

**REGISTERED
SPEED POST**



F.No. 195/419-420/11-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.....20/2/13

Order No. 137-138/13-cx dated 19-02-2013 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 Order-in-Appeal No.
M-I/RKS/30 to 31/2011 dated 18.01.2011
passed by Commissioner of Central Excise,
(Appeals), Mumbai-I.

Applicant : M/s. Doshi Impex,
Mumbai.

Respondent : Commissioner of Central Excise,
Mumbai-I.

ORDER

These revision applications are filed by the applicant M/s. Doshi Impex, Mumbai against the Orders-in-Appeal No. M-I/RKS/30 to 31/2011 dated 18.01.2011 passed by Commissioner of Central Excise (Appeal), Mumbai-I, with respect to Orders-in-Original A/Rebate/23/DI/06 dt. 31-07-2006 passed by the Assistant Deputy Commissioner, Central Excise, Div-A, Mumbai-I, Commissionerate.

2. Briefly stated the facts of the case are that M/s. Doshi Impex, a manufacturer exporter procured the goods from M/s. Vinay Textiles, Surat used the same for manufacturing of final export product and filed a rebate claim for Rs. 88,992/- in respect of duty paid on the goods exported. On scrutiny of the said rebate claim, it appeared that the applicant had taken and utilized Cenvat credit on the basis of input invoices issued by M/s. Vinay Textiles, Surat, who had availed and utilized Cenvat credit on those input invoices issued by the companies that were found fake and bogus, as reported by the Superintendent, Central Excise, Range-III, Division-I, Surat vide letter F.No. CEX/R-III/Vinay/05-06/1074 dated 21-04-2006. It was further revealed that the name of M/s. Vinay Textiles, Surat appeared in the Alert Circular issued under F.No.IV / 12-HPIU-III/9/04-05, dated 23-09-2005, issued by the Commissioner, Central Excise & Customs, Surat-I. It was further reported by the Superintendent; Range-I, Division-A having jurisdiction over the factory of the claimant-assessee-vide his letter F.No. C.EX/R- I/DIV.A/D.I./Rebate/2005/53 dated 2.5.06, that the claimant-assessee had taken Cenvat credit on the invoices issued by the bogus/fake/non-existent units. Accordingly, it appeared that the goods cleared vide ARE-I are non-duty paid and hence the claimant-assessee had contravened the provisions of Rule 9(3) of Cenvat Credit Rules, 2004, by not taking reasonable steps to ensure that the credit was taken on duty paid inputs on which appropriate duty of Excise as indicated in input documents had been paid and hence the goods mentioned in the ARE-I are ineligible for sanction of rebate claim. Accordingly, a Show Cause Notice was issued to the applicant proposing rejection of the rebate claim and also proposing penalty under Rule 26 and 27 of the Central Excise Rules, 2002 and also under Section 11 of the Central Excise Act, 1944. The said Show

Cause Notice was decided by the Assistant Commissioner, Central Excise, Division-A of Mumbai-I Commissionerate vide impugned Order-in- Original dated 31-07-2006/24-08-2006 he has rejected the rebate claim amounting to Rs. 88,992/-. However, he has refrained from imposing penalty proposed in the show cause notice under Rule 26, and Rule 27 of Central Excise Rules, 2002 and Section 11 of the Central Excise Act, 1944.

3. Being aggrieved by the said Order-in-Original, both the applicant party and respondent department filed appeals before Commissioner (Appeals). Department filed appeal on the ground that the original authority erred in not imposing penalty upon applicant. The Commissioner (Appeals) vide impugned Orders-in-Appeal, modified the Order-in-Original in as much as, he directed the original authority to initiate penal proceedings against the applicant.

4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision applications under section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 Applicant humbly submits that the respondent has erred in placing blind reliance on the alert circulars. Respondent has failed to appreciate that the alert circulars use the words "most of the firms" and "most of the verification reports". It cannot be said with certainty or any conclusiveness that M/s. Vinay textiles, Surat is non-existent unit and invoice issued by them is fake or bogus. In the circumstances, the order passed by the respondent suffers from non-application of mind and ought to be set aside.

4.2 Applicant was a star export house, and has been in the export business from the year 1996 and was a regular exporter. Applicant has never been found to have indulged in any malpractice. It is further submitted that the Respondent failed to appreciate that M/s. Vinay Textiles, Surat was registered under Central Excise Registration No. 370104/M/666/2004 with Range-3 Division-I, Surat-I and vide Letter F.No. R-3/ Annx- D/Verification/05-06/984 dated 30-09-2005, the Range

Superintendent confirmed that the above said unit was registered with them under Rule 12B under the said registration number. The said letter was addressed to Superintendent of Central Excise & Customs, Range-I, Division-A and both the Ranges are under the charge of adjudicating authority. Once M/s. Vinay Textiles has been found to be an existing firm inspite of a alert notice, no credence can be placed on alert circulars and no demand can be raised on the basis of such alert circulars. In the circumstances, the reliance placed by the Respondent on the alert circulars is improper and unfounded.

4.3 The invoice issued by M/s. Vinay Textiles carried duty payment particulars and in the circumstances, the Applicant submits that the ratio of the decision in R.S. industries v. Commissioner of C. Ex., New Delhi-I is clearly applicable to the present case. In the aforesaid case it was held that once the receipt of the fabrics and its subsequent export is not denied and once the invoices carry the duty paying particulars and the payment has been made for the fabrics, the credit cannot be denied and duty, if any, can be demanded only from the suppliers of the inputs who have said to have incorrectly passed on the credit.

4.4 It is humbly submitted that Cenvat Credit availed is not only on the basis of the invoice raised by M/s. Vinay Textiles but also on the basis of goods purchased from other suppliers. Applicant submits that the department has not categorically stated as to how the duty paid from cenvat credit in the present case was related to the cenvat credit allegedly obtained by fraud. It was incumbent upon the lower authorities to establish one to one correlation before rejecting the rebate application of the applicant. Both the lower authorities have failed to establish this correlation and in the circumstances, the lower authorities ought to have allowed the rebate application of the applicant. Furthermore, unless the Revenue independently challenges the availment of the other Cenvat credit under other transactions, it cannot reject the present rebate application. In this regard, the applicant relies upon the judgment and order no.470/09-CX of the Government of India dated 2.12.09 in the case of Asst. Commissioner (Rebate), Raigad v. M/s. Mehta Tubes Ltd.

4.5. It is further submitted that the self assessment made by the applicant has not been challenged by the revenue till date. The refund claim is not an appeal proceeding. In the circumstance, both the lower authorities, who were considering the Rebate application of the applicant cannot sit in appeal over the self assessment of the applicant. Reliance is placed by the applicants on the case of Priya Blue Industries v. Commissioner of Customs (preventive), reported in 2004 E.L.T. 145 (S.c.). In the circumstances, the order is liable to be set aside on this ground alone.

4.6 The impugned order is erroneous inasmuch as it has unlawfully sought to shift the burden to prove the 'non-duty paid' character of the goods on us. It has been categorically held in case of Texmaco Ltd. 1992 (61) ELT. 227 that the burden to prove the 'non duty paid' character of the goods squarely lies on the department, Applicant also submits that insofar as the allegation of invalid/fraudulent duty paying invoices is concerned, the burden of proving its falsity lies on the department as was held in the case of Arsh Castings Pvt. Ltd. 1996 (81) ELT 276 (T), which it has failed to discharge in the present case. It is further submitted that it is not the case of the department that the payment under the invoice was not made or that the goods were not received by the applicant.

4.7 The impugned order is erroneous in so as it allows the appeal filed by the department on the aspect non imposition of penalty. It is humbly submitted that in an application rebate filed by the applicant, no such order for imposition of penalty would be passed. The lower authority has exceeded his jurisdiction by doing so.

5. Personal hearing scheduled in this case on 21-12-2012 was attended by Shri Krishan Kumar, advocate and Shri Naresh J. Doshi, partner on behalf of the applicant who reiterated the grounds of Revision Application. Nobody attended hearing on behalf of 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 observes that the original authority rejected three out of four rebate claim filed by the applicant on the grounds that the applicant had taken and utilized Cenvat credit on the basis of input invoices issued by M/s. Vinay Textiles, Surat, who had availed and utilized Cenvat credit on those input invoices issued by the companies that were found fake and bogus and M/s. Vinay Textiles, Surat was declared as non-existent unit as per alert circular issued by CCE, Surat. Being aggrieved by the said Order-in-Original, both the applicant party and respondent department filed appeals before Commissioner (Appeals). Department filed appeal on the ground that the original authority erred in not imposing penalty upon applicant. The Commissioner (Appeals) vide impugned Orders-in-Appeal, modified the Order-in-Original in as much as, he directed the original authority to initiate penal proceedings against the applicant and upheld the rejection of rebate claim. Now, the applicant has filed this revision application on grounds mentioned in para (4) above.

8. The applicant have pleaded that since the goods exported and their duty paid character, are not in dispute, the sole ground that the supplier of grey fabric had taken credit wrongly thereupon cannot be the basis of rejection of rebate claim. In this regard, it is observed that during investigation by department the suppliers of inputs i.e. M/s. Vinay Textiles, Surat were found non-existent and accordingly vide alert circular issued by Commissioner of Central Excise, Surat-I, the said unit was declared as fictitious. Nobody came forward to claim the said suppliers was not fake unit. It remains a fact that due investigations were done and the proper authorities conclusively proved that what is involved in these cases were intentional fraud involving fake/fictitious identities and as such cenvat credit availed on such inputs by fraudulent means. The applicant calimed to have purchased the duty paid inputs from entity which was found non-existent. As such it quite clear that applicant had taken the Cenvat Credit against fraudulent documents which are null and void and payment of duty non-existent. The case laws cited by the applicant of individual facts are of no help, when till today the involved "fraud" stands tall and applicant is party to fraud. Unless and until duty paid character of exported goods is proved the rebate cannot be granted. In this case applicant manufacturer exporter has procured the grey fabrics from non-

existent suppliers and therefore exporter himself has in a way played role in committing this fraud. When the purported person, who have issued the invoices of grey fabrics is factitious, whole transaction starting from procurement and ending with exports are vitiated since the applicant manufacturer exporter procuring grey fabrics on fake papers was in knowledge of said fraud.

8.1 Government notes that issuance of fraudulent bogus invoices on the name of non-existent suppliers of grey fabrics are not contested by applicant. They are neither pleading that such suppliers existed nor produced any documentary evidence like affidavit from any of such suppliers that they are not fake and bogus. Thus the applicant knowingly that no such supplier existed, they have paid duty from such fraudulently availed cenvat credit. As such the whole transaction becomes bogus which was created on paper for availing rebate claims fraudulently. The duty paid out of such wrongly availed cenvat credit cannot be treated as payment of duty on export goods as no actual cenvat credit was available with applicant manufacturer exporter who was party to said fraud. Applicant has also failed to take reasonable steps to ensure that credit was taken on duty paid inputs on which appropriate duty of excise had been paid. Hence applicant contravened the provisions of rule 9 (3) of Cenvat Credit Rules, 2004. As such the rebate claim is not admissible under Rule 18 of Central excise Rule 2002.

9. 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 judgement has been upheld by the Hon'ble High Court of Gujarat. In another judgement 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:

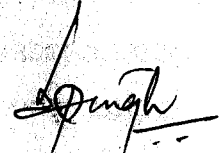
"Once the supplier is proved non-existent it has to be held that goods have not been received. However, the applicant's claim that they have received goods but how they have received goods from a non-existent supplier is not known."

In a similar case matter in the case of M/s. Multiple exports Pvt. Ltd. Government vide GOI order No. 668-686/11-Cx dt. 01-06-2011 has upheld the rejection of rebate claim by lower authorities. Hon'ble High Court of Gujrat, vide its order dated 11-10-2012 in SCA No. 98/12 with SCA No. 101/12, filed by party has upheld the above said GOI Revision order dated 01-06-2015.

10. In view of above, Government finds that duty paid character of exported 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 orders-in-appeal and therefore upholds the same.

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

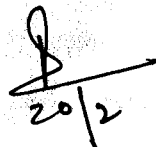
12. So, ordered.


(D.P. Singh)

Joint Secretary to the Govt. of India

M/s. Doshi Impex,
14, Ashoka Shopping Centre,
Ground Floor, G.T. Hospital Compound,
L.T. Marg, Mumbai-400001.

ATTESTED


20/12
(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
C.B.E.C.-OSD (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
बिल्डिंग्स/Buildings
New Delhi

Order No. 137-138 /13-CX dated 19-02-2013

Copy to:

1. The Commissioner of Central Excise & Customs, Mumbai-I, Commissionrate 115, New Central Excise Building M.K.Road, Opp. Church Gate Station, Mumbai-20.
2. The Commissioner of Central Excise (Appeals) Mumbai Meher Building, Dadiseth Agyari Lane, Chowpatty, Mumbai-400007.
3. The Assistant Commissioner (Rebate) Central Excise, Mumbai Meher Building, Dadiseth Agyari Lane, Chowpatty, Mumbai-400007.
4. Shri Krishan Kumar, advocate and Shri Naresh J. Doshi, partner, c/o M/s. Doshi Impex, 14, Ashoka Shopping Centre, Ground Floor, G.T. Hospital Compound, L.T. Marg, Mumbai-400001
5. PS to JS(RA)
6. Guard File.
7. Spare Copy

ATTESTED



(BHAGWAT P. SHARMA)
OSD (REVISION APPLICATION)

THE HISTORY OF THE UNITED STATES

The first part of the history of the United States is the story of the early years of the nation, from the time of the first settlers to the beginning of the American Revolution.

The second part of the history of the United States is the story of the American Revolution, from the time of the first battles to the signing of the Declaration of Independence.

The third part of the history of the United States is the story of the early years of the nation, from the time of the first settlers to the beginning of the American Revolution.

The fourth part of the history of the United States is the story of the American Revolution, from the time of the first battles to the signing of the Declaration of Independence.

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