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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. 371/27/DBK/17-RA/1233 Date of Issue: 28 .03.2022

ORDER NO. 115 /2022-CUS (WZ)/ASRA/MUMBAI DATED 24 .03.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicant : Palvi Powertech Sales Pvt. Ltd.
315, Aditviya Complex,
Nizampura, Vadodara-390002

Respondent: Commissioner of Customs (Appeals), Ahmedabad

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962, against the Order In Appeal No 256/2011/Cus/Commr(A)/ AHD dated 05-07-2011 passed by Commissioner of Customs (Appeal), Ahmedabad

ORDER

1. This Revision Application has been filed by M/s Palvi Powertech Sales Pvt. Ltd. (hereinafter referred to as 'the applicant') situated at 315, Aditviya Complex, Nizampura, Vadodara-390002 against the Order-in-Appeal No. 256/2011/Cus/ Commr(A)/AHD dated 05-07-2011 passed by Commissioner of Customs (Appeal), Ahmedabad.

2. The brief facts of the case are that the applicant are merchant exporter and had exported chemical items like Caustic Soda Flakes or Caustic Soda Solid produced by M/s Gujarat Alkalies and Chemicals Ltd., (M/s GACL), Vadodara and claimed drawback in respect of 36 shipping Bills filed between 15.06.2009 to 09.10.2009. Pursuant to export, the applicant had filed drawback in respect of the said shipping bills at higher rate on the grounds that the manufacturer, M/s GACL have not availed Cenvat credit. The Adjudicating Authority found that the manufacturer had availed Cenvat credit of Service Tax paid on input services used in or in relation to the manufacture and clearance of the exported goods and hence SCN was issued as to why the drawback at the lower rate should not be paid to them. Subsequently the Adjudicating authority vide OIO No. 03/AC/ ICD-Dashrath/DBK/2010 dated 30.10.2010 sanctioned the drawback at the lower rate on the grounds that the manufacturer had not reversed the Service tax credit paid on input services used in relation to the manufacture of the exported goods at the time of clearance of the goods.

3. The applicant filed appeal with the Commissioner Appeal against the aforesaid Order. The Commissioner appeal vide his OIA No. 256/2011/Cus/ Commr.(A)/AHD dated 05.07.2011, dismissed the appeal of the applicant. Aggrieved by the said Order the applicants filed appeal with the CESTAT, Ahmedabad. CESTAT vide Order No. A/11398/2017 dated 18.07.2017 dismissed the appeal as non-maintainable and directed the applicants to approach the appropriate authority.

4. The applicant then filed the impugned Revision Application along with the Condonation of delay application, with the Revisionary authority on the following grounds:

4.1) The Applicants, had claimed All Industry Rate of Drawback, in respect of Caustic Soda Flakes or Caustic Soda Solids, as specified in the Schedule to the Customs, Central Excise Duties & Service Tax. Drawback Rules, 1995, at the higher rate applicable, subject to the condition that in connection with export goods, the Manufacturer has not claimed CENVAT Credit of duty, paid on Inputs or Packaging Materials or Service Tax, paid on Input Services. The manufacturer had reversed CEVNAT Credit of duty, paid on Inputs and Packaging Materials, which had gone in production of the export goods but inadvertently and on account of oversight, they did not reverse CENVAT Credit Service paid on Input Services. However, as soon as it was learnt by the Applicants, about the said discrepancy that M/s. GACL, had reversed CENVAT Credit of duty, paid on Inputs, before removal export goods but did not reverse CENVAT Credit Service Tax, paid on Input Services, which had gone in production of the said export goods and they approached M/s. GACL and accordingly, M/s. GACL reversed proportionate CENVAT Credit of Service Tax and also paid Interest thereon, for delayed reversal the Credit of Service Tax but all this was done before sanction. of the Drawback Claim, in question. The details of such reversal was conveyed to the Department, under the authority of Certificate, issued by the concerned Central Excise Officer, having jurisdiction over Unit of M/s. GACL, Vadodara.

4.2) The applicant submitted that there is no dispute of the fact that so far as it relates to CENVAT Credit of Central Excise Duty paid on Inputs and Packaging Materials, CENVAT Credit was already reversed at the relevant time. Subsequently, CENVAT Credit of Service Tax, paid by M/s. GACL, on their Input Services, used in or in relation to manufacture of the export consignment has been reversed by them.

4.3) This being the position, the applicant submitted that the Authorities have erred in sanctioning the Duty Drawback Claim of the Applicants, at the lower rate of Duty Drawback, under Rule 16 of the Customs, Central Excise Duties & Service Tax Rules, 1995, read with, Section 28 of the Customs Act, 1962, in as much as, finally, it has been established that in respect of Export Consignments, covered by 36 Shipping Bills, M/s. GACL, did not take CENVAT Credit of Central Excise Duty, paid on the Inputs, Packaging Materials and Service Tax, paid on Input Services. This means that the Applicants, have satisfied the condition for claiming higher All Industry Rate of Drawback, by not availing CENVAT Credit of duty, paid on Inputs, Packaging Materials and Service Tax, paid on Input Services, by M/s. GACL and accordingly, Duty Drawback Claim, should have been sanctioned by the Original Authority, at higher rate of Duty Drawback.

4.4. Just because the Manufacturer, due to oversight or inadvertently could not reverse CENVAT Credit of duty, paid on inputs used in production of export goods, in question, should not mean that the Government should earn this amount of Duty Drawback, by denying Duty Drawback to the Applicants. It will be just unfair and imprudent action if such Duty Drawback Claim is disallowed to the Applicants, acting as a Merchant-Exporter. What is to be seen is that an Exporter, should not take CENVAT credit and simultaneously claim Duty Drawback, at a higher rate. Before sanctioning Duty Drawback, CENVAT credit was reversed, which was sufficient compliance of Law, for which such vital export benefit, should not be denied in the interest of Export of Indian goods.

4.5. In order to support their view, the Applicants discussed the decisions of the following case laws:

a) CHANDRAPUR WIRES (P) LTD., VERSUS, NAGPUR, [1996 (81) E.L.T. (S.C.)];

b) C.C.E., VERSUS, ASHIMA DYECOT LTD., [2008 (232) E.L.T. 580 (GUJ.)];

c) COMMR., VERSUS, ASHIMA DYECOT LTD., [2009 (240) E.L.T. A-41 (S.C.)].

4.6. The applicant concluded by requesting to dismiss the Order in Appeal.

5. The applicant was granted personal hearing on 21.10.2021 or 28.10.2021. Ms Shamita Patel and Shri J. C. Patel, Advocates, appeared online for the hearing. They submitted that they are eligible for All Industry Rate of Drawback on both Customs and Central Excise portions, once Cenvat credit availed on inputs has been reversed. They also submitted that the reversals has been certified by the Excise Authorities and also mentioned judgement of Indo Rama passed by the Government.

6. Government has carefully gone through the relevant case records, perused the impugned Order-in-Original, Order-in-Appeal and the Revision Applications filed by the applicant. The issue to be decided in this case is whether the duty drawback at higher rate as claimed by the applicant is admissible to them when CENVAT credit of service tax availed on the input services had not been reversed at the time of export but has been reversed subsequently before sanction of drawback.

7. Government first proceeds to discuss the issue of delay in filing the revision application. As per provisions of Section 35EE of Central Excise Act, 1944 the revision application can be filed within 3 months of communication of Order-in-Appeal and delay up to another 3 months can be condoned provided there are justified reasons for such delay. In view of judicial precedence that period consumed for pursuing appeal bonafidely before wrong forum is to be excluded in terms of Section 14 of Limitation Act, 1963 for the purpose of reckoning time limit of filing revision application under Section 35EE of Central Excise Act, 1944, Government, in exercise of power under Section 35EE of Central Excise Act, 1944 condones the said delay and takes up revision application for decision on merit.

8. Government observes that the adjudicating authority had sanctioned the drawback claimed at a lower rate (0.8% of FOB value/Rs.0.2 per kg on the grounds that the applicant had wrongly claimed drawback at higher rate (4.5% of FOB value/Rs.1.1per kg) though they had availed Cenvat credit on the input

services used in respect of impugned exported goods.

8.01. Government observes that provision of drawback of duty of material/inputs used in manufacture of export product has been provided under Section 75 of the Customs Act, 1962. Further, Customs, Central Excise and Service Tax Drawback Rules, 1995 have been formulated under said Section 75 of the Customs Act, 1962. The said Drawback Rules, 1995 as amended, empowers the Government to issue notification at such amount or at such rate, as determined by the Central Government. The Central Government has issued various notifications including Notification No. 103/2008-Cus. (N.T.), dated 29-8-2008 (for the relevant period) prescribing (AIR) drawback rates. Government notes that Notification No. 103/2008-Cus. (N.T.) dated 29.08.2008, issued under Rule 3(1) of the said Drawback Rule, 1995 provides for full rate of AIR of drawback 'when Cenvat facility has not been availed'. The first proviso of Rule 3(i) specifies that if any tax/duty paid has been given as credit then the drawback admissible on the said goods shall be reduced accordingly, by taking into account the credit obtained and also the difference between AIR under heading 'when Cenvat facility has not been availed' and 'when Cenvat facility has been availed' (refers to Central Excise and Service Tax component of drawback) and from harmonious reading of Rule 3(1) and provision of the Notification No. 103/2008-Cus. (N.T.), it can be logically held that if the Cenvat credit of Service Tax has been availed, then higher rate of drawback is not admissible.

8.02 The relevant condition of the Notification No. 103/2008- Cus (NT) dated 28.08.2008 in which the Air for drawback for the period 2008- 09 was notified is reproduced as under:-

"No.13. The expressions "when Cenvat facility has not been availed", used in the said schedule, shall mean that the exporter shall satisfy the following conditions, namely:-

(i) The exporter shall declare, and if necessary, establish to the satisfaction of the Assistant Commissioner of Customs or Assistant Commissioner of Central Excise or Deputy Commissioner of Customs or Deputy Commissioner of Central Excise, as the case may be, that no Cenvat facility has been availed for any of the inputs or input services used in the manufacture of the export products."

The term "Cenvat credit has not been availed" has been explained to mean that no Cenvat facility has been availed for any of the inputs or input services used in the manufacture of the export products.

8.03. In view of the above it is very clear that the condition of availment/non-availment of Cenvat credit should be to the satisfaction of the Jurisdictional Officer. It would therefore follow that if the applicant has availed Cenvat credit, such credit was required to be reversed while clearing the goods for export. In this case, the applicant at the time of export had declared that Cenvat facility has not been availed and had reversed the credit attributable to the export goods except the service tax credit availed on the input services. However the applicant reversed the Service tax credit availed alongwith the interest as soon as it was detected but after the goods were exported. The applicant has submitted that before sanctioning Duty Drawback, CENVAT credit alongwith the interest was reversed, which was sufficient compliance of Law, for which such vital export benefit, should not be denied in the interest of Export of Indian goods

8.04 In support of their contention that credit reversed amounts to non availment of Cenvat credit, the appellant has relied on the following judgements:

(a) S.C. Judgement in case of *Chandrapur Magnet Wires Pvt. Ltd.* v. *Collector of Central Excise, Nagpur* - 1996 (81) E.L.T. 3 (S.C.)

(b) Gujarat High court in case of *Commissioner of Central Excise* v. *Ashima Dyecot Ltd.* - 2008 (232) E.L.T. 580 (Guj.) and affirmed by the Supreme Court in *Commissioner* v. *Ashima Dyecot Ltd.* - 2009 (240) E.L.T. A41

(S.C.)

(c) Gujarat High court in case of CCE, Ahmedabad-II Vs Maize Products – [2009(234) E.L.T. 431(Guj)]

(d) GOI Order No.151/2013-Cus dated 06-06-2013 in case of Indo Rama-2014(314)ELT 1006 (GOI)

Government proceeds to examine the issue in the light of above said judgments:

(a) In case of Chandrapur Magnet Wires Ltd., the Hon'ble Supreme Court has held that on reversal of Modvat credit before utilization, the assessee cannot be said to have taken credit of duty on inputs utilized in the manufacture of exported final product. This judgment clearly spells in unambiguous terms that reversal of Modvat amounts to non-availment of Modvat.

(b) Hon'ble Gujarat High Court in case of CCE v. Ashima Dyecot Ltd., relying upon above judgments in case of Chandrapur Magnet Wires (P) Ltd. and Hello Mineral Waters Pvt. Ltd. has held that reversal of credit amounts to non-availment of credit. This order of Hon'ble High Court has further been affirmed by the Hon'ble Supreme Court.

(c) SLP filed by the department against the said High Court judgement has been dismissed. The High Court had remanded the matter to the jurisdictional authorities to accept the offer of the assessee to reverse the entire credit on the common inputs.

(d) GOI held that the applicant is entitled for drawback claims at higher rate since they had reversed the credit and therefore held that the initial sanction of drawback claim is legal & proper.

The above said judgments holds that reversal of Cenvat credit before utilization amounts to non-taking of credit that such reversal can be done subsequent to export of goods. Government observes that there are a plethora of other judgements too holding the same. Some of them are as follows:

(a) In the case of CCE, Mumbai v. Bombay Dyeing & Manufacturing Co. Ltd.- 2007 (215) E.L.T. 3 (S.C.) Hon'ble Supreme Court has held that, the assessee got credit which was never utilized and before removal of goods, they reversed the same, which amounts to not taking credit.

(b) In case of CC v. Diplast Plastics Ltd.,- 2010 (257) E.L.T. 397 (P & H) Hon'ble Punjab and Haryana High Court has held that the contention of department that assessee has reversed Cenvat credit after detection by the department and hence they are not eligible for exemption is devoid of merit and misplaced as well, because mere fact of reversal of credit is sufficient compliance to claim the indicated benefit. This order of Hon'ble High Court clearly spells out that even after detection, the reversal of Cenvat credit amounts to non-availment of Cenvat credit.

(c) In case of Hello Mineral Water (P) Ltd., -2004 (174) E.L.T. 422 (All.) the Hon'ble Allahabad High Court has clearly held that reversal of Modvat credit amounts to non-taking of credit on inputs, and also that such reversal of credit can be made subsequent to clearance of final product.

(d) In case of GOI Order No. 168/2014-Cus dated 12-12-2014, in respect of Pee Vee Textiles, it was held that the Cenvat credit taken on the input service reversed along with the interest subsequent to export amounts to non-taking of credit

8.05. By harmonious reading of above said judgments it is established that reversal of Cenvat credit amounts to non-taking of credit and that such reversal can be done subsequent to export of goods. In this case the applicant had made the reversal of Cenvat credit taken on the service tax input along with the interest before the drawback claim was sanctioned. Since, applicant has reversed the Cenvat credit availed on input services when the dispute arose, this reversal has also to be treated as non-availment of Cenvat credit in view of case laws cited above. Government therefore holds that the applicant is eligible for the drawback

claim at the higher rate subject to the verification of the reversal of Cenvat credit on input services.

9. In view of the above, Government set asides the Order-in-Appeal No. 256/2011/CUS/COMMR(A)/AHD dated 05-07-2011 passed by the Commissioner of Customs (Appeals), Ahmedabad and remands the case back to the original adjudicating authority for doing the needful on the basis of observations made above.

10. The Revision Application is disposed off on above terms.

Shrawan 24/3/22

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 115 /2022-CUS(SZ)/ASRA/Mumbai dated 24-03-2022

To,

1. M/s. Palvi Powertech Sales Pvt. Ltd.,
   315, Aditviya Complex,
   Nizampura, Vadodara-390002

Copy to:

1. Pr. Commissioner of Customs, Custom House, Near All India Radio, Navrangpura, Ahmedabad -380009.
2. Commissioner of Customs (Appeals), Mrudul Tower, 7th Floor, B/H Times of India, Ashram Road, Ahmedabad - 380009
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Notice Board.