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

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Date of Decision: 14th March, 2023

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W.P.(C) 10767/2019

M/S BAL PHARMA LIMITED

..... Petitioner

Through: Mr. Jayant Kumar & Mr. Soham
Bandyopadhyay, Advs.

Versus

PRINCIPAL COMMISSIONER AND ADDITIONAL

SECRETARY GOVERNMENT OF INDIA & ANR..... Respondents

Through: Mr. Rajesh Gogna, CGSC with Ms.
Priya Singh, Adv. for R-1.

Mr. Bhagwan Swarup Shukla,
CGSC with Ms. Sunita Shukla, Adv.
for UOI.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The petitioner has filed the present petition impugning the order dated 06.08.2018 (Order no.517/18-CX and Order no.512-516/18-CX) passed by the Government of India, whereby the revision applications filed by the petitioner under Section 35EE of the Central Excise Act, 1944 (hereafter the '**CE Act**') were rejected.

2. The petitioner had preferred Revision Applications against the Orders-in-Appeal (five in numbers) dated 28.07.2014 rejecting the petitioner's claim for refund and rebate of tax suffered on inputs used

for export of goods.

3. The petitioner claims that the first batch of refund claims related to the period 2012-14. The petitioner had sought refund of ₹17,37,263 on 20.04.2012; ₹15,66,920/- on 10.12.2012; ₹10,04,897 on 17.12.2013; ₹7,95,226/- on 17.12.2013; ₹5,71,207/- on 07.01.2014 and ₹4,00,858/- on 07.01.2014. The petitioner contends that it had filed the aforementioned applications seeking refund of taxes suffered on inputs under the mistaken belief that the same were available under Rule 5 of the Cenvat Credit Rules, 2004 (hereafter the '**CC Rules**'). The petitioner claims that it was not entitled to refund under Rule 5 of the CC Rules but was entitled to claim rebate under Rule 18 of the Central Excise Rules, 2002 Act (hereafter the '**CE Rules**'). The petitioner also claims that it had submitted necessary intimations for claiming such rebate on 30.05.2011 and 22.12.2014, which was prior to commencing export of goods.

4. By an order dated 19.03.2014, the concerned authority rejected the petitioner's claim on the ground that the goods were manufactured in the State of Uttarakhand, where certain exemptions were available and therefore, no refund could be claimed under Rule 5 of the CC Rules. The petitioner is essentially aggrieved as the refund sanctioning authority did not consider whether the petitioner was entitled to any rebate under Rule 18 of the CE Rules read with Notification no.21/2004-CE(NT) dated 06.09.2004. The rebate sought under the five applications were for a sum of ₹13,14,845/-; ₹1,80,920/-; ₹5,74,109/-; ₹5,44,536/- and ₹8,01,215/-.

5. In the meantime, on 28.07.2014, the petitioner also filed an appeal before the Commissioner of Central Excise (Appeals) (hereafter **Appellate Authority**) against the orders rejecting the applications for refund under Rule 5 of the CC Rules (the first batch of petitions). The petitioner states that in its appeal, it claimed benefit of Rule 18 of the CE Rules, however, the Appellate Authority rejected the appeal filed by the petitioner. The order rejecting the appeal is not on record. However, it is not disputed that the petitioner's appeal was rejected without considering the applicability of Rule 18 of the CE Rules.

6. The petitioner filed a Revision Application impugning the order dated 28.07.2014 passed by the Appellate Authority before the Central Government, however, the same was rejected by the impugned order dated 06.08.2018 (Order no.517/2018-CX). A plain reading of the said order also indicates that the Central Government had not considered the petitioner's plea that it was entitled to rebate under Rule 18 of the CE Rules.

7. The petitioner's application for refund was rejected solely on the ground that the Central Government did not have any jurisdiction to consider an issue regarding rejection of a refund under Rule 5 of the CC Rules.

8. The second batch of applications seeking rebate were rejected by the Adjudicating Authority in terms of various orders passed in the months of April and September, 2015. The Adjudicating Authority denied the petitioners prayer for rebate under Notification no.21/2004-CE(NT) on the ground that the goods were not exported on ARE-2 and

the shipping bills reflected the petitioner's Bangalore address and not the factory address at Uttarakhand.

9. The petitioner filed appeals before the Appellate Authority, which were rejected by five separate orders (orders dated 23.10.2015, 23.10.2015, 08.01.2016, 11.01.2016 and 11.01.2016). The said orders indicate that the appeals preferred by the petitioner were rejected on the ground that the petitioner had not followed the procedure as set out in the Notification no.21/2004-CE(NT) dated 06.09.2004 inasmuch as the petitioner had not filed ARE-2 for export of the goods. The Appellate Authority referred to the decision dated 17.12.2013 of the Division Bench of the Madhya Pradesh High Court in *M/s CIL Textiles Pvt. Ltd. v. UOI: W.P.(C) No.8199/2011*, whereby the Madhya Pradesh High Court had held that submission of ARE-2 is mandatory and the failure to file the same would deprive the applicant the benefit under the Scheme.

10. Aggrieved by the aforementioned Orders-in-Appeal, the petitioner preferred revision petitions before the Central Government, which were rejected by a common order dated 06.08.2018.

11. As noted above, the said order is impugned in the present petition.

12. The principal controversy involved in the present petition is whether the petitioner can claim rebate under Rule 18 of the CE Rules. As noted above, in the first batch of cases, the Adjudicating Authority rejected the petitioner's application for refund under Rule 5 of the CE Rules without considering the question whether the petitioner was

entitled to rebate under Rule 18 of the CE Rules. The petitioner claims that it had, in its appeal, specifically urged that it was entitled to rebate under Rule 18 of the CE Rules but the same was not considered by the Appellate Authority. Further, the Central Government had also not considered the same on the ground that it had no jurisdiction in matters of refund under Rule 5 of the CE Rules.

13. Mr. Gogna, learned counsel appearing for the respondents, does not dispute that the petitioner's claim for rebate under Rule 18 of the CE Rules was not considered by the Appellate Authority even though the said ground was urged.

14. In view of the above, we deem it appropriate to set aside the impugned order (Order no.517/2018-CX) as well as the Orders-in-Appeal dated 28.07.2014 and restore the petitioner's appeal before the Appellate Authority [Commissioner of Central Excise (Appeals), Meerut-II] to consider the petitioner's claim that it was entitled to rebate under Rule 18 of the CE Rules.

15. Insofar as the second batch of applications for rebate is concerned, it is seen that the Appellate Authority [Commissioner of Central Excise (Appeals)-I, Meerut] has specifically noted that the petitioner had filed an original copy of ARE-I; self-attested copy of shipping bills; self-attested copy of export invoices, self-attested copy of the Bill of Lading; self-attested price list; triplicate copy of invoices issued under Rule 7 of the CE Rules and self-attested copy of input invoices. However, the petitioner's appeal was rejected as the Appellate Authority found that petitioner had not followed the procedure as laid

down in Notification no.21/2004-CE(NT) dated 06.09.2004. As noted above, the Appellate Authority proceeded on the basis that the said controversy was covered by the decision of the Madhya Pradesh High Court in *M/s CIL Textiles Pvt. Ltd. v. UOI* (*supra*).

16. It is relevant to note that in *M/s CIL Textiles Pvt. Ltd. v. UOI* (*supra*), the petitioner therein relied on the decision of the Division Bench of the Bombay High Court in *UM Cables Limited v. Union of India: 2013 (293) E.L.T. 641 (Bom.)*, however, the Madhya Pradesh High Court did not consider the said decision as it found that the question was also covered by two other decisions of the Madhya Pradesh High Court. The said two earlier decisions of the Madhya Pradesh High Court were not mentioned in the said decision.

17. Mr. Gogana fairly states that he has been unable to trace out the said decisions of the Madhya Pradesh High Court.

18. In *UM Cables Limited v. Union of India* (*supra*), the Bombay High Court had referred to the decision of the Supreme Court in *Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner: 1991 (55) E.L.T. 437 (SC)* wherein distinction was drawn between conditions which are substantive and fundamental to the Policy for grant of exemption and those which are merely procedural. The Supreme Court had held that it would be erroneous to attach equal importance to non-observance of all conditions. The relevant observations of the Supreme Court are reproduced below:

“The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and

some other may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve.”

19. The Bombay High Court noted the aforesaid passage and proceeded to hold as under:

“.....mere non-production of the ARE-1 form would not *ipso facto* result in the invalidation of the rebate claim. In such a case, it is open to the exporter to demonstrate by the production of cogent evidence to the satisfaction of the rebate sanctioning authority that the requirements of Rule 18 of the Central Excise Rules, 2002 read together with the notification dated 6 September, 2004 have been fulfilled. As we have noted, the primary requirements which have to be established by the exporter are that the claim for rebate relates to goods which were exported and that the goods which were exported were of a duty paid character. We may also note at this stage that the attention of the Court has been drawn to an order dated 23 December 2010 passed by the revisional authority in the case of the Petitioner itself by which the non-production of the ARE-1 form was not regarded as invalidating the rebate claim and the proceedings were remitted back to the adjudicating authority to decide the case afresh after allowing to the Petitioner an opportunity to produce documents to prove the export of duty paid goods in accordance with the provisions of Rule 18 read with notification dated 6 September, 2004 [Order No.1754/2010-CX, dated 20 December, 2010 of D.P. Singh, Joint Secretary, Government of India under Section 35EE of the Central Excise Act, 1944]. Counsel appearing on behalf of the Petitioner has also placed on the record other orders passed by the revisional authority of the Government of India taking a similar view [*Garg Tex-O-Feb Pvt. Ltd.* – 2011 (271) E.L.T. 449] and *Hebenkraft* – 2001 (136) E.L.T. 979. The CESTAT has also taken the same view in its decisions in *Shreeji Colour Chem Industries v. Commissioner of Central Excise* – 2009 (233) E.L.T. 367, *Model Buckets & Attachments (P) Ltd. v. Commissioner of Central Excise*- 2007 (217) E.L.T. 264 and *Commissioner of Central Excise v. TISCO* – 2003 (156) E.L.T. 777.”

20. In a latter decision delivered by the Gujarat High Court in ***Raj Petro Specialities v. Union of India: 2017 (345) E.L.T. 496 (Guj.)***, the Division Bench of the Gujarat High Court had referred to the decision of the Bombay High Court in ***UM Cables Limited v. Union of India (supra)*** and set aside the order of the Revisional Authority rejecting the rebate claims filed by the petitioners for non-submission of the original and duplicate ARE-1 and held that the petitioner would be entitled to rebate of duty on excisable goods, which were in fact imported on payment of excise duty from their respective factories.

21. It is informed that the judgment passed by the Gujarat High Court in ***Raj Petro Specialities (supra)*** has not been appealed against and is accepted by the Department. We also concur with the view taken by the Hon'ble Gujarat High Court and the Hon'ble Bombay High Court in the above referred cases. Therefore, the Appellate Authority fell in error in dismissing the appeal filed by the petitioner while relying upon the decision of the Madhya Pradesh High Court in ***M/s CIL Textiles Pvt. Ltd. (supra)***.

22. Mr. Gogna, however, submits that the claim of the petitioner was also rejected on the ground that as per the shipping bills produced by the petitioner, the goods were exported by M/s Bal Pharma Limited, Bangalore and not by the unit situated in Rudrapur. In that regard, the learned counsel for the petitioner refers to the decisions of the Central Government in ***Re: Pidilite Industries Ltd.: 2014 (311) E.L.T. 965***, whereby the goods had been cleared from the factory premises to the godown of the applicant located at another city (Bhiwandi), which was

not a registered warehouse. The goods had been exported from the said godown at Bhiwandi and therefore, the department had denied the rebate under Rule 18 of the CE Rules. The Central Government had set aside the order rejecting the claims for rebate. It is relevant to refer to the following observations made by the Central Government in its order:

“9.1 On simple perusal of Excise documents and export documents, Government observes that the details regarding quantity, net weight, gross weight, description, etc. are exactly tallying impugned ARE-1s and shipping bills. Further, the Part-II on reverse of ARE-1 contains the Customs Certification about export of goods vide relevant Shipping Bills. Customs has certified that goods mentioned ARE-1 have been exported vide relevant Shipping Bill. At the same time Part-I on reverse side of ARE-1 has the endorsement of Central Excise Officers, which denotes that identity of goods and its duty paid character is established. The Central Excise Officers are required to verify the particulars of packages / goods lying / stored with the particulars given in ARE-1 Form and if the Central Excise Officer is satisfied about identity of goods, its duty paid character and all the particulars given by the exporter in his application, he will endorse the ARE-1 Form and permit export. In this case no contrary observation is made by Central Excise Officers and therefore they have made endorsement in ARE-1 after doing the requisite verification and allowed exports. In view of this position, Government finds no force in the contention of department that Central Excise Officers have not made verification as required under C.B.E. & C. Circular dated 30-1-1997. The certification by Central Excise Officers in ARE-1 is certainly required to be done after verifying that goods are in original packing. The Central Excise Officers have nowhere pointed out that goods were not in original packing. So the contention of department regarding correlability is not sustainable. The cross reference of ARE-1s and Shipping Bills is available on ARE-1s and shipping bills. the ARE-1s duly certified by Central Excise Officers and Customs Officers leave no doubt that duty paid goods cleared from factory have been exported as there is no reason to doubt the endorsement of Customs Officers on the ARE-1 Form.”

23. It is the petitioner's case that all relevant material to establish that the excise paid inputs were used for export of goods and the material

for correlating the same are available on record, however, the same has not been examined.

24. As discussed above, the appeal preferred by the petitioner was dismissed solely relying upon the judgment passed by the Madhya Pradesh High Court in *M/s CIL Textiles Pvt. Ltd. (supra)* without considering other aspects. We, therefore, consider it apposite to set aside the impugned orders dated 06.08.2018 (Order no.517/18-CX and Order no.512-516/18-CX) as well as the orders passed by the Appellate Authority and remand the matter to the Appellate Authority to consider afresh in the light of the observations made in this order.

25. The Appellate Authority shall examine whether there is material on record to clearly establish the petitioner's claim for rebate on duty paid on excisable material used for manufacture and packing all goods exported by the petitioner.

26. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MARCH 14, 2023

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