

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. 195/59/14-RA, 195/60/14-RA,
195/61/14-RA, 195/63/14-RA,
195/64/14-RA.

Date of Issue:- 12/01/2020

600

ORDER NO. 110-114 /2020-CX(WZ)/ASRA/MUMBAI DATED 15.1.2020 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.	195/59/14-RA	M/s Five Star Agrico Pvt. Ltd., Himmatnagar	Commissioner of Central Excise, Ahmedabad - III.
2.	195/60/14-RA	M/s Five Star Agrico Pvt. Ltd. Himmatnagar	
3.	195/61/14-RA	M/s Five Star Agrico Pvt. Ltd. Himmatnagar	
4.	195/63/14-RA	M/s Smruti Agencies, Himmatnagar	
5.	195/64/14-RA	M/s Smruti Agencies, Himmatnagar	

Subject :Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the Orders in Appeal No. OIA No. AHM-EXCUS-003-APP-344-13-14 dt. 28.01.2014, OIA No. AHM-EXCUS-003-APP-345-13-14 dt. 29.01.2014, OIA No. AHM-EXCUS-003-APP-328-13-14 dt. 31.12.2013, OIA No. AHM-EXCUS-003-APP-319-13-14 dt. 04.12.2013 and OIA No. AHM-EXCUS-003-APP-320-13-14 dt. 04.12.2013 respectively passed by Commissioner (Appeals-III), Ahmedabad.

ORDER

These following Revision applications have been filed by M/s Five Star Agrico Pvt. Ltd. Himmatnagar (applicant No.1) and M/s Smruti Agencies, Himmatnagar (applicant No. 2) against the Orders-in-Appeal as detailed in Table below passed by Commissioner (Appeals-III) Central Excise, Ahmedabad.

TABLE

Sl. No	Revision Application No.	Name of the Applicant	Order-In-Original No. & Date	Order-In-Appeal No. & Date
1	2	3	4	5
1	195/59/14-RA	M/s Five Star Agrico Pvt. Ltd., Himmatnagar	AHM-CEX-003-ADC-038-13 dated 30.08.2013 passed by Additional Commissioner, Central Excise, Ahmedabad-III	OIA No.AHM-EXCUS-003-APP-344-13-14 dt. 28.01.2014
2	195/60/14-RA	M/s Five Star Agrico Pvt. Ltd., Himmatnagar	592 to 599/Reb/Cex/2013 dated 20.09.2013 passed by the Deputy Commisioner CEX, Div. G'nagar, Ahmedabad-III	OIA No.AHM-EXCUS-003-APP-345-13-14 dt. 29.01.2014
3	195/61/14-RA	M/s Five Star Agrico Pvt. Ltd., Himmatnagar	322 to 346/Reb/Cex/2013 dated 30.07.2013 passed by the Deputy Commisioner CEX, Div. G'nagar, Ahmedabad-III	OIA No. AHM-EXCUS-003-APP-328-13-14 dt. 31.12.2013
4	195/63/14-RA	M/s Smruti Agencies, Himmatnagar	AHM-CEX-003-ADC-036-13 dated 21.08.2013 passed by Additional Commissioner, Central Excise, Ahmedabad-III	OIA No. AHM-EXCUS-003-APP-319-13-14 dt. 04.12.2013
5	195/64/14-RA	M/s Smruti Agencies, Himmatnagar	347 to 403/Reb/Cex/2013 dated 30.07.2013 passed by the Deputy Commisioner CEX, Div. G'nagar, Ahmedabad-III	OIA No. AHM-EXCUS-003-APP-320-13-14 dt. 04.12.2013

2. The brief facts of the case are that the applicant No. 1 and applicant No. 2 are engaged in the manufacture and export of various kinds of hand tools viz. spades, shovels, picks, hoes etc. used in the agriculture, horticulture or forestry. These items are covered under the heading 82013000 to the First Schedule to the Central Excise Tariff Act, 1985. The aforesaid goods manufactured by the applicants are exempted from whole of Central Excise Duty leviable thereon under

Notification No.23/2004 -Central Excise dated 09.07.2004 issued under sub-section (1) of section 5A of the Central Excise Act 1944. The said notification was superseded vide notification no. 05/2006-Central Excise dated 01.03.2006(Serial No.49) and thereafter the notification No.12/2012 Central Excise dated 17.03.2012 (S.No.226) which exempted the products manufactured by the applicants unconditionally. The applicants are availing the rebate of duty paid on inputs used in the exported goods under Rule 18 of Central Excise Rules, 2002 read with Notification 21/2004-CE (N.T.) dated 06.09.2004 issued thereunder. The applicants were granted permission under Rule 18 of Central Excise Rules, 2002 by the Assistant Commissioner, Central Excise, Gandhinagar Division for availing the said benefit.

A. Revision Applications No. 195/59/14-RA, 195/60/14-RA and 195/61/14-RA filed by M/s Five Star Agrico Pvt. Ltd., Himmatnagar, (applicant No.1).

3. The applicant No. 1 had exported the finished goods and had filed 248 rebate claims aggregating to Rs.2,43,83,979/- (Rupees Two Crore Forty Three Lakh Eighty Three Thousand Nine Hundred Seventy Nine only) in respect of the Central Excise duty paid on raw materials used in the manufacture of goods exported during the period 2008-09 to 2012-13, under Rule 18 of the Central Excise Rules 2002 read with Notification No.21/2004-CE(N.T.) dated 06.09.2004. The said rebate claims were sanctioned by the Deputy Commissioner, Central Excise Gandhi Nagar Division. Thereafter, the applicant received a Show Cause Notice F. No. V. 82/15-46/OFF/OA/2013 dated 16.05.2013 demanding Rs.2,43,83,979/- of the rebate sanctioned during past five years as erroneous. The Additional Commissioner, Central Excise, Ahmedabad-III confirmed the demand of Rs.39,07,611/- (Rupees Thirty Nine Lakh Seven Thousand Six Hundred and Eleven only) for one year along with interest and also imposed penalty of Rs. 5 Lakh under Rule 25 of Central Excise Rules, 2002 vide Order in Original NO. AHM-CEX-003-ADC-038-13 dated 30.08.2013, on the ground that the applicant had not fulfilled the condition No. 4 (c) of Notification No.21/2004-CE(N.T.) dated 06.09.2004 in as much as the waste and scrap generated during the manufacture of these exempted goods had not been cleared on payment of duty. However, the Additional Commissioner Central Excise, Ahmedabad-III dropped the remaining demand holding that all the facts were within the knowledge of the department, hence demand beyond one year is clearly hit by limitation.

4. The applicant No. 1 had also exported the finished goods and had filed 25 rebate claims aggregating to Rs.28,82,163/- (Rupees Twenty Eight Lakhs Eighty Two Thousand One Hundred Sixty Three only) in the month of May 2013 in respect of Central Excise Duty paid on raw materials used in the manufacture of the exported goods under the provisions of Rule 18 of the Central Excise Rules 2002 read with notification no. 21/2004-CE (NT.) dated 06.09.2004 issued there under. The aforesaid rebate claims were rejected by the Deputy Commissioner, Central Excise Gandhi Nagar, Division, Ahmedabad-III vide Order in Original No. 322 to 346/Reb/Cex/2013 dated 30.07.2013 on the ground that the applicant No. 1 had failed to fulfill the condition No. 4 (c) laid down in the Notification No.21/2004-CE (N.T.) dated 06.09.2004 in as much as the waste/scrap had not been cleared on the payment of duty.

5. The applicant No. 1 had also exported their finished goods and filed 8 rebate claims aggregating to Rs.11,12,059/- (Rupees Eleven Lakh Twelve Thousand Fifty Nine only) during the period March 2013 to May 2013 in respect of Central Excise Duty paid on raw materials used in the manufacture of the exported goods under the provisions of Rule 18 of the Central Excise Rules 2002 read with notification no. 21/2004-CE (NT.) dated 06.09.2004 issued there under. The aforesaid rebate claims were again rejected by the Deputy Commissioner, Central Excise Gandhi Nagar, Division, Ahmedabad-III vide Order in Original No. 592 to 599/Reb/Cex/2013 dated 20.09.2013 on the ground that the applicant No. 1 had failed to fulfill the conditions No. 4 (c) laid down in the Notification No.21/2004-CE (N.T.) dated 06.09.2004 in as much as the waste/scrap had not been cleared on the payment of duty.

6. Aggrieved by the Orders in Original mentioned at paras 3, 4 and 5 supra, the applicant No.1 filed appeal before Commissioner (Appeals-III), Ahmedabad. However, Commissioner (Appeals-III) Ahmedabad, vide Order in appeal Nos. AHM-EXCUS-003-APP-344-13-14 dt. 28.01.2014, AHM-EXCUS-003-APP-328-13-14 dt. 31.12.2013 and AHM-EXCUS-003-APP-345-13-14 dt. 29.01.2014 rejected the appeals filed by the applicant No.1.

7. Being aggrieved and not satisfied with the impugned orders mentioned supra, the applicant No. 1 has filed the present Revision Applications (mentioned above at Sl. No. 1, 2, 3 of Column 2 of the Table at para 1 above) on the grounds mentioned therein.

B. Revision Applications No. 195/63/14-RA and 195/64/14-RA filed by M/s Smruti Agencies, Himmatnagar (applicant No.2)

8. The applicant No. 2 had exported the finished goods and had filed 335 rebate claims aggregating to Rs.6,77,84,427/- (Rupees Six Crore Seventy Seven Lakh Eighty Four Thousand Four Hundred and Twenty Seven only) in respect of the Central Excise duty paid on raw materials used in the manufacture of goods exported during the period 2008-09 to 2012-13, under Rule 18 of the Central Excise Rules 2002 read with Notification No.21/2004-CE(N.T.) dated 06.09.2004. The said rebate claims were sanctioned by the Deputy Commissioner, Central Excise Gandhi Nagar Division. Thereafter, the applicant received a Show Cause Notice F.No.V.82/15-34/OFF/OA/2013 dated 10.05.2013 demanding Rs.6,77,84,427/- (Rupees Six Crore Seventy Seven Lakh Eighty Four Thousand Four Hundred and Twenty Seven only) of the rebate sanctioned during past five years as erroneous. The Additional Commissioner, Central Excise, Ahmedabad-III confirmed the demand of Rs.86,77,917/- (Rupees Eighty Six Lakh Seventy Seven Thousand Nine Hundred and Seventeen only) for one year along with interest and also imposed penalty of Rs. 10 Lakh under Rule 25 of Central Excise Rules, 2002 vide Order in Original NO AHM-CEX-003-ADC-036-13 dated 21.08.2013 on the ground that the applicant had not fulfilled the condition No. 4 (c) of Notification No.21/2004-CE(N.T.) dated 06.09.2004 in as much as the waste and scrap generated during the manufacture of these exempted goods had not been cleared on payment of duty. However, the Additional Commissioner Central Excise, Ahmedabad-III dropped the remaining demand holding that all the facts were within the knowledge of the department hence demand beyond one year is clearly hit by limitation.

9. The applicant No. 2 had also exported their finished goods and filed 57 rebate claims aggregating to Rs.77,73,708/- (Rupees Seventy Seven Lakh Seventy Three Thousand Seven Hundred and Eight only) during May 2013 in respect of Central Excise Duty paid on raw materials used in the manufacture of the exported goods under the provisions of Rule 18 of the Central Excise Rules 2002 read with notification no. 21/2004-CE (NT.) dated 06.09.2004 issued there under. The aforesaid rebate claims were rejected by the Deputy Commissioner, Central Excise Gandhi Nagar, Division, Ahmedabad-III vide Order in Original No. 347 to 403/ Reb

/ Cex/2013 dated 30.07.2013 on the ground that the applicant No. 2 had failed to fulfil the condition No. 4 (c) laid down in the Notification No.21/2004-CE (N.T.) dated 06.09.2004 in as much as the waste /scrap had not been cleared on the payment of duty.

10. Aggrieved by the Orders in Original mentioned at paras 8 and 9 supra, the applicant No.2 filed appeal before Commissioner (Appeals-III), Ahmedabad. However, Commissioner (Appeals-III) Ahmedabad, vide Order in appeal No. AHM-EXCUS-003-APP-319-13-14 dt. 04.12.2013 and AHM-EXCUS-003-APP-320-13-14 dt. 04.12.2013 rejected the appeals filed by the applicant No.2.

11. Being aggrieved and not satisfied with the impugned orders mentioned supra, the applicant No. 2 has filed the present Revision Applications (mentioned above at Sl. No. 4 & 5 of Column 2 of the Table at para 1 above) on the grounds mentioned therein.

12. A Personal hearing was held in this case on 18.09.2019 and Shri Hasmukh Patel, Accountant appeared on behalf of the applicant No.1 and Shri Vishnu Patel, Partner appeared on behalf of the applicant No. 2. They reiterated the submissions filed through their respective Revision Applications and written submissions filed earlier as well as on the date of the hearing.

13. In their written briefs submitted earlier and during the personal hearing, both the applicants mainly contended that :-

13.1 they are manufacturer of agriculture tools like spades, showels etc. falling under Tariff Heading 82.01 which are exempted by virtue of Notification No.12/2012-CE. They were exporting the goods under claim of rebate in respect of duty paid on the inputs used in manufacture of the same as per Notification No.21/2004-CE (N.T).

13.2 in the year 2013 they received show cause notice for rejecting the rebate claims sanctioned for past five years on the ground that the condition of 4(c) of Notification No. 21/2004-CE (NT) dated 06.09.2004 is not fulfilled which stipulates that when any raw materials are sent for job work, the waste and scrap arising should be cleared on payment of duty.

13.3 they had not sent any raw materials for job work and the notice did not allege anything in this regard. Further, as per Notification No. 89/95-CE dated 18.05.1995 the scrap generated in the manufacture of exempted goods is fully exempted from payment of central excise

duty. Earlier they were was paying duty oblivious of the exemption, but the department directed them vide their letter dated F. No. IV/16-16/Tech/Misc/2005 dated 17.06.2005 that they have no option to pay the duty when the goods are unconditionally exempted.

13.4 there was no question of payment of duty on scrap and violation of conditions No.4(c) of Notification No.21/2004-CE (N.T). Thus the Assistant Commissioner as well as Commissioner (A) erred in confirming the demand. Commissioner (A) has went a step ahead saying- that the applicant had availed Cenvat credit and hence duty is paying which is not mentioned anywhere in the show cause notice. Being the final products exempted the applicant cannot avail Cenvat credit. Copy of Central Excise returns are submitted as evidence.

13.5 the Orders-in-original by which the rebate claims were sanctioned have not been reviewed by the Commissioner and no appeal has been filed against any of the OIOs passed. Hence no rebate claims can be rejected subsequently without revising the OIOs under which the rebate claims were sanctioned as held in the following case laws:

- (i) Madurai Power Corporation (P) Ltd-2008 (229) ELT.521 (Mad)
- (ii) Overseas Engineers-2007 (215) ELT.513 (Tri-Ahrnd)
- (iii) Dynamatic Technologies Ltd-2005 (186) ELT.277 (Kar)
- (iv) TTK Prestige Ltd-2005 (191) ELT.847 (Tri-Bang) (v)
- Sudptg Engg, TNEB-2006 (201) ELT.619 (Tri-Chennai) (vi) Voltas Ltd-2006 (202) ELT.355 (Tri-Bang)

The above fact is reiterated by Board's Circular No.869/7/2008-CX dated 16.05.2008 also.

13.6 the Hon'ble Tribunal decision in the case of Commissioner of C. Ex. Ludhiyana vs. Amar Wheels (P) Ltd. — 2009 (245) ELT 736 (Tri.- Del.) is quite identical to their case and ratio thereof is squarely applicable and aforesaid decision has not been challenged by the department as such we are eligible for the rebate claims rejected by the department

13.7 the conditions mentioned in Notification No.21/2004-CE (NT) are procedural and the intention of the government was very clear that the procedure prescribed under said notifications are directive and it is to be fulfilled in consonance with the tariff notifications. If notification issued under section 5A exempts the goods than the said directive should also be treated as fulfilled as goods i.e. waste is exempted and it is cleared accordingly and it cannot be treated as without payment of duty. The officers of the department were fully aware that the waste & scrap is exempted and accordingly they had directed them to clear the waste without payment of duty as they knew that the conditions of notification no.21/2004 are fulfilled.

13.8 they were filing monthly returns and showing completely in the monthly returns that the waste is cleared at NIL rate of duty vide Notification No.89/95. They had been filing the rebate claims since last 8 to 9 years and all the facts were mentioned in the claims as well as returns filed by them and after verification of the claims at Range level as well as Division levels, the officers very clearly mentioned in the order-in-original that the condition of notification no.21/2004 is fulfilled and after detailed verification, the claims were sanctioned and there were nearly 300 claims which were sanctioned and copies of the order of the sanctioned were submitted to the reviewing authority and even reviewing authority also endorsed that the orders of the claims were in order and not a single order was reviewed by the department. When OIO were not reviewed, the question of erroneous refund does not arise and department cannot issue such show cause notices when issue has been settled by accepting the order of the lower authority by higher authority and judicial discipline needs to be followed.

13.9 these officers were correct in granting the refund because they had no option to direct them to pay the duty on scrap when scrap is exempted from payment of duty and even the Deputy Commissioner, Central Excise as well as Commissioner (Appeal) has not given any comments or reasons on the letter of Assistant Commissioner, Central Excise, Gandhinagar issued on 17.06.2005 for not clearing goods without payment of duty in their OIA and OIO. Not only that but they have not given any direction in their OIO & OIA that if duty is required to be paid then at what rate, they should pay the duty. Thus, these facts shows that the adjudicating authority have grossly misinterpreted the notification No.21/2004 and has made an attempt to take away the benefit granted by the government to them. Further, they would like to bring to the notice that neither the department nor the adjudicating officers have made a single whisper for withdrawal of the aforesaid letter till this date hence all the refund claims filed by them automatically become legal and proper and the order passed by the Deputy Commissioner and Commissioner (Appeal) are not fair and just and it may be set aside and the appellant also request to allow their both the appeals with consequential relief.

13.10 so far, penalty is concerned, all the facts were within the knowledge of the department and they have not violated any in-grediance stipulated under Rule 25 of Central Excise Rules, 2002 hence no penalty should be imposed.

In light of above, the applicants requested to set aside the Orders-in-Appeal and no penalty should be imposed and appeals may be allowed with consequential relief.

14. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Orders-in-Original and Orders-in-Appeal. The issues involved in all these Revision Applications being common, they are taken up together and are disposed of vide this common order.

15. Government observes that the applicants in these cases had been claiming rebate of duty paid on inputs used in the manufacture of exported goods under the provisions of Rule 18 of Central Excise Rules, 2002 read with Notification No. 21/2004-Central Excise (NT) dated 06.09.2004, hence they were required to mandatorily fulfill all the conditions as prescribed in the Notification No. 21/2004-Central Excise (NT) dated 06.09.2004. Government further observes that condition 4(c) of Notification No. 21/2004-Central Excise (N.T.)-dated 06.09.2004 [erstwhile Notification No. 41/2001-C.E. (N.T.)] stipulates that any waste arising from processing of materials may be removed on payment of duty as if such waste is manufactured or processed in the factory of the manufacturer or processor. Whereas in the instant cases, the applicants cleared the waste and scrap arising during the course of manufacture of exported goods without payment of central excise duty and thereby violated condition 4(c) of Notification No. 21/2004-Central Excise (N.T.) dated 06.09.2004.

16. Both the applicants contended that they were clearing the waste on payment of duty but it was Assistant Commissioner, Central Excise, Gandhinagar who directed them vide letter dated F. No. IV/16-16/Tech/Misc/2005 dated 17.06.2005 that *in view of the amendment made in the Section 5A of CEA-1944 in the Finance Act 2005, the manufacturer has no option to pay the duty when the goods are unconditionally exempted and in context the aforesaid letter, they had no option in this regards hence the provisions made for exemption from payment of C.Ex. Duty is mandatory required to avail off . Therefore henceforth you are not required to pay C.Ex. duty on your final product as well as Waste & Scraps arising during the manufacture of said final product as discussed above*. Hence in due obedience of department's directions, they started to clear the waste, thereafter, under exemption Notification No.89/95 ibid.

17. Government observes that both the applicants are mainly contesting that the waste and scrap generated during the manufacture of these exempted goods is

exempt unconditionally vide notification No.89/95-CE dated 18.05.1995 and therefore, no duty is payable on clearance of such waste and scrap.

18. It is also a fact that the applicant had opted to work under the said Notification No.21/2004-C.E. (N.T.) dated 06.09.2004 under which rebate of whole of duty paid on excisable goods used in the manufacture or processing of export goods is allowed subject to fulfillment of certain conditions of that notification. When the applicants themselves had opted to work under the said notification 21/2004-C E. (N.T.) dated 06.09.2004 they were required to strictly adhere to the conditions laid down in it.

19. Government observes that export of goods under claim for rebate on inputs used in manufacture of export goods is governed by Rule 18 of Central Excise Rules, 2002 and condition 4(C) of Notification No.21/2004-CE(NT) dated 06.09.2004 lays down that *"any waste arising from the processing of materials may be removed on payment of duty as if such waste is manufactured or processed in the factory of manufacture or processor"*.

20. Thus the requirement of clearance of waste/scrap manufactured in the factory manufacture or processor on payment of duty is a statutory condition for manufacturer exporter availing Notification No.21/2004-CE(NT) dated 06.09.2004 and claiming rebate of duty on the inputs contained in the finished goods exported. Government finds it pertinent to note that earlier, the applicants were paying duty on scrap in consonance with condition No. 4 (c) of Notification No.21/2004-CE(N.T.) dated 06.09.2004.

21. Hence once the applicants had opted to work under Notification No.21/2004-C.E. (N.T.) dated 06.09.2004, they were required to pay the duty on the clearance of scrap and waste manufactured or processed in the factory of manufacture or processor in terms of condition No. 4 (c) of the aforesaid Notification. Government, therefore, holds that non fulfilling the statutory conditions laid down under the impugned Notification cannot be treated as procedural lapse for the purpose of availing the benefit of rebate on impugned goods.

22. As regards the contention of the applicants that Division Office vide letter F.No. IV/16-16/Tech/Misc/2005 dated 17.06.2005 informed them that scrap is exempted vide Notification No.89/95-C.E. dated 18.05.1995, hence manufacturer

has no option to pay duty at his own volition in terms of Section 5A of the Central Excise Act, 1944 and hence they stopped paying duty on scrap and waste, Government observes that such a clarification was not binding on the department when on a proper examination of the issue it came to the conclusion that the applicants are not entitled for benefit of provisions of Notification No. 21/2004-N.T., dated 6-9-2004, as they had failed to comply with the condition appended to the said notification. There cannot be an estoppel against the law as held by the Hon'ble Supreme Court in Elson Machines Pvt. Ltd. v. Collector of Central Excise - 1988 (38) E.L.T. 571 (SC) = 1988 (19) ECR 449 SC. Further, Government following the principle laid down by Hon'ble Supreme Court in cases (i) ITC Ltd. v. C.C.E. - 2004 (171) E.L.T. 433 (S.C.) and (ii) Paper Products Ltd. v. C.C. - 1999 (112) E.L.T. 765 (S.C.) that simple and plain wording of applicable statutory provisions as elaborated vide relevant Notification /Circular are to be strictly adhered to, holds that as the applicants have not followed the statutory provision of Notification No. 21/2004-C.E. (N.T.), dated 6-9-2004 and therefore input rebate claims are rightly held not admissible to them.

23. Government also observes that GOI in its earlier orders viz. Order No. 85/2015-CX dated 21.09.2015 in Re : M/s Kriti Nutrients Ltd. Dewas and Order No. 11/2016-CX dated 20.01.2016 in Re : M/s Themis Medicare Limited, Haridwar, have also rejected the Revision Applications by upholding rejection of rebate claims of the applicants therein, for not following the other provisions of Notification No.21/2004-CE(NT). The GOI in its aforementioned orders observed as under :-

“Government, therefore, holds that non fulfilling the statutory conditions laid down under the impugned Notification and not following the basic procedure of export as discussed above, cannot be treated as just a minor or technical procedural lapse for the purpose of availing the benefit of rebate on the impugned goods. As such there is no force in the plea of the applicant that this lapse should be considered as a procedural lapse of technical nature which is condonable in terms of case laws cited by applicant.

Government notes that nature of above requirement is both a statutory condition and mandatory in substance for removal of goods for exports under claim for rebate of duty either on the final goods exported or on the inputs contained therein.

It is in this spirit and this background that Hon'ble Supreme Court in case of Sharif-ud-Din, Abdul Gani - (AIR 1980 SC 3403) has observed that distinction between required forms and other declarations of compulsory

nature and/or simple technical nature is to be judiciously done. When non-compliance of said requirement leads to any specific/odd consequences, then it would be difficult to hold that requirement as non-mandatory.

It is a settled issue that benefit under a conditional Notification cannot be extended in case of non-fulfillment of conditions and/or non-compliance of procedure prescribed therein as held by the Apex Court in the case of Government of India Vs. Indian Tobacco Association 2005 (187) ELT 162 (S.C.); Union of India Vs. Dharmendra Textile Processors 2008(231) ELT 3 (S.C.). Also it is settled that a Notification has to be treated as a part of the statute and it should be read along with the Act as held by in case of Collector of Central Excise Vs Parle Exports (P) Ltd – 1988(38)ELT 741(S.C.) and Orient Weaving Mills Pvt. Ltd. Vs Union of India 1978 (2) ELT J 311(S.C.) (Constitution Bench).

Government notes that the applicant relied on the various judgments regarding procedural relaxation on technical grounds. The point which needs to be emphasized is that when the applicant seeks rebate under Notification No. 21/2004-NT dated 06.09.2004, which prescribes compliance of certain conditions, the same cannot be ignored. While claiming the rebate under such Notification No.21/2004-NT dated 06.09.2004 the applicant should have ensured strict compliance of the conditions attached to the Notification No.21/2004-NT dated 06.09.2004. Government place reliance on the Judgment in the case of MIHIR TEXTILES LTD. Versus COLLECTOR OF CUSTOMS, BOMBAY, 1997 (92) ELT 9 (S.C.) wherein it is held that:

"concession/ relief of duty which- is made dependent on the satisfaction of certain conditions cannot be granted without compliance of such conditions. No matter even if the conditions are only directory."

Further, Government finds that there is no provisions under Rule 18 of Central Excise Rules 2002 for condonation of non-compliance with the conditions and procedure laid down in the Notification allowing rebate under said Rule. In view of the above discussions, Government finds that the applicant failed to fulfill the above mandatory condition of the said provisions and the condition being mandatory the same is required to be followed by the applicant particularly when the applicant is the beneficiary in the claim of rebate".

24. Government observes that the applicants have also contended that Orders-in-original by which the rebate claims were sanctioned have not been reviewed by the Commissioner and no appeal has been filed against any of the Orders in Original passed and therefore no rebate claims can be rejected subsequently without revising the Orders in Original under which the rebate claims were sanctioned. In support of their aforesaid contention, the applicants have relied

upon the case laws mentioned at para 13.5 supra. In the case of Madurai Power Corpn. (P) Ltd. 2008 (229) E.L.T. 521 (Mad.) cited by the applicants, the Hon'ble Madras High Court held that Section 11A could not override Section 35E of the Central Excise Act. In this case the Hon'ble High Court held that the show-cause notice issued under Section 11A of the Act without following the procedure laid down under Section 35E of the Act was without jurisdiction. However, Government observes that the said decision of Hon'ble High Court was distinguished by Hon'ble Tribunal Mumbai [2012 (278) E.L.T. 72 (Tri. - Mumbai)] observing as under :

We note that the Hon'ble High Court's decision was rendered without noticing the Hon'ble Supreme Court's judgment in Re-Rolling Mills case (supra) wherein the Apex Court passed the following order :

"The learned Counsel for the parties do not dispute that this appeal is covered by the decision of this Court in Union of India & Ors. v. Jain Shudh Vanaspati Ltd. & Anr. - 1996 (86) E.L.T. 460 (S.C.) = (1996) 10 SCC 520. In that case the Court was dealing with Section 28 of the Customs Act which is in pari materia with Section 11A of the Central Excise Act. The said decision is thus applicable to the present case also. For the reasons given in the said judgment, the appeal is dismissed with no order as to costs."

Therefore, the Hon'ble High Court's decision in Madurai Power Corpn. case cannot be followed as a binding precedent.

Moreover, Government also observes that Union of India has filed Civil Appeal No. 1858 of 2009 against the Judgment and Order dated 8-8-2007 of Madras High Court [2008 (229) E.L.T. 521 (Mad.) (Madurai Power Corpn. (P) Ltd. v. Deputy Commr. of C.Ex.)] which has been admitted by Hon'ble Supreme Court which is still pending decision. On the other hand, Government observes that GOI in many of its Orders has held the erroneous refund/rebate sanctioned under an order can be recovered by invoking provisions of Section 11A of Central Excise Act, 1944, without taking recourse to provisions of Section 35E ibid and filing appeal against the order under which refund was initially sanctioned. Government in this regard relies on the following GOI Orders:-

1. RE: Adani Enterprises Limited, 2015 (328) E.L.T. 726 (G.O.I.)
2. RE: Fresenius Kabi Oncology Limited, 2016(344)E.L.T.671(G.O.I.)

25. Government also observes that while confirming the demand for erroneous rebate of duty paid the original authority imposed a penalty of Rs. 5 Lakh and Rs.

10 Lakh on the applicant No. 1 and applicant No. 2 respectively under Rule 25 of Central Excise Rules, 2002, vide Orders in Original No. AHM-CEX-003-ADC-038-13 dated 30.08.2013 and AHM-CEX-003-ADC-036-13 dated 21.08.2013. The applicants in their Revision Applications have contended that all the facts were within the knowledge of the department and they have not violated any ingredients stipulated under Rule 25 of Central Excise Rules, 2002 hence no penalty should be imposed and in support of this, they relied on the case laws mentioned at para 13.10 supra.

26. Government in this regard observes that IN Re : Upper Doab Sugar Mills [2016 (343) E.L.T. 742 (G.O.I.)], the Department had challenged the order of Commissioner (Appeals) setting aside the penalty under Rule 25 of the Central Excise Rules, 2002. While setting aside the said Order in Appeal vide its Order Nos. 146-147/2015-CX, dated 30-10-2015, after discussing the provisions of Rule 25 of Central Excise Rules, 2002, GOI observed as under:

“Rule 25. Confiscation and penalty. - (1) Subject to the provisions of Section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer : -

(a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under Section 6 of the Act, or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty.

Then all such goods shall be liable to confiscation and the producer or manufacturer or registered person of warehouse or a registered dealer as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed.”

15.1 *From a plain reading of the above Rules, Government notes that penalty shall be imposed on a manufacturer if he removes goods in contravention of the provisions of the Central Excise Rules and Notifications*

issued thereunder. In the present case it is an uncontested fact that provisions of Rules 4, 6 & 8 ibid have been violated by the applicant.

15.2 The Commissioner (Appeals) has held that though the show cause notice alleges contravention of provisions of Rules 4, 6 & 8 ibid, yet it does not insinuate that such contravention were with intent to evade payment of duty. However, for contraventions in parts (a), (b) and (c) of the rule intent to evade is not a prerequisite and the present case clearly falls under para (a). Thus Government finds that Commissioner (Appeals) has erred in holding that none of the clauses of Rule 25 ibid is invocable so as to impose penalty upon the applicant.

27. Government notes that it is clearly held by the Original authority that the applicants have claimed rebate of duty paid on inputs used in the manufacture of exported goods under the provisions of Rule 18 of Central Excise Rules, 2002 without fulfilling all the conditions and limitations as prescribed in the Notification No.21/2004-CE (NT) dated 06.09.2004 in as much as they have cleared waste and scrap arising during the course of exported goods without payment of Central Excise duty and thereby violated condition 4(c) of the above said Notification and hence are liable for penal action under Rule 25 of Central Excise Rules, 2002. Therefore, applying the rationale of GOI Order Nos. 146-147/2015-CX, dated 30-10-2015 referred at para 26 supra, Government holds that penalty under Rule 25 of Central Excise Rules, 2002 is rightly imposed on the applicants in the present cases and accordingly upholds the same.

28. In view of the above discussion and findings, Government,

- (a) upholds Order in Appeal No. AHM-EXCUS-003-APP-344-13-14 dt. 28.01.2014 passed by Commissioner (Appeals-III), Central Excise, Ahmedabad, and rejects Revision Application No. 195/59/14-RA filed by M/s Five Star Agrico Pvt. Ltd., Himmatnagar.
- (b) upholds Order in Appeal No. AHM-EXCUS-003-APP-345-13-14 dt.29.01.2014 passed by Commissioner (Appeals-III), Central Excise, Ahmedabad and rejects Revision Application No. 195/60/14-RA, filed by M/s Five Star Agrico Pvt. Ltd., Himmatnagar,
- (c) upholds Order in Appeal No. AHM-EXCUS-003-APP-328-13-14 dt. 31.12.2013 passed by Commissioner (Appeals-III), Central Excise, Ahmedabad and rejects Revision Application No. 195/61/14-RA, filed by M/s Five Star Agrico Pvt. Ltd., Himmatnagar,
- (d) upholds Order in Appeal No. AHM-EXCUS-003-APP-319-13-14 dt.04.12.2013 passed by Commissioner (Appeals-III), Central Excise,

Ahmedabad and rejects Revision Application No. 195/63/14-RA filed by M/s Smruti Agencies, Himmatnagar.

- (e) upholds Order in Appeal No. AHM-EXCUS-003-APP-320-13-14 dt. 04.12.2013 passed by Commissioner (Appeals-III), Central Excise, Ahmedabad and rejects Revision Application No. 195/64/14-RA filed by M/s Smruti Agencies, Himmatnagar.

29. So ordered.

(SEEMA ARORA)

Principal Commissioner & ExOfficio
Additional Secretary to Government of India

ORDER No. 110-114/2020-CX (SZ) /ASRA/Mumbai Dated 15.01.2020

To,

1. M/s Five Star Agrico Pvt. Ltd.,
Near Sabar Dairy, Talod Road,
P.O. Boria, Himatnagar
383006. Gujarat.

2. M/s Smruti Agencies,
Survey No.40 & 41,
Idar Road, Dhandha
Himatnagar 383001, Gujarat.

Copy to:

1. The Commissioner of CGST, Gandhinagar, 2nd Floor, Customs House, Near All India Radio, Navrangpura, Ahmedabad - 380009.
2. The Commissioner of CGST (Appeals), Ahmedabad, Central Excise Bhavan, Ambawadi, Ahmedabad - 380015.
3. The Deputy / Assistant Commissioner, CGST, Himatnagar Division, 2nd Floor, Central Excise Bldg., Sector 10/A Division, Gandhinagar- 382010
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Spare Copy.