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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

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Mumbai- 400 005

F.No.195/276/2013-RA
F.No.195/286-287/2015-RA/526 Date of Issue: 21.01.2021

ORDER NO. 29-30-31 /2021-CX (WZ)/ASRA/MUMBAI DATED 13.01.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No SRP/127/VAPI/2012-13 dated 08.11.2012 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vapi and Orders-in-Appeal No CCEA-VAD(APP-II)/SSP-125 & 126/2014-15 (Final Order) dated 03.06.2015 passed by the Commissioner (Appeals-II), Central Excise, Customs & Service Tax, Vadodara.

Applicants : 1 & 2. M/s Mohit Industries.

Respondents : 1.Commissioner of Central Excise, Vapi

2. Commissioner of Central Excise, Surat

ORDER

These Revision Applications are filed by M/s Mohit Industries Ltd., Plot No. 2, Survey No. 301/1, Tipco Road, Masat, Silvassa and A/601-B, International Trade Centre, Majura Gate, Ring Road, Surat – 395 002 (hereinafter referred to as "the Applicants") against the Order-in-Appeal No SRP/127/VAPI/2012-13 dated 08.11.2012 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vapi and Orders-in-Appeal Nos. CCEA-VAD(APP-II)/SSP-125 & 126/2014-15 (Final Order) dated 03.06.2015 passed by the Commissioner (Appeals-II), Central Excise, Customs & Service Tax, Vadodara.

2. Briefly

Sl. No.	Rebate claim(Rs) & date	SCN dt	OIO No & Dt	OIA No & Dt	Revision Application No.
1	314598 dt 30.07.10	8.04.10	180/AC/SLV-II/Reb/11-12 dt 27.02.2012	SRP/127/VAPI/2012-13 dt 08.11.2012	195/276/2013-RA
2	259991 dt 6.09.13	18.11.13	333/AC-RFA/2014-Rebate dt 07.05.14	CCEA-VAD(APP-II)/SSP-125 & 126/2014-15 (Final Order) dt 3.06.15	195/286-287/2015-RA
	319053 dt 25.11.13	23.01.14	334 & 335/AC-RFA/2014-Rebate dt 7.05.14		
	310531 dt 25.11.13	23.01.14			

the Applicants, manufacturer-exporter is having Central Excise Registration No. AABCM590EXM001 for manufacturing of excisable goods falling under Chapter Heading No. 54 & 55. They were availing Notifications Nos. 29/2004-CE and 30/2004-CE both dated 09.07.2004 simultaneously since 09.07.2004 and under Circular No. 795/28/2004-CX dated 28.07.2004 they were maintaining separate records. The Applicant carried forward the balance Cenvat credit of Rs. 1,29,70,128/-(BED +SED) & Rs. 3,79,097/-(Edu. Cess) = Rs. 1,33,49,225/- which was prior to 09.07.2004 in their Cenvat register maintained under Notification No. 29/2004-CE and fresh Cenvat credit was availed and duty on finished goods was also paid through this Cenvat register. The Applicants are availing Cenvat credit of duty paid

on that portion of input, which is used for the manufacture of final product and cleared on payment of duty. On the other hand, they were not availing Cenvat credit on that portion of duty, which was used in the manufacture of finished goods, which has been cleared without payment of duty under Notification No. 30/2004-CE both dated 09.07.2004. During the month of November, 2012, the Applicants had transferred their unit from Silvassa to Kim, Surat along with stock, machinery and balance amount of Cenvat credit amounting to Rs. 1,58,73,511/-.

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2. The Applicant had filed rebate claim dated 30.07.2010 of Rs. 3,14,598/- (Rupees Three Lakhs Fourteen Thousand Five Hundred and Ninety Eight Only) under the provisions of Rule 18 of the Central Excise Rules, 2002. On processing, it was found that the Applicant had paid the Central Excise duty of Rs. 3,14,598/- from the Cenvat Credit lying in balance after availment of exemption of Notification No. 30/2004-CE dated 09.07.2004 instead of paying of Central Excise duty from the fresh credit taken after availment of Notification No. 29/2004-CE dated 09.07.2004. While on availment of exemption Notification No. 30/2004-CE dated 09.07.2004, the accumulated unutilized credit lying in balance lapse and hence payment made through such credit became non-payment of duty, therefore, the rebate of duty is no admissible under Rule 18 of the Central Excise Rules, 2002 read with Section 11B of the Central Excise Act, 1944. Hence Applicant was issued Show Cause Notice dated 08.04.2010. The Assistant Commissioner, Central Excise & Customs Division-II, Silvassa vide Order-in-Original dated 27.02.2012 rejected the rebate claim under Section 11B of the Central Excise Act, 1944 read with Notification No. 19//2004-CE(NT) dated 06.09.2004. Aggrieved, the Applicant then filed appeal with the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vapi. The Commissioner(Appeals) vide Order-in-Appeal dated 08.11.2012 rejected their appeal and upheld the Order-in-Original dated 27.02.2012.

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3. The Applicant had filed rebate claims for Rs. 2,59,991/- (Rupees Two Lakhs Fifty Nine Thousand Nine Hundred and Ninety One Only) and Rs. 6,29,584/-(Rupees Six Lakhs Twenty Nine Thousand Five Hundred Eighty Four Only). Based on the Range Superintendent letters dated 12.12.2013 and 19.12.2014 the Applicants were issued Show Cause Notices dated 18.11.2013 and 23.01.2014 respectively wherein it was alleged that the Applicants had reversed Cenvat credit for the goods lying in stock as on 31.07.2006 to avail benefit of Notification No. 30/2004-CE dated 09.07.2004. But due to inverted duty structure of the previous period, even after such reversal there was a balance of unutilized credit of Rs. 1,33,49,225/- and such unutilized credit balance at the time of opting for exemption cannot be utilized for any subsequent duty payment of finished goods manufactured out of freshly procured inputs. It was alleged in the SCNs that after excising the option of Notification No. 30/2004-CE issued under Section 5A of the Central Excise Act, 1944, the excisable goods manufactured by the Applicant became exempted from whole of the duty of excise leviable thereon under the Central Excise Act, 1944, they could not carry forward any balance in their Cenvat Credit Account after deducting the amount of Cenvat credit attributed to the inputs, should lapse and the said balance Cenvat credit could not be utilized for payment of Central Excise duty on clearance of their final product for home consumption or for export, or for payment of Service Tax on any output service in terms of Rule 11(3)(ii) of the Cenvat Credit Rules, 2004. It was accordingly alleged that duty was not paid on the aforesaid clearance for export under claim of rebate. Further it was also alleged that the Applicant had shifted their plant or machinery from Silvassa to Kim, Surat and transferred Cenvat credit of Rs. 1,58,73,511/- during the month of November 2012 without the satisfaction of the JAC and thus contravened the provisions of Rule 10 of Cenvat Credit Rules, 2004. Accordingly, the Applicants were required to maintain a balance of Rs. 2,92,22,736/- (i.e. Rs. 1,33,49,225/- + Rs. 1,58,73,511/-) of such wrongly accumulated Cenvat credit. The Assistant Commissioner, Central Excise, Customs & Service Tax, Division-Olpad,

Surat-II vide Orders-in-Original both dated 07.05.2014 rejected the rebate claims under Section 11B of the Central Excise Act, 1944 read with Rule 18 of Central Excise, 2002. Aggrieved, the Applicant then filed appeal with the Commissioner (Appeals-II), Central Excise, Customs & Service Tax, Vadodara. The Commissioner(Appeals) vide Order-in-Appeal No dated 03.06.2015 rejected their appeal and upheld the Orders-in-Original all dated 07.05.2014.

4. Aggrieved, the Applicants filed the Revision Application on the following grounds:

(i) There is no allegation that the entire accumulated Cenvat credit is illegal. The allegation is limited only to that the accumulate Cenvat credit lying in balance prior to 01.03.2010 became lapse during the time of opting Central Excise exemption under Notification No. 30/2004-CE dated 09.07.2004.

(ii) The Commissioner(Appeals) has travelled beyond the scope of show cause notice. The Applicants had exported Polyester Texturised filament yarn (finished goods) on payment of duty, under Notification No. 29/2004-CE dated 09.07.2004, which was manufactured from Partially Oriented Yarn(Input) and availed Cenvat credit in the month of March 2010. The finished goods were exported in the month of March 2010 and April 2010 on payment of duty. The Applicant was running the factory prior to dated 09.07.2004, when the Notification No. 30/2004-CE dated 09.07.2004 came into force. So before this date, they had legally availed Cenvat credit in their RG 23A Part-II register more than one Crore. From 09.07.2004 onwards, the Applicants had started to maintain separate records under Notifications Nos. 29/2004-CE and 30/2004-CE both dated 09.07.2004 according to Board's Circular No. 795/28/2004-CX dated 28.07.2004. In this circumstance, the Cenvat credit legally availed by the Applicant upto 09.07.2004 can be carried forward in their RG 23A Part-II register maintained under Notification No. 29/2004-CE dated

09.07.2004. There is no condition in Notification No. 30/2004-CE that when this notification will be availed than the legally availed Cenvat credit will be lapsed. So the basic allegation made in the SCN is erroneous and without support of law.

(iii) There is no dispute that the Applicants are availing Notifications Nos. 29/2004-CE and 30/2004-CE and maintaining separate records and filing monthly ER-1 Returns with the Range Officer and the department had never raised any objection on the availment and utilization of Cenvat credit till the date they filed rebate claim for export in the month of July 2010 under Rule 18 of Central Excise Rules, 2002.

(iv) The Applicant had exported the goods under the Notification No. 29/2004-CE via debiting duty in their RE 23A Part II and not under the Notification No. 30/2004-CE. Thus the payment of duty through such accumulated unutilized balance of credit becomes legal payment of duty and the accumulated Cenvat credit is legal which never became lapse. Hence, payment made through pool of legally accumulate Cenvat credit can be treated as genuine payment of duty on exported goods, as there is no one to one co-relation of CEnvat credit required, when it is paid from the pool of amount of Cenvat credit as held by the Hon'ble Supreme Court in the case of CCE, Pune Vs DAI ICHI Karkaria Ltd. [1999 (112) ELT 353 (SC.)].

(v) The Applicants had taken fresh credit of the duty paid on raw material by taking credit of the duty in RG 23A Part-II at the time of purchase of input (POY) from the period of 11.03.2010 to 31.03.2010 for the purpose of producing their final exported goods (Texturising Yarn). They had utilized their fresh Cenvat credit from 11.03.2010 to 31.03.2010 for debiting the duty at the time of removal of goods from the factory for export. The same fact can be clearly seen from the RG 23A Part-II for the month of March 2010 and April 2010. Thus, for the allegation of the department that the Applicants had utilized the

accumulated Cenvat credit of Rupees One Crore lying balance in RG 23A Part-II as on 01.03.2010 is also not sustainable.

(vi) It is not mandatory in Board's Circular No. 845/03/2006-CX dated 01.02.2007, that proportionate Cenvat credit will be taken at the end of the month, when the full quantity of input has been shown in the RG 23A Part-II in the month of March 2010. Since they had taken full quantity shown in invoice in RG 23A Part-I, so full amount of Cenvat credit is available to them in RG 23A Part-II maintained under Notification No. 29/2004. However the clarification has been given in Board's Circular No. 845/03/2006-CX dated 01.02.2007 is in relation to common input used by process house of Dyed and Man Made Fabrics. In the current case, the Applicants are manufacturer of POY. Hence impugned Order-in-Appeal is liable to set aside.

(vii) The Applicant had physically exported goods under ARE-1 on payment of duty under Notification No. 29/2004. Finally remittance has also been received by the Applicant. In the circumstance, legally rebate claim should not be held up by the department and for the delay period of sanction of rebate claim, interest should be provided under Section 11BB of Central Excise Act, 1944 and CBEC's Circular No. 670/61/2002-CX dated 01.10.2002.

(viii) Since 09.07.2004, the Applicants started to avail both the Notification simultaneously and kept separate records. CBEC vide Circular No. 795/28/2004-CX dated 28.07.2004 had clarified that there is no restriction on availing both the notification simultaneously The Cenvat credit prior to 09.07.2004 was carried forward in the record maintained under Notification No. 29/2004-CE and fresh Cenvat credit was availed and duty on finished goods was paid through this Cenvat register. In respect of any clearance of finished goods made under Notification No. 30/2004-CE, no Cenvat credit was availed on inputs and no duty was paid on the finished goods manufactured from such inputs. So accumulate amount of Cenvat credit cannot be

declared non-est and it can be legally used for the payment of duty, on finished goods, for subsequent clearance.

(ix) Provision of Rule 11(3)(ii) are not applicable to the current case as their final product POY is not absolutely exempt under Section 5A of the Central Excise Act, 1944 and it is liable to duty at the rate given under Notification No. 29/2004-CE. Therefore, it is exported under payment of duty.

(x) They relied on the judgment of the Hon'ble Supreme Court in the case of M/s Eicher Motors Ltd Vs UOI [1999 (106) ELT 3 (SC)] wherein in para 3 and 6 of the judgment it is held that the right to avail Cenvat credit accrue as soon as scheme is availed. Right to adjust the tax on final product accrue to the assessee on the date when they pay the tax on the raw material or the inputs and the right would continue until the facility available there to gets worked out or until those goods exist. So the right to adjust the Cenvat credit lies with assessee till the assessee till the Cenvat credit is existed, on the future clearance. Once legally availed Cenvat credit will never be lapsed.

(xi) CBEC in Circular No. 845/2007-CX dated 01.02.2007 read with Circular No. 858/2007-CX dated 08.11.2007 had clarified that "*in case, credit taken on inputs used in the manufacture of the said goods cleared under notification No.14/2002-CE or notification No. 30/2004-CE, has been* ***reversed before utilization****, it would amount to credit not having been taken.*" The Applicants had availed Cenvat credit on the inputs, which was converted to finished Texturised Yarn and lying in stock as on 31.07.2006 and that finished goods was supposed to be cleared under Notification No. 30/2004-CE. Therefore, the Applicants had reversed the Cenvat credit involve in the stock of 31.07.2006 on 01.08.2006 vide E.No. 488 and cleared that Texturised Yarn under Notification No. 30/2004. The Board's Circular does not say that if any assessee avails Notification No. 30/2004-CE, then the balance amount of Cenvat credit will be lapsed. So the allegation made in the impugned

SCN is without authority of law and only in assumption and presumption.

(xii) On the point the finding given by the adjudicating authority at para 22 & 23 of the impugned Orders-in-Original Nos. dated 07.05.2014 is erroneous and beyond scope of show cause notice, the Hon'ble CESTAT, WZB, Ahmedabad vide Order No. M/11001/2014 dated 25.02.2014 had granted stay. Further, CESTAT in final order No. A/10195/2015 dated 04.02.2015 had allowed the appeal for the part of amount utilized for the payment of duty, from the balance amount of Cenvat credit, which department is considering not utilizable by virtue of provision of Rule 11(3) of Cenvat Credit Rules, 2004.

(xiii) The Applicant submitted that their plant from Silvassa along with stock and plant & machinery was shifted to Kim plant and also transferred Cenvat credit of Rs. 1,58,73,511/- during the month of November 2012 under Rule 10 of the Cenvat Credit Rule, 2004. Since the Cenvat credit was legally earned by their Silvassa unit and legally transferred to Kim unit, the Applicants can utilize the accumulated amount of Cenvat credit and the is no need to maintain a balance of Rs. 2,92,22,736/- status quo as stated in the impugned SCN. Against the Commissioner of Central Excise Order-in-Original No. SUR-EXCUS-002-COM-099-13-14 dated 06.03.2014 was challenged by the Applicant before CESTAT, Ahmedabad, therefore the case had not reached finality and it cannot be considered ground for the rejection of rebate claims.

(xiv) It is alleged in the show cause notice that balance amount of Cenvat credit of Rs. 1,28,70,128/- and Rs. 3,79,097/- lying in Cenvat credit register on 01.08.2006 is non-est, hence cannot be used. Provision of Rule 11(3)(ii) of Cenvat Credit Rules, 2004 was incorporated vide Notification No. 32/2007-CE(NT) dated 03.08.2007. The balance amount of Cenvat credit was on 01.08.2006 when the sub-rule (3) of Rule 11 of Cenvat Credit Rules, 2004 was *not in statute*. So how the

said provision can be apply on 01.08.2006, when it was no in existence. The sub-rule (3) of Rule 11 was introduce with effect from 01.03.2007 vide Notifiction No. 10/2007-CE(NT) dated 01.03.2007. So the entire allegation in the show cause notice is in wrong fooling of law.

(xv) The provision of Rule 11(3)(ii) of Cenvat Credit Rules, 2004 will apply when the final product is absolutely exempt, whereas the Applicants product Texturised Yarn/Grey fabrics are not absolutely exempt. Under Section 5A of Central Excise Act, 1944, their goods are liable to duty at the rate given under Notification No. 29/2004-CE, hence provision of Rule 11(3)(ii) is not applicable in their case. Therefore, it is exported under payment of duty.

(xvi) Applicants prayed that their revision applications be allowed and interest be granted for the delayed period.

5. A personal hearing in the case was held on 18.09.3019. The Applicant vide written submission letter dated 09.09.2019 requested to pass the order considering documents available in record and they do not want any further personal hearing. Still in view of a change in the Revisionary Authority, hearing was granted on 09.12.2020, 16.12.2020 and 23/12/2020, however non appeared on behalf of the Applicants and Respondents.

6. The Applicant in their written submission dated 09.09.2019 submitted that

(i) They were availing Notifications Nos. 29/2004-CE and 30/2004-CE both dated 09.07.2004 simultaneously and under Circular No. 795/28/2004-CX dated 28.07.2004 they were maintaining separate records. They were availing credit of duty paid on input only that much quantity, which had been used in the manufacture of Texturised Yarn and cleared on payment of duty.

(ii) In their own case, the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vapi vide Order-in-Appeal No. VAP-EXCUS-000-APP-361 to 363-13-14 dated 30.10.2013, wherein at para 11 a clear finding has been given that the Applicant is maintaining separate records and taken the credit only on inputs used in the manufacture of finished goods cleared on payment of duty under Notification No. 29/2004-CE dated 09.07.2004. Thus the Applicant had satisfied the condition of Circular No. 795/28/2004-CE dated 28.07.2004 for simultaneous availment of Notifications Nos. 29/2004-CE and 30/2004-CE both dated 09.07.2004

(iii) The Applicants rely on the following judgments of Jai Corp Ltd. [2014 (312) ELT 961(GOI)] and Venu International [2014 (312 ELT 859 (GOI)].

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(ii) At para 2 of SCN, it was alleged that the Applicant was required to maintain balance of Rs. 2,92,22,736/- because this credit is under dispute. There is no provision in the Central Excise Act to maintain any balance. If the credit is wrongly availed then SCN for recovery can be given for full amount but utilization of credit is permissible. But in the present case, the Applicant had exported the goods by debiting the duty from balance amount of Cenvat credit. Therefore the rebate was not sanction.

(iii) On the other hand, department had also issued separate SCN for recovery of duty Rs. 1,58,73,511/- which was set aside by Tribunal, WZB, Ahmedabad by remand order dated 12.07.2018. For the balance amount, department had stated in SCN to maintain balance and not to utilize, because it is non-est credit. But in another matter, Applicant had utilized the balance and litigation started. Finally, Tribunal vide Order No. A/10867-10868/2019 dated 10.05.2019 had held that demand is without any support of law and erroneous.

(iv) The Applicant submitted that not to sanction of rebate claim is double demand. There is no dispute that the goods had been exported on the payment of duty, hence the rebate should be sanctioned.

(v) They requested that the rebate claims be sanctioned with interest for delay period of sanction of rebate.

7. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Orders-in-Original and Orders-in-Appeal. The issue to be decided-

(i) in respect of the three Revision Applications are whether the Applicants are eligible for rebate of duty paid from accumulated Cenvat credit as on 09.07.2004 on the goods exported by them during the period from March -April 2010 and April –Sept 2013 under Rule 18 of the Central Excise Rules read with Notification No 19/2004-CE (NT) dated 06.09.2004.

(ii) in respect of the Revision Application F.No.195/286-287/2015-RA whether the Applicants are eligible for rebate of duty paid from accumulated Cenvat credit of Rs. 1,58,73,511/- during the month of November 2012 when their plant/unit has shifted from Silvassa to Kim along with stock and plant.

8. On perusal of the records, the Applicants, manufacturer-exporter of excisable goods falling under Chapter Heading No. 54 & 55. The Applicants in their Cenvat register maintained under Notification No. 29/2004-CE carried forward the balance Cenvat credit of Rs. 1,29,70,128/-(BED +SED) & Rs. 3,79,097/- (Edu. Cess) = Rs. 1,33,49,225/- which was prior to 09.07.2004 and fresh Cenvat credit was availed and duty on finished goods was also paid through this Cenvat register. Findings of the Original adjudicating authority in OIO dated 27.02.2012 are reproduced below,

"On going through the rebate claim papers and copy of RG23A Part II filed by the manufacturer-exporter it found that the goods have been exported by

paying duty from the unutilized CENVAT Credit lying in balance after availment of exemption Notification No. 30/2004-C.Ex. dated 09.07.2004, instead of paying the Central Excise Duty from the fresh CENVAT Credit taken after availment of Notification No. 29/2004 C.EX Dated 09.07.2004, the accumulated unutilized Credit became lapse and payment made through such credit become non-payment of duty on the goods cleared for export under abovementioned ARE-1.

The JRO vide letter F. No. SLV-II/R-V/Misc-Rebate/11-12/1402 dated 20.02.2012 reported that the assessee has the accumulated Cenvat Credit of more than Rupees One Crore prior to 01.03.2010.

As discussed in the foregoing paras, it s found that the manufacture-exporter is having accumulated CENVAT Credit more than Rupees One Crore on 01.03.2010, while the same should be lapsed on date of availment of exemption Not. No. 30/2004-CE dated 09.07.2004. Furthermore, the manufacturer-exporter has utilised such lapsed Cenvat Credit illegally, which is not available to them, for payment of duty on goods exported under above mentioned ARE-1. Such payment of duty from lapsed Cenvat Credit is non-payment of duty and hence the rebate in such case is not admissible."

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9.1 The Applicant had filed rebate claims of the duty paid on the goods exported by them during the period from March -April 2010 and April –Sept 2013 (details in Para 2 above) and on processing, it was found that the Applicant had paid the Central Excise duty from the Cenvat Credit lying in balance after availment of exemption of Notification No. 30/2004-CE dated 09.07.2004 instead of paying of Central Excise duty from the fresh credit taken after availment of Notification No. 29/2004-CE dated 09.07.2004

The Applicant submitted that they availed the benefit of both the said Notifications simultaneously and that they maintained separate accounts in respect of inputs as per Circular dated 28.07.2004. They have further contended that they had taken the credit only in respect of the inputs used

in the manufacture of dutiable goods cleared under Notification No. 29/2004-CE and not taken any credit on inputs used in the manufacture of exempted goods cleared under Notification No. 30/2004-CE.

9.2 The Original adjudicating authority under para 25 of his OIO dated 07.05.2014 has recorded his findings,

" On the basis of the above I find that the noticee's submissions are not acceptable as the notice had paid Central Excise duty by utilizing non-est/accumulated Cenvat Credit accumulated on account of balance available on the date of starting of availing exemption and balance Cenvat Credit could nto be utilized for payment of Central Excise duty on clearance of their final product for home consumption or for export, or for payment of service tax on any output service in terms of Rule 11(3)(ii) of the Cenvat Credit Rules, 2004 or from Cenvat Credit wrongly transferred from their Silvassa unit. Hence, it is considered that duty has not been paid on above clearance for export under claim of rebate."

9.3 The Commissioner(Appeals) vide Order-in-Appeal No SRP / 127 / VAPI / 2012-13 dated 08.11.2012 rejected their appeal and has held that

> *"11. There is nothing on record to prove that the appellants have maintained separate records in respect of duty paid and exempted goods and inputs used in duty paid and exempted goods cannot be identified. The entries shown in photo copies of their CENVAT registers show that they have not taken proportionate Cenvat credit on their inputs at the end of the month, but have taken full credit through out the relevant month. In this way, they have not fulfilled the second condition also."*

9.4 Contention of the applicant that they were availing both notifications and maintain separate accounts all along since 2004 cannot be true otherwise the credit of Rs. 1,33,49,225/- would not have been lying in their account till 2010.

10. Sub-rule (3) to Rule 11 of Cenvat Credit Rules, 2004 was inserted vide Notification No. 10/2007-C.E. (N.T.), 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."*

The sub-rule (3)(i) & (ii) of Rule 11 of Cenvat Credit Rules, 2004 clearly stipulates that if a manufacturer 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. 30/2004-C.E. provides for exemption from whole of duty and therefore Government finds that the excess Cenvat credit lying in balance as on 09.07.2004 should have lapsed as on 01.03.2007 when sub-rule (3) of Rule 11 of the Cenvat Credit Rules, 2004 was introduced on a subsequent date. Government also observes that even if they had opted for the benefit of notification before 1.3.2007 they were required to expunge

such credit when the rules were amended and the sub-rule (3) of Rule 11 of the Cenvat Credit Rules, 2004 was introduced. It is also on record that the Central Excise duty paid by the Applicant for the impugned exports for which they claimed rebate was paid out of such accumulated Cenvat Credit as on 09.07.2004 which should have lapsed w.e.f. 01.03.2007 as explained hereinabove. Since there was no accumulation of Cenvat credit validly in law, there was no question of duty being paid therefrom.

11. Government observes that the Applicant has relied upon Circular No.795/28/2004-CX dated 28.07.2004 which allows the manufacturer to avail both Notification Nos. 29/2004-C.E. and 30/2004-C.E. simultaneously. Even in this circular, at clarification to issue No. 2, it was clarified that for manufacturers who had pre-budget stock of inputs (or stock of semi finished or finished goods which contained inputs) on which credit had already been availed, he can continue to pay duty on the finished goods made therefrom at post budget rates or he can reverse the credit amount and avail full exemption on the finished goods. As the Applicant had opted benefit of Notification No.30/2004 CE from 09.07.2004 onwards and availed exemption from payment of duty they were required to reverse the entire Cenvat credit amount before opting for exemption under the said Notification.

12. In Eicher Motors Ltd.[1999(106)E.L.T.3(S.C.) relied upon by the Applicant, the challenge to the validity of scheme as modified by introduction of Rule 57F of Central Excise Rules, 1944 was under consideration. According to Section 57F (4A) of Central Excise Rules, 1944, credit which was lying unutilized on 16-3-1995 with the manufacturers, stood lapsed and wherein Hon'ble Apex Court observed that "*the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assessees had availed of the credit facility for payment of taxes.* The above judgment was delivered on a different set of facts and circumstances compared to the case in hand in as much as in the

present case the option to carry forward credit and pay duty on finished goods was very much available to the Applicant. However, the Applicant preferred to avail exemption under Notification No. 30/2004-CE and therefore the entire Cenvat credit of duty lying unutilized when they opted for the benefit of Notification No. 30/2004-CE should have lapsed. Hence the reliance placed by the Applicant on this judgment is misplaced.

13. Government further observes that though the Applicant had availed the Cenvat Credit accumulated for the period prior to 09.07.2004 when the Cenvat Credit rules were amended and the sub-rule (3) of Rule 11 of the Cenvat Credit Rules, 2004 was introduced, they opted for the exemption from payment from duty vide Notification No. 30/2004-CE continuously for the years onwards after 09.07.2004. Hence, they were bound to follow the sub-rule (3) of Rule 11 of the Cenvat Credit Rules, 2004 which they failed to do.

14. Similarly the facts of the case of M/s HMT & Ors Vs CCE, Panchkula, 2008-TIOL-1884-CESTAT-DEL-L.B. wherein the Larger Bench decision of the Tribunal was confirmed by the P & H High Court. The Court after referring to various judgments of the Tribunal and High Courts and more particularly placing reliance on the Apex Court decision in the case of *Dai Ichi Karkaria* (1999 (112) E.L.T. 353 (S.C.) held that it is not a matter of dispute that the assessee has paid the duty on inputs used in the indicated manufacturing of final goods, the assessee has maintained separate accounts/record, duly entered credit of duty-paid on the inputs in manufacture of final goods and validly availed the Cenvat credit. Therefore, the same cannot be reversed on the ground that the final product were subsequently exempted from tax. Whereas in the instant case, the option of availing either Notification No. 29/2004-CE or 30/2004-CE was very much available to the Applicant from the beginning and once they had opted to avail exemption from the payment of duty under Notification 30/2004-CE continuously for the years onwards after 09.07.2004, all the conditions stipulated under the sub-rule (3) of Rule 11 of the Cenvat Credit Rules,

2004 were required to be followed by them. Moreover, Hon'ble Tribunal in the said Order had not gone into the submission of the Ld. Advocate that the Notification No. 10/2007-C.E. (N.T.), dated 01.03.2007 inserted sub-rule (3) to Rule 11 of Rules 2004, is a specific provision for reversal of credit because such issue was not in the referral order, hence distinguished.

15. In view of the forgoing discussion Government holds that as the Applicant had opted for benefit of exemption Notification No.30/2004 CE continuously for the years onwards after 09.07.2004, the Cenvat Credit Balance carried forward in their Cenvat accounts lapsed after insertion of sub-rule (3) of Rule 11 of Cenvat Credit Rules, 2004 w.e.f. 01.03.2007 since the Applicant availed total exemption on all their final products during the aforesaid period and as such the duty paid from such lapsed Cenvat Credit on the said exported goods at a much later date is not a payment of duty and therefore their rebate claims were rightly held inadmissible by the Commissioner(Appeals).

16. Reliance is placed on the judgment of the Hon'ble Bombay High Court in the case of Union of India vs. Rainbow Silks[2011(274)ELT 510(Bom)]. In that case their Lordships were dealing with a case where the merchant exporter-respondent had claimed rebate in respect of goods where the manufacturer of the exported goods was found to have availed CENVAT credit on the basis of bogus documents. The Hon'ble High Courts observations regarding the inadmissible CENVAT credit are reproduced below.

> *"7. .....The contention of the Revenue is that under Rule 18 of the Cenvat Credit Rules, 2002, rebate can be granted of excise duty paid on goods exported. According to the Revenue, in these cases no excise duty was as a matter of fact paid. Cenvat credit was accumulated on the basis of fraudulent documents of bogus firms and such credit was utilised to pay duty. Since there was no accumulation of Cenvat credit validly in law, there was no question of duty being paid therefrom. This submission warrants serious consideration and the Revisional Authority would have to apply its mind to it. In that view of the matter, we find that the approach of the Revisional Authority is unsustainable."*

Government observes that the fundamental principle which the Hon'ble High Court has endorsed through the judgment cited supra is that rebate under Rule 18 can only be granted of excise duty *paid* on goods exported. In the present case, the CENVAT credit balance available in their account was to lapse at the time of opting for complete exemption on their final product. However, the Applicant has chosen to not adhere to the requirement of the rules and continued to retain a very large amount of such CENVAT credit. Under the provisions of the Act, it is open to the manufacturer to pay duty through CENVAT credit account by debit entry. However, if any inadmissible CENVAT credit or CENVAT credit which should correctly have lapsed is continued to be retained and if such amount is utilized for the purpose of payment of the Central Excise Duty, it would mean that the appropriate duty has not been paid and the consequences of non-payment of duty would follow. The observation made by their Lordships that *"Since there was no accumulation of CENVAT credit validly in law, there was no question of duty being paid therefrom."* is squarely applicable to the facts of the present case. In the circumstances where the exported goods are clearly non-duty paid, it is evident that the question of rebate being sanctioned would not arise.

F.No.195/286-287/2015-RA

17. Government observes that the Applicants plant/unit had shifted from Silvassa to Kim along with stock and plant and also transferred accumulated Cenvat credit of Rs. 1,58,73,511/- during the month of November 2012 under Rule 10 of Cenvat Credit Rules, 2004. On the issue on Cenvat credit in respect of their shifting of their units, the Applicants was issued Show Cause Notice dated 01.11.2013. This show cause notice was confirmed by the Commissioner (Appeals) vide Order-in-Appeal No. SUR-EXCUS-002-COM-099-13-14 dated 06.03.2014, which was challenged by the Applicants before CESTAT, Ahmedabad. The Hon'ble Tribunal vide final order E/11411/2014 dated 12.07.2018 held that

> *" 4. We have carefully considered the submission made by both sides and perused the records. We find that the facts of the case is that the appellant factory of Silvassa Unit has been shifted to Surat Unit, they had an accumulated utilized Cenvat credit in their Cenvat account which is permissible to be transferred to the transferee unit in terms of Rule 10 of CCR, 2004, which reads as under:-*

"(l) If a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the Cenvat credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory."

As per the reading of the above Rule 10, it is observed that the Rule does not prescribe any procedure to be followed for transfer of the credit lying unutilized from transferred unit to transferee unit. The only requirement is that if any stock of raw-material, capital goods and other goods on which Cenvat credit had been availed, the same should also be transferred to the transferee unit. Only with this aspect, the Jurisdictional Assistant Commissioner or Deputy Commissioner as the case may be, should be satisfied. This fact can be verified from the Cenvat account of transferee unit and Cenvat account of transferee unit. Since, there is no requirement, the Adjudicating Authority imposing condition on the appellant that they should have taken prior permission is absolutely unwarranted. As regard the ground that the shifting was done before registration, the same is not the condition before transfer of unutilized credit. It is obvious that if any unit has to be transferred it can be transferred during the registration only and there is no mandatory requirement that shifting can be done only after surrender of the registration of the transferred unit. Therefore, this condition was also unnecessarily imposed by the Adjudicating Authority. We do not agree with the contention of the Adjudicating Authority that the appellant has violated any condition for transfer of the credit from the transferor unit. Moreover, it is observed that the appellant vide their letter dated 09.11.2012 and 10.12.20112 intimated to the Jurisdictional Assistant Commissioner of Silvassa as well as Surat regarding the transfer of factory including plant & machinery, stock of raw-material and transfer of unutilized credit. The Jurisdictional Assistant Commissioner should have satisfied himself about the correctness of the transfer of credit on the basis of Cenvat account of both the Units. Without doing, merely on assumption basis allegation made against the appellant is not tenable. However, we find that the Adjudicating Authority denied the credit transferred from Silvassa to Surat only on the ground which is not supported by any authority of law. At the same time, no verification of records of Silvassa and Surat was carried out by the Adjudicating Authority or the Jurisdictional Assistant Commissioner. In these circumstances, we are of the view that the Adjudicating Authority must get the records verified and thereafter pass a reasoned order. We reiterate that only on the ground which was made in the adjudication order such as the shifting was done without permission and without surrendering the registration, the Cenvat credit cannot be denied. With our above observations, the appeal is allowed by way of remand to the Adjudicating Authority."

18. Further, on the issue of shifted their plant or machinery from Silvassa to Kim, Surat and transferred Cenvat credit of Rs. 1,58,73,511/-, department had also issued separate show cause notice for the recovery of Rs. 1,58,73,511/-. Aggrieved with the Commissioner(Appeals), Central Excise & Service Tax, Surat Orders-in-Appeal Nos. CCESA-SRT-APPEALS-PS-491-492-2017-18 dated 15.01.2018, the Applicants had filed appeals before the CESTAT, Ahmedabad. The Hon'ble Tribunal vide final order A/10867-10868/2019 dated 10.5.2019 held that

> *".....The demand for transfer of credit from Silvasa to Surat is already settled and this Tribunal has remanded the matter to original adjudicating authority vide order dated 12.07.2018. In these circumstances, raising the demand on the same ground again is not legal and proper."*.

19. Government finds that the issue of demand for transfer of credit from Silvasa to Surat is not res-judicata as the case was remanded to the Jurisdictional Adjudicating Authority to get the records verified and thereafter pass a reasoned order on the correctness of the transfer of credit on the basis of Cenvat account of both the Units. Hence the Applicant was not entitled to use the accumulated Cenvat credit of Rs. 1,58,73,511/- for paying the duty on the exported goods till the remanded order is passed by the jurisdictional adjudicating authority.

20. Discussion contained under para 10 to 16 equally applies to these applications as well.

21. In view of the above discussions and findings, Government uphold the impugned Order-in-Appeal No SRP/127/VAPI/2012-13 dated 08.11.2012 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Vapi and Orders-in-Appeal Nos. CCEA-VAD(APP-II)/SSP-125 & 126/2014-15 (Final Order) dated 03.06.2015 passed by the Commissioner (Appeals-II), Central Excise, Customs & Service Tax, Vadodara and does not find sufficient ground to modify above orders.

22. The Revision Application filed by the Applicants are dismissed being devoid of merit.

13/01/21

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

29-30-31
ORDER No. /2021-CX (WZ)/ASRA/Mumbai DATED 13.01.2021.

To,
M/s Mohit Industries Ltd.,
A/601-B, International Trade Centre,
Majura Gate, Ring Road,
Surat – 395 002.

Copy to:

1. The Commissioner of Goods & Service Tax, Surat Commiissionerate, New Central Excise Building, Chowk Bazaar, Surat – 395 001.
2. Shri Mukund Chouhan & Co., Advocate, 731, Ajanta Shopping Centre, Ring Road, Surat – 395 002.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file