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F.No. 195/428-429/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue 27/5/13

Order No. 431-432/13-cx dated 28-05-2013 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, 1944 against the Order-in-Appeal No. 259/M-I/2006 dated 25.02.2011 passed by Commissioner of Central Excise (Appeals), Mumbai-I.
Applicant	:	M/s. Sakaria Exports, Mumbai.
Respondent	:	Commissioner of Central Excise, Mumbai-I.

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ORDER

These revision applications are filed by the applicant M/s. Sakaria Exports, Mumbai against the Orders-in-Appeal No. 259/M-I/2006 dated 25.02.2011 passed by Commissioner of Central Excise (Appeal), Mumbai-I, with respect to Orders-in-Original passed by the Assistant Commissioner, Central Excise, Div.-I, Mumbai-I.

2. Brief facts of the case are that the applicant a merchant exporter, engaged in export of processed man-made fabrics during the period April 2004 to August 2004, exported processed man-made fabric on payment of duty and filed 11 rebate claims. The original authority observed that the applicant neither got their goods examined by the Central Excise officers nor opted for self sealing procedure; that the applicant failed to submit triplicate copy of impugned AREs-1; that they failed to file their monthly return; that education cess claimed by them was not available to them prior to 06-09-2004 and also that they have availed and utilised cenvat credit on strength of inputs invoices issued by M/s. Shree Laxmi Textiles, M/s. Hindustan Cotton Mills and M/s. S.P. Cotton Mills which were found to be forged and bogus. On these grounds, the Show Cause Notice was issued and subsequently vide impugned Order-in-Original, the rebate claim were rejected.

3. Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioner (Appeals), who rejected the same. The department also filed appeal before Commissioner (Appeals) for the reason of non-imposition of penalty on applicants, which was allowed by the Commissioner (Appeals).

4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed these revision application under section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 The applicants categorically deny the allegations/findings that they had never purchased any yarn or grey fabrics from M/s. Shree Laxmi Textiles, M/s. Hindustan Cotton Mills and M/s. S.P. Cotton Mills and states that they have received the

yarn/grey fabrics from the said parties under their respective invoices, quantity as well as duty credit was taken in the respective books of cenvat accounts and the goods manufactured out of the said materials were exported on payment of duty, thorough debits in cenvat account. The applicant submitted the linkage statement showing the details of materials received from specified suppliers, accountal thereof, goods manufactured there from exported on payment of duty after due accountal thereof, supported by relevant documents.

4.2 The applicants say that during the periods 01-04-2003 to 08-07-2004, they had purchased 16,15,941.15 LM Fabrics, out of which grey fabrics purchased by them from the said three companies are as under:

Sl. No.	Name of the party	Qty. (L.Mtr)
1	M/s. Laxmi Textiles	2,47,640.10
2	M/s. Hindustan Cotton	1,56,100
3	M/s. S.P. Cotton Mills	85,981.75
	Total	4,89,721.85

They also annexed the statement showing details of invoice-wise purchases, covering the aforesaid quantity from each of the said suppliers, carved out from the earlier statement. It could be seen that not only the processed fabrics manufactured out of grey fabrics purchased from the said three parties were exported by the applicants, but also the grey fabrics purchase from other parties amounting to 3.30 times of the purchases from the said three parties, were also used in the manufacture of finished fabrics, exported by them and, hence, without any prejudice it is submitted that rejection of the rebate claims in respect of the fabrics manufactured out of grey fabrics supplied by other than said three parties is highly unjustified. The applicants say further that we have made payment to the said parties for the yarn/grey fabrics purchased from them through crossed cheques and crave leave to rely upon the relevant documents in proof of said payment, when produced.

4.3 Regarding allegation of non-filling of monthly returns, applicants say that although they did not file monthly returns from March 2004 onwards, they had filed all the past monthly returns in the month of November 2004 for which they had received a Show Cause Notice dated 31-05-2005 proposing to impose penalty inter-alia for procedural lapse which was decided by the ACCE, under his Order-in=-Original dated 03-08-2006, imposing personal penalty of Rs. 5,000/-. In view of the above issuance of SCN based on the same allegation for the second time is not permissible in the C.E. Law, based on the settled position of the law on the issue.

4.4 It is not a fact that three suppliers, namely M/s. Shree Laxmi Textiles, M/s. Hindustan Cotton Mills and M/s. S.P. Cotton Mills have not supplied the grey fabrics to the applicants or not paid duty thereof, as claimed by the lower authorities in the impugned orders. Those suppliers have been supplying grey fabrics to the applicants for a number of years, even prior to introduction of Central Excise duty on yarn/fabrics and they are still supplying grey fabrics to the applicants. Therefore the statements recorded is contrary to the factual position and evidence on record and hence are not sustainable. Further, the applicants have obtained certificates/letters from the said suppliers, confirming their supply of grey fabrics to the applicants, during the disputed period, and duty payment thereon.

4.5 In any case, the applicants are not purchasing duty paid grey fabrics from aforesaid three suppliers alone. There are many other suppliers of grey fabrics to the applicants, whose payment of duty on the goods supplied by them has not been disputed or questioned by the department and hence, rebate to that extent ought not to have been denied. In support of the contention that there were/are other suppliers also, the applicants submitted a statement showing the details of name of the suppliers; the quantum of grey fabrics supplied and amount of duty paid thereon; details of payments made for such supplies. Statement of two or three suppliers, stating that they have not supplied grey fabrics or not paid duty, cannot not be invoked universally for other suppliers, as the applicants understand from them that those statements were made under duress and the same have been retracted subsequently and their proceedings are pending before Tribunal; that duty

was paid by all the suppliers, including the aforesaid 3 suppliers, on the yarn or fabrics supplied by them and payments towards such supplies were made by the applicants by "A/c. Payee" cheques.

4.6 In any case, with a view to resolve the controversy once and for all, the applicants have obtained certificates from the respective Range Supdt. of the aforesaid three suppliers, certifying that fabrics supplied by such suppliers to the applicants, during the disputed period, were duty paid.

4.7 Applicant also stated that they are eligible for rebate of education cess paid by them.

5. Personal hearing scheduled in this case on 20-03-2013 was attended by Shri R.K.Sharma, Sr. Counsel and Shri R.K. Dash, Consultant appeared on behalf of the applicant who reiterated the grounds of Revision Application. Nobody attended hearing on behalf of respondent department.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

7. Government observes that the applicant as merchant exporter, exported the goods on payment of duty and filed rebate claims, which were rejected by the original authority mainly on the grounds that they have availed and utilized Cenvat Credit on strength of forged bogus input invoices issued on behalf of M/s. Shree Laxmi Textiles, M/s. Hindustan Cotton Mills and M/s. S.P. Cotton Mills. The applicant filed appeal before Commissioner (Appeals) who also rejected their appeal. Department also filed appeal before Commissioner (Appeals) against for the impugned Order-in-Original for the reason of non-imposition of penalty on applicant which was allowed by the Commissioner (Appeals). Now, the applicant has filed these revision applications on grounds mentioned in para (4) above.

8. Government notes that the rebate claims are rejected mainly on the grounds that applicant failed to submit triplicate copy of ARE-I evidencing payment duty on exported good, that they availed and utilized cenvat credit on the strength of bogus and forged invoice issued on behalf of M/s. Shree Laxmi Textiles, M/s. Hindustan Cotton Mills and M/s. S.P. Cotton Mills and paid duty from said wrongly availed cenvat credit on the exported goods. The applicant has contended that out of total grey fabric of 1615941.15 LM purchased by the during 01-04-2003 to 08-07-2004 a quantity of 48972.85 LM was only purchased from the said three units and that through they had received the goods from these three units on valid duty paying documents and they claimed the rebate correctly, yet they requested to allow rebate claim in r/o exports made w.r.t. receipt of grey fabrics from other suppliers. Government finds that lower authorities have not given any finding on this contention. This is the main contention of party and lower authorities were required to consider the said contention on merit.

9. Regarding irregular availment of cenvat credit on the basis of bogus/forged invoices, Commissioner (Appeals) in his Order-in-Appeal has observed as under:

"I further find that the jurisdictional Range Superintendent in his report has categorically reported that all the input invoices received from above mentioned companies, on the basis of which the claimant-assessee had taken Cenvat credit were bogus. Thus, it is evident that Cenvat credit availed by the claimant-assessee is on illegal/fabricated, bogus, fictitious and ineligible documents and therefore, the Cenvat credit availed by them is illegal and becomes ab-initio null and void. Therefore, it is evident that the goods cleared for export under 11. ARE-1s in respect of which the claimant-assessee have filed rebate claims, are of "Non duty paid" character and hence the said rebate claims are liable for rejection, as there was no sufficient balance in the Cenvat account of the claimant-assessee at the time of debiting of duty for clearances of goods meant for export under relevant ARE-1s and Central Excise invoices. Thus, it is clear that the goods were cleared from the factory and exported without any payment of duty and hence question of sanctioning the rebate claim in respect of non-duty paid goods does not arise at all and hence the adjudicating authority has rightly rejected the rebate claims amounting to Rs. 23,79,513/- and also rejected inadmissible Education Cess amounting to Rs. 15,607/- vide the impugned Order-in-Original. "

9.1 Government notes that Commissioner (appeals) has found that cenvat credit was availed on bogus invoices. The three units in their statements recorded under section 14 of Central Excise Act, 1944 have denied having sold/dispatched any grey

fabrics under impugned invoices to the applicant. The superintendent Central Excise has also intimated that applicant has taken cenvat credit on said bogus invoices. As such, it becomes quite clear that applicant has fraudulently availed said wrong cenvat credit on the basis of bogus invoices and there from paid duty on exported goods. It is on record that these three suppliers have not supplied good to applicant. So, applicant knowingly availed the wrong cenvat credit and there from paid on exported goods to fraudulently claim the rebate under rule 18 of central Excise Rules 2002. In this case the export goods claimed to be procured from said three suppliers are not duty paid goods and no rebate claim is admissible under Rule 18 Central Excise Rules 2002 r/w Notification NO./ 19/2004-CE (NT) dt. 06-09-2004.

9. 2 Government notes that Apex Court in the case of Omkar Overseas Ltd. [2003 (156) ELT 167(SC)] has held in unambiguous terms 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, has held that any fraud vitiates transaction. This judgement has been upheld by the Hon'ble High Court of Gujarat. In another judgement in the case of Chintan Processors [2008 (232) ELT 663 (Tri. Ahm), the Hon'ble CESTAT while deciding the question of admissibility of Credit on fraudulent invoices has held as follows:

> *"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."*

9.3 Hon'ble Gujrat High Court in its order dt. 31-03-2011 in the case of M/s. Roman Overseas reported as 2011 (270) ELT 321 (Guj) has held that rebate claim is not admissible to exporter (merchant export) who is party to fraud and had knowledge of the fact that duty was paid on exported goods from the fraudulently availed cenvat credit. Similar view is taken by Hon'ble Gujrat High Court vide order dt. 11-10-2012 in the case of M/s. Multiple Exports P. Ltd. reported as 2013 (288) ELT 331 (Guj.) wherein view taken by revisionary authority in GOI Revision Order No. 668-686/11-Cx dt. 01-06-2011 was upheld. In the said order rebate of duty paid on exported goods out of cenvat credit wrongly availed on bogus invoices was held

admissible since the merchant exporter was party fraud and he had knowledge about payment of duty on exported goods from wrongly availed cenvat credit.

10. Government notes that as per provision of Notification No. 19/2004-CE (NT) dt. 06-09-2004 the triplicate copy of ARE-I is required to sent to rebate sanctioning authority by the Range Superintendent who certifies the duty payment particulars in the said ARE-I. Rebate sanctioning authority has to compare original, duplicate copy of ARE-I with the triplicate copy of ARE-I to determine the export of duty paid goods. Applicant has not been able to procure said copies. He may procure the same from Range Superintendent and submit before rebate sanctioning authority to facilitate processing of claims.

11. In view of above discussion, Government observes that the rebate of duty paid on the goods procured from three suppliers as stated above is not admissible. However, the rebate of duty paid on exported goods which were procured from supplier other than 3 suppliers mentioned and for which there is no dispute regarding availment of cenvat credit is to be considered afresh by original authority by considering the above contention (para 8) of applicant on merit.

12. In view of above discussion, Government sets aside the impugned Orders and remands the case back to original authority for denovo consideration in the light of above observations. A reasonable opportunity of hearing will be afforded to the parties.

13. The revision applications are thus disposed of in above terms.

14. So, ordered.

(D.P. Singh)
Joint Secretary to the Govt. of India

M/s. Sakaria Exports,
38/0, M.J. Market lane, Champa Galli,
Gross Lane, 2nd Floor, Mumbai-400002.

ATTESTED

29/5

(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
C B E C -O S D (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt of India

Order No. 431-432/13-CX dated 28-05-2013

Copy to:

1. The Commissioner of Central Excise, Mumbai-I, 115, Central Excise Bldg., Maharshi Karve Road, Mumbai-400 020.

2. The Commissioner of Central Excise (Appeals) Mumbai -I, Meher Bldg., Dadi Seth Lane, Chowpatty, Mumbai-400 020.

3. The Assistance Commissioner of Central Excise, Division-I, Meher Bldg., Dadi Seth Lane, Chowpatty, Mumbai-400 007.

4. Shri R.K.Sharma, Sr. Counsel Indian, Shri R.K. Dash (Counsel of Customs and Central Excise), 157, 1st Floor, DDA Office Complex, CM-Jhandewalan Extension, New Delhi- 110055.

5. PS to JS(RA)

5. Guard File.

6. Spare Copy

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(BHAGWAT P. SHARMA)
OSD (REVISION APPLICATION)