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F.NO.195/781-783/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE
NEW DELHI-110 066

Date of Issue: .....

ORDER NO. 1074-1076 /2013-Cx DATED 30.07.2013 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.101-103/11/Ahd-I/CE/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-I

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ORDER

These revision applications are filed by M/s. Ashima Dyecot Ltd., Ahmedabad, against the orders-in-appeal No.101-103/11/Ahd-I/CE/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. Brief facts of the case are that M/s Ashima Dyecot Limited (the applicants) are engaged in the manufacture of 100% cotton dyed and finished fabrics falling under Tariff heading No.5208 2230 and 5208 3230. The applicants had exported bleached shirting fabrics, falling under tariff heading 52082230 and dyed shirting fabrics falling under tariff heading 52083230 and had filed claim of rebate. 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 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 rejected the rebate claims vide impugned orders-in-original.

3. Being aggrieved by the said orders-in-original, 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 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. Hence it is submitted that the observation made in impugned OIA is wrong and clearly are without considering the factual aspects of the matter and hence the same is bad in law and requires to be quashed and set aside.

4.2 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 at [1999 (106) ELT 3] and [1999 (112) ELT, 353] reported in Dai Ichi Karkaria Limited 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.

4.3 It is also submitted that the Commissioner (Appeals) has relied on the decision of the Hon'ble Tribunal in the case of KBACE Tech. Pvt. Limited vs. CCE Bangalore, reported at 2010 (18) STR, 281 to hold that rule making authority can frame rules covering lesser area than what is empowered to do under the statue but cannot go beyond limits provided under the statute and make rules covering a greater area. It is submitted that the aforesaid decision is at all not relevant in the facts and circumstance of the case. The applicant submits that the aforesaid decision is in the context of refund of service tax on service tax credit accumulated in the books of exporter of service. Further, the issue in the aforesaid decision was with reference to availment of Cenvat credit and not subsequent refund of credit. Hence the issue in the aforesaid decision was totally different from the issue of the present case. Further, it is submitted that when the Hon'ble Supreme Court holds that cenvat credit becomes a vested right once the raw-material is used in the manufacture of products, on which duty is paid, no subordinate authority can hold that the same is not vested but a procedural right. Hence also, the observation made in the Order-in-appeal clearly requires to be set aside.

4.4 The Commissioner (Appeals) has further relied on Supreme Court decision in the case of PTR Exports Madras Limited vs. Union of India, to hold that legislature are at liberty to revise the policy at any time in larger public interest. It is submitted that the aforesaid view of the Supreme Court is also not relevant in the facts and circumstances of the present case. It is submitted that it is not a case of promissory estoppel and

hence the aforesaid order is also not relevant for denying the rebate of the present applicant.

4.5 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. Hence, the view taken in para 5 is incorrect that the goods were fully exempt from payment of duty under notification No.30/2004 and still the exporter paid the duty. For the said reason only, the department has also allowed availment of both the notifications simultaneously to a manufacturer of textile article. It is submitted that here in the case of exports, the present appellant opted not to clear the goods under exemption and decided to clear the same on payment of duty. If all the conditions prescribed under rule 18 for rebate of duty are fulfilled, by the manufacturer then, their claim should not be rejected on any ground. The order is incorrect on this ground also and hence the same is required to be quashed.

4.6 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.

4.7 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.

4.8 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. It is submitted that the applicant's case is squarely covered by the aforesaid case law. However, the Commissioner (Appeals) has strangely distinguished the same by holding that as per rule 11(3) the credit is not admissible. It is submitted that the Commissioner (Appeals) has clearly erred in law by not following the decision of the higher authorities.

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. Nobody attended hearing on behalf of applicant as well as respondent on 27.6.13.

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 applicants exported cotton bleached and finished fabrics on payment of central excise duty at the rate specified in the Notification No.29/2004-CE dated 9.7.04 and filed rebate claims which were initially sanctioned to them. Subsequently, show cause notices were issued to the applicant on the grounds that:

(a) since the applicant did not avail cenvat credit, they were compulsorily required to avail benefit of exemption of Notification No.30/2004-CE (NT) dated 9.7.04 and hence, these export goods cleared on payment of concessional rate of duty under Notification No.29/2004-CE dated 9.7.04 was not correct.

(b) It was further observed by the department that the applicant opted for full duty exemption w.e.f. 16.1.2006 under Notification No.30/2004-CE(NT) dated 9.7.04; therefore, credit available as on 16.1.2006 lapses in terms of proviso to Rule 11 of Cenvat Credit Rules, 2004 and hence, utilization of such lapsed credit was not correct.

(c) It was further held by the department that the applicant procured the raw materials duty free against quality based advance licence scheme, DEEC Scheme and by using these duty free inputs, the final export goods were manufactured and exported. On account of absence of the duty paid nature of raw materials, the applicant was not entitled for cenvat credit.

The Original Authority rejected the rebate claims on above grounds. Commissioner (Appeals) upheld impugned orders-in-original. Being aggrieved by impugned orders-in-appeal, the applicant filed these revision applications on grounds mentioned in para (4) above.

8. On perusal of records, Government observes that facts involves in these cases are similar to facts involved in R.A. No.195/488-506/12-RA. The said R.As. have been disposed off by the Government of India vide Revision Order No.331-349/2013-Cx dated 2.4.2013 by way of remand to original authority. Facts being similar, ratio of said revision order is squarely applicable to these cases also. Further, the appellate authority has also observed the case laws of M/s TAFF Limited; M/s Gokuldas Intimate Wear and M/s Perfect Knitting Ltd. cited by the applicants pertain to cases prior to period 1.3.2007. However, in this impugned case, the exports took place in 2010 and hence, ratio of the same cannot be made applicable. Government observes that in the said case laws, the courts have conclusively held that provision of Rule 11(3) is having prospective effect from 1.3.2007. Further, it is undisputed fact that the unutilized credit available prior to 1.3.2007 has been utilized in export for year 2010. Applicant has also claimed that the deemed credit of Rs.2843964/- lying in balance was debited on 1.11.03. Further, the above said judgements are discussed in detail in said GOI revision order dated 2.4.2013. The said judgements have to be taken into account since the accumulated cenvat credit pertains to period prior to 1.3.07.

9. The lower authorities have stated that applicant procured raw materials duty free under DEEC Scheme and the same were used in the manufacture of goods exported. It is not clear how the applicant has taken cenvat credit. In the absence of duty paying documents how cenvat credit can be taken. If the cenvat credit was wrongly taken, the same was required to be recovered under the provisions of Cenvat Credit Rules. But there is no such show cause notice for recovery of wrongly availed cenvat credit. This point needs to be thoroughly examined to arrive at a definite conclusion. Further Notification No.30/04-CE is a conditional notification since the exemption from duty is available when cenvat credit is not availed. In terms of Section 5A(1A) of Central Excise Act 1944, the manufacturer has no option to pay duty when the excisable goods are wholly exempt from duty unconditionally. As such this notification is not hit by provisions of Section 5A(1A). Moreover CBEC vide circular dated 1.2.07 has permitted the simultaneous availment of both Notifications Nos.29/04-CE & 30/04-CE both dated

9.7.04 subject to compliance of procedures & conditions laid down therein. The lower authorities have not given any categorical finding whether the provisions of said circular were followed by the applicant. These issues are to be examined with reference to relevant records.

10. In view of above discussions Government set asides the impugned orders, and remands the cases back to original authority to decide the issue afresh keeping in mind above mentioned observations. A reasonable opportunity of hearing will be afforded to both the parties.

11. Revision applications are disposed of in above term.

12. So ordered.

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

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

5/8/2013

(भागवत शर्मा/Bhsgwat Sharma)
सहायक आयुक्त/Assistant Commissioner
C B E C -O S D (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

Order No. 1074-1076/2013-Cx dated 30.07.2013

Copy to:

1. Commissioner of Central Excise, Ahmedabad-I, Ambawadi, Ahmedabad.
2. Commissioner of Central Excise (Appeals-V), Central Excise Bhavan, Near Polytechnic, Ambawadi, Ahmedabad
3. Assistant Commissioner of Central Excise, Ahmedabad-I, Excise Bhavan Ambawadi, Ahmedabad
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

5/8/2013

(B.P.Sharma)
OSD (Revision Application)