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SPEED POST

F.NO.198/652-653/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
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NEW DELHI-110 066

Date of Issue: 14/02/13

ORDER NO. 121-122 /2013-Cx DATED 14.02.13 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D. P. SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944

SUBJECT	:	Revision Application filed under Section 35 EE of the Central Excise Act, 1944 against The Order-In-Appeal No.26&27/2011-CX(SLM) dated 25.03.11 and passed by Commissioner of Central Excise (Appeal), Salem
APPLICANT	:	Commissioner of Cental Excise, Salem
RESPONDENT	:	M/s Arthanari Loom Centre (Textiles) Pvt. Ltd., Salem

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ORDER

These revision applications are filed by the applicant Commissioner of Central Excise, Salem against the order-in-appeal No. 26&27/2011-CX(SLM) dated 25.3.11 passed by Commissioner of Central Excise (Appeals), Salem with respect to order-in-original No. 202&203/2010 dated 30.11.10 passed by Assistant Commissioner of Central Excise, Salem-I Division.

2. Brief facts of the cases are that the respondents M/s Arthanari Loom Centre (Textiles) Pvt. Ltd., Salem holders of Central Excise Registration are manufacturing and exporting 100% cotton yarn, dyed woven fabrics falling under tariff item 52084130 of CETA 1985 and effecting clearance of the goods for home consumption as well as export. They filed rebate claims for the duty paid on the goods exported during the period from June 2010 to August 2010. These claims were rejected by the Assistant Commissioner of Central Excise, Salem-I Division, Salem stating the reason that the respondents have opted for availing both notification simultaneously only from 10.6.2010 and utilized the cenvat credit on capital goods received during the period January 2006 to June 2007 and taken on 10.6.2010.

3. Being aggrieved by the said orders-in-original, respondents filed appeal before Commissioner (Appeal) who sets aside the impugned orders-in-original and allowed the appeal.

4. Being aggrieved by the impugned orders-in-appeal, the applicant department has filed these revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following common grounds:

4.1 The Commissioner (Appeals) has failed to appreciate the legal provisions of Rule 6(4) of the CENVAT Credit Rules, 2004 which prohibits allowing of Cenvat credit on the Capital goods used exclusively in the manufacture of exempted goods.

Rule 6(4) of the Credit Rules, reads as under:

> (4) "No CENVAT credit shall be allowed on Capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year".

4.2 M/s. Arthanari Loom Centre (Textiles) Pvt Ltd., Erumapalayam, Salem availed Cenvat credit on the receipt of Capital goods in question, during the period from January 2006 to June 2010, when their final product was fully exempted from payment of duty under Notification No.30/2004-CE dated 9.7.2004 and as such no duty was paid on such clearances by the assessee. This would imply that the Capital goods in question, at the time of receipt by the assessee in their factory, were exclusively used in the manufacture of exempted goods and thus, Cenvat credit was not admissible in respect of the Capital goods in question in view of the provisions of Rule 6(4) of the CENVAT Credit Rules, 2004, which are unambiguous.

4.3 In the case of Binani Cement Ltd. Vs CCE 2002 (053) RLT 0436 (CEGAT-Del) 2002 (143) ELT 577 - 2002 (143) E.L.T. 577 (Tri.- Del.) the Tribunal has held that vested right of taking credit arises on the date of receipt of the goods and that the date of installation of Capital goods being only a deferred date of taking credit for administrative reasons, credit is eligible on the date of receipt of the goods. Thus the date of eligibility will be the date of receipt of the Capital Goods and as the date of receipt of the goods was between 23rd July, 1996 to 31st August, 1996 and as the said Capital Goods were out of the purview of the MODVAT Credit scheme, the Hon'ble tribunal has held that the appellant were not entitled to take MODVAT Credit on those Capital goods. This case is very much identical to the case on hand.

The assessee received the Capital Goods in question during the period when they availed full duty exemption on their final product.

4.4 In a similar case of CCE Vs Sengunthar Spinning Mills, reported in 1998 (099) ELT 409, it was held that the availability of Modvat credit on capital goods has to be determined at the time of receipt of capital goods in the factory and if no Modvat credit was available at that time, the question of subsequently making available any Modvat credit would not arise. This view has been further cemented by the Larger Bench, CESTAT, Mumbai in the case of Spenta International Ltd Vs CCE, Thane reported in 2007 (216) ELT 133 (Tri-LB) wherein it has been held that Cenvat credit eligibility is to be determined with reference to the dutiability of the final product on the date of receipt of Capital goods.

4.5 Whereas in the case on hand the Capital goods are not eligible for Cenvat credit on the date of their receipt in the factory, since the capital goods in question were used exclusively for the manufacture of final product, as the assessee were availing exemption vide notification No.30/2004-CE dated 9.7.2004. The assesse was well aware of that they were not eligible to take Cenvat credit on capital goods during the exemption period and therefore they have not availed the cenvat credit on capital goods immediately on receipt and availed the same when they started availing the benefit of Notification No.29/2004-CE dated 9.7.2004.

4.6 The Hon'ble Tribunal in the case of Commissioner of Indore Vs Surya Roshini, reported in 2003 (155) ELT 481(T) has held that the availability of Modvat credit is to be looked into at the time of receipt of the capital goods. If the capital goods are exclusively used in the manufacture of exempted products, Modvat credit will not be available to the manufacturer. Subsequently, if the exempted product becomes dutiable on account of withdrawal of exemption or the manufacturer uses the capital goods in the manufacture of any other dutiable goods it would not entitle the manufacturer to claim Modvat credit which stands

determined at the time of receipt of the capital goods. This case of CCE, Indore Vs Surya Roshini Ltd supra has been affirmed and upheld by Apex Court in Civil appeal No.8512/03. Further, the same view has been taken by the Larger Bench, CESTAT, Mumbai in the case of Spenta International Ltd Vs CCE Thane reported in 2007(216) ELT 133 (Tri-LB) as also discussed supra.

4.7 In view of the above, it emerges that admissibility of CENAVT credit on capital goods has to be determined at the time of receipt of such capital goods in the factory and if no Cenvat credit was admissible on that date, it cannot be allowed subsequently. In the instant case, at the time of receipt of capital goods, (spare parts to the Capital goods) in factory, final product was cleared without payment of duty on claiming full exemption under Notification No.30/2004 CE dated 9.7.2004 and as such capital goods were used exclusively in the manufacture of exempted goods during the material period. Accordingly, Cenvat credit on such capital goods was not admissible to the assessee on the latter date, in view of the provisions of Rule 6(4) of the Credit Rules and therefore, export of goods under claim for rebate on payment of the duty by way of debit in such CENVAT Credit is legally not correct and such debit cannot be considered as payment of duty and hence claim of rebate upon such debit cannot be considered. Therefore, rejection of the rebate claim of the assessee in this case by the Original Authority is legally correct and setting aside the order of the Lower Authority by the Commissioner (Appeals) in this case is legally not correct.

4.8 The Commissioner (Appeals) appeared to have erred in relying on the following six case laws but in all these cases, the issue involved are different from the issue involved in the instant case except in the case of ST Kottex Exports Pvt Ltd.

i) Philips India Ltd- 2005(191) ELT 1028 (TRI.-Mumbai)

ii) Surya Prabha Mills Ltd - 2002 (149) ELT 929 (TRI -CHE)

iii) Tamilnadu petro products Ltd-2003 (160) ELT 199(TRI-CHE.)

iv) Valsad S.K.Udyog Mandali Ltd - 2008 (228) ELT 561(TRI-AHMD)

v) J.R.Herbal care India Ltd - 20,10 (253) ELT 321 (TRI-DEL)

vi) S.T.Kottex Exports Pvt Ltd., - 2010 (261) ELT 807 (Tri. Del.)

5. A show cause notice was issued to the respondents under Section 35 EE of Central Excise Act, 1944 to file their counter reply. They vide their letter dated 21.1.12 submitted that:

5.1 At the outset, it is submitted respectfully that the appeal by the department had filed after the lapse of appealable period prescribed under Section 35EE of the Central Excise Act, 1944 and hence the same is liable to be rejected on this ground alone. The appeal had been filed with a petition for condonation of delay. The appeal had been filed even beyond the period available for condonation of delay as prescribed under Section 35EE. The date of receipt of Order-in-Appeal is 31.03.2011, which had been indicated in the Form E.A.8 also by the department. The relevant date for filing appeal is within three months from the date of receipt of order, which falls on 30.06.2011 as per Section 35EE. However, as per the proviso to Section 35EE(2), the appeal can be condoned for a further period of three months, which in our case would fall on 30.09.2011. However, the appeal had been filed only on 06.12.2011, beyond the period of condonation available under the Act, and hence, there is no jurisdiction for any court in India, to condone the delay. Hence, the appeal is liable for rejection on the above ground alone.

5.2 It had been held by Honourable appeal courts that object of limitation is to extinguish stale demands. Equitable considerations are out of place. Therefore if the legislature prescribed the period of six months for filing the appeal with condonation, it should be filed within that time limit.

Hence, it is submitted respectfully that the appeal is liable to be set aside toto on the above grounds.

Case laws relied upon by the respondent are:

- Rejendra Singh Vs. Sante Singh – AIR 1973 SC 2537
- Delta Impex Vs. CC (ACU), New Delhi – 2004(173) ELT 449 (Del.)

6. Personal hearing was scheduled in this case on 14.12.12. Shri R. Arumugam, Consultant appeared on behalf of the respondents who submitted that the orders-in-appeal being legal & proper may be upheld. The applicant department vide their letter dated 14.12.12 stated that:

6.1 Against the Commissioner's (Appeals) order Nos.26/2011 and 27/2011 both dated 25.03.11, an appeal has been filed with the CESTAT, Southern Bench, Chennai on 23.06.11 by the Department. The Hon'ble CESTAT in the Final Order No.1094-1095/2011 dated 26.09.2011 has dismissed both appeals as not maintainable as the Tribunal would have no jurisdiction to deal with these two appeals, the jurisdiction having been barred by Clause (b) of the first proviso to Section 35B of the Central Excise Act, 1944. And the CESTAT has also held that the department is at liberty to approach any other appropriate forum, if it is so advised. Under the circumstances the revision application has been filed under Section 35EE of the Central Excise Act, 1944.

6.2 The appeals with Hon'ble CESTAT have been filed on time. Hence, the period of pendency with the Hon'ble CESTAT i.e. from 23.06.2011 to 12.10.2011 has to be excluded in terms of Section 14 of the Limitation Act, 1963, since the appeals were filed with wrong Appellate Forum in good faith. In this regard the following are the case laws for considering the condonation of delay.

- Geeta Clearing Agency, Bomaby Vs CC Bombay CEGAT 1986 (26) ELT841(Tri)

- Akshra Chhaya Vs CC CEGAT 1989(42) ELT 82 (Tri)

In the above CEGAT Orders, it has been held that condonation of delay when appeal filed to wrong authority - Period of pendency with wrong authority excludable. Accordingly, it is prayed that the claim of the respondent that the appeal is time barred may please be rejected.

7. Government has carefully gone through the relevant case records and perused the impugned orders-in-original and orders-in-appeal.

8. On perusal of records Government observes that before proceeding further the condonation of delay application is to be decided first. In this case the orders-in-appeal was received by the department on 31.3.11 and appeal was filed before Hon'ble CESTAT on 23.6.11. CESTAT finally dismissed the appeal on 26.9.11 for want of jurisdiction in terms of proviso to Section 35B(1) of Central Excise Act 1944. After excluding time of 3 months 3 days for pursuing appeal before CESTAT, the total time taken for filing revision application before Central Government is 5 months 11 days.

Government notes that Statutory time limit including condonation in filing revision application in terms of 35EE of Central Excise Act 1944, read with Section 34EE(2) and its first Proviso is 6 months. In above circumstances it can be seen that the revision application is within condonable time limit. Hon'ble High Court of Gujarat vide order dated 15.9.11 in W.P.No.9585/11 in the case of M/s Choice Laboratories, Hon'ble High Court Delhi vide order dated 4.8.11 in W.P.No.5529/11 in the case of M/s High Polymers and Hon'ble Bombay High Court vide order dated 25.4.12 in W.P.No.10102/11 in the case of UOI Vs EPCOS Pvt. Ltd. have held 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. The ratio of said judgements is squarely applicable to this case. In view of above judgements

Government after considering the genuine reasons for delay, condones the said delay and takes up the issue for decision on merit.

9. Government notes that the original authority held that the claimant were availing full duty exemption scheme from 6.6.07 to 9.6.10 and all the capital goods on which the credit had been taken were received prior to 10.6.10 i.e. when they were availing full duty exemption in terms of Notification No.30/4-CE dated 9.7.04. The did not pay duty on any clearances for the said period whether for export or for home clearance. But they had taken Cenvat credit of Rs.2045725/- from 28.1.06 to 4.6.10 for the purpose of paying duty on export for the goods exported on 10.6.10 which was ineligible in terms of sub Rule(4) of Rule 6 of Cenvat credit Rules 2004 for exempted goods. The Adjudicating Authority accordingly rejected the rebate claim. Commissioner (Appeals) held that in terms of Rule 4(2) (a) & 4(2)(b) of Cenvat Credit Rules 2004 credit in respect of capital goods received in the factory or in the premises of the provider of output service at any point of time in a given financial year can be taken for an amount not exceeding 50% and the balance of credit may be taken in any financial year, hence he accordingly allowed the appeal. Now the applicant department has filed this revision application on the grounds stated at para (4) above.

10. Government notes that the only issue to be decided here is that whether a manufacturer who have opted for full exemption during year 2007 to 9.6.10 can take Cenvat credit on capital goods imported during the year 2007 which were used exclusively in the manufacture of exempted goods. In the instant case the manufacture claimed/opted for full exemption during year 2007 onwards for all goods cleared from factory under Notification 30/4 dated 9.7.04 and from 10.6.10 onwards they opted for availment of Notification 29/2004 dated 9.7.04 for the goods cleared for export and Notification 30/4 dated 9.7.04 for the goods cleared for home consumption. It is on records that all the capital goods were received during availment of exemption and as per Rule 6(4) of Cenvat credit Rules 2004 no cenvat credit is allowable on capital goods

which were exclusively used for manufacture of exempted goods. The relevant Rule reads as under:

6(4) "No CENVAT credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year."

However, Rule 4(2)(a) & 4(2)(b) provides condition for allowing Cenvat credit which read as under:

4(2) (a) "The CENVAT credit in respect of capital goods received in a factory or in the premises of the provider of output service at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent of the duty paid on such capital goods in the same financial year"

4(2)(b) "The balance of CENVAT credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, or in the premises of the provider of output service, if the capital goods, other than components, spares and accessories, refractories and refractory materials, moulds and dies and goods falling under heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act, are in the possession of the manufacturer of final products, or provider of output service in such subsequent years."

Government notes here that Rule 6(4) of the CENVAT credit Rules 2004 is a specific rule which apply when a manufacturer exclusively uses capital goods for manufacturing of exempted goods or in providing exempted services whereas the Cenvat Credit Rule 4(2)(a) & 4(2)(b) ibid are the general Rules which provides the manner and method for allowing cenvat credit. Hence Government finds much force in the contention of the department that if the capital goods are used exclusively in the manufacture of exempted products, cenvat credit will not be available to the manufacturer. Therefore the admissibility of cenvat credit on capital goods has to be determined at the time of

receipt of such capital goods in the factory and if no cenvat credit was admissible on that date it cannot be allowed subsequently as held in various case laws relied upon by the applicant department.

11. In view of above circumstances Government sets aside the impugned orders-in-appeal and restores the impugned orders-in-original.

12. The revision applications succeed in terms of above.

13. So, ordered.

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

Commissioner of Central Excise,
No. 1 Foulkes Compound,
Anaimedu Road,
Salem – 636 001.

Copy to:

1. M/s Arthanari Loom Centre (Textiles) Pvt. Ltd., 5/127 A, Erumapalayam Main Road, Erumapalayam, Salem-636015
2. Commissioner of Central Excise (Appeals), No. 1 Foulkes Compound, Anaimedu Road, Salem – 636 001.
3. Assistant Commissioner, Central Excise, Salem I Division, Salem.
4. PA to JS(RA)
5. Guard File.
6. Spare Copy

ATTESTED

(P.K.Rameshwaram)
OSD (RA)