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F.No. 198/75-76/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
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NEW DELHI-110 066

Date of Issue 7.11.13

ORDER NO. 227-228/13-Cx DATED 06.03.2013 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. 498/2010 dated 26.10.10 & 480/2010 dated 27.10.10 passed by the Commissioner of Central Excise (Appeals), Madurai
Applicant	:	Commissioner of Central Excise, Madurai
Respondent	:	M/s Valli Textile Mills, N.Venkateswarapuram, Virudhunagar Distt.

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ORDER

These revision applications are filed by the applicant Commissioner of Central Excise, Madurai against the order-in-appeal No. 498/2010 dated 26.10.10 & 480/2010 dated 27.10.10 passed by the Commissioner of Central Excise (Appeals), Madurai with respect to order-in-original No.18/2009-CE (Refund) dated 31.8.09 & 14/2009-CE (Refund) dated 27.7.09 passed by Assistant Commissioner of Central Excise, Virudhunagar Division. M/s Valli Textile Mills (A unit of Loyal Textile Mills Ltd.), Virudhunagar are the respondents in these cases. The detail of revision applications is as under:

S.No.	Revision Application No.	Against Order-in-Appeal No. and Date
1.	198/75/11-RA	498/2010 dated 26.10.10
2.	198/76/11-RA	480/2010 dated 27.10.10

2. Brief facts in respect of case revision application No.198/75/11-RA (order-in-appeal No. 498/2010).

The respondents have exported Grey Knitted Fabrics on payment of duty under claim for rebate in terms of Rule 18 of Central Excise Rules, 2002 and filed rebate claim on 03.09.2007 for a sum of Rs.2,78,334/- being duty paid on Cotton Grey Knitted Fabrics cleared vide ARE1 No: 1/07-08 and 2/07-08 both dated 26.7.07 and 3/07-08 dated 31.7.07. Of this sum of Rs.2,78,334/-, an amount of Rs.2,75,632/- (BED Rs.2,70,228/- plus Rs.5,404/- Edu Cess) was paid from Cenvat Credit account in terms of Cenvat Credit Rules, 2004 and an amount of Rs.2,702/- Secondary and Higher Education Cess was paid in cash through Personal Ledger Account. On scrutiny of the rebate claim dated 03.09.2007, a sum of

Rs.2,76,847/- was sanctioned' vide 0-1-0 No:27.12.2007 in cash and the balance amount of Rs.1,487/-, being the duty paid on the value difference between FOB Value and ARE-1 Value, was allowed as re-credit into Cenvat Credit account. However the above sanction order was reviewed by the department as the respondents were alleged to have utilized an amount of Rs.2,75,632/- from inadmissible un-utilised cenvat credit lying in balance as on 1.3.2007 towards payment of duty on Cotton Knitted Fabrics cleared for export during the period during July, 2007 in contravention of Rule 11(3)(i) of Cenvat Credit Rules, 2004 and thus the rebate claim of Rs.2,74,159/- restricted on the basis of FOB value and sanctioned to the appellants was considered as erroneous refund. In view of the above, the lower authority vide its impugned Order in Original No: 18/2009 CE (Rebate) dated 31.8.2009 has (i) demanded the erroneous refund of Rs.2,74,159/- in terms of Section 11A of Central Excise Act, 1944; (ii) demanded appropriate interest under Section 11AB of the Act and (iii) imposed penalty of Rs.2,74,159/- under Section 11AC of the Act in as much as the respondents have paid the excise duty from out of ineligible cenvat credit.

2.1 Brief facts of the case in R.A. No.198/76/11-RA (order-in-appeal No. 480/2010)

The respondents are engaged in the manufacture of Cotton Yarn, Cotton fabrics, Knitted Fabrics of Chapter 52 and Polyester Cotton Blended Knitted Fabrics of Chapter 55 of Central Excise Tariff Act, 1985 and clear the same for home consumption and for export also. The respondents have exported Cotton Grey Fabrics and Grey Knitted Fabrics on payment of duty under claim for rebate in terms of Rule 18 of Central Excise Rules, 2002 and 15 rebate claims on 31.7.2008, (3 claims on 31.7.2008, 2 claims on 11.8.2008 and 10 claims on 16.9.2008) for a sum of Rs.67,10,159/-. Of this sum of Rs.67,10,159/-, an amount of Rs.65,14,712/- BED plus Rs.23,933/- Edu Cess was paid from Cenvat Credit

account in terms of Cenvat Credit Rules, 2004 and an amount of Rs.1,06,364/- BED plus Rs.65,150/- Edu Cess was paid in cash through Personal Ledger Account. Vide Notification No:29/2004 CE dated 9.7.2004, effective rates of duty of excise are prescribed for the Textile and Textile Articles thereof falling under Chapter 50 to Chapter 63 of Central Excise Tariff Act, 1985 and there are no conditions prescribed for availment of such exemption. Vide Notification No:30/2004 CE dated 9.7.2004, full exemption is granted to Textile and Textile Articles thereof falling under Chapter 50 to Chapter 63 provided no credit of duty paid on inputs or capital goods has been taken under the provisions of the Cenvat Credit Rules, 2002. Initially, the respondents have availed the concessional rate of duty for the textile and textiles articles manufactured by them vide Notification No:29/2004 CE upto 31.12.2004 and have availed Cenvat credit on inputs used in the' manufacture of the finished goods. However, then the respondents have started availing exemption provided vide Notifications No:29/2004 CE and 30/2004 CE simultaneously in respect of Cotton Yarn and have started availing full exemption vide Notification No: 30/2004 CE in respect of all other textile and textile articles other than cotton yarn manufactured by them. The respondents have also chosen to pay duty on Knitted Fabrics vide Notification No:29/2004 CE from July, 2005 to 18.11.2005, and again under full exemption from 19.11.2005 onwards and then again reverted back to clear the Knitted Fabrics on payment of duty from 24.7.2007 onwards. The respondents have a Cenvat Credit of Rs.1,18,01,702/-(including BED, AED (T&T), AED (GSI) and EC) as on 31.12.2004. Reversal of Credit lying in stock as on 1.1.2005 is Rs.12,80,848/- (including BED, AED (T&T), AED (GSI) andEC) and hence the Cenvat credit lying un-utilised as on 1.1.2005 is Rs.1,05,20,854/'- (including BED, AED (T&T), AED (GSI) and EC). The appellants have also taken credit of duty paid on packing materials and furnace oil during the period from 1.1.2005 to 30.7.2006. The appellants have also utilized such credit for payment of duty on cotton yarn exported. Thus the appellants

have a sum of Rs.92,17,111/- as un-utilised Cenvat Credit balance under Cenvat Credit Rules, 2004 as on 28.2.2007. Incidentally Sub-rule 3(i) to Rule 11 of Cenvat Credit Rules, 2004 was inserted vide Notification No:10/2007-CE(NT) dated 1.3.2007 which reads as follows-

> "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 lying in stock, if
>
> (i) he opts for exemption from whole of 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 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."

As per the above Rule 11(3) of Cenvat Credit Rules, 2004, the un-utilised cenvat credit lying in balance as on 01.03.2007 shall lapse and shall not be allowed to be utilized for payment of duty on any other final product cleared for home consumption or for export; However, it is alleged that the respondents have utilized an amount of Rs.65,14,712/- BED plus Rs.23,933/- Edu Cess from such un-utilised cenvat credit lying in balance as on 1.3.2007 towards payment of duty on Cotton Grey Fabrics and Cotton Knitted Fabrics cleared for export during the

period from May, 2008 to July, 2008 in contravention of Rule 11(3)(i) of Cenvat Credit Rules, 2004 and that the respondents have filed the impugned 15 rebate claims under .Rule 18 of Central Excise Rules, 2002 read with Section 11B of Central Excise Act, 1944 for the refund of Rs.67,10,159/-. In view of the above, the lower authority vide its impugned Order in Original No: 14/2009 CE (Refund) dated 21.7.2009 has restricted the rebate claim to the extent of Rs.1,71,154/- which is paid in cash through PLA and has rejected the balance amount of Rs.65,38,645/- in as much as the respondents have paid the excise duty from out of ineligible cenvat credit and without availing the full exemption granted absolutely in terms of Notification No: 30/2004 CE dated 9.7.2004.

3. Being aggrieved by the said orders-in-original, respondents filed appeal before Commissioner (Appeal), who set aside the impugned orders-in-original and allowed the appeal.

4. Being aggrieved by the impugned order-in-appeal, the applicant department has filed these revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following common grounds:

4.1 The insertion made to Rule 11 of CCR, 2004 by Notification No.10/2007-CE (N.T) reads as below.

"(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 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."

A plain reading of the above sub-rule would make it clear that with effect from 1.3.2007, a manufacturer of final product would 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, in anyone of the following two circumstances i.e. (i) when 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. It further states that after deducting the said amount from the balance of CENVAT 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.

In this case, it is an admitted fact that the assessees had availed the whole exemption provided under Notification No. 30/2004-CE dated 9-7-2004, which is a notification issued under Section 5A. Thus the case of the assessees is covered by the

first circumstance discussed above. The appearance of 'semi colon' and 'or' between the two circumstances make it clear that to attract the provisions of the Sub-rule, existence of any one of the circumstances is enough.

4.2 It appears that Commissioner(Appeals) has given a different interpretation as the clause "after deducting the said amount from the balance of CENVAT 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" appear along with the second circumstance though there is a 'comma' and an 'and' appearing after the second circumstance. It may be noted that the main clause of the sub-rule requiring the manufacturer 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 is governed by the conditional clouse that

"if

(i) he opts for exemption from whole of the duty of excise leviable on the sold 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".

The usage of a " comma" and an "and" after the words Section 5A of the Act in the second condition above and prior to the sentence "after deducting the said amount from the balance of CENVAT 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" make it clear that the automatic lapsing of the credit by the operation of this sub-rule and the requirement of non-utilization of the credit so lapsed 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 is a second dictum in continuation of the first dictum requiring payment of 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.

4.3 The interpretation sought to be given by the Commissioner (Appeals) would discriminate between the assessees who opt for conditional exemption and those who avail unconditional exemption even though both the notifications are impermanent in their nature, as in the first case the assessee can withdraw himself from availing the exemption at any time and in the second case, the Government can withdraw the exemption at any time. Such a discrimination would defeat the intention of the sub-rule that whenever an assessee opts for availing exemption all the credits that may be available in the cenvat credit account after deducting the credits attributable to inputs lying in stock or in process or is contained in the final product lying in stock, unutilized should be made to lapse.

4.4 A doubt may arise as to why the sub-rule places the second dictum ibid at the end of the sub-rule after the second circumstance ibid. Basically the intention of the sub-rule is to require payment of an amount equivalent to the CENVAT credit taken on the inputs lying in stock or in process or is contained in the final product lying in stock when a manufacturer opts for availing exemption under a notification issued under Section 5A. The reason for such a requirement

is that credit is allowed on the inputs only if the final products are dutiable. When the assessee opts for exemption then all the credit taken on inputs lying in stock or in process or contained in the final products will be used in exempted final product and therefore the assessee would not be eligible for the credit taken on such inputs. However, if the credits taken on such inputs had already been utilized then, the sub-rule ibid requires payment of amount equivalent to the credit taken, There may be cases where the credit balance in the Cenvat account may exceed the amount of credit to be paid as per the sub-rule. In such cases, the rule automatically lapses the balance credit by the second dictum by placing it after the two circumstances. If the interpretation given by the Commissioner (Appeals) is accepted then only those manufacturers who opt for unconditional exemption alone would be required to lapse the credit, which would defeat the intention of the notification.

5. A show cause notice was issued to the respondent under Section 35 EE of Central Excise Act 1944 to file their counter reply. They vide their letter dated 16.5.2011 submitted that:

5.1 We submit that, the Rule 11 of CCR, 2004 is not applicable to the assessee who was availing exemption under notification No. 30/2004 CE dt. 9.7.2004. The said notification contains a conditional exemption and not an absolute one despite of the fact that the said notification had been issued under Section 5A of Central Excise Act, 1944. The Commissioner of Central Excise in the grounds of appeal has given a lengthy argument to establish that the said exemption is an absolute one and the assessee is not supposed to continue the credit to next financial year when exemption has been granted for the final goods.

5.2 We submit that, the effective rate of duty was given under Notification No.29/2004 CE dt.9.7.2004. Simultaneous availment both the notifications were permitted by the CBE&C. The Central Board of Excise and Customs had confirmed the very promise of the Central Government in the Budget, 2004 that, the textile manufacturers can avail the notifications 29/2004 CE dt.9.7.2004 and 30/2004 CE dt.9.7.2004 simultaneously, vide letter F. No.345/2/2004-TRU dt.28.7.2004 (Circular No. 795/28/2004-CX). The clarification reads as under:

> *"Notification 29/2004 CE (prescribing optional duty at the rate of 4%for pure cotton goods and 8%for other goods) and No. 30/2004 CE (prescribing full exemption) are independent notifications and there is no restriction on availing both simultaneously. However, the manufacturer should maintain separate books of account for goods availing notification No.29/2004 CE and for goods availing notification 30/2004 CE" (emphasis supplied)*

5.3 We submit that, in plethora judgments various appellate forums had held that, "Where two exemption notifications covers the goods in question, the assessee is entitled to the benefit of that exemption notification which gives greater benefit regardless of the fact that, the notification is general in its terms and the other notification is more specific to the goods. "Refer to the case: HCL Ltd Vs CC reported in 2001 (130) ELT 405 (SC). Similarly, in the case of CC Vs Hindustan Motors Ltd, reported in 1998 (98) ELT 557 (T) the Hon'ble Tribunal had held that, "simultaneous benefit of more than one notification can be availed unless there is a prohibition to the contrary". Similarly, in the case of CCE Vs Bharat Metal Industries reported in 1999 (105) ELT 94 (T), it had been held that, "When there are two concurrent exemption notifications in force, it is necessary to give effect to the both harmoniously construe them for this end. It is also necessary to be given effect to the notification which is more beneficial to the assessee. We submit that, the Hon'ble CESTAT, Bangalore in the case of Forbes Gokak Mills Limited Vs CCE, Belgaum reported in 2006 (77) RLT 626 (CESTAT-Bang) has

confirmed in an issue regarding availment of Cenvat credit that, the textile manufacturers can go for the notifications 29/2004 and 30/2004 simultaneously.

5.4 We submit that, in the Rule 18 of Central Excise Rules, 2002 there is no such stipulation that the assessee who pays duty for the clearances for home consumption alone can export goods on payment of duty for claiming the rebate. The newly inserted subsection (1A) of Section 5A of the CEA, 1944 does not drive out an assessee from availing the concessional rate and the full exemption simultaneously. One can easily see the intricacies of the new sub section and the intention behind it. The sub section reads:-

> *"for 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"*

In the above-mentioned sub-section, the term 'absolutely' carries greater significance. The dictionary meaning for the term 'absolute' is, total, utter, complete, unconditional and unlimited' etc. The exemption contained in the notification 30/2004-CE dt.9.7.2004 is a conditional one subjected to the fulfillment of the requirement in the proviso to the notification. In the show cause notice, it is contended that, the supplier of the fabrics had availed exemption under notification 30/2004 ibid. This contention is highly dramatic since there is no stipulation in the notification 30/2004 above that, the buyer should not pay duty on their final goods when no duty had been paid on the raw materials (inputs) have been supplied. In the show cause notice the exemption contained in the notification 30/2004 had been interpreted to give a meaning which is favourable to them. The condition of the notification is that,

"Provided that nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs has been taken under the provisions of Cenvat Credit Rules, 2002."

5.5 We submit that we had continued the balance amount of unutilized credit earned prior to 9.7.2004 for future availment. No law restricts such continuation of accumulated credit in the circumstances explained above. Therefore, the credit lying in or Cenvat books shall not be treated as amount lapsed in terms of Rule 11 (3) (i) of Cenvat credit Rules, 2004. We submit that, rebate is an incentive given to the exporters to encourage them for export more. Their claims had been submitted for the export made in terms of the notification 19/2004 CE (NT) 6.9.2004. They did not claim any rebate of duty paid on their inputs used in the exported goods. Instead they had utilized only the accumulated credit earned prior to 2005 for payment of duty for the export goods. For the above mentioned reasons, their claims should not be rejected as devoid of merits and for the reasons stated in the show cause.

6. Personal hearing was scheduled in this case on 8.10.12 and 13.12.12. Shri V.Sankaran, Supdt. of Central Excise Sattur Range, Madurai Commissionerate appeared on behalf of the applicant who reiterated the ground of revision application. Shri S.Murugappam, Advocate and Shri K.Lakshman Shankar, AGM appeared on behalf of respondents who reiterated the submission made in counter reply as stated at para (5) above and submitted that the orders-in-appeal being legal and proper may be upheld.

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

8. In these cases, 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. 1.3.07 since assessee availed absolute exemption on all of their final products during material time. As such the duty paid from such lapsed cenvat credit on the said exported goods is not a payment of duty. Therefore the portion of rebate claim of duty paid from said lapsed cenvat credit was rejected. However, Commissioner (Appeals) observed that the exemption under Notification No.30/04-CE dated 9.7.04 is not an absolute exemption and therefore the duty was paid from valid cenvat credit which had not lapsed. Now department has filed these revision applications on the grounds stated above.

9. To understand the issue Government finds it proper to go through the statutory provisions in this regard.

9.1 Government notes that the Notifications No. 29/2004-CE prescribe effective rate of duty with/without any condition whereas Notification No. 30/2004-CE dated 9.7.04 provides for full exemption from duty provided no cenvat facility on inputs has been availed.

The sub-Rule 3(i) to Rule 11 of Cenvat Credit Rules 2004 which was inserted vide Notification No.10/2007-CE(NT) dated 1.3.2007 reads as follows:

(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 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.

9.2 The Rule 3(i) & (ii) to Rule 11 of Cenvat Credit Rules 2004 clearly stipulates that if a manufafturer opts for exemption from whole of duty of excise leviable on the said final product under a Notification issued under Section 5A of the Act or the said final product has been exempted absolutely under Section 5A of the said Act, he shall be required to pay an amount equivalent to the Cenvat Credit 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 the stock and after deducting the said amount from the balance of cenvat 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. The Notification No.30/04-CE provides for exemption from whole of duty and therefore respondent's case is covered under sub-rule 3(i) of Rule 11 and not under sub-rule 3(ii). Commissioner (Appeals) has erred in not considering the word 'or' after sub-rule 3(i). Respondent has also referred to provision of sub-rule 3(ii) and ignored the provisions of sub-rule 3(i) of rule 11. As such, Government finds force in pleadings of the applicant department, and holds that the orders passed by original authority are legal & proper, and do not suffer with any legal infirmity.

10. In view of above position Government sets aside the impugned orders-in-appeal and restores the impugned orders-in-original.

11. The revision applications succeed in terms of above.

12. So ordered.

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

Commissioner of Central Excise
Central Revenue Building
Bibikulam, Madurai-2

Attested

K. RAMESHAPPA
Under Secy./OSD-II (RA)
Ministry of Finance (Dept. of Rev.)
GOVT. OF INDIA/Govt. of India
New Delhi / New Delhi

G.O.I. Order No. 227 – 228 /2013-CX dated 06.08.2013

Copy to:-

1. M/s Valli Textiles Mills, N.Venkateswarapuram, Virudhunagar District
2. Commissioner of Central Excise (Appeals), Central Revenue Building, Lal Bahadur Shastri Marg, Madurai – 625 002.
3. The Asstt. Commissioner, Central Excise, 138/8-1 Katcheri Road, Virudhunagar Division, Virudhunagar
4. Shri S.Muruguppam, Advocate
5. Guard File.
6. PS to JS (RA)
7. Spare Copy

ATTESTED

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