

REGISTERED SPEED POST AD



**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**
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No. 198/124/2013-RA
F. No. 198/126/2013-RA

Date of Issue: 22.12.2021

838-899

ORDER NO. /2021-CX (WZ)/ASRA/MUMBAI DATED 21.12.2021
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 THE CENTRAL
EXCISE ACT, 1944.

Applicant : Commissioner of Central Excise, Surat-I

Respondent : M/s Bindal Exports Pvt. Ltd.
P-216, Kadodara Char Rasta,
Tal - Palsana, Surat

M/s Bindal Silk Mills
P-216, Kadodara Char Rasta,
Tal - Palsana, Surat

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. SUR-EXCUS-001-APP-315-13-14 dated 29.08.2013 and Order-in-Appeal No. SUR-EXCUS-001-APP-318-13-14 dated 30.08.2013 passed by the Commissioner of Central Excise(Appeals), Surat-I

ORDER

These revision applications have been filed by the Commissioner of Central Excise, Surat-I(hereinafter referred to as "the applicant") against OIA No. SUR-EXCUS-001-APP-315-13-14 dated 29.08.2013 and OIA No. SUR-EXCUS-001-APP-318-13-14 dated 30.08.2013 passed by Commissioner of Central Excise(Appeals), Surat-I in respect of M/s Bindal Exports Pvt. Ltd., P-216, Kadodara Char Rasta, Tal – Palsana, Surat and M/s Bindal Silk Mills, P-216, Kadodara Char Rasta, Tal – Palsana, Surat(hereinafter referred to as Respondent No. 1 and Respondent No. 2 respectively):

2.1 The Respondent No. 1, a merchant exporter had filed ten rebate claims for export of MMF on payment of central excise duty. The Assistant Commissioner, Central Excise, Division-II, Surat-I rejected the rebate claims and also imposed a penalty of Rs. 50,000/- under Rule 27 of the CER, 2002 vide OIO No. SRT-I/Div-II/04 to 13/13-14/Reb dated 01.04.2013. On appeal by the Respondent No. 1, the Commissioner of Central Excise(Appeals), Surat-I allowed the appeal and set aside the OIO vide his OIA No. SUR-EXCUS-001-APP-315-13-14 dated 29.08.2013.

2.2 Likewise, the Respondent No. 2, a manufacturer exporter had filed three rebate claims for export of MMF on payment of central excise duty. The Assistant Commissioner, Central Excise, Division-II, Surat-I rejected the rebate claims and also imposed a penalty of Rs. 15,000/- under Rule 27 of the CER, 2002 vide OIO No. SRT-I/Div-II/01 to 03/13-14/Reb dated 01.04.2013. On appeal by the Respondent No. 2, the Commissioner of Central Excise(Appeals), Surat-I allowed the appeal and set aside the OIO vide his OIA No. SUR-EXCUS-001-APP-318-13-14 dated 30.08.2013.

3. The Commissioner of Central Excise, Surat-I found that the OIA No. SUR-EXCUS-001-APP-315-13-14 dated 29.08.2013 and OIA No. SUR-EXCUS-001-APP-318-13-14 dated 30.08.2013 were not legal and proper and hence filed revision applications on the following common grounds :

(i) the orders of the Commissioner(Appeals) are improper, invalid, bad in law, erroneous and contrary to the statutory provisions and legislative intent

contained in statutory provisions of the Act and the Rules framed thereunder and therefore deserve to be quashed and set aside.

(ii) it had been established from the evidences such as the letter bearing no. IV/16-HPIU-IV/09/08-09 dated 19.08.2010 issued by the Additional Commissioner(Prev.), Central Excise, Surat-I, statement dated 30.06.2008 of Shri Hitesh Ashokkumar Jariwala, Proprietor of M/s Shri Sai Baba Textiles and statement dated 30.06.2008 of Shri Kaushik Farashram Bharucha that although M/s Shri Sai Baba Textiles had obtained central excise registration the said unit was bogus and non-existent, that they did not have looms to manufacture polyester grey fabrics nor did they supply any grey fabrics, that they had only issued bogus duty paid invoices of grey fabric without actual supply of grey fabrics and fraudulently passed on CENVAT credit to processors.

(iii) the Respondent No. 2 was availing CENVAT credit of duty shown to have been paid on such invoices and it was claimed that after processing the processed fabrics were cleared for export on payment of central excise duty under claim of rebate of duty and accordingly rebate claims were filed. In terms of Rule 7(2) of the CCR, 2002/Rule 9(3) of the CCR, 2004, the burden of proof regarding the admissibility of CENVAT credit had been laid upon the manufacturer taking such credit. In the present case, this onus had not been discharged by the processor.

(iv) it had been established from the record that no dutiable grey fabric had been supplied by the grey supplier as that unit was not in existence. Therefore, grey fabrics used in the exported goods cannot be considered as duty paid goods. Reliance was placed upon the judgments in Shri Vivekanand Mills Ltd.[1999(109)ELT 32(SC)] and Phoenix Mills Ltd.[2004(168)ELT 310(Bom.)] wherein it was held that the burden of proof lies upon the person who has made the claim to prove it as a true fact by adducing evidence.

(v) it can be concluded that the amount said to have been paid by the processor as duty against the invoices issued cannot be considered as "duty" in terms of the CEA, 1944 and the rules made thereunder and hence the same cannot be considered to be eligible for rebate under Section 11B of

the CEA, 1944 and the rules made thereunder read with Notification No. 40/2001-CE(NT) dated 26.06.2001.

(vi) Reliance was placed upon the judgment of the Hon'ble Supreme Court in the case of Omkar Overseas Ltd.[2003(156)ELT 167(SC)] to support the contention that rebate is to be denied in cases of fraud.

(vii) The judgment of the Hon'ble High Court of Gujarat in the case of Multiple Exports Pvt. Ltd. vs. UOI[2013(288)ELT 331(Guj)] was also relied upon to contend that in order to get credit of CENVAT, Rule 7(2) casts a duty upon the unit to take all reasonable steps to ensure that inputs or capital goods in respect of which the unit has taken CENVAT credit are goods on which appropriate duty of excise as indicated in the documents accompanying the goods has been paid. In this view, since the processor in the present case was not entitled to CENVAT credit availed on the basis of fake invoices therefore the rebate of such duty paid from such CENVAT credit was not admissible.

(viii) it was pointed out that the CESTAT had held that fraud vitiates the transaction in its decision in the case of Sheela Dyeing & Printing Mills (P) Ltd.[2007(219)ELT 348(Tri-Mum)] and that this decision had been upheld by the Hon'ble High Court of Gujarat.

(ix) it was submitted that the Hon'ble CESTAT in the case of Chintan Processors[2008(232)ELT 663(Tri-Ahm)] had while deciding the question of admissibility of CENVAT credit on fraudulent invoices held that once the supplier is proved to be non-existent, it has to be held that the goods have not been received.

(x) attention was drawn to Order No. 537-572/11-CX dated 26.05.2011 of the Govt. of India in the case of Vikram Knittex Pvt. Ltd., Surat wherein invoice of fake grey manufacturer was used and rebate claim was rejected.

(xi) the judgment of the Hon'ble Supreme Court in Aafloat Textile[2009(235)ELT 587(SC)] was relied upon wherein it was held that fraud vitiates everything and consequently even the bonafide purchaser is not entitled to any protection.

(xii) it was contended that the Commissioner(Appeals) ought to have appreciated that once the Department has established that the documents are not genuine, the CENVAT credit becomes inadmissible and no further

evidence is required to be placed on record to justify rejection of refund of duty paid by utilizing wrongly availed CENVAT credit on the basis of forged document.

(xiii) it was further averred that the only fact required to be proved by the Department was that no grey fabric was supplied and since the Department had done so, the burden of proof shifts to the respondent/processor to establish that the supplier was in existence and that the raw material had been received and used in the production of the exported goods. This burden had not been discharged by the respondent/processor and therefore the impugned order was liable to be set aside.

(xiv) rule 9(3) of the CCR, 2004 relates to documents and accounts in respect of CENVAT credit casting a legal obligation upon the manufacturer availing CENVAT credit to prove the bonafides of the credit. Therefore, the Commissioner(Appeals) had failed to examine the most important aspect required to be looked into in the case as to whether the processor has fulfilled this obligation cast upon them.

(xv) the rule 9(3) of the CCR, 2004 requires that the assessee knows the supplier personally or obtains a certificate from a known person and keeps it with himself for production on demand. He may obtain this certificate from the jurisdictional Range Officer. This burden had not been discharged by the processor and therefore the impugned order must be set aside.

(xvi) reliance was placed upon the judgment of the Hon'ble Supreme Court in the case of Hari Chand Shri Gopal[2010(260)ELT 3(SC)] wherein it was held that the burden of proof lies on the person claiming the exemption or concession to establish that he is entitled to such exemption or concession.

(xvii) the Hon'ble High Court of Bombay had in the case of CCE, Mumbai-I vs. Rainbow Silks & Anr.[2011(274)ELT 510(Bom.)] held that when a processor is party to a fraud and CENVAT credit had been accumulated on the basis of fraudulent documents of bogus firms and utilised it for payment of duty on exported goods, there was no accumulation of CENVAT credit validly in law and there was no question of duty being paid therefrom.

(xviii) in a similar case in respect of M/s Jhawar International[2012(281)ELT 460(GOI)], the Joint Secretary(Revision Application) had held that when duty is paid on exported goods out of CENVAT credit taken on invoices raised by

fake/fictitious firms/persons, unless and until the duty paid character of the exported goods is proved the rebate cannot be granted.

(xix) the judgment in the case of Shree Narayan Dyeing & Printing Mills, Surat has not been accepted on merits. Therefore, if the Commissioner(Appeals) intended to invoke the doctrine of judicial discipline in terms of the judgment of the Hon'ble Supreme Court in the case of Kamalakshi Finance Corporation then he ought to have applied the ratio of the judgments in the case of Omkar Overseas Ltd.[2003(156)ELT 167(SC)], Sheela Dyeing & Printing Mills (P) Ltd.[2007(219)ELT 348(Tri-Mum)], Chintan Processors[2008(232)ELT 663(Tri-Ahm)] and Jhawar International[2012(281)ELT 460(GOI)].

(xx) with regard to the observation recorded by the Commissioner(Appeals) that no report had been received regarding filing of Review Petition by the Department against the Order of the Hon'ble Supreme Court in the case of Vitrag Silk Mills, it was submitted that the Department had already filed 8 SLP's and in two cases SLP No.'s have also been received; viz. Adarsh Textile Mills – SLP(Civil) No. CC 15801/2013 and Kirtida Silk Mills – SLP(Civil) No. CC 13387/2013.

(xxi) it was further submitted that the Hon'ble High Court of Gujarat had in the case of Diwan Brothers vs. UOI in SCA No. 13931 of 2011 held vide Order dated 15.09.2011 that when it is found that several suppliers who claimed to have supplied goods were either fake, bogus or non-existent, the petitioner cannot claim rebate merely on the strength of export made.

(xxii) the processor had derived monetary benefit by availing CENVAT credit in their account on the basis of invoices of non-existent, fake, bogus parties. However, no physical, visible, tangible evidence of existence of these traders/manufacturers who have raised invoices on the basis of which the respondent has availed CENVAT credit has been provided by the respondent.

(xxiii) in the light of these facts, the Commissioner(Appeals) findings that failure to include verification report of Range Superintendent vide letter F. No. SRT/Range-III/Div. II dated 28.04.2011, Additional Commissioner(Prev.), Surat-I's letter F. No. IV/16-HPIU-IV/09/08-09 dated 19.08.2010, statement dated 30.06.2008 of Shri Hitesh A. Jariwala,

statement dated 30.06.2008 of Shri Kaushik F. Bharucha as relied upon documents & non-availability of any evidences in support of the allegations in the notice, non-declaring of exports as bogus/fake & non-mention/non-determination of non-compliance of provisions of Notification No. 19/2004-CE(NT) dated 06.09.2004 would not undermine the Departments case.

(xxiv) the judgment of the Hon'ble High Court of Gujarat in the case of Prayagraj Dyeing & Printing Mills Pvt. Ltd. has not been accepted finally by the Department till date and therefore the reliance placed on this case law by the Commissioner(Appeals) is not acceptable.

4.1 Personal hearing was granted in the matter on 15.10.2018. Shri B. L. Agrawal, Assistant Commissioner appeared on behalf of the applicant and reiterated the grounds for revision. He prayed that the OIA be set aside and the order of the original authority be restored. Shri Manjesh Kumar Jha, Sr. Legal Executive appeared on behalf of the respondents. He reiterated the submissions made by the respondents in the OIA, requested that the revision application filed by the Department be dismissed and the OIA be upheld. He also filed written submissions at the time of personal hearing.

4.2 In the written submissions the respondents stated that the export was completed within the statutory time limit, that all the documents related to export were genuine and that none of these documents had been proved to be fake or bogus by the Department. The BRC had also been submitted by them. They further submitted that they were totally unaware of the fraud; if any, committed by the grey fabric supplier M/s Shri Sai Baba Textiles and that in the absence of any evidence to the effect that they were accomplices to the fraud committed by M/s Shri Sai Baba Textiles the rebate claims cannot be denied. They placed reliance upon the judgments in the case of Guardian Steel Pvt. Ltd. vs. CCE, Thane-I[2017(8)TMI 1263(CESTAT Mumbai)], Tulsi Extrusion Ltd. vs. CCE, Nashik[2015(11)TMI 1037(CESTAT Mumbai)], Sheetal Exports[2011(6)TMI 600(Bom)], D. P. Singh vs. Roman Overseas[2011(3)TMI 1370(Guj)], In Re : Vikram International[2009(12)TMI 698(GOI)], Sheela Dyeing & Printing Mills Pvt. Ltd. vs. CCE, Surat-

I[2006(12)TMI 408(CESTAT Mumbai)] and Prayagraj Dyeing & Printing Mills Pvt. Ltd. vs UOI[2013(5)TMI 705(Guj)].

4.3 Upon change in revisionary authority, personal hearings were granted on 04.02.2021, 18.02.2021 and 19.03.2021. However, none appeared for personal hearing on behalf of the applicants or the respondents.

5. Government has carefully gone through the impugned order, the order passed by the adjudicating authority, the written submissions filed by the respondents, the submissions of the applicant and the respondents at the time of personal hearing, the revision application and the case records.

6. Government finds that the issue for decision in these revision applications is whether the respondents are eligible for the rebate claimed by them in respect of processed fabrics cleared utilising CENVAT credit alleged to have been availed on the basis of bogus invoices issued by suppliers of grey fabrics viz. M/s Shri Sai Baba Textiles.

7. The respondent no. 1 had filed rebate claims in respect of 10 ARE-1's issued during the period between January 2008 to May 2008. Likewise the respondent no. 2 had filed rebate claims in respect of 3 ARE-1's issued during the period between January 2008 to June 2008. The claimants were called upon to show cause why the rebate claims should not be rejected vide show cause notices dated 28.03.2012 and 14.06.2011 respectively. Thereafter, all 13 rebate claims were adjudicated by the original authority and rejected vide 2 separate OIO's dated 01.04.2013. The matter was carried in appeal before the Commissioner(Appeals) who decided the appeals vide 2 separate OIA's dated 29.08.2013 and 30.08.2013 respectively. The Department then filed revision applications against both OIA's in December 2013.

8.1 The case for rejection of the rebate claims has its origins in the alleged fraud by the grey fabric supplier M/s Shri Sai Baba Textiles who has purportedly issued bogus invoices which facilitated the passing on of

inadmissible CENVAT credit availed by the manufacturer which in turn was used for payment of duty on the exported goods. The grounds allude to a letter no. IV/16-HPIU-IV/09/08-09 dated 19.08.2010 issued by the Additional Commissioner(Prev.), Central Excise & Customs, Surat-I, statement dated 30.06.2008 of Shri Hitesh Ashokkumar Jariwala, Proprietor of M/s Shri Sai Baba Textiles and statement dated 30.06.2008 of Shri Kaushik Farashram Bharucha who looked after the entire working of M/s Shri Sai Baba Textiles to assert that the said unit is bogus and non-existent. The provisions of Rule 7(2) of the CCR, 2002/Rule 9(3) of the CCR, 2004 have been referred to contend that it is incumbent upon the recipient of CENVATable invoices to ensure the genuineness of the credit being availed by them. Many case laws have also been relied upon.

8.2 It is on the basis of the letter of the Additional Commissioner and the two statements recorded by the Department that the show cause notices have been issued to the respondents calling upon them to show cause why the rebate claims should not be rejected. These show cause notices are in the nature of deficiency memo's pointing out the defects in the rebate claims. They are not show cause cum demand notices issued under the provisions of the Central Excise Act, 1944 and the rules made thereunder. These "show cause notices dated 28.03.2012 and 14.06.2011" do not deny and seek recovery of wrongly availed CENVAT credit from the manufacturer of the exported goods. They seek to reject the rebate claims on the basis of allegations made out by the Department which have not been adjudicated.

8.3 As such, Section 11A of the CEA, 1944 provides for issue of notice only for recovery of erroneous refund granted to a claimant. The CEA, 1944 and the rules thereunder do not provide for issue of notice for rejection of rebate claimed. The scheme of the Central Excise Act, 1944 is based on the principles of equity and natural justice. The letter of the Additional Commissioner and statements recorded cannot by themselves result in an enforceable demand or denial of CENVAT credit. The letter of the Additional Commissioner and the statement recorded can at best be relied upon documents for adjudication proceedings before the authority competent to

decide the offence case against the grey fabric supplier and for recovery of CENVAT credit from the manufacturer of the exported goods.

8.4 Before the rebate can be denied on the ground that the duties on the exported goods has been paid out of inadmissible CENVAT credits, the demand for recovery of CENVAT credits wrongly availed by the manufacturer of the exported goods has to necessarily be adjudicated and determined as inadmissible in terms of the provisions of the CENVAT Credit Rules, 2004. Government observes that although over 5 years had already elapsed after the date of export(January 2008 to June 2008) in the rebate claims, the grounds for revision do not speak about any show cause cum demand notice issued to M/s Shri Sai Baba Textiles or show cause cum demand notice issued to the respondent for recovery of wrongly availed CENVAT credit.

9. In the circumstances, Government directs the original adjudicating authority to ascertain the status of demand, if any, issued to the manufacturer of exported goods for denial of CENVAT credit availed and decide the rebate claims accordingly. Needless to say, if show cause cum demand notice has not been issued for wrongly availed CENVAT credit to the manufacturer of the exported goods, the rebate claims may be considered for sanction. This exercise may be completed within eight weeks of receipt of this order.

10. The revision applications filed by the Department are disposed off in the above terms.


21/12/21
(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

898-899
ORDER No. /2021-CX (WZ) /ASRA/Mumbai DATED 21.12.2021

To,

- (i) M/s Bindal Exports Pvt. Ltd.
P-216, Kadodara Char Rasta,
Tal – Palsana, Surat

- (ii) M/s Bindal Silk Mills
P-216, Kadodara Char Rasta,
Tal – Palsana, Surat

Copy to:

- 1) The Commissioner of CGST & CX, Surat Commissionerate
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- 3) Sr. P.S. to AS (RA), Mumbai
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