# 2013 (290) E.L.T. 504 (Mad.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS
**M. Jaichandren, J.**

**ORCHID HEALTH CARE**
*Versus*
**UNION OF INDIA**

*W.P. No. 5667 of 2012 and M.P. No. 1 of 2012, decided on 30-11-2012*

**Export - Rebate - Claim of - EOU, having predominantly exports sales - As they were required to procure input services on payment of Service Tax, they were compelled to avail Cenvat credit of same - Also, Central Excise duty paid by them, however rebate for same rejected on ground that impugned goods were exempt from Excise duty - *HELD :* EOU was entitled to rebate - Giving it in credit was of no use to them as they did not have any local sales, and were not liable to pay Central Excise duty - Hence, rebate was payable in cash, subject to conditions to safeguard interests of Department - Rule 18 of Central Excise Rules, 2002.** *[paras 17, 18]*

***Petition allowed***

**CASES CITED**

Commissioner of Sales Tax v. Pine Chemicals Ltd. — (1995) 1 SCC 58 — *Referred*... [Paras 12, 18]
Eagle Flask Industries Ltd. v. Commissioner — 2004 (171) E.L.T. 296 (S.C.) — *Referred* [Paras 9, 18]
Johari Digital Health Care Ltd. — 2012 (281) E.L.T. 156 (G.O.I.) — *Referred*..... [Paras 9, 18]

REPRESENTED BY : Shri K.S. Venkatagiri for M/s. Lakshmi Kumaran Sridharan, for the Petitioner.
Shri P. Mahadevan (SCGSC), for the Respondent.

**[Order].** - Heard the learned counsel appearing for the petitioner, as well as the learned counsel appearing on behalf of the respondents 1, 2 and 4.

**2.** It has been stated that the petitioner is a 100% Export Oriented Unit, engaged in the manufacture of export of bulk drugs and formulations. The petitioner is a registered manufacturer and it is liable to pay Excise Duty on the bulk drugs and formulations manufactured by it, unless such payment is specifically exempted.

**3.** It has been further stated that the Government of India has announced various exemptions from the payment of Excise and Customs Duty payable on the raw materials and consumables used in the manufacture of export products, by a 100% Export Oriented Unit. Concessional rate of duty is also granted for the sale of the finished products in the Domestic Tariff Area, on fulfilment of the export obligation. While so, the Government of India had introduced the levy of Service Tax on taxable services, under Chapter 5 of the Finance Act, 1994. Even though the Government of India had granted exemption from the payment of Customs and Central Excise Duties on the capital goods, raw materials and consumables supplied to a 100% Export Oriented Unit, no such exemption had been granted in respect of the payment of Service Tax. Hence, the petitioner is liable to pay the Service Tax on the services received by them and used in the manufacture of the goods exported by the petitioner and in respect of the goods allowed to be cleared in the Domestic Tariff Area.

**4.** It has been further stated that the Government of India had introduced a scheme of credit, in respect of the Indirect Taxes, including Service Tax paid on the capital goods, inputs and input services used by the manufacturer of excisable goods, under the CENVAT Credit Rules, 2004. As the benefit of availing credit, under the CENVAT Credit Rules, 2004, is available for an 100% Export Oriented Unit, the petitioner had taken credit of the service paid on the input services received and used by them in the manufacture of bulk drugs and formulations. As per the scheme contemplated under the CENVAT Credit Rules, 2004, a manufacturer can utilize the credit of duties or Service Tax paid on the capital goods, inputs and input services for payment of excise duty on the final products cleared for home consumption. As Excise Duty is not payable on exports there is an accumulation of the duties and the taxes paid on the inputs and input services. Such credit could be used for payment of Excise Duty on other manufactured excisable goods cleared in the Domestic Tariff Area. The rules also provide for the refund of the accumulated credit, subject to the time limit prescribed under the rules.

**5.** It has been further stated that Rule 18 of the Central Excise Rules, 2002, provides for the grant of rebate of duty paid on excisable goods which are exported and on such duty paid on materials used in the manufacture or processing of such goods, by way of a notification issued by the Central Government. Thus, a manufacturer, as an exporter, can either claim refund of the duties and the Service Tax paid on the inputs and input services used in the manufacture of the export goods, under Rule 5 of the CENVAT Credit Rules, 2004, or pay the duty on the final products exported, by utilizing the credit and claim rebate of the duty so paid.

**6.** It has been further stated that the sales made by the petitioner, which is a 100% Export Oriented Unit, are predominantly by way of exports. As the petitioner was required to procure the input services on payment of Service Tax it had been compelled to avail the benefit of CENVAT credit of the Service Tax so paid. Instead of exporting the goods without payment of duty and claiming refund of the Service Tax paid on the input services, the petitioner had chosen to export the goods on payment of the applicable duty of excise leviable thereon and sought rebate of the duty so paid, in terms of Rule 18 of the Central Excise Rules, 2002.

**7.** It has been further stated that the petitioner had followed all the procedures for the export of the goods manufactured by it, on payment of duty, and had submitted the various forms and the documents, including the shipping bills, at the time of the export. The export proceeds were also realized in foreign exchange and had filed the claim for rebate of Rs. 93,71,334/-, under Rule 18 of the Central Excise Rules, 2002. However, the Deputy Commissioner of Central Excise, the second respondent herein, had rejected the claim of the petitioner, on the ground that the goods manufactured by the petitioner are exempted from excise duty, in terms of Notification No. 24/2003-C.E., dated 31-3-2003, and therefore, the petitioner cannot pay the duty and claim the rebate of duty so paid. However, the rejection of the rebate claim was not on the ground of limitation or on other procedural infirmities.

**8.** It has been further stated that, on the rejection of the rebate claim application made by the petitioner, under Rule 18 of the Central Excise Rules, 2002, the petitioner had filed an appeal before the third respondent. The third respondent had also held that the goods in question are exempt from the payment of duty, in terms of the Notification No. 24/2003-C.E., dated 31-3-2003, and therefore, the petitioner cannot choose to pay the duty and claim the rebate thereon. Thereafter, the petitioner had filed a revision application, under Section 35EE of the Central Excise Act, 1944, and it had also been rejected by the first respondent, which is the authority to hear the revision application. The first respondent, vide its order, dated 28-12-2011, had held that the exemption under Notification No. 24/2003-C.E. is an absolute exemption notification and therefore, the petitioner had no option to pay the duty in terms of Section 5A(1-A) of the Central Excise Act, 1944, and therefore, the rebate claim of the petitioner is liable to be rejected. In such circumstances, the petitioner has preferred the present writ petition before this Court, under Article 226 of the Constitution of India.

**9.** The learned counsel appearing on behalf of the petitioner had relied on the following decisions in support of his contention :

1. *Eagle Flask Industries Limited* v. *Commissioner of Central Excise, Pune*, 2004 (171) E.L.T. 296 (S.C.), and
2. *In Re : Johari Digital Health Care Ltd.*, 2012 (281) E.L.T. 156 (G.O.I.)

**10.** In the counter affidavit filed on behalf of the respondents 1, 2 and 4 it has been stated that the petitioner would not be entitled for the rebate of duty due to the reason that the petitioner had paid the duties of excise, on its own volition and had claimed the same as rebate of duty, in terms of Rule 18 of the Central Excise Rules, 2002, in contravention of the provisions of sub-section 1-A of Section 5A of the Central Excise Act, 1944. Further, when any duty is paid without availing the exemption, such payments could not be considered as duties of excise and therefore, no rebate can be availed, as per Rule 18 of the Central Excise Rules, 2002.

**11.** It has been further stated that the petitioner can claim refund of the duties and the Service Tax paid on the inputs and input services used in the manufacture of the exported goods, under Rule 5 of the CENVAT Credit Rules, 2004, as unutilized credit, by fulfilling the conditions stipulated therein. However, duty cannot be paid on the final goods exported by utilizing the credit and claim rebate of the duty paid in terms of Section 5A(1-A), since the goods manufactured by the Export Oriented Unit are exempted from payment of duty, in view of the Notification No. 24/2003-C.E., dated 31-3-2003, and the provisions in Section 5A(1-A) of the Central Excise Act, 1944. The petitioner, which is an Export Oriented Unit, cannot claim rebate of duty, under Rule 18 of the Central Excise Rules, 2002. Therefore, the rebate claim of the petitioner had been rightly rejected by way of the impugned order, which had been challenged in the present writ petition.

**12.** It has been further stated that Section 5A of the Central Excise Act, 1944, provides for granting of exemption to goods generally, either absolutely or subject to certain conditions. The impugned Notification No. 24/2003-C.E. does not grant any absolute exemption. In fact it is only exempting excisable goods produced or manufactured in an Export Oriented Unit. Being a conditional exemption, the provisions of Section 5A(1-A) is not applicable to the impugned notification. It has also been submitted that Section 5A(1-A) of the Act is to be applied only when the exemption granted is absolute in nature. When an exemption is granted to the goods manufactured by a particular manufacturer the same cannot be considered as generally exempt from excise duty, as held by the Apex Court in *Commissioner of Sales Tax* v. *Pine Chemicals Ltd. and Ors.*, (1995) 1 SCC 58

**13.** It had also been submitted that the proviso to Notification No. 24/2003-C.E. clearly stipulates that the exemption is not applicable for the goods when they are brought to any other place in India. Thus, the notification grants more exemption for the goods cleared by an Export Oriented Unit. It has also been submitted that the exemption notification is to be read as a whole to understand whether the exemption is absolute or not. The department has ignored the proviso to the notification in reaching its conclusion that the exemption is absolute. As per the proviso excise duty exemption is not applicable when the goods are cleared for consumption in India. Hence when excise duty is payable there is no question of the finished goods being exempt from duty.

**14.** It has been further submitted that the petitioner is a manufacturer of excisable goods and it avails CENVAT credit on the Service Tax paid on the input services. As stated above, no CENVAT credit is available if the finished goods are exempted from duty. For the purpose of allowing credit the revenue is treating the goods manufactured by the petitioner as not being exempt from duty. It cannot be the case of the revenue that while credit can be allowed as if the finished goods are not exempt from duty the petitioner cannot export the goods on payment of duty and claim rebate, under Rule 18 of the Central Excise Rules, 2002. Hence, the Department not questioning the credit taken, cannot question its utilization to the detriment of the assessee-exporter. When the goods are not exempt absolutely and unconditionally, the payment of duty on the finished goods using the credit permitted and claim of the rebate on their exports is justified and correct.

**15.** It has been further submitted that Rule 5 of the CENVAT Credit Rules, 2004, mandates, that before the claim of refund of credit, the finished product is to be cleared for export, on payment of duty. Only, when such adjustment is not feasible the manufacturer has to claim refund. It has been further submitted that the petitioner had followed the procedures stipulated by Rule 5 of the Central Excise Rules, 2002, and had cleared the final product for export, on payment of duty. As such, the payment of the excise duty on export of goods is legal and therefore, the petitioner is eligible to claim rebate.

**16.** It has also been submitted that Rule 18 of the Central Excise Rules, 2002, enables export on payment of export duty and Rule 19 of the said Rules enables the export of goods without payment of duty. It depends on the choice of the manufacturer/exporter to exercise their option, between the two modes. There is no bar, under Rule 18, that 100% Export Oriented Unit cannot export on payment of export duty. Therefore, the rebate claim of the petitioner, under Rule 18 of the Central Excise Rules, 2002, is legal and valid.

**17.** At this stage of the hearing of the writ petition the learned counsel appearing on behalf of the petitioner had submitted that it would not be of any use to the petitioner if the respondents are keeping the rebate amount in credit, as the petitioner does not make any local sales and therefore, no excise duty would be payable by the petitioner. Therefore, the second respondent is bound to pay the rebate amount to the petitioner, in cash, if necessary, subject to certain safeguards and conditions, as may be specified by the Central Government, by notification. Therefore, it has been prayed that this Court may be pleased to quash the impugned order of the first respondent, dated 28-12-2011 and to consequently, direct the second respondent to grant the rebate claim made by the petitioner, in respect of the exports made by it, as per Rule 5 of the CENVAT Credit Rules, 2004.

**18.** In view of the averments made on behalf of the petitioner, as well as the respondents, and on a perusal of the records available and in view of the decisions cited supra, this Court finds it appropriate to conclude, without going into the other issues relating to the matter, that the second respondent is bound to refund the rebate payable to the petitioner, in cash, subject to certain conditions to safeguard the interests of the respondent Department. In view of the fact that the petitioner had paid the excise duty on the goods exported by it, and as it may not be of use to the petitioner if the respondent Department keeps the amount of rebate claim in credit, as the petitioner does not have local sales, the respondent department is directed to refund the duty paid by the petitioner, on the goods exported by it, as expeditiously as possible, subject to certain conditions, which may be necessary to safeguard the interests of the respondent Department. The writ petition is ordered accordingly. No costs. Consequently, connected miscellaneous petition is closed.

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