

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.195/254-255/14-RA

Date of Issue: 22/5/2018

ORDER NO. 150-151/2018-CX (WZ)/ASRA/MUMBAI DATED ^{01/5} 2018 OF
THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR
MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL
SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF
THE CENTRAL EXCISE ACT, 1944.

Applicant : (i) M/s Prime Exports, Surat &
(ii) M/s Daffodils Exports, Surat.

Respondent : Commissioner of Central Excise, Mumbai- Zone-I.

Subject : Revision Application filed under Section 35EE of the Central
Excise Act, 1944 against Order-in-Appeal No.PD/57 & 58/M-
1/2014 dated 28.03.2014 passed by the Commissioner
(Appeals-I), Central Excise Mumbai Zone-I.



ORDER

These two revision applications are respectively filed by the applicants (1) M/s Prime Exports, Surat and (2) M/s Daffodils Exports, Surat against the Order in Appeal No. PD/57 & 58/M-1/2014 dated 28.03.2014 passed by the Commissioner (Appeals-I), Central Excise Mumbai Zone-I.

2. Brief fact of the case is that M/s Prime Exports, the applicant No. 1 who are also engaged in the export of processed fabrics falling under Chapter 54 of the First Schedule to the Central Excise Tariff Act, 1985 procured two consignments from M/s Muni Trade Pvt. Ltd.; six consignments from M/s Globe Traders and one consignment from M/s Mansa Traders all falling under the jurisdiction of Division-Kalyan-1, Thane-1 Commissionerate and claimed to have exported these fabrics. Thereafter, they filed 9 rebate claims amounting to Rs. 15,73,049/- (Rupees Fifteen Lakhs Seventy Three Thousand and Forty Nine only) under Notification No. 19/2004CE (NT) date 06.09.2004 and Notification No.40/2001 CE(NT) dated 26.06.2001 against export of goods. In light of different frauds committed by Manufacturers and Exporters a Show cause Notice cum Deficiency Memo was issued to the applicant No.1 to produce the duty payment certificate in a sealed cover amongst others. In addition the jurisdictional Range Superintendent was requested to verify the genuineness of Cenvat credit availed and duty paid on the impugned goods by the manufacturers. Jurisdictional Assistant / Deputy Commissioner was asked to verify if the goods were self sealed and self certified by the manufacturer under prior intimation. Assistant Commissioner (Prev), Central Excise, Thane-1 vide letter No. V/PI/Th-1/12-5/05 dated 02.05.2005 informed that a case of fraudulent availment of Cenvat Credit and fraudulent claim of rebate has been booked against M/s Muni Trade Pvt. Ltd., M/s Globe Traders, M/s Mansa Traders, M/s Apex Corporation etc. (herein after referred to as 'Muni Group') and that these units had availed Cenvat credit on the basis of invoices pertaining to false, bogus and non-existing units. Since the



applicant No.1 did not appear for the personal hearing and had failed to produce the Duty Paying Certificate in a sealed cover, the claims were rejected. The applicant No.1 preferred appeal, which was also rejected by Commissioner (Appeals). The applicant No.1 preferred appeal against the same with Government of India by way of Revision Application. Hon'ble Joint Secretary (R.A.) vide his Order No. 192/10-CX dated 09.02.2010 allowed the Revision Application. Revenue preferred Writ Petition No. 6288/2010 in Bombay High Court. Hon'ble Bombay High Court vide Order dated 27.06.2011 remanded the matter back to Joint Secretary (R.A.) for fresh consideration after taking into account all the materials on record. Pursuant to Hon'ble Bombay High Court order dated 27.06.2011, Joint Secretary (R.A.) vide Order No. 95-96/13-Cx dated 01.02.2013 remanded the case back to the original authority for denovo adjudication after taking into consideration the observations made by GOI and set aside the Order in Appeal.

3. In another Revision application, M/s Daffodils Ltd. (applicant No. 2) who are engaged in the export of processed fabrics falling under Chapter 54 of the First Schedule to the Central Excise Tariff Act, 1985, during June 2004, procured dyed printed fabrics from M/s Mansa Traders falling under the jurisdiction of Division-Kalyan -I, Thane-I Commissionerate and claimed to have exported these fabrics. Thereafter, they filed 14 rebate claims amounting to Rs.34,66,462/- (Rupees Thirty Four Lakhs Sixty Six Thousand Four Hundred and Sixty Two only) under Notification No. 19/2004CE (NT) date 06.09.2004 and Notification No.40/2001 CE(NT) dated 26.06.2001. In light of different frauds committed by Manufacturers and Exporters a Show Cause Notice cum Deficiency Memo was issued to the applicant No. 2 to produce the duty Payment certificate in a sealed cover amongst others. In addition the jurisdictional Range Superintendent was requested to verify the genuineness of Cenvat credit availed and duty paid on the impugned goods by the manufacturers. Jurisdictional Assistant /Deputy Commissioner was asked to verify if the goods were self sealed and self certified by the manufacturer under prior intimation. Assistant Commissioner (Prev), Central Excise, Thane-1 vide letter No. V/Pl/Th-1/12-



5/05 dated 02.05.2005 informed that a case of fraudulent avilment of Cenvat Credit and fraudulent claim of rebate has been booked against M/s Mansa Traders, M/s Muni Trade Pvt. Ltd., M/s Apex Corporation etc. (herein after referred to as 'Muni Group') and that these units had availed Cenvat credit on the basis of invoices pertaining to false, bogus and non-existing units. Since the applicant No.2 did not appear for the personal hearing and had failed to produce the duty paying certificate in a sealed cover, the claims were rejected. The applicant No. 2 preferred appeal, which was also rejected by Commissioner (Appeals). The applicant No. 2 preferred appeal, against the same with Government of India by way of Revision Application. Joint Secretary (R.A.) vide his Order No. 193/10-CX dated 09.02.2010 allowed the Revision Application. Against this order of Hon'ble Joint Secretary (R.A.), Revenue preferred Writ Petition No. 6289/2010 in Hon'ble Bombay High Court. Hon'ble Bombay High Court vide Order dated 27.06.2011 remanded the matter back to Joint Secretary (R.A.) for fresh consideration in accordance with law. Pursuant to Hon'ble Bombay High Court order dated 27.06.2011, Joint Secretary (R.A.) vide his Order No. 95-96/13-Cx dated 01.02.2013 remanded the case back to the original authority for denovo adjudication after taking into consideration the observations made by GOI and set aside the Order in Appeal.

4. The Deputy Commissioner (Rebate), Central Excise, Mumbai-I Commissionerate, decided both the cases. He rejected the rebate claims filed by both the applicants under Rule 18 of the Central Excise Rules, 2002 read with Section 11B of the Central Excise Act, 1944 vide Orders-in-Original No.23/MTC-R/denovo/2013-14 dated 14.05.2013 & No.21/MTC-R/denovo/2013-14 dated 13.05.2013 respectively.

5. Being aggrieved with the above Orders in Original, both the applicants preferred an appeal with the appellate authority, who, vide impugned Order in Appeal dated 28.03.2014 rejected applicants' appeals on merits as well as on time bar and upheld both the Orders in Original.



6. Being aggrieved, both the applicants filed the instant Revision Applications against the impugned Order in Appeal on the following common ground that :

- 6.1 the impugned Order-in-Appeal dated 28.3.2014 passed by the Commissioner (Appeals), Central Excise, Mumbai-I is incorrect in law as well as on facts. The impugned decision is liable to be set aside for this reason itself,
- 6.2 the Commissioner (Appeals) in its impugned Order-in-Appeal dated 28.3.2014 held that since the appeal was filed after 152 days of the Order-in-Original dated 13/14.5.2013, there is delay of 92 days in filing the appeal Further, the applicants have neither filed any application for condonation of delay nor they submitted sufficient cause for delay in filing the appeal. Therefore, the appeal is time barred and hence rejected. The aforesaid finding of the Commissioner (Appeals) is factually and legally incorrect. Section 35(1) of the Central Excise Act 1944 provides that statutory time limit for filing of the appeal before the Commissioner (Appeals) is sixty days from the date of communication of the order to be appealed against. The applicants submit as per the Section, time limit of the 60 days must be computed from the dated of receipt of the impugned order. The applicants submit that before 22.8.2013, they neither received any communication from the office of the Deputy Commissioner (Rebate) in respect of the personal hearing nor they received their copy of Order-in-Original dated 13/14 5.2013,
- 6.3 it was only in August 2013, when the applicants followed up with the department for the status of the de-novo proceedings, the department informed the applicants that the matter has been already adjudicated by the Deputy Commissioner (Rebate) and the exparte orders-in- original dated 13/14. 5.2013 has been passed in the matter rejecting the rebate claim filed by the



- applicants. The applicant received their copy of Order-in-Original dated 13/14.5. 2013 on 22.8.2013,
- 6.4 the Order-in-Original dated 13/14.5.2013 and communication address of the applicants mentioned on page 8 of the Order-in-Original dated 13/4.5.2013 evident the fact that the department was sending all the communication in respect of the matter to the old office address of the applicants,
- 6.5 that remand order dated 4.2.2013 of the Revisionary Authority was communicated to the applicants by the office of Revisionary Authority at their new office premises. The applicant submit that Page No 15 of the revision order dated 4.2.2013 mentioned the new office address of the applicants and copy of the order was marked to Assistant commissioner (Rebate), Mumbai-I. The applicants submit that the department erred in maintaining the records and fails to update the same.
- 6.6. they had also filed RTI application dated 16.4.2014 before the Central Public Information centre in the office of the Deputy Commissioner (Rebate), Mumbai - I requesting them to confirm the fact that the applicants' copy of the order-in-original dated 13.5.2013 was handed over to the applicants' authorized representative on 22.8.2013. Second reminder letter dated 9.5.2014 was sent to the department with the same request. In response to the above letters/application, the applicants received a letter dated 20.5.2014 from the department confirming the fact that the applicants, copy of order-in-original dated 13.5.2013 was handed over to their Authorized representative on 22.8.2013,
- 6.7 from the above facts, it is clear that the department was not aware of the address of the new office premises of the applicants. The office of the Deputy Commissioner (Rebate) ought to have recorded the new communication address in their records as it was mentioned on the order of Revisionary Authority. All the correspondence in respect of the proceedings ought to have done on the new office address of the applicants.



- It is submitted that for the mistake of department, the applicants cannot be penalized by the way of rejection of claim,
- 6.8 from the above facts, it is clear that date of receipt of the Orders-in-Original dated 13.5.2013 & 14.05.2013 is 22.8.2013. Accordingly, last date of filing the appeal in view of Section 35(1) of the central Excise Act, 1944 was 21.10.2013. However, the applicants filed the appeal before Commissioner on 14.10.2013. Hence, there is no delay in appeal,
- 6.9 the Commissioner (Appeals) fails to consider the above facts and incorrectly held that the appeal filed by the applicants is time barred. The commissioner (Appeals) passed the order without application of mind. Therefore, the impugned order-in-Appeal dated 28.3.2014 is liable to be set aside,
- 6.10 the impugned Order-in-Appeal dated 28.3.2014 held that that the applicants have connived with supplier for availing undue benefits. The transactions entered by the applicants were not done in bonafide manner,
- 6.11 all the aforesaid findings of the impugned Order-in-Appeal dated 28.3.2014 are factually incorrect. First of all, the applicants submit that they were not aware of the fraud, mis-statement, suppression of facts, etc., if any, committed by supplier. The applicants' bonafidely believed that supplier had cleared the goods on payment of the excise duty as shown on invoices. There was nothing to doubt the correctness of the duty payment particular as mentioned on the invoices issued by supplier on the impugned goods,
- 6.12 they had purchased all the goods from supplier on due payment of excise duty. Further, the fact that the goods have been exported is not under dispute. The applicants purchased all the goods from supplier directly on principal to principal basis. The applicants have taken all the "reasonable steps" to ensure that the transaction was bonafide. The applicants verified whether supplier have cleared the goods on correct payment of duty. The



applicants submit that they had always acted in a bonafide manner as a normal prudent businessman would do,

- 6.13 they believed in the declarations made by supplier in their invoices under which the impugned goods were cleared by supplier for export. There was no particular reason for doubting that supplier has not paid appropriate excise filing duty on the goods which were supplied to & exported by the applicants. supplier in their invoices, specifically mentioned that goods cleared by them to the applicants were cleared on due payment of excise duty,
- 6.14 in view of the above, the applicants submit that they have fulfilled all the legal obligations on their part. Further, the applicants submit that it is not humanly possible to verify and ascertain that accumulated credit balance used by supplier for payment of duty is regular and admissible to supplier or not,
- 6.15 rebate claim filed by them cannot be rejected on the grounds that supplier had paid the duty by utilizing the irregular and inadmissible credit balance. The applicants submit that they are not required to prove that credit balance lying in the books of supplier is admissible to them or not. It is well settled law that the source of source is not required to be proved. Kindly refer:

a) Pariniseti Seetharamamma Vs. CIT
(1965) 57 ITR 532 (SC)

b) CIT Vs. Daulatram Rawatmull
(1973) 87 ITR 349 (SC)

c) Narayandas Kedarnath vs. CIT
(1952) 22 ITR 18 (Bom)

d) Balchandra Chand Munnalal vs. CIT
(1958) 33 ITR 781 (Allahabad)



e) CIT Vs. Metachem Industries
(2000) 245 ITR 160 (MP)

f) CIT Vs. Jawahar Lal Oswal
(2004) 267 ITR 308 (P&H).

- 6.16 in view of above, they submit that findings of the impugned order that the applicants did not act in bonafide manner, is incorrect and baseless. The impugned order-in-Appeal has not given any evidence to show that the applicants did not act in bonafide manner,
- 6.17 in the impugned Order-in-Appeal dated 28.3.2014, the Commissioner (Appeals) has relied upon number of decisions to content that in case the assessee have not paid the excise duty on the goods exported, rebate for such duty cannot be sanctioned The Commissioner (Appeals) has relied on the decision given in the case of Karisham Overseas Vs. CCE -2009 (235) ELT 844 (T); UOI Vs, Sheetal Exports - 2011 (272) ELT 663 (Bom.); Zenith Chemical 1991 (53) ELT 560 (GOI); Sabari Starch Vs. CC -1992 (58) ELT 531 (Mad.); etc.
- 6.18 reliance placed by the Commissioner (Appeals) on theaforesaid judgment is incorrect. The ratio laid down in all the above judgments cannot be applicable in the present case since the facts of the present case are different. The facts that the applicants have exported the goods and excise duty has been paid by the applicants are not in dispute. As already submitted supra the applicants have acted in bonafide manner and procured all the goods from Supplier on the payment of excise duty,
- 6.19 rebate claim filed by them cannot be rejected if Supplier has not paid appropriate duty to the government after collecting it from them. There are no evidence to show that the applicants have not paid the duty on the goods exported. In view of above



reliance placed on the decision given in the aforesaid decision is incorrect and illogical,

- 6.20 In view of the above submission, the impugned Order-in-Appeal dated 23.8.2014 is liable to be set aside in its entirety,
- 6.21 in the impugned Order-in-Appeal dated 28.3.2014; the Commissioner (Appeals) held that the applicants have connived with supplier for availing undue benefits. The impugned order held that all the transactions, carried on by the applicants with supplier, were mere paper transactions done with a view to defraud the Government.
- 6.22 aforesaid finding given under impugned Order-in-Appeal dated 28.3.2014 is incorrect and perverse. It is mere assertion without any basis and supporting. There is nothing on the records to show that the applicants were involved in the fraud committed by supplier,
- 6.23 onus to prove the wrong doing, if any, by the applicants is on the department. There is nothing on records to show that the applicants acted with malafide intention to defraud the government. There is no suppression of facts or misrepresentation on the applicants' part. They submit that they have complied with all the conditions for claiming the rebate of duty paid on exported goods. In fact, the original rebate sanctioning authority rejected the rebate claim in their previous orders on the grounds that duty paid by supplier is inappropriate. There was no question raised on the applicants that they connived with supplier for availing undue benefits. As earlier, submitted the applicants had acted in bonafide manner and complied with all the Provisions of law,
- 6.24 the Hon'ble Bombay High Court remanded the matter back to Revisionary Authority to consider the findings given in the order-in-original dated 29.1.2010 and to ascertain whether the applicants had acted in bonafide manner or not. They submit that all the findings given against the applicants in the order in



original dated 29.1.2009 passed by the Thane-I Commissionerate are incorrect, perverse and bad in law,

- 6.25 they were not a party to any proceedings initiated by Thane-I Commissionerate against supplier. The department did not carry out any investigation against the applicants. The applicants were not issued with any direction or summon in respect of proceedings initiated against supplier. The applicants were not made party to the show cause notice 30.9.2008 which was issued by the Thane Commissionerate to supplier and other parties. Further, there were no allegations or charges specifically against the applicants in the show cause notice dated 30.9.2008. Even the Order-in-Original dated 29.1.2010 have not given any specific findings or evidence directly against the applicants,
- 6.26 there has been no admission or statement from any officer of the applicants or any person authorized by the applicants or proprietor of the applicants firm in this behalf to the effect that the applicants were in connivance with supplier to avail undue benefit,
- 6.27 all the findings of the Order-in-Original dated 29.1.2010 adjudicating show cause notice dated 30.9.2008 were inter alia in respect of Mr. Ayush Agarwal and Namaste Exports only.
- 6.28 Mr. Ayush Agarwal or M/s Namaste Exports were not associated or connected with the applicants. The applicants had never issued any letter of Authorization or any other documents authorizing Mr. Ayush Agarwal to represent, deal or handle Central Excise, Customs, Imports and Exports or any other matters related to the business of the applicants. Further, the applicants submit that Mr. Ayush Agarwal had not paid or received cash or placed any purchase order or booked any sales order or carried out any other business activity, for or on behalf of the applicants. Further, there are no evidence in the order-in-original dated 29.1.2010 that Mr. Ayush Agarwal was authorized representative of the applicants. There is nothing on



records to prove that the applicants have authorized Mr. Ayush Agarwal to represent the applicants. The Thane Commissionerate have incorrectly assumed that since M/s Namaste Exports and the applicants share a common office premises, Mr. Ayush Agarwal, proprietor of M/s. Namaste Exports is representative of the applicants,

6.29 in view of the above, various statement of Mr. Ayush Agarwal recorded on 18.5.2006, 2.6.2006 & 10.6.2006 by Thane - I Commissionerate cannot be taken as evidence to allege or hold that the applicants were involved with supplier. The applicants submit that it is well settled law that duty cannot be demanded from assessee on the basis of third party evidences/record./statements. Kindly refer:

i) CCE Vs. Rajaguru Spinning Mills

2009 (243) ELT 280 (T)

ii) Senthil Kumar Soaps Works Vs. CCE

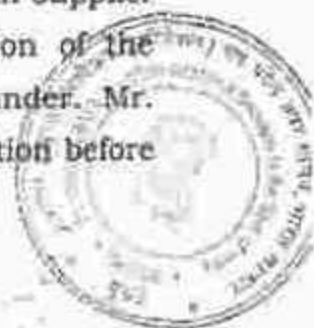
1997 (89) ELT 77 (T)

iii) Sharma Chemicals Vs. CCE.

2001 (130) ELT 271 (T).

6.30 in view of above, the applicants submit that findings given in the Order-in- Original dated 29.1,2010 relying on statement of Mr. Ayush Agarwal are incorrect and perverse. There is nothing on record to show that the applicants have authorized Mr. Ayush Agarwal to represent them or to act on their behalf. Therefore, statement given by Mr. Ayush Agarwal cannot be taken as basis to assume that the applicants were also involved in the fraud committed by supplier in absence of any supporting evidence or documents.

6.31 vide Order-in-Original dated 29.1.2010, the Commissioner of Central Excise, Thane-I, imposed penalty of Rs.50,00,000/- on Mr. Ayush Agarwal and held that he was connived with supplier for availing undue benefit contravening the provision of the Central Excise Act, 1944 and rules made there under. Mr. Ayush Agarwal filed an appeal along with stay application before



the Hon'ble Tribunal against the aforesaid order dated 29.1.2010. The Hon'ble Tribunal at the time of granting stay for recovery of penalty imposed on Mr. Ayush Agarwal vide stay order dated 29.5.2012 held that there are no allegations in the show cause notice dated 30.9.2008. Further, the Order-in-Original dated 29.1.2010 have not given any findings to show that merchant exporters (i.e., the applicants in the present case) had connived with supplier to avail any undue benefit. Accordingly, in absence of such findings, the Hon'ble Tribunal waived pre-deposit of the penalty and stayed the recovery of the same,

- 6.32 The finding of the Hon'ble tribunal given in the stay order dated 29.05.2012 clearly shows that neither Mr. Ayush Agarwal nor the merchant exporters (i.e. the applicants in the present case) were in connivance with supplier to commit fraud or to avail any undue benefits. In view of above, findings of the impugned Order-in-Appeal dated 28.3.2014 that the applicants have connivance with supplier for availing undue benefits is perverse & malafide. Further, dismissal of the appeal filed by supplier against the order-in-original dated 29.1.2010 on account of non-prosecution does in no way establish or prove the fact that the applicants have connived with supplier to avail undue benefits,
- 6.33 the Commissioner (Appeals) have placed reliance on number of decisions of given in the case of Kanugo & Co.Vs.CC-1983(13) ELT 1486 (SC); K. Janandharan Pillai Vs.CC-1988 (38) ELT 647(T);Devi Dass Garg Vs. CCE-2010 (257) ELT 289 (T);GTC Inds.Vs.CC-2011 (264) ELT 433(T), etc.to hold that the onus to prove the correctness of the rebate claims is on the applicants and not on the department to prove it otherwise,
- 6.34 in the view of facts of present case, the ratio given in the above decisions cannot be applied. In view of the above submission, the onus to prove the wrong doing, if any, by the applicants is on the department. As submitted in para supra, the applicants have sufficiently proved that they are not a party to fraud. There



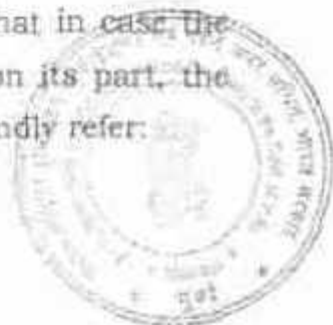
is nothing on the records to show that the applicants connived with the supplier in committing fraud, Therefore reliance placed by the Commissioner (Appeals) on the aforesaid decision is incorrect. In view of the above, finding of the impugned Order-in-Appeal dated 28.3.2014 that the applicants have connived with supplier for availing undue benefits is incorrect and perverse. Therefore, the impugned Order-in-Appeal dated 28.3.2014 rejecting the Rebate claim filed by the applicants is *incorrect, perverse and vitiated*. The same is liable to be set aside,

- 6.35 as submitted supra they have acted in bonafide manner. The applicants submit that they have taken the required reasonable care in order to ascertain the correctness of the duty payment particular in respect of the goods exported by them. Accordingly, *they are eligible for the rebate of the excise duty paid on the goods exported by them.*
- 6.36 In the case of CCE Vs. DP Singh - 2011 (270) ELT 321 (Guj.), the assessee was a manufacturer-exporter who availed rebate claim of excise duty paid on export goods. The assessee availed Cenvat credit on inputs on the basis of invoices issued by the input manufacturers. *The department denied rebate claims on the ground that supplier to the input-manufacturers were non-existent entities & hence there was no way in which the assessee could have claimed credit and consequential rebate. As per department, the goods received by the assessee were non-duty paid and hence, rebate claims were inadmissible.*
- 6.37 *The Hon'ble High Court of Gujarat dismissed Revenue's contention by holding that the assessee was not party to the fraud and that the assessee had purchased the goods by paying duty to the vendor. It was further held that since the assessee had taken precautions as envisaged in Rule 9 of Cenvat credit Rules, 2004, denial of rebate was unsustainable.*
- 6.38 *they also wish to place reliance in the case of CCE Vs. K. Jay*



Industries - 2013 (295) ELT 177 (SC). In this particular case, the respondent-company availed deemed modvat credit on the strength of invoices. The competent Authority was of the view that appropriate duty of excise had not been paid by the manufacturer of inputs under the invoices on the strength of which the respondent took the benefit of deemed modvat credit. As per the competent authority, it was obligatory on the part of the respondent to take all reasonable steps to ensure that the appropriate duty of excise had been paid on the inputs used in the manufacture of their final product,

- 6.39 The Hon'ble Apex Court dismissed Revenue's contention by holding that the respondents had taken all reasonable steps prescribed in the rules. It was further held that the proviso postulates and requires "reasonable care" and not verification from the department whether the duty stands paid by the manufacturer-seller,
- 6.40 There is nothing on records to prove or show that the applicants connivance with supplier to avail ineligible benefits by the way of rebate of the excise duty. They were not party to the fraud / mistake, if any, committed by supplier. The applicants were totally unaware of the fraud / mistake, if any, committed by supplier. In the case of the Omkar Overseas Vs. UOI - 2003 (156) ELT 167 (SC), the Hon'ble Apex court held that benefit of rebate of the duty paid on exported goods cannot be denied for the reason of short payment unless such short payment is for the reason of fraud, collusion or any willful mis-statement or suppression of facts. In the present case also the applicants are not involved with any fraud, collusion or any willful mis-statement or suppression of facts. In the para supra, they have sufficiently proved that they acted in bonafide manner and there did not connived with supplier to avail undue benefit,
- 6.40 they further submit that it is well settled law that in case the assessee have taken required reasonable care on its part, the benefit of the credit cannot be denied to them. Kindly refer:



(a) State of Madras Vs. Radio & Electricals
1966 (18) STC 222 (SC);

(b) Chunnilal Parshadilal Vs. CST
1986 (62) STC 112 (SC);

(c) State Vs. Bharat Petroleum Corporation *
2001 (122) STC 559 (Ori);

(d) SRF Vs. CCE
2000 (120) ELT aa8 (T);

(e) CCE Vs. Sadashiv Casting
2005 (187) ELT 381 (T);

(f) CCE Vs. Genesis
2004 (176) ELT 496 (T);

(g) Haryana Steel Alloys Vs. CCE
2002 (148) ELT 377 (T);

(h) CCE Vs. Ashok Leyland
2001(127) ELT 804 (T);

(i) Shree Rolling Mills Vs CCE
2001 (129)ELT 722 (T); &

(j) Century Laminating Vs CCE.
2001 (127) ELT 268 (T).

6.41 The ratio laid down in the aforesaid cases is squarely applicable in the present case. As already submitted, the applicants have taken due care on their part. Therefore, rejection of rebate claim for the duty paid on goods exported by the applicants is not correct,

6.42 In view of the above submissions and decisions, it is submitted that rebate claim rejected by the impugned order-in-Appeal dated 28.3.2014 is incorrect and the same is liable to be set aside,

6.43 in the present case, the department has rejected the rebate claim filed by the applicants only for the reason supplier had accumulated the credit on the basis of fake and bogus invoices and therefore duty paid utilizing such credit is not proper.

Hence, rebate of the duty paid on such goods cannot be given to the applicants,

- 6.44 the department should have taken reasonable steps to control the fraud committed by supplier. The applicants submit that the CBEC has issued circulars with an intention to avoid misuse of modvat to the effect that credit availed by a manufacturer on the strength of dealers invoices for an amount exceeding Rs.10,000/-should be cross verified by the Department internally. Kindly Refer:
- (a) Circular No. 18/86-CX.6 dated 28.5.1986
 - (b) Circular No. 12193-CX.8 dated 2'11.1993
 - (c) Circular No. 33/33/94\CX.8 dated 4.5.1994
 - (d) F. No. B-4/7/2000-TRU dated 3.4.2000,
- 6.45 in the present case also, the department should have cross-verified the credit availed by supplier and should have taken appropriate measures to restrict supplier for committing fraud. The applicants submit they cannot be penalized by rejection of the excise duty on account of failure of the department to carry out cross verification in respect of the credit availed by supplier cannot be used for penalizing the applicants',
- 6.46 Further, the applicants submit that the department cannot proceed against them for recovery of credit by the way rejection of the rebate claim when the applicants have not been proved to be party to the fraud. Hence the only remedy available to the department is to proceed against the dealers,
- 6.47 the applicants cannot be penalized for the act done by supplier. It is submitted that the applicants are not the party to the fraud but victim of the fraud committed by supplier. The applicants are the bonafide assessee who has followed the procedure under Central Excise Act read with rules made thereunder. The impugned Order-in-Appeal dated 28.3.2014 held that Government of India has not provided any guarantee to rebate the amount to any assessee for the loss if any caused due to fraud etc. The applicants have different recourse under the law of the land to recover the amount from the person who had



defrauded them. They submit that the above contention of the impugned Order-in-Appeal dated 28.3.2014 is baseless and illogical,

- 6.48 the Hon'ble Tribunal dismissed the appeal filed by supplier on account of non-prosecution vide order dated 29.5.2012. Accordingly, it has been more than 2 years since the appeal filed by supplier against the Order-in-Original dated 29.1.2010 was dismissed and the proceedings initiated by the Thane-1 Commissionerate have attained finality. Therefore, the demand against supplier has been confirmed and must have been recovered by the department. Further, they have complied with all the provisions, condition, rules and regulations, laid down in the Central Excise Act, 1944 or Rules made there under. They have followed the procedure laid down in the Act to avail the benefit of the duty free exports. They have paid excise duty to supplier on the basis of the invoices. They have taken all the reasonable care as provided under Rule 9(2) of the cenvat credit Rules, 2004 to verify the correctness of the duty paid on the goods exported.
- 6.49 they have carried the entire transaction in accordance with the Central Excise Act, 1944 and the Rules made there under. The law itself provides that once the specified conditions are fulfilled, the assessee will become eligible for rebate of the excise duty paid on the goods exported by them. Therefore, the contention of the Commissioner (Appeals) that the department or the Government of India is not responsible for the loss caused to the applicants is incorrect and perverse. Since, the applicants have complied with all the provision of law, the department /Government of India is responsible for rebate of the excise duty paid on the goods exported in accordance to law,
- 6.50 in view of the above, it is submitted that the impugned order-in-Appeal dated 28.3.2014 rejecting the rebate claim is incorrect and the same is liable to be set aside,



6.51 it is not the case of the department that the applicants did not make payment of the excise duty to supplier of the goods. It is the submission of the applicants that they have paid excise duty on the goods exported as per the invoices received by them and filed the rebate claims in respect of the same. Once the goods have been exported, the applicants are eligible for rebate of the duty paid on such goods. Once payment is made to supplier including duty, then action, if any for nonpayment of such collected duty from purchaser is required to be taken on manufacturer/dealer supplier and not on purchaser. In this regard, the applicants would like place reliance on CBEC Circular No. 766/82/003-CX., Dated 15. 12.2003, wherein at paras 5 and 6 this aspect is dealt with as below:

..On the issue of avilment of credit by the user-manufacturer, it is clarified that action against the consignee to reverse/recover the CENVAT Credit availed of in such cases need not be resorted to as long as bonafide nature of the consignee's transaction is not in dispute."

6.52 they have already submitted supra that after the rejection of the appeal filed by supplier was dismissed by the Hon'ble Tribunal vide Stay Order No.S-1195-1198/EB/C-II, A/552-555/12/EB dated 29.05.2012, the department must have already recovered the amount of duty confirmed by the Order-in-Original dated 29.7.2010. Therefore, the applicants in the present case are eligible for rebate of the excise duty paid by them.

In view of the above, the impugned Order-in-Appeal dated 28.3.2014 is incorrect and the same is liable to be set aside sustainable in law,

6.53 the Commissioner (Appeals) in the impugned Order-in-Appeal dated 28.3 .2014 held that the applicants are not eligible for the rebate of the duty paid on the impugned goods exported since they have not complied with the conditions specified under Notification No.40/2001-CX (N.T) dated 26.06.2001 or Circular No. 294/10/ 97-CX dated 30.1.1997. The applicants submit that findings of the Commissioner (Appeals) given in the



impugned Order-in-Appeal dated 28.3.2014 has travelled beyond the direction of the Revisionary Order given in their order dated 4.2.2013.

6.54 they submit that the aforesaid findings of the impugned Order-in-Appeal dated 28.3.2014 are beyond the remand order of the Higher Authorities. They submit that the Hon'ble Bombay High Court have remanded the matter back to Revisionary Authority to reconsider the decision given in earlier Order taking into account the findings of the Order-in-Original dated 29.1.2010 passed by the Commissioner of Central Excise, Thane-I. The High court in its order held that imposition of the penalty on Mr. Ayush Agarwal raised the doubt of bonafides of the transaction entered by the applicants with supplier. The Revisionary Authority further remanded the matter back to the original adjudicating authority to examine, check and verify, whether the applicants or supplier or both were involved in any kind of fraudulent activities with view to get in eligible refunds claims. They submit that in view of the above submission made in para supra, it is clear that the applicants were not party to the fraud committed by supplier. Further, it is submitted that the applicants have acted in bonafide manner and they were neither aware of the fraud committed by supplier nor they were connived with them to avail undue benefit,

6.55 However, the impugned Order-in-Appeal dated 28.3.2014 held that the applicants are not eligible for the refunds claim since they have not complied with the condition specified under aforesaid Notification and Circular. The aforesaid findings of the Commissioner (Appeals) are incorrect and perverse since it travels beyond the remanding order. It is well settled law that findings given in de-novo proceedings if travels beyond the specific directive guidelines or scope laid down by the remanding orders, such findings are not sustainable in law.



7. A common personal hearing was held in these cases on 06.02.2018 and Shri Mohan Gupta, authorized representative for and on behalf of both the respective applicants appeared for hearing. The applicant reiterated the submissions filed through the two applications alongwith synopsis. It was prayed that Orders-in-Appeal be set aside and Revision Applications be allowed. In their additional written submissions filed on the day of the hearing, the applicants submitted that :

- vide Revisionary order dated 9/16 February, 2010, Revisionary Authority allowed the appeals of both the applicants by sanctioning the rebate claims amounting to Rs.34,66,462/-in favour of Daffodils Exports and Rs. 15,73,049/- in favour of Prime Exports,
- Department filed the writ petition sometime in the month of September / October 2010 with the Bombay High Court with a prayer to set aside and quash the order of Revisionary Authority on the ground that Revisionary Authority at the time of passing the order dated 9/16 February 2010 did not take in to consideration the O.I.O dated 29.01.2010 passed and issued by the Commissioner of Central Excise Thane-I imposing the personal penalty of Rs. 50.00 Lacs Ayush Agarwal so called said to be the Authorized Signatory – cum- Power of Attorney holder on behalf of Daffodils Exports and Prime Exports,
- vide order dated 27.06.2011 issued on 30.08.2011 Bombay High Court remanded the case for fresh adjudication by the Revisionary Authority taking in to consideration the findings given by the Commissioner of Central Excise Thane-I in his O.I.O dated 29.01.2010,
- however, notwithstanding the facts as stated here in above the moot point which must be noted at this juncture is that the Department never placed the complete facts and true position of law before the Bombay High Court at the time of personal hearing which took place on 27.06.2011 in as much as the Commissioner of Central Excise Thane-I never issued any Show Cause Notice to Daffodils Exports and Prime Exports and consequently when no Show cause notice having been issued to any of the aforementioned two applicants the question



for passing and issuing any order in original against Daffodils Exports and Prime Exports does not arise in whatsoever manner,

- The Show cause Notice and Order-in-original was issued by the Commissioner of Central Excise Thane-1 in the personal name of Ayush Agarwal in the capacity of his being the authorized signatory - cum- power of Attorney holder on behalf of Daffodils Exports and Prime Exports. The truth, true and factual position of law is contrary to that factual position of law, since the financial year 2004-05, neither Daffodils Exports nor Prime Exports [where both are proprietorship firm] till date have given and issued any power of Attorney or Letter of Authorization in whatsoever manner in favour of Shri Ayush Agarwal who himself is a Proprietor of Namaste Exports. Since, no power of Attorney or any letter of Authorization was ever issued and given to Shri Ayush Agarwal on behalf of Daffodils Exports and Prime Exports the question of its existence on the records of the case proceedings does not arise in what so ever manner in any respect at any stage of proceedings,
- these facts have been brought to the knowledge of Revisionary Authority while filing the written submissions after the case was remanded back to him for fresh re-adjudication as ordered by the Bombay High Court as well as to the Commissioner of Central Excise (Appeals) Mumbai-1 while filing the appeal after Assistant Commissioner of Central Excise (Rebate) Mumbai-1 once again rejected the rebate claims of both the applicants as also once again to Revisional Authority while filing the Revisional application on 09.07.2014 by impressing upon the facts and true position of law to the effect that so called Order-in-original dated 29.01.2010 passed and issued by the Commissioner of Central Excise Thane-1 is in no way, in whatsoever manner and in any respect will have any bearing to the case of both the applicants during the course of fresh re-adjudication carried out by the Revisionary Authority,
- the only legal position of law which emerges could be crystallized to conclude that order-in-original dated 29.01.2010 passed and issued



by the Commissioner of Central Excise Thane-I imposing penalty to the tune of Rs.50.00 lacs on Shri Ayush Agarwal does not help the department in whatsoever manner to hold that rebate claims of Daffodils Exports and Prime Exports are not sustainable in law. However, in any case the appeal of Shri Ayush Agarwal to quash and set aside the order of the Appellate Tribunal W.Z.B is pending in the Bombay High Court since 2015 for final disposal,

- the citation of Supreme Court decision heavily relied upon by both the applicants is given herein below in support of the contention and stand taken out in the revision applications by both the applicants filed on 09.07.2014 with the Revisionary Authority:- 2013 (295) E.I.T.177 (S.C.) Commr. of Cen. Ex. Jalandhar Vs Kay kay Industries.

8. 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. The issue involved in both these Revision Applications being common, they are taken up together and are disposed off vide this common order.

9. Government observes that Hon'ble Bombay High Court vide its order dated 27.06.2011 set aside the order of Revisionary authority and remanded the matter back to the revisionary authority for re-considering the matter afresh after taking into account all the material on the record. Upon remand Revisionary Authority observed that the main issue whether applicant merchant exporters were party to any fraud committed at manufacturer's end is required to be thoroughly examined in the light of court judgments and Hon'ble Bombay High Court directions in the instant cases and accordingly remanded the cases back to original authority for fresh consideration. Revisionary authority also observed that in the Order in Original dated 29.01.2010, CCE Thane has imposed penalty of Rs.50.00 lakhs on Shri Ayush Murarilal Agarwal, Proprietor of Namaste Exports, authorized signatory & brother of Anuj Murarilal Agarwal who was proprietor of M/s Prime Exports and authorized signatory and son of Murarilal Agarwal Proprietor of Daffodils Exports. He also observed that the



involvement of applicant exporters in the said fraud has to be examined with reference to all the evidence relating to the case available with the department. Original authority during the adjudication of the case on remand observed that the claimant (applicants) failed to provide evidence regarding payment of duty against the said exported goods and accordingly rejected the rebate claims of the applicants. Upon appeal filed by the applicants' the Commissioner (Appeals) vide his impugned order rejected the appeals on limitation as well as on merits.

10. Government will first consider the aspect of delay in filing appeal by the applicants before Commissioner (Appeals). Commissioner (Appeals) has observed that the appeals in both the cases were filed after 152 days in as much as the Orders in original were issued to the applicants on 15.05.2013 and the appeals in both the cases were filed on 15.10.2013. Commissioner (Appeals) has further observed that the applicants have claimed to have received the Orders in original on 22.08.2013, however, no evidence has been produced as to why it took 99 days to receive the order from the date of dispatch nor any application for condonation of delay has been filed by the applicants before him.

11. Government observes that Section 35(1) of the Central Excise Act 1944 provides that statutory time limit for filing of the appeal before the Commissioner (Appeals) is sixty days from the date of communication of the order to be appealed against. The applicants in their applications have inter alia submitted that they neither received any communication from the office of the Deputy Commissioner (Rebate) in respect of the personal hearing nor they received their copy of Order-in-Original dated 13/14.5.2013; it was only in August 2013, when the applicants followed up with the department for the status of the de-novo proceedings, the department informed the applicants that the matter has already been adjudicated by the Deputy Commissioner (Rebate) and the ex parte orders-in-original dated 13/14.5.2013 has been passed in the matter rejecting the rebate claim filed by the applicants; the Order-in-Original dated 13/14.5.2013 and communication address of the applicants mentioned on page 8 of the Order-in-Original dated 13/4.5.2013 evident the fact that the



department was sending all the communication in respect of the matter to the old office address of the applicants. The applicants have further submitted that remand order dated 4.2.2013 of the Revisionary Authority was communicated to the applicants by the office of Revisionary Authority at their new office premises. The applicant submit that Page No. 15 of the revision order dated 4.2.2013 mentioned the new office address of the applicants and copy of the order was marked to Assistant commissioner (Rebate), Mumbai-1. Government also notes that the applicant had filed RTI application dated 16.4.2014 before the Central Public Information Officer (CPIO) in the office of the Deputy commissioner (Rebate), Mumbai - I requesting them to confirm the fact that the applicants' copy of the order-in-original dated 13.5.2013 was handed over to the applicants' authorized representative on 22.8.2013 and the applicants vide letter dated 20.5.2014 were informed by the CPIO that order-in-original dated 14.5.2013 was handed over to their Authorized representative on 22.8.2013. From these facts, Government observes that the copy of the impugned Orders in original were received by the applicant on 22.08.2013 and therefore, the computation of the period would commence from the said date 22.08.2013. So computed, the appeals filed before the Commissioner (Appeals) on 15.10.2013 would be within the prescribed period of 60 days and hence cannot be termed as time barred. Government in this regard places its reliance on Hon'ble Supreme Court Order dated 20.07.2015 in Civil Appeal Nos. 5631-5632 of 2015 in the case of M/s Saral Wire Craft Pvt. Ltd Vs Commissioner of Customs, Central Excise and Service tax [2015(322)ELT 192(SC)]. Government, therefore, sets aside the impugned Order in Appeal to the extent it dismissed the appeals on the issue of "Time Bar" and now proceeds to decide the applications on merits.

12. Government observes that both the applicants have stated to have procured Processed Fabrics from Muni Group of units as mentioned at para 2 & 3 above i.e. M/s Muni Trade Pvt. Ltd., M/s Globe Traders, M/s Mansa Traders. In view of different frauds committed by Manufacturers and Exporters the jurisdictional Range Superintendent was requested to verify the genuineness of Cenvat credit availed and duty paid on the impugned



goods by the manufacturers and the Jurisdictional Deputy Commissioner was asked to verify if the goods were self sealed and self certified by the manufacturer under prior intimation. Assistant Commissioner (Prev), Central Excise, Thane-I vide letter No. V/PI/Th-1/12-5/05 dated 2.05.2005 informed that a case of fraudulent availment of Cenvat Credit and fraudulent claim of rebate has been booked against M/s Muni Trade Pvt. Ltd., M/s Globe Traders, M/s Mansa Traders, M/s Apex Corporation etc.(hereinafter referred to as 'Muni Group') and that these units had availed Cenvat credit on the basis of invoices pertaining to false, bogus and non-existing units. Shri Ayush Murarilal Agarwal is the Proprietor of M/s Namaste Exports.

13. From the Order in original No. 03/BR-03/Th-I/2010 dated 29.01.2010, it is observed that Shri Ayush Murarilal Agarwal son of Shri Murarilal Agarwal, dealt as authorized representative of both the applicants with the Muni Group. As per the Investigation the Show Cause Notices were issued to Muni group for denial of Cenvat Credit taken, imposition of penalty etc. and to Shri Ayush Murarilal Agarwal, for dealing as authorized representative of both the applicants with the Muni Group for imposition of penalty amongst others. Investigations also revealed that M/s Muni Trade Pvt. Ltd., M/s Globe Traders, M/s Mansa Traders, M/s Apex Corporation etc. of 'Muni Group' did not have any manufacturing facilities and had not carried out any manufacturing activities. They had taken Cenvat credit on the basis of invoices pertaining to false, bogus and non-existing units. The other Noticees were party to the fraud. During the investigations, M/s Prime Exports, M/s Daffodils Exports (the applicants) M/s Namaste Exports had submitted that the goods were door delivered to them. However, they did not give the name of the person on behalf of Muni Group with whom they had dealt. All the three firms were operating from the same premises. Government is thus in full agreement with the observations of Commissioner (Appeals) in his impugned order that both the applicants have nowhere stated if not for Shri Ayush Murarilal Agarwal, who amongst them have dealt with Muni Group, with whom they negotiated for the supply of Fabrics, quality,



its price etc., to whom they had placed the Order, who visited the non-existing manufacturing unit, who had inspected the goods, who was told that the goods are to be exported, where i.e. destination, from where the goods were to be exported (including the Port etc.), the quantity, number of packages and value to be shown in the export documents, who had signed the ARE-1 forms apart from the person from Muni Group etc.

14. Government also observes that Shri Ayush Agarwal in his statement dated 18.05.2006, as a Proprietor of M/s Namaste Exports and representative of two more firms (i.e. the applicants in the present case) had given bank account number in UTI Bank, Surat and OBC Surat and ledger in respect M/s Venkatesh Mercantile, Globe Traders, Apex Corporation, duly signed by Shri K.K. Gupta. Detailed investigations / scrutiny of cheques shown in the ledger against payment made to M/s Mansa Traders, Muni Trade and M/s Globe, copies of which were obtained from UTI bank and OBC revealed that the actual beneficiaries were the discounters/shroffs at Surat. In their statements recorded under Section 14 of the Central Excise Act, 1944 these shroffs revealed the name of Shri Ayush Agarwal to whom they had given the cash after discounting, thus clearly indicating that no payments were made to Muni Group and merely for accounts purpose. Similarly scrutiny of cross bearer cheques issued by M/s Prime Exports, M/s Daffodil Exports (the applicants) , M/s Namaste Exports etc. to Muni Group and cheques issued from the accounts of Apex and Globe, it was found that the cheques were ultimately credited into the account of M/s Shrenik Corporation. In his further statement dated 14.10.06, Shri Shrenik also identified Shri Agarwal having office at Golden Plaza and his phone number as the other party who also had taken cash on discounting. Shri Yatindra Jain who is engaged in the activity of collecting the cheques from their various parties including merchant exporter showing exports on the documents of Muni Group in his statement recorded on 29.09.2006 under Section 14 of the Central Excise Act, 1944, and on being shown the copies of the cheques issued by M/s Prime Exports (applicant No. 1) to M/s Globe Traders , stated that the cheques were discounted by him and



cash in respect of the cheques of M/s prime Exports (applicant No.1) was paid to the person sent by Shri Ayush Agarwal. Thus, the investigations proved that though the exporters (including the applicants) have made an attempt to show that the transaction were genuine by issuing cheques in the names of units of Muni Group, for the purported purchase of fabrics, the flow of the amounts shown in such cheques back to the exporters (including applicants) indicates that no payments were made to Muni Group for claimed purchase of fabrics. This pattern of Financial flow indicated the very bogus / fake nature of transaction. The details of various cheques and how the manipulations were made is elaborated in para (viii) of page No. 79 onwards of the Order in original No. 03/BR-03/Th-1/2010 dated 29.01.2010.

15. From the above it is clearly evident on the record that the Muni Group supplier of the fabrics did not discharge the Central Excise duty on the goods purportedly supplied by them including the one to the applicants. The Department had prima facie proved that the supplier of the goods, had committed fraud against the Department and had taken Cenvat credit fraudulently based on bogus/ non-existent units and they themselves did not have any manufacturing unit. The investigations clearly indicated that no payments were made to Muni Group by the applicants and merely for accounts purpose payments were shown in ledgers, where actually no payments were made.

16. Government observes that the applicants have contended that they were not a party to any proceedings initiated by Thane-1 Commissionerate against supplier; the department did not carry out any investigation against the applicants; the applicants were not issued with any direction or summon in respect of proceedings initiated against supplier, they were not made party to the show cause notice 30.9.2008 which was issued by the Thane Commissionerate to supplier and other parties; there were no allegations or charges specifically against the applicants in the show cause notice dated 30.9.2008 and even the Order-in-Original dated 29.1.2010 have not given any specific findings or evidence directly against the



applicants. However, Government observes that Shri Ayush Murarilal Agarwal (Noticee No. 25) was made a Noticee on behalf of three firms, M/s Namaste Exports, M/s Prime Exports (applicant no. 1) and M/s Daffodils Exports (applicant no.2). Moreover, para 47 of the Order in original No. 03/BR-03/Th-1/2010 dated 29.01.2010 clearly show that summons were issued to all the three aforementioned exporters (includes the applicants) who were having a common address i.e. 2036, Golden Plaza, Ring Road Surat.

17. It is pertinent to note here that in his statement recorded under Section 14 of the Central Excise Act, 1944 as a proprietor of M/s Namaste Exports on 18.05.2006, Shri Ayush Murarilal Agarwal has interalia stated that in addition to M/s Namaste Exports, two more firms viz. M/s Daffodils Exports (applicant No.2) owned by his father Shri Murarilal Agarwal and M/s Prime Exports (applicant No.1) owned by his brother Shri Anuj Murarilal Agarwal were also functioning from his premises and the entire operations of all the three firms were looked after by him and he also furnished copies of the export documents in respect of goods purportedly received from M/s Muni Trade Pvt. Ltd., M/s Globe Traders and M/s Mansa Traders Bhiwandi and exported by M/s Daffodils Exports (applicant No.2), M/s Namaste Exports and M/s Prime Exports (applicant No. 1)[as appearing at page 46 and 47 of the Order in original No. 03/BR-03/Th-1/2010 dated 29.01.2010]. Government also observes that contrary to the claim of the applicants the investigations in respect of the applicants has been duly carried out as indicated by the Order in original No. 03/BR-03/Th-1/2010 dated 29.01.2010. Government also observes upon conclusion of the investigations the Commissioner, Central Excise, Thane-I at page 173 of the Order in original No. 03/BR-03/Th-1/2010 dated 29.01.2010 in response to the contention that 'M/s Namaste Exports, M/s Prime Exports (applicant no. 1) and M/s Daffodils Exports (applicant No.2) through their, Shri Ayush Agarwal, have all claimed that the payment by Order cheques were made middleman, to supplier and so, merely on suspicion, penalty cannot be imposed' observed that the evidence on records, i.e. cheques issued by them,



marking on the cheques and identification of it by the shroff, has clearly shown that the so called payments were all received back by him; as such there is no suspicious but a solid proof that his transactions were bogus. Accordingly, penalty of Rs. 50 lakhs was imposed on Shri Ayush Murarilal Agarwal (Noticee No. 25) Proprietor of Namaste Exports, Authorized signatory and brother of Shri Anuj Murarilal Agarwal, Proprietor of M/s Prime Exports, Authorized signatory and son of Murarilal Agarwal Proprietor of M/s Daffodils Exports (applicant No.2). Moreover, Government further observes that Hon'ble CESTAT West Zonal Bench vide its Order No. A/3314-3329/15/EB dated 16.07.2015 dismissed the appeal filed by Shri Ayush Murarilal Agarwal, against the imposition of penalty of Rs. 50 Lakhs by upholding the findings of the Commissioner, Central Excise, Thane-I in Order in Original No. 03/BR-03/Th-1/2010 dated 29.01.2010.

18. Government also notes that the CESTAT West Zonal Bench vide its Order No. A/3314-3329/15/EB dated 16.07.2015 has been challenged by Shri Ayush Murarilal Agarwal vide Central Excise Appeal No. 244/2016 before Hon'ble Bombay High Court and Hon'ble Bombay High while admitting the said appeal Court vide its Order dated 22.01.2018 has observed as under :

"Having heard both sides and perusing the order of the tribunal to a limited extent, namely, the findings pertinent to the appellant before us, we are of the view that this appeal raises a question of interpretation of Rule 26 of the Central Excise Rules, 2002 prior to their amendment. Hence, the appeal is admitted on the following two substantial questions of law:-

"(a) Whether on the facts and circumstances of the case, the appellate tribunal was justified in confirming the penalty under Rule 26 of the Central Excise Rules, 2002?"

"(b) Whether under the facts and circumstances of the case, imposition of penalty on the appellant is justified under Rule 26 of the Central Excise Rules, 2002, when the appellant is not responsible for the business transacted by concerns not belonging to the appellant?"



From the above, it is clear that the appeal filed by Shri Ayush Murarilal Agarwal is only in respect of the penalty imposed on him and not against the investigation and findings of the Commissioner of Central Excise, Thane-1 vide Order in original No. 03/BR-03/Th-1/2010 dated 29.01.2010 that the suppliers of the goods, had committed fraud against the Department and had taken Cenvat credit fraudulently based on bogus/ non-existent units and they themselves did not have any manufacturing unit.

19. Government further observes that the applicants have also contended that neither Daffodils Exports nor Prime Exports till date have given and issued any power of Attorney or Letter of Authorization of in whatsoever manner in favour of Shri Ayush Agarwal who himself is a Proprietor of Namaste Exports. Since, no power of Attorney or any letter of Authorization was ever issued and given to Shri Ayush Agarwal on behalf of Daffodils Exports and Prime Exports the question of its existence on the records of the case proceedings does not arise in what so ever manner in any respect at any stage of proceedings. However, Government observes that in his statement recorded under Section 14 of the Central Excise Act, 1944 on 18.05.2006, Shri Ayush Murarilal Agarwal has not only stated that in addition to M/s Namaste Exports, two more firms Viz. M/s Daffodils Exports (applicant No.2) owned by his father Shri Murarilal Agarwal and M/s Prime Exports (applicant No.1) owned by his brother Shri Anuj Murarilal Agarwal were also functioning from his premises and the entire operations of all the three firms were looked after by him but he also furnished copies of the export documents in respect of goods purportedly received from M/s Muni Trade Pvt. Ltd., M/s Globe Traders and M/s Mansa Traders Bhiwandi and exported by the applicants. Government also notes that Hon'ble Supreme Court of India in many cases have held that Customs officers are not police officers and therefore statements given before Customs officers are valid as substantive evidence. It has been categorically held that the statements made before the customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973 and therefore, it is a material piece of evidence collected by the customs officials under Section 108 of the



Customs Act. These aspects have been dealt with in detail by the Hon'ble Supreme Court in the following judgments (i) Surjit Singh Chhabra v. Union of India reported in 1997 (89) E.L.T. 646, Naresh J. Sukhawani v. Union of India - 1996 (83) E.L.T. 258 (S.C.) etc. In view of the above as well as the findings of the Commissioner of Central Excise, Thane-1, Government is of the considered view that Shri Ayush Muralilal Agarwal was also looking after the affairs of the applicants.

20. In view of the foregoing discussion the applicants' contentions that all the findings given against the applicants in the order in- original dated 29.1.2010 passed by the Thane-1 Commissionerate are incorrect, perverse and bad in law, are unacceptable.

21. The applicants have relied on of CCE Vs. DP Singh - 2011 (270) ELT 321 (Guj.), CCE Vs. Kay Kay Industries - 2013 (295) ELT 177 (SC) in support of their claim of rebate. In this connection Government observes that Hon'ble High Court Gujarat vide its order dated 02.07.2014 in case of M/s Diwan Brothers Vs Union of India [2014(309) ELT 244 (Guj)] while distinguishing the case of CCE Vs. DP Sing (supra) observed as under :-

5.1 Now, so far as the reliance placed upon the decision of the Division Bench of this Court in the case of D.P. Singh (supra) is concerned, the said decision shall not be applicable to the facts of the case on hand. It is required to be noted that in the present case even the transactions between the petitioner and M/s. Universal Textiles (supra) are found to be fake transactions. Merely because M/s. Universal Textiles was not declared as fake company/supplier, it makes no difference. As such there is a distinction between the fake transaction and the fake company. When the transactions between the petitioner and the supplier were found to be fake transactions and it was found that the petitioner has failed to establish and prove that the petitioner used the inputs/goods in manufacturing of even the goods which came to be exported on which the actual excise duty or paid, the petitioner shall not be entitled to the rebate of the duty, which is not proved to be paid. Our aforesaid view is supported by the decision of the Division Bench of this Court in the case of Multiple Exports Pvt. Ltd. v. Union of India reported in 2013 (288) E.L.T. 171 (Guj.).



In the present case the Department had prima facie proved that the supplier of the goods, had committed fraud against the Department and had taken Cenvat credit fraudulently based on bogus/non-existent units and they themselves did not have any manufacturing unit. Moreover, investigations revealed that no payments were made by the applicants to Muni Group and merely for accounts purpose payments were shown in ledger and thus the decision of the Division Bench of this Court in the case of *D.P. Singh* (supra) is not applicable to the present case of the applicants. Moreover, for the same reasons as depicted above, the reliance placed by the applicants' on the Supreme Court judgement reported in 2013 (295) E.L.T. 177 (S.C.) in the case of Commissioner of Central Excise, Jalanadhar v. M/s. Kay Kay Industries, is also misplaced.

22. Government further observes that in the case of *M/s Poddar Exports (India) Vs Union of India* [2015(316) ELT 179 (Guj)] Hon'ble High Court Gujrat while dismissing the Special Civil Application filed by the petitioner observed as under :-

Under the circumstances, when the transactions between the manufacturer (processor) and the merchant exporter (petitioner) are found to be bogus and when it has been established that the purported suppliers are fake and fictitious persons and the entire transaction is found to be only billing activities for the purpose of taking undue advantage of the Cenvat credit and/or the rebate, no error has been committed by the Authorities below in denying the rebate claims claimed by the petitioner.

5.1 Now, so far as the contention on behalf of the petitioner that as the petitioner had exported the goods on payment of duty the petitioner is entitled to rebate of Excise duty is concerned, the same arguments came to be considered by the Division Bench of this Court in Special Civil Application No. 13931/2011 [2013 (295) E.L.T. 387 (Guj.)]. At that stage also, the petitioner of that petition heavily relied upon the decision of this Court in the case of *D.P. Singh* (supra). While not accepting the said submission and while denying the rebate claim on actually exported goods, the Division Bench of this Court has observed as under :

Basically the issue is whether the petitioner had purchased the inputs which were duty paid. It may be true that the petitioner manufactured the finished goods and exported the same. However, that by itself would not be sufficient to entitle the petitioner to the rebate claim. In the



present case, when the authorities found inputs utilized by the petitioner for manufacturing export products were not duty paid, the entire basis for seeking rebate would fall in this case, particularly when it was found that several suppliers who claimed to have supplied the goods to the petitioner were either fake, bogus or nonexistent, the petitioner cannot be claimed rebate merely on the strength of exports made.

In the present case also, there are concurrent findings of fact given by all the authorities below with respect to the fake transactions between the petitioner and M/s. Raju Synthetics Pvt. Ltd., we are of the opinion that all the authorities have examined the case in detail and as such no interference is called for. The conclusions arrived at by the authorities below are on the basis of evidence on record and such conclusions are not pointed out to be perverse. Under the circumstances, as such no interference in exercise of powers under Articles 226 & 227 of the Constitution of India, therefore, can be made.

23. In view of above discussions and findings, Government holds that the impugned orders of Commissioner (Appeals) are legal and proper and hence, required to be upheld. Government, thus, finds no infirmity in impugned orders and, uphold the impugned orders-in-appeal.

24. These impugned revision applications are thus rejected being devoid of merit.

25. So ordered.

ए. आर. हिरुलकर
S. R. HIRULKAR

(ASHOK KUMAR MEHTA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 15-151/2018-CX (WZ)/ASRA/Mumbai DATED 21/5/2018.

True Copy Attached

- To,
- (i) M/s Prime Exports,
Brijwasi Estates, Near Gateway Hotel,
Behind Gokul Raw House, Parle Point,
Surat-395007, Gujrat.
 - (ii) M/s Daffodils Exports
Brijwasi Estates, Near Gateway Hotel,
Behind Gokul Raw House, Parle Point,
Surat-395007, Gujrat

3
21/5/18
ए. आर. हिरुलकर
S. R. HIRULKAR



Copy to:

1. The Commissioner of CGST, Mumbai South, Commissionerate, 13th Floor, Air India Bldg., Nariman Point, Mumbai 400 021.
2. The Commissioner, CGST, Thane Mumbai (Appeals) -I, , 9th Floor, Piramal Chambers, Jijibhoy lane Lalbaug Parel 400 012.
3. The Deputy / Assistant Commissioner (Rebate), CGST, Mumbai South, Commissionerate .
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.

0/0

