer-exporters, albeit subject to compliance with existing procedure, i.e., the procedure specified, vide Board's Circular dated 12.10.1998 and Circular No. 445/11/1999-CX dated 17.03.1999 read with para 10 of part 1 of Chapter-VII and para 6 of part-1 of Chapter-VIII of Central Excise manual issued on 01.09.2001. It is apparent that the requirement of advance intimation was not dispensed with, vide the Circular dated 11.08.2003. The Government observes that the requirement of advance intimation is not an empty formality – it provides the department an opportunity to examine the goods, if it so desires, before these are sealed by the exporter. Thus, the advance intimation is in the nature of a safeguard that enabled checking of any misuse. By not informing the department, the Applicants herein circumvented this safeguard and thereby misused the facility.

6.7 The department has challenged the adoption of self sealing procedure itself by the Applicant on the ground that this procedure, which arose out of the second proviso to Rule 187A *ibid*, was available only to the manufacturer-

exporters and not to the cases where exports are made through a merchant exporter. As brought out hereinabove, as per second proviso to Rule 187A read with Circular dated 12.10.1998, the self sealing procedure was made available to only two categories of large manufacturer-exporters. This facility was subsequently extended to all manufacturer-exporters by virtue of Circular dated 11.08.2003. As in the present case, the exports were made through the merchant exporter, the contention of the department that the Applicant wrongly adopted the self sealing procedure is correct. Further, it is also apparent that even when adopting a procedure, that was not available to them, the Applicants did not comply with the requirements thereof. Needless to say that only because the Applicants herein followed the self sealing procedure that the goods were neither examined at the place of despatch nor at the place of export. In other words, the export goods were not examined by the Central Excise officers at the place of despatch as the Applicant followed the self sealing procedure, which was not available to them, and the goods were not examined at the place of export by the Customs officers as the goods were self sealed. It is also brought out by the authorities below that the seal number was not mentioned on the relevant documents and, consequently, the fact of sealing at the place of despatch itself is disputed.

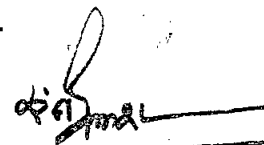
6.8 To summarise, the Applicants adopted the self sealing procedure, even though it was not available to them. Even when adopting the same, the Applicants failed to inform the department in advance. Further, there is also no certainty that the goods were actually sealed. In these facts and circumstances, it is evident that the goods despatched for export by the Applicant were neither examined at the place of despatch by the Central Excise officers nor at the place of export by the Customs officers nor is there a certainty that the goods were actually sealed at the place of despatch (as claimed), under the self sealing procedure. The contraventions are, therefore, so egregious that the chain of identity of goods despatched by the Applicant through the merchant exporter and those actually exported has been broken. As such, the conclusion drawn by the lower authorities that the identity of the export goods is not established, is

well founded. Since, it is not established that the goods that were exported by the Applicants were the same goods on which central excise duty was paid by the Applicants, the denial of rebate claim cannot be faulted.

7. The Applicants have cited the cases of M/s Grace Nutrients and M/s Kamakshi Exports and claimed parity with them. However, the Government observes from its earlier Order No. 1351-1352/2012-CX dated 01.10.2012, in respect of said two entities, that the issue of incorrect adoption of self sealing procedure and consequent inability to establish the identity of the goods was not involved in those cases. Therefore, the judgments of the Hon'ble Gujarat High Court in the case of M/s Kamakshi and M/s Grace are of no help to the present Applicant.

8. Since the rebate has been found inadmissible on the issue of establishment of the identity of the export goods itself, Government does not consider it necessary to examine the other issues involved herein.

9. In view of the above, the Revision Application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

M/s Blue Whale Enterprises Pvt. Ltd.,
B/179, Sector-25, GIDC Gandhinagar,
Gandhinagar-382 025.

G.O.I. Order No. 258 /21-CE dated 13-12-2021

Copy to: -

1. The Commissioner of CGST, Jaipur, New Central Revenue Building, Statue Circle, C-Scheme, Jaipur – 302 005.
2. The Commissioner (Appeals), Central Excise & Customs, Jaipur, New Central Revenue Building, Statue Circle, C-Scheme, Jaipur – 302 005.
3. M/s Blue Whale Enterprises Pvt. Ltd., SP 818(G), Road No. 14, Vishwakarma Industrial area, Jaipur- 302 013.

4. P.S. to A.S. (Revision Application).
5. Guard File.
6. Spare Copy.

ATTESTED

G. Bhatia
13/12/2021

गुलशन भाटिया
अधीक्षक