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**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. 195/29/WZ/2022-RA/8010

Date of Issue: 22.11.2023

ORDER NO. 386/2023-CX (WZ) /ASRA/MUMBAI DATED 20.11.2023 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 Asarwa Mills,
(A Div. of Bengal Tea & Fabrics Limited)
Asarwa Road, Ahmedabad Civil Hospital,
Ahmedabad - 380016.

Respondent : Commissioner of CGST & Central Excise,
Ahmedabad North, 1st floor, Custom House,
Near All India Radio, Income Tax Circle, Navrangpura,
Ahmedabad - 380 009.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. AHM-EXCUS-002-APP-24/2022-23 dated 22.08.2022 passed by the Commissioner (Appeals), CGST, Ahmedabad.

ORDER

The subject Revision Application has been filed by M/s Asarwa Mills, Ahmedabad (here-in-after referred to as 'the applicant') against the impugned Order-in-Appeal dated 22.08.2022 passed by the Commissioner (Appeals), Ahmedabad. The said Order-in-Appeal disposed of an appeal against Order-in-Original dated 15.05.2021 passed by the Assistant Commissioner, CGST, Division – II, Ahmedabad North, which in turn decided a Show Cause Notice dated 06.09.2019 issued to the applicant.

2. Brief facts of the case are that the applicant was engaged in the manufacture of Yarn, Cotton and Knitted fabrics and held Central Excise registration. During the course of audit it was noticed that the applicant had cleared certain Capital goods, on which they had availed Cenvat credit, without paying Central Excise duty amounting to Rs.9,19,075/- as required by Rule 3(5A)(a)(ii) of the Cenvat Credit Rules, 2004 leading to issue of a Show Cause Notice dated 06.09.2019 demanding the said duty. The demand so raised was confirmed by the original authority vide Order-in-Original dated 05.05.2021 and the appeal preferred by the applicant against the said Order-in-Original was rejected by the Commissioner (Appeals) vide the impugned Order-in-Appeal.

3. Aggrieved, the applicant has filed the subject Revision Application against the impugned Order-in-Appeal on the following grounds:-

(a) The Commissioner (Appeals) had failed to appreciate their submission that they had followed the procedure of reducing the Cenvat credit @ 2.50 % for each quarter for a period 10 years from the date of taking Cenvat Credit as per the formula prescribed under Rule 3(5A) of the Cenvat Credit Rules, 2004;

(b) That duty was recoverable only when the capital goods were cleared as such or as waste and scrap, which was not true in their case as they had cleared the same in the above mentioned manner;

(c) They had cited several decisions of the High Court and Tribunals in support of their case which was not considered by the Commissioner (Appeals) and that his findings were based on personal opinion without relying on any technical or industrial understanding.

In light of the above, the applicant submitted that the impugned Order-in-Appeal be set aside and their application be allowed.

5. Personal hearing in the matter was held on 11.10.2023 and Shri Rajkumar Bohra, Vice President of the applicant firm appeared online for the same. He reiterated their earlier points. He further submitted that on removal of capital goods after ten years, there was no requirement for reversal of credit or for payment of duty. He requested to set aside the Order-in-Appeal and allow their application.

6. Government has carefully gone through the relevant records available, the written and oral submissions and also perused the relevant Order-in-Original and the impugned Order-in-Appeal.

7. Government observes that that the Show Cause Notice in the present case demands duty on the 'Capital Goods' cleared by the applicant. Government finds that the issue for decision in this case is whether the applicant was required to pay Central Excise duty demanded by the Show Cause Notice on clearance of capital goods on which they had availed Cenvat credit in terms of the Cenvat Credit Rules, 2004. Government notes that at this juncture it is pertinent to examine Section 35EE and Section 35B of the Central Excise Act, 1944, which provide for Revision by the Central Government and specifies the nature of cases that would lie before the Central Government, respectively. Relevant portions of the same are reproduced below:-

(i) Section 35EE - Revision by Central Government -

*(1) The Central Government may, on the application of any person aggrieved by any order passed under section 35A, where the order is of the nature referred to in the **first proviso to sub-section (1) of section 35B**, annul or modify such order :*

[Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.]...

(ii) Section 35B - Appeals to the Appellate Tribunal

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) a decision or order passed by the ¹[Principal Commissioner of Central Excise or Commissioner of Central Excise] as an adjudicating authority;

(b) an order passed by the ²[Commissioner (Appeals)] under section 35A;

... [Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;

(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998:

[emphasis supplied]

On examining the first proviso to Section 35B of the Central Excise Act, 1944, Government notes that it does not include cases relating to demand of Central Excise duty in respect of Capital goods on which Cenvat credit had

been availed, which is the issue in the instant case. As stated above, Government also notes that the issue involved does not pertain to rebate of the duty paid on goods exported either. Further, Government finds that the issue does not pertain to loss of goods nor does it involve the credit of duty utilized for payment of duty on final products. Given the above, Government notes that the issue for decision is not covered under the clauses (a) to (d) of the first proviso to Section 35B of the Central Excise Act, 1944. Thus, Government finds that in terms of Section 35B and Section 35EE of the Central Excise Act, 1944, it does not have jurisdiction over the dispute involved in the present *lis*.

8. In view of the above, Government dismisses the subject Revision Application as the same is non-maintainable due to lack of jurisdiction.


(SHRAWAN KUMAR)

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

ORDER No. ~~386~~/2023-CX (WZ) /ASRA/Mumbai dated 20.11.2023

To

M/s Asarwa Mills,
(A Div. of Bengal Tea & Fabrics Limited)
Asarwa Road, Ahmedabad Civil Hospital,
Ahmedabad – 380016.

Copy to:

1. The Commissioner of CGST & Central Excise, Ahmedabad North, 1st floor, Custom House, Near All India Radio, Income Tax Circle, Navrangpura, Ahmedabad – 380 009.
2. Commissioner (Appeals), CGST, Ahmedabad, CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad – 380 015.
3. Sr. P.S. to AS (RA), Mumbai.
4. Notice Board.

