REGISTERED
SPEED POST

F.No.195/1270/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

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

Date of Issue: 22/9/15

ORDER NO. 84/2015-CX DATED 21.09.2015 OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

SUBJECT	:	Revision applications filed, under Section 35 EE of the Central Excise Act, 1944 against the Orders-in-Appeal No.185(CB)CE/JPR-II/2010 dated 29.8.2011 passed by the Commissioner of Customs and Central Excise (Appeals), Jaipur.
APPLICANT	:	M/s RSWM. Ltd., Udaipur.
RESPONDENT	:	Commissioner of Customs and Central Excise, Jaipur.

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ORDER

This Revision Application has been filed by M/s RSWM. Ltd., Udaipur (hereinafter referred to as 'the applicant') against the Order-in-Appeal No.185(CB)CE/JPR-II/2010 dated 29.8.2011 passed by the Commissioner (Appeals), Customs and Central Excise, Jaipur-II with regard to Order-in-Original No. 46/CE/JP-II/2011/ADC dated 28.03.2011.

2. Brief facts of the case are that the applicant exported yarn and claimed rebate of duty paid thereon which was sanctioned vide Order-in-Original No.186/08/R-CE(Ref) dated 15.09.2008, 187/08/R-CE(Ref) dated 16.09.2008 and 188/08/R-CE(Ref) dated 16.09.2008, but the amount of duty paid by utilizing CENVAT Credit was not refunded in cash by the refund sanctioning authority and the same was restored in the CENVAT Credit account on the ground that the applicant are availing exemption under Notification No.30/2004-CE dated 09.07.2004. Against the non-sanctioning of the refund in cash viz-a-viz CENVAT Credit the applicant filed the appeal before the Commissioner (Appeal) who vide Order-in-Appeal No. 289-291(DK)CE/JPR-II/2009 dated 27.03.2009 upheld the findings of the refund sanctioning authority. However the Department also approached the Commissioner (Appeals) against the order of the refund sanctioning authority for restoration of the CENVAT credit without following the procedure under Section 11 B of the Act which was also allowed by the then Commissioner (Appeals) vide his Order-in-Appeal No. 404(DK)CE/JPR-II/2009 dated 30.06.2009. Against the Order-in-Appeal No. 289-291 (DK)CE/JPR-II/2009 dated 27.03.2009 the applicant filed the appeal before the Revisionary Authority to the Government of India and the Revisionary Authority vide his Order No. 854-856/10-CX dated 21.05.2010 upheld the findings of this Order-in-Appeal. However pursuant to filing of appeal before Commissioner (Appeals), protective demands to the extent of restoration of the CENVAT credit were also issued by the Department which consequent to Order-in-Appeal No. 404(DK)CE/JPR-II/2009 dated 30.06.2009 were adjudicated by the impugned Order-in-Original No.46/CE/JP-II/2011/ADC dated 28.03.2011.

3. Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioner (Appeals), who upheld the impugned Order and rejected the appeal.

4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision application under Section 35EE of Central Excise Act, 1944 before Central Government mainly on following grounds:

4.1 **That as per principle of judicial discipline Order of higher authority is binding on lower authority:-**

(a) That, the basic issue involved in the case is sanction/restoration of credit against duty paid on goods exported under claim for rebate. That the issue

(b) stands decided in favour of applicants by Joint Secretary, Government of India, New Delhi vide Order no. 854-856/10-CX dated 21.05.2010 issued from File no. 195/633-635/09-RA-CX. That there is no dispute about this fact, because this fact is mentioned in the Order-in-Appeal no. 404(DK)CE/JPR-II/2009 dated 30.06.2009, passed on same issue earlier and nothing has been challenged in appeal or whether the same has been stayed/set aside by the Revision Authority. That in absence of any such information he preferred to follow this Order-in-Appeal dated 30.06.2009 instead of the decision dated 21.05.2010 of Higher Authority i.e. Joint Secretary, Government of India, New Delhi issued in the matter for same applicants.

(c) That the Order-in-Appeal No. 404(DK)CE/JPR-II/2009 dated 30.06.2009 has not been accepted by the applicants and was under challenge before Joint Secretary, Government of India, New Delhi. Further, that whether or not the Order has been appealed, or whether the same has been stayed or set aside, the fact remains that at the time of passing the present Order-in-Appeal dated 29.08.2011, there were two Orders available with Commissioner (Appeal) on similar issue. One was in favour of Revenue passed by the Office of Commissioner (Appeal) Jaipur and the other was in favour of the applicant passed by Joint Secretary, Government of India, New Delhi. As per the principles of judicial discipline, the Order of higher authority is binding on lower authority and therefore Ld. Commissioner (Appeal) was duty bound to follow the Order of Joint Secretary, Government of India, New Delhi which is undisputedly a higher authority than the Office of Commissioner (Appeal). Therefore, the present Order-in-Appeal is liable to be set aside on this ground alone.

(d) Applicant placed reliance on following case laws in this regard:-

- Milcent Appliances Pvt. Ltd Vs. Union Of India-2006 (205)ELT 130 (Guj)
- Pushpanjali Silks Pvt. Ltd Vs Chief Commissioner of Customs, Chennai-2006(200)ELT 204(Mad)
- Topland Engines Pvt. Ltd Vs Union Of India -2006 (199)ELT 209 (Guj)
- Jayshree Plastics Vs Commissioner of Central Excise, Raipur-2003(161)ELT920(Tri-Kolkata)
- SSM Processing Mills Ltd. Vs Union of India-2003 (161)ELT.87(Mad)

4.2 **<u>An Appellate authority cannot modify/review its own stand. Hence the Order-in-Appeal no. 185(CB)CE/JPR-II/2010 dated 29.08.2011 issued in the present case is void-ab-initio.</u>**

(a) That the issue involved in the present matter is grant of rebate of the duty paid on goods exported on which simultaneously duty drawback was also claimed

by not taking any CENVAT Credit on corresponding inputs. That the issue stands already decided by Hon'ble Commissioner (Appeals) in the matter of appeals filed by various assessees, one of which is the present applicant itself whose similar matter was decided while Order-in-Appeal no. 289-291(DK)CE/JPR-II/2009 dated 25/27.03.2009, wherein it was held that the applicants are entitled for rebate but since they have paid duty from CENVAT accounts, the Deputy Commissioner's Order giving credit in the CENVAT Credit account do not require any interference and the appeals are accordingly rejected to that extent. In these orders the Hon'ble Commissioner (Appeals) held that claim of rebate is liable to be sanctioned to the exporters, however, he further held that in the present circumstances such rebate is to be granted by way of credit and therefore he upheld the order of the Ld. Deputy Commissioner who allowed credit of the duty paid under an application made by the applicant under Rule 18 read with Section 11B for claiming Rebate.

(b) That the Commissioner (Appeals) has taken a complete U turn from his earlier stand taken in the appeals filed by the exporters. In the Appeals filed by Revenue against the same Order-in-Original the Ld. Commissioner (Appeals) has dismissed the order of the Deputy Commissioner holding that allowing of re-credit by the Deputy Commissioner in disposal of an application for claiming rebate filed under Rule 18 read with Section 11 B of the Central Excise, Act, 1944 was not correct.

(c) That such contrary view in the present order from the earlier view taken on the same issue by the same office of Commissioner (Appeals) tantamounts to review of its own order which is not permissible in law. That the law does not provide powers to Commissioner (Appeals) for review of his own orders and therefore the present Order in Appeal dated 29.08.2011 are liable to be set aside on this ground alone.

(d) Applicant placed reliance on following case laws in this regard:-

- Commissioner of Customs, Ahmedabad Vs. Millat Fibres-2009(233)ELT 254(Tri-Ahmd)
- Sandur Manganese and Iron Ores Ltd.Vs Commissioner of Customs, Chennai-2008(223)ELT 214 (Tri-Chennai)
- Narendra Industries Vs. Commissioner of Central Excise, Rajkot-2006 (196)ELT 208-(Tri-Mumbai)
- D.C.W. Limited Vs. Assistant Commissioner of Central Excise, Tuticorin-2004 (166) ELT 169 (Mad)
- India Pistons Limited Vs. Assistant Collector Of Central Excise, Madras-II-2000 (117)ELT 545(Mad)
- Hindustan Motors-2003(156)ELT 572(Commr.Appl)

4.3 **Re-credit is allowable in any case**

(a) That a proper application under Section 11 B was filed by the applicants before the Ld. Deputy Commissioner in which rebate of Excise duty paid on goods exported was claimed. That in discharge of the same application, the proceedings were going on since the year 2008 and settled on merit against the applicants by rejection of rebate claim vide the Government of India Order no. 854-856/10-CX dated 21.05.2010 issued from file no. 195/633-635/09-RA-CX. That in para 8 of the said order it was accepted that ".....the re-credit of this amount into their CENVAT Credit account has rightly been allowed by the Commissioner (Appeals)". In the Order of Government of India all the reasons for allowing re-credit have been given. The order has been passed relying upon the judgement of Hon'ble High Court of Punjab and Haryana in the case of M/s Nahar Industrial Enterprises Ltd. Vs. UOI on similar issue and therefore the same was also binding on Ld. Commissioner (Appeals) to follow.

(b) That the Department cannot keep the applicant deprived of their right to take credit of any duty paid on export of goods. Such duty cannot be retained by the Department in any case. If duty is not payable then also re-credit is correct and if duty was payable, then also rebate is to be granted to the applicants. Therefore, right of re-credit cannot be taken away from the present applicants.

(c) That only goods are to be exported and not the duty and taxes. It is a fact on record that the present duty was paid on the goods exported. Even if it is considered that rebate under Rule 18 is not allowable even then duty paid cannot be illegally retained by the Government, because the same pertains to goods exported. Therefore, even if rebate under Rule 18 is rejected, then also the credit is required to be restored.

(d) Applicant placed reliance on following case laws in this regard:-

- Union of India Vs Arphi Incorporated-1989(40)ELT311(Bom)
- The above case has been upheld by the Hon'ble Supreme Court-1997(94)ELT A-257 (SC) Union Of India Vs. Arphi

4.4 **Order-in-Original is to be read duly modified by Order-in-Appeal allowing rebate (though in credit), hence no separate request is legally required.**

(a) That a proper application under Section 11B was filed before the Ld. Deputy Commissioner in which rebate of excise duty paid on goods exported was claimed. That in discharge of the same application the Ld. Deputy Commissioner allowed re-credit vide three Orders–in-Original dated 15.09.2008, 16.09.2008 and 16.09.2008. Further such Order stands duly

modified by the Order-in-Appeal no. 289-291(DK)CE/JPR-II/2009 dated 25.03.2009 passed by the Ld. Commissioner (Appeals) against the appeals filed by the applicants in which the rebate claim of the applicant was found to be in order hence the same was sanctioned by way of credit. That, the orders dated 15.09.2008, 16.09.2008 and 16.09.2008 of the Deputy Commissioner have to be read as duly modified by the order of the Commissioner (Appeals). A combined and a harmonious reading of the same shows that there was an application under Section 11 B for claiming of refund by way of rebate, which has been disposed off by allowing rebate in credit and therefore, it is submitted that the credit is against the application made under Section 11 B and there is no other separate request required in law.

(b) That the Department cannot keep the applicants deprived of their right to take credit of any duty paid on export of goods. If duty is not payable then also re-credit is correct and if duty was payable, then also rebate is to be granted to the applicants. Therefore, right of re-credit cannot be taken away from the present applicants.

Applicant placed reliance on following case laws in this regard:-

- Ferrous Forgings Pvt. Ltd Vs Commissioner of Central Excise, Delhi-IV-2003(160)ELT856 (Tri-Del)
- Crown Steel Company Vs. Commissioner of Customs Jamn agar-2008 (222)ELT 282 (Tri-Ahmd)
- Commissioner of Central Excise, Surat-I Vs Tirumala Fine Texturiser Pvt. Ltd-2007 (217) ELT 85(Tri-Ahmd)

4.5 **<u>According to Revenue the duty was not payable at all. So its restoration of credit under a rebate claim was a logical conclusion, as Government cannot retain an unauthorized collection.</u>**

(a) That allowing re-credit vide Order-in-Original No. 186/2008/R-CE(Ref) dated 15.09.2008, 187/2008/R-CE(Ref) dated 16.09.2008, and 188/2008/R-CE(Ref) dated 16.09.2008, the Ld. Deputy Commissioner had taken a view that payment of duty by the applicants on goods exported was erroneous as complete exemption was applicable to such clearances under Notification no. 30/2004.

(b) That according to the Deputy Commissioner whatever duty was paid by the applicants was not payable at all and the same was paid in excess. In other words duty was erroneously paid to Revenue authorities and the same was collected by them erroneously. In such circumstances the action of the Deputy Commissioner in allowing re-credit was justifiable, as when duty was not

payable at all, but paid then Government cannot retain such erroneous collection with it.

(c) That it is a settled principle of law that erroneous collection may not be retained by Revenue authorities and the same is liable to be returned back. Applicant placed reliance on following case laws in this regard:-

- Hexacom (I) Ltd. Vs Commissioner of Central Excise, Jaipur-2003(156)ELT.357 (Tri-Del)
- Binjrajka Steel Tubes Ltd.Vs Commissioner of Central Excise, Hyderabad-2007(218)ELT 563(Tri-Bang)
- Adarsh Metal Corporation Vs Union Of India -1993 (67)ELT 483 (Raj)
- A Tosh and Sons Pvt. Ltd Vs. Assistant Collector, Central Excise-1992 (60)ELT 220 (Cal)

4.6 **Allowing re-credit under rebate claims stands already accepted in past period**

(a) That in the past also Department has been regularly allowing re-credit may be partial, against rebate claims made in the Division office. Such orders granting re-credit instead of rebate in cash, stands already accepted by the Department and there is no appeal against the same.

(b) That the Department cannot take a position contrary to the earlier accepted position without distinguishing the previous case. It is a settled principle of law that if Department has accepted the principles laid down in earlier cases then contrary stand in similar subsequent cases cannot be taken.

(C) Applicant placed reliance on following case laws in this regard:-

- Roots Muticlean Ltd. Vs Commissioner of Central Excise, Coimbatore-2004 (174)ELT 123 (Tri-Chennai)
- Jayaswals Neco Ltd Vs. Commission of Central Excise, Nagpur-2006 (195)ELT 142 (SC)
- Commissioner of Central Excise, Kanpur Vs. New Decent Footwear Industries-2008 (231)ELT 26 (SC)
- Leader Engg. Works Vs. Commissioner of Central Excise, Chandigarh

4.7 The applicant has prayed that the Order-in-Appeal no. 185(CB)CE/JPR-II/2011 dated 29.08.2011 may be set aside and the re-credit granted of Rs. 9,93,641/- may be held to be validly granted.

5. Personal hearing was held in this case on 27.04.2015 which was attended by Shri Keshav Maloo, Chartered Account on behalf of the applicant and he 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. On perusal of records Government observes that the applicant's rebate claim under Rule 18 of Central Excise Rules, 2002 was rejected by Order-in-Original No. 186/08/R-CE(Ref) dated 15.09.2008, 187/08/R-CE(Ref) dated 16.09.2008 and 188/08/R-CE(Ref) dated 16.09.2008 but allowed restoration of the amount paid by the applicant into the Cenvat credit account from where the amount was paid.. Aggrieved by the order the applicant went in appeal to Commissioner (Appeals) who vide Order-in-Appeal No. 289-291(DK)CE/JPR-II/2009 dated 27.03.2009 upheld the Orders–In-Original. Thereafter the Revision Application filed against the Order-in-Appeal dated 27.03.2009 was also rejected by Order No. 854-856/2010-CX dated 21.05.2010. At the same time the Department also filed an appeal before Commissioner (Appeals) on the grounds that orders of recredit is not legally correct as no refund under Section 11 B of the Central Excise Act, 1944 can be granted without any application/request by the person; as the applicant has made no such request the amount allowed as recredit is liable to be recovered with interest. In the event of Department succeeding in the appeal the refund allowed as recredit would become erroneous, therefore, Show Cause Notice dated 17.05.2009 was also issued to the applicant by the Department to protect the recovery of impugned amount and for which the department had filed appeal before Commissioner (Appeal) which was pending at the time of issuance of show cause notice.

8. Government observes that the appeal filed by the Department against Order-in-Original 186/R-CE(Ref) dated 15.09.2008, 187/R-CE(Ref) dated 16.09.2008 and 188/R-CE(Ref) dated 16.09.2008 was also allowed by the Commissioner(Appeals) vide Order-in-Appeal No. 404(DK)CE/JPR-II/2009 dated 03.07.2009. The appellate authority also observed that in the earlier Order-in-Appeal No. 289-291(DK)CE/JPR-II/2009 dated 27.03.2009 while rejecting the request for cash refund of rebate amount only passing observation was made that granting credit in Cenvat account by adjudicating authority is correct but this observation is not a judgement or an order. Moreover, the appeals filed by the applicant and the Department against Orders-in-Original were on different grounds. Thereafter, the applicant's Revision Application filed against the Order-in-Appeal No.404(DK)CE/JPR-II/2009 dated 03.07.2009 was also rejected as devoid of merit vide Order No. 1238/2011-CX dated 21.09.2011. Therefore, impugned Order-in-Original No. 46/CE/JPR-II/2011 dated 28.03.2011 has attained finality.

9. Government further observes that the protective Show Cause Notice dated 17.05.2009 was decided vide impugned Order-in-Original No.46/CE/JPR-II/2011 dated 28.03.2011, wherein the granting of refund by way of recredit in Cenvat account without a refund application was held to be erroneous based on the decision of the

Commissioner (Appeals) in Order-in-Appeal No. 404(DK)CE/JPR-II/2009 dated 03.07.2009 and ordered recovery of the impugned amount with interest. Aggrieved by the impugned Order-in-Original, the applicant filed appeal before Commissioner(Appeals). The Commissioner (Appeals) upheld the impugned Order-in-Original on the ground that the Order-in-Appeal No. 404(DK)CE/JPR-II/2009 dated 03.07.2009 based on which the erroneous refund was confirmed has attained finality as applicant have not exhibited that the said order has been appealed against or that any higher authority has stayed/set aside this order. Government finds that indeed the applicant did file a Revision Application against the said Order-in-Appeal which was rejected vide Order Nos. 1238/2011 dated 22.09.2011 holding that rejection of rebate claim does not make applicant entitled for recredit of Cenvat Credit when proper duty was paid in accordance with law. In fact applicant has neither contested nor placed anything on record to show that the said order of the Government has been challenged by them in a Higher Court or has been stayed/set aside by a Higher Court.

10. In view of the above discussion, Government finds that the Order-in-Appeal no. 404(DK)CE/JPR-II/2009 dated 03.07.2009 based on which the impugned demand has been confirmed and recovery ordered has attained finality. Therefore, the impugned Order-in-Original ordering recovery. On the basis of the said Order-in-Appeal and the Order-in-Appeal upholding the same are just and legal and Government finds no cause for interference.

9. In view of above, Government finds no legal infirmity in the impugned Order-in-Appeal and hence, upholds the same.

10. The revision application is thus rejected being devoid of merit.

11. So, ordered.

(RIMJHIM PRASAD)
Joint Secretary to the Government of India

M/s RSWM Ltd.,
Rishabhdev,
Distt. Udaipur
Rajasthan-313802.

ATTESTED

शौकत अली
Shaukat Ali
अवर सचिव (पु. आ)
Under Secretary (RA)

GOI ORDER NO. 84/2015-CX DATED 21.09.2015

Copy to:

1. The Commissioner, Central Excise NCR Building, 'C' Scheme, Jaipur-302005.

2. The Commissioner (Appeals) Customs and Central Excise, New Central Revenue Building, Statue Circle, C-Scheme, Jaipur.

3. Shri Keshav Maloo, Chartered Accountant, 238, 2nd Floor, Anand Plaza, Near Ayad, Bridge, Udaipur (Rajasthan).

4. The Additional Commissioner of Central Excise Jaipur-II, Jaipur.

5. PA to JS(RA).

6. Guard File.

ATTESTED

(Shaukat Ali)
Under Secretary to the Government of India