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F.No.198/206/10-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..1.8.12/1.3

ORDER NO. 1409 /13-CX DATED 13.12.2013 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
Act, 1944 against the orders-in-appeal No.88-CE/MRT-II/2011
dated 26.2.2010 passed by the Commissioner (Appeals) Central
Excise, Meerut-II

Applicant : Commissioner, Customs & Central Excise, Meerut-II.

Respondent : M/s Mentha Allied Products, Rampur, U.P.

ORDER

This revision application is filed by Commissioner, Customs & Central Excise, Meerut-II against the orders-in-appeal No.88-CE/MRT-II dated 26.2.2010 passed by the Commissioner (Appeals) Central Excise, Meerut-II with respect to order-in-original passed by Assistant Commissioner of Central Excise Division, Rampur. M/s Mentha & Allied Products, Civil Lines, Rampur (UP) are the respondents in this case.

2. Brief facts of the case are that the respondents are engaged in the manufacture of various excisable products namely Menthol, Liquid Menthol, Dementholised Peppermint Oil, Menthol Crystals & various forms of essential oils, Peppermint Oil (Ex-Mentha Piperita), Spearmint Oil, Terpene Oil etc. falling under chapter 29,33,38 and 39 of the First Schedule to the Central Excise Tariff Act 1985. The respondent exported the excisable goods vide various ARE-1, after payment of central excise duty amounting to Rs.39827351/- (including Ed. Cess & H.E.Cess) from their Cenvat Credit account and filed rebate claims. The original authority observed that during the period 2005-06 to 2006-07, the respondent procured 375 consignment of inputs from the units situated in J&K and availed cenvat credit of Rs.26,31,89,542/- on above said inputs purported to have been received from the manufacturers situated at J&K State. The investigation carried out by excise authorities revealed that there was fraudulent availment of cenvat credit in respect of inputs shown to have procured from J&K based units. As such, the duty paid from such fraudulent availed cenvat credit is not eligible for rebate benefits. The original authority rejected the rebate claims on above said grounds.

3. Being aggrieved by the said order-in-original, respondents filed appeal before Commissioner (Appeals) who set aside the order-in-original and allowed the appeal in favour of respondents.

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

4.1 The Commissioner (Appeals) failed to appreciate the fact that an investigation regarding fraudulent availment of CENVAT credit by the party in respect of the inputs shown as purchased from the J & K based manufacturers was in progress and a show cause notice has been already issued to the party. The investigations conducted by the department against the party regarding fraudulent availment of CENVAT credit have interalia revealed that payment of duty was from the accumulated credit which was fraudulently availed. On the basis of detailed investigation, a show cause notice has been issued to the respondents proposing recovery of cenvat credit of Rs. 27,23,76,070/- availed by them. The entire transaction has been fabricated with the intent of taking and utilizing the Cenvat credit fraudulently and thereby wrongly claiming the rebate in respect of duty shown as paid through the Cenvat credit.

4.2 Respondents have knowingly & willfully indulged in fraudulent availment of Cenvat credit on the strength of bogus/fake CENVAT invoices against which no goods have actually been received by them in their factory and utilized the same for payment of duty on the goods cleared for home consumption as well as export and also fraudulently claimed the rebate of duty paid on the goods so exported under Rule 18 of the Central Excise Rules, 2002. Various J&K based manufacturers were instrumental in passing on Cenvat credit fraudulently by issuing bogus invoices to Respondents.

4.3 The Hon'ble Supreme Court in the case of Commissioner of Customs Vs Candid Enterprises reported in 2001(130) E.L.T-404 (S.C.) has held that "Fraud nullifies everything" and hence the decisions which have so far been given in favour of the party are not sustainable as the party has not come up before the various authorities with clean hands. In the same context it is submitted that the Hon'ble High Court of Punjab & Haryana in the case of Golden Tools International Vs Joint DGFT, Ludhiana [2006(199) E.L.T-213 (P&H)] mentioned that the observations of the former Lord Chief Justice of England, Sir Edward Coke, more than three centuries ago, that "fraud avoids all judicial acts, ecclesiastical or temporal" noticed by the Hon'ble Supreme Court in the

case of M/s S.P. Chengalvaraya Naidu V. Jagannath, AIR 1994 SC 853, are apt in such cases.

4.4 It is also evident from the decision of the Hon'ble Supreme Court in the case of Commissioner of Customs, Calcutta, Vs Hanuman Trading Corporation [1997(95) E.L.T-008 (SC)] that the Hon'ble Tribunal can permit adducing evidences before it for the first time. On this basis, it is submitted that even if the present grounds are considered as fresh grounds, the same may be allowed by the Govt.

4.5 The Commissioner (Appeals) have failed to appreciate that it is a case of rebate and no one to one correlation can be established between the input credit invoices and export invoices on which duty was paid. Availment of credit and payment of duty are two separate events having no one to one correlation. Thus the adjudicating authority had no option but to reject the claim in toto.

4.6 The Commissioner (Appeals) has wrongly interpreted the issue of bogus invoice. The issue under investigations was whether there was any actual physical movement of the goods alone with the said invoices. The annexure "D" verification is just one aspect to cross check as to whether the duty was paid on that document. The Commissioner (Appeals) have just selectively picked up one aspect that the duty was found paid by the J&K unit and ignored the hordes of other findings of investigation placed before her by the department. The Commissioner (Appeals) has wrongly held that the adjudicating authority nowhere pointed out any noncompliance on part of the party. The O-in-O's have categorically mentioned that a deficiency memo was issued to the party which was not replied.

4.7 The Commissioner (Appeals) has wrongly held that there was no noncompliance of the statutory provisions & Procedures laid down by Notification No. 19/2004-CE (NT). The rebate claims of the party cannot be examined in isolation restricted to the provision & illustrative procedure contained in Notification No. 19/2004-CE(NT). The

duty which is being sought to be rebated was paid out of the CENVAT credit accrued on the invoices issued by J&K units.

4.8 The ratio of the case Laws of Sterical Gutstringes (P) Ltd. & Classic strips (P) Ltd mentioned by the Commissioner (A) have no applicability to the case at hand. The export of goods by party is not under challenge as in Sterical Gutstringes (P) Ltd case. As far as classic strips (P) Ltd case Law is concerned there are numerous documentary evidences on record indicating the receipt of invoice only without actual movement of goods.

4.9 The Commissioner (Appeals) have very strongly pointed out that the investigation was not completed by the Department in 10 months, however the Commissioner (Appeals) failed to take note of the status of investigations, points of future investigation & the instances of non-cooperation on part of the party, communicated to her by the department on 08-10-09. The Commissioner (Appeals) failed to appreciate the fact that the investigations are not one sided affair, the co-operation of the party/persons under investigation are an absolute must for expeditious conclusion.

5. Show cause notices were issued to the respondent under section 35EE of Central Excise Act, 1944 to file their counter reply. The respondent in their counter written reply dated 23.02.2012, has mainly stated that duty paid nature of goods and export of such duty paid goods stands established and hence, they are eligible for rebate claims. The respondent further vide their written reply submitted at the time of personal hearing on 14.10.2013 mainly stated that:-

5.1 The respondents have mainly reiterated contents of impugned order-in-appeal.

5.2 The impugned Orders-in-Original was passed by the original authority rejecting the rebate claims, even when investigation was not complete and no show cause has been issued for recovery of cenvat credit. Such action is completely against the law, in

contravention of provisions of Central Excise Act and in violation of principles of natural justice. In favor of this contention, the respondent relied upon various case laws.

5.3 The respondents also contended that there are plethora of evidences which clearly proves that the cenvat credit availed by them was bonafide and proper. The department issued show cause notice alleging fraudulent availment of cenvat credit without any evidence/material brought on record in support of the said allegation. As such, show cause notice issued for recovery of cenvat credit from respondent is bad in law. The respondent has relied upon various case laws in favour of their contention.

5.4 All the conditions, procedure specified in Notification No.19/04-CE (NT) dated 6.9.04 are complied with. There is neither any finding in the order-in-original nor any averment in the revision application that any condition or procedure of said Notification has not been complied with.

5.5 The main contention of the department in its revision application is that an investigation regarding alleged fraudulent availment of CENVAT Credit was in progress and the investigation has revealed that payment of duty was from the accumulated credit which was fraudulently availed. It is the allegation against the Respondents that they had knowingly and willfully indulged in fraudulent availment of CENVAT Credit on the strength of bogus/fake CENVAT invoices against which no goods were received by them in their factory and utilized the same for payment of duty on goods cleared for home consumption as well as export. It is emphasized that the department has presumed that the investigation has proved the guilt of the Respondents in taking and utilizing the CENVAT Credit wrongly. The revision application has been filed by pre-judging the issue against the Respondents. It is mentioned very emphatically that till now, no adjudication order has been passed against the respondents confirming the wrong availment and utilization of the CENVAT Credit by the respondents. The averments made in revision application are nothing but allegations which have not been proved so far. In view of these facts, the Commissioner (Appeals) has acted judicially in

not accepting the finding of the Assistant Commissioner in order-in-original that the CENVAT Credit was taken on the strength of fake invoices.

5.6 It is submitted that in any case, the allegations that the CENVAT Credit was taken on the strength of fake invoices without receipt of inputs is completely baseless.

It is emphasized that no evidence/material has been brought on record in support of the said allegation at all and the entire show cause notice has been issued on assumptions and presumptions. It appears from the perusal of the revision application that non-receipt of inputs alongwith the Invoices has been presumed by the department on the basis of some investigation carried out about the supply of crude mentha oil by the farmers based in U.P. It is mentioned that the Department has drawn an unwarranted inference that since crude mentha oil was not supplied by the farmers, the manufacturers at Jammu could not have manufactured Menthol solution, Menthol flakes, DMO etc. and supplied to M/s MAPL. There is no finding of any competent authority on the said issue as the same has not been mentioned in the revision application. In absence of any such finding, it cannot be presumed by the department that the invoices issued by those manufacturers were fake and the respondents had not received the goods in their factory. It is settled law that the show cause notice cannot be issued on mere assumptions and presumption. The Supreme Court has held in Oudh Sugar Mills Ltd. Vs Union of India, 1977 (2) ELT (J172) (SC) that the findings which has been arrived at without any tangible evidence and is based only on inferences involving unwarranted assumptions, is vitiated by an error of law.

6. Personal hearing was scheduled in this case on 28.5.12, 7.8.12 & 15.10.12. Hearing held on 15-10-2013 was attended by Shri V.K.Agarwal, Advocate and Shri Satyanarain, General Manager (Operation) of respondent company on behalf of the respondent who reiterated the submissions made in their written replies. Nobody attended hearing as behalf of applicant department.

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

8. Government observes that rebate claims filed by the respondent were initially rejected by the original authority on the ground that investigation conducted in the matter revealed fraudulent availment of Cenvat credit in respect of inputs shown to have been procured from J&K based units and in fact no duty was paid on exported goods. The respondents filed appeal before the Commissioner (Appeals), who decided the case in the favour of respondent vide impugned order-in-appeal. Now, the applicant department has filed this revision application mainly on the ground that respondents have availed Cenvat credit fraudulently on the strength of fake invoices of inputs issued by Jammu and Kashmir based input suppliers; that evidences have been collected from the units located in Jammu and Kashmir, have not received any inputs i.e. Crude Mentha Oil; that crude Mentha Oil is produced in Uttar Pradesh only and all the crude Mentha Oil suppliers are located in Uttar Pradesh; that evidences collected have established that Uttar Pradesh based suppliers have supplied no Mentha Oil to them and only papers have moved, and that further on examination of transportation documents/records goods from Jammu to Uttar Pradesh based manufacturers, contrary evidences have been found.

9. Government observes that the respondent paid duty on exported goods, from cenvat credit availed in respect of inputs shown to have procured from J&K based manufacturers. The department has carried out a detailed investigation and issued a show cause notice dated 20.5.2010 to the respondent and other parties proposing recovery of cenvat credit of Rs.27,23,76,070/- taken by them during the period April' 2005 to March' 2009 and also for recovery/rejection of rebate claims of Rs.147702866/- which pertained to duty paid out of the cenvat credit fraudulently availed, and rebate claims erroneously sanctioned during April' 05 to March' 09. Government notes that the said Show Cause notice was not before Commissioner (Appeals) while deciding the said appeal and passing the impugned Orders-in-Appeal. The payment of duty on the exported goods is in dispute as the duty was paid from wrongly availed Cenvat credit. The respondent has mainly pleaded that they have taken cenvat credit legally and

payment of duty is in order, that there is no violation of condition and procedure laid down in Notification No.19/04-CE (NT) dated 6.9.04.

10. 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 fulfilment of such procedure, as may be specified in the notification."

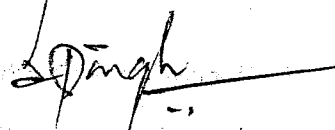
The provision of said rule stipulate that rebate shall be granted of duty paid on excisable goods exported. In this case, payment of duty is in dispute and case for recovery of Cenvat credit & erroneously sanctioned rebate claims is pending adjudication. Though there is no finding in the impugned order-in-original or any averment in the revision application pointing out any violation of condition/procedure as laid down in Notification No.19/04-CE (NT) yet the fact remains that duty paid nature of the exported goods is still in dispute in this case. The fundamental condition for granting rebate is that duty paid nature of exported goods is established. In this case the rebate claims cannot be held admissible as the duty paid from wrongly availed cenvat credit cannot be treated as duty paid on exported goods. The proceeding have been initiated vide the impugned show cause notice dated 20.5.10 for recovery of wrongly availed cenvat credit as well as erroneously sanctioned rebate claims during the period April' 05 to March' 09 and adjudication proceedings are pending before Commissioner of Central Excise. In view of this position it is premature to decide the admissibility of rebate claim till the show cause notice dated 20.5.10 pending adjudication before Commissioner of Central Excise (Adj), New Delhi is decided. The Government does not find force in argument of respondent that issue of demand of cenvat credit and rebate claims are two separate proceedings as the status of payment of duty will be decided in the said ongoing adjudication proceedings. As such, case is

required to be remanded for denovo consideration in the light of outcome of adjudication proceedings in show cause notice dated 20.5.10.

11. Under such circumstances, in the interest of justice, Government sets aside the impugned orders and directs the original authority to decide the rebate claims on the basis of adjudication order to be passed in the ongoing adjudicating proceedings in Show Cause Notice dated 20.5.10 which is pending before CCE (Adj.). A reasonable opportunity of hearing will be afforded to the parties.

12. Revision Application is thus disposed off in above terms.

13. So, ordered.




(D.P.SINGH)

Joint Secretary (Revision Application)

Commissioner Customs & Central Excise,
Meerut-II, (Opp. Shaheed Smarak)
Delhi Road, Meerut, UP

Attest



(शश्वेत शर्मा/Shshwet Sharma)
सहायक आयुक्त/Assistant Commissioner
CBEC-OSD (Revision Application)
वित्त मंत्रालय (आर.एस. विभाग)
Ministry of Finance (Deptt. of Rev.)
नयाँ दिल्ली/New Delhi

Copy to:

1. M/s Mentha & Allied Products, Civil Lines, Rampur
2. Commissioner (Appeals), Customs & Central Excise, Meerut-II, (Opp. Shaheed Smarak) Delhi Road, Meerut, UP.
3. Assistant Commissioner, Customs & Central Excise Division, Rampur
4. Shri V.K.Agrawal, Advocate, C/o M/s Mentha & Allied Products, Civil Lines, Rampur
- ✓ 5. PA to JS(RA)
6. Guard File
7. Spare Copy.

ATTESTED



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