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SPEED POST

F.No. 195/792/11-RA
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 21.3.14

Order No. 74/14-cx dated 06-03-2014 of the Government of India, passed by Shri D. P. Singh, Joint Secretary to the Government of India, under section 35 EE of the Central Excise Act, 1944.

Subject	:	Revision Application filed, under section 35 EE of the Central Excise, 1944 against the Order-in-Appeal No. 06/2010/SLM(ST) dated 29-01-2010 passed by Commissioner of Customs and Central Excise, (Appeals), Salem
Applicant	:	Adani Enterprises Limited, Adani House, Nr. Mithakhali Circle, Navrangpura, Ahmedabad-380009.
Respondent	:	Commissioner of Customs & Central Excise, Salem.

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ORDER

This revision application is filed by Adani Enterprises Limited, Adani House, Nr. Mithakhali Circle, Navrangpura, Ahmadabad against the Order-in-Appeal No. 06/2010/SLM(ST) dated 29-01-2010 passed by Commissioner of Customs & Central Excise, (Appeals), Salem with respect to Order-in Original passed by the Additional Commissioner of Central Excise, Salem.

2. Brief facts of the case are that the applicant engaged in the business of import and export of various goods, have procured Grey Woven power Loom Fabrics from various places and have got them processed at M/s. Erode Rana Textile Processors Ltd., Erode. Then the processed fabrics have been exported to various foreign countries by the applicants. The applicants in accordance with Rule 12 of the erstwhile Central Excise Rules, 1944 read with Notification No. 31/98 CE (NT) dt. 16-02-1999 had claimed and received rebate of duty of Rs. 81, 68,999/- for the goods exported by them during the period January 1999 to March 2000. The admissible rebate of duty with regard to processed textile fabrics was based on a formula mentioned in the notification according to which monthly average rate of rebate was inversely proportional to the actual quantum of processed woven fabrics produced during the month i.e. if the quantity of fabrics processed is more, the rate of rebate will be less and if the quantity of fabric processed is less, then rate of rebate will be more. Subsequently upon investigation by the Central Excise preventive group it surfaced that the processor who undertakes processing of fabrics for several customers had suppressed the actual production of the processed fabrics in the statutory records and have shown only lesser quantity. Had the processor furnished the actual production figures to the department, the eligible amount of rebate for the applicants would have been lesser by Rs. 30,73,604/-. Hence, the applicants was put on notice by the department proposing for the recovery of excess rebate sanctioned. Upon confirmation of the demand for recovery of the excess rebate sanctioned along with interest besides imposition of penalty by the lower authority vide Order-in-Original Sl. No. 05/2006 (ADC) dt. 31-03-2006; the applicants filed appeal to the Commissioner (Appeals) challenging the said order. The appellate authority vide his Order-in-Appeal No. 144/2006 CE (SLM) dt. 01-08-2006 had set

aside the order by the lower authority by allowing the appeal by way of remand holding that the order is not sustainable in law in as much as the same has been passed by the lower authority without providing the applicants the relied upon documents which is in violation of the principles of natural justice. Subsequently, vide impugned Order-in-Original by the lower authority consequent to the Order-in-Appeal reconfirmed the demand without providing the relied upon documents.

3. Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioner (Appeals), who rejected the same. The applicant initially filed appeal before Tribunal, who vide order dated 05-09-2011 rejected the applicant's appeal on the ground of non-maintainability and lack of jurisdiction.

4. Now, being aggrieved by the impugned Order-in-Appeal dt. 29-01-2010, the applicant has filed this revision application under section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 The Commissioner (Appeals) failed to appreciate that the Order-in-Original had been passed in gross contempt of the Order-in-Appeal dated 1st August 2006, passed by the then Commissioner (Appeals) and also in breach of the principles of natural justice. The Commissioner (Appeals) vide the aforesaid order dated 1st August 2006 had given clear and categorical directions to the original adjudicating authority to furnish all relevant relied upon documents to the applicants prior to adjudicating the case, which directions were bound to be followed and given effect to. The Commissioner (Appeals) ought to have appreciated that the said Order-in-Appeal dated 1st August 2006 passed by his predecessor had been accepted by the department and no appeal against the same had been filed. As such, it was incumbent and mandatory on the part of the original adjudicating authority to have followed the directions of the higher authority. The Commissioner (Appeals) failed to appreciate the order of the Hon'ble Tribunal in Voltas Limited Vs. Commissioner of Customs & Central Excise, Hyderabad reported at 2006 (202) ELT 355 (Tri.- Bang.) wherein it was held that a show cause notice issued for recovery of erroneous

refund would not sustainable when the order sanctioned refund was not challenged by the revenue.

4.2 The Commissioner (Appeals) ought to have appreciated that it was not open to the Additional Commissioner to go into the necessity or otherwise of providing the relied upon documents to the applicants in the light of the binding order of the Commissioner (Appeals). As the department had not challenged the order of the Commissioner (Appeals), it amounted to an acceptance of the same, and the Additional Commissioner was bound to supply the documents to the applicants and to provide them reasonable opportunity of giving written representations and oral hearing prior to passing his order. The Commissioner (Appeals) ought to have appreciated that the actions of the Additional Commissioner showed scant respect for the directions of the higher ups and complete and utter disregard for the settled principles of law and therefore, the Commissioner (Appeals) ought to have set aside the order impugned before him.

4.3 The Commissioner (Appeals) ought to have appreciated that not only was it binding upon the Additional Commissioner to supply copies of the relied upon documents to the applicants but he also ought to have given the applicants a reasonable opportunity of filing a proper reply to the notice and thereafter give an opportunity of personal hearing to the applicants prior to passing the Order-in-Original. The principles of natural justice require that not only all the relied upon documents are made available but also a reasonable opportunity of filing written representation and personal hearing is granted before any order is passed. This provisions of section 11A of the said act categorically lays down the procedure to be followed by the adjudicating authority prior to passing an order confirming a demand. The Order-in-Original having been passed in gross breach of principles of natural justice, deserved to be set aside and in agreeing with the findings of the Additional Commissioner, the Commissioner (Appeals) has rendered the impugned order unsustainable and illegal.

4.4 The Commissioner (Appeals) failed to appreciate that the Hon'ble High Court and the Hon'ble Tribunal have held in a catena of judgments, including the ones mentioned herein below, that non-supply of documents amount to violation of principles of natural justice and fair play.

a) Commissioner of Central Excise and Customs, Vapi vs. Tuni Textile Mills Ltd., [2008 (225) EL:T 48 (Guj.)]

b) Commissioner of Central Excise Vs. S.R.S Plytex, [2008 9226) ELT 511 (Bom.)]

c) Steel Fittings Mfg. Co. Ltd. Vs. Commissioner of Central Excise, Kolkata-II. [2008 (227) ELT 544 (Tri.- Kolkata)]

d) IPinit Vanaspati Ltd. Vs. Commissioner of Central Excise and Customs, Bhubaneswar-I. [2008 (221) ELT 220 (Tri.- Kolkata)]

e) P. Krishna Mohan Vs. Commissioner of Customs, Chennai, [2007 (220) ELT 223 (Tri.- Chennai)].

4.5 Without prejudice to the aforesaid and in any event, the Commissioner (Appeals) failed to appreciate that the demand raised in the show cause notice and subsequently confirmed vide the Order-in-Original dated 12th September 2008 is not sustainable inasmuch as the order sanctioning rebate in favour of the applicants, which is a quasi-judicial order, was not challenged by the concerned authorities. The rebate was granted to the applicants after thorough scrutiny of the records. The proper officer granted the rebate in terms of Rule 12 of the said Rules read with Notification No. 31/98-CE (NT) after due application of mind. The rebate sanctioned cannot be termed as erroneous inasmuch as the order passed as above, granting the rebate remains unchallenged. As such the demand raised by issuing a show cause notice under section 11A of the Act is not sustainable and bad in law. In the circumstances, the Commissioner (Appeals) ought to have set aside the Order-in-Original, dated 12th September 2008.

4.6 Without prejudice to the aforesaid and in any view of the matter the Commissioner (Appeals) failed to appreciate that the extended period of limitation was inapplicable for the purpose of recovery of rebate in the present case. By the

finding of the Additional Commissioner as rendered in paragraph 11 and 12 of the Order-in-Original, the applicants had not indulged in the act of mis-declaration and/or suppression of facts at all. A cumulative reading of the findings in paragraphs 11 and 12 of the Order-in-Original showed that the applicants had relied upon the declarations made by the said processor before the department while making the rebate application. The applicants had no control over the working of the said processor and/or knowledge about the incorrect and/or wrong declarations, if at all, made by the said processor before the department. The applicants solely relied upon statutory declarations filed by the processor before the department to lay its claim for rebate. The Commissioner (Appeals) ought to have appreciated that there was no allegation against the applicants in the entire show cause notice that they had in any manner whatsoever misled the department and therefore on the ground of limitation alone, the applicants were liable to succeed. The Commissioner (Appeals) failed to appreciate that in view of the fact that the rebate claim was correctly sanctioned and further the lager period of limitation under the proviso to section 11A(1) of the said act was not applicable, the proceedings for recovery of rebate from the applicants is not sustainable.

4.7 The Commissioner (Appeals) failed to appreciate that inasmuch as the recovery of rebate from the applicants cannot be made under section 11A (1) of the said act, there is no question of paying interest under section 11AB of the said act at all and therefore he ought to have set aside the order impugned before him and held that no interest was payable. The Commissioner (Appeals) failed to appreciate that so also as the demand for rebate under the provisions of section 11A (1) of the said Act is not sustainable, there is no question of imposing penalty under section 11AC on the applicants arise at all. He ought to have appreciated that in any event, the applicants had acted bonafide all along and had not notice of the alleged irregularity of their processor. In terms of settled law, penalty can also be imposed for contumacious conduct of an assessee or where an assessee deliberately defies the law with an intention to illegally gain and defraud the exchequer.

5. Personal hearing was scheduled in this case on 14-02-2012 was attended by Shri Tarun Jain, Advocate on behalf of the applicant who reiterated the grounds of Revision Application. Nobody attended hearing on behalf of department.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

7. Government observes that the applicants in accordance with Rule 12 of the erstwhile Central Excise Rules, 1944 read with Notification No. 31/98 CE (NT) dt. 16-02-1999 had claimed and received rebate of duty of Rs. 81, 68,999/- for the goods exported by them during the period January 1999 to March 2000. The admissible rebate of duty with regard to processed textile fabrics was based on a formula mentioned in the notification according to which monthly average rate of rebate was inversely proportional to the actual quantum of processed woven fabrics produced during the month i.e. if the quantity of fabrics processed is more, the rate of rebate will be less and if the quantity of fabric processed is less, then rate of rebate will be more. Subsequently, upon investigation by Central Excise preventive group it surfaced that the processor who undertook processing of fabrics for several customers had suppressed the actual production figures of the processed fabrics in the statutory records and have shown only lesser quantity. Had the processor furnished the actual production figures to the department, the eligible amount of rebate for the applicants would have been lesser by Rs. 30,73,604/-. After following due process of law, the adjudicating authority confirmed the demand for recovery of the excess rebate sanctioned along with interest besides imposition of penalty vide Order-in-Original Sl. No. 05/2006 (ADC) dt. 31-03-2006. The applicants had appealed to the Commissioner (Appeals) challenging the said order dtd. 31-03-2006. The appellate authority vide his Order-in-Appeal No. 144/2006 CE (SLM) dt. 01-08-2006 set aside the Order-in-Original and remanded the matter to original authority for denovo adjudication after providing the applicants the relied upon documents. Subsequently, vide Order-in-Original dt. 12-09-2008, the original authority reconfirmed the demand without providing the relied upon documents. Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioner

(Appeals), who after considering all the submissions upheld the impugned Order-in-Original, and rejected the applicant's appeal. The applicant initially filed appeal before Tribunal, who vide order dated 05-09-2011 rejected the same on the ground of non-maintainability and lack of jurisdictions. Now, the applicant has filed this revision application on grounds mentioned in para (4) above.

8. Government first proceeds to discuss issue of time bar in filing this revision application. The chronological history of events is as under.

a) Date of receipt of impugned Order-in-Appeal dtd. 29-01-2010- 08-02-2010
b) Date of filing of appeal before Tribunal - 26-04-2010
c) Time taken in filing appeal before Tribunal - 2 months and 19 days
d) Date of receipt of Tribunal order dtd.05-09-2011 - 15-09-2011
e) Date of filing of revision application - 10-10-2011
f) Time taken between date of receipt of Tribunal order to date of filing of revision application - 24 days.

From the above factual position, it is clear that applicant has filed this revision application after 3 months and 13 days when the time period spent in proceedings before CESTAT is excluded. As per provisions of section 35 EE of Central Excise Act, 1944 the revision application can be filed within 3 months of the communication of Order-in-Appeal and the delay upto another 3 months can be condoned provided there are justified reasons for such delay.

8.1 Government notes that Hon'ble High Court of Gujarat in W.P. No. 9585/11 in the case of M/s Choice Laboratory vide order dated 15.9.11, Hon'ble High Court of Delhi vide order dated 4.8.11 in W.P. No.5529/11 in the case of M/s High Polymers Ltd. and Hon'ble High Court of Bombay in the case of M/s EPCOS India Pvt. Ltd. in W.P. No. 10102/11 vide order dated 25.4.2012, have held that period consumed for perusing appeal bonafidely before wrong forum is to be excluded in terms of section 14 of Limitation Act 1963 for the purpose of reckoning time limit of filing revision

application under Section 35 EE of Central Excise Act, 1944. The ratio of above said judgment is squarely applicable to this case. Government therefore keeping in view the above cited judgments, considers that revision application is filed after a delay of 13 days which is within condonable limit. Government, in exercise of power under section 129 DD of Customs Act, condones the said delay and takes up revision application for decision on merit.

9. Government observes that applicant has mainly contended that impugned Order-in-Original has been passed is gross violation of principle of natural justice in as much as the original authority did not follow the direction of Commissioner (Appeals) made in Order-in-Appeal dtd. 01-08-2006 for supply of some relevant relied upon documents to the applicants and said Order-in-Original has been passed without following principle of natural justice. Government finds that this issue was also contested before Commissioner (Appeals), in 2nd round of appeal. Commissioner appeal after considering all the submissions has not found merit in the pleadings of applicant. The Commissioner (Appeals) in impugned order-in-Appeal has observed as under:-

" 6. I have through the facts of the case, points put forth by the applicants in the grounds of appeal and submissions made during personal hearing and the written submissions filed thereafter and also examined the lower authority's denovo order. While it had been observed in the Order-in-Appeal No. 144/2006-CE (SLM) dated 01-08-2006 that the lower authority shall decide the case afresh after giving the applicants adequate opportunity for perusal of relied upon documents and to take copies of the same, if required and also to grant personal hearing before deciding the case, the lower authority relying on certain decisions of Hon'ble Supreme Court had felt that all those things are not required and had proceeded to decide the case by confirming the earlier stand. The lower authority inter-alia has also held that "the documentary evidences relied upon by the revenue are the ones depicting the actual production and clearance of goods made by M/s. Erode Rana Textile Processors Ltd. who had indulged in clandestine production and removal of processed fabrics and the said documents contain all the details in respect of clandestine transactions made to all the customers. There cannot be two opinions that the providing the copies of the documents to one of the merchant exporters involved would not serve any purpose, as M/s. Adani Exports Ltd. would not be in position to offer any other explanation to form any opinion on this matter." It was also stated in the impugned order of the lower authority that the proceedings initiated against the processor M/s. Erode Rana Textile Processors Ltd., by the department on the alleged activity of clandestine production and removal of processed fabrics was decided by the Commissioner vide order-in-Original No. 8/2006 (Denovo) dated 28-08-2006 by confirming the demand arising on account of their suppression of production and the processor had not preferred any appeal against it. When

the order had remained uncontested by the processor which amounts to acceptance of the suppression of production and clandestine removal of processed fabrics, the quantity of production/clearance ascertained by the department on verifying the private records of the processor becomes final and this has made the lower authority to come to a conclusion that there is no necessity to provide such relied upon documents to M/s. Adani Exports Ltd.

7. I find some force in the decision of the lower authority in not providing the applicants an opportunity to peruse the documents. In this scheme of rebate the quantum of processed fabrics produced is the vial factors which decides the amount of rebate. According to the formula given under Notification No. 31/98-CE (NT) dated 24-08-1998 as amended which extend the rebate benefits to the exporters, the average rate of rebate for a month is inversely proportional to the quantum of processed fabrics produced during the month i.e. if the quantity of fabrics processed is more, rate of rebate will be less and if the quantity of fabrics processed is less then the rate of rebate will be more. The applicants being the exporters got the fabrics processed at the hands of the processor M/s. Erode Rana Textile Processors Ltd. and exported it. Though the applicants are the exports, the amount of rebate eligible for them depends on the total quantity of processed fabrics manufactured including those for all others by the processor. Based on the quantity of the processed fabrics declared as production by the processor in their statutory records the applicants had claimed rebate working the rebate as per the formula given in the notification and got is sanctioned by the department. When it had been found by the department on verifying the private accounts of the processor that the quantum shown as produced by the processor was wrong and it was actually more, having the effect of lowering the rebate, the applicants had been put on notice by the department proposing for recovery of excess rebate sanctioned which has subsequently been confirmed by the adjudicating authority. For arriving at such a conclusion the records recovered from the processor was the basis. Those records where only required by the applicants for their perusal which has been denied by the lower authority in the impugned order as not necessary. The department had also proceeded against the processor for their suppression of production and clearance payment of duty. The case has been adjudicated by the Commissioner, Salem vide Order-in-Original Sl. No. 08/2006 (Denovo) dated 28-08-2006 confirming the demand of Rs. 4,00,72,500/- on the processor M/s. Erode Rana Textile Processors Ltd. The Lower authority has caused necessary verification and and found that the processor had not preferred any appeal. This has made the lower authority to conclude that when there is no dispute over the actual quantity of processed fabrics produced by the processor and when the whole scheme of evasion through illicit design had been accepted as uncontested by the processor M/s. Erode Rana Textile Processors Ltd. there is no necessity to provide the copies of documents to the applicants.

8. I also find from the order of the lower authority first issued in this case vide order Sl. No. 05/2006 (ADC) dated 31-03-2006 that he had given opportunity to the applicants to peruse the records relied upon in the case and take copies, if required, within 15 days of receipt of the notice by contacting the adjudicating section on any working day. But the applicants wanted the relied upon documents to be sent to Ahmadabad for their perusal. The request was not acceded by the lower authority holding that there was no provision to send the relied upon documents to Ahmadabad. It was also recorded in the order that the

applicants had neither replied to the notice nor availed the opportunities given to them to appear for personal hearing before the adjudicating authority. Hence the lower authority had passed an ex-parte order. It appears that the applicants in the first instance have erred in not availing the opportunities given to them by the adjudicating authority. Further their calling for the case records for perusal by them at their place in Ahmadabad is also not agreeable to anyone. This shows their non-cooperative tendency with he authorities. In the second order, which is under appeal now, the lower authority satisfactorily explains the nature of the case as it stands now, in the back drop of the case registered against the processor decided by the Commissioner of Central Excise, Salem which remains uncontested by the processor, and has held that there is no need now for providing the relied upon documents or perusal of the applicants which will serve no purpose. Though this office has directed the lower authority vide Order-in-Appeal No. 144/2006 CE (SLM) dated 01-08-2006 to provide an opportunity to the applicants to peruse the relied upon documents/personal hearing. In view of the facts and circumstances of the case as it stands now I am fully convinced with the findings of the lower authority who has passed the denovo order reconfirming the earlier stands without extending the opportunity to the applicants to peruse the relied upon documents and without granting a personal hearing. The documents required for perusal by the applicants are those of the processor M/s. Erode Rana Textile Processors Ltd. when the processor himself has accepted the contents of the documents as correct and has accepted their guilt subjecting those documents for perusal by the applicants is neither warranted nor will serve any purpose. As I do not infirmity in the order by the order of the lower authority I hold it as sustainable. The interest demanded under section 11AB of the act is also correct in law as the applicants have wrongfully claimed the rebate in excess of the admissible amount and enjoyed the benefit on the excess rebate amount which they are not entitled to."

9.1 Government notes that Commissioner (Appeals) has now given the reasoned findings and rightly held that no purpose will be served by supplying the documents relied upon by department while confirming demand of Rs. 4,00,72,500/- by Commissioner of Central Excise, Salem vide Order-in-Original No. 8/06 (Denovo) dt. 28-08-2006. It is noted that the said demand of more than Rs. 4.00 Crores is confirmed for clandestine removal and suppression of production against the processor M/s. Erode Rana Textiles Processor Ltd. from whom the applicant has also got his grey fabrics processed. The processor has not contested the said demand and therefore the said Order-in-Original has attained finality. Since the clandestine removal of processed fabrics is established, the rebate claimed by applicant (Merchant exporter) on the higher rate was incorrect and rebate claim has to be revised and sanctioned at the rate fixed as per formula prescribed in the notification after taking into account the actual production figures of the processor. Applicant has neither availed the opportunity of inspecting the records nor attended

personal hearing before adjudicating authority as pointed out by Commissioner (Appeals). So, there is no force in the contention that principles of natural justice were violated.

10. Applicant has contended that department has not reviewed the initial Order-in-Original under which rebate claims were sanctioned and hence it was not legally permissible for the department to initiate proceedings under section 11A of Central Excise Act, 1944 without reviewing the Order-in-Original under section 35 E of Central Excise Act, 1944. In this regard, it is relevant to rely on the judgment of Hon'ble High Court of Bombay in the case of M/s. Indian Dye Stuff Industries Ltd. Vs. UOI 2003 (161) ELT 12 (Bom.). In the said judgment it is held that section 11A if Central Excise Act 1944 being an independent substantive provision, the appellate proceedings are not required to be initiated before issuing Show Cause Notice under section 11A if there are grounds existing such as short levy, short recovery or erroneous refund etc. Section 11A is an independent substantive provision and it is a complete code in itself for realisation of excise duty erroneously refunded. There are no pre conditions attached for issuance of notice under section 11A for recovery of amount erroneously refunded. This decision of Bombay High Court has been upheld by Hon'ble Supreme Court reported as 2004 (163) ELT A 56 (SC) where Supreme Court has held that recovery of duty erroneously refunded is valid in law under section 11A of Central Excise Act and there is no need of first filing the appeal against the order by which refund was erroneously sanctioned. Following case law also laid down the same principles.

10.1 In the case of Union of India Vs. Jain Shudh Vanaspati Ltd. [1996 (86) ELT 460 (SC), the apex court has held in paras 5,6 & 7 as under:

" 5. *It is patent that a Show Cause Notice under the provisions of section 28 for payment of Customs duties not levid or short-levied or erroneously refunded can be issued only subsequent to the clearance under section 47 of the concerned goods. Further, section 28 provides time limits for the issuance of the Show Cause Notice there under commencing from the "relevant date"; "relevant date" is defined by sub-section (3) of*

section 28 for the purpose of section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; which is to say that the date upon which the permissible period begins to run is the date of the order under section 47. The High Court was, therefore, in error in coming to the conclusion that no Show Cause Notice under section 28 could have been issued until and unless the order under section 47 had been first revised under section 130. "

10.2 While referring to the above mentioned case law in the case of Collector of Central Excise, Bhubaneshwar vs. Re-Rolling Mills [1997 (94) ELT 8 (SC)], the Hon'ble Supreme Court has held as under:

" *The learned counsel for the parties do not dispute that this appeal is covered by the decision of this court in Union of India & Ors. V. Jain Shudh Vanaspati Ltd. & Anr.- 1996 (86) ELT 460 (SC)= (1996) 10 SCC 520. In that case the court was dealing with section 28 of the Customs Act which is in pari materia with section 11A of the Central Excise Act. The said decision is thus applicable to the present case also. For the reasons given in the said judgment, the appeal is dismissed with no order as to coasts. "*

10.3 In I T I Ltd. Vs. Commissioner of Customs, ACC, Mumbai [2008 (228) ELT. 78 (Tri. Mumbai)] it has been held:

" *11. We hold that the issue of Show Cause Notice under section 28 of the Customs Act, 1962 for recovery of the erroneously granted refund is sufficient to meet the requirement of law. Following the ratio of the Hon'ble Supreme Court judgments in the case of Re-Rolling Mills and Jain Shudh Vanaspati cited supra and the Tribunal's order in the case of Roofit Industries Ltd., we hold that the proceedings initiated under section 28 of the Customs Act, 1962, are not vitiated on the ground of non-filing of appeals by the Revenue against the orders No. 72 dated 01-03-1994 and 99 dated 11-03-1994 passed by the Assistant Commissioner. Therefore, the demand of erroneous refunds under section 28 of the Customs Act, 1962 is sustainable. "*

10.4 In Roofit Industries Ltd. Vs. Commissioner of Central Excise, Chennai- 2005 (191) ELT. 635 (tri. Chennai) it has been held as follows:

" *4..... We follow this precedent and apply the ratio of the Supreme Court's decision in Jain Shudh Vanaspati (Supra) to the facts of the instant case and, accordingly, reject the appellants' contention that a Show Cause Notice demanding erroneously refunded duty could not be issued under section 11A without revision/review of the refund order. No other issue has arisen from the submissions made in this case.* "

10.5 In view of the principles laid down in above said judgments, Government holds that the erroneous refund/ rebate sanctioned under an order can be recovered by invoking provisions of section 11A of Central Excise Act 1944, without taking recourse to provisions of section 35 E ibid and fling appeal against the order under which refund was initially sanctioned.

11. Applicant has also contended that the show cause notice issued after one year is time barred. Government notes that in the case the processor had removed the processed goods clandestinely and suppressed the production for which a demand of more than Rs. 4.00 crores was confirmed. These facts came to the notice of the department after conducting investigation in the matter. As such the extended period for issuing show cause notice has been rightly invoked in this case.

12. Government notes that applicant has not disputed the factual position that rebate has to be granted at the rate fixed as per formula prescribed in the notification. Applicant has also not argued that the amount of Rs. 3073604/- demanded towards erroneously sanctioned rebate claim was wrongly determined. Since they have not disputed the revised rate of rebate and demand of duty determined by original authority, there is no force in contention of applicant that rebate initially sanctioned was in order. Applicant's contention initial sanction of rebate was legal correct is not acceptable in view of position explained above.

13. In view of above discussions, Government finds no infirmity in the impugned Order-in-Appeal and therefore upholds the same.

14. Revision application is thus rejected being devoid of merits.

15. So, Ordered.

(D.P. Singh)
Joint Secretary to the Govt. of India

Adani Enterprises Limited,
Adani House,
Nr. Mithakhali Circle,
Navrangpura, Ahmedabad-380009.

ATTESTED

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

Order No. 74 /14-Cx dated 06.03.2014

Copy to:

1. The Commissioner of Central Excise, Salem.
2. The Commissioner (Appeals), No.1, Foulk's Compound, Annai Medu, Salem-636001.
3. The Additional Commissioner of Central Excise, No.1, Foulk's Compound, Annai Medu, Salem-636001.
4. PS to JS (RA)
5. Guard File.
6. Spare Copy

ATTESTED

(BHAGWAT P. SHARMA)
OSD (REVISION APPLICATION)