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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on : 04 October 2023**
Judgment pronounced on : 13 October 2023

+ **W.P.(C) 2239/2020**

M/S PAWAN JAIN & SONS. Petitioner
Through: **Mr. Rajiv Tuli and Mr. Himanshu G., Advs.**

versus

UNION OF INDIA Respondent
Through: **Mr. Asheesh Jain, CGSC with Mr. Gaurav Kumar, Adv. for R-1.**
Mr. Satish Aggarwal, Sr. Standing Counsel

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

DHARMESH SHARMA, J.

1. The petitioner invokes the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India for issuance of a Writ of Certiorari and/or any other appropriate writ challenging the impugned order dated 27 September 2019 passed by the Revisionary Authority, Additional Secretary to the Government of India, Ministry of Finance, New Delhi¹, whereby the claim for refund of duty paid on inputs for executing the export obligations under Rule 18 of the

¹ Revisionary Authority



Central Excise Rules, 2002² read with notification No. 41/2001-CE (NT) dated 26 June 2001 was declined.

FACTUAL BACKGROUND:

2. The petitioner, having its registered office in Delhi, is engaged in the business of manufacturing and export of S.S. Utensils etc. and it was having Central Excise Registration No. AAOPJ7853NXM001. It is stated that certain exports obligations were duly undertaken during the period 2003-2004 for which the petitioner filed six separate Rebate Claims in the year 2004 pertaining to the period from September 2003 to March 2004, thereby seeking rebate of duty amounting to a total of Rs. 97,71,926/- that was claimed to have been paid on the inputs used in the manufacturing of the end product. It is stated that the Rebate Claims were lodged in terms of Rule 18 of the CER and in terms of Notification No. 41/2001 dated 26 June 2001. All the relevant documents were submitted with the respondent except that a request was also made by the petitioner to condone the procedural lapse of filing A.R.E. 1 instead of A.R.E. 2 besides submitting a request for fixation of the input-output norms in terms applicable during the export period in terms of letter from the Office of Assistant Commissioner, Central Excise dated 18 March 2004³.

3. To cut the long story short, six Orders-in-Original dated 30 July 2008 were passed separately by the Adjudicating Authority, thereby granting total refund amounting to Rs.49,15,971/-. Aggrieved thereby the petitioner filed an appeal before the Commissioner

² CER

³ C.No.V(87)18/REF/IO/PJS/D-I/2003



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(Appeal) on 06 January 2009 which was dismissed in *limine* vide order dated 29 September 2009 primarily for the same being time barred as it was claimed by the Department that the copy of the impugned six orders in original had been supplied to the authorised representative of the petitioner on 21 August 2008. The revision application filed by the petitioner before Revisionary Authority was allowed vide order dated 30 August 2011, thereby setting aside the orders in Appeal dated 29 September 2009 and remanded the matter back to the Commissioner (Appeal) with a direction to decide the case afresh on merits after affording a reasonable opportunity of hearing to the petitioner.

4. It is stated by the petitioner that he moved an application dated 10 January 2012 before the Commissioner (Appeal) submitting, *inter alia*, if the copies of the six orders-in-original were dispatched on 30 July 2008 by post, there was no occasion to hand over physical copies of the orders on 21 August 2008, but the application was dismissed by the Commissioner (Appeal) vide order dated 29 October 2012, whereby again holding that there was inordinate delay of 139 days in the filing of the appeal, thus, rendering it time barred, and hence, no findings on merits were warranted. The petitioner then approached the Revisionary Authority, which vide order dated 04 December 2014 allowed the Revision, thereby setting aside the order dated 29 October 2012 passed by the Commissioner (Appeal), but again the Commissioner (Appeal) proceeded to deal with the issue of limitation and passed orders dated 03 February 2016 dismissing the appeal, which was then challenged before the Revisionary Authority on 18



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March 2016. The revision application came to be dismissed vide impugned order dated 27 September 2019, assigning the following reasons:

“4. The issue of time bar raised by the Commissioner (Appeals) in the impugned order has been settled by the earlier revision order no. 373/14-CX dated 04.12.2014 of the government. Therefore the matter is being taken up on merits for a decision.

5. The applicant has claimed that rebate should have been sanctioned as per actual consumption of raw material (steel flats) used in the manufacture of steel utensils which were subsequently exported. The department has sanctioned the rebate on the basis of SION (Standard Input Output Norms) for coils/springs (1.30: 1.00) whereas the special norms for steel flats were fixed by the department as 1.88: 1.00 on 18.03.2004.

5. The Government has examined the matter. The procedural requirement as provided in the notification no. 41/2001 dated 26.06.2001 specifies that

(1) the ratio of input and output has to be mentioned in the prescribed declaration before the commencement of export of such goods.

(2) the jurisdictional Assistant Commissioner has to call for sample or even carry out an inspection in factory or process to satisfy the correctness of claim.

Since the impugned goods were exported prior to fixation of the special input/output norms for steel flats by the jurisdictional central excise authorities, the mandatory conditions of Notification No. 41/2001 dated 26.06.2001 regarding declaration and subsequent verification remain unfulfilled. These are substantive conditions of Notification No. 41/2001 dated 26.06.2001 for claiming rebate under Rule 18 of Central Excise Rules, 2002. Hon'ble CESTAT in the case of M/s Arun International Vs CCE [2015(317)ELT465(TRI-DEL)] has held **that non-declaration of Input-output ratio in respect of export of fully exempted steel utensils manufactured from duty paid inputs is a substantive condition of notification 41/2001 and is not condonable.** The above judgement squarely covers the facts of the present case.

6. It is observed by the Adjudicating Authority in the impugned orders that the applicants themselves requested to grant the rebate as per SION norms fixed by DGFT. No evidence as advised during the course of Personal Hearing that the applicant had subsequently requested the respondent to consider the special input- output norms fixed for steel flats in respect of the impugned rebate claims has been produced.



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7. As per the Central Excise Rules, 2001 duty on the scarp generated has to be paid from PLA account as per Notification No. 41/2001 dated 26.06.2001 wherein the exporter has to furnish a declaration that CENVAT Credit has not been availed. Notification 41/2001 dated 26.06.2001 clearly specifies that any waste arising during the manufacture of export goods may be removed on payment of duty as if such waste has been manufactured in the factory of the manufacturer. As the applicant paid duty from CENVAT account in respect of such waste generated during the manufacture of impugned export goods, it is observed that the Commissioner (Appeals) has correctly upheld the original authority's order deducting the impugned amount from the rebate claims. The issue regarding payment of duty thrice has already been decided by Commissioner (Appeals) and needs no Interference.
8. Accordingly, the revision application filed by the applicant is rejected.”

GROUND FOR CHALLENGE:

5. The impugned order dated 27 September 2019 is assailed in the instant writ petition, *inter alia*, on the grounds that the Revisionary Authority totally misconstrued Clause 4 (c) of the Notification dated 26 June 2001 which permitted removal of waste on payment of duty if such waste was manufactured or processed out of the factory of the applicant seeking rebate; and that the petitioner was entitled to seek rebate in terms of modified SION⁴ norms fixed in terms of the letter dated 18 March 2004 issued by the Office of Assistant Commissioner, Central Excise and not as per the norms fixed by the DGFT; and that the petitioner accordingly manufactured the product consuming 1.882 kgs of SS Flats for the manufacture of 1.00 kg of SS Utensils. Thus, the grievance of the petitioner is that rebate claims have been disallowed in an arbitrary manner. The relevant details are compiled in tabular form as under:

⁴ Standard Input Output Norms



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S.no	Order No	Rebate Claim as per SION norms 1.882:1	Rebate Claim allowed as per SION norms fixed by DGFT 1.30:1	Reduction in claim by change in SION norms.
1.	218-R	Rs.14,76,143	Rs. 10,46,193	Rs.4,29,950
2.	219-R	Rs.13,78,593	Rs.9,51,614	Rs.4,26,979
3.	220-R	Rs.18,23,931	Rs. 13,87,353	Rs.4,36,578
4.	221-R	Rs.17,68,788	Rs. 12,21,775	Rs.5,47,013
5.	222-R	Rs.14,04,633	Rs.6,95,199	Rs.7,09,434
6.	223-R	Rs.19,19,838	Rs. 13,60,755	Rs.5,59,083
	Total			Rs.31,09,037

REPLY BY THE RESPONDENT:

6. On behalf of respondent No. 2, Mr. Aman Singla, Assistant Commissioner, Central Goods & Service Tax (North), Delhi, has filed a short affidavit and the stand of the department is reiterated that the petitioner filed declaration as per ARE-1 in terms of notification No. 41/2001 dated 26 June 2001 that made application of input-output norms applicable as existing at the time of exports; and that it was mandatory for the exporter to file a declaration containing details, *inter alia*, about the manufacturing formula with particular reference to quantity or proportion to which raw material were actually used as well as about the quality before commencement of export of such goods, but the assessee/petitioner failed to file the relevant details in terms of notification No. 41/2001 dated 26 June 2001. As regards, the scraps/waste generated during the course of manufacturing of S.S. Utensils, it is deposed that the waste product of the petitioner was



marketable and arose regularly in the ordinary course of business, and therefore, dutiable, despite the fact that the main product, viz. S.S. Utensils was exempted from duty under notification No. 10/2003 dated 01 March 2003; and since, no CENVAT credit facility was available to the petitioner during the relevant period, hence, it was liable to pay duty on scrap from the cash ledger. Lastly, it has been reiterated that the copies of the six Orders-In-Original dated 30 July 2008 had been handed over to Sh. Shiv Kumar, the representative of the petitioner on 21 August 2008, and therefore, the appeals were filed beyond the prescribed period of limitation.

ANALYSIS AND FINDINGS:

7. We have given our thoughtful consideration to the submissions made by the learned counsels for the parties and have perused the relevant documents placed on the record.

8. First things first, insofar as the issue of statutory appeals initially filed beyond period of limitation is concerned, it is manifest that the issue was set to rest by the Revisionary Authority vide its order dated 04 December 2014 calling upon the Commissioner (Appeal) to decide the claim on merits. Further, the Revisionary Authority in its subsequent order dated 27 September 2019 too, refused to go into the issue of limitation. Since the said orders had not been assailed by the department, we find no legal imperative to interfere in such disputed question of facts as to whether or not the impugned Orders-In-Original were served upon the representative of the petitioner on 21 August 2008 and hence, find it unpersuasive to



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hold that the initial statutory appeals against the orders in original were time barred.

9. As regards the rebate claims of the petitioner and the plea of non-application of correct SION, it is borne out from the record that pursuant to application moved by the petitioner on 08 January 2004, the office of the Assistant Commissioner of Central Excise vide letter dated 18 March 2004 (Annexure P-2) fixed the input output ratio for different categories of work as under:-

S.No.	Export Goods	Inputs	Output
<u>Export goods Manufactured out of S.S. Sheets/Coils</u>			
1.	S.S. Utensils/ Kitchenware	1.30	1.00
<u>Export goods Manufactured out of S.S. Flats</u>			
2.	S.S. Utensils/ Kitchenware	1.882	1.00
<u>Export Goods Manufactured out of S.S. INGOTS</u>			
3.	S.S. Utensils/ Kitchenware	1.901	1.00

10. There is no gainsaying that the fixation of input output norms is done to enable the manufacturer exporters to seek rebate for the inputs used in the export of the manufactured product. Admittedly, the goods had been duly exported presumably meeting with all the relevant regulatory norms between the period September, 2003 to January, 2004. It is pertinent to indicate that two rebate claims were filed on 07 January 2004 and third one on 01 March 2004, whereas, the rest of the three were filed after the aforesaid communication dated 18 March 2004. However, the petitioner has not placed on the record a copy of its letter dated 08 January 2004 and it is not clear if the said letter



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pertained to any request about fixation of input-output norms with regards to export obligations already undertaken or to be taken in future. The issues are further confounded since it is also not clear as from which date the norms specified vide aforesaid communique had been made applicable. Be that as it may, ordinarily the input output ratio fixed vide aforesaid communique dated 18 March 2004 could not have been applied retrospectively. We find that the Adjudicating Authority failed to render any findings on such issues.

11. This brings us to the last issue of applicability of central excise duty on removal of waste/scrap generated during the course of the manufacture of S.S. Utensils etc. At this juncture, it would be relevant to reproduce Rule 18 of the CER which provides as under:

"Rule 18. Rebate of duty. - 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 fulfillment of such procedure, as may be specified in the notification."

12. The notification No. 41/2001-CE(NT) dated 26 June 2001 has been issued under the aforesaid Rule, which provides as under:

"Inputs used in manufacture/processing of export goods - Rebate of whole of duty when goods exported-Conditions and procedure

In exercise of the powers conferred by of Rule 18 of the Central Excise (No. 2) Rules 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:-

- (1) **Filing of declaration.**- The manufacturer or processor shall file a declaration with the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having



jurisdiction over the factory of manufacture describing the finished goods proposed to be manufactured or proceeded along with their rate of duty leviable and manufacturing/processing formula with particular reference to quantity or proportion in which the materials are actually used as well as the quality. The declaration shall also contain the tariff classification, rate of duty paid or payable on the materials so used, both in words and figures, in relation to the finished goods to be exported;

(2) Verification of Input-output ratio - The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise shall verify the correctness of the ratio of input and output mentioned in the declaration filed before commencement of export of such goods, if necessary, by calling for samples of finished goods or by inspecting such goods in the factory of manufacture or process. If, after such verification, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise is also satisfied that there is no likelihood of evasion of duty, he may grant permission to the applicant for manufacture or processing and export of finished goods.

(3) Procurement of material: - The manufacturer or processor shall obtain the materials to be utilized in the manufacture of the finished goods intended for export directly from the registered factory in which such goods are produced, accompanied by an invoice under Rule 11 of the Central Excise (No2) Rules, 2001:

Provided that the manufacturer or processor may procure materials from dealers registered for the purposes of CENVAT Credit Rules, 2001 under invoices issued by such dealers.

(4) Removal of materials or partially processed material for processing.- The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise may permit a manufacturer to remove the materials as such or after the said materials have been partially processed during the course of manufacture or processing of finished goods to a place outside the factory:-

(a) for the purposes of test, repairs, refining, reconditioning or carrying out any other operation necessary for the manufacture of the finished goods and return the same to his factory without payment of duty for further use in the manufacture of finished goods or remove the same without payment of duty in bond for export, provided



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that the waste, if any, arising in the course of such operation is also returned to the said factory of the manufacture or process; or

- (b) for the purpose of manufacture intermediate products necessary for the manufacture or processing of finished goods and return the said intermediate products to his factory for further use in the manufacture or process of finished goods without payment of duty or remove the same, without payment of duty for export, provided that the waste, if any, arising in the course of such operation is also returned to the factory of manufacturer or processor;
 - (c) any waste arising from the processing of materials may be removed on payment of duty as if such waste is manufactured or processed in the factory of the manufacturer or processor;
- (5) Procedure for export.**- The goods shall be exported on the application in Form A.R.E. 2 specified in the Annexure and the procedures specified in Ministry of Finance (Department of Revenue) notification No. 40/2001 - Central Excise (N.T.), dated 26th June, 2001 or in notification No. 42/2001 Central Excise - dated 26th June, 2001 shall be followed.
- (6) Presentation of claim of rebate** - The claim for rebate of duty paid on materials used in the manufacture or processing of goods shall be lodged only with the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise having jurisdiction of the place approved for manufacture or processing of such export goods."

13. A careful perusal of the notification No. 41/2001 dated 26 June 2001 would show that the exporter has to furnish a declaration that CENVAT credit has not been availed and the notification clearly spells out that any waste arising during the manufacture of export goods may be removed on payment of duty as if such waste has been manufactured in the factory of the manufacture. There is a merit in the plea advanced by the learned counsel for the petitioner that Para 4 (c) of the notification 41/2001 dated 26 June 2001 also specifies that even in the case of waste from manufacturing process outside the factory of



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the applicant seeking rebate, the removal of such waste or sale thereof is neither prohibited nor it debars a claim for rebate under the said rule or notification. Undoubtedly, the form and declaration have to be examined, but what is significant is the interpretation of the words 'not availed of facility of CENVAT Credit' in the form/declaration. Therefore, what follows is that removal of waste, or sale thereof in home or domestic market, does not prohibit or bar a claim for rebate under the said Rule or notification. Paragraph 4(c) does refer to payment of duty but the said clause applies when there is removal of material or the same is partially processed at a location different from or outside the factory of the applicant.

14. Further, it is also pertinent to mention that in terms of notification No. 10/2003-Central Excise dated 01 March 2003⁵, brought out in exercise of power under Sub-section (1) of Section 5A of the Central Excise Act, 1944, certain items have been exempted

⁵ Notification

New Delhi, dated the 1st March, 2003

No. 10/2003-Central Excise

10 Phalguna, 1924 (Saka)

G.S.R. (E).-In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below and falling within the Chapter, heading No, or sub-heading No. of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act), specified in the corresponding entry in column (2) of the said Table (hereinafter referred to as the said goods), from so much of the duty of excise leviable thereon under the First Schedule to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table.

Explanation I.- For the removal of doubts, it is clarified that a manufacturer who has availed of full exemption under notification No. 8/2002-Central Excise, dated the 1st March, 2002, published in the Gazette of India vide number G.S.R. 129 (E), dated the 1st March, 2002 or notification No. 8/2003-Central Excise, dated the 1st March, 2003, as the case may be, in any financial year, is permitted to avail this exemption in the same financial year.

Explanation II.- xxx omitted – not relevant

Explanation III.- For the purposes of this notification, the rates specified in column (4) of the said Table are ad valorem rates, unless otherwise specified.

Signature Not Verified

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from payment of duty. As per Schedule annexed to the notification, vide item No. 51, it is provided that waste and scrap arising during the course of manufacture of the goods specified against S. No. 9 to 50 of the aforesaid notification dated 01 March 2003 shall be exempted from payment of duty. As we will indicate hereinafter that the petitioner in question is in the business of manufacture of S.S. Utensils, which is covered under item No. 28 of the aforesaid notification and the same is also exemplified from clarification letter bearing No. IV(16)309-CE/TECH/D-I/04/3598, dated 26 July 2005, issued by the Office of Commissioner of Central Excise, New Delhi and addressed to all the Assistant Commissioner, Central Excise Division-I/II/III/IV, New Delhi, which reiterated the formula for assessment of rebate claims as was applicable during the relevant time in terms of an earlier circular bearing No. 129/40/90-CX, dated 29 May 1995.

15. Much mileage is sought to be taken by the respondents from the fact that the petitioner had not submitted Form No. A.R.E. 2. A Constitution Bench of the Supreme Court in the case of **Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal and Ors.**⁶, had an occasion to examine a question of law as to interpretation of exemption or concession provision and whether it is to be strictly construed or not. After referring to earlier judgments in **Novopan India Ltd. v. CCE and Customs**⁷, **Hansraj Gordhandas**

⁶ (2011) 1 SCC 236

⁷ 1994 Supp(3)SCC 606;



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v. CCE and Customs⁸ and TISCO Ltd. v. State of Jharkhand⁹, it was held as follows:

"29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption."

16. Reverting to the instant matter, since presumably the export obligations had been met, the Revisionary Authority took a hyper technical view of the matter. It is evident that in terms of the notification No. 10/2003 dated 01 March 2003, the description of the goods in question was covered vide item No. 28 viz. HSM 7323.90, which is code for S.S. Utensils, read with item No. 51, where the rate of duty is spelt out to be 'NIL'. Meaning thereby that no duty was payable on such waste and scrap arising during the course of manufacture of the same goods. This is exemplified from the clarification letter issued by the Office of Commissioner of Central Excise, Delhi dated 26 July 2005 placed on the record, and therefore, the impugned order dated 27 September 2019 holding that pre-conditions provided by the Notification No. 41/2001 dated 26 June

⁸ (1969) 2 SCR 253

⁹ (2005) 4 SCC 272



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2001 were not met by the petitioner, is perverse and cannot be sustained in law.

17. In view of the foregoing discussion, the impugned order dated 27 September 2019 is hereby set aside and the matter is remanded back to the Adjudicating Authority to decide the rebate claims of the petitioner after affording a fresh opportunity for hearing in accordance with law.

18. The Writ Petition stands disposed of accordingly.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

October 13, 2023

sds/sadique