SPEED POST

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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
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.195/224/13-RA/1000 Date of Issue: 19/07/2018

ORDER NO. 199 /2018-CX (WZ)/ASRA/MUMBAI DATED 07.06.2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR METHA, PRINCIPAL COMMISSIONER & EX-OFFICIA ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF CENTRAL EXCISE ACT,1944.

Applicant	:	M/s Krishna Knitwear Technology Ltd., Silvasa.
Respondent	:	The Assistant Commissioner of Central Excise, & Customs, Piparia, Silvasa.
Subject	:	Revision Application filed under Section 35 EE of the Central Excise Act, 1944 against Order-in-Appeal No. SRP/136/Vapi/2012-13 dated 15.11.2012 passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax, Vapi.

ORDER

This Revision Application is filed by M/s Krishna Knitwear Technology Ltd., Silvasa (hereinafter referred to as "the applicant") against the Order in Appeal No. No. SRP/136/Vapi/2012-13 dated 15.11.2012 passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax, Vapi.

2. The brief facts of the case are that the applicant, is engaged in manufacture of excisable goods falling under chapter 52, 54 and 60. They exported their final product, namely, Cotton Yarn, falling under chapter 52, during the period January 2010 to September 2010 under various ARE-1s, on payment of duty of Rs. 85,26,068/- from Cenvat Credit Account under Rebate and subsequently filed two applications seeking total rebate of the said amount of duty paid in respect of the said exported goods. The exemption Notification No.29/2004-CE dated 09.07.2004 which granted partial exemption to all goods of cotton, not containing any other textile materials, falling Chapter Heading 5205 and charged to duty @ 4% adv was amended vide Exemption Notification No.58/2008- CE dated 07.12.2008 whereby the said goods were fully exempted by way of prescribing Nil Rate of duty. The said Notification 29/2004-CE was further amended vide Notification No. 11/2009-CE dated 07.07.2009 whereby the rate of duty on the said goods was again changed from NIL to 4% adv. Thus during the period 07.12.2008 to 06.07.2009, the said cotton goods were chargeable to Nil Rate of duty without any condition. In view of Section 5A (1) of Central Excise Act, 1944, the said goods were unconditionally exempt from whole of central Excise duty. The department was of the view that the accumulated credit of Rs. 1,67,09,820/- lying in balance in Cenvat credit account as on 07.12.2008 would have lapsed when the goods became totally exempt from duty under the said Notification No. 58/2008,CE dated 07.12.2008. Therefore, it appeared that the said balance of Rs.1,67,09,820/- was not available for payment of duty on the goods exported in the instant case, which was wrongly availed by them for payment of duty on export goods. The department sought to reject the rebate claim on this ground and issued

two Show Cause. Notices dated 20.10.2011 and 08.11.2011 to the applicant. The Adjudicating Authority, after due process, vide Order in Original No.175/AC/SLV-II/REB/2011-12 dated 27.02.2012 rejected Rebate claims of the applicant.

3. Aggrieved by the said Order in Original the applicant filed the appeal before Commissioner (Appeals), Vapi who vide impugned Order in Appeal No.SRP/136/VAPI/2012-13 dated 15.11.2012 rejected the appeal filed by the applicant.

4. Being aggrieved with the impugned Order-in-Appeal, the applicant filed present Revision Application under Section 35EE of Central Excise Act, 1944 before the Government on the various grounds as enumerated in their application. Main grounds of appeal are as follows :

4.1 Recovery of alleged irregular CENVAT Credit through rejection of Rebate of Terminal Excise Duty is beyond jurisdiction and ex-fascia illegal.

4.2 The applicant have exported 100% cotton yarn falling under Chapter heading 5205 of Central Excise Tariff Act under the claim of rebate by paying the appropriate Central Excise Duty during the period January 2010 to September 2010.

4.3 Rule 18 of the Central Excise Rule 2002 for granting the rebate of Central Excise Duty placed no such restriction for the usage of CENVAT account for payment of Terminal Excise Duty.

4.4 Assuming not admitting that such CENVAT Credit were taken wrongfully or erroneously, only recourse available to the revenue was to invoke the Rule 14 of the CENVAT Credit Rule 2004.

4.5 The corrosive measures taken by learned Assistant Commissioner are excessive, beyond jurisdiction and beyond the provisions of CENVAT Credit Rule 2004 and the learned Commissioner Appeal . failed to appreciate the statutory restriction while passing such Order-In-Appeal.

4.6 The Rule 11(3) (ii) of the CENVAT Credit Rule, 2004 reads as "A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture

of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if-
(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or
(ii) the said final product has been exempted absolutely under section 5A of the Act,

and after deducting the said amount from the balance of CENTVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported".

4.7 It is submitted that as per the Rule 11(3)(ii) of the CENVAT Credit Rule, 2004 introduced through Central Excise Notification No 10/2007 dated 1.3.2007, the assesses are required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock.

4.8 Such reversal of inputs or lapse of inputs was not called for in the case of the applicant since:
a. inputs used in such exported goods was not in process of manufacturing during the disputed period i.e. 7th December 2008 to 6th July 2009;
b. such inputs were not consumed during the processing of such final product for which rebates are claimed;
c. goods exported was not in stock during the disputed period i.e. 7th December 2008 to 6th July 2009;
d. such rebates are claimed against the Terminal Excise Duty paid upon the final product under the First Schedule of the Central Excise Tariff and not against the inputs used during the process of manufacturing.

4.9 Notification No 29/2004 as amended by 58/2008 dated 7.12.2008 (charged to NIL rate of duty) and Notification No.59/2008 dated 7.12.2008 (charged to 4% of duty) were made applicable concurrently and there was no restriction what so ever, restricting the Assessee to opt any one of the Notifications. Therefore, the applicant was not required to reverse such available CENVAT Credit in the Books of Accounts as envisaged under Rule 11(3)(ii) of CENVAT Credit Rule, 2004 and therefore, eligible to file such rebate of the Terminal Excise Duty paid upon the final product under the First Schedule of the Central Excise Tariff upon export of such goods.

4.10 CBEC Circular No.937/27/2010-CX dated 26th November 2010 is not applicable to the present case. The aforesaid CBEC Circular clarifies that the manufacturer cannot opt to pay the duty under notification 59/ 2008-CE dated 7.12.2008 and he can not avail the Cenvat Credit of the duty paid on inputs during the disputed period from 7.12.2008 to 6.7.2009. It is submitted that the aforesaid Circular was only applicable for the disputed period from 7th December 2008 to 6th July 2009 whereas in the case of Assessee the goods exported and the rebates claimed was within the period from January 2010 to September 2010.

4.11 The aforesaid Circular was further clarified by CBEC Circular No.940/1/2011-CX dated 14th January 2011, which clarified that the Assessee has the option to pay any amount as excise duty on such exempted goods and the same cannot be allowed as CENVAT Credit to the downstream units as the amount paid by the Assessee cannot be termed as duty of excise under Rule 3 of the CENVAT Credit Rule, 2004. Even the CBEC Circular has even provided the option to the Assessee to pay the excise duty only with a condition that the same cannot be treated as inputs for downstream units. Therefore, the CBEC Circular relied upon by the revenue is not applicable, in the given facts of the case.

5. A personal hearing was held in this case on 29.01.2018. Shri Swapnendu Mishra, Advocate, duly authorized by the applicant appeared for hearing and reiterated the submission made in Revision Application and submitted a series of case laws and reiterated the same. It was pleaded that the instant Order-in-Appeal be set aside and the Revision Application may be allowed.

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. On perusal of records, Government observes that the issue in this case is regarding admissibility of rebate claims filed by the applicant for duty paid from accumulated credit under Notification 29/2004-CE as amended vide Notification No.11/2009-CE dated 07.07.2009 on goods made of 100% Cotton exported by them during January 2010 to September 2010, when the said goods were

unconditionally exempt from whole of Central Excise Duty under Notification No. 58/2008-CE dated 07.12.2008 and therefore balance of accumulated credit lying in the Cenvat Credit Account as on 07.12.2008 was liable to be lapsed on said goods and hence was not available for payment of duty on export goods.

7. Government observes that Commissioner (Appeals) in his impugned order observed that ,

> *"the said cotton goods was exempted absolutely under Section 5A vide notification No. 58/2008-C 07.12.2008. I find that even if the appellant had not opted for exemption from whole of duty [refer Rule 11(3)(i)], the provisions of Rule, 11(3) of CCR becomes operative by virtue of clause (ii) thereof as the clauses (i) and (ii) are separated by word "or". In view of the absolute exemption granted to the said cotton goods vide notification no. 58/2008-CE, the appellant shall not be allowed to utilize the credit lying balance in their cenvat credit account as on 07.12.2008, for payment of duty on any other final product whether cleared for home consumption or for export as the credit lying in balance shall lapse by operation of said provisions of Rule 11(3)(ii) of CCR. The appellants have utilized the credit amount lying in their balance for payment of duty (erroneously) on the export goods, which was supposed to be lapsed as on 07.12.2008 and therefore the duty paid on the export goods during the material period cannot be treated as duty at all to allow rebate thereof even otherwise".*

8. Government also observes that in the grounds of appeal of the present Revision Application, the applicant has submitted that

> *as per the Rule 11(3) (ii) of the CENVAT Credit Rule, 2004 introduced through Central Excise Notification No 10/2007 dated 1.3.2007, the assesses are required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock. Such*

reversal of inputs or lapse of inputs was not called for in the case of the applicant since:

a. inputs used in such exported goods was not in process of manufacturing during the disputed period i.e. 7th December 2008 to 6th July 2009;

b. such inputs were not consumed during the processing of such final product for which rebates are claimed;

c. goods exported was not in stock during the disputed period i.e. 7th December 2008 to 6th July 2009;

d. such rebates are claimed against the Terminal Excise Duty paid upon the final product under the First Schedule of the Central Excise Tariff and not against the inputs used during the process of manufacturing.

9. For better understanding of the issue in hand, sub-rule (3) of Rule 11 of Cenvat Credit Rules, 2004 is reproduced below :-

"11(3): A manufacturer or producer of a final product shall be required to pay an amount equivalent to the Cenvat credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if, -

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under Section 5A of the Act; or

(ii) The said final product has been exempted absolutely under Section 5A of the Act, and after deducting the said amount from the balance of Cenvat credit, if any, lying in this credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported."

10. From a plain reading of the above sub-rule, it is clear that this rule applies, if-(a) one or more duty paid inputs in respect of which Cenvat credit has been taken, have been used in or in relation to manufacture of a final product which up to a certain date was dutiable; and (b) that final product has become fully exempt from duty whether on option basis or absolutely from a particular date.

11. In the above situation, if any, stock of Cenvat credit availed inputs is lying in stock or is in process or is contained in the final products lying in the stock as on the date of exemption, the Cenvat credit involved in respect of such inputs lying in stock or in process or contained in final product lying in the stock would be required to be paid by the manufacturer, which he can do by deducting that amount from the Cenvat credit balance, if any, lying in his credit and the credit balance, if still left, shall lapse and the same cannot be utilized for payment of duty on any final product whether cleared for home consumption or for export or for payment of service tax on any output service whether provided in India or exported. Thus, in accordance with the provisions of this sub-rule, the balance credit shall lapse and cannot be utilized for any purpose whether for payment of duty on the domestic clearances or for payment of duty on the goods cleared for export.

12. Government observes that during the period 07.12.2008 to 06.07.2009 applicant's final product was absolutely exempted from the payment of Central Excise Duty. Hence as per provisions laid in Rule 11 (3) (ii) of Cenvat Credit Rules, 2004, read with Notification No.29/2004-CE dated 09.07.2004 as amended by Notification No.58/2008-CE dated 07.12.2008, the Cenvat credit balance, if any, lying in his credit, if still left, shall lapse and the same cannot be utilized for payment of duty on any final product whether cleared for home consumption or for export or for payment of service tax on any output service whether provided in India or exported. Accordingly, Government holds that the balance of the amount lying in the Cenvat Credit account of the applicant as on 07.12.2008 had lapsed and therefore the duty paid on the export goods through such lapsed Cenvat Credit amounts to nonpayment of duty and hence the same cannot be rebated. Government, therefore, is in agreement with the observations of Commissioner (Appeals) in his impugned Order that

'In view of unambiguous provision, of Rule 11(3)(ii), the entire credit lying in balance in the credit account as on 07.12.2008 would lapse and the same is not allowed to be used for payment of duty on any final product or output service The appellant by paying duty on

export during the material period out of the said accumulated credit as stood on 07.12.2008, which was not available to them; the goods have to be treated as non-duty paid goods and hence the question of rebate of duty not paid does not arise'.

13. Government also places its reliance on GOI Order Nos. 227-228 / 2013-CX, dated 6-3-2013 in Re : Valli Textile Mills wherein Government upheld the Order in Original passed by the original authority. The original authority had held that Cenvat credit balance carried forward in their Cenvat accounts all through the period lapsed after insertion of sub-rule (3) of Rule 11 of Cenvat Credit Rules, 2004 w.e.f. 1-3-2007 since assessee availed absolute exemption on all of their final products during material time and as such the duty paid from such lapsed Cenvat credit on the said exported goods is not a payment of duty and therefore, the portion of rebate claim of duty paid from said lapsed Cenvat credit was rejected.

14. In view of the foregoing, Government upholds the impugned Order-in-Appeal and as well as order-in-original.

15. The revision application is dismissed being devoid of merit.

16. So, ordered.

(ASHOK KUMAR MEHTA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 199/2018-CX (WZ) /ASRA/Mumbai DATED 07.06.2018

To,

M/s. Krishna Knitwear technology Ltd.,
Plot No. 65, Krishna Nagar, Samarvani,
Silvassa, UT of Dadara Nagar Haweli-396240

ATTESTED

19/7/18

S.R. HIRULKAR
Assistant Commissioner (R.A.)

Copy to:

1. The Commissioner of GST & CX, Daman, 2nd Floor, Hani's landmark, Vapi Daman Road, Chala Vapi.
2. The Commissioner of GST & CX, (Appeals), 3rd Floor, Mgnus Building, Althan Canal Road, Near Atlanta Shopping Centre, Althan, Surat
3. The Assistant Commissioner, Division VIII, GST & CX Daman Commissionerate, 2nd Floor, Hani's landmark, Vapi Daman Road, Chala Vapi.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.

ATTESTED

S.R. NIRULKAR
Assistant Commissioner (R.A.)

Pr. Commr. (Revision Application) & ex-Officio Additional Secretary to the Govt. of India, Govt. of India, Mumbai