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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F NO. 195/867/13-RA /5934 Date of Issue: 12.12.2019

ORDER NO. 347 /2019-CX (WZ) /ASRA/MUMBAI DATED 11.12.19 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 CENTRAL EXCISE ACT,1944.

Applicants : M/s GHCL Ltd.

Respondents : Commissioner of Central Excise, Vapi

Subject : Revision Application filed, under Section 35EE of Central Excise Act, 1944 against the Order-in-Appeal SRP/161/VAPI/2013-14 dated 02.07.2013 passed by the Commissioner(Appeals), Central Excise, Customs & Service Tax, Vapi

ORDER

This Revision Application has been filed by M/s GHCL Ltd., Survsey No. 191/192, Mahala Falia, Bhilad, Valsad Distt. Gujarat (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. SRP/161/VAPI/2013-14 dated 02.07.2013 passed by the Commissioner(Appeals), Central Excise, Customs & Service Tax, Vapi

2. The Applicant is engaged in the manufacture of Cotton Made-up Textile Articles and has filed two rebate claims amounting to Rs. 8,31,561/- in respect of 100% Cotton fabrics & Made ups falling under Chapter 52 & 63 exported by them, vide two ARE- ls both dated 02.07.2011 on payment of duty under claim for rebate, under Rule 18 of Central Excise Rules, 2002 (herein after as 'CER'). The Applicant was issued Show Cause Notice for rejection of the claim for rebate and was adjudicated by the Assistant Commisisoner, Central Excise Customs, Division-Vapi vide Order-in-Original No. 907-908/AC/REB/Div-Vapi/22012-13 dated 31.10.2012 who rejected the claims. Aggrieved, the Applicant then filed appeal with the Commissioner(Appeals), Central Excise, Customs & Service Tax, Vapi who vide Order-in-Appeal No. SRP/161/VAPI/2013-14 dated 02.07.2013 rejected their appeal and upheld the Order-in-Original dated 31.10.2012.

3. Aggrieved, the Applicant then filed the current Revision Application on the following grounds:

3.1 That the cases relied upon by the Commissioner(Appeals) are not relevant to the facts of the Applicant's case as none of the cases are dealing with the interpretation of Section 5A(1A) of CEA. Hence, the impugned order is liable to be set aside.

3.2 That Board's Circulars 937/27/2010-CX dated 26.11.2010 and 940/1/2011-CX dated 14.01.2011 are contrary to statutory provisions and this not binding. Provisions of Section 5A of the CEA will be attracted when there is only one notification issued

under Section 5A exempting excisable goods absolutely from whole of the duty leviable. The aforesaid view Is strengthened by the expression *"an exemption..... "* appearing in Section 5A(1A) of CEA. Therefore, if there are two notifications in force in respect of the excisable goods in question, one of which is granting full exemption absolutely and another specifying the rate of duty then provisions of Section 5A(1A) of CEA will not apply.

3.3 That in absence of any restriction by provision of Section 5A(1A) of the CEA in case there exist two notifications it would not be open for the department to enforce exemption on the Applicants. Similar view has been taken by the Hon'ble High Court of Gujarat in the case of CCE Vs. Ingersoll Rand (India) Ltd. Tax Appeal No. 798 of 2006 wherein it was held that in absence of any statutory provision of reversal of Cenvat credit in case inputs are written off, Board cannot insist for such reversals.

3.4 That Notfn 58/2008 and Notfn 59/2008-CE are mutually exclusive and independent in nature and therefore Applicants have rightfully opted to clear goods under Notfn 59/2008-CE.

3.5 That 100% cotton fabrics falling under Chapter 52 attracted NIL rate of duty unconditionally in terms of Sl.No.3 of Notfn 29/2004 as amended by Notfn 58/2008. The Notfn 59/2008 was issued under Section 5A of CEA specifying the rate of duty of 4% in respect of 100% cotton fabrics. Therefore, with effect from 07.12.2008, for the very same 100% cotton fabrics falling under Chapter 52, NIL rate of duty was available in terms of the Notfn 58/2008 and the rate of duty of 4% was stipulated under Notfn 59/2008. In view of the above, the Applicant had option to clear the 100% cotton fabrics on payment of duty at 4% and claim Cenvat credit on inputs, capital goods and services.

3.6 That Section 5A (1A) of CEA will be attracted when there is only one Notification issued under Section 5A of CEA exempting

excisable goods absolutely from whole of the duty leviable. Their view is strengthened by the expression "an exemption .. appearing in Section 5A(1A) of CEA. Therefore, Commissioner (Appeals) erred in interpreting the above provision and has wrongly held that it would apply even if there are more than one notification.

3.7 That Rule 11(3) of the CCR was inserted vide Notification No. 10/2007-CE (NT) dated 01.03.2007. Rule 11(3)(i) of CER applies only in a situation where the assessee has opted for exemption on the whole of duty under a notification issued under Section 5A of CEA. It is clearly not the case of the Applicant that exemption from duty was availed. In fact, the Applicant have chosen to pay duty at 4% under Notfn 59/2008. Therefore, Rule 11(3)(i) of CEA cannot be said to be applicable to the current case.

3.8 That in an identical situation, the Hon'ble High Court of Gujarat in the case of Arvind Ltd. Vs UOI in SCA No. 10887 and 10891 of 2012 has held that once the duty has been paid on exported goods, rebate cannot be denied on the ground that the assesse ought to have claimed exemption on the goods in view of Section 5A(1A) of CEA.

3.9 That they prayed the impugned Order-in-Appeal dated 02.07.2013 be set aside and all their appeal be allowed in full with consequential relief.

4. A personal hearing in the case was held on 26.8.2019. Ms Payal Nahar, Charatered Accountant appeared on behalf of the Applicant. The Applicant reiterated the ground of Revision Application and pleaded for setting aside the Orders-in-Appeal.

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

6. The issue in dispute in the current Revision Applications is that when two notification are operative simultaneously for either payment of duty or availing exemption namely Notification No. 58/2008-CE dated 7.12.2008 and Notification No. 59/2008-CE dated 07.12.2008, whether the Applicant has the choice to opt any one notification.

7. The Applicant had been clearing the goods i.e. Cotton Made-up Textile Articles & 100% Cotton or Cotton blended processed fabrics falling under CH 6301, 6304, 5208 and 5210 for export on payment of duty of 4% under Notfn 29/2004 which provides for concession rate of duty for Textile and Textile Articles falling under Chapter 50 to 63 of the First Schedule to the Central Excise Tariff Act, 1985. Notfn 29/2004 was amended vide Notfn 58/2008 dated 07.12.2008 and the rate of duties were substituted from 4% to Nil for the concerned goods. Then on 07.07.2009, the Notfn 29/2004 was once again amended vide Notification No. 11/2009-CE dated 07.07.2009, whereby the effective rate of duty of the said goods was substituted from Nil to 4%. However, another Notfn 59/2008 dated 07.12.2008 also existed which attracted 4% duty of the said goods. Hence, during the period from 07.12.2008 to 06.07.2009 the Applicant paid duty at 4% as per Notfn 59/2008.

8. Government observes that the Applicant claimed rebate of the duty paid on exported goods under Rule 18 of CER. The Applicant filed two rebate claims for a total amount of Rs. 8,31,581/-for goods exported vide two ARE-1s dated 02.07.2011, and the Department rejected the rebate claims on grounds that during the period 07.12.2008 to 06.07.2009 the goods manufactured by the Applicants were exempted from duty vide Notfn 58/2008 and that the Applicant had no option to pay 4% duty under Notfn No. 59/2008. Hence no Cenvat credit could be availed by them for manufacturing such exempted goods and as per Rule 11(3)(ii) of the CCR, the Cenvat credit lying in balance would also lapse. Since the balance has lapsed, the duty paid by utilizing such Cenvat credit is not proper.

9. It is also noticed that the jurisdictional Commissioner had issued Show Cause Notice F.No. V(Ch.63)3-88/Dem/11 dated 07.06.2012 to the Applicant on the grounds that vide Notfn 58/2008 dated 07.12.2008, the Applicant's goods was falling under Nil rate of duty and it was an unconditional notification and as the Applicants had neither reversed an amount equivalent to the Cenvat credit involved in stock lying in the Applicant's premises on 07.12.2008 nor stopped the use of Cenvat credit balance lying with them on 07.12.008 whereas the same amount was already lapsed as per Rule 11(3(ii) of CCR. The said SCN was adjudicated by the Commissioner, Central Excise, Service Tax & Customs, Vapi vide Order-in-Original No. 32/DEM/VAPI/2012 dated 20.12.2012 wherein the demand was confirmed. Aggrieved, the Applicant then filed an appeal with the CESTAT, Ahmedabad. The Hon'ble CESTAT vide Order No. A/11202/2014 dated 07.07.2014 set aside the Order-in-Original dated 20.12.2012 as issue was identical by the bench in the case of M/s Arvind Ltd and M/s Arvind Polycot Ltd. Vs CCE Ahmedabad-III [2014 (6) TMI 271 – CESTAT-Ahmedabad and allowed their appeal. The Department then filed appeal with the Hon'ble High Court of Gujarat who vide Order dated 12.04.2016 dismissed the Department's Civil Application.

10. Government observes that in the case of Arvind Ltd Vs UOI [2014 (300) ELT 481 (Guj.), the Hon'ble Gujarat High Court in its order dated 19.06.2013 had held that-

> *Export rebate- Claim of –Denied, on ground that payment of duty was at the will of the assessee – Export rebate impermissible when assessee was exempt from payment of whole duty but when he paid duty at the time of export permissible – Final products manufactured by petitioner exempted from payment of duty by Notification No. 29/2004-C.E. as amended by Notification No. 58/2008-CE. – However petitioner wrongly availed benefit of concessional rate of duty under Notification No. 59/2008-C.E. which exempted cotton textile products in excess of 4% ad valorem –Thereafter, claims for rebate made – Revenue authorities rejected the claims on ground that payment of duty on final products exported was at will of the assessee – Such orders set aside, as petitioner was not liable to pay in light of absolute exemption granted under Notification No. 29/2004-C.E. as amended by Notification No. 58/2008-C.E. r/w Section 5A(1A) of Central Excise Act, 1944 – When the petitioner was*

given exemption from payment of whole of the duty, and if it paid duty at the time of exporting the goods, there was no reason why it should be denied the rebate claimed which the petitioner was otherwise entitled to – Export rebate claim allowed – Section 5A(1A) and 11B of Central Excise Act, 1944 – Rule 18 of Central Excise Rules, 2002. (paras 9, 10, 11)

Petitions allowed.

Government finds that the same has been upheld by the Hon'ble Supreme Court vide order dated 01.03.2016.

11. The Government finds that in the current case Section 5A(1A) of CEA is not applicable as both the notifications i.e. Notfn 58/2008 and Notfn 59/2008 are effective rate of duty/concessional rate of duty whereas one prescribes NIL rate of duty the other one is dutiable. The text of the notifications are hereby

Notification No.58/2008 - Central Excise

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby directs that each of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the Table hereto annexed shall be amended or further amended, as the case may be, in the manner specified in the corresponding entry in column (3) of the said Table, namely :-

TABLE

S. No.	*Notification number and date*	*Amendments*
(1)	*(2)*	*(3)*
2.	*29/2004-Central Excise, dated the 9th July, 2004*	*In the said notification, in the Table, in column (4),-* *(i) for the entry "8%", wherever it occurs, the entry "4%" shall be substituted;* *(ii) for the entry "4%", wherever it occurs, the entry "Nil" shall be substituted.*

Notification No. 59/2008 -Central Excise

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling under the Chapter, heading, sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as are specified in column (2) of the Table below, from so much of the duty of excise leviable thereon under the said First Schedule as is in excess of the amount calculated at the rate specified in the corresponding entry in column (3) of the Table aforesaid.

Explanation. - For the purposes of this notification, the rates specified in column (3) of the said Table are ad valorem rates, unless otherwise specified.

Table

S.No.	*Chapter or heading or sub-heading or tariff item of the First Schedule*	*Rate*
(1)	*(2)*	*(3)*
5.	*5204, 5205, 5206, 5207, 5208, 5209, 5210, 5211 and 5212*	*4%*

In such situation, the Applicant has the option to decide which notification is suitable for them. Here, the Applicant had opted to availed Notfn 59/2008 and paid duty at the time of export and thus entitled to the rebate to the duty paid at the time of exporting the under Rule 18 of the CER.

12. In view of the above, Government holds that detail verification of the rebate by the original adjudicating authority as to the evidence regarding payment of duty i.e relevant Invoices and ARE 1 as produced by the Applicants in their rebate claim, has to be taken into consideration. The Applicant is also directed to submit their relevant records/ documents to the original authority in this regard for verification.

13. In view of the above, Government set aside the impugned Order-in-Appeal No.. SRP/161/VAPI/2013-14 dated 02.07.2013 passed by the Commissioner(Appeals), Central Excise, Customs & Service Tax, Vapi and remands back the instance case to the original authority which shall consider and pass appropriate orders on the claimed rebate and in

accordance with law after giving proper opportunity within four weeks from receipt of this order.

14. The Revision Application is disposed off in terms of above.

15. So, ordered.

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

ORDER No 367 /2019-CX (WZ) /ASRA/Mumbai DATED 11.12.2019

To,
M/s GHCL Ltd.,
Survsey No. 191/192,
Mahala Falia, Bhilad,
Valsad Distt. Gujarat

Copy to:

1. The Commissioner of Central Goods & Service Tax, Daman, 2nd floor, Han's Landmark, Vapi-Daman Road, Chala, Vapi-396 191.
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Spare Copy.