

REGISTERED
SPEED POST



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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.195/682/2010-RA

Date of Issue:

ORDER NO. 07/2019-CX (WZ)/ASRA/MUMBAI DATED 29.08.2019 OF THE GOVERNMENT OF INDIA PASSED BY SMT SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicants : M/s Sharda Synthetics, Thane

Respondent : Commissioner of Central Excise, Thane-I.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. SB/57/Th-I/2010 dated 26.04.2010 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-I

ORDER

The Revision Application has been filed by M/s Sharda Synthetics (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. SB/57/Th-I/2010 dated 26.04.2010^{*} passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-I wherein he rejected the appeal filed by Applicant.

2. The issue in brief is that the Applicant are engaged in the manufacture /processing of textile fabrics falling under Chapter 52, 54 & 55 of the Schedule I to the Central Excise Tariff Act,1985. They were availing credit of the duty paid on its inputs and capital goods and clearing their final products from their factory on payment of duty.

2.1 During the relevant period, the duty on it final products was paid by them by debiting their Cenvat Credit account in RG-23A Part-II Register. The said Cenvat credit was availed on the strength of the Central Excise Invoices issued to them by their suppliers for supply of the grey fabrics.

2.2 Vide ARE-1 No. 324 dated 25.11.2007, 342 dated 25.11.2007, 327 dated 30.11.2004 & 374 dated 17.01.2005 they cleared Man Made Fabrics on payment of duty by debiting in their Cenvat Credit Accounts in RG23A Part-II and filed a claim of rebate.

2.3 The jurisdictional Deputy Commissioner, Central Excise, Kalyan-III Dn vide Order-in-Originals Nos. 148 dated 26.04.2005, 150 dated 26.04.2005 and 243 dated 29.04.2005 sanctioned the rebate of Rs. 3,37,014/-, Rs.2,53,371/- & Rs.1,20,482/- respectively.(Totaling to Rs. 7,10,867/-)

2.4 The Applicant paid duty by debiting to its Cenvat Credit Account in RS 23A Part-II Register. However, 03 Show Cause Notices dated 03.04.2006 were issued to them proposing to recover the rebate already sanctioned to them as on investigation it was found that M/s Suncekowa Texport Pvt Ltd. (herein after as 'STLP') was closed and not submitting monthly ER-1 returns and had not intimated the serial numbers of invoices before issuing it to the jurisdictional Superintendent. Hence the invoices on which they had taken

Cenvat credit, therefore, treated as bogus. The 03 SCNs were adjudicated by the Dy. Commr. C.Ex. Kalyan-III vide OIO No. 103/2007-08 dated 21.02.2008 wherein the demand of Rs. 7,10,867/- was confirmed along with interest and also imposed a penalty of Rs. 7,10,867/-

- 2.5 Meanwhile, parallel proceeding seeking to deny and recover the credit availed by the Applicant on strength of invoices issued to them by STPL was also initiated by the department vide Show Cause Notice F.No. V/Adjn/15-101/Sharda/K-III/2009/5622 dated 02.09.2009.
- 2.6 Aggrieved with the OIO No. 103/2007-08 dated 21.02.2008, the Applicant filed an application with the CESTAT on 23.04.2008 seeking waiver of pre-deposit and stay against recovery.
- 2.7 And they also filed appeal with the Commissioner(A) who vide Order-in-Appeal No. SB/57/Th-1/2010 dated 26.04.2010 upheld the OIO dated 103/2007-08 dated 21.02.2008 and rejected the appeal.

3. Aggrieved, the Applicant then filed Revision Application on the following grounds :

- 3.1 The supplier's unit was closed or the supplier had cleared the grey fabrics on payment of duty under invoice for which it had neither filed ER-1 returns before the proper jurisdictional authority can be no bearing on the issue of rebate of duty paid on goods admittedly exported. In so far as issue disputing the availment of credit on the said invoices issued by the supplier was concerned, they already been issued a Show Cause Notice V/Adjn/15-101/Sharda/K-III/2009/5622 dated 02.09.2009.
- 3.2 The recovery of rebate in the current proceedings would amount double jeopardy. On one hand credit is being denied to them at the availment stage by way of a separate SCN whereas on the other hand the rebate of the same credit already sanctioned to them is also being sought to be recovered by the present proceedings. If the above SCN dated 02.09.2009 is adjudicated against them and the credit is recovered, then the present proceedings would become infructuous as the alleged irregular payment of duty on the export goods would

be rendered proper. On the other hand, if the said show cause is adjudicated in favour of them, then entire basis of the revenue's case would fall and the current proceedings would have no legs to stand.

- 3.3 There is no evidence relied upon in the Show Cause Notice to support the theory that the invoices issued by STPL under which the goods were received were bogus.
- 3.4 The Commissioner(A) and the adjudicating authority had confirmed the demand on the ground that they were not eligible to avail credit. Even if the same is assumed to be correct, the only remedy available to the department was to deny the credit, which they had sought to do by the above Show Cause Notice dated 02.09.2009. Even if the said SCN is adjudicated against the Applicant and they are asked to reverse the credit, still there would be no cause to deny rebate in as much as during the relevant period applicant had Cenvat credit balance much more than the Cenvat credit pertaining to the said below mentioned disputed invoice

| ARE No. & Date | Duty debit (Rs) | Cenvat Balances (Rs) |
|--------------------|--------------------|-------------------------|
| 324 dt. 29.11.2004 | 3,30,406 | 29,00,200 |
| 327 dt. 30.11.2004 | 2,48,403 | 27,59,915 |
| 374 dt. 17.01.2004 | 1,18,120 | 11,89,623 |

Hence, there would not have been any short fall in the payment of duty.

- 3.5 There is no direct co-relation between the duty paid vis-à-vis the credit availed on the inputs. Cenvat credit is a common pool wherein the accumulated duty can be utilized for payment of duty on any excisable product. Therefore, as the balance lying in their Cenvat Account on the date of the payment of duty was much more than the duty paid on the export goods, it would not have been said that the credit pertaining to STPL was utilized for payment on export goods.

- 3.6 They had received a duty payment certificate from the Director of STPL. As per the erst while Rule 9(3) of the CCR, a manufacturer is deemed to have taken reasonable steps by a certificate of the person whose handwriting the manufacturer is familiar with.
- 3.7 The question of eligibility of the credit availed was not in the jurisdictional domain of the officers at the Applicant's end (receiver's end). It is settled law that the payment of duty at the supplier's end cannot be questioned at the receiver's end.
- 3.8 Any person who issues any document or invoice on the basis of which the user of such invoice is likely to be ineligible credit is liable to a penalty under Rule 26 of the Central Excise Rules, 2002. However, no such proceeding was initiated against STPL except a show cause notice for non-filing of returns.
- 3.9 the find of the Commissioner(A) that the Applicant and STPL had adopted a modus operandi to encash the Cenvat credit is without any basis and bad in law.
- 3.10 The finding that the credit can be utilized for payment of duty on manufactured goods and once the manufacturing activity has ceased the exist, the credit cannot have been passed on its totally incorrect and against the provisions of the law. Even if it is assumed that STPL's factory was closed, there is no bar on passing credit whether by having the grey fabrics process on job work basis or clearing the same in terms of Rule 3(5) of the CCR.
- 3.11 The initial orders sanctioning rebate i.e jurisdictional Deputy Commissioner, Central Excise, Kalyan-III Dn vide Order-in-Originals Nos. 148 dated 26.04.2005, 150 dated 26.04.2005 and 243 dated 29.04.2005 sanctioned the rebate of Rs. 3,37,014/-, Rs.2,53,371/- & Rs.1,20,482/- respectively were appealable order and since no appeal was filed against the said orders, the same had attained finality. It is settled law that an order or erroneous refund can be set aside only after following the procedure under Section 35E of the Act. Therefore, consequent show notice and adjudication order reversing the

original orders sanctioning rebate which had attained finality, without challenging the same, were clearly illegal.

3.12 The finding of the Commissioner(A) that the Applicant was not maintaining proper accounts and not following the procedure under the Central Excise Law and therefore, the department was kept in dark about the receipt of the goods is beyond the Show Cause Notice in as much there was no such allegation against the Applicant in the show cause notice.

3.13 Even if it is assumed that the rebate sanctioned to them was recoverable, as the credit availed by them on the basis of STPL's invoice was ineligible, the whole rebate could not have been denied as the credit pertaining to STPL was only Rs. 4,82,146/- whereas the total amount of rebate sanctioned as Rs. 7,10,867/-. Thus even if the findings of the Commissioner(A) are upheld, there is no ground for recovering rebate of Rs. 2,28,721/- (Rs. 7,10,867/- minus Rs. 4,82,146/-). Even this ground was raised which was also conveniently ignored.

3.14 As there was no fraud, suppression or willful misstatement, the pleas of limitation was applicable to the present case. In fact, there was no such allegation of suppression in the show cause notice.

3.15 The Order passed by the Commissioner(A) is a non-speaking order as it does not deal with all the contentions raised by the Applicant in their grounds of appeal.

3.16 As there has been no suppression or fraud or willful misstatement on the part of the Applicant in claiming refund and that there is no such allegation in the show cause to this effect, penalty under Section 11AC was not imposable.

3.17 In view of the aforesaid, the Applicant prays that the impugned Order-in-Appeal be quashed and set-aside.

4. The Government of India vide Order No. 447/2012-CX dated 18.04.2012 rejected their revision application being devoid of merit. Aggrieved, the Applicant then filed Writ Petition with the Bombay High Court. The Hon'ble Bombay High Court vide Order dated 19.07.2017 in Writ Petition No. 3940 of 2014 directed the Joint Secretary to deal with the

issues afresh in accordance with law, by taking into consideration order dated 31.05.2012 passed by the Tribunal.

5. A personal hearing in the remand case was held which was attended by Shri Vishal Agrawal , Ms Isha Shah both Advocates and Shri Shelhar M Bhor, Company Representative on behalf of the Applicants. The Applicants reiterated their submissions.

6. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

7. Government finds that

7.1 The jurisdictional Deputy Commissioner, Central Excise, Kalyan-III Dn had initially sanctioned 03 rebate claim details as given below :

| Sl.No | Invoice No. & dt | ARE-1 No & Date | Amount sanctioned | Order-in-Original |
|-------|-----------------------|-----------------------------|-------------------|-----------------------|
| 1 | 3300 dt 25.11.2004 | 324/04-05 dt. 25.11.2004 | 3,37,014/- | 148 dt. 26.04.2005 |
| 2 | 3308 dt 30.11.2004 | 327/04-05 dt. 30.11.2004 | 2,53,371/- | 150 dt 26.04.2005 |
| 3 | 3466 dt 17.01.2005 | 374 dt. 17.01.2004 | 1,20,482/- | 243 dt 29.04.2005 |

7.2 However, on investigation it was found that STPL was closed, the Applicant was issued 03 Show Cause Notices dated 03.04.2006 proposing to recover the above sanctioned rebate. The 03 SCNs same was adjudicated by the Dy. Commr. C.Ex. Kalyan-III vide OIO No. 103/2007-08 dated 21.02.2008 wherein the demand of Rs. 7,10,867/- was confirmed along with interest and also imposed a penalty of Rs. 7,10,867/-.

- 7.3 Aggrieved with the above OIO No. 103/2007-08 dated 21.02.2008, the Applicant filed an application with the CESTAT on 23.04.2008 seeking waiver of pre-deposit and stay against recovery.
- 7.4 The Applicant also filed appeal with the Commissioner(A) who vide Order-in-Appeal No. SB/57/Th-1/2010 dated 26.04.2010 upheld the OIO dated 103/2007-08 dated 21.02.2008 and rejected the appeal.
- 7.5. The Applicant then filed Revision Application, and the Government of India vide Order No. 447/2012-CX dated 18.04.2012 rejected their Revision Application being devoid of merit.
- 7.6 Aggrieved, the Applicant then filed Writ Petition with the Bombay High Court. The Hon'ble Bombay High Court vide Order dated 19.07.2017 in Writ Petition No. 3940 of 2014 directed the Joint Secretary to deal with the issues afresh in accordance with law, by taking into consideration order dated 31.05.2012 passed by the Tribunal.

Hence current case was Remanded by the Hon'ble High Court.

8. Government also finds that a parallel proceeding was also initiated by the Department against the Applicant vide Show Cause Notice F.No. V/Adjn/15-101/Sharda/K-III/2009/5622 dated 02.09.2009 amounting to Rs. 14,60,340/- seeking to deny and recover the credit availed by the Applicant on strength of invoices issued to them by STPL. The Show Cause Notice dated 02.09.2009 was adjudicated vide the Additional Commissioner, Central Excise, Thane-I Order-in-Original No. 20/DK-20/Th-I/2011 dated 16.06.2011. The Appellant then filed appeal with the Commissioner(Appeal) who vide Order-in-Appeal No. YDB/234-239/Th-I/2011 dated 19.10.2011 upheld the impugned Order against the Applicant. Aggrieved the Applicant then filed application with the Hon'ble CESTAT for waiver of pre-deposit of duty of Rs. 14,60,340/-, interest and penalty. The Hon'ble CESTAT vide Order No. A/581-582/12/EB/C-II dated 31.05.2012 held that

"6. We find that the demand is confirmed on the ground that the applicant availed credit on the strength of invoice regarding which appropriate duty has not been paid by the supplier of

the grey fabric. The applicants produce evidence to show that appropriate duty has been paid by the supplier and produced documents in this regard with the reply to the show cause notice. We find that this evidence produced by the applicants has not been taken into consideration by the adjudicating authority nor by the Commissioner (Appeals), therefore the applicants have made out a strong case for total waiver of duty, interest and penalty. Pre-deposit of the dues is waived for hearing of the appeals.

7. *With the consent of the parties, the appeals are being taken up for hearing.*

8. *As noted above, the evidence regarding payment of duty by the supplier of grey fabric, as produced by the appellants in their reply to the SCN, has not been taken into consideration, therefore the impugned order is set aside and the matter is remanded to the adjudicating authority for de novo adjudication. The adjudicating authority will decide afresh after taking into the evidence produced by the appellants and after affording an opportunity of hearing to the appellants. The appeals are allowed by way of remand."*

9. Government finds that the nos. and date of the relevant invoices (details as given in Para 7.1 above) against which the credit availed have not been mentioned in the body of the Order-in-Original nor in the Order-in-Appeal except the ARE 1 No. & date and amount. Further, the Applicant in their 03 replies all dated 28.04.2006 to their 03 SCNs dated 03.04.2006 have stated that *"from the lot register in FORM Annexure I & II it is evident that the finished product exported under claim for rebate have been manufactured out of the inputs received from M/s Sudershan Texport Pvt Ltd. Mumbai and M/s Sonu Syn, Fab Pvt Ltd. Murbad and not from the inputs received from Suncekowa Texport Pvt Ltd."* Hence Government finds that the evidence regarding payment of duty by the supplier of grey fabric, as produced by the appellants in their reply to the SCN, has not been taken into consideration, therefore the Order-in-Appeal No. SB/57/Th-I/2010 dated 26.04.2010 is liable to be set aside.

10. Further, Government finds that the Hon'ble Bombay High Court vide Order dated 19.07.2017 in Writ Petition No. 3940 of 2014 has remanded the Revision Application -

"3 Paragraph 6, of the order passed by the Customs, Excise Service Tax Appellate Appellate Tribunal, dated 31st May, 2012 read as thus :

"We find that the demand is confirmed on the ground that the applicant availed credit on the strength of invoice regarding which appropriate duty has not been paid by the supplier of the

grey fabric. The applicants produce evidence to show that appropriate duty has been paid by the supplier and produced documents in this regard with the reply to the show cause notice. We find that this evidence produced by the applicants has not been taken into consideration by the adjudicating authority nor by the Commissioner (Appeals), therefore the applicants have made out a strong case for total waiver of duty, interest and penalty. Pre-deposit of the dues is waived for hearing of the appeals”

Considering the fact that the order passed by the Customs, Excise Service Tax Appellate Appellate Tribunal, (Tribunal) was not available when the hearing took place before the Joint Secretary (Revision Application) (The Joint Secretary), and especially paragraph 6 of the said order goes to the root of the matter. Therefore, without expressing anything on merits, we are inclined to interfere with order dated 24th April, 2012 passed by the Joint Secretary, with direction to deal with the issues afresh in accordance with law, by taking into consideration order dated 31.05.2012 passed by the Tribunal.

4. The learned Counsel appearing for the parties, conceded to this situation and expressed no objection for this mechanism, in the interest of justice.


5. All points on merits are kept open. The petition is accordingly disposed of with liberty. No Costs.”

11. In view of the foregoing, the Government holds that detail verification of the rebate by the original adjudicating authority as to the evidence regarding payment of duty by the supplier of grey fabric i.e relevant Invoice and ARE 1 as produced by the appellants in their reply to the SCN, has to be taken into consideration. The Applicant is also directed to submit their relevant records/documents to the original authority in this regard for verification.

12. In view of the above, Government set aside the impugned Order-in-Appeal No. SB/57/Th-I/2010 dated 26.04.2010 and remands back the instance case to the original authority which shall consider and pass appropriate orders on the claimed rebate and in accordance with law after giving proper opportunity within eight weeks from receipt of this order.

13. The Revision Application is disposed off in terms of above.

14. So ordered.


(SEEMA ARORA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 07/2019-CX (WZ)/ASRA/Mumbai DATED 29.08.2019.

To,
M/s Sharda Synthetics Ltd.,
Plot No. B-1/2, MIDC, Phase II
Manpada Road, Dombivli(East), Plot No. B-1/2, MIDC, Phase II
Thane 421 204.

Copy to:

1. The Commissioner, Central Excise, Thane-I.
2. Sr. P.S. to AS (RA), Mumbai
- ✓ 3. Guard file
4. Spare Copy.