

REGISTERED
SPEED POST



F.No. 195/168/11-RA-CX
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. 26/12/12

ORDER NO. 1769/12-Cx DATED 24.12.2012 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 No. 215/2010 dated 15.12.10 PASSED BY
COMMISSIONER OF CUSTOMS & CENTRAL EXCISE
(APPEALS), TRICHIRAPALLY

APPLICANT : M/S JVS EXPORTS, TRICHY

RESPONDENT : COMMISSIONER OF CUSTOMS & CENTRAL EXCISE, TRICHY

ORDER

This revision application is filed by the applicant M/s JVS Export, Trichy, Karur against the order-in-appeal 215/2010 dated 15.12.10 passed by the Commissioner of Central Excise (Appeals), Trichirapally with respect to order-in-original No. 04/2010-R(C.Ex) dated 20.7.10 passed by Assistant Commissioner of Central Excise Karur Division.

2. Brief facts of the case are that the applicants exported 100% cotton made items on payment of duty under Notification No.59/08-CE dated 7.12.08 during the period 14.2.09 to 19.2.09 and filed rebate claims of Rs.6,58,285/- under Rule 18 of Central Excise Rules 2002. The Notification No.29/04-CE dated 9.7.04 was amended by Notification No.58/08-CE dated 7.12.08 to reduce the duty on cotton made items to zero. During the relevant time duty of said goods was nil as per Notification No.29/04-CE dated 9.7.04 as amended vide Notification No.58/08-CE dated 7.12.08. As such, applicant paid duty on the exempted goods which was not permissible. Since it appeared that the appellants had filed the claim erroneously, a show cause notice was issued to reject the rebate claim. After due process of law, the lower authority rejected the said rebate claim of Rs.6,58,285/- under Rule 18 read with Section 11B of Central Excise Act.

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

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 on the following grounds:

4.1 The applicants submit that they have effected clearances for export during the month of February 2009 (14.2.09 to 19.2.09) on payment of duty under claim for rebate as per the provisions of Rule 18 of Central Excise Rules, 2002. The applicants have utilized the cenvat credit of duty paid on the inputs which had been earned prior

to the issuance of notification No.59/2008-CE dated 7.12.2008. The cenvat credit had accumulated from 9.7.04 exemption had been granted to textile items under Notification No.30/2004-CE dt. 9.7.04. Since the applicants had no opportunity to avail the credit for payment of duty for the clearances effected for home consumption, they have utilized the same for payment of duty on export goods and has claimed rebate.

4.2 The Board's clarification has come only on 26.11.2010. The applicants had paid the duty on export goods in the month of February 2009. During the said period there was no such restriction for payment of duty on export goods in terms of Notification 59/2008-CE dt. 7.12.08. In the circumstances above, the applicants are eligible for either re-credit of cenvat credit utilized for payment of duty or for refund of the duty paid on export goods.

4.3 Notwithstanding anything contained in the Board clarification vide CBEC Circular No.937/27/2010-CX dt. 26.11.2010 issued in F.No.52/1/2009-CX.1 pt, the applicants are entitled for refund of the cenvat credit availed either by cash or by re-credit in the cenvat account as no duty is payable on export goods. The amount paid as per the provisions of Rule 18 of CER, 2002 may be treated as deposit in the absence of the final goods attracts nil rate of duty and may be refunded to the assessee.

Case laws relied upon by the applicants:

- i. Commissioner Vs Suncity Alloy Pvt. Ltd.-2007 (218) ELT 174(Raj)
- ii. IN RE: P.R.S. Permacel Pvt. Ltd – Order No.317-320/2005 dt. 31.8.2005
- iii. CCE, Ahmedabad-III Vs Sucheta Metals Ltd – reported in 2009 (246) ELT 326 (Tri-Ahmd)
- iv. CCE, Jaipur Vs Global Overseas – 2005(192) ELT 334

5. Personal hearing was scheduled in this case on 8.10.12. Nobody appeared for personal hearing either from the applicant side or from respondent's side. However, the applicants vide their letter dated 4.10.12 requested to decide the case on merit without giving them any further date of personal hearing.

6. Government has carefully gone through the relevant case records and perused the impugned the impugned orders-in-original and orders-in-appeal.

7. On perusal of records Government observes that applicants paid duty on the exported goods under Notification No.59/04-CE dated 7.12.08 @4% and claimed rebate of duty paid on exported goods. In fact, the said goods were exempted unconditionally from payment of duty of excise under Notification No.29/04-CE dated 9.7.04 as amended vide Notification No.58/04-CE dated 7.12.08. So, applicant has no option to pay duty in terms of provisions of Section 5A(1A) of Central Excise Act 1944. Commissioner (Appeals) has upheld order-in-original relying on the Section 5A(1A) of the Central Excise Act 1944 and CBEC Circular No.937/27/2010-Cx dt. 26.11.2010 and held that the applicants are not eligible for any rebate for the duty paid on the exempted goods during the said period 14.2.09 to 19.2.09.

8. Government notes that CBEC Circular No.937/27/2010-Cx dt. 26.11.2010 has clarified the issue as under:

"References had been received from the field formations as well as trade to clarify the ambiguity arising out of simultaneous prevalence of two exemption notifications namely 29/2004-CE dated 9.7.2004 as amended by notification No.58/2008-CE dated 7.12.2008 and another notification 59/2008-CE dated 7.12.2008. The period of dispute is from 7.12.2008 to 6.7.2009. During this period while one notification No.29/2004-CE as amended granted full exemption to certain items of Textile Sector without any condition, the second notification 59/2008-CE prescribed a concessional rate of duty of 4% on these items, with the benefit of cenvat credit.

2. The dispute was with regard to whether an assessee can avail the benefit of either of the above said two notifications whichever is beneficial to him or he is bound to avail the unconditional exemption under Notification no.20/2004-CE, as amended, during the period under dispute in terms of the provisions of Section 5A(1A) of the Central Excise Act, 1944.

3. The matter was examined in the Board. As a substantial question of law was involved, the matter was referred to the Law Ministry for its opinion. The

Ministry of Law has opined that the language used in said Section 5A(1A) is unambiguous and principles of harmonious construction cannot be applied in the instant case in view of specific provision under sub-section (1A) of Section 5A of the Central Excise Act. The Law Ministry has accordingly concluded that in view of the specific bar provided under sub-section (1A) of Section 5A of the Central Excise Act. The manufacturer cannot opt to pay the duty under Notification 59/2008-CE dated 7.12.2008 and he cannot avail the Cenvat credit of the duty paid on inputs.

4. The aforesaid opinion of Law Ministry has been accepted by the Board, pending issues, if any, may be decided accordingly."

The CBEC Circular has clearly stipulated that in view of specific bar provided under Section 5A(1A) of Central Excise Act 1944, manufacturer cannot opt to pay duty under Notification No59/08-CE dated 7.12.08 and rebate of duty.

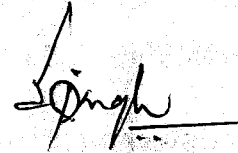
9. Government observes that as per explanation 1(A) to Section 5(A) of Central Excise Act 1944 the manufacturer of such goods has no option to pay Central excise duty since Notification No. 29/04-CE dated 9.7.04 as amended, issued under Section 5A (1A) of Central Excise Act 1944 grants unconditional exemption from whole of duty. The duty paid cannot be treated as duty paid under the provision of Central Excise Law. As such, the rebate of said amount is not admissible to the applicant under Rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE (NT) dated 6.9.04 since exported goods cannot be treated as duty paid goods. Government, therefore, uphold the impugned order-in-appeal to this extent. Applicants have pleaded that they are entitled for refund of the cenvat credit availed either by cash or by re-credit in cenvat account as no duty is payable on export goods. Government notes that this amount paid as duty is to be treated voluntary deposit with the Government and same cannot be retained without any authority of law. The said amount is required to be refunded in the manner it was paid as held by Hon'ble High Court of Rajasthan in the case of CCE Vs Suncity Alloys reposed at 2007 (218) ELT 174 (Raj HC).

Hon'ble High Court of Punjab & Haryana vide order dated 11.9.2008 in the case of M/s Nahar Industrial Enterprises Ltd. Vs. UOI reported as 2009 (235) ELT22 (P&H) has held that refund in case of higher duty paid on export product which was not payable, is not admissible and refund of excess paid duty/amount in Cenvat credit is appropriate.

Government observes that the amount so paid by the applicant is to be treated as voluntary deposit with Government and same is to be refunded in the manner it was initially paid. In the instant case the same was paid from cenvat credit account and hence government directs that the said amount may be allowed to be re-credited in their cenvat credit account. The impugned O-I-A is modified to this extent.

10. The revision application is disposed of in terms of above.

11. So ordered.



(D.P.Singh)

Joint Secretary (Revision Application)

M/s JVS Export
Trichy Main Road
Ramagoundanur
Pasupathypalayam
Karur-639001

Attested
K. RAMESHVARAN
विशेष कार्य अधिकारी/OSD-II (RA)
वित्त मंत्रालय, (राज्य वित्त)
Ministry of Finance (Deptt. of Res.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

ATTESTED

G.O.I. Order No. 1769/12-9 dated 24-12-2012

Copy to:-

1. The Commissioner of Central Excise, No.1, William Road, Cantonment, P.O.Box No.105, Tiruchirapalli-620001
2. The Commissioner of Central Excise (Appeals), No.1, William Road, Cantonment, Tiruchirapalli-620001
3. Assistant Commissioner of Central Excise, Karur Division, No.15, Gowripuram Extn, Annanagar, Karur-639002
4. Guard File.
5. PS to JS (RA)
6. Spare Copy



(P.K.Rameshwaram)
OSD (Revision Application)

MEMORANDUM

TO: SAC, NEW YORK

FROM: SA [Name], NEW YORK

SUBJECT: [Subject]

RE: [Subject]

DATE: [Date]

[Main body of the memorandum text]

Very truly yours,

[Signature]

[Additional text]