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F.NO. 195/609/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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NEW DELHI-110 066

Date of Issue 02/4/13

ORDER NO. 329/13-CX DATED 1.4.2013 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D P SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject	:	Revision Application filed under Section 35 EE of the Central Excise Act, 1944 against the Order-in-Appeal No. 41/CE/APPL/CHD-II/2010 dated 15.2.10 passed by the Commissioner of Central Excise (Appeals) , Chandigarh-II.
Applicant	:	M/s Nahar Industrial Enterprises Ltd., Mohali
Respondent	:	Commissioner of Central Excise, Chandigarh-II

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ORDER

This revision application is filed by M/s Nahar Industrial Enterprises Ltd., Village Jalalpur, P.O. Dappar, Distt. SAS Nagar, Mohali, Punjab against the order-in-appeal 41/CE/APPL/CHD-II/2010 dated 15.2.10 passed by Commissioner of Central Excise (Appeals), Chandigarh-II with respect to order-in-original 43/CE/RJ/08 dated 1.1.09 passed by Additional Commissioner Central Excise, Chandigarh.

2. Brief facts of the case are that the applicants are engaged in the manufacture of various types of textile products such as cotton yarn & woven fabrics of cotton falling under Chapter 52 of the schedule to the Central Excise Tariff Act, 1985. Two exemption notifications namely, Notification No. 29/2004-CE and 30/2004-CE both dated 9.7.2004 are applicable for Textile products. The Notification No. 29/2004-CE grants partial exemption to Cotton yarn in excess of 4% of Central Excise duty whereas Notification No. 30/2004-CE grants total exemption from payment of Central Excise duty to Cotton yarn, subject to the condition that no Cenvat credit is taken on the inputs consumed in the manufacture of final products. The applicants vide their letter dated 8.09.2004 had opted to avail the benefit of total exemption from payment of duty for domestic clearances w.e.f. 01.09.2004, in terms of Notification No. 30/2004-CE, without availing Cenvat credit facility and also declared that the stock as on 31.08.2004 would be cleared on payment of effective rate of duty @4% under Notification 29/2004. However in the case of exports the applicants have been paying tariff rate of duty @8% and have been claiming rebate of such duty paid, in terms of Notification No. 19/2004-CE(NT) dated 6.9.2004. The applicants during the period October, 2006 to July, 2008 exported Cotton yarn on payment of duty from RG23-C account and filed 101 rebate claims thereof after filing proof of export. The jurisdictional Assistant Commissioner allowed cash rebate of Rs.81,99,415/- only and amount of Rs.90,65,578/- was allowed as re-credit in Cenvat account being excess amount paid as duty after observing that the applicants were not required to pay duty @8% but were required to pay duty @4% Adv. and further that the duty was required to be paid on the assessable value

determined under Section 4 of the Central Excise Act, 1944 and not on the CIF value. However, on re-examination of the rebate sanction orders by the department it was observed that the rebate in cash have wrongly been sanctioned to the applicants on the following grounds:

(i) While working under Notification No. 30/2004-CE, they were neither required to pay duty nor could pay duty on the goods being manufactured and cleared by them as they are not availing credit of inputs.

(ii) Notification No. 29/2004-CE prescribes an option to pay duty @4% on pure cotton material and @8% on other than cotton whereas Notification No. 30/2004-CE provides full exemption subject to the condition that Cenvat credit of duty paid on inputs is not availed. However the applicants voluntarily declared that they will not avail Cenvat credit and the finished goods will be cleared at Nil rate of duty in terms of Notification No. 30/2004-CE.

(iii) Since no duty was required to be paid on the goods exported therefore the amount paid by the applicants as duty is not duty but a deposit by wrongly portraying/ claiming it as duty to encash the accumulated Cenvat credit on capital goods as rebate.

Accordingly a show cause notice dated 20.08.2008 was issued to the applicants asking them as to why the erroneously sanctioned rebate of Rs.81,99,415/- alongwith interest should not be recovered from them under Section 11 A of the Central Excise Act, 1944. The adjudicating authority confirmed the demand while observing that as the applicants have not taken any credit on inputs therefore they were not required to pay duty on the finished goods. He also relied upon the Revision Order No. 990/2006 dated 21.11.2006 of the Joint Secretary G.O.I. in the revision application of the CCE, Chandigarh in the case of the applicants themselves on this issue, vide which the revision application was allowed in favour of the department.

3. Aggrieved by the said order-in-original, applicant filed appeal before Commissioner (Appeals), who after considering the rival submissions of both parties, rejected the appeal and uphold the impugned order-in-original.

4. Now, being aggrieved by the impugned order-in-appeal, the applicant has filed this revision application before Central Government under Section 35EE of Central Excise Act, 1944 on the following grounds:

4.1 The impugned order is contrary to the factual and legal position and shows non application of mind. It is evident that the impugned order has been passed arbitrarily and illegally. Therefore the impugned order is contrary to law and deserves to be set aside. The issue involved in the present case is squarely covered by the decision of Hon'ble High Court of Gujarat in the case of M/s Jayant Oil Mills Vs. UOI 2009 (235) E.L.T. 233 (Guj) wherein it was held that the assessee exported goods on which duty is leviable and claimed rebate of duty paid without availing exemption granted under a notification once assessee shows from the record that conditions stipulated by notification under which rebate is available qua the duty paid on goods exported outside India stand fulfilled, unless and until an over-riding provision appears on statute, the claim cannot be denied on a ground which is not in consonance with provisions of the Act or the Rules, once duty is validly levied in accordance with provisions of statute, said levy does not disappear or cannot be obliterated merely because by virtue of a notification, partial or full exemption is granted. Therefore, is view of the law settled by Hon'ble High Court in the above relied case, the rebate claims may be allowed in cash. It is submitted that the Notification 29/2004 and 30/2004 are available to the applicant on simultaneous basis end there is no requirement to file any declaration in this regard. The availment of exemption notification is on per consignment basis the view of the appeal is also endorsed by the Circular of the Board dated 28.07.2004 which permits simultaneous availment of both the Notifications therefore it cannot be said that the option for the time would last for remaining period of business for the applicant. It is most important to note that the Commissioner (Appeal) as well as adjudication authority has relied upon the Order No.

990/2006 of Joint Secretary to hold that the cash rebate was not available to the appellant. As a latest development, Join Secretary in another case vide his Order No.222-312 dated 17.02.2010 distinguished the earlier order while observing that the earlier order was relating to duty paid at the Tariff rate and the same is not applicable to the present issue. All points involved in the present case have been decided in the favour of assessee by the authority appointed to adjudge the admissibility of rebate. Commissioner (Appeal) has now adopted the view of Joint Secretary in Order dated 22.02.2010 and has allowed the cash rebate of 4% in appellant's own case for the subsequent period vide Order in appeal No. 73-90/CE/Appl/CHD-II/2010. Therefore, the finding relating to admissibility of cash rebate stands altered between the Commissioner (Appeals) and the Applicant and consequently the present demand has become infructuous.

4.2 The Central Board of Excise and Customs (hereinafter referred to as CBEC), further strengthens the aforesaid stand taken by the applicant. In respect of rebate of duty on exports, CBEC issued a Circular No. 687/3/2003-CX dated 30.01.2003, clarifying that the duty paid through actual or deemed credit account on the goods exported, must be refunded in cash. It is a well-settled position of law that the circular issued by the Board is binding on the Revenue Authorities. Therefore, the Show Cause Notice proposing to deny the rebate claim in cash, of amount of duty paid by the applicant on export is contrary to clarification issued by the Board. It is submitted that Applicant has correctly paid the applicable duty of excise. It does not make any difference whether Cenvat credit of duty paid on inputs is taken or not. The Cenvat credit scheme is a beneficial provision created in law and it is at the discretion of the Applicant to avail the same or not. The Applicant cannot be compelled to take Cenvat credit of any duty paid. In order to avail the Cenvat credit of the duty suffered on inputs when the assessee is clearing the goods under both the notifications simultaneously i.e. Notification No. 29/2004-CE and Notification No. 30/2004-CE both dated 09.07.2004, the Applicant is required to maintain separate account of inputs in respect of clearances made on payment of duty. In case the assessee fails to maintain separate accounts the assessee becomes ineligible to avail the Cenvat Credit on the inputs. Thus, in the present case as

the Applicant has not maintained separate accounts, the Applicant lost the benefit of Cenvat Credit on the inputs. As per the provisions of law, the assessee pays excise duty on removal of goods for export, on self-assessment. Further, the assessee files a return with the Central Excise Department showing duty paid at self- assessment. The return is processed and scrutinized and the proper Central Excise Officer makes an order that the assessment and duty paid by assessee is correct. The Revenue did not challenge that assessment order and it has attained finality. Now, they cannot be permitted to deny the rebate claim in cash, on the ground that the Applicant was required to clear goods at NIL rate of duty. It has been held by the Apex Court in the case of Collector of Central Excise Vs Flock (India) Pvt. Ltd. 2000 (120) ELT 285 (SC) that any appealable order if not challenged and has attained finality, it cannot be challenged indirectly in another proceedings. Therefore, it is not open for the Revenue to deny the rebate claim without challenging the assessment order.

4.3 Without prejudice to the submissions made above, even in the worst case the Applicant cannot be denied cash rebate of the duty paid to the extent of 4%. It is submitted that the Adjudicating Authority has relied upon the decision of the Joint Secretary Final Order 990/2006 dated 21.11.2006, while rejecting the cash rebate. It is pertinent to note here that the Adjudicating Authority has intentionally picked up a paragraph from the Order whereas the order has to be read wholly and not in parts. In the said Order, the Joint Secretary has actually allowed the rebate in cash to the extent of 4%. The above said order of Joint Secretary granting cash rebate to the extent of 4%, has not been challenged by the Revenue and has attained finality. Moreover, cash rebate to the extent of 4% has been always granted by the Revenue at all levels starting from adjudicating stage. Therefore, at this stage the Revenue is not permitted to deny the total cash rebate. Most importantly Revisionary Authority vide Order No. 222-312/10-CX dated 17.02.2010 has conformed recently in the applicants own case and allowed cash rebate @ 4% while observing that the Commissioner (Appeals) has relied upon the GOI order No. 990/2006 dated 21.11.06 in the case of Nahar Industrial Enterprises but that case, the Commissioner has filed the revision application against the orders of Commissioner (Appeals) who had allowed the cash rebate to the extent of

16%. (Tariff rate) instead of 4% in cash and 12% recredit in the Cenvat Credit as allowed by the original adjudicating officer. The revisionary authority vide its order No. 990/2006 dated 21.11.2006 sets aside the order of the Commissioner (Appeals). This order of the revisionary authority was upheld by the Hon'ble High Court of Punjab and Haryana vide order dated 11.09.08 in CWP No. 2235 of 2007 filed by M/s Nahar Industrial Enterprises Ltd. and CWP No. 3358 filed by M/s Vinayak Textile Mills. The issue of allowing 4% cash rebate of notification No. 29/2004-CE dated 9.07.04 was never agitated before the revisionary authority nor the Hon'ble High Court has given any findings on that issue. In this respect, Government observes that 4% cash rebate under notification 29/2004-CE dated 9.07.04 was allowed by the original adjudicating authority. That part of the order was never challenged by department and the same has attained finality. Government further observes that in a number of cases of the same applicant, 4% cash rebate was allowed to the applicant. Revisionary Authority allowed the cash rebate of the duty paid under Notification 29/2004. The Revenue has initiated two parallel proceedings for recovery of amounting to Rs.14,78,278/- out of Rs.81,99,415/- of rebate. Firstly, they have moved in to appeal before Commissioner (Appeals) who has denied the rebate claim of the Applicant in cash and allowed the appeal of the Revenue for allowing the rebate through cenvat credit vide Order in Appeal No. 644-673/CE/REV/CHD/2008 dated 16.12.2008 and secondly the adjudicating authority has confirmed the recovery of amount sanctioned in cash vide impugned order dated 1.01.2009. The above mentioned amount of Rs.14,78,278/- out of Rs. 81,99,415/- is allowed by the Revisionary Authority vide Order No.222-312/10-Cx dated 17.2.2010 as cash rebate. It is very important to understand that the amount involved in both cases is same. The Revenue has denied the rebate claim of the Applicant in cash vide the above said Order in Appeal dated 22.12.2008. The net result of that order is the Applicant is not entitled to cash rebate. Therefore, the cash rebate sanctioned will be recovered and it will be allowed in cash. By doing so the position of Revenue is neutralized. Such double recovery will result into unwarranted harm to the Applicant and unjust enrichment to Revenue. The position of the Revenue is secured in any case. Therefore, to save the Applicant from double Jeopardy, the present proceeding may be dropped.

4.4 In this regard it is submitted that in the above said order dated 21.11.2006, the facts of that case were not as understood by the Respondent. In that case, the issue was whether the Applicants are eligible to cash rebate of the duty paid at tariff rate i.e. 16% or duty paid @4% under Notification 29/2004. It is clear from above paras that the Respondent has relied upon the Revision order dated 21.11.2006 without being conversant with the facts of that case. It is a settled law that reliance cannot be placed on any decision blindly but the relevance of such case with facts and law of case in hand shall be judiciously tried. This view has been confirmed by Hon'ble Supreme Court in the case of Commissioner of Central Excise Vs M/s Srikumar Agencies 2008 (232) E.L.T.577(S.C.). It is very important to mention here that the Respondent has picked a few lines from the Order dated 21.11.2006 which were findings of this Authority beyond the issue before them. The Applicant rely upon the decision of this Authority in the case of M/s Vinayak Textiles Mills vide Order No. 1052/06 dated 22.12.2006 and order No.222-312-CX/2010 dated 17.02.2010 wherein the issue similar to one in Order in Revision dated 21.11.2006 was addressed and the rebate to the extent of duty paid @4% under Notification 29/2004.

5. Shri Rupender Singh, Counsel for applicant vide letter dated 19.3.2013 submitted that as per order of Hon'ble High Court of Punjab & Haryana in W.P.No.17638/2011, Revisional Authority was directed to dispose off stay application with two months of the date of receipt of certified copy of said order dated 26.7.2012 and requested to list the revision application for early disposal. The copy of Hon'ble High Court order dated 26.7.12 was submitted by the Counsel along with said letter dated 19.3.13. Before this neither applicant nor department brought the said order of High Court to the notice of this authority. However, this office requested the CCE, Chandigarh-II vide letter dated 21.3.13 to arrange to supplying the certified copy of said judgement. Simultaneously, personal hearing in this case was fixed on 28.3.13 and personal hearing notice was issued accordingly.

6. Personal hearing held in this case on 28.3.13 was attended by Shri Rupender Singh, Advocate on behalf of the applicant. The revision applications of 2011 are already decided and this case was kept pending due to stay order dated 17.5.10 passed by Hon'ble High Court in W.P.No.9070/2010 against GOI Revision Order No.222-312/10-Cx dated 17.2.09. Hon'ble High Court has directed to clear the matter expeditiously. Learned Counsel has requested during hearing that case may be taken up for final decision. So, Government takes up the case alongwith stay application for decision.

7. Government has carefully gone through the relevant case records and perused the impugned orders.

8. Government notes that applicants had paid central excise duty @8% (tariff rate) on exported goods and filed rebate claim under Rule 18 of Central Excise Rules 2002 read with Notification No.19/04-CE (NT) dated 6.9.04. At the relevant time, two exemption notifications namely Notification No.29/04-CE & 30/04-CE both dated 9.7.04 were applicable for textile products. The notification No.29/04-CE grants partial exemption to cotton yarn in excess of duty @4% whereas Notification No.30/04-CE grants, total exemption from payment of duty on cotton yarn subject to the condition that no cenvat credit is taken on the inputs consumed in the manufacture of final products. The applicants during the period October 2006 to Jul 2008 exported cotton yarn on payment of duty from RG 23-C account and filed 101 rebate claims. The adjudicating authority allowed cash rebate of Rs.81,99,415/- and remaining amount of Rs.90,65,578/- was allowed as recredit in cenvat account being excess amount paid duty observing that applicants were not required to pay duty @8% but were required to pay duty @4% and further duty was required to be paid on assessable value determined under Section 4 of Central Excise Act 1944 and not on CIF value. Department on re-examination of the said order found that rebate claims were sanctioned in cash wrongly on the ground that while working under Notification No.30/04-CE they were not required to pay duty and Notification No.29/04-CE prescribed optional duty of 4% on pure cotton material and 8% on other than cotton.

Since applicants declared that they will not avail cenvat credit and finished goods will be cleared at Nil duty, so no duty was required to be paid on goods exported. Accordingly show cause notice dated 20.8.08 was issued for recovery of erroneously sanctioned rebate claim of Rs.81,99,415/- alongwith interest. The adjudicating authority confirmed the demand. Applicant being aggrieved of said order also filed appeals before Commissioner (Appeals) who vide impugned order-in-appeal rejected the appeal of the applicants and upheld the impugned order-in-original confirming demand with interest. Now, applicant has filed this revision application on the ground stated above.

9. On perusal of records, Government notes that said issue was decided by this authority vide GOI Revision Order No.222-312/10-Cx dated 17.2.10 in the applicant's own case. Government had held in para 14, 15 of said order as under:

> "14. Following the ratio of the above said order of the revisionary authority as upheld by the Hon'ble High Court of Punjab and Haryana, Government observes that the applicants were entitled to the rebate claims in cash in respect of duty paid under Notification No.29/2004-CE dated 9.7.04. If any duty debited in excess of rates specified in the said Notification by the applicant, the same is nothing but a deposit made voluntarily by them which is refundable in the manner of allowing re-credit in cenvat credit account from where it was debited.
>
> 15. In view of above discussions and findings, Government sets aside the impugned orders-in-appeal and allows the revision application to the above extent subject to condition that applicants have maintained separate books of accounts for goods availing of notification No.29/2004-CE and for goods availing of Notification No.30/2004-CE and followed the provisions of Board's Circular No.795/28/2004-Cx dated 28.7.04 and 845/3/2006-Cx dated 1.2.07."

10. It is noted that department filed writ petition No.9070/2010 before Hon'ble High Court of Punjab and Haryana against the said Revision Order dated 17.2.10. Hon'ble High Court vide order dated 17.5.10, granted the stay against the operation of said GOI order. The issue involved in the present case is exactly similar to the issue decided in

GOI Revision Order No.222-312/10-Cx dated 17.2.10. Original authority and Commissioner (Appeals) have hastened to decide case against the applicant without waiting for the order of Hon'ble High Court. They should have waited for the outcome of pending writ petition. Therefore, Government observes that in the interest of justice, case is to be remanded back for reconsideration as per the final decision of Hon'ble High Court in the WP No. 9070/2010.

11. In view of above position, Government sets aside the impugned orders and remands the case back to original authority to decide the matter afresh as per the final order of Hon'ble High Court in the pending Writ Petition No.9070/2010 filed by department. A reasonable opportunity of hearing will be afforded to both the parties.

12. The revision application is disposed off in terms of above.

13. So, ordered.

(D P Singh)
Joint Secretary (Revision Application)

M/s Nahar Industrial Enterprises Ltd.,
Village Jalalpur,
P.O. Dappar,
Distt. SAS Nagar, Mohali, Punjab

Attested

के. रामेश्वरम/P K. RAMESHWARAM
विशेष कार्य अधि./OSD-II (RA)
वित्त मंत्रालय, (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

GoI Order No. 329/13-Cx dt 1.4.2013

Copy to:

1. Commissioner Central Excise, Chandigarh-II, CR Building, Plot NO.19, Sector-17, Chandigarh.
2. Commissioner (Appeals) Customs & Central Excise, Plot No.19, Sector-17, Chandigarh.
3. The Additional Commissioner, Central Excise Division, Dera Bassi,
4. Shri Rupender Singh, Advocate, 21, UGF, Antriksh Bhawan, Kasturba Gabndhi Marg, New Delhi-110001
5. PA to JS(RA)
6. Guard File
7. Spare Copy

ATTESTED

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