F.No.195/555-558/11-RA-Cx
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6 FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 29/01/13

**Order No. 78 – 81 / 2013-Cx dated 28.01.13 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.**

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| **Subject** | : | **Revision Application filed under Section 35 EE of the Central Excise Act, 1944 against orders-in-appeal No. 151-154/BK/RTK/11 dated 25-04-2011 passed by the Commissioner of Central Excise (Appeals), Delhi-III.** |
| **Applicant** | : | **M/s Sarita Handa Export Pvt. Ltd., Gurgaon (Haryana)** |
| **Respondent** | : | **Commissioner of Central Excise, Delhi-III** |

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# ORDER

These revision applications are filed by the applicant M/s Sarita Handa Export Pvt. Ltd., Gurgaon against orders-in-appeal No. 151-154/BK/RTK/2011 dated 24-04-2011 passed by the Commissioner of Central Excise (Appeals), Delhi-III with respect to Orders-in-Original passed by the Asstt. Commissioner of Central Excise, Division-III., Gurgaon.

2. Brief facts of the case are that the applicant filed rebate claims of Rs.26,099, Rs.13,95,604/-, Rs.6,95,929/- and Rs.22,35,667/- under Section 11 B of the Central Excise Act 1944 Read with Rule 18 of Central Excise Rules,2002 in respect of goods exported out of India on payment of Central Excise Duty paid through cenvat account of service tax. The Adjudicating Authority rejected the above said rebate claims on the basis that the appellant did not have admissible CENVAT credit balance in their credit account of Service Tax so as to pay duty of Rs.26,099/-, Rs.13,95,604/- Rs.6,95,929/- and Rs.22,35,667 respectively on the subject impugned exported goods and hence, the applicant has not paid the said duty. Accordingly, vide impugned orders-in-original the original authority rejected rebate claim of the applicant.

3. Being aggrieved by the said for order-in-original, applicant filed appeals before Commissioner (Appeals), who rejected the same.

4. Being aggrieved by the impugned orders-in-appeal, the applicant has filed these revision applications under Section 35EE of Central Excise Act, 1944 before Central Government on the following grounds.

4.1 The observations of the lower authorities that the duty claimed to have been paid by the applicant was actually not paid, is totally wrong and against the facts. The fact is that the applicant took the CENVAT credit of service tax paid on certain services received by them for their business of manufacture and used such CENVAT credit for payment of duty on goods exported under claim of rebate of duty. Thus the applicant

had balance of CENVAT credit of service tax for utilization to pay duty and actually paid or debited amount of rebate from the said CENVAT credit. The said CENVAT credit of service tax taken by the applicant cannot be treated as wrong merely on the ground that separate show cause notices have been issued to deny such cenvat credit availed. The order of lower authorities to term the CENVAT credit of service tax utilized by the applicant as inadmissible merely on the basis of the fact that separate show cause notices have been issued to deny the CENVAT credit of service tax to the applicant are therefore, unfair, unjust, unreasonable and illegal as it has in a way decided the issue of admissibility of CENVAT credit involved in said show cause notices, which are pending adjudication before the appropriate authorities.

4.2 The matter of denial of CENVAT credit covered under separate show cause notices are still pending before the Commissioner of Central Excise Delhi-III and thus are sub judiced and not conclusive. The utilization of CENVAT credit for payment of duty for export under claim of rebate is absolutely correct and if tomorrow the said credit is conclusively held as inadmissible then the amount utilized by the applicant can be recovered from them along with interest. Thus the impugned orders have wrongly held that the applicant did not have admissible balance of CENVAT credit to pay the duty in respect of goods exported by them under claims of rebate. Here, it is relevant to point out that by now it is clear that the CENVAT credit of every service used by an assessee for its business activity is admissible as CENVAT credit and such service is an admissible 'input' service under Rule 2(1) of the CENVAT Credit Rules, 2004 for the purpose of availment of CENVAT Credit. The applicants rely on the following decisions in this regard.

(i) ABB Ltd. vs. CCE - (2009) 15 STR 23 (CESTAT 3 member bench).

(ii) Coca Cola India Pvt. Ltd. vs. CCE- 2009 (242) EL T 168 (Bom. HCDB).

(iii) CCE vs. Ultratech Cement Ltd. - 2010 (20) STR 577 (Bom.)

4.3 The applicant submits that the lower authorities were wrong in holding that the applicant failed to prove the payment of duty. The applicant has produced the CENVAT credit account with the rebate claim which shows the actual debit of amount of rebate from the said account. It is not understandable whether the applicant are supposed to explain the admissibility of CENVAT credit of service tax to the appropriate adjudicating authority i.e. Commissioner in a matter of separate show cause notices or before the lower authorities in this case where the matter involved is admissibility of rebate claim on exported goods and not the denial of CENVAT credit. Here, it is also relevant to point out that the fact of export of excisable goods is not in dispute in this case and is established from the relevant documents attached with the rebate claim. To sum up, the applicant submits that the lower authorities are not correct in holding that the applicant did not have the legally entitled CENVAT credit and have gone beyond the actual issue of sanction of rebate claim involved in this case.

5. The respondent department in their written submission vide letter C.No. V (Rebate/ Refund) 1813/653/Div.-III/2008-09 dated 10-01-2012 mainly reiterated contents of impugned orders and stated that the applicant party have been issued show cause notices No. CE-20/R-XIII/Demand/Sarita/155/08/2907 dated 23-06-2008 and No CE-20/R-XIII/Demand/Sarita/155/08/2018-52 dated 03-03-2009 for recovery of alleged irregular availment of inadmissible cenvat credit of Custom House Agent services.

6. Personal hearing scheduled in this case on 07-12-2012 was attended by Shri Ram Chander Chaudhary, Advocate on behalf of the applicant who reiterated the rounds of revision application. Nobody attended hearing on behalf of respondent department.

7. Government has carefully gone through the relevant case record and perused the impugned order -in-original and order-in-appeal.

8. Government observes that the applicants rebate claims were rejected by the original authority on the ground that the applicant were not having admissible credit balance in their Cenvat accounts of Service Tax so as to pay duty in respect of impugned exported goods and as such, no duty was paid in these impugned cases. Commissioner (Appeals) upheld impugned Orders-in-Original. Now, the applicant has filed these Revision Applications on ground mentioned in Para (4) above.

9. Government observes that show cause notices have been issued to applicant for recovery in respect of such inadmissible cenvat credit of service tax. Government finds that the applicant in their written submission dated 07-122012 stated that the said show cause notices amongst others have been decided by the Commissioner of Central Excise, Delhi-III vide Order-in-Original No. 57-61/SA/CCE/2012 dated 24-08-2012 and he has allowed Cenvat credit of Rs. 1,32,29,442/- out of total demand of Rs. 1,97,77,785/- and ordered for recovery of remaining cenvat credit of Rs. 65,48,343/-. Therefore applicant cannot be denied the rebate claim of duty paid from the cenvat credit which has been held admissible by CCE Delhi-III in the above said order. Under such circumstances, Government is of opinion if the cenvat credit allowed by the commissioner of Central Excise vide said order dated 24-08-2012 was available for payment of duty at the time of impugned exports, the rebate if otherwise admissible has to be allowed to the extent duty has been paid from such admissible cenvat credit. The duty paid from valid cenvat credit has to be worked out after conducting necessary verification of records by the original authority. Under such circumstances Government finds it in the interest of justice to remand the cases back to original authority to carryout necessary verification and then, decide the cases afresh keeping in mind said order dated 24-08-2012 of the Commissioner of Central Excise, Delhi-III.

10. In view of discussions above, Government sets aside impugned Order-in-Appeal and remands the cases back to original authority to decide the afresh as per

observation made in para (g) above. A reasonable opportunity of hearing to be afforded to parties concerned.

11. Revision applications are be disposed off in above term.

12. So, ordered.

(D P Singh)
Joint Secretary (Revision Application)

To

M/s Sarita Handa Export Pvt. Ltd.,
Plot No.29, Sector-4, IMT,
Manesar, Gurgaon.

(भगवती शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
सी.ओ.एस.डी (पुनरीक्षण आवेदन)/C.O.S.D (Revision Application)
वित्त मंत्रालय (वित्त विभाग)/Ministry of Finance (Deptt of Revn)
भारत सरकार/Govt of India
दिल्ली / New Delhi

GOI Order No. 78-81 /12-CX dated 28.01.2013

Copy to:

1. The Commissioner of Central Excise & Customs, Delhi-III, Udyog Vihar, Vanijya Nikunj, Udyog Minar, Phase-V, Gurgaon, Haryana.
2. The Commissioner of Central Excise & Customs (Appeals), Delhi-III, Udyog Vihar, Vanijya Nikunj, Udyog Minar, Phase-V, Gurgaon, Haryana.
3. The Asstt. Commissioner of Central Excise, Delhi-III, Udyog Vihar, Vanijya Nikunj, Udyog Minar, Phase-V, Gurgaon, Haryana.
4. Shri Ram Chander Choudhary, Advocate, 1610, Sector-4, Urban Estate, Gurgaon-122001
5. Guard File.
6. PS to JS (RA)
7. Spare Copy

ATTESTED

(B.P. Sharma)