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F.No. 198/642/11-RA
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.. 26/12/12

ORDER NO. 1770/2012-C₂ DATED 24.12.2012 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 : REVISION APPLICATION FILED, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944 AGAINST THE ORDER-IN-APPEAL No. 223/Kol-III/2011 dated 15.7.11 passed by Commissioner of Central Excise (Appeals-I), Kolkata

APPLICANT : Commissioner of Central Excise, Kolkata-III

RESPONDENT : M/s Advance Niryat Pvt. Ltd., Kolkata

ORDER

This revision application is filed by the applicant Commissioner of Central Excise, Kokata-III Commissionerate against the orders-in-appeal No.223/Kol-III/2011 dated 15.7.11 passed by Commissioner of Central Excise (Appeals-I), Kolkata with respect to order-in-original No.375/MC/KOL-III/2009-10 dated 17.12.09 passed by the Maritime Commissioner of Central Excise, Kokata-III Commissionerate.

2. Brief facts of the case are that the respondents M/s Advance Niryat Pvt. Ltd. procured goods from the factory of M/s Sigma Chloro Paraffin Pvt. Ltd. Patulia Panchayat Road, Vill-Dangadighila, Mouza-Ruiya, P.O.-Bandipur, 24 Pgs (North) on payment of countervailing duty (i.e. additional Customs duty payable under Section 3 of the Customs tariff Act, 1975) and exported them under ARE-1s No.001/08-09 dt. 21.11.2008, 002/08-09 dt. 29.12.2008, 003/08-09 dt 31.1.09, 004/08-09 dt 10.2.09 & 001/09-10 dt. 30.4.09. Thereafter the exporter submitted claims of rebate under notification no.19/2004-CE(NT) dt. 6.9.2004 issued under Rule 18 of the Central Excise Rules, 2002 for Rs.1,48,310/-, Rs.1,24,517/-, Rs.1,33,569/-, Rs.68,931 and Rs.88,230/- respectively for the duty paid on the goods said to have been exported. Corresponding invoices of the ARE-1s issued by the manufacturer revealed that the goods were actually imported and subsequently cleared from the factory as such for re-export to Bangladesh and the manufacturer had paid additional customs duty while clearing the goods for export. It was stated that under the Notification No. 19/2004-CE(NT) dt. 6.9.2004 rebate of duty paid on all excisable goods is to be granted subject to the conditions, limitations and procedures specified therein. In the said notification the duty, for the purpose of granting rebate has been restricted to explanation-I to the notification and the list of duties entitled to be rebated, as specified in the said list does not include Additional Customs Duty. Therefore the exporter is not entitled to the rebate. Accordingly the subject show cause notice was issued to the exporter and after due process of law the adjudicating authority rejected the claim.

3. Being aggrieved by the order-in-original, the respondents filed appeal before Commissioner (Appeals) who set aside the impugned order and allowed the appeal of the respondent.

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

4.1 Commissioner (Appeal) in his order has erroneously overlooked the provisions of law while passing the said O-I-A No.223/Kol-III/2011 dated 15.7.2011. The power to grant the rebate is by virtue of Rule 18 of Central Excise Rule, 2002. The power to frame Rule 18 of Central Excise Rule, 2002 flow from Section 37(2)(xvi) which is reproduced below:

Provide for the grant of a rebate of the duty paid on good which are exported out of India or shipped for consumption on a voyage to any port outside India (including interest thereon).

For this Central Government is empowered to frame rules for grant of rebate of duty paid on excisable goods exported. Excisable goods have been defined in Section 2(d) of the Central Excise Rule, 1944 as mentioned below:

"excisable goods" means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salts.

From the above provisions of law, it is clear that for getting rebate

- (i) *Goods should be excisable which means that they should be specified in the tariff as being subject to duty of excise.*
- (ii) *Duty should be paid on such excisable goods.*

4.2 In the instant case, the manufacturer has paid an amount in terms of Rule 3(5) of cenvat credit rules, 2004 which reads as below:

When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9:

From the reading of Rule 3(5) it is clear that removal of inputs as such cannot be considered as payment of duty but is mere payment of amount. Realizing this legal position Government has provided Rule 3(6) of cenvat credit rules 2004 which reads as below:

The amount paid under [sub-rule (5) and sub-rule (5A)] shall be eligible as cenvat credit as if it was a duty paid by the person who removed such goods under [sub-rule (5) and sub-rule (5A)]

This rule 3(6) is not at all required if payment of duty is same as payment of amount. Thus it can be conclusively stated that the payment of amount under Rule 3(5) will not amount to payment of Central Excise Duty. Accordingly, rebate cannot be granted in such cases.

4.3 Further, the goods are not excisable as no duty of excise payable on them in absence of manufacture involved. Furthermore, the condition No.2(b) of the Notification No.19/2004-CE (NT) dated 6.9.04 such as 'the excisable goods shall be exported within six months from the date on which they were cleared for export from the factory of manufacture or warehouse or within such extended period as the Commissioner of Central Excise may in any particular case allow', also clearly states that

goods should be exported directly from the factory of manufacturer or from the warehouse. This condition is also not fulfilled in the instant case.

4.4 Commissioner (Appeal) has relied upon CESTAT judgement in the case of Nav Bharat Impex, but his reliance on the said case law is misplaced as the said case was relating to demand of Cenvat credit taken by appellant.

5. A show cause notice was issued to the respondent under Section 35EE of Central Excise Act, 1944 to file their counter reply. They vide their written reply dated 3.1.12 and through additional submission given at the time of personal hearing have submitted that:

5.1 Sub-rule (5) of rule 3 of Cenvat Credit Rules, 2004 does not provides that payment of an amount is not central excise duty. Sub-rule (5) of rule 3 of Cenvat Credit Rules, 2004 provides that when inputs or capital goods, on which cenvat credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9. The said sub-rule does not provide that the amount payable at the time of removal of inputs/capital goods as such is not duty of excise under the Cental excise Act. The term "amount" in sub-rule 5 of rule 3 of Cenvat Credit Rule, 2004 is central excise duty. The "amount" mentioned in the said sub-rule is central excise duty payable under Central Excise Act and cannot be additional duty of customs/countervailing duty.

5.2 Sub-Rule 6 of Rule 3 established that payment of duty by debiting cenvat credit is a central excise duty and not countervailing duty. The sub-sub-rule(5) when read with sub-sub-rule 6 of rule 3 proves that payment of duty by debiting from cenvat account is central excise duty. The said sub-rule provide that the amount paid under

sub-rule (5) and sub-rule (5A) shall be eligible as cenvat credit as if it was a duty paid by the person who removed such goods under sub-rule (5) and sub-rule (5A). The term 'duty' mentioned in the said sub-rule is duty under Central Excise Act and under no stretch of imagination the said 'duty' can be additional duty of customs/ countervailing duty.

5.3 Reversal of credit in terms of sub-rule 5 of rule 3 is a payment of central excise duty. The observation that by paying duty by debiting Cenvat Account in terms of Rule 3(5) of Cenvat Credit Rules when removed as such being only reversal of credit cannot be considered as payment of central excise duty is also baseless and arbitrary for the reasons mentioned above. We request reference to the decision of Appellate Tribunal in the case of Grasim Industries Ltd. vs. Commissioner of Central Excise, Indore reported in 2003 (155) ELT 0200(Tri-Del). The issue in this case whether reversal of credit when inputs are removal as such is a central excise duty or not. In the said case it was held that duty payable on inputs or capital goods when removed as such shall be an amount equal to the duty of excise. In this case yarn was removed as such from the factory by reversing credit fortnightly for payment of duty. The Commissioner under the impugned order has imposed the penalty on the ground that the amount to be paid for removal of inputs as such is neither duty of excise nor such payment is in respect of excisable goods produced or manufactured and accordingly the facility of fortnightly payment was not available to the Appellants on making payment under Rule 57AB(1C). The intent and purpose of Rule 57 AB(1C) of Central Excise Rules, 1944 and Rules 3(5) & 3(6) of Cenvat Credit Rules, 2004 are same. The Tribunal held that sub-rule (1C) does not provide that the amount payable at the time of removal of inputs/capital goods as such is not duty of excise under the Central Excise Act. The ratio of decision of the said case is fully applicable in the instant case.

5.4 Paragraph 4.5 in the ground of Revision Application transpires that to avail benefit of rebate under Notification No.19/2004-CE(NT) the goods should be exported directly from the factory of manufacture. This is a fresh point raised by the department

at the stage of revision application and not dealt with in the show cause notice and/or in Order-in-Original. It will amount to expanding the scope of SCN which is not permissible in law.

5.5 Further the contention that goods should be exported directly from the factory of manufacture or from warehouse in terms of condition No.2(b) of Notification No.19/2004-CE(NT) is not acceptable in view of condition No.2(a) of said notification which provides that the goods should be exported from 'factory' and not from the factory of manufacture and that condition No.2(a) specifies place of exportation whereas condition No.2(b) specifies time limit. Condition No.2(a) provides 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. Hence for the purpose of determination of place of export, condition No.2(a) shall prevail over condition No.2(b)

5.6 There shall be no dispute that Central excise duty was paid by debiting in the cenvat Account as will be evident from ARE-1s and the goods were exported against ARE-1s. It is submitted that rebate claimed being incentive oriented beneficial schemes, intended to boost export, liberal interpretation is to be accorded in cases of technical lapses, if any, so that the very purpose of Rule 18 is not defeated.

5.7 CBEC circular No.283/117/96-CX dated 31.12.96 provides that exports of inputs as such shall be treated as 'final product' by virtue of deemed manufacture. Moreover rebate is available if the activity is not 'manufacture' as held by CESTAT in the case of Nav Bharat Impex Vs. CCE (2009(236)ELT 349. They also relied upon various case laws.

6. Personal hearing was scheduled in this case on 12.10.12. Shri Biman Behari Sengupta, Manager appeared on behalf of the respondents who reiterated to memorandum of cross objection stated at para 5 above.

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

7.1 Government observes that the impugned order-in-appeal dated 15.7.11 was received to the Commissioner, Central Excise on 19.7.11 and therefore the revision application was required to be filed on or before 18.10.11. The said Revision Application was received in this Unit on 1 November, 2011 whereas the applicants have submitted a copy of online booking system of the website which reveals that the same was received by the postal authorities in Delhi on 12.10.11. Government observes that the delay has occurred due to genuine reasons which is too within the condonable limit. Government condons the delay of 15 days accordingly and takes up the issue to decide it on merit.

8. In this case, applicant has procured the imported goods from a manufacturer on payment of countervailing duty and exported them vide 5 ARE-1s. The manufacturer has cleared the inputs on such for export after reversing the cenvat credit under Rule 3(5) of Central Excise Rules, 2004. The rebate claims filed by the applicant were rejected on the ground that in Notification No.19/04-CE dated 6.9.04, the duty for the purpose of granting rebate has been specified in Explanation-I to the Notification and the said list of duties allowed to be rebated does not include Additional Customs duty and therefore exporter was not entitled to the rebate. However, in appeal, Commissioner (Appeals) allowed the rebate to the applicant. Now department has contested the said order-in-appeal on the ground stated in para 4 above.

9. Government notes that the said issue has already been decided by the Revisionary Authority vide order No.18/09 dated 20.1.09 in the case of M/s Sterlite Industries (I) Ltd. The writ petition No.2094 of 2010 filed by the department against the above GOI order dated 20.1.09 was dismissed by Hon'ble Bombay High Court vide order dated 24.3.2011. In para 4 to 9 of said judgement, Hon'ble High Court has observed as under:

"4. The case of the revenue in this Writ Petition is firstly, that the reversal of credit equal to the amount of duty cannot be said to be payment of duty under Rule 18 of the Central Excise Rules, 2002 and consequently the assessee is not entitled to claim rebate on such reversal of credit. Secondly, the capital goods were not exported directly from the factory of the manufacturer as contemplated under Notification No.41/94 dated 12/9/1994, Circular No.294/97 dated 30/1/1997 and Notification No.19/2004 dated 6/9/2004 and, therefore, the rebate claim is liable to be rejected. Thirdly, the capital goods imported by the assessee have been used by the assessee for several years and, therefore, the export of capital goods cannot be said to be "removed as such" as provided under Rule 3(5) of the CENVAT Credit Rules, 2004.

5. We see no merit in the above contention. Reversal of input credit is one of the recognized method for paying duty on the final product. In fact, the Central Government by its circular No.283 dated 31/12/1996 construing similar provisions contained in Rule 57F of the Central Excise Rules, 1944 held that where the inputs are cleared on payment of duty by debiting RG-23A Part II as provided under erstwhile Rule 57F4 of the Central Excise Rules, 1944, the manufacturer would be entitled to rebate under Rule 12(1)(a) of the Central Excise, 1944. Rule 57F in the 1944 Rules is pari materia to Rule 3(5) of CENVAT Credit Rule, 2004. Similarly, Rule 12(1)(a) of the 1944 Rules is pari materia to Rule 18 of the Central Excise Rules, 2002. Therefore, when the Central Government has held that where the duty is paid by debiting the credit entry, rebate claim is allowable, it is not open to the departmental authorities to argue to the contrary.

6. Similarly, the argument that the capital goods have not been exported directly from the factory of the manufacturer is also without any merit because, similar contentions raised by the revenue in Writ Petition No.2195 of 2010 has been rejected by this Court by dismissing the petition on 23/3/2010.

7. The last contention of the revenue is that since the imported capital goods has been used by the assessee for several years, it cannot be said that the capital goods are 'removed as such' as provided under Rule 3(5) of 2004 Rules. There is some dispute as to whether the capital goods imported by the assessee were put to use before they were exported. Assuming that the said capital goods were used by the assessee before export, it would still be export of the capital goods imported by the assessee. In other words, the duty paid capital goods when exported as capital goods even after put to use

for some time, Rule 3(5) of 2004 Rules would be applicable, because in such a case the capital goods even after put to use for some time continue to be capital goods.

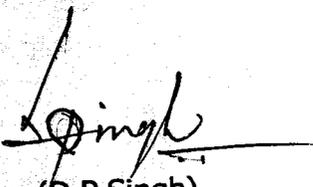
8. The expression "removed as such" in rule 3(5) of the CENVAT Credit Rules, 2004 simply means that when inputs or capital goods are removed as inputs or capital goods as such, the assessee shall pay an amount equal to the credit availed in respect of such inputs or capital goods. In other words, inputs / capital goods on the date of removal must be in the same form as they were on the date on which they were brought into the factory. Normal wear and tear of the inputs / capital goods does not make them different from the original inputs/capital goods. Moreover, it is not the case of the revenue that on account of the user, the character of the capital goods has changed. Therefore, where duty paid inputs / capital goods brought into the factory are subsequently cleared for export, then Rule 3(5) of 2004 Rules would apply. Hence, the Joint Secretary to the Government of India was justified in holding that user of the capital goods before export does not in any way affect the duty liability on export of such capital goods and consequently does not affect the right of the assessee to claim rebate of duty paid on export of such capital goods.

9. For all the aforesaid reasons, we see no merit in the petition and the same is hereby dismissed with no order as to costs."

The special leave petition filed by the department in this case was dismissed by Hon'ble Supreme Court of India vide order dated 14.9.2012 in SLP No.6120/2012. In view of the said judgement which is squarely applicable to this ^{Case}, Government finds no infirmity in the impugned order-in-appeal and therefore upholds the same.

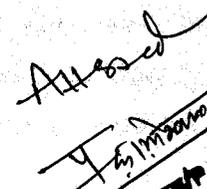
10. The revision application is thus rejected being devoid of merit.

11. So ordered.


(D.P. Singh)

Joint Secretary (Revision Application)

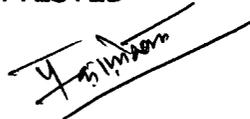
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K. R. RAMESHWAR
Joint Secretary (Revision Application)
Ministry of Finance (Dept. of Excs.)
New Delhi

Copy to:

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2. The Commissioner of Central Excise (Appeal-I), 169, AJC Bose Road, Bamboo Villa (4th Floor), Kolkata-700014.
3. The Maritime Commissioner, Central Excise, Kolkata-III Commissionerate, 180, Shanti Palli, Rajdanga Main Road, Kolkata-700107
4. Shri Biman Behari Sengupta, Manager C/o Advance Niryat Pvt. Ltd, Elegant Central, 9B Marquis Street, 1st Floor, Suit#105, Kolkata-700016.
- ✓ 5. PS to JS(RA)
6. Guard File
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ATTESTED



(P.K.Rameshwaram)
OSD (Revision Application)

