REGISTERED
SPEED POST

F.No. 195/1456-1457/12-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 6/12/13

Order No. 1402-1403/13-cx dated 5-12-2013 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, 1944 against the Orders-in-Appeal Nos. SRP/19/Vapi/2012-13 dt. 13-09-2013 & SRP/54/Vapi/2012-13 dated 05-10-2013 passed by Commissioner of Central Excise, (Appeals), Vapi.
Applicant	:	M/s GHCL Ltd., Mahala Falia, Bhilad, Distt-Valsad, Gujrat.
Respondent	:	The Commissioner of Central Excise, Customs and Service Tax, Vapi, 4th Floor, Adarshdham Building, Vapi Daman Road, Vapi-396191.

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ORDER

These revision applications are filed by M/s GHCL Ltd., Mahala Falia, Bhilad, Distt-Valsad, Gujrat against the Orders-in-Appeal No. SRP/19/Vapi/2012-13 dt. 13-09-2013 & SRP/54/Vapi/2012-13 dated 05-10-2013 passed by Commissioner of Central Excise, Customs and Service Tax (Appeals), Vapi in respect of Orders-in-Original passed by the Assistant Commissioner, Central Excise, Division-Vapi as detailed below:-

S.No.	RA No.	OIA No. & Date	Order-in-Original No. & Date	Amount of Rebate (Rs.) and period involved
1	2	3	4	5
1	195/1456/12-RA	SRP/54/Vapi/2012-13 dated 05-10-2013	2784 to 2813/AC/Reb. Div-Vapi/11-12 dt. 31-03-2012	8543603 from Oct 10 to Dec 2011.
2	195/1457/12-RA	SRP/19/Vapi/2012-13 dt. 13-09-2013	1687 to 1812/AC/Reb. Div-Vapi/11-12 dt. 31-10-2012	24576039 July 09 to Feb 11

2. Brief facts of the case are that the applicant are engaged in the manufacture of Cotton Made-up textile Articles & 100% Cotton or cotton blended processed fabrics falling under heading 63.01, 63.04,52.08 and 52.10. The raw materials used by the applicant are cotton yarn, Polyester yarn, Dyes and chemicals and packing materials. The applicant is availing credit of duty paid on polyester yarn, Dyes and chemicals and packing materials. Notification No. 29/2004-CE dt. 09-07-2004 provided for concessional rate of duty for textile and textile articles falling under chapter 50 to 63 of the first schedule to the Central Excise Tariff Act, 1985. The said benefit was unconditional and the notification permitted clearance of goods at concessional rates wherein a manufacturer was allowed to take cenvat credit on inputs. Notification No. 30/2004-CE dt. 09-07-2004 exempted Textile and Textile Articles falling under chapter 50 to 63 permitting a manufacturer to clear the goods at Nil rate of duty subject to the condition that benefit is not available to the goods in respect of which credit of duty on inputs or capital goods has been taken.

2.1 The applicant cleared the finished goods as under:-

Description of finished goods	Notification availed	Rate of duty
100% Cotton made ups/processed fabric	29/2004	4%
100% Cotton made ups/processed fabric	30/2004	NIL
Cotton Blended made ups/processed fabric	29/2004	8%
Cotton Blended made ups/processed fabric	30/2004	NIL

2.2 The aforesaid Notification No. 29/2004-CE dt. 09-07-2004 was amended vide Notification No. 58/2008-CE dt. 07-12-2008 and the effective rate of duties were substituted from 8% to 4% and from 4% to NIL for cotton blended made up processed fabrics and 100% cotton made up/pr. Fabrics respectively. Vide another Notification No. 59/2008-CE dt. 07-12-2008 the 100% cotton goods manufactured by the applicant attracted duty @ 4%. Thus, there were two notifications operating- One providing for 4% and NIL rate of duty and other providing for effective rate of duty @ 8% and 4% for the said goods.

2.3 However, Notification No. 29/2004-CE dt. 09-07-2004, amended by Notification No. 58/08-CE was again amended vide Notification No. 11/2009-CE dt. 07-07-2009 and the effective rate of duty was again substituted to 8% and 4%. The applicant vide their letter dated 01-04-2009 had informed the JRO that they would avail benefit of both 58/2008 for domestic clearance and 59/2008 dated 07-12-2008 for export clearance. The same was also shown in their ER-1 returns. The applicant filed rebate claims in respect of 100% cotton fabrics and made ups falling under chapter 52 & 63 exported by them on payment of duty @ 4% under claim for rebate, for the period Oct, 2010 to Oct 2011 and July 2009 to Feb 2011 under rule 18 of Central Excise Rules, 2002.

2.4 The department proposed to reject the rebate claim by issuing show cause notices on the grounds that the finished goods manufactured and exported by the applicant were exempt from a payment of duty in terms of Notification No. 58/2008-CE dt. 07-12-2008 issued under section 5A. The department cited Board Circular No. 937/27/2010-Cx dt. 26-11-2010, stating that the applicant had no option to pay duty @ 4% in terms of Notification No. 59/2008-CE. Further, the finished goods became exempt on 07-12-2008 & in view of rule 11 (3) (ii) of the Cenvat credit Rules, 2004 the entire credit balance as on 07-12-2008 amounting to Rs. 2,33,60,780/- lapsed. Further applicant had also wrongfully availed cenvat credit of Rs. 21451883 even after 07-12-2008 and upto 06-07-2009 which was not admissible to them. Since the duty was paid on export goods out of such irregular cenvat credit availed by them, rebate of same could not be granted, as the goods have been exported without payment of duty. The said Show cause notices were adjudicated vide impugned Orders-in-Original wherein the rebate claims of the applicant were rejected.

3. Being aggrieved by the said Orders-in-Original, applicant filed appeals before Commissioner (Appeals), who rejected the same.

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

4.1 The 100% cotton fabrics and made ups falling under chapter 52 and 63 of the Central Excise Tariff act attracted nil rate of duty unconditionally in terms of Notification No. 29/2004-CE dt. 09-07-2004 as amended by Notification No. 58/2008-CE dt. 07-12-2008. In terms of the Notification No. 30/2004-CE the 100% cotton fabrics and madeups attracted nil rate of duty provided that no credit is taken on the inputs. The Notification No. 29/2004-CE dt. 09-07-2004 was issued under section 5A of the Central Excise Act specifying the rate of duty of 4% adv. in respect of 100% cotton madeups. Therefore, with effect from 07-12-2008 for the very same 100% cotton madeups falling under chapter 63, nil rate of duty was

available in terms of the Notification No. 29/2004-CE dt. 09-07-2004 and the rate of duty of 4% adv. was stipulated under Notification No. 59/2008-CE. In view of the above, the applicants had option to clear the 100% cotton made ups for export, on payment of duty @ 4% adv. and claim rebate under rule 18 of the Central Excise Rules. The applicants have availed Notification No. 58/2008-CE dt. 07-12-2008 for domestic clearances and Notification No. 59/2008-CE for export clearance. The applicants submit that both the notification Central Excise Act in existence simultaneously. Both the aforesaid notification do not have any provisions excluding the other. Both the aforesaid notifications co-exist simultaneously. There is no bar in Notification No. 58/2008-CE dt. 07-12-2008 and Notification No. 59/2008-CE mutually excluding each other. In terms of Notification No. 58/2008-CE dt. 07-12-2008 goods are chargeable to nil rate of duty and Notification No. 59/2008-CE provides rate of duty as 4%. There is nothing in either of the notification providing overriding effect. Therefore, there is no violation of any of the provisions of the Central Excise Act, 1944 read with any notification issued there under. When the excisable goods are cleared by them manufacturer, he can pay the duty as provided in anyone of the said notifications. In other words, when both the aforesaid notifications co-exist simultaneously and do not mutually exclude the other, an essessee has an option to chose between the aforesaid two notifications. When pluralities of exemptions are available the assessee has the option to choose any of the exemptions, even if the exemption so chosen is generic and not specific. This legal position is well settled by the Supreme Court in HCL Ltd., V/s. Collector of Customs, New Delhi-2001 (130) ELT 405 (SC).

4.2 The Show cause notice as well as the impugned order seek the reject the rebate claim by contending that in terms of section 5A (1A) of the Act, where the exemption under section 5A (1A) in respect of any excisable goods form the whole of the duty of excise leviable thereon has been granted absolutely, the manufacture of such excisable goods shall not pay duty of excise on such goods. Since, the applicants had paid duty on exported goods which was otherwise not payable the rebate cannot be sanctioned. The provisions of section 5A of the Central Excise Act, 1944 has been mis-understood by the department inasmuch as this provision will be

attracted when there is only one notification issued under section 5A exempting excisable goods absolutely from whole of the duty leviable. The aforesaid view is strengthened by the expression "an exemption....." appearing in section 5A (1A). Therefore if there are two notifications in force in respect of the excisable goods in question one of which is granting full exemption absolutely and another specifying the rate of duty, a s in the present case for the 100% cotton fabrics, the principle laid down by the Hon'ble Supreme Court and various Tribunals.

4.3 Notification No. 58/2008-CE dt. 07-12-2008 and Notification No. 59/2008-CE Mutually or in any other manner does not exclude each other. There is also no other provision under the Central Excise Act or rules made there under which has the effect of requiring the assessee to mandatorily avail the exemption Notification No. 58/2008-CE dt. 07-12-2008 over Notification No. 59/2008-CE. The applicants submit that it cannot also be suggested that the Notification No. 29/2004-CE is to be treated as impliedly repealed by introduction of Notification No. 59/2008-CE. Thus, in the present case, during the relevant there were two notifications in force specifying the rate of duty of nil as well as 4% in respect of 100% cotton fabrics or made ups. In view of the above, the applicants had the option to pay duty in terms of Notification No. 59/2008-CE on 100% cotton fabrics or made ups cleared for export and to claim rebate of such duty under rule 18 of the Central Excise Rules, 2002.

4.4 Commissioner (Appeals) has relied upon the provisions of Rule 11(3) (ii) of the cenvat credit rules, 2004 and has contended that as on 07-12-2008 when goods become exempted, the credit of Rs. 2,33,60,780/- lapsed in view of Rule 11(3) (ii) and credit availed during the period in question was also not available to the applicants. The Commissioner (Appeals) has held that the applicants have wrongly utilized the credit for payment of duty on export goods which is not admissible to them and therefore rebate claim has to be rejected. The applicants submit that the provisions of rule 11(3) (ii) of cenvat credit Rule, 2004 are not applicable to the facts of the present case. Rule 11 (3) statutorily provides that the manufacturer of final products is liable to pay an amount equal to credit taken on the inputs lying in stock

or contained in the product lying in stock on the date when the final product became unconditionally exempted or when the manufacture opt to avail full exemption on the final product manufactured by him. Rule 11 (3) (ii) applies in a situation where initially the final product was dutiable and the manufacturer has taken credit of duty paid on inputs, such credit has been utilized and subsequently the said inputs are used for manufacturer of final product which becomes exempt absolutely/unconditionally under section 5A of the Act. In other words, Rule 11(3) (ii) applies when the said final product was liable to duty and then manufacturer was availing the cenvat credit when the final product became absolutely exempt under section 5A of the Central Excise Act and that the manufacturer is not entitled to take credit after the introduction of exemption notification. However, in the present case as submitted above the applicants had an option to pay duty @ 4% and therefore the goods manufactured by the applicants were not absolutely exempt from payment of duty so as to attract provisions of rule 11(3) (ii).

4.5 Commissioner (Appeals) in the impugned order has relied upon Board Circular No. 937/37/2010 dt. 26-11-2010 Commissioner (Appeals) has further laid emphasis on Board Circular dated 14-01-2011 where in it has been clarified that excise duty paid on exempted goods is not duty of excise and therefore duty paid on exported goods is not duty of excise and thus rebate not admissible. The applicants submit that aforesaid clarification stated 26-11-2010 and 14-01-2011, issued by Board are contrary to statutory provision and thus not binding. As submitted provisions of section 5A of the Central Excise Act, 1944 will be attracted when there is only one notification issued under section 5A exempting excisable goods absolutely from whole of the duty leviable. The aforesaid view is strengthened by the expression " and exemption....." appearing in section 5A (1A).

4.6 Hence, in absence of any restriction by provision of section 5A (1A) of the Central Excise Act, 1944 in case there exit two notifications it would not be open for the department to enforce exemption on the applicants. Similar view has been taken by the High court of Gujrat in the case of CCE Vs. Ingersoll Rand (India) Ltd. Tax Appeal No. 798 of 2006 wherein it was held that in absence of any statutory

provision of reversal of cenvat credit in case inputs are written off Board vide its circular cannot insist for such reversals. Decision relied upon by the Commissioner (Appeals) in the case of Mahendra Chemicals Vs. CCE 2007 (208) ELT 505 (T) is not applicable to the facts of the present case since Tribunal in that case was considering a situation where there was only one notification granting absolute exemption and Tribunal relied upon provision of section 5A (1A). In view of the above, the applicants submit that the impugned order passed is bad in law and is thus liable to be set aside. The applicant submit that since they have satisfied all the conditions of Central Excise Act, 1944 read with Rule 18 of Central Excise Rules, 2002 and Cenvat Credit Rules, 2004 read the impugned order rejecting the rebate claim is bad in law and same is liable to be set aside.

5. Personal hearing was scheduled in this case on 30-09-2013 and 28-10-2013. Hearing held on 30-09-2013 was attended by Shri Ganesh Bapu TR, advocate; Ms- Juhi Bansal, advocate and Mr. Yogesh Mantri, AGM(C) of company on behalf of the applicant, who reiterated the grounds of Revision Application. The applicants also stated that the show cause notice issued to them for recovery of wrongly availed cenvat credit Rs. 44991995/- has been confirmed vide the Order-in-Original No. 32/12 dt. 27-12-2012, passed by the Commissioner of Central Excise, Vapi. In appeal, Hon'ble CESTAT has now granted stay against said Order-in-Original dt. 27-12-2012. This fact is also confirmed by the Additional Commissioner (Review), central Excise, Vapi vide letter F.No. V(Misc.) 2-80/13/RC dt. 31-10-2013, wherein it has been stated the CESTAT, WZB, Ahmedabad, vide stay order dtd. 10-04-2013 granted stay of recovery till disposal of appeal.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Orders-in-Appeal. Since issue involved in both the revision application is same, they are taken up for decision by this common order.

7. On perusal of records, Government observes that the original authority rejected the applicant's rebate claims on the ground that the said goods were

exempted from whole of duty of excise as per Notification No. 29/2004-CE dt. 09-07-2004 as amended by Notification No. 58/2008-CE dt. 07-12-2008 and hence they have no option to pay duty on goods cleared for export. Department cited Board's Circular No. 937/27/2010-CX dt. 26-11-2010 in this regard. It was further held that as the finished goods became exempted vide said Notification No. 58/2008-CE dt. 07-12-2008, the entire cenvat credit balance as on 07-12-2008 lapsed in view of rule 11(3) (ii) of cenvat credit rules, 2004 and the duty paid from such irregular cenvat credit cannot be called on payment of duty and there rebate claims are not admissible. Applicants had also wrongfully availed cenvat credit of Rs. 2451883 even after 07-12-2008 and upto 06-07-2009 which was not admissible to them and paid duty out of said wrongly availed cenvat credit. Commissioner (Appeals) upheld impugned Orders-in-Original. Now, the applicant has filed these revision applications on grounds mentioned in para (4) above.

8. Government notes that applicants cleared goods for export on payment of duty as under:

Description of finished goods	Notification availed	Rate of duty
100% Cotton made ups/processed fabric	29/2004	4%
100% Cotton made ups/processed fabric	30/2004	NIL
Cotton Blended made ups/processed fabric	29/2004	8%
Cotton Blended made ups/processed fabric	30/2004	NIL

The aforesaid Notification No. 29/2004-CE dt. 09-07-2004 was amended vide Notification No. 58/2008-CE dt. 07-12-2008 and the effective rate of duties were substituted from 8% to 4% and from 4% to NIL. Vide another Notification No. 59/2008-CE dt. 07-12-2008 said goods manufactured by the applicant attracted duty @ 8% & 4%. Thus, there were two notifications operating-One providing for cotton goods @ NIL rate of duty and other providing effective rate of duty @ 4%.

However, Notification No. 29/2004-CE dt. 09-07-2004 as amend vide Notification No. 58/08-CE was again amended vide Notification No. 11/2009-CE dt. 07-07-2009 and the effective rate of duty was again substituted to 8% and 4% for the said goods.

8.1 The applicant filed rebate claims in respect of 100% cotton fabrics and made ups falling under chapter 52 & 63 exported by them on payment of duty @ 4% under claim for rebate, for the period Oct, 2010 to Oct 2011 and July 09 to Feb 2011 under rule 18 of Central Excise Rules, 2002. Government notes that the during the relevant period from 07-07-2009 onwards after issuance of Notification No. 11/2009-CE the effective rate of duty became same under both Notifications i.e. 29/04-Ce as amended vide no. 11/09-CE dt. 07-07-2009 and Notification No. 59/2008-CE dt. 07-12-2008. So, the clearances of goods made after 07-07-2009 will not be hit by the provisions of section 5A (1A) of Central Excise Act, 1944 as duty rates were same in both the notifications and thereafter no unconditional exemption from whole of duty of excise was there .

8.2 Government finds that the lower authorities also held that as the finished goods became exempted on 07-12-2008 in view of Notification No. 58/2008-CE dt. 07-12-2008, the credit balance as on 07-12-2008 amounting to Rs. 2,33,60,780/- lapsed in terms of rule 11(3) (ii) of cenvat credit rules, 2004 and Cenvat credit of Rs. 21451883 was not admissible in cotton goods cleared during 07-12-2008 to 06-07-2009. Since there was absolute exemption from payment of duty. Government finds that a show cause notice F.No. V (Ch. 63) 3-88/DEM. dated 07-06-2012 was issued to the applicants for recovery of such wrongly availed cenvat credit. The CCE Vapi adjudicated the case, vide Order-in-Original No. 32/DEM/VAPI/2012 dtd. 20-12-2012 confirming the demand of wrongly availed credit of Rs. 44991995 along with interest apart from imposing penalty of equal amount. The said order has now been challenged by the applicant before CESTAT, WZB, Ahmadabad. The Hon'ble CESTAT vide order No. M/11874 & 11875/WZB/AHD/13 dtd. 10-04-2013 has stayed the said Order-in-Original dtd. 20-12-2012 as intimated by Additional Commissioner (Review) vapi vide letter dated 31-10-2013. Government notes that the issue of admissibility

of Cenvat credit is under consideration of CESTAT in the said pending appeal. The payment of duty is disputed as the same was paid from wrongly availed credit. The final decision of Hon'ble Tribunal in the matter will only resolve the dispute regarding payment of duty on exported goods.

9. The governing statutory provisions of grant of rebate are contained Rule 18 of Central Excise Rules, 2002 which reads as under:

> "Rule 18: Rebate of Duty: Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, any fulfillment of such procedure, as may be specified in the notification."

The provisions of said rule stipulate that rebate of duty paid on excisable goods exported is admissible. The notification No.19/04-CE dated 6.9.04 issued under rule 18, stipulates the condition and procedure to be followed for availing rebate claim. In these cases, payment of duty is in dispute and case matter for recovery of wrongly availed Cenvat credit are pending before CESTAT. Applicant is a manufacturer exporter and duty is paid from cenvat credit which is under dispute. So the duty paid cannot be treated as duty paid in accordance with law unless the said cenvat credit availed by applicant is held a valid cenvat credit. In view of this, it would be premature to decide the admissibility of rebate claims till the final decision is taken by the CESTAT. Therefore, in the interest of justice, the cases are required to be remanded back for fresh consideration in the light of final decision of Tribunal in the matter.

10. In view of above position, Government sets aside the impugned orders and remands the cases back to the original authority for denovo consideration of rebate claims on the basis of final decision of Hon'ble Tribunal in the said pending appeals. It is needless to say that reasonable opportunity of hearing will be afforded to the parties before deciding the case.

11. Revision applications are disposed off in above terms.

12. So, ordered.

(D.P. Singh)
Joint Secretary to the Govt. of India

M/s GHCL Ltd.,
Mahala Falia, Bhilad,
Distt-Valsad, Gujrat.

ATTESTED

(भगवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
C B E C -O S D (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

Order No.1409-1413-Cx dated 5-12-2013

Copy to:

1. The Commissioner of Central Excise, Customs and Service Tax, Vapi, 4th Floor, Adarshdham Building, Vapi Daman Road, Vapi-396191.

2. The Commissioner (Appeals), Customs and Service Tax, Vapi, 4th Floor, Adarshdham Building, Vapi Daman Road, Vapi-396191.

3. The Asstt. Commissioner of Central Excise, Division I SIlvassa, 1st Floor, Sakhar Bhavan, Piparia, Vapi-Silvassa Road, SIlvassa- 396230.

4. PS to JS (RA)

5. Guard File.

6. Spare Copy

ATTESTED

6/12

(BHAGWAT P. SHARMA)
OSD (REVISION APPLICATION)