

F.No.198/99-102/2013-RA

REGISTERED
SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.198/99-102/2013-RA / 2199

Date of Issue: 22.03.2021

ORDER NO. 147-150/2021- CX (WZ)/ASRA/MUMBAI DATED 17.03.21 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Commissioner of Central Excise, Thane-II

Respondent : M/s S.D. Enterprises

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. 244-247/BPS/MUM/2013 dated 09.07.2013 passed by Commissioner of Central Excise & Service Tax (Appeals), Mumbai-IV.

ORDER

These four Revision Applications are filed by the Commissioner of Central Excise, Thane-II (hereinafter referred to as "the Applicant") against the Orders-in-Appeal No. 244-247/BPS/MUM/2013 dated 09.07.2013 passed by the Commissioner of Central Excise & Service Tax (Appeals), Mumbai-IV.

2.1 The issue in brief is that M/s S.D. Enterprises, Unit No. 3, 8-Adhikansha Plot NO. 11 & 12, Chinchpada, Vasi(East), Thane-401 208 (hereinafter as 'the Respondent'), manufacturer of Stainless Steel(S.S.) Utensils had exported the excisable goods for export under claims for rebate under 04 ARE-1s totaling amount to Rs. 14,97,872/-. The four rebate claims were rejected by the Assistant Commissioner of Central Excise, Vasai-1 Division vide the four Order-in-Original without issuance of any Show Cause Notices on the grounds that the department had already booked an offence case of alleged wrong availment of Cenvat credit without receipt of the inputs and also on the grounds that exported goods had not been manufactured by the Respondent in their factory premises. However, the adjudicating authority had duly acknowledged the fact of export of subject goods on payment of duty of Rs. 14,97,872/-.

2.2 Aggrieved, the Respondent filed appeal with the Commissioner of Central Excise (Appeals), Mumbai-I. The Commissioner(Appeals) vide PP-53-56/Th-II/2003 dt 31.7.2003 allowed the appeals by way of remand with a direction to the lower adjudicating authority to decide the matter afresh after giving the Respondent adequate opportunity to present their case and after hearing the Respondent in this regard.

2.3 Aggrieved, the Respondent and the Department both filed appeal before the CESTAT by way of preferring Appeal Nos E/2674 to 2677/03, E/3161, E/3183 to E/3185/03. The Hon'ble CESTAT vide Final Order No. A/159-

166/WZB/2005 C-IV dated 24.01.05 dismissed all the appeals by holding that the appeals filed by the Respondent were premature and that the Respondent would be having adequate opportunity to present their case before the original adjudicating authority.

2.4 Accordingly, in compliance to the Commissioner(Appeals) Order-in-Appeal dated 31.07.2013, the adjudicating authority Deputy Commissioner of Central Excise, Vasai Division decided the matter afresh vide Order-in-Original Nos RKS/32 to 35/2010 all dated 09.03.2011 rejected the rebate claims on the grounds that the Respondent had availed the Cenvat credit on the inputs "S.S. Coils" they had not received the same in their factory and despite giving opportunity of principles of natural justice, the Respondent had failed to produce proper records showing the receipt, consumption and inventory of the inputs.

2.5 Aggrieved, the Respondent filed appeal with the Commissioner of Central Excise & Service Tax (Appeals), Mumbai-IV, who vide Orders-in-Appeals Nos. 244-247/BPS/MUM/2013 dated 09.07.2013 allowed their appeals.

The details of these claims are given below:

Sr. No	ARE-1 No & date	Rebate Amount claimed (Rs)	OIO No & date	OIA No. dt	CESTAT Final Order No & dt	Remanded OIO No. & dt	OIA No. dt.
1	09/02-03 dt 11.09.02	3,78,977	191/2003 dt 28.02.03	PP-53- 56/Th- II/2003 dt 31.7.2003 Remanded the case	A/159- 166/WZB/ 2005 C-IV dt 24.01.05	RKS/35/2010 dt 9.3.2011	244- 247/BPS/M UM/2013 dated 09.07.2013
2	10/02-03 dt 11.09.02	3,95,054	189/2003 dt 28.02.03			RKS/33/2010 dt 9.3.2011	
3	13/02-03 dt 16.09.02	3,71,228	149/2003 dt 25.02.03			RKS/32/2010 dt 9.3.2011	
4	14/02-03 dt 16.09.02	3,52,613	190/2003 dt 28.02.03			RKS/34/2010 dt 9.3.2011	
	Total	14,97,872					

3. Aggrieved, the Applicant Department then filed the current four Revision Applications on the following grounds:

- (i) The Order-in-Appeal passed by the Commissioner(Appeals) as unjust and bad in law and not legal and proper.
- (ii) The Commissioner (Appeals) erred in setting aside the impugned orders on the basis of submissions made by the Respondent without going through the merit of the case, whereas it was brought out that the Cenvat credit was fraudulently availed by the Respondent without receiving the input and duty was paid through Cenvat on export with an intention to claim inadmissible rebate.
- (iii) The Deputy Commissioner in his Order-in-Original No. RKS/33/2010 dated 09.03.2011 have mentioned that:
 - (a) The Honble Tribunal while ordering de nova adjudication also observed that appeals filed by the Respondent was pre-mature and that the Respondent will have adequate opportunity to represent their case before the original adjudicating authority. During the course of personal hearing, Shri Deepak Agarwal, inter alia, relied upon the Order-in-Original No. 1064/2004 dated 14.05.2004 passed by the then Assistant Commissioner, Central Excise, Vasai. The facts mentioned in the said Order-in-Original was that on the basis of the information of clandestine removal received by the officers of Vasai Division they searched the premises of Respondent on 18.09.2002 and withdrew incriminating documents. During investigation it was found that the Daily Stock Register was showing closing balance of 2,187 kgs. of finished goods on 04.10.2002. However, in the factory 160383 kgs. finished goods were found lying in packed condition and 173754 kgs. finished goods were found in unpacked condition. S.S. Scrap of 1040 kgs. was also found lying. Thus, total excess stock of 3,35,177 kgs. was found lying in the premises. No plausible reasons for non-accounting of the excess stock in RG1 Register was given by the Respondent. Hence, the excess stock weighing 160383 kgs. in packed condition and 173754 kgs in loose condition and 1041 kgs

scrap valued at Rs.4,15,61,948/- in aggregate was detained on 04.10.2002. Shri Rajendra Jaiswal authorized signatory of the Respondent, in his statement recorded on 26.10.2002 deposed that there was neither any receipt of S.S. Utensils and Cutlery in finished or semi-finished condition or scrap from any source nor there was any production in the factory premises.

- (b) The unaccounted stock of finished goods was seized on 26.10.2002. The then original adjudicating authority writes in his findings in Para 8 of the said order that the Respondent had not given any convincing reason for non accountal of the seized finished goods in the daily stock account and thus have failed to rebut the allegation of suppression of production and non accounting of goods in Daily Stock Register. Therefore, the deposition of Shri Deepak Agarwal at the time of personal hearing conducted before on 20.12.2010, i.e., *"The case was adjudicated by Assistant Commissioner, Vasai Order-in-Original No. 1064/2004 dated 14.05.2004 under which the complete accountal of inputs of goods submitted under reply dated 27.12.2002 was accepted and a speaking order was passed for the above stated period"*, was misleading, as there is nothing concrete forthcoming from the findings of the said Order-in-Original. Rather, it was noticed that the said quasi-judicial adjudicating authority held that the goods seized by the Department under Panchnama dated 26.10.2002 were liable for confiscation. In view of this, reliance placed on Order-in-Original No. 1064/2004 by Shri Deepak Agarwal was out of context and not relevant with the present issue of deciding the erstwhile rejection of rebate claim.
- (c) The then Assistant Commissioner, Vasai had rejected the claim as the Department had booked a case against the Respondent for availing Cenvat credit on inputs without receiving them into factory premises and without utilizing the inputs for manufacturing into his factory premises. During the investigation, it was found that no manufacturing activity was carried out in the factory premises of the Respondent except buffing of a small quantity in rare case. This fact

has been confirmed by Shri N.P. Raghvan, Export Executive, Shri Rajendra Jaiswal, Excise clerk, Shri Arun Kumar Mishra, Supervisor and the employees of the Respondent in their statements recorded under Section 14 of the Central Excise Act, 1944. Further, Shri N.P. Raghvan, in his statements recorded on 18.09.2002 and 19.09.2002 had admitted that no manufacturing activity except buffing in a rare case was carried out in the factory premises that Shri Rajendra Jaiswal and Shri Awn Kumar Mishra in their statements stated that they were getting finished goods from outside and that there was no production in the factory premises. The Electricity bill of the factory premises was on an average Rs. 11,000/- per month. Such extremely low amount of electricity bills supported that no manufacturing activity was carried out in the factory premises. On the aspect of availment of Cenvat credit without receipt of raw material, Shri Rajendra Jaiswal, the Excise Clerk of the Respondent, in his statement recorded on 27.09.2002 under Section 14 of Central Excise Act, 1944 stated that he was working in the factory premises since November, 2002 and that no raw material was received in the factory, however, as instructed to him by Shri N.P. Raghvan, Executive of the Respondent company he was taking entries in Cenvat Account maintained in RG23Part-I and RG23Part-II; that Shri Deepak Agarwal, the partner of the firm, stated that they were getting S.S. Utensils manufactured on job work basis from 40 job workers. Summons were issued to 36 job workers (as per the list given by the Respodnent). However, 26 Summons returned thrice being undelivered due to insufficient addresses. Some of the job workers like Shri Harakchand T. Vora, Proprietor of M/s. Prestige International, Shri Narendra K. Dedhia, Proprietor of M/s. Ami Metal, Shri Prahlad Sing Rajput, Proprietor of M/s. Kamdhenu Metal Industries, to whom the Respondent had claimed to send S.S. Coil for Job Work had stated under Section 14 of the Central Excise Act that

they had not done any job work for the Respondent. Shri Nihal Patel, Proprietor of M/s. Ganesh Industries has stated that he had manufactured S.S. Bowls and plates for the Respondent on job work basis from S.S. Pattas sent to them, however, he had never received S.S. Coils from the Respondent for manufacturing utensils. M/s Sisotia Impex had informed that the Respondent had purchased ready S.S. utensils and that they had never done any job work for the Respondent. The then original adjudicating authority further found that the Respondent had availed Cenvat credit on input "S.S. Coils" though the same was not received into his factory premises, that the Respondent had not carried out any manufacturing activity in his factory premises, mentioned in forgone para are binding which has not been rebutted by Shri Deepak Agarwal either in his deposition on 20.12.2010 or letter dated 19.11.2010.

- (d) That the sub rules (5) & (6) of Rule 9 of CENVAT credit Rules, 2004 cast burden of proof on the manufacturer regarding admissibility of the Cenvat credit taken/availed. The original adjudicating authority in Order-in-Original No. 149/2003 dated 25.02.2003 had clearly mentioned that the Respondent had availed Cenvat credit on inputs "S.S. Coils" though he had not received the inputs into his factory premises and that the duty was paid through Cenvat with an intention to get refund of such wrongly availed credit by way of rebate of duty paid on exported goods. Despite giving opportunity of principles of natural justice, the Respondent had not come up with proper records for the receipt, disposal, consumption and inventory of the inputs, its utilization, the person from whom the input was procured, relevant information such as value, tax paid etc. The Respondent has also rebutted the statements mentioned in the findings of the Order-in-Original No. 149/2003 passed by the then Assistant Commissioner, Vasai. The Hon'ble Supreme Court in the case of Kanungo & Co. Vs. Collector of Customs [1983 (13)ELT

1486(S.C.)) has held that the "Burden of proof shifts from the department to the assessee if the department has disclosed all the evidence on record which militates against the assessee and the assessee is not liable to meet the inference arising there from, The court further held that the burden will also shift on the assessee if false evidence is given by him. Similarly, where the incorrect or forged documents are seized from the Respondent, burden shift on him to prove his bonafide. The Respondent had not discharged burden of proof regarding availment of Cenvat credit on inputs and proper utilization of the same for payment of duty towards the export of goods vide ARE-1 No. 10/02-03 dated 11.09.2002 amounting to Rs.3,95,054/-. Therefore, the rebate claim is not admissible.

(e) The Applicant relied on few cases laws:

- RE: Jhawar International [2012(281)ELT 460(G01)]
- Omkar Overseas ltd [2003 (156) ELT 167 (SC)]
- Sheela Dyeing and Printing Mills [2007 (219) ELT 348 (Tri.Mum)]
- Chintan Processor [2008(232)ELT 663(Tri.Ahm.)]

(f) The Commissioner (Appeal) had erred in setting aside the impugned order by not considering the statement recorded under Section 14 of the Central Excise Act, 1944 as an evidence.

- The Hon'ble Supreme Court in the case of Shri Surjit Singh Chhabra vs U01 [1997(89) ELT 646 (SC)] held that confession statement before Customs officer is binding since Custom officer's are not Police officers.
- In the case of Bhana Khalpa Bhai Patel vs AC.C.,Bulsar [1997 (96) ELT 211(SC)], the Hon'ble Supreme Court held that: *"Statement recorded under Section 108 of Customs Act,1962/Section 14 of Central Excise Act,1944, when found to be voluntary and not vitiated in any manner admissible in evidence — Section 122 and 135 of Customs Act, 1962 — Section 9 and 33 of Central Excise Act, 1944 [1997(90)ELT 241(SC); AIR1970 S.C.940 relied on]*

iv) The Commissioner (Appeal) had also erred in setting aside the Orders-In-Original on the ground that there is no evidence on record to show that

any dues were outstanding against the Respondent. Whereas the demand of Rs. 1,53,52,659/- confirmed by the Commissioner Central Excise Thane-II vide O-in-O Nos 13-15/PKA/Commr/Th-11/2012 dated 28.05.2012 were pending against the Respondent. The Respondent had preferred an appeal before CESTAT Mumbai against the said orders. The Hon'ble CESTAT vide their Order No. S/850-853/13/EB/C-II dated 01.07.2013 has directed the Respondent to deposit an amount equal to 25% of the rebate sanctioned i.e. of Rs.1,53,52,659/- within eight weeks and report compliance on 12.09.2013. The Range Superintendent of Range-I, Vasai Division vide his letter F.No. C.Ex./R-01/Vasai/S.D.Enpt/OIO-13-15/PKA/Commr/Th-11/2012 dated 11.09.2013 had informed that the Respondent has paid the amount of Rs. 38,38,165/- under protest as per CESTAT order No. S/850-853/13/EB/C-II dated 01.07.2013 vide e-receipt dated 02.09.2013 at State Bank of India, Cuffe Parade Branch. Hence it appears that the Respondent is a habitual offender and this facts was not considered by the learned Commissioner (Appeal) and no opportunity to the Department was given to defend the case.

- (v) The Applicant prayed that the impugned Order-in-Appeal be set aside and to remand the case to the Commissioner(Appeals) for reconsideration.

4. A personal hearing in the case was held on 17.01.2018. Shri Vinay Kumar, Assistant Commissioner, Div.-I Vasai, Palghar Commissionerte appeared on behalf of the Applicant and none appeared on behalf of the Respondent. The Applicant reiterated the submission filed in Revision Application and pleaded that the instant Revision Application be allowed and the Order-in-Appeal be set aside. Another personal hearing was fixed on 18.09.2018 for the Respondent, but none appeared. Since there was a change in the Revisionary Authority, hence final personal hearing was filed on 02.12.2020, 07.12.2020, 10.12.2020 and 28.01.2021, but none appeared for

the hearing. Since sufficient opportunities have been given, Government takes up the matter for decision.

5. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

6. On perusal of the records, Government observes that in the remanded cases(details in para 2 above), the four rebate claims were rejected by the Assistant Commissioner of Central Excise, Vasai-1 Division vide four Orders-in-Original all dated 9.3.2011 on the grounds that the department had already booked an offence case of alleged wrong availment of Cenvat credit without receipt of the inputs and also on the grounds that exported goods had not been manufactured by the Respondent in their factory premises.

7.1 Government observes that the Respondent in their appeal before the Commissioner(Appeals) had submitted that

"6.(v) There is no case outstanding against the Respondent pursuant to the case booked in the year 2002. Moreover, the offence-cum-seizure case made out against the Appellant vide Show Cause Notice F.No. V(Adj. (SCN)15/245/Prev/Vasai/M.III/02/3729 dated 29.1.2002 could not sustain as the Ld. Adj. Authority namely Asstt. Commissioner, Central Excise, Div. Vasai-I vide his Order-in-Original No. 1064/2004 dt. 14.5.2004, for the reasons mentioned therein, imposed a penalty of Rs. 5,00,000/- upon the Appellants under Rule 25 of the C.Ex. Rules, 2002 and refrained from initiating action against Shri Deepak Agarwal, Managing Partner of M/s S.D. Enterprises. The aforesaid Order-in-Original dt. 14.5.2004 was agitated before the Commissione(Appeals), Mumbai who vide his Order-in-Appeal No. BR/29/Th.II/2005 dt. 10.2.2005 modified it by reducing the penalty to Rs. 25,000/- only. Being aggrieved by the Order-in-Appeal dt.10.2.2005, the department as well as the Appellants filed Appeals to the Hon'ble CESTAT which were registered as Appeal No. E/1379/05 and E/1508/05-Mum respectively. The Appeal filed by the Appellants was allowed and the penalty of Rs. 25,000/- imposed upon them was set aside whereas, no merit was found in the revenue's Appeal and the same was accordingly dismissed. The matter was further agitated by the Department before the Hon'ble Bombay High Court who, vide their Orders dt. 13.8.2008 rejected the Department's Appeal as no question of law arose in the said appeal. The SLP filed by the Department against the

Bombay High Court's Order dt. 13.8.2008 was also dismissed by the Hon'ble Supreme Court vide their Order dated 9.4.2009. Hence under no circumstances, the rebate claim could be rejected on the ground that a case was booked against the Appellants in the year 2002."

7.2. Government observes that the facts mentioned in the Order-in-Original No. 1064/2004 dated 14.5.2004 is that on the basis of the information of clandestine removal received by the officers of Vasai Division they searched the premises of Respondent on 18.09.2002 and withdrew incriminating documents. During investigation it was found that the Daily Stock Register was showing closing balance of 2,187 kgs. of finished goods on 04.10.2002. However, in the factory 160383 kgs. finished goods were found lying in packed condition and 173754 kgs. finished goods were found in unpacked condition. S.S. Scrap of 1040 kgs. was also found lying. Thus, total excess stock of 3,35,177 kgs. was found lying in the premises.

7.3. Government notes that a detailed information was called for from the Jurisdictional Superintendent Central Excise Range-01, Vasai who vide his letter F.No. C.Ex./01/Vasai/SD/Ent/10/1226 dated 08.03.2011 replied that on going through the SCN dated 29.10.2002, it was observed that same was issued for confiscation of seized finished goods and for imposition of penalty and not involving rebate as submitted by the Respondent.

7.4 Government finds that the issue was regarding imposition of penalty of Rs. 5,00,000/- under Rule 25 of Central Excise Rule, 2002 for non accountal of finished goods in RG-1 Register and not for availment of Cenvat credit without receipt of the input. Hence the reliance placed by the Respondent on Order-in-Original No. 1064/2004 dated 14.5.2004 and the court orders are mis-leading, out of context and not relevant with the present issue of deciding the rejection of rebate claim.

8. Government finds that the Respondent had submitted all the documents i.e.

- (i) Original, Duplicate and Triplicate copies of ARE-1s.
- (ii) Self attested copy of the Shipping Bills;

- (iii) Self attested copy of the Bill of Lading;
- (iv) Duplicate copy of Excise Invoice;

in respect of the 04 rebate claims and the original authority had not given any adverse comments to show that the goods covered by the respective ARE-1s had not been exported or that no duty had been paid on such goods removed for exportation. Here Government finds that there was no mention about the liability on account of any confirmed demands against the Respondent. When the amount of rebate had become due and payable to the Respondent and especially when the said amount of rebate was not liable to be appropriated against any other confirmed demand, the amount of rebate ought to have been paid to the Respondent.

9.1 Government observes that the Deputy Commissioner (Review), Thane-II vide letter F.No. V-2(Ref) Trb-51/App1/03/Th-II/425 dated 13.01.2011 addressed to the Deputy Commissioner, Vasai Division had informed about the acceptance by the Commissioner on 02.05.2005 for Cestat Order No. a/159-166/WZB/05 dated 24.01.2005 and for taking necessary action on pending rebate claim of Rs. 14,97,872/-.

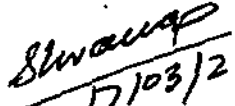
9.2 Findings of Commissioner(Appeals) in his Order-in-Appeal dated 09.07.2013 are reproduced here -

"12. It is therefore, not understood as why the adjudicating authority has failed to take note of the above facts and also the fact that at the time of passing the orders there were no confirmed dues against the Appellants. The Adjudicating Authority has been relentlessly harping repeatedly on the events that took place relating to offence-cum-seizure case booked against the Appellants in the year 2002 which had been lost by the department despite of being agitated before the CESTAT, Bombay High Court and even Supreme Court. On the contrary, there is not even a whisper in the impugned order to show that the goods covered by the aforesaid ARE-1 had not been exported or no duty had been paid on such goods removed for exportation. Moreover, there is no evidence on record to show that any dues are outstanding for recovery against the Appellants."

Government is in agreement with the findings of the Commissioner(Appeals) that the adjudicating authority had the other option of taking re-course of recovery proceedings under Section 11 of the Central Excise Act, 1944 for recovery of erroneous sanction of refunds, if any, or wrong availment of Cenvat credits, etc.

10. In view of above discussions and findings, Government finds no infirmity in the impugned Orders-in-Appeal No. 244-247/BPS/MUM/2013 dated 09.07.2013 passed by the Commissioner of Central Excise & Service Tax (Appeals), Mumbai-IV and upholds the same.

11. The Revision Application filed by the Applicant Department is dismissed on above terms.


17/03/21
(SHRAWAN KUMAR)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 147-150/2021-CX (WZ)/ASRA/MUMBAI Dated 17.03.2021

To,
The Commissioner of Central Goods & Service Tax,
Palghar Commissionerate,
5th floor, GST Bhavan, BKC, Bandra(East),
Mumbai 400 051.

Copy to:

1. M/s S.D. Enterprises, Unit No. 3, 8-Adhikarisha Plot NO. 11 & 12, Chinchpada, Vasi(East), Thane-401 208.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.
4. Spare Copy.