



**REGISTERED
SPEED POST**

**F.No. 195/1272/12-RA-Cx
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 6-1-14.....

Order No. 5/14-Cx dated 02.1.2014 of the Government of India, passed by Shri D. P. Singh, Joint Secretary to the Government of India, Under Secretary 35 EE of the Central Excise Act, 1944.

Subject : Revision Application filed under section 35 EE of the Central Excise Act., 1944 against the Order-in-Appeal No. SB/261/Th-I/10 dated 07.12.2010 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-I.

Applicant : M/s Emtex Industries (India) Ltd., Maharashtra.

Respondent : The Commissioner of Central Excise, Thane-I

ORDER

This revision application is filed by M/s Emtex Industries (India) Ltd., Maharashtra against the Order-in-Appeal No. SB/261/Th-I/10 dated 07.12.2010 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-I, with respect to order-in-original passed by the Assistant Commissioner of Central Excise, Kalyan-IV Division.

2. Brief facts of the case are that the applicants are engaged in processing of 100% cotton & man-made fabrics falling under Chapter 52,54 & 55 of Central Excise Tariff Act, 1995. As such, clearing the products for home consumption up to 8th July, 2004 paying appropriate duty of Central Excise after availing cenvat credit on inputs, under cenvat credit Rules, 2002 & 2004. With effect from 9th July, 2004 applicants opted for exemption under Notification No. 30/2004-CE dated 09.07.04 and stopped payment of duty on their final products, as per the aforesaid notification. Consequently the credit earned on the inputs prior to 9th July, 2004 could not be used but remained in balance. Therefore, the applicants sought refund on 07.10.08 of such accumulated credits to the tune of Rs. 23,03,515/- which had remained unutilized in RG-23 Part-II a/c. Assistant Commissioner Kalyan-IV issued a Show Cause Notice vide F.No. V/Refund/Emtex/1793/08 dated 21.04.2009 proposing rejection of it, on the grounds that there is no provision in Central Excise Act, 1944 & rules made there under for refund of unutilized amount of credit lying in balance in RG 23 Part-II a/c, and the claimants have not mentioned under which provision they are entitled for such refund. The original authority vide Order-in-Original No. R-906/09-10 dated 15.10.2009 rejected the refund claim filed by the Applicants.

3 Aggrieved with their Order-in-Original applicant filed appeal before Commissioner (Appeals), who rejected the same

4 Being aggrieved with the impugned Orders-in-Appeal, the applicant has filed these Revision Applications under section 35EE of Central Excise Act, 1944 before Central Government on the following grounds:-

4.1 The applicants vide their letter dated 08.07.2009, in their reply to the said Show Cause Notice, had submitted that under which provisions of Central Excise Act 1944 or rules made thereunder they are entitled to claim the rebate, as follows:

"8. It is submitted that refund of unutilized CENVAT Credit under Rule 5 of the CENVAT Credit Rules, 2004 read with clause (C) of the proviso to sub-section (2) of Section 11B of the Central Excise Act, 1944. It is abundantly clear that any claim of refund is covered under 11B of the Act, prima facie."

As regards the 1st ground taken in Show Cause Notice proposing rejection of filed claim, the department had already specified, also had negated at the same time, that under Rule 5 of the cenvat credit rules, 2004 read with Notification No. 5/2006-CE(NT) dated 14.03.2006 there is provision to claim unutilized amount of credit lying in balance in RG23 Part-II a/c. Hence no need to clarify the point. From the above it was clear & evident that the applicants had clarified the allegations raised in the Show Cause Notice to Assistant Commissioner Kalyan-IV & as such, there was no valid reasons to reject the instant rebate claim. Whereas Assistant Commissioner, ignoring the settled law on the issue, rejected the instant claim upon different ground than what were specified on the Show Cause Notice, as if by any means he is to reject the rebate claim. So such an order passed by Assistant Commissioner is not sustainable & liable to be set aside & quashed.

4.2 The applicants had already put forth the order of Hon'ble Karnataka High Court, CESTAT Bangalore before Commissioner (Appeals). The order of Hon'ble

High Court is upheld by Hon'ble Supreme Court of India. Relevant portions of it are as follows:-

"The High Court in its impugned order upheld the Tribunal's order [2006(205) ELT 956 (Tri.-Bang.)] holding that there is no expressed prohibition in terms of Rule 5 of Cenvat credit rules, 2002 therefore refund claim for unutilized Cenvat/Modvat credit is eligible and refund is to be made in cash when assessee goes out of Modvat scheme or when the factory is closed."

Apart from these case laws, Various other judicial forums like Hon'ble CESTAT Delhi. Hon'ble CESTAT Mumbai has constantly held that the refund claim is eligible to the assessee and refund has to be made in cash, when the assessee goes out of the Modvat Scheme or their unit is closed. In a similar matter of M/s Shree Prakash Textiles, as reported in [2004(169) ELT 162 (Tri.-Mum.)], Hon'ble CESTAT – Mumbai even went to the extent of accusing the lower authority have overlooked relevant provision of law & remanded back the issue for readjudication.

4.3 Rule 11(3) is applicable to input laying in stock or in process or is contained in the final product laying in stock, whereas none of them is the instant case. We have the balance credit laying in our RG 23 Part-II a/c, equivalent to the amount of duty paid on inputs which are neither laying in stock nor in process or contained in the final product laying in stock. Therefore, the said rule is not applicable in the instant case.

4.4 The law is well settled on the issue long back in 1999 Hon'ble Apex Court of India in the matter of M/s Eicher Motors Ltd. [1999(106) ELT 3(SC)] where it is held that "when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which duty had been paid on the

manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and, in particular, it loses sight of the fact that provision for facility of credit as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessee concerned. Therefore, the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assesses had availed of the credit facility for payment of taxes. It is on the basis of earlier scheme necessarily the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of assesses."

5. Personal hearing scheduled in this case on 26.11.2013 was attended by Shri R.K. Sharma, advocate on behalf of the applicant who reiterated the grounds of Revision Application.
6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.
7. On perusal of records, Government observes that the applicant had opted for exemption under Notification No. 30/2004-CE dated 09.07.04 and stopped paying duty on their final products. Upto 08.07.2004, they were clearing their finished goods on payment of duty after availing cenvat credit on inputs. The applicant filed refund claim for the unutilized cenvat credit, which was rejected by the original authority. Commissioner (Appeals) upheld impugned Order-in-Original. Now the applicant has filed this Revision Application on ground mentioned in para (4) above after expiry a more than 9 months from date of receipt of impugned Order-in-Appeal.

8. Government finds that the applicant filed this Revision Application after expiry of more than 9 months from date of receipt of impugned Order-in-Appeal. The time limit for filing revision application is stipulated under section 35EE(2) of Central Excise Act, 1944 and the provisions of section 35 EE of Central Excise Act 1944 for ready reference are extracted as under :-

Revision by Central Government. —

(1) The Central Government may, on the application of any person aggrieved by any order passed under section 35A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 35B, annul or modify such order :

Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.

Explanation. — For the purposes of this sub-section, "order passed under section 35A" includes an order passed under that section before the commencement of section 47 of the Finance Act, 1984 against which an appeal has not been preferred before such commencement and could have been, if the said section had not come into force, preferred after such commencement, to the Appellate Tribunal.

(1A) The Commissioner of Central Excise may, if he is of the opinion that an order passed by the Commissioner (Appeals) under section 35A is not legal or proper, direct the proper officer to make an application on his behalf to the Central Government for revision of such order.

(2) An application under sub-section (1) shall be made within three months from the date of the communication to the applicant of the order against which the application is being made:

Provided that the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.

The sub-section (2) provides for time of 3 months for filing revision application. The delay upto 3 months can be condoned by Central Government on justified reasons. It is mandatory to follow the time limit as prescribed under section 35EE(2). So any application filed beyond the prescribed time limit being time barred cannot be entertained at all and is liable to be rejected as time barred.

8.1 In the instant case the revision application is filed on 21.8.2012 against the impugned orders-in-appeal No. 261/10 dated 07.12.2010. The said application is filed after the expiry of 3 months initial time period and also even after the lapse of condonable period of 3 months. The revision application filed after stipulated time period is clearly time barred and is not maintainable at all. Applicant has claimed that said order was received on 1.1.12. But no evidence has been produced in support of their claim of receiving said order on 1.1.12. So this contention is not acceptable. As such this revision application is time barred.

8.2 Hon'ble Supreme Court in the case of collector Land Acquisition Anantnag and Others Vs. Mst. Katji and others reported in 1987 (28) ELT (SC) has held that when delay is within condonable limit laid down by the statute, the discretion vested in the authority to condone such delay is to be exercised following guidelines laid down in the said judgment. But when there is no such condonable limit and the claim is filed beyond time period prescribed by statute, then there is no discretion to any authority to extend the time limit.

8.3 Hon'ble Supreme Court has also held in the case of UOI vs. Kirloskar Pneumatics Company reported in 1996 (84) ELT 401 (SC) that High Court under Writ Jurisdiction cannot direct the custom authorities ignore time limit prescribed under section 27 of Customs Act, 1962 even though High Court itself may not be bound by the time limit of the said section. In particular, the customs authorities, who are the creatures of the Customs Act, cannot be directed to ignore or act contrary to section 27 of Customs Act. The said judgement is squarely applicable to this case since similar time limit is provided under section 35EE of Central Excise Act, 1944.

8.4 The Hon'ble CESTAT, South Zonal Bench, Chennai in the case of Precision Controls Vs. Commissioner of Central Excise, Chennai 2004 (176) ELT 147 (Tri.-Chennai) held that the "*Tribunal, acting under provision of central*

Excise Act, 1944 has no equitable or discretionary jurisdiction to allow a rebate claim hors the limitation provisions of section 11B ibid-under law laid down by Apex Court that the authorities working under central Excise Act, 1944 and Customs Act, 1962 have no power to relax period of limitation under section 11B ibid and section 27 ibid and hence powers of Tribunal too, being one of the authorities acting under aforesaid acts, equally circumscribed in regard to belated claims-section 11B of Central Excise Act, 1944-Rules 12 of erstwhile Central Excise Act, 1944 Rule 18 of the Central Excise Act, 2002.-Contextually, in the case of Uttam Steel Ltd., also, the Hon'ble Bombay High Court allowed a belated rebate claim in a Writ Petition filed by the assessee. This Tribunal, acting under the provision of the Central Excise Act, has no equitable or discretionary jurisdiction to allow any such claim de hors the limitation provisions of section 11B. "

8.5 The time limitation for filing appeal before Commissioner of Customs (Appeals) as per section 128 of Customs Act, 1962, is 60 days and delay upto 30 days can be condoned by Commissioner (Appeals). In this regard, Hon'ble Allahabad High Court in the case of M/s. India Rolling Mill (P) Ltd. Vs. CESTAT, New Delhi, 2004 (169) ELT 258 (All) has held that Commissioner (Appeals) cannot condone delay exceeding 30 days in filing appeal. Similarly Hon'ble Supreme Court in the case of Singh Enterprises Vs. CCE Jamshedpur 2008 (221) ELT 163 (SC) has also held that Commissioner (Appeals) is empowered to condone delay upto 30 days and has no power to allow appeal to be presented beyond the delay of 30 days. Hon'ble Bombay High Court in the case of Khanpur Taluka Coop Spinning Mills Ltd. Vs. CCE Pune II 2013 (292) ELT 16 (Bom.) has held that High Court cannot direct the appellate authority to condone the delay exceeding 30 days in filing appeal or interfere with the order passed by original authority. Hon'ble High Court of Rajasthan in the case of Kaizen Organics Pvt. Ltd. Vs. UOI 2013 (293) ELT 326 (Raj.) has held that delay exceeding 3 months in filing revision application cannot be condoned.

8.6 In view of above judgement, the revision application filed after stipulated time limit and even after the condonable period, is liable to be rejected as time barred.

9. Government notes that in this case the issue involved is refund of unutilized cenvat credit ^{which} is not covered under section 35EE read with first proviso to section, 35B(1) of Central Excise Act, 1944. As such, the revision application filed beyond jurisdiction is not maintainable before central Government under section 35EE. Applicant can avail the available appellate remedy under section 35B before Hon'ble CESTAT in accordance with the provisions of law.

10. In view of above position the revision application is rejected in terms of above.

11. So, ordered.

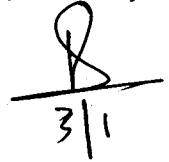


(D.P. Singh)

Joint Secretary (Revision Application)

M/s Emtex Industries (India) Ltd.,
F/4, MIDC, Badlapur,
Distt-Thane,
Maharashtra-421503.

(Attested)

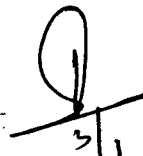


(भगवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
C.B.E.C.-O.S.D. (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

G.O.I. Order No. 5/14-Cx dated 02.01.14

Copy to:-

1. The Commissioner of Central Excise, Thane-I Commissionerate, 3rd Floor, Navprabhat Chambers, Ranade Road, Dadar (West), Mumbai - 400028.
2. The Commissioner of Central Excise (Appeals) Mumbai Zone-I, Meher Building, D.S. Lane, Chaowpathy, Mumbai - 400 007.
3. The Assistant Commissioner of Central Excise, Kalyan-IV Division, 2nd Floor, Bhagwandas Mension Shivaji Chowk, Kalyan (West).
4. Shri R K Sharma, Advocate, 157, 1 Floor, DDA Office Complex, CM Jhandewalan Extn., New Delhi-110055.
5. ✓ PS to JS(Revision Application)
6. Guard File
7. Spare Copy.


(B.P. SHARMA)
OSD (Revision Application)