

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench**

Excise Appeal No. 88185 of 2019

(Arising out of Order-in-Appeal No. PVNS/107/APPEAL THANE/TR/2019-20 dated 20.08.2019 passed by the Commissioner of CGST & Central Excise (Appeals-Thane), Mumbai)

M/s. Fine Organic Industries Ltd.

Appellant

Plot No. N-2, MIDC, Additional Ambernath,
Ambernath (E), Thane 421 506.

Vs.

Assistant Commissioner – Thane Rural

Respondent

Thane Rural Commissionerate,
3rd Floor, Vardan Trade Centre,
MIDC, Wagle Industrial Estate,
Thane (W) 400 604.

Appearance:

Shri Kavish Shah, Chartered Accountant, for the Appellant
Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised
Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 26.08.2022

Date of Decision: 26.08.2022

FINAL ORDER NO. A/85853/2022

This appeal has been filed against order in appeal No PVNS/107/Appeals Thane/TR/2019-20 dated 20.08.2019 dated 27.08.2019 of the Commissioner of GST & Central Excise (Appeals), Thane. By the impugned order, Commissioner (Appeals) has dismissed the appeal filed by the Appellant against order in original No R/SDD/95/2018-19 dated 22.02.2019 of the Assistant Commissioner, CGST & Central Excise Division –V, Thane Rural Commissionerate holding as follows:

"I hereby reject the refund claims of Rs 90,774/- (Rupees Ninety thousand seven hundred and seventy four only) for the reason set out in para 18 above. The Show Cause notice dated 01.05.2017 is disposed off accordingly."

2.1 I have heard Shri Kavish Shah, Chartered Accountant for the Appellant and Shri Amrendra Kumar Jha, Deputy Commissioner, Authorized representative for the revenue.

3.1 Appellant was availing services such as clearing and forwarding agent services, used for exporting their goods. These services are eligible for benefit of rebate of service tax paid as per Notification No 41/2012-ST dated 29.06.2012.

3.2 Appellant filed three refund claims, claiming the refund of the service tax paid by them in respect of these services which were eligible for rebate as per Notification No 41/2012-ST. These refund claims were determined by the original authority in manner as detailed in table below:

S No	Claim No/ Date	OIO Date	Amount of Refund in Rs		
			Claimed	Sanctioned	Rejected
1	1320/ 31.08.2015	R/-/2015-16 dtd 26.11.2015	48104	1203	46901
2	1319/ 31.08.2015	R/-/2015-16 dtd 26.11.2015	45185	3267	41918
3	1323/ 14.08.2015	R/-/2015-16 dtd 26.11.2015	55087	4301	50786
	Total		148376	8771	139605

3.3 Aggrieved by the order rejecting their refund claim partly, appellant filed appeal before the Commissioner (Appeals), who vide order in appeal No SK/13-15/TH-I/2017 dated 24.01.2017 remanded the matter back to the original authority observing as follows:

"10. The adjudicating officer has also rejected some claims where amount involved in Shipping bills is less than Rs. 500/- stating that it is in violation of condition 3(1).

11. I observe that the basis of procedure of claim of rebate in Para 2 is Shipping Bill wise and minimum limit of Rs. 50/- per

Shipping Bill has been accordingly prescribed under its para 2(h). Further the basis of procedure of claim of rebate in para 3 is rebate claim wise accordingly minimum limit of Rs. 500/- per rebate claim has been prescribed under its para 3(j). This is logical and with a sound reasoning. There is no ambiguity. It is explicitly given in the notification.

12. Therefore, I find that appellant have filed the rebate claims for more than Rs 500/- per claim and have fulfilled the condition as prescribed under para 3(j) of the Notification. Thus, it was not proper to take individual shipping bills for denying the claim of the appellant on the grounds that amount in each shipping bill was less than Rs. 500/-. The rebate claim of the appellant is much more than the minimum limit of Rs 500/ and accordingly the rebate claims are to be sanctioned.

13 For above I find support from the Order-in-Appeal No. AHM-SVTAX-000-APP 027 -15-16 dated 22.05.2015 in case of Komal Amin Exports Pvt. Ltd. wherein it has been held that the respondent has made a technical error due to which his substantial claim of rebate cannot be denied. The claim of the rebate should be sanctioned as per para 3 of the Notification or as per the para 2 of the notification.

14. The Adjudicating Authority has also rejected the rebate of some claim amount on the ground that the same are for services provided by Sales Commission Agent which are not admissible as these services have been utilized before the "Port of Export" which is the place of removal and also has not provided any supporting document such as agreement or contract with commission agent to substantiate their claim that these services were utilized beyond place of removal. In respect of these claims, I find that the appellant has submitted the copies of invoices and shipping bills in respect of the services received but the nature of services and place of receipt of services is not evident from these documents. Hence, I hold that the appellant has not provided sufficient ground and documents to substantiate their claim and reject the rebate claim in respect of services received from 'sales commission agent'.

16. It is undisputed that goods have been exported and some services (except Sale Commission Agent Service as discussed

above) have been used beyond place of removal. Thus the appellant is entitled to rebate claim either under para 2 or para 3. For claiming rebate under para 2 a safeguarding declaration as per para 2(d) is required to be given while presenting the Shipping Bill that the rebate will not be claimed under para 3. In this case the same may not have been given as the appellant has chosen the option of para 3. This is, however, a procedural lapse and shall not come in way of grant of substantial claim. The appellant has not contended that his claims are within 20% of para 2 but has stated that if he is not given rebate as per para 3 (which is lower) he should have been given rebate under para 2. It cannot be outrightly rejected. I find force in the appellant's contention when I have held that the declaration as per para 2 (d) is only a procedural requirement and especially when no deficiency memo or SCN issued and no opportunity to personal hearing has been granted. In the above scenario, the impugned order is set aside and the right of rebate is restored as it requires detailed arithmetic calculation which can only be worked out at the level of adjudicating authority. The appeal is disposed off in the above terms."

3.4 In pursuance of the order in appeal, the matter was again taken up and show cause notice dated 01.05.2017 was issued to the appellant asking them to show cause as to why refund amounting to Rs 90,774/- should not be rejected. This show cause notice was adjudicated by the as per order in original No 43/PKA/2017-18 dated 29.12.2017 wherein refund claim for Rs 1,39,605/- was rejected instead of Rs 90,774/-. Rejecting the refund claim following was observed:

"I have perused the case records. The issue in the present case is whether the claimant is entitled for refund claim in terms of Notification No.41/2012 (ST) dated 29.06.2012 as amended.

As per the provisions of Notification No.41/2012 dated 29.06.2012 the rebate claim under Para 3 is admissible only when the difference between the amount under Para 2 and that under Para 3 is not less than 20% of the former. The claimant had filed the rebate claims under Para 3. Each claim comprises of more than one shipping bill and rebate in respect of some shipping bills not admissible because the difference between the amount of rebate under the procedure specified in para 2 and

para 3 is less than 20% of the rebate available under the procedure specified in Para 2, in contravention of clause (c) of the proviso to Para 1. Therefore, it appears that the claims where the difference between the amount under Para 2 and that under Para 3 is less than 20% of the former are liable to be rejected, in terms of clause (c) of the proviso to Para 1 of the said notification. For considering the present claim under Para 2 of the said notification as ordered by the Commissioner (Appeals), then the authority for sanction and disbursement of refund claim is with the Customs and in such case, this office has no jurisdiction to deal with the refund claim. Moreover, the claimant has not submitted that, whether they had approached to the Custom Authority for sanction of the present refund claim. I find that the claimant has not followed the procedure for filing the refund claim under Notfn.41/2012-ST dated 29.06.2012. No declarations have even furnished by the claimant as required under (d) of Para 2. Besides, no document are forthcoming on record evidencing the compliance of as laid down in (f) of Para 2. Further, claims wherein the amount in respect of a particular shipping bill is less than Rs.500/- is also liable to be rejected in view of explanation to the said notification. Therefore, it is apparent that, they have not complied with the conditions as stipulated under the said notification. The Tribunal in cases of Alembic Chemical Works Co. Ltd., - 2001(132) ELT 252 (Trb.Mum.) and maintained by Supreme Court reported at 2002 (140) ELT A252 (SC): Electronic Industries of India - 2004(175)ELT 824 (Tr. Del.); Mahindra & Mahindra Ltd., -2007 (219) 361 ELT (Trb.Mum.) and PVS Memorial Hospital Ltd., reported at 2006 (222) ELT Tr. Chennai) clearly held that, if there is non-compliance of any condition of notification, no benefit under the said notification can be permitted or allowed. Thus, even after extending the opportunities of personal hearings and time for providing the documentary evidences for complying the conditions of said notification, they found to be unwilling to fulfill the provisions of the said notification. It is therefore, contended that the claimant does not have any submission on this issue. As the claimant has not submitted the justification for sanction the present claim with sufficient documents and evidences, the present refund is liable to

rejected on merit as well as on jurisdiction. Consequently, I am inclined to pass the following order.

ORDER

I hereby reject the refund claims of Rs 1,39,605/- (Rupees One lakh thirty nine thousand six hundred five only). The claim is accordingly disposed off."

3.5 Appellant preferred appeal against this order, rejecting the refund claim filed which was allowed by the Commissioner (Appeals) as per order in appeal no PVNS/282/Appeal Thane/TR/2018-19 dated 26.10.2018 and the matter remanded back to the original authority.

3.6 In the remand proceedings as per order in appeal above Assistant Commissioner has vide his order in original referred in para 1 above again rejected the refund claim filed by the appellant observing as follows:

"17. I find that I need to sort out two issues here. Firstly decide on the issue of refund of Rs. 90,774/- on the basis of the Show Cause Notice issued on 01.05.2017. Secondly to throw light on the amount of 45,831/- rejected by the Refund sanctioning authority in his order in original No R-43/PKA/2017-18 dated 29.12.2017 over and above the amount of Rs. 90,774/- as sought in the Show Cause Notice issued on 01.05.2017.

18. In respect of the first issue I find that as per the provisions of Notification No.41/2012 dated 29.06.2012 the rebate claim under Para 3 is admissible only when the difference between the amount under Para 2 and that under Para 3 is not less than 20% of the former. The claimant had filed the rebate claims under Para 3. But I find that in all the three claims the difference between the amount of rebate under the procedure specified in para 2 and para 3 is less than 20% of the rebate available under the procedure specified in Para 2. In such cases if the rebate is sanctioned under Para 3 it will be in contravention of clause (c) of the proviso to Para 1 of the Notification. For considering the present claim under Para 2 of the notification as ordered by the Commissioner (Appeals) in his Order in appeal No SK/13-15/Th.1/20174 dated 24.01.2017, the proper authority as per the Notification is with the Customs. This office has no jurisdiction to deal with the refund claim under Para 2 of the

Notification No.41/2012 dated 29.06.2012 Further, I find that the claimant has not followed the procedure for filing the refund claim under Para 2 of Notification No. 41/2012-ST dated 29.06.2012. No declarations have been furnished by the claimant as required under Para 2(d) of the Notification. I find that they have not complied with the conditions as stipulated under the notification. The honorable Tribunal in cases of - Alembic Chemical Works Co. Ltd., - 2001(132) ELT 252 (Tri Mum.) and maintained by Supreme Court 2002 (140) ELT A252 (SC); Electronic Industries of India - 2004(175 JELT 824 (Tri Del.); Mahindra & Mahindra Ltd., -2007 (219)361 ELT (Tri Mum) and PVS Memorial Hospital Ltd., reported in 2008 (222) ELT 541 (Tri Chennai) has consistently held that, if there was non-compliance of any condition of notification, no benefit under the said notification can be permitted or allowed. Following this ratio. I hold that the claim is devoid of merit under Para of the Notification and beyond the jurisdiction of this authority under Para 2 of the Notification

19. *As regards the second issue of I find that the original claim was for Rs. Rs.1,48,376/- in the first round of litigation the amount of Rs. 8,771/- was sanctioned and the amount of Rs 1,39,605/- was rejected by the Orders in Original No.R-2015-16/3086, 3087 & 3088 all dated 26.11.2015. I further find that an amount of Rs. 48.831/- out of the rejected amount of Rs. 1,39,605/- was pertaining to the Sales Commission. In the appellate order No. SK/13-15/Th.-I/2017-18 dated 24.01.2017 the rejection of Rs. 48.831/- on account of Sales Commission was upheld which was not challenged by the claimant and hence attained finality. Hence, in denovo adjudication, Show Cause Notice was issued on 01.05.2017 for rejecting the balance claim amounting to Rs. 90,774/-. I find that in the Order in Original No. R-43/PKA/2017-18 dated 29.12.2017, the refund sanctioning authority, inadvertently shown the amount of Rs. 1,39,605/-as rejected, which included the already rejected amount of Rs. 48,831/- on account of Sales Commission, which was upheld by the Commissioner (Appeals). The error has been nullified in view of the remand back and the same has been taken care of in this order."*

3.7 Commissioner (Appeals) has by the impugned order, observed as follows while upholding the order of Assistant Commissioner:

"8. The appellant was granted personal hearing on 27.06.2019. Shri Bhushan D. Jain, Chartered Accountant appeared on behalf of the appellant and reiterated the submission made in the appeal memorandum and has requested to sanction refund claims.

9. I have gone through the facts of the case, records placed on the file and submissions made during the course of personal hearing. The issue to be decided by me in the instant case is whether rebate claims to the extent of that amount, wherein the condition prescribed in the Notification No.41/2012 (ST) has not been fulfilled, is required to be rejected or otherwise.

10 Extract of Notification No.41/2012 (ST), dated 29.06.2012, (in relation to the issue under dispute) states as under:

".... 1(c) the rebate under the procedure specified in paragraph 3 shall not be claimed wherever the difference between the amount of rebate under the procedure specified in paragraph 2 and paragraph 3 is less than twenty per cent of the rebate available under the procedure specified in paragraph 2;

(2) the rebate shall be claimed in the following manner, namely:

(d) the exporter shall make a declaration in the electronic shipping bill or bill of export, as the case may be, while presenting the same to the proper officer of customs, to the effect that

(i) the rebate of service tax paid on the specified services is claimed as a percentage of the declared Free On Board(FOL) value of the said goods, on the basis of rate specified in the Schedule;

(ii) no further rebate shall be claimed in respect of the specified services, under procedure specified in paragraph 3 or in any other manner, including on the ground that the rebate obtained is less than the service tax paid on the specified services;

(iii) conditions of the notification have been fulfilled;

(e) *service tax paid on the specified services eligible for rebate under this notification, shall be calculated by applying the rate prescribed for goods of a class or description, in the Schedule, as a percentage of the FOB value of the said goods;*

(3) *the rebate shall be claimed in the following manner, namely:*

(a) *rebate may be claimed on the service tax actually paid on any specified service on the basis of duly certified documents;*

(b) *the person liable to pay service tax under section 68 of the said Act on the taxable service provided to the exporter for export of goods shall not be eligible to claim rebate under this notification;*

(c) *the manufacturer-exporter, who is registered as an assessee under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder, shall file a claim for rebate of service tax paid on the taxable service used for export of goods to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of manufacture in Form A-1;...."*

11. *As per the above Notification, two procedures have been specified for claiming the refund of service tax. The first procedure, as stipulated in Para 2 of the said Notification allows rebate of service tax paid on eligible input services as a percentage value of the declared Free on board (TOB) value of the export goods on the basis of rate specified in the schedule, which is to be claimed from Customs authorities. The other procedure as stipulated in Para 3 is that the rebate may be claimed on the service tax actually paid on any specified service on the basis of duly certified documents, which is to be claimed from Excise authorities. However, the foremost condition as stipulated in Para 1 (c) of the Notification is that the rebate cannot be claimed under the procedure as Para 3, wherever the difference between the amount of rebate under the procedure of rebate as per Para 2 i.e. as a percentage on FOB value and rebate on the basis of documents as Para 3, is less than twenty per cent of the rebate available under the procedure as per Para 2. It is crystal clear that if the difference between the amount of rebate calculated as per procedure laid down under Para 2 and*

the rebate claimed as per the procedure laid down under Para 3. is less than 20% of the rebate available under Para 2, the Rebate cannot be claimed under Para 3. In such a scenario, the appellant is eligible for rebate for the amount as calculated as per Para 2 of the Notification only and cannot claim the rebate under Para 3 of the Notification ibid.

12 *I find that the Adjudicating Authority has rejected the refund of Rs.90,774/-as per the provisions of Notfn. No.41/2012 dt.29.06.2012, the rebate claim under para 3 is admissible only when the difference between the amount under Para 2 and that under Para 3 is not less than 20% of the former. The claimant had filed the rebate claims under Para 3 and in all the three claims the difference between the amount of rebate as specified in Para 2 and Para 3 is less than 20% of the rebate available under the procedure specified in Para 2 and in such cases if the rebate is sanctioned under Para 3 it will be in contravention of clause (c) of the proviso to Para 1 of the Notification. For considering the present claim under Para 2 of the notification as ordered by the Commissioner (Appeals) in his Order-in-Appeal dated 24.01.2017, the proper authority as per the notification is with the Customs. Further, the appellant has not followed the procedure for filing the refund claim under Para 2 and no declarations have been furnished by the claimant as required under Para 2(d) of the said notification. I find that the appellant has not followed the proper procedure under Para 2, Para 2(d) & Para 3 of the said notification and therefore, the appellant is not eligible for the refund amount of Rs.90,774/-. **Held Accordingly.***

13. *The Notification No. 41/2012 (ST) does provide two options for claiming rebate of service tax and the exporter can choose whichever procedure is beneficial to them. However, they cannot ignore the conditions laid down in the Notification for claiming the rebate. A Notification is a law enacted by the Government of India and where the statute provides a condition to be fulfilled for availing the benefit of a particular Notification, the provision has to be complied with as a mandatory requirement of the law. I also find that the Adjudicating Authority has observed that the appellant' have not complied with the conditions as stipulated under the notification.*

14. *The Hon'ble Supreme Court in judgement, reported at 2011 (270) E.L.T. 465 (S.C.), while dismissing the appeal filed by M/s. Saraswati Sugar Mills has held as under:*

"Interpretation of exemption notification - Notification to be strictly construed - Conditions for taking benefit under notification also to be strictly interpreted. Wordings of notification when clear, plain language of notification be given effect to - Court cannot add or substitute any word while construing notification either to grant or deny exemption. (para 7]

Interpretation of statutes - Rules - Rules are framed under statute and should be read as part of statute itself - Rules required to interpreted as intra vires to Act under which they issued. [para 8]

Components - Whether particular article is component of another. Test is to look at article and consider it uses and whether its only use or its primary or ordinary use is as component part of another article. (para 12]

Words and Phrases - Components - Common parlance meaning - Component part of an article is an integral part necessary to constitution of whole article and without which, the article will not be complete. (para 13]"

15. *In view of the above discussion, I find that the adjudicating authority has rightly rejected that the rebate claims to that extent where the condition prescribed in the Notification No. 41/2012-S.T., dated 29.06.2012, has not been fulfilled. I find that as per above citation the appellant has not followed proper procedure/ condition mentioned under Notification No.41/2012-ST dated 29.06.2012. **(Held Accordingly).***

In view of the discussions and findings above, I reject the appeal filed by the appellant and uphold the impugned Order-in-Original."

3.8 From the findings as recorded by the lower authority specifically in the impugned order I find that the findings recorded by him are in contradiction to the findings recorded by his predecessor in order in appeal No SK/13-15/Th-I/ 2017 dated 24.01.2017. Admittedly the order dated 24.01.2017, has

not been challenged by the revenue authorities by filing any appeal against the said order and has acquired finality. Commissioner (Appeals) has vide the said order remanded the matter only for computation of the refund claim to be allowed in favour of the appellant on the basis of observations made by him. While vide order in appeal dated 24.01.2017, Commissioner (Appeals) has specifically recorded that the conditions of notification were only of procedural nature and cannot be reason for outright rejection of the rebate/refund claims, his successor has taken diametrically opposite view in the matter when deciding the appeal against the order passed in the remand proceedings. Any order beyond the observations made in the said order in appeal dated 24.10.2017, would be contrary to the principles of judicial discipline and all the authorities concerned including his successor is bound by the same. In view of above I do not find any merits in the impugned order.

3.9 Accordingly matter needs to be reconsidered by the original authority strictly in accordance with the observations made by the Commissioner (Appeals) in order dated 24.01.2017. For this purpose matter is remanded back to the original authority for redetermination of the refund claims as detailed in table in para 3.2 in accordance with the order in appeal dated 24.01.2017.

4.1 Appeal is allowed setting aside the impugned order. Matter is remanded back to the original authority as per the observations made in para 3.9 above.

4.2 Since the issue is quite old, original authority should decide the matter in the de-novo proceedings within three months of the receipt of this order.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)