

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. 195/63/13-RA

Date of Issue:- 07.01.2020

ORDER NO. 106/2020-CX(WZ)/ASRA/MUMBAI DATED 03.01.2020
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.

Sl. No.	Revision Application No.	Applicant	Respondent
1	195/63 /13-RA	M/s Doshi Impex, Mumbai	Commissioner, Central Excise, Mumbai South

Subject: Revision applications filed under Section 35EE of the Central Excise Act, 1944, against the Order in Appeal No. US/503/RGD/2012 dated 22.08.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai.

ORDER

This Revision application is filed by M/s Doshi Impex, Mumbai (hereinafter referred to as the 'applicant') against the Orders-In-Appeal No. US/503/RGD/2012 dated 22.08.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai.

2. The Brief facts of the case are that the applicants, who are merchant exporters, have filed 2 rebate claims bearing RC No. 30141 & 30142 both dated 13.12.2004 for total value of Rs. 1,60,120/-/- (Rupees One Lakh Sixty Thousand One Hundred Twenty Only). The Deputy Commissioner, Central Excise (Rebate), Raigad vide Order in Original No. 1551/11-12/DC (Rebate)/Raigad dated 22.12.2011 rejected these rebate claims on the ground that :

2.1 Since the export had been undertaken by the merchant exporter, M/s Doshi Impex, it was required to scrutinise the duty paying documents of the processors i.e. M/s Jaykrishna Prints in the instant case. On scrutiny of the invoices it was observed that the processor had availed he Notification No. 30/2004-CE dated 09.07.2004 wherein the goods supplied by them i.e Nylon Acrylic dyed fabric was exempt from payment of duty. The exported goods were fully exempt under Notification No. 30/2004-CE dated 09.07.2004. Hence, the processor ought not to have cleared the goods on payment of duty._____

2.2 The goods cleared for export under Notification No. 30/2004-CE are covered by the provisions of Section 5A(1A) of the Central Excise Act, 1944.

2.3 Further, the adjudicating authority also found that during the material time, DGCEI, Vadodara & Surat Commissionerates had detected several cases of non-existing firm / bogus firm who were purportedly either supplying grey fabrics or processing grey fabrics. Such firms started issuing bogus / fake cenvatable invoice with the sole intention of passing fraudulent / bogus cenvat credit. Therefore, in the instant case, to verify the authenticity of the Cenvat Credit availed by the processors, on the strength of invoices so received from grey fabrics suppliers and the subsequent utilisation of such

Cenvat Credit for payment of Central Excise duty on exported goods, an opportunity was given to the applicant for submission of documents / records regarding the genuineness of the and utilised the Cenvat Credit availed fraudulently on the bogus invoices. However, the applicant did not submit the same. It was, therefore, concluded that the duty paid by the applicant out of the Cenvat credit accumulated is not free from the doubt.

3. The applicant being aggrieved by the said order in original filed appeal before Commissioner (Appeals-II), Mumbai. The Appellate Authority vide impugned Order in Appeal upheld the order in original and observed that :-

3.1 The proviso to Notification No. 30/2004-CE dated 09.07.2004 makes it abundantly clear that the exemption contained in the Notification is not applicable to the goods in respect of which credit of duty on inputs has been taken under the provisions of the Cenvat Credit Rules, 2004. The Copies of the Invoices issued by the supplier of grey fabrics show that the clearances were made on payment of duty. But it was not forthcoming that the clearances were being made under Notification No. 29/2004-CE dated 09.07.2004. Therefore, it is clear that they could not have been possibly exempt under Notification 30/2004-CE. Accordingly, this ground for rejection of rebate claim cannot be sustained and has to be set aside.

3.2 The applicants are merchant exporter and the goods had been cleared on payment of duty to M/s Jay Krishna Prints, Surat by M/s Nikunj Textiles. The credit may have been availed fraudulently and the appellants may also be a party in the fraudulent availment of Cenvat Credit. The bonafide nature of transaction between the merchant-exporter and supplier-manufacturer is imperative for admissibility of the rebate claim filed by the merchant manufacturer. The applicant failed to the evidence of the genuineness of the Cenvat Credit availed by the processors. As such the rebate claim was rightly rejected.

4. Being aggrieved, applicant has filed the instant revision application before Central Government under Section 35EE of Central Excise Act, 1944, on the grounds that:-

i) The payment of duty by the processor can not be questioned and the provisions of Section 5A(1A) were inapplicable in the instant case.

ii) The rejection of the claim on the grounds that the jurisdictional Superintendent reported that the purchase is from non-existent firms / fake firms and the Cenvat Credit availed and utilised fraudulently on the bogus invoices. The first deficiency memo was regarding certain discrepancies in the documents, part of which were factually incorrect and remaining were immediately complied, whereas the second deficiency memo issued on 21.11.2011 only required the applicant to furnish documentary evidence regarding availment of input stage credit on grey fabrics. None of them required the applicant to prove genuineness of the invoices issued by the input supplier. The orders of both the original authority and the applicant authority, therefore, clearly traverse beyond the SCN, wherein the rebate claims have been rejected purely on extraneous ground other than those pointed out in the deficiency memo.

5. A Personal Hearing was held in matter on 27.08.2019. Miss Sparsh Prasad, Advocate attended the same on behalf of the applicant. She reiterated that the Notification No. 30/2004-CE dated 09.07.2004 is not applicable in the matter as it was not in existence at that time. The applicant had never opted for said notification.

6. The Government observes that the applicant had exported the goods viz. Nylon Acrylic Dyed Fabric which were exempt under Notification No. 30/2004-CE dated 09.04.2004 whereas, the processor had cleared the exported goods on payment of duty. The Government also observes that the contention of the Revenue is that the exemption under Notification No. 30/2004-CE is binding upon processor as per the provisions of Section 5A(1A) of the Central Excise

Act, 1944 and the processor did not have the option to avail exemption and pay the duty. Hence the rebate claims were rejected.

The Government finds that the issue pertaining to the ambit of the provisions of sub-section (1A) of Section 5A of the CEA, 1944 is principally relevant to the facts of the case. In the instant case, the Department has put more emphasis to the contention that the respondent ought not to have paid duty while they were eligible to the benefit of exemption under Notification No. 30/2004-CE. The Government finds that Sub-section (1A) of Section 5A of the Central Excise Act, 1944 which is pertinent to the instant issue stipulates as under:-

“(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely the manufacturer of such excisable goods shall not pay the duty of excise on such goods.”

The above provision insists that the exemption granted absolutely from whole of duty of excise has to be availed and in that case there is no option to pay duty. However, in the instant case, goods are exempted under Notification No. 30/2004-C.E. (N.T.) subject to condition that no cenvat credit of duty on inputs has been taken under the provisions of the CENVAT Credit Rules, 2002. Consequently, the Notification No. 30/2004-CE does not pass muster as an unconditional notification. Now given that the Notification No. 30/2004-C.E. (N.T.) is a conditional one, the respondent was not under any statutory compulsion to avail it. Conversely, even if it is assumed for a moment that Notification No. 30/2004-CE is an absolute exemption, the contention that the respondent would be obligated to avail it has been rejected by the Hon'ble Gujarat High Court in the case of Arvind Ltd. Also, as per C.B.E. & C. Circular No. 845/03/06-CX dated 1-2-2007 and 795/28/2004-CX, dated 28-7-2004, both the Notifications can be availed simultaneously. The Government, therefore, holds that there was no restriction on the respondent to pay duty on

the exported goods. Hence this ground for rejection of the rebate claims is not sustainable.

7. Government, further, observes that the other ground on which the rebate claims were rejected was that the applicant have not produced evidence of the genuineness of the Cenvat Credit availed by the processors; that the goods were cleared on payment of duty by debit of Cenvat Credit; that during the material time a number of processors fraudulently availed Cenvat Credit on the basis of 'invoices' issued by bogus non-existent grey manufacturers; that the applicant may also be a party in the said fraudulent availment of Cenvat Credit; that the rebate sanctioning authority was apparently not satisfied about the bona fide / duty-paid' character of the exported goods from the certificate given on the triplicate copy of A.R.E. 1 received from the Jurisdictional Superintendent of Central Excise (Range Office).

8. In this regard, Government finds that the processor M/s Jaykrishna Prints, Surat did not provide the copy of the invoice of grey fabrics used for manufacture of exported goods. Further, Government notes that there is nothing on record to show that there was any further investigation / issuance of show cause notices, confirmation of demand of irregular Cenvat Credit etc. by the concerned Commissionerate against the applicant or the processors supplying grey fabrics to them. This verification from the original authority was also necessary, to establish whether the Cenvat credit availed & subsequently utilized by the processor/manufacturer for payment of duty towards the above exports was genuine or otherwise. Government therefore, is of considered opinion that the Order in Original No. 1551/11-12/Dy.Comm (Rebate)/Raigad dated 22.12.2011 passed by the Deputy Commissioner (Rebate), Central Excise, Raigad Commissionerate lacks appreciation of evidence and hence is not legal and proper.

9. In view of above discussion, Government modifies impugned Order-in-Appeal to the extent discussed above and remands the case back to the original

authority for causing verification as stated in foregoing paras. The applicant is also directed to submit all the relevant export documents with respect to all concerned ARE-1s, duty paying documents etc. for verification. The original authority will complete the requisite verification expeditiously and pass a speaking order after receipt of said documents from the respondent and following the principles of natural justice.

10. Revision application is disposed off in above terms.


(SEEMA ARORA)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

To,

M/s Doshi Impex,
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Copy to:

1. The Commissioner of Central Goods & Service Tax, Belapur, 1st floor, CGO Complex, Sector 10, C.B.D. Belapur, Mumbai - 400 614.
2. The Commissioner of CGST (Appeals), Raigad, 5th Floor, C.G.O. Complex, C.B.D. Belapur, Navi Mumbai - 400 614.
3. The Deputy / Assistant Commissioner (Rebate), ~~CGST & EX~~, Raigad.
4. Sr. P.S. to AS (RA), Mumbai.
- ✓ 5. Guard file
6. Spare Copy.