SPEED POST

F. No. 198/32/2018-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 07/09/22
Order No. 37/2022-CX dated 07-09-2022 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 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. NOI/EXCUS-002-APP-1823-17-18 dated 14.03.2018 passed by the Commissioner (Appeals), Customs & CGST, Noida.

Applicant : The Commissioner of CGST, Gautam Budh Nagar

Respondents : M/s. AGTEC Industries Pvt. Ltd., Greater Noida

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ORDER

A revision application no. 198/32/2018-R.A. dated 02.07.2018 was filed by the Commissioner of CGST & Central Excise., Gautam Budh Nagar (hereinafter referred to as the Applicant) against the Order-in-Appeal No. NOI/EXCUS-002-APP-1823-17-18 dated 14.03.2018 passed by the Commissioner (Appeals), Customs & CGST, Noida, wherein the appeal of the Respondents, M/s AGTEC Industries Pvt. Ltd., Greater Noida, filed against the Order-in Original No. 249/AC/D-I/GBN/17-18 dated 20.12.2017 of the Assistant Commissioner, CGST Division-I, Gautam Budh Nagar, was allowed.

2. Briefly stated, the Respondents, M/s. AGTEC Industries Pvt. Ltd. (formerly known as M/s ANG Automotive Components Pvt. Ltd.), are engaged in manufacture of "Timber Wedge, Log Splitters and other tools". The said goods were exported on payment of duty under claim of rebate, in terms of rule 18 of Central Excise Rules, 2002, and the Respondents filed 06 rebate claims, totally amounting to Rs.23,11,552/-. The goods exported were shown to be classified under CETH 84669200 and the applicable duty under this tariff heading was paid and rebate claimed thereon. The original authority rejected the claims on the ground that the Respondents had classified the same goods under CETH 8201/8436 in their ER-1 returns, which was not disputed by the department also. Since the goods falling under CETH 8201/8436 were exempted from payment of duty under Notification No. 12/2012-CE dated 17.03.2012, no duty was payable on the subject goods and, thus, rebate was not admissible in this case. The contention that the classification, under CETH 8201/8436, on the invoices/ ARE-1s was a clerical mistake, was also not accepted by the original authority. Aggrieved, the Respondents filed an appeal before the Commissioner (Appeals) who allowed their appeals on the ground

that the issue had already been decided by the earlier Commissioner (Appeals) in favour of the Respondents and this case also had to be subsumed in the earlier order.

3. The Revision Application was filed, mainly, on the ground that the Respondents had been working under self-removal procedure and had self-assessed the subject goods under CETH 8201 in ER-1 returns which, the department, at no point of time, had disputed and the Commissioner (Appeals) had erred by creating a new dispute of classification of goods. The goods were being classified under CETH 8201 by the Respondents in their ER-1 returns and, consequently, were exempted from duty under Notification No. 12/2012-CE dated 17.03.2012 and, hence, no rebate was admissible to them in this case.

4. When the revision application was taken up for disposal, personal hearings were fixed on 16.03.2021, 05.04.2021, 26.04.2021 and 10.05.2021. On behalf of the Applicant department, the revision application was supported in the hearing held on 16.03.2021. However, no one appeared for the Respondents nor any request for adjournment was received. Since sufficient opportunities had been granted, the Government proceeded to decide the revision application on the basis of available records. Accordingly, G.O.I order No. 99/2021-CX dated 12.05.2021 was passed, vide which the revision application was allowed and the impugned Order-in-Appeal was set aside.

5. Aggrieved by the G.O.I order dated 12.05.2021, the Respondents filed Writ Tax No. 854 of 2022 before the Hon'ble Allahabad High Court. The Hon'ble

High Court, vide order dated 25.07.2022, disposed of the writ petition with following directions:

(Para 7)

"Accordingly, the impugned order dated 12.05.2021 is set aside. Matter remitted to the revising authority with the further observation, in case, the petitioner appears before the said authority within a period of two weeks from today i.e., 25.07.2022 along with a copy of this order and also with due intimation of its correct address, the revising authority may fix a fresh date of hearing in the matter and proceed and decide the revision on merits".

6. Pursuant to the aforesaid Order dated 25.07.2022 of the Hon'ble Allahabad High Court, the Respondents, vide letter dated 04.08.2022, requested that hearing may be held in the matter. Accordingly, the personal hearing was fixed in the matter on 22.08.2022. The hearing was, however, adjourned to 05.09.2022 at the request of the Respondents. In the meantime, the Respondents filed written submissions, which were received on 22.08.2022.

7. In the personal hearing held, in virtual mode, on 05.09.2022, Sh. Ram Awtar Singh, Advocate, appeared for the Respondents and reiterated the written submissions dated 22.08.2022. Sh. Atul Chaudhary, Assistant Commissioner appeared for the Applicant department and supported and reiterated the contents of the RA.

8.1 The Government has carefully perused the case records and examined the matter.

8.2 In the first round of litigation, the Government had, vide Order dated 12.05.2021, observed that "4.1..... *The government has examined the matter. The respondent had classified the exported goods under CETH 8201/8436 in their ER-1 returns and other documents, and the department had also not disputed this classification. Further, the Respondents was operating under self-removal procedure and the assessment of goods and duty payable was also done by themselves. Hon'ble Supreme Court has, in the case of ITC Ltd. vs CCE, Kolkata {2019 (368) ELT 2016 (SC)}, held that "the claim for refund cannot be entertained under the order of assessment or self-assessment is modified in accordance with law by taking recourse to appropriate proceedings and it would be within the ken of Section 27 to set aside the order of self-assessment and re-assess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act". Thus, in case, the Respondents were of the opinion that self-assessment made by them was not in order, they should have got the same modified in accordance with law, which does not appear to have been done".* It was further observed that the Commissioner (Appeals) had decided the appeal in favour of the respondent solely by following the earlier Order-in Appeal No. NOI-EXCUS-002-APP-1764 to 1769-16-17 dated 29.03.2017, which had been set aside by the Government, vide GOI order No. 702-707/18-CX dated 24.12.2018. Accordingly, the impugned Order-in-Appeal was set aside.

8.3 In the written submissions dated 22.08.2022, the Respondents have attempted to distinguish the judgment in the case of ITC Ltd. (supra) stating that the aforesaid judgment of the Hon'ble Supreme Court has no application in this case as the judgment is in regard to self-assessment of duty made under Customs Act,1962, whereas, the present case is that of self-assessment under Central Excise Rules, 2002 and the provisions of self-assessment under Customs Act ,1962 are different from the provisions of self-assessment under the Central Excise Rules. It has been contented that under the Customs Act, 1962, an endorsement or concurrence of the proper officers of Customs is implied in the self-assessment, whereas, self-assessment under the Central Excise Rules by an assessee is on his own and absolute. Since self-assessment in the Customs Act provides for endorsement /concurrence of the proper officers of Customs, which the Apex Court in the ITC's case has termed as "an order of assessment", and, therefore, if the importer is aggrieved, he has to get the same modified by way of filing an appeal under Section 128 of the Customs Act.

8.4 The Government finds that the submissions identical to those brought out in para 8.3 above, had also been made in the case of RA No. 195/02/2022-RA by the Respondents (who were the Applicants in the aforesaid RA). The said RA was disposed of by the Government vide G.O.I. Order No. 23/2022-CX dated 30.06.2022, wherein, the aforesaid submissions were answered by the Government as follows:

"6. However, it has been pointed out that the Government has relied upon the judgment of the Hon'ble Supreme Court in the case of ITC Ltd. Vs. CCE Kolkata-IV {2019(368) ELT 216(SC)} to

decide the case against them, vide Order dated 15.11.2021. It is contended that the judgment of the Apex Court in ITC Ltd (supra) relates to self-assessment under Customs Act, 1962 and is not applicable to the Central Excise matters. A decision of the Tribunal in the case of Cadila Healthcare Ltd. Vs. Commissioner of Service Tax (Ahmedabad) {2021 (50) GSTL 205 (Tri – Ahmd.)} has been cited in support. The Government observes that in the case of ITC Ltd. (supra), the Hon'ble Supreme Court has held that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings. No doubt, this judgment relates to self-assessment under Customs Act, 1962. However, the Government is not persuaded to accept the contention that ITC Ltd. (supra) has no application in Central Excise matters. It is observed that, in terms of Section 2(2) of the Customs Act, 1962, "assessment" includes provisional assessment, self-assessment, re-assessment and non-assessment in which the duty assessed is NIL. In the present case, the Applicants were, at the relevant time, operating under the Central Excise Rules, 2002 and have claimed the rebate accordingly under Rule 18 of the Rules ibid. As per Rule 2 (b) of the Central Excise Rules, 2002, ""assessment" includes self-assessment of duty made by the assessee and provisional assessment under rule 7;". Therefore, both under the Customs Act, 1962 and under the applicable Central Excise Rules, the self-assessment is also an assessment of duty and, there is no difference statutorily in respect of self-assessment under the

Customs Act, 1962 and the Central Excise Rules, 2002. Further, the decision of the Tribunal in Cadila Healthcare Ltd. (supra) is related to assessment under Service Tax and there was no occasion therein for the Tribunal to consider the applicability of ITC Ltd. (supra) in respect of refunds/rebate under Central Excise Act/Rules".

It is observed that nothing has been brought on record to persuade the Government to deviate from its position as above recorded in G.O.I. Order dated 30.06.2022.

8.5 It may be added here that, though, the Respondents claim that their right of self–assessment is absolute thereby implying that there is no departmental scrutiny of such assessments, the position is not so. As per relevant instructions, an assessee had to file returns in Form ER-1/ER-2 for the month for production and removal of goods and other relevant particulars and submit the same to Range Office within 10 days of the succeeding month. Further, as per Part-VI, para 2 of the Central Excise Manual, such returns were required to be scrutinised by the jurisdictional Central Excise Officers. If upon such scrutiny, any short payment etc. were to be found, demands were to be raised under Section 11A of the Act. Thus, in the scheme of self-assessment under Central Excise Rules also, a concurrence/acceptance of the Central Excise officer was implied if the return filed was not disputed. As such, the distinction sought to be made by the Respondents herein between the self – assessment under the Customs Act and that under the Central Excise Rules to the effect that under the Customs Act, the self-assessment has to be

concurred/accepted by the proper officer of Customs, whereas under the Central Excise Rules, the position is not so, is incorrect and imaginary.

8.6 Even otherwise, the distinction brought out by the Respondents between the self-assessment scheme under the Customs Act and that under the Central Excise Rules, 2002, in fact, buttresses the case against the Respondents themselves. If the self-assessment by the assessee on his own is absolute, as contended, it is only obvious that the liability for such an absolute act will also be absolutely of the assessee himself. Further, if the self-assessment could be allowed to be re-opened by the assessee himself, at any point in time, it would mean that an assessee can self-assess the duty on the excisable goods and at any time without recourse to any appellate or adjudication proceedings, provided under the Central Excise Act and the Rules made thereunder, re-open and change such self-assessment. Such an interpretation would keep the assessment a never-ending exercise, wherein, an assessee can at any point of time change the classification or assessment to his benefit and claim such refund. Needless to say, this would render the provisions of adjudication/appeal/refund etc., under the Central Excise Act, otiose and the entire exercise will be rendered redundant. The Hon'ble Supreme Court had in the case of Collector of Central Excise, Kanpur vs Flock (India) Pvt. Ltd. 2000 (120) ELT 285 (SC), repelled such a position and had stated that unless an order which is appellable under the Central Excise Act is challenged such order is not liable to question and the matter is not to be re-opened in a proceeding for refund. Though Flock (India) was decided in the case of earlier regime under Central Excise when the assessment was made by the Central Excise Officers, the ratio of that decision is applicable in the present case of self-assessment also, as in terms of Rule 2(b) of the Central Excise Rules, 2002,

self-assessment is also an assessment. It is also noted that in its judgment in the case of ITC Ltd. (supra), the Hon'ble Supreme Court has relied upon the aforesaid judgment in the case of Flock (India) Pvt. Ltd. (supra).

8.7 In view of the above, the Government does not find any merit in the submissions made by the Respondents.

9. The revision application is accordingly allowed and the impugned Order-in- Appeal is set aside.

(Sandeep Prakash)
Additional Secretary to the Government of India

The Commissioner of Central Goods &
Service Tax, Gautam Budh Nagar Commissionerate,
3rd Floor, Wegmans Business Park, K.P. – III,
Greater Noida-201306

G.O.I. Order No. 37 /22-CX dated 07.09.2022

Copy to: -

1. M/s. AGTEC Industries Pvt. Limited, A-3/4, Kasna Site – 5, Surajpur, Greater Noida, Dist.- Gautam Buddha Nagar (U.P.)- 201308.
2. The Commissioner (Appeals), CGST & Central Excise, C-56/42, Renu Tower, Sector 62, Noida-201 301.
3. The Assistant Commissioner, CGST Division – I, CGST Commissionerate, GB Nagar, Greater Noida - 201306
4. PS to AS (RA).
5. Guard File.
6. Spare Copy

ATTESTED

07.09.22