रजिस्टर्ड डाक ए. डी. द्वारा :-

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	V2/48/GDS/2018-19	65/2018-19	Date 30.08.2018

ख जारी मूलआदेश : Order-In-Original No.

KCH-EXCUS-001-APP-034-2019

	07.01.2019		14.03.2019

ङ Passed by: Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

च Arising out of above mentioned OIO issued by Assistant/Deputy Commissioner, Central Excise/ST, Division-

छ Appellant & Respondent :

M/s. Gangotri Cooperative Limited, Vishnpur Dist,Village-Virpurgadi, Taluka:Anjar,Dist:Kutch, Pin No 370110Gujarat.

ज Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following manner.

झ Appeal to Customs, Excise & Service Tax Appellate Tribunal

ञ Appeal to the High Court

ट In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

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[illegible] before the Appellate Tribunal.

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Revision application to Government of India:

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:: ORDER-IN-APPEAL ::

M/s Welspun Corp Ltd. Village Varsamedi, District Kutch (hereinafter referred to as "Appellant") filed Appeal No. V2/48/GDM/ 2018-19 against Order-in Original No. 5/2018-19 dated 10.8.2018 (hereinafter referred to as 'impugned order') passed by the Asst. Commissioner, Central GST & Centre. Excise, Anjar-Bhachau Division. Gandhidham Commissionerate (hereinafter referred to as 'Lower adjudicating authority').

2. The brief facts of the case are that the Appellant holding Central Excise Registration No. AAACW0744KXM004, was engaged in the manufacture of M.S. Pipes, Spiral Pipes etc falling under Chapter Heading 73 of the Central Excise Tariff Act, 1985. The Appellant had filed rebate claim of Rs. 11,82,15,739/- under Notification No. 19/2004-CE(NT) dated 6.9.2004 in respect of goods cleared from their factory for export during the month of March, 2014 which was sanctioned by the Dy. Commissioner of Central Excise, Gandhidham Division vide Order-in-Original No. 52/2014-15 dated 28.5.2014.

2.1 The Appellant was availing 'Incentive Scheme 2001' of Government of Gujarat wherein they were allowed to recover amount of Sales Tax involved in sales transactions and retain the same without paying Sales Tax to Government Account. The Department took a view that Sales Tax amount retained by the Appellant was required to be included in assessable value of final product for the purpose of levy of Central Excise duty in terms of Rule 6 of Central Excise Valuation Rules, 2000 read with Section 4(1) and Section 4(3)(a)(d) of the Central Excise Act, 1944. The issue was decided by the Hon'ble Supreme Court in favour of the Department in the case of Super Synotex (India) Ltd-2014 (301) ELT 273(SC). Pursuant to the judgment of the Hon'ble Supreme Court supra, the Appellant paid differential Central Excise duty of Rs. 47,26,594/- on 5.3.2015 in respect of Sales Tax amount retained by them on the goods exported during March, 2014 and subsequently filed rebate claim of Rs 47,26,594/- in respect of Central Excise duty so paid. The Asst. Commissioner, Central Excise and Service Tax, LTU, Mumbai vide Order-in-Original No. LTU/MUM/CX/GLT-B/R-142/2015-16 dated 11.2.2016 rejected the rebate claim on the ground that the Hon'ble Supreme Court rendered judgement on 28.2.2014 and goods were exported by the Appellant in the month of March, 2014 and hence, the Appellant should have paid differential duty at the time of export itself but the Appellant paid differential duty only on 5.3.2015.

2.3 Being aggrieved, the Appellant preferred appeal before the Commissioner(Appeals), LTU, Mumbai which was decided in favour of the Appellant vide Order-in-Appeal No. BR/53/LTU/Mum/2017-18 dated 2.6.2017. Pursuant to the order of the Commissioner(Appeals),Mumbai the Appellant sent letter dated 13.6.2018 to the lower adjudicating authority (received by him on 15.6.2018) but refund was rejected vide the impugned order on the ground that the Applicant was required to file claim within one year from the date of Order-in-Appeal as per in terms of sub-section (B)(ee) of Section 11B of the Act and hence, the claim is hit by limitation of time.

3. Being aggrieved with the impugned order, the Appellant has preferred appeal, inter alia, on the following grounds :

(i) The Appellant submits that the duty paid on the goods exported became refundable in terms of the provisions of Rule 18 ibid read with Notification No. 19/2004 CE(NT) dated 6.9.2004 and that the refund has been held as admissible and sanctioned in terms of the Order-in-Appeal No. 18/LTU/MUM/2017-18 dated 2.6.2017 which subsumes and set aside the earlier Order-in-Original No. LTU/MUM/CX/GLT-6/R-1/2/2015-16 dated 11.3.2016 in terms of which the impugned rebate was earlier rejected. It is settled in order passed under subsection (2) of Section 11B and under which the order of refund is made as held by the CESTAT in the case of Mawlee Irrigation Ltd -2007(207) ELT 617 and also by the Hon'ble Supreme Court in the case of Ranbaxy Laboratories -2011 (273) ELT 3 (SC). Thus, the said Order in Appeal which allowed the Appellant's appeal against the Order-in-Original dated 11.3.2016, with consequential relief, is actually an order passed under Section 11B(2)/Rule 18 and sanctioning the rebate. In the case of Mawlee Irrigation Ltd supra, the Hon'ble CESTAT held that "Earlier orders of Assistant Commissioner not sanctioning refund claim do not exist and Commissioner (Appeals) order takes the place of order sanctioning refund". That being the case, the Explanation (ee) in Section 11B ibid is completely irrelevant and inapplicable and as the impugned order has held the refund time-barred on account of the said explanation (ee).

(ii) The Appellant submits that the supplementary rebate claim was filed on 12.3.2015 which was rejected by the adjudicating authority and the Commissioner (Appeals) vide Order-in-Appeal dated 2.6.2017 allowed the Appellant's appeal holding the claim to be admissible on merit and not hit by time barred and ordering consequential relief. When no action was taken for almost one year after the passing of the said Order in Appeal, the Appellant sent a reminder. To treat such reminder as a fresh application for rebate is

completely untenable and also absurd. It needs to be reiterated that the date of application of refund/rebate remains invariant regardless of whether refund was held admissible by the adjudicating authority or by the higher judicial forum. In the case of Movilex Irrigation Ltd supra, it is clearly held that no fresh application is required in such cases as the Order-in-Appeal is actually an order sanctioning refund.

(iv) It is a settled law that a rebate claim filed under Rule 18 of the Central Excise Rules, 2002 is not hit by the limitation prescribed in Section 11B of the Act as held in following case laws:

(a) Dorcas Market Makers Pvt Ltd- 2015 (321) E.L.T. 45 (Mad.)
(b) ISL Lifestyles Ltd- 2015 (326) E.L.T. 265 (P. & H.)

(v) The Appellant submits that since rebate is payable as held by the Commissioner (Appeals) vide the said order-in-appeal, interest is also mandatorily payable after three months from the date of receipt of the rebate application i.e. from 12.3.2015 and relied upon judgement rendered by the Hon'ble Supreme Court in the case of Ranbaxy Laboratories supra.

3.1 In Personal Hearing, the Appellant reiterated the grounds of Appeal and submitted that they sent letter on 13.6.2018 as reminder that Commissioner(Appeals) had already decided their appeal in their favour on issue of time bar; that in such case, claim cannot be considered by the lower adjudicating authority as time barred when the order of the Commissioner(Appeals), LTU, Mumbai dated 2.6.2017 has not been challenged by the Department; that the order of Commissioner (Appeals) was received by them on 13.6.2017; that the lower adjudicating authority did not issue any SCN /letter for rejecting their claim.

Findings:-

4. I have carefully gone through the facts of the case, the impugned order and written as well as oral submissions made by the Appellant. The issue to be decided in the present appeal is whether the Appellant is eligible for rebate of duty paid on the exported goods or claim of the Appellant is time barred?

5. I find that the lower adjudicating authority denied rebate of duty paid on exported goods vide the impugned order on the ground that the Appellant did not file rebate claim pursuant to the order of the Commissioner(Appeals), LTU, Mumbai within one year from the date of Order-in-Appeal in terms of Explanation (B)(ii) contained in Section 11B of the Act and hence, their rebate claim was hit by limitation of time. The Appellant has contended that duty paid

on the goods exported, to claim refund in terms of the provisions of Rule 18 ibid read with Notification No. 19/2004-CE (NT) dated 6.9.2004 and that the refund has already been assessable and ordered to be sanctioned vide Order-in-Appeal dated 2.6.2017 (received by them on 13.6.2017) and subsumed earlier Order in Original No. LTU/Supdt/CEX/GLT-B/R-142/2015-16 dated 11.2.2016 by setting aside the order which had rejected the rebate; that when no action was taken by the lower adjudicating authority for almost one year after passing of the said Order-in-Appeal, the Appellant sent a reminder on 13.6.2018, which has been wrongly considered in the impugned order as fresh application for rebate; that date of application of rebate remains as 5.3.2015 regardless of whether refund was held admissible by the adjudicating authority or by the Appellate authority or by the higher judicial forum.

6. I find that the Appellant had paid differential Central Excise duty in respect of Sales Tax retained by them pursuant to Apex Court's judgment and had filed supplementary rebate claim of Rs. 17,26,594/- on 12.3.2015, which was rejected on 11.2.2016 by the lower adjudicating authority on the ground of limitation. On filing of appeal, the then Commissioner (Appeals), LTU, Mumbai vide Order-in-Appeal dated 2.6.2017 held that there is no time limit prescribed for filing rebate claims and hence, rebate claim filed by the Appellant on 12.3.2015 was not barred by limitation of time and allowed the appeal of the Appellant with consequential relief.

6.1 I find that, in the present case, for rebate of duty paid on exported goods accrues under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 6.9.2004, the Appellant was not required to file fresh rebate claim since they had already filed rebate claim on 12.3.2015. Only because rebate claim was wrongly rejected holding it time barred, Commissioner(Appeals) vide Order-in-Appeal dated 2.6.2017 held that doctrine of limitation is not applicable in case of rebate claims and since the said order of the Commissioner(Appeals) has not been challenged by the Department in higher appellate forum as noted by the lower adjudicating authority himself at Para 14 of the impugned order, the Order-in-Appeal dated 2.6.2017 attained finality. Under the circumstances, it is not open for the lower adjudicating authority to again reject the rebate claim on the ground of limitation. The Commissioner(Appeals), LTU, Mumbai has allowed the appeal of the Appellant with consequential relief and judicial discipline requires the lower adjudicating authority to implement the Order-in-Appeal dated 2.6.2017, when Department had accepted the order. The Appellant vide letter dated 13.6.2018 stated to have reminded the lower adjudicating authority for non-sanction even after a

year approximately, the lower adjudicating authority now considering the letter dated 13.6.2018 of the Appellant as fresh refund claim. This is legally untenable and very surprising to say the least. Let's examine Explanation (B)(ec) of Section 11B of the Act, which is ground for holding letter dated 13.6.2018 as fresh refund application and it time barred, as below:

> "(B) the relevant date means,
>
> (ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;"

6.2 I find that explanation (B)(ec) of Section 11B of the Act applies in case of refund arising as a consequence of any judgment, decree or order of appellate authority, Appellate Tribunal or any court. However, in the present case, the refund of duty paid on exported goods had arisen under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 6.9.2004 and not on account of Order-in-Appeal dated 2.6.2017 passed by the Commissioner (Appeals), LTU, Mumbai as held by me in Para supra. The Order-in-Appeal dated 2.6.2017 only set aside earlier Order-in-Original dated 11.7.2016 holding claim of the Appellant as time barred. Hence, I am of the considered view that Explanation (B)(ec) of Section 11B of the Act is not applicable to the facts of the present case.

6.3 I rely on an Order passed by the Hon'ble Madras High Court in the case of BNP Paribas Global Securities Operations Pvt. Ltd. reported as 2018 (11) G.S.T.L. 28 (Mad.), wherein it has been held that,

> "7. The assessee's case is that as per Section 11B of the Central Excise Act, 1944, the refund claim has to be filed within one (1) year from the relevant date and the relevant date in the case of the petitioner is the date of order passed by the appellate authority and if such date is reckoned, the application for refund dated 27-4-2017 is filed beyond the period of one year as the order passed by the Appellate Authority are dated 31.12.2015, 13.2.2016 and 25.4.2016.
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> 8. The learned Senior Standing Counsel appearing for the revenue referred to Section 11B(1) Explanation (B)(ec) of the Central Excise Act, 1944 and submitted that in the case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction will be the relevant for the purpose of calculating the period of one year.
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> 9. Therefore, it is submitted that the application dated 27-4-2017 is deemed to be rejected on the ground of time barred and it is the duty of the petitioner to respond to the show cause notice. The respondent, rightly taken a note of the fact that the claim for refund is not as a result of any Judgment or order or direction of a Court or order of a Tribunal or an authority but it is on account of a notification issued by the Central Board being Notification No. 27/2012-C.E. (N.T.), dated 18-6-2012. This notification deals with refund of CENVAT credit under Rule 5 of the CCR, 2004 and it not only prescribes the safeguards, conditions and limitations, it also prescribes the procedure for filing

the refund claim under Clause 2 of the notification and in terms of Clause 3(b) of the notification the application for refund in Form A along with the documents specified therein are the only documents to the quarter for which the refund is claimed shall be filed by the petitioner before the expiry of the period specified under Section 11B of the Act. Thus the petitioner filed an application in terms of the said notification to the adjudicating authority namely, the respondent in Paragraph 5 of the order dated 30.10.2012 is not found that the export invoices raised after 6-3-2012 are well within the period of limitation as per Section 11B of the Act. However, it has to be seen as to whether the adjudicating authority (Section 11B) has to be directed to consider whether the petitioner's applications is hit by the time or not.

10. In the considered opinion it may not be necessary to refer to the submissions (Page 3 para 4 letter (B)(b)) that the amendment in terms of Section 83 of the Finance Act several provisions including Section 11B of the Central Excise Act, 1944 would apply to the present case under the Finance Act (the appeal, we have appropriate the word services should be substituted while reading the definition of relevant date for the appreciation the provisions are quoted herein below :-

11B. Claim for refund of duty. (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date in such form as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty has not been passed on by him to any other person.

(2) "relevant date" means –

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods or, as the case may be, the excisable material used in the manufacture of such goods, –

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India.

11. Since the nature of services done by the petitioner is export of services, it would be appropriate to read the definition of "relevant date" as per the above explanation in the following manner.

"2. "Relevant date" means,

In the case of export of services out of India where a refund of CENVAT paid is available in respect of the export of services or as the case may be, the excisable material used in the export of services shall be the relevant date. If the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded leaves India. If it is exported by land, the date on which such goods pass the frontier, or if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India.

12. As in the above, the refund is to be granted by the Department on issue of any order or judgment but on account of statutory provisions complied with the notification where input services are used for export of services. Thus, the

reliance placed on the explanation (B) does not render any support to the case of the Revenue."

(Emphasis supplied)

6.4 In view of above, I hold that the Appellant is eligible for rebate of duly paid on exported goods.

7. The Appellant pleaded that since rebate is payable, interest is also payable after three months from the date of receipt of the rebate application i.e. 12.3.2015 and relied upon judgment rendered by the Hon'ble Supreme Court in the case of Ranbaxy Laboratories Ltd-2011 (273) ELT 3 (SC). I find that the Appellant files rebate claim of Rs. 47,26,594/- on 5.3.2015, which is eligible to them as held by me in Para supra. I find that the Appellant has yet not been sanctioned rebate and provisions contained in Section 11BB of the Act mandates grant of interest in cases where there is delay in payment of refund beyond 3 months from the date of filing of refund claim. I find that refund includes rebate of duty of excise exported out of India in terms of Explanation (A) of Section 11B of the Act and hence, the provisions contained in under Section 11BB are also applicable to late payment of rebate claim. The Order-in-Appeal dated 2.6.2017 specifically ordered to grant rebate with consequential relief. I also rely on the judgment passed by the Hon'ble Supreme Court in the case of Ranbaxy Laboratories Ltd reported as 2011 (273) ELT 3 (SC), wherein it has been held that,

"9. It is manifest from the afore-extracted provisions that Section 11BB of the Act comes into play only after an order for refund has been made under Section 11B of the Act. Section 11BB of the Act lays down that in case any duty paid is found refundable and if it is not refunded within a period of three months from the date of receipt of the application to be made under sub-section (1) of Section 11B of the Act, then the applicant shall be paid interest at such rate as may be fixed by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below Provision to Section 11BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this Section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under sub-section (2) of Section 11B of the Act. It is clear that the Explanation has nothing to do with the commencement of the date from which interest becomes payable under Section 11BB of the Act. Manifestly, interest under Section 11BB of the Act becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11BB that can be arrived at

is that interest under the said Section be paid on the expiry of a period of two months from the date of receipt of the application under sub-section (1) of Section 11B of the Act and the Explanation does not have any bearing or connection with the determination under Section 11BB of the Act in this regard.

(For this supplies)

7.1 In view of above, I hold that the appellant is eligible for interest under Section 11BB of the Act after expiry of 2 months from date of filing of rebate claim to actual date of payment of rebate claim.

8. I, therefore, set aside the impugned order and allow the appeal filed by the appellant, with consequential relief.

9. अपीलकर्ता द्वारा दर्ज की गई अपील का इस प्रकार निपटारा किया जाता है।

9. The appeal filed by the appellant is disposed off as above.

(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.

To,
M/s Welspun Corp Ltd,
Welspun City,
Village Varsamedi - 370110,
Taluka Anjar,
District Kutch.

सेवा में,
मे. वेलस्पन कॉर्प लिमिटेड
वेलस्पन सिटी, वरसामेडी,
तालुका अंजार,
कच्छ जिला।

प्रतिलिपि:-

1) प्रधान मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र,अहमदाबाद को जानकारी हेतु।

2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाई हेतु।

3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, प्रभार अंजार मण्डल, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।

4) गार्ड फाइल।