F NO. 195/886/13-RA

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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
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. 195/886/13-RA/1330 Date of Issue: 15-03-2018.

ORDER NO. 47/2018-CX (WZ)/ASRA/MUMBAI DATED 15-03-2018
OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF CENTRAL EXCISE ACT,1944.

Applicant : M/s Supertex Industries Ltd. (Unit-II), Plot no. 45/46, Phase-II, Piparia Industrial Estate, Silvassa -394 230 (Dadara and Nagar Haveli)

Respondent : Commissioner of Central Excise & Customs, Vapi

Subject: Revision Applications filed under Section 35EE of Central Excise Act, 1944 against the Orders-in-Appeal No. KRS/49/VAPI/2007 dated 11.09.2007 passed by the Commissioner (Appeals), Central Excise & Customs, Vapi.

ORDER

This revision application is filed by M/s. Supertex Industries Ltd. (Unit-II), Plot no. 45/46, Phase-II, Piparia Industrial Estate, Silvassa -394 230 (Dadara and Nagar Haveli) (hereinafter referred to as "the applicant") against the Order-in-Appeal No. KRS/49/VAPI/2007 dated 11.09.2007 passed by the Commissioner (Appeals), Central Excise & Customs, Vapi, upholding the Order-in-Original No.191/AC/SLV-II/Rebate/06-07 dated 17.10.2006 passed by the Assistant Commissioner of Central Excise, Division-II, Silvassa vide which the rebate claim of Rs. 13,49,798/- was rejected on the ground that the rebate is not allowable on the amount of duty paid on export of second hand capital goods, not manufactured in the premises of exporter.

2. Being aggrieved by the impugned Order-in-Appeal which was received by the applicant on 18.10.2007, the applicant initially filed the appeal E/1270/2007 before the Hon'ble CESTAT, Mumbai on 4.12.2007. The appeal came up for hearing on 4.10.2013. On being realized that appeal before the Hon'ble Appellate Tribunal was not maintainable against the impugned order of the Commissioner of Central Excise (Appeals), as the issue involved in the present proceedings related to rejection of rebate under Rule 18 of the Central Excise Rules, 2002, the said appeal was dismissed as withdrawn on by 4.10.2013 by CESTAT Mumbai. Therefore, the applicant has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds that:-

2.1 The Commissioner (Appeals), has incorrectly interpreted the provisions of Notification no.19/2004-CE (N.T.) dated 6.09.2004 issued under Rule 18 by observing that only new excisable goods can be exported under rebate.

2.2 The Applicant has fulfilled all the conditions of Cenvat Rule as well as of Notification no. 19/2004-CE (NT) dated 6.09.04 inasmuch as;

2.2.1 they are required to reverse the credit originally taken on capital goods as per Cenvat Rule 3(5) on clearance of capital goods from factory either for home consumption or for export and accordingly they have correctly reversed the credit,

2.2.2 Cenvat Rule 3(6) considers such reversal as payment of duty and therefore are eligible for sanction of rebate being duty paid on exportation of goods;

2.2.3 such removal is considered as removal made by the manufacture and therefore, satisfy the condition no.(a) of the Notification.

3. A Personal hearing was held in this case on 16.01.2018 and Shri R.K.Mishra, Managing Director and Shri Sanjay Mishra, Accountant appeared for hearing on behalf of the Applicant. Since there was a delay in filing Revision Application, the Application for Condonation of Delay was taken up. It was pleaded that the applicant received an order from the Commissioner (Appeals) on 11.09.2007. The applicant had filed an appeal before the CESTAT against the said Order-in-Appeal on 4.12.2007. The Mumbai branch of CESTAT passed the order on 4.10.2013 holding that they do not have a jurisdiction in this matter. Hence the applicant filed the impugned Revision Application on 30.10.2013. It is the contention of the applicant that they had filed the appeal before the CESTAT in pursuance to the order of the CESTAT citation 2007 (212) ELT 85 (Tri. - Mumbai), therefore the period of delay may be condoned.

4. Government have carefully gone through the case records and the contention of the applicant. The High Court of Mumbai in Union of India Vs. EPCOS India Pvt. Ltd. citation 2013 (290) ELT 364 (Bom.) had held that the period spent in prosecuting appeal bonafide before CESTAT, which had no jurisdiction for same, has to be excluded under Section 14 of Limitation Act, 1963. Following the ratio judgement of the same Government finds that if the period of filing before CESTAT and prosecuting same before CESTAT is

condoned, the instant application is found to be filed within the stipulated period of 3 months. Following the ratio judgement of aforesaid case law, Government holds that the period the applicant had spent for prosecuting appeal bona fide before the CESTAT is liable to be condoned and accordingly, Government condones delay in filing the instant Revision Application. Accordingly, the case was taken up for Personal Hearing.

5. During the course of Personal Hearing the applicant reiterated the submissions made in the instant Revision Application along with the written brief filed today. He relied upon the case laws cited in para 10 of the compilation and it was pleaded that their case is covered by judgement relied upon them. In view of the same the Revision Application may be allowed and Order-in-Appeal passed by the Commissioner (Appeals) may be set aside.

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. On perusal of records, Government observes that the applicant's rebate claim made under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 – C.E.(NT) dated 06.09.2004 was rejected on the ground as mentioned in para supra.

7. Government notes that the only contention of the Department for rejecting the rebate claim was that the rebate is not allowable on the amount of duty paid on export of second hand capital goods, not manufactured in the premises of exporter.

8. Government observes that the applicants exported the goods and filed rebate claim under Rule 18 of the Central Excise Rules, 2002 read with the Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. The applicant has contended that they have fulfilled all the conditions of Cenvat Rule as well as of Notification no. 19/200-CE (NT) dated 6.09.04 i.e. Central Excise duty has been paid and goods have been actually exported and therefore they are entitled for rebate and in support of the same they relied upon various case laws.

9. Government observes that the original authority i.e. Assistant Commissioner had rejected the claim initially, had not found any such deficiency regarding the payment of Central Excise duty on the exported goods and the export of the said goods.

10. Government also observes that in an identical issue the Commissioner of Central Excise, Raigad on being aggrieved by the order passed by the Joint Secretary to the Government of India in the case of M/s Sterlite Industries dated 20-1-2010 whereby the Revision Application filed by the Commissioner was dismissed, filed a Writ Petition No. 2094 of 2010, before Hon'ble Bombay High Court on the grounds that

- The reversal of credit equal to the amount of duty cannot be said to be payment of duty under Rule 18 of the Central Excise Rules, 2002 and consequently the assessee is not entitled to claim rebate on such reversal of credit.
- Secondly, the capital goods were not exported directly from the factory of the manufacturer as contemplated under Notification No. 41/94, dated 12-9-1994, Circular No. 294/97, dated 30-1-1997 and Notification No. 19/2004, dated 6-9-2004 and, therefore, the rebate claim is liable to be rejected.
- Thirdly, the capital goods imported by the assessee have been used by the assessee for several years and, therefore, the export of capital goods cannot be said to be "removed as such" as provided under Rule 3(5) of the Cenvat Credit Rules, 2004.

11. While rejecting the aforementioned writ petition filed by the Revenue Hon'ble Bombay High Court in its Order dated 24.03.2011 {UOI Vs Sterlite Industries (I) Ltd.[2017(354)ELT 87 (Bom)]}, at paras 5 to 8 observed as under :

> *5. We see no merit in the above contention. Reversal of input credit is one of the recognized method for paying duty on the final product. In fact, the Central Government by its Circular No. 283, dated 31-12-1996 construing similar provisions contained in Rule 57F of the Central*

Excise Rules, 1944 held that where the inputs are cleared on payment of duty by debiting RG-23A Part II as provided under erstwhile Rule 57F(4) of the Central Excise Rules, 1944, the manufacturer would be entitled to rebate under Rule 12(1)(a) of the Central Excise Rules, 1944. Rule 57F in the 1944 Rules is pari materia to Rule 3(5) of Cenvat Credit Rules, 2004. Similarly, Rule 12(1)(a) of the 1944 Rules is pari materia to Rule 18 of the Central Excise Rules, 2002. Therefore, when the Central Government has held that where the duty is paid by debiting the credit entry, rebate claim is allowable, it is not open to the departmental authorities to argue to the contrary.

6. Similarly, the argument that the capital goods have not been exported directly from the factory of the manufacturer is also without any merit because, similar contentions raised by the Revenue in Writ Petition No. 2195 of 2010 has been rejected by this Court by dismissing the petition on 23-3-2010.

7. The last contention of the Revenue is that since the imported capital goods has been used by the assessee for several years, it cannot be said that the capital goods are 'removed as such' as provided under Rule 3(5) of 2004 Rules. There is some dispute as to whether the capital goods imported by the assessee were put to use before they were exported. Assuming that the said capital goods were used by the assessee before export, it would still be export of the capital goods imported by the assessee. In other words, the duty paid capital goods when exported as capital goods even after put to use for some time, Rule 3(5) of 2004 Rules would be applicable, because in such a case the capital goods even after put to use for some time continue to be capital goods.

8. The expression "removed as such" in Rule 3(5) of the Cenvat Credit Rules, 2004 simply means that when inputs or capital goods are removed as inputs or capital goods as such, the assessee shall pay an amount equal to the credit availed in respect of such inputs or capital goods. In other words, inputs/capital goods on the date of removal must be in the same form as they were on the date on which they were brought into the factory. Normal wear and tear of the inputs/capital goods does not make them different from the original inputs/capital goods. Moreover, it is not the case of the Revenue that on account of the user, the character of the capital goods has changed. Therefore, where duty paid inputs/capital goods brought into the factory are subsequently cleared for export, then Rule 3(5) of 2004 Rules would apply. Hence, the Joint Secretary to the Government of India was

justified in holding that use of the capital goods before export does not in any way affect the duty liability on export of such capital goods and consequently does not affect the right of the assessee to claim rebate of duty paid on export of such capital goods.

10. Government also observes that the Supreme Court Bench comprising Hon'ble Mr. Justice D.K. Jain and Hon'ble Mr. Justice Madan B. Lokur vide order dated 14.9.2012 [reported in 2017(354) E.L.T. A26(S.C)] after condoning the delay dismissed the Petition for Special Leave to Appeal (Civil) No. 6120 of 2012 filed by Union of India against the aforementioned Judgment and Order dated 24-3-2011 of Bombay High Court in Writ Petition No. 2094 of 2010. As such the Hon'ble Bombay High Court's Order in Writ Petition No. 2094 of 2010 has attained finality.

11. Following the ratio judgement of the same, Government holds that the order of Commissioner (Appeals) is not proper and legal and hence liable to be set aside and the rebate claims are admissible to the applicant under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004.

12. Revision application filed by the applicant succeeds with consequential relief. So ordered.

True Copy Attested

15.3.18

एस. आर. हिरूलकर
S. R. HIRULKAR
(A.C)

15.3.2018

(ASHOK KUMAR MEHTA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 47/2018-CX (WZ) /ASRA/Mumbai DATED 15.3.2018,

M/s. Supertex Industries Ltd. (Unit-II),
Plot no. 45/46, Phase-II,
Piparia Industrial Estate,
Silvassa -394 230
(Dadara and Nagar Haveli)

Copy to;

1. The Commissioner of CGST, Daman 2nd Floor, Hani's Landmark, Vapi-Daman Road, Chala Vapi.

2. The Commissioner CGST (Appeals), 3rd Floor,Magnus Building Althan Canal Road, Near Atlanta Shopping Centre, Althan, Surat -395007.

3. The Assistant Commissioner CGST , Range-II, Division VI, Silvassa, Daman Commissionerate.

4. Sr. P.S. to AS (RA), Mumbai.

5. Guard File

6. Spare Copy.