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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. 198/207-213/SZ/2017-RA/111 Date of Issue: 02.01.2020

ORDER NO.50-56/2020-CX (SZ) /ASRA/MUMBAI DATED 02.01.2020 OF THE 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.

Applicant : The Commissioner of CGST & Central Excise, Madurai.

Respondent: M/s Shiva Texyarn Limited.
Velvarkottai, Vedasandur Taluk,
Dindigul District – 624 803.

Subject : Revision Applications filed, under Section 35EE (1) of Central Excise Act, 1944 against the Order-in-Appeal No. MAD-CEX-000-APP-182 to 188/2017 dated 12.06.2017 passed by the Commissioner of GST & Central Excise (Appeals), Coimbatore.

: ORDER :

This revision application has been filed by the Commissioner of GST & Central Excise, Madurai (hereinafter referred to as "the applicant") against the Order-in-Appeal No. MAD-CEX-000-APP-182 to 188/2017 dated 12.06.2017 passed by the Commissioner of GST & Central Excise (Appeals), Coimbatore.

2. The case in brief is that M/s Shiva Texyarn Ltd., Dindigul (hereinafter referred to as "the respondents") are engaged in manufacturing of cotton yarn, falling under Chapter No. 52 of the Central Excise Tariff Act, 1985 and clearing the same for home consumption as well as for export. They are also exporting the goods manufactured by other units as Merchant Exporter. The respondents are availing full exemption under Notification No. 30/2004-CE dated 09.07.2004 for their home clearances and are availing Notification No.29/2004-CE dated 09.07.2004 as amended by Notification No. 7/2012-CE dated 17.03.2012 for payment of duty under concessional rate on their export goods under claim of rebate. The respondents have filed 7 rebate claims claiming rebate of duty paid on export goods, as per the provisions of Notification No. 19/2004-CE (NT) dated 06.09.2004 as amended issued under Rule 18 of Central Excise Rules, 2002 along with copies of relevant export documents. The Assistant Commissioner, Central Excise, Dindigul-I Division, Dindigul- 624 001 after due process of law, sanctioned the said 7 rebate claims filed by the respondent vide impugned order in originals collectively for Rs. 32,97,058/- (Rupees Thirty Two Lakh Ninety Seven Thousand Fifty Eight Only). The details are as under : -

Sr. No.	R.A. No.	Order in Original No. /Date	Amount of Rebate (Rs.)	Period of Export
1	198/207-213/SZ/2017	MAD-CEX-000-ASC-208-2016 dt. 21.10.2016	486689	Jul.,16
2	198/207-213/SZ/2017	MAD-CEX-000-ASC-149-2016 dt. 09.09.2016	459699	May.,16
3	198/207-213/SZ/2017	MAD-CEX-000-ASC-199-2016 dt. 06.10.2016	485020	Jun.,16 & Jul. 16
4	198/207-213/SZ/2017	MAD-CEX-000-ASC-200-2016 dt. 06.10.2016	486118	Jul.,16
5	198/207-213/SZ/2017	MAD-CEX-000-ASC-152-2016 dt. 09.09.2016	461284	Jun.,16
6	198/207-213/SZ/2017	MAD-CEX-000-ASC-151-2016 dt. 09.09.2016	457549	Jun.,16
7	198/207-213/SZ/2017	MAD-CEX-000-ASC-150-2017 dt. 09.09.2016	460699	May,16

3. The Department has preferred an appeal against these orders in original on the following grounds :-

3.1 The respondent had already filed rebate claims of duty paid on export of goods through Cenvat Credit taken on Capital Goods which were sanctioned by the rebate sanctioning authority and the Department had preferred appeals against those orders before Commissioner (Appeals), Coimbatore which were rejected by the Appellate Authority. The Department has filed Revision Application against the said Orders in Appeal with Revisionary Authority, New Delhi, which is pending decision. In the above circumstances, the issue has not attained finality. However, in the present Orders in Original, the Assistant Commissioner has sanctioned the present 7 rebate claims which appear to be not correct.

3.2 Proviso to Notification No. 30/2004-CE dated 09.07.2004 prescribes that full exemption on goods specified thereon is not applicable in cases where cenvat credit is availed on inputs. The logical inference is that the assessees taking credit of duty paid on inputs alone need to pay duty. The claimants are not required to pay duty since input credit was not availed by them.

3.3 In the instant case, the duty has been discharged from the capital goods credit account of the assessee. As per the proviso to notification No. 30/2004-CE, no obligation is cast on the assessee to pay

duty in such a situation and the exemption granted in the said notification is absolute.

3.4 The claim of rebate is ploy adopted by the assessee to encash the capital goods cenvat credit by paying duty in situations where the assessee is not legally bound to do so. Rule 5 of Cenvat Credit Rules, 2004 which deals with the refund of credit of duty lying unutilized by an assessee specifically excludes credit earned on the capital goods vide sub rule 1(B) of the Rule. Considering that cotton yarn industry is a capital intensive industry and most of them are exempted under Notification No. 30/2004-CE, it emerges that the legislative intention is to prohibit encashment of capital goods credit.

3.5 The Nahar Industrial Enterprises Ltd. case [2012(283)ELT 444 (GOI)] discusses the Notification No. 29/2004 CE which had since been superseded by Notification No. 7/2012-CE dated 17.03.2012. Also Chapter Nos. 52,53 and 55 which appeared in the earlier notification were not mentioned in the Notification No. 7/2012 CE. Hence reliance placed by the learned appellate Commissioner on the decision does not appear to be correct.

3.6 As regards the appellate Commissioner's reliance on the GOI's decision in the case of Garden Silk Mills [2014 (311) ELT 977 (GOI)], it is seen that the said case relates to rejection of rebate for violation of condition prescribed in a Customs Notification and the ratio of the decision does not apply to the issue in hand.

4. The Appellate Authority vide impugned Orders in Appeal rejected the appeals filed by the Department and upheld Orders in Original passed by the rebate sanctioning authority. The Appellate Authority has observed that:-

4.1 The earlier Orders in Appeal are based on various Revision Authority's decisions and Board's Instructions, especially the Board's Circular No. 795/28/2004-CX dated 28.07.2004 which is directly applicable to the issue.

4.2 The ratio in case of Nahar Industrial Enterprises Ltd. (2012(283) ELT444(GOI)) is applicable to the instant case wherein also the respondent had not availed input credit as mandated by Notification No. 30/2004-CE, but paid duty in terms of Notification No. 29/2004-CE amended, by availing Capital Goods Credit.

4.3 The Revisionary Authority's decision in the case of M/s Garden Silk Mills Ltd (2014(311)ELT977 (GOI)) had been rightly relied on for establishing the fact that the respondents are free to choose any of the Notification either 30/2004-CE (a conditional notification) or 29/2004-CE superseded by Notification No. 7/2012-CE whichever is beneficial to them and are not hindered by Section 5A(1A) of Central Excise Act, 1944. There is no stay for the earlier order passed the appellate forum. Even if the order is appealed against by the Department, till date there is no stay to the implementation of the said order of the Commissioner (Appeals). Therefore, there is no binding precedent to the lower adjudicating authority and there is nothing wrong or bad in law as contended by the appellate department.

5. Being aggrieved with the above Order-in-Appeal, the applicant has filed this Revision Application under Section 35EE of Central Excise Act, 1944 before the Government on the similar grounds as discussed in para 3 supra.

6. A personal hearing was held in this case on 14.10.2019. Shri V. Pandiraja, Joint Commissioner, Madurai attended the hearing on behalf of the Department and Shri M.S. Nagaraja, Advocate duly authorized by the respondent appeared for hearing on 04.12.2019 and reiterated the submissions filed through Revision Application and along with those made in the synopsis filed during the personal hearing.

7. 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.

8. From the perusal of records, Government observes that the respondent were engaged in the manufacture of Cotton Yarn falling under Ch. 52 of the First Schedule to the Central Excise Tariff Act, 1985 and cleared the same for home consumption as well as exports. The respondent was duly registered with Central Excise authorities. Government further observes that with reference to goods falling under Ch. 52, the rate of duty is 4% vide Notification No. 29/2004-CE dated 09.07.2004. Vide Notification No. 29/2004-C.E., dated 9-7-2004, effective rates of duty of excise are prescribed for the Textile and Textile Articles thereof falling under Chapter 50 to Chapter 63 of Central Excise Tariff Act, 1985 and there are no conditions prescribed for availment of such exemption. Whereas, vide Notification No. 30/2004-C.E., dated 9-7-2004, full exemption is granted to Textile and Textile Articles thereof falling under Chapter 50 to Chapter 63 provided no credit of duty paid on inputs has been taken under the provisions of the Cenvat Credit Rules, 2002.The basic condition for availing exemption under Notification No. 30/2004-C.E., dated 9-7-2004 was that the respondent was not allowed to take Cenvat Credit on the inputs utilized for manufacturing/processing of the finished goods. Whereas for availing benefit under Notification No. 29/2004-C.E., dated 9-7-2004, there was no such condition of availing or not availing of the Cenvat Credit on the inputs utilized for manufacturing/processing of the finished goods.

9. The respondent had filed rebate claims under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 – C.E.(NT) dated 06.09.2004. It is further observed that the assessee is clearing the goods for home consumption by availing exemption under Notification No. 30/2004-CE whereas he is clearing the goods for export on payment of duty at concessional rate as prescribed under Notification No. 29/2004-CE. It is also observed that the respondent is clearing the goods for export on payment of duty through debit entry in the Cenvat Credit on Capital Goods.

10. The issue involved in the present case is that the respondent is alleged to have simultaneously availed the benefit of Notification No. 29/2004-CE &

Notification No. 30/2004-CE. The Departments contention is that the respondent should have correctly chosen to avail the benefit of Notification No. 30/2004-CE since they were not availing CENVAT credit of duty paid on inputs and had cleared the goods without payment of duty for export. It was contended that in view of the non-availment of credit on inputs by them, the exemption under Notification No. 30/2004-CE was absolute. It has been averred that the procedure adopted by the respondent was a ruse to encash the CENVAT credit availed on capital goods which would otherwise not have been available to them under Rule 5 of the CCR, 2004.

11. The Government notes that as per Board Circular No. 795/28/2004-CX., dated 28-7-2004, the manufacturer can avail both the Notifications No. 29/2004-C.E., and 30/2004-C.E., both dated 9-7-2004 simultaneously, provided the manufacturer maintains separate set of accounts for goods in respect of which benefit of Notification No. 29/2004-C.E., dated 9-7-2004 is availed and similarly, for goods in respect of which benefit of Notification No. 30/2004-C.E., dated 9-7-2004 is availed. The C.B.E.C. further issued a Circular No. 845/3/2006-CX., dated 1-2-2007 to clarify the provision of simultaneous availment of Notification Nos. 29/2004-C.E., and 30/2004-C.E., both dated 9-7-2004 wherein it has been clearly mentioned that non-availment of credit on inputs is a pre-condition for availing exemption under this Notification (30/2004-C.E., dated 9-7-2004) and if manufacturer avails input cenvat credit, he would be ineligible for exemption under this Notification (30/2004-C.E., dated 9-7-2004). The Board vide Circular No. 845/03/2006-CX dated 01.02.2007 (issued under F. no. 267/01/2006-CX-8) further allowed the availment of proportionate credit on the inputs utilized in the manufacture of goods cleared on payment of duty (under Notification No. 29/2004-C.E., dated 9-7-2004) should be taken at the end of the month only. The Government, therefore, infers that the purpose of this clarification was only to check that the manufacturer should not claim cenvat credit on the inputs and avail exemption under Notification No. 30/2004-C.E., dated 9-7-2004.

12. The Government observes that the case laws in respect of Nahar Industrial Enterprises Ltd. & Garden Silk Mills which have been relied upon by the Commissioner (Appeals) in the impugned order are decisions of the Revisionary Authority. Further, the Hon'ble Gujarat High Court had in the case of Arvind Ltd. vs. UOI [2014(300)ELT 481(Guj.)] dealt with the issue of simultaneous availment of two different notifications and observes as under :

> 9. On, thus, having heard both the sides and on examination of the material on record, the question that involves in these petitions is the wrong availment of the benefit of concessional rate of duty vide Notification No. 59/2008, dated December 7, 2008. Admittedly, the final products were exempted from payment of duty by original Notification No. 29/2004-C.E., dated July 9, 2004 as further amended *vide* Notification No. 59/2008-C.E., dated December 7, 2008. The fact is not being disputed by the respondents that the petitioner availed Notification No. 59/2008 for clearance made to export and thereafter filed various rebate claims. It is, thus, an undisputed fact that the petitioner on final products discharged the duty liability by availing the benefit of Notification No. 59/2008 and as has already been noted in the record, it has reversed the amount of Cenvat credit taken by it on the inputs used for manufacturing of such products. Thus, when the petitioner is not liable to pay duty in light of the absolute exemption granted under Notification No. 29/2004 as amended by Notification No. 59/2008-C.E. read with the provision of Section 5A(1A) of the Act and when it has not got any other benefit in this case, other than the export promotion benefits granted under the appropriate provision of the Customs Act and Rules (which even otherwise he was entitled to without having made such payment of duty), we are of the firm opinion that all the authorities have committed serious error in denying the rebate claims filed by the petitioner under Section 11B of the Act read with Rule 18 of the Rules. The treatment to the entire issue, according to us, is more technical rather than in substance and that too is based on no rationale at all.
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> 10. We also cannot be oblivious of the fact that in various other cases, the other assessees have been given refund/rebate of the duty paid on inputs used in exported goods. The stand of the Revenue is also not sustainable that the payment of duty on final products exported at the will of the assessee cannot be compared with other type of cases of refund/rebate of duty. Admittedly, when the petitioner was given exemption from payment of whole of the duty and the petitioner if had paid duty at the time of exporting the goods, there is no reason why it should be denied the rebate claimed which otherwise the petitioner is found entitled to. We are not going into the larger issues initially argued before us as subsequently the Revenue has substantially admitted the claim of rebate of excise duty and has not resisted in substance such claim of rebate.
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> 11. Resultantly, both the petitions are allowed quashing and setting aside the orders impugned in both the petitions by further directing the respondents to grant the petitioner of Special Civil Application No. 10887 of 2012 rebate of Rs. 3,15,63,741/-

(Rupees Three Crore Fifteen Lac Sixty Three Thousand Seven Hundred Forty One only) and Rs. 39,59,750/- (Rupees Thirty Nine Lac Fifty Nine Thousand Seven Hundred Fifty only) to the petitioner of Special Civil Application No. 10891 of 2012, by calculating interest thereon under Section 11BB of the Central Excise Act, 1944, within a period of eight weeks from the date of receipt of a copy of this judgment.

12. Rule is made absolute in each petition to the aforesaid extent. There shall be, however, no order as to costs.

13. It would be relevant to note that the Hon'ble Apex Court [2017(352)ELT A21(SC)] has dismissed the Special Leave Petitions filed by the Union of India against the above judgment of the Hon'ble Gujarat High Court and therefore the matter has attained finality. The said case involved a situation where that assessee had availed the benefit of two unconditional exemption notifications. The Hon'ble Gujarat High Court after careful consideration of the facts, came to the conclusion that the assessee would be entitled to avail either of the two notifications and may opt to pay duty on the goods; i.e. to avail the benefit of the notification which it considers more beneficial. In this case, the assessee chose to avail the benefit of Notification No. 59/2008-CE which levied effective rate of duty whereas Notification No. 29/2004-CE as amended by Notification No. 58/2008-CE fully exempted the same goods. The inference that can be drawn from this judgment is that even when there are two notifications which are unconditional in nature, the assessee would still have the option to pay duty and claim rebate of such duty paid. In the light of the above referred judgment of the Hon'ble High Court, it would follow that the respondent cannot be compelled to avail the benefit of the exemption notification which exempts the goods cleared for export from the whole of the duty of excise.

14. The Government finds that the issue pertaining to the ambit of the provisions of sub-section (1A) of Section 5A of the CEA, 1944 is also relevant to the facts of the case. In the instant case, the Department has put more emphasis to the contention that the respondent ought not to have paid duty while they were eligible to the benefit of exemption under Notification No. 30/2004-CE. The Government finds that Sub-section (1A) of Section 5A of

the Central Excise Act, 1944 which is pertinent to the instant issue stipulates as under:-

> *"(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely the manufacturer of such excisable goods shall not pay the duty of excise on such goods."*

The above provision insists that the exemption granted absolutely from whole of duty of excise has to be availed and in that case there is no option to pay duty. However, in the instant case, goods are exempted under Notification No. 30/2004-C.E. (N.T.) subject to condition that no cenvat credit of duty on inputs has been taken under the provisions of the CENVAT Credit Rules, 2002. Consequently, the Notification No. 30/2004-CE does not pass muster as an unconditional notification. Now given that the Notification No. 30/2004-C.E. (N.T.) is a conditional one, the respondent was not under any statutory compulsion to avail it. Conversely, even if it is assumed for a moment that Notification No. 30/2004-CE is an absolute exemption, the contention that the respondent would be obligated to avail it has been rejected by the Hon'ble Gujarat High Court in the case of Arvind Ltd. Also, as per C.B.E. & C. Circular No. 845/03/06-CX dated 1-2-2007 and 795/28/2004-CX, dated 28-7-2004, both the Notifications can be availed simultaneously. The Government, therefore, holds that there was no restriction on the respondent to pay duty under Notification No. 29/2004-C.E. (N.T.)

15. It is construed from the judgment of the High Court in the case of Arvind Ltd. [2014 (300) E.L.T. 481 (Guj.)] that when there are two unconditional exemption notifications which co-exist, there cannot be any compulsion on the assessee to avail the one which fully exempts excisable goods because such an interpretation would render the exemption with the higher rate of duty to be redundant. All exemptions issued under Section 5A of the CEA, 1944 are issued in the public interest with some specific legislative intent and cannot be rendered inconsequential. The sub-section

(1A) of Section 5A of the CEA, 1944 would have compelling force only when there is a single absolute exemption applicable to an assessee. In the instant case, there are two competing exemption notifications - Notification No. 29/2004-CE is unconditional in nature whereas Notification No. 30/2004-CE is conditional in nature. Against the backdrop of the judgment cited supra which holds that the exemption under an unconditional exemption notification is not binding on an assessee vis-à-vis another exemption notification which unconditionally grants partial exemption, there can be no case for compelling the respondent in the present case to avail the benefit of a conditional exemption notification such as Notification No. 30/2004-CE. Without prejudice to the judgment of the Hon'ble Gujarat High Court, the fact that the Board had issued Circular No. 795/28/2004-CX., dated 28.07.2004 & Circular No. 845/3/2007-CX., dated 01.02.2007 which ratified the simultaneous availment of exemption Notification No. 29/2004-CE and Notification No. 30/2004-CE cannot be lost sight of. The said circulars have also laid down the procedure to be followed in such a situation by maintaining separate accounts of inputs. Needless to say, the circulars issued by the Board are binding on the field formations.

16. The other major contention of the Department is that the respondent has chosen to avail the benefit of Notification No. 29/2004-CE in spite of being eligible for the benefit of Notification No. 30/2004-CE with the intent to encash the CENVAT credit availed on capital goods. In this regard, Government observes that the embargo of Notification No. 30/2004-CE in so far as CENVAT credit is concerned is limited to CENVAT credit of duty paid on inputs. The respondent is very well entitled to the benefit of CENVAT credit of duty paid on capital goods. Therefore, there can be no challenge to the availment of CENVAT credit on capital goods. In view of the judgment discussed above and the Board circulars cited supra, the respondent cannot be disqualified from paying duty on the export goods by availing the benefit of Notification No. 29/2004-CE. Needless to say, payment of duty from the CENVAT account is equitable with duty paid through account current and

hence would be admissible as rebate. The contention made out in the revision application about the legislative intention to prohibit encashment of capital goods credit is not borne out by any provision in the notifications or the sections.

17. In view of above discussions and findings, Government holds that the impugned order of Commissioner (Appeals) is legal and proper and hence, required to be upheld. Government, thus, finds no infirmity in impugned order and upholds the impugned order in appeal.

18. Revision application is dismissed accordingly.

19. So, ordered.

2/11/20

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

ORDER No 50-56/2020-CX (SZ) /ASRA/Mumbai DATED 02.10.2020

To,
M/s Shiva Texyarn Limited.
Velvarkottai, Vedasandur Taluk,
Dindigul District – 624 803.

Copy to:

1. The Commissioner of CGST & CX, Madurai Commissionerate, Central Revenue Buildings, Bibikulam, Madurai- 625 002.
2. The Commissioner, CGST & Central Excise, (Appeals), Coimbatore, 4, Lal Bahadur Shashtri Marg, C.R. Buildings, Madurai -2.
3. The Assistant Commissioner, CGST & CX, Dindigul-I Division, P.B. No. 47, D.No. 68, Nehruji Nagar, R.M. Colony Road, Dindigul – 624 001.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.