

REGISTERED SPEED POST



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, Cuff Parade,
Mumbai- 400 005

F. NO. 195/893/13-RA / 5128 Date of Issue: 02.09.2020

ORDER NO. 339/2020-CEX (WZ) /ASRA/MUMBAI DATED 5.2.20 OF THE
GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA, PRINCIPAL
COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE
GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE
ACT, 1944.

Applicants : M/s Varun Impex, Surat.

Respondent : Commissioner of Central Excise, Customs & Service
Tax, Surat-I

Subject : Revision Application filed, under Section 35EE of the
Central Excise Act, 1944 against the Order-in-Appeal No.
CCEA-SRT-I/SSP-117/2013-14/u/s 35A (3) of Central
Excise Act, 1944 (Final Order) dated 08.07.2013 passed by
the Commissioner (Appeals), Central Excise Customs &
Service Tax, Surat-I.

ORDER

This Revision Application has been filed by M/s Varun Impex, 3GH, Amar Park, Ghod Dod Road, Surat (hereinafter referred to as the "applicant") against Order-in-Appeal No. CCEA-SRT-I/SSP-117 /2013-14/u/s 35A (3) of Central Excise Act,1944 (Final Order) dated 08.07.2013 passed by the Commissioner (Appeals), Central Excise Customs & Service Tax, Surat-I. as detailed below:

2. The brief facts of the case is that the applicant filed rebate claim for Rs.1,91,948/- (Rupees One Lakh Ninety One Thousand Nine Hundred and Forty Eight only) with the Assistant Commissioner, Central Excise & Customs, Division- III, Surat-I Commissionerate (original authority) under Rule 18 of the Central Excise Rules, 2002 read with Notification No.19/2004-CE(NT) dated 06.09.2004 as amended for rebate of the finished goods exported on payment of duty.

3. Upon verification of said rebate claims, the original authority held that the the applicant was eligible for rebate and accordingly sanctioned the rebate claim filed by the applicant vide Order in Original No. Div-III/1179/ 07-08/R dated 22.01.2008. The Central Excise, Customs & Service Tax, Surat-I Commissionerate filed appeal against the said Order in Original passed by Assistant / Deputy Commissioners, Central Excise & Customs, Division- III, Surat-I Commissionerate before Commissioner (Appeals), Central Excise, Customs & Service Tax, Surat-I . The Central Excise, Customs & Service Tax, Surat-I Commissionerate had also filed appeal against 29 other Orders in Original passed by Assistant / Deputy Commissioners, Central Excise & Customs, Division-II & III, Surat-I Commissionerate involving identical issue before the said Commissioner (Appeals).

4. Commissioner (Appeals) allowed the appeal filed by the department vide Order-in-Appeal No. CCEA-SRT-I/SSP-117 to 146 /2013-14/u/s 35A (3) of Central Excise Act, 1944 (Final Order) dated 08.07.2013 and set aside all the 30 Orders in original including Order in Original No. Div-III/1179/ 07-08/R dated 22.01.2008 referred above. Commissioner (Appeals) vide impugned Order also observed that the relevant facts discovered by the DGICCE during the course of its investigations, were not available before Adjudicating Authority at the time of passing subject Orders in Original and in the course of the investigation of the DGCEI as such or by implication, being chain reaction of transactions which were yet to be examined. Accordingly Commissioner

(Appeals) remanded all the cases back to the Adjudicating Authority for carrying out the above stated exercise in each of the case considering all the material facts and additional evidences detected by the DGICCE, relevant and applicable to that case, and to pass appropriate orders thereon

5. Being aggrieved with the aforesaid Orders-in-Appeal, the applicant filed this Revision Application mainly on the following identical grounds:

- 5.1 The order passed by the Commissioner (Appeals) is not sustainable in law when no appeal was filed by the Assistant Commissioner of Central Excise covering the facts of the case, grounds of appeal and prayer and any other document as is clear from the paper book that the same have been signed by the Commissioner, Central Excise and Customs, Surat-I who has no power to file the statement of facts, grounds of appeal and prayer in terms of Section 35E(2) of the Act.
- 5.2 The Commissioner (Appeals) is not empowered to remand the case in terms of Section 35A(3) of the Act which is very specific which have been explained by the CBEC vide Circular No. 275/34/2006-CX 8A dated 18.02.2010. The said instruction is binding on the Commissioner (Appeals) in view of Supreme Court Judgement in the case of Paper Products Ltd. Reported in 1999(112) ELT 765 (S.C.). Commissioner (Appeals) should exercise the power of adjudicating authority and pass the final order and not remand order as there is no power to remand the case to the adjudicating authority
- 5.3 The Commissioner (Appeals) has erred in not considering the plea that the review application was filed in May 2008 and the matter was heard on 26.02.2013 and till period no evidence of any nature was produced or asked permission by the department. Thus, there was no cause for granting any permission to or production of any documents after hearing is completed and therefore, the exercise of power in terms of Rule 5(4) of Central Excise (Appeals) Rules, 2001 is not warranted and legally not sustainable that too when the Commissioner (Appeals) has remanded the case without authority of law to the original authority.
- 5.4 The Commissioner (Appeals) has ignored the several judgements cited by them that in terms of Section 35E(2), the Assistant Commissioner alone is empowered to file appeal to Commissioner (Appeals) and there is no role of Commissioner except to direct the Assistant Commissioner to file appeal in prescribed time limit.
- 5.5 The Commissioner (Appeals) has failed to appreciate that the rebate sanctioning authority had passed the order for rebate claims after examining all documents in terms of Chapter 8 of CBEC's manual and Instruction No. 8/2005 of Commissioner of Central Excise, Surat-I and further amendment thereto after verifying the duty paid nature of the goods and actual export of the goods under the respective invoices

and therefore there was no question to disturb the said order which is legal and proper.

6. Personal hearing in the matter was held on 11.12.2019 which was attended by Shri K.I. Vyas, Advocate, on behalf of the applicant. He reiterated the grounds filed through Revision applications and pleaded that Revision Applications be allowed. He also made written submissions during the personal hearing and also contended that the Commissioner Surat-I had himself filed appeal and filed additional grounds, being at the same level. In support of this he also cited and placed reliance on the following judgments:-

1. 2009(246) ELT 711 (Tri.Chennai)
2. 2006(200) ELT 313 (Tri.Bang)
3. 2003(159) ELT 615 (Tri.Del)
4. 2009(16) STR 318 (Tri.Bang)

7. Government has carefully gone through the relevant case records available in case files and perused the impugned Order-in-Original and Order-in-Appeal.

8. In the instant case from the copy of Form No. EA-2 appended to the Revision Applications, Government observes that the said EA-2 form has been signed by the Assistant Commissioner, Central Excise and Customs, Division-II, Surat-I who had been duly authorised by the Commissioner, Central Excise & Customs, Surat-I vide his Authorisation issued under F.No. V(Ch.54)3-493/RC/07-Pt.I dated 07.05.2008 to file appeal before Commissioner (Appeals) Central Excise and Customs, Surat-I. Further, Rule 4 (2) of Central Excise (Appeals) Rules, 2001, requires that the "*form of application in Form No. E.A.-2 shall be filed in duplicate and shall be accompanied by a certified copy of the decision or order passed by the adjudicating authority and a copy of the order passed by the Commissioner of Central Excise directing such authority to apply to the Commissioner (Appeals)*". In compliance of the said requirement, , the Assistant Commissioner, Central Excise and Customs, Division-II, Surat-I has also enclosed copy of Authorisation consisting of Statement of facts and Grounds of Appeal signed by the Commissioner, Central Excise & Customs, Surat-I to the said EA-2 form filed before Commissioner (Appeals), Central Excise and Customs, Surat-I. As long as EA-2 has been signed and filed by the Assistant Commissioner along with the copy of authorisation signed by Commissioner, as above, the appeal cannot be said to be non maintainable.

9. The relevant extract of Section 35E (2) & (4) are reproduced below :

“Section 35E Powers of Board or (Commissioner of Central Excise) to pass certain orders —

(1)

(2) The Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order.

(3)

(4) Where in pursuance of an order under sub-section (1) or sub-section (2) the adjudicating authority or the authorized officer makes an application to the Appellate Tribunal or the Commissioner (Appeals) within a period of three months from the date of communication of the order under sub-section (1) or sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals) as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of sub-section (4) of section 35B shall, so far as may be, apply to such application.”

10. A careful reading of the Section 35E(2), supra reveals that the Legislature has conferred powers on the Commissioner of Central Excise to review orders of the lower adjudicating authority. Section 35E(2) confers powers on the Commissioner of Central Excise to review the order of any officer subordinate to him. Section 35E(2) provides that the Commissioner may direct such authority to apply to the Commissioner (Appeals) for determination of such points arising out of the decision of the adjudication order.

11. Hence the requirement of statement of facts, grounds of appeal to be signed by the authorised person is a procedural requirement and the said defect in that act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage. Moreover, the prayer/ relief claimed in Appeal is duly mentioned at Sr. No. 7 of EA-2 Form which is signed by the Assistant Commissioner on 09.05.2008.

12. Government in this regard relies on Hon'ble Gujarat High Court Judgment dated 13.11.2008 [2010(18) S.T.R. 353(Guj.)] in Tax Appeal No. 276 of 2007 filed by Commissioner, Central Excise & Customs, Surat-I in Shree Ganesh Dyeing & Ptng. Works. Hon'ble High Court while deciding the issue whether Appeal filed by Commissioner himself and not by subordinate officer based on authorization, whether maintainable, held that

"Commissioner vested with discretion to give opinion as legality or propriety of impugned order and also to file appeal or not - Formation of opinion by Commissioner as to legality or propriety of impugned order, a pre-requisite and mandatory to direct filing of appeal - Commissioner empowered to file appeal himself when vested with power to delegate such work - Appeal maintainable and Tribunal directed to decide as per law"

Hon'ble High Court, Gujarat also observed in its aforesaid Judgment that

" in a case where an opinion has been formed prior to filing of the appeal, merely because the appeal is filed by the Commissioner himself, the Tribunal cannot dismiss the appeal as an invalid appeal and such an appeal has to be entertained on merits and decided accordingly".

13. Government observes that the case laws relied upon by the applicant at para 6 supra are either relating to the Appeals filed by the appellants before Commissioner(Appeals) without signature of the authorised person or authorisation given to officer other than officer who passed the adjudication orders and hence cannot be made applicable to the instant case. Therefore, Government holds that the said appeal filed against Assistant Commissioner, Central Excise & Customs, Division-II & III, Surat-I Commissionerate is filed in accordance with the statutory provisions prescribed under Section 35E(2) read with 35E(4) of the Central Excise Act, 1944.

14. As regards applicant's contention regarding filing of Additional Grounds of Appeal by the department under Rule 5(4) of Central Excise (Appeals) Rules, 2001, Government observes that the department in their Grounds of Appeal at para 10 had submitted before Commissioner (Appeals) that

10. "As the investigation is only at the half way stage now, further evidence of offence, that may have a bearing on case, may be revealed / established on its completion. Therefore additional evidence/grounds may be directed to be presented at a later stage by the Commissioner (Appeals), in terms of Powers vested on him by the provisions of Rule 5(4) of Central Excise (Appeals) Rules, 2001 before disposing the instant appeal".

Accordingly, the department filed Additional grounds of Appeal under Rule 5(4) of the Central Excise (Appeals) Rules, 2001 in the month of May 2013.

15. Hon'ble Gujarat High Court vide its Judgment dated 13.11.2008 [2014 (34) S.T.R. 35(Guj.)] in Tax Appeal No. 535 of 2012 filed by Commissioner, Central Excise in Utkarsh Corporate Services while deciding the issue of sustainability of Additional grounds raised which were not considered by the lower authority held that

“when production of additional evidence is permissible, raising of additional grounds on the basis of relevant facts existing on record is also permissible - Moreover, legal grounds can be raised at any stage before any authority”

Hon'ble High Court, Gujarat also observed in its aforesaid Order that

10. It is evident from the provision made in the form of Rule 5 of the Central Excise (Appeals) Rules as also from the decisions of the Apex Court and that of Madras High Court (supra) that Commissioner (Appeals) is provided with sufficient discretion to allow additional evidence once the ground is made out by the appellant. It needs to allow adducement of evidence also if any of those grounds exists and legal issue can be raised at any stage before even this Court and the Apex Court as well. What is trite to note is that if additional evidence is permissible as discussed raising of additional grounds on the basis of relevant facts existing on record is permissible. There would be nothing to hamper raising of legal grounds surely. And, all the three additional grounds raised are the issues based on law.

16. Government relying on Hon'ble High Court Gujarat Judgments referred at para 12 and 15 supra, holds that the contention advanced by the applicant is thus not tenable.

17. With regard to Commissioner (Appeals) powers to remand the case in terms of Section 35A(3) of the Central Excise Act, 1944 that the issue is now well settled that remand powers of Commissioner (Appeals) have been withdrawn w.e.f. 11-5-2001 as per above said amendment in Section 35A(3) ibid. So, this pleading of the applicants is acceptable and the impugned order is not sustainable to this extent.

18. Government notes that the rebate claims filed by the applicant had been sanctioned by the Original authority. But the subsequent investigations of DGCEI had proved that there was a fraud at grey stage duty payment and

the accumulation of credits at processors/finished product manufacturer's end. Government also notes that it is a fact that due investigations were indeed carried out by the DGCEI/Central Excise authorities and the proper authorities have conclusively proved that such cases are "frauds" involving fake/fictitious identities. Thus, as claimed by the applicant in their submissions (para 5.5 supra) the consideration of Instruction No. 8/2005 dated 03.02.2005 issued by the Commissioner of Central Excise, Surat-I and the evidences of rebate claims for the export made by the original authorities, earlier to the investigations cannot be treated as authentic unless duty paid nature of the export goods in the subject rebate claims was ascertained by correlating the said goods with the grey fabrics used therein and the yarn used in the grey fabrics.

19. In a similar case of M/s. Multiple exports Pvt. Ltd., Government vide GOI order No 668-686/11-Cx dt. 01-06-2011 has upheld the rejection of rebate claim by lower authorities. Division Bench of Hon'ble High Court of Gujarat, vide its order dated 11-10-2012 in SCA No 98/12 with SCA No 101/12 [reported in 2013 (288) E.L.T. 331 (Guj.)], filed by party has upheld the above said GOI Revision order dated 01-06-2011. Government also observes that the contention of the applicant is that they had exported the goods on payment of duty and therefore, they are entitled to rebate of Excise duty. The same arguments came to be considered by the Division Bench of Hon'ble High Court of Gujarat in Special Civil Application No. 13931/2011 in Diwan Brothers Vs Union of India [2013 (295) E.L.T. 387 (Guj.)] and while not accepting the said submission and while denying the rebate claim on actually exported goods, the Division Bench has observed as under :

"Basically the issue is whether the petitioner had purchased the inputs which were duty paid. It may be true that the petitioner manufactured the finished goods and exported the same. However, that by itself would not be sufficient to entitle the petitioner to the rebate claim. In the present case, when the authorities found inputs utilized by the petitioner for manufacturing export products were not duty paid, the entire basis for seeking rebate would fall. In this case, particularly when it was found that several suppliers who claimed to have supplied the goods to the petitioner were fake, bogus or nonexistent, the petitioner cannot be claimed rebate merely on the strength of exports made."

20. In the case of Omkar Overseas Ltd. [2003(156) ELT 167(SC)] Hon'ble Supreme Court has held in unambiguous terms that rebate should be denied

in cases of fraud. In *Sheela Dyeing & Printing Mills (P) Ltd.* [2007 (219) E.L.T. 348 (Tri.-Mum.)] the Hon'ble CESTAT, has held that any fraud vitiates transaction. This judgement has been upheld by the Hon'ble High Court of Gujarat 2008 (232) E.L.T. 408 (Guj.). In a judgement in the case of *Chintan Processor* [2008 (232) E.L.T. 663 (Tri.-Ahm.)], the Hon'ble CESTAT while deciding the question of admissibility of credit on fraudulent invoices has held as follows:

"Once the supplier is proved nonexistent, it has to be held that goods have not been received. However, the applicant's claim that they have received goods but how they have received goods from a non-existent supplier is not known."

21. Government also relies on the judgments of Mumbai High Court in case of Commissioner of Central Excise, Mumbai-I Vs M/s Rainbow Silks & Anr reported at 2011 (274) ELT. 510 (Bom), wherein Hon'ble High Court, Mumbai, in similar circumstances i.e., when a processor is a party to a fraud, wherein cenvat credit was accumulated on the basis of fraudulent documents of bogus firms and utilized for payment of duty on goods exported, it was held that *"since there was no accumulation of cenvat credit validly in law, there was no question of duty being paid therefrom" and quashed the order of Revisional Authority, sanctioning the rebate on such duty payments.*

22. Government also observes that in the instant cases there was investigation carried out by the DGCEI which revealed the nexus between applicants, processor and grey fabrics manufacturers/dealers to defraud the exchequer by way of claiming fraudulent rebate of Central Excise Duty which was never paid to the exchequer. This further resulted in issuance of show cause notices to those involved in fraudulent activities and Orders in original were also passed by the Commissioner, Central Excise and Customs, Surat-I in respect of the applicants.

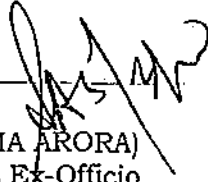
23. In view of discussions and findings elaborated above, Government is of the considered view that the additional evidence which was not available before the original adjudicating authority at the time of passing the impugned Order in Original has to be examined and assessed on its merits. Hence, it would be appropriate to remand the matter to the original authority for de novo consideration for re-adjudicating the case and for passing appropriate orders as per evidences on record. This verification from the original authority

is necessary, to establish the genuineness of the Cenvat credit availed & subsequently utilized for payment of duty towards the above exports. The applicant is also directed to submit relevant records/documents to the original authority in this regard.

24. Government therefore, in exercise of powers under Section 35EE of the Central Excise Act, 1944 remands the case back to the original authority for denovo adjudication as stated above. The original authority will complete the requisite verification expeditiously and pass a speaking order within six weeks of receipt of this order and following the principles of natural justice.

25. The Revision Application is disposed of in the above terms.

26. So ordered.


 (SEEMA ARORA)
 Principal Commissioner & Ex-Officio
 Additional Secretary to Government of India

ORDER No. 339 /2020-CEX (WZ) /ASRA/Mumbai Dated 05.03.2020

To,

M/s Varun Impex, 3GH, Amar Park,
Opp. St. Zavers School, Ghod Dod Road, Surat.

Copy to:

1. The Commissioner of CGST & CX, Surat, New Central Excise Building Chowk Bazaar, Surat 395 001.
2. The Commissioner of CGST & CX (Appeals) 3rd Floor, Magnus Building, Althan Canal Road, Near Atlanta Shopping Center, Althan, Surat-395007.
3. The Deputy / Assistant Commissioner, Division-I/II CGST & CX Surat, New Central Excise Building Chowk Bazaar, Surat 395 001.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.