

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. 195/120-121/WZ/2018-RA / 7267

Date of Issue: 06.10.23

ORDER NO. 371-372 /2023-CX(WZ)/ASRA/MUMBAI DATED 28.9.23 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 : Shri Manohar Mali,
Khushnuma Residence,
Flat No. 1, Shivaji Garden,
Jamna Nagar Bus Stand,
Surat.

Respondent : Pr. Commissioner CGST, Surat.

Subject : Revision Applications filed under Section 35EE of the Central
Excise Act, 1944 against the Orders-in-Appeal No. SUR-
EXCUS-001-APP-364-365/13-14 dated 30.09.2013 passed
by the Commissioner (Appeals) Central Excise, Customs &
Service Tax, Surat- I.

ORDER

These Revision Applications have been filed by Shri Manohar Mali, Khushnuma Residence, Flat No. 1, Shivaji Garden, Jamna Nagar Bus Stand, Surat (hereinafter referred to as "the applicant") against the Orders-in-Appeal No. SUR-EXCUS-001-APP-364-365/13-14 dated 30.09.2013 passed by the Commissioner (Appeals) Central Excise, Customs & Service Tax, Surat- I.

2. Brief facts of the case are that the matter had originated on the basis of information that certain manufacturers/ merchant exporters in and around Surat are availing rebate claims on exports by producing fake Shipping Bills, Bills of Lading, etc., the rebate granted were taken up for verification and inquiries were made with the Deputy Commissioner of Customs, CFS, Mulund, Mumbai, who informed that the Shipping Bills submitted by the M/s. Avinash Exports, 511, Kohinoor Textile Market, Ring Road, Surat were forged, and goods claimed to have been exported were not exported. On verification, M/s. Avinash Exports was not found existing at the declared address viz. 511, Kohinoor Textile Market, Ring Road, Surat on 29.07.2004. After due process the Adjudicating authority has concluded that five real people (including Shri Manohar Mali the applicant) is behind the fictitious organization M/s. Avinash Exports and directly benefitted from the rebate amount of Rs 14,88,348/- and Rs.5,94,140/-.

3. After following the due process the adjudicating authority vide Orders-in-Original No. 33/ADJ/OA/JC-NKS/12-13 dated 31.12.2012 & No. 34/ADJ/OA/JC-NKS/12-13 dated 31.12.2012 confirmed the demand and ordered recovery of the drawback amount equally from all the five beneficiaries already claimed, sanctioned and received by the exporters, jointly and severally, under Section 11A(2) of Central Excise Act, 1944, ordered recovery of the interest at appropriate rate on the fraudulently availed rebate, imposed equal amount of penalty under Section 11AC of Central Excise Act, 1944, imposed penalty of Rs. 5000/- on the applicant under

Section 27 of Central Excise Rules, 2002 and Rs. 10,000/- under Section 117 of the Customs Act, 1962.

4. Being aggrieved by the aforesaid Orders in Original the applicant filed appeal before Commissioner of Customs (Appeals), Mumbai who vide Orders-in-Appeal No. SUR-EXCUS-001-APP-364-365/13-14 dated 30.09.2013 rejected both the Appeals and upheld the Adjudication Orders both dated 31.12.2012.

5. Being aggrieved with the Orders-in-Appeal dated 30.09.2013 the applicant has preferred an appeal with CESTAT, Ahmedabad. CESTAT, Ahmedabad vide Final Order No. A/10591-10592/2018 dated 28.03.2018 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 Applications mainly on the following grounds-

6.1 That the finding of the Commissioner (Appeals) upholding the order of the adjudicating authority fixing the liability on the applicant by dividing the liability of rebate claims equally on each of the five persons under Section 11A of the Act is not sustainable in law as the liability can be fastened only against the person who is registered with the Central Excise Authority and whose name the rebate claims have been sanctioned and paid and who have deposited the said amount in the bank and withdrawn operating the bank account. The present applicant is outside the scope of the above provisions of law and therefore the orders passed by the lower authorities are not sustainable in law.

6.2 That the Commissioner (Appeals) has failed to appreciate the direction of the Tribunal for fixing the liability on each and every individual separately. Thus, as per Section 11A of the Act there is no liability of the present applicant towards rebate claims and the liability to be fixed was nil considering the allegations made in the show cause notice and the finding of the adjudicating authority itself. In view of this, the orders of the lower authorities by dividing the liability against five persons is without authority of law and without any basis and therefore the said order is not sustainable in law.

6.3 That the Commissioner (Appeals) failed to appreciate that the adjudicating authority in para 25(iii) have discussed the role of five persons from which it is crystal clear that in connection with M/s. Avinash Export, it is crystal clear that there was no role of the present applicant at all for the said rebate claims matter and therefore no duty of refund/rebate can be recovered from the present applicant as no rebate claims were received by the present applicant and therefore the provisions of Section 11A of the Central Excise Act, 1944 are not applicable. In view of this, the orders of the lower authorities are not sustainable in law.

6.4 That the Commissioner (Appeals) failed to appreciate that the adjudicating authority in para 26 of the adjudication order to the effect that the five persons were the brain behind defrauding the exchequer, is not correct as there was no role of the applicant either for preparing of any documents or filing of rebate claims or for any transaction for the said papers and only four persons were involved in that activity as is clear from the show cause notice and finding of the adjudicating authority. Thus, the applicant name cannot be involved for such finding. In view of this, the finding of the Commissioner (Appeals) against the present applicant is not correct and far from truth and evidences on record and therefore also said order is required to set aside in the interest of justice.

6.5 That the Commissioner (Appeals) has failed to appreciate that the finding of the adjudicating authority in para 30(a) for imposition of penalty

under Section 11AC of the Act is far from truth as in the proceedings of refund application and sanctioning of the refund/rebate claims, there was no role of the present applicant as is clear from the show cause notice and statement of various persons and therefore the finding of the adjudicating authority that the applicant had made any suppression of facts or mis-representation and fraud etc. does not come in the play as there is no role of the applicant in connection with the said rebate claims. In view of this, the orders of the lower authorities imposing and upholding the penalty imposed under Section 11AC of the Act is not contrary to the law and therefore the orders passed by the lower authorities are not correct and required to set aside in the interest of justice.

6.6 That the Commissioner (Appeals) has failed to appreciate that the finding of the adjudicating authority in para 30 (d) for imposition of penalty under Rule 27 is not applicable at all as the findings are applicable to four persons who are involved in filing rebate claims etc. and the present applicant is not at all involved in such transactions. The present applicant's role is limited to the extent that M/s. Tirupati Textiles had received the cheque and the present applicant was the person for the shroff for clearance of the cheque and accordingly the cheque was cleared and the payment was made to Mahesh Harlalka and the applicant was not aware or not knowing M/s. Avinash Export.

6.7 The Ld. Commissioner (Appeals) have failed to appreciate that the finding of the adjudicating authority in para 30 (e) for imposition of penalty under Section 117 of the Customs Act, 1962 is absolutely unwarranted as the findings made in the said para is far from the truth and evidences on record. In his finding, it is stated that it is established that Shri Manohar Mali was one among the five counterfeit/fictitious persons who created export documents like shipping bills, bills of lading and other export documents duly bearing the fake signatures of the Customs Officer and other customs office stamp showing that the goods have been exported by forgery with mutual conspiracy and connivance. This finding of the adjudicating authority is absolutely incorrect as there is nothing in the show cause notice to establish

that the present applicant was involved in such episode. Thus, the finding of the adjudicating authority is based on assumption and presumption and therefore not sustainable in law. In view of this, the orders of the lower authorities imposing penalty under Section 117 of the Customs Act, 1962 are required to set aside in the interest of justice.

7. A Personal hearing in this case was held online on 21.02.2023 which was attended by Shri Raj Vyas, Advocate on behalf the applicant. He submitted that delay in filing of application was due to earlier filing before wrong forum may be condoned. He further submitted that applicant played very minor role in the matter therefore, fastening him with liability of entire rebate amount and equal penalty is too harsh. He requested to set aside rebate demand and substantially reduce the penalty.

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

9. Government observes that the applicant initially filed appeal against the impugned Orders 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 Applications and pleaded for condonation of delay.

10. Government first proceeds to discuss issue of delay in filing Revision Applications . The Tribunal Ahmedabad vide Final Order No. A/10591-10592/2018 dated 28.03.2018 decided the Orders-in-Appeal dated 30.09.2013 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 Revision Applications in respect of Orders-in-Appeal No. SUR-EXCUS-001-APP-364-365/13-14 dated 30.09.2013. The chronological history of events is as under:-

Sl. No.	Particulars	Orders-in-Appeal No. SUR-EXCUS-001-APP-364-365/13-14 dated 30.09.2013
1.	Date of Receipt of Orders in Appeal by the Respondent	30.09.2013
2.	Date of filing of appeal before Tribunal	24.10.2013
3.	Time taken in filing appeal before Tribunal	24 days
4.	Date of receipt of Tribunal order Final Order No. A/10591-10592/2018 dated 28.03.2018	28.03.2018
5.	Date of filing of Revision application	02.07.2018
6.	Time taken for filing Revision Application when the time period spent in proceedings before CESTAT is excluded.	3 months 6 days

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

11. 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 Applications No. 195/120-121/WZ/2018-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 Applications for decision on merit.

12. On going through the case records, it is observed that the case emanates out of the investigation where the respondent department has alleged certain infirmities and accordingly after following the due process has passed adjudication Orders as detailed in para 3 supra. The main issue to be decided here is whether the orders passed on the allegations and penalties imposed on the applicants are sustainable.

13. The applicants argued that fixing the liability on the applicant by dividing the liability of rebate claims equally on each of the five persons under Section 11A of the Act is not sustainable in law as the liability can be fastened only against the person who is registered with the Central Excise Authority and whose name the rebate claims have been sanctioned and paid and who have deposited the said amount in the bank and withdrawn operating the bank account. However, this interpretation is too narrow and does not consider the broader context and principles of liability in cases of fraudulent activities. Government notes that the applicant is a partner in the fraudulent rebate scheme because the organization responsible for these fraudulent activities viz. M/s. Avinash Exports does not exist. Taking legal action against a non-existent fictitious organization would be futile. In cases involving fraudulent rebate claims, it is essential to look beyond the technical aspects of registration and bank transactions. It is more reasonable and appropriate to issue orders against the actual individuals involved in the scheme, treating them as partners (deemed partners). Hence, the decision of the adjudicating authority to allocate the liability for rebate claims equally among each of the five individuals under Section 11A of the Act is legally sound and justifiable. Therefore, the conclusions arrived at in the impugned Orders-in-Appeal in this regard were just and proper.

14. The Commissioner(Appeals) has observed that applicant claimed that he acted solely as a broker and did not personally benefit from the rebate. However, the Orders-In-Original establishes that he orchestrated the paper transactions for grey fabrics and acquired fraudulent ARE-1 documents

indicating duty payment. He was also the individual who received the checks related to these transactions. Furthermore, the records indicate that he made payments of Rs.1,00,000/- per container to secure fraudulent export documents. Based on this evidence, it is clear that the applicant actively participated in obtaining the fraudulent rebate claim and is one of the beneficiaries of the scheme. Therefore, it is just and appropriate to consider him as a deemed partner when determining liability in this matter. Therefore, the conclusions arrived at in the impugned Orders-in-Appeal in this regard were just and proper.

15. The applicant has argued against the imposition of penalty under Rule 27 of the Central Excise Rules, 2002. However, while the applicant claims a limited role in the handling of the cheque, it's essential to consider the broader context of his involvement. Even if the applicant's direct involvement in filing rebate claims or export transactions was limited, his participation in the process of clearing and handling the cheque cannot be isolated from the fraudulent scheme. In cases of fraudulent activities, individuals may play various roles and liability is not solely determined by direct involvement in specific transactions. Each participant can be held responsible for their role in contributing to or enabling the fraudulent activities, even if their involvement appears less significant compared to others. Therefore, imposition of penalty under Rule 27 of the Central Excise Rules, 2002 is justified.

16. The applicant has argued against the imposition of penalty under Section 117 of the Customs Act, 1962. However, the findings of the Adjudicating Authority asserts that Shri Manohar Mali was one of five individuals involved in the creation of counterfeit export documents, including shipping bills and bills of lading. These documents falsely bore the signatures of a Customs Officer and customs office stamps, indicating that goods had been exported through forgery and collusion among them. Consequently, the

imposition of a penalty under Section 117 of the Customs Act, 1962, is justified.

17. Based on the substantial evidence, including corroborative statements from various individuals the applicants' arguments challenging his liability for fraudulent rebate claims, his role as a broker, and the imposition of penalties under Rule 27 of the Central Excise Rules, 2002, and Section 117 of the Customs Act, 1962, have been countered. The government maintains that considering the fictitious organization responsible for fraudulent activities does not exist, it is appropriate to hold the actual individuals involved as deemed partners, justifying the allocation of liability under Section 11A of the Act. The evidence presented shows the applicants' active involvement in the fraudulent transactions and the receipt of payments for fraudulent export documents, justifying their classification as deemed partners. Therefore, the imposition of penalties under the respective rules and acts is considered justified based on their contributions to and facilitation of the fraudulent activities. Therefore, the conclusions arrived at in the impugned Orders-in-Original and Orders-in-Appeal in this regard were just and proper.

18. In view of the above discussion and findings, Government, upholds Orders-in-Appeal No. SUR-EXCUS-001-APP-364-365/13-14 dated 30.09.2013 passed by the Commissioner of Customs (Appeals) and rejects Revision Applications as devoid of merits.

Shrawan
28/9/23
(SHRAWAN KUMAR)

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

371-
ORDER No. 372/2023-CX (WZ) /ASRA/Mumbai DATED 28.9.23

To,
Shri Manohar Mali,

Khushnuma Residence,
Flat No. 1, Shivaji Garden,
Jamna Nagar Bus Stand,
Surat.

Copy to:

1. Pr. Commissioner CGST, Surat.
2. Commissioner (Appeals) Central Excise, Customs & Service Tax, Surat-I.
3. Kaushik I. Vyas (Advocate), 401, Shivanjali Apartment, Rangila Park, Ghod Dod Toad, Surat.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.

