



REGISTERED
SPEED POST

F.NO.195/671/2011-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: 13/9/11

ORDER NO. 1248 /2013-Cx DATED 12.9.2013 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.84/11(Ahd-III)/KCG/Commr(A)/Ahd dated 17.6.11
passed by Commissioner of Central Excise (Appeals-
III), Ahmedabad

APPLICANT M/s. Bharat Vijay Mills, Gandhinagar

RESPONDENT Commissioner of Central Excise, Ahmedabad-III

ORDER

This revision application is filed by M/s. Bharat Vijay Mills (Textile Division of M/s Sintex Industries Ltd.), Distt. Gandhinagar, Gujarat against the order-in-appeal No.84/11(Ahd-III)/KCG/Commr(A)/Ahd dated 17.6.11 passed by Commissioner of Central Excise (Appeals-III), Ahmedabad with respect to order-in-original No.170/R/11-12 dated 25.1.11 passed by Deputy Commissioner of Central Excise, Kalol Division, Ahmedabad- III.

2. The brief facts of the case are that the applicants are engaged in manufacture of cotton yarn, cotton fabrics, manmade fabrics etc. falling under Chapter 52,53,55 and 58 of the first schedule to the Central Excise Tariff Act 1985. Notification No.29/2004-CE specified rate of duty for 100% cotton fabrics at 4% advalorem. Vide Notification No.58/2008-CE dated 7.12.2008 effective rate of duty for 100% cotton fabrics was changed to NIL by amending Notification No.29/2004-CE. Another Notification No.59/2008-CE dated 7.12.2008 also specified rate of duty @4% for cotton fabrics. The applicant cleared goods for export under claim of rebate on payment duty @4% under Notification No.59/2008-CE even though there was unconditional exemption from duty by Notification No.29/2004-CE as amended. As per. Section 5A (1A) of the Central Excise Act 1944 where an exemption from whole of the duty of excise has been granted absolutely, the manufacturer has no option to pay duty, Since 100% cotton fabrics were exempted from duty unconditionally under Notification No.29/2004-CE, the applicant was not required to pay duty. Therefore a show cause notice was issued for rejecting 129 rebate claims. The lower adjudicating authority rejected all the rebate claims involving amount of Rs.6297781/- vide impugned order.

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 There are no dispute for the following in the subject matter:

- i) That proof of exports are not supplied
- ii) That the rebate is not applicable on the raw materials used on the goods cleared on payment of duty
- iii) That less duty has been paid on the final goods
- iv) That no duty has been paid on final goods.

In absence of the same, the rebate has to be sanctioned as legitimate right for rebate claim filed by the applicant.

4.2 Assistant Commissioner has rejected the rebate claims on the sole reason that since Notification No.58/2008-CE exempts the goods from payment of duty, hence the duty payment by the applicant cannot be construed as duty payment in terms of Section 5A(1A) of Central Excise Act,1944. The same has been simply upheld by Commissioner (Appeals) without giving findings on the submissions of the applicant.

4.3 Your Honour shall appreciate that the intention of the legislation with regard to Textile Sector under present referred notifications and previous notifications are as under:

Prior to 07.12.2008-

First Option-Pay duty and take CENVAT credit - Notification No. 29/2004-CE dated 9.7.2004 whereby under sub heading No. 5204 to 5212, the duty liability was as under:

- i) Goods of cotton, not containing any other textile material - 4% duty
- ii) Others - 8% duty

The said notification was issued under Section 5A of Central Excise Act, 1944.

Second Option-Don't Pay duty and don't take CENVAT credit - Notification No. 30/2004-CE dated 9.7.2004 whereby all goods falling under sub heading No. 5204 to 5212 were subject to

- i) NIL duty

The said notification was issued under Section 5A of Central Excise Act, 1944.

4.4 W.E.F 07.12.2008

First Option-Pay duty and take CENVAT Credit (except where nil rate of duty is there, CENVAT Credit is not eligible) - amendment of Notification No. 29/2004-CE by virtue of Notification No.58/2008-CE dated 07.12.2008 whereby under sub heading No. 5204 to 5212 the duty liability is as under:

- i) Goods of cotton, not containing any other textile material - NIL duty
- ii) Others - 4% duty

The said notification is issued under Section SA of Central Excise Act, 1944.

Second Option - Pay duty and take CENVAT Credit - a new notification got issued i.e Notification No. 59/2008-CE dtd 07.12.2008 whereby all goods falling under sub heading No. 5204 to 5212 are subject to:

4% duty

This notification also is issued under Section 5A of Central Excise Act, 1944.

It should be also noted that the Notification No. 30/2008-CE is still in existence. After referring to the previous notifications and present notifications, the following needs to be understood:

whether two options can exist for the querrist even under the different notifications both issued under Section 5A of Central Excise Act,1944.

4.5 What is the implication of Section 5A of Central Excise Act,1944 on duty liability.

To understand, it is pertinent to refer to Section 5A, which is produced herein below:

SECTION 5A - Power to grant exemption from duty of excise - (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured-

- i) in a [free trade zone [or a special economic zone]] and brought to any other place in India; or
- ii) by a hundred per cent export-oriented undertaking and (brought to any place in India).

Explanation - In this proviso, ["free trade zone", ["special economic zone,]] and "hundred per cent export-oriented undertaking" shall have the same meanings as in Explanation 2 to sub-section (1) of Section 3.

(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.

On plain reading of the aforesaid Section, it is very clear that "the power to grant exemption in excise duty is given by Section 5A to the Government of India" Even, where, any goods are exempted from payment of duty which is absolute, in such cases also, the Government cannot levy any duty as Section 5A prohibits the Government as well and it empowers Government to only act in terms of Statutory Provisions enacted by the legislation of India only. Government cannot override the provisions of Central Excise Act, 1944 equally. Since, the exemption was not absolute by virtue of Notification No.58/2008-CE dated 07.12.2008 and hence Government has issued a simultaneous Notification No.59/2008-CE dated 07.12.2008 wherein duty is applicable to sub heading No. 5204 to 5212. Further, it should be also noted that there is neither any restricting clause or condition in any of the notifications, as discussed above, by which the exercise of Notification No.59/2008-CE can be doubted at any given point of time.

4.6 It should be also understood that it is well settled at law that where two options are available to an assessee, it is always open to an assessee to opt for a notification whichever is more beneficial to that assessee and department cannot restrict any assessee to any particular notification. In light of the same, the applicant claim of rebate needs to be sanctioned and the impugned order requires to be quashed and set aside by additional grant of interest as well on delayed refund as well.

5. Personal hearing scheduled in this case on 8.8.13 at Mumbai was attended by Shri Anandodaya Mishra, Advocate on behalf of the applicant who reiterated the grounds of revision application. He further relied upon judgement dated 19.6.13 of Hon'ble Gujarat High Court in SCA No.10887/12 with SCA No.10891/12 in the case of Arvind Ltd. Vs UOI.

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

7. In this case applicants had cleared the goods for export on payment of duty @4% under Notification No.59/08-CE dated 7.12.08 though there was an unconditional

exemption from payment of duty on said goods vide Notification No.29/04-CE dated 9.7.04 as amended vide Notification No.58/08-CE dated 7.12.08. In view of the provision of Section 5A(1A) of Central Excise Act 1944, manufacturer cannot pay duty if absolute exemption is provided vide notification issued under Section 5A(1) of Central Excise Act 1944. CBEC has also clarified vide Circular No.937/27/10-CE dated 26.11.10 that in view of specific bar provided under Section 5A(IA) of Central Excise Act 1944, the manufacturer cannot pay duty under Notification No.59/08-CE dated 7.12.08. The adjudicating authority has relied upon these provisions and rejected the said rebate claims. The Commissioner (Appeals) has upheld the said order-in-original. Now, the applicant has filed this revision application on the same grounds and also relied upon the Gujarat High Court judgement in the case of Arvind Ltd. cited above.

8. Hon'ble High Court of Gujarat with judgement dated 19.6.13 in the case of Arvind Ltd. (SCA No.10887/12 with SCA No.10891/12) has held as under:

"9. On, thus, having heard both the sides and on examination of the material on record, the question that involves in these petitions is the wrong availment of the benefit of concessional rate of duty vide Notification No.59/2008 dated December 07, 2008. Admittedly, the final products were exempted from payment of duty by original Notification No.29/2004CE dated July 09, 2004 as further amended vide Notification No.59/2008CE dated December 07, 2008. The fact is not being disputed by the respondents that the petitioner availed Notification No.59/2008 for clearance made to export and thereafter filed various rebate claims. It is, thus, an undisputed fact that the petitioner on final products discharged the duty liability by availing the benefit of Notification No.59/2008 and as has already been noted in the record, it has reversed the amount of Cenvat Credit taken by it on the inputs used for manufacturing of such products. Thus, when the petitioner is not liable to pay duty in light of the absolute exemption granted under Notification No.29/2004 as amended by Notification No.59/2008CE read with the provision of Section 5A(1A) of the Act and when it has not got any other benefit in this case, other than the export promotion benefits granted

under the appropriate provision of the Customs Act and Rules (which even otherwise he was entitled to without having made such payment of duty), we are of the firm opinion that all the authorities have committed serious error in denying the rebate claims filed by the petitioner under Section 11B of the Act read with Rule 18 of the Rules. The treatment to the entire issue, according to us, is more technical rather than in substance and that too is based on no rationale at all.

10. We also cannot be oblivious of the fact that in various other cases, the other assesseees have been given refund/rebate of the duty paid on inputs used in exported goods. The stand of the Revenue is also not sustainable that the payment of duty on final products exported at the will of the assessee cannot be compared with other type of cases of refund/rebate of duty. Admittedly, when the petitioner was given exemption from payment of whole of the duty and the petitioner if had paid duty at the time of exporting the goods, there is no reason why it should be denied the rebate claimed which otherwise the petitioner is found entitled to. We are not going into the larger issues initially argued before us as subsequently the Revenue has substantially admitted the claim of rebate of excise duty and has not resisted in substance such claim of rebate.

11. Resultantly, both the petitions are allowed quashing and setting aside the orders impugned in both the petitions by further directing the respondents to grant the petitioner of Special Civil Application No.10887 of 2012 rebate of Rs.3,15,63,741/- (Rupees Three Crore Fifteen Lac Sixty Three Thousand Seven Hundred Forty One only) and Rs.39,59,750/- (Rupees Thirty Nine Lac Fifty Nine Thousand Seven Hundred Fifty only) to the petitioner of Special Civil Application No.10891 of 2012, by calculating interest thereon under Section 11BB of the Central Excise Act, 1944, within a period of eight weeks from the date of receipt of a copy of this judgment. Rule is made absolute in each petition to the aforesaid extent. There shall be, however, no order as to costs."

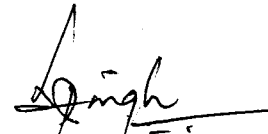
8.1 Government notes that the said judgement of Hon'ble High Court of Gujarat was not before the lower authorities while passing the impugned orders. Now the rebate

claims are to ^{be} considered in the light of said judgement. Therefore case is required to be remanded back for denovo consideration of matter.

9. In view of above position, Government sets aside the impugned orders and remands the case back to original authority for denovo consideration of rebate claims and pass fresh orders in accordance with law after taking into account the above said judgement dated 19.6.13 of Hon'ble High Court of Gujarat. The applicant will submit copy of said judgement before original authority. A reasonable opportunity of hearing will be afforded to the parties.

10. The revision application is disposed off in terms of above.

11. So ordered.



(D.P. Singh)

Joint Secretary (Revision Application)

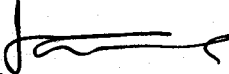
M/s Bharat Vijay Mills
(Textile Division of Mis Sintex Industries Ltd.)
Near Seven Garnala, Kalol
Dist. Gandhinagar

Order No. 1248 2013/Cx dated 12.9.2013.

Copy to:

1. Commissioner of Central Excise, Ahmedabad-III, Custom House, Navrangpura, Ahmedabad - 380 009
2. Commissioner of Central Excise (Appeals-III) Ahmedabad-II, Central Excise Bhavan, 7th Floor, Near Polytechnic, Ambawadi, Ahmedabad-380015
3. Assistant Commissioner of Central Excise, Kalol Division, Ahmedabad-III.
4. Shri Anandodaya Mishra, Advocate, 205-206, Advait, Beside 'Sandesh' Vastrapur, Ahmedabad-380015
5. PA to JS (RA)
6. Guard File.
7. Spare Copy

ATTESTED


(T.R.Arya)
Superintendent (Revision Application)