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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.195/08/17-RA /263 Date of Issue: 19 .01.2023

ORDER NO. 23/2023-CX (WZ) /ASRA/MUMBAI DATED 17.01.2023 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant	:	M/s GTN Industries Limited, Village Khurjgaon, Tah. Saoner, District Nagpur.
Respondent	:	Commissioner of Central Excise, Nagpur – I Commissionerate.
Subject	:	Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal bearing Nos. NGP/EXCUS/000-APPL/308/16-17 dated 18.10.2016 passed by the Commissioner (Appeals), Central Excise & Customs, Nagpur.

ORDER

The subject Revision Application has been filed by M/s GTN Industries Limited (here-in-after referred to as 'the applicant') against the impugned Order-in-Appeal dated 18.10.2016 passed by the Commissioner (Appeals), Central Excise & Customs, Nagpur. The said Order-in-Appeal disposed of an appeal filed by the Deputy Commissioner, Central Excise, Division – II, Nagpur (here-in-after referred to as the respondent/Department) against the Order-in-Original dated 05.12.2009 passed by the jurisdictional Deputy Commissioner, which in turn had decided the rebate claim filed by the applicant.

2. Brief facts of the case are that the applicant held Central Excise registration and were engaged in the manufacture of Cotton Yarn; they availed the facility of Cenvat credit. They exported Cotton Yarn on payment of Central Excise duty of Rs.4,99,059/- and filed rebate claims under Rule 18 of the Central Excise Rules, 2002 claiming rebate of the duty paid. It was observed that the applicant had availed Drawback at full rate on the said goods and hence a Show Cause Notice was issued to them seeking to deny the rebate claimed. The original authority vide Order-in-Original dated 05.12.2009 adjudicated the said Show Cause Notice and found the applicant eligible to the rebate claimed by them and accordingly sanctioned the same. Aggrieved, the respondent Department filed an appeal against the said Order-in-Original before Commissioner (Appeals), who relied on the decision of the Joint Secretary (Revisionary Authority), Department of Revenue, GOI in the case of M/s Raghav Industries Limited [2016 (334) ELT 700 (GOI)] and M/s ISCON Surgicals [2013 (288) ELT 147 (GOI)], to hold that the applicant was ineligible to claim rebate of the duty paid through Cenvat account, as they had availed higher rate of Drawback and hence granting the rebate of duty paid, would amount to allowing them double benefit.

3. Aggrieved, the applicant has filed the subject Revision Application against the impugned Order-in-Appeal dated 18.10.2016 on the following grounds:-

(a) The main reason for recovery of the rebate claim already sanctioned was a consequence of the pronouncement of the judgment by the Hon'ble High Court of Madras in the W.P. No.1226 of 2016 [2016 (334) ELT 584 (Mad)] in the case of M/s Raghav Industries Limited, Tiruchengode; that the said order of the High Court is distinguishable due to the following reasons;

(b) The order of the High Court was rendered when Cenvat credit was taken in respect of inputs and input services; that it does not deal with a situation when Cenvat credit on capital goods was availed;

(c) The following provisions of law/Board's Circulars/decisions of higher forums do not restrict the availment of Cenvat credit on capital goods and also higher Drawback, simultaneously:-

- Notification no.103/2008-Cus(NT) dated 29.08.2008 – Para 13;
- Board Circular No.42/2011 dated 22.09.2011;
- Decision in the case of Trident Ltd. [2014 (312) ELT 934 (GOI)];
- CBEC Circular No.1047/35/2016-CX dated 16.09.2016.

(d) that without prejudice to the above, it was submitted that mere filing of appeal under Section 35E(2) of the Central Excise Act, 1944 was not sufficient for recovery of erroneous refund; that revenue should have simultaneously issue Show Cause Notice within time limit under Section 11A of Central Excise Act, 1944; that rebate was sanctioned by the rebate sanctioning authority on 05.12.2009 and a Show Cause Notice 29.06.2010 was pending adjudication and therefore the question of demand does not arise at this stage.

In view of the above submissions, the applicant has prayed that the impugned Order-in-Appeal be set aside.

4. Personal hearing in the case was held on 18.10.2022. Shri S. Durairaj, Advocate appeared online and submitted a copy of judgment of Raghav Industries by the Division Bench of the Hon'ble Madras High Court dated 07.04.2022. He submitted that they are not asking for double benefit and requested to allow their application. In addition to copy of the above judgment, they vide e-mail dated 18.10.2022 submitted copies of notification nos.103/2008-Cus (NT) and the decisions of the Revision Authority and the Hon'ble High Court in the case of Iscon Surgicals.

5. Government has carefully gone through the relevant records, the written and oral submissions and also perused the Order-in-Original and the impugned Order-in-Appeal.

6. Government finds that the short issue for decision is whether the applicant would be eligible to claim rebate of the duty paid by them on the goods exported by them in light of the fact that they also claimed Drawback at the higher rate on the said export consignment. The original authority had sanctioned the rebate so claimed however the same was set aside by the Commissioner (Appeals) vide the impugned Order-in-Appeal. Government notes that the Commissioner (Appeals) has heavily relied upon the decision dated 24.08.2015 of the Revisionary Authority in the case M/s Raghav Industries Limited [2016 (334) ELT 700 (GOI)] to hold that the applicant will not be eligible to the rebate claimed by them for the reason that they had availed Drawback at the higher rate.

7. Government finds that the above cited decision of the Revisionary Authority was assailed by the exporter vide W.P. No.1226 of 2016 in the Hon'ble High Court of Madras. The Hon'ble High Court upheld the order of the Revisionary Authority. Aggrieved, the exporter had filed a Writ Appeal

No.429 of 2016 before the Division Bench of the Hon'ble High Court of Madras leading to the Order dated 07.04.2022 wherein the Hon'ble Court remitted the matter back to the original authority with the following instructions –

> *" to redo the entire process by considering Paras 6 and 15 (i) and (ii) of the notification no.68/2011-Cus. (N.T.) dated 22.09.2011 as well as Rule 2 (a) and its proviso, after hearing all the parties concerned and thereafter, decide the issue on merits."*

Given the above facts, Government finds that the case law relied upon by the Commissioner (Appeals) which formed the entire basis for the impugned Order-in-Appeal has been set aside by the Division Bench of the Hon'ble High Court vide its Order dated 07.04.2022.

8. Before proceeding any further, Government finds that it is pertinent to record the following facts. It is the case of the applicant that they have not utilized the Cenvat credit of the inputs or input services used in the manufacture of the goods that were exported and that the Central excise duty was paid by utilizing Cenvat credit availed on capital goods. Government finds that the Show Cause Notice dated 29.06.2010, at para 10.1, states that the applicant had initially availed Cenvat credit of the Central Excise duties paid on the inputs used in the manufacture of exported finished goods, however, the same was reversed by them when the said finished goods were cleared for export. This fact has been confirmed by the Commissioner (Appeals) at para 10 of the impugned Order-in-Appeal. The original authority has at para 5 & 6 of the Order-in-Original dated 05.12.2019 recorded that the duty paid nature of the goods has been verified and has also confirmed that the said goods have been exported. The original authority has further observed that the applicant had availed Cenvat credit of the duty paid on Capital goods procured by them and the credit so availed was used for paying duty on the finished goods which were exported. Given the above, Government finds that it is clear that the applicant had not availed Cenvat credit of the inputs used in the manufacture of the finished

goods which were exported and that duty paid on such finished goods was through Cenvat Credit availed on capital goods.

9. Government now proceeds to examine the issue in light of the instructions of the Division Bench of the Hon'ble High Court of Madras in its Order dated 07.04.2022. The relevant portions of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and the notification no.68/2011-Cus (NT) dated 22.09.2011 are reproduced below:-

- Rule 2 (a) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, which defines 'Drawback' reads as under:-

> *" (a) "drawback" in relation to any goods manufactured in India and exported, means the rebate of duty or tax, as the case may be, chargeable on any imported materials or excisable materials used or taxable services used as input services in the manufacture of such goods; "*

- Para 6 notification no.68/2011-Cus (NT) reads as follows:

> *" (6) The figures shown under the drawback rate and drawback cap appearing below the column "Drawback when Cenvat facility has not been availed" refer to the total drawback (customs, central excise and service tax component put together) allowable and those appearing under the column "Drawback when Cenvat facility has been availed" refer to the drawback allowable under the customs component. The difference between the two columns refers to the central excise and service tax component of drawback. If the rate indicated is the same in both the columns, it shall mean that the same pertains to only customs component and is available irrespective of whether the exporter has availed of Cenvat or not..."*

- Para 15(i) of notification no.68/2011-Cus (NT) reads as follows: -

> *" (15) The expressions "when Cenvat facility has not been availed", used in the said Schedule, shall mean that the exporter shall satisfy the following conditions, namely:-*

(i) the exporter shall declare, and if necessary, establish to the satisfaction of the Assistant Commissioner of Customs or Assistant Commissioner of Central Excise or Deputy Commissioner of Customs or Deputy Commissioner of Central Excise, as the case may be, that no Cenvat facility has been availed for any of the inputs or input services used in the manufacture of the export product; ..."

A harmonious reading of the above provisions indicate that Drawback has been defined as the rebate of duty or tax on imported or excisable materials, and the taxable services used as input services, in the manufacture of the goods that have been exported. Further, the higher rate of Drawback, apart from the Customs component, also includes the Central Excise and Service Tax component and for availing such rate the exporter should not have availed Cenvat credit of inputs or input services used in the manufacture of the export product.

10. Government finds that in this case the applicant has not availed Cenvat credit on inputs used in the manufacture of the goods that were exported. There is no allegation that they have availed Cenvat credit of input services either. It has been recorded by the lower authorities that the Cenvat credit, which was used to pay duty on the goods that were exported, was availed on the capital goods procured by the applicant. On examining the issue in light of the provisions of the law which the Hon'ble High Court found applicable in a similar case, Government finds that these provisions do not bar an exporter from availing Cenvat credit on the capital goods and the only condition for availing the higher rate of Drawback is the non-availment of Cenvat credit of the inputs and input services used in the manufacture of goods exported. Given the fact that the applicant has not availed of Cenvat credit on inputs or input services used to manufacture the goods exported, Government finds that the applicant will be eligible to claim the rebate of Central Excise duty paid by them on the good exported by utilizing the Cenvat credit availed on capital goods. Given the facts of the case, Government finds that denying rebate of the duty paid by the applicant in this case would be against the laid down principle that taxes should not

be exported. In light of the above, Government annuls the impugned Order-in-Appeal and holds that the applicant will be eligible to the rebate claimed by them.

11. The subject Revision Application is allowed.

17/1/23

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

ORDER No. 23 /2023-CX (WZ) /ASRA/Mumbai dated 17 .01.2023.

To,

M/s GTN Industries Limited,
Village Khurjgaon,
Tah. Saoner, District Nagpur.

Copy to:

1. Commissioner of CGST & Central Excise, Nagpur – I Commissionerate, GST Bhavan, Civil Lines, Telangkhedi Road, Nagpur – 44 0001, Maharashtra.
2. Commissioner (Appeals), Central Excise & Customs, Nagpur, GST Bhavan, 2nd floor, room no.221, Telangkhedi Road, Nagpur – 44 0001, Maharashtra.
3. Shri S. Durairaj, Advocate, 176/84, West Sambandam Road, R.S. Puram, Coimbatore – 641 002, Tamil Nadu.
4. Sr. P.S. to AS (RA), Mumbai.
5. Notice Board