REGISTERED SPEED POST AD

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. 198/54/2010-RA 5846 Date of Issue: 06/10/2021

ORDER NO.325/2021-CX (WZ) /ASRA/MUMBAI DATED 22.09.2021 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 : Commissioner of Central Excise, Mumbai-I

Respondent : M/s Krishna Exports
412, Turning Point Complex,
Ghod Dod Road,
Surat, Gujarat – 395 001

Subject: Remand proceedings in respect of Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against OIA No. SB(95)95/M-I/2009 dated 28.10.2009 passed by Commissioner(Appeals), Central Excise, Mumbai Zone-I in terms of the Hon'ble Bombay High Court Order dated 10.04.2013 in W.P. No. 10014 of 2012

ORDER

These revision applications had originally been filed by the Commissioner of Central Excise, Mumbai-I(hereinafter referred to as "the applicant") against OIA No. SB(95)95/M-I/2009 dated 28.10.2009 passed by Commissioner(Appeals), Central Excise, Mumbai Zone-I in respect of M/s Krishna Exports, 412, Turning Point Complex, Ghod Dod Road, Surat, Gujarat – 395 001(hereinafter referred to as "the respondent").

2.1 The respondent had filed rebate claims in respect of duty paid on goods manufactured by M/s Panna Synthetics, Bhiwandi having ECC No. AEZPC6250MXM001 pertaining to Division Kalyan-I of Thane-I Commissionerate. The goods had been exported through Mumbai Port. Scrutiny of the claims revealed that they had not followed procedure for clearance of goods under self-sealing/self-certification for export under claim of rebate. Moreover, the duty payment certificates had been submitted in loose/open covers(not sealed) and the same had been issued on 27.01.2005. The respondent had therefore been issued an SCN on these and other grounds. The AC, C.Ex., Kalyan-I Dn., Thane-I Commissionerate informed that the manufacturer M/s Panna Synthetics had procured the grey fabrics from M/s Shree Laxmi Textiles, M/s S. P. Cotton Mills, M/s Hindustan Cotton Mills and M/s S. P. International and that investigations had revealed that there is no manufacturing activity being carried out by these firms, that after 08.07.2004 they had lost their status as deemed manufacturers as Rule 12B of the CER, 2002 had been rescinded. However, they have continued with their clearances after 08.07.2004 which is illegal and hence no CENVAT credit can be allowed on the strength of such invoices. Therefore, the debits were made by the manufacturer M/s Panna Synthetics were out of unlawful CENVAT credit availed by them. Since the debits made by the manufacturer M/s Panna Synthetics out of the unlawful CENVAT credit availed by them, hence the goods cleared for export cannot be said to be duty paid goods. In the light of these facts, the AC(Rebate), C.Ex., Mumbai-I rejected the rebate claims vide his OIO No. 107/R/2006 dated 21.02.2006.

2.2 Being aggrieved by the OIO dated 21.02.2006, the respondent filed appeal before the Commissioner(Appeals). Commissioner(Appeals) found that the report of the AC, C.Ex., Kalyan-I Dn. was not supplied to the respondent. He further observed that there was no charge of connivance between the respondent and their supplier M/s Panna Synthetics, the role of the respondent in the availment of CENVAT on bogus and fraudulent documents has not been brought out in the SCN or the OIO, there is no discussion about how the CENVAT availed by the manufacturer supplier could be linked to the denial of rebate on export of goods and that there was no allegation regarding non-export of goods. The Commissioner(Appeals) placed reliance upon the decision of the Government in its Order No. 304-307/07 dated 18.05.2007 in respect of M/s Shree Shyam International. The Commissioner(Appeals) therefore allowed the appeal filed by the respondent vide his OIA No. SB(95)95/M-I/2009 dated 28.10.2009.

2.3 The Department found that the OIA dated 28.10.2009 passed by the Commissioner(Appeals) was not legal and proper and therefore filed revision application on the following grounds:

(a) The AC, Kalyan Dn. had submitted a report stating that investigation had revealed that there were no manufacturing activities at M/s Laxmi Textiles, M/s S. P. Cotton Mills, M/s Hindustan Cotton Mills and M/s S. P. International who had supplied grey fabrics to M/s Panna Synthetics who had in turn supplied goods for export to the respondent. Inspite of the rescinding of Rule 12B of the CER, 2002 after 08.07.2004, these units continued to clear goods which was illegal as no credit could be allowed on the strength of invoices issued by such firms. M/s Panna Synthetics had availed such unlawful credit and utilised the same for payment of duty on the goods cleared for export.

(b) As per Rule 9 of the CCR, 2004, the receiver of the goods was required to ensure the duty paid nature of the goods. In this case, M/s Panna Synthetics(the manufacturer) had failed to take reasonable steps to satisfy themselves of the duty paid nature of the goods and had availed inadmissible CENVAT credit.

(c) Since the duty paid nature of the grey fabrics was not clear, the availment and utilisation of CENVAT credit on the strength of bogus invoices was inappropriate. Therefore, the goods cleared by M/s Panna Synthetics to the respondent by paying duty by utilising such inadmissible CENVAT credit cannot be presumed to be duty paid and was in contravention of the provisions of Rule 9 of the CCR, 2004.

(d) With regard to the finding of the Commissioner(Appeals) that the transaction was at arms length, it was averred that the credit having been availed on the strength of invoices issued by a bogus firm, the entire credit availed and utilised for payment of duty was illegal and fraudulent. Therefore, the rebate claimed on the basis of such credit utilised for payment of duty was not admissible.

(e) Commissioner(Appeals) had ignored the fact that duty had been paid out of CENVAT credit availed on the basis of bogus documents and in such circumstances excisable goods are to be treated as cleared without payment of duty and hence confiscatable.

(f) The decision in the case of M/s R. S. Industries[2003(153)ELT 114(Tri)] which had been relied upon by the JS(RA) was based upon the decision of CESTAT in the case of CCE, Pondicherry vs. Spic Pharmaceuticals[2006(74)RLT 402(CESTAT-Chennai)] had not attained finalty in as much as the Department had filed appeal before the Hon'ble High Court. Similarly in the case of M/s Aggressive and M/s Amichem also writ petition had been filed before the Hon'ble Bombay High Court.

2.4 On taking up the revision application, while agreeing with the findings of the Commissioner(Appeals) in his OIA No. SB(95)95/M-I/2009 dated 28.10.2009, it was observed that the GOI Order No. 304-307/07 dated 18.05.2007 in the case of Shree Shyam International had been upheld by the Hon'ble High Court and that almost similar view had been taken by the Hon'ble Bombay High Court in CCE, Mumbai-I vs. Rainbow Silk Mills[2011(274)ELT 501(Bom)] vide its order dated 27.06.2011 in W.P. No. 3956/2010. It was further averred that the Hon'ble High Court had not questioned the Governments decision in GOI Order No. 304-307/07 dated 18.05.2007 in the case of Shree Shyam International. On the point of whether duty paid from illegally accumulated CENVAT credit can be termed

as duty paid for the requirement of Rule 18 of the CER, 2002, the revisionary authority noted that the Hon'ble Gujarat High Court had categorically held in para 12 thereof that the merchant manufacturer had made payment to the manufacturer; i.e. the seller of the goods and therefore the entire duty had been paid by them for which they are claiming rebate of duty paid on excisable goods upon their export. The Revisionary Authority therefore vide Order No. 140/12-Cx dated 17.02.2012 upheld the order dated 28.10.2012 passed by the Commissioner(Appeals).

2.5 The Department found that the order dated 17.02.2012 passed by the revisionary authority was not legal and proper and therefore filed W.P. No. 10014 of 2012 before the Hon'ble Bombay High Court. When the W.P. No. 10014 of 2012 filed by the Department was taken up for hearing on 10.04.2013, the Counsel for the Department and the Counsel for the respondent submitted that in terms of the decision of the Hon'ble Bombay High Court in CCE, Mumbai-III vs. Ruchika International and Anr. in W.P. No. 234 of 2011, the order dated 17.02.2012 passed by the Revisionary Authority be set aside and the proceedings be restored to the file of the revisionary authority for a fresh decision in accordance with law. Their Lordships allowed this plea and also ordered that all the rights and contentions of the parties were kept open to be urged in the revisional proceedings.

3. The Revision Application Unit was originally a single unit operating from New Delhi with all India jurisdiction. The Revision Application Unit was bifurcated into two units in July, 2017 by setting up another unit with jurisdiction over the West Zone and South Zone. Thereafter, since the file pertaining to the instant case had inadvertently been left out during the transfer of records from the New Delhi Office and since the jurisdiction for the instant case lies with the Mumbai Office, the file pertaining to R.A. No. 198/54/2010-RA was forwarded to this office in October 2020. On taking up the revision application filed by the Department for fresh decision in terms of the directions of the Hon'ble Bombay High Court in its order dated 10.04.2013, the respondent was granted personal hearing on 21.01.2021.

4.1 Thereupon, the respondent filed written submissions vide letter dated 11/14.01.2021 through their Counsel Shri K. I. Vyas. The counsel referred

the intimation for personal hearing vide letter dated 17.12.2020 fixing personal hearing on 11.01.2021 by virtual mode and requested that since the issue was required to be argued in person considering several aspects of settled law and merits, they should be allowed to be appear for hearing in person and not by virtual mode. It was further submitted that High Court order was based upon the decision of the Hon'ble High Court of Bombay in the case of CCE, Mumbai-III vs. Ruchika International and Anr. and in view of this case, the matter was remanded. It was pointed out that the judgment in the case of Ruchika International was based upon the judgment of the Hon'ble Bombay High Court in the case of CCE, Mumbai-I vs. Rainbow Silk Mills in W.P. No. 3956 of 2010 pronounced on 27.06.2011.

4.2 The respondent stated that the respondent was a merchant exporter and had purchased the fabrics on outright basis and exported them. They further claimed that the payment for the said goods had been made by account payee cheques and foreign remittance had been received. The respondent contended that the issue involved in Rainbow Silk Mills had already been considered by the Revisional Authority. Moreover, the Hon'ble High Court of Gujarat had specifically dealt with the situation where the merchant exporter had purchased the goods and exported them and duty had been paid in the case of Roman Overseas. The respondent made reference to para 10.4 of the Order dated 17.02.2012 passed by the revisionary authority in this case to support this submission. On the said basis they averred that the revisionary authority had already considered the Rainbow Silk Mills case and therefore the order is not required to be disturbed in view of the judgment of the Hon'ble Gujarat High Court in Roman Overseas case which is squarely applicable to the facts of the present case. It was further contended that the Hon'ble Bombay High Court had remanded the case on the basis of the judgment in the case of Rainbow Silk Mills which had already been considered by the Revisionary Authority in his Order No. 140/12-CX dated 17.02.2012/22.02.2012. The text thereof

was quoted by the respondent to lend strength to their contentions. In the light of these submissions, the respondent submitted that the earlier order passed by the revisionary authority rejecting the revision application filed by the Department was to be confirmed as no new facts or law had come to light for deciding the issue in the remand proceedings since the issue had already been settled by the two High Courts and considered by the revisionary authority on merits and law. The respondent also submitted citation of Hon'ble Gujarat High Court judgment in CCE &C vs. D. P. Singh[2011(270)ELT 321(Guj)].

4.3 The respondent again filed written submissions on 18.01.2021. The counsel for the respondent again requested that he be granted hearing in person. The respondent submitted that after 08.07.2004 the status of deemed manufacturer under Rule 12B of the CER, 2002 was continued in the manner prescribed by the Board Circular No. 795/28/2004-CX dated 28.07.2004 in the clarification set out for issue no. 3 therein. It was further averred that in the case of Rainbow Silks[2011(274)ELT 510(Bom)], the matter had been remanded back to the Revisionary Authority for fresh consideration in terms of para 7 thereof where it was held by the court that the contention of the Department that CENVAT accumulated on the basis of fraudulent documents of bogus firms was utilised for payment of duty was not admissible for grant of rebate was found to warrant serious consideration.

4.4 The respondent further stated that in the case of Roman Overseas[2011(270)ELT 321(Guj)] the Hon'ble Gujarat High Court had dismissed the writ petition filed by the Department against the order of the revisionary authority holding that rebate cannot be denied where the merchant exporter had purchased goods and exported them after making payment to the supplier alongwith duty by passing a detailed order. It was pointed out that the said judgment had been approved by the Hon'ble Supreme Court by dismissing the SLP filed by revenue[2014(305)ELT A75(SC)]. The same judgment has been cited by the revisionary authority while

passing Order No. 140/12-CX dated 17.02.2012 in the case of the respondent wherein the order passed by the Hon'ble Bombay High Court in the case of Rainbow Silks was considered. However, the Department had filed writ petition before the Hon'ble Bombay High Court and by showing the judgment of Ruchika International succeeded in having the case remanded to the revisionary authority for fresh decision.

4.5 The respondent submitted that since no new facts had emerged and since the facts were identical to those in the case of Roman Overseas judgment of which has been approved by the Apex Court, the issue raised in Rainbow Silks by Hon'ble Bombay High Court has been resolved in the case of Roman Overseas. Therefore, since the revisionary authority has given detailed findings on facts, law and merits of the case, the respondent prayed that the revision application filed by the Department was required to be rejected and the Order No. 140/12-CX dated 17.02.2012 passed by the revisionary authority was required to be approved and maintained.

5. Shri K. I. Vyas, Advocate appeared on behalf of the respondent at the time of personal hearing on 21.01.2021. He reiterated the submissions made vide written submissions dated 16.01.2021. He submitted that the respondent had purchased goods by paying full value plus duty to their supplier by cheque. Therefore, they cannot be denied credit and rebate is admissible to them. He further requested that since this was a denovo case, it may be decided early.

5. Government has carefully gone through the case records, the order dated 10.04.2013 passed by the Hon'ble Bombay High Court in W.P. No. 10014 of 2012 filed by the Department, the written submissions made by the applicant, their submissions at the time of personal hearing, the revision application filed by them, the impugned order, the order passed by the adjudicating authority.

6. Government finds that the issue for decision in these revision applications is whether the respondent merchant exporter is eligible for the

rebate claimed by them in respect of processed fabrics procured from a manufacturer who had availed CENVAT credit on the basis of bogus invoices issued by suppliers of grey fabrics and such CENVAT credit was utilised for payment of duty on the exported goods. In the first round of proceedings, the matter has travelled upto the Hon'ble High Court. The relevant text of the Hon'ble High Court Order dated 10.04.2013 is reproduced below.

> *"2. Learned counsel appearing on behalf of the Petitioner and learned counsel appearing on behalf of the First Respondent state that in terms of the decision of this Court in Commissioner of Central Excise, Mumbai-III Vs. M/s. Ruchika International and another the impugned order of the Government of India in the Ministry of Finance dated 28 January 2011 may be set aside and the proceedings may be restored to the file of revisional authority for a fresh decision in accordance with law.*
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> *3. Ordered accordingly. Rule is made absolute in the above terms. All the rights and contentions of the parties are kept open to be urged in the revisional proceedings. There shall be no order as to costs."*

Government therefore takes up the case for fresh decision in terms of the directions of the Hon'ble High Court in accordance with law.

7.1 The Hon'ble Bombay High Court has ordered for fresh decision in view of their decision in the case of M/s Ruchika International and Anr. in W.P. No. 234 of 2011. On going through the order of the Hon'ble Bombay High Court in the case of CCE, Mumbai-III vs. Ruchika International & Anr., it is observed that the said case was also restored to the file of the revisionary authority for fresh decision in terms of the judgment delivered by their Lordships in W.P. No. 3956 of 2010 in the case of CCE, Mumbai-I vs. Rainbow Silks & Anr. Since the directions of the Hon'ble High Court in the present case percolate down to the judgment delivered by the High Court in the case of Rainbow Silks, reference must be had to the observations recorded therein. The relevant portion of the text is reproduced below.

"6. The record before the Court, inter alia contains an alert circular which was issued by the Central Excise Commissionerate at Surat on 22 September 2005 noting that during the course of the physical verification of firms, as a part of an investigation into the grant of fraudulent rebate, 71 firms at Surat were found to be bogus and non-existent. Among them was Ganpati Textile listed at Serial No. 13. On 25 January 2008 a notice to show cause was issued to Jai Krishna Prints on the allegation that it had wrongly availed of Cenvat credit on Grey Fabrics, on the basis of invoices issued by Ganpati Textile which was found to be a bogus and fictitious firm. In the notice to show cause, reliance was placed on the statement of a partner of Jai Krishna Prints, stating that he had not received Grey Fabrics directly from the said dealer/manufacturer, but that he had received it through the exporter himself. The notice to show cause culminated in an order dated 28 April 2008 of the Joint Commissioner confirming the demand in respect of the Cenvat credit wrongly availed of, penalty and interest. The order noted that the admitted position was that the unit did job work and had not received Grey Fabrics directly from the manufacturers but through the exporter. In Appeal, the Commissioner (Appeals) by an order dated 1 September 2009 modified the order. Upon a further Appeal by the department, the CESTAT remanded the matter back to the original Adjudicating Authority.

7. The reason why we have adverted to the aforesaid facts, is that the Revisional Authority proceeded on the basis that there was no allegation of a want of bona fides on the part of the First Respondent. This assumption of the Revisional Authority is erroneous because the record before the Court, indicates to the contrary. It is the contention of the Central Excise Department that the First Respondent was a party to the fraud involving the grant of rebate. The fact that this was under investigation right from 2005 is evident from the alert circular dated 22 September 2005. In this view of the matter, the basis upon which the Joint Secretary to the Government of India allowed the claim for rebate was wholly erroneous. The Joint Secretary proceeded on the basis that the case is covered by his earlier decision in Shyam International. The

distinguishing features upon which the Department places reliance would have to be considered by the Revisional Authority. Moreover, the Revisional Authority would have due regard to the parameters of the jurisdiction under Section 35EE of the Central Excise Act, 1944. 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.

8. We accordingly allow the Petition by quashing and setting aside the impugned order dated 1 September, 2009 (Exhibit "D" to the Petition). We are of the view that an order of remand would be warranted in order to enable the Revisional Authority to consider afresh the Revision filed by the First Respondent against the order of the Commissioner (Appeals) confirming the rejection of the Application for rebate. There shall be an order in these terms. In the circumstances of the case, there shall be no order as to costs."

7.2 On going through the judgment, it is observed that the case before the Hon'ble High Court in Rainbow Silks involved availment of fraudulent CENVAT credit fraud where the manufacturer of the exported goods had availed and utilised inadmissible CENVAT credit to pay excise duty on the exported goods. The name of the supplier of grey fabrics in that case; viz. Ganpati Textile figured in a alert circular issued by Central Excise Commissionerate of Surat as bogus and non-existent. On the basis of an investigation, a show cause notice had been issued to the manufacturer for recovery of wrongly availed CENVAT credit which had subsequently been confirmed in adjudication. Their Lordships observed that the Revisionary Authority had failed to take note of

the dubious antecedents of the first respondent in that case – M/s Rainbow Silks and the contentions of the Department of them being party to the fraud involving grant of rebate. The Hon'ble Court opined that the basis on which the Revisionary Authority had allowed the claim for rebate was wholly erroneous. It observed that the Revisionary Authority had proceeded on the basis that the case was covered by its earlier decision in the case of Shyam International and therefore directed that the Revisionary Authority must consider the distinguishing features upon which the Department had placed reliance. The Hon'ble Court further instructed that the Revisionary Authority would have due regard to the parameters of the jurisdiction under Section 35EE of the CEA, 1944.

7.3 It took note of the contention of the Department that rebate under Rule 18 of the CER, 2002 was only in respect of excise duty paid on goods exported whereas no excise duty had actually been paid on the exported goods as CENVAT credit accumulated on the basis of fraudulent documents had been utilised to pay excise duty on the exported goods. Notably, the word "paid" in para 7 of the judgment has been underlined in the copy of the judgment uploaded on the website of Bombay High Court. The judgment goes on affirm that this submission of the Department warrants serious consideration and that the Revisionary Authority would have to apply its mind to it. Their Lordships stated that in this view of the matter, the approach of the Revisionary Authority was unsustainable, allowed the writ petition by setting aside the impugned order and that remand was warranted to enable the Revisionary Authority to consider afresh the revision application filed against the order of Commissioner(Appeals).

8. The judgment of the Hon'ble High Court reveals that due cognizance of the proceedings in investigation must be taken. Moreover, the court has held that the decision in the case of Shyam International cannot be applied without examining the facts. Government finds that there is similar sequence of events in

the present case as in the case of Rainbow Silks. The AC, C.Ex, Kalyan-I Dn. had at the very first stage informed the AC(Rebate), Mumbai-I vide his letter dated 19.01.2006 that the manufacturer M/s Panna Synthetics had procured grey fabrics from M/s Shree Laxmi Textiles, M/s S. P. Cotton Mills, M/s Hindustan Cotton Mills and M/s S. P. International who were not carrying out any manufacturing activity and had lost their status as deemed manufacturers after 08.07.2004 as Rule 12B of the CER, 2002 had been omitted. Since duty paid by utilizing such inadmissible CENVAT credit was not rebatable, the AC(Rebate), Mumbai-I had rejected the rebate claims filed by the respondent. Incidentally, the OIA dated 28.10.2009 does record that there was an investigation which had revealed that there was no manufacturing activity being carried out by the firms from whom the manufacturer had procured grey fabrics. It would therefore have been obligatory for the Commissioner(Appeals) to ascertain the status of the investigation while passing any order regarding the admissibility of rebate. However, the Commissioner(Appeals) has not delved further into the matter.

9.1 On going through the writ petition filed by the Department before the Hon'ble Bombay High Court, it is observed that the investigation carried out has uncovered various incriminating facts. On adjudicating the case booked against M/s Panna Synthetics and the suppliers of grey fabrics, the Commissioner of Central Excise, Thane-I had passed OIO No. 29/BR-29/Th-I/2010 dated 19.05.2010. It had been found that the suppliers of grey fabrics were bogus firms and the transactions for supply of grey fabrics were mere paper transactions without movement of goods. Moreover, it was found from the bank statement of M/s Panna Synthetics that they had not made any payments for these transactions to the suppliers of grey fabrics. Shri Vikas Chandgothia, Proprietor of M/s Panna Synthetics had repeatedly been issued summons to appear before the Department. However,

he had failed to appear before the Department and had absconded. The purported suppliers of grey fabrics were also investigated.

9.2 The demand for CENVAT credit fraudulently availed amounting to Rs. 1,48,23,164/- by M/s Panna Synthetics had been confirmed and penalty of equal amount had been imposed alongwith interest. Penalty of an equal amount had been imposed on Shri Vikas Chandgothia, Proprietor of M/s Panna Synthetics. Penalties were also imposed upon the suppliers of grey fabrics. However, no recoveries could be made as Shri Vikas Chandgothia, Proprietor of M/s Panna Synthetics had absconded and there was no trace of the company at the address on the records of the Department. The appeals filed before CESTAT against the OIO No. 29/BR-29/Th-I/2010 dated 19.05.2010 which have been dismissed for non-compliance with the provisions of Section 35F of the CEA, 1944 vide M/471-473/12/EB/C-II & A/439-456/12/EB/C-II dated 17.04.2012. Besides the case booked by the Department, the Economic Offences Wing of the CBI had also filed a case against M/s Panna Synthetics in the Esplanade Court, Mumbai. The investigation carried out by the Department had ferreted out substantial information to prove it beyond doubt that the CENVAT credit availed and utilised by M/s Panna Synthetics was on the basis of bogus invoices issued by fictitious/non-existent/fraudulent firms.

9.3 In addition to these facts, separate proceedings had been initiated against Shri Prakash Poddar, Proprietor of M/s Krishna Exports(respondent) for claiming rebate of wrongly passed on CENVAT credit by bogus/fictitious/non-existent firms. Shri Prakash Poddar was involved in a similar matter in the case of M/s Sheetal Exports. The nexus between fraudulent CENVAT credit by the manufacturer and the exporter had thus been established. These evidences were duly adjudicated by Commissioner of Central Excise, Thane-I while passing OIO No. 03/BR-03/Th-I/2010 dated 29.01.2010 in respect of M/s Muni Trade and Ors. A penalty of Rs. 75,00,000/- had been imposed upon Shri Prakash Poddar in these

proceedings. The appeal filed by Shri Prakash Poddar against the OIO No. 03/BR-03/Th-I/2010 dated 29.01.2010 has been dismissed by CESTAT vide its Order No. A/3314-3329/15/EB dated 16.07.2015.

10.1 On going through the facts revealed by the investigation which have been adjudicated upon and the facts which were investigated by the EOW, CBI, it is clear that the suppliers of the grey fabrics, M/s Panna Synthetics and the respondent were party to an elaborate conspiracy. It involved the bogus firms masquerading as suppliers of grey fabrics, passing on fraudulent CENVAT credit, M/s Panna Synthetics utilizing such fraudulent CENVAT credit for payment of duty and finally the respondent claiming it as rebate of duty paid on exported goods. These antecedents of the respondent run counter their submissions regarding their bonafides.

10.2 Government observes that the submissions of the respondent in these proceedings is principally based on the contention that they have duly paid M/s Panna Synthetics for supply of the goods which were subsequently exported and also that they had received foreign remittance. It has also been contended that the judgment of the Hon'ble Bombay High Court in Rainbow Silks has already been considered by the Revisionary Authority while passing Order No. 140/12-CX dated 17.02.2012. The respondent has further averred that the situation where the merchant exporter had purchased the goods and exported them had been deliberated upon by the Hon'ble Gujarat High Court while passing its judgment in the case of Roman Overseas[2011(270)ELT 321(Guj)]. The respondent opined that the judgment in the case of Roman Overseas was squarely applicable to their case and that this judgment had been approved by the Hon'ble Supreme Court by dismissing the SLP filed by the Department as reported at [2014(305)ELT A75(SC)]. Government observes that the scope of the words "rebate of duty paid" under Rule 18 was discussed in

the judgment of the Hon'ble Gujarat High Court. Para 12, para 14.2 and para 15 of the said judgment are reproduced below.

"12. The language of Rule 18 however, may pose some question. In particular, it may be contended that Rule 18 envisages rebate for duty paid. Term duty paid as per the department would be duty paid to the Government and not otherwise and when no duty is paid, there can be no rebate. In our view, however Rule 18 also can be looked from this angle. Insofar as respondent M/s. Roman Overseas is concerned, it had paid full duty partly by paying duty directly to the Government and partly by availing cenvat credit. To do so, they had made payment of part duty to seller of goods. Insofar as respondent M/s. Roman Overseas is concerned, therefore, entire duty is paid by them of which it is claiming rebate of the duty paid on excisable goods upon eventual export."

"14.2 We may also record that though counsel for respondent M/s. Roman Overseas contended that without cancellation of cenvat credit granted to M/s. Unique Exports, rebate claimed by respondent M/s. Roman Overseas cannot be declined, we are of the view that such issue cannot be raised by respondent M/s. Roman Overseas in facts of the present case. As already noted, before the competent authority the stand of respondent M/s. Roman Overseas was clear that fraud was not disputed, but that respondent M/s. Roman Overseas was not part of such fraud and that all reasonable care was taken to ensure that goods were duty paid.

15. Before closing, however, we may reiterate that the facts in present case are peculiar. Had there been any allegations and evidence to show that respondent M/s. Roman Overseas was either part of the fraud in non-payment of excise duty or had knowledge about the same or even had failed to take care as envisaged under sub-rule(2) of Rule 7 of the Cenvat Credit Rules, situation would have been different. In the present case, when no such facts emerge, we have no hesitation in confirming the view of the Government."

10.3 In the judgment cited by the respondent, the Hon'ble High Court has averred that duty payment by that respondent to their seller for purchase of

the exported goods entitled them to the rebate thereof. It was noted by the court that the respondent in that case was not party to the fraud and that they had taken all reasonable care to ensure that the goods were duty paid. It was reiterated by their Lordships that if there had been any allegation and evidence to show that the respondent was either part of the fraud in non-payment of excise duty or had knowledge about the same or even failed to take reasonable care as envisaged under sub-rule (2) of Rule 7 of the CCR, the situation would have been different. On the other hand, the facts uncovered by the Departments investigation in respect of the respondent merchant exporter M/s Krishna Exports are an antithesis to the reasons recorded by the Hon'ble Gujarat High Court for arriving at the judgment in favour of Roman Overseas. A case has been booked against Shri Prakash Poddar, Proprietor of M/s Krishna Exports for claiming the rebate of wrongly passed on CENVAT credit by bogus/fictitious/non-existent firms. In view of the facts revealed by the investigation carried out by the Department and the confirmation of demand under OIO No. 29/BR-29/Th-I/2010 dated 19.05.2010, OIO No. 03/BR-03/Th-I/2010 dated 29.01.2010 which have been upheld by the CESTAT and the case booked by the EOW, CBI, the respondent in this case cannot claim parity with Roman Overseas in the judgment of the Hon'ble Gujarat High Court. In the present case, the respondent, their supplier M/s Panna Synthetics and the suppliers of grey fabrics were all complicit in the conspiracy to defraud the revenue. Government therefore holds that the judgment of the Hon'ble Gujarat High Court in the case of CCE & C vs. D. P. Singh(Roman Overseas)[2011(270)ELT 321(Guj)] is clearly distinguishable on facts and hence will not be applicable to the facts of the present case.

10.4 The respondent has also made submissions contending that the status of deemed manufacturer under Rule 12B of the CER, 2002 was continued even after 08.07.2004 in the manner prescribed by CBEC Circular No. 795/28/2004-CX dated 28.07.2004. In this regard, it is observed that the clarification issued was specifically with regard to units which genuinely received inputs on or before 08.07.2004. In the present

case, immediately at the time of the verification of rebate claims, the Department had pointed out that the suppliers of grey fabrics were not having any manufacturing activities and that they had continued to show clearances even after 08.07.2004. Needless to say, if there were no manufacturing activities being carried out by the suppliers of grey fabrics, the question of M/s Panna Synthetics having received any inputs and availing CENVAT credit would not arise. The Department has consistently maintained that CENVAT credit was not admissible on the strength of such invoices and therefore the rebate claimed by the respondent utilising such CENVAT credit for payment of central excise duty was not rebatable. Therefore, the clarification contained in the circular is of no help to the respondent.

11.1 On going through the submissions filed by the respondent, Government observes that they have argued that they had made cheque payments for the goods purchased by them from M/s Panna Synthetics. It has been contended on this basis that they cannot be deprived of the rebate on the exported goods as there is no dispute about the actual export of the goods and the receipt of foreign remittance. In this regard, it is a matter of common knowledge that exports are promoted to maximise the inflow of foreign exchange. Offsetting the tax component also brings down the prices of Indian goods and makes them more competitive in the international market. Towards the end of zero rating exports, domestic taxes on the exported goods are rebated. In other words, the purpose is to ensure that taxes are not exported. The exporter or the supplier of the exported goods pays taxes into the Government account and receives it back as rebate. The argument of the respondent in this case is that notwithstanding the fraud perpetuated by their supplier, they have paid that component of excise duty to their supplier and hence are eligible for the benefit of rebate. For all intents and purposes, revenue is expected to refund the money paid by the merchant exporter to their supplier, inspite of the fact that not a single rupee has been paid as central excise duty into the government account.

11.2 The contention that the exporter being the buyer of the goods who has paid the price for the goods including the central excise duty component

cannot be denied rebate even if there has been a fraud and no duty has been paid into the government account requires careful contemplation. In most cases, the fraud is the outcome of bogus CENVAT being passed on based on mere paper transactions and being utilised to pay duty on the finished goods. The outcome of such a transaction for the revenue is that little or no duty has been paid into the Government treasury. In effect, such a transaction would mean that a bonafide exporter has been led to believe in the genuineness of duty paid nature of the goods whereas he has actually been deceived by the supplier/manufacturer of the goods. In a normal commercial transaction, the perpetrator of the fraud would be held responsible and would have to face legal consequences and also compensate the buyer for the loss caused to him. However, in the same circumstances the liability for deceit by the supplier is sought to be fastened on the revenue to compensate the exporter for the sole reason that it is export rebate. This argument in essence places the revenue in the unenviable position of a guarantor for the merchant exporter to be compensated in the event of the goods being found to be non-duty paid even though little or no central excise duty has actually been deposited into the Government treasury. Therefore, this contention of the exporter does not stand to reason.

12.1 To further fortify this line of reasoning, Government refers a few judgments of the Hon'ble High Courts where the assessees/exporters therein had sought relief in situations emerging from original transactions tainted by fraud. The headnotes of the relevant case laws are reproduced below.

(i) Balaji Impex vs. Commissioner of Cus.(Seaport), Chennai[2019(367)ELT 349(Mad)]

"12. The appellant steps into the shoes of the importer in the sense that they have purchased the advance licence which was granted to the importer. If it is being that the licence obtained by the importer was obtained by fraud nothing further remains to be done as fraud vitiates every solemn act and goes to the root of the matter and therefore, the assessee cannot be allowed to contend that on the date when they utilised the licence, it was not cancelled."

"16. In our considered view, the correct legal position has been spelt out in the decision in Friends Trading Co.(supra), wherein also somewhat identical issue arose for consideration and the Court held that fraud or suppression continues, if document is not genuine and contrary interpretation defeating legislative intention will not enable perpetuation of fraud and a purchaser or successor of fraudulently obtained licence stands in the same position as the predecessor. The said decision squarely would apply to the case on hand, as the petitioner is a purchaser of licence, which was fraudulently obtained."

(ii) Shiv Enterprises vs. Commissioner of Central Excise & Customs[2015(322)ELT 703(Guj)]

"6. The authorities below as well as learned Tribunal have considered the factual scenario in its proper perspective and has clearly recorded the finding that availment of Cenvat credit on the part of the present appellant is a clear case of fraud committed by M/s Ankit Textiles. The fraud vitiates entire transaction. When M/s Ankit Textiles cannot be held valid to enable credit by the dealer as it itself is fictitious because the present dealer has purchased from M/s Ankit Textiles who is no more in existence and fictitious firm and, therefore, the present appellant could not have availed Cenvat credit and, therefore, the authorities below as well as learned Tribunal have rightly confirmed ultimately by reducing the amount of penalty from Rs. 7,36,707/- to Rs. 2,00,000/- which, in our view, is in consonance with the allegations levelled against the present appellant and proved fact in view of the clear provisions of the Cenvat Credit Rules, 2002. We answer both the questions against the appellant-assessee and in favour of the respondent-department. The appeal is accordingly dismissed. There shall be no order as to costs."

(iii) Union of India vs. Sheetal Exports[2011(272)ELT 663(Bom)]

"10. We are not inclined in these proceedings, particularly having regard to the limitations on the exercise of the writ jurisdiction of this Court under Article 226 of the Constitution, to

investigate into all the factual allegations. The exercise of judicial review must follow along the well settled principles. The Court under Article 226 would interfere where, as in this case there has been a manifest error or misdirection on the part of a quasi judicial authority in exercising its jurisdiction. The revisional authority in the present case was called upon to exercise its jurisdiction against an order of remand passed by the Appellate Authority. The order of remand was with a view to enable the First Respondent to have an adequate opportunity to substantiate its case for the grant of rebate, despite the fact that the adjudicating authority had denied the rebate on the ground that Cenvat Credit had been wrongfully availed of on the basis of documents which were fraudulently obtained from Units which were found to be non-existent or bogus. Rule 18 of the Central Excise Rules, 2002 provides that when any goods are exported, the Central Government may by notification grant rebate of duty paid on such excisable goods. Whether duty on the excisable goods has, in fact, been paid to be determined. According to the Excise Department, the duty has not, in fact been paid. The duty was sought to be paid by utilising Cenvat Credit. The Cenvat credit was accumulated on the basis of duty paid documents brought up in collusion with nonexistent or bogus firms. These allegations would have to be enquired into by the adjudicating authority. We are, therefore, of the view that the proper course of action for the revisional authority would have been to allow the order of remand to stand so as to enable the First Respondent to have a full and proper opportunity of establishing its case for the grant of rebate. Instead the revisional authority has purported to make a finding of fact in the absence of virtually any material whatsoever and in the face of the case of the Department that the chain of events in the present case will show a fraudulent attempt to evade the payment of duty. Hence, we are of the view that the order passed by the revisional authority is unsustainable."

12.2 It is deducible from the judgments cited that the purchaser or successor in a transaction originating from fraud is not entitled to any benefit arising therefrom. The purchaser or more specifically the merchant exporter in the present case stands in the same position as the seller M/s Panna Synthetics who have availed fraudulent CENVAT credit. Fraud has vitiated the entire transaction. In the case of Shiv Enterprises cited above, their Lordships have held that CENVAT credit cannot be availed by the appellant in that case because their suppliers themselves were not eligible for the credit. Applying the ratio of the said judgment, it would follow that the respondent in the present case would also be on similar footing as the appellant in the case before the Hon'ble Gujarat High Court. Hence, when the applicant is not eligible for CENVAT credit, they definitely cannot be entitled to a cash refund of the same amount as rebate. In the present case, the facts revealed by the investigation and show cause notice issued subsequently bear out the fact of the respondent merchant exporter being complicit in the elaborate fraud perpetuated by them in collusion with the manufacturer and bogus grey fabric suppliers. The fact that a separate case has been booked against Shri Prakash Poddar, Proprietor of M/s Krishna Exports for claiming the rebate of wrongly passed on CENVAT credit by bogus/fictitious/non-existent firms cannot be disregarded.

12.3 In the judgment of the jurisdictional High Court of Bombay in UOI vs. Sheetal Exports, their Lordships have dealt with facts similar to the facts in the present case. Fraudulent CENVAT credits had allegedly been passed on through a chain of bogus firms and a merchant exporter had come forward to claim rebate. While examining the case, the Hon'ble High Court has while taking note of the provisions of Rule 18 of the CER, 2002 and the powers to grant rebate of duty paid on excisable goods, it opined that it has to be determined whether duty has in fact been paid on the excisable goods. Thereafter, the Hon'ble High Court has recorded a categorical finding that the allegation of the Department that duty had been paid by utilizing CENVAT credit accumulated on the basis of documents brought up in collusion with non-existent or bogus firms would have to be enquired into. It is therefore clear that the factual aspect of whether the CENVAT credits have been availed on the basis of duty actually paid cannot be overlooked

for the reason that the merchant exporter has paid for the goods through banking channels. Incidentally, one of the grounds made out in the Writ Petition filed by the Department against the respondent states that this is not an isolated case against Shri Prakash Poddar, Proprietor of M/s Krishna Exports claiming rebate of wrongly passed on CENVAT credit by bogus/fictitious/non-existent firms and that he was also involved in a similar matter in the case of M/s Sheetal Exports who are the respondents in the case cited at Sr. No. 12.1(iii) hereinbefore.

13. Since the fact that the CENVAT credit availed by M/s Panna Synthetics was availed on the basis of documents issued by bogus/non-existent units and utilised for payment of duty on the exported goods has been established beyond doubt and in view of the two OIO's passed by the Commissioner of Central Excise, Thane-I in respect of M/s Panna Synthetics and Shri Prakash Poddar, Proprietor of M/s Krishna Exports which have also been upheld by the CESTAT and the case booked by the EOW, CBI for the very same offences, the exported goods were clearly not duty paid. Consequently the claims for rebate arising out of such fraudulent CENVAT credit are inadmissible. In this light, Government respectfully follows the ratio of the judgments of the Hon'ble High Courts and rejects the rebate claims filed by the respondent merchant exporter.

14. In the light of the findings recorded hereinbefore, Government sets aside the OIA No. SB(95)95/M-I/2009 dated 28.10.2009 passed by the Commissioner(Appeals), Central Excise, Mumbai Zone-I and holds that the rebate claims filed by the respondent are not admissible. In the result, the revision application filed by the Department against the impugned OIA succeeds.

Shrawan 22/9/21

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

ORDER No.325/2021-CX (WZ) /ASRA/Mumbai DATED 22.09.2021

To,
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Surat, Gujarat – 395 001

Copy to:

1) The Commissioner of CGST & CX, Mumbai South Commissionerate
2) The Commissioner of CGST & CX, (Appeals-I), Mumbai
3) Sr. P.S. to AS (RA), Mumbai
4) Guard file
5) Spare Copy