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SPEED POST

F.No. 195/194/12-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 23/4/14

ORDER NO. 159/14-Cx DATED 22.04.2014 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D.P.SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject	:	Revision applications filed under Section 35 EE of the Central Excise Act, 1944 against the orders-in-appeal No.BC/317/RGD/11-12 dated 16.2.12 passed by the Commissioner of Central Excise (Appeals-III), Mumbai-III.
Applicant	:	M/s Miraj Power Services Rolliwala Compound, 120 Bamroli-Pandesara Road, Surat
Respondent	:	Commissioner of Central Excise, Mumbai-II

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ORDER

This revision application is filed by M/s Miraj Power Services Rolliwala Compound, 120 Bamroli-Pandesara Road, Surat against the order-in-appeal No.BC/317/RGD/11-12 dated 16.2.12 passed by the Commissioner of Central Excise (Appeals-III) Mumbai-III, Navi Mumbai with respect to order-in-original No.994/10-11/AC(Rebate) Raigad dated 9.12.11 passed by Assistant Commissioner of Central Excise (Rebate), Raigad.

2. Brief facts of the case are that:

2.1 M/s. Miraaj Power Services" having office situated at Rotiwala Compound, Opp., Bharat Petrol Pump, Near Manahar Dyeing Mills,120 Bamroli-Pandesara Road, Surat (Gujrat) have filed the below mentioned 4 rebate claims for rebate of duty against the export of capital goods procured from different manufacturers/ suppliers.

2.2 The details of the Rebate Claims filed by the claimant:-

Sr.No	RC-No.	RC- Date	ARE I No and Date	Manufacturer from whom the Capital Goods obtained	Amount of Rebate claimed
1	27857	23/03/2007	03 22/08/2006	FCL Technologies & Products Ltd	3,70,331
2	668	12/04/2007	01 21/07/2006	Rotatex Polyster	72,000
3	669	12/04/2007	02 21/07/2006	Raj Rayon	2,26,200
4	670	12104/2007	01 21/07/2006	Raj Rayon	3,36,000
			Total		10,04,5311

On perusal of above said 4 rebate claims, it is observed that, they have filed rebate claims of Central Excise duty paid on removal of 'capital goods as such'. In this case, the claimant is a merchant exporter and they have purchased 'used capital goods' from the above said manufacturer. The above said manufacturer has removed subject capital goods 'as such' from their

factory which is not manufactured by them. The above said manufacturers are registered under Central Excise Acts for manufacture of 'Polyester Texturised Yarn' under rule 4 of Cenvat Credit rules, 2004. In this regard, a Deficiency Memo-cum-SCN-call for personal hearing was granted by then Assistant Commissioner of Central Excise (Rebate) as to why the rebate should not be rejected on the grounds as under:-

> Exported capital goods have been cleared 'as such' under rule 3(5) of the Cenvat Credit Rules,2004 by reversal of amount equal to the cenvat credit availed at the time of purchase of such capital goods. The said amount paid at the time of clearance of used capital goods for export cannot be treated as duty payment and hence cannot be considered for rebate ". A personal hearing was granted to the claimant on 04/09/09 at 15.30 hours by then Assistant/Deputy Commissioner of Central Excise (Rebate) Raigad

2.3 After following the due process of law, the adjudicating authority rejected the rebate claim holding that amount reversed under Rule 3(5) equivalent to the amount of duty credit originally availed in terms of Rule 3(4) of Central Credit Rules 2002 does not fall within the meaning of duty as per notification No.19/04-CE(NT) dated 6.9.04.

3. Being aggrieved by the said order-in-original, the applicant filed appeal before Commissioner (Appeals) who rejected the same.

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

4.1 There is no dispute that the manufacturer had removal the Excisable Goods (capital goods) from his factory under an invoice issued under rule 11 of Central Excise Rules, 2002. Under the provision of rule 8(1) of Central Excise Rules, 2002, the duty on the goods removal from the factory during the month shall be paid by the 5th day of the following month. By explanation (a) of the rule, the duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specific date. As soon as, the manufacturer debits the amount of duty payable, in the CENVA T Credit register, it means, the duty

liability has been discharged Under Explanation of Rule 8(4) of Central Excise Rules, 2002/ it is stated that for the purpose of this rule, the expression "duty" or "duty of excise" shall also include the amount payable in terms of Cenvat Credit Rules, 2004. Therefore any amount debited in CENVA T Credit register, is nothing but payment of duty.

4.2 The applicant had cleared and the exported capital goods (Excisable goods) as such from the factory, on reversal of Cenvat credit, in terms of rule 3(5) of CENVAT Credit Rules 2004. Under Rule 3(6) of CENVAT Credit Rules 2004, any reversal of CENVAT Credit Under Rule 3(5) is treated as payment of duty. Hence in other words/ whatever amount reversed Under Rule 3(5) is payment of duty only.

4.3 The manufacturer had cleared the capital goods for export under the cover of Central Excise invoice and an amount equal to credit availed was paid according to the provision of Rule 3(5) of Cenvat Credit Rules, 2004. Further, as per Rule 3(6) of Cenvat Credit Rules, 2004 the amount paid under sub-rule (5) should be the goods, under the cover of Central Excise invoice, are eligible to take CENVAT Credit of the amount paid under sub-rule (5). In view of above legal position of law the reversal of CENVAT Credit under Rule 3(5) of Cenvat Credit Rules, 2004,at the time of clearance of Capital goods from the factory is payment of duty under Section 3(1) of Central Excise Act, 1944. Hence, the finding is legally not sustainable.

4.4 Applicant had relied upon the judgement of Hon'ble High Court of Bombay in the case of CCE, Raigad Vs. M/s. Micro Inks Ltd. 2011 (270) E.L.T. 360 (Bom.), where it was held that:-

Rebate - Export of inputs/capital goods on payment of duty by reversing the credit of duty availed on such inputs/capital goods under Rule 3(4) of Cenvat Credit Rules, 2002 - If duty is paid by reversing the credit it does not lose the character of duty and therefore if rebate is otherwise allowable, the same cannot be denied on the ground that duty is paid by reversing the credit. - CBEC's Circular No.283/96, dated 31-12-1996 referred - Plea that identity of exported inputs/capital goods could not be correlated with the inputs/capital goods brought into the factory, not acceptable since the goods were exported under ARE-1

form and same were duly certified by Customs authorities - Rule 18 of Central Excise Rules, 2002 - Rules 3(5) and 3(6) of Cenvat Credit Rules, 2004. [paras 17, 18]

The ratio of this judgement is applicable to our case, hence appeal should be allowed, hence see has to maintain judicial discipline but fails to do so.

5. Applicant vide letter dated 3.4.14 has made following submissions:

5.1 That the applicant is merchant exporter and exported the goods in question which were old and use D.G.Set & its Accessories purchased from different manufacturer where it was installed and used for generation of electricity used for their manufacturing purpose. The said D.G.sets were exported on payment of excise duty by way of payment made in terms of Rule 3(5) of Cenvat Credit Rules 2004.

5.2 The Applicant rely upon the following decisions under which the Joint Secretary has held that an amount equal to Cenvat credit taken on inputs or capital goods debited on removal of inputs and capital goods as such in terms of Rule 3(4)(b) & 3(5) of Cenvat Credit Rules, 2004 is to be treated as Payment of duty of excise for the purpose of Rule 18 of the Central Excise Rules, 2002 readwith the notification issued thereunder. Hence, rebate claim is admissible to the applicant under Rule 18 of Central Excise Rules.

- In the Matter of M/s C.C.E, Raigad vs. Cello International Pvt. Ltd.vide their Govt. of India No.356/07 dated 27.06.2007 under F.No.198/368/06-RA. Vide the above Ruling the Joint Secretary has decided that if duty has been paid on goods exported as such then rebate shall be granted equal to the Cenvat Credit taken on the inputs or capital goods.
- In the Matter of M/s Century Enka Ltd., Pune (GOI Order No.1706/10-CX dt. 23.11.2010 under RA file No.195/542/09-RA), the Joint Secretary has held that debited made in terms of Rule 3(4)(b) & 3(5) of Cenvat Credit Rules, 2004 on removal of inputs as such is to be treated as Payment of duty of excise for the purpose of Rule 18 of the Central Excise Rules, 2002 read with the notification issued thereunder.
- In the matter of M/s Chiripal Industries Ltd., Ahmedabad (Govt. of India Order No.1658/10-CX dt. 01.11.2010 issued under RA file No.195/99/08-

RA-CX), the Joint Secretary has held that duty/cenvat credit reversed in terms of erstwhile Rule 3(4) of Cenvat Credit Rules 2004 is to be treated as payment of duty for the purpose of Rule 18 ibid read with notification issued thereunder.

6. Personal hearing scheduled in this case on 10.4.14 was held on 3.4.14 on the written request of applicant and hearing was attended by Shri D.K.Singh, Advocate on behalf of the applicant, who reiterated the grounds of revision application.

7. Government has carefully gone through the relevant case records, oral & written submissions and perused the impugned order-in-original and order-in-appeal.

8. On perusal of records, Government observes that the issue whether reversal of cenvat credit under rule 3(4)/ 3(5) of Cenvat Credit Rule 2004 on removal of inputs / capital goods as such is to be treated as payment of duty for the purpose of sanctioning rebate claim under rule 18 of CER 2002 read with Not. No. 19/04-CE(NT) dated 6.9.2004, has already been decided vide GOI Revision Order No. 873/10-Cx dated 26.05.10 in the case of M/s Micro Inks Ltd., GOI order No. 18/09 dated 20.01.2009 in the case Sterlite Industries Ltd. Raigarh and GOI Order No. 326/10-Cx dated 18.02.10 in the case of M/s Ispat Industries Ltd., Raigarh. In the said orders it was held that an amount reversed under rule 3(4) / 3(5) of Cenvat Credit Rules 2004 on removal of inputs / capital goods as such payment of duty of excise for the purpose of sanctioning rebate claim under rule 18 of Central Excise Rules 2002 read with Not. No. 19/04-CE(NT) dated 6.9.2004. These GOI revision orders were challenged by department before Bombay High Court in the following writ petitions:

Sr. No.	Case of	W.P. No. filed by department	Against GOI Order No.	Date of Judgment
1.	M/s Ispat Industries	88/11	326/10-Cx dt. 18.2.10	24.03.2011
2.	M/s Micro Ink Ltd.	2195/10	873/10-Cx dt. 26.05.10	23.03.2011
3.	M/s Sterlite Industries India Ltd.	2094/10	18/09 dt. 20.01.09	24.03.2011

9. Hon'ble High Court of Bombay has dismissed all these writ petitions and upheld GOI Revision orders. Hon'ble High Court in its judgement dated 24.3.11 in the case of Sterlite Industries India Ltd. in para 4 to 9 has held as under:

"4. The case of the revenue in this Writ Petition is firstly, that the reversal of credit equal to the amount of duty cannot be said to be payment of duty under Rule 18 of the Central Excise Rules, 2002 and consequently the assessee is not entitled to claim rebate on such reversal of credit. Secondly, the capital goods were not exported directly from the factory of the manufacturer as contemplated under Notification No.41/94 dated 12/9/1994, Circular No.294/97 dated 30/1/1997 and Notification No.19/2004 dated 6/9/2004 and, therefore, the rebate claim is liable to be rejected. Thirdly, the capital goods imported by the assessee have been used by the assessee for several years and, therefore, the export of capital goods cannot be said to be "removed as such" as provided under Rule 3(5) of the Cenvat Credit Rules, 2004.

5. We see no merit in the above contention. Reversal of input credit is one of the recognized method for paying duty on the final product. In fact, the Central Government by its circular No.283 dated 31/12/1996 construing similar provisions contained in Rule 57F of the Central Excise Rules, 1944 held that where the inputs are cleared on payment of duty by debiting RG-23A Part II as provided under erstwhile Rule 57F4 of the Central Excise Rules, 1944, the manufacturer would be entitled to rebate under Rule 12 (1)(a) of the Central Excise, 1944. Rule 57F in the 1944 Rules is pari materia to Rule 3(5) of Cenvat Credit Rule, 2004. Similarly, Rule 12(1)(a) of the 1944 Rules is pari materia to Rule 18 of the Central Excise Rules, 2002. Therefore, when the Central Government has held that where the duty is paid by debiting the credit entry, rebate claim is allowable, it is not open to the departmental authorities to argue to the contrary.

6. Similarly, the argument that the capital goods have not been exported directly from the factory of the manufacturer is also without any merit because, similar contentions raised by the revenue in Writ Petition No.2195 of 2010 has been rejected by this Court by dismissing the petition on 23/3/2010.

7. The last contention of the revenue is that since the imported capital goods has been used by the assessee for several years, it cannot be said that the capital goods are 'removed as such' as provided under Rule 3(5) of 2004 Rules. There is some dispute as to whether the capital goods imported by the assessee were put to use before they were exported. Assuming that the said capital goods were used by the assessee before export, it would still be export of the capital goods imported by the assessee. In other words, the duty paid capital goods when exported as capital goods even after put to use for some time, Rule 3(5) of 2004 Rules would be applicable, because in such a case the capital goods even after put to use for some time continue to be capital goods.

8. The expression "removed as such" in rule 3(5) of the Cenvat Credit Rules, 2004 simply means that when inputs or capital goods are removed as inputs or capital goods as such, the assessee shall pay an amount equal to the credit availed in respect of such inputs or capital goods. In other words, inputs/capital goods on the date of removal must be in the same form as they were on the date on which they were brought into the factory. Normal wear and tear of the inputs/capital goods does not make them different from the original inputs/capital goods. Moreover, it is not the case of the revenue that on account of the user, the character of the capital goods has changed. Therefore, where duty paid inputs/capital goods brought into the factory are subsequently cleared for export, then Rule 3(5) of 2004 Rules would apply. Hence, the Joint Secretary to the Government of India was justified in holding that user of the capital goods before export does not in any way affect the duty liability on export of such capital goods and consequently does not affect the right of the assessee to claim rebate of duty paid on export of such capital goods.

9. For all the aforesaid reasons, we see no merit in the petition and the same is hereby dismissed with no order as to costs."

Government notes that ratio of said judgement is squarely applicable to this case as the facts of instant case and that of cited case are identical.

10. Government notes that Hon'ble Supreme Court has held in the case of UOI Vs. Kamalakshi Finance Corporation Ltd. 1991 (55) ELT 433-SC that

orders of appellate authority are to unreservedly followed by subordinate authorities unless the operation of the same has been stayed by competent court. In this case, no stay is granted by Hon'ble Supreme Court. Government also notes that SLP No. 6120/12 filed in Supreme Court by department against Bombay High Court order dated 24.03.2011 in W.P. No. 2094/10 in the case of Sterlite Industries India Ltd. is also dismissed vide order dated 14.09.2012 whereas SLP filed against order dated 23.3.11 in the case Micro Ink Ltd. is still pending. The ratio of above said judgement is squarely applicable to this case and therefore the rebate claim cannot be denied to the applicant. Government holds that applicant has cleared the capital goods as such for export after payment of duty by way of reversal of cenvat credit under Rule 3(5) of Cenvat Credit Rules 2004. Therefore, the rebate claim is admissible to the applicant under Rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE(NT) dated 6.9.04 subject to the condition that the provision of Notification No.19/04-CE(NT) dated 6.9.04 are complied and rebate claim is otherwise in order.

11. In view of position explained above, the impugned order-in-appeal is not legal and proper, therefore, Government sets aside the said order-in-appeal and allows the revision application in terms of above.

12. The revision application is allowed in terms of above.

13. So ordered.

(D.P.Singh)
Joint Secretary (Revision Application)

M/s Miraj Power Services
Rotliwala Compound, Opp. Bharat Petrol Pump,
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Surat

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

Order No. 159/2014-Cx dated 22.04.2014

Copy to:

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2. Commissioner of Central Excise (Appeals), Mumbai-III, 5th Floor, CGO Complex, CBD Belapur, Navi Mumbai – 400614.

3. The Assistant Commissioner (Rebate), Central Excise, Raigad.

4. Shri D.K.Singh, Advocate, 16/267, Ist Floor, Gali No.9, Joshi Road, Karol Bagh, New Delhi-110005

5. PA to JS (RA)

6. Guard File

7. Spare copy

ATTESTED

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