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
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Mumbai- 400 005

F NO. 198/66/14-RA /94 Date of Issue: 05.01.2021

ORDER NO. 664 /2020-CX (WZ) /ASRA/MUMBAI DATED 14.12.2020 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF CENTRAL EXCISE ACT,1944.

Subject : Revision Application filed, under Section 35EE of Central Excise Act, 1944 against the Order-in-Appeal No. SUR-EXCUS-002-APP-049-14-15 u/s 35A(3) of Central Excise Act,1944 dated 27.06.2014 passed by the Commissioner (Appeals), Central Excise & Customs-Surat-II.

Applicant : Commissioner, Central Excise & Customs-Surat-II.

Respondent : M/s Vineet Synthetics Pvt. Ltd., Surat.

ORDER

This Revision Application has been filed by the Commissioner, Central Excise & Customs, Surat-II (hereinafter referred to as the "applicant") against the Order-in-Appeal No. SUR-EXCUS-002-APP-049-14-15 u/s 35A(3) of Central Excise Act,1944 dated 27.06.2014 passed by the Commissioner (Appeals), Central Excise & Customs-Surat-II.

2. The brief facts of the case are that Vineet Synthetics Pvt., Ltd., Block No. 283, Plot No.9B, Village Karanj, Taluka- Mandvi, Distt. Surat. (hereinafter referred to as the 'respondent') had filed 4 rebate claims for Rs.8,68,087/-, Rs.2,96,006/-, Rs.11,57,450/-, & Rs.2,89,362/- totally amounting to Rs.26,10,905/- in respect of 4 ARE-1's with the original authority, i.e. Assistant Commissioner Div- Olpad, Surat-II on 10.07.2013 & 18.07.2013 under Rule 18 of Central Excise Rules, 2002 read with Notification No 19/2004-CE(NT) dated 06.09.2004 and section 11B of the Central Excise Act, 1944. The original authority observed that the respondent had debited for payment of duty from non-est balance of Cenvat Credit shown to be lying in the balance in Cenvat Credit account as on February, 2012. The respondent had submitted that the Cenvat Credit amounting to Rs.93,66,762/- was lying as balance in Cenvat credit Account of the Unit in the month of April- 2007. The Jurisdictional Range Officer (JRO) vide his letters dated 20.04.2012 & 26.04.2012 clearly informed the respondent that they had opted for absolute exemption from Central Excise Duty under Notification No.30/2004 CE dated 09.07.2004 as amended, during the period 2007-08, 2008-09 & 2009-10 (Upto Nov.2009) hence could not carry forward /utilize the Cenvat Credit lying in the Cenvat Credit account. This accumulated Cenvat Credit should have lapsed in terms of Rule 11(3) of Cenvat Credit Rules, 2004 which was introduced vide notification no. 10/2007 dated 01.03.2007 and new provisions inserted from 01.03.2007. Therefore, the original authority issued show cause notices dated 07.10.2013 seeking to deny rebate claim for the reason that the notice paid duty by utilizing non-est/accumulated Cenvat Credit which was restricted in terms of Rule 11 (3)(ii) of the Cenvat Credit Rules, 2004. After due process of law, the original Authority rejected the rebate claims filed by the respondent for Rs. 26,10,905/ - on this ground, vide Order-in-Original No. 41 to 44/AC-RFA/2014-Rebate dated 25.02.2014.

3. Being aggrieved with the aforesaid Order in Original, the respondent filed appeal before the Commissioner (Appeals), Central Excise & Customs, Surat-II who vide Order in Appeal bearing No SUR-EXCUS-002-APP-049-14-15 u/s 35A(3) of Central Excise Act 1944 dtd. 27.06.2014 (impugned order) allowed the said appeal filed by the respondent and set aside the Order-in-Original No. 41 to 44/AC-RFA/2014-Rebate dated 25.02.2014.

4. Being aggrieved with the said Order in Appeal, the applicant department has filed the instant Revision Application mainly on the following grounds:-

4.1. The respondent filed the rebate claims in pursuance of, Rule 18 of CER, 2002 which clearly stipulates that the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedures, as may be specified in the notification. The Central Government for the operationalization of the Rule 18, issued Notification No. 19/2004 CE (NT) dated 6.9.2004, as amended wherein conditions, limitations, procedure etc. are prescribed. The first and foremost condition for rebate of duty on export of goods is that the excisable goods shall be exported after payment of duty. The learned Commissioner (A) has not appreciated the fact that the unit has not paid duty for the purpose of exportation of the goods.

4.2 The Commissioner (A) has not appreciated properly the fact of the case wherein it is alleged that the JRO clearly mentioned in his report that the unit had debited duty from non-est balance of Cenvat Credit shown to be lying in balance in Cenvat Credit account as on February 2012. The JRO vide his letter dated 20.04.2012 & 26.04.2012 clearly informed the respondent that they had opted for absolute exemption from Central Excise Duty under Notification No.30/2004 CE dated 09.07.2004 as amended during the period 2007-08, 2008-09 & 2009-10 (Upto Nov.2009) hence could not carry forward /utilize the Cenvat Credit lying in the Cenvat Credit account and the said credit should have lapsed in terms of Rule 11(3)(ii) of Cenvat Credit Rules, 2004. As per record the respondent did not reply to these letters. Therefore they could not utilize the said balance Cenvat Credit for payment of Central Excise Duty on any other final product whether cleared for home consumption or for export or for payment of Service Tax on any output service.

4.3 The Commissioner(A) has not properly appreciated the fact that the Unit had opted for the full exemption under Notification No. 30/2004 CE dated 09.07.2004 for the period 2007-08, 2008-09 & 2009-10 (Upto Nov.2009) which was alleged/ found in the SCNs/OIO but the Commissioner (A) at para 5.1 mentioned that the Unit during the course of appeal have submitted a letter dated 26.04.2012 that they were availing benefits of both the notification w.e.f. 08.03.2006. This submission was required to be verified before coming to any conclusion. Further, the Commissioner(A) has not verified the facts of the records like RT-12 / ER-1 from April-2004 onwards & still concluded that the unit was operating simultaneously both under Notifications No.29/2004 & 30/2004.

4.4 The Commissioner(A) has not appreciated the facts that the allegation on the Unit pertain to period 2007-08, 2008-09 & 2009-10 (Upto Nov.2009) wherein the Unit was operating under Notification No.30/2004 wherein it is a pre condition that the Notification shall not apply to the goods in respect of which credit of duty on inputs or capital goods has been taken under the provisions of CCR,2002.

4.5 The Commissioner(A) has not appreciated the fact that the Unit had carried forward the balance of Cenvat Credit for the period prior to 2007-08 without treating them lapse in terms of provisions of Rule11(3)(ii) of CCR,2004, which was inserted vide Notification No.10/2007 CE (NT) dated 01.03.2007 wherein it is clearly mentioned that:

> *"(3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if,-*
>
> *(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or*
>
> *(ii) the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported.*

In view of the above provision, a manufacturer is required to pay an amount equivalent to Cenvat Credit, in respect of inputs consumed for manufacture of final product which was lying on stock when he has opted for Notification No.30/2004 CE that they will not pay Central Excise duty on their finished goods. If they opted for exemption from whole of the duty of Excise leviable on the said final product, then in order to neutralize the effect of credit taken on inputs they were supposed to treat their credit balance as lapsed. In other words, the moment Unit exercising option for exemption under No.30/2004 the balance credit would automatically be lapsed. Despite the clear legal position the Commissioner (A) has not appreciated this fact that the Unit had carried forward the balance of Cenvat credit and simultaneously clear their excisable goods without payment of duty during the period 2007-08, 2008-09 & 2009-10(Upto Nov.2009) & at the later stage claimed that their accumulated Cenvat Credit could be encashed by filing a rebate claim. In other words there were no balance in the account of Cenvat Credit but lapsed credit was carried forward.

4.6 The Commissioner(A) has not appreciated the fact that the unit had requested to him by explaining the fact at para 4(2) that the Cenvat Credit amounting to Rs.93,66,762/- was lying as balance in Cenvat Credit Account of the Unit in the Month of April-2007. This fact could have been read with the allegation made by the

Revenue that the unit had opted benefit of Notification No.30/2004 CE for the period 2007-08, 2008-09 & 2009-10(Upto Nov.2009). In other words, the unit carried forward their accumulated credit but simultaneously cleared their excisable goods without payment of duty. The fact of balance of credit arisen from which source is not ascertainable at belated stage as much as that the credit of March 2007 is submitted for verification in Feb., 2014 or June 2014. The Commissioner(A) has not appreciated the fact that whenever the unit opt for non payment of Central excise duty on their finished goods in terms of Notification issued under Section 5A then they reverse/debit Cenvat Credit on inputs, WIP, credit of inputs consumed in manufacturer of finished goods lying in stock. The unit was working only under Notification No.30/2004CE during the period 2007-08, 2008-09 & 2009-10 (Upto Nov.2009). At para 5.3 it is clearly mentioned that the Commissioner (A) found that from January 2007 to November 2009, the unit have operated under Notfn No.30/2004 CE only.

4.7 The Commissioner(A) has not appreciated the fact that Sub rule 3 of Rule 11 of CCR,2004 is having two clauses which have to be read one after another in order to appreciate the intention of the Rule. The clause(i) does not state about conditional or unconditional exemption. The Clause(ii) clearly state that if the final product has been exempted absolutely u/s 5A of the Act. It is not disputed that Notification No.30/2004 was issued u/s 5A ibid. Therefore, question of creating confusion of absolute exemption /Conditional exemption does not arise. The Commissioner(A) has relied upon a case law , Commissioner of Central Excise Ahamdabad-II v/s Omkar Textiles Mills Pvt., Ltd.,2010(262) ELT115(Guj.) which is not applicable in the current issue as well as in the CCR,2002/2004 as the issue pertains to prior to introduction of CCR,2002/2004. The Commissioner(A) has not appreciated the fact that the goods exported were not duty paid as the accumulated credit of the unit was lapsed on 01.03.2007 in terms of provisions of Rule 11(3) of CCR,2004. Therefore question of granting of rebate on lapsed credit lying in balance prior to 01.03.2007 does not arises.

Accordingly, it was submitted that the impugned order passed by the Commissioner (Appeals) is liable to be set aside and the Order In Original No. 41 to 44/AC-RFA/2014-Rebate dated 25.02.2014 passed by the Assistant Commissioner, Central Excise and Customs, Division-Olpad, Surat-II be restored.

5. A show cause notice was also issued to the respondent under Section 35EE of the Central Excise Act,1944, who in the cross objections dated 08.11.2014 have submitted as under :-

5.1 They are engaged in manufacture of excisable goods, namely Texurised Polyester Yarn Falling under the Chapter 5402 of the First Schedule to the Central Excise Tariff Act, 1985. They are registered with the Central Excise Department vide Registration No, AAACV8091PXM001 dated 03.12.2003 and have been duly filing monthly returns ER-1. They started production activities in the year 2003-04. Till

08.03.2006, they were clearing the final product Texurised Yarn under exemption Notification no.29/2004-CE and were paying C.Ex. Duty at the rate of 8% on clearance of the same. For the said period there was no such condition in Notification No.29/2004-CE that CENVAT credit cannot be availed by the assessee for paying C.Ex. duty under the said Notification, they cleared the final product by paying C.Ex. Duty @ 8% and simultaneously availed Cenvat Credit on the raw material used as inputs. The effective rate of C.Ex. Duty on the raw material was 16%.

5.2 On 09.03.2006, they intimated the department that from now onwards they will avail the benefits of exemption Notification no.29/2004-CE and 30/2004-CE. They further stated in the said intimation that they have paid C.Ex. duty of Rs.577089/- (Rs.565297 C.Ex. duty + Rs.11306/- Ed.Cess on Texurised Yarn and Rs.476/- C.Ex. duty + Rs.10/- Ed.Cess on Texurised Yarn Waste cleared during the period 01.03.2006 to 08.03.2006.

The details of the Cenvat for the period 01.03.2006 to 08.03.2006 are as under:-

Particulars	C.Ex. duty (Rs.)	Ed.Cess (Rs.)	National Calamity Contingent Duty [NCCD](Rs.)
Opening Balance of Cenvat Credit as on 01.03.2006 (*Accumulated due to difference in rate of duty on inputs and final product*)	97,97,637/-	2,87,325/-	18,79,568/-
Duty Debit for clearance for the period 01.03.2006 to 08.03.2006	5,65,773/-	11,316/-	0
Unutilized Balance of NCCD Reversed on 09.03.2006	0	0	18,79,568/-
Balance of Cenvat Credit as on 09.03.2006	92,31,864/-	2,76,009/-	0

The said amount reflected in the monthly return filed by them, They till November 2006 carried forward the balance of Cenvat Credit. In the month of December, 2006, Audit of records maintained by them was conducted by the Audit officers of the Central Excise Department and as pointed out by the Audit officers they reversed/availed the following Cenvat Credit:-

Particulars	C.Ex. duty (Rs.)	Ed.Cess (Rs.)	Total
Opening Balance of Cenvat Credit as on 01.12.2006	92,31,864/-	2,76,009/-	95,07,873/-
Reversal of Credit involved in the closing stock of inputs lying as on 08.03.2006 at the rate of 16%. 54494 Kg * Rs.72/- = 3923568/-	6,27,770/-	12,555/-	6,40,326/-
Reversal of Credit involved in the closing stock of finished product lying as on 08.03.2006 at the	3,34,120/-	6,882/-	3,41,002/-

rate of 8%. 50933 Kg * Rs.82/- = 4176506/-			
Reversal of Credit involved in the closing stock of Yarn wastage lying as on 08.03.2006 at the rate of 8%	383/-	8/-	391/-
Reversal of Cenvat Credit taken on Capital Goods	550/-	11/-	561/-
Availment of Cenvat Credit on raw material purchased during the period 01.03.2006 to 08.03.2006	8,52,975/-	19,078/-	8,72,053/-
Utilisation of Cenvat Credit for payment of Service Tax on transportation	30,279/-	606/-	30,885/-
Balance as on 31.12.2006	90,91,737/-	2,75,025/-	93,66,762/-

They till November, 2009 carried the said Balance of Rs. 93,66,762/-. For the period March 2006 to November 2009 they regularly filed Central Excise Returns showing the Cenvat Credit balance of Rs. 93,66,762/- and cleared the final product under exemption Notification No.30/2004 without availing Cenvat Credit on the inputs as per condition of Notification No.30/2004. They have maintained separate records of :-

1) Inputs used and Final products cleared under the exemption Notification No. 30/2004-CE &

2) Inputs used and Final products cleared under the exemption Notification No. 29/2004-CE &

5.3 They on 19/12/2009, availed CENVAT credit on the inputs and cleared final product by paying the amount of duty under Notification No.29/2004. Also, they were simultaneously clearing final products under Notification No.30/2004 for which separate records were maintained. However, the Jurisdictional Range officer while scrutinizing, ER-1s returns submitted by them observed that balance of CENVAT credit of Rs. 73,00,855/- was lying in Cenvat Credit accounts as on Feb.2012 and sought clarification for the same. They submitted that the balance of Cenvat credit lying in the CENVAT credit accounts is a result of 16% duty on raw materials i.e. POY and 8% of Central Excise Duty on their final products i.e. Texturised Polyester Yarn, which got accumulated over the period of time. A statement of Shri Sanjay Kumar Agarwal, Director of respondent was recorded on 16.01.2013. On being enquired about application of Rule 11 (3)(ii) of CENVAT Credit Rules, 2004 in the present case he stated that they have adopted Notification No. 30/2004 in F.Y. 2007-08 & 2008-09, but the said rule was introduced under Notification No.10/2007 dated 01.03.2007 and thus the question of lapse of Cenvat Credit lying in Cenvat Account does not arise. Inspite of their bonafide contention of a show cause notice (F.No. V (Ch.54)3-2/Dem/2012-13) dated 21.08.2013 was issued by the Additional Commissioner, Central Excise and Customs, Surat-II demanding CENVAT credit amounting to Rs. 26,29,304/- utilized by the respondent for payment of duty on the final product

exported by them. They filed a Rebate claims of Rs. 26,10,909/- under Rule 18 of Central Excise Rules, 2002 in respect of the duty paid on final product being exported by them and in this regard four show cause notices had been issued to them respondent asking to show cause as to why the rebate claims in respect of goods exported on payment of Central Excise duty under Rule 18 of Central Excise Rules. 2002 read with Notification no. 19/2004-CE (NT) dated 06.09.2004 in the FY 2013-14 should not be rejected as show cause notice (F. No V (Ch.54) 3-2/ Dem/2012-13) dated 21.08.2013 has already been issued by the Ld. Additional Commissioner, Central Excise & Customs, Surat-II demanding the Cenvat Credit of Rs. 26,29,304/- utilized by them respondent for payment of duty. The Adjudicating authority without giving due consideration to their submission rejected their rebate claims.On appeal being filed against the said Order in Original, the Ld. Commissioner (Appeals) considered their contention and allowed the rebate claim. Inspite of the above facts the Department has filed a Revision Application and they are giving issue wise submission in the following manner:-

- Ld. Commissioner (Appeals) has appreciated the fact that excisable goods are exported after payment of duty. The Id. Commissioner (Appeals) stated in 7 Para 5.6 of the OIA that, "I find that since goods exported under different ARE-1s were of duty paid character and the duty was debited from the accumulated credit legally accrued by the appellants, the Adjudicating Authority should have no objection to sanction rebate to the appellants. The appellants have submitted all the required documents to satisfy him. I find no reason to reject the rebate when the goods have been exported and duty has been debited/paid."

  The applicant has failed to properly appreciate the facts of the case and the relevant documents submitted by the respondent. The Id. Commissioner (Appeals) has stated that the goods exported were of duty paid character and duty was debited from the accumulated credit. Thus, once the accumulated credit is proper, duty paid by debiting the credit must be proper and duty stands to be discharged.

- Ld. Commissioner (Appeals) has rightly appreciated that Rule 11(3) (ii) of the CENVAT Credit Rules, 2004 was introduced vide notification no. 10/2007 dated 01.03.2007 and the same is not applicable in the respondent's case. In Para 5.5of the OIA the Id. Commissioner (Appeals) has held that, " I find that the Adjudicating Authority has more impressed on Rule 11(3) (ii) of the CENVAT Credit Rules, 2004 was introduced vide notification no. 10/2007 dated 01.03.2007 which specifically applies only in case wherein "ABSOLUTE EXEMPTION" is granted by a notification issued under the powers conferred under section 5A of Central Excise Act, 1944 whereas Notification No. 30/2004 is a conditional exemption notification. Thus, 11(3)(ii) is not applicable in the appellant's case because the appellants also continued working under other notification no. 29/2004-CE where he can avail and utilize cravat credit."

  Ld. Commissioner (Appeals) correctly stated in Para 5.5 of the OIA that, "I find the case cited by the appellant CCEx, Ahmedabad-II v Omkar Textile Mills Pvt

Ltd 2010 (262) ELT 115 (Guj) appears to be applicable here wherein it is held that Cenvat/Modvat - Deemed credit for independent textile processors - Earned under Notification No. 6/2002-C.E. (NT) which was withdrawn vide Notification No. 8/2003-C.E. (NT), dated, 1-3-2003, w.e.f. 1-4-2003 - HELD : Deemed credit earned by respondent upto 31-3-2003 before withdrawal of deemed credit scheme, could not lapse - There could be no objection to its utilization - Proviso to Clause 3 of Notification No. 6/2002-C.E. (NT) could not be made applicable to goods which had already come into existence for which respondents had availed of credit facility, as that would affect rights of respondents - Rule 3 of Cenvat Credit Rules, 2002. 'Para 8]

- Inspite of the clear speaking order of the Ld. Commissioner (Appeals), the applicant in its application stated that the Commissioner (Appeals) has not properly appreciated the fact that, the respondent could not carry forward/utilize the CENVAT Credit lying in the CENVAT Credit account and the said credit should have been lapsed in terms of Rule 11(3)(ii) of CENVAT Credit rules, 2004 .

- The applicant in Para XIII of the application stated that the case CCEx, Ahmedabad-II v Omkar Textile Mills Pvt Ltd 2010 (262) ELT 115 (Guj) is not applicable in this case as it pertains to issue prior to introduction of CCR, 2002/2004. In this regard it is stated before your honour that the date of judgment given by the Hon. Gujarat High Court is 14.08.2012 i.e. after the introduction of CENVAT credit rules, 2004. This case relates to CENVAT credit rules, 2001. Your honour will appreciate that cases related to CENVAT Credit Rules, 2001 is equally applicable to cases related to CENVAT credit rules, 2004. Further, the respondent relies on the Para 5 of the Order passed by the Hon. Gujarat High Court wherein the court stated that, "This question has already been decided by Division Bench of this Court in Commissioner of Central Excise, Ahmedabad-II vs. Omkar Textile Mills Pvt. Ltd. f 2010 (262) ELT 115 (Guj.)J wherein it has been held that in para:8 the Division Bench has held as under:

"8. Having heard Mr. Ravani, learned Standing Counsel appearing for the Revenue and having perused the order of the authorities below including the order passed by the Tribunal in the case of S. V. Business Pvt. Ltd. (supra) and judgment of this Court as well as Hon'ble Supreme Court we are of the view that the issue is squarely covered by the earlier decision. This Court in the case of Dipak Vegetable Oil Industries Ltd. v. Union of India (supra) had clearly held that a right, which is acquired as a result of a statutory provision, cannot be taken away retrospectively unless the statutory provision so provides or by necessary implication it has the same effect. Even with regard to the proviso to Rule 3 support can be derived from the observations made by the Hon'ble Supreme Court in the case of Eicher Motors Ltd. v. Union of India, 1999 (106) E.L.T. 3 (S.C.) 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 assessees had availed of the credit facility for payment of taxes. Any manner or mode of application of the said rule would result in affecting the rights of the assessee. The Hon'ble Supreme Court further observed

that Section 37 of the Act does not enable the authorities concerned to make a rule which cannot be said to be applied to the goods manufactured prior to 16-3-1995 on which duty had been paid and credit facility thereof has been availed of for the purpose of manufacture of further goods. The Court further observed 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 the duty had been paid on the manufacture products and if such 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 the provision for facility of credit is 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." The Hon. High Court of Gujarat gave its judgment relying on the judgment of Hon. Supreme Court of India wherein the Hon. Supreme Court in the case of Eicher Motors Ltd. v. Union of India, 1999 (106) E.L.T. 3 (S.C.) has laid down a principle that, "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 assessee had availed of the credit facility for payment of taxes". Therefore the said case law is applicable in the respondent's case.

- Rule 11(3) (ii) of the CENVAT Credit Rules, 2004 was introduced vide notification no. 10/2007 dated 01.03.2007, the said rule cannot have retrospective effect for the CENVAT credit accumulated by the respondent of duty on raw materials, that were used in the manufacturing of goods prior to introduction of such Rule. The CENVAT credit amounting to Rs. 93,66,762/- (BED 90,91,737/-+Ed. Cess Rs. 2,75,025) was lying as balance in Cenvat Credit Account of the unit in the month of April, 2007. The said CENVAT credit was availed and credited to the CENVAT account of the respondent in the F.Y.2004-05 and F.Y. 2005-06. Rule 11(3) (ii) of the CENVAT Credit Rules, 2004 was introduced vide Notification No. 10/2007 dated 01.03.2007.

- Thus, the above said rule cannot have retrospective effect for the credit of duty on raw materials that were used in the clearance of goods prior to introduction of such Rule. Applying the same in present case it is submitted that Rule 11(3) (ii) of the CENVAT Credit Rules, 2004 was introduced vide Notification No. 10/2007 dated 01.03.2007 and was applicable from the same date and Notification 30/2004-CE does not anywhere specifically provide that the past accrued right shall be taken away by mandate of Statute nor says unutilized credit earlier earned is prohibited to be carried forward. Therefore, there is no question of lapse of credit lying as balance in Cenvat Credit Account of the unit in the month of April, 2007.

- Further, Section 5A of the Central Excise Act, 1944 empowers the Board to grant exemption from duty either absolutely or subject to some conditions. Section 5A of the Central Excuse Duty is reproduced hereunder for the sake of convenience:

"(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such12 conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon; (IA) 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."

From the language of section 5A your honour will appreciate that exemption notification issued under section 5A of the Central Excise Act can be absolute or subject to some conditions (conditional). Your honour Notification 30/2004 is an exemption notification under section 5A of the Central Excise Act, 1944. It is not an absolute exemption but a conditional one. The benefit of this exemption notification is subjected to the condition that CENVAT on input used for manufacturing the final goods shall not to be availed.

- Further, Rule 11(3) of the CENVAT Credit Rules, 2004 provides that when the final product is exempted under section 5A of the Central Excise Act, 1944 the manufacture shall pay an amount equivalent to the CENVAT credit taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock. And if the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported.

- From the above provisions of law it will be appreciated that Rule 11(3)(ii) of the CENVAT Credit Rules, 2004 attracts only if there is an absolute exemption. Notification No. 30/2004 is a conditional exemption notification and thus by harmonious reading of the above stated laws it is amply clear that Notification 30/2004 can never attract provisions of the Rule 11(3)(ii) of the CENVAT Credit Rules, 2004. The accumulated credit was due to the fact that the respondent cleared the final product by paying central excise duty at the rate of 8% and simultaneously availed Cenvat credit on the raw material used as inputs at the rate of 16%. And in the month of Decembe 2006, as pointed out by the Audit Officers the respondent reversed the CENVAT credit involved in closing stock of inputs, closing stock of finish product, losing stock of Yarn wastage lying as on 8.03.2006 and the balance amount of Cenvat Credit was carried forward. Thus, they have rightly carried forward its CENVAT Credit balance and there is no confusion of absolute exemption/ Conditional exemption as alleged by the applicant.

- They had submitted all the relevant documents before the Ld. Commissioner (Appeals) and the Id. Commissioner (Appeals) have verified all the facts of the case. The Ld. Commissioner (Appeals) in Para 5.1 of the OIA has stated that, "I

find that appellants have submitted four rebate claims of Rs. 26,10,905/- in total along with required documents but it was rejected on the ground that they had debited duty from non est balance of Cenvat Credit shown to be lying in balance in Cenvat Credit accounts as on Feb,2012. It is alleged that initially the appellants had opted for the full exemption under Notification 30/2004 dated 09.07.2004 and stopped taking credit on inputs and stopped payment of duty on final products. Later on, the appellants vide their letter dated 09.03.2006, opted to avail benefits of both the Notification Nos. 29/2004 and 30/2004, that this fact has been once again confirmed by the appellants vide their letter dated 26.04.2012 that they are availing benefits of both notifications w.e.f 08.03.2006. On examination of the records like RT-12/ER-1 from April 2004 to Feb 2006, I find that appellants were taking Cenvat Credit on inputs and paying duty on the clearance of the goods which means they were operating under notification no. 29/2004 CE and not under Notification no 30/2004 CE, as alleged in SCN. However, I find that column of notification availed, appellants have not mentioned anything. I find that in the month of March 2006 the appellants have written both the notifications in the respective column and the same is evident from their letter dated 09.03.2006 that they opted to operate both notifications. That means this allegation that initially the appellants had opted for the full exemption under notification 30/2004 dated 09.07.2004 and stopped taking credit on inputs and stopped payment of duty on final products is not found correct. I find that the corroborative evidence available on records have not been examined properly by the Adjudicating Authority.

- Further, the Ld. Commissioner (Appeals) has also stated in Para 5.3 of the OIA that, *"I find that the opinion to operate under one or both the above said notifications is given only and it remains unchanged till written applications are given to change. I do not find that the appellants have given any written application to change option. I find that from Jan'2007 to Nov'2009, they have operated under absolute exemption Notification No.30/2004CE, but never changed the option as not to work under Notification No. 29/2004 CE, as a evident from ER-1 returns filed under both notifications.*

  From the above paras of Order in Appeal reproduced before your honor, your honor will appreciate that the Ld. Commissioner (Appeals) has verified all the ER-1s filed by them. The Ld. Commissioner (Appeals) has verified and has specifically stated in line no 9 of Para 5.1 of the OIA, "*On examination of records like RT-12/ER-1 from April' 2004 to Feb'2006.*" Further the Id. Commissioner (Appeals) in line no. 3 of Para 5.3 of the OIA has specifically stated the fact that he has verified the ER-1 for the period Jan'2007 to Nov'2009.

- Ld. Commissioner (A) has appreciated and verified the facts that for period 2007-08, 2008-09, 2009-10 (up to Nov 09) wherein the respondent was operating under Notification. No. 30/2004 and 29/2004. The Id. Commissioner (Appeals) has verified the fact that separate records were maintained by the respondent. The Id. Commissioner (Appeals) not only verified the RT-12/ER-1 for the period April-2004 to Feb.2005 but also verified the ER-1 returns till November, 2009 as evident from the Order in Appeal. All the relevant documents were submitted before the Ld. Commissioner (Appeals) there was no

requirement of factual verification from the concerning Range Office. The facts of the case were explicitly clear before the Ld. Commissioner (Appeals) along with all supporting documents. Further, it is alleged that the credit of March 2007 is submitted for verification in Feb. 2014. In this regard it is stated that the said fact is also incorrect. In the month of December 2006, Audit of Central Excise records maintained by the respondent were conducted by the Audit Officers of the Central Excise Department. During the course of audit as pointed out by the Audit Officers the respondent has availed as well as reversed the CENVAT credit on inputs. The amounts of CENVAT credit availed/reversed were as per the instructions of the Audit party. The said amounts were also reflected in the monthly return filed by the respondent. The copy of return for the month of December'2006 is enclosed Thus the closing balance of Rs. 93,66,762/- of December'2006 was carried forward by them till November'2009.

- The Audit Officers never rejected the CENVAT credit balance lying during the Audit. Further, Central Excise Audit was again conducted by the Department for the period 01.10.2007 to 9.10.2012 in their premises. Even in the second audit of Central Excise records EA 2000 Scheme no para was raised regarding in admissibility of CENVAT credit lying balance as on 01.04.2007. The copy of Audit report is enclosed. The first Central Excise Audit was conducted in the month of December, 2006 and second in the month of October, 2012 therefore fact that the credit of March 2007 is submitted for verification in Feb. 2014 is not correct.

- They have maintained separate records of inputs used and final products cleared under the exemption notification no. 30/2004 — CE and inputs used and final products cleared under the exemption notification no. 29/2004 — CE. The relevant documents such as Daily Stock Register, ER-1 returns were submitted before the Ld. Commissioner (Appeals). The copies of the same are also enclosed as 64 to 181. The Ld. Commissioner (Appeals) in Para 5.2 of the OIA has specifically mentioned that the respondents was maintaining separate records. The relevant extract of the OIA is reproduced hereunder:

> *"I find that the appellants after opting for Notification No. 30/2004-CE along with notification no. 29/2004CE w.ef. 09.03.2006 have started maintaining separate records under two notifications. I find that the appellants have debited the Cenvat credit taken on Closing stock of inputs @ 16%, finished goods lying in stock @8% , Capital goods and yarn waste etc on 8.3.2006. Thus I find that after reversal, the Cenvat credit of Rs. 9231864/- + Ed. cess Rs. 276009/- remained balance in their credit account on 31.03.2006. Since, the appellants started operating under both notifications the appellants kept this unutilized credit for further use under notification No. 2902004 CE and accordingly kept on filing returns. Since the appellants were also operating under absolute exemption notification No. 30/2004 CE, they kept and maintained separate account for inputs used for manufacture of exempted goods where no Cenvat Credit availed and no duty paid for clearance. On the other hand, the credit accrued as a result of differential duty @ 16% duty on raw material i.e. POY and 8% of Central Excise duty on their final products i.e. Texturised Polyster Yarn, accumulated over the period was utilized by the appellants for payment of duty under notification No. 29/2004-CE where*

the input credit has been taken by them. Since the appellants have opted work under Not No. 29/2004 CE, the credit accumulated cannot lapse."

- Further, the Ld. Commissioner (Appeals) stated in Para 5.3 of the OIA that, *"I find that from Jan'2007 to Nov '2009, they have operated under absolute exemption Notification No.30/2004CE, but never changed the option as not to work under Notification No. 29/2004 CE, as evident from ER-1 returns filed under both notifications."* From the said line the Ld. Commissioner (Appeals) has clearly brought out the facts of the case by stating that the respondent was operating under both the notifications simultaneously by maintaining separate records. The Ld. Commissioner (Appeals) verified the facts by scrutinizing ER-1 returns of them
- They in this regard also relies upon the Board's Circular No. 795/28/2004-CX., dated 28-7-2004 which allows the manufacturer to avail both Notification Nos. 29/2004-C.E. and 30/2004-C.E. simultaneously provided they keep separate accounts in both cases.
- The judgment and order of the Commissioner (Appeals) is as per law, as per the proven facts based on the evidence on records which was submitted by them during the course of investigation and the said order is within the framework of statutory provisions of the prevailing Act and rules framed there under.

6. In view of change in Revisionary Authority, final Personal hearing was accorded to both applicant and respondent on 03.12.2020 through video conferencing. Though nobody appeared on behalf of the applicant department, Shri Anish Goyal, CA [Authorised Representative] attended the hearing on behalf of the respondent through video conferencing. He reiterated earlier submissions filed through cross objections dated 08.11.2014 and additional written submissions dated 22.01.2020 made before my predecessor during the personal hearing held on 22.01.2020. He pleaded that the impugned Order in Appeal be upheld and Revision Application filed by the department be rejected.

7. In their additional written submissions dated 22.01.2020, the respondent re-iterated their submissions made vide cross objections dated 08.11.2014. Additionally they interalia submitted that Jurisdictional Range Officer (JRO) issued a show cause notice dated 21.08.2013 demanding the amount of Cenvat Credit utilised for period April 2010 – Sept.2010 of Rs.26,29,304/-; that subsequently for April 2013 to June 2013 for Rs.30,82,563/- another SCN dated 15.01.2014 was issued; that third SCN dated 08.05.2014 was issued for Rs.29,026/- for the period December, 2013; that total amount of Rs.57,40,893/- for which SCNs were issued, was confirmed by Joint Commissioner vide Order in Original No.46 to 48/JC-OP/DEM/Olpad/2014 dated

12.06.2014; that they filed the appeal before Commissioner (Appeals) against the said Order in Original; that Commissioner (Appeals) allowed the Appeal vide Order in Appeal No. SUR-EXCUS-002-APP-083 & 084-14-15 dated 27.08.2014; that the Revenue Department has filed and appeal against the said Order in Appeal which is pending before the Hon'ble CESTAT, Ahmedabad. The respondent further submitted that the basic allegation of the department was that credit should have been lapsed in terms of Rule 11(3)(ii) of Cenvat Credit Rules, 2004 which was inserted by Notification No.10/2007 with effect from 01.03.2007. They also relied upon the following judgments on various merits points as follows:-

a. Rule 11(3)(ii) of Cenvat Credit Rules, 2004 which was introduced by Notification No.10/2007 with effect from 01.03.2007 cannot have retrospective effect as the cenvat credit balance accumulated by them of duty on raw materials that were used in the manufacturing of goods prior to introduction of such Rule, i.e. during the F.Y. 2004-05 and F.Y 2005-06 and balance as on 31.12.2006 was Rs.93,66,762/-.

(i) In case of Eicher Motors Ltd. Vs Union of India 1999(106)E.L.T. 3(S.C.) has laid down a principle that "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 assessees had availed of the credit facility for payment of taxes".

(ii) CCE Vs Gokaldas Intimate Wear [2011 (270) E.L.T. 351 (Kar.)]

"6. Therefore, it is clear from the aforesaid. Rule that till 1-3-2007, the assessee was entitled to benefit, of the cenvat credit in respect of inputs contained in the work in progress and semi finished products. The said amendment is prospective in nature. It comes into effect from only 1-3-2007. In the instant case, the period is anterior to 1-3-2007, which has no application. Therefore, the substantial questions of law raised in this appeal are answered in favour of the assessee and against the revenue".

(iii) In case of HMT & ORS Vs CCE, Panchkula, 2008-TIOL-CESTAT-DEL-LB it was held that "when the input-credit legally taken and utilised on the dutiable final products, need not be reversed on the final product becoming exempt subsequently".

They also relied on the following judgments:-

CCE, Bangalore-II Vs Mother Dairy 2009 (245) E.L.T. 413 (Tri. - Bang.),

CCE Ahmedabad-II Vs Omkar Textile Mills Ltd.,2010 (262) E.L.T. 115 (Guj.)

M/s Modern Denim Vs CCE, Ahmedabad, 2018-TIOL-2215-CESTAT-AHM

CCE Chandigarh Vs Saboo Alloys Pvt. Ltd., 2008(228)ELT422(T-Del.)

b *Rule 11(3)(ii) of Cenvat Credit Rules, 2004 which was introduced vide Notification No.10/2007 with effect from 01.03.2007 specifically applies only in case case wherein "Absolute Exemption" is granted by a Notification issued under the powers conferred under Section 5A of Central Excise Act, 1944 whereas Notification No. 30/2004 is a conditional exemption Notification and thus Rule 11(3)(ii) is not applicable in this case as they also continued working under other Notification No. 29/2004-CE where they can avail and utilize cenvat credit.*

They rely on Welspun India Ltd Vs CCE & ST Rajkot, 2019-TIOL-1808-CESTAT-AHM wherein the Hon. Ahmedabad CESTAT in para 7 of the Order has specifically stated that the appellant opted for exemption under Notification 30-2004-CE which is not absolute but conditional one, therefore, the provision of clause (ii) of Rule 13, which provides for lasping of credit unutilized, shall not apply.

8. Government has carefully gone through the relevant case records, Order-in-Original, Order-in-Appeal, cross objections & written submissions. The issue to be decided in the instant Revision Application is whether the respondent unit is eligible for rebate of duty paid from accumulated Cenvat credit as on 09.03.2006 on the goods exported by them during the period from April-2013 under Rule 18 of the Central Excise Rules read with Notification No 19/2004-CE (NT) dated 06.09.2004, when they had opted for benefit of Notification No.30/2004 CE continuously for the period 2007-08, 2008-09 & 2009-10 (Upto Nov.2009).

9. The applicant department has contended that the respondent Unit had carried forward the balance of Cenvat Credit for the period prior to 2007-08 without treating the same as lapsed in terms of provisions of Rule11(3)(ii) of Cenvat Credit Rules,2004, which was inserted vide Notification No.10/2007 CE (NT) dated 01.03.2007 and that the utilization of lapsed credit is a loss to exchequer. The respondent unit has opted for the Notification No. 30/2004 CE but had carried forward the Cenvat Credit balance available with them as on 09.03.2006. Respondent unit had argued that they were operating simultaneously both under Notifications No.29/2004-CE & 30/2004-CE and that the provisions of Rule 11(3)(ii) of the Cenvat Credit Rules, 2004 attracted only if

there was an absolute exemption. Notification No. 30/2004 is a conditional exemption notification and thus by harmonious reading of the above stated laws it is amply clear that Notification 30/2004 can never attract provisions of the Rule 11(3)(ii) of the CENVAT Credit Rules, 2004. Therefore, there is no question of lapse of credit lying as balance in Cenvat Credit Account of the unit in the month of April, 2007.

10. On careful consideration of the submissions of both the sides and on perusal of the records, Government observes that the respondent started production activities in the year 2003-04. Till 08.03.2006, they were clearing the final product Texurised Yarn under exemption Notification no.29/2004-CE and were availing Cenvat Credit and paying C.Ex. Duty. Thereafter they had opted benefit of Notification No.30/2004 CE for the period 2007-08, 2008-09 & 2009-10 (Upto Nov.2009). The dispute in the instant case is regarding the carrying forward of balance of Cenvat credit the respondent had in their account on 09.03.2006.

11. Incidentally sub-rule (3) to Rule 11 of Cenvat Credit Rules, 2004 was inserted vide Notification No. 10/2007-C.E. (N.T.), dated 1-3-2007 which reads as follows –

> *"A manufacturer or producer of a final product shall be required to pay an amount equivalent to the Cenvat credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product lying in stock, if*
>
> *(i) he opts for exemption from whole of duty of excise leviable on the said final product manufactured or produced by him under a notification issued under Section 5A of the Act; or*
>
> *(ii) the said final product has been exempted absolutely under Section 5A of the Act, and after deducting the said amount from the balance of Cenvat credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service; whether provided in India or exported."*

The sub-rule (3)(i) & (ii) of Rule 11 of Cenvat Credit Rules, 2004 clearly stipulates that if a manufacturer opts for exemption from whole of duty of excise leviable on the said final product under a Notification issued under Section 5A of the Act or the said final product has been exempted absolutely under Section 5A of the said Act, he shall be required to pay an amount equivalent to the Cenvat credit taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in

the stock and after deducting the said amount from the balance of Cenvat credit, if any lying in his credit, the balance if any still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export or for payment of Service Tax on any output service, whether provided in India or exported. The Notification No. 30/2004-C.E. provides for exemption from whole of duty and therefore Government finds force in arguments of the applicant department that the excess cenvat credit lying in balance as on 09.03.2006 should have lapsed as on 1-3-2007 when sub-rule (3) of Rule 11 of the Cenvat Credit Rules, 2004 was introduced on a subsequent date. Government also observes that even if they had opted for the benefit of notification before 1.3.2007 they were required to expunge such credit when the rules were amended and the sub-rule (3) of Rule 11 of the Cenvat Credit Rules, 2004 was introduced. It is also on record that the Central Excise duty paid by the respondent for the impugned exports for which they claimed rebate was paid out of such accumulated Cenvat Credit as on 09.03.2006 which should have lapsed w.e.f. 01.03.2007 as explained hereinabove. Since there was no accumulation of Cenvat credit validly in law, there was no question of duty being paid therefrom.

12. Government observes that the respondent unit has relied upon Circular No.795/28/2004-CX dated 28.07.2004 which allows the manufacturer to avail both Notification Nos. 29/2004-C.E. and 30/2004-C.E. simultaneously. Even in this circular, at clarification to issue No. 2, it was clarified that for manufacturers who had pre-budget stock of inputs (or stock of semi finished or finished goods which contained inputs) on which credit had already been availed, he can continue to pay duty on the finished goods made therefrom at post budget rates or he can reverse the credit amount and avail full exemption on the finished goods. As the respondent unit had opted benefit of Notification No.30/2004 CE for the period 2007-08, 2008-09 & 2009-10 (Upto Nov.2009) and availed exemption from payment of duty they were required to reverse the entire cenvat credit amount before opting for exemption under the said Notification.

13. In Eicher Motors Ltd.[1999(106)E.L.T.3(S.C.) relied upon by the respondent, the challenge to the validity of scheme as modified by introduction of Rule 57F of Central Excise Rules, 1944 was under consideration. According to Section 57F (4A) of Central Excise Rules, 1944, credit which was lying unutilized on 16-3-1995 with the

manufacturers, stood lapsed and wherein Hon'ble Apex Court observed that *"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 assessees had availed of the credit facility for payment of taxes.* The above judgment was delivered on a different set of facts and circumstances compared to the case in hand in as much as in the present case the option to carry forward credit and pay duty on finished goods was very much available to the respondent. However, the respondent preferred to avail absolute exemption under Notification No. 30/2004-CE and therefore the entire Cenvat credit of duty lying unutilized when they opted for the benefit of Notification No. 30/2004-CE should have lapsed. Hence the reliance placed by the applicant on this judgment is misplaced.

14. Government further observes that though the respondent had availed the Cenvat Credit accumulated for the period prior to 1.3.2007 when the Cenvat Credit rules were amended and the sub-rule (3) of Rule 11 of the Cenvat Credit Rules, 2004 was introduced, they opted for the exemption from payment from duty vide Notification No. 30/2004-CE continuously for the years 2007-08, 2008-09 & 2009-10 (Upto Nov.2009). Hence, they were bound to follow the sub-rule (3) of Rule 11 of the Cenvat Credit Rules, 2004 which they failed to do. Hence, reliance place by them on CCE Vs Gokaldas Intimate Wear [2011 (270) E.L.T. 351 (Kar.)] is also of no avail to them.

15. Similarly the facts of the case of M/s HMT & Ors Vs CCE, Panchkula, 2008-TIOL-1884-CESTAT-DEL-L.B. wherein the Larger Bench decision of the Tribunal was confirmed by the P & H High Court. The Court after referring to various judgments of the Tribunal and High Courts and more particularly placing reliance on the Apex Court decision in the case of *Dai Ichi Karkaria* (1999 (112) E.L.T. 353 (S.C.) held that it is not a matter of dispute that the assessee has paid the duty on inputs used in the indicated manufacturing of final goods, the assessee has maintained separate accounts/record, duly entered credit of duty-paid on the inputs in manufacture of final goods and validly availed the Cenvat credit. Therefore, the same cannot be reversed on the ground that the final product were subsequently exempted from tax. Whereas in the instant case the option of availing either Notification No. 29/2004-CE or 30/2004-CE was very much available to the respondent from the beginning and once they had opted to avail exemption from the payment of duty under Notification

30/2004-CE continuously for the years 2007-08, 2008-09 & 2009-10 (Upto Nov.2009), all the conditions stipulated under the sub-rule (3) of Rule 11 of the Cenvat Credit Rules, 2004 were required to be followed by them. Moreover, Hon'ble Tribunal in the said Order had not gone into the submission of the Ld. Advocate that the Notification No. 10/2007-C.E. (N.T.), dated 1-3-2007 inserted sub-rule (3) to Rule 11 of Rules 2004, is a specific provision for reversal of credit because such issue was not in the referral order, hence distinguished. On a similar footing reliance placed by the respondent on CCE, Bangalore-II Vs Mother Dairy 2009 (245) E.L.T. 413 (Tri. - Bang.),CCE Ahmedabad-II Vs Omkar Textile Mills Ltd.,2010 (262) E.L.T. 115 (Guj.)M/s Modern Denim Vs CCE, Ahmedabad, 2018-TIOL-2215-CESTAT-AHM and CCE Chandigarh Vs Saboo Alloys Pvt. Ltd., 2008(228)ELT422(T-Del.) are found to be misplaced.

16. As regards reliance placed by the respondent on the judgment of M/s Welspun India Ltd Vs CCE & ST, Rajkot 2019-TIOL-1808-CESTAT-AHM, the same is distinguished on facts of the case in as much as in that case the credit lying unutilized as on 01.04.2008 which was attributable to inputs used in goods already exported before 01.04.2008 and refund of the same was already sanctioned to the assessee under Rule 5 of CCR and it was held that objective of Rule 5 cannot be defeated by invoking provisions of Rule 11 of CCR. Whereas in the case in hand though the respondent availed exemption from the payment of duty under Notification 30/2004-CE continuously for the years 2007-08, 2008-09 & 2009-10 (Upto Nov.2009) they carried forward the accumulated balance of cenvat credit as on 09.03.2006 in contravention of provisions of Rule 3 Rule 11 of Cenvat Credit Rules 2004 inserted on 01.03.2007.

17. In view of the forgoing discussion Government holds that as the respondent had opted for benefit of exemption Notification No.30/2004 CE continuously for the period 2007-08, 2008-09 & 2009-10 (Upto Nov.2009), the Cenvat Credit Balance carried forward in their Cenvat accounts lapsed after insertion of sub-rule (3) of Rule 11 of Cenvat Credit Rules, 2004 w.e.f. 01.03.2007 since the respondent availed absolute exemption on all their final products during the aforesaid period and as such the duty paid from such lapsed Cenvat Credit on the said exported goods at a much later date is not a payment of duty and therefore their rebate claims amounting to Rs.26,10,905/- were rightly held inadmissible by the original authority.

18. Reliance is placed on the judgment of the Hon'ble Bombay High Court in the case of Union of India vs. Rainbow Silks[2011(274)ELT 510(Bom)]. In that case their Lordships were dealing with a case where the merchant exporter-respondent had claimed rebate in respect of goods where the manufacturer of the exported goods was found to have availed CENVAT credit on the basis of bogus documents. The Hon'ble High Courts observations regarding the inadmissible CENVAT credit are reproduced below.

> *"7. .....The contention of the Revenue is that under Rule 18 of the Cenvat Credit Rules, 2002, rebate can be granted of excise duty paid on goods exported. According to the Revenue, in these cases no excise duty was as a matter of fact paid. Cenvat credit was accumulated on the basis of fraudulent documents of bogus firms and such credit was utilised to pay duty. Since there was no accumulation of Cenvat credit validly in law, there was no question of duty being paid therefrom. This submission warrants serious consideration and the Revisional Authority would have to apply its mind to it. In that view of the matter, we find that the approach of the Revisional Authority is unsustainable."*

Government observes that the fundamental principle which the Hon'ble High Court has endorsed through the judgment cited supra is that rebate under Rule 18 can only be granted of excise duty *paid* on goods exported. In the present case, the CENVAT credit balance available in their account was to lapse at the time of opting for complete exemption on their final product. However, the respondent unit has chosen to not adhere to the requirement of the rules and continued to retain a very large amount of such CENVAT credit. Under the provisions of the Act, it is open to the manufacturer to pay duty through CENVAT credit account by debit entry. However, if any inadmissible CENVAT credit or CENVAT credit which should correctly have lapsed is continued to be retained and if such amount is utilized for the purpose of payment of the Central Excise Duty, it would mean that the appropriate duty has not been paid and the consequences of non-payment of duty would follow. The observation made by their Lordships that "Since there was no accumulation of CENVAT credit validly in law, there was no question of duty being paid therefrom." is squarely applicable to the facts of the present case. In the circumstances where the exported goods are clearly non-duty paid, it is evident that the question of rebate being sanctioned would not arise. Therefore, Government annuls, thus sets aside Order in appeal SUR-EXCUS-002-APP-049-14-15 u/s 35 A (3) of Central Excise Act, 1944 dated 27.06.2014 passed by the Commissioner (Appeals), Central Excise & Customs, Surat-II.

19. Instant Revision Application is thus decided in the above terms.

14/12/2020

(SHRAWAN KUMAR)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No. 664 /2020-CX (WZ)/ASRA/Mumbai

To,
Commissioner of Central Goods & Services Tax, Surat,
Central Excise Building, Chowk Bazar,
Surat, 395001- Gujarat.

Copy to:

1. M/s Vineet Synthetivs Pvt. Ltd., Block No. 283, Plot No. 9B, Village Karanj, Taluka Mandvi, Dist-Surat
2. The Commissioner of CGST, (Appeals), 3rd Floor, Magnus Building, Althan Canal Road, Near Atlanta Shopping Centre, Althan, Surat-395007
3. Assistant Commissioner of CGST, Division-II; Surat Commissionerate , Central Excise Building, Chowk Bazar, Surat, 395001- Gujarat
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.