REGISTERED
SPEED POST

F.No. 195/114-116/10-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 7/12/12

ORDER NO. 716-718/12-Cx DATED 07.12.2012 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 Application filed, under Section 35 EE of the Central Excise Act, 1944 against the Order-in-Appeal US/486-488/RGD/2011 dated 22.12.2011 passed by Commissioner (Appeals)-II, Central Excise Mumbai
Applicant	:	M/s Kandoi Fabrics Pvt. Ltd., Mumbai
Respondent	:	Commissioner of Central Excise, Raigad Commissionerate, C.G.O. Complex, C.B.D. Belapur, Navi Mumbai – 400614.

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ORDER

These revision applications have been filed by M/s Kandoi Fabrics Pvt. Ltd., Mumbai against the order-in-appeal No. US/486-488/RGD/2011 dated 22.12.2011 passed by Commissioner (Appeals)-II, Central Excise Mumbai with respect to order-in-original passed by the Deputy Commissioner of Central Excise, Raigad.

2. Brief facts of the cases are that by Deputy Commissioner of Central Excise, Rebate, Raigad sanctioned rebate claims of Rs. 44,70,282/-, Rs. 22,87,302/- and Rs. 1,87,389/- to the applicants as claimed for manufacture & export of impugned goods i.e. woven Sacks without liner Polypropyliene woven fabrics etc. The applicant M/s Kandoi Fabrics Pvt. Ltd., had declared in the respective ARE-1s that they are availing facility under 'Notification No. 44/2001-CE(NT) dated 26.06.2011 issued under rule 19 of Central Excise Rules, 2002'. The said Notification is applicable for removal of intermediate goods without payment of duty for manufacture and export by holder of DEEC & Advance Licence and the goods shall be exported under Bond following procedure specified in Notification No. 42-2001-CE(NT) dated 26.06.2001. Department on the ground that since the said goods were required to be exported under Bond without payment of Central Excise duty, rebate sanctioned under Rule 18 of the Central Excise Rules, 2002 is not correct on this point and after due process of review under section 35E(3) of the Central Excise Act, the jurisdictional Commissioner of Central Excise filed respective appeals before Commissioner of Central Excise (Appeals), Mumbai Zone-II.

3. The Commissioner of Central Excise Appeals after due consideration of above appeals of the department allowed the same there by rejecting the rebate claims of the applicant.

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

4.1 Appeals filed by the Revenue before the Commissioner (Appeals) are not maintainable having been filed beyond the prescribed time specified under Section 35E(3) of the Central Excise Act, 1944. This aspect has not been considered by the Commissioner (Appeals).

4.2 Applicant submits that the present cases relates to rebate claims amounting to Rs. 44,70,282/-, Rs. 22,87,302/- and Rs. 1,87,389/- sanctioned by the Deputy Commissioner (Rebate) vide his Order-in-Original dated 17.09.2010, 13.11.2010 and 21.01.2011 respectively. Appeals, if any, against the said Order-in-Original is required to be filed within 3 months of the date of communication of the order. Applicant submits that the office of the Deputy Commissioner (Rebate) as well as of Commissioner (Appeals) are located in the same building, one being on the first floor and the other being the 9th floor. Being in the same building, the date of communication of the order has to be presumed as the date on which the order was signed or at best the date on which order was dispatched. In the present case, the dates of three Orders-in-Original are 17.09.2010, 30.11.2010 and 21.01.2011, whereas, the directions for filing the appeal under Section 35E(3) have been issued on 09.02.2011, 02.03.2011 and 13.05.2011 respectively which is much beyond the period of three months. The cheques for the rebate amount were also issued within 2-3 days of the date of the order. Thus, there is a delay of almost 2 months in the first order, 2 days in the second order and by about 1 month in the third order.

4.3 Strangely, to overcome the period of limitation, the Commissioner, while issuing directions to file an appeal, has given entirely different dates by employing words 'communicated for review'. Applicant submits that once the

order is received by the office of the Commissioner, Central Excise, the date on which the order is received is to be considered as date of communication and not the date on which the Commissioner, after receipt of the order sends it to audit/review branch for review as has been made out by him in his order to file appeals issued under Section 35E(3) of the Central Excise Act, 1944. Applicant submits that since the two offices are located in the same building the date of signing the orders is to be taken as date of communication of the order. This view is supported by Hon'ble Supreme Court decision in the case of Collector of Central Excise Vs. M.M. Rubber Co. reported in 1991(55) ELT 289(SC) wherein it was held that limitation of one year in case of suomotu review by the department runs from the date of signing of the order. In the present case office of Deputy Commissioner (Rebate) is part and parcel of the Commissioner of Central Excise, Raigad office and is also located in the same building. In view of this, all the three appeals filed by the department were not maintainable and should have been straightaway dismissed without going into the merits. The Commissioner (Appeals) order is therefore, liable to be struck down on this ground alone.

4.4 Applicant submits that a plea of appeal being not maintainable but being a question of law can be raised at any stage as has been held by the Hon'ble Supreme Court in the cases of Paul Industries Vs. UOI – 2004(071) ELT 299(SC), Ajaiv Singh Vs. State of Punjab – 2000(118) ELT 4(SC), Commissioner Vs. Macnaiv Exports – 2003(152) ELT A87(50), Collector of Central Excise Vs. Pioma Industries & Imperial Soda Factory – 1997(91) ELT 527 (SC). Recently, the Hon'ble Gujarat High Court has also held similar view in the case of Disco Garments Vs. UOI – 2011(273) ELT 198(Guj.). In view of this, the impugned order is liable to be set aside without going into the merits.

4.5 Applicant submits that the order of the Commissioner (Appeals) is erroneous inasmuch as it has held that ARE-1 is an assessment document which

is self-assessed by the assesse and it is not open for the department to reassess. In support of his contention, the Commissioner (Appeals) has placed his reliance on the Board Circular No. 510/06/200-CX dated 03.02.2000 clarifying that any scrutiny of the correctness of the assessment can be done by the jurisdictional Assistant/Deputy Commissioner only. Applicant submits that ARE-1 is not an assessment document and is simply an application for removal of goods for the purpose of export both under bond as well as under claim of rebate of duty. In case of export under claim of rebate of duty, it simply indicates the amount of duty already paid on the goods, which amount is also certified by the jurisdictional officer on the back of ARE-1 form as having been paid by mentioning the PLA/RG23A Part-II entry number by which the duty amount is debited. Duty is assessed on an invoice or on RT12 returns and not on ARE-1 form as has been erroneously held by the Commissioner (Appeals). The jurisdictional officer only specifies the duty paid on the goods but does not assess it.

4.6 Applicant submits that presuming but not admitting that the ARE-1 form is an assessment document, the Board Circular is in favour of the Applicant rather than the department as, once the ARE-1 indicates that duty has been paid on the exported goods which fact is also duly certified by the jurisdictional officer on the back of the ARE-1 form, the departmental officer could not have taken a view that the applicant has availed the benefit of Notification No. 44/2001-CX (NT) dated 26.06.2001 when in fact, no such exemption was availed. This factual position could not have been changed by the department as has been done in the present case.

4.7 Applicant submits that Commissioner (Appeals) has accepted the factual position that the applicants has procured inputs under the provisions of Customs Notification No. 96/2009-CUS dated 11.09.2009 and not under Notification No. 44/2001-CE(NT) dated 26.06.2001 as has been alleged in the departmental

appeal but has still erroneously held that since Notification No. 44/2001 operated as a compliment to Notification No. 96/2009-Cus dated 11.09.2009 for procurement of raw materials from indigenous manufacturers without payment of duty against advance release order on invalidation of advance licence, the impugned order sanctioning the rebate claim cannot be upheld and has to be set aside. This finding of the Commissioner (Appeals) is totally bereft of any reasoning and shows a pre-determined mind to somehow allow the revenue's appeals without any reasoning whatsoever. Once the Commissioner (Appeals) has accepted that the inputs were indeed procured from M/s Reliance SEZ, Jamnagar under Notification 96/2009-Cus dated 11.09.2009 and not under Notification No. 44/2001-CE(NT) dated 26.06.2011, how can the conditions prescribed under Notification No.44/2001-CE(NT) dated 26.06.2001 be made applicable to the applicant who was not availing the benefit of this Notification, is beyond applicant's comprehension. The entire order is devoid of any merit and needs to be set aside on this ground alone. The case laws relied upon the following judgement:-

4.8 Applicant submits that there is no restriction either under Rule 18 or under Notification No. 19/2004-CE(NT) dated 06.09.2004 that the exporter availing the benefits of Notification No. 44/2001_CE(NT) dated 26.06.2001 cannot export the goods under claim of rebate of duty. Exporters are free to export their goods either under claim of rebate of duty or under bond without payment of duty. They can, therefore, follow either of the procedures prescribed under Rule 18 or Rule 19 of the Central Excise Rules, 2002 as the case may be. The two provisions are complimentary to each other. The whole policy of the Government is to not to recover any duty on the export goods and when such duty is paid, the same is refunded as rebate. Taxes are not to be exported and it is only the goods which are exported. Therefore, once the goods have been exported on payment of duty, the rebate of such duty paid can under no circumstance be denied. It is immaterial that the applicant should have exported his goods under bond but

has instead exported under claim of rebate of duty paid as long as the fact of export and payment of duty is not disputed.

4.9 In support of our above view, applicant refers to the decision of the Government of India, in the case of Banswara Syntex Ltd., Vs. Commissioner – 2004(117) ELT 124 (GOI) wherein it was held that export rebate under Rule 12 of erstwhile Central Excise Rules, 1944 read with Notification No. 41/94-CE(NT) not deniable on the ground that goods cleared for export manufactured out of inputs which were procured duty free in terms of Notification No. 47/1994-CE(NT) issued under Rule 13(i)(b) ibid. Similar view was taken by the Hon'ble Madras High Court in the case of Tablets India Ltd. Vs. Joint Secretary, Ministry of Finance, Department of Revenue – 2010(259) ELT 191 (Mad.) wherein it was held that exports of exempted goods by inadvertence made under Rule 13 of erstwhile Central Excise Rules, 1944, while benefit of rebate on inputs, under Rule 12(1)(b) ought to have been claimed, rebate claim subsequently could not be rejected on the ground that procedure under Notification No. 42/1994-CE(NT) not followed, once the factum of export is not disputed. Case laws relied upon as per :-

(i) Modern Process Prints – 2006(204) ELT 632 (GOI)
(ii) UOI Vs. A.V. Narasimha – 1983 (13) ELT 1534 (SC)
(iii) Ford India Pvt. Ltd. Vs. Assistant Commissioner of Income Tax – 2011(272) ELT 353 (Mad.)

5. Personal hearing held on 11.10.2012 was attended by Shri M.S. Bijodar, G.M. on behalf of the Applicant, who re-iterated grounds of Revision Application. Further vide letter dated 23.10.2012, Ms. Reena Khair, advocate submitted clarifications for the applicant wherein while stressing the facts/merits of their case also submitted a copy of letter dated 19.10.2012 from the office of the Assistant Commissioner, Central Excise, Custom & Service Tax – Division, South Daman in support of their claim of not availing benefit of Notification No.

44/2001-CE(NT) dated 26.06.2001. However Raw-materials were procured under Notification No. 96/2009 dated 11.09.2009. No body attended the personal hearing from the side of the respondent department but, the Deputy Commissioner (Rebate), Central Excise Raigad vide letter F.No. V/15/451/31/430/Reb/Kandoi/Appeal/Regd./2011-2012/11803 dated 30.10.2012 forwarded copies of Assistant Commissioner, Central Excise, Customs and Service Tax, Division sought Daman letter F.No. V/Misc-02/Misc. Corpr/SDMN/12-13/2896 dated 19.10.2012 confirming non availment of benefit of Notification No. 44/2001-CE (NT) and availment of Notification 96/2009-Cus. Dated 11.09.2009 only by the applicant herein in this case matter.

6. Government has considered both oral and written submissions of the respondent and also perused the orders passed by the lower authorities.

7. Government notes that the factual details of the manufacture and exports of impugned goods by the applicant herein are not in dispute. The department is also now admitting the claim of the applicant exporter that for procurement of relevant inputs they have actually availed provisions of Notification No. 96/2009-Cus. Dated 11.09.2009 and not of Notification No. 44/2001-C.E. (NT) dated 26.06.2001, as was initially declared (said as in advertently) on the respective ARE-1s by the applicant. Government therefore proceeds to consider the submitted grounds of the applicant herein with the above factual back ground.

8. Government notes that the applicant herein is claiming that the initial review of the impugned Orders-in-Original by the jurisdictional Commissioner under Section 35E(2) was time barred as having been made after the stipulated period of three months. Here it is on records that the jurisdictional Commissioner of Central Excise Raigarh in her order to file appeal dated 12/13.05.2011 has specifically mentioned the respective dates of Communication of the impugned Orders-in-Original for review which confirms that the review process was done

well within the stipulated periods. The Commissioner (Appeals) herein has admitted the same and at that time no such grounds were agitated by the applicant. Further the applicant is drawing his own interpretation/conclusion on the date of above communication of Orders-in-Original but no documentary legal or otherwise evidence is being produced in support thereof. Government therefore does not find this ground as legal & proper and hence case is proceeded to on facts/merits.

9. Government now notes that the basic and main ground of review of the impugned Orders-in-Appeal under section 35E(2) of the Central Excise Act, 1962 was based on one of major "declaration" on respective ARE-1s that the applicant has availed provisions of Notification No. 44/2001)CE(NT) in respect of inputs used for manufacturing of impugned export goods. But now it is confirmed by the jurisdictional Central Excise offices they did not avail benefit of Notification No. 44/2001-CE(NT) but availed benefit of Notification no. 96/2009-Cus. Dated 11.09.2009. Therefore the applicant has submitted that their substantial export benefits of impugned rebates should not be denied for the above one in-advertant clerical mistake. It is also noted that the Commissioner (Appeals), though presuming the submissions of the applicant has made a comparative study of both the above Notifications and concluded that in any case, the applicant is not entitle to the right to claim of rebate. But Government is of the considered opinion that such generlised conclusion is not legal & proper, as each case matter depend upon the details of its own and even one step of different mode availment of a specific provision of any Notification can make a word of difference. Therefore as the applicant herein is claiming that he has not procured the raw materials from indigenous manufacturers without payment of duty against advance release order or invalidation of advance licence, that is why he is entitled to claim the rebate. Government notes that in view of report of jurisdiction Central Excise officers, the basis objection for rejection of rebate

claims does not sustain. Therefore, the order of original authority sanctioning rebate claims cannot be faulted with.

10. In view of above position, Government set aside the impugned Orders-in-Appeal and restores the impugned Order-in-Original.

11. The revision applications succeeds in terms of above.

13. So, ordered.

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

M/s Kandoi Fabrics Pvt. Ltd.,
406, Lotus House, 4th Floor,
33A, New Marine Lines,
Mumbai 400020.

(Attested)

(R. C SHARMA)
उपायुक्त/Dy Commissioner
C.B.E.C -O S D. to Jt. Secy (R.A.)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

Order No. 1716-1718 **/2012-Cx dated** 06 **12.2012.**

Copy to:

1. Commissioner of Central Excise, Raigad Commissionerate, C.G.O. Complex, C.B.D. Belapur, Navi Mumbai – 400614.
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 (East), Mumbai – 400 051.
3. The Assistant Commissioner of Central Excise, Raigad Commissionerate, Ground Floor, Kendriya Utpad Shulk Bhavan, Plot No.1, Sector-17, Khandeshwar, Navi Mumbai 410206.
4. PS to JS(RA)
5. Guard File.
6. Spare Copy

(R.C. Sharma)
OSD-I (RA)