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SPEED POST

GOVERNMENT OF INDIA
MINISTRY OF FINANACE
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. 195/62-70/16-RA 1491 Date of Issue: 10.02.2022

ORDER NO.167 – 175 /2022-CX(SZ)/ASRA/MUMBAI DATED08/02/2022 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. AVO Carbon India Pvt. Ltd.

Respondent: Commissioner of Central Excise, Chennai-II, Commissionerate.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. 63 to 71/2016 (CXA-II) dated 29.02.2016 passed by the Commissioner (Appeals-II), Central Excise, Chennai.

ORDER

Nine Revision Applications under F. No. 195/62-70/16-RA have been filed by the M/s. AVO Carbon India (P) Ltd., 25/A2, Dairy Plant Road, SIDCO Industrial Estate (NP), Ambattur, Chennai – 600 098 (hereinafter referred to as "the Applicant") against Order-in-Appeal No. 63 to 71/2016 (CXA-II) dated 29.02.2016 passed by the Commissioner (Appeals-II), Central Excise, Chennai. The details of the Orders-in-Original are as under:-

S. No.	Order-in-Original No./Date	Amount of Rebate involved
1	02/2014 (Rebate) dated 02.03.2015	Rs.4,94,707/-
2	03/2015 (Rebate) dated 02.03.2015	Rs.4,60,091/-
3	04/2015 (Rebate) dated 02.03.2015	Rs.4,17,946/-
4	05/2015 (Rebate) dated 02.03.2015	Rs.4,93,562/-
5	06/2015 (Rebate) dated 02.03.2015	Rs.3,73,470/-
6	07/2015 (Rebate) dated 02.03.2015	Rs.5,19,955/-
7	08/2015 (Rebate) dated 02.03.2015	Rs.4,93,319/-
8	09/2015 (Rebate) dated 02.03.2015	Rs.8,25,705/-
9	10/2015 (Rebate) dated 02.03.2015	Rs.4,87,204/-

2. Brief facts of the case are that the Applicant had filed rebate claims for the duty paid on the export of finished goods namely Carbon Brushes falling under Tariff Heading No. 85452000. The rebate sanctioning authority, Assistant Commissioner of Central Excise, Division-IV, Chennai-II Commissionerate rejected the rebate claims vide the impugned Orders on the grounds that the duty on the export of goods was paid by utilizing the ineligible Cenvat Credit. Aggrieved, the applicant filed an appeal. However, the Commissioner (Appeals) denied the appeal and upheld the order of rebate sanctioning authority.

3. Hence, the Applicant filed the impugned Revision Application mainly on the grounds that:

a) The allegation of ineligible availment of cenvat credit of duty paid on stock of imported/indigenous raw material and imported

capital goods at the time of de-bonding is not at all legally sustainable. As mentioned in the impugned show cause notice as well as the order-in-original, that already a separate show cause notice dated 23.5.2013 had been issued to the applicants proposing to deny such credit and demand recovery of the same. The said show cause notice had been adjudicated vide Order in Original No. 16/2013 dated 10.12.2013 confirming the demand proposed. The applicants are contesting the issue and they have already filed an appeal before the Hon'ble Tribunal against the above Order vide Appeal No. E/40187/2014. The Hon'ble Tribunal has granted full waiver from pre-deposit of the duties involved, with interest and penalties vide Stay Order No. 41472/2014 dated 26.08.2014.

b) Since already an Order denying the credit and demand for recovery of the same has been confirmed against them, which has been stayed by the Tribunal, there cannot be any more recovery of such in-eligible credit by denying the rebate claims which otherwise, they are legitimately entitled for. In case if the issue is finally decided in their favour, then there will be not be recovery of any demand against them and even in case if the issue is finally decided against them, then they would be liable to discharge the said demand and hence, there cannot be any second confirmation of demand against them on the same grounds or denial of rebate for the very same reason. On this ground itself, the rejection of rebate is not at all sustainable.

c) They had huge credit in the books of EOU at the time of de-bonding and consequent to de-bonding, the same unit continued to exist as DTA unit. The Credit balance also continued to be available in the cenvat credit account in the same excise registration and hence there is no requirement to request for transfer of such cenvat credit balance under Rule 10 of Cenvat Credit Rules 2004. It is also not a case of fresh taking/availment of cenvat credit after de-bonding. The credit had been originally

availed by the EOU unit based on valid documents and there is no dispute in this regard. The credit lying in balance out of such credit taken continued to be available in the same registration even after de-bonding and merely on account of de-bonding of EOU into DTA unit, the law does not call for any new registration and exiting registered unit continues to operate as such for the purpose of central excise. Therefore, there is no question of any transfer of credit from one registered unit to another registered unit and it is only a continuation of credit balances in the same registered unit even after de-bonding. As such the allegation made on this account also is not sustainable and the appellants are rightfully entitled for the rebates claimed

d) They wish to place reliance on the decision of the Hon'ble Tribunal in the case of CCE, Vadodara - II Vs. Fag Bearing India Ltd reported in 2013 (287) ELT 89, wherein it has been held categorically in an identical situation that the de-bonded EOU continues to function automatically as an DTA unit and there is no requirement of any movement of capital goods/raw materials by way of issuance of any invoices and the credits have been correctly availed in the absence of any new registration.

e) They also wish to place reliance on the judgment of the Hon'ble Tribunal in the case of Sun Pharmaceuticals Indus Ltd vs. CCE, Pondicherry reported in 2010 (251) ELT 312, wherein in a converse situation of converting a DTA unit into EOU, the cenvat credit balance lying in the DTA unit on the date of such conversion was carried forward to the EOU as the materials and capitals goods was also carried forward to the EOIJ unit, but the revenue objected to such carried forward of credit to EOU. The Hon'ble Tribunal held categorically in this case also to the effect that EOU is entitled to take credit under Cenvat Credit Rules, and there is no bar for an EOU to avail cenvat Credit under Cenvat Credit Rules or Central Excise Rules, 2002 unlike in the case of erstwhile Rule IOOH of Central Excise Rules, 1944 and there is no provision in the Cenvat Credit Rules to lapse such credit lying in balance at the time of conversion.

f) Applying the same ratio to the case on hand also, the applicants wish to submit that the credit availed by them is very much in order and denial of rebate claim on the grounds of in-eligible credit is not at all sustainable.

g) that consequent to de-bonding of their EOU unit, they have been continuously importing as well procuring domestically the required materials on payment of duty and from the date of de-bonding till date, they have availed so much of credit to the tune of Rs.3,67,04,519/-. Even presuming without admitting that they not are entitled for the cenvat credits as alleged, even then the appellants had sufficient credit balances otherwise and these duty paid for the export clearances in question under claim of rebate have been duly paid of eligible cenvat credit which are not at all in dispute. As such, the impugned order, denying the rebate claims on the presumption that the duties on the export clearances have been made out ineligible credit is not at all sustainable at all.

In the light of the above submissions, the applicant prayed to set aside the impugned order with consequential relief.

4. Personal hearing in the case was fixed for 13.10.2021. Shri M. Karthikeyan, Consultant attended the online hearing on behalf of the Applicant and he reiterated the earlier submissions. He stated that Hon'ble Madras High Court has vide Order dated 6/8/2019 dropped the issue of Cenvat credit denial and has allowed the credit. He requested to allow the rebate.

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

6. Government observes that the matter in hand can be summarized as follows:

i. The applicant was registered with the Central Excise Commissionerate as an 100% EOU for manufacture of Carbon Brushes falling under Chapter Heading 85852000 of Central Excise Tariff Act, 1985.

ii. Subsequently, they surrendered EOU status on 23-2-2012 and became a DTA unit. At the time of de-bonding, the applicant paid appropriate duty on the imported/indigenous non-duty paid raw materials and capital goods lying in stock.

iii. After issue of final exit order by the Development Commissioner on 23-2-2012, the applicant availed Cenvat credit on the duty paid stock of inputs and on the capital goods.

iv. A show cause notice dated 23-5-2013 was issued to the applicant for recovery of wrong availment of Cenvat credit of Rs. 1,49,33,553/- in contravention of Rule 3 and Rule 9 of Cenvat Credit Rules,2004.

v. The Commissioner of Central Excise, Chennai-II Commissionerate, vide Order-in-original No. 16/2013, dated 10-12-2013, confirmed the demand of Rs.1,49,33,553/- on the ground that the proviso to Rule 3(1) of Cenvat Credit Rules, 2004 provides for only allowing Cenvat credit in respect of the amount equal to the Central Excise duty paid on the capital goods at the time of debonding of the unit.

vi. Hence, the applicant filed an appeal with Hon'ble CESTAT, South Zonal Bench, Chennai, who vide Final Order Nos. 40274-40275/2017, dated 14-2-2017 (2017 (357) E.L.T. 1057 (Tri. - Chennai)) dismissed the appeal.

vii. In the meanwhile, the rebate claims filed by the applicant as detailed at Para 1 of this Order, were rejected by the rebate sanctioning authority on the grounds that duty paid at the time of export was from ineligible Cenvat Credit as it had been held as wrong credit by the Commissioner of Central Excise vide order No. 16/2013, dated 10-12-2013.

viii. The applicant approached Hon'ble Madras High Court against the said CESTAT Order dated 14-2-2017 vide Civil Miscellaneous Appeal No.3023/2017.

ix. The Hon'ble High Court vide Order dated 6-8-2019, while allowing the appeal held that:

18. *There is no dispute or quarrel on the legal proposition on how to interpret a later on inserted Proviso in an enactment. But, what we are looking at is the insertion of Proviso in Rule 3 of Cenvat Credit Rules, 2004 which we find it to be more in the nature of an Explanation clarifying what was in doubt earlier viz., about allowing of Cenvat credit in respect of capital goods earlier. The allowing of Cenvat credit on raw material was never in doubt whether on de-bonding or otherwise on procurement of raw material. Rule 3 does not make any such distinction. Therefore, these judgments cited at Bar do not deflect the position of the Proviso inserted in Rule 3 by Notification No. 35/2008 on 24-9-2008.*

19. *In view of the aforesaid legal position, we are of the view that the Learned Tribunal has erred in denying such benefit of Cenvat credit to the assessee in the present cases and therefore, the present appeals filed by the assessee deserve to be allowed. Accordingly, they are allowed and the impugned order passed by the Assessing Officer as well as the Appellate Authority below are set aside. No order as to costs. The connected Miscellaneous Petitions are closed.*

7. Government observes that the only reason for rejecting the impugned nine rebate claims and the subsequent appeals was aforementioned Order-in-original No. 16/2013, dated 10-12-2013 passed by the Commissioner of Central Excise, Chennai-II, which has been subsequently set aside by the Hon'ble Madras High Court vide aforementioned Order dated 6-8-2019.

8. In view of the findings recorded above, Government sets aside the impugned Orders-in-Appeal No. 63 to 71/2016 (CXA-II) dated 29.02.2016 passed by the Commissioner(Appeals-II), Central Excise, Chennai and allows the Revision Applications filed by the applicant.

9. The impugned Revision Applications are disposed of on the above terms.

Shrawan 8/2/22

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

ORDER No. 167-173 /2022-CX (SZ)/ASRA/Mumbai dated 08.02.2022

To,
M/s. AVO Carbon India (P) Ltd.,
25/A2, Dairy Plant Road,
SIDCO Industrial Estate (NP),
Ambattur, Chennai – 600 098.

Copy to:

1. Pr. Commissioner of CGST,
   Chennai North Commissionerate,
   26/1, Mahatma Gandhi Road,
   Nungambakkam, Chennai – 600 034.

2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Notice Board.