SPEED POST

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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
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.195/117-118/12-RA/SV Date of Issue: 09.04.2018

ORDER NO.112-113/2018-CX(WZ)/ASRA/MUMBAI DATED 28.3.2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR METHA, PRINCIPAL COMMISSIONER & EX-OFFICIA ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF CENTRAL EXCISE ACT,1944.

Applicants: (1) M/s. Status Fashions Pvt. Ltd., 205, Status House, Sakinaka, Mumbai- 400 072.

(2) Shri Ajay Kumar Jain, Partner of M/s. Status Fashions Pvt. Ltd., 205, Status House, Sakinaka, Mumbai- 400 072.

Respondent : The Addl.Commissioner of Central Excise, Mumbai-II.

Subject : Revision Application filed under Section 35 EE of the Central Excise Act, 1944 against Order-in-Appeal No. US/475-476/M-II/2011 dated 21.12.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai, Zone-II Commissioner of Central Excise, Raigad.

Order

These Revision Applications are filed by M/s. Status Fashions, Mumbai (hereinafter referred to as "the applicant") against the Order in Appeal No.US/475-476/M-II/2011 dated 21.12.2011 passed by Commissioner of Central Excise (Appeals) Mumbai-II with regard to Order in Original No. M-II/ADC/6/2007 dated 30.03.2007 passed by Additional Commissioner of Central Excise, Mumbai-II.

2. The brief facts of the case are that the applicant, M/s. Status Fashion were engaged in the manufacture of Textile and Textile Articles for export. They were working under the erstwhile Rule 12B of Central Excise Rules, 2002. The said rule provided a special Job work procedure for Textile and Textile article dealers in getting their goods manufactured on Job work basis after availing CENVAT. Said Rule 12B was omitted, with effect from 09.07.2004 vide notification no.11/2004C.E.(N.T.). However, the applicant continued to avail CENVAT credit from 09.07.2004 to 31.03.2006 and claimed Rebate of Rs.21,77,597/- for goods exported during the said period. The said rebate claim was found not to be in order as the applicant did not carry out any manufacturing activity as defined in chapter notes 54 & 55 and also continued to avail CENVAT credit subsequent to the omission of Rule 12B. Hence, the applicant was issued a show cause Notice cum demand under F.No. V/PI/Enq/12-80/SF/TF II/05 dated 18.05.2006 for recovery of an amount of Rs 21,77,597/- claimed and received by them as rebate on goods exported by suppressing the fact of wrong availment of credit utilized during the period from 09.07.2004 to 31.03.2006 on grey fabrics and finished fabrics, under Section 11 A of the Central Excise Act, 1944. The Additional Commissioner, Central Excise, Mumbai-II vide his Order in Original No.M-II/ADC/06/2007 dt. 30.03.2007 adjudicated the show cause Notice cum demand confirming an amount of Rs. 21,77,597/- towards erroneous rebate and also disallowed equal amount of CENVAT credit to the applicant. Penalty of Rs. 21,77,597/- under Rule 15(2) of

CENVAT Credit Rules 2004 in addition to penalty of Rs. 10,00,000/- on Status Fashion under Rule 25 and Rs.5,00,000/- on Shri Ajay Kumar Jain, Partner under Rule 26 Central Excise Rules, 2002, was levied.

3. Aggrieved by the Order-in-Original No. M-II/ADC/6/2007 dated 30.03.2007 passed by the Additional Commissioner of Central Excise, Mumbai-II, the applicant and Shri Ajay Kumar Jain, Partner filed appeal before Commissioner (Appeals) along with stay application. The Stay applications were decided by the Commissioner (Appeals) with direction to deposit 50% of the duty and 50% of the penalty. As they failed to comply with the said direction, the appeals were dismissed for non-compliance under the provisions of Section 35F of the Central Excise Act, 1944. They filed Revision Applications before the Joint Secretary, GOI, New Delhi who vide Order No.1541-1542/10 dated 11.10.2010 reduced the pre-deposit to 25% of the total dues adjudged by the Order in Original and remanded the matter back to Commissioner (Appeals). The applicant and Shri Ajay Kumar Jain made the pre-deposit. After this the Commissioner (Appeals) vide impugned order upheld the Order in Original and rejected the appeals of the applicant and Shri Ajay Kumar Jain, Partner.

4. Being aggrieved with the impugned Order-in-Appeal, the applicant and Shri Ajay Kumar Jain, Partner has filed this Revision Application under Section 35EE of Central Excise Act, 1944 before the Government on the various grounds as enumerated in their application. Main grounds of appeal are as follows :

4.1 They are 100% Exporters and their local sales are very negligible such as export rejection etc.

4.2 They have exported the goods following the proper procedure as laid down under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 06.09.2004 as amended.

4.3 They cleared under ARE1 and Central Excise invoice. The triplicate copy of ARE-1 was submitted within 24 hours of export to the jurisdictional Range Supdt.

4.4 Their rebate claims were sanctioned by issue of Order in Original. No appeal or SCN has been issued against these Rebate Sanction Orders. These Orders have attained finality. Thus, the impugned SCN, OIO and OIA are nothing but passing double order on the same issue. This is not permitted by law. The impugned SCN was issued after the stipulated period from one year from the date of sanction of rebate claim and hence is barred by limitation.

4.5 There is no suppression/fraud/misstatement in this case, hence confirmation of demand and imposing of penalty is not proper and correct.

4.6 Rule 12 B of Central Excise Rules, 2002 was omitted from 08.07.2004 by that the operation of traders and merchant manufacturers who had registration but had no machinery for manufacturing have been discontinued. Since the Applicants had the necessary manufacturing process for manufacture of grey fabrics and readymade garments they are not affected by this amendment. This is in the knowledge of the Department. The applicants had discontinued the manufacturing operations and surrendered the Central Excise registration to the department on 23.03.2006.

4.7 The order of the Adjudicting authority and Hon'ble Commissioner (Appeals) is not proper and correct as the Cenvat Credit availed for the period from 09.07.2004 to 31.03.2006 and also the rebate has been sanctioned of these amount during the said period and these rebate claims are also paid to the applicants. There is no suppression whatsoever and all the acts are within the knowledge of the department, hence the whole demand is barred by limitation.

4.8 Being a manufacturer of readymade garments the applicants had every right to take Cenvat Credit of grey fabrics and finished fabrics which are raw material for the manufacture of readymade garments..

4.9 The adjudicating authority failed to appreciate that there was neither confiscation of goods nor is there any allegation / finding of availing credit wrongly or claiming rebate wrongly on account of fraud, willful mis-statement, collusion or suppression of facts, penalty was not imposable under Cenvat Credit Rules, 2004. Same is with the partner who has also not committed any fraud, hence penalty imposedon him also needs to be set aside.

4.10 Applicants further submit that if duty is not required to be paid then it should be treated as Deposit. Deposit cannot be retained by the Government and needs to be refunded to the person to whom it belongs.

4.11 Further in this respect, applicants rely on following orders:
2007(218)ELT 174(Raj.) CCE Vs Suncity Alloys Pvt. Ltd.
1994(74) ELT 468(GOI) Re GTC Exports Ltd.
2009(236) ELT 143 (Tri-Chennai) Sterlite Industries V CCE.
2001 (131) ELT 726 (GOI) Re- Krishna Filaments Ltd.
Circular No. 510/06/2000 –CX dated 03.02.2000
Circular No. 81/81/94-CX dated 25.11.1994
2011 (264) ELT 524 (Tri Del) Vimal Alloys P Ltd. Vs Commissioner of Customs, Amritsar.

4.12 After abolition of Rule 12 B on 09.07.2004 applicants continued their registration as there is no condition in the Registration certificate, the same is issued under Rule 12 B or to surrender or lapsed on the date of abolition of Rule 12 B. The Registration Certificate once issued is permanent and renewal also not required unless the same is surrendered by the registrant or dismissed / suspended by the department. No such thing is happened in this case. Further, the department continued to

accept all returns submitted after 09.07.2004 as well as endorsed all the ARE-1s submitted within 24 hours of export. The ER-1 returns as well as endorsed all the ARE-1s submitted within 24 hours of export. The ER1 returns as well as ARE-1s are required to be filed by the registered unit only.

4.13 Jurisdictional Assistant Commissioner sanctioned the rebate claims after getting the duty payment confirmation from the Range Supdt. RG 23 register clearly show the date of taking each credit and duty debited at the end of the month. The jurisdictional Central Excise Authorities i.e Range Supdt has signed the ARE-1 Triplicate copy and also certified the duty payment, Range Supdt. accepted by the Department.

4.14 The applicants had stitching machines as well as Cutting Machine. This is also referred in the Panchnama as well as in SCN. Only these two things are required for the manufacture of Ready made Garments.

4.15 By a Notification No 11/2004-C.F. (N.T.) dated 09-07-2004, the Rule 12B in Central Excise Rules, 2002 was omitted during the budget 2004-05. As per this notification, Registration of traders, dealers and other intermediaries who are not having the manufacturing facility were discontinued. However, it remained optional for 'Manufacturers'. This continued registration is deemed to have been issued under Rule 9 of Central Excise Rules, 2002. They have followed all procedures as prescribed under the Central Excise Act and Rules.

4.16 The applicants had a opening balance of Rs.4,77,604/- in their Cenvat Account as on 08.07.2004. As per Circular and Notification the option was given to the assessee either to reverse the credit or pay duty and clear goods. Applicants had given the option to pay duty at the time of clearance. Even this amount of rebate claimed is also confirmed and equal penalty on this amount has been imposed.

4.17 The statement recorded by the Supdt of Shri Ajaykumar Jain, Partner on 10.08.2005, he clearly stated that they had two Powerlooms and 4 stitching machines. He also informed that they are also getting the fabrics and garments manufactured under job work under Rule 4(5)(A) of CENVAT Credit Rule, 2004 and all the exports are under ARE1.

4.18 There is no allegation that the goods cleared for export has not been exported nor that the Cenvat Credit aviled is illegal improper. There is no dispute that no duty has been paid at the time of export. The only allegation is that proper procedure is not followed. This is only a procedural mistake which needs to be condoned.

4.19 In this case the rebate is properly sanctioned after going through all the export documents. Even otherwise if it is treated that the export is by trader in that case also Applicants are entitled for the rebate. In this connection the applicants rely on GOI Order No. 335-337/2002 dated 31.12.2002.

4.20 Confirmation of the demand under Section 11 A (2) of CEA, 1944 of erroneous rebate claimed and imposition of penalties under Rules 13 (2) and 15 (2) of Cenvat Credit Rules 2004 is not proper and correct. The penalty under these rules can be imposed only when thereis a fraud collusion etc. In this case there is no such thing. Hence penalty needs to be set aside.

5. A personal hearing was held in this case on 27.12.2017. Shri R.V. Shetty, Advocate, duly authorized by the applicant appeared for hearing and reiterated the submission filed through Revision Application and along with those made in the submissions filed during the personal hearing. He relied upon following case laws viz. 2014 (299)ELT 49 (Tri –Mum), 2013 (294) ELT 203(Mum) and 2009 (235) ELT 785 (Guj). In view of the same he pleaded that the Revision Application may be allowed and the Order-in-Appeal be set aside.

6. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal. On perusal of records, Government observes that the had filed rebate claim for the period 09.07.2004 to 31.03.2006 of Rs.21,77,597/- (Rupees Twenty One Lakhs Seventy Seven Thousand Five Hundred and Ninety Seven Only) made under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 - C.E.(NT) dated 06.09.2004 along with all relevant documents. The said rebate claims were sanctioned after verifying all the documents.

7. Government also observes that the applicant was working under the erstwhile Rule 12B of Central Excise Rules, 2002. The said rule provided a special Job work procedure for Textile and Textile article dealers in getting their goods manufactured on Job work basis after availing CENVAT. Said Rule 12B was omitted, with effect from 09.07.2004 vide notification no.11/2004 C.E.(N.T.). However it was noticed that the applicant continued to avail CENVAT credit from 09.07.2004 to 31.03.2006 and claimed Rebate of Rs.21,77,597/- for goods exported during the said period. The said rebate claim was found not to be in order as the applicant did not carry out any manufacturing activity as defined in chapter notes 54 & 55 and also continued to avail CENVAT credit subsequent to the omission of Rule 12B. Hence, the applicant was issued a show cause Notice cum demand under F.No. V/PI/Enq/12-80/SF/TF II/05 dated 18.05.2006 for recovery of an amount of Rs 21,77,597/- claimed and received by them as rebate on goods exported by suppressing the fact of wrong availment of credit utilized during the period from 09.07.2004 to 31.03.2006 on grey fabrics and finished fabrics, under Section 11 A of the Central Excise Act, 1944.

8. The Additional Commissioner, Central Excise, Mumbai-II vide his Order in Original No.M-II/ADC/06/2007 dt. 30.03.2007 adjudicated the show cause Notice cum demand confirming an amount of Rs. 21,77,597/- towards erroneous rebate and also disallowed equal amount of CENVAT credit to the applicant. Penalty of Rs. 21,77,597/- under Rule 15(2) of

CENVAT Credit Rules 2004 in addition to penalty of Rs. 10,00,000/- on Status Fashion under Rule 25 and Rs.5,00,000/- on Shri Ajay Kumar Jain, Partner under Rule 26 Central Excise Rules, 2002, was levied .

9. Government observes that the applicant in their submissions dated 27.12.2017 filed on the date of personal hearing submitted that:-

9.1 the process of Textiles & Garments includes conversion from Fiber to yarn to sizing to doubling to weaving to grey cloth to process of grey cloth to stitching to garment.

9.2 Prior to 2003, duty was only on yarn and later stage of processing of fabrics. All intervening processes were exempted and there was no MODVAT chain. Registration was not required for the intermediate manufacturers.

9.3 Notification No. 24/2003-C.E. (NT) dtd.25.03.2003, CBEC carried out 3rd amendment to Central Excise Rules, 2002 by inserting Rule 12B. As per this new Rule- 12B even the Traders & all intermediaries in the textile trade were brought under the net of Central Excise registration as merchant /manufacturer and get input Cenvat credit & maintain the excise Cenvat chain.

9.4 The applicants obtained Central Excise Registration for the manufacture of excisable goods under Rule 9 of the Central Excise Rule, 2002. The word 'M' shown on the registration certificate stands for manufacturer for dealer or trader it is shown as "D".

9.5 By a Notification No 11/2004-C.F. (N.T.) dated 09-07-2004, the Rule 12B in Central Excise Rules, 2002 was omitted. As per this notification, Registration of traders, dealers and other intermediaries who are not having the manufacturing facility were discontinued. However, it remained optional for 'Manufacturers'.

9.6 There is no dispute of physical exports and duty payment at the time of export on the goods exported. Rebate sanctioned after verifying physical export and duty payment particulars have

been verified by the Jurisdictional Officers before sanction of rebate claims. If they found anything wrong they should have stopped or intimated if there is mistake is only a procedural one and the applicants are innocent.

9.7 The Rebate sanctioned is revenue neutral and there is no loss to Government. The rebate sanctioned is only duty paid at the time of export.

9.8 After abolition of Rule 12B of the Central Excise Rules, 2002, there is no notification requiring manufacturers of textiles to re-register and the applicants continued to be in the excise net even after deletion of 12B because the applicants had necessary power loom machines for manufacture of grey fabrics and stitching machines for manufacture of garments.

9.9 On 05.04.2004 i.e. before abolition of Rule 12B the applicants have informed the Department of purchasing two Power loom machines and godown for the purpose of cutting and packing. This was accepted by the Department vide their letter dated 28.06.2004. Rule 12B was abolished on 08.07.2004.

9.10 After the abolition of Rule 12B, the applicant opted for Notification No. 29/2004-C.E., availed Cenvat credit, paid duty on finished goods at the time of export and claimed rebate after export. The rebate was being sanctioned regularly. The impugned demand confirmed against the sanctioned rebate claims. No appeals filed against the Rebate sanction orders as required.

9.11 The applicant were filing monthly ER-1 Returns. After export each ARE1 was being filed with the Jurisdictional Range within 24 hours of export & each ARE-1 was duly certified by the range superintendent after verification. The applicant had claimed rebate after export and all the refund claims were sanctioned by Department after verification of physical export and duty payment at the time of clearance for export.

9.12 The statement recorded by the Supdt. of the Partner on 10.08.2005, he clearly stated that they had two Powerlooms and 4 stitching machines. He also informed that they are also getting the fabrics and garments manufactured under job work under Rule 4(5)(A) of CENVAT Credit Rule, 2004 and all the exports are under ARE1.

9.13 The CBEC vide Circular No. 795/28/2004-CX, dated 28.07.2004, issued clarification regarding changes in the excise duty structure on textiles and textile articles, as pointed out by the trade and the field formations. Following issues were clarified vide above circular.

i) Issue No. (1) Can a manufacture of textiles or textile articles can avail full exemption under notification No. 30/2004-CE as well as can clear goods on claiming exemption under notification No. 29/ 2004-C.E. without availing Cenvat,

ii) Issue No. (2) A manufacturer had stock ....

iii) Issue No. (3) Rule 12B ....

(a) The case of the applicant is covered as per clarification on issue as referred at Sr.No. (i) as the Applicants continued to be manufacturer, availed Cenvat Credit and paid duty on finished goods at time of exports cleared under ARE 1 as per Notification No. 29/2004-C.E. The applicants are exporters and there is negligible local sale.

(b) The applicant has retained his manufacturing registration as he had necessary setup and machinery for manufacture. The Garments and fabrics were exported on payment of duty debited from Cenvat and P.L.A. account and claimed rebate with the Jurisdictional Deputy Commissioner of Central Excise.

9.14 The applicants were also submitting necessary ER1/ER3 monthly statements showing therein goods manufactured, goods cleared for export, Cenvat availed during the month and utilised, duty paid from Cenvat account and PLA etc. These documents were filed by the applicant to the Range Superintendent for verification and certification of duty payment at the time of export along with the customs documents certifying the export such as S.B., Customs Certified Export Invoice and Packing Slip, Mate Receipt & B.L. etc.

9.15 After verification of duty payment certificate from the Range and after verifying the physical export certificate of Customs Authorities, Jurisdictional Deputy Commissioner sanctioned the rebate claims. No objections of any kind were raised by the Department. Further no appeal has been filed against these Rebate sanction orders.

9.16 However a demand was issued after one year of sanctioning the rebate claims, though orders sanctioning the rebate were not appealed or set aside and all of which were attained finality.

9.17 The Central Board of Excise, Customs and Service Tax vide Notification No. 23/2004-. C.E. (N.T.) dated 10.09.2004 declared Cenvat Credit Rule, 2004.

9.18 The applicants had filed rebate claim for the period (09.07.2004 to 31.03.2006 of Rs.21,77,597/-) along with all relevant documents. The said rebate claims were sanctioned after verifying all the documents.

9.19 Subsequently, the Respondent issued a Show Cause cum Demand Notice No. V/PI/Enq/12-80/SF/TF II/05/1217 dated 18.05.2006 for claiming Rs.21,77,597/- erroneously sanctioned and paid under Rule 18 of the Central Excise Rules, 2002. Without setting aside the original orders of sanctioning rebate claim.

9.20 The said Show cause Notice was adjudicated by additional Commissioner Central excise, Mumbai-III by confirming the demand of Rs.21,77,597/-.

10. In view of the foregoing the issue before the Government for decision is whether the applicant can be treated as manufacturer after the omission of Rule 12B of Central Excise Rules 2004 and whether the credit availed by them was fraudulent and irregular and the claim of rebate after utilizing irregular credit was also incorrect.

11. Government from the annexure 'A' enclosed to Show Cause cum Demand Notice No. V/PI/Enq/12-80/SF/TF II/05/1217 dated 18.05.2006 observes that the contention of the department is that the Rule 12 B ibid, was introduced for benefitting all such dealers who did not have any manufacturing activity of their own, however the said rule was omitted vide Notification No.11/2004 CE (NT) dated 09.07.2004. As a result any person who does not have any manufacturing facility of his own cannot avail Cenvat credit on such inputs which are sent for job work for further process. Department is also of the view that the applicant had installed looms at their factory for weaving grey fabrics from yarn whereas they did not have any manufacturing facility to carry out on grey facrics and finished fabrics purchased by them and on which they had availed Cenvat credit. The said grey fabrics were sent for further processing to different dying houses on labour job and after the receipt of the same, it was exported after cutting and packing. No manufacturing activity on such processed fabrics received from dying houses, were carried out by the applicant in their premises and after availing Cenvat credit on finished fabrics the applicant merely undertook the work of cutting and packing before its export which does not amount to manufacture.

12. Government further observes that it is the contention of the department that Central Excise Registration was allotted to the applicant on 1.04.2003 by virtue of Notification No.24/2003 (NT) dated 25.03.2003,

wherein guidelines were issued abstaining the staff from conducting any verification at the registered premises, whereas the applicant has contended that by a Notification No 11/2004-C.F. (N.T.) dated 09-07-2004, the Rule 12B of Central Excise Rules, 2002 was omitted and as per this notification, Registration of traders, dealers and other intermediaries who are not having the manufacturing facility were discontinued. However, it remained optional for 'Manufacturers'.

13. Government observes that after omission of Rule 12B of Central Excise Rules, 2002, the facility extended to manufacturer who manufactured goods on job work basis had been omitted. From the copy of the Registration certificate issued to the applicant Government observes that the same was issued under Rule 9 of the Central Excise Rules, 2002 for manufacturing of excisable goods. It is also on record that the applicant vide letter dated 05.04.2004 had informed the Jurisdictional Deputy Commissioner of Central Excise, Powai Division that they had installed two power loom machines for manufacture of grey fabrics. The applicant also informed vide said letter that they have also taken a rental premises where they conduct the cutting and packing of their goods. This letter was duly acknowledged by the Department and applicant was informed that the address of the additional premises mentioned has been taken note of in the records of this office. It is pertinent to note here that this letter of installation of power loom machines and renting of additional premises for cutting and packing of goods was given by the applicant prior to the date of omission of Rule 12B of Central Excise, Rules, 2002 vide Notification No.11/2004 CE (NT) dated 09.07.2004. This is clearly indicative of the fact that the applicant was not exclusively working under the erstwhile Rule 12B of Central Excise Rules, 2002.

14. Government further observes that on 05.04.2004 i.e. before abolition of Rule 12B the applicants have informed the Department of purchasing two Power loom machines and godown for the purpose of cutting and packing

This was accepted by the Department vide their letter dated 28.06.2004. Rule 12B was abolished on 08.07.2004.

15. The CBEC vide Circular No. 795/28/2004-CX, dated 28.07.2004, issued clarification regarding changes in the excise duty structure on textiles and textile articles, as pointed out by the trade and the field formations. The said circular is reproduced below :

Circular No.795/28/2004-CX

28th July, 2004

F.No.345/2/2004-TRU
Government of India
Ministry of Finance
Department of Revenue
(Tax Research Unit)

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Subject: Issues relating to changes in the excise duty structure on textiles and textile articles, as pointed out by the trade and the field formations-reg.

The undersigned is directed to state that subsequent to Budget 2004 announcements, a number of representations/ references have been received from the trade as well as from the field formations pertaining to the changes made in the excise duty structure on Textiles and Textile Articles. The point raised and the clarifications thereon are as follows.

Issue No. (1): Can a manufacturer of textiles or textile articles avail full exemption under notification no. 30/2004-CE as well as clear similar or dissimilar goods on payment of duty under notification no. 29/2004-CE simultaneously?

Clarification: Notification No. 29/2004-CE (prescribing optional duty at the rates of 4% for pure cotton goods and 8% for other goods) and no. 30/2004-CE (prescribing full exemption) are independent notifications and there is no restriction on availing both simultaneously. However, the manufacturer should maintain separate books of account for goods availing of notification no. 29/2004-CE and for goods availing of notification no. 30/2004-CE.

Issue No. (2): A manufacturer had stock of inputs as on 08.07.2004 (or stock of finished goods which contained inputs) on which he had availed credit. Can he avail full exemption under notification no. 30/2004-CE on

finished goods which was in stock or are manufactured subsequently from such inputs?

Clarification: If the manufacturer had not taken any credit on his pre-budget stock of inputs, he can clear the finished products without payment of duty under notification no. 30/2004-CE dated 09.07.2004. However, for manufacturers who had pre-budget stock of inputs (or stock of semi-finished or finished goods which contained inputs) on which credit had already been availed, there are two options. He can continue to pay duty on the finished goods made therefrom, at post budget rates i.e. 4% for cotton and 8% for others. Alternatively, he can reverse the credit amount and avail of full exemption on the finished goods.

Issue No.3: Rule 12 B of the Central Excise Rules 2002 (which prescribed special job work procedure for textile traders getting their goods manufactured on job work basis) was omitted vide Notification No. 11/2004-C.E. (N.T.) dated 9th July, 2004. A number of units which were either not undertaking any activity/ processes or were undertaking processes such as cutting and packing (which does not amount to manufacture) had taken registration as 'said person' under the said Rule 12B. Such persons can not be considered 'manufacturers' and their registered premises can not be considered as 'factory'. Some of such persons have credit balance in their account, have inputs on which such credit is taken, and have stock of finished goods received from job workers. Some of the inputs are with their job workers. What would be modalities of clearing such goods and utilizing such credit? Whether such 'said persons' be allowed to issue Cenvatable invoices or ARE-1 for exports?

Clarification: The issue is essentially transitional one and arises only in respect of inputs received on or before 08.07.2004. The person registered under erstwhile Rule 12B, even though not undertaking any manufacturing activity on his own and not having a factory, should be treated as a manufacturer for all practical purposes. If such person reverses the credit on the pre-budget stock of inputs (as mentioned in point no. (2) above), the finished goods would become eligible for duty free clearance by anybody clearing them, be it the registered person or his job workers.

However, in case the trader does not desire to reverse the credit on the pre-budget stock of inputs, he may be allowed to make payment of duty, whereupon the goods can be cleared from his registered premises, or from the premises of the job worker, whether for domestic clearance or for export (under ARE-1 procedure). In either case, no duty is to be paid by the job worker and duty liability, if any, would be on the trader (i.e. the registered person). In case of polyester filament yarn also, which now attracts mandatory duty, the pre-budget stock can be cleared in this manner, by

allowing the trader to pay duty. This procedure would not, however, apply in case of inputs received on or after 9thJuly, 2004.

Gautam Ray
Joint Secretary (TRU)

16. Government observes that in terms of the C.B.E.& C Circular No. 795/28/2004 dated 28-7-2004, referred to above "the person registered under Rule 12B even though not undertaking any manufacturing activity on his own and not having a factory, should be treated as manufacturer for all practical purposes." The dispute in the present case arose on account of omission of Rule 12B of the Central Excise Rules, 2002 vide Notification No. 11/2004 dated 9-7-2004, and thus according to the department the applicant lost their status as assessee and they could not have been treated as manufacturer w.e.f. 9-7-2004 as no manufacturing activity was being undertaken in their premises and the same premises could not therefore be treated as factory. The applicant instead of declaring their stock on 8-7-2004 and reversing the credit on the stock of inputs or paying duty on the stock of finished goods as on 8-7-2004 as required under the Board's Circular No. 795/28/2004-C.Ex continued to pay duty on availed Cenvat credit wrongly on the inputs/finished goods received on or after 9-7-2004 and used the Cenvat credit for payment of Central Excise duty on the clearances of fabrics manufactured by their job workers. They were therefore issued a show cause notice alleging that they have contravened provision of Rule 3 of the Cenvat Credit Rules, 2002 and Cenvat Credit Rules, 2004 in as much as without being a manufacturer or trader, they availed Cenvat credit on inputs for the period 9-7-2004 onwards.

17. Government also notes that in show cause Notice cum demand issued under F. No. V/PI/Enq/12-80/SF/TF II/05 dated 18.05.2006 it was alleged that an amount of Rs 21,77,597/- was claimed and received as a rebate by the said person on goods exported by suppressing the fact of wrong availment of credit utilized during the period from 09.07.2004 to 31.03.2006 on grey fabrics and finished fabrics.. Government further observes that the adjudicating authority at para 25 of its Order in Original observed as under:

"25. Subsequent to the omission of Rule 12B, w.e.f 9.7.204, M/s Status Fashion continued their activities and did not disclose the fact to the department that no machineries to carry out manufacturing activities as defined in Chapter note of 52, 54 & 55 i.e. dyeing, bleaching etc., were installed in their premises. It is therefore evident from the above that they had suppressed all the relevant facts and continued to avail CENVAT credit, fraudulently, on grey fabrics and finished fabrics, which were purchased locally and further utilized the said irregular credit for clearance of their finished goods under claim of rebate. Consequently the rebate claimed is also irregular. Hence the demand is not barred by limitation and correctly demanded by invoking the provisions of Section 11A of Central Excise Act, 1944".

18. Government also observes that the coordinate Bench of Tribunal in *Ultra Tech Cement Ltd.* v. *CCE, Raipur* - 2016 (332) E.L.T. 356 (Tri.-Del.) while considering the issue whether extended period is invocable, held that extended period is not invocable when revenue failed to establish suppression of facts and observed as under :-

"10. The Supreme Court in the case of Continental Foundation Jt. v. Commr. of C.Ex., Chandigarh-1 reported in 2007 (216) E.L.T. 177 (S.C.) held that the expression 'suppression' has been used in the proviso to Section 11A of the Act accompanied by very strong word as "fraud" or "collusion" and therefore, has to be construed strictly. Mere omission to give correct information is not a suppression of facts unless it was deliberate to stop the payment of duty. The incorrect statement cannot be equated with willful misstatement. Similarly, the Hon'ble Supreme Court in the case of Commissioner of C.Ex., Bangalore v. Karnataka Agro chemicals - 2008 (227) E.L.T. 12 (S.C.) held that it is well settled that mere non-declaration is not sufficient to invoke the larger period. Some positive act of suppression is required for invoking larger period of limitation under Section 11A. The Hon'ble Supreme Court in the case of Jai Prakash Industries Limited v. Commissioner of C.Ex., Chandigarh - 2002 (146) E.L.T. 481 (S.C.) held that in the case of divergent views of the various High Courts there was a bona fide doubt as to whether or not such activity amounted to manufacture. In such situation, the extended period cannot be invoked. In Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur - 2013 (288) E.L.T. 161 (S.C.) the Hon'ble Supreme court held the burden of proving any form of mala

fide lies on the person who is alleging it. Such allegations demand proves of order of credibility. Considering the above position of law, we find that in the present case, the demand for extended period cannot be sustained. The ER-1 returns for the period starting from June, 2007 were available with the department and no reason is forthcoming for non-scrutiny or delayed enquiry for more than two years. The Tribunal in the case of Accurate Chemicals Industries v. Commr. of C.Ex., Noida - 2014 (300) E.L.T. 451 (Tribunal-Delhi) examined the scope of scrutiny of ER-1 returns by the departmental officers. The Tribunal held, after examining the instructions issued by the Board from time to time, that returns filed by the assessee are required to be subject to detailed scrutiny in course of which the concerned officer can call for documents from the assessee wherever necessary for the scrutiny. In the present case, we find that the starting of the enquiry was stated to be scrutiny of ER-1 Returns. This was done apparently after two years. Invoking extended period for demand is not tenable in such a situation".

19. Government observes that the applicant had informed the Department about purchasing of two Power loom machines and godown for the purpose of cutting and packing. This was accepted by the Department vide their letter dated 28.06.2004. Rule 12B was abolished on 08.07.2004. Moreover, after the abolition of Rule 12B, the applicant opted for Notification No. 29/2004-C.E., thus continuing his status as manufacturer and availed Cenvat credit, paid duty on finished goods at the time of export and claimed rebate after export. The rebate was being sanctioned regularly. Government also observes that the applicant was filing monthly ER-1 Returns. After export each ARE1 was being filed with the Jurisdictional Range within 24 hours of export & each ARE-1 was duly certified by the range superintendent after verification. The applicant had claimed rebate after export and all the refund claims were sanctioned by Department after verification of physical export and duty payment at the time of clearance for export. So, there was no suppression of facts on the part of applicant and extended time period cannot be invoked in the case. As such, show cause notice issued after one year is clearly time barred and recovery proceedings do not sustain as per law.

20. Government also notes that the demand of irregular Cenvat credit confirmed against the applicant would also not stand on revenue neutrality

and Government in this regards places its reliance on Hon'ble CESTAT (Mumbai) judgement in Commissioner of Central Excise, Pune-I Vs Keetex (reported in 2008(227)ELT 536(Tri-Mumbai). The brief facts of the case were that the respondents M/s Keetex were getting the goods manufactured from their job workers and obtained registration as per provision of Rule 12B of the Central Excise Rules, 2002 was availing Cenvat credit facility. On account of omission of Rule 12B of the Central Excise Rules, 2002 vide Notification No. 11/2004 dated 9-7-2004, they lost their status as assessee and they could not have been treated as manufacturer w.e.f. 9-7-2004 as no manufacturing activity was being undertaken in their premises and the same premises could not therefore be treated as factory. Appellant instead of declaring their stock on 8-7-2004 and reversing the credit on the stock of inputs or paying duty on the stock of finished goods as on 8-7-2004 as required under the Board's Circular No. 795/28/2004-C.Ex continued to pay duty on availed Cenvat credit wrongly on the inputs received on or after 9-7-2004 and used the Cenvat credit for payment of Central Excise duty on the clearances of fabrics manufactured by their job workers. They were therefore issued a show cause notice alleging that they have contravened provision of Rule 3 of the Cenvat Credit Rules, 2002 and Cenvat Credit Rules, 2004 in as much as without being a manufacturer or trader, they availed Cenvat credit on inputs for the period 9-7-2004 onwards. It further alleged that they violated Rule 6 read with Rule 8 of Central Excise Rules, 2002 in as much as without being a valid central excise license they themselves assessed duty and paid the same as prescribed under Rule 8 after 9-7-2004 and also violated Rule 11 of the Central Excise Rules, 2002 in as much as without having any factory and without being a manufacturer, they wrongly issued central excise invoice for clearance of fabrics manufactured by their job worker by utilizing inputs received after 9-7-2004 The show cause notice therefore sought to recover the Cenvat credit amounting to Rs. 1,57,106/- availed by them during the period 9-7-2004 to 30-11-2004. The show cause notice was adjudicated by the Deputy Commissioner, who confirmed the duty amounting to Rs. 1,57,106/ along with interest and imposed a penalty of Rs. 25,000/- under Rule 13(2)/Rule

15(2) of the Cenvat Credit Rules, 2002/2004. On appeal, this order was set aside by the Commissioner (Appeals) who held that since the appellant have paid the duty on the finished product, duty cannot be recovered twice from them as same inputs on which Cenvat credit is being denied get charged to duty twice as the appellants who were not required to pay duty on the final product have paid duty on the same.

21. While dismissing the appeal filed by the revenue against the Order in Appeal the Hon'ble Tribunal observed as under:

> *"5. I have considered the submissions. I find that though the respondents were not entitled to Modvat credit as they have not undertaken any manufacturing activity nor did have any manufacturing premises but the facts remains that they have paid duty on the final products in which the inputs was used and the quantum of duty paid on the final products is not less than the credit taken on the inputs. The whole exercise therefore becomes revenue neutral and therefore no purpose will be served by demanding duty. A similar view was taken by the Apex Court in the case of Commissioner of Central Excise, Pune v. Coca-Cola India Pvt. Ltd. - 2007 (213) E.L.T. 490 (S.C.) where the demand was not sustained on account of revenue neutrality. Similarly in the case of Punjab Tractors Ltd. v. Commissioner of Central Excise, Chandigarh - 2005 (181) E.L.T. 380 (S.C.) where duty was paid on exempted inputs and Modvat credit claimed in respect of goods manufactured out of such inputs it was held that demand cannot be sustained and was set aside. In the case of Commissioner v. Super Forgings & Steels Ltd. - 2007 (212) E.L.T. A151 (S.C.) demand for longer period as well as penalty was set aside on account of revenue neutrality. In view of these decisions, revenue's appeal having no merit, is dismissed".*

22. In view of the foregoing discussion and also in view of the fact that the applicant had been registered with the Central Excise authorities in terms of Rule 9 of Central Excise Rules, 2002; they had with the knowledge of the

department had installed some machinery for manufacturing of their goods and the amendment to the Central Excise Registration Certificate as regards additional premises for cutting and packing of goods was also made in office records, Government holds that the applicant was not exclusively working under the erstwhile Rule 12B of Central Excise Rules, 2002 and had a status of manufacturer even after the omission of Rule 12 B ibid vide Notification No. 11/2004 dated 9-7-2004.

23. Accordingly, Government set aside Orders in Appeal No. US/475-476/RGD/2011-12 dated 21.12.2011, and Order-in-Original No. M-II/ADC/6/2007 dated 30.03.2007 passed by the Additional Commissioner of Central Excise, Mumbai-II.

24. The impugned revision applications are allowed in terms of above with consequential relief.

25. So, ordered.

28/3/2018

(ASHOK KUMAR MEHTA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No.112-113/2018-CX (WZ) /ASRA/Mumbai DATED 28.3.2018.

To,

M/s. Status Fashions,
202, Status House,
2nd Floor, Lathiya Rubber Gally,
Andheri Kurla Road,Sakinaka, Andheri (East),
Mumbai 400 072

True Copy Attested

6.4.18

एस. आर. हिरुलकर
S. R. HIRULKAR
(A-C)

Copy to:

1. The Commissioner of GST & CX, Mumbai East Commissionerate, Lotus Infocentre, Near Parel Station, Parel (East), Mumbai-400012
2. The Commissioner of GST & CX, (Appeals-II) Mumbai.
3. The Assistant Commissioner, Division VIII, GST & CX, Mumbai East Commissionerate, Lotus Infocentre, Parel (East), Mumbai-400012
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.