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.195/111-114/14-RA /794 Date of Issue:- 29.01.2021

ORDER NO.15-18/2021-CEX (SZ) /ASRA/MUMBAI DATED 11.01.2021 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 : M/s. Sanmar Foundries Ltd., Viralimalai, Pudukottai District.

Respondent : Commissioner of Customs & Central Excise, Trichy.

Subject : Revision Applications filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. 04/2014 to 07/2014 dated 09.01.2014 passed by the Commissioner Customs & Central Excise (Appeals) Trichirapalli .

ORDER

These Revision Applications have been filed by M/s. Sanmar Foundries Ltd., Viralimalai, Pudukottai District. (hereinafter referred to as the "applicant") against Order-in-Appeal No. 04/2014 to 07/2014 dated 09.01.2014 passed by the Commissioner Customs & Central Excise (Appeals) Trichirapalli.

2. The applicant are manufacturers of Stainless Steel Castings & Non-Alloy Steel Castings falling under Central Excise Tariff Heading 73259999 & 73259930 of Central Excise Tariff Act, 1985. The brief facts leading to the filing of these 4 Revision Applications are as under:-

2.1 Revision Application No. 195/111/14-RA:-

The applicant filed rebate claim for Rs.75,76,990/- in respect of duties paid on the exported goods under 219 numbers of ARE-1s. The Rebate Sanctioning Authority, vide Order in Original No.63/2011 dated 14.09.2011 rejected the entire claim of Rs.75,76,990/-. Aggrieved with the said Order in Original rejecting rebate claim, the applicant filed an Appeal with Commissioner (Appeals) who vide Order in Appeal No.65/2012 dated 21.03.2012 set aside the order of the lower authority as principles of Natural justice had not been followed in passing the Order. Commissioner (Appeals) directed the lower authority to decide the case afresh after giving reasonable opportunity to be heard in person. Accordingly claim was taken afresh and vide Order in Original No. 76/2012 dated 22.06.2012, the Rebate Sanctioning Authority sanctioned an amount of Rs.7,28,818/- ordered that the excess paid duty of Rs.25033/- to be refunded and allowed be taken as credit in Cenvat Account and rejected an amount of Rs.68,23,139/-. Aggrieved with the said Order in Original rejecting rebate claim to the extent of Rs.68,23,139/-, the applicant filed Appeal with Commissioner (Appeals). Commissioner (Appeals) vide OIA NO.314/2012 dated 19-11-2012 decided the Appeal and pursuant to Commissioner (Appeals)'s Order, the Rebate Claim of Rs.68,23,139/- involved in 156 ARE1 s was taken up afresh by the Rebate Sanctioning Authority and vide Order in Original No.58/2013-R dated 23.07.2013, rejected the claim of Rs.68,23,139/- under Section 11B of Central Excise Act, 1994 read with Rule 18 of the Central Excise Rules, 2002. Aggrieved with the order, rejecting Rebate Claim to the extent of Rs.68,23,139/-. Being aggrieved, the applicant filed appeal before Commissioner(Appeals), Trichirapalli who vide Order in

Appeal No. 04/2014 to 07/2014 dated 09.01.2014 rejected the appeal and upheld Order in Original No.58/2013-R dated 23.07.2013.

2.2 Revision Application No. 195/112/14-RA:-

The applicant filed rebate claim for Rs.1,01,95,111/- in respect of duties paid on the goods exported under 194 ARE-1s. The Rebate Sanctioning Authority vide Order in Original No.75/2011 (R) dated 30-09-2011 rejected the entire claim. Aggrieved with the Order in Original No.75/2011 rejecting the rebate claim, the applicant filed an appeal with Commissioner (Appeals) who vide Order in Appeal No.108/2012 dated 24-05-2012 directed the lower authority to follow the principles of natural justice and remanded back the issue him for taking fresh decision. Accordingly, the Rebate Claim of Rs.1,01,95,111/- was taken afresh by the Rebate sanctioning authority and vide Order in Original No.98/2012-R dated 11-09-2012, an amount of Rs.53,22,393/- was sanctioned and ordered to be paid by cheque as rebate in cash under Section 11B of Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002. It was further ordered that the excess paid duty of Rs.1,97,128/- was liable to be refunded and allowed it to be taken in the Cenvat Credit Account. The Rebate sanctioning authority rejected an amount of Rs.46,75,590/-. Being aggrieved with the order rejecting rebate claim to the extent of Rs.46,75,590/-, the applicant filed Appeal with Commissioner (Appeals) who decided the appeal vide Order in Appeal No.356/2012 dated 20-12-2012, and pursuant to this, the rebate claim of Rs.46,75,590/- involved in 72 ARE1s was taken- afresh by the Rebate Sanctioning Authority and vide Order in-Original No.60/2013-R dated 23-07-2013, the amount of Rs.46,75,590/- was rejected under Section 11 B of the Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002. Being aggrieved, the applicant filed appeal before Commissioner (Appeals), Trichirapalli who vide Order in Appeal No. 04/2014 to 07/2014 dated 09.01.2014 rejected the appeal and upheld Order in Original No.60/2013-R dated 23-07-2013.

2.3. Revision Application No. 195/113/14-RA:-

The applicant filed a rebate claim for Rs.13,29,387/- in respect of duties paid under 21 numbers of ARE-1 s. The Rebate sanctioning authority vide Order in Original No.94/2012-R dated 23.08.2012 sanctioned an amount of Rs.7,64,290/- as rebate and ordered that the excess paid duty of

Rs.9,492/- to be refunded under Section 11B of the Central Excise Act, 1944 and allowed it to be taken in the Cenvat Credit Account under respective heads and rejected an amount of Rs.5,55,425/-. Aggrieved with the said Order in Original, the applicant filed an Appeal with Commissioner (Appeals) who vide Order in Appeal No.332/2012 dated 26.11.2012 set aside the order of the lower authority to the extent of rejecting rebate amount of Rs.23,547/- pertaining to ARE1 No.3972/11-12 dated 13.02.2012 and the applicants were directed to produce sufficient evidence before the lower authority to fully satisfy himself for the fact that only those very goods manufactured and cleared under ARE1 3972/11-12 dated 13.02.2012 were exported and subject to this. The rebate sanctioning authority was directed to sanction rebate as per law in respect of said ARE 1. Commissioner (Appeals) held that the order of the lower authority rejecting rebate in respect of the rest of the 9 AREls as sustainable. Persuant to Commissioner (Appeals) Order, the lower authority took up the Rebate claim of Rs.23,537/- involved in ARE1 No.3972/11-12 dated 13.02.2012 and vide Order in Original No.71/2013-R dated 31-07-2013 rejected the claim of Rs.23,537/-. Being aggrieved, the applicant filed appeal before Commissioner (Appeals), Trichirapalli who vide Order in Appeal No. 04/2014 to 07/2014 dated 09.01.2014 rejected the appeal and upheld Order in Original No.71/2013-R dated 31-07-2013.

2.4 Revision Application No. 195/114/14-RA:-

The applicant filed a rebate claim for Rs.79,93,565/.- The Rebate Sanctioning Authority vide Order in Original No.96/2012-R dated 23.08.2012 sanctioned an amount of Rs.38,93,833/- as rebate under Section 11B of the Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002, and ordered that the excess paid duty of Rs.77,074/- to be refunded under Section 11 B of the Central Excise Act, 1944 and allowed it to be taken in the Cenvat Credit Account under respective heads and rejected an amount of Rs.40,22,658/-. Aggrieved with the said Order in Original to the extent of rejecting rebate of Rs.40,22,658/-, the applicant filed an Appeal with Commissioner (Appeals) who vide OIA No.328/2012 dated 26.11.2012 set aside the order of the lower authority and directed the applicant to produce sufficient evidence before the lower authority to fully satisfy himself for the fact that only those very goods manufactured and cleared under impugned ARE ls were exported and subject to this, the lower authority was directed to sanction rebate as per law in respect of said AREls. Pursuant to

Commissioner (Appeals) Order, the Rebate sanctioning authority took up the Rebate claim of Rs.40,22,658/- involved in 18 ARE ls and rejected the claim under Section 11B of the Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002 vide Order in Original No.59/2013-R dated 23-07-2013). Being aggrieved, the applicant filed appeal before Commissioner (Appeals), Trichirapalli who vide Order in Appeal No. 04/2014 to 07/2014 dated 09.01.2014 rejected the appeal and upheld Order in Original No.59/2013-R dated 23-07-2013.

3. Commissioner (Appeals) vide Order-in-Appeal No. 04/2014 to 07/2014 dated 09.01.2014 observed that

The facts leading to the denial of Rebate Claim in the impugned orders were that, there has been an offence case registered against the Appellants by the Central Excise Headquarters, Anti Evasion vide O.R. No.32/2012-13 (HAE Trichy) in file C.No.IV/06/192/2012-HAE on the grounds that the appellants have apparently availed ineligible Cenvat Credit for the period from September, 2007 to August 2012 to the tune of Rs.7.56 Crores. During the currency of the investigations, the Appellants paid an amount of Rs.7.52 Crores in cash towards the ineligible availment of Cenvat Credit. Such a detection of wrong availment of Cenvat Credit by the Anti Evasion Unit, which is having an implication in the sanction of rebate, emerged at the time of processing of the claim by the Rebate Sanctioning authority in terms of Commissioner (Appeals) Order and this fact of wrong availment of credit was not known during earlier round of litigations. Since new facts emerged while scrutinizing and deciding the issue of sanction of rebate, as required, the correctness of duty payment was taken up the lower authority, before looking into the merits of the case. While doing so, the lower authority has observed that the utilization of the said Cenvat Credit, which had been apparently availed improperly, for the purposes of subsequent duty payment therefrom will also become improper. Accordingly, the lower authority has observed that as soon as it became apparent that the claimants had availed irregular cenvat credit amounting to Rs.7.53 Cr, it also became apparent that the duty accumulation in their cenvat credit was also irregular for the period starting from September 2007 to August 2012 and hence subsequent payments of duty, out of such improperly availed CENVAT credit was also improper and therefore, the rebate claimed by them which pertains to the duty paid on goods removed for export out of the said Cenvat Credit accumulation was liable to be rejected as the correctness of the duty paid could not be established. Further, the lower authority has referred to Rule 9(1)(b) of Cenvat Credit Rules, 2004, which states that the manufacturer cannot take credit on supplementary invoices in case additional amount of excise duties has been paid when such short-levy or non-levy has arisen on account of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of the Central Excise Act.

3.1 As regards appellants contention that *"the lower authority erred in denying the refund based on a ground which was not an issue before the adjudicating authority while processing the application and that the said issue was never raised before the Appellate Authority and that the Rebate Sanctioning Authority completely ignored the directions of the Appellate Authority as well as case law of Union of India Vs. Kamlakshmi Financial Corporation Ltd [(1991) 55 ELT 433] wherein it was elaborately held that the order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction"* Commissioner (Appeals) observed that

> *"In this case, the erstwhile Commissioner (Appeals) has remitted the matter to the lower authority to grant rebate subject to verification of documents. Hence, at this stage it was open to the Rebate Sanctioning Authority to take into account such new facts which came into light during such verification of documents, including the duty paying documents, which became a subject matter of investigations. Therefore, the instant case is not a case of exercising jurisdiction to revise the Order of remand and hence not a case where settled issue has been reopened. In the case of Commissioner of Customs & C.Ex Vs Charminar Non wovens Ltd, Hon'ble Supreme Court of India, [2004 (167) ELT 372 (S.C), referring to classification of goods, has held that, "Even though, decision may have been taken earlier at one point of time but on further investigation discover new fact or law has changed, the matter has to be re-examined". Since additional facts came to light subsequently in these cases at hand, which have to be necessarily considered by the lower authority since the fundamental requirement of 'duty paid nature of the goods' is to be satisfied before sanctioning rebate".*

3.2 Commissioner(Appeals) also refuted the contention of the appellants that the Assistant Commissioner becomes 'functus officio' soon after passing the order and also their reliance on case law of Modi Paints and Varnish Works Vs CCE [(2000) 117 ELT 711], by observing that it is not a case where the lower authority issued any corrigendum to the impugned order.

4. Commissioner (Appeals) relying on the Gujarat High Court judgment in the case of Diwan Brothers (2013) 295 ELT 387, Government of India Order in Marim International (2012) 281 ELT 747(GOI), Hon'ble Bombay High Court judgment in the case of Union of India Vs Rainbow Silks[2011 (274)ELT 510], Government of India Order in RE: Tirupur Sri Senthil Cotton Mills Ltd, 2011 (271) ELT 151], Hon'ble Allahabad High Court judgment in CCE, Ghaziabad Vs Ashoka Metal Detector (P) Ltd 2010 (256) ELT 524 (All) and Hon'ble Supreme Court of India in the case of Omkar Overseas Ltd Vs Union of LF TED India [2003 (156) ELT 167 (S.C)] rejected the appeals filed by the applicant and upheld the Orders in Original referred at para 2.1 to 2.4 above, vide Order-in-Appeal No. 04/2014 to 07/2014 dated 09.01.2014.

5. Being aggrieved, the applicant filed a revision applications against the impugned Order in Appeal, mainly on the following common grounds that:

5.1 The Commissioner (Appeals) failed to appreciate that the High Court of Madras (Madurai Bench) while disposing the Writ Appeal (W.A. No. 339/2014) filed by them, directed the Department to repay the entire amount paid by the Applicant during the investigation. Therefore, the denial of refund based on the dispute which is settled by the High Court is totally against the principles of law.

5.2 The Commissioner (Appeals) failed to appreciate that the Applicant filed a Writ Petition challenging the Show Cause Notice and the Hon'ble High Court directed the Department to maintain status quo. It is a settled position of law that the collection during investigation stage was illegal and the High Court has directed to refund the amount; the Show Cause Notice issued is under challenge and status quo has been ordered.

5.3 The Calcutta High Court in the case of Naresh Kumar and Company Vs Union of India (2010) 19 STR 161 has held that the authority has no jurisdiction to collect any amount during inspection and they are not empowered there for. The Department did not have authority to collect duty or demand reversal without a Show Cause Notice. The payment at the time of inspection was under pressure and was also made under protest. The same view has been adopted by the Madurai Bench of the High Court and directed the Department to refund the amount collected during investigation.

5.4 The Commissioner (Appeals) erred in denying the refund based on a ground which was not a issue before the Adjudicating Authority while processing the application and the said issue was never raised before the Appellate Authority. He failed to appreciate that the previous Appellate Authority condoned the procedural lapses and held that refund must be granted if the goods manufactured by the Appellant and exported is one and the same. The Adjudicating Authority completely ignored the directions of the Appellate Authority and had given a finding that the merits of the case need not be considered.

5.5 The Commissioner (Appeals) erred in rejecting the refund on a totally different ground which is a new invention. The adjudicating authority repeatedly violated the judicial discipline even though there was a finding with reference to this violation. The Rebate Sanctioning Authority has not followed any of the settled principles and arbitrarily deciding the issue on different reasons which will be never ending process.

5.6 The Commissioner (Appeals) failed to appreciate the following case laws:-

- Union of India Vs. Kamlakshmi Financial Corporation Ltd. (1991) 55 ELT 433, para 6; -On The principles of judicial discipline require that

the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities

- Ragam Polymers Vs. Commercial Tax Officer (2008) 12 VST 43 has held that the action of the assessing officer in passing the assessment order without any regard to the direction given by the Appellate Assistant Commissioner whose order was binding was not sustainable and had to be set aside with a specific direction to the assessing officer to follow the directions given by the Appellate Assistant Commissioner.

- Larsen & Toubro Ltd Vs. Assistant Commissioner (CT) (2008) 12 VST 54 wherein it is held that once the Appellate Authority gives a direction to the assessing officer, he is bound to follow it as the Appellate Assistant Commissioner is placed vertically over the assessing officer and the hierarchical system in a taxing statue.

- State of Tamil Nadu Vs. National Fasteners (P) Ltd (1995) 98 STC 10 It is held that while passing a consequential order in pursuance of the remand order of the Appellate Authority, the Assessing Officer cannot go beyond the directions given by the Appellate Authority.

- Modi Paints and Varnish Works Vs. CCE (2000) 117 ELT 711 where it was held that no addendum to the adjudication order could be issued as the Adjudicating Authority became functus officio after passing the order.

5.7 The Commissioner (Appeals) failed to appreciate that the authority becomes functus officio when the Adjudication order is passed. Thereafter the addition made is legally not permissible. In the instant case the Adjudicating Authority denied the refund pointing out certain procedural lapse and the said lapses were condoned by the first Appellate Authority. Once the issue in question is settled by a higher Appellate Authority, it is not possible to deny the benefit by adding additional ingredients. The Commissioner (Appeals) erred in justifying the order by giving a finding that the adjudicating authority issued an addendum and therefore the question of functus officio does not arise. This finding is contrary to the decision of the Tribunal in the case of Modi Paints and Varnish Works cited supra wherein it has been held that after passing the adjudication order, no addendum can be issued. He also failed to appreciate that the addendum itself is not legal and proper and therefore the justification that once addendum is issued, the adjudicating authority is entitled to add new grounds is contrary to law. He failed to appreciate that the Adjudicating Authority cannot pass an order based on his whims and fancies and the Adjudication order must be legal and proper considering the factual and legal aspects of the issue in hand and that the inspection from the department and objection to the availment of credit is not conclusive to decide whether the credit is admissible or not.

5.8 The real issue ought to have been decided by the Adjudicating Authority with reference to the procedural lapse is already been condoned by the

Appellate forum vide Order in Appeal No. 328/2012 dated 26.11.2012. This Appellate forum has followed the decision in the case of Coftab Exports (2006) 205 ELT 1027(GOI) and held that what is relevant is only the goods manufactured by the assessee and the goods exported must be one and the same.

5.9 The Commissioner (Appeals) failed to appreciate that it is a well settled principle that procedural lapse cannot be a reason for denial of a substantial benefit. This view has been upheld in the following cases:

(a) A.G. Enterprises (2012) 276 ELT 127
(b) Ford India Pvt. Ltd. Vs ACCE (2011) 272 ELT 353
(c) Ashima Dyecot Ltd. Vs CCE (2011) TIOL 905
(d) Chamunda Pharma Machinery Pvt Ltd Vs. CCE (2009) 244 ELT 194
(e) Birla VXL Ltd Vs. Collector of Central Excise (1998) 99 ELT 387
(f) Wonderful Packing Vs. Commissioner of Central Excise (2002) 147 ELT 626
(g) Kamud Drugs Pvt Ltd (2010) 262 ELT 1177
(h) In RE: Banaras Beads Ltd. (2011) 272 ELT 433
(i) In RE: Deesan Agro Tech Ltd. (2011) 273 ELT 457
(j) UOI Vs Bharat Aluminium Co. Ltd. (2011) 263 ELT 48
(k) Manubhai & Co. Vs CST (2011) 21 STR 65
(l) Madhav Steel & others Vs UOI and others (2010) TIOL 575
(m) CC,CCE & CST Vs JJ Polycast Ltd. (2010) TIOL 136
(n) CST Vs Convergys India Pvt. Ltd. (2009) 16 STR 198
(o) CCE Vs BILT Industrial Packaging Co. Ltd. (2009) TIOL 66
(p) Maschmeijer Aromatics (I) Ltd. Vs CCE (2009) TIOL 112
(q) A.G. Export Industries Vs CCE (2007) 212 ELT 421
(r) Modi Xerox Financial Services Ltd. Vs CCE (2005) 191 ELT 457
(s) Integra Micro Systems Pvt. Ltd. (2005) 180 ELT 174
(t) IOC Ltd. Vs CCE (2004) 178 ELT 834
(u) Rainbow Knitters Pvt. Ltd. Vs CCE (2002) 141 ELT 105
(v) Jay Engg. Works Ltd. Vs CCE (2001) 137 ELT 454
(w) Amrutanjan Ltd. Vs CCE (2001) 128 ELT 244

5.10 When there is no dispute regarding the fact that the goods have been exported by them Applicant and excise duty has been paid into the Government account denial of rebate of the duty paid defeats the export benefits granted by the Government of India. Rejection of the rebate claims was only on the ground that they allegedly availed cenvat credit wrongly and that the Departmental proceedings are pending. In other words, there is no finding whatsoever in the appeal that the goods have not been exported; or that the Applicant has not complied with the provisions of Rule 18 and the notification issued there under; or the goods which are cleared from the factory were not exported to the satisfaction of the Department.

5.11 The Commissioner (Appeals) ought to have limited his finding to the extent of eligibility or non-eligibility of rebate and ought to have allowed the appeal and sanctioned the rebate. The finding that the duty paid character is

not established is without appreciating the clearance made by them, returns filed indicating the clearance and duty payment etc.

5.12 The Commissioner (Appeals) failed to appreciate that the range officer vide O.C.No. 209/201, dated 20.02.2013 recommended the rebate since they complied with all conditions such as export, receipt in convertible foreign exchange etc. and they had fulfilled all the conditions laid down in the Rules read with relevant Notification.

6. In response to show cause notice issued vide letter F.No. 195/111-114/14-Cx. Dated 13.05.2014 the respondent department filed its cross objection contending therein as follows:

6.1 M/s Sanmar Foundries Ltd., Viralimalai are manufacturers of Castings (Rough) and Non-Alloy Steel Castings (Rough). The main input required for their manufacturing activity is MS and SS melting scrap. On investigation by Headquarters Anti- Evasion Unit, it was noticed that the assessee had availed input credit based on invoices not relating to melting scrap, but on the basis of invoices issued for Re-rollable Scrap / Defective HR Steel Plates, Sec HR Steel Plates, etc. which were actually not received in their factory of production. Thus, the assessee had wrongly availed Centat Credit on the materials which were actually not received in their factory of manufacture and wrongly utilized such credit for payment of duty on final products. Therefore on a reasonable belief that assessee had violated the provisions of Cenvat Credit Rules by way of ineligible availment of Cenvat Credit and wrong utilization of the same for payment of Central Excise duty on their final products, the relevant incriminating documents were seized under Mahazar dated 18.09.2012 which corroborated the above fact of availment of ineligible input Cenvat Credit. Based on the above findings, a case of wrong availment of cenvat credit was registered against the said assessee.

6.2 During the course of investigation, assessee voluntarily paid a sum of Rs.7.53 Crores on various dates, towards the ineligible credit availed. Subsequently, the assessee had filed the Writ Petition No.2026/2013 praying the Hon'ble High Court to issue directions in the nature of writ that the collection of Rs. 7.53 Crores and retention thereof by respondents as illegal and consequently direct the respondent to refund the amount together with appropriate interest and pass such further other order as the Hon'ble High Court deem fit. The Hon'ble High Court in its order dated 08.11.2013 disposed of the W.P.2026/2013 with the directions to complete investigation and to issue show cause notice on or before 30.11.2013; that assessee shall, thereafter, submit objections, if any, along with the documents within five days; that after submission of the objections and the documents, by assessee, the Quasi Judicial Authority shall afford sufficient opportunity to assessee and to pass final adjudication order within a period of one month thereafter.

6.3 As directed by the Hon'ble High Court in W.P.2026/2013, a show cause notice dated 29.11.2013 was issued to assessee and two other co-noticees on il

29.11.2013. Assessee filed reply to show cause notice on 06.12.2013 wherein they sought for cross examination of 14 witnesses. Accordingly the cross examination of witnesses and personal hearing was fixed on 13.2.2014. Assessee vide letter dated 11.2.2014 informed that they have preferred a writ appeal against the order in W.P.No.2026/2013 and requested the adjudicating authority to keep the proceedings in abeyance. Therefore the cross examination was posted for 05.03.2014. The assessee vide letter dated 05.03.2014 informed that they had received a favourable order in the WA filed by them and hence requested not to proceed with the adjudication proceedings until the certified copy in the WA is made available.

6.4 The Writ Appeal No.339/2014 filed by the assessee was listed on 27.2.2014 by the Hon'ble Madurai Bench of Madras High Court and the order in W.P.2026/2013 was dismissed in the admission stage of the above WA by giving direction to the Department to return the amount of Rs. 7.53 crores. The certified copy of above order was received on 18.03.2014 wherein it was ordered that the amount of Rs.7.53 Crores is to be refunded to the petitioner within a period of two weeks from the date of receipt of copy of the order, without Interest and that if the respondent do not return the amount within the stipulated period, the appellant are entitled to interest as applicable to the cases of refund. In the meanwhile, as the adjudication proceedings were posted for 12.03.2014, the assessee filed a Writ Petition 4296 of 2014 on 11.03.2014 wherein they prayed for staying further proceedings in the SCN.

6.5 Hence, the adjudication proceedings could not be taken by the Commissioner of Central Excise, Trichy. However, this office filed a Review Petition on 26.03.2014 against the order of High Court in W.A.(MD) No.339/2014 dated 27.02.2014 wherein the plea for staying the operation of the said Writ Appeal for refund of Rs.7.53 Crores and seeking review of the order passed by the court in the above order. The Hon'ble Madurai Bench of Madras High Court has allowed the review petition No.61/2014 vide separate order passed on 28.04.2014 and the Writ Appeal No.339/2014 dated 27.02.2014 was recalled and set aside the order of the learned Judge. The said Writ Appeal No.339/2014 dated 27.02.2014 was reopened for fresh hearing. Upon the fresh hearing the present judgment was delivered by the Hon'ble High court vide W.A 339/2014 dated 30.04.2014, wherein the Hon'ble High court allowed the Writ Appeal filed by the assessee and directed the respondents (department) to refund the amount of Rs.7.53 crores collected from the assessee. The Hon'ble High Court gave a time of four weeks to the department to make payment of the amount to the assessee, from the date of receipt of copy of the order and if the department fail to make payment within four weeks from the date of receipt of a copy of the order, the department would become liable to pay interest @ 6% per annum on the said amount from the date of expiry of the time for payment stipulated therein. The above judgment is against the revenue and legally not maintainable as the High court wrongly understood the procedures of Central Excise Act, 1944 and the facts of the issue. Hence, proposal for SLP against the said Order was made on various grounds.

6.6 M/s Sanmar Foundries Ltd., Viralimalai filed the subject rebate claims for the duty paid on goods removed from the factory and exported out of the Cenvat Credit Account with such wrongly availed credits during the period from September 2007 to August 2012. The irregular availment of Cenvat Credit of Rs 7.53 Crores by the assessee makes sufficient cause to believe that the duty accumulation of Cenvat Credit Account during the period from September 2007 to August 2012 is improper and subsequent payments of duty out of such wrong credits is also improper. The Central Excise duty on exported goods was paid through the Cenvat Credit by way of utilization of the Credit wrongly availed. On account of the absence of the duty paid nature of raw materials, the said appellant is not entitled to CENVAT Credit. The CENVAT Credit availed and utilized, was a wrong Credit which the appellant is not entitled to discharge of duty on Export Goods and claim for Rebate of duty purported to have been paid. The Scheme of Cenvat, which provides for the facility of availing credit in respect of the duty incurred on raw materials to be utilized in the manufacture of the dutiable final clearly requires proper utilization of such credit in accordance with the provisions of law, otherwise availment of such credit would be rendered unlawful.

In view of the above the respondent prayed that Revision Application filed by M/s Sanmar Foundries Ltd., Viralimalai has no merit and the same may be rejected.

7. Personal hearing in this case was held on 23.12.2020 through video conferencing and Shri K Vaitheeswaran, Advocate appeared online for hearing on behalf of the applicant. He informed that written submission dated 21.12.2020 have been submitted in case of M/s Sanmar Foundeies Ltd. He submitted that in these set of Revision Applications a show cause notice was issued to them denying certain cenvat credit and therefore, rebate has been rejected. He contended that rebate cannot be denied on this ground. He further argued that the said show cause notice has been stayed by the Hon'ble Madras High Court, Madurai Bench.

8. In their written submissions dated 21.12.2020 the applicant reiterated the grounds of the Revision Application and additionally submitted as under:-

- The Department issued Show Cause Notice No.22/2013 questioning the cenvat credit which was challenged before the High Court through Writ proceedings and the current interim order in force is the order dated 08.01.2015 in W.A.No.1151/2014 wherein, the Hon'ble High Court has stayed the Show Cause Notice No.22/2013 dated 29.11.2013.
- It is a settled position of law that normally, a High Court would not interfere in a Writ proceeding against a Show Cause Notice and grant

relief unless it notices that the show cause notice was prima facie illegal. In the instant case, the show cause notice for denial of cenvat credit which is the basis for denial of excise rebate continues to remain stayed by the High Court. There is no adjudication, there is no demand and the department has not moved any petition to vacate the stay.

- It is therefore not correct on the part of the Department to deny the excise rebate on exports when there is no dispute with reference to export or payment of duty on export or on realisation of foreign exchange. When valuable foreign exchange has been garnered for the country and the policy of Government of India has always been to encourage exporters, denial of the excise rebate claim for pendency of a show cause notice completely defeats of the objective of the excise rebate scheme: the policy of the Government of India and the vision of the Hon'ble Prime Minister of India.

- The Range Officer had recommended the rebate since they had complied with all the conditions such as export, receipt in convertible foreign exchange and therefore mere issue of show cause notice which has also been stayed by the High Court cannot be the basis for rejection of rebate claim.

- The Gujarat High Court in the case of Kamakshi Tradexim (India) Pvt. Ltd. Vs. UoI (2016) 338 ELT 528 wherein the High Court has held that the rebate claim of the Petitioner cannot be kept pending till final outcome of proceedings. The rebate claim could not have been made contingent on the outcome of the said proceedings which were to be decided at a future date. The submissions made by the Revenue that the interest of the Revenue would be adversely affected unless the rebate claim are kept pending was rejected by the High Court.

- The decision is directly applicable since the only reason given in respect of the revision application forming part of the list set out in "A' category is the pendency of show cause notice. The rebate claim is based on the duty paid on exports and need not wait the outcome of the show cause notice. In fact, it is the exporter who is affected since on one hand the rebate has been denied and on the other hand even if the show cause notice is quashed by the High Court, a fresh rebate claim cannot be made. On the other hand, there is no loss to the Revenue since even if the High Court allows the show cause notice to go on and assuming, there is a demand based on the show cause notice, the same would be payable subject to appeal. It is submitted that when the cenvat credit was utilized for payment of excise duty it was validly availed cenvat credit and it remains as validly availed credit as on date. A mere issue of show cause notice questioning the credit would not defeat the genuinely availed credit and in any event those are separate proceedings and the pendency of the show cause notice cannot be the basis for denial of excise rebate.

9. Government has carefully gone through the relevant case records and perused the impugned Orders-in-original and orders-in-appeal cross objections filed by the department as well as written submissions dated 21.12.2020 filed by the applicant. As the issue involved in these 4 Revision Applications being common, they are taken up together and are disposed of vide this common order.

10. Government observes that a Show Cause Notice No.22/2013 dated 29.11.2013 has been issued to the applicant for alleged irregular availment of Cenvat Credit of Rs.7.53 Crores for the period from September 2007 to August 2012 and it is the contention of the department that there is sufficient cause to believe that the duty accumulation of Cenvat Credit amount during the period from September 2007 to August, 2012 is improper and subsequent payments of duty out of such wrong credits is also improper. Therefore, the rebates sought to be claimed are denied as the genuineness as to whether the Cenvat Credit taken is lawful and duty debited against such balance is proper / valid in the eyes of law could not be ascertained. The applicant on the other hand has contended that as the Range Officer had recommended the rebate since they had complied with all the conditions such as export, receipt in convertible foreign exchange and therefore mere issue of show cause notice which has also been stayed by the High Court cannot be the basis for rejection of rebate claim.

11. Government observes that SLP filed by the respondent Department against the Hon'ble High Court of Madras, Madurai Bench's Order dated 30.04.2014 in WA No. 339/2014 has been dismissed by Hon'ble Supreme Court vide Order dated 15.12.2014. However, it is equally pertinent to note that Writ Petition (MD) No. 4296 of 2014 and M.P.(MD) No. 1 of 2014 filed by the applicant challenging the show cause notice issued by the Commissioner of Central Excise and Customs, Tiruchirappalli, dated 29 November, 2013, primarily on the ground that "*it was issued with a pre-determined mind and no useful purpose would be served, by holding further enquiry in the matter,* has been dismissed by the Hon'ble High Court of Madras at Madurai vide judgment dated 21.08.2014 holding that " *on a careful consideration of the background facts, I am of the view that the petitioner has not made out a case for quashing the statutory proceedings*". The observations made by the Hon'ble High Court at Para 21 and Para 23 (reproduced below) of its judgment dated 21.08.2014 are relevant in the

context of the issue relating to Show Cause Notice No.22/2013 dated 29.11.2013:-

> ***21.*** *The show cause notice contained various details. It starts from verification at factory premises and evidence collected. The respondent, in the show cause notice dated 29 November, 2013, categorized the background facts, materials collected and the prima facie findings in the following words :*
>
> *"(i) verification at factory premises and evidences found;*
> *(ii) verification at the major suppliers (II stage dealer) to Sanmar;*
> *(iii) deposition of company officials;*
> *(iv) deposition of first stage dealers/manufacturers;*
> *(v) depositions of Custom House Agents involved in the clearance of the alleged imported materials;*
> *(vi) depositions of the major suppliers to the petitioner (second stage dealer);*
> *(vii) further documentary evidences;*
> *(viii) payment by Sanmar towards liability;*
> *(ix) provisional release of seized goods;*
> *(x) summary of charges;*
> *(xi) quantification of Central Excise Duty liability;*
> *(xii) quantification of Central Excise Duty liability towards shortage of 'scrap' noticed during stock taking;*
> *(xiii) contraventions;*
> *(xiv) invocation of extended period; and*
> *(xv) penal provisions."*
>
> ***22.*** .....
>
> ***23.*** *The respondent in a very fair manner disclosed all the materials collected during the course of investigation. Nothing was withheld. In case an argument of this nature is entertained that by giving details of the violations and the evidence collected in the show cause notice as well as in the counter-affidavit, no purpose would be served by submitting to the jurisdiction of the statutory authority none of the authorities, exercising jurisdiction under various Statutes and more particularly, under the Central Excise Act, would be in a position to discharge the statutory function. Merely because the show cause notice does not contain a specific word that these are all prima facie findings, the petitioner cannot be heard to say that the respondent has decided the issue once for all and the notice is issued only as a ritual. It is not as if the order passed by the respondent is final. The Central Sales Tax Act contains hierarchy of authorities, in case final order is passed by the respondent by rejecting the explanation. The petitioner is also having a remedy of appeal before the High Court.*

Hon'ble High Court at Para 14 of its judgment dated 21.08.2014 in '*analysis*' part also observed as under:-

> ***14.*** *The respondent in its show cause notice dated 29 November, 2013, prima facie demonstrated that the petitioner made an attempt to obtain Cenvat credit by manipulating records. The respondent has given certain instances to suggest that the petitioner availed Cenvat credit, notwithstanding its ineligibility. Similarly, in the counter-affidavit filed in this Writ Petition also, the respondent has stated that the investigation conducted prima facie disclosed the commission of certain illegal acts by the petitioner.*

In view of the aforesaid findings of Hon'ble High Court, Government is of the considered opinion that the Show Cause Notice No.22/2013 dated 29.11.2013 issued to the applicant cannot simply be brushed aside while sanctioning impugned rebate claims just because all the other conditions such as export, receipt in convertible foreign exchange have been fulfilled by the applicant. The applicant has relied upon Hon'ble Gujarat High Court's judgment in the case of Kamakshi Tradexim (India) Pvt. Ltd. Vs. UoI (2016) 338 ELT 528 wherein the Hon'ble High Court held that the rebate claim of the Petitioner cannot be kept pending till final outcome of proceedings and that the rebate claim could not have been made contingent on the outcome of the said proceedings which were to be decided at a future date.

12. Government observes that in the above referred case the Original authority rejected the rebate claims filed by the petitioner company on the ground that condition laid down at Sr. No. 2(e) of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004, stood contravened. On appeal being filed by the petitioner Company, the Commissioner of Central Excise (Appeals), Ahmedabad allowed the appeal with consequential relief. The Excise Department filed a revision application against the same before the Joint Secretary, Government of India, New Delhi. who vide the impugned order dated 1-10-2012, held that the case was required to be remanded for a fresh decision. The revisional authority, in the order made on the Revenue's revision application, observed that the outcome of DGCEI investigation and final decision in classification dispute by common adjudicator Commissioner of Central Excise, Vapi were required to be taken into account and the applicability of Condition No. 2(h) of Notification No. 19/2004-C.E. (N.T.) was also required to be examined. In this case the proceedings were also initiated by DGCEI and Commissioner, Vapi against another similarly situated unit, M/s Unicorn Industries which were also pending finalization at various levels. In this context the Hon'ble High Court observed that purpose of keeping *the rebate claims of the petitioners which are filed way back in the year 2011 cannot be kept pending till the outcome of other proceedings*. Whereas in the present case the Show Cause Notice No.22/2013 dated 29.11.2013 has been issued to the applicant for alleged irregular availment of Cenvat Credit of Rs.7.53 Crores for the period from September 2007 to August 2012. When the goods are cleared for exports on payment of duty from such irregularly accumulated Cenvat Credit, there is no question of duty being paid therefrom.

Therefore, outcome of the show cause notice No.22/2013 dated 29.11.2013 is significant to decide whether rebate of duty claimed by the applicant is paid from properly availed / legally admissible Cenvat credit, thus fulfilling the fundamental requirement of "export of duty paid goods", for grant of rebate in terms of Rule 18 of Central Excise Rules read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. Thus, in the present case the grant of rebate is contingent to outcome /decision/adjudication of the said show cause notice. Moreover, in the present case the department after issuing of show cause notice made efforts to get the same adjudicated (para 6.3 supra refers) but it was the applicant who by way of filing WP/WA before Hon'ble High Court, Madras, Madurai Bench, got the show cause notice proceedings stayed. From the prayer made by the applicant as apparent from Order dated 08.01.2015 in W.A.No.1151/2014 of the Hon'ble High Court of Madras, Madurai Bench, the stay on Show Cause Notice No.22/2013 dated 29.11.2013 is likely to continue till the disposal of the W.A.No.1151/2014. Hence, the facts of the present cases are distinguishable from that of Kamakshi Tradexim (India) Pvt. Ltd.(supra) relied upon by the applicant and hence cannot be made applicable to the cases in hand.

13. It is also pertinent to note that when the case of wrong availment of Cenvat Credit was registered against the applicant they voluntarily paid a sum of Rs.7.53 Crores on various dates towards the ineligible credit availed, which they later claimed to have paid under pressure and force. Applicant is so certain about Cenvat Credit availed during the material time being valid and lawful; the applicant would have allowed adjudication of SCN instead of getting it stayed it from Hon'ble High Court. Similarly, despite huge Government revenue being at stake, the department has also not taken any proactive steps for early disposal of the W.A.No.1151/2014 and/ or to get the stay on the Show cause notice vacated so that the department can decide on admissibility of the Cenvat Credit availed which in turn would decide the fate of the impugned rebate claims. As in the present case the said Show cause notice challenging the availment of Cenvat Credit during the period from September 2007 to August, 2012 continued to be stayed by the Hon'ble Madras High Court (Madurai Bench) vide interim Orders dated 08.1.2015 and 25.01.2016, it is already receiving the attention of the said Hon'ble High Court. Therefore, it would not be proper for this authority to take a view of the matter as regards admissibility of the alleged irregular Cenvat Credit and

consequently rebate claims of duty paid for exports out of such alleged inadmissible credit in these cases at this moment. As regards contention of the applicant that *'once the issue in question is settled by a higher Appellate Authority, it is not possible to deny the benefit by adding additional ingredients'* Government observes that initially when these 4 rebate claims were taken up for disposal, the wrong availment of Cenvat Credit availment was not detected by Headquarters Anti Evasion Unit (HAU) and the Range Officer in his report stated that HAU has detected the wrong availment of Cenvat Credit by the applicant to the tune of Rs.7.52 crores during the period from September 2007 to August 2012 and recommended the claims for rejection. This detection did make sufficient cause to believe that duty paid out of such wrongly availed and accumulated Cenvat credit cannot be treated as payment of duty on export goods as no actual Cenvat credit was available. Therefore while considering the cases a fresh in remand, it was obligatory on the part of rebate sanctioning authority to verify correctness of duty paid nature of exported goods. Hence Government is in total agreement with Commissioner (Appeals) observations in impugned Order that *"since additional facts came to light subsequently in these cases at hand, which have to be necessarily considered by the lower authority since the fundamental requirement of 'duty paid nature of the goods' is to be satisfied before sanctioning rebate"* (Para 3.2 supra). Also. as the rebate claims were denied by the rebate sanctioning authority purely on the grounds of detection of irregular availment of Cenvat Credit by the applicant to the tune of Rs.7.52 crores (from which the Export duty was allegedly paid) vide aforementioned 4 Orders in Original and also upheld by Commissioner (Appeals) on the grounds of issuance of Show Cause Notice dated 29.11.2013 for recovery of such wrongly taken credit, the applicant's reliance on various case laws on *'principle that procedural lapse cannot be a reason for denial of a substantial benefit'* mentioned at para 5.9 supra is out of place.

14. Government observes that Hon'ble High Court Madras in Premier Cotton Textiles Vs Commissioner of CGST Coimbatore 2019 (368) E.L.T. 465 (Mad.) while deciding the validity of show cause notice observed as under:-

> **33.** *This takes us to the scope of exercise of writ jurisdiction when SCNs are challenged. No elaboration is required to say that the scope of interference in writ jurisdiction is very limited when SCNs are called in question. The exceptions to this rule are very few and in the instant case, as alluded to supra, the exception was projected on the basis of jurisdictional fact. As jurisdictional fact, ...*

preferring an appeal against O-I-O has been answered against writ petitioners, it follows as a sequitter that this case does not fall in any of the exceptions to the rule of limited and restricted exercise of writ jurisdiction when SCNs are assailed in writ jurisdiction.

34. *This Court also reminds itself of a judgment of Hon'ble Supreme Court in Kunisetty Satyanarayana case being Union of India v. Kunisetty Satyanarayana reported in (2006) 12 SCC 28, wherein Hon'ble Supreme Court has held that interference in SCNs in writ jurisdiction should be in rare and exceptional cases. Relevant paragraphs are paragraphs 15 and 16 and the same read as follows :*

"15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show cause notice or chargesheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

(underlining made by this Court to supply emphasis and highlight)

15. In CCE, Haldia Vs Krishna Wax (P) Ltd., 2019(368) E.L.T. 769 (S.C.) Hon'ble Supreme Court while dealing with a similar issue observed as under:-

11. *It must be noted that while issuing a show cause notice under Section 11A of the Act, what is entertained by the Department is only a prima facie view, on the basis of which the show cause notice is issued. The determination comes only after a response or representation is preferred by the person to whom the show cause notice is addressed. As a part of his response, the concerned person may present his view point on all possible issues and only thereafter the determination or decision is arrived at. In the present case even before the response could be made by the respondent and the determination could be arrived at, the matter was carried in appeal against said Internal Order. The appellant was therefore, justified in submitting that the appeal itself was premature.*

12. *It has been laid down by this Court that the excise law is a complete code in itself and it would normally not be appropriate for a Writ Court to entertain a petition under Article 226 of the Constitution and that the concerned person must first raise all the objections before the authority who had issued a show cause notice and the redressal in terms of the existing provisions of the law could be taken resort to if an adverse order was passed against such person. For example in Union of India and Another v. Guwahati Carbon Limited [(2012) 11 SCC 651 = 2012 (278) E.L.T. 26 (S.C.)], it was concluded; "The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the Writ Court to entertain a petition under Article 226 of the Constitution", while in Malladi Drugs and Pharma Ltd. v. Union of India [2004 (166) E.L.T. 153 (S.C.)] it was observed :-*

"...The High Court, has, by the impugned judgment held that the Appellant should first raise all the objections before the Authority who have issued the show cause notice and in case any adverse order is passed against the Appellant, then liberty has been granted to approach the High Court...

...in our view, the High Court was absolutely right in dismissing the writ petition against a mere show cause notice."

It is thus well-settled that writ petition should normally not be entertained against mere issuance of show cause notice. In the present case no show cause notice was even issued when the High Court had initially entertained the petition and directed the Department to prima facie consider whether there was material to proceed with the matter.

Taking cognizance of the aforesaid judgements, Government observes there are plenty of reasons available with the department to seek the vacation of stay on show cause notice proceedings from the Hon'ble High Court.

16. In view of the foregoing discussions, Government modifies Order in Appeal No. 04/2014 to 07/2014 dated 09.01.2014 passed by the Commissioner Customs & Central Excise (Appeals), Trichirapalli with directions to take necessary steps for early disposal of WA(MD) No.1151 of 2014 before the Hon'ble Madras High Court(Madurai Bench) or alternatively to get the stay on Show Cause Notice No.22/2013 dated 29.11.2013 vacated and expedite the adjudication of the said show cause notice. Thereupon the rebate sanctioning authority shall examine on merits all the rebate claims rejected on account of pendency of the said Show Cause Notice.

17. Revision Applications are disposed off in the above terms.

Shrawan
11/01/2021

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No.15-18/2021-CEX (SZ) /ASRA/Mumbai Dated 11.01.2021

To,
M/s. Sanmar Foundaries Limited,
87/1, Vadugapatti Village,
Viralimalai,
Pudukottai District- 621316

Copy to:

1. The Commissioner of CGST & CX, Tiruchirapalli (Trichy), No.1, Williams Road, Cantonment, Tiruchirapalli 620 001
2. The Commissioner of CGST & CX (Appeals) Tiruchirapalli [Trichy] No.1, Williams Road, Cantonment, Tiruchirapalli – 620001
3. The Deputy / Assistant Commissioner, of CGST & CX, Trichy I Division, No.1, Williams Road, Cantonment, Tiruchirapalli 620 001
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.