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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. 195/456, 1400/12-RA
F.No. 195/409, 456, 693, 694/13-RA 1245

Date of Issue: 11\02\2020

ORDER NO. 170-175/2020-CX (WZ) /ASRA/MUMBAI DATED 05.02.2020 OF THE OF THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF CENTRAL EXCISE ACT,1944.

Applicant : M/s Gokak Textile Limited,
Cotton Exchange Building,
B-74, 1st Floor, Cotton Green (East),
Mumbai - 400033.

Respondent: The Commissioner of Central Excise, Raigad Commissionerate.

Subject : Revision Applications filed, under Section 35EE of Central Excise Act, 1944 against the Order-in-Appeal as detailed in Table-I passed by the Commissioner of Central Excise, Mumbai - II.

ORDER

These revision applications are filed by M/s Gokak Textiles Ltd., Mumbai against the Orders as per table below passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-II, with respect to orders-in-original passed by the jurisdictional Assistant Commissioner of Central Excise (Rebate), Raigad.

TABLE-1

Sl. No	Revision Application No.	Order-in-appeal No. & Date
(1)	(2)	(3)
1	195/456/12-RA	US/70/RGD/2012 dt. 27.1.2012
2	195/1400/12-RA	US/445/RGD/2012 dt. 12.7.2012
3	195/694/13-RA	BC/693/RGD(R)/12-13 dt. 28.3.2013 BC/433/RGD(R)/12-13 dt. 29.11.2012 BC/452/RGD(R)/12-13 dt. 6.12.2012 BC/692/RGD(R)/12-13 dt. 28.3.2013
4	195/409/13-RA	
5	195/456/13-RA	
6	195/693/13-RA	

2. Brief facts of the cases covers vide Sr. No.(1) & (2) are that the applicant had exported yarn and fabric of cotton on payment of duty under Rule 18 of the Central Excise Rules, 2002 and had consequently filed rebate claims under Notification No.19/2004-CE(NT) dated 06.09.2004. The rebate sanctioning authority i.e. the Assistant Commissioner of Central Excise (Rebate), Raigad vide impugned Orders-in-Original rejected the rebate claims on the ground that the applicants have not availed cenvat credit facility; that the goods exported were wholly exempted from duty under Notification No. 30/2004-CE dated 09.07.2004; the applicant had paid duty and claimed rebate and hence the payment made by the applicant could not be considered as excise duty and hence rebate could not be sanctioned under rule 18 of the Rules.

2.1 In respect of cases covers vide Sr. Nos. (3), (4), (5) and (6), the demands were confirmed for erroneously sanctioned rebate claims earlier on the ground that Commissioner (Appeals) decided the cases against the applicant.

3. The Commissioner (Appeals) upheld the impugned Orders-in-Original and rejected applicant's appeals.

4. Being aggrieved with the impugned Orders-in-Appeal, the applicant has filed these Revision Applications under section 35EE of Central Excise Act, 1944 before Central Government on the following grounds:-

4.1 The benefit of exemption under Notification No.30/04-CE dated 06.09.2004 would apply 'provided that' credit of duty on inputs and capital goods has not been taken. It is submitted that non availment of credit is a condition precedent for the goods to be exempt from duty. Hence exemption benefit under Notification No. 30/04-CE dated 06.09.04 is not provided 'absolutely'. Therefore provisions of section 5A(1A) cannot be pressed into service. The impugned order is therefore liable to be set aside.

4.2 The condition / proviso in Notification No. 30/04-CE that Cenvat Credit must not be availed on inputs and capital goods cannot be used as a lever to browbeat the applicant to avail the benefit of Notification No. 30/04-CE. It is submitted that merely because the applicant had not availed credit on inputs, they cannot be ordained to reconcile themselves to acquiesce with Notification No. 30/04-CE. It is the option of the applicant whether or not to avail the benefit of Notification No. 30/04-CE. The impugned order enforcing Notification No. 30/04-CE on the applicant is therefore not justified in law.

4.3 The applicant submits that Notification No. 30/04-CE would apply 'Provided that nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs or capital goods has been taken under the provisions of CENVAT Credit Rules, 2002'. It is submitted that in applying this notification, the Department has examined, scrutinized and restricted itself to the fact that Cenvat Credit has not been availed on inputs. However the Department has failed to discern and bear in mind that Cenvat Credit has been availed on capital goods used to produce the impugned goods. Since the

applicant has availed and utilized Cenvat Credit on capital goods, they have failed to fulfill the condition of Notification No. 30/2004-CE and hence the same would be inapplicable to them. Consequently the applicant could not have exported the goods without payment of duty and section 5A (1A) would not apply to the facts of the case. The impugned order relying on section 5A(1A) to deny the rebate is therefore liable to be annulled.

4.4 The applicant submits that they have been availing Cenvat Credit on the packing material used in the export of the impugned goods in all the ARE-1s. However by inadvertence it was declared by that credit had not been availed in a few ARE-1s. The impugned order stating that credit has not been availed et all is an incorrect finding of fact.

4.5 The applicant submits that declaration in the ARE... _1 is a procedural aspect. The fact that duty has been paid on the goods and that the goods have actually been exported is not disputed by the department. Hence procedural infractions must pave way to substantial compliance and rebate should be granted. The applicant relies on the following judicial decision in support of their submission supra.

4.6 For other revision applications mentioned at Sr. No.(3)(4)(5) & (6), department had issued show cause notice for recovery of erroneously sanctioned rebate claims. The adjudicating authority confirmed the demand and Commissioner (Appeals) upheld the order for confirmation of demand. In this regard, the applicant has relied upon Hon'ble Karnataka High Court's judgement reported as [2012(275)ELT 404 (Kar,)] in case of M/s Stella Rubber Wares.

5. Personal hearing scheduled in this case on 27.11.2019 was attended by Shri Mehul Jivani, Chartered Accountant, Shri Sanjay Naik, Exim Managar & Shri Avadhut Sarnaik, Chief Finance Officer on behalf of the applicant who reiterated the grounds of Revision Application. Nobody attended the hearing on behalf of Respondent department. Applicant has relied upon GOI Revision

Order No.407-410/13-Cx dated 27.5.13 in their own case.

6. 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.

7. In this case, the department has contended that the applicant having declared in impugned AREs-1 that they have not availed cenvat credit, were compulsorily required to avail complete exemption of duty under Notification No.30/2004-CE and hence, the export of goods under Notification No.29/2004- CE was not correct. In this regard Government observes that the Notification No. 29/2004-C.E., dated 9-7-2004, grants partial exemption to goods manufactured and duty is chargeable @ 4% or 8%, and Notification No. 30/2004-C.E., dated 9-7-2004 grants full exemption from payment of central excise duty, subject to the condition that no cenvat credit is taken on the inputs consumed in the manufacture of final product. The applicants could avail both the aforesaid Notifications simultaneously in terms of clarification issued by the C.B.E.C. vide. its Circular No. 795/28/2004-CX., dated 28-7-2004. The basic condition for availing exemption under Notification No. 30/2004-C.E., dated 9-72004 was that the applicant is not allowed to take Cenvat Credit on the inputs utilized for manufacturing/processing of the finished goods. Whereas for availing benefit under Notification No. 29/2004-C.E., dated 9-7-2004, there was no such condition of availing or not availing of the Cenvat Credit on the inputs utilized for manufacturing/processing of the finished goods.

7.1 As per Board Circular No. 795/28/2004-CX dated 28-7-2004, the manufacturer can avail both the Notifications No. 29/2004-C.E., and 30/2004-C.E., both dated 9-7-2004 simultaneously provided the manufacturer maintains separate set of accounts for goods in respect of which benefit of Notification No. 29/2004-C.E., dated 9-7-2004 is availed and similarly, for goods in respect of which benefit of Notification No. 30/2004-C.E. dated 9-7-2004 is availed. The C.B.E.C. further issued a Circular No., 845/3/2006-CX. dated 1-2-2007 to clarify the provision of simultaneous availment of Notification Nos. 29/2004-C.E. and 30/2004-C.E. both dated 9-7-2004 wherein it has been clearly mentioned that non-availment of credit on inputs is a pre-condition for

availing exemption under this Notification (30/2004-C.E., dated 9-7-2004) and if manufacturers avail input cenvat credit, they would be ineligible for exemption under this Notification (30/2004-C.E., dated 9-7-2004). However, Board further allowed the availment of proportionate credit on the inputs utilized in the manufacture of goods cleared on payment of duty (under Notification No. 29/2004-C.E., dated 9-7-2004) should be taken at the end of the month only. The Government, therefore, infers that the purpose of this clarification was only to check that the manufacturer should not claim cenvat credit on the inputs and avail exemption under Notification No. 30/2004-C.E., dated 9-7-2004.

7.2 During the relevant period, the applicants cleared the goods for export after paying the concessional rate of excise duty in terms of Notification No. 29/2004-C.E., dated 9-7-2004 and filed rebate claims under Rule 18 of the Central Excise Rules, 2002. The applicants in their impugned AREs-1 declared that they were not availing the cenvat credit on the inputs used in the manufacture of the exported goods. They were entitled to avail both the Notification 29/2004-CE and 30/2004-C.E., simultaneously provided they followed the provisions of above said CBEC Circulars. The lower authorities have drawn conclusion that as the applicants were not claiming the cenvat credit on the inputs used in the manufacture of the exported goods, hence they were working under exemption Notification No.30/2004-C.E., dated 9.7.2004.The applicant in this regard submitted that they have availed Cenvat Credit on capital goods used in manufacture of export product and also that they availed Cenvat Credit on packing material used in the export of impugned goods in all the AREs-1, but due to clerical error, they failed to declared that they did not avail Cenvat Credit. The applicant have submitted some documents along with certificates issued by jurisdictional Central Excise Range officers that the applicant has availed Cenvat Credit and exported the goods under rebate claim after payment of duty under Notification No. 29/2004-CE dated 09.07.2004. Hence, the contention of lower authority is not tenable. Moreover, the option is with the manufacturer to avail or not to avail cenvat credit on the inputs as the availment of cenvat credit is a beneficial scheme and there is nothing in the Notification No. 29/2004-C.E., dated 9-7-2004 for the manufacturer to compulsorily avail cenvat credit on the

inputs. There is bar only on for-availment of Cenvat input credit under Notification No. 30/2004-C.E., dated 9-7-2004. As such, the lower authorities have erred in holding that the applicants having not availed cenvat credit will have to opt for exemption under Notification No.30/2004-CE and cannot pay duty under Notification No.29/2004- CE.

8. The Government observes that the case laws in respect of Nahar Industrial Enterprises Ltd. & Garden Silk Mills which have been relied upon by the Commissioner (Appeals) in the impugned order are decisions of the Revisionary Authority. Further, the Hon'ble Gujarat High Court had in the case of Arvind Ltd. vs. UOI [2014(300)ELT 481(Guj.)] dealt with the issue of simultaneous availment of two different notifications and observes as under :

> 9. On, thus, having heard both the sides and on examination of the material on record, the question that involves in these petitions is the wrong availment of the benefit of concessional rate of duty vide Notification No. 59/2008, dated December 7, 2008. Admittedly, the final products were exempted from payment of duty by original Notification No. 29/2004-C.E., dated July 9, 2004 as further amended *vide* Notification No. 59/2008-C.E., dated December 7, 2008. The fact is not being disputed by the respondents that the petitioner availed Notification No. 59/2008 for clearance made to export and thereafter filed various rebate claims. It is, thus, an undisputed fact that the petitioner on final products discharged the duty liability by availing the benefit of Notification No. 59/2008 and as has already been noted in the record, it has reversed the amount of Cenvat credit taken by it on the inputs used for manufacturing of such products. Thus, when the petitioner is not liable to pay duty in light of the absolute exemption granted under Notification No. 29/2004 as amended by Notification No. 59/2008-C.E. read with the provision of Section 5A(1A) of the Act and when it has not got any other benefit in this case, other than the export promotion benefits granted under the appropriate provision of the Customs Act and Rules (which even otherwise he was entitled to without having made such payment of duty), we are of the firm opinion that all the authorities have committed serious error in denying the rebate claims filed by the petitioner under Section 11B of the Act read with Rule 18 of the Rules. The treatment to the entire issue, according to us, is more technical rather than in substance and that too is based on no rationale at all.
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> 10. We also cannot be oblivious of the fact that in various other cases, the other assessees have been given refund/rebate of the duty paid on inputs used in exported goods. The stand of the Revenue is also not sustainable that the payment of duty on final products exported at the will of the assessee cannot be compared with other type of cases of refund/rebate of duty. Admittedly, when the petitioner was given exemption from payment of whole of the duty and the petitioner if had paid duty at the time of exporting the goods, there is no reason why it should be denied the rebate

claimed which otherwise the petitioner is found entitled to. We are not going into the larger issues initially argued before us as subsequently the Revenue has substantially admitted the claim of rebate of excise duty and has not resisted in substance such claim of rebate.

11. Resultantly, both the petitions are allowed quashing and setting aside the orders impugned in both the petitions by further directing the respondents to grant the petitioner of Special Civil Application No. 10887 of 2012 rebate of Rs. 3,15,63,741/- (Rupees Three Crore Fifteen Lac Sixty Three Thousand Seven Hundred Forty One only) and Rs. 39,59,750/- (Rupees Thirty Nine Lac Fifty Nine Thousand Seven Hundred Fifty only) to the petitioner of Special Civil Application No. 10891 of 2012, by calculating interest thereon under Section 11BB of the Central Excise Act, 1944, within a period of eight weeks from the date of receipt of a copy of this judgment.

12. Rule is made absolute in each petition to the aforesaid extent. There shall be, however, no order as to costs.

9. It would be relevant to note that the Hon'ble Apex Court [2017(352)ELT A21(SC)] has dismissed the Special Leave Petitions filed by the Union of India against the above judgment of the Hon'ble Gujarat High Court and therefore the matter has attained finality. The said case involved a situation where that assessee had availed the benefit of two unconditional exemption notifications. The Hon'ble Gujarat High Court after careful consideration of the facts, came to the conclusion that the assessee would be entitled to avail either of the two notifications and may opt to pay duty on the goods; i.e. to avail the benefit of the notification which it considers more beneficial. In this case, the assessee chose to avail the benefit of Notification No. 59/2008-CE which levied effective rate of duty whereas Notification No. 29/2004-CE as amended by Notification No. 58/2008-CE fully exempted the same goods. The inference that can be drawn from this judgment is that even when there are two notifications which are unconditional in nature, the assessee would still have the option to pay duty and claim rebate of such duty paid. In the light of the above referred judgment of the Hon'ble High Court, it would follow that the respondent cannot be compelled to avail the benefit of the exemption notification which exempts the goods cleared for export from the whole of the duty of excise.

10. The Government finds that the issue pertaining to the ambit of the provisions of sub-section (1A) of Section 5A of the CEA, 1944 is also relevant to the facts of the case. In the instant case, the Department has put more emphasis to the contention that the respondent ought not to have paid duty while they were eligible to the benefit of exemption under Notification No. 30/2004-CE. The Government finds that Sub-section (1A) of Section 5A of the Central Excise Act, 1944 which is pertinent to the instant issue stipulates as under:-

"(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely the manufacturer of such excisable goods shall not pay the duty of excise on such goods."

The above provision insists that the exemption granted absolutely from whole of duty of excise has to be availed and in that case there is no option to pay duty. However, in the instant case, goods are exempted under Notification No. 30/2004-C.E. (N.T.) subject to condition that no cenvat credit of duty on inputs has been taken under the provisions of the CENVAT Credit Rules, 2002. Consequently, the Notification No. 30/2004-CE does not pass muster as an unconditional notification. Now given that the Notification No. 30/2004-C.E. (N.T.) is a conditional one, the respondent was not under any statutory compulsion to avail it. Conversely, even if it is assumed for a moment that Notification No. 30/2004-CE is an absolute exemption, the contention that the respondent would be obligated to avail it has been rejected by the Hon'ble Gujarat High Court in the case of Arvind Ltd. Also, as per C.B.E. & C. Circular No. 845/03/06-CX dated 1-2-2007 and 795/28/2004-CX, dated 28-7-2004, both the Notifications can be availed simultaneously. The Government, therefore, holds that there was no restriction on the respondent to pay duty under Notification No. 29/2004-C.E. (N.T.)

11. It is construed from the judgment of the High Court in the case of Arvind Ltd. [2014 (300) E.L.T. 481 (Guj.)] that when there are two unconditional exemption notifications which co-exist, there cannot be any compulsion on the assessee to avail the one which fully exempts excisable goods because such an interpretation would render the exemption with the higher rate of duty to be redundant. All exemptions issued under Section 5A of the CEA, 1944 are issued in the public interest with some specific legislative intent and cannot be rendered inconsequential. The sub-section (1A) of Section 5A of the CEA, 1944 would have compelling force only when there is a single absolute exemption applicable to an assessee. In the instant case, there are two competing exemption notifications - Notification No. 29/2004-CE is unconditional in nature whereas Notification No. 30/2004-CE is conditional in nature. Against the backdrop of the judgment cited supra which holds that the exemption under an unconditional exemption notification is not binding on an assessee vis-à-vis another exemption notification which unconditionally grants partial exemption, there can be no case for compelling the respondent in the present case to avail the benefit of a conditional exemption notification such as Notification No. 30/2004-CE. Without prejudice to the judgment of the Hon'ble Gujarat High Court, the fact that the Board had issued Circular No. 795/28/2004-CX., dated 28.07.2004 & Circular No. 845/3/2007-CX., dated 01.02.2007 which ratified the simultaneous availment of exemption Notification No. 29/2004-CE and Notification No. 30/2004-CE cannot be lost sight of. The said circulars have also laid down the procedure to be followed in such a situation by maintaining separate accounts of inputs. Needless to say, the circulars issued by the Board are binding on the field formations.

12. In view of above discussions, the Government sets aside the impugned Orders-in-Appeal and remands the cases back to original authority to sanction the rebate claim after verifying that cenvat credit was availed on some of inputs as certified by Superintendent of Central Excise and applicant has

followed the procedure laid down in said CBEC circulars.

13. Since the Orders-in-Appeal mentioned at cases covered vide Sr. No. (1) and (2) of table above are set aside, the other four Orders-in-Appeal covered vide cases at Sr. No. (3) (4) (5) and (6) are also not sustainable and are liable to be set aside. Government, therefore, set aside these Orders-in-Appeal and directs the Original Authority to decide the cases as directed in forgoing para.

14. Revision Applications are disposed off in above terms.

15. So, ordered.

(SEEMA ARORA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No 170-175/2020-CX (WZ) /ASRA/Mumbai DATED 05.02.2020

To,

M/s Gokak Textile Limited,
Cotton Exchange Building,
B-74, 1st Floor, Cotton Green (East),
Mumbai – 400033.

Copy to:-

1. The Commissioner of Central Goods & Service Tax, Belapur Commissionerate, 1st Floor, CGO Complex, CBD Belapur, Navi Mumbai – 400 614.
2. The Commissioner of Central Excise (Appeals) Mumbai Zone-II, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector E, Bandra Kurla Complex, Bandra (E), Mumbai — 400 051.
3. The Assistant Commissioner of Central Excise (Rebate), Central Excise, Raigad, Gr. Floor, Kendriya Utpat Shulk Bhavan, Sectior-17, Khandeshwar, Navi Mumbai -410206.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Spare Copy.