

SPEED POST



F. No.195/156/SZ/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. 27/08/24.

Order No. 27/2024-CX dated 23-08-2024 of the Government of India, passed by Ms. Shubhagata Kumar, 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. VIZ/EXCUS/001/APP/214/17/18, dated 31.01.2018, passed by the Commissioner (Appeals), Guntur, Central Tax & Customs, sub-office@ Visakhapatnam.

Applicant : M/s Asia Pacific Resources Pvt.Ltd, Visakhapatnam .

Respondent : Pr. Commissioner of CGST, Visakhapatnam.

ORDER

A Revision Application No. 195/156/SZ/2018-R.A. dated 16.08.2018 has been filed by M/s Asia Pacific Resources Pvt. Ltd., Visakhapatnam (hereinafter referred to as the Applicant), against the Order-in-Appeal No. VIZ/EXCUS/001/APP/214/17/18, dated 31.01.2018, passed by the Commissioner (Appeals), Guntur, Central Tax & Customs, sub-office@ Visakhapatnam. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, set aside the Order-in-Original No. 60/2014-15-R(A.C.) dated 24.12.2014 passed by the Assistant Commissioner of Central Excise, Division-III of Visakhapatnam-I Commissionerate, in an appeal filed by department (hereinafter referred to as the Respondent).

2. Brief facts of the case are that the Applicant herein is a dealer registered under Rule 9 of Central Excise Rules, 2002. The Applicant filed a rebate claim as a merchant exporter for an amount of Rs. 12,02,546/-, under Rule 18 of the Central Excise Rules, in respect of Central Excise duty paid on 2719.460 Mts of 'Mill Scale' exported to China vide ARE-1s bearing Nos JBM01/13-14 to JBM132/13-14 during the period 09.10.2013 to 25.10.2013 from their registered premise on 05.05.2014. The exported goods were procured by them from another dealer i.e. M/s Jai Balaji Minerals, Raipur who in-turn had procured the said goods from various manufacturers of Raipur. After verification of the documents produced i.e. original, duplicate and triplicate copies of the ARE-1s, commercial invoice, shipping bill, invoices issued by the dealer and the manufacturers of the goods exported, Bank realisation certificate etc., the Rebate Sanctioning Authority (hereinafter referred to as "RSA") sanctioned the rebate vide Order-in-Original No. 60/2014-15-R(A.C.) dated 24.12.2014.

3. The aggrieved Respondent department vide their appeal dated 22.04.2015 contended before the Commissioner (Appeals) that:

(i). The rebate claim has been filed before the wrong authority i.e. Assistant Commissioner of Central Excise, Division-III of Visakhapatnam-I Commissionerate

whereas as per the trade Notice No. 03/2014-CE dated 04.07.2014, the Assistant Commissioner of Central Excise, Division-II of Visakhapatnam-I Commissionerate has been designated as the maritime commissioner for the purpose of processing & granting rebate claims of the manufacturer /merchant exporter in respect of exports effected through Visakhapatnam port. Therefore the Assistant Commissioner of Central Excise, Division-III of Visakhapatnam-I Commissionerate was not the proper authority to sanction rebate claim and accordingly the Applicants did not follow the condition prescribed in para 3(b) (i) of the the Notification No. 19/2004-CE (NT) dated 06.09.2004.

(ii). Condition 2 (a) of of the the Notification No. 19/2004-CE (NT) dated 06.09.2004 also not fulfilled nor complied with by the Applicants since the Applicants herein neither exported the goods directly from the factory or from a warehouse in terms of the said condition.

(iii). The Applicants did not follow the procedure in terms of Board's Circular No. 294/10/97-CX dated 30.01.1997. Further the rebate sanctioning authority did not establish that the goods manufactured and duty paid alone have been exported.

4. Vide the impugned OIA, the Commissioner (Appeals) held that as the Applicants herein exported goods through Visakhapatnam port, they were under statutory obligation to file rebate claim with the Assistant Commissioner of Central Excise, Division-II of Visakhapatnam-I Commissionerate, he being the proper officer i.e. the Maritime commissioner under Rule 18 of the Central Excise Rules, 2002 read with notification No. 19/2004-CE(NT) dated 06.09.2004. As such, the Applicants herein failed to follow the provision under para 3(b)(i) of the the Notification No. 19/2004-CE (NT) dated 06.09.2004. He also held that registered premise from where the goods were exported is not a factory or a warehouse or otherwise not a premise as permitted by CBEC by a general or special order. Thus, the Applicants herein also failed to comply with condition 2 (a) of of the the Notification No. 19/2004-CE (NT) dated 06.09.2004. Further, the Commissioner(Appeals) held that the jurisdictional range authorities of the manufacturers of the goods purchased by the dealer at Raipur ,can at the best

certify that the goods cleared under Excise invoices issued by the manufacturers are duty paid and can never certify that the impugned goods procured by the Applicants herein are the same goods that were cleared by the manufacturers to the dealer i.e. M/s Jai Balaji Minerals, Raipur; that the goods stored in the premises of the dealer at Raipur can be the goods procured from the manufacturers on payment of duty as well as without payment of duty from the manufacturers operating under an exemption notification of threshold limit of 150 Lakhs per annum. Finally, the Commissioner (Appeals) held that the refund sanctioning authority's act of addressing letters to the jurisdictional range officers of the manufacturers from whom the dealer at Raipur purchased the goods, in order to co-relate the duty paid goods with the stock of impugned goods in the premise of the dealer at Raipur and procured by the Applicant exporter(being another dealer at Visakhapatnam) is well short of application of mind and is in deviation of statutory provisions in force and is entirely un-warranted .Accordingly, the Commissioner(Appeals) set aside the OIO and allowed the departmental appeal.

5. Revision Application has been filed on the grounds that the impugned OIA was passed in revenue bias, without following the judicial discipline and depriving the legitimate substantial benefit to the Applicants as provided in the Notification No. 19/2004-CE(NT) dated 06.09.2004 on mere alleged non-compliance of administrative procedural aspects by the mistakes allegedly stated to have been committed by the departmental officers , for no fault of the Applicants. The customs officers have verified the consignment and appended their endorsement on the reverse side of the ARE-1s, certifying that the subject aforesaid consignment as described in the relevant ARE-1 was stuffed under their supervision for export; that the lower adjudicating authority sanctioned the rebate after satisfying himself with the documents submitted by the Applicants; that the claim was also pre-audited by the Assistant/Deputy Commissioner(audit) ; that the Commissioner(Appeals) has not appreciated the definition of "warehouse" given in Rule 2(h) of Central Excise Rules, 2002; that the Applicants exported the goods from their own registered premise under Rule 9 of Central Excise Rules, 2002, which is a warehouse in terms of the aforesaid definition, hence, they fulfilled the conditions of Notification No. 19/2004-CE(NT) dated 06.09.2004 ; that Trade Notice No.03/2014-CE notifying

Assistant Commissioner of Central Excise , Division –II as Maritime Commissioner was issued on 04.07.2014 and the Trade Notice takes effect prospectively and not retrospectively, whereas, they had filed the claim on 05.05.2014 for the period 03.05.2013 to 29.06.2013 in which the goods on which rebate is being sought were exported; that as per CBEC Circular no. 19/92-CX dated 18.12.1992, the Central Excise Authorities having jurisdiction over the premises from where the duty paid goods are exported once such goods are cleared out from the manufacturing factory, have to sanction rebate and a trade notice issued by the Commissioner cannot override the above CBEC circular. Finally, the Applicant contended that the relevant documents pertaining to the export which were later on verified and certified by the authorities cannot be brushed aside on mere assumptions and presumptions without any evidence in contra.

6. Personal hearing in the matter was held before the earlier revisionary authority on 19.02.2024 which was attended by Sh. N.V. Ramana Rao, Advocate for the Applicants. Sh.Rao stated that the Applicant is a merchant exporter; that in terms of Rule 2(h) of Central Excise Rules,2002, the premise of a registered dealer is in effect a warehouse; that the jurisdictional officer certified the documents; that their claim was pre and post audited and no irregularity was found; that no notice was given under section 35(A) of Central Excise Act-2nd proviso for demand of duty ; that the Trade Notice referred to by the department was issued two months after the rebate claim was filed and that the same Commissioner who later reviewed the Assistant Commissioner's order had earlier given condonation of delay certificate for delay of 30 days . He prayed that substantial benefit should not be withheld from a genuine exporter for a mere procedural lapse. No one appeared for the Respondent nor any request for adjournment has been received.

7. At the outset, it is observed that the impugned OIA was received by the Applicant on 25.05.2018, whereas, the revision application has been filed on 10.09.2018. As such there is a delay of 17 days in filing of the revision application beyond the stipulated period. The Applicant in the accompanied condonation of delay application have submitted that in the preamble attached to the impugned OIA they were given guidelines to file the appeal before Hon'ble CESTAT, South

regional bench Hyderabad. Accordingly, they filed an appeal with the said bench of the CESTAT. However, during the course of proceedings before the CESTAT they came to learn that the appropriate forum to appeal against the impugned OIA is the Revisionary Authority, hence they are before this authority. From the scrutiny of the preamble attached to the impugned OIA it has been observed that as stated by the Applicant, the preamble does not have any mention of appeal to be filed before the Revisionary Authority. Further from the record placed before the Revisionary Authority, it is observed that the Applicant appealed to the Hon'ble CESTAT and vide order dated 11.12.2018, Hon'ble CESTAT dismissed Applicant's appeal as non-maintainable. Thus, the reason attributed for the delay by the Applicant appears to be genuine, hence, the delay is condoned.

8. The Government has carefully examined the matter. The subject rebate sanction order passed by the Lower adjudicating Authority has been set aside by the Appellate authority primarily on the following grounds:

- (a) The Respondents failed to comply with the condition 2 (a) of the notification no. 19/2004-CE (NT) dated 06.09.2004.
- (b) The rebate claim has been sanctioned by the Assistant Commissioner of Central Excise, Division-III of Visakhapatnam-I Commissionerate who was not the Maritime Commissioner.
- (c) The identity of goods is not established. It is not possible to co-relate the exported goods with the goods cleared from the factory on payment of Central Excise duty.

9. Issues in Para 8 above are taken up below:-

9.1 Condition 2 (a) of the notification reads as under:

"(2) (a) that the excisable goods shall be exported after payment of duty, directly from a factory or a warehouse, except as otherwise permitted by the Central Board of Excise and Customs by a general or special order."

It is not disputed that the goods were not exported directly from the factory. But at the same time it is also observed that the goods were exported from the Applicant's premise registered under Rule 9 of the Central Excise Rules, 2002. The Government observes as per Rule 2(h) of the Rules *ibid*, a warehouse is defined as "any place or premises registered under Rule 9. Thus, a dealer's premise registered under Rule 9 of Central Excise would also falls in the definition of a warehouse. Condition 2(a) of the Notification No. 19/2004-CE(NT) dated 06.09.2004 provides export after payment of duty, directly from a factory or a warehouse but the same does not specify that it should be from the warehouse of the manufacturer. The Commissioner (Appeals) observation at para 5.3(B) of the impugned OIA that the merchant exporter shall export the excisable goods either directly from the premises or warehouse of the manufacturer is erroneous to this extent. Reliance is placed on **G.O.I's order No. 366-367/2017-CX dated 07.12.2017 in RA Nos. 195/69/2014-RA and 195/264/2014-RA of M/s DSM SINOCHEM Pharmaceuticals Pvt. Ltd.{2018(15) G.S.T.L.476 (G.O.I.)}** , wherein, the Government has held that:

*"4. On examination of the revision applications, Commissioner (Appeals)'s orders and all other relevant records in this case, it is absolutely clear that there is no dispute about the fact that the goods are not exported directly from the factory of the principal manufacturer or the factory of the Applicant. Whereas, as per condition 2(a) of the Notification No. 19/2004, the rebate of the duty shall be available only if the goods are exported directly from the factory or warehouse except as otherwise permitted by the C.B.E. & C. by a general or special order. However, it is claimed by the Applicant that they have exported the goods from their warehouse which is registered with the department and thereby they have complied the first condition of Notification No. 19/2004 as per which the goods can be exported directly either from the factory or from the warehouse. It is further averred that warehouse is defined as any place or premises registered under Rule 9 as per Rule 2(h) and accordingly their place of export, being a registered place under Rule 9 as a dealer, is also a warehouse as envisaged in the above condition of Notification No. 19/2004. **The Government finds that this argument has***

substantial force and their rebate claims cannot be rejected on this ground alone."

Thus it is abundantly clear that a dealer's premise registered under Rule 9 of the Central Excise Rules, 2002 is also a warehouse for the purpose of condition 2(a) of the notification no. 19/2004-CE (NT) dated 06.09.2004.

9.2 Second issue in the RA to be deliberated upon is as to whether the jurisdictional Assistant/Deputy Commissioner can sanction the rebate claim instead of the Maritime Commissioner. From the record placed before, the Government observes that the Applicant filed their rebate claim on 05.05.2014 before the Assistant Commissioner of Central Excise, Division-III of Visakhapatnam-I Commissionerate i.e. their jurisdictional Central Excise authority. Whereas, Assistant Commissioner of Central Excise, Division-II of Visakhapatnam-I Commissionerate was notified as Maritime Commissioner for Vishakhapatnam-I Commissionerate vide Trade Notice No.03/2014-CE dated 04.07.2014. This implies that there was no Maritime Commissioner in the said Commissionerate till 03.07.2014. Condition 3(b) (i) of the the Notification No. 19/2004-CE (NT) dated 06.09.2004 dealing with the presentation of claim for rebate to Central Excise stipulates that "*Claim of the rebate of duty paid on all excisable goods shall be lodged along with original copy of the application to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacture or warehouse or, as the case may be, the Maritime Commissioner.*"

A plain reading of the condition reveals that Assistant/Deputy Commissioner having jurisdiction over a warehouse is also a competent authority before whom a rebate claim can be filed. Thus the Government observes that The Commissioner (Appeals) holding at para 5.2 B of the impugned OIA that as the Applicant had exported goods through Vishakhapatnam port , they were under statutory obligation to file the rebate claim with Assistant Commissioner of Central Excise, Division-II of Visakhapatnam-I Commissionerate being the proper officer i.e. the Maritime Commissioner under rule 18 of the Central Excise rules, 2002 read with the Notification No. 19/2004-CE (NT) dated 06.09.2004 is erroneous to this extent too.

9.3 Third contention of the respondent department in the instant case is that the identity of the goods exported has not been established. Thus, the goods exported cannot be co-related with the goods that were cleared from the factory of the manufacturers after payment of duty. The Government proceeds to address this issue in the succeeding paras.

9.3.1 The Government observes that as per the condition 2(a) of the notification No. 19/2004-CE (NT) dated 06.09.2004, it is mandatory that the excisable goods for which rebate is intended to be claimed shall be exported after payment of duty. This implies that all the excisable goods exported for which rebate claim is filed should have suffered duty. Thus, a rebate sanctioning authority before sanctioning a rebate has to first satisfy himself that goods for which rebate is claimed by a merchant exporter were duty paid or not.

9.3.2 It is undisputed that the goods have been exported. Further, it is not in dispute that the Applicants had procured goods intended to be exported from M/s Jai Balaji Minerals, Raipur who is also a registered dealer under Rule 9 of the Central Excise Rules, 2002 and who in-turn had procured those goods from various manufacturers of Raipur. It is also not in dispute that the goods cleared by the manufacturers at Raipur were not duty paid. However, the Respondent department in this case has cast a doubt on the duty paid nature of the goods exported by the Applicants herein. It is further seen here that the Commissioner (Appeals) agreeing with the departmental contention has recorded at para 5.3.B in the impugned OIA that "*In the instant case, the place of procurement of the impugned goods is a dealer's premise i.e. M/s Jai Balaji Minerals, Raipur, who purchased goods from various manufacturers and stored the goods in his premises whereby the individual identity of the goods purchased from each of the manufacturer was lost ; that the jurisdictional range officers/authorities of the manufacturers of the goods purchased by the dealer at Raipur can at the best certify that the goods cleared under Excise invoices issued by the respective manufacturers are duty paid good and can never certify the impugned goods procured by the respondent exporter(Applicant herein) are the same goods that were cleared by the manufacturers to the dealers i.e. M/s*

Jai Balaji Minerals, Raipur; that the goods stored in the premises of the dealer at Raipur can be the goods procured from the manufacturer on payment of duty as well as without payment of duty from the manufacturers operating under an exemption notification of threshold limit of 150 Lakhs per annum.” The Commissioner(Appeals) in the same para recorded that he was of the considered opinion that in case called for in order to prove the identity of goods stored in their premises and supplied to the responder exporter(Applicant herein) , the dealer i.e. M/s Jai Balaji Minerals, Raipur will never be in a position to prove identity along with a documentary evidence for the sole reason that a dealer is registered under Rule 9 of the Central Excise Rules, 2002 as a person who carries on the trade but not as manufacturer and also dealer does not maintain daily stock account as mandated to a manufacturer so as to prove or corroborate the identity of the goods manufactured under Rule 10 of Central Excise rules, 2002 except that a dealer sells the goods and passes the credit to the ultimate buyer by the virtue of the RG23D record maintained in terms of the purchase invoices but no individual identity of the goods is maintained in the said record of the dealer.”

On this issue, the Government observes that as per the record following points have emerged in the matter which require deliberation for arriving at a judicious conclusion:-

(i) The goods i.e. Mill Scale in this case were initially cleared by the manufacturer to M/s Jai Balaji Minerals, Raipur, a dealer under Central Excise invoices issued under Rule 11 of the Central Excise Rules, 2002 for home consumption. Those goods were not cleared for export by the dealer as no ARE-1 was filed which requires the counter signatures of the respective manufacturers also.

(ii) M/s Jai Balaji Minerals, Raipur stored the goods so obtained from various manufacturers at their premises collectively. Mill Scale in loose condition is generally stored in heaps. The Government on this issue is inclined to agree with the Commissioner (Appeals) observation that the goods stored in the premises of the dealer at Raipur can be the goods procured from the manufacturers on payment of duty as well as without payment of duty from the manufacturers operating under an exemption notification of threshold limit of 150 Lakhs per annum. There is a

possibility of duty paid goods getting mixed with the non- duty paid goods. There is nothing on record which establishes that the duty paid Mill scale procured by M/s Jai Balaji Minerals, Raipur was stored in specific and identifiable containers and such Mill scale was only supplied to the Applicant herein. The Government observes that the Rebate Sanctioning Authority in its O-I-O has recorded at Para 3 that:

" As the assessee procured the said goods from a dealer viz. M/s Jai Balaji Minerals, Raipur who purchased the same from various manufacturers situated at Raipur, letters dated 23.05.2014 have been addressed to the jurisdictional Ranges in Raipur requesting them to confirm duty payment particulars . The jurisdictional Ranges vide their letters dated 06.06.2014, 09.06.2014 have confirmed that the duty has been paid on material i.e. Mill Scale supplied by the manufacturers falling under their respective jurisdiction, on monthly basis."

From the recording of the Original Authority reproduced above it has come to fore that he has satisfied himself of the duty paid nature of the goods supplied by various manufacturers situated at Raipur to M/s Jai Balaji Minerals, Raipur but has not specifically established that the goods supplied by M/s Jai Balaji Minerals, Raipur to the Applicant herein were the same goods.

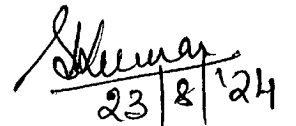
9.3.3 The Government observes that Condition 2(a) of the Notification No. 19/2004-CE dated 06.09.2004 stipulates that:

" that the excisable goods shall be exported after payment of duty , directly from a factory or warehouse, except as otherwise permitted by the Central Board of Excise and Customs by a general or special order".

Thus, it is a mandatory condition that excisable goods that are exported and on which the exporter later on intends to claim rebate, should have been duty paid. In other words, any excisable goods which are exported but on which Central Excise duty has not been paid are not entitled to rebate. Therefore, it becomes obligatory on the Rebate Sanctioning Authority to satisfy themselves about the duty paid nature of goods exported and on which the rebate has been claimed without ambiguity, which is missing in this case. The Hon'ble Bombay High Court has, in the

case of UM Cables Ltd. vs. UOI {2013 (293) ELT 641 (Bom)}, held that the Rule 18 ibid. "10.....makes a clear distinction between matters which govern the conditions or limitations subject to which a rebate can be granted on one hand and the fulfillment of such procedure as may be prescribed on the other hand. The notification dated 6 September, 2004 that has been issued by the Central Government under Rule 18 prescribes the conditions and limitations for the grant of rebate and matters of procedure separately". Accordingly, the Hon'ble Bombay High Court has held that as the Rule 18 itself makes distinction between conditions and limitations on the one hand and the procedure governing the grant of rebate on the other hand, ".....conditions and limitations for the grant of rebate are mandatory, matters of procedure are directory". Therefore, it would be in the interest of justice that the matter is remanded to the original authority with directions to examine the matter *de novo* after following the principles of natural justice and after giving due opportunity to the Applicant herein to furnish the documents/evidence to establish that the goods procured by them from M/s Jai Balaji Minerals, Raipur and subsequently exported by them were the same which had been cleared by various manufacturers of Raipur after payment of duty.

10. The Revision Application is allowed by way of remand to the original authority with directions as above and to pass a reasoned order within three months of receipt of this order.


23/8/24

(Shubhagata Kumar)

Additional Secretary to the Government of India

M/s Asia Pacific Resources Pvt. Ltd.,
Door No.50-49-30, 1st Floor,
T.P.T. Colony , Seethammadhara,
Visakhapatnam-530013.

G.O.I. Order No. 27 /24-CX dated 23-08-2024

Copy to: -

1. Pr. Commissioner of CGST, Visakhapatnam, GST Bhavan, Port Area, Visakhapatnam-530035.
2. The Commissioner of CGST (Appeals), Guntur, 3-30-15, Ring Road, Near Shubham Convenson, Guntur-522006. PS to AS (RA).
3. PPS to AS(RA)
4. Guard File.
- ✓ 5. Spare Copy
6. Notice Board

ATTESTED

Shailendra
23/8/24
(शैलेन्द्र कुमार मीना)
(Shailendra Kumar Meena)
अनुभाग अधिकारी / Section Officer
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi

