

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. 195/8/14-RA / 5145

Date of Issue: 26.10.2020

ORDER NO. 476 /2020-CUS (WZ) /ASRA/MUMBAI DATED 21.04.2020 OF THE GOVERNMENT OF INDIA PASSED BY SMT SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF CUSTOMS ACT, 1962.

Applicant : M/s Visaka Industries Limited, Nagpur.

Respondent : Commissioner, Customs & Central Excise, Nagpur.

Subject : Revision Application filed, under Section 129DD of Customs Act, 1962 against the Order-in-Appeal No. NGP/EXCUS/000/APPL/903 /13-14 dated 28.10.2013 passed by the Commissioner (Appeals), Central Excise & Customs, Nagpur.



ORDER

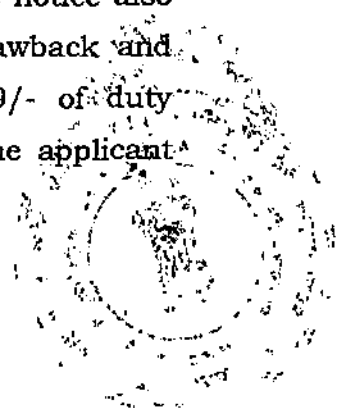
This Revision Application has been filed by M/s Visaka Industries Ltd., Nagpur (hereinafter referred to as the "applicant") against the Order -in -Appeal No.NGP/EXCUS/000/APPL/903/13-14 dated 28.10.2013 passed by the Commissioner (Appeals), Central Excise & Customs, Nagpur.

2. The brief facts of the case is that the applicant are engaged in the manufacture of Polyester / Viscose Blended Yarn classifiable under Chapter 55 (Yarn containing 85% or more by wt. of MMF) (Gray and Dyed) of the Central Excise Tarrif Act, 1985, exported the goods and claimed duty drawback under All Industries rate (AIR) of Drawback at ICD, Nagpur. The applicant exported Polyester / Viscose Blended yarn during the period between July 2009 to March 2011 by filing Shipping Bills from ICD (Ajni) Nagpur and claimed duty drawback at full rate of FOB Value of their export to the tune of Rs.1,81,48,609/- (Rupees One Crore Eighty One Lakh Forty Eight Thousand Six Hundred and Nine only) on the ground that they had not availed the Cenvat Credit.

3. The applicant in respect of aforementioned exports, claimed refund of service tax paid on certain specified services i.e. CHA services and GTA services (Transport of goods from the factory of the applicant to the ICD). These services were used by the applicant beyond the factory gates for export of the aforementioned export products on which service tax was paid by the service provider to the Government and service tax was reimbursed by the applicant to the service provider. The applicant claimed this refund under Notification No. 17/2009-ST dated 07.07.2009.

4. The applicant, during the relevant period claimed an amount of Rs.1,57,152/- towards refund of service tax in terms of Notification No.17/2009-ST dated 07.07.2009 on CHA services and GTA services and this was intimated to the Assistant Commissioner of Customs, ICD, Ajni Nagpur vide its letter dated 17.12.2011. Thereafter a Show cause notice C.No. VIII (48) Cus/173/ICD/2011 dated 30.01.2012 was issued to the applicant alleging that they were not entitled to higher rate of AIR of duty drawback as they have availed refund of input services in terms of Notification No.17/2009-ST dated 07.07.2009. Show cause notice also alleged that the applicant was entitled to lower rate of duty drawback and

accordingly an amount of Rs.1,52,09,762/- (out of Rs.1,81,48,609/- of duty drawback granted at full rate of FOB value) was demanded from the applicant towards recovery of excess drawback granted to them.



5. After following due process of law, the Assistant Commissioner vide Order in Original No. VIII(Cus)48/173/ICD/2011 dated 06.03.2013 confirmed the demand and ordered recovery of Rs.1,52,09,762/- as erroneously excess granted drawback and also ordered for recovery of interest under the provisions of Rule 16 of Customs, Central Excise and Service Tax Drawback Rules, 1995.

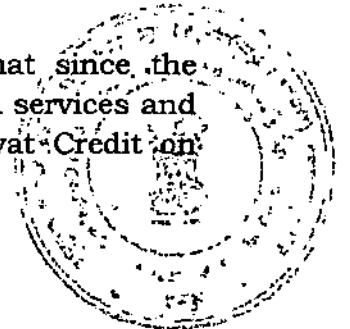
6. Being aggrieved with the aforementioned Order in Original the applicant filed appeal with Commissioner (Appeals), Central Excise & Customs, Nagpur alongwith stay application seeking stay from payment of pre-deposit of the excess granted drawback of Rs.1,52,09,762/-. After hearing the applicant for grant of stay from pre-deposit, the Commissioner (Appeals) passed Stay Order No. Misc/PVR / 140 / 2013 dated 30.09.2013 wherein applicant was ordered to pre-deposit the whole amount of Rs. 1,52,09,762/- plus interest on or before 24.10.2013. Against this stay order the applicant filed a modification application dated 17.10.2013 before Commissioner (Appeals) for modification of the impugned stay order with a request to dispense with the pre-deposit of any amount.

7. Commissioner (Appeals), Central Excise & Customs, Nagpur vide Order-in - Appeal No.NGP/EXCUS/000/APPL/903/13-14 dated 28.10.2013 observed that as per the provision of Section 35 of Central Excise Act, 1944 there is no scope for the Commissioner of Central Excise (Appeals) to modify his own order. As the appellant had not made the pre-deposit alongwith interest within stipulated time and thus not complied with the conditions envisaged under the said Stay Order dated 30.9.2013, the Commissioner (Appeals) dismissed the main appeal filed by the applicant for non compliance of stay order without going into merits of the case.

8. Being aggrieved with the above Order-in-Appeal, the applicant has filed this Revision Application mainly on the grounds that

- 8.1 the Commissioner (Appeals) dismissed the appeal without giving an opportunity of hearing to them in respect of modification application or on the merits of the case,
- 8.2 the issue in the present case relates to whether availing refund of Service Tax paid on GTA services and CHA services will amount to taking Cenvat Credit on input services, so as to disentitle the them to higher rate of duty drawback on exports made during the relevant period,

the Assistant Commissioner in its order has held that since the applicant had availed refund of service tax paid on GTA services and CHA services, therefore the applicant has taken Cenvat Credit on



by the Divisional Assistant Commissioner of Excise and Customs, Bhandara on the ground that they had already claimed the duty drawback benefit. However on filing of appeal against the said Order, the Commissioner (Appeals) Nagpur vide Order in Appeal dated 08.07.2011 categorically held that the said exemption by way of refund under Notification No.17/2009-ST has no relation with the Drawback provisions (copy annexed to Revision Application as Annexure-9).

- 8.10 reliance is placed on Notification No. 41/2007-ST dated 06.10.2007 which is predecessor notification to Notification No.17/2009-ST which provided for refund of service tax paid on services availed by an exporter beyond the place of removal for export of goods such as GTA services etc. When this Notification No. 41/2007-ST was notified it contained a clause (e) which provides that refund of service tax under this notification will not be available in cases / situations where the exporter has availed duty drawback of service tax paid on such services. The aforementioned condition 9(e) of Notification No. 41/2007-ST was deleted vide Notification No.33/2008-ST dated 07.12.2008. By virtue of this deletion it was clear that the exporter was entitled to avail the benefit of refund of service tax under Notification No. 41/2007-ST as well as higher rate of duty drawback, which includes the service tax portion also,
- 8.11 assuming without admitting that the applicant is not eligible for both the benefits simultaneously, then they should be required to surrender the benefit of refund of service tax availed in terms of Notification No.17/2009-ST which amounts to Rs.1,57,152/-. This is for the reason that in case an exporter has availed double benefits then it is the discretion of the exporter to retain benefit of his choice unless specifically provided under the relevant law.
9. A Personal Hearing in this matter was held 17.10.2019, Mr. Mohammad Ismail, General Manager (Commercial), Mr. Rajanikanth Rama, Deputy General Manager (Legal) and Mr. S.C. Jain, Advocate appeared for the hearing on behalf of the applicant. They re-iterated grounds of revision application and stressed that the balance of convenience is in their favour.
10. Government has carefully gone through the relevant case records & written submissions and the impugned Order-in-Original and Order-in-Appeal.
11. Government observes that in the instant case the applicant exported Polyester / Viscose Blended yarn during the period between July 2009 to March 2011 by filing Shipping Bills from ICD (Ajni) Nagpur and claimed duty drawback at full rate of FOB Value of their export to the tune of Rs.1,81,48,609/- on the ground that they had not availed the Cenvat Credit. Thereafter, the applicant also claimed



an amount of Rs.1,57,152/- towards refund of service tax in terms of Notification No.17/2009-ST dated 07.07.2009 on CHA services and GTA services and this was intimated to the Assistant Commissioner of Customs, ICD, Ajni Nagpur vide its letter dated 17.12.2011 who after issuing a show cause notice and following due process of law confirmed the demand and ordered recovery of Rs.1,52,09,762/- as erroneously excess granted drawback and also ordered for recovery of interest under the provisions of Rule 16 of Customs, Central Excise and Service Tax Drawback Rules, 1995.

12. The applicant has contended that availing refund of service tax paid on GTA service and CHA services, in terms of Notification No. 17/2009-ST dated 07.07.2009 is not equivalent to availing CENVAT Credit so as to disentitle them from availing higher rate of All Industry Rate of duty drawback on export of polyester/viscose blended yarn during July 2009 to March 2011.

13. The applicant has further argued that earlier Notification No. 41/2007-S.T. dated 06.10.2007 (which was superseded by the Notification No.17/2009-ST dated 07.07.2009 and in terms of which the applicant availed refund of service tax on CHA services and GTA services) prescribed condition (e) that "the said goods have been exported without availing drawback of Service Tax paid on the specified services under Customs, Central Excise Duties and Service Tax Drawback Rules, 1995" and the said Condition (e) of Notification No. 41/2007-S.T. barring availability of refund of Service Tax on input services if the goods exported under claim of drawback, has been withdrawn w.e.f. 7-12-2008 vide Notification No. 33/2008-S.T. dated 07.12.2018, thereby allowing the refund of Service Tax as well as duty drawback of service tax paid on the specified services to the exporters after 07.12.2008. In the present case the applicant exported Polyester / Viscose Blended yarn during the period between July 2009 to March 2011 (i.e. after 07.12.2008) from ICD (Ajni) Nagpur and claimed duty drawback at full rate of FOB value on their export.

14. The applicant has submitted that in their appeal against rejection of refund on specified services as per Notification No.17/2009-ST, Commissioner (Appeals) observed that Service Tax refund is not a case of refund under rule 5 of Cenvat Credit Rules, 2004 and have contended that the same findings are relevant and hold good to the question in dispute.

the service tax refund availed by the applicant is Rs.1,57,152/- and the amount of erroneous/excess duty drawback is Rs.1,52,09,762/-, Government.



observes that the applicant have made a strong case against the demand deserving consideration of the issue on merits without insisting on pre-deposit. In this regard Government places reliance on the ratio held by the Hon'ble High Court Allahabad in case of Standard Gram Udyog Sansthan Versus Union Of India [2016(344) ELT) 79)All.) that "In view of decision of Tribunal in 2013 (291) E.L.T. 409 (Tribunal) in a similar matter, petitioner has a strong prima facie case in his favour and Commissioner (Appeals) directions of 25% pre-deposit, would cause serious prejudice - Pre-deposit fully waived and appellate authority directed to decide appeal expeditiously."

16. Therefore, Government in the interest of justice waives pre-deposit of dues along with interest and remands the matter back to the Commissioner (Appeals) for an appropriate decision on merits. The appeal, however, may be heard and decided expeditiously.

17. The revision application is disposed off in the above terms.

18. So ordered.

(SEEMA ARORA)

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

ORDER No. 476 /2020-CX (WZ)/ASRA/Mumbai dtd. 21.04.2020.

To,
M/s Visaka Industries Limited,
39 K.M. Mile Stone, N.H. No.6, Bhandara Road,
Vil Chiruwa, Tah, Mouda, Dist. Nagpur.

ATTESTED

B. LOKANATHA REDDY
Deputy Commissioner (R.A.)

Copy to:

1. The Commissioner of Central GST, Post Box No. 81, Civil Lines, Telengkhedi Road, Civil Lines, Nagpur-440001.
 2. The Commissioner Of Central GST (Appeals) , Telengkhedi Road, Nagpur-440001.
 3. The Assistant Commissioner , Customs, ICD, Ajni, Nagpur.
Sr. P.S. to AS (RA), Mumbai
- Guard file
Prepare Copy.

