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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. 373/49-50/DBK/17-RA | 3082 Date of issue: 22.07.2022

ORDER NO.212-213/2022-CUS (SZ)/ASRA/MUMBAI DATED 19.07.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicant : M/s. Japan International

Respondent : Commissioner of Central Excise, Coimbatore.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962, against the Orders-in-Appeal No. CMB-CEX-000-APP-146 & 147-17 dated 21-06-2017 passed by the Commissioner of Customs, Central Excise, & Service Tax (Appeals-I), Coimbatore.

ORDER

1. These Revision Applications are filed by M/s. Japan International, 191/4, Kavillpalayam, Near Subbiah Matric School, Tirupur - 641603 (hereinafter referred to as "the Applicant") against Orders-in-Appeal No. CMB-CEX-000-APP-146 & 147-17 dated 21-06-2017 passed by the Commissioner of Customs, Central Excise, & Service Tax (Appeals-I), Coimbatore.

2. Brief facts of the case are that the applicant is a manufacturer and exporter of 100% cotton knitted/woven garments falling under chapter heading 61 and 63 of Central Excise Tariff Act,1985. During the course of audit, it was found that during the period Apr'11 to Jul'12, the applicant had availed Cenvat credit of common inputs/services such as packing material, telephone, security etc. and utilized it for payment of duty on domestic clearances. It was also observed that during the impugned period, the applicant had claimed drawback at higher rate meant only for those exporters who do not avail Cenvat credit of common inputs/services. Thus excess drawback had been claimed and received by the applicant. Therefore, two Show Cause Notices were issued to the applicant which were confirmed vide following Orders-in-Original:

OIO No./Date	FOB Value (in Rs.)	Amount confirmed towards excess drawback (in Rs.)	Penalty imposed	Period	Place of export
08/2016-ADC(Cus.)/ 26.08.2016	1,94,77,629	8,35,802	50,000	Apr-11 to Jul-12	ICD-CONCOR
09/2016-ADC(Cus.)/ 31.08.2016	8,22,00,606	41,41,503	1,00,000	Apr-11 to Jul-12	ICD-RAKKIAPALAYAM

3. Aggrieved, the Applicant filed appeals with the Commissioner (Appeals) who vide impugned Orders-in-Appeal rejected the appeals.

4. Hence, the Applicant has filed the instant revision applications mainly on the following grounds:

a) The Commissioner(Appeal) has rejected the applicant's submission of reversal and paying back of Cenvat Credit attributable to exports transaction on the basis of the Judgment of Hon'ble Delhi High Court in case of M/s. Vishal Beverage Private limited (Supra), but there is a grave error on part of the Appellate Commissioner in relying upon this judgment because the facts of the case before Hon'ble Delhi High Court are clearly different and distinguishable from the facts of the present case. Moreover, the Hon'ble High Court has only held that relief as claimed in the writ petition cannot be granted because petitioner's hands were not clean and thus the writ petition is dismissed by the Hon'ble High Court without laying down any proposition about the reversal of credit at the later stage and the situation thereupon being as if no cenvat Credit was taken. In any case, the applicant herein has reversed Cenvat Credit of export transaction in July-2012 itself when the Audit Officers pointed out the inadvertent error and therefore the applicant was not guilty of benefiting unjustly in the present case. The case before the Hon'ble Delhi High Court was even otherwise not for the appropriate rate of drawback like issue involved in the present case and therefore also the judgment of the Hon'ble High Court is inapplicable.

b) The Commissioner (Appeal) has committed a clear error in distinguishing the decisions and judgments relied upon by the applicant in this case. While not disputing the legal position that reversal of Cenvat Credit (or amount equal to such credit) the situation was as if no credit was taken, the Commissioner(Appeal) has observed that in the cases relied upon by the applicant, the credits were not utilized whereas credits were utilized for payment of duty in the present case; but this basis is factually and legally incorrect and fallacious. If amount equal to Cenvat Credit

attributable to inputs / input services for exempted transactions was actually paid back, then it was a case where the assessee had not taken Cenvat Credit; and therefore the Commissioner (Appeal) could not have refused to follow this legal position on a spacious distinction that credits were not utilized in cases relied upon by the applicant but the applicant had utilized the credits in the present case.

c) The Authorities below have mis-directed themselves in considering decision of the Appellate Tribunal rendered in case of Go Go International Ltd. 2010 (255) ELT 81 because this decision was not at all applicable in this case and it had no precedent value either.

d) The applicant has reversed and paid back inadvertently taken cenvat credit of certain materials and input services attributable to the export transactions, and therefore, the situation as if no cenvat facility had been availed. The applicant has reversed and paid back appropriate amounts as far back as July, 2012 and this fact is also verified and certified as true by the Central Excise Range Officer, Therefore, the applicant has not availed cenvat facility for exports of Knitted Garments made during April, 2011 to July, 2012, and consequently there is no excess payment of drawback for these exports. The orders to recover any amount as excess duty drawback and all other consequent liabilities therefore deserve to be set aside in the interest of justice.

e) The proceedings initiated against the applicant for recovery of alleged excess payment of Drawback were barred by limitation because recovery under show cause notice issued in January, 2016 could not have been sought to be made for exports made and Drawback paid for the period of April, 2011 to July, 2012. The adjudicating authority has not disputed the legal position that reasonable period of limitation was inbuilt under Rule 16 of the Drawback Rules for recovering any excess payment even

though the Rule itself did not provide any specific time limit because this is the principle settled by virtue of the judgement of the Hon'ble Gujarat High Court in case of Pratibha Syntex Ltd. 2013 (287) ELT 290 (Guj.) also.

f) Imposition of penalties of Rs. 50,000/- and Rs.1,00,000/- under Section 114AA of the Customs Act is also wholly illegal and without jurisdiction for more than one reasons. Firstly, it is not disclosed in the adjudication order whether penalty was imposed under Section 114(iii) or under Section 114AA of the Act, because a composite penalty under both these Sections jointly was not permissible. The ingredients of both these Sections are separate, and even the extent of penalty imposable under these two Sections is also different; and therefore a composite penalty under two separate Sections could not have been imposed in this case. Further, imposition of penalty on the applicant in this case invoking Sections 114(iii)/114AA of the Customs Act is also clearly without any justification in facts and in law. There is no justification in demand of drawback and therefore, no penalty could have been lawfully or justifiably imposed on the applicant. The impugned order of the Commissioner (Appeals) upholding such penalties is therefore liable to be set aside.

On the above grounds, the applicant prayed to set aside the impugned Order-in-Appeal with all consequential benefits and to grant any other further relief as deemed fit.

5. A Personal hearing was held in this case on 30.03.2022. Shri Amal Paresh Dave, Advocate appeared online on behalf of the Applicant for the hearing and reiterated the earlier submissions. He contended that once Cenvat credit has been reversed alongwith interest, this condition stood satisfied and they cannot be deprived of their legitimate drawback at higher rate.

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

7. Government observes that the issue involved is whether reversal of inadmissible Cenvat credit justifies Drawback claimed at higher rate by the Applicant.

8. Government observes that the relevant provisions of Cenvat Credit Rules, 2004 applicable during the material time were as follows:

> ***Rule 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.-***
>
> *(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule (2).*
>
> ***Provided** that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.*
>
> *(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.*

Government observes that as per the Applicant, in normal course, in compliance with Rule 6(2) ibid, they were maintaining separate stocks for the inputs meant for manufacture of the goods to be sold in the domestic market, and for manufacture of goods to be exported and Cenvat credit of duties paid on the inputs and input services used in relation to goods meant for export was not being availed by them. This contention of the Applicant has not been contested in the impugned Orders passed by Original/Appellate authorities. However, during the period April,2011 to July,2012, admittedly, they availed inadmissible Cenvat credit amounting to Rs.1,93,840/-. Due to this fact, the Drawback amount claimed by the Applicant at higher rate of 7.1% (which was available if Cenvat facility for the inputs and input services used for manufacture and clearance of concerned goods for export is not availed) became inadmissible, resulting in excess Drawback claim amounting to Rs.8,35,802/- for exports carried out from ICD-Concor and Rs.41,41,503/- for exports carried out from ICD-Rakkiapalayam.

9. Government observes that the authenticity of exports carried out by the Applicant during the period Apr'11 to Jul'12 from ICD-Concor and ICD-Rakkiapalayam has not been challenged by Original/Appellate authority. Total amount of Drawback claimed by the Applicant against these exports is as under:

Period	Place of export	Total FOB Value (in Rs.)	Amount of drawback claimed (in Rs.)	Amount rejected being excess drawback (in Rs.)
Apr-11 to Jul-12	ICD-CONCOR	1,94,77,629	12,11,737	8,35,802
Apr-11 to Jul-12	ICD-RAKKIAPALAYAM	8,22,00,606	58,96,894	41,41,503
		Total	71,08,631	49,77,305

Government finds denial of an amount of Rs.49,77,305/- against an inadvertent availment of inadmissible Cenvat credit amounting to Rs.1,93,840/- unreasonable. Further, the applicant has paid this amount of Rs.1,93,840/- alongwith interest thereby covering for delay in payment.

10. Government observes that in various judgments/Orders passed by different Courts/authorities including this office, it has been held that when a credit is taken wrongly and the same is reversed it tantamount to non-availment of the credit. In a recent Order in the case M/s. BHEL-GE Gas Turbine Services Pvt. Ltd. [2021 (44) G.S.T.L. 399 (Tri. - Hyd.)] Hon'ble CESTAT, Hyderabad observed that:

> ***6.*** *The facts involved in this case are not in dispute that the appellant had availed common input services, which were used for providing the taxable output services as well as the trading activities and that the appellant had reversed the quantum of Cenvat credit attributable to such trading activities. We have noticed from the impugned order at paragraph 9.7 that the appellant had deposited the service tax amount in respect of the Cenvat credit taken for providing the trading activities. Since, the Cenvat credit amount towards trading of goods was paid by the appellant, it has to be construed that no Cenvat credit was at all taken by the appellant in respect of the common input services. In this context, the Hon'ble Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd. v. Collector of Central Excise, Nagpur - 2002-TIOL-41-SC-CX = 1996 (81) E.L.T. 3 (S.C.) have ruled that on reversal of credit, the assessee cannot be said to have taken credit of duty on the inputs utilized in the manufacture of exempted final products. However, the appellant is liable to compensate the Government exchequer by paying the interest amount between the period of taking Cenvat credit on the common input services and actual payment of such Cenvat amount into the Central Government account.*

11. In the case of M/s. Star Agriwarehousing & Collateral Management Ltd. [2021 (44) G.S.T.L. 271 (Tri. - Del.)], Hon'ble CESTAT, New Delhi held that:

10. *We also take note of this Tribunal's decision on the same issue in case of M/s. The Oberoi Rajvilas v. Commissioner of Central Excise, Jaipur reported under 2018 (5) TMI 1715 - CESTAT New Delhi, the relevant extract of same are reproduced here below :-*

> *"9. From the above, we note that the appellant has followed the proportionate method for availment of credit on common input services. It cannot be said that the appellant has availed any credit on input services used in providing exempted service. The reversal of credit as above satisfies the requirement of non-availment of credit laid down in the Notification No. 1/2006-S.T. ibid.*
>
> *10. It is a settled position of law that proportionate reversal at a later date will satisfy the requirement of non-availment of Cenvat credit. This view is supported by various decisions of the Supreme Court/High Courts and Tribunal, some of which have been cited by the appellant.*
>
> *11. The procedure prescribed in Rule 6(3A) of the [Cenvat] Credit Rules is only to make the provisions of Rule 3 workable. By means of proportionate reversal the requirement of Rule 6(3) has been substantially satisfied. This is also provided in Rule 6(3D) of the Cenvat Credit Rules which was introduced at a later date".*

Thus, Government observes that in the instant case too, once the Applicant paid the amount towards inadmissible Cenvat credit availed, they had satisfied the condition of 'non-availment of Cenvat facility' as required under the applicable Drawback Notification viz. Notification No. 68 / 2011 - Customs (N.T.) dated 22.09.2011.

12. In view of the above discussion and findings, the Government sets aside Orders-in-Appeal No. CMB-CEX-000-APP-146 & 147-17 dated 21-06-2017 passed by the Commissioner of Customs, Central Excise, & Service Tax (Appeals-I), Coimbatore.

13. The Revision Application is disposed of on the above terms.

19/7/22

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

ORDER No. 212-213/2022-CUS (SZ)/ASRA/Mumbai dated 19.7.2022

To,
M/s. Japan International,
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Copy to:

1. Pr. Commissioner of CGST,
   No.6/7, A.T.D. street, Race Course Road,
   Coimbatore – 641 018.

2. Sr. P.S. to AS (RA), Mumbai

3. Guard file

4. Notice Board.