REGISTERED
SPEED POST

F.No. 199/02/ST/13-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.....

ORDER NO. 34/2018-CX dated 2-4-2018 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI RAJPAL SHARMA, ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

SUBJECT	:	Revision Application filed under section 35EE of the Central Excise Act, 1944, read with Section 83 of the Finance Act, 1944 against the Order-in-Appeal No. 28/ST/Appl/Noida/13 dated 28.02.2013, passed by the Commissioner of Central Excise (Appeals), Noida.
APPLICANT	:	Commissioner of Central Excise & CGST, Noida.
RESPONDENT	:	M/s Adobe Systems India (P) Ltd., Noida

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ORDER

A Revision Application No. 199/02/ST/13-RA dated 18.07.2013 is filed by the Commissioner of Central Excise, Noida (herein after referred to as the applicant) against Commissioner(Appeal)'s Order-in-Appeal No. 28-ST/Appl/Noida/13 dated 28.02.2013 who has allowed the appeal of the respondent M/s Adobe Systems India Pvt.Ltd., Plot No. 1-1A, Sector- 25A, Noida UP (referred as "exporter") filed against the Order-in-original No. 130/R/N-III/2012-13 dated 31.08.2012, issued by the Assistant Commissioner, Central Excise, Division-III, Noida.

2. The Brief facts leading to the filing of the Revision Application are that the respondent, an exporter of Information Technology Software Service (referred as ITSS) and Business Auxiliary Services (BAS) had filed a rebate claim for Rs. 3,00,57,762/- on 21.03.2012 under Notification No. 12/2005-ST dated 19.04.2005 for the period April, 2011 to September,2011 which was rejected by the adjudicating authority mainly on the ground that they had not filed the declaration prior to the export of services as prescribed under Notification No. 12/2005-ST dated 19.04.2005. The exporter filed appeal before Commissioner (Appeals) against Assistant Commissioner's order dated 31.08.2012 which was allowed vide aforesaid Order In Appeal dated 28.02.2013. Being aggrieved with the Commissioner (Appeals)'s order, the applicant has filed the Revision Application before the Government with a request to set aside the Commissioner (Appeals)'s order on the ground that the respondent did not submit declaration prior to export of services in term of Para 3(1) of the Notification No. 12/2005-ST dated 19.04.2005 and

the sanctioning authority did not get proper opportunity to verify the correctness of the rebate claim.

3. A Personal hearing was granted on 17/01/2018 which was attended by Sh. Nitish Karnatak, Assistant Commissioner, on behalf of the applicant who mainly reiterated the grounds of revision already pleaded in the revision application. However, no one appeared for the respondent. However, the respondent, vide letter dated 15.02.2018, contested the revision application by pleading that they could not file prior declaration as it was not possible for them to quantify the exact amount of input services in advance, non filing of declaration is a procedural lapse only, substantive benefit can not be denied just because of this procedural lapse alone, cenvat credit availed by them on input and input services was already verified by revenue authorities and their eligibility for rebate of tax is supported by decisions in the case of M/s Wipro Solutions Ltd. Vs UOI 2013 (29)STR 545 (Delhi H.C), M/s Taco Faurcia Design Centre P. Ltd., Vs. CCE, Pune 2015 (38) STR 654 (Tri- Mumbai) & CST, Delhi Vs Convergys India Pvt. Ltd., 2009 (16)STR 198, (Tri- Delhi). As per request of the respondent a second hearing was held on 07.03.2018 and it was availed by Shri Ashish Vaish, Chartered Accountant, for the respondent and opposed the revision application on the above stated grounds already mentioned in their letter dated 15.02.2018.

4. On examination of the Revision application, the Government finds at the outset that the revision application has been filed on 18.07.2013 against the Order- In- Appeal dated 28.02.2013 which was received on 03.04.2013 as per revision application itself. Therefore, the revision

application was required to be filed within three months from the date of the communication of Order- In- Appeal as per sub section (2) of Section 35EE of Central Excise Act. Accordingly, the revision application should have been filed by 03.07.2013 in this case. However, the revision application has been presented on 18.07.2013 and thereby it has been delayed by 15 days. The Government is empowered to condone the delay upto three months under proviso to above referred sub section (2) if the applicant was prevented by sufficient cause from presenting the application within initial three months. But in the instant case it is observed that the order of the Commissioner (Appeal) itself was reviewed on 15.07.2013 by the Commissioner which is 12 days after the expiry of three months from the receipt of the Commissioner (Appeals)'s order. But no explanation, not to speak of sufficient cause, has been given in the application for condonation of delay or in the Revision Application which might have prevented the applicant in reviewing the Order-In-Appeal in time. Further, in the application for the condonation of the delay, it is mentioned that the revision application could not be filed in time as the appeal was submitted before the CESTAT, New Delhi, and the registry of CESTAT advised them to file revision application before the Government. But this claim is not supported by any evidence regarding submission of any appeal in this matter before CESTAT and advice of CESTAT to present the revision application before the Government. Moreover, even if it is accepted that they had filed any appeal wrongly before CESTAT, such error on the part of the departmental officers cannot be condoned as they are supposed to be fully aware about right appellate forums for different matters and several revision applications have been filed in past from Noida Central

Excise Commissionerate before the Government in respect of the Order In Appeals involving the issues relating to rebate of central excise duty & rebate of service tax etc. Therefore, there was no reason for wrong filing of the appeal before the CESTAT earlier. Above all, as pointed out above, the delay in filing the revision application in this case is not only because of the filing earlier wrong of appeal before the CESTAT as is claimed by the applicant but is also on account of delayed reviewing of the Order In Appeal for which no one else can be blamed and by no yardstick it can be termed as sufficient cause for condonation of delay. Therefore, the Government finds that the present case does not deserve condonation of delay in this case and accordingly the revision application is time barred.

5. Besides above, the Revision Application is filed mainly on the ground that respondent did not file the declaration prior to export of services in accordance with para 3.1 of Notification 12/2005 ST dated 19.04.2005. While it is not in dispute that the respondent did not file prior declaration, the use of various taxable input services in relation to export of services is also not in doubt in this case. Further, it is also clearly noted by the Commissioner (Appeals) in her order that the filing of prior declaration was not possible due to seemless export of services, the jurisdictional authority was fully aware of the export activities of the respondent, the input services used in the exported services had been verified earlier in reference to rebate claims filed in past and the same were sanctioned despite the declaration had been filed similarly after effecting export of services. From these above controverted facts, it is manifest that earlier the jurisdictional authorities themselves did not

consider prior filing of the declaration as mandatory and by sanctioning all earlier claims the respondent was given a belief that the declaration could be filed even subsequently. Therefore, for non-filing the declaration prior to export of service, the respondent cannot be blamed entirely. Moreover, the objective of Notification No. 12/2005 ST and overall government's policy of granting various export incentives is to grant rebate of taxes and not to deny the same on technical and procedural reasons such as non-filing of declaration prior to export of service. It is evident from Notification No. 12/2005 S.T itself in as much as it has been divided into two parts whereby the conditions and limitations, which are essentially to be fulfilled, are stipulated in Para 2 and the procedural part relating to operation of the notification is covered under Para 3 of the said notification. While the fundamental conditions such as export of taxable services, payment of duty and tax on the inputs and the input services and non-availment of Cenvat credit in respect of input and input services are specified in Para 2 under the heading "Conditions and Limitations", filing of declaration has been specified under the heading "Procedure" under Para 3. Thus filing of declaration prior to date of export of taxable service is treated part of procedure under the notification itself and its obvious purpose is that while declaration should facilitate the departmental authorities for smooth implementation of the above notification, it should not be equated with the essential conditions and limitations specified in Para 2 for denial of rebate of tax. Moreover, the declaration along with all required details has been furnished by the respondent subsequently with the rebate claims under consideration and no fault has been pointed out with regard to the declared inputs, inputs, service tax, value thereof and

rate of duty/tax etc. Above all, the respondent had earlier filed several declarations along with rebate claims in past and the rebate claims were sanctioned by the same authority without any such objection from which it is implied that the use of inputs/input services, their value and rate of tax etc. were already approved. Since the respondent's rebate claim involved in the present proceeding was also filed in respect of the same services involving the same inputs/input services, the revenue does not have any legitimate basis for denying the rebate claim in the instant case merely on the basis of non-filing of declaration prior to export. Even the decisions mentioned in Para- 3 of this order, relied upon by the respondent to oppose the Revision application, support the view that the rebate of tax cannot be denied merely because of non filing of declaration prior to export of services. Considering all these facts, overall structure of the notification and the case laws, the Government does not find any fault in the order of the Commissioner (Appeals).

6. In view of the above discussion, the Revision application is rejected.

2.4.18

(RAJPAL SHARMA)
ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA

Commissioner of Central Excise & CGST,
Central Excise Division-III
Noida.

GOI No-34/2018-ST dt. 2-4-18

Copy to:-

1. The Commissioner of Central Excise, (Appeals), Noida
2. The Commissioner of Central Excise & CGST, Noida
3. The Assistant Commissioner, Division-III, Noida
4. M/s Adobe Systems India Pvt. Ltd., Plot No. 1-1A, Sector-25A, Noida, UP.
5. PS to AS(RA)
4. Guard File.

ATTESTED

24.4.18

(Nirmala Devi)
~~Sr. Technical~~ Section Officer (R.A.)