REGISTERED
SPEED POST

GOVERNMENT OF INDIA
MINISTRY OF FINANACE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre,
Centre – I, Cuffe Parade,
Mumbai-400 005

195/1269/12-RA/318 Date of Issue 29.11.2017

ORDER NO. 08/2017-CX (WZ) / ASRA / MUMBAI/ DATED 28.11.2017 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. Kandoi Fabrics Pvt.Ltd., Mumbai

Respondent : Commissioner of Central Excise (Appeals-II), Mumbai.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No.US/441/RGD/2012 dated 11.07.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai.

ORDER

The instant Revision Application is filed by M/s. Kandoi Fabrics Pvt.Ltd., Mumbai (hereinafter referred to as "the Applicant") under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. US/441/ RGD/ 2012 dated 11.072012 passed by the Commissioner (Appeals-II), Central Excise, Mumbai, dismissing the appeals filed by the Applicant against the Orders-in-Original No. 159 to 161/U-12/ ADC /Raigad dated 12.01.2012 passed by the Additional Commissioner of Central Excise, Raigad whereby he has upheld the protective-demand notices in respect of the rebate claims of Rs.44,70,282/--, Rs.22,87;302/- and Rs.1,87,389/- respectively.

2. Brief facts of the cases are that by Deputy Commissioner of Central Excise, Rebate, Raigad sanctioned rebate claims of Rs. 44,70,282/- Rs. 22,87,302/- and Rs, 1,87,389/- to the Applicant as claimed for manufacture & export of woven Sacks without liner Polypropyliene woven fabrics etc. Vide Orders in Original dated 17.09.2010, 13.11.2010 and 21.01.2011 respectively. The Applicant had declared in the respective ARE-1s that they are availing facility under 'Notification No 44/2001- CE(NT) dated 26.06.2011 issued under rule 19 of Central. Excise Rules, 2002'. The said Notification is applicable for removal of intermediate, goods without payment of duty for manufacture and export by holder of DEEC & Advance Licence and the goods shall be exported under Bond following procedure specified in Notification No 42-2001-CE(NT) dated 26.06.2001. Since the said goods were required to be exported under Bond without payment of Central Excise duty, rebate sanctioned under Rule 18 of the Central Excise Rules, 2002 was found to be erroneous on this point and after due process of review under section 35E(3) of the Central Excise Act, the jurisdictional Commissioner of Central- Excise filed appeals before Commissioner of Central Excise (Appeals) Mumbai Zone-II.

3. Simultaneously, three show cause notices bearing F.No.V/ 15-430/ Reb/ kandoi-945/ 10-11 / 6297 dated 19.07.2011,F.No.V/ 15-451 / Reb/ kandoi-945/ 10-11/ 814 2 dated 27.09.2011 F.No. V/ 15-31/ Reb/kandoi/ Appeal-1684/ Rgd/ 11-12/10130 dated 01.11.2011 were also issued to the Applicant seeking to recover the above rebate amounting to Rs.44,70,282/-, Rs.22,87,302/- and Rs. 1,87,389/- respectively as being erroneously sanctioned.

4. Meanwhile, Commissioner (Appeals), vide Order in Appeal No.US/486-488/RGD/2011 dated 22.12.2011 set aside Orders in Original No.945/10-11 dated 17.09.2010 amounting to Rs. 44,70,282/-, No.1397/10-11 dated 30.11.2010 amounting to Rs. 22,87,302/- and No. 1684/10-11 dated 21.01.2011 amounting to Rs, 1,87,389/- passed by Deputy Commissioner of Central Excise, Rebate, Raigad and the Department's Appeals were allowed.

5. Aggrieved by the Order in Appeal No.US/486-488/RGD/2011 dated 22.12.2011 passed by the Commissioner (Appeals), the Applicant filed Revision Application before the then Joint Secretary to the Government of India under Section 35EE of the Central Excise Act, 1944 vide RA No.195/114-116/10-RA.

6. The abovementioned show cause notices were taken up together for adjudication by the Additional Commissioner of Central Excise, Raigad and vide Order-in-Original no. Raigad/ ADC/159-161/11-12 dated 12.01.2012 he ordered recovery of the rebates already sanctioned to the Applicant.

7. While ordering the recovery of Rebate amounting to Rs. 44,70,282/-, Rs. 22,87,302/- and Rs, 1,87,389/- already sanctioned, the Additional Commissioner, Central Excise, Raigad in Order-in-Original no. Raigad/ ADC/159-161/11-12 dated 12.01.2012 observed as under :

10. The show cause notices have alleged that M/s Kandoi Fabrics Pvt. Ltd. have declared under Sr.No.3(c) of ARE-1 declaration that they are availing facility under Notification No.44/2001-CE(NT) dtd. 26.6.2001 issued under Rule 19 of Central Excise Rules, 2002. The said notification is applicable for removal of intermediate goods without payment of duty for manufacture and export by the holder of DEEC in Advance License. It is admittedly not disputed that the ARE-1's declarations in respect of the series of ARE- is over the months declared that they are availing the facility under Notification No.44/2001-CENT) dtd. 26.6.2001. Presently they are attributing their claim for Notification No.44/2001-CE(NT) dtd. 26.6.2001 as a clerical error. ARE-1 is a assessment document and after doing the self-assessment the same was accepted by the Customs. The Commissioner(Appeals) in his Order-in-Appeal No.US/486 to 488/Rgd/2011 dtd. 22.12.2011 has held that once the self assessed document is processed by Customs, it is not open for the claimant to re-assess it. Board has also clarified under Circular No.510/06/200 CX dtd. 3.2.2000 that any scrutiny of correctness of the assessment shall be done by the jurisdictional AC/DC. Therefore, I find that the claimant is bound by the declaration in ARE- ls given to them Furthermore, in total there are 38 ARE-1 s of different dates ranging over a period from 4.2.2010 to 14.06.2010. Therefore, there cannot be inadvertent error continuing for more than four months in 38 consignments of export by mistake.

11. Notification No.44/2001 –CE(NT) dtd. 26.06.2001 provides for removal of intermediate goods without payment of duty for manufacture and export by holders of DEEC Advance License. Condition (viii) of the Notification stipulates that the goods shall be exported following the procedures specified in the Ministry of Finance. Notification No.44/2001-CE(NT) dated 26.06.2001

prescribes the condition and procedure for export of all excisable goods without payment of duty. This Notification stipulates that the goods have to be exported without payment of duty under Bond. The appellant have stated that they were availing the benefit of Notification 96/2009-CUS dtd. 11.09.2009 for procurement of raw material required for the manufacture of export goods without payment of duty against Advance Release Order (ARO) on invalidation of Advance License. Therefore, they were not required to pay the duty on their final product. Hence they were not entitled for any rebate of such amount.

12. *Commissioner (Appeals) had set aside the impugned Order-in-Originals No. 945/10-11 dtd 17.09.2010 amounting to Rs. 44,70,282/-, No.1397/10-11 dtd 30.11.2010 amounting to Rs.22,87,302/- 86 No.1684/10-11 dtd 21.01.2011 amounting to Rs. 1,87,389/- passed by the AC(Rebate) Raigad, and the Department's appeal were allowed.*

13. *Hon'ble Supreme Court in Union of India V/s Kamlakshi Finance Corporation ltd. - 1991(55) ELT 433 (SC) has held that the principles of judicial discipline require that the Orders of higher appellate authorities should be followed unreservedly by the subordinate officers. Accordingly, I am bound to give effect to the orders of higher Appellate Authority in this case.*

14. I, therefore,find that the rebate amounting to Rs.44,70,282/-, Rs.22,87,302/-, Rs.1,87,389/- sanctioned were not legal and correct. Therefore the same is recoverable from the claimant under Section 11 A(1) of Central Excise Act. Also interest under Section 11 AB of the Central Excise Act is recoverable. The notices have proposed penalty on M/s Kandoi Fabrics Pvt. Ltd. I find that despite availing the benefit of Notification No.44/2001-CE (NT) dtd.

26.6.2001 they have claimed rebate with intent to take undue benefit. They are therefore liable for penalty under Rule 27 of Central Excise Rules.

8. Aggrieved by the aforesaid Order in Original dated 12.01.2012, the Applicant preferred an appeal before the learned Commissioner (Appeals). However, vide Order-in-Appeal No. US/441/ RGD/ 2012 dated 11.072012 the Commissioner (Appeals-II), Central Excise, Mumbai, restored the Orders-in-Original No. 159 to 161/U-12/ ADC /Raigad dated 12.01.2012 passed by the Additional Commissioner of Central Excise, Raigad, so far as it related to the recovery of erroneous rebate claims amounting to Rs, 44,70,282/-, Rs. 22,87,302/- and Rs, 1,87,389/-; but reduced the penalty imposed on the Applicant from Rs.6,99,000/- to Rs.5,000/- under Rule 27 of the Central Excise Rules, 2002, thereby partly allowing the appeal filed by the Applicant.

9. Aggrieved by the impugned Order-in-Appeal No. US/441/ RGD/ 2012 dated 11.072012 the Commissioner (Appeals-II), Central Excise, Mumbai, the Applicant filed a Revision Application under Section 35 EE of the Central Excise Act, 1944 before the Joint Secretary to the Government of India on the following grounds:-

9.1 the impugned order passed by the Commissioner(Appeals) is illegal, erroneous and unsustainable.

9.2 Commissioner (Appeals) has accepted the factual position that the applicant has procured inputs under the provisions of Customs Notification No. 96/2009-CUS dated 11.09.2009 and not under Notification No. 44/2001-CE (NT) dated 26.06.2001 as has been alleged in the departmental appeal but has still erroneously held that since Notification No.44/2001 operated, as a compliment to Notification No.96/ 2009-Cus dated 11.09.2009 for procurement of raw materials from indigenous manufacturers without payment of

duty against advance release order on invalidation of advance license, the impugned order sanctioning the rebate claim cannot be upheld and has to be set aside. This finding of the Commissioner (Appeals) is totally bereft of any reasoning and shows a pre-determined mind to dismiss the Applicants appeal without any reasoning whatsoever. Once the Commissioner (Appeals) has accepted that the inputs were indeed procured from M/s. Reliance SEZ, Jamnagar under Notification No. 96/2009-CUS dated 11.09.2009 and not under Notification No. 44/2001-CE (NT) dated 26.06.2011, how can the conditions prescribed under Notification No.44/ 2001-CE (NT) dated 26.06.2001 be made applicable to the applicant who was not availing the benefit of this Notification, is beyond applicant's comprehension. The entire order is devoid of any merit and needs to be set aside on this ground alone.

9.3 Commissioner (Appeals) has concluded in the impugned order that goods exported in fulfillment of obligation under Notification No. 96/2009-CUS dated 11.09.2009 could not have been exported under claim for rebate of the duty paid on the raw materials which were used in the manufacture of the export product. In the present case applicant has not claimed rebate of the duty on the raw material but has claimed rebate of duty materials which were used in the manufacture of the export product. In the present case applicant has not claimed rebate of duty on raw materials but has claimed rebate the duty finding that rebate of duty paid on finished product was admissible Commissioner (Appeals) here upheld the finding of the Additional Commissioner and held without any basis that duty was not required to be paid on goods exportable.

9.4 Commissioner (Appeals) has erred in holding that Notification No. 44/2001-CE (NT) dated 26.06.2011 and Notification No. 96/2009-CUS dated 11.09.2009 were complimentary. This finding of the Commissioner (Appeals) even if assumed to be correct cannot result in

conditions under Notification No. 44/2001-CE (NT) being imported in Notification No. 96/ 2009-CUS. The order which seeks to do so deserves to be quashed and set aside on that ground alone.

9.5 Commissioner (Appeals) has failed to appreciate that merely because there was a clerical mistake in one of the footnotes in ARE-I substantial benefit could not be denied. What revenue has overlooked that none of the conditions of Notification No. 44/2001-CE (NT) were fulfilled. Applicant is herein below reproducing some of the conditions which are to be fulfilled while claiming benefit of Notification No. 44/2001-CE (NT).

(i) the manufacturer of the intermediate goods holds an Advance Intermediate License or has applied for such license to the Licensing Authority and has obtained an acknowledgement for the same, or as the case may be, has been permitted by the licensing authority or the Committee to manufacture for supply of such goods to the ultimate exporter; - No such license exists in the present case.

(ii) the provisions of the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 shall be followed, mutatis mutandis; - No such rules were followed in the instant case.

(iii) the goods shall be exported following the procedures specified in the Ministry of Finance (Department of Revenue) Notification No. 42/2001-Central Excise (N.T.), dated 26th June, 2001. — Not exported in terms of Notification No. 42/2001-Central Excise (N.T.)

The impugned order has overlooked this fact and thus deserves to be quashed and set aside in this ground alone.

9.6 As held by the Joint Secretary, Government of India's in the case of Modern Process Prints reported in 2006 (204) ELT 632 (GOI),

rebate/ drawback and other export promotion schemes of the government are incentive oriented beneficial schemes intended to boost exports in order to promote exports by exporters to earn more foreign exchange for the country and in case the substantive fact of export having been made is not in doubt, a liberal interpretation is to be accorded in case of technical lapses, if any, in order not to defeat the very purpose of such scheme.

9.7 The Hon'ble Supreme Court has, in the case of UOI Vs. A. V. Narasimha reported in 1983 (13) ELT 1534 (SC) observed that the administrative authorities should instead of relying on technicality, act in a manner consistent with the broader concept of justice. Procedural infractions of Notifications/Circulars are to be condoned if export has taken place actually and substantive benefit should not be denied. Kind attention is also invited to the decision of the Hon'ble Madras High Court in the case of Ford India Pvt. Ltd., Vs. Assistant Commissioner of Income Tax [2011 (272) ELT 353 (Mad.)] wherein it was held that substantive compliance is sufficient where factum of export is not in doubt. Rebate being a beneficial scheme, it should be interpreted liberally. Rebate claim cannot be denied on technicality. There are several Tribunal and Govt. of India's decisions in revision petitions holding that once the factum of export is not denied, rebate claim should not be withheld on account of procedural deficiency.

9.8 In its case, there has been no deviation in the procedure and all requirements laid down under Notification No.19/2004-CE (NT) dated 06.09.2004 have been complied with. However, if for some reason, it is still held that procedures prescribed under Notification No. 44/ 2001-CE (NT) dated 26.06.2001 should have been followed, the rebate claim cannot be denied once the fact of duty having been paid on the export goods is not being disputed by the department.

9.9 It is a settled policy of the government not to recover any duty on the export goods and when such duty is paid, the same is refunded

as rebate. Taxes are not to be exported and it is only the goods which are exported. Therefore, once the goods have been exported on payment of duty, the rebate of such duty paid can under no circumstance be denied. It is immaterial that the applicant should have exported his goods under bond but has instead exported under claim of rebate of duty paid as long as the fact of export and payment of duty is not disputed.

9.10 In support of our above view, applicant refers to the decision of the Government of India, in the case of Banswara Syntex Ltd., Vs. Commissioner [2004 (117) ELT 124 (GOT)] wherein it was held that export rebate under Rule 12 of erstwhile Central Excise Rules, 1944 read with Notification No. 41/94-CE (NT) not deniable on the ground that goods cleared for export manufactured out of inputs which were procured duty free in terms of Notification No.47/1994-CE (NT) issued under Rule 13(i)(b) ibid. A similar view was taken by the Hon'ble Madras High Court in the case of Tablets India Ltd., Vs. Joint Secretary, Ministry of Finance, Department of Revenue [2010 (259) ELT 191 (Mad.)] wherein it was held that exports of exempted goods by inadvertence made under Rule 13 of erstwhile Central Excise Rules, 1944, while benefit of rebate on inputs, under Rule 12(1)(b) ibid ought to have been claimed, rebate claim subsequently could not be rejected on the ground that procedure under Notification No. 42/1994-CE (NT) not followed, once the factum of export is not disputed.

9.11 Commissioner (Appeals) has erred in imposing penalty under Rule 27 in as much as there was no breach of any Central Excise Rules, 2002.

10 In view of the aforesaid Grounds of Appeal, the Applicant has prayed for quashing and setting aside the impugned Order in Appeal; to restore the

Orders in Original sanctioning the rebate claims and any other and further relief as may be just and necessary in the facts and circumstances.

11. A personal hearing in this matter was held on 23.11.2017 which was attended by Shri M.S. Biradar, GM on behalf of the Applicant, who reiterared grounds of Revision Application. Shri M.S. Biradar, GM also handed over the written submissions dated 23.11.2017 at the time of personal hearing wherein he mentioned that they had filed revision application against order in Appeal No. US/486-488/RGD/2011 dated 22.12.2011 passed by the Commissioner (Appeals) II, Central Excise, Mumbai and Ld. Jt. Secretary (R.A) set aside the impugned order in appeal and restored the Orders in Original vide Order No. 1716-1718/12-CX dated dated 07.12.2012. Copy of the said Order was also enclosed to this letter. It was further mentioned in the said letter that they struck out the words "without availing facility" on ARE-1 by oversight and due to this, the query raised by the department was that, they have availed the benefit of notification No. 44/2001 CE(NT) dated 26.06.2001. In this connection the Applicant also enclosed copy of a verification report received vide letter F.No. V/18-Misc/Circular-Rebate/09-10 dated 28.02.2011 from Assistant Commissioner, Central Excise, Customs & Service Tax, Division South Daman to the extent that the Applicant M/s Kandoi Fabrics Pvt. Ltd. (Unit-II) have not availed benefit of the said notification. They also enclosed a copy of letter F.No. V/MISC-02/MISC CORR/SDMN/12-13 dated 19.10.2012 received from Assistant Commissioner, Central Excise, Customs & Service Tax, Division South Daman confirming the actual benefit availed under notification no. 96/2009-Cus dated 11.09.2009.

12. The Government has carefully gone through the case records of Revision Application, contention of the department in the Order-in-Original, contentions made in the Order-in-Appeal under question and the

submissions made by the Applicant in his Revision Application as well as during the personal hearing.

13. The Government has observed that the present Revision Application is filed by the Applicant against the Order-in-Appeal No. US/441/ RGD/ 2012 dated 11.07.2012 passed by the Commissioner (Appeals-II), Central Excise, Mumbai, restoring the Orders-in-Original No. 159 to 161/U-12/ ADC /Raigad dated 12.01.2012 passed by the Additional Commissioner of Central Excise, Raigad, for the recovery of erroneous rebate claims amounting to Rs, 44,70,282/-, Rs. 22,87,302/- and Rs, 1,87,389/-.

14. The Government also notes that the Orders-in-Original No. 159 to 161/U-12/ ADC /Raigad dated 12.01.2012 passed by the Additional Commissioner of Central Excise, Raigad, ordering the recovery of erroneous rebate claims amounting to Rs, 44,70,282/-, Rs. 22,87,302/- and Rs, 1,87,389/- sanctioned to the Applicant was entirely based on Commissioner (Appeals) order US/486-488/RGD/2011 dated 22.12.2011, which had allowed the department appeals by rejecting the rebate claims of Rs. 44,70,282/- Rs. 22,87,302/- and Rs, 1,87,389/-sanctioned by the Deputy Commissioner of Central Excise, Rebate, Raigad.

15. Government has also noted that the Applicant had also filed Revision Application No.195/114-116/10-RA against Order in Appeal No.US/486-488/RGD/2011 dated 22.12.2011 passed by the Commissioner (Appeals), under Section 35EE of the Central Excise Act, 1944.

16. The Revision Application No.195/114-116/10-RA filed by the Applicant had since been decided by the Revisionary Authority vide Order No. 1716-1718/12-Cx dated 07.12.2012 by setting aside Order in Appeal No.US/486-488/RGD/2011 dated 22.12.2011 and restoring Orders in Original dated 17.09.2010, 13.11.2010 and 21.01.2011 passed by the Deputy Commissioner (Rebate), sanctioning rebate claims amounting to Rs.44,70,282/-,

Rs.22,87,302/- and Rs.1,87,389/-respectively. While doing so, the Revisionary Authority at para 9 of its order has observed as under :-.

> 9. *Government now notes that the basic and main ground of review of the impugned Orders-in-Appeal under section 35E(2) of the Central Excise Act was based on one of major "declaration" on respective ARE-is that the applicant has availed provisions of Notification No 44/2001 CE(NT) in respect of inputs used for manufacturing of impugned export goods. But now it is confirmed by the jurisdictional Central Excise offices they did not avail benefit Notification No. 44/2001CE(NT) but availed benefit of Notification no, 96/2009-Cus. dated 11.09.2009. Therefore, the applicant has submitted that their substantial export benefits of impugned rebates should not be denied for the above one inadvertent clerical mistake. It is also noted that the Commissioner (Appeals), though presuming the submissions of the applicant has made a comparative study of both the above Notifications and concluded that in any case, the applicant is not entitled the right to claim of rebate. But Government is of the considered opinion that such generalised conclusion is not legal & proper, as each case matter depend upon the details of its own and even one step of different mode in availment of a specific provision of any Notification can make a word of difference. Therefore, as the applicant herein is claiming that he has not procured the raw materials from indigenous manufacturers without payment of duty against advance release order or invalidation of advance licence, that is why he is entitled to claim the rebate. Government notes that in view of report of jurisdiction Central Excise officers, the basis objection for rejection of rebate claims does not sustain. Therefore, the order of original authority sanctioning rebate claims cannot be faulted with.*

17. Government also notes that the issue in present application being identical, and as the Revisionary Authority vide Order No. 1716-1718/12-Cx dated 07.12.2012 has upheld the Orders in Original dated 17.09.2010, 13.11.2010 and 21.01.2011 passed by the Deputy Commissioner (Rebate), sanctioning rebate claims amounting to Rs.44,70,282/-, Rs.22,87,302/- and Rs.1,87,389/-respectively by setting aside Order in Appeal No.US/486-488/RGD/2011 dated 22.12.2011, the Orders-in-Original No. 159 to 161/U-12/ ADC /Raigad dated 12.01.2012 passed by the Additional Commissioner

of Central Excise, Raigad, ordering the recovery of the said rebate claims as well as Order in Appeal No. US/441/RGD/12 dtd.11.07.2012 upholding the same are now rendered defunct and hence deserve to be set aside.

18. Government, therefore, sets aside Order in Appeal US/441/RGD/12 dtd.11.07.2012 and allows the revision application.

19. The revision application thus succeeds in terms of above.

20. So, ordered.

28-11-2017

(ASHOK KUMAR MEHTA)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No.08/2017-CX (WZ) /ASRA/ DATED 28.11.2017

To,

M/s Kandoi Fabrics Pvt. Ltd.,
406, Lotus House,
4th floor, 33 A, New Marine Lines,
Mumbai-400 020.

29/11
(Cs - Mumbai)
Asstt. Comm (RA)

Copy to:

1. The Commissioner, CGST & Central Excise Commissionerate, Raigad.
2. The Commissioner (Appeals-II), CGST & Central Excise, Mumbai.
3. The Deputy Commissioner (Rebate), CGST & Central Excise Commissionerate, Raigad.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File.
6. Spare Copy.