

REGISTERED  
SPEED POST



F.No. 198/124-131/05-RA (Remand)  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6 FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue...17/5/13

Order No. 382-389 / 2013-CX dated 16-05-2013 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 orders-in-appeal No. SVS/48 to 55/NGP-II/05 dated 16.02.05 passed by Commissioner (Appeals) Central Excise, Nagpur.

Applicant : Commissioner of Central Excise, Nagpur

Respondent : M/s Indo Rama Textiles Ltd., Butibori, Distt. Nagpur.

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ORDER

These revision applications have been filed by the applicant Commissioner of Central Excise, Nagpur against the order-in-appeal No. SVS/48 to 55/NGP-II/05 dated 16.02.05 passed by Commissioner (Appeals) Customs and Central Excise, Nagpur with respect to orders-in-original passed by Assistant Commissioner of Customs and Central Excise, Division-II, Nagpur.

2. Brief facts of the cases are that the respondent M/s Indorama Textiles Ltd., Nagpur had procured the inputs without payment of duty under Notification No. 43/2001 dated 26.06.01 for manufacture of final products in their manufacturing unit. After completion of manufacturing processes the applicant exported the finished goods on payment of duty following procedure as prescribed under Notification No. 40/2001-CE(NT) dated 26.06.01 and claimed rebate of duty paid on the final products so exported. Notification No. 43/2001 was amended w.e.f. 3.06.04 vide Notification No. 10/2004-CE(NT) dated 3.06.04. The condition No. (vi) of Notification was substituted to the effect that exports are to be effected in terms of Notification 42/2001 issued under Rule 19 of Central Excise Rules. Accordingly, the rebate claims of the applicant were rejected by the adjudicating authority.

3. Being aggrieved by the said orders-in-original, the respondent filed appeal before Commissioner (Appeals) who set aside the order of the lower adjudicating authority and allowed the appeal observing that the goods were already handed over to the carrier (CONCORD) before 03.06.04, on the date of amendment and thereafter the applicant had no control over the goods, the goods were deemed 'exported' and also the proof of export of these goods is already accepted by the department. Therefore, in terms of clarification issued by the Board, the amended provision will not apply to the goods in question.

4. Being aggrieved by the impugned orders in appeal, the applicant department had filed these revision applications under Section 35EE of Central Excise Act, 1944 before Central Government on the following grounds that:

4.1 The assessee had undertaken to export the goods without payment of duty and submitted a B-1 General Bond dated 13.05.03 stating that the goods would be exported without payment of duty under Rule 19 of the Central Excise Rules. Thus they had clearly opted for exporting the goods following the procedure prescribed under Notification No. 42/2001-CE(NT) dated 26.06.01 based on which permission to procure duty free inputs was given to them under Notification No. 43/2001-CE(NT) dated 26.06.01. Hence cash rebate cannot be granted in respect of duty paid through Cenvat Credit account on the goods cleared for export.

4.2 By not exporting the goods without payment of duty under Rule 19(1) they contravened their own undertaking amounting to non-compliance of the condition of Notification No. 43/01-CE(NT) dated 26.06.01 for procurement of duty free inputs for use in the export goods.

4.3 The Notification No. 43/2001- was amended vide Notification No. 10/2004-CE(NT) dated 03.06.04 and an Explanation-II was inserted into the Notification No. 43/2001-CE(NT) which reads as *"Explanation-II – For the removal of doubt, it is clarified that the goods manufactured or processed using the excisable goods so procured without payment of duty under this Notification shall be exported in terms of sub-Rule (1) of Rule 19 of the Central Excise Rules, 2002."*

It was clarified vide Board's Circular 805/2/2005-CX dated 11.01.05 that the amending provision introduced in Notification No. 43/01-CE(NT) dated 26.06.01 vide Notification No. 10/2004 dated 02.06.04 would be applicable retrospectively.

4.4 The Commissioner of Central Excise (Appeals) in his impugned order has misplaced reliance on a decision of the Hon'ble High Court of Madras in the case of M/s Lukas TVS, Madras vs. Assistant Commissioner, Customs Madras [1987 (28) ELT 266]]. In this case, the issue before the Hon'ble High Court relates to the determination of the stage at which goods can be treated as exported for the purpose of drawback claims under Section 75 of the Customs Act, 1962 whereas, in the present case under review, the issue relates to the determination of date of export, whether before or after the amendment made in Notification No. 43/2001-CE(NT) dated 26.06.01 by Notification No. 10/2004-CE(NT) dated 03.06.04. Thus the ratio of the aforesaid judgment of the Hon'ble High Court is misplaced in the present case. The Hon'ble Supreme Court's decision in the case of Commissioner of Customs, Calcutta vs. Sun Industries 1988 (35) ELT 241 (SC)] had discussed the aforesaid decision of High Court and given its clear view that export will happen only when the goods are taken to a place outside India. Also the Hon'ble Supreme Court has again endorsed the above views in its order in the case of UOI vs. Rajindra Dyeing & Printing Mills Ltd. [2005 (180) ELT 433 (SC)]. In view of the facts and applying the ratio of the Hon'ble Supreme Court's judgment, the actual export of the goods should be held as effected from 09.06.04 to 25.06.04 when the entry outward was granted to the vessel from the post of final carriage. Therefore, the goods should have been exported without payment of duty as per the amended Notification No. 43/01 (CE(NT) dated 26.06.01 effective from 03.06.04.

5. A show cause notice was issued to the respondent under Section 35EE of Central Excise Act, 1944 to file their counter reply. They filed their counter reply vide letter dated 05.07.08. Their main submissions are as under:

5.1 CBEC has clarified in Circular No. 805/2/2005-CX dated 11.01.05 that amendment made by Notification No. 10/2004- dated 2.06.04 has prospective effect.

5.2 There are direct judgements of Government of India on this issue. GOI has held that if the law permits export on payment of duty, under claim of rebate, export on payment of duty cannot be disallowed on the ground that it results in encashment of credit.

5.3 In the case of Prabhat vs. UOI [1982 (10) ELT 203] Hon'ble High Court of Gujarat has held that two different yardsticks cannot be applied in defining import and export. The High Court has rejected the concept of entry into or exit from the territorial waters of India. The judgement has been upheld by Hon'ble Supreme Court [1999 (113) ELT 358 (SC)].

6. The said revision applications were decided by Government vide GOI Order No. 911-918/2012-Cx dt. 21-08-2012 by allowing department's revision applications. The concluding operative portion of the said Revision Order is as under:-

*" In view of position explained above, it is clear that in these cases goods were exported outside India during the period after 3.06.04 when the provision of Notification No. 43/01-CE(NT) as amended vide Notification 10/04-CE(NT) dated 2.06.04 were in force. The amending Notification No. 10/04-CE(NT) requires that goods manufactured or processed using excisable goods so procured without payment of duty under Notification 43/01-CE(NT) shall be exported under bond, in terms of Rule 19(1) of Central Excise Rules, 2002. After issuance of Notification No. 10/04-CE(NT) dated 2.06.04, there is no option to export goods under claim of rebate of duty in such cases. Therefore, Government holds that original authority had rightly denied the rebate claims under Rule 18 of Central Excise Rules, 2002. "*

7. The said order was challenged by the respondent by way of Writ petition No. 632 of 2013 before Hon'ble Bombay High Court, Nagpur Bench. The Hon'ble

High Court vide order dt. 06-03-2013, remanded the case back to this authority by observing that the Notification No. 10/2004-CE (NT) dt. 03-03-2004 relied upon by the Revisional Authority in impugned Revision order is already invalidated by the Division Bench of Hon'ble Gujrat High Court on 17-11-2005 in special civil application No. 816/2005, hence, the Revisional authority has to reconsider the revision application in light of Hon'ble Gujrat High Court judgment.

8. In compliance of Hon'ble High Court's Order, the case was taken up for fresh proceedings and hearing was fixed on 04-04-2013 Shri Ramesh Nair, advocate appeared for hearing on behalf of respondent and stated that Orders-in-Appeal being legal and proper, may be upheld. Nobody attended hearing on behalf of applicant department.

9. Government observes that in first round of revision proceedings, the cases were decided in favour of department on sole ground that after issuance of Notification No. 10/2004-CE (NT) dt. 02-06-2004, amending Notification No. 43/01-CE (NT), there was no option to export goods under claim of rebate of duty, when the inputs were procured duty free under notification No. 43/01-CE (NT).

Government finds that now it has come to the notice that the said Notification No. 10/2004-CE (NT) dt. 02-06-2004 has been invalidated by the Division Bench of Gujrat High Court vide order dt. 17-11-2005 in special civil application No. 816 of 2005 filed by M/s. Zenith Spinners, Ahmedabad. The Hon'ble High Court in concluding para of above said order has held as under:-

*" In the circumstances, the impugned Notification being Notification No. 10/2004-CE (NT) dt. 03-06-2004 is bad in law for the aforesaid reasons, namely, it is not in consonance with the principal provisions, namely, Rules 18 and 19 of the Rules,*

*and it is, even otherwise, Revenue neutral. The CBEC cannot exercise power under Rule 19 of the Rules to negate a notification issued by the Central Government under Rule 18 of the Rules."*

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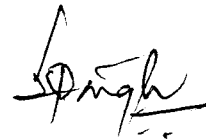
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10. From perusal of the above judgment, it is ample clear that the Notification No. 10/2004-CE (NT) dt. 02-06-2004 has no legal validity and hence, the provisions of Notification No. 10/2004-CE (NT) cannot be applied to deny benefit to exporter, who has otherwise fulfilled the condition of claiming rebate benefit under relevant notification. As such, the respondent who has otherwise fulfilled substantial condition of rebate notification are eligible for rebate benefit.

11. In view of above discussion, Government is of opinion that rebate claim is rightly held admissible by Commissioner (Appeals). As such, Government upholds the impugned Orders-in-Appeal.

12. Revision Applications are thus rejected being devoid of merit.

13. So ordered.



(D P Singh)  
Joint Secretary (Revision Application)

Commissioner of Central Excise & Customs,  
Manik Bagh Palace,  
Indore – 452 001(MP)

ATTESTED



17/5

(भागवत शर्मा/Bhagwat Sharma)  
सहायक आधुनिक/Assistant Commissioner  
CBEC-OSD (Revision Application)  
वित्त मंत्रालय (राजस्व विभाग)  
Ministry of Finance (Deptt of Rev.)  
भारत सरकार/Govt of India  
नई दिल्ली/NEW DELHI

Order No. 382-389 /13-CX dated 16-05-2013

Copy to:

1. M/s Indo Rama Textiles Ltd., Plot No. 51-A, Industrial Area, Sector-III, Pithampur(MP).
2. Commissioner of Customs & Central Excise (Appeals) , 4, Indralok Colony, Keshar Bagh Road, Indore – 452 009.
3. The Assistant / Deputy Commissioner of Central Excise & Customs, CR Building, Plot No. 510, Sector-III, Pithampur, Distt. Dhar(MP).
4. Shri Ramesh Nair, Advocate, 227-B, Bansi Trade Centre, 581/5, MG Road, Indore.
5. Guard File.
6. PS to JS (RA)
7. Spare Copy

ATTESTED



(BHAGWAT P. SHARMA)  
OSD (REVISION APPLICATION)