



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. 198/03/WZ/2020-RA / 2902

Date of issue: 22.11.2023

ORDER NO. 389 /2023-CX (WZ) /ASRA/MUMBAI DATED 20.11.23 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 CENTRAL EXCISE
ACT,1944.

Applicant : Commissioner, CGST & Central Excise, Surat

Respondent : M/s. Vandana Overseas

Subject : Revision Applications filed under Section 35EE of the Central
Excise Act, 1944 against the Order-in-Appeal No. CCESA-
SRT/(Appeals)/PS-593-595/2019-20 dated 28.01.2020 passed
by the Commissioner of CGST & Central Excise, Appeals
Commissionerate, Surat.

ORDER

This Revision Application has been filed by the Commissioner, CGST & Central Excise, Surat (hereinafter referred to as "the Applicant-Department") against Order-in-Appeal (OIA) No. CCESA-SRT/(Appeals)/PS-593-595/2019-20 dated 28.01.2020 passed by the Commissioner of CGST & Central Excise, Appeals Commissionerate, Surat.

2. The brief facts of the case are that a Show Cause Notice No. INV/DGCEI/BRU/39/2008 dated 10.05.2010 was issued to M/s. Vandana Overseas (hereinafter referred to as "the Respondent"), a merchant-exporter, on the following grounds:

- (i) Rebate amounting to Rs.56,415/-, being erroneously refunded, should not be recovered from them alongwith interest and penalty;
- (ii) Rebate claims amounting to Rs.3,33,824/- filed by them and pending disposal should not be rejected;

3. The original adjudicating authority (OAA), ordered recovery of Rs.56,415/- along with interest & penalty of Rs. 56,415/- and rejected Rebate claims amounting to Rs.3,33,824/- vide Order-in-Original (OIO) No. SRT-III/ADJ/05/Dem/2011-12 dated 31.01.2012. Aggrieved, the respondent filed an appeal which was allowed by the Commissioner (Appeals) vide the impugned OIA.

4. Hence, the Applicant-Department has filed the impugned Revision Application mainly on the following grounds:

- (i) The Commissioner (Appeals) has failed to appreciate the facts that in the present case the merchant exporter i.e. the respondent is the purchaser of grey fabrics and shown the same as has been processed on job-work basis from the processor. However, grey fabric manufacturers who have issued invoices for supply of grey fabrics to the respondents, were found

to have issued only invoices without physical movement of goods. The grey fabrics covered under these invoices, were shown to have been supplied to the processor. As grey fabrics was not supplied under the said invoices, the question of processing of said grey fabrics and subsequent export of resultant processed fabrics does not arise. In view of this, the findings of the Commissioner (Appeals) — "*The duty paid nature of the invoices of the processor has not been questioned. Therefore, denying the rebate on the basis of non-receipt of grey fabrics from the supplier is not sustainable, there is no one to one correlation of utilization of credit by the processor.*", is not correct and against the basic principles of availment and utilization of Cenvat Credit. In this case, the processor had received invoices not accompanied with grey fabrics and therefore, invoices were procured only to avail CENVAT credit which was subsequently utilised for payment of duty on processed fabrics, As CENVAT credit on the basis of such invoices was not admissible, the duty payment on processed fabrics utilising such credit was not valid and thereby, the processed fabrics exported by the respondent is to be considered as non-duty paid. Accordingly, allowing rebate of duty shown to have paid on processed fabrics, is not correct. In this regard, the reliance is placed on the judgment of Hon'ble High Court of Bombay in the case of CCE Mumbai-I v/s Rainbow Silk- 2011 (274) ELT 510 (Bom.) wherein the Hon'ble Court held that - "*Since there was no accumulation of Cenvat Credit validly in law, there was no question of duty being paid there from.*"

- (ii) The Commissioner (Appeals) has erred in giving findings that the issue is decided in Government of India in its Order No. 304-307/07 dated 18.05.2007 wherein it was held that the merchant exporter cannot be denied the rebate claim for the reason that manufacturer has availed Cenvat Credit wrongly on the basis of bogus duty paying documents when there is no evidence to show that the merchant exporter was party

to fraud. The Commr.(A) failed to take note that the facts of said case and the case in hand are quite different. In the cited case the merchant exporter had purchased the processed fabrics from the processor and exported the same, whereas in the present case the respondent himself had shown purchase the goods i.e. grey fabrics from bogus/fake grey manufacturers, under the cover of fake/bogus duty paid invoices, without actual receipt of grey fabrics, shown to send the same to the processor for processing on job-work basis and further shown to have exported the resultant processed fabrics. Thus, the respondent was actively involved at every stage in availing Cenvat Credit fraudulently based on bogus/fake invoices and utilising the same for payment of duty on processed fabrics. The respondent was actively involved in fraud to encash the Cenvat Credit as rebate. He was a party to fraud in the entire case. When the purported persons, who have issued the fake/bogus duty paid invoices of grey fabrics are fictitious, than the whole transaction starting from procurement of grey fabrics and ending with export of resultant processed fabrics are vitiated. Thus, the order no. 304-307/2007 of GOI is not applicable in the present case.

- (iii) The Commissioner (Appeals) has erred in holding that rejection of rebate and recovery of Cenvat Credit is not sustainable on the grounds of limitation by relying upon the Hon'ble High Court judgment in the case of Prayagraj Dyeing and Printing Mills Pvt. Ltd. and Hon'ble Apex Court Order in the case of Kirtida Silk Mills. The Commr.(A) failed to take note that the facts of both the above cases and the case in hand are quite different. In both the said case, the Hon'ble Court allowed the tax appeals of the appellants (processors) mainly on the ground of limitation considering the facts that the said appellants are not party to fraud as they received the goods i.e. grey fabrics and availed cenvat credit, on the strength of endorsed invoices. Whereas in the present case, the merchant exporter i.e. the respondent had procured fake/bogus duty paid invoices

of grey fabrics from the fake/bogus grey manufacturers and sent the said invoices (without accompany of any grey fabrics) to the processor to facilitate them to take/avail cenvat credit. The processor had availed the cenvat credit on the strength of such fake/bogus invoices and utilized the said cenvat credit towards clearance of resulted processed fabrics which were ultimately shown to be exported. Thus, in the entire case and at every stage the respondent (merchant exporter) was involved in fraud. He was a party to fraud. Therefore, extended period of limitation was rightly invoked in the present case. In view of this also, the order passed by the Commissioner (Appeals) is not correct and required to be set aside in the interest of revenue.

- (iv) The Commissioner (Appeals) has erred in not considering the settled position of law laid down by Hon'ble High Court of Gujarat in the case of Diwan Brothers Vs. Union of India (SCA No. 13931 of 2011).
- (v) The Commissioner (Appeals) has erred in not considering the several judgments relied upon by the AA. The Hon'ble Apex Court in the case of Omkar Overseas Ltd. (2003 (156) ELT 167 (SC) has held that rebate should be denied in cases of fraud. In Sheela Dyeing and Printing Mills (P) Ltd. — 2007 (219) ELT 348 (Tri.-Mum.) the Hon'ble CESTAT held that any fraud vitiates transaction. This judgment has been upheld by the Hon'ble High Court of Gujarat. In the case of Chintan Processor — 2008 (232) ELT 663 (Tri.-Ahm.), the Hon'ble CESTAT while deciding the question of admissibility of credit on fraudulent invoices has held as under -

"Once the supplier is proved non-existent it has to be held that goods have not been received. However, the applicant's claim that they have received goods but how they have received goods from a non-existent supplier is not known."

(vi) In similar case of Multiple Exports Pvt. Ltd., Government of India vide Order No. 668-686/11-CX dated 01.06.2011 has upheld the rejection of rebate claim by lower authorities. This order is upheld by the Hon'ble High Court of Gujarat vide its order dated 11.10.2012 in SCA No. 98/12 with SCA No. 101/12, filed by the party. In view of the above also, the order passed by the Commissioner (Appeals), is not correct and required to be set aside in the interest of revenue.

5. The Respondent has filed cross objections mainly contending as under:

(i) The respondent submits that the Commissioner (Appeals) has considered the submissions made at the time of hearing as indicated in para 7 of his order to the effect that the duty paid documents issued by the processor and duty paid on the fabrics supplied are not in dispute; that the goods are physically delivered and exported; that the duty paid nature mentioned in the invoices of the processors is true and correct and therefore the question of denying rebate claims on the basis of grey suppliers non-existent etc. is not tenable in law.

(ii) The respondent submits that as required in law the Commissioner, CGST and Central Excise, Surat was served with the copy of the appeal memo to file the counter and to appear before the appellate authority. However, neither the counter had been filed nor any authority from revenue side appeared before the Commissioner (Appeals) as and when the matter was listed for hearing. Thus, now there is no point to raise and counter the findings of the Commissioner (Appeals) on what ground so ever. In view of this, subsequent stand of Commissioner, CGST and Central Excise, Surat in revision application raising several points which are not raised before the Commissioner (Appeals) cannot be taken into consideration and therefore also the revision application filed by the revenue is required to be dismissed in larger interest of justice.

(iii) The respondent submits that no stay has been obtained and there is no provision for stay in revision application and therefore following Board's Circular No. 276/ 186/2015-CX.8A dated 01.06.2015, the rebate is to be paid along with interest forthwith subject to final outcome of the revision application filed by the revenue.

6. Personal hearing in the case was held on 29.08.2023. Shri R.V.Shetty and Shri S.R.Shetty, Advocates, appeared on behalf of the respondent and submitted that the Commissioner(Appeals) has passed judicious order and submitted that RA filed by the Applicant-Department has no specific evidences against the respondent. They requested to uphold the Order passed by the Commissioner (Appeals). No one appeared for the personal hearing on behalf of the Applicant-Department.

7. Government has carefully gone through the relevant case records available in the case file, written submissions, and perused the impugned Order-in-Original and Order-in-Appeal.

8. Government observes that the respondent is a merchant-exporter and had procured grey fabrics from M/s. Shree Balaji Textile and M/s. Shri Sai Textiles, got it processed from M/s. Rachna Art Prints Pvt. Ltd and exported it. On the grounds that the grey fabric supplies were only paper transactions without actual receipt of goods a SCN was issued to the respondent, which was confirmed vide the impugned OIO, ordering recovery of amount of Rs.56,415/- alongwith interest and penalty, being erroneously refunded and rejecting rebate claims totally amounting to Rs.3,33,824/-. However, the AA allowed the appeal and hence the impugned RA has been filed by the Applicant-Department.

9. Government finds that in the impugned OIA, the AA has discussed the issue in detail and reached at the conclusion after proper analysis of the facts on record. The relevant paras of the OIA are reproduced hereunder:

9.2 From the statements of the proprietors of grey manufacturers/supplier firms, it is evident that the case is not that they were not in existence or not traceable. The only allegation is that they had not manufactured the grey fabrics but issued the duty paying invoices for the same just to pass on Cenvat credit. This allegation is solely based on the confessional statements and no any other independent corroborative evidence has been brought on record to establish the same. It is not disputed that both the parties had taken the looms on lease with intent to manufacture the grey fabrics out of the yarn purchased by them. They had got themselves registered with the Central Excise department. They had filed their ER-1 returns for the relevant period showing manufacture and clearance of grey fabrics and duty payment thereon. Even in the case of M/s. Shree Sai Textiles, the allegation of non-manufacture of grey fabrics is based on the quantity of production per 100 mtr of fabrics, which is on assumption and presumption basis without corroborated with any other evidence. The investigation was conducted in very generic way and no specific evidence has been brought on record which proves that the said grey fabrics manufacturers had not manufactured and supplied the grey fabrics to the appellant at the processor's premises. The appellant has made payments to the said parties (grey fabrics suppliers) through account payee cheques including central excise duty on account of purchase of grey fabrics. The authorized signatory of the appellant and M/s. Rachna has confirmed the fact that they had purchased the grey fabrics from these parties. He, although, stated that they did not have any mechanism of physical verification of the grey fabrics and that of co-relation of the invoices and corresponding grey fabrics, but he has not admitted anywhere in his statements that the grey fabrics was not received/purchased and/or was not sent at the premises of processor (M/s. Rachna) for processing. In the similar cases where the grey fabrics were not manufactured but invoices were issued by the grey fabric suppliers, the department had issued alert

circulars, after investigations/verifications conducted but there appears no alert circular in respect of the said two grey fabrics manufacturers/suppliers, in the records of the present appeals. The entire case has been made out only on the basis of statements of the proprietors of these firms without having any other corroborative evidence of non-manufacture and non-supply of grey fabrics. There is no evidence on record that the grey fabrics was not received at the premises of the processor (M/s. Rachna) along with the invoices issued by these grey fabric suppliers. Thus, there is no reason in the case to deny the Cenvat Credit availed by the processor on the goods (grey fabrics) supplied by the appellant for processing under the invoices issued by the above said grey fabrics manufacturers/suppliers.

10. So far as the rebate claims rejected and ordered for recovery are concerned, I find in the instant case that the export of goods (processed fabrics) made by the appellant is not under dispute at all. Further, when the allegations of the department that the grey fabrics manufacturers/suppliers had not manufactured and supplied the grey fabrics to the appellant and that the processor had availed cenvat credit fraudulently themselves are not sustainable in the instant case, the rebate claims of the central excise duty paid by the processor and filed by the appellant on the exports of processed fabrics cannot be rejected. Even if these allegations are accepted as true then also the rebate of duty shown to have been paid on the processed fabrics cleared to the appellant and exported thereafter cannot be denied when their export is not under dispute as it has not brought out on record that if the goods were not obtained from the grey fabric suppliers then out of which grey fabrics the processed fabrics (actually exported) were manufactured by the processor. In other words, the alternate source of procurement of grey fabrics has not been identified in the case. The duty paid nature of the invoices of the processor has not


been questioned. Therefore, denying the rebate on the basis of non-receipt of grey fabrics from the suppliers is not sustainable particularly when there is no one to one correlation of utilization of credit by the processor. The facts and circumstances of the case do not inspire confidence in the department's case. In absence of investigation and evidences, it has to be held that the goods were processed by the processor and cleared on payment of duty which in turn exported by the appellant. The Government of India in its Order No. 304-307/07 dated 18.05.2007 has decided the issue holding that merchant-exporter cannot be denied rebate claim in such circumstances when manufacturer had availed Cenvat Credit wrongly on the basis of bogus invoices and there is no charge of any mutuality of interest, financial control, flow back of funds and non bona fide nature of transactions between the merchant-exporter and manufacturer/supplier of goods. The instant case is not even of wrong availment of cenvat credit by the processor. The department's ground for recovery of credit is only that the grey fabrics manufacturers had not manufactured the grey fabrics hence issued only the invoices on which the processor had availed cenvat credit but as discussed in the foregoing para, there is no concrete evidence for the said allegations.

11. *The case of recovery of rebate, rejection of rebate and recovery of Cenvat credit, is not sustainable on the ground of limitation also. The show cause notice has been issued on 10.05.2010 for the relevant period 2007-08. The grey fabrics suppliers/manufacturers as well as the processor were duly registered with the department and were filing their monthly ER-I returns regularly. The appellant had purchased the grey fabrics under the invoices issued by the grey fabric manufacturers, sent the same for processing to the processor who accounted the same in their records and cleared the same on Central Excise invoices on payment of Central Excise duty. The appellant had made payments towards purchase of grey fabrics*

and processed fabrics. Even in the cases where the grey suppliers/manufacturers were not in existence and there were clearly established cases of issuing only invoices without supply of grey fabrics, the Hon'ble High Court of Gujarat has held in the case of M/s. Prayagraj Dyeing & Printing Mills Pvt. Ltd. vs. UOI [2013(290) ELT 61(Guj.)] that department cannot rely upon a larger period of limitation. The Hon'ble Court has held that there was no case for reopening of the transactions after the period of limitation. Relying upon the said judgment of Hon'ble High Court of Gujarat in M/s. Prayagraj case, the Hon'ble High Court has, in another case of M/s. Kirtida Silk Mills [2014(303) ELT 530(Guj.)] has held that in order to invoke the extended period of limitation, positive evasion of duty is required, the departmental appeals filed against the said judgments have also been dismissed by the Apex Court and affirmed the said judgments. None of the ingredients for invocation of extended period of limitation is applicable in the instant case hence the same is not justified. The show cause notice issued in the instant case is therefore clearly time barred hence the order of recovery of cenvat credit; order of recovery of rebate already granted to the appellant; and order of rejection of rebate claims filed by the appellant pending disposal, are not sustainable on the ground of limitation also.

10. Government concurs with the above findings of the AA. In the impugned RA, the allegations raised in the investigation have been repeated and the contentions are not based on any new facts. The impugned rebate claims were filed in FY 2007-08, hence already around 15 years have lapsed. Government holds that the refund should not be denied on mere allegations, as there are provisions in law to safeguard Government revenue, which can be used to cover up any future exigency. Therefore, Government does not find any infirmity in the impugned Order-in-Appeal and accordingly upholds the same.

11. The subject Revision Application is rejected.


(SHRAWAN KUMAR)

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

ORDER No. 389/2023-CX (WZ)/ASRA/Mumbai

dated 20.11.23

To,

M/s. Vandana Overseas,
Plot No. 177/1, G.I.D.C.,
Pandésara, Surat-394 221.

Copy to:

1. Commissioner of CGST & Central Excise, Surat,
New Central Excise Building, Chowk Bazar, Surat – 395 001.
2. Adv. Shri R.V.Shetty /Shri S.V.Shetty,
B-10, Chandra Niwas, Marol CHS Ltd.
Adj. to Airport Metro Station,
Andheri(E), Mumbai – 400 059
3. Sr. P.S. to AS (RA).
4. Guard file