

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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.195/1656/2012-RA / 5495

Date of Issue: 17.09.2020

ORDER NO. 445 /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 THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Maroof Exim, Mumbai.

Respondent : Deputy Commissioner (Rebate), Central Excise, Raigad.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. US/163/RGD/2012 dated 12.03.2012 passed by the Commissioner (Appeals-II), Central Excise, Mumbai.

ORDER

This revision application is filed by the M/s Maroof Exim, Mumbai (hereinafter referred to as "the applicant") against the Order-in-Appeal No. US/163/RGD/2012 dated 12.03.2012 passed by the Commissioner (Appeals-II), Central Excise, Mumbai.

2. The issue in brief is that the applicant, a Merchant Exporter had filed 7 rebate claims collectively for Rs. 14,84,871/- (Rupee Fourteen Lakh Eighty Four Thousand Eight Hundred Seventy One Only) which were sanctioned by the adjudicating authority vide Order-in-Original No.636/05-06 dated 29.06.2005. Out of these 7 sanctioned rebate claims, 6 rebate claims amounting to Rs. 13,27,191/- (Rupees Thirteen Lakh Twenty Seven Thousand One Hundred Ninety One only) pertained to the manufacturer of the export goods M/s Devi Synthetics, Valsad. Said M/s Devi Synthetics manufactured the goods from the raw materials i.e. grey MMF supplied by M/s Vinod Silk Mills Silvassa and M/s Qaswa textiles, Surat.

3. The DGCEI Regional Unit, Vapi vide letter F.No. IV/15-25/DGCEI/Vapi/2004 dated 26.06.2007 informed that a case has been booked against M/s Devi Synthetics, Valsad, regarding wrong availment and utilization of Cenvat Credit on the strength of fake invoices of grey fabrics issued by M/s Vinod Silk Mills Silvassa and M/s Qaswa Textiles and that the same was utilized to show the payment of Central Excise Duty against fictitious clearances of fabrics to the merchant exporters including the applicant. Further the Jurisdictional Superintendent of Central Excise Range - Atul, Division Valsad vide his letter F. No. AR-Atul/Devi Synthetics/04-05/22 dated 16.4.2007 also informed that M/s. Devi Synthetics, Valsad has availed Cenvat Credit on the inputs namely grey fabrics on the basis of invoices issued by major supplier M/s Vinod Silk Mills, Silvassa without carrying out any manufacturing activity and cleared processed fabrics on payment of duty entirely through Cenvat Credit and under claim for rebate by themselves and through various merchant exporters including the applicant. It was also alleged that M/s. Devi Synthetics have availed Cenvat Credit without actually receiving the material and therefore the Cenvat credit availed by M/s Devi Synthetics was not valid and the duty subsequently paid on the export goods from the said cenvat account was not valid.

4. In view of the above, a Show Cause Notice No. V(15)/Rebate/Marroof Exim/Rgd/07 dated 04.12.2007 was issued to the applicant by the Additional Commissioner, Raigad Commissionerate proposing to recover consolidated rebate amounting to Rs. 13,27,191/- which was erroneously refunded to them under Section 11A of the Central Excise Act, 1944 along with appropriate interest, and also proposing to impose penalty on the applicant and its partner under Section 11AC of the Central Excise Act, 1944, Rule 25 of the Central Excise Rules, 2002 and Rule 26 of the Central Excise Rules, 2002 , respectively.

5. After following due process of law, the Adjudicating Authority, i.e. Additional Commissioner, Central Excise, Raigad vide Order in Original No. Raigad/ADC/66/10-11 dated 22.10.2010, confirmed the demand alongwith interest and imposed penalties under Section 11AC of the Central Excise Act, 1944, Rule 25 of the Central Excise Rules, 2002 and Rule 26 of the Central Excise Rules, 2002.

6. Being aggrieved, the applicant filed appeal before the Commissioner (Appeals-II), Central Excise, Mumbai who Order-in-Appeal No. US/163/RGD/2012 dated 12.03.2012 upheld the Order-in-Order No. Raigad/ADC/66/10-11 dated 22.12.2010 and rejected the appeal of the applicant.

7. Being aggrieved, the applicant filed the Revision Application before Government mainly on the following grounds :

7.1 They are Merchant Exporter who procured the duty paid goods from the manufacture M/s Devi Synthetics. The said goods were exported under rebate claim by following the proper procedure. The rebate claims were rejected by the adjudicating authority on the ground that the manufacturer- supplier had availed fraudulent Cenvat Credit on the basis of invoices raised by the non-existent companies and utilized the same for duty payment on goods cleared for export.

7.2 The goods were supplied under cover of duty paying Central Excise documents and in the invoices issued the duty amount paid by manufacturer has been mentioned and for the goods supplied the applicant has made payment of total amount inclusive of Central Excise duty. This position is not disputed. The statutory requirement of duty paid character by way of

certification by Supdt. Central Excise in triplicate copy of ARE-1 in terms of Notification 40/2001-C.E. (N.T.), dated 26-6-01 read with paras 8.3 and 8.4 of Central Excise Manual is also not in dispute.

- 7.3 The order in original and order in appeal there is also no charge or allegation that the transaction between exporter/respondent and the manufacturer/supplier was not at arms length or not in the nature of a transaction in the normal course of business or non-bona fide and influenced by any extra commercial consideration. There is no whisper /evidence on record to establish much less point out even prima facie any role direct or indirect, connivance or intention of applicant in the act of procurement of inputs by supplier manufacturer on basis of bogus invoices.
- 7.4 The charge in the Order in appeal is that is that the manufacturer/supplier had availed Cenvat Credit on basis of bogus invoices which is under investigation and since this wrong credit was availed without taking reasonable steps in terms of Rule 7 of Cenvat Credit Rules, 2002 [now Rule 9(2) of Cenvat Credit Rules, 2004] the duty paid on exported goods through debit entry of this wrongly availed credit cannot be rebated to the Applicant /merchant exporter who purchased the goods and exported them.
- 7.5 This allegation forming the genesis and basis for denial of rebate claim to the merchant exporter is not against him but the manufacturer supplier who availed Cenvat Credit wrongly and availed the same for duty payment of goods exported by the applicant/ exporter. There are sufficient legislative and machinery provisions exist in Central Excise Act/Rules to recover such allegedly wrongly availed and utilized credit from the manufacturer supplier of finished goods along with interest and penalty. They have bonafidely purchased and exported the goods after payment of entire amount inclusive of duty per se cannot be also penalized by way of denying his claim of rebate if otherwise it is in order, especially when no evidence has been laid to show any mutuality of interest and financial control or any flow-back or fund flow between the applicant and manufacturer supplier of goods. The applicant cannot be punished by denying him benefit of rebate on goods purchased legitimately in ordinary course of business from the supplier/manufacturer by paying the entire amount inclusive of duty and exporting them as per procedural requirements of Rule 18 of Central Excise Rules read with Notification No. 40/2001-C.E. (N.T.), dated 26-6-01.

- a) R.S. Industries - 2003 (153) ELT. 114 (T.-Del.)
- b) CCE, Pondichery v. Spic Pharmaceuticals - 2006 (74) RLT 402 (CESTAT-Chennai).
- c) Parasrampuriah Synthetics Ltd v. CCE, Jaipur - 2005 (191) E.L.T. 899 (Tri. - Del.)
- d) Bhairav Exports v. Commissioner of Central Excise, Mumbai, 2007 (210) E.L.T. 136 (Tri. - Mumbai),

7.6 The Commissioner (A) vide its order states the applicant has failed to fulfil the requirement of sub rule (2) of rule 7 of the rules [now sub-rule (3) of Rule 9 of Cenvat Credit Rules 2004]. It is the responsibility of the manufacturer who avails credit to take reasonable steps to ensure that the inputs in respect of which credit is availed are goods on which appropriate duty of excise as indicated in the documents has been paid. In the present case, the manufacturer supplier M/s Devi Synthetics as alleged had failed to take such reasonable steps for verifying addresses of supplier who issued invoices to them. As per ratio of various decisions discussed above, it is observed that action for not taking such reasonable steps as alleged definitely lies squarely on the manufacturer supplier but not on the applicant/merchant exporter who at third stage purchased the goods bonafidely in normal course of commercial activity and exported them on the strength of clearances to them on ARE-1s and Central Excise Invoices indicating duty payment particulars showing all other details of manufacturers addresses, value etc. and the entire amount inclusive of duty has also been paid by them to supplier manufacturer.

7.7 It is submitted that the applicant/ merchant exporter under the circumstances cannot be held responsible for having not taken adequate reasonable steps in terms of Rule 9 of Cenvat Credit Rules, 2004. It is deemed that manufacturer taking credit have taken reasonable steps if he satisfies himself about identity and address of the supplier/ manufacturer issuing the invoice evidencing payment of duty and confirming its registration with Central Excise department.

a) Prachi Poly Products Ltd v. Commissioner of Central Excise Raigad - 2005 (186) E.L.T. 100 (Tri. - Mumbai) and similar instructions also exist in C.B.E.C. Circular No. 766/82/2003-CX., dated 15-12-2003 in clarifying that where the supplier defaults any payment of duty, the same along with interest is recoverable from him and action against the consignee to reverse/recover to the credit is not to be resorted to as long as the bona fide nature of consignees transaction is not in dispute.

- 7.8 In the present case the supplier/manufacturer is a Central Excise registered manufacturing unit and there seems no dispute regarding its existence and identity and as shown on documents supplied with rebate claims. There is also no such charge or allegation in the orders of lower authorities to indicate that the manufacturer/supplier is itself a non-existent or bogus unit or had obtained Central Excise registration under erstwhile Rule 12B of Central Excise Rules on basis of any forged/fabricated document or information including identity and address. If such a charge existed then despite purchase of goods by merchant exporter on basis of Central Excise documents/invoices showing duty payment particulars, the entire transaction would have been non bona fide. In the present case there is no such charge, hence the order passed by the lower authorities needs to be set aside in the interest of justice.
- 7.9 The Export Promotion and Incentive Scheme of Rebate broadly envisage under Rule 18 of Central Excise Rules that whatever duty has been paid on exported goods may be given back as rebate to the exporter who earns valuable foreign exchange. This is the legislative intent of Rule 18 of Central Excise Rules and should form the foundation of judicial interpretation [2007 (211) ELT. 12 (S.C.)]. If the exporter as in the instant case has procured goods from the supplier/manufacturer under cover of proper Central Excise documents, including invoices showing duty payment particulars and payment has been made of entire amount inclusive of duty and goods exported as per prescribed procedure, it will be legally incorrect to deny the merchant exporter the benefit of rebate in case there is no charge that the transaction between the supplier and exporter was not at arms length or non bona fide or the exporter had any nexus/connivance or any other role to play in the alleged wrong procurement of inputs by the supplier/manufacturer on bogus invoices. There are legal provisions exist in the Central Excise Act, 1944 and Cenvat Credit Rules, 2004 for recovery of such alleged wrongly availed credit from the supplier/manufacturer along with interest and penalty but the merchant exporter in the facts and circumstances cannot be denied his otherwise legitimate rebate claim.
- 7.10 The recovery of rebate is time barred as the rebate was sanctioned on 29.6.2005 and the impugned Show Cause Notice was issued on 04.12.2007 after period of 2 ½ years is barred by limitation. There was no malafide intention as alleged in show cause notice and there is no justification for invoking the penal provisions in the present case and in such instances penalty

under Section 11 AC is not sustainable. They rely on following decisions:-

When Penalty is not imposable under Section 11 AC penalty under Rule 25 is not imposable.

a) Proteck Circuit & Systems P.Ltd Vs CCE Chennai 2008 (225)ELT 139

In the present case when the recovery of rebate is not sustainable under Section 11A (1), therefore, interest under Section 11 AB is not chargeable in the light of following judgments:

a) CCE Chandigarh Ws. S.R.Fragrances Ltd.,
2009 (245) E.L.T. 822 (Tri. - Del.)

b) Dhillon Kool Drinks Beverages v/s CCE, New Delhi
2000 (120) ELT 81 (Tri)

8. Personal hearing in this case was scheduled on 12.12.2017, 09.10.2019 and 07.11.2019. However the applicant neither appeared for the personal hearing on the appointed dates, nor made any correspondence seeking adjournment of hearings. Hence, Government proceeds to decide these cases on merits on the basis of available records.

9. Government has carefully gone through the relevant case records available in case files, and perused the impugned Order-in-Original and Order-in-Appeal.

10. On perusal of records, Government observes that DGCEI Regional Unit, Vapi had booked a case against M/s Devi Synthetics, Valsad, who were the purported manufacturer who signed invoices and ARE-1s for export in the instant case alongwith the applicant. Investigations carried out by DGCEI. Regional Unit, Vapi revealed that M/s Devi Synthetics availed Cenvat Credit on the strength of the fake invoices of grey fabrics issued by M/s Vinod Silk Mills, Silvassa and M/s Qaswa Textile, Surat and utilized the same to show the payment of Central Excise duty against the fictitious clearances of fabrics of their Merchant Exporters including the applicant.

11. Government observes that the adjudicating authority in his Order in Original has correctly observed that "since there was no manufacturing activity at the manufacturer's premises and invoices were only issued on paper and there was no delivery of the goods meant for export, the duty debited by

the manufacturer from the fraudulent availment of CENVAT credit was not actual payment of duty and consequently no rebate accrues to the claimant i.e. merchant exporter M/s Maroof Exim. The adjudicating authority further observed that on investigation M/s Devi Synthetics, Valsad, a manufacturer was found to be fake/bogus unit having no manufacturing activity and invoices were issued without clearance of goods against which rebate was claimed by deliberate misrepresentation of facts and fraud and with intent to evade duty and claim wrongful rebate. Therefore, the applicant contravened provisions of Rule 18 of Central Excise Rules 2002, read with Notification NO. 40/2001 CE(NT) and Notification No.19/2004 CE(NT) which rendered the rebate claims ineligible, and therefore amount of Rs.13,27,191/- erroneously paid to them was liable to be demanded and recovered under proviso to Section 11A(1) of the Central excise Act, 1944.

12. In this regard Government relies on the judgment Hon'ble High Court Gujarat in case of M/s Poddar Exports (India) Vs Union of India [2015(316) ELT 179 (Guj)] wherein while dismissing the Special Civil Application filed by the petitioner observed as under :-

Under the circumstances, when the transactions between the manufacturer (processor) and the merchant exporter (petitioner) are found to be bogus and when it has been established that the purported suppliers are fake and fictitious persons and the entire transaction is found to be only billing activities for the purpose of taking undue advantage of the Cenvat credit and/or the rebate, no error has been committed by the Authorities below in denying the rebate claims claimed by the petitioner.

5.1 Now, so far as the contention on behalf of the petitioner that as the petitioner had exported the goods on payment of duty the petitioner is entitled to rebate of Excise duty is concerned, the same arguments came to be considered by the Division Bench of this Court in Special Civil Application No. 13931/2011 [2013 (295) E.L.T. 387 (Guj)]. At that stage also, the petitioner of that petition heavily relied upon the decision of this Court in the case of D.P. Singh (supra). While not accepting the said submission and while denying the rebate claim on actually exported goods, the Division Bench of this Court 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 either fake, bogus or nonexistent, the petitioner cannot be claimed rebate merely on the strength of exports made."

13. Government also relies on the judgment of Mumbai High Court in case of Commissioner of Central Excise, Mumbai-I Vs M/s Rainbow Silks & Anr reported as 2011 (274) ELT. 510 (Bom), wherein Hon'ble High Court, Mumbai, in similar circumstances i.e., when a processor is a party to a fraud and cenvat credit was accumulated on the basis of fraudulent documents of bogus firms and utilized for payment of duty on goods exported, it was held that "since there was no accumulation of Cenvat credit validly in law, there was no question of duty being paid therefrom" and quashed the order of Revisional Authority, sanctioning the rebate on such duty payments.

14. The applicant has contended that they cannot be punished by denying benefit of rebate on goods purchased legitimately in ordinary course of business from the supplier/manufacturer by paying the entire amount inclusive of duty and exporting them as per procedural requirements of Rule 18 of Central Excise Rules read with Notification No. 40/2001-C.E. (N.T.), dated 26-6-01. In support of their contention the applicant has relied on case laws mentioned at para 7.5 supra. However, Government observes said case laws are not applicable to the facts of the instant case, inasmuch as, the allegations against the manufacturing unit is that the credit has been availed without actually receiving any duty paid inputs in their factory. The above fact has come on record from the investigations conducted by the DGCEI and the admitted position that the M/s Devi Synthetics had taken Cenvat Credit on fake invoices of grey fabrics and issued export documents like invoices and ARE-1 etc. without actually manufacturing and supplying the goods and thus the clearances of M/s Devi Synthetics to the applicant and the export of the same by the applicant were fictitious.

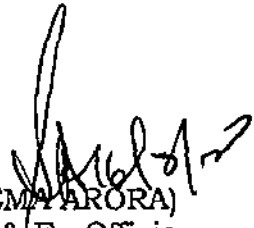
15. Another contention of the applicant is that extended period is not invocable in this case. Government from the available records has observed that the range Superintendent, Central Excise, Range Atul, Division-Valsad,

informed that a case had been booked against M/s Devi Synthetics and it was revealed that the said unit has availed Cenvat Credit on inputs namely grey fabrics on the basis of invoices issued by M/s Vinod Silk Mills, Silvassa. The said M/s Vinod Silk Mills were allegedly involved in passing of fraudulent Cenvat Credit without actually undertaking any manufacturing activity, but involved themselves in clearance of processed fabrics on payment of duty entirely through Cenvat Credit and under claim for rebate by themselves and through various merchant exporters during the period August 2004 to November 2004. A case had also been booked against M/s Vinod Silk Mills, Silvassa which was investigated by DGCEI, Vapi regarding fraudulent issue, of cenvatable invoices during the period May 2004 to November 2004. The applicant had also filed rebate claims with Divisional Office, Valsad and show cause notice were also issued for the same. Moreover, the applicant in the instant Revision Application has not refuted Commissioner (Appeals) observation in the impugned order that "*in the instant case the appellants arranged for invoices of grey fabrics from M/s Vinod Silk Mills, Silvassa to M/s Devi Synthetics and jointly signed the ARE-1s with M/s Devi Synthetics. Thus they actively participated in fraudulent export and fraudulently claimed and received rebate*". It is also pertinent to note that despite being summoned, manufacturer M/s Devi Synthetics neither appeared before the adjudicating authority nor before the Appellate Authority. It is clear from the Order in Original as well as impugned Order in Appeal that goods described in the invoices were not received by the applicant as the same had not been manufactured by the manufacturer shown in the invoice and ARE-1, i.e. M/s Devi Synthetics. Such a thing cannot happen without active connivance of applicant and undoubtedly this is a case of fraudulent availment of credit. Government, therefore rejects this contention of the applicant and holds that extended period is rightly invoked in this case. Having come to the conclusion that M/s Devi Synthetics, Valsad, a manufacturer was found to be fake/bogus unit having no manufacturing activity and invoices were issued without clearance of goods against which rebate was claimed by deliberate misrepresentation of facts and fraud and with intent to evade duty and claim wrongful rebate, penalty imposed on the applicant under Section 11AC of the Central Excise Act, 1944 and also under Rule 25 of Central Excise Rules, 2002, is justified.

16. In view of above discussions Government finds no infirmity in impugned Order-in-Appeal and upholds the same.

17. The revision application is thus dismissed being devoid of merit.

18. So ordered.


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

ORDER No. 445 /2020-CX (WZ)/ASRA/Mumbai DATED 16.03.2020
2020.

To,
M/s Maroof Exim,
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Mahim, Mumbai 400 016.

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.