

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  
8<sup>th</sup> Floor, World Trade Centre, Cuff Parade,  
Mumbai- 400 005

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F.No. 195/1660/12-RA/5483

Date of Issue: 12.09.2020

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ORDER NO. 443 /2020/CX(WZ)/ASRA/MUMBAI DATED 16.03.2020, OF THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF CENTRAL EXCISE ACT, 1944.

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Applicant : M/s. K.T. Creations, Surat.

Respondent : Commissioner, Central Excise, Raigad.

Subject : Revision Applications filed, under Section 35EE of Central Excise Act, 1944 against the Order-in-Appeal No. US/509/RGD/2012 dated 23.08.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai.

## ORDER

This revision application has been filed by M/s K.T. Creations, Surat (hereinafter referred to as "the applicant") against the Order-in-Appeal No. US/509/RGD/2012 dated 23.08.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai.

2. The case in brief is that the applicant had filed an appeal against order-in-original No. 1838/11-12/DC (Rebate)/Raigad dated 18.01.2012 passed by Deputy Commissioner, Central Excise (Rebate), Raigad rejecting 6 rebate claims filed by the applicant collectively for Rs.1,71,565/- on the ground that the exported goods were fully exempt under Notification No.30/2004-CE dated 9.7.2004 and in view of sub-section (1) of Section 5A of the Act read with CBEC Circular No. 937/27/2010-CX dated 26.11.2011, the applicant could not have paid duty and did not have the option to pay the duty. The adjudicating authority also rejected the claims on other grounds such as Duty Payment Certificates from the Central Excise authorities indicating the debit entries of the duty payments were not submitted, Chapter sub heading of Central Excise Tariff declared in excise invoice and in the corresponding shipping bills was not tallying; the declaration of self sealing / self certification not given on ARE-1; in RC no. 27752, container No. and seal No. was not mentioned in the Bill of Lading and thus conditions for grant of rebate under Notification No. 19/2004-CE(NT) were not fulfilled. The adjudicating authority further observed that the applicant had failed to submit the documentary evidence to prove the genuineness of the availment of Cenvat credit and subsequent utilization by them for payment of duty on the above exports

3. Vide Order-in-Appeal No. US/509/RGD/2012 dated 23.08.2012, the Commissioner (Appeals), rejected the appeal filed by the applicant on grounds mentioned in impugned Order.

4. Being aggrieved with the above Order-in-Appeal, the applicant has filed this Revision Application under Section 35EE of Central Excise Act, mainly on the following grounds:

4.1 The show cause notices dated 08.12.2011 and 19.12.2011 issued for rebate claims filed in 2005 were beyond the period of five years and

therefore, the said notice was not sustainable. In view of Hon'ble Gujarat High Court Judgment in Ani Elastic Industries [ 2008 (222) E.L.T. 340 (Guj.)], the orders passed by the lower authorities are required to be set aside.

- 4.2 The findings of the Commissioner (Appeals) on the basis of Bombay High Court Order in the case of Rainbow Silk and Revision Authority in the case of Sheetal Exports are not applicable at all as the appellant is merchant exporter and have exported the goods beyond doubt on payment of duty and the invoices of the exporter and ARE-1 s are not under challenge. The proof of duty payment is very well verified from the monthly returns submitted by the manufacturer exporter and there is no notice to the manufacturer exporter as regards to wrong availment of any credit and therefore the finding of the Commissioner (Appeals) made is not applicable at all and therefore the order passed by the Commissioner (Appeals) is not sustainable in law.
- 4.3 They have exported the goods beyond doubt and foreign remittance have been received and therefore considering the Supreme Court judgment in the case of Baby Marine Exports reported in 2007 (211) ELT 12 (S.C.) the rebate claims cannot be rejected. In view of this, orders of the lower authorities are required to set aside in the interest of justice.
- 4.4 The appellant submits that the appellant have exported the goods as merchant exporter, the processors have paid duty on the goods exported by the merchant exporter and the said exporters are not issued with any show cause notice denying the Cenvat Credit and therefore the finding of the lower authorities are without any evidences in law for denial of the Cenvat Credit for rejection of rebate claims. As a merchant exporter they have paid the entire amount of goods including duty element and therefore there is no cause to deny the rebate claims for the goods received from M/ s. Mullaji Dyeing and Printing Mills and Rameshwar Textile Mills. The issue involved for the goods as merchant exporter is covered by the judgment in case of Roman Overseas reported in 2011 (270) ELT 321 (Guj.) which have been upheld by the Supreme Court rejecting the SLP of revenue. In view of this, the finding of the Commissioner (Appeals) based on the order of the Bombay High Court as against the final order of the Gujarat High Court is not sustainable in law and therefore also the said orders are required to set aside allowing the appeal with consequential relief.
- 4.5 The contention of the revenue cannot be considered as the finding of the High Court and based on that the rebate claims cannot be rejected as the Hon'ble High Court have remanded the case to revisional authority to decide it a fresh. It is therefore submitted that the rebate claims filed by the merchant exporter are meeting with the criteria of Shree Shyam International and therefore the revisional application is prayed to allow with consequential relief in the interest of justice.

5. Personal hearing in this case was scheduled on 21.12.2017, 09.10.2019, 21.11.2019; however neither the applicant nor its authorized representative appeared for the personal hearing. Further, there was no correspondence from the applicant seeking adjournment of hearing again. Hence, Government proceeds to decide the case on merits on the basis of available records. Government observes that there was a delay of 10 days in filing the present Revision Application by the applicant. The applicant in its Application for condonation of delay submitted that they had received the impugned Order in Appeal on 29.08.2012; that the present application had been filed by them on 30.11.2012 by speed post (reached Revision Application Unit, New Delhi on 06.12.2012) which has caused the delay; that the cause for delay is that the proprietor of the applicant company was not well due to severe viral fever and was not attending the office since last twenty days which had caused the delay for filing the revision application. Since, the applicant filed this revision application 10 days after the initial 90 days period, which falls within condonable limit of 90 days, Government in the interest of justice condones the said delay and proceeds to examine the case on merits.

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

7. Government observes that the Commissioner (Appeals) has upheld the Order in Original rejecting the rebate claims filed by the applicant on following issues :

- (i) The provision of self sealing / self certification is a mandatory provision and the appellant has not followed the procedure as laid down in para 3(a)(ix) of the Notification No.19/2004-CE (NT) dated 06.09.2004, and
- (ii) The appellant did not produce evidence of genuineness of the Cenvat Credit availed by the processors. The appellants are merchant exporters and the goods had been cleared on payment of duty by debit of Cenvat Credit. During the material time a number of processors fraudulently availed Cenvat Credit on the basis of 'invoices' issued by 'bogus / non existent grey manufacturers. The appellants may be party in the said fraudulent availment of Cenvat Credit. The bonafide nature of transaction between the

merchant exporter and supplier manufacturer is imperative for admissibility of the rebate claims filed by the merchant exporter.

8. As regards rejection of rebate claims holding that the provision of self sealing / self certification as laid down in para 3(a) (xi) of the Notification No.19/2004- CE (NT) dated 06.09.2004 is a mandatory provision and the applicant has not followed the procedure, Government observes that Para (3)(a)(xi) relating to procedure of Notification No. 19/2004-C.E. (N.T.) dated 6-9-2004 provides that where the exporter desires self-sealing and self-certification for removal of goods from the factory or warehouse or any approved premises, the owner, the working partner, the Managing Director or the Company Secretary, of the manufacturing unit of the goods or the owner of warehouse or a person duly authorized by such owner, working partner or the Board of Directors of such Company, as the case may be, shall certify all the copies of the application that the goods have been sealed in his presence, and shall send original and duplicate copies of the application along with goods at the place of export, and shall send triplicate and quadruplicate copies of application to the Superintendent or Inspector of Central Excise, having jurisdiction over the factory or warehouse, within twenty-four hours of removal of the goods. Government notes that in the instant case the impugned goods were cleared from the factory without sealing by Central Excise officers and without certification about the goods cleared from the factory under self-sealing and self-certification procedure and therefore the conditions and procedure of sealing of goods at the place of dispatch were not followed. Therefore, the correlation between the goods cleared from the factory and those exported cannot be said to have been established. Government further holds that absence of Self sealing / Self Certification on the ARE-1s / not following the basic procedure of export as discussed above, cannot be treated as just a minor or technical procedural lapse for the purpose of availing the benefit of rebate of duty. As such this lapse should not be considered as a procedural lapse of technical nature which is condonable.

10. It is observed that the second ground for rejecting the claims was that the applicant did not produce evidence of the genuineness of the Cenvat Credit availed by the processors and the duty on exported goods was paid out of Cenvat credit taken on invoices raised by fake/fictitious firm/persons. This ground was upheld by Commissioner (Appeals) holding that since the genuineness of the duty payment could not be verified, the rebate claim has to be rejected.

11. Government finds that in the instant case the suppliers of grey fabrics did not exist. The transaction shown as supplier of grey fabrics on central excise invoices was found to be a fraudulent and bogus transaction created on paper to wrongly avail the Cenvat credit for the purpose of bogus payment of duty and irregular/fraudulent availment of rebate.

12. In the case of Omkar Overseas Ltd. [2003(156) ELT 167(SC)] Hon'ble Supreme Court has held in unambiguous terms that rebate should be denied in cases of fraud. In Sheela Dyeing & Printing Mills (P) Ltd. [2007 (219) E.L.T. 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 a judgement in the case of Chintan Processor [2008 (232) E.L.T. 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 nonexistent, 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."*

13. In a similar case of M/s. Multiple exports Pvt. Ltd., Government vide GOI order No 668-686/11-Cx dt. 01-06-2011 has upheld the rejection of rebate claim by lower authorities. Division Bench of Hon'ble High Court of Gujrat, vide its order dated 11-10-2012 in SCA No 98/12 with SCA No 101/12 [reported in 2013 (288) E.L.T. 331 (Guj.)], filed by party has upheld the above said GOI Revision order dated 01-06-2011. Government also observes that the contention of the respondent that they had exported the goods on payment of duty and therefore, they are entitled to rebate of Excise duty . The same arguments came to be considered by the Division Bench of Hon'ble High Court of Gujarat in Special Civil Application No. 13931/2011 in Diwan Brothers Vs Union of India [2013 (295) E.L.T. 387 (Guj.)] and while not accepting the said submission and while denying the rebate claim on actually exported goods, the Division Bench has observed as under :


*"Basically the issue is whether the petitioner had purchased the inputs which were duty paid. It may be true that the petitioner manufactured the finished goods and exported the same. However, that by itself would not be sufficient to entitle the petitioner to the rebate claim. In the present case, when the authorities found inputs utilized by the petitioner for manufacturing export products were not duty paid, the entire basis for seeking rebate would fall. In this case, particularly when it was found that several suppliers who claimed*

*to have supplied the goods to the petitioner were fake, bogus or nonexistent, the petitioner cannot be claimed rebate merely on the strength of exports made."*

14. In view of above discussion, Government finds that since the duty paid character of exported goods was not proved, which is a fundamental requirement for claiming rebate under Rule 18 of Central Excise Rules, 2002, the rebate claim is not admissible to the applicant.

15. Government finds no infirmity in the impugned Order-in-Appeal and therefore upholds the same and rejects the Revision Application filed by the applicant being devoid of merit.

16. So, ordered.

  
(SEEMA ARORA)  
Principal Commissioner & ex-Officio  
Additional Secretary to Government of India

ORDER No. 443/2020-CX (WZ) /ASRA/Mumbai DATED 16.03.2020

To,

M/s K.T. Creations,  
408, Metro Tower, Ring Road,  
Surat 395 002.

Copy to:

1. The Commissioner of CGST, Belapur CGO Complex, Sector 10, C.B.D. Belapur, Navi Mumbai -400 614.
2. The Commissioner (Appeals) of Central Goods & Service Tax, Raigad, 5th Floor, CGO Complex, Belapur, Navi Mumbai -400 614.
3. The Deputy / Assistant Commissioner (Rebate), Belapur, CGO Complex, Sector 10, C.B.D. Belapur, Navi Mumbai -400 614
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file,
6. Spare Copy.