



केंद्रीय कर आयुक्त (अपील)



सत्यमेव जयते

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

केंद्रीय उत्पाद शुल्क भवन,

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Near Polytechnic,

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रजिस्टर डाक ए .डी .द्वारा

S33470
S388

क फाइल संख्या (File No.): V2(76)15/EA-2/North/Appeals/ 2017-18

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 29-16-17

दिनांक (Date): 27.06.2018, जारी करने की तारीख (Date of issue): 26/7/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker , Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-III), अहमदाबाद- II, आयुक्तालय द्वारा जारी

मूल आदेश सं _____ दिनांक _____ से सृजित

Arising out of Order-In-Original No. 1062-1079/R/V/17-18 Dated: 13/10/2017

issued by: Assistant Commissioner., Central GST (Div-III), Ahmedabad North

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s Ball Aerocan (India) Pvt. Ltd

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person an aggrieved by this Order-in-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way:

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India:

(1) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी चाहिए।

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

(ii) यदि माल की हानि के मामले में जब हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार में हो माल की प्रकिया के दौरान हुई हो।

In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।



ORDER IN APPEAL

This appeal has been filed by the Assistant Commissioner, Central Goods and Service Tax & Central Excise, Division-III, Ahmedabad (North), against the OIO No.1062-1079/R/V/17-18 dt.13.10.2017 (herein after referred as 'the impugned order'). M/s. Ball Aerocan India Pvt. Ltd., (*hereinafter referred to as the 'respondent'*) situated at Plot No. SM 9/2, GIDC Estate, Sanand-II, Village - Bol, Tal. Sanand, Dist. Ahmedabad, had filed 18 claims for rebate of Central Excise duty amounting to Rs.47,85,097/-, being paid on goods exported under drawback scheme and under Notification No. 19/2004-CE (NT) dated 06.09.2004, issued under Rule 18 of the Central Excise Rules, 2002. The Adjudicating Authority vide the impugned order, sanctioned the rebate claims amounting to Rs. 47,85,097/-. However, during the post-audit of the rebate claims, it was noticed that out of the total rebate claimed amounting to Rs.47,85,097/-, an amount of Rs.27,08,551/-, pertained to Cenvat Credit availed by the Respondent on Special Additional Duty (SAD) levied in terms of Section 3(5) of the Customs Tariff Act. Notification 19/2004-CE(NT) dated 06.09.2004, grants rebate to the duty paid of all excisable goods exported to any country. However, SAD is not included in the Explanation-I of the said Notification, where 'duty' for the purpose of the said Notification has been explained. The Department aggrieved by the said OIO, filed an appeal against the same, before me.

2. The facts of the case, in brief, are that the respondent had filed 18 Applications for rebate claiming an amount of Rs.47,85,097/-, before the Assistant Commissioner, Central GST, Division-III, Ahmedabad (North) claiming rebate of Central Excise duty paid on the goods exported under Drawback and Zero Duty EPCG scheme. The Adjudicating Authority found the rebate claims filed by the respondent to be proper and therefore sanctioned the rebate claim amounting to Rs.47,85,097/-, vide OIO No. 1062-1079/R/V/17-18 dt.13.10.2017. As all the claims of the respondent being of amounts which were less than Rs. 5 lakhs, the said OIO was sent for post audit of the rebate claims. During the post-audit, it was noticed that for ARE-1 No. 1130 to 1134, the respondent had paid the Central Excise duty by debiting Cenvat Credit, amounting to Rs.11,02,213/-, vide Entry No. 459 dated 28.02.2017, taken on Special Additional Duty (SAD) levied in terms of Section 3(5) of the Customs Tariff Act, 1975. Similarly, it was observed that for ARE-1 No. 1145 to 1155, the respondent had paid the Central Excise duty by debiting Cenvat Credit, amounting to Rs.24,29,066/-,



vide Entry No. 539 dated 31.02.2017, taken on Special Additional Duty (SAD) levied in terms of Section 3(5) of the Customs Tariff Act, 1975. It was noticed that out of the total amount of Rs. 35,31,279/- (11,02,213 + 24,29,066) debited by the respondent from their Special Additional Duty of Custom vide both the above-mentioned entries, only an amount of Rs.27,08,551/-, pertains to the above-mentioned rebate claims.

3. As per Section 3(5) of the Customs Act, 1975, under which SAD is leviable, reads as under :

"3(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent. of the value of the imported article as specified in that notification.

Explanation.—In this sub-section, the expression " sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs, and where such taxes, or, as the case may be, such charges are leviable at different rates, the highest such tax or, as the case may be, such charge."

As such the Special Additional Duty being a duty levied under Section 3(5) of the Customs Tariff Act, 1975, is meant to counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India. But then, as per Rule 3 of the Cenvat Credit Rules, 2004, a manufacturer or provider of output service shall be allowed to take Cenvat credit of any of the following duties paid on inputs or capital goods and service tax paid on input services :-

"Rule 3.

1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

- (i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;
- (ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;
- (iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);

- (iv) *the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);*
- (v) *the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);*
- (vi) *the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No.2) Act, 2004 (23 of 2004);*
- (via) *the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);*
- (vii) *the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) (vi) and (via);*
- (viii) *the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act,*
- Provided that a provider of taxable service shall not be eligible to take credit of such additional duty;*
- (ix) *the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003);*
- (x) *the service tax leviable under section 66 of the Finance Act;*
- (xi) *the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004); and*
- (xii) *the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and*
- (xiii) *the additional duty of excise leviable under section 85 of Finance Act, 2005 (18 of 2005)."*

Further, under Rule 18 of the Central Excise Rules, 2002, which governs the rebate of excise duty of the exported goods states that -

"Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification."

Now, Rule 18 of the above-mentioned Central Excise Rules, 2002, is very clear that the rebate of excise duty of the exported goods shall be subject to such conditions or limitation, and fulfilment of such procedure, as may be specified in the notification. Accordingly, the Conditions, limitations and the procedure for granting rebate of excise duty of the exported goods have been indicated in the Notification No. 19/2004-CE(NT) dt. 06.09.2004, and wherein at Explanation I, the duty for the purpose of Notification No. 19/2004-CE(NT) has been defined as :

"Explanation I - "duty" for the purpose of this notification means duties of excise collected under the following enactments, namely:

- (a) *the Central Excise Act, 1944 (1 of 1944);*
- (b) *the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);*



(c) the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

(d) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), as amended by section 169 of the Finance Act, 2003 (32 of 2003) and further amended by section 3 of the Finance Act, 2004 (13 of 2004);

(e) special excise duty collected under a Finance Act;

(f) additional duty of excise as levied under section 157 of the Finance Act, 2003 (32 of 2003);

(g) Education Cess on excisable goods as levied under clause 81 read with clause 83 of the Finance (No.2) Bill, 2004."

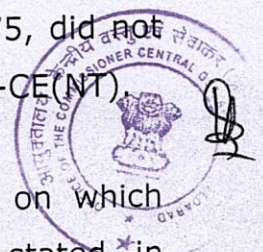
Now the notification, *ibid*, the relevant extracts of which is quoted above, clearly states that there shall be granted rebate of the whole of the duty paid on all excisable goods falling under the First Schedule to the Central Excise Tariff Act, 1985, exported to any country other than Nepal and Bhutan, subject to the conditions, limitations and procedures specified therein. The notification further vide its Explanation-I defines what "duty" would be for the purpose of rebate.

4. Despite being given several separate dates for personal hearing on 08.03.2018, 21.03.2018, 27/28.03.2018 and 25.04.2018, the respondent did not appear before me.

5. I have carefully gone through the facts of the case on record, grounds of appeal in the Appeal Memorandum, written submissions & cross-objections made by the respondent.

6. On examining the impugned order in this back drop, I find that [a] the respondent has filed the rebate under notification No. 19/2004-CE(NT) dated 6.9.2004; [b] the respondent has exported the goods on payment of duty from their CENVAT account. There appears to be no dispute as far as other conditions & limitations, laid down in the notification, except that the respondent discharged the duty before exporting the goods by debiting from CENVAT credit, the amount which was lying in the credit on account of 4% SAD. The Department in their appeal before me have alleged that the claims could not be sanctioned primarily because the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975, did not find a mention in the Explanation-I of the Notification No.19/2004-CE(NT).

7. Explanation-I [reproduced above], clearly lists the duties on which rebate will be granted. The adjudicating authority has nowhere stated in the impugned order that the rebate claims filed by the respondent is in



respect of 4% SAD paid by the respondent. There is no doubt in my mind that the rebate claims are in respect of duties of excise paid under the Central Excise Act, 1944, before export of goods under rebate. This payment of duty of excise under Central Excise Act, 1944, clearly finds mention in (a) under Explanation-I [extracts provided supra].

8. Now coming to the second ground on which the sanction of rebate is being challenged, that is utilization of amount standing to the CENVAT credit of the Respondent under 4% SAD, towards payment of Central Excise duty. Neither the notification nor the concerned central excise rule, puts any bar on the utilization of the CENVAT credit lying to the credit of 4% SAD. Though not directly relevant, I have reproduced the relevant extract of Rule 3 of the CENVAT Credit Rules, 2004, to primarily see whether the CENVAT credit availed in respect of duty paid with regard to of 4% SAD was eligible as credit to the respondent. The relevant extracts, clearly shows that the availment of CENVAT credit by the respondent was correct. When there is no bar on availment of CENVAT credit in respect of amount paid towards 4% SAD and there is no bar towards utilization of the said CENVAT credit towards payment of duty under the Central Excise Act, 1944, in respect of claim of rebate for exports, the impugned order by the adjudicating authority appears to be legal and correct.

9. Now I would like to deal with the last contention of the Department in their appeal, in so far as reliance on the case laws of Vinati Organics Limited [2014(311) ELT 994(GoI)] and Alpa Laboratories Limited [2014(311) ELT 654 (GoI)] is concerned. I find that in both the above cases the rebate claims were filed under notification No. 21/2004-CE(NT) dated 6.9.2004. The relevant text of the notification *ibid*, is reproduced below for ease of reference:

NOTIFICATION NO. 21/2004-CE(NT) [relevant extracts]

Rebate of duty on excisable goods used in manufacture/ processing of export goods — Procedure — Notification No. 41/2001-C.E. (N.T.) superseded

In exercise of the powers conferred by of rule 18 of the Central Excise Rules, 2002 and in supersession of the Ministry of Finance, Department of Revenue, notification No. 41/2001-Central Excise (N.T.), dated the 26th June, 2001 [G.S.R. 470(E) dated the 26th June, 2001], the Central Government hereby, directs that rebate of whole of the duty paid on excisable goods (hereinafter referred to as 'materials') used in the manufacture or processing of export goods shall, on their exportation out of India, to any country except Nepal and Bhutan, be paid subject to the conditions and the procedure specified hereinafter :-

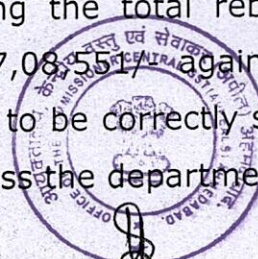


Explanation. - "duty" means for the purposes of this notification, duties of excise collected under the following enactment, namely :-

- (a) the Central Excise Act, 1944 (1 of 1944);
- (b) the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
- (c) the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);
- (d) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), as amended by Section 169 of the Finance Act, 2003 (32 of 2003) and further amended by Section 3 of the Finance Act, 2004 (13 of 2004);
- (e) special excise duty collected under a Finance Act;
- (f) additional duty of excise as levied under section 157 of the Finance Act, 2003 (32 of 2003);
- (g) Education Cess on excisable goods as levied under clause 81 read with clause 83 of the Finance (No. 2) Bill, 2004.

As is evident, Notification no. 21/2004 grants rebate of the whole of the duty paid on excisable goods used in manufacture/processing of export goods. The notification thereafter defines *duty* under explanation. There is a clear distinction between both the notifications issued under Rule 18 of the Central Excise Rules, 2002. While Notification No. 19/2004-CE(NT) dated 6.9.2004 grants rebate on export of excisable goods, Notification no. 21/2004, *ibid*, grants rebate on duty paid on excisable goods used in the manufacture/processing of export goods. Under notification No. 21/2004, no rebate can be claimed on materials used, in respect of 4% SAD, since the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, does not find a mention in the list of duties under explanation to the notification. Now to stretch this logic to notification No. 19/2004-CE(NT) dated 6.9.2004, when it clearly speaks of rebate of excise duty on exports of excisable goods on payment of duty under the Central Excise Act, 1944, is not a valid argument. Hence, the reliance of the Department in their appeal on the aforementioned two case laws is not tenable since they are not at all relevant to the present dispute.

10. When, SAD paid by the respondent is collected by the Government as duties of excise, then such duties of excise collected by the Government under the Central Excise Act, 1944, are covered under Sl.No.(a) of the Explanation I to the Notification No. 19/2004-CE(NT) dated 06.09.2004, as amended, and therefore are eligible for rebate of duties of excise collected on such goods when exported. I therefore find no justification to interfere with the impugned order dt.13.10.2017, sanctioning the total rebate claim of Rs.47,85,097/-, including the rebate of Rs. 27,08,551/- against which the Department has filed an appeal, which appears to be correctly sanctioned. I, therefore, uphold the impugned order and dismiss the department's appeal.



11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
11. The appeal filed by the department, stands disposed off on above terms.

उमा शंकर
(उमा शंकर)
आयुक्त (अपील्स)

ATTESTED

[Signature]

(R.R. NATHAN)
SUPERINTENDENT,
CENTRAL TAX APPEALS,
AHMEDABAD.



To,

M/s. Ball Aerocan India Pvt. Ltd.,
Plot No. SM 9/2, GIDC Estate,
Sanand-II, Village-Bol,
Taluka-Sanand,
Dist. Ahmedabad.

Copy to:

- 1) The Chief Commissioner, Central Tax, GST, Ahmedabad Zone.
- 2) The Commissioner, Central Tax, Ahmedabad-North.
- 3) The Dy./Asst. Commissioner, Division-III, Central Tax, GST, Ahmedabad (North), Ahmedabad.
- 4) The Asst. Commissioner(System), Central Tax, Hqrs., Ahmedabad (North).
- 5) Guard File.
P.A. File.

