

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, Cuffe Parade,
Mumbai- 400 005**

F.No.195/73/WZ/17-RA / 661

Date of Issue:- 02.02.2023

ORDER NO. 34/2023-CEX (WZ) /ASRA/MUMBAI DATED 30.1.2023 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 :- M/s. Garden Silk Mills Ltd.. (DT Division)
Village-Jolwa,
Tal.- Palsana, Dist. Surat.

Respondent :- Commissioner, GST & CX, Surat.

Subject :- Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. V-2(Misc)VAD-II/APP-II/2015-16 dt. 31.07.2015 passed by the Commissioner (Appeals), GST & CX Surat.

ORDER

These Revision Application have been filed by M/s. Garden Silk Mills Ltd. (DT Division), Village - Jolwa, Tal.- Palsana, Dist. Surat (hereinafter referred to as "the applicant") against Order-in-Appeal F. No. V-2(Misc)VAD-II/APP-II/2015-16 dt. 31.07.2015 passed by the Commissioner (Appeals), GST & CX Surat.

2. The brief facts of the case are that M/s. Garden Silk Mills Ltd. (DT Division), holding Excise Registration No. AAACG8932CXM007 for manufacturing of Excisable Goods falling under chapter heading No. 54 (Polyester DTY Yarn) has filed rebate claims under Rule 18 of Central Excise Rules 2002 read with notification No. 19/2004-CE(NT) dated 06.09.2004 as amended for rebate on finished goods exported after duty payment.

3. After following due process of law, the Assistant Commissioner Central Excise, Division -II Surat vide Order-in-Original No. SRT-I/DIV-II/427 & 428/14-15/Reb dated 28.01.2015 rejected rebate claims on certain grounds.

4. The applicant being aggrieved by the Orders filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) vide his Order-in-Appeal F. No. V-2(Misc)VAD-II/APP-II/2015-16 dated 31.07.2015 rejected the appeal as the applicant failed to pay pre-deposit of 7.5% of within the meaning of Section 35-F of Central Excise Act, 1944.

5. Being aggrieved with the Order-in-Appeal dated 31.07.2015 the applicant had preferred an appeal with CESTAT, Ahmedabad. CESTAT, Ahmedabad vide Final Order No. A/12283/2017 dated 06.09.2017 dismissed the appeal, as Tribunal does not have any jurisdiction to pass any order in respect of rebate claims filed by the applicant on export of goods and opined that, the appellant is at liberty to file revision application before the appropriate forum.

6. Accordingly, the applicant filed Revision Application mainly on the following grounds-

6.1 The applicant stated that the learned Commissioner (Appeals) has committed a grave error in interpretation of Section 35F as amended w.e.f. 6.8.2014.

Section 35F reads as under:

SECTION 35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal - The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal-

(1) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent, of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the [Principal Commissioner of Central Excise or Commissioner of Central Excise];

(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 35B, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten per cent, of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores;

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.

Explanation. – For the purposes of this section “duty demanded” shall include,-

(i) amount determined under section 11D;

(ii) amount of erroneous Cenvat credit taken;

(iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004.

It is thus manifest on a plain reading of Section 35F that the subject mandatory requirement of pre-deposit is in case of any dispute with regard to any duty or penalty. By Explanation appended to the said Section 35F, the words "duty demanded" shall include:

(1) amount determined under section 11D;

(ii) amount of erroneous Cenvat credit taken;

(iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004.

There can be no dispute or doubt that the instant case does not involve any demand of duty nor any amount determined under Section 11D nor any amount of erroneous cenvat credit taken nor any amount payable under Rule 6 of the Cenvat Credit Rules, 2001/2002/2004. The present case relates to non-sanction of rebate claim filed by the Applicant. It involves neither any duty nor denial or recovery of cenvat credit nor any amount due or payable by the Applicant to the Government. It involves an amount of

rebate claimed by the Applicant as due to them and payable by the Government. Consequently, Section 35F and the requirement of pre- deposit does not, on the face of it form a pre-requisite or a mandatory requirement under Section 35F. Consequently, the impugned Order is patently illegal and deserves to be set aside.

6.2 They further stated that the learned Commissioner (Appeals) has misplaced reliance on the Board Circular which also nowhere supports the interpretation of Section 35F sought to be adopted by the learned Commissioner (Appeals).

7.1 Applicant made submissions dated 03.10.2022 wherein they stated that as regards the applicant's bonafied mistake in prosecuting the matter before Tribunal, they contended that this revision application though being filed now is to be considered as well within the normal time limit because of the fact that the applicant had been bonafiedly prosecuting this very matter and issue, before a wrong forum, was filed on or around 5/08.09.2015 and the appeal so filed came to be dismissed on or around 06.09.2017/18.09.2017, the present application being filed on or around 31.11.2017 is well within the normal limitation period of 3 months. They further stated that according to Section 5 read with Section 14 of the Limitation Act, 1963, the aforesaid period of proceeding bonafidely in another Court without jurisdiction has to be excluded. The applicant in this connection also relied upon the judgement of the Hon'ble Supreme Court in case of M.P.Steel Corporation Vs. CCE reported in 2017 (50)STR 205 (SC). Accordingly, they requested for condonation of delay.

7.2 They further stated that the alleged requirement of pre-deposit of 7.5% vide Order-in-Appeal dated 31.07.2015, it is submitted that there can be no dispute or doubt that the instant case does not involve any demand of duty no any amount determined under Section 11D nor any amount or erroneous cenvat credit taken nor any amount payable under Rule 6 of the

Cenvat Credit Rules, 2001/2002/2004. The present case relates to non-sanction of rebate claim filed by the applicant.

8. Personal hearing in this case was held on 07.10.2022 Mr. Willingdon Christian, Advocate appeared online and submitted that claim was originally filed within time limit subsequent filing of claim with additional documents cannot make the claim delayed. He requested to condone the delay of time spent before, CESTAT.

9. Government has carefully gone through the relevant case records available in case files and perused the impugned Order-in-Appeal, CESTAT Order.

10. Government observes that the applicant initially filed appeal against the impugned Order before Tribunal, Ahmedabad. Tribunal refrained from passing any order as Tribunal does not have any jurisdiction to pass any order in respect of rebate claims filed by the applicant on export of goods. On receipt of the said CESTAT order, applicant filed the instant Revision Application and pleaded for condonation of delay.

11. Government first proceeds to discuss issue of delay in filing Revision Application. The Tribunal Ahmedabad vide Final Order No. A/12283/2017 dated 06.09.2017 decided the Order-in-Appeal dated 31.07.2015 and refrained from passing any order in respect of rebate claims filed by the applicant on export of goods for lack of jurisdiction with liberty to file necessary application before the appropriate authority. Applying the same ratio Applicant has filed a Revision Application in respect of Order-in-Appeal F. No. V-2(Misc)VAD-II/APP-II/2015-16 dt. 31.07.2015. The chronological history of events is as under:-

Sl. No.	Particulars	Order-in-Appeal F. No. V-2(Misc) VAD-II/APP-II/ 2015-16 dt. 31.07.2015
1.	Date of Receipt of Order in Appeal by the applicant	31.08.2015
2.	Date of filing of appeal before Tribunal	5/8.9.2015
3.	Time taken in filing appeal before Tribunal	8 days
4.	Date of receipt of Tribunal order Final Order No. A/12283/2017 dated 06.09.2017	18.09.2017
5.	Date of filing of Revision application	04.10.2017
6.	Time taken between date of receipt of Tribunal order to date of filing of Revision application	16 days
7.	Time taken for filing Revision Application when the time period spent in proceedings before CESTAT is excluded.	24 day

As per provisions of Section 35EE of Central Excise Act, 1944 the revision application can be filed within 3 months of the communication of Order-in-Appeal and the delay up to another 3 months can be condoned provided there are good reasons to explain such delay.

12. Government notes that Hon'ble High Court of Gujarat in the case of M/s. Choice Laboratory [2015 (315) E.L.T. 197 (Guj.)] , Hon'ble High Court of Delhi in the case of M/s. High Polymers Ltd. [2016 (344) E.L.T. 127 (Del.)] and Hon'ble High Court of Bombay in the case of M/s. EPCOS India Pvt. Ltd. in [2013 (290) E.L.T. 364 (Bom.)] have held that period consumed for pursuing appeal bonafidely before wrong forum is to be excluded in terms of Section 14 of Limitation Act, 1963 for the purpose of reckoning time limit of filing revision application under Section 35EE of Central Excise Act, 1944. The ratio of above said judgements is squarely applicable to these cases. Government therefore keeping in view the above cited judgments holds that revision application No.195/73/WZ/17-RA is condonable. Government, in exercise of power under Section 35EE of Central Excise Act, 1944 condones the said delay and takes up these Revision Application for decision on merit.

13. Government observes that Commissioner(Appeals) has rejected the appeal vide his order dated 31.07.2015 as the applicant failed to pay pre-deposit of 7.5% of within the meaning of Section 35-F of Central Excise Act, 1944. Section 35-F is reproduced below for lucidity:

Section 35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. -

The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal, -

(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty demanded or penalty imposed or both, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Commissioner of Central Excise;

(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 35B, unless the appellant has deposited seven and a half per cent. of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten per cent. of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against:

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

Explanation - For the purposes of this section "duty demanded" shall include, -

- (i) amount determined under section 11D;*
- (ii) amount of erroneous Cenvat credit taken;*
- (iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004.*

The instant case relates to non-sanction of rebate claims filed by the applicant. It does not involve any duty nor any denial or recovery of cenvat credit nor any amount due or payable to the government, therefore, in the instant case payment of pre-deposit is not a pre-requisite or a mandatory requirement under Section 35F.

14. Accordingly, Order-in-Appeal No. V-2(Misc)VAD-II/APP-II/2015-16 dt. 31.07.2015 is set aside and the matter is remanded back to the Commissioner (Appeals) to decide the issue on merits after granting an

opportunity of personal hearing to the applicant. The appeal, however, will be heard and decided expeditiously and preferably within six weeks.

15. Revision Application is disposed off in terms of above.


(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 34/2023-CEX (WZ) /ASRA/Mumbai Dated 30.1.2023

To,

M/s. Garden Silk Mills Ltd. (DT Division)
Village-Jolwa,
Tal.- Palsana, Dist. Surat.

Copy to:

1. Commissioner, GST & CX, Surat.
2. Commissioner (Appeals), GST & CX, Surat.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy.