

195/667-675/13-RA (CX)

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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and  
Ex-Officio Additional Secretary to the Government of India  
8<sup>th</sup> Floor, Centre-I, World Trade Centre, Cuff Parade, Mumbai- 400 005

F NO. 195/667-675/13-RA CX / 914

Date of Issue: 24.01.2018

ORDER NO. 06-14 / 2018-(SZ) / ASRA/Mumbai Dated - 23<sup>rd</sup> January, 2018  
OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA,  
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO  
THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL  
EXCISE ACT, 1944.

Applicant: M/s Blue Mount Textiles & M/s Gugan Mills,  
Bhadrakalliamman Koil Road, Nellithurai (Post),  
Mettupalayam - 641 305.

Respondent: The Commissioner of Central Excise, Salem.

Subject: Revision Applications filed, by M/s Blue Mount Textiles  
Bhadrakalliamman Koil Road, Nellithurai (Post), Mettupalayam -  
641 305. against the Orders-in-Appeal\_No. 08 to 16/2013 SLM-  
CEX dated 21.02.2013 passed by The Commissioner (Appeals)  
Central Excise, Salem.



ORDER

This is an appeal filed against the 9 (nine) Orders in Appeal No. 08 to 16/2013 SLM-CEX all dated 21.02.2013 passed by the Commissioner of Customs and Central Excise (Appeals), Salem.

The brief facts of the case are as below:

2. M/s Blue Mount Textiles & M/s Gugan Mills (both units of M/s Sharda Terry Products Ltd) have exported their goods under ARE-1s and had filed 9 (nine) rebate claims for claiming total rebate of Rs. 30,23,618/- under Rule 18 of Central Excise Rules, 2002. The Assistant Commissioner sanctioned the rebate claims but appropriated the same towards the dues, which are pending in various appellate forums. The details of the nine Revision Applications are detailed below.

Sl. No.	Name	Revision Application No.	O-i-A Nos all dated 21.02.2013.	Amount.
1	M/s Blue Mount Textiles	195/667/13-RA-CX	08/2013	2,08,480/-
2	---do---	195/668/13-RA-CX	09/2013	4,95,174/-
3	---do---	195/669/13-RA-CX	10/2013	3,97,801/-
4	---do---	195/670/13-RA-CX	11/2012	2,76,749/-
5	---do---	195/671/13-RA-CX	12/2013	4,67,193/-
6	---do---	195/672/13-RA-CX	13/2013	2,87,617/-
7	---do---	195/673/13-RA-CX	14/2013	4,27,071/-
8	---do---	195/675/13-RA-CX	16/2013	4,55,389/-
9	Sri Gugan Mills	195/674/13-RA CX	15/2013	8,144/-

All the nine Revision applications involve the same issue and therefore they have been simultaneously addressed with this order.



3. Aggrieved by the appropriation, the Applicants filed an appeal before the Commissioner Appeals. The Commissioner (Appeals) relying on the directions of various Instructions and Circulars by CBEC Board to field formations held that the action initiated for the recovery of sums due to the Government by the field formations is legally in order. The Commissioner (Appeals) held that the Adjudication authority, has correctly invoked the provisions of section 11 of Central Excise Act, 1944 and is empowered to recover the arrears payable by the Appellants, consequent to the demands confirmed in the Orders-in-Original against the Appellants. The appropriation was done in respect of confirmed demands wherein appeals have been filed with the Commissioner (Appeals) or CESTAT, which are pending with them for disposal but in respect of which no stay orders have been granted, and also when an interim stay order which was granted by the CESTAT, has got lapsed after the lapse of 180 days from the date of stay order and no further extension of stay order was granted.

4. Aggrieved by the order in appeal, the applicants have preferred this revision application interalia on the grounds detailed below;

- The application for extension of stay has been filed with the respective forum.
- Stay applications were yet to be disposed off by the appellate authorities.
- The applications were not pending because of the default of the applicant but because of the reasons beyond the control of the applicant.
- The Commissioner Appeals ought to have followed the ratio of the decision rendered in the case of M/s Arunachala Gounder Textiles Mills (P) Ltd Vs CCE - 2012-T101.-958-HC-MDS-ST.

The Applicants prayed for orders sanctioning the rebate amounts in cash.



5. Personal hearing was scheduled on 29.11.2017, which was attended by Shri S. Durairaj, advocate, on behalf of the applicant, he reiterated the submissions filed in the revision application. In their written submissions, the Applicants have represented that at the time of appropriation of the sanctioned rebate claims, no dues were pending against them. All their demands were pending in various appellate forums, and therefore they were not realizable dues. The applications for stay were not pending because of the fault of the applicant, and the reasons for delay, were justifiably, beyond the control of the applicant. The advocate also submitted the latest position of the cases which were pending at various Appellate forums places vis-a vis the amounts appropriated. He further pleaded that the Revision Applications be allowed to the extent pleaded in the submissions. No officer attended the personal hearing on behalf of department.

6. Government has carefully gone through the case records and facts of the case, the main issue to be decided is as to whether the Order in Appeal upholding the order of the original Adjudicating Authority in appropriating the rebate amounts sanctioned to the Applicant in respect of demands pending in various appellate forums is legal and proper or not.

7. During the personal hearing, Governments was informed that four of the five pending demand appeals, wherein demands were confirmed and under which amounts were appropriated, have now been decided and have attained finality. In one case, CESTAT vide a miscellaneous order has granted stay on predeposit of Rs. 20,000/-. As such most of the appropriated amounts are required to be refunded. A summary of these cases is detailed below;

Sl. No.	O-i-O Nos. i.r.o. Demands confirmed & Amts appropriated vide the order	Amount appropriated (in Rs.)	Present status of the case.
1	01/2006 dated	Rs.	Hon'ble CESTAT vide final order 40878-



	09.01.2006	24,25,015/-	40879/2014 dated upheld demand of Rs. 6,84,805/- and Rs.70,204/- and set aside duty demand of Rs. 48,50,520/- , interest and penalty. Department had preferred an appeal with the Madras High Court which has also been dismissed.
2	8/2011 dated 17.10.2011	Rs. 3,30,826/-	Commr.(A) has set aside the demand, Order has been accepted by the department.
3	06/2011 dated 08.08.2011	Rs. 8,144/-	CESTAT Misc. Order stay granted on payment of predeposit of Rs. 20,000/-
4	30/2008 dated 30.12.2008	Rs. 1,66,038/-	Final orders issued by CESTAT, penalty has been set aside, Order has been accepted by department.
5	31/2008 dated 30.12.2008	Rs. 47,366/-	Final orders issued by CESTAT, penalty has been set aside. Order has been accepted by department.

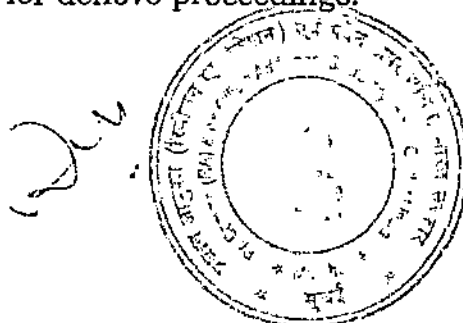
8. Government is of the opinion that an Order in original is not final, and every such order is open to appeal by both, the Appellants and Respondents and every such order can be appealed against. Therefore, reasonable opportunity should be extended to the appellant at all available forums before appropriation of the amounts confirmed by the orders in original, are actually undertaken. A certain amount of restraint and caution is also to be exercised when matters are subjudice. Government also opines appropriation of such amounts should not be done arbitrarily, the Applicants should be given a reasonable opportunity before such appropriation is ordered.



9. The judgment in the case of M/s Voltas Ltd. v. Commissioner of Central Excise, Hyderabad-II, reported in 2006 (201) E.L.T. 615 (Tri. - Bang.) = 2008 (9) S.T.R. 591 (Tri. - Bang) explores this issue. The relevant paragraph in the said decision is extracted herein below :-

*“ Section 11 is actually a provision for recovery of sums due to Government. There are some assessee’s who do not pay promptly the Government dues. In order to deal with such recalcitrant assessee’s, the above provision is made and it enables the proper officer to deduct the amount payable from any money owing to the assessee. In this case, the refund is actually due to the appellant. But the appellants by virtue of certain Orders-in-Original owed money to the Government. The important thing to be noted is that these amounts decided by the Orders-in-originals were not final. Every Order-in-Original can be appealed. Therefore, at the first stage of confirmation of a demand, no finality has been reached. To put in other words, those demands cannot be called as arrears. There is a possibility that these demands could be set aside by the Commissioner (A) or the Tribunal or any other judicial forum. That is why large number of decisions hold that refund cannot be adjusted against the demands which are sub judice. In the present case, the action of the authorities in adjusting the refund is against the legal provisions. Section 11 should be involved only when the demands have reached finality and should not be invoked even at the initial stage. Section 11BB provides interest for delayed refunds. This is squarely applicable to the present case. The Commissioner (A) has not at all given any reason as to why the said section is not applicable. In view of the above findings, we allow the appeal with consequential relief.”*

The ratio of this decision is squarely applicable to the facts of this case. In view of the above the impugned orders in appeal are liable to be set aside and the matter is liable to be remanded for denovo proceedings.



10. Further, the decision of Mumbai bench of CESTAT rendered in the case of M/s Ispat Industries vs The Commissioner of Central Excise, Raigad, 2005 (182) E.L.T. 109 (TRI-Mumbai), frowns on such recoveries stating;

*“ The action recovering disputed amount during the pendency of the applications for extension of stay are clearly an abuse of Tribunal's process.....where the department takes impermissible and undue advantage of the inherent and unavoidable time gap that exists between the date when an application for extension of stay is filed and the time when the order for extension is ultimately received by both the parties.....Even after an application is listed, it may get adjourned for any number of reasons, many a times despite the applicant's and other concerned's keenness to expedite the matter..... If, in the meanwhile, the department exploits the situation, as they indeed have, by taking action for recovering the disputed amounts, rendering the entire application and the proceedings and the standing of the CESTAT infructuous. Such an action therefore would certainly be an abuse of this Tribunal's process.”*

The judgment in the case of M/s Arunachala Gounder Textile Mills Pvt. Ltd. 2013(290) E.L.T. 499 (Mad.) also echoes similar views.

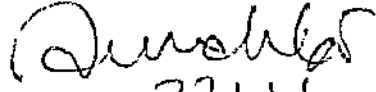
9. In the light of observations and discussions made in foregoing paras and material produced on record the Government observes that the appropriation of the sanctioned rebate claims by the original Adjudicating Authority and Order of the Commissioner (Appeals) upholding the same is not legally sustainable. Whenever the demand appeals pending before various appellate forums have been decided in favour of applicants, the same are to be allowed. Therefore, the impugned orders in appeal are liable to be set aside and the instant Revision Applications are liable to be allowed by way of denovo consideration and amounts appropriated need to be readjusted ~~subject to the verification~~ by the original Adjudicating Authority.



10. Accordingly, the Government, sets aside Orders-in-Appeal No. 08 to 16/2013 SLM-CEX dated 21.02.2013 passed by The Commissioner (Appeals) Central Excise, Salem. The matter is remanded back to the original adjudicating authority for denovo consideration afresh. The original Adjudicating Authority shall examine the final status of the confirmed appropriated demand and pass the appropriate orders for sanction after due adjustment within eight weeks from the receipt of this order.

11. The 9 (nine) Revision Applications are thus disposed of in terms of the above.


12. So ordered.

  
27.11.18

**(ASHOK KUMAR MEHTA)**  
Principal Commissioner (RA) & Ex-Officio  
Additional Secretary to Government of India  
Mumbai

**True Copy Attested**

M/s Blue Mount Textiles,  
M/s Gugan Textiles,  
Bhadrakalliamman Koil Road,  
Nellithurai (Post),  
Mettupalayam - 641 305.

  
24.11.18  
एस. आर. हिरुलकर  
**S. R. HIRULKAR**  
(A-C)

ORDER No. <sup>06-14</sup> /2018-CEX(SZ)/ASRA/Mumbai

Dated: 23.01.2018.

Copy to;

1. the Commissioner of Customs (Appeal-II), Central Excise, Chennai.
2. The Deputy Commissioner Central Excise, Rebate, Coonoor.
3. Sr. P.S. to AS(RA), Mumbai.
- ✓ 4. Guard File .
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