F.No. 195/242-250/11-RA-Cx
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

O/C

Date of Issue 19/12/12

ORDER NO. 1757-1765/12-cx DATED 18-12-2012 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D. P. SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

SUBJECT : ORDER IN REVISION APPLICATION FILED, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944 AGAINST THE ORDER-IN-APPEAL No. P-III/VM/342-350/2010 dated 13.12.2010 passed by the Commissioner (Appeals) III, Central Excise, Pune

APPLICANT : M/s Sulzer India Ltd., Pune

RESPONDENT : The Commissioner, Central Excise, Pune-III Commissionerate.

****

ORDER

These revision applications have been filed by M/s Sulzer India Ltd., Pune, against the orders-in-appeal P-III/VM/342-350/2010 dated 13.12.2010 passed by the Commissioner (Appeals), Central Excise, Pune-III with respect to Order-in-Original passed by Assistant Commissioner, Central Excise, Pune-VIII Division.

2. Brief facts of the case are that:

2.1 The applicant under took manufacturing of column internals on the basis of job work . The materials were supplied free of cost from the foreign party. The applicant exported the goods manufactured from materials supplied free of cost from foreign party and had filed refund claims in terms of Rule 18 of the Central Excise Rules, 2002 read with Notification No.19/2004-C.E. (NT) dt. 06-09-2004.

2.2 Scrutiny of the Shipping Bills and ARE-1s filed along with the rebate claims revealed that the value declared on the ARE-1 was much higher than the FOB value appearing on the Shipping Bills. As per Rule 18 of the Central Excise Rule, 2004 duty paid on the 'Transaction Value" in terms of Section 4 of the Central Excise Act, 1944 is to be rebated. In the instant case transaction value was the FOB value appearing on the Shipping Bills where the duty paid as per ARE-1 was higher than the Transaction value. As per Rule 18 of the Central Excise Rules, 2002 extra duty paid would constitute an amount erroneously paid which is liable to be refunded by allowing credit in their cenvat credit in terms of Section 11B of the Central Excise Act, 1944. In view of the above the original adjudicating vide impugned Order-in-Original, authority allowed the rebate claims partly in cash and partly through credit it cenvat account.

3. Being aggrieved by the order-in-original, the Applicant filed appeal before Commissioner (Appeal) who rejected the same.

4. Being aggrieved by the impugned order-in-appeal, the applicant has filed these revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 It is submitted that the Commissioner (Appeals) ought to have appreciated the fact that the Adjudicating Authority has refunded the partial amount in cenvat credit account only on the ground that the said amount was not required to be paid. Commissioner (Appeals) ought to have appreciated the fact that the Applicants have correctly paid the duty by applying provisions of Section 4 of the Central Excise Act, 1944 read with Rule 6 of the Valuation Rules, 2002 as there is involvement of free supply of material. The Commissioner (Appeals) therefore erred in not appreciating the legal position that the applicants have correctly assessed the duty and paid same while exporting goods. The reason given by the Adjudicating Authority therefore is without support of law.

4.2 It is submitted that the Commissioner (Appeals) erred in not appreciating the legal position that the transaction under dispute required application of Section 4 of the Central Excise Act, 1944 read with Rule 6 of the Valuation Rules as the same involves free supply of material. The Commissioner (Appeals) ought to have appreciated the legal position that in the current transaction the Assessable Value cannot be arrived at by applying Section 4(1)(a) of the Central Excise Act, 1944 for the simple reason that there is an additional consideration flowing from buyer to seller in the form of Free Supply of Material. The Commissioner (Appeals) therefore ought to have appreciated that the duty paid on the exported goods by the applicants is correct in terms of provisions of Section 4 of the Central Excise Act, 1944 and the same is not in excess.

4.3 It is submitted that the Commissioner (Appeals) erred in not appreciating the fact that having established that the duty paid by the applicants is correct and not in excess the question of application of Government of India Order No.110/2009 dated 6.5.2009 does not arise. The Appellate Authority therefore ought to have sanctioned the rebate in cash.

4.4 It is submitted that the Commissioner (Appeals) ought to have appreciated the settled legal position and clarification issued by the Board that the value has to be arrived as per Section 4 of the Central Excise Act, 1944 and the rebate shall have to be allowed equivalent to duty paid. It is further clarified that the rebate has to be paid in cash. The Commissioner (Appeals) ought to have therefore sanctioned the rebate claim in cash as clarified by the Central Board of Excise Customs vide Circular Nos. 510/6/2000-CX dated 3.2.2000 and 687/3/2003 dated 3.1.2003.

5. Personal hearing schedule in this case on 11.10.2012 was attended by Shri Anupam Dighe, Advocate on behalf of the Applicant who reiterated the grounds of Revision Application. Nobody attended hearing on behalf of respondent department.

6. Government has carefully gone through the relevant case records and perused the impugned order-in-original and order-in-appeal.

7. Government notes that the applicant got the goods manufactured on job work basis from materials supplied free of cost by foreign party and exported the same under rebate claim of duty paid on such exported goods. Original authority observed that ARE-1 value was higher than FOB value declared on Shipping Bills. Accordingly, vide impugned Order-in-Original, he sanctioned rebate claim to the extent of duty payable on FOB value and remaining amount was ordered to be re-credited in Cenvat credit account. Commissioner (Appeals) uphold impugned

Order-in-Appeal. Now, applicant has filed these revision applications as grounds mentioned in para (4) above.

8. Government notes that the applicant has contended that under the provisions of section (4) of Central Excise Act, 1944 r/w rule 6 of the central Excise valuation (Determination of price of excisable goods) Rules, 2000, the assessable value for the purpose of determination of duty has to be calculated on the basis of manufacturing charges plus monetary value of free supplies received by the applicant. As such, they are eligible for duty paid on such value declared in impugned AREs-1 and not on FOB value declared on impugned Shipping Bill which indicate only conversion charges of converting of duty free material to final export product.

8.1 The provision of Rule 6 of the Central Excise valuation (Determination of price of excisable goods) Rules, 2000, reads as follows:

" *Rule 6: Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee*

Explanation 1 *- For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely : -*

(i) value of materials, components, parts and similar items relatable to such goods;

(ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;

(iii) value of material consumed, including packaging materials, in the production of such goods;

(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods. "

8.2 From perusal of above provision, Government is of opinion that the said provision is applicable where the 'price is the sole consideration'. But, in the instant case the applicant received free of cost material, processed them and manufactured the final export product and exported the same. While exporting the final export material, they declared conversion charges of converting free of cost material into final export product which they were actually going to realize. The applicant was neither going to realize total cost of final export goods nor the total amount declared in AREs-1 which include value of free material received from foreign party plus cost of conversion. Under such circumstances, if at all there is any amount which is considered of sole consideration, would be cost of conversion and not anything else. The FOB value declared in Shipping Bills which is equivalent to cost of conversion is the transaction value in this case which is realized toward export sale proceeds.

9. Applicant has relied upon CBEC circular No.510/06/2000-CX dated 3.2.2000 and contended that jurisdiction to determine correct value of goods cleared from factory is with jurisdictional officers of the factory and not with the office of Maritime Commissioner. In this regard Government notes the procedure from claim rebate of duty paid on exported goods is prescribed in Notification No.19/04-CE (NT) dated 6.9.04 issued under rule 18 of Central Excise Rule 2002. Para 3 (b) of said Notification stipulates as under:

> "(b) Presentation of claim for rebate to Central Excise:-
>
> (i) 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;
>
> (ii) 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, Maritime Commissioner of Central Excise shall compare the duplicate copy of application received from the officer of customs with the original copy received from the exporter and with the triplicate copy received from the

> Central Excise Officer and if satisfied that the claim is in order, he shall sanction the rebate either in whole or in part."

The provisions contained in said para 3 (b)(ii) clearly stipulate that Assistant Commissioner of Central Excise/Deputy Commissioner of Central Excise having jurisdiction over factory of manufacture or the Maritime Commissioner of Central Excise if satisfied after scrutinizing the rebate claim that said claim is in order, he shall sanction the rebate either in whole or in part. The sanctioning of rebate claim in whole or in part will depend on admissibility of claim as per laid down parameters. So the provisions of Notification authorizes the Maritime Commissioner of Central Excise to sanction the rebate claim only to the extent it is admissible. The CBEC circular dated 3.2.2000 was issued to prior to the said Notification No.19/04-CE (NT) dated 6.9.2004. So the provision of Notification will prevail.

10. The original authority has rightly held that transaction value in this impugned case is FOB value declared in Shipping Bills and rebate of duty payable on said value is required to be sanctioned. Any excess duty paid is required to be refunded in the manner it was paid. Government notes that Hon'ble Punjab and Haryana High Court in the case of M/s. Nahar Industrial Enterprises Ltd. Vs. UOI [2009 (235) ELT 22(P&H)], has held that:

> " *Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty – Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate – Board's Circular No.687/3/2003-CX, dated 3.1.2003 distinguished – Rule 18 of Central Excise Rules, 2002."*

In view of above, Government is of the view that the excess paid amount of duty which is not held admissible for being rebated under Rule 18 of CER 2002, is to be allowed as re-credit in the Cenvat credit account from where said duty was initially paid. Under such, circumstances, Government finds no infirmity in impugned Orders-in-Appeal and therefore upholds the same.

11. Revision Applications are thus rejected being devoid of merit.

12. So, ordered.

(D P Singh)

Joint Secretary to the Government of India

M/s Sulzer India Ltd.,
Gat No.304, at Post Kondhapuri
Taluka Shirur
Dist. Pune 412 205.

(Attested)

1757-1765/12-Cx Dt. 18-12-12

G.O.I. Order No. 2012-CX dated .2012

Copy to:-

1. The Commissioner, Central Excise, Pune-III Commissionerate
2. The Commissioner (Appeals) of Central Excise, Pune-III, 41-A, ICE House, Sasoon Road, Pune -411 001.
3. The Assistant Commissioner, Central Excise, Pune-III Division, 41-A, ICE House, Sasoon Road, Pune -411 001.
4. Shri Anupam Dighe, Advocate, c/o M/s Sulzer India Ltd., Gate No.304, at Post Kondhapuri Taluka Shirur Dist. Pune 412 205.
5. PS to JS (Revision Application)
6. Guard File
7. Spare Copy.

(R.C. SHARMA)
OSD-I (Revision Application)