REGISTERED
SPEED POST

F.No.195/612/2011-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue 12/9/13

ORDER NO. 1247/13-Cx DATED /2-9-2013 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D. P. SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, 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 orders-in-appeal No. M-I/AV/223/2011 dated 21.04.2011 passed by Commissioner of Central Excise (Appeals-II), Mumbai Zone-I
APPLICANT	:	M/s Shree Enterprises, Lower Parel (E) Mumbai
RESPONDENT	:	Commissioner of Central Excise, Thane-II

ORDER

This revision application is filed by M/s Shree Enterprises, Lower Parel (E) Mumbai against the order-in-appeal No. M-I/AV/223/2011 dated 21.04.2011 passed by Commissioner of Central Excise (Appeals-II), Mumbai Zone-I with respect to order-in-original No. 1392-1394-R/06-07 dated 28.12.2006 passed by ACCE Boisar Division-II, Thane-II Commissionerate.

2. Brief facts of the case are that applicants are Merchant Exporters of fabrics. They exported fabrics from the factory premises of their supporting manufacturer M/s Gini Silk Mills Ltd., on payment of Central Excise duty under claim of rebate and filed three rebate claims totally amounting to Rs.4,69,434/-. During the course of audit of M/s Gini Silk Mills Ltd., it was observed that applicants had deposited grey fabrics purchased from M/s Harco Exports, Mumbai. It was found that the said firm was not carrying out any manufacturing activities. The said firm had, therefore, lost the status of 'Deemed Manufacturer' as Rule 12B of the Central Excise Rules, 2002 was omitted vide Notification No.11/2004-CE(NT) dated 9.7.2004. However, they continued clearances and continued to wrongly pass on inadmissible Cenvat credit by issuing invoices. M/s Gini Silk Mills Ltd., had taken Cenvat credit on the strength of invoices issued by M/s Harco Exports. Since M/s Harco Exports had lost the status of Deemed Manufacturer with effect from 9.7.12004 as specified under the omitted Rule 12B of the Central Excise Rules 2002, the Cenvat credit on the basis of the invoices issued subsequent to omission of Rule 12B was legally not admissible as the said invoices were not proper and valid documents for taking Cenvat credit under Rule 9 of Cenvat Credit Rules 2002 and subsequent clearance of the said fabrics for export on which applicant filed the rebate claim. A show cause notice dated 31.08.2006 seeking to reject the impugned rebate claims. The adjudicating authority vide order-in-original No. 1392-1394-R/06-07 dated 29.12.2006 rejected the rebate claims.

3. Being aggrieved by the said order-in-original, applicant filed appeal before Commissioner (Appeals) who rejected the same.

4. Being aggrieved by the impugned order-in-appeal, the applicant has filed this revision application under Section 35 EE of Central Excise Act 1944 before Central Government on the following grounds :-

4.1 The applicants say and submit that admittedly the goods viz. processed fabrics were cleared from export by M/s Gini Silk Mills Ltd. on payment of duty and the goods have been duly exported by the applicants. There is no dispute as far as these facts are concerned. The only dispute raised in the present case is that M/s Harco Exports had paid duty and issued invoices for grey fabrics i.e. inputs for M/s Gini Silk Mills Ltd. which according to lower authorities is not proper and consequently the Cenvat credit of such duty availed by the manufacturer M/s Gini Silk Mills Ltd. is not admissible. In this regard, without prejudice to other submissions, the applicants submit that in the orders of the lower authorities, effectively made re-assessment of the Cenvat credit availed by the manufacturer M/s Gini Silk Mills Ltd., at the time of grant of rebate, which is not permissible under the law. It is respectfully submit that the rebate sanctioning authority is not at liberty to re-assess the goods or the assessment of the manufacturer while considering the rebate claim filed by a merchant exporter. Once it is established that the export goods have been cleared on payment of Central Excise duty and the goods have been duly exported, then the rebate of the duty paid on the export goods is liable to be sanctioned and paid to the exporter.

4.2 It is submitted that the Commissioner (Appeals) has passed the impugned order following the same grounds as in the order-in-original passed by the Assistant Commissioner. The applicants submit that they had purchased the goods from M/s Harco Exports and delivered the same to M/s Gini Silk Mills Limited, for further processing, before it was exported. M/s Harco Exports had issued Central Excise invoices under the provision of Rule 11 of the Central Excise Rules, 2002, clearly evidencing payment of Central Excise duty by them. The applicants understand that

the payment of Central Excise duty by M/s Harco Exports has been accepted by the Department, without raising any dispute. As a matter of fact, the show cause notice or for that matter the impugned order, does not declare these invoices as null and void. Therefore, the Cenvat credit taken on the strength of the said invoices by M/s Gini Silk Mills Ltd., which they had utilized for clearance of export goods of the applicants, was proper, legal and correct and the entire basis on which the impugned order has been passed are not tanable.

4.3 Without prejudice to other submissions, the aplicants submit that the whole issue raised in the present case is void ab initio. It is not in dispute that M/s Harco Exports were duly registered for issue of Central Excise invoices under the provisions of Rule 12B and all the actions taken by them during the period prior to omission of Rule 12B were in accordance with the law and were acceptable to the department. It is submitted that merely because the provisions of Rule 12B were omitted, the actions taken subsequent to omission of the provisions of Rule 12B cannot be termed as illegal. Therefore, the entire base, for initiating the present proceedings is legally unsustainable and the same deserves to be quashed on this ground alone. The essence of duty, prior to omission of Rule 12B and after omission of Rule 12B, was safeguarded in the words that the Revenue was paid.

4.4 While on the subject, the applicant also submit that in any case, the department had issued a show cause notice, F.No. V.Adj(SCN)30-30/Th-II/07 dated 31.03.2008 to M/s Gini Silk Mills Ltd. for disallowing Cenvat credit availed by them on the invoices issued by M/s Harco Exports, after omission of Rule 12B. The Cenvat Credit has ultimately been disallowed vide order-in-original No. 8/VKS/Th-II/08 dated 23.07.2008. Thus, having disallowed the Cenvat Credit availed by M/s Gini Silk Mills Ltd. the rebate claims cannot be rejected, since simultaneously disallowing cenvat credit as well as rebate claims tantamount to double recovery. Therefore, the impugned order deserves to be set aside and quashed as legally unsustainable.

5. Personal hearing as scheduled in this case on 26.06.2013 and 8.8.2013. Personal hearing held at Mumbai on 8.8.2013 was attended by Shri S.M. Singh, Consultant on behalf of the applicant who reiterated the grounds of revision application. Nobody attended hearing on behalf of the respondent department.

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

7. Government notes that applicants, a merchant exporter purchased the grey fabrics from M/s Harco Exports Mumbai and got it processed from M/s Gini Silk Mills Ltd. The applicant exported the processed fabrics from the factory premises of M/s Gini Silk Mills and filed rebate claim of dutypaid on export goods. On scrutiny, it was found that M/s Harco Exports had lost the status of Deemed Manufacturer as the Rule 12B of Central Excise Rules 2002 was omitted vide Not. No. 11/2004-CE(NT) dated 9.7.2004. The goods were cleared for export on ARE-1 Nos. 16/25.07.2005, 19/10.08.2005, 25/13.09.2006, 26/29.09.2006, 27/21.09.2006, 29/27.09.2006; M/s Harco Exports continued to clear the goods on Central Excise invoices even after omission of Rule 12B and continued to wrongly pass on inadmissible cenvat credit by issuing invoices. M/s Gini Silk Mills had wrongly taken cenvat credit on the strength of the said invoices issued by M/s Harco Exports. As such the duty paid on exported goods from such wrongly availed cenvat credit cannot be treated as duty paid as per provision of Central Excise law. As such the adjudicating authority rejected the said rebate claims. Commissioner (Appeals) has upheld the impugned order-in-original.

8. Applicant in this revision application has contended that M/s Harco Exports has issued valid Central Excise invoices and demand of wrongly cenvat credit is already confirmed alongwith interest and penalty and therefore, the rebate claim cannot be denied.

8.1 In this regard, Government observes that applicant has purchased the grey fabrics from M/s Harco Exports who was not a manufacturer at the relevant time. After the omission of Rule 12B, M/s Harco Exports was not a deemed manufacturer and he

was not authorized to issue any Central Excise invoice under rule 11 of Central Excise Rules 2002. The invoices in question issued by him cannot be called legal and valid documents. As such, M/s Gini Silk Mills, the processor has wrongly availed Cenvat credit on said invoices, Commissioner (Appeals) has observed in his finding in para 6 of order-in-appeal as under :-

" On verification it has been ascertained that a show cause notice had already been issued to M/s Gini Silks vide F.No. V.Adj(SCN)30-30/Th-II/07 dated 31.03.2008 for Rs.12,55,652/- for the invoices issued by M/s Harco Exports. The said show cause notice has already been adjudicated vide order-in-original No. 8/VKS/Th-II/08 dated 23.07.2008 wherein not only the credit been denied to M/s Gini silks, but penalty of Rs.12,00,000/- on Shree Enterprises i.e. the applicants themselves has been imposed as they were one who had procured the goods and sent them to M/s Gini Mills. The contention of the applicants that duty had been discharged out of the credit which had been validly taken is therefore no longer a valid argument. Once the credit had been denied to the applicants any duty discharged through such erroneous credit becomes invalid and no rebate of such invalid payment can be sanctioned. That such credit on the basis of the documents issued by the supplier of the inputs who is a trader and not the manufacturer after omission of Rule 12B which conferred the status of deemed manufacturer on such traders cannot be considered as a valid duty paying documents has also been held by the Tribunal in the case of Bombay Burmah Trading Corpn. Ltd vs. CCE, Pune-I [2008 (221) ELT 513 (Tri-Mum)]. "

It is quite clear that the demand for wrongly availed cenvat credit has been confirmed along with interest. The penalty of Rs.12,00,000/- is also imposed on applicant for his connivance / role in said fraudulent availament of cenvat credit with an intention to fraudulently avail the impugned rebate claims.

8.2 Government notes that applicant was found involved in committing said fraud of wrong availment of cenvat credit. The duty paid on export goods from such wrongly availed Cenvat credit cannot be treated as payment of duty. Hence the exported goods are not duty paid. The penalty of Rs.12,00,000/- is also imposed on the applicant. So it is quite clear that he was party to said fraud.

8.3. Government notes that Apex Court in the case of Omkar Overseas Ltd. {2003 (156) ELT 167 (SC)] has held in unambiguous terms held that rebate should be denied in cases of fraud. In Sheela Dyeing and Printing Mills (P) Ltd. [2007(219) ELT 348 (Tri.-

Mum)] the Hon'ble CESTAT, has held that any fraud vitiates transaction. This judgment has been upheld by the Hon'ble High Court of Gujarat. In a recent judgment in the case of Chintan Processors [2008 (232) ELT 663 (Tri.-Ahm), the Hon'ble CESTAT while deciding the question of admissibility of credit on fraudulent invoices has held as follows:

"Once the supplier is proved non existent, it has to be held that goods have not been received. However, the applicnat's claim that theyhave received goods but how they have received goods from a non-existent supplier is not known."

9. In view of above, Government finds that duty paid character of exported goods was not proved which is a fundamental requirement for claiming rebate under Rule 18 of Central Excise Rules, 2002. As such, Government finds no infirmity in the impugned order-in-appeal and therefore upholds the same.

10. Revision application is thus rejected being devoid of merit.

11. So, ordered.

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

M/s Shree Enterprises,
409, Jogani Industrial Estate,
Opp. Kasturba Hospital,
J.R. Boricha Marg,
Lower Parel (E) Mumbai

(Gnsgwal Sharma)
सहायक आयुक्त/Assistant Commissioner
CBEC-OSD (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

Order No./247/13-Cx dated 12.9.2013

Copy to:

1. Commissioner of Central Excise, Thane-II, 4th Floor, Navprabhat Chambers, Ranade Road, Dadar (West), Mumbai – 400 028
2. Commissioner of Central Excise (Appeals), Mumbai Zone-I, Mehar Building, Dady Seth Lane, Chowpatty, Mumbai – 400 007.
3. The Assisant Commissioner of Central Excise, Boisar-II Division, Thane-II, Krishikesh Apartment, Boisar, Distt. Thane, Maharashtra.
4. PA to JS(RA)
5. Guard File.
6. Spare Copy

12/9

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