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SPEED POST

F.NO.195/784-791/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
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NEW DELHI-110 066

Date of Issue: 30/7/13

ORDER NO. 1064-1071 /2013-Cx DATED 29.07. 2013 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D. P. SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944

Subject	:	Revision Application filed under Section 35 EE of the Central Excise Act, 1944 against the order-in-appeal No.103-110/11(Ahd-I)CE/MM/Commr(A)/Ahd dated 15.9.2011 passed by the Commissioner of Central Excise (Appeals-V), Ahmedabad
Applicant	:	M/s. Ashima Dyecot Ltd., Texcellence Complex Khokhara Mehmedabad, Ahmedabad
Respondent	:	Commissioner of Central Excise, Ahmedabad-V

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ORDER

These revision applications are filed by M/s. Ashima Dyecot Ltd., Ahmedabad, against the orders-in-appeal No.103-110/11(Ahd-I)CE/MM/Commr(A)/Ahd dated 15.9.2011 passed by the Commissioner of Central Excise (Appeals-V), Ahmedabad with respect to orders-in-original passed by the Assistant Commissioner, Central Excise, Division-I, Ahmedabad.

2. The brief facts of the case are that the applicants exported textile articles and filed claim of rebate of duty paid on such exported goods. On verification of the rebate claim, it was observed that duty liability was discharged by way of utilization of unutilized cenvat credit lying in balance. It was the contention of the department that the said balance of credit was on account of deemed credit availed by the present applicant. It was also the contention of the department that the said deemed credit shall lapse on 9.7.2004 and the same should not be used for payment of duty. In view of the above, show cause notice was issued for denial of rebate claim. The adjudicating authority dropped the said show cause notice and sanctioned the rebate claims vide his OIO No.5/AC/Rebate/2010 dated 6.4.2010. Aggrieved by the aforesaid order, the department had preferred appeal before Commissioner (Appeals). After preferring the appeal before the Commissioner (Appeals), the department had issued a show cause notice for recovery of the rebate amount sanctioned. Departmental appeal was allowed by the Commissioner (Appeals) in favour of department vide OIA No.296 to 303/2010(Ahd-I)/CE/MM/Commr(A)/Ahd dated 27.8.2010. Pursuant to said orders-in-appeal dated 27.8.2010, the original authority adjudicated the show cause notice issued for recovery of already sanctioned rebate claim and confirmed the demand.

3. Being aggrieved by the said orders-in-original confirming the demand of sanctioned rebate, applicant filed appeals before Commissioner (Appeal), who rejected the same.

4. Being aggrieved by the impugned orders-in-appeal, the applicant has filed these revision applications under Section 35EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 The order is bad in law as the same is against the settled principles of judicial discipline and consistency. Similar issue had arisen with reference to earlier rebate claim also of the same applicant. In that issue also, Commissioner (Appeals) decided the appeal of the present applicant in which Commissioner (Appeals) held that the rebate claim should be sanctioned and the amount of rebate shall be given in cash to the applicant irrespective of the fact whether they have availed any Cenvat on raw-material or not. On this ground also, before deciding the issue in favour of the department and holding a different view from her predecessor-in-office, the Commissioner should have granted opportunity to represent the case. Even otherwise, the Commissioner was duty bound to give her comment why she wants to take a different view than the earlier one and was also required to discuss the order of her predecessor in detail before taking a different view. On this ground also, the order is bad in law and requires to be set aside.

4.2 It is submitted that the order is passed solely on the assumption that the applicant had paid duty from their deemed credit account. In this regard, firstly it is vehemently denied that the said duty was paid from deemed credit account. It is submitted that the applicant had no deemed credit balance available with him. Deemed credit notification was withdrawn with effect from 1.4.2003. On 1st April 2003, the applicant had balance of Rs.28,43,967/- on account of unutilized deemed credit. However, the same was debited from their account on 1.11.2003 as per Commissioner (Appeal's) order No. 93/03-04. Hence entire amount of deemed credit stands debited on 1.11.2003.

4.3 However, with effect from 1.4.2003, the applicant was availing Cenvat on actual basis which was lying unutilized in his account due to exports of goods. The applicant further submits that credit lying unutilized in their account is an accrued right as held by the Honourable Supreme Court in the case of Eicher Motors Limited Vs. Union of India,

reported in [1999 (106) ELT 3] that right cannot be taken away by any subsequent legislation. It is submitted that the contention that the credit should lapse under rule 11 is misconceived and also against the settled principles of law laid down by the Honourable Supreme Court in the aforesaid two cases. It is submitted that even rule 11 does not say that the credit lying unutilized shall be lapsed if the manufacturer clears any goods under exemption. It is submitted that as per rule 11, the credit shall lapse only if a manufacturer avails benefit of value based exemption notification. Hence, it is incorrect to hold that the credit lying unutilized in the applicant's account shall lapse on account of opting for benefit of exemption notification No.30/2004. Further to the above, it is submitted that the applicant had relied on the decision of the Honourable Karnataka High Court in the case of CCE Bangalore-II Vs. TAFE Limited, reported at 2011(268) ELT 49, and in the case of CCE Bangalore Vs. Gokaldas Intimate wear reported at 2011 (270) ELT, 351 in which the Honourable High Court has taken a view that provisions of rule 11 (3) are prospective in nature and the same are not attracted retrospectively. In the case of the applicant, the duty was lying in their cenvat credit account since 16/1/2006 and the rule 11 (3) itself was inserted in 1/3/2007. Hence, the said provisions are at all not attracted and credit lying in their books of accounts would not lapse. However, the Commissioner has strangely held that the applicants' case pertain to the period 27/8/2010 i.e. date of export and hence credit lying should have been lapsed. It is submitted that the aforesaid view is totally erroneous as credit was unutilized prior to insertion of rule 11 (3) with effect from 1/3/2007 and the applicant was clearly eligible to use the same for the exports. Hence also the order is required to be quashed and set aside on this ground also. Further, the case laws cited by the Commissioner (Appeals) are not relevant to this case.

4.4 It is submitted that as per the departmental circular also, manufacturer of textile articles can simultaneously avail the benefit of both the notifications. For clearing goods without payment of duty under Notification No.30/2004, the manufacturer shall not avail any Cenvat on raw-material consumed in the manufacture of such goods which are cleared without payment of duty. However, the manufacturer can clear the

resultant finished goods on payment of duty under Notification No.29/2004 if he does not wish to avail exemption under 30/2004 on any count. It is submitted that Notification No.30/2004 is conditional notification. It is not a notification where a product is exempted unconditionally and the manufacturers are required to clear the same without payment of duty under Section 5-A of the Central Excise Act. Notification No.30/2004 being a conditional notification, the manufacturers are at liberty to opt or not to opt for the same.

4.5 It is further submitted that the Commissioner has held that credit availed must be utilized lawfully and in clearance of non-exempted final product. The availment of credit cannot be considered lawful if the same is not utilized properly for clearance of taxable final product. In this regard it is submitted that the availment of credit was genuine and lawful as there is no show cause notice issued for reversal of wrongly availed of Cenvat credit. Regarding the utilization portion, as submitted above, the goods are excisable and option is with the manufacturer whether to opt or not to opt for notification. If the manufacturer opts for clearance of goods on payment of duty, then it cannot be said that the said utilization is wrong and entire availment of credit is wrong. It is further submitted that there is also no dispute regarding reversal of Cenvat credit on goods cleared without payment of duty. It is submitted that the applicant was simultaneously availing benefit of both the notifications upto 15/1/2006. However, thereafter, the manufacturer is clearing the entire finished goods under notification No.30/2004. The manufacturer has also reversed proportionate Cenvat on 15/1 /2006 on quantity of raw-material which is supposed to be used for clearance of goods under Notification No.30/2004 hence also, the observations made in OIA stands duly complied with. It is also submitted that if the manufacturer has reversed proportionate Cenvat credit on 15/1/2006 before opting for clearance under 30/2004, the balance lying after such reversal, can be used for clearance of any excisable final product on which duty of excise is leviable by the manufacturer. In the circumstances, the balance lying unutilized shall never lapse and shall be available to the manufacturer as an accrued

right. Hence also, observation made in O.I.A. is wrong in law and requires to be set aside.

4.6 It is again submitted that the unutilized Cenvat credit was not a deemed credit availed under notification No.6/2002 and hence observation made in the order is clearly factually wrong. Nonetheless, it is submitted that the balance was on account of Cenvat credit availed on input raw-material. The same had been accumulated in the books of accounts of the present applicant only on account of exports of goods by them under bond. Even, rule 5 of the Cenvat Credit Rules permits the manufacturer for refund of such credit which is lying unutilized in the books of accounts of manufacturer-exporter. Hence also, the rebate must be allowed in the true spirit as the intention of the legislature is to grant rebate of duties paid on export goods.

4.7 The applicant also relied upon decision of the Hon'ble Tribunal in the case of M/s Perfect Kitens Ltd. reported at 2010(256)ELT 619 and GOI order No.222-312/10-Cx dated 24.2.2010 in the case of M/s Nahar Shipping Mills Ltd.

5. Personal hearing was scheduled in this case on 20.3.2013 & 27.6.2013. Hearing held on 20.3.2013 was attended by Shri H.S.Rajput, General Manager, Excise and Shri Nirav P.Shah, Advocate on behalf of the applicant, who reiterated the grounds of revision application. The applicant further stated that the impugned orders-in-original confirming demand of erroneously paid rebate was issued pursuant to order-in-appeal No.296-303/10(Ahd-I)CE/MM/Commr(A)/Ahd dated 27.8.2010. The said order-in-appeal has been set aside vide GOI Revision order No.3-10/2012-Cx dated 6.1.2012 in R.A.No.195/781-788/2010-RA-Cx filed by the applicant and case was remanded back to original authority for denovo adjudication.

6. Government has carefully gone through the relevant case records and perused the impugned orders-in-original and orders-in-appeal.

7. Government observes that the applicant's rebate claims were initially sanctioned by the original authority. Department filed appeals against the said rebate sanctioning

orders, which were decided by the Commissioner (Appeals) in favour of department vide orders-in-appeal No.296-303/10(Ahd-I)/CE/MM/Commr(A)/Ahd dated 27.8.2010. Department had issued show casue notice for recovery of erroneously sanctioned rebate claim. The adjudicating authority vide impugned orders-in-original confirmed recovery of earlier sanctioned rebate claims. Commissioner (Appeals) rejected the appeals filed by the applicant. Now, the applicant has filed these revision applications on grounds mentioned in para (4) above. The applicant during the course of hearing stated that the above said orders-in-appeal No.296-303/10 dated 27.8.2010 has been set aside vide GOI revision Order No.03-10/2012-Cx dated 6.1.2012 in their earlier revision applications No.195/781-788/2010-RA-Cx and cases were remanded back for denovo adjudication.

8. Government observes that in impugned cases have arisen pursuant to orders-in-appeal No.296-303/10(Ahd-I)/CE/MM/Commr(A)/Ahd dated 27.8.2010 wherein cases were decided by Commissioner (Appeals) in favour of department. The applicant filed revision applications No.195/781-788/2010-RA-Cx against above said orders-in-appeal dated 27.8.2010, which were decided vide GOI revision Order No.03-10/12-Cx dated 6.1.2012 by way of remand. However, in these impugned cases the already sanctioned rebate claims sought to be recovered mainly on the grounds that as per the provisions of the Rule 11(3) of Cenvat Credit Rules 2004, the unutilized credit lying in balance lapses on date when manufacturer commences availment of full duty exemption w.e.f. 9.7.2004 under Notification No.30/2004-CE dated 9.7.2004.

8.1 Government observes that provision contained in Rule 11(3) of the Cenvat Credit Rules 2004 reads as under:

> *"Rule 11 (3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if,-*
>
> *(i) he opts for exemption from whole of the duty of excise leviable on the said final*

product manufactured or produced by him under a notification issued under section 5A of the Act; or

(ii) the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported."

It is noted that applicant has availed exemption from whole of duty of excise during the relevant period and therefore, Department is contending that Cenvat Credit lying in balance would lapse in terms of Rule 11(3) ibid.

8.2 Government observes the applicant has relied upon judgement of Hon'ble Karnataka High Court order dated 11.4.2011 on CEA No.109 of 2009 in the case of CCE, Bangalore-II Vs. Gokaldas Intimate Wear reported in 2011 (270)ELT 351(Kar), CESTAT order in case of CCE Banglore-II Vs. Mother diary 2009 (245) ELT – 413 (T-Bang) and CCE Chandigarh Vs. Saboo Alloys Pvt. Ltd. 2008 (228) ELT 422 (T-Delhi) and contended that rule 11(3) of Cenvat Credit Rule 2004 inserted w.e.f. 01.03.2007 vide Notification No. 10/07-CE(NT) dated 01.03.2007 and therefore its provision can not be made applicable to impugned Cenvat Credit balance lying as on 16.01.2006.

8.2.1 Hon'ble Karnataka High Court in case of M/s Gokaldas Intimate Wear 2011 (270) ELT 351 (KAR) has observed as under:

"5. *It was pointed out to us that in the year 2008 (sic) sub-rule (3) was inserted by a Notification No. 10/2007 with effect from 1-3-2007, which reads as under :-*

"(3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if, -

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or

(ii) the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in

his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported."

6. *Therefore, it is clear from the aforesaid. Rule that till 1-3-2007, the assessee was entitled to benefit, of the cenvat credit in respect of inputs contained in the work in progress and semi finished products. The said amendment is prospective in nature. It comes into effect from only 1-3-2007. In the instant case, the period is anterior to 1-3-2007, which has no application. Therefore, the substantial questions of law raised in this appeal are answered in favour of the assessee and against the revenue."*

In above judgements, it has been clearly held that the said Rule 11(3) came into effect only from 1.3.2007 and effect of the same is prospective.

8.2.2 Hon'ble CESTAT in the case of CCE Banglore-II Vs. Mother Diary 2009 (245) ELT 413 (T-Bang) has observed as under:-

"8. On a very careful consideration of the issue, we find that this Bench had already taken a view in some of the decisions that once input credit is taken legally, then the same cannot be denied after the issue of exemption notification on the final products. We do not want to differ from such a view at this stage. If the ratio of this decision is applied, they would not be any necessity to withhold or deduct the amount due to the respondents. In other words there was no need for reversal of input credit lying in stock and also in the finished goods. Further, our attention was brought to amendment made in Cenvat Credit Rules, 2004 wherein sub-rule 11(3A) has been introduced. The effect of this amendment is that when a product on which input Cenvat Credit taken is exempted by way of a Notification, then the input credit lying in stock and contained in the finished goods should be necessarily reversed. It was argued that this provision came into effect from 1.3.2007. The period in the present case is prior to 1.3.2007. On this ground also the action of the Original Authority cannot be sustained. Therefore, there was no merit in the revenue's appeal. The same is dismissed."

8.2.3 Hon'ble High Court & CESTAT has taken view in these cases that the Rule 11(3) was inserted on 1.3.07 and has a prospective effect.

8.2.4 The appellate authority held that facts of this case is different from facts involved in above mentioned judgements and also that the applicant's case pertains to the period 27.8.2010, which was much after the introduction of Rule 11(3) of the Cenvat Credit Rules, 2004. In this regard, Government observes that issue involved in this case is applicability of Rule 11(3). The above said judgemtns deal with applicability of Rule 11(3) and held that the provision of Rule 11(3) came into existence w.e.f. 1.3.2007 and effect of the same is prospective. Further, the applicant has utilized unutilized cenvat credit available before 1.3.2007 for clearance of goods in subsequently period. Mere, utilization of such eligible cenvat credit in export of year 2010 cannot be held as improper as observed by the appellate authority. The applicability of said judgement in the context of above observation are required to be considered by the authority and finding is required to be given after considering the same. The lower authorities have not considered the applicability of these case laws and proceeded on wrong presumption that applicants case pertains to the period 27.8.10 whereas, the cenvat credit balance was lying in cenvat credit account as on 17.1.06. So the case is required to be remand back for fresh consideration.

9. Government notes that the appellate authority has held that credit availed must be utilized lawfully and in clearance of non-exempted final product. In this regard, Government observes that the applicant availed cenvat credit during 10.9.2004 to 16.1.2006 on raw materials and w.e.f. 17.1.2006, the applicant opted for clearance under Notification No.30/2004-CE (NT). At that time, they reversed proportionate cenvat credit on goods lying in balance. Further, if manufacturer had opted for clearance of goods on payment of duty, it cannot be said the said utilization was wrong and entire availment of cenvat credit was wrong. Moreover, no show cause notice is stated to have been issued for recovery of any wrongly availed cenvat credit.

10. In view of above discussions Government sets aside the impugned orders, and remands the cases back to original authority to decide the issue afresh keeping in mind

above said observations. A reasonable opportunity of hearing will be afforded to both the parties.

11. Revision applications are disposed of in above terms.

12. So, ordered.

(D.P. Singh)
Joint Secretary (Revision Application)

M/s. Ashima Dyecot Ltd., Ahmedabad
Texcellence Complex, Khokhara
Ahmedabad – 380 021

Order No. 1064-1071/2013-Cx dated 29.07.2013

Copy to:

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4. Shri Nirav P.Shah, Advocate, D/722, B.G.Tower, O/s Delhi Darwaja, Shahibaug Road, Ahmedabad-380004
5. PA to JS(RA)
6. Guard File.
7. Spare Copy

ATTESTED

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